

DELINKING THE LAW OF EVIDENCE OF TANZANIA FROM ITS INDIAN ANCESTRY

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INTRODUCTION: NAVIGATING THE “LONG, COMPLICATED, AND OUTDATED” EVIDENCE ACT

This Article owes a great deal to Professor Ronald J. Allen of Northwestern University School of Law and his team of researchers who studied the 1967 Tanzanian Evidence Act (“TEA”) in detail and concluded that the TEA was in great need of an overhaul:

[The TEA] is *long, complicated, and outdated*. . . . [It] has 188 separate sections, with innumerable subsections, that go on for approximately fifty-three pages. . . . It almost certainly acts as a barrier to the bringing of legal actions; only those with skilled counsel could effectively use . . . its numerous provisions. The vast majority of its text was drafted not by the Tanzanians themselves, but by the

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English in the form of the Indian Evidence Act of 1872 . . . which was later grafted onto Tanzanian law through British colonial rule. . . . [I]t is not well suited to the modern-day realities of Tanzania.¹

Indeed, the forty-seven-year-old TEA needs an overhaul to address the substantial changes that have taken place in Tanzania. Other nations whose evidentiary codes are also modeled on the 1872 Indian Evidence Act have similarly called for reform.² In Singapore, for example, reform was necessary to “bridge the gap between the rules of an antiquated statute and the modern realities of practice.”³

This Article makes two arguments: first, that Tanzania urgently needs a new code of evidence; and, second, that Tanzania must move cautiously when implementing a new code to avoid any unintended negative consequences. Lord Denning explained the need for caution when transplanting the law of one nation for use in another:

[T]he common law cannot be applied in a foreign land without considerable qualification. Just as with an English oak, so with the English common law. You cannot transplant it to the African continent and expect it to retain the tough character which it has in England. It will flourish indeed, but it needs careful tending. . . . [P]eople must have a law which they understand and which they will respect. The common law cannot fulfill this role except with considerable qualifications.⁴

Before Professor Allen critiqued the TEA, most commentators were content to sit back and praise the genius of Sir James Fitzjames Stephen, the eminent nineteenth century jurist who crafted the Indian Evidence Act.⁵ In

¹ Ronald J. Allen, Timothy Fry, Jessica Notebaert & Jeff VanDam, *Reforming the Law of Evidence of Tanzania (Part Two): Conceptual Overview and Practical Steps*, 32 B.U. INT’L L.J. 1, 2 (2014) [hereinafter Allen et al., *Part Two*] (emphasis added) (citations omitted).

² See Chen Siyuan, *The Future of the Similar Fact Rule in an Indian Evidence Act Jurisdiction: Singapore*, 6 NUJS L. REV. 361, 361 (2013) (citations omitted).

³ See *id.* (“Sir James Fitzjames Stephen’s seminal Indian Evidence Act of 1872 has had an enduring legacy. Many Commonwealth jurisdictions which had modeled their evidence legislation after this seminal work in the late 1800s continue to retain the legislation. Singapore, which originally enacted its Evidence Act . . . in 1893, is one of them. In yet another attempt to modernize the [Evidence Act], the statute was amended in 2012. Amongst the amendments were changes made to the provisions on hearsay and expert opinion evidence.”) (citations omitted).

⁴ *Nyali Ltd. v. Attorney General*, [1956] Q.B. 1 at 16-17 (U.K.).

⁵ See, e.g., John D. Heydon, *Reflections on James Fitzjames Stephen*, 29 U. QUEENSLAND L.J. 43, 54 (2010) (“T. O. Elias said [the Indian Evidence Act] ‘is a model of its kind.’”); Note, *Developments in the Law – Privileged Communications*, 98 HARV. L. REV. 1454, 1460-61 (1985) (explaining that Stephen’s work was greatly influential on

India, whose laws provided the model for the TEA,⁶ reviewing the law of evidence is a most formidable task, and law commissioners have not recommended a complete overhaul of the Indian Law of Evidence or even suggested a new code.⁷ Instead, they have made sporadic amendments to the Law of Evidence, incorporating developments from courts both within and outside of India, as well as the writings of leading authors on the Law of Evidence.⁸ Tanzania has followed a similar, gradual approach to reforming the TEA.⁹

The TEA has been used in a variety of ways during its forty-seven years in force. It has been applied to deal with both simple and complex cases, but today the TEA faces new challenges due to globalization and the information communication technology (“ICT”) revolution.¹⁰ If the law is to effectuate a transformation in a complex society, any reform of the TEA must be predicated on a thorough understanding of its vitality.¹¹ The rationale for reform and the challenges that the TEA faces must be identified in developing a new code.

This Article is designed to show the advantages of a reformed code of evidence in Tanzania for the Tanzanian courts and legal practitioners. First, this Article discusses how the TEA has operated by analyzing Section 7, a key provision of the TEA, and other relevant provisions. Second, it explains why Tanzania has preferred a cautionary approach to reform instead of a complete overhaul of its laws. Third, the Article underscores

contemporary commentators).

⁶ Allen et al., *Part Two*, *supra* note 1, at 2.

⁷ See generally LAW COMM’N OF INDIA, 11TH REPORT (Sept. 1958), 14TH REPORT (Sept. 1958), 48TH REPORT (May 1974), 60TH REPORT (May 1977), 69TH REPORT (May 1977), 88TH REPORT (Jan. 1983), 91ST REPORT (Aug. 1983), 93RD REPORT (Sept. 1983), 113TH REPORT (July 1985), 148TH REPORT (1993), 152ND REPORT (1994), 154TH REPORT (1996), 172ND REPORT (Mar. 2000), 177TH REPORT (Dec. 2001), 179TH REPORT (Dec. 2001), 180TH REPORT (May 2002), 185TH REPORT (Mar. 2003) (reviewing the Indian Evidence Act, 1872).

⁸ See LAW COMM’N OF INDIA, 185TH REPORT, *supra* note 7, at 3.

⁹ Sporadic amendments of the Evidence Act were carried out through the Law of Marriage Act, Act No. 29 of 1971 (Tanz.); The Administration of Justice (Miscellaneous Amendments) Act, Act No. 26 of 1971 (Tanz.); The Evidence (Amendment) Act, Act No. 19 of 1980 (Tanz.); The Sexual Offences Special Provisions Act, Act No. 4 of 1998 (Tanz.); The Prevention of Terrorism Act, 2002 (Tanz.); The Written Laws (Miscellaneous Amendments), Act No. 6 of 2012 (Tanz.); The Written Laws (Miscellaneous Amendments) Act, Act No. 3 of 2011 (Tanz.); and The Written Laws (Miscellaneous Amendments) Act, Act No. 15 of 2007 (Tanz.).

¹⁰ See Alex B. Makulilo, *Admissibility of Computer Evidence in Tanzania*, 4 DIGITAL EVIDENCE & ELEC. SIGNATURE L. REV. 56, 56 (2007) (“TEA contains no provision which defines the term electronic document.”).

¹¹ Rude W. James, *Implementing the Arusha Declaration – The Role of the Legal System*, 3 AFR. REV. 179, 203 (1973).

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the role of the Law Reform Commission of Tanzania (“LRCT”) in reforming the TEA.

A. Interconnected Provisions of the TEA

Though the TEA is “long, complicated, and outdated,”¹² Tanzanian courts have managed to navigate it. One advantage of the TEA is its ability to make use of foreign judicial precedents from other jurisdictions whose evidentiary codes were also developed from the Indian Evidence Act. Tanzanian courts invariably fall back on judicial interpretations from other jurisdictions to interpret codes of law that are *in pari materia* with their own.¹³ Most provisions of the TEA are *in pari materia* with the laws of evidence in Pakistan, Bangladesh, Sri Lanka, Malaysia, Singapore, Kenya, Uganda, and Nigeria.¹⁴ This large body of precedent has enabled Tanzanian courts and legal practitioners to navigate the TEA, creating the consistency and certainty essential to the administration of justice. A complete overhaul of the TEA would mean that Tanzanian courts would no longer be able to rely on those decisions.

The TEA is meant to apply in both civil and criminal proceedings.¹⁵ While some TEA provisions apply specifically to civil or criminal proceedings, many provisions apply to both.¹⁶ Any reform of the TEA should take stock of the way that the words used in one provision explain or influence the words or phrases used in another.

For example, the language in Chapter 1, Sections 4 and 5, is used to interpret other instances of similar language in the TEA.¹⁷ Section 4 directs that “[w]henever it is provided by this Act or any other written law that the court *may presume* a fact, [the court] may either regard such fact as proved, unless and until it is disproved, or the court may call for the proof of it.”¹⁸ Section 4 is used to interpret the provisions of the TEA regarding certified copies of any judicial record,¹⁹ “information on matters of public or general interest,” as well as published maps,²⁰ messages forwarded from a

¹² See Allen et al., *Part Two*, *supra* note 1, at 2.

¹³ See A. N. Allott, *Judicial Precedent in Africa Revisited*, 12 J. AFRICAN. L. 3, 4-5 (1968).

¹⁴ Allen et al., *Part Two*, *supra* note 1, at 19.

¹⁵ Evidence Act, Act No. 6 of 1967, § 2, codified as amended at Cap. 6 R.E. 2002 (Tanz.).

¹⁶ See, e.g., *id.* § 3(2)(a)-(b) (Tanz.).

¹⁷ *Id.* §§ 4, 5. This Chapter of TEA is titled “Preliminary Provisions” and contains definitions of words and phrases.

¹⁸ *Id.* § 4 (emphasis added).

¹⁹ *Id.* § 95.

²⁰ *Id.* § 96.

telecommunications office to the person to whom the message purports to be addressed,²¹ and documents bearing a signature in verifiable handwriting.²² In each case, the court applies the language of Section 4 as the standard of admissibility, and regards the offered documents as proven facts until they are disproven, unless the court otherwise decides to call for proof of the presumed facts.²³

Section 5 directs that “[w]hensoever it is provided by this Act or any other written law that the court *shall presume* a fact, that court shall regard that fact as proved, unless and until it is disproved.”²⁴ For example, Section 5 allows the court to presume that a document certified by a public officer is genuine, waiving the requirement to introduce leading evidence (proof of authenticity).²⁵ This presumption reduces the costs of litigation and saves time for both the court and the litigants.

When Professor Allen and his team reviewed the TEA, they found that the TEA does not operate in isolation; rather, “it has complicated interactions with the civil and criminal procedure codes,” which means “that revision of the TEA alone will not solve the problem of access to justice in Tanzania.”²⁶ Indeed, the TEA overlaps considerably with several statutes, including the Criminal Procedure Act (“CPA”), which contains many provisions that cover various aspects of the rules of evidence, invariably resulting in unnecessary confusion and delays in disposing of cases.²⁷ For example, the provision in the CPA outlining the procedure for excluding illegally obtained evidence has occasionally confused the courts, which are unsure about whether they should follow the exclusionary rule in the CPA or apply the rule from the TEA that regulates involuntary confessions.²⁸ The TEA and the CPA also contain overlapping procedures regarding the admission of documentary evidence, such as the reports of government analysts, fingerprint experts, and handwriting experts.²⁹ Accordingly, reform of the TEA must be preceded by a thorough analysis

²¹ *Id.* § 97.

²² *Id.* § 99.

²³ *Id.* §§ 95-97, 99.

²⁴ *Id.* § 5 (emphasis added).

²⁵ *See id.* § 88.

²⁶ Ronald J. Allen, Timothy Fry, Jessica Notebaert & Jeff VanDam, *Reforming the Law of Evidence of Tanzania (Part One): The Social and Legal Challenges*, 31 B.U. INT’L L.J. 217, 220 (2013) [hereinafter Allen et al., *Part One*].

²⁷ *Compare* Evidence Act, §§ 144-167 (Tanz.) (on the examination and questioning of witnesses), *with* Criminal Procedure Act, 2002, §§ 195-205, codified as amended at Cap. 6 R.E. 2002 (Tanz.) (on the examination and questioning of witnesses).

²⁸ Criminal Procedure Act, § 169 (Tanz.).

²⁹ *Compare* Evidence Act, §§ 88-89 (Tanz.), *with* Criminal Procedure Act, §§ 203-205 (Tanz.).

of the way in which the interconnected provisions of the Act have operated in practice.

B. Section 7: The Key to Understanding the TEA

The TEA is designed to fit into the legal fabric of Tanzania and coexist alongside other Tanzanian law. Section 7 of the TEA states that “[s]ubject to the provisions of any other law, evidence may be given in any suit or proceeding of the existence or non-existence of every fact in issue, and of such other facts as are hereinafter declared to be relevant, and of no others.”³⁰ This provision reminds courts and legal practitioners that the TEA is not the exclusive source of evidentiary rules in Tanzania; rather, Parliament may enact additional, specific rules of evidence. Other laws that contain additional evidentiary provisions include the CPA,³¹ the Prevention and Combating of Corruption Act,³² and the Magistrates Court Act (“MCA”).³³ The TEA, therefore, is a general piece of legislation that leaves room for other particular evidentiary rules, and a complete overhaul of the TEA will necessarily require investigation into how other legislation containing evidentiary rules has operated in practice and supplemented the TEA. Likewise, any proposed evidentiary code must either leave room for additional, specialized rules of evidence or be exhaustive enough to prohibit other statutes from making additional evidentiary rules.

The scope of the second phrase in Section 7, which states that “evidence may be given in any suit or proceeding of the existence or non-existence of every fact in issue,” depends on the individual facts and circumstances of each case. The phrase has been interpreted to mean that courts may admit all evidence regarding facts which, according to the parties’ pleadings, are disputed and which the parties must prove or disprove to prevail on their respective claims. Thus, the pleadings filed by the disputing parties determine the facts at issue; the evidentiary code cannot restrict the litigants’ freedom to determine the matters that they may assert in their pleadings, nor can it restrict the evidence that they may provide to support their complaint.

The final phrase of Section 7, which provides for the admission “of such other facts as are hereinafter declared to be relevant, and of no others” permits the identification in the TEA of distinct categories of specifically admissible evidence. These specific categories of evidence are described in

³⁰ Evidence Act, § 7 (Tanz.) (emphasis added).

³¹ Criminal Procedure Act, §§ 204-205 (Tanz.). This law has provisions governing the admissibility of evidence of handwriting experts and fingerprint experts.

³² Prevention and Combating of Corruption Act, Act No. 11 of 2007 (Tanz.).

³³ Magistrates’ Courts Act, Act No. 22 of 1964 (Tanz.). The Magistrates’ Courts Act (“MCA”) made the Rules of Evidence applicable to primary courts.

Sections 8 through 180 of the TEA. If one cannot find an avenue under Sections 8 through 180 to introduce a given fact, this fact is not considered evidence and is not relevant. In other words, facts that do not fall within the ambit of Section 7 and Sections 8 through 180 of the TEA are not admissible.³⁴ Taken together, these provisions provide a useful guide for criminal investigators to assemble evidence and for prosecutors to present the evidence before the courts.

Sections 8 through 180 of the TEA contain many distinct types of evidence. A few examples illustrate the way that the TEA is systematically organized to provide avenues to present evidence before the courts. Sections 8 through 180 make relevant, and hence admissible, the evidence of *res gestae*: facts or statements of fact or opinion so closely associated in time, place, or circumstance with some act or event at issue that they can be said to form a part of the same transaction as the act or event at issue.³⁵ Section 9 contains several “pigeon-holes” for admitting evidence: (1) facts admissible because they occasioned the fact at issue; (2) evidence regarding causation of facts at issue; and (3) evidence related to facts in issue.³⁶ Sections 19 through 26 cover “admissions,” or evidence of inference.³⁷ These are oral or documentary statements that suggest any inference relating to facts at issue or relevant facts. Sections 27 through 33 cover “confessions,” and include evidence from which to infer guilt, as well as categories of confessions together with the persons to whom confessions can be made.³⁸

In addition to establishing whether evidence is admissible, the TEA also removes the element of surprise because each party has notice regarding the categories of admissible evidence. This certainty enables legal practitioners to advise their clients appropriately. The TEA is largely undisturbed by statutory amendments because it took a long time for the law of evidence to be fully codified and crystallized.³⁹ This predictability gives the TEA an advantage.⁴⁰ An absence of evidentiary rules inevitably leads to a lack of uniformity in the administration of justice.⁴¹ That is why Tanzania’s

³⁴ See JUDICIAL SYSTEM REVIEW COMM’N, REPORT 257 (1977) (Tanz.) [hereinafter JSRC] (arguing that where individual rights, duties, and liabilities have to be ascertained, the TEA determines which facts may and may not have to be proven).

³⁵ See, e.g., Evidence Act, § 8 (Tanz.) (“Facts which, though not in issue, are so connected with a fact in issue as to form part of the same transaction, are relevant whether they occurred at the same time and place or at different times and places.”).

³⁶ See *id.* § 9.

³⁷ *Id.* §§ 19-26.

³⁸ See *id.* §§ 27-33.

³⁹ JSRC, *supra* note 34, at 257.

⁴⁰ See *id.* at 268-69.

⁴¹ See *id.* at 269.

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Judicial System Review Commission (“JSRC”) concluded that the solution to problems stemming from the application of archaic or unsatisfactory rules of evidence is not to abolish those rules but rather to replace or improve upon them.⁴²

C. The TEA and the Rule against Hearsay

The TEA does not explicitly mention the word “hearsay;”⁴³ however, several provisions have been interpreted to provide exceptions to the common law rule against hearsay evidence.⁴⁴ The TEA applies to judicial proceedings in all courts, other than primary courts, in which evidence may be given.⁴⁵ Unlike the Federal Rules of Evidence, which prevent the admission of hearsay evidence unless provided otherwise by a federal statute or rule prescribed by the Supreme Court,⁴⁶ the TEA provides that all varieties of evidence enacted from Sections 8 through 180 of the TEA are relevant, and hence admissible.⁴⁷ This means that the TEA or any other evidentiary statute in Tanzania may make hearsay evidence admissible.

I. OUTSIDE INFLUENCE ON THE TEA

The TEA originated from the Indian Evidence Act,⁴⁸ and Tanzania has borrowed evidentiary principles from outside jurisdictions over time. After the Evidence (Amendment) Act of 1980 made significant amendments to the TEA,⁴⁹ the JSRC issued a report recommending improvements to TEA

⁴² See *id.* at 259.

⁴³ In Tanzania, the term “hearsay evidence” has been judicially applied to that species of testimony given by a witness who relates not what he knows personally, but what others have told him, or what he has heard said by others.

⁴⁴ Examples of these provisions are:

(1) admissions and evidence of inference (Sections 19 to 26 of the TEA provide for relevancy and admissibility of certain species of evidence under the name of “admissions”); (2) confessions by accused persons in criminal cases (the admissibility of written or oral statements acknowledging guilt made by one who has been accused or charged with an offense under Sections 27 to 33 of the TEA); (3) statements of persons who cannot be called as witnesses because they are dead or their whereabouts are unknown under Section 34; (4) statements on certain trade or business records under Section 34A; and (5) relevance of evidence of previous proceedings that is given in later proceedings under Section 35.

⁴⁵ See Evidence Act, § 2 (Tanz.) (“Except as otherwise provided in any other law this Act shall apply to judicial proceedings in all courts, other than primary courts, in which evidence is or may be given.”).

⁴⁶ See FED. R. EVID. 802.

⁴⁷ Evidence Act, § 7 (Tanz.) (“[E]vidence may be given in any suit or proceeding of the existence or non-existence . . . of such facts as are hereinafter declared to be relevant. . . .”)

⁴⁸ See Indian Evidence Act, No. 1 of 1872, INDIA CODE (1993).

⁴⁹ The Evidence (Amendment) Act (Tanz.).

Section 34 regarding statements by persons who cannot be called as witnesses.⁵⁰ The JSRC's recommendations, which led to the current iteration of Sections 34, 34A, 34B, and 34C, were borrowed from laws in England, the United States, and Nigeria.⁵¹ This is evident in the observations and recommendations of the JSRC⁵²:

The present state of the law is clearly unsatisfactory and, as it seems to us a major contributory factor to delays in disposing the trial cases. As we have pointed out *supra*, the move to widen the scope of the admissibility of statements in lieu of calling their makers to testify thereto has already received statutory expression in England and in the United States of America. For the purposes of completeness, we set out hereunder the appropriate provisions on this subject as they appear in the law of the United States of America and of Nigeria. The American and the Nigerian provisions are of interest as providing models, other than the English one, for amending our law.⁵³

It is also evident in Recommendation 8.9:

8.9 Recommendations with respect to Proof by Written Statements:

- (a) We recommend that a provision on the lines of section 1732 of the Federal Business Records Act of the United States be adopted.
- (b) We recommend that, after taking into consideration the factors outlined in subparagraph 8.8 together with a consideration of the recommendations of the C.L.P.M.R.C.S.A., provisions on the lines of the provisions of the Criminal Justice Act, 1967, (U.K.) relating to the admissibility of written statements in lieu of calling witnesses in criminal proceedings be adopted with necessary modifications.
- (c) We recommend that a provision on the lines of sections 90 and 91 of the Evidence Ordinance of Nigeria be adopted, with necessary modifications, in respect of civil proceedings.
- (d) We recommend that the first two gaps disclosed in subparagraph 8.4 as existing in section 34 of the Evidence Act, 1967, be suitably filled in, and that the sections relating to documents and their proof be amended accordingly.⁵⁴

Part VII of the TEA, which focuses on final judgments that are relevant as evidence in subsequent trials, borrows evidentiary principles from

⁵⁰ See JSRC, *supra* note 34; see also Evidence Act, § 34 (Tanz.).

⁵¹ The Evidence Act (2011) Cap. (E14), § 90 (Nigeria).

⁵² JSRC, *supra* note 34, at 275.

⁵³ *Id.*

⁵⁴ *Id.* at 277.

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Kenya.⁵⁵ This adoption was a direct result of the JSRC recommendation that the law should be amended in accordance with Kenya's Evidence Act.⁵⁶ The law of evidence now allows a criminal court's final judgment to be admitted as conclusive evidence that the person convicted or acquitted was guilty or innocent of the offense to which that final judgment relates.⁵⁷

II. HISTORY OF EVIDENTIARY REFORM IN TANZANIA: THE CHOICE BETWEEN COMPLETE OVERHAUL AND PIECEMEAL REFORM OF THE TEA

There is no doubt that Professor Allen's reform recommendations represent the most serious challenge that the TEA has ever seen.⁵⁸ Even the earlier report of the JSRC, which carried out an extensive review of the laws of Tanzania, did not make such major recommendations to overhaul the TEA.⁵⁹ Likewise, the LRCT's more recent project on the review of the civil justice laws of Tanzania did not question or challenge the foundations of the TEA in the same way that Professor Allen and his team did.⁶⁰ Many jurisdictions have substantially transformed their rules of evidence since 1872 when the Indian sub-continent first codified its rules of evidence into the Indian Evidence Act. In jurisdictions like Tanzania which adopted the Indian Code, social, global, scientific, and technological changes have rendered some of the Indian Code's rules of evidence inapplicable, forcing courts to judicially accommodate for these changes. The TEA has not evolved at the same pace as the Indian Evidence Act; this is particularly evident when one compares India's adoption of the Information Technology Act ("IT Act") in 2000⁶¹ and its subsequent amendment in 2008⁶² with Tanzania's adoption of the Written Laws (Miscellaneous Amendments) Act ("Miscellaneous Amendments") in 2007.⁶³ Tanzania enacted the

⁵⁵ See Allen et al., *Part Two*, *supra* note 1, at 19.

⁵⁶ JSRC, *supra* note 34, at 280 ("We recommend, therefore, that Part VII of the Evidence Act, 1967, be amended with a view to incorporating, with necessary modifications, a provision on the lines of section 47A of the Evidence Act, 1963, of Kenya.").

⁵⁷ Evidence Act, § 43A (Tanz.) (allowing the final judgment of a court in any criminal proceedings to be admitted as conclusive evidence that the person convicted or acquitted was guilty or innocent of the offense to which that final judgment relates).

⁵⁸ See Allen et al., *Part One*, *supra* note 26, at 3.

⁵⁹ See JSRC, *supra* note 34; Allen et al., *Part Two*, *supra* note 1; Allen et al., *Part One*, *supra* note 26.

⁶⁰ See THE LAW REFORM COMM'N OF TANZ., THE CIVIL JUSTICE REVIEW SYSTEM 2. The Law Reform Commission of Tanzania ran the Civil Justice Review Project from 2007 to 2012.

⁶¹ See Information Technology Act, No. 21, Gazette of India (June 9, 2000).

⁶² See Information Technology (Amendment) Act, 2008, No. 10, Gazette of India (Feb. 5, 2009).

⁶³ See The Written Laws (Miscellaneous Amendments) Act, 2007, No. 15, Acts of

Miscellaneous Amendments⁶⁴ to codify electronic rules of evidence within the existing structure of the TEA,⁶⁵ but the amendments were not as extensive as the amendments that the IT Act made to the Indian Evidence Act. The IT Act made changes to many other laws addressing evidentiary matters and expanded India's evidentiary laws from admitting only tangible evidence, such as writings, to admitting certain intangible pieces of evidence, such as electronic documents.⁶⁶

The Civil Justice Review Project of the LRCT also identified pieces of legislation that impede efficient and accessible administration of justice and dispute resolution.⁶⁷ The LRCT reviewed the Government Proceedings Act;⁶⁸ the Civil Procedure Code ("CPC"), which is modeled upon the Indian law;⁶⁹ the Arbitration Act;⁷⁰ and the Appellate Jurisdiction Act of 1979. Unlike Professor Allen and his team, who recommended a complete overhaul of the TEA, the LRCT recommended only modest amendments to the CPC.

A. A Cautionary Approach to Reform of Cross-sector Laws

The Government of Tanzania has unilaterally adopted an extremely cautious approach to reforming important legislation, such as the laws of evidence. This cautionary approach may explain why Tanzania has relied on laws that have already been drafted, enacted, and tested in India. Tanzania has taken this approach since 1920, when it enacted the Tanganyika Indian Acts (Application) Ordinance,⁷¹ incorporating several Indian Acts into the laws of pre-independence Tanzania.⁷² As explained

Parliament, 2007 (India).

⁶⁴ See *id.*

⁶⁵ Neither the CPA nor the CPC were affected by the changes made to the TEA. See Criminal Procedure Act (Tanz.); Civil Procedure Code (Tanz.).

⁶⁶ See Information Technology Act (India).

⁶⁷ *Civil Justice Reform Program*, LAW REFORM COMM'N OF TANZ. (Jan. 15, 2015, 12:02 PM), <http://www.lrct.go.tz/civil-justice-reform-program>.

⁶⁸ Government Proceedings Act, 1967 (Tanz.).

⁶⁹ The CPC of Tanzania is largely modeled after the Indian Civil Procedure Code of 1908. See Civil Procedure Code, ch. 33 (Tanz.).

⁷⁰ The Arbitration Act was enacted on May 22, 1931 and modeled on the 1931 Arbitration Act of the United Kingdom. Although the United Kingdom's Act has undergone several amendments since 1931, the Tanzanian Act has largely remained the same. See Civil Procedure Code, ch. 15 (Tanz.); The Arbitration (Foreign Awards), 1931, 20 & 21 Geo. 5, c. 15 (Eng.); Appellate Jurisdiction Act, 1979 (Tanz.).

⁷¹ Application of Laws Ordinance, No. 7 of 1920 (Tanz.).

⁷² The laws of India that were slightly modified to apply in Tanganyika (present day Tanzania Mainland) were the following: Indian Succession Act, 1865, No. 10, Acts of Parliament, 1865; Hindu Wills Act, 1870, No. 21, Acts of Parliament, 1870 (India); Indian

earlier, the LRCT did not suggest breaking the CPC away from its roots in the Indian Civil Procedure Code when it reviewed Tanzania's civil justice laws. Essentially, the prevailing legal philosophy is that if a law thrives in India, it must be well-suited for Tanzania.

Apart from the experience gained from the interpretation of the Indian Evidence Act, the jurisprudence on TEA interpretation has been aided in great measure by interpretations of the evidence codes of several other jurisdictions, such as Kenya,⁷³ Uganda,⁷⁴ and Zanzibar,⁷⁵ who, like Tanzania, imported their laws of evidence directly from India. Despite minor differences caused by respective national legislative activities, these codes of evidence are in *pari materia* with the TEA. This means that judicial decisions from any of these jurisdictions invariably create a large pool of jurisprudence for the interpretation of the TEA.

In a report on civil justice reform, the Law Reform Commission of Tanzania articulated Tanzania's reluctance to depart from laws based upon Indian law, here in the context of the CPC:

Thus the Tanzanian Code of Civil Procedure is a statute in *pari materia* with the Civil Procedure Code of India. Since its enactment in 1966 the CPC has been vastly enriched by decisions of courts in Tanzania, academic commentaries as well as precedents from other common law jurisdictions. Any proposal to discard or completely overhaul the CPC must inevitably be based on overwhelming empirical and statistical evidence that the CPC has become a serious impediment to the administration of justice. Neither Dr. A[ngelo] Mapunda, the consultant nor the Law Reform Commission found any such empirical justification to discard or overhaul the CPC at this juncture.⁷⁶

Evidence Act; Indian Oaths Act, 1873, No. 10, Acts of Parliament, 1873; Code of Civil Procedure, 1908, No. 5, Acts of Parliament, 1908 (India); Indian Limitation Act, 1908, No. 9, Acts of Parliament, 1908.

⁷³ See The Evidence Act, (2012) Cap. 80 (Kenya).

⁷⁴ Evidence Act, (1909) Cap. 6 (Uganda), available at <http://www.ulii.org/ug/legislation/consolidated-act/6>.

⁷⁵ Evidence Decree, Cap. 5 (Zanzibar), available at <http://www.judiciaryzanzibar.go.tz/essential%20satutes/Evidence%20Decree-%20Cap%205.pdf>.

⁷⁶ LAW REFORM COMM'N OF TANZANIA, REPORT OF THE COMPREHENSIVE REVIEW OF CIVIL JUSTICE SYSTEM IN TANZANIA 29 (2013), available at <http://www.lrct.go.tz/wp-content/uploads/2013/05/FINAL%20REPORT.pdf> (presented to the Minister for Justice and Constitutional Affairs in Dar es Salaam).

III. CHALLENGES AND RECOMMENDATIONS FOR LEGAL REFORM

A. The National Unifying Role of Law Reform

There has always been an underlying belief in Tanzania that law should play a role in the integration of the nation's people. That is, legal reform should result in improved national cohesion and integration in a nation that is comprised of more than 120 tribes, several races, and multiple religions. During the British occupation of Tanganyika, law did not play the integrative role that it is required to play today. The underlying legal philosophy of the British administration was based on the principle of "indirect rule," which was structured to allow tribal authorities to flourish separately and at different paces.⁷⁷ Separate court systems were established for various races, resulting in the divided legal system that developed under British administration. As Tanganyika was approaching independence, even the British administration was concerned about how a nation ruled by a divided system of laws and courts could organically transform into an independent State governed under a unified legal system. Ideally, new reforms to the TEA should promote the development of such a unified legal system.

B. Reform of the TEA in Tandem with Other Procedural Laws

Professor Allen's own report argues that substantial changes to Tanzania's procedural laws (the TEA,⁷⁸ CPA,⁷⁹ and CPC⁸⁰) could reduce the length of proceedings and backlog of cases, improving the quality of Tanzania's justice system.⁸¹ He also argues that the TEA interacts with, compliments, supports, and balances the CPA and CPC to create a singular legal fabric for Tanzania.⁸² I fully agree with Professor Allen that reforming the laws of evidence cannot be done without considering all evidentiary rules scattered throughout several pieces of Tanzanian legislation. In order for Tanzania to reduce the complexity of its procedural laws and the procedural steps in any given legal proceeding, several statutes must be reviewed in tandem.

Reform of Tanzania's evidentiary law will be incomplete without reviewing the distinct types of evidence recognized under the current code,

⁷⁷ Ibrahim H. Juma, *Role of Law and Politics in Making a Nation and Integration*, 4 L. REFORMER J. 8, 14 (2013).

⁷⁸ See Evidence Act (Tanz.).

⁷⁹ See Criminal Procedure Act (Tanz.).

⁸⁰ See Civil Procedure Code (Tanz.).

⁸¹ See Allen et al., *Part Two*, *supra* note 1; Allen et al., *Part One*, *supra* note 26.

⁸² See Allen et al., *Part Two*, *supra* note 1; Allen et al., *Part One*, *supra* note 26.

which include admissions against one's interest,⁸³ confessions in criminal cases,⁸⁴ evidence from witnesses who are dead or missing,⁸⁵ evidence contained in maps, charts and plans,⁸⁶ facts from previous judgments relevant to ongoing proceedings,⁸⁷ opinions of experts,⁸⁸ character evidence,⁸⁹ and judicial notice.⁹⁰

C. The Financial Cost of Reform

Tanzania is aware of the importance of identifying the challenges to and costs of reform before making the decision to overhaul or make piecemeal amendments to the TEA.⁹¹ In 1993, Tanzania established the Legal Task Force ("LTF"), which was committed to legal reform.⁹² The LTF soon realized that legal reforms are expensive for a developing country; nonetheless, it made several recommendations for law reform and developed an expensive reform package, which would have cost a total of \$220 million.⁹³ This estimate forced the government to scale back its ambitions by embarking instead on piecemeal reforms. Smaller individual priority areas in need of reform were identified; within these priority areas, smaller, more cost-effective reform programs were designed.⁹⁴

Due to the magnitude and cost of legal reform measures recommended by the LTF, the government developed the Legal Sector Reform Programme: Medium Term Strategy and Action Plan ("MTS").⁹⁵ The MTS was updated in March 2003 to address key national policies such as the Poverty Reduction Strategy.⁹⁶ While legal reform was a primary focus of the MTS, reform efforts were hindered by insufficient local and external financial resources to support implementation of the reform. These financial concerns have remained and could hinder any proposed reform of

⁸³ Evidence Act, §§ 19-26 (Tanz.).

⁸⁴ *See id.* §§ 27-33.

⁸⁵ *See id.* §§ 34, 34A, 34B, 34C, 35.

⁸⁶ *See id.* § 38.

⁸⁷ *See id.* § 42.

⁸⁸ *See id.* §§ 47-53.

⁸⁹ *See id.* §§ 54-57.

⁹⁰ *See id.* §§ 58-60.

⁹¹ David Louis Finnegan, *Law and Private Sector Development in Tanzania*, at 111 (2008) (unpublished Ph.D. dissertation, University of Michigan) (on file with the University of Michigan Library).

⁹² *Id.* at 105.

⁹³ LEGAL SECTOR REFORM PROGRAMME (LAW AND ORDER), 1 MEDIUM TERM STRATEGY 1, 46 (2004).

⁹⁴ *Id.* at 2.

⁹⁵ *Id.* at 1.

⁹⁶ *Id.*

the TEA.

Even in India, the recent modernization of the law of evidence to accommodate the ICT revolution brought several challenges that law reformers in Tanzania must take into account when embarking on reforming the law of evidence. For example, India now admits digital signatures, and the law is sufficiently broad to allow admissions of biometrics and other new forms of electronic signatures.⁹⁷ However, this progressive law has brought challenges:⁹⁸ for example, a majority of citizens are unable to access or use electronic signatures or electronic authentication techniques, despite the recent reforms, and there is an urgent need to educate the general public on using electronic signatures and other electronic authentication techniques.⁹⁹

In Tanzania, reform of the TEA will give rise to other challenges as well. Universities offering law degrees will have to revise their curricula. Tanzania will also need to provide re-training programs for judges, magistrates, and other legal practitioners. Finally, Tanzania must consider its role as a partner state in the East African Community, as well as its long-term goal of establishing a political federation and taking all necessary steps to unify and integrate partner states' national laws.¹⁰⁰ Therefore, while reforming its law of evidence, Tanzania should also promote harmonization of its laws with the laws of other partner states in the East African Community.

CONCLUSION: THE WAY FORWARD FOR THE TEA

It is indisputable that Tanzania must join the list of states that have recently reformed their laws of evidence. Nigeria enacted a new evidentiary code in 2011, which remedied many issues that its old code perpetuated. For example, the "old law . . . had been criticized for most of its anachronistic provisions, especially, its lack of recognition of modern documentary probative tools like computer generated print-outs, electronic digital messages and other paraphernalia of business and commerce of this

⁹⁷ Karnika Seth, *IT Act 2000 vs 2008 – Implementation, Challenges, and the Role of Adjudicating Officers*, at 2 (May 8, 2010) (paper presented at the National Seminar on Enforcement of Cyber Law in New Delhi).

⁹⁸ *Id.* at 2.

⁹⁹ *See id.* at 3 ("[Implementing the new law] involves expenditure as such authentication tools will require purchase, installation & [sic] training, particularly in all government departments where it is proposed to be used. Equally challenging will be the drafting of duties of subscriber of electronic signature certificate under Section 40 A [sic] of the Act which will need to incorporate security measures subscribers can adopt depending on electronic signature [sic] being used for signatures.").

¹⁰⁰ East African Community Charter art. 126(2)(b).

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Information and Communication Technology age.”¹⁰¹ The prior evidentiary code caused “conflicting decisions” by the judiciary and “confusion and uncertainty regarding evidentiary procedure.”¹⁰² The same criticisms can likely be made of the TEA.

After Professor Allen’s extensive and insightful research, the next practical step is for the LRCT to take over the reform process. The LRCT is best able to meet the challenges of reforming the TEA because it has an extensive array of expertise to prepare for the practical challenges that Tanzania will face in the event that the TEA is overhauled. The LRCT is best able to coordinate all stakeholders involved in the reform process, including the judiciary, the Office of the Attorney General, the Office of the Director of Public Prosecutions, and law schools. The LRCT has built up a cadre of legal researchers and an important institutional memory regarding reforms. Additionally, the LRCT benefits from an array of legal experts that it can call on for assistance. With these resources and the institutional knowledge at its disposal, the LRCT can recommend appropriate mechanisms to ensure that any new code of evidence takes root systematically with minimal confusion.

While reforming its evidentiary law, Tanzania cannot avoid examining its other statutes that interact with the rules of evidence. Inevitably, the LRCT must also study the rules of evidence that are scattered throughout several other statutes like the CPA, CPC, and even in the Prevention and Combating of Corruption Act.¹⁰³ The many reverberations and aftershocks of reform will be minimized if an overhaul of the TEA includes reform of these statutes as well.

¹⁰¹ Kayode Ketefe, *New Evidence Act and Implications for Administration of Justice*, USA AFRICA DIALOGUE SERIES: NEW EVIDENCE ACT AND IMPLICATIONS FOR ADMINISTRATION OF JUSTICE (Mar. 19, 2012, 11:12 AM), <https://groups.google.com/forum/#!topic/usaafri dialogue/7Jjj4LWeSSc>.

¹⁰² *Id.*

¹⁰³ See Allen et al., *Part Two*, *supra* note 1; Allen et al., *Part One*, *supra* note 26.