Critical criminological perspectives on the construction of criminal law
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Criminological relevance

- (neo-)Positivism: criminality = attribute of an individual / group
  - ➔ little or no relevance

- Symbolic interactionism: criminality = definition of conduct or an act
  - Creation of the definition, legislation & enforcement of criminal law
  - Historical & political context, social stratification, distribution of power, etc.
  - ➔ better understanding of (the aetiology of) crime
Limited interest in construction of criminal law (1)

- Why is the criminological interest in the construction of criminal law limited?

- Several reasons
  - Positivist domination of criminology
  - Bauman’s *liquid modernity*
  - The criminology – politics nexus
  - Neoliberalism, individualisation and responsibilisation
Positivist domination of criminology

- Insight by assessing the positivist paradigm
  - Criminal behaviour = trait of a substantially different person
  - Criminal ≠ non-criminal
  - Goal = prediction of future behaviour
  - Positivist criminologist is involved in (criminal) policy

- Attention to the construction of criminal law confronts positivist criminologist with own involvement in the construction of these laws!
Limited interest in construction of criminal law (3)

- Bauman’s *liquid modernity*
  - Ontological anxiety & waning power of governments
  - Development of elaborate strategies of control

- Attention to the construction of criminal law undermines the need of these strategies and thus the legitimization of governments!
Limited interest in construction of criminal law (4)

- The criminology – politics nexus
  - Politicians control scientific funding
  - Criminologists are involved in politics

- Criminologists who pay attention to the construction of criminal law might undermine their privileged position and miss out on funding
Limited interest in construction of criminal law (5)

- Neoliberalism, individualisation and responsabilisation
  - Social problems become criminal problems
  - Shared responsibility becomes individual responsibility

- Attention to the construction of criminal law undermines this discourse and emphasizes shared responsibility
Theories on the construction of criminal law

- Consensus paradigm
- Pluralism paradigm
- Conflict paradigm
  - Symbolic interactionism
  - Conflict theory
- Neomarxist paradigm
  - Instrumental neomarxism
  - Structural neomarxism
  - Gramscian neomarxism
Consensus paradigm

- Society is founded on shared values and rules
- Criminal law reflects the most fundamental collective values and rules

- Evaluation
  - Little empirical support
  - Ignores conflict
  - Ignores unequal distribution of power
  - Stigmatization
Society is diverse and conflict is present, however only in a limited and controlled amount.

Law system is neutral and mediates these conflicts.

**Evaluation**

- Acknowledges conflict ➔ conflict paradigm
- State & society are still seen as neutral
Conflict and power are essential
- Society is composed of different social groups that strive for their own interests
- Power is not equally distributed
- Conflict is rooted in this unequal power distribution
- Conflict is inherent in criminal law
  - Conflict is the cause of the construction of criminal law
Symbolic interactionism (1)


- Criminal law is a social construction
- Defined by powerful individuals or groups (‘moral entrepreneurs’)
- Criminal law reflects the values of the dominant groups in society
Symbolic interactionism (2)

- Value
  - Vague
  - Can conflict with other values

- Rule
  - More specific
  - Can be guide in a situation

- Law
  - Very specific
  - Unambiguous
Symbolic interactionism (3)

- Evaluation
  - Attention to the inequal distribution of power
  - Detailed description of the process of criminalization

- Ignores economical context (e.g. Marihuana Tax Act)
- Overemphasizes creation of social definitions and legislation
- Ignores role of the state
Conflict theory (1)


- Construction of criminal law is complex and rooted in the unequal distribution of power and ensuing conflict.
Conflict theory (2)

- Distribution of power & construction of criminal law
  - Classes that control the economic resources of society are most dominant (e.g. vagrancy laws)
  - Bureaucracies (e.g. American drug laws)
  - Lobby groups (e.g. prohibition)
Conflict theory (3)

- Conflict & construction of criminal law
  - Latent conflict: social and economical elites safeguard their interests
  - Manifest conflict: polity wants to guard status quo and creates the illusion that the origin of the conflict is dealt with
  - In between conflicts: social groups with less power will be able to expand their power
Evaluation
- Acknowledges complexity of construction of criminal law
- Power and conflict
  - Empirical support (cf. Chambliss, 1976)

+ Overemphasizes political dimension
+ Overemphasizes suppressive function of criminal law, denial of ideological function of criminal law

- Criminal law is seen as an easy to manipulate instrument in the hands of the powerful
- In general: analysis remains to universal and to shallow
Class struggle

- Superstructure
  - Education
  - Mass Media
  - Family
  - Religion
  - Law

- Base
  - Relations of Production
  - Means of Production
Instrumental neomarxism (1)

- Criminal law is an instrument used by the capitalist elite, in order to secure their interests and to perpetuate the economic order and social stratification, by oppressing and controlling the powerless class.

- Legitimization: illusion of equal protection
  - criminal law serves the interests of the capitalist elite in a direct or indirect way
  - even when it apparently is irrelevant or disadvantageous to their interests
  - Rules which harm the interests of the capitalist elite are mostly regulated in civil law
Instrumental neomarxism (2)

- Example in Belgian criminal law
  - Art 463 Sw.: Theft, [...] will be punished with a prison sentence, ranging from one month to five years [...].
  - Art 464 Sw.: The prison sentence will be at least three months if the thief is an employee or a (paid) servant [...].

- No criminal law for an employer who materially disadvantages an employee
Instrumental neomarxism (3)

- Evaluation
  - Emphasis on capitalist interests
    - Too narrow, not historical
    - No attention to the process of legislation → too instrumental, criminal law is not easily manipulated
  - Consensus within capitalist elite
    - The powerless are not completely without power: not passive, labour and consumption
State is seen as ‘relatively autonomous’ from the logic of capitalism

Criminal law

- Double function
  - Willingness to work
  - Promote an ideology which supports hard labour

- Also influenced by other interests aside from those of the capitalist elite
Structuralist neomarxism (2)

- Evaluation
  - State is relatively autonomous
  + More balanced
    - Acknowledges historical context

- Overemphasizes economical interests
Hegemony
- Construction of criminal law serves to establish political and ideological hegemony
- Hegemony is established by allowing limited pluralism

Gramscian neomarxism (2)

- “Legislation of consent”
  - What?
    - Reforms of moral, sexual and social criminal laws in England under both Conservative (PM Butler) and Labour (PM Jenkins) governments
  - Double taxonomie
    - More government + less government
  - Aim of the reforms
    - Reconstructing femininity
First period
- Redefining the social and economical role of the women
- Goal = introducing mass consumption ideal in the English family

Second period
- Redefining the social and sexual role of the women
- Goal = safeguarding the link between social and sexual reproduction
Gramscian neomarxism (4)

- Preconditions for the reform are rooted in changing economical, social and political structures
  - Economical: new economical ideals need to be introduced
  - Social: hegemony of a progressive, reform-minded middle class
  - Political: both political parties want to establish political hegemony by appealing to the new middle class
Gramscian neomarxism (4)

- **Evaluation**
  - Attention is paid to the mechanism that determines the form of criminal law
  - Overemphasizes economical functions
  - Not enough attention is paid to the historical context
No theoretical approach is able to deliver a full-understanding of the construction of criminal law

Should theoretical attention be paid to the construction and evolution of criminal law?