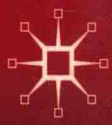
Criminology, Conflict Resolution and Restorative Justice

Edited by
Kieran McEvoy and Tim Newburn



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Criminology, Conflict Resolution and Restorative Justice

This book is dedicated to Alice Plunkett, a true unsung hero, and to the memory of Beryl Moorhouse

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KIERAN MCEVOY AND TIM NEWBURN
April 2003

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Criminology, Conflict Resolution and Restorative Justice

Kieran McEvoy and Tim Newburn

As with many such projects, this book began in a series of conference conversations conducted over a number of years bemoaning our discipline's failure to address a common preoccupation. Its particular genesis was in discussions concerning what we perceived to be criminology's lack of substantive engagement with the processes of conflict resolution. Although, as is discussed below, our focus soon broadened – to include conflict resolution not just at the political level within states but also micro-conflict resolution between indigenous and metropolitan cultures, within and between justice systems, and within neighbourhoods – our deliberations began with the role of criminology in peace processes such as those pursued in South Africa and Northern Ireland.

In all such processes, the standard issues of criminology (policing, prisons, the criminal justice system, the treatment of victims and so forth) clearly remained central both during the respective conflicts and in the subsequent eras of conflict resolution and transition. Criminologists working in such jurisdictions were obviously engaged in research on such matters. However, we felt that greater effort was needed in attempting to link this criminological enterprise in a more systemic and theoretical fashion to the contours of conflict and the process of conflict resolution. If, as Gouldner (1973) suggested, *The New Criminology* succeeded in making criminology intellectually respectable by linking it to wider concerns of social theory, then to us it appeared that these events were too important (and too clearly within the disciplinary remit) for criminology not to have something more to say.

Paul Walton has argued that 'from a small marginal discipline in faculties of law and social science, criminology has emerged as an important and politically crucial discipline ...' (Walton, 1998:4). We agree with that assertion. Yet central to the intellectual development

and maturation of a legal/social science discipline is its willingness to encompass the analysis of phenomena which are themselves politically crucial. Writing in the wake of the terrorist attacks on the USA on 11 September 2001, it is all the clearer how important is the study and analysis of political conflict. Criminology, if it wishes to continue to be taken seriously, must contribute to such central debates in the new millennium. Indeed, as both Van Zyl Smit (with regard to South Africa) and McEvoy and Ellison in particular argue (with regard to Northern Ireland), the analytical frameworks and epistemological strengths of criminology offer a particularly grounded vantage point for the analysis of 'terrorism' and how to deal with it.

At the other end of the scale criminologists have, in recent years, shown increasing interest in the resolution of smaller-scale conflicts and what such techniques and processes might have to tell us about our formal systems of justice (both their limitations and how they might be reformed). Despite the relatively recent revival of interest, according to its major proponents 'restorative justice has been the dominant model of criminal justice throughout most of human history for all the world's peoples' (Braithwaite, 1998:323). It appears, to take one example, that during the time of the Roman Empire victims could select between civil and criminal proceedings. Non-judicial forms of dispute resolution took precedence over state-centred remedies. The shift towards state punishment (Lacey, 1988) was a gradual one, moving away from restorative approaches towards retributive models in which crime was treated as a matter of fealty to and felony against the monarch occurring simultaneously with the decline of feudalism (McAnany, 1978; Braithwaite, 2002). Reflecting on this trend in a now famous essay, Nils Christie (1977) commented on the way in which conflict had been appropriated. Criminal conflicts, he argued, have progressively either become other people's property, usually lawyers', or have been defined away by those in whose interest it is valuable to do so.

Christie suggested that criminology itself was complicit in this process and that 'maybe we should not have any criminology' (1977:1). The latter point, it should by now be clear, is not one with which we agree (and nor in practice, it appears, did Christie). Christie's starting-point was that conflicts are important and that industrialized societies, far from having too much conflict, actually have too little. In this he was following John Burton's rather more colourful analogy that conflict is like sex. It is pervasive, should be enjoyed and should occur with reasonable frequency. After it is over, people should feel better as a consequence (Burton, 1972). In this manner, Christie argued that 'conflicts ought to

be used, not only left in erosion. And they ought to be used, and become useful, for those originally involved in the conflict' (1977:1). His view was that conflicts are scarcer than property and are immensely more valuable. They are valuable because they provide an opportunity for participation, an opportunity for the clarification of values and principles, and in the criminal justice setting, an opportunity for victims to gain a better grasp of their experience and reduce their anxiety through contact with the offender. In the current system 'the offender has lost the opportunity for participation in a personal confrontation of a very serious nature. He [*sic*] has lost the opportunity to receive a type of blame that it would be very difficult to neutralise' (1977:9).

Since the publication of Christie's essay a number of authors have sought both to develop more fully theorized versions of non-retributive forms of justice and to promote practical experiments. One of the authors in this volume, Howard Zehr, was among the first to develop an 'alternative justice paradigm' in which it was proposed that victims should play a much more central role and offenders should assume greater responsibility for their actions and for repairing the harm caused (Zehr, 1985, 1990). Zehr's early work placed great emphasis on victim–offender mediation, and such ideas were particularly influential in the UK from the late 1980s onwards (Marshall and Merry, 1990; Wright, 1991; Umbreit, 1994). Criminal-justice-focused forms of mediation and conflict resolution have developed in numerous other directions since then, encompassing both theoretical developments such as 'reintegrative shaming' (Braithwaite, 1989) and 'responsive regulation' (Braithwaite, 2002), as well as practical advances such as 'family group conferencing' (Morris, Maxwell and Robertson, 1993; Morris and Maxwell, 2000), 'sentencing circles', and 'community justice' (Karp, 1998), and advances in business regulation (Ahmed et al., 2001).

It is at this point that work on large-scale conflict resolution and that on alternative justice begin to come together as restorative justice theorists have turned their attention to broader matters than the operation of the criminal justice system. For example, the South African Truth and Reconciliation Commission made specific reference to the concept of restorative justice and the related African notion of *ubuntu* (Truth and Reconciliation Commission, 1998).[1] Villa-Vicenzio (1999), one of the report's authors, has explicitly seen the 'amnesty' process under the TRC (whereby human rights violators were granted immunity from prosecution in return for truth telling) as an expression of the practical applicability of restorative values in a transitional context. Such an approach to restorative justice and conflict resolution has not been without its critics

(e.g. see Leebaw, 2001). None the less, restorative justice has been linked with a wide variety of conflict resolution settings, including discussions concerning post-conflict 'truth' processes in the former Yugoslavia (Nikolic-Ristanovic, 2001) and East Timor (United Nations, 2001), the Gachacha arbitration hearings established in the wake of the massacres in Rwanda (ICRC, 2000), the setting up of the international criminal court (Popovski, 2000) and ongoing attempts at finding alternatives to paramilitary punishment violence in Northern Ireland (McEvoy and Mika, 2002).

At both the macro and the micro level, restorative justice theory and practice offer a template for addressing harms which fits broadly within the increasingly accepted requirements of transition from conflict (Teitel, 2000). A focus on reparation and healing of victims as opposed to retribution visited upon wrongdoers, hearings which are directed towards truth finding rather than adversarial contests, processes which emphasize community involvement and ownership rather than exclusive 'professional' stewardship – these and other features of restorative justice have become increasingly important as ways in which societies seek to emerge from violent and divisive political conflicts.

In perhaps the most far-reaching linkage of restorative justice to conflict resolution, Braithwaite has suggested that the restorative justice paradigm (when linked with work on responsive regulation) is useful 'for reconfiguring how to struggle for world peace' (2002:169). Entering a terrain normally reserved for political scientists and international relations theorists, Braithwaite argues that in light of the end of the cold war, wealthy, economically interdependent states tend to avoid going to war to resolve their differences with each other but rather engage in what he terms 'restorative diplomacy'. Drawing directly from the literature on business dispute regulation and resolution (discussed further below), he argues that they settle disputes through established techniques such as conciliation, mediation, conferences and summits. As developing nations become similarly economically integrated through the process of globalization, Braithwaite (2002:172–4) contends that this creates a more organized sense of 'an international civil society', a process which is directly analogous to the conditions necessary for effective restorative justice at the micro level. Braithwaite goes on to suggest that what he regards as the failings of traditional 'elite' diplomacy (e.g. President Carter's mediation between President Sadat and Prime Minister Begin at Camp David) can be met by 'the democratised peacemaking that is restorative justice'. Modern peacemaking, he argues, must go beyond the notion of top-down deals cut at the negotiating

tables to 'restorative' processes where pragmatic accommodations are stretched to 'shame' violence, move away from retribution, promote the protection of human rights, engender greater communal ownership of the settlement and ensure that all is framed in the generous language of idealism, peace and justice rather than humiliation or victory for any of the protagonists.

While even some restorative justice advocates would balk at the scale of Braithwaite's ambitions, his attempt to draw out the theoretical and practical links between what has traditionally been viewed as the preserve of criminology and the broader process of resolving conflict is formidable. We admire and support that objective. For us, where criminology, conflict resolution and restorative justice meet offers a challenge to the traditional boundaries of the criminal justice process and to conventional, criminological definitions of conflict. The approaches outlined above seek a more holistic understanding of justice which attempts to overcome the long-standing separation of bureaucratic approaches on the one hand and those that place greater emphasis on emotions on the other. As Bazemore (1998:337) puts it, 'this focus implies a vision of justice as "transformative" as well as ameliorative or restorative'. The bottom line in such an approach is that it must involve meaningful forms of participation not only in 'justice' but, at least as importantly, in solving problems, resolving conflicts and rebuilding damaged relationships.

Criminology and the relevance of conflict resolution literature

While conflict resolution has been defined both broadly and narrowly, we have found the definition offered by Ho-Won Jeong most useful for our purposes.[2] As criminologists, our primary focus in this book is the intersection between law, criminal justice and social regulation on the one hand and the process of resolving conflict on the other. While not the only meeting point (see the chapters below on peacemaking criminology), restorative justice is one of the key criminological arenas in which such ideas coalesce. Bearing in mind that our gaze is primarily limited to matters criminological, we have chosen at this juncture to draw out particular elements of the conflict resolution literature which are relevant for our current purposes. As an academic discipline, conflict resolution has its origins within at least three distinct arenas: international relations and peace studies; alternative dispute resolution; and organizational development and management science

(Tidwell, 1998) – each of which can be directly linked to central criminological problematics.

It is within the field of international relations and peace studies that the phrase conflict resolution is perhaps most often encountered (Burton, 1986, 1987, 1997; Jeong, 1999). It emerged as a distinct discipline within the social sciences in the late 1950s in tandem with the growing realization that war, long seen as a staple form of relations between states, had become 'in a very real sense a threat to the survival of humanity' (Rapoport, 1999:vii). By the 1990s, with the demise of the cold war, the focus of the discipline had broadened considerably as scholars and activists recognized that the nature of conflicts had changed. For example, Wallensteen and Sollenberg (1997) note that of a total of 101 armed conflicts between 1989 and 1996, only six were interstate conflicts. The vast majority were between different identity groups defined by racial, religious, ethnic, cultural, political or ideological terms (often a combination), and most such conflicts had a long history.

As the particular configurations of conflicts studied within international relations and peace studies have broadened, so too has the range of conceptual devices used to analyse both conflict and the processes required for its resolution. At least three key features may be drawn from this literature which are of particular relevance to the study of criminology and conflict resolution.

First, the notion of 'structural violence' (Galtung, 1975) in particular broadened the focus to an understanding of issues such as poverty and the denial of human rights as forms of violence often as harmful as physical violence itself. Thus, as Murray argues in her chapter below (Chapter 4) with regard to the prevention of political, social or ethnic conflict in Africa, conflict prevention cannot be divorced from the protection of basic human freedoms. More critical variations of this school (particularly those that focus upon gender, race and power relations) often offered the most sustained critiques of forms of conflict resolution such as mediation. These they saw as promoting a manipulative ideology of harmony, one which inevitably favours the dominant class or order (Lederach, 1989). While not all conflict resolution commentators would share that degree of cynicism, a critical attention to social structure has become a key element in more grounded conflict resolution theory (e.g. Dukes, 1996, 1999). Such a focus resonates strongly with a number of criminological intersections with conflict. For example, the chapter below on 'peacemaking criminology' by Thomas and colleagues (Chapter 5) is located firmly within this paradigm, arguing in essence that no honest attempts at peacemaking can be made which neglect to

address the pernicious influence of a retribution-obsessed criminal justice complex.

Second, the concept of 'ripeness' in the conflict resolution literature appears to us to be of considerable academic usefulness (Aggestam, 1995; Mitchell, 1995; Lieberfeld, 1999). Simply put, this is a view that *timing* is all in resolving conflict, perhaps best summed up by the poet Seamus Heaney (with regard to the Irish peace process) as a juncture when 'hope and history rhyme'.[3] Conflicts may be ripe for conflict resolution at a particular time because of a complex interaction of political, ideological, social, cultural, individual personalities and other factors. A diminution in the legitimacy of the established order and a willingness realistically to address legitimacy deficiencies, pressures for resolution from outside and inside the parameter of the conflict, a viable alternative to armed struggle, individual political leaders willing to take risks and lead their constituencies – these and other factors have all played varying roles in the (apparently) more successful peace processes of recent times. Conversely, conflicts may be *unripe* for resolution, particularly when in the absence of the collapse of an (arguably) viable state system, those seeking to resolve conflict are hamstrung by 'political realities'.[4] 'Premature resolution' will tend to result in only temporary success (Deutsch, 1987). Both the chapters by McEvoy and Ellison (regarding Northern Ireland – Chapter 3) and Van Zyl Smit (South Africa – Chapter 2) are premised on the notion that these were conflicts which had 'ripened' to a greater or lesser extent at the political level. In addition, the process of conflict ripening in both jurisdictions meant that criminological actors and criminological discourses (on issues such as prisoner release, police and criminal justice reform etc.) were moved centre stage in respect of the overall conflict resolution process.

Third, the forms of conflict resolution themselves reflect important underlying tensions, in particular with regard to the role and legitimacy of the state. Rubinstein (1999) has characterized this will by suggesting that those seeking to resolve conflict fall into two broad camps, *technocratic* and *political*. *Technocrats* tend to accept as 'givens' existing legal, conflict management and other arrangements of the state infrastructure. Within such a framework, conflicting parties are assigned to negotiate their differences in state-sanctioned forums. *Politicals* on the other hand consider such dispute resolution as system maintenance. Theirs is a more ambitious project, not only to resolve individual disputes but also to assist in the creation of a political will designed to make structural changes possible. Thus, for example, a *technocratic* approach to the mechanisms of informal dispute resolution employed by high-crime