

## **RECONCEPTUALISING CUSTODY: RIGHTS, RESPONSIBILITIES AND 'IMAGINED COMMUNITIES'**

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*“There can be no true installation of human rights without the end of exploitation, no true end of exploitation without the installation of human rights”.*  
*Bloch (1986 [1961]: author’s preface xxix)*

### **Introduction**

While there has been much reflection and concern with human rights in prison, the depiction of women’s prisons as something ‘other than’ punishment has often resulted in a concealment of the punitive basis of custody as applied to women (e.g. Carlen, 1983; 2008; Hannah-Moffat, 2001; Carlen and Tombs, 2006). In the penal context, the rights of prisoners (as underpinned by human rights priorities) are intended to mitigate the punitive practices of the state, yet they have become increasingly blurred by growing emphasis on ‘reintegration’ and ‘rehabilitation’. For Cohen (1985), the dispersal of control mechanisms from the prison into the community (integral to concepts of rehabilitative throughcare and reintegrative practices) not only blurs boundaries between these spaces but conceals the nature of this expansion of control. The ‘rehabilitative’ discourse that underpins women’s imprisonment makes it a paradox around which the nature of punishment and the significance of wider economic, social and cultural inequalities that drive punitive practices might usefully be considered.

This chapter is inspired by developments in Scotland, reflecting progressive work internationally, which simultaneously aims to reduce the number of women in prison and improve the experiences of those who are imprisoned. The chapter draws upon the recently

introduced concept of ‘community custody’, and highlights the ambiguity that emerges from ongoing attempts to connect the community and prison as spaces of punishment. It thus explores what recent shifts towards discourses of ‘need’ in the prison context for women specifically (but with resonance for both men and women more generally) might mean when disconnected from considerations of ‘equality’ in the broader sense. The notion of ‘equality’ that is embedded in the mainstream concept of human rights is based on an individualised notion of equal treatment or equity, rather than a recognition of the structural underpinnings of carceral systems<sup>1</sup>.

The emphasis on social need, as responded to by punishment systems, creates the impression of ‘benevolent space’ which draws on notions of individual misfortune and the adoption of a philanthropic intervention. When discussing the issue of human rights in prison, and how to attain them, this concept of ‘need’, and how it is defined and responded to, encounters problems when attempts are made to breach the gap between the prison and the ‘community’ (in terms of dominated and dominating spaces). Thus the chapter highlights the structural significance of penal power and the symbolic dissonance between prison and the community in respect of human rights in the context of the imprisonment of women.

A confusion of aims and objectives has become increasingly prominent given recent attempts to embark on a ‘radical’ transformation of imprisonment in Scotland where prisons are being revamped and conditions inside prisons improved across the country, in marked contrast to increasing evidence of a ‘crisis’ in the penal estate south of the border. Noting international

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<sup>1</sup> Chesney-Lind (2002: 91) describes the impact of equality in punishment as ‘vengeful equity’ in terms of its gendered impact. She notes: “This is the dark side of the equity or parity model of justice – one that emphasizes treating women offenders as though they were men, particularly when the outcome is punitive, in the name of equal justice”.

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developments to consider recent attempts to reorganise penal estates for women, this chapter explores the relevance of a human rights framework in the repositioning of custodial spaces. It considers the links between human rights and social justice in relation to women and explores the relationship between mainstream rights and critical rights thinking. Finally, it reflects on how critical rights thinking and practices can facilitate progressive change.

### **Penal Reforms for Women**

The history of penal reform in many western countries is characterized by good intentions leading to unintended consequences. For many scholars, this reflects a failure to consider the ability of the prison to co-opt and circumvent these ‘good intentions’ according to its own institutional logics (e.g. Correctional Services Canada, 1990; Rafter, 1990; Hannah-Moffat, 2001; Malloch and McIvor, 2013; Moore, Scraton and Wahidin, 2017). The result has often been to reinforce the legitimacy of punishment as a response to wider social problems while innovative ‘alternatives’ become extensions of the prison system.

Over the years, a number of enquiries and reports have been produced<sup>2</sup> which have recognised the general inappropriateness of sending many women to prison and made the case for gender-appropriate ‘alternatives’. In England and Wales, concerns about the circumstances of women in prison and the impact of imprisonment on them led to the commission of the Corston Review of ‘women with particular vulnerabilities in the criminal justice system’. This reported in 2007, making a range of recommendations to reduce the number of women in prison and to restructure the remaining penal estate (see Moore, Scraton and Wahidin, 2017). Corston (2007), like others previously (e.g. Social Work and Prison Inspectorates, 1998 reporting on

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<sup>2</sup> The list is considerable but for indicative examples see: Bloom, Owen and Covington, 2003; Canadian Human Rights Commission, 2003; Corston, 2007; Commission on Women Offenders, 2012; All Party Parliamentary Group on Women in the Penal System, 2015.

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Scotland) was of the view that her proposed penal reforms would result in a significant reduction in the number of women imprisoned and that, as a consequence, the female prison estate (as it existed at the time of her report) would require radical restructuring. While the Corston report focused particularly on England, it also had implications for other UK jurisdictions and it reflected similar and parallel work in Northern Ireland and Scotland where the plight of women in prison – and the need for action – had been highlighted over previous decades<sup>3</sup>.

The Corston Report (2007) provided a blueprint which set out the importance of addressing the specific ‘vulnerabilities’ of women within the prison specifically and the criminal justice system more generally (see also All Party Parliamentary Group on Women in the Penal System, 2015). This report – as well as the Commission for Women Offenders in Scotland (see below) – have placed an emphasis on needs and equity as key concepts governing the imprisonment of women. Both highlight the importance of addressing women’s ‘needs’ during the process of punishment and providing equity in penal measures.

Nevertheless, subsequent recommendations frequently direct their attention to delivering improved services in/through the criminal justice system, despite the widespread recognition that women’s imprisonment is inextricably linked to circumstances and conditions outside the prison. Across other international jurisdictions, similar developments have been evident (Hannah-Moffat, 2008). The extent to which recommendations from inquiries and commissions have been accepted by national governments and incorporated into practice is questionable. Deaths of women in prison continue to be a significant cause for concern (Prisons

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<sup>3</sup> See for example Social Work Services and Prisons Inspectorates for Scotland (1998); Scraton and Moore (2007).

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and Probation Ombudsman, 2017) and appear to be on the increase despite the recommendations set out by a number of official reports (e.g. Prisons and Social Work Inspectorates, 1998; Prisons and Probation Ombudsman for England and Wales, 2003; Corston, 2007 ).

### **The Scottish Context**

The experience of women in prison in Scotland had received considerable media and public attention during the 1990s and early 2000s when a series of tragic deaths occurred in Scotland's national prison for women, HMP Cornton Vale. This resulted in a series of official reports and concerted action by penal reformers, service-providers and policy-makers to reduce the imprisonment of women. For policy-makers in Scotland, the development of community provisions which could offer alternatives to custody were considered a priority<sup>4</sup>.

The most recent report into women in the criminal justice system in Scotland, the Commission for Women Offenders (2012) echoed many of the recommendations of the Corston Review and specifically called for the closure of the national prison for women which it denounced as being 'unfit for purpose'. This call was widely welcomed and agreed to by the Scottish Government. The Scottish Prison Service (SPS) swiftly developed plans to build a new 'state of the art' institution for women, intended to meet the needs of most imprisoned women in one location. Although acknowledging the benefits of an enhanced environment for women, there was widespread dissatisfaction (from community based service providers, academics and penal reformers) at the construction of such a large prison which, it was claimed, would result in more rather than fewer women being imprisoned. Following a concerted public campaign to

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<sup>4</sup> See Malloch and McIvor (eds) (2013) for a collection of papers on international developments.

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halt the development of this 300-350 bed prison (see Malloch, 2016 for details), the Cabinet Secretary for Justice agreed to revise SPS plans for a restructured penal estate and indicated that, instead, a new approach to women would be ‘radical and ambitious’, reflecting the vision of the Commission for Women Offenders (2012). Again, these revised developments were led by the Scottish Prison Service who organised a series of forums across Scotland aimed at informing the plans for a reconfigured penal estate. This culminated in an international symposium and a subsequent 2015 report *From Vision to Reality: Transforming Scotland’s Care of Women in Custody* (SPS, 2015). Confusingly, the developments for this radical and ambitious approach were held firmly under the auspices of the SPS who maintained the leading role in taking plans forward. There was certainly much good will to improve the system for women, however in the preparatory discussions and developing plans, there emerged evidence of an increasingly blurred boundary between prison services and community provisions. This was not along the lines of an abolitionist approach to the imprisonment of women (it was made clear by the SPS organisers that this was not for debate at the international symposium), but instead a new penal imaginary was projected: that of ‘community custody’.

Setting out the vision of the reshaped prison estate for women, the Cabinet Secretary for Justice announced, on 22 June 2015, that a new small national prison with 80 places would be created, alongside five smaller community-based custodial units each accommodating up to 20 women across Scotland<sup>5</sup>. These custodial units were intended to provide women with access to intensive support for issues such as alcohol, drugs, mental ill-health and domestic abuse trauma. It was intended that the units would be located in areas which would support the

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<sup>5</sup> Corston (2007) had also called for small custodial units that would gradually replace the women’s prison system as her wider initiatives came into play – and it was suggested that eventually, these units would be removed from the prison service to be taken over by specialists in working with women (Corston, 2007: 86). Similar aims were held by Correctional Services Canada in the development of the Healing Lodges which, for those built on Aboriginal land, were intended to be handed to community control and administration at a future date.

maintenance of family contact. The vision was for an individually-focused, ‘recovery-based’ approach to women of all ages (Liddell Thomson, 2015)<sup>6</sup>; the attempted creation of benevolent space within the prison system reflected international attempts to enhance the use of custody for women. Plans for these community-custody units are ongoing and, at present, the location sites have been identified for some but not all of the units. Much work is being carried out to develop the practical, physical structures of the units although there are ongoing concerns that unless services are established in local communities, women will continue to be processed through the criminal justice system to access resources and, ultimately, the numbers sentenced to custody are unlikely to be reduced significantly. As identified elsewhere (see Carlen, 2008, 2013; Malloch and McIvor, 2013), if services (including support for problems such as poverty, substance use, refuge from violent and abusive relationships) are absent in communities, but help is available in prison (with the punitive element of incarceration assuaged by terms such as ‘community custody’) then sentencers will continue to send women to prison.

This ‘radical and ambitious’ approach introduced in Scotland may sound resonant of developments in Canada in the early 1990s (Hannah-Moffat, 2001 and 2008; Hannah-Moffat and Shaw, 2000; Hayman, 2006). Here, the report *Creating Choices* (Correction Services Canada, 1990) outlined plans to close the national prison for women (Kingston Prison) and to hold women in five community-based institutions across Canada, including an Aboriginal healing lodge. However, the Canadian government was subsequently criticised for not providing the necessary funds for the introduction of these community-based services; leading

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<sup>6</sup> In a presentation to the Scottish Association for the Study of Offending, Rona Hotchkiss (SPS operational lead for the development of the women’s custodial estate), outlined plans for: “minimal visible security” where women will be held in “optimum security conditions for their individual needs, risks and strengths” - most will be serving short-term sentences (Robertson, 2016). Plans for these units include the potential for dedicated space for visiting experts and workers, residential facilities designed like small flats, opportunities for children to visit and to stay overnight and for an environment where women will be “able to wander about, confined only within the perimeter of the building and only at the times that are appropriate (...)”.

to an imbalance in funding which prioritised support for the institutions to the detriment of the community infrastructures surrounding them (Hannah-Moffat and Shaw, 2000).

While the history and legacy of these Canadian developments have been explored elsewhere (notably Hannah-Moffat and Shaw, 2000; Haymen, 2006), they share a number of challenges with efforts to transform the women's prison estate in Scotland, notably: (i) the challenging relationships between the prisons and the communities in which the new prisons for women were to be sited<sup>7</sup>; (ii) inquiries which highlight the inextricable social, political and economic circumstances (and in the case of Canada, the legacy of colonial policies) outside the prison which impact on experiences within it<sup>8</sup>; and, (iii) increasing security features beyond those originally intended (see also Malloch, 2013). As attempts to develop the new institutional system in Scotland have proceeded, the significance of human rights and the potential consequences of penal reforms have come to the fore.

### **Human Rights Discourse**

Ongoing international developments intended to divert individuals from custody or provide alternatives to imprisonment (see Cohen, 1985) have led to an increasing emphasis on 'punishment' and or/detention in the community. This area is also governed by international standards and norms. For example, the 1966 'International Covenant on Civil and Political Rights' (Article 9 and Article 14) and the 1990 'UN Standard Minimum Rules for Non-custodial Measures' (the 'Tokyo Rules') set out the conditions under which UN Member States

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<sup>7</sup> The healing lodge, which was located in Nekaneet land and had been intended to connect Aboriginal women with their communities and traditions, instead took on the features of Correctional Services rather than the Nekaneet custom and culture, on whose land it was built.

<sup>8</sup> In February 2017 the Standing Senate Committee on Human Rights launched a 'comprehensive study' into the human rights of federal prisoners notably 'vulnerable or disadvantaged' groups to include indigenous people, visible minorities, women and those with mental health issues.



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should develop measures within their legal systems intended to reduce the use of imprisonment, and to rationalize criminal justice policies, “taking into account the observance of human rights, the requirements of social justice and the rehabilitation needs of the offender”. The Tokyo Rules indicate that non-custodial measures should be used in accordance with the principle of minimum intervention and that they should “be part of the movement towards depenalization and decriminalization instead of interfering with or delaying efforts in that direction” (United Nation, 1990: para 2.7).

In 2010, the United Nations developed specific Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the ‘Bangkok Rules’). Until the introduction of these Rules, the particular concerns of women had rarely featured in human rights discourse; other than in relation to the general prohibition of discrimination, requirements of care for pregnant women, mothers and babies in custody, the separation of male and female prisoners and gender staffing requirements<sup>9</sup>. The Bangkok Rules encouraged the development and use of non-custodial and gender-specific policies and practices. They covered a number of issues including accommodating women close to their homes where possible, acknowledging vulnerability and responding to various gendered needs.

Recognising the potentially harmful effects of imprisonment, the Bangkok Rules emphasised the importance of alternatives to custody and prioritized non-custodial measures to women who have come into contact with the criminal justice system. The Rules encourage Member States to adopt legislation to establish alternatives to imprisonment and to give priority to the financing of such systems. Under Section III of the Rules (on Non-custodial measures), the

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<sup>9</sup> For example the UN Standard Minimum Rules for the Treatment of Prisoners; European Prison Rules; European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment which also established standards for the gender-specific health care of women.

importance of appropriate responses to women is outlined, including gender-specific options for diversionary measures and pretrial and sentencing alternatives. The need to take account of histories of victimization and women's caretaking responsibilities is also highlighted.

The Bangkok Rules recognize that women in contact with the criminal justice system must be provided with appropriate resources to address their most common problems. Examples of this include: therapeutic courses and counselling for victims of domestic violence and sexual abuse; suitable treatment for those with mental disability; educational and training programmes to improve employment prospects; and, 'gender-sensitive, trauma-informed, women-only substance abuse treatment programmes' (United Nations 2010, Rule 62). Such initiatives, which have clearly informed aspirations for a reformed penal estate for women in Scotland, are recognised as positive developments which can eliminate or mitigate the harms caused by prison sentences. They also recognise the legitimacy of nation states to provide criminal justice disposals outside the prison; wherever possible, these resources should be directed to the 'community' where it is envisioned that a range of support and opportunities will be available.

### **Benevolent Spaces**

The difficult circumstances of women prior to imprisonment are features of the lives of women in the justice system internationally: poverty, family issues and victimisation characterised by high levels of problematic substance use and experiences of poor mental health. Rates of self-harm and attempted/realised suicide are disturbingly high. It is such circumstances that led Carlton and Segrave (2011) to argue that the 'pains of imprisonment' are not distinct to the prison itself but for many women the pains exist before, during and after imprisonment. Baldry (2010) has described this as a disadvantaged or liminal space where women are located from an early age. This 'space' consists of an environment with inadequate housing, abuse, poor

schooling and time spent in care resulting in cumulative hardships which are exacerbated by the criminal justice system.

In many ways, the penal treatment of women is often indistinguishable from ‘welfare treatment’ with punitive impact in both spheres. Carlen (2013) argues that the shift from a ‘welfare state’ to a ‘security state’ is characterised by the use of risk scores to determine the extent to which human and legal rights should be respected (in light of assessments of potential risk). And in highlighting this, she points to the unequal structures of society within which concepts of ‘rehabilitation’ have no relevance for the rich, but characterise the injustice directed at the poor. Indeed ‘criminal justice’ supports the maintenance of an unjust social order. Recognition of the intersectionality of class, ‘ethnicity’ and gender relations becomes evident as the basis for overlapping structural inequalities that determine and shape processes of criminalisation and disadvantage.

Social, political and economic influences are crucial in determining processes of criminalisation and punishment, and also impact on the ways in which both criminalisation and punishment are subsequently experienced by the individuals and communities on whom they are directed. Prisoners are drawn disproportionately from disadvantaged and marginalised communities (Houchin, 2005) for whom ‘rehabilitation’ has almost rhetorical significance. While this is acknowledged by Scottish Government policy-makers (Scottish Government, 2017), attention to improving the prison estate is unlikely to impact on the circumstances which feature within the communities from which most prisoners originate. Thus, while a discursive focus is directed towards meeting woman’s needs (see Fraser 2013), consideration of women’s

‘rights’ are often absent from discussions in penal contexts<sup>10</sup>. This reflects the ‘therapeutic’ approach that is such a consistent feature of discourse surrounding penal service design for women, where health models regularly form the basis of a ‘trauma-informed approach’. As Fraser (2013) notes more generally, the relationship between needs and rights is a controversial issue in contemporary theory. Concerns that rights claims work against radical social transformation by encapsulating notions of ‘bourgeois individualism’ are countered by those like Fraser who argues for the translation of justified needs claims into social rights. She suggests (2013: 82), “in a context devoid of poverty, inequality and oppression, formal liberal rights could be broadened and transformed into substantive rights, say, to collective self-determination”. This raises important questions around the significance of collective rights (recognised within indigenous communities in Latin America and aboriginal communities elsewhere) but rarely considered within a westernised model of individual rights. The collective rights of women and the application of rights within communities requires some attention; the notion of ‘community-custody’ brings these issues to the fore.

Attempted reforms, including the concept of ‘community custody’, emerged from good intentions, aimed at reducing the number of women in prison and facilitating better integration into communities<sup>11</sup>. However, there is rarely any meaningful sense of what ‘community’ is or what the wider implications in terms of human rights might be, both inside and outside the prison. It is this shift in discourse – from ‘punishment’ to ‘needs’ - that has been highlighted as particularly troublesome in relation to justice for women.

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<sup>10</sup> Although the Commission on Women Offenders team included a secondment from the Equality and Human Rights Commission attached to the Commission, with oral evidence provided by representatives from the Scottish Human Rights Commission.

<sup>11</sup> Although see Anthony (2013) for a discussion of changing conceptions about the impact of community as a site for reintegrating Indigenous People.

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Recognition of the needs of many women in the justice system is indeed, very important. Services aimed at providing support are crucial. Relatedly, the focus given to supporting trauma and addiction, meeting health needs and developing life-skills via training and contact with families is also important in many respects. However, introducing such resources in a penal context, with the aim of addressing the potential ‘risk’ of reoffending weighs such interventions towards ‘responsibilities’ of individuals with the expectation that counteracting such deficits will resolve imbalance and result in a return to law-abiding citizenship. This assumes that individuals who break the law can be ‘fixed’ by changing their cognitive behaviour. However as Dryden and Souness (2015) show in their study of women’s services across Scotland, women who had been referred to criminal justice interventions did not display faulty cognitive processes, rather, the problems underpinning their involvement with the criminal justice system appeared more related to their actual lived circumstances of extreme disadvantage.

### **Individual Rights versus Community Entitlement**

For advocates, the role of human rights in supporting a shift toward democratic legitimacy can only be partial, limited and narrow if more structural concerns are not acknowledged. The hope that penal and criminal justice institutions are capable of reforming themselves has not been borne out by history. As examples, Bell notes the absence of a human rights ‘ethos’ within many criminal justice institutions, the UK government’s opposition to human rights legislation, and the failure to comply with rulings from the European Court of Human Rights on prisoner voting.

Given the limitations of penal institutions to develop a cultural environment grounded in the application of rights, the likelihood of revising the structure of penal estates may continue to operate with a rights deficit, concealed by an over-riding discourse of responses to ‘needs’.

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Similarly, while recognising the importance of ‘community’ in supporting reductions in imprisonment, countervailing factors are evident. Attempts to shift focus from the prison to the community fail to denote on what theoretical/ideological basis of ‘community’ these developments are based. Community can be conceived of as a conceptual ideal, spatial entity or political signifier (Lacey and Zedner, 1995). As Bauman (2001:3) notes “‘Community’ is nowadays another name for paradise lost – but one to which we dearly hope to return, and so we feverishly seek the roads that may bring us there”.

Community as a concept has been problematized within sociology and criminology. It is both vague and open to misinterpretation, and the application of the term to actual lived experience is often widely contested<sup>12</sup>. As Young (1990/2011) notes, critics of welfare capitalist society often proffer an alternative domination- and oppression-free vision of society in an ideal of community. She explores this notion, drawing out the significance of moral theory and the potential of a community based on needs and solidarity in contrast to the liberal concept of community in terms of rights and entitlements. Within criminal justice, community is often used to refer to punishment outside the prison (community punishment, community payback, community corrections) and rather than being portrayed for what it **is**, there has been more attention to what it **is not** (i.e. not-prison). There appears to be an implicit assumption that in order for women to access support and services, location in ‘the community’ is a good thing<sup>13</sup> and that ‘community custody’ would be a way of joining up some of the dots that are reflective of the currently ‘fractured’ process that appears to characterise many women’s propulsion

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<sup>12</sup> Lacey and Zedner (1995: 305) note that it was the very governments (of Thatcher and Reagan) that “exploited the appeal to community most wholeheartedly” yet “simultaneously pursued socio-economic policies which directly or indirectly attacked the very infrastructures which might be thought to make references to community meaningful”. By the late 1980s, as Lacey and Zedner note, ‘community’ in terms of criminal justice was associated with “the diffusion of responsibility for both crime prevention and the management of crime” (310).

<sup>13</sup> Community’ is referred to 257 times in the Commission for Women Offenders Report (a report of 109 pages).

through the criminal justice system. Community spaces are presented as the locus where individual problems can be addressed.

### **Under-resourced Communities**

There have been many insights into the ways in which communities are affected by crime and punishment although these have limited impact on theoretical considerations of punishment. Mauer and Chesney-Lind (2002) and Leonard (2015) highlight the ways in which incarceration policies in the United States impact on communities in terms of cutting into public spending and the opportunities of those who remain in these communities. Internationally, there is evidence to suggest that the majority of prisoners come from a small number of geographical areas (Houchin, 2005; Wacquant, 2008 and 2009; Leonard, 2015). Despite a reduction in experiences of crime and victimisation in Scotland, and internationally, these reductions are not experienced equally across communities. While the risk of being a victim of crime has fallen overall, it is unchanged in the most deprived areas (Leonard, 2015). Overall, it is estimated that in Scotland, for example, less than five percent of adults experience 58 percent of all crime with those living in the most deprived areas at greater risk of being a victim of crime, civil law problems (including with neighbours, debt and housing), hospitalisation or death from alcohol or drug related causes, imprisonment and criminalisation (Scottish Government Justice Strategy, 2017). There are parallels in relation to health, where inequalities in health are noticeable across the UK<sup>14</sup>.

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<sup>14</sup> For example after adjustment for differences in deprivation, premature mortality (<65 years) in Scotland is 20 percent higher than in England and Wales (10 percent higher for deaths at all ages); similarly, the excess for Glasgow compared with Liverpool, Manchester and Belfast has been shown to be approximately 30 percent for premature mortality, and around 15 percent for deaths at all ages <http://www.scotpho.org.uk/comparative-health/excess-mortality-in-scotland-and-glasgow>

Poverty and hunger remain features of the lives of the most disadvantaged within society (see All Party Parliamentary Group on Hunger and Food Poverty, 2014). Recent social policy changes in areas of welfare reform in the UK (including significant cuts to benefits, tax credits, pay and pensions since 2010) have impacted negatively on those who are already disadvantaged and this has had a disproportionate impact on women who are more likely to be dependent on welfare benefits than men. The majority of lone parents (92 percent) are women and 95 percent of lone parents who claim income support are women (Engender, 2015). The criminalisation of many women in the UK and internationally is associated with material disadvantage, poverty, unemployment, psychological distress, addiction, victimisation and abuse (Loucks 1997). Thus the impact of inequality is significant.

This has two main consequences for a human rights framework in the interstice between prison and community that ‘community custody’ is paradoxically presented as a panacea for. Firstly, an individual model of rights within institutional spaces cannot address the factors that contribute to imprisonment, sustain processes of criminalisation and continue to exert impact following imprisonment and into communities post-release. Secondly, this has implications for the siting of community custody units which, if they are to be near the majority of prisoners home addresses, are likely to be in already deprived areas; begging the question of how the existing absence of resources in these areas will then be addressed. A continual theme across international literature is the concern about moving ‘punishment’ into communities that are already lacking in resources. As Pate (2013) notes in Canada the new prisons for women were built in areas where there was limited access to the services that women required, resulting in the development of such services within the prisons themselves. This also caused resentment for those outside prison fuelling public concerns that resources were provided in prisons that



were not available in the community (see Hannah-Moffat and Shaw, 2000). The emphasis on human rights tends to proffer individualised solutions which focus on the individual, where the emphasis on ‘rights’ and ‘responsibilities’ is also focused.

### **Human Rights and Social Justice**

Access to ‘justice’ and the resources (redistribution, recognition, participation) that influence how structural forces operate on the individual both create and restrict opportunities to social, political, economic and civil engagement (Fraser 2007). Although communities often appear to be fragmented and dislocated entities, it may be that the concept of ‘community’ as being in opposition to ‘individualistic’ approaches, may have the potential to provide a source of ‘active, mutual responsibility’ where needs are ‘woven together from sharing and mutual care’ (Bauman 2001, p.150). This has the potential to raise broader issues of (social) equality that need to be considered in ‘transformative’ penal programmes. The basis for this goes beyond the confines of criminal justice systems. For example, the European Committee of Social Rights (2015) highlights the importance of pursuing the attainment of conditions in which, among other things, the right to health, the right to social security, the right to social and medical assistance and the right to benefit from social welfare services may be effectively realised. At a time when there is a growing number of people in Europe deprived of dignity because of their exclusion from society, specific importance should be attributed to the protection against poverty and social exclusion (Secretary General of the Council of Europe, 2015: 78).

Fundamental reform requires imaginative alternatives but also a radical change in structures of power and the rethinking of dominant cultures, both institutionally and politically. As Douzinas and Gearey (2005: 101) note “...there can be no freedom or dignity without economic

equality”. This fits with a ‘utopian’ vision by recognising the need for structural change rather than individual conformity. Opportunities to collectivise experience and opportunities to challenge existing structures and normative views of ‘crime’ have the potential to shift focus away from ‘crime’ to much more comprehensive and broader visions of ‘justice’. But moving outside the criminal justice system and exploring the resurrection of concepts of ‘community’ in terms of local autonomy, self-governance and mutual aid requires a different language and different frameworks of ‘rights’.

In the absence of ‘community’ itself, community when discussing penal disposals is generally taken to mean ‘non-prison’ yet the very retention of ‘custody’ suggests the retention of incarceration – this is a real oxymoron. It is also an imaginary concept, a policy built on ‘imaginary communities’<sup>15</sup>. Inevitably, visions of a ‘just’ and equitable society raise questions around material and social inequalities, private ownership and power relations (see Malloch and Munro, 2013). Similarly, recognition of the intersectionality of class, ‘ethnicity’ and gender relations becomes evident as the basis for overlapping structural inequalities that determine and shape processes of criminalisation and cumulative disadvantage. Fundamental reform requires imaginative alternatives but also a radical change in structures of power and the rethinking of dominant cultures, both institutionally and politically. Addressing structural injustices requires a different way of seeing ‘community’ and a different language in which to discuss it. Opportunities to collectivise experience and to challenge existing structures and normative views of ‘crime’ have the potential to shift the focus away from this to much more comprehensive and broader visions of ‘justice’. This would require attention to addressing

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<sup>15</sup> This reimagining and re-visioning has affinities with the work of Anderson whose definition of a nation was of an *imagined and political* community. A nation was imagined because ‘the members of even the smallest nation will never know most of their fellow members, meet them, or even hear of them, yet in the minds of each lives the image of their communion’ (Anderson, 1983/2006: 6).

economic inequality, the collective rights of women and the inclusion of excluded communities in the distribution of resources and access to social and political decision-making.

### **Concluding Points**

Addressing inequality is as important as upholding individual rights, but what, if any, emancipatory potential can human rights have? For Douzinas and Gearey (2005: 101), “The first task of freedom as liberation from oppressive determinations is therefore to eliminate economic deprivation”. Reflecting on Bloch’s *Principle of Hope*, they claim that human rights will be at the heart of socialism. Like Bloch, they hold out a hope that human rights can create new imaginings in the struggle against injustice, claiming that “their promise exists hidden beyond conventions, treaties and bills in a variety of inconspicuous cultural forms. Human rights, based as they are on the fragile sense of personal identity and the – impossible – hope of social integrity, link integrally the individual and the communal” (2005: 105).

Critical criminology requires going beyond the limitations of a mainstream approach to ‘crime’ and ‘justice’ and, as well as critiquing penal solutions within a social, political and economic analysis, requires the presentation of new visions for a ‘just’ society (Cohen, 1985; Hudson and Ugelvik, 2012). While there is a long tradition of re-imagining justice within a critical context, this has been evident more recently in discussions around the potential for radical imaginings (e.g. Barton et al. 2011; Loader and Sparks, 2011; Young, 2011; Malloch and Munro, 2013; Bell and Scott, 2016) aimed at reinvigorating debates around the necessity of penal abolitionism (Moore, Scraton and Wahidin, 2017). Certainly, there remains a tension around the potential for achieving radical change and the legitimisation of the existing system; evident in the creation of apparently benevolent spaces within which women are incompatibly both punished and rehabilitated. A central problem to moving beyond current conceptual

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frameworks is the centrifugal pull of criminal justice and penal systems around which ‘alternatives’ are developed, thus failing to challenge the ‘ontological reality’ of crime (Hulsman, 1986). These challenges and paradoxes remain features of current developments in the Scottish penal context and have resulted in an ongoing oscillation between hope (for improvements in responses to women as law-breakers) and fear (that the criminal justice system remains the go-to solution for social distress created and experienced in and by communities).

Challenges to systems of harm require significant social, political and economic change capable of addressing wider social conditions; hence Bloch’s argument for the inextricable connection between human dignity and economic liberation which requires human rights. Radical reform thus requires the development of socially just and thereby transformative solutions, rather than simply enhancing the operation of criminal justice interventions. For Bloch (1986/1961: xxx) differences between social utopias and their aim of happiness, and theories of natural law with their focus on dignity, must be brought together. He says “This much is certain: There is just as little human dignity without the end of misery as there is happiness without the end of all old and new forms of subjugation”. This will require the reimagining, not of different forms of custody or enhanced penal systems, but of better societies where resources are targeted at structural inequality. While human rights may be central to such processes, wider collective obligations are also required to achieve these transformations.

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