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20th Kilbrandon Lecture (University of Strathclyde, 8 December 2022): Children of the beloved country - lives and legacies from Kilbrandon to Mandela

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Abstract

This lecture traces Lord Kilbrandon's legacy in the South African Child Justice Act's 'preliminary inquiry'. Other interconnecting lives and legacies of South African reformers such as Alan Paton, Charlotte Maxeke, Leila Reitz, and Nelson Mandela are explored. The lecture concludes with selected post-Constitution reflections on the holistic realisation of children's rights in South Africa, in the context of contemporary discussions about Scotland's incorporation of the Convention on the Rights of the Child.

Keywords

Children’s rights, youth justice, child welfare, apartheid, UNCRC, Kilbrandon, South Africa, Scotland

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I first came across the Kilbrandon Report (1964)[1] when I was working on the reform of South Africa's child justice system. But to take a few steps back from there, I will share with you my introduction to the need for child justice reform, which was both shocking and life changing. In 1986, having completed my law degree and needing to pay back a bank loan, I took my first job as a public prosecutor. The practice at the time was to have junior prosecutors 'cut their teeth' in what was known as 'the juvenile court'. This was the late 1980s, still firmly in the apartheid era. Although it was only a few years before the release of Nelson Mandela in 1990, it did not feel as though we were on the verge of a new dawn. Quite the contrary – it was an era of a 'situation of emergency' which suspended many of the few rights that existed in this pre-bill of rights period. As I stood in the bleak magistrates' court room that smelt of a ghastly mix of urine and disinfectant, looking at the faces of mostly African children appearing in the dock, seeing the poverty in their shabby clothes and the evidence of police brutality, hearing sentences of whipping and reform school and prison being handed down, I thought: 'Someone has to do something about this!' I soon realised that my calling was not in the prosecution service. I left and joined Lawyers for Human Rights, and shortly thereafter moved the focus of my career to children's rights – and I have remained on that trajectory ever since.

Nelson Mandela was released in 1990, and during the following years until 1994 when South Africa held its first democratic elections, and after, I was privileged to work alongside mentors and colleagues in the African National Congress who were preparing for the new Constitutional era. When Nelson Mandela made his opening address to Parliament in 1994, he said:

> The Government will, as a matter of urgency, attend to the tragic and complex question of children and juveniles in detention and prison. The basic principle from which we will proceed from now onwards is that we must rescue the children of the nation and

[1] The Report of the Committee on Children and Young Persons, Scotland (Cmnd 2306) is available in the Kilbrandon Lectures Archive: https://www.strath.ac.uk/humanities/schoolofsocialworksocialpolicy/thekilbrandonlectures/

> ensure that the system of criminal justice must be the very last resort in the case of juvenile offenders.[2]

Mandela's awareness of and concern for children was legendary. It is his signature that appears on South Africa's ratification on the Convention on the Rights of the Child, on 16 June 1995.

Just one year later, in 1996, I was appointed by the Mandela Cabinet to chair a Law Reform Committee[3] to draft South Africa's Child Justice Act.

Until this time, South Africa had no separate law for dealing with child offenders – so the canvas was blank, and we decided to undertake a comparative study of systems that were considered very progressive. We selected three countries for this exercise: Uganda, which incorporated interesting aspects of African customary law and procedure; New Zealand, which was feted for its family group conferences, modelled on Maori conflict resolution; and Scotland, which was famous for its hearings system (South African Law Commission, 1997, 1998).

The Kilbrandon Report, written in Scotland, for Scottish children, thus reached across the ocean to be added to the 'big ideas' we were storing up for the new child justice system in South Africa. Writing elsewhere I have described the decade-long process of getting that Bill drafted and passed through Parliament, where it largely weathered the popular punitive storms that it drifted into (Skelton & Gallinetti, 2008). We cannot claim that the Act mirrors the Scottish system, as it is justice rather than welfare oriented, albeit the focus is mainly on restorative justice. However, one aspect of the Act embodies an idea that comes from the hearings system. The Child Justice Act introduced, for the first time in South African law, a procedural step called the 'Preliminary Inquiry' (Child Justice Act, 2008, chapter 7). Children who have been charged with committing offences are not arrested (except in limited circumstances), but are instead issued with a warning to appear at a preliminary inquiry. Prior to this inquiry they are each individually assessed by a probation officer (trained in social

[2] Nelson Mandela, State of the Nation Address, delivered in Parliament in May 1994: http://www.mandela.gov.za/mandela_speeches/1994/940524_sona.htm

[3] South African Law Reform Commission Juvenile Justice Project 106 established December 1996.

work), based on which they may be diverted by a prosecutor before ever appearing at a preliminary inquiry. However, where this does not occur, they are brought to the preliminary inquiry. This is a meeting that is chaired by a magistrate but is preferably held in a room other than a court room, and court robes are not worn. The child is accompanied by his or her parent or other appropriate adult, his or her legal representative and the prosecutor, and the probation officer is also present. The purpose of this inquiry is to pause and think – in a non-adversarial environment - about the next steps, to reconsider the possibility of diversion, and to consider whether referral to care and protection proceedings is more appropriate. If it is decided that the matter must proceed to a plea and trial in the child justice court, then careful efforts should be made to consider all possible non-custodial options during the pre-trial period.

The drop in the number of children going to plea and trial in the South African justice system since the introduction of the Act is staggering. This may not be entirely due to the preliminary inquiry, as it is seen alongside a drop in children coming into the system at the front-end. But it is clear that this non-adversarial 'stop and think' process has certainly played a very positive role. In my view, this can in part be accredited to the legacy of Lord Kilbrandon.

The 'beloved country' in the title of my speech borrows from the title of a book by South African writer Alan Paton, *Cry the Beloved Country* (1948), published just as South Africa retreated into its darkest years of official apartheid, following three hundred years of colonisation. The story follows the journey of a Zulu priest, who goes to Johannesburg to help his son who has been arrested for the murder of a white man. Paton's message is that despite the brutality of apartheid, and the despair and hopelessness during that era, human dignity and human connectedness offered some hope of a future beyond hatred and racism.

He wrote many other books and poems, with several of the poems being about children who he worked with as the principal of a reformatory school for young offenders – with colonial sounding names like Ha'penny and Pinky. One particularly beautiful poem about the funeral of one of these children is also a critique of the criminal justice system. Besides being a writer, Paton was a

reformer in the field of children and justice. Let me give you a small taste of his poem, 'Death of a small child in Diepkloof Reformatory' (1995).

> Small offender, small innocent child
>
> With no conception or comprehension
>
> Of the vast machinery set in motion
>
> By your trivial transgression,
>
> Of judges, magistrates, and lawyers,
>
> Psychologists, psychiatrists, and doctors
>
> Principals, police, and sociologists,
>
> Kept moving and alive by your delinquency,
>
> This day, and under the shining sun
>
> Do I commit your body to the earth
>
> Oh child, oh lost and lonely one.
>
> Clerks are moved to action by your dying;
>
> Your documents, all neatly put together,
>
> Are transferred from the living to the dead,
>
> Here is the document of birth
>
> Saying that you were born and where and when,
>
> But giving no hint of joy or sorrow,
>
> Or if the sun shone, or if the rain was falling,
>
> Or what bird flew singing over the roof
>
> Where your mother travailed. And here your name
>
> Meaning in white man's tongue, he is arrived,
>
> But to what end or purpose is not said.

Paton's experiments with justice and freedom as the principal of Diepkloof Reformatory School were based on his theory of punishment. He was of the view

that, beyond the two general approaches to punishment, which he identified as retributive and deterrent – there were two further approaches. The third approach to punishment was what he called 'reformatory', in which the word 'punishment' would be replaced with 'treatment'. This was not Paton's own idea – he ascribed to a broader movement, popular in his time, which is often called 'rehabilitative'. The rehabilitative approach arose at the same time as the rise of social work, probation work and psychology. The fourth approach to punishment explored by Paton was a radical one; namely, 'that there need be none at all' (Broster, 1993). According to this view, steps are taken against the offender for the sole reason of protecting society. If society does not need protection, then the person need not be punished.

Paton experimented with his ideas at Diepkloof Reformatory, where he was appointed in 1935 and was director until 1948. Paton's reforms were developed around a system of the boys being encouraged to take personal responsibility, and being granted rewards and 'graduated freedom'. Elsewhere I have written about the fact that this idea of rewards and graded freedom was not Paton's own 'brain-child' but rather part of a child-centred pedagogy growing in popularity at the time, which stressed the relationship between pupil and teacher, emphasised the individual psychology of each child, and promoted the creation of a community and family setting instead of a vast 'borstal' or prison type of approach.[4]

Whilst Paton's reforms undeniably brought about general improvements for all the boys, there were some aspects of his work that remain questionable, especially when judged from a modern viewpoint. The most puzzling of these was his continued use of corporal punishment at Diepkloof, especially for those who had not earned their rewards. A little-known fact is that Paton had to have a finger amputated in 1938 after he punched a 'recalcitrant inmate' of Diepkloof in the mouth – a wound made by the youth's tooth became infected and the finger would not heal (Alexander, 2009).

[4] 'Vakasha: Alan Paton and justice for child offenders': 22nd Alan Paton Lecture (2015), by Ann Skelton, referring to Chisolm (1989) 340 and 371.

The prevailing view in society at that time was that it was 'better for a child or youth to be whipped rather than be imprisoned as a criminal'. In 1947 the South African government appointed the Landsdown Commission to investigate aspects of criminal law reform. It found that corporal punishment should be retained as a sentence for children and youths. During the apartheid years it was increasingly used as a method of youth crime control.[5] Indeed, it was not until 1995, in the case of S v. Williams, that South Africa's Constitutional Court abolished the whipping of child offenders as a sentence.[6]

Paton did manage to reduce the incidence of corporal punishment at Diefkloof. One of the ways he did so was though a practice that would today raise eyebrows. He encouraged the smoking of tobacco. One of his earliest reforms was to relax the rules on the use of tobacco, and he even used it as a reward. From the health-conscious perspective of today, this seems a strange reform, but apparently it was effective. Paton told an amusing story about the boys in this regard. One Sunday he had invited a Dutch Reformed Church Minister to present an evangelistic sermon. When this was concluded the minister asked if they had questions. 'When they did not respond, he said to them encouragingly, "You may ask anything you wish". And a boy stood up at the back and said, "Meneer, asseblief 'n stukkie twak"'. ('Please, Sir, a bit of tobacco') (Paton, 1980, p. 105).

Paton's commitment to rehabilitative justice led him to a common error made by proponents of that movement – namely, that the treatment model justified longer residential sentences. In other words, he thought it best that the 'real' freedom of the boys be delayed while he experimented with the limited freedom he could bestow on them. Historian Linda Chisolm (1989, p. 374) has observed that in all this there was a '…fine irony, unseen by Paton himself. For he maintained the fiction of "freedom as a reformatory instrument" while training African boys for a poverty, farm labour and "unfreedom" that they did not choose'.

[5] There was some criticism of this at least by the 1960s (see Kahn, 1960).

[6] S v. Williams, 1995 (3) SA 632 (CC). See http://www.saflii.org/za/cases/ZACC/1995/6.html

Paton was becoming frustrated and isolated towards the end of his tenure at Diepkloof. In 1946 he went on an international tour to look at reformatory schools in the United Kingdom, Sweden, Norway, and the United States. I find it intriguing to think that he would almost certainly have met with Scottish reformers – could he have met with Charles Shaw? Not yet called Lord Kilbrandon, Shaw was at that time a senior advocate; it was only in 1949 that he was nominated Queen's Council, and in 1959 he received a traditional life peerage as Lord Kilbrandon. Alan Paton and Charles Shaw were contemporaries – Paton was born in 1903 and Charles Shaw in 1906 - and they died within a year of one another, in 1988 and 1989 respectively.

Certainly, they shared similar views – a major finding of The Kilbrandon Report was that all 'juveniles' under 16 should in principle be removed from the jurisdiction of the criminal courts. All existing juvenile courts should be abolished. The aim of the hearings system was to supervise special measures of education and training according to the needs of the individual child. There is the ring of an echo here with Paton's ideas about the abolition of punishment and need for rehabilitating education.

The early part of the 20th century was a time during which a welfarist approach to child justice was favoured worldwide. In 1935 the League of Nations undertook a survey of 43 countries and found that 32 had established special children's courts which were welfarist in nature. But over the years the welfarist approach lost popularity, with most states moving to adopt more punitive or 'justice' models. Scotland, in carrying out the reforms recommended by the Kilbrandon report, went against the trend.

I want to also introduce here a towering figure in South Africa's history, Charlotte Maxeke. She was not a contemporary of Lord Kilbrandon, as she was born much earlier, in 1869. Recent historical accounts by South African authors Thembeka Ngcukaitobi (2018) and Zubeida Jaffer (2021) have breathed new life into Charlotte Maxeke's early years when she travelled with the African Jubilee Choir to England and spent a year in the UK in 1891-1892, where she performed at Queen Victoria's jubilee concert in the Royal Albert Hall and met with suffragette Emily Pankhurst. Charlotte subsequently graduated with a BSc from Wilberforce University in the United States in 1901 (and this all before Charles

Shaw was born!). Less known is the fact that the multi-talented Maxeke was South Africa's first black probation officer (Skelton, 2005, p. 323). She worked with children in the criminal courts and served simultaneously as a child welfare officer in Johannesburg from 1923. According to Jaffer, she worked with 'waifs and strays and destitute children' and was credited with having 'done considerable work in the alleviation of the causes of crime in the city' (Skelton, 2018). However, she was discharged in 1929, and according to education historian Linda Chisholm, 'the relinquishing of her services [was] a sign of both cost-cutting exercises in the context of the great depression, as well as the steadily hardening segregationist programme of non-recognition of the right of Africans to be in urban areas' (Chisolm, 1989, p. 153). Maxeke, like her Western counterparts, worked on child rights issues some years before white women got the vote in 1930. Despite working on the campaign for women's suffrage with women of all races, Maxeke herself was never able to cast a ballot – not because of her gender, but because of her race. She died in 1939. Africans did not get the vote until 55 years later, in 1994.

Another South African woman, who due to her race did get the vote in 1930, was Leila Reitz. Having obtained the right to vote, Reitz stood for Parktown in Johannesburg and was the first woman elected to the South African Parliament in 1933. She served as a member of a government committee established in 1934 called the Inter-Departmental Committee on Destitute, Neglected and Delinquent Children and Young Persons. The committee's terms of reference included the instruction to: 'consider whether it is desirable and practicable to dispense with criminal procedure in dealing with juvenile and/or juvenile-adult delinquents, and instead to deal with them paternally, on the lines of the procedure adopted in administering the Children's Protection Act'. The committee recommended far reaching changes in the form of a Young Offenders Bill and a Children's Bill. The Committee's report of 1937 made a remarkable statement for its time: 'The draft bills submitted by the Committee make no distinction on racial grounds. The principles underlying the treatment of children "in need of care" or of delinquents are of equal validity whether the children to whom they apply are of one race or another' (Union Government Report of the Inter-Departmental Committee, 1937, p.5). In an impassioned speech to

Parliament, Mrs Reitz said: 'I want to make it clear to the House that if we do not bring in a comprehensive measure such as I have outlined, we shall fall very short indeed not only of what other countries have achieved, but certainly of what must be done in this country' (cited in Midgley, 1975, p. 64). The Young Offenders Bill did not pass, despite the work put into it by reformers. That opportunity was missed, and South Africa entered a long period of stagnation and deterioration in the field of the rights of children in the justice system, which lasted over 40 years. There does seem to be a seminal lesson for would-be reformers here – do not miss a big opportunity.

It wasn't until 1995 that the Mandela government ratified the Convention on the Rights of the Child and put in motion a process for the drafting of South Africa's first separate piece of legislation for child offenders, the Child Justice Act, which was finally passed by South Africa's first democratic parliament in 2010.

South Africa's ratification of the Convention on the Rights of the Child (CRC) was a pivotal moment, but of course it was the implementation, the embedding of the Convention, which has really made the difference.

South Africa has one of the most comprehensive sections on children's rights in the constitution, and this was influenced by the ratification of the CRC. The convention and the constitution have been embedded into our laws about children, into our planning and budgeting, into our service delivery. Where there are failures and weaknesses – and I acknowledge there are many – the convention and the constitution have been instrumental in promoting accountability. As I have spent most of my working life trying to advance children's rights within a constitutional democracy, I have come to know the value of that constitution, the power of it. Let me give you an example. The last case that I argued in the Constitutional Court was a challenge to the constitutionality of the defence of reasonable chastisement – in other words, it was about smacking of children by their parents, in the home. The Chief Justice at the time was a conservative Christian. When he hears the words 'reasonable chastisement' or 'corporal punishment', I respectfully imagine that biblical epithets jump into his head. To put it mildly, he did not like the argument I was presenting. It was a difficult day, and as we waited for judgment – it took rather a long time – I started to get worried. And yet I knew in my bones we had to

win, because our constitution guarantees everyone the right to be free of violence from public or private sources.[7] Children, as the youngest and most dependent people, could not be provided with less protection than anyone else. I knew also that that we had to win because the Convention on the Rights of the Child, as interpreted by the committee,[8] makes it clear that corporal punishment of children is against the convention, and in South African law rights must be interpreted in a manner that recognises, and is compatible with, international law. And, indeed, we won. The Chief Justice himself wrote the unanimous judgment for the court (Freedom of Religion South Africa v Minister of Justice and Constitutional Development et al., 2018). But the judgement, when I read it, seemed strangely reticent. And I realised why – it seemed as though the Chief Justice did not want to find the defence of reasonable chastisement unconstitutional – but he had to because of the constitution. That is the power of it.

So, this brings me to Scotland's decision to incorporate the Convention on the Rights of the Child. What is the power of it? It is the importance of the compatibility with the CRC of Scotland's laws, policies, plans, budgets, and its actions through its public authorities. It's the lodestar of actions in respecting and protecting children's rights.

Let me put on my UNCRC Committee hat for a few moments: An important disclaimer here is that I will not be sitting with the committee when the United Kingdom comes for review in the near future.[9] That is because I am a dual citizen of the United Kingdom and South Africa. I am therefore required to recuse myself when either of these states come to the committee.

So let me say then that the committee will, I strongly imagine, be paying attention to what Scotland has committed to in terms of its children's rights promises. The committee does not, of course, see the United Kingdom as a

[7] Section 12(1)(c) of the South African Constitution.

[8] Article 19 of the Convention on the Rights of the Child, read with General Comment 13 (2011) Article 19: The right of the child to freedom from all forms of violence.

[9] Committee on the Rights of the Child review of the United Kingdom scheduled for May 2023.

monolithic entity. It will therefore be very aware of how Scotland differs in its approach and actions from, for example, England and Wales (and how Wales differs from England and Wales, for that matter). I speculate that the committee will ask questions about how far things have come. So, my respectful advice is to ensure that Scotland retains its exceptionalism – and not just in repeating promises about children's rights, but in showing what it has done to realise those promises.

I believe that Scotland is standing on one of its historic moments – of course it is not possible to make exact comparisons between countries as different as South Africa and Scotland, but what I have hoped to show, in my speech here tonight, is that when big opportunities come up it is important to grasp the thistle.

I am respectful of the fact that Scotland is facing challenging times – but an investment in children always pays dividends. The Committee on the Rights of the Child, in its General Comment on public budgeting for children's rights, has indicated that even in times of crisis it is not permissible for states to take retrogressive measures, and as all economists know, sometimes just standing still is retrogression in real terms (United Nations Committee on the Rights of the Child, 2016, p. 31).

Let me end on another heart-warming promise that Scotland has made: To remove all young people aged under 18 from placement in prison or young offenders' institutions (Learmonth, 2022). This too is a crucially important step in the evolution of Lord Kilbrandon's legacy. I am sure that, if he was here, he would be urging the passing of the Bill with all speed.

To return to the title of my speech – Children of the Beloved Country – whether they are here in Scotland, or in South Africa, or anywhere, we must continue to walk the paths of the great reformers – from Kilbrandon to Paton, from Maxeke to Mandela – and we must walk on, into the future. Let me close my speech by taking you back to the second half of the poem I read from earlier – about the death of a child in Diepkloof reformatory. And I read it in the memory of children and young people who have died in custody in Scotland in recent years – and in the memory of all children who have died in custody, everywhere:

Here is the last certificate of Death;

Forestalling authority he sets you free,

You that did once arrive have now departed

And are now enfolded in the sole embrace

Of kindness that earth ever gave to you.

So negligent in life, in death belatedly

She pours her generous abundance on you

And rains her bounty on the quivering wood

And swaddles you about, where neither hail nor tempest,

Neither wind nor snow nor any heat of sun

Shall now offend you, and the thin cold spears

Of the Highveld rain that once so pierced you

In falling on your grave shall press you closer

To the deep repentant heart.

Here is the warrant of committal,

For this offence, oh small and lonely one,

For this offence in whose commission

Millions of men are in complicity

You are committed. So do I commit you,

Your frail body to the waiting ground,

Your dust to the dust of the veld, –

Fly home-bound soul to the great Judge-President

Who unencumbered by the pressing need

To give society protection, may pass on you

The sentence of indeterminate compassion.

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