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# REFORMING THE LAW OF EVIDENCE OF TANZANIA (PART TWO): CONCEPTUAL OVERVIEW AND PRACTICAL STEPS

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ABSTRACT

*The nation of Tanzania currently employs a code of evidence that is long, complicated, and outdated. Aiming to modernize, the Tanzanian government recently began a project to overhaul its evidence code, inviting various stakeholders from the nation’s legal community to review and reform how evidence is currently used in the country. The authors of this Article are part of a research team from Northwestern University School of Law that traveled to Dar es Salaam in 2012 to meet with stakeholders in the Tanzanian legal community to assess how the Tanzania Evidence Act (“TEA”) is actually being used – and not used – in various parts and by various constituencies within the nation’s legal system. In Spring 2013, the authors returned to Tanzania to participate in a conference with those stakeholders to discuss specific reforms to the TEA and to present a set of guiding principles for the reform of evidence law that they had developed in conjunction with this project. This Article serves as a blueprint for those discussions. First, it provides a conceptual overview of both evidence and the law of evidence. Second, it provides a comprehensive critique of the TEA’s various inconsistencies and anachronisms that must be addressed in order for Tanzania – as well as the other nations that have adopted the Indian Evidence Act on a near-wholesale basis – to reorient its law of evidence to accord with modern legal thought. Third, this Article articulates a set of principles to guide the reform of evidence law, whether of Tanzania or any other jurisdiction. It concludes with a skeletal outline of a proposed replacement for the TEA.*

I. INTRODUCTION

The nation of Tanzania currently employs a code of evidence that is long, complicated, and outdated. The Tanzania Evidence Act (“TEA”) has 188 separate sections, with innumerable subsections, that go on for approximately fifty-three pages of single-spaced, relatively small print.<sup>1</sup> It almost certainly acts as a barrier to the bringing of legal actions; only those with skilled counsel could effectively use – rather than be intimidated by – its numerous provisions. The vast majority of its text was drafted not by the Tanzanians themselves, but by the English in the form of the Indian Evidence Act of 1872 (“Indian Evidence Act”), which was later grafted

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<sup>1</sup> See generally Evidence Act, 1967, Act No 6 of 1967 (Tanz.), codified as amended at Cap. 6 R.E. 2002.

onto Tanzanian law through British colonial rule.<sup>2</sup> Whatever advantages the Indian Evidence Act has over what preceded it, it is not well suited to the modern-day realities of Tanzania.

To that end, the Tanzanian government recently began a project to overhaul its evidentiary code, inviting various stakeholders from the nation's legal community to review and reform how evidence is currently used in the country's courts.<sup>3</sup> The authors of this Article are part of a research team from Northwestern University School of Law, led by Professor Ronald J. Allen, which is assisting a Working Group appointed by Tanzania's government to draft a new code of evidence. The authors traveled to Dar es Salaam in 2012 to meet with the Working Group, as well as numerous other stakeholders in the Tanzanian legal community, to assess how the TEA is actually being used – and not used – in various parts and by various constituencies within the nation's legal system. An initial article by the authors detailed the research team's findings on the difficult doctrine behind and administration of the TEA.<sup>4</sup> In addition, the article assessed Tanzania's general jurisprudential and judicial landscape, an area that can accurately be described as challenging.<sup>5</sup> In Spring 2013, the authors returned to Dar es Salaam for a conference with the Tanzanian government's committee of stakeholders to discuss specific reforms to the TEA – indeed, a complete overhaul – as well as express a set of guiding principles for the reform of evidence law that we have developed in conjunction with this project.

This Article serves as a blueprint for those discussions. First, it provides a conceptual overview of both evidence and the law of evidence, two distinct concepts that are critical to understand in order to undertake any project of this nature and magnitude. Second, it provides a comprehensive critique of the TEA's various inconsistencies and anachronisms that must be addressed in order for Tanzania – as well as the other nations that have adopted the Indian Evidence Act on a near-wholesale basis<sup>6</sup> – to reorient its law of evidence to accord with modern legal thought. Third, this Article articulates a set of principles to guide the reform of evidence law, whether of Tanzania or any other jurisdiction. It concludes with a skeletal outline of a proposed replacement for the TEA.

Reforming the law of evidence at this moment in Tanzanian history is

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<sup>2</sup> Ronald J. Allen et al., *Reforming the Law of Evidence of Tanzania (Part One): The Social and Legal Challenges*, 31 B.U. INT'L L.J. 217, 222–23 (2013) (identifying 90% of the current code as a direct copy from the British India code).

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> See generally *id.* (describing various challenges of the modern legal landscape in Tanzania).

<sup>6</sup> See *infra* notes 55–63 and accompanying text for these nations and their efforts for reform.

likely to be particularly beneficial. Although perhaps somewhat obscure to the general public, the law of evidence is among the most important of the various fields of law. First, as elaborated below, accurate fact-finding is as fundamental to the construction of a just society as the articulation of rights and obligations. Indeed, accuracy in fact-finding may be more fundamental than rights and obligations, for without accurate fact-finding, rights and obligations are meaningless. Every contested claim of a right or an obligation is entirely dependent upon the juridical finding of facts. In order to assert and defend a right in court, one must first be able to establish the foundational facts to demonstrate a violation of that right. Without competent evidence law to govern fact demonstrations, trials become unwieldy and result in inaccurate findings of fact.

Second, the law of evidence, in conjunction with the law of procedure, structures the citizen's contact with the law in the most dramatic way. Anyone unable to resolve disputes without legal action will be immersed in a legal world largely constructed by the law of evidence. The law of evidence is created by the state, which means that immersion in this legal world will construct and color a citizen's view not only of this important aspect of the machinery of justice, but also of the government of Tanzania itself. Evidence law that facilitates the smooth and consistent operation of trials will generate respect for both the law and the government.<sup>7</sup>

Third, the efficiency and efficacy of the law of evidence will affect, in some instances dramatically, the very value of the right or obligation being contested. If the law of evidence imposes large costs in the discovery or presentation of evidence, certain rights may be impossible to vindicate. If the cost of litigation is ten million Tanzanian shillings ("TSH"), but the value of the right is four million TSH, it is fiscally imprudent to vindicate that right through the court system, thus raising the specter of personal justice.

Fourth, the law of evidence and its associated costs both act as barriers to the bringing of lawsuits and, more fundamentally, as determiners of how

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<sup>7</sup> This is an important consideration in Tanzania, where the judiciary lacks the public's trust. *See, e.g.*, The Prevention and Combating of Corruption Bureau, The United Republic of Tanzania, *National Governance and Corruption Survey* 29 (2009), <http://www.pccb.go.tz/images/stories/publications/NGACS%20Public%20Officials%20Survey.pdf> (reporting that the judiciary is ranked as the third most corrupt institution in the country with 76% of national households not believing that the judiciary deserves the public trust and 57.4% of public officials rating the district and primary courts as "dishonest" or "completely dishonest"). International surveys support this view. *See, e.g.*, *2011 Country Portfolio Performance Assessment*, AFRICAN DEV. BANK GRP. (Jan. 27, 2012), [http://www.afdb.org/fileadmin/uploads/afdb/Documents/Project-and-Operations/2011%20PPA-FOR%20DISCLOSURE\\_\\_\\_-1-SS.xls](http://www.afdb.org/fileadmin/uploads/afdb/Documents/Project-and-Operations/2011%20PPA-FOR%20DISCLOSURE___-1-SS.xls) (showing Tanzania in top ten of African governments in portfolio performance assessment); *2012 Ibrahim Index of African Governance*, MO IBRAHIM FOUND., <http://www.moibrahimfoundation.org/interact> (last visited Feb. 25, 2013) (ranking Tanzania in the top ten of African governments).

disputes within a society will be resolved. On the opposite side of the coin of a right that cannot be vindicated is the risk that the law will encourage too much litigation and too little private negotiation.

Reforming the law of evidence demands that attention be given to the actual operation of the legal machinery of trials and, more generally, to social dispute resolution. How is the present law functioning? Whom, if anyone, does it favor or disadvantage? Does it encourage the waste of scarce judicial resources? Does it prevent the bringing of lawsuits in contexts where official clarification of rights would be valuable? Are there discrepancies in modes of dispute resolution throughout the country that are not justifiable for historical or social reasons? Conversely, should there be more flexibility in the law than it presently possesses?

Having largely been written 140 years ago, the TEA does not reflect the advances of legal knowledge about evidence specifically, the nature of regulation generally, and the underlying epistemological concerns that should inform the law of evidence. Additionally, the TEA is unaffected by the vast increase in knowledge about the actual operation of trials, including the role of the law of evidence in fashioning trials and their substitutes, and the implications of that knowledge for the actual construction of effective rules of evidence in countries as diverse as the United States and China.<sup>8</sup> Indeed, this accumulated knowledge is now even substantially influencing Europe, which has long had a different view of the law of evidence emanating from its continental legal perspective.<sup>9</sup> The European courts are beginning to embrace in a common law fashion many of the principles that animate the Anglo-American law of evidence.<sup>10</sup>

Part II provides a conceptual overview of evidence and evidence law that attempts to synthesize modern thinking about these matters in a way that informs the construction of a law of evidence. Part III critiques the present TEA from the perspectives developed in Part II. In light of that overview, Part IV identifies a set of principles that should underlie any attempt at fashioning a law of evidence. Part V concludes with a proposed conceptual outline of a new law of evidence for Tanzania that takes into account the principles set forth below.

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<sup>8</sup> See, e.g., John J. Capowski, *China's Evidentiary and Procedural Reforms, the Federal Rules of Evidence, and the Harmonization of Civil and Common Law*, 47 *TEX. INT'L L.J.* 455 (2012).

<sup>9</sup> See JOHN D. JACKSON & SARAH J. SUMMERS, *THE INTERNATIONALISATION OF CRIMINAL EVIDENCE: BEYOND THE COMMON LAW AND CIVIL LAW TRADITIONS* 1–56 (2012).

<sup>10</sup> See, e.g., *Heaney & McGuinness v. Ireland*, 2000-XII Eur. Ct. H.R. 419 (discussing the right to confrontation); JACKSON & SUMMERS, *supra* note 9.

## II. A CONCEPTUAL OVERVIEW OF EVIDENCE AND THE LAW OF EVIDENCE

“Evidence” and “evidence law” are two quite distinct concepts. “Evidence” generally refers to those inputs to decision-making that influence its outcome in what, to introduce a third concept, is normally referred to as a “rational manner.”<sup>11</sup> In the United States and most other countries, “evidence” also has a technical legal meaning to refer to the testimony and exhibits introduced at trial, but this label is problematic.<sup>12</sup> Fact-finders must take into account their observations of witnesses (i.e., demeanor), which is “evidence” in any useful sense of the term. On a deeper level, no observation may be processed and deliberated upon without the use of a vast storehouse of preexisting concepts; observations; and decision-making tools, such as logic, abduction, and utilities. Thus, a useful concept of evidence must expand considerably far beyond the mere “trial inputs” or the observations of witness testimony and exhibits. What “rational” means in this context is putting all of the inputs and cognitive capabilities to the use of discovering, as best can be done, the way the world was at some prior time, and then letting rights and obligations be determined consistently with the preexisting state of affairs.

By contrast, “evidence law” refers to the manner in which the evidentiary process is organized, though the organization of the evidentiary process is contingent on both “evidence” and the nature of “rationality.” The domain of evidence law, then, extends to the traces of the past colloquially referred to as “evidence,” the manner in which such traces of the past are processed and relied upon in human decision-making, and the regulation by law of the formal evidentiary process. Evidence law is thus contingent upon, and must accommodate, at least three things: (1) universal truths of the human condition; (2) contingent aspects of the nature of government and its legal system; and (3) highly specific policies to be pursued in addition or opposition to the pursuit of truth. These are examined in Subsections A, B, and C. Subsection D then articulates four issues that the drafters of any complex legal area must consider. Lastly, Subsection E provides a general summary of the implications of all of the above.

### *A. Universal Truths*

Although much of human culture is socially determined, cognitive capacities are not. How capacities are developed and employed may differ, but the underlying epistemological capacities to perceive, process,

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<sup>11</sup> See Laura K. Brennan, *Exploring New Opportunities for Evidence-Based Decision Making*, 39 AM. J. PREVENTATIVE MED. 282, 282 (2010) (finding that without sufficient input evidence, public health decision-makers cannot make effective and rational decisions).

<sup>12</sup> 1 MCCORMICK ON EVIDENCE § 1 (Kenneth S. Broun ed., 7th ed. 2013).

remember, and relate what was observed are part of the human condition. Although they differ across individuals within societies, they are universally present in all competent adults. Many of the tools that humans employ to assist in understanding their environment likewise are universal. Mathematics and logic do not vary from place to place, nor do decision tools, such as utility functions and cost curves.<sup>13</sup> Together, these epistemological capacities and formal tools are referred to as the “tools of rationality.” These tools of rationality are what permit humans to understand and control their environment. They include such things as simple deductive reasoning, the capacity to generalize, abductive reasoning (the search for the explanation of a series of data points), and an understanding of cause and effect and of necessary and sufficient conditions. These issues make up epistemology – the study of knowledge – and the law of evidence is in fact the law’s epistemology.<sup>14</sup>

While there surely are universal truths of cognition, just as surely there are cultural and social influences, at all levels, operating on the basic tools of rationality. Two individuals from different cultures may experience the same perceptual event but understand it completely differently based on their respective familiarity with the type of event in question and their background knowledge.<sup>15</sup> Similarly, the assumptions that begin logical processes may differ. This is particularly true with respect to one significant aspect of rationality – cost–benefit analysis – and utilitarian considerations generally. Plainly, considering the relationship between costs and benefits is critical to intelligent decision-making, but there can be disagreements over the costs and benefits of any particular action, their relative weights, and the probability that any particular outcome may materialize.

One of the primary tasks of the law of evidence is to process and digest this elaborate set of considerations and use it to create a system of dispute resolution that serves the interests of the community.<sup>16</sup> It is critically

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<sup>13</sup> See, e.g., Christian Greiffenhagen & Wes Sharrock, *Mathematical Relativism: Logic, Grammar, and Arithmetic in Cultural Comparison*, 36 J. THEORY SOC. BEHAV. 97, 98 (2006) (rejecting cultural relativists’ claim that cultural variation in mathematical practice, such as a counting system of 27 instead of the Western 10, means that mathematics is anything but universal).

<sup>14</sup> See Ronald J. Allen & Brian Leiter, *Naturalized Epistemology and the Law of Evidence*, 87 VA. L. REV. 1491 (2001).

<sup>15</sup> See, e.g., Richard E. Nisbett & Yuri Miyamoto, *The Influence of Culture: Holistic Versus Analytic Perception*, 9 TRENDS COGNITIVE SCI. 467 (2005) (comparing Westerners’ and Asians’ perception of events to suggest that perception does not exist universally across cultures); Hannah Faye Chua, Julie E. Boland & Richard E. Nisbett, *Cultural Variation in Eye Movements During Scene Perception*, 102 PROC. NAT’L ACAD. SCI. U.S.A. 12629 (2005) (demonstrating that Chinese and Americans view images differently for the same reason).

<sup>16</sup> EVIDENCE LAW: A STUDENT’S GUIDE TO THE LAW OF EVIDENCE AS APPLIED IN AMERICAN TRIALS § 1.01 (Roger C. Park et al. eds., 3rd ed., 2011) (stating that the

important for the law of evidence to be broadly consistent with natural reasoning processes. Yet, there are also occasions that justify departures from the natural manner in which a decision would be reached. The law must decide when to embrace and when to try to affect or change the natural reasoning processes of fact-finders.<sup>17</sup>

### *B. Contingencies of Government and Its Legal System*

Although there is much that is common to humanity, the ways in which humans organize themselves vary almost infinitely. Legal systems are critical components of government, and they reflect the resolution of issues of deep political theory. Whatever form of government is chosen and, more importantly, whatever assumptions form its foundation will obviously impact the nature of the legal system. The nature of the legal system, in turn, will impact the way that disputes are resolved and evidence is administered. One need look no further than the history of Tanzania and the United States to see this clearly. Because of the political history of the United States, the founders concluded that political power should be diffused over the three branches of government, each needing one or both of the others in order to be effective. This was designed to counteract what Western observers almost universally believe is the centripetal force of all power centers and their tendency toward aggrandizement.<sup>18</sup> Thus, the central political problem facing the drafters of the American Constitution

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adversarial justice system is a system of “dispute resolution that helps order society, designed to keep us from resolving our differences by other less systematic, less predictable, less reliable, and ultimately less peaceful methods.”)

<sup>17</sup> For instance, in the United States, the Federal Rules of Evidence make inadmissible any evidence of an alleged sexual assault victim’s past sexual history despite its likely relevance to the issue of consent – the rape shield rule. FED. R. EVID. 412; *id.* advisory committee’s note (“The rule aims to safeguard the alleged victim against the invasion of privacy, potential embarrassment and sexual stereotyping. . . . By affording victims protection in most instances, the rule also encourages victims of sexual misconduct to institute and to participate in legal proceedings against alleged offenders.”). By contrast, Tanzania has a reverse rape shield rule, explicitly allowing such evidence. Evidence Act, § 164(1)(d) (Tanz.) (“[W]hen a man is prosecuted for rape, or an attempt to commit rape, it may be shown that the prosecutrix was of generally immoral character.”). India retained a similar rule until 2003, when it was replaced by an exclusionary rule. *See* Indian Evidence (Amendment) Act, 2002, No. 4, Acts of Parliament, 2003 (India) (providing a ban on cross-examination questions during rape prosecutions “as to [the prosecutrix’s] general immoral character”).

<sup>18</sup> *See, e.g.*, *Buckley v. Valeo*, 424 U.S. 1, 122 (1976) (“The Framers regarded the checks and balances that they had built into the tripartite Federal Government as a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other.”); THE FEDERALIST NO. 49, at 283-84 (James Madison) (Clinton Rossiter ed., 1961) (“We have seen that the tendency of republican governments is to an aggrandizement of the legislative at the expense of the other departments.”).



was a principal–agent problem.<sup>19</sup> The question was how the principal (the people in whom sovereignty lay) could control their agent (the government) in the face of the obvious fact that the agent could easily have its own agenda at odds with that of its principal. In brief, this is why the United States has a tradition of independent courts conceived of as being a potential brake on the other branches of government.<sup>20</sup> It also explains a significant part of the approach of the United States to rules of evidence, such as the reliance on complex exclusionary rules.<sup>21</sup>

That said, there are innumerable ways in which governments can be constructed. The original political theory of Tanzania after its separation from the British Empire involved a single-party state<sup>22</sup> that perforce had a less robust theory of separation of powers. This structure concentrates political power in the party, and emphasizes that any state organization is largely a means of efficiently and effectively pursuing the policies set by the party.<sup>23</sup> An important question for the drafters of the law of evidence to consider is the lingering consequences of Tanzania’s political origins. To what extent do communitarian norms still exert their influence so that dispute resolution has a communal aspect as compared to disputes being a “private” matter, as they are largely conceived to be in the United States?

There is, however, at least one universal aspect of dispute resolution, and it is not what one might think. There is a misconception in the West that the fundamental political insight of the Enlightenment, and the strongest plank supporting modern Western governments, has something to do with

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<sup>19</sup> UNDERSTANDING DEMOCRACY: ECONOMIC AND POLITICAL PERSPECTIVE 85 (Albert Breton et al. eds, 1997).

<sup>20</sup> THE CONSTITUTION IN 2020 293 (Jack M. Balkin and Reva B. Siegal eds., 2009) (“It is widely agreed among comparative scholars that the single most influential contribution that the U.S. Constitution has made to the world has been the idea of a written set of rights enforced by independent courts . . . . Nowhere is that independence more important than in interpreting the Constitution as a limit on other branches of government.”).

<sup>21</sup> See, e.g., *Mapp v. Ohio*, 367 U.S. 643 (1961) (excluding evidence from unreasonable search and seizures from state criminal cases).

<sup>22</sup> See Goran Hyden & Colin Leys, *Elections and Politics in Single-Party Systems: The Case of Kenya and Tanzania*, 2 BRIT. J. POL.SCI. 389, 405–08 (1972) (describing the formation of Tanzania as an independent nation with one party, the Tanganyika African National Union (“TANU”), at its head).

<sup>23</sup> Tanzania first allowed other political parties in 1992. See The Political Parties Act, 1992, Act No. 5 of 1992 (Tanz.), Cap. 258 R.E. 2002. Of course, permission to organize does not grant or diffuse power. Election rules favor the ruling party. See Mohabe Nyirabu, *The Multiparty Reform Process in Tanzania: The Dominance of the Ruling Party*, 7 AFR. J. POL. SCI. 99 (2002). Mainland Tanzania’s Parliament and President have always remained in the hands of the Chama Cha Mapinduzi (Swahili for the Party of the Revolution), TANU’s successor. The Commonwealth Observer Group, *Tanzania General Elections 5–8*, 31 (2010), available at <http://www.thecommonwealth.org/files/232431/FileName/FinalReport-TanzaniaCOG.pdf>.

rights and obligations. This view may be in the ascendency in Tanzania – with its apparent inexorable progression toward market capitalism.<sup>24</sup> Citations to prominent Enlightenment philosophers, such as Hobbes, Locke, and Rousseau, are found in abundance in legal scholarship and underscore this point.<sup>25</sup> While rights and obligations are important, the more fundamental insight of the Enlightenment was the epistemological revolution that there is a world external to the mind that may be known objectively through evidence. This reverses the actual relationship of facts and rights/obligations. Facts are prior to and determinative of rights and obligations. Without accurate fact-finding, rights and obligations are meaningless.

Consider the simple case of ownership of the clothes you are wearing. Your ownership of those clothes allows you the “right” to possess, consume, and dispose of those assets, but suppose someone demands that you return “his” clothes. That is, he insists that the clothes that you are wearing actually belong to him. What will you do? You will search for a decision-maker to whom you will present evidence that you bought, made, found, or were given the clothes in question, and, if successful in this effort, the decision-maker will indeed grant you those rights and impose upon the other person reciprocal obligations. The critical point is that those rights and obligations are dependent upon what facts are found and are derivative of them. The significance of this point cannot be overstated. Tying the rule of law to true states of the real world anchors rights and obligations in things that can be known and are independent of whim and caprice. This is why the ideas of relevance and materiality are so fundamentally important to the construction of a legal system. They tie the legal system to the bedrock of factual accuracy.

This point is truly universal. Neither rights nor obligations, on the one hand, nor policy choices on the other, can be pursued in the absence of knowledge of the actual, relevant state of affairs. Thus, even within the contingencies of ways of governing, there is a universal aspect of the law of evidence that cannot be ignored. No matter what else may be true, factual accuracy will always be a desideratum of considerable importance.<sup>26</sup>

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<sup>24</sup> See Int’l Monetary Fund [IMF], *United Republic of Tanzania: Sixth Review Under the Policy Support Instrument*, IMF Country Report No. 13/166, ¶¶ 1, 10 (May 17, 2013), available at <http://www.imf.org/external/pubs/ft/scr/2013/cr13166.pdf> (reporting Gross Domestic Product growth of nearly 7% in 2011 and 2012, while anticipating similar growth in 2013 through reforms supported by the IMF).

<sup>25</sup> See, e.g., Michael W. Doyle & Geoffrey S. Carlson, *Silence of the Laws? Conceptions of International Relations and International Law in Hobbes, Kant, and Locke*, 46 COLUM. J. TRANSNAT’L L. 648 (2008); Tara Helfman, *Nasty, Brutish and False: Rousseau’s State in the International Order*, 39 SYRACUSE J. INT’L L. & COM. 357 (2012).

<sup>26</sup> Even the Chinese government has recognized this. The People’s Supreme Court recently announced the creation of the Research Project on Evidence Rules for the Major

Of course, how one might think facts are most accurately or efficiently found, and what policies may offset the significance of factual accuracy, are matters of reasonable disagreement, matters to which we now turn.

*C. The Significance of Evidence-Related Policy Issues*

The designer of a legal system faces an enormous number of policy choices. Some are consistent with the pursuit of factual accuracy, but many are in opposition to it. Note that the phrase “policy issues” is used to accompany all interests that society may pursue, whether practical and utilitarian or designed to advance some normative interest, such as privacy or confidentiality. It is surely acceptable to make the distinction between normative and utilitarian policies, but they are parts of the larger category of interests governments pursue and can effectively be lumped together when thinking about the law of evidence.<sup>27</sup> Evidence law does some things because of constitutional commitments, but even at the highest level of generality, this is no different than fashioning evidence law to pursue an interest that is not embedded in a constitutional document.

We now turn to many of the specific policy issues that must be accommodated by the law of evidence.

*Pursuit of Factual Accuracy.* This is the one policy that no legal system can afford to ignore. One might reasonably suppose that natural reasoning processes based on innate cognitive capacities work well, and thus typically should be deferred to in the pursuit of factual accuracy. However, there may be recurring situations that lead to error. In such cases, rules of evidence may attempt to correct for that systematic error. The possibility that natural reasoning assumptions about certain evidence can generate error explains the frequently found authorization to exclude evidence when it may be misleading or unfairly prejudicial.<sup>28</sup> It also underlies other rules,

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Project of National Social Science Foundation of China and Professor Allen has been appointed as its advisor.

<sup>27</sup> Another distinction that could be made, but that we do not make, is between the sources of policy issues. The source of some is just the standard questions that all governments face involving the ordinary exercise of police power – the power of the state to regulate issues affecting health, safety, and welfare. By contrast, the sources of some others are explicit constitutional provisions, whatever the form a constitution may take in any particular country, and the source of further policies may be traditions or conventions. To be sure, one can sort out constitutional questions from other kinds of policy questions. While doing so is coherent, the distinction is not helpful to understanding the law of evidence, and thus we do not bother with making it.

<sup>28</sup> FED. R. EVID. 403 (“The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of . . . unfair prejudice [or] misleading the jury. . . .”); HODGE M. MALEK, JONATHAN AUBURN & RODERICK BAGSHAW, *PHIPSON ON EVIDENCE* § 20-63, 540 (16th ed. 2005) (“The [English] common law discretion to exclude evidence more prejudicial than probative remains. . . .”).

such as limitations on character and propensity evidence,<sup>29</sup> and the requirement that witnesses testify from firsthand knowledge.<sup>30</sup> The circumstances under which individuals systematically make errors heavily depends on culture and, in this instance, important work by the drafters of the law of evidence must be undertaken to identify the situations when the law should impede, rather than embrace, natural reasoning processes.

Factual accuracy is the most significant aspiration of a rational legal system, but it is by no means the only one. Accuracy has a cost, and the cost can sometimes exceed its value. A legal system overly preoccupied with factual accuracy may undermine the very social conditions that the legal system is trying to foster. As mentioned above, a dispute worth a fraction of what it would take to litigate it to a factually accurate conclusion perhaps should not be litigated; no one would argue for hiring an expert to dispute a traffic ticket, for instance. Such litigation may very well reduce overall social welfare and discourage private settlement of disputes. Where the limit is reached is difficult to say, and surely depends in part on local views. A drafter of any rules of evidence must concentrate on where this limit is and ensure that the rules accommodate this point.

*The Value of Incentives.* Factual accuracy competes not just with cost but also with other policies that a government may reasonably pursue. The list of such policies is long and, again, is culturally contingent. For example, the law of privileges may foster and protect numerous relationships that a specific culture considers important (e.g., spousal, legal, medical, spiritual, and governmental).<sup>31</sup> Another example is that a system can incentivize people to fix dangerous conditions in a timely fashion after an accident by preventing the use of evidence that a person fixed a dangerous condition on her property following an accident but before trial.<sup>32</sup> Although a reasonable person might infer that repair shows that the

<sup>29</sup> FED. R. EVID. 404 (“Evidence of a person’s character . . . is not admissible to prove . . . the person acted in accordance with the character.”); Criminal Justice Act, 2003, c. 44, §§ 99–112 (U.K.) (excluding character evidence subject to exceptions).

<sup>30</sup> FED. R. EVID. 602 (“A witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter.”); MALEK, AUBURN & BAGSHAW, *supra* note 28, § 12-17, 324 (“The facts testified to by a witness must . . . be those which have occurred within his own personal knowledge. . .”).

<sup>31</sup> *See, e.g.*, FED. R. EVID. 501 advisory committee notes to 1974 enactment (outlining a proposed system of privileges for the Federal Rules of Evidence, including protections for communications between husbands and wives and communications with clergy, among several others); Rules of Procedure and Evidence, Doc. ICC-ASP/1/3 (pt. 11-A), Rules 73, 75 (Sept. 9, 2002) (providing absolute privilege for attorney-client and family communications, while privileging certain confidential communication with professionals – such as doctors, counselors, and clergy – when it meets certain requirements). *See also* JUDGE RICHARD MAY & MARIEKE WIERDA, *INTERNATIONAL CRIMINAL EVIDENCE* §§ 6.74–6.76, 195 (2002) (privileging communication of U.N. personnel).

<sup>32</sup> *See, e.g.*, FED. R. EVID. 407 (disallowing the admission of evidence where “measures

property owner acknowledged a dangerous condition, admission of the repair evidence might disincentivize fixing the dangerous condition, thus putting more people in danger. Evidence law can help to remove this disincentive and protect more people by preventing the admission of evidence about property repairs after accidents. Perhaps the settlement of disputes is preferred to litigation, which leads to the exclusion of statements made during settlement talks.<sup>33</sup> The encouragement of settlement is also a reason not to price litigation too low. The more the public subsidizes litigation, presumably the more of it there will be, and the less of private negotiation. Still other policies can be pursued by the creation of incentives in the law of evidence. For example, in the United States, a vast body of exclusionary rules is premised on the perceived need to regulate police investigative activities.<sup>34</sup> Rules of evidence can also encourage or discourage certain kinds of lawsuits from being brought.<sup>35</sup>

*General Considerations of Fairness.* These may also influence the law of evidence, although the precise effect of this variable is often hard to sort out from more overtly utilitarian motivations. Some think that the limit on unfairly prejudicial evidence reflects not only the concern about accuracy but also the concern about humiliation, as is the case with rape relevancy rules.<sup>36</sup> The limits on prior behavior and propensity evidence reflect in part a belief that an individual should not be trapped in the past.<sup>37</sup> The hearsay

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are taken that would have made an earlier injury or harm less likely to occur” to prove negligence, culpable conduct, design defects, or need for warning); *Hart v. Lancashire & Yorkshire Ry. Co.*, [1869] 5 Can. L.J. N.S. 327, 329 (Ct. Exchequer) (Bramwell, B.) (“[P]eople do not furnish evidence against themselves simply by adopting a new plan in order to prevent the recurrence of an accident.”).

<sup>33</sup> See, e.g., FED. R. EVID. 408 (holding settlement offers inadmissible as evidence).

<sup>34</sup> See Ronald J. Allen & Ross M. Rosenberg, *The Fourth Amendment and the Limits of Theory: Local Versus General Theoretical Knowledge*, 72 ST. JOHN’S L. REV. 1149, 1174 (1998) (“The point of the exclusionary regime . . . is to stop . . . inappropriate searches from occurring in the first place.”).

<sup>35</sup> See generally John Leubsdorf, *Evidence Law as a System of Incentives*, 95 IOWA L. REV. 1621 (2010).

<sup>36</sup> See FED. R. EVID. 412–15. See also *supra* note 17 (comparing the policy choice behind the U.S. rules and comparing with the choices made in Tanzania and India).

<sup>37</sup> See, e.g., *United States v. Harding*, 525 F.2d 84, 89 (7th Cir. 1975) (Stevens, J.) (“When the prior conviction is used to impeach a defendant who elects to take the stand to testify in his own behalf, . . . [it] implies that he is more likely to have committed the offense for which he is being tried than if he had previously led a blameless life.”); I WIGMORE, EVIDENCE § 57 (3d ed. 1940) (“The deep tendency of human nature to punish, not because our victim is guilty this time, but because he is a bad man and may as well be condemned now that he is caught, is a tendency which cannot fail to operate with any jury, in or out of Court.”); W. R. Cornish & A. P. Sealy, *Juries and the Rules of Evidence*, 1973 CRIM. L. REV. 208 (reporting on a study where the number of jurors voting to convict a defendant rose 30% after impeachment evidence of the defendant’s past conviction despite limiting instructions); Julie Horney & Cassia Spohn, *Rape Law Reform and Instrumental Change in Six Urban*

rule to some extent reflects the values of the right to confront witnesses against you.<sup>38</sup>

*The Risk of Error.* A mistake-free legal system is not possible. It is critically important to recognize that two types of errors can be made: a wrongful verdict for a plaintiff, including a conviction of an innocent person (a “false-positive error”), and a wrongful verdict for a defendant, including an acquittal of a guilty person (a “false-negative error”). Resource allocation and other decisions affect the relationship between these two types of errors. Normally, civil litigation is structured to both reduce the total number of errors and equalize the number of errors made on behalf of plaintiffs and defendants. In civil cases, an error either way results in the identical misallocation of resources. If a plaintiff wrongly wins a five million TSH verdict, a citizen (the defendant) wrongly must part with five million TSH. If a defendant wrongly wins a verdict that he or she does not owe five million TSH, a citizen (the plaintiff) will be wrongly deprived of five million TSH that he or she rightfully should possess. These two cases are analytically identical. The criminal justice process, by contrast, is designed to reduce the possibility of wrongful convictions at the admitted expense of making more mistakes of wrongful acquittals. Although the matter is complicated, these perspectives explain in large measure the preponderance standard in civil cases and the standard of proof beyond a reasonable doubt in criminal cases.<sup>39</sup>

The analysis in the previous paragraph states the conventional account of legal errors, but an important qualification is necessary.<sup>40</sup> The actual error rate at trial is dependent on the baseline of factually innocent and factually guilty people who go to trial and the accuracy of probability judgments made by the fact-finders. In addition, the normal approach neglects the values of true findings of guilt and innocence, and thus is not an appealing approach as a normative matter. Consider a simple example. If the decision rule is set to ensure that there are ten erroneous acquittals for every erroneous conviction, a legal system would be compliant with this objective if it wrongly acquitted ninety out of every hundred defendants and wrongfully convicted nine out of every hundred defendants. This means that a system that made mistakes in ninety-nine out of every hundred cases would be in compliance. Such an error-ridden system hardly seems ideal,

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*Jurisdictions*, 25 *LAW & SOC’Y REV.* 117, 117, 119 (1991) (describing the problems associated with admitting evidence of a victim’s sexual history in rape cases).

<sup>38</sup> See *Crawford v. Washington*, 541 U.S. 36, 51, 53 (2004) (acknowledging that while “not all hearsay implicates the Sixth Amendment’s core concerns,” concern with hearsay is the amendment’s “primary object”).

<sup>39</sup> Tanzania shares these well-known standards. See Evidence Act, § 3(2) (Tanz.).

<sup>40</sup> See, e.g., Ronald J. Allen & Larry Laudan, *Deadly Dilemmas*, 41 *TEX. TECH L. REV.* 65 (2008); Larry Laudan & Ronald J. Allen, *Deadly Dilemmas II: Bail and Crime*, 85 *CHI. KENT L. REV.* 23 (2010).

but it is a direct derivative of the conventional thinking about errors.

Rules of evidence can affect the types of cases brought to trial and the actual distribution of errors by admitting or excluding categories of evidence. The general message here is that the drafters of rules of evidence cannot be content to work off of the slogans of old, but must strive to obtain as clear a picture as possible of the actual operation of the legal system.

*Rules vs. Discretion in the Admissibility of Evidence.* Aspects of the law of evidence are rule-like in the sense of providing necessary and sufficient conditions that permit deductions to be drawn. However, important parts of the law of evidence simply allocate responsibility and discretion precisely because the relevant issue is too complicated for rule-like treatment. Perhaps the single most important aspect of the law of evidence – relevancy – has this attribute. It is impossible to state *a priori* the necessary and sufficient conditions for the relevance of most evidence presented at any particular trial. The conditions that make evidence relevant or irrelevant cannot be known in advance; they depend on the unique characteristics of each trial. For example, it is impossible to know in advance how a witness will testify in a dispute that has not yet materialized. Thus, it is impossible to create a set of evidentiary rules that regulate such matters in detail. Instead, the law of evidence must vest responsibility in someone – party or judge – to determine what evidence to offer, and it does so under quite general guidelines. “Relevant evidence” is defined as evidence that may increase or decrease the probability of some material fact being true,<sup>41</sup> but the rules cannot specify in advance when the condition may be met.

*Rules vs. Discretion in the Allocation of Power.* The drafters of the law of evidence must consider how to allocate responsibility among the various actors in the legal system. For example, by determining how much discretion the trial judge has, the law of evidence affects how much control the parties have over the trial process.<sup>42</sup> In addition, the law of evidence structures the relationship between trial and appellate judges. Should there be *de novo* review of a trial in the appellate court or just a limited review of legal errors? Are small civil cases different from large commercial cases in ways that justify different treatment? What is unique about criminal cases? The law of evidence also regulates a complex set of interactions involving Parliament, judges, lawyers, parties, and witnesses. In sum, the drafters must decide whether to have a highly complicated set of rules to restrict the power of trial judges or, instead, a series of guidelines with the expectation

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<sup>41</sup> See FED. R. EVID. 401.

<sup>42</sup> Of course, the abilities of the actors in a nation’s legal system can interact with the structured legal process. The American system, adversarial in nature, aided by well-trained lawyers, allows counsel discretion in organizing a trial. Tanzania, with fewer attorneys and more cases with unrepresented parties, may provide *de facto* discretion to its magistrates no matter the formal rules. See Allen et al., *supra* note 2, at 241–42 (describing one such case of a magistrate asking all questions in a trial in Dar es Salaam).

that trial judges are largely competent to administer them fairly. While the TEA is the former, the modern trend with regard to law of evidence is more consistent with the latter.<sup>43</sup>

The balance between rules and discretion is critically important and deserving of some elaboration. A highly discretionary set of rules has benefits and drawbacks in terms of the allocation of power. Discretion allows judges to make judgments that reflect individualized considerations of certain pieces of evidence in any given case. However, the higher the discretion threshold gets, the more power trial-level judges receive. Discretionary rules insulate trial judges from control by appellate judges, and, in the case of Tanzania, control of the Judiciary by Parliament. In contrast to discretionary rules, highly complicated evidence rules maintain control over the evidentiary process in the governmental organ that issues the rules. They remove discretion from individual judges, and thus have the theoretical potential of reducing disparate and inconsistent treatment of similar cases. They also facilitate appellate review and, thus facilitate appellate court control over trial courts. In an ideal world, everyone would know all the rules applicable to their behavior, and these rules would be enforced in an evenhanded and reliable fashion.

However, in the real world, this idealized vision is difficult to achieve. Rules of evidence largely attempt to regulate the inferential process, but the inferential process pertinent to the law ranges over all of human affairs and involves all the complexity of cognition. No complex body of law, whether it is the TEA or the common law of England and the United States, has ever satisfactorily reduced this complexity to a manageable simplicity while satisfying the goal of facilitating efficient and accurate adjudication. Indeed, one of the primary motivations for the drafting of the Federal Rules of Evidence was the unwieldy complexity of the common law of evidence.<sup>44</sup> One way to handle this complexity is to provide for complex

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<sup>43</sup> See Eleanor Swift, *One Hundred Years of Evidence Law Reform: Thayer's Triumph*, 88 CALIF. L. REV. 2437, 2440–41 (2000) (describing twentieth-century evidence scholars' success in advocating for more discretion for trial judges, and stating, "[m]ore recently, a powerful trend toward expanding such discretion has been fueled by amendments to the [Federal Rules of Evidence], by the United States Supreme Court's interpretations of the Rules, and by the gradual erosion of existing doctrinal limits through the trial court decision.").

<sup>44</sup> See, e.g., Glen Weissenberger, *Evidence Myopia: The Failure to See the Federal Rules of Evidence as a Codification of the Common Law*, 40 WM. & MARY L. REV. 1539, 1573–74 (1999) ("[T]he development of the Federal Rules of Evidence emerges as a part of the codification movement in the United States that sought to make the increasing complexity of the common law more accessible."). The FRE's impact on codification is difficult to overstate. "Before work on the Federal Rules began, only four states had codified their evidentiary rules." Margaret A. Berger, *The Federal Rules of Evidence: Defining and Refining the Goals of Codification*, 12 HOFSTRA L. REV. 255, 256 (1984). As states adopted codified rules based on the example set by the Federal Rules, by the beginning



rules and insist on their application, but this may lead to static laws that are unresponsive to the needs of society.<sup>45</sup> How one resolves this problem depends primarily on one's assessment of trial judges. If one has faith in the skill and diligence of trial judges, then a simple law of evidence that provides discretionary guidelines is preferable to a complex code. Imposing a complex code of evidence on trial judges is equivalent to saying that they are not up to the task of overseeing trials to ensure accurate and efficient adjudication.

*The Social Effects of Rules vs. Discretion.* A related question is the social consequences of differing forms of evidentiary regulation. Complex rules of any sort give strategic and tactical advantages to certain groups in society, in particular those with the resources to master and employ those rules. This includes the wealthy and repeat players in the legal system. It is difficult to imagine how the common person in Tanzania is able to defend his rights in disputes with institutions or corporations.<sup>46</sup> There appears to be a troubling tendency on the part of Tanzanian judges to throw cases out on legal technicalities even when a party is not represented by counsel.<sup>47</sup> For example, Professor Wanitzek identified one example of a woman who appealed an unfavorable decision by the Primary Court, noting that the court did not give her any guidance as to how she was supposed to present her witnesses.<sup>48</sup> Her memorandum of appeal explained that she had brought her witnesses to court, but did not have the opportunity to present them to the court because of procedural rules.<sup>49</sup> She was supposed to present the witnesses before she told her case to the judge; since she did not do so, she was barred from presenting witness testimony, and lost the

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of the twenty-first century, only six states remained without codified evidence rules. 21 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., *FEDERAL PRACTICE AND PROCEDURE* § 5009 (2d ed. 2005).

<sup>45</sup> See, e.g., Lisa Yurwit Bergstrom & W. James Denvil, *Availability of Spousal Privileges for Same-Sex Couples*, 11 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 224 (2012) (outlining the difficulty of applying spousal evidentiary privilege to married and unmarried same-sex couples given conflicting state and federal laws on such marriages).

<sup>46</sup> During the authors travels to Tanzania, they learned that the average hourly rate for a Tanzanian attorney is in line with an American corporate attorney – between \$100 and \$500. See Allen et al., *supra* note 2, at 249.

<sup>47</sup> See, e.g., Andrew Miraa, *Technicalities and Role of Courts in Administering Justice*, THE ARUSHA TIMES (June 6-12, 2009), [http://www.arushatimes.co.tz/2009/22/society\\_2.htm](http://www.arushatimes.co.tz/2009/22/society_2.htm) (claiming that the Court of Appeal has thrown out cases on the basis that a party only pleaded material facts, rather than stating the law, even though judges are “presumed to know the law in respect to the suit.”).

<sup>48</sup> Ulrike Wanitzek, *Legally Unrepresented Women Petitioners in the Lower Courts of Tanzania: A Case of Justice Denied?*, 30 & 31 J. LEGAL PLURALISM & UNOFFICIAL L. 255, 267 (1990–1991) (citing *Mwanza*, H.C. 14/79, 43/79).

<sup>49</sup> *Id.*

case.<sup>50</sup> These types of technicalities may prevent meritorious claims from being heard and have the potential to even further marginalize social groups that historically have had trouble accessing the judicial system. As a result, the TEA, rather than being the neutral arbiter of rationality, probably exacerbates social distinctions in Tanzania.

*Rules vs. Discretion and the Instability of Decision.* The existence of a complex set of evidence rules also contributes to the instability of decisions by encouraging appeals, and in Tanzania, approximately half of appealed cases are reversed.<sup>51</sup> Given the complexity of the TEA, it is likely difficult to conduct a trial without a high probability of legal error. That means that trials are often followed by appeals, which means that the transaction costs of litigating increase. Increasing the transaction costs of protecting a right decreases its value, and thus generally has detrimental social consequences. Similarly, an active appellate practice with many reversals and new trials is not a sign of a healthy legal system, but the opposite – it is a sign of substantial wasted resources.<sup>52</sup>

One of the most difficult problems facing the Working Group is how to balance all these considerations. Although the present technicalities of the TEA are excessive, and a more streamlined law of evidence is desirable, there remains the question of when to provide guidelines and when to provide complex rules. For example, in the United States, the Federal Rules of Evidence adopt more or less a guidelines approach. Nonetheless,

<sup>50</sup> *Id.*

<sup>51</sup> Bernard James, *Legal Quandary as Many Appeals are Upheld by the Highest Court*, THE CITIZEN (July 10, 2011) (reporting on the Court of Appeal reversal rate of over half of criminal appeals).

<sup>52</sup> The authors make this claim even while recognizing that the U.S. Supreme Court reverses most of the cases it hears. Roy E. Hofer, *Supreme Court Reversal Rates: Evaluating the Federal Courts of Appeals*, 2 LANDSLIDE 8, 10, fig. 2 (Jan.-Feb. 2010), available at [http://www.americanbar.org/content/dam/aba/migrated/intelprop/magazine/LandslideJan2010\\_Hofer.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/intelprop/magazine/LandslideJan2010_Hofer.authcheckdam.pdf) (reporting a median reversal rate from all federal circuits of 68.3% between 1999 and 2008). Scholars have suggested this has to do with a legal system attuned to those areas that the Supreme Court wants addressed. See, e.g., VANESSA A. BAIRD, ANSWERING THE CALL OF THE COURT: HOW JUSTICES AND LITIGANTS SET THE SUPREME COURT AGENDA (2007); Charles M. Cameron, Jeffrey A. Segal & Donald Songer, *Strategic Auditing in a Political Hierarchy: An Informational Model of the Supreme Court's Certiorari Decisions*, 94 AM. POL. SCI. REV. 101 (2000). One should not rule out the possibility that Tanzania's high reversal rate has to do with Tanzanian attorneys selecting the most appropriate cases for appeal. However, the U.S. appellate courts, which hear many more cases than the Supreme Court, reverse less than 10% of the time, a rate dramatically lower than that of the Tanzanian appellate courts. See *Appeals Terminated on the Merits by Circuit*, U.S. COURTS (2012), <http://www.uscourts.gov/uscourts/Statistics/StatisticalTablesForTheFederalJudiciary/2012/december/B05Dec12.pdf> (last visited Aug. 4, 2013) (reporting reversal rates of 6.7% in 2012 and 8.4% in both 2011 and 2010).

they also have enormously complicated hearsay<sup>53</sup> and character evidence rules.<sup>54</sup> These are not offered as models for Tanzania, but simply as examples of the kinds of choices that must be made. The proposals contained in this Article significantly diverge from the Federal Rules of Evidence in these areas.

*Influence of Comparative International and Other Tanzanian Laws.* Part of this work is informed by a survey of what other nations that adopted the Indian Evidence Act have done to modernize their evidence laws. The Indian Evidence Act – or some close derivative of that Act – remains in force in India,<sup>55</sup> Pakistan,<sup>56</sup> Bangladesh,<sup>57</sup> Sri Lanka,<sup>58</sup> Malaysia,<sup>59</sup> Singapore,<sup>60</sup> Kenya,<sup>61</sup> Uganda,<sup>62</sup> and Nigeria.<sup>63</sup> Although some scholars have pushed for the sort of wholesale reform suggested here,<sup>64</sup> none of these nations has yet embraced it, despite the fact that most nations with evidence codes similarly derived from the Indian Evidence Act experience struggles similar to those facing Tanzania.<sup>65</sup> Some countries have implemented piecemeal reforms.<sup>66</sup> Typically, the reforms have responded to: (1) the increased use of electronic evidence;<sup>67</sup> (2) international discourse

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<sup>53</sup> FED. R. EVID. 801–07 (providing at least twenty-three general exceptions to the hearsay rule, five exceptions when the declarant is unavailable, and a residual exception to allow a judge to find additional exceptions despite a general rule to exclude this evidence).

<sup>54</sup> *Id.* 404–06 (providing for the exclusion of character evidence used to prove action “in accordance with the character or trait” before providing exceptions in criminal cases and for action “in accordance with habit or routine practice”).

<sup>55</sup> The Indian Evidence Act, No. 1 of 1872, INDIA CODE (1872), vol. 5.

<sup>56</sup> Qanun-e-Shahadat Order, 1984, (Law of Evidence) (Pak.) (replacing the Indian Evidence Act but making only minimal revisions).

<sup>57</sup> Indian Evidence Act, 1872, as amended by Bangladesh Laws (Revision and Declaration) Act, 1973 (Act No. VIII of 1973) (Bangl.) (amending the existing Indian Evidence Act to reflect Bangladesh adoption).

<sup>58</sup> Evidence Ordinance, (2001) Cap. 14 (Sri Lanka).

<sup>59</sup> Evidence Act 1950, (Ordinance No. 11 of 1950), as amended by Act No. 56 of 1971 (Malay.).

<sup>60</sup> Evidence Act, (Ordinance No. 3 of 1893) (Cap 97, 1997 Rev Ed.) (Sing.).

<sup>61</sup> Evidence Act, (2009) Cap. 80 (Kenya).

<sup>62</sup> Evidence Act 1909, Cap. 6 (Uganda).

<sup>63</sup> Evidence Act 2011 (Nigeria).

<sup>64</sup> *See, e.g.*, RAFIQR RAHMAN, LAW OF EVIDENCE 189 (1993) (pushing for reform in Bangladesh).

<sup>65</sup> *See, e.g.*, JEFFREY PINSLER, EVIDENCE, ADVOCACY AND THE LITIGATION PROCESS 17–22 (2d ed. 2003); NIGERIA LAW REFORM COMMISSION, REPORT ON THE REFORM OF THE EVIDENCE ACT 1, ¶ 4 (1998).

<sup>66</sup> *See infra* notes 67–69 and accompanying text discussing reforms in other countries.

<sup>67</sup> *See, e.g.*, Evidence Act, (2009) Cap. 80 § 3 (Kenya) (adding “computer” to the Act’s definitions); Evidence Act, (2011) § 258(1)(d) (Nigeria) (revising the definition of “document” to include discs, tapes, soundtracks, film, and information recorded including by

regarding the admissibility of confessions,<sup>68</sup> and (3) a desire to distance evidence law from British colonial roots and embrace the current culture of the country.<sup>69</sup> However, it is highly unlikely that the unwieldy and archaic approach of the Indian Evidence Act will survive the various law reform efforts that will develop under the pressure of advancing economies and the forces of democratization at play in East Africa.<sup>70</sup> It appears that, while calls for reform or change in the countries presently encumbered with a derivative of the Indian Evidence Act have been episodic, when nations have sought wholesale evidence law reform, they have sought American statutory exemplars.<sup>71</sup>

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a computer); Qanun-e-Shahadat Order (1984), § 164 (Pak.) (“[T]he Court may allow to be produced any evidence that may have become available because of modern devices or techniques.”).

<sup>68</sup> See, e.g., Evidence Act 1909 § 23 (Uganda) (making any confession to a police officer at or above the rank of “assistant inspector” admissible after the initial Indian Evidence Act excluded all confessions).

<sup>69</sup> See, e.g., Evidence Act (Bangl.) (amending the Act to include local cities and currency); Qanun-e-Shahadat Order (Pak.) (replacing gap filing based on English common law with principles of Islamic Law in the Holy Quran).

<sup>70</sup> The flaws in the TEA have long been recognized. As the authors previously chronicled, British administrators in the Indian colony felt the TEA’s antecedent was “hasty” and “defective.” Allen et al., *supra* note 2, at 227–28. Similarly, British officials in East Africa also petitioned unsuccessfully to amend the evidence law to apply it to conditions in Africa. *Id.* at 230. Scholars contemporary to the drafter of the Indian Evidence Act also widely criticized the Act. JAMES A. COLAIACO, JAMES FITZJAMES STEPHEN AND THE CRISIS OF VICTORIAN THOUGHT 90 (1983). Over time, these concerns have only grown. See *infra* notes 165–172 and accompanying text (discussing the introduction of electronic evidence concerns).

Perhaps the one exception to that call for wholesale change is modern India. There, “the Act has always been regarded . . . as a model piece of legislation.” LAW COMM’N OF INDIA, SIXTY-NINTH REPORT ON THE INDIAN EVIDENCE ACT, 1872, i (1977). The Law Commission of India cautioned readers not to treat the Indian Evidence Act with “blind adoration bordering on reverence.” *Id.* Even in India, however, there have been calls for major reform. See, e.g., *id.* (proposing reforms in a 907 page report); LAW COMM’N OF INDIA, 185TH REPORT ON REVIEW OF THE INDIAN EVIDENCE ACT, 1872 (2003) (proposing reforms in a report of over 950 pages).

<sup>71</sup> For instance, Ghana, a former British colony, also inherited the British common law of evidence. See GHANA LAW REFORM COMM’N, COMMENTARY ON THE EVIDENCE DECREE, 1975 131 (1975); see also George N.K. Vukor-Quarshie, *The Evidence Law of Ghana 2* (July 21, 1976) (unpublished S.J.D. Thesis, on file with authors). In 1975, the nation replaced it with the Evidence Decree of 1975 (“Evidence Decree”). A major influence on the Ghana Law Reform Commission was the American Law Institute’s Model Code of Evidence (“Model Code”) (1942). See GHANA LAW REFORM COMM’N, COMMENTARY §§ 5, 51–52, 59, 66, 69, 70, 76, 80–82, 89, 90, 94, 96–98, 100–01, 118–21, 124, 127 (citing the *Model Code* 28 times). This influence extends to unacknowledged wholesale borrowing. For instance, the hearsay rules are a wholesale change from the British common law. For example, § 118 of the Evidence Decree copies the general rule from *Model Code* Rule 503

Our work is also couched against the backdrop of increasing regional integration and legal pluralism in the newly revived East African Community. The East African Community has already instituted a common market and customs union between its five members.<sup>72</sup> To fulfill its ambitious goals, the East African Community will need synchronization and harmonization of the domestic laws of each partner-state.<sup>73</sup> Furthermore, given greater regionalization, Tanzania's courts will face a growing number of foreign judicial participants in both civil and criminal matters. These participants will include those coming from diverse lingual and legal traditions. Potentially more difficult, there is a possible tension between Tanzania's common law traditions for handling evidence and those of neighboring civil law countries.<sup>74</sup> In considering the regional reforms, Tanzania also has the opportunity to serve as an example for the whole East African Community in ensuring justice through a revised and more modern evidence code.

Finally, the interaction of the TEA with Tanzania's procedure codes must be considered. As previously discussed, the laws of evidence and procedure structure a citizen's interaction with the justice system. Both the Civil Procedure Code of 1966 and the Criminal Procedure Act of 1985

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("Evidence of a hearsay declaration is admissible if the judge finds that the declarant is (a) unavailable as a witness, or (b) is present and subject to cross-examination.") before adding additional exceptions. Likewise, § 119 on admissions combines *Model Code* Rules 506–08 and §§ 123, 125–26 are analogs of Rules 513–15, respectively. The Commission also borrowed from the then proposed U.S. Federal Rules of Evidence (1973), see GHANA LAW REFORM COMM'N, COMMENTARY §§ 20, 51, 56–58, 66, 68–70, 72, 77, 83–85, 99, 110, 127, 142, 157, 161, 141 (citing the proposed Federal Rules of Evidence 21 times), and even the California Evidence Code, *id.* § 93 (deriving confidential communication presumptions from Cal. Evid. Code § 917). Despite this codification effort, the English common law is still necessary to understand the Evidence Decree. See J. OFOR-BOATENG, *THE GHANA LAW OF EVIDENCE*, iv, 182–87 (1993).

<sup>72</sup> See EAST AFRICAN COMMUNITY TOWARDS A COMMON MARKET, <http://www.commonmarket.eac.int/> (last visited Feb. 15, 2013); Tim Bowler, *East Africa's Common Market Begins*, BBC NEWS (June 30, 2010, 11:29 PM), <http://news.bbc.co.uk/2/hi/business/8769566.stm>.

<sup>73</sup> Treaty for the Establishment of the East African Community art. 126, Nov. 30, 1999, 2144 U.N.T.S. 255 (as amended Dec. 14, 2006 & Aug. 20, 2007), available at [http://www.eac.int/index.php?option=com\\_docman&task=doc\\_download&gid=158&Itemid=163](http://www.eac.int/index.php?option=com_docman&task=doc_download&gid=158&Itemid=163) ("[T]he Partner States shall . . . take all necessary steps to . . . harmonise all their national laws appertaining to the Community . . . and the standardisation of judgements [sic] of courts within the Community.").

<sup>74</sup> See U.N. Conference on Trade & Dev., *Harmonizing Cyberlaws and Regulations: The Experience of the East African Community 2* (2012), available at [http://unctad.org/en/PublicationsLibrary/dtlstict2012d4\\_en.pdf](http://unctad.org/en/PublicationsLibrary/dtlstict2012d4_en.pdf) (the divergence of the common law and civil law traditions "has led to somewhat divergent legislative practices and procedures between the groups of countries, and may have contributed to slowing down the process of harmonization efforts in the region").

affect this system and, of importance to this project, effectively reduce a litigant's ability to introduce evidence that a court will admit. For example, the Civil Procedure Code of 1966 requires the disclosure of documentary evidence early in the litigation process.<sup>75</sup> For unrepresented parties, this means courts will simply refuse to admit relevant documentary evidence because it was not presented at the proper time. Even for represented parties, one Tanzanian attorney told the authors that these provisions "always lead to objections against production of documents at the time of trial."<sup>76</sup> Such adherence to technical codes does not further justice nor does it follow the declarations of the Tanzanian Constitution.<sup>77</sup>

Although our proposals do not necessarily specifically address each of these areas for reform, they are made with this comparative context in mind.

#### *D. General Considerations for Drafting Codes*

The matters discussed above indicate the breadth of the foundations and implications of the law of evidence. The next four analytical points are critical for the drafter of any legislation to consider. They involve:

1. the distinction between the law on the books and the law in action;
2. the relationship between procedural and evidentiary law, on the one hand, and substantive law on the other hand, and, in particular, how procedural and evidentiary law are in fact quite interrelated with, rather than distinct from, substantive law;
3. economics, or the idea that if you use a dollar (or shilling) here for one purpose, you cannot use it there for a different purpose; and
4. whether trials are ideal or instead are perverse. Is the legal system designed to encourage trials or settlement? For what should it be designed?

*The Law on the Books; the Law in Action.* Constitutions are enacted, legislation is passed, executives issue orders and directives, courts decide, and one would think that the rest of us more or less obey. Unfortunately (or

<sup>75</sup> *E.g.*, Civil Procedure Code, Act No. 49 of 1966, part VII, § 14(1) (Tanz.) ("Where a plaintiff sues upon a document in his possession or power, he shall produce it in court when the plaint is presented and shall at the same time deliver the document or a copy thereof to be filed with the plaint.").

<sup>76</sup> Interview with Mike Ngalo, Attorney, IPP Limited, in Dar es Salaam, Tanz. (Mar. 14, 2012).

<sup>77</sup> *See, e.g.*, Constitution of the United Republic of Tanzania, Article 107A(1)(e) (requiring courts "to dispense justice *without being tied up with technicalities provisions* which may obstruct dispensation of justice") (emphasis added).

perhaps fortunately), life is not so simple. When constitutions or laws are adopted in any multiparty decision-making process, there will be multiple understandings of what the legal language connotes.<sup>78</sup> Some legislators may vote for the passage of a law even though they do not believe it goes far enough in its coverage (or even though it goes too far); others may vote against it for just the same reasons.<sup>79</sup> There also may be serious disagreements as to precisely what a particular provision is supposed to mean or do.<sup>80</sup> One person may think that the legal language has one implication, and someone else may think that it has a different implication. Statutory language in the abstract often will not resolve the meaning of those phrases. Compounding the difficulty even further, legal language is often deliberately left vague because of the inability to come to an agreement as to precisely what it should say or because of the omnipresent inability to anticipate all possible scenarios in which a particular problem might arise.<sup>81</sup>

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<sup>78</sup> See, e.g., Mark Tushnet, *Theory and Practice in Statutory Interpretation*, 43 TEX. TECH L. REV. 1185, 1193 (observing that for Justice Scalia [as a stand-in for judges and commentators uncomfortable with using legislative history as a form of statutory interpretation], “legislation is the product of compromise and deal-making, with the result that no statute has a unitary ‘purpose’ that courts can advance when the statute’s terms are unclear.”).

<sup>79</sup> For example, consider the widely acknowledged (if detested) practice of “logrolling,” which “occurs when two proposals each supported by a minority are combined into one ballot proposition supported by a majority, and the two minorities support the combination of policies but respectively prefer to enact one policy and not enact the other.” Robert D. Cooter & Michael D. Gilbert, *A Theory of Direct Democracy and the Single Subject Rule*, 110 COLUM. L. REV. 687, 706 (2010); see also Tushnet, *supra* note 78, at 1193 (“Sometimes the statute is simply a deal: Proponents wanted to push quite far in one direction, opponents resisted, and what resulted was something that had no normative justification other than that it was where the legislative process happened to come to rest with the political forces arrayed as they happened to be.”). See generally JEFFREY H. BIRNBAUM & ALAN S. MURRAY, *SHOWDOWN AT GUCCI GULCH: LAWMAKERS, LOBBYISTS, AND THE UNLIKELY TRIUMPH OF TAX REFORM* (1987).

<sup>80</sup> See, e.g., Frank H. Easterbrook, *Statutes’ Domains*, 50 U. CHI. L. REV. 533, 543 (1983) (positing a hypothetical situation in which employees and employers advocate for different constructions – based on legislative intent arguments – of the same set of collective-bargaining laws).

<sup>81</sup> See Courtney Simmons, *Unmasking the Rhetoric of Purpose: The Supreme Court and Legislative Compromise*, 44 EMORY L.J. 117, 117–18 (1995) (“The legislative compromise in *Landgraf* [*v. USI Film Prods.*, 511 U.S. 244 (1994) (considering whether Title VII of the Civil Rights Act of 1991 applies retroactively)] was of a particular form: silence. In such contexts, opposing factions resolve a stalemate by saying nothing at all; in essence, they throw up their hands and toss the political hot potato to the courts for resolution. The court must fill in the ‘gap.’ A related form of compromise occurs when lawmakers intentionally choose ambiguous statutory terms. In this situation, both factions accept the terminology because the language can be interpreted to include their positions; again, however, a specific application will require judicial interpretation. In other situations,

The concept of separation of powers adds further complexity. In both the United States and Tanzania, it is the legislature's job to enact law, but it is the courts' job to apply that law. The judges may have different understandings of the implications of the language adopted by the legislature, and their institutional concerns likely will differ as well.<sup>82</sup> Thus, the application of the law by the courts may differ from the idealized meaning of the law intended by a legislature or an individual legislator.<sup>83</sup>

The law of evidence has one potentially unique structural aspect that exacerbates the problem of indefiniteness, and thus the potential discrepancy between the law on the books and the law in action. It is another aspect of the rules versus discretion issue discussed previously. Aspects of the law of evidence are rule-like in their provision of necessary and sufficient conditions for the operation of a rule. However, important parts of the law of evidence simply allocate responsibility and discretion, precisely because the relevant issue is too complicated for rule-like treatment.<sup>84</sup> As discussed above, perhaps the single most important aspect of the law of evidence – relevancy – has precisely this attribute. As the TEA's complex relevancy rules attempt to predict and regulate every possible dispute and any potential evidence that may ever be offered at trial – something that is quite simply impossible – the law in action must likely ignore some of the commands of the law on the books.<sup>85</sup>

One last factor that may result in the law on the books being different from the law in action is that some areas of evidence law must try to accommodate conflicting principles or impulses. This can result in part of the law making a promise, and another part subverting that promise. Two important examples of this are the hearsay rule and the rule against

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compromising legislators will state conflicting goals or draw a seemingly arbitrary line between two positions to resolve their impasse.”)

<sup>82</sup> For example, Judge Easterbrook describes two components of public choice theory that impact judges' ability to ascertain the understanding of legislators: (1) the “order of decisions” – the idea that legislatures' one-by-one consideration of proposals ignores alternative options and degrees of lawmakers' preferences; and (2) logrolling – the idea that legislators will vote against their views on some proposals in order to obtain votes on other proposals. Easterbrook, *supra* note 80, at 548–49. Although “the order of decisions and logrolling are not total bars to judicial understanding . . . [,] they are so integral to the legislative process that judicial predictions of how the legislature would have decided issues it did not in fact decide are bound to be little more than wild guesses.” *Id.* at 549.

<sup>83</sup> Consider, for example, Congress's correction via passage of the Civil Rights Act of 1991 of *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989) and other Supreme Court cases that Congress found had “weakened the scope and effectiveness of Federal civil rights protections.” See Civil Rights Act of 1991, 105 Stat. 1071, § 102 (1991).

<sup>84</sup> See, e.g., FED. R. EVID. 104 (providing the judge with discretion to admit evidence conditionally); FED. R. EVID. 403 (providing the judge with discretion to exclude relevant evidence whose probative value is outweighed by an enumerated risk).

<sup>85</sup> See *supra* text accompanying note 41.



character and propensity evidence. The hearsay rule promises to exclude hearsay, but there has been a unidirectional growth of the exceptions to the hearsay rule for centuries.<sup>86</sup> In civil cases, the promise of the exclusion of hearsay is rarely redeemed, and, even in criminal cases, hearsay is routinely admitted.<sup>87</sup> Similarly, the law of evidence promises the exclusion of character and propensity evidence, but then creates broad avenues of admission.<sup>88</sup>

*The Relationship Between Substantive Law and Procedural Law.* Substantive law is sometimes conceived of as quite distinct from evidentiary (and procedural) law, but this is misleading, as the two are in a complex and interactive relationship.<sup>89</sup> This point has become particularly clear and is the subject of interesting legal research in the United States due to its significance to the protection of constitutional rights,<sup>90</sup> as well as its application to general evidentiary matters. The decisions of the U.S. Supreme Court extending and enforcing individual rights have been viewed as imposing considerable constraints on both the police and prosecutors, yet the legal system has not been greatly disturbed by these rulings.<sup>91</sup> Legal systems are dynamic and infinitely adaptable; they can and do respond to changes in unpredictable and astonishingly varied ways.<sup>92</sup> Thus, “reform” to a dynamic process often cannot be imposed unproblematically through discrete measures that yield only the desired effect with no unintended consequences.<sup>93</sup> One important aspect of this dynamic phenomenon is that

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<sup>86</sup> See, e.g., Ronald J. Allen, *The Evolution of the Hearsay Rule to a Rule of Admission*, 76 MINN. L. REV. 797 (1992).

<sup>87</sup> *Id.* at 799, n.4 (referencing the increased practice of perpetuating testimony from a grand jury or a preliminary hearing).

<sup>88</sup> Compare FED. R. EVID. 404(a) with FED. R. EVID. 404(a)(1), 404(a)(2), 404(a)(3), 404(b), 607, 608, 609.

<sup>89</sup> For a general treatment of how substance and procedure are overlapping and interrelated categories, see Walter Wheeler Cook, “*Substance*” and “*Procedure*” in the *Conflict of Laws*, 42 YALE L.J. 333 (1933).

<sup>90</sup> Paul D. Carrington, “*Substance*” and “*Procedure*” in the *Rules Enabling Act*, 1989 DUKE L.J. 281, 285–88 (1989) (considering “four new uses of ‘substance’ and ‘procedure’ to mark distinctions of constitutional significance” in the areas of federalism and separation of powers); William J. Stuntz, *Substance, Process, and the Civil-Criminal Line*, 7 J. CONTEMP. LEGAL ISSUES 1 (1996).

<sup>91</sup> See Ronald J. Allen, *Foreword: Montana v. Egelhoff – Reflections on the Limits of Legislative Imagination and Judicial Authority*, 87 J. CRIM. L. & CRIMINOLOGY 633 (1997).

<sup>92</sup> See J.B. Ruhl, *Law’s Complexity: A Primer*, 24 GA. ST. U. L. REV. 885, 901 (2008) (“[I]n social systems, change very often is the specific intent of human intervention, in which case knowing how the system responds to change should be an important factor in the design of the instrument of change. The problem for both types of change is that by their very nature, complex adaptive systems make tinkering an undertaking plagued by uncertainty. Law is no exception.”).

<sup>93</sup> *Id.*; see also Eric Kades, *The Laws of Complexity and the Complexity of Laws: The*

legitimate substantive changes can blunt virtually any procedural innovation that emerges from courts or law reformers.

An example from the United States that involves the Fourth Amendment limit on unreasonable searches and seizures clarifies this point. Suppose the police want to stop cars to do cursory inspections for criminality,<sup>94</sup> but courts rule that the Fourth Amendment requires that the police have probable cause that a crime has been committed before a car can be stopped. To make this judicial command a practical nullity, the legislature need only expand the criminal law to include more rigorous driving requirements. The legislature can essentially make it next to impossible to drive without violating a criminal statute (such as crossing the center line, driving too closely to the car ahead of you, not putting your turning light indicator on early enough, or putting it on too early). If the legislature passes such laws, the police will be able to stop virtually any car by following it until the driver violates one of the statutes regulating driving. Accordingly, the stop will be made on probable cause because the legislation will have expanded dramatically the potential sources of probable cause, thus subjecting everyone to being stopped by the police whenever the police decide to do so.<sup>95</sup> This would occur despite the attempt by the courts to forbid just that process. Similarly, if the government cannot seize certain information without probable cause, the legislature can achieve its desired result – possession of the information – by instead requiring individuals to keep and divulge records of the information to the government.

This point generalizes across evidentiary and procedural law. The most obvious example is materiality, which is directly determined by the substantive law (because it refers to a proposition's relationship to the establishment of an element of or a defense to a legal claim), but the point

*Implications of Computational Complexity Theory for the Law*, 49 *RUTGERS L. REV.* 403, 411–12 (1997).

<sup>94</sup> See, e.g., *Indianapolis v. Edmond*, 531 U.S. 32, 48 (2000) (rejecting suspicionless searches of automobiles for drug interdiction purposes under the Fourth Amendment for their “general interest in crime control”).

<sup>95</sup> Such an expansion should not be considered farfetched. A New York City-based judge recently issued a decision ending the city's unconstitutional “stop and frisk” policy. See *Floyd v. City of New York*, 08 CIV. 1034 SAS, 2013 WL 4046209 (S.D.N.Y. Aug. 12, 2013), *appeal dismissed* (Sept. 25, 2013) (rejecting the “stop and frisk” policy for disregarding the Fourth Amendment and indirectly using racial profiling). The mayor and the city counsel could put the policy on more solid ground by stopping more people, including those in racial majority populations and avoid racial discrimination in order to continue these efforts. However, in light of the new mayor-elect's promises to end the stop and frisk policy, a real world example of the presented hypothetical may have to wait. See Edith Honan & Joseph Ax, *New York's de Blasio would drop stop-and-frisk appeal: source*, *REUTERS* (Nov. 1, 2013 5:11 PM), <http://www.reuters.com/article/2013/11/01/us-usa-newyork-stopandfrisk-idUSBRE9A00YZ20131101>.

goes deeper than that. By changing the elements of causes of action, legislatures can make recovery under those causes of action easier or more difficult. Whether oral testimony concerning the meaning of contractual provisions is allowed – what is called the “parol evidence rule”<sup>96</sup> – obviously impacts the evidentiary regime. Equally obvious, a statute of frauds requiring certain contracts to be in writing displaces normal evidentiary principles,<sup>97</sup> as does *res ipsa loquitur* in tort law.<sup>98</sup>

Just as substantive law can affect the evidentiary process, evidence law can affect substantive law. The examples are legion. Rules of exclusion typically increase the costs of litigation by forcing individuals to obtain substitutes for the excluded evidence, while rules of admission typically decrease these costs. As privileges expand, the cost of litigating and, thus, enforcing rights goes up in most instances.<sup>99</sup> The ready admission of hearsay makes proof easier (although at the same time perhaps less reliable). Discovery rules can dramatically affect parties’ incentives to create and search for evidence. Individual rules, like the rape relevancy rules,<sup>100</sup> can affect the ease with which cases may be proven. Allocation of burdens of proof can encourage or discourage the bringing of certain causes of action.<sup>101</sup>

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<sup>96</sup> James B. Thayer, *The “Parol Evidence” Rule*, 6 HARV. L. REV. 417, 418 (1892). U.C.C. § 2-202 (2003).

<sup>97</sup> U.C.C. § 2-201 (2003). See *Gen. Dynamics Corp. v. United States*, 131 S. Ct. 1900, 1908 (2011) (“[The Statute of Frauds] assumes a valid, enforceable agreement between the parties but nevertheless leaves them without a remedy absent reliable evidence—a writing.”).

<sup>98</sup> RESTATEMENT (SECOND) OF TORTS § 17 (2010); Ronald J. Allen, *Burdens of Proof, Uncertainty, and Ambiguity in Modern Legal Discourse*, 17 HARV. J.L. & PUB. POL’Y 627, 636 (1994) (discussing process by which *res ipsa loquitur* doctrine creates a presumption of negligence).

<sup>99</sup> RONALD J. ALLEN ET AL., *EVIDENCE: TEXT, PROBLEMS, AND CASES* 793 (5th ed. 2011) (“Most rules of evidence are designed to facilitate the fact-finding process, but rules creating evidentiary privilege are different. For the most part, they exclude relevant evidence in order to promote extrinsic policies unrelated to accurate fact-finding.”).

<sup>100</sup> FED. R. EVID. 412–15.

<sup>101</sup> Consider, for example, the burden-shifting framework created for employment discrimination lawsuits by *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). Under *McDonnell*, an employee can state a prima facie case of sex discrimination under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1) (2006), simply by demonstrating that (1) he is a member of a protected class; (2) he was qualified for his job and his job performance was satisfactory; (3) he suffered an adverse employment action; and (4) other employees who were not members of the protected class did not suffer such adverse actions. *Bryant v. Bell Atl. Md., Inc.*, 288 F.3d 124, 133 (4th Cir. 2002). The burden then shifts to the employer to identify purportedly legitimate, nondiscriminatory reasons for taking adverse action against the employee. *McDonnell*, 411 U.S. at 802. Finally, the burden shifts back to the employee to demonstrate that those “proffered explanation[s] are unworthy of credence,” i.e., pretextual. *Id.* at 802, 804. The result of this burden-shifting framework is

There is one other interaction between substantive law and evidence law that should be noted. Evidence law should underlie everything that a client or lawyer does, since everything can collapse into litigation – wills, criminal matters (sentencing is based in part on what is in the record), antitrust, commercial work, etc. Evidence bears upon every legal field, and the worst-case scenario of every legal transaction is its collapse into litigation. In litigation, a crucial variable will be what can be proven. Thus, everyone, no matter how remote from the courtroom, must take the courtroom into account, which means taking the rules of evidence into account prior to litigation so that if litigation ensues, the necessary facts can be proven. This means that the law of evidence impacts even such basic business procedures as good record-keeping, because a court can require that a business produce its records in an admissible format later on, at least for well-represented interests.

*Economics.* The old adage, “there is no such thing as a free lunch,” is literally true for government. Governments are constrained by their economies, and economies are finite. Of the many valuable things that, in theory, governments could do, they are able to do only some of them, and often they must make difficult choices. If resources are used for one purpose, there are simply fewer resources left to do other things. In total, there are too many different “things” to fund them all. Similarly, private resources are finite, whereas the ways in which they can be consumed are almost infinite.

In thinking about the litigation system, the finite extent of resources is critically important. Difficult choices need to be made about the allocation of resources across the whole range of governmental interests, including the operation of the legal system. Again, let us give a dramatic example. Investments in the criminal justice process obviously compete with investments in other social goods. If government provides more judges or police, or funds counsel for poor people, fewer resources will be available for economic development or medical research, or whatever else is desired. The police face an aspect of this problem daily. Confronted with a surplus of crime, they must constantly decide how to allocate their limited resources. Should the police patrol this part of the city or that part? Should they concentrate on economic crimes, crimes of violence, or fraud? Investments within the criminal justice process likewise compete with other investments in different parts of that same process. If government provides more judges, it must also provide less of some other desired commodity.

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that many employment discrimination cases are filed because the prima facie standard is easy to meet. However, most employees who bring such claims ultimately fail at the summary judgment stage because it is hard to show that an employer’s proffered reasons for termination are pretextual. One can imagine a change to the burden-shifting procedure that would make the burden higher on the employee at the outset, which may discourage the number of non-meritorious lawsuits filed and decrease pretrial burdens on courts.

The implications of economics extend further. Consider, for example, an important issue: the right to counsel.<sup>102</sup> If the active involvement of defense counsel increases, a trial's duration will increase and result in fewer trials overall because the total time available to try cases is finite. In general, as the average cost of a case increases, the total number of cases that can be tried decreases. This, in turn, means that effective counsel will either reduce the number of convictions that occur or will cause the government to substitute other means of enforcement. This is also true of the rules of evidence, which can interfere with or expedite the efficient trial of disputes. The Tanzanian code is so lengthy and complicated that it almost surely imposes serious costs on the process (which includes an investment of time to learn the complex code).<sup>103</sup>

Analogous but subtly different issues exist with respect to civil cases. The optimal amount of civil litigation may differ from the optimal amount of criminal litigation, although the matter is complicated. If the costs of litigating civil cases go down, one would predict that the amount of litigation would increase, which may be perceived as socially useful. Indeed, both in Tanzania and the United States, the inaccessibility, cost, and delay of the litigation process are often identified as problems to be rectified.<sup>104</sup> Yet, they have positive effects as well, in particular through their encouragement of the private resolution of disputes. At perhaps the most shocking extreme of this point, most criminal cases in the United States are resolved through what is essentially private negotiation between an accused and the government that results in a plea agreement.<sup>105</sup> In

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<sup>102</sup> Tanzania does not guarantee counsel for criminal defendants. Legal Aid (Criminal Proceedings) Act, Act No. 21 of 1969 (Tanz.), §§ 3–4 (providing discretionary decision to the “Principal Judge of the High Court or the Judge in charge of the district registry” to consider providing counsel for criminal cases “in the interests of justice”). Commentators have criticized the lack of a widespread and concrete right to counsel. See, e.g., James L. Mwalusanya, *The Tanzania Experience*, in *THE PROTECTION OF HUMAN RIGHTS IN AFRICAN CRIMINAL PROCEEDINGS* 291 (M. Cherif Bassiouni & Ziyad Motala eds., 1995) (noting that the right to counsel for all criminal defendants in the Tanzanian Constitution is missing).

<sup>103</sup> This is a cost that the Tanzanian government can ill afford. As it stands, resources for the judiciary are not adequate. In one problematic example, the High Court took a three-month recess, delaying the results of an election, until the government provided 2.2 billion TSH, or \$1,481,980, to pay for the cases. See Rosina John, *Judiciary Requires Sh2.2 Billion for Poll Cases*, *THE CITIZEN* (Dar es Salaam), Dec. 16, 2010. Illustrative of these lacking resources, the Court of Appeal sessions in Dar es Salaam take place at a former yacht club where the wealthy used to “chill [their] throats (with beer)” instead of at a building designed for judicial cases, which shows that the nation is ill equipped to afford these imposed costs. Lucas Liganga, *Ex-CJ Decries Arbitrary Arrests, Detentions*, *THE CITIZEN* (Dar es Salaam), Feb. 23, 2012 (quoting the ex-Chief Justice of the Court of Appeal about the yacht club and the lack of resources for the Tanzania judiciary).

<sup>104</sup> See Allen et al., *supra* note 2, at 241–51.

<sup>105</sup> For discussions of the negotiation process that occurs during plea bargaining, see

Tanzania, where cases can take more than a decade to work through the formal legal system,<sup>106</sup> private settlement negotiations may be a solution to a seemingly intractable problem.

*Trials as the Ideal v. Trials as the Embodiment of Social Breakdown.* As indicated, the implications of the law of evidence go far beyond trial itself. Nonetheless, there is a close association between the law of evidence and trials, both in fact and in the public mind. In the West, trials are often idealized and glorified. In part, this is because of the role of juries in both political theory and self-conception.<sup>107</sup> In part, this is because of the glorification of the rule of law, with trials embodying its public vindication.<sup>108</sup> In Tanzania, by contrast, the public conception appears to be one of frustration and lack of understanding.<sup>109</sup> Even people who do not litigate for a living recognize the delays and inconsistencies plaguing trial practice in Tanzania.<sup>110</sup> It is obvious, though, that evidence law is written with an eye toward its use at trial, and, consequently, how one conceives of a trial may affect what one thinks are the optimal rules of evidence.

The relationship between one's conception of trials and the law of evidence holds regardless of one's conception of trials. If one accepts the idealized, media-glossed view of trials in the United States, one would want to fashion rules of evidence that further the purposes of the public vindication of the rule of law and human rights. Great latitude should then be given to criminal defendants and to the "underdog" in civil litigation. Rights of allocution should be protected, and so on, and perhaps the role of counsel should be downplayed in order to facilitate self-representation.

But it is not so clear that trials should be glorified in this way, even if (as we believe is true) the rule of law should be. For all their drama, trials

Frank H. Easterbrook, *Criminal Procedure as a Market System*, 12 J. LEGAL STUD. 289 (1983) and Rebecca Hollander-Blumoff, Note, *Getting to "Guilty": Plea Bargaining as Negotiation*, 2 HARV. NEGOT. L. REV. 115 (1997). In the federal system in 2009, the vast majority (88%) of adjudicated defendants were convicted by a guilty plea. Mark Motivans, *Federal Justice Statistics, 2009*, BUREAU OF JUSTICE STATISTICS, OFFICE OF JUSTICE PROGRAMS, U.S. DEP'T OF JUSTICE 12 (2011).

<sup>106</sup> Allen et al., *supra* note 2, at 250–51.

<sup>107</sup> See, e.g., 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 343 (1769) ("But the founders of English laws have with excellent forecast contrived, that no man should be called to answer . . . for a capital crime, unless . . . by the unanimous suffrage of twelve of his equals and neighbors, indifferently chosen, and superior to all suspicion."); PATRICK DEVLIN, TRIAL BY JURY 164 (3d ed. 1966) ("[T]rial by jury is more than an instrument of justice and more than one wheel of the constitution: it is the lamp that shows freedom lives.").

<sup>108</sup> See, e.g., JOHN RAWLS, A THEORY OF JUSTICE 210 (rev. ed. 1999) ("[T]he rule of law requires some form of due process . . . . Trials must be fair and open, but not prejudiced by public clamor.").

<sup>109</sup> See Allen et al., *supra* note 2, at 246–51.

<sup>110</sup> *Id.*

reflect a breakdown in the rule of law. They occur because there have been accusations of wrongdoing – civil or criminal – and the parties have not been able to come to an agreement to resolve their dispute. Trials, thus, are in a sense pathological. They may consume resources that could be better spent in more productive ways (although, again, getting the facts right one way or the other is critically important to the flourishing of any society). At an even higher conceptual level, there can be reasonable disagreements about the ontology – the nature – of disputes themselves. Are disputes primarily between individuals? Or do they have a social aspect?

*E. Conclusions Regarding the Conceptual Foundations and Implications of Evidence*

The various issues discussed above illuminate the depth and profundity of the conceptual foundations and implications of evidence. These matters can be summed up by the following four sets of issues and questions:

1. In its most straightforward manifestation, evidence is the study of dispute resolution, focusing on the interaction and regulation of the various actors in the drama: trial judge, jurors and other lay assessors, attorneys, parties, and witnesses (both lay and expert). The rules of evidence structure the relationships between these individuals, but the rules are themselves relatively rough distillations of a complex set of factors, and that set of factors contains the real “foundations and implications” of evidence. The rules of evidence are reflective of those underlying ideas.
2. How one constructs trials, and, thus, how one fashions the rules of evidence to facilitate trials, is a function of one’s beliefs concerning one of the fundamental questions of human thought: what does it mean to know something? A trial is an epistemological event at which claims of knowledge are advanced, considered, rejected, or accepted. The question of knowledge just discussed leads to another fundamental question: what is the purpose or purposes of trials? The typical response has much to do with accurate fact-finding, and that typical response has enormous significance. But, are trials like science in its pursuit of truth, and, more importantly, should they be? How do scientific and legal decision-making differ? Unlike scientific pursuits, legal decision-making cannot defer judgment until more information is collected. Also, the judgment to be made is what actually happened rather than what the underlying universal laws might be. Most tellingly, perhaps, there is no organized body of knowledge that is applicable to the typical case, as there is in science. To the contrary, the fact-finder has to import the

necessary background knowledge for a decision. If, on reflection, trials do not seem a lot like science (at least some types of science), are they like history? The focus of history is on facts, but as a means, generally, of greater understanding. At trials, understanding is largely irrelevant (except as a matter of persuasion) – or is that inaccurate? Should trials be the means by which social peace is restored and preserved regardless of any considerations of what “actually” happened? Whether, and to what extent, one thinks a scientific truth or a deep understanding of historical facts is obtainable will affect one’s view of particular evidence rules.

3. What other purposes may trials serve? Consider the economic aspects of trials. Not only the parties, but also the lawyers, the judges, the court reporters, and all the court personnel have vested economic interests in trials. What about the symbolic purposes of trials? The political purposes? And so on. There is an extraordinarily complex set of issues that informs the nature of trials. In light of all this, what might be the purposes of the rules of evidence? And again, how do the answers to these questions affect how trials should be constructed? To what extent should trials look like free markets; to what extent should the government regulate them? Which model is likely to foster efficient truth-seeking, and why? What values other than efficiency and truth seeking are, or should be, at stake?
4. Evidence law does not just structure fact-finding; it also creates incentives of various kinds. How does the significance of accurate fact-finding compete with other social values?

Evidence and evidence law are not normally thought of as critical factors in the construction of a just and fair society. However, as demonstrated, they are in fact central and fundamental to the structure of society. Without accurate fact-finding, and, thus, without a rational law of evidence, all other pursuits are made exceedingly difficult, if not impossible. Informed by the above discussion about the purposes of the law of evidence, the following section critically analyzes the TEA. The TEA is evaluated with a focus on the following considerations: (1) whether the provisions are designed to facilitate the accurate finding of facts; (2) whether the TEA as a whole encourages or discourages use of courts and the trial process; (3) whether the TEA helps to create a system that is cost-effective for Tanzanians; and (4) whether the TEA inappropriately contains substantive legal provisions that are better addressed elsewhere.



## III. THE 1967 TANZANIA EVIDENCE ACT

This section provides an analytical dissection of the TEA. The point is not to praise it, but to be brutally frank about its problematic aspects. This section begins with a word of caution. As discussed above, while the law on the books is one thing, the law in action is another. This section deals exclusively with the analytical problems in the written TEA.<sup>111</sup> However, these analytical problems are significant. The TEA is a labyrinthine, inconsistent, and frustrating set of rules that impedes rather than facilitates justice. It does not lead to efficient and effective fact-finding, and there is no evidence that it contributes to the perception of social justice.

Furthermore, the basic structure of the TEA is all the more curious because there are no juries in Tanzania.<sup>112</sup> As explained in Part II, a code of evidence mediates between many different actors in the social drama of litigation. In the Anglo-American world that generated the 1872 Indian Evidence Law, the most important of those relationships was that between judge and jury.<sup>113</sup> Codes and the common law of evidence have some (but not much) justification in shielding jurors from the difficult if not impossible task of appraising evidence, prejudicial influences, and meaningless cumulative presentations that merely waste the jurors' time and the parties' resources. Some of these considerations simply do not exist without juries.<sup>114</sup> The same judges who will decide a case are the judges

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<sup>111</sup> For a discussion of how the TEA operates in practice, see generally Allen et al., *supra* note 2.

<sup>112</sup> See Magistrates' Courts Act, 1984, Act No. 2 of 1984, § 7 (Tanz.) (mandating that lay assessors assist magistrates in primary courts, which do not use the TEA; higher courts governed by the TEA can use assessors but usually do not).

<sup>113</sup> The British introduced jury trials into India around the time of the drafting of the Indian Evidence Act. See A. G. P. Pullan, *Trial by Jury in India*, 28 J. COMP. LEGIS. & INT'L L. 104, 105 (1946). India has since ended jury trials after the judiciary reversed a jury's acquittal in a famous murder case. *K. M. Nanavati v. State of Maharashtra*, A.I.R. 1962 S.C.AIR 605 (India).

<sup>114</sup> Curiously, the Indian Evidence Act has not been revised to take into account the government's termination of jury trials. The quintessential guide to evidence in India — *Sarkar's Law of Evidence* — did not change after 1960. Compare S.C. SARKAR, SARKAR'S LAW OF EVIDENCE (INDIA, PAKISTAN, BURMA & CEYLON) § 118, 1135 (11th ed. 1964) (stating that juror is a competent witness with personal knowledge) and *id.* § 166, 1372 (mandating that jury may put questions to a witness) and PRABHAS C. SARKAR & SUDIPTO SARKAR, SARKAR'S LAW OF EVIDENCE § 121, 1148–49 (12th ed. 1971) (showing no change from the 11th edition) and *id.* § 166, 1388–89 (showing no change from the 11th edition) with S.C. SARKAR, SARKAR'S LAW OF EVIDENCE § 121, 1182 (7th ed. 1946) (demonstrating no difference from the 11th or 12th editions) and *id.* § 166, 1414 (demonstrating no difference from the 11th or 12th editions). These rules continue to linger despite lacking juries to apply them to. See IV KEYSAVO RAO, SIR JOHN WOODROOF & SYED AMIR ALI'S LAW OF EVIDENCE 5730–31, 5752, 6577 (18th ed. 2009) (discussing current Indian Evidence Act provisions that comment on jurors as witnesses).

who will decide the admissibility of evidence. Thus, those judges will “hear” the evidence that they are then asked to exclude. There is no efficiency obtained, and one must at least wonder how well the judges who exclude evidence can “un-ring the bell” so that the excluded evidence has no effect on their cognitive effort in deciding the case.

With those general thoughts in mind, consider the following series of examples of some of the more problematic aspects of the TEA.

*A. Relevancy and Materiality*

The common law of evidence worked out the most fundamental of the epistemological principles underlying litigation in the concepts of relevance and materiality. Relevance is the relationship between a proffer of evidence and the proposition that it is offered to prove (i.e., increase or decrease the probability of some proposition). Materiality is the relationship between that proposition and the case being tried. As the Federal Rules of Evidence in the United States demonstrate in Rule 401,<sup>115</sup> these ideas can be simply and elegantly presented in quite brief provisions. The TEA, by contrast, has no general definition of either, has instead unnecessary and obfuscating verbiage, and treats the issues of relevance at various places throughout the TEA rather than in a single location. Consider:

1. The only definition of “relevancy” is in § 3 and is essentially meaningless. It says, “‘relevant’ in relation to one fact and another, means the one is connected with the other in any of the ways referred to in the provisions of this Act relating to the relevancy of facts.”<sup>116</sup> However, in §§ 7–18, the TEA confuses conclusions about relevancy for the reasons why those conclusions might be reached. These provisions range from the nonsensical to the curious to the banal. Consider, for example, the nonsensical provision that “[f]acts which, though not in issue, are so connected with a fact in issue as to form part of the same transaction, are relevant whether they occurred at the same time and place or at different times and places.”<sup>117</sup> Facts that are part of the same transactions may be material to the litigation, but they have no a priori relevancy to each other. They may be completely independent logically, though necessary to establish a cause of action.

As for banality, consider § 14’s unremarkable pronouncement that “[i]n suits in which damages are claimed, any fact which

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<sup>115</sup> Rule 401 simply reads, “Evidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action.” FED. R. EVID. 401.

<sup>116</sup> Evidence Act, § 3 (Tanz.).

<sup>117</sup> *Id.* § 8.

will enable the court to determine the amount of damages which ought to be awarded is relevant.”<sup>118</sup> Of course, damages are relevant in an action for damages. Other provisions simply go in circles, such as § 11: facts “which establish the identity of any thing or person whose identity is relevant” are relevant.<sup>119</sup> Roughly, the logic of this is: if identity is relevant, identity is relevant and may be established by evidence. This outcome derives directly from straightforward definitions of relevancy and materiality. Section 16 confuses relevancy and the hearsay rule.<sup>120</sup> Whether to admit a prior conviction as proof of some proposition it encompasses, as § 16 also does, has only trivial relevance issues, but significant hearsay issues.

Perhaps most remarkably, one section gets close to the modern conception of relevancy, but does so as though this conception were an exception rather than the general rule – but then the section gets the general rule wrong. Section 13(b) provides: “Facts not otherwise relevant are relevant . . . if by themselves or in connection with other facts they make the existence or non-existence of any fact in issue or relevant fact highly probable or improbable.”<sup>121</sup> First, the very idea of relevance is the logical, probative relationship between two facts, so what this section treats as an exception is, in fact, the general rule. Second, the section takes a wrong turn by requiring that evidence is relevant to some proposition if, but only if, the evidence makes the proposition “highly probable or improbable.”<sup>122</sup> Evidence is relevant if it affects the probability of some other proposition, however slightly. Whether at the end of the trial a proposition is proven is a question of sufficiency of the evidence, not of relevancy.

2. “Materiality” is not defined. Although § 3 seeks to define “fact in issue,”<sup>123</sup> the definition makes a fundamental error. It cannot be true that something is material if, but only if, “the

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<sup>118</sup> *Id.* § 14.

<sup>119</sup> *Id.* § 11.

<sup>120</sup> *Id.* § 16(1) (“Facts showing the existence of any state of mind, such as intention, knowledge, good faith, negligence, rashness, ill will or good will towards any particular person, or showing the existence of any state of body or bodily feeling, are relevant, when the existence of any such state of mind or body or bodily feeling is in issue or relevant.”).

<sup>121</sup> *Id.* § 13(b).

<sup>122</sup> *Id.*

<sup>123</sup> *See id.* § 3 (defining “fact in issue” as “any fact from which, either by itself or in connection with other facts, the existence, non-existence, nature or extent of any right, liability or disability, asserted or denied in any suit or proceeding, necessarily follows”).

existence . . . of any right . . . necessarily follows.”<sup>124</sup> Evidence of some proposition can be sufficient to prove the proposition, or contribute to its proof, even if not necessary. Similarly, the elements of causes of actions typically can be proved in a great variety of ways, with no particular manner of proof being logically necessary. For example, if there are four witnesses to an event, any of them may provide sufficient evidence that the event occurred, and the testimony of none of them is strictly necessary.

3. Collectively, §§ 3 and 13 confuse the admissibility of evidence (determined when the evidence is offered at trial) with its sufficiency to support a verdict (determined after all the evidence has been heard). The provisions also exemplify the inconsistencies in the TEA. Section 13(b) says that “[f]acts not otherwise relevant are relevant . . . if . . . in connection with other facts they make . . . any fact in issue . . . highly probable . . . .”<sup>125</sup> This is inconsistent with the § 3 requirement of necessity.<sup>126</sup>
4. Much of what is referred to as “relevancy” through the first eighteen sections is not relevancy at all, but materiality.<sup>127</sup> Moreover, all of these definitions are simply superfluous, as they follow directly from the idea of materiality and the substantive elements of causes of action.
5. Modern legal science has identified and refined the idea of conditional relevance, whereas the TEA struggles to deal with it. Sections 144 and 145 deal not with the examination of witnesses but with conditional relevance<sup>128</sup> and should be treated in a general section on relevancy. Moreover, the problem of conditional relevance that these sections refer to implicitly is a problem for all forms of evidence, not just oral examinations of witnesses. Again, this suggests treating the issue in a single place.
6. The word “relevant” appears throughout the TEA, and virtually all the sections in which it appears could be collapsed into a

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<sup>124</sup> *Id.*

<sup>125</sup> *Id.* § 13(b).

<sup>126</sup> *Id.* § 3.

<sup>127</sup> *See, e.g., id.* §§ 8, 9, 12, 16.

<sup>128</sup> *Id.* §§ 144–45. Section 144 declares, for example, that “[t]he order in which witnesses are produced and examined shall be regulated by the law and practice for the time being relating to civil and criminal procedure respectively and, in the absence of any such law, by the discretion of the court.” *Id.* § 144.

single, simple definition of what “relevancy” means, from which all these independent rules on relevancy would be the logical consequence. For example, there seems to be little point to §§ 7–19, 23, 47, 49, 52, and 53, which all purport to define relevancy (the concept, if not the word itself) in certain contexts.<sup>129</sup> For example, § 10(1) provides a rule of relevancy specific to facts relating to motive or preparation.<sup>130</sup> But this, along with all of the other narrowly tailored relevancy rules,<sup>131</sup> likely could be obviated by a general relevancy definition.

7. Often the TEA uses “relevance” to mean “admissible” and “irrelevant” to mean “inadmissible,” thus confusing the distinction between relevance and other policies that admit or exclude evidence to further various interests.<sup>132</sup> The TEA thus makes it unclear what the purpose is of entire subsections, such as that entitled, “Relevancy of Opinions of Third Persons.”<sup>133</sup> Are these policy prescriptions of some sort, or do they reflect the fear that a rational judge would make egregious mistakes that these rather simple propositions avoid?
8. The TEA fails to distinguish relevancy from hearsay, and thus refers to evidence as “relevant” where it should be referring to it as admissible (or inadmissible) hearsay.<sup>134</sup>
9. Lastly, the TEA fails to distinguish the best evidence rule and its implications from relevance. For example, § 24 holds that:

Oral admissions as to the contents of a document are not relevant, unless and until the party proposing to prove them shows that he is entitled to give secondary evidence of the contents of such document under the rules hereinafter

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<sup>129</sup> See, e.g., *id* § 14 (defining relevant facts in suits in which damages are claimed); *id* § 15 (defining relevant facts when the existence of any right or custom is in question); *id* § 47(1) (defining relevant facts “[w]hen the court has to form an opinion upon a point of foreign law, or of science or art, or as to identity of handwriting or finger or other impressions.”).

<sup>130</sup> *Id.* § 10(1) (“Any fact is relevant which shows or constitutes a motive or preparation for any fact in issue or relevant fact.”).

<sup>131</sup> E.g., *id.* § 52 (“When a court has to form an opinion as to the relationship of one person to another, the opinion, expressed by conduct, as to the existence of such relationship of any person who, as a member of the family or otherwise, has special means of knowledge on the subject, is a relevant fact . . .”).

<sup>132</sup> See, e.g., *id.* §§ 35, 54, 56. Section 54(2) states: “In civil cases the fact that the character of any person is such as to affect the amount of damages which he ought to receive is relevant.” *Id.* § 54.

<sup>133</sup> See *id.* ch. II, part VIII.

<sup>134</sup> See *id.* §§ 23, 34B, 36.

contained, or unless the genuineness of a document produced is in question.<sup>135</sup>

Whether to have a best evidence rule and what it should consist of are difficult questions in their own right, but have little to do with relevancy.

### *B. Authentication*

There is one, and only one, universal rule or law of evidence: everything must be shown to be what it purports to be. With regard to witnesses, they must be shown to have firsthand knowledge or be within an exception, such as an expert testifying on the basis of expert knowledge. With regard to any other form of proffered evidence, it has to be shown that it is what the party offering it asserts that it is and that, as a result, it is admissible under the law of evidence. This is the concept of authentication. One “authenticates” a contract, for example, by showing that it is the paper that the parties signed that contains their agreement. One authenticates a photograph by showing that it is a fair and accurate representation of the scene the photograph captures. Like relevancy and materiality, authentication is a general matter that can be treated analytically in a code of evidence in a simple and direct fashion.<sup>136</sup> The TEA does neither.

At the time the Indian Evidence Law was written in 1876, the Anglo-American world operated under the constraint that, with rare exceptions, evidence at trial was to be oral testimony from persons with firsthand (or “personal”) knowledge.<sup>137</sup> A few specialized rules, such as the shopkeeper’s books rule, the best evidence rule, and the parol evidence rule, arose to handle, and implicitly permit admission of, specific forms of non-testimonial evidence, such as contracts. The TEA, reflecting this view, defines “evidence” as the means by which facts are proved, but gives only testimonial examples.<sup>138</sup> Moreover, it defines “fact” as “(a) anything, state of things, or relation of things, capable of being perceived by the senses; (b) any mental condition of which any person is conscious.”<sup>139</sup> These definitions may encompass corporeal matters, such as contracts, documents,

<sup>135</sup> *Id.* § 24.

<sup>136</sup> *See, e.g.*, FED. R. EVID. 901 (“To satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is.”).

<sup>137</sup> *See, e.g.*, 1 JOHN HENRY WIGMORE, A TREATISE ON THE SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW: INCLUDING THE STATUTES AND JUDICIAL DECISIONS OF ALL JURISDICTIONS OF THE UNITED STATES §§ 24–25 (1904) (distinguishing between direct evidence, such as the bloody knife, and a larger, second class of circumstantial or testimonial evidence); *id.* § 656 (“A witness who states facts ought to state those only of which he has personal knowledge.”).

<sup>138</sup> *See* Evidence Act, § 3(1) (Tanz.).

<sup>139</sup> *Id.*

guns, etc., but it is odd to talk of a contract as a “fact.” It is a “fact” that there is a contract, but the contract is a thing, not a fact.

Presumably because the TEA originated at a time when the common law emphasized the significance of oral testimony, it does not handle non-testimonial evidence well. Rather than having a general treatment of authenticity, such as Federal Rule 901,<sup>140</sup> it has no specific treatment at all and tends to handle such matters through what it refers to as “presumptions,” as exemplified by Chapter III, Part VI.<sup>141</sup> All of this is unnecessary, potentially confusing, and, most distressingly, lacks generality. This is a predictable result of a complex regulatory measure that was written for a society that no longer exists. As society changes, so do the disputes people have and the way in which they are resolved.

The difficulties are compounded because the TEA contains no definition of “presumption,” a point elaborated on below. More importantly, other issues of authentication are handled directly rather than through presumptions,<sup>142</sup> which raises the standard question about inconsistent treatment of some matter: is there some reason for it, or is it truly just an inconsistency? Thus, two major subsections in a row, Chapter III, Parts V and VI, handle highly analogous problems in highly disparate ways. Further complicating this maze, Part V on Public Documents does not contain a provision admitting such documents.<sup>143</sup> The only reference in the TEA to admitting these documents has to do with secondary evidence proving its existence.<sup>144</sup>

The TEA provides a complex regulation for bankers’ books.<sup>145</sup> The Act also contains a cursory, and possibly inappropriate, regulation of general business records.<sup>146</sup> Bankers’ and shopkeepers’ books posed a particular

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<sup>140</sup> FED. R. EVID. 901 (“To satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is.”).

<sup>141</sup> *E.g.*, Evidence Act, § 91 (Tanz.) (“A court shall presume that maps or plans purporting to be made by the authority of Government were so made and are accurate; but maps or plans made for the purposes of any legal proceedings must be proved to be accurate.”).

<sup>142</sup> *See, e.g., id.* ch. III, part V (listing the ways in which public documents can be proved, and thus authenticated, without referring to presumptions).

<sup>143</sup> *Contra id.* § 77 (“[B]anker’s book shall in all legal proceedings be received as prima facie evidence . . .”).

<sup>144</sup> *Id.* § 67(1)(e) (“Secondary evidence may be given of the existence . . . when the original is a public document within the meaning of section 83.”). Clearly, the TEA intends to admit these documents as it spends five sections on this type of evidence, but, without general rules, the TEA leaves gaps in admissibility.

<sup>145</sup> *See id.* ch. III, part IV.

<sup>146</sup> *See id.* §§ 36, 78, 78A. One example: “A copy of an entry in a banker’s book shall not be received in evidence under this Act unless it is first proved that the book was at the time of the making of the entry one of the ordinary books of the bank and that the entry was

problem for the common law two centuries ago and beyond, but that particular problem was resolved through the elimination of incompetency for interested parties.<sup>147</sup> There is no reason today for a separate authentication-like rule for bankers' books. Moreover, the treatment of bankers' books obscures the peculiar problem they pose (in addition to general authentication), which is the same problem posed by any other business record – hearsay. This is discussed further below.

Also, note that what are actually straightforward authentication problems are scattered throughout the TEA in different provisions apparently dealing with other matters. For example, § 49 deals with the recurring authentication problem of knowledge of handwriting, but does so under the subsection heading Relevancy of Opinions of Third Person.<sup>148</sup> The problem of identifying handwriting in part involves opinion testimony, but the more important part is firsthand knowledge, which goes to authentication. Section 52 similarly and unhelpfully mixes up firsthand knowledge and hearsay problems with the opinion issue.<sup>149</sup>

### C. Hearsay

Hearsay is a problem for all modern codes of evidence. For example, the approach of the Federal Rules of Evidence is not optimal.<sup>150</sup> A possible alternative may be the modern British approach that has eliminated hearsay in civil trials and curtailed its exclusion in criminal cases.<sup>151</sup> Nonetheless,

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made in the usual and ordinary course of business, and that the book is in the custody or control of the bank.” *Id.* § 78(1).

<sup>147</sup> For instance, FED. R. EVID. 601 provides that all people are competent to be witnesses at trial. As the Advisory Committee’s notes make clear, this rule “eliminates all grounds of incompetency not specifically recognized in the [Rules],” including bars on interested persons. FED. R. EVID. 601 advisory committee’s note. Without the bar on interested parties, there is no need for separate bankers’ book provisions, which allowed commercial entities to introduce ledgers, daybooks, account books, and other records in civil disputes despite the ban on a banker testifying for his interests.

<sup>148</sup> See Evidence Act, § 49(1) (Tanz.) (“When the court has to form an opinion as to the person by whom any document was written or signed, the opinion of any person acquainted with the handwriting of the person by whom it is supposed to be written or signed that is was or was not written or signed by that person, is a relevant fact.”).

<sup>149</sup> *Id.* § 52 (“When a court has to form an opinion as to the relationship of one person to another, the opinion, expressed by conduct, as to the existence of such relationship of any person who, as a member of the family or otherwise, has special means of knowledge on the subject, is a relevant fact.”).

<sup>150</sup> See Allen, *supra* note 86 and accompanying text; Allen, *supra* note 87, at 799, n.4 and accompanying text.

<sup>151</sup> Civil Evidence Act 1995, c. 38 § 1(1) (U.K.) (“In civil proceedings evidence shall not be excluded on the ground that it is hearsay.”); Criminal Justice Act 2003, c. 44, §§ 114–36 (U.K.) (codifying and replacing the common law of hearsay); *id.* § 118(2) (declaring, with limited exceptions, “the common law rules governing the admissibility of hearsay



hearsay calls for a general treatment of some sort to exclude non-trustworthy out-of-court statements, but there is no such treatment in the TEA.<sup>152</sup> Once again, “relevancy” is called upon to do the duty that some other rule or concept should serve. Virtually every section from § 34 to § 57 deals with a hearsay question, but uses the language of relevancy.<sup>153</sup> The specific provisions that do exist make inexplicable distinctions. For example, the TEA contains a more modern business records exception to the hearsay rule (as it is normally thought of), but it is limited to criminal cases.<sup>154</sup> More curiously, the TEA has a quite modern version of the business records exception, yet it is limited to bankers’ books rather than being generally applicable.<sup>155</sup>

#### *D. Burdens of Proof and Presumptions*

Burdens of proof and presumptions form a tightly knit analytical structure.<sup>156</sup> The TEA deals with burdens of proof, but employs “presumptions” without a definition.<sup>157</sup> Chapter III, Part VI: Presumptions as to Documents, has a lengthy series of “presumptions” but never defines the term. Also, note that the burdens of persuasion are defined in § 3, even though the TEA’s Chapter IV is a complex set of rules governing the very same issues. Almost all of this could be replaced with simple rules governing the burdens of persuasion and production. Moreover, as noted above, many of the uses of the term “presumption” in the TEA are actually designed to handle authentication problems.

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evidence in criminal proceedings are abolished”). These statutory amendments were a “radical departure” from the common law’s default exclusion of hearsay; the Criminal Justice Act even makes “some hearsay automatically admissible.” HODGE M. MALEK, PHIPSON ON EVIDENCE § 28-01 (17th ed. 2009).

<sup>152</sup> A common law hearsay doctrine has evolved. *See, e.g.*, *Gibb Eastern Arica Ltd. v. Syscon Builders Ltd.*, Comm. Case No. 84 of 2003 (CA) (unreported) (Tanz.); *Yusuph Seif Mkumba v. Republic*, Crim. App. No. 204 of 2007 (HC) (unreported) (Tanz.); *Mpeka v. Republic*, Crim. App. No. 23 of 2004 (HC) (unreported) (Tanz.).

<sup>153</sup> *See, e.g.*, Evidence Act, § 35(1) (Tanz.) (“Evidence given by a witness in a judicial proceeding is relevant for the purpose of proving, in a subsequent judicial proceeding or in a later stage of the same judicial proceeding, the truth of the facts which it states . . .”).

<sup>154</sup> *Id.* § 34A (“In any criminal proceedings where direct oral evidence of a relevant fact would be admissible, any statement contained in any writing, record or document, whether in the form of any entry in a book or in any other form and which tends to establish that fact shall, on production of the writing, record or document, be admissible as evidence of that fact . . .”).

<sup>155</sup> *Id.* § 78 (requiring entries in bankers’ books to be made in “the usual and ordinary course of business . . .”).

<sup>156</sup> *See* Ronald J. Allen, *Presumptions in Civil Actions Reconsidered*, 66 IOWA L. REV. 843 (1981); Ronald J. Allen, *Structuring Jury Decisionmaking in Criminal Cases: A Unified Constitutional Analysis of Evidentiary Devices*, 94 HARV. L. REV. 321 (1980).

<sup>157</sup> *See* Evidence Act, ch. IV (Tanz.).

Consider the following:

1. Although there is no definition of a “presumption,” the term “rebuttable presumption” is employed, which compounds the ambiguity.<sup>158</sup>
2. Section 3 defines burdens of persuasion, yet several of these provisions seem inconsistent with the general treatment.<sup>159</sup>
3. Section 112 declares that “[t]he burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by law that the proof of that fact shall lie on any other person.”<sup>160</sup> For example, in a contract suit, one side wishes the court to believe there was a contract, and the other side wishes the court to believe in the opposite. In that example, who has what burden?
4. Section 113 places “[t]he burden of proving any fact necessary to be proved in order to enable a person to give evidence of any other fact” upon “the person who wishes to give such evidence.”<sup>161</sup> It is odd to think of a party having a burden of proof on matters that go to relevancy or conditional relevancy, at least not the same burden of proof as a party bears on the necessary elements of a cause of action.
5. Finally, note that § 111 is quite inconsistent with a number of the sections noted above: “The burden of proof in a suit proceeding lies on that person who would fail if no evidence at all were given on either side.”<sup>162</sup> Perhaps this was intended as a general rule with the others being the exception, but this is not clearly spelled out or obvious.

In sum, these provisions are not adequately sorting out the general structure of trials from the discrete assignment of burdens of production or persuasion for tactical reasons, or to advance the general goals of trials.

Lastly, the TEA provides that “[a] court may infer the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private

<sup>158</sup> *Id.* § 121 (“The fact that any person was born during the continuance of a valid marriage between his mother and any man, or within two hundred and eighty days after its dissolution the mother remaining unmarried, shall raise a rebuttable presumption that such person is the legitimate son or daughter of that man.”).

<sup>159</sup> *See, e.g., id.* § 115 (“In civil proceedings when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him.”). In a contract dispute, to whom does that refer?

<sup>160</sup> *Id.* § 112.

<sup>161</sup> *Id.* § 113.

<sup>162</sup> *Id.* § 111.

business, in their relation to the facts of the particular case.”<sup>163</sup> If this is meant as a general proposition, one wonders why evidence needs to be presented at trial. If, as we assume is the case, this rule is referring to drawing inferences from evidence, it is obviously superfluous because the court has no other choice.

#### *E. The Best Evidence Rule*

Another modern problem for evidence law is the proliferation of new and reliable means of storing and retrieving information. Two hundred years ago, there were no copy machines or computers. Together, the best evidence rule and the parol evidence rule dealt with what was then the primary problem of documentary evidence, which was the authenticity of contracts and deeds.<sup>164</sup> Modern litigation presents a host of different scenarios, however, ranging from the admissibility of photographs to the meaning of an “original,” given copy machines, scanners, PDF files, computer printouts, and digital signatures. There has also been increasing recognition that the law of evidence should facilitate accurate and efficient adjudication by relying on fair and disinterested common sense reasoning. To this end, in Western jurisdictions, formal barriers have been reduced to admitting copies of documents, and the status of computer printouts or electronic messages has been clarified.<sup>165</sup> This can be done through broad and general best evidence rules that define “original” capaciously,<sup>166</sup> make printouts from modern means of storage such as computers admissible as originals, and permit the liberal admission of copies of documents.

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<sup>163</sup> *Id.* § 122.

<sup>164</sup> This is a problem that has existed for centuries. During the Medieval period, lawyers developed indentures, which randomly cut the document into pieces, so a decision-maker could know it was authentic when the two halves were brought to court at the same time. See MICHELLE P. BROWN, *A GUIDE TO WESTERN HISTORICAL SCRIPTS FROM ANTIQUITY TO 1600* 78–79 (1990).

<sup>165</sup> See, e.g., Information Technology Act, 2000, No. 21, Acts of Parliament, 2000 (India) (amending the Indian Evidence Act to classify electronic records as “documentary evidence”); ASS’N OF CHIEF POLICE OFFICERS, *GOOD PRACTICE GUIDE FOR COMPUTER-BASED ELECTRONIC EVIDENCE* (4th ed. 2010), [http://www.7safe.com/electronic\\_evidence/ACPO\\_guidelines\\_computer\\_evidence.pdf](http://www.7safe.com/electronic_evidence/ACPO_guidelines_computer_evidence.pdf) (providing a best practice guide for investigation and admission of electronic evidence for use in England, Wales, and Northern Ireland).

<sup>166</sup> See, e.g., FED. R. EVID. 1001(d) (“An ‘original’ of a writing or recording means the writing or recording itself or any counterpart intended to have the same effect by the person who executed or issued it. For electronically stored information, ‘original’ means any printout – or other output readable by sight . . . .”); see also *Garton v. Hunter* [1969] 2 Q.B. 37 at 44 (Eng.) (“The only remaining instance of [the best evidence rule] is that if an original document is available in your hands, you must produce it . . . . Nowadays we do not [otherwise] confine ourselves to the best evidence. We admit all relevant evidence. The goodness or badness of it goes only to weight, and not to admissibility.”).

The TEA has at best an archaic and limited best evidence rule.<sup>167</sup> Chapter III, Part VII treats contracts in a fashion that would have been recognized in the 1870s,<sup>168</sup> but nowhere does the TEA treat in a general fashion modern forms of evidence, such as computer storage, which are not within the definition of “document” in § 3 (a computer file is only metaphorically “readable by sight,” as stated by § 3<sup>169</sup>) nor referred to in § 64.<sup>170</sup> Tanzanian scholars have expressed concern with this antiquated treatment and efforts have been made to modernize.<sup>171</sup> But, again for reasons that are not clear, § 78A, dealing with bankers’ books, does refer to computer storage and read out issues, and § 40A makes admissible in criminal cases certain electronic forms of evidence.<sup>172</sup> These provisions should be generalized.

#### *F. Miscellaneous*

We note here a number of miscellaneous issues for consideration:

1. There are further potentially inconsistent provisions:
  - a. Section 20 has the internally inconsistent phrase “expressly impliedly authorised by him to make them, are admissions.”<sup>173</sup> Something can be expressed or implied, but not both.
  - b. Compare §§ 27 and 29. One forbids inducement,<sup>174</sup> but the

<sup>167</sup> See Evidence Act, ch. III, part III (Tanz.).

<sup>168</sup> See, e.g., *id.* § 104 (“When language used in a document is plain in itself, but is unmeaningful in reference to existing facts, evidence may be given to show that it was used in a peculiar sense.”); *id.* § 102 (“When the language used in a document is, on its face, ambiguous or defective, evidence may not be given of facts which would show meaning or supply its defects.”).

<sup>169</sup> *Id.* § 3.

<sup>170</sup> *Id.* § 64.

<sup>171</sup> ANDREW MOLLEL & ZAKAYO LUKUMAY, *ELECTRONIC TRANSACTIONS AND THE LAW OF EVIDENCE IN TANZANIA* 8, 83, 99 (2007) (arguing for admission of e-signatures and e-documents under the TEA despite the fact that 70% of Tanzania attorneys are concerned with reliability of e-evidence).

<sup>172</sup> These provisions were added in 2007 in the Written Laws (Miscellaneous Amendments) Act, 2007, No. 15 of 2007 (Tanz.). However, even with these provisions complications remain. No language was added to deal with the authentication of digital evidence. See Fikiri B. Liganga, *An Assessment of the Legal System in Relation to the Increasing Rates of Cyber Crimes in Tanzania* 29–30 (July 22, 2012) (unpublished manuscript, available at <http://ssrn.com/abstract=2114934>). There is at least some evidence that judges are admitting this evidence regardless of the TEA’s provisions. *Id.*; Interview with Judge Robert V. Makaramba, High Court of Tanzania, in Dar-es-Salaam, Tanz. (Mar. 14, 2012) (discussing admission of digital documents, including email, in Tanzania cases despite the provisions of the TEA).

<sup>173</sup> Evidence Act, § 20 (Tanz.).

<sup>174</sup> *Id.* § 27 (“No confession made to a police officer shall be proved as against a person

other only forbids inducements that would cause an innocent person to confess.<sup>175</sup>

- c. Section 54(1): “In civil cases the fact that the character of any person concerned is such as to render probable or improbable any conduct imputed to him is irrelevant, except in so far as such character appears from facts otherwise relevant.”<sup>176</sup> How can what is irrelevant be made relevant by some other evidence in this fashion?
  - d. Section 62 requires “direct” oral evidence,<sup>177</sup> but that is not what experts give.
2. Section 23 confuses admissions and hearsay.
  3. Section 58 fails to treat judicial notice generally. There is no provision for the taking of judicial notice of obviously true matters.
  4. Compare §§ 63 and 66. One says either primary or secondary evidence may be used,<sup>178</sup> and the other says something quite different.<sup>179</sup>
  5. Compare §§ 69, 71, 99. The first two require proof of handwriting,<sup>180</sup> and the other foregoes proof through a presumption.<sup>181</sup>
  6. Chapter III, Part VII: Exclusion of Oral Evidence by Documentary. This part does not reflect modern thinking about

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accused of an offence.”).

<sup>175</sup> *Id.* § 27 (“No confession which is tendered in evidence shall be rejected on the ground that a promise or threat has been held out to, the person confessing unless the court is of the opinion that the inducement was made in such circumstances and was of such a nature as was likely to cause an untrue admission of guilt to be made.”).

<sup>176</sup> *Id.* § 54(1).

<sup>177</sup> *Id.* § 62 (“Oral evidence must, in all cases whatever, be direct . . .”).

<sup>178</sup> *Id.* § 63 (“The contents of documents may be proved either by primary or by secondary evidence.”).

<sup>179</sup> *Id.* § 66 (“Documents must be proved by primary evidence except in the cases hereinafter mentioned.”).

<sup>180</sup> *See, e.g., id.* § 69 (“If a document is alleged to be signed or to have been written wholly or in part by any person, the signature or the handwriting of so much of the document as is alleged to be in that person’s handwriting must be proved to be in his handwriting.”).

<sup>181</sup> *Id.* § 99(1) (“When any document, purporting or proved to be not less than twenty years old, is produced from any custody which the court in the particular case considers proper, the court may presume that the signature and every other part of such document, which purports to be in the handwriting of any particular person, is in that person’s handwriting, and, in the case of a document executed or attested, that it was duly executed and attested, by the persons by whom it purports to be executed and attested.”).

the integration of contracts.

7. Chapter IV, Part II: Estoppel. Are estoppel and the parol evidence rules matters of evidence or substantive law?
8. Section 141A: In privileges, there is a relevancy rule about possession of recently stolen goods.
9. Chapter 5, Part III: Questioning of Witnesses. This section can be reduced to a few general rules.
10. There are no general provisions about harmless error, goals of trials, or offers of proof. Section 178 provides some guidance, but without context, it offers only limited direction to judges.<sup>182</sup>

#### IV. PRINCIPLES TO GUIDE EVIDENCE LAW REFORM

As the discussion in Part III indicates, the TEA is unsuited for modern Tanzania and reform is necessary to correct its failures. There are, however, obstacles along the way. First, the nations that use the Indian Evidence Act or its derivatives have amended their laws on a provision-by-provision basis (if that); no truly wholesale, comprehensive reform has been successful – or even seriously attempted.<sup>183</sup> Therefore, there is no specific guidance to follow that will cure the TEA’s problems. Second, hegemonic concerns arise whenever Western observers attempt to exert too much influence on developing nations’ legal systems. There are particular concerns with the law of evidence because it is tempting to import the Federal Rules of Evidence, which are simple, concise, and appear as though they would, for the most part, operate efficiently in any common law system.<sup>184</sup> Although we are attempting to mitigate fears of our impinging on Tanzania’s autonomy by working closely with the Working Group and with lawyers across the country, we are sensitive to such issues. In order to address these issues, along with the perspectives, questions, and considerations discussed above, we have developed eight principles that synthesize the task of evidence law reform, not just in Tanzania, but also perhaps in any nation seeking to reform its evidence law. Any reform effort

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<sup>182</sup> Section 178 provides, “The improper admission or rejection of evidence shall not, of itself, constitute grounds for a new trial or reversal of any decision in any case if it appears to the court before which such objection is raised that, independently of the evidence objected to and admitted, there was sufficient evidence to justify the decision, or that the rejected evidence, had it been received, the court would not have varied the decision.” *Id.* § 178.

<sup>183</sup> Jessica E. Notebaert, *The Indian Evidence Act Throughout Modern Africa and Asia Part II* (2012) (unpublished manuscript, on file with Northwestern University School of Law).

<sup>184</sup> Or, as in the case of Ghana, the ALI’s *Model Code of Evidence*. See *supra* note 71 for a discussion of Ghana’s embrace of American exemplars.

should be informed by these principles, which are guided by: contemporary commentary on evidence law; one author's extensive work in the field of epistemology; and first principles such as fairness, acknowledgment of individuals' autonomy and individual rights, and respect for the human experience.

1. Evidence law should facilitate the accurate, efficient, and fair finding of facts pertinent to legal disputes. Generally, all relevant evidence (evidence that would influence a reasonable person's inferential process) should be admissible. Evidence should be excluded only if there is a very good reason for doing so that outweighs, in the particular context, the value of accurate adjudication.
2. The law of evidence does not determine the "facts" that may be found; the substantive law does. The law of evidence facilitates reliable investigation into those facts.
3. The evidentiary process should respect natural reasoning processes. It should not impose strained or artificial limits on testimony or the presentation of real evidence absent a compelling justification.
4. Evidence law exists to facilitate the rational resolutions of disputes and not as an end, or set of ends, in itself, and should be so constructed and interpreted. Meticulous compliance with technical modes of proceeding that do not serve the ultimate ends of accurate, efficient, and fair fact-finding should not be demanded, whether emanating from evidence or procedural codes. Trials should be conducted not as games requiring technical compliance with complex rules but instead as a rational search for truth. Reversals on appeal should be limited to cases in which a significant violation of a right likely affected the outcome of the case.
5. Decision at trial is always decision under uncertainty, with mistakes being unavoidable in the long run. Evidence law should facilitate the reduction of the total number of errors made at civil trial. Civil parties typically stand equal before the law and should not be discriminated against because of their formal status (e.g., plaintiff, defendant, applicant, respondent, intervener). Deviations from that principle should be rare and well justified, such as civil cases of fraud.<sup>185</sup> In criminal cases, the government must prove

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<sup>185</sup> See FED. R. CIV. P. 9(b) ("In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake."). The chief drafter explained this increased burden (above a "short and plain statement") as "useful [but] probably

each element of any charged offense beyond a reasonable doubt; affirmative defenses with differing burdens of persuasion are allowable, but should be narrowly limited.

6. Evidence law should not discriminate among groups in society, for example, by giving an undue advantage to repeat participants in litigation. Its language should, thus, be as spare, non-technical, and immediately comprehensible as the subject permits. It should be administered to advance rather than obstruct the underlying purposes of a legal system.
7. To the extent possible without significantly compromising any of the guidelines noted above, the law of evidence should respect the norms of the communities to which it applies.
8. There may be occasion to provide exceptions to any of the guiding principles noted above, but those exceptions should be rare, limited, clear, and justified. Examples may include privileges, as well as the structuring of incentives for other socially valuable purposes.

It is with these principles in mind that we have prepared the following conceptual outline of a revised evidence law for Tanzania.

#### V. A CONCEPTUAL OUTLINE OF PROPOSED EVIDENCE LAW

If upon considering the various issues discussed in this Article, the Tanzanian government is convinced that the present approach is not optimal and that something more akin to the simplified approach of the Federal Rules of Evidence should be considered, then we would recommend the following. Note that while what follows is to some extent inspired by the Federal Rules of Evidence, it is quite different from the Federal Rules and would amount to an improvement on them. Also, the individual context of every specific rule would have to be intensely scrutinized from the Tanzanian perspective.

**ARTICLE 1 – GENERAL PROVISIONS:** This article would contain a series of rules on the purposes of trials, the obligations of lawyers to facilitate rulings on admissibility, how to handle preliminary questions of fact (including conditional relevancy), and other miscellaneous general rules. Definitions would be included as well.

**ARTICLE 2 – RELEVANCY AND MATERIALITY:** Here, the basic

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stat[ing] only what courts would do anyhow and may not be considered absolutely essential.” Charles Edward Clark, *Simplified Pleadings*, 2 F.R.D. 456, 463-64 (1943). It appears that the Advisory Committee assumed this to be standard practice in England and the United States. *But see generally* Christopher M. Fairman, *An Invitation to the Rulemakers - Strike Rule 9(b)*, 38 U.C. DAVIS L. REV. 281 (2004) (arguing that this assumption is unwarranted).



concepts that drive a trial would be defined, admission of relevant and material evidence provided for, and grounds of exclusion articulated (e.g., undue prejudice, waste of time). This article would contain the greatest variation from the current TEA because, as described in the guiding principles above, a truly successful code for Tanzanian purposes requires a switch from a mostly exclusionary law of evidence to a mostly inclusionary one. Thus, “specialized” relevancy sections, such as the section deeming information pertaining to damages relevant in damages proceedings, will be eliminated, and a general rule of admissibility will be instituted. This change, however, may not dramatically alter the practice of evidence law in Tanzania. Due to the circular provisions described above and the many ways one could interpret the various relevancy provisions of the TEA, much, if not most, of the evidence that would come in under this inclusionary rule would probably already be admitted. But the change reflects a mindset of fairness, nondiscrimination, and natural reasoning in a way that the TEA does not.

**ARTICLE 3 – SPECIFIC RELEVANCY RULES:** Here would be a list of policy-based rules of admission or exclusion that respond to Tanzania’s needs. If the Working Group decides to keep character evidence rules, this is where they would be placed. This is the ideal section in which to tailor Tanzania’s evidence law to the country’s culture and specific needs, as guiding principle (7) instructs. For example, the section of the TEA that deems evidence of any custom at issue to be admissible should be preserved.<sup>186</sup> We also intend to draw on the Federal Rules of Evidence and our conversations with Tanzanians to decide whether other common specific relevancy rules will be included, such as the subsequent repair rule, the rule disallowing admission of evidence of plea negotiations, or offers to pay medical expenses. We have also conducted a great deal of research and are planning further conversations with Tanzanians in order to determine whether specialized relevancy rules for sex cases are appropriate. We anticipate the challenges in drafting this section to be balancing a respect for Tanzania’s customs and preexisting law with an effort to modernize the code so as to increase the fairness of results, particularly for unrepresented and indigent litigants.

**ARTICLE 4 – THE HEARSAY RULE:** Hearsay is largely a specialized relevancy rule. It should be treated along with other regulations of relevancy. Considerable thought would have to be given to how complex these rules should be. Revising the hearsay rules in the TEA is particularly challenging because of the confusing way hearsay is treated. First, there is no universal or standard definition of hearsay; frequently, what United States lawyers would call hearsay provisions, the TEA labels relevancy provisions. Second, the TEA allows admission of certain types

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<sup>145</sup> Evidence Act, §§ 15, 50 (Tanz.).

of hearsay – especially when the declarant is unavailable – but it does not regulate such admission in a clearly delineated way. For example, there is no general ban on the admission of hearsay. Some provisions admit certain types of hearsay (e.g., out-of-court statements about family relationships are admissible under § 34<sup>187</sup>), but there are other provisions that may bar such evidence (e.g., § 160’s prohibition of “questions or inquiries which [the court] regards as indecent or scandalous”<sup>188</sup> or § 161’s prohibition of “any question which appears to [the court] to be intended to insult or annoy”<sup>189</sup>). Without understanding the way all of these provisions interact – and how they interact with what appears to be a common law bar to hearsay evidence<sup>190</sup> – this portion of the TEA is impossible to understand. Our revision of this section, therefore, will be driven primarily by two of the guiding principles: principle (1), which provides that all relevant evidence should be admissible, and principle (4), which provides that to the extent possible, unnecessary technicalities should be eliminated from the code and not enforced in practice. We intend to structure a hearsay rule like that contained in the Federal Rules of Evidence or the British statutes – one that expressly defines hearsay evidence, generally excludes it with some exceptions (to be determined by reference to the current TEA and the Working Group’s preferences), and subjects admissible hearsay evidence under this article to exclusion on grounds of prejudice, unfairness, etc.

**ARTICLE 5 – BURDENS OF PROOF AND PRESUMPTIONS:**

General rules concerning burdens of production and persuasion, who has them, and any exceptions would be described here. The article would include a definition of a presumption as regulating burdens of proof, and list them. A more radical but better option to consider is the elimination of the concept of “presumption” and simply directly allocate burdens as the Working Group thinks desirable. Judicial adjustments according to articulated standards to accommodate unanticipated problems should be authorized. As an initial matter, in the interest of making the TEA more accessible, we intend to re-categorize the bulk of the provisions currently called “presumptions” into an article on authenticity, where they truly belong. Further, as indicated, our preference is to simplify the burdens of proof and presumption sections of the TEA, as guiding principle (4) would seem to encourage. However, we anticipate this to be a complicated

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<sup>187</sup> *Id.* § 34.

<sup>188</sup> *Id.* § 160.

<sup>189</sup> *Id.* § 161.

<sup>190</sup> *See, e.g.*, *Abias v. Republic*, Crim. App. No. 200 of 2007 (HC) (unreported) (Tanz.) (excluding as hearsay the testimony of witness who heard complainant’s screams for help at the time she was allegedly raped); *Tesha v. Ministry of Natural Resources and Tourism*, Miscellaneous Civil Cause No. 50 of 2003 (HC) (unreported) (Tanz.) (excluding affidavit of applicant who testified that she did not identify herself to the court because she could not hear the clerk announcing her case because the clerk’s testimony was hearsay).

revision because of the way that presumptions interact with other Tanzanian laws, including, but not limited to, the Criminal Procedure Act of 1985 (as amended), which has implications on substantive law, not just the manner in which evidence is presented.<sup>191</sup> As another example, the Land Act contains presumptions about the approval of disposition of land.<sup>192</sup> Thus, this is another area of the law in which efforts to streamline and modernize the TEA must not alter the substantive rights that Tanzanians currently possess or disrespect cultural norms.

**ARTICLE 6 – JUDICIAL NOTICE:** Judicial notice should be taken whenever the appropriate burden of persuasion is satisfied. Thus, this topic should follow Article 5. Without juries, much of the Federal Rules of Evidence provisions operationalizing judicial notice<sup>193</sup> are irrelevant. Meanwhile, the TEA’s current treatment is to provide a defined list of those facts eligible for judicial notice. However, no list will ever include every source that would provide adjudicative facts that are beyond dispute. Like so much else in the proposed rules, a concise, general rule is needed.

**ARTICLE 7 – AUTHENTICATION:** Here, the general rule that everything must be shown to be what it purports to be should be adopted and illustrated. This area of the TEA requires updating to account for the ways in which modern technology and modern litigation practice have changed the type of evidence that parties are seeking to admit in court proceedings. This set of provisions is most guided by principles (1), (4), and (6). Principle (1) calls for the general admissibility of most pieces of evidence, and this principle’s guidance can be followed by including a general statement about authentication: anything that can be shown to be what it purports to be is authenticated. This improves the current TEA’s treatment of certain “presumptions,” which may or may not be an exclusive list, and may actually prevent litigants from authenticating certain electronic or other technologically generated evidence. Principle (4) encourages the elimination of unnecessary technicalities. Here, there is no reason to include a separate provision about authenticating bankers’ books. Preserving that section would conflict with our general authentication rule and may create confusion about what other sorts of business records can be authenticated under this article. Principle (6) raises questions about how the evidence code can be best structured so as not to discriminate against groups in society, such as illiterate or generally unsophisticated individual parties. Thus, we intend to include a residual rule for authentication providing that where the totality of the circumstances pertaining to a piece of evidence provides reason to support a finding of authenticity, it will be considered authenticated under the new code. This may help individuals

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<sup>191</sup> See, e.g., Criminal Procedure Act No. 9 of 1985, § 50.

<sup>192</sup> See Land Act No. 4 of 1999, § 41(2) (Tanz.).

<sup>193</sup> See, e.g., FED. R. EVID. 201(f).

who do not keep pristine records introduce their evidence.

**ARTICLE 8 – CONTENTS OF WRITINGS, BEST EVIDENCE**

**RULE:** If the Working Group is going to preserve a best evidence rule of some sort, the rule should follow Article 7, as it is a specialized authentication provision. Many of Article 7’s considerations are also present here. The biggest decision will be whether or not to preserve the TEA’s treatment of the parol evidence rule. This is the sort of substantive law that we do not want to radically alter during reform efforts, but we are skeptical that an evidence code is the correct home for such a longstanding substantive rule of contract. This, perhaps, is the best example of principle (8) in action. Principle (8) suggests that it might be necessary – in rare instances – to depart from the rest of the guidelines. Thus, although principle (2) would suggest that we should strip the TEA of its substantive provision in favor of provisions that only facilitate reliable investigation into facts, whose materiality is dictated by substantive – not procedural – law, it may be necessary to retain the parol evidence rules in this section so that the statutory basis for substantive Tanzanian law is not eliminated.

**ARTICLE 9 – WITNESSES:** This article would contain general provisions for qualifying witnesses, a lay opinion rule, examination and cross-examination, refreshing memory, impeachment, and so on. Miscellaneous rules, such as the court’s capacity to interrogate and sequester witnesses, would also be included. Currently, there are nearly fifty provisions in the TEA relating to witness competence and compellability and to the examination of witnesses. Revisions in this area will mainly be directed by principles (1), (3), and (4). We intend to restructure the rules so that the default rule is that any person is competent to testify as a witness, and plan to eliminate provisions about children under a certain age being incompetent witnesses, all in furtherance of principle (1)’s goal that evidence law facilitate admission. We also believe that all of the provisions dictating how witnesses should be questioned can be simplified into something more like the Federal Rules of Evidence, which are logically related to individuals’ natural reasoning processes. Strict technical rules may inhibit parties from clearly telling their stories in a way that is relatable to a judge, and more fluid rules can enable questioning – on both direct and cross-examination – that brings all the crucial details to light without imposing artificial limits on testimony.

**ARTICLE 10 – EXPERT WITNESSES:** This article would provide for the qualification of expert, scientific, or specialized testimony; rules governing its use; and court-appointed experts. Expert witnesses need to be dealt with separately because they provide a different type of evidence – scientific, technical, or other specialized knowledge – instead of firsthand knowledge of the litigated matter. In the United States, the Supreme Court has asked district judges to serve as “gatekeepers” to ensure juries hear

reliable and generally accepted expert testimony.<sup>194</sup> Without juries, and given the differing quality of Tanzanian magistrates, we suspect that this is not the correct approach for the Tanzanians. Instead, the British approach – focusing on necessity, reliability, and cost – may provide a useful guide.<sup>195</sup> We plan to continue conversations with the Working Group on what expert witness regulation would be most helpful for their particular needs.

**ARTICLE 11 – PRIVILEGES:** This article would catalogue privileges in Tanzania, their exceptions, invocation, and waiver. The TEA currently contains several rules relating to evidentiary privileges, but they require updating and streamlining to best serve litigants in modern Tanzania. The largest problem with the privileges provisions in the current TEA is that they are complicated and overlapping, i.e., there are many rules regarding privileges when few would suffice, and some provisions are redundant. Thus, guided by principle (4), we are attempting to determine what the goals of evidentiary privileges are in Tanzania (e.g., preserving a spouse’s right not to testify against her husband and protecting the attorney–client relationship) and draft provisions that clearly state these priorities in as clear and nontechnical a manner as possible. We also intend to discuss with the Working Group whether additional privileges that are not in the TEA, such as a clergy–penitent privilege, would be desirable, because privileges are a highly culturally sensitive facet of evidence law, and principle (7) calls for us to be as respectful as possible of norms currently held by Tanzanians.

**ARTICLE 12 – MISCELLANEOUS RULES:** This article would address the scope and application of rules, along with other lingering issues.

## VI. CONCLUSION

During our second visit to Dar es Salaam in March 2013, we proposed to the Tanzanian government’s Working Group on evidentiary reform that Parliament replace the TEA with a highly modern and considerably streamlined set of rules. Our proposal was crafted both to align with the

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<sup>194</sup> See *Daubert v. Merrell Dow Pharm.*, 509 U.S. 579, 597 (1993); Ronald J. Allen, Symposium, *The Conceptual Challenge of Expert Evidence*, V INT’L CONGRESS ON PROCEDURAL L. 23 (Aug. 30–Sept. 1, 2012, Cartagena, Columbia), available at <http://ssrn.com/abstract=2141395>.

<sup>195</sup> ADRIAN KEANE & PAUL MCKEOWNET, *THE MODERN LAW OF EVIDENCE* 535, 547–48 (9th ed. 2012). Although it does not appear that the British have settled on one approach for testing reliability. Another option would be to consider the civil law approach where the court calls experts to serve as part of the inquisitorial process. See, e.g., P.T.C. VAN KAMPEN, *EXPERT EVIDENCE COMPARED: RULES AND PRACTICES IN THE DUTCH AND AMERICAN CRIMINAL JUSTICE SYSTEM* 20 (1998) (comparing Dutch expert rules with those in the United States). However, the financial costs of this approach would likely challenge the already financially strapped Tanzanian judiciary and the civil law approach would not be consistent with the rest of the justice system.

principles discussed in detail above and, to the best of our ability, to adapt to Tanzania's unique problems and legal structure. Our sincere hope is that the Tanzanian government will seriously consider implementing our suggestions, but also that it will incorporate the opinions of the consensus of its legal community in doing so, as there are no doubt significant local concerns that we as American evidentiary scholars are unable to anticipate. Above all, we have urged them to consider the larger theoretical and policy issues that in our view must accompany any effort to make rules of evidence.

This Article is the second in a series. In our next effort, we will articulate the specifics of our proposals to the Tanzanian government, explaining our choices for reforming the nation's evidentiary rules and the multiple sources from which they draw. But we will also endeavor to step beyond a strictly legal lens in order to again consider the larger societal context in Tanzania and make suggestions for how such a new set of laws could be implemented. This is a discussion that must necessarily go beyond the notion of a simple yes or no vote in Parliament. As our first article described in detail,<sup>196</sup> the legal landscape in Tanzania is a difficult one, full of complexity and anachronisms. Education on such a vital set of procedures will be critical at all levels of the legal structure and so a future article will discuss ideas for empowering all stakeholders in Tanzania to use the new law to their maximum benefit. This effort to transform a nation's law of evidence will be for naught if all participants of the system cannot fully utilize it.

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<sup>196</sup> Allen et al., *supra*, note 2 at 234, 236.