



The debate concerning deviance and divergence: A new theoretical proposal

OÑATI SOCIO-LEGAL SERIES VOLUME 14, ISSUE 2 (2024), 505–529: DERECHOS EMERGENTES Y BIENES COMUNES EN EL SUR GLOBAL

DOI LINK: [HTTPS://DOI.ORG/10.35295/OSLS.IISL.1813](https://doi.org/10.35295/OSLS.IISL.1813)

RECEIVED 12 JULY 2023, ACCEPTED 12 DECEMBER 2023, FIRST-ONLINE PUBLISHED 7 FEBRUARY 2024, VERSION OF RECORD PUBLISHED 1 APRIL 2024

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Abstract

This article discusses theoretic questions related to the notion of social deviance, a concept that has been a pillar of criminology and sociology since the mid-20th century. We argue that the concept of social deviance is not adequately equipped to satisfactorily describe social actions labelled as transgressions. This discussion reframes the notion of social deviance, recasting its theoretic significance and use in the field of criminology. In its place, we advance the category of social divergence, highlighting its greater analytical power to address social actions that trigger penal control interventions. Social

All authors listed have made a substantial, direct and intellectual contribution to the work, and approved it for publication.

We are especially grateful for critical remarks and comments by Dina Siegel (Utrecht University), Vincenzo Ferrari (Università degli Studi di Milano), Wanda Capeller (Université Sciences Po), Víctor M. Uribe-Uran (Florida International University), Angélica Cuéllar Vázquez (Universidad Nacional Autónoma de México UNAM), María Inés Bergoglio (Universidad Nacional de Córdoba), Rogelio Pérez Perdomo (Stanford University), Germano Schwartz (Universidade LaSalle).

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divergence is a novel conceptual contribution in the tradition of conflict theory in sociology. Its purpose is to offer an analytical model of social conflicts and their inner workings as key elements to describe, analyze and improve our understanding of their interactions with penal control systems from a criminological perspective.

Key words

Criminology; deviance; social conflicts; social control; social divergence

Resumen

Este artículo expone una discusión crítica de la noción de desviación social, un concepto que ha sido pilar de la teoría criminológica y sociológica desde mediados del siglo XX. Sostenemos que la desviación social no está adecuadamente provista como dispositivo analítico para describir satisfactoriamente las acciones sociales que se etiquetan como transgresiones. La discusión reconsidera los alcances de la noción de desviación social, reformulando su significado teórico y su uso en el campo de la criminología. En su lugar, proponemos la categoría de divergencia social, destacando su mayor potencia analítica para abordar las acciones sociales que desencadenan intervenciones de control penal. La divergencia social es una contribución conceptual novedosa en la tradición de la sociología del conflicto. Su propósito es ofrecer un modelo analítico de los conflictos sociales y su funcionamiento interno como elementos clave para describir, analizar y mejorar nuestra comprensión de sus interacciones con los sistemas de control penal desde una perspectiva criminológica.

Palabras clave

Criminología; desviación; conflictos sociales; control social; divergencia social

Table of contents

1. Introduction	508
2. Discussion of the concept deviance	508
2.1. Notion, significance and value	508
2.2. A formalistic category	509
2.3. Reduces the universe of social actions to prescribed mandates.....	509
2.4. Neither majoritarian nor coherent.....	510
2.5. Fades competing interests	510
2.6. A prescriptive category	511
2.7. A pejorative and stigmatizing term	511
2.8. Promotes social segregation and inhumanization	511
2.9. Pervasive use of the term and search for alternatives	512
2.10. Not a semantics issue	513
2.11. A useful revision of the term.....	514
3. The notion of divergence.....	514
3.1. Elements of divergence theory.....	514
3.2. Divergence in penal control systems	516
3.3. Main differences between deviation and divergence.....	519
4. Conclusions	521
References.....	524

1. Introduction

Criminology faces obstacles in developing new interpretations concerning social actions involving criminal offenses as well as the operation of the penal justice system. Recent criminological publications share concerns about the need to rigorously assess the theoretical frameworks that currently guide criminology (Petersilia and Sampson 2018). This contribution, which is part of the sociological theory of conflict and of criminal offenses, is an effort to expand criminology's frontiers by reassessing analytical tools currently used to observe social phenomena in this field of knowledge. A full discussion of this sociological theory is beyond the scope of this article, which is limited to examining the theoretical category of *social divergence*, a key concept in this framework. As indicated below, the issue is not merely a matter of semantics. Terms have ideological connotations and contribute to the construction of a given social reality (Mayr and Machin 2012).

The category of social divergence contributes to the tradition of conflict theory in sociology, especially in the work of George B. Vold (1967). Conflictual sociology offers the theoretical foundations on which this category is based. Divergence provides a set of analytical tools to understand social conflict, especially the acute social unrest that characterizes Latin America. It also stems from the need to break with the epistemological premises that concur to accentuate social exclusion underlying the definitions and classifications of traditional criminology.

The starting point is a discussion of the scope and nature of the concept of *deviance*, followed by the exam of the main criticisms that have been levelled at it, as well as of the ineffective alternatives that have been proposed instead. We then proceed to introduce the category of *social divergence* and to reformulate the meaning and scope of the concept of deviance. The findings gathered by comparing both concepts will support the reassessment of our understanding of the social phenomena currently termed as criminal offenses.

2. Discussion of the concept deviance

2.1. Notion, significance and value

As noted, the concept of social divergence is a main pillar in the theoretical framework of this contribution. It is opposed to the notion of social deviance. The introduction of the former will begin with an initial appraisal of the latter that will justify a reassessment of its content and scope. The above, because the term social deviance is without doubt the most widely used expression in modern sociology and criminology (Becker 1963, Lemert 1972, Cohen 1974, Taylor *et al.* 1975, Bergalli 1983, Baratta 1986, Ogien 1999, Lianos and Douglas 2000, McCaghy *et al.* 2008, Downes and Rock 2011, Hall 2012, Jones 2017).

The term deviance is used to refer to behaviors that transgress social or legal norms or expectations prescribed by others, which consequently carry disapproval or punishment (Mitchell 1979). Talcott Parsons (1951/1991), who developed the notion in depth, defines it as a *motivated orientation to infringe one or more institutionalized normative patterns*. The key elements in Parsons' definition are widely endorsed to this day (e.g., Vito and Maahs

2012, Jones 2017). And yet, they are also the core drawbacks that render the concept of *deviance* insufficient and incomplete on a theoretical level in criminological scholarship.

2.2. *A formalistic category*

Criminology handbooks and research articles frequently use the term *deviant* to assess a social action that is disparate from a socially accepted, normal position or correct orientation (e.g., Akers and Jensen 2006, Wortley 2011, Tierney 2013, Franzese 2015, Jones 2017). Thus, the term powerfully endorses the validity and legitimacy of expectations prescribed by *others* as well as of statutory penal norms, that impose a predetermined assessment of a situation based on a dichotomy that discriminates between what is *normal* or *correct*, and what is *deviant*. The concept of social deviance pays excessive due to formalism (Weinrib 1988) by reducing conflicting social actions to mere contradictions between social behavior and penal law (e.g., Giddens 1993, Vito and Maahs 2012, Humphrey and Schmalleger 2012, Palmer and Humphrey 2013, Clinard and Meier 2014, Franzese 2015, Fried 2020).

Scrutiny of historical evidence and philosophical reasoning shows that legal normative assessments of actions considered *deviant* are far from fail-safe. Abundant evidence shows that normative mandates and prescribed behaviors for certain social groups, even when these are legally issued, are found to be lacking in terms of social, political, or axiological legitimacy. Such practices omit conflicting interests, values or beliefs that underlie socially charged issues, while concealing or denying their influence as driving factors of social controversy. For example, media generally present the actions of migrants in a xenophobic light, denoting their undesirability with scarce reference to contextualize their circumstances. Such practices tend to obscure the principles and conditions that govern penal control systems and the analysis and interpretation of non-conforming social actions. Thus, the rationality of legal formalism is commonly used in the sphere of law, particularly in the civil law tradition, to avoid transcending legal reasoning (the application of norms to fact) and to evade discussions about subjacent policy considerations (Gordon 1984, Goodrich and Carlson 1998).

2.3. *Reduces the universe of social actions to prescribed mandates*

Deviance tends to focus narrowly on the link between a norm or prescribed behavior and the deviant action, overlooking how the deviant subject is related to whoever sets the normative standard. It also excludes the specific or diffuse claims of third parties affected by the alleged deviant action, who may eventually be recognized as victims or offended parties in a penal proceeding. In fact, third parties are defined as such because the State, or whoever claims the prerogative to mediate and rule on the litigation or discord, are excluded from the altercation. The shortcoming of leaving out other individuals and broader social groups that may have a stake in the matter responds to a fundamental premise of the theory of deviance, which is the pretense that behavior guidelines or rules presumably embody and represent all other members of society. This is a main flaw affecting the notion's very limited capacity to understand the phenomena it purports to observe and describe.

The deviant / conformist dichotomy, as black and white opposites, does not correspond to the complexity of social reality. This shortcoming is evident when examining, for

example, the divergence of the powerful. In this sense, Yakov Gilinsky (2006) examines corruption in Russia after the fall of the Soviet Union making use of the notion of deviance. Though Gilinsky acknowledges that the new ruling elite and the new rich running the country act in a deeply corrupt way, he overlooks this behavior and states that these elites are not infringing legal statutes, but instead, legislating and applying them in their best interest. This false dichotomy generates multiple problems. The idea of deviation has been crucial in the definition of crime and the justification of punishment. Yet in contemporary society it is meaningless, as differentiating whatever is *normal* from what is not, is based on a very simplistic view that denies the complexity of contemporary society and leads to reconsidering the relationship between crime and society (Lianos and Douglas 2000). Indeed, studies concerning legal awareness have established that in different contexts people do not know or use the law as it was intended (Cowan 2004). This leads to a quagmire since the idea of deviance is based on an unequivocal understanding of prescribed expectations.

2.4. *Neither majoritarian nor coherent*

Moreover, it is questionable to suggest that normative standards or expectations prescribed by those facing deviant action effectively constitute the expression of a majoritarian representation of *normality*. The premise that the adherence to norms or prescribed behaviors is generally and coherently observed in mainstream social life is also debatable (e.g., Wortley 2011, Palmer and Humphrey 2013). On the contrary, it is necessary to acknowledge the fact that non-prescribed actions constitute an important trend observed in social life. Indeed, self-report studies about engagement in reckless or criminal behavior show that individuals during their life course reliably inform of undetected behaviors of this kind, which generally tend to diminish with age (Thornberry and Krohn 2000). Thus, the validity of the assessment of conformist actions as *normal* cannot be merely based on the content of formal administrative records, nor is it legitimate to label as anomalous actions that take place in daily social transactions or that express alternative beliefs that do not conform to certain values or prescribed behaviors (e.g., Humphrey and Schmallegger 2012). The deviance *versus* conformity dichotomy presupposes that conformists consistently follow institutionalized patterns of behavior and unexceptionally act in congruent fashion, while in contrast, deviants only sparingly adhere to patterns of behavior and values espoused by the establishment, a premise that is not necessarily in line with how social life generally occurs. Thus, it is not compelling to visualize conformists and deviants as homogeneous and separate crowds. Individuals alternatively act as conformists and deviants, behaving in accordance to prescribed mandates throughout most of their lives and, at times, in varying degree and magnitude, do so in a *deviant* manner. Hence, the dichotomized classification applied to the framework of social deviance is conceptually flawed.

2.5. *Fades competing interests*

Deviance theory hypothesizes ideal behaviors and highlights the inconsistencies between social actions and prescribed norms. In this framework, the interests, beliefs, conceptions or values that encourage the actor to act in a *deviant* fashion, and his adversaries to resist and oppose these actions, are completely obscured even though these are the drivers that underlie their true intentions. The struggles to achieve or

impose one's interests and ideologies, which are the essential core of social conflict that trigger the intervention of social control systems, are overlooked and masked. This overshadows the fact that the intervention of the conflict by penal control institutions, rightly or wrongly, also acts with the purpose of defending certain interests and ideologies, which are embedded in the statutes enforced by them.

2.6. *A prescriptive category*

Deviance is a normative category that refers to either statutory or informal regulatory systems and is therefore prescriptive. In this context, it may be appropriately applied to assess a social reality in evaluative and subjective terms, but not to describe it as an empirical entity (Fukushima 2015, Pera 2017). Thus, in the framework of deviance theory there is no difference between the notions of *deviance* and *crime*. Both are normative concepts, though the notion of deviance is the broader category encompassing both statutory penal and other types of offenses (e.g., Akers and Jensen 2006, Inderbitzin *et al.* 2013, Best 2014, Young *et al.* 2014). Conceived as a prescriptive category, the notion of deviance cannot be validly applied to describe empirical social phenomena, as it neglects the distinction between two separate and dissimilar spheres, as is the case of the subjective world of value judgments, on one hand, and the objective world of social reality, on the other.

2.7. *A pejorative and stigmatizing term*

Moreover, the term deviance has several pejorative connotations indicative of defective or abnormal behavior, generally in bogus association to social pathologies (e.g., Ogien 1999, Rafalovich 2001, Best 2014, Aftab and Rashed 2021), that lend themselves to label deviant actions and their agents as essentially reprehensible. In the field of medicine, in which the expression has been long used in a negative sense, it designates deformities or physical defects. Thus, the stigmatizing undertone stemming from this terminology adds extra harmful attributes to the individual that engages in criminal behavior (Bader and Baker 2019), distorting the nature of social actions that are of penal interest, which as a rule are not related to any pathological origin. On the contrary, behavior and social action controlled by penal proceedings are normal social phenomena that result from conflicting social interactions. Thus, the use of the term “divergence” is preferable, instead, as it is free of value laden labels.

2.8. *Promotes social segregation and infracumanization*

It must be underscored that social analysis and its conclusions are of a different nature and have implications that are distinct from legal analysis and its consequences. Accordingly, sociological categories cannot be misinterpreted as equivalent to legal terms, nor can the latter serve as direct references of the former, incorrectly substituting reality. Based on this clarity, the dyad constituted by the social deviant and its opposite, the conformist, introduces into sociological analysis the notion of segregation, in the sense of a wall simplistically erected on distinctive subjective classifications according to legal norms improperly considered as valid references.

In this fashion, social segregation may lead to classify the deviant as *infracuman* or *subhuman*, a status in which deviants retain their human condition, but are reduced to a

lower rank by belief models that break down humankind into social categories based on the essentialist premise that people or events possess fixed qualities that define them (Leyens *et al.* 2007). The definition of an individual as deviant is a negatively charged moral judgment. Moral exclusion is a form of *infrahumanization*. This is the outcome of socially excluding actors from the protection of legal system and its rules, leaving them in the position as null subjects, expendable or deserving of punishment, so that inflicting harm on them seems necessary and just (Opatow 1990). Ensuring that a subject is judged not by his or her actions or situational contingencies, but by the way in which he or she is defined is in the legal context a step in the direction of instituting models of attribution of responsibility and guilt (Yelderman *et al.* 2021, Flick and Schweitzer 2021). On the contrary, acknowledging individual differences and circumstances is an indispensable condition to warrant comprehensive protection of human rights (Castillo Dussán *et al.* 2022), as well as to rethink the relationship between conflict and law (Quiñones Páez and León 2023), and to develop theoretical models that respond to the singular traits of specific social realities (Silva-García and Pérez-Salazar 2021).

2.9. *Pervasive use of the term and search for alternatives*

Despite the arguments advanced here concerning the theoretical shortcomings of the notion of deviance, *What is Criminality*, a widely used book edited by Oxford's Faculty of Law professors Mary Bosworth and Carolyn Hoyle (2011), which also includes contributions from several prestigious Anglophone criminologists, is a representative example of its continued and widespread use in contemporary criminology. This book offers different derivations of the concept (deviant, deviation, deviance) in at least 51 occasions.

The inadequacy of the term deviance has been subject to successive critiques recorded in criminological theory. Generally, criticism disapproves of the term *deviance* itself and conveys dissatisfaction with collateral meanings implied in its use, labelling it as "dark" due to its ambiguous meanings (Sagarin and Kelly 1987). However, criticisms have failed to replace the concept with any alternative notion endowed with enhanced interpretive and analytical attributes (e.g., Lofland 1969, Liazos 1972). After numerous critical appraisals in this sense (Silva-García 2000), more recently, the concept's normative nature as well as its relativity have been questioned (e.g., Curra 2014), but no better alternative has been proposed. Therefore, the term continues to be pervasive even within contemporary trends and critical criminology, as if it were simply a word whose scope and meaning were nuanced by mere reference to complementary concerns.

Worthy of mention are some exceptions that distance themselves from this general tendency. One of them is the abolitionist perspective, in the ostensible critical criminology tradition, which describes crime by means of expressions such as "conflict", "deplorable act", "undesirable behavior" (Kostenwein 2023), among others. However, the use of the term deviance is not entirely absent in this approach, as its major focus is on replacing the notion of crime (e.g., Hulsman and de Celis 1982). Yet, the proposed alternative terms, which mainly concern the consequence (e.g., "conflict") or the subjective valuation of certain behaviors (e.g., "unfortunate", "undesirable", "annoying"), poorly describe the characteristics of the social action labeled as criminal, and often disregard the underlying relationships between the parties engaged in situations of interest for crime control systems.

Another subsequent effort is the work of the British criminologist Colin Sumner (1994), who favored adopting the term *ensorship* or *censored behavior* in lieu of deviant conduct. Yet, consistent with his position that the field of criminology must be reduced to the study of crime control, Sumner declines to define or characterize social actions rated as unlawful. Censorship of an unfit behavior is not the intrinsic trait of deviant or criminal actions, as defined in sociology and criminology. Censoring is a verb or an action by which social control is wielded regarding certain situations and parties, thus being a consequence or a property attributable to social control itself.

Vincenzo Tomeo (1979) approached the crux of the matter in his critical review of the term *deviance*, which he proposes to replace by the word *conflict*. Though conflict is a key aspect of divergence, it is only one of its multiple components and in rigor constitutes a manifestation or effect of divergence.

Another stab at finding a suitable concept was proposed by Morris Ghezzi (1987), who introduced the notion of *marginality* to explain the likelihood of a social action being defined as criminal. In his approach, individuals inappropriately labeled as deviants in fact find themselves in marginalized condition. Ghezzi's contribution helps understand the process of crime control, particularly regarding the role of *power agencies* in this context, and sheds light on the relationships between parties engaged in divergent actions and the reaction of crime control systems. However, this proposal is not entirely suitable to describe social action branded as criminal. Recognizing this shortcoming Ghezzi (2001), has since adhered to the notion of divergence and contributed to its development alongside with other Italian authors such as Cirus Rinaldi (2009), who in addition to furthering the critical review of deviance, renders a detailed exposition of the process of social construction that gave origin to and continuously reinforces the popular use of deviance in sociology.

2.10. Not a semantics issue

Indeed, as suggested at the outset, the issue under consideration is not merely a matter of semantics. Terms have ideological connotations that purposefully serve the construction of a given social reality (Mayr and Machin 2012). As noted by Stanley Cohen (1985), words are a true source of power and as such justify policy changes, aiding to deflect criticism aimed at political systems. Besides, the discussion is not about a word. Its focus is on a basic concept which has deep implications for the interpretation of the phenomena concerning criminal offenses and crime control. As French author Philippe Robert (1992) has rightly pointed, an established definition of crime is an essential starting point for theoretical development and sound empirical work in the field of criminology. He admits his dissatisfaction with his own definition and the weakness of the scientific validity of his theoretical construction. Barak and Henry (1998) also subscribe to the need for a better understanding of crime as an essential condition to successfully control it. The concept of divergence is introduced here in response to the need for a category that adequately describes the nature of behavior classified as criminal, enabling the unbiased analysis of the distinct traits pertaining to parties engaged in divergent action, as well as the features of crime control reaction against actions defined as criminal.

2.11. *A useful revision of the term*

The above discussion reveals the inadequacy of the term social deviance and the limitations inherent in many of the proposals made to supplement it. Yet despite all these limitations, it must be said that the expression is not useless, nor should it be entirely banished from sociology. It may usefully be revamped to refer to those social constructions of crime based on stigmatized social misrepresentations or prejudices that are scantily supported by empirical data and are based on figments or subjective and value-laden definitions and judgments. It suitably describes assorted prescriptive versions (based on decisions and value judgments) attempting to explain social actions reputed as criminal, supposedly based on objective theories that merely simulate a valid description of social reality. Furthermore, the term social deviance may appropriately be used to refer to a manner of perceiving crime or any action contrary to some normative system based on the implicit parameters and acquirements presently associated with the notion of deviance.

In sum, the revised use of a social deviance concept may helpfully provide an expression to refer to theories that favor the understanding of behavior contrary to normative orders under the following premises: 1. The analysis is centered on the non-conformity of the behavior with normative standards, allowing no consideration for conflicts of interest or of ideological positions; 2. The transgressed norm is considered valid and legitimate; 3. The behavior under exam confronts the deviant with the State or whoever stands on behalf of the infringed norm but excludes other parties that embody their own distinct interests and ideologies; 4. Individuals consistently act either as conformist or deviant agents, but not both; 5. In society, the majority is conformist and deviants are a minority; 6. Deviance is a social anomaly; 7. Deviance is observable, though some claim it is a prescriptive term; 8. Perversion, deficient conditions or social anomalies are to some extent traits shared by deviant parties (Silva-García 2000, 2022, Rinaldi 2009, Silva-García *et al.* 2022).

3. The notion of divergence

3.1. *Elements of divergence theory*

In geometry, divergence measures the separation between two lines that have a common origin. In the context of sociological analysis, the origin is the setting in which social interactions initiate, which we will refer as the *meeting point*. Behaviors and social actions that follow interdependent and yet dissimilar paths are represented by *lines of social action* that split apart, generating an observable *separation field* that entails areas of disagreement and contradiction. Separation fields contain elements such as interests, attitudes and ideologies and are enclosed by disparate lines of social action which may manifest social conflict. *Diversity* emerges in the exchange of reasons and motivations that take place in the separation field generated as parties meet and interact with their individual traits and contextual conditions.

Divergence conveys both diversity and dissent. It expresses diversity of ideas, beliefs, conceptions, values, attitudes, and interests, all leading to dissimilar expectations or actions. It also refers to motivations that denote and maintain diversity, mainly those concerning meaningful actions in social life. Diversity is an essential trait of divergence.

It is the outcome of distinct behaviors and motivations represented by dissenting lines of social action. Diversity is an emergent property of the separation field, and interests, ideologies and attitudes located in this field are its essential substrate. Diversity is embedded in divergence and is its object of study.

Based on the preceding elements it is possible to establish the sociological notion of divergence. Overall, the concept of social divergence refers to a dynamic process of interaction between lines of social action that maintain a dialectic relationship and generate a separation field enfolding differences in interests, attitudes, and ideologies between parties. It is applicable to incongruous situations that emerge and may potentially derive in contentious confrontations fueled by divorced motivations and forms of action. Though the diverging lines of action generally display similar properties, they are set apart by the primacy of one of them, while the other is liable to be classified as unlawful by the penal system. This outcome supposes the intervention of a crime control system that selects and prescriptively labels one of the contending lines of action and its agent party as criminal.

Divergence is sometimes the expression of collective action and often the consequence of varying degrees of informality as actions taken by individuals generally involve or affect groups in tangent ways. Diverse social groups that continuously integrate and reintegrate around certain interests and goals or to impose their values and views on other groups. Ideologies provide group identity and legitimacy for shared interests; disputes over interests and ideologies lead to divergence.

Fittingly, the concept of social divergence contains the following elements. First, it involves a setting for the interaction. Parties arrive at this setting endowed with several conditions: personal; social; those pertaining to their specific situation; and those ascribable to the context. Personality, ideology, and individual identity are main aspects to be considered regarding personal conditions. Social conditions include the power and prestige that provides parties with status, as well as a distinctive social identity. Parties interact in specific social situations and the general context consists of historical and social structural components, as well as concomitant elements such as culture, law, and economics, among others. These conditions influence the nature of the interactions and socially significant exchanges between parties and shape the evolution of the multiple courses of action that subsequently emerge.

Second, as lines of social action unfold, social interactions develop in continuous exchanges that are connected, dynamic and interdependent. Initial conditions surrounding the social interaction and attitudes assumed by each party characterize the process. Conditions framing the interaction are subject to change, though personal and context conditions are seldom affected by sudden or broad change, which underscores the fact that interactions tend to respond to social and historical circumstances.

Third, though lines of action differ, they are reciprocal. They are shaped by those motivations and conditions that originally engage the agents in their relationship. As a result of their performance, lines of action produce specific types of social behavior, both active or passive, which intentionally affect or influence other parties (Weber 1921/1968). Lines of action evolve in interactive processes that involve social roles and socially prescribed patterns of behavior and attitudes, which stem from institutions internalized in the socialization process. Social interactions also contribute to role innovation, which

in the case of divergent situations may be a frequent event. Social roles are set according to several factors. Among them, the specific situation of the interaction, the acknowledged status of each party (including their beliefs about what others expect of them in their current status), and the importance that each party ascribes to their means or ends. Furthermore, parties often act or interpret situations according to typologies or well-established repertoires they have learned or perceived as successful in similar situations (Schütz 1962).

The *separation field* is the area enclosed between the diverging lines of action. It encompasses the dissenting interests and ideological differences that drive parties to disparate positions. Diverging parties interact in common separation fields that frame their relationships. In absence of convergent interests, attitudes, values or beliefs, contradiction is the main characteristic of the separation field.

Concerning the parties at odds, the divorcing directions that each line of social action follows, and the resulting field of separation are in dialectic relationship, simultaneously contradictory and interdependent. Once differences separate parties, contradiction becomes visible as a result of the contest between rival interests and ideologies (hence their interdependence). In sum, the grounds of contention underlying their differences are common to both parties, which is why divergence reciprocally engages opposing parties as well as their actions.

The eventual outcome of a conflict, the lifespan of its respective separation field as well as the influence of social roles on how the lines of social action unfold, all depend to a large extent on the amount of power available to those engaged in a divergent relationship. Power is unequally distributed in society and depends on access to multiple factors from which it emanates.

Differences in *views*, attitudes and ideologies become visible as separation fields emerge. These potentially endanger or damage the individual or collective interests of one or more of the parties engaged in divergent relationships and may lead to social conflict, which is an important component of the notion of divergence. In many cases social conflicts entail intervention by the penal justice system. When a party is labelled as a likely criminal or their actions are typified as illicit conducts according to penal law, criminalization is easily installed.

Lines of action do not necessarily diverge. They also converge in the presence of common identity of interests, ideas, values, beliefs, conceptions, and attitudes, even despite differences concerning some aspects. Parties may prefer to bow and follow convergent lines of action influenced by aspects such as lack of power, opportunity costs, the prospect of a future negotiation, or the prevalence of other interests that advise avoiding the risk of a penal reaction, among others. In such cases, active behaviors that might negatively affect others are avoided, and dissent is simply consciously registered with no divergent effect. Yet when the preceding does not prevail, diversity characteristically emerges. Diversity is the main object of study in the inquiry of divergence.

3.2. Divergence in penal control systems

Additionally, interventions by the penal system often reproach one of the engaged lines of social action and its agent party, thus leading to the legal definition of its criminal

status and the application of a punitive sanction to settle the controversy. However, to be admissible such an intervention will require the presence of relevant legal and political powers. This will only occur when the scale of the conflict is relevant in terms previously established by the penal control system. It also entails that interpretation concerning the matter are congruent with significant contributions made in the evolution of social, historical and legal thought. Thus, divergent actions that are labeled as criminal acquire a different status that set them apart from other types of social divergence.

Social conflict often sets off alarms that activate punitive intervention. Divergence linked to the use of violence is highly visible and thus attracts the involvement of penal control agencies. Intervention may also occur in response to complaints before the penal justice system by one of the parties engaged in a divergent relationship, to array the conflict in the form of a situation that merits penal sanction. In any case, the mediation of a communication pattern is essential to produce penal intervention, be it an alarm triggered by violent conflict or a complaint demanding intervention. This pattern of communication connects the divergent situation and the penal control system. In this context, language is an essential device that works in both directions. Once the intervention is activated or called for (from the divergent situation to the penal control system), penal agencies will conduct their activity interpreting the behavior in question to assess it either as lawful or unlawful, concluding with a decision about the status of the divergent parties (feedback from the control system to the divergent situation).

Generally, penal control systems do not intervene in most divergent situations. Excluding those cases in which one of the parties engaged in the conflict is inhibited to demand penal intervention for reasons such as lack of power or resolve to do so, there are several circumstances that affect the ability of crime control systems to intervene. Penal systems are selective, which means that according to criteria formally established to initiate their intervention, they often abstain from doing so. Additionally, in many cases divergent situations are not communicated or information about them is insufficient to support initiating an intervention. In this absence, the conflict may unfold and eventually lead to an outcome unforeseen by the law and the penal justice system, including increase in power of one of the parties engaged in the divergent situation. In democratic societies under the rule of law, the purpose of penal action is to guide social conflict towards a regulated setting in which disputes are settled in rational and peaceful fashion, thus warranting the value of justice. A major concern is the protection of parties in vulnerable condition and lacking sufficient power to resist their opponents outside the span of control of penal justice.

The nature of interventions by penal control systems depends both on the form adopted by the state and the structure of the administration of justice, as well on the specific traits of the respective legal system, and of penal proceedings. How the law and facts related to a given case are interpreted is highly relevant, as the ideological preferences of legal operators usually have a definite impact on the outcome of the process (Goodrich and Carlson 1998).

When penal interventions conclude with a statement of responsibility, one of the lines of social action and their agents are branded as criminal. As the essential properties of social actions are broadly equivalent, the selectivity of the process is evidently based on

political, social, ethical, economic and cultural criteria. Therefore, the situation of the party whose performance is declared lawful, will generally run parallel to the fate of their adversary but in the opposite sense. In other words, the penal intervention legalizes the favored line of action, and its plaintiff is recognized as a victim or entitled to reparation.

However, the penal system is not automatically or instantly inclined to favor any one side in a divergent situation. The matter may be confusing, or controversial, and defensive or evasive mechanisms are available to forestall the attribution of penal liability. Once again, access to power is highly relevant and can be used alternatively to call for penal intervention or to avoid it, as reflected in the case of marginality presented by Morris Ghezzi (2001). Moreover, as has been noted, the ideology of the legal operators also has a significant impact on the outcome of penal interventions.

A party accused in a penal proceeding may be innocent and yet divergence and conflict may persist. Consider a party who has not unlawfully engaged in a social action as the terms of accusation suggest. Still, differences in beliefs and attitudes regarding the facts produce dissenting lines of social action, a separation field, a discrepant situation and possibly a social conflict with unpredictable consequences. Likewise, a divergent situation may also be the consequence of a penal decision based on a mistaken interpretation of an event; subsequently diverging interests or values come into conflict and separation fields emerge, etc. As illustrated above, the concept of social divergence is well endowed to unambiguously describe and analyze this type of situations, confirming it as a relevant category both in the field of sociology of law and general sociology.

Though the verification of divergent situations that erupt into conflict may not be far-flung, it is not compelling for the State or the law in any of its branches to process each and every event of this nature. Social conflict deriving from divergent situations is frequently dealt with by parallel or informal means. Excluding cases in which motivating factors fade away, divergence and conflict are alternatively dealt with, beyond the penal justice system, through negotiation, by eliminating rival parties or by subordination and absorption of one by another.

Though endowed with broad judicial discretion, the purpose of penal control systems is to rule within the provisions of law on the forms of diversity considered acceptable or even desirable for the enrichment of social life. Admission of diversity has been subject to far-reaching changes and variations throughout history, revealing the importance of its impact on penal law. Thus, to a large extent, the future of penal law lies in the exploration of diversity in the realm of divergence.

Conceptually, the term divergence acknowledges that in the face of any given value or interest, social life unmistakably brings its opposite along; thus, conditions for conflict are permanently and normally recreated. The notion of deviance suggests, otherwise, that conflict is something abnormal and exceptional in society. Yet, social conflict is a central element of divergence and is a characteristic trait of social life (Vold 1967).

3.3. Main differences between deviation and divergence

The use of the concept of deviance in penal law proves incongruent. Consider the case of a false accusation concerning an act that has purportedly infringed statutory law and eventually ends in a conviction. Is the individual deviant or not? The label may be both valid and refutable. This constitutes a logical contradiction as two opposite categorical propositions cannot be attributed to a single entity (Garrett 2020). For reasons presented in this article, this contradiction does not occur when using divergence as a theoretical category. Given that the final ruling on the respective penal status is the outcome of a prescriptive process, the divergent party will retain this condition whether declared guilty or not guilty.

The concept of divergence does not require, *a priori*, that prescribed penal statutory law constitutes the unquestionable representation of a normative standard, a central tenet underlying the notion of deviance (e.g., Barak 2003). Instead, it is applicable to either criminalized or lawful behavior, the latter being divergent in regard to the former. This property endows the concept with the ability to describe dialectic relationships. Thus, it acknowledges the presence of disparate interests that often become controversial, which penal justice systems settle by adjudicating primacy to one side of the competing interests, in accordance with penal proceedings.

Furthermore, divergence as a theoretical approach encloses significant potential for critical thought. The concept of divergence openly displays the political nature of penal control. When statutory reform decriminalizes a behavior formerly valued as unlawful, it is logically awkward to accept that what was previously assessed as deviant, incorrectly or not, is now abruptly accepted as correct. Such situations are only plausible if one agrees with the premise that behavior classified as criminal is the outcome of a political decision, and with the corollary that crime is not a descriptive but a prescriptive category. The political origin of legal classifications becomes manifest in the face of conflicting interests or prescribed behaviors that are at loggerheads and neither can *per se* be classified as good or right; both are simply divergent. In this event, decriminalization of a given behavior does not dissolve the divergent relationship in which it is engaged and remains active. It simply removes the penal intervention previously established to settle this type of situation.

The opposite of divergent is *convergent*, which constitutes an additional theoretical advantage. In designating the will to behave according to normative standards or prescribed expectations, non-deviant behavior expresses tameness; yet it does not inform about the motivations behind compliance. In contrast, the term *convergence* accurately signals properties that characterize this variety of social interactions, such as ideological affinity or the willingness to subordinate certain interests to other concerns, which motivate engagement among parties.

Moreover, when *deviant* behavior is favorable to social change and, perhaps, opposed to unjust social or legal norms, the conceptual weakness of *deviance* as a descriptive and analytical category becomes manifest (Wolf and Zuckerman 2012). Its usefulness for the analysis of contemporary social conflicts is questionable, especially concerning victims of severe harm inflicted by discriminatory policies that label them as *rule transgressors*. These conceptual limitations are discernible when the notion of deviant is applied to refer to victims of sexual trafficking (Veldhuizen-Ochodničanová and Jeglic 2021), as

well as migrant groups engaged in asylum-seeking processes (Flynn 2016, Silverman and Lewis 2017, Navas-Camargo and Montoya 2018, Browning *et al.* 2021). The same happens when it is used to label individuals who are profiled and criminalized based on their ethnic group membership (Lacey *et al.* 2018); or to Indigenous peoples that have been marginalized by colonial practices and legal systems (Cunneen and Tauri 2019, Restrepo-Rhodes 2020, Vivas-Barrera *et al.* 2023), among others.

Nor is the notion of deviance helpful to analyze State power abuses, as in the case of judicial procedures established in Soviet modelled legal systems designed to skirt due-process protections by defining misdemeanors as administrative offenses (Bui 2020), or to justify the deadly outcomes of policing cultures that operate under the guidelines of *danger imperative* doctrines (Sierra-Arévalo 2020). The descriptive shortcomings of the concept of *deviance* are also evident in contexts troubled with corruption issues, as in cases concerning tax avoidance, tax evasion and drawing the line between legal and illicit behaviors in this matter (Machan 2010); or payments to public officials made to ensure desired outcomes, or the use of political patronage practices to influence electoral outcomes (Campbell 2020); or taking cover under legal immunities by government officials to dodge international penal accountability (Hillebrecht 2020).

The concept of *divergence* has no trouble to address any of these concerns. It acknowledges that the *criminal* label is not applicable to any action or agent *per se* because such a qualification is never an ontological property. Instead, this attribute is the outcome of established formal criminalization procedures derived from acts of political will (Becker 1963). *Divergence*, by contrast, is the implied property of any event of interest for the penal justice system; as such, it is always and everywhere present in controversial interactions and allows for crisp descriptions and analyses of complex social conflicts, even when the agents or actions in question have not been criminalized or have ceased to be so.

Furthermore, the selectivity of crime control proceedings as noted by classic authors such as Frank Tannenbaum (1938) and Howard S. Becker (1963), is only fully understood once coupled with the concept of divergence. Two lines of social action that create conflict are divergent; thus, in principle both share some common properties. The main difference between them is the consequence of selective decision making by the punitive system which, based on political, economic, social, cultural, and ethical considerations, endorses one line of social action and condemns the other. This does not hold in the case of deviance, which is conceptually unfit to deal with the notion of penal selectivity. As deviance is *wrong* and conformism represents *normality*, warranting this allegedly empirical reality automatically translates into criminalizing deviant behavior and protecting conformism, overlooking the influence of the political considerations that in effect gauge the penal system's response. In brief, the deviance paradigm allows no consideration for the possibility that the penal justice system may intervene in favor of certain interests and in detriment of others. If deviant behavior is an expression of non-normality, it is only natural for the penal control reaction to repress this type of behavior. Consequently, discussions regarding interests vanish from the realm of crime control. By contrast, in the domain of divergence, the question of interests is explicitly set forth.

While the notion of deviation is founded on the premise that norms serve as infallible references to qualify a given behavior, the category of divergence does not as it is

descriptive and void of value judgments. In deviance theory, the central question of the interests and ideologies of social groups that are defined as *deviant* or *conformist* is made invisible. On the other hand, in the theory of divergence these aspects play a major role in the comprehensive analyses of conflict. The false dichotomy of deviant vs. conformist is replaced by acknowledging that during the course of their lives individuals sometimes act convergently and at other times divergently, reflecting the complexity of social reality, their choices and situational particularities. In adopting correct or incorrect as a scale or measure of qualification, the definition of deviation is burdened with the defects, inconsistencies and controversies inherent in normative statutes. In contrast, divergence dismisses this premise outright, insofar as it acknowledges conflicts as disputes concerning interests and ideologies rather than normative assessments. The notion of deviance is poorly endowed to invigorate legal reform since it is based on normative statements and not their critical assessment. By focusing on the study of the conflict of interests and ideologies, regardless of normative weightings, the concept of social divergence is more suitable to assess the need for such reforms. In deviance theory, conformists and deviants are mistakenly described as distinct and homogeneous groups. By contrast, divergence describes subjects involved in conflict as divergent and, more generally, as alternately divergent and convergent according to the situation.

Deviance is prescriptive in nature and is therefore the result of a value-laden decision, with which one can agree or disagree, but lacks any form of empirical representation. Divergence, on the other hand, represents social actions embedded in social practices, and therefore is empirically grounded. Consequently, deviance is bound to pejorative and stigmatizing connotations, while the term divergence is free of any attribution of defective or abnormal state to parties engaged in conflict. Finally, the notion of deviance excludes the possibility of evaluative and normative pluralism (Rinaldi 2009), which the category of divergence enables with its pluralistic and inclusive perspective of conflicts. Thus, from this outlook actors involved in just and reasonable actions, such as political resistance and opposition to a tyranny, are not disqualified because their actions are contrary to current statutory norms, since divergence theory abstains from introducing value judgment to describe this or any other specific conflicting circumstance.

4. Conclusions

The labelling theory criticizes in an accurate and forceful way the interpretation of social conflicts as conveyed by the notion of social deviance. According to the labelling theory, deviance is primarily a subjective definition that does not intend to describe reality, but rather to discursively declare a “reality” by assigning an identity or status to whoever is rendered as deviant (Becker 1963). In other words, it is a social construction, brimming with subjective value judgments.

In concluding this article, we believe it is essential to discuss a special use of the notion of deviance as defined in the previous paragraph, which has not yet been dealt with up to now. After the labelling theory’s criticism revealed the notion of social deviance as an evaluative and subjective construction of social conflicts, this category has nevertheless continued to be used. Attempts to renovate it so it would no longer be what labelling theory refuted, tacitly acknowledge that after Howard S. Becker it should be understood in a neutral and relativized fashion when associated with contexts of conflict. Thus, the dismissal by many criminologists and legal sociologists of the distinction between

deviance and divergence as largely semantic. It is our contention that, on the contrary, the notion of social deviance must continue to be used to refer to those criminological theories that, before and after the labelling theory, continue to build subjective, evaluative and socially constructed interpretations of social conflict (Rinaldi 2009). It belongs to what can be suitably named a *sociology of deviance*.

Additionally, there are other compelling reasons for not allowing the use of the neutral and relativized notion of deviance. By stripping the concept of the elements that motivated the labelling theory's criticism, it becomes a meaningless, hollow term. Secondly, it entails the practical problem of easily differentiating between those who continue to use the category in its neutral or revised meaning, and those who use it in the conventional sense that was refuted by the labelling theory. This article reviews numerous academic works that persist in using the value-laden subjective meaning of deviance. Moreover, recognizing the validity of the critical perspective of the labelling criminological analysis does not preclude the need for a descriptive, objective and comprehensive category to investigate social conflict. This is where the theory of social divergence is useful. In our view, critical criminology mistakenly assumed that as a consequence of the labelling theory's demonstration, all that was necessary was to engage in debating penal social control, overlooking the fact that prior to labelling there are social actions that produce conflicts. Therefore, it is necessary to develop tools to study and analyze those social actions.

The limitations and shortcomings of conceptual categories will never be surmounted by definitions that denaturalize their content. An action regarded as contrary to a legal norm is prescriptively portrayed as deviant. Therefore, this same category cannot be used to describe and analyze the meaning of that action in a conflictual context. This is a fundamental difference between deviance and divergence, which surmounts any semantic nuance. Divergence is not only a category. It is a theory that introduces several additional elements (meeting point, lines of social action, field of separation, social conflict, diversity) that are absent in the theoretical definition of deviance, and that are useful to analyze, differentiate, classify and understand social actions in conflictual contexts. Finally, conformity, the category that expresses a relation of order opposite to deviance, does not admit as its contrary a neutral and value-free category. It is logically inconsistent. In contrast, the opposite category of relation of order regarding divergence is convergence.

Having said this, we can leave aside the revised version of social deviance and continue to consider some additional conclusions concerning its original definition. In this respect, we have attempted to sufficiently prove that the category of *social divergence* is more suitable to describe and interpret those social actions that may be of interest for penal justice control systems. Its significance and its differences with respect to the category of social deviance were tested in depth in the course of this discussion. Both in a negative sense regarding the shortcomings of the category of social deviance, as well as in a positive sense that highlights the descriptive potential of the category of social divergence. Moreover, it stresses the advantages that the notion of *social convergence* brings with it in contrast with the politically convenient but socially inoperative category of *conformity*.

A key issue in distinguishing these categories is that divergence is descriptive, while deviance is prescriptive. Indeed, a persistent source of confusion in present day criminology is the unwavering and often successful resolve to infiltrate sociological theory with the notion that holds social deviances as a descriptive tool. Descriptive and prescriptive are closely related but distinct dimensions of social life. These dimensions mutually influence each other: whatever happens in one of them affects the other, and vice versa. Therefore, if it is admissible to integrate levels of analysis of microsociology that deal with social action, on one hand, and of macrosociology that deal with social structures, on the other, accordingly it is also plausible to advance an analogous integration between socially divergent actions and penal control structures. As explained above, the introduction of the concept of social divergence allows for this integration, an accomplishment that transcends the scope of the notion of social deviance. Given its prescriptive nature, deviance overlooks social actions as a dimension, and only deals with the social structure in the form of penal control intervention. Obviously, integration of action and structure occurs because both elements belong to different species. Integration between elements of the same species makes no sense.

The amalgamation of descriptive and the prescriptive aspects in the notion of social deviance leads to logical contradictions. When stating that somebody has been found guilty by the penal justice system and therefore deviant, as in the case of Nicola Sacco and Bartolomeo Vanzetti, deviance as a category offers a misleading description of defendants that have been wrongfully convicted and are truly innocent. The same contradiction emerges when normative definitions issued by oppressive regimes, such as the *apartheid* in colonial South Africa, declare persons like Nelson Mandela to be deviant. Tellingly, none of these inconsistencies occur when using *social divergence* to describe the social actions of parties such as Sacco, Vanzetti or Mandela, which in this framework are considered divergent as are their rivals and opponents, as well.

Yet, the most salient aspect of the category of social divergence is its acknowledgment of diversity. This is especially relevant in Latin American societies, but also in the better part of a world where societies are becoming increasingly differentiated due to ethnic, social, political and economic aspects, and in which the different out-group is discriminated against and oppressed. Diversity is an objective component of social divergence that can be empirically verified and described. Thus, it is clearly different from pluralism, which is prescriptive in nature since it informs subjective appreciations, assessments and decisions about diversity.

The adoption of social divergence as an analytical category and theory suggests a significant transformation in the object of study of criminology. This fresh bid views a proposal composed of two well interconnected components. On the one hand, a special class of social actions consistent with the definition discussed above in terms of social divergence of interest for the penal justice system. On the other hand, social control, which includes the reactions of the penal justice system provoked by this special class of social actions. The notion of divergence supposes scrapping and replacing social deviance as a major category in sociological theory, and its acceptance represents an important transformation in its content. It implies relevant changes in the substance of

legal sociology, a specialty of sociology that, among its specialties, is most concerned with studying social actions of interest for the penal justice system.

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