PREVENTION OF CRIME AND RESTORATIVE JUSTICE SYSTEM

1.1. Crime and Criminalization:

- **What is the crime?**

Many sociologists and criminologists have reiterated the insufficiency of the legal definition of crime for the objectives of criminology. Selin recommends those criminologists who are interested in the advancement of the study on criminally behaviors to free themselves from the bonds created by the criminal law.

According to Selin, the subjects being put forward by the criminal law do not satisfy the desires and demands of the scientists. Because, the issues of criminal law have non-scientific and non-standard natures[1] and "do not truly result from the nature of the subject".

He adds:

"The unconditional acceptance of the legal definition of the subjects or the basic subjects of criminology researches violates the basic standards and regulations of science…"

The definition of crime presented by Durkheim is famous among the sociologists. According to his definition, "The act is crime which wounds the fully obvious and serious status of the collective conscience." This definition of crime can be useful in small, coordinated and congruous societies, but if we intend to define the crime in large, plural and multi-cultural and incongruous societies, then it will not be so

appropriate. In the small societies and informal ones, the condition of "the collective conscience" and discovering a merit rank of "consensus" related to norms and social values can be determined, but this issue is impossible in the case of complex industrial societies whose features are their incongruousness and cultural plurality. In such societies, there are a very few actions which impose damage on the whole of individuals or affect the society at large. An action might be obscene with regard to a specific group of society, but it might be acceptable and favorable for another group. The lack of such a consensus and agreement in relation to the basic norms and values can be observed with regard to the acts which leads to homicide (i.e. murder as a result of sympathy, assisted suicide, abortion and death penalty) or sexual operations (i.e. incest, homosexuality, prostitution) or ethics (gambling, drug addiction, pornography). Maurice Parmelee[2] in his book entitled "Criminology" suggests the following definition for the crime:

"Crime is usually a counter-society action in such a nature that its suppression for the maintenance of the existing social system is necessary and it is assumed to be essential. This definition includes pillars and elements which are not found in other definitions, however in this very definition, some questions should be responded too: What is a counter-society action? According to what standards, an action should be considered as a counter-social action? Why the criminal law punishes many actions which can not be considered as anti-societal action? What are the sociological definitions and characteristics of the crime which describes it as a socially harmful act or as a socially injurious act? Why are some of the acts which are not socially dangerous but punishable? Such as abortion in a populous society, whereas other acts which are

dangerous and harmful in the view of the society are left without any punishments?

Basically, the intended concept is relative injury. In a society, it is possible that an act to be considered "damaging" in relation to a social class, but it might be useful for other social group, for example, the act of theft in a society in relation to those who are possessing wealth and properties is harmful and dangerous, "but it does not damage the poor and the underprivileged people". Whereas some of the economists believe that in some crimes, the stolen objects or assets are not indeed demolished but their ownership and possession have been changed. Thus they consider this act as a useful act from the economic point of view. Because, they lead to more just distribution of objects or they increase the economic value of some selling objects and goods (for example, if a set of T.V. is stolen from a family who possess 3 sets of T.V., it will be placed in the house of a family which does not have any T.V.).[3]

Marx defines: "Crime is the violation of the interests of the capitalist group". In other words, crime means an act or leaving [abandoning] an act which violates the interests and rights of a minority who hold the economy and production instruments under their control.

On this basis, there is a basic difference between the crimes committed by the greedy powerful people and the crimes committed by the poor working class. The crimes of the powerful people includes mostly the economic crimes (such as fraud, violation of labor law, destruction of environment) and the governmental crimes (corruption, human rights violation and misuse of the public assets) and in opposition, the crimes

of the inferiors or working class are mostly taking roots in economic and social motivations such as stealing from the shops, working place, vandalism and aggression with the intention of imposing a harm on the ruling system. Such differentiation invites us to find out the reason for the occurrence of the crime should be sought in the structure of the unequal social relations and this inequality creates ground for felony in the capitalistic society.

Finally, Marxists believe that the definition on crime should be extended its realm to include all kinds of activities which are in contradiction with the human rights and this issue demands the establishment of the broader standards on the nature of the crimes. And lastly, they reason that wherever exploitation takes place, a crime is occurring. [4]

Perhaps, the simplest and most precise definition on crime can be presented as follows:

Crime is something that has been forbidden by the criminal law.[5] But, it must be admitted that the regular and usual legal definition on crime has specific advantage and privilege- which precisely and directly states: crime is every commission of act or omission of an act which is punishable in the law. [6]

In a general wrap up, it can be stated that there is no consensus on definitions of crime and each thoughtful person has presented his own specific understanding and interpretation of crime and the sociological, psychological, political and legal definitions of crime has various ambiguities and problems. Such as: Do we call whatever we wish as crime? Is there a crime without the penal law? Is the crime a social phenomenon or a legal one? Which one is the origin of the crime: the

penal law or the society? Is the penal law an instrument under the control of the holders of power in a society? Why does penal law punish only specific types of violence? If in accordance with the law, the crime is merely considered as a punishable act, if the society abandoning the punishment in favor of other systems of penal justice, then what will happen? Does crime include the crimes of compensating the damages imposed on the victim of offence or does that include conducting the social services without any wage [which have been replaced with the punishment] too? Is every form of social incompatibility a crime? Is anyone who does not treat well against the environmental pressures and does not adapt himself/herself with the surroundings is an offender person? Is the forecast of Fritz Saak which says "all efforts to define crime seems to be failed" correct? [7]

Lastly, doesn't it seem to be necessary that there is a need to a new view in dealing with the crime, offender and resorting to other approaches? Basically, what kind of behavior should be considered criminal and what are the limits and borders of criminalization?

- **Limits and borders of criminalization:**

Criminalization of an act or omission to do an act is a process by which, new behaviors become subject to the penal code in accordance with the criminal canons. To the same extent that the ranges of these rules become broader under the pressure of public views, to the same extent, they create new offenders.[8] That is materialized by announcing an act as a criminal and punishable act by the government.[9] In this relation, efforts to legalize ethics and impose virtue by law have become an advanced tradition which all have transformed into crime and are

constantly increasing and pursued by a mechanism. They do not have necessary efficiency and have become useless more than ever. Many of the crimes have not entailed behaviors which impose damage on any body with the exception of the offender through self destruction.[10]

According to a group, the extension of the arms of criminal law to all kinds of non-ethical behaviors also has led to the radical suppression of the behaviors that have been [neither damaging for the society nor dangerous].

The human sexual desires are the first realm of the invasion in the history of criminal law.

Nerval Morris, in an article entitled, "Canon is a Meddler" describes this condition better. He says, "To consider an ethical role for the criminal law and to interfere or try to rule over the private behavior of the citizens, is an unfavorable act and far from interest and it is harmful from social point of view….. In fact, perhaps, the regulations have only related to the sexual offences which the designers of those regulations have tried in such a way to provide a ground to include all populations by approving a belt of macro virtues of legislation and have made a ban on every things with the exception of individual masturbation and natural intercourse within the framework of marriage.[11]

In the present world of the west, the criminal law is mostly used to support the individual and public interests in which there are also ethical values. This criminal support extended to the ethical values is due to the fact that they include interests and it is not merely due to their value. [12]

At the same time, some others believe that criminalization of the ethics without paying attention to its limiting principles provides ground to violate the "legal" principle of crime. [13]

However, replying to this important question that "which kind of behavior should be criminalized in criminal policy?" is not easy, but in 1859, John Stuart Mill in his famous book on freedom and on the basis of a liberalistic stance announced that "the only objective which justifies the correct application of power against the freedom of the members of a civilized society is to prevent of imposing any damage on the others. Personal goodness and interest either physical or spiritual is not a sufficient justification.

This theory was harshly and importantly criticized by Braithwait and Pettit. [14]

This type of view from the John Stuart Mill can be resulting from the broad criminalization in classic period in particular in the quality of view towards execution, because from the smallest to the heaviest crime was in the realm of the execution punishment. The crime of writing against the power of the religion was equal to death penalty, whereas the crimes such as adultery, theft and rape were subject to mitigation of punishment. [15]

The method of the implementation of the punishment was also very tragic. The execution of Damin who was punished for malice intention crime against the life of King Louis XV of France, on March 2, 1757 was in a terrible form. Being ties to four horses, giving a torch of hot wax was to his hand , in the place of execution , his meats of breasts,

arms, legs and thighs were cut by pliers and they were pouring melting lead , hot oil , blazing gum, wax and sulfur in the place of wounds.[16]

It is said that because of the weakness of the four horses in tearing his body into four parts, he was tied to six horses. Finally, in order to speed up the execution, the executioner (hangman) cut the tendons of the joints of Damin by a knife and amid this situation, his life came into end. [17]

Concerning the same issue, Bakaria stated," instead of the execution of Damin, he must be put into the metal cage of Cardinal Du la Balo in chain". One of the judges of the classic period announced that "in the course of his career life, he had issued 20000 execution decrees, that is to say, in average 500 decrees for execution per year.[18]

Of course, the main approach of this school in dual attitude towards punishments (entailing "the punishments should not be more than "useful and just" border) has been formed on the basis of the views of Bakaria, Bentham, Gizo and Rossi. Under the influence of these theoreticians, the realm of execution penalty was limited in the law of 28 April, 1832 in France. In 31 December, 1854, the civil death penalty was cancelled. Also the execution penalty for the political crimes in the Article 5 of the Constitutions of the year 1848 was nullified in France and instead of execution penalty, in the law of the year 1850; the punishment of exile and keeping in the reinforced castles was legislated. In the year 1867, in Belgium and in the year 1889, in Italy also the execution penalty was annulated under the influence of this school.[19]

Anyway, the modern attitudes in most of the western countries is to detach the ethics from the criminal law and decriminalize those acts which do not create touchable social damage and do not have the

intensive reactions of the majority of the people . However it is possible that these actions are considered as non-ethical acts on the basis of the dominant standards.

In recent years, the criminologists have suggested three macro principles which should dominate the realm of criminalization and to be used as criterion for decision making on type of behaviors which must be considered criminal in a democratic and irreligious society. The suggested principles include:

1. The principle of being non-ethical. In the concept that this principle is not sufficient in order to identify an act as a crime.[20]

2. The criminal law should not be used for the punishment of the non-ethical or sinful behaviors, unless that behavior is apparently anti-society or to be considered as a harmful act by the society.

3. The behavior should be harmful towards others potentially or in effect or at least, it must violate the basic rights of others.

Many criminologists cast doubt on the appropriateness of the most intensive interference of the government (i.e. punishment) and the logic of using the heavy and costly penal justice system to control or suppression. [21]

Vagrancy, gambling, behaviors associated with disorder, public drunk, homosexuality, drug addiction and etc are a broad spectrum of behaviors for which in 1965, Shikour has coined the terms "the crimes without victims or victimless crimes"

In addition, a group believes that the criminalization of a behavior, in particular in the standpoint of human rights is intended. That is to say, every society which considers value for the principle of freedom should use the criminal law as the last stage of the instrument of fighting against misdemeanor act. By all these, it is always possible that a criminal system to be accepted as a mechanism to maintain the social order. In that case, the criminalization means that through law, it must be announced that such behaviors should not be conducted and in fact the preventive feature of the criminal canon takes roots in this very reality.[22]

A governmental document being published under the title "Criminal Law in Canada" in 1982[23] put forward the doctrine of limitation in the criminal canon. It introduced the criminal law as an instrument and the last solution. It advised that the criminal law should be only used for dealing with the behavior for which other instruments of social control are insufficient and inappropriate. In 1976, the previous commission on correction of the criminal law in Canada supported the same approach and persistently announced that the real criminal law should be limited to the wrongdoing actions which threaten or ignore the basic values of the society seriously. The suggested standards by this Commission on "what cases should be considered as crimes" were as follow:

1. Does the action do damage on others seriously or not?

2. Does that action violate our basic values in such an intensive form that it is harmful for the society?

3. Are we sure that the necessary executive measures to use the criminal law against that behavior will not violate our basic values by itself?

4. With the assumption that we give "yes" response to the previous three questions, are we convinced that the criminal law can have an effective role in facing the problem?

From the viewpoint of this Commission, the standard of "injury" either in form of potential or in effect threat, is the first standard of criminality for criminalization.[24]

It goes without saying that high criminalization or penal inflation, in particular in the domain of individual rights and freedom will increase the range of the interference of the criminal system and thus it will reduce its dignity and efficiency towards important crimes.[25]

On the other side, in accordance with the principle of "legitimization" of the crimes, what has been already criminalized by the legislator is merely prosecutable and thus, the space of the people's freedoms will not become narrow and restricted. [26]

On this case, the Article 2-11, World Deceleration of Human Rights and similar to that , the Article 1-15 of the International Convention on Civil-Political Rights also envisage: "No body will be sentenced for doing or lack of doing an action which at the time of committing that action is not considered crime in accordance with the national or international laws".

Nevertheless, the doors of the penal arsenal are still open and today, the violence crimes are dealt with harsher than the crimes which are

associated with the treasonable acts. But the social transformations and the change in the public views and beliefs, in particular in the western and laic communities have brought about the creation of new attitudes towards the foundations of the penal justice system. The foundations which have shown themselves at the limit and sizes of the foundations of classic penal justice system and is introduced under the title of "The System of Restorative Justice".

Today, this transfer and part of its theoretical frameworks encompass even the non-laic communities in all fields [with the exception of the ethical domain] in its own domain and that is also due to the religious limitations and gradually it is making capacity for imposing and substituting its other strategies in these communities too.

2.2 Prevention of Crime and Criminal Policy

- **Concept of Prevention :**

In the encyclopedia, the term prevention means "hindrance and repulsion" and the act of prevention means "hold back". [27] The idiomatic meaning of prevention in criminal sciences as put forward by criminologists, today is mostly used with the meaning of "getting ahead of" or "making aware and warning" . [28]

"Prevention of Crime"[29] is one of the key concepts in the literature of criminal sciences and has an important position in the criminal policy. This concept entered into the Iranian literature of criminal sciences since 1990's. Thereafter, in particular from the dimension of theoretical bases, it is a known subject in the academic circles and even among the policy making and administrative bodies. [30]

Generally, in criminology and in penal theory, every kind of measure and method which prohibits the occurrence of crime (either in penal form or in non-penal framework) is called "prevention".

The penal prevention measures can be divided into two distinguishing categories: First the suppressive and forcible responses and measures which are within the format of penal system and they are so called "reactive responses" and its other types are the non-forcible and non-suppressive responses and measures which is called preventive functional responses and have been introduced as specific and limited prevention and pursue to reduce the interference of the penal system.

- **Objective of prevention:**

With a view of the necessity of finding responses outside the realm of penal law, the preventive responses with a non-forcible nature emerge and in a precise definition, the objective of these responses is also to limit the range of crimes, to make the possibility of committing crime impossible and make it difficult or to reduce the possibility of crime occurrence and control the offensiveness.

The preventive responses have impact on the process of formation of guilty mind (mensrea) and consequent act (actusreus)[31] and due to the presence of the functional and non-penal measures in the domain of prevention of crimes in its extensive meaning, it can be concluded that non-penal preventive responses also take roots in a big way attracting criminal policy in one way or another and its base is on the set of different measures and methods which is aimed at ****preventing the offence being outside the penal system [which has been introduced as an functional and non-penal prevention].

Enrico Ferry (1856-1928), despite the fact that he is one of the pioneers of Positivism school and founders of criminal sociology, but by presenting the social defense measures and aiming at this idea that the organizing of social environment should prevent of crime occurrence, is the first theoretician on functional preventive measures.[32]

Among the scholars of law, Raymon Gassin, the French criminologist also believes that prevention is a set of measures – apart from penal measures- whose ultimate goal is to limit the range of crimes, making it impossible or difficult or to reduce the possibility of crime occurrence. Morris Kussen, the Canadian criminologist also believes that prevention is non-forcible or non-suppressive measures whose objective is to control offensiveness or to reduce the possibility of the crime occurrence. [33]

So, however the objective of prevention of criminality in its extensive meaning is the set of measures which prevent committing crime, but the center of gravity of prevention concept in criminology includes non-forcible and non-suppressive measures and in other words , the purpose of prevention, is to present the functional and non-penal preventive responses in the range of criminal policy. [34]

- **The mechanisms of prevention in criminal policy:**

Despite the fact that the governments have resorted to the forcible institutions (the police and justice) and suppressive reaction (punishment) to fight against the crimes and to maintain public order being exposed to the danger of disintegration and threat since long time ago, but with regard to the development of the realm of criminal law and

reinforcement of penal arsenal, the criminal statistics indicates that there is necessity of finding approaches in addition to the realm of penal law.

In order to protect the health of the society and to remove the crime producing situations, the functional measures with non-forcible and non-suppressive nature have been put forward beyond the realm of penal law under the title of "preventive responses".

Amid this situation, "decriminalization" as one of the preventive mechanisms in the criminal policy of some countries has assumed specific position and role to itself.

With no doubt, some important questions will be put forward on this issue and inevitably they must be responded. Questions such as: What is the basics, concept and objective of prevention? What is the position and role of prevention in criminal policies? Is the characteristic of prevention is penal and suppressive or non-penal and non-suppressive one or both? What are the differences between the suppressive responses and preventive responses? What are the strategies and mechanisms of prevention in the criminal policy? Finally, what is the role and impact of decriminalization as one of the preventive mechanisms in the criminal policy?

So that, before opening the discussion on the nature of decriminalization, we will review foundations, range, strategies and mechanisms of preventive responses in the criminal policy, because the response to these questions and by explaining these mechanisms, the mutual link between crime prevention and decriminalization is understood and revealed.

- **The prevention foundations in the criminal policy:**

The idea of prevention of the crime has a long record and dates back to minimum 2400 years ago, i.e. the age of Protagoras, the Greek sophist and perhaps, it could be said that its antiquity is in parallel with the appearance and emergence of criminality. The general prevention of crime is usually a part of the primary objective of penal law. In Anglo Saxon culture, the pillar of general prevention was based on the deterrent aspect of punishment which could prevent others from committing forbidden act. In fact, it is a classic base towards the penal theory and can have a power as much as the very criminal law.

Despite the fact that the western philosophers, in particular Bacarria, Bentham and Feorbach, the philosophers of 18 and 19 centuries have dealt with and analyzed the concept of prevention in details, but the second half of the twenty century can be considered as the beginning of the tendency towards prevention and also its rebirth.[35]

Now, we should have a reference to the relationship between prevention and criminal policy.

The criminal policy has been considered by a group of the scientists of penal law as the legal and social strategy based on ideological options to present a realistic response to the issues resulting from the prevention and suppression of the criminal phenomenon in its sociological sense.[36]And have assumed it as a type of science and art to elucidate the prevention and suppression of the crime.[37]

For the purpose of prevention of crime and support to the natural rights of citizenship, the legislators are obliged to find and identify the

instruments of prevention of crime in order to be able to put it into effect with regard to the specific attitudes of every government.

- **The beliefs of penal thinkers in relation to prevention:**

In the Chapter 41 of the treatise of crimes and punishments, on crime prevention, importance and the necessity of non-forcible measures and those outside the penal law to control the crime, Cesar Bacarria, the philosopher of criminology (1764) says, "Prevention of crimes occurrence is better than punishment". [38]

In the beginning of the eighteenth century, Bentham also like Baccaria put forward preventive solutions (education, introducing rules to the people, cultural activities and…) as supplementary measures to make a better control of offenses. [39]

After more than half a century, Enricoo Ferry who was also one of the founders of positivism school and professor of penal law in Rom and Turin (Italy) universities, in his work entitled "New Horizons of Penal Law" in 1881 which was known as the "Charter of Criminal Sociology", asked for reforms in penal law including revision in the method of struggle against felony. He divided the social reaction towards the crime or the same measures of social defenses into two categories: On one side, the suppressive defensive measures and on the other side, the preventive defensive measures.

The recent measures which Ferry mentioned them as the "substitutes or alternatives for punishment" under the influence of the approaches or preventive solutions presented by Bentham, in fact, have an educational, political, economic, religious, administrative , family nature and so on.[40]

Thus, Ferry also admitted that the penal threat and application punishment (suppressive measures) had not been able to prevent of the growth of crime rates solely. [41]

- **The theory of social defense towards prevention:**

Less than one century later, "the international society of social defense" which is also the continuer of the activities of the social defense school, in its "minimum program for the materialization of human-oriented criminal policy" believes that struggle against offense demands restoring to different measures and at the same time provides for prior to the occurrence of crime (prevention) and after the occurrence of crime (suppression). (Article 1, Paragraph 2) and (Paragraph 3, Article 1) of this program prescribes that the objectives for these measures should be double: On one hand, it should guarantee the support to the society against offenders and on the other hand, it should secure the members of the society against the danger of fall vis-à-vis criminality .Thus it is observed that the ideal criminal policy of the new social defense school in fact holds two attitudes suppressive and preventive against criminality. [42]

The base of non-penal and functional preventive measures against criminality is of the innovations of Marck Anssel, the French judge and jurists and founder of the new social defense school. He believed that in the criminal policy, in line with the development of the realm of criminality from crime to deviation, the prevention of social factors which makes ground for the crime committing should also be developed. [43]

- **Prevention policy and the United Nations:**

In the criminal policy of the United Nations at the global level "prevention of crime" has specific characteristic and importance. According to Article 1, Paragraph 1, the UN Charter "The UN is bound to do effective collective measures in order to prevent of and remove the threats against peace and to stop any aggressive actions or other actions which violates the peace….".

Preparing and approving declarations, strategic principles, recommendations, conventions and pacts by taking inspiration from Articles 1 and 55 of UN Charter , all have been included as part of the written resources of the global criminal system and also the prevention system of countries since the late 1940's that partially are bounding and sometimes they are not bounding.

The fourfold generations of the main core of the Human Rights also include:

1. civil and political rights with an attitude towards legal justice
2. economic, social and cultural rights with an attitude towards the materialization of social justice
3. correlation rights with an attitude towards the right of development, communications, common heritage of humans , right of peace , right of healthy environment

4. The individual rights with an attitude towards supporting the individual rights vis-à-vis scientific and technical advancement [44]

The above mentioned items have formed the main contents of the documents of human rights system within the format of World Declarations of Human Rights (1948), international convention of political and civil rights (1966) and international conventions of economic, cultural and social rights (1966). The orientation of these documents is in fact pursuing the prevention system at the global level through reinforcement and emphasis on support and defense of the human dignity and its materialization.

For this purpose, the technical and professional institutions have been created within the format of committees and commissions of human rights, international organizations of UNESCO, FAO, UNICEF, ILO [45] by the UN and by activating them. Executive guarantees and other necessary assurances have been established.

Also, in order to extend a further support to the human rights, by putting forward the subject of prevention, the UN adopted certain initiations within the format of different conventions and so far, it has led to the formation of the following conventions:

1. The UN Convention on the Prevention and Punishment of the Crime of Genocide of 1948

2. Convention on the Elimination of All Forms of Racial Discrimination (1965)

3. Convention on the Elimination of All Forms of Discrimination against Women (1979)

4. The Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (1984).

5. Convention on the Rights of the Child[46]

Despite the fact that the approvals of Peking conference within the rules of Beijing, related to the children penal justice, the rules of Tokyo on non-denying freedom measures and advices of Riyadh on prevention of children criminality has an orienting and advising aspect and they are not obligatory for the member states legally, but in the realm of penal policy, they have considered and targeted the subject of prevention.

Thus it is observed that the strategy of non-penal preventive responses or those functional measures, with regard to the extensive concept of criminal policies are placed besides the penal preventive responses or the same reactive measures in the UN plans to bring about the enforcement of human rights principles and materialize it at the international level.

- **The prevention viewpoint in the Council of Europe:**

On 17th September 1987, the Council of Europe [47] approved a resolution entitled; "Organizations for Crime Prevention". This regional organization has 44 members. The resolution, while emphasizing the different position and aspects of prevention in the ideal criminal policy and introducing the governments which have made planning and policy making on prevention by establishing specific institution, recommended the formation of similar independent institutions to other countries.

Also, the European Council had approved specific rules and plans at the level of member governments since a decade ago for the purpose of developing and reinforcing the preventive policy of crimes in particular prevention of children crimes. [48]

Thus, The European Council while placing emphasis on the necessity of prevention has put the non-suppressive and non-forcible strategy in priority and believes that the mere reliance on the suppressive and forcible governmental strategies are not effective and sufficient.

- **Prevention programmes in America and France:**

Terrorism, human trafficking, cyber and environmental crimes, … formation and broadness of new types of offence resulting from the economic, technical, political and social changes, growth of the excessive costs of the institutions related to the penal reactions, the rise of the statistics of murder, theft, rape… has made the necessity of the adoption of new policies and execution of non-penal suppressive methods inevitable. The recommendations of the UN and other regional organizations indicate the new recommendations which encourage the government towards the approach of expanding the policy of prevention of crime which results in not only accumulating the system of penal justice, but also reducing the costs and damages resulting form the crimes occurrence.

The establishment of a policy making, planning and executive organization for crime (felony) prevention in the USA in 1961 brought about the development and implementation of the "National Plan for Criminal Behavior Prevention" and afterwards, the "National

Commission on the Causes and Prevention of Violence" was founded under the orders of Lyndon B. Johnson and started its activities. [49]

In 1978, with the establishment of the Committee for the Prevention of Violence and Criminal behavior",the French government also brought about and added the prevention system to its own penal justice system.[50] Finally as the last measure, the bill for the criminal behavior prevention was formulated in December 2003.[51]

- **Crime prevention in Iran:**

The process of criminal behavior prevention in Iran has had different stages and we will deal with its course of process:

(i) Prevention of criminal behavior has entered into the realm of legislation and criminal policy of Iran since 1960 indirectly. Article 1, the Act of Security and Educational Measures of 1960 has considered the "measures which can be adopted by the court to prevent of the repetition of crime on dangerous criminals" as reactive prevention and its objective was to protect the society from the dangerous criminals.

(ii) In 1980, certain power vested in Governer General these powers appear to deal with the subject of "Crime Prevention at the Provincial Levels".

(iii) In 1983, with the approval of the law on the establishment of the Ministry of Intelligence, the issue of "Prevention of Specific Crimes" is considered and according to the Article 1 of the law, this Institution is bound to manage the prevention on security crimes and it endeavors to reduce the rate of security crimes.

(iv) The Islamic Consultative Parliament approves the Law of National Security Council in 1983 and it has stated the crime prevention at the three levels, (national, provincial and cities) and within the formats of the Articles 4, 5 and 7. According to the Note 2 of the Article 3, the Security Council with a "national- security-oriented attitude does policy making on prevention of insecurity such as general crimes by adopting the security-oriented preventive measures" for the purpose of establishing security in the society.

The micro security policies of the country, in addition to determining "the security-oriented preventive policies" for the purpose of establishing and maintaining social security, the Security Council of the Province adopts "society-oriented preventive measures" in order to establish welfare and meet the social public needs of the people.

(v) The canon of the Law Enforcement Forces (The Police) of the Islamic Republic of Iran (approved in 1990) has also considered the "crime prevention" as part of the most important duties of the police.

According to the Paragraph 8 of the Article 4 of the Law, dealing the enforcement domain, the subject of "prevention of crime" has been given emphasis.

However, it seems that in accordance with the [Part D of Paragraph 8 of Article 4 in the domain of duties of the Force (police organization)], the subject of prevention has some difficulties and the duties of two domains of the police have been mixed with each other because:

The responsibility of the technical police includes: to discover the crime and pursue the convicted person and to respond to the system of penal justice but the responsibility of the administrative police includes: to adopt non-penal appropriate measures and to implement functional measures to face the criminal behavior phenomenon and to deter the crime occurrence.[52]

(vi) In 1996, the Islamic Consultative Parliament revised and approved the bill for the completion of the Rehabilitation Organization which had been within the approval of the Supreme Council for Cultural Revolution in 1980.

The bill has dealt with both aspects of crime prevention:

1. The functional, non-penal and treatment-corrective attitude through preparing prevention facilities

2. Reactive attitude in order to educate the delinquent who has deviated from the society.

(vii) Prevention policies in the realm of fighting against drugs:

After the approval of the canon on restricting the opium in 1910, fighting against the crimes of drugs was started in Iran formally.[53] These regulations has had a mere penal and suppressive attitude up to the year 1997, but since then, the non-penal and functional policies and measures have been noticed in parallel with the penal and reactive measures.[54] The approval of the act on reforms for fighting against crime of drugs. The amendment of Articles made the establishment of the Headquarter to fight against the crimes associated with drugs. The relevant part of the amendment is given below:

Article 33 prescribes that "in order to prevent of addiction and fight against the contrabandists of drugs including distribution, buying and selling, usage, ….a Headquarter is formed under the presidency of the President ….and the plans on prevention and public teaching and publicizing against drugs will be concentrated in this Headquarter". Note 2 of this Act makes the government bound to allocate budget every year and communicate it to the respective organizations "to prevent of committing drug crimes…"

According to the existing documents, the attitude to the "prevention policy" in fighting against drugs had utilized models of three stages:

The first stage: To adopt preventive measures to reduce the inclination towards drug addiction and the ecstasy drugs and to fight against cigarette consumption via public teachings, cultural and artistic plans, guiding, propagating and alarming plans, equipping the schools' libraries, to expand the consulting centers for the leisure times of the youth, to make films and dispatch the propagators and to create self-helping groups of addicts, to establish data bank of addiction (the subjects of the Paragraph 4 and 1 of the Article 1 and Paragraphs 5, 8. 9, 12, 16, 17 Article 2 and Paragraphs 1,4,5,6 Article 5 and Articles 8,7,6 of the Executive Regulations of Fighting against Drugs).

The second stage: To adopt the preventive and deterring measures in the case of the individuals who are susceptible or exposed to drugs through quantitative and qualitative expansion of consultative and supportive centers for the groups exposed to danger , to extend spiritual and material supports to the damaged families and to identify the students being exposed to damage due to the inappropriate conditions of their

parents, (the subject of the Paragraph 4, Article 1, Paragraph 10 of Article 2, Article 3 and Paragraph 2 of Article 5.)

The third stage: To adopt the preventive treatment and corrective measures and to re-adapt the drug addicts in order to prevent them of renewing their addiction through the following course of action:

To treat and rehabilitate, to adopt necessary measures for the situation after their freedom from prison, to develop and equip the treatment professional centers for stopping (abandoning) drug consumption, to activate the health and treatment networks for stopping addicts and…. (the subject of Paragraphs 3, 2, Article 1, Paragraphs 1, 2, 3, 4, 14, Article 2, - Articles 12 and 13).

(viii) Prevention in the Constitution Law

The prevention of crime and correction of criminals was considered to very important. The reference is available in the introduction of the constitution. The constitution while dealing with the general principles provide in Paragraph 5 of the Principle 156 that the crime prevention and correction (reform) of the criminals is one of the duties of the Judicial Branch, In accordance with the Paragraph 2, Principle 158 of the Constitution Law, the Judicial Branch has also taken measures for the crime prevention.

Thus, it is observed that Iran has initiated the crime prevention policy keeping in view the international conventions and pacts. Priority has been given to the materialization and guarantee of the human rights and in order to prevent the violation of people's civic, social, political, cultural and economic rights. In order to provide justice add social

security, the legislator of the Islamic Republic of Iran has considered the "criminal behavior and deviation prevention" as an essential element.

- **The scope of prevention and its dimensions:**

In general, the scope of the prevention system and its dimensions can be studied in two parts:

(a) Suppressive and forcible prevention :

The suppressive and forcible prevention which is associated with measures for punishment after commission of a crime and by way of reactive responses and is known as "criminalization strategy" which manifests itself also within "the penal justice system".

In this prevention, the objective is also to fight against the general causes of crime from the penology viewpoint where by deterrent element resulting from punishment, it brings about the observance of rights and civic and political freedoms of the society.

These measures intend to make a general crime prevention and specific crime prevention.[55] Thus two main components of suppressive and forcible prevention. Firstly, it creates an element of deterrence secondly exemplarity punishment of violators will reduce the crime.

The punishment, measures and responses within the format of various penal models in the criminal policy under the "criminalization" pursue the ban on behaviors which violates the basic values of the society along with guarantee for punishment. This process even puts the new and future behaviors under the umbrella of penal law. So, the basic strategy

in this kind of suppressive and forcible prevention is the mechanism of "criminalization".

(b) Non-Suppressive and non-forcible prevention :

The second part is a non-suppressive and non-forcible prevention which is followed by functional measures and responses. In this type of prevention, partly the theoretical frameworks of restorative justice are the basic mechanisms and the objective of this kind of prevention is to reduce the load of the system of penal justice and reduce the penal inflation, to increase the power of the government in order to control and reduce criminal behavior in the society and to limit the range of interference of the criminal justice system. In the other side of this prevention, there exists the intellectual movement of moderates who believe in re-formation of the interference of penal system in a delicate and ideal form. [56]

The non-penal prevention in the prevailing and classic categorization is divided into two parts:

(i) Social or individual-oriented prevention

It has impacts on society and individual both. These preventive measures are applicable to child and young adult either deviated, incompatible or convicted persons. The goal set for this category of preventive measures is to overshadow the process of formation to the character of the individual or his/her surrounding environment.[57]

(ii) Determining prevention :

It includes making the whole society responsible towards the criminal danger and also the danger of the victims. In other words, the determining preventive measures provides for status, conditions and situations before criminal behavior. To make the crime committing difficult, to reduce the expected profit and pleasure of offender vis-à-vis aggression on the target, to make the offender give up in practicing his/her idea towards the victims and in summary to limit the opportunities to commit crime via securing and promoting the security factors and barriers, to survey the physically environments and to adopt the other limited determining measures which might even deny some of the individual rights [58] and freedoms, can be considered as parts of preventive measures.

In the non-penal prevention type of determining, the act of monitoring, care, control and consequently limiting the freedom and rights of individuals have basic role and its programs are associated with the dominancy of interference or the presence of security and police agents.[59]

Components of this type of prevention include individual/specific deterrence, reform, rehabilitation, incapacitation, re-integrative shaming within the format of the theory of John Braith Wait, the Australian criminologist.[60]

As it was stated, in order to materialize the non-penal prevention in the criminal policy, the basic strategy of abolitionism of penal system on the basis of three fold mechanisms of de-penalization, diversion and decriminalization against criminal behaviors are used. According to the

scientists, these mechanisms which in fact are the theoretical framework of restorative justice can serve as an alternative for the classic penal justice either in punishing form or in form of reform (corrective) and its rehabilitation. [61]

- **Prevention strategy:**

Criminologists have divided the prevention strategies into two groups:

The first group is the pervasive reactive strategy by using two mechanisms of criminalization and decriminalization to fight against the general causes of criminality.

The second group deals with the specific reactive strategy by using the mechanisms of de-penalization and diversion to prevent from the repetition of crime by the primary criminals.

But it seems that despite the belief of some groups in suppressive nature of de-penalization and diversion mechanisms, from the viewpoint of criminal policy, this categorization requires some changes. Because, on one hand, responding to the criminal behavior is not constantly associated with the imposition of punishment and despite maintaining the criminal title and or the competency of investigation of penal justice system, the necessity of adaptation of criminal policy with the social changes and interests makes restrictions and obstacles for the penal system, and on the other hand, all three mechanisms of decriminalization, de-penalization and diversion follow a one kind of withdrawing strategy in the criminal law in different proportions.

That is to say that they either make the eradication of criminal title from some crimes and denial of punishment for a determined behavior[62] or

they make the de-inflation of penal system by giving discount, suspension, change, exemption or denial (fall) of punishment as alternative measures[63] for penalty or make the deterrence of pursuance or stopping it by resorting to non-penal measures and responses outside the criminal justice system despite the competency of investigation by the criminal justice system.[64] Whereas, it is only the criminalization mechanism which among the penal reactions has progressive aggressive strategy which can be one of the responses towards the criminal phenomenon.

In view of the above, the preventive strategies can be placed in a new categorization and presented as follow:

1. The aggressive or moving ahead strategy through criminalization mechanism.

2. The withdrawal or back warding strategy through mechanisms of decriminalization, de-penalization and diversion.

It is concluded that in the criminal policy for the purpose of prevention, if the objective and strategy is to intensify the penalty, it will lead to the suppressive responses within the format of criminalization, but in the event of the adoption of reducing or abolition strategies and measures of penalty, the mechanisms of de-penalization, diversion and decriminalization emerge.

As it was stated, along with the classic policy of criminalization, which are put forward as aggressive and moving-ahead responses in the system of criminal justice, the necessities such as limiting and reducing the influence of extensive penal policy, and harmonizing the criminal policy

with the social changes, using and employing the de-penalization, diversion and decriminalization mechanism emerge as preventive responses in the back warding strategy of criminal policy.

Due to the relative association and link among the mentioned mechanisms with each other, and their impacts on penal changes, we will have a glance at the de-penalization and diversion mechanisms and then we will tackle the nature of decriminalization mechanism in a separate discussion.

- **De-penalization:**

Since the trend of the contemporary criminal policy has a greater tendency towards limiting the punishment, perhaps inclination towards de-penalization would be much simpler and more useful than decriminalization. [65]

In the strategy of the criminal law withdrawal, the de-penalization is one of the mechanisms that by maintaining the criminal description of a behavior, the guarantee for the penal implementations (punishments) of a criminal phenomenon is removed and denied or its crime and response become well proportional towards each other.

In other words, the measures which are modified as alternatives for punishment through limiting, discounting or even omitting those punishments or replacing them with reform and rehabilitation inside the criminal justice system in different forms in accordance with value-based concepts and conditions of the society are considered as de-penalization.

De-penalization has also been introduced as incomplete decriminalization. Despite the existence of detachment of the two concepts from each other, the term Decriminalization[66] has been used for the two concepts,[67] but it should be admitted that decriminalization and de-penalization are two independent and detached concepts in the criminal policy. In the report of the "The European Committee on Crime Problems", while presenting a short definition of de-penalization, "including all forms of de-accumulation from the penal system" , the "alternative measures for punishments being denial of freedom" have been mentioned as the most notable samples of de-penalization after mechanisms such as "criminalizing the criminal crimes".[68] [That is to say, the criminal crime to be converted into misdemeanor].

One of the most eminent reflections of the de-penalization idea in the history of penal changes is "the movement of limiting the scope of prison penalty and the expansion of its alternative measures". This movement which has been manifested within the format of pessimism towards imprisonment punishment, today, despite the existing criticisms has been noticed by many scientists and international institutions as a new and effective idea to prevent of crime repetition and has a specific position in the model of restorative justice[69]

Despite the fact that prison as an essential institution still continues its life even in the most advanced countries and in accordance with Mark Ansel who had said," We fired the death penalty (execution) in the year 1982 with a tip of a pen from the penal arsenal of France, but we cannot do the same with the prison:[70]

It seems that the imprisonment of the offenders should be considered as an exceptional issue in the mind of the judge and the prison should be allocated to someone whose freedom is dangerous for the society.

Today, in countries such as Zambia, Malaya and many other African countries such as the European and American countries, the charitable working allocated a broad position to itself in the penal system and the policy of fighting against criminal behavior and prevention of crime repetition.

Of course, while having optimism, we should not forget that the local attitudes and in total, the national culture has had its impact on the rate of the success of alternatives. For example in some African countries, it has been observed that the caring staff who has been responsible to control the implementation of public services in the parks by the losing party has commissioned the culprit in doing his personal jobs.

In Iran, some judges of children courts, by interpreting some legal articles, even without having the exact text of wording of law have initiated a kind of de-penalization. Detention at home, doing charitable working and imprisonments at the end of weeks have been the alternatives which on the basis of the judges' discretion has prevented of imprisonment or dispatching the youth to the Correctional Institution (Juvenile Institution)[71]. Thus, judicial de-penalization within the legislative de-penalization can be practiced.

"THE RESTORATIVE JUSTICE"

2.3 The restorative Justice

- **Concept and foundation of restorative Justice:**

Concerning the concept of restorative justice, it has been said that a revolution is occurring in the penal justice, a quiet and deep-rooted and to some extent precedent move. But indeed a revolutionary movement is changing the nature and structure of penal justice, despite the fact that in the course of the history of penal justice, the changes led to innovative and constructive measures, but it rarely changed the substantive foundations of the penal justice. What is now occurring is a throughout change in direction which is changing the focus from penal justice and the result of this shift is to re-divert it from offender toward the society and the injured parties of the crime (victims).[72]

Also it is stated that "the restorative justice is a philosophical structure to respond to the crime which is concentrated on the damage resulting from the crime and the measures which is necessary to restore the imposed damage. The restorative justice is concentrated on crime as an action against another individual or society and not an action against the government. The restorative justice is the model focused on future and emphasizes on the settlement of problems resulting from crime instead of its punishment. [73]

Tony Marshal, the English criminologist has a comprehensive definition of restorative justice. He says: The restorative justice is a process in which all those who have a share in a specific crime came together to

make a decision collectively for future on the quality of dealing with the effects and results of crime and the problems resulting from it and find a solution. [74]

Today, this definition has found a broad application at the international level.

- **Emergence of Restorative Justice :**

When the scientific criminology was born in 1876 with the publication of the book entitled: "Criminal Human" [75] by Cesar Lumberzo**,** the non-scientific criminology or speculative criminology which had cast shadow on the history of penal law and criminology for many years towards the phenomenon of crime and criminality faded and gave its position in the domain of penal codes to the new views which were based on research method, test and scientific sampling laid down by Lumberzo.

A glance at non-scientific criminology or speculative criminology also shows that it has been based on the pillars of theories, reasoning and personal experiences of philosophers, literary men , jurists and thinkers such as Aristotle, Plato, Imam Mohammad Qazali, Imam Fakhr Razi, Cicerone and the Christian jurisprudents of the Middle Age such as Saint Agustin, Thomas Aquine [76] and the philosophers of the Enlighten Age of 17 and 18 centuries such as John Lack, Thomas Habes, Jean Jeaque Rosso, Montesquieu, Geremi Bentham and Cesar Beccaria

A quick study on the theories put forward after Lumberzo in the range of penal codes from the viewpoint of the theories of criminology of Aetiology shows a growing trend of scientific criminology and amid

these, the intellectual currents of "scientific criminology" was gradually emerged.

On one side, the view of the advocates of the criminal justice system emerged by "putting into effect the criminal thought" which this view was in turn also based on two pillars of "the theory of criminal character or culpably character" and the other "the theory of punishment, reward and compensation" of Garry Baker who finally led to the theory of the diversity of penal system, the intensification of the rate of punishment and drawing of a dreadful perspective of the performance of judicial system for the purpose of prevention from crime[77]. On the other hand, the advocates of restorative justice emerged with two attitudes and asked for diminishing and limiting the competency of the penal authorities and even abolitionism in the penal system within the format of decriminalization, depenalization, diversion strategies which this section is also considered as the outcomes of scientific criminology.

Since 1980's, the concepts of Restorative Justice entered into the literature of penal law and its bases were formed on the basis of maintaining the rights, interests and benefits of the victim and three fold principles. [78] Before finding a legislative aspect, it was enforced in some countries in accordance with the request of the parties of crime or the beneficiaries families and/ or in a local community and within the format of discussion and dialogue, restitution and compensation, mediation and compromise, etc[79] and in the 1990's also, the theoretical framework of restorative justice was heeded in the documents of the European Council and also that of the document of the United Nations.[80]

Since criminal law supplies a controlling system to respond to the criminal's behavior in the case in which that behavior is more than the endurance capacity of the society[81] and on the other hand, the emphasis on absolute criminalization has been formed on the basis of the important and historical views of thinkers such as Bentham within the framework of the Utilitarian School [Bentham believes that punishment must be to the level that the intender (offender) of the crime see more damages between the damages resulting from the crime and its interests such that he/she gives up on committing the crime] [82] and/ or the duration of prison should make such a fear and intimidation in the minds of those who think to commit a crime that prevent them from committing that criminal act [83] and also on the other side, following the theory of Cesar Bakaria , despite his emphasis on reducing the numbers of crimes and omission of some criminal titles in the canons on the certainty of a punishment even a moderate one, always leaves a harsher impact than the fear of a terrible punishment for which there is a hope for liberation[84], therefore, with regard the above theories, none of these two faces of the coin of criminal law and other similar suppressive policies have led to absolute prevention of the committing the crimes and preventing of their rate of growth solely.

According to Levy Berol "No time, the intensive toughness of punishments prevented from the re-emergence of crime seriously".[85] So, in such a condition, the performance of the classic penal system without paying attention to the needs and feelings of the community and public opinion and without using the facilities of the society in the different stages of penal procedure, apart from lack of shifting the management of criminality to the civic society which made the penal accumulation, it

also gave a limited role to the victim and imposed extravagant costs on him/her too and brought about psychological and physical depression for the victim.

So, in such conditions, according to a number of jurists, the restorative justice could be applied for various reasons as an alternative for the classic criminal justice – either in its punishing or rehabilitation forms- to solve the disputes resulting from the crime, to prevent the criminality (offence) and even to correct the criminal. Thus, in the history of penal thought, not only disparity and discontinuity are not seen, but also in the criminal policies, a kind of balance is established between the currents of classic penal law and those of social defense. Also, between the intimidating and punishing ideas on one hand, and on the other hand, the neutralizing ideas, correction and treatment of the criminals, a constant link is created. [86]

- **The Theoretical Framework of Restorative Justice:**

The basic strategy which can be substituted with classical criminal justice in the criminal policy is the mechanisms of the theoretical framework of restorative justice which include: de-penalization, diversion and decriminalization which are in fact alternatives for classic criminal justice either in form of punishment or within the format of correction and rehabilitating and pursue the base of abolition of criminal justice system.

As it was said, since 1990, the theoretical frameworks of restorative justice are noticed in the documents of the Council of Europe and UN too and on the basis of abolitionism view, the restorative justice intends

to limit the realm of interference of criminal system and make the civic society contribute vis-à-vis criminality in different methods.[87]

- **Models of restorative justice:**

The two macro attitudes which show the quality of their inclination towards restorative justice include:

Purist Model, Maximalist Model.

(i) The Purist model:

The advocates of this attitude believe that the restorative justice will gradually be replaced with the system of traditional penal justice and the restorative justice is a process in which the involved parties in one crime try to solve and settle the differences and effects resulting from the committing of crime collectively. According to this model, the needs and interests of the parties of crime are provided in collaboration and through their voluntarily dialogues. Thus, the main role in settling the issues related to the crime should be played by the injured person (victim), culprit and the contribution of the local community and these two [victim and offender] are dependent on it (local community) in one way or another.

The first objective of the advocates of this model is to limit the domain of restorative justice to giving appropriate responses towards events and incidents resulting from the crime and not to its broader judicial and political consequences. The restorative programs should be developed and expanded in parallel with the system of traditional penal justice and by diversifying the cases of this system. In this path, the system of traditional justice will be gradually replaced with the system of

restorative justice based on the informal and non-ceremonial method of dispute settlements and the destiny of the penal file will come again under the control of direct beneficiaries of the crime. Thus, the objective of the Purists is much more limited than the objectives which are intended by other advocates of restorative justice. [88] The advocates of this model have presented and reviewed their views and models in two important gatherings. First in the Ninth International Congress on Criminology, Vienna in September 1983 entitled, "Policies and the Methods of Non-Penal and Informal Social Control of the Crime" and the other entitled,

"Abolition of Penal System" in the Montreal Conference in June 1987.[89]

These models include:

- **Model of the Northern America**: which was established in 1970 on the basis of mediation between the offender and the victim and aiming at the diversion movement. In 1980's, in particular in America, the friendly settlements of disputes between the offender and the victim in the Community Boards and in particular on the crimes against ownership, it witnessed 150 social and judicial experiences on the basis of mediation which were investigated.

Putting aside the prisons gradually and in particular agreement on leaving the implementation and execution of it and also the reduction of the number of prisons are among the characteristics of this model.[90] The foundation of social justice in this model gets impression from the traditional justice in particular the anthropology in Africa and it is an adaptation from the action and the method of making compromise

between the employers and workers (employees) in the law of America.[91]

- **The Italian–Germany Model**:

This model casts doubts on the absolute power of the government. By a very critical analysis on the defeat of the penal system, the radical Italian and German criminologists desire the sit on the throne and emergence of a society which in the field of social policy gives greater priority to the prevention rather than suppression of the offender.

According to Baratta, one of the leaders of the mentioned model, the omission of penal system is possible only when another better society which is not bourgeois and could do a direct supervision on abnormalities to be replaced with the present society.[92]

- **The Dutch Model**:

In 1982 in France a small book entitled "Peines Perdues" [93] was published by Look Hulsman, Professor of Law at Rotterdam University.[Louk Hulsman, profesor emérito de Derecho Penal de la Universidad de Rotterdam] Due to attraction of the innovation of disputes settlement among individuals and on the other hand the suffering and useless difficulties for them by the penal system, this jurist asked for the annulment of the penal organizations and prisons. In his view, the prison was a sign indicating the intention of punishment and punishing and this is a pessimistic and abusive attitude towards hum an and sign of unequal society and against human rights. According to Hulsman, even the terms of criminal law should be also changed ideally. In his view, the term "Situations-Problems" should be substitute for the

terms of "criminal policy", "murders or misdemeanors". After "annulling the penal system", (he selected this term to have an impact on the views of authorities) in his model, he identified three solutions as necessary to settle the disputes among the involved individuals and he recommends:

1) Resorting to a method of the type of "Community Boards" that within its format, the involved individuals are invited to find the solution to settle the existing disputes among themselves and they are also helped in this direction.

2) If this method ends in defeat, in that case, it is necessary to use the method of referring to a mediator to present a solution which is agreed by two sides (i.e. by the mediator).

3) And at the last stage, the civil law solutions of the type of restorative and compromising should be resorted. [94]

The teaching of Louk Hulseman is such that it can not be easily ignored. It does not cast doubt on justice, because he maintains the existence of judge and even the idea of obligation in his suggested model. [95]

But, this teaching is criticized for three faults. First, the mentioned teaching is based on the principle of innate or natural goodness of human. Second is that the Hulseman's teaching is not executable on some cases in particular when the committed or incidental acts and incidents are important. Lastly, this teaching might be dangerous for the very offender who is deprived of the guarantees of the criminal procedure.[96]

- **The Maximalist model:**

Criticizing the Purists, the advocates of this attitude believe that the principles of traditional penal justice should be restored through correction or abolition and in line with that and/ or within the traditional penal justice framework to act to settle the situations resulting from committing crime.

Putting other criticisms, the Maximalists believe that the drawn principles by the purists:

A) Has this danger that it provides only the ground for the enforcement of restorative programs for slight and small crimes.

B) It has also this danger that the intensive crimes (intensive misdemeanor and murders) to remain still in the monopoly of reflective measures with suppressive and punishing nature, whereas the injured parties resulting from the intensive misdemeanors and murders have the highest need to the restorative programs.

C) The intermediary management in penal disputes, if being performed with a voluntarily settlement by the victim and the offender, it will not include all grantees and it is not known that the mutually acceptable solution for the parties of dispute would be necessarily a restorative one.

D) The methods of the implementation of restorative justice, Victim-Offender Mediation (VOM), Family Groups Conferencing (FGC), Circles, Community Reparative Boards and others can not respond to all situations resulting from committing crimes

> and using these methods with the voluntarily feature, will bring about the limitation of the capabilities of the parties of disputes in achieving an agreement. Thus the Maximalists suggest a model as the real substitution of the penal justice system which can encompass all the cases.[97]

They suggest that inside the penal system, all forms of rectifications should be in line with discount like the transform of "criminal rank" of a offense into the "misdemeanor rank" or displacing one penalty for "denier of freedom" with one "alternative action" and also by resorting to the non-penal methods, despite the legal competency of the system of penal justice, "the prohibition of prosecution or stopping the penal prosecution" to be enforced. [98]

The intellectual framework of this moderate movement, in the beginning in a sensible form has been based on the intensive pessimism towards the freedom-depriving punishment and they [the advocates of this movement] have allowed prison as a exceptional executive guarantee and merely for the following purposes:

1. Rejecting the offenders who endanger the members of the community in a very serious way.

2. Introducing the very dangerous behaviors which aggress the basic values of the society.

3. Obligatory action against the offenders who refuse to yield to the implementation of other executive guarantee.[99]

Also for a higher equality among the offenders, the maximum of punishments and with the purpose of life sentence to be diminished and

a Commission independent from the prisons administration to be established to take important decisions on the situation of detention, freedom and revisions on these decisions. [100]

In this theory, the alternative measures for the imprisonment penalty have been divided into three categories.

1. Measures related to the quality of implementation of prison punishment such as:

   A) Semi-Detention (Aiming at prevention of the disassociation of link between the offenders and their family and social environment and also those being convicted to the short prisons [at least three months] which they are obliged to spend it).

   B) Short leave from prison in order work outside the prison environment [101]

   C) Week-end penal which is allocated to the holidays at every weekend.

   D) Arrest at domicile [102]

   E) Keeping at the outside institutions and non-prison place[103]

2. Measures detached from imprisonment such as:

   A) Daily fine[104] which is usually determined in proportion between the importance of the committed crime (conviction) and the financial situation of the losing party.

   B) Probation of driving means of transportations and public services (service orders) [105]

3. Measurers to prevent the execution of punishment such as:

   A) Suspension of the implementation of prison penalty (suspension [106] of the French type and suspended sentence of imprisonment of English type)

   B) Suspension of penal decree (suspension of the implementation of punishment decree in France and deferred sentence decree in England)

Concerning the positive results of the mentioned solutions, according to various researches, it can be said that these solutions:

1. As compared with the prison punishment prevents from the repetition of the crime.

2. Imprisonment does not have higher efficiency as compared with the substitution solutions.

3. Thus, it is in the interest and benefit of the society to use the alternative measures for the imprisonment punishment. [107]

Now, the basic question is that whether or not the theory of substitution solutions [108] are really substitutes for the imprisonment punishment?

In reply, it must be said that it is not always so, because it has bee said that the alternative measures has a combinational aspect rather than substitutional[109] in practice and indeed, theses innovations have been converted into supplementary measures.[110] Therefore, when the public services (service orders) entered into the law of Denmark in an experimental form, it was suggested to become an alternative for the

imprisonment punishments (on those groups of decrees which have really been issued).[111]

- **Relationship between restorative justice and criminology:**

The main preoccupations of criminology include: definition of crime and criminality, elaborating the reasons or the reason of committing a crime and methods of dealing with it.

In order to prevent or reduce the crime and criminality, various strategies have been adopted in the course of rather short history of criminology to respond the reason for committing the crime and also to make the ways of dealing with it appear as legitimate within the penal or punitive format or in form of non-penal measures.

However, since 1960's and 1970's, this subject has had a faster course, but there are numerous different opinions about that. Perhaps, it might be better to speak about "criminological theories" instead of criminology and therefore , in the existing literature on the concepts of criminology in the western societies which is their place of birth too, the titles of positivist criminology, traditional/conventional criminology, new criminology, interactionist criminology, radical criminology, critical criminology[112] and as likes are still used [113]

Amid these, the main part of the theory of "critical criminology" can be assumed as very close or equal to the restorative justice system. [114]

The critical theory was used for the first time by the founders of Frankfurt School.

Its final objective was to achieve an interpretation from the society in which the foundation of coordinating the social relations is rational mutual agreement and not trick and force and the human needs should be met reasonably.[115] These intellectual main attitudes include the left realists, Feminism and peace-making criminology.

Hall Pepinsky and Richard Quinney developed the peace making criminology to give a sharp response to the advocates of lodging a growing war against the crime and the one who commits it within the format of punishment and prison. This thought claims that the selected way to face the crime is generally wrong and the crime can not be suppressed or stopped by resorting to governmental violence or punishment.

So it is better to establish and substitute a social policy instead of social control, a restorative justice instead of a retributive/repressive justice, a compromise /reconciliation instead of imprisonment [116] and coordination, convergence and agreement among people instead of avenge and enmity among people.

Also it is better to stop war against offenders which is used by using the hallmark of crime and punishment and instead of employing the instruments and language to fight against crime and offender, to use the concepts of connectedness and caring.

This way of thinking intends to digest and absorb crime as a real or perhaps natural phenomenon and by accepting crime as one of the other existing realities in the society, to end the crime and not to reject and omit its perpetrator.

Also, this way of thinking states that within the format of throwing away and leaving the traditional assumptions from the crime and fighting against that, it is necessary to have interaction with the perpetrator and not to separate him/her from the self and the society via prison and overcome him/her by war and make him a constant enemy against himself/herself. [117]

It seems that the respective motivations of the advocates of this viewpoint of criminology, despite criticism made by many Marxist authorities can be confirmed by many people.[118]

- **Distinguishing features of the restorative justice system:**

Two basic weaknesses have been enumerated for the penal correction system:

One weakness is the practical defeat of treatment and correction and the Second is the danger of annihilation of the personal freedom right of the offender [i.e. the mere right of enforcement of classic punishment on him/her vis a vis the enforcement of the right of correction and treatment] along with the advantages of the intimidating punishing system. [119]

At the same time, concerning the position of the restorative justice, despite extensive creditability and welcoming it, there is a kind of encountering associated with prudence.[120] Because, the restorative justice in any situation deals with the human rights including the offender, victim and the members of the society[121] and thus , there exist many doubts and serious questions such as: Does this theory provide sufficient justifying foundations to implement punishment by the

government? Does the concept of restorative justice adaptable with the concept of punishment? Does the restorative justice adaptable with the present system of the penal justice of the adults and children? What are the standards to evaluate the restorative justice?[122] and with regard to the concept of justice: Should restorative justice give priority to the feeling of justice and equity – i.e. mainly the feeling of satisfaction by both sides-or opposite to that , should it observe more the legal regular principles? Should the values and outcomes such as: observing the human rights mentioned in the local rules and different international documents enter into the restorative justice and observed? To what extent, the guarantee of the legal rights of the parties of crime – in particular convicted or offender- form the preoccupation of restorative justice?...[123]

And precisely, despite the unprecedented growing welcome, does the process of restorative justice continue?

Putting four conceptual criticisms on restorative justice, Wanness and Strong announce that;

1. The restorative justice means the end of the criminal law.
2. Many parties (the parties of claim and others in restorative justice) can not pursue many objectives and at the same time to achieve a loftier intention.
3. All damages are not identifiable and those which can be detected do not enjoy the same importance.
4. The government and the society will not be able to contribute in the responsibility of maintaining the public

> welfare in an arrangement which is forecasted in the restorative justice. [124]

Morris states that he has really difficulty with the term of restorative justice and prefers to use the term of transformational justice instead of it. He explains that the restorative justice believes that at the beginning, we held justice, peace, equality and a "caring community" along with dutifulness feelings, but we lost it. [125]

Ashworth emphasizes that the restorative justice should be introduced as the objective of the advanced punishment. He claims that the restorative approach has not been able to present a clear standard for the restoration of victimization. In addition, he reminds that no specific spectrum from the dimensions of restorative justice has been able to prove itself in theory or practice. [126]

Quinn mentions that each system of penal justice which is in lack of restorative elements (damages resulting from crime) is doomed to deficiency and annihilation and many victimized groups fear that the slogan of restorative justice to become an instrument and pretext for greater attention to the rehabilitation of the offenders. [127]

Walgrave believes that the realm of restorative justice has not identified yet and up to this time, the model of restorative justice includes a broad spectrum and at the same time ambiguous. [128]

Pranis also has stated that the restorative justice is not describable with "liberal" or "conservative" hallmarks, however, it might include the positive characteristics of each of them. [129]

At the same time, Nellis explains that the philosophy and foundation of the restorative justice can be developed greater if it adjusts well. [130] Even beyond that and with a higher confidence, Pranis has reminded that the restorative justice has a green root in the nature and it is clear that the interest in this attitude is developing increasingly and constantly among the experts of penal law, social leaders and the society. [131]

Amberait and Cary also state that the movement of a corrective and educational system and changing its path to emerge a new concept of penal justice is not easy. This entails having a clear view and an effective leadership. They have alerted that perhaps the most important wrong doing which might be committed by many institutions is that at the same time they try to accept the principles of restorative justice, they assume that whatever the penal justice institution is active on it is a restorative justice.

They explain that the restorative justice basically has a different structure with the traditional understanding of the criminal phenomenon and responding to that is in the framework of traditional penal institutions. [132]

However, despite the fact that evaluation of the restorative justice programs-which have been implemented in a great number of spots in the world more or less-indicates the optimistic outcomes, but considering the critical viewpoints and existing ambiguities in the foundations of restorative justice which have been revived in the recent quarter of the twentieth century with a new identity once again, can restorative justice remain as a rival or an alternative for the traditional penal justice and develop continuously?

Will the creditability of bounding documents or orienting recommendations of the global and regional organizations which have converted into restorative justice with a new understanding of justice in penal affairs remain and survive? The future time is an occasion to receive the response on this transformation in the penal thought. [133]

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to be brought to trial and some years after that, he/she was taken out of the tomb and burned, Or a horse who had thrown his owner on the ground and made his death, was brought to trial and executed and finally the sickle by which someone had been killed was sentenced to be demolished. The trial of the insane persons, the minors or others who were committing a crime without any intention and will was a natural affair and were sentenced for the committed crimes. It was only after the Great Revolution of France that the concepts of intention and will enter into the penal responsibility. (Quotation from Public Penal Law, vol.1, Mohammad Ismail Afrasiyabi, p.137)

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