

THE MAGAZINE OF NORTHWESTERN UNIVERSITY SCHOOL OF LAW

NORTHWESTERN LAW REPORTER

VOLUME III
NUMBER 1
FALL 2014

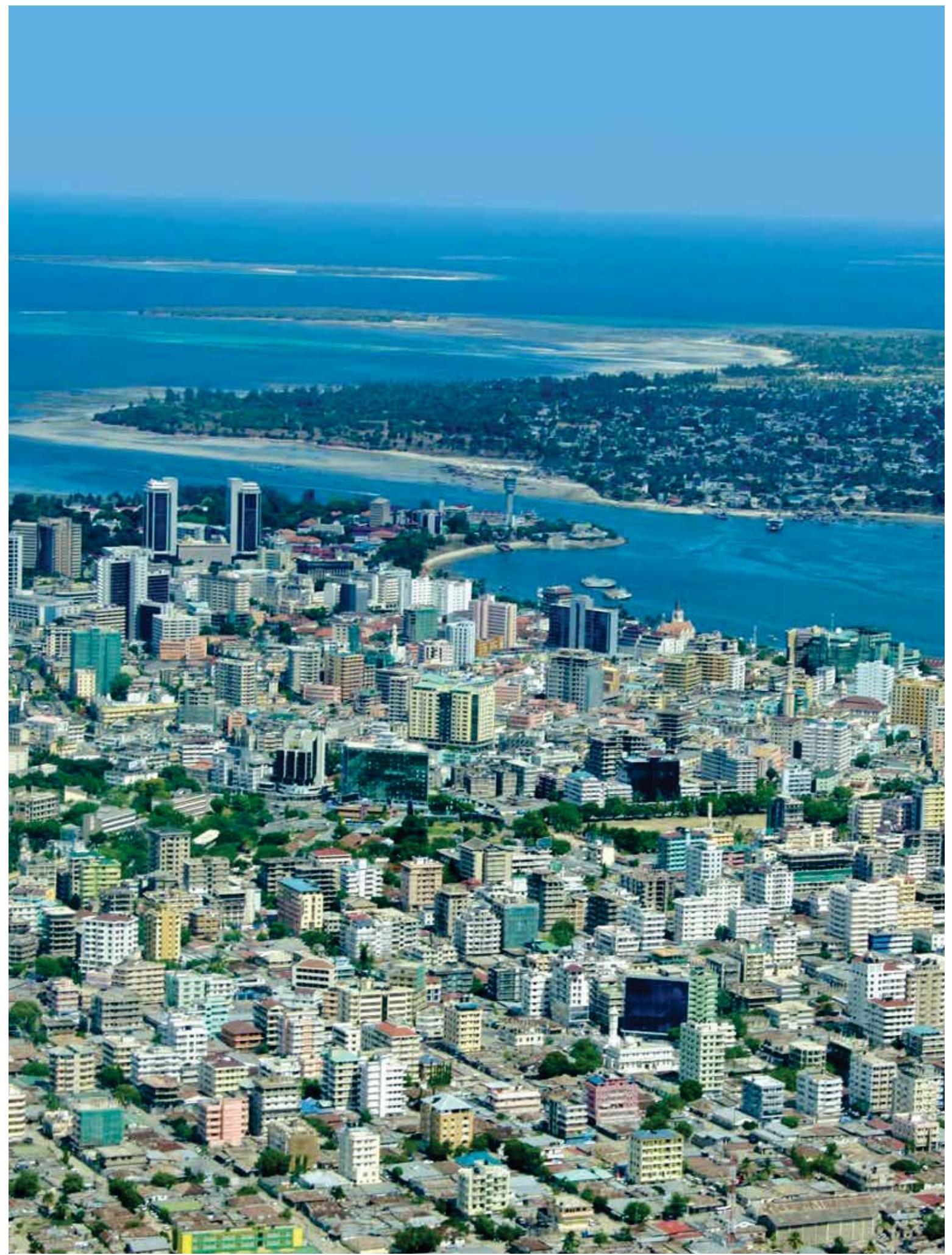


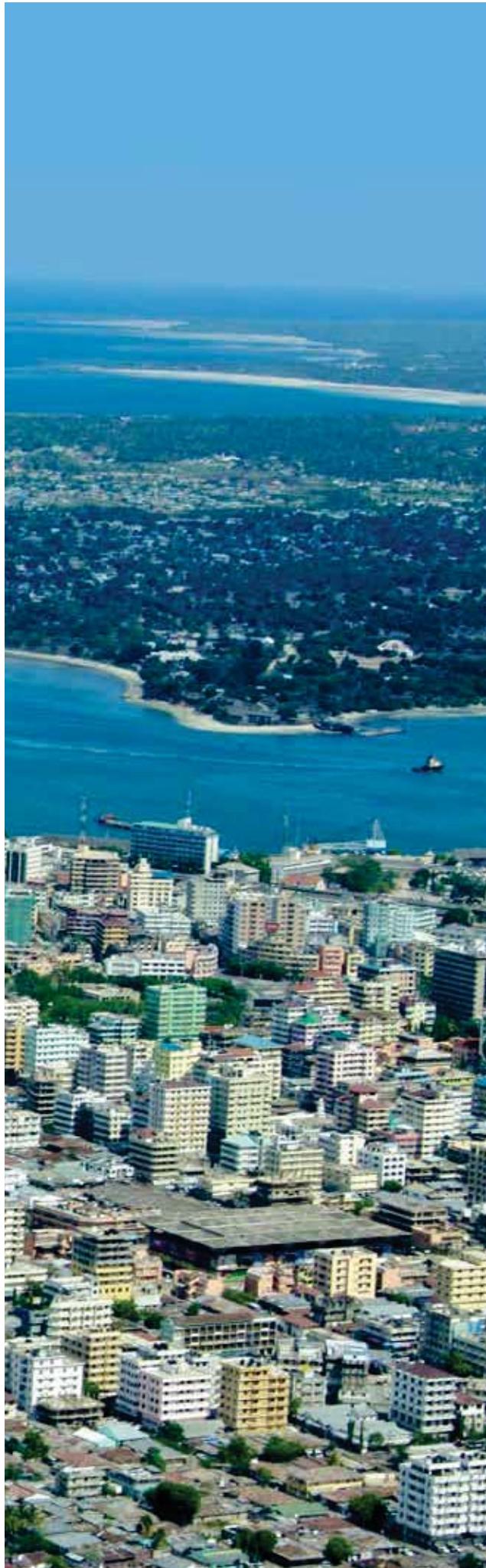
Reforming the Law of Evidence of Tanzania

The Importance of Death Penalty Litigation

New Research Faculty

LLM Alumni in International Human Rights

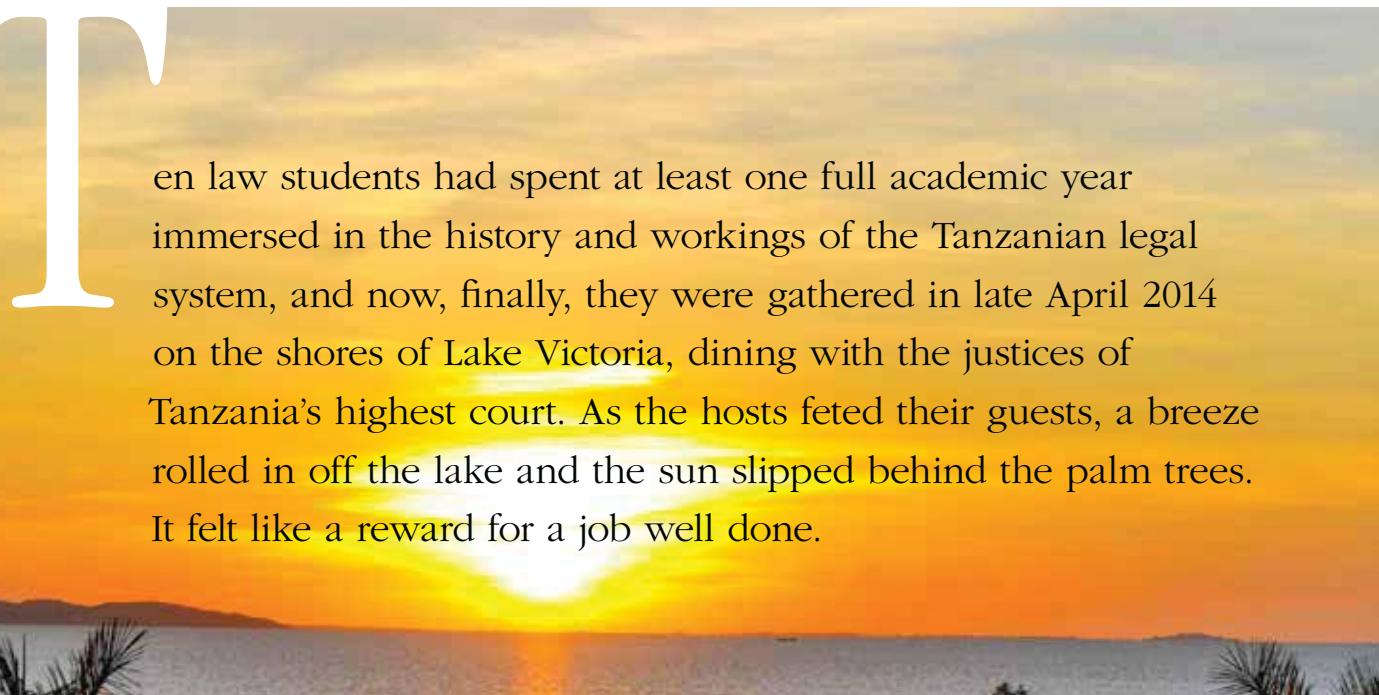




Reforming the Law of Evidence of Tanzania

Last spring Professor Ronald Allen, nine students, and one recent Northwestern Law graduate presented a draft Evidence Act to the Court of Appeals, Tanzania's highest court, for consideration. Their visit to Tanzania continued a project that has been three years in the making and will continue in the coming year.

By Steve Hendershot



en law students had spent at least one full academic year immersed in the history and workings of the Tanzanian legal system, and now, finally, they were gathered in late April 2014 on the shores of Lake Victoria, dining with the justices of Tanzania's highest court. As the hosts feted their guests, a breeze rolled in off the lake and the sun slipped behind the palm trees. It felt like a reward for a job well done.

At that point, "there was just no way to comprehend the significance of what we were there to do," remembers Katy Pine (JD '15), one of the students.

That changed abruptly the following morning. That's when the students unveiled their proposal to replace the East African nation's rules of evidence with a new set they had written themselves. This was not an abstract presentation of a research paper, it was a radical reinvention of a foundational component of Tanzanian law.

Not everyone present rushed to embrace the recommendations. On the contrary, one of the justices rose and suggested that adopting the Northwestern proposal would be a terrible mistake. He argued that the existing code served the country well. The Tanzania Evidence Act had been in place since shortly after Tanzania gained independence from Britain in 1964, and even then was only slightly modified from the evidence rules adopted by India in 1872. The Indian Evidence Act had been drafted by a British colonial legal official, James Fitzjames Stephen, and some version was still in effect in many former British colonies in Africa and Southeast Asia.

But to Ronald Allen, the Northwestern professor and renowned evidence scholar who led the

delegation, Stephen's rules of evidence were at best antiquated and at worst prejudiced toward cultural elites, with "conceptual foundations that are crazy beyond belief." Professor Allen and his team of students were in Tanzania at the invitation of Dr. Edward Hoseah, a senior government official and leader of the country's Prevention and Combating of Corruption Bureau. Hoseah is an advocate for legal reform and an admirer of Allen. The two met 20 years ago at a conference in Vancouver, after which Hoseah came to Chicago to do doctoral research. It was while Hoseah was at Northwestern that Allen convinced him of the importance of a sound evidential code within a broader legal reform movement. "It's the best place to start," says Allen. "First, it's trans-substantive, covering all fields of the law. Second, accurate fact-finding is the single most important factor in the legal system."

In 2011 Hoseah emailed Allen and asked him to become the chief legal-reform consultant to the Tanzanian parliament. Allen accepted. And now here they were in spring 2014, watching a team of law students from Northwestern get grilled by Tanzania's foremost jurists. Their hope was that the proposed rules would be adopted and serve as a cornerstone for greater legal reform. As the



objecting justice spoke, it was clear that roadblocks remained. Yet the intensity of the debate also made clear that the proposal was being received with great seriousness.

This was no field trip.

Says Pine: "Once the justices started pushing back, started resisting, that's when I realized this was legitimate—this could really make an impact."

Building the Foundation

When Professor Allen first traveled to Tanzania in spring 2012, he did so with three students and no idea that he would oversee the drafting of new evidentiary rules. Instead, that first year focused on research—on the existing code, as well as the culture, politics, economy and history of Tanzania.

"There are certain things that are universal in any field of law, but there also are a lot of things that are quite local and indigenous, and you have to understand how the two relate in order to be effective in law reform," says Allen. "It's not as simple as taking the American Constitution and trying to plop it down. We wanted to think conceptually from the bottom up, identify the issues, and then respond to them."

During the trip his team not only met with a group of Tanzanian officials and scholars investigating legal reform but also with groups representing AIDS patients, rural Tanzanians, and the impoverished. The breadth of those interviews was immediately valuable: "It wasn't clear that legal elites were talking to and working with those populations," says Tim Fry (JD '13), a student who went on the trip and is now an associate at McGuireWoods. "Part of our value there had nothing to do with evidence but just relaying one group's concern to another and hearing, 'Oh, that's interesting, maybe we should talk to them.'"

Another of the group's discoveries was that the complex set of existing evidence rules wasn't compatible with the realities of Tanzania's courts. Case files for the highest court were bound up with string; there was no electronic filing system. Lower court judges acted as de facto court reporters, attempting to take verbatim notes while also presiding. The evidence rules themselves, byzantine and constrictive by modern standards, confounded lower-court attorneys and judges alike, a problem exacerbated by language barriers—English, the language of the Tanzanian government, is spoken only by a minority of citizens, and often eschewed at trial. (Tanzania's national language is Swahili, and dozens of other languages and dialects are spoken as well.)

The trip concluded with a presentation at a law school in Dar es Salaam, where the team learned there had been a major study of Tanzanian evidence law in the 1970s. It was a fitting end to a journey of discovery.

"There were things you couldn't know unless you were on the ground," says Jeff VanDam (JD '13), who participated in both the 2011–12 and 2012–13 iterations of the project and is now a law clerk for Chief Judge Diane Wood of the US Court of Appeals for the Seventh Circuit. "There had to be an initial stage where we just listened, where we didn't impose what we thought but just asked them about their experience and what they wanted, then tried to interpret it as best we could."

Following the 2012 trip Allen recommended that the Tanzanian working group draft and adopt new laws of evidence. That fall, as he thought of ways

Chief Justice Mohamed Chande Othman of the High Court of Tanzania; Dr. Edward Hoseah, director general of the Prevention and Combating of Corruption Bureau in Tanzania; and Professor Ron Allen relax between sessions during the April 2014 presentation in Mwanza.



to bring a new batch of students up to speed, he had an idea for a class project: “While we wait for the Tanzanians, let’s go ahead and draft a model code of evidence as a means of really dealing with the conceptual foundations.” The group presented it in spring 2013 during a second trip to Tanzania, this time at Edward Hoseah’s offices at the Prevention and Combating of Corruption Bureau in Dar es Salaam. The point,

colonial quotations. “If you’re worried there’s Western hegemony at work here, you’re right. It’s not us, though,” Allen told them, adding that his preference was that a Tanzanian team draft the new rules.

Following the presentation Tanzanian officials asked Allen to refine and refashion the draft proposal into one that could be considered for adoption.



Katherine Klein (JD '14) consults with Professor Ron Allen before beginning her presentation to the Tanzanian justices the spring.

Allen says, “was not to make an actual proposal, but to highlight the conceptual gap.” The centerpiece of the presentation was the identification of eight guiding principles of reform, underlying concepts of evidence law such as the notion that the law should facilitate accurate, efficient and fair fact-finding, and should respect community norms where possible. The eight principles also formed the basis of an article published in the *Boston University International Law Journal*.

Allen also feared that he and his team would be seen as Western interlopers, so he came prepared. During his presentation to about 60 Tanzanians, he displayed a picture of James Fitzjames Stephen, the British colonialist who wrote the current code, along with some of Stephen’s more domineering

Drafting the Document

“The rubber hit the road,” says Allen of the decision to turn his project into a document worthy of consideration by the Tanzanian Parliament. “Until then, it was a really interesting, tremendous pedagogical experience that I enjoyed and thought was helping out my friends in Tanzania. But this is a different story.”

For the students, it was clear the stakes had been raised, and they responded. “We were all working insane hours, because we didn’t want to drop the ball. It was, ‘This isn’t an assignment anymore; it’s for a country,’” says Katherine Allison (JD '14).

The students divided into subgroups to tackle specific articles within the proposal, such as authentication, expert witnesses, and specific relevancy. Each group would present a draft to the larger class for analysis and critique, then head back for another round of revision.

Many of the changes were intended to modernize or clarify the older code. The Tanzania Evidence Act had been amended only a handful of times, and still was very much rooted in the Indian Evidence Act of 1872. The Northwestern document develops a standard for authentication, something missing from the old code, which is rooted in an era when oral testimony was strongly preferred over any other form of evidence, and before the many kinds of evidence that exist today were created (electronic information, for example). There is no general provision for electronic evidence in the current Tanzanian code; the Northwestern team drafted provisions to make the Act “technologically neutral” to accommodate the changes that have



“There were things you couldn’t know unless you were on the ground. There had to be an initial stage where we just listened, where we didn’t impose what we thought but just asked them about their experience and what they wanted, then tried to interpret it as best we could.”

Jeff VanDam (JD ’13)

occurred and provide a mechanism to deal with those that will.

Clarification also was a critical concern. The old code is complex, which in Tim Fry’s view contributed to injustice: “There are these very technical rules that the higher courts follow to a ‘T,’ but at the lower levels, lots of cases are getting thrown out on technicalities that perhaps don’t deserve to be.”

Some changes were more fundamental. Among the most striking differences between the Northwestern draft and the existing Tanzanian evidence law were:

The Tanzanian code requires evidence to meet specific, pre-defined criteria in order to be admitted. The Northwestern proposal applies a more typical, modern test of materiality and relevancy, along with the idea that a piece of evidence ought to be allowed unless there is a specific reason to disqualify it.

The old code’s rule of “best evidence” ranks evidence by category and demands that the top-ranking form be presented. The Northwestern code is more accommodating in its interpretation, so that if a lower-ranking form of evidence is less expensive to obtain and equally effective in proving a point, it is admissible. Allen’s analysis of the original Indian Evidence Act is that it aims to remove, as much as is possible, the judgment and discretion typically left to a jurist or advocate. The Northwestern proposal trusts the discretion of the system’s actors. Says Allen of the best-evidence rule, for example: “The parties have the incentive to produce the best evidence, because they’re trying to win. The best evidence is the most persuasive, and the most persuasive is almost always going to be that which is most likely to be true. People are not stupid, and that’s why the system works actually pretty well.”

The Tanzanian code prohibits hearsay evidence, with a couple of peculiar exceptions such as the allowance of bankers’ books. Allen calls that exemption an example of the old code’s hegemonic

A former visiting fellow at Northwestern Law, Dr. Edward Hoseab recruited Professor Ron Allen to serve as chief legal-reform consultant to the Tanzanian parliament in 2011.





Members of the 2012-13 project team visit the Tanzania Court of Appeal in March 2013. From left: Tim Fry (JD '13), Professor Ronald J. Allen, Lilian William (from the Prevention and Combating of Corruption Bureau), Jeff VanDam (JD '13), Jessica Notebaert (JD '13).

influence, “where the rich and powerful are being systematically preferred by the law of evidence. They did what they did to make sure the British East India Company could get its contracts enforced.” The Northwestern code applies a more liberal standard.

The Response

Over the course of two days of presentation in Tanzania this spring, opposition to the Northwestern proposal gradually receded. This was due in part to a shift in the presenters’ tone; instead of emphasizing the differences between the two sets of rules, they presented a chart that focused on the commonalities, and how to a great extent the rules the justices knew were being refined, rather than overthrown.

“Once people got the sense it was more of a streamlining and modernizing than a complete change, they became more comfortable,” says Katherine Klein (JD '14), who participated in both the 2012–13 and 2013–14 iterations of the project.

The justices also began to appreciate the more conceptual changes. “You could just see, one by one, light bulbs turning on and people getting what we were talking about,” says Allen. “If you grow up in a conceptual universe, it’s not easy to get outside of that box. They did it.”

At the conclusion of the presentation, the justices voted unanimously to forward the Northwestern proposal to the

Party Hegemony versus Evidentiary Law in China

Tanzania isn’t Professor Ronald Allen’s only current project aimed at reforming evidence law overseas. It’s not even his biggest.

That honor goes to China, where Allen has traveled 18 times since the early 2000s, when the dean of a Chinese law school arrived in Chicago to seek his help.

During the Chinese Cultural Revolution of the 1960s, many of the

country’s lawyers and intellectuals were killed, and the legal system was gutted, according to Allen. After Communist Party leader Mao Zedong died in 1976, successor Deng Xiaoping struggled in his push for economic growth, in part, Allen says, because “the economy can’t function without a legal system. At that point, you’re just bartering.”

So in the 1980s, Chinese scholars began traveling overseas to learn law

and economics, an effort that ultimately led to Chicago when members of the reformist vanguard determined that evidentiary reform was a smart starting point and that Allen could help them learn the field. Since that first dean arrived unannounced at Allen’s office, dozens of Chinese law students have followed; Allen says he’s averaged between three and five Chinese students per term over the last decade.

The underlying legal principles differ from those in Tanzania because they are Germanic in origin, not British, and they were adopted by the leaders of Republic of China after the overthrow of the Qing dynasty



“Once the justices started pushing back, started resisting, that’s when I realized this was legitimate—this could really make an impact.”

Katy Pine (JD ’15)

Tanzanian Parliament, along with the court’s recommendation that the proposed new law of evidence be adopted. Parliament has yet to rule on the matter.

Hoseah, the leader of Tanzania’s Prevention and Combating of Corruption Bureau and the man who recruited Allen to Tanzania, heralds the team’s work as “the foundational basis for reforming the law” and “enhancing the quality of the justice system” in Tanzania.

in 1912. The legal system was declared but not replaced after the mid-century Communist revolution, so the same foundation remains in place. That system doesn’t feature American-style adversarial proceedings and thus doesn’t decentralize the evidentiary process.

“My students are grafting an Anglo-American conception of the law of evidence onto a Germanic system, and the Germans would say you can’t do it,” Allen says. “The Chinese are saying, ‘Yes, we can.’ And so it’s kind of a fun and interesting exercise.”

Some of Allen’s students drafted a code of evidence that has been adopted by several Chinese judicial districts. Meanwhile, several other districts have

adopted alternative evidentiary codes, and last year the nation’s highest court started a research program to investigate more formal legal reform. Allen is an adviser to the 30-person committee, which includes many of his former students.

Allen is interested to watch the process play out, in part because the underlying principles of Western-style legal reform seem somewhat at odds with the Communist Party’s principles. “Everything governmental that happens in China happens to preserve the hegemony of the Communist Party. The only reason they care about legal reform is because they know the economic miracle has to continue in order to

preserve them in power,” says Allen. “They now know that they need a legal system that looks something like a Western legal system because of its commitment to stability and facts. When you rest a property right on facts, it’s stable, because facts are stubbornly resistant to manipulation.”

Yet a commitment to accurate fact-finding is not perfectly aligned with the hegemony of the Communist Party.

“Exactly right,” says Allen. Besides, he says, economic growth and the power of the Communist Party “are implacably in opposition to each other. Everywhere you look in the world, the creation of a robust middle class changes the dynamic between governor and governed.” ●

Next spring Allen and the Northwestern team will travel to Tanzania again. If Parliament has approved the rules, the plan is to focus on educating attorneys and judges nationwide about the changes. Allen believes that’s the next step in achieving broader reform in Tanzania, followed by an overhaul of the country’s rules of procedure, which he calls “just as problematic as their evidentiary regime.”

Says Allen: “We haven’t changed the world. Evidence is a brick, not a wall. A single piece of evidence is not a whole case, and it’s the same point here: a single statutory change to a complex governmental-social-political dynamic is not going to bring about fundamental change. The question to ask is whether you think that kind of change is necessary and what’s the first step to take. This is that first step to take, and now they need to take the next ones.”

This fall Professor Allen will convene a conference to discuss reforming evidence law in Tanzania, China, and other countries. Academics, students, and government officials are invited to attend the November 21–22 conference, “The Foundations of the Law of Evidence and Their Implications for Developing Countries,” which will be held at Northwestern Law. ●