

PROPOSED FINAL DRAFT: TANZANIA EVIDENCE ACT 2014
FROM THE CHIEF CONSULTANT AND DRAFTING COMMITTEE

MAY 7, 2014

The Chief Consultant and the Drafting Committee (the “DC”) for the Tanzanian Evidence Law Project recommend that the present Tanzania Evidence Act of 1967 (the “TEA”) be repealed and replaced with a new and modernised law of evidence. This recommendation comes after more than three years of study of the TEA, its use in Tanzanian case law, various research trips to Tanzania, and an international comparison of evidence law. In addition, the DC has examined the history and political economy of the United Republic, with a special emphasis on the colonial history of the country and its significance for the legal system of the United Republic. What follows is a report based on these efforts and a proposed set of rules to replace the TEA.

If adopted, the DC’s Proposed Tanzanian Evidence Act (hereinafter “Proposed Act”) will modernise and streamline the archaic and conceptually problematic TEA. The DC considered whether incremental change was preferable to wholesale replacement, taking into account the consequences of changing a complex set of laws that have been in effect for a considerable time.¹ Ultimately, the DC rejected incremental change. For reasons that will become clear throughout the remainder of this report, preservation of the present TEA serves little to no social interest. The only cognizable benefit that the TEA provides is a competitive advantage to those few individuals who have already mastered its unnecessary and peculiar complexities. Any value garnered by these few individuals is offset by the widespread inefficiencies and injustice that the continued use of the TEA will perpetuate throughout Tanzanian society. However, the DC is acutely aware that the people and Government of the United Republic have more expertise in your society and legal system than we do, and that we cannot strike the difficult balance between the potential costs and benefits that law reform entails. Regardless of your decision to accept or reject the proposed rules, we ultimately hope that this report will begin the important process of evidentiary law reform and we look forward to a continued collaborative effort.

The TEA is a by-product of colonial imperialism and was taken nearly word-for-word from the Indian Evidence Act of 1872 (the “IEA”). In many respects, the TEA reflects the status of the common law of evidence that governed during the latter part of the nineteenth century. Indeed, its drafter, James Fitzjames Stephen, in his introduction to the IEA noted that “[t]he Indian Evidence Act is little more than an attempt to reduce the English law of evidence to the form of express propositions arranged in their natural order, with some modifications rendered necessary by the peculiar circumstances of India.”² Thus, it treats some problems that no longer exist and ignores many that do. In the 140 years since the IEA was written, there have been vast strides in the fields of evidence law and trial procedure. The TEA reflects none of these developments. Furthermore, the IEA embodies the idiosyncratic ideas about the law of evidence and how it should be structured, that were held

¹ Richard A. Posner, *Economics, Politics, and the Reading of Statutes and the Constitution*, 49 U CHI. L. REV. 263–291 (1982) (discussing the costs of radical law reform and suggesting there are times when those costs can be justified); Richard A. Posner, *An Economic Approach to the Law of Evidence*, 51 STAN. L. REV. 1477–1546 (1999) (discussing the economic implications of evidence law on the legal system and society as a whole).

² JAMES FITZJAMES STEPHEN, *THE PRINCIPLES OF JUDICIAL EVIDENCE: BEING AN INTRODUCTION TO THE INDIAN EVIDENCE ACT 2* (1872).

by James Fitzjames Stephen. Although Fitzjames Stephen's ideas were quickly rejected by virtually the entire Anglo-American world,³ the TEA still incorporated these peculiarities. Indeed, Even Indian legal scholars have complained that the IEA's language and concepts are convoluted at best and counterproductive at worst.⁴

While we recognise that the TEA may have at one time served some regulatory purpose, it is no longer compatible with technological innovation and the cultural context of the United Republic. Consisting of 188 separate sections, with innumerable subsections that span approximately 53 pages of single-spaced small print, the TEA is long, complicated, archaic, and occasionally inconsistent. The TEA's complexity has become a barrier against accurate adjudication and innovative judicial reform. The TEA's mere existence exacerbates wealth differentials within the country, giving an unfair advantage to those with greater financial resources to secure the most sophisticated counsel.

For all the above reasons and more, it is particularly appropriate for the Government of the United Republic to focus on the law of evidence at this time. Although somewhat obscure to the general public, the law of evidence is among the most important fields of law. First, as we elaborate below, accurate fact-finding is as fundamental to the construction of a just society as is 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 finding of facts. In order to assert and defend a right in court, one must first establish the facts that demonstrate that a right has been violated. Efficiently and effectively establishing the facts at trial is, in turn, critically dependent upon the law of evidence. A well-considered law of evidence can facilitate the fact-finding process, and an ill-considered one can obstruct it.

Second, the law of evidence, in conjunction with laws of procedure, structures the public's contact with the legal system in the most dramatic way. Anyone unable to resolve disputes without legal action will be immersed in a legal world framed by the law of evidence. The law of evidence is created by the state, which means that this immersion in the legal world will construct and colour the public's view, not just of an important aspect of the machinery of justice, but of the Government of the United Republic itself. Evidence law that facilitates smooth and consistent operation of trials will strengthen the public's respect not just for the judiciary but the Government as a whole, as well as vindicate public aspirations for the rule of law.

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

³ These idiosyncrasies are discussed in the introduction to the next section, Critique of the Tanzania Evidence Act. English legal scholar and Judge James Fitzjames Stephen drafted the TEA's precursor, the Indian Evidence Act, in the early 1870s. JAMES FITZJAMES STEPHEN, *A DIGEST ON THE LAW OF EVIDENCE* iii (2d ed. 1879). Stephen's attempt to put forth a nearly identical act in his own country in 1873 was rejected. *Id.* at 3–4. Critics noted the idiosyncrasies of Stephen's views, and that definitions put forth for crucial words, such as "fact," were ambiguous and contrary to popular understanding. See *An English Evidence Code II*, 20 SOL. J. 869, 869 (Sept. 9, 1876). There were additional concerns about the scope of evidence that the code would admit. See, e.g., 3 CHARLES FREDERIC CHAMBERLAYNE, *A TREATISE ON THE LAW OF EVIDENCE* 2213 § 1718 (1912); JAMES BRADLEY THAYER, *A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW* 266 (1898).

⁴ For example, one Indian legal expert remarked, "The Act does not appear to make any distinction between logical relevancy and legal relevancy," which he identified as a problem because the Indian Evidence Act's definitions of relevance related to logical relevance even though the concept of admissibility is founded on law and not logic. S.C. SARKAR, *LAW OF EVIDENCE* 22–23, 39 (7th ed. 1946).

of evidence imposes large costs on the discovery or presentation of evidence, certain rights may be impossible to vindicate. For example, if the cost of litigation is ten million shillings (TSH), but the value of the right is four million TSH, it is fiscally imprudent to vindicate the right through the court system, which will likely raise the spectre of vigilante justice.

Fourth, the law of evidence and its associated costs act as both barriers to the bringing of lawsuits and, more fundamentally, as determiners of how disputes within a society will be resolved. On one side of the coin is the threat that a right cannot be vindicated; on the other is the risk that the law will encourage too much litigation and too little private negotiation.

In reforming the law of evidence, attention should 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 favour 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, or conversely, should there be more flexibility in the law than it presently possesses?

These kinds of questions should be approached within a well-defined conceptual framework. Accordingly, below we articulate the appropriate guiding principles of evidence law reform, and then we turn to a discussion of certain policies that should inform this effort.

GUIDING PRINCIPLES OF EVIDENCE LAW REFORM

After studying different processes of evidence law reform that were undertaken in various countries, the DC identified the following eight principles that should guide the task of evidence law reform:

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. Otherwise relevant 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—or contributes to the probability of it.
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 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 as a rational search for truth, rather than games that require formalistic compliance with complex rules. Reversals on appeal should be limited to cases in which a significant violation of a right likely affected the outcome of the case.

5. Decisions at trial are always decisions under uncertainty, with mistakes being unavoidable in the long run. Evidence law should facilitate equal treatment of parties and the reduction of errors made at civil trials. Civil parties typically stand equal before the law and should not suffer discrimination due to their formal status (plaintiff, defendant, applicant, respondent, intervener, etc.). Deviations from that principle should be rare and justified (such as civil cases involving allegations of fraud). In criminal cases, the Government must prove each element of any charged offence beyond a reasonable doubt; affirmative defences with differing burdens of persuasion are allowable in limited circumstances.
6. Evidence law should not discriminate among groups in society. For example, undue advantage should not be given to repeat participants in litigation. Its language should thus be as spare, nontechnical, and immediately comprehensible as the subject permits. Evidence law should always 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.

The content of these eight principles of evidence law reform is generally self-explanatory, but we believe an elaboration of some of their implications is in order:

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 some recurring situations that lead to error when natural reasoning is applied; for example, perhaps certain forms of hearsay are systematically given too much weight by fact-finders. In such cases, rules of evidence may attempt to correct for that systematic error by adopting a rule that calls for the exclusion of the particular form of offending hearsay. The possibility that natural reasoning about certain forms of evidence can generate error explains the frequently found authorization to exclude evidence when it may be misleading or unfairly prejudicial. It also underlies other rules, such as limitations on character and propensity evidence, and the requirement that witnesses testify from first-hand knowledge. The circumstances under which individuals systematically make errors heavily depend on cultural attitudes and general life experiences, and in this instance, important work by the drafters of evidence law 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 the amount required to litigate it to a factually accurate conclusion perhaps should not be litigated. Such litigation may very well reduce overall social welfare and discourage private settlement of disputes. Identifying this limit is difficult and depends, at least in part, on local views.

The Economic and Social Values of Incentives. Factual accuracy competes not just with cost; it must also be weighed against other policies that a government may reasonably pursue. The list of such policies is long, and again, contingent upon the culture of the population it governs. For example, the law of privileges may foster and protect numerous relationships, including spousal, legal, medical, spiritual, and governmental. Another example is that a system can provide incentives to fix dangerous conditions in a timely fashion after an accident by preventing the use of evidence related to those repairs. Although a reasonable person might infer such repair shows that the property owner acknowledged a dangerous condition, admission of the repair evidence creates a disincentive to fix the dangerous condition, putting more people in danger. Perhaps settlement of disputes is preferred to litigation, which leads to the exclusion of statements made during settlement talks. The encouragement of settlement is also a reason not to price litigation too low. The more the public subsidises litigation, presumably the more of it there will be, and the less of private negotiation. Still other policies can be pursued. As one last practical example, in the United States, a vast body of exclusionary rules is premised on the perceived need to regulate police investigative activities.⁵ Rules of evidence can also encourage or discourage certain kinds of lawsuits from being brought.

General Considerations of Fairness. Principles of fairness and equity 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 also the case with character evidence rules. The limits on prior behaviour and propensity evidence reflect in part a belief that an individual should not be trapped in the past. The hearsay rule to some extent reflects the values of the right to confront witnesses against oneself.

The Risk of Error. A mistake-free legal system is not possible. It is critically important to recognise that two types of errors can be made: a wrongful verdict for a plaintiff (or in a criminal case a conviction of an innocent person), which we call a Type I or false-positive error, and a wrongful verdict for an accused (or the acquittal of a guilty person), which we call a Type II or false-negative error. Resource allocation and other decisions will affect the relationship between these two types of errors. Reasonable people can disagree as to the significance of these two types of errors, but both must be taken into account in the construction of the legal system. Normally, civil litigation is structured to attempt both to reduce the total number of errors and to equalise the numbers of errors made on behalf of plaintiffs and defendants. In civil cases, an error either way results in identical misallocation of resources. For example, if the plaintiff wrongly wins a 5,000,000 TSH verdict, a citizen (the defendant) wrongly must part with 5,000,000 TSH. If the defendant wrongly wins a verdict that he or she does not owe 5,000,000 TSH, a citizen (the plaintiff) unjustly will be deprived of 5,000,000 TSH that rightfully he or she should possess. These two cases are analytically identical. The criminal justice process, by contrast, is designed to reduce the possibility of wrongful conviction at the admitted expense of making more mistakes of wrongful acquittals. Although the matter is complicated, these perspectives explain in large measure the preponderance of evidence standard in civil cases and the standard of proof beyond a reasonable doubt in criminal cases.

⁵ See for example RONALD J. ALLEN, WILLIAM J. STUNTZ, JOSEPH L. HOFFMANN, DEBRA A. LIVINGSTON & ANDREW D. LEOPOLD, *COMPREHENSIVE CRIMINAL PROCEDURE* (3RD ED.) (2011).

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 for deduction to occur about the matter that the rule governs. However, important parts of the law of evidence simply allocate responsibility and discretion precisely because the particular 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 materialised. 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, 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. In addition, the law of evidence structures in part the relationship between trial judges and appellate judges. Should there be trial *de novo* in the appellate court, or is appellate review limited to the resolution 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 judges, lawyers, parties, witnesses, and Parliament. In sum, the drafters must decide whether it is better to have a highly complicated set of rules to restrict the power of trial judges or instead a series of guidelines with the expectation that trial judges are largely competent to administer them fairly. The TEA is in the former category; the modern trend with regard to law of evidence is more consistent with the latter.

To elaborate, a highly discretionary set of rules has benefits and drawbacks in terms of the allocation of power. Discretion allows judges to make judgements that reflect individualised considerations of certain pieces of evidence in any given case. However, the higher the discretion threshold gets, the more power is passed down the chain of command to trial level judges. Discretionary rules insulate trial judges from control by appellate judges, and the Judiciary from control of Parliament. In contrast to discretionary rules, highly complicated evidence rules maintain control over the evidentiary process in the governmental organ that issues the rules—Parliament in the case of the United Republic. It removes discretion from individual judges, and thus has the theoretical potential of reducing disparate and inconsistent treatment of similar cases. It also facilitates appellate review, and thus facilitates appellate court control over trial courts. In an ideal world, everyone would know all the rules applicable to their behaviour, and they would be enforced in an evenhanded and reliable fashion.

However, in the real world this idealised 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, neither the TEA nor 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 U.S. Federal Rules of Evidence (“FRE”) was the unwieldy complexity of the common law of evidence. One way to handle this complexity is to provide for complex rules and insist on their application, but this may lead to static laws that are unresponsive to the needs of society. How one resolves this problem depends primarily on one’s assessment of trial judges. If one has faith in the skill, diligence, and impartiality of trial judges, then plainly 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 concerns 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 the United Republic today is able to defend his or her rights in disputes with institutions or corporations. 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. Independent scholarly research identified at least one example of a woman who appealed an unfavourable decision in the Primary Court, noting that the court did not give her any guidance as to how she was supposed to present her witnesses.⁶ 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. 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 she lost the case. These types of technicalities may prevent meritorious claims from being heard, and they have the potential to even further marginalise social groups that have historically had difficulty accessing the judicial system. The many technicalities and obscurities in the TEA most likely exacerbate social distinctions in the United Republic.

Rules vs. Discretion and the Instability of Decision. Complex codes of evidence law also contribute to the instability of decision making by encouraging appeals. This proposition is supported by our research, which suggests that approximately 50% of appealed criminal cases are reversed in the United Republic.⁷ 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 will often be followed by appeals, which increase the transaction costs of litigation. Increasing the transaction costs of protecting a right decreases its value, which 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 rather the opposite: a sign of substantial wasted resources.

The most difficult problem involved in the reform of evidence law is how to balance all of 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. Codes that generally adopt a

⁶ 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, 266–67 (1990–1991) (citing *Mwanza*, H.C. 7/85).

⁷ See 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).

guideline approach often have complicated hearsay and character evidence rules, for example, an approach that this Proposed Code tends to take as well.

Influence of Comparative International and Other Tanzanian Laws. The Proposed Act is informed by a comprehensive survey of what other nations that adopted the Indian Evidence Act of 1872 have done to modernise their evidence laws and an equally comprehensive survey of worldwide trends in evidence law. The Indian Evidence Act of 1872, or some close derivative of that Act, remains in force in India, Pakistan, Bangladesh, Sri Lanka, Malaysia, Singapore, Kenya, Uganda, and Nigeria. None of these nations has yet embraced the sort of wholesale reform that we suggest here, although some scholars have advocated for it,⁸ and some of the nations with an Evidence Act similar to that of the United Republic report difficulties with it mirroring those of the United Republic.⁹ Some countries have implemented piecemeal reforms; typically, the reforms have responded to: (1) the increased use of electronic evidence, (2) pressure from international organizations to limit the use of confessions obtained by torture, and (3) a desire to distance evidence law from British colonial roots and embrace the current culture of the country.¹⁰ Outside of the countries that had versions of the Indian Evidence Act as a colonial legacy, literally no country has modelled its law of evidence on the Indian Evidence Act.¹¹ The modern trend in evidence law is unequivocally a shift away from narrow, restrictive codes toward codes that allow for judicial discretion.

Our work is also couched against the backdrop of increasing regional integration and legal pluralism in the newly-revived East African Community and the Southern African Development Community. The East African Community has already instituted a common market and customs union between its members. To fulfil its ambitious goals, the Community will need further synchronization and harmonization of the domestic laws of each partner-state. Furthermore, given greater regionalization, the United Republic's courts will face a growing number of foreign judicial participants in both civil and criminal matters. These participants will come from diverse lingual and legal traditions, introducing certain complexities into the process of law reform. For example, there is potential tension between the handling of evidence in the United Republic's common law tradition compared with that of neighbouring civil law countries. Such complexities also generate opportunities. The United Republic can serve as an example for the whole Community in advancing justice for all East Africans through a revised and more modern evidence law.

⁸ See RAFIQUK RAHMAN, LAW OF EVIDENCE 189 (1993).

⁹ 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).

¹⁰ Reforms of Nigerian rules on the admissibility of evidence intimate a shift away from deference to UK common law rules and an effort to limit legal authority to domestic laws. Previously, § 5(a) of the Nigerian Evidence Act (2004) provided for the “admissibility of evidence which would apart from the provisions of this Act be admissible.” The language of §5(a) was interpreted by Nigerian courts as permitting deference to English common law rules in circumstances where the Nigerian Evidence Act was silent. See, *R. v. Itule* (1961) ALL NLR 462 (where the Supreme Court of Nigeria in considering the admissibility of a confession statement in support of the accused and finding no instruction under Nigerian evidence laws, relied upon English common law) and *Onyeawusi v. Okpupara* (1953) 14 WACA 21 at 311. In 2011, Nigeria adopted a revised evidence code that restricts authority on evidence to domestic legislation. (“Nothing in this Act shall prejudice the admissibility of any evidence that is made admissible by any other legislation validly in force in Nigeria.” Nigerian Evidence Act (2011), § 3. See, Isaiah Oreweme, What’s New About the 2011 Evidence Act? (<http://ssm.com/abstract=2111157>).

¹¹ The DC conducted a survey of the following countries: Australia, the Bahamas, Bangladesh, Botswana, Canada, China, England, France, Germany, Ghana, India, Ireland, Italy, Jamaica, Kenya, New Zealand, Nigeria, Scotland, Singapore, South Africa, Trinidad and Tobago, Uganda, United States of America, and Zimbabwe.

Finally, we considered the interaction of the TEA with the United Republic's procedure codes. As we previously discussed, the law of evidence and procedure structure a citizen's interaction with the justice system. Both the Civil Procedure Code, 1966, and the Criminal Procedure Act, 1985, affect this system and, of importance to this project, effectively reduce the ability of a litigant to introduce evidence that a court will admit. For example, the Civil Procedure Code requires the disclosure of documentary evidence early in the litigation process. 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, in interviews with members of the Bar we were informed that these provisions often lead to objections against production of documents at the time of trial. Such adherence to technical codes does not further justice nor does it follow the declaration of the Tanzanian Constitution Section 107A(2)(e) "to dispense justice without being tied up with technicalities . . . which may obstruct dispensation of justice." The procedural codes are beyond our mandate, but they are as integral to the delivery of justice as an evidence code. Revising the law of evidence is an important and prudent first step toward law reform in the United Republic, but it is the DC's emphatically held belief that law reform must also extend to the procedural context.

CRITIQUE OF THE TANZANIA EVIDENCE ACT

We provide here an analysis of the TEA. Judged by the principles and concepts discussed above, the TEA is inadequate for modern-day United Republic. While some sections are worth preserving, many are not. In general, the TEA's primary virtues are that it provides a complex set of rules for judges to follow and that some judges and lawyers may know it well enough to feel comfortable with it. The value of inertia should not be understated, but as we illustrate below, there are too many deficiencies in the TEA to justify revision over replacement. Moreover, a new evidence act would allow Tanzania to begin the process of revising its legal system in line with its aspirations for greater modernization.

To summarise, the TEA is a long, prolix, and at times internally inconsistent document. From its adaptation, the TEA has never been reflective of Tanzanian needs; it was written by a British colonizer for use in India, and then transplanted to the United Republic without contemplating the unique characteristics of Tanzanian society. Its length and complexity act as barriers to efficient adjudication, as it requires intense study to master. This gives tactical advantages, which are independent of the underlying merits of disputes, to those who have mastered the code over those who have not. The predictable result of this excessive complexity is to increase the probability that decisions are reached on unnecessary technical legal grounds—rather than the underlying merits of litigation. A legal system that resolves disputes on meaningless technicalities, rather than substantive merits, generates both disrespect for the law and costly avoidance mechanisms on the part of the affected population (citizens, businesses, and institutions). Additionally, the TEA does not reflect the advances in legal knowledge that have occurred in the more than 140 years since it was written. These include advances in our understanding of the most effective uses of evidence, the purposes of regulation, and the underlying epistemological concerns that should inform the law of evidence.

The basic structure of the TEA is even more curious because there are no juries in Tanzania. A code of evidence mediates between many different actors in the social drama of litigation, but in the Anglo-American world that generated the 1872 Indian Evidence Act, the most important of those relationships was that of judge and jury. Technical codes or the complex common law of evidence have some justification in shielding jurors from evidence

that is difficult or impossible to appraise, prejudicial influences, and meaningless cumulative presentations that merely waste the jurors’ time and the parties’ resources. Most of these considerations simply do not exist without juries. The same judges who will decide a case are the judges who will decide the admissibility of evidence; thus the purpose of exclusion—keeping inappropriate evidence from the fact-finder—is not achieved. This consideration weighs in favour of reducing the scope of technical or complex rules of exclusion.

Most profoundly, the theoretical foundation of the TEA, what its author referred to as the “[f]undamental rules of English law of evidence,”¹² ranges from one true proposition that is undeveloped to one false proposition to one impossible to implement proposition. These “rules” are:

- (1) Evidence must be confined to the matters in issue.
- (2) Hearsay evidence is not to be admitted.
- (3) In all cases the best evidence must be given.

The first is true, for of course evidence that does not pertain to the matters in issue is a pointless waste of time, but the relationship between this true proposition—what modern evidence law refers to as “materiality”—and the rest of the law of evidence is left obscure in the IEA. As we discuss below, the relationship between materiality and relevance is the mainspring of modern evidence law. The second is false because litigation could literally not occur without hearsay evidence. The world is filled with hearsay evidence that is relied upon routinely and indeed scarcely without notice. A street sign is a hearsay statement concerning the official name of the street. Very few people have first-hand knowledge of their birthdates, place of birth, parents, and so on. A modern legal system must decide how much hearsay and under what circumstances is to be admitted, and even the IEA (and the TEA in its wake), in a remarkable feat of obfuscation, proceeds to create a number of hearsay exceptions without ever using the word.¹³ The decision about hearsay in modern evidence law, however, is simply part of the central aspiration to facilitate the admission of reliable evidence, whatever its form. It is reliability, not the form, of evidence which should dominate a modern evidence code.

The third principle is impossible to operationalize because it is blind to the modern realization that complex rules governing the inferential process are impossible to structure *a priori*. What will be the best evidence in some particular factual circumstances will not be in some other case. These are not matters for a code of evidence to be adjudicating but rather matters that govern the activities of parties and advocates. The parties have every incentive to present “the best evidence” because it will invariably be the most persuasive evidence. A modern law of evidence should exploit the natural incentives of the participants in the legal system rather than try to govern their behaviour by detailed rules. To be sure, in order for the natural incentives to operate, the parties must have access to most if not all the relevant evidence, and thus there is a critical interaction between the law of evidence and procedure. If the law of procedure does not provide efficient access to evidence, however, it is a misguided and futile effort to try to rectify that failure through evidence rules informed by a hundred and fifty year old concept of “best evidence.”

¹² JAMES FITZJAMES STEPHEN, THE PRINCIPLES OF JUDICIAL EVIDENCE: BEING AN INTRODUCTION TO THE INDIAN EVIDENCE ACT 3 (1872).

¹³ See for example IEA §§ 18–32. The counterpart provision in the TEA are §§ 19–31.

Only after firmly situating the law of evidence on the sound foundation of the pursuit of fair, efficient, and accurate fact-finding can the remaining questions concerning the structure of evidence law be pursued effectively. These range over all the traditional categories of the law of evidence from the form of questioning to the process of admitting evidence to policies that justify deviation from the central aspiration of fair, efficient, and accurate fact-finding. The critical point, though, is that these are derivative of, or deliberate deviations for reasons of important social policy from, the central aspiration of litigation. One must build upon secure foundations.

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

A. RELEVANCY AND MATERIALITY.

Reflecting the overriding goals of fair, efficient, and accurate fact-finding, the most fundamental principles of the law of evidence are contained in the concepts of relevance and materiality rather than the organizing principles of James Fitzjames Stephens. Relevance is the relationship between a proffer of evidence and the proposition that it is offered to prove (“prove” means increase or decrease the probability of some proposition). Materiality is the relationship between that proposition and the case being tried. The United States’ FRE Rule 401 exemplifies how the concepts of relevancy and materiality can be simply and elegantly presented in a general provision. Rule 401 states, “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.” The TEA, by contrast, lacks a general definition of either relevancy or materiality. Instead, it contains unnecessarily confusing language and addresses specific issues involving relevance in various ostensibly unrelated provisions. Consider:

1. The only definition of “relevancy” is in § 3 and is essentially meaningless. Section 3 states, “‘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.” However, the TEA then proceeds to confuse conclusions about relevancy with the reasons why those conclusions might be reached. In a series of sections, §§ 7–18, the TEA provides certain formal rules for “relevancy” as though attempting to regulate the inferential process through a complete set of rules. Rather than formalizing relevancy, these provisions range from the banal to the curious to the nonsensical. Consider, for example, § 8: “Facts 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.” 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 even though necessary to establish a cause of action. As for banality, consider the unremarkable pronouncement in § 14 that reads “[i]n suits in which damages are claimed, any fact which will enable the court to determine the amount of damages which ought to be awarded is relevant.” Of course damages are relevant in an action for damages. Other provisions are circular, such as § 11: facts “which establish the identity of any thing or person whose identity is relevant” are relevant. The logic of this is roughly: “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. Whether to admit statements of state of mind or a prior conviction as proof of some proposition it encompasses has only trivial relevance issues but significant hearsay issues.

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—and 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.” 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, and only if, the evidence makes the proposition “highly probable or improbable.” Evidence is relevant if it affects the probability of some other proposition, however slightly. Whether or not a proposition is proven at the end of the trial is a question of sufficiency of the evidence, not of relevancy.

2. “Materiality” is not defined. Section 3 refers to “facts in issue,” but the definition makes a fundamental error if its purpose is to capture the meaning of “materiality.” It cannot be true that something is material if, and only if, “the existence . . . of any right . . . necessarily follows.” Evidence of some proposition can be sufficient to prove the proposition, or contribute to its proof, even if not necessary. Similarly, 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, many cases can be proved either directly through testimony from a person with first-hand knowledge or indirectly through circumstantial proof. Eyewitness identification evidence and DNA testing in rape cases are an example. If there is more than one way to establish an element or a defence, neither is “necessary.”
3. Collectively, §§ 3 and 13 confuse the admissibility of evidence (which is determined as of the time the evidence is offered at trial) with its sufficiency to support a verdict (which is determined after all the evidence has been heard). These sections also are an example of the inconsistencies in the TEA. Section 13(b) says facts not otherwise relevant are relevant if “in connection with other facts they make . . . any fact in issue . . . highly probable” This is inconsistent with the § 3 requirement of necessity.
4. Much of what is referred to as “relevancy” through the first 18 sections is not relevancy at all, but materiality. See, e.g., §§ 8, 9 12, 16, and so on. 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 with conditional evidence, not with examination of witnesses, and should be treated within a general section on relevancy. Moreover, the problem of conditional relevance that these sections implicitly refer to is a problem for all forms of evidence, not just oral examinations of witnesses. This is another reason why the central conceptual content of relevancy should be handled through a general rule located 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 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, 53, etc.
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. See, e.g., §§ 35, 54, 56. The TEA thus makes the purpose of entire subsections unclear, such as Chapter II, Part VIII: Relevancy of Opinions of Third Persons. It is unclear whether these are policy prescriptions of some sort, or reflect the fear that, without these rules, a rational judge would make egregious mistakes.
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. See §§ 23, 34B, 36.
9. The TEA fails to distinguish the best evidence rule and its implications from relevance. See § 24. 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.
10. Last, note § 122: “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 business, in their relation to the facts of the particular case.” It is completely unclear what the point might be of authorizing the drawing of inferences from evidence, as the court has no other choice.

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. Witnesses must be shown to have first-hand 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 must 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 the paper in question contains the agreement that the parties signed. One authenticates a photograph by showing that the photograph captures a fair and accurate representation of the scene in question. 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, which the TEA does not do.

At the time the Indian Evidence Act was written, the Anglo-American world operated under the constraint that, with rare exceptions, evidence at trial was to be oral testimony from persons with first-hand (or “personal”) knowledge.¹⁴ A few specialised rules such as the

¹⁴ Discussing the admission of evidence under the Indian Evidence Act, Stephen declared that all evidence other than the contents of documents was to be made through direct oral testimony. The exception for documentary evidence extended the underlying principle that required primary evidence (original documents). JAMES FITZJAMES STEPHEN, *INDIAN EVIDENCE ACT WITH AN INTRODUCTION ON THE PRINCIPLES OF JUDICIAL EVIDENCE* 129–30 (1872).

shopkeeper's books rule, the best evidence rule, and the parol evidence rule had arisen to handle, and implicitly permit admission of, certain 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. See § 3(1). 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." These definitions may encompass corporeal matters such as contracts, documents, guns, etc., but it is odd to talk of a contract as a "fact." It is a "fact" that a contract exists, but the contract itself is a thing, not a fact.

The TEA does not handle non-testimonial evidence well. Modern codes of evidence tend to address the authentication of evidence through a unified set of general and specific rules. First, authentication is addressed with an overarching general rule, such as FRE 901, that establishes a requirement for proponents to "produce evidence sufficient to support a finding that the [proffered] item [of evidence] is what the proponent claims it is." Next, these codes elaborate upon how different types of evidence can be authenticated through specific rules, in accordance with the general rule.

In contrast, the TEA handles authentication through a disjunctive and inconsistent series of sections and methods. In fact, the TEA never refers to "authentication" by name. Rather, the TEA first addresses some general and substantive authentication issues through rules referred to as "presumptions." See, e.g., Chapter III, Part VI. It then changes course and addresses authentication in a direct manner, through rules that require proffered documentary evidence to contain specific qualifying factors of proof. See, e.g., Chapter III, Part V: Public Documents, which lists the ways in which public documents can be proved, and thus authenticated, without referring to presumptions. The problem with the TEA's method for addressing authentication is two-fold.

First, addressing authentication through presumptions is unnecessary, potentially confusing, and lacking in generality. Indeed, the TEA does not even define "presumption"—a point that we discuss below. The TEA's shortcoming on authentication is the predictable result of a complex regulatory measure that was written for a society that no longer exists. As society changes, so does the nature of disputes and the way in which they should be resolved. The concept of authentication should be generalised to a requirement that the party presenting evidence must show the evidence to be what it purports to be.

Second, the inconsistent treatment of authentication through both presumptions and direct rules jeopardises the integrity of the TEA. For example, TEA Chapter III, Parts V and VI—two major, simultaneous subsections—handle highly analogous authentication problems in highly disparate ways, thus raising the logical question: Is there some reason for this disparity or is it truly just an inconsistency? The TEA also provides different treatment for analogous issues concerning business records. On the one hand, the TEA provides for complex regulation of bankers' books, but on the other hand, provides only the most cursory regulation of general business records. There are other anomalies as well. See, e.g., §§ 34(b) (business records for unavailable witness), 34(A)(1) (statements in books in criminal proceedings), 36 (statements in books of account—unavailability not required), 78 (bankers' books), 78A (electronic bank records). See also §79 (special proof rules for bankers books). Bankers' books and shopkeepers' books posed a particular problem for the common law two centuries ago, but that particular problem was resolved through the elimination of the incompetency of interested parties. Today, there is no reason for a separate "authentication-like" rule for bankers' books. Moreover, the curious treatment of bankers' books obscures

that the particular problem bankers' books pose (in addition to general authentication) is the same problem posed by any other business record, which is hearsay, as we discuss further below.

In line with the TEA's failure to create a unified method of authentication, the TEA misidentifies straightforward authentication problems. For example, § 49 deals with a recurring authentication problem—knowledge of handwriting—but does so under the subsection heading of Relevancy of Opinions of Third Persons. The problem of identifying handwriting in part involves opinion testimony, but the more important part is first-hand knowledge, which goes to authentication. Section 52 similarly and unhelpfully confuses first-hand knowledge and hearsay problems with the opinion issue.

C. HEARSAY.

Hearsay is a problem for all modern codes of evidence. Although there is considerable disagreement as to what the scope of the hearsay rule should be, the topic of hearsay calls for at least a general treatment in evidence law, but there is none in the TEA. 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. The specific provisions that do exist make inexplicable distinctions. For example, the TEA contains a relatively modern business records exception to the hearsay rule (as it is normally thought of), but it is limited to criminal cases. See § 34A. More curiously, § 78 has a quite modern version of the business records exception, yet it is limited to bankers' books rather than being generally applicable.

D. BURDENS OF PROOF AND PRESUMPTIONS.

Burdens of proof and presumptions form a tightly-knit analytical structure. The TEA deals with burdens of proof, but employs "presumptions" without a definition. See Chapter IV: Production and Effect of Evidence. Chapter III, Part VI: Presumptions as to Documents has a lengthy series of "presumptions" but never defines the term. Also note that burdens of persuasion are defined in § 3, even though Chapter IV is a complex set of rules governing just such 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.

Also consider the following:

1. Although there is no definition of a "presumption," the term "rebuttable presumption" is employed, which compounds the ambiguity. See, § 121.
2. Section 3 defines burdens of persuasion, yet several of these provisions seem inconsistent with the general treatment. See, e.g., § 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?
3. Section 112: "The 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." Again, in a contract suit, one side wishes the court to believe that there was a contract, and the other side wishes the court to believe in the opposite—so who has what burden?

4. Section 113: “The burden of proving any fact necessary to be proved in order to enable a person to give evidence of any other fact is on the person who wishes to give such evidence.” 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.” It also is important to note that this statement is logically empty. Who would “fail” depends on who has the burden of proof. Elements and affirmative defences are logical transpositions—putting a negative sign on an element transforms it into an affirmative defence and vice versa. One can say that the plaintiff in a tort case has to show lack of contributory negligence or one can “add a negative sign” and say a defendant has to show contributory negligence. A prior decision as to the allocation of burdens needs to be made in order to determine “who would fail if no evidence at all were given on either side.” This provision is a perfect example of the TEA not accommodating the vast growth of knowledge about the field of evidence over the last century-and-a-half.

In sum, these provisions do not adequately sort out the general structure and goals of trials from the discrete assignment of burdens of production or persuasion for tactical reasons.

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. Modern litigation presents a host of different scenarios, however, ranging from the admissibility of photographs to the meaning of an “original,” given photocopies, computer printouts, and digital page images. There has 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, formal barriers have been reduced to admitting copies of documents, and the status of computer printouts or electronic messages has been clarified. This is normally done through broad and general best evidence rules that define “original” broadly, deem printouts from modern means of storage such as computers admissible as originals, and permit the liberal admission of copies of documents.

The TEA has at best an archaic and limited best evidence rule. See, Chapter III, Part III. Chapter III, Part VII treats contracts in a fashion that would have been recognised in the 1870s, but nowhere does the TEA treat in a general fashion modern forms of evidence such as computer storage and the like, which are not within the definition of “document” in § 3 (a computer file is only metaphorically “readable by sight”) nor referred to in § 64. 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. These provisions should be generalised.

F. MISCELLANEOUS.

We note here a number of miscellaneous issues for consideration:

1. Further potentially inconsistent provisions:
 - a. Section 62 requires “direct” oral evidence, but that is not how experts testify. They express opinions based on study that largely involves hearsay from the books in their fields.
 - b. Compare §§ 27 and 29. One forbids inducement entirely but the other only forbids inducements that would cause an innocent person to confess.
 - 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.” How can what is irrelevant be made relevant by some other evidence in this fashion?
2. Section 20 has the internally inconsistent phrase “expressly impliedly authorised by him to make them, are admissions.” Something can be express or implied, but not both.
3. Section 23 confuses admissions and hearsay.
4. Section 58 fails to treat judicial notice generally. There is no provision for the taking of judicial notice of obviously true matters.
5. Compare §§ 63 and 66. One says either primary or secondary evidence may be used, and the other says something quite different.
6. Compare §§ 69, 71, 99. The first two require proof of handwriting, and the other forgoes proof through a presumption.
7. Section 141A: In the competency, compellability, and privileges section, there is a relevancy rule about possession of recently stolen goods. The section does contain a further rule about requiring notice of using a person’s prior record, but it is unclear why that is not subsumed within a general prior records rule. This is an example of unnecessary prolixity and convoluted organization.
8. Chapter V, Part III Questioning of Witnesses can be reduced to a few general rules.
9. There are no general provisions about harmless error, goals of trials, offers of proof. The only provision dealing with such matters is § 178.
10. Chapter II, Part VII: Relevancy of Judgements & Chapter IV, Part II: Estoppel treat estoppel in two different places. In addition, the TEA conflates estoppel with exceptions to the hearsay rule in § 44. The treatment of estoppel should be isolated and treated in one place and the hearsay exception should be treated in the section on hearsay.
11. Chapter III, Part VII: Exclusion of Oral Evidence by Documentary Evidence deals with issues that are normally not treated in a law of evidence and intersects important issues in the law of contract. Consequently, the DC has refrained from

removing or amending this section to avoid substantive change to the law of contract.

A PROPOSED EVIDENCE LAW

In the opinion of the Chief Consultant and the DC, a modernised and simplified law of evidence should replace the TEA. We are firmly convinced that the TEA, a relic of colonialism, obstructs rather than facilitates the achievement of justice, and we recommend the following code to replace it. This Proposed Act is inspired by the worldwide reformulation of the law of evidence that has occurred over the last thirty years generally. The Proposed Act has influences from the TEA, the FRE, and numerous other codes from around the world, but the Proposed Act is quite different from these codes and is an improvement on all of them. Nonetheless, the individual context of every specific section must be intensely scrutinised from the Tanzanian perspective. One other caution: reforming the law of evidence is a critical first step in reforming the Tanzanian legal system, but it is not a panacea in and of itself that will bring about substantially improved access to justice. The law of procedure, both civil and criminal, exerts a powerful influence on the litigation process, and these areas are also in need of substantial reformulation. Like the TEA, the Tanzanian procedural contexts are bewilderingly complex and similarly obstruct rather than facilitate justice. With these cautions in mind, we proceed to our proposed substitute to the TEA. Along with our Proposed Act, we provide commentary to explain each Subsection and its relation to the TEA. We also note where various provisions of the TEA have been incorporated verbatim into the Proposed Act and where certain provisions of the TEA have been deleted in their entirety.

In quite general terms, the Proposed Act has three types of changes that are typically clear on the face of what is being proposed and to which the Comments occasionally refer for clarity sake. The first type of change is a ‘consolidation’ change. ‘Consolidation’ changes indicate a rule where the DC has collapsed multiple provisions of the TEA into a single simplified provision for ease and efficiency. This is the most common type of change seen throughout the document. The second type of change is a ‘clarification’ change. ‘Clarification’ changes are attempts by the DC to make existing TEA sections, or norms extracted from case law, more concrete and understandable. Finally, the third type of change is a ‘modernisation’ change. ‘Modernisation’ changes are suggestions for additions to the TEA in order to comprehensively address evidence issues of the modern world. The ‘consolidation’, ‘clarification’, and ‘modernisation’ tags are spread throughout the DC commentary. The parties examining this Proposed Act for potential adoption should pay particular attention to ‘modernisation’ changes. These are changes that the DC was least able to examine in the Tanzanian context because their substance does not currently exist in Tanzanian law. Thus ‘modernisation’ changes need the most scrutiny of all proposals in order to determine their pertinence to the Tanzanian legal, social, and cultural particularities.

SECTION I: GENERAL PROVISIONS

Much of TEA § 3 has been deleted because the various definitions have been moved to other Subsections, or were superfluous or erroneous. For example, presumptions and burdens of proof have been treated in Section V. Definitions of “fact” and “evidence” are unnecessary. Relevancy and materiality have been given modernised definitions.

Subsection 1.1 Definitions. The following definitions apply throughout the Act.

“attorney” means a person authorised by Law or reasonably believed by the client to be authorised by Law to practise law in any country;

“attorney’s representative” means a person employed to assist the attorney in the rendition of professional legal services;

“balance of probabilities” has the meaning given in Section V;

“business” has the meaning given in Section IV

“burden of persuasion” has the meaning given in Section V;

“burden of production” has the meaning given in Section V;

“by Law” refers to any binding and applicable judicial precedent, statutory provision, administrative regulation, customary or Islamic law, or applicable clause of the Constitution of the United Republic of Tanzania.

“character” has the meaning given in Section III;

“client” means a person, public officer, or corporation, association, or other organisation or entity, either public or private, who receives professional legal services from an attorney, or who consults an attorney in order to obtain professional legal services from the attorney;

“client’s representative” means a person employed to assist the client or reasonably believed by the client to be employed to assist him;

“confession” means words or conduct that admit an element of an offence;

Drafting Committee Note: This definition simplifies and clarifies the definition of “confession” in the TEA § 3(1), which provided four redundant ways of saying the same thing. The DC does not intend here or anywhere in this Proposed Act to provide instructions on how inferences should be drawn by a fact-finder; however, this definition can be amended to include subjective or objective elements that would influence how inferences are drawn. It should be noted that confessions are considered admissions by opposing parties under Subsection 4.3.

“copy of a document” has the meaning given in Section VIII;

“confidential communications” means any communications, including those that are verbal, written, or digitally transmitted, not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication. Clients must take reasonable precautions in order to ensure confidentiality;

“court” includes all judges, magistrates and assessors and all persons, except arbitrators, legally authorised to take evidence;

“credibility” has the meaning given in Section III;

“declarant” means the person who made a specific statement;

“document” means objects in which a work is fixed by any method now known or later developed, and from which the work can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device, such as: writing, handwriting, typewriting, printing, photocopy, photograph, photographic negative, electronic database and computer readout or printout, and every recording upon any tangible or digital medium now in existence or hereafter developed, any form of communication or representation by letters, figures, marks or symbols or by more than one of these means, which may be used for the purpose of recording any matter;

Drafting Committee Note: Under the TEA, the treatment of documentary evidence required the “existence of elements of physicality, visibility by sight and permanence of the record.” ANDREW MOLLEL & ZAKAYO LUKUMAY, ELECTRONIC TRANSACTIONS AND LAW OF EVIDENCE IN TANZANIA 79 (2007). This narrow concept of the term document excluded any form of electronic data or digital media. Id. Under the revised and modernised definition presented in this Section, photographic negatives, electronic forms of data and digital media all fall under the broad ambit of the term “document.” The former law also contained the following definition: “‘documentary evidence’ means all documents produced as evidence before the court.” TEA § 3. The definition is superfluous.

“expectation of confidentiality” has the meaning given in Section XI;

“hearsay” has the meaning given in Section IV;

“legal custodian” means any public official who is authorised to deliver copies of public documents in the ordinary course of their official duties;

“material proposition” means any proposition of fact sought to be established by evidence at trial that is in a reasonable inferential chain leading to the conclusion that an element of or a defence to any legal claim has or has not been established by the pertinent burden of persuasion;

Drafting Committee Note: TEA § 3 contains the following definition: “‘fact in issue’ means 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.” This is inadequate because there are often multiple ways to prove elements and defences. Thus, rarely if ever is any fact such that liability or a defence “necessarily follows.” TEA § 3 is also in tension with § 13(b) that says facts not otherwise relevant are relevant if “in connection with other facts they make . . . any fact in issue . . . highly probable” These Subsections may be grappling with the distinction between elements of causes of action and defences on the one hand, and material propositions on the other. Whatever their provenance, they are confusing, archaic, and unnecessary. The proposed definition includes credibility issues. The term “material proposition” is used primarily in Section II, but the concept permeates trial. No definition of “fact” is provided because it is superfluous. A “fact” for juridical purposes is the referent of any proposition with truth value that is material to a case.

“member of the clergy” has the meaning given in Section XI;

“official information” means any unpublished official records or communications received by a public officer in the course of his duty, the production of which document has been called for in any proceedings;

“opinion” has the meaning given in Section III;

“original document” has the meaning given in Section VIII;

“oral evidence” is synonymous with “testimony” and means all statements which the court permits or requires to be made before it by witnesses, in relation to matters of fact under inquiry;

“police officer” means any member of the Police Force of or above the rank of constable;

“presumption” is not used within this code as the term simply refers to various evidentiary relationships or devices that go by other names, such as creating substantive rules or allocating burdens of production and persuasion. See Section V;

“private documents” means all other documents not included in the definition of public documents;

“public documents” means

- A. any documents or records of the acts of:
 - i. the President of the United Republic;
 - ii. official bodies and tribunals; and
 - iii. public officers, whether legislative, judicial, or executive.
- B. public records of private documents kept by the United Republic.

“reasonable doubt” has the meaning given in Section V;

“relevant” means that proffered evidence tends to increase or decrease the probability of a material proposition being true;

“reputation” has the meaning given in Section III;

“secret of state” means a governmental secret relating to the national defence or the international relations of the United Republic;

“spouse” means a person married to another person under the laws of the United Republic. This definition shall extend to Spouses in polygamous marriages;

“statement” means any oral or written assertion, or any action intending to communicate;

Drafting Committee Note: The complex definition of statement in the TEA has been simplified and clarified. The key is that statements can include actions intending to communicate information. For instance, someone may shake one’s head from side-

to-side to communicate “no.” To the extent that the United Republic’s culture has other gestures that communicate information, they would be non-verbal communications and thus statements within this definition.

Subsection 1.2 Scope. Except as otherwise provided by Law, this Act shall apply to proceedings in all Tanzanian courts, other than primary courts, in which evidence is or may be given but shall not apply to arbitration proceedings or affidavits presented to any court or officer.

Drafting Committee Note: This Subsection retains the thrust of § 2 of the TEA. The DC has proposed minor adjustments to the language not to change the scope of the Rules, but only to make the language clearer. This Subsection allows for the policy choices of Parliament to exempt certain types of proceedings from the Proposed Act, such as the juvenile courts. See The Law of the Child Act, 2009, § 97 et seq., Act No. 21 of 2009 (providing a more informal proceeding held in camera, rather than a typical court proceeding). Since these choices may have been made for other types of proceedings, we do not propose listing all such exceptions here; instead we provide a general exemption for other laws.

Subsection 1.3 Purposes. This Act shall be interpreted and applied to facilitate achieving accurate and just outcomes at trials. The court shall apply these rules and the rules of civil and criminal procedure in order to avoid factually unjustified outcomes based on technicalities rather than justice, so long as the court may do so without compromising its neutrality in the case. As examples, without limiting the scope of the rule, the court may forgive the failure to sponsor witnesses at the appropriate time or to proffer documents consistent with the procedural rules. In doing so, the court shall take care not to prejudice either party but in its discretion shall take such action as justice requires, including permitting adjournments if necessary to facilitate just and accurate outcomes.

*Drafting Committee Note: This Subsection makes clear that the Proposed Act adheres to the Tanzanian Constitution’s declaration that courts shall “dispense justice without being tied up with technicalities [and] provisions which may obstruct dispensation of justice.” CONSTITUTION OF THE UNITED REPUBLIC OF TANZANIA § 107A(2)(e). Despite the constitutional declaration, it appears that in some cases courts decide based on mere technicalities. For example, the Arusha High Court dismissed an appeal for using a memorandum of appeal instead of the petition called for by the Civil Procedure Code. *Timoheo Ona v. David Ona*, Civil No. 18, [1993] Tanz. High Ct., in BEN LOBULU, PITFALLS IN LITIGATION 236, 237 (2004). See also *Ghati Methusela v. Matiko W/O Marwa Mariba*, [2007] Tanz. C.A. (striking an application because an affidavit in support of the notice of motion was incurably defective because it did not show where the affidavit was sworn). The judiciary has suggested the reason for following technical rules is that it is not for courts to decide which of Parliament’s decrees they are to follow. *Mark Msoke, Advocate Dismisses Petition as Incompetent*, CITIZEN (Dar es Salaam), Apr. 24, 2011 (reporting on a refusal to use such a provision to strike a technical challenge because the provision cannot “stand by itself without being supported by other provisions of the law”). However, the proposed rule is not completely new to the United Republic. Case law also supports the notion that litigants shall not be denied a fair chance in court via procedural technicalities. In *Nduruwe Hasani v. The Republic*, Crim. App. No. 70, [2004] Tanz. C.A., the court overturned the denial of a petitioner’s request for more time to file an appeal, due to prison typewriter*

malfunctions, on the grounds that procedural technicalities should not bar determinations on the merits, especially for a lay person. The court reasoned that such a denial runs a risk to “ignore substantive justice and to glorify technicalities.”

Subsection 1.4 Rulings on Evidence. The parties must clearly articulate the ground of objection or admission. Error on appeal may be claimed only if a substantial right of a party has been violated sufficient to cast serious doubt on the outcome of the trial and:

- A. if the party opposing the admission of evidence has objected and stated an adequate ground for exclusion of the evidence; or
- B. if the party proffering evidence has made clear the nature of the evidence and the basis of its admissibility; or
- C. if the proper ruling on the evidentiary question is so clear that the trial court’s decision amounts to clear error. A “clear error” is an error that is sufficiently basic and obvious that it should be noticed by the court, regardless of the actions of the parties in objecting or otherwise bringing the matter to the court’s attention.

If requested by a party, the trial court shall include within its notes an adequate description of the objected-to or admitted evidence and the basis of the objection.

Drafting Committee Note: See also Subsection 1.5. The parties have the obligation to facilitate the judge’s rulings on evidentiary questions by making clear the grounds for the admission or exclusion of evidence. The only exception to such party responsibility should be clear error. The clear error standard provided for represents a more concise phrasing of the rule of an independent ground for a decision embodied in TEA § 178. The Court of Appeal of Tanzania has quashed convictions due to a trial court’s clear error in admitting prejudicial evidence. See, e.g., Gombela v. Republic, Crim. App. No. 44 of 2006, [2011] Tanz. C.A. (quashing convictions because sole valid evidence against the accused’s was a confession by a co-accused, which violated the TEA § 33(2)); Totoro @ Zungu v. Republic, Crim. App. No. 21 of 2003, [2009] Tanz. C.A. (quashing conviction when sole evidence of crime was confession was not given freely and thus obtained in violation of the TEA § 27)).

Subsection 1.5 Preliminary Questions of Fact. The party opposing admissibility of evidence need only articulate a plausible ground for exclusion of evidence. If that occurs, the evidence shall nonetheless be admitted if the proffering party shows that a reasonable person could find the preliminary facts favouring admissibility by a preponderance of the evidence. The rules on privileges apply to the determination of preliminary questions. Otherwise, these evidence rules do not apply to the determination of preliminary questions.

Drafting Committee Note: This Subsection addresses the distinction between facts that go to the application of the rules of evidence and evidence that is relevant to material propositions, which is treated in Section II. For example, a party may offer hearsay. If so, the opponent must object on the proper hearsay ground. The party offering the hearsay then bears the burden to establish that it is within an exception to the hearsay rule. The distinction between facts that go to the application of rules and evidence relevant to material propositions is significant because of the general policy to admit all relevant evidence. The standard for

admitting relevant evidence is more easily met than the standard for preliminary facts that go the application of the rules of evidence. See Subsection 1.1 (definition of “relevant”), and Subsection 2.3 that provides for admission of evidence over a relevancy objection if “evidence could rationally influence a reasonable person’s inferential process concerning any material proposition.”

Subsection 1.6 Limited Admissibility. Evidence that is admissible for one purpose but excludable for another purpose shall be admitted, and consideration of it by the fact-finder shall be limited to its permissible purpose.

Drafting Committee Note: Subsection 1.6 is closely linked with Subsection 2.2 that allows discretionary exclusion of evidence that has weak probative value and has a high risk of unnecessary inflammatory, confusion, or misleading impact on the court. This Subsection also relates to Section III (Specific Relevancy), where evidence is excluded not for its lack of logical relevance but for policy reasons to protect other substantive goals of the United Republic. Under both of these referenced exclusions, the evidence may still be admissible under these rules for a limited, non-excluded purpose. This means that the court should consider evidentiary exclusions in regard to each material proposition the party advocates.

Subsection 1.7 Order of Admissibility. The trial court may direct the parties to produce evidence in an order designed to advance the goals of these rules. For example, if part of a document is admitted by one party, the court may direct the remainder of the document, if otherwise admissible, to be admitted at the same time.

Drafting Committee Note: Subsection 1.7 modernises and rewrites TEA § 144. Clearly, as TEA § 144 provided, the presentation of evidence shall be consistent with the relevant rules of the civil and criminal procedure codes. These codes, however, provide wide scope for advocates to present evidence in a manner best suited to convince the fact-finder of any material proposition. This rule acknowledges this wide scope, providing discretion for the court to direct certain admission of evidence when it is necessary for a just outcome or due consideration at that time. Absent this discretionary direction, advocates retain the ability to organise their case as they see fit.

Subsection 1.8 Extent to Which Statement is to be Proved. When any statement of which evidence is given forms part of a longer statement, or of a conversation or part of an isolated document, or is contained in a document which forms part of a book, or of a connected series of letters or papers, evidence shall be given of so much and no more of the statement, conversation, document, book or series of letters or papers as the court considers necessary in that particular case to the full understanding of the nature and effect of the statement, and of the circumstances in which it was made.

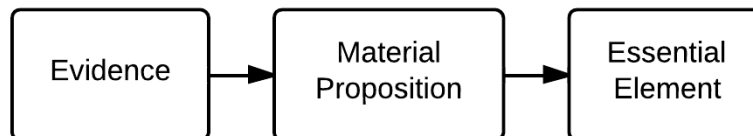
Drafting Committee Note: Subsection 1.8 adopts TEA § 41 in its entirety.

SECTION II: RELEVANCY AND MATERIALITY

Relevancy is the foundational principle for all modern systems of evidence law, as only relevant evidence facilitates a rational outcome through the application of the fact finder’s reasoning capacity to the evidence. If proffered evidence is irrelevant, it should not have an impact on a trial because it is not pertinent to rational deliberation on the evidence. Once the court finds that proffered evidence is relevant, as explained below, it shall admit the evidence subject to the other rules of evidence, which implement concerns other than logical relevancy. The threshold finding for proffered evidence is relevance.

Subsection 2.1 incorporates the common law concepts of both materiality and relevancy. Materiality requires that the evidence be linked with some proposition of consequence to the trial. The substantive law involved in the dispute at trial provides whether evidence is material through the identification of elements and defences. Facts in a logical chain leading to either an element or a defence are material and are referred to as “material propositions.” Relevancy, by contrast, is determined by natural reasoning processes. As James Bradley Thayer spelled out more than a century ago—“[this] principle . . . forbids receiving anything irrelevant, not logically probative. How are we to know what these forbidden things are? Not by any rule of law. The law furnishes no test of relevancy.” JAMES BRADLEY THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 264 (1898).

The common law concepts of relevancy and materiality are treated in this Section by a definition of relevancy and the recognition that material propositions are determined by the applicable substantive law, both contained in the definitions in Section I. Relevancy tests the relationship between the proffered evidence and the material proposition to see if the evidence increases or decreases the probability of that proposition being true, as judged by a reasonable fact-finder. As long as a reasonable person could have their assessment of a proposition’s probability changed by the evidence, however slightly, the evidence is relevant. One can show this relationship as follows:



Evidence is relevant only if the evidence affects the fact-finder’s assessment of a material proposition, which in turn is determined by the essential elements and defences of the cause of action. This relationship must be treated generally.

Consider the diagram above in regards to the following example about the relevance and materiality of a knife at trial. Imagine that counsel has a knife that they would like to enter into evidence at trial. In a trial involving a stabbing victim, the accused’s knife offered as evidence is likely relevant. The knife will make it more likely that the accused had a knife, and thus more likely that he had a knife at the time the crime was committed, which is necessary for him to have committed the stabbing. However, this same piece of evidence is not likely relevant in a contract dispute. But, if the testimony at trial is that the contract involves knife sales, the knife too may then be relevant because of its relationship to a trial proposition (“here is an example of the knives covered by the contract”). As this example illustrates, a priori, no set of evidence rules can define relevancy. The unique facts of each case will determine what is relevant to what, and what the material propositions are.

Rather than treat relevancy as a manifestation of rationality, the TEA attempts to define by rules what is and is not relevant. Its attempt to substitute rules for reasoning is a misguided and indeed futile effort. A priori, almost all evidence could be “relevant” to a material proposition in a case because relevance is contingent upon the unique facts and circumstances of each case. The key to relevance is whether a reasonable person could believe that there is a relationship between the evidence and a material proposition (sometimes referred to as “a fact of consequence”) as determined by the essential elements and defences of the substantive law. This depends most critically on the natural reasoning processes of reasonable people and cannot be reduced to rules. This is why Thayer says “The law furnishes no test of relevancy.” JAMES BRADLEY THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 264 (1898). Consequently, we propose replacing the TEA’s formal rules of “relevance” (§§ 7–18), its definition of admissibility (§ 19), and the numerous specific rules calling things relevant (§§ 23, 47, 49, 52–53, etc.) with a general rule.

Subsection 2.1 General Rule of Admission. All evidence relevant to a material proposition is admissible unless otherwise provided by this Act or by Law. Irrelevant evidence is not admissible.

Drafting Committee Note: This Subsection provides the general treatment of relevancy the DC articulated in this Section’s preamble. This Subsection will admit all relevant evidence, subject to other rules of evidence, or the Constitution or statutes of Tanzania, which may provide tests of admissibility other than logical relevancy (for example, common law courts have tended to exclude some hearsay for reliability concerns, even if this evidence is logically relevant). This Subsection incorporates the concept of materiality and the requirement of relevance (“increases or decreases the probability” of that proposition).

With the exception of § 12, which involves statements by co-conspirators and is treated in the context of Admissions by Party Opponents, see Subsection 4.3, this rule replaces the relevancy rules in TEA §§ 7–18 that do not treat the concept generally, and includes the relevancy rule imbedded in the definition of “admission,” as found in TEA § 19.

Subsection 2.2 Discretionary Exclusion. This Act is to be interpreted and applied to facilitate the admission of all relevant evidence not otherwise prohibited. Nonetheless, the trial court may exclude relevant evidence if its probative value is weak and the evidence is unnecessarily inflammatory, confusing or misleading, or would be a waste of time because of being cumulative.

Drafting Committee Note: The purpose of this Subsection is to allow the court to exclude relevant evidence that is unnecessary or harmful to the trial. If evidence is essential to a party’s case, the probative value will not be weak except in extraordinary circumstances. However, when evidence has weak probative value, it may be offered to harass the other party, confuse the court (especially if there are assessors assisting the judge), or increase the other party’s cost by wasting time. See, e.g. Magazi Kilunga v. Republic, Crim. Session 18 of 1980, [1980] Tanz. C.A. (failure of the judge to explain the duties of assessors before they hear the evidence is not fatal to the proceedings). In such a circumstance, justice is not served by allowing the additional evidence, and the court has the discretion to exclude the proffered evidence. It should be noted that this rule applies to the admission of all evidence. Thus, merely because some other Subsection permits the admission of

evidence does not preclude its discretionary exclusion. For example, evidence that is within a hearsay exception as defined in Section IV may still be excluded under this rule.

Subsection 2.3 Conditional Admissibility. The court may admit evidence over a relevancy objection upon, or subject to, a finding that the evidence could rationally influence a reasonable person’s inferential process concerning any material proposition.

Drafting Committee Note: The traditional understanding of conditional relevancy is that there will be a limited amount of evidence proffered at trial that will only be relevant if the existence of another fact is established. See e.g., FED. R. EVID. 104(b) adv. comm. note (“Thus, when a spoken statement is relied upon to prove notice to X, it is without probative value unless X heard it.”). The FRE adopts this understanding. Id. The traditional understanding is erroneous. All evidence, not a limited subset, relies on other evidence for its relevance at trial. Ronald J. Allen, The Myth of Conditional Relevancy, 25 LOY. L.A. L. REV. 871 (1992).

For instance, if a plaintiff in a contract dispute has the burden of persuasion to show authority to contract, if the court determines that no reasonable person could conclude there was authority, evidence of offer and acceptance is irrelevant to the case. But the court cannot make this conclusion until the trial ends with all evidence on authority admitted for consideration. The conventional concept of conditional relevancy is analytically identical to the concept of relevancy and persists in the Anglo-American world as an unnecessary and obscuring artefact of the common law. This Subsection, thus, provides the court the ability to admit evidence on offer and acceptance subject to further evidence on the authority issue at the root of the contract dispute, and applies that solution generally to include all evidentiary proffers.

This Section also replaces the concepts inherent in §§ 7 and 13(b) of the TEA. The first phrase of § 7 is superfluous, as the very point of trials is to be a vehicle for evidence of facts in issue. The second phrase implies that the TEA will determine the entire set of relevant evidence, but that is false. The parties determine what is relevant by their choices on how to prove material propositions. The last phrase limiting proof to “no other” facts is false for the same reason. Subsection 13(b) comes closer to a coherent view of relevance, but gets the rule wrong. The requirement of relevancy is not that it makes a fact or issue “highly probable or improbable,” which is an issue of sufficiency that comes at the end of trial to decide whether the parties met their burden of persuasion. Instead, as discussed, relevancy is the tendency of evidence to change a reasonable person’s view of any fact or issue however slight. Only at the end of trial can the evidence be weighed by considering the entire case.

SECTION III: SPECIFIC RELEVANCY

Specific relevancy Subsections are instrumental to the ability to control for proper outcomes at trial in circumstances where natural reasoning processes may produce erroneous outcomes or important social policies in tension with the pursuit of truth are at stake. These Subsections control the admissibility of proffered evidence on policy grounds, rather than logical relevancy grounds, as mentioned in the Drafting Committee Note to Subsection 2.1. The Drafting Committee Notes in this Section elaborate on the ways undesirable outcomes may arise and the ways specific relevancy Subsections can regulate and minimise these outcomes.

To frame later discussions, here are two brief examples to demonstrate the value of specific relevancy provisions. First, specific relevancy Subsections control the admissibility of character evidence at trial. The specific relevancy Subsections on character prevent undue reliance on specific past acts to avoid the assumption, "once a liar always a liar." This assumption, which to many people may appear reasonable, can create disincentives for a criminal to reform. Subsections 3.2–3.5 will address reputation and character evidence issues and will elaborate on the value of this evidentiary regulation.

Second, specific relevancy Subsections can create incentives through regulating the admission of evidence to promote public or individual safety. Public safety is promoted by excluding evidence that a property owner repaired a dangerous condition after an accident. Public or individual safety can also be promoted by restricting the use of evidence of medical assistance, negotiations, etc. Subsections 3.6–3.10 propose repair rules that are intended to minimise this sort of harm, and thus promote social welfare.

The specific relevancy Subsections can also promote efficiency and protect vulnerable participants at trial. For example, character Subsections minimise wasted time at trial by limiting the scope of information that can be introduced regarding witnesses that, while perhaps relevant, is only marginally so. Moreover, specific relevancy Subsections that limit the scope of inquiry into the witness's past have serious implications for the willingness of victims to participate in sex offence trials and to report sex offence crimes. The DC has thus proposed amendment to the Sex Offence Subsection, formerly § 161(4)(d) and currently Subsection 3.11.

In addition to substantive changes, this Subsection also proposes one significant terminology change from the TEA. The character evidence Subsections of the TEA are replete with misuses of the word "relevance" where the TEA is actually referring to admissibility. Misuse of the term "relevance" is not a purely terminological problem; misuse of "relevance" where the TEA means "admissibility" is indicative of a profound mischaracterisation of the foundational concepts of evidence law. This is discussed in Subsection A of the 'Critique of Tanzanian Evidence Law' at page 10. Moreover, the misuse of the term complicates application of the rules. Sometimes character evidence should be excluded because it is irrelevant, sometimes because it is relevant but a waste of time, and other times because some other social policy is at stake. The new proposed Subsections thus use the proper term "admissibility" in place of the TEA's misuse of "relevance."

Subsection 3.1 Definitions. The following definitions apply throughout this Act:

“character” means the generalised disposition of a person, comprised of general traits such as honesty, temperance, or peacefulness;

“credibility” means the likelihood that a person’s account of events or a witness’s testimony is accurate and true;

“opinion” means the conclusions of a witness based on observation;

“reputation” means what is generally thought of a person by a community whose individuals were in a position to have observed that person in the relevant context, testified to by a member of that community.

Drafting Committee Note: These definitions are based on TEA § 57, a survey of case law, and a survey of materials about the meaning of the terms in the original Indian Evidence Act. For further background, see RATANLAL RANCHHODDAS & DHIRAJLAL KESHAVAL THAKORE, THE LAW OF EVIDENCE (THE INDIAN EVIDENCE ACT) 143–45 (6th ed. 1932). The DC also utilised international comparative law research to formulate these definitions. The Ghana Evidence Decree, § 179(1), defines ‘character’ as “a person’s generalised disposition made up of the aggregate of his traits, including traits of honesty, peacefulness, temperance, skill or care and their opposites...”; See also, Glen Weissenberger, Federal Rules of Evidence: Rules, Legislative History, Commentary and Authority §404.3. The Australian and New Zealand evidence acts define ‘opinion’ as “an inference from observed or communicable data.” New Zealand Law Reform Commission, available at <http://www.judcom.nsw.gov.au/publications/benchbks/civil/opinion.html>; Allstate Life Insurance Co v ANZ Banking Group Ltd No 5 (1996), 64 FCR 73, 75.

Subsection 3.2 Character of a Party. Character of a party may not be admitted to demonstrate action in conformity therewith. Character evidence may be admitted for the following limited purposes:

- A. In civil proceedings, character evidence is admissible if relevant to damages or if it is an essential element of a claim or defence.
- B. In criminal proceedings character evidence is admissible if:
 - i. The accused seeks to introduce evidence of good character in general or to support a defence. If introduced by the accused, the prosecution may produce contrary evidence through other witnesses; or
 - ii. Character is an essential element of the crime or defence; or
 - iii. In a homicide case, the accused offers evidence that the victim was the first aggressor. The prosecutor may then offer evidence of the alleged victim’s trait of peacefulness to rebut such evidence.
- C. Evidence of a party’s testimonial credibility is governed by Subsection 9.10.

Drafting Committee Note: This Subsection is a consolidation of §§ 54, 55, and 56(2) & (4) of the TEA. Subsection 3.2(A) is a consolidation of § 54 of the TEA. The text of § 54(1) & (2) is addressed by the introductory text of this Subsection about action in conformity therewith as well as Subsection 3.2(A) of this proposed Subsection. A literal reading of § 54(1) is circular. The provision states that evidence of character in civil proceedings is irrelevant unless shown to be relevant,

which makes § 54(1) essentially meaningless. If § 54(1) is read substituting the word admissible for relevant, this still leaves the problem that character evidence is inadmissible unless shown admissible. The DC suggests removing this empty provision in favour of proposed Subsection 3.2(A). A strong limit on character evidence is appropriate in civil matters because there is little necessity for character inferences to resolve civil disputes such as property ownership or the terms of a contract.

Subsection 3.2(B) is a consolidation of §§ 55 and 56(2) of the TEA. Clarification of the underlying rationale of the Subsections is improved by consolidating §§ 55 & 56(2) into a single Subsection. The rationale allows the criminal accused to present evidence of good character generally or as a defence. The prosecution may attack the good character evidence once presented on cross-examination and through additional witnesses as provided in this Subsection and in Subsections 3.3 and 3.4. The Subsection 3.2 (B) (i)–(iii) exceptions to the prohibition on evidence to show action in conformity therewith are subject to Subsection 3.3 and 3.4 limitations on methods to show character. The interlocking relationship between the 3.2(B) (i)–(iii) exceptions and the methods for providing evidence under those exceptions almost completely eviscerate the prohibition on character evidence in very specific scenarios. The DC recognises that these provisions can generate confusion, or can seem contradictory, but believes that this is currently the best model to address the difficult regulation of character evidence.

Subsection 3.2(C) in this Subsection is redundant, but it serves as an important reminder that character of an individual and credibility are distinct concepts. Despite the textual changes to and reorganisation of the TEA character evidence Subsections, this proposed Subsection is consistent with the underlying rationale for character evidence as it is employed in Tanzania, East Africa generally, India and many other countries.

TEA § 56(4)(c) has been omitted from this Proposed Act. The DC believes this provision applies to witnesses. Witnesses are addressed in Section IX of this Proposed Act.

The rationale for this Subsection and for Subsections 3.3 and 3.4 is that “[a]s a general [principle] when the character is not in issue, it must be excluded. . . . In criminal proceedings the fact that the accused is of good conduct is admissible but the fact that he is of a bad character is inadmissible. The evidence of good character is usually given on the grounds of humanity for raising presumptions of innocence and evidence of bad character are excluded as being too remote and tending to prejudice the accused whose guilt must be established beyond reasonable doubt from relevant facts and not from presumptions to be raised from his character—his disposition and reputation.” JAMES YONATHAN OBOL-OCHOLA, EAST AFRICAN LAW OF EVIDENCE, 123 (1972).

Additional commentary on the rationale behind the Indian Evidence Act is also instructive. “A man’s guilt is to be established by proof of the facts alleged and not by proof of his character; such evidence might create prejudice but not lead a step towards substantiation of guilt. The prohibition does not in any way affect evidence which is otherwise relevant. . . . Evidence of reputation or disposition must be confined to the particular traits which the charge is concerned about. Thus, it would be useless to offer evidence of a prisoner’s reputation of honesty on a charge

of cruelty, or of his mild disposition on a charge of theft.” RATANLAL RANCHHODDAS & DHIRAJLAL KESHAVALAL THAKORE, THE LAW OF EVIDENCE (THE INDIAN EVIDENCE ACT) 143–45 (6th ed. 1932).

Furthermore, “If a person’s character is itself an issue in the case, then character evidence is crucial. But if the evidence of character merely is introduced as circumstantial evidence of what a person did or thought, it is less critical. Other, and probably better, evidence of the acts or state of mind usually may be available, and the exclusionary Subsection creates an incentive to produce it. Furthermore, [triers of fact] may regard personality traits as more predictive of individual behaviour than they actually are.” MCCORMICK ON EVIDENCE 311 (Kenneth S. Broun, ed., 5th ed. 2006).

Subsection 3.2(B)(iii) allows an accused to introduce evidence about the victim’s character. This limited character evidence is admissible to allow an accused to establish that the accused injured or killed the victim while acting in self-defence as allowed by the Tanzanian Penal Code. FB Attorneys, Q&A with FB Attorneys (May 21, 2012) http://www.fbattorneys.com/news/May21_12.html. See Penal Code, Chapter XVI, Subchapter IV, Sections 18(A)–18(C) codifying self-defence. Available at http://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/TZA_penal_code.pdf. Subsection 3.2(B)(iii) responds to a difficulty of proof in prosecuting cases where the accused claims self-defence and accuses the victim of precipitating the encounter. The deceased cannot speak from the grave. In such circumstances, the victim’s character is almost as critical as though it were an element of the charge.

Subsection 3.3 Methods of Proving Character.

- A. If admissible, character may be shown by reputation or opinion evidence.
- B. If character evidence is admitted, the adverse party may inquire into specific instances of conduct on cross-examination.
- C. Extrinsic evidence of specific instances of conduct to show character is admissible only if character is an essential element of a claim or defence.

Drafting Committee Note: This Subsection is a consolidation of §§ 56, 57 and 149 of the TEA. Under the Indian Evidence Act, reputation has always meant “[w]hat is thought of a person by others and is constituted by public opinion; it is the general credit which a man has obtained in that opinion.” 2 KESAVA RAO, SIR JOHN WOODROFFE AND SYED AMIRALI’S LAW OF EVIDENCE 2834 (18th ed. 2009). This Subsection employs the same conception of reputation as the Indian Evidence Act. Evidence of reputation should be general, and should not be described in terms of specific acts. Opinion evidence may also be admitted if it is general in nature. Opinion evidence is not mentioned in the TEA Part IX on character, but due to the close relationship between reputation in a community and opinion of an individual testifying, the addition of opinion testimony to this proposed Section will improve logical clarity. Opinion of an individual could be used to lay the foundation for reputation testimony, and thus this inclusion is important.

Subsection 3.3(A) sets the general standard that character evidence may only be shown through general reputation or opinion evidence. Subsections 3.3(B) and 3.3(C) are narrow exceptions to the preference for general evidence. General evidence is preferred because it is less likely for a fact-finder to erroneously make action in conformity therewith inferences from general evidence than it is from specific instances and it minimises the trial time spent on these issues.

Subsection 3.3(B) addresses § 56(2) in the TEA. If character is an essential element, a broader introduction of character evidence should be allowed than in cases where the evidence is merely a collateral attack to suggest guilt. Subsection 3.3(B) also corresponds to § 149 of the TEA. Because character is such a sensitive subject, it is important that witnesses be subject to cross-examination regarding character testimony.

Subsection 3.3(C) provides for more flexible admission of specific acts evidence where the evidence is crucial to an essential element being considered in the case, such as damages in a libel or slander case. It thus generalises § 54(2) of the TEA

Subsection 3.3 makes a serious departure from § 57 of the TEA by removing ‘disposition’ as a method available to prove character. The inclusion of ‘general’ disposition evidence by definition defeats the very things that character evidence Subsections are intended to achieve. Disposition as defined in relation to the Indian Evidence Act is “inferred from: (i) certain acts which the person has done; or (ii) certain demonstrable facts directly connected with them. The word ‘disposition’ means natural tendency.” 2 KESAVA RAO, SIR JOHN WOODROFFE AND SYED AMIRALI’S LAW OF EVIDENCE 2837 (18th ed. 2009). By this definition, disposition evidence essentially takes a summary of a party’s past acts and uses them as a reason to conclude he behaved in a certain manner. This defeats the notion that each case must be decided on the facts rather than on the nature of the person. The shift from disposition evidence to opinion evidence reduces the danger of using disposition evidence to convict someone.

It is important to emphasise that the admissibility of reputation evidence does not change the foundation that has to be laid for the admissibility of character evidence. Reputation evidence generally is not admissible until the proponent establishes that (1) the character witness has a connection with the witness in a particular community, (2) the witness being testified about has a general reputation for truthfulness or untruthfulness in the community, (3) the character witness is in a position to know that reputation, and (4) the witness’ reputation was known during the relevant time period the character witness is testifying to (i.e. the time that the witness is testifying or at the time the charged crime involving truthfulness occurred).

Subsection 3.4 Prior Bad Acts, Wrongs, etc. Prior specific acts are not admissible to prove action in conformity therewith at a later occasion, but are admissible for other limited purposes in criminal matters:

- A. Past criminal convictions or other specific acts are admissible if their existence is an element of a crime or a defence; or
- B. If the past conviction is relevant to sentencing; or

- C. If relevant to such things as intent, motive, purpose, opportunity, preparation, plan, knowledge, identity, absence of mistake, or lack of accident in the present action.

Drafting Committee Note: This Subsection consolidates §§ 56(2) and 141(A) of the TEA, and also modernises and generalises these sections. Restrictions on the available methods for proving character are important because these restrictions prevent undue inferences about an individual based on a single past bad act or instance of unfavourable conduct. Evidence admissible pursuant to Subsection 3.4(A) is admissible for very limited purposes. For example, a prior bad act or wrong may be admissible to show that the accused was previously convicted of a crime that would make their current action criminal.

If evidence is admissible according to Subsection 3.4(B), the evidence should be introduced after the conclusion of the trial but prior to sentencing. This restriction is aligned with the TEA.

This proposed Subsection is consistent with Tanzanian case law. See Criminal Appeal No. 62 of 2005 Mathayo Igokelo @ Kipala and Mathias Charles @ Igokelo v. The Republic, finding that ‘imported evidence’ of a past conviction for robbery following a similar fact pattern as the present case could not be used along with weak identification evidence in order to convict the appellants. Judgement was overturned and the accused were released.

Subsection 3.4(C) departs from the explicit text of the TEA, and thus it is a clarification and modernisation change. This Subsection incorporates the rationale underlying the disposition provisions in the TEA and it also includes § 141(A) of the TEA. Subsection 3.4(C) allows the court to admit evidence of past behaviours the accused has exhibited without equating those past behaviours with guilt. Admissibility is restricted in such a way that disposition is used only with regard to specific elements of a charge rather than with regard to overall guilt.

Subsection 3.4(C) is notable because if applied freely it can erode many of the protections offered by the restriction in Subsections 3.2 and 3.3 on specific acts evidence. Therefore, Subsection 3.4(C) should be applied with caution. Where a party needs to prove motive, notice, opportunity, etc., to satisfy their burdens of production and persuasion, admissibility of past specific acts may be necessary. Take for example a murder case. If the accused claims to have never owned or shot a gun in their entire life, and presents witnesses that testify the accused is very peaceful, not very nimble, and could never shoot a gun accurately, then evidence that a week before the murder the accused bought a gun and shot it at a shooting range could be very important to the case. In these circumstances the court should hear evidence of the specific act of buying and shooting a gun as evidence of opportunity or knowledge pursuant to Subsection 3.4(C).

Subsection 3.5 Prohibited Character Questions. If the court determines that a question is inappropriate under this Section or under Subsection 2.2, the court shall instruct the witness that an answer is not required.

Drafting Committee Note: This Subsection reflects TEA §§ 158(1), 160 and 161, thus it is consolidation change. This provision emphasises the applicability of Subsection 2.2, but the Subsection is so significant that the DC felt repetition was

appropriate. The court’s ability to exclude certain questions that are unnecessarily scandalous or embarrassing to a witness is important as a way to reduce distractions at trial and to make witnesses comfortable testifying. If the court fails to exercise this discretion, indecent questions may have a chilling effect on potential witnesses who are fearful of the inquiries they may confront on the stand. When engaging in this balancing test the court should consider if there is another way the evidence could be obtained without embarrassing the witness in an unnecessary fashion.

Subsection 3.6 Corroboration. A judge may accept testimony of a single uncorroborated witness as determinative. For children see the additional restrictions in Subsection 9.3.

Drafting Committee Note: This Subsection is taken from §143 of the TEA and Tanzanian case law. Consider this excerpt from Omari v. Republic, Crim. App. No. 154 of 2005, [2009] Tanz. C.A. (Nov. 27, 2009): “We are fully aware that there is no formula to apply when it comes to consideration of the credibility of a single witness. The trial Court will weigh the evidence, will consider its merits and demerits and having done so, will decide whether or not it is trustworthy despite the fact that there are shortcomings and/or defects or contradictions in the testimony. In [Hassan Juma Kanenyera v. Republic, [1992] T.L.R. 100 (Tanz. CA)], it was stated that it is a section of practice, not of law, that corroboration is required of the evidence of a single witness of identification of the accused made under unfavourable conditions; but the section does not preclude a conviction on the evidence of a single witness if the court is fully satisfied that the witness is telling the truth. In the circumstances of this case, we have reluctantly come to the conclusion that it was necessary to examine other circumstances or otherwise, supporting [the witness’s] assertion in respect of the identity of the appellant. . . . While we have no problem in reaching a conclusion that the evidence on record supports the allegation of rape, we are not satisfied that the prosecution has established on the standards required under the law that it was the appellant who committed the act of rape. Cumulatively all the defects in the complainant’s evidence lead to the conclusion that her evidence did not measure up to the requisite standard both in relation to credibility and reliability.” The court overturned the conviction because it was made on uncorroborated evidence. Id.

Sections 165 and 166 of the TEA also address corroboration. As these provisions indicate, in determining the sufficiency of a single witness the court should consider any surrounding circumstances that provide context for the witness’s testimony. Additionally the court may consider other corroborating recorded evidence subject to the hearsay Subsections in Section IV.

If the court is convinced by the pertinent standard of persuasion after examining the single witness’s evidence, the court should not hesitate to proceed to a verdict solely because a party has only proffered a single witness. Scenarios often arise where only a single individual could provide a first-hand account of the events that occurred. As long as the court is satisfied by the genuineness of the testimony and other evidence provided, there is no reason to penalise a party who presented the single witness.

Note that there is also a discussion of existing corroboration laws in the Drafting Committee Note to Subsection 3.11.

Subsection 3.7 Subsequent Repair. Measures taken following an accident to reduce the likelihood of future harm are not admissible in order to show guilt or liability of the party taking preventive measures. However, the court may admit evidence of the party taking preventive measures to establish ownership or control over the harm-causing place or object.

Drafting Committee Note: This provision is a modernisation change. A subsequent repair Subsection is a policy-based bar to admissibility based on the rationale that, if there is a dangerous condition, a property owner should not hesitate to repair it for fear of prosecution.

Take for example, a piece of land in a national park where individuals go walking that has a railing along the side of the walking trail. The railing is in good condition. Assume one day that an elderly person is walking along the trail and falls and gets injured. The fall is reported to the park service, and the park service installs a second railing. The subsequent repair Subsection prevents the elderly person from entering into evidence the construction of the second railing to prove the guilt of the park service for the elderly person's fall. The Subsection does this for at least two important reasons. First, the fact that the park service built a second railing does not mean that the railing or lack of two railings in the first place caused the elderly person to be hurt. Thus, it would be unfair to the park service to use the construction of the new railing to prove that the park service was negligent prior to the fall. Second, assume the park service decides to build a second railing simply in hopes that two railings will make the park safer for all patrons, but not because the railing or lack of railing caused the elderly person injury. Social welfare is furthered when the park service can build the new railing to potentially make all patrons safer without fear that it will be sued for doing so.

Subsection 3.8 Offers of Assistance. Offers to assist or compensate for or treat an injury may not be used as proof of liability.

Drafting Committee Note: This provision is a modernisation change and employs the law of evidence to promote socially desirable outcomes. This Subsection permits both good Samaritans and those involved in possibly tortious behaviour to provide assistance without fear of prejudicing a subsequent lawsuit. For example, it is better to help an injured person following an accident than to leave the person at the whim of passing traffic out of fear of prosecution for admitting liability by or injuring the pedestrian while helping him to move. Subsection 3.8 promotes this balance for public safety by protecting the person who assists from use of their actions to prove liability.

Subsection 3.9 Negotiations, Pleas, and the Plea Process.

- A. Any plea offer or acceptance or anything said in proceedings leading to an offer or acceptance of a plea of guilty is not admissible against an accused, in either civil or criminal proceedings.
 - i. This includes but is not limited to a withdrawn guilty plea or anything said to attorneys during the plea process.
 - ii. If another statement made during plea bargaining is admitted, the court may decide that fairness requires admission of similar plea

related statements that would otherwise be excluded so that the content may be considered in appropriate context.

- B. Any offer or acceptance made during negotiations concerning civil cases, or anything said in proceedings contemplating an offer or acceptance of an agreement or settlement, is not admissible against the parties to the negotiations in either civil or criminal proceedings.

Drafting Committee Note: This provision is a modernisation change. It is another example of using evidence rules to promote desirable outcomes. Plea bargains and negotiations or settlement are socially useful. Reducing disclosure of statements or offers during the process provides parties with the necessary confidentiality to effectively bargain without adversely affecting the potential for a fair trial.

Subsection 3.10 Liability Insurance. Evidence that a party has liability insurance is not admissible to prove liability for an injury or occurrence. Evidence of insurance may be used to show control or ownership over a place or object.

Drafting Committee Note: This provision is a modernisation change. We do not know the extent to which Tanzanians use liability insurance and thus we have no idea if this Subsection will be appropriate. The essence of the provision is that one should not be held responsible for an injury simply because they have insurance to protect them in litigation in case of an injury.

Subsection 3.11 Sex Offence Cases. Evidence regarding the sexual behaviour, reputation or character of an alleged victim of a sexual offence is not admissible for the purposes of showing consent or attacking the victim's credibility. However, the following exceptions apply:

- A. Evidence specifically identifying an individual other than the accused as the source of semen, injury, or other physical evidence may be introduced for the purpose of showing that the accused was not responsible.
- B. Evidence of prior sexual intimacy between the alleged victim and the accused is admissible to establish a consensual relationship between the two parties.

Drafting Committee Note: This Subsection loosely reflects § 164(1)(d) of the TEA. It is a modernisation change that proposes some significant departures from the TEA. Anything admissible or inadmissible pursuant to this provision is also governed by Subsection 2.2. Note that an accused can provide good character evidence in sex offence cases as provided by Subsection 3.2(B)(i).

This Subsection changes the way the TEA treats character evidence about a victim. Under the TEA, the accused can introduce any evidence of the victim's immoral sexual character to suggest that the accused was not responsible for the rape on the basis of the victim's promiscuous character. The proposed Subsection 3.11 narrows the scope of character evidence admissible about a victim. The rationale behind the provision is that a accused should not be exonerated because the victim has a reputation for engaging in sexual conduct with more than one partner in the community. A prostitute can be the victim of rape despite the fact that the prostitute regularly engages in sexual conduct for money.

Rather than allowing general evidence about the character of a victim, this proposed Subsection limits the scope of admissible evidence such that the character evidence about victims is only that of specific instances of conduct. Thus, unlike Subsection 3.2, which discourages evidence of specific instances of conduct, this Subsection encourages instances of specific conduct. In the context of a sexual offense case, specific instances of past conduct that show an on-going relationship between the victim and accused, or evidence that another individual is responsible for the ‘rape’ of the victim is preferable to evidence about the general sexual reputation of the victim. These limited instances of the victim’s conduct are preferable because the limits expose the victim to a less probing inquiry about details of her private sexual life than if the Subsection allowed evidence of a general nature about her sexual reputation.

The proposed Subsection introduces a moderate balance between exculpatory evidence on an accused’s behalf, and sensitivity to the risks involved in allowing evidence on an alleged victim’s sexual reputation. As long as the accused has a meaningful opportunity to produce exculpatory evidence based either on misidentification or consent, there should be little concern that a accused could be wrongfully framed as a rapist on the basis of the evidence admissible under this Subsection.

Presently, there is no universal approach to evidence in sex offence cases. The Indian Evidence Act has been amended to prohibit extensive cross-examination of a prosecutrix. “Provided that in a prosecution for rape or attempt to commit rape, it shall not be permissible to put questions in the cross-examination of the prosecutrix as to her general immoral character.” Unlike § 164(d), this limitation shields the victim from direct personal attack, but it does not alleviate the problem of embarrassment or prejudice. By contrast, Kenya has not amended the equivalent portion of their Evidence Act dealing with sex crimes. Kenya Evidence Act § 163(1)(d) (stating “when a man is prosecuted for rape or an attempt to commit rape, it may be shown that the prosecutrix was of generally immoral character.”).

*Subsection 3.6 has an important implication in the sex offence context. In a criminal proceeding involving a sexual offence when the only evidence is that of a victim of a sexual offence, the court shall receive the evidence, and may, after assessing the credibility of the victim, proceed to convict if convinced beyond a reasonable doubt of the accused’s guilt. The DC is raising this issue in the notes of this Subsection because we observed in the Tanzania case law many sexual offence cases that were overturned based on corroboration issues. It is our understanding, for example, that in *Kiegezo v Republic*, Crim. App. No. 8 of 2005, [2005] Tanz. High Ct. (Nov. 28, 2005), a rape conviction was quashed simply because the victim was the only witness of the crime. More generally, statistics from the Tanzanian Judiciary suggest that rape cases are rarely successfully prosecuted. See, Tanzania Women Judges Association, *Stopping the Abuse of Power for Purposes of Sexual Exploitation: Naming, Shaming, and Ending Sextortion—A Toolkit*, pg. 28 (Last accessed Feb. 4, 2014: http://www.iawj.org/Tanzania_Toolkit_final_.pdf) (“There is a general consensus that the conviction rate of sexual offences is rather low as clearly depicted by the statistics made available to us by the Department of Criminal Investigations and Attorney General’s Chamber zonal offices. . . rape cases take the majority of sexual offences, about 92%. . . about 31.2% of rape cases are still pending in court, while 17% fall out of the system. . .”). However, third party entities report a high incidence of rape in Tanzania. See, UNICEF, *Children**

and Women in Tanzania: Volume 1, Mainland, pg.147 (Last accessed Feb. 4, 2014: http://www.unicef.org/tanzania/SITAN_Mainland_report.pdf). See also, Kizito Makoye, *Gender based violence rising in Tanzania*, Thomson Reuters Foundation, July 25, 2013 (Last accessed Feb. 4, 2014: <http://www.trust.org/item/20130725231724-ijt3z/>). *Convictions should be based on the probative value of the evidence, even if the only evidence available is from one source.*

SECTION IV: HEARSAY

The TEA's treatment of hearsay evidence is out of step with modern developments in the law of evidence. It does not define or reference the term hearsay, which was deliberately excluded by the drafters of the TEA's precursor because it could have multiple meanings. JAMES FITZJAMES STEPHEN, THE PRINCIPLES OF JUDICIAL EVIDENCE: BEING AN INTRODUCTION TO THE INDIAN EVIDENCE ACT 3–4 (1872). However, the possibility that a critical term may be misunderstood does not mean that its existence should be denied; rather, care should be taken to explain it. The DC believes that any confusion over the possible multiple meanings of "hearsay" can be avoided through the inclusion of an explicit definition in the Proposed Act. Moreover, the term "hearsay" is used in other laws of the United Republic. See e.g., Code of Civil Procedure, Order XIX, Rule 3(2). Despite this, many of the hearsay exceptions of the English common law are preserved in the TEA without being explicitly connected to any general prohibition on the admission of hearsay—even though excluding hearsay evidence was one of three major goals set by the drafters of the TEA's precursor. JAMES FITZJAMES STEPHEN, THE PRINCIPLES OF JUDICIAL EVIDENCE: BEING AN INTRODUCTION TO THE INDIAN EVIDENCE ACT 3 (1872). For example, § 34 of the TEA provides that dying declarations, statements against the interest of the person making them, statements about birth, marriage, adoption, and statements relating to family history are admissible when the person making the statements is unavailable. However, the TEA's provisions excluding hearsay evidence are scattered and individualised, undercutting the principles behind excluding such evidence by focusing instead on certain exceptions without explanation. This issue could be resolved by a general prohibition on hearsay evidence supplemented by hearsay exceptions that do not prevent the evidence from being excluded for other reasons, such as the irrelevance of the evidence or its prejudicial effect.

Despite the TEA's attempt to regulate the admission of hearsay evidence without referencing or defining the term hearsay, the Tanzanian judiciary appears to have created a common law hearsay rule in lieu of strict application of the TEA's provisions. See, e.g., Gibb Eastern Arica Ltd. v. Syscon Builders Ltd., Comm. Case No. 84 of 2003, [2004] Tanz. High Ct.; Mkumba v. Republic, Crim. App. No. 204 of 2007, [2008] Tanz. High Ct.; Mpeka v. Republic, Crim. App. No. 23 of 2004, [2007] Tanz. High Ct. Although this rule is frequently relied on to exclude evidence, its scope and the definition of hearsay employed by the Tanzanian courts remain unclear. Several of the cases surveyed appear to invoke the hearsay rule in situations in which the proffered evidence would not constitute hearsay under the definition adopted in the FRE, the English common law, or any other evidentiary system of which we are aware. See, e.g., Abias v. Republic, Crim. App. No. 200 of 2007, Tanz. High Ct. (testimony of witness who heard complainant's screams for help at the time she was allegedly raped excluded as hearsay); Tesha v. Ministry of Natural Resources and Tourism, Misc. Civil Cause No. 50 of 2003, Tanz. High Ct. (affidavit of applicant who testified that she did not identify herself to the court because she could not hear the clerk announcing her case excluded because the clerk's testimony was hearsay). An articulated, statutory treatment of the hearsay rule will provide clarity to the law regarding the admissibility of evidence, hopefully resulting in fewer hearsay-related appellate reversals.

The proposed approach is also necessary in order to integrate the treatment of hearsay with the concepts of relevancy and materiality established in Section II of this Proposed Act. The TEA's treatment of hearsay, which provides that certain types of evidence are relevant or admissible in any legal proceeding, is inconsistent with the definitions of those terms provided in the Proposed Act. Evidence is relevant only if it increases or decreases the probability of a material proposition being true, and the materiality of a

proposition is determined by reference to the elements of the substantive law and the reasonable inferences that can be drawn from the evidence. Accordingly, the relevance (and consequently the admissibility) of evidence can only be determined on a case-by-case basis and cannot be determined categorically for a given type of evidence, as the TEA attempts to do. The proposed hearsay framework re-establishes the hierarchy between the prohibition on hearsay and the exceptions, in the process making it clear that evidence that is not barred by the hearsay rule may be excluded under another provision, such as the discretionary exclusion authorised by Section II, Subsection 2.2.

The TEA recognises many of the traditional exceptions to the hearsay rule, but the Tanzanian judiciary's current practice is to supplement the TEA with common law decisions that reject evidence that would apparently be admissible under the TEA. Accordingly, the optimal approach to the regulation of hearsay evidence entails a statutory definition of hearsay, a general prohibition on the admission on hearsay, and a series of well-defined exceptions to this general prohibition on hearsay. Such an approach will provide more guidance to judges and litigants than the current practices of the Tanzanian judiciary. It will also be easier for courts to apply than the current statutory framework. The changes being suggested are less radical than they appear, however, as many of the hearsay-related admissibility rules in the TEA are preserved in the proposed rules in the form of hearsay exceptions

Certain Commonwealth countries, including England, have moved away from general inadmissibility of hearsay, particularly in civil cases where no jury is present. Under the Civil Evidence Act 1995, England provided for a general admissibility of hearsay evidence, instructing courts to evaluate evidence based on its reliability and its probative value, rather than its origin. England has also liberalised hearsay admissibility in criminal cases. The Criminal Justice Act 2003, although it retains a general exclusionary rule, provides for the automatic admittance of hearsay evidence that has been shown to be probative and reliable. This approach embodies the view that evidence law should be simplified and generalised, with substantial discretionary power afforded to judges. These recent reforms to the English approach to hearsay are arguably superior to the approach taken in other jurisdictions such as the United States. When considering reforms to its own Evidence code, the New South Wales Law Reform Commission described the U.S. approach and the existing common law as highly technical and "distortion-riddled," comprised of "a lengthy list of overlapping and often irrational exceptions." See New South Wales Law Reform Commission, Report on the Rule Against Hearsay, 1978, ¶ 19.18. The DC has not implemented this kind of reform in this Act, and maintains the general inadmissibility of hearsay evidence with numerous exceptions, as to do otherwise would represent a substantial departure from the TEA. The arguments in favour of general admissibility are compelling, however, and should be taken into account when considering the approach to hearsay evidence that the United Republic employs in the future.

Subsection 4.1 The Rule Against Hearsay. "Hearsay" means a statement that:

- A. the declarant does not make while testifying at the current trial or hearing; and
- B. a party offers in evidence to prove the truth of the matter asserted in the statement.

Hearsay is not admissible unless it is within an exception enumerated in this Section or its admission is mandated or allowed by Law.

Drafting Committee Note: Not all out of court statements are hearsay. For example, if a statement is offered into evidence to prove its effect on the listener, it is not hearsay because it is not being offered to prove the truth of the matter asserted. The determination as to whether evidence is admissible under an exception involves a preliminary question of fact and is therefore governed by the standard established in Subsection 1.5.

In evaluating whether evidence is barred by this provision, a court should first determine whether the proffered evidence is “hearsay” as defined in this provision. Evidence that is not hearsay is not excluded by this Section, but can be excluded by another Subsection in this Proposed Act such as Subsection 2.2 Discretionary Exclusion. If the court determines that the evidence is hearsay, the proponent of the evidence bears the burden of showing that it satisfies one of the hearsay exceptions established in the subsequent Subsections.

Evidence that is admissible under an exception to the hearsay rule is to be given whatever weight the trier of fact deems appropriate. Admission is not conclusive proof of the matter asserted.

The Proposed Act contains three categories of hearsay exceptions in addition to a residual clause. Multiple categories are necessary because some hearsay exceptions are very likely to be reliable and should be used freely, whereas other exceptions should only be used as a last resort after a showing that the declarant is unavailable. This distinction is recognised in the TEA. Compare § 34 (requiring the unavailability of the declarant) with §§ 36–40, 40A (admitting statements regardless of the availability of the declarant).

Subsection 4.2 Exceptions to the Rule Against Hearsay—Prior Statement of a Declarant Who is Testifying at the Current Trial or the Prior Statements of a Criminal Accused Who Elects Not to Testify.

- A. The prior statements of a testifying witness are not barred by Subsection 4.1 if the witness is subject to cross-examination and redirect about the prior statement.
- B. In criminal cases, the prior statements of a criminal accused are not barred by Subsection 4.1 if offered by the prosecution, regardless of whether the accused elects to testify at trial.

Drafting Committee Note: This Subsection permits the admission of all prior statements made by witnesses who testify at trial and by all criminal accused persons, even those who elect not to testify in their own defence.

Subsection 4.3 Exceptions to the Rule Against Hearsay—Regardless of Whether the Declarant is Available as a Witness. The following categories of statements are not excluded by the rule against hearsay. These exceptions are available regardless of whether the declarant is available to testify unless the exception in question provides otherwise.

- A. *An Admission by an Opposing Party.* A statement that is offered against an opposing party and:
 - i. was made by the party in an individual or representative capacity; or

- ii. is one the party manifested that it adopted or believed to be true; or
- iii. was made by a person whom the party authorised to make a statement on the subject; or
- iv. was made by the party's agent or employee on a matter within the scope of that relationship and while it existed; or
- v. was made by the party's co-conspirator during and in furtherance of a conspiracy.

Drafting Committee Note: This Subsection consolidates and preserves §§ 19–26 of the TEA. Note that §§ 27–33 of the TEA, which relate to confessions, have been preserved in Section XII. For the purposes of the hearsay rule, confessions fall within the definition of admissions and are exceptions to the rule against hearsay.

B. *Excited Utterance.* A statement that:

- i. relates to a startling event or condition; and
- ii. was made while the declarant was in an excited emotional state caused by the event or condition.

C. *Present Sense Impression.* A statement that describes or explains an event or condition, made while or immediately after the declarant perceived it.

Drafting Committee Note: In evaluating the admissibility of a statement under this exception, a court should focus on the amount of time between the occurrence of the event and the statement describing the event.

D. *Statement Made for Medical Diagnosis or Treatment.* A statement that:

- i. was made for the purpose of and is pertinent to medical diagnosis or treatment; and
- ii. describes medical history, past or present symptoms and sensations, or the cause of the symptoms or sensations.

Drafting Committee Note: To be admissible under this statement, the declarant need not be the person seeking medical treatment. For example, if a child's mother tells a doctor that the child has had a fever for the past three days, the mother's statement would satisfy the requirements of this exception even though the child and not the mother, is seeking medical treatment.

E. *Then-Existing Mental, Emotional, or Physical Condition.* A statement reflecting the declarant's state of mind (such as motive, intent, or plan) or emotional, sensory, or physical condition (such as mental feeling, pain, or bodily health) at the time the statement was made.

F. *Statements Relating to the Declarant's Will.* A statement relating to the validity or terms of the declarant's will.

G. *Recorded Recollection.* Any record that:

- i. pertains to a matter the witness once knew about but now cannot recall well enough to testify to fully and accurately; and
- ii. was made or adopted by the witness when the matter was fresh in the witness's memory; and
- iii. accurately reflects the witness's knowledge at the time.

Drafting Committee Note: A recorded recollection is typically entered into evidence by the declarant—that is, the person who created the record—who must rely upon it due to memory impairment. Therefore, unlike some other provisions in this Subsection, this exception necessitates the presence of the declarant.

H. *Business Records.* The term “business” includes any business institution, association, profession, occupation, and calling of any kind, whether or not conducted for profit.

Any memorandum, report, record, or data compilation, in any form that:

- i. was kept in the course of regularly conducted business activities; and
- ii. was created at or near the time of the act, event, or condition that it is documenting by, or on information from, someone with knowledge; and
- iii. is routinely relied upon by the business in the performance of its business activities; and
- iv. is presented by a witness who has personal knowledge of the procedures through which the records were created, updated, maintained, and relied upon. The witness need not have personal knowledge regarding the creation of the specific entries in the record that are relevant in the case before the court.

Drafting Committee Note: The TEA contains multiple provisions that establish the admissibility of business records. See TEA §§ 34(b) (records where the declarant is unavailable), 36 (entries in books of account), 76–82 (banker's books). This provision consolidates these overlapping provisions into a single hearsay exception and expands and generalises the exception to include electronic records, which are treated as documents under Section VIII. The TEA's approach of admitting records only where the declarant is unavailable is suboptimal. In many cases, the identity of the person who made specific entries in a business record will be unknown, making it difficult to establish that person's unavailability. Furthermore, under the TEA, business records can be used to refresh a witness's recollection, permitting the witness to testify about their contents. However, oral testimony regarding the content of records is typically more difficult for a fact-finder to process than the records themselves, especially given the Tanzanian practice of creating a record of the proceedings by hand. The proposed approach requires a greater degree of reliability than § 34(b) by requiring testimony from someone familiar with the records while avoiding the problems posed by § 34(b)'s unavailability requirement.

Not all documents created by businesses qualify for this exception. For example, an advertisement prepared for goods or services provided by the business would not

satisfy this exception because the business would not rely on the representations in the advertisement when conducting its business. Similarly, a report prepared for the purposes of litigation would not qualify because it would not have been prepared in the course of business or relied on by the business in the performance of its business activities.

- I. *Public Records.* Any statement in any public or other official book, register, record, or data compilation, in any form, made by a public office, agency or servant in the discharge of an official duty.

Drafting Committee Note: This approach replicates the approach taken in § 37 of the TEA, which provides for the admissibility of virtually all public records. It also includes §§ 38 and 39 of the TEA, which are logical subsets of § 37. Such documents are self-authenticating under Subsection 7.3(B)(i).

- J. *Statements Regarding Public Custom.* Any statement made before the controversy asserting the existence or scope of any public right or custom, the existence of which, if it had existed, the declarant would likely have been aware.

Drafting Committee Note: This exception preserves § 34(d) of the TEA. Public rights, customs, and traditions may be promulgated orally, making them difficult to establish without a hearsay exception. The DC does not fully understand the implications of § 34(d), and so is not in a position to evaluate whether or not it should be preserved.

- K. *Records of Vital Statistics.* Records or data compilations, in any form, of births and deaths, including foetal deaths, if the report thereof was made to a public office pursuant to requirements of law.
- L. *Records of Religious Organisations.* Statements of births, marriages, divorces, deaths, legitimacy, ancestry, relationship by blood or marriage, or other similar facts of personal or family history, contained in a regularly kept record or data compilation of a religious organisation.
- M. *Marriage Certificates.* Statements of fact contained in a marriage certificate issued pursuant to the Law of Marriage Act.

Drafting Committee Note: This Subsection has been written to accommodate what appears to the DC as the United Republic's policy for a uniform system of marriage registration. Accordingly, only certificates issued in accordance with the Law of Marriage Act are admissible under this provision.

- N. *Certificates of Religious Rites.* Statements of fact contained in a certificate, other than a marriage certificate, that the certificate-maker administered a religious rite in the status of a clergyman, imam, or other person authorised by the rules and practices of a religious organisation to perform the rite.
- O. *Family Records.* Statements of fact concerning personal or family history contained in family religious texts, genealogies, charts, engravings on rings, inscriptions on family portraits, engravings on urns, crypts, tombstones, or the like.

P. *Statements in Ancient Documents and Data Compilations.* Statements in documents or data compilations that:

- i. have been in existence for at least twenty years; and
- ii. have been authenticated pursuant to Subsection 7.2(B)(xi).

Q. *Market Reports and Commercial Publications.* Market quotations, tabulations, lists, directories, or other published compilations generally relied upon by the public or by persons in pertinent occupations whether relied upon by the public or not.

Drafting Committee Note: This exception permits the admission of information contained in reports that are regularly relied on by the public as proof of the matter contained therein and by experts in relevant fields. Examples include lists of stock prices, weather reports, or telephone directories.

R. *Learned Treatises.* To the extent called to the attention of an expert witness upon cross-examination or relied upon by an expert witness in direct examination, statements contained in sources such as published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice.

Drafting Committee Note: This Subsection largely preserves the exception to the direct evidence rule in § 62 of the TEA.

S. *Reputation Concerning Personal or Family History.* Reputation among members of a person's family by blood, adoption, or marriage, or among a person's associates, or in the community concerning a person's birth, adoption, marriage, divorce, death, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history.

Drafting Committee Note: This exception clarifies § 52 of the TEA, which allows proof of "the relationship between one person and another" through opinions offered by third parties.

T. *Reputation Concerning Boundaries or General History.* Reputation in a community, arising before the controversy, as to boundaries of or customs affecting lands in the community, and reputation as to events of general history important to the community in which located.

Drafting Committee Note: This exception is founded on the trustworthiness of reputation that has been discussed and decided upon by a community. The DC believes this to be distinct from the public customs discussed in Subsection 4.3(J) because the evidence affected by this proposed Subsection is confined to the subject of land. However, the DC recognises its lack of familiarity with Tanzanian property law, which may affect the significance of this proposed Subsection.

U. *Reputation as to Character.* Reputation of a person's character among associates or in the community.

Drafting Committee Note: Although character evidence is not barred by the Rule Against Hearsay, it may be inadmissible pursuant to Section III.

- V. *Judgement of a Previous Conviction.* Evidence of a valid final judgement, entered after a trial or upon a plea of guilty, adjudging a person guilty of a crime punishable by death or imprisonment in excess of one year, to prove any fact essential to sustain the judgement, but not including, when offered by the United Republic in a criminal prosecution for purposes other than impeachment, judgement against persons other than the accused. The pendency of an appeal may be shown but does not affect the admissibility of the judgement.

Drafting Committee Note: The TEA establishes a complex set of rules regulating whether or not judgements are conclusive or sufficient to establish the matters they assert. See, e.g., TEA § 43A (providing that a criminal judgement shall constitute conclusive evidence that the person convicted or acquitted was guilty or innocent of the offence to which the judgement relates). The DC emphasises that the proper role of an evidence code is to establish the admissibility of evidence, not the weight of evidence that has been admitted. Thus, Subsection 4.3(V) provides for the standard hearsay exception that allows judgements in over a hearsay objection as proof of any facts essential to support the final judgement. However, this Subsection does not purport to determine the weight to be given to such evidence; that is a matter for the trier of fact. The sections in the TEA providing that judgements are “conclusive evidence” are not rules of evidence but rules of estoppel that are not properly dealt with by the law of evidence. Nonetheless, the DC does not wish to inadvertently recommend substantive change to Tanzanian law. Thus, the provisions providing for conclusive effect have been added to Section XIV Estoppel.

- W. *Evidence of Prior Judgements, Orders, or Decrees.* Judgements, orders, or decrees that are admissible or establish estoppel under any provision of Law.

Drafting Committee Note: This Subsection generalizes TEA § 45, which precludes admission of any judgement, order or decree which is not mentioned in TEA §§ 42, 43, or 44 unless it is, by itself, a fact in issue or admissible under some other provision. Because the hearsay Section excludes judgements, orders or decrees that are not explicitly admissible, there is no need to explicitly refer to TEA §§ 42, 43, or 44 as the previous Subsection did.

- X. *Judgement as to Personal, Family, or General History, or Boundaries.* Judgements that rely on findings regarding matters of personal, family, or general history, or boundaries, where such findings are essential to the judgement.

- Y. *Absence of Records.* Evidence of the absence of records that would be admissible under this Subsection is admissible to prove the record does not exist, if a party had an obligation to keep such records.

Drafting Committee Note: Subsection 4.3(Y) is a modernisation change. Subsection 4.3 would encompass, for example, public records discussed in 4.3(I) or records of vital statistics in 4.3(K). There is no analogue to Subsection 4.3 in the TEA. Its value depends on the record-keeping practices of the Tanzanian government and other entities, something with which the DC is not familiar.

- Z. *Matters of a Public Nature.* Judgements, orders, or decrees if they relate to a matter of a public nature that is relevant to the proceedings.

Drafting Committee Note: Subsection 4.3(Z) implements TEA § 44. As a hearsay exception, Subsection 4.3 provides for the admissibility of such documents but, in keeping with TEA § 44, they are not conclusive proof of that which they state. The court must make appropriate determinations as to what constitutes a matter of a public nature and to afford these documents their proper weight.

Some countries provide a specific hearsay exception for records of documents that affect an interest in property and statements in documents that affect an interest in property. See U.S. FED. R. EVID. 803(14)–(15). The TEA does not appear to have a direct analogue, and the DC has refrained from drafting one due to its lack of familiarity with Tanzanian property law.

Subsection 4.4 Exceptions to the Rule Against Hearsay—When the Declarant is Unavailable as a Witness.

- A. *Definition of Unavailability.* A declarant is unavailable to testify when:
- i. the declarant is deceased; or
 - ii. the declarant is outside of the jurisdiction of the courts of the United Republic; or
 - iii. the declarant cannot be compelled to testify due to privilege, diplomatic immunity, or another similar reason; or
 - iv. the declarant has become incapable of giving evidence due to a physical or mental condition, including memory loss; or
 - v. the declarant’s attendance cannot be procured without an amount of delay or expense that, in the circumstances of the case, appears to the court to be unreasonable; or
 - vi. the declarant refuses to appear in court in violation of a court order.
- B. Notwithstanding anything in Subsections 4.4(i)–(vi) to the contrary, a declarant is not “unavailable to testify” if the court determines that the declarant’s unavailability was induced by the party proffering the declarant’s statement into evidence.

Drafting Committee Note: The conditions required to establish unavailability are virtually identical to those in § 34 of the TEA. The unavailability of the declarant is a preliminary question of fact subject to the standard established in Subsection 1.5.

- C. *Hearsay Exceptions.* The following categories of statements are not excluded by the rule against hearsay if the court determines that the declarant is unavailable to testify under Subsection 4.4(A):

- i. *Dying Declaration.* A statement made by a declarant who believed that his or her death was imminent, concerning the cause or circumstances of what the declarant believed to be impending death.

Drafting Committee Note: In order for this exception to be available, the declarant need not have actually died but must be unavailable pursuant to Subsection 4.4(A). The DC wishes to flag that the TEA was amended in the 1980's to remove the requirement of awareness of impending death. However, the DC does not have access to the previous language of the TEA. As we understand it, the present TEA § 34 would let in any statements by the deceased concerning the cause of death, regardless of awareness of immanency. This removes one of the variables thought by some to give such statements adequate reliability to admit them over a hearsay objection, but the broadening of admissibility may be socially useful. By requiring the declarant to be dead, though, the TEA makes prosecution of assaults and attempted murders more difficult. For example, if an accused allegedly assaults or attempts to murder a victim, the victim believes he or she is dying and makes a statement concerning the assault, under the Proposed Code the statement would be admissible if the victim were unavailable for some other legitimate reason than death.

- ii. *Statement Against the Interest of the Declarant.* A statement that:
 - a. a reasonable person in the declarant's position would have made only if the person believed it to be true because, when made, it was so contrary to the declarant's proprietary or pecuniary interest or had so great a tendency to invalidate the declarant's claim against someone else or to expose the declarant to civil or criminal liability; and
 - b. is supported by corroborating circumstances that indicate its trustworthiness.

Drafting Committee Note: This exception largely preserves § 34(c) of the TEA.

- iii. *Statement of Personal or Family History.* A statement:
 - a. concerning the declarant's own birth, adoption, marriage, divorce, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history, even though declarant had no means of acquiring personal knowledge of the matter stated; or
 - b. concerning the foregoing matters, and death also, of another person, if the declarant was related to the other by blood, adoption, or marriage or was so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared.

Drafting Committee Note: This exception preserves the statements formerly admissible under § 34(e) of the TEA.

- iv. *Forfeiture by Wrongdoing.* Any prior statement of a declarant—whether or not such statement is made under oath—may be offered

against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of a declarant as a witness.

Drafting Committee Note: This provision is broader than the provision in § 35(a)(1) of the TEA, which only permits the admission of statements made under oath in prior proceedings between the same parties. It is intended to provide a more effective deterrent against parties who attempt to coerce, intimidate, or otherwise induce witnesses into not testifying in order to obtain a benefit in litigation.

Subsection 4.5 Hearsay Within Hearsay. Hearsay included within hearsay is not excluded under this Section if each part of the combined statements conforms with a hearsay exception provided in this Code or by Law.

Drafting Committee Note: Statements may involve multiple levels of hearsay. For example, suppose Person A writes a letter describing a statement he was told by Person B. There are two statements being made here: Person B is making a statement and Person A is asserting that Person B told him something. If Person A's letter conforms with a hearsay exception it is admissible to establish its truth (that Person B made the statement to Person A), but not the truth of Person B's statement. For Person B's statement described in the letter to be admissible for its truth, it would also have to conform to an exception in this Section.

Subsection 4.6 Attacking and Supporting the Declarant's Credibility. When a hearsay statement has been admitted in evidence, the declarant's credibility may be attacked, and then supported, by any evidence that would be admissible for those purposes if the declarant had testified as a witness. The court may admit evidence of the declarant's inconsistent statement or conduct, regardless of when it occurred or whether the declarant had an opportunity to explain or deny it. If the party against whom the statement was admitted calls the declarant as a witness, that party may examine the declarant on the statement as if on cross-examination.

Drafting Committee Note: Before a party may introduce positive credibility evidence, credibility must first be attacked. This principle is further elaborated upon in Subsection 9.10.

Subsection 4.7 Residual Exception.

- A. Hearsay not covered by any of the exceptions established in Subsections 4.3–4.5 may be admitted notwithstanding Subsection 4.1 if the court determines that the statement was made under circumstances indicating that the statement is likely to be reliable.
- B. In evaluating circumstantial guarantees of reliability to determine whether a statement should be admitted under this Subsection, a court may consider the following non-exclusive factors:
 - i. Whether the circumstances make it likely that the declarant had a motivation or incentive to be truthful at the time the statement was made;

- ii. Whether the circumstances make it likely that declarant accurately perceived the basis for the matter asserted in the statement;
 - iii. Whether the circumstances in which the declarant's statement was made make it likely that the statement was accurately perceived, remembered, and/or recorded by the person testifying about it or establishing a foundation for its admission into evidence.
- C. Parties that seek to admit evidence under this provision must notify the court and all opposing parties of their intent to do so before the start of trial. When justice so requires, a court may admit evidence under this Subsection where such notice has not been given. If evidence is admitted without notice, the court shall take such action as is necessary to avoid undue prejudice to the opposing party.

Drafting Committee Note: This Subsection is a modernisation of §§ 34A–C of the TEA, which allow for the admission of affidavits under certain circumstances. The DC believes that the TEA too frequently emphasises procedure over substance. For example, § 34B(d) and (e) permit the admission of affidavits if the opposing party does not object to the admission of the affidavit within ten days of receiving notice of intent to offer the affidavit into evidence, regardless of the merits of the objection. This rule operates to the disadvantage of parties who are not familiar with its workings. Sophisticated parties will object to affidavits asserting information they are unwilling to stipulate to. Unsophisticated parties will not understand the rule and will fail to object, putting them at a disadvantage that has nothing to do with the merits of the case. The proposed Subsection eliminates many of these procedural impediments, focusing instead on the reliability of the proffered statement.

SECTION V: BURDENS OF PERSUASION & PRODUCTION

There are three burdens—and only three burdens—that a litigant can face. The first is the burden of pleading. The burden of pleading refers to the responsibility of initiating a claim or raising a defence. Because the burden of pleading is a function of the substantive law and the law of civil procedure, it is not addressed in this Section. The second is the burden of persuasion. The burden of persuasion refers to the responsibility of a party to convince a court to find in its favour on a particular element or defence. The burden of persuasion dictates which party wins in the face of inevitable uncertainty. The third is the burden of production. The burden of production refers to the responsibility of producing evidence sufficient to support a finding on an element or defence on which the party has the burden of persuasion.

*The TEA—like other evidence codes—does not distinguish between burdens of persuasion and production. Rather, it falls prey to the general trend of conflating the two concepts and calling the result the “burden of proof.” See TEA § 110. Section 110 provides that the party asking the court to find for it on a particular issue (i.e., the party that bears the burden of persuasion) must produce evidence sufficient for the court to make such a finding (i.e., bears the burden of production). See, e.g., *Rock Beach Hotel v. Tanzania Revenue Authority*, Civil Appeal 52 of 2003, [2008] Tanz. C.A. (citing Section 110 and reversing an award for specific damages because the specific damages were not sufficiently proven). In order to resolve the confusion that results from combining these two concepts, the DC has opted to abandon the term burden of proof in favour of the more specific terms burden of persuasion and burden of production. Subsection 5.1 reflects this change. Changing the terminology improves definitional and conceptual clarity, allowing courts and parties to efficiently and effectively assess what a party’s burdens are and to determine when they have been satisfied.*

Subsections 5.2 and 5.3 set default rules regarding the allocation of burdens of persuasion in civil and criminal cases, respectively. The TEA does not directly allocate civil burdens of persuasion. This may be because the substantive law usually determines such allocations. However, § 110 suggests that a civil plaintiff would typically bear the burden of persuasion; we have preserved that concept in Subsection 5.2. The TEA directly addresses burdens of persuasion in the criminal context. It provides that an accused shall be acquitted if the prosecution fails to prove the case against him beyond a reasonable doubt. § 114. This standard is captured in Subsection 5.3. In many contexts, however, the burden of persuasion is directly set by applicable substantive law. This is acknowledged in Subsections 5.2 and 5.3, which contain provisions expressly accommodating the substantive allocation of the burdens of persuasion and production.

*Subsection 5.4 allocates the burden of production. The TEA has provisions allocating the burden of production (what the TEA calls the burden of proof). See §§ 112–115. Although the provisions are all worded slightly differently, they all seem to say the party with the burden of persuasion on a given element or defence has the burden of producing evidence sufficient to support a finding in its favour on that element or defence. See *Efficient Freighter Ltd v. Kanema*, Comm. Case 33 of 2009, [2009] Tanz. High Ct. (noting where a plaintiff did not prove expenses above replacement cost for damages incurred where the accused failed to return containers to a shipping company, those damages were not available given the burden imposed by Section 112). That concept is preserved here.*

This Section does not employ the term “presumption.” Many of the provisions the TEA labels as “presumptions” are actually authentication rules. Those are addressed in Section VII and will not be included here. The TEA does include a number of provisions that use the concept of or set forth evidentiary presumptions. See §§ 4–5, 116–121. As a general matter, presumptions (and permissible inferences) are treated by the TEA as legal devices separate from burdens of persuasion and production. This is a conceptual mistake. The term “presumption” is simply a label applied to such things as allocating burdens of persuasion and production. Various legal systems also apply the term in other contexts as well that possess their own name such as creating substantive rules or taking judicial notice. The only effect of such uses of the term is to create confusion. See Ronald J. Allen, Structuring Jury Decisionmaking in Criminal Cases: A Unified Constitutional Approach to Evidentiary Devices, 94 HARV. L. REV. 321 (1980); Ronald J. Allen, Presumptions in Civil Actions Reconsidered, 66 IOWA L. REV. 843 (1981). Accordingly, the DC has opted to eliminate the term from the Proposed Code. In order to preserve the policy preferences already expressed by the Tanzanian legislature, we have preserved in Subsection 5.5 all the allocations of burdens of persuasion previously established by the TEA through the use of the term “presumption.” However, these provisions simply reflect natural reasoning processes, and thus the DC recommends that these provisions not be adopted. As is discussed below, this kind of meddling with the inferential process can lead to direct conflicts that then need to be sorted out. In the opinion of the DC, this results in harm and no benefit to the legal system.

Subsection 5.1 Definitions. The following definitions apply throughout this Section.

“balance of probabilities” means the greater weight of the evidence, established not by the greater number of witnesses testifying to a fact but by evidence that a party’s case is more likely to be true than its opponent’s case;

Drafting Committee Note: “Balance of probabilities” is shorthand for a party’s duty to prove that “on the balance of probabilities, his case was more credible and probable than the other[’s].” Ndaweka v. Mtera, Civil App. No. 5 of 1999, [2003] Tanz. C.A. (May 1, 2003); see also PHIPSON ON EVIDENCE ¶ 6–53 (6th ed. 2005) (“If, therefore, the evidence is such that the tribunal can say ‘we think it more probable than not,’ the burden [of proof] is discharged.”). In other words, balance of probabilities has the same meaning as “preponderance” or “more likely than not,” in jurisdictions that use those alternative formulations.

“burden of persuasion” means a party’s duty to convince a court to find in its favour on a particular element or defence to whatever standard is set by law;

“burden of production” means a party’s duty to produce sufficient evidence to support a finding in its favour on an element or defence;

“presumption” is not used within this code as the term simply refers to various evidentiary relationships or devices that go by other names, such as creating substantive rules or allocating burdens of production and persuasion;

“reasonable doubt” means the belief, after considering all of the evidence, that there is a plausible account of the facts in evidence that would support a finding of innocence.

Drafting Committee Note: All of these phrases refer to the relative plausibility of a party’s interpretation of the facts in evidence and the inferences derived therefrom.

See, e.g., Ronald J. Allen & Sarah A. Jehl, Burdens of Persuasion in Civil Cases: Algorithms v. Explanations, 2003 MICH. ST. L. REV. 937–98. Relative plausibility refers to the choice the fact-finder makes about which party’s “story” is believed. Fact-finders view proof at trial as comparative; they consider each side’s evidence and arguments, and then decide which interpretation of the facts and law is most likely to be accurate. This process of deciding which party’s story to adopt as true (or of constructing one’s own story based on information provided by the parties) is captured by the “more likely” language in our definition of balance of probabilities. “Reasonable doubt,” by contrast, means that, given the evidence, there is a plausible account of innocence, and thus the fact-finder must be in “doubt” about the truth of the criminal allegation. The Anglo-American legal world has struggled for centuries to give meaning to the concept of reasonable doubt. The definition suggested here captures both the best analytical understanding of the term and how fact-finders actually behave.

Subsection 5.2 Allocating the Burden of Persuasion in a Civil Case. In a civil proceeding, unless otherwise provided by Law:

- A. *Plaintiff’s Burden.* The plaintiff bears the burden of persuasion by a balance of probabilities on all elements of its case. Failure to satisfy the burden of persuasion shall result in a judgement for the defendant.
- B. *Defendant’s Burden.* The defendant bears the burden of persuasion by a balance of probabilities on all affirmative defences.

Drafting Committee Note: Although the TEA does not set the standard for civil cases as the balance of probabilities (or define the term), the case law is clear that in civil cases, a plaintiff must “prove her case on a balance of probabilities.” Tanzania Cigarette Co. v. Mastermind Tobacco Ltd., Comm. Case No. 11 of 2005, [2005] Tanz. C.A. (Nov. 28, 2005); see also Haji v. Alois, Civil Appeal 99 of 2004, [2006] Tanz. C.A. (“It is an elementary principle that he who alleges is responsible to prove his allegations.”); Mohamed v. Mohamed, Civil App. No. 31 of 2000, [2005] Tanz. C.A. (Oct. 19, 2005). If both parties present equally convincing evidence to support their respective positions, the case is to be decided against the party with the burden of persuasion. See Sapuli v. Mrope & Attorney General, [1985] T.L.R. 148, 153 (Tanz. High Ct. 1986).

As defined, the phrase, “unless otherwise provided by Law,” is meant to be comprehensive. For example, the proposed Subsections would not overturn the rule of Mtikila v. Attorney General, Misc. Civil Cause No. 10 of 2005, [2006] Tanz. High Ct. (May 5, 2006), which provides that after an individual citizen makes a prima facie showing that his constitutional rights have been violated, the burden shifts to the government to prove that the violation was justified by the public interest. It also preserves any higher standards of persuasion that exist for certain types of civil actions. Tanzania Cigarette Co. v. Mastermind Tobacco Ltd., Comm. Case No. 11 of 2005, [2005] Tanz. C.A. (Nov. 28, 2005) (suggesting that there might be a judicially created higher standard than balance of probabilities for fraud cases).

Subsection 5.3 Allocating the Burden of Persuasion in a Criminal Case. In a criminal proceeding, unless otherwise provided by Law:

- A. *Prosecutor's Burden.* The prosecutor bears the burden of persuasion beyond a reasonable doubt on all elements of the offence(s) charged. Failure to satisfy the burden of persuasion shall result in acquittal.
- B. *Accused's Burden.* The accused bears the burden of persuasion by a balance of probabilities on all affirmative defences.

Drafting Committee Note: This Subsection is consistent with the text of the TEA, see § 114(1) (providing that an accused shall be acquitted of the charged offence if the court “is satisfied that the evidence given by either the prosecution or the defence creates a reasonable doubt as to the guilt of the accused person in respect of that offence”), and with Court of Appeal precedent, see Republic v. Mwaipopo, Crim. App. No. 33 of 2004, [2005] Tanz. C.A. (June 3, 2005) (providing that the prosecution must “prove[] the guilt of the [accused] beyond all reasonable doubt”).

Some cases refer to the standard “beyond all reasonable doubt.” That standard is the same as “beyond a reasonable doubt” and those cases should be construed consistently with this Proposed Act. Tanzanian courts typically refer to the prosecution’s duty to prove a case beyond a reasonable doubt as the prosecutor’s duty to ensure that his case is “watertight.” See also Mohamed v. Republic, Crim. App. No. 170 of 2004, [2006] Tanz. High Ct. (Aug. 17, 2006) (“If the evidence is so strong against an accused person as to leave only a remote possibility in his favour which can easily be dismissed, the case is proved beyond reasonable doubts”(quoting Magendo Paul vs. Republic, [1993] T.L.R. 219 (Tanz. C.A.))). The proposed definition of reasonable doubt crystallises more precisely the meaning of the term.

The “beyond a reasonable doubt” standard applies only to the prosecution’s duty to prove the guilt of the accused. An accused does not need to prove his innocence beyond a reasonable doubt; rather, there must simply be doubts about the prosecutor’s case. Mwanamaganga v. Republic, [2009] 2 E.A. 282, 285–86 (Tanz. C.A. 2009); Hamisi v. Republic, [1997] T.L.R. 1, 2–3 (Tanz. High Ct. 1996).

Similarly, the “beyond a reasonable doubt” standard does not apply when the burden of persuasion lies on the accused to present evidence of an affirmative defence (as is usually the case). For example, an accused seeking to raise an insanity defence must persuade the court of his defence by a balance of probabilities, the standard for civil cases. Samson v. Republic, Crim. App. No. 61 of 2002, [2004] Tanz. C.A. (Aug. 6, 2004). Affirmative defences to criminal charges may be found throughout the Criminal Procedure Act, 1985 (see, e.g., §§ 216–220 (setting forth procedure for using insanity as a defence at trial); § 194 (setting forth procedure for using alibi as a defence at trial)) and, in particular, in the Penal Code (see, e.g., § 13 (“A person is not criminally responsible for an act or omission if at the time of doing the act or making the omission he is through any disease [sic] affecting his mind incapable of understanding what he is doing, or of knowing that he ought not to do the act or make the omission.”); § 14 (“Intoxication shall be taken into account for the purpose of determining whether the person charged [h]ad formed any intention, specific or otherwise, in the absence of which he would not be guilty of the offense.”); § 15 (“A person under the age of seven years is not criminally immature [sic] responsible for any act or omission.”))).

Subsection 5.4 Allocating the Burden of Production. Unless otherwise provided by Law, the party that bears the burden of persuasion on a particular element or defence bears the burden of production with respect to that element or defence.

Drafting Committee Note: This Subsection preserves what the DC believes to be the intent behind TEA §§ 110, 112, and 113—that when a party asks a court to rule in its favour, that party is responsible for providing the court with enough evidence to make that ruling.

This Subsection should not be interpreted to alter statutory allocations of burdens of production to an accused. See, e.g., Mwenda v. Republic, [1980] T.L.R. 86, 88 (Tanz. High Ct. 1980) (explaining a criminal statute prohibiting unauthorised gun possession that requires a prosecutor to prove possession of the gun but not that the possession was unauthorised; rather, the accused must produce evidence that he was legally authorised to possess the gun).

Subsection 5.5 Specific Allocations of Burdens of Persuasion. Subsections 5.5(A) –(F) provide specific allocations of burdens of persuasion. In the event that they conflict in a particular case, the conflicting Subsections do not apply, and the burdens of persuasion remain where they otherwise would be allocated by this Section or Law.

Drafting Committee Note: The DC recommends the elimination from the Proposed Act of the term “presumption.” The term has proven needlessly obscuring historically, and adds nothing analytically. Each of the uses of the term “presumption” can be accomplished without using the term, such as authenticating evidence, creating substantive rules or allocating burdens of persuasion or production. Sections 116-120 of the TEA use the concept of a presumption although not the term in order to allocate burdens of persuasion (and § 121 refers to a “rebuttable presumption”). Subsections 5.5(A)-(F) simply do that directly. Note that these provisions also abandon the distinction between permissible inferences and rebuttable presumptions in §§ 4–5 of the TEA because the specific provisions in Chapter IV (§§ 116–121) contain only “presumptions” that allocate burdens of persuasion. Adding to the conceptual confusion, § 121 of the TEA refers to a “rebuttable presumption” without defining the phrase.

The DC has declined to include an equivalent of § 122 in this Proposed Act. There are only two ways to interpret § 122. The first gives a court tremendous (and undesirable) leeway to assume facts not in evidence. The second simply states a natural reasoning process that occurs at trial—the court, after hearing evidence, infers the truth of certain matters. The DC does not believe this process needs to be codified either way.

Although the DC has kept the various provisions of the TEA in modified form, it does not recommend that these provisions be adopted. They are unnecessary meddling with the natural inferential process of the fact-finder. They also can cause needless complications, as demonstrated by Subsections 5.5(A) and 5.5(B), which can conflict.

- A. *Evidence that a person is dead.* When one party proves that a person has been alive within the past thirty years, the burden of persuasion is on the opposing party to show that he or she is dead. This Subsection shall not apply to any proceedings under the Law of Marriage Act.

Drafting Committee Note: Subsection 5.5(A) rewrites § 116.

- B. *Evidence that a person is alive.* When one party proves that persons who would naturally have contact with another person have not heard from that person within the past five years, the burden of persuasion is on the opposing party to show that he or she is not dead. This Subsection shall not apply to any proceedings under the Law of Marriage Act.

Drafting Committee Note: Subsection 5.5(B) rewrites § 117. Specific allocations of burdens of persuasion should be disfavoured. They amount to unnecessary interference with the natural reasoning processes of fact-finders, and in addition they can conflict with one another. One example of possible conflict is between Subsections 5.5(A) and 5.5(B). Tension between Subsections would clearly arise if there were evidence that a person had been alive ten years ago but had not been heard from by persons with whom he or she would naturally have contact with since then. In the event that they conflict, both Subsections 5.5 (A) and (B) are disregarded and the burdens of persuasion left where they otherwise would be.

- C. *Evidence of legal relationship.* When one party proves that individuals have been acting as partners, landlord and tenant, or principal and agent, and that relationship is at issue in the case, the burden of persuasion is on the opposing party to show that those individuals are not in such a relationship.

Drafting Committee Note: Subsection 5.5(C) rewrites § 118.

- D. *Evidence of ownership.* When a party proves that an individual is in possession of some thing, the burden of persuasion is on the opposing party to show that the individual is not the owner.

Drafting Committee Note: The DC believes that this provision, which is taken from § 119 of the TEA, should be eliminated. It is an example of a completely unnecessary attempt to regulate the natural inferential process of the fact-finder. Possession is evidence of ownership, as most people own what they possess and possess what they own. It is also inconsistent with Tanzanian case law, which has adopted the common law rule that, where an accused is found in possession of stolen property, he bears the burden of showing how he came into possession of such property by providing an “explanation [that] must be within the compass of the possible in human terms.” Maruzuku Hamisi v. Republic, [1997] T.L.R. 1–3 (Tanz. High Ct. 1996). We have refrained from suggesting repeal because this directly affects property relationships in the United Republic, a topic about which we are not competent to prescribe. We should note in addition that any statute that is adopted should also overturn the holding in the Maruzuku Hamisi case. The effect of shifting the burden is in essence to require the accused to prove his innocence rather than the prosecution prove his guilt.

- E. *Evidence of good faith.* When the good-faith nature of a transaction is at issue and one party proves that the other party stands in a position of active confidence relative to the first party, the burden of persuasion is on the second party to show that the transaction was in good faith.

Drafting Committee Note: Subsection 5.5(E) rewrites § 120.

- F. *Evidence of legitimacy of a child.* When one party proves that a child was born either during a marriage or within 280 days of the dissolution of the marriage and the mother remains unmarried, the burden of persuasion is on the opposing party to show that the child was not fathered by the husband of the child's mother.

Drafting Committee Note: Subsection 5.5(F) rewrites § 121. Again, the DC thinks this rule should be eliminated in light of modern techniques of determining maternity and paternity, but we not confident that we adequately understand the Tanzanian situation to make such a recommendation.

SECTION VI: JUDICIAL NOTICE & STIPULATIONS

This Section follows Section V on Burdens of Persuasion and Production because the court should take judicial notice whenever the appropriate burden of persuasion is satisfied such that no reasonable person could disagree that the burden of persuasion has been met. Judicial notice can save time and cost, and it promotes consistency in decision making. There is no reason to require formal evidence for obviously true matters. In a case involving an automobile accident, if one of the witnesses states that one car hit another, all understand the witness meant “automobile” for car. Requiring additional evidentiary proof of these equivalent terms would be an inefficient use of resources. If an accident occurs within Dar es Salaam, requiring formal proof that Dar es Salaam is in the United Republic, and thus that the Tanzanian courts have jurisdiction, would be an unnecessary waste of time. Similarly, when the parties agree that certain events transpired and will stipulate to certain facts, it is unnecessary to undergo the costs of producing evidence of what all agree took place. However, the matters a judge chooses to acknowledge without proof can have a drastic impact on the outcome of a case. We thus proceed cautiously; although the revisions we describe below expand the scope of subjects on which the Tanzanian judiciary may take judicial notice, we provide safeguards so that judicial notice cannot be used capriciously.

*Despite the lack of a general judicial notice provision in the TEA, which provides only a list of specific instances where courts must take judicial notice, the Tanzanian judiciary has developed a common law doctrine of taking judicial notice of obviously true facts. For instance, in *In re Constitution of the United Republic of Tanzania*, Misc. Civil Cause No. 77 of 2005, [2006] Tanz. High Ct. (Apr. 24, 2006), a suit challenging the constitutionality of the Elections Act, 1985, the High Court took judicial notice of the fact that “the majority of the voters are poor.” Similarly, the Court of Appeal has taken judicial notice of the mercantile practice of paying interest on debts. *Engen Petrol. Ltd. v. Tanganyika Inv. Oil & Transp. Ltd.*, Civil App. No. 103 of 2003, [2005] Tanz. C.A. (Sept. 8, 2005). Subsection 6.2 of this Section codifies this approach of taking judicial notice of obviously true facts without requiring evidence, subject to meeting the necessary burden of persuasion such that no reasonable person would dispute this finding.*

In addition to notorious facts, most nations provide numerous statutory provisions providing for the taking of judicial notice on specific matters. PHIPSON ON EVIDENCE ¶ 3–02 (16th ed. 2005). The TEA is no exception. It provides nine facts of which a court must take judicial notice, in addition to any additional judicial notice requirements in other Tanzanian laws. We retain these provisions and add a tenth to make clear that judicial notice shall be taken if any other Tanzanian statute so requires. Some provisions in other statutes may be more controversial than the discretionary judicial notice provisions because they might admit evidence that would lead to incorrect inferences and results. However, Tanzanian law provides that formal proof is unnecessary for these facts and so these rules of evidence yield to these Parliamentary decisions.

Subsection 6.1 Result of Judicial Notice and Stipulations to Facts. No fact of which a court takes judicial notice or accepts as a stipulation need be proved.

Drafting Committee Note: This Subsection is adapted from the text of TEA § 58. The DC assumes that Tanzanian courts use these types of facts—those taken by judicial notice and those stipulated to by the parties—as any other fact, and reasonably infer all other relevant facts of consequence that the inferential chain will support, as described in Section II. To the extent Tanzanian courts do not treat

these facts in the same manner as any other proven fact in the inferential chain, this Proposed Act will allow such inferences to be made.

Subsection 6.2 Judicial Notice of Adjudicative Facts. The court may take judicial notice of a fact where no reasonable person could disagree with the existence of the noticed fact, given the burden of persuasion applicable to it, because it:

- A. is generally known within the court’s territorial jurisdiction; or
- B. can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.

Drafting Committee Note: Subsection 6.2 allows the court discretion to take judicial notice of adjudicative or historic facts so notorious or so well established within the jurisdiction of the court that they may be accepted without further enquiry. Most common law evidence systems have such a rule. For instance, in India, “judicial notice is taken of various facts the universal notoriety or regular recurrence of which in the ordinary case of nature or business has made them familiar to the judges.” S.C. SARKAR, LAW OF EVIDENCE IN INDIA & BURMA 567, § 57 (7th ed. 1946) [hereinafter SARKAR]; see also, e.g., England, PHIPSON ON EVIDENCE ¶ 3–02; Kenya, KEA § 60(1)(o); United States, FED. R. EVID. § 201(b) (providing the modern language for this proposed rule). The purpose of the provision is to save time and cost by not requiring evidence and pleading on those issues that are already within the knowledge of the court’s jurisdiction.

This Subsection, while consistent with Tanzanian court decisions, see In re Constitution; Engen Petro, will reverse the outcomes of some case holdings where a court declined to take judicial notice. See, e.g., Tanzania Cigarette Co. v. Mastermind Tobacco Ltd., Comm. Case No. 11 of 2005, [2005] Tanz. C.A. (Nov. 28, 2005) (declining to take judicial notice that a newspaper is in wide circulation throughout Tanzania because “that fact . . . is not expressly listed under s. 59 of the Evidence Act 1967”); Mbengu v. Amani, Civil App. No. 12 of 2001, [2004] Tanz. C.A. (Jan. 16, 2004) (holding that a court could not take judicial notice of a report by the Principal Secretary, Minister of Land, because it was not covered by § 59(1) of the TEA). The listing of a fact for taking judicial notice is no longer dispositive; instead, judicial notice shall be taken when, given the burden of persuasion applicable to the fact, no reasonable person could disagree with the existence of the fact.

The DC cautions that this proposed Subsection is not an invitation for a court to take judicial notice of any fact. The fact must be “generally known” and “cannot reasonably be questioned.” Whether either is true is determined in part by the burden of persuasion applicable to the fact in question. In civil cases, if no reasonable person could disagree that some fact is more likely than not true, it is pointless to spend resources on litigating that fact. In criminal cases, by contrast, judicial notice should not be taken unless no reasonable person could disagree that some fact is true beyond reasonable doubt. In practical terms the distinction between these two standards is not going to vary much. If there is residual doubt about a fact, a judge is likely to want to hear evidence regardless of the applicable standard of proof under Section V. This Subsection does not anticipate that judicial notice will be taken liberally in criminal cases.

The proposed provision operates in a similar manner to the appellate court decisions of the United Republic’s neighbouring countries. For instance, in Atemo v. Imujaro, an estate was disputed between two alleged widowers, one of whose family paid her marital dowry after the decedent died but prior to his burial. [2003] 1 E.A. 4, 6 (Kenya C.A.). The Kenya Court of Appeal took judicial notice of the “notorious fact” that no marriage contract is complete before a dowry is paid, but refused to take notice that their particular tribe had a custom where a marriage is complete if the dowry is paid after death but before burial. Id. at 7. The latter custom still needed evidentiary proof.

This proposed Subsection emphasises that the court may not equate its own beliefs with the general knowledge of the community but must be open to the presentations of the parties. The Uganda Supreme Court and Court of Appeal both chastised a High Court judge for relying on his personal knowledge of the appellant company’s negligent driving record. Uganda Breweries Ltd. v. Uganda Rys., [2002] 2 E.A. 634, 640 (Uganda Sup. Ct.) (stating that the court needed to consider only the evidence presented at trial). Similarly, the Kenyan Court of Appeal rejected an appellate court’s effort to use judicial notice on the time of morning dawn to say there was enough light for a positive identification when all sides agreed it was dark outside. Haka and others v. Republic, [2004] 2 E.A. 77, 81 (Kenya C.A.). On second appeal, the Court of Appeal cautioned judges to not create their own theories through judicial notice and instead stay within the evidence and the counsel’s speeches. Id. This is in accord with the rule from India. See SARKAR at 568, § 57 (“[A] judge cannot import knowledge of facts which has come to him from other [non-trial] sources.”). The taking of judicial notice for notorious facts is well-accepted and, when these safeguards are employed, can greatly assist the trial process.

Subsection 6.3 Judicial Notice of Non-Adjudicative Facts.

- A. Subject to the requirements of Subsection 6.3(B), the court shall take judicial notice of the following non-adjudicative facts:
 - i. all written laws, rules, regulations, proclamations, orders, or notices having the force of law in any part of the United Republic;

Drafting Committee Note: Tanzanian courts appear to take judicial notice of these facts frequently. See, e.g., Stanbic Bank Tanzania Ltd. v. Abercrombie & Kent (T) Ltd., Civil App. No. 21 of 2011, [2006] Tanz. C.A. (Aug. 3, 2006) (“[J]udicial notice of the fact that the appellants['] appeal had been dismissed and, therefore, the High Court findings of fact . . . remain intact. Only the findings of fact by the High Court to the extent that they are relevant to the cross-appeal can now be considered.”); Ndyanabo v. Attorney General, Civil App. No. 64 of 2001, [2002] Tanz. C.A. (Feb. 14, 2002) (taking judicial notice of the minimum wage in the civil service).

For judicial notice of orders or notices of judicial determinations, notice should only be taken for those facts that make up the particular case in dispute (including the existence of a decision). Any part of a court’s opinion dealing with legal reasoning and the law-making processes of the judiciary is not a candidate for a judge taking judicial notice. This distinction ensures that the common law of the United Republic can continue to grow without a court merely taking notice of a past

decision to decide this case. Precedential impact of past decisions is governed by current judiciary practice; this DC note should not be construed to impact precedent or the rules of the common law in any way.

- ii. the existence and title of societies or other bodies whose registration has been publicised in the Gazette;

Drafting Committee Note: Subsection 6.3 is a modernisation of the language of TEA § 59(1)(b).

- iii. the course of proceedings of Parliament;
- iv. all seals of all the courts of the United Republic duly established and of notaries public, and all seals which any person is authorised to use by Law;
- v. the accession to office, names, titles, functions, and signatures of the persons holding any public office in any part of the United Republic, if the fact of their appointment to such office is notified in the Gazette;
- vi. the existence, title, and national flag of every State or Sovereign recognised by the United Republic;
- vii. the divisions of time, the geographical divisions of the world, and public festivals, feasts, and holidays notified in the Gazette;
- viii. the commencement, continuance, and termination of hostilities between the United Republic and any other State or body of persons;
- ix. the names of the members and officers of the court, and of their deputies and subordinate officers and assistants, and also of all officers acting in execution of its process, and of all advocates and other persons authorised by Law to appear or act before it; and
- x. all other matters of which it is directed by Law to take judicial notice.

Drafting Committee Note: The list provided in Subsection 6.3(A) is the same as that in TEA § 59(1), with the addition of Subsection 6.3(A)(x). This provision is borrowed from Kenya Evidence Act (Ch. 80) (R.E. 2008) (KEA) § 60(1)(p). The DC reviewed both the KEA and the 1872 Indian Evidence Act (IEA) for additional items that might be included in this proposed Subsection, but ultimately rejected adding these items:

- (i) *Articles of War for the Armed Forces [KEA § 60(1)(c)];*
- (ii) *the rule of the road on land or at sea or in the air [id. at (l); see also IEA § 57(12)];*
- (iii) *the ordinary course of nature [KEA at (m)];*
- (iv) *the meaning of English words [id. at (n)]; and*
- (v) *all matters of general or local notoriety [id. at (o)].*

The DC does not recommend including these items for required judicial notice. For example, “the meaning of English words” can be contextual and determine a substantive right. Many contract disputes may revolve around what the parties’ intended use of a particular word was. The law of evidence should not mandate this meaning; the parties’ production of evidence to meet their burden of persuasion should. Judicial notice is thus inappropriate. However, this Note should not be understood to exclude any of these items from judicial notice under Subsection 6.2, which covers “all matters of general or local notoriety,” including these items where they meet that Subsection’s test.

- B. When considering taking judicial notice of facts under Subsection 6.3(A) and also in matters of public history, literature, science or art, the court may consider any pertinent material.

Drafting Committee Note: This is a modernisation of TEA § 59(2)’s language. The Drafting Committee believes this should be understood to be a generally permissive grant to the court to refer to the appropriate sources to ensure the propriety of judicial notice. The amended language allows the court to consider “any pertinent material,” rather than restricting judicial notice to “appropriate books or documents of reference.”

Each item listed in Subsection 6.3 may be judicially noticed pursuant to Subsection 6.2. This proposed Subsection retains this list to ensure judicial notice continues to be taken of these facts.

Subsection 6.4 Procedure for Taking Notice. The court may hear evidence from a party on the propriety of taking judicial notice. The court shall not take judicial notice unless:

- A. the party making the request has given each adverse party such notice, if any, as the court deems necessary to enable the adverse party fairly to prepare to meet the request; and
- B. any party opposing judicial notice has the opportunity to present evidence that such facts are inaccurate.

Drafting Committee Note: Subsection 6.4 is a modernisation of TEA § 59(3). It makes clear that the court may decline to take judicial notice if the requesting party does not provide the information the court needs to ensure its accuracy. Without accurate information there is no reason to take judicial notice. To ensure a fair trial, the DC has also proposed that courts require the party requesting notice to notify adverse parties of its intent to do so.

Subsection 6.5 Stipulations to Facts. The court may take judicial notice in any civil proceeding of: (1) any facts the parties or their agents agree to admit at the hearing; (2) any facts that, before the hearing, the parties agree in writing to admit; or (3) any facts that the parties admitted in their pleadings under any rule of pleading in force at the time. The court may, in its discretion, require the facts admitted to be proved otherwise than by such admissions.

Drafting Committee Note: This Subsection retains the text of TEA § 60 with a small amendment to incorporate it within the larger structure of this Section. The DC retained the limitation of stipulations to civil proceedings in the proposed

Subsection's text. However, the DC notes that India does not require that stipulations be limited to civil cases. See SARKAR at 570, § 58. The Tanzanian context may or may not continue to require this limitation. To the degree that there are concerns that the unrepresented accused will agree to stipulate to facts without understanding their substantive rights, the DC suggests retaining this limitation. However, if the court's discretionary exclusion (in the interests of justice) would be enough to protect the accused from agreeing to fictitious or colourless facts, this limitation should be struck to ease trial burdens similar to civil stipulations. If stipulations are extended to criminal cases, the DC recommends also amending the Subsection to ensure the accused voluntarily stipulates to the facts. Such language should not be modelled on the TEA's § 34B(d)–(e) requirement for timely objection prior to admission of written documents, since that does not protect the accused who are not familiar with the TEA.

The DC assumes that civil stipulations are being used in a manner similar to how India uses this device (i.e., stipulations are generally not admissible in other proceedings but they continue to have effect in subsequent proceedings of the same trial). SARKAR at 569, § 58. This Subsection overrules any contrary judicial practice under TEA § 60.

Subsection 6.6 Recording of Facts Admitted by Judicial Notice or Stipulation. The court shall include in the record of the trial a statement of all facts admitted by stipulation or of which judicial notice was taken under this Section, along with the reasons for noticing these facts.

Drafting Committee Note: As an appellate court can review a trial court's ruling, all facts of which the court takes judicial notice need to be in the record. At the common law, many judges would not include these findings in the record. This practice caused needless dispute in the United States over what the trial court found during trial. AM. L. INST., MODEL CODE OF EVIDENCE 324 (1942). This may not be a problem in the United Republic, as the DC did not find an appellate case with this particular dispute; however, to be safe, the DC proposes adding this Subsection to make clear that the court must provide sufficient information in the record to allow appellate review of the inferential chain from a fact of which the court took judicial notice to the overall judgement.

SECTION VII: AUTHENTICATION

The only “universal rule” of evidence law is that “all evidence must be shown to be what it purports to be”—which is what it means to “authenticate” evidence. Authentication is a crucial threshold inquiry that precedes all determinations of admissibility. After a determination that evidence is authentic, its contents may be examined to assess whether it is admissible in light of various other evidence Subsections, such as best evidence, hearsay, and relevancy. This important distinction, between the authenticity and admissibility of evidence, is not contained within the language of the TEA.

The TEA addresses authentication of evidence through a series of ad hoc Subsections, such as §§ 88–99, which only govern authentication in specific factual situations, without any general guiding principles. The DC believes that adopting broad principles of authentication is a critical reformulation and modernization of the substance of the TEA, and it will provide courts with a systematic but adaptable way to address evidence when it is first introduced. Subsection 7.2(A) is a general authentication rule that provides an overarching evidentiary standard to authenticate evidence. Subsection 7.2(B) supplements 7.2(A) by providing a non-exhaustive list of illustrations that hopefully provide guidance concerning how authenticity determinations are to be made. Subsection 7.2(B)(iii) is present to emphasise that courts are to make common sense judgements about authenticity and not apply rigid rules. It is perhaps unnecessary, but the conceptual shift in this Section from the rules-based approach of the TEA to the common sense judgement approach of the Proposed Act deserves the emphasis provided by this Section.

A further comment on the relationship between authenticity and relevancy is in order. Because evidence cannot be admitted unless it is relevant, there is a sense in which authenticating evidence includes a demonstration that the evidence is indeed relevant. A party proffering evidence purports that evidence to be relevant. The standard for doing so is contained within Subsection 2.3, and requires the admissibility of evidence over a relevancy objection “upon, or subject to, a finding that the evidence could rationally influence a reasonable person’s inferential process concerning any material proposition.” Thus, the proffering party must demonstrate that the evidence contains, or will otherwise reveal, information that is relevant to the pertinent factual issues—the material propositions—of the case. In other words, the proffering party must demonstrate that the evidence, being indeed what the proponent claims it to be, is relevant to a material proposition in the case.

Subsection 7.3, “Self-Authenticating Evidence,” is a new general rule that embodies the TEA in substance. The term “self-authenticating” replaces the term “presumption.” See the Drafting Committee Notes to Section V. Subsection 7.3 serves policy goals such as judicial economy by exempting certain types of evidence from Subsection 7.2 procedural scrutiny, unless the party opposing admission demonstrates a genuine issue concerning its authenticity. Many of these exemptions are taken whole-cloth from the TEA, and are merely re-written and re-organised to improve logical flow and clarity.

Beyond linguistic and organizational improvements, this Section improves the treatment of electronic evidence—a vital concern within the Tanzanian legal community. Unsurprisingly, the drafters of the TEA did not foresee such technological innovation, and thus did not create sections to assess the authenticity or admissibility of electronic evidence—which may lead to categorical exclusion. Indeed, the TEA contains a problematic implication that reliable forms of electronic evidence, which might otherwise be admissible, are inadmissible unless they fit within one of the TEA’s few and very narrow provisions. For example, Section 40(A) of the TEA only provides for the admission of select forms of

electronic evidence in criminal cases, to the exclusion of other forms of electronic evidence that have not been specifically defined. Similarly, Section 78(A) provides for the general admission of bankers' books, by virtue of their reliable creation. But Section 78(A) inexplicably does not extend to the wide-range of electronic business records that are created with the same procedural reliability. Many stakeholders have called for evidentiary law reform that would allow for broader admission of electronic documents. However, this problem is conceptually misidentified, as electronic evidence first faces a problem of authentication, not admissibility. Like all other types of evidence, it must be shown that electronic evidence "is what it purports to be" before it may be rendered admissible.

*Because the DC also lacks foresight concerning technological innovations, we recommend that the United Republic adopt "technologically neutral" rules. The Proposed Act accomplishes technological neutrality by defining "document" in a conceptually abstract way, so that it can adapt to future technological innovations. See Subsection 1.1. With this approach, the need for specialised rules is reduced, as electronic documents can be authenticated using the general principles of authentication provided in this Section. Additionally, this approach to electronic evidence is informed by significant comparative law research, including South Africa, Ireland, and the United Kingdom. See generally, STEPHEN MASON, *ELECTRONIC SIGNATURES IN LAW* 3RD (2012); Murdoch Watney, *Admissibility of Electronic Evidence in Criminal Proceedings: An Outline of the South African Legal Position*, 1 J. INFO. L. & TECH. (2009). See also LAW REFORM COMMISSION OF IRELAND, *CONSULTATION PAPER ON DOCUMENTARY AND ELECTRONIC EVIDENCE*, (2009) available at http://www.lawreform.ie/_fileupload/consultation%20papers/cpDocumentaryandElectronicEvidence.pdf. We were also aided by the very helpful memo to the DC by Prof B. Rutinwa, Dean the School of Law, University of Dar es Salaam, *The Extent to which the Evidence Act, 1967 Recognises Electronic Evidence*, Memo to Drafting Committee (2012). We discuss electronic evidence in greater detail below in the DC Notes to Subsections 7.2(B)(viii) and (ix).*

This Section is written broadly and intended to include demonstrative aids, which are distinct from real, demonstrative, and documentary evidence. Demonstrative aids are used during a witness' testimony to enable the witness to testify more clearly about the witness' first-hand knowledge. Common examples of demonstrative aids are not-to-scale maps or nautical charts and visual aids such as a flow charts or pie graphs—all of which assist the fact-finder with following, understanding, and summarizing information presented in the witness' testimony. The TEA apparently does not provide for the use of demonstrative aids, and the DC believes that incorporating the use of demonstrative aids may resolve some of the difficulties of presenting complex information through a witness' testimony. Demonstrative aids are particularly helpful in complex litigation matters, as they allow a fact-finder to view graphs, flow-charts, informal drawings, or other visual presentations that can bring together pieces of technical, long, or complex testimony. The standard for using a demonstrative aid is captured by the general authentication requirement of showing the exhibit to be what it purports to be—which would be something that would facilitate the presentation of reliable testimony.

Subsection 7.1 Definitions. The following definitions apply throughout this Section.

"document" has the meaning given in Subsection 1.1;

"legal custodian" has the meaning given in Subsection 1.1;

"private documents" has the meaning given in Subsection 1.1;

“public documents” has the meaning given in Subsection 1.1.

Drafting Committee Note: The definitions in this Subsection are clarifications of those already contained in the TEA §§ 65, 66, and 85(2).

Subsection 7.2 General Standard of Authentication and Illustrations.

- A. **General Authentication Standard.** The proponent of evidence must produce evidence sufficient to support a finding that the proffered item is what the proponent purports it to be.

Drafting Committee Note: This is a modernisation proposal. As discussed in the overview, this Subsection creates a general rule for authentication, which does not exist in the TEA, and eliminates the implication of the TEA that proffered evidence should be barred from admission, regardless of its actual authenticity, when the court cannot identify a specific rule that governs the type or surrounding factual circumstances of the evidence. Additionally, there are special procedures for establishing authenticity of certain types of evidence; these procedures include those provided throughout the remainder of Section VII or by any other Tanzanian Law. This Section does not provide for admission of evidence that is otherwise barred by Law.

Under Subsection 7.2(A), the proponent of evidence has a burden to introduce evidence that is sufficient to show that the proffered evidence is what the proponent claims it to be. This functions under a reasonableness inquiry—whether a reasonable person could conclude that the exhibit or evidence is what the proponent claims it to be, based upon the evidence presented.

What appears to be an infinite regress (one must produce evidence about evidence . . .) is cut off by other Subsections. For example, most authentication evidence will come from witnesses with first-hand knowledge. Consistent with this rule, Subsection 9.2 requires sufficient evidence to support a finding that a witness possesses first-hand knowledge, but that evidence may come from the testifying witness.

If another law provides authentication standards for evidence, then the authentication threshold is a showing that the proffered evidence is what the relevant Law governs.

- B. **Illustrations of Authentication.** Subsections 7.2(B)(i)-(xii) are illustrations of evidence that typically satisfy the general authentication requirement of this Subsection. These Subsections are illustrations only, and do not constitute an exhaustive listing.

Drafting Committee Note: This is a modernisation, clarification, and consolidation proposal. Subsection 7.2(B) provides twelve examples of acceptable means of providing proof of authenticity of proffered evidence. In line with Chapter III, Part V of the TEA, they are primarily applicable to documentary evidence, and solely constitute illustrations of proper methods of authentication. This Subsection does not limit the means available to a proponent of proving authenticity. The general provision of Subsection 7.2(A) controls the issue of proof of authenticity; proponents then may use: (1) any of the illustrations included under Subsection 7.2(B), or (2) any combination of the illustrations included under Subsection 7.2(B),

or (3) any other proof that may be available to that proponent to satisfy their obligation of showing that the proffered evidence is what they claim it to be.

The first three Subsections, Subsections 7.2(B)(i)–(iii), are the broadest examples of methods of authenticating proffered evidence. While evidence of first-hand knowledge or reliable processes is most trustworthy, the combination of these types of evidence with circumstantial evidence is often critical to authenticating proffered evidence. The next seven Subsections, Subsections 7.2(B)(iv)–(x), are very common, but much narrower than their predecessors. Subsection 7.2(B)(xi) may actually serve as both an inclusive and exclusive authentication method, as it defers judgement to the other Laws of the United Republic.

- i. *First-hand Knowledge.* Testimony by a witness with first-hand knowledge that the evidence is what it purports to be, including that the witness possesses first hand-knowledge as provided for in Subsection 9.2.

Drafting Committee Note: This is a modernisation proposal. Evidence may be authenticated by the testimony of witnesses with first-hand knowledge that the evidence is what the proffering party claims it to be. This testimony is often referred to as “laying the foundation.” Under this provision, a witness who purports to have first-hand knowledge may testify to the facts that establish his or her own first-hand knowledge. See Subsection 9.2 (Establishing First-Hand Knowledge).

One of the most important uses of first-hand knowledge testimony is to establish that a proffered piece of “real evidence”—a physical object in a case—is authentic. Authentication is not rule bound, and may be accomplished in any fashion consistent with common sense. This is normally done either through its distinctive characteristics (see Subsection (B)(iii) below) or because it has been kept in a proper chain of custody, but again these are simply generalities rather than rules. For example, it could easily be adequate to authenticate an exhibit that it has been imprinted with a specific serial number or inscribed with initials of the police officer who took the evidence from a crime scene. Similarly, items that are quite distinctive, memorable (for example, a ransom note written on a napkin in green pen), or difficult to replicate can normally be authenticated by anyone with first-hand knowledge of the characteristics. Alternatively, establishing a formal chain of custody would normally suffice to authenticate. Proof by chain of custody requires evidence from each person who had custody of the item in question, showing that it remained unchanged from its initial seizure until its appearance in the courtroom. It is typically used in criminal cases in connection with evidence seized during the course of an arrest or legal search, or with evidence confiscated from a crime scene. It is also frequently used in connection with the introduction of voice-recorded conversations (i.e. wiretapping evidence).

At common law, proof of a proper chain of custody was strenuously enforced and required three types of testimony: (1) testimony that a piece of evidence is what the proponent purports it to be (i.e. a slide with a blood sample is indeed the blood of the accused); (2) testimony of continuous possession by each individual who has held possession of the evidence, from the moment it is seized until the moment it is presented in court; and (3) testimony by each person who has had possession that the particular item of evidence was not tampered with, and has remained in

substantially the same condition, from the moment one person took possession until the moment that person released the evidence into the custody of another (i.e. testimony that the evidence was stored in a secure location, such as a police station locker, where no one but the custodian had access to it).

It is important to emphasise that under the Proposed Act, the common law chain of custody would be sufficient but not necessary to authenticate evidence. The Proposed Act requires that evidence sufficient to support a finding of genuineness must be provided, but creates no explicit rules as to how that may occur. Such evidence could be provided even though a link in the common law chain of custody was missing. The court is to use its common sense in evaluating the proffer. If the court concludes that the proponent has provided sufficient evidence to support a finding of the genuineness of the proffer, the evidence should be admitted regardless whether the formalities of the common law chain of custody requirement were satisfied.

- ii. *Evidence about processes or systems.* By showing that the evidence is a product of a reliable record keeping system or process and was in safe custody leading up to authentication at trial.

Drafting Committee Note: This provision is a clarification of § 99(2) of the TEA. If a routine process or system exists, and the evidence is a product of the process or system, the evidence is generally reliable unless particular doubt is raised about the specific application in question. In some instances it may also be necessary to demonstrate that the proffered evidence was kept in a reasonably safe manner and that there is little reason to think it has been tampered with prior to being proffered in court. For example, if accounting records are always kept the same way by the same employee and then the records once completed are placed in a filing cabinet in the office, evidence that this routine occurred should be adequate to authenticate the records. We reiterate, though, that these are all examples and not rules. The court is to exercise good judgement about whether there is sufficient evidence to find that the evidence is what it purports to be.

- iii. *Distinctive Circumstantial Evidence.* If the totality of circumstances regarding the proffered evidence provides sufficient reason to believe the evidence is authentic. These circumstances include, but are not limited to, the item's distinctive characteristics, a process or system producing accurate results, or any other such means.

Drafting Committee Note: This provision is a modernisation suggestion. This residual illustration of authentication is possibly the most significant divergence from the TEA; indeed, this illustration essentially is a recapitulation of Subsection 7.2(A). It is included to emphasise that authentication involves a common sense judgement from the court concerning the genuineness of the proffer in question. Trials often involve unique, challenging pieces of evidence, especially with the rapid evolution of technology. In each case, the question remains the same: Is there sufficient evidence to support a finding that the item in question is what it purports to be?

- iv. *Documents in proper custody.* The contents of evidence less than twenty years old produced from any custody that the court considers proper. This extends to the authenticity of the signature, handwriting,

and every other part of a document that purports to be in the handwriting of any particular person 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.

Drafting Committee Note: This provision reproduces § 99(1) of the TEA. The DC has been unable to uncover the modern significance of this provision. We note it is taken word for word from the IEA (the IEA referred to documents less than thirty years old). Because the Proposed Act uses such matters as illustrations only, no harm can be done by including this here.

- v. *Non-Expert Opinion on Handwriting.* Opinion of a non-expert that a handwriting or signature is genuine, if the non-expert:
 - a. is familiar with the handwriting and/or signature based on observance, receipt, or correspondence; and
 - b. has not acquired familiarity for a purpose related to the current litigation.

Drafting Committee Note: This provision is a modernisation suggestion. Handwriting is normally sufficiently distinct that a person familiar with the handwriting can identify it. It consolidates §§ 49 and 69.

- vi. *Expert Handwriting Comparisons.* Opinion by a qualified expert comparing the handwriting and/or signature in question with an authenticated sample.

Drafting Committee Note: This is a clarification of § 47 of the TEA. Subsection 7.2(B)(vi) gives the obvious example that a court may rely on a qualified expert to authenticate handwriting. However, this Subsection does not exempt an expert's opinion from compliance with Section X, which requires that a proponent must show that the expert has the requisite expertise before the court can rely on the expert's testimony, which includes testimony regarding authenticity.

- vii. *Opinion on Voice Recognition.* Opinion by a non-expert who can identify a speaker by his or her voice, based upon hearing the voice under circumstances that connect it with the alleged speaker. Identification of the voice may be made from hearing it first-hand or through electronic transmission or recording. In deciding whether to hear the evidence, the court may choose to consider among other matters:
 - a. the competence of the operator of the recording device;
 - b. the integrity of the recording equipment;
 - c. the absence of material alterations;
 - d. the identification of relevant sounds or voices.

Drafting Committee Note: This provision is a modernisation proposal and is not part of the TEA. The illustration suggests a determination of authenticity when a

layperson has knowledge of a voice under circumstances that a reasonable person, using common sense, would deem reliable.

- viii. *Evidence about a telephone conversation.* Telephone, or other electronic voice conversations, by evidence that a call was made to the recipient's number or address, which was assigned at the time by a telecommunications service provider, to a particular person or business, if:
 - a in the case of a person, circumstances, including self-identification, demonstrate that the person who answered the call is the intended, assigned recipient; or
 - b. in the case of a business, the call was made to a place of business and the conversation related to business reasonably transacted over the phone.

Drafting Committee Note: This is a modernisation proposal. Authenticating a telephone conversation does not prove the contents of the conversation. Rather, a successfully authenticated telephone conversation results in showing that the conversation the proponent offers indeed occurred and that the participants of the conversation were who the proponent claimed they were. A purported telephone conversation may be authenticated with testimonial, circumstantial, and documentary evidence. Typically, the proponent will elicit testimony from a sponsoring witness who was the caller and therefore can testify that a phone conversation took place at the time in question and that a phone conversation occurred with the individual assigned to the phone number (by the public telephone provider). The proponent can also offer evidence of phone records to support the witness' testimony. A witness can often supply additional corroborating circumstantial evidence (such as distinctive characteristics or voice recognition, as noted in Subsections 7.2(B)(iii) & (vii) respectively) or evidence that the conversation would only occur with the recipient party. In the case of a business, the proponent might provide evidence that the conversation was related to a business that reasonably includes transactions over the phone.

This provision echoes but replaces the principle underlying TEA § 97, which addresses the need to authenticate telegram messages, and is a good example of a general illustration. As technology changes, the question facing the court remains the same: is there sufficient evidence to find the proffered evidence is what it purports to be. Social and technological trends have diverged from communicating via traditional "faceless" telephone conversations. Individuals are no longer required to use a telephone line, with a specific telephone number, designated by a public telephone service provider company, to conduct a phone conversation. Voice conversations are conducted via landlines, cellular towers, and the Internet. Notwithstanding any technological change, the question for the court is whether a reasonable person could find the evidence to be what it purports to be, and the proponent of such evidence may show this to be true in any reasonable manner.

- ix. *Evidence of electronic communications.* Emails and other forms of electronic communication may be authenticated by reference to the appearance, contents, substance, internal patterns, or other distinctive characteristics, of the electronic communication, taken in conjunction

with circumstances. In deciding whether to hear the evidence, the court may choose to consider among other matters whether:

- a. there is evidence that the electronic message was received;
- b. the specific electronic message bore the customary format of that type of electronic message, including the addresses of the sender and recipient;
- c. the electronic message address was the same as the electronic message address on a message sent to the party who has admitted receipt of that particular electronic message;
- d. a recipient of an electronic message in question sent a reply electronic message;
- e. an electronic message was sent in reply to one sent to the person ostensibly replying;
- f. the content of the electronic messages indicated the alleged sender's knowledge of facts that were distinctly known by the sender, or to a discrete number of persons including the sender;
- g. the body of the electronic message contained the typewritten name, nickname, or alias of either the recipient or the sender;
- h. the content of the electronic message is what would be expected if the electronic message is what it purports to be;
- i. following receipt of the electronic message, the recipient witness had a discussion with the alleged sender, and the conversation reflected the sender's knowledge of the contents of the electronic message;
- j. the electronic message contained the electronic signature of the sender.

Drafting Committee Note: Emails and other forms of electronic communications can be authenticated in the same general manner as other forms of evidence, although each form of communication presents its own idiosyncrasies and challenges. For example, many email addresses are created by the user and lack the reliability of independent assignment of phone numbers by a public phone company. However, many individuals incorporate distinct qualities into their email settings that may make their emails as identifiable as writings or phone calls, such as an individual's name, a unique set of numbers the individual self-identifies with, and a personalised signature block. SEE JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S EVIDENCE MANUAL (9th ed. 2011). Rather than try to provide by rule for the bewildering complexity of different and evolving forms of communication, this illustration emphasises the central component of Section VII that any and all proffers of evidence must be evaluated on their own terms employing common sense. The proponent of such evidence must provide evidence of sufficiently identifying characteristics to authenticate proffers of electronic evidence, whatever

the form of the evidence may be. The opponent of such evidence may always object to the authenticity of a proposed item of electronic communication.

The courts of the United Republic are struggling to reconcile the language of the TEA with the realities of the evolution of electronic forms of communication. As Dean Rutinwa, supra, points out, one example is Lazarus Mirisho Mafie and Another v. Odilo Gasper Kilenga. Commercial Case No. 10 of 2008 (Unreported.) The court interpreted “document” in the TEA to include emails and provided for admission of emails when the following questions are answered affirmatively:

- (1) Is the email relevant as determined under the TEA? [Cap.6 R.E. 2002] (Does it have any tendency to make some fact that is of consequence to the litigation more or less probable than it otherwise would be?);*
- (2) If relevant under the TEA, can the proponent show that the email is what it purports to be to show authenticity? [Cap.6 R.E. 2002];*
- (3) If the email is offered for its substantive truth, is it hearsay as defined under the rules in the TEA? [Cap.6 R.E. 2002] If so, is it covered by an applicable exceptions to the hearsay rules under the TEA? [Cap.6 R.E. 2002];*
- (4) Is the email that is being offered as evidence an “original” or “duplicate” under the original writing rule? If not, is there admissible secondary evidence to prove the content of the email?; and*
- (5) Is the probative value of the email substantially outweighed by the danger of unfair prejudice or other identified harm?*

Another example is Trust Bank Tanz. Ltd. v. LeMarsh Enters, Ltd., Commercial Case No. 4 of 2000 (HC)(unreported), where the Commercial Division admitted a computer printout in a landmark case over a strenuous objection.

- x. *Opinion as to Relationships.* Opinion of any person with first-hand knowledge as to the relationship of one person to another, based upon conduct, familial relationship or other reliable knowledge.

Drafting Committee Note: This is a consolidation of § 52 of the TEA. Under the Law of Marriage Act, such opinion testimony is not sufficient to prove the legal existence of marriage. However, the opinion evidence as to the relationship may provide the court with context for further evidence regarding the legitimacy of the marriage in compliance with the Law of Marriage Act.

- xi. *Ancient Documents and Data Compilations.* For documents or data compilations that are at least 20 years old when offered, evidence that it:
 - a. is in a condition that raises no suspicion as to its authenticity; and
 - b. was in a place where it would likely be if authentic.

Drafting Committee Note: This Subsection is a modernisation change, and adds a provision to the Proposed Act that does not exist in the TEA. The rationale of this illustration is that certain documents if preserved for long enough under the

specified conditions are very likely reliable. When there is little reason to doubt the age or method for storing an ancient document, the fact-finder should be inclined to accept the document as reliable.

- xii. *Methods Provided by Law.* Any method of authentication allowed by or prohibited by Law.

Drafting Committee Note: This is a modernisation change, and no correlating provision exists in the TEA. This provision prevents conflict between the Proposed Act and other Law. For example, the authenticity of a marriage appears to be controlled by Law of Marriage Act. This proposed Subsection has no effect on such substantive provisions and merely acknowledges deference to them.

Subsection 7.3 Self-Authenticating Evidence. Evidence is self-authenticating under the following circumstances, unless the opponent of the evidence raises a genuine question concerning its authenticity, in which case, Subsection 7.2 applies:

Drafting Committee Note: As mentioned in the overview, this Subsection merely clarifies, consolidates, and updates the substantive rules embedded in §§ 88–99 of the TEA. Sections 88–99 of the TEA outline certain “presumptions as to documents.” Subsection 7.3 replaces the term “presumption” with the term “self-authenticating.” Self-authenticating provisions reduce waste of time at trial by eliminating the need to establish the legitimacy of common, or reliable, types of evidence.

Note the procedural distinction here from Subsection 7.2; once the proponent has made a showing that the proffered evidence is indeed self-authenticating, the party opposing (rather than proposing) the self-authenticating evidence must show that the evidence should not be treated as self-authenticating. An opponent should only oppose self-authenticating evidence where they have genuine doubt and good reason to think the evidence is not authentic.

A. Domestic Governmental Documents.

- i. *Signed and sealed documents.* Government documents bearing an official signature and seal from an individual with the authority to issue a signature and seal.
- ii. *Signed and certified documents without a seal.* Government documents bearing an official signature and certification from an individual with the authority to issue the signature and certification.
- iii. *Certified Copies of Public Documents.* A copy of a public document that the legal custodian of which has certified and signed that it is a true copy of the document in question.
 - a. An official seal is only required if the legal custodian of the document is an officer authorised by Law to make use of a seal.
 - b. The legal custodian of a public document, which may be inspected by Law, shall provide any person with a certified copy of such document upon payment of reasonable fees. The certification represents that the document is a true copy, and it

shall list: the date, the subscribing officer's name, and the officer's official title.

Drafting Committee Note: Subsection 7.3(A) is a consolidation and clarification of § 85 & § 88(1)(a) & (b) of the TEA. Subsection 7.3(A) is also a consolidation and clarification of the various provisions throughout §§ 85–99 that create presumptions for public documents. The scope of Subsection 7.3(A) is broad, and includes the following items: Government acts, orders, or notifications (TEA §87(a)); legislative proceedings (TEA § 87(b)); executive proclamations, orders, or regulations (TEA § 87(c)); municipal proceedings (TEA § 87(e)). It also includes the documents in § 89(1), which pertain to judicial proceedings and are public in nature pursuant to the definition of public document provided in § 83(a)(ii)–(iii). Many of the documents listed in § 90(1) also fall under this public documents provision—including the Government Gazette of the United Republic or of the Revolutionary Government of Zanzibar. The fundamental concepts from the TEA regarding authentication and public documents are preserved in this Subsection, but the provisions are reorganised to improve logical clarity and to promote judicial efficiency.

Whether a document or record needs to be signed and sealed, signed and certified, or simply certified, depends upon the origin of the evidence, the current location of the evidence, the standard custody procedures for the evidence, and the level of authority bestowed upon the custodian by Law. To be found authentic, all certifications, seals, and signatures should be issued by an individual or entity that has been designated and authorised to do so.

In regard to judicial proceedings, all statements made by the party signing the recordings about the circumstances in which the recordings were taken, are also self-authenticating (TEA § 89(1)(b)).

The DC recommends that Subsection 7.3(A) should also apply to tribal proceedings. The DC does not know if tribal proceedings were previously considered within the scope of municipal proceedings (TEA § 87(e)).

B. Other Domestic Documents.

- i. **Official Publications.** A book, pamphlet, gazette, map, plan, or other publication issued by an authority of the United Republic.

Drafting Committee Note: This Subsection is a consolidation of TEA §§ 37, 38, 39, 90 and 91. If the opponent of the evidence raises a reasonable objection to the legitimacy of the document, the proponent of the evidence should authenticate the document pursuant to Subsection 7.2. This Subsection applies to statutes, officially printed volumes of court decisions, and all other miscellaneous public documents. Admissibility of the contents over a hearsay objection is handled by Subsection 4.3(I).

- ii. **Powers of Attorney.** Any document purporting to be a power of attorney that has been duly executed and authenticated by a notary public, commissioner for oaths, any court, judge, magistrate, registrar, foreign service officer, or diplomatic representative in a manner commonly in use in the country of origin.

Drafting Committee Note: This provision modifies and clarifies § 94 of the TEA with a simple linguistic amendment. Reference to diplomatic representatives of a “Commonwealth country” has been removed and replaced with a more general rule that can be applied to the laws of the country where a power of attorney is executed. This change reflects the global nature of business in modern society. The DC also advises Parliament to consider an even broader alternative formulation to this rule. For example, an alternative could encompass all acknowledged documents that have been notarised. “All notarised documents” would include the subcategory of “powers of attorney.”

- iii. *Business Records.* Certified domestic records of a regularly conducted activity if accompanied by a written or oral declaration under oath of its custodian or other qualified person, certifying that the record was:
 - a. kept in the course of regularly conducted business activities; and
 - b. created at or near the time of the act, event, or condition that it is documenting; and
 - c. routinely relied upon by the business in the performance of its business activities.

The proponent must give an adverse party reasonable written notice of the intent to offer the record and must make the record and certification available for inspection, so that the adverse party may have a fair opportunity to challenge them. When justice so requires, a court may admit evidence under this Subsection where such notice has not been given. If evidence is admitted without notice, the court shall take such action as is necessary to avoid undue prejudice to the opposing party.

Drafting Committee Note: This is a consolidation, modernisation, and clarification of TEA §§ 76–79, 88, & 99. Subsection 7.3(B)(iii) also reflects the chain of custody requirements laid out in TEA §90(2). Subsections 76–79 of the TEA addressing banker’s books are a perfect example of the difficulties of trying to enumerate every possible fact scenario instead of laying out general provisions. The banker’s book provisions were drafted at a time when banking may have been the only industry with reliable enough methods for keeping records to make them self-authenticating. Today, there are many industries that have established methods for keeping documents that are similar in reliability to the way banker’s books are treated. The proposed business records Subsection reflects this expansion and is broad enough to accommodate future technological innovations in record keeping methods without the need to amend the Law of Evidence, as occurred for example with TEA § 78(A).

It is critical to note that this provision provides for the authentication of business records, but admissibility may still be determined by other rules of evidence. The language replicates the Business Record exception in Section IV, and thus hearsay should not be an issue. However, a business record can be kept in impeccable circumstances but still raise other evidentiary issues such as relevance or character

evidence. A business record must not be admitted until it has been authenticated and then tested for admissibility under any other provision that may be applicable.

See Trust Bank Tanz. Ltd. v. Le-Marsh Enterprises Ltd. et al., Comm. Case 4 of 2000, [2000] Tanz. High Ct. (finding that the evidence was authenticated under TEA § 36, a result that would be identical under this Subsection. However, the case goes on to once again conflate admissibility and sufficiency by holding that “such statement shall not alone be sufficient to charge any person with liability.”) See the discussion of corroboration in the preamble to Section IX. The DC is recommending the elimination of all rules that conflate admissibility and sufficiency, as well as all formal corroboration requirements.

Foreign business records are addressed in Subsection 7.3(C)(ii).

- iv. *Documents relating to terrorism.* Notwithstanding the above requirements or other written laws, where in criminal proceedings involving the offence of terrorism or international terrorism, a question arises as to whether anything or a substance is in a state described in a document, that the document shall be admissible in evidence without proof of the signature or authority of the person appearing to have signed it and shall, be proof of the facts stated therein.

Drafting Committee Note: This provision is a clarification of §89(2) of the TEA. The DC finds this provision slightly abnormal, but recognises that terrorism is a prominent concern for any government. Rather than removing this provision or significantly redrafting it, the DC retained this provision in order to protect the ability of the fact-finder to inquire into situations that might present serious danger to the United Republic. The DC notes that this provision might be better placed as an example in Subsection 7.2. Documents regarding a matter as serious as terrorism should be required to meet some baseline standard of authenticity even if the procedure to examine authenticity is less stringent than that for most government documents with official seals and certifications. This provision is also unique in mandating admission. Again, the DC hesitates to suggest changes to what might be an important policy choice of the United Republic.

C. *Foreign Documents.*

i. *Governmental Documents.*

- a. *Foreign Public Documents that Are Certified and Sealed.* Foreign public documents which are certified by a legal custodian, and under seal of a Foreign Service officer or diplomatic representative upon proof of the character of the document(s) according to law of the foreign country. The document must be accompanied by a final certification attesting the genuineness of the signature and official position of the signer.

Drafting Committee Note: This provision clarifies and modernises the substance of § 87(d) & (f) of the TEA, while broadening the language that previously was limited to “diplomatic representatives of a Commonwealth nation” to any “diplomatic

representative.” Unlike public documents from the United Republic, governed by Subsection 7.3(A) that require a seal only if the custodian of the document has legal authority to seal the document, for foreign documents a seal is always required. If the official that keeps the document does not have legal authority to create a seal, then the certificate of genuineness takes the place of a seal.

- b. *Foreign Legal Publications or Judicial Records.* A book, reporter, or other publication printed under the authority of the Government of any country, containing the laws, executive acts, and legislative proceedings of that country or reporting judicial decisions of the courts of that country, and documents purporting to be certified copies of foreign judicial records, if certified in a manner by a Foreign Service officer or diplomatic representative, in that country to be the manner commonly used for the certification of copies of judicial records.

Drafting Committee Note: This provision consolidates §§40, 87(d), 92 and 95 of the TEA.

- c. *Foreign Private Documents.* Private documents purporting to be duly executed outside of the United Republic if:
 - 1. the document is executed within the East African Community, Malawi, or Zambia, and purports to be authenticated by a magistrate, registrar or judge under seal of the court or by a notary public under signature and seal of office; or
 - 2. the document is executed within the East African Community, Malawi, or Zambia, affects property not exceeding a value of sixty-five million TSH, and includes a statement signed by a magistrate or justice of the peace that:
 - (a) the person executing the document is a person known to them; or
 - (b) two other persons known to them have separately testified before them that the person executing the document is known to each of them; or
 - 3. the document is executed in any other country outside of the United Republic, and purports to be authenticated by the signature and seal of the office of:
 - (a) a Foreign Service officer of the United Republic or diplomatic representative in that country; or
 - (b) any Secretary of State, Minister, Under-Secretary of State, or any person in such foreign place duly certified by a foreign service officer or diplomatic representative in that country.

Drafting Committee Note: This Subsection 7.3(C)(i)(c) preserves and modernises § 93 of the TEA. References in Subsection (C)(i)(c)(1) & (2) to the East African Community refer to the regional intergovernmental organisation created by the Treaty for the Establishment of the East African Community (Signed on Nov. 30, 1999 and entering into force on July 7, 2000; as amended on Dec. 14, 2006 and Aug. 20, 2007). This reference is a slight departure from §§ 93(a) and (b) of the TEA, which listed only Kenya and Uganda. The DC is assuming that the inclusion of these countries in the TEA was based on membership in the old East African Community. Hence, we have removed Kenya and Uganda and replaced them with the more generic language “within the East African Community” to account for the accession of Rwanda and Burundi into the organisation in recent years and the continued possibility of increasing membership. The DC recommends that this geographical edit be reviewed for accuracy.

Subsection (C)(i)(c)(2) delineates a property value threshold of sixty-five million TSH. Section 93(b) of the TEA provided for five thousand TSH. The DC has adjusted this figure for inflation based on the value of the TSH at the time of the passage of the TEA. The DC recommends that this value be reviewed for accuracy, and that the necessity and benefits of this threshold figure be considered.

- ii. *Business Records.* Certified foreign documents of regularly conducted business activity that meet the requirements of Subsection 7(B)(iii) except that the certification must be such as to subject the maker to criminal liability in the foreign country if the certification is false.

Drafting Committee Note: This is a modernisation suggestion. Given the global nature of business in the modern world, and the high frequency of business among geographically close East African countries the DC believes that Tanzanian courts should recognise the legitimacy of business documents made outside the United Republic. Although there is no corresponding provision in the TEA, the DC advises that modern business makes this type of modernization amendment a necessity.

D. *Miscellaneous.*

- i. *Newspapers, Journals, and Periodicals.* Any publication purporting to be a newspaper, journal, or periodical.

Drafting Committee Note: This Subsection preserves § 90(1) of the TEA, in regard to newspapers and other media, but it is a modernisation of that provision. TEA § 90(1) ignores that many daily newspapers and other journals and periodicals are now most widely accessible in electronic form, such as over the Internet and mobile phone applications. This proposal is aligned with the international trend to accept reliable, widely disseminated forms of electronic publications, and the DC’s objective to promulgate technologically neutral rules.

The DC also recommends that this provision apply to both domestic and foreign newspapers, journals, or periodicals. If the opponent of evidence has reasonable grounds to doubt the authenticity of a foreign publication, the document should then be authenticated in accordance with Subsection 7.2.

- ii. *Trade Inscriptions and Registered Intellectual Property Designations.* An inscription, sign, tag or label purporting to have been affixed in the course of business and indicating origin, ownership, or control.

Drafting Committee Note: This is a modernisation suggestion, and no corresponding provision exists in the TEA. This provision is based both on the overwhelming reliability of trade and brand names, and on the fact that many trademarks, copyrights, patents and brand names are registered under domestic and international laws that prohibit others from using them impermissibly. Labels that indicate foreign origin are reasonably reliable evidence that the commodity to which they are attached is of foreign origin.

The DC believes that this provision can be used broadly to authenticate many types of registered or certified intellectual property designations.

- iii. *Corporate Bonds and Commercial Paper.* Corporate bonds and commercial paper, signature(s) thereon, and related documents thereto, to the extent allowed by governing commercial law.

Drafting Committee Note: This is a modernisation suggestion, and no corresponding provision exists in the TEA. However, the addition of this provision is contingent upon the reliability of the United Republic's commercial code, the safeguards that it supports, and the recognition and enforcement of other Commercial Codes within the United Republic.

- iv. *Books.* Any book a court refers to regarding a matter of public or general interest and that published a map or chart produced for inspection in court was written and published by the person, and at the time and place it purports to have been written or published.

Drafting Committee Note: This provision is a clarification of § 96 of the TEA. It is substantially the same. A publicly available book not compiled for litigation must be distinguished from a map or chart produced specifically for litigation, which must be independently authenticated under Subsection 7.2. This requirement maintains § 91 of the TEA. We also note that the TEA section is taken almost verbatim from IEA § 87, and we thus doubt its modern significance. However, these rules simply facilitate the admission of evidence of largely public documents and materials and do not inhibit an opponent from contesting the authenticity of the document in question. Thus we have opted to preserve this provision.

Subsection 7.4 Attesting Witnesses. The authenticating testimony of an attesting witness to a document is only necessary as required by Law.

- A. *Party Admission.* The admission of a party to an attested document of its execution by himself shall be sufficient proof of its execution as against him, even though the document is required by law to be attested.
- B. *Party Denial.* If the attesting witness denies, or does not recollect, the execution of the document, its execution may be proved by other evidence.

Drafting Committee Note: This provision is a modernisation of the TEA §§ 72–74. The TEA subscribed to the historical common law rule requiring attesting witnesses

to be produced to authenticate writings. This practice is burdensome and has been largely abandoned. Some jurisdictions have retained the requirement of attesting witnesses for certain types of writings such as wills. The DC recommends removing this burdensome attestation requirement unless necessary to ensure authenticity of documents presented at trial. An adverse party may always raise reasonable concerns regarding the authenticity of any proffer of evidence whether the issue is governed by Subsection 7.2 or 7.3. Because litigants are always able to air concerns about the authenticity of documents, it is superfluous to require litigants to provide attestation witnesses. Changing the requirement of attestation from the norm to the occasional necessity advances judicial economy and facilitates findings upon substance rather than technical bases.

Subsection 7.4 modernises TEA § 74. Subsection 7.4(A) modernises TEA § 72. Subsection 7.4(B) modernises TEA § 73.

SECTION VIII: CONTENTS OF WRITINGS, BEST EVIDENCE RULE

Under the common law, the best evidence rule enforced the belief that an original document was more reliable than any duplicate for proving that document's contents. This belief was sensible in a time where the most common method for duplicating a document was handwriting, and forensic tools for determining forgeries were yet undeveloped. However, as copy-making and forensic technology has become more reliable, the best evidence rule has been relaxed through exceptions for reliable duplicates. The TEA's treatment of the best evidence rule does not diverge greatly from most modern forms of the rule. However, the DC has identified and implemented four reforms to the best evidence rule in the TEA.

First, the DC has renamed the categories of primary and secondary evidence to original and copy evidence, respectively. Original and copy evidence better describe the evidentiary categories than the older terminology of primary and secondary evidence. More importantly, these new names remove the implication that there is a hierarchy of documentary evidence. As discussed immediately below, the DC has removed the hierarchy of primary and secondary evidence found within the TEA. These new names thus prevent confusion arising from that change.

Second, the DC has eliminated the requirement that a party proffering copy (formerly secondary) evidence demonstrate original (formerly primary) evidence to be unavailable. Modern copy-making technology can create duplicates a court can rely upon as they would an original for the purposes of proving a document's content. This reform removes rules restricting the use of reliable duplicates in court found in TEA §§ 62–67. However, any party may still provide evidence a given duplicate document is not reliable.

Third, the DC has included an updated definition of document, as provided in Subsection 1.1. The DC has removed the requirement that a document be “tangible,” as was provided in TEA § 3(1), and allowed other document formats, including digital works. In doing so, the DC has created a definition of document that is more responsive to changes in documentary technology.

Fourth, the DC revised the best evidence rule of the TEA into a single Subsection, with simplified language and straightforward categories. Section VIII combines TEA §§ 24, 40A, 63–75, 153, and 169. Here, § 40A, Evidence Obtained in Undercover Operations, has been omitted because the new generalised rules of this proposed Subsection make § 40A's special rules for undercover operations technologies unnecessary.

Subsection 8.1 Definitions. The following definitions apply throughout this Section:

“document” has the meaning given in Subsection 1.1;

“original document” means the document itself in its original form or each counterpart executed or produced with the same intended effect as the original.

“copy of a document” means the document in a duplicate form created by any process which may ensure the fidelity of the duplicate.

Drafting Committee Note: The terms defined in this Section have been changed from the archaic language of the common law to the modern language of originals and copies, but the substance is a consolidation and modernization of TEA §§ 64 and 65. The only significant change has been to simplify the language to increase

accessibility and longevity. The DC believes that this rule’s language should be technologically-neutral. Technological-neutrality will place emphasis on the conceptual core of these rules and make them flexible to future changes in evidence law.

The new definition of “the original document” provided here includes, but is not limited to, photographs created from negatives and outputs from computers. Original documents in the TEA and common law included documents executed in counterparts or through a uniform process, See TEA § 64. The DC has updated this definition to include modern technologies that produce a document analogous to a counterpart (like a photograph created from a negative or a printout of a computer-generated document). To determine whether a novel form of document should be considered original, the fact-finder should consider whether the document producer intended to create an original document, and the actual process through which the document is created.

The new definition of “a copy of a document” focuses attention on the duplication process. Here, rather than limiting duplication to “any mechanical process” as § 65 of the TEA, or to “mechanical, photographic, chemical” processes as defined in United States, the proposed provision allows duplication by any process. By using the broader construction “by any process” the provision allows for technological advancements, which cannot be predicted.

More importantly, it emphasises the two characteristics necessary for any duplication process: fidelity and the minimization of human error. When exercising discretion in admitting copies, the fact-finder should evaluate its value based on these two characteristics in addition to whether the document producer intended to duplicate an existing original document.

Under this Subsection, original document evidence includes any photograph developed from a negative, as well as the negative itself. However, a copy of a developed photograph is a copy of a document. For the purposes of electronic documents, both the digital file and any tangible output created from it are original documents. Duplicate copies of electronic files are also original documents, while duplicates of printed documents or other tangible media are not. If a digital document is reproduced in a format that does not preserve the quality of the original, such as through the creation of a new “jpeg” image or other compressed file, the resulting document is a copy rather than an original document. These digital copies are to be evaluated based on their level of fidelity relative to the original document, and the extent to which such fidelity is needed to prove what the document is introduced to prove. Where a digital copy does not itself have probative value, but is used as evidence of the existence of a probative, higher quality, original, the copy should be evaluated alongside corroborating evidence in establishing what the original document would have established.

“private documents” has the meaning given in Subsection 1.1;

“public documents” has the meaning given in Subsection 1.1.

Subsection 8.2 Original Document Evidence Requirement. The contents of a document must be proved by an original except as provided by other Subsections of this Act, or by Law.

Subsection 8.3 Use of a Copy of a Document. A copy is admissible to prove the contents of a document as if it were an original document, unless:

- A. A genuine issue as to its authenticity is raised, in which case the proponent must produce sufficient evidence to support a finding of its authenticity; or
- B. The circumstances make it unfair to admit the copy of the document.

Drafting Committee Note: Modern legal systems routinely admit copies (secondary evidence) and put the burden on the objector to demonstrate some reason why it should not be admitted. This reflects modern commercial practise as well as the widespread use of reliable copy making technologies.

Assessing whether circumstances make the admission of a copy unfair will necessarily involve judicial discretion. For example, if a copy does not wholly reproduce portions of the original that are in question, it may be unfair to admit those incomplete portions to prove the content in question. See. e.g. Amoco Production Co. v. United States, 619 F.2d 1383 (10th Cir. 1980). It would also be unfair to admit copies of documents that are not wholly reproduced when the party proffering the copies has not explained why they are not using complete or higher quality copies, or made the originals available for inspection by the opposing party.

Nothing in Subsection 8.3 is intended to relax the evidentiary requirements established by other Subsections. Otherwise admissible copies may still be excluded for other reasons such as relevancy, hearsay, prejudice, fairness, and undue burden. See Subsection 2.2. It should be noted that if there is insufficient evidence to support a finding of the existence of the primary document, the document would not be authenticated, and thus neither it nor a purported copy would be admissible.

Subsection 8.4 Other Evidence to Prove Content. Other evidence may be admissible to prove the contents of a document:

- A. *Unavailability.* When an original document is unavailable through no wrongdoing on the part of the party wishing to offer the evidence, including but not limited to circumstances where:
 - i. It has been lost or destroyed by a person other than the one offering the evidence; or
 - ii. It is in the possession of a third party and has not or cannot be successfully obtained by judicial process; or
 - iii. It is in the possession of an adverse party or their representative, and has not been produced; or
 - iv. It is not easily movable.
- B. *Admission by an Opposing Party.* When there are admissions by an opposing party of the contents of the document, which may be written, in depositions, testimony, or any other admission under Subsection 4.3 (A); or

Drafting Committee Note: Subsections 8.4(A)(i)–(iv) and (B) revise and combine several TEA provisions: Subsection 8.4(A)(i) revises § 67(1)(c). Subsection 8.4(A)(ii) rewrites §§ 67(1)(a)(ii)–(iii). Subsection 8.4(A)(iii) combines and revises §§ 67(1)(a)(i)&(iii). Subsection 8.4(A)(iv) revises § 67(1)(d). Subsection 8.4(B) revises § 67(1)(b). Sections 24 and 153 are no longer necessary and thus omitted.

- C. *Copies of Public Documents.* When the document is a public document under Subsection 7.3(A), has satisfied the requirements of that Subsection, and is otherwise admissible under this Act.

Drafting Committee Note: Subsection 8.4(C) combines and revises TEA §§ 67(1)(e) and 67(1)(f).

- D. *Cumulative and Summary Evidence.* When the document is too large to be conveniently examined in court, the proponent of the document may summarise its contents either through lay or expert examination. The document must be made available for subsequent examination by party-opponents or the court.

Drafting Committee Note: Subsection 8.4(D) combines and revises TEA §§ 67(1)(g) and 67(5).

SECTION IX: WITNESSES

Among the most important goals of evidence law is to facilitate the accurate, efficient and fair finding of facts pertinent to legal disputes. This goal is furthered by evidence rules that encourage admitting testimony from witnesses with first-hand knowledge.

*The TEA contains a vast set of rules relating to witnesses and oral testimony. However, the DC's survey of Tanzanian case law revealed that most of these rules are seldom cited. The most commonly disputed areas of witness evidence are credibility and competency to testify, particularly as it relates to victims of sexual offences and children. Cases have held that the value of certain witness testimony, including children and victims of sexual offences, turns on the existence of corroborating evidence. See, *Hamisi Rajabu Djabagula v. The Republic*, [2003], (Tanz. C.A. 2003). See also, *Waziri Amani v. The Republic*, [1980] (T.L.R. 250) (discussing when a court should act on evidence of visual identification). The DC is not clear if these cases are adequately sorting out admissibility from sufficiency issues in the context of eyewitness identification, or potentially creating formal corroboration rules. In this Proposed Act, the DC seeks to depart from the requirement of corroboration by proposing that testimony from witnesses require no corroboration, and also rigorously makes the distinction between admissibility and sufficiency. See, *Scottish Law Commission, Evidence Report on Corroboration, Hearsay and Related Matters in Civil Proceedings*, (SCOT. LAW COM. NO. 100) (1986). The probative value of witness testimony should simply turn on the weight of the evidence in relation to other evidence that is available. This is in line with § 143 of the TEA, which states that no particular number of witnesses shall in any case be required for the proof of any fact. Case law in support of this approach includes *Msigwa v. Republic*, [1990] T.L.R. (Tanz. C.A. 1990), holding that one eyewitness was enough to affirm a murder conviction because what is important is what the witness claimed to have seen, and the witness's credibility.*

The proposed Subsections for witnesses modernise the witness rules contained in the TEA, and condense particular sections of the TEA for the purpose of clarity and serviceability. Few of the TEA rules have been eliminated entirely. Where rules were omitted, omission was intended to reduce the complexity of the TEA by removing rules or sections that were apparent by implication or repetitive.

Subsection 9.1 Competency to Testify in General. Unless otherwise provided by Law, every person who is not qualified as an expert under Section X is competent to be a witness if the person:

- A. possesses first-hand knowledge of a material proposition; and
- B. understands the meaning of an oath or the duty to tell the truth; and
- C. can understand questions put to him or her; and
- D. can give rational answers.

Drafting Committee Note: This Subsection consolidates §§ 127–31 and 141–43 of the TEA, which deal with competency and compellability of witnesses. This Subsection evaluates competency by the witness's perception, memory and ability to narrate, and thus eliminates all the common law forms of incompetency. Anyone with first-hand knowledge who meets the cognitive requirements of the Subsection may testify, unless otherwise provided by Law. Similarly, § 192 of the South African

Criminal Procedure Act of 1977 provides for the competence of a witness unless excluded by an expressly stated rule. By implication, it also permits a witness to testify in any manner that permits coherent and intelligible communication, and thus preserves § 128 of the TEA. For example, a witness who is unable to speak may present evidence in any manner that is intelligible, such as by writing or by sign language. In keeping with §143 of the TEA, this Subsection does not limit the number of witnesses required for the proof of any fact.

Subsection 9.2 Establishing First-Hand Knowledge. A non-expert witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has first-hand knowledge of the matter. Evidence to establish first-hand knowledge may consist of the witness’s own testimony.

Drafting Committee Note: In keeping with the universal evidence rule that everything must be shown to be what it purports to be, witnesses must be shown to possess first-hand knowledge, or be within an exception, for example, an expert testifying on the basis of expert knowledge—see Section X. A witness who testifies to a fact that can be perceived by the senses must have had the opportunity to actually observe the fact. This aligns with the goal of evidence law to encourage information from the most reliable source. See also Section VII—Authentication.

This Subsection replaces TEA §§ 61 and 62 on oral evidence.

Subsection 9.3 Oath or Affirmation to Testify Truthfully. Prior to testifying, a witness must give an oath or solemn affirmation to testify truthfully. The oath or affirmation must be in a form designed to impress the duty to tell the truth on the witness’s conscience. If the court determines that the witness understands his or her duty to tell the truth, then a witness who does not understand the nature of administered oaths may still testify.

Drafting Committee Note: Pursuant to the Oaths (Judicial Proceedings) and Statutory Declarations Act (1966), courts have the authority to administer oaths or affirmations to all persons examined before them. Section 4 of the Statutory Declarations Act provides that persons who “profess any faiths other than the Christian faith” and object to swearing an oath on the basis of differing religious beliefs may make a “solemn affirmation . . . of the same effect as if he had made an oath.” Chapter XI § 102 of the Tanzanian Penal Code also criminalises perjury irrespective of whether false testimony is given under oath. This proposed Subsection reaffirms the general requirement of an oath that is designed to afford the flexibility required in dealing with individuals of varying religious beliefs, conscientious objectors, mental defectives, and children. No particular form is prescribed for taking an oath, as long as the witness fully understands the duty to tell the truth. The TEA does not have a section that requires an oath for all witnesses; the TEA is limited to oaths for children. See TEA § 127(2).

Children who do not understand the nature of an oath are treated in the Law of the Child Act (2009). According to the Law of the Child Act, a person below the age of eighteen is a child. The court may regard the testimony of a child as material evidence corroborating the evidence of another witness’s testimony. When a child does not understand the nature of an oath or affirmation, the child’s evidence may still be received if, in the opinion of the court, the child understands the duty to tell the truth. See, Law of the Child Act (2009) § 115(1). See also, Mohamed Rajabu v.

The Republic, [2009] (Tanz. H.C. 2009). This Subsection parallels § 115(1) of the Law of the Child Act's provision that child witnesses who understand the "duty of speaking the truth" may testify without swearing an oath. See also, Jumu Choroko v. The Republic [2002] (Tanz. C.A. 2002).

This Subsection replaces TEA § 127, which refers to testimony from a "child of tender years" or a person of unsound mind.

Subsection 9.4 Interpreter. A witness may use an interpreter. An interpreter must be qualified and must give an oath or affirmation to make an accurate translation.

Drafting Committee Note: A qualified interpreter is a person who is capable of translating statements from one language into another language effectively, accurately and impartially, without altering the context or meaning of the statements. While English is the official language of education, administration and business, Swahili is the more widely spoken national language. See, Government Portal Content Committee, Tanzania Government Official Webpage (<http://www.tanzania.go.tz/home/pages/19>) (Last accessed March 2, 2014). Consequently, language may pose a barrier to accessing higher-level courts that use English as the main language. This Subsection is meant to alleviate this problem by permitting witnesses to use an interpreter who is under oath to make true translations. Similarly, hearing-impaired witnesses may also use sign-language interpreters.

Subsection 9.5 Competency of Judges, Magistrates, and Lay Assessors as Witnesses. Judges, Magistrates, and lay assessors may not testify as witnesses at a trial over which they are presiding, nor may they be compelled to discuss such matters or anything that came to their knowledge while in court as a judge in other proceedings except upon the special order of some court to which he or she is subordinate.

Drafting Committee Note: By including lay assessors, this Subsection broadens TEA § 129, which discusses examination of judges and magistrates presiding over a case. TEA § 129 prevents judges, magistrates or lay assessors from being compelled to answer any questions relating to their own conduct, thought processes, or knowledge acquired from cases over which they presided or in which they participated as lay assessors. The proposed Subsection also broadens the TEA by providing that a judge, magistrate, or lay assessor should also not be called as a witness in a case over which they are presiding. Section 129's provision that such a person "may be examined as to other matters" is omitted because it is superfluous. The exclusionary reach of § 9.5 does not extend to such matters.

Subsection 9.6 Mode and Order of Examining Witnesses and Presenting Evidence.

- A. *Control by the Court.* The court should exercise reasonable control over the mode and order of examining witnesses and presenting evidence so as to:
- i. Facilitate the purposes of trial; and
 - ii. Avoid wasting time; and
 - iii. Protect witnesses from harassment and undue embarrassment.

- B. *Scope of Cross-Examination.* Cross-examination can extend to any material proposition.
- C. *Leading Questions.* Leading questions should not be used on direct examination except as necessary to develop the witness's testimony. The court should allow leading questions only in the following instances:
 - i. For matters that are introductory or undisputed; or
 - ii. On cross-examination; or
 - iii. When a party calls a hostile witness, an adverse party, or a witness identified with an adverse party; or
 - iv. Where necessary to develop the testimony.

Drafting Committee Note: This Subsection consolidates Chapter 5, Part III of the TEA (§§ 144–67), which covers questioning of witnesses.

The proposed Subsection addresses undue delay, which concerns all legal systems. It also gives Judges the control to protect witnesses from harassment or undue embarrassment during evidentiary proceedings. This judicial discretion involves weighing the importance of the testimony, the nature of the inquiry, its relevance to credibility, and its potential to waste time or cause confusion. It should be noted that a right of cross-examination extends to all parties in multi-party cases. Additionally, if a witness called by a party becomes hostile, the techniques of cross-examination may be used at the discretion of the trial judge. These are matters of trial practice that in the judgement of the DC do not need to be embodied in specific rules.

*This Subsection reflects the view that suggestive powers of leading questions are undesirable, apart from trivial matters, except in cases involving a hostile witness, a witness that is unwilling or biased, children, adults with communication problems, and a witness whose recollection is exhausted. See, Andrew Ligertwood, *Australian Evidence* (4th ed. 2004), Henry Francis Morris, *Evidence in East Africa*, Issue 24 (1968) (pg. 206) and David T. Zeffertt, *The South African Law of Evidence* (2003) (pg. 739). Nonetheless, the court has discretion to permit leading questions whenever it believes it is useful to do so.*

Subsection 9.7 Court's Calling or Examining of a Witness. The court may call or examine a witness on its own or at a party's request. Each party is entitled to cross-examine a witness that is called by the court.

Drafting Committee Note: This Subsection is a modernisation of TEA §§ 176 and 177, which relate to the power of the court and assessors to question witnesses, and perhaps an expansion of the court's authority to the calling of witnesses. The authority of a court to call and examine a witness is well established under common law. It is infrequently employed, but the DC can imagine circumstances justifying the unusual act of calling a witness that neither party calls. Recalling a witness is functionally indistinguishable from calling a witness and thus this Subsection implicitly authorizes that practice as well, all of which is in the trial judge's discretion.

Subsection 9.8 Sequestration of Witnesses. At a party's request, or on its own, the court may order a witness excluded so that they cannot hear another witness's testimony. This Subsection does not authorise excluding a person authorised by Law to be present, or a person whose presence a party shows to be essential to presenting a party's claim or defence.

Drafting Committee Note: Sequestration of witnesses ensures that testimony given is purely based on what witnesses perceived, and is not influenced by the testimony given by other witnesses.

Subsection 9.9 Writing Used to Refresh a Witness's Memory. If a piece of writing is used to refresh a testifying witness's memory, it must be disclosed to an adverse party who is entitled to inspect it, to cross-examine the witness about it, and to introduce in evidence any portion that relates to the witness's testimony.

Drafting Committee Note: This Subsection consolidates and simplifies §§ 168–72 of the TEA, which deal with refreshing memory and the rights of an adverse party relating to writing used to refresh memory.

The use of pieces of writing to refresh a witness's recollection is well established in the common law system. See, JOHN HENRY WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 735 (Chadbourn rev. 1970) as cited by Morry Cole, Refreshed Recollection of Witnesses Prior to Testimony: Certainty Stands Strong in Missouri State Courts, 61 MO. L. REV. (1996) (<http://scholarship.law.missouri.edu/mlr/vol61/iss3/5>). This Subsection pertains to the disclosure of documents used to refresh a witness's memory during testimony. It does not extend to documents that the testifying witness may have referred to in preparation for testimony, unless the court holds that such disclosure would serve the interests of justice.

Subsection 9.10 Impeaching a Witness. Any party, including the party that called the witness, may attack the witness's credibility. The credibility of a witness may only be attacked in the following ways:

- A. By testimony about the witness's reputation for having a character for truthfulness or untruthfulness or in the form of opinion about that character. Evidence of truthful character is admissible only after the witness's character for truthfulness has been attacked.
- B. By inquiry into specific instances of conduct that are probative of the character of truthfulness or untruthfulness of the witness. Extrinsic evidence of specific instances of conduct is not admissible to prove a witness's character for truthfulness or untruthfulness.
- C. By evidence that the witness was convicted of a crime, whose elements required proving—or the witness's admission of—a dishonest act or false statement.
- D. By evidence of prior statements that are inconsistent with the testimony of the witness. If the inconsistent statement was not made under oath, a witness's prior inconsistent statements are admissible only if the witness is given an

opportunity to explain or deny the statement and the adverse party is given an opportunity to examine the witness about it.

- E. By evidence of impartiality owing to bias or an interest in the litigation or its outcome. Such proof of impartiality may include but is not limited to evidence of an illegal inducement made to a witness for offering testimony or evidence of personal interest such as impact on finances and reputation.
- F. When a witness or declarant is unavailable, but prior statements or testimony is admitted, the person's credibility may be impeached or confirmed to the extent it would have been available for inquiry had the person testified.

Drafting Committee Note: This Subsection simplifies §§ 154-156, 158(1-2), 162, 164 and 167 of the TEA dealing with impeaching witnesses. This Subsection also addresses elements of §§ 47-57 of the TEA dealing with relevancy of character evidence. See also Section III (Specific Relevancy). The rationale for this Subsection is that the assessment of a witness's credibility should be based on the formal, adversary-driven credibility assessment.

The enumerated conditions for admission of credibility evidence under § 158(2) have been largely removed. We believe that the three factors of § 158(2)(b) are adequately addressed by the familiar probative value test provided in Subsection 2.2.

Additionally, while this Subsection retains §162(a-b) with respect to the use of character evidence and prior convictions to impeach witnesses, it removes the §162 provision that calls for the exclusion of evidence contradictory to a witness's prior testimony.

Subsection 9.10(A) requires that the inquiry into a witness's character be limited to character for truthfulness rather than general character, and only after a witness's credibility has been attacked. The justification for this limitation is to sharpen relevancy and to reduce surprise, waste of time, and confusion. For further guidance on impeaching a witness by inquiry into a witness's character for truthfulness and specific instances of conduct, see Subsections 3.2-3.4 of this Code. Also see Section IV (Hearsay). See also, United Kingdom Law Commission Report (No. 273), Evidence of Bad Character in Criminal Proceedings, Oct. 2001.

The rationale for Subsection 9.10(B) remains as it was for the counterpart provision of the TEA. As Notes on the Indian Evidence Act observed, limits on character inquiries for witnesses avoid undue delay and distraction during a trial. A witness's answer will only be inquired into if the answer has an effect on a material proposition or a statement made by the witness. An example, given in the 1932 Illustrations, is as follows: "A affirms that on a certain day he saw B at Lahore. A is asked whether he himself was not on that day at Calcutta. He denies it. Evidence is offered to show that A was on that day at Calcutta." RATANLAL RANCHHODDAS & DHIRAJLAL KESHAVLAL THAKORE, THE LAW OF EVIDENCE (THE INDIAN EVIDENCE ACT) 335-36 (6th ed. 1932). This discrepancy is not significant to impair the credibility of A, but it is significant to show that there is no certainty that B was in fact at Lahore. The illustrations also include the following: Witness A is asked whether he was fired from an unrelated position owing to his dishonesty. He says no.

Subsequently, evidence is offered to show that he was in fact fired for being dishonest. The extrinsic evidence is NOT admissible, as it bears no effect on a material proposition or statement made by the witness. This rationale is aligned with the text of Subsection 3.5 as a whole as well as TEA §§ 158 and 162.

For purposes of impeachment under Subsection 9.10(C), prior crimes committed by the witness involving dishonesty or false statements are probative. A conviction that satisfies this Subsection would be admissible even if an appeal were pending. However, evidence of a conviction would not be admissible if the conviction had been subject to a pardon or annulment based on a finding of innocence, and this Subsection may be limited by the passage of time since the crime was committed through discretionary exclusion under Subsection 2.2. If prior convictions are not considered probative to witness's credibility in Tanzania, then this proposed Subsection might be excluded from the Proposed Act.

Subsection 9.10(D) is consistent with Martha Michael Wejja v. Attorney General & 3 Others, Civ. Appeal No. 3 of 1982, [1982] Tanz. C.A. (citing TEA § 34C, holding that if documents have already been produced in court for identification purposes, they can be used to contradict oral testimony of the maker of the documents).

Subsection 9.10(F) deals with evidence regarding the character of witnesses in previous proceedings that are now unavailable and hearsay declarants generally. If a statement of an unavailable person is admitted, that person's credibility is in issue.

Subsection 9.11 Religious and Customary Beliefs or Opinions. Evidence of a witness's religious and or customary beliefs or opinions is not admissible to prove character for truthfulness or untruthfulness.

Drafting Committee Note: Article 19 of the Tanzanian Constitution guarantees freedom of religion and the right to religious practice. While courts acknowledge that the veracity of religious beliefs "cannot fall for determination by a court of law," it is conceivable that evidence of a witness's religious or customary beliefs may be introduced particularly in cases where religious belief is a material element. See, Hamisi Rajabu Digabula v. The Republic, Crim. App. No. 53 of 2001 (Tanz. C.A. 2001). For instance, Section 129 of the Penal Code criminalises as a misdemeanour punishable by one year of imprisonment the "wounding (of) the religious feelings of any person" with deliberate intent. It is our judgement that the religious beliefs of a witness should be largely irrelevant. Although this Subsection forecloses inquiry into religious or customary beliefs or opinions of a witness for the purpose of showing that his character for truthfulness is affected by their nature, pursuant to Subsection 9.10 (E), an inquiry for the purpose of showing interest or bias because of them is not within the prohibition.

Subsection 9.12 Adverse Inference. The court may infer from the refusal of a witness to testify or a party's refusal to produce relevant evidence when it would otherwise be within the party's ability to do so, that the unproduced evidence would be unfavourable to the party's interests.

Drafting Committee Note: This Subsection generalises § 158 (3) of the TEA. A fact-finder should not be required to draw an unfavourable inference from a witness's refusal to respond to a question, but should be allowed to. A witness could refuse to

respond for any number of harmless reasons. For example, a witness in certain instances may wish to refrain from answering a question due to the embarrassing or personal nature of the answer that would be revealed. When a witness refuses to answer a question a judge should consider the totality of the circumstances and all of the reasons a witness may not answer a question rather than being required to draw an adverse inference.

Subsection 9.13 Opinion Testimony by Lay Witnesses. If a witness is not testifying as an expert, testimony in the form of an opinion is limited to opinion that is:

- A. Rationally based on the witness's perceptions; and
- B. Helpful to clearly understand the witness's testimony or determine a fact in issue; and
- C. Not based on scientific, technical, or other specialised knowledge.

Drafting Committee Note: This Subsection consolidates and simplifies §§ 47–53 of the TEA relating to opinions of third persons. It is often difficult for witnesses to testify purely in the form of facts rather than opinions. For example, under this Subsection, a lay witness who is acquainted with the handwriting of a person would find it impossible to articulate the manner in which the handwriting appears unique or identifying to the witness and thus may give an opinion as to whether or not the handwriting belongs to a particular person. This is consistent with TEA § 49. Similarly, testimony of the speed of a car is opinion testimony summarizing observations of distance divided by time. Although lay witnesses should be encouraged to testify to their direct memories of events, occasionally they should be allowed to summarize those observations in the form of a lay opinion. This Subsection allows that to occur.

SECTION X: EXPERT WITNESSES

This Section generalises and replaces §§ 47–53 of the TEA. As knowledge advances and societies grow more complex, trials mirror this complexity with disputes of matters not within the generalised knowledge of the fact finder. To overcome this knowledge gap, expert witnesses are called to present information and conclusions based on the application of specialised knowledge so that the court may draw better-informed inferences from the evidence presented in a case. Specialised knowledge in this sense is not limited to scientific and technical knowledge, but extends to all knowledge not held by the court ranging from traditional healers to financial experts. Gaining this vital information for trial requires a different set of rules for expert as compared to lay witnesses because experts do not always testify from first-hand knowledge in the sense required in Section IX for lay witnesses. Consequently, a legal system must articulate the standards for the admission of expert testimony.

Formulating the standards for expert testimony is more difficult than it may appear because expert witnesses by their very nature present a number of conceptual challenges for the trial process. See Ronald J. Allen, The Conceptual Challenges of Expert Evidence, INT’L CONG. ON PROC. L. (Aug. 30, 2012). Most challenging is the tension between the goal of expert testimony, which is to provide specialised knowledge not held by the court, with the court’s inability to independently test the reliability of the expert’s testimony. If the court does not fully grasp the expert’s discipline and specialised knowledge, the court will be unable to appraise its accuracy and reliability. The traditional solution to this problem has been to condition qualifying a witness as an expert on a showing that the witness will testify from a reliable foundation. This foundation may come from systematic study or special experience in the subject area at issue. Courts typically rely on the education, training, and experience of the expert in making this determination. Ideally, however, the court should go considerably further and require the expert to educate the judge adequately about the subject matter so that the judge can understand and process the information provided by the expert.

Without an adequate understanding of the pertinent field, all that courts can do is defer to expertise to decide the trial, but this is an abrogation of the deepest aspiration of the legal system for rational decision based on comprehensible evidence. The power of this aspiration is reflected in the universal approach to experts to the effect that the court is not required to rely on expert opinion, and always retains the power to decide. See, e.g., Hild Abel v. Republic, [1993] T.L.R. 246. But it is a mystery how a court can decide rationally to rely on an expert’s opinion or not in the absence of comprehension of the discipline in question. If the judge does possess knowledge of the discipline, expert opinion testimony is not necessary. This tension is resolved only by utilizing experts to educate fact-finders and not to provide opinions to which fact-finders can defer. The Proposed Act is designed to nudge but not require the legal system in Tanzania to move in that direction. A requirement requiring education and excluding expert opinion is presently too radical, although it is the position that enlightened legal systems should embrace.

Judging from the DC’s survey of Tanzanian case law, medical experts are a key category of expert witnesses in Tanzanian courts. There seems to be few instances of expert testimony given in other specialised areas, such as determination of defects in a product liability case. A wider range of experts in Tanzanian cases should be anticipated as the Tanzanian economy grows and disputed issues evolve. This Section for expert witnesses aims to broaden the availability of expert testimony by allowing expert testimony from a wide range of experts.

Subsection 10.1 Expert Testimony. A witness qualified as an expert under Subsection 10.3 may testify concerning a subject on which the expert is qualified. An expert's testimony is not objectionable because it discusses an essential element.

Subsection 10.2 Duty of an Expert. The expert is to furnish the court with the knowledge necessary to make an independent assessment of the evidence and to assist the court in deciding the case rationally. The court may allow testimony in the form of a proper opinion and inference.

Drafting Committee Note: This Subsection provides the duty of an expert witness. The Subsection makes it clear that experts are encouraged to provide testimony about their field, but may provide opinions and inferences where appropriate, including an opinion reflecting the expert's view of the outcome of a case. This Subsection should not be read as a radical change that forbids the traditional form of testimony but it encourages the system to move towards an educational versus deferential model of decision making. This Subsection is consistent with Tanzanian case law that is moving toward adopting an educational model for expert testimony. The D.P.P. v. Shida Manyama @ Seleman Mabuba, Criminal Appeal No. 285 (2012), Tanz. C.A. (Nov. 27, 2012).

Subsection 10.3 Qualifying an Expert. Subject to Subsection 2.2, a witness may be qualified as an expert if:

- A. the subject of a dispute is sufficiently beyond common experience that the expert's testimony would assist the court in understanding evidence or in determining an issue; and

Drafting Committee Note: As stated in this Section's preamble, the "subject of a dispute . . . beyond common experience" can include any specialised knowledge, such as custom, tradition, science, medicine, or technical expertise. Where the fact-finders can make their own determination of a matter without the assistance of an expert, Subsection 10.3(A) does not allow the witness to be classified as an expert.

The common knowledge rule has been regarded differently in common law countries. In England, the rule draws authority from seminal cases such as R v. Turner, 60 Cr App Rep 80 (1974) and Folkes v. Chad (1782) 3 Doug KB 157 which restricted expert opinion to facts or "scientific information which is likely to be outside the experience and knowledge of a judge and jury." Some common law countries – like Australia and Singapore – have rejected the common knowledge rule and permit expert testimony on matters of common knowledge. See, Australian Law Reform Commission Report "Evidence of an opinion is not inadmissible only because it is about a matter of common knowledge." See also, Singapore Evidence Act § 47(3) ("The mere fact that lay persons have a common sense perspective on some issues does not necessarily mean that an expert opinion on that issue will not be permitted." Rather, these countries employ a "substantial assistance" test, which is based upon the likelihood of expert testimony to offer substantial assistance to the fact-finder, in determining whether expert testimony is admissible.

The reference in this Subsection to Subsection 2.2 is redundant, as all evidence is subject to Subsection 2.2 unless provided by Law to the contrary, but we

recommend the redundancy to emphasise that a court may consider the cost-benefit analysis of Subsection 2.2 in deciding whether to hear evidence. This consideration may be particularly important in qualifying a witness in Tanzania because of the potential for cost shifting in a civil suit. See Civil Procedure Code § 30 (No. 49 of 1966).

- B. the witness possesses comprehensive and authoritative knowledge of, or skill in, a particular area relevant to a fact in issue based on the expert's knowledge, skill, experience, training, or education; and
- C. the expert testifies in a reliable manner from this knowledge.

*Drafting Committee Note: Subsections 10.3(B) and (C) require the witness to possess the specialised knowledge necessary under Subsection 10.3(A) from a reliable foundation and to apply that foundation in a reliable fashion to the facts of the case before the court will qualify the witness as an expert. Testing reliability is challenging. Different jurisdictions use different tests, especially for scientific evidence. The U.S. federal courts use a factor test to ensure reliability by reference to the scientific method, its general acceptance, its error rate, and whether the theory has been subject to peer review. *Daubert v. Merrell Dow Pharms.*, 509 U.S. 579 (1993). Some U.S. states continue to use a test that defers to the relevant scientific community by asking if that community considers the science to be generally accepted. See *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923). Australian courts similarly defer to the relevant scientific community in determining the reliability of the expert witness's foundation. See, *Mallard v. The Queen*, [2003] WASCA 296. Meanwhile, English courts do not appear to have a settled rule on the question of expert reliability. *Adrian Keane et al.*, *The Modern Law of Evidence* 534–36 (8th ed. 2010).*

Subsection 10.4 Calling an Expert Witness. Any party may call an expert witness. The court may, on its own or on a party's motion, call its own expert witness, subject to the parties' opportunity to object and provide names for the court's consideration of additional expert witnesses. All non-calling parties may cross-examine the expert witness.

Drafting Committee Note: This rule addresses §§ 47, 48, and 53 of the TEA. A minority of nations has curtailed the parties calling expert witnesses in favour of a single court-called expert. The DC believes the adversarial process is best supported through party-called experts. Nonetheless, the court should have this power to be used in exceptional circumstances, as most common law countries—including the United States, England, Singapore, Australia, and New Zealand—provide. If the court calls an expert witness, the parties should have the opportunity to challenge and cross-examine the witness, as this Subsection provides.

Subsection 10.5 Disclosing the Facts or Data Underlying an Expert's Opinion. Experts may rely on the kind of facts, data, or resources other experts in their field would rely upon regardless of whether these items are otherwise admissible

Drafting Committee Note: If a discipline is sufficiently respected to allow its practitioners to testify at trial, the legal system should also respect the epistemological foundations of that field. Indeed, without concluding that the

epistemological foundations of a field are sound, a court should not admit expert testimony relating to that field. If the foundations are sound, the court should hear the basis of an expert's opinion without regard to any technical rule of evidence. This Subsection thus contemplates allowing an expert witness to rely on hearsay evidence that is otherwise not admissible for the purposes of testifying and forming an opinion. This is in accord with the TEA § 53 as well as U.S. and English practice. The purpose is simple—other professions do not have the same evidentiary concerns as the legal system. A doctor, for instance, would be acting within the typical behaviour of the medical field to rely on the statements from other health professionals or patients to form an opinion as to the patient's condition. Admitting such evidence furthers the goals of the legal system, even if the initial statements would otherwise be inadmissible. This Subsection goes further than the practise in some countries by not distinguishing between using the evidence relied upon by the expert solely to appraise the expert's opinion and relying on it for its truth content. It makes admissible otherwise inadmissible evidence reasonably relied upon by experts, if there is any question about the matter.

Subsection 10.6 Compensation of an Expert. An expert witness shall disclose any and all compensation received directly or indirectly from the parties.

Drafting Committee Note: Compensation may influence the incentives and thus credibility of an expert. This Subsection requires such compensation to be made known to the court. See also Civil Procedure Code, Order XVI, Rule 2(2) for guidance on compensation of experts. Specifically, Order XVI Rule 2(2) of the Civil Procedure Code provides that the court may determine whether a sum paid to an expert witness is “reasonable remuneration for the time occupied both in giving evidence and in performing any work of an expert character necessary for the case.”

SECTION XI: PRIVILEGES

Rules on privileges are exceptions to the general truth-seeking purpose of evidentiary law. A privilege keeps evidence out of court which otherwise may be highly probative information. Thus, any privilege rule reflects a trade-off between the general truth-seeking purpose of evidence law and protections for certain social relationships. Yet for the past several centuries, the law of multiple countries has contained evidentiary privileges where it is generally believed that the communications generated by certain relationships and the contribution of those communications to the relationships is so valuable as to outweigh the loss to the legal process of useful information. The following Section builds on the privilege rules contained in the TEA, providing more streamlined, modern privilege rules.

The DC’s survey of Tanzanian case law revealed few matters reaching the Court of Appeal or the High Court that turned on the application of an evidentiary privilege. The DC has been unable to determine whether this area of evidence law is long-settled or simply dormant in The United Republic. However, the TEA’s privilege rules have their origin in the Indian Evidence Act and reflect the IEA’s antiquated language and structure. Thus, the TEA’s privilege rules essentially reproduce a 19th century understanding of privilege law, and leave many opportunities for useful revision. Similarly, Parliament’s later modifications to evidentiary privileges, while helpful, are also in need of revisions to better serve the purposes of the legal system and Tanzanian society generally.

Some of the privilege rules promulgated in the TEA have been intentionally omitted from this Proposed Act. Some omissions were simply to reduce the complexity and prolixity of the TEA by removing rules or sections that were apparent by implication from other Sections. For example, §131 of the TEA allowed that spouses would be competent and compellable witnesses in all civil proceedings—and yet that statement was obvious from the specific application to criminal proceedings in the previous rule, § 130, which sets the only rules for spousal privilege in the entire TEA. Also, other privilege provisions of the TEA are mislabelled, such as those relating to a witness’s lack of privilege against testifying about potentially incriminating matters (see TEA §§ 139–41).

These proposed Subsections also add recognised modern privileges not contained in the TEA, such as Subsections 11.3, 11.8, 11.9, and 11.10. The DC has included these privileges as they are now commonplace in privilege law in the Anglo-American world, and we believe protect relationships valued in Tanzanian society. However, these privileges do represent a policy shift for the current trial system of the United Republic, as they may require the exclusion of evidence upon which litigants ordinarily rely today. Additionally, the DC has declined to include an updated version of TEA § 138, the privilege protecting the production of title deeds by witnesses not a party. The DC does not believe this privilege advances any significant social policy and thus presents an unjustified barrier to the fact-finder.

Subsection 11.1 Privileges Recognised Only as Provided. Except as otherwise required by Law, no person has a privilege to:

- A. Refuse to be a witness; or
- B. Refuse to disclose any matter; or
- C. Refuse to produce any object in writing; or

- D. Prevent another person from being a witness or disclosing any matter or producing any object or writing.

Drafting Committee Note: This explicitly states that no party may claim privileges unless otherwise provided by Law. This principle is implicit in TEA §§ 129–141, which list the circumstances in which an individual may claim a privilege, but provide no explicit default rule. The purpose of this Subsection is to affirm the default rule that privileges generally do not apply unless otherwise stated in this Proposed Act or by Law.

Subsection 11.2 Attorney-Client Privilege.

- A. *Definitions.* The following definitions apply throughout this Section:

“attorney” has the meaning given in Subsection 1.1;

“attorney’s representative” has the meaning given in Subsection 1.1;

“client” has the meaning given in Subsection 1.1;

“client’s representative” has the meaning given in Subsection 1.1;

“confidential communications” has the meaning given in Subsection 1.1.

- B. *General Rule of Privilege.* A client may refuse to disclose, and may prevent any other person from disclosing, confidential communications made for the purpose of rendering professional legal services to the client. This privilege applies to confidential communications:

- i. Between the client or his representative and the client’s attorney or the attorney’s representative; or
- ii. Between the client’s attorney and the attorney’s representative; or
- iii. Between the client or the client’s attorney and an attorney representing another party in a matter of common interest, such as matters in which the client is presenting a joint defence in a criminal case, or is a joint plaintiff or defendant in a civil case; or
- iv. Between the client’s representatives or between the client and one of the client’s representatives; or
- v. Between attorneys representing the client and their representatives.

- C. *Who May Claim the Privilege.* The client’s privilege extends to the client’s guardian or representative, or to a similar representative of a corporation, association, or other organisation. The attorney who represented the client at the time of the communication may claim the privilege only on behalf of the client; the attorney has the authority to claim such privilege in the absence of contrary evidence. The client’s privilege may be invoked on behalf of the client by any of the individuals identified in Subsection 11.2(B).

- D. *Exceptions.* This Subsection shall not apply:

- i. *Crime or Fraud.* If the attorney-client communication in question was made in furtherance of an intended crime or fraud by the client.
- ii. *Claimants Through Same Deceased Client.* If parties who claim through the same deceased client seek to protect a communication relevant to an issue between those parties.
- iii. *Breach of Duty by Lawyer.* If the attorney-client communication in question is relevant to an issue of breach of duty by the attorney to the client, or by the client to the attorney.
- iv. *Document Attested by Lawyer.* If the attorney-client communication is relevant to an issue concerning an attested document to which the lawyer is an attesting witness.
- v. *Joint Clients.* If the attorney-client communication is relevant to a matter of common interest between two or more clients, was made by any of the clients to a lawyer they retained or consulted in common, and is offered in an action between any of the clients.

E. *Waiver of Privilege.* The Attorney-Client Privilege is waived:

- i. *Inadvertent Disclosure.* If reasonable steps to prevent disclosure of the communications are not taken, and, if disclosure occurs, reasonable steps to rectify the disclosure are not taken.
- ii. *Intentional Disclosure.* If there is an intentional disclosure of certain communications, and the disclosed communications concern the same subject matter as undisclosed and privileged communications that should reasonably be considered together with the disclosed matter, the privilege shall be considered waived for the undisclosed communications.

Drafting Committee Note: The Attorney-Client Privilege is the oldest, most established, and most deeply ingrained, of all evidentiary privileges. See 4 JOHN HENRY WIGMORE, A TREATISE ON THE SYSTEM OF EVIDENCE AT TRIALS AT COMMON LAW § 2290 (1905) (“The history of this privilege goes back to the reign of Elizabeth, where it already appears as unquestioned . . .”). It has been described as “indispensable to the lawyer’s function as advocate on the theory that the advocate can adequately prepare a case only if the client is free to disclose everything, bad as well as good.” Geoffrey C. Hazard, Jr., An Historical Perspective on the Attorney-Client Privilege, 66 CALIF. L. REV. 1061, 1061 (1978).

This Subsection replaces § 134 of the TEA (Professional Communications), which largely reproduced the exact language of the § 126 of the IEA. The IEA § 134 does not define “client,” which creates ambiguity as to whether “client” might include a corporation or other organisational entity in addition to an individual person. More fundamentally, TEA § 134 retains a Subsection of IEA § 126 that may be inconsistent with the aim of the privilege: it removes from the reach of the privilege facts the attorney observes that indicate a “criminal offence . . . has been committed since the commencement of his employment.” If this extends to learning of crimes through confidential disclosures, it should be eliminated. Attorneys often learn whether their clients have committed crimes; doing so is vital to determining how

the attorney will represent the client. It is irrelevant whether the criminal act in question is committed before or after the start of an attorney's representation of the client. Excluding such activities from the privilege can serve only to discourage clients from communicating fully and openly with their attorneys, which ultimately decreases the quality of representation and thus the administration of justice. The DC's opinion that Subsection 11.2(E) should be removed is incorporated in the above draft Subsection 11.2. Thus this revised Subsection extends the privilege to confidential communications involving a crime committed after the commencement of representation.

However, this Subsection distinguishes between confidential communications received by an attorney and observations of the commission of a crime. For example, if a defence attorney witnesses his client commit murder, there is no privilege under this Subsection because the act of murder is not a "confidential communication" for the purpose of the rendition of legal services. But, if a client tells his defence attorney that he has committed a murder, that communication is protected by this privilege.

This Subsection also incorporates TEA § 135, which mandated that TEA § 134 apply to "servants of advocates" as well as their interpreters and clerks—another vestige of the IEA. (These positions are subsumed in the proposed Subsection's application to "representatives" of attorneys.) It further removes the exclusion from the privilege of information that might be aired in proceedings that place an attorney's professional conduct at issue. In such proceedings, attorneys themselves may retain an attorney to represent them; excluding such proceedings from the reach of the Attorney-Client Privilege is, as above, antithetical to the policy behind the privilege. However, this proposed Subsection also adopts specific facets of TEA § 134, including its subjective standard on who is considered an "attorney:" "a person authorised by law or reasonably believed by the client to be authorised by law to practise law in any country." This Subsection has also retained the strong crime-fraud exception articulated in TEA § 134, excepting any attorney-client communications made to further commission of a crime or fraud from the privilege.

Subsection 11.3 Work Product Privilege.

- A. *General Rule of Privilege.* Ordinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent). But those materials may be discovered if:
 - i. they are otherwise discoverable under Rules 23–27 of the Civil Procedure Code of Tanzania; and
 - ii. the party shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means.
- B. *Protection Against Disclosure.* If the court orders discovery of those materials, it must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation.

- C. *Previous Statement.* Any party or other person may, on request and without the required showing, obtain the person's own previous statement about the action or its subject matter. A previous statement is either:
- i. a written statement that the person has signed or otherwise adopted or approved; or
 - ii. a contemporaneous stenographic, mechanical, digital, or other recording—or a transcription of it—that recites substantially verbatim the person's oral statement.

Drafting Committee Note: The Work Product Privilege is related to the Attorney-Client Privilege, but they protect separate phases of the rendition of legal services. The Work Product Privilege "exempts from production material generated by the attorney in anticipation of litigation." Ronald J. Allen et al., A Positive Theory of the Attorney-Client Privilege and the Work Product Doctrine, 19 J. LEGAL STUD. 359, 361 (1990) (emphasis added). This Subsection borrows from the United States Federal Rules of Civil Procedure Rule 26. The U.S. Supreme Court provided the classic justification for the work product privilege when it recognised that a lawyer must "assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference." Hickman v. Taylor, 329 U.S. 495, 511 (1947). In the absence of protection for such activities, "[a]n attorney's thoughts, heretofore inviolate, would not be his own. Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. The effect on the legal profession would be demoralizing. And the interests of the clients and the cause of justice would be poorly served." Id.

The TEA does not provide a privilege for legal work product, but it does recognise a privilege for the Attorney-Client relationship. The proposed Work Product Privilege advances the same goal as Attorney-Client privilege—the promotion of effective legal service. Modern evidence law recognises the Work Product Privilege as a bedrock principle of evidence law. In sum, the DC believes the Proposed Act should protect attorney work product.

Subsection 11.4 Spousal Privilege.

- A. "Spouse" has the meaning given in Subsection 1.1.
- B. *General Rule of Privilege.* The Spouse of an accused in a criminal proceeding, has a privilege to refuse to testify against the accused.
- C. *Exceptions.* This Subsection shall not apply to any Spouse:
- i. In any case charged under Chapter XV of the Penal Code;
 - ii. In any case charged under the Law of Marriage Act;
 - iii. In any other case in which the accused is charged with an action which affected the person or property of the Spouse(s) or children of the accused. This exception shall extend to Spouse-Witnesses in polygamous marriages who may potentially testify against a Spouse-

Accused who is charged with any crime against another Spouse in the marriage.

- iv. To out-of-court statements by the Witness-Spouse, provided that such statements are admissible under or are exempted from the rule against hearsay, Subsection 4.2.

Drafting Committee Note: This Subsection revises TEA § 130. This Subsection does not extend the privilege of an accused to prevent their spouse from being called to testify, as provided by TEA § 130 (4). Instead, this Subsection provides an explicit privilege to the spouse of an accused to refuse to testify. This reallocates the privilege accords with the intention of Parliament in enacting the Law of Marriage Act, which sought to “liberate married women from . . . exploitation and oppression by reducing the traditional inequality between them and their husbands in so far as their respective domestic rights and duties are concerned.” Mohamed v. Sefu, Civ. App. No. 9 of 1983, [1983] Tanz. C.A. Also, this revision may reaffirm a right implicit in the TEA; § 130 (1) can be read to provide an implicit privilege to spouses as they are not “compellable,” and this Subsection has made that privilege explicit.

The DC has interpreted TEA § 130 to not address the issue of one spouse from a polygamous marriage being called to testify against another spouse from the marriage to whom they are not married—most commonly seen in the case of two wives of the same man (wives of a polygamous marriage). This Subsection does not provide a privilege to individuals who are both spouses to a third person. These individuals are not married to each other and thus not spouses. Thus, this Subsection preserves the DC’s understanding of spousal privileges, though there is an open question whether communication between co-wives should benefit from the privilege in this provision.

The DC has limited this Subsection to a testimonial privilege, and not a confidential communications privilege, as no rule protecting confidential communications between spouses exists in the TEA. Despite the existence of such a rule in the Indian Evidence Act (at § 122), it appears to have been excluded when the TEA was created. Such a confidential communication privilege is advocated by Wigmore. See 4 WIGMORE, supra, § 2332. However, The DC is sceptical of the actual social impact of such a rule in encouraging spouses to discuss confidential matters, and declines to add such a privilege to this Proposed Act without empirical research attesting to the social impact of a confidential spousal communications privilege.

Finally, the DC has preserved the scope of this privilege outlined in TEA §§ 130–31, and limited this privilege to criminal case. This Subsection retains the exceptions found in § 130 (2) and incorporates TEA § 131. TEA § 131 limits the privilege here to criminal matters and provides that Spouses of parties to civil matters may be called to testify.

Subsection 11.5 Judicial Privilege. A judge, magistrate, or justice of the peace may refuse to testify regarding their own conduct while performing official duties, or regarding anything which came to their knowledge in the course of performing official duties. A judge, magistrate, or justice of the peace may prevent any other person from testifying about confidential communications among the judge or magistrate and their staff, or colleagues, made in the performance of their official duties.

A. *Exceptions.* This Subsection shall not apply:

- i. *Crime or fraud.* If the communications in question were made in furtherance of an intended crime or fraud by the judge, magistrate, or justice of the peace.
- ii. *Order from higher court.* If the order for information on the communications in question is from a court to which the judge, magistrate, or justice of the peace is subordinate.

Drafting Committee Note: The Subsection expands on the privilege provided in § 129 of the TEA. Section 129 provides a testimonial privilege to judges regarding the performance of their official role, but would allow any judicial staff to testify regarding the judge's performance of official duties. This loophole threatens judicial independence by allowing key staff to testify to otherwise privileged matters. The DC, in drafting this Subsection, preserved § 129 and added a confidential communications privilege to close this loophole.

A strong judicial privilege is important to protect the integrity of the justice system. For a discussion of the common law origins and present status of the judicial privilege, see Charles Sorenson, Adopting the Judicial Deliberations Privilege: Making Explicit What Has Been Implicit, 94 Massachusetts Law Review 243 (2014). Opening a judge's internal papers, drafts, and other writings to public scrutiny through the courts would impinge upon the independence of the judiciary, particularly if parties to a case before a judge were permitted to question that same judge's internal operations through evidentiary challenges. However, this Subsection preserves the key exception provided in TEA § 129 is preserved, and judges remain accountable to superior courts. Furthermore the DC has added an exception for inquiries into judicial crime or fraud, as this privilege should not protect corruption.

The protection for judicial communications also protects the privacy of those who have had matters heard before a particular judge or magistrate. Section 129 of the TEA was strictly limited to the situation of a judge or magistrate answering questions about his activity "in court," which excludes any communications between the judge or magistrate and her staff or colleagues relating to the crafting of opinions, memoranda, and so on. This Subsection thus provides broader protections for information disclosed in judicial proceedings.

Subsection 11.6 Self-Incrimination.

- A. *Accused Called as Witness.* In any criminal proceeding, an accused may refuse to testify. If an accused chooses to testify, he must answer every proper question truthfully.
- B. *Non-Accused Called as Witness.*
 - i. In any civil or criminal proceedings, a non-accused witness will not be excused from answering any question or producing any document, upon the ground that the answer to that question may incriminate the witness, or that it may expose the witness to a penalty or forfeiture of any kind, or that it may establish that the witness owes a debt or is otherwise subject to a civil suit.

- ii. An answer that a witness is compelled to give per Subsection 11.6 (B)(i) shall not subject him to any arrest or prosecution, or be proved against him in any subsequent criminal proceedings, except to a prosecution for giving false evidence by such answer.

Drafting Committee Note: This is a modernisation of TEA §§ 139 and 141, which provide a privilege dealing with statements and documents that may lead to self-incrimination or pecuniary loss. There does not appear to be a similar provision in the Constitution of the United Republic. In discussing the IEA version of this privilege, Sarkar notes that the privilege against self-incrimination exists in England but was removed in India, with the proviso that self-incriminating statements are immune from future liability—a “sensible compromise” in response to criticism by Wigmore and others that the self-incrimination privilege is simply sponsorship of crime. SARKAR at 1230. The DC does not enter into this discussion and recommends that the accused not be compellable and witnesses protected if they are compelled to testify.

This Subsection is drafted in order to accord with Section XII (Confessions).

Subsection 11.7 Identity of Informer Privilege.

- A. *General Rule of Privilege.* The Government, or a subdivision thereof, may refuse to disclose the identity of a person who has provided information assisting in an investigation into the violation of law to a law enforcement officer, or member of a parliamentary committee, or its staff conducting an investigation.
- B. *Exception: Voluntary disclosure; informer as witness.* No privilege exists under this Subsection if either the identity of the informer or the subject matter of his communication has been disclosed to those who would have cause to resent the communication by a holder of the privilege or by the informer’s own action, or if the informer appears as a witness for the government.

Drafting Committee Note: Section 133 of the TEA is another rule taken almost directly from the IEA, § 121: it allows judges, magistrates, public revenue officers, and police officers to refuse disclosure of “any information regarding the commission of an offence.” This rule would appear to allow many public officials to avoid revealing in court the basis of a charge against an accused, a concept that is out of step with modern conceptions of the justice system. In India, this rule was justified in Sarkar on the basis of protecting the identities of informers, and encouraging citizens to inform the police of crimes and criminals. SARKAR at 1180–84. Even if incentivising informers is a worthy goal, § 133 as written is far too broad, as it extends to “any information” about a crime, not just that provided by informers. The Subsection is an attempt to more directly reconcile the policy goal of protecting informers with that of producing the most possible information, especially with regard to evidence the Government may possess against an individual, in court proceedings.

Subsection 11.8 Official Information Privilege.

- A. *Definitions:* The following definitions apply throughout this Section:

“secret of state” has the meaning given in Subsection 1.1;

“official information” has the meaning given in Subsection 1.1.

- B. *General Rule of Privilege.* The Government may refuse to give evidence and to prevent any person from giving evidence upon a showing of reasonable likelihood of danger that the evidence will disclose a secret of state or official information, as defined in this Subsection.

Drafting Committee Note: This Subsection is drafted to fully retain the privilege over official information of the TEA § 132 in cases to which the Government is a party, or in which the Government may be ordered to provide evidence that fits the definitions of “state secrets” or “official information” in the Section. Section 132 of the TEA is curious, as it gives individuals defined only as “Ministers” the independent authority to withhold “unpublished official records or communications” from judicial scrutiny, apparently overriding or superseding any determination of the court itself. The DC sees no reason why such a privilege should be vested in “Ministers” instead of in the Government itself, and it sees no reason why courts should not review the claim of privilege here as in any other privilege. This Subsection is consistent with English practice. See Conway v. Rimmer, (1968) A.C. 910, in which the House of Lords held that the court may view the document and then balance the harm to public interest against the administration of justice. That is what this Subsection proposes as well.

Subsection 11.9 Clergy-Communicant Privilege.

- A. *Definitions:* The following definitions apply throughout this Section:

“member of the clergy” is a pastor, minister, imam, priest, rabbi, or other similar functionary of a religious organisation, or an individual reasonably believed to serve in such a capacity by the person claiming the privilege.

“expectation of confidentiality” is reasonable if the communication in question is made privately, and is not intended for further disclosure except to other persons present in furtherance of the purpose of the communication.

- B. *General Rule of Privilege.* A person may refuse to disclose or prevent another from disclosing communications that the person has made to a member of the clergy in their spiritual and professional capacity with a reasonable expectation of confidentiality. The clergy member may claim the privilege on behalf of the person.

Drafting Committee Note: Tanzania is a religious country. Only 1.4 per cent of the population is unaffiliated with any religion. PEW FORUM ON RELIGION & PUBLIC LIFE, THE GLOBAL RELIGIOUS LANDSCAPE 50 (2012), available at http://www.pewforum.org/uploadedFiles/Topics/Religious_Affiliation/globalReligion-full.pdf. While Tanzania has not codified a privilege for communications between clergy and their communicants, the Drafting Committee proposes one here to fulfil the protection of “the right to the freedom to have conscience, or faith, and choice in matters of religion” contained within the Constitution of the United Republic. CONST. § 19(1) (Tanz.).

The TEA’s exclusion of the religious communications privilege most likely derives from its omission from the Indian Evidence Act. The Indian law was modelled on English evidence doctrine at the time it was written in 1872, and English courts

have refused to recognise a religious communications privilege since the Seventeenth Century. See Seward Reese, Confidential Communications to the Clergy, 24 OHIO ST. L.J. 55, 57 (1963) (“There is still no priest-penitent privilege statute in England . . .”); Jacob M. Yellin, The History and Current Status of the Clergy-Penitent Privilege, 23 Santa Clara L. Rev. 95, 103 (1983) (“[T]here seems little doubt that a minister in post-Reformation England did not have a privilege against testifying. In present day England the law remains that a minister has no right to refuse disclosure of confidential communications.”). While the English courts do not recognise a religious communication privilege, other countries do. In Ireland, the privilege was recognised in Cook v. Carroll, (1945) I.R. 515, which stated that religious communications meet the Wigmore’s four standards of privilege communications. According to the Polish Criminal Procedure Code, Article 178, a priest cannot be examined in the capacity of a witness on facts communicated to him in confession. The United States Supreme Court has described the basis for this privilege in universal terms, as “the human need to disclose to a spiritual counsellor, in total and absolute confidence, what are believed to be flawed acts or thoughts and to receive priestly consolation and guidance in return.” Trammel v. United States, 445 U.S. 40, 51 (1980). While protection for religious communication originates in the confessional seal of the Catholic Church, other religions such as Islam place great emphasis on the confidentiality of such communication and religious officials’ duty to maintain it. See JOHN C. BUSH & WILLIAM HAROLD TIEMANN, THE RIGHT TO SILENCE: PRIVILEGED CLERGY COMMUNICATION AND THE LAW 43–44 (3d ed. 1989); Azizah Al-Hibri, The Muslim Perspective on the Clergy-Penitent Privilege, 29 LOY. L.A. L. REV. 1723, 1725–27 (1996) (discussing high value of confidentiality among imams and adherents to Islam for religious communications). This privilege is thus intended to be construed widely, with equal application to all religious communications between penitents (or communicants or parishioners or congregants) and religious leaders (such as pastors, priests, and imams) that are intended to be private and confidential.

Subsection 11.10 Political Vote Privilege. Every person may refuse to disclose the content of their vote in a political election conducted by secret ballot, unless the vote was cast illegally.

Drafting Committee Note: This Subsection has no corresponding rule in the TEA. While the Tanzanian Constitution does not call for secret ballots, the political vote privilege is present in other countries, such as England and the United States, whose constitutions also do not call for secret ballots. See Charles B. Nutting, Freedom of Silence: Constitutional Protection Against Governmental Intrusion in Political Affairs, 47 Mich. L. Rev. 181 (1948–49).

Subsection 11.11 Trade Secrets Privilege.

- A. *General Rule of Privilege.* A person has a privilege, to refuse to disclose and to prevent other persons from disclosing a trade secret owned by him, if the allowance of the privilege will not tend to conceal fraud or otherwise work injustice.
- B. *Who May Claim the Privilege.* This privilege may be claimed by the person or the person’s agent or employee.

- C. When disclosure is directed, the judge shall take such protective measures as the interest of the holder of the privilege, of the parties, and the furtherance of justice may require.

Drafting Committee Note: In applying this Subsection, a court should assess fraud through the evidence offered in the case and under the burdens of proof established in Subsections 1.5 and 1.6. The trade secret privilege attempts to accommodate two interests. First, it recognises that trade secrets are an important property interest deserving protection. Second, it recognises the importance of fair adjudication. This Subsection accommodates both interests by requiring a party to disclose a trade secret only if necessary to prevent fraud or injustice. Disclosure is required only if necessary for a fair adjudication of the requesting party's claims or defences. If possible, the court should protect trade secrets where they are the subject of litigation.

Subsection 11.12 Waiver of Privilege. A person who may invoke a privilege provided within Section 11 against disclosure of a confidential matter or communication waives that privilege if the person or their predecessor, while acting as holder of the privilege, voluntarily discloses or consents to disclose any significant part of the matter of communication or document. This Subsection does not apply if the disclosure is itself a privileged communication.

Drafting Committee Note: This Subsection provides clearer language than that of TEA § 136, which appears contradictory on its face; it holds that a party giving evidence “at his own instance” is not “deemed to have consented thereby to such disclosure.” This Subsection, as with much language above, is copied nearly word for word from the IEA. Its aim is understandable, as explained by Sarkar: to allow witnesses to testify about certain matters without having waived an entire privilege to which they are entitled. See SARKAR at 1220–21. But the suggested replacement above follows a modern approach, allowing a finding of waiver of a privilege when it appears clear that the holder of a privilege intends to waive it, which can be signalled by disclosing significant portions of the protected communication itself. This Subsection also incorporates TEA § 140.

SECTION XII: CONFESSIONS

This Section reproduces TEA §§ 27–33, Confessions, and adds an explicit prohibition on the admissibility of confessions obtained through torture. In most common law jurisdictions, the law governing confessions falls within the law of criminal procedure. Criminal procedure establishes the manner in which a government enforces substantive criminal law. Criminal procedure law functions to balance the rights of the accused against the social interest in the prosecution of crime. In contrast, rules of evidence structure trials and determine the admissibility of evidence.

The DC believes the normal structure of the law is sensible and that the law governing confessions is best codified within Tanzania's law of criminal procedure rather than within this Proposed Act. The DC is reluctant to propose new confession law because any proposed rule creates a significant risk of changing or repealing portions of Tanzania's existing law of criminal procedure, which would risk disrupting the complex system of law governing criminal procedure. The United Republic already has a separate code of criminal procedure with its own rules for gathering confessions, in addition to an exclusionary rule and a Bill of Rights within its Constitution, which touches on confessions through outlawing torture. None of these three legal structures references any of the others, which produces complexity bordering on confusion for the outside observer and, perhaps, stakeholders in the legal system as well, given the purported use of torture in obtaining confessions in Tanzania. See COMMONWEALTH HUMAN RIGHTS INITIATIVE, THE POLICE, THE PEOPLE, THE POLITICS: POLICE ACCOUNTABILITY IN TANZANIA 14 (2006) (“Despite constitutional protections of human rights and freedoms, there are reports of police abuse of power and use of excessive force, arbitrary arrests and detention, torture and mistreatment of detainees and a failure to prosecute for human rights violations.”). Nonetheless, rules for the use of confessions in court only exist within the TEA.

Another reason to stay our hand is that confessions and rights to silence comprise one of the most complicated areas within the already complex arena of criminal procedure. For a discussion of the controversies within the English speaking world over such matters, see David Hamer, et al., Submission on Exposure Draft: Evidence Amendment (Evidence of Silence) Bill 2012 available at <http://ssrn.com/abstract=2401445>. Lacking a complete understanding of Tanzania's criminal procedure law and criminal trial practice, and a hesitancy to wade into complicated and contested policy issues, the DC declines to modify and has largely retained the current confessions section contained in the TEA. This Subsection is unmodified from §§ 27–33 of the TEA except for the following changes: The DC has added an explicit prohibition on confessions obtained through torture, found in Subsection 12.2; The DC has added Subsection titles (in italic) and typographical formatting in compliance with this Proposed Act; The DC has modified some rule language where more clear language can be used without changing the substance of the law.

Subsection 12.1 Admissibility of confessions to police officers.

- A. A confession voluntarily made to a police officer by a person accused of an offence may be proved as against that person.
- B. The burden of persuasion that any confession made by an accused person was voluntarily made by him shall lie on the prosecution.

- C. A confession shall be held to be involuntary if the court believes that it was induced by any threat, promise or other prejudice held out by the police officer to whom it was made or by any member of the Police Force or by any other person in authority.

Drafting Committee Note: This Subsection reproduces TEA § 27 verbatim, except that "onus of proving" has been replaced with "burden of persuasion" for clarity purposes. While the DC has left these provisions largely unchanged for the reasons discussed above, it recommends that the archaic language used by this Subsection be modernised if it is to remain in this Proposed Act.

Subsection 12.2 Prohibition on Confessions Obtained Through Use or Threat of Torture. A confession made under threat or subjugation to torture or inhuman or degrading punishment or treatment is inadmissible.

Drafting Committee Note: In an exception to the general decision to leave the confession rules within the TEA untouched, the DC has included an explicit prohibition on the use of confessions obtained through torture. The Tanzanian Bill of Rights, as incorporated into the Constitution, includes two provisions relevant to confessions and torture. First, § 13(6)(d) provides that "for the purposes of preserving the right or equality of human beings, human dignity shall be protected in all activities pertaining to criminal investigations and process, and in any other matters for which a person is restrained, or in the execution of a sentence." Second, § 13(6)(e) mandates that "no person shall be subjected to torture or inhuman or degrading punishment or treatment." However, no provision of the constitution, including the 1984 Bill of Rights, mentions confessions, self-incrimination or any other related concept. The current law of confessions provided in the TEA provides no explicit prohibition of evidence obtained through the use of torture.

*Currently, §§ 27, 29–30 of the TEA explicitly allow any confession made under threat unless it produces false information—these provisions implicitly clash with § 13(6)(e), which is not conditioned on the falsity of the confession. The Court of Appeal addressed this issue in *Sambula @ Kishuu v. R.*, Crim. App. No. 112 of 2005, [2007] Tanz. C.A. ("Since Exh. P3 was obtained through torture, it should not have been admitted in evidence regardless of its truth."). Additionally, the Court of Appeal held in *Lubilo v. R.*, Crim. App. No. 10 of 1995, Tanz. C.A., "Where torture is alleged, this Court has taken a more serious view and has implicitly presumed an associated confession to be vitiated and incapable of admission under [TEA] section 29." Thus, this Subsection resolves any constitutional conflict, and incorporates existing Tanzanian case law by explicitly prohibiting torture as defined in § 13(6)(e) of the Tanzanian Bill of Rights.*

This Subsection must be read in conjunction with Subsection 12.4, which reproduces TEA § 29 that explicitly tolerates confession obtained through threat unless the court is of the opinion that the nature of the threat "was likely to cause and untrue admission of guilt to be made." This Subsection should be read to create a per se rule that the threat or subjugation to torture or inhuman or degrading punishment or treatment is likely to cause an untrue admission of guilt to be made.

Subsection 12.3 Confessions before magistrate. A confession which is freely and voluntarily made by a person accused of an offence in the immediate presence of a

magistrate as defined in the Magistrates' Courts Act, or a justice of the peace under that Act, may be proved as against that person.

Drafting Committee Note: This Subsection reproduces TEA § 28 verbatim.

Subsection 12.4 Confession caused by inducement, threat or promise. No confession which is tendered in evidence shall be rejected on the ground that a promise or a 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.

Drafting Committee Note: This Subsection reproduces TEA § 29 verbatim. Though, as noted above, this Subsection should not be read to allow confession obtained through threat or subjugation to torture or inhuman or degrading punishment or treatment. Such confessions are likely to cause an untrue admission of guilt to be made.

Subsection 12.5 Confession made after removal of impression caused by inducement, threat or promise. Where an inducement has been made to a person accused of an offence in such circumstances and of such a nature as are referred to in Subsection 12.4 and a confession is made after the impression caused by the inducement has, in the opinion of the court, been fully removed, the confession is admissible unless otherwise provided by Law, and need not be rejected.

Drafting Committee Note: This Subsection reproduces TEA § 30, but the words “relevant” has been replaced with “admissible, unless otherwise provided by Law.” This modification updates the idiosyncratic usage of relevance within the TEA, and brings this Subsection in line with modern usage of the term relevant in the rest of this Proposed Act.

Subsection 12.6 Admissibility of information received from accused in police custody. When any fact is proved to be discovered in consequence of information received from a person accused of any offence in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, is admissible, unless otherwise provided by Law.

Drafting Committee Note: This Subsection reproduces TEA § 31, with the exception that the word “relevant” has been replaced with “admissible, unless otherwise provided by Law.” This modification updates the idiosyncratic usage of relevance within the TEA, and brings this Subsection in line with modern usage of the term relevant in the rest of this Proposed Act. The DC wishes to note that this Subsection verges on incoherence, and we would certainly recommend changes to it but for the reasons given above to stay our hand. We also note, as it may explain the incoherence, that apart from an introductory phrase this Subsection reproduces § 27 of the IEA verbatim.

Subsection 12.7 Confession otherwise admissible not to become inadmissible because of promise of secrecy, etc. If a confession referred to in Subsection 12.4 is otherwise admissible, it does not become inadmissible merely because it was made under a promise of secrecy, or in consequence of a deception practised on the accused person for the purpose of obtaining it, or when he was drunk, or because it was made in answer

to questions which he need not have answered, whatever may have been the form of those questions, or because he was not warned that he was not bound to make such confession, and that evidence of it might be given against him.

Drafting Committee Note: This Subsection reproduces TEA § 32, but the words “relevant” and “irrelevant” have been replaced with “admissible” and “inadmissible,” respectively. This modification eliminates the idiosyncratic usage of relevance within the TEA, and brings this Subsection in line with modern usage of the term relevant in the rest of this Proposed Act.

Also, consistent with Subsection 12.2, this Subsection should not be read to allow confession obtained through threat or subjugation to torture or inhuman or degrading punishment or treatment.

Subsection 12.8 Confession may be taken into consideration against co-accused

- A. When two or more persons are being tried jointly for the same offence or for different offences arising out of the same transaction, and a confession of the offence or offences charged made by one of those persons affecting himself and some other of those persons is proved, the court may take that confession into consideration against that other person.
- B. Notwithstanding Subsection 12.8, a conviction of an accused person shall not be based solely on a confession by a co-accused.
- C. In this Subsection, "offence" includes the abetment of, or attempt to commit, the offence charged and any other offences which are minor and cognate to the offence charged which are disclosed in the confession and admitted by the accused.

Drafting Committee Note: This Subsection reproduces TEA § 33 verbatim, except that cross-references have been amended accordingly.

SECTION XIII: PAROL EVIDENCE

This Section retains TEA §§ 100–109’s extensive treatment of parol evidence verbatim. In most common law jurisdictions, parol evidence rules develop within the substantive law of contracts, because they provide instructions for contract interpretation. Parol evidence rules explain the relative weight judges must ascribe to various types of written and oral evidence in determining the terms of a contract. In contrast, rules of evidence structure trials and determine the admissibility of evidence.

The DC believes that a parol evidence rule is best codified within Tanzania’s law of contracts, and is not appropriately addressed within this Proposed Act. Moreover, drafting a new parol evidence rule creates a significant risk of overruling Tanzania’s existing substantive contract law. Therefore, absent a clear understanding of Tanzania’s current law of contract, the DC declines to modify the TEA’s parol evidence rule and has included the current parol evidence rule contained in the TEA. The substance of the parol evidence rule contained below is unmodified from §§ 100–109 of the TEA. The proposed parol evidence rule differs from the version currently in the TEA only in the addition of Subsection titles (in italic) typographical formatting, and vocabulary updates, in particular the use of the phrase “copy of a document” to replace “secondary evidence,” in compliance with this Proposed Act.

Subsection 13.1 Residual Parol Evidence Provisions.

- A. *Evidence of terms of contracts, grants, and other dispositions of property.*
 - i. When the terms of a contract, grant, or any other disposition of property, have been reduced to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms of such contract, grant, or other disposition of property, or of such matter except the document itself, or a copy of its contents in cases in which a copy of a document is admissible under the provisions of this Act.
 - ii. Notwithstanding Subsection 13.1(A)(i), when a public officer is required by Law to be appointed in writing, and it is shown that any particular person has acted as such officer, the writing by which he is appointed need not be proved.
 - iii. Wills admitted to probate in the United Republic may be proved by the probate.
 - iv. Subsection 13.1(A)(i) applies equally to cases in which the contracts, grants or dispositions of property referred to are contained in one document and to cases in which they are contained in more documents than one.
 - v. When there are more originals than one, one original only need be proved.

The statement, in any document, of a fact other than the facts referred to in this Subsection, shall not preclude the admission of oral evidence as to the same fact.

- B. *Exclusion of evidence of oral agreement.* When the terms of a contract, grant or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved according to Subsection 13.1 A, no evidence of any oral agreement or statement shall be admitted, as between the parties to that instrument or their representatives in interest, for the purpose of contradicting, varying, adding to or subtracting from its terms: Provided that—
- i. any fact may be proved which would invalidate any document, or which would entitle any person to any decree or order relating thereto such as fraud, intimidation, illegality, want of due execution, want of capacity in any contracting party, want or failure of consideration or mistake in fact or law;
 - ii. the existence of any separate oral agreement as to any matter on which a document is silent and which is not inconsistent with its terms may be proved and in considering whether or not this paragraph of this provision applies, the court shall have regard to the degree of formality of the document;
 - iii. the existence of any separate oral agreement constituting a condition precedent to the attaching of any obligation under the contract, grant or disposition of property, may be proved;
 - iv. the existence of any distinct subsequent oral agreement to rescind or modify the contract, grant or disposition of property may be proved, except in cases in which the contract, grant or disposition of property is by Law required to be in writing or has been registered according to the law in force for the time being as to the registration of documents;
 - v. any usage or custom by which incidents not expressly mentioned in any contract are usually annexed to contracts of that description may be proved, if the annexing of such incident would not be repugnant to or inconsistent with the express terms of the contract;
 - vi. any fact may be proved which shows in what manner the language of a document is related to existing facts.
- C. *Exclusion of evidence to explain patent ambiguity.* 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.
- D. *Exclusion of evidence against application of document to existing facts.* When language used in a document is plain in itself, and when it applies accurately to existing facts, evidence may not be given to show that it was not meant to apply to such fact.

- E. *Evidence as to latent ambiguity.* 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.
- F. *Evidence regarding application of language which can apply to one only of several persons or things.* When the facts are such that the language used might have been meant to apply to any one, and could not have been meant to apply to more than one, of several persons or things, evidence may be given of facts which show which of those persons or things it was intended to apply to.
- G. *Evidence regarding application of language to one of two sets of facts.* When the language used in a document applies partly to one set of existing facts and partly to another set of existing facts but the whole of it does not apply correctly to either, evidence may be given to show to which of the two it was meant to apply.
- H. *Evidence regarding meaning of illegible characters.* Evidence may be given to show the meaning of illegible or not commonly intelligible characters of foreign, obsolete, technical, local and regional expressions, of abbreviations and of words used in a peculiar sense.
- I. *Evidence of variation given by third parties.* Persons who are not parties to a document or their representatives in interest may give evidence of any facts tending to show a contemporaneous agreement varying the terms of the document.
- J. *Saving of provisions of written law regarding construction of wills, etc.* Nothing in this Section shall be taken to affect the provisions of any other written law as to the construction of wills or other testamentary dispositions.

SECTION XIV: ESTOPPEL

This Section retains TEA §§ 123–126’s treatment of estoppel, verbatim. In both the United States and England, estoppel is largely a common law doctrine. Although relating to the law of evidence by limiting a party’s claims, such doctrines are substantive or procedural rather than evidentiary. We thus treat them as we do in Sections XII and XIII by retaining these provisions verbatim to avoid inadvertently destroying substantive or procedural rights. However, this Section contains one innovation. For inexplicable reasons, the TEA has certain provisions outside of its ESTOPPEL section to the effect that evidence of judgements are “conclusive” evidence or proof of various matters. These are in fact estoppel rules, and thus this Section places those provisions of TEA §§ 42–46 here. Equally curiously, §§ 44 and 45 make judgements admissible on certain facts, and thus these are in fact hearsay exceptions. They are thus reproduced under Section IV, Hearsay.

Last, TEA § 42, Previous Judgements Relevant to bar a Second Suit or Trial, has been omitted from this Proposed Act for two reasons. First, the section provides for the admissibility of previous judgements when res judicata or collateral estoppel is at issue (although those are not the terms used in the TEA). However, both res judicata and collateral estoppel normally are thought of as questions of law and not questions of fact. Regardless of the complex distinctions between questions of law and of fact, this Proposed Act (and the TEA) should not extend to what everyone agrees is a question of law. Put simply, the judge should make determinations of whether to take cognizance of a prior judgement or hold a trial without regard to the law of evidence. Second, this provision may interact in complex ways with procedural law, which is beyond the scope of our task. Thus, as with the previous two Sections, the DC has elected not to propose a new rule.

Subsection 14.1 General Estoppel. When one person has, by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon that belief, neither he nor his representative shall be allowed, in any suit or proceedings between himself and that person or his representative, to deny the truth of that thing.

Drafting Committee Note: This Subsection reproduces TEA § 123 verbatim.

Subsection 14.2 Estoppel of Tenant or of License or Person in Possession. No tenant of immovable property or person claiming through such tenant shall, during the continuance of the tenancy, be permitted to deny that the landlord of the tenant had, at the beginning of the tenancy, a title to the immovable property; and no person who comes upon any immovable property by the licence of the person in possession thereof shall during the continuance of such licence be permitted to deny that such person had a title to such possession at the time when such licence was given.

Drafting Committee Note: This Subsection reproduces TEA § 124 verbatim.

Subsection 14.3 Estoppel of Acceptor of Bill of Exchange. No acceptor of a bill of exchange shall be permitted to deny that the drawer had authority to draw the bill or to endorse it: Provided that the acceptor of a bill of exchange may deny that the bill was actually drawn or endorsed by the person by whom it purports to have been drawn or endorsed.

Drafting Committee Note: This Subsection reproduces TEA § 125 verbatim.

Subsection 14.4 Estoppel of a Bailee or Licensee. No bailee or licensee shall be permitted to deny that his bailor or licensor had, at the time when bailment or licence commenced, authority to make such bailment or grant such licence: Provided that if a bailee delivers the goods bailed to a person other than the bailor, he may prove that such person had a right to them as against the bailor.

Drafting Committee Note: This Subsection reproduces TEA § 126 verbatim.

Subsection 14.5 Estoppel of Facts Related to Prior Judgements

- A. A final judgement, order or decree of a competent court, in the exercise of probate, matrimonial, admiralty or insolvency jurisdiction, which confers upon or takes away from any person any legal character, or which declares any person to be entitled to any such character, or to be entitled to any specific thing, not as against any specified person but absolutely, is admissible when the existence of any such legal character or the title of any such person to any such thing, is in issue.

Drafting Committee Note: The language of this Subsection is a modernisation of TEA § 43. The phrase “probate, matrimonial, admiralty or insolvency jurisdiction” is thought to encompass all civil proceedings, and the substance of Subsection 14.5(A) should be applicable to any non-criminal trial. This Subsection diverges from the TEA in form, but not substance, by replacing the two occurrences of the word “relevant” with “admissible” and “in issue,” respectively.

- B. A judgement, order or decree referred to in Subsection 14.5(A) is conclusive proof—
- i. that any legal character which it confers accrued at the time when such judgement, order or decree came into operation;
 - ii. that any legal character to which it declares any such person to be entitled, accrued to that person at the time when such judgement, order or decree declares it to have accrued to that person;
 - iii. that any legal character which it takes away from any such person ceased at the time from which such judgement, order or decree declares that it had ceased or should cease; and
 - iv. that anything to which it declares any person to be so entitled was the property of that person at the time from which such judgement, order or decree declares that it had been or should be his property.
- C. A final judgement of a court in any criminal proceedings shall, after the expiry of the time limit for an appeal against that judgement or after the date of the decision of an appeal in those proceedings, whichever is the later, be taken as conclusive evidence that the person convicted or acquitted was guilty or innocent of the offence to which the judgement relates.

Drafting Committee Note: Subsection 14.5 is a consolidation of TEA §§ 43 and 43A, relating to estoppel of facts from prior judgements and the use of evidence of prior convictions and acquittals in subsequent trials

The distinction between the phrases “conclusive proof,” used in TEA § 43, and “conclusive evidence,” used in TEA § 43A, is unclear. This distinction is thus retained in the Proposed Act in order to avoid an inadvertent impact on substantive law, but its elimination would clarify and ease the administration of this Subsection.

Subsection 14.6 Evidence of Invalid Judgements. Any party to a suit or other proceedings may show that any judgement, order or decree which is relevant under Subsection 14.2 or Subsection 4.3 (Z), and which has been proved by the adverse party, was delivered by a court not competent to deliver it, or was obtained by fraud or collusion.

Drafting Committee Note: Subsection 14.6 adopts TEA § 46, and has been amended to apply to the language of TEA § 43A in addition to § 43. TEA § 43A was adopted as a result of the Relevancy of Judgements In Criminal Proceedings Act No. 19 of 1980, but the text of TEA § 46 was not at the time amended to apply to the new Subsection. Evidence of fraud, collusion, or of an incompetent court should be admissible for the purpose of countering evidence of guilt or innocence based on a prior final judgement. Also, the cross references in TEA § 46, have been updated to be compliant with this Act.