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The selective criminalization of vagrancy or non-work

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ABSTRACT
The conduct of idleness or non-work is typified as a criminal misdemeanor of vagrancy under the terms of Decree-Law no. 3.688 / 1941, article 59, providing for simple imprisonment from fifteen days to three months. In this sense, the present article discusses the historical and legal process of the criminalization of vagrancy (or non-work) through an empirical investigation, based on studies on Criminal System, Criminal Code and Criminal Offenses Act, in a legal interpretation sociological. It is hoped that the research will contribute to the deepening of the debate on the different political, legal and cultural aspects involved in the criminalization of vagrancy by collaborating cumulatively with legal science and social transformation from a human rights perspective.

Keywords: Unemployed, Vagrancy, Criminal Contravention, Human Rights.

1 INTRODUCTION

Can the millions of unemployed Brazilians be considered vagrants? The conduct of idleness, called loitering, is typified as a criminal offense in Decree-Law No. 3,688/1941, article 59, providing for the offender simple imprisonment from fifteen days to three months[1]. The referred criminalization is evident in the nineteenth century, in view of the population growth in urban centers, embodying a process of positive ideologization of work, because for the modernization of the State it was fundamental to separate the working people from the lazy and unproductive people with the purpose of 'cleansing' society before their own patterns of survival contrary to the *dominant status quo* (RACHID, 2013, p.7).

According to Fernandes, Esquivel and Zimmermann (2010, p.122), the idea spread that the worker owned his labor force, free in the physical and economic aspect and, above all, useful and responsible for the growth and sustenance of the State. The non-agreement of the workers to the ideal

[1] This typification dates back to the Manueline and Philippine Ordinations of the Empire of Portugal. The Brazilian Criminal Code of 1830 provided for the punishment of imprisonment with work of eight to twenty-four days and, if there was no house of correction, simple imprisonment of up to twenty-eight days. The first Penal Code of the Republic, of 1890, established imprisonment of fifteen to thirty days for those who ceased to exercise profession or any type of work.

model of work aroused discomfort to the elite and to the public power that interpreted these unemployed as pernicious and contributors to the moral disruption of society; Therefore, loitering should be controlled.

In this context, the general objective of the study is to know and deepen the analysis on the criminal contravention of loitering and its criminalizing legal evolution both in international law and in Brazilian law, pointing out the main conceptual differences on the subject, contributing to legal science and social transformation, in the light of human rights.

2 FREED WORKERS: FIRST WANDERERS

Despite the abolition of slavery, the Brazilian economic system remained structured in the same model excluding a large mass of free men, called "declassified", because by concentrating and monopolizing economic resources, such a structure prevented the emergence of alternatives that absorbed this mass of uprooted (KOWARICK, 1994, p. 27).

In this way, the agro-export system, based on captive labor, did not allow them to become masters or workers adapted to the new situation of freed men. Therefore, they were left with marginalization in relation to the productive processes, the work of occasion and, the activities of survival, perpetrating an economic instability and a social imbalance.

At the end of the nineteenth century, Brazil had a nation marked by men "without function", who would soon be known as "vagabonds" or "vagrants". According to Kowarick (1994, p. 30):

> In short, the free population was extremely mobile, moving around and providing occasional services to the large estate. As long as production remained slave-centered, this vast and growing contingent of the poor would continue to be excluded from the productive system and [...] regarded by the great potentates as vagrants and therefore unfit for disciplined and regular work.

Therefore, the first vagrants have been embodied, that is, the workers freed from slavery, targets of a process of positive ideologization of labor tending to the modernization of the State and objects of social control through criminal law.

3 CRIMINAL SYSTEM FOR THE CONTROL OF DIVERSION

Criminal legislation is linked to the needs and opinions of the ruling classes, as an instrument of social control and, in this sense, for Santos, J. (1981, p. 57), there is no way to separate criminal legislation from the capitalist production system:

> [...] The law functions as a "class instrument" (produced by one class to be applied against another) and the criminal justice system as a mechanism of class domination (differential management of crime). Criminal practices and the differential management of crime are articulated in a historical framework of social struggles structured in the regime of private property and legal exploitation of labor, up to the movements for the limitation of the working

> day, improvement of working conditions, wage increases, organizational rights, protests against police repression (expanded with the expansion of production and the concentration of private control of the economy, multiplying the opportunities and modalities of crimes), etc.

In the context of legislation linked to the needs of the ruling classes, Santos, B. (2013, p. 12), when analyzing the distinction between the State and civil society, understands that Marxist structuralism has fallen into a trap by separating economics and politics, reducing politics and the right to state action. For him, "the 'economic relations' were also markedly political and juridical relations in their structural constitution" (SANTOS, B., 2013, p. 152).

In fact, Marx and Engels (2001, p. 74) affirm that the right is reduced to the law. The Marxist-theoretical construction considers the influence of economic relations on the political formation of the state, understanding that state action is exactly the representation of the interests of the ruling class and that the common will of civil society is an illusion.

In this sense, when analyzing the origin of the State, Engels (1984, p.188) asserts that with the expansion of trade, the centralization and concentration of wealth progressed rapidly into the hands of a small "class", leading to the "emprobrecimento of the masses" and the increase in the number of the poor. The division of men into "classes" formed the basis of every "social edifice," which was a product of society, placed on top of it. In this line, the society of "classes" is divided by "irreconcilable antagonisms", by virtue of the colliding interests:

> [...] As the State was born of the need to contain the antagonism of the classes, and as, at the same time, it was born in the midst of their conflict, it is, as a rule, the State of the most powerful class, of the economically dominant class, a class that, through it, also becomes a politically dominant class and acquires new means for the repression and exploitation of the oppressed class. (ENGELS, 1984, p.193).

In the Brazilian society of the late nineteenth century, just out of slavery, the concern of the elite with the affairs of the proletarian mass, especially blacks (FERNANDES; ESQUIVEL; ZIMMERMANN, 2010). Faced with the changes in the structure of production, the need for repression of the *lupemproletariat* (miserable elements detached from social production and dedicated to marginal activities) and the improvement of moral discourse were glimpsed. Marx and Engels (2001, p. 15) understood that "slavery continued to be the basis of all production."

It happens that the idea of broad freedom was introduced in the workers, not only in the physical aspect, but mainly in the economic aspect; Therefore, each worker, in the new productive model, fulfills, in solidarity, with social development, not admitting a different conduct.

In this wake, still according to Fernandes, Esquivel and Zimmermann (2010), the image of the vagrant is embodied as one who had no occupation, who lived uselessly, without contributing to the production of wealth for himself and/or for society. However, an interesting aspect used in this conceptualization was the exclusion of the individual who had means of subsistence. Moreover, the

concern did not lie in the finding of eventual failure with the structure of work, but with the need for consumption. That is, being a vagrant, but a consumer – in the case of the rich and wealthy – was no reason to suffer criminal repression. However, not working and not having his own income to consume, made the individual an effective target of criminal sanction[2].

Santos, J.V. (2009, p. 1) comments on how the legacy of a representation, which has also been transmitted in the daily life of Brazilian society since the late nineteenth century, has imprinted on the concept of loitering the character of something degrading. In this sense, the perpetrators of crimes were being labeled "vagabonds", in a context in which the apology of work was made as the only way to human virtue and social order:

> The very repression of idleness, initiated with greater political and social discourse in that period, remains to this day in the current penal books, with criminal figures such as loitering, begging and drunkenness. (SANTOS, J.V., 2009, p. 1)

Certainly, such social representations are crystallizations of the period of liberal ideals present at the turn of the nineteenth century and first decades of the twentieth century. at this time, the state apparatus was fundamental, through its legislation and forms of the ruling class to build a new ideology of labor that aimed to watch over and control the working class, as well as to repress and punish via police and judicial authorities those who did not fit the pattern, that is, the vagrants and beggars. Santos, J.V. (2009, p.3) also highlights the:

> Pressing need of the ruling class to transform its conceptions and impositions in relation to work and that it be understood as something positive and without the pejorative legacy of the phase, overcome, of slave labor, citing the legislative debate after abolition and aimed at combating idleness and which aimed to "educate" the freedman to keep in mind that "work is the supreme value of life in society. [...] The ideological construction on the positive aspects of work, the perniciousness of loitering and the relationship created between idleness and poverty is reinforced, where only those who were idle and could not guarantee their survival were considered vagrants, and there was a "bad idleness and a good idleness", where the "bad", that of the poor, should be fought, with the adoption of the concept of the "dangerous classes", coming from similar experience in Europe, but here, in Brazilian lands, its scope was for any and all poor classes.

For Baratta (2014, p. 165), the penal system of control of deviation makes it clear, as well as all bourgeois law:

> the fundamental contradiction between formal equality of the subjects of law and substantial inequality of individuals which, in this case, manifests itself in relation to the chances of being defined and controlled as deviants.

[2] The issue of consumption is a striking feature of the social order, contributing to classifications, generalizations, definitions and social separations, even mattering in the seductive individualisms of the market. Bauman (1998, p. 55) argues that success and fame are presented as the fruit of an abundant consumption that disseminates the culture that owning and consuming certain goods and products, or adopting certain lifestyles, guarantees satisfaction, happiness and even human dignity. There remains, of course, categorization or classification of those who will work to consume in the hope of belonging to the social order; on the other hand, also those who will be excluded.

In this sense:

> [...] Criminal Law tends to privilege the interests of the ruling classes, and to immunize from the process of criminalization socially harmful behaviors typical of individuals belonging to them, and functionally linked to the existence of capitalist accumulation, and tends to direct the process of criminalization, mainly, to forms of deviations typical of the subaltern classes. (BARATTA, 2014, p. 165)

On the importance of the equal treatment of laws, in the light of citizenship, aiming to overcome inequality, France (1923, p. 409, *our translation*) understands:

> [...] Another source of pride, to be a citizen! This means, for the poor, sustaining and conserving the rich in their opulence and idleness. They must work before the equality of the laws, which forbid both the rich and the poor to sleep under bridges, to beg in the streets, and to steal bread. (FRANCE, 1923, p. 409, *our translation*)[3]

The punishment would not be linked to the conduct, but to the condition itself. Therefore, punishability would not be conditioned on the fact, on the result of individual conduct, but:

> [...] the possibility that certain pre-selected individuals could become delinquent, that is, the punishment should be based on a criminal potentiality, that is, society should be prevented from a possible danger. In short, certain social segments would be punished for being part of these groups, regardless of the severity and/or existence of an effectively criminal conduct. (FERNANDES; ESQUIVEL; ZIMMERMANN, 2010, p. 123)

Still, in the view of Fernandes, Esquivel and Zimmermann (2010), both imprisonment, as well as all other forms of control and punishment, are related to the way the penal state responds to those unsubmissive to the capitalist system, who do not fit into the labor-consumption relationship. However, the issue is much more complex, because it is not a question of the State being a single nucleus of power, originating from all kinds of social control, which permeates law and violence. In the Foucauldian conception it is necessary to dissociate the concepts of domination and repression in order to understand the web of micropowers and the set of social relations that produce and reproduce the discourse of truth; After all, capitalism itself would not sustain itself based solely on repressive force:

> What makes power maintained and accepted is simply that it does not weigh only as a force that says no, but that in fact it permeates, produces things, induces pleasure, forms knowledge, produces discourse. It should be considered as a productive network that crosses the entire social body much more than a negative instance that has the function of repressing. (FOUCAULT, 2017, p. 45)

It should be noted that for Foucault, truth is subject to constant political and economic provocation; it is the object of political debate and social confrontation, of diffusion and consumption;

[3] "Another reason for pride is to be a citizen! It is for the poor to support and retain the rich in their power and idleness. They must work there before the majestic equality of laws, which forbids the rich and the poor to sleep under bridges, to beg in the streets and to steal bread."

conceived and propagated under the control not exclusive, but dominant. Truth, therefore, must be understood as a set of regulated procedures for the production, law, distribution, circulation and functioning of statements; being intoxicated to systems of power that produce and sustain it, embodying a "regime" of truth that is not only ideological or superstructural, but a condition of formation and development of capitalism (FOUCALT, 2017, p. 52-54).

The study carried out so far demonstrates the strength and influence of the dominant interests in the coercive imposition of the State through Criminal Law, forcing individuals to a labor subjection to the bourgeois productive system, classifying them, dictating conceptions and behaviors.

4 CRIMINAL CODE

Only after the promulgation of the Imperial Constitution of Brazil, in 1824, the debates around the need to organize a Civil and Criminal Code for the Brazilian nation arise. Until the Criminal Code of the Empire was promulgated in 1830, Brazil as a colony of Portugal was subject to the legal system Portuguese (Ordenações do Reino).

In the Manueline Ordinations (sixteenth and seventeenth centuries), the theme of loitering appears in Book V, Title LXXII, entitled "Dos Vaadios" (COIMBRA et al., 1521):

> [...] We command, that any man who does not live with master, or with master, nor has office, nor other master in which he works, and earns his living, or does not go about negotiating some business of his own, or of others, after twenty days of the day he arrives at any City, Town or Place, not taking within the said twenty days I love, or lord, with whom he lives, or mister in which he works, and earns his living; or if he takes it, and then leaves it, and does not continue, let him be arrested, and publicly flogged; and if he be a person in whom [the penalty of] flogging does not fit, let him be degraded to the parts beyond [sea] for a year.

In turn, loitering was foreseen as a crime in the Philippine Ordinations (seventeenth to nineteenth centuries), in Book V, Title LXVIII, entitled 'Of the Wanderers' (SALGUEIRO et al., 1595):

> We command that any man who does not live with lord, or with master, nor has Office, nor other mister, in which he works, or earns his living, or does not go about negotiating some business of his or others, after twenty days of the day he arrives, to any city, town, or place, not taking within the said twenty days I love, or lord, with whom he lives, or mister, in whom he works, and earns his living, or if he takes it, and then leaves it, and does not continue, be arrested, and publicly flogged. And if you are a person, in whom there is no room for flogging, be degraded to Africa for a year [...].
> 1. And in the city of Lisbon the Corregedores of the Court and of the City, and judges of Crime of it, will be particularly informed [at] every three months, if there are in it some idle and slut people, whether men, or women. And thinking that they exist, they will have them arrested, and each of them will proceed summarily, without more order, nor certainty of Judgment, than is necessary to know the truth. And the said Corregedores will give their sentences to execution without appeal or aggravation. And the judges will give appeal and aggravation, in cases where it fits. And seeming to each of the said Corregedores, who deserve greater punishment, they will make it known to the Judges of the Palace and with their opinion will change the said penalties, sending them to embark for Brazil or to Galés, for the time, that it seems to them. 2. [...] And we command all the judges to take particular care in this case, and to be very diligent in arresting and punishing such vagrants.

It should be noted that in the eighteenth century the work of Beccaria (2015) "Of crimes and penalties", asserts that society does not obtain any advantage by establishing laws based on political morality and that, if so, it will always suffer resistance. The fundamental principles would reside in the human heart by warding off disproportionate and cruel punishments. However, regarding loitering, Beccaria (2015, p. 89) warns that "it is exclusively up to the laws, and not to the rigid virtue (but closed in narrow ideas) of some censors, to define the kind of punishable idleness." Exactly about the punctuation he also dwells:

> [...] The interest of all is not only that few crimes be committed, but also that the crimes most disastrous to society be the rarest. The means that legislation employs to prevent crime must therefore be stronger as the offence is more contrary to the public good and may become more common. There must therefore be a proportion between the offences and the penalties. (BECCARIA, 2015, p. 72)

The Criminal Code of the Empire, sanctioned by Emperor Dom Pedro I, is considered the first autonomous in Latin America and received influence from Beccaria. According to Fernandes, Esquivel and Zimmermann (2010, p. 127), its main characteristics were originality and clear exposition, among other aspects, it also established a general order for the application of penalties. Such aspects can be perceived in:

> modification of the punishment for the crime of loitering, which went from "simple" imprisonment and flogging to imprisonment for a certain period, yet still based on the philosophy of work as a means of dignity and repression. (FERNANDES; ESQUIVEL; ZIMMERMANN, 2010, p. 127)

As stated in Chapter IV, "of the Vadios and Mendigos":

> Art. 295. Not to take any person an honest and useful occupancy, of which he happens to subsist, after being warned by the Justice of the Peace, having no sufficient income.
> Penalties – imprisonment with work for eight to twenty-four days.
>
> To the criminal author:
> Maximum – 24 days of imprisonment with work.
> Medium – 16 days, ditto.
> Minimum – 8 days, ditto.
>
> If there is no correction box:
> Maximum – 28 days of simple imprisonment.
> Medium – 18 days and 2/3, ditto.
> Minimum – 9 days and 1/3, ditto.

Loitering and begging are conducts treated in an interconnected way, so much so that the Imperial Criminal Code itself provided for them in the same chapter IV. Thus, begging was laid down in the *caput and in* four paragraphs of article 296 of the aforementioned Criminal Code of the Empire: the criminal type prohibited, in its first paragraph, conduct in public spaces and the choice for begging was opposed, mainly, to those who were able to work, as provided for in the second paragraph; the

third paragraph dealt with simulating wounds or other infirmities to obtain the charity of others; and, in the fourth paragraph, a situation that deserves to be highlighted is the fact that individuals gather in groups to practice begging, including the presence of women and children. The penalty provided for was simple imprisonment, being fixed at eight days (minimum penalty), nineteen days (average penalty) and up to one month (maximum penalty); restriction of freedom and the prediction that, depending on the state of the beggar's forces, work would also be imposed on him.

An important highlight lies in the way the prison sentences with work were arranged by the Code of 1830, because the forecast revealed, in comparison to the other criminal diplomas of the period, the modernity of the Brazilian codification, consistent with what was most current in the scope of criminal law (COSTA, 2013, p. 240-241.262.274).

Liberally inspired, the Criminal Code of the Empire exactly reflected the Eurocentric tradition of Western criminal law. Authored by the Minas Gerais deputy Bernardo Pereira de Vasconcelos, it was composed of 334 articles, 10 of which were based on the draft Criminal Code of Pascoal de Melo Freire, prepared for Portugal in 1786, 32 were influenced by the Spanish Penal Code of 1822 and 24 in the French of 1810 (COSTA, 2013, p.241).

From another point of view, Pinto (2010, p. 3) affirms "the coexistence of a constitutional monarchy with slavery, the continuity of the death penalty, of perpetual galleys or of flogging". The author also comments on the Criminal Code in a concise and precise way:

> [...] The construction of the Criminal Code is founded by those same great merchants and landlords and slaves. The European influence, coming from his student sons in Coimbra, clothed that slave and aristocratic society with the liberal appearance, however, its members were not willing to give up their position and privileges. [...] Law becomes the field of legitimation and the law is redefined as an instrument of discipline and control. Concern for order and discipline led the police to worry frequently about slaves and the free poor. The police system spent most of its time cracking down on loitering, begging, and gatherings. (PINTO, 2010, p. 4)

In the Criminal Code, of 1830, there were devices to repress the idle and, according to Silva (2009, p. 19), it was considered insufficient to combat the conduct of loitering among other practices that are detrimental to morals, good customs and the need for development. Referring to the parliamentary debate of the time, Silva (2009, p.19) points out that for Deputy Antônio Prado, the legislation was ineffective to force the idle to work, because the objective was to produce workers who fit the expectations of labor employers and, therefore, the persecution of stragglers and drunks was very common after abolition. In the opinion of the said deputy, as well as the Minister of Justice himself, there were gaps in the Criminal Code that needed to be remedied, such as the absence of institutions that collected the "idle offenders". To this end, another project was proposed that aimed to fill such gaps left by the Criminal Code and, at the same time, increase the penalties applied to

offenders of the "terms of good living",[4] also contributing to the orientation to those considered "misguided spirits, correct vicious provisions, before punishing criminals". (SILVA, 2009, p. 19).

Effectively, the Criminal Code was an instrument of domination of an elite that sought to reiterate its hegemony through a knowledge/power whose political and legal structure remained founded on the same colonial bases, the agro-exporting latifundia and slave labor. This mechanics of power was exercised by surveillance and coercion, with the aim of reaching the most concrete reality of the individual, his body, aiming to make him docile and manipulable.

According to Silva (2009, p. 23), to force the vagrant to work, he should serve his sentence in houses or work establishments, such as those intended for agriculture, many created for this purpose, because it was necessary to educate the idle and this education would only be possible through forced labor in the so-called "correctional houses".

It is found that the Criminal Code, of 1830, established more severe penalties for slaves as opposed to public officials, who received light penalties or almost always fines. However, most of the sentences were imprisonment with work; in addition to generating a more humane punishment, the Criminal Code of 1830 made explicit the struggle, the relations of force, the techniques of coercion and training. Society has itself become a prison (PINTO, 2010, p. 8). In fact, for Santos (2004, p. 13), "the construction of the new system of penitentiary establishments implied the adaptation of a liberal ideology to local customs, practices and ideas, still greatly influenced by slavery".[5]

5 PENAL CODE OF 1890

The repression against the conduct of loitering continued to be the object of criminalization, so much so that it was typified in the Penal Code of 1890, in Chapter XIII, "Dos Vadios e Capoeiras":

> Art. 399. Fail to exercise profession, officio, or any mister in which he earns his living, not having means of subsistence and certain domicile in which he dwells; to provide subsistence by means of occupancy prohibited by law, or manifestly offense of morals and good morals: Penalty—imprisonment for fifteen to thirty days.
> § 1 - By the same sentence that condemn the offender as a vagrant, or vagabond, he shall be obliged to sign a term of taking occupation within 15 days, counted from the completion of the sentence.
> § 2 - Those over 14 years old will be collected to industrial disciplinary establishments, where they may be kept until the age of 21 years.

[4] Procedural documents, supported by the Code of Criminal Procedure of 1830, with the purpose of coercing conduct and profiles of individuals who fled the standard of tolerance of the imperial agrarian elite. This practice of power had the function of watching, punishing and segregating in the urban space from the categories of delinquency, that is, according to its sociocultural practices. (MARTINS, E. Watch to punish: the criminal processes of having to live well. Master's Thesis. UNESP. 2003, p.16. Available at: <http://www.historia.ufpr.br/monografias/2009/2_sem_2009/anne_cacielle_ferreira_silva.pdf>).

[5] There weren't enough jails to comply with the new laws. They were located in the center of the cities occupying the same buildings that housed the City Halls. The prisoners were not isolated from the population and often fled. As in the present, the state of the prisons was precarious, lack of space, concentration of prisoners of different ages and conditions, constant idleness and poor hygiene conditions. (SAINTS, 2004, p. 143)

When providing for the criminalization of loitering, the Penal Code of 1890 also considered the possibility of recidivism of conduct, providing in its article 400 the collection of the offender for one to three years in penal colonies, or even in military prisons, In the case of a foreigner, the same would be deported. Another provision, disciplined in Article 401, established the possibility of extinction of the penalty inculpable in the previous articles, if the convict came to acquire or prove sufficient income for his subsistence, or the suspension of the same if the offender presented a suitable guarantor.

According to the Penal Code, the idle became "criminals", individuals contrary to the "law" of labor: "The deprivation of liberty should serve as a punishment for those who refused to work and, reflexively, imposed on the population, the search for an honest occupation" (SILVA, 2009, p. 52).

An important highlight on the criminal type of loitering contained in the Penal Code of 1890 is that, if the individual proved sufficient means of subsistence and had no income, his offender character would be removed, nor would he constitute a danger to the social order. On the other hand, without subsistence conditions, the individual would be considered a potential criminal, that is, the criminal law of the author would be applied, punishing those who, by their way of life, by their behavior, represented a threat to the social order.

Vagabonds, beggars, tricksters, and all manner of social misfits could be punished and marginalized, regardless of whether they committed a crime. However, the repression was not only aimed at those without the necessary means for subsistence, but also at those who maintained themselves through illicit activities. "Therefore, if he was arrested for the crime of loitering, the freedman was required to prove that he had obtained a lawful occupation, under penalty of returning to prison." (FERNANDES; ESQUIVEL; ZIMMERMANN, 2010, p. 128).[6]

Reflecting on the typicality of loitering provided for in the Penal Code of 1890, Fernandes, Esquivel and Zimmermann (2010, p. 128) reinforce the understanding that the legal provision was intended for the characteristics of individuals, predominantly Afro-descendants. In this way, the practice of capoeira was criminalized, as well as all activity developed in the post-abolition period. Freedmen had to resign themselves to criminal repression, as they were considered a threat to public order, modesty and human life.

Thus, for Fernandes, Esquivel and Zimmermann (2010, p. 129), the legal norm followed the same path as the previous legislations, the option for a modality of loitering in which the individual would be a potential criminal, one who without his own means of subsistence, indulges in idleness and

[6] In this context, capoeira, which was described by the journalist and writer Portuguese Alberto Bessa (1901, p. 71), as a "game of hands, feet and head, practiced by vagrants of low shera", had its practice as a target of repression and social segregation. Its adherents, manumitted blacks, poor, or white immigrants also dispossessed, were pointed out by the police as the main responsible for the crimes of robbery, robbery and prostitution (SANTOS, 2004).

for whom the source of income will be some illicit means. However, work is a subjective right of the person and not a duty. Although it can be morally reproached by certain people or social groups, the one who indulges in idleness, "in the offense that idleness represents to the defenders of the collective pact, there is no logic in the fact that this conduct consists of a criminal offense, or rather, no sanction at all" (FERNANDES; ESQUIVEL; ZIMMERMANN, 2010, p. 129).

6 CRIMINAL MISDEMEANORS ACT

The Law of Introduction to the Penal Code (LICP), Decree-Law No. 3,914/1941, in its article 1, introduced in Brazil a bipartite system of classification of criminal offenses into crimes/offenses and misdemeanors. Misdemeanors are conducts that are less serious, compared to crimes. Such a distinction is purely a matter of a political-criminal order, being of quantitative or extrinsic criteria, based on punishment and assuming, therefore, a formal character. Thus, the Brazilian legal system applies the penalty of imprisonment, to crimes, in the modalities of imprisonment and detention; and, to misdemeanors (when applicable), that of simple imprisonment. Therefore, the distinguishing precept between crime and misdemeanor is substantiated by the nature of the custodial sentence provided for in the rule.

In fact, the Law of Criminal Contraventions (Decree-Law No. 3,688/1941) was instituted, edited under the aegis of the Constitution of 1937, the Magna Carta that sustained the dictatorship of the Estado Novo, with the concentration of executive and legislative power in the hands of the President of the Republic.

With the advent of Decree-Law No. 3,688/1941, the criminal type of loitering was shifted from its specific scope and referred to discipline by the Criminal Offenses Law. The conduct of loitering, therefore, still remains framed as a criminal offense, having been thus provided in the LCP:

> Art. 59. To give oneself habitually to idleness, being valid for work, without having an income that assures him sufficient means of subsistence, or to provide for one's own subsistence through illicit occupation:
> Penalty – simple imprisonment, from fifteen days to three months.
> Single paragraph. The supervening acquisition of income, which assures the condemned person sufficient means of subsistence, extinguishes the penalty.

It is observed that from the Law of Criminal Misdemeanors, of 1941, the punishment of those given to idleness, in its maximum degree, was tripled instituting the restriction of liberty for up to three months; for, as seen in the mold of the Criminal Code of 1830, the conduct had as punishment imprisonment with labor for eight to twenty-four days, and, if there was no house of correction, simple imprisonment up to twenty-eight days. It is noteworthy that in this punitive wake, the Penal Code of 1890 established imprisonment for fifteen to thirty days, to those who failed to exercise profession or any type of work, even without a certain domicile.

For Silveira (2006), the discipline of loitering in the Criminal Contraventions Law, in the chapter of the police of customs, denotes the bourgeois and moralistic vision of the Brazilian State, distinguishing, at the factual level, the rich classes from the poor classes. Knopfholz (2012, p. 38-39) also presents his critical view of the political and economic option:

> [...The LCP emerged, in fact, as an instrument of social control used by the dictatorship of Getúlio Vargas to guarantee the ideology of law and order. Like a tightrope walker, the government approached the bourgeoisie by demanding the work of the proletarian, but at the same time it was paternal to the employees, granting them numerous benefits. Their goal was therefore more political and economic and less legal.

In this tuning fork, the Law of Criminal Misdemeanors reinforced the concept of "loitering" inculpido in the Brazil Empire, deepening the marginalization of the most impoverished social strata and embodying an ideology that the poor who do nothing, probably, will commit some crime, which, by itself, is enough to punish him; that is, the "loiterer" is considered a threat to the interests of the State, and not a social issue to be resolved. It is reiterated that for the typification of loitering, the illicit, reprehensible, criminal conduct, comprises the agent not having income that ensures his subsistence, that is, the agent being poor. On the other hand, the vagrant who habitually indulges in idleness, even if he is valid for work, but who has income will not be considered criminal, going back to the conception of noblemen in taverns of yore. Likewise, in the present day, there are wealthy people enjoying their time in clubs *or resorts,* getting drunk during business hours, or devoting themselves to the worship of the body.

It should be noted that the bipartite system between crime and misdemeanor may be extinguished if the Brazilian parliament approves the New Penal Code Project (PLS No. 236), which has been in the Federal Senate since 2012. By the project, in its article 530, in the final provisions, the Law of Criminal Contraventions (Decree-Law No. 3.688/1941) will be repealed; Thus, it is important to argue that such a distinction between crimes/misdemeanors and misdemeanors will not exist, and criminal offenses will become only "crimes." Obviously, while this does not occur (and it is not known whether it will happen or not), the bipartisan system and the LCP persist, persisting the criminalization of loitering conduct.

Analyzing the concept of loitering, as it appears in article 59 of Decree-Law No. 3,688/1941, the fact that the inexistence of income is in the type, that is, it is not a punishment for the conduct itself, but for the potentiality or expectation that that group represents to commit some crime, to cause damage to the patrimony; This is what is being legally punished and what has led to abuses.

For Borges (2012), the initial part of the typification of loitering presented in article 59 is more serious in relation to the second part, in which it is a matter of analyzing the illicit occupation, because the legislator, intending to combat loitering, by incriminating only poor individuals, without resources

for their own sustenance, discriminates against them from rich vagrants; therefore, configuring a manifest structural violence.

It is, therefore, a violation of the principle of equality, conceiving the rich belonging to an upper, noble and privileged caste, while the poor are destined to the leisure of prisons, restricted of freedom, inferior beings:

> The capital sin against human dignity consists precisely in considering and treating the other – an individual, a social class, a people – as an inferior being, under the pretext of the difference of ethnicity, gender, customs or patrimonial fortune. (COMPARATO, 2010, p. 241)

Bobbio (2004, p. 65) maintains that the "equality", enshrined in the Declarations of Human Rights, establishes that no individual can have more freedom than the other, inadmissible all discrimination based on differences between men or groups. Of course, this does not mean that everyone should be treated as if they were in the same legal position or that they have the same natural characteristics and are in the same factual conditions. Arendt (2012, p. 410) understands that: "Equality, in contrast to everything that relates to mere existence, is not given to us, but results from human organization, because it is guided by the principle of justice." Alexy (2011, p. 396) asserts:

> The equality of all in relation to all legal positions would not only produce norms incompatible with their purpose, meaningless and unjust; It would also eliminate the conditions for the exercise of its powers.

7 LOITERING ON THE DEMOCRATIC RULE OF LAW

Borges (2012) asserts that any form of intolerance, aimed at social behaviors different from the general behavioral pattern, can characterize discrimination or prejudice. However, in the Democratic State of Law, it is inconceivable that only immoral behavior with consequences restricted to the person who practices it should rise to the level of crime. In the Democratic State of Law it should not be admitted that the Criminal Law has the purpose of selectivity between good and evil,

> [...] a religious Manichaeism, establishing the punishment of a behavior whose moral censorship exists, but does not go so far as to justify the deprivation of liberty. It is a real paradox to pretend that the Brazilian legislator prevents idleness and, even worse, only of the poor, to subject them to idleness in prison. This goes beyond legislative hypocrisy to become an affront to constitutional principles of criminal law. (BORGES, 2012, p. 18).

In this sense, no differentiation, distinction or discrimination should be allowed; that is, "the equal must be treated equally; the unequal, unequal" (ALEXY, 2011, p. 399). In addition, it is a matter of criminalizing the "bad life or dangerous state, regardless of the occurrence of the crime, through the selection of individuals with certain stereotyped characters" (BRUNONI, 2007, p. 2).

Borges (2012, p. 19) points out that, before the Criminal Misdemeanors Law, the idle individual was warned by the justice of the peace about the conduct of loitering and only after could he be

punished. It should be noted that idleness was considered immoral, but it was still necessary to warn the criminal individual that, maintaining his conduct, he would be subjected to the sanction of imprisonment with forced labor. What is observed from the Estado Novo is that the so-called "vadios" began to be punished immediately, and there is no longer the warning.

Likewise, Silveira (2006) draws attention to the fact that loitering is a misdemeanor of mere conduct and, as such, becomes imperceptible any potential harmfulness, not even an abstract danger. In any case, it is also necessary to consider social plurality, multiculturalism, from which certain customs or behaviors cannot be considered or measured by a *discriminatory social* standard.

> Thus, in the present day, one cannot accept the maintenance of this figure as valid. It has fallen into disuse, either because of its discriminatory configuration, or even because of the evolution of the State and the perception of the impossibility of intervention in the lives of citizens, who have wide freedom to perform their lives. The authoritarian idea of an intervening state or even of a simple presumption as to the dangerousness of non-workers is completely reprehensible. Unacceptable, in a Democratic State of Law, the conception of a police control of people who are not at work, for mere preventive matter. (SILVEIRA, 2006, p. 278)

Jorge (2004) criticizes the fact that loitering is considered a criminal offense, because of the precarious economic situation of the Brazilian population, including the conduct of begging itself, justifying its exclusion from the legal system due to its retrograde and unjust content. A country that values the dignity of the human person (Article 1, III of the Constitution of the Republic of 1988) and has millions of unemployed cannot punish a person for loitering, in view of the impossibility of understanding whether the subject habitually indulges in idleness due to lack of interest in working or is one of the victims of unemployment. Moreover, work can be understood as a right, whether the individual can exercise it or not; on the other hand, also as an obligation, imposed by the interests of the State, meeting the need of consumption.

For Silveira (2006), in the same way as the contravention of loitering, the repressive discipline of begging revealed the moralistic nuances of the bourgeoisie and the concept of a good living. It is important to highlight the contrast between the first half of the twentieth century and the early years of the twenty-first century, with regard to Brazilian urban growth, industrialization, the labor market, among many other difficulties of a developing country. Thus, the State itself does not have satisfactory conditions to meet the set of social demands in which, most of the time, the helpless are relegated to the charity of others and, in the streets, seek survival.

Nevertheless, the conduct of begging was incriminated in Article 60 of Decree-Law No. 3,688/1941, shortly after the loitering:

> Art. 60. Begging, for idleness or cupidity:
> Penalty – simple imprisonment, from fifteen days to three months.
> Single paragraph. The penalty is increased from one-sixth to one-third if the misdemeanor is committed:
> a) in a vexatious, threatening or fraudulent manner;

b) by simulating disease or deformity;
c) in the company of a alienated person or a person under eighteen years of age.

However, unlike loitering, this misdemeanor was repealed on July 16, 2009, by Law No. 11,983. In any case, the criminal type of begging was limited to the condition of idleness or cupidity, that is, it was silent on the condition by state of necessity, which, *in itself,* would be characterized as an exclusion of illegality, under the terms of Article 24 of the Penal Code.

Silveira (2006, p. 280) also states that: "the state of poverty is not punished, but, subjectively, the practice of exploiting compassion alien to honor is contradicted." The practice of begging attentive to the dignity of the human person; However, this does not justify the criminal repression of those who are victims of their own social exclusion. With regard to the type in question, the characteristic of conduct by idleness or cupidity was objective. Even so, the content was tainted by a morality that is not consistent with the law. As far as habituality was concerned, this question was dispensable with the type of criminal law referred to. Begging became, therefore, an instantaneous act, practiced by idleness or cupidity, listing also hypotheses of aggravating the penalty.

In fact, the criminalization of begging could not be allowed, punishing excluded individuals and paying attention to their own constitutional precepts such as the dignity of the human person, since it is the responsibility of the State to ensure individual and social rights: freedom, security, development, well-being, assistance, equality and justice, precepts vital to social harmony, under the terms of the Constitution of the Republic of 1988.

However, the legislative road to repeal the misdemeanor of begging was a long one. PL No. 4,130/2001, authored by Congressman Orlando Fantazzini, which sought to attack the criminalization of conduct, was approved by the Chamber of Deputies and the Federal Senate, giving rise to Law No. 11,983, sanctioned by President Lula on July 16, 2009. The parliamentarian justified the decriminalization of begging by saying that, "Nothing could seem more surreal in view of the social reality, characterized by one of the worst income distributions on the planet." With this, article 60 of the Criminal Contraventions Law (Decree-Law No. 3,688/1941) was extinguished, and the conduct of begging was no longer considered illegal in Brazil.

Despite the criminal offense of begging, through Law No. 11,983/2009, the portion of the population living on the streets remains vulnerable to the remaining ideological authoritarianism, based on the validity of the contravention of loitering. The begging was revoked because it was incompatible with the precepts of the Republican Constitution of 1988, a fact that did not give rise to the same treatment to loitering, relativizing the guarantees of human rights and strengthening a discriminatory Criminal Law. Borges (2012, p.14) defends the repeal of the criminalization of loitering, such as begging, from a minimum criminal law, proper to the rule of law. In his words, the author understands that those who defend the Criminal Misdemeanors Act of 1941 intend:

> remove from the streets of the cities the beggars who, supposedly, would be able to work, but remain at different points proposing to take care of parked cars or other favors, in exchange for money, or, when not so, ask for money from drivers or passers-by, even saying that they prefer to act like this than to steal.

The fact that people wander the streets as beggars and marginalized, bothers certain social groups, which in turn, defend police intervention to identify and record beggars, stragglers and beggars leading them to police stations (BORGES, 2012, p. 14). With regard to the constitutionality or unconstitutionality of the misdemeanor of loitering, the author states that:

> The departure from the legal system of the provisions of article 59 of the LCP, due to lack of reception by the Federal Constitution of 1988, recognizing its unconstitutionality, is consistent with the foundations of the Democratic State of Law (article 1, item III, CF); with the fundamental objectives of Brazil, consistent in the construction of a free society that is fair and solidary (article 3, item I, CF), in the eradication of poverty and marginalization (article 3, item III, CF), and in the promotion of the good of all, without prejudice of origin, race, sex, color, age and any other forms of discrimination; and the rule of the principle of the prevalence of human rights (article 4, item II, CF). (BORGES, 2012, p. 25)

From the technical point of view, there is divergence whether it is the case of an analysis of "constitutionality or unconstitutionality" or of "reception or non-reception" of the contravention of loitering by the Constitution of the Republic of 1988 (BORGES, 2012, p. 26). The preponderant fact is that, from the technical-legal point of view, the maintenance of loitering is not consistent with the principles of Magna Carta, such as the dignity of the human person and equality, and individuals cannot be discriminated against on the basis of their economic condition. Therefore, the criminalization of the social conduct of loitering is in fact unconstitutional or, at the very least, invalid against the constitutional principled basis.

In this tuning fork*, there is article 25 of Decree-Law No. 3,688/1941, in the Extraordinary Appeal (RE) No. 583,523* of Rio Grande do Sul. On October 3, 2013, the RE was judged by the STF. Filed by the public defender of Rio Grande do Sul, in view of the decision of the Criminal Appellate Panel of the Special Criminal Courts of the TJ/RS, which upheld the conviction of the appellant for unjustified possession of an instrument of usual employment in the practice of theft. The matter had recognition of general repercussion, being declared that article 25 of the Law of Criminal Contraventions (Decree-Law No. 3.688/41) was not accepted by the Constitution of the Republic of 1988.

The referred article 25 typifies the unjustified possession of objects usually used in the practice of theft (gazuas, crowbar, micha key, etc.), by persons previously convicted of theft or robbery, or when known as "vadio" or "beggar". By unanimity, the Plenary of the Supreme Court understood that the device is anachronistic, discriminatory and violates the fundamental principles of isonomy and dignity of the human person. There are subjective aspects related to the subject's personal and

economic condition in order to characterize the criminal offense. Thus, the incompatibility with the constitutional precepts is flagrant, since their effects have direct repercussions on jus *libertatis*.

8 HUMAN RIGHTS

On discrimination and violation of fundamental principles, the Minister of the Federal Supreme Court, Gilmar Mendes asserts:

> [...] One cannot admit the punishment of the subject only for what he is, but for what he does, because to conclude differently would be to accept, in a Democratic State of Law, the unwanted and combated criminal law of the author.
> [...] The Brazilian penal system is based on the criminal law of the fact, because it seeks the worthlessness of an action (or omission), that is, the agent will be punished for the conduct practiced, contrary to what occurs in the theory of criminal law of the author, which punishes the agent without the externalization of the will, but simply for what he is.
> [...] Thus, I observe that the condition required by the norm of the active subject to be "*known as a vagrant or beggar*", as necessary for the configuration of the criminal type affronts the constitutional principles of the dignity of the human person and of isonomy, provided for in articles 1, item III; and 5th, *caput* and item I, of the Federal Constitution. (STF – Extraordinary Appeal No. 583.523/2013).

Thus, by its own reasoning, the opinion espoused by Minister Gilmar Mendes had unanimous approval. The understanding, therefore, of the Constitutional Court, lends a new dimension to the constitutional rights confronted with the types still in force of criminalization in the face of the author, demanding that they be revoked, not admitting any punishments to the individual for what he is, nor condemning him to prison for a crime of lesser offensive potential.

It is in this context that Sganzerla (2012) claims that the constitutional jurisdiction is capable of conferring legitimacy and function to the Constitution, aiming at "the guarantee of citizens' rights, preventing the State from violating them, making the constitutional text rigid and inflexible" (SGANZERLA, 2012, p. 258). By defending democracy and fundamental rights, the Judiciary is validated "as a state organ whose function is to safeguard the foundations of the rule of law" (SGANZERLA, 2012, p. 259).

Hence the value of human rights as a guiding reference of constitutionalism, since: "in the scope of Western Constitutional Law, we witness the elaboration of constitutional texts open to principles, endowed with a high axiological load, with emphasis on the value of human dignity" (PIOVESAN, 2011, p. 39). However, the protection of human rights is not reduced to the national order, having been formed, in the face of a process of universalization, an international system of protection (PIOVESAN, 2011, p. 41). In this sense, it is worth mentioning the Universal Declaration of Human Rights, adopted and proclaimed by the General Assembly of the United Nations (Resolution 217 A III), on December 10, 1948, which precepts in its article 7:

> Everyone is equal before the law and, without any discrimination, is entitled to equal protection of the law. Everyone is entitled to equal protection against any discrimination that violates this Declaration and against any incitement to such discrimination.

Still, in the wake of the legal protection of human rights, the United Nations (UN) recommended to member countries the adoption of sanctions and measures that do not involve the loss of freedom for crimes of minor and medium offensive potential, through Resolution 45/110 of December 14, 1990, known as the "Tokyo Rules". This normative instrument contains a set of minimum principles guaranteeing human dignity and the modernization of Criminal Law, aiming to establish guidelines that avoid the increase of the prison population and, reflexively, the overcrowding of prisons, which impairs the fulfillment of the sentence within the standards of legality and dignity.

Seeking to decriminalize the conduct of loitering and still, at the time, that of begging, Congressman Marcos Rolim presented Bill No. 5,799/2001, justifying that Brazil "has millions of human beings living on the margins of the very idea of law" and according to him:

> [...] More conservative criteria, there are at least 32 million Brazilians who inhabit this world of forgetfulness, violence and despair. Each of them, strictly speaking, can be framed in the conducts that the legislative wickedness of the last century typified in these two articles. (HOUSE OF REPRESENTATIVES. Bill No. 5,799/2001 proposing the amendment of Decree-Law No. 3,688/1941).

That bill was eventually shelved in the face of the end of the legislature. Rolim (2017) asserts that it is "a pity that a picture of arbitrariness and insensitivity like this has not been overcome in Brazil", symbolizing perfectly "how the Brazilian elites have always treated the excluded", and in practice, the legal provision has served only to legitimize police brutality in the face of homeless people, for example. In the view of the former federal deputy, it was not possible to advance in the decriminalization of loitering, because "the Lula and Dilma governments never worried about issues of this kind."

However, in 2004, Congressman José Eduardo Cardozo proposed Bill No. 4,668, in the same sense as Bill No. 5,799/2001, having in its process attached Bill No. 4,977/2005 authored by Congressman Francisco Olímpio, because it also aimed at the decriminalization of loitering and begging conduct. Cardozo thus justified his legislative proposition:

> [...] The matter dealt with in this proposition is of extreme relevance, in addition to repairing one of the great injustices that are still perpetrated in our legal system, aims to adapt the legislation to the Brazilian social and economic reality. (HOUSE OF REPRESENTATIVES. Bill No. 4,688/2004 that proposes the repeal of the articles. 59 and 60 of Decree-Law No. 3,688/1941).

PL No. 4,668/2004 was approved in the Chamber of Deputies on August 8, 2012, and sent to the Federal Senate, receiving the number of PLC 81/2012, being attached to the Project of the New Penal Code (PLS 236/2012), along with 145 other legislative propositions and 806 amendments.

However, PLC 81/2012 was not assessed by the legislators, and the opinion of the Temporary Committee for the Study of the Reform of the Penal Code requested its filing, in view of the repeal provision of the Criminal Offenses Law, from the validity of the New Penal Code.

It should be noted that if the process of legislative assessment is less time-consuming than one might imagine, there are no guarantees, in theory, that the type of criminalization of loitering conduct will be extinguished from our criminal system, judging by the very conservative composition of the National Congress.

For José Eduardo Cardozo (2017), who after two terms as a federal deputy, was appointed Minister of Justice in 2010 by then-President Dilma Rousseff, remaining in office until 2016, the criminalization of loitering has an ideological content, being a crime for the poor, for the excluded; there is not the slightest possibility of validity in the Brazilian legal order in the face of unemployment; therefore, it is manifestly discriminatory content. Cardozo states that although the Lula and Dilma governments had a progressive matrix and humanist values, it was not possible to sensitize the National Congress, which is mostly conservative, to issues of this nature. In his analysis, the former minister of justice points out that the PT governments formed a base of political support that did not have a progressive ideological compaction, that is, they had a majority for government issues, but unable to sensitize the issues of injustice on the criminalization of loitering.

Thus, considering the political and economic situation in which the country's unemployment rate stood at 13.1% in the first quarter of 2018, pointing to the contingent of unemployed in 13.7 million people, a growth of 11.8% compared to the previous quarter (IBGE, 2018), the legal-social consequences arising from the maintenance of selective criminalization on idleness are enhanced. Should the 13.7 million unemployed be criminalized as "vagrants"?

In this sense, it is adduced that the fact that the individual does not want to work, for example, is insufficient for punishment. In addition, even if you want to work, getting a formal job becomes difficult in the face of great demand, even causing a vexatious situation for the unemployed before society. On the other hand, through social assistance, subsistence conditions are provided to those helpless by the State itself: "Therefore, a new incoherence is noted, since, tacitly, the State would not be willing to punish the same individual who helps" (RACHID, 2013, p. 12).

Thus, Borges (2012, p. 16) argues that discrimination and the consequent social exclusion, fruit of the "current model of postmodern society, must be fought, from the principle of humanization and through the guarantee of access to fundamental goods, for a dignified existence." He affirms that it is essential to build public policies that insert the excluded and marginalized within society, and it is inadmissible to submit this mass of the population to prison, in a manifest "social hygiene", a reflection of an archaic penal legislation and proper to the totalitarian regime of the Estado Novo. At the same

time, it considers that all criminal misdemeanors and crimes with a maximum penalty of up to one year should be revoked.

Therefore, there is no doubt that in the light of the emancipation of democratic constitutions, the minimum criminal law and guarantee of human rights must be instituted, not admitting the social, legal discrimination and criminal recrudescence, typical of totalitarianism. By the way, "the whole question of human rights has been associated with the question of national emancipation; Only the emancipated sovereignty of the people seemed capable of securing them—the sovereignty of the people to which the individual belonged." (ARENDT, 2012, p. 396).

On the other hand, the capitalist state's bet on a dehumanizing criminal law and a deforming prison system as a form of social control, attacks not only the sovereignty of the people, but the individual in its own meaning,

Studies on criminal law and, in particular, on the prison system, Rudnicki (2013, p. 147) positions himself critically: "the prison system does not serve to reintegrate, resocialize or reeducate. It is a form of social control; yet another way for the state to exercise control."

In the defense of the democratic State, of justice and guarantee of human rights, it is not possible to admit a political-criminal model that affronts the dignity of the human person, thus inadmissible the maintenance of the criminalization of the individual by the mere conduct of loitering.

9 FINAL CONSIDERATIONS

The study points out the main conceptual differences on the theme whose discourse, in contemporary times, glorifies work as the source of all values, becoming the creative and defining criterion of the social man.

In this way, man is reduced to the object, to the commodity, to the labor power essential for economic development. By establishing that leisure and leisure are pernicious to capitalist society, the ideologization of labor has been based on a moralizing and utilitarian archetype, in such a way that the spoliative relations of labor in bourgeois society become natural. Therefore, the economic exploitation of the *lupemproletariat* accentuates inequality and, with it, the proliferation of miserable people, whose confrontation is materialized through two mechanisms: assistance and repression.

Legislative proposals for the decriminalization of loitering have been attempted in the Brazilian parliament in recent years. Soon, it was found that even during the administrations of progressive governments, it was not possible to sensitize the congressmen to repeal the contravention of loitering. The initiative that succeeded in the Chamber of Deputies was PL No. 4,668/2004, authored by Deputy José Eduardo Cardozo, approved on August 8, 2012, being sent to the Federal Senate and receiving the number of PLC 81/2012. However, the legal proposition was attached to the Project of the New Penal Code and was not assessed by the said legislative house, and there was even an opinion for its

archiving. This means that the criminalization of loitering remains in force, unlike other social conduct, always associated with this, that is, begging.

By maintaining the contraventional device in our legal system, in theory, it would be possible to conclude that the type provided for in loitering allows its use as a repressive ground against the unemployed. The analysis of the concept of loitering, the fact of the absence of income, implies a model of conduct appropriate only to the most humble, the poor and miserable; Therefore, it is not a punishment for the conduct itself, but for the potentiality or expectation of some offense.

The modern age has glorified work as the source of all values, becoming the creative and defining criterion of social man. However, capitalism did not promote better distribution of wealth, but the concentration of capital and thus increased impoverishment. The phenomenon of the concentration of misery generates a heap of unemployed, undoubtedly, vulnerable and visible in large Brazilian cities.

In this line, poverty is presented by the dominant ideology not as a consequence of capitalism and the structural division of class society, but as bad luck, a lack of luck that can be reversed through a willingness to work and good behavior.

Finally, it is important to consider that the interests and cultural aspects of the individuals who are members of the various social groups perfectize what is considered (or not) a deviation or an infraction, settling and perpetrating the existing inequalities, whether of ethnicity, gender, age, sexual orientation, creed, social class. In this context, it is important to analyze and critically relex social issues, fostering and grounding activism in favor of human rights, operating a counterdiscourse on the criminalization of loitering.

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