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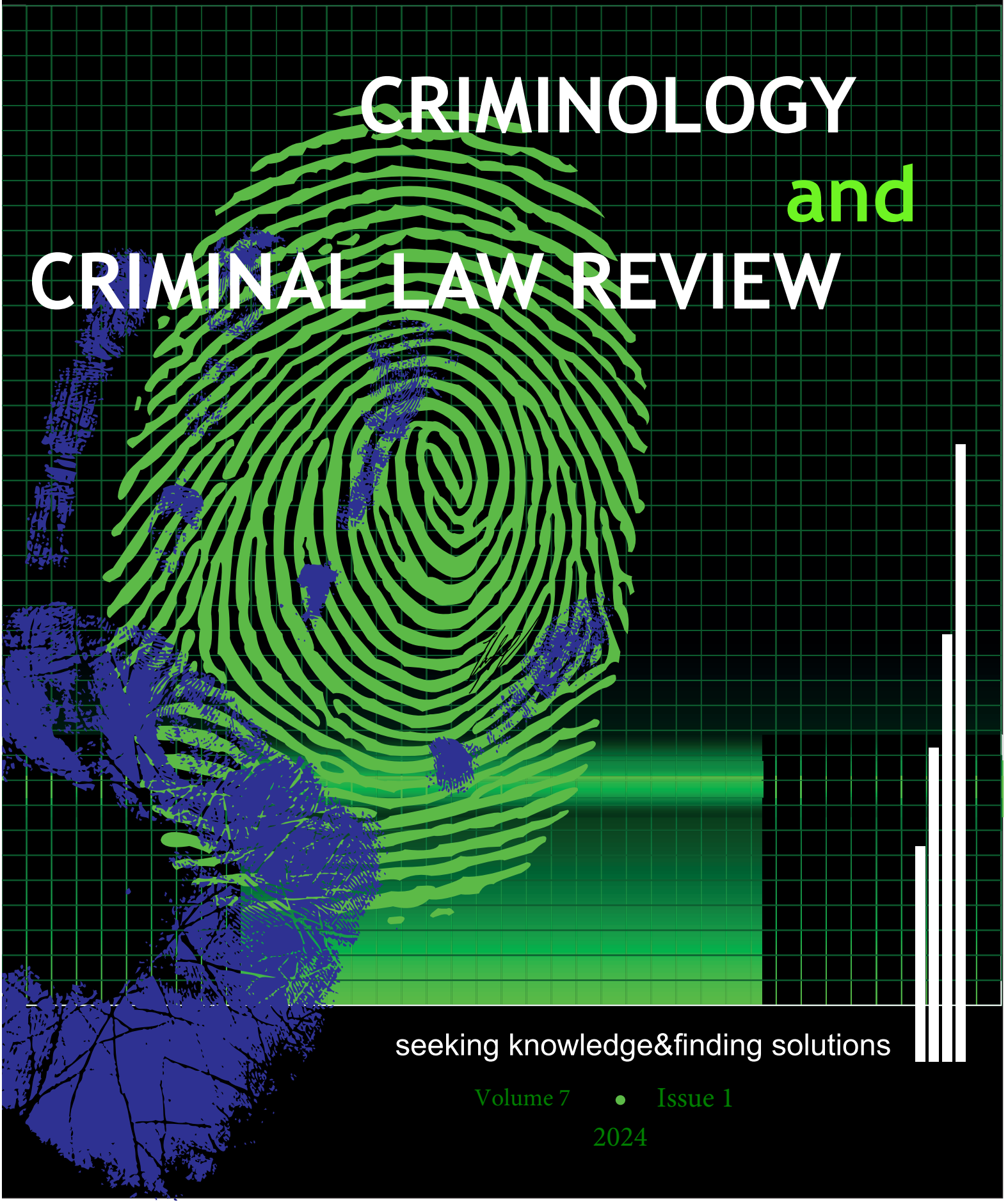

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A study on the relationship between the individual, deviance and the power of social control

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Abstract

Starting from the most significant theoretical contributions, the present study aims to analyze the relationship between deviance, social norms and legal norms, investigate the complex field of interpretative problems of the term deviance, delve into the dimension of social role expectations, investigate the phenomenon of labeling and the related processes, understand, finally, how much social control can impact deviant phenomena, also in terms of prevention. Over time, as is known, the social and criminological sciences have focused their interest on individual behaviors linked to deviance phenomena, the latter of which can be classified as the distancing of individuals or groups from shared norms within each specific social context and on criminal behavior, in clear violation of legal-regulatory precepts, to which a sanction is attributed. In the modern panorama and in advanced industrial societies, what increases interest in the study of deviance in general is the growing fear of crime and victimization, which generate feelings of insecurity and fear in members of society. The multiple forms of deviant behavior have therefore, over the years, been increasingly analyzed and debated, given the increase in their visibility, their representation and emphasis on the mass media, but, above all, due to their treatment within public, control and prevention policies. Parsons (1965) underlines that the term "deviance" was introduced into the sociological debate in the 1950s.

Keywords: deviance, society, deviant behavior, social control, labeling.

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1. Introduction

It should be noted that deviant behavior varies depending on time, context, cultural affiliation and role; it depends on historically and socially constructed norms and the sanctions that result from their transgression. Deviance is not always dysfunctional; indeed, according to the theorists of the past, in certain cases it carries out a positive function of regulating behaviour, promotes creativity and serves as a negative reference for social control. The distinction of theories between traditional and modern is used exclusively for practical reasons, that is, to distinguish more recent (modern) theories such as interactionism, from those originated and developed during the first half of this century (traditional) such as, for example. e.g., the theories oriented towards the study of social problems of the Chicago School. The Sociology of deviance has long had a substantial number of theories which, each in its own way, attempt to explain the phenomenon. Theories that explain "deviance" vary depending on the "paradigm" according to which they are oriented (e.g. positivistic, functionalistic, interactionist), on the "focus" of the explanation (the deviant, the social reaction to deviance), on the "level" of explanation (macro or micro-social), the type of relationship that exists between the variables (cause-effect, probability) and whether or not values are taken into consideration in the research. In the Sociology of deviance, for example, the multiplicity of paradigms can be observed in the different way of interpreting deviant behavior starting from positivism, functionalism and interactionism. The traditional theories, those of the first half of the 20th century, used by the Chicago School to explain "social problems", have in some way a functionalist tendency. They seek the cause of deviant behavior in the social disorganization of the territory, that is, in the dysfunction of a part of society. Their question is focused above all on "why" a subject tends to be deviant. There are different approaches within the same paradigm: for Sutherland (1947) it is a question of learning; Merton (1959) explains it as a consequence of the tension (strain) produced by a gap between sought goals and the means available to achieve them; Shaw & McKay (1969) looked for the causes of deviance in the social disorganization present in large cities.

Traditional theories focus on the deviant from the perspective of social control and attempt to explain "why" people deviate, the conditions and circumstances that contribute to deviance. Modern theories instead focus on the deviant from the point of view of the deviant himself: how society reacts to deviance, "how" the labeling process occurs, how deviants respond to labeling, and "who" is labeled by the social reaction. One can distinguish between objectivist and subjectivist theories, depending on the object focused. Objectivist theories define deviance as a violation of the social norm. Deviance in this sense is an objective data, which means that the researcher can identify an act as deviant through the comparison between the act itself and the normative code (informal, formal or health) available in a given society. These theories explain deviance as the result of the conditioning of structural, cultural factors and interactive processes within which individuals maintain a deviant status.

2. Deviance and the most representative theories

Cohen (1955) defines deviance as "that behavior which violates institutionalized expectations, that is, those expectations which are shared and recognized as legitimate within a social system". The subjectivist conception, in turn, defines deviance as an act (real or imaginary) that has been identified as deviant by people. So, in this conception it is the social reaction that defines whether an act is deviant or not. An example is the

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definition of deviance given by Becker (1963): "from this point of view, deviance is not a quality of the act that a person commits, but rather a consequence of the application by others of rules and sanctions to a deviant. The deviant is one to whom this label has been successfully applied; deviant behavior is behavior so defined by people."

Some theories develop within a macro-sociological approach to the study of deviance: in this case the researcher tends to look rather at the structural variables (cultural, economic, social) that condition people's behavior. This is the case of the research undertaken by Durkheim (1969) who sought the causes of suicide in the condition of anomie of rapidly evolving societies. The most recent theories tend to be micro-sociological in nature and emphasize psychosociological variables, social interaction and behavior in groups. Goffman (1970) focuses his research on subjects and groups of subjects subjected to social reaction and stigmatized by it. Traditional theories conceive of a relationship between variables in a cause-effect manner. They tend to say that, for example, family breakdown causes drug addiction. More recent theories arrive at less rigid conclusions, based on co-variance and probability calculations: for example "family breakdown increases the probability - and therefore is a risk factor - of drug use". And, lastly, the consideration of values. Positivistic theories tend to distance themselves (neutrality) from the question of values. They are considered as subjective variables that must not mix with those of an objective nature. The latter can be demonstrated, tested and analysed. Other theories tend to consider values as important variables for research. Interactionist theories have a humanistic orientation and consider values as an integral part of research, once man is the subject of the theories he creates and cannot fail to consider the question of values.

he consequence of the different approaches is the adoption of different methodologies in the research field: traditional theories tend to use quantitative methods considered more objective: statistical analyzes provided by the State, "surveys" and experiments. The most recent theories, in turn, tend to favor qualitative methods: participatory observation, interviews, the analysis of documents, the analysis of the historical context and the present. It may be fun to remember, now just a historical curiosity, that in the last century and at the beginning of this one, the "physics" category also included studies that hypothesized and tried to demonstrate an influence of the physical environment (climate, season, latitude etc.) on crime and deviance, especially among young people. Subsequent research has radically changed the meaning of this apparent false statistical evidence. Moving from the external physical environment to the physical conditions of the subjects, it can be observed that from Lombroso (2013) onwards, physiological, constitutional, genetic, hormonal, neurological, etc. signs and clues have been systematically sought, capable of distinguishing and making the criminal is recognisable, "objectively" identifiable compared to the non-criminal, the perverse, the bad, the socially dangerous compared to the normal. Lombroso (2013) by absorbing and synthesizing, in an eclectic, disorderly and often confused way, important cultural stimuli of his time, such as

materialism, biological and sociological Darwinism, physical and cultural anthropology, attempted to give an initial positive response, empirical, to that ancient ideology. Carrying out anthropometric measurements on hundreds of prisoners, especially in Venetian prisons, in 1876, in his best-known work, "L'uomo delinquente" (The delinquent man) (2013), he formulated his hypothesis of the "born criminal" as a distinct anthropological type, with a compulsive tendency to commit crimes, characterized by anomalies, malformations and asymmetries of the skeleton, skull and face. Over the years, facing the many criticisms that had already been raised about his thesis (which also had a vast international success), Lombroso (2013) limited the share of born delinquents to 35% of all criminals, maintaining that these to be considered as such, they had to possess at least five of the proposed stigmata; he added to this category the "crazy criminal" and the "occasional criminal", and concluded his scientific journey by stating that every crime has its origin in a multiplicity of causes. As is evident, it can be said that the specific thesis of the criminal man did not survive its author, while the model of bio-anthropological research inaugurated by Lombroso had enormous success and was taken up by doctors, psychiatrists, geneticists and criminal anthropologists of Worldwide. Modern theories consider deviance to be relative and subjective.

elative because it is socially constructed and not a scientific fact. In this sense, the research is oriented towards the study of social reaction and the creation and imposition of rules by social control (formal, informal and healthcare); they see deviance as a phenomenon created by society and freely chosen by deviants. If the subject is free then the relationship between the variables can no longer be considered deterministically (cause-effect method of natural sciences) but probabilistically (correlations and probabilities). Goode (1996) offers a vision of the different approaches to deviance which appears useful as he manages to distinguish between absolutist and relativist perspectives, in order to also consider functionalist theories from a subjectivist perspective. The framework of the approaches is defined as follows: for the "absolutist approaches" deviance is an objective fact: it is a negative action not because it violates the norms, the laws of a group or a given society, but because it is constitutionally, objectively and absolutely negative. In the absolutist approach, those who determine whether an action is deviant or not are the laws and moral principles that guide human behavior: deviance is a violation of the law of nature, of scientific law, of divine law, of the law of the totalitarian state. An example is the conception of deviance that jumps from the bio-psychological theory of Lombroso (2013): the aberration of nature, characteristic of subjects in the process of involution, is a fact of nature that indicates the subject as a born delinquent; it is enough that the subject is objectively aberrant for it to be automatically considered deviant because it violates a law of nature; for the "subjectivist approach" deviance is a more relative than absolute phenomenon, more constructed than essentialistic, more subjective than objective. It is not considered an act that can be deduced as such from natural or divine laws, an intrinsic characteristic of the act, but rather a behavior considered this way because people perceive it that way. What determines whether an action is deviant or not "is the actual or potential condemnation that it will procure from common sense". We can distinguish, with Goode (1996), three perspectives within the subjectivist approach: "normative", "slightly reactive" and "strongly reactive". The "normative" perspective considers any act that violates the norms of society as deviant. Those who define whether an action is deviant or not are not the natural and moral laws (objectivist approach) but the sociologist, who observes and studies society and finds the actions that in that specific culture and context are considered deviant. For example, if the

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sociologist finds that in a given society there are norms that condemn homosexuality, it is considered deviance regardless of the social reaction. Therefore, the normative perspective also considers the existence of "secret deviance": even if his deviance is not visible the subject can be considered deviant because he violates a social norm. Functionalist theories of anomie and learning take on this normative perspective. Some of the authors who support this trend are: Merton (1959), Cohen (1955), Sutherland (1947), Park (1925), Kreager (2007).

The reactive perspective has, according to Goode (1996), two gradations, the light one and the strong one. The "strong reactive perspective", which we prefer to identify here as radical, includes the most radical methodological currents, such as ethnomethodology: "deviance exists when and only when an action or condition is currently and concretely punishable or condemnation. Without condemnation there is no deviance." If a deviance is experienced in secret it does not constitute deviance because it does not cause condemnation; it will only be constituted on the day in which, due to various circumstances, it becomes visible and can therefore be sanctioned as a deviance. A drug addict will be considered a deviant only from the moment he comes out into the open and therefore the social reaction will be triggered which will sanction him and label him as a "drug addict". Otherwise he remains like a normal citizen. The “light reactive” perspective is an intermediate position between the normative one and the radical reactive one; the "focus" is not oriented to the norm itself (normative perspective), not even to the social reaction "here and now" (radical reactive perspective). Normativity is not denied: it exists and can be affected by the experiences of negative reactions (sanctions from the public) that have occurred in the past, in the present and that will probably occur in the future. The sociologist, however, first looks at the social reaction and then compares it with the norms. A different procedure is that of the normative perspective in which the sociologist first of all looks at the norm and then compares it with the sanctions of society. Just as no rule is absolute, there are no causal relationships between the variables in question, but rather correlations between them. The sociologist therefore adopts a probabilistic approach to deviance. Not only is people's reaction to the behaviors in question studied but also how people perceive the deviant is assessed; how this perception influences his behavior in the future; the consequent changes that occurred on the self-concept and on one's identity. The social reaction does not necessarily "create" the behavior: it is the result of a whole process of which the subject is also an integral part. Some authors who support this perspective are: Becker (1963), Erikson (1950), Matza (1976), Goffman (1970) and Lemert (1981).

3. The relativity of the norm in the concept of deviance

According to Ward et al. (1994) "deviance is created by society. Social groups create deviance by establishing norms whose infringement constitutes deviance itself." And if created it is also relative to the culture in which it occurs. Some factors can change the references to the rules and therefore their methods of sanctioning and transgression. Relativity is mainly due to certain factors such as time, context, the group one belongs to and the role one plays in society. 1) the time factor: behavior considered deviant in the last century may not be so today, such as the use of trousers by women. Other behaviors are related to life time: sexual abuse, juvenile delinquency, drug use; 2) the context factor: our conduct varies in relation to the context in which we are placed at a given moment: a church, a carnival party, the work or family environment; 3) the cultural belonging factor: society is made up of different subcultures, each of which is able to provide those who belong to it with a set of values, norms and sanctions. In a complex society, composed of the configuration of the most differentiated subsystems, the subject must adapt to particular cultural circumstances, that is, he must know how to interact and communicate with people and groups in contexts supported by the most varied sets of values and norms. In some groups - e.g. among members of a gang - what is considered deviant in wider society is considered "normal"; 4) the social role factor: deviance is related to the social role played by the members of a social group. Characteristics such as age, social status and gender determine the attribution of a deviant character to certain behaviors. The role of the policeman allows him to carry a weapon; that of the religious man to wear the cassock; that of the child to throw tantrums or mischief, and so on. On the other hand, the carrying of a weapon by a civilian, the wearing of a skirt by a non-religious person and mischief done by an adult are considered deviant. The study of deviance phenomena has proven to be essential for understanding the central processes of social systems, as deviance appears closely connected with other typical phenomena of collective life, such as the dynamics of power, the formation of the framework of norms and values, socialization processes, the definition of the role-status system, etc. It can therefore be stated that the study of deviance is not necessarily equivalent to the analysis of "social pathology", precisely because deviance is a "normal" fact that occurs occurs in any society, even in the hypothetically most integrated ones. Hence the "symptomatic" character of deviant behavior, that is, its ability to refer to problems, questions and contradictions that are rooted much further upstream, in the very "logic" of social systems, and consequently, the need not to isolate the discussion on deviance in a completely superficial descriptive phenomenology, but to insert it into a multidisciplinary reflection that takes account, above all on an interpretative level, of the complexity of the topic. However, the discussion on deviance is mainly placed in the perspective of sociological analysis which, despite being rich in critical ideas and multiple openings, certainly does not exhaust the entire problem; the reason for this priority choice essentially lies in the need to address the topic with methodological homogeneity, even if partial, before summarizing the results obtained with other data. However, it is an open sociological discourse, which does not reject comparison and integrations when they are organic to the topic under analysis. This discussion focuses, for example, on the phenomenon of deviance and not on deviant behavior, both because the latter perspective is better suited to a psychological or psychiatric analysis, and because the phenomenon of deviance is actually not restricted to non-compliant "behaviors", but it also includes "ways of being and placing oneself" in the social system, which cannot be traced back to a "behavior".

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4. Deviance and the difficulties of interpreting the term

Defining the concept of deviance is certainly not easy. Over time, there have been numerous efforts to define a dimension that can be linked - for many authors - to the behavior of the single individual in the social space full of norms and laws. Below are the main contributions: "it is behavior that does not conform to the models that are prescribed in a community or group and which therefore violates institutionalized expectations" (Leonardi 1967); "it is the process by which some subjects escape control" (Fichter 1961); "that behavior which violates the rules is deviant" (Cohen 1966); "conformity and deviation have meaning only in relation to the fact that the agents or actors in social systems are oriented towards social norms which are internalized as part of their personality" (Johnson & Walker, 1987); "behavior that violates the institutionalized expectations of a given social norm is deviant" (Ciacci & Gualandi 1977). From the example it is difficult to draw an overall definition of deviance, as the interpretations are heterogeneous; we can, however, attempt to isolate some elements that present problematic aspects: a) deviance refers to a violation of the norm. It is not only the intentional violation of an institutionalized "behavior model", but also more simply than a discrepancy in somatic, psychic, moral, cultural, etc. characteristics. considered "normal" in a given social context. Thus theft is considered "deviant" in a society that sanctions private property, just as a person who is significantly taller or shorter than average, a mentally ill person, or a disabled person is considered deviant (because "different"). The advanced distinction seems to assume that deviance is not a quality inherent to a specific behavior or characteristic, but is a quality attributed from outside, i.e. socially, to a certain way of being or acting that differs from accepted standards. In addition to the problem of defining deviance in terms of objective/subjective and non-conformity/difference, the question arises about the extreme relativity of every definition of deviance. In reality, as we will see later, deviance, precisely in relation to the variability of the norm, is commensurate with extremely changeable space-time dimensions. In fact, not only do the norms change, but also the tolerance limits around the norm and the criteria for negative-positive evaluation of non-compliant or different behaviors and characteristics. The phenomenon of deviance has to do with the processes of formation and maintenance of power, as it presents itself as an alternative to social control or, at least indirectly, expresses the need for change as opposed to the need for social order. Hence the obvious consequence that no society, no matter how interested in its own survival, can ignore the reality of deviance: generally every community touched by deviance, and all of them are, tries to theoretically understand deviance (and therefore interprets it in its own way). its) and to control it on a practical level (and the various methods of containment, stigmatization and sanction which we will deal with at length). Deviance, at least in cases where it involves deviant behavior, is obviously related to socialization processes (through which the internalization of norms takes place) for several reasons (Caliman 1997): the

different outcomes of socialization in different individuals explain in fact, how some are able to exercise internal control over themselves (orientating themselves towards conformism) and external control over others (stigmatizing their behavior or "different" quality) and how other subjects are instead inclined towards non-conformity and non-conformism. On the basis of these observations it is possible to give a provisional definition of deviance, to be further specified in the continuation of the discussion: "deviant is a behavior or a quality (characteristic) of the social person which, exceeding the limits of tolerance with respect to the norm allowed in a certain context social space-time, is the object of a process of sanctions and/or stigmatization, which expresses the functional need of the social system to control cultural change according to the logic of the predominant power".

The relationships between "normal" behavior or quality and "deviant" behavior or quality are extremely fluctuating, precisely in relation to the variable nature of the norm: the area of permissiveness or tolerance allowed towards the norm varies. In reality the norm is just an abstraction; it is a behavioral model corresponding to "average" conduct, with oscillations whose amplitude is considered legitimate, i.e. normal, in relation to a considerable and variable number of variables. Thus, with respect to a certain model of social behavior (e.g. premarital sexual courtship), certain variations are permitted depending on the age and gender of the individuals. The degree of internalization of the norm varies depending on the different modes of socialization, which characterize the different subjects and which explain the presence of a more or less profound consensus with respect to the regulatory framework. Finally, the degree of consistency, organicity and legitimacy of the regulatory system itself varies in relation to the global framework of a given society. Winslow (1970) pointed out that regulatory systems are differently structured depending on the structures of society and the types of institutional organization present in a certain context. Thus the oligarchic, anomic and pluralist structures correspond to coercive, utilitarian and normative organisations, characterized by different taxonomies and different qualitative connotations of deviance. In the first type (oligarchic-coercive) the norms appear organized in a rigid framework, supported by predominantly punitive sanctions (even in a physical way) and produce a type of alienating conformism (the subject adapts to ritualized behavior or withdraws by renouncing participation); in the second type (anomic-utilitarian) the rules appear devoid of organicity and foundation, they receive sanctions of the reward-punishment type, favoring opportunism and calculation, occasioning the different forms of deviance inspired by individual gain; in the third type (pluralist-normative) the norms are organized according to the different hegemonies of the emerging power in society, they receive a strong moral and symbolic sanction from which, however, the subjects who do not consent to the hegemony and who aim (through rebellion and innovation) to the development of other regulatory frameworks. However, Winslow's (1970) structural-institutional approach does not explain the presence of some deviances present in all the types of society listed and furthermore does not account for many forms of deviance independent of the institutional organization, but connected, in his opinion, to strictly individual factors. Not even the attempt by Dinitz et al. is free from criticism. (1969) who try to clarify the different structure of the regulatory framework in two opposing types of society: the traditional-popular society and the modern-industrial society. The contribution of Dinitz et al. (1969) is important because it introduces an essential relationship between the regulatory framework (and deviance) and social change. In other words, it is stated that in static societies deviance takes on a rather limited character, precisely because the

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norms are simple, easily identifiable because they are organic and peacefully internalized, the sanctions are such as not to stigmatize the overall personality of the deviant, but only one aspect sector of his behavior. On the contrary, in modern societies, the factors that produce social change also produce greater deviance precisely because the characteristics of the resulting framework of norms encourage infractions more and make the stigmatization of the deviant more incisive.

5. Role expectations contradicted by deviances

The definition of deviance in relation to normative systems implies a series of considerations on the relationships between deviance and role expectations: it is obvious that a violation of the norm also constitutes, in parallel, an infringement of the role expectations that a specific group of social observers have it came by building towards the subject. This fact cannot help but produce a certain frustration in the group, which sees the network of mutual, predictable and standardized relationships on which the safety of individuals is based threatened. The reaction to this perceived infraction of role expectations can be extremely varied; however, it never excludes widespread hostility towards the deviant, an attempt at blocking, a tendency to recover normal behavior through the use of the reward-punishment system, etc. In any case, deviance that is not remedied causes a radical rethinking of the system of role expectations that are not easy to rebuild in a short time. Beyond this global consideration, it should be underlined that deviants are usually deviants, as an objective infringement of a norm, only in relation to particular roles, exercised within particular groups or contexts (Gibbs 1966). And yet in modern industrial societies we are witnessing a phenomenon of role diffusion whereby there is a tendency to extend the judgment of deviance to the entire personality of the different person who is thus globally stigmatized. This is not the case in pre-modern societies where stigmatization remains, if anything, restricted to truly different sectors and does not include a judgment on all behaviour. In reality, the deviant is always compliant at least with respect to some sectors of his being or acting: he generally adapts to many norms of common life and conforms to the models of the deviant group to which he refers. On the other hand, it is difficult to find a perfectly conformist social person; everyone is deviant, at least in some roles, as we have already noted regarding the pluralism of institutional affiliations and loyalties which, when conflicting, pushes us to make choices towards some models and to place ourselves in a situation of dissimilarity compared to others. The case seems to occur in societies with a high degree of complexity, which imply a great risk of poor integration, if not outright disintegration. The reality of an inevitable non-integration of roles is reflected and transformed into the need to activate wider limits of tolerance of deviance: and it is precisely the mechanism that is triggered, alternatively and together with stigmatisation, when the group or system, accepting the insurmountability of deviance, they try to mitigate or prevent any disruptive effects. An example of this mechanism is represented by the way in which a few years ago

the capitalist model of Western society tried (with excellent results) to neutralize the hippie protest by progressively widening the limits of permissiveness towards the few deviant roles (hair, clothes, music, drugs) and encapsulating them through consumerist manipulation (commercialization of hippie fashion, etc.). Finally, again in relation to role expectations, it should be noted that deviance takes on different social relevance depending on whether it refers to roles that concern central or peripheral groups-institutions in the social system.

6. Social control as an "engine" to combat deviance

Deviance is a social construction: it is an inadequate response to the social norms constructed within a culture and is attributed to individuals who transgress these norms. Some deviances are unintentional and some are intentional. In a complex society it is more likely that a subject transgresses the norms, given that there are as many as the subsystems, subcultures and contexts that integrate it. Social control tends to threaten rather than punish unintentional deviance. Some people are considered deviant not for what they do or fail to do or for whether or not they intend to do it but for what they represent in themselves: therefore, the question of stigma arises. People can be stigmatized based on physical and psychological characteristics: skin color, cultural affiliation, madness. The process of stigmatization that manages to create the stereotype can be easily perceived in everyday life when Germans are referred to as Nazis, young people in nightclubs as drug addicts, gypsies as thieves and so on. But the center of concern of sociologists and social control agencies are intentional deviances, that is, when an individual consciously and voluntarily transgresses the norm. In fact, the desire to transgress constitutes the first step in the process of becoming deviant and is defined by Matza (1976) as affinity. There are many reasons that lead to deviance from the norm: family conflicts, the desperate search for an identity, the desire to belong to a rebel group, the lack of meaning in life, the social condition of deprivation regarding race, age, employment, education. These and other reasons, which more profoundly reveal the frustration of fundamental needs, can trigger the more or less clear, voluntary, intentional decision to transgress the norm. But just the desire to transgress is not enough. Many want it, but do not have the courage to take the risks of self-control (guilt) and social control. In relation to the regulatory frameworks and the corresponding role expectations, it is possible to highlight a close correlation between "deviance and social control"; for this purpose it is perhaps useful to recall some elementary notions on the concept of control: social control "is a process or mechanism tending to maintain the conformity of the individual elements of a social system to behavioral models, roles, relationships, culturally relevant". It is therefore a phenomenon that has to do directly with deviance, as Johnson (1960) more explicitly notes: "it consists in the action of all the mechanisms that counterbalance the deviant tendencies, either by completely preventing the deviation or, what more importantly, by controlling or reversing those elements that tend to produce deviant behavior." From the definition given it would seem that social control can essentially be thought of as having an antagonistic function with respect to deviance, which in turn would be defined as a process by which some subjects escape control; in reality it is not difficult to demonstrate that in certain typical situations social control can produce or at least stabilize and define deviance. As the theory of stigma dictates, social control determines the qualitative leaps that occur progressively in the process by which

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one becomes deviant, contributing decisively to the establishment of secondary deviance (i.e. real deviance, not occasional or episodic). (Gibbs 1982).
he forms in which social control manifests itself are many, as demonstrated by some useful distinctions that are not only theoretical. Thus positive control is that which is exercised through persuasion, suggestion, the gratification-reward system, education, while negative control is achieved through threats, orders, prohibitions, sanctions (Gibbs 1975); Furthermore, the two methods are almost always applied simultaneously. Another distinction concerns the formal control expressed through regulations, statutes, official rules and the informal one which consists of calls, gestures, direct or indirect, implicit or explicit, often even merely symbolic presences; the first seems more widespread in complex and differentiated structures, identifying itself at most with the forms of organization and bureaucracy; the second is instead found much more present in simple structures, such as in primary groups where face-to-face relationships prevail. Finally, it is useful to keep in mind the difference between internal control and external control: the first can be defined as the effect of the internalization of role expectations and the acquisition of sufficient skills and motivations to adequately respond to role expectations, while the second corresponds to the current notion of social control and is the sum of the prescriptions or norms adopted by the social unit to ensure the minimum of functionality and consensus for the purposes of the unit itself (Heitzeg 1996). These various forms of control are exercised differently at different levels of the structure and by different forms of social aggregation: by global society, by different power centers (hegemonic groups or associations), by specialized institutions, by pressure or interest groups minorities, by more or less charismatic leaders.
One of the most studied points of the deviance-social control relationship concerns the measurement of the effectiveness of social control on reducing deviance. This analysis is relatively recent. The Merton school (1959) had neglected to consider reactions to deviance as a form of social control; Becker (1963), Kitsuse (1963) and Scheff (1966) emphasized the importance of social control following "primary" (i.e. occasional and episodic) deviance in producing "secondary" (i.e. structured) deviance, but did not study social reactions to deviance in their analytical properties and in their variability. Others like Lindesmith (1965) had limited themselves to noting the uselessness or ineffectiveness of social control; finally others such as Hollhingshead and Redlich (1958), Clark and Cornish (1985) had tried to delimit the social characteristics of the deviant, which condition the type of public reaction.
A global presentation of the issue on the forms of social control exercised after deviance is contained in a contribution by Clark and Gibbs (1965). These authors distinguish between normative reactions and actual reactions. The former refer to a social norm, in the sense that they are reactions to deviance that are predictable on the basis of a certain more or less legal evaluation criterion of deviance. They are divided into "evaluative" ('vulgar' regulatory sanction of deviance), legal (official sanctions) and "provisional" (probable

'vulgar' sanction). Of these reactions, in principle, it can be said that they are subject to a lot of variability: the authors cited take into account the degree of generality (not all reactions apply to all types of deviance), specificity (many reactions apply discretionally and not specifically), of relativity (the reactions depend on the characteristics of the deviant, the victim, the reactant, the situational circumstances), of consensus (not all reactions are equally legitimate), of coherence (between the three forms of normative reaction) . From what has been said, it is clear that evaluative reactions are essential in giving a consistent basis to legal ones; and that a possible gap between evaluative norms and predictive norms (i.e. between the reaction that people consider "dutiful" and the one they consider "probable") automatically becomes a symptom of an ongoing social change in the regulatory system. The same goes for "effective reactions", for which it is not possible to predict a precise taxonomy, but only to determine two fundamental patterns: correlation and relativity. On the basis of the first pattern, certain correlations that actually exist between actual reactions and types of deviance can be established: e.g. to what degree a given reaction actually applies to a given type of deviance (degree of generality); to what extent a given deviance is able to arouse a more or less wide range of reactions (degree of variation); to what degree is a reaction exclusive in relation to a deviance (degree of distinction). Analyzing the relationships between the two types of social control (the normative and the effective) we note that there are always notable discrepancies between the two, that is, there is a variable degree of certainty of real application of the sanction depending on the types of deviance and this variable certainty is related to the aforementioned characteristics of the protagonists of the entire deviance/reaction process. Moreover, this discrepancy and relativity is indicative of the distance existing between manifest principles and latent principles of social control in a given social system. The authors cited, in addition to analyzing the reaction system, also study the characteristics of the control agents (i.e. the reagents), distinguishing between normative reagents (in terms of what they should or can be) and actual reagents. The former (present in all societies in the three modalities: legal, evaluative, forecasting), are subject to a certain uncertainty: their designation as holders of the right to apply social control to deviance is conditioned by some variables: the status of the subject (exclusivity of roles), its availability or not (occupational exclusivity), the degree of coherence existing between the modalities (consistency), the level of consensus attributed, the characteristics of the people involved (relativity), the moral and legal authority granted (generality). As for the latter (actual reagents), it is noted that they tend to be more numerous than the normative ones. Furthermore, their characterization is conditioned by a large series of variables which almost exclusively concern the status of the reagents in relation to the breadth, specificity and complexity of the deviance. In a society in which only the statuses of legal (or official) reagents are clearly established, the specificity and differentiation of the statuses of unofficial reagents become a sign of the global importance of such statuses not only in relation to deviance, but also within the company. In other words, whoever reacts to deviance is either a person designated for this purpose, or a person with relevant status (Masini 1987). Even the discrepancies existing between normative reagents and actual reagents, in addition to depending on the general structures of society and the degrees of consensus and coherence relating to three types of reagents, ultimately demonstrate the consistency or authority of the norm (or its opposite) and emphasize the degree of "social order" that exists in a system. As for the degree of effectiveness of the reactions analyzed on deviance, it has not yet been possible to establish empirically whether the reactions

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marked by an organic, rigid, global normative reference are more incisive, or those characterized by a specific, differentiated, relativized reference.

7. Labeling as a social practice

Opportunities to deviate are conceptually encompassed in what Matza (1976) terms "affiliation." It constitutes the bridge between the simple desire and the real possibility of deviating. It is the moment of acquiring "know how": knowledge of the techniques, values, skills associated with the various deviances. The desire to take drugs is not enough, but you have to know how to do it. Deviance can be assumed individually, but usually the process of learning this knowledge often takes place in association with others already affiliated and already in possession of the know-how. At this moment the group has a great influence: (1) of "belonging" when and if it constitutes a subculture in conflict with the norms and values of the larger society. Our society is made up of multiple subcultures. The most obvious example is that of subcultures involving punk and rap music, in which lifestyles, clothing, appearances and visions of the world are shared in such a way that only those who belong to them are able to interact and participate while others are considered merely curious; Other groups are of: (2) real and imaginary reference: in their real mode they allow direct interaction and in their imaginary mode they correspond to a representation fueled by fantasy or the mass media. In the latter case, the models that are presented tend to push people to imitate through substitutive experience: that is, the desire to do and behave as they suggest. Some groups are considered; (3) of "circumstances", or "near-groups" (e.g. a crowd, a night club, a fan), characterized by the lack of organization and interaction between members and by a common goal (e.g. escape, typhus, a demonstration, drug use). In these impersonal environments, collective deviance often arises from a motive linked to a common objective. Another aspect concerns the visibility of deviant behavior between secreted, visible and deliberately visible behaviors. The first case concerns deviants who experience their behavior "off". This is the case, for example, of homosexuality experienced in secret and revealed to others only selectively. In the second case, we distinguish those who cannot hide their personal characteristics and, therefore, are necessarily exposed to stigma for reasons of height, weight, race and age. Lastly, there are deviants by personal choice: it becomes a "way of speaking", a symbol that is often transmitted through the way of dressing, haircut, tattoo, etc. Deviance also depends on labeling. It in turn can vary according to gravity, permanence, salience, source and connotation. a) severity: less strong sanctions are attributed to many deviant behaviors and this is the case for those that concern informal norms. Deviance within the healthcare model is stronger. A person who bears the label of crazy, schizophrenic, mentally ill, manic depressive, etc., has a greater probability of remaining permanently segregated from society. Even behaviors that deviate from the formal norm are often punished with intensity, and this is the case of

murderers, kidnappers, child molesters and traitors. Some of these behaviors against the formal norm, however, can also be reinforced within the culture, or within certain subcultures once it is a shared behavior. E.g. in some cases people praise behavior that clearly goes against the formal rule of not paying taxes to the state; b) the duration of the stereotype over time: some are just transitory, others are permanent. Some behaviors are found in the moment of deviance, sanctioned and immediately forgotten. For example when a driver runs a red light and is deemed crazy or something similar and immediately forgotten. Others last over time and this is the case, for example, of those who are stigmatized due to physical characteristics or alcoholism even years and years after they have stopped drinking. Those applied by justice remain practically forever: "once a criminal, always a criminal"; c) the salience of the stereotype: concerns the assumption by the deviant of the very quality of deviant; the acceptance and consequently the structuring of a deviant identity. Consider, for example, the case of a person who, in a condition of severe deprivation and hunger, finds himself in need of stealing food; he may be labeled as a "thief", but this will not easily become part of his identity, once it is established that the act was necessary for him to survive. On the other side there are those who assume, accept and live a deviant identity and status so that they are able to reconcile a lifestyle and sometimes be better accepted by others as an alcoholic, drug addict, prostitute, etc.; d) the source of the stereotype: it comes from society and ends up in society through the action of social control. But there are many agents of social control: the police, common sense, the group to which one belongs, the family, the school, etc. But it is rather the police that manages to draw people's attention to the person of the deviant in order to provoke the stereotype. They themselves start the process and want it for various reasons. This is the case, for example. e.g., skinheads, rappers, bloods, those who belong to the Ku Klux Klan, etc., who want to express themselves through the symbol and the assumption of a specific identity, as long as it guarantees them a status in society. The sense of the stereotype between positive, negative and neutral. The negative sense is the one most often present in common sense, which often serves as the main agent of social control. Society generally tries to dissuade deviants from their dissent from the norm through the sanctioning of transgression. And deviants normally have knowledge of disapproval of their behavior. Other behaviors are considered neutral, that is, through the justification and rationalization of the deviant action and the denial of the deviant character of the behavior. Other deviant behaviors may be given positive evaluations and deviants considered good, to be imitated. In this case the deviants have "overturned the table": what was deviant has become normal and desirable.

8. Individual and deviance

Sociologists of deviance, over time, have come to the conclusion that it is not possible to predict who becomes deviant. Everyone can be one, and the only thing that can and, indeed, needs to be considered, once a cause-effect relationship cannot be established, is to examine the probability that a person becomes deviant. Deviance is often linked to social conditions, especially socioeconomic status, race, sex and age. Some deviances are linked to socioeconomic status. The disadvantage of the poor is due, in part, to opportunity and, in part, to the greater likelihood of being labeled. Some deviances are more often found in wealthy environments and therefore depend on social position, power and prestige. In this category we find behaviors such as: illegal dumping of atomic waste, air pollution, financial scams on the stock exchange and computer systems. They are

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white collar crimes, rather than street crimes. The deviants belonging to the so-called white collar workers are more difficult to sanction and punish: they have easier access to protective means such as money, privacy, secrecy, criminal defense. Furthermore, their crimes are often committed in protected and private environments such as in their villas and in reserved clubs and not in the middle of the street. Lastly, they are punished by administrative justice, rather than criminal justice. Street deviance is rather found among the poor population: not paying for transport, purchasing on the black market, theft from the supermarket, robberies, prostitution, etc. The condition of poverty, both in its concept of absolute and relative poverty, can push people to find illicit means to achieve ends that are not easily traceable through legal and normal means. The poor are more unfortunate in their relationship with justice: they are more likely to be labeled for both medical and healthcare deviance and criminal deviance. Some reasons for stigmatization are: the bad conditions in which the poor live, which encourage certain deviant behaviors; rather, criminal legislation tends to control violations of the law by the poor, while administrative legislation tends to control that of the rich. All this does not necessarily mean that the poor are more deviant than the rich, but rather that deviance among the poor is more monitored, visible and therefore sanctioned. It is necessary to take into consideration: a) race: even minorities of certain racial groups are victims of stigma: this is the case of black children who, in Brazil, can be more easily identified as deviants and themselves considered a risk to be avoided.

Other groups tend to raise the level of social and personal control, such as gypsies and immigrants. In other cases it seems to be not so much the racial component that attracts attention but rather the belonging to some subcultures considered deviant, such as that of rappers for black people. All in all it does not seem to be the racial component that leads to a deviant tendency; it seems more true that it is belonging to certain minorities that creates a greater probability of being suspected, of being arrested and of undergoing the labeling process; b) gender: certain behaviors prevail among males: violent actions, crimes against property, gang formation and mental disorders; others are connected to females: prostitution, crimes against morals, shoplifting, anxiety. These differences are mainly due to different socialisation, as it is easier for men to be educated in environments marked by force and violence, while women are more likely to be used to hiding their deviance. Males are, compared to women, subjected to stricter rules regarding dressing (less choice of color and style). But the big difference is especially noticeable in the statistics of convictions for transgression of the formal norm: the great majority of the prison population is made up of males; c) age: most norms in our society are related to people's age. Just look at the stereotypes directed at the elderly ("old", "demented") and those directed at the young ("unrestrained", "stoned", "irresponsible", etc.). But young people are rather the center of attention regarding deviance. Youth is a period of life in which people are more likely to look hard at their transgressions; common sense often mitigates and tolerates the "carefree" behavior of young people. But it becomes an age at

risk of assuming a deviant identity given that they are in a very unstable phase on the one hand and at the same time taking important steps towards the formation of identity and personality on the other. The statistics of drug use in nightclubs demonstrate how it is a behavior found rather among young people and not at all among adults and even less among those of the elderly. If, on the one hand, structural variables such as social status, cultural belonging, sex and age can explain the conditions and opportunities for deviating, they certainly cannot explain the cultural variables connected to the personal freedom of subjects who deliberately they want to deviate. Many people deviate intentionally, that is, because they can and want to. And it is social psychology that is best able to explain this last aspect, which is rather connected to predisposition and personal freedom. To explain the cultural component, two variables must be taken into consideration: 1) *socialization*; 2) *the formation of the self-concept*: 1) *by socialization* - tout court - we mean the process through which the norms, values and knowledge of a society are transmitted to new members. Through socialization, norms are internalized and behaviors and attitudes of conformity towards them are learned. A good part of the answers to the question "who becomes deviant" can find the answer in the lack of socialization or in the socialization of attitudes, values, norms and beliefs within an alternative subculture. Conformity and consensus are the main results of the internalization of the norm. This "support for conformity" comes from attachment to people and institutions and constitutes the main guarantee against deviance: attachment to parents, to school, consent to conventions, norms and shared values. Lack of attachment is related to deviance. Without the support of conformity the door is open to deviance. Others deviate not for the reasons just described, i.e. the lack of attachment to people and values, but because they have been socialized within deviant cultures that support deviance: the peer group, gangs, problematic and socially disorganized territories. Alternative socialization often includes learning not only norms but also values, lifestyles, attitudes and techniques. And everything is reinforced by the beliefs that are learned and seen around: if drug dealers make a lot of money they must not all be bad; if everyone smokes marijuana it won't be a bad thing; if many people don't stamp the bus ticket, I can do it too. It is through the process of socialization that deviance is learned as an advantageous option and a preferable path to conformity; 2) *the self-concept*: the self-concept concerns personal self-knowledge, identification and self-evaluation. It is clearly one of the variables that distinguish between the deviant and the non-deviant: the former is often aware of the difference in behavior, of the choice he has made, and of the career he has chosen. It is the awareness of acting and sometimes of being "outside" normality (outsiders). And those who subjectively feel like outsiders easily actually become outsiders. Feeling like an outsider depends rather on the labeling process. The first encounter with justice can be a strong influence on the assumption of a "deviant" self-concept. The boy who is arrested the first time because he stole an object from the supermarket is immediately labeled by the policeman as criminal, deviant or marginal. The evaluation of others on their behavior can become part of one's identity starting from the moment in which he subjectively takes on the label and therefore a status attributed to him.

Conclusions

At the end of the study conducted, it emerges that the multiple deviant situations do not seem to find an adequate response from the institutions and from society itself: the cultural dimension of the individual and the subjective predominates and manifests itself and materializes, consequently, in the actions of each social actor. In this system,

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traditional values and structures enter into crisis, such as those of reference (family, school system and broader educational-training systems) which more easily allow the implementation of behaviors defined as deviant. The questions that still need to be asked today are the following: what is the connection between deviance, or rather deviant behavior, and the social construction of the same? And, in what terms does it manifest itself in the post-modern? Deviant behavior, i.e. deviant behavior, which finds elements that can be found both in one's own personality structure and in the social roles played, (also personal and implemented in the general environmental context) is described as the action that leads the individual to deviate from a norm socially, on average and legally accepted by all individuals. Specifically, the concept can have at least two interpretations: one of a negative nature since it is to be understood as a violation of (social and legal) norms; the other neutral since deviant is the one who deviates from the criterion/concept of normality. The fact remains that the term deviance is used more to indicate a sociological category than a social category. Sociology, in general, in fact, speaks of deviant behavior when it intends to describe behavior that deviates from the expectations of normality tested by a given society: it can deviate from a norm or an individual actor or a group; or it can be considered deviant behavior that is characterized by its relative exceptionality compared to the regulatory framework generally accepted by a society - State and, in any case, well rooted in the dominant culture of the time. Once again, at the basis of deviant behaviors, there seems to be a breakdown of the most intrinsic social bonds. The current social context, therefore, not only presents elements of risk for the process of forming one's personality but also and above all reveals its progressive renunciation of the creation of a more equitable, just and supportive context. The strong social conditioning, the lack of educational and training proposals on the one hand, and the fragmentation of social ties on the other, therefore, lead to the real risk of producing easily conditioned personalities, withdrawn into themselves, insecure and avoidant, willing to take on any behavior, even negative if this allows them to achieve objectives that would otherwise be unattainable.

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A Soft Prison Called Compulsory School Time

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Abstract

This article attempts to reflect on school time as a paradoxical moment of realization of a right (that of education and upbringing) and de facto negation of other intangible and yet essential rights (the right to play, to the construction of an authentic identity, to self-fulfilment, to freedom). Starting from a provocative, hyperbolic question that could be dismissed as utopian and academically irrelevant: «Can compulsory school time be considered a potential *soft crime*?», this paper tries to delve into technical and functional aspects of school organization to analyse the potential and shortcomings of *en-situation* school time, trying to account for the complex dynamic interferences that link functional the normality of the flattening-demotivation of the learners binomial, homologation, social mobility and ordering control. In particular, while citing virtuous and vicious examples of school time taken from realities distant in geographical space or the result of a historical moment other than the current one, this paper focuses on Italy as a case study, with particular reference to the school segment of Kindergarten and some hints relating to primary and lower secondary school - the latter being configured as a weak segment par excellence. Finally, the examination of some legislative measures (in particular Law 53/2003 and Legislative Decree No. 262 of 29 December 2007) will highlight a key problem of school time, namely the split between two moments (infant, primary and middle school on the one hand, upper secondary schools on the other) which is also a split between two modalities, which translates into an opposition between school understood as a social service in the first phase and academia or early professionalization in the second one. A split perpetrated in violation of the healthy principles of didactic continuity and which finds questionable counterweights in the exceptionality of the competition-excellence binomial and in the normality of the flattening-demotivation of the learner's binomial.

Keywords: *School; Time; Law; Society; Social Mobility.*

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1. Introduction: The birth of a school for all, between historical materialism and the mythologization of Wisdom

History is a teacher, and even a radically functional analysis of social phenomena is not exhaustive if it is not measured against it. We live in times of profound desymbolization and dehistoricization, yet it seems useful to me to have recourse to the past to understand the school phenomenon in its contingent unfolding. To begin with, we must consider a fact: school, as we know it today has not always existed, it is a relatively recent phenomenon, and only in the last little more than a century has it become a right. For long centuries, the school was not an expression of state power, nor a generalist institution fueled by an inclusive drive oriented towards large numbers. On the contrary, in the past, the "schools" were, like the artisan workshops, exclusive and exclusive places of apprenticeship and learning reserved for a select few. Famous, in classical antiquity, is the long period of silence imposed on the aspiring students of the Pythagorean one; They had to prove, by observing five years of abstinence from the Logos, that they deserved access to knowledge. Meritocracy, which in the rationalization of contemporary law unravels in fieri, or in its worst drifts is formalized in the posthumous crowning of certifications, in the past was a prerequisite and conditio sine qua non for access to knowledge itself. What the progressive thought of the second half of the twentieth century imputes to the systemic responsibility of the State as a guarantor of equal opportunities, lashing out against failures, the limited number of access to some faculties, and in regulatory practices going so far as to erode and redesign times and limits for carrying out exams for learners in difficulty, in the past was imputed to the individual, to his will and personal ability to "deserve" access to knowledge. Education, which in today's school in crisis requires recourse to stratagems of ludification of knowledge capable of motivating learning, in the past was an epic initiation, it was something that was opted for, almost always by birth, rarely by nature, accepting a load of responsibilities and duties, before a right. Knowledge, wisdom, study, were not the prerogative of everyone and there was no lack of referees, as evidenced by memorable pages of anthropology and literature – I am thinking in particular of Margaret Mead, in the famous *Continuities in cultural evolution*, and of the character of Julien Sorel in Stendhal's novel *Le Rouge et le Noir*. Mead's anthropological study of the North American Indians, whose sons always had initiatory visions that heralded suitability, unlike the children of the common inhabitants, who were never able to dream of the right thing and to deserve an improvement in their social position in the group, as well as many revolts and the many historiographical testimonies of protests against the brotherhoods of trades and professions, they show how the interests of a few individuals or small groups are also well delineated along a dynastic or at least familist line, which in part has vitiated meritocracy ab origine. But in spite of the latent sonocracy from which the West has been affected since the beginning, in epics, in chivalric literature and not only, up to the sects and Masonic organizations, there has been taking shape over the centuries, with all the diversions of the case, an almost systematic mythologization of true wisdom, or true science, even philosopher's stone and Holy Grail, in the rivulets of alchemy and faith. Those who were able to distinguish themselves, accessed, and the distinction moved the functional gears of formation today moved by inclusion and functional indistinctness, also known as equality and fueled by a fuel called the right to educational success - only to then clash with pockets of distinction determined through the mediation of differentiated and differentiating conditionings, linked to the different conditions of existence (through the mediation, as Bourdieu explains well, of exclusions and inclusions, unions given by pacts

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or marriages, and divisions such as struggles or ruptures, which define the operation of the social structure through the filters of hierarchies and classifications inscribed in institutions and cultural products, and even in language itself). The rhetoric of the right to educational success has the paradoxical effect of creating a semblance of egalitarianism, but in the daily interactions it produces it only amplifies an internalization of the social order, of which it exacerbates the sense of limit by producing the experience, the sense of one's place, which perpetrates, in the paradox perception-oblivion of the limit, a substantial block of social mobility. Thus, just as school is preached as a right, this right is exhausted in attendance and certification of skills, while the relations of domination remain substantially intact, only the criteria on the basis of which, from time to time, fractions or groups believe they must access the dominant position change: intellectuals, entrepreneurs, military, influencers. Power is coveted more than knowledge, and the mythologization of the true science of the past is revisited as the mystique of indispensable information, of last-minute technology; it is a trivial mysticism of a wisdom that one wants to possess as a viaticum towards power, therefore towards domination over those who ignore that ultimate, avant-garde knowledge, the Damned Grail of post-modernity (think of digitization, financial dematerialization processes, ecc).

2. School time between functional diachronicities and social control: some reflections on the Italian education system as an exemplary case study.

In the struggle for the supremacy of the ruling classes, the school becomes an element of diversion and a stumbling block, if it fully realizes social mobility and becomes the keystone of authentic democracy. In a famous interview in 1982, Michel Foucault provocatively said: "Imagine what would happen if young people wanted to study with the same frenzy with which they crave to make love: rows and rows of young people would crowd the doors of the academies! It would be the social disaster!" Who would go to the factories? Who would serve under arms? Who would cultivate the land? The functional needs of a good social system are heterogeneous, if everyone was passionate about reading and studying, who would ever stay doing manual work? And even if everyone were willing, in a utopian hypothesis of ideal civilization, to study for half the day and work for the other half, with everyone participating, there would remain unresolved conflicts regarding the division of available resources. In all societies, sophisticated and primordial, as anthropology testifies and as Vincenzo Ferrari rightly points out, the problem of the scarcity of available resources is cardinal. Sometimes it is not scarcity in the absolute sense, since this perception of the idea of scarcity persists even in affluent societies. The real issue, in fact, is the division of these resources, and the modalities of priority and secondary access to them. And we are talking not only about fundamental resources

(water, a roof over one's head, food, heat), but, especially in Western advanced societies, about symbolic-cultural resources and comfort (luxury housing, in gentrified areas of urban areas, access to leisure and the possibility of taking care of one's psycho-physical well-being and aesthetics, cultural services, transport, entertainment, luxury clothing, accessories etc). If the resources of the first class are available in a smaller number than the totality of the social actors, it will be necessary to set up the mechanisms and rules that govern, in an acceptably coherent way, the methods of access. Not only that, it will also be necessary to build a hermeneutic of consensus that guarantees respect for the regulatory system adopted. The regulatory system will have to be cloaked in a legitimacy that can be perceived in an immediate way, given by criteria of evident common sense, equity, justice and possibly supported by a tradition of reference. In this sense, the school institution stands as the ideal place for what we could define as the social stratagem of access to resources and opportunities for actors, and the main ingredient turns out to be time. The great upheavals of the years 68/69 in the direction of opening up the education system to the masses were fueled by what emotional engine? From the feeling of social revenge, from the desire for improvement and ascent, from the somewhat humanist and slightly bourgeois myth of homo faber fortunae suae. In other words, from a glimmer that had leaked out, largely thanks to the spread of television, the superior lifestyles reserved for the country's professional elites, the doors of whose Eldorado opened thanks to access to university. But, again, what would have become of a nation in which everyone had decided to graduate? What would have become of mines, fishing boats, trains, factories, fields, waste? In order to guarantee the relative well-being of the upper classes, some had to be excluded, but in order to avoid a revolt of the proletarian masses, it was necessary to establish a general consensus with respect to the division of social roles and access to higher courses of study and profession. School for all, opportunity and right, thus also became a litmus test of a paradoxical legitimization of exclusion from the most coveted final goals in the name of generalized inclusion in the medium-low goals, i.e. the segments of basic schooling. Domestication to this process of legitimizing social distinction through education required a discipline of time and opportunity. On the alchemy of opportunity, it would be impossible to surpass the expressive effectiveness of Foucault, who in the same interview of 1982 says two very important things: that the teacher builds a relationship of power on the basis of the things that students manage to learn or not, triggering in the learners, and consequently in their families, a process of guilt (Thus every social actor who goes through school is led to say to himself: if I had known things better, if I had studied more, I would have had access to those opportunities that through my fault and my shortcomings are rightly denied to me); secondly, that authentic knowledge is inextricably linked to pleasure, so in the school conceived as a disciplinary system, knowledge is routinely presented, thanks to formalized gears in the programs and evaluation systems, as strongly grayed, not exciting, incapable of igniting the spark of the desire to know in the majority of learners, which prevents the triggering of that frenzy of knowledge that would constitute, as mentioned above, a social disaster- that is why another decisive ingredient is the system of voting, rewards and punishments, as well as the promise of future social

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privileges and high wages, which kill the pleasure of knowledge ab origine. And as a culmination, Foucault adds that the diploma is a sanction that serves only to add a market value to knowledge, and allows all those who do not possess a diploma to believe that they are not capable of knowing; everyone who gets a diploma knows practically that it is useless in the strict sense, but it is all those who have not been able to obtain a diploma who give full meaning to the diploma itself; indeed, Foucault says that the diploma is made precisely for those who have not obtained it. That sense of guilt, or at least of inadequacy, will shift the attention of social actors from inequality, which persists in protecting a hierarchy of domination between various individuals and groups, to their own individual responsibility, guaranteeing an efficient and subtle social orthopaedics, which has emerged, volens nolens, as a system that keeps dreams, passions and any diversion at bay for the majority of individuals, while few are left to dare. The school time factor is not oriented in a different direction from this social orthopedics, so much so that it conveys through precise choices in programs and textbooks a series of contents aimed at shaping a civic education that is indeed a noble discipline of community building but is also the glue of a disciplinary operation aimed at taming the masses; thus, the school calendar follows the rhythms of production in order to guarantee workers the possibility of entrusting their children to the school institution while busy at work. The extension of school time compared to full-time and the stretching of calendars (in forty years of schooling, from the beginning of October we ended up on September 1 and from the end of May to the beginning of July), together with the large numbers, has slowly transformed the school from an academy to a social service, leading to a split between kindergarten, primary and middle school as inclusive schools, certifications, and higher education institutions, which are more selective and suffer from a growing degree of early school leaving. The basic school, which should forge those preparatory skills for the further intellectual growth of the learners, is chronologically work oriented, so its times are not designed on the basis of the children's lines of development, on their resistance, on their needs: it is a school that is sacrificed and self-sacrificing, although ineffective in terms of the quality of education; it is a school that lasts too long and does not leave enough time for teachers and students to regenerate. In the early years, the long summer break allowed the birth of the pleasure of reading, the possibility of experiencing family, community, perhaps different places for the luckiest ones; And for the less fortunate, the emptiness of boredom acted as a springboard for imagination and creativity. In the contemporary school system, on the other hand, institutional and academic roles and political responsibility have been mixed up in the concrete streams of basic education, confusing and influencing each other in the worst

ways. Jane Austen would define most of the activities proposed to our learners as a long series of busy nothings: in fact, the pupils are busy, exhausted by homework, yet mediocre on large numbers. Is it a question of method? Is it the fault of the families of origin? Blame the cognitive limitations of some pupils or the listlessness of others? All plausible elements, but the main cause is the time factor, an underestimated pedagogical ingredient and constantly subordinated to a chronological functionalization that organizes the masses in a routine that does not contemplate free and liberating time and by disciplining and filling every interstice causes an oppressive regulatory pressure to loom that cultivates in teachers and students a sense of subjection rather than a liberating feeling thanks to the joy of school and be passionate about it. And since sometimes the best is the enemy of the good, in addition to the regulatory pressure set up by insiders, the voice of experts and families adds to engulfing this great disciplinary machine that is the school. Two regulatory moments, in these respects, appear to be decisive in the Italian panorama: on the one hand, the delegated decrees of 1974 and Legislative Decree no. 59 of 19 February 2004 ; on the other hand, Law 59/1997 and Law 127/1997. In the political-cultural climate of the early 1970s, with a purity of intent that was certainly more marked than in the early 2000s, school began to become that porous institution, increasingly open to the territory and less and less academic in the traditional sense, which, under the blows of interference from many sides, would experience the profound crisis that we are witnessing today. Legislative Decree no. 59 of 19 February 2004, issued on the basis of the reform provided for by the enabling law number 53, was inspired by the creation of an autonomous, high-quality school, in line with European parameters and capable of accommodating the vocations and expectations of pupils. All this by strengthening the role and participation of families and enhancing the commitment and professional skills of teachers. The attempt was to place individual educational institutions at the heart of the education and training system, leaving it to their organizational and didactic capacity to achieve the general objectives of the training process and specific learning objectives, through the personalization of study plans. Although the intentions announced were almost exhilarating, the excellent proved to be an enemy of the good in the application practice of the transition from the prescriptiveness of ministerial programs to the conscious and participatory adoption of national indications, whose characteristics of mandatory must relate only to the configuration of the learning objectives. In theory, this great shift should have enhanced the role of the autonomy of educational institutions, recognizing teachers' responsibility for choices that would enhance their professional profile. However, it has not been easy, and in fact the great territorial divisions revealed by the statistics confirm this, to ensure the maintenance of the unity of the national education system by ensuring the achievement of the essential levels of performance and the general and specific learning objectives envisaged. In fact, despite the fact that the management of this flexibility has been doubly regulated, also in accordance with the provisions of articles 4 and 5 of the Decree of the President of the Republic number 275 of 1999 on didactic and organizational autonomy, the excessive emphasis that in this context has taken on the tutorial function, as well as the emphasis on laboratory activity and on the process of

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personalization of training interventions provided for the entire school career of each student, all this has in fact led to a general lowering of essential transversal skills; I am referring, in particular, to the hermeneutical-interpretative competence, a competence par excellence because it allows the elaboration and interpretation of texts and therefore structures the ability to study and the ability to learn tout court. In a school in which the great symphony of learning is continually fragmented by a re-discussion in the didactic pact between parental interference, special educational needs, individual learning difficulties and pressing planning, the Italian school turns out in the end to be a school of too much, a school jumbled up with small pieces and which seems to have lost its ability to return a harmonious mosaic as a whole. While we build the great skills that will bring us to Europe, we leave thousands of adolescents on the pavement who have suffered, also due to digitalization, and in the very last years of the pandemic, an exceptional impoverishment of their semantic and lexical competence, and find it difficult to understand even simple texts. And the great experts in pedagogy, all the technical figures who in recent years have been legitimized in various ways and ways to medicalize, suggest, and comment on the institution of the school constitute further syncopations that disturb the concert of knowledge. If it is true, in fact, that ministerial program in a constantly changing society cannot be excessively rigid, it is also true that in the schools of the past they constituted, in a sort of normative hierarchy. Now, however, the amount of solicitations coming from below from the territory, from families, from technicians, from the micro-legislative inflation of the administrative streams is so cumbersome as to make it very difficult to preserve the unity of a "school of the Italian nation". In other contexts, numerous minds have been devoted to recounting the uselessness and limits of sovereignism in an increasingly globalized world, but do we really want to make it impossible for an Italian school as a whole to continue to exist? It is not a patriotic issue, as in the school told by Edmondo De Amicis, it is a question of returning a school product whose quality is more or less homogeneous and consistent throughout the country. Otherwise, in the name of theoretical freedom and with the best of intentions, a scholastic path will be built that will proceed at different speeds, exasperating those territorial differences that it should combat. And the anxiety of quantitative measurements to chase global standards will not drive local dimensions as much as it will push global nihilism... Notes for a disaster, in short! A disaster that, from a socio-juridical point of view, is supported by a regulatory and cultural management of the time factor that is too accelerated and work-oriented, to the detriment of the integral construction of the person.

3. Conclusions: Law 53/2003 and Legislative Decree No. 262 of 29 December 2007

I would like to conclude this paper with some reflections on Law 53/2003 and Legislative Decree number 262 of 29 December 2007. A superficial analysis, for reasons of space, of these two norms, I believe can make it clear what I intended to emphasize in the conclusion of the previous paragraph from a sociological-legal point of view, with respect to the time factor. First of all, through Law 53/2003 there is a fundamental decline in the school time of each pupil in a utilitarian direction. First of all, it defines early schooling, which could also be part of those indirect welfare measures for families that are so necessary (even if a serious welfare should have an impact on contractual reforms and labor law, for example by increasing the holidays for parents until their children reach the twelfth year of life – giving them more time to be parents, instead of extending the homologating institutional buffers, such as school services, but this is the subject of further analysis which is not appropriate here); in reality, early school education represents an acceleration of the socialization and regulation of early childhood, already with the anxiety of forming future citizens, obviously global. Secondly, Article 4 of Law 53/2003 contains a legislative delegation concerning the alternation between school and work, which, despite theoretical readings in the direction of expendability and operability of knowledge, in reality has to do first and foremost with a saving of training time, with an anticipation of the entry of young people into the world of production and work and with a de facto limitation of the free time dedicated to training- the fact that it has not been reserved for technical institutes, where perhaps it would have a more legitimate reason to exist, but has been extended to high schools, which are under attack also thanks to the continuous attempts to shorten and accelerate them to four years instead of five, inflicts a deep wound on that conception of high school that was supposed to give the very young time to discover and experiment with talents, conceiving thoughts, cultivating doubts: a fruitful time precisely because of its gratuitousness, that would have enriched them with a theoretical baggage that does not constitute a burden, but an existential opportunity. Free time, not socially disciplined and emancipated from regulatory pressures functional to the mechanisms of production, is the time of being totally, fully human. On the other hand, also thanks to the climate of perpetual crisis that constantly presses actors and institutions, the time of reflection and the time of patience of the seed in the furrow, which the traditional school for many ways cultivated, it remained a luxury that was less and less granted to young people, who must be channelled and must get used early to a socially oriented chronology, whose use is legitimate only if it is productive, finalized, regulated. Even the use of time made by Law 53/2003, through the establishment of the Recovery and Development of Learning Laboratories, makes us think: the vast majority of interventions are calibrated on remedial interventions, while the share of time allocated to the development of learning is negligible. This means, in fact, that educational and didactic planning, on large numbers, neglects to adequately consider students as particularly brilliant, towards levelling down the overall level of teaching. The promotion of excellence remains only a scrap of time, while the school as a whole is managed as an

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inclusive service. In the past, Legislative Decree No. 262 of 29 December 2007, entitled "Provisions to encourage the excellence of students in educational paths", had tried to prepare for the promotion of excellence, but with a time limit: the incentive paths extend exclusively to the higher education segment, i.e. belatedly, without affecting the mediocre and downwardly levelled character of the basic school segments. In addition, the identification of excellence takes place through comparison procedures within national and international competitions, building a competition-excellence binomial that is questionable in terms of the individual development of learners. As Foucault feared, competition and the market for certifications and the consequent acquisition of training credits commodify the school system. Those who reach the higher levels of education, and up to university, will access excellence through increasingly sophisticated and competitive mechanisms of exclusion, while compulsory schooling unfolds as a total institution wrapped in an invisible cage, that of a meekly oriented and disciplined time.

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Prison Overcrowding in Italy: From an Empirical Analysis to Potential Solutions for an Evolving Correctional System

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Abstract

This paper aims to describe the current state of Italian prisons in terms of overcrowding, using descriptive statistics to investigate the current composition of the prison population, highlight trends, and shed light on notable facts within correctional facilities. The paper concludes with the formulation of possible solutions to reduce the problem of prison overcrowding in Italy.

Keywords: prison's overcrowding; human rights; prison; crimes.

1. Introduction

As a starting point, we define prison overcrowding as the condition that arises when the number of inmates exceeds the regulated capacity of correctional facilities. The issue has gained increasing prominence in the italian public debate, both from the perspective of the economic management of prisons and the sociological implications that prison overcrowding generates. This problem undermines the very essence of the constitutional values enshrined in article 27 paragraph 3, stating that *"punishments may not consist of inhuman or degrading treatment but must aim at the re-education of the convicted person*", compromising both the detention and rehabilitation capacities of prisons and

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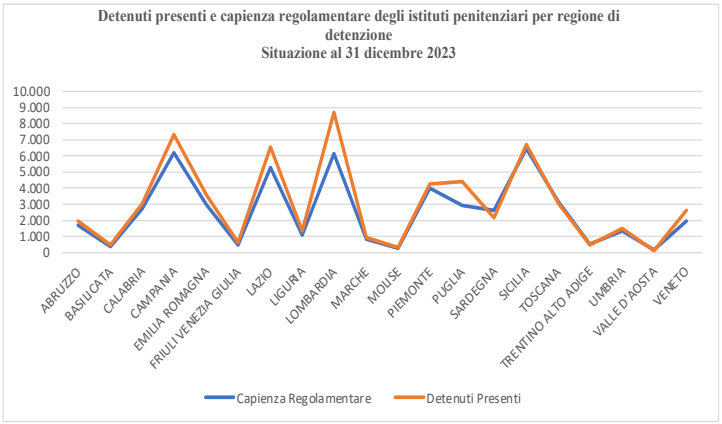
creating challenging physical and psychological conditions for inmates. Given the centrality of the issue, this article intends to study in detail the composition of the prison population with the aim of defining its main contours, possible trends, or recurring effects. The attention of the legislator to the humane conditions of prisoners took a turning point after the inclusion in the Constitution of article 27 paragraph 3, when in 1975 the Penitentiary Order Reform (Law no. 354/1975) came into force with the aim of introducing principles that placed humanity and the re-education of the convicted person at the center, further endorsing the purposes that our legal system attributes to the concept of detention itself, namely the re-education of the inmate aimed at their reintegration into society. A necessary condition to achieve this goal is to have prisons capable of fulfilling the fundamental task that the legislator assigns to the penitentiary system. Today, from the first summary statistics, we can already notice how the physical capacity conditions that prisons should have in order to pursue the legislator's objective do not exist. We find, in fact, prison overcrowding in Italy amounting to 117.55%, data as of December 31, 2023.

2. Data description

The Italian prison system, with its 51,179 places and 60,166 inmates, shows an overcrowding rate of 117.55%. Analyzing in detail individual correctional facilities, we are faced with an even more alarming picture, with a presence of inmates exceeding the average capacity spread across the entire national territory, with few facilities meeting capacity parameters. As shown in Figure 1, except for Sardegna, we can observe how widespread the problem of overcrowding is at the regional level. Leading the ranking of prison overcrowding are the prisons in Lombardia, Puglia, Lazio, and Campania.

Figure 1



Source: Self-generated based on data from the Ministry of Justice

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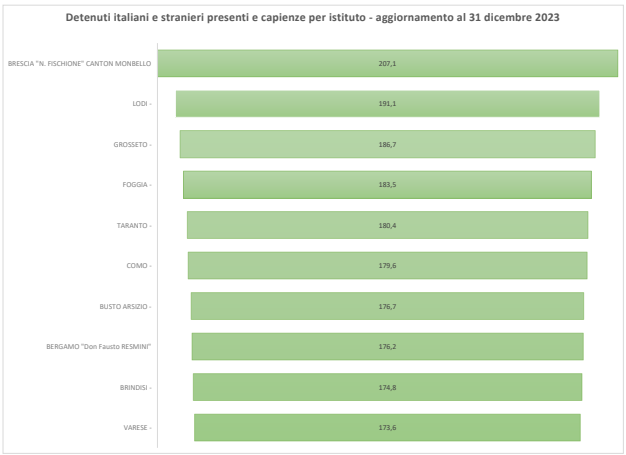
Descending to the level of individual correctional facilities, in an even more detailed analysis (Figure 2), considering the data of each structure, we observe that in some prisons, the overcrowding rate reaches even over 180%, with peaks of 207.1% for the Brescia "N. Fischione" Canton Monbello prison.

Figure 2



Source: Self-generated based on data from the Ministry of Justice

To fully understand the state of overcrowding, we will examine demographic data such as the age of inmates, the type of crime committed, geographic origin, and educational attainment.

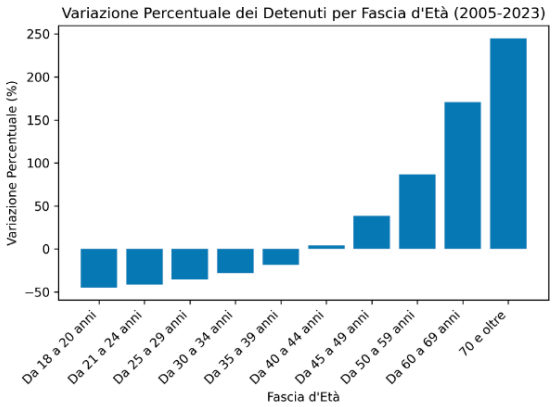
We can observe how in the last two decades, the prison population has changed enormously (Figure 3), with significant percentage variations, both in the younger age group (we find reductions of around 50% in the age group from 18 to 24 years) and in the older age group (with variations in the order of three digits for inmates over 60 years old, with peaks of over 200% in the oldest age group).

This trend highlights a crucial point in the descriptive analysis of the prison system, which must be taken into account by the legislator even before setting any attempt at penitentiary reform: *the prison population is aging*. With the current data available, it is not yet possible to determine whether this phenomenon is due to aging in

prison or to an increase in crimes committed by people over 50 years old (in the future, we will dedicate further research to this relationship).

The basic information remains crucial, showing us the image of an older prison system, with all the limitations and problems that arise, especially in terms of rehabilitation. While it is socially positive to observe the reduction of young inmates, on the other hand, we cannot ignore how an aging prison system does not facilitate the achievement of the objectives that the legislator set during the regulatory phase of detention.

Figure 3



Source: Self-generated based on data from the Ministry of Justice

At the same time, what is alarming is the composition of the prison population by the type of offense committed by inmates (Figure 4). We observe how, as of 2023, the most representative offenses among inmates are serious crimes, ranging from crimes against property to crimes against persons, up to nearly eight thousand inmates for mafia association. This data complicates the legislator's work in decriminalizing offenses and managing prison overcrowding, as it limits legal action, unable to break the social pact between citizens, the prison system, and security, by releasing unrehabilitated inmates who have committed serious offenses, jeopardizing the sustainability of the deterrent penal system itself, significantly reducing the risk of spending a long time in prison in case of committing one of the aforementioned crimes. Inmates and non-inmates would have an additional incentive (the lack of a deterrent penalty) to commit crimes. We also observe that the only strand of offenses, committed enough to incentivize a public intervention that does not break this social pact, is represented by the so-called "drug law." However, this type of offense hides a pitfall linked to the narrative about drugs and their illegal trade that has developed in the country in the last 9 years. A narrative that today clouds the public debate on the issue, polarizing opinions and making it difficult to reach a synthesis solution at the level of social debate that, while always taking into account the social pact between citizens, detention, and security, allows, without

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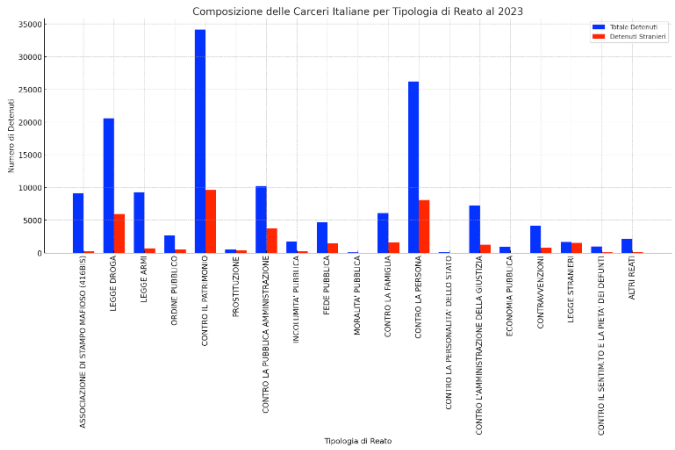
sacrificing the latter, to effectively decriminalize and significantly reduce the prison population.

Figure 4

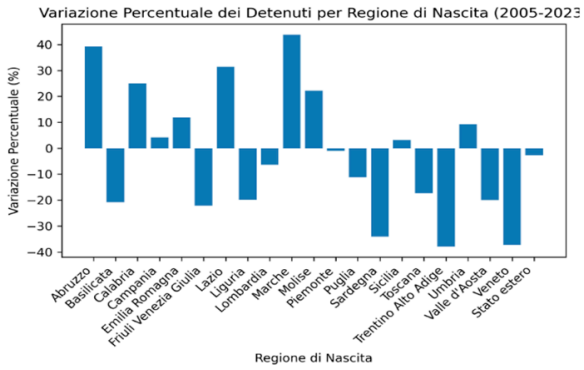


Source: Self-generated based on data from the Ministry of Justice

Adding another level of analysis (Figure 5), we can observe how in the last two decades there has been a significant variation in the geographic origin of Italian inmates, with a notable increase of over 40 points in inmates coming from the Marche region, followed closely by Abruzzo, Lazio, Calabria, Molise, Emilia-Romagna, Campania, Umbria, and Sicily, offset by a reduction in regions such as Veneto, Sardegna, Basilicata, Friuli-Venezia Giulia, Toscana, Valle d'Aosta, Puglia, and Trentino.

These data indicate an important trend: *the prison population is increasingly composed of inmates from central-southern Italy and fewer from northern Italy.* More precisely, there is a worrying increase in inmates from contiguous regions such as Lazio, Umbria, Marche, Abruzzo, Molise, Campania, and Calabria, and fewer from northern Italy. This is symptomatic of a criminally active central Italy, which is effectively replacing northern Italy from this perspective, as it was more active up to twenty years ago, demonstrating that *the criminal geography of Italy is changing.*

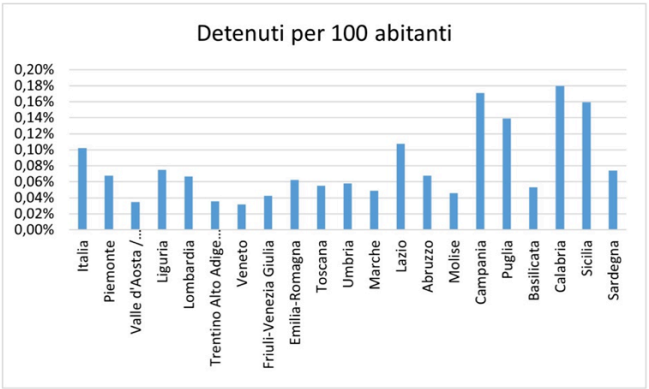
Figure 5



Source: Self-generated based on data from the Ministry of Justice

Furthermore, we observe that the presence of inmates throughout the national territory, as of 2023, is heterogeneous. Although the Italian average is one inmate per thousand inhabitants, we see how this figure almost doubles in Calabria, Campania, Sicilia, and Puglia, and decreases to almost halve in regions like Valle d'Aosta, Veneto, Trentino-Alto Adige, and Molise (Figure 6).

Figure 6



Source: Self-generated based on data from the Ministry of Justice

We can also notice how the composition of inmates, divided by educational attainment (Figure 7), has undergone significant changes over the past two decades, with a noticeable increase in inmates with a high school diploma and a small increase in graduates, alongside a sharp decrease in lower levels of education, considering illiteracy and unreported data as inconsequential. This picture can be interpreted in two different ways, with equally different repercussions on the prison system. On one hand, we can interpret

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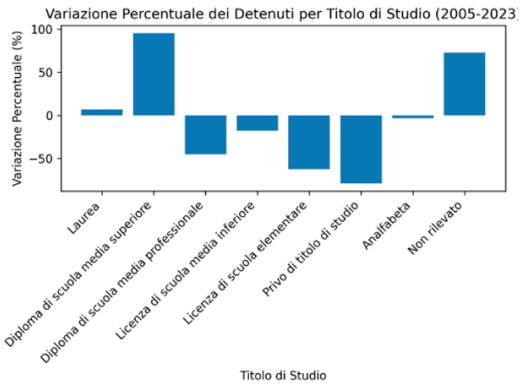
the data as a success of the educational system within prisons, which manages to academically educate inmates over the two decades under examination. On the other hand, we can interpret it as a change in the type of inmates who commit crimes, with a reduction in inmates with low levels of education in favor of an increase in "white-collar" offenders and inmates with higher levels of education. Both potential implications would deserve greater attention, unfortunately impossible with the data from this research.

Figure 7



Source: Self-generated based on data from the Ministry of Justice

To conclude the descriptive analysis of the composition of the prison population, we can observe some interesting facts, once again related to the changing geography of inmates. Compared to 2007, in 2023, we observed a reduction of approximately eight percentage points in foreign inmates from European countries, contrasted with an increase in inmates from Africa, Asia, and the Americas, respectively by 4%, 3%, and 1%.

From the graph in Figure 8 (b), we can see how in the last two decades, the proportion of inmates from the Middle East has exponentially increased, along with sustained growth in foreign inmates from Nigeria, Asia, sub-Saharan Africa, and Central America, at the expense of a decrease in inmates from North Africa, the former Yugoslavia, and other Asian countries. This is indicative of the fact that, as seen above, our prison system has also changed in its ethnographic composition.

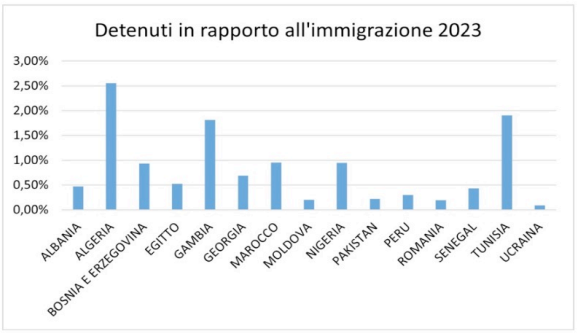
In the graphs in Figure 8 (c) and Figure 8 (a), the percentage of foreign inmates in Italy is compared to the total number of foreign inmates and total immigration, highlighting

important facts that policymakers should consider when crafting educational, rehabilitative, and detention policies.

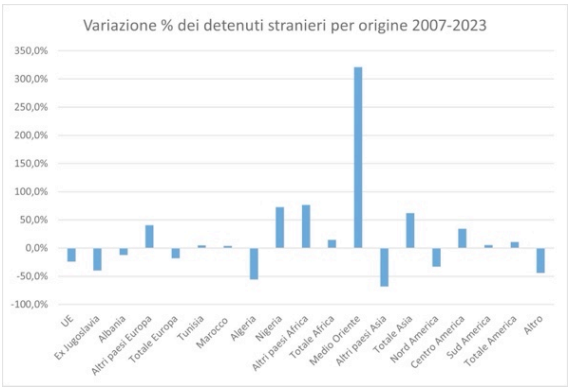
A prison that changes in its ethnographic composition must simultaneously and proportionally adapt the orientation of inclusion and educational policies. While on one hand, we observe that inmates from Marocco represent one-fifth of foreign inmates in Italian prisons, closely followed by Algeria, Romania, and Tunisia, with Nigeria showing growth, on the other hand, we observe an interesting fact: inmates from Marocco are much fewer than those from Algeria, Gambia, Tunisia, and Nigeria when measured in relation to immigration. This should serve as a warning for the public decision-maker when proposing to intervene comprehensively on the issue.

Figure 8

a)



b)



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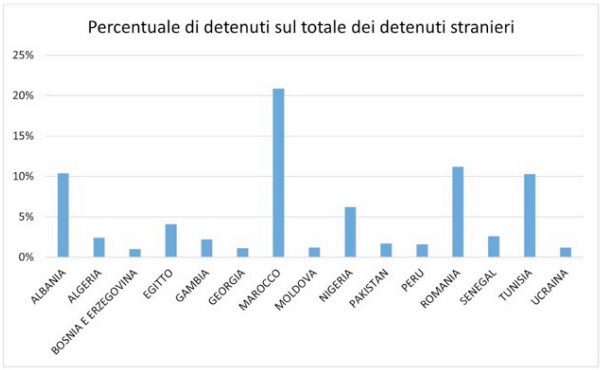
c)



Source: Self-generated based on data from the Ministry of Justice

3. Where do the causes of prison overcrowding reside?

Prison overcrowding, as observed, brings about problems both in terms of prison organization, with a lack of available space, and on a psychophysical level, undermining the well-being of inmates. Investigating the causes of overcrowding is of considerable importance as it allows us to proactively address the aforementioned issues. The causes of prison overcrowding can be attributed to three elements: penitentiary construction, the lack of implementation of alternative measures to detention, and excessive use of pre-trial detention in prison.

Firstly, regarding penitentiary construction, whose goal is to design, improve, and build prison structures that are humane and efficient, often fails to achieve the set goal. The lack of adequate spaces and unavailable cells leads to the growth of inmates who cannot be safely and dignifiedly accommodated, thus compromising the maintenance of order and security within prisons. The lack of space also results in limited access to both vocational and educational pathways, denying inmates their fundamental rights.

Secondly, concerning the lack of implementation of alternative measures, which aim to prevent inmates from being imprisoned, reference is made to the fact that these measures are often not correctly applied. For example, they are often implemented late due to problems with the length of the legal process.

Finally, regarding the excessive use of pre-trial detention[1], it refers to the continuous resort to pre-trial incarceration. However, this aspect could be addressed immediately with the adoption of additional measures such as electronic monitoring or house arrest. Regarding this last aspect, it is worth noting that in 2020, Italy was considered the fifth country in Europe with the highest rate of inmates in pre-trial detention[2]. As seen in Figure 9, the detention rate even reaches 31.50%.

Figure 9

	2020	2021	2022	2023
percentuale condannati definitivi	67.80%	69.60%	71.70%	73.40%
Percentuale condannati non definitivi	31.50%	29.90%	27.80%	26.00%

Source: Self-generated based on data from the Ministry of Justice

This laxity towards prison overcrowding has led Italy to suffer numerous convictions from the European Court of Human Rights, which is "*a judicial body responsible for enforcing the European Convention on Human Rights*[3]*"* to all signatory states. The Convention, on the other hand*, "is an international treaty that aims to protect human rights"*[4]. The Italian state has been convicted for the inhuman and degrading conditions of its prisons and for violating the human rights of detainees. In this case, there has been a violation of Article 3

[1] Art. 285 cpp "Art. 285 cpp: *"1. Con il provvedimento che dispone la custodia cautelare, il giudice ordina agli ufficiali e agli agenti di polizia giudiziaria che l'imputato sia catturato e immediatamente condotto in un istituto di custodia per rimanervi a disposizione dell'autorità giudiziaria.*

2. Prima del trasferimento nell'istituto la persona sottoposta a custodia cautelare non può subire limitazione della libertà, se non per il tempo e con le modalità strettamente necessarie alla sua traduzione.

3. Per determinare la pena da eseguire, la custodia cautelare subita si computa a norma dell'articolo 657, anche quando si tratti di custodia cautelare subita all'estero in conseguenza di una domanda di estradizione [722] ovvero nel caso di rinnovamento del giudizio a norma dell'articolo 11 del codice penale."

[2] XIII Rapporto Associazione Antigone – sezione Custodia Cautelare

[3] "Il sistema CEDU – La Presidenza del Consiglio dei ministri" - Dipartimento Affari giuridici e legislativi - Ufficio contenzioso, per la consulenza giuridica e per i rapporti con la Corte europea dei diritti dell'uomo

[4] Mettere in pratica i diritti e le libertà, Consiglio d'Europa e Convenzione europea dei diritti dell'uomo - Aprile 2012

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of the Convention ("Prohibition of torture"), which states, "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

Among the most important judgments, we certainly remember the *Sulejmanovic* judgment[5] in the Rebibbia prison and the *Torreggiani and others* judgment[6] in the prisons of Busto Arsizio and Piacenza. In both cases, the applicants complained about inhuman and degrading conditions within their prisons. Among the problems that emerged, we find: minimum space per person not meeting standards, lack of lighting, lack of ventilation, and lack of hot water. And it is for this reason that the Court has condemned the Italian state for violating Article 3 of the Convention, urging it to adopt urgent measures to address this issue.

4. Solutions to Overcrowding

We have seen how overcrowding manifests as a real problem in our country; therefore, it is necessary to observe what solutions can be implemented in this regard. The issue of prison overcrowding has become a central point in the socio-political debate of our country in recent decades due to the relevance and severity of the problem.

Contrary to what might seem at first glance, solving this problem requires complex solutions that go well beyond the construction of new structures or the decriminalization of certain offenses. While overcrowding is indeed a capacity issue within the judicial system, simply decriminalizing offenses outright does not represent an effective tool for solving the problem. As we have seen throughout this paper, the problem of prison overcrowding, by its nature, can only be addressed through the expansion of existing facilities and the depenalization of offenses.

Expanding existing facilities requires not just social investigation but also analysis of penitentiary construction. On the other hand, depenalizing offenses implies a thorough and meticulous analysis of the composition of the prison population, which I have attempted to undertake in this paper.

Specifically, the composition of the prison population exhibits interesting characteristics. Over the past decade, the prison population has changed significantly in its main characteristics. It has aged, changed in terms of foreign population, with shifts in the countries of origin of detainees, and is notably different in terms of the offenses committed by detainees. At first glance, this suggests that the sociological solution to

[5] Corte Europea dei diritti dell'uomo, Sez. II, - CASO Sulejmanovic c/Italia - (Ricorso n. 22635/03) – Sentenza - Strasburgo, 16 luglio 2009

[6] Corte Europea dei diritti dell'uomo, Sez. II, Causa Torreggiani e altri c. Italia, 8 gennaio 2013
(Ricorsi nn. 43517/09, 46882/09, 55400/09, 57875/09, 61535/09, 35315/10 e 37818/10)

deterrence from committing crimes should not exclusively target new generations but must increasingly include the over-50 population in the socioeconomic system.

Regarding the foreign population, it is undoubtedly necessary to implement policies for the inclusion and integration of immigrant populations that take into account the geographical origin of the main nationalities of foreign detainees in Italy. If in the 1990s, the main migration involved Eastern Europe, particularly Albania, Romania, Bulgaria, and the Balkans in general, the epicenter of migration in the 21st century has shifted southward, increasingly involving North African and Sub-Saharan African populations. Therefore, to at least partially counter this phenomenon, it is necessary to massively invest in the education of broader segments of the population, thus providing more opportunities for social inclusion to these individuals.

This shift in the composition of the prison population should prompt reflection on two main considerations:

The limitations of alternative measures to prison as a deterrence and justice tool. The concerning picture that emerges regarding the crimes committed within the country. A country that sees a constant increase in the number of detainees and crimes such as association with criminal organizations raises concerns not only from a prison perspective but also from a broad social perspective.

In light of these considerations and the elaboration presented, it is necessary to act on parallel fronts. On the one hand, where possible, for minor offenses and those with little social impact, it is necessary to reduce, modify, or find alternative penalties that compensate for the crimes committed. This can be achieved through depenalization, which can be implemented with minimal risks to the stability of the social system by providing access to alternative solutions for first-time offenders or those with a low likelihood of reoffending. On the other hand, where depenalization alone cannot reduce the prison population, it is necessary to build or enhance new or existing facilities to ensure adequate space for incarcerated individuals.

Conclusions

What we have seen in the preceding paragraphs leads us to consider how the Italian prison system is currently in difficulty, does not meet the technical requirements of detention, and entails serious deficiencies in both penal and penitentiary administration. We have been able to discern within the prison system what the characteristics of the prison population are by examining the individual characteristics of detainees in detail. It is noted that numerically alone, Italian facilities struggle to contain detainees and are almost always, most distressingly, undersized in relation to the prison population itself, not to mention the dilapidation of the structures themselves, as well as the workplace of the staff, too often overlooked.

While the construction of new prisons represents a social cost in terms of economics and damage to the cities that host them, outright decriminalization of offenses does not represent a viable solution. It is necessary to simultaneously act to ensure the sustainability of the prison system not only in the immediate future following the measures taken but also in the long term. It is also desirable to reform detention facilities and the process of imposing penalties to take into account the sustainability of the structures in general.

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To the immediate and intuitive reasoning mentioned above, complex considerations derived from the in-depth analysis of the data taken into consideration in this paper must be added. On one hand, we observe the characteristics of the prison population, while on the other hand, we analyze the results, also in terms of measures taken by the European Union against Italy. We have observed how the current prison population is more educated, multiethnic, and dangerous in terms of the severity of offenses charged compared to that of the early 2000s and how this, at times, poses an obstacle to action on the lever of decriminalizations.

On the contrary, the awareness of the need to invest in new structures, their maintenance, and management creates great uncertainty in the public decision-maker, which in turn leads to an immobilism that crystallizes the situation, which worsens year by year. The objective of this paper was to show the current situation of Italian prisons, analyze their characteristics and main features, delve into legal issues related to judgments and infringement procedures, and thus provide an immediate, actionable, and precise tool on the state of Italian prisons in order to structure hypotheses that solve or at least mitigate the problem.

To date, given what emerges from this study and the state of the prisons themselves, it is difficult to think of solutions that, going beyond the banal levers of demand and supply of cells, can definitively solve the problem without resorting to simplistic solutions that have little to do with the reality of the facts.

The country's social situation, a growing organized crime, an explosion of crimes against individuals and gender, the poor socioeconomic integration of foreign and non-foreign minorities, and the country's cultural level are all matrices of a resurgence of crimes that drive part of the problem. On the other hand, the lack of political debate on the issue prevents decisive positions from being taken to stem the problem itself. It would be necessary for the theme addressed here to be common sense and involve daily debate in order to leverage the public decision-maker and lead to greater investments in more humane structures and living conditions for detainees and sector operators. In summary, it is necessary to invest more in structures, both new and existing, in the daily living conditions of detainees and sector operators; it is necessary to invest in deterrence from committing criminal acts through the economic and cultural integration of the country and to increasingly integrate people who, fleeing from situations far worse than prison itself, risk being sucked into its vortex due to endemic weaknesses in their living conditions. Finally, it is necessary to rethink and improve legal processes so that courtroom inefficiencies do not impact structures and weigh on them. To date, the state of the structures remains worrying everywhere and deserves to be addressed as soon as possible.

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Importance of Compliance with the Obligation of the Suspicious Activity Report (SAR) against Money Laundering: Some General Considerations

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Abstract

In the fight against Money Laundering, the effectiveness of the task known as the Suspicious Activity Report (SAR), undoubtedly, constitutes one of the main protection shields for Obligated Subjects to their prevention with Risk-Based Approach (RBA). It stands as one of the most relevant sources of information for the analytical work of a Financial Intelligence Unit (FIU). It is the starting point for subsequent investigation, prosecution and application of criminal measures, and it is an incentive of great importance for decision-making in administrative, criminal and criminological policies for its confrontation in its dual profile: as a Risk, and as a Crime. And all this at an accelerated pace since, in addition to its seriousness, by the devastation it represents to the stability of a country's socio-economic financial order, its implementation and effectiveness, is being permanently monitored and qualified by international agencies specialized in the matter, and whose reports work as a basic criterionto measure Country-Risk, and therefore a true radar for attracting lawful investments. Then again, it becomes necessary to understand the guidelines for an effective SAR, and understand, in order to mitigate its impact, the most common reasons for its non-compliance, as a consequence of infractions to specific legal frameworks, that can make the whole Anti-Money Laundering system of a country, ineffective. Definitely, the presentation of a SAR with Quality,

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Timeliness and Accuracy, directly affects the mitigation of the Risk of Financial Crime, in pursuit of the health of businesses and the economy.

Keywords: Suspicious Activity Report; Money Laundering; FATF; Compliance; Guarantor Position.

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1 Introduction

There is a piece of particularly sensitive information both in its structuring, management, and analysis, which is generated precisely, when there are complex operations or unusual transaction patterns, without an apparent economic or lawful purpose. This kind of information is denominated Suspicious Activity Report (SAR) and it is presented to the Financial Intelligence Unit (FIU), by companies and activities, qualified as Obligated Subjects to the Risk Prevention against Money Laundering, Terrorist Financing, and Financing of Proliferation of Weapons of Mass Destruction (BC/FT/FP). The effectiveness of the SAR constitutes a collaborative bridge between companies and the State, a very valuable input to counter Transnational Organized Crime. This short article aims to explain its reach and importance.

2.- The SAR: bull's-eye, meeting and inflection point between the reporting entities and the FIU, in an Anti-Money-Laundering System

2.1.- FATF Standards and UN Conventions, as an international foundation of SAR

With the emergence of the Financial Action Task Force (FATF, in 1989), and its Technical Recommendations[1], it is regarded as one of the most relevant worldstandards in the fight against Money Laundering. The legal obligation for early detection, and the scaling of Alerts, Unusualness and Suspicions, and consequently, the opportune presentation of the correspondent Suspicious Activity Report (SAR), by the denominated Obligated Subjects (Financial or Non-Financial) to the Risk Prevention of Money Laundering, Terrorism Financing and Financing for the Proliferation of Weapons of Mass Destruction. This sensitive and extremely confidential Information, must be sent to the competent authority, the Financial Intelligence Unit (FIU), which operates on each country, to be analyzed. Their names vary according to each country. SEPBLAC in Spain,

[1] The Financial Action Task Force (FATF) is an inter-governmental body established in 1989 by the Ministers of its Member jurisdictions. The mandate of the FATF is to set standards and to promote effective implementation of legal, regulatory and operational measures for combating money laundering, terrorist financing and the financing of proliferation, and other related threats to the integrity of the international financial system. In collaboration with other international stakeholders, the FATF also works to identify national-level vulnerabilities with the aim of protecting the international financial system from misuse. Source: https://www.fatf-FATF.org/

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UAF in Nicaragua, UAF in Panama, IVE in Guatemala, UIAF in Colombia, FINCEN in the United States of America.

Money Laundering, as one of the most significant expressions of Financial Criminality (Blanco Cordero, I. 2015), consisting of the criminal activity by which it is intended to give appearance of legality to profits obtained illegally (beyond its mere enjoyment), in order to conceal its origin; distorts the economy and impedes the action of authorities with powers to adopt and implement cross-cutting regulatory, supervisory, financial intelligence, freezing, confiscation of property, investigation and prosecution mechanisms. And it is here, in this action, that SAR is precisely emerging as a backbone within an effective Anti-Money Laundering System in all countries that follow the current 40 FATFRecommendations, hereinafter 40-R-FATF.

SAR, as an expression of compulsory collaboration of Compulsory Subjects with the respective FIU, finds its main basis in the FATF Technical Recommendations, particularly those referred to in numbers 10, 20 and 29. Where number 10 refers to the existence of the legal obligation to develop Due Diligence of Knowledge of Clients and Other Counterparts (DDC), as the work of the Compulsory Subject. Number 29, which refers to the existence of a State Information Centralizing Office created by Law, whose generic name is that of the Financial Intelligence Unit (FIU)[2] And number 20, which is a bridge between the previous two, at which point joint efforts and shared responsibilities converge, and which refers to the existence of the legal obligation for Reporting Entities to submit to the FIU, the Suspicious Activity Reports (SAR). And, suspects of what? Well, precisely, of Money Laundering, and/or Terrorist Financing (FT), or Financing for the Proliferation of Weapons of Mass Destruction (FP), or activities related to Preceding Crimes or Determinants of Money Laundering (Blanco Cordero, I. 2020), within which the widest range of serious crimes and generators of huge profits for criminal organizations, fits.

FATF Recommendation 20:

"If a financial institution suspects or has reasonable grounds to suspect that the funds are the result of criminal activity, or are related to the financing of terrorism, it should be required, by law, to promptly report its suspicions to the Financial Intelligence Unit (FIU)."

Due to its relevance, it is worth to portray here, the Interpretative Note from the FATF, on the aforementioned Recommendation 20, which points out:

"1. The reference to criminal activity in Recommendation 20 refers to all criminal acts that would constitute a predicate offence for money laundering or, at a minimum, to those offences that would constitute a predicate offence, as required by Recommendation 3. Countries are strongly encouraged to adopt the first of these alternatives".

"2. The reference to terrorist financing in Recommendation 20 refers to: the financing of terrorist acts and also terrorist organizations or individual terrorists, even in the absence of a link to a specific terrorist act or acts.

"3. All suspicious transactions, including attempted transactions, should be reported regardless of the amount of the transaction."

4. "The reporting requirement should be a direct mandatory obligation, and any indirect or implicit obligation to report suspicious transactions, whether by reason of possible prosecution for a money laundering or terrorist financing offence or otherwise (so called "indirect reporting"), is not acceptable."

FATF, through a rigorous and detailed Evaluation Methodology, monitors countries in regulatory compliance and the effectiveness of 40-R-FATF, including the issue of SAR, and their subsequent treatment until they reach judicialized cases. It is important to mention that the Mutual Assessment Reports (MARs) issued by FATF are also incorporated as country-risk qualification criteria by other international agencies and research centres, that also take the pulse of the subject under their own Methodology, such as the Basel Institute[3] (https://www.translatoruser.net/bvsandbox.aspx?&from=es&to=en&csId=b9f3dbc0-426b-44cc-9c3f-ab1a0896dedb&usId=10f42060-a48b-4864-a48a-891791741879&ac=true&bvrpx=true&bvrpp=&dt=2020%2F12%2F5_22%3A13_-_ftn7), which is positioning itself as a referent for investors who take care of their financial health on their business strategies.

For example, while FATF currently has Panama and Nicaragua as Jurisdictions with Strategic Deficiencies in its ALA/CFT-FP System[4], and in which Spain does not profile for having greater strengths; Basel Institute, on the other hand, in its last June 2020 Report, of the three countries, only Nicaragua is in the 16th position, poorly valued (the closer to 1, the higher the level of Risk) with a Risk score of 6.78, where the maximum

[3]Of the most relevant indicators for the comprehension of Risk LA/FT/FP by jurisdiction in the world, two outstand: The listing of jurisdictions that maintain strategic deficiencies on their systems ALA/CFT-FP, issued by the FATF; and the Basel AML Index from the Basel Institute on Governance. Both indicators have the pretension to contribute with reliable and useful information, on the permanent task of preventing and mitigatin the LA/FT/FP Risk, both on the private sector, as well as on the public entities, and they coincide with some data. However, they show slightly different results, due to the fact of specific (own) methodologies being used.

[4]See the FATF Informs from February 2020 and February 2021.

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Risk equals 10. Panama ranks 36th with a Risk score of 5.96. And Spain ranks 129th with a Risk score of 3.66.

On the other hand, commitments to the SAR system of countries that follow, the 40-R-FATF, go beyond them, and also point to compliance with at least four major United Nations (UN) Conventions, of which they are signatories, and which include anti-money laundering subjects, and in particular SAR. We saw this gestate on the 1988 UN Convention Against Narcotics and Psychotropic Substances Illicit Trafficking, namely on article 15, which includes aspects on training and discovery of suspicious circumstances in international trade subjects. Then, the SAR, already promptly configured, is present in Article 18 (paragraph.1.b) of the 2000 UN Convention for the Suppression of Terrorist Financing, which states that Compulsory Subjects must pay *"special attention to unusual or suspicious transactions and report transactions suspected of criminal activity"*. For its part, article 7 (paragraph 1.a) of the 2001 UN Convention against Transnational Organized Crime, suggests that countries should take measures to *"(...) prevent and detect all forms of money laundering, and this regime will emphasize the requirements relating to customer identification, record-keeping and reporting of suspicious transactions."* Article 14 (section 1.a) of the 2003 UN Convention against Corruption provides similarly that *"(...) this regime will emphasize the requirements relating to the identification of the customer and, where appropriate, the final beneficiary, the establishment of records and the reporting of suspicious transactions"*, and this must be understood in combination with Articles 12 (paragraph 1) and 58 of the same international instrument which guide respectively: *"Each State Party, in accordance with the fundamental principles of its domestic law, it shall take measures to prevent corruption and improve accounting and audit rules in the private sector, as well as, where appropriate, provide for effective, proportionate and deterrent civil, administrative or criminal sanctions in the event of non-compliance with such measures". and, to this end, consider establishing a financial intelligence unit to receive, analyze and disclose to the competent authorities any reports relating to suspicious financial transactions."*

2.2.- Legal, express and direct obligation for Reporting Entities to submit SAR.

The obligation to submit SAR, in accordance with the UN Conventions and the FATF Recommendations, must necessarily be entered into Laws explicitly, and without perjury, of course, to the specific administrative regulations that address the details

according to the Risk-Based Approach (EBR) of each Regulator in the country concerned. Almost all countries that follow the 40-R-FATF have the obligation of SAR established by law and unequivocally.

The following provisions of law are mentioned as mere references:

In Spain, Law No. 10 (of the year 2010 and reforms), Law on the Prevention of Money Laundering and the Financing of Terrorism: *"Article 18. Communication by indication. The obligated subjects shall, on their own initiative, communicate to the Executive Service of the Committee on the Prevention of Money Laundering and Monetary Infringements (hereinafter referred to as the Executive Service of the Commission) any fact or operation, including the mere attempt, in respect of which, following the special examination referred to in the preceding article, there is evidence or certainty that it relates to money laundering or the financing of terrorism."*

In Nicaragua, Law No. 976 (of the year 2018 and reforms), Law of the Financial Analysis Unit: *"Article 8. Obligation to report suspicious operations. 1. obligated subjects who suspect that a client's assets are linked to LA/FT/FP and previous crimes associated with Money Laundering at the time of performing or attempting an operation requested by the Client or at the conclusion of the analysis of their operations shall immediately report these suspicions to the UAF. Similarly, they will report the operations and assets of fund providers, services, associates, employees, partners and business partners on which they suspect that there is a relationship with LA/FT/FP and previous crimes associated with Money Laundering. (...)"*

In Panama, Law No. 23 (of 2015 and reforms), Law on Measures to Prevent Money Laundering, the Financing of Terrorism and the Financing of the Proliferation of Weapons of Mass Destruction: *"Article 54. Obligation to report a suspicious transaction Financially obligated subjects, non-financial obligated subjects and activities carried out by supervisory professionals shall communicate directly to the Financial Analysis Unit for the Prevention of the Crime of Money Laundering and Terrorist Financing any facts, transactions or operations, which are suspected of being related to crimes of money laundering, terrorist financing and financing of the proliferation of weapons of mass destruction, (...)".*

2.3.- Structuring a viable SAR for an FIU.

In the context of SAR, there are basically three legal scenarios, three perspectives, three functions in scaling format, all complementary to each other. In a first stadium, that of the Obligated Subject, who generates Financial Information through SAR. Behind the scenes, the FIU, which as the recipient of SAR, analyses and shares financial intelligence results, based on the so-called Operational Analysis. Third, that of the Investigative and Judgment bodies, which as appropriate, generate evidence and financial evidence, incidentally.

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SAR is always subjective in nature because it is a conclusion reached precisely by the Obligated Subject on suspicion or for having reasonable grounds to suspect that a possible situation of money laundering, or FT/FP, is being faced with suspicions of Preceding Crimes or Determinants of Money Laundering; but based on objective facts (and therein lies the reasonability required) and also presented in good faith. Precisely to be able to seize the respective legal protection. This is picked up on Recommendation 21 by FATF: *"Tipping off and confidentiality: Financial institutions, their directors, officers and employees should be: (a) protected by law from criminal and civil liability for breach of any restriction on disclosure of information imposed by contract or by any legislative, regulatory or administrative provision, if they report their suspicions in good faith to the FIU, even if they did not know precisely what the underlying criminal activity was, and regardless of whether illegal activity actually occurred; and (b) prohibited by law from disclosing ("tipping-off") the fact that a suspicious transaction report (STR) or related information is being filled with the FIU. These provisions are not intended to inhibit Information sharing under Recommendation 18."* For example, this Recommendation of the FATF we see expressed on Article 23 of the Spain's Law No.10/2010; on Article 11 of Nicaragua's Law No. 976 of Nicaragua, and on Article 56 of Panama's Law No. 23.

Sending a SAR does not constitute a criminal complaint, let alone an accusation. The reporting entity does not need to be certain that it is actually a criminal activity, nor to identify the criminal type or verify that the resources have an unlawful origin; only the operation is required to be suspicious for the Obligated Subject, where the person (or group of persons) mentioned in the SAR, should not know or be warned of such a situation. All its handling is strictly confidential.

It is for the FIU and the other competent authorities to determine and judge whether or not there is a true scheme or case of LA/FT/FP, and to proceed accordingly. It should be noted that the Obligated Subject does not receive feedback on the specific SAR that he has submitted, since it is not the function of the FIU to co-manage the Risk with the Obligated Subject, who by his own, free decision, and according to his "risk appetite" decided to do business with a certain person, to which he should later report. An FIU does share with the Obligated Subjects general information, but not that resulting from the Operational Analysis of the one-off case, but the product of its Strategic Analysis, from which Typologies, Schemes and Trends on LA/FT/FP are generated.

For any Anti-Money Laundering System and FT/FP, SAR always constitutes sensitive and basic information, true raw material for the corresponding financial analysis

and investigation work done by the FIU, which has access to extensive sources of information. Consequently, in order for SAR to be effective and useful to the work of the FIU, it is necessary that the information be in application of Quality (appropriate information), Opportunity (updated information) and Accuracy (exact information) criteria, somewhat of a crosshair pointing to the financial structures or transnational criminal organizations. In this important mission, a frontline role is played by the main official, on the Management of that Risk withinthe Company Obliged by Law, the position known as Compliance Officer, who must lead the implementation of an updated and effective LA/FT/FP Prevention Program, and therein lies the need for its constant training and training in the field[5] (https://www.translatoruser.net/bvsandbox.aspx?&from=es&to=en&csId=b9f3dbc0-426b-44cc-9c3f-ab1a0896dedb&usId=10f42060-a48b-4864-a48a-891791741879&ac=true&bvrpx=true&bvrpp=&dt=2020%2F12%2F5 22%3A13 - _ftn11·.)

In order to achieve the above, a SAR must be built or structured under certain special guidelines that are present in a myriad of regulations emanating from the FIUs, and among which, the following can be mentioned and recommended:

a. Qualifying an operation as suspicious, and consequently reporting it to the FIU, is an exclusive decision of the Obligated Subject based on the application of the DDC and with a Risk-Based Approach.
b. It is at the discretion of each Obligated Subject, in the assumption of his own Risks in business, to cancel or continue the relationship or link with the person (or persons) included in the SAR.
c. It is presented taking into account the deadlines, forms, platforms as means of sending, security and confidentiality measures, as well as the minimum content required by the respective FIU in each country, which must be its only recipients.
d. It is built and presented by both Materialized Transactions and Attempted Transactions.
e. It is structured from LA/FT/FP Alert Signals or Unusualness, detected early, derived from reliable sources (internal or external), and which have not been clarified or discarded by the Obligated Subject.
f. Presents itself in good faith.
g. SAR should not necessarily be based on a single Alert Signal and/or Unusualness.

[5]It is taken into account within the Superior Personal nomination for Obliged Subjects. On the Interpretative Note of the FATF Recommendation 18, it is anticipated:

"1. Financial institutions' programmers against money laundering and terrorist financing should include: (a) the development of internal policies, procedures and controls, including appropriate compliance management arrangements, and adequate screening procedures to ensure high standards when hiring employees. (b) an ongoing employe training programme; and

(c) an independent Audit function to test the system.

2. The type and extent of measures to be taken should be appropriate having regard to the risk of money laundering and terrorist financing and the size of the business.

3. Compliance management arrangements should include the appointment of a compliance officer at the management level (…)".

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h. It should refer only to Operations classified by the Obligated Subject as Suspicious. Operations held only as Alerts or only as Unusual should not be reported.
i. Always focuses on suspected LA/FT/FP and/or LA Precedent Crimes, and not on other and different possible Crimes.
j. You must describe at least one LA/FT/FP Suspicious Operation or that is linked to the LA/FT/FP.
k. It is presented independently: -of the amount or amount of the transaction(s), -of the nature of the transaction(s), -of the type of customer(s) or counterparty(s) concerned (n), - whether or not tax or tax matters are involved, -whether or not the potential underlying criminal activity or preceding crime is known, whether or not the potential underlying criminal activity actually occurred, - whether or not the relationship with the client(s) or counterparty(ies) included in the Report is continued.
l. Transactional information should be relevant and accurate, and should not be scarce.
m. The conclusions should be reasonable, the result of the escalation of information in the internal analysis carried out by the Obligated Subject.
n. It should not meet panic criteria.
o. The minimum information content of the SAR Format may be comprised of the following parts: -place where the suspicious operation(s) was carried out, -natural or legal person who is a customer or counterparty of the Reporting Obligated Subject, and on behalf of the person who carried out or attempted the transaction, -beneficiary of the account or business relationship, -natural person (manager) who carried out or attempted the suspicious operation, -information about the suspicious operation, -indication of the warning signals and their sources, -current state of the relationship between the obligated subject and the person(s) mentioned within the SAR, -description of the operation(s) suspicious(s).
p. Clear and concise language should be used in the description of the Suspicious Operation(s).
q. The facts should be recounted as a short argument, ordering the ideas with the following parameters: -distinguishing between premises and conclusion, - on the basis of reliable premises, - presenting ideas in a chronological order, - using professional, concrete, specific and definitive language, - avoiding personal and emotional language.

All FIUs are entitled to reject SAR that do not meet the content and quality criteria indicated by it through Regulations or Instructions.[6]https://www.translatoruser.net/bvsandbox.aspx?&from=es&to=en&csId=b9f

[6]For example, on Article 18 of Spain's Law No. 10/2010. *"(…) In any case, communication to the Executive Service of the Comission, will be preceded by a structured process of special examination of the operation, in accordance of the provisions of article 17. In cases where the Executive Service of the Commission deems that the Special examination carried out is insufficient, it will return the communication to the obliged subject so that the latter may deepen the examination of the operation, in which the reasons for the return and the content to be examined will be succinctly expressed."*

3dbc0-426b-44cc-9c3f-ab1a0896dedb&usId=10f42060-a48b-4864-a48a-891791741879&ac=true&bvrpx=true&bvrpp=&dt=2020%2F12%2F5_22%3A13_-_ftn12
Once SAR is received, the FIU submits it to a risk certification/validation, both objective and subjective to determine priorities, based on the information contained in the description of the operator. The objective one, made by the system or platform (required fields). The subjective one, carried out jointly by Analysts and Managers of the respective FIU Analysis Area, and which determines the urgency and importance of the attention of the FIU, in order to determine whether it is in the presence of a true money laundering scheme.

3.- SAR Compliance Omission: inflection point which debilitates the Anti Money Laundering System

3.1.- Some non-compliancescenarios.

The compliance and effectiveness of SAR are currently marking accelerated changes and legal, legislative and administrative, doctrinal, jurisprudence and criminological trends and trends in the different countries following 40-R-FATF (Blanco Cordero, I. 2009); and in particular with regard to delimiting responsibilities of different natures for those who by law are Subject to Risk Prevention LA/FT/FP, who do not comply with the obligation to detect Suspicious Operations and report them in a timely manner. In this context, the global FATF standard requires that sanctions (of any kind) be proportionate, effective and dissuasive.[7] This is the case, for example, of the crime of money laundering under the form of the Default Commission where the one who omits reporting is placed in a position of direct or indirect collaborator of the Money Launderer or Whitener (Caparrós, Eduardo F. 2013).

Following up, a synthesis of the main situations in which the Legal Obligation to present SAR is not usually met, grouped into the following three general scenarios. For these, there may be responsibilities at all levels:

a.- The Obligated Subject does not quite have Measures (Internal Control Policies and Procedures) for LA/FT/FP Risk Prevention Management.

b.- The Obligated Subject does have Measures (Internal Control Policies and Procedures) for LA/FT/FP Risk Prevention Management; however, these contain structural failures.

c.- The Obligated Subject does have Internal Control Policies (Policies and Procedures) for LA/FT/FP Risk Prevention Management, which do not contain structural failures, but become poorly implemented.

[7]Recommendation 35 of FATF: *"Countries should ensure that there is a range of effective, proportional and dissuasive sanctions, whether criminal, civil or administrative, that are available to treat natural or legal persons covered in Recommendations 6 and 8 to 23, who fail to comply with the requirements. AML / CFT. Sanctions should be applicable not only to financial institutions and DNFBPs, but also to their directors and senior management."*

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The above circumstances may give rise to or cause the following two possible factual variables that are serious regarding the non-compliance with SAR:

i.- That it is omitted to report the Suspicious Activity that has been detected and classified as such.

ii.- The Suspicious Activity is ignored even if it is obvious and reasonably easy in terms of detection and analysis.

And if it is the case that with the two indicated conducts the facilitation of Money Laundering occurred in any of its stages: Placement, Stratification and Integration; those responsible for them can then be prosecuted under the Commission's criminal justice test for omission of this Crime, regardless of the level of participation that is delimited for each of those involved, which can reach even the managers of a company.

This is the case, for example, of the grounds provided for in paragraphs 2 and 3 of article 301 of the Spanish Penal Code[8], or in article 282 (f) of the Nicaraguan Penal Code[9], or in article 255(1) of the Panama Penal Code[10], obviously, all under a wide range of various interpretative nuances.

The situation will then be presented with different legal effect if the Obligated Subject does have Internal Control Policies (Policies and Procedures) for LA/FT/FP Risk Prevention Management, these do not contain structural failures, and are ultimately reasonably well implemented. So the confluence of these three duly documented positive circumstances will be a real radiance, exempt from responsibilities, even if no Report has been submitted to the FIU[11]. There are a few situations in which there are cases detected

[8] *"2. With the same penalties, the concealment or concealment of the true nature, origin, location, destination, movement or rights over the goods or property of the same will be sanctioned, according to the cases, knowing that they come from any of the crimes expressed in the previous section or an act of participation in them. 3. If the facts are carried out due to gross negligence, the penalty will be imprisonment from six months to two years and a fine of three times as much."*

[9] *"Seriously breaches the duties of his position to facilitate the conduct described in the preceding paragraphs"*

[10] *Without having participated, but knowing its origin, conceals or prevents the determination, origin, location, destination or ownership of money, goods, securities or other financial resources, or helps to ensure their benefit, when these come from or have been obtained directly or indirectly from any of the illicit activities indicated in the previous article or, in any other way, help to ensure their benefit".*

[11] As a reference in this situation, article 31 bis (paragraph 2) of the Spanish Penal Code stands out:

"2. If the crime is committed by the persons indicated in letter a) of the previous section, the legal entity will be exempt from liability if the following conditions are met:

1.ª The administrative body has adopted and executed effectively, before the commission of the crime, organization and management models that include the appropriate surveillance and control measures to prevent crimes of the same nature or to significantly reduce the risk of theircommission.

from Alerts or Unusualness, but which in the end are not reported to the FIU because the decision-making of the Obligated Subject concludes that there is no suspicion and do not qualify as such to the information known and analyzed. In such a case, however, it is recommended to rate the customer or counterparty as High Risk, and apply an intensified or reinforced DDC, which includes stricter monitoring of the relationship.Of everything acted internally, the Obligated Subject must archive and retain the information for the minimum period indicated by the respective legislation, and have it available to the authorities (administrative and judicial) with competence in the matter[12].

3.2.- Risk situation and Position of Guarantor in the context of the SAR Compliance Omission.

Money Laundering presents us with an overview of the permanent danger of the protected legal good, basically considered the stability of a country's socio-economic-financial order. For any company, as long as it is open developing its business turns, then there is no LA/FT/FP "0" Risk for it; risk will always be inherent to its economic activity. Here comes into scene, the figure that the doctrine calls The Position of Guarantor, which has particular legal-criminal relevance, although quite explicitly absent as such in the legislative texts. This is the holder of a duty of reply to avoid the harmful, unwanted outcome, and which is prohibited. It is the guarantor of the non-production of that result and that criminal responsibility for it may be substantiated and attributed to it in respect of the un impeded outcome. In reference to the Penal Code of Spain: *"(...) in our legal system and from a harmonious interpretation of art. 11, the equality between action and omission, will only be possible, according to the meaning of the text of the Law, when there is a guarantor who has infringed a special legal duty"* (CuadradoRuíz, 2000, p. 19).

2.ª The supervision of the operation and compliance with the implemented prevention model has been entrusted to a body of the legal entity with autonomous powers of initiative and control or that is legally entrusted with the function of supervising the effectiveness of the internal controls of the legal entity;

3.ª individual perpetrators have committed the crime by fraudulently evading the organization and prevention models and,

4.ª there has not been an omission or insufficient exercise of its supervision, surveillance and control functions by the body referred to in condition 2ª."

[12]*FATF Recommendation 11:*

"Registry mantenance

Financial institutions should be required to maintain, for a period of at least five years, all the necessary records on transactions, both local and international, so that they can quickly comply with the requests for information requested by the competent authorities. These records must be sufficient to allow the reconstruction of individual transactions (including the amounts and types of currency involved, if any) in such a way as to provide evidence, if necessary, for the prosecution of criminal activity.

Financial institutions should be required to retain all records obtained through CDD measures (e.g., copies or records of official identification documents such as passports, identity cards, driver's licenses, or similar documents), account files, and correspondence. including the results of any analyzes that have been performed (e.g., preliminary investigations to establish the background and purpose of complex, unusually large transactions), for a period of at least five years after the termination of the business relationship or after the date of the occasional transaction.

Financial institutions should be required, by law, to maintain records on transactions and information obtained through CDD measures. "

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In this situation, the omissive action of any official or collaborator within the Obligated Subject may be subsumed, who has seriously failed to fulfill the duties of his office in his own tasks related to SAR within the route of detection, analysis, decision-making, structuring and presentation to the FIU, and who has thus contributed to the timely scheme of a money laundering in any of its stages.

Guarantor's Position then points, but not exclusively, to the Compliance Officer as the main executive of the matter within the Obligated Subject, as he is generally responsible for ultimately deciding whether the Operation is of a Suspicious nature and consequently whether or not to report to the competent authority such as the FIU. Whoever assumes the position of Compliance Officer within a mandatory entity, is constituted as a kind of barrier to prevent the company from being used as an instrument to launder assets from illicit activities, and if, by doing so, does not prevent the commission of the crime (knowingly), it will be had as if it had committed the conduct itself. There are many interpretive currents around Guarantor's Position(CuadradoRuíz, 1998, pp. 11-68).

Nevertheless, it could only be the author of the crime of money laundering under the modality of the Commission by Omission, persons who, with certain characteristics and functions, are required to carry out specific tasks under their LA/FT/FP Risk Prevention Programme, in order to prevent such a crime from materializing. The criminal responsibility of the Commission for omission in the field of money laundering, without at the causal level, must be placed at the regulatory level. This is because the crime of money laundering or money laundering is mostly accepted as a continuing crime, of mere activity, and not necessarily of result[13].

[13]Article 11 of the Spanish Penal Code:

"Crimes that consist in the production of a result will only be understood to have been committed by omission when the failure to avoid it, by infringing a special legal duty of the author, is equivalent, according to the meaning of the text of the law, to its causation. For this purpose, the omission will be equated with the action:

a) When there is a specific legal or contractual obligation to act.

b) When the defaulter has created an occasion of risk for the legally protected asset through a preceding act or omission "

Article 12 of the Nicaraguan Penal Code:

"In pure crimes of omission, the act is considered carried out where the omitted action should have taken place."

Article 25 of the Penal Code of Panama:

"Crimes can be committed by commission or omission. There is a crime of commission when the agent, personally or using another person, performs the conduct described in the criminal law, and there is a crime of omission when the subject fails to comply with the mandate provided in the standard. When this Code incriminates a fact due to a prohibited result, it is also carried out by those who have a legal duty to avoid it and did not avoid it, being able to do so. "

The doctrine highlights several formal sources for Guarantor's Position, including: -the Law, -the Contract, -Special Relations and -Interference. Officials with direct roles to manage, mitigate and contain the Risk of Money Laundering, within an Obligated Subject, may frame their obligations in the four sources indicated, especially with the first two. On the one hand, the Law and the abundant Administrative Regulations, require the official in a specific and express way. On the other hand, the Employment or Professional Services Contract defines the scope of its functions and competences, which are LA/FT/FP Risk Surveillance Duties, and by not avoiding what is avoidable and available to it, acts not as an Active Subject, but as an Omissive Subject.

Without prejudice, to the omission of SAR, the materialization of money laundering schemes has been facilitated or not, the application of Administrative Sanctions by the Regulatory and Supervisory Authorities may always correspond for breaching the obligation to refer SAR to situations that do apply.

4. Conclusions andrecommendations:

i.- Useful SAR should be the result of compliance with adequate and effective implementation of Money Laundering and FT/FP Risk Prevention mechanisms.

ii.- The presentation of SAR with characteristics of Quality, Opportunity and Accuracy, directly affects the mitigation of the Risk of Financial Crime, and promotes the health of business and economy, in any country.

iii.- The Obligated Subjects, their officers and officials, are guarantors that, under the proper exercise of their respective positions and roles, the necessary measures are taken and developed within the company, in order to prevent and detect suspicious operations early and to report them in a timely manner to the FIU.

iv.- The existence and effective application of proportional sanctions for the various SAR non-compliances, including cases of serious omission, achieve a deterrent effect on Obliged Subjects, resulting in the strengthening of mechanisms for determining, structuring and presenting better-targeted SAR, with primary information for the FIU.

v.- The constant strengthening of an effective SAR System, shields Subjects Bound against the Risk of Money Laundering and FT/FP, weakens the financial structures and movements of Organized Crime, and improves the perception of Country Risk.

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Money laundering in Bosnia and Herzegovina

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Abstract

The problem of money laundering in the world is becoming more and more challenging, which Bosnia and Herzegovina are not spared, and there is more and more "dirty" money coming from various criminal activities and trying to "launder", ie put into legal channels. Therefore, anti-money laundering projects in Bosnia and Herzegovina are extremely important, and they have shown the first results.

In this regard, in May 2017, the European Union launched a two-year twinning project "Support to the fight against money laundering", and in the meantime, our country was removed from the so-called “gray lists” of the Interstate Anti-Money Laundering Authority (FATF).

It should be emphasized that the benefits for Bosnia and Herzegovina due to the removal from the FATF "gray list" are multiple. Due to the fact that Bosnia and Herzegovina were placed on this "gray list", economic entities in their daily business encountered difficult foreign payment transactions. By removing our country from the Interstate Anti-Money Laundering Authority "gray list", the causes of the problems that business entities from Bosnia and Herzegovina face in their daily business, as well as the causes that our citizens encounter when performing financial transactions abroad, cease.

Keywords: *money, laundering, Bosnia and Herzegovina, legal flows, FATF*.

1. Introduction

Money laundering appears as a phenomenon of the twenty-first century. As a global problem, money laundering is widespread throughout the world. The global nature of the problem requires finding a global solution, which is necessary to preserve the integrity of financial institutions and financial systems.

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Money laundering is the process by which criminals and their associates use the financial and non-financial system to carry out transactions or transfer funds from one account to another in order to hide the source and the real owner of the funds, in order to legalize illegally acquired money.

According to the Law on Prevention of Money Laundering and Financing of Terrorist Activities, money laundering means the exchange or transfer of the property if the property was acquired through criminal activities, with the aim of concealing or covering up the illegal origin of the property or providing assistance to a person involved in such activities. actions; concealment or concealment of the true nature, place of origin, disposal, movement, right to or ownership of property if that property was acquired through criminal acts or an act of participation in such acts; acquisition, possession, or use of property acquired through criminal acts or the act of participating in such acts; participation or association for the purpose of doing, attempting to do or aiding, abetting, facilitating or giving advice in doing any of the above actions.(Law on Prevention of Money Laundering and Financing of Terrorist Activities: Article 2)

Money laundering means an activity aimed at collecting unfairly or illegally acquired income through permitted transactions. (Cindori 2007: p. 58) Money laundering is a dynamic process that adapts to economic flows and legislation, at the national and international level, and takes place through the falsification of financial documentation and through manipulations in the systems of interbank transactions. (Cindori 2007: p. 59)

Money laundering can lead to destabilization of the financial stability of a country, through disruption of financial relations, weakening of international trade, reduction of investments, and general damage to reputation, to which Bosnia and Herzegovina were exposed by coming to the "gray list". The literature mentions that the term "laundering" was promoted by London's The Guardian some thirty years ago in connection with the famous Nixon Watergate affair, which involved the amount of $ 200,000 that was allegedly intended to finance the American Republican election campaign.

2. International regulations

The increase in the number of criminal acts marked as "money laundering" has prompted the international community to adopt a series of conventions, recommendations, and guidelines. The United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, (United Nations Convention, 1988) which discusses the problem and determines ways to combat narcotics by confiscating profits from illicit drug production and trafficking, and promotes international cooperation between member states. This is the first document punishing laundering through punishment for acts from which dirty money arises.

At the G-7 meeting in Paris in 1989, the Financial Action Task Force (FATF) was formed to monitor the implementation of measures to prevent money laundering and terrorist financing. The task of this Group is to establish standards for combating money laundering, terrorist financing, and proliferation of weapons of mass destruction, assess compliance with FATF standards and identify threats to the integrity of the international financial system and respond to them through studies of high-risk jurisdictions and typologies.

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The standards applied by the FATF in the fight against money laundering and terrorist financing are known as the "FATF Recommendations". The mentioned recommendations represent a global standard for the prevention of money laundering and terrorist financing and their inadequate application or integration into the legal-institutional system of the state can have serious consequences for a given country, which means that countries that have not harmonized their system for prevention of money laundering and terrorist financing According to the FATF recommendations and through a certain assessment undertaken in accordance with the FATF methodology, they are considered as "countries with a higher degree of risk in terms of money laundering and terrorist financing". (FATF Recommendations 2020)

Resolution 246211 (UN Security Council Resolution 2462, New York, 2019) calls on UN member states to apply the comprehensive international standards contained in the FATF recommendations. Implementation of the FATF recommendations has become an international legal obligation, as Article 25 of the Resolution obliges UN member states to implement resolutions adopted in accordance with Chapter VII of the United Nations Charter, while Article 103 clarifies that obligations under the UN Charter will to prevail over any other international agreement.

The 141st Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, (Council of Europe Convention on Laundering 1990) which provides for the obligation to confiscate profits from all illegal activities, and for international co-operation in the seizure and distribution of confiscated funds.

EU Council Guidelines on the Prevention of the Use of the Financial System for Money Laundering (EU Council guidelines 1991) prescribing customer identification, in-depth analysis, verification and supervision of the client - beneficial owners, cash use limits, identification of related, illogical and suspicious transactions, reporting obligations, ban on disclosure of information, maximum protection of members financial institutions responsible for disclosing information, staff training and risk management, record keeping and statistics, supervision and sanctions.

The 2005 Anti-Money Laundering Directive is also known as the third Directive. (EU Directive) Regulation 1781/2006 stipulates the obligation for the information on the principal to monitor the transfer of money for the prevention, investigation and detection of money laundering and terrorist financing.

Directive 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purpose of money laundering or terrorist financing amended Regulation no. 648/2012 of the European Parliament and of the Council and repealed Directive 2005/60 / EC of the European Parliament and of the Council and Commission Directive 2006/70 / EC.

3. Regulations in Bosnia and Herzegovina

Despite the ongoing efforts of banking regulators to put an end to the financial black market, criminals are always one step ahead when it comes to mechanisms for injecting dirty money into legal financial flows. This is best evidenced by money laundering scandals that simply catch up with each other. Last year alone, several scandals involving billions of dollars were discovered.

In recent years, global efforts to combat money laundering have become increasingly significant due to the growing problem of terrorism on a global scale. Preventing and combating money laundering and terrorist financing is one of the priorities when it comes to current world politics.

The promulgation of the Law on Prevention of Money Laundering (Law on Prevention of Money Laundering and Financing of Terrorist Activities: no 47/14, 46/16) precisely prescribes the obligations of legal and natural persons, as well as certain institutions in BiH, which monitor the trends of international regulations in this area. The Financial Intelligence Unit (FIU) has been established within the State Investigation and Protection Agency SIPA, which is the main and responsible institution in the fight against money laundering in Bosnia and Herzegovina, and makes a significant contribution to the fight against money laundering.

The law also harmonizes the procedure with relevant international acts, primarily in relation to the identification of the party and the definition of the beneficial owner, ie the in-depth analysis of the party, and the keeping of comprehensive records.

With the adoption of the Law on Prevention of Money Laundering, Bosnia and Herzegovina have actively joined countries that, according to internationally recognized standards, take measures and responsibilities for the detection, prevention and investigation of money laundering and terrorist financing. One of the important conditions set before us by the international community has been fulfilled.

The Law on Prevention of Money Laundering defines that the taxpayer, in accordance with the prescribed conditions, is obliged to submit to the FIU the prescribed information regarding the following: Laundering (Law on Prevention of Money Laundering and Financing of Terrorist Activities: article 13)

- any transaction, party or person of suspicious nature immediately after the suspicion arises and before the execution of the transaction, stating the period in which the transaction is expected to take place
- on a cash transaction whose value amounts to or exceeds the amount of 30,000 KM, and
- on related cash transactions whose total value amounts to or exceeds the amount of 30,000 KM, immediately after the execution of the transaction and no later than 3 days after the execution of the transaction.

The aim of measures to prevent and detect money laundering, which are usually carried out by special financial intelligence units, is to monitor and analyze financial transactions and detect typologies of money laundering. Monitoring (suspicious) transactions seek to determine their illegal origin. Monitoring of these transactions should be viewed

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separately from integrated financial investigations aimed at identifying, tracing, seizing and confiscating proceeds at the same time as conducting a criminal investigation into a proceeding that resulted in property gain.

The Financial Intelligence Unit is also a special body for the prevention, investigation and detection of money laundering operations and the financing of terrorist activities. According to the Law on Prevention of Money Laundering, the FIU also promotes cooperation between the competent authorities of Bosnia and Herzegovina, the Federation of Bosnia and Herzegovina, Republic of Srpska and Brčko District, in the field of prevention of money laundering and terrorist financing, as well as promoting cooperation and exchange of information with other authorities states and international organizations in charge of preventing money laundering and terrorist financing. (Law on Prevention of Money Laundering and Financing of Terrorist Activities: article 5)

When determining the identity of the party, the obligor is obliged to obtain information about the party and the transaction. Customer identification is performed:

- during each transaction or several related transactions whose value amounts to or exceeds 30,000 KM, even if it is a public sale or cash trading in works of art and the like,
- in cases of life insurance when the total amount of an individual installment or several installments to be paid within one year is or exceeds the amount of 2,000 KM or if the payment of one premium is or exceeds 5,000 KM,
- in the case of pension insurance if it is possible to transfer the policy, or use it as collateral to raise a loan or credit,
- when playing games of chance and gambling if the transaction is 5,000 KM or more.

The Financial Intelligence Department has primary activities: detecting and investigating money laundering and terrorist financing, international cooperation in the field of money laundering, informing prosecutors and submitting reports.

In order to prevent money laundering and terrorist financing, the Financial Intelligence Unit may request data, information and documentation necessary for the performance of tasks from foreign law enforcement agencies, prosecutors or administrative bodies, financial intelligence units and international organizations.

The Department may provide data, information and documentation collected in Bosnia and Herzegovina to financial intelligence units of other countries, provided that similar protection of confidentiality is ensured, at their request or on its own initiative. Before submitting personal data to financial intelligence units of other countries, the financial intelligence department requires a guarantee that the information, data and documentation

will be used only for the purposes prescribed by the provisions of this law. (Law on Prevention of Money Laundering and Financing of Terrorist Activities: article 21)

If the Financial Intelligence Department, on the basis of data, information and documentation obtained in accordance with the provisions of this Law, assesses that there are grounds for suspicion that it is a criminal offense related to a transaction or person, it shall provide the prosecutor with written notice.

The Financial Intelligence Unit shall not state in the notification the data on the employee or persons from the taxpayer who communicated the data in accordance with this Law, or who are in any other way involved in the execution of the transaction on behalf of the taxpayer, unless there are grounds for doubt that the taxpayer or his employee has committed a criminal offense, or if that information is necessary to establish the facts during the criminal proceedings. (Law on Prevention of Money Laundering and Financing of Terrorist Activities: article 22)

The Financial Intelligence Department submits annual reports to the Director of the State Investigation and Protection Agency and the Minister of Security of BiH on the general activities of the Financial Intelligence Department, as well as on activities related to the prevention of money laundering and terrorist financing. (Law on Prevention of Money Laundering and Financing of Terrorist Activities: article 24)

The Central Bank of Bosnia and Herzegovina has the following clients in its operations: commercial banks of BiH, state and entity ministries of finance and treasury, as well as banking agencies. It does not have a direct role in the prevention of money laundering and terrorist financing and is not obliged to report suspicious money laundering transactions. The Central Bank of Bosnia and Herzegovina is not obliged to report suspicious transactions and expressed risk in the purchase and sale of domestic currency with commercial banks, there is no risk in investing foreign exchange reserves in time deposits. Banks operating in the territory of Bosnia and Herzegovina, in accordance with the provisions of the Law on Prevention of Money Laundering, must have an internal procedure for the preliminary assessment of suspicious transaction reports and the procedure for mediating these reports by the FIU. They must identify the main specific person, usually called the "money laundering officer". Pursuant to the Law on Prevention of Money Laundering, bank employees are personally responsible for its observance. Banks should use the following policies, procedures and systems in their work:

1. The principle "Meet your customer" is the most effective means that banks have in preventing money laundering. The principle requires careful identification and caution, targeted non-suspicious transactions. This somewhat lowers the reputation of banks by connecting with customers on the principle of good business policy. Banks do not need to enter into business relationships with customers until they know their true identity,

2. The “get to know your customer” principle includes major activities that bank customers must obtain the necessary evidence for identification. When a bank customer opens an account, enters into business relationships and issues large one-off transactions (or a series of related transactions) he must prove the legality of the transactions. A document can be used to identify the client, e.g. driver's license or ID card if it is a natural person, and if it is a document on the legal status of the company (excerpt from the register of companies),

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3. Knowledge of the client's business activities.

All bank employees must be wary of new client activities that are not related to clients of known business activities. Given the size and scope of the activity, it is easy to obtain data for the relevant issues of the source of funds, the unusualness of some unusual business activity. This is part of the anti-money laundering policy and procedure that every bank has. Data on the identity of the party and its property transactions should be kept for the purposes of money laundering investigations.

According to the Law on Prevention of Money Laundering, the bank must keep evidence of the sources of financial transactions for five years from the date when the transaction was executed. These documents include the bank's payment or deposit orders, checks, transaction records, etc. The Law on Prevention of Money Laundering prescribes "conditionally speaking" two categories of violations of the law:

(1) The first category refers to situations if the following obligations are not fulfilled:

- does not perform the identification of the party, or if the identification is not performed in accordance with the provisions of the law;
- does not inform the FIU or does not provide it with legally prescribed information, data or documentation;
- does not act on the order of the FIU on the temporary suspension of the transaction or does not act on the instructions issued by the FIU in connection with that order and in accordance with the provisions of the law;
- does not store information, data and documentation in accordance with the provisions of the law for at least 10 years after identification, transaction, closing of account or termination of the contract in accordance with the provisions of the law.

For the listed offenses (first categories): (Law on Prevention of Money Laundering and Financing of Terrorist Activities: article 39)

- The legal entity, in terms of this law, is fined for a misdemeanor in the amount of 20,000 KM to 200,000 KM,
- The competent person in the legal entity is fined in the amount of 2,000 KM to 15,000 KM,
- A natural person in the performance of independent activities is fined in the amount of 5,000 KM to 20,000 KM.

(2) The second category refers to situations where the following obligations are not fulfilled:

- Does not obtain all necessary data for identification in accordance with the provisions of the law or does not perform the identification by the method prescribed by law;
- Does not re-identify a foreign legal entity at least once a year in accordance with the provisions of the law;
- Does not submit the prescribed information to the FIU or does not submit it in the prescribed manner in accordance with the provisions of the law;
- Does not establish internal control or does not compile a list of indicators for identifying suspicious transactions within the prescribed period or in the prescribed manner in accordance with the provisions of the law;
- Does not appoint an authorized person and his deputy or does not notify the FIU of this appointment in accordance with the provisions of the law;
- Does not provide professional training for staff in accordance with the provisions of the law;
- Do not keep data on the authorized person and deputy authorized person, on professional training of employees and on performing internal control for at least 4 years after the appointment of the authorized person and deputy authorized person, after completion of professional training or performing internal control, in accordance with the law.

For the listed offenses (second categories): (Law on Prevention of Money Laundering and Financing of Terrorist Activities: article 40)

- A legal entity is fined in the amount of 10,000 KM to 100,000 KM,
- The responsible person in the legal entity is fined in the amount of 1,000 KM to 5,000 KM,
- A natural person, who performs self-employment, is fined in the amount of 2,000 KM to 20,000 KM.

4. Conclusion

The entire international community has recognized the danger of criminal activities of individuals and groups aimed at laundering and concealing money and other property gains obtained by committing criminal acts. Thus, international law, as well as certain national legislations provide for criminal liability for money laundering as a criminal offense threatened with severe penalties aimed at preventing and combating such socially dangerous activities.

Corruption and organized crime have been continuously identified as obstacles to the successful implementation of the Dayton Peace Agreement. Money laundering, which is an integral part of organized crime and corruption, is an effort to cover up an illegal source of money in order to make it legitimate for further profit-making. The global problem of money laundering disproportionately affects transition countries such as Bosnia and Herzegovina, poses a threat to the political and economic stability of these countries, and discourages legal and long-term foreign investment necessary for economic development in Bosnia and Herzegovina.

The legislative and institutional framework in Bosnia and Herzegovina is such that the system of prevention, detection and investigation of money laundering and terrorist financing in Bosnia and Herzegovina is not under the jurisdiction of only one institution

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but is an area under the jurisdiction of institutions at all levels of government. with the legal definition of the role of all participants in the system and their obligatory mutual interaction and cooperation.

In Bosnia and Herzegovina, in May 2017, the European Union launched a two-year twinning project "Support to the fight against money laundering", and in the meantime, our country was removed from the so-called “gray lists” of the Interstate Anti-Money Laundering Authority (FATF).

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