Abstract

Decriminalization and diversion in Iran is a new crime control mechanism. Over-criminalization affects the efficiency and effectiveness of criminal process in preventing crimes. In Iran a number of actions and behaviour have been declared as crime and punishment has been provided. Iranian criminal policy is mainly based on Islamic canon. Alternative punishment, even under Islamic canon is found in many cases depending upon certain conditions. However, the process of decriminalization specially in the field of technical and administrative criminal law may result in effective criminal justice system. In the western countries and Europe decriminalization process is applicable even in those cases which according to the Islamic canon have been declared as crime and legal punishments have been provided. In Iran there is limited scope of decriminalization of crimes for which specific legal punishments have been provided under Islamic canon. Thus there is difference in approach towards decriminalization between the western criminal policy and Iranian criminal policy. Keeping in view these facts the topic of research was selected as *"**Decriminalization in Iranian Criminal Policy: A Comparative Study with Western Criminal Justice System.*** What is Decriminalization? What are factors which regulate the criminalization and decriminalization policy? These questions require a brief discussion.

Criminal Law which some times referred to as penal law is known as a body of rules and statutes that defines behaviour or conduct prohibited by the government in order to maintain public order or to provide public

safety and welfare. It also contains punishment to be imposed for commission of such acts.

Substantive criminal law mainly deals with the definition of crime and punishment therefore, whereas criminal procedure requires the procedure to be adopted for the enforcement of criminal laws. Such procedure set out rules and regulations that administer the process of investigating, incriminating and trying the accused of a crime.

An act could not be treated as crime unless it is prohibited by law made by the legislature or declared to be crime by judicial pronouncement. The process by which certain behaviour may be transformed into crime through legislation or judicial decisions is known as criminalization. The reverse process is known as decriminalization. Decriminalization is the abolition of criminal penalties. An act is decriminalized when the society takes the view that the act is no longer harmful. Thus decriminalization reflects the changing social views and moral values.

The penal laws also speak about the characteristics of each crime with regard to the essential conditions and the legal punishment of each of them separately.

From the historical point of view, it is observed that the legislated penal laws tried to regain its position and find a rather complete rules after a series of constant decay and disorder finally in 18 and 19 centuries and in particular after the first charter of human rights in the French revolution.

On the other hand, after independence of the America, in 1776, the penal laws of Common Law of England were adapted to the extent that

it was not in conflict with the Federal Constitutions laws of the newly established states. Mr. William Black Stone, a Professor at the University of Oxford developed the legal principles of “Common Law” and his commentary became a kind of referential legal book. Then the penal law of the New United States was formed for the fifty states as modern penal rule.

It is worth mentioning that in the books on Islamic jurisprudence, we do not find clearly general penal issues, but in a scattered way, there are some references in the commentaries and description of penal books and other jurisprudential resources and books. This demands a lofty endeavor to collect the general issues of criminal laws of Islam from different sources here and there.

One of the important and basic subjects in criminal law is to do research and review the different corners and dimensions of criminal law of different countries in particular advanced and progressive countries which are compared and are so called "Comparative Criminal Law." Today due to correlation and interrelated global necessities of the social system and interaction at the international level, it requires elaboration by jurists and legal thinkers of criminal law and penal subjects. This will help the pillars of criminal policy, which is today in crises to be formed on the basis of humanism and to be expanded[1].

Thus, it is necessary that the researchers and thinkers of law take the following measures:

Firstly, they should review and compare the philosophical principles, foundations and concepts of great legal systems and schools of law.

Secondly, they should make a comparative study on intrinsic penal laws including general law and special penal law and their respective issues.

Learning about the legal schools of other countries and the neutral evaluation and assessment of the views of the scientists of legal schools and also reviewing the views of the legislators of penal laws out of existing views and rules, they could select those superior penal principles and regulations which are in harmony with the interest of humanity in order to provide security and establish justice.

- **Statement of the problem**

Speaking about "Decriminalization" and "the comparative study of its position, in the Iranian Criminal Policy and the Western Criminal Justice System", initially, it demands precisely to state and elaborate criminalization in the realm of the penal justice system and on the other hand, it requires having knowledge on the system of prevention, position of restorative justice, models and its theoretical frameworks. The mutual link between prevention and decriminalization and also the triple mechanisms of de-penalization, diversion and decriminalization vis-à-vis criminality [which are the theoretical frameworks of restorative justice] and in a sense can be used as alternatives for classic penal justice either in punishing form or as measure of corrective and rehabilitation.

The idea of preventing of crime has a long history and dates back to 400 B.C. In Chapter 41 of the treatise on crimes and punishments, concerning the prevention of the occurrence of crime, Cesar Bacarria (1764), the philosopher of the criminology says," Preventing of the occurrence of crimes is better than punishment".

Enrico Ferry (1856-1928) the first theoretician of non-penal preventive measures is the founder of criminal sociology. Despite the fact that he was one of the pioneers of Positivism school, but he presented the theory of social defense measures through organizing the social environment in order to prevent the crime occurrence.

The second half of the twentieth century can be considered as the beginning of the attitude towards prevention and its rebirth in the realm of criminal policy. The public prevention of the crime is usually considered as a part of the primary objectives of the execution of criminal law and penal code and its range has been divided into two sections of "penal preventive measures" and "non-penal preventive measures" and reviewed.

The preventive strategy are also divided into two classes of pervasive reactive strategy (aggressive) and specific reactive strategy (withdrawal).

The mechanism of pervasive reactive strategy is criminalization and de-penalization and diversion are the mechanisms of specific reactive strategies that each of these mechanisms along with decriminalization mechanism follows a one kind of withdrawing strategy in criminal law in different proportions. The preventive responses with the non-forcibly and non-suppressive nature and with an attitude to correct, rehabilitation and health the society are the last consequence outside the realm of criminal law.

The gravity center of the concept of prevention in criminology is the non-suppressive and non-forcibly measures.

It is said that the concepts of restorative justice have entered into the literature of criminal law since 1980's. However, despite the creditability and broad welcome extended to "restorative justice", its position is accompanied with a kind of encounter associated with prudence.

The restorative justice is a process in which all those who have a share on a specific crime come together to decide on the quality of facing the effects and results of crime and its resulting problems for the future collectively and find a solution.

This saying of Tony Marshal, the English criminologist has found a broad application in the international level today.

"Decriminalization" has a specific position and role to itself since 1990 as one of the "theoretical frameworks of restorative justice" in the criminal policy and criminal law of some countries.

Certain acts in some countries are considered as crime based on some objective justification whereas, in western countries, this objective justification is not accepted and some act is decriminalized or at all not criminal. Thus the approach to the criminal justice system is at variance at it may be based on various reasons. Keeping in view Iranian criminal policy the dissimilarity in certain areas with the western criminal justice system a comparative study of ‘decriminalization’ in the Iranian Criminal Policy and Western Criminal Justice System is the main area of research.

- **Objectives of Study:**

The objectives which are pursued in this research are:

A. A comparative study of decriminalization in the criminal policy of Iran and the western penal justice system.

B. Highlighting commonalities and differences of the criminal policies of the west and Iran.

C. Clarifying and introducing appropriate mechanisms to exercise decriminalization in the criminal policy of the west and Iran

Part Three: Scientific, historical background and the distinguishing features and innovations of the research:

- **Hypotheses of research**:

1) Inspite the fact that de-criminalization is a merit and efficient solution in the western penal law , but due to radicalism in de-criminalization in particular areas such as homosexuality, prostitution, alcohol, drugs of certain kinds and even their legalization in some western countries, has been successful. In other words, it has not only been unable to reduce public crime prevention but also has brought about many damages and has cast doubts on the scientific non-suppressing policy and decriminalization of these behaviors .

2) Prevention from the risk of over criminalization should be aimed at maintaining a balance between social changes and application of de-criminalization strategy and that to in accordance with

jurisprudential regulations and international documents in the penal law of Iran.

3) Decriminalization in the Islamic Shariah (religious laws) will be possible in certain punishments of “prescribed punishments”, blood ransom” and also in the realm of “discretionary punishments” in line with the public interest or repelling corruption from the society provided that it is not in disagreement with the direct text of religious law and general principles or spirit of its legislation .

- **Methodology:**

The present study is based on doctrinal method of research. The researcher has drawn help from Holy Quran, various books on Islamic jurisprudence, articles, various relevant reports and statutes. Despite the fact that the valuable resources and references of the Western scientists have been considered and used in this research frequently, but the main reliance has been upon the rich resources and references of the jurisprudence of Islam. Using the indigenous resources , attempts are made to reveal the greatness of the vast civilization and valuable services of the eastern lands to the sacred scene of science more than any other time which has not taken place truly yet.

Due to the necessity of drawing the model and structure of research and also to determine the strategy and doctrine of the research, it was necessary to refer to some different texts and resources of the Islamic scientists whose names have been recorded in the history of comparative law and their works have remained eternal and brilliant. Using the comparative methods adopted by these great and pioneer figures, a new

plan and style can be put forward. So, the subjects of researches and methods of scholars of Islamic law were referred to in resources such as: Book ”Tasis al Nazar” Obeid Allah ben Omar Dabousi [d. 430 A.H.], Book ”Bedayat Al mojtahed Va Nahaya Al moqtased” Mohammad ibn Ahmad Ibn Rushd [d. 595], Book ”Al Khelaf Fi Al Ahkam” Sheikh Toosi [d. 460 A.H.], Book “Al Moqni” Abdullah ibn Ahmad known as Ibn Qodamah [d. 620 A.H.], Book “Al tazkerah Al Foqaha, Al mokhtalef va Montahi al Mataleb" Allameh Helli [d. 647, A.H.], Book ”Al Mizan Al kobra” written by Mohammad ibn Abdolvahab Shaarani [d. 973 A.H.], and also from the new resources, Book “Al Fiqhe al Islami Al Moqaran” by Ahmad Mohammad Hasry, “Al fiqh Ala Al Mazaheb Al Arba” by Abdulrahman Jariri Va “Al Fiqh ala Al Mazaheb Al khamsah” by Mohammad Javad Moqniyeh, Book ”Generalities of Comparative Law” by Hassan Afshar, "Legal Schools in the Law of Islam" Mohammad Jafar Jafari Langroudi and from the resources of the orientalists and contemporary western jurists, the Book “Discussions about the relationship between Byzantium and Islam” Emilio Busi, Book ,”Civic Codes of Rom Aimos”, Book ”Courses of Civil Laws of Mazeauo”, and also Book ”An Introduction on Comparative Law of Rene David”. After a deep review of the subjects, methods and ways of reasoning in the above-mentioned resources, the “conjunction method in comparative laws” was selected and practiced.

- **Chapterization:**

The thesis entitled, *“**Decriminalization in Iranian Criminal Policy: A Comparative Study with the Western Criminal Justice System**”* comprises six chapters. It is worth mentioning that in all 6 chapters, due to the adoption of the method of “preciseness” in research, the obvious

and repetitive issues have been avoided in all subjects of the dissertations as much as possible. Efforts have been made to review the prominent and important issues in a comparative way, and it has been tried that prior to reasoning, no result to be presented.

Chapter I:

Chapter one deals with Introduction which contains the statement of problem, Limitation and motivation of research, objectives of the study, characteristics of research and further, describes about the Methodology of research.

Chapter II:

Chapter two deals with necessity of gaining knowledge about the penal system have dealt with precise expression and clarification of the criminalization in the realm of penal justice system. In addition to definition of concepts of crime, its importance in criminology has been reviewed and the limits and borders of criminalization have also been discussed. Since long time ago, more than anything else, by resorting to forcible punishment, the governments have taken measures to fight against crimes in order to maintain the public order from being exposed to the risk of disintegration and threat. But criminal statistics have unveiled the inability of penal system to achieve the desired objectives and reveals the necessity of finding mechanisms beyond this realm of penal law. “Preventive Responses” are the latest outcomes of this kind of penal idea which has a non-forcible and non-suppressive nature and have been put forward with an attitude towards correction and health building of the society and removal of crime. In this discussion, foundations, scope, strategy and mechanisms of preventive responses in

the criminal policy have been investigated. In addition, the mutual relation between prevention from criminality and decriminalization has been overtly clarified.

The social changes and alterations of public views and beliefs in particular in the western secular societies have brought about new attitudes towards the foundations of penal justice system being introduced under the title of restorative justice system. These changes and part of theoretical frameworks today have encompassed even the non-secular (religious) societies in all fields with the exception of the ethical domain and that is because of religious limitations. Describing this process and change in penal idea, also the necessity of inclination towards restorative justice and views of thinkers in this regard and introducing models in its theoretical frameworks is the subject of study.

Chapter III:

Chapter third deals with the concept of decriminalization and its process, position, necessity, objective and the importance of the decriminalization strategy, grounds and standards of decriminalization in the history of penal changes, realm and kinds of decriminalization including practical and formal (legal) decriminalization, views, visions and schools of decriminalization are the set of discussions which have been reviewed and studied in this discussion. The relationship between law and ethics and that of the decriminalization and its impact on two domains of legal morality and idea of liberalism are the subjects being discussed. In many societies, human right is considered as valuable element of social life. Guarantee of individual freedom at the stage of judicial proceeding and repulsion of the concept of dangerous status

prior to committing a crime in criminal law are some manifestations of human rights.

Form the very beginning, the UN has approved its criminal policy within the documents such as deceleration, strategic principles, recommendation, convention, and treaties which have a human rights aspect and are in the realm of fighting against crimes.

The theoretical frameworks of restorative justice in the documents since 1990 have been traced. These documents recommend and emphasize on non-suppressive measures by giving priority and specific position under the title of independent institution of “prevention of crime” along with measures of penal justice system.

Using this reasoning that “prevention is better than suppression”, in addition to obliging governments to observe individual freedoms and rights, the human rights documents make them committed to do duties and adopt policies and mechanisms by which they could also prevent crime, though it is likely that the fruit of adopting such as policy lead to “minimum results” and only to reduction of the scope and forms of criminality.

The relation between theoretical frameworks, restorative justice such as decriminalization, diversion and de-penalization with human rights approaches and mechanisms have formed the contents of this discussion.

Foundations and principles of believe in Decriminalization, reviewing the views of its pros and cons and studying the impacts and results of attitudes towards non-penal strategies are the frameworks of remarks under investigation in this discussion.

Chapter IV:

Chapter four deals with contents of criminal law of Iran is a mixture of Islamic criminal law and on the other hand is under the influence of legal system of Roman-German, in this discussion, the analysis of viewpoint of Islam towards decriminalization has inevitably been made.

While reviewing and describing the penal teachings of Islam and learning about the jurisprudential and legal views of five jurisprudential schools of thought of Islam on the realm of criminalization and religious punishments alongwith the subject of decriminalization in the criminal law of Islam has also been dealt with. Furthermore, in this chapter, the approaches which cause abatement, conversion or denial of punishment in criminal jurisprudence, [taken place through the establishment of "pardon institution" and observed in the conduct of the messenger of Allah (p.b.u.h.) and the Rightly Guided Caliphs with regard to criminal cases] by referring to the history of Islam have been independently studied.

In this discussion, decriminalization in the criminal policy of Iran has been discussed in details and initially, two general periods of customary criminal laws and background of criminalization have been discussed:

i. Periods of royal system

ii. Periods after disintegration of royal system

Then the highlights of the law of Islamic punishment, the importance and influencing factors on criminal law of Iran have also been studied. The background and present situation of decriminalization, de-penalization and diversion mechanisms in the criminal law of Iran in the

recent quarter of century along with the reasons of necessity of tendency towards mechanism of decriminalization matters of this discussion. In this discussion decriminalization in the criminal policy of India has been discussed in details.

Chapter V:

Chapter fifth deals with despite distance in the viewpoints of two different thinking trends in the movement of social defense, i.e. the view (theory) of Gramatika and the other the view (theory) of Mark Ancel, the necessity of limiting the scope of classic penal law in both views is common. The mobility which was created by the new school of social defense became a turning point for the emergence and exceptional influence against exerting penal system. And in 1970 to 1980 this movement was developed and expanded in a big way and sustained its impact strongly. The Europe and the North America have had main shares in this movement and as a result of indifference towards religion and ethics, they have fallen into extremism. In this chapter, also after making a comparative macro study of criminal policy of the west and Iran along with the review of the viewpoint of Islam, have been discussed making comparative micro study and by selecting one of the important samples of decriminalization in the west, so as to make comparative study: For this purpose, the subject of decriminalization of drugs has been selected and studied comparatively in order to clarify the dimensions of criminal policy of Iran and west. Apart from detailed briefly comparative study of decriminalization in the filed of abortion, suicide, alcohol, prostitution and homosexuality has been made highlighting mainly the western and Iranian law.

– **Conclusion and Suggestions:**

In conclusion the effects of over criminalization have been identified. It lead to creation of new attitudes towards the foundations of system of classical penal justice which has been introduced under the title of system of restorative justice. Further it has been concluded, how the mechanisms of de-penalization, diversion and decriminalization developed. The impact of failure to adopt the process of decriminalization in some criminal behaviours and petty offences has been elaborately discussed. The extent and scope of decriminalization in the Iranian policy have been discussed specially in the light of religious commandments.

Keeping in view the prevention policy as one of the characteristics of applied criminology and with the purpose of etiology of crime, a number of suggestions have been mentioned for the criminal policy of Iran and also for the criminal policy of the West. It has been suggested, how and to what extent the mechanism of decriminalization may be adopted in Iranian criminal policy. Taking a critical view of the decriminalization of the west, some suggestions have been made.

- **Suggestions:**

1. The criminal policy of Iran :

1-1. The prevention policy as one of the characteristics of applied criminology and with the purpose of etiology of crime in order to remove the grounds of its emergence should be practiced in the criminal policy of Iran seriously.

1-2. A penal policy formed according to the findings of applied criminology should be balanced and free from any kind of sentimentalism and irregular violence which is resulting from the conditions and nature of the revolution and war periods. By maintaining the religious criminal titles, the penal codes relating to the public order should be corrected according to the basis of the needs of the society and necessities of the condition of time. Only in the event that there are superior interests, criminalization should be conducted such as crimes terrorism, cyber, internet and environment.

1-3. According to the religious teachings, at present no one gives proposals for the decriminalization of the behaviors which is considered to be crimes according to the dominant cultural values of society and also foundations of Shariah having major punishments. Due to social changes, the necessity of adaptation of conducive canons arises. Numerical increase in titles of crimes would certainly increase the burden of courts which may lead to lack of quality of judgment. Concept of fair justice may become victim. In order to avoid this situation certain petty offences may be dealt by the bodies beyond the criminal justice system. Further for some offences prevention policy and theoretical framework of restorative justice may be adopted while maintaining the jurisprudential and customary regulations.

1-4. In accordance with some regulations, the petty offenses of the guilds, employees, workers and members of different centers are administrated according to guild, administrative and labor directives. This method can also be extended to other similar institutions and organizations such as arbitrary councils, and board of administrative offenses which may be vested with the power to deal with the cases of insignificant economic, financial, disciplinary, social and cultural nature. In this direction, first, the insignificant crimes should be identified fully and then it should be classified coherently. The domain of practice of Quasi-Judicial

Organization of Arbitrary Councils must be developed up to the limit of districts. Regarding the determination of the investigation scope, these councils must be detached professionally, i.e. on one hand, the insignificant financial and administrative crimes should be shifted to some of its branches, and on the other hand, insignificant acts crimes of family and family assignments must be referred to its other branches and in accordance to the rule of "انمـا اقضـی بیـنکم بالبینـات والایمـان", the investigations must not associated with prolongation or sluggishness and the emergence. Such problem should be prevented by attracting competent individuals and by giving professional and essential skills to them. These institutions and organizations which become substitutes for the courts and perform their roles by using the sociological and psychological findings similar to the role of Community Boards. They can make friendly dispute settlement between the offender and victim of offence in particular in the crimes against ownership. In the event that this technique is not successful, the method of reference to arbitration for restoration and reconciliation should be used. Resorting to the system of penal justice can be practiced only as the last resort, the load on penal justice system in particular and also High Administrative Court will be reduced to some extent. However, it must be ensured that reducing the load of criminal justice system should not lead to making new other organization over burdened.

1-5. The institution of prison punishment is so glaring as compared with its advantages and prison should enforced on the cases of those offenders whose freedom will endanger others and the society and temporary detention or imprisonment should be considered an exceptional issue before the judge. It seems that the age of the broad use of the punishment of imprisonment has come to an end and prison punishment thus has become ineffective and its deterring factor is fading. The punishment of prison is on one hand contrary to the individuals' rights and freedom, and on the other hand, it is costly. So the costs of prison should be also spent

on prevention policy such as health, education and employment and in fact, the punishment of imprisonment should only apply to "heavy crimes".

1-6. The mutual criminal policy, due to social changes and adaptation of canons with the conditions and necessities of time should be laid down through formation of a constant studying core ***Criminal Policy Think Tank*** in order to study the reasons of violence, prevention and control of crime and promotion of the system of penal justice and reinforcement of the effects of prevention and deterrence.

Reviewing the existing codes, identifying their deficiencies and completing them, adapting canons suited to the conditions and demands of time and also constant coordination of criminal policy may be performed by criminal Policy Think Tank.

The main focuses of study of the Criminal Policy Think Tank can be recommended to be as follows:

A) Determining public prevention measures and policies.

B) Review the actions which must be taken away out of the circle of criminal regulations and their criminal title may be removed. This should be done by way of comparative studies with great care and by considering all aspects and observing the technical aspects of the issue and various factors.

C) Identify those crimes, which can be investigated outside the judicial branch and should be transferred to the alternative legal systems as alternative solution.

D) Identifying and elaborating the crimes in accordance with the cultural values; determining the contour of crime, considering the factors of crime and reviewing the benefits of criminalization.

E) The cases which should be criminalized due to priority interests and time necessities and their punishment should be determined.

F) Reviewing and determining the measures of social defense through grading the standard and dangerousness state of criminals

G) Reviewing and determining the measures to use the alternative institutions to convert the aggravation degree of punishments into lighter degree for less dangerous criminals.

H) Reviewing and determining the principles of just judgment and the more effective intervention by the victim of offense during the process of investigation and also maintaining the defensive rights of the convicted person.

I) Preventing of the destructive effects of criminalization and decriminalization.

J) Filtration, classification and determining crimes and punishments with an attitude to the back warding and non-penal strategy having in view the mechanisms of de-penalization, diversion and decriminalization in order to reduce the burden of criminal courts.

K) Providing punishments being rhythmic and balanced and proportional with crimes.

L) Reviewing the methods of de-imprisonment in those cases which are losing the element of deterrence.

M) Identifying and detaching the two realms of considering religious unlawfulness and legal criminalization.

N) Reviewing to adapt the Shariah commandments with the conditions of the day and determining alternative punishments.

O) Reviewing and determining the acceptable customary punishments with adaptation with the principles and foundations of Shariah.

P) Reviewing and planning to change the attitudes of the aboriginal and national culture and understanding of the society towards criminal policy and public teaching of the citizens.

Q) Revising, correcting and developing the set of effective and useful criminal codes in order to reduce the volume of canons and bring down the excessive and irregular cases.

2. The criminal policy of the west:

Though the full abolition of the penal system in the western criminal policy is not ideal to everybody, but the jurists and penal criminologists who support" alternative measures" and "abolition or re-organization of the realm of penal justice system" have stepped up the path by taking model of the movement of "diversion", "de-penalization" and finally "decriminalization". They have recommended and practiced resorting to the three mentioned methods in the penal realm by adopting the policy of non-penal and informal social control. But concerning the positive results of these alternative solutions and using these mechanisms after about a quarter of century, the "minimum of assessment" towards the efficiency of each of them should be noticed and it must be studied to see whether or not the broad use of these mechanisms have really been useful.

The existence of eminent social and judicial experiences, in particular about diversion and de-penalization should not lead to extremism in decriminalization and legalization of certain behaviour i.e. homosexuality, prostitution, alcohol and drugs. Such decriminalization in some of the western countries, are in contradiction with the spirit and nature of the humans such measure has caused irreparable damages to the western societies which face dangerous challenges.

Thus, the policy of decriminalization and legalization of the behaviors which have disturbed the firmness, stability and cultural and indigenous entity of the western societies and have imposed grave and plenty damages on individuals and society, though they are limited to the personal life of individuals should be stopped. It has been proved that by decriminalization of these groups of behaviors, does not result in reduction of crimes, but ugliness of the behavior raised its head in the society and it has brought about unfavorable, destructive and irretrievable results.

Hence, it is submitted that necessarily, the adoption of the mechanism of decriminalization about some behaviors should be changed and employed within an appropriate realm.