**UGANDA LAW REFORM COMMISSION**

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**REFORM OF THE LAW ON EVIDENCE: UGANDA’S EXPERIENCE**

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***This paper provides a brief on the study on the law of evidence undertaken by Uganda Law Reform Commission. The paper discusses the issues considered during the study and sets out recommendations arising out of the study.***

# 1.0 Introduction

Evidence plays an important role in the administration of justice. It helps to guide legal proceedings by determining the type of facts that can be admissible as evidence. The Evidence Act of Uganda is cited as the Evidence Act, Cap 6. It was enacted in 1909 and has not undergone major reform despite the numerous developments in the area of evidence law, including technological developments and the changing nature of information.

As mandated by the Uganda Law Reform Commission Act, Cap. 25 of the Laws of Uganda, to study and keep under constant review the Acts and other laws of Uganda with a view to making recommendations for their systematic improvement, development, modernization and reform, the Uganda Law Reform Commission undertook to reform the law of evidence during the financial year 2014/2015.

The objective of the study was to review and reform the laws that govern evidence in Uganda to contribute towards the improvement of the justice system and to ensure adaptation of new and more effective methods for the administration of the law and dispensation of justice.

The purpose of the review was to address the shortcomings of the Evidence Act. Specifically, to consider issues of technological developments, address challenges of identification evidence, challenges relating to preservation of evidence, challenges of providing expert evidence, and to explore other emerging areas, for instance circumstantial and forensic evidence.

The review considered other Acts in the Laws of Uganda that affect implementation of the Evidence Act. These include:

1. the Magistrates Courts Act, Cap.16;
2. the Trial on Indictments Act, Cap. 23;
3. the Criminal Procedure Code Act, Cap. 116;
4. the Civil Procedure Act, Cap. 71; and
5. the Civil Procedure Rules S.I. 71-1.

# 2.0 Background to the study

The Evidence Act, Cap. 6 like most of Uganda’s legislation was received from the British and commenced on 1st August, 1909. The Act was derived from the Indian Evidence Act of 1872 which was an attempt at codification of English Common Law. Uganda was a protectorate under the British Government from 1894 to 9th October 1962. The Act was implanted in Uganda with little regard to the social, economic and cultural conditions.

Over the years, efforts have been made towards reforming this law, specifically; the Evidence Act was amended by:

1. the Evidence Act, Cap. 43 (1964 Edition);
2. the Existing Law (Amendment) Instrument, S.I. 135/1968;
3. the Evidence (Amendment) Decree 25/1971; and
4. the Judicature Statute, No. 13/1996.

The amendments did not however adequately address the changing circumstances and developments in evidence law in Uganda, despite the fact that the countries from which this law was derived namely; Britain and India having undertaken serious reform of their evidence laws over the same period of time. In Britain, various changes have been made to the common law, including changes to the hearsay rule in criminal matters which were reformed by the Criminal Justice Act of 2003.

In addition there are emerging circumstances that affect the law of evidence that merit attention. For instance expert evidence generated from other jurisdictions, technological developments, including issues to do with forensic evidence as circumstantial evidence, which have not been taken care of by the present Uganda law of evidence.

As a result of the gaps discussed above, the current Evidence Act does not adequately address matters like the use of a traditional method of identification of evidence. This method of identification does not take into consideration other emerging mechanisms of identification such as video and photographs; as such, it may lead to a miscarriage of justice.

It is against this background that the study was undertaken as a strategy to address the gaps and anomalies that present challenges to the full realization of both criminal and civil justice**.**

# 3.0 Problem statement

1. The use of technological advancements for purposes of identification evidence such as use of videos, photographs, DNA, fingerprint and audio in carrying out identifications are not used much in Uganda. The traditional method of identification parade is used.
2. The adversarial system of litigation in Uganda is such that judicial officers only listen to the submission of the parties and do not play an inquisitorial role even where their intervention would lead to justice being delivered. This system is lengthy and does not necessarily bring out the true facts of a case.
3. Although electronic evidence is admissible in Uganda’s court system sometimes, there have not been any substantial changes to the law of evidence to enable the applicability of electronic evidence in both civil and criminal proceedings. The law does not sufficiently address the admissibility of electronic evidence and the issue of authentication of this evidence in the face of the escalating cyber and related crimes.
4. The delivery of expert opinion remains a challenge in the administration of justice. Traditionally expert opinion has been given through physical presence in court. This practice is constrained by the number of experts *vis a vis* the number of cases. The practice excludes a lot of evidence from court proceedings and leaves many litigants in search of true justice. Delivery of expert evidence can be complemented by the use of video conferencing, which is also lacking.

The lack of guidelines for handling, storage and preservation of evidence remains a key challenge in the administration of justice in Uganda. Once evidence is not properly documented, it creates doubt in the mind of a judicial officer who is likely to discredit the evidence, leading to a miscarriage of justice sometimes.

Under Uganda’s criminal justice system if a person gives unsworn evidence in a magistrates court under section 128 of the Magistrates Courts Act, Cap. 16 and in the High Court under section 74 of the Trial of Indictments Act, Cap. 23, that person is not required to be cross examined. Unsworn evidence in most cases introduces new facts, yet the person who alleges them is not subject to cross examination. This undermines the right to fair trial.

The above were the main problems identified that necessitated review of the Evidence Act so as to address its short comings.

# 4.0 Objectives of the study

The overall objective of the study was to review and reform the laws that govern evidence in Uganda to ensure that justice is done in the provision of information that is required to prove a fact within the civil and criminal justice system.

# 5.0 Specific objectives of the study

The specific objectives of the study were:

(a) to explore mechanisms for identification of evidence;

(b) to investigate how the adversarial system of litigation can work alongside the inquisitorial role of judicial officers;

(c) to explore the use of electronic evidence;

(d) to identify the challenges faced in providing expert testimony in court;

(e) to explore methods of preserving evidence by investigators, prosecutors and the courts;

(f) to establish the use of emerging technological developments that impact on the law of evidence; and

(g) to establish the use of forensic evidence and psychic evidence as circumstantial evidence.

# 6.0 The research process on reform of the Evidence Act

During the study, consultations with key stakeholders were undertaken in 2 phases- the preliminary consultations and the main consultations. The preliminary consultations were undertaken in five districts to collect information for generation of the issues for the study while the main consultations were undertaken to gather views from stakeholders and the general public on the areas of the law of evidence that need to be reformed.

Meetings were held with key stakeholders, i.e representatives from Uganda Law Society, Inspectorate of Government, Directorate of Public Prosecutions, Makerere University (School of Law), Uganda Human Rights Commission, Uganda Police Force, Uganda People’s Defence Forces, the Judiciary and the Ministry of Justice and Constitutional Affairs.

Collected data against which the study report and the draft bill were prepared was backed up by the findings of desk research and a comparative analysis which included a bench marking study in the Republic of South Africa. The study findings and legislative proposals considered by a technical working group comprised of institutions regularly involved in the implementation of the Evidence Act.

# 7.0 Summary of findings and recommendations

The findings of the study indicate various concerns, including lack of regulations, practice guidelines and codes of good practice in most areas of the Ugandan criminal justice system. The study also makes recommendations to address the challenges identified in the Evidence Act as summarized below:

## 7.1 Admissibility of electronically generated evidence in a court of law

The present law of evidence of Uganda recognizes the ‘Best Evidence Rule’ which requires that only original documents in a written form can be admissible in courts of law. In case of dispute, the admissibility and weight of this kind of evidence can be a challenge.

Due to the advancement of digital technology, the use and scope of electronic evidence has expanded greatly all over the world. While many Ugandans have adopted the use of electronic technology, reliance on the ‘Best Evidence Rule’ as provided under the Evidence Act can pose challenges for admissibility of electronic evidence.

In addition, Uganda enacted three laws relating to electronic evidence namely:

1. the Computer Misuse Act, No. 2 of 2011;
2. the Electronic Signatures Act, No. 7 of 2011; and
3. the Electronic Transactions Act, No. 8 of 2011;

The Computer Misuse Act provides for *inter alia*, the security electronic transactions and information systems; prevention of unlawful access, abuse or misuse of information systems and for security of electronic transactions. The Act creates offences for unauthorized use, access, abuse of computers or data. Offences under the Act also include electronic fraud, child pornography, cyber harassment and stalking. The Act does not provide for how electronic evidence should be handled.

The Electronic Signatures Act regulates the use of electronic signatures. There may be need to improve the provisions of the Act in relation to regulating admissibility of electronic signatures in court.

The Electronic Transactions Act provides for the use, security, facilitation and regulation of electronic communications and transactions as forms of communication. The Act provides legal certainty in respect of validity, legal effect and enforceability of information in electronic form; it relates electronic evidence to electronic transactions but does not give the use of electronic evidence general application.

**Recommendations**

1. The Evidence Act should expressly provide for electronic evidence.
2. The law should provide comprehensive and flexible definition of terms like document, data, electronic records and electronic record system, among others, to cover the present and any future advances in technology.
3. There is need for guidelines that highlight key principles for determining the reliability of electronic evidence.
4. There is also need for detailed provisions relating to security, functionality of the computer from which electronic evidence is generated, and generally setting rules governing the admissibility of electronic records.
5. The Uganda Law Reform Commission should review the Computer Misuse Act No. 2 of 2011, the Electronic Signatures Act No. 7 of 2011, and the Electronic Transactions Act No. 8 of 2011 so as to establish whether they are still relevant in scope and serve the purpose for which they were enacted.

## 7.2 Identification Evidence

The use of technological advancements like use of videos, photographs, DNA, fingerprint and audio in carrying out identifications in Uganda are not developed. Instead, the traditional method of identification parade still thrives. Although it is the most used, identification parades are often problematic because of inconsistency of witness statements with the identification parade evidence. There is a lack of enabling legislation to facilitate appearances in court by video conferencing, which may lead to miscarriage of justice. The law requires the physical presence of witnesses in court. This is limiting considering challenges such as the cost of transportation of witnesses, the risks involved in transportation of certain types of witnesses and the inadequacy of transport facilities. In addition, expert witnesses are limited in number and in most cases not available to perform the extra task of appearing in court and avail reports when required to do so.

**Recommendations**

1. The law should provide a check for all unfair and unreliable identification procedures for all forms of identification evidence. This can be done by regulations that codify the procedure to be followed when carrying out identification and practice guidelines for dealing with computer based evidence for high tech crimes in a timely and appropriate manner.
2. The use of video conferencing should be introduced in Uganda’s legislation with procedural requirements to support the use of video conferencing and provide for how and when it should be used.

It should be noted that the Chief Justice made the Judicature Visual Audio Link Rules S.I. 25 of 2016 to enable the use of video conferencing in courts of law in Uganda.

## 7.3 Classification of evidence

The provisions on admissibility and evidential weight of a data message or an electronic record under the Electronic Transactions Act, No. 8 of 2011, mainly takes care of civil proceedings that relate to an electronic transaction, but are not sufficient to take into consideration aspects of electronic evidence of a criminal nature. Provisions of the Evidence Act are inadequate for dealing with evidential records in criminal matters and civil matters of a non-transaction nature i.e. land.

**Recommendation**

Section 2 (1) (b) of the Evidence Act that defines document should be amended to reflect use of innovations like computers, the internet and the different forms of communication such as Skype, whatsApp, telephone and telephone print outs, emails and video link in order to facilitate both criminal and civil procedure.

## 7.4 Confessions

Section 23 of the Evidence Act provides that confessions can be made to a police officer at the rank of Assistant Inspectorate of Police (AIP) and above or a magistrate. There is no statutory definition of the word “confession”. Requiring confessions to be made before a police officer at the rank of AIP and above or magistrate impedes access to justice because AIPs and magistrates are only in certain stations which are not necessarily accessible to the people.

**Recommendation**

Regulations should be made under section 23(1) (2) of the Evidence Act to codify the taking of confessions by police officers andmagistrates.

## 7.5 Unsworn statement of an accused person in criminal matters

Under section 128 of the Magistrates Courts Act and section 74 of the Trial of Indictments Act, unsworn evidence in most cases introduces new facts, yet the person who alleges them is not subject to cross examination. This at times undermines the right to fair trial which is provided for under Article 28 of the Constitution.

**Recommendation**

Section 128 of the Magistrates Courts Act and section 74 of the Trial of Indictments Act on persons who give unsworn statements should be amended to provide for cross examination on theirstatements.

## 7.6 Adversarial vs the inquisitorial system of litigation

The adversarial system that Uganda predominantly employs has several limitations, notably time consuming thus leading to case backlog and high cost of litigation. For purposes of evidence, the inquisitorial system allows a judicial officer to conduct investigation in person or through the police but not as a prosecutor. He or she alternates the forensic role and the exercise of judicial power in context of the investigation. This allows for search for the truth by an impartial officer of the state saving and delivering justice in a timely manner.

**Recommendation**

The existing provisions should be reviewed so as to introduce elements of the inquisitorial systems in order to overcome the limitations of a purely adversarial system that Uganda employs to ensure that justice is done and seen to be done for all parties.

# 8.0 Institutional recommendations

Legislation alone cannot ensure that justice is done. Institutional actions are therefore proposed for application in the day- to-day operations of selected institutions so as to improve the handling of evidence to ensure its admissibility in court.These include:

(a) Continuous training of **Judicial Officers, Prosecutors and Police Officers** on matters of admissibility of electronic evidence to enable them keep abreast of the constantly changing electronic world.

(b) **Justice Law and Order Sector (JLOS)** should fund a study to be conducted by the Uganda Law Reform Commission to evaluate the impact of the Computer Misuse Act No. 2 of 2011, the Electronic Signatures Act No. 7 of 2011 and the Electronic Transactions Act No. 8 of 2011.

(c) **The Uganda Police Force should** develop a Good Practice Guide for Computer Based Evidence to assist staff in dealing with allegations of crime which involve a high-tech element and to ensure that they collect all relevant evidence in a timely and appropriate manner. The Uganda Police should also develop a code of practice to be used by police officers to identify persons in connection with the investigation of an offence and the keeping of accurate and reliable criminal records.

(d) **Uganda Law Reform Commission should** widely disseminate the report to the institutions to which recommendations have been made so as to ensure that the recommendations of the study are considered and implemented.

# 9. General Recommendation

The Foreign Tribunals Evidence Act, Cap. 10 enacted in 1964 which provides for the taking of evidence within or without Uganda in relation to proceedings pending before courts within or without Uganda and the Evidence (Bankers’ Books) Act, Cap. 7 enacted in 1930 which relates to the law of evidence with respect to bankers’ books should be reviewed and amended to accommodate electronic evidence and video conferencing.

# 10. Conclusion

At the conclusion of the study the Commission proposed various draft laws which include:

1. the **Evidence (Amendment) Bill, 2015** to provide for a comprehensive meaning of the words “document”, “data”, create a part on electronic records, provide for evidence of prints, bodily samples or bodily appearance of accused, provide for evidence obtained in undercover operations, provide for giving evidence through live video or live television links and for other related matters;
2. the **Evidence (Confession to Police Officers) Rules** to enable Police Officers to take confessions;
3. the **Evidence (Confession to Magistrates) Rules** to enable Magistrates to take confessions;
4. the **Police (Amendment) Bill, 2015**, to amend the Police Act, Cap. 303 to facilitate taking and management of fingerprint and Deoxyribo Nucleic Acid (DNA) evidence;
5. the **Police (Fingerprint) Regulations, 2015** drafted under section 73 of the Police Act, Cap. 303 to give guidance to the taking of finger prints, creation of finger print database, storage and use of fingerprints, body-prints and photographic images of persons; and
6. The **Police (Deoxyribo Nucleic Acid) Regulations, 2015** to provide for the establishment of a Deoxyribo Nucleic Acid (DNA) data base under the Police Act, Cap. 303, the establishment of the National Forensic DNA Database, keeping of a Crime Scene Index, and Arrestee Index, Convicted Offenders Index, Investigative Index, Elimination Index, Missing Persons and Unidentified Human Remains Index, among others.

The study by the Uganda Law Reform Commission has been completed and the study findings and recommendations are due for submission to the Minister of Justice and Constitutional Affairs for further management. If the recommendations contained in the study report are adopted and implemented, Uganda will have a modern law on evidence and this will improve administration of and access to justice.