
INTRODUCTION

REFORMING THE LAW OF EVIDENCE OF TANZANIA (PART THREE): THE FOUNDATIONS OF THE LAW OF EVIDENCE AND THEIR IMPLICATIONS FOR DEVELOPING COUNTRIES

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In 2011, the Government of the United Republic of Tanzania, under the auspices of the Prevention and Combating of Corruption Bureau and its Director General Dr. Edward Hoseah, initiated a project to review and reform the law of evidence of Tanzania, which is embodied in the Tanzania Evidence Act of 1967¹ (“TEA”). Approximately ninety percent of the TEA comes directly from the 1872 Indian Evidence Act² and has remained in significant part unaltered for over fifty years. To facilitate this project, the Government created a committee of stakeholders in Tanzania, the Working Group, with Dr. Hoseah as Chair, and retained me as its Chief Consultant. I in turn created a Drafting Committee formed by students from the Northwestern University School of Law to assist in the research and eventually the drafting of a new code of evidence for Tanzania. After three years of work, the Drafting Committee completed the *Proposed Final Draft: Tanzania Evidence Act 2014* (“Proposed Code”).³ In April, 2014,

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¹ Evidence Act, Act No. 6 of 1967, codified as amended at Cap. 6 R.E. 2002 (Tanz.).

² Ronald J. Allen, Timothy Fry, Jessica Notebaert & Jeff VanDam, *Reforming the Law of Evidence of Tanzania (Part One): The Social and Legal Challenges*, 31 B.U. INT’L L.J. 217, 222-23 (2013).

³ The Proposed Code has been published as part of this symposium series. Ronald J. Allen, *A Proposed Evidence Law*, 33 B.U. INT’L L.J. 283, 359 (2015). The Drafting Committee also compiled commentary on the Proposed Code, and the Proposed Code with Commentary may be found on the *Boston University International Law Journal* website. See *Proposed Final Draft: Tanzania Evidence Act 2014* (2014) [hereinafter Proposed Tanzania

the draft of the Proposed Code was presented to the Court of Appeal of Tanzania, which is the country's highest court. The Court of Appeal forwarded it to the Parliament of the United Republic with its recommendation that the draft be considered for adoption. Parliament then forwarded it to the Law Reform Commission of Tanzania ("LRCT"), which now has it under advisement.

At the inception of this project, I did not intend to draft a replacement code for the TEA. The original terms of reference were for me and the Drafting Committee to consult with the Tanzanians on work product largely produced by its Working Group. As it was immediately clear that simply transplanting American rules of evidence to Tanzania was out of the question,⁴ we began by focusing on the political economy, sociology, history, and structure of the legal system of Tanzania to prepare to provide useful feedback on reform proposals suitable for Tanzania. It was also clear that standard academic research had to be supplemented with on-the-ground observation, so after a year of research we travelled to Tanzania to conduct fieldwork for the reform effort. In its 2013 summer issue, the *Boston University International Law Journal* ("BUILJ") published the results of our research and Tanzania fieldwork in *Reforming the Law of Evidence of Tanzania (Part One): The Social and Legal Challenges*.⁵

That article is long and complex, ranging over the history, sociology, politics, and economics of Tanzania to the conceptual foundations and details of the TEA, which I will not reproduce here. Distilled to their somewhat banal essence, the lessons we extracted from our study were that there were considerable challenges facing law reform efforts in Tanzania, but that there were grounds for optimism. We also concluded that, in our judgment, the TEA was not worth saving. It is a conceptual and drafting nightmare that almost surely exacerbates injustice in Tanzania, and so we recommended to the Working Group that it should consider drafting a completely new code of evidence based on sound conceptual foundations and taking into account the best practices and thinking about the field of evidence worldwide.⁶ However, our exploration of worldwide law reform efforts, including the rule of law and law and development movements reconfirmed that such conclusions and the resulting efforts must be embraced and run by the stakeholders in Tanzania. Thus, we were pleased

Evidence Act], available at <http://www.bu.edu/ilj/reforming-the-law-of-evidence-of-tanzania-part-three>.

⁴ Or as we put it in our first article on evidence law reform in Tanzania, "a cure worse than the disease." Allen et al., *supra* note 2, at 265.

⁵ See generally *id.*

⁶ A summary of our conclusion may be found in the introduction to the Proposed Code with Commentary published on the BUILJ website. See Proposed Tanzania Evidence Act, *supra* note 3.

to report after our meetings in 2012 in Tanzania that “the domestic committee [would] retain[] ultimate responsibility for leading reform efforts.”⁷

Upon our return to the United States, we expected to receive work product from the Working Group, but this did not occur.⁸ We thought that perhaps one reason for this paralysis was our recommendation of scrapping the entire TEA and literally replacing not only the TEA, but also its conceptual foundations. Consequently, we decided to set forth a blueprint for reform including the distillation of the principles that should guide any evidence reform project, which the *BUILJ* published as *Reforming the Law of Evidence of Tanzania (Part Two): Conceptual Overview and Practical Steps*.⁹ We also decided to provide a rough draft of a Proposed Code simply to demonstrate that the task of constructing an evidence law on modern foundations was feasible. We presented our blueprint and the rough draft to the Tanzanian stakeholders in the spring of 2013 with the hope that doing so would be the catalyst to the reform effort.

When we returned to the United States again, we were informed that the Working Group had been disbanded, and we were asked to provide more than just a rough draft of a Proposed Code. We debated whether to do so, principally for the reason discussed above that in our view these efforts must be indigenous. For various reasons, however, we agreed, and drafted the Proposed Code with Commentary that was presented to the Court of Appeal. Now, the *BUILJ* is publishing the third and final contribution to Tanzanian evidence law reform. This issue includes an abridged version of our proposed Tanzanian evidence code as well as four articles written by participants of *The Foundations of the Law of Evidence and Their Implications for Developing Countries*, a conference held at Northwestern University School of Law to discuss the evidence law reform project in Tanzania, an analogous project in China, and similar reform efforts in developing countries around the world. The conference was co-sponsored by the Government of the United Republic of Tanzania and the Evidence Law and Forensic Sciences Institute of ZhengFa University (the China University of Political Science and Law). In addition, the *BUILJ* is publishing electronically the papers presented at the conference and the Proposed Code with Commentary.¹⁰ The conference focused on precisely

⁷ Allen et al., *supra* note 2, at 221.

⁸ We received one research paper, which was very helpful but on a single topic. B. Rutinwa, *The Extent to Which the Evidence Act, 1967 Recognises Electronic Evidence* (Sept. 22, 2012) (on file with author).

⁹ Ronald J. Allen, Timothy Fry, Jessica Notebaert & Jeff VanDam, *Reforming the Law of Evidence of Tanzania (Part Two): Conceptual Overview and Practical Steps*, 32 B.U. INT’L L.J. 1 (2014). For a description of the eight principles, see *id.* at 47-48.

¹⁰ *The Foundations of the Law of Evidence and Their Implications for Developing*

what the title describes, and in addition explored more generally the implications of political economy, sociology, history, and anthropology for legal reform.

An important theme of the conference was the contributions of the field of evidence to the growing aspirations across the world for the rule of law. The rule of law is generally conceived as the essential ingredient in the glue that holds society together peacefully. It provides the means by which rights and obligations can be known in advance, and negotiated around. I own something. You want it. You need to negotiate with me over its price rather than just seize it arbitrarily. There is thus a critical sense in which the law, rather than being restraining, is liberating. It channels the ways in which people can construct their lives and pursue their livelihoods, and removes the risk of arbitrary and unpredictable intrusions into their personal spheres, whether from governments or other individuals.

The values of the rule of law conventionally are attributed primarily to the articulation of rights and their reciprocal obligations. There is some important truth to this view, but it obscures something equally profound, which is that without accurate resolution of disputes—without accurate fact-finding, in other words—rights and obligations are meaningless. Facts are prior to and determinative of rights and obligations. Consider the simple case of ownership of the clothes you are wearing. Your ownership of those clothes allows you the “right” to possess, consume, control, and dispose of those assets, but suppose I demand that you return “my” clothes; I insist that the clothes that you are wearing actually belong to me. What will you do? You will search for a decision-maker to whom you will present evidence that you bought, made, found, or were given the clothes in question, and, if successful in this effort, the decision-maker will grant you those rights and impose upon me reciprocal obligations. The critical point is that those rights and obligations are dependent upon what facts are found and are derivative of them. The significance of this point cannot be overstated. Tying rights and obligations to true states of the real world anchors rights and obligations in things that can be known and are independent of whim and caprice. This is why the ideas of relevance and materiality are so fundamentally important to the construction of a legal system. They tie the legal system to the bedrock of factual accuracy. This point is truly universal. On the one hand, neither rights nor obligations nor policy choices can be pursued in the absence of knowledge of the actual, relevant states of affairs. On the other hand, tying rights to facts gives them solidity and stability so that they cannot be removed arbitrarily. In my opinion, a rational law of evidence is truly the bedrock of a rational system

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of law.

The focus on accurate adjudication crystalizes what many consider to be the main and dominant theme of the field of evidence, and this is what I call the **Epistemological Problem** of a legal system—how does it construct and use knowledge? The conventional view is the law of evidence largely resides here. It structures trial through rules that govern the admission and exclusion of evidence, which in turn hopefully advance the interests of the legal system and more generally the society of which it is a part. However, the tasks of the law of evidence go far beyond the epistemological problem and involve at least four other matters that must be taken into account by the law reformer.

The Organizational Problem:

The efficient and effective establishment of the facts is only the beginning of the obligations of the law of evidence. In addition, the law of evidence regulates the interactions of the various participants in the legal system: trial judge, jurors and other lay assessors, attorneys, parties, and witnesses (both lay and expert) and constructs the framework for a trial. It allocates both power and discretion to each of the actors. 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. Similarly, the law of evidence structures 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 the relationships among branches of government, in particular but not limited to the judiciary and legislature.

Take just one example. There is always a question whether it is better to have a highly complicated rule or 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. One may think that the primary implication of this choice has to do again with the epistemological problem. Can one create sensible *a priori* rules that advance accurate fact finding or is this a matter best left to the judicial officer closest to the scene—the person who actually observes witnesses testify and so on? Although discretionary rules allow trial judges to make judgments that reflect individualized considerations of certain pieces of evidence in any given case, that is not the only effect. The higher the discretionary 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, but they also insulate the judiciary from control of the legislature. In contrast to discretionary rules, categorical rules maintain control over the evidentiary process in the governmental organ that issues the rules, whether that organ is appellate courts or legislatures. Categorical rules also can be the means of educating trial judges of the risks of certain kinds of evidence. Consider another complexity. Some think that reducing discretion in individual judges has the potential to reduce inconsistent treatment of similar cases. Indeed it does, but at the same time it may result in increased errors of fact; one might get consistently wrong results.

The complexities do not end there. 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, whereas simpler rules largely benefit those with lesser financial means. Complex codes of evidence law also contribute to the instability of decision making by encouraging appeals, which increase the transaction costs of litigation. Increasing the transaction costs of protecting a right decreases its value, which may have detrimental social consequences, a point I develop below. An active appellate practice with many reversals and new trials may not be a sign of a healthy legal system but rather the opposite: a sign of substantial wasted resources. In any event, the law of evidence must be fashioned with all of these variables in mind.

The Governance Problem:

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 color the public's view, not just of an important aspect of the machinery of justice, but of the government itself. Evidence law that facilitates smooth and consistent operation of trials will likely 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, but so, too, will a misshapen law of evidence undermine these values.

Notwithstanding the importance of accurate fact finding, the public has other demands in addition to sensible trials, and consequently accurate fact finding competes with other social values, in particular through the creation of incentives of various kinds. Moreover, completely accurate fact finding is impossible, and difficult questions of how to allocate errors and correct decisions must be addressed. Collectively, these comprise what I call the governance problem of the law of evidence.

The value of factual accuracy must be weighed against other policies that

a government may reasonably pursue. The list of such policies is long and culturally contingent. 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. In the United States and more and more in the world at large, a body of exclusionary rules is premised on the perceived need to regulate police investigative activities.

The governance problem presses even more deeply. To see this, it is helpful to separate primary from litigation behavior. Primary behavior is everyday behavior of the population. Litigation behavior is activity directed toward formal resolution of disputes. The two are not definitionally precise; there is a gray area of negotiation and compromise that leads to or away from formal litigation but plainly involves dispute resolution, but I will put that detail aside. Regulating primary behavior deals with what a society thinks is right and wrong, with creating the conditions for efficient economic behavior, regulating social interactions and institutions, and so on. Facilitating such behavior is the typical objective of social organization generally, and the law specifically. Litigation behavior, by contrast, involves parties attempting to resolve disputes that have arisen over claims about inappropriate primary behavior or to rectify social disruptions that have occurred through alleged violations of substantive law. Most current analyses focus on either primary behavior or litigation behavior as though they were separate spheres of influence with internal logics of their own. This separation, while analytically useful in many contexts, misses or distorts the central regulatory problem.

Primary and litigation behavior are not hermetically sealed off from each other, and they cannot be analyzed separately in the abstract. For example, there may be some types of litigation where behavior (both primary and litigation) are optimized by a low or zero cost litigation process. However, there may be other types of litigation that are optimized by infinitely high costs—in other words, cases that should not be brought. Perhaps family disputes are an example of this latter category. Other cases may be somewhere in between in that behavior is optimized by the impositions of some costs. The tasks for the legal system include responding intelligently in the face of such complexity—which cases should be encouraged to be brought, and which should not, and the law of evidence is a critically important tool in implementing whatever decisions are reached.

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There is a related problem to which cases should be encouraged or discouraged, and that is the risk of error. A mistake-free legal system is not possible. It is critically important to recognize that two types of errors can be made: a wrongful verdict for a plaintiff (or in a criminal case a conviction of an innocent person), which is a false-positive error, and a wrongful verdict for an accused (or the acquittal of a guilty person), which is a false-negative error. Resource allocation and other decisions will affect the relationship between these two types of errors. It is equally important to realize that there are two types of correct decisions that can be made, and thus the error problem is not simply the problem of avoiding wrongful verdicts whether in civil or criminal cases but extends to optimizing the four possible decisions at trial.

The Social Problem:

Trials may serve yet many other purposes, such as symbolic and political purposes. Both institutions and individuals can make statements through the means of trials, and impart lessons of various kinds. Trials also can be the means of vindicating reputations and obstructing governmental overreaching. Obviously, the law of evidence can impact all such issues. 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 behavior and propensity evidence reflect in part a belief that an individual should not be trapped in the past. The hearsay rule reflects the values of the right to confront witnesses against oneself.

The Enforcement Problem:

There is a critical distinction between the law on the books and the law in action. It is one thing to write laws and rules; it is another to enforce them in the way anticipated by the drafter of those provisions. The drafter of an evidence code may think that allocating discretion to someone, whether trial judge or attorney, makes sense, but the drafter will have in mind an approach to exercising that discretion that might not be shared by those being regulated by the rule. More generally, it is hard to enforce complex codes in social events such as trials. The event itself, the trial, is often fluid and unpredictable, and it would be impossible to have every decision made at trial second guessed by some other authority. Drafters of a law of evidence law must attempt to accommodate such matters.

Articles from the Conference:

At the conference, a rich set of presentations discussed these and related matters, and out of the materials presented at the conference, the Editors of the *BUILJ* decided to publish four in print and the others in electronic form. In the first article published below, *Delinking the Law of Evidence of Tanzania from Its Indian Ancestry*, Associate Justice Ibrahim H. Juma of the Tanzania Court of Appeal traces the TEA's development from its origins in English jurisprudence and the Indian Evidence Act of 1872¹¹ to its current state. Justice Juma first elaborates on key components of the TEA's 188 interconnected provisions and how those provisions operate in practice. Because of its complexity, Justice Juma strongly recommends reforming the TEA to bring Tanzania's evidence code into the twenty-first century. Justice Juma also points to the reform efforts of other countries with evidence codes that are similar to the TEA, such as Singapore and Nigeria, as further evidence that reform in Tanzania is necessary. However, Justice Juma notes that certain challenges that are unique to Tanzania may require a more cautious approach to reform. Among those challenges are the promotion of cohesion among the over "120 tribes, several races, and multiple religions"¹² of Tanzania; identification and reform of other procedural laws, such as Tanzania's Criminal Procedure Act and Civil Procedure Act, which provide additional rules of evidence apart from the TEA; and the cost of reform, which may run into the hundreds of millions of dollars. Justice Juma reminds readers that ambitious attempts at legal reform in Tanzania's past were scaled back after reformers proposed changes with too high a price tag. Nevertheless, Justice Juma is optimistic about the LRCT's latest reform efforts, recognizing that the potential benefits from properly updating the TEA will outweigh the obstacles in the TEA's path to reform.

Chief Justice Mohamed Chande Othman of the Tanzania Court of Appeal is the author of the series' second article, *An Eclectic Paradigm in the Law of Evidence and Its Reform in Tanzania: Competency of a Child Witness*. In this piece, Chief Justice Othman focuses with precision on the admissibility of child testimony, especially in cases of sexual assault. He first notes with disappointment that, until recently, Tanzanian trial courts struggled to apply the TEA's admissibility requirements for the testimony of child witnesses. This led to a general trend of exclusion of child testimony and functional immunity for perpetrators of sexual assault against whom the child's testimony would have been the pivotal piece of evidence

¹¹ Indian Evidence Act, No. 1 of 1872, INDIA CODE (1993).

¹² Ibrahim H. Juma, *Delinking the Law of Evidence of Tanzania from Its Indian Ancestry*, 33 B.U. INT'L L.J. 297, 308 (2015).

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to secure a conviction. In *Kimbutu Otinuel v. The Republic of Tanzania*,¹³ the Court of Appeal attempted to correct this problem. However, the Chief Justice suggests that a legislative, rather than a judicial solution, is required. The Chief Justice goes on to explain how the laws of other common law countries, such as England, Ireland, Australia, and the United States handle the admissibility of child testimony. The Chief Justice suggests that the worldwide trend is toward greater admissibility of child testimony and insists on the incorporation of this trend into TEA reform. He then cites Subsection 9.3 of the Proposed Code, which, if adopted, would provide for broad admissibility of child testimony in Tanzania.¹⁴ However, the Chief Justice concludes on a cautionary note, explaining that Tanzania must not blindly adopt another country's evidence code in overhauling the TEA. Rather, TEA reform must take into consideration Tanzania's unique circumstances.

In the third article of the series, *Exporting the Hearsay Provisions of the Federal Rules of Evidence*, Professor Roger Park balances the advantages and disadvantages of the Federal Rules model for the rule against hearsay in countries, like Tanzania, without jury trials. Professor Park argues that a broad rule against hearsay with many exceptions, like Rules 801 through 804,¹⁵ may be better suited for a bifurcated jury trial system in which the jury does not listen to any hearsay evidence until the judge determines its admissibility. With rigid rules for the admissibility and exclusion of hearsay, judges benefit from guidelines for deciding which kinds of hearsay evidence will minimize the risk of undue jury prejudice. However, in a unitary system where the judge is both the gatekeeper that determines the admissibility of hearsay evidence and the factfinder, the Federal Rules model does not make as much sense. In such a system, judges hear every piece of hearsay evidence before deciding admissibility or exclusion. Even if a judge excludes the hearsay under one of the Federal Rules' multiple provisions, that evidence may still covertly influence the judge later on in reaching a verdict. In a unitary system, a rule against hearsay with a broad residual exception, like Rule 807,¹⁶ may therefore be the best option. Under such a rule, judges, who hear every piece of hearsay evidence, but do not have to worry about hearsay's effect on lay jurors, will be freer to credit the hearsay that they find probative and discredit the hearsay that they find dubious. No lengthy determinations under a complex system of exceptions would be required.

Finally, in *Are the Federal Rules of Evidence Dynamite?*, Professor

¹³ See *Otinuel v. Republic*, Crim. App. No. 300 (Ct. App. Tanz. 2011) (unreported).

¹⁴ Proposed Tanzania Evidence Act, *supra* note 3, § 9.3.

¹⁵ FED. R. EVID. 801-804.

¹⁶ *Id.* 807.

Stephan Landsman underscores the dangers inherent in using the Federal Rules of Evidence as a template for evidence law reform in other countries. First, Professor Landsman analyzes the work of Professor Inga Markovits on exporting American legal mechanisms, concluding that the Federal Rules would fit under Professor Markovits' broader category of procedural reforms that would not easily gain acceptance in foreign jurisdictions (i.e., reforms that disrupt "firmly established patterns 'based on repetition, role-playing and tradition'"¹⁷). Professor Landsman then identifies four fundamental characteristics of the Federal Rules: the Rules' (1) place in an adversarial system; (2) emphasis on oral testimony; (3) disdain for misleading and prejudicial evidence and its effect on lay jurors; and (4) treatment of all litigants on equal terms. Professor Landsman suggests that drafters who model reform after the Federal Rules may find it difficult for their proposals to take hold in a country whose institutions and culture do not reflect these four values. Then, after examining the effect of American Supreme Court case law on the Federal Rules, Professor Landsman points to certain Federal Rules that reformers should avoid due to those rules' lack of empirical support. One of the most poignant examples is the admissibility of evidence of prior instances of sexual assault and child molestation under Rules 413 through 415.¹⁸ Those rules permit factfinders to determine a defendant's guilt based on an inference from prior acts of sexual assault that the defendant has a propensity to commit such acts generally. This notion, Professor Landsman suggests, enjoys "only modest empirical support while the prejudicial impact" of such evidence "is clearly great."¹⁹

Each of these articles is interesting, valuable, and thought provoking. I am largely in agreement with the general thrusts of both Justice Juma's and Chief Justice Othman's articles and thus have nothing of interest to add about them. I do have a few comments on Professor Park's and Professor Landsman's contributions.

Professor Park provides a conventional critique of the hearsay rule and its implications for legal systems with juries, with which I agree. However, I think he gives insufficient consideration to the organizational problem described above. He mentions that rules can give "guidelines to judges about especially reliable hearsay,"²⁰ but the law of evidence can do

¹⁷ Inga Markovits, *Exporting Law Reform – Will It Travel?*, 37 CORNELL INT'L L.J. 95, 110 (2004).

¹⁸ FED. R. EVID. 413-415. Professor Landsman also describes in detail other Federal Rules that similarly lack empirical support, including FED. R. EVID. 407, 411, 609. Stephan Landsman, *Are the Federal Rules of Evidence Dynamite?*, 33 B.U. INT'L L.J. 343, 355 (2015).

¹⁹ *Id.* at 356.

²⁰ Roger C. Park, *Exporting the Hearsay Provisions of the Federal Rules of Evidence*,

considerably more than that. There may be certain areas of the law, regardless of whether juries are involved, in which legislatures or appellate courts think greater control of the trial judges may be in order or in which detailed rules may do more than give guidance by furthering understanding in the trial courts of the risks of certain kinds of evidence. This will be particularly true as the quality of the judges and their support services diminish. As Professor Park analyzes the hearsay rule, he seems to have in the back of his mind the image of the federal district court judge who typically is a quite impressive creature—well-educated and honest, with vast experience, good judgement, and rich supporting resources, such as highly educated and motivated clerks. However, not all trial judges are like federal district court judges, and one of the most difficult tasks that the Drafting Committee faced was trying to decide when to temper our enthusiasm for the essential elimination of relevancy-based special rules (which the hearsay rule is) with other concerns, such as giving more harried, less robustly supported, trial judges decision-making guidance. We opted for a detailed hearsay rule for precisely that reason, although it should be noted that, like its modern counterpart in the Federal Rules, most reasonably reliable hearsay is admitted rather than excluded, and a residual exception allows individualized determinations of admissibility to be made in any event.²¹

The Drafting Committee also shares Professor Landsman's worry about exporting American legal mechanisms, but what is missing here is, first, a consideration of an alternative approach, and second, a focus on how much the Proposed Code diverges from the Federal Rules of Evidence. As to the first point, we hope that Professor Landsman's article stimulates a discussion on what would be a good model for reform, a point that his analysis does not include. It is possible that maintaining the TEA would be preferable to the wrenching change that would come from a complete overhaul, no matter what model is used, but having spent four years thinking about just this issue, we doubt it. It is hard to imagine how the TEA fulfills any social need of the Tanzanians except, perhaps, to solidify the position of elites who have the capacity to utilize it for their own benefit. It is also telling that, so far as we are aware, every major reform effort in the field of evidence over the last forty years has used the Federal Rules as a model or a foil, just as the Drafting Committee did. Some jurisdictions have been heavily influenced by the Federal Rules of Evidence and their predecessors, such as Ghana;²² others are inspired by or react to

33 B.U. INT'L L.J. 327, 336 (2015).

²¹ The hearsay rule is in Section IV of the Proposed Code, and the residual exception is in Subsection 4.7. See Proposed Tanzania Evidence Act, *supra* note 3, § 4.

²² See, e.g., GHANA LAW REFORM COMM'N, COMMENTARY ON THE EVIDENCE DECREE (1975).

aspects of them, such as China.²³

Moreover, although the Proposed Code obviously was compiled in the shadow of the Federal Rules, there are fundamental differences, including differences that embrace many of Professor Landsman's discrete criticisms about certain Federal Rules.²⁴ The Proposed Code is ordered differently and better. It moves from general provisions to the critical policy issues facing the law of evidence, in particular relevancy, and then all the specialized relevancy rules including the hearsay rule. It then provides for the general structure of trials with a burden of proof section, followed by a derivative of burdens of proof, judicial notice, which resolves the long-standing dispute about the conditions under which notice should be taken. This is followed by the general conditions of authentication embodying the one uniform rule of evidence that actually exists that everything needs to be shown to be what it purports to be. The current Best Evidence rule, which is just a specialized authentication rule, follows. Witnesses are then treated, followed by expert witnesses. The last of the new sections contains the exceptions to all the previous rules, privileges.

In addition to a radically different structure, important innovations reflecting the best understanding of the field of evidence are introduced. Among the most general of these are:

1. The analytical identity of "relevance" and "conditional relevancy" is noted and operationalized through the elimination of the otiose doctrine of conditional relevancy;²⁵
2. The equally otiose concept of presumptions, in all its forms, is also eliminated by simply focusing directly on allocations of burdens of proof;²⁶
3. Judicial notice, as mentioned above, is rationalized by providing the obvious solution to the elusive meaning of such phrases—"generally known within the trial court's territorial

²³ See John J. Capowski, *China's Evidentiary and Procedural Reforms, the Federal Rules of Evidence, and the Harmonization of Civil and Common Law*, 47 TEX. INT'L L.J. 454 (2012); see also H. ALLAN LEAL, ONTARIO LAW REFORM COMM'N, REPORT ON THE LAW OF EVIDENCE (1976), available at http://archive.org/stream/reportonlawofevi00onta/reportonlawofevi00onta_djvu.txt (frequently comparing Canadian law to U.S. law).

²⁴ There is no counterpart in the Proposed Code to FED. R. EVID. 413-415, and the approach to prior convictions in Subsection 3.4. See Proposed Tanzania Evidence Act, *supra* note 3, § 3.4.

²⁵ Subsection 2.3 of the Proposed Code combines relevancy and conditional relevancy into a single question. *Id.* § 2.3.

²⁶ *Id.* § 5.

jurisdiction”²⁷ and “can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned”²⁸—by tying them to whether a reasonable person could disagree given the burden of persuasion;²⁹ and

4. Moves the use of experts toward an educational model, which, it turns out, Tanzania case law was already trending toward.³⁰

Nonetheless, and consistent with Professor Landsman’s primary point, none of this means that the Proposed Code is a good fit for Tanzania. We will have to hear from the Tanzanians on that point. On behalf of the Drafting Committee, our primary aspiration has been to be helpful to the ongoing law reform efforts in Tanzania. We would be delighted if, at the end of the day, the Proposed Code is just a catalyst rather than a model, although we would be even more delighted the more of a model it becomes. We are also delighted by the assistance given to the Tanzanians and the Chinese delegations by the thoughtful presentations and discussions at the conference, and we express our gratitude to all the participants.

And now, on to the Proposed Code and the contributions of the commentators.

²⁷ *Id.* § 6.2(A).

²⁸ *Id.* § 6.2(B).

²⁹ *Id.* § 6.2.

³⁰ *Id.* § 10.2.