

Reclaiming the delinquent child: a proposed framework for a customary law-based child justice system in Africa using Zambia as a case study

Kelly Kapianga*

<https://orcid.org/0000-0001-9793-4376>

ABSTRACT: One consequence of Africa's colonial history appears to be the subjugation of African customs and rites in favour of western values in the legal systems of several African countries. An example of this subjugation is the 'repugnancy clauses' that still populate the statute books of several African nations. The effect of the 'repugnancy clauses' has been multiplied by their suppression of African customs relating to the rearing of children alleged or adjudged to have committed a crime. The article draws upon limited research conducted in 2020 and 2021 in five districts of Zambia on children in conflict with the law as part of a limited study conducted by the author in the preparation of Zambia's juvenile justice strategy (2021-25). The study collected quantitative data on the rates of children prosecuted in Zambia's courts for the years 2012-17 and 2019-2020 and determined the rates at which these cases were diverted to customary institutions. It also collected qualitative data in the form of interviews with seven adjudicators, five law enforcement officials and one Chief to make sense of the quantitative data. The research found that although dealing with alleged child delinquents under customary law is a requirement under Zambia's Juveniles Act, neither law enforcement officials nor magistrates referred cases to customary institutions. This article seeks to propose a framework for a balanced incorporation of customary law and its institutions in Zambia's juvenile justice system. Such framework, the article argues, comports not only with the spirit of the Charter for African Cultural Renaissance, but also the African Charter on the Rights and Welfare of the Child, the United Nations Convention on the Rights of the Child, and the Committee on the Rights of the Child's General Comment 24.

TITRE ET RÉSUMÉ EN FRANCAIS:

Réinsertion de l'enfant délinquant: proposition d'un cadre légal efficace pour un système de justice juvénile basé sur le droit coutumier en Afrique avec la Zambie comme étude de cas

RÉSUMÉ: L'une des conséquences de l'histoire coloniale de l'Afrique semble être l'assujettissement des coutumes et des rites africains en faveur des valeurs occidentales dans les systèmes juridiques de plusieurs pays africains. Plusieurs nations africaines. L'effet des clauses de répugnance a été multiplié par sa suppression des coutumes africaines relatives à l'éducation des enfants présumés ou reconnus coupables d'un crime. Le document s'appuie sur des recherches limitées menées en 2020-2021 dans cinq districts de Zambie sur les enfants en conflit avec la loi dans le cadre d'une étude limitée menée par l'auteur dans le cadre de la préparation de la stratégie de justice pour mineurs de la Zambie (2021-25). L'étude a collecté des données quantitatives sur les taux d'enfants poursuivis devant les tribunaux zambiens

* MA (Harvard), MSC (Oxford); kkapianga@llm20.law.harvard.edu or kellskaps@yahoo.com

pour les années 2012-17 et 2019-2020 et a déterminé les taux auxquels ces affaires ont été détournées vers les institutions coutumières. Il a également collecté des données qualitatives sous la forme d'entretiens avec sept arbitres, cinq responsables de l'application des lois et un chef pour donner un sens aux données quantitatives. Les données. La recherche a révélé que bien que le traitement des enfants délinquants présumés en vertu du droit coutumier soit une exigence en vertu de la loi zambienne sur les mineurs, des lois de la Zambie, ni les responsables de l'application des lois ni les magistrats n'ont renvoyé les affaires aux institutions coutumières. Ce document cherche à proposer un cadre pour une incorporation équilibrée du droit coutumier et de ses institutions dans le système de justice pour mineurs de la Zambie. Un tel cadre, fera valoir le document, est conforme non seulement à l'esprit de la Charte pour la renaissance culturelle africaine, la Charte africaine des droits et du bien-être de l'enfant, la Convention des Nations Unies relative aux droits de l'enfant et le Comité sur l'Observation générale sur les droits de l'enfant no 24, respectivement.

KEY WORDS: juvenile justice system, repugnancy clauses, Zambia, delinquency

CONTENT:

1	Introduction	159
1.1	Recent attempts to balance English and customary value systems in Zambia ...	160
1.2	Structure of the remainder of the article	162
2	Defining Zambia's juvenile justice system	162
2.1	An overview	162
2.2	The statutory subsystem	163
2.3	The customary subsystem	164
2.4	Harmonising Zambia's juvenile justice system: a story of oil and water	165
3	The role of customary law institutions under international and regional instruments	169
3.1	An overview of provisions in international and regional instruments.....	169
3.2	Addressing some concerns regarding customary dispute resolution mechanisms	170
4	A new way of thinking about customary law and juvenile delinquency: the example of Sierra Leone.....	174
5	A customary-based framework for dealing with juveniles in Zambia: a coalition of sub-systems	176
6	Conclusion.....	178

1 INTRODUCTION

The juvenile justice system is the portion of a country's legal system concerned with questions of guiding children from infancy into law abiding adulthood. Every carer of children probably knows the arduousness of child rearing. Within a household, guiding children into law abiding and productive citizenship is complicated by several factors including the diversity of value systems to which modern caregivers and children are exposed. The difficulty only multiplies when these concerns are at a national level. At this level, states are obligated to set child policies. In doing so, they must also accommodate the rights of primary caregivers to raise their children by whatever value system they deem fit whilst simultaneously ensuring adherence to minimum safeguards set out in national and international child rights instruments designed to protect children. Africa faces an even more daunting challenge. As a result of its colonial history, African customary value systems have been diluted by western value system and significantly eroded. This concern has motivated efforts at the continental level for nations to collectively audit their legal systems to reify the role that African culture and values play in their respective

legal systems. Instruments such as the Charter for African Cultural Renaissance (Renaissance Charter) represent such an effort.

1.1 Recent attempts to balance English and customary value systems in Zambia

Zambia has in recent years taken steps to reinstate the prominence of customary institutions enjoyed in Zambian life before Zambian society came into contact with western value systems. From around 2008, the process of amending the Constitution of the Republic of Zambia¹ began and this culminated in the enactment of the Constitution (Amendment) Act, 2 of 2016. Among the many amendments introduced this statute made to the Constitution, there was a marked attempt to formally recognise customary law as a source of law in Zambia,² and to restore the powers and prestige that customary institutions³ enjoyed in Zambia's pre-colonial legal system. In the amended Constitution, article 165(1) guarantees the existence of the chieftaincy and traditional institutions 'in accordance with the culture, customs and traditions of the people to whom they apply'. Article 165(2)(b) goes on to caution parliament not to 'enact legislation which (b) derogates from the honour and dignity of the institution of Chieftaincy'. These provisions appear to be a direct response to legislative efforts which started at the onset of British domination of present-day Zambia and continued after independence to limit the adjudicative powers of chiefs and customary institutions. The amendments also address the need to reify the role of dispute resolution mechanisms under customary law. For this, the Constitution requires the formal courts to promote the use of 'traditional dispute resolution mechanisms'.⁴ Despite these developments, little has been done to realign subordinate legislation and the practice on the ground with the new constitutional framework. This is most evident in Zambia's juvenile justice system.

Between July 2017 and September 2018, the Office of the Auditor General of the Republic of Zambia conducted an audit of the performance of Zambia's juvenile justice institutions in the statutory sub-system.⁵ These institutions include the Zambia Police Service, the Department of Social Welfare, the courts (the Magistrate and High Court), Zambia Department of Corrections, the approved Schools and

1 Ch 1 of the Laws of Zambia.

2 This is achieved by art 7(d) of the of the Constitution of the Republic of Zambia, 2016.

3 The customary law institutions include family elders, headmen, chiefs and the chief's police force called Kapasus.

4 The Constitution of the Republic of Zambia, 2016, art 118(2)(d).

5 Office of the Auditor General of the Republic of Zambia (2018) 'Performance Audit on the Juvenile Justice System in Zambia for the Period 2014 to 2017' (unpublished).

Reformatory and are concerned with the proper upbringing of juveniles.⁶ The audit examined the performance of these institutions between the years 2014 and 2017. The findings were published in December 2018. The report highlights significant violations of juvenile's rights including overuse of arrests by law enforcement, an overuse of pre-trial detention, prolonged detention at every stage, lack of separation of detained children from adults, inadequate provision of the necessities to children in detention and overall, no evidence that the system rehabilitates children.⁷ One of the causes of this state of affairs was the fact that the number of juveniles brought into the system far outstripped the available institutional capacity to provide them with the care required by national and international human rights standards.⁸ This was partly because, according to the report, 'in the Zambian juvenile justice system, there is no legal provision that allows for pre-trial diversion of cases'.⁹ The notion that Zambian law does not provide for pre-trial diversion is not true. A more accurate position is that the erosion of Zambian cultural values results in the disuse of restorative diversion options under customary law with preference being given to the retribution-oriented western-style juvenile justice. The use of customary law in the juvenile justice system is not only permitted but is actually required. Section 1(2) of the Juveniles Act Chapter 53 of the Laws of Zambia, which is the primary statute dealing with juvenile justice, reads as follows:

In the application of this Act to juveniles, the provisions of African customary law *shall be observed* unless the observance of such customary law would not be in the interests of such juveniles.

Customary law is used to deal with juvenile delinquency mostly in rural areas. The issue the Auditor General detected was not the lack of diversion under Zambian. It is in fact a resistance by the actors in the formal juvenile justice system to refer cases to the customary law institutions despite the mandatory obligation imposed by the Juveniles Act. The result of this resistance is that there exists in Zambia two distinct and standalone sub-systems for dealing with juvenile delinquency, one customary and predominant in rural areas and the other statutory and predominant in urban areas. This situation results in the treatment of juveniles who commit similar offences receiving different treatments depending on the system they are treated under. This arrangement goes against the recommendations by the United Nations Committee on the Convention on the Rights of the Child (CRC Committee) which discourages 'children committing similar crimes ... being dealt with differently in parallel systems or forums'.¹⁰

Against this background, this article has three goals. First, it seeks to investigate the legal basis of these diverging subsystems and the

6 Constitution of Zambia (n 4).

7 Auditor General (n 6) viii to ix.

8 Auditor General (n 6) 67.

9 Auditor General (n 6) 41.

10 United Nations Committee on the Convention on the Rights of the Child, General Comment 24 (2019) on children's rights in the child justice system, para 103, 17. <https://undocs.org/CRC/C/GC/24> (accessed 27 May 2021).

source of the difficulties in merging the two. Second, it shows that Zambia's obligations under international public law require that it establishes a framework for the co-existence of both sub-systems. Third, the article considers the approach taken by Sierra Leone in incorporating customary institutions into its juvenile justice system to propose a framework for establishing synergy between Zambia's juvenile justice subsystems.

1.2 Structure of the remainder of the article

The remainder of the article is divided into four parts from parts two to five. Part two provides a brief description of Zambia's juvenile justice system and brief overviews of its constituent sub-systems. Part three discusses the position of international and regional child rights instruments on the role of customary institutions in the juvenile justice system and addresses some concerns regarding the use of customary institutions in juvenile cases. Part four discusses how Sierra Leone's laws have attempted to incorporate customary institutions into its juvenile justice system. Finally, part five proposes a framework, inspired by Sierra Leone's example, for incorporating customary laws and institutions into juvenile justice systems on the African continent using Zambia as an example.

Sierra Leone is not the only African country to have taken steps to harmonise its customary law system with the inherited western-style justice system in dealing with juvenile delinquents. Also, this choice does not suggest that Sierra Leone's juvenile justice system functions flawlessly or that the merger of these two systems is perfect. Sierra Leone has been chosen for two reasons. First, Sierra Leone's demographic and legal diversity, and its colonial history resembles that of Zambia. Second, the way it has legislated the co-existence of customary and statutory sub-systems is one of the best examples in the region for borrowing the best features of the customary and western-style juvenile justice systems and merging them into a homogenised juvenile justice system. These justifications are explored in detail below.

2 DEFINING ZAMBIA'S JUVENILE JUSTICE SYSTEM

2.1 An overview

Zambia's juvenile justice system comprises the laws, institutions, processes, and procedures for dealing with juveniles¹¹ falling into three categories. The first category covers juveniles who need care as a result of several factors including familial neglect, abuse or the lack of primary

11 Sec 2 of the Juveniles Act defines a juvenile as 'any person who a person who has not attained the age of nineteen years'.

caregivers. The second category relates to juveniles who are beyond their caregiver's capacity to control them and are in legal, moral or physical danger. The final category is that of juvenile delinquents, that is, those alleged or adjudged to have committed an offence under Zambian law.

The Constitution of Zambia spells out the various sources of law to include laws enacted by Parliament¹² and Zambian customary law.¹³ This duality of the sources of law in turn establishes two distinct subsystems within Zambia's legal system, that is, the statutory and customary subsystem. The juvenile justice system inherits this duality and contains subsystems along the same lines.

2.2 The statutory subsystem

The statutory subsystem is based on written laws. It is a creation of Zambia's colonial legacy and was established by the Juveniles Act, 1956¹⁴ which was modelled after the English Children and Young Persons Act, 1933.¹⁵ This system applies to all juveniles in Zambia. Philosophically, this system constructs juvenile delinquency as a crime to be dealt with through the criminal justice system.¹⁶ As such, the same substantive criminal laws that apply to adults, primarily the Penal Code Act (PCA), is also used to establish criminal culpability in juvenile cases. Similarly, the institutions which enforce penal laws in juvenile cases are the same as those which deal with adults. These include law enforcement agencies (the Zambia Police Service, Drug Enforcement Commission, Zambia Department of Immigration, and the National Prosecution Authority), adjudicative bodies (the Subordinate and High Court) and institutions which implement penalties issued by the courts (such as the Department of Social Welfare and Zambia Correctional Service). Also, the same procedures applied to adult cases as prescribed under the Criminal Procedure Code Act are also applied to juvenile proceedings with minor modifications in the Juveniles Act relating to matters such as the nature of the orders that can be issued in juvenile proceedings, the attendance of parents or guardians in courts proceedings and court's power to assist juveniles in examining witnesses.¹⁷

As regards adjudicating juvenile cases, the court with primary jurisdiction is the Magistrate Courts.¹⁸ Proceedings before these courts are adversarial. Hence, criminal proceedings are undergirded by the

12 Constitution of Zambia (n 4) art 7(b).

13 Constitution of Zambia (n 4) art 7(d).

14 Now Chapter 53 of the Laws of Zambia.

15 E Simuluwani 'Zambian approaches to disposition of juvenile offenders', unpublished master's degree thesis, Simon Fraser University (1985) 53.

16 Simuluwani (n 15) 65.

17 Juveniles Act, Chapter 53 of the Laws of Zambia, sec 64.

18 Juveniles Act (n 17) sec 63.

juvenile's presumption of innocence,¹⁹ which obligates the state to prove the juvenile's guilt beyond a reasonable doubt, through examination of witnesses. In these proceedings, the juvenile is provided an opportunity to cross-examine state witnesses and call their own evidence in rebuttal.²⁰ Once the court finds the juvenile guilty of the alleged offence, it is empowered to issue any orders available to it under the law including those applicable to adults²¹ except the death penalty.²² Courts can also issue orders:

- (a) for juveniles above the age of 16 years, detention in a reformatory or imprisonment in a prison;²³
- (b) for all juveniles –
 - (i) detention in an Approved School;
 - (ii) For the juvenile or their primary caregiver to pay a fine, damages or costs;
 - (iii) Placing the juvenile on probation;²⁴
 - (iv) For the juvenile to undergo counselling;²⁵ and
 - (v) For the juvenile to perform community service.

2.3 The customary subsystem

In contrast to the statutory subsystem, the customary law subsystem is established by unwritten customary laws. This was the sole system that applied to the geographical territory that is present-day Zambia before 1899, when European settlers first settled in the territory. Zambia has approximately 73 ethnic groups each, having its own customary system. Despite the plurality of customary systems, there are features common to all customary systems.

Across nearly all customary systems, pre-pubescent juveniles are treated differently from juveniles who have attained puberty. As regards pre-pubescent juveniles, customary law constructs them as incapable of understanding society's requirements of them and therefore neither subjected to trials nor sanctions. However, there appears to be no uniform age for the onset of puberty among the customary law systems. Research suggests that it can range from 10²⁶ to 15.²⁷ Pre-pubescent juveniles are, therefore, not subjects of the law

19 Constitution of Zambia (n 4) art 18(2)(a).

20 Constitution of Zambia (n 4) art 18(2)(e).

21 Juveniles Act (n 17) secs 73(1)(j) & (3).

22 Penal Code Act, Chapter 87 of the Laws of Zambia, sec 25(2).

23 Juveniles Act (n 17) secs 73(1)(d) & (i).

24 Juveniles Act (n 17) secs 73(1)(b), (c), (f) & (g).

25 Penal Code Act, sec 138(4).

26 Zambia Law Development Commission 'Report to the Minister of Justice on the restatement of customary law project' 2004 252; <http://www.zambialawdevelopment.org/research-reports/#> (accessed 1 May 2021).

27 Y Calliou & YH Burchill 'Customary law and juvenile justice' (2016) 9, https://www.tdh.ch/sites/default/files/le_droit_coutumier_khopeburchill_ycolliou_en.pdf (accessed 20 May 2021); Save the Children, 'An exploratory study on the interplay between African customary law and practices and children's protection rights: a focus on South Africa and Zambia' (2011) 14, <https://resourcecentre.savethechildren.net/node/5845/pdf/5845.pdf> (accessed 20 May 2021).

but objects of the community's care. From this perspective, juvenile delinquency is viewed as a lapse in children's upbringing to be dealt with within the juvenile's family or clan.²⁸ If a party external to the family unit is harmed by the juvenile's behaviour, the focus of communal interventions, if any, is on ensuring that the juvenile's caregivers repair whatever harm ensued from the juvenile's behaviour.²⁹

Post-pubescent juveniles are considered to be adults and treated as such.³⁰ As regards criminal conduct by this population, customary law treats it just like any other non-criminal infraction. It is important to note that unlike Western-style justice system, Zambian customary law constructs justiciable disputes as one single phenomenon and does not construct 'crimes' in a manner distinguishable from a civil wrong.³¹ Under customary law, any conduct which threatens social harmony is a justiciable wrong.³² This broad categorisation covers behaviours which are purely personal, such as assaults, and those which have a more public outlook such as murder or witchcraft. Within this framework, the goal of dispute resolution is restorative,³³ that is, to restore social harmony in the community by ensuring that the offender understands the impact of their conduct, reconciling the parties involved and repairing the harm caused by the anti-social behaviour.³⁴

The proceedings for determining whether the juvenile, whether pre or post pubescent engaged in the alleged delinquent conduct, or caused the harm are often informal, taking the form of negotiation, mediation and familial arbitration.³⁵ Where arbitration is used, the proceedings are inquisitorial in nature³⁶ and there is no evidential threshold to be met for any findings of fact.

2.4 Harmonising Zambia's juvenile justice system: a story of oil and water

The preceding discussion highlights fundamental differences in the statutory and customary subsystems. These differences are largely based on how the juvenile is constructed and the goal of each

28 Simuluwani (n 15) 43.

29 Simuluwani (n 15) 63.

30 Simuluwani (n 15) 40.

31 Zambia Law Development Commission (n 26) 252.

32 Simuluwani (n 15) 37.

33 Calliou & Burchill (n 27) 6.

34 Simuluwani (n 15) 38; United Nations Human Rights Office of the High Commissioner 'Human rights and traditional justice systems in Africa' (2016) 69, https://www.ohchr.org/Documents/Publications/HR_PUB_16_2_HR_and_Traditional_Justice_Systems_in_Africa.pdf (accessed 1 May 2021).

35 Danish Institute for Human Rights, 'Access to justice in the Republic of Zambia: a situation analysis' (2015) 29, https://www.academia.edu/20028811/Access_to_Justice_in_the_Republic_of_Zambia_A_Situation_analysis (accessed 3 May 2021).

36 Danish Institute for Human Rights (n 35) 276.

subsystem. Since the arrival of European settlers in present day Zambia, several attempts to harmonise the existence of the English law and customary law were made. The various constitutional documents which regulated the English settler's governance of present-day Zambia made provision for the continued application of customary laws subject to the so-called repugnancy clauses. A repugnancy clause is generally a clause used to qualify the application of native customary laws in most African countries colonised by the British. These clauses were intended to prevent the application of so-called 'barbaric practices' under African customary laws.³⁷ In terms of these clauses, customary laws would only be recognised and legally enforced only to the extent that they were 'not repugnant to natural justice or morality, or to any order made by Her Majesty in council, or to any regulation made' by the colonial administration.³⁸ Simply put, to be recognised as a source of law, customary law had to be consistent with the English sense of justice.³⁹

Within the juvenile justice system, however, a different standard was introduced with the enactment of the Juveniles Act. This statute was enacted at a time when Zambia was a British protectorate and made up of two distinct demographics that is, the European settlers and native Zambians bound by customary laws. To harmonise the subsystems, the Act, first, limited the application of statutory subsystem to specified areas which were those largely inhabited by European Settlers and, second, left customary laws to apply to the natives.⁴⁰ This was consistent with the British's concept of indirect rule.⁴¹ To achieve this, section 1 of the Juveniles Act it would apply only to geographical areas the Minister of Justice would designate and that customary law would be applied unless its application was not in the juvenile's best interests. Therefore, as long as Zambia's population remained segregated, the subsystems applied to two different demographics connected only by the condition that a native juvenile could be subjected to the English-style system if applying the customary subsystem would not be in their best interests. There is little literature and jurisprudence on how this applied in practice.

Upon attaining independence, the entire Juveniles Act was made applicable to the whole of Zambia.⁴² This created an overlap in the application subsystems over the same population. This development was also accompanied by several other changes whose ultimate design was to remove all adjudicative functions from customary institutions and vest them into the statutory system. Simuluwani⁴³ and Hoover, Piper and Spalding⁴⁴ provide a comprehensive discussion of the history

37 *Laoye v Oyetunde* [1944] AC 170 cited from E A Taiwo 'Repugnancy clause and its impact on customary law: comparing the South African and Nigerian positions – Some lessons for Nigeria' (2009) 34(1) *Journal for Juridical Science* 92.

38 North Eastern Rhodesia Order in Council, 1900, art 35.

39 Taiwo (n 37) 90; M Ndulo 'African customary law, customs, and women's rights' (2011) 18(1) *Indiana Journal of Global Legal Studies* 96.

40 Simuluwani (n 15) 54.

41 Simuluwani (n 15) 44.

42 By Gazette Notice 276 of 1964.

43 Simuluwani (n 15) 52.

of attempts to harmonise the statutory and customary sub systems and will not be repeated here. For purposes of this discussion, three developments are most significant.

First, Zambia retained the repugnancy clauses introduced by the English and discussed above. Repugnancy clauses were modified to reflect the fact that statutes are now enacted within Zambia. Since independence for customary law to be valid, it must be consistent with the Constitution,⁴⁵ written law, natural justice, morality, equity, and good conscience.⁴⁶ The latent effect of this is that the customary subsystem was viewed as being inconsistent with the notion of justice adopted from the colonial masters and began to erode.

Second, the Independence Constitution made a requirement that people could only be convicted for an offence if such offence were set out in a written law and such law set a penalty.⁴⁷ On its face, this provision eradicated criminal offences under customary law which are unwritten. However, there are some provisions of the Constitution which marginally suggest that customary law can still be a source of criminal liability. For instance, section 20(12)(b), in setting out an exception to the right to appear in criminal proceedings through a legal representative provided that

nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of – ... (b) subsection (2)(d) of this section to the extent that the law in question prohibits legal representation before a subordinate court in proceedings for *an offence under African customary law* (being proceedings against any person who, under that law, is subject to that law ...

In addition, the Local Courts Act, also recognises criminal offences under customary law.⁴⁸ These provisions seem to recognise that customary law, though unwritten can create criminal offences.

Third, the law was amended to limit trials for customary offences to the statutory system. The Local Courts Act was enacted to establish Local Courts and vest in them sole jurisdiction of trying criminal cases under customary law.⁴⁹ This statute makes it a criminal offence for any person not duly authorised by a written law to perform any adjudicative functions vested in these courts except in the case of customary arbitrations and the reaching of settlements under African customary law.⁵⁰ This provision was directly intended to strip customary authorities of all compulsory adjudicative functions and is still in Zambia's statute books.

There is some debate regarding the impact of these developments on the customary system broadly and the juvenile justice system in particular. Some scholars argue that these developments eradicated or

44 EL Hoover, JC Piper & FO Spalding 'The evolution of the Zambian courts' (1970) 2 *Zambia Law Journal* 55.

45 Constitution of Zambia, art 7(d).

46 Constitution of Zambia, art 118(3).

47 Independence Constitution of Zambia, sec 20(8).

48 Local Courts Act chapter 29 of the laws of Zambia, sec 12(2).

49 Hoover, Piper & Spalding (n 44) 56.

50 Local Courts Act Chapter 29 of the Laws of Zambia, sec 50.

at least limited the customary system's jurisdiction over criminal offences⁵¹ while others feel that it remained intact. However, a third view can be taken. It could be argued that these developments, although, clearly intended to impact customary law, actually had no effect on it. For instance, the constitutional requirement that people could not be convicted of 'criminal offences' unless the offences were in a written law could not apply to customary law because customary law does not create 'criminal offences' as already pointed out. In fact, the definition of an offence under the statutory subsystem refers to offences under written statutes. An offence is defined as 'any crime, felony, misdemeanour, contravention or other breach of, or failure to comply with, *any written law*, for which a penalty is provided.'⁵² In any event, as regards the juvenile justice system, these developments could not have impacted it for several reasons. First, the customary subsystem of the juvenile justice system was unaffected by the repugnancy clause because its application was explicitly preserved in section 1(2) the Juveniles Act. Second, since juvenile delinquency proceedings under the customary subsystem are not strictly criminal, they are unaffected by the constitutional requirement for the underlying offences to be in writing. Finally, the fact that delinquency proceedings under customary law are resolved through settlements and arbitration meant that they are unaffected by the provisions of the Local Courts Act prohibiting 'criminal trials' of cases outside the Local Courts.

Whatever view one takes about the legal implications of the post-independence legislative changes on the juvenile justice system, there is no denying that they were motivated by an intention by the government to create a single juvenile system based on the western style statutory subsystem.⁵³ However, in reality, it created a *de facto* bifurcated juvenile justice system with two independent subsystems having no connection between them. The risk this created is that a juvenile is not protected from punishment under both subsystems. This is because the so called 'double jeopardy' defence, the legal device traditionally used to protect people from being criminally punished twice of the same offending conduct, only operates where the first punishment was under a written law (the statutory sub-system). The PCA provides as follows:⁵⁴

... if a person does an act which is punishable under this Code and is also punishable under another Act or Statute of any of the kinds mentioned in this section, he shall not be punished for that act both under that Act or Statute and also under this Code.

The 2016 Constitutional amendments are intended to reverse the course charted from the Independence Constitution. The recognition of customary law as a source of law subject only to the Constitution⁵⁵ shows an intention to establish customary law as a source of law on par with subordinate written legislation. The recognition of the existence of the chiefs and customary institutions with the powers and privileges

51 Simuluwani (n 15) 63.

52 Interpretation and General Provisions Act Ch 2 of the Laws of Zambia, sec 3.

53 Simuluwani (n 15) 65.

54 Penal Code Act Ch 87 of the Laws of Zambia sec 2.

55 Constitution of Zambia (n 4) art 7(d).

conferred on them by their respective customary laws⁵⁶ coupled with a bar on parliament enacting legislation eroding these powers and privileges⁵⁷ is intended to ensure that the legislative efforts taken by the Kaunda government to limit the relevance of customary institutions in Zambia never recurs. Finally, the obligation placed on the formal courts to promote the use of traditional dispute resolution mechanisms is intended to recognise and reinvigorate the use of these institutions in Zambia. However, as far as the juvenile justice system is concerned, it is clear that these changes on their own have not gone far enough to harmonise the statutory and customary subsystems.

3 THE ROLE OF CUSTOMARY LAW INSTITUTIONS UNDER INTERNATIONAL AND REGIONAL INSTRUMENTS

3.1 An overview of provisions in international and regional instruments

In thinking about establishing a synergised juvenile justice system in Zambia, it is important to recognise the provisions of international and regional child rights which bear on the incorporation of customary institutions within the juvenile justice system. At the global level, the United Nations Convention on the Rights of the Child, 1989 (CRC) starts from the position that child policies must not unduly interfere with the roles that communal institutions of socialisation, including those under customary law, play in child rearing. It obligates state parties to

respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention.⁵⁸

The United Nations Standard Minimum Rules for the Administration of Juvenile Justice, 1985⁵⁹ (Beijing Rules) echo this position and recommend as follows:⁶⁰

Sufficient attention shall be given to positive measures that involve the full mobilization of all possible resources, including the family, volunteers and other community groups, as well as schools and other community institutions, for the purpose ... of effectively, fairly and humanely dealing with the juvenile in conflict with the law.

56 Constitution of Zambia (n 4) art 165(1).

57 Constitution of Zambia (n 4) art 165(2).

58 CRC art 5.

59 This is the pre-eminent UN instrument setting out non-binding standards for juvenile justice systems.

60 United Nations standard minimum rules for the administration of juvenile justice, 1985 rule 1.3.

Building on these instruments, the Committee on the CRC recognises the advantages that come with the use of customary systems in the juvenile justice system. It expresses itself as follows:⁶¹

Many children come into contact with plural justice systems that operate parallel to or on the margins of the formal justice system. These may include customary, tribal, indigenous or other justice systems. They may be more accessible than the formal mechanisms and have the advantage of quickly and relatively inexpensively proposing responses tailored to cultural specificities. Such systems can serve as an alternative to official proceedings against children and are likely to contribute favourably to the change of cultural attitudes concerning children and justice.

Instruments on the African continent also emphasise the need for children to be raised in a way that preserves African culture and moral values. Article 11(2)(c) of the African Charter on the Rights and Welfare of the Child, 1990 (African Children's Charter) provides that African children's education and socialisation should be directed towards 'the preservation and strengthening of positive African morals, traditional values and cultures'. The Charter also repeats the need for child rearing practices in Africa to reify African values when it provides, in the Preamble as follows:

it is imperative to edify educational systems which embody the African and universal values so as to ensure the rooting of youths in African culture, their exposure to values of other civilisations, and mobilize forces in the context of sustainable, endogenous participatory development.

The Charter goes on to emphasise the need to recognise and utilise customary institutions in resolving conflicts. Article 14 reads as follows:

Elders and traditional leaders are cultural stakeholders in their own right. Their role and importance deserve official recognition in order for them to be integrated in modern mechanisms of conflict resolution and inter-cultural dialogue system.

From this, it appears that customary institutions are relevant at two levels of a juvenile justice system. First, the African Children's Charter and African Charter emphasise the relevance of these institutions in inculcating African moral values which can serve as part of a strategy to prevent children engaging in delinquency. Second, the UNCRC, the Beijing Rules Committee on Experts on the Rights of the Child and the Children's Charter recognise the positive role these institutions can play as part of the legal infrastructure to for dealing with juvenile delinquency without resort to the criminal justice institutions.

3.2 Addressing some concerns regarding customary dispute resolution mechanisms

There are several concerns often raised regarding the use of customary institutions when dealing with children. These must specifically be addressed as part of the strategy for incorporating customary institutions into the juvenile justice system. To this end, the Committee on the CRC observes as follows:

Considering the potential tension between State and non-State justice, in addition to concerns about procedural rights and risks of discrimination or marginalization, reforms should proceed in stages, with a methodology that involves a full

61 General Comment 24 (n 10) para 102.

understanding of the comparative systems concerned and that is acceptable to all stakeholders. Customary justice processes and outcomes should be aligned with constitutional law and with legal and procedural guarantees.⁶²

Some scholars are concerned that customary law systems extol social harmony at the cost of procedural safeguards for the children they deal with.⁶³ The safeguards allegedly sacrificed in the pursuit of social harmony include the lack of the rights to remain silent, presumption of innocence, lack of evidential thresholds to guide the determination of findings of fact, the lack of records of the proceedings and weak oversight mechanisms which allow for decisions which seem arbitrary.⁶⁴ Other concerns are directed at the composition of these institutions. Commentors observe that customary adjudicators are rarely appointed based on any training but usually based on heritage. This raises questions about the competence of these adjudicators to address the peculiar challenges of juvenile delinquency. Third, it is often observed that the views of juveniles are rarely sought and considered in customary law proceedings which leads to a charge that these institutions discriminate against children.⁶⁵ Finally, some observers take the view that the application of customary law may not be tenable in today's societies due to the disassociation of people from the rural settings to which customary laws are often limited and also the influx of non-native migrant communities who are not the subject of these customary laws.⁶⁶

To begin with, the concerns about the lack of procedural safeguards, the untrained adjudicators and the unstructured decision-making processes are often raised by people alien to these mechanisms. These features of the customary institutions do not appear to bother the users. Research shows that customary institutions in Zambia are vastly more popular and result in outcomes that disputants find more satisfying than the statutory subsystem.⁶⁷ To the Zambian users of these institutions, the apparent informality appears is what makes these institutions affordable, familiar and flexible enough to tailor outcomes to meet the needs of society.⁶⁸ Also, although the adjudicators may be untrained in the conventional sense, they are often well vested in the society's norms and values and have years of experience resolving disputes. It is also worth noting that similar western style dispute resolution mechanisms such as negotiation, mediation and arbitration rarely face similar criticisms even when they can have informally trained adjudicators themselves.

62 General Comment 24 (n 10) para 103.

63 Caliou & Burchill (n 27) 6.

64 Caliou & Burchill (n 27) 9.

65 Caliou & Burchill (n 27) 9; United Nations Human Rights Office of the High Commissioner (n 34) 63.

66 Hoover, Piper & Spalding (n 44) 50.

67 Danish Institute for Human Rights (n 35) 252.

68 African Human Security Initiative, 'The criminal justice system in Zambia: Enhancing the delivery of security in Africa' (2009) 113, <https://www.africa-portal.org/publications/the-criminal-justice-system-in-zambia-enhancing-the-delivery-of-security-in-africa/> (accessed 13 May 2021).

Furthermore, although little is being done in several African countries to reinforce the role of customary law in criminal policy, global trends in criminal policy are moving towards adopting approaches which are similar to those at the core of African customary law. As discussed, African customary law's goal when dealing with anti-social behaviour is restorative. In line with this, there is growing recognition at the global level of the benefits of restorative justice as a penal goal not only for the juvenile justice system but also the broader criminal justice system. This recognition is evident from the adoption of the basic principles on the use of restorative justice programmes in criminal matters by the United Nations in 2002. However, the argument for maintaining records of proceedings before these bodies and the need to establish more robust review mechanism is worth taking on board.

There is little debate that customary law institutions tend to inadequately consider the views of children in their processes. This can be attributed to the fact that most ethnic groups in Zambia, children depend on adult men for subsistence.⁶⁹ As a result, children are constructed as objects of care and protection and not holders of rights equivalent to adult men.⁷⁰ This no doubt violates international customary law which requires that every person be recognised and be treated equally before the law and international best standards regarding juvenile justice which require adequate both that the views of children be obtained wherever possible and that there be adequate representation among the institutions in the juvenile justice system.⁷¹ However, this critique is not unique to customary systems. One could argue that the statutory sub-system suffers the same problem in that although children ostensibly have a right to express themselves during the proceedings, the esoteric nature of adversarial proceedings and the intimidating environment created in these proceedings makes the exercise of this right impracticable in most cases. On this issue, the office of the Auditor General of Zambia concluded, regarding the statutory sub-system: 'It was observed that the courts lacked the necessary facilities to provide the required child friendly environment for juvenile offenders as stipulated in the Juvenile Act and the CRC.'⁷²

Finally, in respect of the charge that customary law may be out of step with the demographic realities of modern-day Zambia, this in itself, is not a basis for abandoning the use of this system. One feature of customary law that compares favourably to the statutory subsystem is the former's near unlimited capacity to adapt to suit the society's lived experiences whether economic, social or political which contrasts

69 K Kariseb 'Signs of triumph, trial and tribulation: reflections on the domestication and implementation of article 9 of the Women's Rights Protocol in Namibia' (2018) 2 *African Human Rights Yearbook* 150-151, <http://doi.org/10.29053/2523-1367/2018/v2n1a6> (accessed 1 July 2021).

70 Ndulo (n 39) 89.

71 Rule 22.2 of the Beijing Rules.

72 Office of the Auditor General of the Republic of Zambia (2018) 'Performance Audit on the Juvenile Justice System in Zambia for the Period 2014 to 2017' (unpublished) 41.

the latter's rigidity and cumbersome procedural requirements for change.⁷³ Therefore, customary law is fully capable of adapting to the demographic and social changes identified in the critique. In fact, as shown below, some countries have adapted their customary law institutions to accommodate the changes in the populations to whom customary law is intended to apply.

A point that also ought to be made is that some of the features of the customary subsystem make it particularly apt for dealing with juvenile delinquency. For instance, its flexibility and capacity to keep abreast with social changes makes it a far superior system for addressing acts of delinquency which tend to be equally versatile. Customary's broad definition of delinquency which covers all conduct which threatens social harmony will naturally cover even emergent threats to harmony. Conversely, the statutory subsystem will only cover offences listed in the statute books. This distinction in speed of adapting was brought into contrast as regards dealing with cyberbullying. Customary institutions had little trouble dealing with this phenomenon which is covered by the broad prohibition for insulting and intimidating language while the statutory subsystem only captured this behaviour at the beginning of 2021 with the enactment of the Cyber Security and Cyber Crimes Act, 1 of 2021.

Second, the speed with which disputes are dealt with under the customary subsystem is not only required by child rights instruments⁷⁴ but also entail minimum disruption to the live and developmental progression of the juvenile. This is in addition to the fact that no detention is ever used either to secure the juvenile's attendance or as a punishment before these institutions.

Third, the informality of the proceedings in the customary subsystem, the use of local languages and the fact that adjudicators are often known by, and know the juvenile, all serve to create a more child-friendly environment than prevails in the statutory subsystem. In this environment, the juvenile is better able to participate in the proceedings. Also, the fact that the adjudicators will often know the juvenile and their home situation makes it more likely that these institutions will only intervene where intervention is necessary and issue dispositions to address the underlying causes of the juvenile's delinquency. However, it is worth bearing in mind that this knowledge of the juvenile can also impede the conduct of a fair trial especially as regards juveniles who have a reputation of delinquency or from families with such reputation.

Finally, the fact that pre-pubescent juveniles are not the direct subjects of delinquency proceedings shields these children from the

73 Danish Institute of Human Rights (n 35) 35; United Nations Human Rights Office of the High Commissioner (n 34) 1; A Varvaloucas et al 'Improving the justice sector: law and institution-building in Sierra Leone' in OEG Johnson (ed) *Economic challenge and policy issues in early-twenty-first century Sierra Leone* (2012) 511 <https://www.theigc.org/wp-content/uploads/2012/03/Johnson-Ed.-2012-.pdf> (accessed 2 February 2022).

74 See for instance the CRC, art 40(2)(b)(iii) and the Beijing Rules, Rule 20.

labelling effect that can come with bringing children into contact with the criminal justice institutions.

4 A NEW WAY OF THINKING ABOUT CUSTOMARY LAW AND JUVENILE DELINQUENCY: THE EXAMPLE OF SIERRA LEONE

Even when it is acknowledged that customary institutions have a role to play in the juvenile justice system, situating them within legal systems that are heavily shaped by colonial forces is not any easy task. Despite this, there is at least one African nation, the Republic of Sierra Leone, whose approach offers a promising example, on paper, of how this can be done while simultaneously addressing some of the concerns raised regarding the use of customary institutions.

Sierra Leone enacted its Children's Act in 2007.⁷⁵ One of the most notable features of this statute is the innovative way it deals with the incorporation of customary institutions into Sierra Leone's juvenile justice system. Sierra Leone is a particularly good comparison to Zambia because of the similarities between the two countries', histories, demographic composition and legal structures. Demographically, Sierra Leone, like Zambia has several ethnic groups, about 149 chiefdoms headed by Paramount Chiefs with village chiefs overseeing individual towns and villages.⁷⁶ Also, like Zambia, it was formerly administered by the British leaving it with a dual legal system which is split between a formal, British-style legal system and its indigenous customary system.⁷⁷

Sierra Leone has legislated the co-existence of customary and statutory systems by creating parallel subsystems, one for dealing with minor acts of delinquency and the other for dealing with serious offences. Minor acts of delinquency are the preserve of Child Panels which are to be established at the district level.⁷⁸ These panels are a blend of customary, religious, and statutory institutions. They comprise seven members as follows:

- (i) a chairperson nominated by the district council from among the members of the council;
- (ii) a member of a women's organisation;
- (iii) a representative of the Chiefdom Councils in the district;
- (iv) the district social welfare officer, who shall be the secretary;
- (v) a district council member, representing the council;
- (vi) two other citizens from the community of high moral character and proven integrity one of whom shall be an educationalist.

75 By the Supplement to the Sierra Leone Gazette Extraordinary Vol CXXXVIII, No 43 dated 3 September 2007.

76 Varvaloucas et al (n 73) 497.

77 Varvaloucas et al (n 73) 497.

78 Children's Act 2007 sec 71.

In dealing with juvenile delinquency, the Panels are empowered to deal with minor acts of delinquency through mediation⁷⁹ in which the child may be asked to apologise, offer restitution or a form of service to victim of their conduct.⁸⁰ Child Panels can also facilitate reconciliation between the child alleged to have committed an offence and any person offended by the action of the child.⁸¹ They can also impose an order, called a 'community guidance order' placing the juvenile under the guidance and supervision of a person of good standing in the local community for a period not exceeding six months for purposes of his reform.⁸² A Child Panel may in mediation propose an apology, restitution to the offended person or service by the child to the offended person.

Serious offences such as murder, treason and felonies related to the serious damage to property, injury to the person, and other serious crimes that may from time to time be specified in the Gazette by the Minister responsible for justice⁸³ are dealt with through juvenile justice institutions in the statutory subsystem, and these comprise law enforcement agencies, Magistrate Courts, and the High Court.⁸⁴

There are several features of this set-up that are worthy of some praise. First, the establishment of the panels at the district level harnesses the benefits of accessibility associated with customary institutions. Importantly, the composition of these bodies directly addresses the concerns about the lack of child perspectives in the customary system as well as the need for trained personnel in customary institutions dealing with delinquent juveniles. Also, the lack of procedural safeguards is addressed by downgrading the proceedings to be more conciliatory and mediatory, which ensures that outcomes are consensual.

Second, the inclusion of customary, state, and religious institutions is a noteworthy innovation. African societies are religious. Recognition of this religiosity is not only a reflection of the evolution of African cultures, but it is also in keeping with the requirement to ensure that the actors in the juvenile justice system reflect the diversity within the society. Rule 22(2) of the Beijing Rules provides that '[j]uvenile justice personnel shall reflect the diversity of [j]uveniles who come into contact with the juvenile justice system.'

Third, by treating minor offences as acts of delinquency within institutions which perform the broader function of child welfare, Sierra

79 Children's Act (n 78) sec 71(2).

80 Children's Act (n 78) sec 75(5).

81 Children's Act (n 78) sec 75.

82 Children's Act (n 78) sec 74(4).

83 Children's Act (n 78) sec 52(1).

84 I Leao 'An analysis of specific laws concerning youth crime and associated procedures for juvenile delinquency: the Sierra Leone case under the framework of international law' (2011) 11, https://www.academia.edu/3586339/An_Analysis_of_Specific_Laws_Concerning_Youth_Crime_and_Associated_Procedures_for_Juvenile_Delinquency_The_Sierra_Leone_Case_Under_the_Framework_of_International_Law, 11 (accessed 30 June 2021).

Leone's Children's Act casts delinquency in its proper light as an issue of child welfare and not criminal policy.

Despite the commendable job Sierra Leone's statute does in incorporating customary institutions, it has some limitations. First, it does not appear that Child Panels have exclusive jurisdiction to deal with minor allegations of delinquency. From the face of the statute, there is nothing to suggest that the state is proscribed from prosecuting minor acts of delinquency. The lack of an express prohibition is likely to water down the apparent separation between the systems for dealing with minor acts of delinquency separate from serious offences. Second, the differentiation based on the offence the juvenile is alleged to have committed may be difficult to police. This is because unless there are simultaneous measures to limit prosecutorial discretion, the prosecuting authority can choose to skip the jurisdiction of Child Panels by simply charging juveniles with serious offences even where the evidence does not support such a charge. Third, this differentiation is also unprincipled. There is no justification based on principle why two juveniles who commit offences must be treated under different systems by reason only that one has committed a felony and the other a misdemeanour. The requirement to uphold the best interests of juveniles requires that in all interactions with state institutions, the juveniles must be treated first and foremost as juveniles and without differentiation based on the charges they are facing. The juvenile charged with a felony who also enjoys the presumption of innocence should not forfeit her childhood by reason only of the fact that they are charged with a felony.

5 A CUSTOMARY-BASED FRAMEWORK FOR DEALING WITH JUVENILES IN ZAMBIA: A COALITION OF SUB-SYSTEMS

Sierra Leone's Children's Act, 2007 can provide an inspiration for how Zambia can rebalance its juvenile justice system as required by the 2016 constitutional amendments. A balanced co-existence of the systems can only be achieved if they are placed on an equal plane and clear linkages between the two are established. What is clear from the discussion is that section 1(2) of Zambia's Juveniles Act has not managed to create a functional linkage between the two subsystems with the consequence that the two operate independently. In addition, it has established a juvenile justice system whereby the outcomes of juvenile cases depend on where the juvenile is located. In what follows, I propose a framework for maintaining the statutory sub-system largely intact but modifying the customary subsystem to exist alongside and not beneath the statutory subsystem as is currently the case.

A proper framework for a cohesive juvenile justice system in Zambia would entail maintaining the statutory subsystem but developing the customary subsystem to be on par with this system in a synergised fashion. For this, I propose a three step-process.

At step one, the Constitution needs to set up customary law alongside and not beneath the written law. The current constitutional provision on the sources of law partly does this. However, this is then watered down by the repugnancy clauses contained in the Constitution and subordinate legislation which still establish consistency with a written law, natural justice and good conscience as preconditions for customary law's validity. These should all be deleted. Consistency with the Constitution should be the only requirement that customary law must meet.

Step two, customary institutions with jurisdiction to settle cases of juvenile delinquency should be reorganised along the lines of Sierra Leone's Child Panels. The advantages of this transformation have already been discussed. Additional impetus for this transformation can be situated in Zambia's Constitution. First, as regards gender parity, customary institutions are public bodies,⁸⁵ which are bound to the constitutional requirement to ensure 'adequate and equal opportunities for appointments, training and advancement of members of both gender and members of all ethnic groups'.⁸⁶ As regards the inclusion of religious officials, the Constitution reflects Zambia's 'multi-religious ... character'. This religiosity is even more important when it comes to child rearing and must be reflected in all institutions for the rearing of children as the Beijing Rules recommend. This may not be difficult to do. In the last couple of years, Zambia has been creating institutions at the district level called 'Child Protection Committees' which comprise personnel from the Department of Social Welfare and customary institutions for the purpose of promoting the welfare of children.⁸⁷ All that needs to be done is to establish these bodies by law, clearly provide for their composition to include the same number of juveniles and women as men and expand their jurisdiction to include resolution of juvenile delinquency.

The final step involves establishing jurisdictional rules for the two subsystems to prevent overlaps, building clear linkages between the two sub-systems and oversight mechanisms to police the linked system. Any reforms in this area can be linked to a few developments which are current in Zambia. Three are particularly relevant. The first, the Village Protection Committees, have already been discussed. Second, Zambia is in the process of enacting a new statute intended to revamp its juvenile justice system. One of the fundamental provisions intended to be introduced is to raise the minimum age of criminal responsibility (MACR) to 14 which will align it to the internationally recommended age.⁸⁸ Although this is a positive move, there is a risk that anti-social behaviours by children below this age which often points to the need for social welfare interventions will remain unaddressed. Third, in 2018, Zambia promulgated a National Diversion Framework (NDF) which is an administrative framework for dealing with juveniles outside the

85 Constitution of Zambia (n 4) art 171(2).

86 Constitution of Zambia (n 4) art 173(1)(j).

87 https://tbinternet.ohchr.org/Treaties/CRC/Shared%20Documents/ZMB/CRC_C_ZMB_Q_2-4_Add-1_22814_E.pdf (accessed 2 February 2022).

88 General Comment 24 (n 10) para 22.

statutory subsystem using restorative approaches. The NDF is currently being piloted. What this development shows is that there is some political will within Zambia to use restorative approaches to dealing with juvenile delinquency. What is disappointing, however, is that instead of building on the customary subsystem, which is already restorative, the NDF establishes diversion as a disposal within the statutory subsystem and largely relies on institutions within the statutory subsystem.

Once a synergised juvenile justice system is established following the three step process just suggested, this synergy can be emphasised by establishing clear jurisdictional rules to regulate this system. The following could be done. First, a clear rule must be established that children under the MACR, proposed to be at 14, cannot be subjected to any form of court proceedings for acts of delinquency. Instead, such children must be referred to the appropriate social welfare institutions. Second, as regards children above the MACR, the customary law subsystem must be given primacy and resorted to unless the juvenile or their primary caregiver raises an objection. This set-up is because section 1(2) of the Juveniles Act makes the application of the customary subsystem mandatory in all juvenile cases the only exception being in cases where the application of this subsystem would not serve the juvenile's best interests. Under international child rights instruments, the best way to assess the child's best interests would be to respect the views of the juvenile or those of their primary caregivers on how the case must be determined. Therefore, the starting point would be that every juvenile case would be by customary institutions unless the juvenile opts out and chooses to have their case determined in the statutory subsystem. Once the customary subsystem assumes jurisdiction over a case, the outcome of the proceedings must be reduced in writing and submitted to the Magistrate Court for review and reduction into a court order. This would provide accountability, ensure that the decisions of these institutions are in the juvenile's best interests as required by section 1(2) of the Juveniles Act and also align with the Constitution. Finally, the statutory subsystem would apply to any juvenile who opts out of the customary sub-system. The entry point into the subsystem would be the NDF. All cases eligible for diversion under the NDF could be diverted. Those ineligible for diversion can proceed to the court system. The customary institutions can report the case to the Police and the case would thereafter proceed under the statutory sub-system.

6 CONCLUSION

International public law recognises the difficulty of creating state policies for the proper upbringing of children. It also recognises the importance of utilising all a society's resources in socialising children and, the role of customary law institutions in this endeavour is gaining prominence. The rise of customary law institutions aligns with the goals of the Children's Charter which include reifying the role that these institutions play in conflict resolution. This article built on these points to make a case for greater integration of customary law institutions in the juvenile justice system using Zambia as an example. The article

showed the chaotic state of Zambia's laws relating to the role of customary institutions in the juvenile justice system and pinpointed the progressive replacement of the customary value system with the adopted Anglo-American value system as the cause of this chaos. The article argued for a reification of the customary law system. It sought inspiration from the Sierra Leonean Child Panels to develop a framework upon which Zambia can reorganise its customary institutions and incorporate them into the juvenile justice system while at the same time updating these institutions to align them with the demands of international child rights instruments and modernity. The life of nation need not necessarily entail the death of the tribe.