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Creating spaces for change: engaging civil society to harness change in criminal justice practice

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Abstract

In a context of neoliberal penality, crime is falling yet prison populations continue to rise. Governments profess to recognise the problem yet have had little impact on underlying trends in criminal justice practice. This paper reports on a Scottish initiative to try and disrupt this cycle through broadening the base for deliberation upon justice matters to include civil society. In so doing we sought to build upon an emerging civic engagement evident in the wake of the 2014 Independence Referendum. Our premise was that to effect change requires that we look beyond policy fixes to the values and the socio-cultural drivers that take practice in particular directions. We conclude with a reflection on the obstacles to change.

Keywords: Scotland; criminal justice; punishment; knowledge exchange; civil society; values

Introduction

Law and order policies in the 1980s, marked the beginning of what commentators have identified as a global punitive turn in criminal justice, associated with the wider neo-liberal turn chrystalised in the elections of Thatcher and Regan in the UK and US respectively. A central feature of neo-liberalism is the construction of the citizen, as 'homo economicus', whose access to rights of citizenship, envisaged by Marshall (1950), became contingent on his or her ability to evidence their economic worth within a market economy. Of course, not everyone can take their place in this marketplace leading to exclusion and disaffection. Neoliberalism's 'free market turn' thus requires a penological adjunct, to police those excluded from the market place, resulting in a parallel 'punitive turn'. A range of writers such as Cavadino and Dignan (2006), Garland (2001) and Wacquant (2009) point to the consequences of such developments in a homogenisation of criminal justice across western societies, driven by the spread of punitive policies from the USA.

The punitive turn is also driven by a crisis of legitimacy faced by governments across Western democracies, as they are increasingly unable to deal with the ontological insecurities of late modernity. These render people fearful, predisposing them to punitive sentiments (Bauman, 2006). Criminal justice policy and practice has sought to respond to this concern about insecurity and risk. Under a rubric of evidence-based practice and 'what works?', the dominant approach for addressing offending behaviour has been Bonta and Andrews' (2017) Risk-Need-Responsivity (RNR) model. The idea of risk has become central and located within the offender. Risk is imagined to be assessable and manageable and thus amenable to 'scientific' rather than moral interventions.

This article seeks to locate the situation in Scotland against this more global backdrop. In some respects, Scotland might be thought to occupy a geographical and ideological space between Anglo-American punitivism and social democratic European welfare models. Certainly, for a while, it resisted some of the more

punitive developments mentioned above, hanging on to what commentators identify as greater penal welfarism (McAra, 2005). It was able to do so due to the ability of Scottish Office civil servants, working under the old Westminster regime, to assuage some of the more ideological aspects of Thatchersim and to hang onto a greater welfare consensus (Paterson, 2000). Ironically, following devolution in 1999, and especially during the Labour Liberal Democrat coalition from 2003-2007, crime was identified as a key political issue and initiatives in Scotland reflected the punitive turn driven by the New Labour government at Westminster, leading to what McAra (2005) identifies as the de-tartanisation of criminal justice policy, which involved a shift away from welfarism. This shift was short-lived, however and reverted back to welfarist principles, rhetorically at least, with the election of a minority Scottish National Party (SNP) government in 2007, resulting in what McNeill (2011) identifies as a re-tartanisation of criminal justice, key features of which included an emphasis on reparation and reintegration, 'fairer' justice and prevention (McAra, 2017). Notwithstanding the significance of these shifts, McAra (2017) observes that the impact of the above policy turns on criminal justice cultures and practices has been minimal, suggesting a degree of dissonance between criminal justice as political strategy and institutional performance and practice.

Crime in Scotland, as across most of the developed world, has fallen substantially over the past decade (McVie, Norris and Pillinger, 2015), yet prison populations and community-based sanctions continue to rise (Robinson and McNeill, 2016). With a prison population rate of 147 prisoners per 100,000 population, Scotland has one of the highest per capita rates of imprisonment in Europe (Tata, 2015; Carloway, 2016). The numbers imprisoned in Scotland have increased year on year from almost 6,000 in 2000 to almost 8,000 in 2014 (Carloway, 2016). Our near neighbour, Ireland, locks up around half the number of men and a third the number of women that Scotland does. These comparative figures suggest there are national particularities that fuel the country's relationship with punishment and imprisonment.

Scotland persists in this recourse to imprisonment in full knowledge that the system is not effective in achieving its goals of rehabilitation and is known to exacerbate

many of the problems it seeks to address as a result of the co-lateral damage of imprisonment. The negative effects of imprisonment on individual wellbeing and mental health (Scotland Institute, 2015), on families, (Scottish Centre for Crime and Justice Research, 2015), on citizenship and on resettlement and reintegration (Weaver, 2013) are well documented. Yet, as McAra (2017: 768) observes: 'the prison system appears impervious to failure rates that would be a major scandal in any other area of public policy such as health or education', a situation all the more pronounced in a public policy environment that is increasingly focused on outcomes.

Government reports in recent years, from McLeish (2008) to Angiolini (2012) recognise the problem, yet have had little impact on sentencing or on underpinning trends in criminal justice practice. In 2014, responding to these and related reports, the Scottish Government launched proposals for the reform and redesign of community justice, with an explicit emphasis on better outcomes, community collaboration and strategic leadership. In the same period, the Scottish Prison Service launched an institutional 'rebrand', under the tagline: *Unlocking potential, transforming lives*. These institutional transformations are not without their tensions (see Tata, 2015); however, they speak to a developing consensus that change is needed and to a growing recognition of the need to look beyond punishment in developing effective responses to offending behaviour.

Our argument in this article is based on the premise that ambitions for a more progressive Scottish justice are hampered by reliance on existing levers for change, which, whilst important, are rarely transformative. Furthermore, and perhaps more significantly, they do not engage with the philosophical and socio-cultural constraints and enablers to reform, including, for example, Scotland's historically complex relationship to punishment and welfare in delivering justice. Relatedly, while there is much talk in Scotland and beyond about the need for a more value-based approach to criminal justice, no consistent attempt has been made to articulate clear and coherent values for Scottish criminal justice policy and practice.

The place of values in Scottish criminal justice is complicated but important. Commentators have long noted the co-existence of penal harshness, penal welfarism, and penal innovation in the country's justice system (Young, 1997), while others argue that its more progressive elements are either exceptional or contingent (Muncie, 2011). Relatedly, values 'talk' appears to rise and fall in justice reforms, at times giving way to more modern and expedient preoccupations with evidence, outcomes and costs, only to resurface in rallying calls for 'compassionate' (see McAra, 2017) 'fairer' (Matheson, 2015) or 'transforming' justice (Scottish Prison Service, 2014). However, even as values talk resurfaces, we know that public bodies cannot impose values or cultures of practice. Public services and public service outcomes are now postulated to be a collaborative affair. They rest 'as much on the attitudes and actions of the people and communities who co-produce them, as they do on the attitudes and actions of those who once presumed to orchestrate them' (Smith and McCulloch, 2016: 163). Perhaps for these reasons, despite institutionally-led shifts and turns, punishment and imprisonment remain firm in the Scottish justice psyche, suggesting a paucity of ideas regarding how we move from the old to new orders.

While the possible reasons for the dissonance between policy rhetoric and practice reality are complex, McAra (2017) and others point to the limitations of an approach to reform and innovation conceived persistently through an institutional lens. Murray, Caulier-Grice and Mulgan (2010) suggest that existing structures and policies are inadequate in addressing some of the most pressing issues of our time, of which crime and justice reform is one. The same authors argue that current policies and structures of government tend to reinforce old rather than new ways of working, relying on classic tools such as legislation and policy, performance management and revised funding streams on the one hand, and market solutions on the other. Moreover, the silos of government departments are poorly suited to tackling complex problems. However, civil society alone lacks the capital, skills and resources to take promising ideas to scale. The authors suggest that, in matters of social reform, networks involving public sector commissioners, social enterprises, social movements and entrepreneurs may be key to innovation and change. Koch

(2017) similarly identifies state failure to effect change and calls for a reassessment of the relationship between democratic politics and criminal justice. It is this relationship that we sought to explore in the project we go on to discuss.

Social welfare, citizen participation and nation building

The election in 2007 of an SNP government brought with it the promise of a 'distinctive' Scottish politics, rooted in a civic rather than an ethnic conception of nationalism and with an emphasis on 'participatory' and 'progressive' welfare services based on espoused principles of solidarity, social justice and equality. Linked to this, the government set out an equally ambitious approach to public service reform, as outlined in the Christie Commission report (Scottish Government, 2011). The Commission, chaired by Campbell Christie, a former Trade Union leader, set out a vision and programme for welfare reform centred on empower[ed] individuals and communities who are involved in the design and delivery of the services they use. In the foreword to the report, Christie (2011: vi) notes:

> Experience tells us that all institutions and structures resist change, especially radical change. However, the scale of the challenges ahead is such that a comprehensive public service reform process must now be initiated, *involving all stakeholders*.

Essentially, Christie sought to encourage a shift from representative towards greater participative democracy, so setting out a new model for public service delivery and reform. In many respects, this was a prospectus for a reinvigorated civil society, an ideal that resonates historically in Scotland, where civil society performed a powerful role in ensuring the maintenance of a national identity following political Union with England in 1707 (Lindsay, 2006). Christie's vision also picks up on recent global directions in the delivery and development of welfare, prompted by broader 21st century challenges, including an increasing struggle amongst public policy and

service organisations to maintain authority and credibility in the face of radical uncertainties, complexities and inequalities. Relatedly, the recent revisioning of social welfare in Scotland is undoubtedly about more than welfare, reflecting, as Mooney and Scott (2016) observe, a broader politics of national autonomy and nation building. In this respect, Scotland's recent progressive and participatory 'turn' speaks to the dualities of both welfare reform and citizen participation, and to the different ways in which these developments are currently being constructed and mobilised. Importantly, this is nothing new, as history attests - notions of welfare and citizenship are constantly 'in the making' (Ferguson, 1767; Nairn, 1997; Chilvers and Kearnes, 2016;).

The Scottish Independence Referendum

If Christie set out a model of reform, centred on enhanced citizen participation, the 2014 Scottish Independence Referendum provided a catalyst for its enactment, mobilised by a refreshed vision of Scottish independence. As Malloch, Munro and Rogers (2017: 5-6) observe:

> At the heart of the campaign for Scottish Independence, was a view that things could be better in Scotland and that the enhanced democracy which the Scottish Referendum offered, provided the way to make change. … In this sense the 2014 Referendum was not a conflict over nationalism and unionism but one between different imaginings of a political community.

For many, in this period, Scotland took on the identity of a 'society in transition', daring to imagine alternatives identities, futures and political and social practices. The concept of justice was central to these imaginings, as was the idea of enhanced participative democracy as a mechanism for change (Paterson, 2015; Malloch et al., 2017).

In September 2014, the Scottish electorate voted narrowly in favour of remaining part of the UK. However, the political community and imagining mobilised through

the referendum process proved, for a period, durable and transformative. In the weeks and months following, many recently formed civil groups chose to constitute themselves more formally and continued their efforts towards independence, social justice and citizen participation - ideas which were, for many, now interdependent. *Women for Independence*, for example, founded initially to campaign for an independent Scotland, extended their activity to campaign across a range of Scottish policy areas, including penal policy. They are now recognised as contributing, through their campaigning, to a policy U-turn on proposed government plans for the significant expansion of the female custodial estate.

The extent to which a reinvigorated 'public sphere' has been or can be sustained in Scotland is subject to analysis (Paterson, 2015; Malloch et al., 2017). Similarly, the transformative and progressive potential of the recent 'participatory turn' remains much debated. Notwithstanding these important questions, the Independence referendum represented a key moment in Scotland's history and politics, demonstrating the imaginative and transformative potential of developing constructions of citizenship, participation and of collective and value-led visions for change. Politically, this post-referendum energy was expressed in a landslide for the SNP in the UK general election and a continuing majority in the 2016 Scottish parliamentary election.

It was against this political and cultural backdrop that the idea for the knowledge exchange project reported on here was conceived. Our aim was to explore the potential of a 'reinvigorated public sphere' for a collective, deliberative and value-based reimagining of Scottish criminal justice policy and practice. We did not set out with a prescribed end in mind, beyond a desire to test the possibility and potential of the above. . As recent UK and global politics attest, in practice, enhanced citizen participation rarely conforms to democratic ideals or pre-determined ends. Indeed, as above, various writers point to the Janus faced natures of citizenship and civil society (Ferguson, 1767; Nairn, 1997; Garland, 2015). However, as Chilvers and Kearnes (2016) observe, experimental processes of relationship, power sharing and redistribution can open up new possibilities for innovation and change.

The knowledge exchange project

In 2015 we applied to the Scottish Universities Insight Institute (SUII) for funding to develop and deliver a knowledge exchange project titled: Creating spaces for change: towards humane, participatory and effective responses to offending behaviour. SUII brings together a number of Scottish universities to fund and facilitate projects that promote collaboration and engagement between academics, policy makers and practitioners to encourage better-informed policy and practice across societal issues. We sought to extend this professional community and method and gathered a group of interdisciplinary academics and civil society organisations and representatives with an interest in criminal and social justice. In addition to interdisciplinary academic members, key partners included Kenny MacAskill, former SNP Cabinet Secretary for Justice; representatives from *Women for Independence*; *Vox Liminis*, a community of citizens that harnesses the power of music-making to assist the reintegration of people with convictions; *Positive Prison? Positive Futures* (PP?PF), a community of interest that draws on the shared lived experience of people who are or have been subject to criminal justice sanctions, and Garry Fraser, a care leaver, filmmaker and social entrepreneur (see { HYPERLINK "https://wideo.scot/" }). Partners shared a desire to change the conversation around justice in Scotland and to advance and experiment with more culturally relevant methods for change.

The aim of our project was to provide a multi-disciplinary, cross-sectional and collaborative forum to examine and advance existing responses to offending behaviour, with a view to interrogating the values and cultures that frame and constrain criminal justice reform. In addition, we sought to explore what an alternative and progressive penal paradigm, which did not rely upon imprisonment, might look like, and what kind of values might usefully underpin this. Our aim was to

move beyond the traditional boundaries and polarisations of 'justice talk', and to reposition this research-led dialogue firmly in the public realm. In this respect, the project was about more than facilitating a programme of knowledge exchange, it was about exploring the potential of political-professional-citizen alliances, or 'communities of action', to interrogate, articulate and mobilise shared justice values across multiple strands of Scottish society.

We held three events between November 2015 and June 2016. Each of these was well-subscribed, attracting around 60 participants, across academic, professional, political, citizen and service user communities. We made explicit attempts to nurture a broad and inclusive participant base, including, for example, a 'plus one' approach which invited those signed up to invite a friend or colleague who might not usually participate in such fora. For like reasons, we actively sought to engage and involve civil organisations including those working with people with lived experience of the justice system. Events took place in community spaces and were designed to incorporate an interplay of lecture, lived experience, activism, music, food, and reflection, including, for example, songs written by prisoners and others, and stories built around case studies. Our intent was not to inform per se, but to stimulate and create space for deliberative dialogue, imagination, innovation and change though the engagement of 'hearts and minds'. As Murray et al. (2010: 8) note: 'much innovation comes from the creative blending of ideas from multiple sources'.

The first event was titled: 'We need to talk about punishment', and sought to debate punishment as a framing value and discourse for Scottish justice. We sought to move the focus from overtly criminological perspectives and invited Richard Holloway, the former Episcopal Bishop of Edinburgh, writer and cultural commentator as keynote speaker. Coinciding with the event, Holloway and Kenny MacAskill published articles in a national newspaper, seeking to extend our reach and stimulate broader public engagement.

Holloway (2015) considered features of Scottish history and culture that may predispose us towards punishment which, he argued, hangs over national thinking

about justice 'like the Haar off the North Sea'. This cultural legacy is based around a theological view of sin as willed, freely chosen, disobedience of God's moral commandments. Premised on such a notion of free will, disobedience requires to be punished and avenged. Within such an anthropology, humans have no history to distort or determine their choices. The reality, of course, is that most of those caught up in the criminal justice system have encountered personal and structural impediments that have 'profoundly impacted on their capacities to make 'good' choices' (Smith and McCulloch, 2016: 162). Holloway went on to caution that if we want to lead conscious and intentional lives we need to face up to and learn to counter the unconscious urges that drive our wish to avenge and punish. This becomes doubly important if these urges become manifest not only in private behaviour but public policy, as they clearly do. Picking up on a trope from Scottish literary history, Holloway introduced Gregory Smith's term, Caledonian antisyzygy, coined to reflect the duelling polarities in the national psyche, to highlight prevailing contradictions within our criminal justice system – specifically that of liberal rhetoric set against a fear of withholding punishment. Broadly, event one concluded that initiatives for change in Scottish justice need to reach beyond formal systems and structures and extend more routinely into social and cultural spaces. In turn, initiatives for change need to utilise a broader range of media and method if new ideas and thinking are to connect and be deliberated beyond the usual suspects and spaces.

The second event considered obstacles to change, taking as its focus the problem of 'others' and othering in Scottish society and Scottish justice. Inputs included diverse and divergent contributions from Lord Carloway, the Head of Scotland's Judiciary, Professor Mike Neillis, Pete White of PP?PF and others. Carloway entitled his paper 'Imprisonment in Scotland: towards a penological post-modernism?' Drawing on Garland (1990) he surfaced and questioned the modernist belief that deviants could be constructed and handled in a positive way by technical apparatus. Carloway went on, however, to describe a justice system that remained decidedly modernist, looking for ever-more technical fixes to address a system that was increasingly

constipated and lacking in imagination or even acknowledgment of the need for change.

Event two revealed divergences in developing ideas about reform and innovation in Scottish justice, including the place of 'offenders' and citizens within that. Scotland may be recognised for and talk up its 'progressive' lean and values, however event two suggested little clarity across justice institutions and actors regarding exactly what is meant, understood and imagined by a 'progressive' justice system and service. The danger here is that we continue to trade on an imagined progressive past (Muncie, 2011, Carlen, 2012) while failing to articulate a clear and distinctive future.

The final event sought to consider what an alternative set of values for Scottish criminal justice might look like, stimulated through storytelling. The scenario told the life story of Doreen, a character storied from data collected through McAra and McVie's (2010) Edinburgh Study of Youth Transitions and Crime. Here, the aim and method was to enable engagement with an embodied person rather than an abstract offender. Doreen confronted listeners with the problem and privilege of social distance. When confronted directly with her complex and distressing life-story, participants were instinctively understanding, sympathetic and troubled. Were they faced only with Doreen's actions committed as an abstract 'offender' they may have reached different conclusions. Such a dynamic is borne out in the criminological literature that suggests that publics are less likely to be punitive when faced with personal circumstances and predicaments (Hutton, 2005).

The task of the exercise was for participants to 'design a justice system for Doreen'. The ensuing dialogue concluded in a collective call for a justice system re-centred on values of care, equality, participation, citizenship, human flourishing and reparation. Significantly, for most, this required more than institutional reform; it required a radical decentring and contraction of the criminal justice enterprise. Ideas and conclusions emerged from a variety of contributors through grounded references to

lived experience, research, broader Scottish policy and alternative justice models and paradigms. A key feature of this event was the opportunity to surface and confront some of the longstanding contradictions and paradoxes of Scottish justice, including an oft-expressed desire for change set alongside a reluctance to move beyond the 'already known'. As Malloch and Munro (2016) observe: 'fundamental reform requires imaginative alternatives but also radical change in structures of power and the rethinking of dominant cultures, both institutionally and politically'.

It was intended that this 'final' event would take the form of a series of local events, led by local actors, with a view to enabling the kind of distributed, empowered and consequential dialogue Escobar (2016) and others identify as important in achieving and sustaining impact. In the event, resource and timing challenges proved prohibitive. This was a significant limitation and speaks to the constraints of national and largely formal initiatives which depend on local and informal actors and longer term relationships for impact.

Reflexive evaluation and learning

Creating Spaces for Change was part knowledge exchange initiative and part social experiment using new and emerging methods. In this respect, reflection on the project outputs and impact necessarily requires some consideration of the metrics by which impact is measured and assessed.

For SUII, our funder, project efficacy and impact is reasonably straightforward and is evidenced across a range of metrics. Key outputs include: evidence of knowledge exchange and insights, improved or extended networks, various academic outputs, and a variety of policy and practice outputs. It is expected that these outputs will in turn inform policy development, practice improvement, sustained networks and/or benefits to communities and end users.

In differing degrees, many of the above boxes were 'ticked'. The project was well attended, received and reported on. Across events, networks and insights were developed and deepened, resulting in or contributing to publications and outputs across a variety of media, including: academic publications (McCulloch and Smith, 2016), cultural pieces (Smith and McCulloch, 2016), newspaper articles (Holloway, 2016; MacAskill, 2016), new funding applications and local practice initiatives. Relatedly, there was clear overlap between project emphases and action areas and concurrent policy developments, including, for example, the need to advance a more inclusive and non-stigmatising language when referring to 'people with convictions' (see Scottish Government, 2016), and/or broader socio-political initiatives to extend the presumption against short prison sentences.

However, it would be naïve to suggest a linear relationship between the project events and some of the above outputs and impacts. Knowledge exchange functions within a contributive rather than an attributive frame, and this is particularly so in the political and social sphere. Further, one of the key principles of the project was to move beyond standard and institutionally-centric methods and metrics to explore the potential of a more innovative, participatory and deliberative space and method. The effects of these more innovative and participatory ambitions are more difficult to measure. As Murray et al. (2012) observe, in this 'emerging social economy', measuring success is necessarily problematized. Discussing participatory initiatives, Chilvers and Kearnes (2016) take this a step further and argue against linear or unitary measures of impact which they suggest flow from a 'realist' rather than a 'constructivist' conception of participation, reflecting instrumental and legitimatory deployments of that.

What then are the new metrics by which social innovations and participatory initiatives in the justice sphere might be measured? Reviewing international examples of 'innovative justice', Graham and White (2014) argue that questions of success demand answers from outside of the logic of social control and offender management. From this perspective, they assert that creative interventions and initiatives are innovative 'only insofar as they push the boundaries and transcend the

correction mission and the urge to punish' (2014: .4). The authors go on to argue that evidence of innovation is 'not [only] about emotional connections, goodwill and concerted efforts, but demands critical appraisal of whether there is evidence, as well, of 'good deeds'. Relatedly, discussing participatory and deliberative practices, Escobar (2016) argues that effective participation is marked by evidence of inclusion and diversity, the quality of public deliberation, and clear links to decision-making and/or action. Though Chilvers and Kearnes (2016) take issue with the ideal of a linear relationship between participatory initiative and impact, they agree that the 'ultimate test' is how far power is progressively shared and social justice genuinely created.

Considered through these lenses, our reflections on the project outcomes and impacts suggest that we have much to learn and do. The project revealed considerable appetite and capacity for innovation, some consensus regarding the nature of change needed, and evidence of multiple political, academic, professional, civic and citizen initiatives orientated towards that, albeit often with limited connect. At the same time, the project foregrounded the narrowness of our ideas, intellectual capital, methods, networks and technologies, attesting to a need to develop our knowledge, understanding, and capacity for social innovation and deliberative participation. Murray et al. observe that we are not alone in this: 'most people trying to innovate are aware of only a fraction of the methods they could be using' ((2012: 2).

Key here is developing our understanding of what constitutes social innovation, its key features and its place in Scottish criminal justice. Relatedly, we need to develop a clearer and more co-productive vision for change that extends beyond imaginary talk. As McAra (2017) and others observe, despite more than a decade of relatively progressive political strategy and initiative (albeit ones replete with paradox), criminal justice institutions, cultures, practices and outcomes remain stuck. As has been argued, in part, this reflects the reluctance of governments to look beyond institutional level reform and revisionism, but it may also reflect a lack of innovative ambition and initiative from below. As Murray et al. observe: 'most social change is

neither purely top-down nor bottom-up. It involves alliances between the top and the bottom' (2012: 8), or what they term the 'bees' - the creative individuals with ideas and energy, and the 'trees' - the big institutions with the power and money to make things happen to scale.

Malloch and Munro (2016) pick up on these themes, identifying a dissonance between Scotland's desire for a better justice system and outcomes, and a reluctance to move beyond the 'already known'. This dissonance speaks to tensions between what Carlen (2012) and others describe as the 'imaginary' – used to describe a dominant discourse represented as natural and inevitable, and the 'imagination', defined by Malloch and Munro as an openness to new ideas, discourses and social practices. Both Carlen and Malloch and Munro observe that advancing our 'imagination', and the innovations it can give rise to, requires us to surface and unfix the long accepted paradoxes of justice, including the discord between social and criminal justice, the imaginary of an integrative approach, and the idea that justice can be done *to* rather than *with* people with convictions.

Linked to the above, the project identified a need for a more critical and reflexive engagement with developing local and global conceptions of citizenship and citizen participation, and the implications for a more publicly engaged and deliberative justice practice. While the project contributed to a *more* inclusive, participatory and imaginative deliberation and dialogue, the liminalities and exclusions of our initiative were apparent.

Much has been written about the merits and de-merits of citizen and deliberative participation in recent years, including, though to a lesser extent, in relation to criminal justice policy and practice. Recent analyses highlight the value, benefits and potential of citizen participation for social and criminal justice, also underscoring the important relationship between the two (McCulloch, 2017; Garland, 2015; Weaver and McCulloch, 2012; Dzur, 2012). At the same time, emerging scholarship cautions against idealised or 'imaginary' constructions of the citizen and citizen participation,

specifically those that fail to engage with the challenge of advancing citizen participation in neoliberal contexts (Crawford, 2002; Lacey, 2007; Carlen, 2012).

Malloch et al. (2017) discuss the multiple and intersectional barriers to active citizen engagement experienced and evidenced through the Scottish Referendum. Civil society is, as Nairn (1998) notes, janus-faced, not necessarily the forward-thinking challenge to an omnipotent state but, equally, a reactive response to a perceived state of crisis. In this vein, Walker, McQuarrie and Lee (2015) speak to the paradox of growing participation and growing inequalities, raising old-new questions regarding the extent to which inequalities in health, income, wealth and education continue to reflect inequalities of power and influence. As Ryfe and Stalsburg (2012) observe, advanced uncritically, new models of citizenship and participation run the risk of reinforcing old orders and inequalities, under a refreshed rhetoric of participation and inclusion.

Developing scholarship points to a need to 'unfix' our constructions of citizen participation. Chilvers and Kearnes (2016) argue for its 'remaking' in more constructivist, reflexive and responsible ways. As above, this means reconceptualising participation - and its effects - as co-productive, relational and emergent. Such an ambition is likely to prove a challenge for justice institutions, professionals and citizens operating in situations where public participation in the criminal justice system has traditionally be seen as a toxic mix (Koch, 2017) requiring layers of bureaucracy to mediate the public's perceived punitivism and to ensure the scales of justice remain balanced. This justifies the maintenance of 'professionalised' and technocratic responses, further excluding those who already perceive the system to be distant and hostile (Koch, 2017). However, as has been argued, if we wish to create genuine spaces for imagination, innovation, change and impact, these old orders cannot be allowed to determine and delimit the new.

There is also a need to recognise that questions of state authority and its relationship to criminal justice are always bound to be political (Koch, 2017). Relatedly, we need to acknowledge that public participation is not intrinsically good,

necessary or authentic, but neither is it the opposite: co-opted, trivial or ineffective. As before, these relationships and outcomes are always 'in the making' and thus must constantly be deliberated and fought for. Recognition of the social, political and economic dimensions of both state authority and participatory practices brings us to a reflection on the cultural politics at play in Scotland's contemporary relationship with criminal justice.

The continuing antisyzygys of Scottish criminal justice

As described, the project was rooted and took its inspiration from the upsurge in civil engagement in the run-up,and the immediate aftermath of the Scottish independence referendum. As organisers, we were not inured to this wider public mood and were perhaps seduced to believe we could achieve more than proved to be the case, or, in retrospect, was likely. The early, energising flush of this period has given way to business as usual. Different reasons for this might be identified, some party political, others perhaps that may be linked to the Scottish psyche. To that end, we return to the idea of antisyzygy, as a lens through which to view the contradictory pulls that are exerted on the Scottish cultural landscape and are identified as operating within the criminal justice system.

At the level of civil society, disappointment or even anger at the referendum result perhaps reverted to resignation or fatigue (Malloch *et al* (2017). This evident despondency may have reflected a bit of naivety on the part of activists, as the kind of hopes and expectations that had been harboured came face-to-face with political realities. At one level, this might evoke Jim Sillars' (the former depute leader of the SNP) lament in response to previous devolution referendum, about 90-minute nationalists. But, there were also contradictory signs of continuing progressive aspirations, perhaps especially among the young, finding a different direction in renewed support for the Labour Party under Jeremy Corbyn in the 2017 UK General election. Taking a broader political sweep, the ensuing period of retrenchment might be identified as symptomatic of Scotland's historical relationship within the UK. As

Paterson (2015:22) observes: 'Radical challenge is followed by pragmatic adjustment as the state cedes just enough power to keep the Union intact for the time being, a compromise which sows the seeds of the next phase of radical rebellion'.

At a party political level, the Referendum result left the SNP, despite its landslide victory in the 2015 General Election, somewhat aimless. A lack of political initiative has resulted in accusations of political timidity and of the party seeking to control and neuter the more unruly elements of the wider independence movement. In policy terms, it has retreated to narrow managerial responses. We might reflect that the punitive haar that hangs over the criminal justice system may in fact be thickening. For all its progressive rhetoric, the SNP, against all expert opinion and in the absence of any strong demand, introduced the Prisoners (Control of Release) (Scotland) Act 2015, which changed the rules governing early release for long-term prisoners to extend the period of a sentence that needs to be served before consideration for parole. Moreover, Carloway (2016) notes an increase in the punishment component that judges are ascribing to sentences, largely in response to what is perceived to be popular pressure. If this is the case, then the judiciary is behind the curve in this perception. Surveys prior to the 2007 Scottish parliamentary election identified that crime was the foremost concern for 7% of the population. By 2011, his figure was down to 2% (Smith and McCulloch, 2016). Yet, prosecution and sentencing practice continue to be driven by this over-emphasised fear of crime and of media responses to what might be seen as 'lenient' sentences.

Another tension identified by Malloch et al. (2017) is between civic and civil society. We think of civic society here as the semi-institutionalised groupings that exist, generally with state approval and often funding, while civil society is constituted of the more activist citizen groups that sprung up around the Referendum campaign. The distinction is not always clear-cut and there are obvious crossovers, which again exemplifies the Janus-faced nature of civil engagement. One example might be the position taken by some women's groups. As noted, *Women for Independence* claimed to have influenced the replacement and upscaling of a women's prison. Many of its members have been instrumental in supporting a presumption of prison

sentences of under a year. On the other hand, the Chief Executive of *Scottish Women's Aid*, and, as such, a major voice in the policy arena in relation to gender issues, sought to exempt domestic abuse from such a presumption (Scott, 2016). Aside from identifying certain acts as *crimen exceptum*, in a situation where, as Carloway (2016) notes, such a large proportion of court time is spent on domestic and sexual crimes, then to exclude these is likely to undermine any progressive developments in sentencing. Currently, civic society groups such as Victim Support and The Scottish Women's Convention, with substantial funding from Scottish Government, also resist attempts to repeal the controversial Offensive Behaviour at Football Act, 2012. So, a convoluted matrix of, often contradictory, connections between Government and civic society groups operates to subvert the Government's expressed intentions to reform justice and specifically to reduce imprisonment. In doing so they maintain the corrective mission and the urge to punish which Graham and White (2014) identify as being inimical to innovation.

This latter piece of legislation might be seen as a continuation of New Labour's focus on prosecuting low-level incivilities. However unsavoury sectarian singing might be, it is questionable as to whether criminalisation is the most effective response, especially when the evidence is clear that bringing people into the criminal justice system is likely to contribute to, rather than to deter, further offending. Similar legislative reactions, based on advocacy by groups such as *Scottish Women's Aid* have been utilised, Koch (2017) argues, to legitimate more punitive policing styles. A consequence of ostensibly populist legislation, such as that around offensive behaviour and domestic violence, is that the Police, increasingly, become drawn into quotidian disputes (Koch, 2017). The pitfalls of such have been compounded by the centralising of local police forces within Police Scotland, which sought to make its mark with some heavy-handed initiatives around, for instance, sex work and stop and search (MacAra, 2017).

Perhaps the most troubling feature in the examples given above is the failure to see any alternative to handing over deep-seated social problems to what Bauman (1993) identifies as the magistrates and black letter law. Avowedly progressive elements in

civic and civil society, those who might support independence for its potential to bring about a new social order, seek to short-cut the road to their New Jerusalem through demanding legislation to criminalise expanding swathes of the private and social sphere. In looking forward they simultaneously look back to a past built on punishment. More imaginative and effective responses must surely be possible. Yet, there can be a strong disincentive to even suggest as much in respect of emotive and politicised issues such as domestic and sexual crimes. One, perhaps, does not have to look too far below the surface of the Anglophone world's increasing focus on sexual offending to find resonances of a Presbyterian fascination with the sexual imagination and which links back to Holloway's observations. One might look to Young's (2009) use of Ranulf's (1934) work on moral indignation, described as 'the emotion behind the disinterested tendency to inflict punishment and which is a kind of disguised envy'. Ranulf coins the term *ressentiment* or resentment. Resentment has within it the impulse to 'condemn what one secretly craves, that which is subject to restraint and restriction but which other people seem to access; there is fascination here as well as dislike and fear, the demons, at once, attract and repel and must be renounced. Set against such complex psychodynamics, Holloway (2015) notes: 'the urge to punish, … is too blind a force to understand or respond to the psychological complexities of human behaviour: and when engaged in systematically and reactively only serves to fortify and maintain offending behaviour and its antecedents'. Scottish society needs to be allowed and assisted to have a deliberative discussion about how to respond to crime, including crimes of sex and violence. Such a discussion must move beyond Manichean dualities of good and bad, victim and perpetrator – terms that still seems to be permitted even if 'offender' isn't.

We might be tempted in these ostensibly modern and rational times to deny the continuing and pervasive influence of punishment in the human psyche and to submerge it beneath 'professionalised' responses to keep it in check. These are not working; the state has become punitive. Koch (2017: 216) offers an alternative scenario, suggesting that: 'rather than trying to keep punitivism in check, a more fruitful starting point may be to look for alternative demands and responses that

remain unacknowledged by focusing on punishment alone'.

Conclusion

Concluding reflections on our project suggest that Scottish criminal justice has not lacked political initiative, even if our initiatives often fail to cohere and connect. Rather, it appears beset by a fear of holding back from punishment, cultural and political antisyzgy, and a lack of social and penal imagination, including from the bottom up. Though there are many promising and transforming initiatives which curb this conclusion, these operate mostly in the margins and are yet to achieve the kind of social, political and cultural connect needed to enable transformative change.

The project sought to explore the potential of a more participatory, deliberative, imaginative and value-based approach to justice innovation and transformation, prompted by the refreshed political imagining evidenced through the Scottish Independence referendum. While there are reasons to advance these methods and outcomes carefully, the idea that 'we' can transform Scottish justice systems and outcomes in non-participatory, non-deliberative and non-imaginative ways seems nonsensical. At the same time, advancing a more participatory, deliberative and imaginative justice system will require us to 'unfix' our often fixed ideas of 'what is' and 'what must be', and to imagine together a better future for all.

These are challenging conclusions for Scotland and its publics, both culturally and practically; but it is amongst and across these publics that the potential and leverage for transformative change resides. Academic and professional actors have a key role here which must extend beyond what Nils Christie (1977) describes as the monopolising of conflicts. Instead, Christie (2011: 709) suggests, we ought perhaps

to see ourselves more as ‘cultural workers’, a role which ought to be preoccupied with ‘find[ing] our way to other human beings’. In political, social and justice systems increasingly hollowed out by economic and techno-rational approaches to improvement, change and transformation, this seems a sensible and responsible path.

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