v. 1, n. 2, 2021

International Journal of Human Sciences Research

THE ILLICIT PROOF: THE PROBLEM OF THE EXCLUSIONARY RULE OF PROOF WITHOUT LEGAL SUPPORT IN BRAZIL AND IN THE USA[1]

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1. This work was carried out with the support of the Coordination for the Improvement of University Education Personnel - Brazil (CAPES) - Financing Code 001

Abstract: The evidence is shown as one of the sides of evidence of what happened, formalizing the answer to a question asked by someone in the procedural sphere that can generate conviction. Proof by itself does not reveal an object, but is, in this sense, discourse. Brazilian legislation, as a rule, does not admit illegal evidence in criminal proceedings, so that the admission of such evidence violates infra and constitutional rule. The aim of the article is to analyze the modern contours of the illegality of the evidence in the procedural scope, considering the legal systems of Brazil and the United States of America, through the new instruments of the neoconstitutionalist movement and the correct moment of its exclusion from the process. It is also the objective of this article to provide a legal starting point for possible non-explicit constitutional guarantees and their form of lawful insertion in the studied legal systems, through the methodology of inductive reasoning and doctrinal and jurisprudential analysis and from the investigation of new forms of interpretation, such as the purposeful interpretation.
Keywords: Test, Illicit evidence, Illicit evidence by derivation, Brazil, USA.

INTRODUCTION

The tests have a scientific treatment that cut across different areas of knowledge. Weighing and evaluating the value and reliability of evidence are pre-legal phenomena with greater affinity with philosophy, especially epistemology, which is the discipline that deals with the way in which reality is known in the form of evidence. In this sense, it is logical to say that something is known through evidence or evidence.

By itself, the term proof can have several meanings, but for the present theme dealt with here, the sense of proof as demonstration and experimentation are the ones that fit. In the field of law, evidence has special characteristics and can be conceptualized in different ways. One of them is the source for court decision, at least as one of the sources used. Feitosa teaches us that "the evidence as a source refers to people and things used as evidence, considered as sources of sensory stimuli that reach the perception of the decision-making entity (for example, the judge) about a fact."[2]

Therefore, the purpose of the test is to convince the judge, with the means of obtaining evidence being those objects, people, statements, expertise, documents, taps that can stimulate sensory and lead the judge to convince. Deltan Dallagnol adds that the element of evidence is usually called that fact or circumstance on which the judge's conviction rests, the element of evidence or evidence is also designated as *factumprobans*, while the *factumprobandum* is what is intended to demonstrate with the evidence.[3]

The same author deals with the intertwining between evidence and the context of knowledge investigation, according to him, the concept of evidence is intertwined with the discussion on justification, which is one of the three conditions, although not sufficient, for the existence of knowledge in reason of the CVJ theory (belief, truth and justification), in which knowledge is a true and justified belief. It is inferred, therefore, that evidence or proof is the name given to a belief that performs a supporting or grounding function in relation to another belief in a chain of justification.[4]

In this article they will be explained as useless evidence to demonstrate or justify

2. PACHECO, Denílson Feitoza. **Direito Processual Penal: Teoria, Crítica e Praxis**. Niterói: Editora Impetus, 2008, p. 604.
3. DALLAGNOL, DeltanMartinazzo. **As lógicas das provas no processo:** prova indireta indícios e presunções. Porto Alegre: Livraria do Advogado, 2019, p. 17.
4. DALLAGNOL, DeltanMartinazzo. **As lógicas das provas no processo:** prova indireta indícios e presunções. Porto Alegre: Livraria do Advogado, 2019, p. 119.

the facts in the criminal procedure and in a reflexive manner in civil, in view of the Brazilian and North American legal systems, as well as the correct moment of their exclusion or removal in the records.

THE ILLICIT PROOF

There is a strong link between truth and evidence in the legal sphere, especially in the procedural area. The degree of connection is difficult to ascertain. Jordi Beltrán teaches that the truth of a proposition is a necessary, but not sufficient, condition for deciding whether or not this proposition is proved.[5]. Therefore, evidence accepted in court may not be the reproduction of past facts that occurred, but be sufficiently safe for procedural use, that is, there is a space for failure in which what is accepted as truth in the process has not occurred factually, that is, a representation false hypothetical of reality.

What is proved is the veracity of the allegation, which may or may not be sincere, therefore, on some occasions false statements may be proven. Hence, he concludes that man only manages to reach the "consciousness of a high degree of probability, an awareness that we will call conviction"[6].

Article 157 of the Code of Criminal Procedure, after the reform arising from Law 11,690/2008, has a new wording. let's see: "**Article 157**. Illicit evidence, understood as that obtained in violation of constitutional or legal norms, is inadmissible and must be removed from the process..[7]

Private individuals, those who are not part of the State in criminal prosecution, in Brazil, cannot obtain the evidence illegally either, and must not be admitted to the process, in this sense:

> ILLICIT PROOF. PHOTOGRAPHIC MATERIAL THAT WOULD EVIDENCE THE CRIMINAL PRACTICE (LAW No. 8069/90, ARTICLE 241). PHOTOS THAT WERE STOLEN FROM THE DEFENDANT'S PROFESSIONAL OFFICE AND WHICH, DELIVERED TO THE POLICE BY THE AUTHOR OF THE THEFT, WERE USED AGAINST THE ACCUSED, TO INcriminate HIM. INADMISSIBILITY (CF, ARTICLE 5, LVI). -The constitutional clause of the dueprocessoflaw finds, in the dogma of procedural inadmissibility of illicit evidence, one of its most expressive materializing projections, as the defendant has the right not to be denounced, not to be prosecuted and not to be convicted based on evidence obtained or produced in a way that is incompatible with the ethical and legal limits that restrict the State's actions in criminal prosecution. - Illicit evidence - as it qualifies as an unsuitable element of information - is rejected by the constitutional order, presenting itself as devoid of any degree of legal effectiveness. [8]

With regard to the North American system, Haack tends to be more critical regarding the rules of exclusion of evidence, because according to her, exclusion rules are inherently at odds with the epistemological desideratum of completeness.[9] This would create obstacles in the search for the truth in the FRE (*Federal*

5. BELTRÁN, Jordi Ferrer. **Prueba y verdad en el derecho**. 2. ed., Madrid: Marcial Pons, 2005, p. 55.

6. BELTRÁN, Jordi Ferrer. **Prueba y verdad en el derecho**. 2. ed., Madrid: Marcial Pons, 2005, p. 69.

7. BRASIL. DECRETO-LEI Nº 3.689, DE 3 DE OUTUBRO DE 1941.Código de Processo Penal. Available on the website: http://www.planalto.gov.br/ccivil_03/decreto-lei/del3689compilado.htm. Accessed on 10/26/2021 at 21:00.

By virtue of the system of inadmissibility of illicit evidence, illustrates Gomes, which must be excluded immediately from the case records (CPP - Code of Civil Procedure, article 157). Under the admissibility system, the evidence is not withdrawn from the process, given that in the end the judge declares its nullity (which results in criminal or criminal and civil liability for those who used the illegal evidence). The inadmissibility system does not allow evidence to remain in the process: it must be promptly excluded. A priori or immediate exclusion (inadmissibility system) and a posteriori declaration of nullity (admissibility system): therein lies the difference between the two systems.

8. BRASIL. Federal Supreme Court. Resource: 251.445-GO. Rapporteur: Min. Celso de Mello. Published on 03/08/2000.

9. HAACK, Susan. **Epistemology Legalized:** Or Truth, Justice, and the American Way. 49. ed., Washington: American Journal

International Journal of Human Sciences Research ISSN 2764-0558 DOI 10.22533/at.ed.5582101117

Rule of Evidence). For the author, the system of formation of the evidentiary set must be free as a rule and the evidence must be analyzed in full, the critical author, however, Bentham due to its radicalism, preferring to be more moderate, not admitting torture, for example, even if that was the only way to get closer to truth and process. But even so, the analysis of illegality would be up, for the foundationalist theory, to the judges of the cause who could form their conviction about the completeness of the evidence presented. A big problem arises here, especially in the criminal field, given that the conviction after contact with the illegal evidence would only depend on good argumentation and support in other evidence, without being able to know that in fact the convict was doing so by the judge's mental basis the illicit evidence.

ILLICIT EVIDENCE BY DERIVATION AND THE THEORY OF THE FRUITS OF THE POISONED TREE

Illicit evidence by derivation is evidence acquired in accordance with the legal system and in a lawful manner, but was produced from another illegally obtained. In this way, the legal evidence becomes inadequate and cannot be used in the process, according to the theory of the fruits of the poisoned tree.

With the arrival of Law 11,690/2008, illegal evidence by derivation was regulated in article 157 of the Code of Criminal Procedure, *in verbis*:

> Article 157. [...]
>
> § 1 The evidence derived from illegal acts is also inadmissible, except when the causal link between one and the other is not evidenced, or when the derivatives can be obtained by a source independent of the former.
>
> § 2 An independent source is considered to be that which by itself, following the typical and customary procedures, typical of criminal investigation or instruction, would be able to lead to the fact that is the object of evidence.
>
> § 3o Precluding the decision to extricate the evidence declared inadmissible, this will be rendered useless by a court decision, with the parties being able to follow the incident.
>
> § 4th (VETOED)
>
> § 5 The judge who finds out about the content of the evidence declared inadmissible will not be able to pronounce the sentence or judgment.[10]

From the above-cited article, Aury Lopes Júnior[11], extract some rules:

> [...] inadmissibility of the derived evidence (contamination principle); there is no contamination when the causal link is not evidenced; there is no contamination when the evidence can be obtained from a source independent of the illicit one; disemboweling and disabling evidence considered illegal.

Some examples of illegal evidence by derivation are:

> [...]the case of a confession extorted through torture, which provides correct information about the place where the proceeds of crime are found, allowing for their regular apprehension. This last test, despite being regular, would be contaminated by a defect at the origin. Another example would be clandestine telephone interception – a crime punishable by two to four years' imprisonment, in addition to a fine (Article 10 of Law No. 9,296/96) – through which the police agency discovers a witness to the fact that, in a regularly given testimony, incriminates the accused. There would also be illegality by derivation. In this sense, Luiz Francisco Torquato Avolio. Such proofs cannot be accepted, since they are

of Jurisprudence, 2004, p. 29

10. BRASIL. **Law number 11,690, of June 9, 2008** changes provisions of Decree-Law No. 3,689, of October 3, 1941 – Code of Criminal Procedure, relating to evidence, and other measures. Available at: http://www.planalto.gov.br/ccivil_03/_ato2007-2010/2008/lei/l11690.htm. Accessed on: January 16, 2021.

11. LOPES JÚNIOR, Aury. **Direito Processual Penal.** 16. ed., São Paulo: Saraiva, 2019, p. 491.

> contaminated by the defect of illegality in their origin, which affects all subsequent proofs. Any other evidence that originates from them will be illegal. This conclusion follows from the provisions of article 573, paragraph 1, of the CODE OF CIVIL PROCEDURE, according to which "the nullity of an act, once declared, will cause the acts that directly depend on or are a consequence of it". [...][12]

Before the entry into force of Law 11,690/2008, in Brazil, there was not even a legal provision related to illegal evidence by derivation, even so, the Federal Supreme Court had already recognized and already applied the theory of the fruits of the poisoned tree. Therefore, with the advent of the law, the discussion about the lack of legal provision ceased.

According to the teachings of Eugênio Pacelli[13]:

> If the agents producing the illegal evidence could use it to obtain new evidence, the existence of which could only have been reached from that (illicit one), the illegality of the conduct would be easily circumvented. It would be enough to observe the form provided for by law, in the second operation, that is, in the search for evidence obtained through the information extracted through illegality, so that the illegality of the first (operation) could be legalized. Thus, the theory of unlawfulness pro derivation is an imposition of the application of the principle of inadmissibility of evidence obtained lawfully.

Grinover, Fernandes and Gomes Filho[14] make the following caveat:

> [...] when the connection between one and the other is tenuous, so as not to place the primary and secondary as cause and effect; or, still, when the evidence derived from the illicit could in any way be discovered in another way [...] it means that if the illicit evidence was not absolutely decisive for the discovery of the derivatives, or if these derive from its own source, they are not contaminated and can be produced in court.

It is noted that illegal evidence by derivation is supported by the theory of the fruits of the poisoned tree, supporting the principle of inadmissibility of illegal evidence in criminal proceedings, according to the teachings of Antônio Gomes Filho[15]:

> It is impossible to deny a priori the contamination of secondary evidence by the initial unlawfulness, not only on the basis of a causal criterion, but mainly on account of the purpose for which the prohibitions under analysis are established. Restrictions on the admissibility of evidence would be useless if, by derivative means, information collected from a violation of the law could serve to convince the judge - in this matter, the prophylactic element must be highlighted, avoiding conduct that violates fundamental rights and the administration itself correct and fair criminal justice.

The theory of the fruits of the poisoned tree was created by the American Supreme Court, which holds that the addiction to the plant is transmitted to all of its fruits. Thus, the illegal evidence by derivation was recognized by the US Supreme Court based on the theory of the fruits of the poisoned tree. And, "from a decision rendered in the SiverthorneLumberCo case. vs. United States in 1920, the American courts did not admit any evidence, even if legal in itself, arising from illegal practices".[16]

The expression fruitsofthepoisonoustree was created by Judge Frankfurter, where in

12. CAPEZ, Fernando. **Curso de Processo Penal.** 25. ed., São Paulo: Saraiva, 2018, p. 368.

13. PACELLI, Eugênio. **Curso de Processo Penal.** 21. ed., São Paulo: Atlas, 2017, p. 363.

14. GRINOVER, Ada Pellegrini; FERNANDES, AntonioScarance; GOMES FILHO, Antonio Magalhães. **As nulidades no processo penal.** 5. ed., São Paulo: Malheiros, 2007, p. 163.

15. GOMES FILHO, Antônio Magalhães. A inadmissibilidade das provas ilícitas no processo penal brasileiro. ***In:*** **Revista Brasileira de Ciências Criminais.** São Paulo, 2010, p. 267.

16. CAPEZ, Fernando. **Curso de Processo Penal.** 25. ed., São Paulo: Saraiva, 2018, p. 369.

the decision, in the case Nardone v. United States, in 1937, he stated that:

> [...]prohibiting the direct use of certain methods, but not placing limits on their full indirect use, would only provoke the use of those same means considered inconsistent with ethical standards and destructive of personal freedom. The logic is very clear, even though the application is extremely complex, that if the tree is poisoned, the fruit it bears will also be contaminated (by derivation).
>
> A typical example is the seizure of objects used for the commission of a crime (weapons, cars, etc.) or even that constitute the corpus of crime, and that have been obtained through illegal telephone tapping or through the violation of electronic correspondence. Even if the search and seizure is regular, with the respective warrant, it is an act derived from the previous one, illicit. Therefore, contaminated is.[17]

Besides, Aury Lopes Júnior[18], reports on how the courts handle the issue.:

> The biggest inconvenience is the timidity with which the courts deal with the issue, focusing on the "causal link" in a very restrictive way to verify the scope of the contamination. There is a very clear tendency in Brazilian jurisprudence to avoid the "domino effect", without considering that in the face of an illegality, the contamination must be recognized, even to signal the other organs of the administration of justice (including the judicial police) that it is I need to act, but within the legality. The US Supreme Court teaches the importance of being concerned about "judicial integrity", that is, not giving judicial approval to abuses and evidence collected in violation of legal rules. It is the incorporation of the deterrent effect – deterrenteffect. Superior courts have the mission to "communicate" the standard of ethics and the standard of legality of the criminal process. It is the commitment of the STF (Supreme Federal Court) and the STJ (Superior Court of Justice) to "communicate" the validity and scope of the rules of due process and exclusion of illegal evidence (exclusionaryrules) in a clear and objective manner, without the appropriate casuistry what you see nowadays.

There is the continuation:

> [...] when a case is annulled for illegality of evidence, one cannot think of the proportionality linked to that case, but in relation to the system of administration of justice. It is a consideration, but in relation to that specific case, if not in relation to the fairness of the justice administration system, to prevent dozens or hundreds of other illegalities from continuing to be practiced in the collection of evidence. This is an efficient communication of the scope and effectiveness of the rules of due process.[19]

Currently, in Brazil, the law is clear regarding the inadmissibility of illegal evidence by derivation. The issue is in the discussion whether what must prevail are the constitutional guarantees that protect the individual or the interest of society in fighting crime.[20]

> In this sense, the lesson of constitutionalist JJ Gomes Canotilho: "In general, it is considered that there is no collision of fundamental rights when the exercise of a fundamental right by its holder collides with the exercise of the fundamental right by another holder". The author continues: "[...] fundamental rights not subject to restrictive norms cannot be converted into rights with more restrictions than those restricted by the Constitution or with its authorization (through the law)".
>
> In other words, the right to liberty (in the case of defence) and the right to security, protection of life, property, etc. (in the case of the prosecution) often cannot be restricted by the prevalence of the right to privacy

17. LOPES JÚNIOR, Aury. **Direito Processual Penal.** 16. ed., São Paulo: Saraiva, 2019, p. 492.
18. LOPES JÚNIOR, Aury. **Direito Processual Penal.** 16. ed., São Paulo: Saraiva, 2019, p. 492.
19. LOPES JÚNIOR, Aury. **Direito Processual Penal.** 16. ed., São Paulo: Saraiva, 2019, p. 493.
20. CAPEZ, Fernando. **Curso de Processo Penal.** 25. ed., São Paulo: Saraiva, 2018, p. 369.

> (in the case of telephone interceptions and clandestine recordings) and by the principle of prohibition of other illicit evidence.[21]

Therefore, the jurisprudential understanding used before the enactment of Law 11,690/2008 was confirmed with the amendment to the Criminal Procedure Code regarding the prohibition of illegal evidence by derivation. It is noticed that, as no constitutional guarantee is absolute, the prohibition of illicit evidence by derivation is not absolute either, and must be analyzed in each specific case. Thus, theories emerged in US law, which aim to justify the admissibility of illegal evidence by derivation in certain hypotheses, which will be analyzed below.

EXCLUDING THEORIES OF CONTAMINATION APPLIED TO NATIONAL LAW AND COMPARATIVE LAW (EUA)

In the same way that the theory of the fruits of the poisoned tree was created in the United States, the exceptions to it were also created. These exceptions are intended to prevent disproportionate judgments from the rigid application of unlawful evidence by derivation.

Independent source theory

The doctrine developed from the jurisprudence of the US Supreme Court on the inadmissibility of the use, in the process, of evidence obtained in violation of these constitutional guarantees is called, in US law, exclusionary rules.

The Supreme Court, initially, due to a radical understanding of the federative principle, understood that the exclusionary rules applied only to evidence obtained illegally by federal police authorities, not applying the restrictions of the Fourth Amendment to evidence obtained by state police officers (Weeks v. United States).

This understanding of the Supreme Court was linked to the very origin of the first eight amendments to the US Federal Constitution, known as the Bill of Rights.

Indeed, with the American colonies freed from English domination, the delegates of the newly created States were concerned to establish a body of guarantees, so that the States and the people would not fall under the yoke of the Federal Government. The Bill of Rights, therefore, was conceived as a set of guarantees included in the Constitution in order to protect citizens against the oppression of the Federal Government, being, therefore, as understood by the Supreme Court of the United States originally, inapplicable to acts performed by State Governments.

The independent source theory is one of the clearest exceptions to what is provided in our legal system, it is typified in article 157, §§ 1 and 2 of the Code of Criminal Procedure, *in verbis*:

> Article 157. [...]
>
> § 1o Evidence derived from illegal acts is also inadmissible, except when the causal link between one and the other is not evidenced, or when the derivatives can be obtained by a source independent of the former.
>
> § 2o An independent source is considered to be that which by itself, following the typical and customary procedures, typical of the criminal investigation or instruction, would be able to lead to the fact that is the object of the evidence..[22]

The first part of the aforementioned article deals with the theory of the fruits of the poisoned tree, while the second part deals with the theory of the independent source. Therefore, the next paragraph brings the

21. CAPEZ, Fernando. **Curso de Processo Penal.** 25. ed., São Paulo: Saraiva, 2018, p. 370.

22. BRASIL. **Decreto-lei nº 3.689, de 3 de outubro de 1941.** Código de Processo Penal. Available at: http://www.planalto.gov.br/ccivil_03/decreto-lei/Del3689.htm. Accessed on: May 16, 2021.

concept of independent source.

> This is a theory that has already been adopted by the Supreme Court, in which it was understood that the complaint supported by autonomous evidence must be preserved, regardless of the illegal evidence challenged by virtue of non-compliance with formalities in the execution of a search and seizure warrant (STF, HC-ED 84.679/ MS, report. Min. Eros Grau, j. 8-30-2005, DJ, Sept. 30 2005,
>
> for. 23). Therefore, the derived evidence will be considered an autonomous source, regardless of the illicit evidence, "when the connection between them is tenuous, so as not to place the primary and secondary in a strict cause and effect relationship".[23]

According to the teachings of Noberto Avena[24]:

> If, on the contrary, it comes from an independent source, considered as such, which by itself, following the typical and customary procedures, typical of the criminal investigation or instruction, would be capable of leading to the fact that is the object of the proof (article 157, §2, of the CIVIL PROCESS CODE), the contamination will not occur.

To Fernando Capez[25]:

> [...] if there is no causal link between the new evidence and the previously produced evidence, this means that one did not derive from the other. If the generating cause of the proof is absolutely independent in relation to the previous one, it is because one had nothing to do with the other, and it is impossible to speak of illegal proof by derivation. In other words, if the fruit was derived from a tree other than the one that was poisoned, there is no need to talk about the theory of the fruit of the poisoned tree. The rule of limiting the independent source is therefore superfluous, unnecessary. It is enough to apply the well-known theory of conditio sinequanon and the criterion of hypothetical elimination: if, when excluding the previous proof from the causal chain, the new proof continues to exist, it is because it was not caused by that one, and the allegation of illegality of the proof by derivation is inapplicable. If, on the contrary, the evidence produced is upheld or justified in the previous illegal evidence, it will not be possible to claim independence of source, in view of the criterion of hypothetical elimination (excluding the illegal evidence, the production of the evidence derived from it disappears, revealing the nexus of interdependence between them).

Besides, to Luiz Francisco Torquato Avolio[26]:

> The issue in this field is a delicate one, as it is argued that the unavailability of certain rights linked to the status of people would deserve special treatment, in order to honor the search for real truth. In this sense, authors such as Yussef Cahali and Washington de Barros Monteiro maintain that the means by which the evidence is obtained is irrelevant, and the judge must take advantage of its content and send to the Criminal Court any evidence of the existence of a criminal offense. José Rubens Machado de Campos argues that, in the conflict between the right to privacy and illicit means of proof, absolute protection to public liberties and, among them, to intimacy, which must yield whenever they come into conflict with the public order and the freedoms of others.

This theory is based on the absence of "causal relationship or logical or temporal dependence (production of evidence after the illicit one)". In other words, it is the "evidence not related to the facts that generated the production of the contaminated evidence. Nothing else".[27]

23. CAPEZ, Fernando. **Curso de Processo Penal.** 25. ed., São Paulo: Saraiva, 2018, p. 376.
24. AVENA, Noberto. **Processo Penal esquematizado.** 6. ed., Rio de Janeiro: Método, 2014, p. 516.
25. CAPEZ, Fernando. **Curso de Processo Penal.** 25. ed., São Paulo: Saraiva, 2018, p. 377.
26. AVOLIO, Luiz Francisco Torquato. **Provas Ilícitas:** Interceptações telefônicas, ambientais e gravações clandestinas. 3. ed., São Paulo: Revista dos Tribunais, 2003, p. 73.
27. PACELLI, Eugênio. **Curso de Processo Penal.** 21. ed., São Paulo: Atlas, 2017, p. 191.

Eugênio Pacelli[28], still, exemplifies:

> [...]Police authority, upon seeing, in traffic, a prima linea vehicle, driven by a specific person, suspected that it was a theft, solely because of the (black) color of the driver.
>
> It must be noted that, although the seizure of the vehicle in these circumstances seems to us the result of discriminatory conduct on the part of a State agent, staining the diligence of illegality, nothing would prevent any witnesses who witnessed the theft in the vehicle owner's residence from being heard and prove authorship. The seizure would have nothing to do with the witnessed fact (independent source)

Thus, for such a theory to be valid, it is necessary to prove that the derived proof was not obtained illegally. If proven in a different way, the evidence can be disentangled from the process.

Inevitable Discovery Theory

The theory of inevitable discovery bears a resemblance to the independent source theory discussed earlier. The focus of this theory is that one must not talk about contamination of the derived evidence if it could be discovered anyway.

For a better understanding of this theory, Thiago André Pierbom Ávila[29] cites the Nix x Williams case, which was tried in 1984:

> In this precedent, the accused had killed a child and hidden the body; started a search process for 200 volunteers, neighboring municipalities were divided into search zone; during the search, the accused made a confession, obtained illegally, in which he specified the location of the body; the search was halted, a few hours before discovering where the body was, the police went to the place indicated in the confession and the body was seized. The Court considered that the accused's confession about the place where the body was found was illicit evidence, but the pressure of the body was valid, as its discovery was inevitable. It was also understood by the concurring vote of Judge Stevens that the burden of proof on the conjecture of the inevitable discovery rests with the prosecution.

Regarding illegality, it is considered valid, according to this theory, as it would end up being discovered anyway. However, care must be taken "so as not to render the guarantee clause for the prohibition of illegal evidence null and void".[30]

With the same kind of thinking, Fernando Capez[31]:

> Thus, the search in the entire area had already started effectively, before the information gathered from the accused, which only accelerated, but did not determine the finding of evidence. It must be noted that the hypothetical elimination rule and the conditio sinequa non apply here as well. Even if there was no confession, as the search had already started and was heading towards the meeting, proof would inevitably be produced. Thus, there was no causal link, as the admission considered illicit had been eliminated, the body would still be found. Quite different would be the case if the search was started because of the information. Then, yes, the proof would be illegal, as the causal link is evident. Inevitable discovery, therefore, is one in which all valid procedures are already initiated and the meeting is a mere matter of time, and the illegal evidence produced in parallel is unnecessary. On the contrary, if the autonomous evidence had produced nothing, when the illegal evidence began, in this case, the admissibility rule provided for in the new law does not apply.

Therefore, in the theory of inevitable discovery, proof is admitted even if there is a "causal or dependent relationship between

28. PACELLI, Eugênio. **Curso de Processo Penal.** 21. ed., São Paulo: Atlas, 2017, p. 191-192.
29. ÁVILA, Thiago André Pierobom de. **Provas Ilícitas e Proporcionalidade.** Rio de Janeiro: Lúmen Júris, 2007, p. 136.
30. CAPEZ, Fernando. **Curso de Processo Penal.** 25. ed., São Paulo: Saraiva, 2018, p. 377.
31. CAPEZ, Fernando. **Curso de Processo Penal.** 25. ed., São Paulo: Saraiva, 2018, p. 377-378.

the evidence (the illicit and the discovery), precisely because it deals with means of proof routinely adopted in certain investigations", such as, for example, "although it is illegal for the police authority to enter a certain residence, the eventual discovery of a corpse in the place will not prevent the initiation of an investigation into a homicide". Thus, it is necessary to avoid the contamination of all evidence arising from illegal.[32]

As it was seen, there are theories that defend the inadmissibility of illicit evidence by derivation, by contamination, as well as theories that admit them. Note that there is a divergence on the subject that is difficult to be exhausted.

THE (IN)ADMISSIBILITY OF ILLEGAL EVIDENCE IN BRAZILIAN CRIMINAL PROCEEDINGS

Brazilian legislation, as a rule, does not admit illegal evidence in criminal proceedings, so that the admission of such evidence violates a material and constitutional law. Furthermore, the fundamental rights enshrined in the Federal Constitution are not absolute, given that in the event of collisions of equally protected rights, it is necessary to use the principle of proportionality in the specific case to decide which right must prevail.

Fernando Capez[33] asks the questions:

> The question that arises is to know to what extent the constitutional guarantees inherent to the due process of law and the preservation of the intimacy of the accused can be made more flexible, given the consideration of contrasting values between individual and society. In other words: how to proceed in the face of an eventual conflict between the citizen's protective constitutional guarantees, derived from due legal process, and society's interest in fighting crime?

Regarding the admissibility of illegal evidence, the argument aims at the principles of free conviction of the judge, probationary freedom and the real truth, maintaining that the interest of Justice in discovering the truth must remain. When this evidence is not manifested, it harms the State's interest in the fair exercise of the law, as well as in the resolution of infractions and crimes.

The admissibility of unlawful evidence, for Aury Lopes Júnior[34]

> For this current, evidence could be admitted as long as it was not prohibited by the procedural order. Violation of substantive law did not matter. For his followers (minority nowadays), the person responsible for the illegal evidence could use it in the process, responding in another process for the possible violation of the substantive law rule (which could constitute an offense or even a civil offense).
>
> [...]
>
> The critique of this current arises precisely from this paradoxical situation created: the same object, given the illegality with which it was obtained, would be considered a criminal offense to lead to the conviction of someone and, at the same time, would be perfectly valid to produce effects in the process criminal. As said, in Brazil nowadays, it is a position that no longer finds any shelter in the jurisprudence.

The admissibility of illicit evidence comes to protect the greater interests under the right to intimacy and privacy, with the objective of achieving a real truth of the facts, needing to happen in exceptional criteria when it is difficult to conceive the truth of the facts by possible means, without running into any public freedom.[35]

A quality objective in favor of this theory is that in some cases, the non-recognition of the

32. PACELLI, Eugênio. **Curso de Processo Penal.** 21. ed., São Paulo: Atlas, 2017, p. 191.

33. CAPEZ, Fernando. **Curso de Processo Penal.** 25. ed., São Paulo: Saraiva, 2018, p. 369.

34. LOPES JÚNIOR, Aury. **Direito Processual Penal.** 16. ed., São Paulo: Saraiva, 2019, p. 485-486.

35. REIS, Juliana Duclere Costa. **Provas ilícitas no processo brasileiro:** admissibilidade ou inadmissibilidade? 2013. Dissertação

International Journal of Human Sciences Research ISSN 2764-0558 DOI 10.22533/at.ed.5582101117

evidence by the declaration of unlawfulness of the same would cause irreparable harm to the person. Therefore, the right to prove innocence would need to prevail over the State's interest in punishing. The State, having in its power the person responsible for the crime, needs to believe that such evidence, even if it is considered illegal, so that an innocent person is not punished instead of the true culprit.[36]

Therefore, the application of the principle of proportionality, or of weighing up the inadmissibility of unlawful evidence, is already beginning to be admitted. If the evidence was obtained to safeguard another property protected by the Constitution, of greater value than that protected, there is no need to speak of illegality, therefore, there will be no restriction of the inadmissibility of the evidence.

For the followers of this thesis, unlawful evidence must always be accepted, as the foundation of the criminal action is to aim for the real truth and the punishment of the real ones guilty of the infraction. must be accepted.

But regarding the absolute inadmissibility, according to Aury Lopes Júnior [37]:

> Those who make a literal reading of article 5, LVI, of the Constitution defend this position, where it is stipulated that "inadmissible, in the process, evidence obtained by illegal means".
>
> Such theory finds echo, mainly, in cases where the obtaining of (illicit) evidence is violated constitutionally guaranteed rights. They also start from the premise that the constitutional prohibition would not admit an exception or relativization. It is a current that has many followers and that finds some shelter in jurisprudence (including the STF -Supreme Federal Court).

There is the continuation:

> The criticism is precisely in relation to the "absolutization" of the fence, at a time when science (since the theory of relativity) and constitutional law itself deny the absolute character of rules and rights. For us, since Einstein, there is no more room for such theories that claim to be "absolute", even more when it is evident that all knowledge is dated and has an expiration date and, mainly, that the Constitution, like any law, an old woman is born, given the incredible speed of the social rhythm. Therefore, absolute inadmissibility has the absurd claim to contain a universal and universalizing reason, which could (could) dispense with the consideration required by the complexity that involves each case in its specificity.[38]

One of the goals regarding the inadmissibility of illegal evidence is education, in a way that inhibits the practice of illegal evidence, such as teachings of Eugênio Pacelli[39]:

> The prohibition of illegal evidence acts to control the regularity of the persecutory state activity, inhibiting and discouraging the adoption of illegal evidentiary practices by those who are largely responsible for their production. In this sense, it fulfills an eminently pedagogical function, while protecting certain values recognized by the legal system.

The rule that ensures the inadmissibility of evidence obtained illegally, violating a right, aims to protect fundamental rights and guarantees, as well as the quality of the

(Pós-Graduação Lato Sensu em Direito Penal e Processo Penal) – Escola da Magistratura do Estado do Rio de Janeiro, Rio de Janeiro, 2013. Disponível em: https://www.emerj.tjrj.jus.br/paginas/trabalhos_conclusao/1semestre2013/trabalhos_12013/JulianaDuclercCostaReis.pdf. Acesso em: 14 fev. 2021, p. 11.

36. REIS, Juliana Duclere Costa. **Provas ilícitas no processo brasileiro:** admissibilidade ou inadmissibilidade? 2013. Dissertação (Pós-Graduação Lato Sensu em Direito Penal e Processo Penal) – Escola da Magistratura do Estado do Rio de Janeiro, Rio de Janeiro, 2013. Disponível em: https://www.emerj.tjrj.jus.br/paginas/trabalhos_conclusao/1semestre2013/trabalhos_12013/JulianaDuclercCostaReis.pdf. Acesso em: 14 fev. 2021, p. 17.

37. LOPES JÚNIOR, Aury. **Direito Processual Penal.** 16. ed., São Paulo: Saraiva, 2019, p. 486.

38. LOPES JÚNIOR, Aury. **Direito Processual Penal.** 16. ed., São Paulo: Saraiva, 2019, p. 486.

39. PACELLI, Eugênio. **Curso de Processo Penal.** 21. ed., São Paulo: Atlas, 2017, p. 183.

evidence to be introduced and evaluated in the process.[40]

The use of this evidence violates individual rights, such as the "right to intimacy, privacy, the image (Article 5, X), the inviolability of the home (Article 5, XI), normally the most affected during investigations".[41]

Regarding the quality of the test:

> [...]the recognition of the illegality of the means of obtaining the evidence already prevents the use of methods whose evidential suitability is previously questioned, as occurs, for example, in the confession obtained through torture, or through hypnosis, or even through the administration of chemical substances (truth serum, etc.). On the other hand, the prohibition of illegally obtained evidence also has repercussions in the scope of procedural equality, in that, by preventing the irregular production of evidence by State agents - normally those responsible for the evidence -, it balances the relationship of forces in relation to the activity instruction developed by the defense.[42]

The inadmissibility of illegal evidence is a difficult topic to be exhausted, not only in relation to the evidence, but also how it will be interpreted.

> [...] the proof of proof does not only occur in relation to the chosen medium, but also in relation to the results that can be obtained with the use of a certain proof method. A telephone interception, as a means of evidence, may be lawful if authorized in court, but unlawful when not authorized. In the first case, the affectation (the result) of the right to privacy and/or intimacy is allowed, while in the second, it is not, resulting in an undue violation of those values.
>
> In terms of evidence, therefore, even when there is no express prohibition as to the means, it will still be necessary to inquire about the result of the test, that is, whether the results obtained constitute a violation of rights or not. And if they do, if the violation was and could have been authorized.[43]

As previously seen, article 157 of the Code of Criminal Procedure says that "evidence obtained illegally must be removed from the records", but it is not clear at which procedural moment this will occur.

According to the teachings of Eugênio Pacelli[44]:

> In our opinion, the judge must assess the illegality of the evidence and its consequent removal from the case records before the criminal investigation hearing, that is, after the presentation of a written defense, provided, of course, that the evidence has been attached at a previous time. In the case of evidence presented at the hearing, the judge must immediately consider the matter.
>
> In the first hypothesis, of examination and decision to extricate itself before the hearing, the appropriate appeal will be an appeal in the strict sense; during the hearing, the appeal will be of appeal, if and only if the sentence is rendered at the hearing. In this case, the presentation of two appeals will not be required, but only the appeal (article 593, § 4, CODE OF CIVIL PROCEDURE). The decision that does not recognize the illegality of the evidence is unappealable, which does not prevent the matter from being reconsidered on the occasion of a possible appeal or through autonomous actions of objection, such as habeas corpus.

There is the continuation:

> In fact, it must be borne in mind that, despite the preclusion of the decision to extricate the illegal evidence, the matter concerns the issue of public interest, unavailable to the parties. Therefore, both the judge and the court will always be able to hear the matter when judging the merits. The only reservation is up to the Jury Court. There,

40. PACELLI, Eugênio. **Curso de Processo Penal.** 21. ed., São Paulo: Atlas, 2017, p. 183.
41. PACELLI, Eugênio. **Curso de Processo Penal.** 21. ed., São Paulo: Atlas, 2017, p. 183.
42. PACELLI, Eugênio. **Curso de Processo Penal.** 21. ed., São Paulo: Atlas, 2017, p. 183.
43. PACELLI, Eugênio. **Curso de Processo Penal.** 21. ed., São Paulo: Atlas, 2017, p. 183.
44. PACELLI, Eugênio. **Curso de Processo Penal.** 21. ed., São Paulo: Atlas, 2017, p. 183.

> where a trial is held by lay people and without any need for motivation, it will not be up to the jurors to know the disentangled evidence.
>
> But the Law says more (article 157, § 3, CODE OF CIVIL PROCEDURE). The unusability of the unlawful evidence is determined by a court decision, with the monitoring of the parties being allowed. However, if the production of unlawful evidence could cause damage to third parties, whether civil or criminal, how will you proceed to demonstrate the materiality of the unlawful act? It must be borne in mind, then, that the disabling of the evidence will depend on the existence (or not) of possible legal consequences for the person responsible for its production.[45]

Judgments that always or never admit unlawful evidence fail to analyze the conflicting rights in the specific case. For illegal evidence to be used in the process, four requirements must be met, as per Fredie Jr. Didier[46]:

> (i) indispensability: it can only be accepted when it is verified, in the specific case, that there was no other way to demonstrate the factual allegation object of the unlawful evidence [...]; (ii) proportionality: the good of life object of protection by the illegal evidence must prove, in the specific case, more worthy of protection than the good of life violated by the illegality of the evidence; (iii) punishability: if the conduct of the party that uses the illegal evidence is unlawful/unlawful, the judge must take the necessary measures so that it is punished [...]; (iv) pro reo use: in criminal proceedings, and only there, it has been understood that unlawful evidence can only be accepted if it is to benefit the defendant/accused, never to harm him.

In Brazilian law, it is almost unanimous to admit illegal evidence, when it benefits the defendant, based on the principle of proportionality pro reo. According to Luiz Francisco Torquato Avolio[47]:

> The application of the principle of proportionality from the perspective of the right of defense, also constitutionally guaranteed, and as a priority in criminal proceedings, where the principle of favor reigns, is practically unanimously accepted by doctrine and jurisprudence.

Therefore, the minority understanding of doctrine and courts says that illegal evidence must be admitted in the process, and that which has greater social relevance must prevail, even if this results in harm to the accused. In this line:

> [...] the uncompromising posture of despising, always, any and all illicit evidence is unreasonable. In some cases, the interest you want to defend is much more relevant than the intimacy you want to preserve. Thus, emerging conflict between fundamental principles ofConstitution, it is necessary to compare them to see which must prevail. Depending on the reasonableness of the specific case, dictated by common sense, the judge may admit an illegal evidence or its derivation, to avoid a greater evil, such as, for example, the wrongful conviction or impunity of dangerous criminals. The interests that are placed in an antagonistic position need to be collated, in order to choose which one must be sacrificed.[48]

As it was seen, in Brazil, currently, the admissibility of illegal evidence no longer finds any shelter in jurisprudence. Thus, for the admissibility judgment to be made, it is necessary to analyze the principle of proportionality in the specific case.

45. PACELLI, Eugênio. **Curso de Processo Penal.** 21. ed., São Paulo: Atlas, 2017, p. 183.

46. DIDIER JR, Fredie. **Curso de Direito Processual Civil.**Vol II. 15. ed., Salvador: Jus Podivm, 2014, p. 34-35.

47. AVOLIO, Luiz Francisco Torquato. **Provas Ilícitas:** Interceptações telefônicas, ambientais e gravações clandestinas. 3. ed., São Paulo: Revista dos Tribunais, 2003, p. 80.

48. CAPEZ, Fernando. **Curso de Processo Penal.** 25. ed., São Paulo: Saraiva, 2018, p. 370.

FINAL CONSIDERATIONS

Flexing the constitutional principiological theory of the studied legal systems, as well as looking to the procedural norms of both legal systems, it was realized that there is room for abstract compatibility between constitutional norms and the exclusion of procedural illicit evidence, given the theories presented of application of the principles and their normative force, as well as the application of several infra-constitutional norms that delineate such exclusion.

When analyzing the Federal Constitution of 1988, in particular the already treated article 5, item LVI with the systematic of the civil process code, especially the already treated article 157 there is no doubt that the system of inadmissibility of unlawful evidence, in a broad sense as a contravention of broadly effective legal norms, is what is currently in force nowadays. The system of admissibility of illegal evidence and its subsequent and consequent declaration of nullity is no longer present in our legal system, nor in the US legal system, given that the judge has contact with illegal evidence and can become contaminated with it.

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