

DECRIMINALIZATION

“Principles and general concepts”

- **The concept of Decriminalization:**

Decriminalization is in a sense reverse process of criminalization. It is abolition of criminal penalties in relation to certain acts. It is in fact the reversion of the mechanism of criminalization in the scene of criminal policy¹ Decriminalization is considered as the decrease of the number of penal prohibitions in the law too. The report of the Council of Europe in the year 1980 describes the decriminalization as follows:

"The set of procedures through which, the competency to determine and impose the guarantee of enforcements (punishments) as a reaction against some behaviors are denied from the penal system".²

Thus, if commission of an act or omission to do an act is subject to punishment, but the legislator who holds inherent competency negates the penal description of that action or forbearance of the action, in fact amounts to decriminalization.

Therefore the removing the criminal label and title from an act or a behavior is decriminalization which has been put forward in some periods in relation with the moral crimes and public decency, religion and political affairs. For example, in most countries with customary law, committing suicide or abortion is subject to decriminalization or de-penalization due to the fact that it has no other victims apart from the perpetrator.³

The legalization also is one stage ahead decriminalization. Therefore, sometimes, the terms decriminalization and legalization have been used as synonyms.

Thus, decriminalization does not mean legalization of crimes. While decriminalized act is no longer crime, it may still be subject to penalties, for example monetary fine in place of criminal charge. In contrast legalization removes all or most legal detriments from a previously illegal act. So, according to the definitions being stated on decriminalization, if the criminal title for an act is maintained, but the social measures interferes instead of penalty, in that case, incomplete decriminalization has taken place [which is in fact the same de-penalization mechanism] and if the competency of the criminal justice system is maintained, but the criminal title is eradicated for an act and the measures of other social institutions interfere with the purpose keeping it out of the penal system, the mechanism diversion is materialized.

Thus, a kind of link and association seems to exist among the concepts and performance of mechanisms decriminalization, de-penalization and diversion.

In order to stem the roots of crime and reduce the crimes committing and also to diminish the number of penal prohibitions in the penal code, appropriate solutions have been provided minimizing interference of the penal system.⁴

These solutions include:

- (a). **Action on the environment:** The studies of the sociologists of Chicago School which was started firstly by presenting the view of Shaw-Mckay had considered extensive plans as penal alternatives for the social prevention of criminal acts of children. These programs were implemented since 1934 up to 1960 and was reinforced and pursued by the Kennedy administration under the title of "mobilization for the youth".

- (b). **Technical solutions of prevention:** In this case, the application of changes in the physical environment through technical instruments and facilities can be referred and in this way, will effect on incorrect behaviors for the purpose of diminishing them. For example: by using a new lock, the numbers of stealing cases from inside the cars are reduced and or the increase of electronic facilities and methods in the large shops in which the purchaser does not face the seller will diminish the theft. Experience shows that in Netherlands, the obligation of using helmet while riding a motorcycle or bike has reduced the number of stealing from these kinds of transportation means considerably.

- (c). **Social Re-organization:** The plan of the international society of social defence which was revised in 1983 emphasize on this aspect by recommending a better organization for social relations, environment and leisure time, etc. The changes in the relationships among the men, women, children and adults have brought about the dimensions of violence among these groups. The re-organization of retail sellers within the development of the small shops which has a more personal

aspect also cause the reduction of theft from the shelves of shops. Of course, the reality is that the present transformation is not in line with this direction. But changes in the social organization might inevitably affect the multiplicity of crimes.

- (d). **The expansion of the procedure of decriminalization:** It is for a long time that from every sides, some individuals ask for the acceleration in expanding the decriminalization procedure in particular from the time which on one side the legislator in different countries consider behaviors and deeds as crime which are not indeed in conflict with ethics, and on the other hand, the legislator does this job through an identified method which makes possible all individuals to be accountable. That is to say that the authors of a legal text, after enumerating a great number of rules, they add at the end of that text "every kind of breach of rules which was aforementioned... will be subject to punishment." ⁵

And even the criminologists have consensus on this issue in the American interactionist school.

This group, despite the fact that they consider a detachment between the primary deviation and secondary deviation⁶, believe that as soon as the society make a "label" of "criminality" to an individual and by establishing the "fabricated criminals, and grasp them, the deviation is materialized. In this way the act of "stigmatization" and "defaming" is also expanded and the "labeling theory" is materialized. Thus, "resorting to decriminalization", according to the advocates ⁷ of this trend, for

"lack of interference of criminal system" is considered a suitable solution and recommended by them.

- **The necessity of decriminalization:**

There are many regulations on economic, tax, administrative and health fields which do not necessarily need to be a penal description, which invites the enforcement of penalty, though all criminologists believe that the perpetrators of insignificant crimes or the crimes which do not effect the public order adversely should not be treated like an offender.

Precisely, they believe that a kind of re-organization and a reform of penal system should be performed and the circle of prohibitions leading to penal action should be limited. Now, the discussion about the necessity of decriminalization and lack of interference of penal system, beginning since the early 1960 has been converted into a movement and for a quarter of a century, it has been expanded and emerged in different forms⁸ and has been adopted by different criminal policy systems.

The Europeans who were the innovators of the newly established ideas made great efforts to achieve a dynamic and integrated system of legislation. "The Report of The European Specific Committee on Criminal Problems of the European Council on Decriminalization" in 1980 is among the latest efforts and most important changes in this realm lead to the expansion of such measures at the international levels in particular at the level of UN.⁹

Thus by using the findings of the new criminal policy, along with the criminalization mechanism and creation of new crimes in the penal code, the approach of decriminalization came into life as one of the new

model and mechanisms and brought about the reform of penal system and its reorganization to reduce the load of criminal justice system through the introduction of other legal systems. On the other hand, it would maintain the social balance and prevent the creation of the phenomenon of expanding penal measures. Moreover, according to some thinkers, what is considered as a sin today might be considered a virtue tomorrow. James Reed (1978), in his book entitled, "From the Private Sin to the General Virtue" says: The history of the movement of the control of birth rate in USA in 1830 shows how the social reformists have been pursued, brought to trial and punished for actions which today precious awards are granted to those actions.

At present, they are not only legal, but also the state and federal governments have different opinions at what level they should acquire the main share of the profit resulting of those actions.¹⁰

On the other hand, the insufficiency of the deterring effects of criminal justice system in confronting with unfavourable behaviors with regard to the three fold filters of "principles", "pre-suppositions" and "performances" in considering an action¹¹ as a crime and the heavy costs of penal prevention, today have convinced almost all criminologists that in order to fight against the phenomenon of expanding penal measures and also the phenomenon of repetition of crime (secondary deviation), at least towards some crimes and in particular in the cases which the standards of criminalization have not been adopted, they should tend to "decriminalization" and they consider it a necessary measure.¹²

Considering the relationship which exists between the decriminalization or criminalization and also the crises of criminal policy, so far, in different countries such as Germany, Canada, Italy, the legislators have made strenuous efforts in line with decriminalization from the penal crimes and converting them into administrative crimes, civic, enforcement and even deviation to fight with this crises.¹³

In the countries which are even in lack of density and compactness of prisoners, resorting to decriminalization and diverting towards this attitude as one of the instruments of criminal policy. Also the social necessities compel the society to have a correctional attitude towards crime and revise the penal policies and punishments.

On the other hand, despite the fact that culture¹⁴ and values¹⁵ of the societies are different from each other, but in order to change the attitudes towards the objectives of penal justice and punishments in a society, there is a need to a broad cultural works.

For this purpose, initially , the viewpoint of the society towards this fact that the heavy and intensive punishments (such as prison) is the best instrument to defend the society and secure its health should be transformed through culture-building in a gradual manner before starting decriminalization, so that in the event of decriminalization, this will deter from the emergence of any negative results and partly destructive ones which can weaken or annihilate the objective of decriminalization. It is in these conditions that the ground for resorting to decriminalization in a society is prepared as one of the instruments of criminal policy. Though sometime due to change in the ideas and beliefs of the society toward some criminal behaviors and also towards some insignificant

punishments in the society, there are public attitudes towards decriminalization. If we continue the penalty of insignificant nature instead of adopting the mechanism of decriminalization, credit of the criminal policy would be denuded because of social change and cultural values.

"Criminalization" and "Decriminalization" are considered as two faces of one coin to a great extent but with two different concepts and at the same time two important mechanisms in the criminal policy. Criminalization is a process by which the legislator considers some act as a threat to the maintain the social values and public order and such act is declared as crime by the legislature. The reverse process is decriminalization through which the competency to determine and impose penal action as a reaction against some behaviors is negated (taken away) from the penal system.¹⁶

- **The aim and importance of decriminalization mechanism:**

In previous discussions, we have observed that various factors have definite impacts in the establishment of decriminalization mechanism. The social, economic, political necessities and public and cultural beliefs, reform and re-organization of penal system, searching responses outside the penal realm and also preventing of the establishment of overbunded penal system caused by undue penal jurisprudence.

Opposite to the sociological view which considers the law as the rules resulting from the social phenomena and does not determine an objective for that and merely pay attention to realities [and believes that its system is in lack of artistic aspect].¹⁷ It must be said that law is not merely looking for the confirmation of reality and the result of

cultivation is measured by the scale of reason. Furthermore, the legislator tries to find the best rules out of it and maintains the public order and justice as much as possible.¹⁸

Amidst this, the objective of legislating for decriminalization rules is effective on establishment and quality of its contents.

In fact the understanding the decriminalization foundations is possible only through identifying its objective. So that , as the objective of all legal rules is to secure peace , public order and enforcement of justice, therefore the objective which is pursued by legislating the rules of decriminalization should also meet these objectives in one way or another.

In other words, the foundations of the forming views regarding the objective of rules in the back ward moving and withdrawing strategy and mechanism should lead to the maintenance of peace, public order and observance of justice as much as possible.

In a macro classification, the most important objectives of using the mechanisms of withdrawing strategies is precisely classified as follows:

- a) To limit and reduce the influence of the interference of penal justice system
- b) To reduce the penal sanctions.
- c) To deter the phenomenon of penal multiplicity.
- d) To prevent of the social factors which make grounds for committing crime

- e) To share the burden of the criminal justice system and made it an effective tool for dealing with crimes.
- f) To deter the mitigating and degrading of the position of criminal justice system
- g) To adopt alternative measures for punishment
- h) To limit the selection of crimes and punishments
- i) To limit the scope of prison penalty
- j) To expand the alternative punishment measures without depriving freedom (prison)
- k) To de-accumulate the penal system

In addition to the mentioned cases, the other reducing objectives of penal prohibitions within the format of preventive measures of social defence and with a reform-oriented attitude to make the society healthy are as follows:

1. to support and defend the human dignity and to materialize it to prevent and removing the threats against human rights and peace
2. to materialize the human-oriented criminal policy
3. to deter the damage on cultural beliefs of the society
4. to deter the discrediting and defaming the canons

5. to resort to measures better than penalty and outside the penal law by using education, cultural activities, introducing rules creating awareness among the people.
6. to have a realistic responses to the issues resulting from the criminal phenomenon with a sociological attitude
7. to identify instruments and means to prevent of crime
8. to deter the crime occurrence, and to make it difficult and to reduce the possibility of its occurrence.

- **Grounds and standards of decriminalization:**

In the history of penal changes, decriminalization in the realm of ethics and religion originated particularly in the European countries. In general in the past 200 years, the European and then the countries of the North America have had main roles in the process of decriminalization of ethical and religious crimes. Even in the cases such as homosexuality, it can be said that they have adopted an extremely liberal approach. It is clear that the cultural texture of the western societies in materializing decriminalization has had a great impact in these fields. So that, in the systems whose social texture is dictated by ethical and ideological (religious) traditions and beliefs, the pace of decriminalization is torpid it seems that the strategy (mechanism) of decriminalization in the realm of ethics and religion seems to be difficult and even impossible.¹⁹

Today, the crimes for which decriminalization are more recommended include:

1. Traffic crimes

2. Some behaviors related to family ethics and sexual relations.
3. The penal sanctions even in economic and social crimes which even some authors hold as a result of "the suppressive anger ... of the legislator".²⁰

The Report of Council of Europe reminds that the behaviours and deeds which had earlier invited penal sanctions, now they are considered as "all the same" in view of the public opinions, to be appropriate to decriminalize and The European Court for Human Rights, as the file of "Du-e Dejeon" showed has made reasoning in line with the same direction.²¹

Moreover, in the writings of some writers or in some semi-formal documents, a more general references is observed about decriminalization or the application of a "minimum decriminalization". Preparing and developing legal texts which is currently in process in Canada is a good example in this case. The Commission of Correction of the Law of Canada in a document under the title of " Our Penal Law", a document, which should be used as the base of the future penal code of Canada, explains as follows: "Only at the last stage, one should resort to the criminal law", i.e. for those categories of committed deeds which violate the basic values of the society in an extensive way.²²

In another document from the same Commission under the title of "Our Penal Procedure" which is in fact the future Penal Procedure of Canada reads: "The basic objectives of the criminal law should be materialized while protecting the freedom of the individuals".²³

This trend in a broad level is the result of a thinking flow in the North America which is the advocate for diminishing the number of crimes in canon. Hall and Gluck in 1951 have written in this regard that the realm of penal law is as a "small technical island in a sea of prudence thinking".²⁴

Great efforts have also been made by the Council of Europe to develop mechanism for decriminalization within the framework of determining the possible cases and also to regulate its forms.²⁵

When a specific type of behavior is decriminalized, every kind of deterring effect and threat of punishment is spontaneously removed. Therefore, it must be noticed that decriminalization or abolition of legal punishment even on trifling acts should not to be considered as lack of control on crimes or reduction of the people's fear from committing or repeating it.

However in decriminalization, the system of control of deeds and behaviour attained without the interference of the system of criminal justice by introducing the elements of threats of religious admonitions and social excommunication and fear of the danger of ethical punishments and deter the annihilation of the deterring effects which has a specific legal position in the system of general prevention.

The non-suppressive system should be substituted with the suppressive system and capacity building should be made by the establishment of economic, social, cultural, academic, health and welfare systems to control the crime and in fact, with the change in conditions, the non-penal ideal deterrents should be invoked instead of suppression of the offenders.

Only those acts to be persecuted which, firstly create social and ethical abhorrence and secondly, that crime to be punishable really endangers the interests and security of the society absolutely such as spying of foreigners, betraying the national interests and security, committing incest and etc.

Basically, the legislated (determined) canons are needed to be revised because the social norms are constantly in the process of change and transformation. It is possible that in a section, an act was considered to be a threat to law and order, public security and social values but with the change in the conditions of time, it needs to be revised. Thus, some countries have made revisions in their penal codes. In 1981, the Law of Punishments in the Egypt which had been approved in 1937 within the format of 15 chapters and 370 articles were revised. Despite the changes in some of the rules after the Islamic Revolution in Iran, the oldness of some other codes with a rather 100 years old, the conditions of time reminds us the necessity of the change and revision in them absolutely to the legislator.²⁶ Therefore, with regard to the alteration of the viewpoints in recent decades which has also made the imagination of a crime without punishment possible in the new criminal policy, the grounds of orientation towards decriminalization mechanism along with penal reactions in these revisions and changes are necessary issues which should be adopted inevitably in the determined canons in order to prevent of the negative consequences due to the over increase of crimes in the canon.

Today, many criminologists are following the policy of modifying the criminal titles or reducing the number of crimes in the criminal code. Radicalism in criminalization and increasingly criminal titles have given

rise to the emergence of a phenomenon so called, "criminal wanderings", because, in this event, no one knows for sure that in Canon which action or forbearance from action is permitted or prohibited? ²⁷

This radicalism and inclination towards a moving-ahead strategy under the prevailing inefficiency of the mechanism of criminalization may damage the edifice of criminal justice system. In these conditions, other scientists have tended to believe in the attitude to limit the interference of the system of criminal justice, to diminish the criminal prohibitions. It has also been welcome by a number of those involved in the criminal policy too.

Those involved in the new ideas were pursuing to learn which kind of crimes should be eradicated from the realm of criminal justice or sent out or legitimized? And whether or not, in addition to eradication of punishment, the legalization or formalization criminal titles should also be conducted?

Concerning this issue, the viewpoints of the experts are different. Some believe that employing decriminalization does not necessarily mean the removal of denunciation of a determined behaviour but it means the shifting of competency to investigate on that to other legal systems outside the system of criminal justice.(such as the system of administrative law, civil law).²⁸ Some have considered it's scope merely as eradication of labeling and criminal title from an action or from a behavior.²⁹ They also consider this realm subject to change and alteration of public opinions and views and consider a neutral role for the government too.

Some have taken an extreme path and while considering the detachment of the concept of decriminalization from legalization. They have considered and used decriminalization and legalization as synonym with each other. For example, this group, in homosexuality deeds, due to the mutual will and satisfaction of both mature parties, they consider it outside the scope of criminal description and consider it as a part of individual rights and freedoms and the right to select the quality of life which should be respected by others too.

So, from the standpoint of this current of thinking, in one stage, a behavior is taken away from the form of crime and its punishment is abolished and in the second stage also, to legalize or to formalize it, in order the necessity of restoring the personal rights and controlling and monitoring the government to establish and maintain of social order, and legislate accordingly. Doubtless to say, it is the dominating culture and values of the societies which make a selection out of these three options in order not to have any reverse role and result.

As it was stated, ethics and religion run as counter current in the realm of decriminalization whereas it is easier to adopt decriminalization by the Laic societies, being under the mastery and sovereignty of liberalism and secularism, The realm of decriminalization ethically-prohibited behaviors in the religious society is either limited or relating to obstructed or impossible.

The control and investigations on economic, financial, disciplinary, social, cultural, educational, health can be added to the scope of decriminalization in order to transfer them to the alternative legal systems.

Perhaps, to some extent, it can be said that the materialization of decriminalization in these cases is the common feature of all societies and does not have the difficulties of decriminalization from the ethical prohibited behaviors in the religious societies and its materialization in different societies are similar or equal.³⁰

Some other also has spoken about its conscious usage by drawing a specific limit for decriminalization as follows:

Firstly; by applying it in all fields which are not necessary and basic for the security of the society, it would be possible to help with the reduction of the load of the system of criminal justice considerably. Secondly, through it, it would be possible to achieve an appropriate coordination among the measures of different sectors of the society including formal sectors such as (the police, justice), and informal sectors such as (peoples' associations) for the purpose of crime prevention.³¹

Of course, one should always be aware that the scope and realm of decriminalization should not cause the weakness of the public order, security of the society, basic social values.

- **Types of decriminalization:**

As it was stated earlier, the lack of efficiency and effectiveness of the formal system of criminal justice led to the efforts of modernism to eradicate the problem. This process made the social and economic forces leave their impacts on the criminological views and on the formation of new concept of crime and offender. Furthermore, it caused have the manifestations of adaptive responses in the Europe and

America which one of these manifestations has been introduced within the format of different types of decriminalization.³²

a) Pragmatic decriminalization³³ is "the gradual phenomenon of reduction of the activities of criminal justice system vis-à-vis some behaviors or conditions, however formally and legally no change has been made in the competency of that system". This has been presented in the report of the European Committee on Criminal Problems in 1980 entitled, "De facto decriminalization".³⁴

In lieu of increase in the crime rate and high number of files, the institutions of criminal justice have limited the circle of crime and the peoples' request addressed to these organizations effectively by resorting to various methods, via administrative permits, far from the eyes of mass media and politicians by gradual transfer of complaints and files from the system of criminal justice or by reducing the rate of specific behaviors and their punishments.

This strategic adaptation (which started in 1960's in America seriously and at about one decade later in England) became possible on the considerations related to the saving in costs with a criminological understanding. The criminalization of petty offences were considered as unnecessary hallmarks and also with negative results.

This caused the increase of the number of cases in the criminal justice system in England in 1980's and 1990's despite the fact that the number of convicted individuals had been reduced.

Though in America, the situation was somehow different, after the beginning of 1980's, despite the fall of crimes against assets, the number

of violence related crimes cases, due to adoption of the policy of war against drugs, to the number of arrests in 1980's and 1990's increased which indicate the constant preoccupation of the expansion of the realm of criminal justice.

At the same time, whereas the volume, output and number of the cases under investigation has constantly been increasing, but in opposition, the public institutions of criminal justice have been reducing the limits of investigation and insignificant criminal behaviors. The policy of broken windows³⁵ and Net-Widening³⁶ in New York are the general and exceptional cases in the inclination towards this strategy.³⁷

However an action has been criminalized, but in fact that action is not considered as a crime and any complaints lodging against that crime is ignored. Many people after being arrested are not going under the criminal prosecution and punishment, Adopting such processes and methods have decriminalized many behaviours in different fields in practice and perhaps its more appropriate title in some cases is to term them as " hidden practical decriminalization" and some have termed the practical decriminalization as "executive decriminalization" .³⁸

b) Formal (legal) decriminalization³⁹ is a process which is conducted through legislation or judicial decisions.

- **Background of decriminalization and Social Defence Movement.**

The criminal theory and its concept has been used and presented by most of the criminal scientists and thinkers of criminal law. According to Pelaniol, the theory or doctrine has almost the same role in the law science which public opinion exert in the politics.⁴⁰

But it should be noticed that the creation of "a general attitude and vision of the criminal law" which cause "the establishment of criminal institutions" and also respond to the substantive rights and form-based rights is different from the criminal theory and is not limited to the domain of law. It is possible that they enter to the realm of philosophy and economy in addition to the realm of criminal law and even to be put forth by the non-specialized or semi-specialized individuals too.⁴¹

The wise Plato, John Mabiun the priest, Montesquieu and Durkheim- the philosophers, Bacarria-the economist, Fauconnet- the sociologist, Balzak and Tolstoy-the novelists (in the Novel : Resurrection) and even Michaud, the French politician have been partly the founders of general criminal visions which have given rise to the emergence of innovations in legislation too.

Therefore in this direction, the followings can be mentioned:

The intensification of punishment for the offenders with a record and discounting the punishment of offenders without record and suspicious to low dangerousness in the year 1832, suspension-attentive system (of its American type) in the year 1840, intensification of punishments against thief of (children) and murderers in 1937, 1954, and also recently the de-penalization and decriminalization which brings about withdrawal of the criminal law and increase of the realm of interference of administrative, disciplinary law or civil law in some countries which are among the criminal institutions have been established by legislators.

Baccaria dropped some of the acts from the list of crimes [which were accepted by the then determined law but did not have two features of usefulness and ethics]. These crimes firstly include the "crimes against

the divine sovereignty": According to Bacarria, in fact, it is not possible to impose beliefs on others by exerting force. Then he enumerates these offences including adultery, infanticide⁴², committing suicide and duel⁴³. He says, that committing adultery because of its punishment does not cause fulfillment of promise in matrimonial life; Infanticide, because the guarantee of enforcement of such a crime cannot also prevent the act of an isolated and disappointed mother⁴⁴ and finally committing suicide and duel which indeed imposes punishment on innocent individuals.⁴⁵ Baccaria decriminalizes these actions.

Gaetano Filanjeri desires not to consider committing suicide, magic deeds, usury and adultery as offenses any more and in other words, he wants to have them decriminalized, because, he believes that in the case of committing suicide, "the punishment is useless and unjust". Concerning magic deeds, due to the fact that their perpetrator is an idiot, the punishment is useless and concerning usury also the punishment is unjust because the freedom should be defended.⁴⁶

Bentham believes that decriminalization should encompass the "crimes against God".⁴⁷

Rossi sets out some deeds which are at the same time in conflict with ethics and problematic for fellow creatures. He sufficiently condemns the guarantee of religious implementation (religious punishments) or natural punishments of these deeds. He suggests to place two kinds of actions out of the penal realm:

- a) "The actions which the social power (government) can prevent from committing by using formal instruments which are less intensive than instruments of criminal justice".

b) "The actions for which sufficient restorative reactions have been considered".

Ferri,⁴⁸ the professor of Criminal Law in his book "Criminal Sociology" (1892) which he wrote under the inspiration of his previous book entitled, "New Horizons of Criminal Law and Procedure" (1881) has allocated long paragraphs to the criminal alternatives measures⁴⁹ and considered them as the main instruments for "social defense".

- **Social defense movement:**

Social defence is generally considered as the protection of society against crimes through a Systematized and coherent action by both the state and civil society. Though this term has long been in use in the criminological and penological literature, the modes and modalities of achieving its inherent objective have been shifting with the development of social sciences and behavioural disciplines. It is not possible to determine fool-proof theory of crime causation, without which it is impossible to create a society free from crime. Moreover, the definition of crime vary from country to country and from time to time, depending upon the changes in social structure, cultural values and normative expectations. Thus not a single system would be applicable to different situations and conditions. The objective behind social defence cannot be achieved merely by focusing on individuals who are organized offenders; it is all the more necessary to focus on those who are vulnerable to crime. Thus, the objective of social defense is not only to create a system that deals with offenders but also is to decimate conditions that originate and accelerate criminality

• **Initial trend of social defense:**

A sketch of International Union of Criminal Law was founded in 1888. It was founded as a fighting body against so called the 'classical' or 'legal' school of penal science because they attached too little importance to the social and realistic side of criminality. The founders of the society on the contrary emphasized the necessity of research of fact and realities of vast territory of scientific study of its causes and conditions. From beginning it has been one of the principal aims of the movement to make it clear that the traditional penal system were too rigorous on one side and not efficient enough on the other and that in some respects they tended to foster criminality instead of preventing and repressing it.⁵⁰ This is indicated by the programme of the first session of Union (Brusect, 1889), which considered the following topics:

1. Is the suspended sentence desirable?
2. What penal methods is it possible to substitute for the undesirable short prison sentences?
3. What are the defects of most modern legislations in regard to the treatment of recidivists?
4. Treatment of Juvenile offenders, including determination of age under which no criminal proceeding should be taken, and extension of reformatory school treatment.

Swiss welcomed the ideas of the Union. Adolph Prins, Van Hamel, Von Liszt, laid down the movement of social defense. The treatise on "comparative criminal legislation" under the supervision of Von Liszt

and in 31 volumes was published in 1849 in which the "modified act of Swiss Criminal Law" is reviewed broadly.

Adolph Prins created the first independent intellectual flow in this movement. In his view, the human creatures should be considered as social creatures who have certain obligations towards social creatures and see in the offender someone who damages the social order. He also takes another step to support the social order at a stage prior to committing the crime, the idea whose discussion was unprecedented until that time. He says that as long as we have organizations for the supply of the body health, we are also in need of a mental and ethical health service to cure the mental patients.⁵¹ In this thinking trend, the social defense is based on the basis of elaborating a "dangerous status" as the standard of the responsibility of the criminal individual and by ranking the standard and condition of the dangerousness of the criminals, the defense measures are suggested and the execution punishment (putting to death) is converted into specific measures to maintain order and neutralize the "dangerous status".

Rejecting the dangerous criminal and depriving him/her of social rights (who has escaped from his cage like a wild tiger and appears in a human face)⁵² along with measures for the stage prior to the committing of the crime found many followers. Von Liszt believed that (on the basis of social correction and not necessarily ethical base), the imposition of a strong and long punishment will bring about the destruction of the talent of the offender from inclination towards crime.⁵³

Gostavloben also considered all offenders without any exception as responsible and was thinking that the protection against them is the right of the society.⁵⁴

Loba recommended that one of the best methods to suppress and protect the society is to reject and transfer the offenders to the colonies.⁵⁵ Thus, in 1902 in Norway, in 1908 in England, in 1930 in Belgium, in 1927 in Sweden, in 1933 in Spain and Germany, the security measures of punishments were enforced. Also the absolute principle of social reconstruction and principle of rejection of the offender beside each other and equally were put forward and the objective of suppressive measures emerged in the social defense.⁵⁶

- **The second trend of social defense:**

Following the end of the World War Two, reactions against that war along with humanistic feelings emerged in all sides. In 1945, Philipo Garamatica, the Italian lawyer established the Centre for Social Defense Studies in Geneva. In 1960, he published his book entitled, "Principles of Social Defense" and believed that the concepts of offence, responsibility and punishment should be omitted from the criminal system fully⁵⁷ and replaced the measures of social defense adaptable with the needs of each offender with that of the punishments proportional with crime.⁵⁸ He was also interested in diversion.⁵⁹ Thus, in order to limit the scope of the interference of criminal law, he moved ahead up to the stage of its abolition and targeted it. In parallel with him, Marck Ansel, the French judge, by writing a book on "New Social Defense" in 1954, and with "a moderate view and with the aim of interference of criminal system"⁶⁰ once again, he expanded the ideas

movement. The Center of Social Defense Studies was formed with the membership of a great number of judges and professors at the French center of comparative law and thus another intellectual trend of social defense movement emerges under the title of the school of "new social defense". The view of Ansel is not limited to the "abolition of execution punishment" and encompasses also the "study of the character of the convicted person" and "postponing the issuance of punishment decree" too and brings about the creation of other new institutions which was also accepted by the French legislator.

Paragraph 6 of Article 81 and Paragraph 5 of Article 41 of the Act of the old criminal procedure and the Article 3-469 of new criminal procedure provides for the establishment of mentioned institutions.⁶¹ At the same time, the climax of the Ansel's view led to the establishment of the "de-penalisation" institution, because he believes, "in the present condition and societies, no one proposes a suggestion for the decriminalization from the willful murder.

But the current of the today's criminal policy which tends toward limiting the punishment perhaps could tend to "de-penalisation" easier and more useful. Here it does not mean to deny the characteristic of practical criminality from it, but the objective its that if such an interpretation is correct, to make it harmonized. This means to reduce the punishment intensification in most cases or deny the criminal feature of punishment from that. The today's movement of social defense considers frequent importance for the criminal policy and practical methods of de-penalisation.⁶²

The effects of attitude and general vision of the school of new social defense on execution of punishment has been very effective in France. It was such that "since the first of January 1968 to 31 December 1978, 9231 convicted persons were trialed for the crimes which could bring about death conviction. Out of these, the criminal courts issued 38 decrees of conviction on death. Following the violation of a number of these decrees in the Supreme Court, the number of the convictions on death were diminished to 23 cases. At these very periods, the number of executions were seven cases. So that, the right of forgiveness of the president included more than two third of those sentenced to death."⁶³

Thus, the movement of social defense left deep impacts on criminal changes and in 1975 to 1980 expanded in a speedy way. The important factors of the development of this movement include: "multiplicity of criminal crimes in canons up to the infinite border in particular in economic and social fields,⁶⁴ lack of implementation and even lack of enforceability of an important part of this set⁶⁵, faith in securing social defense through methods which are lighter and faster as compared with the methods of criminal law (in particular when the criminal law resorts to the freedom denial) and lastly, the social and political environment which welcome the discipline-oriented ideas and also less obligation."⁶⁶

The movement of social defense was updated and emerged with revision in "the program of minimum of the international society of social defense".

- **Interaction orientation and labeling:**

As it was stated, criminologists in the American interactionist school believe that upon the labeling of "criminality" to the individual on the

side of the society, the deviation has been materialized and dishonor and defame expands. The base of this theory has been presented by Edwin M. Lemert in his book entitled, "social pathology". He put forward the concept of the sociology of secondary deviation (repetition of crime in the domain of criminal law) in this theory. After him, Howard Becker in the book, "sociology of deviation" introduces two groups of individuals under the title of "counter-society" (anti-canon) and non-social individuals (deviant) who lives outside the legitimate law and call them "Outsiders".⁶⁷

The artificiality of deviation by the social groups, establishment and implementation of enforcements guarantee (punishments) and criminal prohibitions by the ruling group which finally is led to the hallmark of "labeling" and "defaming" of the offender, and that if there is not a reactive, there will not be any deviation, have formed the principles of this theory. Backer believes:

5. Radical and irregular criminology in the system of criminal justice causes the increase of the list of legal crimes and following that the list of the real crimes.
6. The change of attitude and reaction towards crime and punishment through medicalization of the criminal law and substitutions the concept of treatment instead of suppression is itself a crime producing factor.
7. The social values are selected and they do not belong to the mass public and are in line with the securing the interests of the ruling political power. Thus, the decisions of the agents

is very effective in the rate of labeling and committing of crime fully.

In accordance with what was stated, from the viewpoint of interactionist school, the hallmark of "deviation and labeling" is a social reaction which they should be faced through theoretical mechanisms of restorative justice and /or also if necessary through the abolition of the criminal justice system. ⁶⁸

3.2 The Relationship between Law, Morality and Decriminalization:

- **Mutual relationship between Law & Morality:**

Morality is a real and social issue which is the outcome of the history and civilization of an ethnic group which protects and continues its ideals and its source of inspiration is the religious teachings, judgments of practical reason and social customs. Moreover, the behavior of the prophets and also the pious people is its model and the standard of assessing the ethical behaviors of people is based on these models. In the ancient time, there was no need to the canon and the power of behaviors and customs and obligatory manner of religious rules was the successor of the duty of human rights and for a long time it was preventing of separation of law and ethic.

At the age of the Roman emperor, breach of promise and disloyalty in deposit was considered a very indecent issue ethically and in fact its ethical ugliness was harsher than punishment. ⁶⁹

But in the eighteenth century, the separation between law and ethics found many followers and efforts to secure the individual rights and freedoms made the scientists of that age insist on the independency of

ethic and rights and consider a specific objective and subject for each of the both two systems.

These philosophers were not sufficed to the separation of law and ethics and they developed the theory of finding the "rules in agreement with the social nature of human" by the reason within the format of "natural rights".

In the last two centuries, in the materialistic theories, ethics has no concept but to obey the canons and in a better words, the morality does not exist in reality. On the other hand, Ripert, the founder of legal psychological school, while criticizing the natural rights severely, stated that law in its most technical rules is under the influence of ethics and in fact law was the historical sediment of social ethic and in order to modify the will of the government and to prevent from its aggression, it was necessary to resort to ethics.

Precisely, it can be said that ethic is resulting from one of the three sources:

1. God (via religion);
2. Human (via reason or emotion);
3. Society (via habits and customs).

But law is the outcome of the will of those who rule over others under the title of ruling class and in the name of God or the nation and sometimes in the name of themselves. However, it is possible that religion and general desires to contribute have an impact on the will of the legislator and the political power of the government too, but between

these factors and law, there is not always an association. In the legal rules, vis-à-vis any obligation, there is a right for others but the main objective in ethics is to create obligation and not the right. So the difference between ethic and law is in the quality of their objectives and not their natures.

Law is resulting from four sources of canon, custom, judicial procedure and legal ideas, while ethic has an impact on all of the four sources more or less. In many ethical rules, by determining the specific enforcement guarantee, (punishment) the legislator has included them in the rank of legal rules.

- **Domain realm of ethics in criminal law:**

Most of the crimes are against the good ethics: Despite the fact that the determination of crime and punishment is only possible by canon and ethics does not have any interference in this way directly, but a great group of criminal codes have been under the influence of the ethical rules. Murder, theft, fraud, disloyalty in deposit, rape etc are the actions against the ethics which are prohibited by the law.

The ranking of some crimes (like murder) intentionally and Quasi-intentionally and unintentionally, the necessity of evil intention of the culprit and his exemption of punishment in a legitimate defense are the signs of the influence of ethic in these kinds of canons. Despite the support extend to non-religiosity of criminal law and detaching it from religion and ethic, many criminologists believe that the criminal concepts are always under the influence of the ethical and religious concepts or in some cases; they are determined by the religious and ethical concepts.⁷⁰

Thus, in most of the penal decrees, ethics has a great impact and the judge considers all ethical and social aspects of the crime. He includes the degree of evil intention and the psychological status and the living environment of the culprit and his relation with the victim and issues decree for a punishment which he considers as to be just.

In this psychological and social research, ethic has a very influential role. A judge who believes in the ugliness of the free relations between men and women and thinks that the fragility of the bases of family is a social catastrophe, in the crimes against public chastity is more strict than the one who considers these bonds as something in opposition with the individual freedom and commitment to that as a useless and superstitious issue.⁷¹

- **Idea of legal morality and its impact on law and ethic:**

Amid these views, the morality followers with a faith in legal morality believe that government along with its other duties is committed and dutiful to make a legal support of morality such as extending penal support. Because, breaching a moral rule is bad inherently and thus, in order to support the ethics in general, the legal guarantee enforcement (punishment) should be used and morality should become obligatory.

And upon committing breach, the ethical rule becomes subject to legal support and obligation either it imposes any damage on others or not, either it is in privacy or in public.

However, some of the individuals of this group have considered the limited support of the moral rule to be necessary to protect the rights of the individuals and the society.

Kant and Stephen and many other Islamic jurists and moralists (ethic-oriented followers) who believe that the Islamic government is obliged to support the ethical rules, irrespective of its utility are among this group.⁷² The philosophers who are follower of this theory have put "criminalization" under the name of "legal morality" as the main pivot of their discussion. The legal morality followers permit that an action - which exactly due to the fact that it is non-ethical action or at least it is considered non-ethical in the whole society- to be criminalized.⁷³

The thinking foundations and principles of the followers of " the legal obligation of morality has been described accordingly:

1. The ethical behavior is inherently bad either it damages the others or does not.
2. Supporting the general ethics and society is considered to be part of the duties of the government and some more radical individuals have considered it as only the duty of criminal law.⁷⁴
3. Intensification of enforcements guarantee (punishments) against any kind of non-ethical behaviors is a way to confront with the increase of crimes
4. The existences of some legal canons which support the ethical values indicate the necessity of extending penal support to morality.
5. The government should act indirectly in line with maintaining and reinforcing the ethical motivation and action and perfectionism also with the aim of spreading the virtues, must be the base for the justification of the interfering measures of the

government in limiting the individual freedom and ethical intention. This action of the government can be considered similar to the legal paternalism (Principle of utility and granting ethical interest to others), however this theory is less bright and with a fewer number of followers.⁷⁵

- **Liberalism and its impact on law and ethic:**

Opposite to this group, in particular the liberals believe that due to various reasons in particular the distinguish between the two domains of law and morality, there is not such an obligation for the government and they consider its interference in morality corruptive and something which annihilate the motivation of an moral act.

They state that the personal and individual behaviours which are against ethics and which do not damage the others and do not create any corruption, in addition, they are done in privacy too are not subject to support. The main intellectual principles of the advocates of this theory include:

1. The government can not make the people ethical by force, but it should prepare the conditions of freedom and independency of action for them. The breach of this rule is prohibited unless for the purpose of achieving this very freedom of individual practice and through the path of prevention of damage.
2. In a society which ethical obligation is legal, to what extent are the ethical virtuous prevailing? In other words, if the government takes away its penal support from the ethics, will the society tend to breach the moral rules?

3. No group has right to impose its ethical beliefs or standards on other groups by using the force of criminal code or via threat of penal enforcement guarantee. ⁷⁶
4. The law should recognize the freedom and independency of individual action and the rules of law must not breach them and every person should follow its own understanding of life well with the exception of accepting the minim of necessary limitations which this very freedom is secured for others too. ⁷⁷
5. The indecent behaviors are considered crimes due to fact that they are in conflict with the public chastity and not because they are against the morality and or they are crime due to the fact that they breach the peace not due to their support of religious decree. ⁷⁸
6. In the free and democratic society, the behavior against the morality belongs to the domain of individual freedom and the government, with the exception of reference to the "principle of not harming the others" has no right to interfere in the private life of the people⁷⁹ and the government has no business in the peoples' beds! ⁸⁰
7. Each behavior which is appropriately to be observed does not mean that its imposition as an ethical standard would be useful and appropriate too. ⁸¹
8. The scope of criminal law should not be merely subject to the ban on bad behaviors, but it should be extended to securing the social useful behaviors too.

9. The government should only respond to the serious and direct threats which are against the basic structures of the acceptable values of the society.⁸² And as it was said, the real criminal law should be limited to the wrongdoing actions which threaten the basic values of the society or ignore them seriously.⁸³
10. Making morality an obligation duty in legal form has a discriminatory shape, because the interests of the life of people in the free society, like the desire of the ruling group is limited and in a society in order to respect the rights of individuals, it is not possible to call some behaviors as ethical values and support them and do not support some other behaviors. It is just like that an individual who is damaged in a condition, to be supported, but the freedom of sexual act of the same individual is not to be supported.⁸⁴ On the other hand, the moralities are subject to quick social changes and what has been non-ethical and punishable in the past, today is partly considered as a non-criminal action. So that the ethical rules in the course of time are not fixed and are subject to change and there is no need to support them.

Thus, the philosophers who are in favour of the theory of "lack of the necessity of support the ethics" in the limit of their own intellectual principles have included "decriminalization" as one of their main pivots of discussion. According to the liberalistic views, the badness of the behavior does not necessarily justify the penalty, because the punishment even if being applied severely, they would not be an obstacle to prevent such incorrect behaviors. Thus, opposite to the legal morality advocates, this group has no agreement with the absolute

justification of penalty vis-à-vis the indecent behaviors,⁸⁵ and do not consider the depth of insolence and ugliness of action from ethical point of view as something sufficient for identifying of the same action as a crime inherently⁸⁶ and believe that the criminal law should not be used to deter from going into the hell.⁸⁷ The present tendency in most of the western countries is that there are many reasons for the detachment of ethics from criminal law and they must be detached and those actions should be decriminalized which do not make a touchable social damage and do not have the intensive reaction of the majority of people.⁸⁸

At the same time, it does not seem that decriminalization to be acceptable and logical action on the behaviors which are accepted as ethical beliefs and values by a society, have constant features and confrontation with them have always been a part of the history of penal law (such as murder, theft and rape) and are among the public sacred issues of that society and also they will bring about the deep disrespect and discredit of the social norms.

"THE RELATIONSHIP BETWEEN THE NON-PENAL STRATEGIES AND HUMAN RIGHTS MECHANISMS"

- **The relationship between the non-penal strategies and human rights mechanisms:**

In many societies, human rights are considered as main values. Also, the guarantee of individual freedom at the stage of judicial investigation and repulsion of the concept of dangerous status before committing a crime in the criminal law are considered as manifestations of human rights.⁸⁹

As it was stated, UN has adjusted and approved its criminal policy from the beginning of activities within the format of documents such as declaration, strategic principles, recommendation, convention, etc which have human rights aspects and are in the domain of fighting against crime. The UN believes that criminal behaviors in their turn are threats against the global peace & security and according to the Article 1, Paragraph 1 of the UN Charter, it is necessary to take collective effective measures to prevent the criminal behaviors, remove the threats against peace and to stop any kind of aggressive action or other deeds which violate peace. These documents have two different characteristics which are partly bounding and some have also guiding aspect.

Also, the principle of regularity of penalties which supplements the principle of regularity of crimes prescribes the pre-determined human legal penalties in accordance with the committed crimes and in harmony with the acceptable value systems of the majority of the members of the society.

On this basis, the Article 5 of the Declaration of Human Rights reiterates, "No one can be put under torture, punishment or behavior which is cruel and against the humanity and human dignity or indecent." Also part of the Article 15 of this Declaration reads, "...and also no punishment will be determined harsher than what has been applicable at the time of committing the crime and whenever after committing the crime, the law prescribes a rather softer punishment for that, the perpetrator will utilize it". In completion the Article 5 of the Declaration, the Article 7 of the International Convention of Civic and Political Rights states that "no body can be bothered, disturbed, tortured, punished or to be put under cruel, inhumane or wicked behaviors. In

particular putting a person under medical test or surgery without his/her deliberate satisfaction is prohibited".

At the same time, despite the fact that Article 2-6 of this Convention has accepted the execution penalty only on intensive murders, but after a quarter of century, in 1989, within the second arbitrary Protocol in the Convention of Civic and Political Rights, the abolition of "death penalty" and "execution punishment" in all crimes have been emphasized and has become obligatory for the member states.⁹⁰

On the other hand, it has put the non-suppressive measures with priority and specific position under the title of the independent institution of "crime prevention" along with the measures of criminal justice system and recommends and emphasizes it.

On the basis of the human rights documents of UN, it is observed that as for the application of reactional measures in the criminal justice system, the enforcement of human rights is emphasized, in the issue of prevention of offending behavior; also the observance of the principles of human rights is emphasized.

In line with this idea, the just prevention of criminal behavior has two aspects:

- a) Forcible prevention by resorting to the penal system
- b) Non-forcible prevention without resorting to penal system.

Moreover, the traces of the "strategy of crime prevention", without resorting to the penal system can be found in the documents of human rights which are put forward within the format of "individual and social

rights and freedoms". The human rights documents, with this reasoning that prevention is better than suppression, and the non-forcible measures with economic, cultural, social and ... natures are in priority for the materialization of individual rights and freedoms, in addition to the fact that it has obliged the government to observe these rights, it has enforced them to do obligations and adopt policies and mechanisms through which it could also bring about the crime prevention.

According to Article 1-16 of the World Declaration of Human Rights, each mature woman or man has a right to marriage and form family without any racial, national or religious limitation with his/her desired person. Also according to the Article 1-10 of the International Convention of Economic, Social and Cultural Rights, the formation and establishment of family and free marriage is supported. The Article 2-23 of the Convention of Civic, Political Rights recognizes the right of marriage and formation of family for men and women when they reach to the marriage age. In the Article 3-23, the mentioned Declaration states that whoever works is entitled to receive a fair and satisfactory wage which could secure his/her life and that of his/her family in accordance with the human dignity and supplement it with any other social supportive instruments if necessary. Also, the Article 1-25 of this Declaration emphasizes on supporting of the securing the health, level of living, one's own welfare and one's family and has emphasized on supporting him/her at the times of unemployment and has put the responsibility of procuring this ground on the shoulder of the government as one of the examples of human rights.

Article 1-6 of International Convention of Economic, Social and Cultural Rights has obliged the governments to secure the freedom in

the selection of job and activity of the citizen. According to the Article 9 also, it is necessary to recognize the right of each individual to enjoy the appropriate social security including social insurances.

The contents of Article 24 and Article 7-D of the World Declaration of Human Rights recognizes the right of enjoying rest, leisure time, recreation, rational limitation of working hour, periodical short leave, etc for every body. ⁹¹ Article 31 of the Convention of Children Rights also recognizes the rights of having recreation, peace, playing and artistic activities proportional with his/her age and the Articles 33, 34 and 36 of this Convention support the children against drugs, smuggling⁹², exploitation, sexual abuse, pornography accordingly and all forms of exploitation which could endanger the aspects of the welfare of the child. ⁹³ The regulations of Beijing had put forth another criminal justice policy for the children.

The rule 1-26, considers the guarantee of social working, support, education and acquisition of professional competencies and social skills in line with playing a constructive and generative role in the society as the objectives of behaving with the children and the youth in the institutions which negate the freedom (prison). The rule 1-19 has recommended the dispatch and maintenance of children in the governmental institutions as the last approach and in a short term as much as possible and at the same time, the rule 1-18 considers the non-disturbing freedom measures (non-prison) as more appropriate ones and emphasizes on them. Concerning the mechanisms to prevent the criminal behavior by the children, the Principle 9 of the Principles of Riyadh also states that the governments are obliged to present the methods of effective reduction of the opportunity to commit criminal

acts within the comprehensive plans of prevention. In the Principle 33, it prescribes that the societies should arrange or reinforce a set of broad participatory measures including the expansion of the centers of social developments and specific recreational facilities for the children who are exposed to social danger and also for the youth. The Principle 43 has emphasized on the reduction of the level of pornography, the display of addiction and violation and restoring to the violence and exploitive methods. It has obliged the mass media to present these kinds of cases as unfavourable ones and avoid of showing the individuals in particular women and children in an obscene way. Also while encouraging these media, in particular through movies, it has recommended the spread of correct and logic principles and roles.

The contents of the Principle 44 also emphasizes on the broad social role and the influence of mass media in the filed of addiction to drugs and alcohol and reminds the employment of balanced and correct methods from the credit and power of this media to prevent of addiction.

It also recommends the expansion of effective programs on drugs in all levels and finally in the Principle 53, it advises the governments by legislating the canons and their implementation to prevent the children and the youth of becoming victimized, or being exploited or mistreatment or being used in the criminal activities.⁹⁴

Today, the governments which violate the human rights, have caused the offenders who are the main victims of their anti-human policies [on one side bear the economic and cultural poverty and on the other side have also "stigma" and "criminality labeling" and "criminal-record"] on their head front constantly.

As it was stated, one of the selected strategies in the materialization of prevention of criminology is the "withdrawal strategy"; whose executive mechanisms are the non-forcible measures.

In other words, in order to de-accumulate the system of the criminal justices and to reduce the costs and compensate the damages resulting from the occurrence of crimes, the non-suppressive mechanisms such as "decriminalization", "de-penalization" and "diversion" are recommended and emphasized in line with crime prevention besides the penal measures to bring about the implementations of principles of human rights and its materialization at the international level.

Thus, the society by observing respect to the economic, social and cultural rights of human and through preparing the grounds to materialize that by the governments become needless in resorting to the merely suppressive and limiting measures. However, it is possible that the outcome of adoption of such a policy might lead to "minimum results": i.e. only lead to the reduction of the scope and forms of criminal behaviors.

By adopting the non-suppressive preventive policy, and paying the price of observing human rights, in all its dimensions by the governments ' vis-à-vis the citizens, it is possible to have a hope in crime prevention.

In this direction, the framework of theoretical foundations of the restorative justice such as "decriminalization", "de-penalization" and "diversion" are among effective ways to secure and guarantee the personal and social security⁹⁵ of the citizen's rights.

**THE EFFECTS AND RESULTS OF INCLINATION TOWARDS
NON-PENAL STRATEGIES AND THE VIEWPOINTS
OF PROS AND CONS**

- **The effects and results of inclination towards non-penal strategies:**

As it was expressed, decriminalization should not bring about the weakness and damage to the public order, the security of the society and the social values and the abolition of the penal regulations, in accordance with the Report of the European Committee which within the format of types of decriminalization has been divided into 3 groups of general and distinct can have effects and consequences.

Within the format of this classification, if the insignificant and unimportant behaviors to be decriminalized and this act is not considered to be an unfavorable action, then it would not create any problem. But the result of this measure towards the behaviors which are still considered unfavorable is reverse and can bring about some problems.

Though, after decriminalization, the component of intimidation and deterrence which is one of the two components of suppressive and forcible preventions undergoes changes towards that behavior and might reduce the public fear and deterrence on that particular behavior, but from the viewpoint of penology, the scope of fear and deterrence is not merely limited to the legal punishment. It is likely that with the abolition of the canon, there would be nothing to be lost. And in this range, threatening to the social repulsion, religious rebuke and in particular fear of ethical punishment can be noticed and it might deter the overshadowing of the effect of intimidation and deterrence.

The inclination towards prevention of criminal behavior through alternative solutions such as mechanisms of administrative or civic rights which take place outside it despite the maintenance of competency of criminal justice system, it should not be accompanied by intimidation or defame and dishonor, moreover they should reduce or compensate the damage with a non-penal and non-suppressive nature and with the change in the conditions of environmental, economic, social and cultural status.⁹⁶

At the same time, the component of serving as an example and utility of the punishment which in criminalization brings about intimidation and ethical training of the society can be damaged as a result of decriminalization. Though, it should be noticed that the fear of punishment is created as a result of committing an action which indeed a crime whether we like or not, on the other hand, some behaviors which due to different factors lead to criminalization and also intensively find capability to apply punishment, that action not only seems to be acceptable from the viewpoint of "ethic", but it is praised by the ethics too such as legitimate defense or confrontation with the invading enemy.... . In the countries in which the act of incest is performed among the adults with the mutual agreement, however, there is no minimum of legal punishment and it has been decriminalized, but it is harshly denounced from the ethical point of view.⁹⁷

Thus, it is observed that on one side, the effect of prevention and deterrence of the components of fear of punishment serving as an example has kept its efficiency and can remain in the society as the constant ethical and educational effect for the criminal law and enforcement of punishments. On the other hand, even in the case of

decriminalization, fear of social repulsion, religious rebuke and ethical punishment has served as intimidating and deterring factors. However, in this way, in both forms, the crime prevention is intended.

Due to change in beliefs and public opinions on the role of formal and governmental bodies and doubts of the minds on legitimacy and acceptability of the penal regulations also in a certain domain, the aspect of social and ethical effect of canons diminishes and fades. At the same time, despite the dangers and damages to some ideological beliefs and ethical values resulting from decriminalization, the Report of Specific Committee on Criminal Problems of the European Union reflects the general inclination towards decriminalization and its consequent effects on the power of prevention and deterrence:

1. Decriminalization does not have so many problems on the actions which are considered as insignificant and unimportant ones and those which are rarely prosecuted or punished by the police.
2. It is not expected that decriminalization of the unfavourable behaviour which has intensive ethical condemnation and remain under the control explicitly by other social factors and maintain its preventive power after decriminalization cause any problem too.
3. Decriminalization of a behaviour which has been conducted as a result of inclination towards alternative solution:

- A) It is expected that the power of control of the systems of administrative and civic rights to be replaced with the preventive effect resulting from criminalization.
 - B) If the power of the control of decriminalization behavior to be transferred and shifted to the non-legal social systems such as educational, health, welfare and social security systems, in that event, any deterring effect as a result of decriminalization can be secured through positive forms of deterring in these systems.
4. However, decriminalization might reduce the effects and preventive feature, but despite this danger, in many cases, this danger is insignificant as compared to the advantages of decriminalization.(such as reducing the defamation or paying attention to prosecution of more important crimes, etc)
5. In all cases of decriminalization, the destructive side effects should be forecasted and prevented as much as possible and in the case of emergence of these effects, in the following stages, also they must be omitted or reduced.⁹⁸

• **Viewpoints in support of decriminalization:**

1. To enforce the policy of prevention through non-penal strategies is better than punishment.⁹⁹
2. Decriminalization causes the crimes reduction.¹⁰⁰
3. Inclination and the need of the society to expand the individual freedoms and lack of their satisfaction towards

the dominancy of the authoritarians and legislation of strict and intensive rules reveal the necessity of decriminalization¹⁰¹ whereas, every body has the right of one's own control sovereignty¹⁰² and controlling the freedom of action of others is in conflict with the freedom and private limit of the individuals.

4. Decriminalization of some unfavourable behaviors cause the increase of the control of the government and annihilation of the underground economy and it makes possible the prevention of damage and making the legal support, securing social security and welfare and vindication of rights of beneficiaries through qualified bodies.¹⁰³
5. Decriminalization of some behaviors may bring about the real thriving status of economy and help with the increase of government's income though collecting tax.¹⁰⁴
6. Decriminalization brings about investment and allocation of financial and human resources in fighting with other necessary sectors¹⁰⁵ whereas, in order to fight against the crime, it is necessary to spend financial costs and this issue demands collecting further tax from people and the possibility of the reduction of the standard of their life.¹⁰⁶

- **Viewpoints against the decriminalization:**

1. Decriminalization is an action in line with the removal of ethical virtues and the only way to fight against the spread of crime is to enforce punishment.¹⁰⁷
2. Decriminalization causes damages on the society and lack of confrontation with crime and fighting against crime will cause its repetition.¹⁰⁸
3. In general, decriminalization will break the social norms.¹⁰⁹
4. Since the philosophy of most of the punishments is to maintain the general interests in favour of the victim of offence, so decriminalization is in contradiction with the philosophy of punishment.¹¹⁰
5. The enforcement of individual freedom should not be used as instruments to destruct the individual in the society and the punishment should be considered.¹¹¹
6. The pros and the promoters of decriminalization have certain interests themselves.¹¹²

Thus, decriminalizing some behaviors, in addition to weakening the ethical sensitivities can have the danger of extension and expansion of crimes (generalizing and dissemination) and it might lead to the double occurrence of kinds of similar behaviors which are still considered unfavorable and even they might be practiced in an open form. The decriminalization of pictures and obscene drawings, incest among the adults (with mutual satisfaction) or small and insignificant thefts can be

emerged in new forms such as public supply and postal request for pornographies, disagreed incest with the intimates among the adults and or even with the children and also big and intensive stealing. So that, before starting any decriminalization, first, the concerned crimes should be identified on the basis of the prevailing cultural values of the society and then with a comprehensive and restrictive recognition, the limit and realm of decriminalization about that specific behavior, through comparative or concentrated studies, the minimum danger of its extension or expansion (generalizing or disseminating it) to other crimes to be assessed. This will make the unfavorable side effects of that behavior to a minimum level and become insignificant and the grounds to be provided for decriminalization of that behavior.

Though the danger of extension (generalization) from one crime to another crime and also the decriminalized behavior to other behavior is different, but the reverse effects which are created directly or indirectly as a result of decriminalization and in long term should not be underestimated and in the case of the behavior which despite the expectation emerges in disharmony with other cases, and shows the negative results and effects resulting from decriminalization, the legislator should stop this process and adopt a scientific policy formulation and programme keeping in view whole territory of causation of crime.

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3. Najafi Abrand Abadi, Ali Hossein, Hashem Beigi, Hamid, op.cit. p.77.
4. Report of the Specific Committee of Criminal Issues, Council of Europe on Decriminalization, p.13.
5. Pradel, John, op.cit., pp.126, 127.
6. Primary deviance (1a) Deviance primaries. The difference between the primary deviation and secondary deviation was put forward firstly by Edvin M. Lemert in the book entitled, *Social Pathology*, 1950), and it was precisely reviewed in his other book under the title of "Deviation of Human", *Social Problems and Social Control* (1972). The primary deviation is related to the perpetrator which enter into the deviation deeds but they are in the contract- based and customary position. At this stage, there is not the self-imagination and deviation is considered as part of the role of perpetrator which is accepted from the social point of view whereas, the secondary deviation (or professional) is a term for the actions of those who are accustomed to deviation (crime repetition) and deviation has had impacts on their self imagination and the deviance role comes into practice consciously. The secondary deviation is established when the deviation role is

reinforced as a result of increase in contact with the more contaminated deviators (for example through membership in petit cultures) and mostly due to the impacts of labeling. (Narrated from the Encyclopedia of Criminology, Ali Hossein Najafi Abrandabadi et al, pp.271, 272.

7. Lemert (E), *Social Pathology*, 1951, Becker (S), *Outsiders: Study in Sociology of Deviance*, 1963, 2nd ed, 1973, Goffman (E), *Asiles*, 1968.
8. Aghayee, Hossein, *op.cit.*, p.162.
9. Rayejian Asli, *op.cit.* p.94.
10. Abd Alfattah, Ezzat, *op.cit.* p.155.
11. Shonshek Johnathan, on *Criminalization*, Dor, Recth, Klwer, Academic, 1994.

By principles it means that whether or not basically is the action the subject of criminalization? and is it under the competency of the government and is it relevant to the government? Is the nature of the action such that it imposes damage on the base and pillar of the public order or not? By presupposing , it means whether or not, using the non-penal controlling systems such as civil, administrative, disciplinary or law enforcement laws are more effective or not? And finally, by their functions, is that whether or not the interests of criminalization on an action is greater than its disadvantages or not?

12. Pradel, John, *op.cit.*
13. Abd Alfattah, Ezzat, *op.cit.*, forward by the translation, p.136.
14. Culture means a complex set of knowledge, belief, art, ethic, canon, customs and any other habit which is acquired by human as a member of the society. (Narrated from the *Sociology of Values*, Parviz Sanei, p.502)
15. Values - (Les) valeurs: Values include the appropriate ideological, ethical, social, political, economical, and security models which have constant or changing feature and the society obeys and follows them.

16. Report of Specific Committee on Criminal Problems By the European Council on Decriminalization, p.13.
17. For further information, See: Levy Bruhl, Sociology of Law, and Levy Bruhl, Resources, Method and Instruments: In the Introduction on Studying the Law, volume 1 and Katooziyan, Naser, Philosophy of Law, volume 1.
18. Katooziyan, Naser, Philosophy of Law, Volume 1, p.441, no.164.
19. Rayejian Asli, Mehrdad, op.cit. p.105.
20. Dalsace (A) Revue des societes, p. 400: G. Ripert, Le declin du droit, no.56.
21. Koering – Joulin. Revue de science criminelle, p.730.
22. Notre droit penal, Ottawa, p. 16 et 17.
23. Notre procedure penale, Ottawa p.28
24. Hall(L); Gluck(S), Criminal Law and its Enforcement
25. Pradel, John, op.cit., pp.127, 128.
26. Niyazi, Mohammad, (The then President of the Judicial Organization of Armed Forces of I.R. of Iran). Decriminalization of Canon, (Panel), p.43.
27. Najafi Abrandabadi, Ali Hossein, Hashem Beigi, Hamid, op.cit. p.77.
28. Rayejian Asli, Mehrdad, op.cit. p.96.
29. Najafi Abrandabadi, Ali Hossein, Hashem Beigi, Hamid, op.cit. p.77.
30. Rayejian Asli, Mehrdad, op.cit. p.96.
31. Pica, George, Criminology, p.116.
32. Garland, David, The Culture of Control, Crime and Social Order in Contemporary Society, pp.114-126.
33. Defining deviance down. This term was for the first time used by an American senator namely Moynihan in an article with the

same title in 1992 in criticizing the conducted changes on the rate of cultural tolerance and that the rate of high crime has converted into a normative and regular issue. (Quoted from David Garland)

34. European committee on crime problems, op.cit. p.13.
35. Broken Windows: In March of 1982, conservative theorists James Q. Wilson and George L. Kelling published an article in the Atlantic Monthly introducing a new crime fighting theory known as "broken windows" The theory states: *if the first broken window in a building is not repaired, then people who like breaking windows will assume that no one cares about the building and more windows will be broken. Soon the building will have no windows....*

The theory endorsed the belief that crime was the result of lax police efforts and that stricter law enforcement policy is the primary ingredient to promoting safer communities. Wilson and Kelling theorized that if rude remarks by loitering youth were left unchallenged, they will be under the impression that no one cares and their behavior will likely escalate to more serious crimes. As crime became a major political issue during the 1980's and 90's, many politicians quickly echoed the commonsense nature of the "broken windows" theory.

Nowhere has "**Broken Windows**" become more prominent than in New York City. Upon his election in 1994, Mayor Rudolph Guiliani instituted sweeping changes in his police department adopting a zero tolerance approach stressed by "broken windows." Guiliani ordered his police to enforce even the lowest level offenses including jaywalking, vagrancy and public intoxication. Coinciding with these policies was a dramatic drop in overall crime, particularly serious crime. These declining crime rates catapulted Mayor Guiliani into the national spotlight as his policies seemed to confirm the assumptions of conservative commentators and law enforcement advocates.

During the time that New York City was being heralded as a national model, similar crime rate declines were occurring in other cities around the country. These equally dramatic crime rate decreases occurred despite the absence of "broken windows" policies. The most notable antithesis to New York City is San Francisco. In recent years, San Francisco adopted less strident law

enforcement policies that reduced arrests, prosecutions and incarceration rates. Long derided by conservatives for its alternative crime policies, San Francisco registered reductions in crime that exceed or equal comparable cities and jurisdictions - including New York.

The study is the first analysis of San Francisco's crime rates in relation to more traditional or conservative jurisdictions that are typically cited as national models. San Francisco is also compared to other comparable California jurisdictions. For further information, see: <http://www.cjcj.org/pubs/windows/windows.html>

36. Net-Widening (**Net Widening**): Within critical criminology this term is used to describe the effects of providing alternatives to incarceration or diversion programs to direct offenders away from court. While all of these programs developed since the late 1960's were intended to reduce the numbers of offenders in prison or reduce the numbers going to court, it has been found that what has happened instead is that the total numbers of offenders under the control of the state have increased while the population targeted for reduction has not been reduced. In short, the net of social control has been thrown more widely (or some might say the mesh has been made smaller). For further information see: <http://bitbucket.athabasca.ca/dict.pl?term=NET%20WIDENING>
37. Garland, David, op.cit.
38. Farajiha, Mohammad, Adaptive Responses of Criminal Modernism, (Translation), p.751.
39. De jure decriminalization
40. Ibid, p.11.
41. Ibid, p.12.
42. L'infanticide
43. Le duel
44. Le geste desespe

45. Pradel, John, Op.cit. p.44.
46. Ibid, p.59.
47. Ibid, p. 61.
48. Ferri (1856-1928)
49. Les substitutes penaux.
50. Dr. J.A. Van Hamel, Journal of the American Institute of Criminal Law and Criminology, Vol. 2, No.1 May, 1911. p. 24
51. Pradal, John, op.cit. p.110.
52. Tarde (G), La criminalite comparee, p.35.
53. Von Liszt(F), traite de droit criminal allenmand, p.113.
54. Le Bon (Gustave), Problmes anthropologiques, la question des criminals, p.539.
55. Loubat (M), La cirse de la repression, p.467.
56. Pradel, John, op.cit. p.111.
57. Ibid.
58. Gramatica (F), Principes de defense social, p.33.
59. Pradel, John, op.cit. p.112.
60. Ibid, p.124.
61. Mogoyee, Haji Ali, op.cit. p.162.
62. Ansel, Marck, op.cit. p.105.
63. Norman, Marcel, op.cit. p.79.
64. In France according to the report by the Office of Criminal Affairs, Ministry of Justice, there are eight thousands titles of crimes and in Canada, it is said that there are about seventy thousands types of criminal titles too. In Iran, at minimum 1545 criminal titles are estimated. For further information, See: www.law-training.org

65. According to Pradel, 98 percent of the issued convictions in France includes less than 400 offends of these eight thousands criminal titles.
66. Pradel, John, op.cit. pp.124, 125, For further information, see: Gassin R, "Les ecoles en criminology", p.201 et s.
67. Goodarzi, Mohammad Reza, op.cit. p.121.
68. Ibid, pp.121, 123.
69. Abd Alfattah, op.cit. p.159.
70. Ibid, p.159.
71. Katooziyan, Naser, op.cit. p.586 onward.
72. Mahmoodi Janaki, Firooz, Penal Support extended to Ethics, pp.764, 767.
73. Abd Alfattah, Ezzat, op.cit. p.152.
74. Devlin, Patric, "Law Democracy and Morality", pp.635-649.
75. Feinberg, Joel, The Moral Limits of Criminal Law, Harm to Others, p.27.
76. Hart, H.L.A., "Law, Liberty and Morality", p.19.
77. Richards, D.A.J., "Right, Utility and Crime", p.247.
78. Ibid, pp. 42-45.
79. American Law Institute, Model Penal Code, Tentative, Draft, No.4, p.277.
80. Abd Alfattah, Ezzat, Narrated from "Pierre Eliott Trubeaus"
81. For further information, See: Miorris, N. The law is a busy body.
82. Lacey N. "State Punishment", p.120.
83. Commission on Correction of Penal Law in Canada, Report "Our Criminal Law", 1976.
84. Wilson, William, "Criminal Law: Doctrine and Theory", p.38.
85. Mahmoodi Janaki, Firooz, op.cit. p.764 onwards.

86. Hall, A.C. Crimes and its relations to social progress, p.19.
87. Morris, N. op.cit. p.2.
88. Abd Alfattah, Ezzat, op.cit. p.152.
89. Najafi Abrandabadi, Ali Hossein, Hashem Beigi Hamid, op.cit. pp.34-345.
90. Article 37- A. this Convention which is the detailed description of Article 6-6 of this Convention prohibits the application of torture or other reckless, inhuman behaviors and those in conflict with the human dignity and also life imprisonment and execution penalty for the individuals under 18 years of old and the pregnant women. In this case, refer to Statutes of Temporary International Penal High Courts of former Yugoslavia 1993 and also International Court for former Yugoslavia, Mehrdad Seyedi (Trans.), p.384 onwards.
91. Najafi Abrandabadi, Ali Hossein, Just Crime Prevention, p. 576 onwards.
92. Abachi, Maryam, Supporting the Children against Addiction and Smuggling the Drugs, (Article 33 of the International Convention of Children Rights), p.141, 178.
93. For further information, see: World Deceleration of Human Rights, International Convention of Economic, Social and Cultural Rights, International Convention of Civic and Political Rights, Convention of Child Rights, The Rules of Beijing, Strategic Principles of Riyadh to Prevent Criminal Behavior of Children.
94. Najafi Abrandabadi, Ali Hossein, op.cit. p.578.
95. Articles 1 and 4 of the World Declaration of Human Rights. For further information, See: Jafari Tabrizi, Mohammad Taghi, Global Rights of Human from the viewpoint of Islam and the West, p. 30.
96. Aghayee Hossein, op.cit. p.175.
97. Ibid, p.176.
98. Ibid, pp.180, 181.

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100. <http://capitalfax.blogspot.com/2006-08-01-rchavehtml...out/25/2006>, <http://au.msesages.yahoo.com/news/top-stories/237964...out/25/2006>
101. www.marijuanavaporizer.com
102. [http://web.ebscohost.com/ehost/detail? Weed=19 & hid=122 &sid=e7aaoda-6dae-4ff7-b7...01/12/2006](http://web.ebscohost.com/ehost/detail?Weed=19&hid=122&sid=e7aaoda-6dae-4ff7-b7...01/12/2006) quoted from Nicholson, Rachel H.
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111. [http://web.ebscohost.com/ehost/detail? Weed=19&hid=122&sid=e7aaoda-6dae-4ff7-b7...01/12/2006](http://web.ebscohost.com/ehost/detail?Weed=19&hid=122&sid=e7aaoda-6dae-4ff7-b7...01/12/2006) quotation from Nicholson, Rachel H.
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