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The Person in Situation of Street and Theft of Small Value

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Abstract

This article seeks to discuss small-scale property crimes committed by homeless people. In the course of this approach, we will seek to bring contexts that allow us to approach this vulnerable group, intertwining with doctrinal concepts such as sustainability and the principle of insignificance to recognize a special, differentiated assessment for this community.

Keywords: Homeless people; petty theft; principle of insignificance; social sustainability;

1. INTRODUCTION

The object of this work is to reflect on homeless people and the practices of small-scale property crimes, especially accusations of theft.

Considering the situation of helplessness of homeless people, to discuss the possibility that the Judiciary, when evaluating the imputation from the perspective of the criminal justice system, apply a different treatment when there are cases of homeless people suffering a theft charge.

The scientific objective of this work is to draw attention to the reality of a community that is little seen, provoking legal operators to take a different view, a more accurate assessment of the criminal system.

The problem that we intend to face consists of the following question: is the homeless person, when accused of committing a crime, being treated with what determines the dignity of the human person?

One of the hypotheses raised points to the potential of homeless people to be wronged if the humanistic training of the judge ignores the imbalance of the criminal system.

Another pertinent hypothesis is the finding that the criminal judge must see himself as the last hope of the individual against state power and cannot identify himself as an instrument to combat crime.

In the course of the article, we intend to make an analysis, based on the constitutional principle theory, focusing on guarantees and fundamental rights, a different look at the almost invisible community, evaluating the concrete inequality ignored when placed in front of the claim of equality, which reveals merely abstract, which is reflected in potentially unfair decisions.

2. A MATTER OF SUSTAINABLE DEVELOPMENT

2.1. From the principle of Sustainability

The first approach, as it is an unexpressed principle, but supported by our Federal Constitution, must address Sustainability as a guiding principle of the law [1].

Ferrer and Cruz[2] present a concept of Sustainability allowing a general and adequate view of its scope. For the authors:

> Sustainability is nothing more than a process through which an attempt is made to build a global society capable of perpetuating itself indefinitely in time under conditions that guarantee human dignity. Once the objective of building this new society has been achieved, everything that contributes to this process will be sustainable and anything that departs from it will be unsustainable.

Seeking to specify the principle of Sustainability, Freitas [3]says:

> This is the constitutional principle that determines, with direct and immediate effectiveness, the responsibility of the State and Society for the solidary realization of material and immaterial, socially inclusive, durable and equitable, environmentally clean, innovative, ethical and efficient development, in order to ensure, preferably in a preventive and cautious way, in the present and future, the right to well-being.

[1]Several authors contributed to the formation and dissemination of the concept of Sustainability, highlighting the importance of studying this principle, among which I highlight FERRER, FREITAS and CRUZ. Among the most outstanding works, one can point out FERRER, Gabriel Real. Quality of life, environment, sustainability and citizenship Can we build the future together? Electronic Journal New Legal Studies , Itajaí, v. 17, no. 3, p. 310-326, December 2012; FREITAS, Juarez. **Sustainability. Right to the future** . 2. Ed. Belo Horizonte: Forum, 2012; CRUZ, Paulo Marcio. BODNAR, Zenildo. **Globalization, transnationality and Sustainability** . Itajaí: UNIVALI, 2012.

[2]FERRER, Gabriel Real. CRUZ, Paulo Marcio. Law, sustainability and the technological premise as an expansion of its foundations. **Journal of the Faculty of Law of UFRGS** , Porto Alegre, n. 34, p. 276-307, Aug. 2016. Available at http://seer.ufrgs.br/index.php/revfacdir/article/view/62003/38600 . Access on 03 Mar. 2018 _

[3] FREITAS, Juarez. **Sustainability. Straight to the Future** . 2nd ed. Belo Horizonte: Editora Fórum, 2012, p. 41 .

In this way, we can define Sustainability as a guiding principle for the regulation of choices, especially in the field of government policies, since the material and immaterial realization of socially inclusive development that seeks to ensure future well-being is sought.

Like most important discussions, Sustainability is also revealed from different perspectives. Despite possible doctrinal disparities, we can conclude that a striking and common point is the recognition that future generations are able to not only survive, but lead a dignified life.

It is important to recognize that the discussion about Sustainability originated with a focus on environmental balance, given the emergency in which the destruction of nature was presented.

However, from this initial approach, which always remains updated, other dimensions have emerged. In this context, Ferrer's doctrine is adequately presented.

> "The environmental is the first indisputably global problem that is trying to face humanity, but it has opened the door to other problems, equally global, what it has produced, in the first moment, what we can call "the expansion of the environmental" [4].

The study on Sustainability presents several approaches, all with their importance. However, for the approach of this work, we will only focus on those three dimensions that were initially proposed: the Environmental, the Economic and, mainly, the Social.

Environmental Sustainability is concerned with the preservation of environmental resources in order to equate the relationship between the environment and the human being. The strategy was to draw society's attention to understanding the emergency of nature preservation, with a serious risk of annihilation. This original concern favored making the discussion important, making it possible to demand from nations and large corporations the planning of alternative forms of environmental exploitation, paying attention to the damage of certain activities, seeking to prohibit them and even rewarding conducts that needs or comfort of the affected social groups.

Economic Sustainability, on the other hand, was analyzed from an economic-business and public management perspective. In this case, also pressured by the negative view that was presented, although motivated by marketing, entrepreneurs were forced to rethink their practices. The same occurred in the political and administrative environment. Organizations, attentive to the new demands of the "Sustainability concept" and concerned

[4]FERRER, Gabriel Real. CRUZ, Paulo Marcio. **Law, sustainability and the technological premise as an expansion of its foundations.** Journal of the Faculty of Law of UFRGS, Porto Alegre, n. 34, p. 276-307, Aug. 2016. Available at http://seer.ufrgs.br/index.php/revfacdir/article/view/62003/38600 . Access on 03 Mar. 2018 _

with the desire of consumers, which interferes with market demands, realized the potential economic advantage for organizations with a good environmental reputation.

2.2. Of Social Sustainability.

For the purposes for which this work is intended, social sustainability is presented as a process of improving living conditions in the communities in which people are inserted, that is, in the social environment in which they live.

Michael Hans[5] defines social sustainability as:

> A development process that leads to stable growth with equitable income distribution" where it is possible "to reduce the current differences between the different levels in society and to improve the living conditions of the populations" through access to basic services such as clean water, healthy air, medical services, safety, security and education.

Bringing the study closer together, when it comes to homeless people, it is necessary to pay attention to the legal-criminal treatment in the face of behaviors that fall into petty theft crimes, but which can also apply to several other situations.

In this aspect, when dealing with vulnerable people, it is important to highlight the study of sustainability, with greater focus on the social dimension, remembering that the State has assumed the commitment to "eradicate poverty and marginalization and reduce social and regional inequalities" [6].

It disregards the principle of Social Sustainability and even Equality when it treats all people in the same way, ignoring their differences, especially when this disparity is visible.

When this group commits minor thefts, it is easy to perceive that the aggression in the property results more from a lack of social options, than the intention to cause damage justified by greed, for the easy profit.

The discussion is that homeless people sometimes receive social, police and judicial treatment in disagreement with the right to Sustainability, disregarding their characteristic of vulnerable, minority and hyposufficient community.

3. CONDUCT OF INSIGNIFICANT THEFT.

Another important point to be addressed is what small-scale theft consists of and its consequence in the penal system.

Article 155 of the Brazilian Penal Code provides that the conduct of:

[5]HANS, Michael Van Bellen. **Sustainability Indicators: a comparative analysis.** Rio de Janeiro: Renovar, 2006, p. 37.
[6] FEDERAL, Senate. Constitution. **Brasília (DF)** , 1988.Art. 3, item III.

> "Theft. Art. 155 - To subtract, for oneself or for others, someone else's movable thing: Penalty - imprisonment, from one to four years, and fine".

With this idea, any person, national or foreign, who takes as his own an object that has an owner, will commit the crime and will be subject to a penalty of 1 to 4 years in prison, in addition to having to pay a sum of money, fine, in favor of the Union.

Theft is a crime that exclusively affects the victim's assets, reducing it. This classification guarantees the right to property, provided for in the "caput" of Art. 5 of the Magna Carta, also reaffirmed in Section XXIII, where it is said that "XXII - the right to property is guaranteed".

Still, in this same scenario, the Constituent warned that " XXIII - property will fulfill its social function". Well then.

Based on these premises, it is important to establish the scope of the criminal figure under evaluation by repeating the phrase, now as a questioning:

> Any person, national or foreign, who takes as his own an object that has an owner, will commit the crime and will be subject to a penalty of 1 to 4 years in prison, in addition to having to pay a sum of money, as a fine, in favor of the Union?

The doctrine has long established a limitation for the framing of some property crimes, bringing a cause of exclusion of the typicality called "crime of trifle", based on the insignificance of the subtracted good.

The theory of insignificance is supported by the principle of minimum criminal law, where it is believed that criminal law should only be called upon to intervene as a last alternative, when the other possibilities of the law are not able to solve the problem.

Basically, it is stated that when the stolen object has a negligible value, the patrimonial aggression is small and the criminal response, although minimal, is disproportionate to the aggression.

As Zafaroni and Piarangelli teach[7], legal typicality is not enough, more is needed. For an imputation, in addition to the suitability of the fact to the typical norm, anti- normativity must be sought, an assessment of what was intended to be prohibited and the concrete violation of the protected entity. In this case, Zaffaroni maintains that "the *conglobante typicality is a corrective of the legal typicality* ".

Thus, in accordance with Zaffaroni, insignificance enters the context of conglobating typicality, to make conduct atypical in which, despite carrying

[7] ZAFFARONI, Eugenio Raúl ; PIERANGELLI, José Henrique. **Manual of Brazilian Criminal Law** : **general part** . 4th ed. São Paulo: Revista dos Tribunais, 2002.

out the criminal type, it does not identify the aggression intended by the system.

The theory of insignificance does not find express support in the legislation, but only in a "hidden" way, for this reason it is treated as a supralegal theory, of exclusion of typicality.

This theory, even for not being legally foreseen, has rejection among some jurists. In this sense, these jurists rely on superior court judgments that, in order to accept the trifle theory, introduce some conditions, notably the evaluation of the agent's previous life.

In this sense, E. TJRO presents jurisprudence limiting the application of the application of the concept of insignificant.

> SUMMARY: Criminal appeal. Qualified theft. authorship Materiality. Principle of Insignificance. Absolution. Impossibility. Specific recurrence. Prison regime. Replacement. Inapplicability. 1 – The application of the principle of insignificance demands, in addition to the negligible value of res furtiva, the observance of the agent's previous life, making it impossible to recognize it when there is habituality. 2 – The specific recidivism makes it impossible to change the initial regime to the open one, as well as the replacement of the custodial sentence by restrictive of rights, ex-vi of arts . 33, § 2º, c and 44, §3º, both from CP [8].

Likewise the STJ.

> INTERLOCUTORY APPEAL IN HABEAS CORPUS. SIMPLE THEFT. DELITIVE HABITUALITY. RECURRENCE OF THE AGENT IN PROPERTY OFFENSES. INABILITY TO APPLY THE PRINCIPLE OF INSIGNIFICANCE. RES FURTIVA EVALUATED AT BRL 210.70 (TWO HUNDRED AND TEN REAIS AND SEVENTY CENTS) - VALUE THAT EXCEEDS 10% (TEN PERCENT) OF THE MINIMUM WAGE. REFUND OF THE GOODS REMOVED FROM THE VICTIM. DISINFLUENCE. REGIMENTARY INTERLOCUTORY DISMISSED. "1. Given the fragmentary character of modern criminal law, according to which only the most important legal interests should be protected, only cases that involve significant serious injuries justify the effective movement of the state machine. 2. Three criminal proceedings were instituted against the Appellant, for crimes of the same nature. In this way, the application of the principle of insignificance in the concrete case proves to be incapable, in view of the evident disapproval of the conduct, evidenced by the criminal habituality in property crimes. 3. The Appellant subtracted, on 02/19/2021, res furtiva valued at BRL 210.70 (two hundred and ten reais and seventy cents), an amount that exceeds 10% (ten percent) of the minimum wage - a circumstance that also rules out the application of the trifle principle. 4. The fact that the product of the theft was returned to the Victim does not, in itself, remove the material typicality of the criminal conduct. 5. Regimental grievance lacking [9].

[8] TJRO Appeal no. 0000509-14.2020.8.22.0010, judged on 05/26/2021.
[9] AgRg in HC 670125 / SC. Rapporteur: Minister LAURITA VAZ. Published in DJe 06/30/2021.

However, the jurisprudence of the Federal Supreme Court has the understanding in the sense that the principle of insignificance acts as a cause of exclusion of typicality and cannot fail to be applied just because the defendant has a criminal record, according to HC 198437/SE, DJe 5.5 .2022:

> Criminal and criminal procedure. habeas corpus. Insignificance. Possibility of applying the principle of insignificance in cases involving repeat offenders, according to the circumstances of the specific case. Material atypicality. precedents. Appeal provided. (STF - HC: 198437 SE 0048811-67.2021.1.00.0000, Rapporteur: RICARDO LEWANDOWSKI, Judgment Date: 04/05/2022, Second Panel, Publication Date: 05/05/2022)

In this Habeas Corpos case, the 2nd Panel of the Federal Supreme Court, by three votes to two, acquitted a repeat offender convicted of stealing four deodorants and two prestobarb razors , in the amount of R$ 114.36.

It can be seen in this case that the rejection of the application of the principle of insignificance still presents a strong resistance by jurists. This is verified in the number of votes in favor and against the acquittal of the appellant, based on article 386, item III, of the CPP. However, the majority followed in the direction of the application of this principle.

According to the understanding of Minister Gilmar mendes, in the sense that criminality must be seen, first, from the perspective of formal typicality, however, nowadays, the so-called material typicality gains importance, as stressed by Minister Celso de Mello, when granting the order in HC 98.152/MG, DJe 5.6.2009:

> (...) the principle of insignificance that must be analyzed in connection with the postulates of fragmentation and minimum intervention of the State in criminal matters - has the sense of excluding or removing the criminal typicality itself, examined from the perspective of its character material, which is why, as the Federal Public Defender's Office well maintained, the granting of the habeas corpus order, by the Superior Court of Justice, should have necessarily led to (…) the acquittal of the accused due to the absence of a crime and not to the mere extinction of the punishability of the acts committed.

Thus, the delimitation of material typicality thought in its positive and negative dimensions can illuminate the understanding of the applicability of the principle of insignificance in the concrete case, as exemplified in the aforementioned HC:

> The positive evaluative dimension of the material type is linked to the protected legal asset, and the decisive question here is whether the norm protects a community value worthy of being protected by criminal law. On the other hand, the negative dimension of material typicality is closely connected with the degree of harmfulness of the concrete conduct to the legal good protected by the criminal law. (D'AVILA, Fabio, Offensiveness in criminal law, 2009. p. 45 ss).

The joint reading of the principle of offensiveness with the principle of insignificance, in the specific case, allows us to analyze whether we are facing an atypical behavior, because it does not represent, due to the derisory offense to the protected legal interest, damage (in crimes of damage), a certainty of risk of harm (in crimes of concrete danger) or, at least, a possibility of risk of harm (in crimes of abstract danger), although there is, in fact, a formal subsumption of the behavior to the criminal type.

In view of the above, there will be no crime when the behavior is not sufficient to cause damage, or an effective danger of damage, to the protected legal interest. Therefore, starting from the reasoning that crime is a typical and unlawful fact or, for others, a typical, unlawful and culpable fact, it is certain that, once the typical fact is excluded, there is no need to even talk about a crime.

These considerations about the principle of insignificance and its applicability in the specific case are important to make another framework, which concerns the person who eventually practices the theft, specifically the homeless person.

4. THE HOMELESS PERSON AND PETTY THEFT: A DIFFERENT PERSPECTIVE.

At this point, the study points to a category that deserves a special look: homeless people.

In most urban communities we have seen people who, for numerous reasons, do not have a roof over their heads. Several studies seek to understand the context in which these citizens are not even seen by society, as if they were not people.

In fact, these people are normally considered as such only when they practice some unlawful conduct and a state action is demanded.

In this sense, the approach of FRAZÃO, Thereza Christina Jardim [10]when it addresses the visibility of people in street situation only in police pages.

> In this way, the starting point are hypotheses, such as that the homeless person is invisible in society and the media discourse is invisible, where the identity and condition of the subject of their world are not valued and preserved. The assumption is that the media does not reserve more space for him outside of the police pages, (always as a suspect of crime or victim of violence) or in the pages of urban life, (as an agent of invasion of residential or public areas).

[10] Frazão, Thereza Christina Jardim . **The homeless person and the invisibility of the subject in journalistic discourse.** Available at https://repositorio.unb.br/handle/10482/8909 . Access on 14 Apr. 2022

In a similar vein, BALLIN, Lenara Carniel that "Addresses the issue of the homeless population and its invisibility both for the Public Power and for the population in general and the reasons that cause this invisibility" [11].

In this case, it is important to establish a discussion that emerged from the guidelines arising from Resolution n. 40 of the Ministry of Women, Family and Human Rights/National Council for Human Rights points to homeless people as vulnerable people. Such a condition deserves to be taken into account in the assessment of apparently criminal conduct.

In this scenario, the possibility emerges that exclusively patrimonial and small-scale illicit conduct may be evaluated in a different scenario than "normal" people.

The terminology "Normal" refers to those who receive the minimum benefits from the State and, in return, may be required to behave in accordance with their condition.

In this scenario, art. 6 of Resolution no. 40 of the Ministry of Women, Family and Human Rights/National Human Rights Council guides that:

> Art. 6th In order to avoid criminalizing and blaming people for the homeless situation in which they find themselves, programs, projects, services and all types of care directed to this population must consider that this social phenomenon includes structural factors that mark Brazilian society. such as social inequality, unemployment, insufficient income, lack of housing, racism, which are exacerbated by the lack of access to social rights and policies.

Still in this wake, it is necessary to emphasize that the State serves the man and not the other way around. In this case, the State is only authorized to act in the face of the citizen when the conduct poses a danger to the existence of other citizens.

When it comes to a vulnerable person, the discussion takes a more delicate turn, as the treatment needs to be differentiated.

When we approach homeless people with appreciated behavior in the face of criminal charges for small-value theft, it is interesting to pay attention to the concept of Human Dignity.

In accordance with the thesis POPULAÇÃO RIBEIRINHA DE RONDÔNIA AND THE STATUTE OF DISARMAMENT: understanding of Criminal Law from the theory of culturally motivated crime [12], the scope of the concept of Dignity of the Human Being came:

> The Dignity of the Human Being represents an ethical way of relating to another person, organizing itself in such a way that no individual has more or less rights, allowing everyone to be treated as a subject and not as an object of law. Sociability implies inhabiting a morally decent world, a world in which

[11] BALLIN, Lenara Carniel. **Homeless: the invisible that no one wants to see** . Available at https://pesquisa.bvsalud.org/portal/resource/pt/biblio-939733 . Access on 14 Apr. 2022

[12] Available at https://www.univali.br/Lists/TrabalhosDoutorado/Attachments/258/TESE%20-%20FRANKLIN%20VIEIRA.pdf . , at p. 10.

> all human beings have what they need to live a life in accordance with human dignity.

I insist that when approaching people considered to be "normal" in comparison with vulnerable people, a differentiated assessment is necessary.

In this sense, in the Thesis mentioned above, p. 165, it was stated that:

> It is also intended to establish the Dignity of the Human Being and its consequences as a socio-legal reference that guides the choices of the State-judge when analyzing potentially illicit conduct, if evaluated by the formalist aspect, but which do not resist questioning about the legal-criminal treatment of part of the population, notably those who cannot behave differently.

In the midst of this discussion, discussions may even emerge about the reasons why that citizen placed himself as a homeless person, maintaining that he had the option to be in a different scenario.

Even if one wants to move away from determinism, if one were to advance in this discussion, it would be necessary to conclude that there is no space to talk about options for homeless people. There is no space to talk about choice.

However, the narrowness of this study does not allow to deepen this evaluation.

Anyone who does not pay attention to the scope of this proposal could say that this community receives the "existential minimum", what is necessary for the maintenance of life.

However, this way of seeing the world affronts the Dignity of the Human Being, because it is not enough to exist, to have life. The State assumed the commitment to make possible a dignified life, providing a minimum that allows to conclude by the deserved respect to each one of the human beings, based on the Federal Constitution (CF), in its art t. 1, III, the dignity of the human person as the foundation of the Federative Republic of Brazil and, in its article 3, III, the eradication of poverty and marginalization and the reduction of social and regional inequalities as objectives of the Republic.

From these two principles stems the notion of "existential minimum", which brings together the entire set of factors and rights that are conditions for a dignified existence. In the words of Minister Celso de Mello in ARE 639.337 AgR /SP. DJe 9.14.11

> The notion of "existential minimum", which implicitly results from certain constitutional precepts (CF, art. 1, III, and art. 3, III), comprises a complex of prerogatives whose implementation proves to be capable of guaranteeing adequate conditions. of a dignified existence, in order to ensure the person effective access to the general right to freedom and also to positive benefits originating from the State, enabling the full enjoyment of basic social rights, such as the right to education, the right to protection integral care of children

> and adolescents, the right to health, the right to social assistance, the right to housing, the right to food and the right to security. The omission or insufficiency in the provision of social assistance services and equipment by the Government constitutes a violation of the State's duty to promote the dignity of the human person and the elimination of poverty through the realization of social rights (art. 6 of the CF).

The Public Power has a great challenge in the implementation of policies that promote the dignity of the human person and the promotion of the social rights of homeless people.

According to surveys carried out in 2020 by the Institute for Applied Economic Research (Ipea), the population growth rate of homeless people was 140% as of 2012, reaching almost 222,000 Brazilians in March 2020. In that year, the trend was to increase with the economic crisis accentuated by the Covid-19 pandemic. Among the homeless are the unemployed and informal workers such as car keepers and street vendors.

In this case, it is necessary to conclude that, when it is a case of a crime of theft or any other whose aggression does not go beyond the patrimonial sphere, the possibility emerges of evaluating the conducts making a potentialization of culpability, as an element of the crime, removing the imputation, for not a different behavior can be demanded from this population. Since you cannot demand a "normal" behavior when you are in a different environment.

In such cases , a conviction does not fulfill the right. On the contrary, it confronts you.

In this way, the Public Ministry, as the holder of the criminal action, when analyzing cases of small-value theft committed by homeless people, should apply the principle of insignificance, even when dealing with people who have already practiced the same conduct that materially would not be crime, as it does not significantly offend a legal interest relevant to society.

Based on this understanding, the news of facts and police investigations referring to cases of petty theft would be archived, in a way that would avoid the denunciation and, consequently, the possible conviction for such crimes.

The possibility of conviction is certain given the position of jurists who deny the application of the principle of insignificance. This denial exacerbates the problem of social inequalities.

This analysis is necessary due to the vulnerability of these people, who live in a risky environment, and about 90% do not have any benefit from government agencies, according to IPEA research. In this scenario, there is great potential for the recurrence of these manifestly atypical behaviors .

As a form of disapproval for the practice of these atypical behaviors, the simple intervention of the police guarding the agent is sufficient, because it does not have major consequences for the legal world.

5. FINAL CONSIDERATIONS

The vulnerability of homeless people is enough to remove the dignity of the human being, a socio-juridical problem of the State, in the present study, the reality of these people who are omitted from society is brought to light, requiring the look of the operators of the right to specifically in the criminal field.

It was demonstrated in the discussions that this social vulnerability leads people who find themselves in this situation to the practice of minor thefts, showing that the aggression in the property results more from a lack of social options, than the intention to cause damage justified by greed, for easy profit.

It happens that these homeless people sometimes receive social, police and judicial treatment in disagreement with the right to Sustainability, disregarding their characteristic of vulnerable, minority and hyposufficient community.

Finally, in this article, based on the constitutional principle theory, focusing on guarantees and fundamental rights, a differentiated look at the almost invisible community was discussed, demonstrating the concrete inequality ignored when faced with the claim of equality, which reveals itself merely abstract, which is reflected in potentially unfair decisions.

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