

REFORMING THE LAW OF EVIDENCE OF TANZANIA (PART ONE): THE SOCIAL AND LEGAL CHALLENGES

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ABSTRACT

Over fifty years after its independence, the nation of Tanzania has built a complex court system along with intricate rules to govern it. Among those rules is Tanzania’s Evidence Act, a prolix and confusing 56-page document with 188 sub-points, some of which contradict. In 2011, the Tanzanian government established a working group to examine the Evidence Act with the goal of reforming it and invited the authors to Dar es Salaam to meet with stakeholders in the legal community and discuss revision of the law. This article is the result. It examines both the British colonial origin and inconsistent modern application of Tanzania’s evidence rules. The article then identifies functional realities of the nation’s judicial system that must be considered in adopting any potential reform, many gleaned from the authors’ interviews and observations in Tanzania. This article will serve as the first in a series about reform of Tanzania’s Evidence Act. Later articles suggesting a new framework for governing the use of evidence in Tanzania and identifying methods vital for adoption and acceptance of the new rules are forthcoming.

INTRODUCTION

In 2011, the government of Tanzania initiated a project — called the Program for the Review of Evidence Act in Tanzania (“the Program”) — to review and reform the law of evidence in Tanzania. The government created a committee of stakeholders in the legal community — including a law professor, legislators, the Chief Parliamentary Draftsman of the Attorney General’s office, a representative from the Law Society of Tanganyika, and the head of the Prevention and Combating of Corruption Bureau (“PCCB”) — to run the Program, which seeks to update the

Tanzania Evidence Act of 1967 (“TEA”).¹ The TEA was initially based on the Indian Evidence Act of 1872 (“IEA”) and has not been comprehensively edited or updated since its enactment in 1967.² The authors of this article are part of a research team from Northwestern University School of Law, led by Professor Ronald J. Allen, which is working with the Program’s committee to review and eventually revise the law of evidence in Tanzania.

The authors conducted an in-depth study of the TEA, related literature, and available case law, and then traveled to Tanzania in March 2012 to perform research and interviews on the ground. The research team met with the committee directing the Program, as well as judges, practitioners, government agents, and advocacy groups, with the goal of identifying the shortcomings of the TEA and developing suggestions for revision that meet the needs of the various participants in the legal system. This article contains findings from the research team’s efforts in Tanzania, which uncovered both the dysfunctional doctrine and application of the TEA, as well as a somewhat difficult judicial and jurisprudential landscape — albeit one with several bright spots and openings for positive change.

This particular article proceeds in five parts. Parts I through III examine the problems inherent to the TEA, which result from Tanzania’s importation of the IEA, a law that has proven to be both anachronistic and foreign in its application. Part I explains how Tanzania’s colonial past led it to adopt an evidence code substantively identical to the IEA, resulting in a highly technical code suited to the peculiarities of colonial administration. Part II describes the use of the TEA by different courts in Tanzania’s hierarchical judicial system. Part III analyzes the structure and content of the TEA, as well as case law interpreting the TEA. It predicts that the TEA exacerbates socioeconomic stratification and the erection of artificial barriers to the pursuit and enforcement of justice.

Part IV describes the logistical challenges that the research team

¹ Various stakeholders in Tanzania’s legal system are driving the reform efforts. For example, the Program’s chairperson and the director of the Prevention and Combating of Corruption Bureau (“PCCB”) has advocated for revised evidence rules that permit the introduction of more circumstantial evidence, which would substantially aid his organization’s mission of combating corruption. *See generally* EDWARD HOSEAH, CORRUPTION IN TANZANIA: THE CASE FOR CIRCUMSTANTIAL EVIDENCE (2008); *see also* MICHAEL GENELIN, U.S. AID, ENHANCING THE CAPACITY OF THE JUDICIARY 25–27 (2008), *available at* http://www.tzdp.org.tz/uploads/media/ENHANCING_THE_CAPACITY_OF_THE_JUDICIARY_IN_TANZANIA_FINAL_REPORT_9.19.08.doc (reporting on ways to successfully gather evidence in corruption investigations for use in Tanzanian courts). Legal practitioners also point to the shortcomings of the TEA in a digital age. LAND RIGHTS RESEARCH & RESOURCES INSTITUTE, THE ANALYSIS OF THE LAW OF EVIDENCE ACT, CAP. 6 R.E. 2002, at 2 (2012) (on file with authors) [hereinafter HAKIARDHI/LARRI].

² *See infra* notes 16–22 and accompanying text.

encountered on the ground in Tanzania, which simultaneously reflect both the need for revision to the TEA as well as its potential to impede the successful revision of the TEA. While investigating the TEA, the research team encountered problems with legal education, access to case law and other research resources, language barriers, institutional reluctance to change, reports of corruption among members of the judiciary and bar, and difficulty accessing the court system. Further, we confirmed our suspicion that the TEA does not operate in isolation; it has complicated interactions with the civil and criminal procedure codes that make it clear that revision of the TEA alone will not solve the problem of access to justice in Tanzania. Nonetheless, we remain optimistic that substantive change in the area of evidence law in Tanzania can and will have positive impacts on other segments of Tanzanian society. Part V concludes by considering how these challenges may impact the effort to revise the TEA and discussing the next steps in the reform process.

An in-depth, comprehensive study of the revision of the TEA has broad applications outside of Tanzania. Other nations have recently undertaken reform projects dedicated to improving their evidence law,³ and Tanzania faces challenges similar to those any government faces when attempting to reform aspects of its legal system. First, consistent with New Jersey Chief Justice Vanderbilt's classic formulation of the challenges of law reform, there is a dearth of well-respected lawyers and judges.⁴ Second, the threat exists that courts and legislatures will be hostile to a transition from the understood and mastered rules currently in place to a simpler, streamlined system.⁵ Third, opportunities for delay at nearly every stage of legal proceedings cause a great deal of inefficiency in Tanzania's legal system.⁶ Finally, the substantive legal codes with which procedural rules must interact are often unwieldy and outdated.⁷ Thus, a case study of the challenges to reforming this particular code of evidence sheds light on the issues that future reformers in other geographical areas are likely to face when they attempt to update their own procedural codes.

In addition to examining the need for reform, the authors have the unique

³ See e.g., Ronald J. Allen, *Relevancy and Admissibility*, 18 EVIDENCE SCI. 365, 365 (2010) (lecturing on the law of evidence and thanking the assembled audience for working together to reform the Chinese legal system's use of evidence); Ronald J. Allen, *The Theoretical Foundations and Implications of Evidence*, 18 EVIDENCE SCI. 485, 485 (2010) (lecturing on the distinctions between evidence and evidence law and this distinctions impact on the Chinese law of evidence).

⁴ See ARTHUR T. VANDERBILT, *THE CHALLENGE OF LAW REFORM* 11 (1955); see *infra* Parts IV.A, IV.D, and IV.F.

⁵ See VANDERBILT, *supra* note 4, at 40; see also Alexander Holtzoff, *Leadership in the Struggle for Law Reform*, 17 F.R.D. 251, 252 (1955); see *infra* Parts IV.D and IV.G.

⁶ See VANDERBILT, *supra* note 4, at 76–77; Holtzoff, *supra* note 5, at 252.

⁷ See VANDERBILT, *supra* note 4, at 135.

opportunity to contribute to the dialogue on *how* best to assist a developing nation with law reform. The international development community has been skeptical of law reform efforts driven by foreign nations. Such efforts, which gained widespread traction in the 1990s,⁸ have included “drafting legal codes; training legal officials . . . ; solidifying law schools and the legal profession; and enhancing legal access for citizens.”⁹ For the most part, international legal commentators believe that these efforts have failed.¹⁰ Our collaboration with the Program committee, however, attempts to avoid some of the pitfalls that have led to earlier failures. First, development scholars have flagged foreign nations’ pressuring of developing nations to reform as a major problem when there is little domestic commitment to a transformative process.¹¹ Here, the Tanzanian government and the Program’s committee are the driving forces behind the reform. Indeed, the project was initiated from within the Tanzanian government as a program sponsored by the nation’s PCCB. Second, a widely observed problem is that the external consultants do not consider the wider interaction of the law with society.¹² Here, we believe that our comprehensive attempts to study not just the TEA, but also the TEA’s impact on lawyers, litigants, judges, and other stakeholders, will help to overcome this shortcoming. While the authors hope to provide support and guidance as requested by the Program’s committee, the domestic committee retains ultimate responsibility for leading reform efforts. Our hope is that the successful collaboration might serve as a model for other law reform initiatives in developing nations.

For our part, we conceive of this article as the first in a series on the reform of the law of evidence in Tanzania. In this article, we operate primarily on a descriptive basis, analyzing the application of the TEA, as well as the overall legal environment in Tanzania, the latter of which has inevitable and profound effects on the former. In a subsequent article, we

⁸ Thomas Carothers, *The Rule of Law Revival*, FOREIGN AFF., March/April 1998, at 95, 95 (noting that “[t]he concept is suddenly everywhere” and outlining several examples).

⁹ Brian Z. Tamanaha, *The Primacy of Society and the Failures of Law and Development*, 44 CORNELL INT’L L.J. 209, 213 (2011).

¹⁰ See, e.g., *id.* (“These legal reforms have not taken hold.”); Amichai Magen, *The Rule of Law and Its Promotion Abroad: Three Problems of Scope*, 45 STAN. J. INT’L L. 51, 85 (2009) (noting “leading commentators” critique of “judicial-centric ‘check list’ approach to . . . reform”); Carothers, *supra* note 8, at 99–100 (distinguishing different rule of law reforms and criticizing most efforts).

¹¹ Thomas Carothers, *Rule of Law Temptations*, FLETCHER F. WORLD AFF., Winter/Spring 2009, at 49, 59–60; Wade Channel, *Lessons Not Learned about Legal Reform*, in PROMOTING THE RULE OF LAW ABROAD: IN SEARCH OF KNOWLEDGE 137, 141 (Thomas Carothers ed., 2006).

¹² Stephen Golub, *A House without a Foundation*, in PROMOTING THE RULE OF LAW ABROAD: IN SEARCH OF KNOWLEDGE, *supra* note 11 at 105, 127.

plan to outline our proposal for the reform of the TEA itself, taking into account a set of guiding principles of evidence law reform, as well as the lessons we learned during our research in and visits to Tanzania.¹³ A third article will focus on implementation of the code proposed in the prior article, with an acute awareness that “[r]eform does not work if it focuses solely on courts in isolation.”¹⁴ As Professor Thomas Carothers has noted, “mere enactment of laws accomplishes little without considerable investment in changing the conditions for implementation and enforcement.”¹⁵ In that spirit, the third article will analyze the challenges of educating not only the judiciary and bar of Tanzania about any reform to its law of evidence, but also the whole of society, for it is the whole of the country’s 43 million people any potential reforms are intended to benefit.

I. THE INDIAN EVIDENCE ACT AND ITS INTRODUCTION TO TANZANIA

The TEA is not a locally developed statutory scheme.¹⁶ It was first introduced to Tanzania during the British colonial period.¹⁷ The TEA is a direct descendant of the IEA, which codified mid-nineteenth century English common law.¹⁸ Of the TEA’s 188 sections,¹⁹ 145 of the sections are substantively identical to analogous sections of the IEA,²⁰ and thirteen sections provide modest updates to the initial nineteenth century IEA.²¹

¹³ See *infra* Part V.

¹⁴ Tamanaha, *supra* note 9, at 222.

¹⁵ Carothers, *supra* note 8, at 104.

¹⁶ See *generally* Evidence Act, 1967, Act No 6 of 1967 (Tanz.), codified as amended at Cap. 6 R.E. 2002.

¹⁷ See *infra* note 77 and accompanying text.

¹⁸ See *generally* Indian Evidence Act, No. 1 of 1872, INDIA CODE (1872), vol. 5; JAMES FITZJAMES STEPHEN, THE INDIAN EVIDENCE ACT (I. OF 1872) WITH AN INTRODUCTION ON THE PRINCIPLES OF JUDICIAL EVIDENCE 137–214 (1872).

¹⁹ The initial version of the TEA contained §§ 1–180, and eight sections have been added since that initial enactment. See *generally* Cap. 6 R.E. 2002.

²⁰ See *generally id.*; Indian Evidence Act. There are some stylistic differences between the Indian Evidence Act and the TEA. For instance, the Indian Evidence Act uses “Parts” as the high-level separator and “Chapters” for smaller sub-sections. The TEA reverses this usage. Secondly, the TEA does not use explanations or illustrations like the Indian Evidence Act. Instead, the TEA incorporates the former into the statutory text, while excluding the latter. See, e.g., Evidence Act (Tanz.) §§ 10, 125–126. *But see id.* § 154 (not incorporating the explanation of § 144 of the IEA). Thirdly, the TEA uses “a court” instead of the Indian Evidence Act’s use of “the court.” Compare, e.g., *id.* §§ 58–59, with Indian Evidence Act §§ 56–57. *But see, e.g.,* Evidence Act (Tanz.) § 51 (not updating “the court” language). Finally, the TEA also makes stylistic changes to cross-references and updates the names of British India government entities to Tanzania government entities.

²¹ These updates include: adding “daughter” to language regarding the presumptive

Only thirty sections, or sixteen percent, of the TEA are new provisions.²² Understanding the conceptual challenges that this background presents to Tanzania requires an inquiry into the history of the IEA and its creator.

A. *Sir James Fitzjames Stephen: Author of the Indian Evidence Act*

It is impossible to lay down any principles of legislation at all unless you are prepared to say, I am right and you are wrong, and your view shall give way to mine, quietly, gradually, and peaceably; but one of us two must rule and the other must obey, and I mean to rule. — Sir James Fitzjames Stephen²³

The IEA (and consequently the TEA) is the brainchild of Sir James Fitzjames Stephen, who was born March 3, 1829.²⁴ Stephen was an active participant in the legal discussions of Victorian England.²⁵ He was heavily influenced by utilitarian legal philosophers, such as Jeremy Bentham and John Stuart Mill. This philosophy contained a strong authoritarian component, particularly when it came to lawmaking for England's colonies.²⁶ Mill, for example, opposed Indian self-rule, believing, without setting foot in India, that it was an inferior culture.²⁷ Stephen shared Mill's belief in the need to subjugate the colonies; his particular brand of colonialism emphasized the domination of the colonizer over the colonized.

legitimacy of children of married parents, Evidence Act (Tanz.) § 121, changing “telegraphs” to “telecommunications,” *id.* § 97, adding fingerprint evidence, *e.g.*, *id.* §§ 47, 75, and changing the length of time that must elapse before evidence will be presumed accurate, such as in the case of presuming someone's death after a long absence, *id.* §§ 99, 117.

²² Even this accounting overstates the modernization and domestication of the IEA. For instance, seven sections on the admissibility of Bankers' Books, Evidence Act (Tanz.) §§ 76–82, were added to the IEA in the late nineteenth century before its adoption in Tanzania. See Bankers' Books Evidence Act, No. 18 of 1891, INDIA CODE (1981), vol. IV-B 81, available at <http://indiacode.nic.in/>. In addition, the TEA's first two sections and last two sections merely identify the Act and its places within the code. If both of these notes are excluded from the count, 90 percent of the TEA is a direct copy of the British India code. See generally Evidence Act (Tanz.).

²³ JAMES FITZJAMES STEPHEN, LIBERTY, EQUALITY, FRATERNITY 90 (reprint 1991).

²⁴ John D. Heydon, *Reflections on James Fitzjames Stephen*, 29 U. QUEENSLAND L.J. 43, 43 (2010).

²⁵ His family, containing well-known figures in England, certainly contained strong contributors to this conversation. Both his father, Sir James Stephen, and grandfather, James Stephen, played a large role in the anti-slavery movement as an administration official and chancery judge respectively. See *Sir James Fitzjames Stephen*, 6 GREEN BAG 161, 161 (1894). His brother was an eminent biographer and literary author, and also father to Virginia Woolf. Heydon, *supra* note 24.

²⁶ JOHN HOSTETTLER, POLITICS AND LAW IN THE LIFE OF SIR JAMES FITZJAMES STEPHEN 99 (1995).

²⁷ *Id.* at 87.

Before Stephen's time in India, the colonial administration had already begun imposing its view of racial superiority through law. This was first reflected in the transition from a reliance on local adjudicators and "native" justice to the imposition of a penal code codifying contemporary English law.²⁸ Stephen supported imposing English law, which he called a "new religion," on India, writing that the "gospel of the English . . . [is] a compulsory gospel which admits to no dissent and no disobedience."²⁹ Stephen disagreed to some extent with thinkers such as Mill, who believed that consent, tradition, and mutual advantage were society's glue.³⁰ To Stephen, force was the organizing principle of a society's affairs.³¹ While never using the phrase, Stephen could aptly be described as a social Darwinist. Similarly, Judge Posner called Stephen the first "neoconservative," and his views are similar to those of twentieth century American conservatives, such as William F. Buckley, Robert Bork, and William Kristol.³² Government, in Stephen's mind, should not simply allow libertarian choices; in a world with "natural and radical inequality among persons," it has a moral mission to try to improve the condition of disadvantaged nations.³³

Stephen's philosophical beliefs influenced his attitude regarding the

²⁸ *Id.* at 92. The penal code actually had been drafted in 1838 but was not used until the mutiny in 1857 when the British decided they needed legal norms to check Indians and ensure an orderly society on the subcontinent. JAMES A. COLAIACO, JAMES FITZJAMES STEPHEN AND THE CRISIS OF VICTORIAN THOUGHT 100–01 (1983). Stephen, indeed, praised this effort comparing it to the French and German codes as "what a finished picture is to a sketch." Rupert Cross, *The Making of English Criminal Law: (5) Macaulay*, 1978 CRIM. L. REV. 519, 528 (1978).

²⁹ K.J.M. SMITH, JAMES FITZJAMES STEPHEN: PORTRAIT OF A VICTORIAN RATIONALIST 134 (1988) (citations omitted).

³⁰ See *id.* at 167. After returning from India, Stephen penned *Liberty, Equality, Fraternity*, which was an "audacious challenge to Mill." RICHARD A. POSNER, *The First Neoconservative*, in OVERCOMING LAW 259, 263 (1995).

³¹ POSNER, *supra* note 30, at 267 ("There has to be an elite to wield the lash, and hence a division between masters and slaves."). Stephen's views of superiority were not limited to racial or ethnic divisions. His beliefs about women, for instance, were in the same vein and may make modern readers uncomfortable. See STEPHEN, *supra* note 23, at 209 ("Let us suppose . . . that men and women are made as equal as law can make them . . . ; that women are expected to earn their living just like men; that the notion of anything like protection due from the one sex to the other was thoroughly rooted out . . . and what would be the result? The result would be that women would become men's slaves and drudges, that they would be made to feel their weakness and to accept its consequences to the very utmost. Submission and protection are correlative."). Similarly, Stephen was incorrect in his belief that without religion, a state's support of the law would collapse. POSNER, *supra* note 30, at 268 (describing modern Europe's religiosity and comparing it to Stephen's religious beliefs).

³² See POSNER, *supra* note 30, at 264.

³³ *Id.* at 267. To be clear, he saw this "radical inequality" positively.

indigenous Indian population. When Stephen arrived in Calcutta in 1869 as a law member of the Governor-General's Supreme Council of British India,³⁴ his predisposition was to bring English law to the natives.³⁵ He saw the country as a "mass of village communities, presided over by perhaps the most inorganic, ill-defined aristocracies and monarchies that ever existed."³⁶ These villages were "a crude form of socialism, paralyzing the growth of individual energy and all its consequences."³⁷

Stephen believed that the British were bringing "order to chaos, light to darkness, and benevolent government to a primitive despotism."³⁸ Efforts such as the IEA emerged from a "moral necessity" to support the Indians.³⁹ "For Stephen . . . self-government [for the Indians] was . . . negligible as a political reality. The chances of Indians reaching the higher ranks of government were shut out largely by the standard belief that the necessary hereditary character was not to be discovered amongst the indigenous population."⁴⁰ Stephen argued that the "conquest" of India was necessary because of the "heathenism" and "barbarian[ism]" of the Indians.⁴¹ However benevolent or malignant his private motivations, much of his work, such as the IEA, had the effect not of benefiting the native people but of protecting British interests, such as their contracts. Despite the fact that it reflects views on law and development that are now tremendously disfavored, Stephen's IEA remains in force in Pakistan, Bangladesh, Sri Lanka and Burma, and "[i]t has heavily influenced the laws of Malaysia, Singapore, Brunei, Kenya, Nigeria, Uganda, Zanzibar, parts of the West Indies, and even parts of Australia."⁴²

B. *The Indian Evidence Act and Its Impact on Colonial India*

When Stephen arrived in India, he enthusiastically embraced codification efforts: "The Penal Code has triumphantly supported the test of experience . . . with a degree of success which can hardly be ascribed to any other statute or anything approaching to the same dimension."⁴³ This

³⁴ Cross, *supra* note 28, at 520.

³⁵ See HOSTETTLER, *supra* note 27, at 95.

³⁶ SMITH, *supra* note 29, at 134 (citation omitted).

³⁷ *Id.*

³⁸ COLAIACO, *supra* note 28, at 116.

³⁹ SMITH, *supra* note 29, at 147.

⁴⁰ *Id.* at 157. To be sure, this was not necessarily a modern racial-superiority view that Stephen held. He believed the same about the Irish. *See id.* at 153. His views were that the English political and legal systems were superior to all others; thus, the British had the responsibility and the right (based on power) to rule over others.

⁴¹ *Id.* at 145.

⁴² Heydon, *supra* note 24, at 54.

⁴³ 3 JAMES FITZJAMES STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 299

example encouraged Stephen to undertake additional codification efforts while in India.⁴⁴ The law of evidence was fertile ground for his first effort because Stephen's 1863 work *General View of the Criminal Law of England* already addressed the common law of evidence.⁴⁵

In his own words, "The 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."⁴⁶ But Stephen also had some prejudices against the English common law of evidence that may have been reflected in the IEA. He felt that the terms "evidence," "issue," and "hearsay" were ambiguous and used differently by different judges.⁴⁷ Stephen criticized English lawyers for overlooking the distinction between relevancy of facts and the method used to prove facts.⁴⁸ He also argued that evidence includes "any fact from which any other fact may be inferred."⁴⁹ Stephen believed that evidence law not only should include rules regarding the testimony or documents presented at trial, but also should regulate the inferences drawn by a judge or, in England, a jury.⁵⁰

From these views, he drafted an act containing 167 sections⁵¹ for use in India.⁵² Stephen's IEA was organized along three main categories: what facts could be admitted at trial, what proof was necessary for each set of facts, and who could produce the information for this proof.⁵³ In the IEA, relevancy referred to the connections and inferences between the presented

(1883); see also Cross, *supra* note 28, at 524 ("Stephen characterized the Code as 'the first specimen of an entirely new and original method of legislative expression.'" (citation omitted)).

⁴⁴ During his time in India from December 12, 1869 to April 18, 1872, "Stephen drafted 11 other Acts and had a part in drafting eight further enactments." J.D. Heydon, *The Origins of the Indian Evidence Act*, OXFORD U. COMMONWEALTH L.J. 1, 1 (2010).

⁴⁵ See generally JAMES FITZJAMES STEPHEN, *The Principles of Evidence in Relation to the Criminal Law*, in GENERAL VIEW OF THE CRIMINAL LAW OF ENGLAND 234–75 (1863); JAMES FITZJAMES STEPHEN, *English Rules of Evidence*, in *id.* at 276–324.

⁴⁶ STEPHEN, *supra* note 18, at 2.

⁴⁷ *Id.* at 3.

⁴⁸ COLAIACO, *supra* note 28, at 89.

⁴⁹ STEPHEN, *supra* note 18, at 4.

⁵⁰ See *id.* at 16 (including inferences from "any mental condition of which any person is conscious").

⁵¹ See generally *id.*

⁵² JAMES FITZJAMES STEPHEN, *A DIGEST OF THE LAW OF EVIDENCE* iii (2nd ed. 1879) (explaining that the drafting process took place from 1870 to 1871 and was passed by the Parliament in 1872).

⁵³ See STEPHEN, *supra* note 18, at 8–9; see also STEPHEN, *supra* note 52, at iv (discussing his approach to the *Digest* and how it mirrors the organization of the Indian Evidence Act).

evidence and the substantive law.⁵⁴ In making relevancy decisions, a judge was to use “probability attainable in scientific and in judicial inquiries . . . [and] not admit of exact measurement or description.”⁵⁵

Two other important characteristics of the IEA were Stephen’s treatment of categories of evidence he deemed inadmissible and of credibility assessments. First, the Act deemed certain types of evidence — including hearsay, prior bad acts, and witness opinions — inadmissible because they were irrelevant.⁵⁶ As Stephen wrote, “the word ‘hearsay’ is nearly, if not quite, equivalent to the word ‘irrelevant.’”⁵⁷ Second, drawing on Mill’s work on induction,⁵⁸ Stephen acknowledged that a judge’s most difficult task was to sense whether a witness was telling the truth — an impression that he considered a part of the trial and the evidence.⁵⁹ This took experience. No rule of evidence could fix such an unconstrained decision.⁶⁰

The impact of the IEA on India was profound — European juristic and moral notions of individual rights swept aside a more collectivistic culture and custom.⁶¹ Although Stephen, not surprisingly, believed the IEA was well received and required little work to implement,⁶² several scholars criticized its structural and substantive faults. James Bryce found while traveling India in 1888 that the IEA was “too metaphysical.”⁶³ Stephen’s efforts, Bryce explained, were “poorly constructed, nebulous in language, and superfluous in most of its provisions.”⁶⁴ Similarly, Stephen’s successor, Sir Courtenay Ilbert, criticized the quality of Stephen’s codification efforts as leaving “behind some hasty work . . . , some defective courses of masonry which his successors had to remove and replace.”⁶⁵ James Bradley Thayer and Dean John Henry Wigmore criticized Stephen for equating admissibility with relevancy.⁶⁶ Clearly,

⁵⁴ STEPHEN, *supra* note 18, at 52.

⁵⁵ *Id.* at 35.

⁵⁶ *See id.* at 122, 130.

⁵⁷ *Id.* at 5.

⁵⁸ *Id.* at 18.

⁵⁹ *Id.* at 41.

⁶⁰ *Id.* at 42.

⁶¹ SMITH, *supra* note 29, at 128.

⁶² STEPHEN, *supra* note 52, at iii.

⁶³ COLAIACO, *supra* note 28, at 104.

⁶⁴ *Id.* Bryce also criticized Stephen’s Contract Act, which “greatly increased the power of creditors over debtors.” *Id.* This might be expected as Stephen’s view of power was to enforce social norms and govern weaker people. *See supra* notes 26–41 and accompanying text.

⁶⁵ *Id.* at 105. Stephen, who followed Bentham in believing codes needed frequent revision, may not have been concerned with such critiques. SMITH, *supra* note 29, at 130.

⁶⁶ COLAIACO, *supra* note 28, at 90. Dean Wigmore also had concerns with the structure and drafting of the Indian Evidence Act. The authors of this article reviewed Wigmore’s

evidence can be relevant — such as the community’s opinion of the accused — and yet be inadmissible because of its prejudicial nature. This inadmissibility is not irrelevance, even if Stephen treated them synonymously.⁶⁷

Despite all of the IEA’s conceptual faults, Stephen changed the direction of the English common law from negative exclusionary rules with exceptions for admission to a positive law with exceptions keeping things out.⁶⁸ His work also replaced the common law, which required lawyers to learn a series of decisions,⁶⁹ with a codified system of rules that could be more easily understood. Later scholars, especially American reformers, took up similar efforts enthusiastically.⁷⁰

C. Tanzania’s “Embrace” of the Indian Evidence Act

Like India, Tanzania has been shaped by British colonial influence. England was the final country to control Tanzania among a succession of imperialist powers. Beginning with Vasco da Gama’s arrival in East Africa in 1498,⁷¹ the Portuguese controlled most of the East African coast, including Tanzania, by 1506.⁷² By the eighteenth century, the Portuguese influence had declined and was replaced by the Omani Arabs.⁷³ Omani Arabs controlled Zanzibar to some degree (with British acquiescence after the 1880s) until the 1960s.⁷⁴ In 1886, Britain and Germany divided modern Tanzania into two spheres of influence; the Germans controlled the mainland, called Tanganyika, and the British controlled the islands.⁷⁵ This

copy of Stephen’s Indian Evidence Act volume. See STEPHEN, *supra* note 18. Wigmore made numerous corrective marks of Stephen’s drafting errors. See, e.g., Indian Evidence Act § 92, proviso 1 (Wigmore marking “want of” in “want of failure of consideration” for deletion). The TEA retains the drafting error. Evidence Act (Tanz.) § 101(a).

⁶⁷ G.D. Nokes, *Codification of the Law of Evidence in Common Law Jurisdictions*, 5 INT’L & COMP. L.Q. 347, 356–58 (1956).

⁶⁸ JAMES FITZJAMES STEPHEN, A DIGEST OF THE LAW OF EVIDENCE xi (Am. ed., 1887).

⁶⁹ See STEPHEN, *supra* note 52, at vi (describing the existing treatises available to explain the rules of evidence to students and practitioners, all of which are longer than 1500 pages and strive to cover every remote legal possibility rather than teach practical application).

⁷⁰ See Note, *Developments in the Law — Privileged Communications*, 98 HARV. L. REV. 1454, 1460–61 (1985).

⁷¹ H.R. Tate, *A Medieval Navigator: Vasco da Gama*, 43 J. ROYAL AFR. SOC’Y 61, 64 (1944).

⁷² *Tanzania Profile*, BBC NEWS AFRICA (Oct. 17, 2012, 06:22 AM ET), <http://www.bbc.co.uk/news/world-africa-14095868>.

⁷³ Bureau of African Affairs, *Background Note: Tanzania*, U.S. DEP’T OF STATE (Dec. 16, 2011), <http://www.state.gov/outofdate/bgn/tanzania/192341.htm>.

⁷⁴ *Id.*

⁷⁵ BBC NEWS AFRICA, *supra* note 72.

arrangement lasted until the end of World War I, when the Treaty of Versailles gave the British sole mandate over all of modern Tanzania.⁷⁶

During British colonial control of Tanzania, British law and the IEA were introduced to both Tanganyika and Zanzibar, the pre-independence predecessor regions of modern Tanzania.⁷⁷ The Africa Order in Council, a British colonial legislative body, promulgated the Foreign Jurisdiction Acts in 1889, which provided for the establishment of consular courts in Africa.⁷⁸ These Acts granted jurisdiction “upon the principles of, and in conformity with, the substance of the law for the time being in force in England.”⁷⁹ In 1897, the Zanzibar Order in Council refined the courts’ jurisdiction by requiring them to act in conformity with Indian enactments, including the IEA.⁸⁰ Under this order, any amendments to the laws of India would apply to Zanzibar and certain appeals would be heard in Bombay.⁸¹ Ten years later, an updated ordinance froze the code as of enactment.⁸² Finally, in 1917, the Zanzibar Evidence Decree replaced the IEA in Zanzibar, but it was a virtual reproduction of the IEA as it then stood.⁸³ In 1920, mainland Tanganyika also adopted the IEA and other Indian laws.⁸⁴

Despite major criticisms that the IEA did not apply to African conditions because it contained foreign and unjust principles,⁸⁵ there were relatively few amendments after its enactment in Tanganyika and Zanzibar.⁸⁶ During the inter-war period, members of the British administrative service, who did most of the magisterial work, attempted and failed to change the IEA.⁸⁷ The most important amendment during British rule came after a 1936 House of Lords’ decision, which changed sections relating to burdens of proof to ensure that an accused defendant had the benefit of reasonable

⁷⁶ *Id.*

⁷⁷ The British similarly introduced the Indian Evidence Act to Uganda and Kenya in East Africa. H.F. MORRIS, *EVIDENCE IN EAST AFRICA* 3–4 (1968).

⁷⁸ 1843–1878, 6 & 7 Vict., c. 94; 28 & 29 Vict., c. 116 and 41 & 42 Vict., c. 67 (Eng.).

⁷⁹ MORRIS, *supra* note 77, at 3.

⁸⁰ *Id.*

⁸¹ J.E.R. Stephens, *The Laws of Zanzibar*, 13 J. SOC’Y COMP. LEGIS. (n.s.) 603, 603, 606 (1914).

⁸² MORRIS, *supra* note 77, at 3.

⁸³ *Id.* at 4. *But see* Sidney Abrahams, *The Conflict of Laws in Zanzibar*, J. COMP. LEGIS. & INT’L L. 169, 169 (1941) (discussing how the Evidence Decree also included provisions to bar the use of Islamic evidence rules in all courts).

⁸⁴ Tanganyika Indian Acts (Application) Ordinance, 1920, No. 7 of 1920 (Tanz.); *see also* MORRIS, *supra* note 77, at 4.

⁸⁵ *See* COLAIACO, *supra* note 28, at 104–5, 90; Nokes *supra* note 67.

⁸⁶ MORRIS, *supra* note 77, at 4, 7. However, there were a few changes to make the Act work in Africa. For example, section 130 allows spousal privilege for polygamous marriages. Evidence Act, 1967, Act No 6 of 1967, § 130(3) (Tanz.).

⁸⁷ MORRIS, *supra* note 77, at 4.

doubt.⁸⁸

There were not even significant amendments to the IEA once Tanzania obtained its independence in 1964. Shortly after its independence, Tanzania passed the TEA,⁸⁹ which reiterates verbatim the provisions of the IEA then in force.⁹⁰ Since independence, there have been only a handful of relatively minor amendments to the TEA.⁹¹ During the same period, there has been significant international scholarly output reconsidering the law of evidence and its underlying concepts, such as relevancy.⁹² There have also been numerous technological advances — like computers and photocopiers, to state two of countless obvious examples — that Stephen could not anticipate.⁹³ Tanzania's courts could build a common law of evidence that overcomes some of these concerns, and in some cases at the periphery, it has done so.⁹⁴ However, the Tanzanian judiciary follows the statutory law

⁸⁸ *Id.* at 6–7.

⁸⁹ Evidence Act (Tanz.). The Tanzania Evidence Act only applies to mainland Tanzania. It appears that Zanzibar Evidence Decree of 1917 remains in force with amendments. See Salma Maoulidi, *Zanzibar GBV Advocacy: Important Lessons for Future Legal Reform Strategies*, ASS'N CONCERNED AFRICA SCHOLARS (Sept. 2009), <http://concernedafricascholars.org/bulletin/83/maoulidi/>. Despite retaining the Decree that was supposed to bar Islamic evidence law from the courts, this probably is not the case even outside the Kadhi courts. J.N.D. ANDERSON, *ISLAMIC LAW IN AFRICA* 69 (1955) (discussing how the courts ignored § 2 of the Decree that bars Islamic evidence rules in the mid-twentieth century).

⁹⁰ MORRIS, *supra* note 77, at 7; see also *supra* notes 19–22 and accompanying text (explaining how to this day the majority of the TEA is a word-for-word reproduction of Stephen's Indian Evidence Act).

⁹¹ See Evidence Act, codified as amended at Cap. 6 R.E. 2002 (Tanz.) (listing “Act 5 of 1971, Act 9 [sic] of 1980, Act 4 of 1998” as amending the 1967 Act); see also MORRIS, *supra* note 77, at 7. But see Act to amend the Evidence Act 1967, 1980, Act No. 19 of 1980 (Tanz.) § 6 (revising the rules regarding admission of a co-defendant's confession, which may substantially impact proof at criminal trials involving multiple defendants).

⁹² See generally, e.g., Ronald J. Allen & Brian Leiter, *Naturalized Epistemology and the Law of Evidence*, 87 VA. L. REV. 1491 (2001) (rejecting theories to explain the law of evidence, including the Utility Theory, Bayesian Theory, and Posner's law and economics model, and instead suggesting a Relative Plausibility Theory).

⁹³ In fact, the TEA actively impedes the admissibility of such evidence. Evidence Act (Tanz.) § 65(b) states that “copies made from the original by mechanical process which in themselves ensure the accuracy of the copy,” may be classified as secondary evidence. Such evidence is generally excluded, and can only be used if it meets a narrow exception. *Id.* § 67. This prohibition made sense when copying was fraught with possibility for error but makes less sense today when a copy machine or printer would print an exact replica. Today by contrast, the United States allows duplicates to be admissible unless “a genuine question is raised about the original's authenticity or the circumstances make it unfair to admit the duplicate.” FED. R. EVID. 1003.

⁹⁴ For instance, the High Court's Commercial Division admitted a computer printout in a landmark case over a strenuous objection. *Trust Bank Tanz. Ltd. v Le-Marsh Enters. Ltd.*,

as written, making it impossible to overcome the choices and intellectual undercurrents driving its initial author, Stephen, over 140 years ago.

II. THE USE OF THE TANZANIA EVIDENCE ACT TODAY

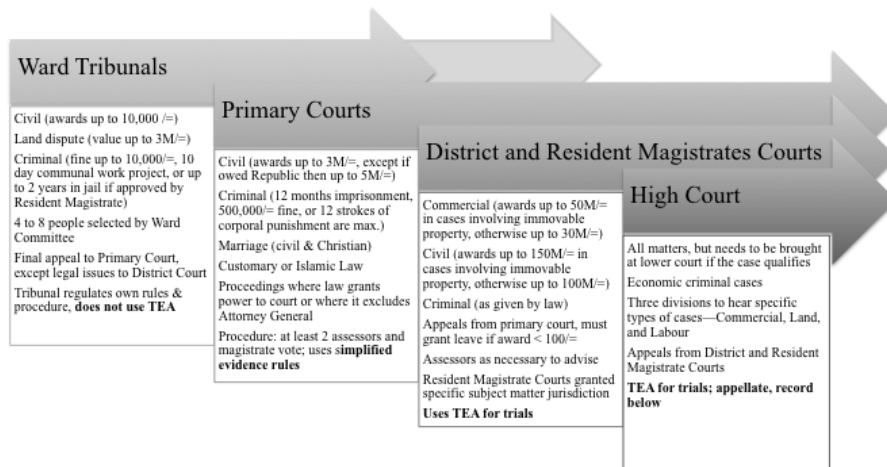
While the TEA is the statutory evidence law in Tanzania, not every adjudicatory body uses it. To understand why, one must have a sense of the hierarchical structure of the Tanzania adjudicatory system, which includes both courts and tribunals. As demonstrated in Figure 1, the jurisdiction of each of these courts and tribunals varies based on geography, subject matter, and monetary threshold amounts. These jurisdictional requirements, especially those based on subject matter, often overlap. A party in Tanzania must sue or prosecute a case in the lowest-level adjudicatory body eligible to hear the case.⁹⁵ Higher-level courts are primarily courts of appeal, but also have the authority to conduct *sua sponte* review of and make corresponding revisions to lower court judgments that have not been appealed.⁹⁶ While this overlap may seem complex, it is not out of the norm for common law nations,⁹⁷ and, as described below, Tanzania has a rationale for each adjudicatory body.

Commercial Case No. Case 4 of 2000 (HC) (unreported) (Tanz.).

⁹⁵ Civil Procedure Act, 1966, Act No. 49 of 1966 (Tanz.), § 13.

⁹⁶ Magistrates' Courts Act, 1984, Act No. 2 of 1984 (Tanz.), §§ 22, 31–32, 43, 44.

⁹⁷ VANDERBILT, *supra* note 4, at 36–39 (the Chief Justice of the Supreme Court of New Jersey describing how that state revised its jurisdictional rules to eliminate some of the 17 different state courts and comparing this with the over 100 English common law courts).

Figure 1 – Summary of the Tanzania Adjudicatory Bodies Jurisdiction⁹⁸

The two lowest bodies, the Ward Tribunals and the Primary Courts, do not use the TEA.⁹⁹ The reason for this is simple: these bodies are designed to be more accessible by the average person and preserve some elements of the old tribal courts, and thus intentionally avoid the formalities of the TEA and other procedural codes. The Ward Tribunals, for instance, are not part of the judicial branch, but rather are controlled by local executive branch officials.¹⁰⁰ Local authorities can select four to eight officials from the

⁹⁸ This figure was created from sections of the Magistrates' Courts Act; Ward Tribunals Act, 1985, Act No. 7 of 1985 (Tanz.); Village Land Act, 1999, Act No. 5 of 1999 (Tanz.); The Courts (Land Disputes Settlements) Act, 2002, Act No. 2 of 2002 (Tanz.). The monetary jurisdictional amounts may be incorrect. Figure 1 includes recent amendments of the cited statutes. However, the Tanzanian government has not prepared a compiled statute in over a decade and cross-listings of statutory amendments are at best unofficial and at worst incorrect. This chart's display is only to show a high-level overview of the jurisdictional considerations in bringing a dispute in Tanzania courts and not as a practice guide. The authors are not alone in facing this jurisdictional maze; practicing attorneys and potential litigants in Tanzania face this challenge daily. *See, e.g., Melisho Sindiko v. Julius Kaaya (Melisho Sindiko)* [1977] L.R.T. no. 18, at 66 (East African Court of Appeal) (dismissing a primary court judgment for proceedings that "were a nullity" without proper pecuniary jurisdiction); B.D. CHIPETA, CIVIL PROCEDURE IN TANZANIA: A STUDENT'S MANUAL 4–6 (2002) (describing the Melisho Sindiko case and explaining how an exception to the general pecuniary jurisdictional amount had been "tucked away in the Schedule to the Written Laws (Miscellaneous Amendments) Act, 1968, together with other amendments to ten other Acts.").

⁹⁹ Ward Tribunals Act, § 15(1); Magistrates' Courts Act, § 19(2).

¹⁰⁰ *See generally* IDDI A.M. MAKOMBE & ALEX J. SIKALUMBA, THE ROLE OF WARD TRIBUNALS IN ENHANCING THE ADMINISTRATION OF JUSTICE IN TANZANIA: THE CASE OF

community, one of whom must be female,¹⁰¹ to serve on the Ward Tribunals.¹⁰² The Minister of Justice, a high-ranking executive official, oversees the Ward Tribunals.¹⁰³ The goal in establishing the Ward Tribunals was to allow mediation and local dispute resolution before resort to an adversarial trial in the formal court system, thus allowing parties to be heard and natural justice to be considered.¹⁰⁴ To support these goals, judicial procedural and evidentiary rules are not required.¹⁰⁵ Questions remain as to the effectiveness of the Ward Tribunals — especially regarding allegations of bribery of Ward Tribunal members who are not paid well¹⁰⁶ — but the exemption from the TEA for Ward Tribunals is not in doubt.

The Primary Courts, the lowest judicial branch body,¹⁰⁷ are also exempted from the TEA.¹⁰⁸ In place of the TEA, a Primary Court admits “evidence as is pertinent and . . . worthy of belief.”¹⁰⁹ It appears¹¹⁰ that a condensed evidentiary code of nineteen rules guides the admissibility of

SELECTED WARD TRIBUNALS IN SUMBAWANGA URBAN AND RURAL DISTRICTS (2004). There are over 2,400 wards in Tanzania. Odd-Helge Fjeldstad, *Fiscal Decentralisation in Tanzania: For Better or for Worse?* 3 n.4 (Chr. Michelson Inst., Working Paper No. 10, 2001), available at <http://bora.cmi.no/dspace/bitstream/10202/213/1/WP2001-10.PDF>. The wards are further subdivided into approximately 9,000 villages of at least 250 households. *Id.* Thus, each ward is, a highly localized government entity that provides services at a local level.

¹⁰¹ The Courts (Land Disputes Settlements) Act, § 14(1) (adding the requirement for women on the Ward Tribunal). *But see* MAKOMBE & SIKALUMBA, *supra* note 100, at 38 (reporting that the Ward Tribunals in their study did not have women serving).

¹⁰² Ward Tribunals Act, § 4 (providing for the selection of Tribunal members by the Ward Committee, and not the general population of the Ward).

¹⁰³ Ward Tribunals Act, § 25.

¹⁰⁴ MAKOMBE & SIKALUMBA, *supra* note 100, at 4.

¹⁰⁵ Ward Tribunals Act, § 15(1). Indeed, it is up to each Ward Tribunal to regulate its own provisions. *Id.* § 15(2).

¹⁰⁶ MAKOMBE & SIKALUMBA, *supra* note 100, at 39–41.

¹⁰⁷ The judicial branch gets its power from the Tanzania Constitution, which declares, “The Judiciary shall be the authority with final decision in dispensation of justice in the United Republic of Tanzania.” Constitution of the United Republic of Tanzania, Article 107A.

¹⁰⁸ Magistrates’ Courts Act, 1984, Act No 2 of 1984, § 19(1).

¹⁰⁹ *Id.* § 19(2).

¹¹⁰ The Magistrates’ Courts Act of 1984 repealed the prior 1963 Act and provided for new regulations to be made in lieu of the existing regulations. *Id.* § 72(1). Section 72(3) allows for regulations made under the old Act to remain in force until promulgation of the new regulations. We have been unable to confirm with an official source that the rules are still in place (or in contrast found that they are not in place). Research suggests that it is likely that these regulations do continue to govern Primary Courts. *See* 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, 260 (1990–1991); Interview with Lilian William, PCCB, in Dar es Salaam, Tanz. (Mar. 16, 2012).

evidence in Primary Court proceedings.¹¹¹ These rules explain what each party must prove, discuss the weight of evidence in criminal and civil cases, define relevancy, and explain how to present different kinds of evidence and testifying witnesses.¹¹² There are two likely reasons for these simplified proceedings. First, the TEA's complexity requires a trained attorney, but attorneys are not allowed to represent either party in Primary Courts.¹¹³ Second, Tanzania's shortage of attorneys and the somewhat impoverished legal education available in the country, described below, suggest that Primary Court magistrates may struggle with the TEA's complexity.¹¹⁴

There are a number of courts above the Primary Courts that have original jurisdiction over certain cases. These include the District Courts, Resident Magistrate Courts, and the High Court. When a case is heard as an original matter above the Primary Courts, the Civil Procedure Code, Criminal Procedure Act, and TEA all apply.¹¹⁵ Tanzania statutes allow for additional evidence to be heard on appeal.¹¹⁶ Presumably, such new evidence would only be admissible if it meets the requirements of the TEA, but in practice, it appears that magistrates and judges do not frequently allow additional evidence to be admitted on appeal.¹¹⁷ The decisions of the High Court are

¹¹¹ Primary Courts (Evidence) Regulations, G.N. 22/1964; *see also* Primary Courts (Civil Procedure) Rules, G.N. 310/1964.

¹¹² *See generally* Primary Courts (Evidence) Regulations, G.N. 22/1964.

¹¹³ Magistrates' Courts Act, § 33.

¹¹⁴ The law requires a Primary Court, usually with multiple magistrates, in all of Tanzania's approximately 100 districts. *Tanzania: Regions and Districts*, THE CITIZEN (Mar. 2, 2010, 8:37 AM), <http://thecitizen.co.tz/about-tanzania.html?start=4>.

¹¹⁵ Magistrates' Courts Act, § 42; Evidence Act, 1967, Act No. 6 of 1967, § 2.

¹¹⁶ Magistrates' Courts Act, § 29.

¹¹⁷ Email from Adam Kilongozi, Legal Officer, PCCB, to Edward Hoseah, Director-General, PCCB (Feb. 6, 2012) (on file with authors) ("No new evidence is introduced in the appellate stage nor will the code apply."); Interview with Lilian William, *supra* note 110. *Cf. Morandi Rutakyamirwa v Petro Joseph* [1990] TLR 49, 52 (CA) (holding that the District court improperly relied on facts contained in appellant's submission not considered by the primary court, but also noting that such submissions are not evidence without oath or affirmation and the party is not subject to cross-examination), *but see infra* notes 148 and 153, for cases allowing evidence on appeal. The one requirement that does appear to be adhered to, implicating the TEA on appeal, is that a defendant must have an opportunity to be heard before reversing an acquittal. Magistrates' Courts Act, § 29. Tanzania does not have a double jeopardy prohibition like the United States. *Compare* Constitution of the United Republic of Tanzania (lacking a provision) *with* U.S. CONST. amend. V ("nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb"); *see also* Magistrates' Courts Act, § 20 (allowing district court to hear an appeal of an acquittal from the primary court). This treatment makes sense, because criminal matters brought in the Ward Tribunals or Primary Court are without a prosecuting attorney, and so the Republic's first chance to prosecute the accused would be on appeal. This process can continue on

appealable to the highest adjudicatory body in the Union of Tanzania — the Court of Appeal.¹¹⁸ The Court of Appeal is an exclusively appellate body and does not permit introduction of additional evidence.¹¹⁹

The direct effect of reforming the law of evidence in Tanzania, as requested by the Program, is confined to those disputes brought in three judicial bodies — District Courts, Resident Magistrate Courts, and the High Court. But as we continue the work of reviewing current Tanzania law and practice and proposing reforms, we will consider whether other adjudicatory bodies may also benefit from evidence law reform.

III. DOCTRINAL ISSUES

A. *The Tanzania Evidence Act*

Prior to traveling to Tanzania, the authors reviewed the TEA and cases interpreting evidence law in Tanzania in an attempt to assess what the TEA's operational problems would be on the ground. Analyzing the TEA allowed the authors to make predictions about the TEA's shortcomings. The TEA consists of 188 sections and is fifty-six pages long. It contains seven chapters organized into twenty-seven parts. It covers what U.S. observers would consider the more obvious or traditional evidentiary topics, including relevancy and admissibility requirements,¹²⁰ competency,¹²¹ and rules regarding the questioning of witnesses.¹²² It also covers topics that those same observers would consider to be substantive law.¹²³ It is, quite unlike the Federal Rules of Evidence, a highly specified and technical

multiple levels, as there does not appear to be a rule that would keep the Republic from multiple appeals of someone's acquittals. *See, e.g.,* Karama Kenyunko, *Tanzania Lodges Appeal Against Richmond Agent's Acquittal*, GUARDIAN (Mar. 2, 2012), <http://in2eastafrika.net/tanzania-lodges-appeal-against-richmond-agents-acquittal/> (reporting on an appeal of a resident magistrate's decision to acquit because the "prosecution had [not] made out a prima facie case against the accused"); Bernard James & Vicent Mnyanyika, *Tanzania: State Files Appeal Notice on Zombe Acquittals*, CITIZEN (Aug. 20, 2009), <http://allafrica.com/stories/200908200722.html> (reporting on an appeal to the Court of Appeal by prosecutors of the acquittal of nine police officers charged with murder after being on trial for two and a half years).

¹¹⁸ Constitution of the United Republic of Tanzania, Article 117. The Court of Appeal hears appeals from the High Court of Tanzania and the High Court of Zanzibar. *Id.* However, cases interpreting the Zanzibar Constitution, laws of Zanzibar, and issues beginning in the Kadhi courts are not referred unless implicated by the United Republic's Constitution. Constitution of Zanzibar [R.E. 2006], Article 99.

¹¹⁹ Constitution of the United Republic of Tanzania, Article 117.

¹²⁰ *See, e.g.,* Evidence Act, § 7.

¹²¹ *Id.* at Cap. 5, pt. I.

¹²² *Id.* at Cap. 5, pt. II.

¹²³ *See, e.g., id.* at Cap. 4, pt. II (defining estoppel).

evidentiary code.¹²⁴

At the start of this project, we developed several working hypotheses, expecting in general that the structure and content of the TEA would cause several problems with the operation of evidence law in Tanzania. As we discuss below, we predicted that the complexity and rigidity of the law would (1) lead to it often being ignored; (2) result in it being applied somewhat haphazardly; and (3) discriminate against disadvantaged groups.

B. *Case Law Regarding Evidence*

Despite the difficulty in conducting case research in Tanzania,¹²⁵ it is possible to discern some characteristics of the treatment of evidence law by Tanzania's judiciary, which tend to vindicate the concerns expressed above. First, many evidence-related decisions do not refer to the TEA, raising questions about the TEA's relevancy and utility. Second, there are inconsistencies in the standards of appellate review of lower courts' evidentiary decisions that seem to undermine the legislature's intent that lower courts be easily accessible by the average citizen. Third, evidence law, among other procedural devices, appears to operate as a hindrance to lawsuits initiated by members of marginalized social groups, such as women.

Of thirty-three evidence cases¹²⁶ surveyed, only thirteen specifically referred to provisions of the TEA. Even that number may misrepresent the scope of the TEA's application, because many of those thirteen cases consider the same handful of TEA provisions.¹²⁷ Many of the evidence cases that do not refer to the TEA are about the credibility of witnesses and the parties' burden of proof.¹²⁸ Examining these judge-made evidentiary rules may shed light on some of the shortcomings of the current TEA by demonstrating what evidentiary issues judges and parties are forced to handle without the benefit of legislative guidance.

¹²⁴ See generally FED. R. EVID.

¹²⁵ See *infra* Part IV.A.

¹²⁶ "Evidence case" refers to a case designated in either a Tanzania Law Reports or East Africa Law Reports volume index as pertaining to evidence.

¹²⁷ The most commonly cited provisions were § 27 (noting that voluntary confessions are admissible against the accused, that the prosecution bears the burden of proving that a confession was voluntary, and that confessions are involuntary if induced by threat or promise by police); § 58 ("No fact of which a court takes judicial notice need be proved."); § 143 ("Subject to the provisions of any other written law, no particular number of witnesses shall in any case be required for the proof of any fact.").

¹²⁸ See, e.g., *Discile Ng'onja and Four Others v Republic* [1998] TLR 111 (CA 1995); *Yohanis Msigwa v Republic* [1990] TLR 148 (CA); *Jackson s/o Mwakatoka & 2 Others v Republic* [1990] TLR 17 (CA).

1. Lack of Reliance on the Tanzania Evidence Act

Although a few provisions of the TEA concern the credibility of witnesses,¹²⁹ judges appear to ignore them when considering the credibility of witnesses.¹³⁰ The TEA provisions all relate to whether testimony of credibility can be elicited in a trial setting.¹³¹ For example, the TEA allows a witness to be questioned as to his or her credibility at the discretion of the judge.¹³² In deciding whether to order a witness to answer questions about his or her credibility, the judge must consider whether the questioning goes to the witness's truth-telling capacity and whether the questioning is on an issue so tangential or remote as not to affect the court's perception of the witness's credibility.¹³³

Perhaps as a result of the failure to follow the TEA, courts have reached different conclusions in similar scenarios about the credibility of witnesses. For example, in *Jackson s/o Mwakatoka & 2 others v Republic*, the Court of Appeal of Tanzania threw out a conviction that was based on the testimony of a witness it found to be incredible.¹³⁴ The witness told the police that he witnessed a bar fight that resulted in a murder and then returned home at a certain time.¹³⁵ At trial, the witness testified that he returned home at a different time.¹³⁶ The Court of Appeal found that the trial testimony materially deviated from his police statement and thus could not support a murder conviction.¹³⁷ To the contrary, in *Mukami w/o Wankyo v Republic*, the Court of Appeal affirmed a conviction despite inconsistent statements by the defendant, whose confessions to two police officers were the only basis for her conviction.¹³⁸ The defendant told the police officers incompatible statements about where she obtained the poison with which

¹²⁹ See Evidence Act, §§ 127, 155, 158.

¹³⁰ See, e.g., *Discile Ng'onja* [1998] TLR 111 (holding that judges should approach eyewitness testimony of interested parties — here, the brother of a murder victim — “with caution because of the possibility that the witness might have been tempted to exaggerate his story”); *Yohanis Msigwa* [1990] TLR 148 (holding that the testimony of a single eyewitness is sufficient to support a murder conviction if the witness demonstrates first-hand knowledge and is credible); *Jackson s/o Mwakatoka*, [1990] TLR 17 (finding that one witness was not credible where his trial testimony conflicted with his police statement and a second witness was not credible because his direct testimony conflicted with his testimony on cross-examination).

¹³¹ See Evidence Act, §§ 127, 155, 158.

¹³² *Id.* §§ 155, 158(1), 162, 164, 167.

¹³³ *Id.* § 158(2)(a), (b).

¹³⁴ *Jackson s/o Mwakatoka* [1990] TLR at 23.

¹³⁵ *Id.* at 20.

¹³⁶ *Id.*

¹³⁷ *Id.* at 21–22.

¹³⁸ *Mukami w/o Wankyo v Republic* [1990] TLR 46, 46 (CA).

she allegedly murdered her husband.¹³⁹ Nevertheless, the court found that the defendant-witness was, overall, truthful, and that her statements regarding the rest of the material facts were truthful.¹⁴⁰ In neither scenario did the court address whether the witness's credibility was attacked or rehabilitated pursuant to the TEA. The opinions both reflect an informal assessment of credibility based on the court's perception, as opposed to the more formal, adversary-driven credibility assessment contemplated by the TEA.

Another example of the courts' ignoring the TEA is *Maruzuku Hamisi v Republic*, which considers the burden of proof in "robbing with violence" cases.¹⁴¹ The TEA addresses burdens of proof extensively.¹⁴² In *Maruzuku Hamisi*, the High Court considered the issue of which party had the burden of proving how the defendant acquired stolen property.¹⁴³ The defendant had claimed that he acquired the property through a legitimate sale weeks after the theft occurred.¹⁴⁴ The TEA addresses this question directly; section 112 instructs that "[t]he burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by law that the proof of that fact shall lie on any other person."¹⁴⁵ Further, section 114 provides that "[w]hen a person is accused of an offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from . . . and the burden of proving any fact especially within his knowledge is upon him."¹⁴⁶ Despite the existence of two arguably on-point evidentiary provisions, the High Court simply stated — without citing to any authority — that the defendant bore the burden of proof on this type of issue in a "robbing with violence" case.¹⁴⁷ From the opinion, it is unclear whether the High Court was either unaware of the TEA provisions (perhaps the parties ignored it) or explicitly decided not to cite to the TEA. Although courts may reach the "right" result when making evidence decisions without referring to the TEA, decisions without a legal foundation can seem like arbitrary enforcement to observers. The Tanzanian courts' inability or unwillingness to use the TEA may signal credibility problems.

¹³⁹ *Id.* at 48.

¹⁴⁰ *Id.* at 48–49.

¹⁴¹ *Maruzuku Hamisi v Republic* [1997] TLR 1, 1 (HC 1996).

¹⁴² Evidence Act, 1967, Act No 6 of 1967, Cap. 4, pt. 1, §§ 110–122.

¹⁴³ *Maruzuku Hamisi* [1997] TLR at 2.

¹⁴⁴ *Id.*

¹⁴⁵ Evidence Act, § 112.

¹⁴⁶ *Id.* § 114.

¹⁴⁷ *Maruzuku Hamisi* [1997] TLR at 2.

2. Inconsistent Standards of Appellate Review

Tanzanian evidence cases appear to exhibit an inconsistency in the standards of appellate review of lower-court evidentiary decisions. For example, some cases have permitted the introduction of new evidence on appeal, and some have not.¹⁴⁸ Some decisions have overturned lower court determinations of witnesses' credibility, and some have not.¹⁴⁹ Some cases have deferred to lower courts' fact-finding decisions, and some have not.¹⁵⁰ Disparate results are not inherently problematic — U.S. courts engage in similar case-by-case determinations. However, the lack of articulable standards for reviewing a trial court's evidentiary rulings may lead to an undesirable lack of predictability and consistency.

In *Melita Naikiminjal and Another v. Sailevo Loibanguti*, the Court of Appeal for Tanzania set forth a standard for reviewing trial-level findings of fact: “[I]f there is no evidence to support a particular conclusion, or if it is shown that the trial court has failed to appreciate the weight or bearing of circumstances admitted or proved, or has plainly gone wrong, the appellate court will not hesitate to so decide.”¹⁵¹ This suggests something akin to the U.S. courts' plain error standard of review. In practice, however, Tanzanian courts appear to give less deference to trial court findings of fact. For example, the Court of Appeal for Tanzania in *Jackson s/o Mwakatoka* reversed the trial court's factual finding that two men were eyewitnesses to the murder being tried before the court.¹⁵²

In addition to making inconsistent statements about the level of deference shown to trial court findings, Tanzanian courts have made apparently contradictory decisions regarding the admissibility of new evidence on appeal.¹⁵³ In *Morandi Rutakyamirwa v. Petro Joseph*, the appellant

¹⁴⁸ Compare *Morandi Rutakyamirwa v Petro Joseph* [1990] TLR 49, 49–50 (CA) (holding that evidence not considered by the Primary Court could not be introduced in the District Court), with *Jamaat Ansaar Sunna v The Registered Trustees of Umoja wa Vijana wa Chama cha Mapinduzi* [1997] TLR 99, 100 (CA) (holding that newly discovered evidence could be admitted in High Court proceeding). As a matter of statutory law, it is clear that on appeal courts *can* hear additional evidence, even if the case law reveals a more complicated common law deciding such admissibility decisions. Magistrates' Courts Act, 1984, Act No. 2 of 1984 (Tanz.), §§ 21, 29.

¹⁴⁹ Compare *Jackson s/o Mwakatoka & 2 Others v Republic* [1990] TLR 17, 23 (CA) (overturning convictions where the record revealed inconsistencies in witnesses' statements), with *Mukami w/o Wankyo v Republic* [1990] TLR 46, 48 (CA) (upholding conviction where the record revealed inconsistencies in defendant's statements).

¹⁵⁰ Compare *Melita Naikiminjal and Another v Sailevo Loibanguti* [1998] TLR 120 (CA 1995) (cautioning appellate courts to respect findings by trial judge), with *Jackson s/o Mwakatoka* [1990] TLR at 17 (reviewing trial court's factual findings).

¹⁵¹ *Melita Naikiminjal* [1998] TLR at 120.

¹⁵² *Jackson s/o Mwakatoka* [1990] TLR at 21–22.

¹⁵³ Compare *Morandi Rutakyamirwa* [1990] TLR at 49–50 (holding that evidence not

attempted to introduce evidence that was not presented to the Primary Court — supporting his title to land as against the respondent — on appeal to the District Court of Tanzania.¹⁵⁴ The Court of Appeal of Tanzania held that the District Court of Tanzania erred in considering such evidence, because it should have been submitted to the Primary Court first.¹⁵⁵ By contrast, in *Jamaat Ansaar Sunna*, the appellant was permitted to introduce evidence regarding the parties' disputed title to a certain tract of land that came to light during a pending appeal.¹⁵⁶ Because the TEA does not apply to Primary Courts, but does apply to District Courts,¹⁵⁷ allowing admission of new evidence on appeal threatens to harm unrepresented litigants who initially pursued or defended their claims under the relatively lax evidentiary standards of the Primary Courts.

3. Evidence Law Impedes Women's Access to the Courts

Confusion over evidentiary requirements in the lower courts can be a barrier to women's claims.¹⁵⁸ One problem with the current evidentiary rules is that they are not flexible enough to accommodate the needs of many rural women, who are relatively uneducated (for instance, who cannot read or write) and who keep no documentary evidence.¹⁵⁹ For example, one such case involved an older rural woman who offered in-depth oral testimony regarding how she and her husband jointly acquired marital property.¹⁶⁰ The court insisted on documentary evidence to support her assertions, and when the woman could not produce any — because it did not exist — the court refused to consider her oral evidence.¹⁶¹

Even women who have the requisite evidence in their possession have experienced difficulties presenting it in court because they cannot obtain the legal guidance they need “to know what facts were relevant, what kind of evidence was necessary to prove these facts, and how such evidence should be produced.”¹⁶² Women's claims to marital property might fail because they present insufficient evidence of their participation in acquiring such property and “courts usually do not consider it their task to call the

considered by the Primary Court could not be introduced in the District Court), *with Jamaat Ansaar Sunna* [1997] TLR at 100 (holding that newly discovered evidence could be admitted in High Court proceeding).

¹⁵⁴ *Morandi Rutakyamirwa* [1990] TLR at 51.

¹⁵⁵ *Id.* at 49–50.

¹⁵⁶ *Jamaat Ansaar Sunna* [1997] TLR at 100

¹⁵⁷ Evidence Act, 1967, Act No 6 of 1967, § 2.

¹⁵⁸ *See Wanitzek, supra* note 110, at 266.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.*

petitioner's attention to missing evidence."¹⁶³

Female litigants may also fail because many women do not know the procedure for having evidence admitted to and recorded by the court.¹⁶⁴ For example, one woman appealed an unfavorable decision in the Primary Court, noting that the Primary Court did not give her any guidance as to *how* she was supposed to present her witnesses.¹⁶⁵ 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.¹⁶⁶ These types of technicalities may prevent meritorious claims from being heard, and have the potential to even further marginalize social groups that have historically had trouble accessing the judicial system.

IV. EXTERNAL FACTORS AFFECTING REFORM OF THE TANZANIA EVIDENCE ACT

As one law professor stated in an interview in Dar es Salaam, the process of attaining judgments from the country's judiciary can be a "haphazard, episodic exercise."¹⁶⁷ Evidenced by our visit to a district court proceeding at Kisutu in Dar es Salaam in March 2012, the typical administration of justice in Tanzania might proceed like the following account:

The courtroom is the size of a maintenance closet, but it is packed with people, so much so that the crowd has to shift around to let individuals enter and exit; the parties are stuffed around two tables. There is one fan blowing, over which barely anyone can be heard, and it is aimed directly at the magistrate; the parties, the attorneys, and the spectators are all sweating as the proceedings continue. Jackhammers and car horns are blaring on the street directly outside the window. As the witnesses and attorneys speak, the magistrate is taking longhand notes for appellate review. But she does not record what she says herself, especially during a long colloquy with one of the defendants, during which she records nothing. Further complicating this effort is that the proceeding is in Swahili, but the magistrate must record the proceedings in English.¹⁶⁸

It is a criminal trial, and the defendants have been charged with the theft

¹⁶³ *Id.* at 266–67.

¹⁶⁴ *See id.* at 267.

¹⁶⁵ *See id.*

¹⁶⁶ *See id.*

¹⁶⁷ Interview with Prof. Bonaventure Rutinwa, Faculty of Law, University of Dar es Salaam, in Dar es Salaam, Tanz. (Mar. 13, 2012).

¹⁶⁸ *See infra* notes 191–195 and accompanying text.

of a car. At one point, one of the defendants objects that a statement that has recently been offered by the prosecution is of uncertain provenance, as it was supposedly said by another defendant who is not in court. Yet the magistrate overrules the objection, apparently because the objector did not give a statement himself and was thus incompetent to make an objection over another person's statement. No attorney objects or even addresses the magistrate over this ruling, and the defendant is not heard from again.

This episode represents the context within which reform is being considered: a system that looks mostly unfamiliar, yet retains some of the trappings of Westernized legal proceedings. As we proceeded through interviews and observations of the system at work, however, we learned from practitioners and officials of various agencies that the problems run deeper than the TEA itself. Rather, litigants in Tanzania today must confront a system where delays in justice are legion, where case law is not available, where lawyers are hard to find and too expensive when retained, and where corruption is a constant undercurrent. The problems we learned about from our investigative trip to Tanzania indicate that the TEA project would indeed be a case study in trying to effect change in a vastly complicated and, to Western eyes, unfamiliar system. At the same time, we also discovered multiple positive examples of individuals and organizations that are already working to effect change in both large and small ways, indicating that reform is indeed possible. The following sections present evidence of what we encountered.

A. *Access to Research Resources*

As an initial matter, the lack of access to court decisions remains problematic for Tanzania's common-law legal system.¹⁶⁹ This is potentially as urgent a problem as the reform of the TEA itself; it assuredly must be considered alongside any legislation reforming Tanzania's law of evidence.

The Tanzania Law Reports Board compiles and edits cases for inclusion in the Tanzania Law Reports.¹⁷⁰ Yet there are at least four drawbacks to relying on this publication for information about judicial decisions. First, there is a long lag time between the decisions and their publication — as many as nine years or more.¹⁷¹ Second, the reporter is a compilation of

¹⁶⁹ Francis K. Stolla, President, Tanganyika Law Soc'y, Welcome Remarks at the Annual General Meeting (Feb. 17, 2012) [hereinafter *Welcome Remarks*].

¹⁷⁰ See, e.g., TANZANIA LAW REPORTS 1998 (2007).

¹⁷¹ For example, the 1998 version of the Tanzania Law Reports, containing cases decided between 1979 and 1998, was not published until 2007. TANZANIA LAW REPORTS 1998 (2007). The 1996 version of the Tanzania Law Reports, containing cases decided between 1977 and 1996, was not published until 1999. TANZANIA LAW REPORTS 1996 (1999).

selected cases, not all cases. It only includes some decisions from the Court of Appeal of Tanzania and the High Courts of Tanzania and Zanzibar.¹⁷² Among other problems, this leaves litigants with no judicial guidance on the unique evidentiary procedure used by the Primary Courts, the main point of access for Tanzanian citizens. Third, the reports have not consistently been made available to practitioners or the general public.¹⁷³ Fourth, the decisions are not available electronically, which makes research slow and cumbersome.¹⁷⁴ In addition to the Tanzania Law Reports, LawAfrica publishes some Tanzanian High Court and Court of Appeal decisions in its annual volumes, the East Africa Law Reports.¹⁷⁵ However, the number of cases pertaining to Tanzanian law contained in these volumes is relatively low, and evidence-related cases are particularly rare.¹⁷⁶

There is a great deal of confusion among the legal community about how to access legal decisions. For example, one Justice on the Court of Appeal told the research team that all Court of Appeal decisions would be available on the Court of Appeal website so that lower courts and practitioners could easily access that Court's precedential decisions.¹⁷⁷ There appears to be some progress toward such a comprehensive collection of cases.¹⁷⁸ However, the Court of Appeal's database still appears incomplete, and, perhaps even more problematic, no practitioner with whom the research team met was aware of the database.

The further down the judicial hierarchy one goes, the more difficult it becomes to gain access to decisions. One magistrate judge told us that, in order to gain access to Magistrate Court decisions, judges (and litigants) must use one of three resources:¹⁷⁹ they can ask the parties to a given case

¹⁷² TANZANIA LAW REPORTS 1998 vi (2007).

¹⁷³ As of February 2012, the 1998-2006 Tanzania Law Reports had been made available to the judiciary but had not been made available to the Tanzanian bar. See *Welcome Remarks*, *supra* note 169, at 8. Francis Stolla, the President of the Tanganyika Law Society, suggested that "inaccessibility by the legal profession to case law and precedents is tantamount to a perversion of justice and disregard of the Rule of Law." *Id.*

¹⁷⁴ See *id.* at 9.

¹⁷⁵ See, e.g., 1 [1999] E. AFR. L. REP. (2003); see also *Brief History of LawAfrica*, LAWAFRICA, <http://www.lawafrica.com/page.php?id=14> (last visited Nov. 5, 2012).

¹⁷⁶ There were seven Tanzanian cases reported in the first volume of the 1999 East Africa Law Reports. Only one of them referenced the Evidence Act, and only did so tangentially. See 1 [1999] E. AFR. L. REP. v (1999); *ER Invs. Ltd. V Tanz. Dev. Fin. Co. & Another* [1999] 1 EA 75 (HC).

¹⁷⁷ Interview with Justice January Msoffe, Court of Appeal of Tanz., in Dar es Salaam, Tanz. (March 14, 2012).

¹⁷⁸ See *Judiciary Database*, UNITED REPUBLIC OF TANZANIA, <http://www.judiciary.go.tz:8081/help/index.jsp> (last visited Apr. 16, 2012).

¹⁷⁹ Interview with Magistrate Judge Ilvin Mugeta, Kisutu Magistrate Court, in Dar es Salaam, Tanz. (March 15, 2012).

for a copy of the judgment in that case, go to a higher court library and ask the librarian for help finding a judgment, or go to a judge's chambers and sift through the proper file until he or she finds the judgment needed.¹⁸⁰ Because of the difficulty in doing legal research, judges may not even know when a reviewing court has overturned their decisions, preventing them from making correct decisions in the future.¹⁸¹ The predictable consequence of this inconsistent reporting — magistrates and litigants without access to the same judgments — is a real ongoing challenge.¹⁸²

Even statutory research is difficult in Tanzania. There is no electronically available statutory compilation. Although statutes are available on the Tanzanian Parliament's website, the website frequently experiences technical difficulties that render it inaccessible.¹⁸³ Further, even when the website is functioning correctly, statutes are not available in a compiled form. The original statute is posted in electronic form, but subsequent amendments and additions are not incorporated into the original text; they remain scattered throughout the site, organized by date (not by topic or section of the legal code), and are difficult to sort through. The government recently compiled all of the statutes into a single, multi-volume print version, but this version has not been made widely available.

B. *Language*

In addition to confusion regarding the procedural and substantive rules that apply in the pluralist legal system, litigants must deal with a language barrier as well. In any discussions regarding reform of the TEA, this barrier must be addressed, as the TEA cannot effectively govern the interaction between parties and evidence in courts if the parties cannot understand the evidence in the first place.

The official language of the Primary Courts is Swahili.¹⁸⁴ The official language of all superior courts is English.¹⁸⁵ Tanzanians are first exposed to their regional language at home, then in primary school they are taught

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² See, e.g., *Bishop H.N. Sarya & Two Others v. Salmon Buteng'e & 16 Others*, Civil Case No 68 of 1998 (HC Mwanza) (unreported), in BEN LOBULU, *PITFALLS IN LITIGATION* 77, 78 (2004) ("One thing I should state is that I have not been able to get the judgment cited by Mr. Maira — that judgment of *Joo Rugarabamu*.").

¹⁸³ In one author's experience, the website was functioning on one out of three attempted dates of access between March 1, 2012 and April 16, 2012.

¹⁸⁴ Wanitzek, *supra* note 110, at 259 (internal citations omitted); *Kiswahili*, UNITED REPUBLIC OF TANZANIA NATIONAL WEBSITE, http://www.tanzania.go.tz/learn_kiswahilif.html (last visited Oct. 30, 2012).

¹⁸⁵ See Wanitzek, *supra* note 110 at 259–60 (internal citations omitted).

Swahili.¹⁸⁶ It is only in secondary school that Tanzanians begin to learn English officially.¹⁸⁷ Only fifty-seven percent of school-aged children (ages five to fourteen) in Tanzania attend school,¹⁸⁸ which may mean that many children are not learning English at all. Tanzania's laws — including the TEA and the Constitution — are predominantly in English.¹⁸⁹ Chief Justice Othman notes that because of this discrepancy, “it is no surprise that it is often difficult for ordinary people in Tanzania to press for justice.”¹⁹⁰

A number of interviewees commented that the language barrier often frustrates the efficient exercise of justice. One told us that in the Primary Courts, evidence is recorded by the magistrate who is overseeing proceedings.¹⁹¹ The magistrate is required to record, verbatim, all testimony given by witnesses and all arguments made by attorneys.¹⁹² Those proceedings, at the Primary Court level, take place in Swahili. The magistrate is required to translate everything in his or her head into English, and to write down only English in his or her notes.¹⁹³ As one of our interviewees commented in a remarkable understatement, not having a precise record of a witness's testimony can present problems for reviewing courts.¹⁹⁴ Further, judges have differing linguistic capabilities and, in particular, varying degrees of fluency in English, resulting in inconsistent levels of accuracy in the Primary Court records.¹⁹⁵

One judge, who must perform such Swahili-to-English translations while on the bench, said that this language requirement often leads to

¹⁸⁶ *Kiswahili*, UNITED REPUBLIC OF TANZANIA NATIONAL WEBSITE, http://www.tanzania.go.tz/learn_kiswahilif.html (last visited Oct. 30, 2012).

¹⁸⁷ *Id.*

¹⁸⁸ BUREAU OF INT'L LABOR AFFAIRS, U.S. DEP'T OF LABOR, FINDINGS ON THE WORST FORMS OF CHILD LABOR 353 (2008), *available at* <http://www.dol.gov/ilab/programs/ocft/PDF/2008OCFTreport.pdf>.

¹⁸⁹ Mohamed Chande Othman, Chief Justice, Tanzania Court of Appeal, Keynote Address at the Annual Conference of the Tanganyika Law Society 4–5 (Feb. 17, 2012), *transcript available at* <http://www.tls.or.tz/docs/speechdocs/CJ%20speech,AGM.pdf>.

¹⁹⁰ *Id.*

¹⁹¹ Interview with Casmir S. Kyuki, Chief Parliamentary Draftsman, Tanzania Attorney General's Office, in Dar es Salaam, Tanz. (March 13, 2012).

¹⁹² *Id.* The Civil Procedure Code provides for a judge or magistrate to direct a court stenographer to record the proceedings in short hand. 1966, Act No. 49 of 1966 (Tanz.) Order XVIII, r. 8. However, in practice, there are insufficient qualified stenographers for the judiciary to utilize this provision and magistrates and judges are expected to record the proceedings themselves. *See* CHIPETA, *supra* note 98, at 196–97; *see also* B.D. CHIPETA, *MAGISTRATE'S MANUAL* 88 (2d ed. 2010) (imploring magistrates to record court proceedings accurately, neatly, and avoiding abbreviations).

¹⁹³ Interview with Casmir S. Kyuki, *supra* note 191.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

“distortions” in the translations.¹⁹⁶ Furthermore, the need for translation results in a huge delay during the judicial proceedings.¹⁹⁷ We observed two proceedings where judges were making translations from Swahili to English. In both settings, the speaker — whether it was a lawyer, a witness, or a party — would make frequent pauses to accommodate the needs of the judge taking notes. In the authors’ conservative estimate, the need for frequent pauses while the judge writes doubled the time spent conducting the proceedings. While some judges in Tanzania have received training in using digital recording devices,¹⁹⁸ and they are in use in the Commercial Division of the High Court,¹⁹⁹ such equipment was not in use in any court we witnessed, and no interviewees mentioned its adoption. The language problem exacerbates the already widespread and problematic problem of the delay in judicial proceedings.²⁰⁰

C. *Access to Law, Access to Justice*

1. Scarcity of Attorneys

In tandem with a rapid increase in outlets for legal education in Tanzania is the rapid growth in the number of individuals who are seeking admission to the bar. In December 2010, the Tanganyika Law Society (the bar association for mainland Tanzania) held its largest admission ceremony to date, with 400 new advocates joining the rolls, an “upsurge” over the 120 admitted the year before.²⁰¹ Nearly 300 more attorneys were admitted to the bar the following summer, with each new member welcomed by the Chief Justice of Tanzania himself. The law society pronounced the growth in new attorneys to be “exponential.”²⁰²

Tanzania has had problems since its independence, however, with achieving a number of attorneys appropriate for its population, which is another issue that must be considered when addressing evidence law reform. As noted previously, the highly complex nature of the TEA likely

¹⁹⁶ Interview with Ilvin Mugeta, *supra* note 179.

¹⁹⁷ *Id.*

¹⁹⁸ See *Tanzania: At Last, Judiciary Goes Digital*, ARUSHA TIMES (Feb. 27, 2010), <http://allafrica.com/stories/201003010920.html>.

¹⁹⁹ See *Technology Used at Commercial Court*, HIGH COURT OF TANZANIA: COMMERCIAL DIVISION, <http://www.comcourt.go.tz/comcourt/about-the-court/technology> (last visited May 16, 2012).

²⁰⁰ See *infra* Part IV.F.

²⁰¹ Tanganyika Law Soc’y, *Hon. A.S.L. Ramadhani, CJ (RTD) Admitted 400 New Advocates on 17th December, 2010*, THE NEWSFLASH, 4 (Jan. 2011), <http://www.tls.or.tz/docs/flashdocs/2011/JanNEWSFLASH.pdf>.

²⁰² Tanganyika Law Soc’y, *CJ Admits 288 New Advocates to the Bar on 10th August, 2011*, THE NEWSFLASH, 3 (Aug. 2011), <http://www.tls.or.tz/docs/flashdocs/2011/AUG%20NEWSFLASH%202011.pdf>.

presents a barrier to most citizens who seek to have their day in court; without access to attorneys, that problem is likely to persist.

Despite the growth in the number of advocates in Tanzania since its independence, that number decreased again in the 1970s; by 1976, a government report put the figure at forty-three advocates.²⁰³ Then, as now, private attorneys were concentrated in the major metropolitan areas; and then, as now, there were “persistent public complaints of unethical conduct on part of some private advocates.”²⁰⁴ The situation had grown so dire, in fact, that in 1983 a government commission recommended abolishing private practice altogether.²⁰⁵ However, after further study, Tanzania’s Law Reform Commission recommended against the idea, as it was “unable to find a workable alternative to private legal practice without jeopardizing the constitutional and statutory right of persons to legal assistance and representation.”²⁰⁶

Figure 2: Sampling of Attorneys Per Capita²⁰⁷

Entity	Lawyers	Population	Pop. Per Att’y
Tanzania	2,317	43,000,000	18,558.00
DC	50,440	572,059	11.34
New York	161,031	18,976,457	117.84
Illinois	60,069	12,419,293	206.75
Florida	64,715	15,982,378	246.97
Nevada	6,732	1,998,257	296.83
Idaho	1,294	1,293,953	364.19
Arkansas	2,673	2,673,400	482.13

Today, the number of lawyers in the country as a whole remains tiny compared to the overall population. As Dr. Reginald Mengi, executive chairman of Tanzanian media conglomerate IPP Limited, put it to us simply, “We need more lawyers.”²⁰⁸ In the spring of 2012, when he spoke to us, Dr. Mengi’s company had fifty cases pending against it — all for libel — and had cases ongoing, some for up to ten years.²⁰⁹

²⁰³ *Report on Private Legal Practice*, LAW REFORM COMM’N OF TANZANIA, 2 (1986), [http://www.lrct.go.tz/download/reports\(2\)/Private%20legal%20pract%20pages.pdf](http://www.lrct.go.tz/download/reports(2)/Private%20legal%20pract%20pages.pdf).

²⁰⁴ *Id.*

²⁰⁵ *Id.* at 1.

²⁰⁶ *Id.* at 4.

²⁰⁷ *See infra* notes 212 and 213.

²⁰⁸ Interview with Reginald A. Mengi, Executive Chairman, IPP Limited, and corporate attorneys, in Dar es Salaam, Tanz. (Mar. 14, 2012).

²⁰⁹ *Id.*

In a nation of nearly 45,000,000 people,²¹⁰ there are 2,317 licensed attorneys,²¹¹ or one attorney for every 18,558 citizens. By way of comparison, the District of Columbia, by far the most lawyered entity in the United States, has about 50,000 lawyers²¹² for its population of over half a million,²¹³ or approximately one lawyer for every eleven people. (See Figure 2 above.) Much more common is a rate like Nevada's, with about one lawyer for every 297 people in a population of about 2,000,000 residents,²¹⁴ just above the average rate of one lawyer for every 296.42 residents. But Tanzania's ratio pales in comparison even to the U.S. state with the fewest attorneys per capita (Arkansas, at one lawyer for every 482 residents) and the most sparsely populated state (Wyoming, at one lawyer for every 298 residents).

The contingent of attorneys in Tanzania is also miniscule when contrasted with neighboring Kenya and Uganda, which each boast about 10,000 lawyers,²¹⁵ despite having fewer citizens.²¹⁶ Promisingly, there is no shortage of Tanzanians who want to become attorneys, yet their efforts have been frustrated. At one point in late 2009, 1,714 individuals — a number approaching the country's extant number of licensed attorneys — had applications pending for admission to the bar; yet they could not gain interviews with the government's Council for Legal Education because of "budgetary constraints."²¹⁷ Other aspirants to the bar have been refused

²¹⁰ *Population, Total*, WORLD BANK, <http://data.worldbank.org/indicator/SP.POP.TOTL> (last visited Apr. 16, 2012).

²¹¹ Othman, *supra* note 189, at 9.

²¹² *National Lawyer Population by State*, AMER. BAR ASS'N (2011), http://www.americanbar.org/content/dam/aba/migrated/marketresearch/PublicDocuments/2011_national_lawyer_by_state.authcheckdam.pdf.

²¹³ Population data is from 2010 and taken from *Resident Population by Race and State*, U.S. CENSUS BUREAU, <http://www.census.gov/compendia/statab/2012/tables/12s0019.xls> (last visited Apr. 16, 2012).

²¹⁴ For data used in calculations, see *supra* notes 212–213.

²¹⁵ Florence Mugarula, *Over 300 Lawyers Admitted to Bar*, CITIZEN (Dec. 18, 2010, 9:42 AM), <http://thecitizen.co.tz/news/4-national-news/6411-over-300-lawyers-admitted-to-bar.html>.

²¹⁶ Kenya's latest census put its population at 38.6 million. KENYA NAT'L BUREAU OF STATISTICS, KENYA 2009 POPULATION & HOUSING CENSUS HIGHLIGHTS 2 (2010), available at <http://www.knbs.or.ke/Census%20Results/KNBS%20Brochure.pdf>. Uganda's population is currently estimated at 33.4 million., *Background Note: Uganda*, U.S. DEP'T OF STATE (Feb. 3, 2012), <http://www.state.gov/r/pa/ei/bgn/2963.htm>. There are, however, counterexamples in other surrounding nations. Rwanda, for example, has 7.5 million people, but only about fifty lawyers, twenty prosecutors, and fifty judges in 1997; Malawi had about 300 lawyers for 9 million people at the same time. Laure-Hélène Piron, *Time to Learn, Time to Act in Africa*, in *PROMOTING THE RULE OF LAW ABROAD: IN SEARCH OF KNOWLEDGE* 275, 282, 291 (Thomas Carothers ed., 2006).

²¹⁷ Tanganyika Law Soc'y, *Advocates Admission Process Requires Major Overhaul* —

admission because of an objection from the Attorney General on the day of their admission ceremony.²¹⁸ The former president of the Tanganyika Law Society, Felix George Kibodya, has argued that the country needs to increase the number of lawyers in the population to 7,000 to 8,000 to adequately serve its growing population.²¹⁹

Finally, it should be observed that Tanzania's low attorney ratio, as low as it is, is still not representative of the country as a whole, as attorneys are disproportionately distributed around the country, with the vast majority concentrated in Dar es Salaam.²²⁰ As Chief Justice Othman recently observed, there are just three attorneys each in the sectors of Kigoma and Rukwa,²²¹ two large western regions of the country with populations of 1.8 million and 1.5 million residents, respectively,²²² and some regions have no attorneys whatsoever.²²³

2. Cost of Attorneys

Compounding the problem further is inequity in the availability of lawyers, as dictated by how much their services cost. It is a common lament in Tanzania that many citizens cannot afford legal representation; as former Tanzanian President Benjamin William Mkaapa observed in 2007, "we nurture a system with an entry threshold so high that only the mighty of the land can enter."²²⁴ The average hourly rate for attorneys would not seem out of place in the United States, where the average income is higher by a matter of several degrees; the standard market rate is between \$100 and \$500 per hour, with some attorneys charging up to \$700 per hour.²²⁵

Fauz, THE NEWSFLASH, 2 (Dec. 2009), <http://www.tls.or.tz/docs/flashdocs/2009/December2009Newsflash.pdf>.

²¹⁸ Tanganyika Law Soc'y, *The Chief Justice Admits 66 Lawyers to the Bar*, THE NEWSFLASH, 5 (Apr. 2011), [http://www.tls.or.tz/docs/headlinesdocs/April%202011%20Newsflash\(wec\).pdf](http://www.tls.or.tz/docs/headlinesdocs/April%202011%20Newsflash(wec).pdf) (noting that the objection was later overruled after "a series of meetings" and that "[n]otably absent from the ceremony was the Attorney General").

²¹⁹ Lazaro Felix, *Chief Justice: Take Legal Services to the People*, GUARDIAN (Dec. 18, 2010), <http://www.ippmedia.com/frontend/index.php?l=24180> (quoting Felix George Kibodya, then-president of the Tanganyika Law Society).

²²⁰ *Id.*

²²¹ Othman, *supra* note 189, at 9.

²²² NAT'L BUREAU OF STATISTICS, MINISTRY OF FINANCE, TANZANIA IN FIGURES 2010 29 (2011), available at http://www.nbs.go.tz/takwimu/references/Tanzania_in_Figures2010.pdf.

²²³ Felix, *supra* note 219.

²²⁴ Benjamin William Mkaapa, *The Legal System Should be More Accessible and Affordable to More Tanzanians*, in LAW AND JUSTICE IN TANZANIA 40 (2007).

²²⁵ Interview with Zephryne Galeba, Senior Advocate, & Emilia Siwingwa, Chief Executive Officer, Tanganyika Law Society, in Dar es Salaam, Tanz. (Mar. 16, 2012) [hereinafter Interview with Galeba & Siwingwa].

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These rates are typical in a nation where the gross national income per capita in 2009 was \$524.80.²²⁶

The problem has been widely recognized. In 2010, the winner of Tanzania's Young Lawyer Award, while receiving a five million-shilling check, proposed free legal services for indigent Tanzanians and urged lawyers "to join our hands in assisting the poor, who mostly reside in rural areas."²²⁷ Related to this problem is the fact that most Tanzanians speak Swahili, and yet most of the country's laws are written in English, just as its law schools are conducted in English, raising both efficiency and due process concerns.²²⁸

Furthermore, there is at least one court in Tanzania that is for all purposes cut off to all but wealthy litigants: the commercial division of the High Court, a civil appeals court. At the outset of litigation, the plaintiff must pay forty cents for every twelve shillings claimed in the pleadings, or about three percent.²²⁹ And as noted above, the Commercial Division is one of the few judicial bodies in the country where full court proceedings are actually recorded,²³⁰ freeing the judge of the responsibility to take longhand notes, potentially at the expense of effectively administering the hearing at hand.

3. Delays

In addition to corruption, delays in cases due to unprepared lawyers are also commonplace, producing a backlog in the system that causes some parties to "give up" on their claims.²³¹ Indeed, here again is an area tied up in the question of evidence law reform. Though many factors contribute to the delays in Tanzanian courts, it stands to reason that a simplified code written with widespread understanding in mind could serve to at least

²²⁶ World Statistics Pocketbook, *United Republic of Tanzania*, UNDATA, <http://data.un.org/CountryProfile.aspx?crName=United%20Republic%20of%20Tanzania> (last visited May 16, 2012).

²²⁷ Lusekelo Philemon, *Young Lawyer Award Winner Calls for Free Services to the Poor*, *GUARDIAN* (Feb. 22, 2010), <http://ippmedia.com/frontend/index.php?l=13771>.

²²⁸ See *supra* Part IV.B; B. Rwezaura, *Constraining Factors to the Adoption of Kiswahili as a Language of the Law in Tanzania*, 37 *J. AFR. L.* 30, 36–43 (1993). Conversely, an early study showed that the lower the court in Tanzania, the more frequently Swahili was spoken during proceedings: 28 percent at High Court, 56 percent at Resident Magistrates' Court, 79 percent at district court, and 92 percent at primary court. *Id.* at 36.

²²⁹ See Interview with Judge Robert V. Makaramba, High Court of Tanzania, in Dar-es-Salaam, Tanz. (Mar. 14, 2012) (indicating that the court has considered decreasing the fee to two percent, but has not yet done so); *Judicature and Application of Laws Ordinance*, Cap. 453 (Tanz.), available at <http://www.comcourt.go.tz/comcourt/tanzania-court-hierarchy/court-brokers-rules>.

²³⁰ See *supra* note 199 and accompanying text.

²³¹ Interview with Galeba & Siwingwa, *supra* note 225.

somewhat alleviate the delay problem.

Examples of delays are legion. In a February 2012 criminal case before a principal magistrate in Temeke, a district of Dar es Salaam, a defense attorney was able to delay a trial over a stolen Zambian transit container for an entire month because he had not yet requested the statement of a prosecution witness in writing.²³² Though the judge scolded the attorney for not acting “like [a] learned person[,]” and calling the case a “journey without end,” she allowed the delay after the attorney said the statement was “too bulky.”²³³ The defendants had been arrested four years prior.²³⁴ According to Dr. Mengi of IPP Limited, “Not knowing your rights is a problem, but then in court, the worst thing is *delay*.”²³⁵

Long waits that precede the issuance of opinions are often the biggest causes of delay. Lawyers for one Dar es Salaam corporation told us in March 2012 that they had one case that ended in 2006, and yet the presiding judge in the case still had not released his opinion.²³⁶ Lawyers at the Tanganyika Law Society told a similar story about a case that concluded in 2007.²³⁷ As remarked by a senior advocate who teaches at the Law School of Tanzania, the system for distribution of opinions is “not systematic. It’s not electronic. They’re still using typewriters. It takes time to release” the opinions and get them to the public.²³⁸

The reputation of attorneys in Tanzania as ineffective has solidified; as an international client of a Tanzanian firm observed recently, “[t]he thing with Tanzania is that their lawyers are very expensive and not so good.”²³⁹

4. Positive Signs in the Legal Market

Yet the picture is certainly not one of gloom in Tanzania’s legal profession, and efforts at reform provide a sense of hope that larger reforms, such as those this team will propose to the TEA, will gain some traction. For example, in many instances, the active bar in Tanzania provides a singular voice on national issues, speaking with authority on vital legal topics. The recent debate over the nation’s Constitutional Review Act

²³² *Case Delays Irk Magistrate*, DAILY NEWS (Feb. 13, 2012, 9:00 PM), <http://www.dailynews.co.tz/index.php/local-news/1873-case-delays-irk-magistrate>.

²³³ *Id.*

²³⁴ *Id.*

²³⁵ Interview with Reginald Mengi, *supra* note 208.

²³⁶ *Id.*

²³⁷ Interview with Galeba & Siwingwa, *supra* note 225.

²³⁸ Interview with Gabriel Mnyele, Senior Advocate, Law School of Tanzania, in Dar es Salaam, Tanz. (Mar. 15, 2012).

²³⁹ Krista Bates-van Winkelhof, *Tanzania*, in 2010 IFLR 1000 867, 868 (2010), available at <http://www.iflr1000.com/pdfs/Directories/13/Tanzania.pdf>.

("CRA") is a case in point. The CRA, which dominated discussions of Tanzania's parliament and passed in late 2011, gives the president the authority to assemble a constitutional review commission, which is supposed to gather opinions on how to amend the country's constitution.²⁴⁰ Yet several groups around the country have protested its potential passage, arguing that the public was not able to participate in its crafting.²⁴¹ Indeed, the CRA as signed into law explicitly penalizes organizations for forwarding — or intending to forward — the views of their members to the Commission.²⁴² The punishment for such activities is up to 15,000,000 shillings (about \$9,400) or imprisonment from three to seven years.²⁴³

In early 2012, the Tanganyika Law Society lodged a formal petition against the CRA to the High Court, specifically protesting the lack of widespread involvement of the people in writing the CRA and its provision for punishment for those who are "deemed to derail" the work of the presidential commission on the CRA.²⁴⁴ The bar's participation has been far from an annoyance to the government; in fact, it has been actively encouraged.²⁴⁵ In early 2012, President Jakaya Kikwete agreed²⁴⁶ to amend the CRA to allow organizations to "convene meetings in order to afford opportunity to its members to air their views on the Draft Constitution and forward such views to the Commission."²⁴⁷

In addition, female lawyers have significantly contributed to the bar. One organization, the Tanzania Women Lawyers Association ("TAWLA"), founded as a group of student lawyers in 1989,²⁴⁸ has provided direct legal

²⁴⁰ Fumbuka Ng'wanakilala, *FACTBOX — Key Political Risks to Watch in Tanzania*, REUTERS (Dec. 14, 2011, 5:06 AM), <http://af.reuters.com/article/energyOilNews/idAFRISKTZ20111214?sp=true>.

²⁴¹ See, e.g., *Activists Reject Constitutional Review Bill*, CITIZEN (Nov. 2, 2011, 10:19 PM), <http://www.thecitizen.co.tz/news/5-political-news/16711-activists-reject-constitutional-review-bill.html> (describing efforts of Tanzania's Constitutional Forum to criticize the bill for failure to allow public comment).

²⁴² *JK Okays Chadema Views on New Law*, CITIZEN (Jan. 23, 2012, 7:38 AM), <http://thecitizen.co.tz/component/content/article/37-tanzania-top-news-story/19122-jk-okays-chadema-views-on-new-law.html> (discussing potential amendments to bill to change criticized provisions).

²⁴³ Constitutional Review Act, 2011, Act No 8 of 2011, § 21.

²⁴⁴ Frank Kimboy, *TLS to Lodge Petition on Law Review*, CITIZEN (Jan. 15, 2012, 11:18 AM), <http://www.thecitizen.co.tz/sunday-citizen/40-sunday-citizen-news/18880-tls-to-lodge-petition-on-law-review.html>.

²⁴⁵ See *VP Advises Dar Law School to Foster New Constitution Making*, GUARDIAN (Oct. 24, 2011), <http://ippmedia.com/frontend/index.php?l=34674>.

²⁴⁶ *JK Okays Chadema Views on New Law*, *supra* note 242.

²⁴⁷ Constitutional Review (Amendment) Act, 2011, TANZ. BILL SUPP. § 2(b).

²⁴⁸ Iman Mani, *Women Lawyers Bringing Legal Aid to People*, DAILY NEWS (Feb. 16, 2012, 3:10 AM), <http://www.dailynews.co.tz/index.php/features/popular-features/1962->

aid to over 10,000 people²⁴⁹ and helped bring about property rights for women in Tanzania.²⁵⁰ Widespread problems have marked the experiences of women seeking legal redress in Tanzania.²⁵¹ At the time of the TAWLA's founding, women composed the large majority of petitioners in matrimonial causes of action, yet they were often unrepresented and often could not present their cases effectively.²⁵² Today, the organization performs tasks as large as national policy advocacy to small-bore mediation between married couples; the TAWLA's head of legal aid, Grace Mkinga, recently described an episode in which a husband and wife discussed their problems at the TAWLA office, after which they made a compromise to both go for an HIV test.²⁵³

Other groups have mobilized as well to protect specific interests in Tanzanian society, such as inequality in the distribution of the country's land. One organization, HAKI ARDHI (a Swahili abbreviation for the Land Rights Research and Resources Institute), was founded in 1994 as a non-profit land rights research and resources institute but is now litigating specific cases.²⁵⁴ One recent example is a sugar dispute in North Mara and Namwawala Village, where the group supported local villagers who successfully sued a district authority that had previously evicted them to make way for a sugar investor.²⁵⁵ As an advocate for HAKI ARDHI told us in Dar es Salaam, land distribution is a critical problem in Tanzania, where villagers are frequently misled by officials who make spurious promises of jobs and money in exchange for land, and there is often no way for a family to prove its decades of land ownership.²⁵⁶

D. Legal Education

At the time of Tanzania's independence from Great Britain in 1961, there

women-lawyers-bringing-legal-aid-to-people.

²⁴⁹ *Welcome to TAWLA*, TANZ. WOMEN'S LEGAL ASS'N, <http://www.tawla.or.tz/index.php> (last visited May 16, 2012).

²⁵⁰ *Women Lawyers Reflect on Achievements After Two Decades of Difficult Campaign*, GUARDIAN (Sept. 1, 2011), <http://ippmedia.com/frontend/index.php?l=32883>.

²⁵¹ Andrew Novak, *The Globalization of the Student Lawyer: A Law Student Practice Rule for Indigent Criminal Defense in Sub-Saharan Africa*, 3 HUM. RTS. & GLOBAL L. REV. 33, 36 (2009–10).

²⁵² Wanitzek, *supra* note 110, at 266–69.

²⁵³ Mani, *supra* note 248.

²⁵⁴ Interview with Joseph Chiombola, HAKI ARDHI, in Dar es Salaam, Tanz. (Mar. 13, 2012).

²⁵⁵ *Tanzania Land Alliance (TALA)*, HAKI ARDHI, http://www.hakiardhi.org/index.php?option=com_content&view=article&id=67:tanzania-land-alliance-tala&catid=41:about-us&Itemid=16 (last visited May 16, 2012).

²⁵⁶ Interview with Joseph Chiombola, *supra* note 254.

were only two African lawyers in the entire country; the reason, of course, was that legal training had not been previously available to the native population under British rule.²⁵⁷ Though Great Britain may have entertained grand plans prior to Tanzania's independence to undertake "an imaginative gesture" to "underwrit[e] the expansion of legal education in and for East Africa,"²⁵⁸ it hardly got the chance. Two months before independence, in 1961, Tanzania's first law school, the present-day University of Dar es Salaam, was established²⁵⁹ at a location selected by founding president Mwalimu Julius Nyerere himself.²⁶⁰ The first class had just fourteen students, including one woman.²⁶¹

Though the school was originally an affiliate to the University of London,²⁶² and was known early on for the Marxist writings of its professors,²⁶³ it has become a respected and forward-looking independent institution, having instituted a clinical program in 1978²⁶⁴ and having graduated several luminaries in the East African legal community, such as Ugandan President Yoweri Museveni.²⁶⁵ The school played such a prominent place in the country's first several decades that it was the only one mentioned in a 1983 report of the Law Reform Commission of Tanzania recommending ways to strengthen the country's legal profession.²⁶⁶ Today, no fewer than seven universities, many of which

²⁵⁷ Richard L. Abel, *The Underdevelopment of Legal Professions: A Review Article on Third World Lawyers*, 7 AM. B. FOUND. RES. J. 871, 873 (1982).

²⁵⁸ A.N. Allott, *Legal Education in East Africa*, 4 J. AFR. L. 130, 132 (1960).

²⁵⁹ Kirsten A. Dauphinais, *Training a Countervailing Elite: The Necessity of an Effective Lawyering Skills Pedagogy for a Sustainable Rule of Law Revival in East Africa*, 85 N.D.L. REV. 53, 57 (2009).

²⁶⁰ Florence Mugarula, *UDSM Campus Assumes New Name*, CITIZEN (Oct. 13, 2011, 10:12 PM), <http://thecitizen.co.tz/news/4-national-news/16107-udsm-campus-assumes-new-name.html>.

²⁶¹ Frank Aman & Rosemary Mirondo, *Former Students to Grace Key UDSM Anniversary*, CITIZEN (July 11, 2011, 9:37 AM), <http://www.thecitizen.co.tz/news/4-national-news/12718-former-students-to-grace-key-udsmanniversary.html>.

²⁶² Mugarula, *supra* note 260.

²⁶³ Dauphinais, *supra* note 259, at 79, 84 n.183 (noting that faculty has "fully changed from its old role in socialist Tanzania [into] an excellent faculty of law").

²⁶⁴ Novak, *supra* note 251, at 52. *But see* Frank Aman, *Dar Varsity Defends Old Law Students*, CITIZEN (Oct. 17, 2011, 12:26 PM), <http://www.thecitizen.co.tz/news/4-national-news/16203-dar-varsity-defends-old-law-students.html> (discussing criticism of law faculty at UDSM for matriculating students that might have been responsible for corrupt government contracts).

²⁶⁵ Mugarula, *supra* note 260.

²⁶⁶ *Report on Private Legal Practice*, *supra* note 203, at 5 (recommending that the faculty of the school receive more resources "in order to enable the Faculty to train undergraduates at required academic standard levels").

have been established in the last two decades, now offer the degree.²⁶⁷ It is in this context that education of lawyers about any changes to the evidence law of Tanzania must take place, and as the following analysis reveals, that effort will face daunting difficulties.

Most importantly, conditions at the nation's law schools are not always conducive to effective education. One American jurist, who was a guest professor of law at Tumbani University in Dar es Salaam, observed that "[c]heating on exams was an accepted part of the culture," with students jammed in two to a desk, or without a desk at all.²⁶⁸ Courses did not have set textbooks, there were constant distractions, students never participated in class, and most failed to complete any assignments.²⁶⁹ There is often a vast disparity between the resources available to students who are wealthy and students who are not;²⁷⁰ at one law school, the majority of students had no computers, compounding the difficulties of effective participation in the educational enterprise and doing the most efficient forms of research.²⁷¹ The lack of resources extends to compensation for faculty, who are paid \$400 to \$500 per month, and are at the same time "highly sought after by governments, corporations, and by private law firms," making it "impossible to devote their full-time to teaching."²⁷² While there have been

²⁶⁷ In addition to the University of Dar es Salaam, those schools with undergraduate legal studies are: The Open University of Tanzania, a distance learning institution, *The Open University of Tanzania*, <http://www.tanzania.go.tz/out.htm> (last visited Dec. 27, 2012); Tumbani University, Iringa University College in Iringa, *Faculty of Law*, TUMAINI U., <http://www.tumaini.ac.tz/index.php/faculties-a-departiments/law> (last visited Dec. 27, 2012); Tumbani University Makumira in Arusha, *Bachelor of Law*, MAKUMIRA, <http://www.makumira.ac.tz/index.php/academic-programmes/81-article/107-bachelor-of-law> (last visited Dec. 27, 2012); Tumbani University Makumira Dar es Salaam College in Dar es Salaam, *Programs/Courses*, TUMAINI DAR ES SALAAM, http://www.tumainidm.ac.tz/academic/programs_courses.php (last visited Dec. 27, 2012); Sebastian Kolowa University College Of Tumbani University Makumira in Lushto and Tanga, *Faculties*, SEBASTIAN KOLOWA U. (May 24, 2011 1:32 PM), http://www.sekuco.org/index.php?option=com_content&view=article&id=118&Itemid=53; St. Augustine University of Tanzania in Mwanza, *Faculties – Law*, ST. AUGUSTINE, <http://www.saut.ac.tz/law/> (last visited Dec. 27, 2012); the University of Dodoma, *Call for Admission*, U. DODOMA, <http://www.udom.ac.tz/index.php/admission/undergraduate-application> (last visited Dec. 27, 2012) (reporting price of LL.B tuition); and Mzumbe University in Morogoro, Mbeya, and Mwanza (LLM only), *Faculty of Law*, MZUMBE U., <http://fol.mzumbe.ac.tz/> (last visited Dec. 27, 2012).

²⁶⁸ William E. Howard, *Teaching Law in Tanzania: Just for the Love of It*, JUDGE'S J., Fall 2006, at 45–46.

²⁶⁹ *Id.* at 45.

²⁷⁰ See Adam Ihucha, *Law Firm Donates Computers to MuCO Students*, ARUSHA TIMES (Dec. 19, 2010), <http://allafrica.com/stories/201012201411.html>.

²⁷¹ *Id.*

²⁷² Thomas F. Geraghty & Emmanuel K. Quansah, *African Legal Education: A Missed*

some benefactors willing to put more resources into the system of teaching law,²⁷³ widespread help does not appear to be forthcoming.

Though legal education in Tanzania is largely administered at the bachelor degree level, present and future attorneys can also elect to obtain a Post-Graduate Diploma in Legal Practice at the relatively new Law School of Tanzania.²⁷⁴ Offering a one-year program, the Law School of Tanzania came into being via an act of the Parliament of Tanzania in 2007, replacing a post-bachelors of law (“LL.B.”) internship program that had been in place since 1974 “as a stopgap measure,” according to Gerald Ndika, Dean of the Law School of Tanzania.²⁷⁵ The internship program had been considered outmoded, as it “couldn’t accommodate huge numbers of law graduates; it lacked standards, curriculum and assessment criteria; and supervision of field attachment of pupils was extremely weak.”²⁷⁶ In fact, students in the program often had no supervision whatsoever, as there were no training officers on site.²⁷⁷

Attendance at the law school replaces both the old internship system and the former requirement that all lawyers wishing to practice in Tanzania receive approval from the country’s Council for Legal Education, a body notorious for backlogs in granting attorneys the right to practice.²⁷⁸ The change to the law school-based system has also done away with the oral examination requirement for those entering the field before 2007.²⁷⁹ The Law School of Tanzania has already trained 1,500 students, and enrolls two classes of approximately 200 students each year.²⁸⁰ The curriculum of the school is set by statute, and includes such courses as Advocacy Skills, Practical Aspects of Commercial Law, Legal Drafting Skills and Techniques, and Basic Health and Social Skills for Lawyers.²⁸¹ Additionally, there is a requirement for clinical experience, which can include internships with the judiciary, the Attorney General’s office, law

Opportunity and Suggestions for Change: A Call for Renewed Attention to a Neglected Means of Securing Human Rights and Legal Predictability, 5 *LOY. U. CHI. INT’L L. REV.* 87, 98–99 (2007).

²⁷³ See Ihucha, *supra* note 271 (describing law firm’s decision to donate 25 new laptops to law students at Makumira University College near Arusha).

²⁷⁴ See generally *Academic Programmes*, THE LAW SCHOOL OF TANZANIA, <http://lst.ac.tz/academics/programmes.php> (last visited Feb. 29, 2012).

²⁷⁵ Interview with Gerald Ndika, Principal, the Law School of Tanz., via email (Feb. 18, 2012) (on file with author).

²⁷⁶ *Id.*

²⁷⁷ Medard R.K. Rwelamira, *The Tanzania Legal Internship Programme: A New Horizon in Legal Education*, 15 *AFR. L. STUD.* 29, 36–37 (1977).

²⁷⁸ Interview with Galeba & Siwingwa, *supra* note 225; see also *supra* Part IV.C.1.

²⁷⁹ See Interview with Galeba & Siwingwa, *supra* note 225.

²⁸⁰ *Id.*

²⁸¹ The Law School of Tanzania Act, TANZ. SUBSIDIARY LEG. SUPP. No. 19 § 3 (2011).

firms, and legal aid groups.²⁸²

The law school, it should be said, is not without its critics. Executives from the Tanganyika Law Society attributed part of the blame for the decreasing quality of attorneys in the country to the law school, as they are no longer required to pass an oral examination, nor must they pass an entrance examination or complete an internship.²⁸³

In addition to the LL.B. degree, the master of laws (“LL.M.”), and the degree from the new Law School of Tanzania, the Tanganyika Law Society in 2009 introduced mandatory Continuing Legal Education (“CLE”) for its members.²⁸⁴ With most sessions costing 50,000 shillings, or about \$6, the topics cover commonsense, pragmatic lessons like “Enforcing Judgments and Arbitral Awards” and “Developing & Strengthening Viable Solo Practices.”²⁸⁵ Without CLE, academics and others have warned, lawyers in Tanzania would not be able to keep up with rapidly changing laws in the country, or adapt to the country’s developmental needs.²⁸⁶ Other groups have taken steps to expand expertise of the bar into new areas; in 2009, for example, a group of attorneys formed an intellectual property rights law network.²⁸⁷ Elsewhere in the country, local lawyers are teaming up with international law firms such as SNR Denton to offer free seminars specific to subjects such as tax, reflecting the idea that “East Africa has to open up to the global market and form more successful alliances . . . in order to stay competitive.”²⁸⁸

E. Corruption and Fear of Corruption

With scarcity of attorneys has come corruption, the presence of which presents another potential hindrance to widespread effectiveness of any legal reform in Tanzania, including changes to the country’s evidence law.

²⁸² LAW SCHOOL OF TANZANIA, LS 100: CLINICAL LAW GUIDE 1, 4 (2008) available at <http://lst.ac.tz/documents/download.php?id=23>.

²⁸³ Interview with Galeba & Siwingwa, *supra* note 225.

²⁸⁴ *Continuing Legal Education Programme (CLE)*, TANGANYIKA LAW SOC’Y, <http://www.tls.or.tz/otherpages/CLE.asp> (last visited Feb. 29, 2012).

²⁸⁵ See *CLE Calendar for 2011 (March to August)*, TANGANYIKA LAW SOC’Y, (2011), [http://www.tls.or.tz/docs/cledocs/CLE%20CALENDAR%20FOR%202011%20\(Jan%20-%20Aug\)%20FOR%20TLS%20MEMBERS.doc](http://www.tls.or.tz/docs/cledocs/CLE%20CALENDAR%20FOR%202011%20(Jan%20-%20Aug)%20FOR%20TLS%20MEMBERS.doc).

²⁸⁶ Njonanje Samwel, *Lawyers Called on to Be Multidisciplinary*, GUARDIAN (Dec. 18, 2009), http://ippmedia.com/frontend/functions/print_article.php?l=11389.

²⁸⁷ Zephania Ubwani, *Best Students to Get Intellectual Property Awards*, CITIZEN (Dec. 30, 2010, 10:04 PM), <http://www.thecitizen.co.tz/news/4-national-news/6772-best-students-to-get-intellectual-property-awards.html>.

²⁸⁸ Mkinga Mkinga, *Firm Trains Professionals on Tax Matters*, CITIZEN (Dec. 7, 2010, 10:37 PM), <http://thecitizen.co.tz/business/13-local-business/6175-firm-trains-professionals-on-tax-matters.html> (quoting senior partner Wilbert Kapinga of Tanzanian law firm Mkono & Co.).

As Chief Justice Othman wryly noted, “The public reading of a lawyer is not always positive. An aloof and arrogant ‘msomi!’”²⁸⁹

In rural areas, with the low (or nonexistent) number of lawyers in certain regions of the country comes the phenomenon of fraudulent “bush lawyers,” or non-attorneys “conning people by posing as lawyers.”²⁹⁰ Such fraudulent practice is not limited to rural areas, however; individuals have masqueraded as foreign lawyers qualified to practice in Tanzania, as well as business consultants in law firms.²⁹¹ In the cities, lawyers face a different problem: they have a reputation for corruption,²⁹² as evidenced by their participation in fraudulent contract scams that have involved outside corporations taking advantage of the Tanzanian government.²⁹³ Accusations of corruption extend to workers within the judiciary as well, where there have been reports of court clerks attempting to extort bribes in exchange for copies of court rulings.²⁹⁴ In general, corruption is one of the largest concerns in Tanzania as a whole, a nation where one-fifth of the government’s budget is lost to corruption every year.²⁹⁵ While the

²⁸⁹ Othman, *supra* note 189, at 14. “Msomi” is Swahili for “intellectual.” The Kasumi Project, *Search Results for ‘Msomi,’* KASUML.ORG, http://www.kamu.si/sw/lookup/en?Word=msomi&utm_source=self&utm_medium=link&utm_campaign=reverse (last visited Feb. 29, 2012).

²⁹⁰ Rose Mwalongo, *Human Rights Activists Decry ‘Bush Lawyers,’* GUARDIAN (July 20, 2010), <http://ippmedia.com/frontend/index.php?l=18976>.

²⁹¹ Tanganyika Law Soc’y, *Address the Problem of Unauthorised Legal Practice Fast - Brooke,* THE NEWSFLASH 5 (Dec. 2009), <http://www.tls.or.tz/docs/flashdocs/2009/December2009Newsflash.pdf>.

²⁹² See *Dubious Contracts Blamed on Unethical, Disobedient Lawyers,* GUARDIAN (Oct. 20, 2011), <http://ippmedia.com/frontend/index.php?l=34602>; Mugarula, *supra* note 215 (quoting then-Chief Justice Augustino Ramadhani: “[S]everal advocates are doing shameful things that tarnish their names and the profession in general, I would like the new advocates to be different.”). There has been something of a backlash to the backlash, however, as government justice officials have accused some lawyers of making fraudulent claims about claims of fraud among attorneys. See Sylvester Ernest, *Rogue Lawyers Hit,* CITIZEN (Oct. 22, 2011, 10:37 PM), <http://www.thecitizen.co.tz/sunday-citizen/40-sunday-citizen-news/16402-rogue-lawyers-hit.html#comment-8489> (quoting Tanzania’s attorney general criticizing attorneys for calling one of the companies in a power contract fictitious, when it was in fact real).

²⁹³ See *Court Orders Tanzania to Pay \$66 Mln to Power Firm,* REUTERS (Sept. 29, 2011, 1:45 PM), <http://af.reuters.com/article/tanzaniaNews/idAFL5E7KT2XC20110929> (detailing legal wrangle over Tanzania awarding utilities contract to American company on potentially questionable basis); Sarah Arnott, *BAE Faces Fine Over Tanzanian Radar Contract,* INDEPENDENT (Dec. 21, 2010), <http://www.independent.co.uk/news/business/news/bae-faces-fine-over-tanzanian-radar-contract-2165651.html> (same, regarding radar contract).

²⁹⁴ *Low Pay Lures Judiciary Workers Into Corruption - Judge Mchome,* GUARDIAN (May 26, 2009), <http://ippmedia.com/frontend/index.php?l=2581>.

²⁹⁵ BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR, U.S. DEP’T OF STATE, 2010

government has promised to root out the problem of corruption in the court system, the story is often one of a vow to clean up without specifics.²⁹⁶ The nation as a whole recently earned the dubious honor of overtaking Kenya in the East Africa Bribery Index for third place in the region, while the judiciary and courts specifically ranked ninth out of 115 in the bribery rankings of East African institutions.²⁹⁷

There are certainly efforts underway to address widespread corruption in Tanzania.²⁹⁸ Perhaps the foremost of these efforts emanates from the PCCB.²⁹⁹ Founded in 1974 as the Anti-Corruption Squad,³⁰⁰ PCCB today runs anticorruption programs on everything from elections and land reform to loopholes in the regulation of entrance fees for soccer matches.³⁰¹ Though there is some public argument over whether PCCB is able to achieve its full, intended effect given the fact that it does not decide whether prosecutions go to court,³⁰² there is evidence that the PCCB's successes are increasing,³⁰³ despite shortages in equipment and trained personnel.³⁰⁴

HUMAN RIGHTS REPORT: TANZANIA 28, *available at* <http://www.state.gov/documents/organization/160147.pdf>. Reports of new graft schemes are commonplace, and occasionally creative, often with the assistance of lawyers; in early 2012, two Arusha residents printed a fake title deed for a plot of land and then sold it for 15 million shillings (about \$9,500), with the help of attorneys. Marc Nkwame, *Fresh Land Speculation Rackets Rock Arusha Municipality*, DAILY NEWS (Jan. 22, 2012, 4:29 AM), <http://www.dailynews.co.tz/index.php/local-news/1203-fresh-land-speculation-rackets-rock-arusha-municipality>.

²⁹⁶ See, e.g., Issa Yussuf, *Shein Chides at Graft in the Judiciary*, DAILY NEWS (Feb. 8, 2012, 3:58 AM), <http://www.dailynews.co.tz/index.php/local-news/1672-shein-chides-at-graft-in-the-judiciary> (reflecting chief justice's promise to deal with corruption and strengthen the justice system, but without giving details on how to do so).

²⁹⁷ *The East African Bribery Index 2011*, TRANSPARENCY INTERNATIONAL, 1–4 (2011), <http://www.transparency.org/content/download/63593/1019155>. The Tanzania police were the only national institution in Tanzania to rank higher, at sixth overall. *Id.* at 1.

²⁹⁸ As we should point out, the host for our particular evidence law reform project is the country's PCCB.

²⁹⁹ For purposes of full disclosure, we should mention again that this project is being conducted in conjunction with the PCCB.

³⁰⁰ *Historical Background*, PREVENTION AND COMBATING OF CORRUPTION BUREAU, <http://www.pccb.go.tz/index.php/about-pccb/historical-background> (last visited May 16, 2012).

³⁰¹ *Public Awareness*, PREVENTION AND COMBATING OF CORRUPTION BUREAU, <http://www.pccb.go.tz/index.php/public-awareness/publications/research-reports> (last visited Nov. 9, 2012); *The Prevention and Combatting of Corruption Bureau Report*, E. AFR. ASS'N FOR ANTI CORRUPTION AUTHORITIES ANNUAL GENERAL MEETING COUNTRY REPORT – TANZANIA 8 (2010), <http://www.eaaca.org/wp-content/uploads/2007/06/PCCB-Report-for-4th-AGM-Nairobi-2010.doc>.

³⁰² See *Laws Restrict PCCB, Says Official*, DAILY NEWS (Mar. 15, 2012, 2:19 AM), <http://dailynews.co.tz/index.php/local-news/2935-laws-restrict-pccb-says-official>.

³⁰³ See, e.g., Omary Magongo, *PCCB Takes 7 to Court over Abuse of Office*, CITIZEN

Although the battle against corruption has strengthened, as one observer in Dar es Salaam told us, “forms of corruption are changing, they are more sophisticated. Maybe the roots are becoming stronger because the political will has increased.”³⁰⁵ The fight against corruption, as it rages on, is clearly a factor to consider as a potential roadblock to any sort of reform of the country’s evidence law, which would inevitably interact with legal efforts to combat corruption.

F. *Interaction with Other Tanzanian Laws*

1. Substantive Laws Add Additional Court Structures

As previously discussed, Tanzania has a multi-level adjudicatory structure with overlapping jurisdictions.³⁰⁶ Beyond this court structure, some substantive laws add additional adjudicative bodies that have their own interaction with the TEA and questions of evidence. For example, the Parliament of Tanzania has addressed land disputes in a series of substantive acts, including many in the last few years.³⁰⁷ This legislation provides for a new multi-level adjudicatory structure that supplements the existing courts. This structure consists of the Village Land Council,³⁰⁸ Ward Tribunals,³⁰⁹ the District Land and Housing Tribunal,³¹⁰ and the High Court (Land Division).³¹¹ In adjudicating land disputes, the High Court and the District Land and Housing Tribunal use the TEA and the Civil Procedure Act.³¹² Exceptions exist when deciding the customary law of a particular region,³¹³ and, with certain regulatory promulgations, acceptance

(May 7, 2012, 10:57 AM), <http://www.thecitizen.co.tz/business/13-local-business/22112-pccb-takes-7-to-court-over-abuse-of-office.html>; Marc Nkwame, *PCCB Arrests Three in Connection with Bribes*, DAILY NEWS (Mar. 3, 2012, 3:40 AM), <http://dailynews.co.tz/index.php/local-news/2506-arumeru-east-primaries-pccb-arrests-three-in-connection-with-bribes>.

³⁰⁴ See Marc Nkwame, *President Kikwete Praises Hosea’s PCCB*, DAILY NEWS (Mar. 31, 2012, 2:01 AM), <http://www.dailynews.co.tz/index.php/local-news/3539-president-kikwete-praises-hosea-s-pccb>.

³⁰⁵ Interview with Usu Mallya, Executive Director, Tanzania Gender Networking Programme, in Dar es Salaam (March 13, 2012) (on file with author).

³⁰⁶ See *supra* Part II.

³⁰⁷ See, e.g., Land (Amendment) Act, 2004, Act No. 2 of 2004 (Tanz.); Courts (Land Disputes Settlements) Act, 2002, Act No. 2 of 2002 (Tanz.); Village Land Act, 1999, Act No. 5 of 1999 (Tanz.).

³⁰⁸ Courts (Land Disputes Settlements) Act § 9.

³⁰⁹ See *id.* § 9; Village Land Act § 60.

³¹⁰ Courts (Land Disputes Settlements) Act §§ 23–36.

³¹¹ *Id.* §§ 37–47.

³¹² *Id.* § 51(1).

³¹³ *Id.* § 50(2) (allowing the admission of “any statement thereof which appears to it to

of evidence that “is pertinent and . . . appears to be worthy of belief.”³¹⁴ Like the general court structure, the substantive land dispute laws create questions regarding appeal evidence and the lower tribunal evidentiary regulations. All should be considered as Tanzania looks to reform or replace the TEA.

The establishment of a Juvenile Court³¹⁵ is another example of substantive law creating new adjudicatory structures to consider during examinations of the TEA. The Juvenile Court decides all criminal prosecutions of children, except homicides,³¹⁶ and cases involving the application of childcare, maintenance, and protection monies.³¹⁷ The Resident Magistrate of a district presides over the Juvenile Court.³¹⁸ Proceedings are in camera with only a social worker, the parents of the child, those directly involved in the case, witnesses, and those people the court authorizes to be present.³¹⁹ Hearings are informal, and inquiries are not allowed to subject the child to an adversarial process.³²⁰ While there is no statute specifically excluding the use of the TEA, there appears to be no room for those rules within such an informal process. For instance, the Resident Magistrate is required to explain both charges³²¹ and a right to an appeal in simple language to the child.³²²

Most likely, land disputes and juvenile justice are not the only laws by which the Parliament of Tanzania has created adjudicatory bodies outside of the main multi-level process. Before compiling a final report and advising the Tanzania government about a new evidence code, the research team plans to review these substantive provisions and better understand their interaction with the admissibility of evidence.

2. Tanzania’s Civil and Criminal Procedure Codes Impact Evidence Admissibility

Complicating the limitations of the TEA discussed above, both the Civil Procedure Code³²³ and the Criminal Procedural Act³²⁴ of Tanzania exert

be worth of belief which is contained in the record of proceedings or from any other source which appears to be credible or may take judicial notice”).

³¹⁴ *Id.* § 51(1)(a).

³¹⁵ Law of the Child Act, 2009, Act No. 21 of 2009, § 97(1) (Tanz.).

³¹⁶ *Id.* § 103.

³¹⁷ *Id.* § 98.

³¹⁸ *Id.* § 97(3).

³¹⁹ *Id.* §§ 99(1)(b), (1)(d), (1)(e), (2).

³²⁰ *Id.* § 99(1)(c).

³²¹ *Id.* § 105.

³²² *Id.* § 99(1)(g).

³²³ Civil Procedure Code, 1966, Act No. 49 of 1966 (Tanz.).

³²⁴ Criminal Procedure Act, 1985, Act No. 9 of 1985 (Tanz.).

additional pressure complicating the usual goal of evidence law: the admissibility of relevant and material evidence. For instance, in civil cases, the Civil Procedure Code requires the complaint to include documentary evidence relied on in commencing the suit, and then requires that all remaining documents be produced at the commencement of the first hearing.³²⁵ In most cases, even harmless errors are not forgiven — if a party fails to present the evidence at the correct time, it will be lost in all proceedings.³²⁶ One member of the Court of Appeal justified this technical admissibility decision on the ground that the procedure codes are substantive law, and that it is not the role of the judiciary to question what the Parliament had created as law.³²⁷ Attorneys and advocates, on the other hand, think this rule needs to change.³²⁸

Further complicating the admission of documentary evidence in Tanzania trials is the lack of American-style civil discovery rules.³²⁹ To the extent that a party in a Tanzanian civil suit can seek evidence from the other party using interrogatories, discovery requests, or requests to inspect documents, it is only with the judge or magistrate's permission.³³⁰ While a judge or magistrate is supposed to grant such disclosure requests, the court may decline to do so if it believes that the information is not necessary to fairly dispose of a case, that disclosure would increase costs, or that the party possessing the document properly objects.³³¹ Under such rules, a party may not have an opportunity to learn of an important document in its case; general requests are not allowed. And even if a party learns of the existence of an important document, statutory provisions, as previously discussed, can also prevent this information from being shared.³³²

The Criminal Procedure Act also has a complex relationship to the TEA. Reading sections 164 and 166 of the TEA together allows a party, such as a

³²⁵ Civil Procedure Code, Order VII, r. 14, Order XIII, r. 1(1).

³²⁶ Interview with Law School of Tanzania faculty in Dar es Salaam, Tanz. (Mar. 15, 2012).

³²⁷ Interview with Justice January Msoffe, *supra* note 177.

³²⁸ See, e.g., HAKIARDHI/LARRRI, *supra* note 1, at 2–3; Interview with Law School of Tanzania faculty, *supra* note 326; Interview with Galeba & Siwingwa, *supra* note 225.

³²⁹ See generally FED. R. CIV. P. tit. V.

³³⁰ See Civil Procedure Code, Order XI; see also CHIPETA, *supra* note 98, 137–47 (describing the control magistrates have over the discovery process). The party must also make a specific request for the information. *Id.* at 142.

³³¹ CHIPETA, *supra* note 98, at 142–43.

³³² See, e.g., Evidence Act, 1967, Act No 6 of 1967 (Tanz.), § 132 (prohibiting production of unpublished official records or communications received by a public officer in the course of his duty where the Minister certifies that the information would not be in the public interest to release). Under the practice of the Tanzanian courts, a judge or magistrate would not only deny admission of this information, she would deny discovery. CHIPETA, *supra* note 98, at 143.

criminal defendant, to “corroborate” or contradict the statement of a witness in court through prior statements, thus potentially impeaching a witness. However, in criminal trials, prosecutors ensure that defense counsel never sees prior statements made during police investigations.³³³ Attorneys we interviewed suggested that some magistrates would require that the prosecution provide such statements after the witness testifies, but this appears to be uncommon and objections based on not receiving this information are generally overruled.³³⁴ Typically this means that, despite provisions in the TEA to allow for impeachment of witnesses, a criminal defendant cannot do so because his or her advocate is unable to ever challenge a witness “bas[ed] on [a] previous statement because [an advocate] never see[s] it.”³³⁵

This area is one that the research team needs to consider in more depth before proposing a way to proceed to the Program. Though outside of this project’s mandate, it is clear that procedural codes have a profound impact on evidence admissibility in Tanzanian courts and must be considered to avoid unforeseen consequences.³³⁶ Such interactions need more study and discussion with Tanzanian stakeholders to appropriately consider what a TEA replacement should address.

G. Institutionalized Attitudes and Opinions

The purpose of the research team’s interviews in Tanzania was in part to gauge the opinions of Tanzanian lawyers regarding a potential shift from a rule-based system of admissibility to one generally mandating the admission of all relevant and material evidence, subject to constricted judicial discretion to exclude the truly “bad” evidence.³³⁷ The team anticipated, and was not surprised to find, some institutional hesitancy to this direction. Chief Justice Vanderbilt once again anticipated this problem

³³³ See HAKIARDHI/LARRRI, *supra* note 1, at 4; Interview with Law School of Tanzania faculty, *supra* note 326.

³³⁴ See HAKIARDHI/LARRRI, *supra* note 1, at 4; Interview with Law School of Tanzania faculty, *supra* note 326.

³³⁵ HAKIARDHI/LARRRI, *supra* note 1, at 4.

³³⁶ For instance, in *Haruna Mpangaos and 932 others v. Tanzania Portland Cement Co. Ltd.*, the Court of Appeal held that in a case of 933 plaintiffs, each needed to present their own evidence and testify to bring suit. Civil Appeal No. 129 of 2008 (CA) (unreported). Without a structure for joinder or class action suits, as in the United States, such a case may now be impossible because hearing such evidence during trial would be logistically challenging. The TEA may not be the place to deal with such a problem, but it is clear that some Tanzanian stakeholders would like this project to attempt to address such a problem.

³³⁷ “Bad” evidence could refer to evidence that is irrelevant or that should be excluded either because of specific policy determinations or because concerns of harassment and delay outweigh the value of the evidence.

when he wrote of the phenomenon that judges are more damaging to a nation's laws than criminals or gangsters because they "oppose . . . every change in procedural law and administration . . . because they would be called upon to learn new rules of procedure or new and more effective methods of work."³³⁸ What Chief Justice Vanderbilt was expressing — although perhaps in somewhat too graphic a fashion — is the inherent advantage of the trained bar in understanding the current rules, an advantage given away by reform, and hence their underlying opposition to most proposed procedural changes.

A number of the Tanzanian stakeholders the research team interviewed expressed such a concern. A member of the Program Advisory Board³³⁹ expressed opposition to the idea that the TEA would be replaced whole cloth, since some parts of the law work.³⁴⁰ Similar concerns were expressed in a meeting with members of the University of Dar es Salaam School of Law faculty. When questioned about moving to a discretionary admissibility system, one faculty member voiced the concern, "We'll have to go back to school."³⁴¹ And select members of the judiciary whom we interviewed seemed dismissive of the idea altogether.³⁴²

Unexpectedly, stakeholders also raised concerns about judicial discretion because of their perception of the ability of the current magistrates and the threat of corruption. As Professor Bonaventure Rutinwa expressed, discretion for the judiciary is difficult because the "quality is not very good."³⁴³ He recalled that after a new labor law was passed, the first 100 cases on appeal were decided without consideration of the new law.³⁴⁴ This concern of whether the nation's magistrates and judges could use a reformed evidence act blends with concerns of corruption. As previously discussed, numerous interviewees expressed concern with how magistrates record proceedings. Stakeholders worried about the consequences of providing these same individuals with yet another choke point to decide a case.

On the other hand, several Tanzanian lawyers expressed the need to change the current rule-based system. Executive members of the

³³⁸ VANDERBILT, *supra* note 4, at 4. He continued with criticism for lawyers who "know the defects of the law from personal experience as well as from the complaints of their clients" but likewise oppose reform for the same reasons or "out of supine subservience to [judges]." *Id.*

³³⁹ See *supra* note 1 and accompanying text (listing the members of this group).

³⁴⁰ Interview with Lilian William, *supra* note 110.

³⁴¹ Interview with Gabriel Mnyele, *supra* note 238.

³⁴² See Interview with Judge Robert V. Makaramba, *supra* note 229; Interview with Justice January Msoffe, *supra* note 177.

³⁴³ Interview with Bonaventure Rutinwa, *supra* note 167.

³⁴⁴ *Id.*

Tanganyika Law Society expressed “interest in reform,” arguing that the bar’s attorneys are “angry” about current problems, including admissibility issues in the TEA.³⁴⁵ One attorney for a major Tanzanian corporation suggested the same — that the TEA is a barrier to justice and that major changes are needed, even for a major corporation, to function in the courts.³⁴⁶ The research team plans to continue these conversations with local stakeholders so that those with a stake in the status quo can explore how changing the law may be beneficial to the nation, even if it hinders their built-in advantages.

CONCLUSION

Quite simply, the TEA is not serving the needs of Tanzania. This fact is not surprising, although its cause is complicated. The TEA was initially written to serve colonial powers on another continent, it has not been amended to meet the needs of Tanzania, and the initial drafter’s conceptual understanding of evidence does not reflect modern thinking. Reinforcing these difficulties, the Tanzania courts and bar have a variety of their own problems — resources, education, corruption, complexity, and colonial burdens. Too often, those without the resources to pay trained legal counsel cannot pursue justice in the courts. The Tanzania government is on solid ground in initiating an effort to consider reforming or replacing the TEA.

Identifying the many difficulties facing a new evidence regime in Tanzania is only a first step. To address the law of evidence, these difficulties must be overcome. The next step is to continue to review the laws of Tanzania, examine other nations that have sought to replace the IEA, and consider ways to overcome the challenges that this nation of nearly 45,000,000 people³⁴⁷ faces in securing efficient justice. When we are finished, we hope to have completed a draft of an amended TEA that will be easier to use, more conceptually coherent, and a better fit for the people of modern Tanzania. Ultimately, we will face the challenge of implementing the new evidence laws on the ground in Tanzania.

Our studies have led us to conclude that there are at least three primary principles to which we need to adhere as we attempt to reform the law of evidence of Tanzania. First, we need to be guided in our reform efforts by the Tanzanian people who will be utilizing the amended version of the TEA. A new colonization effort consisting of transplanting the U.S. Federal Rules of Evidence into Tanzania would surely be a cure worse than

³⁴⁵ Interview with Galeba & Siwingwa, *supra* note 225.

³⁴⁶ Interview with In-House and External Counsel, IPP Limited, in Dar es Salaam, Tanz. (Mar. 14, 2012).

³⁴⁷ See WORLD BANK, *supra* note 210.

the disease.³⁴⁸ Certain aspects of Tanzania's evidence law, such as the structuring of privileges and presumptions, will have to be guided by domestic norms and preferences. We will need to work closely with legislators, advocacy groups, and lawyers to identify how best to satisfy the needs of Tanzanian society when we draft those portions of the code. Additionally, we will push for the accessibility of the revised evidence law; it should be in Swahili as well as English, and it should be readily available on court and government websites and in courthouse libraries.

Second, Tanzania should structure the new version of the TEA such that it favors admissibility, with limited exceptions. The current version of the TEA is a complex code with many exclusionary rules. It appears from our interviews that most practitioners believe that the goal of evidence law should be to allow litigants to tell their stories and to achieve an accurate result. This weighs in favor of admitting as much evidence as possible. The ability to admit more evidence than currently allowed by the TEA — including more circumstantial evidence and more electronic evidence — will help improve the fair administration of justice in Tanzania.

Third, Tanzania should focus on eliminating barriers to accessing justice. Currently, the system is riddled with technicalities and delays that either prevent citizens from vindicating their rights or prevent them from vindicating their rights in an effective way. Any revisions that the nation's legislators and officials make should be tailored toward access and efficiency. This may mean working with civil and criminal procedure codes to ensure that procedural rules are not unnecessarily preventing litigants from presenting evidence. It may also mean encouraging a sincere and comprehensive movement to make statutory and decisional law available online and in libraries, as well as encouraging more deferential review standards so fewer cases linger before the higher courts on appeal. It certainly means that, to the extent possible, the government needs to reform aspects of its evidence law that deprive many citizens — in particular, the nation's most marginalized citizens, such as women and the poor — of access to justice. If these principles do not guide this effort at reform, there is a clear risk of exacerbating existing resource imbalances, offending a developing nation's sense of autonomy, and failing to fulfill Tanzania's constitutional promise that the judiciary “dispense[s] justice without being tied up with technicalities.”³⁴⁹

³⁴⁸ See Thomas Carothers, *The Problems of Knowledge*, in *PROMOTING THE RULE OF LAW ABROAD: IN SEARCH OF KNOWLEDGE* 15, 25 (Thomas Carothers ed., 2006).

³⁴⁹ Constitution of the United Republic of Tanzania, Article 107A(2)(e).