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EVIDENTIAL WEIGHT OF PUBLIC RECORDS: COMPARATIVE VIEW OF WORLD'S CONSTITUTIONS

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ABSTRACT: *This paper examined the evidential weight of public records across different jurisdictions of the world. The paper identified the problem of the admissibility or otherwise of items of public records in legal processes. This problem may have arisen against the backdrop of the need for personal privacy protections. The paper aimed to show that while evidence is the key to reaching a decision on the adjudication of any matter, public records are the most important record of government activities. On the controversy arising from the arguments for access to public records and that of the protection of personal privacy, balancing the interests is key. On the issue of the evidential weight of public records, certain criteria are identified as qualifying any item to be presented as evidence, namely - materiality, relevance, cogency and admissibility. It is not out of place to conclude, as demonstrated in this paper, that across the selected jurisdictions of the world, namely – Nigeria, United States of America, and the United Kingdom, items of public records that meet the aforementioned criteria enjoy very high evidential weight. The only exceptions are when the need for privacy supersedes the public interest and when the items of public records are acquired in ways that contravene the Constitution as is the case in the United States of America.*

KEYWORDS: weight, public records, comparative view, world's constitutions

INTRODUCTION

Evidence, simply defined, could be said to be the available body of facts or information indicating whether a belief or proposition is true or false and whether an argument is valid or invalid. In relation to the law courts, evidence could be seen as the material presented to a court or jury in proof of the facts in a matter before the court or the jury. The concept and content of evidence are relevant in many fields including law, logic, ethics, politics, economics, psychology and even medicine. In logic, for instance, the relationship between the evidence and the conclusion constitute the grounds on which an argument is deemed valid or invalid. Syllogistic logic is about the placement of premises (evidence) in relation to the conclusion drawn. Thus, logic is concerned, not just with the conclusion reached or with the material truth or falsity of either the premises or the conclusion, but with the relationship between the premises and the conclusion. A relationship that admits of no gaps or jumps.

This line of thought is not different from the conception and use of evidence in law. In the same way premises are indispensable to logic, evidence is indispensable to any legal process. Without the presentation of relevant evidence, no judge or jury can reach a decision on any

matter before him. Evidence for the courts or jury is a difficult term to define. This may be why Hon. Justice Benedict Bakwaph Kanyip opines that "Because evidence is the lifeblood of litigation, the very basis of dispensing justice, it at once lends itself to an inherent difficulty" (Kanyip, 2010). Evidence may simply be classified as oral (that is unequivocal and equivocal), documentary or real (that is tangible) or a conception which may simply be descriptive of either the quality or the content of the evidence.

Evidence and its application in the administration of justice is governed by what is called the "Rules of Evidence" or the "Law of evidence." This law brings together the rules and legal principles that govern the proof of facts in a legal proceeding. When a matter is brought before a court, whether it is a civil or criminal matter, the litigation brings up a number of issues which either or both of the parties will require the court to decide on and therefore try to persuade the court to decide in its favour. However, the law includes certain rules or guidelines that must be met in ensuring that the evidence presented to the court can be said to be trustworthy. The rules of evidence determine what piece of evidence must be considered or otherwise discarded by the jury or judge as the case may be. Anderson, *et al* (2005): pp.290-291) aver that the law of evidence concerns itself with facts that may be presented in court with respect to a matter before the court, as well as who should present them and the manner of the presentation. Thus, for any piece of evidence to be considered trustworthy, it must meet at least four criteria, namely – materiality, admissibility, relevance and cogency.

Among the facts that can be presented in the law courts as evidence on a matter are information or materials from public records. Public records are information stored in documents that are often considered confidential because they relate to the activities and conduct of government. Examples of public records include information on births, marriages, deaths, and documented transactions and activities of government, their agencies and institutions (Martin and Nissenbaum, 2017). In certain jurisdictions, when for example, a couple fills out an application for a marriage license, they have the option of checking the box as to whether they want their application to be confidential or public. If they check the box for confidentiality, it means that the record will be closed and not open to the public. If they check the box for public, it means that their application will become public records. This implies that a copy of the application can be ordered from the county or council where the marriage was registered. Thus, the application is accessible. However, just as the description of evidence is not without difficulty in grappling with and the rules of evidence are not the same in all jurisdictions, the evidential weight of public records also present some problems in different jurisdictions of the world. This paper is an attempt to undertake a comparative examination of the evidential weight of public records under some select world constitutions.

The Rules of Evidence

The place of evidence in any legal process cannot be questioned. Even in the old traditions of the law, cases have been decided on the strength of evidence. Franklin (2001: p.7) observes that in ancient Roman Law, judges had the freedom to evaluate evidence but it was the norm that proof is incumbent on the party who affirms the fact, not on the one who denies it. The ancient Roman law system insisted that no one should be convicted on mere suspicion.

In almost every jurisdiction built on the English Common Law traditions, evidence, as important as it is to the dispensation of cases must conform to certain rules and restrictions in order to be admissible and in order to have any evidential weight. These rules include – materiality, admissibility, relevance and cogency and these are briefly examined subsequently.

Materiality: For evidence to be admissible, it must be material. In *Regina v. Benardi* (1974), the learned judge stated that material evidence refers to evidence that contributed to proving a fact that is of consequence to the trial. That is to say that there must be a relationship between the evidence and a legal issue brought before the trial judge. To be material is not exhausted by the notion of being physical. Material evidence can be that evidence that establishes a fact that is necessary to prove an essential element of the case or it can be a fact that negates an essential element of the case. With respect to the materiality of evidence, evidence can also be positive or negative. Positive evidence is that evidence that demonstrates the occurrence of an event, while negative evidence is that which reveals the nonoccurrence of an event (Omonuwa, 2015). Negative evidence on the non-occurrence of an event can be as relevant and forceful as positive evidence on the occurrence of an event. More so, even the proof of the withholding of evidence may itself become some form of material evidence.

Admissibility – Admissible evidence is any evidence that is testimonial, documentary or tangible information or fact that may be presented to a judge or jury in order to establish the point of a case. Glover (2015: p.29) maintains that for any piece of evidence to be admissible by the rules of evidence, it must be relevant and not excluded by or contradicted by the rules of evidence. On the issue of the admissibility of evidence, the general rule is that all relevant evidence is admissible and all non-relevant evidence is in-admissible. In some jurisdictions however, like the United States and Australia, evidence obtained in violation of constitutional law is banned or forbidden and so not admissible on any matter. This is what is called the exclusionary rule and under it, relevant evidence can be rendered inadmissible.

Relevance: Under the Common Law system, relevance is the quality of a given fact or item of evidence to prove or disprove a legal element or elements of a case. Relevant evidence is any evidence with probative value, that is the ability to prove (Hill and Hill, 2002). As a matter of general rule in law, evidence that is not probative, that is, any evidence that does not contribute anything in proving the matter at issue, cannot be considered relevant in proving the matter and therefore cannot be admissible. However, a balancing test may come into effect or force if the probative value of the evidence is weighted against its prejudicial nature.

Cogency: Cogency has to do with being direct to the point. In the context of this paper, a cogent evidence is any evidence that helps in establishing the fact of a case. Tinari (2018) states that truth is the backbone of justice, while evidence is the vehicle by which truth is carried and the proof is the framework through which the truth can be visualized. The job of every judge in a case is to discover the truth from all the facts and evidence advanced on the matter. Although, all legal systems of the world have their own justice delivery mechanisms, commonly paramount to all of them is the evidence. Naturally, in matters of litigation, judges are always distant from the facts which create the liability, whether the remedy sought is civil or criminal. Irrespective of the nature of the liability, the facts must have to be established before the judge. This is done through the evidence that is advanced. Although, there are other rules guiding the

advancement of evidence before a jury or a judge, for any evidence to be admissible, it must be cogent. That is, it must be directly helpful in establishing the fact of the case.

Ordinarily, no legal system would allow the judge or the parties to grope in the dark in the pursuit of justice. This is why there are barriers and limits imposed by the law on the value, limit and scope of facts which are to be presented before a court in order to establish a party's case. Some of these barriers include that evidence must be presented to prove the facts of the case; the evidence must be relevant, material and cogent in order to be admissible. Thus, only the best evidence in all cases must be given. Hearsay evidence or evidence obtained in contravention of the law or constitution should be discarded. The question now remains as to what extent public records could be admissible as evidence.

Public Records as Evidence

Public records could be said to be publicly accessible information collated and stored by the government or its institutions. To properly understand the implications of the accessibility or non-accessibility of public records is to imagine one living in a dystopian state where all government actions are kept in secret. In this situation, the people will in no way understand the activities or operations of the government and the government can always exert as much power as it wants on the people. Public records are very important because they not only keep the people properly informed, they also help ensure transparency and accountability in governance.

As a matter of fact, it is the people's craving and agitations for more access to information on the activities of government and its personnel that led to the *Freedom of Information Act* (2011) in Nigeria. The *Freedom of Information Act* is an *Act* of the national Assembly of the Federal Republic of Nigeria which makes public records and information more freely accessible. It provides for public access to public records and information and at the same time protects public records and information to the extent that is consistent with public and private privacy interest. The *Act* also protects personal privacy and protects serving public officers from adverse consequences of disclosing certain kinds of official information without authorization. In No.1 of section 1, the Act states "Notwithstanding anything contained in any other *Act*, law or regulation, the right of any person to access or request information, whether or not contained in any written form, which is in the custody or possession of any public official, agency or institution, howsoever described is established" (FOI, 2011).

The *Freedom of Information Act* (2011) in Nigeria describes what constitutes public records in the following classifications:

-A description of the organization and responsibilities of the government institution including details of the programmes and functions of its divisions, branches and departments;

-Records under the control of the government institution

-Manuals used by employees of the institution in administering or carrying out any of the programmes or activities of the institution;

-Documents containing final opinions including concurring and dissenting opinions as well as orders made in the adjudication of cases;

-Substantive rules of the institution

-Statements and interpretations of policy which have been adopted by the institution;

-Planning policies, recommendations, and decisions;

-Factual reports, inspection reports, and studies whether prepared by or for the institution;

-information relating to the receipt or expenditure of public or other funds of the institution; Names, salaries, titles and dates of employment of all employees and officers of the institution;

-Name of every official and the final records of voting in all proceedings of the institution;

-Files containing applications for any contract, permit, grants, licenses or agreements;

-Reports, documents, studies, or' publications prepared by independent contractors for the institution;

-Materials containing information relating to any grant or contract made by or between the institution and another public institution or private organization;

-Titles and addresses of the appropriate officer of the institution to whom an application for information under this Act shall be sent, provided that the failure of any public institution to publish any information under this subsection shall not prejudicially affect the public's right of access to information in the custody of such public institution (FOI, 2011).

Looking at the above listings, one would see that public records are not only very encompassing, they are also very important in each of the cases. Public records are the main reference point for all government activities. Considering the importance of public records, the next question becomes – what is their evidential weight in the legal process. Public records captures almost all shades of government activities (that is, activities of government personnel, agencies and institutions), it therefore follows that from time to time, pieces of information from the public records will be requested or ordered in legal processes. This paper subsequently examines the evidential weight of public records in selected jurisdictions of the world.

Evidential Weight of Public Records in Nigeria

In Nigeria, as in most other jurisdictions of the world, facts of a matter are proved by evidence. The most important question to be asked any piece of information presented as evidence in a matter is whether it supports or negates one or more of the facts at issue. Basically, this is the question of relevance. Any material to be tendered as evidence in a matter before any court in Nigeria must meet the four identified criteria of materiality, admissibility, relevance and cogency. Any evidence that bears these characteristics could therefore, be said to be evidence

which tends to make the existence of any fact of them matter more or less probable than it would have been without the evidence. This view agrees with section 1 of the *Evidence Act* (2011) which provides that facts that, though may not be the main matter at issue, but are so connected with the fact at issue as to form part of the same transaction, are relevant. This is notwithstanding whether they occurred at the same material time and place or at different times and places.

Sections 4, 5, and 6 of the same *Evidence Act* (2011) extend the rule of what constitutes relevant and admissible evidence in a matter to include facts that cause, occasion, effect or give the opportunity for relevant facts, as well as facts that show or constitute a motive or preparation for the fact at issue. Relevant or admissible evidence can be either directly relevant or indirectly relevant. This reading of "directly" or "indirectly" here should not be confused with what is known as direct evidence, which is the evidence, that if believed, resolves the matter at issue and circumstantial evidence, which on the other hand, requires additional reasoning. The reading classification of "directly relevant" and "indirectly relevant" should be purely understood in terms of the immediacy or remoteness of the impact of the item of evidence.

In Nigeria, public records which document activities of government personnel, agencies and institutions have very high evidential weight. As far as these items of public records meet the criteria of materiality, relevance, admissibility and cogency. In Nigeria, it has been witnessed instances of individuals being convicted of swearing to false affidavits. The former Chief Justice of Nigeria, Justice Walter Onnoghen was removed from office following his conviction at the Code of Conduct Tribunal for reasons of discrepancies in his sworn Assets Declaration form which was ordered from the public records of the Code of Conduct Bureau. Section 52 of the *Evidence Act* (2011) states that:

An entry in any public or other official book, register or record, including electronic record stating a fact in issue or relevant fact and made by a public servant in the discharge of his official duty or by any other person in the performance of a duty specifically enjoined by the law of the country in which such book, register or record is kept, is itself admissible.

To be admissible and with the example of the Justice Onnoghen case, there is no doubt that such records enjoy very high evidential weight under the Nigerian Constitution.

Evidential Weight of Public Records in the United States of America

The *Constitution of the United States of America* has from the beginning provided for the Open Public Record system which has been the backbone of the country's democracy and economy. The open records system allows American citizens to oversee their government in their dealings on infrastructure such as roads, airports, seaports, healthcare and telephone lines. It is widely believed in the American system that the open records system facilitates A vibrant economy, improves efficiency, reduces costs, creates jobs and provides valuable products and services to the people. The Federal Reserve Board, in a report to Congress on financial information as cited in Cate and Varn (2019) reports that "It is the freedom to speak, supported by the availability of information and the free-flow of data, that is the cornerstone of a democratic society and market economy."

Cate and Varn (2019) observes that access to public records and the privacy of public records about individuals are nearly always at war, hence, there is always the need to balance out both access and information privacy. In an age when technologies like the information and communication technologies, and the internet make it a lot easier for individuals and government agencies to access pieces of information from public records, there is also greater concern for personal privacy. Balancing seems to be the key.

Cate and Varn (2019) maintain that years of legislative, administrative and judicial work and experience have identified and isolated about twelve principles that should guide the process of balancing access and information privacy. These 12 principles include:

i. Policy makers must identify and evaluate conflicting interests. Arguments for both privacy and access often involve other interests. These interest must be evaluated on their merit in determining how they are implicated or impacted by a proposed government laws, judgement or regulation and how far they can be accommodated.
ii. Privacy solutions must respond reasonably to defined problems. There can be no general claim to privacy.
iii. There is need to, while accommodating privacy needs, to continue to allow access as much as possible without invading privacy.
iv. Access to public records that do not isolate individuals should not be restricted on the basis of protecting privacy.
v. No privacy claims can restrict access to information that will enhance government revenue.
vi. Public policy information should at all times promote robust access to public records.
vii. There should be no secret public records.
viii. The courts have established that there are some instances where the society's interest in access is greater than all privacy claims, while there are also instances where privacy claims supersede societal interest for access. Thus, not every privacy/access issue can be balanced. There are always need to evaluate the situations on the merit of each claim.
ix. Education is the key in educating and informing the people on the merits of access and in defending their privacy rights. People must be made to understand what constitutes their privacy rights and their limits as well as what is in the interest of the society.
x. Information policy must ensure the security of the public records infrastructure.
xi. The mechanisms for accessing public records and for protecting private privacy should not be cumbersome.
xii. The process for balancing should be sound.

With a good balance at every instance of the presenting of public records as evidence, and the evidence so presented fulfill all the already identified criteria of materiality, relevance, admissibility and cogency, public records have very strong evidential weight in the United States of America. Another exception to the admissibility of public records as evidence in the United States is a situation where the item of public record was obtained in contravention of any section of the constitution. In this case, such item of public record becomes inadmissible and as such prohibited.

Evidential Weight of Public Records in the United Kingdom

In the United Kingdom, where the document of public records set out standards which regulations make mandatory, and non-compliance with them will result to a breach of the regulations, there should be no difficulty in getting the courts to accept such documents as evidence. The *Interpretation Act* (1978) in the United Kingdom, posits that "Evidence does not have to be produced of the existence of public Acts of Parliament or of Private Acts passed since 1850, they are taken to be judicially noticed." The *Evidence Act* (1845) in the United Kingdom still, provide that statutory instruments may be proved by the production of the Queen's Printer or Stationery Office copy. Thus, where the offence at issue involves a contravention of a statutory instrument, the accused can defend himself by proving that the instrument had not been published as at the time of the alleged contravention. But if it has been published and a copy can be provided by the prosecution, it is fully admissible and as such carry enormous evidential weight. According to the *European Communities Act* (ECA) (1972), evidence of instruments issued by country agencies and institutions, including orders of the courts (even the European Court) or evidence of any document in the custody of any government agency or institution may be given by production of a certified true copy by that institution.

According to the *Health and Safety Work Act* (HSWA) (1974), approved codes of practice provide that elements of public records are admissible in evidence where they are relevant. An entry in the births or deaths register is admissible in court if proved by a certified true copy. In *Bird v. Keepe* (1918), the court averred that information contained in the death certificate is the only evidence of the death and as such, is admissible as evidence of the cause of death. Thus, in accordance with the laws of the United Kingdom, items of public records have very high evidential weight, in particular, where they are relevant, material, cogent and therefore admissible.

CONCLUSION

Evidence has been demonstrated to be the cornerstone of the prosecution of cases. Evidence in the legal process or in any process whatsoever that requires prove is so important that without it, the jury or judge and the parties will be groping in the dark. Evidence is the route to reaching the truth in a matter and evidence is evidence only when it is shown to be effective in proving the facts of a case.

Almost common to all legal jurisdictions is the fact that there are certain criteria which an item to be admitted as evidence must fulfill, namely – materiality, relevance, cogency and admissibility. Public records which is a collation of information and data on the activities of government personnel, agencies and institutions have also been shown to be very important. They are important as documentation of government activities, the make for transparency, accountability and fluidity of government processes. In the United States of America, public records are regarded as the cornerstone of American democracy and economy. Considering that these items of public records may include private details of individuals, there has always been some controversy with regards to access to public records and the protection of individual privacy. This paper has argued for the need for balance in all individual cases. This balance

comes from evaluating both the public interest for access and the individual's privacy rights and needs.

A major question for this paper was to determine the evidential weight of public records across different jurisdictions of the world. It has been demonstrated that in Nigeria, the United States of America, and the United Kingdom, public records enjoy very high evidential weight being information certified by government offices as bearing correct and true information. In all cases where items of public records presented as evidence, meet the criteria of materiality, relevance, admissibility and cogency, they enjoy very evidential weight. The only few exceptions are when the need for privacy supersedes the public interest for access and when items of public records are retrieved in ways that contravene the constitution as is the case in the United States of America. In such cases, they are not admissible as evidence.

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