The social function of the principle of insignificance and its applicability by the police authority

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ABSTRACT
This scientific article aims to analyze the social function of the principle of insignificance and its applicability within the scope of the police authority. The principle of insignificance is a doctrinal and jurisprudential construction that seeks to exclude the typicality of behaviors that, despite formally qualifying as criminal offenses, are considered socially irrelevant. The present research was based on a bibliographic review, pertinent legislation and analysis of judicial decisions related to the theme. The study highlighted the importance of the principle of insignificance as an instrument to contain the punitive power of the State, avoiding the criminalization of conducts with low social impact and focusing the resources of the criminal justice system on more relevant cases. In the context of the action of the police authority, the applicability of the principle of insignificance gains relevance, since it is the responsibility of these bodies to carry out preliminary investigations and apply precautionary measures. The approach of insignificance by the police authority can avoid the initiation of unnecessary criminal proceedings, directing the efforts of the judiciary towards the repression of more serious conduct. The study pointed out that the application of the principle of insignificance by the police authority requires a careful and sensitive analysis of the particularities of each case. It is essential to consider factors such as the absence of relevant injury or danger, the minimal offensiveness of the conduct, the inexpressiveness of the legal injury and the absence of social disapproval. The results obtained indicate that the proper application of the principle of insignificance by the police authority contributes to a more efficient and fair performance, avoiding overloading the penal system and preserving the social function of Criminal Law. However, the importance of solid and up-to-date training for professionals in the area of public security is highlighted, as well as the adoption of objective and clear criteria in the analysis of cases.

Keywords: Principle of insignificance, social role, criminal law.

1 INTRODUCTION

The social function of the principle of insignificance and its applicability by the police authority are topics of great relevance and interest in the field of Law and, in particular, for the criminal sciences. The principle of insignificance, also known as the principle of trifle, aims to prevent the criminalization of conduct of low impact or minimal harm to the legal good protected.

In the context of Criminal Law, it is essential to understand the scope of this principle and how it can be applied by the police authority in the exercise of its attributions. The social function of the principle of insignificance lies in avoiding unnecessary and disproportionate criminal prosecution in the face of minor offenses, thus ensuring the efficiency and rationality of the penal system.

In this article, we seek to analyze the social function of the principle of insignificance, exploring its origin, legal basis and the criteria established by doctrine and jurisprudence for its application. In addition, we will examine the importance of the performance of the police authority in the correct identification of situations in which the principle of insignificance can be invoked, contributing to a fairer and more efficient performance of the criminal justice system.

It should be noted that this principle is the result of the historical evolution of legal science, because as is known, in past periods of history illicit conduct was punished with excessive force and disproportion. Only with the passage of time and much effort was it possible to arrive at the current legal format of the country. What is currently perceived is that the laws that govern the Brazilian legal system are fairer and proportional, in addition, the bias of decarceration existing in the Magna Carta and therefore in other areas of public law is notorious.

Through this research, it is intended to contribute to the deepening of knowledge about the social function of the principle of insignificance and its applicability by the police authority, providing a reflection on the limits of the penal system and the importance of a proportional approach and focused on the effectiveness of the criminal process.

2 MATERIAL AND METHODS

The method employed in the current article is the logical-behavioral-investigative form. The inductive method was used to identify the fragments of knowledge, so that, when they are related, they become a whole. Bibliographic research was carried out in books, in jurisprudential collections and in legislation in general.

3 RESULTS AND DISCUSSIONS

This scientific article aims to analyze the social function of the principle of insignificance and its applicability by the police authority. Based on extensive bibliographic research and jurisprudential

analysis, relevant results were obtained that contribute to the understanding of this principle in the context of the criminal justice system.

The results of the research indicate that the social function of the principle of insignificance is to limit the punitive action of the State, directing the resources of the justice system to cases of greater severity. This principle seeks to avoid the criminalization of conduct of low social impact, whose punishment is not proportional to the objectives of the penal system.

With regard to the applicability of the principle by the police authority, the results reveal that there is an important role played by this institution in the preliminary analysis of the typicality and insignificance of criminal conduct. The police authority plays a fundamental role in the evaluation of the materiality and authorship of the crimes, in line with its functional attribution also identifies situations in which the principle of insignificance could be applied.One of the main discussions raised by the results obtained is the need for respect for the competencies of each agency, considering that the police authority does not have formal legitimacy to decide on the insignificance of the conduct of the subjects.

It is essential that there is, initially, a legislative change in the police competence, allowing it to have greater freedom for discretionary application, increasing its list of competences in this matter. It should be noted that, currently, it is impossible for a body to exceed its legal competence and at the same time, not to render null and void the investigative and criminal process.

In addition, the results highlight the importance of a collaborative action between the police authority and the Public Prosecutor's Office, aiming at a joint and judicious analysis of the cases. The exchange of information and dialogue between these institutions are essential for the correct application of the principle of insignificance, preventing conduct of low social impact from being unnecessarily brought into the criminal justice system.

However, the results also reveal some challenges related to the applicability of the principle of insignificance by the police authority. The lack of clear and uniform guidelines can lead to divergent interpretations and legal uncertainty in their application. In addition, social pressure and the need for quick results can negatively influence the analysis by the police authority, leading to a greater number of cases referred to the criminal justice system.

Thus, the results obtained point to the importance of a legislative improvement in order to ensure an adequate and uniform application of the principle of insignificance. In addition, the relevance of dialogue between the actors of the criminal justice system is highlighted, seeking mutual understanding and the construction of clear guidelines for the analysis of the applicability of this principle.

3.1 CONCEPT OF THE PRINCIPLE OF INSIGNIFICANCE

The principle of insignificance, also known as the principle of trifle, is an important concept of criminal law that seeks to limit the intervention of the State in cases where the fact practiced by the agent is of minimal relevance or has low social impact. This principle is based on the idea that the penal system should deal only with the most serious conducts, leaving aside those that do not cause significant damage or that do not represent a concrete threat to the protected legal assets.

On the subject, Capez (2022, p. 27) adds:

> If the purpose of the criminal type is to protect a legal good, whenever the injury is insignificant, to the point of becoming incapable of harming the protected interest, there will be no typical adequacy. It is that in the type are not described conducts incapable of offending the protected good, which is why damages of no amount should be considered atypical facts.

One of the main scholars who addresses the subject is the renowned Brazilian jurist Luiz Flávio Gomes. In his work "Criminal Law - General Part", Gomes (2015) emphasizes the importance of the principle of insignificance as an instrument of humanization of criminal law and highlights that its application is directly linked to the principles of fragmentarity and minimal intervention.

Brazilian legislation does not provide an explicit definition of the principle of insignificance, but it is possible to find a basis in the Criminal Code. Article 20 of the aforementioned Code provides that "the agent who, by his will, practices the act in a state of necessity, in self-defense, in strict compliance with legal duty or in the regular exercise of law, does not commit a crime." This legal provision points to the need to consider the relevance of the fact to the configuration of the crime.

It is important to emphasize that the application of the principle of insignificance requires a careful analysis of the concrete case, taking into account the proportionality between the conduct and the punitive reaction of the State. In addition, it is necessary that the agent has not practiced the fact habitually, seeking to benefit from impunity.

The Criminal Law has a subsidiary character, that is, it must act only when the other spheres of Law are not efficient for the control of public order. Because of this characteristic, the minimum intervention of Criminal Law is imposed, and this should be triggered only in cases of greater relevance and transcendence for the life of society in general, as in the case of crimes of robbery and homicide, and it is not up to this branch of law to deal with insignificant conduct, which offend minimally a protected legal good, As can be seen, for example, in the theft of a pen.

3.2 THE SOCIAL FUNCTION OF THE PRINCIPLE OF INSIGNIFICANCE IN THE DECRIMINALIZATION OF LOW-IMPACT CONDUCT

The social function of the principle of insignificance in reducing the criminalization of low-impact conduct is a relevant topic in the field of criminal law and criminal procedure. Several legal scholars discuss this issue, such as Luiz Flávio Gomes, Fernando Capez and Guilherme Nucci, bringing analyses and reflections on the importance of this principle in the selectivity of the penal system, both in the pre- and post-procedural phase.

One of the renowned authors who address the subject is Fernando Capez in his book Curso de Direito Penal - Parte Geral (2022, p.27):

> In the Democratic State of Law, it is necessary that the conduct considered criminal actually has the content of a crime. Crime is not only what the legislator says it is (formal concept), since no conduct can materially be considered criminal if it does not somehow endanger fundamental values of society. From dignity are born the other guiding and limiting principles of Criminal Law.

Capez (2022) explores the principle of insignificance as a fundamental guarantee of the individual, highlighting its role in protecting fundamental rights and limiting criminal intervention disproportionate to the crime committed. Moreover, it maintains that all the guiding principles of law derive from the principle of the dignity of the human person.

That is, when applying the law, the judge must be careful to select, among all criminal conducts, only those that, in fact, cause irreparable social damage or endanger fundamental values of society. In the words of the author (2022, p.27), "the function of the norm is the protection of legal goods from the solution of social conflicts, which is why the conduct will only be considered typical if it creates a situation of real danger to the collectivity."

Still on the subject, the prestigious author Paulo César Busato (2015) analyzes the applicability of the principle of insignificance from a procedural perspective, emphasizing the sequelae left to the individual who enters the state punitive system, no matter how small the illicit conduct practiced by it:

> [...] a criminal law obedient to the idea of minimal intervention, a true welfare state, must take into account the process of progressive replacement of the dimension of sociability that the convict suffers and the resulting social damage. Not only for the convict, but for all the people who have to live with someone whose capacity for sociability is impaired (BUSATO, 2015, p.181).

The context of the illicit act committed by the subject is analyzed in a comprehensive way, not limited only to the illicit act itself, it is necessary to pay attention to the fact that once prosecuted, no matter how small the crime committed, the individual will suffer the consequences of this crime for the rest of his life, considering that, in addition to the criminal record, He is part of society and, as a corollary, will suffer the ills of having carried a criminal case on his back. In this same sense, Busato

(2015, p.181) highlights the importance of this principle in the fight against desocialization arising from incarceration:

> Currently, the fight against desocializing deprivation of liberty is also part of the minimum criminal law program. It should be borne in mind that short-term incarceration sentences do not produce resocialization, but, on the contrary, produce, to a greater or lesser extent, a certain amount of desocialization.

In the meantime, the author highlights the relevance and influence of the principle of insignificance in the post-procedural phase, in the phase of execution of the sentence, as well as the importance of this principle in the applicability of less stringent sanctions and alternatives to the dreaded custodial sentence, allowing the criminal subject not to be segregated from society and, subsequently, making it impossible to reinsert.

3.3 THE APPLICABILITY OF THE PRINCIPLE OF INSIGNIFICANCE IN THE PRE-PROCEDURAL PHASE

The applicability of the principle of insignificance in the pre-procedural phase is a controversial and relevant topic in the context of the current legal system. In this initial stage of the criminal process, the police authority plays a fundamental role in the analysis of conduct and in making decisions related to the continuation or not of investigations. According to the understanding enshrined in the book "Criminal Investigation by the Judicial Police" authored by legal scholars Hoffmann, Machado, Anselmo, Gomes and Barbosa (2016, p.9),

> Brazil has adopted a system of preliminary investigation conducted by the Civil Police and the Federal Police, with the police inquiry presided over by the police chief being the main form of search for the truth beyond a reasonable doubt. It is precisely through criminal investigation, conducted with exemption and independence, that the State investigates criminal offenses, allowing the accountability of the perpetrators, on the one hand, and on the other, avoiding unfounded accusations. In this path, the police chief is projected as the first state authority to preserve the fundamental rights, not only of the victims, but also of those investigated themselves, being the state agent who has the most intimate contact with the institutes of the investigative phase.

In the pre-procedural phase, the application of this principle assumes singular importance, since the police authority has the responsibility to analyze the circumstances of the fact and decide if there are sufficient elements to initiate the criminal process, using the police investigation to carry out the proper investigation. On the nature of the police investigation adduces Guilherme Nucci (2021, p.184):

> The police investigation is a preparatory procedure for criminal proceedings, of an administrative nature, conducted by the judicial police and aimed at the preliminary collection of evidence to ascertain the practice of a criminal offense and its authorship [...] its primary objective is to serve as a ballast for the formation of the conviction of the representative of the Public Prosecutor's Office (*opinio delicti*), but also to gather urgent evidence, that may disappear after the crime has been committed.

In the context of the investigation of crimes by the judicial police, the consideration of the insignificance of the action can lead to the non-initiation of criminal proceedings, saving resources of the justice system and directing them to cases of greater relevance. Nucci states that "nothing prevents the delegate, upon receiving a concrete case, in front of him, to draw up (or not) the arrest warrant in flagrante (or initiate an investigation), to detect an insignificant offense and, therefore, not to draw up the record or not to initiate the investigation (2021, p. 203)."

However, the application of the principle of insignificance in the pre-procedural phase is surrounded by challenges and controversies. One of the main challenges is the definition of objective criteria to assess the insignificance of a conduct, since it is necessary to establish clear and consistent parameters to avoid subjective or arbitrary interpretations.

In addition, the police authority must take into account not only the quantitative aspect of the injury, but also other relevant elements, such as the absence of social dangerousness of the agent, the absence of criminal records, the condition of the victim and the reparation of the damage caused. These aspects may influence the decision not to initiate criminal proceedings on the basis of the principle of insignificance. Capez (2022, p. 28) explains the most commonly used requirements in the application of this principle:

> The Federal Supreme Court has already established jurisprudence, stating that the assessment of the material relevance of the criminal typicality and the consequent application of the principle in question must take place through the concomitant satisfaction of some requirements, which are: (i) the minimum offense of the agent's conduct; (ii) the absence of social dangerousness of the action; (iii) the low degree of reproach of the behavior; (iv) the inexpressiveness of the legal injury caused.

It is observed that there is a need to analyze a series of requirements that, together, can characterize the insignificance of the agent's conduct. Busato (2015, p. 179) makes a rereading of these requirements, explaining them in a simpler and easier to perceive way:

> [...] The requirements for assessing the hypothesis of incidence of the principle of minimum intervention are: (a) the recognition that the case reflects an attack on a legal good fundamental to the development of the victim in society; (b) that this attack was serious enough to warrant the ultimate instance of criminal social control taking action. This severity, in turn, must be measured taking into account: (b.1) the class of violation performed, in view of its social tolerability; (b.2) the intensity of the damage to the legal property of the victim in view of his personal conditions; (b.3) whether the use of criminal law, in the concrete hypothesis, is not merely symbolic, in the face of the best and most effective possibility of solving the social problem by another means.

Complementing the understanding, Capez (2022) points out that only one of the above requirements cannot be taken into account:

> Thus, it is already pacified that one should not take into account only and only the value subtracted (or intended to subtract) as a parameter for the application of the principle of insignificance, even because, otherwise, obviously, the attempted modality of various crimes

> would cease to exist, as in the example of simple theft itself, as well as the figure of privileged theft would disappear from the legal system (CP, Art. 155, § 2). In fact, the criterion of material typicality must take into account the importance of the legal good possibly achieved in the specific case. (2022, p. 28)

However, it is important to emphasize that the application of the principle of insignificance in the pre-procedural phase does not prevent the Public Prosecutor's Office or the Judiciary from subsequently questioning its incidence and deepening the analysis of the conduct during the procedural phase. On the continuation of investigations after the closure of the investigation, Nucci (2021) informs that

> The closure of the investigation does not have definitive effect and the situation may be reviewed at any time, including because new evidence may emerge. It happens that the police authority, according to the precept in law, regardless of the establishment of another investigation, can carry out new research, which means going out in search of evidence that arises and comes to its knowledge. (2021, p. 230)

In short, the applicability of the principle of insignificance in the pre-procedural phase requires a careful analysis by the police authority, considering the criteria established by jurisprudence and doctrine. This analysis should take into account not only the quantitative dimension of the damage, but also other relevant elements to assess the severity of the conduct, as explained.

Furthermore, with regard to the role of the police chief in the application of that principle, it is clear that it plays an essential role within the context of the application of justice. However, it is very important to discuss the extent to which it is responsible for deciding on the investigation and the continuation of the police investigation. Any action of the police authority that exceeds its attribution, as a rule, violates the procedibility of the analysis of the specific case and, therefore, will pass through the fulcrum of the Public Prosecutor's Office and the judiciary, which are responsible for discussing the recognition and legality of the application of this principle during the police investigation.

According to Gomes (2009, p.17), the police chief "cannot render a definitive decision on the insignificance of the conduct or the result", and his attribution is only to proceed with the registration of the criminal fact. Gomes points out that the delegate cannot by himself file the investigation or the detailed term, and it is up to him only to register the criminal fact and refer the criminal investigative process to the Public Prosecutor's Office so that the prosecution body proceeds with the filing, if the material atypical nature is found, and later the competent judge also so determines. It also argues that the police authority may not have files filed, and such practice is prohibited to the police chief.

According to Vidal and Britto (2020, p.21):

> The line that considers it impracticable to apply the principle of insignificance by the police chief, inadmitting that he fails to draw up the arrest warrant in flagrante or file the investigative process, maintains the absence of legal provision in this sense, the non-compliance with article 17 of the Code of Criminal Procedure, and also, that the admission of this practice would

> characterize a true violation of competences, for it would be the police chief claiming functions inherent to the Public Prosecutor and the Judge, thus extrapolating his prerogatives.

On the basis of Art. 5, § 2 of the Code of Criminal Procedure, the delegate may cease to carry out the police investigation, by legal provision that confers on him such prerogative. This is possible when the police authority is faced with facts that are atypical to unleash a criminal prosecution, however, its decision should be based on the filing of the police report.

> The application of the principle of insignificance that the establishment of the police investigation is enough for there to be an attack on what is called the status dignitatis of the investigated. The investigative procedure, by itself, represents an embarrassment that will prove unnecessary if we are faced with the absence of just cause, without gathering a set of elements that construct the authorship and materiality of the criminal offense put under investigation. (Isabelle Modesto Vidal and Cláudia Aguiar Britto, 2020. p.13)

Through this prism, it is noted that it is not possible to apply the principle of insignificance in the pre-procedural phase, precisely because most of the crimes committed are considered of high relevance to society and the law. The result of this is perceived in the large volume of cases received by the judiciary.

Regarding the analysis of the impacts on the legal system caused by the applicability of the principle of insignificance in pre-procedural terms, it should be noted that in order to have formal legitimacy of this competence, it would be necessary to have changes regarding the discretionary power of the police authority.

Thus, even before discussing the possibility of the police authority being able to resolve issues based on the principle of insignificance, it is necessary and fundamental to change the current legislation regarding its competences. For, as is known, each organ and its respective public servant has its respective functions and competences, and any action that goes beyond its limits makes the administrative act vitiated, either in the scope of legality or legitimacy.

In the meantime, according to Filocre (2017, p.67):

> The foundation of the police power of public security – and, consequently, of discretion in its exercise – is the general duty of preservation of public order – modernly taken – originating from the thought of the natural right to control the disturbances of the good order of the community resulting from individual existence. Where the police exceed in the requirement of the performance of that duty, they will be outside their scope of action and thus exorbitant of their discretionary power. Police discretion in public safety is fundamental for the legal order to defend itself against those who refuse its claim to authority. Provided that the limits of the law are respected, the public security police have a choice of the opportunity and convenience of exercising police power, in the public interest. Outside the limits established by law, arbitrariness in police action is established. The specific purpose of the public security police is to control the dangers arising from crime. Such control, in protective terms, consists primarily of actions preventing conduct hypothetically capable of producing damages – resulting from allegedly criminal practices -, or, if these are configured, aims at the public security police to restrict the damage and prevent its expansion. At the same time that the dangers that can be prevented by police must result from practices provided for by law as criminal, the police power of public security is necessarily assigned by law – a norm of competence and police attribution – and aims to achieve the ends established therein, so that

> it can be affirmed that there are no police without law or outside the law and the law, even if the police situations and measures are not, by impossibility, all of them typified.

The police competences are legally defined and based on the national order, the same understanding applies to the competences of the body responsible for the criminal action that is the Public Prosecutor's Office and the one responsible for the decision of the case that is the court. Thus, there is nothing to talk about in the possibility of an organ exceeding its legal competence and even then, such an administrative act does not harm the continuity of the legal process. For Di Pietro (2021, p. 168) "The competence and the procedure must also observe the relevant legal norms".

In addition, the author adds:

> Like any administrative act, the police measure, even if it is discretionary, always runs into some limitations imposed by the law, as to the competence and form, the ends and even with respect to the motives or the object; as to the latter two, even if the Administration has a certain amount of discretion, it must be exercised within the limits set by law. (DI PIETRO 2021, p. 168).

It remains evident, according to the understanding of the aforementioned authors, that the competences of each body must be legally respected. In the example of the closure of the police investigation, Article 28 of the Code of Criminal Procedure states that "once the closure of the police investigation or any information of the same nature is ordered, the Public Prosecutor's Office shall communicate to the victim, the investigated person and the police authority and forward the case to the ministerial review body for homologation purposes, in the form of the law." That is why the order and the democratic rule of law are also observed. That is, even though the police authority is competent to preside over the police investigation, it is the Public Prosecutor's Office that decides to dismiss it.

4 CONCLUSIONS

For a correct analysis of the principle of insignificance, some highlights about the criminal typicality should be made. Initially, the traditional doctrine analyzed the typicality under the formal prism, where it was verified merely the subsumption of the agent's conduct to the norm typified in the legal system. With the evolution of the studies of the sciences of criminal law, in the face of the protection of the fundamental rights of the human person, embodied in the principle of non-retrogression, the current modern dogmatics tends, however, towards an analysis of formal typicality concomitant with material typicality. As such, it is not enough just the legal provision in the abstract plane in which it conforms to the conduct, being necessary, that such conduct also violates, in a relevant way, the legal good protected, being precisely in the field of material typicality the scope of application of the principle of insignificance.

This principle, introduced into the penal system by Claus Roxin in 1964, was established in the Brazilian legal system, and its applicability occurs in the procedural phase, given the vectors

established by the Federal Supreme Court (STF). In the meantime, the theme in question, sought to develop in the course of this study, the analysis of the likelihood of the application of the principle of insignificance in pre-procedural headquarters, by the police authority (delegate), and its reflections within the national legal system. To develop the proposed case, the assumptions and requirements for the application of insignificance to the concrete case were presented, allied to the positioning of the best doctrine, with a focus on the legal foundations.

The principle of insignificance is already settled in the country through jurisprudence and doctrines, however, there is still no legal provision, which is why it is required that the concrete case be directed to the Judiciary for its assessment and, only at this stage, the magistrate will decide whether or not the principle will be applied, evaluating the material typicality of the crime, leaving the Police Authority only the analysis of the formal typicality.

In spite of the understanding described above to be the majority in the country's legal system, a new current has been forming, where several operators of the law defend that the Police Authority is the first guarantor of fundamental rights, not only can, but should appreciate both typicities before the concrete fact, and the procedure can be promptly filed and, in this way, avoid the wear and tear that the procedural movement generates to those involved. Thus, we seek in this article to analyze and justify the applicability of the principle of insignificance by the Police Authority, in pre-procedural terms, in its possible reflections within the social context and also in the celeumas pointed out in the current legal system itself with regard to this theme.

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