30th anniversary

Children's Hearings System

THE FIFTH KILBRANDON CHILD CARE LECTURE

By Professor Sir Neil MacCormick MEP

in the Bute Hall, Glasgow University, on Thursday 1 November 2001

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A Special Conception of Juvenile Justice: Kilbrandon's Legacy

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What a great pleasure it is to be here tonight and to return to my first university as this year's Kilbrandon Childcare Lecturer. One of the first things you always do in preparing for a job like this is read what someone else has written before you. I had the lecture by Professor Anthony Clare of Dublin to look at and I was very touched by it. He opened his lecture with warm remarks about times past when the youthful orators of University College Dublin's Literary and Historical Society would visit the Union here and do rhetorical battle with the home team or teams. He reminisced at the beginning of his lecture about a debating competition in which the late Patrick Cosgrave and he were allotted the task of proposing the motion 'The British Empire has been a boon to humanity'.
He wrote:

> **'Opposing us was the First Minister of Scotland, Donald Dewar – that's not what he was then though I have a distinct recollection that actually that is what he looked like even then – and I think it was Neil MacCormick. To my great satisfaction we two Irish Republicans defended successfully the name and glory of the British Empire against a man who was subsequently to become such a distinguished servant of Scotland.'**

For a moment, as I read the last sentence, its syntax left me with the warm glow imparted by generous, perhaps too generous, praise. But then I realised that it was on my dear, and now too soon departed friend that the praise was being bestowed, and justly. Still, when I think back to the times of which Anthony Clare spoke, some relics of which I see here present tonight, I realise what a huge good fortune it was to have been a student here just when I was, between the late fifties and early sixties. That was long before the barbarous phrase 'transferable skills' was invented. But in this place we were certainly able to serve an unrepeatable and highly enjoyable apprenticeship in the skill of speaking fluently and with little self-consciousness and less notes before a critical and sometime even ribald audience, and commanding a hearing from it. This I discovered was to have been a most useful prelude to the life of a university lecturer or subsequently politician – or indeed both.

In each generation, here on government hill, each of us to some extent I suppose modelled himself or herself on the greats of the senior years, and so it went on. I would like to speak warmly of people like Jimmy Gordon, John Smith, Alasdair MacDonald, Leonard Turpie, Gordon Hunter, Bob McLaughlan, Lillian Taylor and Jean Livingstone, whom I remember as some particularly striking role models, and I had some pretty impressive adversaries on the floor of the house down the hill in people like Donald Dewar, Malcolm Mackenzie, Brian Gill, Kenny Munro, David Miller, Menzies Campbell, Charles MacKay, Fred Kennedy, Donald Caskie, Eleanor Watson, Anne Gordon, Anna McCurley and Maeve McDonald, to say nothing of my redoubtable brother Iain MacCormick, who subsequently became MP for Argyll, and my equally redoubtable cousin Donald who was the presenter of Newsnight when it was still a very good news programme. Our successors included such contemporary worthies as Alan Rodger, recently translated from Lord President to Lord of Appeal in Ordinary, that very outstanding broadcaster Colin MacKay, and Alan Alexander, who is now in charge of Scotland's water industry, which was one of the products we had little use for in the times of which I speak. They and many others became friends for life, and the powerful pull of loyalty that this great house of learning, now 550 years old, exercises on its alumni has for me its roots not only in the rich experiences I had in studying literature and philosophy at the feet of very distinguished teachers, but also and probably even more in the zest of its student corporate life.

I was awarded a Snell Exhibition on the basis of an examination in the Christmas vacation of my final year and thus I betook myself off to Balliol College in 1963, safely endowed with what my contemporaries regarded as the only ideologically acceptable ticket for proceeding from this University to the educational establishment on the banks of the Isis. In due course I was there elected, among other things, to be president of Balliol's Younger Society, which was dedicated not to the appreciation of Alloa Ales but to the study of the Jurisprudence that had been adorned by the name

of one member of the famous brewing family who abandoned beer to become a Lord of Appeal in Ordinary (as Lord Blanesburgh). In fact in this office of president of that society, my chief task was to organise the annual dinner for all past and present members of the college connected with the law, and to find a suitably distinguished Balliol lawyer for the address to the gathered company. With all due consciousness of my own roots and of my then intention to enter practice at the Scots Bar after leaving Oxford, my thoughts naturally turned to the Court of Session. To my delight Lord Kilbrandon, who was my targeted Senator of the College of Justice, accepted the invitation with alacrity. When the evening came, he gave a spectacularly successful, urbane and witty address to a society most of whose members, being English lawyers, had no idea who he was until he turned up and did this. That was later to change when Lord Kilbrandon moved on from being a judge in the Court of Session to be a Lord of Appeal in Ordinary and was subsequently elected to be Visitor of Balliol.

Kilbrandon was certainly a fine judge but was a great human being. I have good reason to honour his memory in a personal, and not a merely institutional, way. Our first acquaintance at that Younger Dinner ripened over the years into a friendship of mutual respect and affection. Despite all his enormous judicial and public standing, he extended to me that kind of kindly and avuncular, but by no means condescending friendship that those of one's father's generation can sometimes manifest to their juniors. Indeed, I think he and my father had actually collaborated in the Covenant movement in the late forties of the last century. However that may be, I learned a great deal from Lord Kilbrandon, and, with good cause, liked him very much. So it is not only a huge honour, but also an occasion of heartfelt personal commemoration to be here this evening as Kilbrandon Lecturer and I'm particularly happy to be able to say so to Lady Kilbrandon and other members of the family here tonight because he was to me a very good friend. Because I remember with very great pleasure and affection a lunch that was held in Blackie House in Lady Stairs Close in the Kilbrandon flat after I had given evidence to the Royal Commission on the Constitution in 1970 and it was one of the most enjoyable lunches and if I didn't write to say thanks then I say it now. I think I probably did as well.

Two among Jim Kilbrandon's great labours were and remain of deep interest to me of course, namely his work on the Royal Commission on the Constitution and that part of his work that led to the establishment of the Children's Hearings. Each of these is in a real sense a monument to his life's work that is likely to prove of more than brazen durability. Today what I really want to do in this lecture is to challenge the idea that, whether successfully or not successfully, the Hearings system is somehow antithetical to justice. I don't think it is. As the lecturer's title says, I think we find in Kilbrandon's work a special conception of justice, a conception that is particularly relevant and I hope that this might prove a timely theme for consideration on this occasion.

I want to declare one or two other interests. From the *galère* of my contemporaries that mentioned above, Fred Kennedy and Donald Dewar played a very particular role in making the Hearings System work, as first appointees to the Reporter's office respectively in Glasgow and Lanarkshire. Donald Dewar spoke eloquently of his contribution to the early years of the Panels and the Hearings in the Kilbrandon Lecture of 1997. As Reporter for Strathclyde Region and previously the Glasgow Reporter, Fred Kennedy played an enormous part in developing the system through to the point of establishment of the single national system, which perhaps has still to show it has the kind of local sensitivities that the old local based system had. I want also to pay tribute to Maeve McDonald's work in the chair until recently of the Children's Panel Advisory Group, following many years as a Panel Member. Her recent call for urgent Executive action to recruit more male members to Panels is one I warmly endorse tonight and commend to the Minister.

In academic life, I need to mention several considerable debts, starting with Peter Morton whose researches updated my rusty knowledge. That knowledge was at all times rather derivative, dependent on work by Ruth Adler, Stewart Asquith, the late Derick McClintock, Alex Robertson and Mary McIsaac among others. These were all close friends and/or colleagues of mine in the Centre for Criminology and the Social and Philosophical Study of Law at Edinburgh University (now less cumbersomely entitled the Centre for Law and Society). There much interesting work was done and many stimulating discussions took place, not least with high-powered visitors from other countries who took a strong comparative interest in Scottish institutions. Professor Heike Jung of the University of the Saarland was perhaps the foremost of those, and his many writings, often sent to me in offprint form, are a valued part of my library. The late Ruth Adler's *Taking Juvenile Justice Seriously* (Scottish Academic Press, 1985) originally took shape in the CLS as a PhD thesis under my supervision. But from her as from Stewart Asquith, who also did a PhD with me, comparing aspects of English and Scottish juvenile justice systems, I learned much more than I was ever in a position to teach. Today's lecture is in particular a kind of delayed-action response to Ruth Adler's work, by which I have over the years been considerably inspired. I wish she could have been here to receive it.

After this perhaps too long set of introductory remarks, it is high time to turn to the lecture itself and to the ideas of justice that I want to persuade you to take seriously. I shall start with what for most persons here present will be no more than a set of all too brief – perhaps tedious and brief – reminders of the main characteristics of the system of Children's Hearings we now have in Scotland.

1. Essentials of the Hearing System

The essential character of this system is the way in which it places decision making about children into the hands of a Hearing whose members are drawn from a Panel of ordinary people belonging to the same local authority area. The Panel Members are selected for the task on the basis of application or nomination, and trained thoroughly for the role they play at Hearings. The Hearing is called at the instance of the Reporter, who must set out one or more appropriate statutory grounds of referral. I would summarise these briefly. First, there is a welfare set: the child must be one of the following: out of control, be falling into bad associations, exposed to moral danger, suffering from lack of adequate parental care or be a victim of or in various ways exposed to the risk of sexual offences. Then there is a behavioural set: the child must be involved in truancy or in misusing alcohol, drugs or volatile substances or must be engaging in behaviour such that special measures of supervision are needed in his interest or the interest of others. Or finally (though not placed last in the statutory list), it must be the case that the child 'has committed an offence'.

The child whom a Reporter has called before a Hearing on any one or more of the mentioned grounds of referral is entitled and required to be present at the Hearing, as are his or her parents. In cases where there appears to be any possible conflict of interests between parents and child, a 'Safeguarder' is appointed to ensure proper regard for the distinct interests of the child. No compulsory decisions about a child can be taken save by the Hearing, except in cases of emergency, when, for example, a 'place of safety' order may be made by a Sheriff at the instance of a Local Authority. This makes it lawful to keep the child in safety until the matter can be referred to a Hearing.

In general, a Hearing can take decisions concerning the matters referred to it only if the grounds of referral are admitted by the child and parents. If they are disputed, the Hearing must refer the issue to the Sheriff Court sitting in Chambers, where the Reporter has to prove the grounds of referral to a satisfactory standard of proof, the objectors having a right of audience also, to challenge the evidence and inferences made from it. But if the ground is so proved, the case is referred back to the Hearing for determination.

Grounds of referral include both what I have labelled as 'welfare grounds' or as 'behavioural grounds'. Put another way, what is in issue is either an instance of problems affecting a child, or an instance of problems caused to others by a child's behaviour, including acts that amount in law to offences criminal in character. Where serious offences are involved, children have to be tried with all due process of law before the Sheriff Court or High Court. But no disposal by that court can be undertaken until after the opinion of a Hearing has been sought and given. Only a tiny proportion of cases involving child offenders take that route, so for all ordinary purposes, the Children's Hearings in Scotland are responsible both for compulsory welfare measures involving children, and for compulsory measures taken to deal with those involved in delinquency.

The character of the Hearing is markedly dialogical rather than accusatory. For the starting point is a ground of referral that has either been agreed by the child and the parents, or one that has been proven before the Sheriff and referred back to the Hearing for decisions to be taken. Where the Children's Hearing to whom a child's case has been referred is satisfied that compulsory measures of supervision are necessary in respect of the child they may make a supervision requirement. This may or may not be conditional, and can include a requirement that the child reside in a particular place, which may or may not be secure accommodation. It should be so, if the child, having previously absconded, is likely to abscond unless kept in, and if he or she will then be in material or moral danger, or is likely to injure himself or some other person unless he is kept in.

Decisions about such supervision requirements are typically reached in a process of discussion or dialogue aimed at trying to identify the character of a problem and the best way to deal with it. Responses to a problem are as far as possible established by agreement, but in the last resort, of course, a requirement is a requirement. All such disposals are subject to periodic review when all parties return to a Hearing to identify what, if any, progress has been made, whether a particular requirement should be discontinued or continued, with or without variation. This is not like an all or nothing verdict and sentence in a criminal trial. It is an ongoing and dialogical search for a solution to an identified problem, pursued as far as possible by consent rather than compulsion.

That is a starting point. Turn to second theme.

2. Human Rights and Children's Rights

It was in 1991 when the United Kingdom signed up to the Convention on the Rights of the Child. The Children (Scotland) Act of 1995, aimed at making the Convention effective in Scots Law, happened to be one of the latest Acts the United Kingdom Parliament passed specifically for Scotland in a domain that is now within the devolved powers of the Scottish Parliament. We are, as a country, committed to respecting the moral personality of children and acknowledging thereby that children as much as adults have to be regarded as ends in themselves and not as mere means to other people's ends. In particular, this is enshrined in the principle that everyone who takes public decisions that affect children must have primary regard to what is in the interest of the child or children affected. In principle at least, the 1995 Act writes that commitment into our law and in doing so it has updated the provisions of the 1968 Act that implanted the Kilbrandon proposals.

At this point, one is apt to think comfortable thoughts. Our international obligation is to have regard to the interests of children. The natural and human rights of children require us to put their interests at the top of any agenda affecting them. Surely the Children's Hearings System as I summarised it enables us in Scotland to pass a test of this kind with flying colours. For it is exactly the point of this system that it should give primacy to the issue of a child's welfare. We look at children in trouble, whether they are in trouble on the basis of their own actions or the actions of others, 'needs and deeds' as the saying has it, and we seek such remedial action as will improve the situation in the child's interest. What could be better than that?

Well, there do have to be certain caveats. In one famous case, *McMichael v. United Kingdom,* the European Court of Human Rights cast a critical eye on one aspect of procedure at the Hearings. Where social, psychological, psychiatric or other confidential professional reports on a child or their parents were considered relevant to disposal of a case, it used to be the practice that the texts of such reports were seen only by the Reporter and the Panel Members. The Chair of the Hearing had the duty to explain the main points to the child and the parents, in order to explain what view the Hearing took of a problem and its possible solutions. First the detail was not disclosed, one can see what lies behind such an approach. It could foster candour in reporting and it may help to avoid what is meant to be a dialogical approach becoming drowned in professional jargon and unwieldy concepts. In the *McMichael* case itself, both the parents involved were psychiatric patients and the circumstances of the reported case suggest that sensitive Panel Members might well have been reluctant to confront the unfortunate individuals involved with raw reports about their psychiatric condition and their supposed capability to be entrusted with their own child's upbringing. Still, as the Court pointed out, taking fundamental decisions about, for example, a person's parental rights on the basis of reports and information never disclosed in full to the person concerned is simply unfair. It denies a basic requirement of procedural fairness. Only a robust attitude of openness concerning essential bases of decision-making can in the end be satisfactory in a trustworthy system of public decision-making.

So there is a clear warning: even if we are inclined to favour the Scottish system in its main lines, let us be sure that we do not undermine the fundamental rights either of children or of adults. Such challenges as those in *McMichael* call us to live up to our own ideals.

So that takes me to my third section.

3. Welfare or Justice?

That sets the stage quite well for a shift of focus to the issue of Welfare versus Justice. Those who have studied and described systems of juvenile justice are in the way of drawing an arresting contrast. They differentiate what they call 'the welfare model' from what they call 'the justice model'. Systems for dealing with misconduct and harmful behaviour that base themselves primarily on rehabilitation or treatment of the persons involved, scholars class as belonging within a 'Treatment' or 'Welfare' model. In our particular case, the welfare model is exemplified by a system that focuses on the needs of children who are involved in some form of trouble, either by way of causing it or by way of being its victims. Such a system then seeks to find out the best solution to the difficulty in a spirit of benevolence that may involve a fairly wide discretion in those who are responsible.

The justice model stands in sharp contrast. Systems that exemplify it focus on deeds, and the consequential deserts of their doers. In systems dealing with children, the concern is with their bad deeds rather than with their perceived needs. The deeds being misdeeds, the point is to apply appropriate retribution, provided the misdeed has been properly proven in a fair judicial process and provided that rules enacted in advance match sanctions to wrong-doing in an appropriate and proportionate way.

That is not a contrast that should be overdone. Where somebody is in trouble on account of neglect or ill treatment by other persons, one set of needs may be indicated. Where somebody is in trouble primarily on account of the bad things he or she has done to somebody else, or to public assets, something different may be needed than in the former case. At the very least, there ought to be some element of making it clear that and why doing such things is unacceptable in a civilised society. Deeds can be indicative of distinctive needs. But the point is that this is not exclusive. Quite likely a real live case will contain some element of both. For those who neglect the wellbeing of others are often the same people as those who have themselves experienced callous ill-treatment or worse at the hands of others with power over them. The point of the so-called welfare approach is that, as in the Children's Hearings, it makes possible a holistic look at the situation of a child in whose case, in one way or another, grounds for referral to a Hearing have become evident.

Anyway, the contrast between the pair of ideal typical approaches is real enough, even if actual systems will in practice contain elements of both rather than being pure types. A moment's reflection on the contrast seems to suggest that what we have in Scotland scores high in terms of welfare and of children's interests. But equally, just because welfare systems contrast with justice systems, we must suppose our system scores low in terms of justice. This failure by the standards of justice will perhaps be a serious one. It could give rise to at least a pair of objections.

The fourth section is

4. Sparing the Rod and Spoiling the Justice?

The first of these objections is the practical one of the kind to which the tabloid newspapers sometimes give voice. There are children around who do bad things, sometimes very bad things indeed. They disrupt our social peace, and yet what do they get from a Hearing? They get mollycoddled or pampered as though they were stars of the show rather than villains of the piece. What we need, say our fearless friends in the popular press, is proper protection of the public. We have to take seriously the seriously wicked deeds of young people. We should prevent delinquency whenever and as far as we can, and we should punish what we fail to prevent. When it is appropriate, we should teach young people a good lesson for their own good and for encouragement of others into better behaviour.

The second is a deeper and more philosophical objection, but it could be connected. One of the seminal contributions to the political philosophy of the late 20th century was a book called *The Theory of Justice* that John Rawls brought out in 1972. It is a book full of striking thoughts and sayings, but none more so than the following: 'Justice is the first virtue of political institutions as truth is of systems of thought'. This has the sure ring of truth. Different systems have different special virtues. A system that fails its proper virtue is a disastrous failure. If you found a system of healthcare that on the whole made people ill rather than made them better, you would say it failed in its essential point. If you found an educational system that on the whole inculcated ignorance and a hatred of learning among those who were exposed to the system, it would have failed in its intrinsic purpose. Health systems are to help us remain healthy or regain health from sickness, educational systems are for dispelling ignorance, imparting knowledge and skills and indeed for encouraging a capacity to learn and a love of learning. Likewise, the political institutions of a State are there to secure justice among citizens and those others who are in the jurisdiction of the State. Any failure in that would be a failing in the intrinsic virtue proper to the system as such.

Does Rawls then have bad news for us in Scotland? If our system for dealing with children in trouble scores low by the standards of justice, it fails in no mere accidental or ancillary criterion of value. It fails of the principal and proper virtue of the kind of system it sets out to be. Systems for dealing with misbehaving children which attend only to welfare and which ignore the lessons of the justice model seem to be defying the first virtue to which they ought to be addressed. If justice is the first virtue of political institutions then let us make sure that our Children's Hearings and everything else line up with justice.

That seems to me to be a challenge that has to be taken seriously. We cannot just side-step it. We ought to be concerned with justice and if what we might like to call our 'Juvenile Justice' system is omitting due concern with justice, the sooner our Parliament goes back to its drawing board and designs a just system for us, the better.

If the premises were true the conclusion would necessarily be true too. We would indeed have cause for alarm. But I want to attack the premises rather than sow the alarm. Who says our system fails in respect of justice, and why? It may turn out that, after all, there is not much more to it than the prejudices of tabloid journalism and the conventional descriptive apparatus of the social sciences. In fact, it may be – I shall argue that it is – our conceptual framework that more needs adjusting than our Children's Hearings.

I want to offer a frontal assault on an implicit 'persuasive definition'. This persuasive definition is accomplished precisely in the juxtaposition of the two rival models or ideal types under the terminology of welfare for the one and justice for the other. It is important to note carefully what a sleight of hand there is involved. It is achieved by arrogating the term 'justice' to one of the two models for treatment of children in trouble. In saying that the justice model dispenses justice and the welfare model dispenses welfare we sell the pass at once. For how could one defend the so-called 'welfare model' within the domain of a political discourse that puts justice in its proper place as the first proper virtue.

5. Rethinking Justice

Where should we start to challenge this? An obvious start lies at once to hand. Who says that welfare has nothing to do with justice? Nearly every system of moral and political thought has at least some place for considerations of welfare and (on the justice side particularly) the distribution of welfare. More thought on this is called for.

I find much of wisdom in the old Roman lawyers' summary of what they called *juris praecepta,* 'the precepts of right'. They were simply 'to live honestly, to harm nobody, and to give to everybody their due'. Following that, for a moment let us suppose justice is a virtue that requires us to live an honest life, to harm no other person, and to give to everyone their due. How does that sound? *Live honestly?* Well, I suppose it is not very controversial that just people refrain from cheating and fraud, and respect the truth in interpersonal dealings with each other. *Refrain from harm?* It is surely no more controversial that just people avoid inflicting avoidable injury on others. More problematic may be *To each his due?* For the great begged question is: *What is due?*

If we can't deal with that question in a way that avoids begging it, we are sunk. For in truth it is already tacitly involved in the other two. Honesty requires not cheating others out of their rights, and not harming them requires refraining from taking or damaging their belongings as well as their persons. Both these ideas depend on a sense of what does, and what ought to, belong to people. What belongs to us is what is due to us. But what is that? For this we need some acknowledged framework of fair shares and perhaps the deepest task of a theory of justice is to establish principles of fair sharing of the social product and the available natural resources.

Needless to say I am not going to complete that deepest task today. But at least I can say that a due regard to the human interest in freedom will yield a large place for market-based arrangements in working out what belongs to whom. That also has a good deal to do with expanding general welfare as Adam Smith said here long ago. What would be unacceptable would be to treat the market as omnicompetent and unchallengeable. Markets are efficient information systems and guides to the allocation of effort. Markets tend to produce the best goods at the cheapest prices. They leave people free to follow their own best judgment on the basis of the information they have. But there are huge possibilities of market failure and serious risks of extreme short-term casualties.

So there do have to be systems of social distribution that correct and override market results to an acceptable extent. There are both procedural and substantive constraints on what is acceptable. Procedurally, only democratic forms of decision-making that give effective decision-making power to elected representatives can acceptably take such decisions. Substantively, they must ensure that all citizens have at least the minimum requirements to make it possible for them to enjoy the established human rights (e.g., those recited in the European Human Rights

Convention or the European Union Charter of Rights) in conditions of fair equality of opportunity. This involves a substantial degree of provision for public goods, both in the way of physical infrastructure, in the way of educational and health services and in provision of sufficient public, police and judicial resources for maintenance of civil peace under a rigorously upheld rule of law. And in the wake of what was said in the Chokkar report we must ask if we are not making available sufficient resources if we are to uphold the rule of law.

6. Simple Retribution: Getting One's Due

A concern in any generation for members of the next generation, that is, at any given 'now', a concern for those who are now children, poses significant demands on the upbringing of children and their engagement with public institutions, including those of the State. First and foremost, children themselves must learn the duties of justice, the first two, honesty and liberty being the more straightforward. Not cheating and not injuring people are duties it is easy to teach and to learn, even though both have presuppositions of a deeply discussable kind. To everyone their due has one simple aspect, namely that of simple retribution. By simple retribution I mean that we can all learn from an early age that good behaviour (including honesty and avoiding harm to others) brings the reward of approval and unqualified affection, while bad deeds lead to disapproval, reproof, and temporary withdrawal of the outward manifestations of affection. Particularly good behaviour, especially in the face of strong contrary temptation, merits and receives active and warm signs of approval. Particularly bad behaviour, especially that which expresses an actively bad will merits and receives active and grave manifestations of disapproval. Even in families this can amount to more or less clearly articulated and pre-announced forms of punishment. In institutional settings from the school on and up, formal punishments – and also formal prizes and rewards – play a substantial part. The more formal the institutions involved, the more necessary is a measure of formal procedure and explicit attention to procedural fairness in this process of retribution. The McMichael case pops back into mind.

For any of this to make real sense to any participant, there has to be already some understanding that there exists a fair, or reasonably fair, overall framework for the allocation of goods. People who are asked to respect the rights of others, as we should all be asked to do, and all should do, have to have some confidence that the rights belonging to each person do emerge from a fair process of the allocation of rights. That requires an overall context of reasonable distributive fairness in a surrounding social milieu, along the lines I already indicated. Indifference to basic needs of others that we may or may not have in our present society cannot be acceptable in this context. Especially as to children, ensuring that they have available those most basic needs that are comprised in the welfare headings of Children's Hearing grounds of referral is a minimum case of something that is due. It is due as a matter of distribution rather than retribution, but it is another elementary element of what to each is due.

We are back to things that must be made available to people whom the market has failed, to the extent it has failed them. These matters belong to what the Romans called '*res extra commercium*', 'things outside of commerce', public goods that have to be constructed and delivered outside of markets. In this sense, even young children need to begin to form a deeper sense of the idea that each person has certain entitlements just as a person and justice involves respecting these entitlements. The fairness of simple retribution, which most of us find intuitively obvious, thus presupposes also a context of at least relative fairness in distribution. In families where all are treated as equals this is easy enough to take for granted. In the more institutionalised settings of civil society and of the State it is more problematic and requires more explicit attention.

7. Simple Retribution and Institutionalised Retribution

How then does the idea of simple retribution connect up with the forms of elaborate institutionalised retribution that the criminal law and criminal justice system of a contemporary State so grandly and dramatically exemplify? Why does it become the function of the State to handle the allocation of our due to each of us in the matter of retribution for dishonesty and harmful conduct, including in this harms to the institutions of the State as the presumptive protector of a whole society? Why is a monopoly of coercion granted to the State in respect of this process, even while other institutions may be free to maintain forms of internal discipline and retribution under the overall tutelage of the State? The justifying reason for this, if not its historical explanation, can be expressed in terms made familiar by H L A Hart, states function on the basis of what Hart called 'voluntary co-operation in a coercive system'.

Most people who are law abiding are not so because of immediate fear of immediate or overwhelming State-imposed sanctions. Reasonable legal orders are met with voluntary compliance most of the time by most of the people because social peace really is in most people's interest, and they are aware of this. The difficulty is that not everybody acts out this voluntary compliance all the time and some adopt forms of life that put no value on compliance as such, however much they may seek to avoid detection of their non-compliant behaviour. To maintain the continuing willingness of the current willingly compliant majority, they have to be given some reason to suppose that they will not simply be made mugs of by the non-compliers. That is, their contribution of compliant behaviour will not serve to benefit those who wilfully fail to reciprocate it.

It can easily be argued that the institutions of a coercive system of criminal law are required to secure this. A kind of non-contractual reciprocity of law-abiding behaviour is required for civil peace. This depends on an underpinning guarantee that those who refuse to reciprocate voluntarily will not get away with this in the long run. The State is the agency to which hitherto societies such as ours have entrusted this function. Even now, as we move to transcend the State in the new institutional forms of our growing European confederation, few of us can see how we will be able safely to pass any large, or perhaps even any, part of these functions to more remotely based authorities.

All that sets the framework in which I want to think now about the treatment of children within an overall system of public justice. It is easy enough to grasp an outline of the duties of justice that children have to learn on their way to assuming a place among the self-governing members of a self-governing polity. It is easy to see what sense of justice they should and will acquire if all goes well with them in the process of nurturing, education and maturation through which they, which we all, pass. But that says relatively little if anything at all about what is to be done when for some reason there is some failure in the system. What about those children who in some respect go wrong, or for whom in some respect their environment goes wrong so that they either neglect what the duties of justice require of them, or suffer from their neglect by others?

One answer seems ruled out from the start. Simply applying the 'adult' system of criminal law would make no sense at all. It would be to act as though these were people who had deliberately dropped out of the game of non-contractual reciprocity and hence exposed themselves to the fully justified intervention of the state's agencies of coercion. But they are not, and they have not. They are people who have not yet been effectively inducted into that game. There are forms of simple retribution that make very obvious sense even to very small children. But these are far removed from the cumbersome solemnities of the criminal courts, that highly institutionalised retribution coupled with all the safeguarding of rights of the defence that are the required counterweights to the State's coercive interventions.

So penultimately talk about

8. Justice for Children

If, therefore, we are concerned with justice to children we will be anxious to deal honestly with them, to avoid harming them and yet at the same time to give them faithfully what is their due. Institutionally, within the State, we will be most anxious to try and ensure that institutions external to, or certainly of a lower level than the State, will do most of what has to be done. All the nonsense that has been spouted in the name of family values should not blind us to the values families, both nuclear ones and even today somewhat extended as well as non-standard ones, can realise in the nurturing and maturation of the next generation. Schools and voluntary organisations too. But the State does have ultimately parental and fraternal duties when others fail and then social work and juvenile justice do become the order of the day. A State concerned to give children their due will at one and the same time seek to make good any glaring deficiencies in the family or quasi-familial setting in which a child is found, and to ensure that damaging interventions by the adult world cannot take too long a course. Where children are embarked on courses of conduct that express a policy of dishonesty or a practice of active harmfulnes to others or to the public in respect of bodily security or valued possessions, whether individual or collective, intervention must be provided for. It should as far as possible be educative in intent and geared to awakening a sense of the injustice of unjust doing. Simply banging up or packing off to boot camps lacks any appropriate component of the educative.

Doing this kind of task via a Hearing convened by a Reporter before a group of ordinary people drawn from the local Children's Panel is on the face of it a sensible and imaginative way to try to bring about the educative function that is needed. Even if there were no empirical evidence to help us we might be inclined to think it worth while to give such a system a try. Today in Scotland we are however, more fortunate. For we have empirical evidence and it points strongly in the direction that common sense suggests.

To put it no higher, the juvenile justice system that is in place here in Scotland seems to have had far better effects than possible alternatives in diminishing the likelihood that delinquency in childhood and early youth will function simply as an apprenticeship for a life of professional criminality in adulthood. On the whole, our system seems to persuade more of its clients than others do that injustice is a mug's game, as well as being simply unjust. We may still have dismayingly high levels of adult criminality and a rather fiercely retributive adult criminal justice system to deal with our adult criminals. But in the case of children, we seem to be dealing with those who are in trouble or causing it in a way that helps a good few of them, even a majority, to join in the non-contractual reciprocity of reasonably law-abiding adult life. This is not a very grand claim but it is an important achievement nevertheless. May I quote some wise words written by Stewart Asquith along with his colleague Dr Docherty:

> 'What is at stake is not simply the most effective way of dealing with children and young people who offend but more importantly identifying the most appropriate philosophy on which to base preventive measures. Article 2 of the Riyadh Guidelines on Preventing Juvenile Delinquency illustrates this position succinctly:
>
> Prevention of juvenile delinquency requires efforts by the entire society to ensure the harmonious development of adolescents, with respect for and promotion of their personality from early childhood.
>
> There is clear evidence from criminological literature, from our knowledge of what is happening elsewhere in Europe and the commitment to the UN Convention on the Rights of the Child, that any attempt to develop measures which ignore the social, economic and political climate in which children find themselves will inevitably fail. Conversely, the literature and current developments provide continued evidence based support for the philosophy on which the system of juvenile justice in Scotland is based'.[1]

1 Asquith, S. & Docherty, M. (1999) 'Preventing Offending by Children and Young People in Scotland' in *Criminal Justice in Scotland*. Ed. Duff, P., Ashgate pp. 243–260

9. The 'Welfare versus Justice' Fallacy

So to conclude, I return to my original question. Do we in Scotland achieve whatever the Children's Hearing System achieves by systematically prioritising welfare over justice? Do we, in the way we treat children among us who are in trouble violate the first virtue of political institutions?

My answer is a resounding negative, and the reasons for this negative are already clear. A credible theory of justice applied to a society such as ours would not condemn or deprecate a system such as that embodied in the Children's Hearings. On the contrary, it would prescribe something rather like the system that Kilbrandon and his Committee foresaw and for which they prepared the way. Despite all the adverse currents in the popular ideas of the past thirty years, despite all the sensationalism of the tabloid press, the Hearings System, subject to alterations and adaptations, has stood the test of time. We should be grateful to all those who have played a part in making it work and in defending it against trends of retributive fashion.

A lecture of this kind can do nothing more than a modest contribution to the real work. There is, perhaps, some value in adding a conceptual buttress to the practical arguments and empirical evidence. Our system is not a welfare system that works better than a justice system. It is a better system because it matches a better conception of justice than in this context the so-called 'justice model' would do. We

do better justice to children than we used to do and than we would do if we were to go down the road of further assimilating the children's system to the criminal law and the criminal process as this, quite properly, applies to adults. My final homily would be, never accept that our system, whatever its merits, diverges from what could properly be called a justice model. That is to sell a conceptual pass that should be defended in the last ditch. Say rather, that we have here a model of justice that tells us why to treat children differently from adults. We do not treat them differently because we respect them less. Rather our respect for them as moral beings is differentiated in a way that makes proper allowance for the differences between mature and immature moral agents and aims to help the latter to grow in due course to take their place among the ranks of the former.

That is a wonderful tribute to the memory of Lord Kilbrandon that we are able to say that.

30th anniversary