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# A PROPOSED EVIDENCE LAW<sup>1</sup>

## SECTION I: GENERAL PROVISIONS

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

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

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

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

“business” has the meaning given in Section IV;

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

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

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

“character” has the meaning given in Section III;

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

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<sup>1</sup> This Proposed Evidence Law was drafted by Professor Ronald J. Allen of the Northwestern University School of Law and a Drafting Committee composed of students of the School of Law over a four-year period from 2012-2015 at the request of the Government of the United Republic of Tanzania. In April, 2014, a draft of the proposal was presented to the Court of Appeal of Tanzania. The Court of Appeal forwarded it to the Parliament of the United Republic with its recommendation that the draft be considered for adoption. Parliament then forwarded it to the Law Reform Commission of Tanzania, which now has it under advisement.

102 *BOSTON UNIVERSITY INTERNATIONAL LAW JOURNAL* [Vol. 33:nnn]

attorney in order to obtain professional legal services from the attorney;

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

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

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

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

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

“credibility” has the meaning given in Section III;

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

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

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

“hearsay” has the meaning given in Section IV;

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

“material proposition” means any proposition of fact sought to be established by evidence at trial that is in a reasonable inferential

2015]

*A PROPOSED EVIDENCE LAW*

103

chain leading to the conclusion that an element of or a defence to any legal claim has or has not been established by the pertinent burden of persuasion;

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

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

“opinion” has the meaning given in Section III;

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

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

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

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

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

“public documents” means

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

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

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

“reputation” has the meaning given in Section III;

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

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

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

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

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

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

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

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

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

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

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

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

## SECTION II: RELEVANCY AND MATERIALITY

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

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

**Subsection 2.3 Conditional Admissibility.** The court may admit evidence over a relevancy objection upon, or subject to, a finding that the evidence

could rationally influence a reasonable person's inferential process concerning any material proposition.

### SECTION III: SPECIFIC RELEVANCY

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

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

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

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

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

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

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

2015]

*A PROPOSED EVIDENCE LAW*

107

**Subsection 3.3 Methods of Proving Character.**

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

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

- A. Past criminal convictions or other specific acts are admissible if their existence is an element of a crime or a defence; or
- B. If the past conviction is relevant to sentencing; or
- C. If relevant to such things as intent, motive, purpose, opportunity, preparation, plan, knowledge, identity, absence of mistake, or lack of accident in the present action.

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

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

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

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

**Subsection 3.9 Negotiations, Pleas, and the Plea Process.**

- A. Any plea offer or acceptance or anything said in proceedings leading to an offer or acceptance of a plea of guilty is not

108 *BOSTON UNIVERSITY INTERNATIONAL LAW JOURNAL* [Vol. 33:nnn]

admissible against an accused, in either civil or criminal proceedings.

- i. This includes but is not limited to a withdrawn guilty plea or anything said to attorneys during the plea process.
  - ii. If another statement made during plea bargaining is admitted, the court may decide that fairness requires admission of similar plea related statements that would otherwise be excluded so that the content may be considered in appropriate context.
- B. Any offer or acceptance made during negotiations concerning civil cases, or anything said in proceedings contemplating an offer or acceptance of an agreement or settlement, is not admissible against the parties to the negotiations in either civil or criminal proceedings.

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

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

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

#### SECTION IV: HEARSAY

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

- A. the declarant does not make while testifying at the current trial or hearing; and



2015]

*A PROPOSED EVIDENCE LAW*

109

- B. a party offers in evidence to prove the truth of the matter asserted in the statement.

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

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

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

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

- A. *An Admission by an Opposing Party.* A statement that is offered against an opposing party and:
- i. was made by the party in an individual or representative capacity; or
  - ii. is one the party manifested that it adopted or believed to be true; or
  - iii. was made by a person whom the party authorised to make a statement on the subject; or
  - iv. was made by the party's agent or employee on a matter within the scope of that relationship and while it existed; or
  - v. was made by the party's co-conspirator during and in furtherance of a conspiracy.
- B. *Excited Utterance.* A statement that:
- i. relates to a startling event or condition; and

## 110BOSTON UNIVERSITY INTERNATIONAL LAW JOURNAL[Vol. 33:nnn

- ii. was made while the declarant was in an excited emotional state caused by the event or condition.
- C. *Present Sense Impression.* A statement that describes or explains an event or condition, made while or immediately after the declarant perceived it.
- D. *Statement Made for Medical Diagnosis or Treatment.* A statement that:
  - i. was made for the purpose of and is pertinent to medical diagnosis or treatment; and
  - ii. describes medical history, past or present symptoms and sensations, or the cause of the symptoms or sensations.
- E. *Then-Existing Mental, Emotional, or Physical Condition.* A statement reflecting the declarant's state of mind (such as motive, intent, or plan) or emotional, sensory, or physical condition (such as mental feeling, pain, or bodily health) at the time the statement was made.
- F. *Statements Relating to the Declarant's Will.* A statement relating to the validity or terms of the declarant's will.
- G. *Recorded Recollection.* Any record that:
  - i. pertains to a matter the witness once knew about but now cannot recall well enough to testify to fully and accurately; and
  - ii. was made or adopted by the witness when the matter was fresh in the witness's memory; and
  - iii. accurately reflects the witness's knowledge at the time.
- H. *Business Records.* The term "business" includes any business institution, association, profession, occupation, and calling of any kind, whether or not conducted for profit.

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

- i. was kept in the course of regularly conducted business activities; and

2015]

*A PROPOSED EVIDENCE LAW*

111

- ii. was created at or near the time of the act, event, or condition that it is documenting by, or on information from, someone with knowledge; and
  - iii. is routinely relied upon by the business in the performance of its business activities; and
  - iv. is presented by a witness who has personal knowledge of the procedures through which the records were created, updated, maintained, and relied upon. The witness need not have personal knowledge regarding the creation of the specific entries in the record that are relevant in the case before the court.
- I. *Public Records.* Any statement in any public or other official book, register, record, or data compilation, in any form, made by a public office, agency or servant in the discharge of an official duty.
- J. *Statements Regarding Public Custom.* Any statement made before the controversy asserting the existence or scope of any public right or custom, the existence of which, if it had existed, the declarant would likely have been aware.
- K. *Records of Vital Statistics.* Records or data compilations, in any form, of births and deaths, including foetal deaths, if the report thereof was made to a public office pursuant to requirements of law.
- L. *Records of Religious Organisations.* Statements of births, marriages, divorces, deaths, legitimacy, ancestry, relationship by blood or marriage, or other similar facts of personal or family history, contained in a regularly kept record or data compilation of a religious organisation.
- M. *Marriage Certificates.* Statements of fact contained in a marriage certificate issued pursuant to the Law of Marriage Act.
- N. *Certificates of Religious Rites.* Statements of fact contained in a certificate, other than a marriage certificate, that the certificate-maker administered a religious rite in the status of a clergyman, imam, or other person authorised by the rules and practices of a religious organisation to perform the rite.
- O. *Family Records.* Statements of fact concerning personal or family history contained in family religious texts, genealogies,

## 112BOSTON UNIVERSITY INTERNATIONAL LAW JOURNAL[Vol. 33:nnn

charts, engravings on rings, inscriptions on family portraits, engravings on urns, crypts, tombstones, or the like.

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

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

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

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

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

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

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

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

2015]

*A PROPOSED EVIDENCE LAW*

113

The pendency of an appeal may be shown but does not affect the admissibility of the judgement.

- W. *Evidence of Prior Judgements, Orders, or Decrees.* Judgements, orders, or decrees that are admissible or establish estoppel under any provision of Law.
- X. *Judgement as to Personal, Family, or General History, or Boundaries.* Judgements that rely on findings regarding matters of personal, family, or general history, or boundaries, where such findings are essential to the judgement.
- Y. *Absence of Records.* Evidence of the absence of records that would be admissible under this Subsection is admissible to prove the record does not exist, if a party had an obligation to keep such records.
- Z. *Matters of a Public Nature.* Judgements, orders, or decrees if they relate to a matter of a public nature that is relevant to the proceedings.

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

- A. *Definition of Unavailability.* A declarant is unavailable to testify when:
  - i. the declarant is deceased; or
  - ii. the declarant is outside of the jurisdiction of the courts of the United Republic; or
  - iii. the declarant cannot be compelled to testify due to privilege, diplomatic immunity, or another similar reason; or
  - iv. the declarant has become incapable of giving evidence due to a physical or mental condition, including memory loss; or
  - v. the declarant's attendance cannot be procured without an amount of delay or expense that, in the circumstances of the case, appears to the court to be unreasonable; or
  - vi. the declarant refuses to appear in court in violation of a court order.

- B. Notwithstanding anything in Subsections (i)–(vi) to the contrary, a declarant is not “unavailable to testify” if the court determines that the declarant’s unavailability was induced by the party proffering the declarant’s statement into evidence.
- C. *Hearsay Exceptions.* The following categories of statements are not excluded by the rule against hearsay if the court determines that the declarant is unavailable to testify under Subsection 4.4(A):
  - i. *Dying Declaration.* A statement made by a declarant who believed that his or her death was imminent, concerning the cause or circumstances of what the declarant believed to be impending death.
  - ii. *Statement Against the Interest of the Declarant.* A statement that:
    - a. a reasonable person in the declarant’s position would have made only if the person believed it to be true because, when made, it was so contrary to the declarant’s proprietary or pecuniary interest or had so great a tendency to invalidate the declarant’s claim against someone else or to expose the declarant to civil or criminal liability; and
    - b. is supported by corroborating circumstances that indicate its trustworthiness.
  - iii. *Statement of Personal or Family History.* A statement:
    - a. concerning the declarant’s own birth, adoption, marriage, divorce, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history, even though declarant had no means of acquiring personal knowledge of the matter stated; or
    - b. concerning the foregoing matters, and death also, of another person, if the declarant was related to the other by blood, adoption, or marriage or was so intimately associated with the other’s family as to be likely to have accurate information concerning the matter declared.

2015]

*A PROPOSED EVIDENCE LAW*

115

- iv. *Forfeiture by Wrongdoing.* Any prior statement of a declarant—whether or not such statement is made under oath—may be offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of a declarant as a witness.

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

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

**Subsection 4.7 Residual Exception.**

- A. Hearsay not covered by any of the exceptions established in Subsections 4.3–4.5 may be admitted notwithstanding Subsection 4.1 if the court determines that the statement was made under circumstances indicating that the statement is likely to be reliable.
- B. In evaluating circumstantial guarantees of reliability to determine whether a statement should be admitted under this Subsection, a court may consider the following non-exclusive factors:
  - i. Whether the circumstances make it likely that the declarant had a motivation or incentive to be truthful at the time the statement was made;
  - ii. Whether the circumstances make it likely that declarant accurately perceived the basis for the matter asserted in the statement;
  - iii. Whether the circumstances in which the declarant's statement was made make it likely that the statement was accurately perceived, remembered, and/or recorded by the person testifying about it or establishing a foundation for its admission into evidence.

- C. Parties that seek to admit evidence under this provision must notify the court and all opposing parties of their intent to do so before the start of trial. When justice so requires, a court may admit evidence under this Subsection where such notice has not been given. If evidence is admitted without notice, the court shall take such action as is necessary to avoid undue prejudice to the opposing party.

#### SECTION V: BURDENS OF PERSUASION & PRODUCTION

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

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

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

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

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

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

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

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



2015]

*A PROPOSED EVIDENCE LAW*

117

**Subsection 5.3 Allocating the Burden of Persuasion in a Criminal Case.**

In a criminal proceeding, unless otherwise provided by Law:

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

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

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

- A. *Evidence that a person is dead.* When one party proves that a person has been alive within the past thirty years, the burden of persuasion is on the opposing party to show that he or she is dead. This Subsection shall not apply to any proceedings under the Law of Marriage Act.
- B. *Evidence that a person is alive.* When one party proves that persons who would naturally have contact with another person have not heard from that person within the past five years, the burden of persuasion is on the opposing party to show that he or she is not dead. This Subsection shall not apply to any proceedings under the Law of Marriage Act.
- C. *Evidence of legal relationship.* When one party proves that individuals have been acting as partners, landlord and tenant, or principal and agent, and that relationship is at issue in the case, the burden of persuasion is on the opposing party to show that those individuals are not in such a relationship.
- D. *Evidence of ownership.* When a party proves that an individual is in possession of some thing, the burden of persuasion is on the opposing party to show that the individual is not the owner.
- E. *Evidence of good faith.* When the good-faith nature of a transaction is at issue and one party proves that the other party

stands in a position of active confidence relative to the first party, the burden of persuasion is on the second party to show that the transaction was in good faith.

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

## SECTION VI: JUDICIAL NOTICE & STIPULATIONS

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

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

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

### Subsection 6.3 Judicial Notice of Non-Adjudicative Facts.

- A. Subject to the requirements of Subsection (B), the court shall take judicial notice of the following non-adjudicative facts:
  - i. all written laws, rules, regulations, proclamations, orders, or notices having the force of law in any part of the United Republic;
  - ii. the existence and title of societies or other bodies whose registration has been publicised in the Gazette;
  - iii. the course of proceedings of Parliament;
  - iv. all seals of all the courts of the United Republic duly established and of notaries public, and all seals which any person is authorised to use by Law;
  - v. the accession to office, names, titles, functions, and signatures of the persons holding any public office in

2015]

*A PROPOSED EVIDENCE LAW*

119

any part of the United Republic, if the fact of their appointment to such office is notified in the Gazette;

- vi. the existence, title, and national flag of every State or Sovereign recognised by the United Republic;
- vii. the divisions of time, the geographical divisions of the world, and public festivals, feasts, and holidays notified in the Gazette;
- viii. the commencement, continuance, and termination of hostilities between the United Republic and any other State or body of persons;
- ix. the names of the members and officers of the court, and of their deputies and subordinate officers and assistants, and also of all officers acting in execution of its process, and of all advocates and other persons authorised by Law to appear or act before it; and
- x. all other matters of which it is directed by Law to take judicial notice.

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

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

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

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

**Subsection 6.6 Recording of Facts Admitted by Judicial Notice or Stipulation.** The court shall include in the record of the trial a statement of all

## 120BOSTON UNIVERSITY INTERNATIONAL LAW JOURNAL[Vol. 33:nnn

facts admitted by stipulation or of which judicial notice was taken under this Section, along with the reasons for noticing these facts.

**SECTION VII: AUTHENTICATION**

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

“document” has the meaning given in Subsection 1.1;

“legal custodian” has the meaning given in Subsection 1.1;

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

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

**Subsection 7.2 General Standard of Authentication and Illustrations.**

- A. **General Authentication Standard.** The proponent of evidence must produce evidence sufficient to support a finding that the proffered item is what the proponent purports it to be.
- B. **Illustrations of Authentication.** The following Subsections are illustrations of evidence that typically satisfy the general authentication requirement of this Subsection. These Subsections are illustrations only, and do not constitute an exhaustive listing.
  - i. *First-hand Knowledge.* Testimony by a witness with first-hand knowledge that the evidence is what it purports to be, including that the witness possesses first hand-knowledge as provided for in Subsection 9.2.
  - ii. *Evidence about processes or systems.* By showing that the evidence is a product of a reliable record keeping system or process and was in safe custody leading up to authentication at trial.
  - iii. *Distinctive Circumstantial Evidence.* If the totality of circumstances regarding the proffered evidence provides sufficient reason to believe the evidence is authentic. These circumstances include, but are not limited to, the item’s distinctive characteristics, a process or system producing accurate results, or any other such means.

2015]

*A PROPOSED EVIDENCE LAW*

121

- iv. *Documents in proper custody.* The contents of evidence less than twenty years old produced from any custody that the court considers proper. This extends to the authenticity of the signature, handwriting, and every other part of a document that purports to be in the handwriting of any particular person and, in the case of a document executed or attested, that it was duly executed and attested, by the persons by whom it purports to be executed and attested.
- v. *Non-Expert Opinion on Handwriting.* Opinion of a non-expert that a handwriting or signature is genuine, if the non-expert:
  - a. is familiar with the handwriting and/or signature based on observance, receipt, or correspondence; and
  - b. has not acquired familiarity for a purpose related to the current litigation.
- vi. *Expert Handwriting Comparisons.* Opinion by a qualified expert comparing the handwriting and/or signature in question with an authenticated sample.
- vii. *Opinion on Voice Recognition.* Opinion by a non-expert who can identify a speaker by his or her voice, based upon hearing the voice under circumstances that connect it with the alleged speaker. Identification of the voice may be made from hearing it first-hand or through electronic transmission or recording. In deciding whether to hear the evidence, the court may choose to consider among other matters:
  - a. the competence of the operator of the recording device;
  - b. the integrity of the recording equipment;
  - c. the absence of material alterations;
  - d. the identification of relevant sounds or voices.
- viii. *Evidence about a telephone conversation.* Telephone, or other electronic voice conversations, by evidence that a call was made to the recipient's number or

## 122BOSTON UNIVERSITY INTERNATIONAL LAW JOURNAL[Vol. 33:nnn

address, which was assigned at the time by a telecommunications service provider, to a particular person or business, if:

- a. in the case of a person, circumstances, including self-identification, demonstrate that the person who answered the call is the intended, assigned recipient; or
  - b. in the case of a business, the call was made to a place of business and the conversation related to business reasonably transacted over the phone.
- ix. *Evidence of electronic communications.* Emails and other forms of electronic communication may be authenticated by reference to the appearance, contents, substance, internal patterns, or other distinctive characteristics, of the electronic communication, taken in conjunction with circumstances. In deciding whether to hear the evidence, the court may choose to consider among other matters whether:
- a. there is evidence that the electronic message was received;
  - b. the specific electronic message bore the customary format of that type of electronic message, including the addresses of the sender and recipient;
  - c. the electronic message address was the same as the electronic message address on a message sent to the party who has admitted receipt of that particular electronic message;
  - d. a recipient of an electronic message in question sent a reply electronic message;
  - e. an electronic message was sent in reply to one sent to the person ostensibly replying;
  - f. the content of the electronic messages indicated the alleged sender's knowledge of facts that were distinctly known by the sender, or to a discrete number of persons including the sender;

2015]

*A PROPOSED EVIDENCE LAW*

123

- g. the body of the electronic message contained the typewritten name, nickname, or alias of either the recipient or the sender;
- h. the content of the electronic message is what would be expected if the electronic message is what it purports to be;
- i. following receipt of the electronic message, the recipient witness had a discussion with the alleged sender, and the conversation reflected the sender's knowledge of the contents of the electronic message;
- j. the electronic message contained the electronic signature of the sender.
- x. *Opinion as to Relationships.* Opinion of any person with first-hand knowledge as to the relationship of one person to another, based upon conduct, familial relationship or other reliable knowledge.
- xi. *Ancient Documents and Data Compilations.* For documents or data compilations that are at least 20 years old when offered, evidence that it:
  - a. is in a condition that raises no suspicion as to its authenticity; and
  - b. was in a place where it would likely be if authentic.
- xii. *Methods Provided by Law.* Any method of authentication allowed by or prohibited by Law.

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

A. *Domestic Governmental Documents.*

- i. *Signed and sealed documents.* Government documents bearing an official signature and seal from an individual with the authority to issue a signature and seal.

## 124BOSTON UNIVERSITY INTERNATIONAL LAW JOURNAL[Vol. 33:nnn

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

B. *Other Domestic Documents.*

- i. *Official Publications.* A book, pamphlet, gazette, map, plan, or other publication issued by an authority of the United Republic.
- ii. *Powers of Attorney.* Any document purporting to be a power of attorney that has been duly executed and authenticated by a notary public, commissioner for oaths, any court, judge, magistrate, registrar, foreign service officer, or diplomatic representative in a manner commonly in use in the country of origin.
- iii. *Business Records.* Certified domestic records of a regularly conducted activity if accompanied by a written or oral declaration under oath of its custodian or other qualified person, certifying that the record was:
  - a. kept in the course of regularly conducted business activities; and
  - b. created at or near the time of the act, event, or condition that it is documenting; and



2015]

*A PROPOSED EVIDENCE LAW*

125

- c. routinely relied upon by the business in the performance of its business activities.

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

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

C. *Foreign Documents.*

i. *Governmental Documents.*

- a. *Foreign Public Documents that Are Certified and Sealed.* Foreign public documents which are certified by a legal custodian, and under seal of a Foreign Service officer or diplomatic representative upon proof of the character of the document(s) according to law of the foreign country. The document must be accompanied by a final certification attesting the genuineness of the signature and official position of the signer.
- b. *Foreign Legal Publications or Judicial Records.* A book, reporter, or other publication printed under the authority of the Government of any country, containing the laws, executive acts, and legislative proceedings of that country or reporting judicial decisions of the courts of that country, and documents purporting to be certified copies of foreign judicial records, if certified in a manner by a Foreign Service officer or diplomatic

representative, in that country to be the manner commonly used for the certification of copies of judicial records.

c. *Foreign Private Documents.* Private documents purporting to be duly executed outside of the United Republic if:

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

2015]

*A PROPOSED EVIDENCE LAW*

127

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

D. *Miscellaneous.*

- i. *Newspapers, Journals, and Periodicals.* Any publication purporting to be a newspaper, journal, or periodical.
- ii. *Trade Inscriptions and Registered Intellectual Property Designations.* An inscription, sign, tag or label purporting to have been affixed in the course of business and indicating origin, ownership, or control.
- iii. *Corporate Bonds and Commercial Paper.* Corporate bonds and commercial paper, signature(s) thereon, and related documents thereto, to the extent allowed by governing commercial law.
- iv. *Books.* Any book a court refers to regarding a matter of public or general interest and that published a map or chart produced for inspection in court was written and published by the person, and at the time and place it purports to have been written or published.

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

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

**SECTION VIII: CONTENTS OF WRITINGS, BEST EVIDENCE RULE**

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

“document” has the meaning given in Subsection 1.1;

128BOSTON UNIVERSITY INTERNATIONAL LAW JOURNAL[Vol. 33:nnn

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

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

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

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

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

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

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

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

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

2015]

*A PROPOSED EVIDENCE LAW*

129

written, in depositions, testimony, or any other admission under Subsection 4.3(A); or

- C. *Copies of Public Documents.* When the document is a public document under Subsection 7.3(A) has satisfied the requirements of that Subsection, and is otherwise admissible under this Act.
- D. *Cumulative and Summary Evidence.* When the document is too large to be conveniently examined in court, the proponent of the document may summarise its contents either through lay or expert examination. The document must be made available for subsequent examination by party-opponents or the court.

**SECTION IX: WITNESSES**

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

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

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

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

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

**Subsection 9.5 Competency of Judges, Magistrates, and Lay Assessors as Witnesses.** Judges, Magistrates, and lay assessors may not testify as witnesses at a trial over which they are presiding, nor may they be compelled to discuss

such matters or anything that came to their knowledge while in court as a judge in other proceedings except upon the special order of some court to which he or she is subordinate.

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

- A. *Control by the Court.* The court should exercise reasonable control over the mode and order of examining witnesses and presenting evidence so as to:
  - i. Facilitate the purposes of trial; and
  - ii. Avoid wasting time; and
  - iii. Protect witnesses from harassment and undue embarrassment.
- B. *Scope of Cross-Examination.* Cross-examination can extend to any material proposition.
- C. *Leading Questions.* Leading questions should not be used on direct examination except as necessary to develop the witness's testimony. The court should allow leading questions only in the following instances:
  - i. For matters that are introductory or undisputed; or
  - ii. On cross-examination; or
  - iii. When a party calls a hostile witness, an adverse party, or a witness identified with an adverse party; or
  - iv. Where necessary to develop the testimony.

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

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

**Subsection 9.9 Writing Used to Refresh a Witness's Memory.** If a piece of writing is used to refresh a testifying witness's memory, it must be disclosed to

2015]

*A PROPOSED EVIDENCE LAW*

131

an adverse party who is entitled to inspect it, to cross-examine the witness about it, and to introduce in evidence any portion that relates to the witness's testimony.

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

- A. By testimony about the witness's reputation for having a character for truthfulness or untruthfulness or in the form of opinion about that character. Evidence of truthful character is admissible only after the witness's character for truthfulness has been attacked.
- B. By inquiry into specific instances of conduct that are probative of the character of truthfulness or untruthfulness of the witness. Extrinsic evidence of specific instances of conduct is not admissible to prove a witness's character for truthfulness or untruthfulness.
- C. By evidence that the witness was convicted of a crime, whose elements required proving—or the witness's admission of—a dishonest act or false statement.
- D. By evidence of prior statements that are inconsistent with the testimony of the witness. If the inconsistent statement was not made under oath, a witness's prior inconsistent statements are admissible only if the witness is given an opportunity to explain or deny the statement and the adverse party is given an opportunity to examine the witness about it.
- E. By evidence of impartiality owing to bias or an interest in the litigation or its outcome. Such proof of impartiality may include but is not limited to evidence of an illegal inducement made to a witness for offering testimony or evidence of personal interest such as impact on finances and reputation.
- F. When a witness or declarant is unavailable, but prior statements or testimony is admitted, the person's credibility may be impeached or confirmed to the extent it would have been available for inquiry had the person testified.

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

132 *BOSTON UNIVERSITY INTERNATIONAL LAW JOURNAL* [Vol. 33:nnn]

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

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

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

#### SECTION X: EXPERT WITNESSES

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

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

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

- A. the subject of a dispute is sufficiently beyond common experience that the expert's testimony would assist the court in understanding evidence or in determining an issue; and
- B. the witness possesses comprehensive and authoritative knowledge of, or skill in, a particular area relevant to a fact in issue based on the expert's knowledge, skill, experience, training, or education; and
- C. the expert testifies in a reliable manner from this knowledge.

**Subsection 10.4 Calling an Expert Witness.** Any party may call an expert witness. The court may, on its own or on a party's motion, call its own expert witness, subject to the parties' opportunity to object and provide names for the



2015]

*A PROPOSED EVIDENCE LAW*

133

court's consideration of additional expert witnesses. All non-calling parties may cross-examine the expert witness.

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

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

**SECTION XI: PRIVILEGES**

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

- A. Refuse to be a witness; or
- B. Refuse to disclose any matter; or
- C. Refuse to produce any object in writing; or
- D. Prevent another person from being a witness or disclosing any matter or producing any object or writing.

**Subsection 11.2 Attorney-Client Privilege.**

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

“attorney” has the meaning given in Subsection 1.1;

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

“client” has the meaning given in Subsection 1.1;

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

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

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

## 134BOSTON UNIVERSITY INTERNATIONAL LAW JOURNAL[Vol. 33:nnn

- i. Between the client or his representative and the client's attorney or the attorney's representative; or
  - ii. Between the client's attorney and the attorney's representative; or
  - iii. Between the client or the client's attorney and an attorney representing another party in a matter of common interest, such as matters in which the client is presenting a joint defence in a criminal case, or is a joint plaintiff or defendant in a civil case; or
  - iv. Between the client's representatives or between the client and one of the client's representatives; or
  - v. Between attorneys representing the client and their representatives.
- C. *Who May Claim the Privilege.* The client's privilege extends to the client's guardian or representative, or to a similar representative of a corporation, association, or other organisation. The attorney who represented the client at the time of the communication may claim the privilege only on behalf of the client; the attorney has the authority to claim such privilege in the absence of contrary evidence. The client's privilege may be invoked on behalf of the client by any of the individuals identified in Subsection 11.2(B).
- D. *Exceptions.* This Subsection shall not apply:
  - i. *Crime or Fraud.* If the attorney-client communication in question was made in furtherance of an intended crime or fraud by the client.
  - ii. *Claimants Through Same Deceased Client.* If parties who claim through the same deceased client seek to protect a communication relevant to an issue between those parties.
  - iii. *Breach of Duty by Lawyer.* If the attorney-client communication in question is relevant to an issue of breach of duty by the attorney to the client, or by the client to the attorney.
  - iv. *Document Attested by Lawyer.* If the attorney-client communication is relevant to an issue concerning an

2015]

*A PROPOSED EVIDENCE LAW*

135

attested document to which the lawyer is an attesting witness.

- v. *Joint Clients.* If the attorney-client communication is relevant to a matter of common interest between two or more clients, was made by any of the clients to a lawyer they retained or consulted in common, and is offered in an action between any of the clients.

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

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

**Subsection 11.3 Work Product Privilege.**

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

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

**Subsection 11.4 Spousal Privilege.**

- A. "*Spouse*" has the meaning given in Subsection 1.1.
- B. *General Rule of Privilege.* The Spouse of an accused in a criminal proceeding, has a privilege to refuse to testify against the accused.
- C. *Exceptions.* This Subsection shall not apply to any Spouse:
- i. In any case charged under Chapter XV of the Penal Code;
  - ii. In any case charged under the Law of Marriage Act;
  - iii. In any other case in which the accused is charged with an action which affected the person or property of the Spouse(s) or children of the accused. This exception shall extend to Spouse-Witnesses in polygamous marriages who may potentially testify against a Spouse-Accused who is charged with any crime against another Spouse in the marriage.
  - iv. To out-of-court statements by the Witness-Spouse, provided that such statements are admissible under or are exempted from the rule against hearsay, Subsection 4.2.

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

2015]

*A PROPOSED EVIDENCE LAW*

137

communications among the judge or magistrate and their staff, or colleagues, made in the performance of their official duties.

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

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

**Subsection 11.6 Self-Incrimination.**

A. *Accused Called as Witness.* In any criminal proceeding, an accused may refuse to testify. If an accused chooses to testify, he must answer every proper question truthfully.

B. *Non-Accused Called as Witness.*

- i. In any civil or criminal proceedings, a non-accused witness will not be excused from answering any question or producing any document, upon the ground that the answer to that question may incriminate the witness, or that it may expose the witness to a penalty or forfeiture of any kind, or that it may establish that the witness owes a debt or is otherwise subject to a civil suit.
- ii. An answer that a witness is compelled to give per Subsection 11.6(B)(i) shall not subject him to any arrest or prosecution, or be proved against him in any subsequent criminal proceedings, except to a prosecution for giving false evidence by such answer.

**Subsection 11.7 Identity of Informer Privilege.**

A. *General Rule of Privilege.* The Government, or a subdivision thereof, may refuse to disclose the identity of a person who has provided information assisting in an investigation into the violation of law to a law enforcement officer, or member of a parliamentary committee, or its staff conducting an investigation.

B. *Exception: Voluntary disclosure; informer as witness.* No privilege exists under this Subsection if either the identity of the

informer or the subject matter of his communication has been disclosed to those who would have cause to resent the communication by a holder of the privilege or by the informer's own action, or if the informer appears as a witness for the government.

**Subsection 11.8 Official Information Privilege.**

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

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

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

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

**Subsection 11.9 Clergy-Communicant Privilege.**

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

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

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

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

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

2015]

*A PROPOSED EVIDENCE LAW*

139

**Subsection 11.11 Trade Secrets Privilege.**

- A. *General Rule of Privilege.* A person has a privilege, to refuse to disclose and to prevent other persons from disclosing a trade secret owned by him, if the allowance of the privilege will not tend to conceal fraud or otherwise work injustice.
- B. *Who May Claim the Privilege.* This privilege may be claimed by the person or the person's agent or employee.
- C. When disclosure is directed, the judge shall take such protective measures as the interest of the holder of the privilege, of the parties, and the furtherance of justice may require.

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

**SECTION XII: CONFESSIONS****Subsection 12.1 Admissibility of Confessions to Police Officers.**

- A. A confession voluntarily made to a police officer by a person accused of an offence may be proved as against that person.
- B. The burden of persuasion that any confession made by an accused person was voluntarily made by him shall lie on the prosecution.
- C. A confession shall be held to be involuntary if the court believes that it was induced by any threat, promise or other prejudice held out by the police officer to whom it was made or by any member of the Police Force or by any other person in authority.

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

**Subsection 12.3 Confessions before Magistrate.** A confession which is freely and voluntarily made by a person accused of an offence in the immediate presence of a magistrate as defined in the Magistrates' Courts Act, or a justice of the peace under that Act, may be proved as against that person.

**Subsection 12.4 Confession Caused by Inducement, Threat or Promise.**

No confession which is tendered in evidence shall be rejected on the ground that a promise or a threat has been held out to the person confessing unless the court is of the opinion that the inducement was made in such circumstances and was of such a nature as was likely to cause an untrue admission of guilt to be made.

**Subsection 12.5 Confession Made after Removal of Impression Caused by Inducement, Threat or Promise.**

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

**Subsection 12.6 Admissibility of Information Received from Accused in Police Custody.**

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

**Subsection 12.7 Confession Otherwise Admissible not to Become Inadmissible Because of Promise of Secrecy, Etc.**

If a confession referred to in Subsection 12.4 is otherwise admissible, it does not become inadmissible merely because it was made under a promise of secrecy, or in consequence of a deception practised on the accused person for the purpose of obtaining it, or when he was drunk, or because it was made in answer to questions which he need not have answered, whatever may have been the form of those questions, or because he was not warned that he was not bound to make such confession, and that evidence of it might be given against him.

**Subsection 12.8 Confession may be Taken into Consideration against Co-accused**

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



2015]

*A PROPOSED EVIDENCE LAW*

141

minor and cognate to the offence charged which are disclosed in the confession and admitted by the accused.

**SECTION XIII: PAROL EVIDENCE****Subsection 13.1 Residual Parol Evidence Provisions.**

A. *Evidence of terms of contracts, grants, and other dispositions of property.*

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

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

B. *Exclusion of evidence of oral agreement.* When the terms of a contract, grant or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved according to Subsection 13.1(A), no evidence of any oral agreement or statement shall be admitted, as between the

parties to that instrument or their representatives in interest, for the purpose of contradicting, varying, adding to or subtracting from its terms: Provided that—

- i. any fact may be proved which would invalidate any document, or which would entitle any person to any decree or order relating thereto such as fraud, intimidation, illegality, want of due execution, want of capacity in any contracting party, want or failure of consideration or mistake in fact or law;
  - ii. the existence of any separate oral agreement as to any matter on which a document is silent and which is not inconsistent with its terms may be proved and in considering whether or not this paragraph of this provision applies, the court shall have regard to the degree of formality of the document;
  - iii. the existence of any separate oral agreement constituting a condition precedent to the attaching of any obligation under the contract, grant or disposition of property, may be proved;
  - iv. the existence of any distinct subsequent oral agreement to rescind or modify the contract, grant or disposition of property may be proved, except in cases in which the contract, grant or disposition of property is by Law required to be in writing or has been registered according to the law in force for the time being as to the registration of documents;
  - v. any usage or custom by which incidents not expressly mentioned in any contract are usually annexed to contracts of that description may be proved, if the annexing of such incident would not be repugnant to or inconsistent with the express terms of the contract;
  - vi. any fact may be proved which shows in what manner the language of a document is related to existing facts.
- C. *Exclusion of evidence to explain patent ambiguity.* When the language used in a document is, on its face, ambiguous or defective, evidence may not be given of facts which would show meaning or supply its defects.
- D. *Exclusion of evidence against application of document to existing facts.* When language used in a document is plain in itself, and

2015]

*A PROPOSED EVIDENCE LAW*

143

when it applies accurately to existing facts, evidence may not be given to show that it was not meant to apply to such fact.

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

**SECTION XIV: ESTOPPEL**

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

**Subsection 14.2 Estoppel of Tenant or of License or Person in Possession.** No tenant of immovable property or person claiming through such tenant shall,

during the continuance of the tenancy, be permitted to deny that the landlord of the tenant had, at the beginning of the tenancy, a title to the immovable property; and no person who comes upon any immovable property by the licence of the person in possession thereof shall during the continuance of such licence be permitted to deny that such person had a title to such possession at the time when such licence was given.

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

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

**Subsection 14.5 Estoppel of Facts Related to Prior Judgements**

- A. A final judgement, order or decree of a competent court, in the exercise of probate, matrimonial, admiralty or insolvency jurisdiction, which confers upon or takes away from any person any legal character, or which declares any person to be entitled to any such character, or to be entitled to any specific thing, not as against any specified person but absolutely, is admissible when the existence of any such legal character or the title of any such person to any such thing, is in issue.
- B. A judgement, order or decree referred to in Subsection (A) is conclusive proof—
  - i. that any legal character which it confers accrued at the time when such judgement, order or decree came into operation;
  - ii. that any legal character to which it declares any such person to be entitled, accrued to that person at the time when such judgement, order or decree declares it to have accrued to that person;
  - iii. that any legal character which it takes away from any such person ceased at the time from which such

2015]

*A PROPOSED EVIDENCE LAW*

145

judgement, order or decree declares that it had ceased or should cease; and

- iv. that anything to which it declares any person to be so entitled was the property of that person at the time from which such judgement, order or decree declares that it had been or should be his property.

- C. A final judgement of a court in any criminal proceedings shall, after the expiry of the time limit for an appeal against that judgement or after the date of the decision of an appeal in those proceedings, whichever is the later, be taken as conclusive evidence that the person convicted or acquitted was guilty or innocent of the offence to which the judgement relates.

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