

THE APPLICATION OF THE DOCTRINE OF DOLI INCAPAX IN UGANDA'S
CONTEMPORARY LEGAL SYSTEM

BY

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DECLARATION

I **MASEREKA ISAAC**, declare that this thesis is my original work and has not been submitted or presented for any award of degree at any university or institution of higher learning.

Signature.....

Date

APPROVAL

This thesis has been submitted to the Directorate of Higher Degrees and Research of Kampala International University, with my approval as the candidate's supervisor.

Signature.....

Date

Dr. Chidiebere, C. Ogbonna

DEDICATION

This piece of work is dedicated to my nephews: Darmian Mark and Emanuel. Nieces: Sarafina Joy Evanisi, Salama May, Maria Michel and Baguma Blessing.

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Glory and Honor be to our Almighty Lord Jehovah the most High for, the gift of life and abundant grace to see me through this Masters course, amidst unthinkable social and financial struggles. Indeed, our God is able to do superabundantly, far over and above all that we [dare] ask or think [infinitely beyond our highest prayers, desires, thoughts, hopes or dreams] (Eph. 3:20 AMPV). May the name of the Lord be praised, Amen.

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LIST OF ACRONYMS/ ABBREVIATION

ACRWC:	African Charter on the Rights and Welfare of Children
CFPU:	Child Family Protection Unit
CRC:	Convention on the Rights of the Child
CRVS:	Civil Registration and Vital Statistics
DPP:	Director of Public Prosecutions
FDG:	Focused Discussion Groups
ICRC:	International Committee of the Red Cross
JLOS:	Justice Law and Order Sector
LCs:	Local Councils
LDC:	Law Development Center
MACR:	Minimum Age of Criminal Responsibility
MVRS:	Mobile Vital Records System
NGOs:	Non-Governmental Organizations
PSWO:	Probation and Social Welfare Officers
UNICEF:	United Nations Internal Children's Emergency Fund
UHRC:	Uganda Human Rights Commission
ULS:	Uganda Law Society
URSB:	Uganda Registration Service Bureau

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ABSTRACT

The doctrine of *doli incapax* is a common law/ legal presumption which contends that, a child lacks criminal capacity and cannot be held criminally liable for his/ her unlawful conduct in which he/ she engaged, because such a child does not have both moral and intellectual ability to plan and execute crime. The study was guided by two theories, namely: the Welfare Theory, and the Theory of Justice, which was the primary theory for this study. In addition, three objectives guided the study, which were: To review the suitability of the Minimum Age of Criminal Responsibility, to examine how the doctrine of *Doli Incapax* is applied in the contemporary Uganda legal system, and to examine the challenges of implementing the doctrine of *Doli incapax*. The research employed a descriptive survey design and a qualitative research approach, with a sample size of 50 respondents to whom data was collected through focused group discussions and interviews. Data analysis was done through editing interview transcripts manually and meticulously to represent the views of the respondents in their own words without changing the meaning. The study discovered that, 14 years were found to be the appropriate age of *doli incapax* in Uganda despite the fact that Uganda's *doli incapax* is set at 12 years today (LDC. 1997). Further, that Uganda ratified the United Nations Convention on the Rights of the Child (CRC) in 1990 and set its Minimum Age of Criminal Responsibility (MACR) or *doli incapax* at 12 years and that, this position was incorporated in the Constitution of the Republic of Uganda 1995 as amended under Articles 34 and 257 (1) (c), as well as Section 2 of the Children's Act, which defines a 'child' to mean a person under the age of 18 years. Children can also make complaints about violations of their rights to the national Human Rights Commission, a body established by Government to investigate complaints and promote public awareness about human rights in Uganda. However, the central challenges to the application of the doctrine has been the absence of information regarding the birth of children in Uganda, lack of enough mandate by the judiciary in terms of human resource and structural facilities suitable for accommodating children and their care takers during the trial process or rehabilitation, complexity of tracking abuses against children and traditional cultural practices done by local councils like beating of children as a way of disciplining them. The study concluded that, the suitable Minimum Age of Criminal Responsibility is 14 years in Uganda, establishing a shift from 12 years, further, that, the doctrine of *doli incapax* and its applicability is not familiar to so many except the legal community and that, the key challenges to the implementation of the doctrine are; the absence of information regarding the birth of children in Uganda, poor mandate of the judiciary in terms of human resource and structural facilities development (rehabilitation centers), and traditional cultural practices of administration of juvenile justice used in local council tribunals. Finally, the study recommended that, the Minimum Age of Criminal Responsibility be reviewed in Uganda from 12 years as cited in the Children's Act Cap 59, section 88 to 14 years of age, secondly that, the state should establish campaigns to sensitize social workers, children and the entire public on the notion of the doctrine of *doli incapax* and its applicability and lastly that, Government should establish monitoring and evaluating mechanisms in family courts to a certain whether the judiciary is upholding the doctrine of *doli incapax*, train LC tribunals, and enactment of strict policies to effect compulsory birth registration.

CHAPTER ONE

GENERAL INTRODUCTION

1.0 Introduction

The doctrine of doli incapax is a common law/ legal presumption which contend that a child lacks criminal capacity and cannot be held criminally liable for his/ her unlawful conduct in which he/ she engaged, because such a child does not have both moral and intellectual ability to plan and execute crime. However, the doctrine categorizes liability in children as: 0 to 7 years, meaning that the child within this age bracket may have the capacity, but does not have the intention to commit crime. Children under 7 years are irrefutably presumed to lack criminal capacity. Irrefutably presumed means that a court will not even allow evidence tendered with a view of rebutting the presumption. From the age of 7-14 years, children are refutably presumed to lack criminal capacity. Rebuttable presumed means that although the point of departure is that a child in this age bracket lacks criminal capacity, this point of departure (or presumption) may be rebutted by evidence that at the time of the commission of the act the child had the necessary mental abilities required for criminal capacity. The onus of proving this lies with the state (prosecution).

The United Nations Committee on the Rights of the Child has repeatedly expressed the view that the minimum age of criminal responsibility should be 12 years (UNCRC, 2008). This position is also expressed in, Rule 4 of the Beijing Rules, which recommends that the beginning of Minimum Age of Criminal Responsibility (MACR) shall not be fixed at too low, bearing in mind the facts of emotional, mental and intellectual maturity. In line with this rule, the committee has recommended States parties not to set the MACR at too low level, rather advised states to increase the existing low MACR to an internationally acceptable level. In light of the above, the United Nations Committee of the Rights of the Child recommended that the minimum age of criminal responsibility should be below 12 years. However, countries have the final decision on this issue, as they retain the power to revise the age within their borders.

In my opinion, a higher MACR, for instance 14 or 16 years of age should be the minimum standard for all state parties, because it will help to protect children from the harshness of the criminal justice system during their childhood. Children of any age can break the law, but at what age should children first face the possibility of criminal responsibility for their alleged crimes? This study will provide analysis of the national Minimum Age of Criminal Responsibility (MACR) in Uganda, the international legal obligations that surround them and, the principal considerations for establishing and implementing respective age limits to protect children.

1.1 Background of the study

The background of the study focused on the historical, theoretical, conceptual and contextual perspectives.

1.1.1 Historical perspective

In its formative years, the common law provided no definite point as the age at which a child would be held criminally responsible. Early records show that different treatment was meted out to children below the age of seven years, according to whether or not they were considered able to distinguish right from wrong. Thus, up to the seventeenth century in England, it was almost impossible to tell with certainty the age at which a person would be held answerable for a crime committed. It was left to the individual judge in each case to decide whether the child brought before the court was old enough to be criminally sanctioned. This approach stemmed from recognition of the severity of the punishments imposed at that time, which were based on vengeance. In an age where a person would be hanged for stealing a sheep, it was considered necessary to protect young children from the full rigors of harsh adult justice.

In an article entitled “Criminal Responsibility of Infants (Photis, 1987) the author Photis states that, during Anglo-Saxon times, a child could not be found guilty of a crime until he attained the age of 12. By the time of King Edward I, the law had become more severe and the age of criminal responsibility was reduced to seven. This marked the beginning of

an era where, until that age was attained, no evidence that the child knew that his conduct was wrong would avail. A. D. Photis, however points out that, although the Year Books 30 and 31 Eds. recorded that a child of tender years was incapable of committing a crime, the “Register of Writs” refers to a precedent of a pardon to a child under seven, and so implies that children under that age were still on occasions prosecuted.

The controversy as to the age at which criminal responsibility should commence continued until the age of seven was confirmed by Lord Hale of the House of Lords in 1778, who further confirmed the common law rule that children between the ages of seven and 14 were presumed to be *doli incapax*, though this presumption was capable of being rebutted by evidence to the contrary (Photis, 1987). It is perhaps worth noting that the antiquity of the origin of the common law rule setting the minimum age of criminal responsibility at seven years of age does not of itself imply that the rule is no longer valid in modern times. Many common law rules of long standing are still applied today and have survived the test of time. The issue is whether the circumstances and conditions which prevailed in medieval England and in the light of which the age of seven was set are still of relevance to present day Uganda. In addition, there is a need to weigh the evidence of modern findings as to the age at which a child can reasonably be expected to differentiate right from wrong.

1.1.2 Theoretical perspective

This study was guided by two theories, namely: the Welfare Theory, which is also known as the Protection Theory and the Theory of Justice, which was the primary theory for this study because, the welfare of children is a subset of justice. Usually, children are first prosecuted and then rehabilitated if found guilty. Therefore the Theory of Justice comes first to address prosecution of children, and the welfare theory to address their rehabilitation.

The Theory of Justice: The key proponent of this theory was John Rawls 1959. It was first conveyed as a model in his 1958 article “Justice as Fairness”, and was later revised and

published as “Theory of Justice” in 1999 (Rawls, 1999). The theory emphasizes the role of societal institutions and argues that they have a decisive influence when it comes to the distribution of welfare, the production of goods and services, the revision of laws, and the allocation of duties and rights (Johannessen, 2003).

The Welfare Theory/ Protection Theory: The theory was a continuation of his other theory known as the theory of Justice. The Welfare Theory/ Protection theory examined a state or condition of doing or being well, with reference to rights, resources or possessions, and income. The theory emphasizes the welfare of people in the society, as the basis for development. Accordingly, the welfare theory has been incorporated in the Convention on the Rights of the Child (CRC) under the four general principles identified by the Committee on the Rights of the Child as fundamental for the realization of children’s rights, which entitles: nondiscrimination (Article 2); Best interest of the Child (Article 3); Right to life, survival and development (Article 6) and respect for the views of the child (Article 12).

1.1.3 Conceptual perspective

The independent variable in this study was the doctrine of *doli incapax*, a Latin term that means “incapable of doing harm”. This term has been used to describe a presumption of innocence for children in Criminal law in most countries. The origin of this legal presumption is traced from ancient England legal system known as the common law. The main argument of this presumption lies in the theory of criminal responsibility, which was built upon the model that a person would be held criminally responsible only for the acts he intended to commit.

The common law model recognized that, there was a line (age line) below which children were not truly capable of criminal behavior, because they lack the requisite moral and cognitive process. Thus, children above 7 and less than 12 years of age are granted legal protection, by a way of presumption of innocence to crime. However, for children between 7 and 12 years, this presumption could be rebutted on account of evidence that a child

intentionally and consciously committed a crime. In this case, if the prosecution procured evidence and prove that a child (within 7 and 12) who committed a crime knew that his/her actions amounts to a crime prior to committing the act, then the child's immunity to persecution will be rebutted. This immunity was termed by scholars as "qualified-immunity".

On the other hand, the dependent variable is Uganda's contemporary legal framework. In this case, the contemporary legal framework entails the Constitution of the Republic of Uganda and other subsidiary legislations like the Children's Act, Trial on Indictment Act, Magistrates Act, Probation, Criminal and Civil Procedural Codes, the Evidence Act, Case law and other related legal documents as well as the court systems and procedures in the administration of juvenile justice in Uganda.

1.1.4 Contextual perspective

This study focused on Uganda's contemporary legal framework and administration of juvenile justice. Uganda ratified the United Nations Convention on the Rights of the Child (CRC) in 1990 and set its MACR at 12 years, while 18 years is set as the age of majority. It also ratified the African Charter on the Rights and Welfare of Children (ACRWC) in 1994. As a follow-up measure, it adopted the Uganda National Plan of Action for Children (UNPAC). Children's rights are entrenched in the Uganda Constitution (1995) and the Children Statute of 1996, which guarantees the right to education, medical treatment, protection and other socio-economic benefits. The Babies and Children Homes Rules Statutory Instruments 13 and 14 (1991) specified the rules and regulations for the establishment and operation of Children and Infant Homes in Uganda. These rules provide for a minimum standard of institutional care.

The Local Government Act (1997) provides for a Secretariat for Children's Affairs within each Local Council administrative unit to handle the welfare of children. A Street Children Desk in the Ministry of Gender, Labor and Social Development was established in 1995 to provide technical guidance on policy and practice regarding street children. Minister of

State in charge of children functions as an institutional framework to give voice to children's issues. A National Youth Policy has been adopted, which focuses on empowering young people aged 12-30 through key strategic actions.

Furthermore, the Constitution of the Republic of Uganda provides for the creation of Local Councils as part of the decentralization of power. Local Councils are the lowest units with administrative, legislative, and judicial powers on behalf of central governments. Local Council Courts have the authority to handle petty offences to the criminal code. The Children's Act also gives the local councils the responsibility to safeguard and promote the rights and welfare of children, from this level, the case can be appealed to the magistrate court and further to the high court if a party is not satisfied with the decisions of the lower courts.

There has been a number of challenges in juvenile justice in Uganda, starting from having undocumented birth records of children, which sets a challenge in determining the age of a minor in trial processes, untrained local council committees in handling legal matters, inadequate family courts and rehabilitation centers for juvenile victims as well as unreliable mechanisms in tracking child crime.

1.2 Statement of the problem

Uganda ratified the United Nations Convention on the Rights of the Child (CRC) in 1990 and set its Minimum Age of Criminal Responsibility (MACR) or *doli incapax* at 12 years, while 18 years was set as the age of majority. This position was incorporated in the Constitution of the Republic of Uganda 1995 as amended under Articles 34 and 257 (1) (c), as well as Section 2 of the Children's Act, which defines a 'child' to mean a person under the age of 18 years. Specifically, section 88 of the Children's Act, Cap 59 provides that, the MACR shall be 12 years. However, despite Uganda adopting and setting the age of *doli incapax* below 12 years, children within this age are still prosecuted and sometimes detained with adults in prison. Between 2015 and 2016, more-than 70 cases in breach of *doli incapax* were recorded to have been prosecuted on various criminal offences (UHRC,

2016). Besides, between 2014 and 2017 about 1600 children have been detained in juvenile homes in Uganda, of whom about 400 are within the age of doli incapax (clerk, 2018). Thus, in Uganda, children are subjected to the harshness of the Criminal Justice System even though they have not attained the MACR. Family Courts accept cases to trial children below the age of 12, usually without an advocate provided by the state to represent them. Consequently the rights of the affected children are abused through isolation from their families during remand and after trial in-cases where they are found guilty, which often lead to psychological torture and sometimes result in self-harm due to unpleasant treatment. Therefore, this research intends to examine the applicability of the doctrine of Doli Incapax and its implementation challenges thereof in the Uganda's contemporary legal system.

1.3 Purpose of the study

The purpose of the study is to examine applicability of the doctrine of Doli Incapax in Uganda's contemporary justice/ legal system.

1.4 Research objectives

- To review the suitability of the Minimum Age of Criminal Responsibility in Uganda.
- To examine how the doctrine of Doli Incapax is applied in the contemporary Uganda legal system.
- To examine the challenges of implementing the doctrine of Doli incapax in Ugandan legal system

1.4.1 Research questions

- What is the suitability of the Minimum Age of Criminal Responsibility in Uganda?
- How is the doctrine of Doli Incapax applied in Uganda's contemporary legal system?

- What are the challenges facing implementation of the doctrine of Doli Incapax in Uganda's legal system?

1.5.0 Scope of the study

1.5.1 Content scope

The study focused on the implementation of the doctrine of the Doli Incapax in the contemporary legal framework of Uganda.

1.5.2 Geographical scope

The study was carried out at the High Court of Fort portal Kabarole District Western Uganda. The justification of this selection is based on the increased rate of juvenile delinquency in the region (RSA, 2018) and the renowned seating of the family Court at fort portal and a well-established regional juvenile home.

1.5.3 Time scope

The study will cover a period of 23 years beginning from 1995 to 2018. The reason for choosing this period is because it was in 1995 that Uganda promulgated a new constitution that incorporated children's rights. Thus, the study intends to examine the promotion of children's rights in Uganda, specifically with regard to the MACR, from the time it was incorporated in the national Constitution.

1.6. Significance of the study

This study will benefit different categories of people including;

- The state: The study will provide information on criminal protection of children's in Uganda. Therefore, it will serve as a template to the government of Uganda to review its justice system in line with international standards for child protection.
- Social workers: The study will provide social workers with legal approaches in dealing with juvenile justice and welfare of delinquent victims in Uganda.

- **Scholars:** The study will serve as a source of reference for future researchers on the application of the doctrine of doli incapax in Uganda's Justice System
- **Caregivers (parents):** This will educate parents on the extent of liability of their delinquent children, the process of trial, the rights of the child in the trial process and their welfare if detained.

1.7 Definitions of key operational terms

Doctrine: Is a codification of beliefs or a body of teachings or instructions, taught principles or positions, as the essence of teachings in a given branch of knowledge or in a belief system (Küçükcan, 2010).

Doli incapax: This is a Latin term that means “incapable of doing harm”. This term has been used to describe a presumption of innocence for children in Criminal law in most countries (Fredricks, 1995).

Legal system (s): Are the systems of civil law, common law and religious law that, each country often develops variations on each system and incorporates many other features into the system. It should be noted that, the contemporary legal systems of the world are generally based on one of the four basic systems: civil law, common law, statutory law, religious law or combinations of these. However, the legal system of each country is shaped by its unique history and so incorporates individual variations (Elina, 2004).

Common Law: This was a set of rules that emanated from the English customs and culture, these rules were applied in the governance of the community for social justice and order, and the rules were later documented as bills of rights (Photis, 1987)

CHAPTER TWO LITERATURE REVIEW

2.0 Introduction

This chapter reviews literature, theories and related studies to provide in-depth understanding of juvenile justice. The literature reviewed focuses on what has been previously established in as far as the delivery of justice to child offenders as alienated to national and international declarations, set out to protect children's rights as discussed in related studies. The chapter will also cover both the conceptual framework and address the research gaps of the study.

2.1 Theoretical review

The study was guided by two theories, the Welfare Theory and the Justice Theory being the primary theory of the study.

2.1.1 The theory of justice

The key proponent of this theory was John Rawls 1959. It was first conveyed as a model in his 1958 article "Justice as Fairness", and was later revised and published as "Theory of Justice" in 1999 (Rawls, 1999). The theory emphasizes the role of societal institutions and argues that they have a decisive influence when it comes to the distribution of welfare, the production of goods and services, the revision of laws, and the allocation of duties and rights (Johannessen, 2003). In addition, Children are perceived under the theory of justice as mature, rational, self-determining, fully responsible for their actions and thus accountable before the law. Retribution rather than reformation or rehabilitation was the primary goal of this theory. The theory places no distinction between children and adults in terms of treatment in criminal justice proceedings. It's a significant departure from the notion of the "immature" and "innocent" child under the welfare theory, and an erosion of the distinction between an adult and innocent offender.

A justice system modeled in terms of this theory exposes the young children in conflict with the law to the danger of adversarial criminal proceedings. It places a heavy emphasis

on the weight of the offence rather than the circumstances of the child offender (Odhiambo, 2005). A good example of a functioning justice model is the Scandinavian countries where there are no special courts for young people in conflict with the law. These are dealt with by the adult criminal courts. However, most cases involving young offenders in these countries have resulted in less punitive sanctions as compared to those involving adult offenders. The justice theory is antithetic to *doli incapax*, a widely accepted principle of criminal law that states that under a certain age young people are *doli incapax*, i.e, incapable of forming an intention to commit a crime and should not be held fully responsible for their actions. It runs contrary to the reality that in virtually all countries, there are special institutions, procedures and laws that pertain to the differential treatment between adult and young offenders. By tearing the borders that distinguish young and adult offenders, the theory promotes the “adultification” of the juvenile justice systems

As earlier noted, the system of juvenile justice in Uganda comprises three main departments: Ministry of Gender, Labor and Social Development; the Uganda Police Force; and the Judiciary of the Republic of Uganda. However, the judicial system seems to be the face of juvenile Justice despite the fact that there are other departments that deal with juvenile criminal offences.

2.1.2 The welfare theory

The theory was a continuation of his other theory known as the theory of Justice. The Welfare Theory/ Protection theory examined a state or condition of doing or being well, with reference to rights, resources or possessions, and income. The theory emphasizes the welfare of people in the society, as the basis for development. The welfare theory is also referred to as the protection model by virtue of its inclination towards protection of the “innocent and vulnerable” child; the court has to be a primary protector of the child because the latter is both mentally and physically immature. By virtue of this immaturity, children cannot be considered to be rational, let alone self-determining (Bowling, 1995).

As such, they have to be treated separately from the adults through a separate justice system. Children found in conflict with the law, in terms of this theory, are supposed to be nurtured in such a way that they become responsible adults instead of being subject to criminal punishment (Steve, 2018). It places a heavy emphasis on the vulnerability of children on the one hand, and a reduced punishment or alternatives to punishment, on the other hand. The theory is strongly rooted in the doctrine of *parens patriae*, which is an English law doctrine which states that: “The state has a responsibility to protect vulnerable parties in the courts of equity and children form part of this group of vulnerable parties” Welfarism therefore, is simply an extension of this doctrine to children.

The starting point is a presumption that children in general and those that are in conflict with the law in particular, are vulnerable and as such, they deserve special protection. Such special protection can only be granted by the state by way of establishing a distinctive juvenile criminal justice system for them, which will offer a different treatment from the one that is accorded to adults. In terms of this theory, the judiciary must be granted powers to extend protection measures for children (Schissel, 1993). Such protections include, but not limited to probation, supervision, institutionalization in foster homes, etc., as opposed to custodial sentences or any other such treatment as would be deemed inappropriate for the enhancement of the rights of the child. It can be argued thus, that it is this theory that informed juvenile law reform in Western Europe and elsewhere in the early 20th century. The concept of the “best interest of the child” as a primary consideration in all decisions involving children, and which formed the basis of the Convention on Rights of a Child (CRC), the African Charter on the Rights and Welfare of a Child (ACRWC) and all the relevant international statutes that serve to promote the rights of the children, is clearly evident in this welfarist approach to juvenile justice (Odhiambo, 2005)

The theory imagines a children’s court which reacts to juvenile delinquency in such a manner as would reform and rehabilitate the child offender rather than punish them. Thus, in terms of the welfare theory, rehabilitation of the child offender as opposed to their

punishment is an essential component. The welfarist approach emphasizes an enhanced role of social workers in the juvenile court, such experts include, among others, social workers, probation officers as well as clinicians. These experts will assist the judge of the juvenile court in the examination of the specific needs of the child offender and in the determination of the best treatment and appropriate sanctions for them (Fower, 2003). This later on became common practice in the juvenile justice practices of many countries worldwide. The influence of the welfarist theory is clearly evident in the wording of the provisions of the CRC and the ACRWC as well as other relevant international statutes that seek to promote the rights of children in conflict with penal law. For example, the preambles of both the CRC and the ACRWC make reference to the physical and mental immaturity of the children and the need to treat them in a special way that accrues therefrom.

The theory relied a lot on both criminological and sociological research. One of the criminological theories from which the welfare theory borrowed was the moral intellectual development theory in criminology, which states that the younger the actor, the less probable it is that the sense of right and wrong always informs the actor's behavior (Kohlberg, 1969)

The problem with welfarism however is that by granting wide discretion to juvenile court judges, it led to a departure by these judges from the established principles of due process, thus leading to arbitrariness (Re Gault, 1967). In short, welfarism does not guarantee the children in conflict with the law the due process safeguards of the law such as legal representation, Miranda rights, presumption of innocence, habeas corpus to mention but a few. It has thus, an inherent potential for discriminatory treatment. Such absence of due process safeguards motivated the United States Supreme Court in Re Gault to rule that: "the juvenile in conflict with the law is entitled to right to counsel and other due process rights, because the condition of being a boy does not justify a kangaroo court (Re Gault, 1967).

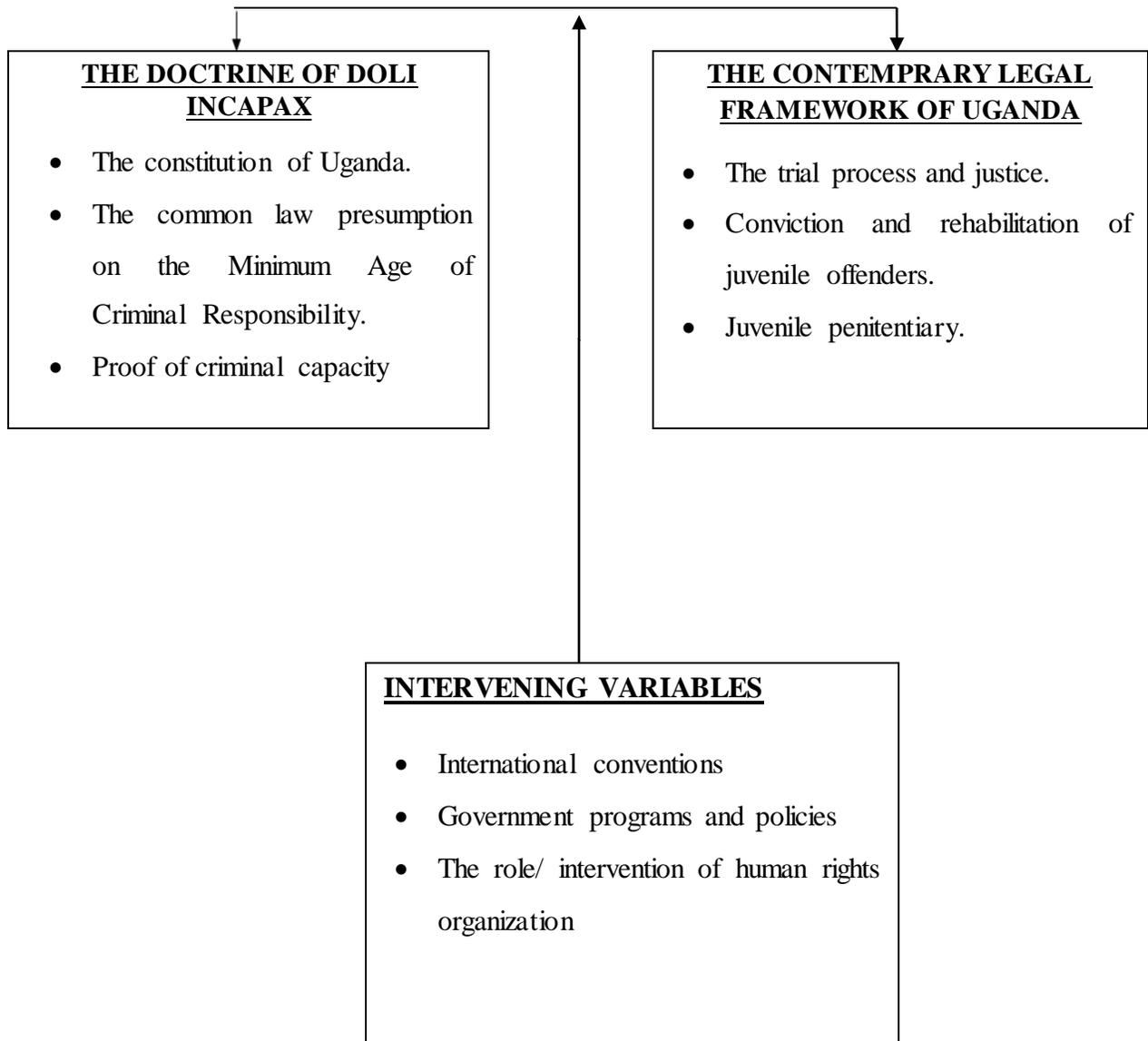
2.2 Conceptual framework

The conceptual framework of this study was represented in figure 2.1 below. It explicates how the independent and dependent variable of this research has been perceived by the researcher. The independent variable (The Doctrine of Doli incapax) has been conceptualized to mean the constitution of the Republic of Uganda, which set a landmark in children's rights when it incorporated the CRC principles that were basically emulating the common law legal presumption on the MACR thus, setting a standard to proof of criminal capacity for children, upon which all courts of law and tribunals must emulate in practice.

Whereas the dependent variable (The contemporary Legal System) points out key areas where the applicability of the independent variable may be evaluated and these are: The trial process and justice of children in family courts or local council courts or other legalized tribunals by law, the process of conviction and rehabilitation of accused children pending sentence by family courts, as well as the state of Juvenile penitentiary homes in Uganda which provide for the welfare of children during detention pending sentence of children.

In conclusion, the intervening variables in the study acted as drivers that might influence both the independent variable and dependent variable directly or indirectly through monitoring and reporting on the status quo of both the independent variable and dependent variable, putting into consideration the role of international Human Rights Conventions, government programs and policies on child prosecution as well as role of Human Rights NGOs, in realization of children's rights in Uganda.

Figure 2.1: Conceptual Framework



Source: Developed by the researcher, 2018

2.3 Thematic review of literature

This section will review related literatures on the doctrine of Doli Incapax and the Minimum Age of Criminal Responsibility of Child

2.3.1 Estimating the age of a child

Article 257 (1) of the Constitution of the Republic of Uganda, 1995 and Section 2 of the Children Act defines a child to mean a person under the age of eighteen years. Section 88 of Children Act Cap 59 provides that the minimum age of criminal responsibility shall be twelve years. This makes it important therefore to establish that children being charged with a crime have attained the age of criminal responsibility and that they are under 18 years, to avoid having children undergo criminal systems and proceedings for adults (UNICEF, 2000). Ratified international conventions are neither automatically effective in Ugandan law nor automatically enforceable by local courts. They are incorporated by implementing legislation in accordance with the convention or must be re-enacted via legislation. All laws and conventions are subordinate to the Ugandan Constitution: any law or custom that is inconsistent with a provision of the Constitution is considered void (Uganda G. o., Constitution of the Republic of Uganda, Chapter 1 Article 2, 1995).

The Convention on the Rights of a Child (CRC) and the African Charter on the Rights and Welfare of the Child (ACRWC) have been incorporated into Ugandan law by virtue of the Children Act 1997 (Uganda, 1997). Uganda has ratified the Optional Protocol on the involvement of children in armed conflict and the Optional Protocol on the sale of children, child prostitution and child pornography but neither protocol has been explicitly incorporated into Ugandan law. However, The CRC has been incorporated into Ugandan law by the Children Act. Notably, the CRC and the Organization for African Unity's Charter on the Rights and Welfare of the African Child are only incorporated "with appropriate modifications to suit the circumstances in Uganda" (Uganda, 1997). Governmental policy in general aims to adhere to the principles and standards set out in the CRC and its associated protocols, but there are economic and practical obstacles to the

full and effective protection by the Ugandan government of the rights of Ugandan children.

Because of a poor culture of births registration in Uganda, often it is not easy to determine the age of a child and yet this is crucial in determining how a child should be dealt with by the justice system. The Births and Deaths Registration Act makes it compulsory for every child to be registered at birth. There is also a national directive requiring all citizens aged 16 years and above to register for national identity cards (Prosecutions, 2016). Birth certificates and national identity card cards are important because they provide conclusive proof of age. Where the age of an accused person or victim is in doubt and the person has no birth certificate or national identity card, there are administrative guidelines on determining age. Accordingly, the Police Guidelines on the Implementation of the Children Act provide as follows:

Extract of police guidelines on the implementation of the children’s Act (Prosecutions, 2016)

- The Police may rely on documentary evidence to prove the age of the child to their satisfaction.
- The Police can rely on “other evidence” to prove the age of the child such as (a) the testimony of the father or mother to the child in conflict with the law or (b) the testimony obtained from members of the community where the child lives or was born from.
- Where a dispute as concerns age of the child in conflict with the law arises and in the mind of a reasonable person, the child is of apparent age of twelve years and above, such a child shall be charged with the offence committed and shall be taken to the Family Court within twenty four hours and the dispute in relation to the age of the child in conflict with the law shall be brought to the attention of court.
- A certified copy of an entry in the Birth Register issued in Uganda by the Registrar appointed under the Birth and Death Registration Act, 1970 in respect of the child

shall be prima facie evidence of the facts contained in it. Criminal justice agencies such as the Police, Director of Public Prosecutions (DPP) and the Courts make use of other means of verifying age such as evidence from immunization cards, school records and baptism certificates. Medical evidence can be relied upon to prove age. Medical professionals look at the teeth and may x-ray bones to estimate the age of a person. Such evidence can be used as corroborative evidence but might not be conclusive on its own.

2.3.2 Charging children with criminal offences

Charging of children is provided for under Section 89 of the Children Act. The Police are ordinarily the first point of contact for a child with the formal justice system. As far as possible all cases involving children in conflict with the law shall be handled by the Child Family Protection Unit (CFPU). The CFPU is an important child friendly mechanism and ensures that children are not treated in the same manner as adult offenders. Officers in this unit are required to dress in plain clothes, use child friendly language and liaise with either the parents/guardians of the child, the Probation and Social Welfare Officers (PSWO) and Local Councils (LCs.)

After a case has been filed by a complainant, an arrest is not to be made until enough information is got to support the case. A record of the arrest should be made by the police. Section 89 stipulates that where a child is arrested, the police shall under justifiable circumstances caution and release the child. The police are empowered to dispose of cases at their discretion without recourse to formal court hearings in accordance with criteria to be laid down by the Inspector General of Police as provided for under Section 89(3) of the Children's Act. As soon as possible after arrest, the child's parents or guardians and the secretary for children's affairs of the local government council for the area in which the child resides shall be informed of the arrest by the police (Peetz, 2008).

The police shall ensure that the parent or guardian of the child is at the time of the police interview with the child except where it is not in the best interests of the child. This could

arise where the child is fearful, embarrassed or intimidated by the presence of an adult regardless of the relationship with the child. For instance, some cases arise out of family disputes and incest or defilement by family members.

Where a child's parent or guardian cannot be immediately contacted or cannot be contacted at all, the probation and social welfare officer or an authorized person shall be informed as soon as possible after the child's arrest so that he or she can attend the police interview. When more than one interview is necessary, it should preferably be carried out by the same person, in order to ensure coherence of approach in the best interests of the child. The number of interviews should be as limited as possible and their length should be adapted to the child's age and attention span.

Where a child is arrested with or without a warrant and cannot be immediately taken before a court, the police officer to whom the child is brought shall inquire into the case and, unless the charge is a serious one, or it is necessary in the child's interests to remove him or her from association with any person, or the officer has reason to believe that the release of the child will defeat the ends of justice, shall release the child on bond on his or her own cognizance or on a cognizance entered into by the parent of the child or other responsible person (Kanyehamba, 2000).

After the interview, if the evidence obtained is not sufficient, the police may close the case and discharge the child without any condition. The Police have discretion to use diversion in certain cases further explained below. In cases that cannot be diverted, the police shall prepare a charge and refer the case to the prosecution (DPP) for advice.

Where release on bond is not granted, a child shall be detained in police custody for a maximum of twenty-four hours or until the child is taken before a court, whichever is sooner. Under subsection (8) No child shall be detained with an adult person. A female child shall, while in custody, be under the care of a woman officer as provided under subsection (9). In this regard, there are children reception centers that have been set up for

children in a number of police stations; and even where they are no dedicated facilities, there are some improvisations (Kanyehamba, 2000).

2.3.3 Diversion

Diversion is recognized as a critical child rights based approach under the Convention on the Rights of the Child (CRC), Children Act and various UN Guidelines, such as the UN Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules) and the United Nations Minimum Rules on the Prevention of Delinquency. It is applied at various phases of the criminal justice process (Stewart, 2003).

Diversion refers to the turning away or averting from the formal criminal procedure. The formal system covers the criminal justice processes from the time of charges being lodged by complainants against a child, through investigations, arrest, remand, trial and detention. At any point of these processes, all attempts should be made to provide alternatives to formal justice processes for children who admit their wrong acts and have the potential to reform with the help of societal members and the PSWO (Dalby, 1985).

The Convention on the Rights of the Child (CRC) recognizes the importance of a properly functioning diversion system. Article 40 of the CRC states that States parties shall seek the establishment of “whatever appropriate and desirable measures for dealing with such children under the age of 18 years without resorting to judicial proceedings” providing that human rights and legal safeguards are fully respected.

Article 34 of the Constitution of Uganda provides for the rights of children. It is specifically stipulated that laws must be enacted in children’s best interest and they must be protected from social or economic exploitation or any condition harmful to their health or physical, mental, spiritual moral or social development.

According to the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules) (UNCRC, 2008):

- Consideration shall be given, wherever appropriate, to dealing with child offenders without resorting to formal trial;
- The police, the prosecution or other agencies dealing with child cases shall be empowered to dispose of such cases, at their discretion, without recourse to formal hearings, in accordance with the criteria laid down for that purpose in the respective legal system;
- Any diversion involving referral to appropriate community or other services shall require the consent of the child, or her or his parents or guardian, provided that such decision to refer a case shall be subject to review by a competent authority, upon application;
- In order to facilitate the discretionary disposition of children's cases, efforts shall be made to provide for community programmers, such as temporary supervision and guidance, restitution, and compensation of victims.

According to the Juvenile Justice Law and Order Sector Diversion Guidelines 2015, diversion is meant to minimize the negative impact and trauma that results from children undergoing formal justice proceedings, prevent stigmatization and labeling of children and their families, minimize overreaction of the system to petty offences and promote rehabilitation as opposed to recidivism. Diversion is envisaged at any stage of the formal criminal justice process from the time charges are preferred through to investigations, arrest, remand and trial, except in cases of capital offences such as murder and rape (JLOS, 2015).

Methods of Diversion under the 2015 Guidelines include: Verbal and written warnings, formal cautions, victim/ Offender family conferencing, and referral to community-based, programs. It should be noted that, diversion is allowed only in the following instances in which::The case is not serious (petty crimes), the child is a first offender, the child is remorseful and repentant.

2.3.3.1 The Role of the DPP in diversion

According to the 2015 Justice Law and Order Sector (JLOS) Standard Guidelines on Diversion, the DPP can play a role in diversion by:

- Offering preliminary assessment support on whether case is divertible and to where.
- Liaising with the police, probation and fit persons in respect of the case information.
- Maintaining a register of cases diverted.
- Advising police and court to divert minor juvenile cases from the justice system.
- Advising probation officers to prepare juveniles for court and to visit the child's home for a better social inquiry report

2.3.3.2 Uganda police powers of diversion

Section 89 (2) of the Children Act empowers the police to dispose of cases at their discretion without recourse to formal court hearings in accordance with criteria laid down by the Inspector General of Police. The Police under Section 89 (1) of the Children Act also have powers to caution and release a child who has been arrested. In this case, Police have powers to release a child who is in conflict with the law and refer without a formal charge, to the Secretary for Children Affairs or to the Probation and Social Welfare Officer. It should be noted that, Section 89 (6) as well empowers the police to release on police bond any child arrested with or without a warrant who cannot be immediately taken before a court. Lastly, the police have powers under diversion to detain a child under custody where release on bond is not granted for a maximum of twenty four hours or until the child is taken before a court, whichever is sooner (Uganda L. D., 2015).

2.4. Government responsibility and progress in juvenile justice policy implementation

Children in conflict with the law in Uganda are principally the responsibility of the Ministry of Gender, Labor and Social Development. The Uganda Police Force and the Judiciary of the Republic of Uganda also play an important role. Detained children are placed in one of four established remand homes if awaiting trial or in the national rehabilitation center, if they have received orders or sentences. There are currently four operating remand homes serving all local districts in Uganda, and these include:

- Fort Portal Remand Home
- Gulu Remand Home
- Naguru Remand Home
- Mbale Remand Home

However, the Kampiringisa National Rehabilitation Centre serves children from the whole of Uganda. It is also important to note that, all of the homes and the center contain young males and females in conflict with the law from the ages of 12 to 18. In addition, and contrary to its original mandate, the national rehabilitation center also contains children found roaming the streets of Kampala who have not been charged with or sentenced with an offence.

2.4.1 Bail and remand of juveniles

The Children Act stipulates that unless there is a serious danger to the child they should be released on bail (Government, 1997). If they are bailed they get a bail remand form and are required to report to court. If bail is not granted, the court may remand them to custody in a remand home, either in the same area as the court making the order or within a reasonable distance of the court. The Children Act sets out that remand in custody:

- Should not exceed 6 months in the case of an offence punishable by death (if they were an adult)

- Should not exceed 3 months in the case of any other offence
- That no child should be remanded in custody in an adult prison (Government, 1997)

2.4.2 The United Nations Standard Minimum Rules for Non-custodial Measures (the Tokyo Rules)

The rules provide for alternatives to imprisonment and restorative justice means. They strongly discourage the use of pre-trial detention (ICRCC, 2014). It is therefore suggested that before a decision to remand a child is made, a social inquiry report detailing the background of the child is written and availed before the court.

2.4.2.1 Child Friendly trial proceedings

Criminal proceedings are complex and intimidating, even for adults. In child friendly trial proceedings, children should be treated with consideration taking into account their age, vulnerability, maturity and level of understanding, and bearing in mind any communication difficulties they may have. The trial process should be fair and equitable for them to obtain true justice. Cases involving children should be dealt with in non-intimidating and child-sensitive settings (Platt, 1966).

Before proceedings begin, children should be familiarized with the layout of the court or other facilities and the roles and identities of the officials involved. As far as appropriate and possible, interviewing and waiting rooms should be arranged for children in a child-friendly environment. Where possible specialist courts (or court chambers) procedures and institutions should be established for children in conflict with the law. This could extend to the establishment of specialized units within the police, the judiciary, the court system and the prosecutor's office (Piper, 2012).

Court sessions involving children should be adapted to the child's pace and attention span: regular breaks should be planned and hearings should not last too long. To facilitate the participation of children to their full cognitive capacity and to support their emotional stability, disruption and distractions during court sessions should be kept to a minimum.

In addition, language appropriate to children's age and level of understanding should be used.

When children are heard or interviewed in judicial and non-judicial proceedings and during other interventions, judges and other professionals should interact with them with respect and sensitivity. Children should be allowed to be accompanied by their parents or, where appropriate, an adult of their choice, unless a reasoned decision has been made to the contrary in respect of that person, whose presence for example could be threatening, embarrassing or intimidating the child. Interview methods, such as video or audio-recording or pre-trial hearings in camera may be used and considered as admissible evidence (Kanyehamba, 2000).

Children should be protected, as far as possible, against images or information that could be harmful to their welfare. In deciding on disclosure of possibly harmful images or information to the child, the judge should seek advice from other professionals, such as psychologists and social workers.

2.4.3 The United Nations Guidelines on Child Victims and Witnesses of Crime

Provide further guidance on how children in the justice system can be treated in a child-friendly manner that, a Child victims and witnesses should be treated in a caring and sensitive manner throughout the justice process, taking into account their personal situation and immediate needs, age, gender, disability and level of maturity and fully respecting their physical, mental and moral integrity (UNCF, 2002). Additionally, every child ought to be treated as an individual with his or her individual needs, wishes and feelings and interference in the child's private life should be limited to the minimum needed at the same time as high standards of evidence collection are maintained in order to ensure fair and equitable outcomes of the justice process. In order to avoid further hardship to the child, interviews, examinations and other forms of investigation should be conducted by trained professionals who proceed in a sensitive, respectful and thorough manner (CRC, 2009).

In a nutshell, all interactions should be conducted in a child-sensitive manner in a suitable environment that accommodates the special needs of the child, according to his or her abilities, age, intellectual maturity and evolving capacity. They should also take place in a language that the child uses and understands.

2.4.4 Village Executive Committee Court

Local councils are meant to play a central role in the administration of juvenile justice legislation. The reasoning for this is that communities can handle children's issues more quickly, without recourse to more formal courts. Indeed the Children Act stipulates that all matters of a civil and criminal nature concerning children should be dealt with by the Village Executive Committee Court (Local Council level 1). They have the power to make an order for: reconciliation, compensation, restitution, apology, or caution. They can also make a Guidance Order for a maximum of six months „under which the child shall be required to submit himself or herself to the guidance, supervision, advice and assistance of a person designated by the court (LDC, 1997). The local councils are not supposed to make an order remanding a child into custody. Unfortunately, however, the local councils have been constrained by their lack of training on the law and on juvenile justice issues in particular (Doreen, 2007).

2.4.5 Family and children courts

Family and Children Courts for every district in the country were established by the Children Act 1997. This is in line with the UN Convention for the Rights of the Child, which calls for state parties to establish laws, procedures, authorities and institutions specifically applicable to children in conflict with penal law, and in addition, the General Comment No. 10, which recommends that state parties establish juvenile courts either as separate units or as part of existing regional/district courts (ICRC, 1989).

The Family and Children Court have the jurisdiction to hear and determine all criminal charges against a child except offences punishable by death or offences for which a child

is jointly charged with a person over 18 years of age. The maximum order period for a petty offence is six months. It is stated that „detention shall be a matter of last resort and shall only be made after careful consideration and after all other reasonable alternatives have been tried and where the gravity of the offence warrants the order (Government, 1997)

2.4.6 High Court

According to legislation, only children charged with capital offences or those who are being tried jointly with adults should be sent to High Court. These children are provided with lawyers and legal aid by the government. Those who are tried jointly with adults should be remitted to the Family and Children Court for an appropriate order (Committee, 2007). However this rarely appears to be the case (Doreen, 2007). As these children are tried in the same courts as adults with no priority, there is a backlog of children waiting for their cases to be heard at court. The maximum sentence for those who have committed capital offences is three years.

2.5 Key drivers of juvenile delinquency especially among doli incapax children?

The discussion below presents causes and drivers to juvenile delinquency among doli incapax children as revealed by the study.

Lack of social and moral training: The study established that, lack of social and moral training of children often lead to juvenile delinquency among doli incapax children (FDG., 2018). For example in the African culture, it is the parent’s duty to teach morals and ethical values, eating habits, greetings, work, interpersonal skills to foster social inclusion among others, all these were taught to children so as to distinguish between right and wrong behavior. Today, the same is being done although, the effectiveness of teaching children by parents is still demanding, for example most informants acknowledged that, they failed to teach their children sex education due to shame or shyness. Whereas others feared that, children would instead practice sex since children are so much into venturing about what

they hear, Nevertheless, in Tooro region, children were taught about sex as a way of preparing them for marriages, given that early marriages were accepted then, today, when children are taught about the same, they actually practice it (FGD, 2018), little wonder that, between 2014 and 2016, the family court seated at Fort portal received about 32 cases of child to child sex of the 113 cases that were recorded in family courts (RSA, 2018). In addition, the lack of social and moral values among children may also lead to poor relations with others and make them less confident and may end up being selfish, arrogant and unruly. For example where a child has difficulty with speaking or explaining issues to age mates, the age mates may allow make fun of him with laughter's and nicknames, in response, the victimized child will always get angry, undermined and hated by the fellows, this will affect his response towards them or third parties to be arrogant, and may also lead to violent physical conduct thus leading to delinquency.

Parenting styles: These were also put into consideration as one of the biggest reasons why children commit crime, alleging that, parents are sometimes very harsh and they punish their children for small issues, this results into children, to start disrespecting them and they become violent (FDG., 2018).

Psychological issues: Psychological problems in parents or siblings can also be a threatening factor of juvenile delinquency especially in cases of mental illnesses or other psychological complications like depression, frustration, aggression or hyper behavior showed by the parents (Robina, 2018), this can make the child feel deprived and inferior among friends, which later develops into violence, thus deliquesce as a child begins to respond to his inferiority complex. According to information from attain from the juvenile home Warden at Fort Portal Remand Home, at times the family court sentenced some children to the remand without critically examining the mental status of children, because upon arrival of some inmates, they just become violent and radical. When the conditions seem persisting, such children are sent to Buhinga Mental Hospital in the town center, where they are usual examined and pronounced as metal victims (Humura, 2018). Therefore mental illness may also be a driver in Juvibile delinquency, despite the fact that,

most parents and peoples in the community do not take critical observation of childrens behavior.

Lastly, negative nicknaming destroys the personality of the children, and can make them criminals forever (Robina, 2018). Nicknaming means that society labels a child a criminal once he/she commits a crime, though this is his/ her first time but due to the tagging, the child begins to perceive himself a criminal, and might repeat a similar crime or other crimes in future, and consequently, the child begins to longer feel any embarrassment in committing crimes. It should be noted that, nicknaming of children develops a bad perception towards a child's personal perception given that, most children always want to be loved and seen as good children, for example most children in juvenile homes do not believe that, they are guilty but just biased, and they always want to go back home and meet their family and friends. This is a positive perception they have, because it gives hope that, they can be transformed. However, if these children perceived themselves as criminals, one may ascertain that, even after severing their sentence, they would still go back and commit crime, thus making them perpetual criminals.

2.6 Related studies

This subsection reviews related studies in order with the research objectives prepared for this study as discussed below:

Under the English common law the defense of infancy was expressed as a set of presumptions in a doctrine known as *doli incapax*. (Photis, 1987) Contends that, a child under the age of seven was presumed incapable of committing a crime and the common law presumption was conclusive, barring the prosecution from offering evidence that, the child had the capacity to appreciate the nature and wrongfulness of what they had done. (Frankline, 1986) Further asserts that, children aged seven to under fourteen were presumed incapable of committing a crime but the presumption was rebuttable. The prosecution could overcome the presumption by proving that the child understood what they were doing and that it was wrong. In this case, the aspect of capacity was a necessary

element of the state's case to be accepted. Frankline goes on to explicate that, if the state failed to offer sufficient evidence of capacity, the infant was entitled to have the charges dismissed at the close of the state's evidence.

In comprehending this aspect, a MACR was necessary to a certain trial which is still relevant today in administration of juvenile justice in Uganda and other countries despite the fact that, children today grow up in a more informed society than those who grew up in the 15th century. Today children are not only introduced to civic education but also televisions and internet, where they can easily learn how to plan crime. In this case, there is need to review the MACR to suite a particular environment in which children are growing, which is the primary objective of this study.

According to (Alex, 2015), administration of Juvenile justice in Uganda is well policed with various laws ranging from the Constitution of the Republic of Uganda, Trial on indictments Act, the Criminal and Civil Procedure Codes as well as the Children's Act Cap 59. However, (UNICEF., 2013) establishes facts that, violence against children in conflict with the law is still evident at police posts and juvenile homes by caretakers which is takes one these forms: physical, sexual and emotional. The report further contends that, 40 per cent of all children, who were in conflict with law and were taken to police suffered physical violence by beatings from police officers and LC one village tribunals. (Rowland, 2016), also affirms that, children below 12 years of age are confined in almost each of the 5 juvenile homes in Uganda. According to these reports, there is still much to be addresses in establishing why the doctrine of doli incapax is not effectively applied in Uganda in accordance to the laws that incorporated it as law in Uganda.

In understanding juvenile delinquency, (Finckenauer, 2000) states that, it consists of criminal behavior that includes rape, robbery, arson, theft and drug related crime. It also includes a host of misbehavior such as habitually disobedient or habitually and voluntarily truant that is called juvenile status offenses. These offenses are unique and specific to juveniles. The challenge is whether juvenile courts should retain, limit or give up its

jurisdiction over this peculiar class of offenses. Status offenders have special needs, and they engage in behavior which leads to more serious delinquency. Similarly, (Hirschi, 2004) defines delinquency by acts and the detention of which is thought to result in punishment of the person committing them by agents of the larger society.

According to (Hill, 2007), peer association and neighborhood norms in certain areas may encourage endemic crime almost regardless of family circumstances. Conversely many young people whose parental or substitute care is problematic, had the personal and or environmental strengths to avoid engagement in crime. It is common that children and young people who have serious family care problems become offenders. In my opinion, this position has no may not be necessarily based on family back, or peer rather inherent personal character to make rational decisions.

2.7 Gaps in the literature review

With regard to the discussed literature, there has not been enough research on the applicability of the doctrine of doli incapax in Uganda's contemporary legal system. Most of the studies such as children's perceptions of their right to health, education, and social welfare (Uganda W. V., 2000), situational analysis on the rights of children with disabilities (Uganda S. t., 2015), Child rights and protection in slum settlement (Uganda A. c., 2014) among others studies, focuses on the application of children's rights in Uganda and not specifically on the application of the doli incapax, thus creating a research gap. This study therefore intends to fill this gap by examining the application of the Minimum Age of Criminal Responsibility in Uganda's legal system.

CHAPTER THREE METHODOLOGY

3.0 Introduction

This chapter presents the research design, targeted population. Sample size, sampling techniques, data sources, research instruments, data collection process, data analysis, ethical consideration and limitations of the study.

3.1 Research design

This study employed descriptive survey design. Furthermore, the study utilized a qualitative research approach. The reason for adopting this approach was to provide the researcher with the opportunity to carry out in-depth study, through fieldwork, to gain insight and elicit detailed information/data from the respondents.

3.2 Population Study

The study population was 72,000. According to the information obtained from the Uganda Law Society and Legal Aid Uganda (ULS, 2018). This included all the Lawyers/ Advocates, Judges, Court Clerks and Registrars of courts where juvenile cases are administered in Uganda. Additionally, the population included; caregivers (parents) whose child/children have been prosecuted in a juvenile or criminal court, as well as social workers/ staffs of juvenile rehabilitation/ correction facilities in Uganda and Juvenile prosecutors in the Ugandan Police.

3.3 Sample size

Given that the study relied on a qualitative approach in data collection, the researcher drew the sample size purposively. Thus, the sample size for the study were 50 respondents.

Justification for the above sample size was to the effect that, in a qualitative study, the main goal of the researcher is to attain saturation which occurs when a researcher no longer elicits new perspective from each subsequent interview or observation (Glaser and Strauss, 1967). Thus, saturation occurs when adding new data does not improve the

explanations of the themes or the categories or add new information to the study. Given the above explanation, the Sample Size for the study was 50 participants (key informants).

The respondents were people believed to possess in-depth knowledge of the concept and application of Doli Incapax in Uganda’ legal system. The respondents in this case comprised of 8 advocates (lawyers); 5 Magistrates; 3 Judges and 2 Court officials (Clarks and Registrars). In addition, 15 social workers / staffs of juvenile rehabilitation facilities; 10 caregivers (parents) and 7 Police Officers (Juvenile Prosecutors) were included as well

Table 3:1 Represents the categorization of respondents and sampling techniques

Category of Respondent	Sample Size	Sampling Method
Lawyers	8	Purposive Sampling
Magistrates	5	Purposive Sampling
Judges	3	Purposive Sampling
Court Registrars	2	Purposive Sampling
Social Workers/ Staffs of Juvenile Correction Facilities	15	Simple Random Sampling
Care-givers (parents)	10	Purposive Sampling
Police Officers (Juvenile Prosecutors)	7	Purposive Sampling
Total	50	

Source: developed by the researcher, 2018

3.4 Sampling techniques

This segment entailed the discussion of the process and criteria in which different key informants were selected from a large population of the study to participate as key informants in addressing the objectives of the research as discussed below:

3.4.1 Purposive sampling

This was a non-probability sample that was selected based on the respondents' characteristics, with regards to their fields of expertise, accessibility and experience, in dealing with *doli incapax* prosecution and welfare, to suitably address the objectives of the study. Therefore, selection of key informants like the legal practitioners, care givers and Police Officers (Juvenile Prosecutors) were done on a judgmental, and selective basis, giving limited chances for the entire population of the study to participate.

3.4.2 Simple random sampling

This was a subset of key informants selected from a large population of social workers, each individual respondent was chosen randomly and entirely based on luck. In this case, every individual social worker in the population of the study had the same probability/chances of being selected to participate, the reason for employing simple random sampling was to the effect that, there were many social workers, who were also accessible and reliable to give information addressing the objectives of the study.

3.5 Data Sources

The study employed both primary and secondary sources of data

3.5.1 Primary data sources

Primary data dealt with the new evidence or information gathered in the field during the course of research. It included data gathered from respondents through interviews and focus group discussion.

3.5.2 Secondary Data

Secondary data means data that is already available. It also refers to the data which has already been collected and analysed by someone else. This study employed such data (secondary data) that was either published or not. Published data was traced from: (a) various publications of the Ugandan government; (b) various publications of foreign governments or of international bodies and their subsidiary organisations; (c) legal journals; (d) books, magazines and newspapers; (e) reports and publications of various associations connected with juvenile justice; (f) reports prepared by research scholars, universities, lawyers, etc. in different fields; and (g) public records and statistics, historical documents, and other sources of published information. The sources of unpublished data were also considered and included; information found in diaries, letters, unpublished biographies and autobiographies and also may be available with scholars and research workers, international associations, and other public/ private individuals and organisations.

3.6 Data collection methods/ instruments

The study employed two methods of data collection: Focus Group Discussion and Interview Guide Questions.

3.6.1 Focus Group Discussion

The study used Focus Group Discussion to elicit information from some of the respondents, specifically social worker/ staffs of juvenile correction facilities and care givers/ parents who were 25 key informants. This category of respondents were randomly selected and put in groups for discussion. This method was preferred for this category of respondents because it provided me with ease and convenience to collect data faster from available and accessible respondents. In addition, key informants were placed in groups of five persons per procession, and data was collected electronically as discussions proceeded.

3.6.2 Interview

Face to face, interviews were conducted with 25 key informants, to elicit information from respondents who were; legal practitioner and police officers. The study employed open-ended interviews, where questions were posed to the respondents, who then explained and discussed their answers. The instrument was preferred because it allowed participants to express in details their views, opinions and belief towards an idea or issue under investigation, which in this case was the implementation of Doli Incapax in the Uganda justice/ legal system. Also it offered the researcher an opportunity for thorough scrutiny and clarification of respondents answers.

3.7 Data collection procedures

I selected my respondents and schedule appointments with them on a convenient date and time to meet with each of them. Some of the appointments were scheduled via telephone to reduce travel costs. However, actual interviews were conducted face to face between me and the respondents. During the interview, the respondents were properly briefed about the study and the reason why it is being carried out. In addition, the respondents were encouraged to answer honestly and to the best of their knowledge and ability, the questions contained in the interview guide questions

3.8 Data analysis

The employed content data analysis. The essence of data processing and analysis was to verify the value of the information gathered during the research. The process involved assessment of the accuracy and uniformity of data generated in the field. In addition, it enabled the researcher to delete and eliminate possible errors that would potentially manipulate the results of the study. Thus, the process involved rereading and editing of the answers elicited from the respondents. Given the above, the interviews that were recorded/taped electronically were reduced into writing manually, and then transcript were meticulously edited and represented in a way that captured the views of the respondents in their own words.

3.9 Ethical considerations

I acquired an introductory letter from Kampala International University. Furthermore, then sort the consent of the respondents and affirmed to them that, their names or identifications would be made anonymous unless approval was given by them to have their names published. Information collected from the respondents was also treated with utmost confidentiality. In addition, I acted honestly, fairly and respectful to all respondents involved in the study. Furthermore, accurate acknowledgement of all authors and sources of information used in this study was properly cited and referenced.

3.10 Limitation of the study

In the course of data collection, my biggest challenges were transport costs to up country (Kabarole District) where data was collected, among other travel expenses to meet the respondents in different parts of the district, this was overcome through financial support from friends and family members. In addition, busy work schedules of the respondents especially judicial officers at the High Court also stood as a great challenge which frustrated the quick process of data collection, despite the fact that, I had made appointments with them. Fortunately, most respondents honoured my request to reschedule appointments after official working hours and on weekends, were I conducted interviews in a more convenient time off their work schedules.

CHAPTER FOUR

DATA PRESENTATION, ANALYSIS AND INTERPRETATION

4.0 Introduction

This chapter presents the analysis of data gathered and interpreted thereof. It as well gives the demographic characteristics of the respondents and the variables used in the study.

Response Rate

The study sample size were 50 respondents, of whom 25, data was collected by interview guide questions by way of purposive sampling, and the remaining 25 respondents through focused discussion groups selected randomly. There turn up of respondents was 100% which implied that, I was in good position to carryout data analysis because the targeted. Sample size had been meet to full capacity.

Table 4.1 Representation of the general demographic characteristics of respondents

Scale	Sex/Gender		Age bracket		Marital status		Qualification			Work experience	
	F	M	40 to	41 years	MC.	O	<Dip.	DG.	PG	<15	16>
Frequency	27	23	31	19	32	18	16	27	7	20	30
Percentage	54	46	62	38	64	36	32	54	14	40	60
TFQS	50		50		50		50			50	
TPS	100%		100%		100%		100%			100%	

Source: field survey (2018)

Key:

- F Female
- M Males
- MC. Marrieds with Children
- O Others

<Dip.	Qualifications below Diploma and Diploma
DG.	Degree qualifications
PG	Postgraduate Degree qualifications
TFQ	Total Frequency Summation
TPS	Total Percentage Summation

Demographic characteristics of respondents and their rationale to the study

This section was developed to establish the demographic characteristics of respondents by way of posing optional questions at the beginning of the interviews and focused group discussions. For the interest of the study, questions meant to establish the demographic characteristics of respondents were limited to, age, qualification and work experience, gender and marital status as discussed below:

The results of this study indicate that, out of 50 respondents, 27 were females and 23 males which stood at 54% to 46% respectively. These findings imply that most of the respondents/ participants were female compared to males. This implied that, given that women are commonly regarded as the primary care givers of children in society, their massive participation in the research gave prospects of discovering more drivers to juvenile delinquency and the status of children with regards to their treatment and general perception in a humanitarian and legal basis, when they are in conflict with the law.

Meanwhile, the study revealed that, out of the 50 respondents, 62% of them were in the age group of 18- 40 years and 38% were above 41 years. Therefore, the study divulges that, there are more youth dealing in juvenile issues than elderly members of the society. This position meant that, there has been a great transition of understanding children's affairs, from not only considering children issues as cases to be addressed by elders, but also every member of the community. In addition, given that a big figure of productive youth are dominating the affairs of children, it goes without saying that, the age difference between the youth and children is not wide, in this case, the youth are believed to have a better interaction with children regarding their perceptions on various issues, which

empowers them with broader information. Therefore information collected from these youth for purposes of this study was regarded as reliable information to benefit discussions on various issues in the research.

The research preferably considered married spouses with children who have under gone prosecution and other categories of persons either married with children or not, or dealing with children in conflict with the law. The study revealed that, 64% respondents were married with children who had been victims to child prosecution whereas, 36% either had children but not married, or did not have children but married. Therefore the study found that, there were more married people with children who have under gone prosecution at different levels, working with civil society organisations to help children in conflict with the law, a position which justifies the reliability of information collected regarding the trial of doli incapax children and their welfare during prosecution and rehabilitation.

In addition, the findings on the level of educational qualification revealed that, 32% of the respondents were qualified below the level of a university diploma, whereas 54% were degree holders and 14% had postgraduate degrees. In this case, it goes without saying that, majority of the respondents were degree holders, which makes them reliable informants for the investigation, given that, the respondents were also qualified in diverse fields like law, social work, among others and professionally trained to handle children affairs as the law demanded. This collective professionalism targeted to address children affairs with regards to prosecution and general welfare, valuably contributed to the reliability of information collected to address the objectives of the study.

Finally, the findings on the work experience unveiled that, 40% of the respondents had experience of a period less than 15 years, whereas, 60% had experience of 16 years and more. In this case, the fact that, there are more experienced people dealing with children in conflict with the law, who as well participated in the study, chances are high that, the data collected was reliable and could be considered for data analysis

4.1 Suitability of the minimum age of criminal responsibility in Uganda

The first objective of the study was to review suitability of the minimum age of criminal responsibility in Uganda. The objective was addressed through interviewing primarily respondents like judges and magistrates as well state prosecutors, parents and care takers and police officers through a face to face interview. The interviews were taped and reduced to writing as summarized below.

Item 1: I asked the participants that: **Uganda’s Minimum Age of Criminal Responsibility (MACR) has been set at 12 years as per the provisions of the Children’s Act. In your opinion, what would be the suitable MACR in Uganda?**

The deputy state prosecutor key informant 1 states that; *“It is complicated to a certain the age of criminal responsibility in children because of their different mental abilities which we cannot be measured.... but in a nut shell, In my opinion, 14 years would be a reasonable age to consider, because at this age, most children have completed primary school and have joined senior secondary. I would presume that, they have attained some knowledge and skill about how to live in society”*

A family lawyer who was the second key informant, also stresses that; *“13-14 years would be a good age to put into consideration by the state if there was a move to review the age of criminal responsibility to its suitability today. In my experience with children, I have observed that children generally think more positive than negative, they always want to please everyone and feel so guilty about their mistakes... so when they get to the age of 13, 14, and 15, they begin to lose the guilty aspect intentionally, this implies that, they are fully aware of their wrongs but do not care about it, seemingly because, there are no serious punishment attributed to their wrongs”.*

In another interview with a retired senior Chief magistrate, key informat 3, on the suitability of the age of criminal responsibility, he said that; *“14 years are more appropriate... whether a child is schooling or not, at this age I presume not only as a*

learned friend, but also as a parent, that, a child will have attain basic knowledge to tell between what is wrong and wrong.

key informat 4, a social worker and a parent of 5 working with Save the Children in Fort Portal also stressed that; *“The ages of 13, 14 and 15 should be carefully studied by the state to make a an appropriate selection of the age of criminal responsibility, because basing on the our culture and traditions, children of this age are capable to manage a family... implying that, they are capable of making rational decision”*

However, in a focused group discussion with a team of social workers from Save the Children, the team wholesomely by a vote of show of hands, agreed that, the age of 13 was appropriate to be set for criminal responsibility. The team justified their position on grounds of education which they said plays a central role in enlightening children, parental consoling factors, among others which will be discussed in chapter 5 of this study.

Unlike the other respondents. key informat 5 averred that; *“the suitable age of criminal responsibility should preferably be at 9 years... at this age children can as well distinguish between wrong and right, and they are aware of punishments against their wrongful actions, the difference is that, children do not know how big is their offence and punishment thereto... which is negligible in criminal law. What is key is that, a crime has been committed, and the offender is fully aware that he was in wrong”*

4.2. The applicability of Doli Incapax in Uganda’s contemporary legal system

The second objective of the study was to examine the application of the doctrine of Doli Incapax in the contemporary Uganda legal system. The objective was still addressed through interviewing judges and magistrates as well state prosecutors and police officers through a face to face interview. The interviews were again taped and reduced to writing as summarized below.

Item 1: I further asked the participants that: **Uganda promulgated a new constitution in 1995 which incorporated the principles of the Convention on the Rights of a child**

(CRC). In your opinion, what has been the level of the state’s adherence and performance of courts with regard to the CRC provisions on the Minimum Age of Criminal Responsibility (MACR)?

Key informat 6, a Chief Magistrate stressed that: *“The standard gauge of children’s rights can be traced from the CRC which Uganda has been incorporated into the Children’s Act. Notably, the African Charter on the Rights and Welfare of a Child has also been another legal instrument to read together with the CRC to capture a broader and comprehensive understanding of children rights and how they are applied in Uganda. However, government sets policies through parliament that aim to adhere to the principles and standards set out in the CRC and its associated protocols. But there has been significant economic and practical obstacles to the full and effective protection of these rights by the Ugandan government...”*

key informat 7, an advocate of the High court from the Musana Co. Advocates firm, further stresses that; *“...Ratified international conventions are neither automatically effective in Ugandan law nor automatically enforceable by local courts. They are incorporated by implementing legislations in accordance with the convention or must be reenacted via legislation. All laws and conventions are subordinate to the Ugandan Constitution: any law or custom that is inconsistent with a provision of the Constitution is considered void. In this case therefore, the CRC cannot be directly enforced by the Ugandan courts. However, the Children Act, as part of Ugandan legislation, can be enforced by the courts. This is equivalent to direct enforcement of the CRC by the courts, since the Children Act effectively reenacts the CRC by expressly stating that children have the right to enforce all rights under the CRC, in addition to the rights stated in the Act.”*

key informat 8, a Justice of the high court also brings it to light that, children’s rights violations can be challenged before national courts, she explains that; *“The Constitution states that any person who claims that a fundamental or other right or freedom guaranteed under the Constitution has been infringed or threatened can apply to the High Court for*

redress, through the procedure created by the Judicature (Fundamental Rights and Freedoms) (Enforcement Procedure) Rules 2009. The Constitution also states that “any person alleging that an Act of Parliament or any other law or anything in or done under the authority of any law or that any act or omission by any person or authority is inconsistent with or in contravention of a provision of the Constitution, may petition the Constitutional Court for a declaration to that effect, and for redress where appropriate”.

In addition key informat 9, the registrar of the High Court gives guides on institution of cases by minor asserting that; *“A child and/or their representatives may institute cases if they have reasonable cause to believe that an offence has been committed, and such action could be a fallback if a report pursuant to Section 11 of the Children Act has failed to achieve the desired effect.*

Secondly, judicial review proceedings can be brought with the leave of the High Court in accordance with Order XLIIA of the CPRs, inserted into the CPRs by the Civil Procedure (Amendment) (Judicial Review) Rules 2003. Again, such action could be a fallback if a report pursuant to Section 11 of the Children Act has failed to achieve the desired effect”

Lastly, key informat 10 also stressed that: *“Children can make complaints about violations of their rights to the national Human Rights Commission, a body established by Government to investigate complaints and promote public awareness about human rights in Uganda. However, out of the 4,753 complaints received by the Commission in 2013, only 3.3% were lodged by children, mostly concerning the right to education, maintenance and neglect by parents or guardians. The Committee on the Rights of the Child has expressed its concern at the lack of a specific department in the Commission dealing with children’s rights, and has recommended that Uganda establish a separate department with the necessary human and financial resources to receive and investigate complaints from or on behalf of children on violations of their rights”*

Item 2: In another interview session, I asked the participant that: **Children have constitutional rights to be observed under Article 34 of the constitution of the**

Republic of Uganda and the Children's Act. How are children's rights observed when doli incapax children are in conflict the law?

A senior officer in the Child Family Protective Unit of police, key informant 11 asserted that: *"...When dealing with children, the Police by law is expected to be mindful to respect the personal rights and dignity of all children and have regard to their vulnerability, that is to say, taking into account of their age and maturity and any special needs of those who may be under a physical or mental disability or have communication difficulties as a principle standard. Thereafter, the child should be informed in a manner and in language that is appropriate to his or her age and level of understanding of the reason for which he or she has been taken into custody, and such a child should have immediate access to a lawyer and be given the opportunity to contact their parents, guardians or a person whom they trust"*

Key informant 12, a sociologist officer in Child Fund Uganda also averred that: *"The Center for Justice Studies and Innovation trained a group of sociologists women as "Fit Persons," and distributed them to almost every family court in the country, whose role during the trial sessions was to prepare children (in any capacity) for court appearance through briefing them on what to expect in court and from the court environment; telling them about the different court officials, their roles and how to address them; explaining the plea taking process and its consequences: Outlining the typical progression of a case and what happens when a case is proved?, what the likely order to be given is and its purpose?; making sure children understand their right to ask and be informed about any issue and explaining who they should talk to in case of any need?"*

In addition, Key Informant 13 clarifies that: *"Children have a constitutional right to be heard in all matters that affect them or at least to be heard when they are deemed to have a sufficient understanding of the matters in question by any trial Magistrate or Judge and such must be respected for purposes of involving the child in the trial process. Proceedings should as well be adapted to the child's level of understanding and ability to communicate and take into account the circumstances of the case, and children should be consulted on*

the manner in which they wish to be heard. Upon that, due weight should be given to the child's views and opinion in accordance with his or her age and maturity”.

Item 3: I asked another group of informants that: **It is constitutional that, the state shall extend best social welfare to delinquent victims. Do you think the state has meet the desired standards of addressing the best interest of the child and social welfare?**

Chief Magistrate Key Informant 14 denoted that: *“Yes. I believe the state has done enough...The welfare needs of children are considered in sentencing. Usually, all children who are undergoing trial for an offence have a social welfare report prepared by probation and social welfare officers which includes the background information on the child that is by practice taken into account by the court before making an order/sentence”*

However, contrary to the above, a number of social workers (key formants 15) dealing in children's rights contended that: *“The state has failed...in majority cases, social welfare reports are not prepared by the said probation and social welfare officers, and children end up being convicted without them, leaving remand homes with little understanding of the child's background, vulnerability or risk factors*

In Key informant 16's opinion: *“Assessing government performance on the social welfare of children in conflict with the law, it is paramount that we put a gauge on these four key area which are: the accommodation of children (beddings and clothing's), secondly, the health care (nutrition and hygiene, medical services, psychological support and detoxification) then education and training (primary school education, vocational trainings and recreation). Lastly, community reintegration which includes, parental contact and resettlement.... in a nut shell, despite government establishing structures to put the mentioned areas into action, there has been poor performance sometimes associated to lack of political will, funding and effective supervision”*

4.3 Challenges facing the implementation of the doctrine of Doli incapax in Uganda's legal system

The third objective of the study was to examine the challenges of implementing the doctrine of Doli incapax in Ugandan legal system. The objective was still addressed through interviewing judges and magistrates as well state prosecutors, parents, social workers and police officers through a face to face interview and focused group discussion for social workers. The interviews were again taped and reduced to writing as summarized below.

Item 1: I asked the participants that: **Are there any challenges with regard to the administration of juvenile justice in Uganda?**

Key informant 17 a Justice of the high court responded that; *“Of course yes, actually, it’s not just a challenge, but several challenges accruing to administration of juvenile justice, the key challenge being the absence of information regarding the birth of children in Uganda, because many birth dates are not registered, even when they are registered, there is no systematic way of keeping records. So when there are no records it becomes complicated to tell, what age bracket is the child? Which consequently leads to gross violation of rights as children might end up being detained with adults, especially the big bodied teenagers, or they may end up not being tried in family courts as the law demands.”*

In addition, another justice of the High Court, Key informant 18 asserted that; *“... the judiciary its self lacks enough human resource and structural facilitates suitable for accommodating children and their care takers during the trial process or rehabilitation. This deprives child offenders from the desired legal environment enabling them to psychologically prepare for their trial. The situation does not only affect the child but also the care takers, prosecutors and advocates as children may easily be diverted from the case due to the environment around him or her”.*

In another lengthy conversation with a police constable under the Child Family Protection Unit in Kabarole District, Key informant 19 contents that: *“There is a big challenge with*

tracking abuses against children as most of them are domestic in nature and they are committed within households by their guardians, who cannot logically report themselves to police nor can children report them due to threats or ignorance of their rights, which we cannot unfortunately blame them for, because they are children...”

Similarly, key informant 20 a probation officer, conforms to the notion that, most abuses against children are committed in homes especially in Uganda. However, she aligned the causes of these abuses to traditional practices and culture, she made it clear that: *“Traditional cultural practices like beating of children as a way of disciplining them, as well as engaging them in hectic labor as punishment for their wrongs has become a vice to children’s rights today, as so many rural local council courts entrusted to settle local juvenile delinquency issues, have opted beating of children and giving them corporal punishments with hope to reform them contrary to the children’s Act.”*

CHAPTER FIVE

DISCUSSION OF FINDINGS, CONCLUSION AND RECOMMENDATIONS

5.0 Introduction

This chapter deals with discussion of the findings of the study. The findings were presented based on the objectives that guided the study and discussions were presented with reference to similar works done in previous studies. The chapter then draws conclusions from the discussions, after which it offered recommendations. Finally, it provides areas for further research

5.1 Discussion of the findings

The findings of the study were presented chronologically following the research objectives.

5.1.1 Suitability of the Minimum Age of Criminal Responsibility in Uganda

The study findings revealed that there are three main factors which complicate the certainty of determining the appropriate Minimum Age of Criminal Responsibility in Uganda namely; The different mental abilities among children, Education and morals, as well as dynamics of child growth and development. However, based on the findings of the study as revealed in chapter four, 14 years were found appropriate to be regarded as the age of doli incapax in Uganda, despite the fact that Uganda's doli incapax is set at 12 years today (LDC., 1997).

Different mental abilities among children: The challenges associated with determining the suitability of the MACR according to the study was identified to be the complexity to ascertain the age of criminal responsibility in children because of their different mental abilities which cannot be measured. It should be noted that, thinking in children is dynamic and is usually developed based on various interests that influence desires and emotions, although children generally have a common interest in utilities that satisfy their needs, as well as the desire for people to love them, and have their interests addressed in time.

However, there is no scientific evidence that justifies this common phenomenon among children, in terms of having similar ability or desire to plan or commit crime.

Education and morals: According to, there is need to strike a balance between the impact of education on moral development among children or the contrary, nevertheless, 14 years would be a reasonable age to consider, because at this age, most children have completed primary school and have joined senior secondary. It is ideal to presume that, they have attained some knowledge and skill about how to live in society. In my opinion, this position is reasonable to uphold, because children of 12 years have literally spent the first 7 years of their life with their family without actually relating with the outside community so much, then the next 5 year in school to make 12 years, which is the age of doli incapax in Uganda. But still at twelve, much time has been spent studying science and history but not crime and positive living, hopeful at 14, children might have additionally attained knowledge on criminal responsibility, through their social relations with the society norms and practices if the academic knowledge is not enough to expose them.

Dynamics of child growth and development: There are several psychological aspects regarding child growth and development which makes it uncertain whether or not a child is acting her age, and that should be the general public expectation from all children in the same age bracket? According to a family lawyer key informant 2, children generally think more positive than negative, they always want to please everyone and feel so guilty about their mistakes... so when they get to the age of 13, 14, and 15, they begin to lose the guilty aspect intentionally, which implies that, they are fully aware of their wrongs but do not care about it, seemingly because, there are no serious punishment attributed to their wrongs. In critical analysis to this argument, when children are taught about their rights, it may seem like an empowerment strategy in realization of children's rights but also a big threat that, children might take advantage of this legal protection against serious punishments to commit crime intentionally, especially those who are doli incapax. In this case, if that is the likelihood, then the MACR should be reduced from 12 to at least 9 years. However, in Uganda, it is so clear that most children understand their right to

education than prosecution dynamics simply because, the state`s political will seems to be more focused on children`s rights to education than internationally acceptable child prosecution provisions and standards.

Therefore, since Children in Uganda are seemingly ignorant about their prosecution dynamics, there is a likelihood that, they cannot be a threat to take advantage of the law to commit crime, contrary to key informat 2. In my opinion, 13 years is as good as 12 years in the general reasonable ability of children compared to 14 and 15 years. However 15 years can also be a big age difference in common mental reason and ability which positions 14 years to be most appropriate age of the MACR.

Finally, contrary to the other respondents who were all suggesting that the MACR be raised from 12 to either 13, 14, or 15 years, one lawyer who was key informat 5 asserted that, the suitable age of criminal responsibility should preferably be at 9 years, justifying his argument that, at this age children can distinguish between wrong and right, and that, there are punishments against their wrongful actions. In his opinion, the difference is that, children may not know, how big is their offence and punishment thereto, which is negligible in criminal law because, what is key is that, a crime has been committed, and the offender is fully aware that he is in wrong.

In my opinion, it is true that a crime can be committed by a child who is fully aware of the possible punishments, despite the fact he/she might not know the gravity of the offence or punishment. But it is prudent to note that, the purpose of criminal law is punishment, and the enactment of the doctrine of *doli incapax* was to save children from the harshness of criminal law because, children at times were accomplices to crime, and would also lack mental/ reason, confidence and ability to defend themselves before a strict and “harsh” criminal law procedures and standards. For example, a child of 9 years under reasonable circumstances, putting into consideration his/her mental and moral ability, it`s not fair for him to be sentenced as if he/she was mature, besides, there is hope that he/she can reform as he/she grows up.

5.1.2 Applicability of the Doli Incapax in the contemporary Uganda legal system

The applicability of the doctrine of doli incapax in Uganda follows chronological procedures which include; ratification of international instruments establishing doli incapax with its subsequent procedures of application, then incorporation of the principles into the domestic legislations and lastly enforcement mechanisms.

Ratification and Incorporation: Uganda ratified the United Nations Convention on the Rights of the Child (CRC) in 1990 and set its Minimum Age of Criminal Responsibility (MACR) or doli incapax at 12 years, while 18 years was set as the age of majority. This position was incorporated in the Constitution of the Republic of Uganda 1995 as amended under Articles 34 and 257 (1) (c), as well as Section 2 of the Children's Act, which defines a 'child' to mean a person under the age of 18 years. Specifically, section 88 of the Children's Act, Cap 59 provides that, the MACR shall be 12 years.

Applicability: it is important to note that, ratified international conventions are neither automatically effective in Ugandan law nor automatically enforceable by local courts. They are incorporated by implementing legislation in accordance with the convention or must be reenacted via legislation. All laws and conventions are subordinate to the Ugandan Constitution: any law or custom that is inconsistent with a provision of the Constitution is considered void. In this case therefore, the CRC cannot be directly enforced by the Ugandan courts. However, the Children Act, as part of Ugandan legislation, can be enforced by the courts. This is equivalent to direct enforcement of the CRC by the courts, since the Children Act effectively reenacts the CRC by expressly stating that children have the right to enforce all rights under the CRC, in addition to the rights stated in the Act.

In Re: Guardianship of Kasozi Moses (Minionor aged 14 years) (Family Cause NO.094 of 2009) ((Minor aged 14)) [2009] UGHC 64 (30 September 2009), the trial judge avered that, in making any decision by the honourable court concerning the child, the welfare of the child shall be of primary and paramount concern. This position can also be aligned to section three of the CRC. Therefore it goes without saying that, in applicability of the

doctrine of *doli incapax*, it is central to put the welfare of the child in to consideration during or pending the trial process, to safe guard the volunerable status of children as well as their dignity thereof. However most importantly to note is that, the principle comes into action in Uganda because of the rafitiification and incorporation of the CRC.

Enforcement mechanisms: The Constitution of the Republic of Uganda states that, any person who claims that a fundamental or other right or freedom guaranteed under the Constitution has been infringed or threatened can apply to the High Court for redress, through the procedure created by the Judicature (Fundamental Rights and Freedoms) and (Enforcement Procedure) Rules 2009. The Constitution also states that, any person alleging that an Act of Parliament or any other law or anything in or done under the authority of any law or that any act or omission by any person or authority is inconsistent with or in contravention of a provision of the Constitution, may petition the Constitutional Court for a declaration to that effect, and for redress where appropriate. In this case children rights in general can be petitioned if infringed in any way (Racheal, 2018).

On institution of cases or petitions by minors, a child and/or their representatives may institution cases if they have reasonable cause to believe that an offence has been committed, and such action could be a fallback if a report pursuant to Section 11 of the Children Act has failed to achieve the desired effect.

For example in the case of J (a 7 years old minor) Vs. Umeme Limited HCS NO. 3452 of 2017, as reported by daily monitor Uganda, a minor of seven years old sued an electricity distribution firm in the names of Umeme Limited Company in Uganda, through his Lawyer Mike Katende, alleging negligence in connection with on electrocution that caused him shock and injury, he also alleged that, he had been hit by a rotten electricity pool that collapsed on his parents' house, inflicting on him grievous injuries on the head which demanded special medical attention as he was referred to Kampala International Hospital, where he subsequently went through plastic surgery on his head. The minor was seeking for \$400,000,000 Ugandan shillings for general damages, and 6 billion in special punitive and exemplary damages with interests thereon.

Secondly, judicial review proceedings can be brought with the leave of the High Court in accordance with Order XLIIA of the CPRs, inserted into the CPRs by the Civil Procedure (Amendment) and (Judicial Review) Rules 2003.

In *Neil Vs. North Antrim Magistrates Court* (1992) WLR 1220, the honorable court averred that, even if a right decision is arrived at, a party may still petition the court if some procedural flaws occurred occasioning damage. The trial magistrate went on to explain that, if a party had a case and even if he argue that case as cogently, as he would, failure to grant a fair hearing will bring the court to invalidate that decision no matter how bad the case was. A person must have a chance to be heard, and the aggrieved party may apply for a judicial review (LDC, 2015).

However, such action can be a fallback if a report pursuant to Section 11 of the Children Act has failed to achieve the desired effect. Children can also make complaints about violations of their rights to the national Human Rights Commission, a body established by Government to investigate complaints and promote public awareness about human rights in Uganda (Prosecutor, 2018). However, out of the 4,753 complaints received by the Commission in 2013, only 3.3% were lodged by children, mostly concerning the right to education, maintenance and neglect by parents or guardians (Report, 2013).

Lastly, The Committee on the Rights of the Child has expressed its concern at the lack of a specific department in the Commission dealing with children's rights, and has recommended that Uganda establish a separate department with the necessary human and financial resources to receive and investigate complaints from or on behalf of children on violations of their rights (CRC, 2014)

5.1.2.1 Observing doli incapax constitutional rights of children in conflict with the law

When dealing with *doli incapax* children, the Police by law (Police Act) is expected to be mindful to respect the personal rights and dignity of all children and have regard to their vulnerability (Officier, 2018), that is to say, taking into account of their age and maturity and any special needs of those who may be under a physical or mental disability or have communication difficulties. This is done as a principle standard in juvenile administration of justice. Thereafter, the child should be informed in a manner and in language that is appropriate to his or her age and level of understanding of the reason for which he or she has been taken into custody, and such a child should have immediate access to a lawyer and be given the opportunity to contact their parents, guardians or a person whom they trust (Rules-UNCRC, 1985).

However, said principle is not cooperated in Ugandan legislations as discussed above and *inter alia*, given that some police officers confessed that, the absence of enough facilities to accommodate juvenile suspects pending trial, sometimes leads to sharing of cells with adults especially at police posts, for example, at Kacwamba police post, some female key informants disclosed that, usually, some parents persuade police officers to come and arrest their children and detain them in the local police post, because such children are unruly at home. Unfortunately, the children are detained in cells with adults for days and sometimes for weeks (FGD, 2018), the worst of it all is the beating of children in cells and arrogantly communicating to them, a factor which has led to violation of children's rights

In realization of the above rules in the Police Act and (Rules-UNCRC, 1985), the Center of Justice Studies and Innovation in Uganda, has trained a group of sociologists who are women known as "Fit Persons," and distributed them to almost every family court in the country, whose role during the trial sessions is to prepare children (in any capacity) for court appearance through briefing them on what to expect in court and from the court environment; telling them about the different court officials, their roles and how to address them; explaining the plea taking process and its consequences: Outlining the typical progression of a case and what happens when a case is proved?, what the likely order to

be given is and its purpose?; making sure children understand their right to ask and be informed about any issue and explaining who they should talk to in case of any need?

All that being said, Children have a constitutional right to be heard in all matters that affect them or at least to be heard when they are deemed to have sufficient understanding of the matters in question by any trial Magistrate or Judge and such must be respected for purposes of involving the child in the trial process. Proceedings as well be adapted to the child's level of understanding and ability to communicate and take into account the circumstances of the case, and children should be consulted on the manner in which they wish to be heard. Upon that, due weight should be given to the child's views and opinion in accordance with his or her age and maturity as provided by the children's Act cap 59. For example in court, children are always asked whether, they understand the language of court in addition to being briefed on the court proceedings by fit persons trained to help them. Children are also given opportunity to ask questions on matters they do not understand and usually, their concerns are put into consideration as aligned to Article 27 regarding the right to fair hearing of all persons.

Lastly, upon commencement of the trial, the first thing the prosecution must affirm to the trial judge and court, must be the age of a child. When it is proved that the child is doli incapax, the case is quashed immediately. For example in the case of AG. Vs. B junior ULR 432, Prosecution failed to prove that, the accused was not doli incapax in the case of theft of money, which led the trial magistrate to quit the case, given that the burden of proof laid on the prosecution. However, even when court fails to ascertain the age of the child, court is not limited to making recommendations for a doli incapax child to receive psychological support from the state through consoling. Whereas, when the contrary is true, the case proceeds as guided by section 89 of the Children's Act Cap 59, with proper consideration of the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules) 1985.

5.1.3 Challenges of implementing the doctrine of Doli incapax in Ugandan legal system

The study discovered several challenges relating to the implementation of the doctrine of doli incapax in Ugandan legal system as; the absence of information regarding the birth of children, lacks enough human resource and structural facilities, complexity of tracking abuses against children and traditional cultural practices.

The general absence of information regarding the birth of children in Uganda: This has been a key challenge in administration of doli incapax justice. It should be noted that, the absence of information regarding the birth of children in Uganda is due to unregistered birth dates, even when they are registered, there is no systematic way of keeping records. So when there are no records it becomes complicated to tell, what age bracket is the child? Which consequently leads to gross violation of rights as children end up being detained with adults, or prosecuted yet they are doli incapax. It should also be noted that, the absence of data regarding the birth of children may also leave possible juvenile criminals above the age of doli incapax walk free. For example in the case of AG. Vs. B junior ULR 432, as earlier discussed, prosecution failed to prove that, the accused was not doli incapax in the case of theft of money, which led the trial magistrate a quit the case, given that the burden of proof laid on the prosecution.

However, in addressing this challenge government of Uganda has introduced the civil registration and vital statistics (CRVS) program where the occurrence and characteristics of all vital events pertaining to the population of the country like births, deaths, marriages and divorces are recorded. The purpose of civil registration is primarily for establishing the legal documents provided by the law. Given that about 51 million births go unregistered every year in developing countries which Uganda is a member, with Sub-Saharan Africa having the highest percentage of children under age of five who are not registered recorded at more than 66% (UNICEF2013).

It should be noted that, in 2011 Uganda introduced the Mobile Vital Records System (MVRS) Project, through a public private partnership between Uganda Registration Service Bureau (URSB), Uganda Telecom and UNICEF, birth and death registration would be done electronically and Mobile VRS enabled birth notifications to be sent by mobile phones to URSB's server and enabled health and government officials who have access to the internet and a printer to register and print birth certificates in real time (Robina, 2018). This was done with prospects of simplifying the process of birth registration in Uganda despite the fact that, the system has not been effective especially due to the closure of Uganda Telecom Company which was entrusted to with mobile registration of these birth cases, in addition, the limited accessibility to internet today in Uganda due to taxes and limited coverage of internet services in the country have also contributed to the unpopularity of the program, not withholding the fact that, internet users are elites who mostly dwell in urban centers as compared to the majority poor and illiterate persons staying up country with limited access to internet and information regarding national programs.

Lack of resources: The judiciary its self lacks enough human resource and structural facilities suitable for accommodating children and their care takers during the trial process or rehabilitation. This deprives the alleged child offenders from the desired legal environment enabling them to psychologically prepare for their trial. The situation does not only affect the child but also the care takers, prosecutors and advocates as children may easily be diverted from the case due to the environment around them. In other words, children need a more convenient place like their homes with people they are familiar to around them to enable them focus on the trial process. With regards to structural facilities and accessibility to courts in Uganda, the Judiciary is functionally present in 90 per cent of districts now up from 56 per cent in 2006 despite the fact that, it operates in unsuitable facilities with less offices and small court rooms that limits the number of attendants and also affects court processions resulting from congestion especially during child trials. The 229 functional courts of the Judiciary the country have largely been constructed slowly

literary because of depending on foreign aid which has also not been enough, about only 65 per cent of the districts of Uganda have judiciary owned structures (court houses), unfortunately, even among the mentioned courts, most of them do not have allocated court rooms specifically for family courts. It should be noted that, almost all family courts in Uganda share court rooms and other facilities, which limits the number of times the family courts have to seat, which also causes prolonged detention of children pending trial thus violating the rights of children

Complexity of tracking abuses: Another big challenge is to do with tracking abuses committed against children since most of them are domestic in nature. That is to say, they are committed within households by their guardians, who cannot logically report themselves to police nor can children report them due to threats or ignorance of their rights. Unfortunately, the blame cannot be imposed on children because of their age as well as reason, rather their guardians who ought to protect them from any cruel conduct towards them. It's therefore a big setback in promotion and protection of children's rights, since the, would be reliable informants and trustees to children's rights are the ones instead perpetrating crime.

However, this position should not only be seen on an angle of guardians abusing doli incapax children and covering it up, the other side of the coin should as well be put into consideration that, doli incapax children commit crimes in homes but guardians end up covering their evil deeds, which still remains a big challenge in tracking crime. It should therefore be not that, even when doli incapax children commit crimes, they are not subjected to prosecution but courts usually recommend them to be psychologically help through consoling which shapes their moral conduct. Unfortunately, most parents fear to report their doli incapax children to family courts for fear of trial yet, the said trial is allowed as long a parent proved the age of the age.

Traditional cultural practices: Like beating of children as a way of disciplining them, as well as engaging them in hectic labor as punishment for their wrongs has become a vice

to children's rights today, as so many rural local council courts entrusted to settle local juvenile delinquency issues, have opted beating of children and giving corporal punishments with hope to reform them contrary to the children's Act. This barbaric approach (corporal punishments) was banned in the Ugandan penal code as well as in the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules) 1985 to save children from the harsh criminal law code. Unfortunately, most local council courts lack legal knowledge and training to handle juvenile cases and resort to traditional mechanisms of justice which are today contrary to the provisions of international standards. For example according to a report release by the Uganda Human Rights Commission, it was established that, children's writes were still continuously abused through administration of corporal punishments and beating in homes and at schools especially in primary schools in rural places, the report further contented that, more than 85% children have fallen victims, either at schools, homes or in local council tribunals (UHRC 2016). Therefore this position stands as a major setback in the protection and promotion of children's rights at grass root levels in the state.

5.2 Conclusion

The conclusions to the study were presented chronologically following the research objectives and based on the findings of the study, upon analyzing the data collected from the field as discussed below:

Objective one: The study concludes that, the suitable Minimum Age of Criminal Responsibility is 14 years in Uganda, establishing a shift from 12 years.

Objective two: The study concludes that, despite the ratification of several International Conventions with their follow-up rules and domestic legislations to see the realization of Children's rights and *doli incapax* in particular, there seems to be an oversight in realizing the doctrine of *doli incapax*. The study reveals that, children's rights are generally understood by different stakeholders in the administration of Juvenile justice and welfare. However, the doctrine of *doli incapax* in particular and its applicability is not familiar to so many except the legal community. The question left unanswered is, whether or not, the legal community does not give priority to the doctrine in practice despite the provisions of the law, or there is always an oversight of the doctrine in practice?

Objective three: The study concluded that, the key challenges to the implementation of *doli incapax* are, the absence of information regarding the birth of children in Uganda, because many birth dates are not registered, which makes it complex to tell what age bracket is the child?, the poor mandate of the judiciary in term of financial resource to establish more family courts in the country, and traditional cultural practices of administration of juvenile justice in LC courts, through awarding of corporal punishments contrary to the Ugandan Penal code, above all the unprofessionalism exhibited in local council courts entrusted to settle juvenile cases stands as a great setback to the realization of *doli incapax* and children's rights in Uganda

5.3 Recommendations

Based on the findings and conclusions of this study, the following recommendations were suggested as aligned to the objectives of the study:

5.3.1 Suitability of the Minimum Age of Criminal Responsibility in Uganda.

- This study recommends that, the Minimum Age of Criminal Responsibility be reviewed in Uganda from 12 years as cited in the Children's Act Cap 59, section 88 to 14 years of age. This review will be meant not only to protect innocent children from the harsh criminal law code, but also to abide by the United Nations Committee on the rights of a child recommendations that encourages member states to set the Minimum Age of Criminal Responsibility above 12 years. Therefore, upon reviewing the Minimum Age of Criminal Responsibility, the state should additionally embark on integrating social civic humanitarian education in the academic curriculum of children, to help them grow up into tender ages, with positive interpersonal relations, basic legal knowledge of their wrongful conduct in society and punishments thereof. Because 12 years is reasonably a premature age for children to comprehend both academic work and social being, hopefully, the additional 2 years to make 14 is a reasonable allowance of time, to help children develop both mentally and morally.

5.3.2 Application of the doctrine of Doli Incapax in the contemporary Uganda legal system.

- With regards to the findings and conclusions drawn to the second objective of this study, I recommend that, the state should establish campaigns to sensitize social workers, children and the entire public on the notion of the doctrine of doli incapax and its applicability. This will empower various stakeholders to pin the judiciary and local council courts or tribunals upon their exercise of power versus the law applicable. In addition, the judiciary should emulate professionalism in dealing with juveniles as provided by the United Nations Standard Minimum Rules for the

Administration of Juvenile Justice ("The Beijing Rules"), United Nations Standard Minimum Rules for Non-custodial Measures (The Tokyo Rules) and the Children's Act Cap 59. The observation of these provisions will dictate the need to address the age of a child first, before instituting any case against minors, thus the observation of the doctrine of doli incapax will be inevitable as courts will not entertain any case against a child proved doli incapax

5.3.3 The challenges of implementing the doctrine of Doli incapax in Ugandan legal system

- The government of the Republic of Uganda should practically portray political will in realization of the doctrine of doli incapax and children's rights at large, through establishing monitoring and evaluation mechanisms in family courts, to establish whether the judiciary is upholding the doctrine of doli incapax, empower local council courts with legal knowledge and skills to uphold international standards in juvenile trials. Above all, the state should enact strict national policies to force and foster parents attain birth certificates for their children, which can be used as reliable evidence in determining the age of a child, in case such a child is in conflict with the law. This will in the long run, enable the realization of the doctrine of doli incapax in implementation.

5.4 Contribution to knowledge

The study significantly contributed to knowledge by relating the Theory of Justice and The Welfare Theory to the application of doli incapax in Uganda.

Furthermore, the study established that, 14 years is a more appropriate Minimum Age of Criminal Responsibility in Uganda as against the 12 years stated in the Children's Act Cap 59. The study further presented a critical analysis on the implementation and challenges facing full realization of the doctrine of doli incapax in Uganda, but also it proffers recommendations to address the said challenges. Therefore, the study has

generated literature that will be used by other scholars and government in the present and future applicability of the doctrine of doli incapax in Uganda's contemporary legal system.

5.5 Areas for further studies

Based on the findings of this study, methods employed, literature and conclusions drawn, I find it appropriate to suggest following studies to be done for further and proper comprehension of the doli incapax in Uganda:

- Public awareness and the doctrine of doli incapax in Uganda
- Doli incapax prosecution and emotional impacts of children in Uganda
- The impact of doli incapax and juvenile delinquency in Uganda.

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APPENDICES

APPENDIX I: INTERVIEW GUIDE QUESTIONS FOR LEGAL PRACTITIONERS (LAWYERS/ADVOCATES, JUDGES, MAGISTRATES, CLARKS AND COURT REGISTRARS AND JUVENILE PROSECUTORS)

- (1) Uganda promulgated a new constitution in 1995 which incorporated the principles of the Convention on the Rights of a child (CRC). In your opinion, what has been the level of the state's adherence and performance of courts with regard to the CRC provisions on the Minimum Age of Criminal Responsibility (MACR)?
- (2) Uganda's Minimum Age of Criminal Responsibility (MACR) has been set at 12 years as per the provisions of the Children's Act. In your opinion, what would be the suitable MACR in Uganda?
- (3) How has the state and courts implemented doli incapax in Uganda with regards to international standards?
- (4) What are the major challenges faced in the administration of juvenile justice in Uganda?
- (5) Do you think Uganda is making significant progress in realization of the doli incapax despite the (challenges mentioned above)?
- (6) What are the rights of children during the trial process and detention?
- (7) How are these rights brought to light for children to understand them?
- (8) It is constitutional that, the state shall extend best social welfare to delinquent victims. Do you think the state has meet the desired standards of addressing the best interest of the child and social welfare?
- (9) In your own opinion, what do you think the judiciary should additional put into consideration or give priority in ensuring an effective role of administration of juvenile delinquency?

**APPENDIX II: QUESTIONS FOR FOCUSED GROUP DISCUSSION (FDG)
WITH SOCIAL WORKERS AND CARE GIVERS/ PARENTS**

- (1) Uganda promulgated a new constitution 1995 which incorporated the principles of the Convention on the Rights of a child (CRC). In your opinion, how has administration of Juvenile justice in Uganda been handled?
- (2) Uganda's Minimum Age of Criminal Responsibility (MACR) has been set at 12 years as per the provisions of the Children's Act. In your opinion, what would be the suitable MACR in Uganda?
- (3) What are the major challenges faced in the administration of juvenile justice in Uganda?
- (4) Do you think Uganda is making significant progress in realization of the *doili incapax* despite the (challenges mentioned above)?
- (5) How are rights brought to light for children to understand them?
- (6) It is constitutional that, the state shall extend best social welfare to delinquent victims. Do you think the state has meet the desired standards of addressing the best interest of the child and social welfare?
- (7) What are the key drivers to juvenile delinquency?