

CHAPTER 2: ANTECEDENT FACTORS AFFECTING JUVENILE OFFENDERS FROM ACCESSING PRE-TRIAL DIVERSION SERVICES: A REVIEW

The chapter seeks to critically review relevant literature in existence in the corpus of scholarship on the discourse of restorative juvenile justice with much accentuation or stress on the antecedent factors affecting juvenile offenders from accessing Pre-Trial Diversion services. The theoretical framework informing the study shall also be outlined in the chapter. Thereafter, an in-depth review of related literature is conducted at global, regional and national levels in respect to the objectives of the study. Thus, this literature review shall also orient the study to the current gaps in juvenile justice systems and this will then help to answer the study's research objectives. At the end, a chapter summary shall also be provided.

Owing to the anti-oppressive and child-rights sensitive nature of the study, the Restorative justice theory was adopted. The concept of restorative justice firstly appeared in written sources since the first half of the 19th century and it is deeply embedded in 'socio-criminology', 'moral' and 'intellectual' development research (Berg, 2012:14). The modern usage of the term was introduced by Albert Eglash in 1977. During the 1990s, the concept became highly popular, masking and surpassing other justice notions that were circulating in the 1970s and 1980s (Daly, 2013). However, Restorative Justice as a new paradigm or approach to juvenile justice was popularized by Zehr in the 1990s. It later became a globally recognized approach to justice in the 2000s when it appeared in the United Nations Economic and Social Council and the European Commission for the Efficiency of Justice Guidelines for a better implementation of the recommendation pertaining mediation in penal matters.

Restorative justice as presented by Wilson *et al*, (2017) cited in Mangwiwo and Chitereka (2021), is a theoretical framework that views crime as a gross disruption of people and relationships that in turn, creates a responsibility to make things right. According to Zehr (2002:114), this theory views the justice system as constituting of three fundamental pillars that are firstly, engagement, participation or involvement of an enlarged circle of parties who have a stake to the offence in question. The second pillar is harm and needs that must be balanced with obligations and the final pillar is 'obligations' that must emanate from the harm posed; that then implies responsibility and accountability for the harm caused. This theory's key tenets are reparation, rehabilitation, restoration, transformation, crime prevention, corrective justice, reintegration, healing, reconciliation and mediation (Martin, 2005:11). It also stresses on the significance of probation, supervision, referral and institutionalization in dealing with juveniles' cases as opposed to custodian sentence. Thus, the philosophical tenets of this theory are in tandem with the desired goals and objectives of competent social work practice in the context of juvenile justice. According to Martin (2005), this theory offers a more rehabilitative and reformatory approach to juvenile justice establishment and thus, it presents itself as a protection model that views children as physically and cognitively incapable of committing crimes; hence vulnerable. To this end, it best suits the study as it advocates for a distinctive or separate juvenile justice system that is moulded or tailor made to specifically meet children's diverse or unique needs from those of adults. This is precisely what Zimbabwe still lacks in terms of practice and partly in legal theory regardless of all the attempted efforts to develop a Child Justice Bill (among other proposed reforms) to establish a distinctive child justice system. More still, this theory allows a comprehensive conceptualization of the underlying factors influencing juveniles' accessibility to diversion services. These factors may span from politico-legal, region-cultural, socio-economic to geo-environmental (Kaime, 2009).

This theory also accounts for the needs that crimes create for the juvenile offenders as it also proposes alternatives to punishment; hence this renders it the most fitting theory for the study as it places children's welfare and responsibilities on a balanced position of eminence. In case of Chitungwiza District, the PTD Programme is one of such programmes that seeks to address juvenile crimes with recognition of their welfare and rights although its effectiveness has been questioned in various platforms. This owes to proliferating cases of juvenile offending and an increase in children's rights abrogation especially those who infringe the law in Zimbabwe, Chitungwiza district included. The study therefore seeks to explore such barriers to PTD accessibility. However, given the nature of the study, the key child rights concepts that include the child's best interest, right to life, development and survival non-discrimination and right to be heard in all juvenile justice processes are the primary considerations recognized by this theory (Bazemore and Schliff, 2005). Thus, although this theory is taken for granted in most children's cases, Wilson et al (2017) and Wong et al (2016) agree that it plays a pertinent role in mandating the state to protect vulnerable parties in the courts of justice since it is also rooted in the doctrine of *parens patriae*. The latter concept in the context of modern children's courts is when guardianship or custody of a juvenile is temporarily taken from the parents and that juvenile is placed under the care of social services or foster parents until the court determines what is in best interest of that juvenile.

The Pre-Trial Diversion Programme in its whole phenomenal sense, is when a juvenile offender is deviated from the formal court procedures; and this act is done before a juvenile goes through the formal court procedures to avoid retribution and unnecessary detention (Davis and Busby, 2006:102). McGregor (2010:31) concurs with Brink (2010:24) on the above provided conceptualisation, but Skelton and Tshehla (2008:52) add that after this process of diversion, these juvenile offenders are then referred to applicable reintegrative programmes. Whatever view suggested, all the above conceptual views still appear to relate to the process of diverting all young offenders from the harsh criminal justice

system. This PTD Programme thus, can also help in curbing recidivism, but it can solely be attained if juveniles could be successfully rehabilitated (Munzie, 2004). However, each and every country in the world seems to have different PTD options and versions coupled with legal frameworks informing the operationalization of such programmes depending on the context. Yet still, the overall objective of these PTD programmes as averred by Mangwiro and Chitereka (2021) is to establish restorative, preventive, rehabilitative, protective and reformatory justice for juvenile offenders who might have committed non-serious offenses (those attracting a sentence of less than a year).

In a bid to draw from the experiences of other countries and obtain a global view, and to offer a point of departure concerning Zimbabwe's available diversion services, this section considers the nature and scope of the PTD programmes in other countries. The countries discussed hereunder therefore, were chosen on the basis that they have been running diversion programmes for many years and more still, some were operationalized without a distinctive legal framework for diversion like Zimbabwe currently. In the USA as presented by Kleinhans (2013:112) and Walsh & Russell, (2010:222), there is the wilderness adventure programme that is a 21-day diversion programme developed in Minnesota, America, to assist juvenile offenders address issues that lead to their anti-social behaviour. Other diversion practices in the USA as supported by Van Ness et al (2001) include restorative justice programmes, where offenders are held responsible for the harm they have caused. These programmes do not vary much from those in Australia and South Africa. According to Thembo (2018) nonetheless, it is uncertain whether it is implemented in the same way and to what extent the resources differ between programmes in the different countries. More significant to note is that diversion schemes are presented by police, school and court programmes to juvenile offenders and thus, diversion is either partially or totally applied (Kratcoski or Edelbacher, 2009:211; Sibisi, 2020, Promise, 2023). When diversion is applied totally, the police seldom act and can solely give the juvenile a

warning. In partial diversion, the police refer the juvenile who have committed non-serious offenses to a programme and in the USA, the police are involved in managing diversion programmes (Samuels, 2015). This is similar to the situation in Hong Kong, China, where the police can refer young offenders to diversion services that they manage.

Since the 1980s and 1990s, Hong Kong, China has seen an improved focus on alternatives to the courts and new community-based diversion options in Hong Kong (Kleinhans; 2013; Wing Lo, Wong & Maxwell, and 2006:11). According to Maxwell and Hayes (2006) the Police Superintendents Discretion Scheme is utilized to divert juvenile offenders who might have committed non-serious offences away from the criminal justice system. Even though there seemed to be no restorative justice programmes, these juvenile offenders could be simply warned by police who were required to attend aftercare supervision. Police may also refer them to go for social support services and other therapeutic counselling sessions (Wing Lo *et al.*, 2006:11). Wong and Wing Lo (2010:8) however, aver that restorative justice was established to Hong Kong in 2002 and was taken as a way to divert young offenders away from the criminal justice system. Many issues were raised with regards to the implementation of the restorative justice approach, some within which were that restorative justice may be an enabling factor for increase in juvenile crime, and mediation could be influenced by political parties in Hong Kong (Karp and Breslin, 2001:249). This approach was practised and experimented with in schools and in some welfare organisations with young learners who had behavioural problems and with juveniles (Wong & Wing Lo, 2010:8, 11, 12). There was uncertainty concerning the implementation of restorative justice as an option of diversion in Hong Kong because it was an unfamiliar concept. However, Munzie (2004:112) other diversion options were practised that were effective in some ways, but they seemed to lack the restorative justice element. To this end, offenders were not encouraged to repair the harm they had caused and this might have contributed to juvenile re-offending and besides, Njungwe (2008) avers that there is no

legal framework for the practice of diversion, so restricting the chances for juvenile offenders to be diverted away from the criminal justice system.

Another good example is Australia where there has been a drastic increase in diverting drug-using offenders to therapeutic treatment. According to Clancey & Howard, (2006:377,378) drug courts have been put in place to deal specifically with cases of drug-using offenders on the principle that the law is seen as the therapeutic agent. In the eyes of Hammersley (2002:7), substance and drug abuse is considered to lead to criminal activities such as possession of illegal substances, theft, and violence due to the effect of the substance on the brain, by addressing the substance use, the criminal behaviour would then be reduced. Although most offenders passing through the criminal justice system hail from traditional communities in Australia, just a small number of juvenile offenders from these communities were in diversion schemes (Clancey & Howard, 2006:381). Restricted access to diversion services is likely to eventuate in fewer offenders having the chance to be rehabilitated, thus contributing to recidivism and so perpetuating the crime cycle. Clough, Lee and Conigrave (2008:437) elaborate that there are barriers to the implementation of diversion programmes in Australia.

In Hungary, there seem to be no formal system of diversion especially in Budapest but this seldom mean that diversion is not practiced. These diversion practices as put forward by Vandi (2007:37) involve the settling of none-serious cases that include parents, relatives, care-givers of victims and juvenile offenders in police stations, customary courts or even with community and religious leaders. Parental and family participation in diversion programmes is pertinent as it contributes to a more successful intervention. This contributes to reduction in recidivism. Hansen (2006:1) further asserts that because there is no separate legal system for juveniles in Hungary, restorative justice cannot be utilized frequently. The paucity of a legal system for juveniles

consequently results in many young offenders being excluded from the chances of being rehabilitated.

Studies in Singapore portray that there have been multiple attempts in recent years to address the plight of juvenile offenders outside the criminal justice system. According to Chen Zhang, Choo & Lim (2009:139). Various services, programmes coupled with juvenile homes in this vein, have been used in Singapore to rehabilitate young offenders. Someda (2009:82) supports that the rehabilitation of these juvenile offenders have largely contributed to the reduction of recidivism in Japan. Therefore, it is to the society's great advantage that young offenders be rehabilitated as it eventually curbed the problem of crime. Diversion programmes that are utilized in Singapore to rehabilitate juveniles and young offenders at risk of delinquency and those who have committed offences include guidance programmes, community service orders, weekend detention orders, periodic training orders and probation orders (Lawrence et al, 2009; Chen Zhang et al., 2009:139). Other diversion programmes to help juveniles and their families in Singapore include the Streetwise Programme, Youth Family Care Programme and School-Probation-Courts. These programmes are used within a legal framework, the Children and Young Persons Act (Chen Zhang et al., 2009:139). More to the list of programmes is the drug court that is run as a diversion option targeting non-violent drug abusers without serious anti-social tendencies in Japan (Someda, 2009:83). The aforementioned programmes are aimed at rehabilitation and involve the family in the intervention that is regarded as beneficial for the rehabilitation of these offenders. The focus on the rehabilitation of juvenile offenders follows research that indicated that punitive and retributive measures to address crime were unsuccessful.

Most African countries like Botswana, Malawi, Mozambique, Tanzania and Zambia with the coming of the UNCRC (1989), the Beijing Rules and the ACRWC (1999), have also made significant strides in establishing diversion programmes that seek to promote restorative and

rehabilitative juvenile justice (Moirira, 2013; Vengesai, 2014; Nyazema, 2018). However, in as much as these programmes seek to accomplish the same goal, they differ in structure, design and scope. Yet still, Zimbabwe's diversion programme seem to be more alike with that of South Africa particularly in design and scope. Some scholars like Sithole (2021) and Sithole (2023) even contend that Zimbabwe's juvenile justice system taps more from that of South Africa that is thought to be one of the African countries with a robust and distinctive juvenile justice system.

In this light, South Africa provides multiple diversion options and programmes at each diversion level. To this end, probation officers, diversion officers, prosecutors and magistrates must be fully informed about all the available options to ensure that any juvenile is referred to an option that is in their best interest and will be most beneficial for the rehabilitation and developmental needs associated with the juvenile's delinquency (O'Mahony *et al*, 2012:269). According to Nyazema (2018), South Africa's PTD programme differs from that of Zimbabwe in that, community service seems to practically apply not in Zimbabwe.

The PTD Programme evolved from the understanding that the viewpoint of cases that involved juvenile offenders was not sufficient enough, with large numbers of juveniles being prosecuted and incarcerated without cause (UNICEF, 2019; Bhaiseni, 2016). The PTD is provided for in Articles 37 and 40 of the UNCRC that stipulate that juveniles in conflict with the law should not be ruthlessly treated and should be provided with legal assistance. According to Mangwiro and Chitereka (2021) the Pre-trial diversion programmes comprise part of a restorative justice framework and PTD in Zimbabwe was established in 2009 when UNICEF and Save the Children firstly instituted a pilot project that was then formally adopted by the government in 2016 through the Ministry of Justice, Legal and Parliamentary Affairs. In May 2013 the government, through the support of partners such as Save the Children and UNICEF among others launched the PTD programme

aimed at exploring better ways of addressing cases of juvenile offending for minor crimes outside the formal justice system (Sloth-Nielsen and Mushohwe, 2020:15). It is a national programme that ensures all juveniles who commit non-serious offenses in both rural and urban areas have equal access to justice. Since 2016, a considerable number of juveniles in conflict with the law have been diverted from the formal criminal justice system and are supported in their rehabilitation (Mears *et al*, 2016:53).

The establishment of the PTD programme resulted in the development of various diversion options that were set to prevent juveniles from appearing before the formal justice system, that according to Reiss (1988) cited in JCT (2017) often resulted in the exposition of many juveniles to the influence of hard core criminals. The following diversion options are being implemented in the Zimbabwean pre-trial diversion programme: reparation, counselling, victim offender mediation, police cautions, family group conference and constructive use of leisure time (Vidjia, 2008). To this end, the first Diversion option is Reparation that refers to any form of suggested work or service for the benefit of the victim and it may also include reasonable compensation in cash or kind (Ministry of Justice, Legal and Parliamentary Affairs, 2013; JCT, 2017). The second Diversion option is counselling that is necessary depending on the nature of the offence and is facilitated by persons or professionals trained in this field. In this context, counselling focus on juveniles who have committed crimes and have behavioural, substance related and mental health-related problems and therefore need intensive therapeutic counselling (UNICEF, 2013; JCT, 2017). The third Diversion option accordingly, is Attendance at a particular institution for educational and vocational purposes and as such, vocational skills training and entrepreneurial programmes offer vocational training, such as business skills training, craftsmanship, entrepreneurial skills, computer skills, mentorship and small development and follow-up training (Wood, 2000:22; GoZ, 2019).

The fourth diversion option is Victim-Offender Mediation that involves meeting the young offender and the victim, with their significant others or close relatives (JCT, 2017). The Government of Zimbabwe (2019) identified Victim Offender Mediation as a restorative justice component. This option's intention according to Steyn (2010) is to facilitate the healing of social wounds to foster societal healing. Issues such as feelings, compensation, and apology performance are also involved in this option. The aim of victim offender mediation is to establish a platform for the victim and the offender to discuss the events surrounding the offence and the consequences for all parties, to develop a mutually beneficial agreement to remedy it through restitution efforts, community service programmes and compensation (Van der Merwe, 2013).

The fifth Diversion option is Constructive use of leisure time that is intended to occupy the leisure time of the juvenile to prevent him from indulging in crime through boredom. This may include activities such as sporting, church or youth groups coupled with training in areas such as horticulture, carpentry and hairdressing among others. The sixth Diversion option is Police cautions- In practice the police issue cautions in relatively non-serious cases. The seventh Diversion option is Family group conferencing and this is similar to victim offender mediation but is more holistic and will involve all persons such as local leaders, church leaders among others who have a stake in the matter. When employing family-based services as a diversion option, the juvenile is placed back with his or her family, with the condition that specific support services are provided to both the juvenile and family (JCT, 2017; Nyazema, 2018). This option is effective in mitigating recidivism with a variety of age groups, ranging from young offenders to adult offenders, and different levels of offenses from minor crimes to heinous felonies (Thembo, 2018).

The first key stakeholder is the police and he or she should utilize the power to arrest as a last resort (Steyn, 2010:64) and the arresting detail should consider diversion options before effecting an arrest depending

on the nature and seriousness of the offence. The juvenile should be assessed within the shortest period of time and in any event, within a week and if the police decide to arrest the child, minimum force should be used (Clancey and Howard, 2006). The police officer should also explain all the rights entitled to the juvenile in a language that he or she best comprehends and investigations should be completed urgently and promptly and notification of the arrest must be given to the diversion officer, giving all relevant details of the young person. Young offenders should not undergo identification parades or fingerprinting and where a young offender is incarcerated, the arresting detail and the officer in charge should ensure that the offender has proper food, medical treatment if required, adequate clothing, access to religious counsellors, his lawyer, parents, guardians and should be separated from adult offenders to avoid criminal contamination (Steyn, 2010:68). Where the police fail to determine whether the matter should go for diversion or not, they should prepare the docket that would be sent to the prosecutor, who upon receipt of the docket should refer the case to the diversion officer to make investigations.

Another stakeholder is the prosecutor who is a representative of the Prosecutor General's Office and has the power to decide whether to prosecute or not in any matter. Reservations are made about the desirability of the prosecutor to solely decide on the suitability of an offender for diversion in an impartial manner considering that the prosecutor represents the victim's rights and is in the business of bringing offenders to trial and seeking their conviction (Steyn, 2010). The result is that they may be fewer cases for diversion hence the small multidisciplinary committee to make the decision had to be constituted as the diversion committee.

There is also the Diversion Committee that consists of the Area Public Prosecutor, the Provincial or Resident Magistrate, Superintendent in charge of crime and in his/her absence a Commissioned Officer appointed by him/her to represent him for the Zimbabwe Republic

Police, preferably not in charge of a station, the District child welfare officer or a senior child welfare officer in his/her absence and the Diversion Officer. Where the committee acquiesces by majority that the young offender should be diverted, such decision should be implemented immediately by the Diversion Officer and all record of proceedings and decisions reached by the committee should be kept (Wood, 2003). Where a finding is made that the young offender is not suitable for diversion, the diversion officer should refer the case together with the assessment report to the public prosecutor who would deal with the case in a normal way. Where a matter is before a Magistrate who is of the opinion that the matter is eligible for diversion, he should request the public prosecutor to urgently consider the matter for diversion and refer the matter to the diversion officer for a report to be made. When a report is made, the diversion committee will also be called to handle the matter.

Among other key stakeholders in the juvenile justice system, it should be noted that social workers play a significant role in pursuing the course of restorative and rehabilitative justice for juvenile offenders. Some of their roles and responsibilities are outlined hereunder and they perform these roles in the jacket of either 'probation officer' or 'diversion officer'.

The diversion officer should immediately investigate the personal circumstances of the young person and his eligibility for diversion after notification from the police (Nyazema, 2018). Where the diversion officer is satisfied that a warning is necessary at this stage, he/she will refer the young offender to the police to be dealt with in terms of the police guidelines. Thembo (2018) contends that the diversion officer would produce a report that will be submitted to the Area Public Prosecutor for consideration and the report should contain the age of the offender, the socio- economic and demographic circumstances, the personal circumstances and contact details of relatives or guardians, the nature of crime committed, the circumstances surrounding such commission,

whether the young person admits his guilt, the justification for diversion and the recommended activity to that the young person will be subject. Social workers as Probation Officers also play a crucial role in diversion processes. They are employed in the Department of Social Welfare and their roles include assisting the Police to locate parents and caregivers to support the young person during questioning and to ensure that there is a safe place for the young to be released (Steyn, 2010:113). They also provide the technical support to the diversion officer to compile the assessment report coupled with supporting the Diversion Officer to identify suitable diversion options and support the young person to access any services identified (Nyazema, 2018). Bhaiseni (2016) also indicate that they assist young offenders through education, treatment and counselling to abandon anti-social behaviours and to ensure young persons on the diversion programme are duly enrolled on the relevant register by the relevant Child Protection Committee for supervision and monitoring. Again, they act as referral persons for young offenders who might have been referred to the formal justice systems so that proper support and documentation are prepared for the court, to walk the young person through the due process, in consultation with the diversion officer, where one is available (Wood, 2003:12). They also maintain a register for young persons who might have been put on the pre-trial diversion programme and to stand in for the diversion officer where the diversion officer is not available and offer secretarial services to the diversion committee when called upon to do so by the Office of the Public Prosecutor. If PTD programme is provided or ordered, the social worker bears the responsibility of selecting the most suitable or appropriate programme or setting, and assisting the juvenile to complete the suggested diversionary option or measure successfully.

Generally, there are various legal instruments that seek to inform, guide and promote child justice. In relation to diversion services however, the most significant legislative framework is the United Nations Convention on the Rights of the Child (UNCRC). The United Nations Convention on the Rights of the Child (UNCRC) provides the solid bedrock for juvenile

justice administration. Article 40 (1) – (4) of the UNCRC establishes a comprehensive framework within which states are mandated to design a child-friendly justice system. According to Desai (2020) the UNCRC covers a wide spectrum of yardsticks, guidelines and principles including non- discrimination, the child’s right to dignity and privacy, the need for juveniles to respect the fundamental rights of others, and the desirability of ensuring the juvenile’s reintegration and assuming a constructive role in society. This almost universally ratified Convention sets the much-needed framework for juvenile justice administration (Gabriel *et al.*, 2013:215). Specifically, articles 37 and 40 deals with the issue of juvenile offenders. Article 37 of the Convention on the Rights of the Child guarantees the juvenile offender the right to be protected against torture, inhuman or degrading treatment; capital punishment; and life imprisonment. It disqualifies unlawful arrest or arbitrary deprivation of liberty, and that imprisonment of young offenders should only be employed as a matter of last resort and for the shortest period of time possible (Bhabha, 2008). It also sets down conditions for the arrest, detention, and imprisonment of young offenders such as respect for the juvenile’s inherent dignity, separation from adult offenders while in custody, maintaining contact with family, access to legal assistance, access to court, and a quick trial.

The other legal framework is so called the Standard Minimum Rules for the Administration of Juvenile Justice or simply the Beijing Rules, were adopted by the UN General Assembly in 1985, and sets out minimum age for young offenders in juvenile justice administration by member states (Mititelu, 2015:151). These Rules are comprehensive and provide guarantees to the juvenile offender at all stages of the criminal justice process. The Beijing Rules also emphasises on the need for diverting young offenders from the formal criminal justice proceedings and the need to detain them only as a measure of last resort and for the shortest period of time possible. The Beijing Rules were a resolution of the general Assembly, so they did not have the binding legal force such as that of a Convention. Other significant laws in juvenile justice issues

include the United Nations Guidelines on the Prevention of Juvenile Delinquency (Riyadh Guidelines), United Nations Rules for the Protection of Juveniles Deprived of their Liberty (Havana Rules), United Nations Basic Principles on the use of Restorative Justice Programmes in Criminal Matters, and the Guidelines for Action on Children in the Criminal Justice System (Goldson and Munzie, 2012:47).

In Zimbabwe, there are various pieces of legislation that inform juvenile justice administration. These include the Children's Act [Chapter 5:06], the Criminal Codification and Reform Act [Chapter 9:23] and the Criminal Procedure and Evidence Act [Chapter 9:07]. Zimbabwe ratified the Convention on the Rights of the Child (CRC) in 1990 and the African Charter on the Rights and Welfare of the Child (ACRWC) in 1999 and both treaties oblige the state to develop a juvenile justice system defined by the parameters set by these instruments (Madhuku, 2010). The Constitution of Zimbabwe Amendment (No. 20) Act 2013 (hereafter referred as the constitution) provides rights for all offenders alleged to have committed a crime including juveniles. Section 81 of the Constitution specifically deals with the rights of children offenders. It repeats Chapter 37 (b) and (c) verbatim by providing that juveniles below the age of 18 must not be detained except as a measure of last resort and if detained, must be kept therein for the shortest period of time and while there, must be treated in a manner, and kept in conditions that take into account their unique needs (Maronje, 2017). Shorter (2008), however, reveals that with regards to the shortest period of time mentioned above, the provision is rather vague, for it seems not to specify the exact length of this shortest period of time. Nevertheless, such clarification is provided for in terms of the Children's Act (Chapter 5:06). The same Section also provides for detaining children separately from persons above the age of 18. All the decisions made with regard to young persons in conflict with the law must take into consideration the best interests of the child.

Section 6, 7 and 8 of the Criminal Law Codification and Reform Act (Chapter 9:23). Pursuant to Article 17 (4) of the ACRWC, and Article 40 (3) (a) of the CRC, Egede (2007) attests that these sections set out a minimum age below that juveniles shall be presumed not to have the capacity to abrogate the penal law. In terms of Section 7, a juvenile who is of or above the age of seven years but under the age of fourteen years at the time of the conduct constituting any crime that he or she is alleged to have committed shall be presumed to be *doliincapax*; that is to lack the capacity to form the intention necessary to commit the crime; or where negligence is an element of the crime concerned, to lack the capacity to behave in the way that a reasonable adult would have behaved in the circumstances unless the contrary is proved beyond a reasonable doubt. The wording of this section denotes that the defence of infancy is rebuttable for young offenders of, or over the age of seven. The defence of *doliincapax* is not applicable for persons over the age of 14, in terms of Article 8 of the Criminal Law Codification and Reform Act. *Doliincapax* mirrors Article 17 paragraph 4 of the ACRWC and Article 40 paragraph 3 (a) of the CRC that states that there should be a minimum age below that children shall be presumed to not have the capacity to commit criminal offences.

Studies across continents indicate that there are a plethora of factors that militate against juvenile offenders' access to diversion services (Steyn, 2010:113; Mangwiro and Chitereka, 2021). As discussed hereunder, these factors have presented themselves as key barriers to diversion services accessibility and they often span from developmental (personal), socio-economic, politico-legal, religio-cultural, physical ones (Wood, 2003:114; UNICEF, 2020)

There are a plethora of factors that have impeded easy and equitable access to Pre-Trial Diversion services globally. Studies by Clancey and Howard (2006:381) show that in as much as countries like UK, Hungary, Australia and Japan are believed to have adequate resources, there is still limited access to diversion services by juvenile offenders due to

poor resource management, poor programme coordination and poor staffing that later result in poor programme implementation. However, studies in Africa as shown in Clough et al's studies (2008:437) have shown that there is no adequate resources to fund and manage the PTD programme and this has been worsened by lack of expertise to run the programme. Among these African countries, there is Zambia, Mozambique and Zimbabwe that have also critically recorded high levels of resource inadequacy and shortage of skilled labour (Muchinako *et al*, 2016; Dziro, 2015).

Limited diversion options coupled with poor referral systems have also seriously affected juvenile offenders' access to diversion services in many countries particularly in Africa. Suitable diversion options are not always available in all African communities and besides, there are often long durations between the committing of an offence and the referral of the offender to a diversion programme, that leads to clients' and their families' failure to understand the purpose of diversion (Wood, 2003:22). JCT (2017) also indicates that care-givers of children who are diverted are overwhelmed by many challenges they face in their communities that affects their motivation to become involved in diversion programmes. On the other hand, Craig *et al.* (2013) aver that diversion programmes are often implemented inappropriately; few diversion programmes are evaluated; the methods employed to evaluate diversion programmes are not of an acceptable quality; and diversion programmes are not enough to mitigate the re-offending of juvenile offenders (Steyn, 2005:64; Wood, 2003:1). Also, community service does not have a component in that the youth is confronted and required to take responsibility for their actions (Steyn, 2005:64).

Some studies also indicated that paucity of awareness or know-how on the side of prosecutors and probation officers (among other key stakeholders) with regards to the needs of juvenile offenders and yet these are the responsible professionals for deciding on the referral of these juvenile offenders in the context of the type of the available

diversion services and their intended objectives. Skelton (2002:496) points out, as family group conferencing is practised as diversion in South Africa; however, the new challenge is that few cases are referred for family group conferencing. On the other hand, it is difficult to work with juvenile offenders who have a poor relationship with their parents or in situations where parents encourage the offending behaviour of their children (Goldson *et al.*, 2002). Kleinhans (2013) the parenting styles or ways in that young offenders have been socialised by their families also influence their views about their offending behaviour that may be a stumbling block to intervention as that offender may not be willing to change. Zimbabwe has never been spared on this area of lack of technical training and knowledge among the stakeholders who work in juvenile justice system (Nyazema, 2018; Thembo. 2018; Vengesai, 2014). Other recent studies also reveal how Covid-19 lockdown restrictions have also worsened these juvenile offenders' access to diversion services especially victim-offender mediation among other services that required movement from one place to the other (UNICEF, 2020; JCT, 2021; Mangwiwo and Chitereka, 2021).

Lack of knowledge or awareness among the juveniles parents themselves their needs is another key factor that seem to militate against juvenile offenders' access to juvenile justice (Muridzo, 2018; Mangwiwo and Chitereka, 2021). In the context of pre-trial community service, Wood (2003:2) postulates that one of the benchmarks for one to access such service is that the young offender accepts accountability for the offence yet most juveniles seemed to lack legal guidance or knowledge that later affected them from accessing these diversion services. More still, Patel *et al.* (2007:1302) posits that this is challenging as many offenders are burdened with challenges such as family violence, substance use, financial problems in their households, and so on, that contribute to their behaviour and poor motivation. Thus, to Steyn (2010:101) lack of knowledge among the children with regards to the existence of the PTD and their general rights of children is also a key barrier to restorative justice. Juveniles in Zimbabwe in this context has

never been spared as shown in Nyazema's (2018) study and UNICEF's (2020) report. Therefore, this is precisely what affects these juveniles' preparedness to accept accountability for their actions, making it hard to modify their behaviour.

Furthermore, lack of involvement of the family is another key barrier that interferes with juveniles' access to family group conferencing in countries like South Africa (Amani *et al.*, 2018:483). Other local studies also show that parents were overburdened by competing priorities (job, caretaking responsibilities) and having to coordinate multiple probation-related appointments at various locations (Amani *et al.*, 2018). Studies by JCT (2017) also reveal that in Zimbabwe lack of parental support and involvement in children's matters is also affecting juvenile offenders' access to juvenile justice. This lack of support also manifest itself in unavailability of identity validation documents for children who might have conflicted with the law (Chereni, 2017; UNICEF, 2020). Indeed, young offenders on probation are not only expected to meet with probation officers but may also be expected to comply with as many as nine probationary requirements (Nemoyer *et al.*, 2014; JCT, 2017). Amani *et al.* (2018) also found that probation officers were aware that parents' competing responsibilities could often interfere with their ability to drive their child to probation and diversion meetings. They even acknowledged that non-compliance was often a result of parents being unable to provide transportation. However, instead of offering transportation support, they found that probation officers attempted to "remove structural barriers" by encouraging parents to seek transportation assistance from a family member or neighbour (Amani *et al.*, 2018:483). While probation officers were aware of and chronicling existing structural barriers, parents—not probation departments—bore the responsibility of finding solutions and eliminating barriers.

Juveniles who are cognitively underdeveloped (Granot, 2019) usually struggle with diversion programmes in most African countries like South Africa, Malawi and Zimbabwe. A challenge in previous diversion

programmes has had to work with young offenders of lesser intellectual abilities (Steyn (2010:145) and that is a risk factor that triggers delinquent behaviour among young offenders. Typically, juveniles do not have plenary legal capacity because of their age. This means that they cannot bring a case autonomously but can solely do so through a parent, guardian or other representatives. On the contrary, juveniles between the ages of 14 and 18 may have restricted legal capacity allowing them to address the court in certain types of cases in some countries in both Europe and Africa (UNICEF, 2020). For example, in USA and Australia, juveniles are permitted to initiate proceedings for a protection order when they are affected by domestic violence. Hungary allows juveniles above the age of 14 to take autonomous legal action to guard against their inherent rights, including in cases involving equal treatment; freedom of conscience; deprivation of liberty; and insult to their honour, integrity or human dignity (UNICEF, 2020).

More still, Singapore and some countries in Western Europe allow juveniles aged 15 and above to initiate litigation autonomously, without legal representation, in marital and family disputes. It is also highly common that young offenders with certain disabilities in particular are not given legal capacity law (Steyn, 2010). For example, in Armenian law, a juvenile with intellectual or psychosocial disabilities can be deprived of their legal capacity by a court decision. The court in this vein can then identify a guardian to make decisions on his or her behalf. This approach as presented by Wood (2003) can be sometimes termed 'substitute decision-making' and yet it is not always in conformity with Article 12 of the CRPD, that requires that juveniles with a disability must be guaranteed their right to legal capacity on an equal basis with others. Thus, Article 12(3) of the CRPD introduces the concept of collectively supported decision-making, that requires States to take appropriate measures to provide access by juvenile offenders particularly those with disabilities to the support they may require to fully exercise their legal rights. According to Maepa (2005:77) it is highly challenging for juvenile offenders to gain insight into the information shared and they struggle

with reading and writing in some of the activities required. These juveniles with behavioural and intellectual challenges especially in countries like Japan, Australia and many others in Southern Africa fought hard to access counselling services among others (UNICEF, 2020). To deal with such challenges, skilled and experienced staff would be needed to facilitate diversion programmes.

Hansen (2006:1) postulates that because there is no separate legal system for juveniles in Hungary among other countries in Asia and Western Europe, restorative justice cannot be used frequently. The lack of a legal system for juveniles results in many youth being excluded from the opportunity to be rehabilitated. However, there is no study that shows how COVID-19 has also impeded the implementation and enforcement of the PTD options in most of the communities where this programme is. In Zimbabwe on the other hand, Rugaranganda and Rugaranganda (2016) agree with JCT (2017) that lack of a separate juvenile justice system coupled with legal inconsistencies and absence of a robust legal framework that inform the implementation of the PTD programme is one of the key barriers to diversion service accessibility. Vengesai (2014) also argues that this lack of consistency in policy and legal frameworks to inform the operationalization of juvenile justice related programmes can be attributed to lack of political will in the context of alignment and harmonisation of these child protection laws.

Social norms coupled with religio-cultural beliefs highly seem not to recognize juveniles as rights-holders because of their age; and these have also interfered with these juveniles' capacity to access diversion services. More still, these beliefs have caused parents of these juvenile offenders to opt for religious means (exorcism included) to address delinquency in most African countries (Clough *et al.*, 2008:437, Mabvurira, 2016). This tendency thus, is also proliferated by discriminatory treatment of juveniles with disabilities due to their impairment. The barriers they face in accessing diversion services are similar to, but also partly unique from, those experienced by other juveniles with disabilities. Some of

these barriers are systemic and relate to paucity of coordination between different diversion services. To this end, cultural and perceptual barriers can also affect juvenile offenders particularly those with disabilities from accessing restorative justice. Such barriers according to UNICEF (2020) evolve from negative assumptions about their intellectual, psycho-social and physical capacities that the children themselves often internalize.

According to JCT (2021), the above highlighted barriers are often perpetuated by institutional, policy and legislative failure to challenge and revamp discrimination, stigma coupled with impunity. Thus, denying juvenile offenders (especially those with disabilities) their right to access restorative justice compounds the circumstantial challenges they face in their daily lives, exposing them to risks of ongoing exploitation and violence and further entrenching discrimination, impunity and poverty (UNICEF, 2020). The barriers they face in accessing justice are similar to, but also different from, those encountered by other children or by adults with disabilities.

Steyn (2010: 145) contends that some are physical barriers or infrastructural barriers that literally prevent children from accessing ombudsperson offices, mediation meeting rooms, court-rooms and lawyers' offices. As suggested by Thembo (2018) other barriers to diversion service are economic, such as transport costs to designated places for mediation and conferencing, while still others are procedural and arise as a result of the complexity and rigidity of many justice system processes. Studies that were conducted in relation to juvenile justice reveal that the juvenile offenders with disabilities must be provided with disability- and age-appropriate support to enable them to participate in all stages of any legal proceedings affecting them. Yet in practice, many of these juveniles do experience specific practical barriers that render justice procedures and processes less effective and child-sensitive for them than those juveniles without impairments. Other barriers can also relate to the type of procedural accommodations needed (Mangwiwo and Chitereka, 2021), but not always provided.

Juveniles with physical impairments may confront barriers in accessing court or police buildings that including stairs or narrow doors (UNICEF, 2020). Children with disabilities living in institutions may find it hard to attend hearings or meetings because of lack of permission or transport. However, there is no local, evidence-based and context-based research that has so far been carried to fully explore the underlying key barriers behind juvenile offenders' failure to access diversion services in Zimbabwe as many studies on barriers seemed to be more biased on the juvenile justice accessibility in the context of the formal criminal justice system as revealed in Mangwiro and Chitereka (2021) study. In this case, most researches on factors affecting access to PTD services have been carried outside Zimbabwe, hence a need to consider those factors affecting Zimbabwe in particular. More still, most of these studies as also shown in the preceding chapter predated the COVID-19 pandemic era, hence a need for a context based study that explores these barriers to PTD accessibility while establishing the extent to that juvenile offenders' plight has been worsened.

Various governments have made significant efforts to ensure full or plenary implementation of the UNCRC (1989) and the Beijing Declaration among other international legislative frameworks and guidelines that seek to promote a distinctive child-friendly, restorative and rehabilitative juvenile justice system (Bhaiseni, 2016). Among these states, there is Australia, Hungary, Japan, Singapore and Britain including other countries in the Western Europe. However, USA is one of the countries that has not yet the UNCRC although it has managed to establish a sound juvenile justice system. Furthermore, the aforementioned countries as averred by Wood (2003:20) have tried to allocate resources towards the implementation of diversion programmes across their respective jurisdictions coupled with the enhancement of capacity building and training of professionals who work in the juvenile justice systems. In Africa, the ACRWC has been ratified and enforced by

many governments including South Africa, Botswana, Malawi, Namibia and Zimbabwe. However, Vengesai (2014) avers that due to different socio-economic, politico-legal and geo-environmental contexts in that these countries thrive, the implementation of this Legislative framework has been impeded. Some of these factors include economic meltdown, lack of political will and epidemiological issues such as COVID-19-induced challenges.

In Zimbabwe, there are significant efforts to reform the current juvenile justice system and these reforms include the development of the Child Justice Bill that seeks to establish the separate juvenile justice system that is child-friendly. Again, there is also the Children's Act Amendment Bill that also seeks to deal with some legal inconsistencies contained in the children's Act among other laws. However, there has been a delayed enactment process although these two bills have been recently approved by the cabinet. The government of Zimbabwe has been since been trying to incorporate the probation and diversion officers and engage other key stakeholders like UNICEF and Save the Children in ensuring the implementation of the PTD programme. Other organisations such as CATCH, JCT, ZHRC and ZNCWC have also greatly contributed through their advocacy work towards the reduction of recidivism, child incarceration and promotion of rehabilitative and restorative justice services (Ruparanganda and Ruparanganda, 2016). However, regardless of these efforts, juvenile offenders still struggle to access diversion services and this is most probably because of the lack of evidence-based research on barriers to diversion service accessibility. Therefore, this scenario has consequently necessitated the need for the study.

The chapter has critically reviewed relevant literature on the discourse of juvenile justice accessibility with much emphasis or stress on the barriers inhibiting juvenile offenders from accessing diversion services. The theoretical framework informing the study has also been canvassed

in the chapter. This literature review has been done at global, regional and national levels in respect to the objectives of the study. To this end, this section has oriented the study to the current gaps in juvenile justice systems that would then help to answer the study's research objectives. However, the next chapter seeks to explore the methodological optics and paradigms informing the study.