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What is a criminal law?
Criminal law is the part of law that deals with crimes.
But what is a crime? A crime is considered a violation of the law, however not every violation of the law is a crime. A crime is an offence that can be punished with **criminal sanction** that is a punishment. This is to distinguish criminal offences with other offences which break the law
But what does punishment mean? What is the difference between criminal sanctions and other sanctions?

Punishment, criminal sanctions, always involve **paying** → it deals with sufferance, limitation of the freedom of a person.
The central idea of punishment is infliction of paying. The idea of suffering has changed a lot during history, however there are still countries that provide capital punishment.
The idea of paying could be based on the idea of going to jail or paying money → still behind it there is the idea of suffering.
The essence of punishment is inflicting a form of suffering.

The features:
- Punishment must be ***for*** breaking the law (a response to a crime)
- Punishment must be ***of a person*** for breaking the law → murder has taken place, we can't punish anyone in the neighborhood because someone has committed murder, we must only punish the particular person who broke the law.
- Punishment always involve a loss (paying)
- Punishment is a for of suffering that must be inflicted ***by the state or a public authority*** → this is important because criminal law has to do with a vertical relation between the state and the individual, it refers to the relationship between the offender and the State

Punishment is NOT COMPENSATIVE in nature

What specific criminal law are we going to study? Criminal law is a national law → it falls under the sovereignty of the state → we are not going to study a specific legal system.

There is an international system of criminal law but ius not a general one, for important crimes there is an international level of criminal law (crimes against humanity, genocide…)
It refers only to specific crimes and violation.
There is no general international law system, but at the same time at the supranational level there are some institutions that directly affect national criminal law → i.e.: 1) UE law, the European union has little competences in national criminal law
2) human rights protection system, human rights law → the European court of human rights has a great influence in national criminal law however it is NOT a criminal court, it is a human rights court which means that it refers to individuals and alleges the violation of human rights (this is the difference for the ICJ) the citizens can obtain protections of their rights
There are also other regional courts of human rights (the inter America court of human rights and the African court on human and people's rights)

They can have an impact on national criminal law because this is a system that can have a dual relationship with criminal law: on one hand the violation can relate with the basic human rights of the victims of the crimes, some people that are victims of the crime and they consider that under the state law there was a violation of human rights they can go to the court (for example one a crime is not punished by the state, the state didn't guarantee the protection of the victims). There is also another side, the rights of the offender→ if the punishment is too harsh and it goes against the rights of the offender (rights to a fair trial)

We can identify some principles which are common between the different national criminal law

THEORIES OF PUNISHMENT

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Punishment is one of the harshest tools that the state has. Since the enlightenment cruel punishment has been banned from being used (at least in democratic countries). Punishment involves pain and deprivation even when they are more humans → limitation of movement (jail) and fines.

Why do we punish? What is the justification of the power of the state?

To maintain the order → DETERRENCE

There are two different approaches

1- the punishment prevents other people from committing crimes

2- people who commit crimes deserve punishment because they harmed the society so they deserve to suffer a pain which is equal to the pain that they caused to the society

We have **absolute theories** and **relative theories** → in the first case punishment is justified itself because of the simple fact that a crime was committed (punitur quia peccatum est). in the second case we punish not because it is just or a duty of the state but because it is useful, it prevents other from committing crimes, in this case it is justified in view of the purpose of preventing crimes (punitur ne peccetur)

The absolute theories look at the crime that HAS BEEN committed → backwards looking prospective

The relative theories have a forward looking prospective → the punish in order to prevent

RETRIBUTIVISM (absolute theories)

Also known as the theory of the "just desert"

In this case the offender deserves to be punished because he committed a crime

The idea of retribution of commission of a crime was explained on the LEX TALLIONES (an eye for an eye). The offended person should be allowed to inflict the same pain he experienced, there is the idea of revenge. However, the idea of retributivism overcomes the idea of revenge

1- **divine retribution** → the person who commits crimes also violates a law offending god (god delegates judges on earth to punish the offender) → most ancient

2- **moral retribution** → developed by Kant, punishment is a sort of categorical imperative, the function is to compensate the violation of an ethical principle caused by a crime, the state has the MORAL duty to compensate for the violation of an ethical principle.

3- **legal retribution** → developed by Hegel, punishment is the reaffirmation of the legal order violated through the commission of the offence. Through punishment we reestablish the integrity which was violated

There are some arguments that are used by the retributivist to explain why the offender deserves a punishment:

1- **free will** → it is strictly connected with the idea of retribution, human beings possess free will so they have the capacity to act freely so they can choose to do something wrong and they are responsible for that, their action is a consequence of a free choice. We are morally responsible for our choices.

2- **pay back of the debt** → when we punish an offender, he pays back the debt that he had with the society, committing a crime he has taken something from society

3- **unfair advantages** → criminals have taken unfair advantages in respect of the other members of the society, the criminal benefits form the others respecting rules but doesn't respect the counter ways of the agreement

We also have some implication of retributivism, there are some important principles that derive from this prospective and concern the limits of the punishment

1- **personality of criminal liability** → we can only punish the person who committed the crime and was blame worthy of that crime

2- **principle of proportionality** → the punishment should be proportionate to what the offender deserves (how much can we punish?) the punishment must fit the crime, it means that it should be adequate for that specific crime

There are some CRITICISMS:

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The main objection is about **morality,** the fact that this is mainly a moral conception and this leads to an overlap between morality and law. On one hand we can say that morality is subjective, there is no general consensus about what is right and wrong so how can we say that is just to punish per se? On the other hand, it is not the aim and the power of the state to tell us what is wrong and right. It would be contrary to the principle of laicity.
Another criticism was about what is a "just" or proportionate punishment? Also, here there is no general consensus

Retributivism is an important theory but it cannot be the only justification for punishment

PREVENTIVE THEORIES (relative theories)
The general idea is that punishment is justified in view of a purpose. This is a forward looking prospective. We punish to avoid future crimes
There are two kinds:
1-general prevention, punishment is needed to prevent all citizens from committing crime
2-special prevention, punishment is needed to prevent that specific person (the offender) from committing crime in the future

Utilitarianism
Jeremy Bentham
→ principle of utility. Law has a name a task which is to produce the greatest happiness to the greatest number of people. The aim of the law is to provide a benefit for the community, maximize the national welfare.
This means that a criminal sanction should be used only when it could help maximize utility, ensure that there is a balance of happiness and suffering. In this case punishment is evil in itself because it is a form of pain which creates suffering, we can only justify this when the benefit from this pain is greater than the pain itself.
Punishment could be justified also if the aim is to prevent the future commission of crimes, this means that punishment is a sort of instrument, means to an end. The practical end is the protection of the community by the commission of crimes.

How can punishment actually avoid and prevent the commission of crimes?
To understand this, we have to look at the utilitarianism way to see human beings→ they think that human beings are **rational individuals** that are governed in their action and decisions by **pain** and **pleasure.** There is a balance between those two, between pain and pleasure. The criminal as a rational calculator will make this balance between costs and benefits.
This is the explanation of deterrence, we can deter people if the expected benefits form a crime are less important that the expected costs.
If we say that punishment has to deter the commission of crime, punishment should give a sufficient amount of pain in order to balance the pleasure.

There are several types of deterrence:
1- general deterrence → you punish one person because you want to use it as a lesson for the other people of society, you want to give a warning (**effect towards society**)
2- specific deterrence → when I punish someone, I give a message to the offender himself, he will remember the pain he suffered and so he will not commit crime again, because it creates fear (**effect towards the offender**)

There is a moral objection from Kant. He said that human beings are always an end of themselves, they should not be used for another purpose. This could infringe human dignity because we don't care about that person, we are just pursuing that purpose. The logic of deterrence can produce disproportionate increase in punishment, because we are just looking for our purpose, if we move from the assumption that more punishment means more deterrence than higher suffering punishment can be justified→ this can break the principle of human dignity and proportionality

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There is also some objection form an empirical point of view, it is really true that punishment deters? Is it really effective?
From one side there are some studies that show that what has a really effect is the certainty of punishment and the probability of getting caught, whereas the amount of punishment (the years of jail) do not have a deterrence effect.

There is also another point, not all human decisions are actually motivated by economical decision/rational decisions, there is not a balance of costs and benefits → there are some cases, such as murders and terrorists, are not motivated by economical decisions.
On the other side, it is questionable that people decide to commit or not a crime because there is a punishment → if criminal codes didn't provide for higher punishment would you kill other people?

Specific individual deterrence→ punishment deters the convicted person. There is no evidence that imprisonment has deterrence effect, in particular long imprisonment
The so called **CRIMINOGENIC EFFECT**, it is possible that an inmate that has served a long period in prison once out will commit crime again→ about Italy 38% are on the first imprisonment the other 62% is back in prison.
There is a high recidivism rate. This is because in prison prisoners tend to learn more criminal practices in prison and also because they get used to be in prison so the deterrence effect doesn't work anymore.

There are also other preventive theories, some scholars have also developed a different idea of general prevention which is called **positive general prevention**→ punishment has a role on educating citizens. it is also called a function of cultural orientation, with punishment we don't want to threatened people but to teach people the values to follow.
This is more recent but it also has criticism, criminal takes a sore of promotional role which can be used by the power to give messages that do not correspond with society values.

There is also the **positive special prevention** → it is the concept of rehabilitation as a possible purpose of punishment. Punishment is a sort of mean to restore the criminal in a way that this criminal becomes a good citizen and commits no other crime after the punishment. We use this punishment to lead the person to reflect why he committed the crime and then we give another chance. Punishment gives utility also to society. There is a benefit for society, but in order to achieve this goal punishment should involve some other steps different from incarceration. Give the offender possibility to change.
Negative special prevention → we have the concept of incapacitation, punishment prevents the person from committing the crime because we temporally put the person outside the society. So, punishment and incarceration physically prevent the offender from committing crimes → also called NEUTRALIZATION of the criminal
Special prevention has also been criticized→ the main criticism of incapacitation is that it can lead to indeterminate imprisonment (a long period of imprisonment). In this case we again have a problem of proportionality. In the case of rehabilitation, it has been the most used approach, however at some point there was a change and the idea were that rehabilitation was mostly unsuccessful. There is little evidence that punishment can work to rehabilitate convicted people. However, it is not so true that rehabilitation doesn't work → some studies show that rehabilitation can reduce recidivism rates.
There is also a second criticism against rehabilitation, it is a moral objection → if we see the offender as an individual to be curated and educate this goes in contrast with the person right to self-determination. The idea of rehabilitation could lead to see the criminal as abnormal person (people who need to be cured).

RESTORATIVE JUSTICE
It is the negation of the theory of punishment, it moves from the assumption that the reaction of the state for the commission of crime should not necessarily by through punishment. The real aim of the reaction of the state is to compensate the victim of the crime → the state role is to create a dialogue between the offender and the victim. The state task is to reestablish this relationship.
There are some attempts to put this idea into practice.

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Most scholar believe that all those purposes of punishment should co-exist → it is called **polyfunctionality of punishment**
We need to consider what the constitution says about the purpose of punishment → art.27 Italian constitution *"punishment shall aim at reeducating the convicted"*
It doesn't mean that punishment must succeed to rehabilitate the convicted. This also mean that there is a precise duty of the state to provide for rehabilitation, to provide for all the means (the offender shall be given a chance form the state to go back to society after the punishment)
Principle of rehabilitation is very important because it gives a limit to the punishment that the state can give to an offender.
Not all constitutions in the world provide this → the constitution of the USA doesn't say anything about the purposes of punishment. Doesn't impose a duty for the state to adopt a particular theory. In fact, according to the supreme court punishment can have a variety of purpose, the legislator can decide.

The problem is that we have to prevent one of those purposes from erasing the others, we cannot accept a pure retributivism idea or a pure prevention idea.
We have to give a different answer according to different stages of punitive power→ the different moments of punishment exercised by the authority/ punitive power
1- *threat stage* → punishment is threated by the law. The legislator provides for a particular punishment for the purpose of deterrence (no one has committed anything, it is to prevent) mainly governed by general deterrence
2- *sentencing phase*→ there is a court that give the punishment and decides how much the punishment should be. Also, here general deterrence can play a role, the threat would lose its significance if punishment were not inflicted. We have to inflict punishment because otherwise the provision of penalty would lose significance, it cannot be the main purpose → the main purpose is special prevention (rehabilitation). In this case retribution cannot be the sole purpose of punishment at any state because it would imply a moralistic approach to law.
3- *enforcement*→ execution of punishment by the administration. The main approach is special prevention of punishment

From retribution we have to save an important principle which is proportionality→ it works as a limit to the other purposes. The other purposes must always be pursued within the limits of proportionality. This means that there is a limit for the legislator→he cannot punish theft more than murder because it would be disproportionate.
It is also a limit for the judge to put a limit on the concrete amount of the sentence.

PRINCIPLES THAT LIMIT THE POWER OF THE STATE TO IMPOSE PENALTIES

1- REHABILITATION
2- PROPORTIONALITY → punishment should be proportionate both to the seriousness of the crime and the culpability (blameworthiness) of the criminal
This principle has a ground on the idea of retribution→ punishment that a person deserve is the punishment which is proportionate to the seriousness of the crime.
It may also be consistent with the idea of utilitarianism and preventing theories. A disproportionate punishment is not a deterrence for people to commit crimes. If theft and robbery would be punished in the same way (a disproportionate way) the person would not be detersa (?)
A disproportionate punishment could not rehabilitate the person because that person would not recognize the value of that punishment

This principle has only one legal instrument that provides for proportionality → the EUROPEAN CHARTER OF FUNDAMENTAL RIGHTS (instrument of the European union) **Art.49** "*the severity of penalties must not be disproportionate to the criminal offence"*
This is the only explicit provision that refers to this limitation
Despite the lack of these explicit provision, the principle of proportionality is a generally recognized principle. There are mainly two indirect ways in which it is recognized

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1**- based on the principle of equality, non-discrimination**→ principle for which all people are equal before the law without nay discrimination. All people have to be treated equally before the law so it is infringed when two cases which are equal are not treated equally. But also, if different cases are treated in the same way. Applying this principle to criminal law we mean that punishment required for murder has to be different from the punishment for stealing. But it also requires that the sentence given to a thief that stole fruit has to be different from the one that was given to someone who stole millions of euros.

2- **the prohibition of inhuman and degrading punishments** → stated in art.3 in the European convention of human rights. In the American constitution we find the 8th amendment which prohibits the infliction of cruel and unusual punishment. According to the supreme court, cruel and unusual punishment is not directed against torture itself but against all punishment that because of their excessive length are grossly disproportionate to the severity of the crime.

3. PROHIBITION OF INHUMAN PUNISHMENT

Punishment could be very harsh and cruel. Those type of punishments in most countries are not used anymore, in other countries those types of cruel punishments are still used (i.e.: Singapore and Saudi Arabia). In most countries they have been replaced by more human punishment.
If a legislator wanted to could they use corporal punishment again?
Most constitution and universal declaration provide for limits and prohibition for using those inhuman punishments (see slides for which type of constitutions and declaration we are talking about)

Art 3 of the European convention of human rights → this gives individuals a string instrument for the protection of their right against the state. The court can pronounce that the state must compensate the individuals that have a violation of human rights. It is very effective

The jurisprudence of the European court of human rights has given a notion of torture and inhuman and degrading treatment
→ *torture*, causes severe, serious inhuman treatments
→ *inhuman treatment*, they have less severe treatments (physical harm, psychological suffering) it goes beyond
→ *degrading*, it causes the victim fear or feeling inferior. It causes degradation and human humiliation
The difference is the level of severity of the suffering
It is an absolute guarantee, it cannot be abolished or nullified, or derogated. Cannot be derogated in times of war or other public emergencies.
Also, the court has stated that these treatments are never permitted even for the highest reasons of public interest.

There is a case law of the ECHR on art 3 and on this prohibition with respect to conditions of detention. In most European countries corporal punishment doesn't exist anymore but other types of punishment have been applied such as imprisonment → so this article has been applied to this type of punishment.
We should ensure that inmates are detained in conditions that respect human dignity. One problem is the one of prison overcrowding, this may result in poor human living condition→ the court found a violation of art.3 because the inmate had a personal space of 2.7 meters available. The court identified 3 square meter that should be guaranteed in order to provide right human conditions.
There was another case: *torreggiani vs Italy* → the court found a structural violation of art.3 by Italy due to prison overcrowding
The court ordered the state of Italy to use measures to solve this problem such as alternative ways of detention (home detention) or the construction of new prisons. It also stated that the state had to compensate the prisoners for the violation of their human rights.

Another point is related to the hygienic conditions. This was related to Russia in which some Russian inmates complained that they contracted contagious illnesses.

Another point is **solitary confinement (art.41-bis)** → putting a person alone in a cell and prohibiting him to have contacts with the outside world. The court says that this is permissible but only when it is exceptional

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and temporary measure. Italy had a problem with this because there is a special incarceration regime which is for particular types of crimes (mafia crimes, terrorism crimes and crimes against the public order). This involves complete isolation because the subject is considered dangerous.
This has been justified by the European court because it is exceptional and temporary. However, sometimes there have been some pronunciation by the court because the principle had been breached → this is the case of *Provenzano vs Italy*

4. PROHIBITION OF CAPITAL PUNISHMENT
More than 70% of the countries in the world either abolished death penalty or they do not practice it. 55 retentionist countries exist and still use death penalty.
In 2022 there were more than 883 executions there was an increasement from the middle east or north Africa. This number doesn't take in consideration the death penalties carried out in china.
Some of these death penalties refer also to crimes less severe than murder, such as drug crimes. As for the execution method where beheading, shooting, lethal injection.

Is it a legitimate punishment or not?
Arguments on moral grounds
PRO
This is a punishment which is morally just and right because it is the application of retributivism (an eye for an eye)
CONS
Moral can be subjective; a modern society should embrace higher values than revenge
Killing cannot restore the same situation that was present before the crime was committed.
Beccaria said that the state does not have the right to deprive a citizen of life.
According to Beccaria human beings didn't give all their freedom to the state, they didn't give to the state the power to sacrifice their right to life.

Arguments on practical grounds
PRO
capital punishment is a strong deterrent and it is able to prevent future crimes so the state should use it in order to prevent more serious crimes. Fear of death is deterrent than any other punishments
It is also the only way to stop the criminal from committing crimes ever again

CONS
Execution does not actually terrify people; death penalty is less deterrent that imprisonment. Idea of Beccaria, the show of the execution doesn't scare people because it only lasts a moment (it is only just flesh) these executions were just an entertainment. No real impression remained in their mind.
The second argument is that is very much deterrent life in prison than death penalty because we are much sacred of losing freedom than life. The empirical studies show that death penalty is ineffective, there is no evidence that death penalty deterrers much more than life in prison.

Other arguments against death penalty
- The risk of executing innocent people (there are evidence that mistake have been made)
- The risk of discrimination (race, socio-economic factors, quality of defense) + risk of political abuse
- Violation of the prohibition of inhuman and degrading treatment
- Inhuman of the execution (there is no human way to kill) b. Inhuman of the "death row"

PROHIBITION OF CAPITAL PUNISHMENT articled
UE
Article 2, 5 2, European Charter of Fundamental Rights: "§ 1. Everyone has the right to life. §2. **No one shall be condemned to the death penalty, or executed**." ECHR

Article 2, § 2, ECHR: "No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law"

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Protocol No. 6 to the Convention (1985), abolishing the death penalty in peacetime: it has been signed by all Council of Europe member states; with the exception of Russia, all member states have also ratified it.

Protocol No. 13 (2003), abolishing the death penalty in all circumstances: it has since been signed and ratified by all Council of Europe member states except Armenia, Azerbaijan and Russia. Armenia has signed the protocol but not ratified it.
Death penalty has been basically abolished in all 47 Council of Europe member states (except for Russia, that provides death penalty but does not apply it because of a moratorium signed in 1996).
In Europe, only Belarus still provides and applies death penalty (but is not part of the Council of Europe).
In Europe a long period of death row is considered against the prohibition of inhuman and degrading treatment.

Why does the European court of human rights deal with these topics?
A problem can arise in case of extradition of a suspect from another country and there is the possibility that that suspect will be subject to capital punishment.

Even before the introduction of protocol against death penalty there was a jurisprudence stating that a long period of detention before death penalty (death row) is considered as an inhuman treatment
The leading case is:
Soering (he was a German national and he was bought to the USA, with his girlfriend they decided to kill his girlfriend parents, this happened march 1985, few month later they fly to Europe and in 1986 they were arrested in England) v. UK (1989) The ECHR ruled that extraditing a man accused of murder to a country (US) where he could face the death penalty would violate the prohibition of torture, because of the long period of time he would spent on death row (in extreme conditions of detention and psychological sufferance, and anguish of being executed). According to the Court:

- Death penalty is not in itself in breach of Article 3 (and Article 2.2 allowed its imposition as well)
- Specific conditions of detention related to the execution of death penalty (such as a long period of death row) can constitute "inhuman and degrading treatments".
- In that case, the extradition of a suspect to a country where death penalty is in use – when not seeking reassurances that the latter will not be carried out – violates Article 3

This man appealed against the decision of extradition because he argued that…

He appealed without success so he went to the ECHR, at that time the European convention didn't prohibit capital punishment. He stated that with his extradition he would face an inhuman treatment.
The court as first thing held that there was a real risk of death penalty being imposed if the offender was extradited, but according to the court the imposition of death penalty itself would not be a violation of art. 3 itself.
However, the extradition could involve a breach of art. 3 in some specific circumstances: the case of Soering (he would spend maybe 7-8 year in death row)
According to the court extraditing a fugitive to the USA in the way they were doing with Soering would be a violation of art. 3

There is another case:
CASE: Al-Saadoon and Mufdhi (they were accused of being involved in the murder of a British soldier after the invasion of Iraq in 2010) v. UK (2010)

- the extradition of an individual to another jurisdiction, where there is a real risk that he would be subject to death penalty, is a violation of Article 3 in all circumstances.
- The execution of death penalty always involves pain and is thus inhuman
- Article 2 has been "de facto" amended (Protocol 13 has been signed and ratified by nearly all the States of the European Council): death penalty is prohibited in all circumstances

The applicants issued a review in order to be judged by a British court and not an Iraq court.
This decision was different from the previous one.
Why did the court arrive to this decision? The court held that the authorization of death penalty has been overcome, this is because death penalty has been substantially abolished in the European states.

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The European court said that art.2 of the convention has been amended, to prohibit death penalty in any cases.

5. LIFE IMPRISONMENT

Sentence of imprisonment under which a person is convicted to remain in prison for the rest of their life. In some states lifelong means for the whole life but not everywhere, in most western European countries it doesn't mean whole life→ after some years the offender can have **parole** (In some countries, after a minimum term the convicted person becomes eligible for parole (= early release under conditions))
He receives freedom but under certain conditions.
The minimum is 12 years in northern countries, in other places is 15 years. Most European countries provide for a minimal term of 20 to 30 years. In Italy the prisoners must serve at least 26 years before becoming eligible for parole.
In the UK the minimum term is set by the judge when he pronounces the sentence of life imprisonment (the average is 15 years) in more serious cases the judge can sentence life imprisonment for the whole life (**all life order**) there is no possibility of being eligible for parole.
In the west most states do not provide parole.

In Europe there are some states that have abolished life imprisonment → first country to abolish it was Portugal. Other countries abolished it "de facto" → Spain, Norway, Slovenia and Croatia.
It is the most serious type of punishment since death penalty was abolished in Europe

Is life imprisonment a legitimate punishment? Can it be an infringement of human rights?
Life imprisonment could be an obstacle to rehabilitation. It is a principle that can be violated in the case in which the inmate is not given the possibility of parole.

The ECHR doesn0t deal with the principle of rehabilitation but it focuses on the other side: the prohibition of degrading and inhuman treatments.
Life imprisonment is considered a violation of art.3 when it doesn't have any prospect of release because it is an inhuman and degrading treatment.
This doesn't mean that there is an actual right to be released, if they are dangerous and they continue to be dangerous for the community and they don't show rehabilitation they stay in prison.

Leading case: Vinter and Others v. UK (2013): Life imprisonment sentences do not constitute in themselves a violation of Article 3 There could be a violation of Article 3 if: 1) The sentence is grossly disproportionate to the gravity of the offence 2) The sentence is irreducible (without possibility of early release or review of the sentence).
This case refers to the regulation of the UK about life in prison, it deals with three murder which were given the all life order. According to the Uk legislation murdering is always connected with life imprisonment + the judged can decide to set the all life order. In this case the offender must remain in prison for the rest of their life unless the secretary of state discretionally orders the prisoner release on compassionate grounds.
It wasn't clear what these compassionate grounds were, this was given when the prisoner was incapacitated or had a terminal illness.

Those three went to the European court of human rights and complained that this all life order was not consistent with art.3 of the ECHR. The state can determine the just length of a sentence, and there is even the duty in some circumstances to keep the person in prison. However, this life sentence may infringe art. 3 in 2 different cases:
1. When life imprisonment is grossly disproportionate to the offence (violates art.3 under the principle of proportionality)→ it is met in very rare occasions because it has to be GROSSLY DISPROPORTIONATE
2. Life imprisonment is actually irreducible: there is no prospect of early release nor possibility of review of the sentence. The review is necessary because the grounds of detention may change after a period of time.

After at least 25 years of imprisonment are entitled to a review of their sentence, at the time of the sentence they must know what they must do to be considered for release.

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The EU court had that the applicants' sentences were not reducible so there was a violation of art. 3. The court stated that is not prohibited for the UK to have this system but the important thing is that prisoners should have a sufficient prospect of release, the regulation has not been changed by the UK but the jurisprudence has been changed to adapt. The prospect of release is not limited to incapacitation and mental illnesses anymore. The prisoner is also entitled to a review by the secretary of state.

We also had another case in Italy, the problem in Italy is that this possibility is not given to all citizens, it is not possible for more serious crimes (mafia, organizations).
When the person doesn't cooperate with authorities and doesn't contribute with the investigation there is a presumption that they were not rehabilitated so they were not entitled to early releasing (ergastolo ostativo).
There is a case:
Viola v Italy (2018) → the court found the violation of art. 3 by the Italian discipline of life imprisonment. The court held that cooperation with authorities is not per se an indicator for rehabilitation. On the other side, there could be some reasons for which the person doesn't want to cooperate and it can be different from the connection with organizations.
According to the court this presumption was against art.3.

THEORIES OF CRIMINALISATION

What kind of conduct can the legislator legitimately criminalize? Is the state free to consider every wrong behavior as a crime?

Crime as substantial point of view can be considered as an offence against the duties hold to society, it is a **public wrong** so society has the duty and right to punish

There has been an historical distinction between two kind of crimes:
- MALA IN SE (wrong in itself) they are natural crimes or moral wrong, behaviors that are considered as crimes everywhere (i.e.: murder, rape, theft)
- MALA QUIA PROHIBITA (wrong because ethery are prohibited) they are artificial crimes, these are actions considered as crimes just because they are declared as such by a specific jurisdiction. They are not self-explanatory i.e.: tax evasion, speeding, gambling

The problem of what offences can be criminalized comes when we refer to the second category of crimes.

In the recent years there are new fields covered by criminal law, such as safety at work. This is because there are some rights that need to be protected (in the past it was different), but also there is a tendency to feel reassured for some issue. *Is there really a need for protection or is it just the idea of protection to reassure?*

Because of these issues criminal law scholars have always tried to develop some thepries to develop some linits to the power of the state to introduce new crimes. We need to make a distinction between two main tradition :
- Continental European tarditon (mostyly Germany but also used in Italy)
- Anglo-american tradition

CONTINENTAL EUROPEAN TRADITION
Here we have the doctrine of legal goods → only the protection of legal goods can justify the intervention criminal law.
A legal good is a sort of prenormative entity, an interest that is not created by the legislator which exist in the social context. An interest that society deems worthy of protection. It is a socially relevant interest. They could be individual interest (life, physical integrement). When the state has to protect those interest the use of a criminal sentence can be justied. This is also for collective gooods (military defebce, environment) also in this case criminal sentences are justified.

The notion of legal good acts as a limit to the power of the state to punish.

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During national socialism, these notions was strongly opposed by the regime. It was the so called Kiel school, it was understood that the totalitarian state was free to intervene in criminal law in every field without any limits.

In a liberal/democratic regime the idea is that there should be limits to the power of the state to punish→ the concept of legal good was rediscovered in Germany in 1960/1970, which was a period of reform, a lot of behaviors which used to be connected with criminal sentences were not anymore (homosexual acts, abortion).
In case of decriminalizing homosexual acts the notion of legal good was used. It is not an interest that has to be protected by the society.

The concept of legal good and protection of legal good is a very vague concept. It is a socially relevant interest which depends very much on the context. This concept has been criticized because it was too vague. Some scholars tried to develop some restrictive notions of legal good: not every interest can justify criminal law but only this interest that are necessary for free development of individuals or for example for the functioning of the state.
Or, another theory developed in Italy, interest that ha a constitutional relevance. We can use punishment to protect right that is granted by constitution, it had a great success, however this concept has some problems: from one side it could be too narrow (i.e.: environment rights).
This doctrine is not a very strong limitation to the power of the state to punish, but still is very important. In Italy it gave the start to a very important principle **offensiveness principle**: crimes should be offensive of a legal good, if not they can be considered unconstitutional. This is the theory of legal good that has been constitutionalized.

It means that if we have a crime that doesn't protect a legal good the court can declare it unconstitutional, it happens but very rarely. Once it was a crime to expose another state flag, however it was considered unconstitutional

ANGLO-AMERICAN TRADITION

The harm principle → goes back to john stuart mill → he wrote "on liberty"
The main point was the importance of defending individual rights and freedom. He dealt with the question : what can be legitimally punish by the state?^ according to him state can punish behaviors that cause harm to others.
"quote slide"

We can justify a criminal intervention only by the need of defending infividuals. *What is harm to individuals?*
There are some crimes which are non-controversial→ murder, homicide, rape, assault. These are crimes mala in se

There are also serious crimes against prorpety→ stealing, robbery, fraud.

The common element of all these crimes is the direct production of harm against an individual or groups of individuals. Not every kind of act that produce harm can be punished. Only those that produce serious harm.

Some claim that the harm principle should be integrated with the introduction of harm of …

Law should not criminalize insignificant conduct, there is always the need to balance the rights that are affected by conduct.

Besides those crimes we can say that the harm principle is also satisfied by other kinds of behaviors where we don't have a harm but the creation of a serious risk of creating a harm (reckless driving) → it is not controversial that criminal law can be invoked.

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Another problem is that of collective interest, the crimes that damage collective interest (the so called public harm). Conducts that do not cause harm to a specific person or a specific group of people but to the public (i.e.: environment) it is not possible to criminalize those crimes.
In this case we have a damage to collectively shared interest. Indirectly we can have a harm.

There could be a criticism which relates to collective interest. This is a vague notion, collective interest is quite vague, it is difficult to state of public peace or security entails. Because security is vague and wide concept it can be used to classify for crime.
When we speak of public harm, we have to pay attention to the importance of a balance with individual freedom. Criminal protection should be limited to those …

This principle has been reviewed by other scholars. Certain kinds of crimes which are morally wrong, *if behavior is regarded as morally wrong by society is this an enough justification to criminalize it?* Mill would say no
There are some cases which are controversial. Outraging public acts → sex in public.

According to another theory, that was proposed by Feinberg. The harm principle should be supplemented by an offence principle.
It is additional to the harm principle. The idea is that there are certain acts that cause harm to other people but they are highly disturbing. Legislator may prohibit and punish those crimes which cause OFFENCE, it is outrage to people's sensibility. Strong negative feeling.
Feinberg has proposed a social experiment to prove his theory. He invites the reader to imagine to be on a ride bus and during this ride the reader witnesses certain things that can be disturbing. This is to test the limits of our tolerance. This leads to the conclusion that certain acts are so unpleasant that we can ask protection from them.
It is very controversial because the problem is always the same. *What is a conduct that is not so offensive?* This can change in time and from place to place.
There is another criticism, this theory relay to the emotional reaction of people, but those emotion could be based on prejudice.
We cannot criminalize every immoral behavior but only that immoral behavior that hurts in some way.

There are also other cases, according to other scholars, harm to others should also include the so called HARM TO SELF (i.e.: drug use, euthanasia). Criminalize acts that harm the same person who commits the conduct.
This relays on paternalism → the state can prohibit and punish conducts in order to prevent adults from self-inflicting harms
(it is the image of a father protecting his son)

There is a distinction between two different conceptions:
- ***hard paternalism***: it is the true legal paternalism, accept as a reason for criminalization to protect capable adults against their will from the harmful consequences of their voluntary choices. Criminal law can protect them even if they are conscious of what they are doing (it violates personal individual autonomy)
- ***soft paternalism***: the state has the right to prevent self-regarding harmful conduct but only when that conduct is substantially not voluntary. It is not so much paternalistic; the idea is that the intervention of criminal law is legitimate in case of not full voluntary choices. The idea is not to protect people from harms as such but to implement people's rational choices. These are cases in which a person cannot make a really free choice because for example for economic needs or illnesses, in this case the intervention of criminal law can be justified. We are simply protecting him or her form external factors, the possibility of this person to make real and free choices. (it doesn't violate personal individual autonomy)

The protection of legal moralism. We can say that in modern states criminal law has been more justified from a secular point of view. Theories of crinminalization took a unmoralistic pov

We still have prohibition against immoral behaviors.

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From a theoretical pov there are two ways to …
-***straight moralism***: true moral values should be protected as such, it can be criticized from many points of view because who can decide what is true morality
-***functional moralism***: according to this criminal law has the duty to safeguard the continuate existence of society so it is necessary to protect shared opinions about values because lack of protection can be detrimental for society. In this theory we can also find criticism. It has an uncertain empirical base.

SOME EXAMPLES:
Homosexual
Incest → it is punished almost everywhere. But *why?* There has been a debate.
Abortion
(see slides)

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