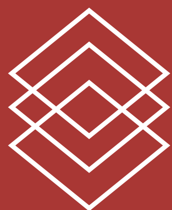

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Admissibility of Evidence in the Criminal Process. Between the Establishing of the Truth, Human Rights and the Efficiency of Proceedings”

Editorial of dossier “Admissibility of Evidence in Criminal Process. Between the Establishment of the Truth, Human Rights and the Efficiency of Proceedings”[1]

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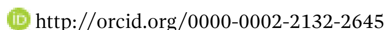
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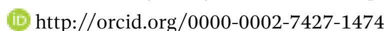
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Abstract: The rules on the admissibility of evidence secure accurate fact-finding as a prerequisite for the correct application of substantive criminal law and proper operation of the criminal justice system in

[1] This publication has been developed as part of the project Admissibility of Evidence in Criminal Proceedings. Between Truth Seeking, Fairness and Effectiveness of Proceedings (Registration No. 2017/27/B/HS5/00854) financed by the National Science Centre, Poland.

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society. But the search for the truth must be limited in order to take into account other important values, among which human rights hold a central place. The quest for a fair balance between the effective fight against crime and respect for individual rights constantly remains in the center of heated discussion. However, there are two other factors that strongly influence the evidentiary rules, creating an environment where finding the truth becomes more complicated than ever before. The popularity of the disposition of cases out of trial and the impact of technology and science, both interrelated and focused on the efficiency of the criminal justice system, paradoxically make the quest for the truth easier and faster, but also more prone to errors. Moreover, the new technologies allowing evidence gathering have become a vital threat to the right to privacy. Finding solutions to these challenges necessitates dialogue including various stakeholders and free of the penal populism that has recently dominated the legal discourse.

Keywords: admissibility of evidence; rights of individual; plea-bargaining; digital evidence; illegally obtained evidence.

Resumo: *As regras sobre admissibilidade de provas garantem a verificação exata dos fatos como uma condição para a aplicação correta do direito penal material e o funcionamento adequado do sistema de justiça criminal na sociedade. Mas a busca pela verdade deve ser limitada para ponderar outros valores importantes, entre os quais os direitos humanos têm importância central. A meta de equilíbrio justo entre a persecução efetiva do crime e o respeito aos direitos individuais permanece constantemente no centro de acaloradas discussões. No entanto, existem dois outros fatores que influenciam fortemente as regras probatórias, gerando um cenário onde encontrar a verdade torna-se mais complicado do que nunca. A generalização da resolução de casos sem processo (barganha penal) e o impacto de tecnologia e ciência, ambas inter-relacionadas e dirigidas à eficiência do sistema de justiça criminal, paradoxalmente tornam a busca pela verdade mais fácil e rápida, mas também mais sujeita a erros. Além disso, as novas tecnologias que permitem a coleta de provas tornaram-se uma ameaça determinante ao direito à privacidade. Encontrar soluções para esses desafios exige um diálogo que inclua as várias partes interessadas e livre do populismo penal que recentemente dominou o debate jurídico.*

Palavras-chave: *admissibilidade da prova; direitos individuais; barganha penal; prova digital; ilicitude probatória.*

> “When Jesus of Nazareth, in the hearing before the Roman prefect, confessed to being a king, he said: ‘I was born and am come into this world to bear witness to the truth’. At which Pilate asked ‘What is truth?’ The sceptical Roman obviously expected no answer to this question, nor did Our Lord give any. For to be witness to the truth was not the essence of his mission as a Messianic king. He was born to bear witness to justice, that justice which he wished to realise in the Kingdom of God. And for this justice he died on the cross.
>
> So behind Pilate’s question: What is truth? there rises from the blood of the crucified another and still weightier question, the eternal question of mankind: What is justice?”
>
> Hans Kelsen, *What is Justice?*, Berkeley 1957, p. 1.

1. The truth-seeking in criminal process – between the divergence and the convergence of the systems

Adequate fact-finding is frequently presented as the most fundamental principle of criminal process[4]. Yet, despite the perception of the truth as the essential element of the successful operation of the criminal justice system, lawyers keep posing the question whether the truth is the most important value of all that comes in play in criminal process and whether the truth should be sought by all possible means and at all costs. As observed by scholars in a consciously ridiculed way, commenting on what the US criminal trial has become in the eyes of the public after the OJ Simpson verdict, “we must bag, once and for all, the

[4] See for example WEIGEND, Thomas. Should We Search for the Truth, and Who Should Do it? *North Carolina Journal of International Law and Commercial Regulation*, vol. XXXVI, pp. 389-415, 2011, p. 389 (in relation to Germany and France); WALTOŚ Stanisław; HOFMAŃSKI Piotr. Proces karny. Warszawa: Wolters Kluwer, 2016, p. 220 (in relation to Poland); BORGERS Matthias J.; STEVENS Lonneke. The Netherlands: Statutory Balancing and a Choice of Remedies. In: THAMAN Stephen C. (ed.) Exclusionary Rules in Comparative Law. Springer: Dordrecht–Heidelberg–New York–London, 2013, p. 183 (in relation to the Netherlands), BACHMAIER WINTER Lorena. Spain: The Constitutional Court’s Move from Categorical Exclusion to Limited Balancing. In: THAMAN Stephen C. (ed.), op.cit., p. 211 (in relation to Spain).

outmoded notion that a trial is a somber 'search for truth.'"[5] And even if this is just an exaggeration, we should be searching for an answer to the question of whether the truth does lie in the center of criminal process and, if so, what are the limits of fact-finding and what other values should be considered under certain circumstances as more important than the pure and ultimate truth?

The view that establishing the truth is the main principle of criminal process is well grounded in the *civil law* countries. The *common law* jurisdictions, however, are frequently perceived as placing either consensus or fair contest between the parties above the truth. Nonetheless, accurate fact-finding is also a cornerstone of the criminal justice system in *common law* tradition. That is confirmed by the law[6], case law[7] as well as by the legal scholarship[8]. The differences between the adopted models of criminal process in the two main legal families are a fact, but should be understood as a consequence of promoting alternative methods of searching and establishing facts of the case, rather than an expression of a distinct goal the criminal justice system should serve[9]. From that perspective the role of the parties in adversarial disputes and the scope

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[5] BRADLEY Craig M.; HOFFMANN Joseph L. Public Perception, Justice and the "Search for the Truth" in Criminal Cases. Southern California Law Review, vol. 69, pp. 1267-1302, 1996, p. 1268.

[6] See Rule 102 of US Federal Rules of Evidence, which provides that rules of evidence are designed to ascertain the truth and secure a just determination. English Criminal Procedure Rules state that the ultimate goal of criminal proceedings (Rule 1.1.) is acquitting the innocent and convicting the guilty. Although the accurate fact-finding is not mentioned, it is obvious that it is necessary to apply *ius puniendi* correctly.

[7] See examples from England and Wales, Canada and USA in: HO Hock Lai. A Philosophy of Evidence Law. Justice in the Search for Truth, Oxford: Oxford University Press, 2010, p. 52.

[8] See: ROBERTS Paul; ZUCKERMAN Adrian, Criminal Evidence, Oxford: Oxford University Press, 2010, p. 19.

[9] SPENCER John R. *Evidence.* In: DELMAS-MARTY Mireille; SPENCER John R. European Criminal Procedures, Cambridge: Cambridge University Press, 2002, pp. 636-637, WEIGEND Thomas. Should We Search for the Truth, and Who Should Do it?, op.cit., p. 414, VANDERMEERSCH Damien, Droit continental vs. droit anglo-américain: quells enseignements pour le droit belge de la procédure pénale, *Revue de Droit Penal et de Criminologie*, 2001, pp. 467-531, p. 513, ASHWORTH Andrew; REDMAYNE Mike. The Criminal Process. Oxford:

of a judge's inquisitorial powers are tools of securing the most efficient and accurate fact-finding. As a result, the central role of the truth in criminal process, regardless of the legal family to which a legal system belongs, should not be questioned.

The pursuit of the truth in the criminal context is quite formalized. A variety of provisions refer to gathering, preserving, processing and evaluating relevant evidence. Among them the rules regarding admissibility of evidence are uniquely important. They serve a gatekeeping function and as a result may have an adverse influence on establishing the truth. Not surprisingly, the rules on the admissibility of evidence differ between the common law and Continental system, which will be discussed in this volume by Hanna Kuczyńska[10]. While the common law system opts for excluding some relevant evidence based on technical rules before it is heard in the courtroom, preventing the trier of fact from acknowledging the inadmissible evidence, the Continental model allows much more to be presented during trial and aims at evaluating the evidence post factum[11]. This distinction is ordinarily explained by the influence that laymen jurors have on the evidentiary rules in the common law system which is lacking in the Continental model. No doubt that in such a legal regime the more precise and harsher rules on the admissibility of evidence had to be developed[12].

This leads to the identification of the origins of the evidentiary rules, which are as old as ancient criminal trials. Even though the evidence law has for a long time been in a position of a single unified subject in a common law system, while not as much in the Continental one, the evidentiary rules are not foreign to the latter either. Interestingly, it has

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Oxford University Press, 2010, p. 23, KREMENS Karolina. Dowody osobowe w międzynarodowym postępowaniu karnym. Toruń: TNOiK, 2010, p. 60.

10 KUCZYŃSKA Hanna. Mechanisms of elimination of undesired evidence from criminal trial.

11 RYAN Andrea. Towards a System of European Criminal Justice. The Problem of Admissibility of Evidence, New York: Routledge 2014, p. 241.

12 See the classic discussion on the origins of evidentiary rules in connection to jury trials in common law system by DAMAŠKA Mirjan. The jury and the law of evidence: real and imagined interconnections. Law, Probability and Risk, vol. 5, issue 3-4, pp. 255-265, 2006.

been argued that the reason why the contemporary rules on admissibility of evidence in the Continental criminal process embrace "free proof" is "an emphatic rejection of formalistic Roman-canon classification of evidence types and mechanistic qualifications of probative value"[13]. Illustrating that, Jerzy Skorupka takes us in this volume for a journey throughout the rules on admissibility of evidence of the Roman Empire, Ancient Greece and Teutonic tribes[14]. This analysis shows that the formal rules on evidence have also developed in the inquisitorial model and only incidental historical events have detached Continental Europe from the original inflexibility of rigid normative evidentiary rules.

It seems however that the era of differences is coming to an end. The evidence law currently faces unprecedented convergence. Although the criminal procedure in no way can be described as unified, similar tendencies in distinct countries can be observed, such as the growth of penal populism that results in retreat from some fundamental values[15]. Major changes can also be observed in the context of the European Union, which works hard on adopting common rules in criminal matters among EU members. With such tools as principles of mutual trust and recognition in criminal matters[16], the European Arrest Warrant and the European Investigation Order[17], common evidentiary standards are fast approaching. One example of such emergence of EU law relating

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[13] JACKSON John; ROBERTS Paul. Beyond Common Law Evidence: Reimagining and Reinvigorating, Evidence Law as Forensic Science. In: BROWN Darryl K., TURNER Jenia J.; WEISSER Bettina (eds.). The Oxford Handbook of Criminal Process, Oxford: Oxford University Press, 2019, p. 788.

[14] SKORUPKA Jerzy. The rule of admissibility of evidence in the criminal process of continental Europe.

[15] HODGSON Jacqueline S. The Metamorphosis of Criminal Justice. A Comparative Account, Oxford: Oxford University Press, 2020, p. 343.

[16] See broadly on mutual recognition in MITSILEGAS Valsamis. EU Criminal Law. Oxford: Oxford and Portland: Hart Publishing, 2009, pp. 115-127. See specifically on mutual admissibility of evidence in the context of telephone tapping and house search in KUSAK Martyna, Mutual admissibility of evidence in criminal matters in the EU. A study of telephone tapping and house search, Antwerp: Maklu, 2016.

[17] Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters [2004] OJ L130/1 1.5.2014

to the collection of location data will be discussed in this volume by Dominika Czerniak[18]. But even outside of this peculiar European legal regime, a tendency to reimagine traditional evidentiary processes can also be identified through the proliferation of international criminal courts and tribunals. The direction in which the international criminal justice system developed in that regard is analyzed in this volume by Bartłomiej Krzan[19]. Whether the international criminal law may be named *sui generis* or is just an amalgam of two traditionally identified systems of criminal process may still be disputed[20]. Yet, it is certain that it adds in an important way to the merger of evidentiary practices by giving a stage to reexamine the strengths and weaknesses of different procedural and evidentiary mechanisms[21].

Therefore, regardless of the legal system prevailing in a given state, in the light of evidentiary rules gradually approaching one another, and acknowledging that adversarial and inquisitorial systems reflect two distinct yet equally valid approaches toward the search for the truth, we may now turn to as fundamental a question as what may limit the truth-seeking process. Accordingly, when limitations on fact-finding are considered, the discussion may be narrowed down to one significant

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[18] CZERNIAK Dominika. Collection of location data in criminal proceedings –European (the EU and Strasbourg) standards.

[19] KRZAN Bartłomiej. Admissibility of evidence and international criminal justice.

[20] See for example AMBOS Kai. International Criminal Procedure: "Adversarial", "Inquisitorial" or "Mixed"? International Criminal Law Review, vol. 3, pp. 1-37, 2003; KEEN Peter Carmichael. Tempered Adversariality: The Judicial Role and Trial Theory in the International Criminal Tribunals. *Leiden Journal of International Law*, vol. 17, pp. 767-814, 2004 and MUNDIS Daryl A., From 'Common Law' Towards 'Civil Law': The Evolution of the ICTY Rules of Procedure and Evidence, *Leiden Journal of International Law*, vol. 14, pp. 367-382, 2001.

[21] See JACKSON John, ROBERTS Paul. Beyond Common Law Evidence: Reimagining and Reinvigorating, Evidence Law as Forensic Science, op.cit., p. 815 and literature quoted there, in particular the analysis of a normative integration of criminal procedure described as a "hybridization" by DELMAS_MARTY Mireille. Reflections on the "Hybridisation" of Criminal Procedure. In: JACKSON John, LANGER Máximo, TILLERS Peter (eds.). Crime, Procedure and Evidence in a Comparative and International Context. Essays in honour of Professor Mirjan Damaška, Oxford and Portland: Hart Publishing, 2008, pp. 251-260.

problem – what evidence should be admissible as a basis of a criminal judgment? Generally, all evidence that is relevant and reliable should be preliminarily considered as admissible in criminal proceedings. Therefore, the rules on the admissibility of evidence may be perceived as always serving an aim to protect certain values that are challenged against the truth. This will be further explored in this volume by Giulio Ubertis[22] and Paolo Ferrua[23].

Three important and timely factors causing serious implications for fact-finding at trial can be identified. The first one relates to the pressing need for the efficient processing of criminal cases. Although that phenomenon is more often discussed from the perspective of shortcomings that adversely affect procedural fairness, the evidentiary issues seem to be equally important. The second concerns the long-discussed human rights perspective that must be taken into account when the evidence obtained against such rights is considered to be admitted at trial. This in particular applies to the rights of the defendant, such as the right to remain silent or the right to examine or have examined witnesses, and is essential if the standard of the due process (fair trial) is to be met. Finally, the digital revolution also has an impact on criminal evidence and has started to play a particularly important role in the discussion on the admissibility of evidence. These challenges will now be discussed in turn.

2. The Admissibility of Evidence and Out-of-Trial Case Disposal

The most recent and crucial factors limiting the pursuit of truth relate to the necessity to guarantee the efficiency of criminal proceedings. Virtually all countries are faced with this challenge, due to the enormous overload of criminal cases[24]. Broadly accepted

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[22] UBERTIS Giulio – I criteri di ammissibilita probatoria.

[23] FERRUA Paolo - Ammissibilità della prova e divieti probatori

[24] See comparatively on ways in which states try to ensure the efficiency of criminal proceedings in JEHLE Jörg-Martin, WADE Marianne. Coping with Overloaded Criminal Justice Systems. The Rise of Prosecutorial Power in Europe, Berlin: Springer 2006 and more recently the analysis covering

negotiated agreements based on plea bargaining or other instruments made available to prosecutors allowing for disposition of cases outside of trial inevitably lead to ambiguous determination of the factual basis of decisions concerning the criminal liability of the defendant. While the judgment frequently relies on the evidence already considered as admissible by the prosecutor, the court's responsibility for admitting the evidence becomes limited. This changes the dynamics between the actors of criminal process and reinforces the position of the prosecutor, weakening the judicial influence on the outcome of criminal proceedings[25]. In theory, this may seem uncontroversial, since the negotiated procedures assume that the accused when pleading guilty adheres to evidence on which the prosecutor relies to proves defendant's guilt. However, when attention is paid to the details the question of authority playing a major role in the decision-making process regarding admissibility of evidence becomes more complicated. Such issues as the access of the defendant to evidence gathered during the investigation by criminal justice agencies and the exclusion of such evidence if necessary seems to be crucial in providing the defendant with the desired fairness of proceedings. Moreover, the advantages of various procedures allowing a full trial to be avoided may play an important role for the prosecutors and judges. Their ability to drastically reduce the caseload and smoothly close cases may negatively affect the willingness to question the facts established by the investigating authorities and accepted through the guilty plea. That may be the case even if there are potential lacunas in the case materials that would most probably have been raised and debated during trial. Certainly, the law may offer safeguards assuring that when the facts are disputed the case should be decided during an adversarial trial. Moreover, the fairness of proceedings may be guaranteed by demanding that the guilty plea be informed and voluntary. Nonetheless, the effectiveness of such provisions may be questioned when a defendant pleads guilty on

impressive variety of countries by LANGER Máximo. Plea-bargaining, Conviction Without Trial and the Global Administratization of Criminal Convictions, *Annual Review of Criminology*, 2021, vol. 4, pp. 377-411.

[25] See on the redefinition of the position of the prosecutor during criminal process in: KREMENS Karolina. Powers of the Prosecutor in Criminal Investigation. A Comparative Perspective. New York: Routledge, 2021 (forthcoming).

the basis of case materials containing evidence that should be excluded. An important role in that regard may be played by the defense counsel raising doubts toward the legality of obtained evidence. In this volume Thomas Weigend will seek an answer to these questions, arguing that rules on the exclusion of evidence should accordingly apply at an early stage of the criminal process[26].

The avoidance of full trial raises doubts related to human rights issues. Convictions not preceded by full adversarial trial and based on limited evidence gathered in an inquisitorial manner by the investigating authorities, even if accepted by the defendant, are problematic. As a consequence, they may affect the integrity of criminal process, understood as a tool designed to do justice in the society. Similar dilemmas regarding the integrity of criminal process arise when not the quantity and reliability of evidence to support the conviction, as in the case of simplified procedures, but the legality or propriety of their acquisition is controversial. Today, it can no longer be convincingly claimed that "It matters not how you get it; if you steal it even, it would be admissible in evidence."[27] If the allegations that the evidence were obtained improperly are raised they have to be addressed at trial.

3. The Admissibility of Evidence and Improperly Obtained Evidence

As indicated, the goal of establishing the truth is not absolute and the criminal process does not function in a vacuum. Those who are suspects, defendants, victims or witnesses are also involved in a multitude of personal and professional relations that entail certain rights and duties. The rules of criminal procedure cannot be construed and applied without acknowledging that basic fact. In consequence, various values external to criminal process influence their shape and functioning. Some of them, like human dignity, acknowledged as a fundamental and

[26] WEIGEND Thomas. Exclusion without trial? Exclusion of evidence and abbreviated procedures.

[27] Per Crompton J in R. v. Leatham (1861) 8 Cox CC 498 at 501.

universal principle[28], have influenced the fact-finding process in the criminal context for at least a few centuries. The prohibition of torture and the privilege against self-incrimination, as basic principles safeguarding human dignity, are perhaps the best examples limiting the powers of investigating authorities[29].

The last centuries, however, are marked with an even more visible tendency to limit the investigative powers of criminal justice agencies involved in the fact-finding process. Establishment of the exclusionary rule in the USA and its development prove that the observance of human rights (guaranteed in the Fourth, Fifth and Sixth Amendments) became a crucial factor limiting the pursuit of truth in criminal proceedings. Certainly, this tendency is not exclusive to the USA, although it is true that in that system the exclusion of evidence has been developed in the broadest way. Similar developments can also be observed in other countries[30]. In this volume Frank Verbruggen and Charlotte Conings with regard to Belgian law[31] and Pasquale Bronzo and Guido Colaiacovo concerning the Italian system[32] analyze national approaches toward the exclusion of illegally obtained evidence.

Apart from changes in domestic legal systems, the European standard regarding the exclusion of evidence obtained in violation of the European Convention on Human Rights (ECHR)[33] was also developed

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[28] Article 1 of the Universal Declaration of Human Rights provides that all human beings are born free and equal in dignity and rights.

[29] In the common law tradition, the origins of the privilege against self-incrimination are traced back as early as 1568 (CHOO Andrew L-T. The Privilege Against Self-Incrimination and Criminal Justice. Oxford-Portland: Oxford University Press, 2013, p. 2). On the prohibition of torture as a well-established principle in English *common law* see: A v Secretary of State for the Home Department (No 2) [2005] UKHL 71.

[30] See for example THAMAN Stephen (ed.) Exclusionary Rules in Comparative Law, op.cit., Springer: Dordrecht–Heidelberg–New York–London 2013.

[31] VERBRUGGEN Frank, CONINGS Charlotte. After Zigzagging Between Extremes, Finally Common Sense? Will Belgium Return to Reasonable Rules on Illegally Obtained Evidence?

[32] BRONZO Pasquale, COLAIACOVO Guido. Delitto di tortura e inutilizzabilità delle prove nel sistema processuale italiano.

[33] The Convention for the Protection of Human Rights and Fundamental Freedoms, opened for signature in Rome on 4 November 1950, came into force in 1953.

in the case law of the European Court of Human Rights (ECtHR). And even though the Strasbourg Court is generally reluctant to intervene in the evaluation of evidence before national courts[34], it nonetheless recognizes the relation between safeguarding rights of the parties to the proceedings and excluding improperly obtained evidence. Moreover, the judges perceive that relation in certain areas as strong enough to establish absolute exclusionary rules. For example, the ECtHR held that the admission of statements obtained as a result of torture or inhuman or degrading treatment, real evidence obtained directly by torture, as well as evidence obtained by police incitement renders the trial unfair in terms of Article 6 ECHR[35]. More recently the scope of the exclusionary rule has been extended to cover statements admitted at trial obtained by torture administered by private individuals[36], which will be further explored in this volume by Małgorzata Wąsek-Wiaderek [37]. The ECtHR also developed a more nuanced approach to exclude evidence gathered in violation of the right to privacy[38], the right to access to a lawyer[39] as well as real (non-testimonial) evidence obtained by inhuman or degrading treatment[40] and fruit of the poisonous tree of violations of inhuman or degrading treatment prohibition[41]. It is adopted that in such contexts, the exclusionary rule is not working automatically. The admission of evidence should therefore be assessed taking into consideration the totality of circumstances of the case and that the holistic approach determines the evaluation of the fairness of the proceedings.

Not surprisingly, the exclusion of evidence obtained in violation of human rights raises numerous controversies. The first

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[34] Cf. for example *Jalloh v. Germany* [GC], no. 54810/00, 11 July 2006, § 95.

[35] *Gäfgen v. Germany* [GC], no. 22978/05, 1 June 2010, § 166-167.

[36] *Ćwik v. Poland*, no. 31454/10, 5 November 2020.

[37] WĄSEK-WIADEREK Małgorzata. Admissibility of Statements Obtained as a Result of "Private Torture" or "Private" Inhuman Treatment as Evidence in Criminal Proceedings: Emergence of a New European Standard?

[38] *Bykov v. Russia* [GC], no. 4378/02, 10 March 2009.

[39] *Beuze v. Belgium* [GC], no. 71409/10, 9 November 2018.

[40] *Jalloh v. Germany* [GC], no. 54810/00, 11 July 2006.

[41] *Gäfgen v. Germany* [GC], no. 22978/05, 1 June 2010.

concerns whether the respect for human rights (the so-called protective principle[42]) is in fact a convincing rationale for the exclusion. Although the intuitive answer might seem positive, the existence of alternative justifications such as deterrence and integrity principles[43] proves that human rights do not act as trump in deciding on the admissibility of evidence. Moreover, the historical development of the exclusionary rule in the USA indicates that the original justification for the exclusion of evidence obtained in violation of the Fourth Amendment, namely protection of rights of the individual, was replaced by understanding the exclusionary rule as an instrumental device designed to deter police misconduct[44]. Even though the rationale based on human rights protection is questioned and sometimes abandoned in favor of other rationale, the deterrence principle and integrity principle implicitly accept the argument that respect for rights of the individual should at least to some extent be taken under consideration while gathering evidence to establish the truth in criminal proceedings. Recourse to the moral integrity of the criminal justice system, which is based on the fundamental right to a fair trial, as well as to the principle of deterrence, which aims at safeguarding the dignity and liberty of individuals and protecting the rule of law, implicitly confirms that while gathering evidence the rights of people subjected to investigative actions cannot be ignored.

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[42] Term used in ASHWORTH Andrew. Excluding Evidence as Protecting Rights. *Criminal Law Review*, vol. 3, pp. 723-735, 1977.

[43] See for example CHAU Peter. Excluding Integrity? Revisiting Non-Consequentialist Justifications for Excluding Improperly Obtained Evidence in Criminal Trials. In: ROBERTS Paul, HUNTER Jill, YOUNG Simon NM., DIXON David (eds.). The Integrity of Criminal Process. From Theory into Practice, Oxford–Portland: Hart Publishing, 2016, p. 279, ASHWORTH Andrew. Exploring the integrity principle in evidence and procedure In: MIRFIELD Paul, SMITH Roger. Essays for Colin Tapper, Oxford–New York: Lexis-Nexis, 2003, pp. 107-125, TURNER Jenia Iontcheva, WEIGEND Thomas. The Purposes and Functions of Exclusionary Rules: A Comparative Overview In: GLESS Sabine, RICHTER Thomas (eds.). Do Exclusionary Rules Ensure a Fair Trial? A Comparative Perspective on Evidentiary Rules. Cham: Springer, 2019, pp. 255-263.

[44] MACLIN Tracey. The Supreme Court and Fourth Amendment's Exclusionary Rule. Oxford–New York: Oxford University Press, 2013, pp. 348-349.

The emphasis makes, nonetheless, a substantive difference. While the protective principle is focused primarily on the rights of the individual, the other justifications imply a more complex weighing of competing interests. A good illustration of the latter are exceptions to the exclusionary rule created in case law. In a landmark judgment *United States v. Leon*[45] establishing the "good faith" exception to the Fourth Amendment exclusionary rule, the US Supreme Court ruled that if the police officer executing a search warrant acted in good faith and within its scope, the evidence gathered should not be excluded even if the warrant ultimately was found to be invalid. As a result, narrowing the scope of the exclusionary rule proves that the violation of the individual's rights is not sufficient to suppress evidence. A similar approach can be observed in the case law of the ECtHR. In *Al-Khawaja and Tahery vs. United Kingdom* it was decided that the right to a fair trial is a complex concept encompassing, apart from the rights of the defense, also the interests of the public and the victims of crime as well as, where necessary, the rights of the witnesses[46]. Therefore, it should be no surprise that limitations to the exclusion of evidence based on human rights arguments started to proliferate among various jurisdictions after the initial protective approach[47].

Moreover, the tension between safeguarding accurate fact-finding and imposing limitations on that process related to considerations of external values is clearly visible in different approaches to the exclusion of material (real) evidence and testimonial evidence. The ECtHR case law regarding real and testimonial evidence obtained in violation of Article 3 of the ECHR may serve as a good example. While the Strasbourg Court is firm in stating that admission at trial before the domestic court of

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45 468 U.S. 897 (1984).

46 Al-Khawaja and Tahery vs. United Kingdom, nos. 26766/05 and 22228/06, 23 May 2006, § 118.

47 In that context it is worth mentioning the example of Spain, where the exclusionary rule referring both to direct and indirect evidence (Article 11(1) Ley Orgánica 6/1985, de 1 de julio, del Poder Judicial) is interpreted by the judicial authorities as having exceptions in cases of fruit of the poisonous tree. See: BACHMAIER WINTER Lorena. Spain: The Constitutional Court's Move from Categorical Exclusion to Limited Balancing, op.cit., pp. 215-217.

depositions obtained by torture and inhuman or degrading treatment violates the right to a fair trial, the same standard is not applied in respect of real evidence obtained by inhuman or degrading treatment[48]. Moreover, the ECtHR adopts a very inclusive attitude toward real evidence obtained by violation of the right to privacy[49]. Although it was not articulated explicitly by the Court, the reason for an adoption of the dual standard seems to be related to a distinct assessment of the reliability of material and testimonial evidence. The implicit emphasis on reliability of evidence as a crucial factor in deciding on its admissibility can be noticed in many jurisdictions in an inclusive approach to admitting real evidence obtained during a search conducted in violation of a right to privacy[50]. Naturally, it may be a matter of dispute how respect for human rights or the pursuit of truth should be weighed. However, even if the inclusive trend in admissibility decisions related to improperly obtained evidence is visible in many jurisdictions, no one advocates that violations of human rights should be disregarded. Rather they are treated as one of the factors that should be assessed, with an emphasis on the seriousness and intentionality of violation[51]. These arguments relating to the optimum scope of the exclusion of reliable evidence and limitation of search for the truth are becoming equally important in the context of the most challenging revolution concerning evidence law – the era of digital evidence.

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[48] *Jalloh v. Germany* [GC], no. 54810/00, 11 July 2006.

[49] See for example *Bykov v. Russia,* no. 4378/02, 10 March 2009 and the criticism of that approach in dissenting opinions.

[50] It is visible in at least questionable distinction between legality of search itself and seizure of evidence revealed by search stemming from case law of German and Italian courts (THAMAN Stephen C. Balancing Truth Against Human Rights: A Theory of Modern Exclusionary Rules [w:] Exclusionary Rules in Comparative Law, In: THAMAN Stephen C. (ed.) Exclusionary Rules in Comparative Law, op.cit., p. 434; RUGGIERI Francesca; MARCOLINI Stefano. *Italy.* In: LIGETI Katalin (ed.). Toward a Prosecution for the European Union, Volume 1. A Comparative Analysis, Oxford–Portland: Hart Publishing, 2013, p. 396).

[51] See WEIGEND Thomas. Germany. In: LIGETI Katalin (ed.). Toward a Prosecution for the European Union, Volume 1. A Comparative Analysis, op.cit., p. 296.

4. The Admissibility of Evidence and the Technological Developments

The expansion of new technologies experienced during the past forty years certainly has not left the criminal justice system untouched. Without exaggeration this process can be called one of the greatest challenges that the criminal law and procedure has been faced with. And yet it is uncertain how influential this process might be in the future, as the creation of new technologically advanced devices and tools is speeding up. The self-driving cars tested in cities, the development of the 5G network or the rising popularity of home assistants and smart TVs that were all unimaginable even a decade ago are just a few examples of a rapidly changing reality which does not leave the criminal law beyond its influence.

Certainly, it is not a novel reflection that the growth of the impact of science on our lives is also influencing the criminal law[52]. This process is constantly observed through such mechanisms as electronic monitoring of convicts[53] and the significant increase in the digitalization of court proceedings that allows for the conducting of proceedings through high-quality video link. It is no longer impossible to imagine court hearings happening online, as this takes place every day in many national and international courts and started long before the social distancing requirements of COVID-19[54]. It would be, therefore, surprising if the digital revolution did not influence the engagement of criminal evidence in the fact-finding process.

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[52] See very recently CAIANELLO Michele. Criminal Process faced with the Challenges of Scientific and Technological Development, *European Journal of Crime, Criminal Law and Criminal Justice* 2019, vol. 27, pp. 265-289.

[53] See NELLIS Mike, The Electronic Monitoring of Offenders in England and Wales: Recent Developments and Future Prospects, *The British Journal of Criminology,* vol. 31 (2), 1991, pp. 165-185 and more recently NELLIS Mike, Understanding the Electronic Monitoring of Offenders in Europe: Expansion, Regulation and Prospects, Crime, *Law and Social Change*, vol. 62, 2014, pp. 489-510.

[54] See one example of the pre-covid era in online hearings by MENASHE Doron, A Critical Analysis of the Online Court, University of Pennsylvania Journal of International Law, vol. 39 (4), 2018, pp. 921-953.

Perhaps the earliest signs of it have been the use of scientific evidence and the expansion of forensic science leaving a significant mark on the evidentiary rules more than a hundred years ago. The discussion over the reliability of scientific evidence that swept through the US system[55] are just one of many examples of how the rules on admissibility of evidence demand a distinct approach when scientific knowledge that is hard to grasp and control becomes a part of evidence-taking. This is definitely not yet a completed chapter and the cases of wrongful convictions based on pseudoscience or resulting from the lack of proper testing of biological samples are just the tip of the iceberg[56]. The wrongful convictions are also frequently caused by the improper identification. In this volume Janaina Matida and William Weber Cecconello discuss that issue in the context of identification by eyewitness through photographs[57]. Some other contemporary problems of exclusion of scientific expert evidence from the Continental perspective are also discussed in this volume by Juan Sebastian Vera Sanchez[58].

However, the technological development has also already left its mark on the gathering of criminal evidence. For one, the police and other agencies have gained immediate access to various databases from the level of the police car which allows them to verify the identity of a stopped car or a person on the spot[59]. Quicker access to data has facilitated the

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[55] See the landmark cases Frye v. United States, 293 F. 1013 (D.C. Cir. 1923) and Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993). See also critically on the Frye-Daubert standard by HILBERT Jim. The Disappointing History of Science in the Courtroom: Frye, Daubert, and the Ongoing Crisis of "Junk Science" in Criminal Trials. *Oklahoma Law Review,* vol. 71, 2019, pp. 759-821.

[56] See also an interesting piece on the perceptible need for a change of the law of evidence in the common law system faced with the use of forensic science by JACKSON John; ROBERTS Paul. Beyond Common Law Evidence: Reimagining and Reinvigorating, Evidence Law as Forensic Science, op.cit., pp. 787-820.

[57] MATIDA Janaina and CECCONELLO William Weber. Reconhecimento fotográfico e presunção de inocência.

[58] VERA SANCHEZ Juan Sebastian. Exclusión de la prueba pericial científica (de baja calidad epistémica) en fase de admisibilidad en procesos penales de tradición románica-continental.

[59] This is not limited to the most common databases such as for fugitives, suspected criminals, fingerprints, DNA profiling etc. See an analysis on the role

actions of the police and led to more accurate verification of offenders or persons at large. Moreover, the drive toward recording daily activities of criminal justice agencies plays a crucial role in creating convincing evidence. Video recordings are available not only during interrogations conducted at the police station, but body-worn cameras are nowadays even placed onto officers' uniforms providing on-site coverage of their interactions with the public, which makes them a remarkable argument in the courtroom[60]. The most recent novelty in that regard is the use of artificial intelligence as a tool for providing criminal evidence[61]. The use of these new tools brings another risk to the traditional approach toward the administration of justice blurring the boundaries between preventive and traditionally repressive criminal justice[62]. This can be observed for example in the US federal system, which has already widely employed algorithmic risk assessment tools in criminal sentencing processes[63].

Another example of challenges faced by criminal justice systems in the context of admissibility of evidence resulting directly from the development of new technologies is the issue of access obtained by

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of genetic genealogy databases in discovery of a crime by GUERRINI Christi J.; ROBINSON Jill O.; PETERSEN Devan, McGUIRE Amy L. Should police have access to genetic genealogy databases? Capturing the Golden State Killer and other criminals using a controversial new forensic technique, *PLOS Biology*, 2 October 2018 https://doi.org/10.1371/journal.pbio.2006906.

[60] See SOUSA William H., COLDREN James R.; RODRIGUEZ Denise Jr., BRAGA Anthony A. Research on Body Worn Cameras: Meeting the Challenges of Police Operations, Program Implementation, and Randomized Controlled Trial Designs, *Police Quarterly,* vol. 19 (3), 2016, https://doi.org/10.1177/1098611116658595

[61] GLESS Sabine. AI in the Courtroom: A Comparative Analysis of Machine Evidence in Criminal Trials, *Georgetown Journal of International Law* vol. 51, 2020, pp. 195-253.

[62] CAIANELLO Michele. Criminal Process faced with the Challenges of Scientific and Technological Development. *European Journal of Crime, Criminal Law and Criminal Justice*, vol. 27, pp. 265-289, 2019, p. 279.

[63] KEHL Danielle; GUO Priscilla; KESSLER Samuel. Algorithms in the Criminal Justice System: Assessing the Use of Risk Assessments in Sentencing. Responsive Communities Initiative, Berkman Klein Center for Internet & Society, Harvard Law School, July 2017, https://dash.harvard.edu/bitstream/handle/1/33746041/2017-07_responsivecommunities_2.pdf (accessed 25.01.2021).

law enforcement agencies to data stored on electronic carriers, such as computers, cellphones, clouds, etc. This strongly interrelates to the discussion on exclusionary rules but sheds a new perspective on how the evidentiary rules should be drafted in this new context. The traditional rules on admissibility of evidence developed over centuries for the purpose of house searches and personal searches did not foresee the problems that come with the complexity of electronic devices storing gigabytes of highly personal data[64].

One striking illustration of that problem is the admissibility of evidence obtained from cellphones. Cellphones differ distinctly from any other object that may be found on a person. They are constantly accessible, portable, and may be used for multiple purposes, giving a space for social and emotional communication[65]. They are even considered such a pervasive and insistent part of daily life that, as one judge has stated, "the visitor from Mars might conclude they were an important feature of human anatomy."[66] Most importantly, modern smartphones contain highly private data that can only be compared to what is kept at home and certainly not to what is found in someone's pocket or wallet.

Therefore, the key issue in this discussion concerns the limits of interference of criminal justice authorities with data contained on smartphones and whether the police should have similar powers to search such devices as they usually have for searching a person and their belongings at the time of arrest. So far this has been answered ambiguously both on a normative level[67] as well as in the case law[68].

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[64] SACHAROFF Laurent. The Fourth Amendment Inventory as a Check on Digital Searches, *Iowa Law Review* vol. 105, pp. 1643-1699, 2020, p. 1645.

[65] FOWLER Joanna E.N.; Noyes Janet M. From dialing to tapping: University students report on mobile phone use. *Procedia Manufacturing*, vol. 3, pp. 4716-4723, 2015, p. 4717.

[66] Riley v. California, 573 U.S. 373 (2014), at 2484.

[67] The attempts to regulate the issue of cellphone searches provide a variety of resolutions and there is no common ground achieved. See for example the Formobile project devoted to analysis on how the current criminal procedure laws in the EU Member States deal with the topic of mobile forensics https://www.timelex.eu/en/horizon-projects/formobile (accessed 21.01.2021).

[68] See for example Hoge Raad Judgment of 4 April 2017, ECLI:NL:HR:2017:584 available at https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:

Particularly interesting in that regard has been the dialogue that took place in 2014 among North American courts taking different stances on that issue. One position was adopted by the US Supreme Court in a split judgment *Riley v. California*[69]. In a majority opinion the Court confirmed the uniqueness of the cellphone as an object and established that because of that feature the cellphone cannot be searched based on the same grounds as in the case of other objects found on a person[70]. The decision has clearly favored privacy interests with respect to all data contained in portable devices and recognized these interests as more valuable than the effectiveness of criminal investigation. The judgment has made the lives of criminal justice authorities just a bit harder by forcing them to obtain judicial search warrants prior to engaging in searching practices. Interestingly, almost at the same time the issue of cellphone searches was deliberated by the Canadian Supreme Court in *R v. Fearon*[71]. In the split decision the Court came up with exactly the reverse opinion, arguing that the cellphone search falls under the same old common law rule of searches incident to arrest without a warrant. The Court just added some additional safeguards as the cellphone search potentially brings a more significant invasion of privacy than the other similar searches. The additional protection proposed by the court, focused on such technicalities

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HR:2017:584. (The Dutch court has presented the view that that if the search concerned a small amount of certain data stored or available on the electronic data carrier such as cellphone it may be that the search is justified. On the other hand, if the search is so far-reaching that a more or less complete picture is obtained of certain aspects of the personal life of the user of the data carrier or the computerized work, this investigation may be considered as unlawful.) See also a short note on the case in English https://www.liberties.eu/en/stories/dutch-police-can-search-smartphone/11769.

[69] Riley v. California, 573 U.S. 373 (2014).

[70] See comments on this judgment by George DERY III M., MEEHAN Kevin. A New Digital Divide? Considering the Implications of Riley v. California's Warrant Mandate for Cell Phone Searches. *University of Pennsylvania Journal of Law and Social Change* vol. 18 (4), 2015, pp. 311-339 and comparing it with the Italian standard by LASAGNI Giulia, Tackling phone searches in Italy and the United States: Proposals for a technological rethinking of procedural rights and freedoms, *New Journal of European Criminal Law*, vol. 9 (3), 2018, pp. 386-401.

[71] R v. Fearon 2014 SCC 77.

as the taking of notes by the police officers while conducting the search, has been criticized both in concurring opinion and in literature[72].

The concurring perspectives delivered in these judgments, which split even internally, prove that the case of the legality of cellphone searches demands more careful attention, as weighing the value of privacy interests against the law enforcement objectives in the digital era is all but self-evident. This seems to be extending analogically to other cases of technological developments touching on the sphere of evidence-taking which through their novelty create multidimensional challenges to the criminal justice system. One thing however appears to be beyond question: these challenges call for immediate regulation as those who commit crimes make use of new devices and digital technology without any restraints. The states cannot be reluctant in providing legislation regulating such issues and wait for the courts to resolve the problems on a case-by-case basis. But how a balance is struck between the needs of society in successfully investigating crimes in a way that responds to criminals' use of technology without violating the rights of an individual is the question that should be quickly answered. And this most likely cannot be answered in isolation by a single state, as the ease with which digital evidence crosses borders demands unified and collective action.

5. Conclusions

It is undisputed that relevant and reliable evidence should generally be admissible in criminal proceedings. Their admissibility secures accurate fact-finding as a prerequisite for the correct application of substantive criminal law and, as a consequence, proper operation of the criminal justice system in society. At the same time the search for the truth must be limited in order to take into account other important values, among which human rights hold a central place. A matter of dispute is however how the competing interests should be balanced. That results in significant differences in views on the optimum shape of provisions related to admissibility of evidence.

[72] See comments on this judgment by SKOLNIK Terry. Improving the Current Law of Warrantless Cellphone Searches after R v. Fearon, *Revue Juridique Thémis de l'Université de Montréal*, vol. 49, 2015, pp. 825-833.

That divergence is understandable taking into consideration the competing approaches as well as the desired way of verifying admissibility of evidence. The latter, relating to the choice between a trial before professional judges or a jury, is of vital importance. Even though the identified variances are remarkable, the noticeable convergence trends may be identified as well. The drive toward effective international cooperation in criminal matters and the need for the universal protection of human rights are the main reasons forcing the approximation of provisions related to the admissibility of evidence. It seems the traditionally recognized distinction between the common law and civil law models is becoming less important in light of the progressive integration of systems. Certainly, that process is not linear and we should not expect that a common unified standard emerges soon. Yet, its influence on national laws of evidence should not be marginalized, of which the EU cooperation in criminal matters is just one of the most remarkable examples.

The admissibility of evidence, apart from being subjected to divergent and convergent trends, also faces other important challenges. The first of them is the need for the protection of human rights. As in previous decades, the quest for a fair balance between the effective fight against crime and respect for individual rights will be in the center of heated discussion. However, there are two other factors that strongly influence the evidentiary rules, creating an environment where finding the truth becomes more complicated than ever before. The popularity of the disposition of cases out of trial and the impact of technology and science, both interrelated and focused on the efficiency of the criminal justice system, paradoxically make the quest for the truth easier and faster, but at the same time more prone to errors. Moreover, the new technologies allowing evidence gathering have become a vital threat to the right to privacy.

Certainly, there is hope in what we experience. As Caianiello predicts, "the traditional bases of fact-finding at trial can endure even against these [scientific and technological] challenges."[73] He adds that it is possible only as far as lawyers and scholars will be able to approach the new available tools with a sufficient amount of criticism. This seems

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[73] CAIANIELLO Michele. Criminal Process faced with the Challenges of Scientific and Technological Development. op.cit., p. 265.

to be crucial to face the challenges. None of them can be answered in a simple and universal way. Finding solutions necessitates dialogue including various stakeholders and free of the penal populism that has dominated the legal discourse in at least several countries. An important part of that discussion should be devoted to comparative analysis, which allows countries to share and profit from the experience of other legal systems. This issue of *Revista Brasileira de Direito Processual Penal* aims at achieving that goal. And while closing this brief discussion let us give a floor to those who will provide an answer to some of the questions raised toward the modern challenges of admissibility of evidence in criminal procedure.

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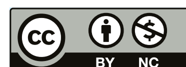

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Mechanisms of elimination of undesired evidence from criminal trial: a comparative approach

Mecanismos de exclusão de provas indesejáveis ao processo penal: um estudo comparado

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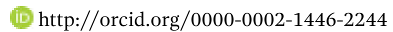

Abstract: This text presents two models of elimination of undesired evidence that operate in common law and continental law states. It analyses the mechanisms of blocking information from becoming evidence in a criminal trial which can be defined as the procedural instruments (solutions) adopted in a given model of criminal trial that allow for assessment and eventual elimination of inadmissible evidence as deemed to be undesired in the process of fact-finding. On the basis of a „model approach" it will be shown how such mechanisms of elimination (or blocking) of undesired evidence function in the United States and England, Germany, France, Poland and Italy. Also the stage of elimination will be analysed, as well as the type of procedure of applying a blockade. It will be explained in what ways the atomistic and holistic assessment of evidence work and what consequences they have. The last part of the text will show how the rationale for elimination of evidence in the form of illegality, unreliability or relevance, may result in various consequences depending on the seriousness of violation of law. These elements of analysis will allow to examine whether the continental and common law models of elimination of undesired evidence are coherent and effective and whether they allow for achieving the assumed goal of eliminating of undesired evidence. In the conclusions it will be shown that the final

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arbiter of admissibility of evidence in both procedural models is a judge and how this solution allows for weighting legally protected interests in every case. The argumentation presented in the article will also lead to an observation that in the continental model of elimination of undesired evidence it cannot be said that there is a full-fledged "mechanism" of blocking information from becoming evidence in a criminal trial.

Keywords: exclusionary rules; comparative criminal procedure; rules of evidence; admissibility of evidence.

Resumo: *Este artigo pretende apresentar dois modelos de exclusão de provas indesejáveis que operam em ordenamentos continentais e de common law. São analisados os mecanismos de bloqueio de informações antes de se tornaram provas no processo penal, os quais podem ser definidos como instrumentos (soluções) adotadas em um determinado modelo de processo penal que permite a verificação e eventual exclusão de provas inadmissíveis pois definidas como indesejáveis à verificação dos fatos. Com base em uma "perspectiva de modelo", será descrito o funcionamento desses mecanismos de exclusão (ou bloqueio) de provas indesejáveis nos Estados Unidos e na Inglaterra, na Alemanha, na França, na Polônia e na Itália. Também serão analisados o estágio da eliminação e o tipo de procedimento para aplicar o bloqueio. Analisar-se-á o modo em que a análise atomística e holística da prova atua e as suas consequências. A última parte do texto irá demonstrar como a existência de distintos motivos para a exclusão da prova na forma de ilegalidade, não fiabilidade e irrelevância, a depender da gravidade da violação da lei, podem resultar em diferentes consequências. Isso permitirá verificar se os modelos continentais ou de common law são coerentes e efetivos e se eles atendem ao objetivo almejado de eliminar provas indesejáveis. Nas conclusões, será demonstrado que o árbitro final sobre admissibilidade da prova em ambos os modelos é o julgador e como isso autoriza a ponderação dos interesses legalmente protegidos em cada caso. Assim, também se observará que no modelo continental de exclusão de provas indesejáveis não se pode afirmar que há um mecanismo integralmente desenvolvido para bloquear informações de se tornarem provas no processo penal.*

Palavras-chave: *regras de exclusão; processo penal comparado; teoria da prova; admissibilidade da prova.*

1. Introduction

In every system of criminal procedure there is evidence that is not desired in the process of fact-finding. In most legal orders, an undisputed obligation is that every court take into consideration certain legally protected values, even at the cost of not finding the truth or letting the perpetrator go free. Because of these protected values – becoming ever more endangered as states become technically capable of deeper intrusions into the sphere of individual privacy – in certain cases fact-finding cannot be considered as an absolute value and must be subjected to certain limitations[2]. In every state, a mechanism of elimination of evidence must be also considered as a necessary systemic reaction to a violation of legal provisions by the state authorities in the process of evidence gathering. It is assumed that a system that remains indifferent to such violations could lead to total arbitrariness of state authorities in this

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[2] The need to take into account these other interests and guarantees of the rights of an individual makes the law of evidence a branch of a hybrid law - at the same time it contains the rules of the methodology of the criminal trial and is constitutes an expression of the moral principles and logic applicable in a given society: it has not only a normative but also an ethical dimension. See e.g.: NIJBOER, Johannes, F. Methods of Investigations and Exclusion of Evidence – a Comparative and Interdisciplinary Perspective. In: Beweisverbote in Ländern der EU und vergleichbaren Rechtsordnungen. HÖPFEL, Frank; HUBER, Barbara (eds.). Freiburg in Breisgau: Max-Planck-Institut, 1999, p. 49; ROBERTS, Paul; ZUCKERMAN, Adrian. Criminal Evidence. Oxford: Oxford University Press, 2012, p. 17; DAMAŠKA, Mirjam. Free Proof and Its Detractors. *The American Journal of Comparative Law*, n. 3(43), 1995, p. 348; HO, Hock Lai. Exclusion of Wrongfully Obtained Evidence: A Comparative Analysis. In: Oxford Handbook of Criminal Process. BROWN, Darryl et al. (eds.). Oxford: Oxford University Press, 2019, p. 833; WEIGEND, Thomas. The Potential to Secure a Fair Trial Through Evidence Exclusion: A German Perspective. In: Do Exclusionary Rules Ensure a Fair Trial?: A Comparative Perspective on Evidentiary Rules, GLESS, Sabine, RICHTER, Thomas (eds.). Basel: Springer, 2019, p. 62. On the role and importance of these values see: TURNER, Jenia I., WEIGEND, Thomas, The Purposes and Functions of Exclusionary Rules: A Comparative Overview. In: Do Exclusionary Rules Ensure a Fair Trial?: A Comparative Perspective on Evidentiary Rules, GLESS, Sabine, RICHTER, Thomas (eds.). Basel: Springer, 2019, p. 255-263, who also come to a conclusion that as to the rationales of the exclusion of evidence no clear divide exists between adversarial and inquisitorial systems, see p. 279.

regard[3]. In consequence, a "blockade of information" must be introduced (in the German literature: *Informationsblockade*"[4]) – or a certain type of "evidentiary barrier"[5], a "hurdle to admissibility"[6] or a "filter". From a dogmatic point of view, such a blockade (barrier) can be perceived as a mechanism that operates in order to prevent "information" becoming "evidence". There are various types of such mechanisms across various states. They either operate in order to withhold information from the eyes of the fact-finder, or to not allow such information to become a basis for fact-finding. Consequently, mechanisms of blocking information from becoming evidence in a criminal trial can be defined as the procedural instruments (solutions) adopted in a given model of criminal trial that allow for assessment and eventual elimination of inadmissible evidence as deemed to be undesired in the process of fact-finding. This text will present the two models of mechanisms of elimination of undesired evidence that operate in common law states and continental law states and show that the exclusion of undesired information is administered differently in these two models of criminal trial.

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[3] See the literature in Poland: JASIŃSKI, Wojciech. Nielegalnie uzyskane dowody w procesie karnym. W poszukiwaniu optymalnego rozwiązania. Warszawa: Wolters Kluwer, 2019, p. 41 and in Germany: ROGALL, Klaus. Grundsatzfragen der Beweisverbote. In: Beweisverbote in Ländern der EU und vergleichbaren Rechtsordnungen. HÖPFEL, Frank, HUBER, Barbara (eds.). Freiburg in Breisgau: Max-Planck-Institut, 1999, p. 119, although the opinions on this topic in the common law states differ: see. e.g. PIZZI William. Trials Without Truth: Why Our System of Criminal Trials Has Become an Expensive Failure and What We Need to Do to Rebuild. New York: NYU Press, 1998, p. 38 who writes "If the exclusionary rule is to protect citizens against police abuse it is a failure".

[4] This terminology is used frequenlty in the German literature, among others by: ROGALL, Klaus. Grundsatzfragen der Beweisverbote, p. 125-126; KLEINKNECHT, Theodor. Die Beweisverbote im Strafprozess. *Neue Juristische Wochenschrift*, n. 19, 1966, p. 1539; KERN, Eduard; ROXIN, Claus. Strafverfahrensrecht: ein Studienbuch. München: Beck, 1987, p. 141; and in the French literature: BENEDICT, Jerome. Le sort des preuves illégales dans le procés pénal. Lausanne: Editions Pro Schola, 1994, p. 49.

[5] See the notion used by DAMAŠKA, Mirjam. Evidentiary barriers to conviction and two models of criminal procedure: a comparative study. *University of Pennsylvania Law Review*, n. 121, 1973, p. 508.

[6] ROBERTS, Paul, ZUCKERMAN, Adrian, Criminal Evidence... op.cit., p. 97.

Across different states there are different barriers and different mechanisms of elimination of evidence – regarding rules of admissibility of evidence, the scope of evidence that should be eliminated, the functioning of such mechanisms, and the consequences of their application. The model of the mechanism of elimination mirrors the different methods of solving conflicts between the values that should be fulfilled by a criminal trial. Every model of admissibility of evidence must function in a different legal environment and in a different legal culture. In consequence, it has broader implications, "which somehow transcend the narrow bounds of the law of evidence and affect the working of the whole machinery of criminal justice, creating what can be perceived as 'the two evidentiary styles'"[7]. Mechanisms adopted for elimination of evidence become one of the determinants of the given model of criminal trial: be it Anglo-Saxon or continental. In both legal traditions a certain "information blockade" exists – although in a different form – that allows for eliminating certain types of evidence from a fact-finder's (either a professional court or a jury) assessment – either before the trial, during the trial or in the process of fact-finding.

In this article a "model approach" will be presented: an attempt will be made to find and analyse the "model schemes" of mechanisms of elimination (or blocking) of undesired evidence in common law and continental law states. Comparative criminal law has adopted a method of conducting comparative research based on the created division into legal systems (models) belonging to the Anglo-Saxon common law tradition (in other words: the legal family[8]) that is a model of a strictly adversarial criminal procedure, and systems belonging to the tradition of continental law (civil law), known also as a mixed or non-adversarial model (by representatives of the first tradition also called the inquisitorial model[9]).

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[7] DAMAŠKA, Mirjam. Evidentiary barriers... op.cit., p. 508. PRADEL, Jean. La preuve en procédure pénale comparée. Rapport general, *Revue International de Droit Penal* 1992, p. 13.

[8] In the normative sense: see GLENN, Patrick, H. Legal Traditions of the World. Oxford: Oxford University Press 2014, p. 366-367.

[9] See: DAMAŠKA, Mirjam. On Structures of Authority and Comparative Criminal Procedure. *Yale Law Journal*, n. 84, 1974-1975, p. 481 FULLER, Lon, L. The Adversary System. In: Talks On American Law. BERMAN, Harold (ed.).

The first group includes the models of English and United States trials, whereas Polish, French and German criminal procedures belong to the second group. The example of Italy cannot be ignored either, as it is presently the best example of a continental model of criminal procedure of increased adversariality. It introduced certain features of the common law model's approach to evidence (and thus became a kind of a "hybrid model"). This model approach has been used by comparativists on an international scale, in order to find, define, precise and analyze (also to label) contrasts between the above-mentioned models of administration of justice[10]. The concept of a "model" may be understood primarily as a "specimen" structure or procedure. Speaking of "legal traditions", authors often refer to "ideal models", or "theoretical models" of criminal trial[11] - as, for the purposes of comparative research, it is important to distinguish between a "normative model" of the criminal process in a given country, and an "ideal model"[12] - in other words a "theoretical model". In the theory of criminal trial, a model is understood as a "set of basic components of a system that allows differentiating it from other systems", a "common denominator"[13]. These components (simplifying) are constituted by specific procedural institutions, solutions used in a

New York: Vintage Books, 1971, p. 43–44; THIBAUT, John, WALKER, Lauren, LIND, E. Allan. Adversary presentation and bias in legal decisionmaking. *Harvard Law Review*. n. 86, 1972–1973, p. 390. In German literature: TRÜG, Gerson. Lösungskonvergenzen trotz Systemdivergenzen im deutschen und US-amerikanischen Strafverfahren. Tübingen: Mohr Siebeck, 2003, p. 26-27.

[10] See: DAMAŠKA, Mirjam. The Faces of Justice and State Authority. New Haven–London: Yale University Press, 1986, p. 3. Also: LANGER, Maximo. From Legal Transplants to Legal Translations: The Globalization of Plea Bargaining and the Americanization Thesis in Criminal Procedure', *Harvard International Law Journal*. n. 1(45), 2004, p. 7–8.

[11] Discussed in: WEBER, Max. On Law in Economy and Society. Harvard: Harvard University Press, 1954, and later by: LANGER, Maximo. From Legal..., *op.cit*., p. 7-8.

[12] As in: ROBERTS, Paul. Faces of Justice Adrift? Damaška's Comparative Method and the Future of Common Law Evidence. In: Crime, Procedure and Evidence in A Comparative and International Context – Essays in Honour of Professor Mirjan Damaška. JACKSON, John, LANGER, Maximo (eds.). Oxford: Hart Publishing, 2008.

[13] LANGER, Maximo. From Legal..., *op.cit*., p. 7-8.

criminal procedure, principles of criminal trial or functions performed by one of the actors in trial.

The model approach will allow for a generalised overview and – as with all model constructs – for finding common ground for discussions about comparative criminal procedure. Therefore, the research cannot go deeply into specific regulations functioning in the six analysed states. It must restrict itself to finding the general mechanisms governing the process of elimination of unwanted evidence. The first example of such an attempt to generalise the rules of the mechanism of elimination is the very title of this text, which speaks of "undesired evidence"; this concept is meant to signify all the potential evidence that, for many reasons, should not become evidence in a procedural meaning: both because of illegalities in the procedure of gathering and because of lack of credibility or lack of relevance of the evidence. When formulated in a more general way, as "undesired evidence" it provides a common platform to discuss the common features of grounds for exclusion of evidence in various legal orders.

Based on these assumptions in the text below, four aspects of different procedures aiming at elimination of such unwanted material will be analysed. These aspects function as components of every given model of elimination of evidence. They were selected on the basis of the fact that – despite many differences in the detailed form of the procedures in various states – these elements can be found to function in the same aim in every one of them. It is the aim – from the functional perspective – which binds sometimes different procedures together and allows for a coherent analysis from a comparative point of view.

Firstly, different types of mechanisms of elimination will be presented: featured not on the basis of a name of an institution, or the reason of application, but on the basis of their aim and the function they play in a criminal trial. Four mechanisms may be differentiated: exclusionary rules, admissibility rules[14], nullity of procedural actions, and general fairness of trial. These mechanisms may function separately or jointly in one model of criminal trial.

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[14] And these two mechanisms should not be mixed as it was mentioned by DAMAŠKA, Mirjam. Evidentiary barriers... op.cit., p. 515.

Secondly, the stage of elimination will be analysed: whether the mechanisms of elimination function in the moment of acquiring and gathering information that may become evidence (blocking the information at the input stage), the stage of processing evidence (eliminating evidence while or after presentation at trial when the fact-finder makes contact with them, at the output stage) or the stage of fact-finding (eliminating evidence from the process of fact-finding)[15]. At every stage of a criminal trial, certain mistakes, defects of evidence, may appear that lead to elimination of evidence.

Thirdly, the procedure of applying a blockade will be presented, during which a state authority may take a decision: it may be a pre-trial hearing, a *voir dire*, or a motion to supress evidence procedure, a preliminary stage of trial before the evidentiary proceedings begins, as in Italy - which all allow for an atomistic assessment of evidence. Even a decision taken by a court during evidentiary proceedings by French, German or Polish judges constitutes a mechanism of atomistic elimination of evidence – as it plays the same role as the above mentioned mechanisms. This procedure may be also differently initiated: either on a motion of a party or *ex officio*. The procedure of elimination of evidence from the process of fact-finding may also happen in a holistic manner after the closure of evidentiary proceedings.

Fourthly, the consequences of application of a mechanism of elimination of evidence may differ: usually in most legal orders the reason for elimination may be illegality, unreliability and relevance of evidence. The meaning every legal system gives to these grounds of elimination is different. Also the consequences differ not only depending on the type of deficiency of evidence but also depending on the seriousness of violation of law – and here the mechanism of "balancing of legal interests" will be described.

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[15] The same structure of analysis of illegaly obtained evidence is marked in: HO, Hock Lai. Exclusion of Wrongfully... op.cit., p. 822 and: AMELUNG, Knut. Zasady rządzące zakazami wykorzystania dowodów. In: Współczesne problemy procesu karnego i wymiaru sprawiedliwości. Księga ku czci Profesora Kazimierza Marszała. HOFMAŃSKI, Piotr; ZGRYZEK, Kazimierz (eds.). Katowice: Wydawnictwo Uniwersytetu Śląskiego, 2003, p. 17.

The purpose of advancing these models will be to analyze how the above-mentioned elements of the researched models of elimination of evidence operate. They must be evaluated in the light of the question of whether each model is coherent and effective, and whether it allows for achieving the stated goal of elimination of undesired evidence. The analysis will make it possible to find out whether this mechanism of blocking information from becoming evidence in a criminal trial functions properly, and to identify any deficiencies in the models researched. The research will also go into evaluation of the consequences of elimination of evidence that will show why the result of determining the inadmissibility of a piece of evidence should be practical elimination of such documents from the case file. It is also important to compare the connections of the adopted model of elimination of evidence with the principles of criminal trial. The most important conclusion is that a criminal trial can be considered to be adversarial only if the rules of admissibility of evidence operate on equal terms for both parties, and when issues of admissibility are adjudicated in a clear and equal procedure.

2. Mechanisms of elimination of undesired evidence

In order to eliminate undesired evidence from criminal trial four different mechanisms can be used: rules of exclusion (which forbid gathering certain evidence or in a certain way); admissibility rules (which dictate what types of evidence can be admitted at trial), nullity of procedural actions (which treats evidence as if it did not exist, as the consequence of violations of the rules in procedural actions taken by the state authorities), and finally the evaluation of the general fairness of a trial by a judge, performed through free assessment. In most legal systems these mechanisms function jointly – although sometimes at different stages of trial. However, their meaning and the method of their application differ between the common law states and continental states. In the Anglo-Saxon model, a clear scheme exists that allows for elimination of inadmissible evidence at successive stages of assessment, and is based on statutory rules. In the continental model a judge acts according to the “free proof” theory and is free to decide on the evidence that will be admissible - as there are no strict rules of admissibility. In

consequence it can be observed that in the latter model the decision as to the admissibility of evidence is "shifted" to the stage of decision of a judge.

The Anglo-Saxon Approach

In the Anglo-Saxon states, the scheme of admissibility rules is based on four foundations: the list of admissible evidence, rules of exclusion and rules of admissibility, and the final stage of assessment of general fairness of the proceedings. "The law of admissibility" is defined as the law that regulates whether a particular piece of evidence should be received – or "admitted" – into the trial[16]. The aim of these rules and the function they fulfil is to determine whether to allow the fact-finder to be informed about a piece of evidence and to give them the opportunity of taking it into account in arriving at their verdict. Deciding on admissibility of evidence, the judge "regulates the informational resources available to the fact-finder"[17].

In this model of evidentiary law, the assessment of admissibility of evidence takes place at several stages (which can be described as "hurdles to admissibility", corresponding to a series of questions that a trial judge must ask while assessing evidence[18]): first in a positive and later in a negative aspect and then again in positive. The positive aspect means that evidence is only admissible in a certain form according to the rules provided by a legal act. This assessment must also relate to the question of whether the evidence is relevant – irrelevant evidence is conclusively inadmissible and does not have to undergo the next stages of assessment. After this assessment, the character of the evidence may result in an observation that evidence falls within rules of exclusion (such as client privilege or state secrets), which means an assessment in a negative aspect. In the case of rules of exclusion, the exclusion should be automatic[19]. As to other

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[16] ROBERTS, Paul, ZUCKERMAN, Adrian. Criminal Evidence .... op.cit., p. 96.

[17] ROBERTS, Paul, ZUCKERMAN, Adrian. Criminal Evidence ... op.cit., p. 97.

[18] ROBERTS, Paul, ZUCKERMAN, Adrian. Criminal Evidence... op.cit., p. 97; DAMAŠKA, Mirjam. Evidentiary barriers ... op.cit., p. 508.

[19] CHOO, Andrew. England and Wales: Fair Trial Analysis and the Presumed Admissibility of Physical Evidence. In: Exclusionary Rules in Comparative

evidence, not falling into one of the above categories, it is presumptively admissible, but may be excluded through the exercise of judicial discretion to exclude prosecution evidence in order to ensure a "fair trial". At this stage, an assessment of admissibility may take place also in the form of applying "soft" standards.

The best example of this mechanism of assessment of evidence functions in the English legal order, where on the basis of s. 78 PACE 1984, if it appears to the court that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence (on which the prosecution proposes to rely) would have such an adverse effect on the fairness of the proceedings, the court ought not to admit it. At the final stage the inclusionary exceptions should be analysed (again, an assessment in a positive aspect) – those that can be used for admitting hearsay (in the English legal order that is s. 114-118 CJA). Inclusionary rules can rescue evidence from presumptive inadmissibility. As a consequence of numerous exceptions, evidence rendered presumptively inadmissible by the application of an exclusionary rule at the last stage of assessment can turn out to be admissible thanks to the "protective wing of an inclusionary rule"[20]. The final arbiter of admissibility is a judge, using free evaluation – however, based on jurisprudence[21]. This discretion is limited by the legal provisions of the CJA – s. 126 states that "in criminal proceedings the court may refuse to admit a statement as evidence of a matter stated if (a) the statement was made otherwise than in oral evidence in the proceedings, and (b) the court is satisfied that the case for excluding the statement, taking account of the danger that to admit it would result in undue waste of time,

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Law. THAMAN, Stephen (ed.). Dordrecht - Heidelberg - New York – London: Springer, 2013, p. 331, who counts that there are, in essence, three automatic exclusionary rules: evidence obtained by torture; the admission in evidence of communications intercepted illegally; a confession made by an accused person that was obtained by oppression, or by words or actions conducive to unreliability.

[20] ROBERTS, Paul, ZUCKERMAN, Adrian. Criminal Evidence ... op.cit., p. 98.

[21] See e.g.: R v. Jeffries and Chalkley (1998) 2 Cr App R 79; y R v. Latif (Khalid), [1996] WLR 104; Attorney-General Reference (No. 3 of 2000) 1 WLR 2060, R v. Loosely, [2001] UKHL 53; R v. Smurthwaite (1994) 98 Cr App R 437; R v. List (David), [1966] 1 WLR 9;

substantially outweighs the case for admitting it, taking account of the value of the evidence". This section can be seen both as a rule limiting the inclusionary discretion and as an exclusionary rule. Only after the three-tier evaluation does information become evidence. In the United States a similar formula applies on the federal level as it results from rules 403-415 of the Federal Rules of Evidence[22].

The Continental Approach

The continental model of admissibility of evidence is much simpler: there is no positive list of evidence: the free proof rule reigns[23]. However, the mechanism of elimination of evidence also takes a mixed form: both rules of exclusion and admissibility rules. Rules of exclusion are prohibitions of all types that limit the power to gather or use evidence[24]. In this case the source of these rules is a legal act – the legal act also decides about the ban on gathering/using such evidence. However, this is not the case for all of the rules of exclusion – the legal consequences of only specific parts of rules of exclusion are decided by the legal act. As to the remaining part, the rules of judicial freedom of decision apply – characteristic of the second stage of assessment.

The second stage of assessment regards evaluation of the evidence in the light of the rules of admissibility. Generally in continental states these rules are not clearly described. The consequences of deficiencies of evidence are not provided for by a legal act. The final decision is left to the free assessment of a judge. The judge can act on the basis of a conviction that a certain piece of evidence is "inadmissible". This decision finds its grounds in the continental codes of criminal procedure (in Poland it is art. 170 § 1 of the code of criminal procedure - k.p.k., and

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22 As amended December 1, 2020, see: https://www.law.cornell.edu/rules/fre (access 7.12.2020).

23 DAMAŠKA, Mirjam. Free Proof ... op.cit., p. 347-348.

24 SKORUPKA Jerzy. Eliminowanie z procesu karnego dowodów uzyskanych w sposób sprzeczny z prawem. In: Dowody. Vol. VIII(2), System Prawa Karnego Procesowego. SKORUPKA, Jerzy (ed.). Warszawa: Wolter Kluwer 2019, p. 2767.

in Germany § 244(1) StPO). These provisions both stipulate that it is possible to overrule an evidentiary motion of a party when such evidence is "inadmissible" (*niedopuszczalny*, *unzulässig*) – and the interpterion of this notion is left to a casuistic decision of a judge. Also rules of general character that forbid using certain types of information constitute an equal source of inadmissibility: rules of criminal procedure (such as the fair trial principle), the Constitution or the ECHR.

In consequence, there is no possibility to formulate certain and clear rules of admissibility that would be known in advance. Thus, the decision as to the admissibility of evidence is "shifted" to the stage of decision of a judge. It is the judge who decides on the basis of assessment of the potential value for fact-finding and the harm done to the rights of the accused as well as principles of a fair trial[25]. It may be noticed that in this way the courts – above all the Supreme Courts - go beyond the "normal" continental role – "interpretative" and "commentatory" – and enter into the domain of law-making, providing for a model reaction on undesired evidence. The continental judge not only decides about the admission of all the evidence (both applied for by the parties and *ex officio*) but later decides about the value of this evidence during the fact-finding stage.

After these two stages of assessment of the evidence, the final stage is the holistic evaluation of the totality of evidence presented (or revealed) in the case as to credibility, relevance and meaning for the case. It is characteristic of the continental model that these three stages of evaluation of evidence can take place both during atomistic, *a priori* evaluation, and during the holistic stage of evaluation. At the latter stage, this model rejects formal rules of evaluation of evidence: both as to the credibility of evidence and to its relevance. On the continent it is believed that it is not possible to decide *a priori*, on the level of a legal act, about the relevance and credibility of evidence[26]. As a professional, the fact-finder does not have to be protected by numerous rules of admissibility

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[25] On this rationale as a ground for exclusion see: HO, Hock Lai. The Fair Trial Rationale for ExcludingWrongfully Obtained Evidence. In: Do Exclusionary Rules Ensure a Fair Trial?: A Comparative Perspective on Evidentiary Rules, GLESS, Sabine; RICHTER, Thomas (eds.). Basel: Springer 2019, p. 288.

[26] DAMAŠKA, Mirjam. Evidence Law Adrift, Yale: Yale University Press, 1997, p. 20, DAMAŠKA, Mirjam. Evidentiary barriers ... op.cit., p. 515.

of evidence as they can professionally assess the relevance and credibility and the weight of the evidence. From the continental point of view the alternative would signify shifting the "decision-making centre" to the level of a legal act from the level of the free assessment of a judge[27].

The theory of free proof in this model is bound to the overwhelming importance of free evaluation of evidence – the emphasis in the procedure of evaluation is placed on the "ordinary process of cognition" of judges, who are supposed to arrive at "an intime conviction" about guilt[28]. In the Anglo-Saxon model evidence is declared by the legal provision to be unreliable because of the way it was obtained, and is considered to be inadmissible at the first positive stage of assessment of admissibility. Thus, the stage of credibility assessment differs between the two models: in the Anglo-Saxon model it is an *a priori* assessment, in the continental model - *a posteriori* assessment[29]. In the continental model, evidence that lacks credibility will most often be presented and subjected to a holistic analysis, although this is not a rule: it may also be rejected *a prori* on the basis of statutory premises as "inadmissible".

When analysing the system of elimination of undesired evidence in continental states one cannot forget about the mechanism of "nullity" of a procedural legal action or "evidentiary nullity". This mechanism

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27 STEINBORN, Sławomir. Aksjologiczne uwarunkowania ograniczeń w dochodzeniu do prawdy materialnej w procesie karnym. In: Pojęcie, miejsce i znaczenie prawdy materialnej w polskim procesie karnym: materiały Wrocławskiego Seminarium karnoprocesowego. SKORUPKA, Jerzy; KREMENS, Karolina (eds.). Wrocław 2013, p. 98-107.

28 DAMAŠKA, Mirjam. Free Proof and Its Detractors ... op.cit., p. 348.

29 WEIGEND, Thomas. Germany. In: Toward a Prosecution for the European Union. Vol I. LIGETI, Katalin (ed.), Oxford: Hart Publishing, 2013, p. 296-297; BILLIS, Emmanouil. Die Rolle des Richters im adversatorischen und im inquisitorischen Beweisverfahren. Berlin: Duncker & Humblot, 2015, p. 64; ROGALL, Klaus. Beweisverbote im System des deutschen und des amerikanischen Strafverfahrens-rechts. In: Zur Theorie und Systematik des Strafprozessrechts: Symposium zu Ehren von Hans-Joachim Rudolphi. WOLTER, Jürgen (ed.). Berlin: Luchterhand, 1995, p. 113-160; GRÜNWALD, Gerald. Das Beweisrecht der Strafprozeßordnung, Baden-Baden: Nomos,, p. 143; GLESS, Sabine. Das Verhältnis von Beweiserhebungs-und Beweisverwertungsverboten und das Prinzip »Iocus regit actum. In: Festschrift für Gerald Grünwald, SAMSON, Erich, DENCKER, Friedrich, FRISCH, Peter, FRISTER, Helmut, REIß, Wolfram (eds.). Baden-Baden: Nomos, 1999, p. 197-198.

functions in France and Italy. There is a special procedure that allows for nullification of actions taken by state authorities, and all the consequences of such. As a result of such a decision, evidence must be considered non-existent – *ex tunc* (by textual nullities) or may be pronounced null and void, where a violation of formalities has had the effect of damaging the interests of the party concerned (by substantive nullities)[30]. A nullity is a defect in the act, hypothetically, where a legitimate power to gather evidence was exercised in a way that did not conform to the law – and thus should be distinguished from "non-usability of evidence", which refers to prohibited evidence[31]. It is also a mechanism of elimination of evidence as well – but not in the result of evaluation of substantive value and meaning of evidence but only formal premises of executing a legal action by state authorities.

From the point of view of the Anglo-Saxon literature, this model of management of evidence is chaotic and unpredictable. However, from the continental point of view, this perspective is mistaken. Anglo-Saxon lawyers focus on courtroom rules and consider the rules of admissibility only from this perspective. Therefore, they often omit the numerous evidentiary rules that apply at the stage of investigation. This is the main forum for application of detailed evidentiary law in the continental model of criminal procedure – as writes J. Ross[32]. Evidentiary rules tend to be activated mostly at the stage of gathering evidence (before acquiring evidence), not just at the stage of presentation. The lack of admissibility

[30] PRADEL, Jean. Procedural Nullities and Exclusion,. In: Exclusionary Rules in Comparative Law. THAMAN, Stephen (ed.). Dordrecht - Heidelberg - New York – London: Springer, 2013, p. 148. In the Anglo-Saxon literature this method of reaction is considered to be „older" than „modern" exclusionary rules. See: THAMAN, Stephen. Balancing Truth Against Human Rights: A Theory of Modern Exclusionary Rules. In: Exclusionary Rules in Comparative Law. THAMAN Stephen (ed.). Dordrecht - Heidelberg - New York – London: Springer, 2013, p. 410, who explains how "nullities", in the abstract, differ from modern exclusionary rules.

[31] ILLUMINATI, Giulio. Italy: Statutory Nullities and Non-usability., In: Exclusionary Rules in Comparative Law. THAMAN, Stephen (ed.). Dordrecht Heidelberg New York London: Springer, 2013, p. 244-245.

[32] ROSS, Jacqueline. Do Rules of Evidence Apply (Only) in the Courtroom? Deceptive Interrogation in the United States and Germany. *Oxford Journal of Legal Studies*, n. 3(28), 2008), p. 444.

rules applicable at trial does not mean that there are no rules determining the desired shape of information in order to become evidence. It only means that there are two possible ways of acquiring the desired form of evidence: either at the stage of gathering or at the stage of presentation. In the first model, only information gathered and preserved in a specific form may be presented during trial. Investigative rules function as evidentiary rules to the extent that they filter and shape the information that reaches the trier of fact. Exactly like Anglo-Saxon rules of evidence, continental investigative rules transmute raw data into evidence, determining which information reaches the fact-finder, and the manner in which it is framed. In consequence, as J. Ross argues: this difference leads to a conclusion that the rules (specifically interrogation rules) that operate at such an early stage of procedure, are better seen as norms designed to protect the accused from the police – whereas the Anglo-Saxon rules have a primary goal of keeping certain facts from the fact-finder. "This makes evidentiary rules difficult to evade"[33]. Nonetheless, it has to be stressed that this rule only applies to the evidence gathered by the accusation in the preparatory proceedings – and does not operate at trial, when parties present their evidentiary motions that are to be assessed by the judge during trial.

3. The stage of elimination of undesired evidence

It is important to determine at what stage the decision as to the elimination of evidence is taken. One can speak of "blocking information" from becoming "evidence" when two stages are considered: gathering of evidence and presentation in trial (then information does not become evidence). However, once evidence is included in the preparatory proceedings file (in the continental model) or presented at trial (in both models) it is not the notion of "blocking of information" that should be used but "disqualification". In the last case, the fact-finder has knowledge of the evidence, but cannot use it in the fact-finding process. Elimination of evidence can thus take both the form of blocking of information and

[33] ROSS, Jacqueline. Do Rules ... op.cit., p. 472.

its disqualification. In the doctrine of comparative criminal procedure it has been established that that the Anglo-Saxon courts base their decisions mainly on the "atomistic", prior, evaluation of evidence, whereas the continental judges evaluate evidence in a holistic, total, manner, after termination of evidentiary proceedings. However, it will be shown below, that this conviction is not entirely precise.

The Anglo-Saxon Approach

In the Anglo-Saxon model, the scheme of elimination of evidence is clear: there is no possibility to consider the notion of "evidence" before the trial stage, as there is no formal investigation stage. Therefore, this model more often and usually results in "blocking of information". It is only after issuing an indictment that the problem of "forging" information ("data", "information about evidence") into "evidence" appears in the procedural meaning[34]. Such types of blocking of evidence rely on *a priori* evaluation of admissibility of evidence. It has been established in the doctrine of comparative criminal procedure that the Anglo-Saxon courts are based mainly on the "atomistic" evaluation of evidence[35]. Atomistic assessment signifies evaluation of every piece of evidence separately: according to rules of exclusion, admissibility rules, credibility, relevance and legality. In consequence, only admissible evidence can be presented at trial, and no information can reach the eyes of the fact-finder if it has not become evidence in the procedural sense[36]. In this model, the inadmissible evidence remains "frozen" before trial and does not reach the eyes of the fact-finder. This type of blockade eliminates the danger of "contamination" of the fact-finder's mind with information that should not be included in the evidentiary material. In this model the atomistic evaluation of evidence comes into play on two stages of criminal proceedings: before trial during

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[34] VAN CAENEGEM, William. New trends in illegal evidence in criminal procedure: general report – common law, Paper presented at XIII World Congress of Procedural law, Rio de Janeiro, Brazil. https://research.bond.edu.au/en/publications/new-trends-in-illegal-evidence-in-criminal-procedure-general-repo (access: 18.11.2020).

[35] DAMAŠKA, Mirjam. Evidentiary barriers ... op.cit., p. 519-520.

[36] DAMAŠKA, Mirjam. Evidentiary barriers ... op.cit., p. 519-520.

various types of pre-trial hearings and during trial in the form of a ruling over an objection of the opposite party. In the latter procedure it may relate to an entire piece of evidence (a certain witness) or a part of this evidence (a certain question to a witness, e.g. during cross-examination).

However, it is not possible to claim that in the Anglo-Saxon model of criminal procedure, only an atomistic assessment of evidence is conducted. The fact-finder after presentation of all evidence must proceed with its holistic evaluation. It is not an assessment of the admissibility of evidence, but of value and relevance for the case, as well as credibility. It must also take into consideration the summary by the presiding judge, where s/he informs the jury about the potential problems with the credibility of evidence (as in the case of doubtful confessions). Nonetheless, the holistic assessment is not part of the mechanism of elimination of evidence, but of its evaluation.

The Continental Approach

At the same time, the continental states are considered to exercise only holistic assessment of evidence (*a posteriori*)[37]. According to this concept the totality of evidence undergoes a total assessment after finalization of evidentiary proceedings[38]. This method of assessment of admissibility of evidence has the result that the blockade of information works only at the stage of fact-finding. It is more "disqualification" of evidence than "blocking", as it takes place in the process of fact-finding. Although when the fact-finder disposes of certain information they decide to "forget about" their influence on the findings – it is "the law's demand that evidence be disregarded"[39]. However, this simplified position

[37] DAMAŠKA, Mirjam. Free Proof ... op.cit.., p. 349 and in the Polish literature: JASIŃSKI, Wojciech. Nielegalnie ... op.cit., p. 74.

[38] DAMAŠKA, Mirjam. Free Proof ... op.cit., p. 349; TWINNING, William. Theories of Evidence: Bentham and Wigmore. (Jurists: Profiles in Legal Theory). London: Stanford University Press 1985, p. 183-185.

[39] DAMAŠKA, Mirjam. Free Proof ... op.cit., p. 350, who argues that on this stage of fact-finding "the implementation of exclusionary rules is psychologically difficult and easily acquire an aura of unreality".

cannot be supported, as it does not refer to two relevant aspects of the continental evidentiary law.

Firstly, inadmissibility of evidence can stem not only from the way of gathering of this evidence, which can be perceived before trial, but also from the way of using it in trial (e.g. if a witness refused to testify, thus his/her earlier testimony cannot be considered to constitute evidence). In this situation it is sometimes impossible to predict that certain evidence may become illegal as a result of their use in trial. Evidence that is legal in preparatory proceedings can become illegal at trial – as the "defectiveness" may arise at trial.

This situation is explained in the German literature: a rule of exclusion (*Beweisverbote*) is either a rule excluding gathering evidence (*Beweiserhebungsverbote*) or a rule excluding the use of evidence (*Beweisverwertungsverbote*)[40]. Both types of rules play the same role: they "block" the use of information by the judge ("*Informationsblockade*") in the process of fact-finding (§ 261 StPO). However, there is no automatic, legally established, reaction to either type of "defectiveness". The StPO does not provide for an information, what the consequences of using such evidence are[41]. These two types of rules of admissibility are not necessarily bound to each other. A rule excluding the use of evidence does not always stem from, nor is it always a derivative of a rule excluding gathering evidence. Usually it is so but there are many situations where a rule excluding the use of evidence is of an independent character[42]. Additionally, besides these two types of rules of admissibility, there may be also rules forbidding the use of evidence on a third stage: the rule excluding the possibility to conduct fact-finding on the basis of certain evidence – in the case of the continental model it would be often a "soft" prohibition, e.g. as in the case of rule forbidding fact-finding on the basis of incredible evidence[43].

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[40] KLEINKNECHT, Theodor. Die Beweisverbote im Strafprozess. *Neue Juristische Wochenschrift*, n. 19, 1966, p. 1539; KERN, Eduard; ROXIN, Claus. Strafverfahrensrecht: ein Studienbuch. München: Beck, 1987, p. 141.

[41] BENEDICT Jerome. Le sort des preuves ...op.cit., p. 51.

[42] ROGALL, Klaus. Grundsatzfragen der Beweisverbote.... op.cit., p. 126.

[43] KWIATKOWSKI, Zbigniew. Model zakazów dowodowych *de lege lata* w polskim procesie karnym. In: Nowe spojrzenie na model zakazów dowodowych

In the French doctrine the notion of “legal evidence” (*preuves legales*) is distinguished from “legality of evidence” (*legalité des preuves*). Whereas the first notion relates to evidence which is not in conformity with the rules established in the legal act, the second relates to the way of administering of the evidence (*l’interdictions d’utilisation*)[44]. In the second case, legality should be connected with the way of presentation the evidence in a courtroom (*l’administration de preuves*). In the hybrid model of criminal trial (continental with increased adversariality) in Italy “non-usability” can be understood as a prohibition on admitting evidence (*a priori*) or a prohibition on taking it into account in the process of fact-finding (*a posteriori*). As it is admitted: “Inadmissibility of evidence and a prohibition on evaluating it are two sides of the same coin, in the sense that if evidence cannot be admitted, neither may it be evaluated and, vice versa, if it may not be used for the decision, it should not be admitted”[45].

Secondly, the atomistic evaluation of evidence takes place at trial when the presiding judge makes a decision on every single piece of evidence before its presentation, ruling on its admissibility according to the codified premises, though very general ones. In consequence, there is a barrier between “evidence” in preparatory proceeding and in trial. Even if evidence is included in the case file, the decision of a judge is needed in order to include it into the caseload. A court is not bound by the assessment conducted by an investigative organ: even if certain information was considered to be evidence in preparatory proceedings, the court is not exempted from its independent assessment[46]. It is only the decision of the judge that allows for its “metamorphosis”. However, although this scheme seems to be clear, it is characteristic that the notion

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w procesie karnym. SKORUPKA, Jerzy (ed.). Warszawa 2014, p. 61.

[44] BENEDICT, Jerome. Le sort des preuves ... op.cit., p. 20; GIUDICELLI-DELAGE, Geneviève. Les transformations de l’administration de la preuve pénale. Perspectives comparées : Allemagne, Belgique, Canada, Espagne, Etats-Unis, France, Italie, Portugal, Royaume-Uni. *Archives de politique criminelle*, n. 26(1), 2004, p. 72.

[45] ILLUMINATI, Guilio. Italy: Statutory Nullities, p. 240.

[46] WILIŃSKI, Paweł. Konstytucyjny standard legalności dowodu w procesie karnym In: Proces karny w dobie przemian. Zagadnienia ogólne. STEINBORN, Sławomir., WOŹNIEWSKI, Krzysztof (eds.). Gdańsk: Wydawnictwo UG, 2018, p. 310.

of "evidence" is often used in an "atechnical" manner in the continental literature: signifying not only evidence allowed by the judge in trial but also a source of information, the result of presenting evidence – and is also applicable during the investigative phase[47].

Atomistic assessment of evidence is conducted on the basis of premises that allow the court to reject the evidentiary motion (art. 170 § 1 k.p.k. or § 244 ust. 3 StPO). In the continental states for the evidentiary law of key importance is the notion of an "evidentiary motion" (*Beweisantrag*), by which is meant a demand on behalf of a party to the proceedings, directed to the court to allow for presentation of the evidence (see: art. 167 k.p.k., § 219(1) StPO, art. 444 French c.p.p.). In this model of evidentiary proceedings it is the court that admits evidence. The role of a party in the perspective of presentation of evidence is a role of a "petitioner", an "informant" who draws the attention of the court to the possible evidence that could be relevant in the case. This power is accompanied by a "twin power" to admit evidence *ex officio*, giving to the judge the power of evidentiary initiative. It is the decision of the court that transforms "information" into "evidence" for the purpose of a trial. This power makes it a dominant organ that controls the totality of evidentiary proceedings. The last element of this model is lack of procedure in which it would be possible to control the court's power as there is no appeal procedure for this decision. A decision not to admit evidence can be usually appealed only during an appeal procedure. Also a French judge must assess evidentiary motions before trial or during trial (art. 444 c.p.p., art. 6 ECHR[48]), based on either on prohibitions on the use of evidence scattered throughout the code of criminal procedure (e.g. art. 432 c.p.p. prohibiting the use as evidence correspondence between a lawyer and his/her client, or art. 706-62 c.p.p., prohibiting ruling basing solely on the anonymous witness' testimonies), or on the basis of rules interpreted from the general procedural principles, which are considered: legalism, loyalty, proportionality and dignity[49]. In this model of elimination of evidence, the decision is taken by the same authority

[47] ILLUMINATI, Giulio. Italy: Statutory Nullities ... op.cit., p. 239.

[48] PRADEL, Jean. Procédure pénale, Paris: Cujas, 2014, p. 774.

[49] PRADEL, Jean. Procédure pénale ... op.cit., p. 354-357.

which decides on the facts of the case (even in the case of a jury trial in Italy and France, as the jury is then unified with the professional court) and the fact-finder is (at least partly) a professional.

In consequence, the continental model uses a double mechanism of elimination of evidence: before admitting evidence to be presented in the trial, the presiding judge *a priori* assesses the evidence is "admissible" and during the fact-finding process, when the judge decides about the facts of the case. There are no "positive" rules that would describe what premises should be fulfilled in order to admit a certain piece of evidence. The judge can apply all the elements of assessment: legality, relevance to the case, actual feasibility of conducting – and also the rules of a fair trial. Whereas the Anglo-Saxon model introduces positive premises ("evidence should be relevant and credible"), the continental law disposes of "negative" premises ("evidentiary motion will be rejected if it is irrelevant or inadmissible"). Both constructs assume that the potential sources of information are assessed *a priori,* in an atomistic model.

On the other hand, if some evidence has already been introduced at the continental trial, it is re-assessed in a holistic manner after the trial (by the same person or persons), i.e. in the perspective of its importance in the light of all the evidence presented in the case. This is also the stage where the credibility of the evidence is most often assessed and, again, its significance for the case, if the initial control did not lead the court to the conclusion that the evidence should be inadmissible. After the evidence has been introduced in trial, judges have to decide whether they can base their decision on the evidence or they will try to "forget" about it and not base a decision on it. If the evidence has already been used or conducted, then at the *a posteriori* evaluation stage there can be no question of a blockade on use. At most it can be a disqualification of such evidence in the process of fact-finding. In the latter situation, the judge has to "erase" his/her knowledge gained from excluded evidence – obtained by reading in case files exhibits or by observing the presentation of conducted evidence in trial. This leads to a dilemma as to whether s/he will be able to do it effectively. If not, the elimination of the evidence is only formal, not real[50].

[50] GLESS, Sabine. Germany: Balancing Truth Against Protected Constitutional Interests. In: Exclusionary Rules in Comparative Law. THAMAN, Stephen

From the normative point of view this model is clear. However, the practical application of these solutions raises many questions – especially in regards to the evidence presented by the prosecutor in the case file. The decision about including certain pieces of evidence into evidentiary material is taken after a judge gets acquainted with them reading the case file. In consequence, a continental judge enters a courtroom equipped in the knowledge of all the evidence gathered so far in the case at the stage of investigation (in the continental states known as preparatory proceedings)[51]. Thus, the method of dealing with evidence is necessarily connected with the existence of a *dossier* of a criminal case. The judge decides about admissibility of evidence while often having prior knowledge of its content. Moreover, if the evidence is included in the case file, the judge can order that that documents in case file are considered to be "disclosed" at trial. This decision, expressed in the minutes of the trial includes the "disclosed" evidence in the frames of evidentiary material. Such a legal construct is absent in Anglo-Saxon trials.

4. Procedure of assessment of admissibility of evidence

In every legal order a mechanism of elimination of evidence should take the form of a certain procedure that will construct a procedural forum of assessment of admissibility. In the Anglo-Saxon states the admissibility of evidence is decided during a special type of an adversarial procedure, by a professional judge in the absence of the jury. This model allows for both a thorough analysis of admissibility of evidence and for keeping such doubtful evidence from the eyes of the adjudicator. Contrary to this, in the continental states there is no special procedure and forum for such an assessment, as the admissibility of evidence is evaluated by a professional judge usually at trial or at best during a *in camera* hearing.

(ed.). Dordrecht - Heidelberg - New York – London: Springer 2013, p. 118, who observes that „This dilemma brings about a strong risk of diluting the impact of exclusionary rules".

[51] This is usually not true in the Italian criminal proceedings as it does not belong to a strictly continental model of criminal procedure but to its more adversarial version, that could be called "the continental model of increased adversariality".

The Anglo-Saxon Approach

The mechanism of blocking information in the Anglo-Saxon model of evidentiary law functions at many stages. The first stage takes place before trial: after disclosure (discovery) of evidence of the opposite party the parties issue motions to declare certain pieces of evidence as inadmissible (in the United States it is a "motion to supress"). In such a motion the party must specify with particularity the grounds upon which the motion is based (e.g. by alleging that the evidence in question was obtained from the defendant incident to an arrest that was not made upon probable cause or lack of "voluntariness" of a confession)[52]. The motions are usually recognised during a pre-trial hearing: depending on a legal system such hearings have different names and are either dedicated solely to admissibility issues or also other issues can be decided. E.g. in the United States there is a special type of procedure known as a suppression hearing. In England in the magistrates' courts there are pre-trial hearings and in the Crown Courts - management hearings. Such a hearing is adversarial – the parties have the opportunity to present arguments (and evidence) in favour of the motion and to confront the arguments of the opposite party. In the process of assessment the judge may conduct an inquiry as to the nature and method of acquiring the evidence. Thus, this procedure is often treated as a "trial within a trial".

In this model the admissibility of evidence is decided by a professional judge in the absence of the jury (which has not normally been appointed yet). However, in the case of a bench trial (and before the magistrates' courts) it is the professional judge who decides on the admissibility of the evidence – the court has discretion to exclude evidence if it would bear unfairly on the proceedings[53]. This is not a rule that the admissibility questions are decided by another judge as recognises the case. Usually magistrates are informed about the nature of the evidence before ruling as to whether it is admissible or not. "If they decide that it

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[52] LAFAVE, Wayne, ISRAEL, Jerold, KING, Nancy, KERR, Orin. Criminal Procedure. St. Paul: West Academic Publishing, 2009, p. 557.

[53] WAINE, Lydia, MAY, Radmila, POWLES, Steven. May on criminal evidence. Sweet & Maxwel 2015, p. 494.

is inadmissible they must ignore it”[54]. Thus, in this model of evidentiary proceedings the fact-finder is sometimes faced with the need to disregard evidence that s/he has knowledge of. However, there are many voices pointing to a need to protect the fact-finder from undesired evidence also in this procedure[55].

It is also possible to question the admissibility of evidence during a trial. If the party demonstrates that it was not possible to question the admissibility of the evidence earlier, it is possible to submit a motion to supress evidence also during trial. Thus, there is a certain type of “correctional procedure”, where the party has a second chance for convincing the judge about inadmissibility of evidence, using new evidence and more convincing arguments. The mechanism of elimination is initiated by a party who submits objection as to the admissibility of evidence and supports it by a legal ground for inadmissibility. In England this procedure is known before the Crown Courts as *voir dire*[56] (whereas in the United States the same name is used to describe the procedure in which the composition of a jury may be questioned[57]). Because of numerous rules of admissibility of evidence and their complicated structure, in many cases the legal status of information must be explained and decided in actual time of trial. Also in this procedure a presiding judge may “filter” the evidence that will be presented to the fact-finder – if it is a jury trial. Consequently, in this model of trial, a certain part of a trial is devoted to deliberation between counsellors and determining the issues of admissibility. In this procedure every party has an opportunity to present its argumentation as to its position. Only after adversary discussion the court takes a decision: either sustains the objection or overrules it. In practice, when an inadmissibility question is raised, the presiding judge will

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[54] WAINE, Lydia, MAY, Radmila, POWLES, Steven. May on criminal ... op.cit., p. 301.

[55] WAINE, Lydia, MAY, Radmila, POWLES, Steven. May on criminal ... op.cit., p. 494.

[56] See: s. 76 and 78 PACE 1984 and more: WAINE, Lydia, MAY, Radmila, POWLES, Steven. May on criminal ... op.cit., p. 477-479.

[57] LAFAVE, Wayne, ISRAEL, Jerold, KING, Nancy, KERR, Orin. Criminal Procedure ... op.cit., p. 1084.

hear the parties in a way that is not audible to jurors: either at sidebar or in chambers[58]. The judge will ask the jurors to leave the courtroom only when the deliberations would take more time. If it happens (as it sometimes does) that the jury is present during deliberation over admissibility of evidence – it will be informed by the presiding judge about the obligation to "disregard" such evidence that was considered to be inadmissible (however, in the United States this should not be done as to search and seizure claims[59]). The issues of raising objections in trial are crucial to the way of conducting the presentation of evidence in trial: formulating objections in the right moment of trial is an art of searching for a maximum effect on jurors. Obviously it plays a much smaller role in bench trials.

One of the elements of the mechanism of blocking information is the method of its initiation. For the Anglo-Saxon model a characteristic feature is initiation of the control mechanism by a party – and it is a mechanism of controlling the behaviour of the other party: they are "strategic protests of one lawyer against the tactics of another. And since these objections of counsel do not involve criticism of the ultimate fact finder – the judge, or the jury (...) they can be made by attorneys with relative ease". The judge has no obligation to control the admissibility of evidence and in practice rarely exercises this control. If any of the parties levers the admissibility of evidence, the evidence is effectively introduced in the evidentiary material. Thus, only the reaction of the opposite party and signalisation of one of the grounds of inadmissibility may result in exclusion of the evidence. On the other hand, the continental lawyer submitting objection as to the admissibility of evidence makes a move against the judge and risks "antagonising those who decide on facts"[60].

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[58] MIRFIELD, Peter. Silence, Confessions and Improperly Obtained Evidence. Oxford: Oxford University Press, 1998, p. 257; LAFAVE, Wayne, ISRAEL, Jerold, KING, Nancy, KERR, Orin. Criminal Procedure ... op.cit., p. 1166.

[59] LAFAVE, Wayne, ISRAEL, Jerold, KING, Nancy, KERR, Orin. Criminal Procedure ... op.cit., p. 569-570.

[60] DAMAŠKA, Mirjam. Evidence Law ...op.cit., p. 86.

The Continental Approach

The Continental model does not use any special type of procedure during which evaluation of admissibility of evidence could be undertaken. The "procedure" limits itself to a sole "decision" taken by the court. The admissibility of evidence can be decided on two stages: either during pre-trial procedures (*in camera* hearings, which in most of the states are not adversarial) or in trial. In both cases this is a single decision of a judge that exhausts the whole "procedure". There is usually no discussion on this topic nor is there an interlocutory appeal allowed. Although there is a "simplified version" of the "adversary" formula: when a party makes a motion, the other party is asked if it supports the motion or objects to it. The decision to reject an evidentiary motion takes the form of a "court's decision", whereas allowing for admittance of evidence can be conclusive[61]. Characteristic to this model, the prosecution usually exhausts its evidentiary motions in the frames of the attachment to an indictment where it formulates the evidence that is wishes to present in trial. Also in this case this attachment is considered to constitute an evidentiary motion and the particular evidentiary motions could be rejected. However, in some states this is not the case. As what evidence will be introduced does not depend on the parties, it often happens that evidentiary motions formulated in the indictment are fully realised, compared to not a single one of the motions of the defence. Poland is a sad example of this tendency.

This model of proceeding on evidentiary motions includes one more trait: once evidence is included in the file of preparatory proceeding there is no procedure for demanding the exclusion of such evidence. There is a tendency to consider as evidence the results of the prosecutor's investigations[62]. In consequence, the existence of a case file leads to

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[61] ŚWIECKI, Dariusz. Przeprowadzanie dowodów na rozprawie głównej. Wybrane zagadnienia. In: Proces karny w dobie przemian. Przebieg postępowania, STEINBORN, Sławomir; WOŹNIEWSKI, Krzysztof (eds.). Gdańsk: Wydawnictwo UG, 2018, p.283.

[62] MARAFIOTI, Luca. Italian Criminal Procedure: A System Caught Between Two Traditions. In: Crime, Procedure and Evidence in a Comparative and International Context: Essays in Honour of Prof. Mirjan Damaška. JACKSON, John; LANGER, Maximo (eds.). Hart Publishing, 2008, p. 93.

serious malfunction of the system of eliminating evidence: even the results of illegal actions of state authorities must remain "stuck" in the file. Some continental states have noticed the dangers of such a solution and introduced "double-dossier" as Italy, or prohibition of inclusion of police-interrogations in the evidentiary material, as Germany. However, in Poland and France what comes into the file, stays in the file, and the presiding judge before trial has the opportunity to get the knowledge of all evidence taken in the preparatory proceeding – even if s/he decides later that there constituted "evidence" in the phase of preparatory proceedings only but not in trial phase.

This lack of special procedure in continental states is considered to constitute a serious flaw in the mechanism of elimination of evidence. Adopting such a special procedure became one of the main characteristic features of the continental model of trial of increased adversariality. In Italy, not only is there a separate file for the trial stage, but also a separate procedure for deciding about admissibility of evidence. According to art. 431 of the Italian c.p.p. a special "pre-trial (preliminary) judge" (*giudice dell'udienza preliminare*) during a pre-trial hearing decides on the transfer of evidence from the prosecutor's file (the investigative dossier) into the trial file ("*fascicolo per il dibattimento*"). This system, called the "double dossier-system" ("*doppio fascicolo*"), was created in order to avoid bias to the trial judge's "virgin mind," guaranteeing that the judge would acknowledge only the evidence produced in court and decide only on that basis. Only certain documents can be transferred[63]. Additionally, the parties can also agree on the transfer of other documents – as well as adding certain evidence gathered by the defence. Thus, the conversion from "preparatory proceeding evidence" into "trial evidence" happens according to the list of documents enumerated in the legal act and to the list as agreed by the parties. The presiding, fact-finding judge has

[63] Art. 431(1) points a-h c.p.p. lists these documents: evidence which is objectively impossible to reproduce in court; results of mutual assistance; evidence that may be lost before trial; physical evidence connected with the crime, and evidence gathered using the *incidente probatorio*, prior convictions of the accused and such documents on which both parties agree.

no access to other documents[64]. What is more, the second element of this mechanism of elimination of evidence comes into play in the beginning of a trial: before trial both parties must point to the evidence they plan to rely on and make an evidentiary motion. Before opening of the evidentiary proceeding, after the opening statements, the presiding judge decides on their admissibility (art. 495 c.p.p.). If the question of inadmissibility appears during the evidentiary proceeding, then the judge decides on this stage. The judge is both obliged to decide on the admissibility of every piece of evidence on the motion of the party and *ex officio*[65]. This admissibility question is rather to settle what information the judge is prepared to hear in the trial, but it does not settle whether it may be finally judged "usable" in the evaluation of evidence[66]. Also in the case of this hybrid model the same person decides on the facts of the case and on the admissibility of evidence[67].

4. Consequences of applying a mechanism of elimination of evidence

Every adopted mechanism of elimination of evidence has elimination of undesired evidence as its goal. However, depending on the type of evidence and the type of its defectiveness, elimination may or may not take place. There are two possibilities: either an automatic elimination on the basis of the legal act or "balancing" of interest in every case on a casuistic basis, taking into consideration the scale of violation of law, its relevance for the judgment and the fair trial principle[68]. Interestingly, the

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64 See: MARAFIOTI, Luca. Italian Criminal Procedure ... op.cit., p. 93; ILLUMINATI Giulio. The Frustrated Turn to Adversarial Procedure in Italy (Italian Criminal Procedure Code of 1988). *Washington University Global Studies Law Review* 2005, p. 6; RYAN, Andrea. Towards a System of European Criminal Justice. The problem of admissibility of evidence, London/New York: Routledge, 2014, p. 227.

65 ILLUMINATI, Giulio. Italy: Statutory Nullities ... op.cit., p. 242-243.

66 See the interviews conducted by A. Ryan with the Italian prosecutors: RYAN, Andrea. Towards a System ... op.cit., p. 218.

67 RYAN, Andrea. Towards a System .. op.cit., p. 218.

68 A good example of this attitude in the Polish law has been given by: D. Solodov, I. Solodov, Legal safeguards against involuntary criminal confessions in

last element of the mechanism of elimination of undesired evidence has the least differences. In both Anglo-Saxon and continental states there is no automatic exclusionary rule for improperly obtained evidence. The main difference still remains that in one case there are statutory foundations for a judge to decide about the illegality or unreliability and incredibility of evidence, whereas in the continental states (with the exception of Italy) there is no such clear statutory basis.

The Continental Approach

In the continental model there is no coherent theory as to the consequences of illegal gathering or presentation of evidence. There is no mention of these consequences in the codes of criminal procedure[69]. In the Anglo-Saxon perspective it is often concluded that many European states do not have exclusionary rules that would supress evidence improperly seized by the police[70]. This conclusion is not justified. Firstly, from the reasons mentioned above – that is, the formal character of all the actions taken by procedural authorities in the preparatory proceedings. Secondly, although there is no legal provision forbidding the use of illegal evidence, in most of the continental states the most common (but not the sole) reaction is shifting the final solution to the level of judicial decisions. Thirdly, in some cases the legal act itself mentions the consequences of violation of specific rules of gathering of evidence as it is in the cases of exclusionary rules.

Automatic elimination applies in two cases: firstly, when it comes to the rules of exclusion, and secondly, in the case of "invalidity" of procedural actions (used in order to eliminate evidence that was acquired due to violations of law). As to the remaining deficiencies, the prevailing belief is that the lack of a procedural sanction expressed by the legislator

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Poland and Russia, „Rev. Bras. de Direito Processual Penal", 2020, v. 6(3), p. 1674. About continental procedural solutions also see: K. Kremens, The authority to order search in a comparative perspective: a call for judicial oversight, „Rev. Bras. de Direito Processual Penal", 2020, v. 6(3), p. 1599-1603.

[69] ROGALL, Klaus. Grundsatzfragen der Beweisverbote ... op.cit., p. 129.

[70] PIZZI, William. Trials Without Truth ... op.cit., s. 43.

does not mean that such a sanction cannot be applied. The admissibility of deficiently gathered or presented evidence can be freely assessed by a judge, who takes into account the principles arising from the Constitution, the ECHR and generally recognized values. This concept assumes that not every violation of the law in the process of gathering evidence should lead to inadmissibility of evidence, because the type of violation and its impact on the entire procedure should be considered: "the possible elimination of evidence obtained illegally should take place depending on the circumstances of a given case and taking into account many factors, such as the weight of the private interest, the weight of the public interest or the direction of evidence"[71]. This conclusion must, however, be seen from the perspective of the importance of the principle of substantial truth – which plays the central role in a continental trial. Thus, when weighting interest, the continental courts must always look for a proper balance between the protected interests and the obligation of a continental judge to search for the truth[72]. Also, the practical perspective allows for agreement with the statements, that "The disparity between the attention

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[71] Such a asumption has been expressed in the Polish literature: WILIŃSKI, Paweł. Pojęcie rzetelnego procesu karnego. In: Rzetelny proces karny w orzecznictwie sądów polskich i międzynarodowych. WILIŃSKI, Paweł (ed.). Warszawa: Scholar, 2011, p. 26; SKORUPKA, Jerzy., Eliminowanie z procesu, p. 2747-2748; JASIŃSKI, Wojciech. Nielegalnie ... op.cit., p. 89; in the German literature: EISENBERG, Ulrich. Beweisrecht der StPO. Spezialkommentar. 10. Auflage. C. H. Beck 2017, p. 141, p. 154-158; GLESS, Sabine. Germany ... op.cit., p. 114; ROGALL, Klaus. Grundsatzfragen der Beweisverbote, p. 145; and in the French literature: DARSONVILLE, Audrey. Les limites au principe de la liberté de la preuve pour les parties, Dalloz. Actualité, https://www.dalloz-actualite.fr/breve/limites-au-principe-de-liberte-de-preuve-pour-parties#.X2SD7IswhPY (access 18.09.2020);) GARÉ, Thierry. L'admission de la preuve illégale: la Chambre criminelle persiste et signe, *Recueil Dalloz* 2000, p. 391; MOLINA, Emmanuel. Réflexion critique sur l'évolution paradoxale de la liberté de la preuve des infractions en droit français contemporain., *Revue internationale de droit comparé*, n. 54(1), " 2002, p. 263; MERLE, Roger, VITU André. Traité de droit criminel. 2. Procédure pénale. Paris: Cujas, 1989, p. 162-163; PRADEL, Jean. Procédure pénale, Paris: Cujas, 2014, p. 354-357.

[72] GLESS, Sabine. Germany ... op.cit., p. 139; WEIGEND, Thomas, The Potential to Secure a Fair Trial Through Evidence Exclusion: A German Perspective. In: Do Exclusionary Rules Ensure a Fair Trial?: A Comparative Perspective on Evidentiary Rules, GLESS, Sabine; RICHTER, Thomas (eds.). Basel: Springer, 2019, p. 73.

paid in the literature to the various theories behind exclusionary rules and the few actual cases of evidentiary exclusion is striking”[73].

In practice, this means that the mechanism of “weighing” legal interests and, as a result, eliminating defective or incorrectly obtained evidence, has been left to the discretion of the courts. Its application and scope most often depend on the stage of the infringement or detection of illegality, as well as the nature and consequences of the violation of law. Especially in Germany the need to find a pattern and model for weighting of various interests in the process of assessing the admissibility of evidence has resulted in the creation of plentiful theories which can guide the judge: a theory based on the type of the protected interests (*Rechtkreistheorie*), a theory based on the possible violation of the state of law principle (*Rechtsstaatsprinzip*); a theory of weighting of legal interests (*Abwägungstheorie*), and the aim of protection expressed in the given provision (*Schutzzwecktheorie*) or the type of violation of the privacy sphere (*schlichte Privatsphäre)*[74].

Only in Italy is there a statutory provision that specifies the prohibition of using illegally obtained evidence (art. 191 c.p.p.). On the other hand it is worth mentioning that the previously discussed mechanism of nullities used in France and Italy is not subject to weighting – in case of fulfilling the statutory premises of nullity of an evidentiary action the results of this action cease to exist in a procedural sense.

In the process of assessment of admissibility of evidence, art. 6 ECHR also plays a distinct role – the Strasbourg Court has developed a notion of a fair trial that has become a key element in the analysis of the admissibility of evidence in criminal procedures by all the State Parties. Article 6 of the Convention refers to the description of the entire model of the criminal trial, to the entire legal situation of the accused, and thus

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[73] GLESS, Sabine, MACULA, Laura. Exclusionary Rules—Is It Timefor Change? In: Do Exclusionary Rules Ensure a Fair Trial?: A Comparative Perspective on Evidentiary Rules, GLESS, Sabine; RICHTER, Thomas (eds.). Basel: Springer 2019, p. 352.

[74] ROGALL, Klaus. Grundsatzfragen der Beweisverbote ... op.cit., p. 145 ; EISENBERG, Ulrich. Beweisrecht, p. 155; SCHRÖDER, Svenja. Beweisverwertungsverbote und die Hypothese rechtmässiger Beweiserlangung im Strafprozess, Berlin: Duncker & Humblot, 1992, p. 24 and 66.

to the type and quality of evidence leading to the conclusion of guilt, i.e. the type and method of gathering evidence[75]. The notion of a fair trial - so far characteristic of Anglo-Saxon states - has also penetrated into continental European systems of criminal proceedings and began to give the law of evidence a new quality. The guarantees resulting from this notion become apparent in the case-law of national courts, which are now required to assess the standard of evidence in the light of this.

This multi-level solution allows for differentiating the consequences of violations, depending on the gravity of the violation and the relevance of the violation of the human rights and constitutional principles, such the rule of law[76]. It is flexible and optimizes the functioning of the rules of elimination. However, at the same time, it makes the results of "weighting" of admissibility of evidence quite unpredictable.

The Anglo-Saxon Approach

In the common law states there is no automatic exclusionary rule for improperly obtained evidence: there is not necessarily a connection between a violation of law and the elimination of evidence. The courts have accepted that improperly obtained evidence can be excluded in the exercise of discretion if its use would render the trial unfair[77]. Interestingly,

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[75] See e.g. a more detailed analysis: BACHMAIER, Lorena. Rights and Methods to Challenge Evidence and Witnesses in Civil Law Jurisdictions. In: Oxford Handbook of Criminal Process. BROWN, Darryl et al. (eds.)., Oxford: Oxford University Press, 2019, p. 844-849; HO, Hock Lai. The Fair Trial Rationale for Excluding Wrongfully Obtained Evidence. In: Do Exclusionary Rules Ensure a Fair Trial?: A Comparative Perspective on Evidentiary Rules, GLESS, Sabine; RICHTER, Thomas (eds.). Basel: Springer 2019, p. 284; SOLODOV, Denis; SOLODOV, Ilia. Legal safeguards against involuntary criminal confessions in Poland and Russia, *Rev. Bras. de Direito Processual Penal*, 2020, v. 6(3), p. 1670.

[76] See: BACHMAIER, Lorena. Rights and Methods ... op.cit., p. 853; WILIŃSKI, Paweł. Konstytucyjny standard legalności ... op.cit., p. 319; ROGALL, Klaus. Grundsatzfragen der Beweisverbote ... op.cit., p. 129; SKORUPKA, Jerzy. Eliminowanie z procesu ... op.cit., p. 2787; WEIGEND, Thomas. Germany ... op.cit., p. 114.

[77] CHOO, Andrew, NASH Susan. Improperly Obtained Evidence in the Commonwealth: Lessons for England and Wales? *The International Journal of*

despite numerous rules of admissibility of evidence existing in the Anglo-Saxon states, the same mechanism of judiciary discretion is applied. In both England and the United States, it cannot be claimed that the consequences of applying rules of admissibility are strictly prescribed: only the effect of some rules is automatic, once the conditions for their application have been found to exist. Other rules of admissibility lead to a conclusion that the trial judge enjoys a wide discretion whether to admit evidence[78]. The view that is presented in the literature points to the fact that there is a different degree of judicial discretion in relation to various rules of admissibility of evidence. Different rules of admissibility require more or less judicial discretion, requiring contextual application to the facts of a concrete case[79]. Although there is a theoretical differentiation between legal rules of admissibility and judicial discretion – the first ones cannot exist without the second one.

In the English literature it is considered that both the exclusionary and the admissibility rules create grounds for a motion to exclude evidence, however, the final decision is left to the decision of a judge. This decision requires judge a careful balancing of interests and procedural rights: the judge should eliminate a piece of evidence if the harm resulting from such evidence would be bigger than a potential advantage[80]. The Court of Appeal has repeatedly refused to accept that the use of improperly obtained but reliable evidence has adversely affected the fairness of the trial – thus making credibility of evidence, not the method of acquiring

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Evidence & Proof, n. 11, 2007, p. 78.

[78] HANNIBAL, Martin; MOUNTFORD, Lisa. Criminal Litigation 2019-2020 (Legal Practice Course Manuals), Oxford: Oxford University Press, 2019, p. 100.

[79] ROBERTS, Paul; ZUCKERMAN, Adrian. Criminal Evidence ... op.cit., p. 99.

[80] CHOO, Andrew, NASH Susan. Improperly Obtained ... op.cit., p. 79; ASHWORTH, Andrew J. Excluding Evidence as Protecting Rights. *Criminal Law Review*, n. 3, 1977, p. 723; CHOO, Andrew; NASH Susan. What's the Matter with S. 78?, *Criminal Law Review*, n. 12, 1999, p. 929; DENNIS, Ian, H. Reconstructing the Law of Criminal Evidence. *Current Legal Problems* n. 42, 1989, p. 21; GREVLING, Katharine. Fairness and the Exclusion of Evidence under s. 78(1) of the Police and Criminal Evidence Act. *Law Quarterly Review*, n. 113, 1997, p. 667; ORMEROD, David, BIRCH Diane. The evolution of the discretionary exclusion of evidence. *Criminal Law Review*, n. 9, 2004, p. 767 HO, Hock Lai. The Fair Trial Rationale ... op.cit., p. 294.

it, the main test for admissibility of evidence[81]. This regime – allowing for the necessary flexibility – makes the judge responsible for "the success of this admissibility regime"[82]. It is the trial judge who is responsible for supplying the most credible and probative information to the jury. Finding the proper balance must take into consideration not only the prerequisites described in the legal act and evidentiary principles of general application but also the European fair trial standards[83]. Also in this case an equal basis for exclusion of evidence constitutes the *Human Rights Act 1998*, incorporating *inter alia* art. 6 ECHR. The English law can be characterized by the general absence of fixed rules of automatic inadmissibility and other "bright-line" rules and "rather, a case-by-case approach is favoured"[84].

In the United States the exclusionary rules are understood as results of violations of the Amendments to the Constitution. At the same time the Constitution is silent as to the results of these violations. The consequences are established in the Supreme Court's jurisprudence, which formerly decided upon an automatic elimination of evidence acquired in a violation of constitutional rights and freedoms. The landmark case was *Mapp v. Ohio*[85], where the Court decided that the exclusionary rule applies in state courts – in this regard, that it obliges the exclusion of evidence obtained in violation of the Constitution (typically the Fourth, Fifth or Sixth Amendments). The automatic effect of this rule is however restricted by the exceptions to this rule: the "good faith exception" and the "impeachment exception", as well the exceptions to the "fruits of the poisonous tree doctrine". In consequence, the U.S. exclusionary rules

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[81] CHOO, Andrew, NASH Susan. Improperly Obtained ... op.cit., p. 79.

[82] ROBERTS, Paul, ZUCKERMAN, Adrian. Criminal Evidence ... op.cit., p. 346.

[83] ROBERTS, Paul, ZUCKERMAN, Adrian. Criminal Evidence ... op.cit., p. 399.

[84] ROBERTS, Paul, ZUCKERMAN, Adrian. Criminal Evidence ... op.cit., p. 25; JACKSON, John, D., SUMMERS, Sarah, J. The Internationalisation of Criminal Evidence. Cambridge: Cambridge University Press, 2012, p. 38; CHOO, Andrew. England and Wales: Fair Trial Analysis and the Presumed Admissibility of Physical Evidence. In: THAMAN, Stephen (ed.). Exclusionary Rules in Comparative Law, Dordrecht - Heidelberg - New York – London: Springer, 2013, p. 352.

[85] 367 U.S. 643 (1961).

were historically considered to be more categorical than the English and continental rules and usually were not subject to balancing[86].

Currently, however, the Supreme Court's approach to the exclusion of illegally obtained evidence is characterized by a parsimonious conception of the rights guaranteed by the constitution based on (or justified by) a textualist theory of constitutional interpretation. E.g. the Court has unequivocally rejected the proposition that exclusion of illegally seized evidence is required by the Fourth Amendment, and regards the exclusionary rule as a judicially created deterrent remedy designed to protect the right against unreasonable search and seizures[87]. In the process of refusing to consider evidence as inadmissible, described as "deconstitutionalization of the exclusionary rule"[88], the perception of the nature of exclusionary rules has changed. They have moved from being an institution belonging to the area of "individual's rights" into the area of "sanction for violation of the law", a "remedy", whose main aim is to discipline the procedural authorities – although there is no final agreement on this in either jurisprudence or doctrine[89]. The Supreme Court recently stated that the exclusionary rule is applicable only "where its deterrence benefits outweighs its substantial social costs" (so called "cost-benefit balancing")[90]. In consequence, if the deterrence potential of the rule is

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86 The perspective adopted in some of the U.S. literature, e.g. WORRALL, John L. Criminal Procedure. From First Contact to Appeal. New York: Pearson Education 2007, p. 56.

87 CAMMACK, Mark E. The United States: The Rise and Fall of the Constitutional Exclusionary Rule. In: Exclusionary Rules in Comparative Law. THAMAN, Stephen. (ed.)., Dordrecht - Heidelberg - New York – London: Springer, 2013, p. 4 and 10; LAFAVE, Wayne, ISRAEL, Jerold, KING, Nancy, KERR, Orin. Criminal Procedure ... op.cit., p. 133-136.

88 CAMMACK, Mark E. The United States ... op.cit., p. 31. See also the jurisprudence: *Herring v. United States*, 555 U.S. 135 (2009), 129 S.CT. 695, 172 L.Ed.2d 496 (2009); *Kansas v. Ventris,* 129 S.Ct. 1841, 1846 (2009).

89 See e.g. *Dickerson v. United States* 530 U.S. 428 (2000).

90 So called „cost-beneft" balancing, used e.g. in *Hudson v. Michigen*, 547 U.S. 586, 126 S.Ct. 2159, 165 L.Ed.2d 56 (2006). See e.g.: CAMMACK, Mark E. The United States ... op.cit., p. 5; LAFAVE, Wayne, ISRAEL, Jerold, KING, Nancy, KERR, Orin. Criminal Procedure ... op.cit., p. 139; PATTENDEN, Rosemary. Pre-verdict Judicial Fact-finding in Criminal Trials with Juries, *Oxford Journal of Legal Studies*, n. 29(1), 2009, p. 17; HO, Hock Lai. Exclusion of Wrongfully, p. 835.

too negligible or if it is outweighed by the costs of the exclusionary rule, then exclusion should not happen[91]. The Court's attitude is summed up by saying that exclusion "has always been our last resort, not our first impulse"[92]. However, the balancing does not depend on the circumstances of the adjudicated case, but rather on a category of evidence that serves a certain purpose[93].

If exclusionary rules are provided for in state law, the rules are different: in some cases the provision actually says that the sanction is exclusion of evidence. In other cases courts may utilize the exclusionary rule when the provision in question confers a substantial right, especially if it is one that can be said to relate rather closely to constitutional protection[94]. In consequence, also in this model of elimination of evidence, there are no automatic consequences of violation of the law in the process of gathering evidence and the final decision is handed to the judge. However, in this case the balancing happens in decidedly more restricted frames.

5. Conclusions

The analysis conducted in this text led to several conclusions. Firstly, there are two stages where the admissibility rules operate in two different models of criminal trial. In the continental model, the main body of rules of evidence must be applied during preparatory proceedings, whereas in the common law states the rules of evidence are designed to be used at trial. As a result, the continental states do not have statutory

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91 See: *Herring v. United States* 555 U.S. 135 (2009).

92 In *Herring v. United States* 555 U.S. 135 (2009) a case cited by: CAMMACK, Mark E. The United States ... op.cit., s. 32.

93 See: TURNER, Jenia I. Regulating Interrogations and Excluding Confessions in the United States: Balancing Individual Rightsand the Search for the Truth. In: Do Exclusionary Rules Ensure a Fair Trial?: A Comparative Perspective on Evidentiary Rules, GLESS, Sabine; RICHTER Thomas (eds.). Basel: Springer, 2019, p. 104.

94 E.g. *U.S. v. Caceres*, 440 U.S. 741, 99 S. Ct. 1465, 49 L.Ed.2d 733 (1979) and *Virginia v. Moore* 553 U.S. 128 S.Ct. 1598, 170 L.Ed.2d 559 (2008) cited by: LAFAVE, Wayne, ISRAEL, Jerold, KING, Nancy, KERR, Orin. Criminal Procedure ... op.cit.,p. 136.

provisions that would forbid the use of illegally obtained evidence, whereas the Anglo-Saxon model provides for multiple rules of admissibility and presentation of evidence at trial. Secondly, the lack of detailed statutory rules of admissibility and presentation of evidence at trial is bound to the deciding role of the continental judge during evidentiary proceedings. In the common law model the parties decide about the scope and way of presentation of evidence, within the rules provided by the law. The judge plays a central role as to both deciding about admissibility and the rules of presentation of evidence. Thirdly, in continental trials, evidence collected in the case file plays a predominant role in the mechanism of elimination of evidence – once evidence is included in the file it must stay there, even if disqualified in the process of fact-finding - declared by the judge "inadmissible". It also creates the situation that the adjudicating judge is familiar with the evidence that can be later declared "inadmissible". At the same time in the common law model, the judge has no prior knowledge of the evidence that will be presented at trial. The fifth difference between the analysed models relates to the presence of an effective and equal to the parties procedure of deciding about admissibility of evidence in the Anglo-Saxon model of evidentiary law. This procedure allows the parties to control the admissibility of evidence and permanently eliminate inadmissible items from the trial. However, there is no similar procedure in the continental model.

Although the exclusion of undesired information is administered differently in the two analysed models of criminal trial, the result of these mechanisms may be similar. In every analysed model of elimination of evidence, notwithstanding its affiliation to the model of trial whether it would be continental or Anglo-Saxon, the final arbiter of admissibility of evidence is a judge. S/he takes the final decision as to the evidence[95]. In consequence, both legal models can be perceived as chaotic and casuistic, as there is no certainty for the parties as to the final decision of a judge – "as predictability in the application of an exclusionary rule increases with its determinacy"[96]. This model is often perceived as dependant on the

[95] GALLIGAN, Denis, James. Discretionary Powers, Oxford: Clarendon Press, 1986, p. 6, 8 and 22.

[96] HO, Hock Lai. Exclusion of Wrongfully ... op.cit., p. 835.

personal skills and convictions of the actors of the trial: both the judge and the representatives of the parties. On the other hand, this model is also flexible and allows for weighting legally protected interests in every case. It does not signify that the judge has total liberty as to the result of such a decision. A judge must take into consideration not only "external" premises – such as the purpose of truth-finding and of fairness and justice, an assessment of the purpose of a given action and its circumstances, the rightness of its performance, in view of the existence of general clauses in a given case[97] - but also intrinsic arguments, rooted in the judge's conscience. Such a task requires from a judge to have certain skills in legal science and a stable sense of justice. Moreover, the judge's decision may be subject to review by the court of appeal.

The analysis presented above also leads to the conclusion that the Anglo-Saxon model of elimination of undesired evidence is very complex, but coherent and carefully designed. It allows for equal participation by both parties and for effective procedures of challenging the admissibility of evidence. On the other hand, the mechanism for blocking information from becoming evidence in the continental model does not function in a predictable, way as there are several deficiencies identified in this model. In the continental states it cannot be said that there is a comprehensive "mechanism" for blocking information from becoming evidence in a criminal trial – it is rather a partial mechanism, quite unpredictable. It can be thus seen that in the continental model there are evident defects in the mechanism of elimination of undesired evidence.

Firstly, there is no statutory basis for excluding illegal or illegally acquired evidence (except for the hybrid model of Italy) – and without such a clear basis for excluding evidence, motions of the parties (usually defence) to exclude illegal evidence become often disregarded by the court. Potentially the court may base decisions on only art. 6 ECHR or the national Constitutions[98]. Secondly, there is no separate procedure that allows for conducting an adversarial, *a priori* elimination of undesired evidence. The assumption that there is a need to eliminate undesirable evidence should presuppose the existence of an effective procedure allowing a party to

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97 PATTENDEN, Rosemary. Pre-verdict ... op.cit., p. 4.

98 GLESS, Sabine; MACULA Laura. Exclusionary Rules ... op.cit., p. 361.

apply for the elimination of such evidence. Even if in bench trials it is the professional judge who decides about the admissibility of evidence, holding the role of fact-finder at the same time, the procedure for deciding on the admissibility of evidence in the Anglo-Saxon model is equal and the same for both parties. Meanwhile, in the continental model, the judge examines the evidence in the case file; as a result, as a rule, s/he becomes familiar with all prosecution evidence collected during the preparatory proceedings. This conclusion leads to the third serious flaw of this model, that is the previous knowledge of a judge about the evidence gathered in the preparatory proceedings, which is not yet evidence from the point of view of the trial stage. So even if a piece of information does not ultimately become evidence in court proceedings, "the damage has already been done": the judge already has knowledge of evidence that can be potentially illegal, unreliable and irrelevant to the case[99]. Fourthly, the unitary structure of the continental court (also in the jury trials in France and Italy where both the professional judges and the jury member adjudicate together) also makes it more difficult to "hide" the illegal evidence from the eyes of the fact-finder[100]. Yet, it should be clear, that the aim of the elimination mechanism is not including undesired evidence in the evidentiary basis for fact-finding. Moreover, there is no procedure in which the defense could request that the evidence contained in the case-file be declared inadmissible. The defense can make a free (not regulated in the code of criminal procedure) motion during trial – however, there is no obligation on the part of the court to react to this motion.

These "deficiencies" of the continental model lead to a conclusion that this model of elimination of evidence is incoherent: the obligation to eliminate evidence from the fact-finding process should be bound with the court's legal prohibition to become acquainted with such evidence. The blockade should lead to the fact that such evidence „disappears" in the procedural sense - it is also eliminated from the case files. The "evidence" cannot be considered to be everything that is in the case

[99] Even thought the law forces the judge to „forget about" such evidence: - see: WEIGEND, Thomas. The Potential to Secure ... op.cit., p. 75.

[100] It was also observed by: BACHMAIER, Lorena. Rights and Methods ... op.cit., p. 854.

file. Such documents cannot constitute the basis for making evidentiary findings, if there is no signal or decision proving that the court was acquainted with such documents before or during the trial, in order to rule on their admissibility.

These two problems could be solved by introducing a construction characteristic for the mixed procedure model of increased adversariality as functions in Italy. A pre-trial hearing presided over by a pre-trial judge would allow for the selection of evidence gathered in preparatory proceedings (by both parties) so that undesired evidence would not reach the eyes of the fact-finder. Such a selection process should therefore take place mostly before trial, and be led by a judge who will not preside over the case during trial. This additional stage of procedure – taking place during a type of pre-trial hearing, would allow the parties to meet and debate over admissibility of evidence – and thus to control their admissibility. Also, importantly for the continental models, such a hearing would become an "indirect form of judicial control over the actions taken in the preparatory proceedings"[101] – especially in the states where there is no investigative judge. Moreover, the result of determining a piece of evidence as inadmissible should be the practical elimination of such documents from the case file. On both stages of trial the rules of admissibility should be effectively used in a way that is equal for both parties. There is also a need for introducing an obligatory reaction on the part of the court to a motion of the parties as to inadmissibility of evidence. Granting the parties such a right would be an expression of respecting the procedural principles included in the code in a criminal procedure, such as the right to defence and to a fair trial, the principle of legality of the actions of procedural organs, the principle of procedural loyalty, all of which also result from broader constitutional, conventional and international law values[102].

It should be stressed that a criminal trial can be considered to be adversarial only if the rules of admissibility of evidence operate on

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[101] This need is stressed in the Polish literature, see: ZAGRODNIK, Jarosław. Model interakcji postępowania przygotowawczego oraz postępowania głównego w procesie karnym. Warszawa: Wolter Kluwer 2013, p. 193.

[102] SKORUPKA, Jerzy. Eliminowanie z procesu ... op.cit., p. 2805.

equal terms for both parties, and when the issues of admissibility are adjudicated in a clear and equal procedure. There is a connection between the operating mechanism of elimination of undesired evidence and the degree of implementation of fair trial principles. In the continental states the obligation of the judge to search for the true account of event leads to a "free proof" principle and total discretion for the judge to decide on the admissibility of evidence. In the Anglo-Saxon states the central position of the adversariality principle leads to the dominant position of the parties in the mechanism of elimination of evidence. The parties both decide on what evidence will be presented in trial and whether to object to the admissibility of the evidence introduced by the other party. If the continental models move to be "adversarial" – even if not in a clear, full meaning of this notion as used by the Anglo-Saxon states, but in the meaning of being "*contradictoire*"[103], that is in compliance with the requirements of art. 6 ECHR – they could improve the procedure of ruling on admissibility of evidence. Certainly the current situation, where the judge is acquainted before trial with the evidence presented by the prosecution and there is a "free flow" of "preparatory proceedings evidence" into the group of "trial evidence" is unacceptable and cannot be justified on the basis of a claim that the prosecutor is a "guardian of law" in the continental states, as this claim does not withstand the test of practice.

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[103] See: RYAN, Andrea. Towards a System ... op.cit., p. 245 who claims that the notions of „adversarial" and „contradictoire" are not a translation of the same concept; the procedural format in France and Italy cannot be described as adversarial – however, as it has all the features required by art. 6(3)(d) ECHR, it cannot be described as „inquisitorial" either.

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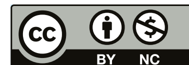

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The rule of admissibility of evidence in the criminal process of continental Europe[1]

A regra de admissibilidade da prova no processo penal da Europa continental

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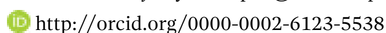
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Abstract: This paper presents a doctrinal review of the rule of admissibility of evidence in the criminal process of continental Europe, which can be understood narrowly as applying exclusively to the question of acceptability, i.e. determination what evidence can be admitted. This rule can also be understood in broad terms and applied to determine not only the admissibility of evidence but also its relevance and adequacy. Much attention was paid to the functions performed by the admissibility rule, especially its guarantee function. The state of scientific discussion on the recognition of unlawfully obtained evidence as "inadmissible evidence", and the author's views on this issue were also presented.

Keywords: criminal process; law of evidence; admissibility of evidence: legality of actions of authorities; postulate of the moral integrity of the justice system.

Resumo: *Este artigo apresenta uma revisão doutrinária sobre a regra da admissibilidade da prova no processo penal da Europa continental, que pode ser entendida estritamente como aplicável somente à questão da admissibilidade, ou seja, da determinação de qual prova pode ser admitida. Essa regra pode também ser entendida em termos amplos e aplicada para determinar não somente*

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a admissibilidade da prova, mas também a sua relevância e pertinência. Muita atenção foi direcionada para as funções desempenhadas pelas regras de admissibilidade, especialmente a sua função de garantia. Também são expostos o estado da discussão científica no reconhecimento de provas obtidas ilicitamente e a posição do autor sobre a questão.

Palavras-chave: *processo penal; direito probatório; admissibilidade da prova; legalidade dos atos estatais; postulado de integridade moral do sistema de justiça.*

1. Introduction

The rule of admissibility of evidence is an important procedural concept. The rule expresses the norm that only evidence that is admissible by applicable law may be introduced into criminal proceedings. Provisions of the law of evidence which define admissible and inadmissible evidence should be understood in broad terms. The notion of "applicable law" consists of statutory provisions, usually expressed as codes of criminal procedure, the provisions of applicable constitutions, which generally contain clauses prohibiting the use of torture and cruel, inhuman or degrading treatment, as well as corporal punishment. The notion also extends to provisions of international law, including that of the European Union[3] and the Council of Europe[4].

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[3] The law of the European Union is applied in national legal systems in accordance with the principles of primacy, direct effect and indirect effect of EU law. According to the principle of primacy (supremacy) of European Union law over domestic laws of EU Member States, in the situation of a conflict between a rule of national law of a given Member State and a rule of European Union law, priority must be given to the rule of EU law. In such a situation, the primacy principle prevents the application of the rule which forms part of the national legal system of the Member State concerned. The principle of primacy applies to all legally binding sources of European Union law: its primary and secondary legislation, as well as international agreements concluded by the European Union with third countries. The provisions of the European Union law falling within the scope of national laws of evidence include, in particular, framework decisions and directives of the Parliament and of the Council.

[4] A key international instrument affecting national laws of evidence is the European Convention for the Protection of Human Rights and Fundamental Freedoms.

The law of evidence specifies that only certain measures of evidence[5] are admissible, namely those including evidence given by persons, i.e. testimony given by the accused and witness and reports drafted by expert witnesses. National procedural laws do not define the measures of evidence obtained from what is known as "material sources of evidence". The notion and classification of material measures of evidence were formulated by the science of evidence, based on the analysis of evidentiary procedures permitted by law, in particular the examination of a person, location and objects or the procedural experiment. By permitting the examination of a location, person or object and the carrying out of a procedural experiment, the law permits the measures of evidence which are obtained in the course of those evidentiary procedures. The law of evidence does not explicitly define the material measures of evidence despite the fact that such measures of evidence are established by statutory provisions that govern evidentiary procedures. National procedural laws permit the use of material measures of evidence but do not define what a material measure of evidence is or specify the existing types of such measures. National law merely provides that material measures of evidence comprise any measures of evidence obtained from the examination of a location, person and objects, a procedural experiment and other evidentiary procedures specified by law. Consequently, it is entirely possible that a measure yet unknown (unnamed), which at some point will become accessible through examination in consequence of scientific and technological progress, may be classified as evidence in the future. In such a case, such evidence should be considered admissible under law[6].

EUROPEAN CONVENTION OF HUMAN RIGHTS, adopted in Rome on 4th November 1950. Available at: https://www.echr.coe.int/documents/convention_eng.pdf. (access: December 20, 2020). Hereinafter: the ECHR.

[5] In an attempt to address the ambiguity of the notion of "evidence", in this paper I use that term to refer to both sources and measures of evidence; a source of evidence is a person or object from which the evidence originates, whereas a measure of evidence is the medium that contains information about the facts to be proved, e.g. testimony of the accused, a witness's testimony or a report of an expert witness, features and characteristics of an object; the notion of "evidence" understood strictly embodies a measure of evidence.

[6] Throughout the history of the criminal process many measures of evidence have "appeared" thanks to the development of science, e.g. fingerprints, trace evidence, DNA traces.

On the other hand, in most cases, the law of evidence clearly indicates what evidence is considered inadmissible. Such restrictions on the admissibility of evidence are expressed by "evidentiary prohibitions", i.e. norms prohibiting proof of specific facts (e.g. the course of the deliberations and voting on a verdict), proof of facts by means of specific types of evidence (e.g. testimony of a lawyer representing the accused) and the use of certain methods of obtaining evidence (e.g. torture or corporal punishment).

The rule of admissibility of evidence is an important guarantee. According to that rule, the facts relevant to the determination of the accused's guilt can only be established by means of legally admissible evidence. National legislators have developed procedural laws of evidence in a way that enables the carrying out of evidentiary activities (understood as the conduct of participants in evidentiary procedures) exclusively in a pre-determined manner. By doing so, national legislators legitimise the conduct of the participants in the process as evidentiary activities carried out as part of criminal proceedings. Thus, the method of conducting evidentiary proceedings, i.e. the collection, recording and taking of evidence, may not be discretionary but is strictly regulated. If evidence is acquired and used in an unlawful manner, law enforcement authorities gain an unfair advantage over the accused. Instead of resorting to dishonest, and hence unfair, conduct that is not legitimised by the law, law enforcement authorities should use the capabilities and resources that the state has already put at their disposal. As a guarantee, the rule of admissibility of evidence ensures that a citizen (the accused) knows *how* the evidentiary proceedings will be conducted. The awareness that factual findings in criminal proceedings will be determined based on evidence admissible under law provides the accused with the opportunity to predict what decisions may be taken by criminal justice bodies and effectively defend themselves against prosecution. On the other hand, if law enforcement authorities could determine the facts based on evidence that is inadmissible and thus contrary to the law of evidence, the defence of the accused's case would be difficult or even impossible.

Notably, the rule of admissibility of evidence is an important safeguard of the accused's legal interests. Indeed, it draws the boundaries of the accused's "protective sphere", which must remain free from any

interference by criminal justice bodies. In such a way, the accused is protected against unlawful violations of their realm of permissible behaviour and freedom and economic activity which could otherwise result from the use of inadmissible evidence. The rule of admissibility of evidence also serves as a safeguard of public interest. After all, it defines the sphere of permitted procedural activities for state authorities, and thus sets the limits for acceptable interference with the rights and freedoms of participants in criminal proceedings.

Another guarantee provided by this rule concerns the prevention of the arbitrary conduct on the part of criminal justice bodies, which, in turn, ensures that the rights and freedoms of a citizen (the accused) are respected. Thanks to this guarantee, the accused is not at the mercy of law enforcement authorities, the public prosecutor or the court.

2. The importance od the rule od admissibility of evidence

The rule of admissibility of evidence is a legal construct deliberately designed and developed by national legislators to achieve specific procedural objectives and used to achieve these objectives. In consequence of the above, the offence, its perpetrator and the accused's guilt can only be established on the basis of facts established following the taking of legally admissible evidence.

The rule of admissibility of evidence is connected with the right of the parties to criminal proceedings to request that evidence be taken by a criminal justice body (the court during the trial and, in pre-trial proceedings, by the prosecutor or other competent authority). The taking of evidence is the activity that involves including in the criminal process measures of evidence originating from sources of evidence. This is done by means of evidentiary procedures, which may involve an interview of the accused or a witness, examination of a person, location or object, a search of a person or premises, etc. Although different entities may be entitled to request the taking of evidence, the initiative in evidence-taking may always be undertaken ex officio or at the request of an authorized entity, if a law so permits. The legal design of initiative in evidence-taking depends on the adopted model of the criminal process and the underlying model of evidentiary proceedings, which may be based on the inquisitorial

or adversarial principle and on the principle of truth. Depending on the model, criminal justice bodies and parties to the proceedings have a different impact on evidentiary proceedings. In a model which is based (entirely or predominantly) on the inquisitorial principle, the scope of evidentiary proceedings, and thus the determination of facts, will be significantly influenced by criminal justice bodies (the police, prosecutor, court). In a model based (entirely or predominantly) on the adversarial principle, evidentiary proceedings at the main trial are conducted by the parties (the prosecution and the accused), while the court's authority to take evidence ex officio is limited.

In contemporary criminal processes of continental Europe, evidence may be taken if the following conditions are met: (1) the evidence must be admissible, (2) the fact to be proven must be relevant to the resolution of the case; (3) the evidence must be relevant to establish factuality of a given circumstance; (4) it is possible to take the evidence. Sometimes, a further condition is added, namely that the taking of evidence must not be intended to protract the proceedings.

The rule of admissibility of evidence can therefore be understood narrowly as applying exclusively to the question of *acceptability*, i.e. determination what evidence can be admitted. This rule can also be understood in broad terms and applied to determine not only the admissibility of evidence but also its relevance and adequacy.

The rule of admissibility of evidence in the criminal process of continental Europe is determined by three elements:

a) the principle of truth, which expresses the requirement that the findings of facts must reflect the reality,
b) the principle of expediency, which requires that proceedings be conducted swiftly and that the case be resolved within a reasonable time,
c) the rights and freedoms of the accused and of the persons giving evidence, which lay down boundaries that must be respected by criminal justice bodies collecting evidence and introducing it into the criminal process.

The right to initiate evidentiary procedures was introduced in the 19th-century criminal codifications and was associated with the recognition of the accused as a subject rather than an object of the criminal

process. However, the principles governing the introduction of evidence in the criminal process, including the rule of admissibility of evidence, were only defined in 20th-century criminal codifications. This does not mean that there were no earlier rules on the admissibility of evidence in the criminal process. Changes of measures of evidence and principles governing the introduction of evidence accompanied the development of the criminal process. However, the rules of the criminal process of continental Europe have repeatedly established subjective and objective limitations concerning the proving of facts relevant to the resolution of the case. For a long time, the law provided that certain categories of persons have no capacity to be witnesses in criminal proceedings. The evidence obtained from such persons was inadmissible. The law also defined measures that could not constitute evidence. It was inadmissible to prove facts through such measures.

3. The development of the rules on admissibility of evidence – historical approach

3.1. Ancient Greece

In ancient Greece,[7] Aristotle divided the means available to a speaker in court into *pisteis entechnoi*, i.e. means dependent on the art of rhetoric, and *pisteis atechnoi,* i.e. means independent of rhetorical proficiency (*Retoryka* (The Rhetoric) 1355 b 35). In order to be considered as belonging to the art of rhetoric, means of persuasion needed to originate from that art. According to Aristotle, witnesses' testimonies, evidence given under torture and written statements did not belong to the art (of rhetoric)[8].

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[7] See: BONNER, Robert J. *Evidence in Athenian Court*. Chicago 1905; LIPSIUS, Justus Herman. *Das attische Recht und Rechtsverfahren*. Leipzig 1905-1915. p. 866-900; HARRISON, Alick Robin Walsham, *The Law of Athens. Procedure.* Oxford 1971, p. 133-154; MACDOWELL, Douglas M. *The Law in Classical Athens.* London, 1978. p. 242-247.

[8] See: ARYSTOTELES. Retoryka. In: ARYSTOTELES. *Dzieła wszystkie*, v. 6. Warszawa 2001.

An exhaustive list of *pisteis atechnoi*, provided by the Stagirite elsewhere in *The Rhetoric* (1375 a 24 f), includes laws, witnesses testimonies, evidence given under torture, contracts, oaths. It was a common principle to listen to both parties to the dispute and to give the accused a chance to justify themselves. The Athenian oath sworn by judges included the promise to hear the accuser, the accused and the latter's counsel[9]. It appears that the oath was not necessary where the case was self-evident[10]. Therefore, statements of the accused given during the trial should be added to the list of *pisteis atechnoi*.

In the legal process of ancient Greece, parties to a dispute were obliged to present the law (*nomos, nomoi*) or resolutions of the popular assembly (*psephisma, psephismata*) on which they relied. The parties had to find and rewrite such instruments on their own. Persons invoking a non-existing law faced the death penalty[11]. Wills, contracts, books of accounts were among documents constituting procedural evidence. Testimonies of witnesses (*martyria*, *martyriai*) were the crucial proof during a trial.[12] In Athens, only free adult males had the privilege of testifying. As stated by most commentators, female Athenian citizens could not give evidence during the trial.[13] The testimony of slaves could constitute evidence only if extracted by torture. It was then considered more credible than the testimony of a free man (*martyriai*).

Similarly, persons who had lost their Athenian citizenship could not serve as witnesses[14]. Still, foreigners[15] could give testimony in public[16] and private[17] cases. Parties to a dispute could not be witnesses in their

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[9] See: DEMOSTENES. *Przeciw Timokratesowi*. p. 149-151.

[10] See: ARYSTOFANES. *Osy*. p. 919.

[11] See: DEMOSTENES. XXVI 24.

[12] For a more detailed discussion, see: LEISI, Ernst. *Der Zeuge im attischen Recht*. Frauenfeld 1907; MIRHADY, David C. *Athens' Democratic Witness*. Phoenix, 56/3, p. 255-274, 2002.

[13] See: GAGARIN, Michael. *Women in Athebian Court*. Dike 1, p. 43, 1998.

[14] See: DEMOSTENES. XXI 95.

[15] See: HARRISON, Alick Robin Walsham, *The Law...*, p. 138.

[16] See: DEMOSTENES. XXXV 14; HYPEREJDES. V 33.

[17] See: DEMOSTENES. XIX 146; AJSCHINES. II 155.

own case[18]. However, testimony in support of a litigant's case could be given by persons who spoke on their behalf (*synegoroi*).[19] Relatives of a party to the proceedings were allowed to testify. It is assumed that Athenian law prevented jurors hearing a given case from acting in the capacity of witnesses[20].

3.2. Ancient Rome

In Roman law, there were no statutory rules for dealing with evidence. The Roman theory of evidence was not developed to a degree sufficient to fully restate the principles of evidentiary proceedings. The majority of sources concerning evidence in criminal trials of the Republican era appear in court speeches, which are devoid of theoretical references. Roman law provided for no list of admissible measures of evidence. A piece of evidence, proof (*probatio*), understood as a measure of evidence was defined as the information about circumstances relevant to the adjudication of a dispute. It was the parties who were required to present and take evidence. Neither the judge presiding over the trial (*quaesitor*) nor the multi-person tribunal had any participation in the taking of evidence. The burden of proof (*onus probandi*) rested on whoever made the claim.

Roman law did not introduce a list of admissible measures of evidence. Consequently, there were no restrictions on the admissibility of evidence. The only known categorisation of evidence, the one cited by Quintilian[21] and derived from Aristotle, was based on the distinction

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18 See: DEMOSTENES, VII 46.

19 See e.g.: ISAJOS, XII 4; AJSCHINES, II 170.

20 See: HARRISON, Alick Robin Walsham, *The Law...*, p. 138.

21 Quintilian, or Marcus Fabius Quintilianus, c. 35– c. 96 AD, Roman rhetorician and rhetoric educator, advocate. The author of *The Institutes of Oratory; or, Education of an Orator. In Twelve Books* (Latin: *Institutionis oratoriae libri XII*), which presents the theory of rhetoric, remarks about foundational education and a depiction of the ideal teacher. In Book V of the *Institutio Oratoria,* Quintilian presents the types of evidence in the Roman legal process, including evidence derived from the court proceedings themselves, public opinion and rumours, evidence extracted by torture, testimonies of official documents, oaths, witness testimonies, evidence derived from laws, circumstantial evidence.

between artificial proofs (*probationes artificiales*) and natural proofs (*probationes inartificiales*)[22]. According to Quintilian, artificial proofs originate from the speaker himself, i.e. the prosecutor and the advocate, are a product of their rhetorical skills. The above category was said to include arguments, which in practice denoted circumstantial evidence[23]. Natural proofs consisted of evidence obtained from sources external to the speaker, which included „appropriate" measures of evidence, namely those intended to demonstrate the existence or non-existence of certain past events. *Probationes inartificiales* included witness statements, documents, etc.

The key evidence was the testimony of witnesses *(testimonia*). A special type of witness was the *laudator* (praiser), i.e. a character witness called during the trial to give verbal or written testimony in support of the accused's case, his conduct and lifestyle. The laudator's testimony constituted a measure of evidence. Another type of witness was the *index* (informant), an accomplice who confessed to the crime. An *index* received immunity or even a reward. An *index* was questioned at the preparatory stage of the proceedings and then as a witness during the trial. Expert witnesses were not considered a separate source of evidence; they were treated as witnesses, albeit of a special kind.

As a rule, only freemen could be witnesses, although this condition was not formally defined until the 5th century AD[24]. The criminal process of the Republican era did not provide for any common, statutory restrictions on the admissibility of testimony on the grounds of sex, societal status or age of a witness, their foreign origins or even

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22 In Book V of the *Institutio Oratoria* 5.1.1. (*Liber Quintus*) Quintus writes: *"Ac prima quidem illa partitio ab Aristotele tradita consensum fere omnium meruit, alias esse probationes quas extra dicendi rationem acciperet orator, alias quas ex causa traheret ipse et quodam modo gigneret; ideoque illas atechnous, id est inartificiales, has entechnous id est artificiales, vocaverunt" (To begin with it may be noted that the division laid down by Aristotle has met with almost universal approval. It is to the effect that there are some proofs adopted by the orator which lie outside the art of speaking, and others which he himself deduces or, if I may use the term, begets out of his case. The former therefore have been styled inartificial proofs, the latter or artificial.).*

23 See: LITEWSKI Wiesław. *Rzymski proces karny*. Kraków 2003, p. 93.

24 C. 4, 20, 10.

indecency or previous convictions. Some scholars present the view that children were customarily excluded from testifying in cases against their parents[25], but others argue that such a relationship was merely a ground for a refusal of testimony, known already in the times of the Republic. Paulus's testimony that a son is not a suitable witness in his father's case, and the father – in the son's case[26] (or, more broadly, in a case concerning the daughter, grandson or grandfather),[27] is sometimes interpreted as referring to testimony given *in support* rather than *to the detriment of*, a party to the dispute[28].

The first formal subjective restrictions on the admissibility of testimony were introduced by Emperor Augustus,[29] who resolved that in cases involving the charge of *vis*, no testimony for the accuser's case may be given by slaves freed by the defendant (or the defendant's father), minors, persons convicted of a public offence and not reinstated to their previous status, offenders held in shackles or in prison, persons fighting wild animals (*bestiarii*), female prostitutes, as well as all persons convicted, or even accused, of accepting a financial advantage for giving or refraining from giving testimony.

According to Ulpian (as quoted in the *Collatio)*[30], the list of persons strictly excluded from testimony also comprised of freedwomen of the accused, the accused's ascendants or freed slaves (of both sexes) of any of the accused, or the accused's ascendants, any slaves freed by the above freedmen (or freedwomen), men who hired themselves as gladiators or *bestiarii* (with the exception of javelin throwers), as well as persons who have appeared or were to appear in public.

It was also pointed out that the prosecution should not appoint as a witness a person previously accused in a public trial or a person who

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[25] See: ZUMPT, August Wilhelm. *Das Criminalrecht der Römischen Republik*. Berlin 1869, p. 256 and 267-268.

[26] D. 22, 5, 9.

[27] See D. 50, 16, 201.

[28] MANFREDINI, Arnoldo D. *La testimonianza del liberto contro il patrono nel processo criminale di età classica*. In: *Studi in onore di Arnaldo Biscardi*. v. 3. Milano 1982, p. 234.

[29] D. 22, 5, 3, 5.

[30] *Collatio* 9, 2.

was under the age of 20[31], (although the *Lex Iulia de vi* refers to the age of maturity)[32]. In addition, no person who has already testified against the accused could be appointed as a witness for the accused[33]. Persons suspected of bias, in particular, those "brought by the accuser from their own home"[34], as well as those who have fallen into infamy as a result of their lifestyle[35] were also disqualified as witnesses.

Moreover, judges hearing the case, advocates[36] and jurors were generally disqualified as witnesses. There was also a rule prohibiting a party from acting as a witness in their case.[37]

During the Republican period, the accused's statements, including their admission of guilt (*confessio*), did not constitute evidence. The accused's admission of guilt resulted in the proceedings ending immediately with conviction. However, Seneca, who lived in the 1st century AD, expressed the principle that both parties to a dispute should be heard: "*Quicunque aliquid statuerit, parte inaudita altera, Aequum licet statuerit, haud aequus fuerit*"[38].

During the Imperial period, the *confessio* obtained the status of evidence. As such, the admission of guilt was required to be examined in the light of other evidence gathered, subject to the proviso that if the prosecution's allegations are not supported by other evidence, the accused's admission of guilt should not be treated as evidence of a crime the accused has allegedly committed[39].

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[31] D. 22, 5, 20. Cf. GIUFFRE, Vincenzo. *La repressione criminale nell 'esperienza romana*, Napoli 1997, p. 152.

[32] D. 22, 5, 3, 5 and *Coll.* 9, 2, 2.

[33] D. 22, 5, 23. A different rule is expressed in C. 4, 20, 13.

[34] D. 22, 5, 24; *Coll.* 9, 3.

[35] *Collatio* 9, 3.

[36] D. 22, 5, 25. See also ZUMPT August Wilhelm. *Das Criminalrecht...*, p. 271-272.

[37] D. 22, 5, 10.

[38] "Whoever shall have determined anything without hearing the other side, may have decreed justly, yet he will not have been just." SENECA, *Medea*, Poznań 2000, p. 199-200.

[39] D. 48, 18, 1, 17; D. 48, 18, 1, 27.

During the reign of Emperor Constantine, the spontaneous *confessio* was treated as a sufficient basis for conviction in cases of capital offences, namely adultery, manslaughter or witchcraft. A conviction could be handed down also in the absence of the perpetrator's confession, if there were consistent statements of persons subjected to torture or made by witnesses[40]. It was permissible to torture the accused in order to obtain their *confessio*.

Public opinion views (*rumores*) had a major influence on the content of criminal judgments[41]. Such views constituted one of the measures of evidence.

3.3. Medieval criminal process and rules of admissibility of evidence

In the early medieval process, no separate procedures were established for private and criminal cases, because both were based on a sense of harm suffered by a party, regardless of the nature of the harmful deed. In this context, all proceedings had features of a criminal trial.

Evidentiary proceedings were conducted not before but after the judgment was delivered. The proceedings took place out of court but in the presence of the opposing party. The person obliged to take evidence (usually the respondent/accused) thus had to solemnly swear to the opposing party (the claimant) that they would take evidence. Accordingly, the claimant/accuser had to acknowledge the result of the evidence-taking process. Anyone who failed to comply with the obligation to take evidence was outlawed. All types of evidence were regulated in a strictly formalistic fashion. These included the confession of guilt, the apprehension of the perpetrator in the act, oaths, the ordeals and witness testimony.

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[40] C. 9, 47, 16.

[41] In Book V *of the Institutio Oratoria* (5.1.2, *Liber Quintus*) Quintilian writes: "***Ex illo priore genere sunt praeiudicia, rumores, tormenta, tabulae, ius iurandum, testes, in quibus pars maxima contentionum forensium consistit.*** *Sed ut ipsa per se carent arte, ita summis eloquentiae viribus et adlevanda sunt plerumque et refellenda. Quare mihi videntur magnopere damnandi qui totum hoc genus a praeceptis removerant.*"

The tribal period is considered the period of the emergence of ordeals (*iudicia Dei*), which were based on the belief that a deity would identify the guilty party. Recourse to this measure prevented other evidence from being used, as the ordeal was considered definitive proof. These included the trial by hot water (*iudicium aquae ferventis*) and the trial by hot iron (*iudicium ferri candentis*) and trial by cold water (*iudicium aquae frigidae*).

Under Germanic law, every free man could be a witness. However, a witness was required to possess property, at least movable, probably because of the necessity of paying a fine for perjury. A tenant sitting on someone else's land could not serve as a witness, even though he was granted the right to act as an oath-helper. A witness was also required to be settled in the county where the case was adjudicated. Perjurers, offenders sentenced to death and later pardoned, minors, women and persons deprived of honour did not have the capacity to serve as witnesses. The category of persons deprived of honour included comedians, jesters, men cohabitating with a concubine, sons of unmarried mothers and prostitutes.

The Swabian Mirror allowed the use of torture if there was circumstantial evidence (*Indizien*) that an accused person may have committed an offence, based on the credible testimony of one or two witnesses. After receiving such testimony, the court had one month to obtain the accused's confession to the commission of the alleged offence by means of torture. Over time, courts have been using torture in an increasingly arbitrary fashion, merely based on a suspicion of commission of a crime.

3.4. Rules of evidence of the *Constitutio Criminalis Carolina*

Adoption by the *Reichstag* (on 27 June 1532) of the *Constitutio Criminalis Carolina* (the *Carolina*, or "CCC"), has brought a new, strong impetus for the development of the theory of evidence, connected with the inquisitive type of criminal proceedings popularised by this codification. The system of formal proof envisaged in the *Carolina* has replaced the existing system of evidence in the accusatory process. The legal (formal) theory of evidence laid down in the Carolina determined the hierarchy and worth of individual types of evidence and set the requirements for

valuable evidence. The accused ceased to be a subject of the proceedings and became the object of the proceedings.

According to the *Carolina*, not only witness statements and documents but also circumstantial evidence, suspicions and conjectures could be accepted as evidence. If the accused could not prove his innocence and did not confess, the judge ordered them to be tortured. The torture-induced testimony given by the accused needed to be confirmed by testimony given after the torture. Only the admission of guilt obtained under the procedure provided for by *Carolina* was considered "complete" evidence and sufficient grounds for a conviction (art. 60 CCC).

The *Carolina* required that a witness should have a good reputation and therefore prohibited convicted perjurers from serving as witnesses. Furthermore, the codification did not allow unknown and hired witnesses.

The legal theory of evidence that governed the inquisitorial criminal process applied to all evidence used in the process. On the one hand, it has curtailed then-existing judicial arbitrariness related to the examination of evidence. On the other hand, the legal theory of evidence determined, in a rigid and top-down manner, what evidence the judge had to believe and what they had to refuse to believe and established what conclusions and legal consequences the judge had to draw from the evidence presented, regardless of their personal judgement.

The principles provided for in the inquisitorial criminal process did not apply to witchcraft trials, as such proceedings were considered to be taken against Satan himself, while the accused witch was perceived merely as Satan's victim and supine tool. No rules of the legal theory of evidence were followed in witchcraft trials. Even the testimony of children had full evidentiary value. No restrictions concerning the use of torture existed in such proceedings and presumptions could be admitted as evidence. Witchcraft trials saw the re-emergence of ordeals, which had been out of use since the Middle Ages, such as the trial of water.

3.5. The admissibility of evidence in the modern era criminal proceedings

During the Enlightenment period, all stages of the French judicial process, including sentencing, were closed to the public, as it was the case in most European countries. The knowledge of the collected evidence

was a privilege of the accuser. Under the Criminal Ordinance of 1670, the accused did not have access to evidentiary proceedings, did not know accusers, witnesses or the content of their testimonies, could not invoke any defences until the trial was completed, and was deprived of the right to legal representation. The magistrate, on the other hand, could admit any evidence submitted by the prosecution, even anonymous proof. The judge independently established the facts, notifying the accused. The judge questioned the accused once, before making the judgment. The accused was still treated as an object rather than a subject of the criminal process.

The rule that criminal proceedings should be conducted in camera and in writing was a consequence of the principle that the determination of the truth was the sole prerogative of the sovereign and the judges appointed by the sovereign. After all, the supreme authority, including the right to impose criminal penalties, could not be left in the hands of commoners. Another byproduct of procedural secrecy was a strict system of formal evidence. The essence and procedural value of evidence were defined by a long-standing tradition dating back to medieval times. As late as in the 18th century, proofs were classified as real, direct and formal; indirect, circumstantial and presumptive; and also as evident, considerable and non-considerable.[42] In principle, the formal restrictions placed on evidence-taking were a means of the internal regulation of the absolute power that applied the law for its exclusive use.

Torture was a legitimate method of evidence-taking. As such, torture, independently from the "modern" inquisitive methods, was a living relic of the ancient probative methods such as ordeals, judicial duels or other "God's judgments". According to the procedure, if the accused endured torture and did not confess, the accuser was obliged to drop the charges. A consequence of the above rule was the custom, prevailing in cases of most serious offences, of ordering torture, but "subject to evidence". In such a case, upon the conclusion of torture, the judge was still allowed to adjudicate based on presumptions to prevent the accused's acquittal. This procedure offered the accused the "advantage" of being protected against capital punishment.

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[42] See: JOUSSE, Daniel. *Traite de la justice criminelle*. Paris: Debure 1771, p. 660.

The Austrian *Franciscana*, or the *Book of Laws on Felonies and Grave Police Offences*, enacted on 3 September 1803, emphasised the principle of "legal belief", expressed in the admissible finding of the accused's guilt based on certain rules of evidence despite the absence of the accused's confession. The new codification did not abolish the theory of legal evidence in Austrian criminal procedure, but the accused's admission of guilt was no longer the conclusive evidence.

Furthermore, under the Prussian Criminal Ordinance (*Preussische Criminalordnung*) of 1805, the obsolete "positive" form of the theory of legal evidence continued to govern the assessment of evidence. Accordingly, proofs were divided into complete, incomplete and less than incomplete (i.e. doubtful).

3.6. The admissibility in France in the Napoleon Bonaparte era

The Code of Criminal Procedure (*Code d 'instruction criminelle*) adopted in France on 16 December 1808 marked the beginning of a new era in the history of the European criminal process. Under the 1808 Code, anyone who had knowledge of a crime or its circumstances could serve as a witness. The hearing of witnesses by the judge during the investigation took place in camera and in the absence of the accused (art. 73). Before starting to testify, witnesses took an oath that they would tell the truth and only the truth. Pursuant to art. 322 of the Code, the following persons could not testify as witnesses: (1) father, mother, grandfather, grandmother and ascendants of the accused or a co-accused; (2) sons, daughters, grandchildren or ascendants of any of them; (3) brothers and sisters; (4) persons related by affinity in the first or second degree; (5) husband and wife, also divorced; 6) denunciators (whistleblowers, informants) paid for their services; unpaid denunciators could appear before the court as witnesses, but the court had to instruct the jury of their status (art. 323). Testimony given by the aforementioned persons was nevertheless valid provided that the prosecutor, the aggrieved person and the accused made no objection.

Napoleon Bonaparte introduced restrictions on certain persons' capacity to become a witness. In art. 510 of the Code, he stipulated that "the Princes and Princesses of Imperial Blood, the Grand Dignitaries

of the State, and the Grand Judge the Minister of Justice shall not be summoned to appear as witnesses, even at a trial before the assembly of juries, unless the Emperor, at the request of a party and after obtaining the report of the Grand Judge, by special decree, gives His approval for their appearance".

4. The contemporary discussion of the rules on admissibility of evidence in criminal process

The concept of "admissible evidence" is currently under discussion in the European science of evidence and case law. The core of this discussion is the question of whether evidence obtained illegally can be deemed admissible. In fact, illegality in obtaining evidence should trigger relevant procedural sanctions including declaring it null and void or ineffective.

It is noted in the debate that the state is obliged to ensure the safety of its citizens. The state should introduce effective measures aimed at preventing and combating crime. The obligation to ensure the safety of citizens means that the state can, or even – if the circumstances of a given case so require – has to, resort to obtaining evidence in an unlawful manner. Since the 11 September 2001 attacks, the notion of admitting illegally obtained evidence has been expressed more often. The opinion is expressed that in extreme situations it is necessary to obtain testimonies by violence, especially in "ticking-bomb" scenarios. There are even more far-reaching proposals to legalise and institutionalise the use of torture. However, supporters of this view note that such drastic measures are exceptional and allowed only in extreme situations and that torture is only to be applied under supervision and must be governed by legally defined procedures[43]. In Germany, the discussion revolved around the use of physical and psychological violence by police officer Wolfgang

[43] See: SLATER. Jerome. Tragic Choices in the War on Terrorism: Should We Try to Regulate and Control Torture? *Political Science Quarterly*, v. 121, no. 2, p. 191-215, 2006. DERSHOWITZ, Alan M. Is There a Torturous Road to Justice?, *Los Angeles Times,* 8.11.2001; DERSHOWITZ, Alan M. *Why terrorism works: Understanding the threat, responding to the challenge.* Yale University Press, 2002, p. 131-164.

Daschner in connection with the abduction of the son of a well-known financier by Magnus Gäfgen[44]. In a "ticking bomb" scenario, violence is used against the accused in order to save or protect the life and health of other people. Opponents of violent evidence-taking measures counter the above rationale for extorting evidence by pointing to the ultimate value, namely the inherent dignity of a human being.

The necessity for the state authorities to maintain lawful forms of action is quoted in opposition to the views justifying the admission of unlawfully obtained evidence. After all, the authorities are obliged to act on the basis and within the boundaries of the law. The principle of legality governing the actions of authorities, as expressed in most European constitutions, prescribes the respect for and compliance with legal forms and methods of obtaining evidence in the criminal process.

The ECtHR expressed the view that the use of evidence obtained directly as a result of torture always makes the criminal process unreliable. In the judgment of the Grand Chamber in the case *Jalloh v. Germany* the Court stated that: *"... incriminating evidence – whether in the form of a confession or real evidence – obtained as a result of acts of violence or brutality or other forms of treatment which can be characterised as torture – should never be relied on as proof of [the victim's] guilt, irrespective of its probative value. Any other conclusion would only serve to legitimate indirectly the sort of morally reprehensible conduct which the authors of Article 3 of the* [European Convention for the Protection of Human Rights and Fundamental Freedoms] *sought to proscribe or, as it was so well put in the United States Supreme Court's judgment in the* Rochin *case, [...] to "afford brutality the cloak of law"*[45].

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[44] See: EUROPEAN COURT OF HUMAN RIGHTS. *Judgment of 1 June 2010,* Gäfgen v Germany, no. 22978/05. https://hudoc.echr.coe.int/.

[45] See: EUROPEAN COURT OF HUMAN RIGHTS. *Judgment of 11 July 2006,* Jalloh v Germany, no. 54810/00, §105. The same view was expressed in: EUROPEAN COURT OF HUMAN RIGHTS. *Judgment of 21 September,* Söylemez v Turkey, no. 46661/99, § 122; see also: GRAFFIN, Niel. The Legal consequences of Ill-treating Detainees held for Police Questioning in Breach of Article 3 ECHR. *European Journal of Current Legal Issues*, v. 20, no. 2, p. 5-6, 2014, http://webjcli.org/article/view/339/437.

The said opinion has been repeated in other judgments.[46] In *El Haski v. Belgium*, the ECtHR reiterated that the use of evidence obtained by torture and by inhuman or degrading treatment in criminal proceedings automatically renders the trial, as a whole, unreliable. The same standard should be applied to material evidence obtained directly through the use of torture[47]. It is irrelevant here whether the evidence obtained as a result of torture or inhuman treatment played a significant role in the making of a factual finding. The very fact of admitting such evidence to the criminal process is a factor determining the unreliability of the entire proceedings[48]. Evidentiary prohibitions set out in Article 3 of the Convention are absolute in nature and have cross-border implications. Hence, it is unacceptable to use evidence (testimonies of witnesses' or the accused) obtained through international legal assistance from a person interviewed in another country with the use of torture or inhuman treatment.

According to the ECtHR, narrowly understood evidentiary prohibitions also apply to the evidence obtained as a result of a faulty fictitious transaction, which constitutes incitement of the accused to commit a prohibited act. The ECtHR has expressed such a position in *Ramanauskas v. Lithuania*. The Court held that "*where an accused asserts that he was incited to commit an offence, the criminal courts must carry out a careful examination of the material in the file, since for the trial to be fair within the meaning of Article 6 § 1 of the Convention, all evidence obtained as a result of police incitement must be excluded. This is especially true where the police operation took place without a sufficient legal framework or adequate safeguards.*"[49] The Court also found that where a national court establishes that the accused was incited to commit a prohibited act imputed to them, the Court will be obliged to exclude evidence obtained as a result of police provocation that was improperly carried out. In other

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[46] Cf. EUROPEAN COURT OF HUMAN RIGHTS. *Judgment of 1 June 2010,* Gäfgen v Germany, no. 22978/05, §§ 166-167.

[47] See: EUROPEAN COURT OF HUMAN RIGHTS. *Judgment of 25 September 2012,* El Haski v Belgium, no. 649/08, § 85.

[48] See: EUROPEAN COURT OF HUMAN RIGHTS. *Judgment of 11 February 2014,* Cěsnieks v Latvia, no. 9278/06, § 62-70.

[49] See: EUROPEAN COURT OF HUMAN RIGHTS. *Judgment of 5 February 2008,* Ramanauskas v Lithuania, no. 74420/01, § 60.

judgments, the ECtHR pointed to the obligation to exclude such evidence from the criminal process or apply a "*procedure with similar consequences*"[50].

5. The axiological foundations of the rules on admissibility of evidence in criminal proceedings

It is noted in the ongoing debate that if the principle of legality of the actions of authorities, the principle of respect for inherent human dignity, legal protection of individual freedoms and rights, including the right to privacy, and the prohibition of torture, inhuman and degrading treatment and the use of corporal punishment are introduced into national legal systems, then the authorities of the state should respect these principles. It is pointed out that the history of law provides numerous examples of the fact that a sovereign is obliged to respect the law that they have established. In the early Middle Ages (until 1100) there was a principle, expressed as a moral obligation, that the king rules within the law inherited from his ancestors and is obliged to respect that law. This obligation was reiterated in early medieval Christian writings. Saint Ambrose (c. 340-397), Bishop of Milan, claimed that kings were not subject to criminal law but nevertheless emphasized that the ruler should observe the laws he had established[51].

In the late Middle Ages St. Thomas recommended that the ruler obeyed the law on account of his moral duty. In distinguishing between the "coercive" and "directive" force of the law, St. Thomas expressed the view that "when it comes to the directive force of the law, the ruler

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[50] See: EUROPEAN COURT OF HUMAN RIGHTS. *Judgment of April 2014,* Lagutin and Others v Russia, no. 6228/09, 19123/09, 19678/07, 52340/08 and 7451/09, § 117; Also: EUROPEAN COURT OF HUMAN RIGHTS. *Judgment of 9 June 1998,* Teixeira de Castro v Portugal, no. 44/1997/828/1034, §§ 34-36; EUROPEAN COURT OF HUMAN RIGHTS. *Judgment of 26 October,* Khudobin v Russia, no. 59696/00, § 135; EUROPEAN COURT OF HUMAN RIGHTS. *Judgment of 15 December 2005,* Vanyan v Russia, no. 53203/99, § 46-47; EUROPEAN COURT OF HUMAN RIGHTS. *Judgment of 2 December 2014,* Taraneks v Latvia, no. 3082/06, § 60.

[51] See: AMBROSE OF MILANO. *Epistulae,* 21.9, where he wrote: "the emperor makes laws, so let him be an example of respect for that law"; see also: ISIDORE OF SEVILLE. *Sententiae,* 3.51.

surrenders to the law of his own free will". As Thomas Aquinas said, that is why it had been stated in the Decrees of Gregory that "whoever obliges the other by the law that has been issued should himself respect that law. And the Sage teaches further: 'hold on to the law that you yourself have established'"[52].

During the Renaissance, Jean Gerson[53] indicated that the king may not kill anybody without applying the rules of due process of law (*iuris ordine*) and that the king may not take the life of anyone who has not been charged, brought to court and convicted. "The monarch and prelate, although they are usually said to be free from the binding force of the law (*solutus legibus*), should respect the law they have established to set an example to their subjects"[54].

During the Enlightenment, Jean Bodin[55], the greatest contemporary supporter of the absolute monarchy, claimed that the quintessence of sovereignty was that the sovereign should not be bound by any laws. Nevertheless, he believed that the kingdom should be governed, as far as possible (*quantum fieri poterit*), by laws rather than by the arbitrary will of the ruler. Beccaria, Montesquieu and Voltaire protested against the arbitrariness of governmental power. J. Locke also wrote about the need for the monarch to respect the law[56]. Notably, in the 18th century, the arbitrariness of the government that went beyond the law because of the alleged existence of royal prerogative was the reason for the action

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[52] See: TOMASZ Z AKWINU. *Summa teologiczna. Prawo*, I-II, q. 96.5., v. 13, p. 86, Londyn 1986.

[53] Jean Gerson (1363-1429), Rector of the University of Paris, philosopher, reformer.

[54] See: GERSON, Jean. Summa contra Ioannem Parisiensem (Opera, 1.11.152). In: KELLY, John M. *Historia zachodniej teorii prawa*. p. 199, Kraków 2006; KELLY, John M. *A short history of western legal theory*. Oxford University Press, 1992.

[55] Jean Bodin (1530-1596), theoretician of the state, creator of the ideology of French absolutism, supporter of absolute monarchy. His ideas became the basis of absolute monarchy in France. His best-known work is *The Six Books of the Republic*. In the treaty entitled *De la démonomanie des sorciers* (Of the Demon-mania of the Sorcerers) Bodin recommended extremely brutal methods of punishing alleged witches.

[56] See: LOCKE, John. *Dwa traktaty o rządzie*. London 1690, p. 310.

taken in England against the Stuarts and the beheading of King Charles I and dethronement of King James II.

It is argued that the law is based on specific axiology. A set of axiological values is contained implicitly or explicitly in or outside the system of law to which it refers. The set of these values constitutes the moral basis of the law. Currently, in the European legal culture, human rights, including the right to a fair trial, are an important element of this set.

6. Conclusions

Bearing in mind the values expressed in the constitutions of the countries of continental Europe or in the preambles to these acts as well as those laid down in legal instruments of the European Union and the Council of Europe, which form part of national legal systems, one should say that justice, truth, freedom and inherent dignity of a human being constitute the axiological basis of the criminal process. They are the primary values of the criminal process. Recognising these values as fundamental values necessitate organising the criminal process in a way that would ensure that these values are respected and protected. Inherent human dignity must be protected fully and unconditionally. The remaining values, i.e. justice, truth and freedom are not absolute in nature and may be restricted according to the criteria laid down by the proportionality principle.

The fairness of the judicial (criminal) process refers to what is known as “procedural fairness”. In accordance with the procedural fairness principle, the process is fair as long as it provides for guarantees of the parties to the proceedings. The essence of procedural fairness is the seeking of justice (a fair outcome) by means of properly designed procedural provisions that duly protect parties’ rights. In the criminal process, procedural fairness requires that procedural provisions be developed in a way conducive to achieving a fair outcome in the most effective way possible. The implementation of the procedural fairness principle creates the presumption of a fair outcome on the object of the process (i.e. on the guilt of the accused). In such a case, it would be difficult to consider a court decision to be procedurally fair if the evidence of the accused’s guilt had been obtained unlawfully.

It should be added that the axiological basis of a legal system on which a legal order is based determines not only the direction of law-making but also the interpretation and application of laws. It is, therefore, the responsibility of the national authorities of continental Europe, including the criminal justices bodies, to construe the law in a pro-constitutional and pro-EU manner and apply the law in accordance with these values.

One should also recall the aforementioned requirement of foreseeability of court decisions. As a side note, one should remember that the period preceding the 19th century's legal codifications is considered to be the era of absent legal certainty. The reasons for this absence were the chaotic structure of legal authorities, particularism, the confusedness and ambiguity of customary laws, which led to arbitrary court decisions. It was hoped that the much-needed codification of law would result in developing a uniform body of law that would contain ready-to-use and accessible solutions. The law as a system was meant to be simple, coherent and complete[57].

Nowadays, calls for legal certainty in the countries of continental Europe are made for reasons other than those quoted in the pre-codification period. Generally speaking, the causes of historical legal uncertainty have already been eliminated. It is now clear who makes the law and how it is made and the law itself is based on socially acceptable rules, principles and standards such as the right to a court or the right to a fair (honest) and impartial trial. However, this does not mean that the law is entirely certain. Whereas the pre-codification postulate of foreseeability of the law centred on abstractly expressed foreseeability, nowadays the foreseeability of the law, or rather of decisions to apply the law, is perceived in concrete terms. The parties have the right to assume that evidentiary proceedings in the criminal process will be carried out in accordance with legal principles and rules. They should expect that evidence-taking procedures will be performed in a way defined in the law and that only the legally admissible

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[57] See: CANALE, Damiano. The Many Faces of the Codification of Law in Modern Continental Europe. In: PATTARO, Enrico, CANALE Damiano, GROSSI, Paolo, HOFMANN, Hasso, RILEY, Patrick (Eds.). *A History of the Philosophy of Law in the Civil Law World, 1600-1900*. Series A Treatise of Legal Philosophy and General Jurisprudence. Netherlands: Springer 2009, p. 137. Online ISBN 978-90-481-2964-5.

evidence will be taken. They should be able to anticipate that the rules of law will be interpreted holistically, in accordance with the principles of interpretation and according to the pro-constitutional and pro-EU interpretation and that similar cases will be decided in a similar manner. If, however, the criminal process involves steps taken without legal basis or in direct contravention of law, inadmissible evidence is collected and taken and the law is interpreted so as to justify illegal actions by authorities and violations of constitutional principles and values, the parties will have none ability whatsoever to predict the final outcome of their case.

One of the arguments raised in the ongoing debate concerns the requirement to preserve the moral integrity of the justice system. It is argued that the criminal process is a social tool and as such requires adequate legitimacy. Its existence is closely linked with the primary values of a given legal system. Thus, one should never allow for a discrepancy between the declared principles and actual actions of state bodies. The above assertion is crucial for the justice system since the authority to administer justice may only reasonably be invoked where the body enforcing compliance with the law itself respects the law. This means that the rules of the "procedural game" should be seen on an equal footing with the pursuit of the objectives of the criminal process defined in substantive law.[58] Arguments referring to the postulate of the moral legitimacy of the justice system also refer to the notion that the rights and freedoms of an individual form a coherent system. A violation of these rights and freedoms results in a violation of the right to a fair trial. The effectiveness of human rights requires proper guarantees, i.e. the possibility of disqualifying illegally obtained evidence.[59] Accordingly, the question arises whether the judging of the accused's behaviour and determination of the accused's guilt (in other words, the administration of justice on behalf of the state) can be reconciled with permitting and accepting the use of fruits (benefits) of illegal activities of state bodies.[60]

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[58] See: ASHWORTH, Andrew. Exploring the integrity principle in evidence and procedure. In: MIRFIELD, Peter. SMITH, Roger. *Essays for Colin Tapper*. Oxford-New York 2003, p. 110.

[59] Ibid. 115-116.

[60] See: CHAU, Peter. Excluding Integrity? Revisiting Non-Consequentialist Justifications for Excluding Improperly Obtained Evidence in Criminal Trials.

The postulate of the moral integrity of the justice system is procedural in its nature. It is linked to the (substantive) values that constitute the axiological basis of a given legal system. This postulate may not be fulfilled if there is a discrepancy between the declared principles and the actions taken as well as an inconsistency in a given system that manifests itself in the divergent behaviour of those acting within the system's framework. It is important insofar as invoking the requirement of the moral legitimacy of the justice system requires detachment from prevailing and changing social expectations. Nowadays, the people of continental Europe quite universally accept that the law may be infringed in connection with the prevention and combating of crime and, more generally, the protection of public safety. Societies approve actions taken by state bodies such as the use of prohibited methods of obtaining evidence. This is evidenced by, among other things, the views and arguments expressed in Germany in connection with the aforementioned case of Wolfgang Daschner[61].

It is also pointed out that the argument concerning the moral integrity of the justice system should be reformulated into an argument based on the prohibition of profiting from illegal activity. The latter assumes that a key aspect of the disqualification of illegally obtained evidence is the assessment of whether such evidence, if admitted, would be procedurally beneficial to a party (basically, the prosecution) who requests the admission. If this is the case, the evidence should be disqualified.[62] This approach deviates from the postulate of moral integrity of the justice system, although it is also based on the systemic assumption that one may not derive benefits from activities that are prohibited within a given system.

In conclusion, it is worth noting that the term "inadmissible evidence" should be understood broadly. Not only the evidence that is

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In: HUNTER, Jill. ROBERTS, Paul. YOUNG, Simon. DIXON, David (Eds.) *The Integrity of Criminal Process: From Theory into Practice*. Oxford-Portland 2016, p. 275-277.

[61] See: ESSLINGER, Detlef. Mildes Urteil im Folter-Prozess, *Süddeutsche Zeitung,* 21.12.2004. See also public opinion polls carried out in Germany by the Institut für Demoskopie Allensbach,Darf die Polizei Gewalt androhen, um Leben zu retten? Die große Mehrheit der Bevölkerung sagt: "Ja", *Allensbacher Berichte,* v. 6, 2004.

[62] CHAU, Peter. Excluding Integrity?...

subject to a statutory prohibition of evidence-taking is inadmissible but also any evidence that has unlawfully been obtained. It is debatable whether such evidence should be disqualified based on *any* discrepancy with the applicable law or whether such disqualification should be reserved for infringements of certain, particularly significant norms expressing the fundamental values of a given legal system or infringements of a specific degree (severity). It seems that a position advocating strict observance of the law by state authorities should prevail. Any attempt to relativize this phenomenon will always lead to more opportunities for legal violations and illegal activities, in line with Gresham's Law that "bad money drives out good". Indeed, bad law will always drive out good law.

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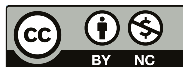

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Collection of location data in criminal proceedings – European (the EU and Strasbourg) standards

Coleta de dados de localização no processo penal – Parâmetros europeus (EU e Strasbourg)[1]

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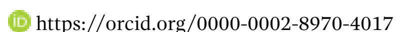
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Abstract: This article deals with the problem of collecting, retaining and processing location data for use in criminal proceedings. The collection of location data is an interference with the right to privacy (the Article 8 of the ECHR, the Article 7 of the Charter). However, such interference is permissible if it pursues the aims indicated in Article 8(2) of the ECHR (prevention of and fight against serious crime, protection of general security, national security). Therefore, the question arises as to when the procedural authorities may obtain location data (what offences may justify interference with the right to privacy) and what conditions should be met by national law with regard to this issue. The ECtHR and the CJEU are increasingly dealing with cases that concern the collection of location data in real time and data retention by telecommunications service providers. This requires an assessment of whether a European standard has now been developed and, if so, what is the standard?

Keywords: Criminal procedure; Human rights; Right to privacy; Location data; Data retention.

Resumo: *Este artigo analisa o problema da coleta, custódia e processamento de dados de localização para uso em processos penais. A coleta de dados de*

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localização é uma restrição ao direito à privacidade (art. 8, CEDH; art. 8, Carta de Direitos Fundamentais da UE). Contudo, isso é permitido se almejar o objetivo indicado no art. 8(2) da CEDH (prevenção e combate a crimes graves, proteção da segurança pública e nacional). Assim, a questão surge sobre quando as autoridades podem obter os dados de localização (quais crimes podem justificar essa restrição à privacidade) e em que condições devem ser respeitadas pelas legislações nacionais sobre o tema. O TEDH e o Tribunal de Justiça da UE estão lidando cada vez mais com casos relacionados à coleta de dados de localização em tempo real e a sua custódia pelos provedores de serviços de telecomunicações. Isso a verificação de se os parâmetros europeus foram desenvolvidos e, em caso positivo, quais são eles.

Palavras-chave: *processo penal; direitos humanos; direito à privacidade; dados de localização; custódia de dados.*

1. Introduction

Location data allows determination of the profile and routine of life, the place where one stays and for how long one stays in a given place[3]. The collection, processing and storage of such data is an interference in the right to privacy (Article 8 of the ECHR[4], Articles 7 and 8 of the Charter[5]). Constant monitoring of an individual's behaviour, wherever they are, may give the impression that he/she is under constant surveillance. There is no doubt, however, that location data can provide relevant information that can assist authorities involved in criminal proceedings. Intervention into the sphere of privacy of an individual is warranted as long as it serves the purposes indicated in art.

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[3] STACHNIK-ROGALSKA, Agnieszka; ROGALSKI Maciej. Udostępnianie billingów rozmów telefonicznych. *Państwo i Prawo* no. 8, p. 31-32, 2012.

[4] EUROPEAN CONVENTION OF HUMAN RIGHTS, adopted in Rome on 4th November 1950. Available at: https://www.echr.coe.int/documents/convention_eng.pdf. (access: December 20, 2020). Hereinafter: the ECHR.

[5] CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION, published in the Official Journal of the European Union no. C 326/391 on 26th October 2012. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12012P/TXT. Hereinafter: the Charter.

8 sec. 2 of the ECHR, and the interference itself fulfils the condition of proportionality and necessity in a democratic society[6]. The restriction of the rights of an individual must be proportionate to the aims that the procedural organs wish to achieve, and the expected positive consequences (ensuring public safety, combating crime) must exceed the negative consequences of violating rights and individual freedom.

In EU law, as defined in Directive 2002/58/EC and of the Council of 12th July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (hereinafter: Directive on privacy and electronic communications; Directive 2002/58) "location data" is understood as "any data processed in an electronic communications network, indicating the geographical location of the terminal equipment of a user of a publicly available electronic communications service"[7]. They are considered a type of "personal data"[8] within the meaning of Directive 2016/680 of the European Parliament and of the Council of 27th April 2016 on the protection of individuals with regard to the processing of personal data by competent authorities for the purposes of crime prevention, investigation, detection and prosecution of offences and execution of punishments, on the free movement of such data and repealing Council Framework Decision 2008/977 / JHA (hereinafter: Directive 2016/680)[9]. The Strasbourg Court[10] - in view of the absence of a separate definition of location data in legal acts adopted at the

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6 BREYER, Patric. Telecommunication Data Retention. *European Law Journal*, v. 11, no. 3, s. 365, 2005.

7 The Official Journal of the European Union no. L 201/37 on 31st July 2002. See: article 2 point c.

8 In accordance with the Article 3 of the Directive 2016/680 "personal data" means any information relating to an identified or identifiable natural person ('data subject'); an identifiable natural person is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person.

9 The Official Journal of the European Union no. L 119/89 on 47t April 2016.

10 The European Court of Human Rights.

forum of the Council of Europe - uses the definitions adopted in the European Union[11].

The CJEU[12] and the ECtHR[13] emphasise the need to balance the interests of the individual and the protection of public safety[14]. The rights to privacy and confidentiality of location data are an important value in a democratic society, but in justified cases, e.g. in connection with the need to fight and prevent crime, it is permissible to interfere with the rights of an individual. Based on the case law of the European Courts and current legislation, it is possible to establish rules for the collection of location data in national law for the purpose of using this data in criminal proceedings. Before analysing this issue, however, it should be clarified how the procedural authorities can obtain location data. Following the ECtHR jurisprudence[15], the following can be distinguished:

1) real-time data collection (e.g. using GPS transmitters), and

2) obtaining "historical" data, i.e. retained by telecommunications service providers (e.g. from radio transmitters) or collected by applications installed on smartphones and saved on these devices (e.g. data on places where one connects to the wifi network, data derived from Google maps).

As for the technical aspects of locating, for example a smartphone user, it is possible to indicate systems based on: 1) obtaining location data based on GPS; 2) connecting the smartphone to the wi-fi network; 3) GSM technology; 4) determining the location of the radio signal; 5) GNSS.[16] The technical aspects of collecting and obtaining location data - although important for smartphone users, tablets, etc. - are of little

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[11] EUROPEAN COURT OF HUMAN RIGHTS. *Judgment of 8 February 2018,* Ben Faiza v France, case no. 31446/12. https://hudoc.echr.coe.int/.

[12] The Court of Justice of the European Union.

[13] The European Court of Human Rights.

[14] DOCKSEY, Christopher, HIJMANS, Hielke, The Court of Justice as a Key Player in Privacy and Data Protection: An Overview of Recent Trends in Case Law at the Start of a New Era of Data Protection Law. *European Data Protection Law Review* (EDPL), vol. 5, no. 3, p. 300-316, 2019.

[15] EUROPEAN COURT OF HUMAN RIGHTS. *Judgment of 8 February 2018,* Ben Faiza v France, case no. 31446/12. https://hudoc.echr.coe.int/.

[16] BU-PASHA, Shakila, ALEN-SAVIKKO, Anette, MEIKINEN, Jenna, GUINNESS, Robert, KORPISAAR, Päivi. EU Law Perspectives on Location Data Privacy in Smartphones and Informed Consent for Transparency. *European Data Protection*

importance from the perspective of establishing the rules for accessing this data. Whatever the information gathering technique, access can only be obtained in two ways - either in real time or ex post.

Interference in the privacy of individuals cannot be arbitrary - state authorities cannot 'cut corners' to ensure security and public order. Although the technical possibilities for tracking an individual's behaviour are almost unlimited, they should not be overused. The aim of this paper is to determine whether there is a common European standard for the gathering and processing of location data to prevent and combat crime. The ECtHR and the CJEU are increasingly addressing this issue. However, the question arises whether, at this stage, it is reasonable to claim that a standard has already emerged.

The jurisprudence of the ECtHR and the CJEU is structured according to the way in which data is collected, i.e. either in real time or ex post (from mobile phone companies). The decisions of the Strasbourg and Luxembourg tribunals were analysed chronologically. This method made it possible to show the evolution of the case law and the attempt to adapt the rulings to changing technical conditions.

2. Limitation of the right to privacy – general rules

The collection of location data in the case-law of the ECtHR is considered under Art. 8 of the ECHR. In assessing a complaint of a breach of the right to privacy, the Court takes into account three factors[17]:

1.the existence of legal bases in domestic law allowing interference in the sphere of privacy of an individual;

Law Review (EDPL), vol. 2, no. 3, p. 312-323, 2016. https://heinonline.org/HOL/LandingPage?handle=hein.journals/edpl2&div=57&id=&page=.

[17] See also: GARLICKI, Lech in: GARLICKI, Lech, HOFMAŃSKI, Piotr. Konwencja o Ochronie Praw Człowieka i Podstawowych Wolności. Tom I. Komentarz do artykułów 1–18, Warszawa 2011; JASIŃSKI, Wojciech, The limits of interference with the right to liberty, privacy property and privilege against self-incrimination in criminal proceedings – European standards, in: SKORUPKA, Jerzy (ed.), The Model of Acceptable Interference with the Rights and Freedoms of a Individual in the Criminal Process, p. 450; 463. Warsaw 2017.

2. the implementation by public authorities of the objectives indicated in Art. 8 sec. 2 of the ECHR

3. the necessity to interfere with the right to privacy in a democratic society[18].

The requirement that any interference with the individual's right to privacy be properly grounded in national legislation is tied to the necessity of ensuring the predictability of the procedure. In the judgement in the case Roman Zakharov against Russia, the Court recalled that the predictability of the proceedings does not mean that a given person should be able to predict when discreet surveillance measures will be imposed on him and therefore be able to adapt his behaviour to the situation[19]. The point is, however, to define the limits of the legality of the actions of public authorities, in order to prevent arbitrary interference with the privacy of an individual. The minimum guarantees that should be provided are:

1.determination of the nature of crimes in cases for which covert surveillance measures may be applied, but the catalogue cannot be too wide;

2. defining the categories of persons against whom covert surveillance measures may be taken;

3. setting a time limit for the application of these measures;

4. establishing a procedure for testing, using and storing data;

5. introducing precautionary measures when communicating data to other people;

6. specifying the circumstances when data may be deleted or destroyed[20].

The ECtHR also points to the necessity of finding an appropriate balance between the interests of the state and the pursuit of public security

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[18] JASIŃSKI, Wojciech, The limits of interference with the right to liberty, privacy property and privilege against self-incrimination in criminal proceedings – European standards, in: SKORUPKA, Jerzy (ed.), The Model of Acceptable Interference with the Rights and Freedoms of a Individual in the Criminal Process, p. 450, Warsaw 2017.

[19] EUROPEAN COURT OF HUMAN RIGHTS. *Judgment of 4 December 2015,* Roman Zakharov v Russia, case no. 47143/06, § 229. https://hudoc.echr.coe.int/.

[20] EUROPEAN COURT OF HUMAN RIGHTS. *Judgment of 4 December 2015,* Roman Zakharov v Russia, case no. 47143/06, § 231. https://hudoc.echr.coe.int/.

(and achievement of the objectives of Article 8 (2) of the ECHR). The margin of freedom of states in introducing specific normative solutions is limited and subject to "supervision" of the Tribunal in Strasbourg[21]. Technical measures aimed at protecting a democratic society must not lead to the destruction of democracy in a given country. When interpreting the concept of "necessity", the Court indicates that it should be understood as a situation in which the interference is justified by a pressing social need, proportionate to the legitimate aim pursued[22]. Therefore, it is crucial to put in place effective and adequate procedural guarantees to prevent possible abuses. The nature and type of procedural guarantees depend on the degree of interference with the privacy of the individual. The more intrusive the activity is, the stronger these guarantees should be provided for the individual.

3. Real-time data collection

3.1. Real-time data collection in the ECtHR jurisprudence

The first case in which the Strasbourg Court analysed problematic real-time data collection was the case of Uzun vs. Germany[23]. The applicant - suspected of participating in a terrorist group and committing crimes in connection with the activities of that organisation[24] - was ordered to be under secret surveillance and tracked via a GPS transmitter in his car. Thanks to the information obtained from real-time location data collection, the trial authorities obtained incriminating evidence, which then became the basis for his conviction. Although the applicant was not

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[21] See also: STEIN Shlomit, In Search of 'Red Lines' in the Jurisprudence of the ECtHR on Fair Trial Rights. *Israel Law Review* v. 50, no. 2, p. 177–209, 2017.

[22] EUROPEAN COURT OF HUMAN RIGHTS. *Judgment of 2 September 2010,* Uzun v Germany, case no. 35623/05, § 78-79. https://hudoc.echr.coe.int/.

[23] EUROPEAN COURT OF HUMAN RIGHTS. *Judgment of 2 September 2010,* Uzun v Germany, case no. 35623/05. https://hudoc.echr.coe.int/.

[24] An organization was called "Antiimperialistische Zelle". The applicant was convicted for attempted murder and causing four explosion (terrorist attack) to 13 years imprisonment. EUROPEAN COURT OF HUMAN RIGHTS. *Judgment of 2 September 2010,* Uzun v Germany, case no. 35623/05, § 11, 17 and 49.

personally subject to geolocation - a GPS transmitter was installed in the car and therefore the movements of every person who used the vehicle were monitored[25] - the ECtHR found that the measures applied constituted an interference with the right to privacy (Article 8 of the ECHR)[26]. However, the Strasbourg Court noted that the collection of location data should be distinguished from that of surveillance, which is video or sound recording. By their very nature, covert surveillance methods that permit "spying" on a person's life are more intrusive to privacy than GPS data observation and collection. Assessing the provisions of the German Code of Criminal Procedure[27] from the perspective of "lawfulness" and predictability of the proceedings, the ECtHR noted that they did not refer directly to the possibility of applying geolocation surveillance, but indicated the possibility of using technical means - other than image or sound recording - enabling the determination of the observed person's whereabouts. Sharing the position of the German courts, the ECtHR decided that in connection with the development of technology in the field of Art. 100c § 1 section 1 lit. b of the German Code of Criminal Procedure it also included collecting location data using a GPS transmitter. Although at that time there were no regulations limiting the duration of geolocation surveillance, the regulations required that one month from the date of ordering surveillance by the prosecutor, the observation was extended by the court[28]. Judicial control was an important guarantee against the use of illegally obtained location data and the arbitrariness of the actions of law enforcement agencies. In the opinion of the ECtHR - and due to the fact that geolocation surveillance interferes less with the sphere of privacy of an individual than, for example, control and recording

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25 It is worth to mention that the car, where the GPS transmitter was installed by the public authorities, did not belong to the applicant, but to his partner. EUROPEAN COURT OF HUMAN RIGHTS. *Judgment of 2 September 2010,* Uzun v Germany, case no. 35623/05, § 11, 17 and 49.

26 EUROPEAN COURT OF HUMAN RIGHTS. *Judgment of 2 September 2010,* Uzun v Germany, case no. 35623/05, § 52.

27 The application of geolocation surveillance was based on Article 100c § 1 point 1 (b) of the German Code of Criminal Proceedings. EUROPEAN COURT OF HUMAN RIGHTS. *Judgment of 2 September 2010,* Uzun v Germany, case no. 35623/05, § 64 and 65.

28 *Ibidem,* § 71.

of conversations - it is not necessary for the judicial authority to decide on the collection of location data[29]. Due to the allegations made against the applicant - participation in a terrorist group, attempted murder - the use of covert surveillance measures was justified on the grounds of protection of public safety, in particular by preventing new (terrorist) bomb attacks. Moreover, the previously-used less invasive investigative techniques did not bring the expected results (they did not prevent the applicant from committing new crimes)[30]. Considering the circumstances of the case, the actions of law enforcement agencies, the procedural guarantees that German legislation provided for people who were subject to covert surveillance and the fact that the investigative steps taken were necessary in a democratic society, the ECtHR found that there had been no violation of Art. 8 sec. 1 of the ECHR.

The Strasbourg Court also dealt with the issue of collecting data on the location in the judgement of Ben Faiza against France[31]. In this judgment, the ECtHR relied on the Uzun v Germany judgement, using the principles developed there. Compared to the previous decision, the novelty was to draw attention to the fact that geolocation monitoring may be applied in two forms: by means of a GPS device installed, for example, directly in a car or other means of transport, or by using its own telephone technology (smartphone), tablet or GPS system included with the car[32]. When analysing French law, the ECtHR noted that, at the time when geolocation surveillance was applied to the applicant, the provisions were not precise enough. The provision of art. 81 of the French CCP

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[29] *Ibidem,* § 73.

[30] *Ibidem,* § 79-80.

[31] EUROPEAN COURT OF HUMAN RIGHTS. *Judgment of 8 February 2018,* Ben Faiza v France, case no. 31446/12. The case concerned the allegation of involvement in an organised criminal group and drug trafficking and smuggling. Apart from geolocation surveillance, other means of covert surveillance were used against the complainant, such as interception, transmission and recording of calls. See: § 54.

[32] At the time when geolocation surveillance was applied in the Uzun v. Germany case, the technology was not yet at such a high level, including smartphones that automatically collect location data. EUROPEAN COURT OF HUMAN RIGHTS. *Judgment of 8 February 2018,* Ben Faiza v France, case no. 31446/12, § 53.

referred to “informational activities useful for revealing the truth”[33]. This regulation did not ensure the predictability of the proceedings within the meaning of Art. 8 of the ECHR - it did not define the conditions and rules for collecting location data with sufficient precision - and the jurisprudence of French courts did not develop mechanisms that would protect individuals against unjustified interference with the right to privacy. Due to the defectiveness of the legislation in force in France at the time, the Court found that there had been a violation of Art. 8 of the ECHR, without considering whether the application of geolocation surveillance was necessary in a democratic society and served the purposes of Art. 8 sec. 2 of the ECHR[34].

3.2. Real-time data collection in the EU law and CJEU jurisprudence

Legislation adopted in the EU requires EU member states to adopt “effective investigative tools” in relation to organised crime and other serious crime, including money laundering[35], sexual crimes against children[36] (sexual abuse, sexual exploitation, child pornography,

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[33] EUROPEAN COURT OF HUMAN RIGHTS. *Judgment of 8 February 2018,* Ben Faiza v France, case no. 31446/12, § 58.

[34] Following the conclusion of the applicant’s case, regulations were introduced in France in 2014 which clarified the application of geolocation surveillance and provided procedural guarantees for the individual to prevent unauthorised interference with the right to privacy. EUROPEAN COURT OF HUMAN RIGHTS. *Judgment of 8 February 2018,* Ben Faiza v France, case no. 31446/12; § 39.

[35] DIRECTIVE (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC, published in the Official Journal of the European Union no. L 141/73 of 5 June 2015. eur-lex.europa.eu. Access on December 20, 2020.

[36] DIRECTIVE (EU) 2011/92 of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JHA published in the Official Journal of the European Union no. L 335/1 of 17 December 2011, eur-lex.europa.eu. Access on December 20, 2020.

solicitation of children for sexual purposes), illegal drug trafficking[37], trafficking in human beings[38] or protection of the EU's financial interests. One such "effective tool" is real-time location data tracking. For the first time, the issue of real-time geolocation supervision was dealt with by the Luxembourg Court in the case of La Quadraturedu Net and the Others[39], and in its ruling it took into account the position of the ECtHR, recognising the Strasbourg standard as the minimum EU standard[40].

Contrary to the cases heard by the Strasbourg court, the CJEU examined French regulations that obliged electronic service providers to retain and process - in an automated manner - data on the location of persons who were suspected of committing a serious crime or posing a threat to national security[41]. However, the Luxembourg Court noted that in practice, this led to real-time geolocation surveillance being extended to all electronic communications users - irrespective of whether the person was actually involved in any prohibited act. Although location

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37 COUNCIL FRAMEWORK DECISION 2004/757/JHA of 25 October 2004 laying down minimum provisions on the constituent elements of criminal acts and penalties in the field of illicit drug trafficking; published in the Official Journal of the European Union no. L 335/8 of 25 October 2004, eur-lex.europa.eu. Access on December 20, 2020.

38 DIRECTIVE (EU) 2011/36 of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA, published in the Official Journal of the European Union no. L 101/1 of April 2011, eur-lex.europa.eu. Access on December 20, 2020.

39 COURT OF JUSTICE OF THE EUROPEAN UNION. *Judgment (Grand Chamber) of 6 October 2020.* C-511/18, C-512/18, C-520/18, La Quadrature du Net, French Data Network, Fédération des fournisseurs d'accès à Internet associatifs, Igwan.net (hereinafter: La Quadrature du Net and the others). http://curia.europa.eu/.

40 COURT OF JUSTICE OF THE EUROPEAN UNION. *Judgment (Grand Chamber) of 6 October 2020.* C-511/18, C-512/18, C-520/18, La Quadrature du Net, French Data Network, Fédération des fournisseurs d'accès à Internet associatifs, Igwan.net, § 124.

41 See: COURT OF JUSTICE OF THE EUROPEAN UNION. *Judgment (Grand Chamber) of 6 October 2020.* C-511/18, C-512/18, C-520/18, La Quadrature du Net, French Data Network, Fédération des fournisseurs d'accès à Internet associatifs, Igwan.net, § 41-45. Those regulations was introduced to prevent and fight with terrorist crime.

data was collected anonymously, it was possible to identify the user if this information was relevant to the criminal proceedings[42].

The CJEU found that the automated geolocation surveillance of the almost unlimited number of users of electronic communications goes beyond what is necessary to ensure national security. It is necessary to apply criteria limiting the number of people subject to discrete geolocation surveillance[43]. The earlier agreed models of automatic data processing and the criteria of those people against whom geolocation surveillance may be used, should be specific and credible (enabling the achievement of results identifying persons with a justified suspicion of involvement in terrorist offences) and non-discriminatory. There is a need for prior judicial review or other independent body to assess whether automatic retention of location data is acceptable in a given case[44]. If the information obtained as a result of automatic mass data retention provided information essential for maintaining national security (e.g. that thanks to it, members of an organised terrorist group were identified), the possibility of their use in a criminal trial depends on the subsequent assessment of the court. An individualised, non-automated analysis is required as to whether discreet geolocation surveillance and data collection have been carried out in accordance with the law and served the purposes provided for by this law[45].

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[42] COURT OF JUSTICE OF THE EUROPEAN UNION. *Judgment (Grand Chamber) of 6 October 2020.* C-511/18, C-512/18, C-520/18, La Quadrature du Net, French Data Network, Fédération des fournisseurs d'accès à Internet associatifs, Igwan.net, § 185-187. The CJEU referred to the ECtHR judgment in case *Ben Faiza v France.*

[43] However, this time may be extended if necessary in a specific case.

[44] COURT OF JUSTICE OF THE EUROPEAN UNION. *Judgment (Grand Chamber) of 6 October 2020.* C-511/18, C-512/18, C-520/18, La Quadrature du Net, French Data Network, Fédération des fournisseurs d'accès à Internet associatifs, Igwan.net, § 183-189.

[45] *Ibidem*. It is also worth mentioning that the CJEU requires regular publication of general information (reports) on the scale of secret geolocation surveillance. Individual notification of persons who have been subject to such supervision is not necessary. However, if the automatic analysis of location data is 'deepened', i.e. a specific individual is identified and his behaviour is further analysed, he should be informed that he has been subject to secret surveillance. However, such information must not affect the tasks of process authorities. See: *ibidem,* § 190-192.

3.3. Partial conclusions

Summing up, when it comes to collecting real-time location data, it is difficult to speak of a developed European standard at this stage. The Strasbourg case-law cannot be considered as developed - the ECtHR has dealt with this issue only twice. Nevertheless, at a very general level, it is possible to determine what conditions should be met by national law so that the interference with the privacy of an individual as a result of geolocation supervision does not lead to violation of Art. 8 sec. 1 of the ECHR. Firstly, the collection of location data is not "reserved" exclusively for serious crime and may also be used in more common criminal offences. The ECtHR considers geolocation supervision to be a measure less intrusive to the privacy of an individual than other forms of covert surveillance, which allow, inter alia, to record the content of conversations or the image of a given person. Consequently, this form of collecting data about an individual may be used in a greater number of cases. Secondly, the Court emphasises the need to introduce procedural guarantees that will prevent abuse and unjustified interference with the privacy of an individual. National legislation should specify:

1. material scope, i.e. in cases of what crimes geolocation surveillance can be applied,
2. the subjective scope, i.e. the categories of people for whom real-time geolocation surveillance can be used, should be defined,
3. temporal scope, i.e. the maximum period during which real-time tracking of the individual's movement is allowed.

Thirdly, geolocation surveillance does not have to be ordered by a judicial authority and the ECtHR considers that judicial control at the stage of assessing the admissibility of using location data is sufficient. The court should check not only whether the statutory conditions for geolocation surveillance have been formally met, but also assess whether such action was "necessary in a democratic society".

The Court of Justice of the European Union has so far dealt with the problem of mass, automated retention and processing of location data of an unlimited group of users in order to ensure national security.

It has allowed for the possibility of automated analysis and collection of location data and the obligation for electronic service providers to transmit this data to procedural authorities, but such activities must be limited to situations where there is a serious threat to national security and it is necessary to ensure effective judicial or independent administrative control. In addition, the collection of real-time traffic and location data must be restricted to only persons reasonably suspected of being involved in terrorist activities, to the extent strictly necessary to ensure national security. National legislation should provide for a maximum period of application of covert geolocation surveillance, but it may be extended - in particularly justified situations.

4. Collecting location data from providers of electronic communications services

4.1. Collecting location data from providers of electronic communications services – the ECtHR jurisprudence

The Strasbourg Court first dealt with the issue of access to location data stored by mobile network operators in the judgement of Ben Faiza against France[46], which emphasised that any data collection and retention related to the use of a telephone without the knowledge of the person concerned, constitutes an interference with the right to respect for private life under the article 8 of the ECHR[47]. It is necessary to distinguish between situations in which state authorities create a system of surveillance of an individual and monitor their behaviour "on an ongoing basis" from the transfer of information obtained by that entity by a private entity, if it is necessary to establish the circumstances of a criminal case. In the opinion of the ECtHR, obtaining *a posteriori* access

[46] It is worth to mention that the ECtHR referred to previous judgments in cases of the access to list of telephone calls. See: EUROPEAN COURT OF HUMAN RIGHTS. *Judgment of 1 March 2007, Heglas v the Czech Republic,* case no. 5935/02, § 61; EUROPEAN COURT OF HUMAN RIGHTS. *Judgment of 8 December 2009,* Previti v Italy, case no. 45291/06, § 303.

[47] EUROPEAN COURT OF HUMAN RIGHTS. *Judgment of 8 February 2018, Ben Faiza v France*, case no. 31446/12.

to location data constitutes less interference with the right to privacy than monitoring the individual's movement in real time[48]. Nevertheless, the duty of state authorities is to comply with the general rules allowing for interference in the private sphere, i.e. such interference must be grounded in national law and serve the purposes of art. 8 sec. 2 of the ECHR and fulfil the condition of necessity in a democratic society. When assessing the French legislation, the Court found that there had been no violation of Art. 8 sec. 1 of the ECHR. The regulations specified which authority could turn to the mobile network operator, in which cases this measure was admissible, and the use of location data was subject to judicial review[49]. There was also an important public interest justifying the interference with the individual's right to privacy. The applicant was charged with serious crimes - participation in an organised criminal group and drug trafficking, and the information obtained thanks to geolocation data was necessary to establish the truth in the trial.

In the decisions of Ringler vs. Austria[50] and Tretter and others vs. Austria[51], the ECtHR assessed the Austrian provisions allowing procedural authorities to request mobile network operators to disclose personal data, e.g. location data, list of calls, personal data of the user of a given telephone number, and IP address[52]. In order to obtain data from the network operator, the law enforcement authorities had to adequately justify such a request, indicating that there is a threat and that the data is necessary for the performance of police tasks. With regard to location data, it was necessary to indicate that there was a direct threat to the life

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[48] EUROPEAN COURT OF HUMAN RIGHTS. *Judgment of 8 February 2018, Ben Faiza v France*, case no. 31446/12, § 71.

[49] *Ibidem*, § 79. The court assessed whether recourse to the mobile network operator was lawful and, if it considered it was not, it had the right to exclude the material thus obtained from the evidence base.

[50] EUROPEAN COURT OF HUMAN RIGHTS. *Decision of 12 May 2020, Ringler v Austria*, case no. 2309/10.

[51] EUROPEAN COURT OF HUMAN RIGHTS. *Decision of 29 September 2020, Tretter and the others v Austria,* case no. 3599/10.

[52] See: the Article 53 sec. 3a and 3b Sicherheitspolizeigesetz. See also: EUROPEAN COURT OF HUMAN RIGHTS. *Decision of 12 May 2020, Ringler v Austria*, case no. 2309/10, § 4-23.

or health of a specific person. Subsequent changes to the regulations[53] extended the possibility of requesting access to location data to include situations where there is a direct threat to the freedom of a person. In such a situation, the procedural authorities could ask for geolocation information of the person who was in danger (the aggrieved party), and not only the person suspected of committing a crime[54]. Austrian regulations guaranteed the person whose data had been transferred to law enforcement authorities the right to submit a request for information on the actions taken against him and the sharing of data with the police authorities, he could request the deletion of data, and the supervision of the correct disclosure and processing of personal data was exercised by an independent authority[55]. In the Ringler and Tretter and Others vs. Austria cases, the applicants argued that the provisions did not provide for an effective measures in protecting individual rights and freedoms[56]. The mechanism of notifying the transfer of personal data (including location data) was questioned. According to the complainants, it cannot be expected that the individuals will regularly request state authorities to provide information on whether their personal data has been transferred to the police authorities in connection with ongoing

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[53] Amendments were introduced on 1 April 2012, 1 April 2014, 1 June 2016 and 25 May 2018 due to obligation to implement the EU directives, especially the directive 2016/680, and REGULATION (EU) 2016/679 of European Parliament and the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation; published in the Official Journal of the European Union no. L 119/1 of 4 May 2016) which has entered into force on 25 May 2018.

[54] The amendments have extended the possibility of requesting the data of a mobile phone user, also in order to avoid endangering life, health or freedom, to avoid an intentional crime or to stop the activities of criminal groups. EUROPEAN COURT OF HUMAN RIGHTS. *Decision of 12 May 2020, Ringler v Austria*, case no. 2309/10, § 23. See also: EUROPEAN COURT OF HUMAN RIGHTS. *Decision of 29 September 2020, Tretter and the others v Austria,* case no. 3599/10, § 18.

[55] EUROPEAN COURT OF HUMAN RIGHTS. *Decision of 29 September 2020, Tretter and the others v Austria,* case no. 3599/10, § 34.

[56] In the meaning of the Article 13 ECtHR.

criminal proceedings[57]. Moreover, the regulations allow one to request access to geolocation data in any circumstances - the regulations do not impose any restrictions[58]. The victim's status[59] was justified by the inability to prove that the applicants had been subject to covert surveillance measures and their personal data (including location data) had been transferred to the police[60].

In Ringler vs. Austria and Tretter and the other vs. Austria cases the ECtHR recalled that its role was not to summarise the national law of a country or the practice of procedural authorities, but to establish whether, in a particular case, the application of national regulations had led to a violation of the Convention[61]. Nevertheless, the specific characteristics of covert surveillance measures mean that an individual may sometimes rely on the fact that he or she is a victim of the very existence of covert surveillance provisions, even if he is unable to demonstrate that such measures were applied to him[62]. In assessing whether this is the case, the Court takes into account:

1. the scope of application of the provisions allowing for a covert interference in an individual's privacy (objective, subjective and temporal), whether such measures could potentially be applied to the complainant due to belonging to a specific category of persons to whom national provisions apply, or examines whether the provisions have a direct impact on all users of electronic communications:

57 EUROPEAN COURT OF HUMAN RIGHTS. *Decision of 29 September 2020, Tretter and the others v Austria,* case no. 3599/10, § 58.

58 *Ibidem,* § 52.

59 In both cases the Austrian Government contested the victim status of the applicants.

60 EUROPEAN COURT OF HUMAN RIGHTS. *Decision of 29 September 2020, Tretter and the others v Austria,* case no. 3599/10, § 47-50. EUROPEAN COURT OF HUMAN RIGHTS. *Decision of 12 May 2020, Ringler v Austria*, case no. 2309/10, § 55.

61 EUROPEAN COURT OF HUMAN RIGHTS. *Decision of 12 May 2020, Ringler v Austria*, case no. 2309/10, § 58 and further the ECtHR jurisprudence.

62 EUROPEAN COURT OF HUMAN RIGHTS. *Judgment of 12 January 2016, Szabó and Vissy v Hungary*, case no. 37138/14, § 33.

2. availability of domestic remedies; Where there is no possibility at national level to challenge the use of covert surveillance measures, public fears that power may be abused may be justified, and therefore the ECtHR needs to be scrutinised[63].

The ECtHR agreed with the applicants that the right to request information as to whether an individual had been subjected to covert surveillance measures was of no practical importance[64]. However, it noted that law enforcement authorities were required to notify an independent authority about requests made to mobile network operators. The authority is obliged to inform the person - upon his / her request - about any unlawful measures that were applied against him, and if he refuses to provide information - the person may submit a complaint to an independent commission whose decisions are subject to judicial review[65]. It may also demand the deletion, rectification or limitation of the processing of personal data, if they are no longer needed to protect public security. Apart from the supervisory authority of the protection of personal data, the personal data protection commission and the judicial control of decisions issued by the commission, the system of measures to protect individual rights is supplemented by the institution of the Legal Protection Commissioner, who has the right to access and control the correct application of the provisions on the protection of personal data[66].

In the cases of Ringler and Tretter and others vs. Austria, the Court dismissed the complaints, questioning the applicants' victim status. Nor did he find that there were grounds for an abstract review of Austrian legislation. It is worth noting, however, that although the ECtHR stated that it did not assess *in abstracto* the legislation of the countries of the Council of Europe, in fact - as if in response to the complainants' allegation - it assessed that the Austrian provisions guarantee effective means of protecting an individual against unauthorised interference with

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[63] *Ibidem*, § 36.

[64] The ECtHR has takien into account the scope of exceptions that allow non-disclosure of such information.

[65] EUROPEAN COURT OF HUMAN RIGHTS. *Decision of 12 May 2020, Ringler v Austria*, case no. 2309/10, § 44.

[66] *Ibidem*, § 78.

the right to privacy. Although he found some mechanisms (e.g. informing an individual about the use of covert surveillance measures against him / her to be burdensome and even devoid of practical significance), due to the existence of an independent system of supervision over the correct processing of personal data, the ECtHR found that the measures available at the national level to protect individual rights and freedoms are sufficient, and therefore no Strasbourg intervention is necessary. However, it should be emphasised that when assessing the Austrian regulations, the Court essentially examined the compliance of EU solutions regarding the protection of personal data, including location data, introduced by Directive 2016/680.

At present, it appears that the Strasbourg Court is avoiding taking a position on the issue of access to location data collected by mobile operators. The rules that the ECtHR has developed in relation to access to the lists of calls made by the telephone user cannot be applied analogously. This is because location data provides other types of information to procedural authorities and are used for a different purpose. Billing data provides information on who the person contacted, how long the call lasted, and how many times it was made within a certain period of time. Location data refer to the places where a given person has been, they allow to determine their pattern of behaviour. They interfere with the privacy of an individual to a greater degree than the list of calls. It is difficult to determine, solely on the basis of the judgement of Ben Faiz vs. France, what are the requirements of the ECtHR with regard to the countries of the Council of Europe regarding the regulation of the issue of access to location data. In the decisions of Ringler and Tretter and others vs. Austria, the Court did not present its own position, but only held that Austrian solutions - implementing EU solutions - were compatible with the Convention.

4.2. Collecting location data from providers of electronic communications services – the EU law and the CJEU jurisprudence

Much attention is paid to the issue of collecting and sharing location data with procedural authorities in relation to the prevention

and combating crime in EU law and the jurisprudence of the CJEU[67]. The provision of the Article 5 of Directive 2002/58 introduces the principle of confidentiality of communications, including the confidentiality of location data. Derogations from this principle are possible for the purposes of ensuring national security, state security, defence, public safety and for the purpose of detecting, investigating and punishing criminal offences (Article 15 of Directive 2002/58). National law must ensure that the investigative measures used in a specific case are necessary, appropriate and proportionate in a democratic society. The clause limiting the confidentiality of location data is exhaustive and cannot be interpreted extensively. Location data is retained in accordance with EU law, provided that the purpose of this activity is to fight crime[68]. These data may be transferred (made available) to state authorities on the terms - and with the guarantee of individual rights - specified in Directive 2016/680. Sharing data is allowed only for the purposes of preventing or combating crime, at the request of a given person, he should be provided with information whether his personal data (including location data) have been processed by the police[69], and he

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[67] See: Zob. szerzej: DOCKSEY, Christopher. Ministerio Fiscal: Holding the line on ePrivacy. *Maastricht Journal of European and Comparative Law,* vol. 26, no. 4, p. 585–594, 2019; THIERSE, Stephen. The Never-Ending Story of Data Retention in the EU, [in:] THEIERSE, Stephen, BADANJAK, Sanja. Opposition in the EU Multi-Level Polity. Legal Mobilization against the Data Retention Directive. Springer 2020, p. 11-26; ZUBIK, Marek, PODKOWIK, Jan, RYBSKI, Robert. Prywatność. Wolność u progu D-day. *Gdańskie Studia Prawnicze,* t. XL, p. 391-408, 2018, OJANEN, Tuomas. Privacy Is More Than Just a Seven-Letter Word: The Court of Justice of the European Union Sets Constitutional Limits on Mass Surveillance: Court of Justice of the European Union Decision of 8 April 2014 in Joined Cases C-293/12 and C-594/12, Digital Rights Ireland and Seitlinger and Others, *European Constitutional Law Review*, v. 10, no. 3, p. 528-541; MURPHY, Maria Helen. Data Retention in the Aftermath of Digital Rights Ireland and Seitlinger. *Irish Criminal Law Journal* t. 105, v. 24, no. 4, 2014; CELESTE, Edoardo. The Court of Justice and the Ban on Bulk Data Retention: Expansive Potential and Future Scenarios. *European Constitutional Law Review,* no. 15, p. 134–157, 2019.

[68] OPINION OF ADVOCATE GENERAL Campos Sanchez-Bordona, delivered on 15 January 2020, case no. C-520/18; http://curia.europa.eu/.

[69] See: article 13 and 14 of the directive 2016/680. The limitation of those rights: see: the Article 15 of the directive 2016/680. A person shall be informed ex officio if the violation of personal data involves a threat to his or her life, health or safety. See: the Article 31 of the Directive 2016/680.

may request the deletion of his data if it is useless to achieve the objectives referred to in the directive, or they are obsolete or have been obtained unlawfully[70]. Control over the correctness of personal data processing in connection with the prevention and combating of crime should be exercised by an independent authority, and the individual concerned - if his/her data has not been deleted despite the request or considers that it is being processed unlawfully - may bring the matter to court[71].

However, EU regulations do not specify in which cases location data can be obtained, nor do they indicate how long this data can be stored. The provision of the Article 15 of the Directive 2002/58 indicates that the data collected by service providers may be transferred to law enforcement authorities in order to combat "criminal offences", and the Article 5 of the Directive 2016/680 requires EU countries to introduce "appropriate deadlines for the deletion of personal data or for periodic review of the necessity to retain personal data". The EU legislator has left the Member States a margin of discretion in regulating the issue, i.e. in what cases and for what purposes the data will be collected, and for what period of time they will be stored. However, Member States' freedom of implementation is controlled by the EU Court of Justice.

In the Tele2 and Watson judgement[72], the CJEU assessed the rules in force in Sweden and the United Kingdom. The law in force in Sweden obliged the provider of electronic communications services to provide - at the request of the prosecutor's office, the police or another authority responsible for combating crime - the subscriber's data if they relate to an alleged infringement, without the subject of criminal proceedings having to be a "serious crime"[73]. The solutions

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70 See: the Article 16 of the Directive 2016/680.

71 See: the Article 17 sec. 3 of the Directive 2016/680.

72 COURT OF JUSTICE OF THE EUROPEAN UNION. *Judgment of 21 December 2016,* C-203/15 and C-698/15. The courts referred questions for a preliminary ruling after the CJEU judgment in Digital Rights Ireland annulled the so-called Retention Directive, and the regulations in force in Sweden and the United Kingdom in connection with which the question was referred for a preliminary ruling were the implementation of the above directive.

73 COURT OF JUSTICE OF THE EUROPEAN UNION. *Judgment of 21 December 2016,* C-203/15 and C-698/15, *Tele2 and Watson,* § 25. The question of the Sweden Court: see § 51.

adopted in the United Kingdom did not specify the scope of access to location data[74]. The body established to prevent and combat crimes had the right to request the mobile network operator to disclose data due to: national security, economic interests of the state, protection of public health, the need to prevent or detect crimes or to prevent violations of public order, to determine the size or collection of taxes, levies, fees or other obligations, contributions or charges due to a state administration unit, emergencies, in order to prevent injuries or damage to the physical or mental health of a person, or to reduce the extent of damage to a person's physical or mental health. In addition, the minister of the interior could, by order, specify other situations in which state authorities could gain access to location data.

In the judgement of Tele2 and Watson, the EU Court of Justice recalled that under the Article 5 of the Directive 2002/58, the protection of the confidentiality of electronic communications is intended to prevent any unlawful access to data, including data related to a message (i.e. location data)[75], irrespective of whether such access could be obtained by public (state) or private entities. The provisions imposing an obligation on telecommunications service providers to provide data fall within the scope of Art. 5 of Directive 2002/58. The CJEU has formulated general rules for data retention, including location data, and then for their transfer to trial authorities. Firstly, clear and precise rules should be introduced in national law regarding the scope and manner of the data storage measure to be applied. The way in which the concept of "national security" is understood in the EU countries does not fall within the scope of the CJEU. However, the Luxembourg Court assesses whether the law in force in a given state does not allow for unauthorised and disproportionate interference with the right to privacy of an individual[76]. Secondly, data retention must be carried out on the basis of objective criteria that show the link between the data that has been retained and the legitimate purpose for which the retention

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[74] COURT OF JUSTICE OF THE EUROPEAN UNION. *Judgment of 21 December 2016,* C-203/15 and C-698/15, § 33. The question of the Sweden Court: see § 59.

[75] *Ibidem,* § 77.

[76] *Ibidem,* § 94-96.

is intended. Third, these criteria must enable the identification and tracking of persons who have, even indirectly, a connection with serious crime. National regulations that ensure universal access to the retained data are inconsistent with EU law, regardless of the existence of any connection with one of the purposes indicated in art. 15 of Directive 2002/58. The generalised and non-differentiated obligation to retain all traffic and location data of all subscribers and users disproportionately violates the fundamental rights of Articles 7, 8 and 11 of the Charter[77]. Users of telecommunications networks cannot be under the constant state surveillance and they should not be afraid that their every move is tracked, registered and may be used against them in the future. In addition, it is necessary to introduce a storage date for location data - it is unacceptable to store information about an entity longer than necessary to ensure public safety.

In response to the preliminary questions, the CJEU questioned the solutions in force in Sweden and the United Kingdom and ruled that the Article 15 par. 1 of the Directive 2002/58 in conjunction with the Articles 7, 8, 11 and art. 52 sec. 1 of the Charter of Fundamental Rights of the European Union should be interpreted in such a way that it precludes national legislation:

- providing for generalised and non-differentiated retention of all traffic data and location data of all subscribers and registered users of all electronic means of communication for the purposes of combating crime; and
- concerning the protection and security of traffic and location data, and in particular access by competent national authorities to stored data, which, in the context of combating crime, does not restrict such access only for the purpose of combating serious crime, and does not make the granting of such access conditional from prior control by a court or an independent administrative authority and do not require that the data be stored within the Union.

[77] See also: OPINION OF ADVOCATE GENERAL Campos Sanchez-Bordona, delivered on 15 January 2020, case no. C-520/18, § 72.

The issue of obtaining access to location data was also resolved in the Privacy International case[78]. The basis for a request by the British court for a preliminary ruling[79] was the doubt whether the provisions allowing the mass acquisition of telecommunications data regarding traffic and location of the individual from providers of electronic communications services[80] on the basis of orders issued by the secretary of state to use such collected information to ensure state security[81] are consistent with EU law[82]. British regulations allowed for undifferentiated and generalised access to location data. In order for geolocation information to be passed on to the security services, it was not necessary to prove that the person was related to an activity that could pose a threat to national security.

The CJEU reminded that any interference with the privacy of an individual must meet the condition of proportionality[83]. Limitation of privacy may occur within strictly defined limits and only when it is necessary to achieve a legitimate aim (e.g. ensuring public security,

[78] COURT OF JUSTICE OF THE EUROPEAN UNION. *Judgment of 6 October 2020, Privacy International,* C-623/17.

[79] The preliminary question; see: COURT OF JUSTICE OF THE EUROPEAN UNION. *Judgment of 6 October 2020, Privacy International,* C-623/17, § 29.

[80] The data was gathered by the British Secret Services: MI5, MI6, GCHQ. See: COURT OF JUSTICE OF THE EUROPEAN UNION. *Judgment of 6 October 2020, Privacy International,* C-623/17, § 20

[81] See also: COURT OF JUSTICE OF THE EUROPEAN UNION. *Judgment of 6 October 2020, Privacy International,* C-623/17; § 16-18. The British, Hungarian, Polish, Czech Republic governments have raised objections, pointing out that national security is an exclusive matter for Member States and does not fall within the scope of Directive 2002/58, so the EU CJ has no jurisdiction to rule on it. See also: COURT OF JUSTICE OF THE EUROPEAN UNION. *Judgment of 6 October 2020, La Quadrature du Net and the Others*, C-511/18, C-512/18 and C-520/18, § 87-103.

[82] The Directive 2002/58.

[83] The problem of the proportionality of interference with the right to privacy - with regard to telephone user/consumer data - was examined by the CJEU in the case Minister Fiscal. See: COURT OF JUSTICE OF THE EUROPEAN UNION. *Judgment of 2 October 2018, Ministerio Fiscal*, C-207/16, § 55. An interference with the rights of the individual may be considered proportionate if, given the seriousness of the offence, the circumstances of the case, it is more beneficial - from the perspective of the general public - to restrict the rights of the individual.

fighting crime)[84]. These goals cannot be pursued at all costs, i.e. without taking into account and respecting the rights of an individual[85]. Legal regulations allowing for the intrusion into the privacy of an individual must meet the conditions of specificity, i.e. indicate the grounds and scope of the restriction (i.e. what data will be processed) and provide for procedural guarantees that will reduce the risk of abuse. It is about creating effective mechanisms that will ensure that data will be processed only to the extent that it is necessary[86]. It is worth emphasising, however, that the EU Court of Justice indicated that the goal of ensuring national (public) security allows for further restrictions on fundamental rights than combating crime, including serious crimes. State authorities must have adequate and effective methods of obtaining information about possible threats that could destabilise the state's activity - constitutional, political or social structures in the country - and directly threaten society and the population[87]. However, the pursuit of national security does not allow for general, universal and undifferentiated collection and processing of location data. In response to a question from a British court, the Luxembourg Court found that the provisions in force in the United Kingdom were incompatible with EU law. It indicated that the Article 15 sec. 1 of the Directive 2002/58 in connection with the Article 4 sec.

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84 COURT OF JUSTICE OF THE EUROPEAN UNION. *Judgment of 6 October 2020, Privacy International,* C-623/17; § 77.

85 The private interest and the interest of the general public must be properly balanced. A priori it cannot be assumed that ensuring public safety and public security in every case is more important than the rights and freedoms of an individual. See: COURT OF JUSTICE OF THE EUROPEAN UNION. *Judgment of 6 October 2020, Privacy International,* C-623/17, § 67 and COURT OF JUSTICE OF THE EUROPEAN UNION. *Judgment of 8 April 2020, Digital Rights Ireland,* C-293/12 and C-594/12, § 52.

86 COURT OF JUSTICE OF THE EUROPEAN UNION. *Judgment of 6 October 2020, Privacy International,* C-623/17, § 74; COURT OF JUSTICE OF THE EUROPEAN UNION. *Judgment of 6 October 2020, La Quadrature du Net and the Others,* C-511/18, C-512/18 and C-520/18, § 132.

87 These include terrorist activities. See: COURT OF JUSTICE OF THE EUROPEAN UNION. *Judgment of 6 October 2020, Privacy International,* C-623/17, § 74; COURT OF JUSTICE OF THE EUROPEAN UNION. *Judgment of 6 October 2020, La Quadrature du Net and the Others,* C-511/18, C-512/18 and C-520/18, § 135.

2 TEU[88], as well as the Article 7, 8 and 11 and 52 sec. 1 of the Charter of Fundamental Rights of the European Union, “must be interpreted as precluding national legislation enabling a state authority to impose on providers of electronic communications services a generalised and non-differentiated obligation to transmit traffic and location data to intelligence and security services for national security protection purposes”.

The problem of bulk retention of location data was also analysed in the judgment of La Quadraturedu Net and the Others[89]. In these proceedings, the Luxembourg Court examined French and Belgian legislation which allowed for the preventive retention of traffic and location data in order to ensure public safety and prevent serious crimes[90]. Nevertheless, even if location data is preventively retained to ensure national security, such actions by state authorities must be limited to what is absolutely necessary. It is necessary to introduce restrictions (e.g. by establishing the subjective and temporal scope) and safeguards that will enable effective protection of the data of persons for whom the data has been disclosed to state authorities against the risk of abuse[91]. Systematic, continuous and unlimited retention of location data is unacceptable. In addition, decisions obliging providers of electronic communications services to retain location and traffic data and then transfer them to state authorities should be subject to effective review by a court or an independent administrative authority, which will be able to assess the legality of actions taken by procedural authorities[92]. With regard to the

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[88] The Treaty on European Union; consolidate version published in the Official Journal no C 326 on 26 October 2012. Access on December 20,2020. https://eur-lex.europa.eu/.

[89] COURT OF JUSTICE OF THE EUROPEAN UNION. *Judgment of 6 October 2020, La Quadrature du Net and the Others,* C-511/18, C-512/18 and C-520/18.

[90] One of the positive obligations of the state from theArticle 8 of the ECHR and Article 7 of the Charter is the introduction of appropriate substantive and procedural provisions which will make it possible to effectively combat serious crime and ensure universal security.

[91] COURT OF JUSTICE OF THE EUROPEAN UNION. *Judgment of 6 October 2020, La Quadrature du Net and the Others,* C-511/18, C-512/18 and C-520/18, § 138.

[92] *Ibidem,* § 139.

implementation of the goal of ensuring universal security, the CJEU allowed - under the above-mentioned conditions - preventive retention and collection of location data. Conversely, the massive, preventive retention of location and traffic data for the purposes of crime prevention, investigation, detection and prosecution is unacceptable. The Court found that national legislation which provides for the general and non-differentiated retention of these data goes beyond what is necessary to combat serious crime and cannot be justified in a democratic society[93]. French and Belgian legislation allowed for the retention of location data of all users of electronic communications services, even if they were not, even indirectly, in a situation that could lead to criminal proceedings against them. These regulations also included persons whose behaviour did not pose any threat to public safety[94]. It does not matter whether the retained data was used in subsequent criminal proceedings. It is important that the procedural bodies entered the sphere of privacy of the individual, violating the confidentiality of communication, expressed in the Article 5 of the Directive 2002/58[95]. The very possibility of accessing personal data is an interference with the right to privacy.

The CJEU formulated general conditions as should be met by the national laws of European Union member states. It is necessary to introduce time, geographic and subjective restrictions - data may be retained on the location of persons suspected of committing a serious crime, persons otherwise involved in criminal activity and persons who could, for other reasons, contribute to the fight against serious crime[96]. Geographical and subject restrictions must be established on the basis of objective and non-discriminatory factors[97]. The retention

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93 *Ibidem,* § 141.

94 *Ibidem,* § 143.

95 *Ibidem,* § 116.

96 E.g. husband, wife or other close relatives to members of criminal groups (organized crimes groups).

97 On the geographical scope, the Court pointed out that these are areas with a high risk of serious crime, such as urban infrastructure regularly visited by large numbers of people, or strategic locations such as airports or railway stations. COURT OF JUSTICE OF THE EUROPEAN UNION. *Judgment of 6 October 2020, La Quadrature du Net and the Others,* C-511/18, C-512/18 and C-520/18, § 150.

time of the location data must not exceed what is strictly necessary for the intended purpose.

4.3. Partial conclusions

In conclusion, the Luxembourg and Strasbourg courts consider that access to ex post location data - previously retained by mobile network operators - is an interference with the right to privacy (the Article 8 of the ECHR, the Article 7 of the Charter). However, this interference is permissible if there are appropriate legal bases in national law, its purpose is to protect the values expressed in the Article 8 sec. 2 of the ECHR and, moreover, has been limited to what is necessary in a democratic society. The ECtHR and the CJEU considered the problem of retention and access to geolocation data from different perspectives. The Strasbourg Court assessed whether, in a specific case, the application of domestic provisions did not result in a violation of the Article 8 of the ECHR. In the Ringler and Tretter and others vs. Austria cases, the applicants tried to induce the ECtHR to analyse abstractly the domestic provisions allowing - in practice - the massive collection of location data. In this regard, the Court did not reply to the applicants. While examining the system of national measures to protect the rights and freedoms of individuals - introduced in connection with the need to implement EU regulations - it concluded that they allow for the enforcement of effective protection of the right to privacy in 'state' proceedings, so Strasbourg intervention is not necessary.

The Luxembourg Court assessed the regulations of the European Union countries that allowed for the mass retention of data on the location of users of telecommunications networks[98]. It was possible to obtain geolocation information about any person, regardless of whether they were involved, even indirectly, with any crime. The introduction of such regulations was justified by the need to protect and ensure national security as well as the prevention and combating of serious crime.

[98] The Court considered that the blanket and indiscriminate obligation to retain all traffic and location data of mobile phone users disproportionately interferes with the fundamental rights protected under Articles 7, 8 and 11 of the Charter.

However, the CJEU recognised that any personal data retention system (including location data) must be organized in such a way that it cannot be transformed into an undifferentiated and general collection of information about individuals[99]. Society cannot be under constant surveillance of state organs. The fight against terrorism and the protection of national security cannot be considered only taking into account the criterion of the effectiveness of actions taken. Each time, the insurmountable limit is respect for the rights of individuals and finding the right balance between the common good and the sphere of individual rights and freedoms. Retaining location data is possible, but on the condition that:

1. clear and precise rules have been introduced regarding the scope and method of data retention, processing and storage (subject, geographic and temporal limitations);
2. there are objective criteria defining the link between the data to be retained and stored and the legitimate purpose (combating serious crime, protecting national security);
3. they concern people who are involved - even indirectly - with serious crime, and at the same time there are mechanisms protecting against obtaining data about the location of other people not involved in criminal activity[100].

5. Conclusions

Obtaining information about the location by state authorities and the related analysis of the routine of an individual's life is an interference with the right to privacy (the Article 8 of the ECHR, the Article 7 of the Charter). Due to the development of technology, law enforcement authorities of a given state can easily collect data relevant to the conducted proceedings. Almost every person uses a mobile phone (smartphone) with

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[99] OPINION OF ADVOCATE GENERAL Campos Sanchez-Bordona delivered on 15 January 2020, C-623/17, Privacy International. http://curia.europa.eu/.

[100] OPINION OF ADVOCATE GENERAL Campos Sanchez-Bordona delivered on 15 January 2020, C-623/17, Privacy International. http://curia.europa.eu/. See also: OPINION OF ADVOCATE GENERAL Campos Sanchez-Bordona delivered on 15 January 2020, C-520/18.

GPS, so the services responsible for public safety no longer need to install separate transmitters to track (reproduce) the behaviour of a given person. The ease of obtaining information about the location and its usefulness for achieving the goal of combating and preventing crime, ensuring public safety, gives rise to the risk of abuse. Although the right to privacy is not an absolute right and is subject to limitations due to the overwhelming social (public) interest, it is necessary to properly balance the interests of the individual and society. European courts try to define the relationship between respecting fundamental rights and the obligation to prevent and combat serious crime. Based on the jurisprudence of the ECtHR and the CJEU, it can be deduced in which circumstances the collection of location data does not violate the fundamental rights of an individual.

Compared to other investigative techniques, the collection of location data violates the right to privacy to a lesser extent than, for example, control and recording of conversations or audiovisual observation. The Luxembourg and Strasbourg Courts recognise the acquisition of geolocation data in real time as a more painful method (interfering in a greater scope in the right to privacy of the individual) from obtaining ex post location data from mobile network operators. The degree of interference with the right to privacy and the affliction of a given method affect the material scope (in which cases such methods are permissible), the subjective scope (determining the group of people whose location data can be obtained), and temporal (how long a given measure can be used).

Regarding the collection of real-time location data, the ECtHR stresses that the use of this covert surveillance method is only permissible in connection with serious crime. The decision to apply geolocation surveillance to a specific person does not have to be taken by a judicial authority. Ex-post judicial control is sufficient, i.e. at the stage of assessing whether the geolocation data has been obtained lawfully and whether it can be used as evidence in criminal proceedings. The Strasbourg Court draws attention to the existence of clear and precise provisions in domestic law, specifying the basic principles and conditions for the application of geolocation surveillance, and assesses whether in a specific case the collection of location data served one of the purposes set out in the Article 8 sec. 2 of the ECHR.

Striving to protect national security, combating serious crime, etc. does not entitle state authorities to massive and automated real-time monitoring of an entire society. A person or group of persons to whom geolocation surveillance is applied must be associated - even indirectly - with criminal activity that poses a threat to public security. The European Union Court of Justice in the judgement of La Quadraturedu Net and the Others emphasised that collecting location data for groups is admissible, provided that such action serves solely the protection of national security. It is necessary to introduce regulations that will minimise the risk of abuse. The decision to include a group of people under automated geolocation must be taken by a judicial authority or other independent body, and then, before the location information is used as evidence in the proceedings, a personalised ex-post control by the court is necessary. However, it should be emphasised that the Luxembourg Court ruled out the possibility of using automated, continuous monitoring of the movement of groups of people in order to combat crime, but on the condition that data collected by automated means are subject to non-automated analysis before being used in the future.

Obtaining location data ex post, i.e. from mobile network operators constitutes less interference with the right to privacy. Procedural authorities may, in individual cases, request geolocation information not only when the subject of the proceedings is a serious crime, but also in relation to prohibited acts of a lower gravity. However, national law may not require mobile network operators to retain location data in a compulsory manner. It is necessary to introduce criteria limiting the subjective and objective circle, determining the time of data retention and a system of domestic remedies that will allow a person whose rights have been violated to assert his or her rights before the courts of a given state.

When analysing the jurisprudence of the ECtHR and the CJEU, one can see a difference in the approach to the protection of individual privacy in relation to the collection of location data. Firstly, the ECtHR assesses whether, in a specific case, the investigative measures applied had a proper basis in national law, were proportionate and necessary in a democratic society. As a general rule, it does not assess the laws of the Council of Europe states in general. It reacts post factum to flawed action by state authorities. The CJEU, on the other hand, examines national

legislation in isolation from the circumstances of the particular case. It checks whether the adopted solutions can be reconciled with EU law (and the EU level of protection of fundamental rights).

Secondly, the lengthiness of the ECtHR proceedings means that the decisions concerning the collection of location data are inadequate to the current technological possibilities. The Strasbourg Court has not yet addressed the issue of automatic processing and collection of data in real time, and thus has not determined under what conditions such information obtained may be used in a criminal trial. For this reason, among others, the CJEU is in a better position to develop coherent, European (EU) rules for the collection and processing of location data in the future. The case law of the Luxembourg court also has the advantage of pointing in the right direction and suggesting to EU countries how they should amend their national laws.

A major challenge to the protection of individual privacy is the problem of mass and automated collection of location data[101]. In order to protect national security, in the La Quadre du net judgment, the CJEU allowed for this, provided that the data are individualised and analysed in a traditional (non-automated) way before being used in criminal proceedings. Also the ECtHR - if criteria are specified in national law - allows for the bulk collection of data on an individual[102].

To sum up, it seems that the European Courts are trying to create a harmonised (or at least inconsistent) standard of protection of the right to privacy in relation to the collection of location data for the purpose of preventing and combating serious crime. The ECtHR does not try to

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[101] The problem of bulk collection of data on an individual was also the subject of Opinion 1/15 on the draft agreement between Canada and the European Union on the transfer and processing of passenger name records. Advocate General Paolo Mengozzi refers, inter alia, to the problem of automated data processing (see paragraph 252). The position presented in this opinion is in line with that of the Judgment of La Quadre du Net, although the issue addressed in that judgment concerned location data. See: OPINION OF ADVOCATE GENERAL Paolo Mengozzi, delivered on 8 September 2016, opinion 1/15; http://curia.europa.eu/.

[102] See: EUROPEAN COURT OF HUMAN RIGHTS. *Judgment of 10 July 2019*, Big Brother Watch and the Others v the United Kingdom, case no. 58170/13, https://hudoc.echr.coe.int/

interfere with the competences of the CJEU, and the CJEU - in creating an EU model of protection of the right to privacy - is based on the case law of the ECtHR. The case law of the ECtHR is late in relation to the developing technological possibilities, but the existing Strasbourg acquis, the general conditions for interference with the right to privacy, provides a good basis for the CJEU to create a model within the EU which, on the one hand, will protect the public against serious crime and, on the other hand, will not lead to a disproportionate interference with individual freedoms and rights.

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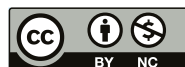

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Admissibility of evidence and international criminal justice

Admissibilidade da prova e justiça criminal internacional

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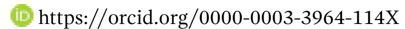
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Abstract: International criminal procedure combines elements of accusatorial and inquisitorial legal traditions, thus constituting a unique amalgam. Because of the broader scale and the complexity of international criminality to be addressed by international criminal courts and tribunals, it may seem interesting to look at developments and their hitherto experience through the lens of the admissibility of evidence. The presented paper scrutinizes the respective law and practice of the International Military Tribunals, the International Criminal Tribunals for the former Yugoslavia and for Rwanda, and the International Criminal Court, and also makes some general observations on the admissibility of evidence from the perspective of international judiciary as a whole, i.e. not only confined to international judicial bodies of a criminal character.

Keywords: admissibility of evidence; international criminal courts and tribunals; international judiciary.

Resumo: *O processo penal internacional combina elementos das tradições acusatórias e inquisitórias, assim constituindo um paradigma único. Em razão da escala mais ampla e da maior complexidade da criminalidade internacional a ser enfrentada pelos Tribunais criminais internacionais, pode ser interessante observar os seus desenvolvimentos e históricos diante da temática da admissibilidade probatória. Neste artigo pretende-se analisar a legislação e a prática dos Tribunais Internacionais Militares, os Tribunais Penais Internacionais para*

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a antiga Iugoslávia e para Ruanda, e o Tribunal Penal Internacional, além de apontar comentários gerais sobre admissibilidade da prova em uma perspectiva internacional ampla, ou seja, não somente limitada a órgãos judiciais internacionais de caráter penal.

Palavras-chave: *admissibilidade da prova; tribunais penais internacionais; justiça internacional.*

Introduction

Evidence may be described "as a tool for the reconstruction of disputed past events in the context of judicial trials"[2]. The term admissibility is "distinctly Anglo-American in origin, and has a technical significance not applicable to the broad rules of international procedure"[3]. Of course, admissibility may have different meanings in different criminal justice systems. Whereas in common law systems the respective scope of potential understandings is much broader, including issues of relevance and the probative value of the information, in civil law inadmissibility would normally be related with improperly obtained evidence[4]. When in a common law criminal trial a judge is to filter the available information that may be offered to a jury, by deciding on its admissibility, the counterpart role of a professional judge in civil law systems is to try the facts. This is yet just one reflection of indeed the different roles assigned for judges, prosecutors, and even defendants in accusatorial and inquisitorial systems.

The present analysis attempts at examining the respective developments concerning the admissibility of evidence in international criminal justice. Unsurprisingly, the combination of the two distinct

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[2] MURPHY, Peter. *Evidence, Proof, and Facts - A Book of Sources*. Oxford: OUP, 2003, p. 1.

[3] SANDIFER, Durward V. *Evidence Before International Tribunals*. Chicago: The Foundation Press, 1939, p. 120.

[4] SWART, Bert. International criminal courts and the admissibility of evidence. In: THAKUR, R. Chandra; MALCONTENT, Peter (eds.). *From Sovereign Impunity to International Accountability: The Search for Justice in a World of States*. Tokyo: United Nations University Press, 2004, p. 136.

procedural systems, and the underlying differences in terms of approaching evidence is worth analyzing, especially against the background of the relevant practice by the international criminal judiciary. It is to address international criminality with a complexity not comparable to ordinary crimes[5]. Hence, in any respect the scale of offences to be prosecuted, as well as the quantity of potential evidentiary sources, affect the operation of proceedings, thus making them incomparable to any domestic criminal proceedings[6]. For that reason our analysis starts with looking at the normative frameworks and their application by International Military Tribunals, the ad hoc Tribunals established by the Security Council, namely the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), and finally by the permanent International Criminal Court (ICC). Subsequently, the troubling combination of adversarial and inquisitorial elements is assessed against the background of proceedings before them. Yet, any reliable examination would be incomplete without then paying attention to the general approach to evidence by international courts, also those of a non-criminal character. It may be claimed that only after taking all those considerations into account, an accurate picture on the admissibility of evidence before international criminal courts and tribunals may be provided.

1. International Military Tribunals

The roots of modern international criminal justice date back to the establishment of the International Military Tribunal (IMT) and the International Military Tribunal for the Far East (IMTFE) in the aftermath of the Second World War. The apparently greatest difficulty in establishing the operational framework consisted in how to reconcile

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[5] DRUMBL, Mark A. *Atrocity, Punishment, and International Law*, Cambridge: CUP 2007, p. 157.

[6] See e.g. OSIEL, Mark. Making Sense of Mass Atrocity, Cambridge: CUP 2009, pp. 106 ff; COGAN, Jacob Katz. The Problem of Obtaining Evidence for International Criminal Courts, *Human Rights Quarterly*, Vol. 22, no. 2, 2000, pp. 404ff.

two very different systems of procedure[7]. The statutes of the International Military Tribunals referred only cursorily to evidentiary issues. Article 19 of the IMT Charter provided that: "The Tribunal shall not be bound by technical rules of evidence. It shall adopt and apply to the greatest possible extent expeditious and non-technical procedure, and shall admit any evidence which it deems to be of probative value". Article 13(a) of the IMTFE Charter was framed in a similar manner, with an additional sentence on admissibility of "all purported admissions or statements of the accused". With regard to the proceedings before the latter Tribunal, in his dissenting opinion, Justice Pal levelled severe criticism in the following words: "In prescribing the rules of evidence for this trial the Charter practically discarded all the procedural rules devised by the various national systems of law, based on litigious experience and tradition, to guard a tribunal against erroneous persuasion, and thus left us, in the matter of proof, to guide ourselves independently of any artificial rules of procedure"[8]. There were no specific provisions in the IMT and IMTFE Charters on the exclusion of illegally obtained or improperly obtained evidence.

With regard to International Military Tribunals, it may be therefore questioned whether the malleability of the evidentiary rules provided a potential for abuse, because of their flexibility expanding beyond the bounds of fairness[9]. Some learned commentators, however opined that the relaxation of the rules of evidence did not lead to "any unsatisfactory consequences" and "no question [could] ever be raised concerning the fairness of the rules of evidence and procedure

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[7] TAYLOR, Telford. *The Anatomy of the Nuremberg Trials: A Personal Memoir.* London: Bloomsbury 1993, p. 64 referring to Justice Jackson's distraction. Cf. ZAHAR Alexander; SLUITER, Goran. *International Criminal Law: A Critical Introduction*. Oxford: OUP, 2008, p. 351.

[8] Judgment of The Hon'ble Mr. Justice Pal, member from India, § 280 [reprinted in:] BOISTER, Neil; CRYER, Robert (eds.). *Documents on the Tokyo International Military Tribunal: Charter, Indictment and Judgments*. Oxford: OUP 2008, p. 932.

[9] WALLACH, Evan J. The Procedural and Evidentiary Rules of the Post-World War II Crimes Trials: Did They Provide an Outline for International Legal Procedure. *Columbia Journal of Transnational Law* Vol. 37, 1999. p. 869.

administered by the Nuremberg Tribunal"[10]. Be that as it may, for many years the practice of the International Military Tribunals had been the only available reference point in international criminal justice, before the Security Council established the International Criminal Tribunals for the former Yugoslavia and for Rwanda.

2. The *ad hoc* international criminal tribunals

Also, the *ad hoc* international criminal tribunals adopted lenient and flexible admissibility rules on evidence. The Statutes of the ICTY and ICTR conferred on the judges the adoption of "rules of procedure and evidence for the conduct of the pre-trial phase of the proceedings, trials and appeals, the admission of evidence, the protection of victims and witnesses and other appropriate matters"[11]. The judge-made Rules provided for admission by the Trial Chambers of "any relevant evidence which it deems to have probative value"[12]. At a later stage, however, the chamber could exclude such evidence[13]. The adopted rules of evidence were considered 'unique' by being "not simply a hybrid of the civil and common law systems" and replicating neither system[14].

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[10] GOODHART, Arthur L. The Legality of the Nuremberg Trials. In: METTRAUX, Guénaël. *Perspectives on the Nuremberg Trial*. Oxford: OUP 2008, pp. 628-629.

[11] Art. 15 ICTY Statute, Art. 14 ICTR Statute.

[12] Pursuant to respective Rules 89(C) of the ICTY and ICTR Rules of Procedure and Evidence, a Trial Chamber 'may admit any relevant evidence which it deems to have probative value.'

[13] ICTY and ICTR Rule 95 states that: 'No evidence shall be admissible if obtained by methods which cast substantial doubt on its reliability or if its admission is antithetical to, and would seriously damage, the integrity of the proceedings.' In addition, ICTY Rule 89(D) provides that: 'A Chamber may exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial.' The ICTR RPE lacked an analogous rule.

[14] See MACDONALD, Gabrielle Kirk. Trial Procedures and Practices, in MACDONALD, Gabrielle Kirk; SWAAK-GOLDMAN Olivia. *Substantive and Procedural Aspects of International Criminal Law: The Experience of International and National Courts*. Vol. 1, The Hague: Kluwer Law International, 2000, p. 556.

In the first annual report of the ICTY, submitted by the President of the Tribunal, Antonio Cassese noted that "[b]ased on the limited precedent of the Nürnberg and Tokyo trials, the statute of the Tribunal has adopted a largely adversarial approach to its procedures, rather than the inquisitorial system prevailing in continental Europe and elsewhere"[15]. Such an observation was followed by a notice that "there are [...] important deviations from some adversarial systems", mentioning among them the lack of any technical rules for the admissibility of evidence[16] and that the Tribunal may order the production of additional or new evidence *proprio motu*[17]. It could be observed that the Tribunal's jurisprudence reflected fully such a statement so that evidence was treated "much more in accordance with the civil law tradition of free proof" despite "paying lip service to the adversarial nature of the Tribunal's proceedings"[18].

In the process of establishing the procedural rules for the ICTY, given the limitations arising from the conflict and the conditions in the former Yugoslavia, in particular the restricted possibilities of gaining access to documentary evidence in the process of an ongoing armed conflict,

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[15] Annual Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, dated 28 July 1994, UN Doc. A/49/342, S/1994/1007, 29 August 1994, § 71.

[16] *Ibidem*, § 72: "The first is that, as at Nürnberg and Tokyo, there are no technical rules for the admissibility of evidence. This Tribunal does not need to shackle itself to restrictive rules that have developed out of the ancient trial-by-jury system. There will be no jury sitting at the Tribunal, needing to be shielded from irrelevancies or given guidance as to the weight of the evidence they have heard. The judges will be solely responsible for weighing the probative value of the evidence before them. Consequently, all relevant evidence may be admitted to the Tribunal unless its probative value is substantially outweighed by the need to ensure a fair trial (rule 89) or where the evidence was obtained by a serious violation of human rights (rule 95).

[17] With respect to the latter point, the report continued: "This will enable the Tribunal to ensure that it is fully satisfied with the evidence on which its final decisions are based. It was felt that, in the international sphere, the interests of justice are best served by such a provision and that the diminution, if any, of the parties' rights is minimal by comparison" (§ 73).

[18] MURPHY, Peter. Excluding justice or facilitating justice? International criminal law would benefit from rules of evidence. *International Journal Evidence and Proof*, Vol. 12, 2008, p. 13.

it was submitted that "the International Tribunal could not be too strict about the criteria for the admissibility of evidence". Accordingly, "it was considered that the inclusion of technical rules would only encumber the judicial process"[19]. For that reason, the Tribunals' chambers had a broad discretion to decide on the admissibility, relevance, and probative value of evidence[20]. The respective sparseness in formulating of the rules on evidence is deliberate. Rather than it being accidental, the rules are drafted and applied to ensure maximum flexibility for chambers in their efforts to run fair and expeditious trials[21].

Over time the practice of the *ad hoc* tribunals moved in the direction of a more active judicial role, despite the textual starting-point being very close to the adversarial model[22]. It was due to the fact that the quite frequent changes were adopted by the judges.

The Appeals Chamber in Aleksovski stated that: "The purpose of the Rules is to promote a fair and expeditious trial, and Trial Chambers must have the flexibility to achieve this goal"[23]. It is quite telling in that

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[19] ICTY, Trial Chamber, Delalić et al., Decision on the Prosecution's Motion for the Redaction of the Public Record, 5 June 1997, § 41.

[20] AMBOS, Kai. International Criminal Procedure: "Adversarial", "Inquisitorial" or Mixed? In: BOHLANDER Michael (ed.). *International Criminal Justice: A Critical Analysis of Institutions and Procedures*, London: Cameron May, 2007, p. 477. See also ICTY, Prosecutor v. Simić, Case No. IT-95-9-PT, Decision on the Prosecution Motion Under Rule 73 for a Ruling Concerning the Testimony of a Witness, 27 July 1999, § 40: "In general terms, the Rules establish a regime for the admission of evidence which is wide and liberal".

[21] BOAS, Gideon; BISCHOFF, James L.; REID Natalie L.; TAYLOR III, B. Don. *International Criminal Law Practitioner Library: International Criminal Procedure*, Volume 3, Cambridge: CUP 2011, p. 336. BOAS, Gideon. Admissibility of Evidence Under the Rules of Procedure and Evidence of the ICTY: Development of the "Flexibility Principle". In: MAY, Richard et al. (eds.), *Essays on ICTY Procedure and Evidence in Honour of Gabrielle Kirk McDonald*. Leiden: Brill, 2001, p. 263.

[22] See KRESS, Claus. The Procedural Law of the International Criminal Court in Outline: Anatomy of a Unique Compromise. *Journal of International Criminal Justice*, Vol. 1, 2003, p. 612; MAY, Richard; WIERDA, Marieke. Trends in International Criminal Evidence: Nuremberg, Tokyo, The Hague, and Arusha, *Columbia Journal of Transnational Law*, Vol. 37, 1999, p. 727

[23] Aleksovski, AC, ICTY, Decision on Prosecutor's Appeal on Admissibility of Evidence, 16 February 1999, § 19.

respect to refer to the early decision by the ICTY rejecting the motion by the Defence to exclude, to rule on the admission of (hearsay) evidence without actually hearing its content and explained that "This procedure, while possibly appropriate if trials before the International Tribunal were conducted before a jury, is not warranted for the trials are conducted by Judges who are able, by virtue of their training and experience, to hear the evidence in the context in which it was obtained and accord it appropriate weight. Thereafter, they may make a determination as to the relevance and the probative value of the evidence"[24].

The role of reliability in the admissibility decision may be considered controversial. Indeed, the hitherto jurisprudence (of the ICTY and the ICTR) offered incoherent visions as to the reliability of a piece of evidence being either relevant to its admissibility or as a matter to be considered when determining its weight[25]. It is worth stressing that the ICTR did not adopt Rule 89(D) permitting its Trial Chamber to "exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial". However, for both *ad hoc* Tribunals their RPEs offered also mandatory exclusion of evidence if "its admission was antithetical to, and would seriously damage, the integrity of the proceedings" or if it had been obtained by methods which cast substantial doubt on the reliability of the evidence[26].

3. The International Criminal Court

A compromise between the common and civil law tradition needed to be also reached in negotiating the Statute of the permanent

[24] ICTY, Prosecutor v. Tadić, Case No. IT-94-1-T, Decision on Defence Motion on Hearsay, 5 August 1996, § 17.

[25] COMBS, Nancy. Evidence. In: SCHABAS, William A.; BERNAZ, Nadia (eds.). *Routledge Handbook of International Criminal Law*. New York: Routledge, 2011, p. 326. Cf. MAY, Richard; WIERDA, Marieke. *International Criminal Evidence*, Ardsley, NY: Transnational Publishers, 2002, pp. 109-110.

[26] See respective rule 95. Since the ICTR Trial Chambers could not rely on a solution similar to that provided in Rule 89(D) of the ICTY RPE they had to rely on Rule 95, whereas the ICTY preferred to make use of Rule 89(D).

International Criminal Court[27] resulting in "a delicate combination of civil and common-law concepts of fair trial and due process"[28]. Yet, "the compromise in the Rome Statute was to eschew generally the technical formalities of the common law system of admissibility of evidence in favour of the flexibility of the civil law system, provided that the Court has discretion to 'rule on the relevance or admissibility of any evidence"[29].

When the International Law Commission discussed the establishment of the international criminal court, it was clear to that the rules of evidence were too complex to be dealt with in the Statute itself, and should therefore be left to be defined in a separate document[30]. During subsequent works a decision was taken that the Statute should only contain the fundamental principles governing evidence, and that the details, secondary and subsidiary rules should be further elaborated in the Rules, more easily amended than the Statute[31] and allowing the Court to flexibly adopt rules according to its practice and requirements[32]. Unsurprisingly, the eventual Rome Statute is not replete with rules of evidence which have been dealt with in full detail in RPE adopted, however, by the Assembly of State Parties[33].

Yet, Article 69 lays down some general principles serving, in the opinion of some authors, the traditional common-law function of the law

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[27] FLETCHER, George P. The Interplay of International Criminal Law and Other Bodies of Law, The Influence of the Common Law and Civil Law Traditions on International Criminal Law. In: CASSESE, Antonio (ed.). *The Oxford Companion to International Criminal Justice*. Oxford: OUP, 2009.

[28] BRADY, Helen. The System of Evidence in the Statute of the International Criminal Court. In: LATTANZI, Flavia; SCHABAS, William A. (eds.). *Essays on the Rome Statute of the International Criminal Court*. Volume 1, Il Sirente, 1999, p. 286.

[29] PIRAGOFF, Donald K.. Evidence. in LEE, R.S. (ed.), *The International Criminal Court—Elements of Crimes and Rules of Procedure and Evidence*. Ardsley: Transnational Publishers, 2001, pp. 351 and 354.

[30] SCHABAS, William A. *The International Criminal Court: A Commentary on the Rome Statute*, Second Edition. Oxford: OUP, 2016, p. 1079.

[31] PIRAGOFF, Donald K.; CLARKE, Paula. Article 69. In: TRIFFTERER, Otto; AMBOS, Kai (eds.). *The Rome Statute of the International Criminal Court*, Third Edition. Oxford: Hart Publishing, 2016, p. 1722

[32] 1996 Preparatory Committee Report I, p. 60.

[33] Rome Statute, Article 51.

of evidence[34]. Again, the provision contains references to different legal traditions and also that of continental law. Under Article 69(3), it is for the parties to submit evidence relevant to the case. However, "[t]he Court shall have the authority to request the submission of all evidence that it considers necessary for the determination of the truth". The language of the quoted provision might seem to at least partially relate to the inquisitorial model, but not in its most rigid form, since the judges are neither under a strict duty to determine the truth, nor remain passive arbiters to reflect the pure adversarial model[35].

The most straightforward provision referring to admissibility is Article 69(4): "The Court may rule on the relevance or admissibility of any evidence, taking into account, *inter alia*, the probative value of the evidence and any prejudice that such evidence may cause to a fair trial or to a fair evaluation of the testimony of a witness". Article 69 belongs to Part 6 concerning the trial proceedings but under Rule 63(1) of the RPE, the rules of evidence, together with Article 69, shall apply in proceedings before all Chambers, thus clarifying the respective ambiguity[36].

A standard to exclude evidence has been included in Article 69(7) of the Rome Statute. Accordingly, "Evidence obtained by means of a violation of this Statute or internationally recognized human rights shall not be admissible if: (a) The violation casts substantial doubt on the reliability of the evidence; or (b) The admission of the evidence would be antithetical to and would seriously damage the integrity of the proceedings".

It might be rightly questioned whether the above formulation does not 'make a mockery of human rights law as an indivisible set of

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[34] ORIE, Alphons. Accusatorial versus Inquisitorial Approach in International Criminal Proceedings. In: CASSESE, Antonio; GAETA, Paola; JONES, John R.W.D. (eds.). *The Rome Statute of the International Criminal Court: A Commentary*. Oxford: OUP, 2002, p. 1485.

[35] KRESS, Claus. The Procedural Law of the International Criminal Court in Outline: Anatomy of a Unique Compromise. *Journal of International Criminal Justice*, Vol. 1, 2003, p. 612.

[36] PIRAGOFF, Donald K.. Evidence. In LEE, R.S. (ed.), *The International Criminal Court—Elements of Crimes and Rules of Procedure and Evidence*. Ardsley: Transnational Publishers, 2001, p. 350.

minimum legal standards.'[37] Without doubt Article 69(7) provides for a model of non-automatic inadmissibility of illegally obtained evidence[38]. The fairness test would be the ultimate step to finally admit otherwise admissible evidence. The quoted provision focuses on the impact of the violation on the reliability of the evidence and the general integrity of the proceedings[39].

Finally, the ICC, like its predecessors, is not bound by national rules of evidence[40]. Against this background it may be useful to refer to *Prosecutor v. Lubanga*, where the Trial Chamber I concluded that "evidence obtained in breach of national procedural laws, even though those rules may implement national standards protecting human rights, does not automatically trigger the application of Article 69(7) of the Statute[41]. The mentioned provision may be considered "lex specialis, when compared with the general admissibility provisions set out elsewhere in the Statute and represents a clear exception to the general approach"[42].

The Statute's approach *vis-à-vis* the admission of evidence is to eschew most of the technical rules on admissibility in favour of a system of utmost flexibility[43]. For some, however, the ICC legal framework does

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[37] ZAHAR Alexander; SLUITER, Goran. *International Criminal Law: A Critical Introduction*. Oxford: OUP, 2008, p. 382.

[38] JASIŃSKI, Wojciech. Admissibility of Illegally Obtained Evidence in Proceedings before International Criminal Courts. In: KRZAN, Bartłomiej (ed.). *Prosecuting International Crimes: A Multidisciplinary Approach*. Leiden-Boston: Brill, 2016, p. 217. Cf. FALLAH, Sara Mansour. The Admissibility of Unlawfully Obtained Evidence before International Courts and Tribunals, *The Law & Practice of International Courts and Tribunals*, Vol. 19, 2020, p. 148.

[39] Cf. Katanga, No. ICC-01/04-01/07-2635, § 39.

[40] See e.g. Rome Statute, Art. 69(8): 8. When deciding on the relevance or admissibility of evidence collected by a State, the Court shall not rule on the application of the State's national law"; ICC RPE, Rule 63(5), The Chambers shall not apply national laws governing evidence, other than in accordance with article 21.

[41] Prosecutor v. Lubanga, Doc. No. ICC-01/04-01/06-1981, Decision on the Admission of Material from the 'Bar Table', 24 June 2009, § 36

[42] Ibidem, §34. also Lubanga, No. ICC-01/04-01/06-1981, § 34; Katanga, No. ICC-01/04-01/07-2635, § 39 (lex specialis as compared to Art. 69 (4) ICCS).

[43] GALLMETZER, Reinhold. The Trial Chamber's Discretionary Power To Devise The Proceedings Before It And Its Exercise In The Trial Of Thomas

not constitute an improvement, since its law of evidence is "possibly even more obscure than that of the *ad hoc* tribunals" and contains some utterly contradictory elements[44]. All in all, the general admissibility standard of evidence is defined by three cardinal criteria[45]. Accordingly, relevance, probative value, and prejudice (probative value as weighed against any prejudicial effect on trial fairness) constitute a three-step approach to determine the admissibility of evidence other than oral evidence[46]. First, "the Chamber must ensure that the evidence is *prima facie* relevant to the trial, in that it relates to the matters that are properly to be considered by the Chamber in its investigation of the charges against the accused and its consideration of the views and concerns of participating victims"[47]. Subsequently, the Chamber must assess whether the evidence has, on a *prima facie* basis, probative value[48]. Finally, where relevant, the probative

Lubanga Dyilo. In: STAHN, Carsten; SLUITER, Goran (eds.). *The Emerging Practice of the International Criminal Court*. Leiden: Brill, 2009. p. 507.

[44] ZAHAR Alexander; SLUITER, Goran. International Criminal Law: A Critical Introduction. Oxford: OUP, 2008, p. 394, alluding to the combination of non-compellability of witnesses with a mandatory exclusionary rule for testimonial evidence not subject to cross-examination (rule 68).

[45] GOSNELL, Christopher. Admissibility of Evidence. In: KHAN, Karim A.A.; BUISMAN, Caroline; GOSNELL, Christopher (eds.). *Principles of Evidence in International Criminal Justice*, Oxford: OUP, 2010, p. 378. As confirmed in other proceedings, the Chamber is to 'first assess the relevance of the material, then determine whether it has probative value and finally weigh its probative value against its potentially prejudicial effect' - see ICC, Trial Chamber II, The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Decision on the Prosecutor's Bar Table Motions, ICC-01/04-01/07, 17 December 2010, § 14.

[46] ICC, Trial Chamber I, The Prosecutor v. Thomas Lubanga Dyilo, Corrigendum to Decision on the admissibility of four documents, ICC-01/04-01/06-1399-Corr, 21 January 2011, §§ 25ff.

[47] ICC, Trial Chamber I, The Prosecutor v. Thomas Lubanga Dyilo, Corrigendum to Decision on the admissibility of four documents, ICC-01/04-01/06-1399-Corr, 21 January 2011, § 27.

[48] Ibidem, § 28. Cf. Prosecutor v. Katanga and Ngudjolo, Doc. No. ICC-01/04-01/07-717, Decision on the Confirmation of Charges, 30 September 2008, § 77 "According to article 69(4) of the Statute, probative value is one of the factors to be taken into consideration when assessing the admissibility of a piece of evidence. In the view of the Chamber, this means that the Chamber must look at the intrinsic coherence of any item of evidence, and to declare

value of the evidence must be weighed against its prejudicial effect[49]. Such a three-stage approach may often appear as being very artificial and unnecessarily cumbersome[50] since it would impose indeed lengthy decisions on admissibility of evidence and as such those would not be indispensable according to the Statute or the Rules.

For the sake of clarity, it may be requested that questions of illegally obtained evidence should be reviewed at the stage of the admission of evidence and not during its assessment[51]. However, the Trial Chamber III decided in *Prosecutor v. Bemba* to admit *prima facie* before the start of the presentation of evidence, all statements of witnesses to be called to give evidence at trial and all the documents submitted by the prosecution in its list of evidence[52]. According to the Majority of the Judges "a ruling on admissibility is not a pre-condition for the admission of any evidence, as it only implies a *prima facie* assessment of the relevance of any material, on the basis that it appears to be a priori relevant to the case"[53].

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inadmissible those items of evidence of which probative value is deemed prima facie absent after such an analysis".

49 ICC, Trial Chamber I, The Prosecutor v. Thomas Lubanga Dyilo, Corrigendum to Decision on the admissibility of four documents, ICC-01/04-01/06-1399-Corr, 21 January 2011, § 29. Observing that: "Whilst it is trite to observe that all evidence that tends to incriminate the accused is also "prejudicial" to him, the Chamber must be careful to ensure that it is not unfair to admit the disputed material, for instance because evidence of slight or minimal probative value has the capacity to prejudice the Chamber's fair assessment of the issues in the case".

50 BITTI, Gilbert. Article 64. In: TRIFFTERER, Otto; AMBOS, Kai (eds.). *The Rome Statute of the International Criminal Court*, Third Edition. Oxford: Hart Publishing, 2016, p. 1619.

51 JASIŃSKI, Wojciech. Admissibility of Illegally Obtained Evidence in Proceedings before International Criminal Courts. In: KRZAN, Bartłomiej (ed.). Prosecuting International Crimes: A Multidisciplinary Approach. Leiden-Boston: Brill, 2016, p. 202.

52 ICC, Trial Chamber III, The Prosecutor v. Jean-Pierre Bemba Gombo, Decision on the admission into evidence of materials contained in the prosecution's list of evidence, ICC-01/05-01/08-1022, 19 November 2010, §8. Cf Ruto et al. (ICC-01/09-02/11), Decision on the Prosecution's Request for Admission of Documentary Evidence, 10 June 2014, § 15.

53 ICC, Trial Chamber III, The Prosecutor v. Jean-Pierre Bemba Gombo, Decision on the admission into evidence of materials contained in the prosecution's list of evidence, ICC-01/05-01/08-1022, 19 November 2010, § 10.

The above admission into evidence of all items mentioned on the Revised List of Evidence was based on a "*prima facie* finding of admissibility", without an item-by-item evaluation or giving reasons was subsequently reversed by the Appeals Chamber. According to the latter, the Trial Chamber has a choice between ruling on the relevance and/or admissibility of each item of evidence when it is submitted or deferring its consideration until the end of the proceedings, thus making it part of its assessment of the evidence when it is evaluating the guilt or innocence of the accused person[54]. The Appeals Chamber underlined that according to the last sentence of Article 74(2) of the Rome Statute a Trial Chamber may base its decision at the end of the trial only on evidence that was "submitted and discussed before it at the trial"[55]. In addition, according to the Appeals Chamber, the Trial Chamber "failed to effectively evaluate any potential prejudice that such evidence may cause to a fair trial, in particular Mr. Bemba's right to a trial without undue delay"[56]. It has been also suggested in the doctrine[57] that instead of undertaking an admissibility test at all cost at the moment of submitting pieces of evidence[58], it may be advisable to defer the Chamber's assessment of the admissibility of evidence until deliberating

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[54] ICC, Appeals Chamber, The Prosecutor v. Jean-Pierre Bemba Gombo, Judgment on the appeals of Mr. Jean-Pierre Bemba Gombo and the Prosecutor against the decision of Trial Chamber III entitled "Decision on the admission into evidence of materials contained in the prosecution's list of evidence'', ICC-01/05-01/08-1386, 03 May 2011, § 37.

[55] Ibidem, § 45.

[56] Ibidem, § 70.

[57] AMBOS, Kai. *Treatise on International Criminal Law: Volume III: International Criminal Procedure*. Oxford: OUP, 2016, p. 449.

[58] ICC, Trial Chamber II, The Prosecutor v. Germain Katanga, Decision on the Prosecutor's Bar Table Motions, ICC-01/04-01/07-2635, 19 December 2010, § 15: There are no automatic grounds for exclusion in the Statute or the Rules. Instead, the Chamber has the discretion to weigh the probative value of each particular item of evidence against the potentially prejudicial effect of its admission. This is a balancing test which must be carried out on a case-by-case basis. The Chamber emphasises, however, that, although the applicable admissibility test allows the Chamber wide- discretion, the Chamber has no discretion in whether or not to apply the test. Before admitting any item of evidence, the Chamber must be satisfied that the admissibility criteria have been met.

its judgment pursuant to Article 74(2) of the Statute[59]. Accordingly, the preliminary admissibility exam would be limited to relevance[60]. Yet, the concept of relevance contains an implicit requirement of probative value. But when compared to the mechanisms available to the *ad hoc* international criminal tribunals, the respective solution included in the Rome Statute seems too moderate.

One important aspect of the ICC procedure, and also on evidentiary aspects thereof, is that under Rome Statute the Rules of Procedure and Evidence are to be adopted by the Assembly of State Parties and not by judges themselves. Such a mistrust in judges[61] may also have more serious and definitely negative consequences, including the significant preclusion of the necessary judicial development, while restricting the judges substantially to a mechanical function, which in turn may affect the ability of the International Criminal Court to function efficiently as a court of law and the ability of its judges to fulfil their mandate[62]. Not only against the background of the ICC's predecessors, such a deprivation cannot be considered a welcome development.

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[59] ICC, Appeals Chamber, The Prosecutor v. Jean-Pierre Bemba Gombo, Judgment on the appeals of Mr. Jean-Pierre Bemba Gombo and the Prosecutor against the decision of Trial Chamber III entitled "Decision on the admission into evidence of materials contained in the prosecution's list of evidence'', ICC-01/05-01/08-1386, 03 May 2011, §9: "The Chamber will consider the relevance, probative value and potential prejudice of each item of evidence submitted at that time, though it may not necessarily discuss these aspects for every item submitted in the final judgment".

[60] KLAMBERG, Mark. *Evidence in International Criminal Trials*. Leiden: Brill, 2013, p. 357. Cf. SCHUON, Christine. The Appeals Decision in the ICC's Jean-Pierre Bemba Gombo Case on the Trial Chamber's 'Decision on the Admission into Evidence of Materials Contained in the Prosecution's List of Evidence'. *Leiden Journal of International Law*, Vol. 25, 2012, p. 520.

[61] CASSESE, Antonio. The Statute of the International Criminal Court: Some Preliminary Reflections. *European Journal of International Law,* Vol. 10, 1999, p. 163.

[62] HUNT, David. The International Criminal. Court. High Hopes, 'Creative Ambiguity' and an Unfortunate Mistrust in International Judges. *Journal of International Criminal Justice*, Vol. 2, 2004, p. 56.

4. Squaring Inquisitorial Law of Evidence in a Predominantly Adversarial System?

Without doubt, rules of evidence, when applied consistently, are an essential component of fairness and good trial management[63]. The law and the respective practice of the judicial bodies analysed above offer numerous occasions to draw firm similarities, notwithstanding the differences between the International Military Tribunals, International Criminal Tribunals, and the permanent ICC. Comparing the experiences of those judicial institutions demonstrated various commonalities. Generally speaking, all of the surveyed international judicial bodies have had a flexible and liberal approach to the admission of evidence.

Yet, the "free proof" may be "a euphemism for a systemic failure of judicial discrimination in admitting evidence without inquiring into its apparent provenance or reliability" and "the price of this failure is evidential contamination"[64].

It goes without saying that international criminal procedure may be portrayed as a competition of or a contest between two conflicting traditions of criminal procedure. In general, it may be concluded that the international criminal procedure is dominated by the common-law adversarial model but the international criminal courts and tribunals have been relying on essentially civil-law mechanisms for tendering and admitting evidence[65]. Thus, international criminal evidence rules constitute a unique amalgam. The trial proceedings are primarily common law in character but basic approach to evidence

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[63] GOSNELL, Christopher. Admissibility of Evidence. In: KHAN, Karim A.A.; BUISMAN, Caroline; GOSNELL, Christopher (eds.). *Principles of Evidence in International Criminal Justice*, Oxford: OUP, 2010, p. 442.

[64] MURPHY, Peter. No Free Lunch, No Free Proof: The Indiscriminate Admission of Evidence is a Serious Flaw in International Criminal Trials. *Journal of International Criminal Justice*, Vol. 8, 2010, p. 540.

[65] KWON, O-Gon. The Challenge of An International Criminal Trial as Seen from the Bench. *Journal of International Criminal Justice*, Vol. 5, 2007, pp. 363–364, see also KRESS, Claus. The Procedural Law of the International Criminal Court in Outline: Anatomy of a Unique Compromise. *Journal of International Criminal Justice*, Vol. 1, 2003, p. 612.

derives from civil law systems, which when blended together provide for inevitable tensions[66] .

When assessing the international intersection of traditions, it is rightly feared that "the mishmash of the two system has abandoned some distinctive checks on which each system depends"[67]. In even stronger words it may be observed in a broader context that "the present system of 'free proof' in the context of international criminal law represents a judicial failure to exercise due discretion by indiscriminately admitting any material claimed by the parties to be 'evidence', regardless of its provenance or apparent reliability and even without inquiry as to possible perjury or fabrication"[68].

Against this particular background it may seem natural to advocate for fully choosing either system, for the selected law of evidence "can only function properly in their respective 'natural habitats', which is either the civil-law objective truth-finding contest or the common-law subjective truth finding contest"[69].

It is thus logical that the representatives of the common law system level criticism against the missing elements. The "deviations" from the adversarial system are considered to frustrate its objective "by making trials longer, more complex, and less efficient, and by tending to bury the truly important evidence in the midst of an enormous accumulation of evidential debris."[70]. Such "evidential debris" may be said to poison

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[66] COMBS, Nancy. Evidence. In: SCHABAS, William A.; BERNAZ, Nadia (eds.). *Routledge Handbook of International Criminal Law*. New York: Routledge, 2011, p. 329.

[67] BIBAS, Stephanos; BURKE-WHITE, William W. International Idealism Meets Domestic-Criminal-Procedure Realism. *Duke Law Journal*, Vol. 59(4), 2010, p. 695 (at p. 638 complaining that "in blending adversarial and inquisitorial systems, international criminal justice has jettisoned too many safeguards of either one").

[68] MURPHY, Peter. No Free Lunch, No Free Proof: The Indiscriminate Admission of Evidence is a Serious Flaw in International Criminal Trials. *Journal of International Criminal Justice*, Vol. 8, 2010, p. 539.

[69] ZAHAR Alexander; SLUITER, Goran. *International Criminal Law: A Critical Introduction*. Oxford: OUP, 2008, p. 394.

[70] MURPHY, Peter. Excluding justice or facilitating justice? International criminal law would benefit from rules of evidence. *International Journal Evidence and Proof*, Vol. 12, 2008, p. 13.

the record and ultimately make it more difficult for judges to assess the weight of the evidence and arrive at the truth[71]. In the alternative, it is also possible to argue against any repetition of the reliability assessment, when determining admissibility, and later at the final deliberations. Thus, procedural economy may as well be invoked as an argument in favour of flexible admission of evidence[72]. The latter suggestion may well fit into the international character of the judicial proceedings.

Some reaction to the referred objections is offered in the Separate and Dissenting Opinion of Judge Cassese in *Erdemović*, which deserves to be quoted at length: "International criminal procedure results from the gradual decanting of national criminal concepts and rules into the international receptacle. [...] It is therefore only natural that international criminal proceedings do not uphold the philosophy behind one of the two national criminal systems to the exclusion of the other; nor do they result from the juxtaposition of elements of the two systems. Rather, they combine and fuse, in a fairly felicitous manner, the adversarial or accusatorial system [...] with a number of significant features of the inquisitorial approach [...]. This combination or amalgamation is unique and begets a legal logic that is qualitatively different from that of each of the two national criminal systems: the philosophy behind international trials is markedly at variance with that underpinning each of those national systems. Also the Statute and Rules of the International Tribunal, in outlining the criminal proceedings before the Trial and Appeals Chambers, do not refer to a specific national criminal approach, but originally take up the accusatorial (or adversarial) system and adapt it to international proceedings, while at the same time upholding some elements of the inquisitorial system"[73]. In a similar vein, another ICTY President, Gabrielle Kirk MacDonald advocated for the flexibility of procedural and evidentiary

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[71] MURPHY, Peter. No Free Lunch, No Free Proof: The Indiscriminate Admission of Evidence is a Serious Flaw in International Criminal Trials. *Journal of International Criminal Justice*, Vol. 8, 2010, p. 539.

[72] KLAMBERG, Mark. *Evidence in International Criminal Trials*. Leiden: Brill, 2013, p. 419.

[73] Erdemovic - Judgement - Separate and Dissenting Opinion of Judge Cassese, Erdemović (IT-96-22), AJ, 7 October 1997, §4.

rules ("a framework, not a straitjacket") to allow the exercise of judicial discretion where necessary[74].

Another perspective on the hybridization of the procedure, and the admissibility of evidence in particular, would be the perspective of the fair trial ideal[75]. One might be reminded of the famous reference to the "poisoned chalice" at Nuremberg[76] that brilliantly covers the delicate interplay between being either too inclined pro-conviction or in the alternative, instead of overlooking rights of the accused to lurch in the opposite direction, with an eagerness to demonstrate unparalleled care for the accused, i.e. being inclined to acquittal at any cost[77].

In a more modern fashion, one might be tempted to rely once again on a learned expert of international (criminal) law. According to Cassese (acting then as dissenting Judge in his capacity as the ICTY President in another case), "notions, legal constructs and terms of art upheld in national

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74 Remarks made by Judge Gabrielle Kirk McDonald, President of the International Criminal Tribunal for the former Yugoslavia, to the Preparatory Commission for the International Criminal Court, ICTY Press Release JL/P.I.S./425-E (30 July 1999), https://www.icty.org/en/press/remarks-made-judge-gabrielle-kirk-mcdonald-president-international-criminal-tribunal-former (accessed on 5 December 2020).

75 Such philosophy of the criminal procedure was employed by ICTY in Delalić and others (IT-96-21-T), TC, 4 February 1998, Decision on the Prosecution's Motion for an Order Requiring Advance Disclosure of Witnesses by the Defence, § 20: "The general philosophy of the criminal procedure of the International Tribunal aims at maintaining a balance between the accusatory procedure of the common law systems and the inquisitorial procedure of the civil law systems; whilst at the same time ensuring the doing of justice. [...] both the Statute and the Rules adhere strictly to the elementary principles of justice, and the protection of the essential rights of the accused"

76 On November 21, 1945, in the Palace of Justice at Nuremberg, Germany, Justice Robert H. Jackson, Chief of Counsel for the United States, made his opening statement to the International Military Tribunal and said: "To pass these defendants a poisoned chalice is to put it to our own lips as well. We must summon such detachment and intellectual integrity to our task that this Trial will commend itself to posterity as fulfilling humanity's aspirations to do justice".- see https://www.roberthjackson.org/speech-and-writing/opening-statement-before-the-international-military-tribunal/ (accessed on 5 December 2020).

77 See: https://www.ejiltalk.org/the-other-poisoned-chalice-unprecedented-evidentiary-standards-in-the-gbagbo-case-part-1/ (accessed on 5 December 2020).

law should not be automatically applied at the international level. They cannot be mechanically imported into international criminal proceedings. The International Tribunal, being an international body based on the law of nations, must first of all look to the object and purpose of the relevant provisions of its Statute and Rules"[78].

This brings to light another element, which relies on the international nature of the judicial bodies admitting or not the information as evidence. Whereas the analysis above concentrated on procedural requirements referring to domestic experience, there might indeed be different combinations or hybrids between the adversarial and inquisitorial systems. Indeed, no single national system could offer a sufficient solution[79]. What becomes crucial at this point of our analysis is to now pay due attention to the international character of the proceedings before a judicial body operating outside the purely domestic context.

A seminal study on evidence in international proceedings concluded that "international tribunals would be seldom troubled with questions of reception or exclusion, based upon the intrinsic character of the evidence itself"[80]. According to M.O. Hudson, "No general rules have been developed to constitute an international law of evidence, and international tribunals are usually free from limitations of national tribunals in this regard"[81]. Apart from special provisions, international tribunals claim, and indeed exercise, complete freedom in the admission and evaluation of evidence in order to arrive at the moral conviction of

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[78] Erdemovic, Judgement, Separate and Dissenting Opinion of Judge Cassese, Erdemović (IT-96-22), AJ, 7 October 1997, § 2.

[79] ACQUAVIVA, GUIDO. Written and oral evidence. In: CARTER, Linda; POCAR, Fausto (eds.). *International Criminal procedure: The Interface of Civil Law and Common Law Legal Systems*, Cheltenham: Edward Elgar 2013.

[80] SANDIFER, Durward V. *Evidence Before International Tribunals*. Chicago: The Foundation Press, 1939, p. 119.Earlier in his treatise the mentioned author opines that "no rule of evidence thus finds more frequent statement in the cases than the one that international tribunals are not bound to adhere to strict rules of evidence." (at p. 9).

[81] HUDSON, Manley O. *International Tribunals. Past and Future*. Washington: Carnegie Endowment for International Peace and Brookings Institution, 1944, p. 92.

truth of the whole case[82]. A tendency in the practice of international tribunals is "to accept all possible means by which the disputed facts could be proved"[83]. Of course, one may be tempted to offer special treatment to newer international tribunals of a criminal character, to be distinguished from the traditional inter-state litigation[84]. In contrast to other international bodies, evidence plays a very prominent role in the decision-making by international criminal courts, as the latter are entrusted with determining the individual's criminal responsibility and not the liability of States. But also, international criminal tribunals suffer from difficulties in securing state cooperation and access to evidence.

Therefore, despite the apparent differences, a general conclusion may be drawn that international tribunals, including criminal courts and tribunals, have generally had the power to decide for themselves what is admissible as evidence and have indeed taken a liberal approach to the matter[85]. It may be even claimed that free evaluation of evidence should be considered a general principle of international law[86].

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[82] CHENG, Bin. *General Principles of Law as Applied by International Courts and Tribunals*. Cambridge: CUP, 2006, p. 307. See also BROWER, Charles N. The Anatomy of Fact-Finding before International Tribunals: An Analysis and a Proposal Concerning the Evaluation of Evidence. In: LILLICH, Richard (ed.). *Fact-Finding by International Tribunals*. Ardsley-on-Hudson: Transnational Publishers, 1991, p. 148 ("By and large there are no rules of evidence applied in international proceedings that automatically would evaluate evidence for reliability and potentially exclude it. Usually anything offered is admitted. For obvious diplomatic reasons international tribunals are especially reluctant to spurn anything proffered by a sovereign").

[83] KAZAZI, Mojtaba. *Burden of Proof and Related Issues: A Study on Evidence Before International Tribunals*. The Hague: Kluwer Law International, 1996, p. 186.

[84] Due to differing functions, parties, and procedures of different tribunals, a general analysis of evidentiary practice is rendered difficult, but it is possible to identify some similar approaches to the international law of evidence – see RIDELL, Anna.Evidence, Fact-Finding, and Experts. In: ROMANO, Cesare P.R.; ALTER, Karin; SHANY, Yuval (eds.). *The Oxford Handbook of International Adjudication*. Oxford: OUP, 2013, p. 850, 868.

[85] AMERASINGHE, Chittharanjan F. *Evidence in International Litigation*. Leiden, Boston: Martinus Nijhoff Publishers, 2005, p. 164.

[86] KLAMBERG, Mark. *Evidence in International Criminal Trials*. Leiden: Brill, 2013, p. 418.

5. Concluding remarks

The foregoing study has alluded to the importance of admissibility of evidence in the context of international criminal proceedings. Despite some problems presented above, the judicial practice has generally struck the necessary balance between ensuring the fair trial requirements and managing the judicial proceedings in a sometime stormy navigation between the inquisitorial and adversarial elements, while maintaining the character of an international judicial body.

The attention paid to admissibility of evidence distinguishes international criminal justice from traditional international courts and tribunals with their natural inclination to flexible procedural and evidentiary frameworks.

All in all, the general position of international criminal justice towards admissibility of evidence proves similar to the general flexibility of the proceedings and struggle to establish truth by the majority of (if not all) international courts and tribunals. The attempt to "install a flexible law of the evidence in a predominantly adversarial trial under the current demands of international criminal justice" may be considered "at the very least a highly dubious undertaking"[87] but it should be borne in mind that any such hybridization of the procedure has been possible and effective. It has indeed been successfully taking place for decades now, due to the utmost care exercised by judges, even if their direct influence on procedural law, and evidentiary issues in particular, has been considerably diminished by the Rome Statute.

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[87] ZAHAR Alexander; SLUITER, Goran. *International Criminal Law: A Critical Introduction*. Oxford: OUP, 2008, p. 394.

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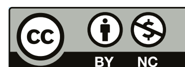

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I criteri di ammissibilità probatoria

The evidence admission criteria

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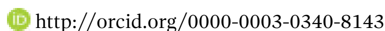
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Abstract: La verità giudiziale, presupposto per una decisione giusta, non può perseguirsi senza limiti. Le norme probatorie mirano a tutelare sia diritti soprattutto fondamentali sia criteri di razionalità processuale, rispettando la durata ragionevole del processo. La valutazione di ammissibilità probatoria ha esito positivo quando il tema di prova sia verosimile e pertinente, nonché qualora il mezzo e/o la fonte di prova siano rilevanti nel triplice senso della loro necessità (ossia, della loro non ridondanza), della loro idoneità contenutistica (perché atti a verificare l'enunciato da provare) e della loro idoneità epistemologica (in quanto l'attività compiuta sia conforme ai parametri gnoseologici storicamente dati). Si chiarisce infine che pure l'impiego dell'intelligenza artificiale deve garantire un controllo umano significativo.

Parole chiave: Ammissione probatoria; Intelligenza artificiale; Pertinenza; Prova scientifica; Rilevanza; Verità giudiziale; Verosimiglianza.

Abstract: *Judicial truth, a prerequisite for a just decision, cannot be pursued without limits. Evidentiary norms aim to protect chiefly fundamental rights and the criteria of procedural rationality, respecting the reasonable time duration of the trial. The assessment of evidence submission is successful when the evidentiary theme is possible and pertinent, and where the means and / or sources of evidence are relevant in the threefold sense of their necessity (i.e. of their non-redundancy), of their content fitness (in that they can serve to verify the statement to be proved) and of their epistemological fitness (as the activity*

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performed complies with the historically given gnoseological parameters). Finally, it is clarified that the use of artificial intelligence must likewise guarantee meaningful human control.

Keywords: *Artificial intelligence; Evidence admission; Judicial truth; Pertinence; Relevance; Scientific evidence; Verisimilitude.*

Sommario: 1. Verità e giustizia. – 2. Fondamenti delle norme probatorie e limiti temporali alla ricostruzione giudiziale. – 3. La sequenza probatoria. – 4. La verosimiglianza e la pertinenza probatorie. – 5. La rilevanza probatoria: *a*) non ridondanza e idoneità contenutistica. – 6. *b*) idoneità epistemologica e "nuova" prova scientifica. – 7. Intelligenza artificiale e controllo umano significativo.

1. Verità e giustizia

Può considerarsi indiscusso che una *decisione* giurisdizionale sia reputata *giusta* solo quando sia fondata su una ricostruzione del fatto originante il processo ritenuta vera[2]. Ciò «indipendentemente dal criterio giuridico che si impiega per definire e valutare la giustizia della decisione»[3], ossia dalla condivisione delle teorie procedurali o sostanziali di giustizia[4]:

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[2] Sebbene, conformemente al linguaggio processualistico, il vocabolo "verità" – quando correlato a quelli di "ricerca", "accertamento" o simili – attenga essenzialmente alla ricostruzione del fatto, non vanno ignorate almeno due precisazioni: per un verso, non può escludersi un impiego del termine anche con riguardo alla soluzione del problema concernente l'individuazione della norma applicabile al caso concreto (cfr. FERRAJOLI Luigi, *Diritto e ragione. Teoria del garantismo penale*, Roma-Bari, 1989, p. 21 e *passim*); per l'altro, non può ignorarsi l'inevitabile connessione tra *quaestio facti* e *quaestio iuris* (v,. recentemente, UBERTIS Giulio, Quaestio facti e quaestio iuris, in *Quaestio facti. Intern. J. Evid. Leg. Reas.*, 2020, n. 1, p. 69 ss.).

[3] TARUFFO Michele, *La prova dei fatti giuridici. Nozioni generali*, in *Trattato di diritto civile e commerciale*, già diretto da CICU Antonio - MESSINEO Francesco e continuato da MENGONI Luigi, III, 2, 1, Milano, 1992, p. 43.

[4] Una sintesi della loro differenza è esprimibile con il rilievo che, «mentre un atteggiamento si sforza di tenere distinti i problemi di natura politica, morale e giuridica, l'altro considera artificiale e inopportuna questa separazione»

una base fattuale ritenuta erronea o inattendibile non potrebbe comunque supportare una decisione con la suddetta qualifica.

Conseguentemente, appare agevole riscontrare come la verità non sia in sé e per sé, lo scopo ultimo del processo, bensì - «compatibilmente con gli altri valori implicati dal medesimo»[5] - il presupposto per poter convenientemente decidere quale sia la norma adatta alla vicenda su cui emettere la pronuncia.

Una conferma della connessione, ma altresì della distinzione, tra verità e giustizia risalta nella formula del giuramento contemplata per i giudici popolari nei giudizi di assise (art. 30 comma 1 l. 10 aprile 1951 n. 287), dove sono scolpiti i requisiti necessari della sentenza, disponendo appunto che essa «riesca quale la società deve attenderla: affermazione di verità e di giustizia».

Quanto dunque attiene alla giurisdizione è una *verità giudiziale*, caratterizzata sia per la sua contestualità (cioè dipendenza dal sapere dato, pure metodologico, quando è perseguita, come accade in qualsivoglia settore di ricerca) sia per la sua funzionalità a quell'"obiettivo della giustizia" storicamente determinato dal vario comporsi dei valori presenti in mezzo al popolo nel cui nome (ai sensi dell'art. 101 comma 1 Cost.) la giustizia è amministrata[6]. È il parallelogrammo delle forze (individuali e collettive) interagenti nel processo a consentire una ricostruzione fattuale fondante una decisione "giusta" perché conforme a una verità che non assurge a meta ultima e assoluta dell'attività giurisdizionale: la sua conclusione ottiene il consenso dei cittadini anche con il rispetto della totalità delle opzioni ordinamentali durante l'intero sviluppo del procedimento.

A questo, assiologicamente e normativamente governato, interessa, per così dire, più il metodo del risultato: «la caccia vale più

(DAMAŠKA Mirjan R., *I volti della giustizia e del potere. Analisi comparatistica del processo* [1986], trad. it., Bologna, 1991, p. 129).

[5] UBERTIS Giulio, Prova: II) teoria generale del processo penale, in *Enc. giur. Treccani*, *Agg.*, XVII, Roma, 2009, p. 2.

[6] UBERTIS Giulio, *Fatto e valore nel sistema probatorio penale*, Milano, 1979, p. 137. Analogamente, v. pure PERELMAN Ch., La preuve en droit, essai de synthèse, in *La preuve en droit*, a cura di Ch. Perelman – P. Foriers, Bruxelles, 1981, p. 364.

della preda» (7) e «la giustizia della sentenza sta nel cammino seguito pel risultato» (8) o, meglio, il risultato che si consegue attraverso il processo è tale (hegelianamente espresso) «nel doppio senso di evento finale e di unità costituita dall'insieme degli altri eventi; i quali quindi ne sono e gli *antecedenti* e i *momenti* (aspetti particolari costitutivi)»[9].

2. Fondamenti delle norme probatorie e limiti temporali alla ricostruzione giudiziale

In tema di ammissibilità (sebbene non solo rispetto a essa) emerge che il sistema probatorio si connota per essere il frutto di opzioni normative derivanti da due diversi ordini di motivi[10], tra loro connessi e distintamente evidenziati per scopi di analisi.

Le *regole probatorie legali*, infatti, hanno un *fondamento* sia *epistemologico* (o processuale) che *politico* (o sostanziale): essi riguardano le esigenze, per il primo, di definire esplicitamente «un metodo per guidare il giudice nella ricerca»[11] (come accade per gli 197, 214 comma 1, 403 e 499 commi 1-3 c.p.p.) e, per il secondo, di tutelare determinati diritti (si pensi agli art. 103 commi 2, 5 e 6, 199, 200, 201, 202, 219 comma 4 e 245 comma 2 c.p.p.), spesso costituzionalmente salvaguardati (ad

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7 CORDERO Franco, Diatribe sul processo accusatorio (1965), in ID., *Ideologie del processo penale*, Milano, 1966, p. 220.

8 ASCARELLI Tullio, Processo e democrazia, in *Riv. trim. dir. proc. civ.*, 1958, p. 858.

9 PRETI Giulio, *Praxis ed empirismo*, Torino, 1957, p. 170.

10 Per la loro classificazione, sostanzialmente analoga alla successiva esposizione, cfr. AMODIO Ennio, Libertà e legalità della prova nella disciplina della testimonianza, in *Riv. it. dir. proc. pen.*, 1973, p. 326, 329; CAPPELLETTI Mauro, *La testimonianza della parte nel sistema dell'oralità. Contributo alla teoria della utilizzazione probatoria del sapere delle parti nel processo civile*, I, Milano, 1962, p. 283 ss., nota 1; CHIOVENDA Giuseppe, La natura processuale delle norme sulla prova e l'efficacia della legge processuale nel tempo (1912), in ID., *Saggi di diritto processuale civile (1900-1930)*, I, Roma, 1930, p. 255 ss.; DENTI Vittorio, Scientificità della prova e libera valutazione del giudice, in *Riv. dir. proc.*, 1972, p. 418; NUVOLONE Pietro, Le prove vietate nel processo penale nei paesi di diritto latino, *ivi*, 1966, p. 470.

11 CALAMANDREI Piero, Il giudice e lo storico, in *Riv. dir. proc. civ.*, 1939, I, p. 115.

esempio, dagli art. 2, 13, 14, 15, 19, 21, 24 e 32 Cost.). Tali prescrizioni possono corrispondere tanto a massime d'esperienza sedimentate nella coscienza giuridica[12] o a discrezionali scelte legislative quanto al generale patrimonio epistemologico storicamente dato.

In una *prima prospettiva*, le regole ammissive possono implicare divieti probatori, con cui si individuano modalità gnoseologiche incompatibili con l'ordinamento e pertanto si contemplano quelle che l'art. 190 comma 1 c.p.p. definisce «prove vietate dalla legge» (tipicamente riscontrabili negli art. 188 o 197 c.p.p.), talvolta collegandosi a impedimenti a compiere indagini su specifici argomenti (esemplificativamente, le «voci correnti nel pubblico» *ex* art. 194 comma 3 e 234 comma 3 c.p.p.) o a limitazioni negli strumenti di verifica attinenti a particolari temi (come avviene per la personalità dell'imputato, in riferimento alla quale possono acquisirsi i documenti inseriti nel catalogo dell'art. 236 c.p.p., ma, salve eccezioni, non può disporsi una perizia).

Relativamente alla sua derivazione da principi epistemologici, la disciplina probatoria è poi tendenzialmente immodificabile se questi non mutino: è ciò che accade per la garanzia del contraddittorio, non solamente inerente alla nozione di "giusto processo", ma pure basata sulla convinzione che «il metodo dialettico rappresenta finora quello migliore escogitato dagli uomini per stabilire la verità di enunciati fattuali, in qualsiasi campo e specialmente in quello giudiziario»[13]. Non a caso, «il legislatore penale contempla che, antecedentemente all'emanazione di qualsiasi ordinanza dibattimentale comportante il diniego di acquisizioni probatorie, sia attuato il contraddittorio tra le parti (art. 190 commi 1 e 3, 495 commi 1 e 4, 603 comma 5 c.p.p.), che potranno così contrastare la

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[12] Per il riconoscimento che la disciplina probatoria eleva spesso massime d'esperienza al rango di norma giuridica, v., ad esempio, CAPPELLETTI Mauro, Le grandi tendenze evolutive del processo civile nel diritto comparato (1968), in ID., *Processo e ideologie*, Bologna, 1969, p. 223-224; CHIOVENDA Giuseppe, L'oralità e la prova, in *Riv. dir. proc. civ*., 1924, I, p. 23; CORDERO Franco, Il procedimento probatorio, in ID., *Tre studi sulle prove penali*, Milano, 1963, p. 11-12; e, più anticamente, MITTERMAIER C.G.A., *Teoria della prova nel processo penale* (1834), trad. it., Milano, 1858, p. 101 ss.

[13] UBERTIS Giulio, Ricostruzione del sistema, giusto processo, elementi di prova, in ID., *Sisifo e Penelope. Il nuovo codice di procedura penale dal progetto preliminare alla ricostruzione del sistema*, Torino, 1993, p. 268.

riduzione dell'opera conoscitiva a vero e proprio 'cerimoniale tautologico' da cui venga rimossa la possibilità di conseguire risultanze gnoseologiche difformi dal 'desiderato'»[14].

E il contraddittorio si rivela tanto più necessario quanto più si osservi che le valutazioni concernenti l'ammissibilità probatoria sono dirette al vaglio delle descrizioni delle parti per rispettare i più elementari criteri di razionalità processuale: nonostante dal punto di vista logico «l'inferenza giudiziale non [sia] rigorosamente deduttiva ed esiste quindi un sia pur minimo margine d'incertezza o possibilità d'errore ... che in linea di principio [è innegabile] possa diminuire in seguito all'acquisizione di nuove prove»[15], *interest reipublicae ut sit finis litium* e occorre conformarsi al canone della ragionevole durata del processo (art. 111 comma 2 Cost., 47 comma 2 Carta dir. fond. UE, 6 comma 1 Conv. eur. dir. uomo e 14 comma 3 lett. *c* Patto intern. dir. civ. pol.), per cui viene tra l'altro in considerazione, come peculiare espressione di «una gigantesca regola controepistemica»[16], la previsione di termini e modi nella presentazione delle richieste probatorie a opera delle parti (v., emblematicamente, art. 468 comma 1 c.p.p.).

A proposito dell'ammissibilità probatoria affiora quindi una *seconda prospettiva* di ricerca. Essa afferisce alla scelta di cosa introdurre nel bagaglio conoscitivo del giudice e pertanto alla costellazione concettuale delle nozioni, spesso confuse[17], di verosimiglianza,

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[14] UBERTIS Giulio, *Profili di epistemologia giudiziaria*, Milano, 2015, p. 59. Si segnala che in tale volume sono già reperibili molte riflessioni esposte nel presente lavoro, ma di esso sarebbero poco eleganti citazioni ulteriori.

[15] MURA Alberto, Teoria bayesiana della decisione e ragionevole durata del processo, in *Cass. pen.*, 2007, p. 3105.

[16] CAVALLONE Bruno, In difesa della *veriphobia* (considerazioni amichevolmente polemiche su un libro recente di Michele Taruffo) (2010), in ID., *Scritti ritrovati sul processo civile e sul giudizio di fatto*, Pisa, 2016, p. 274.

[17] Cfr., per esempi di incompleta considerazione delle differenti nozioni o di confusione tra esse, sebbene nel contesto di alcuni tra i rari approcci definitori in materia, DENTI Vittorio, *La verificazione delle prove documentali*, Torino, 1957, p. 8; FERRUA Paolo, *La prova nel processo* penale, I, *Struttura e procedimento*, Torino, 2017, p, 122-123; FLORIAN Eugenio, *Delle prove penali*, I, *In generale*, Milano, 1924, p. 74; MELCHIONDA Achille, *Prova in generale (diritto processuale penale)*, in *Enc. dir.*, *Agg.*, I, Milano, 1997, p. 843-844; MESSINA Salvatore, *Il regime delle prove nel nuovo codice di procedura penale*, Milano,

pertinenza, rilevanza e concludenza probatorie, di cui occorre chiarire la portata semantica senza ignorare l'ausilio di "ridefinizioni"[18], che non sono evitabili nemmeno per determinare il più esattamente possibile le molteplici accezioni della parola "prova", frequentemente adoperata in argomento (basti pensare alla locuzione "ammissione della prova") senza un'adeguata attenzione discretiva.

3. La sequenza probatoria.

Il vocabolo *prova* può identificarsi *in senso lato* con quanto «destiné à établir une conviction sur un point incertain»[19] riguardante la conoscenza del fatto all'origine della controversia giudiziaria, ossia con quell'insieme di elementi e attività, quel procedimento, quell'esito conoscitivo, aventi la funzione di consentire la verifica di uno degli enunciati fattuali integranti l'intero *thema probandum*.

Occorre tuttavia distinguere ciascuna delle componenti (spesso denominate "prova" senza specificazioni) strutturalmente costitutive della *sequenza probatoria*, le quali nel loro susseguirsi formano il fenomeno probatorio, analizzato, per così dire, in una prospettiva "statica".

Considerata la sua centralità gnoseologica, la prima e più importante di esse è l'*elemento di prova*, rappresentato da ciò *che*, introdotto nel procedimento, può essere utilizzato come premessa della successiva inferenza (per esempio: dichiarazione testimoniale, caratteristica dell'oggetto sequestrato, espressione contenuta in un documento, e così via).

1914, p. 16; TARUFFO Michele, Prova giuridica, in *Enc. dir.*, *Ann.*, I, Milano, 2007, p. 1030-1031.

[18] «Si ha una ridefinizione quando, rimanendo ambito degli usi preesistenti, si determina in modo univoco e preciso il significato di una espressione, che in modo univoco e preciso non era usata. Si può estendere il nome di 'ridefinizione' anche al caso in cui si dà a una espressione un significato che essa non ha mai avuto, ma vicino al significato o alla gamma di significati che negli usi precedenti aveva. La ridefinizione è ... oggetto di una scelta, ma trae un carattere speciale dalla detta parentela con gli usi preesistenti» (SCARPELLI Uberto, *Contributo alla semantica del linguaggio normativo* [1959], Milano, 1985, p. 65-66).

[19] LEVY-BRUHL Henri, *La preuve judiciaire. Étude de sociologie juridique*, Paris, 1964, p. 15.

Il soggetto o l'oggetto *da cui* può derivare al procedimento almeno un elemento di prova è la *fonte di prova*, che a sua volta può essere tanto *personale* (come nel caso del teste) quanto *reale* (come nell'ipotesi del documento).

L'attività *attraverso cui* viene introdotto nel procedimento almeno un elemento di prova è il *mezzo di prova* (testimonianza, perquisizione, intercettazione telefonica, e così via)[20], per la cui esecuzione possono essere coinvolte più fonti di prova (si pensi ai soggetti che partecipano a un confronto o alle persone e alle cose impiegate per effettuare un esperimento giudiziale).

Sulla base dell'elemento di prova conseguito (o di più elementi di prova; per esemplificare, nell'eventualità che vengano reperite impronte digitali sull'arma del delitto, sarà necessario ottenere anche quelle dell'imputato per poter procedere all'analisi dattiloscopica di comparazione), si svolgerà il *procedimento intellettivo* (o, detto altrimenti, l'*inferenza*), il cui esito sarà rappresentato da una proposizione[21] costituente il finale e propriamente denominabile *risultato di prova* (che, se reputato persuasivo dal giudice - perché, ad esempio, sono state da lui positivamente valutate l'affidabilità del testimone o l'autenticità del documento -, corrisponde alla *conclusione probatoria* fondativa della pronuncia[22]), eventualmente preceduto da uno o più passaggi, ciascuno

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[20] L'argomentata opinione che la differenziazione, sorta durante i lavori preparatori della riforma processuale del 1988, tra "mezzi di prova" e "mezzi di ricerca della prova" (poi trasfusa nei titoli II e III del libro III del codice di procedura penale) sia contraria all'esigenza di evitare l'uso di concetti superflui quando non addirittura oscuri, è stata recentemente ribadita con plurime argomentazioni da UBERTIS Giulio, *Sistema di procedura penale*, I, *Principi generali*, Milano, 2017, p. 83, nota 2.

[21] "Proposizione", "enunciato" o "affermazione" sono termini (dei quali, d'altronde, manca un uso uniforme nella letteratura sul tema) che impiegheremo sinonimicamente pure per evitare fastidiose ripetizioni, considerato che ciò non incide sulle nostre considerazioni; invero, dovrebbe agevolmente risultare dal contesto se ci si riferisca all'espressione linguistica o al suo contenuto (tale distinzione si trova esemplificata in un lavoro di epistemologia giudiziaria da GARBOLINO Paolo, *Probabilità e logica della prova*, Milano, 2014, p. 20 ss.).

[22] Emergono a questo proposito le due accezioni principali del termine "prova", occultate nel lessico italiano dalla mancanza di due vocaboli distinti: quella di esperimento gnoseologico (che nella lingua inglese verrebbe detto *evidence*) e quella di epilogo conoscitivo (che in inglese sarebbe la *proof*, ossia ciò che il giudice ritiene appreso a seguito dell'attività compiuta: v. EGGLESTON

concludentesi con ciò che potrebbe altresì estensivamente chiamarsi risultato di prova, però "intermedio".

4. La verosimiglianza e la pertinenza probatorie

Proprio perché inerente alla valutazione giudiziale sulla persuasività dello strumento conoscitivo ormai acquisito, in vista del suo impiego per il definitivo giudizio assertorio sulla verità dell'affermazione rappresentativa della *res in iudicium deducta* posta a base della domanda giudiziale, esula dai criteri di ammissibilità probatoria la nozione di *concludenza*, cui si è precedentemente alluso.

Con riferimento poi agli oggetti dei rispettivi giudizi, differiscono tra loro quelli dei giudizi di verosimiglianza e pertinenza, da un lato, e di rilevanza, dall'altro. Nonostante la loro comune funzione sia di delimitare l'attività istruttoria, verosimiglianza e pertinenza concernono gli enunciati da verificare, cioè i temi (od oggetti) di prova, mentre la rilevanza attiene alle fonti (si pensi a testimoni e documenti) e/o ai mezzi (come testimonianza, perizia, ispezione, perquisizione, ecc.) di prova.

Verosimiglianza e *pertinenza*, infatti, vertono «sulla *affermazione del fatto*, cioè sulla allegazione (*positio*) del fatto proveniente dalla parte che chiede di essere ammessa a provarlo»[23] o dall'autonoma attività di ricerca svolta dall'organo procedente (a seconda dell'assetto che ciascun sistema processuale riservi ai rapporti tra i poteri delle parti e quelli dell'autorità giurisdizionale per la formulazione dei temi di prova).

Relativamente al criterio di *verosimiglianza*, inoltre, gli oggetti di prova comunque individuati devono essere caratterizzati dalla loro *ipotetica verificabilità*, indispensabile per ogni orientamento assunto dall'indagine. Poiché «l'orizzonte istruttorio ha come limite l'epistemologia dominante»[24],

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Richard, *Prova, conclusione probatoria e probabilità* (1983), trad. it., Milano, 2004, spec. p. 191-192.

[23] CALAMANDREI Piero, Verità e verosimiglianza nel processo civile, in *Riv. dir. proc.*, 1955, I, p. 171.

[24] CORDERO Franco, *Procedura penale*, Milano, 2012, p. 572, il quale, anziché l'aggettivo "verosimile", preferisce "probabile": ma, appunto, «in un senso diverso dal consueto, anche se morfologicamente esatto: 'quod probari possit'».

viene richiesto al giudice di valutare se il fatto asserito non sia in contrasto con l'insieme delle leggi logiche e scientifiche non probabilistiche[25] o, detto altrimenti, se possa essere accaduto secondo quello che è il patrimonio gnoseologico storicamente dato (non si richiamino, ad esempio, eventi magici per sostenere l'accadimento di un fatto)[26]. Si tratta di un giudizio che afferisce all'aspetto specificamente storico dell'enunciato fattuale e che, non implicando un apprezzamento sulla plausibilità in concreto del tema di prova, non incorre in un'anticipazione della futura decisione, ma che va integrato da un'ulteriore disamina.

Poiché *frustra probatur quod probatum non relevat*, si deve ancora accertare se l'affermazione probatoria che si intende verificare è congruente con il *thema decidendum*.

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[25] Conviene peraltro rammentare che il legislatore può restringere il campo della ricerca processuale, richiamando in casi specifici pure la non contrarietà a massime d'esperienza, come succede con gli art. 2723 e 2724 n. 1 c.c. e 621 c.p.c., dove, in via di eccezione alle regole generali e riferendo l'aggettivo «verosimile» all'*id quod plerumque accidit* (cfr. TARUFFO Michele, *La prova dei fatti giuridici. Nozioni generali*, cit., p. 479), viene prima vietata e poi consentita solo parzialmente la prova testimoniale.

Conseguentemente, non sarebbe errato riservare il termine di "verosimiglianza" a questo caso e quello di "possibilità" a quello indicato nel testo (analogamente, v. SIRACUSANO Delfino, *Studio sulla prova delle esimenti*, Milano, 1959, p. 186-187).

Tuttavia, a livello epistemologico generale va condivisa l'ormai risalente osservazione di CARNELUTTI Francesco (Prova testimoniale di fatti inverosimili in materia di commercio, in *Riv. dir. comm*., 1923, II, p. 259), secondo cui non vi sarebbe «differenza, fuor da quella di grado, tra la impossibilità e la inverosimiglianza». E poiché ai nostri fini non pare sussistere l'esigenza di sceverare le due nozioni, si ritiene opportuno utilizzare unicamente il più tradizionale (cfr. CALAMANDREI Piero, Verità e verosimiglianza nel processo civile, cit., spec. p. 176; PUGLIATTI Salvatore, Conoscenza, in *Enc. dir*., IX, Milano, 1961, spec. p. 78) e onnicomprensivo termine di "verosimiglianza".

[26] Suggestivamente, CORDERO Franco, *Procedura penale*, cit., p. 572, ipotizza che, se «un pubblico ministero occultista afferma che N abbia devastato le messi a P, scatenandogli sui campi fulmini e grandini, servizievolmente mandati da Satana, col quale aveva dei patti, e indica i relativi testimoni [, si avrebbe il compimento di] una mossa oziosa; l'assunto non costituisce tema proponibile ... [Ma] niente osterà a testimonianze o indagini peritali su simili 'maleficia', quando gli addetti al discorso scientifico riscoprano la categoria cosmologica del diabolico, elaborata dalla Scolastica, riaccreditando testi famosi come i *Disquisitionum magicarum Libri sex* del gesuita Martino del Rio»».

Si tratta di applicare il criterio di *pertinenza*, in forza del quale - attraverso un giudizio necessariamente inserito in coordinate giuridiche - si postula che l'ammissione probatoria possa essere disposta solo nel caso in cui si riconosca la sussistenza di un "nesso decisorio" (astrattamente individuato nel nuovo sistema processuale penale dalle classi di cui all'art. 187 c.p.p.[27]) tra singolo oggetto di prova e regiudicanda[28]: è una valutazione a «carattere ipotetico nel senso che dà per provati i fatti [*rectius*: gli enunciati fattuali], di cui si chiede la prova, e si concentra nel controllare se sarebbero idonei a produrre le conseguenze giuridiche vagheggiate dalle parti»[29]. Ma giova precisare come non occorra che il rapporto tra *thema probandum* e *decidendum* «sia diretto ed immediato, potendo essere soltanto e perfino mediato (così una circostanza da provare può essere pertinente per stabilire la credibilità di un teste)»[30], quest'ultima evenienza inerendo all'ammissione di una cosiddetta "prova sussidiaria"[31].

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[27] Né può sostenersi che ciò varrebbe unicamente per la fase giudiziale. Fin dai primi commenti al c.p.p. 1988, è stato chiarito che il suo art. 187 adempie alla funzione di «criterio-guida per lo sviluppo dell'attività probatoria ... [e] per la definizione dei suoi confini» (GREVI Vittorio, Libro III - Prove, in *Profili del nuovo codice di procedura penale*, diretti da CONSO Giovanni - GREVI Vittorio, Padova, 1990, p. 149) anche riguardo all'impiego di strumenti conoscitivi durante lo svolgimento delle indagini o dell'udienza preliminari. Altrimenti, il loro andamento sarebbe «ingovernabile» e la loro disciplina risulterebbe addirittura in gran parte «inapplicabile» (NOBILI Massimo, *sub* art. 187, in *Commento al nuovo codice di procedura penale*, coordinato da Chiavario Mario, II, Torino, 1990, p. 391).

[28] Sembra pertanto possibile considerare tale giudizio di pertinenza sostanzialmente affine a ciò che P. CALAMANDREI Piero, Verità e verosimiglianza nel processo civile, cit., 1955, I, p. 173, chiama «giudizio sulla rilevanza», ossia «un giudizio di diritto, attinente al merito, che contiene già, *in nuce*, la decisione definitiva», e che D. SIRACUSANO Delfino, *Studio sulla prova delle esimenti*, cit, p. 56-57, denomina «rilevanza in diritto ... determinata operando un collegamento con i fatti costitutivi ... [configuranti] i canoni che imprimono la prima direzione all'indagine e ne condizionano l'ulteriore svolgimento».

[29] ANDRIOLI Virgilio, Prova (diritto processuale civile), in *Nss. D.I.*, XIV, Torino, 1967, p. 273, dove peraltro è usato il vocabolo "rilevanza".

[30] LEONE Giovanni, *Trattato di diritto processuale penale*, II, *Svolgimento del processo penale. Il processo di prima istanza*, Napoli, 1961, p. 181.

[31] Così TARUFFO Michele, *La prova dei fatti giuridici. Nozioni generali*, cit., p. 431, designa il fenomeno relativo a una prova finalizzata alla valutazione di fonti e/o mezzi di prova.

Ne deriva, in ottica giuridica, che, se tutto quanto è pertinente è pure verosimile, è scorretto l'enunciato contrario, non sempre conseguendo a un preliminare giudizio positivo di verosimiglianza quello di pertinenza.

Ma non va ignorato come ambedue dipendano dal momento processuale in cui vengano formulati: invero, se un'eventuale richiesta probatoria, anche per scongiurare attività superflue, va respinta quando «esprime delle circostanze già sufficientemente accertate ... [ovvero] ritenute inidonee a dare un nuovo indirizzo» alla ricerca[32], «l'esperibilità di nuove indagini diminuisce progressivamente col procedere l'accertamento verso la decisione»[33]: e in proposito basti ricordare il restrittivo parametro della "assoluta necessità", per il legislatore processuale penale costituente requisito per consentire "nuove" acquisizioni probatorie ai sensi degli art. 507 e 523 comma 6 c.p.p.

5. La rilevanza probatoria: *a)* non ridondanza e idoneità contenutistica

Il momento processuale nel quale viene formulato assume importanza pure per il giudizio di *rilevanza probatoria*, che però attiene alla delimitazione non degli oggetti, bensì delle fonti e/o dei mezzi di prova, di cui bisogna acclarare dapprima la *necessità*. Occorre che le fonti e/o i mezzi di prova siano *non ridondanti*, poiché non sarebbero acquisibili quando non assolvessero a una funzione diversa dal ribadire ciò che fosse già stato conseguito con prove precedenti (od ottenibile con successive, se il giudizio di rilevanza fosse compiuto in un unico contesto con riferimento a più richieste e si decidesse di accoglierne solo alcune).

Ma, per essere rilevanti, tali fonti e/o mezzi, devono altresì caratterizzarsi, rispetto alla verifica di un tema di prova ritenuto verosimile e pertinente, per la loro *idoneità*[34], sussistente anzitutto in una prospettiva

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[32] SIRACUSANO Delfino, *Studio sulla prova delle esimenti*, cit., p. 190.

[33] SIRACUSANO Delfino, *Studio sulla prova delle esimenti*, cit., p. 189.

[34] Pure VERDE Giovanni, Prova in generale: b) teoria generale e diritto processuale civile, in *Enc. dir*., XXXVII, Milano, 1988, p. 620, parla di «giudizio di rilevanza ... [come] valutazione di idoneità del mezzo di prova». Mentre, proseguendo il confronto con altrui terminologie, può individuarsi una affinità tra

contenutistica (per un altro profilo, v. il successivo paragrafo): essendo cioè atte a veicolare elementi di prova da cui inferire proposizioni in grado di confermare o smentire l'affermazione probatoria cui intendano rapportarsi. Si esige quindi un apprezzamento in concreto sulla congruenza tra quanto conseguibile in sede probatoria e l'enunciato che si intenda verificare, così da impedire uno sterile dispendio di tempo quando già si sappia che l'esperimento gnoseologico avrebbe un esito non fruibile *pro* o *contra* nessuna delle parti; né viene implicata un'anticipazione del compito decisorio, poiché si tratta di una valutazione vertente non sull'affidabilità, attendibilità o credibilità (cioè, comunque sulla forza persuasiva) dell'operazione probatoria[35], ma sulla assoluta inutilità di quest'ultima per la sua incapacità a fornire elementi di prova di cui potersi servire in sede deliberativa nel controllo dell'oggetto di prova considerato. Per esemplificare, sarebbe irrilevante per mancanza di idoneità contenutistica una ricognizione vocale, qualora sin dal momento della richiesta probatoria fosse nota e non contestata la totale sordità congenita della persona chiamata a effettuarla.

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la nozione di "rilevanza" che proponiamo e ciò che D. SIRACUSANO (*Studio sulla prova delle esimenti,* cit., p. 58) e TARUFFO Michele (*Studi sulla rilevanza della prova*, Padova, 1970, p. 33), definiscono, rispettivamente, «rilevanza in fatto» e «rilevanza in senso stretto», non avendo adoperato il termine "pertinenza" per effettuare lessicalmente una differenziazione con la "rilevanza". Una simile distinzione, invece, viene ad esempio proposta da MELCHIONDA Achille, Prova in generale (diritto processuale penale), cit., p. 843-844, nonché (sebbene con esiti diversi da quelli illustrati nel testo, almeno perché ambedue le nozioni vengono riferite a uno stesso «dato probante», senza poi chiarire se questo vada inteso come oggetto, elemento, fonte, mezzo o risultato di prova) da SABATINI Giuseppe, Prova (diritto processuale penale e diritto processuale penale militare), in *Nss. D.I.*, XIV, Torino, 1967, p. 318.

[35] Sembrano incorrere in tale fraintendimento (criticando l'impostazione già sostenuta in UBERTIS Giulio, *La prova penale. Profili giuridici ed epistemologici*, Torino, 1995, p. 62-63) sia DOMINIONI Oreste, *La prova penale scientifica. Gli strumenti scientifico-tecnici nuovi o controversi e di elevata specializzazione*, Milano, 2005, p. 222, sia PAULESU Pier Paolo, *Giudice e parti nella "dialettica" della prova testimoniale*, Torino, 2002, spec. p. 124 e nota 55, dove si richiama, quale esempio giurisprudenziale sulla valutazione di richieste probatorie (erroneamente) ipotizzata come coincidente con il criterio delineato nel testo, un provvedimento relativo all'(in)attendibilità di testimoni per il loro interesse a deporre in un senso o in un altro.

6. *b)* IDONEITÀ EPISTEMOLOGICA E "NUOVA" PROVA SCIENTIFICA

Il sistema processuale impone tuttavia che la rilevanza della fonte e/o del mezzo di prova da assumere possegga un'*idoneità* anche *epistemologica*, per l'esigenza che l'elemento (ipoteticamente) conoscitivo sia conseguito o manipolato in modo tale da permettere il controllo delle parti e della collettività sull'esercizio della giurisdizione e sulla sua conformità al principio di legalità processuale (cfr., per i singoli aspetti qui sintetizzati, art. 1 comma 2, 101, 102 comma 3, 111 commi 1 e 6 Cost.). Siccome difformi dai parametri epistemologici attuali e pertanto inidonei all'impiego nella trama logico-argomentativa del provvedimento[36], non possono avere ingresso nel processo attività dirette a verificare un tema di prova verosimile e pertinente, ma ispirate, per esemplificare, alla magia, all'oracolarità, alla rabdomanzia, allo spiritismo, alla grafologia[37].

È comprensibile come l'importanza di tale caratteristica sia emersa soprattutto con riguardo alla cosiddetta *nuova prova scientifica*, con cui – nell'ambito dei «mezzi di prova nei quali si usa uno strumento scientifico-tecnico che richiede specifiche competenze e quindi l'intervento di un esperto»[38] - si denominano le operazioni probatorie utilizzanti apparati tecnico-scientifici reputati di generalmente elevata specializzazione e nuovi

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[36] Per analoga soluzione, v. CORDERO Franco, *Procedura penale*, cit., p. 615; DOMINIONI Oreste, *La prova penale scientifica. Gli strumenti scientifico-tecnici nuovi o controversi e di elevata specializzazione*, cit., p. 99-101.

[37] Quest'ultima, intesa come studio della scrittura in quanto reputata rivelatrice del carattere, va distinta dall'analisi grafica volto a verificare se un atto sia autentico, cui si riferisce l'art. 75 norme att. c.p.p.

[38] DOMINIONI Oreste, Prova scientifica (diritto processuale penale), in *Enc. dir.*, *Ann.*, II, 1, Milano, 2008, p. 977. Una nozione "allargata" di prova scientifica è invece proposta da GIUNTA Fausto, Questioni scientifiche e prova scientifica tra categorie sostanziali e regole di giudizio, in *Prova scientifica, ragionamento probatorio e decisione giudiziale*, a cura di BERTOLINO Marta – UBERTIS Giulio, Napoli, 2015, p. 57, includendovi «tutti gli accertamenti condotti sulla base di un sapere specialistico, ancorché non tecnologico, comunque estraneo alla formazione professionale del giurista» e pertanto assimilando in un'unica classe ciò che il legislatore distingue quando, ad esempio, prevede la perizia se occorrano «specifiche competenze tecniche, scientifiche o artistiche» (art. 220 comma 1 c.p.p.).

o controversi[39]: giova quindi chiarire che la questione può concernere pure la *prova scientifica*, per così dire, *tradizionale* (riferita a conoscenze comunemente condivise al momento del loro uso nel processo e per le quali l'eventuale «problematicità dell'accertamento probatorio si concentra ... non sulla premessa nomologica, ma sul suo corretto impiego pratico»[40]), quando ne fosse posta in dubbio la «reale 'scientificità'»[41] in seguito allo sviluppo degli studi che la concernano.

Il richiamo alla scienza, infatti, non è sufficiente a tacitare il timore che siano inserite nel quadro gnoseologico componenti di dubbio valore scientifico (la cosiddetta "scienza spazzatura") per la preoccupazione di tralasciare indagini magari determinanti nella soluzione dei casi giudiziari. È stata così sostenuta in ambito penale la proposta, attraverso «un'interpretazione analogica»[42] dall'art. 189 c.p.p. (disciplinante la prova atipica), di interpretare il sistema processuale penale in maniera da consentire in Italia comportamenti analoghi a quelli seguiti nel mondo anglosassone, dove è attribuita al giudice la scelta di procedere a un apprezzamento caso per caso sulla forza persuasiva della "nuova prova scientifica" *prima* di deciderne l'ammissione[43].

Tale impostazione, però, si scontra con alcuni ostacoli insormontabili.

In una prospettiva epistemologica, si assegna al giudice la responsabilità di assumere una posizione talvolta estremamente difficile (e

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[39] DOMINIONI Oreste, *La prova penale scientifica. Gli strumenti scientifico-tecnici nuovi o controversi e di elevata specializzazione*, cit., p. 13. Anche la Corte europea dei diritti dell'uomo ha da tempo riconosciuto il particolare valore di siffatti strumenti, invitando i giudici nazionali a tenerne conto (C.edu, sez. III, sent. 9 novembre 2006, Tavli c. Turchia, § 36).

[40] GIUNTA Fausto, *Questioni scientifiche e prova scientifica tra categorie sostanziali e regole di giudizio*, cit., p. 63.

[41] CAPRIOLI Francesco, *La scienza "cattiva maestra": le insidie della prova scientifica nel processo penale*, in *Cass. pen.*, 2008, p. 3529.

[42] DOMINIONI Oreste, *In tema di nuova prova scientifica*, in *Dir. pen. proc.*, 2001, p. 1062, mentre F. CAPRIOLI, *La scienza "cattiva maestra": le insidie della prova scientifica nel processo penale*, cit., p. 3528, specifica che «soltanto» una siffatta esegesi consentirebbe «l'applicazione dell'art. 189 c.p.p. alla prova scientifica 'nuova'».

[43] DOMINIONI Oreste, *La prova penale scientifica. Gli strumenti scientifico-tecnici nuovi o controversi e di elevata specializzazione*, cit., spec. p. 102 ss.

forse impossibile) da giustificare e non rientrante nelle sue competenze, per poter decidere se seguire le usuali regole dell'ammissione probatoria o quelle speciali della "nuova prova scientifica". Egli dovrebbe cioè selezionare ciò che non è incontestabilmente distinguibile, dato che «il dato acquisito al dibattito epistemologico, pure nelle sue proiezioni giuridico-processuali, per cui la scienza non è in grado di dare certezza incontrovertibili, non consente di tracciare una sicura e netta linea di demarcazione fra 'conoscenze unanimemente accertate' e conoscenze che tali non sono»[44], appunto perché nuove (e conseguentemente non ancora sottoposte a un adeguato collaudo dagli studiosi della materia) o controverse.

In ottica giuridica, la soluzione ipotizzata, anzitutto, confligge con il principio di legalità processuale (statuito dall'art. 111 comma 1 Cost. e individuato tra i principi generali del diritto dalla Corte europea dei diritti dell'uomo[45]) per il richiamo all'analogia, per di più con il fine di applicare il regime della prova atipica (della cui legittimità costituzionale si dubita[46]).

Inoltre, affidare al giudice il compito di formulare «un giudizio di prevalutazione dell'attendibilità o dell'efficacia della prova»[47] violerebbe i requisiti di imparzialità, terzietà e, più specificamente, *neutralità metodologica del giudice*, poiché «non può ammettersi che l'organo giurisdizionale proceda alla verifica delle affermazioni delle parti tenendo comportamenti che siano influenzati da una delle prospettazioni inerenti alla regiudicanda o ne sottintendano l'accoglimento»[48]. Non a caso, nell'esperienza statunitense presa a modello[49], diversi sono i soggetti

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[44] DOMINIONI Oreste, *La prova penale scientifica. Gli strumenti scientifico-tecnici nuovi o controversi e di elevata specializzazione*, cit., p. 369.

[45] C.edu, sez. II, sent. 22 giugno 2000, Coëme e altri c. Belgio, § 102.

[46] CARRATTA Antonio, Prova e convincimento del giudice nel processo civile, in *Riv. dir. proc.*, 2003, p. 55.

[47] DOMINIONI Oreste, *La prova penale scientifica. Gli strumenti scientifico-tecnici nuovi o controversi e di elevata specializzazione*, cit., p. 231.

[48] UBERTIS Giulio, *Sistema di procedura penale*, I, *Principi generali*, cit., p. 146.

[49] Essa è ampiamente illustrata da DOMINIONI Oreste, *La prova penale scientifica. Gli strumenti scientifico-tecnici nuovi o controversi e di elevata specializzazione*, cit., p. 116 ss.

(rispettivamente, il giudice togato e la giuria) che esprimono la valutazione sull'ammissibilità probatoria e quella sul merito della regiudicanda, sebbene resti poi da giustificare la sottrazione dell'apprezzamento di persuasività probatoria di uno strumento conoscitivo al giudice chiamato a decidere sulla regiudicanda (ciò che in Italia parrebbe confliggere almeno con gli art. 25 comma 1 e 101 comma 2 Cost.). «La diversità tra i procedimenti di ammissione italiano e nordamericano, però, non esclude che vengano valorizzati anche nel primo i *parametri* emersi nella giurisprudenza del secondo e *finalizzati all'esclusione dal processo della pseudo-scienza*»[50], ulteriormente raffinati dalla Cassazione senza ignorare l'esigenza di verificare la competenza dell'esperto del cui parere ci si intenda avvalere[51].

Infine, riguardo al rito penale (e senza ignorare ulteriori più specifiche considerazioni[52]), questo già contiene norme in cui sarebbero agevolmente inquadrabili le innovazioni tecnico-scientifiche, in relazione alle quali varrebbe l'ordinaria disciplina dell'art. 190 c.p.p.: si pensi alle ricognizioni di «voci, suoni o ... quanto altro può essere oggetto di ricognizione sensoriale» (art. 216 comma 1 c.p.p.), alle perizie *ex* art. 220 ss. c.p.p., per le quali «la natura particolare ed inconsueta degli accertamenti non vale a determinarne la traslazione al novero delle prove 'atipiche'»[53], o ai documenti, tra cui è annoverabile, oltre agli scritti, tutto quanto rappresenti «fatti, persone o cose mediante la fotografia, la cinematografia, la fonografia o qualsiasi altro mezzo» (art. 234 comma 1 c.p.p.).

Dunque, pure per la "nuova prova scientifica" va attribuita all'organo giurisdizionale l'esecuzione non di un giudizio anticipato sulla sua affidabilità, attendibilità o credibilità, bensì (come per ogni altra ipotesi di ammissione probatoria) di una stima sull'idoneità per lo strumento utilizzato

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50 UBERTIS Giulio, *Prova scientifica e giustizia penale*, in *Riv. it. dir. proc. pen.*, 2016, p. 1202.

51 V., ad esempio, Cass., sez. IV, 29 gennaio 2013, Cantore, in *Giust. pen.*, 2013, II, c. 695 (in motivazione); Cass., sez. IV, 17 settembre 2010, Cozzini, in *Cass. pen.*, 2011, p. 1701 (in motivazione).

52 Cfr. RENZETTI Silvia, La prova scientifica nel processo penale: problemi e prospettive, in *Riv. dir. proc.*, 2015, p. 411-412; UBERTIS Giulio, Il giudice, la scienza e la prova (2011), in ID., *Argomenti di procedura penale*, IV, 2016, p. 29 ss.

53 Cass., sez. I, 21 maggio 2008, Franzoni, in *Cass. pen.*, 2009, p. 1860 (in motivazione).

a conseguire un esito concretamente fruibile (anche perché razionalmente controllabile e giustificabile) per la verifica del singolo enunciato costituente il tema di prova. L'eventuale controversia sulla scientificità della prova richiesta sarebbe risolubile altresì attraverso lo sviluppo del contraddittorio nel suo momento ammissivo, magari usufruendo di prove sussidiarie per accertare controllabilità e giustificabilità dei procedimenti e dei risultati relativi all'apparato tecnico-scientifico: andrebbe comunque «evita[to] di addossare al proponente l'onere di provare la rilevanza di quanto richiesto, garantendogli l'ammissione dell'esperimento conoscitivo, salva la sua irrilevanza»[54], nel dovuto rispetto dell'art. 190 c.p.p.

Solo nel successivo momento valutativo il giudice - dotato non di una cultura scientifica "di merito", ma di una "*cultura di criteri*, consistente in schemi concettuali intesi a scrutinare la validità delle leggi scientifiche e delle tecnologie usate dall'esperto e la loro corretta applicazione"[55] - potrà argomentativamente dire se l'esperimento gnoseologico ha effettivamente adempiuto o no la sua funzione di convincimento e ha quindi conclusivamente consentito il formarsi, sulla sua base, di un epilogo conoscitivo «comprensibile da chiunque, conforme a ragione ed umanamente plausibile»[56].

7. Intelligenza artificiale e controllo umano significativo

Il valore delle conclusioni fin qui raggiunte non è da porre in dubbio nemmeno rispetto a un argomento che sempre più viene affrontato in ambito giudiziario: l'impiego in esso della cosiddetta intelligenza artificiale, la cui complessità di profili non può essere affrontata in questa sede e la cui stessa novità rende difficile fornirne una nozione univoca.

Un minimo livello di consenso è forse ottenibile riconoscendo quali caratteristiche principali dell'intelligenza artificiale «a) l'uso di

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[54] Linee guida per l'acquisizione della prova scientifica nel processo penale, in *Scienza e processo penale: linee guida per l'acquisizione della prova scientifica*, a cura di DE CATALDO NEUBURGER Luisa, Padova, 2010, p. 5.

[55] DOMINIONI Oreste, *La prova penale scientifica. Gli strumenti scientifico-tecnici nuovi o controversi e di elevata specializzazione*, cit., p. 71.

[56] Cass., sez. IV, 29 gennaio 2013, Cantore, cit., c. 695 (in motivazione).

grandi quantità di dati e informazioni; b) una elevata capacità logico-computazionale; c) l'uso di nuovi algoritmi, come quelli del *deep learning* e dell'*auto-apprendimento*, che definiscono metodi per estrarre conoscenza dai dati per dare alle macchine la capacità di prendere decisioni corrette in vari campi di applicazione»[57], senza escludere una modifica degli algoritmi originari «man mano che ricevono più informazioni su quello che stanno elaborando»[58].

Inoltre, giova riprendere e adattare al contesto giudiziario la proposta, sorta durante il dibattito internazionale sviluppatosi nell'ambito dell'ONU sulle armi autonome (si pensi ai velivoli da combattimento senza pilota), di spostare l'attenzione dalla forse insuperabile difficoltà di una loro definizione alla «necessità di assicurare che gli attacchi sferrati da *tutti* i sistemi d'arma siano soggetti a un 'controllo umano significativo'»[59].

Dopo aver rammentato la regola generale sull'osservanza dei diritti fondamentali, con la conseguenza che non sarebbe mai ammissibile una cosiddetta prova digitale se violatrice di essi (il principio del *nemo tenetur se detegere*, ad esempio, potrebbe essere leso da una profilazione personologica[60]), occorre perciò evidenziare che ostacolo all'utilizzabilità della prova è la sua «opacità»[61]. Come già altrove sostenuto[62], andrebbe

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[57] MAGRO Maria Beatrice, *Robot, cyborg* e intelligenze artificiale, in *Cybercrime*, diretto da CADOPPI Alberto – CANESTRARI Stefano – MANNA Adelmo –PAPA Michele, Milano, 2019, p. 1181.

[58] G. SIMEONE, Machine Learning e tutela della Privacy alla luce del GDPR, in *Diritto e intelligenza artificiale*, a cura di ALPA Guido, Pisa, 2020, p. 280, nota 15.

[59] TAMBURRINI Guglielmo, *Etica delle macchine. Dilemmi morali per robotica e intelligenza artificiale*, Roma, 2020, p. 105.

[60] MANES Vittorio, L'oracolo algoritmico e la giustizia penale: al bivio tra tecnologia e tecnocrazia, in *Intelligenza artificiale. Il diritto, i diritti, l'etica*, a cura di RUFFOLO Ugo, Milano, 2020, p. 563.

[61] QUATTROCOLO Serena, Quesiti nuovi e soluzioni antiche? Consolidati paradigmi normativi *vs* rischi e paure della giustizia digitale "predittiva", in *Cass. pen.*, 2019, p. 1764, dove ricorda che «non è consentito che nella funzione probatoria si usino apparati conoscitivi insuscettibili di controllo ad opera del giudice e delle parti» (O. DOMINIONI, *La prova penale scientifica. Gli strumenti scientifico-tecnici nuovi o controversi e di elevata specializzazione*, cit., p. 69).

[62] Si ripropone qui recentissima opinione espressa in UBERTIS Giulio, Intelligenza artificiale, giustizia penale, controllo umano significativo, in *Sistema penale*, 11 novembre 2020, p. 14-15, consultabile all'indirizzo internet

pertanto sancito che l'impiego della "macchina" (secondo la convenzionale denominazione abbreviata del "sistema [o sinonimicamente: dell'apparato] di intelligenza artificiale") in sede giurisdizionale fosse assoggettato a un *controllo umano significativo* costituito dalle seguenti imprescindibili condizioni: 1) pubblicità e vaglio conforme ai criteri di *peer review* riguardo al suo funzionamento; 2) informazione sul potenziale tasso di errore[63]; 3) adeguate spiegazioni traducenti la "formula tecnica" rappresentativa dell'algoritmo nella sottesa regola giuridica, in tal modo resa leggibile e comprensibile dal giudice, dalle parti e dai loro difensori[64]; 4) garanzia del contraddittorio sulla scelta degli elementi archiviati, sui loro raggruppamenti e sulle correlazioni dei dati elaborati dall'apparato di intelligenza artificiale, specialmente con riferimento all'oggetto della controversia; 5) giustificazione da parte del giudice del loro accoglimento alla luce di quanto emerso in giudizio e valutato secondo il principio del libero convincimento.

Il controllo umano significativo, dunque, andrebbe altresì garantito qualora, come prospettato[65], l'intelligenza artificiale fosse impiegata al momento dell'ammissione probatoria, in cui non dovrebbe mancare, rispetto all'uso della macchina, il suo apprezzamento e la corrispondente motivazione da parte del giudice.

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[63] Appare indubbia l'ispirazione dei precedenti criteri a quelli della famosa sentenza Daubert, il cui tetralogo è sinteticamente esposto da CARLIZZI Gaetano, *La valutazione della prova scientifica*, Milano, 2019, p. 91, e da RIVELLO Pier Paolo, *La prova scientifica*, in *Trattato di procedura penale*, diretto da UBERTIS Giulio – VOENA Giovanni Paolo, XVIII, Milano, 2014, p. 79-80.

[64] Similmente, v. Cons. Stato, sez. VI, 5 dicembre 2019 – 4 febbraio 2020 n. 881, MIUR c. Barra e Rosolia, § 10, consultabile all'indirizzo internet www.giustizia-amministrativa.it (ultimo accesso il 13.1.2021).

[65] NIEVA-FENOLL Jordi, *Intelligenza artificiale e processo* (2018), trad. it., Torino, 2019, p. 93 ss.

ANDRIOLI Virgilio, Prova (diritto processuale civile), in *Nss. D.I.*, XIV, Torino, UTET, 1967, p. 260-300

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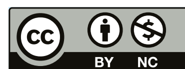

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Ammissibilità della prova e divieti probatori

Admissibility of evidence and exclusionary rules

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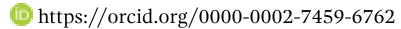
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Abstract: Prova 'ammissibile' è tutto ciò che può essere legittimamente valutato in ordine a una proposizione da provare. Prova 'inammissibile' è quella che il giudice non ha il *potere* di assumere e, come tale, appartiene alla sfera del giuridicamente irrilevante. Occorre tenere ben distinte le questioni relative all'ammissibilità della prova da quelle relative all'efficacia probatoria, ossia alla persuasività. Analogamente non va confusa la prova come premessa probatoria, che esprime una mera potenzialità (la prova *su x*) con la prova come risultato (la prova *di x*), che indica un esito positivo. Con riguardo alle premesse probatorie, resta fondamentale la controversa distinzione tra prove dichiarative e prove critico-indiziarie. Parlando di prove «acquisite in violazione dei divieti stabiliti dalla legge», l'art. 192 c.p.p. è stato variamente interpretato: secondo alcuni, va riferito alle sole prove oggetto di un divieto probatorio, ossia inammissibili; secondo altri, anche alle prove 'ottenute' attraverso una qualsiasi violazione della legge (penale processuale o sostanziale o persino civile). Di recente è stata sollevata una questione di legittimità sul presupposto che le prove assunte in spregio dei diritti costituzionalmente tutelati non possano essere utilizzate, anche in assenza di un esplicito divieto probatorio. La Corte costituzionale ha, tuttavia, dichiarato inammissibile la questione con argomenti poco convincenti. Si è così persa la preziosa occasione per il definitivo chiarimento di un fondamentale interrogativo.

Parole chiave: prova; divieti probatori; prova dichiarativa; prova indiziaria; prova atipica; prova neuroscientifica; libertà di autodeterminazione; diritti fondamentali; Costituzione.

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Abstract: *'Admissible' evidence is anything that can be legitimately evaluated about a proposition to be proved. 'Inadmissible' evidence is the one that the judge does not have the power to undertake and, as such, belongs to the sphere of the legal irrelevancy. Issues related to the evidence admissibility must be distinct from those regarding to evidence efficacy, ie persuasiveness. Equally, there must not be confusion between the evidence as a probative premise, which states a mere potentiality (the evidence on x), and the evidence as a result (the evidence of x), which indicates a positive outcome. Concerning the probative premises, the controversial distinction between declarative evidence and critical-circumstantial evidence remains fundamental. Observing the evidence "obtained in violation of the prohibitions established by law", the art. 192 c.p.p. has been interpreted in various ways: according to some, it refers only to the evidence object of an exclusionary rule, ie inadmissible; according to others, even the evidence 'obtained' through any violation of the law (criminal, procedural or substantive, or even civil). A question of legitimacy has recently been raised on the statement that evidence taken in violation of constitutionally protected rights cannot be used, even in the absence of an explicit exclusionary rule. The Constitutional Court has, however, declared the question inadmissible with unconvincing arguments. Consequently, the precious opportunity for the definitive clarification of a fundamental question was lost.*

Keywords: *evidence; exclusionary rules; declarative evidence; circumstantial evidence; atypical evidence; neuroscientific evidence; freedom of self-determination; fundamental rights; Constitution.*

1. *Il concetto di prova*

Il tema dell'ammissibilità della prova attiene al primo elemento della terna che compone l'operazione probatoria, nella quale occorre distinguere: *a)* le premesse o proposizioni probatorie o prove in senso proprio; *b)* la proposizione da provare, vale a dire l'oggetto della prova; *c)* l'atto del provare, connotato dalla regola dell'oltre ogni ragionevole dubbio, che congiunge le prime alla seconda[2].

[2] Sulla struttura triadica dell'operazione probatoria, v. P. Ferrua, *La prova nel processo penale*, vol. I, *Struttura e procedimento*, 2 ed., Giappichelli, Torino, 2017.

Prova 'ammissibile' nel processo penale è ogni dato che possa essere legittimamente acquisito e valutato dal giudice in ordine ad una determinata proposizione da provare. Di qui, per differenza, la nozione di prova 'inammissibile' come la prova che il giudice non ha il *potere* di acquisire al processo, in quanto oggetto di un divieto probatorio, ossia di una regola di esclusione[3]. Mancando il potere, la prova illegittimamente acquisita è giuridicamente irrilevante, quindi inutilizzabile a fini decisori; né occorre che la legge preveda espressamente l'invalidità processuale, essendo *in re ipsa* che l'atto compiuto in assenza del potere sia giuridicamente inesistente[4].

Diverso il discorso per l'inosservanza delle modalità previste per l'assunzione di una prova in sé ammissibile. Qui l'atto - compiuto in presenza del *potere*, ma in violazione di un *dovere* - lungi dall'essere giuridicamente inesistente, è affetto dal vizio tassativamente previsto dalla legge (nullità o altra sanzione: ad esempio vizio di motivazione); o, se la legge tace, riesce semplicemente irregolare, ferma restando la sua piena validità. In altri termini, la violazione di un dovere non è incompatibile con l'esercizio di un potere.

2. *Regole di inclusione e di esclusione probatoria*

Le regole sulla ammissibilità/inammissibilità della prova – altrimenti dette, *regole di inclusione o di esclusione* probatoria – sono di stretta competenza del legislatore, a differenza, come si dirà, dei *criteri di valutazione* della prova: il giudice deve limitarsi a renderle operative, non essendo pensabile che egli possa, di volta in volta, individuare e variare i criteri di ammissione delle prove.

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[3] Con la prova inammissibile non va confusa la prova di cui il giudice non ammetta l'assunzione in quanto manifestamente irrilevante o superflua; qui la prova non è inammissibile nel senso proprio della parola, ma semplicemente ritenuta inutile, allo stato degli atti, dal giudice; il che, peraltro, non esclude una sua successiva assunzione, quando se ne manifesti l'utilità.

[4] F. Cordero, *Tre studi sulle prove penali*, Giuffrè, Milano, 1963, 61 s.; ID, *Le situazioni soggettive nel processo penale*, Giappichelli, Torino, 1957, *passim*; ID, *Procedura penale*, 9 ed., Giuffrè, Milano, 2012, 610 s.

In particolare, le regole di esclusione possono essere 'assolute' (come per gli scritti anonimi, per le dichiarazioni estorte, per le voci correnti nel pubblico, ecc.), ossia incondizionatamente operanti; o 'relative', quando intervengono solo in rapporto ad una determinata proposizione da provare o in una determinata fase (ad esempio, le dichiarazioni unilateralmente raccolte dagli organi inquirenti non costituiscono prova in dibattimento sul tema della colpevolezza, ma sono pienamente utilizzabili ad altri fini, come nei provvedimenti cautelari o nei riti negoziali).

Da notare che talvolta la regola di esclusione probatoria sembra cadere non sulla prova come premessa probatoria, ma sulla proposizione da provare: ad esempio, quando l'art. 194 c.p.p. afferma che il testimone non può deporre sulla moralità dell'imputato o sulle voci correnti nel pubblico, il divieto non riguarda la prova in sé (la testimonianza), ma l'oggetto, il tema su cui verte (la 'moralità' o le 'voci correnti'). Ma, a ben vedere, se la legge sottrae alla prova un certo tema è solo al fine di evitare che quello stesso tema si converta, nella sequenza argomentativa, in una nuova premessa probatoria [5], vale a dire in prova rispetto alla proposizione finale, rappresentata dalla colpevolezza; in altri termini, si vieta la testimonianza sulla moralità dell'imputato o sulle voci correnti nel pubblico affinché né l'una né le altre assumano valore probatorio per la ricostruzione del fatto. Dunque, la regola di esclusione coinvolge sempre le premesse probatorie.

3. *Criteri di valutazione*

Ben diversa la struttura dei criteri di valutazione che, a differenza delle regole di esclusione, implicano prove validamente costituite e riguardano il passaggio da queste alla proposizione da provare. In linea di massima - e soprattutto nell'ambito del modello accusatorio - l'organo competente a definire i criteri di valutazione è il giudice stesso, proprio perché coinvolgono il maggiore o minore valore che, nel caso concreto, una prova può assumere rispetto alla proposizione da provare.

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[5] Sulle 'sequenze probatorie', v. P. Ferrua, *La prova nel processo penale*, cit., 76 s.

Questo non esclude che talvolta il legislatore ritenga opportuno fissare determinati criteri di valutazione, come accade, nel nostro ordinamento, con l'art. 192 commi 2 e 3 c.p.p., relativi agli indizi e alle dichiarazioni rese dal coimputato. Essendo i criteri per lo più enunciati nella forma '*q* vale come prova di *p* solo in presenza di *r*' (così l'art. 192 c.p.p.), si può essere tentati di convertirli in una regola di esclusione del tipo '*q*, in assenza di *r*', è un dato inutilizzabile'.

Ad esempio, dire che le dichiarazioni del coimputato sono valutate unitamente agli altri elementi che ne confermano l'attendibilità – così il criterio fissato dall'art. 192 comma 3 c.p.p.[6] – non equivale a dire che, mancando tali elementi, la dichiarazione è inutilizzabile? È istintivo rispondere positivamente, ma è un errore, favorito ancora una volta dall'ambiguità del termine 'prova'. Il criterio legale non incide sulla valida *costituzione* della prova, intesa come dato valutabile dal giudice; influisce solo sul *valore* della prova sino ad annullarlo in assenza di certi requisiti. Nell'ipotesi di cui sopra, la dichiarazione del coimputato è 'prova' (si allude ad una potenzialità del dato legittimamente acquisito) e, come tale, dev'essere valutata dal giudice; ma, in forza della regola legale, è inidonea a 'provare' il fatto dichiarato, in assenza di riscontri.

Talvolta il criterio di valutazione si avvicina molto alla regola di esclusione probatoria. È il caso del criterio contenuto nella seconda parte dell'art. 111 comma 4 Cost. e nell'art. 526 comma 1-*bis* c.p.p.: «la colpevolezza non può essere provata sulla base delle dichiarazioni rese da chi, per libera scelta, si è sempre volontariamente sottratto all'esame da parte dell'imputato o del suo difensore». A prima vista appare come una regola di esclusione perché le dichiarazioni in parola non possono in alcun modo provare la colpevolezza, neppure se unite ad altre prove o utilizzate come semplici elementi di riscontro. In realtà, da un'attenta lettura della norma si evince che è, invece, possibile il loro uso in chiave difensiva, a favore dell'imputato; si tratta, quindi, di un criterio di valutazione grazie al quale le dichiarazioni potranno essere acquisite al processo e valutate *in utilibus*, ferma restando la loro assoluta inidoneità a provare la colpevolezza.

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[6] Quanto all'art 192 comma 2 c.p.p. v. *infra* par. 5

Insomma, una cosa è che un dato non possa essere valutato perché inutilizzabile (*id est*, non acquisibile come prova), quindi sottratto *a priori* al convincimento giudiziale; un'altra che, per effetto dei criteri legali, il valore di una prova si riduca o addirittura scenda a zero rispetto a determinati esiti: la negazione che nel primo caso preclude la valutazione, nel secondo ne orienta o ne condiziona negativamente l'esito.

4. *Ammissibilità ed efficacia persuasiva della prova*

Le questioni relative all'ammissibilità della prova sono, dunque, ben distinte da quelle relative all'efficacia persuasiva che in concreto può esercitare il singolo dato. Purtroppo, nei discorsi sulla prova si registra spesso una confusione tra i due piani.

Analizziamo, ad esempio, l'enunciato '*x* non è una prova'. Correttamente inteso, significa che *x* non costituisce una valida premessa probatoria, e quindi non è valutabile dal giudice sul tema *y* (ad esempio, perché raccolto senza l'osservanza delle regole del contraddittorio o illegittimamente acquisito al processo). Ma, nel senso improprio in cui talora è usato nel linguaggio corrente, sta a significare che *x*, pur costituendo una valida premessa, si rivela, nel caso concreto, inidoneo a 'provare' *y* (ad esempio, una testimonianza ritenuta inattendibile o irrilevante). C'è una differenza abissale tra dire che '*x* è (o non è) prova sul tema *y*' e dire che '*x* prova o non prova *y*': nel primo senso si afferma o si nega una potenzialità probatoria; nel secondo, si afferma o si nega l'esito positivo della prova. La prova *su* y, ossia la premessa probatoria, non va confusa con la prova *di* y, ossia con il risultato probatorio, nonostante sia assai frequente la sovrapposizione dei due concetti.

Dovrebbe essere chiaro, infatti, che una testimonianza non cessa di essere 'prova' per il solo fatto che sia vaga, irrilevante o persino falsa; così come costituisce una prova *sul* tema della colpevolezza la circostanza che l'imputato fosse in buoni o cattivi rapporti con la vittima, ne fosse o no geloso, pur trattandosi di elementi di per sé del tutto inidonei a provare il gesto omicida. 'Prova' è tutto ciò che sia legittimamente acquisito al processo e, quindi, valutabile dal giudice in ordine ad un qualsiasi tema probatorio; e poco importa, ai fini del concetto di prova, che un dato

valutabile si riveli in concreto più o meno persuasivo, più o meno rilevante rispetto alla proposizione da provare.

È netta la differenza tra una prova vietata dalla legge, quindi non acquisibile al processo, e una prova manifestamente irrilevante o sovrabbondante. A norma dell'art. 190 c.p.p. il giudice esclude «le prove vietate dalla legge e quelle che manifestamente sono superflue o irrilevanti». Il tenore della disposizione può indurre a ritenere che tanto le prove vietate dalla legge quanto quelle manifestamente irrilevanti o superflue siano inammissibili, dovendo il giudice escluderle. Ma non è così. Inammissibile nel significato proprio della parola è la prova vietata dalla legge, ossia oggetto di una regola di esclusione probatoria (ad esempio, gli scritti anonimi, la testimonianza dell'imputato, i mezzi che ledono la libertà di autodeterminazione, ecc.); vale a dire, la prova che il giudice non ha il potere di assumere. Quella che il giudice esclude perché manifestamente irrilevante o superflua non è inammissibile nel senso appena specificato; né sarebbe corretto dire che il giudice sia privo del potere di assumerla. Viene (provvisoriamente) esclusa perché ritenuta, allo stato, inutile a fini decisori.

Il giudizio sulla superfluità e irrilevanza, infatti, non riguarda la prova in sé, intesa come premessa probatoria, ma il suo rapporto con il contesto in cui si colloca, e, più specificamente, con la proposizione da provare (nel caso della irrilevanza) o con le altre prove (nel caso della superfluità). È un giudizio che, in qualche misura, attiene al merito e la cui anticipazione in sede preliminare, ossia di ammissione della prova, si giustifica per esigenze di ragionevole durata del processo; sarebbe una perdita di tempo assumere prove palesemente superflue o irrilevanti. Ma, proprio per il rischio di sconfinamento nel merito e di perdita di imparzialità del giudice, la legge circoscrive l'estensione delle due tipologie con l'avverbio 'manifestamente'. Si spiega così che il provvedimento di esclusione della prova manifestamente superflua o irrilevante sia pronunciato 'allo stato degli atti', essendo sempre rivedibile al variare del quadro probatorio. La prova già esclusa può, al mutare del rapporto con le altre prove o in una diversa prospettiva di ricostruzione del fatto, rivelarsi utile e pertinente; per converso, una prova vietata dalla legge resta sempre inammissibile, quale che sia il contesto in cui si inserisce.

5. Il concetto di prova indiziaria

Ovunque vi sia una proposizione da provare, necessariamente devono esservi prove, non essendo possibile provare se non attraverso prove. L'idea che qualcosa possa essere 'provato' da entità diverse dalle prove – comunque le si chiami, elementi, indizi, ecc. – è una contraddizione in termini; se *x* è provato da *y* (solo o congiunto ad altre prove), *y* non può che essere una prova. Per converso, è altrettanto evidente che non tutte le 'prove' sortiscono necessariamente l'effetto di 'provare': vi sono prove, ossia dati valutabili dal giudice, che in concreto, a causa della loro irrilevanza o intrinseca debolezza, risultano ininfluenti sulla proposizione da provare o addirittura ne costituiscono la prova negativa.

Assai controversa è la categoria delle 'prove indiziarie'. A nostro avviso, occorre distinguere tra la nozione che affiora dall'art. 192 c.p.p., costruito sul malfermo presupposto di una intrinseca debolezza degli 'indizi', e il concetto teoretico di prova critico-indiziaria, ben delimitato nei suoi contorni; concetto che, nella prospettiva di Francesco Carnelutti, poi perfezionata da Franco Cordero, si contrappone a quello di 'prova dichiarativa'.

L'art. 192 c.p.p. è una disposizione malriuscita, che risente della logica inquisitoria, incline a stabilire astratte gerarchie tra le diverse tipologie di prova[7]. Nel modello accusatorio il valore delle prove va misurato nel contesto del singolo processo, dove l'unità di rilevanza empirica è rappresentata dall'intero quadro probatorio.

Nel tentativo di dare un senso all'art. 192 c.p.p., alcuni autori identificano gli indizi con le prove basate su massime di esperienza anziché su leggi scientifiche, in altri termini con prove fondate sulla *doxa* anziché sull'*episteme*[8]. Ma, impostata in questi termini, la distinzione,

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[7] Cordero definisce l'art. 192 comma 2 c.p.p. «un tentativo velleitario d'imporre regole alla clinica giudiziaria», una «inutile» disposizione destinata ad alimentare «confusione» (*Procedura*, cit., 626, 623).

[8] In tal senso, v., fra gli altri, A. Nappi, *Guida al codice di procedura penale,* 9 ed., Giuffrè, Milano, 2004, 210; G. Ubertis, *Fatto e valore nel sistema probatorio penale*, Giuffrè, Milano, 1979, 112 s.; ID., *Documenti e oralità nel nuovo processo penale*, in *Studi in onore di G. Vassalli*, II, Giuffrè, Milano, 1991, 304 s., e, più di recente, del medesimo autore, *Processo indiziario e valutazione probatoria*, in *Diritto&Questioni pubbliche*, 2020/1, giugno, 317 s., dove si afferma

pur riflettendo il preconcetto che traspare dall'art. 192 c.p.p., risulta incerta, posto che nell'ambito del settore induttivo è impossibile distinguere con un taglio netto le inferenze basate sulla scienza da quelle fondate sulle massime di esperienza; ad esempio, la psicologia è senza dubbio una scienza, ma le inferenze sul comportamento umano sono ben lungi dall'avere la solidità delle scienze così dette dure come la fisica o la chimica. La scienza, ovvero l'*episteme* sfuma nell'esperienza corrente e nella *doxa* senza una netta soluzione di qualità[9].

Tanto meno si potrebbe contrapporre la prova indiziaria alle prove dalle quali la proposizione da provare discenderebbe per 'necessità logica'. Nel processo, dove si riscostruiscono fatti del passato, nessuna prova è in grado di provare in modo 'indubitabile', vale a dire nel senso propriamente deduttivo, tipico delle scienze formali; il massimo, ma al tempo stesso il minimo, che si può pretendere per provare una qualsiasi proposizione, è la prova oltre ogni ragionevole dubbio, dove l'aggettivo 'ragionevole' tempera e riduce la pretesa di assoluta certezza. Fuori dal settore deduttivo - dove la prova assume la forma della dimostrazione, come tale indubitabile - l'oltre ogni ragionevole dubbio è il solo *standard* compatibile con il concetto di 'provare'; non è possibile superare quel livello, ma scendere al di sotto significherebbe sconfinare nella zona delle ipotesi, delle illazioni e, per dir tutto, dei sospetti[10].

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che «un processo può denominarsi indiziario (in sostanziale corrispondenza con il già rammentato uso comune della terminologia) quando la conclusione inferenziale della sequenza probatoria si basa non su prove in senso stretto (rappresentative o critiche), ma su indizi (evitando di adoperare l'ambigua e fuorviante espressione 'prove indiziarie'), caratterizzandosi quindi per la modalità logica non della necessità, ma della semplice possibilità». Perché definire 'ambigua' e 'fuorviante' l'espressione 'prove indiziarie'? Se gli indizi non fossero prove, non potrebbero provare un bel nulla, neppure se gravi, precisi e concordanti.

[9] Nella stessa testimonianza, anche quella sul fatto principale, l'inferenza, che dalla dichiarazione consente di passare al fatto dichiarato, non si può certo definire fondata 'scientificamente'; e, da un certo punto di vista, se c'è una prova debole, è proprio quella dichiarativa.

[10] A mutare non è mai lo *standard* probatorio, che resta sempre contrassegnato dalla regola dell'oltre ogni ragionevole dubbio, ma la proposizione da provare. Mentre ai fini della condanna la proposizione da provare è la 'colpevolezza', ai fini dei provvedimenti cautelari le proposizioni da provare sono i *pericula libertatis* e il *fumus boni iuris* rappresentato dai gravi indizi di colpevolezza,

Altri autori identificano la prova indiziaria con la prova 'indiretta', ossia con una prova che ha ad oggetto un fatto secondario, dal quale poi si risale al fatto principale[11]. Ma in tal modo escono confuse tipologie distinte. Mentre la prova indiziaria è un'entità singola, la prova indiretta nasce dalla congiunzione di due prove disposte in sequenza, l'una rispetto all'altra; la proposizione che viene provata dalla prima prova diventa la prova di una nuova proposizione con un meccanismo che potenzialmente potrebbe andare avanti all'infinito.

Se un teste dichiara di avere visto l'imputato aggirarsi nel luogo del delitto e si utilizza questa dichiarazione per provare la responsabilità dell'imputato, le prove sono due. La prima è rappresentata dalla testimonianza (prova dichiarativa) che prova la presenza dell'imputato nel luogo del delitto; la seconda da questa presenza, la quale, a sua volta, funge da prova (critico-indiziaria) rispetto alla commissione del fatto da parte dell'imputato: la proposizione provata nella prima inferenza si converte in proposizione probatoria per una seconda inferenza. Altrettanto accade nella c.d. testimonianza indiretta che, in realtà, è costituita da due prove dichiarative poste in sequenza, quella del teste diretto e quella del teste indiretto che riferisce quanto appreso.

L'unica distinzione, che riesce a delimitare con precisione la categoria delle prove critico-indiziarie, è quella che le contrappone alle prove dichiarative; tutto ciò che non è prova dichiarativa appartiene al *genus* delle prove critico-indiziarie che risultano così individuate per

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vale a dire dalla 'probabile colpevolezza'. Sul ragionevole dubbio come unico *standard* probatorio, v. M.L. Busetto, *Il contraddittorio inquinato*, Cedam, Padova, 2009, 173; P. Ferrua, *Onere della prova, regola di giudizio e standard probatorio: alla ricerca della perduta proposizione da provare*, in *Cass. pen.*, 2020, 2639 s.; P. Paulesu, *La presunzione di non colpevolezza dell'imputato*, 2 ed., Giappichelli, Torino, 2009, 228 s. *Contra*, per la sussistenza di vari *standard* probatori, v. F. M. Iacoviello, *La Cassazione penale. Fatto, diritto e motivazione*, Giuffrè, Milano, 2013, p. 432, 632 s.; F. Caprioli, voce *Condanna (dir. proc. pen.)*, in *Enc. dir.*, Annali, vol. II, t. 1, Giuffrè, Milano, 2008, 111 s.; C. Santoriello, *Il vizio di motivazione tra esame di legittimità e giudizio di fatto*, Utet, Torino, 2008, 58 s.

[11] In questa prospettiva v., ad esempio, G. Lozzi, *Lezioni di procedura penale*, 8 ed., Giappichelli, Torino, 2013, 210; M. Scaparone, *Procedura penale*, vol. I, 2 ed., Giappichelli, Torino, 2010, 301 s.; D. Siracusano – A. Galati – G. Tranchina – E. Zappalà, *Diritto processuale penale*, Giuffrè, Milano, 2018, 280.

differenza o sottrazione dalla prova dichiarativa. È assai difficile definire la prova critico-indiziaria sulla base di una sua nota peculiare (come si è visto, le definizioni correnti o soffrono di nebulosità ai confini o confondono la prova indiziaria con quella indiretta); conviene, dunque, definirla per esclusione rispetto alla prova dichiarativa, i cui connotati sono invece facilmente identificabili.

La prova dichiarativa contiene, già espressa al suo interno, la proposizione di cui si rende garante, ossia la proposizione da provare: 'Tizio afferma che *x*' è la proposizione o premessa probatoria, '*x*' è la proposizione da provare. All'osservatore resta solo da stabilire se '*x*' sia vero o falso, essendo già individuato il tema della prova. La prova critico-indiziaria è, per così dire, 'muta', nel senso che tocca all'interprete accertare quale proposizione essa possa provare; la qualifica 'critico-indiziaria' sta, appunto, ad indicare questa attività di decifrazione del tema oggetto della prova.

Così impostata, la distinzione non ha nulla a che vedere con la maggiore o minore affidabilità dell'uno o dell'altro tipo di prova: la professione di innocenza dell'imputato è una prova dichiarativa, ma non vale certo più della sua impronta digitale sull'arma del delitto o della fotografia che lo coglie nell'atto di commettere il delitto. L'efficacia persuasiva delle prove va accertata in concreto, nel singolo processo e alla luce dell'intera evidenza disponibile; è illusorio pensare di definirla in astratto, isolando questa o quella tipologia di prova, come accadeva nel processo inquisitorio; categorie del genere riescono inutili, quando non sono dannose.

La definizione di Carnelutti[12], che contrapponeva le prove 'rappresentative' (o storiche) a quelle critico-indiziarie, aveva l'effetto di includere nelle prime anche la fotografia e la videoregistrazione che certamente riproducono e rappresentano fatti del passato[13]; tuttavia,

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[12] F. Carnelutti, *Lezioni sul processo penale*, vol. I, Edizioni dell'Ateneo, Roma, 1946,213 s.; ID., *La prova civile* [1015], ristampa, Giuffrè, Milano, 1992, 92 s.; ID., *Principi del processo penale*, Morano, Napoli, 1960, 162 s.; ID., *Diritto e processo*, Morano, Napoli, 1958, 129 s.

[13] Roland Barthes identifica il noema della fotografia in «È stato» (*La camera chiara. Note sulla fotografia*, Einaudi, Torino, 1980, 78). Anche l'impronta digitale rientra nella categoria carneluttiana delle prove rappresentative.

sono prove critico-indiziarie, dato che la proposizione da provare (la realtà della cosa fotografata o della scena registrata) non è 'espressa' ma indotta dall'osservatore sulla base di leggi ottiche ed acustiche. Si aggiunga che, propriamente parlando, il linguaggio non 'rappresenta' nulla, ma si limita a trasmettere significati. Opportunamente Cordero riduce la classe carneluttiana delle prove rappresentative o storiche alle sole prove dichiarative o funzioni narrative[14].

Resta da determinare quando una prova possa definirsi dichiarativa. I connotati, necessari e sufficienti, sono due. Il primo è un atto comunicativo, ossia un atto volto intenzionalmente a trasmettere significati: il che avviene, per lo più, attraverso il linguaggio, ossia parlando; ma può realizzarsi anche con gesti, quando questi funzionano alla stregua di un linguaggio, ossia sono codificati come equivalenti di parole (così accade nel dialogo tra sordomuti).

Mentre l'uso del linguaggio rappresenta già di per sé un atto comunicativo, salvo situazioni eccezionali (come le parole pronunciate in stato di incoscienza), non è facile stabilire in concreto quando un comportamento non verbale costituisca un atto comunicativo; l'indagine nel nostro ordinamento assume rilievo, ad esempio, al fine di disporre una videoregistrazione nel domicilio privato, ammissibile secondo la giurisprudenza solo per i comportamenti comunicativi, rispetto ai quali è equiparabile ad un'intercettazione. Il criterio di demarcazione, chiaro a livello teorico, ma di non semplice applicazione pratica, può essere così sintetizzato: un comportamento è comunicativo quando l'emittente si propone di trasmettere un'informazione, attraverso il riconoscimento della sua intenzione di trasmetterla[15]. Come si nota, il criterio s'incentra sulle intenzioni, non sempre agevolmente decifrabili,

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14 F. Cordero, *Procedura* [2012], cit., 581 s.

15 Cfr. P. Grice, *Logica e conversazione* (1989), trad. it., Il Mulino, Bologna, 1993, 58 secondo cui «*S* ha voluto dire qualcosa con *x* quando *S* ha avuto l'intenzione che *x* producesse un certo effetto sull'ipotetico destinatario attraverso il riconoscimento di questa intenzione»; ma v. anche L. J. Prieto, *Saggi di semiotica*, II, *Sull'arte e sul soggetto*, Pratiche, Parma, 1991, 104; D. Sperber-D. Wilson, *La pertinenza* (1986), trad. it., Anabasi, Milano, 1993. Per lo sviluppo del tema nel processo penale, v. P. Ferrua, *La prova nel processo penale*, cit., 68 s.

dell'emittente, indipendentemente dalla circostanza, di per sé irrilevante, che l'informazione sia recepita dal destinatario[16].

Il secondo connotato è il carattere 'apofantico' della dichiarazione, ossia la circostanza che l'enunciato sia vero o falso. Se l'enunciato non è né vero né falso – come gli ordini, i consigli, le preghiere ecc. – la prova non è dichiarativa, ma critico- indiziaria; infatti, la proposizione, oggetto di prova, non è contenuta nell'enunciato stesso, ma va, di volta in volta, individuata. Mi spiego con un esempio. Se qualcuno ha detto 'la porta è aperta', si è in presenza di una prova dichiarativa nella quale viene enunciata la proposizione di cui vuole rendersi garante. Ma, se ha detto 'apri la porta', si è in presenza di una prova critico-indiziaria, nella quale occorre individuare la proposizione di cui può essere la prova (ad esempio, che la porta era chiusa, che l'emittente intendeva avviare un dialogo riservato con l'interlocutore, il rapporto confidenziale segnalato dal verbo in seconda persona, ecc.)[17].

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[16] Chiarisco il concetto con un esempio, immaginando che Tizio, seduto al tavolo di un ristorante, agiti il bicchiere vuoto. Possiamo distinguere le seguenti situazioni. Nella prima il soggetto, utilizzando il gesto come un linguaggio, intende apertamente trasmettere al personale l'invito a servirgli da bere; in tal caso si realizzano tutte le componenti della comunicazione, anche se, come vedremo, questa non è di tipo propriamente dichiarativo, trattandosi di un ordine che in sé non è né vero né falso.

Nella seconda Tizio, senza palesare le sue intenzioni, vuole indurre il personale a servirgli da bere, con il proposito che il suo gesto non sia recepito come una richiesta, ma sia decifrato come un segno naturale (quindi, critico-indiziario) di sete: qui l'informazione viene intenzionalmente trasmessa, ma, a differenza del primo caso, il gesto non realizza un atto comunicativo, perché manca la volontà che sia riconosciuto l'intento informativo.

Nella terza, infine, il soggetto agita il bicchiere perché assetato o, semplicemente, perché nervoso, ma senza alcuna intenzione informativa: il gesto può senza dubbio trasmettere varie informazioni in chiave critico-indiziaria, ma risulta slegato da qualsiasi proposito informativo. È evidente che solo nel primo caso il gesto funziona propriamente come un linguaggio, ossia trasmette significati nel senso non naturalistico della parola.

[17] Naturalmente, nel processo, che qualcuno abbia detto 'apri la porta' risulterà o dall'affermazione di un testimone o da una registrazione. In entrambi i casi si è in presenza di due prove disposte in sequenza. Nel primo caso, una prova dichiarativa (la testimonianza) su una prova critico-indiziaria (l'ordine di aprire la porta); nel secondo, una prova critico-indiziaria (la registrazione) su una prova critico-indiziaria (l'ordine impartito).

6. Prove atipiche

Si discuteva, vigente il codice abrogato, se l'elencazione legislativa delle prove dovesse considerarsi tassativa. Il progetto del codice di procedura penale del 1978 era orientato in senso affermativo, ma nel codice vigente è prevalsa l'opposta soluzione. L'art. 189 c.p.p. dispone che «quando è richiesta una prova non disciplinata dalla legge, il giudice può assumerla se essa risulta idonea all'accertamento dei fatti e non pregiudica la libertà morale della persona. Il giudice provvede all'ammissione, sentite le parti sulle modalità di assunzione della prova».

La disposizione è palesemente diretta a consentire l'ingresso nel processo dei nuovi mezzi cognitivi resi disponibili dall'evoluzione scientifica e tecnologica (si pensi allo sviluppo delle prove neuroscientifiche). La verifica dell'idoneità all'accertamento dei fatti serve ad escludere ogni strumento che appaia gnoseologicamente inadeguato, perché non ancora sperimentato a sufficienza o, all'opposto, perché caduto in discredito nella comunità degli esperti. Trattandosi di mezzi, le cui modalità di assunzione non sono definite dalla legge, è corretto che, prima di disporli, il giudice individui tempi e modi di formazione della prova, ascoltando il parere delle parti.

Non è chiaro se l'ammissione delle prove neuroscientifiche nel processo debba svolgersi secondo le regole ordinarie fissate dall'art. 190 c.p.p. o secondo quelle contemplate dalla disposizione in esame. Quanto al controllo sull'idoneità all'accertamento dei fatti e sulla mancanza di pregiudizio per la libertà morale, non vi è differenza tra l'una e l'altra soluzione: la scientificità del metodo – in nome della quale sono messe al bando tecniche non accreditate dal punto di vista epistemologico - è implicita nel concetto stesso di perizia (o di consulenza tecnica); e, a sua volta, la libertà di autodeterminazione è incondizionatamente protetta dall'art. 188 c.p.p. [18].

La differenza sta nella regola di ammissione: per le prove 'atipiche' l'art. 189 c.p.p. impegna al contraddittorio anticipato, dovendo il giudice

[18] Cfr. in senso critico rispetto all'utilizzo dell'art. 189 c.p.p. per introdurre nel processo penale la c.d. 'prova scientifica', V. Bozio, *La prova atipica*, in P. Ferrua-E. Marzaduri-G. Spangher (a cura di), *La prova penale*, Giappichelli, Torino, 2013, 57 s.

sentire le parti sulle modalità della loro assunzione. Può essere questa una buona ragione per considerare 'atipiche' le prove neuroscientifiche; ma, dal punto di vista esegetico, la soluzione incontra qualche ostacolo nella formulazione dell'art. 189 c.p.p., dove si parla di 'prova non disciplinata' dalla legge, mentre le prove in esame entrano nel processo attraverso la perizia o la consulenza tecnica che sono legislativamente regolate. Il problema, in sostanza, è che l'art. 189 c.p.p. riferisce l'atipicità all'assenza di una previsione legislativa per l'ingresso della prova nel processo, mentre nel caso delle neuroscienze l'atipicità sta nella novità del metodo, ancora in fase sperimentale. Una possibile, ragionevole soluzione può essere rappresentata da un'applicazione analogica dell'art. 189 c.p.p., tale da includervi ogni nuova tecnica di indagine, ritenuta idonea all'accertamento dei fatti, quale che sia il veicolo di ingresso nel processo penale (perizia, esperimento giudiziale o altro mezzo).

7. *Libertà di autodeterminazione*

Ai sensi dell'art. 188 c.p.p. «non possono essere utilizzati, neppure con il consenso della persona interessata, metodi o tecniche idonei a influire sulla libertà di autodeterminazione o ad alterare la capacità di ricordare e di valutare i fatti»[19]. La disposizione riguarda anzitutto gli atti in cui la persona (imputato o testimone) interviene come soggetto parlante, quindi le prove di tipo dichiarativo. L'atto di parola è valido in quanto sia frutto di libera volizione; una testimonianza resa in stato di coazione psichica è una pseudo-testimonianza, priva di qualsiasi rilevanza probatoria. Non sono pertanto ammissibili la narcoanalisi o l'ipnosi [20] né

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19 Sulla libertà di autodeterminazione nel processo penale v. L. Scomparin, *La tutela del testimone nel processo penale*, Cedam, Padova, 2001, 101 s.

20 Per l'inammissibilità dell'ipnosi v. Corte di Assise di Caltanisetta 28 aprile 1999, in *Foro it*., 2000, II, 248 (L'attività del perito non è sottratta alla regola generale di cui all'art. 188 c.p.p., la quale si riferisce a tutte le forme di assunzione della prova; ne consegue che sono inutilizzabili i risultati dell'accertamento peritale, avente ad oggetto l'attitudine a testimoniare di individuo minore di età, condotto attraverso al sottoposizione ad ipnosi del minore medesimo allo scopo di accertare la presenza e la natura di elementi condizionanti la sua psiche). Per la responsabilità disciplinare di un pubblico ministero che aveva disposto una consulenza tecnica tramite seduta ipnotica allo

altre tecniche manipolative che tolgano al soggetto il controllo su ciò che intende dire o semplicemente lo affievoliscano, impedendogli di esprimere liberamente il proprio pensiero (come gli interrogatori di 'terzo grado', le minacce, le promesse di favori, le domande nocive ecc.).

Per analoghe ragioni è inammissibile una costrizione del soggetto ad atti che richiedano un comportamento collaborativo, un facere. Il divieto non coinvolge, invece, gli atti in cui, per la loro stessa natura, la persona intervenga come corpo, come oggetto di ispezione, di prelievo o di riconoscimento; atti che implicano un atteggiamento passivo di chi vi è sottoposto, che si sostanziano in un pàtere. In questi casi l'esecuzione coatta dell'atto non è a priori inammissibile, purché sia prevista e regolata dalla legge come richiede l'art. 13 comma 2 Cost., secondo cui «non è ammessa forma alcuna di detenzione, di ispezione o perquisizione personale, né qualsiasi altra restrizione della libertà personale, se non per atto motivato dell'autorità giudiziaria e nei soli casi e modi previsti dalla legge» [21].

8. Memory detection

Si discute se sia compatibile con i principi del nostro ordinamento la *memory detection* che è stata messa a punto in Italia dal neuroscienziato Giovanni Sartori e che ha trovato applicazione in alcuni processi (il c.d. IAT). È una tecnica, costruita sui tempi di reazione alle domande, che consiste all'incirca nel chiedere al soggetto di classificare in modo rapido e accurato come vere o false le frasi che compaiono nel monitor di un computer; lo IAT si basa sulla teoria, di indubbio fondamento, che un ricordo genuino ha rapidi tempi di reazione, mentre la sua falsificazione determina il loro aumento, imputabile al conflitto cognitivo che il soggetto deve superare per fornire una risposta non conforme al ricordo naturale [22].

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scopo di ravvivare la memoria del testimone, Sez. un. civ. 1 febbraio 2008, in *Cass. pen.*, 2008, 3617.

[21] In questi termini si è espressa, in rapporto alla prova del DNA, la Corte costituzionale con sentenza n. 238 del 1996.

[22] Una versione primordiale e divertente dello IAT è descritta dal filosofo Bertrand Russell: «Come ognuno sa, l'associazione offre un metodo per prendere in trappola i criminali. Voi state interrogando, mettiamo, un uomo che sospettate abbia tagliato la gola alla moglie con un coltello. Voi dite una parola,

Numerosi autori rispondono negativamente, per il fatto stesso che queste tecniche si risolvano in varie forme di introspezione mentale [23]; ed è per tale ragione che nel nostro processo non ha mai trovato ingresso il poligrafo o *lie detector*. Tuttavia, non è priva di fondamento l'osservazione di Gian Franco Ricci secondo cui la libertà di autodeterminazione non è pregiudicata né dal *lie detector*, che si limita a registrare la variazione di certi parametri fisiologici, né da altri metodi volti a scoprire la menzogna attraverso l'analisi delle reazioni a certe domande [24].

In effetti, prendendo ad esempio lo IAT, il soggetto si sottopone al test per libera scelta; e, a differenza di quanto accadrebbe con la narcoanalisi o con l'ipnosi, resta pienamente libero di definire vere o false le frasi che gli vengono proposte. Certo, sa che, mentendo, con ogni probabilità sarà scoperto, ma non ci sentiremmo di teorizzare un diritto a mentire senza essere scoperti in base alle modalità extralinguistiche delle risposte. Nessuno nega che l'analisi dei tratti prosodici del discorso (esitazioni, tono della voce, rossore del volto, movimenti del corpo, esitazioni nelle risposte ecc.) fornisca preziosi indici per valutare la credibilità del dichiarante; e qui, in definitiva, è proprio tramite l'analisi dei tratti paralinguistici (i tempi di reazione alle domande) che si decifrano le menzogne.

Le ragioni di perplessità verso le tecniche in esame, a mio avviso, più che nella lesione della libertà del volere, forse stanno altrove; o meglio, solo indirettamente si collegano al tema dell'autodeterminazione. Derivano dalla struttura stessa di questi mezzi nei quali la persona, proprio

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ed egli deve rispondere con la prima parola che gli viene in mente. Voi dite 'gatto' ed egli risponde 'cane'; voi dite 'politico' ed egli dice 'ladro'; voi dite 'coltello' ed egli ha un primo impulso a dire 'gola', ma sa che è meglio non dirlo, così, dopo lunga esitazione dice 'forchetta'. La durata dell'esitazione mostra la sua resistenza» (B. Russell, *Storia delle idee nel XIX secolo*, Mondadori, Milano, 1969, 139 s.).

[23] V., fra i molti, F. Cordero, *Procedura* [2012], cit., 616; G. Di Chiara, *Il canto delle sirene: Processo penale e modernità scientifico-tecnologica: prova dichiarativa e diagnostica della verità*, in *Criminalia*, 2007, 19 s.; V. Grevi, *Prove*, in G. Conso-V. Grevi-M. Bargis, *Compendio di procedura penale*, 6 ed., Cedam, Padova, 313 s.; F. Grifantini, *sub art. 188*, in *Commentario breve al codice di procedura penale*, a cura di G. Conso-V. Grevi, Cedam, Padova, 2005, 530.

[24] G.F. Ricci, *Le prove atipiche*, Giuffrè, Milano, 1999, 543 s.

nell'atto di parola che dovrebbe vederla come partecipe di un processo comunicativo, degrada a mero oggetto di osservazione e di analisi [25]. L'aspetto vagamente inquietante è che qui l'atto di parola non venga più in rilievo come momento di dialogo e occasione di ascolto, ma sia analizzato e per così dire trattato 'chimicamente' allo scopo di estrarne informazioni alla stessa stregua con cui si effettua un esame ematologico o si ispeziona un organo.

Anche nella valutazione della testimonianza si tiene conto dei tratti paralinguistici del discorso; ma lì assumono rilevanza come elementi di riscontro ad un dialogo che si svolge nel contraddittorio e in cui si parla per essere creduti. Qui, invece, il rapporto si inverte perché non si risponde per essere ascoltati né per essere creduti; la parola non è più un mezzo comunicativo, ma serve da elemento di informazione solo attraverso l'analisi dei tempi di reazione (o, in altre tecniche, delle neuroimmagini). Nell'inevitabile bilancio tra costi e benefici, forse l'antico e illustre metodo della *cross-examination* resta ancora il metodo migliore per il controllo sulla credibilità del testimone.

9. *Divieti probatori*

Divieti probatori e regole di esclusione obbediscono a molteplici esigenze. Spesso il fine perseguito è il corretto accertamento dei fatti, talvolta il diritto di difesa o altri diritti individuali (come la tutela della segretezza delle comunicazioni, nei casi in cui è vietata l'intercettazione) o, ancora, una pluralità di valori. Ad esempio, la regola che nega valore probatorio alle dichiarazioni raccolte fuori dal contraddittorio non corrisponde soltanto ad un elementare esigenza difensiva, ma assume anche un valore epistemico, essenziale per la solida ricostruzione dei fatti. Contrariamente a quanto alcuni asseriscono, il contraddittorio non è nemico, ma alleato nella ricerca della verità: le sentenze con cui la Corte costituzionale ha liquidato le regole di esclusione probatoria dettate a tutela del contraddittorio appartengono alle pagine più desolanti della sua giurisprudenza[26].

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[25] Cfr. P. Ferrua, *La prova*, cit., 318 s.

[26] Sentenze nn. 24, 254 e 255 del 1992.

Il divieto probatorio è fissato dalle disposizioni processuali con formule che esprimono l'assenza di potere rispetto all'assunzione di una determinata prova, quali: 'non possono essere assunti come testimoni ...'; 'il testimone non può deporre sulle voci correnti nel pubblico'; 'non possono essere utilizzati, neppure con il consenso della persona interessata, metodi o tecniche idonei a influire sulla libertà di autodeterminazione ..'. In altri casi, il divieto deriva da regole di inclusione dalle quali lo si ricava *a contrario*; ad esempio, l'art. 266 comma 1 c.p.p. secondo cui 'l'intercettazione di conversazioni o comunicazioni telefoniche e di altre forme di telecomunicazioni è consentita nei procedimenti relativi ai seguenti reati ...' o l'art. 431 c.p.p. relativo agli atti probatori destinati a confluire nel fascicolo del dibattimento, sulla cui base è pronunciata la decisione finale.

Talvolta, il divieto probatorio è contemplato direttamente nella Costituzione, come accade con la regola del contraddittorio nella formazione della prova contenuta nell'art. 111 comma 4 Cost.: da questa regola - enunciabile nella forma 'se *x* è prova, allora *x* deve essere formato in contraddittorio' - si ricava deduttivamente per *modus tollens*, ossia negando il conseguente, che 'se *x* non è formato in contraddittorio, allora *x* non è prova'. In tal caso tocca alla legge ordinaria di uniformarsi al divieto probatorio, fissato dalla fonte gerarchicamente superiore, pena l'illegittimità delle disposizioni che lo non rispettino. Altro problema, che si affronterà in seguito, è se il divieto probatorio possa considerarsi implicito nella tutela costituzionale accordata a determinati diritti, al punto da rendere inutilizzabili le prove raccolte in violazione di quei diritti.

10. *Prove illegittimamente acquisite: a) 'acquisite' come 'ammesse'*

Ai sensi dell'art. 191 commi 1 e 2 c.p.p., «Le prove acquisite in violazione dei divieti stabili dalla legge non possono essere utilizzate/L'inutilizzabilità è rilevabile d'ufficio in ogni stato e grado del procedimento».

Nel progetto preliminare del codice di procedura penale la disposizione, alludendo a prove 'ammesse' in violazione dei divieti stabiliti dalla legge, risultava chiaramente volta a sanzionare esclusivamente la violazione dei divieti probatori. Nel testo definitivo la parola 'ammesse' è stata sostituita

con 'acquisite', espressione alquanto ambigua, che ha dato luogo a due distinte interpretazioni; ed è, anzi, verosimile che la sostituzione sia stata scelta a bella posta, allo scopo di lasciare aperta la possibilità di una duplice lettura.

La prima interpretazione, sostenuta principalmente da Franco Cordero[27], intende 'acquisite' come 'ammesse', con la conseguenza di limitare l'inutilizzabilità alla violazione dei divieti probatori, ossia alle prove inammissibili. Così inteso, l'art. 191 c.p.p. esprime una mera tautologia, assumendo un valore essenzialmente pedagogico[28]: la prova ammessa contro i divieti stabiliti dalla legge è ... inammissibile, quindi inutilizzabile. Viceversa, la violazione delle regole previste per l'assunzione di una prova in sé ammissibile è causa di invalidità solo in quanto lo preveda espressamente la legge, restando altrimenti fonte di semplice irregolarità.

Chiare le conseguenze in tema di rapporti tra perquisizione e sequestro e di indebita rivelazione del segreto professionale o d'ufficio. Il sequestro di cose pertinenti al reato a seguito di una perquisizione illegittima è valido perché è lo stesso art. 253 c.p.p. a stabilire che «l'autorità giudiziaria dispone il sequestro», *id est* l'acquisizione al processo, «del corpo del reato e delle cose pertinenti al reato necessarie per l'accertamento dei fatti», senza subordinarlo ad altra condizione.

Inutile invocare l'art. 191 c.p.p., perché in forza dell'art. 253 c.p.p. ogni cosa pertinente al reato è, tramite il sequestro, legittimamente acquisita al processo. L'illegittima acquisizione implica una prova non ammessa dalla legge, quale uno scritto anonimo, una testimonianza

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[27] *Prove illecite nel processo penale* [1961], ora in *Tre studi sulle prove penali*, cit., 177. V. inoltre, dello stesso A., per il codice abrogato, *Procedura penale*, 9 ed., Giuffrè, Milano, 1987, 479 s., nonché, per quello vigente, *Procedura penale*, 9 ed., Giuffrè, Milano, 2012, 628. Nello stesso senso v., fra gli altri, P. Ferrua, *La prova nel processo penale*, I, *Struttura e procedimento*, II ed., Torino, 2017, 251 s.; B. Lavarini, *Segreto d'ufficio e inutilizzabilità della prova*, in *Dir. pen. proc.*, 2004, 900 s.; G. Lozzi, *Lezioni di procedura penale*, 13 ed., Torino, 2018, 192 s.; A. Scella, *Prove penali e inutilizzabilità. Uno studio introduttivo*, Giappichelli, Torino, 2000. Per un quadro delle diverse opinioni, A. Camon, *Le prove*, in AA.VV., *Fondamenti di procedura penale*, Cedam, Milano, 2019, 301 s. Ad evitare equivoci, va ricordato che condizione generale di ammissibilità delle dichiarazioni rese nel processo è la libertà del volere: qualsiasi lesione della libertà di autodeterminazione implica l'inesistenza giuridica della dichiarazione resa.

[28] Cordero, *Procedura* [2012], cit., 629 s.

estorta; o, ancora, una dichiarazione raccolta fuori dal contradditorio e acquisita al dibattimento fuori dai casi in cui ne è ammessa l'utilizzazione. In quest'ultimo caso – che riguarda principalmente le informazioni testimoniali ricevute dagli organi inquirenti - si parla di 'inutilizzabilità fisiologica' perché l'atto è utilizzabile in sede di indagini preliminari ed è conforme alla fattispecie che lo disciplina; ma, rispetto al dibattimento, si è in presenza, come nelle altre ipotesi, di una prova inammissibile.

Analoghe le conclusioni in tema di rivelazione spontanea del segreto professionale o d'ufficio, in rapporto alla quale non si rinviene nel codice di rito alcun divieto probatorio. Per il segreto professionale, l'art. 200 c.p.p. dispone che i titolari «non poss[a]no essere obbligati a deporre» (se lo fossero, naturalmente, la prova sarebbe inammissibile, perché acquisita contro i divieti stabiliti dalla legge); per il segreto d'ufficio, invece, l'art. 201 c.p.p. contempla «l'obbligo di astenersi dal deporre». È probabile che, con la seconda formula, i compilatori del codice intendessero porre un divieto probatorio; ma, come gli apprendisti stregoni, non sono riusciti ad introdurlo. L'essere 'obbligati a non deporre' non equivale a 'non possono deporre'. La prima figura attiene ad un profilo esclusivamente soggettivo; la seconda ad un oggettivo divieto probatorio. 'Obbligati' dalla legge penale a non deporre sono tanto i titolari del segreto professionale quanto quelli del segreto d'ufficio; ma né per gli uni né per gli altri è contemplato un divieto probatorio nel senso proprio della parola, il quale implicherebbe formule - come per l'appunto 'non possono deporre' o ' essere assunti come testimoni' - tali da risolversi, per il giudice, nell'assenza del potere di assumere la deposizione. La spontanea rivelazione di un segreto professionale o d'ufficio costituisce, perciò, una prova validamente assunta.

11. Segue: *b) acquisite come 'ottenute'*

La seconda interpretazione – sostenuta *in primis* da Massimo Nobili[29] - intende 'acquisite' come 'ottenute' o 'scoperte' o 'raccolte',

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[29] M. Nobili, *La nuova procedura penale*, Clueb, Bologna, 1989, 157 s.; R. Gambini, *Perquisizioni, sequestri, esclusione probatoria: interpretazioni attuali e prospettive* de jure condendo, in *Diritto penale e processo*, 2005, 1289 s.; L.P. Comoglio, *Perquisizione illegittima ed inutilizzabilità derivata delle prove acquisite con susseguente sequestro*, in *Cass. pen.*, 1996, 1547 s.

con la conseguenza di rendere inutilizzabile ogni prova le cui modalità di ricerca e di assunzione non siano state rigorosamente osservate o che risulti legata da un nesso causale ad una qualsiasi violazione di legge (anche penale sostanziale o, persino, civile). In questa prospettiva l'illegittimità della perquisizione invalida il sequestro, determinando l'inutilizzabilità dei reperti: non è dubbio, infatti, che tra l'una e l'altro sussista un nesso di dipendenza causale, dato che il materiale sequestrato è stato 'scoperto' grazie alla perquisizione. Altrettanto vale per la spontanea rivelazione del segreto professionale o d'ufficio: la testimonianza risulta, infatti, 'ottenuta' attraverso la commissione di un reato.

Così inteso, l'art. 191 c.p.p., lungi dal ridursi ad una mera tautologia, assume un rilievo centrale, sviluppando l'effetto dirompente di sanzionare con l'inutilizzabilità del risultato qualsiasi irregolarità realizzata nel procedimento probatorio; ma, in compenso, diventano superflue le specifiche previsioni di invalidità stabilite in materia probatoria da singole disposizioni, in quanto già deducibili dalla norma generale.

Questa prospettiva, sulla scia dell'ordinamento angloamericano, viene spesso designata come teoria dei frutti dell'albero avvelenato. Ma è una metafora ingannevole nella parte in cui lascia intendere che la perquisizione produca le cose sequestrate, come l'albero i suoi frutti. Le cose rinvenute non sono né il frutto né il prodotto della perquisizione illegittima, ma semplicemente il suo esito occasionale; la perquisizione in sé, per illegittima che sia, non altera né contamina ciò che si scopre, la cui esistenza è indipendente dall'attività euristica [30]. Naturalmente è possibile che i reperti siano manipolati da chi effettua la perquisizione o ivi dolosamente collocati, ma abusi ed illegalità del genere possono realizzarsi anche in sede di perquisizioni regolarmente autorizzate.

12. *La prospettiva costituzionale*

Sul piano strettamente codicistico, a favore dell'interpretazione che circoscrive l'ambito sanzionatorio dell'art. 191 c.p.p. ai divieti probatori, ossia alle prove inammissibili, milita un semplice rilievo: in

[30] V. Bozio, *La prova atipica*, cit., 86, nota 121.

tanto una prova può ritenersi 'illegittimamente acquisita' ai sensi dell'art. 191 c.p.p. in quanto si riscontri un vizio nel mezzo acquisitivo, il quale nei casi ipotizzati è rappresentato dal sequestro del materiale rinvenuto o dalla deposizione spontaneamente resa sul segreto. Ma, poiché il sequestro è subordinato alla sola condizione che la cosa sia pertinente al reato e nessuna disposizione limita il potere di assumere la testimonianza di chi deponga spontaneamente su un segreto, non si vede come si possa concludere per l'illegittima acquisizione della prova ai sensi dell'art. 191 c.p.p.

Più complesso appare il discorso se svolto nella prospettiva dei principi costituzionali, che lasciano aperto un interrogativo, variamente affrontato e risolto in dottrina: può ritenersi o no compatibile con le disposizioni della Costituzione e della Convenzione europea, relative alla tutela della libertà personale e del domicilio, una disciplina che riconosca piena validità al sequestro delle cose rinvenute in una perquisizione illegittima? Ed altrettanto dicasi in rapporto alla deposizione spontaneamente resa in violazione del segreto professionale o d'ufficio.

A differenza di quanto accade per il contraddittorio, dove la regola di esclusione probatoria per le dichiarazioni raccolte nel segreto è deduttivamente ricavabile dal 4 comma dell'art. 111 Cost., né la Costituzione né la Convenzione europea, pur tutelando entrambe il domicilio e la libertà personale - definiti inviolabili dalla Costituzione - dettano espressi divieti probatori in questa materia. Questo, peraltro, non esclude che qualcuno possa ritenerli necessari per l'effettività delle garanzie costituzionali o convenzionali, sino a considerarli impliciti in quei testi. Ma, trattandosi pur sempre di divieti non contemplati da una norma processuale della Costituzione o della Convenzione, la via corretta per il giudice, che intenda affermarli, non è di immetterli a viva forza nel tessuto codicistico con acrobatiche interpretazioni creative, ma di sollevare la questione di legittimità costituzionale [31].

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[31] Sulla possibilità per il giudice di estromettere direttamente dal processo le c.d. prove incostituzionali, v. A. Camon, *Le prove*, cit., 303 s. A nostro avviso occorre evitare di confondere, sotto la denominazione di 'prova incostituzionale', due fenomeni ben distinti. Un conto è la prova acquisita in violazione di una regola di esclusione probatoria stabilita da una norma processuale della Costituzione, come, ad esempio, il quarto e il quinto comma dell'art. 111 Cost.; altro è la prova alla cui origine si riscontri la violazione di un qualsivoglia diritto costituzionalmente protetto, come la libertà personale o la tutela

La Corte costituzionale, nella motivazione di un lontano precedente (sentenza n. 34 del 1973), era parsa in qualche modo favorevole a ritenere sanzionabile in sede processuale la violazione dei precetti della Costituzione, quando aveva avvertito «il dovere di mettere nella dovuta evidenza il principio secondo il quale attività compiute in dispregio dei fondamentali diritti del cittadino non possono essere assunte di per se a giustificazione ed a fondamento di atti processuali a carico di chi quelle attività costituzionalmente illegittime abbia subito»; ma quell'*obiter dictum*, contenuto in una sentenza di rigetto, non ha avuto seguito ed è rimasto una mera affermazione di principio. Una dichiarazione di illegittimità costituzionale o una riforma legislativa, volte a negare valore alle prove raccolte in violazione dei diritti costituzionali (le cd prove incostituzionali), rappresenterebbero una sorta di via intermedia tra le opposte e più radicali letture dell'art. 191 c.p.p., messe a confronto nel paragrafo precedente.

Dal canto suo, la Corte europea dei diritti dell'uomo ha fornito, in varie occasioni, spunti per un'analoga interpretazione delle disposizioni convenzionali; e, di recente, ha censurato una perquisizione svolta in assenza di un qualsivoglia controllo giurisdizionale, rammentando «di avere ammesso che, in alcune circostanze, il controllo della misura contraria all'articolo 8 effettuato dai giudici penali fornisce una riparazione adeguata per l'interessato, dal momento che il giudice procede a un controllo effettivo della legittimità e della necessità della misura contestata e, se del caso, *esclude dal processo penale gli elementi di prova raccolti* (Panarisi c. Italia, n. 46794/99, parr. 76 e 77, 10 aprile 2007, Uzun c. Germania, n. 35623/05, parr. 71 e 72, CEDU 2010 (estratti), e Trabajo Rueda c. Spagna, n. 32600/12, par. 37, 30 maggio 2017)» (il corsivo è mio)[32].

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del domicilio. Se nel primo caso si può ipotizzare una diretta applicazione della norma costituzionale, nel secondo, quando l'inutilizzabilità non sia deducibile dal codice di rito, il giudice che intenda affermarla deve sollevare questione di legittimità costituzionale: v. in tal senso F. Caprioli, *Colloqui riservati e prova penale*, Giappichelli, Torino, 2000, 236 s.; F. Cordero, *Procedura* [2012], cit., 639; N. Galantini, *L'inutilizzabilità della prova nel processo penale*, Cedam, Padova, 1992, 204 s. Sulla categoria della 'prova incostituzionale' v. P. Tonini - C. Conti, *Il diritto delle prove penali*, 2 ed., Giuffrè, Milano, 2014, 104 s.

[32] Corte Europea dei diritti dell'uomo 27 settembre 2018, Brazzi c. Italia (Ricorso n. 57278/11), in *Questione giustizia* (*on line*), 15 gennaio 2019, con nota di D. Cardamone, *La sentenza della Cedu Brazzi c. Italia: sono arbitrarie le perquisizioni disposte dall'Autorità giudiziaria?*

13. *Un'eccepibile sentenza costituzionale di inammissibilità*

Con ordinanza del 12 dicembre 2017 il Tribunale di Lecce sollevava «la questione di illegittimità costituzionale dell'art. 191 c.p.p., per contrasto con gli articoli 2, 3, 13, 14, 24, 97 comma 3 e 117 Cost. (quanto a quest'ultima norma, con riferimento ai principi di cui all'art. 8 della Convenzione europea dei diritti dell'uomo), nella parte in cui non prevede che la sanzione dell'inutilizzabilità ai fini della prova riguardi anche gli esiti probatori, ivi compreso il sequestro del corpo del reato o delle cose pertinenti al reato, degli atti di perquisizione ed ispezione compiuti dalla p.g. fuori dei casi tassativamente previsti dalla legge o comunque non convalidati dall'A.G. con provvedimento motivato, nonché la deposizione testimoniale in ordine a tali attività».

Si apriva, così, un'ottima occasione per sciogliere un ricorrente interrogativo: la Corte avrebbe finalmente detto con chiarezza se le garanzie sulla inviolabilità della libertà personale e del domicilio richiedessero o no per la loro effettività, accanto alle sanzioni penali e disciplinari, la messa al bando delle prove raccolte in loro spregio.

Attesa delusa perché la Corte costituzionale con sentenza n. 219 del 2019 ha dichiarato inammissibile la questione: il giudice *a quo* avrebbe avanzato «una richiesta fortemente 'manipolativa', pretendendo di desumere l'automatica inutilizzabilità degli atti di sequestro, attraverso il 'trasferimento' su di essi dei vizi che affliggerebbero gli atti di perquisizione personale e domiciliare dai quali i sequestri sono scaturiti».

Detto con il massimo rispetto, dissentiamo fermamente dalla dichiarazione di inammissibilità.

La Corte concorda sulla circostanza che l'interpretazione restrittiva dell'art. 191 c.p.p. assunta dal giudice di merito a base del quesito di legittimità costituisca diritto vivente; e, anzi, ritiene che sia l'unica ragionevolmente sostenibile a fronte del dato testuale. Proprio per questo vi sarebbero stati, a nostro avviso, tutti i presupposti per addivenire ad una

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Sul regime delle prove assunte in violazione delle norme convenzionali v. A. Cabiale, I *limiti alla prova nella procedura penale europea*, Cedam, Milano-Padova, 2019, 133 s. Sulla difficoltà di desumere regole di esclusione probatoria dall'art. 8 CEDU, v. M. Daniele, *Indagini informatiche lesive della riservatezza. Verso un'inutilizzabilità convenzionale?*, in *Cass pen.*, 2013, 367 s.

decisione sul merito, di accoglimento o di rigetto a seconda dell'indirizzo seguito. Il rigetto della questione come infondata o manifestamente infondata - che, come vedremo, viene in qualche modo avvallato da un *obiter dictum* contenuto nella motivazione dell'inammissibilità - avrebbe semplicemente accertato la compatibilità della disciplina vigente con la Costituzione, senza minimamente imporla come una scelta necessaria; quindi, senza pregiudicare la libertà del legislatore di intervenire in futuro, estendendo la inutilizzabilità anche alle cose illecitamente rivenute[33].

Quanto all'eventuale decisione di accoglimento, non si vede cosa vi sarebbe stato di 'manipolativo' o comunque di estraneo ai poteri della Corte nel dichiarare illegittimo l'art. 191 c.p.p. nella parte in cui non vieta di utilizzare i reperti rinvenuti a seguito di una perquisizione illegittima; o nel dichiarare illegittimo, in via principale o derivata, l'art. 253 c.p.p. nella parte in cui consente il sequestro delle cose pertinenti al reato anche in caso di perquisizioni illegittime.

La dichiarazione di illegittimità sarebbe discesa 'a rime obbligate' dalla ritenuta insufficienza delle sanzioni disciplinari e penali a garantire la tutela del domicilio e della libertà personale in sede processuale. A ritenere manipolativa una sentenza del genere, lo sarebbero in buona parte le sentenze di accoglimento; e, in ogni caso, lo sarebbe meno delle numerose sentenze additive emanate nel passato (si pensi, ad esempio, a Corte cost. n. 361 del 1998 relativa all'art. 513 c.p.p. o, per citare una decisione successiva a quella in esame, a Corte cost. n. 242 del 2019 relativa al c.d. suicidio assistito, che, per quanto lodevole, ben difficilmente può dirsi imposta 'a rime obbligate' dalle disposizioni costituzionali).

14. *Gli obiter dicta della Corte costituzionale*

Pur dichiarando inammissibile la questione, la Corte costituzionale non rifugge da una serie di *obiter dicta*[34], uno dei quali lascia intendere,

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[33] Per un auspicio in questo senso, v. G. Spangher, *"E pur si muove": dal* male captum bene retentum *alla* exclusionary rules, in *Giur. cost.*, 2001, 2829.

[34] Nelle sentenze di inammissibilità gli *obiter dicta* attinenti al merito si sono resi sempre più frequenti negli ultimi tempi. Un significativo esempio è costituito dalla sentenza Corte cost. n. 132 del 2019 che, dopo avere dichiarato

in forma abbastanza trasparente, l'infondatezza della questione sollevata. Alludiamo, in particolare, al passo in cui la Corte sostiene «che se è vero quanto afferma il giudice *a quo* a proposito del fatto che le regole che stabiliscono divieti probatori riposano essenzialmente sulla esigenza di introdurre misure volte anche a disincentivare possibili 'abusi' [...] è altrettanto vero che un simile obiettivo viene in ogni modo perseguito dall'ordinamento attraverso la persecuzione diretta, in sede disciplinare o, se del caso, anche penale, della condotta 'abusiva' che possa essere stata posta in essere dalla polizia giudiziaria».

Perché la Corte, sviluppando questa prospettiva, non ha dichiarato infondata la questione? Perché si è preferito scrivere nella motivazione di una sentenza di inammissibilità ciò che meglio si sarebbe adattato ad una dichiarazione di infondatezza? Non è difficile immaginare i motivi.

Anzitutto, il timore di contraddire quel lontano precedente già menzionato sull'impossibilità di porre a fondamento degli atti processuali «attività compiute in dispregio dei fondamentali diritti del cittadino». Sicuramente ha avuto anche il suo peso la recente sentenza della Corte EDU che ha ritenuto insufficienti le garanzie del nostro ordinamento contro il rischio di perquisizioni arbitrarie, data l'assenza di adeguati controlli sia *ex ante* sia *ex post*[35], accennando alla possibilità che il giudice escluda dal processo le prove raccolte; non si dimentichi che, secondo un assunto della Corte costituzionale, poi parzialmente ritrattato, le garanzie della Convenzione europea dovrebbero essere applicate da tutti i giudici nazionali come interpretate dalla Corte di Strasburgo[36]. Infine, una certa

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inammissibile una questione di legittimità costituzionale relativa all'art. 525 c.p.p., si è prodigata in una serie di suggerimenti al legislatore sull'opportunità di introdurre deroghe alla rinnovazione delle prove in caso di rinvio del dibattimento davanti ad un diverso collegio giudicante; il tutto, senza adombrare alcun profilo di illegittimità della disciplina vigente: al riguardo v. i contributi di P. Ferrua - O. Mazza - D. Negri - L. Zilletti, nel *Confronto di idee su: La post immediatezza nella nuova giurisprudenza costituzionale (a margine della sentenza n. 132 del 2019)*, in *Arch. pen. (on line)*, 2019, 2. In una corretta ripartizione dei poteri i suggerimenti della Corte costituzionale al legislatore si giustificano nella stretta misura in cui siano diretti a prevenire o ad eliminare conflitti con i precetti della Costituzione.

[35] Corte EDU 27 settembre 2018, Brazzi c. Italia, cit.

[36] Così le sentenze 'gemelle' (Corte cost. n. 348 e n. 349 del 2007); l'assunto sul carattere vincolante delle interpretazioni della Corte europea è, a nostro

influenza va ascritta anche al timore che un'esplicita dichiarazione di infondatezza potesse incoraggiare abusi da parte della polizia giudiziaria nello svolgimento di ispezioni o perquisizioni.

Comprendiamo l'imbarazzo della Corte, stretta tra quei precedenti sull'esigenza di un pieno rispetto nel processo dei diritti fondamentali e una dichiarazione di illegittimità, capace di mandare in fumo prove di essenziale rilevanza per l'accertamento di gravi reati; al punto che la dichiarazione di inammissibilità le è forse parsa la soluzione ideale per un *commodus discessus*.

Ma a chi, se non alla Corte costituzionale, compete il potere di dire con chiarezza se le garanzie della libertà personale e del domicilio implichino o no, in caso di violazione, l'irrilevanza delle prove così ottenute? Non è una risposta semplice, perché vi sono ragioni dall'una e dall'altra parte, ma è precisamente la risposta che ci si attende dal giudice delle leggi, custode della Costituzione.

Con la dichiarazione di inammissibilità la Corte raggiunge, a modo suo, un doppio risultato: si sottrae alle pesanti critiche di scarsa sensibilità per la lesione dei diritti costituzionali, che sicuramente si sarebbero indirizzate ad una eventuale sentenza di rigetto nel merito; ma, al tempo stesso - anche in forza di quell'*obiter dictum* sulla sufficienza delle sanzioni penali e disciplinari - paralizza, con un energico effetto dissuasivo, ulteriori eccezioni di legittimità sul medesimo tema.

avviso, improvvido per due motivi. Anzitutto perché lesivo del principio di soggezione del giudice alla sola legge. Poi perché trascura la fondamentale distinzione tra motivazione e dispositivo: il dispositivo, in quanto comando, è senz'altro vincolante, ma la motivazione - dove è contenuta l'interpretazione della legge - in quanto esercizio di ragione e non comando, non esercita alcuna efficacia vincolante, risultando semplicemente più o meno persuasiva. Sul tema v., da ultimo, P. Ferrua, *Il giusto processo tra governo della legge ed egemonia del potere giudiziario*, in *Dir.pen.proc.*, 2020, 5 s., e, in precedenza, ID. , *Il contraddittorio nella formazione della prova a dieci anni dalla sua costituzionalizzazione: il progressivo assestamento della regola e le insidie della giurisprudenza della Corte europea*, in *Arch. pen.*, 2008, n. 3, 29. In senso adesivo verso le sentenze 'gemelle' v., invece, G. Ubertis (*La "rivoluzione d'ottobre" della Corte costituzionale e alcune discutibili reazioni*, in *Cass. pen.*, 2012, 20 s.; A*ncora sull'efficacia della giurisprudenza di Strasburgo*, in *Dir.pen. proc.*, 2013, 863 s.; *La Corte di Strasburgo quale garante del giusto processo*, *ivi*, 2010, 372 s.), il quale mi ha ripetutamente criticato con una passione davvero straordinaria.

Se la richiesta del giudice *a quo* era, come afferma la Corte, fortemente manipolativa, la possibilità di eccepire l'illegittimità dell'art. 191 c.p.p. quanto ai rapporti tra perquisizione e sequestro - ma per analoghe ragioni anche in ordine alla violazione del segreto professionale o di ufficio - di fatto è persa per sempre: non perché si sia accertata la legittimità della disciplina vigente, ma perché la stessa *fin de non recevoir* verrebbe opposta a nuove richieste, inevitabilmente destinate ad essere ritenute 'manipolative'.

La discussione proseguirà in dottrina; e, tutto lo lascia pensare, anche nella stessa giurisprudenza dove, come già accaduto, qualche giudice, in dissenso dall'indirizzo dominante e sotto l'alibi della 'prova incostituzionale', troverà modo di 'manipolare' - stavolta il termine è appropriato - il testo dell'art. 191 c.p.p., dichiarando inutilizzabili le cose rinvenute in violazione delle regole sulle perquisizioni o le testimonianze spontaneamente rese sul segreto professionale o d'ufficio. Resta il rammarico che sia sfumata una preziosa occasione per dire parole di chiarezza su una questione di grande rilevanza e, da tempo, al centro di accanite discussioni.

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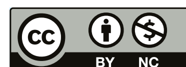

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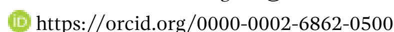
Exclusion without trial? Exclusion of evidence and abbreviated procedures

Exclusão sem julgamento? Ilicitude probatória e procedimentos abreviados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Abstract: Many legal systems have adopted rules that lead to the exclusion of evidence that has been obtained in violation of procedural rules. Exclusion normally occurs before the trial begins or even during trial. However, the majority of criminal cases are today not resolved through a full trial but by some kind of abbreviated procedure, e.g., through a guilty plea or a written penal order. In this article, the author claims that exclusionary rules should, by and large, also apply in such abbreviated proceedings. Practical obstacles could be overcome by a more active involvement of defense counsel in abbreviated proceedings.

Keywords: abbreviated proceedings; exclusionary rule; guilty plea; penal order.

Resumo: *Muitos sistemas jurídicos adotaram normas que acarretam a exclusão de provas que tenham sido obtidas com violação a regras procedimentais. A exclusão normalmente ocorre antes do início do processo ou mesmo durante o seu transcorrer. Contudo, a maioria dos casos criminais atualmente não são resolvidos por meio de um processo completo, mas por alguma espécie de procedimento abrevia, por exemplo, um acordo penal ou uma ordem penal em procedimento por decreto. Neste artigo, sustenta-se que as normas de exclusão probatória devem ser amplamente aplicadas em procedimentos abreviados.*

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Obstáculos práticos podem ser superados por um envolvimento mais ativo da defesa técnica nos procedimentos abreviados.

Palavras-chave: *procedimentos abreviados; ilicitude probatória; acordos penais; ordem penal por decreto.*

I. Introduction

The exclusion of illegally obtained evidence means that the relevant information or items cannot be presented at the trial and the judgment must not be based on them. In recent decades, however, a full trial has in many jurisdictions become a statistically exceptional way of disposing of criminal cases.[2] This fact raises the question whether exclusionary rules are relevant if a case is disposed of without trial. If a criminal case takes a "shortcut to justice", does inadmissibility of evidence still play a role?

In this article, I do not intend to deal with this question from the perspective of a single legal system but will attempt to elaborate on the general function of exclusionary rules in abbreviated procedures and will suggest possible solutions.

II. Criminal Justice without Trial

If a case goes to trial, it is normally the court that rules on the admissibility of evidence that may be subject to exclusion. Many legal systems have, however, implemented ways of sanctioning offenders without holding a full trial on the charges. There exists a broad array of such abbreviated proceedings in different jurisdictions.[3] In some countries,

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2 For example, in Germany only 10% of cases reported to the police with a known suspect are eventually brought to trial. Whereas 73% of the reported cases are dismissed for insignificance or lack of sufficient evidence, 16% are disposed of through abbreviated proceedings. See Thomas Weigend, No News is Good News: Criminal Sentencing in Germany since 2000, in: Michael Tonry (ed.), Sentencing Policies and Practice in Western Countries, pp. 83-106 (2016) at 92.

3 For an overview see Gwladys Gilliéron, Comparing Plea Bargaining and Abbreviated Trial Procedures, in: Darryl K. Brown, Jenia I. Turner and Bettina

for example in England and the United States,[4] the defendant's formal plea of guilty (often entered after negotiations with the prosecution) obviates the need for the taking of evidence in court. Other jurisdictions provide for the option of mini trials in which a judge takes cognizance of the results of the police investigation, any statement of the defendant, and possibly the testimony of individual witnesses and passes judgment on that basis.[5] Another option is a written judgment issued by the judge based on a proposal of the prosecutor, which becomes final unless the defendant files an objection within a short period of time.[6] Germany provides for the option of a "regular" trial in which the defendant's confession provides a shortcut to conviction and the imposition of a sentence that has been agreed upon previously.[7] Some countries, like Brazil, prefer to permit formal conviction only on the basis of a trial but provide for informal sanctioning by way of conditional dismissal of prosecution.[8]

If any of such abbreviated proceedings are employed, the question arises whether illegally obtained evidence that would be subject to exclusion at trial may be taken into consideration for the disposition of the case.

III. Two Case Scenarios

Two case scenarios may demonstrate the problem:

Case 1 - Pillow talk: S is suspected of dealing with illegal drugs. Without the required judicial warrant, the police secretly install a hidden

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Weißer (eds.), The Oxford Handbook of Criminal Process, 2019, pp. 703-727.

4 See Jenia I. Turner, Plea Bargaining Across Borders, pp. 7-72 (2009); Mary Vogel, Plea Bargaining under the Common Law, in: Darryl K. Brown, Jenia I. Turner and Bettina Weißer (eds.), The Oxford Handbook of Criminal Process, 2019, pp. 729-760.

5 See, e.g., Art. 438 et seq. Italian Code of Criminal Procedure (*Giudizio abbreviato*).

6 See, e.g., Arts. 495 – 495-6 French Code of Criminal Procedure (*Ordonnance pénale*).

7 See § 257c German Code of Criminal Procedure (*Verständigung*).

8 Brazilian Lei 9.099/95 Art. 89 (suspensão condicional do processo); see also § 153a German Code of Criminal Procedure.

microphone in S's bedroom and put all conversations on tape. Talking to his wife, S mentions that he received a shipment of cocaine and put it in the garage. Based on this taped conversation, the police break into S's garage the next day and confiscate a small amount of cocaine. S is indicted for the illegal sale of controlled substances. He agrees to have his case resolved in an abbreviated proceeding operational in the relevant jurisdiction. In this procedure, the prosecution offers the evidence collected during the investigation to a single judge, who affords S the opportunity to be heard. S elects to remain silent, and the judge then proceeds directly to judgment, basing S's conviction and sentence on the cocaine found in his garage.

Case 2 - The burglar's confession: S is suspected of having committed a burglary. Police officer P arrests him and interrogates him in the police station in the absence of a lawyer. When S denies his involvement in the burglary, P says that he and his colleagues have certain means to make him talk, implying physical violence. S thereupon confesses to the crime. The prosecutor files an indictment, charging S with armed burglary. Shortly before trial, S's defense lawyer D approaches the prosecutor and asks for a "deal". The prosecutor mentions that S had already confessed to the crime at the police station and therefore declines to reduce the charge; but she offers not to oppose the lawyer's request for a lenient sentence if S accepts his responsibility in court. In a judicial hearing, S formally admits his guilt. Based on the admission of guilt, S is convicted of armed burglary and receives a lengthy prison sentence.

It may be assumed that the key evidence (the cocaine in Case 1 and the confession in Case 2) would be inadmissible at a trial because of serious violations of S's procedural rights.[9] But does the fact that the evidence was obtained illegally also invalidate the convictions of S in the special procedures used? In addressing this question, I will first briefly recall the rationales for the exclusion of illegally obtained evidence. In a second step, I will ask whether these rationales apply to abbreviated procedures and to dispositions without trial. Since the answer will – with

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[9] Since the cocaine in Case 1 is evidence only derived from the illegal taping of the conversation between S and his wife, not every jurisdiction may provide for automatic exclusion. However, given the blatant violation of S's privacy it may be safe to assume that most judges would exclude the cocaine from the trial.

some qualifications – be in the affirmative, the final step of this article will be to look for impediments to exclusion of evidence in abbreviated procedures and for ways to overcome these obstacles.

IV. Rationales for Excluding Evidence

A vast amount of literature has dealt with the rationale of the "exclusionary rule".[10] The starting point for the relevant considerations is the fact that "excluding" evidence reduces the factual basis of the court's judgment and thus interferes with the court's mission of finding the "truth" and basing the judgment on that finding.[11] Excluding relevant evidence with probative value creates an obstacle to truth-finding and must therefore be regarded as an exception, especially since exclusion is often based on extra-procedural interests.[12]

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[10] See, e.g., Guido Calabresi, The Exclusionary Rule, 26 Harvard Journal of Law and Public Policy 111-118 (2003); Kai Ambos, Beweisverwertungsverbote, 2010; Stephen C. Thaman (ed.) Exclusionary Rules in Comparative Law (2013); Jenia I. Turner, The Exclusionary Rule as a Symbol of the Rule of Law, 67 SMU Law Review 821–833 (2014); Christopher Slobogin, A Comparative Perspective on the Exclusonary Rule in Search and Seizure Cases, in: Jacqueline Ross and Stephen Thaman (eds.), Comparative Criminal Procedure (2016), pp. 280-308; Jenia I. Turner, Limits on the Search for Truth in Criminal Procedure: A Comparative View, ibid., pp. 35-73; Sabine Gless and Thomas Richter (eds.), Do Exclusionary Rules Ensure a Fair Trial?, 2019; Shawn Boyne, Truth or Justice: A Comparative Look at the Exclusionary Rule in Germany and the United States, in: Arnd Sinn et al. (eds.), Populismus und alternative Fakten – (Straf-)Rechtswissenschaft in der Krise? (2020), pp. 19-46.

[11] See Stephen C. Thaman, Balancing Truth against Human Rights, in: Stephen C. Thaman (ed.), Exclusionary Rules in Comparative Law, 2013, pp. 403-446; Jenia I. Turner, Regulating Interrogations and Excluding Confessions in the United States, in: Sabine Gless and Thomas Richter (eds.), Do Exclusionary Rules Ensure a Fair Trial? Springer Open 2019, p. 93 at 104-107 (citing examples of "balancing" from United States case law).

[12] See German Federal Constitutional Court, Judgment of 7 Dec. 2011, 2 BvR 2500/09, 2 BvR 1857/10, 130 Entscheidungen des Bundesverfassungsgerichts 1, marginal notes 111-115; German Federal Court of Justice, Judgment of 13 Jan. 2011, 3 StR 332/10, 56 Entscheidungen des Bundesgerichtshofes in Strafsachen 127 at 132.

Three main rationales have been suggested to justify the exclusion of evidence:

(1) Deterrence of police misconduct

(2) Protection / vindication of suspects' procedural rights

(3) Maintaining the integrity of court proceedings.[13]

The first two of these considerations look backward to the violation of legal rules that has occurred and aim at providing some kind of compensation. The police officer is "punished" for his fault by being told that the illegally obtained evidence is ignored by the court and – in the extreme case – that the defendant is acquitted for lack of sufficient other evidence. At the same time, the police officer and his colleagues are expected to realize that a violation of procedural rules "doesn't pay" and that it is better to act lawfully in the future.[14] With regard to the defendant, in most cases the violation of his rights (the right to privacy in Case 1 and the privilege against forced self-incrimination in Case 2) cannot be undone. But the exclusion of evidence may give him a double (immaterial) compensation. The decision to exclude the results of the illegal act from the evidence implies a judicial finding that his rights were violated; and at the same time exclusion reduces the risk that he is convicted.[15]

Both of these rationales generally provide a legitimate basis for excluding evidence, but the consequences may appear excessive if the violation of procedural law was not grievous and if the exclusion of the

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[13] For a comparative overview of the use and problems of these rationales see Jenia I. Turner and Thomas Weigend, The Purposes and Functions of Exclusionary Rules, in: Sabine Gless and Thomas Richter (eds.), Do Exclusionary Rules Ensure a Fair Trial? pp. 255-282 (2019). A brief comparative account of rationales for the exclusion of evidence can also be found in Yukun Zong, Beweisverwertungsverbote im Strafverfahren, 2018, pp. 447-458.

[14] See Yvonne Marie Daly, Judicial Oversight of Policing: Investigations, Evidence and the Exclusionary Rule, 55 Crime, Law and Social Change 199-215 (2011); referring to Swiss law see Sabine Gless and Jeannine Martin, Water Always Finds Its Way, in: Michele Caianiello and Jaqueline S. Hodgson (eds.), Discretionary Criminal Justice in a Comparative Context, 2015, 159-184 at 171.

[15] For a more thorough analysis see Andrew Ashworth, Excluding Evidence as Protecting Rights, 3 Criminal Law Review 723-735 (1977).

particular piece of evidence means that the defendant will have to be acquitted in a case of serious crime. In addition, it is not self-understood that exclusion of evidence will indeed have a positive impact on future police conduct. Any positive effect depends on several conditions, e.g., whether the police officer in question learns of the exclusion and whether he cares about the outcome of the trial after the case has been "cleared" for the purposes of the police.[16] This potential excessiveness explains the rule in some jurisdictions that exclusion of illegally obtained evidence is not automatic but should depend on a balancing of the interests of the individual that was wronged against the interests of law enforcement. Exclusion will then be ordered only if it is more important, in the individual case, to vindicate the defendant's procedural rights and to deter the police from repeating the fault than to convict the defendant of the crime charged.[17] On the other hand, permitting the court to perform this balancing operation introduces an element of vagueness and unpredictability into the process. This also reduces the deterrent effect, because the police may be encouraged to employ illicit methods and hope for a "favorable" outcome of the balancing process and the eventual admission of the incriminating evidence.

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[16] For a seminal analysis see Randy E. Barnett, Resolving the Dilemma of the Exclusionary Rule, 32 Emory Law Journal 937 at 947-959 (1983). For further discussion see Christopher Slobogin, Why Liberals Should Chuck the Exclusionary Rule, 1999 University of Illinois Law Review 363-446; Drury D. Stevenson, Entrapment and the Problem of Deterring Police Misconduct, 37 Connecticut Law Review 67 at 77-79 (2004); Kit Kinports, Culpability, Deterrence, and the Exclusionary Rule, 21 William and Mary Bill of Rights Journal 821-856 (2013). For empirical findings on deterring police misconduct see Christopher J. Harris and Robert E. Worden, The Effect of Sanctions on Police Misconduct, 60 Crime & Delinquency 1258-1288 (2014).

[17] For Germany, see Federal Constitutional Court, Decision of 13 May 2015, 2 BvR 616/13, marginal notes 41, 42; Federal Court of Justice, Judgment of 21 Feb. 1964, 4 StR 519/63, 19 Entscheidungen des Bundesgerichtshofes in Strafsachen 325; Lutz Meyer-Goßner and Bertram Schmitt, Strafprozessordnung, 63rd ed. 2020, Einleitung marginal note 55a. For Austria, see § 166 subsec. 1 no. 2 Code of Criminal Procedure (illegally obtained statements of the accused or of a witness must not be used as evidence "if exclusion is indispensable for compensating for the violation"). But see Art. 171 § 6 Polish Code of Criminal Procedure (absolutely excluding statements of the accused or of a witness made under conditions precluding the possibility of free expression).

But what, then, about the third rationale, i.e., maintaining the integrity of court proceedings?[18] This aspect does not aim at making up for past faults but focuses on the present trial. Assume that there is a written confession in Case 2 and that there are blood stains on the document as a result of a severe beating of the defendant by the interrogating officer. Wouldn't it run counter to the concept of a court of law to use this confession as evidence? The same notion may apply in the Case 1 situation: Will a court of law be willing to use evidence that was obtained through illegally eavesdropping on the defendant's bedroom conversation with his wife? This rationale for excluding evidence has the advantage of not being based on extra-procedural concerns; it promotes the intrinsic goal of conducting a fair process. It must be conceded, however, that the "integrity of the court" approach, like the proportionality balancing mentioned above, does not have clear contours. It is theoretically conceivable to claim that any procedural fault so taints the ensuing evidence that a court should not use it. But that argument is difficult to maintain if the fault was technical and unintentional, for example, a search based on a judicial warrant the temporal validity of which had just expired. Thus, if the seriousness of the procedural fault determines the admissibility of evidence under this rationale, a normative judgment is necessary and a measure of uncertainty again enters the legal analysis.

Summing up, it appears that exclusionary rules are undergirded by a number of concurring rationales. They have in common that they provide a strong basis for excluding evidence obtained by means of serious violations of important procedural rights. They leave open, however, a gray area of minor or merely technical violations of procedural rules, where exclusion of important evidence may not be warranted under all circumstances, especially if the piece of evidence in question is crucial for the determination of the truth.

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[18] For analysis of this rationale see Robert M. Bloom and David H. Fentin, 'A More Majestic Conception', 13 University of Pennsylvania Journal of Constitutional law 47-80 (2010); Jenia I. Turner, The Exclusionary Rule as a Symbol of the Rule of Law, 67 SMU Law Review 821-833 (2014); Hock Lai Ho, The Fair Trial Rationale for Excluding Wrongfully Obtained Evidence, in: Sabine Gless and Thomas Richter (eds.), Do Exclusionary Rules Ensure a Fair Trial? pp. 283-305 (2019). See also the practitioner's perspective on this issue by Susanne Knickmeier, ibid. pp. 329-347.

V. Abbreviated Forms of Disposing of Criminal Cases

1. General Applicability of Exclusionary Rules

Let us now turn to the question of whether exclusionary rules may or should be applied in abbreviated proceedings. If we consider the various rationales of exclusionary rules, it appears obvious that there exists no persuasive reason for limiting their applicability to cases in which a full trial takes place. Any such limitation would diminish the incentive for police to abide by procedural law, because they could hope that the evidence obtained illegally could lead to the conviction of the suspect in an abbreviated proceeding. There would be no vindication or compensation for the violation of the suspect's rights. And if a sanction is imposed on the suspect in a criminal process, the officials involved in that proceeding would have to take into account the tainted piece of evidence, thereby putting into doubt the legitimacy and integrity of the process. If the rationales of the exclusionary rule apply to abbreviated proceedings, so should the exclusionary rule itself. In fact, any evidence that is inadmissible at trial should be instantly removed from the process. Ideally, such evidence would not only be inadmissible in any court proceeding but prosecutors should also disregard it when deciding on whether to file an indictment.

By extending a strict exclusionary rule to abbreviated proceedings, however, the problem of reducing the factual basis of the decision is transferred to these proceedings. In other words, the (remaining) truth-orientation of abbreviated criminal procedures is damaged inasmuch as relevant evidence is removed from the consideration of the decision-maker. To reduce this problem, the arguments in favor of exclusion of tainted evidence should be weighed against the interest in basing the decision on an approximation to the "real" facts of the case. This leads to a further complication, however: A proper balancing of interests can take place only at the trial stage, when all facts about the violation have been disclosed and it has become clear to what extent the evidence in question is needed for arriving at a fair disposition of the case. Yet, the prosecutor must make her decision on a provisional factual basis and without the benefit of argument from the defense. Under these circumstances, it is

not unethical for a prosecutor to rely on evidence of doubtful legality and present it in court, waiting to see whether the defense objects and what the judge's ruling may be.

2. Different Types of Abbreviated Proceedings

For assessing the operation of the exclusionary rule in abbreviated proceedings, it is useful to take a closer look at the existing variants of such proceedings, which all have in common that a sanction is imposed on the offender without a complete presentation of all relevant evidence in a public trial.[19] Given the vast array of different criminal proceedings without a full trial, there is no point in making general statements about "the" abbreviated criminal process. Yet, we can distinguish three basic types of abbreviated proceedings:

(a) Prosecutorial sanctioning

Forms of prosecutorial sanctioning can be found in many legal systems. Although prosecutors normally cannot make formal findings of guilt and cannot impose criminal punishment, they dispose of tools such as deferred prosecution, conditional dismissal of charges, informal probation, and so-called transactions.[20] They all have in common that a sanction of some kind (a fine, a compensation payment to the victim, or a probation-type set of obligations) is imposed on a suspect with his consent; if the obligation is fulfilled, there will be no formal prosecution and trial. The obligation imposed on the suspect can only be interpreted

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[19] On the worldwide spread of abbreviated procedures see Máximo Langer, From Legal Transplants to Legal Translations: The Globalization of Plea Bargaining and the Americanization Thesis in Criminal Procedure, 45 Harvard International Law Journal (2004), pp. 1-62.

[20] See, e.g., Art. 216bis Belgian Code of Criminal Procedure ("transaction" between prosecutor and suspect over payment of money for dismissal of prosecution); Brazilian Lei 9.099/95 Art. 89 (suspensão condicional do processo); Art. 167 sec. 2 Dutch Code of Criminal Procedure; § 153a German Code of Criminal Procedure (conditional dismissal of prosecution); Art. 342 Polish Code of Criminal Procedure (conditional discontinuance of prosecution).

as a response to the offense he is alleged to have committed although his guilt has not been proved in court. In this type of proceeding, there is no presentation of evidence and no formal hearing. Still the question remains to what extent the prosecutor needs a factual basis for her decision and how that factual basis can be created.[21]

(b) Formal Acceptance of Guilt

The second type of abbreviated proceedings can be exemplified by the "guilty plea" typical of the Anglo-American criminal process.[22] In accordance with a long common law tradition, the defendant at the beginning of the judicial process is asked to declare whether he is guilty or not guilty. If his plea is "guilty" and if the judge accepts the plea after a summary examination of its voluntariness and its "factual basis",[23] no evidence concerning the defendant's guilt will be presented in court; his formal declaration is regarded as a sufficient basis for the court's finding of guilt. The court will then proceed directly to sentencing the defendant. The defendant's plea of guilty is often preceded by negotiations between the prosecutor and the defense lawyer. The prosecutor will usually offer some incentive for the defendant to plead guilty, such as a reduction of the original charges or a recommendation for a lenient sentence. On the

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[21] In Germany, commentators demand only suspicion sufficient for filing an indictment; Herbert Diemer, in: Rolf Hannich (ed.), Karlsruher Kommentar zur Strafprozessordnung, 8th ed. 2019, § 153a marginal note 11; Lutz Meyer-Goßner and Bertram Schmitt, Strafprozessordnung, 63rd ed. 2020, § 153a marginal note 7.

[22] For overviews see Jacqueline Ross, The Entrenched Position of Plea Bargaining in United States Legal Practice, 54 American Journal of Comparative Law 717-732 (2006); Jenia I. Turner, Plea Bargaining across Borders, 2009, pp. 7-72 (U.S.); Stephen Thaman, World Plea Bargaining (2010); Marc L. Miller, Ronald F. Wright, Jenia I. Turner, and Kay Levine, Criminal Procedures: Prosecution and Adjudication, 6th ed. 2019, pp. 309-396.

[23] In the United States, the "factual basis" is normally "examined" perfunctorily, and in some States judges rely on a mere written declaration that such a basis exists. See Tina M. Zottoli et al., State of the States: A Survey of Statutory Law, Regulations and Court Rules Pertaining to Guilty Pleas Across the United States, 37 Behavioral Sciences and the Law 388-434 (2019).

other hand, the prosecutor may point out that a very severe sentence might be imposed if the defendant goes to trial and is found guilty.

In other legal systems, where the notion of "pleading guilty" has not been established, a functional equivalent is a joint motion of the prosecutor and the defendant to the judge for the imposition of an agreed-upon sentence.[24] The judge is typically free to accept or reject the proposal. In the latter case, a trial will be held unless another disposition can be found. As in the guilty plea system of the common law jurisdictions, no evidence is taken in court, but the acceptance of the sanction by the defendant is seen as a sufficient legitimization of the proposed disposition.[25]

(c) Penal Orders and Mini Trials

The common denominator of the third type of abbreviated proceedings is the fact that the defendant's conviction is based on the results of the pretrial investigation. This kind of disposition can take several forms. One common sub-type is the so-called penal order[26]: The prosecutor drafts a judgment including a sentence based on the police file of the investigation. The draft order is then forwarded to a single judge, who can sign or reject it.[27] If the judge approves and signs the order, it

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[24] See, e.g., Arts. 495-7 – 495-16 French Code of Criminal Procedure (comparution sur reconnaissance préalable de culpabilité); Art. 335 Polish Code of Criminal Procedure.

[25] In other jurisdictions, negotiated dispositions are limited to cases in which the defendant is willing to provide incriminating evidence on other offenders; see Brazilian Law 12.850/2013. Although the vocabulary of "guilty plea" is used in this connection, the dismissal or reduction of charges here is not tied to an acceptance of responsibility but to aiding in the prosecution of other suspects.

[26] See, e.g., Arts. 495 – 495-6 French Code of Criminal Procedure (ordonnance pénale); §§ 407-412 German Code of Criminal Procedure (Strafbefehl).

[27] In the Netherlands, the prosecutor himself issues the penal order; the defendant can however file an objection and thereby have the case transferred to the District Court for trial. Penal orders cannot include a prison sentence (Arts. 257a et seq. Dutch Code of Criminal Procedure). For similar proceedings (prosecutorial penalty writ) in Norway see Sections 255 et seq. Norwegian Criminal Procedure Act. On the practice of penal orders and its

becomes final and acquires the effect of a regular court judgment unless the defendant files an objection or appeal in due course. In case of an objection, the matter is set for trial in court. The penal order's main field of application is minor offenses, for example, small theft and traffic violations. The sentence to be imposed by penal order is typically limited to non-custodial sanctions (including conditional prison sentences).

Another sub-type is a summary trial before a judge with only a minimum of evidence-taking, or with none at all. For example, in Italy the judge can, with the defendant's consent, proceed to a *giudizio abbreviato*.[28] In that proceeding, the judgment can be based on the file of the prosecutorial investigation, but the judge may also interrogate individual witnesses if she deems that necessary for coming to a firm conclusion about the defendant's guilt or innocence.[29] In the Norwegian abbreviated trial, the judge holds a hearing with only the defendant present and passes sentence immediately after the defendant has confessed to the facts named in the indictment.[30] In either case, the incentive for the defendant to submit to the abbreviated disposition of the case is a sentence reduction.[31]

Germany has a similar type of disposition which is, however, dressed up as a formal trial.[32] In the *Verständigung* procedure, the defense lawyer and the judge(s) of the trial court conduct negotiations before the

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problems see Marc Blotwijk and Michael Fernandez-Bertier, Out-of-Court Criminal Dispute Resolution in the Netherlands, Belgium and the U.S., Tijdschrift voor Sanctierecht & Onderneming 2015, 95-107 at 98.

28 Arts. 438 et seq. Italian Code of Criminal Procedure.

29 Art. 441 subsec. 5 Italian Code of Criminal Procedure. The defendant may also propose evidence to be taken; Art. 441bis subsec. 5 Italian Code of Criminal Procedure.

30 Art. 248 Norwegian Criminal Procedure Act.

31 See Art. 442 subsec. 2 Italian Code of Criminal Procedure (sentence for petty offenses is reduced by half, sentence for other offenses is reduced by one third).

32 For a comparison of the German *Verständigung* procedure with guilty plea proceedings in England and the United States see Jenia I. Turner and Thomas Weigend, Negotiated Case Dispositions in Germany, England, and the United States, in: Kai Ambos, Antony Duff, Julian Roberts and Thomas Weigend (eds.), Core Concepts in Criminal Law and Criminal Justice, vol. I, Cambridge 2020, pp. 389-427.

beginning of (or sometimes during) the trial. The judge, who is familiar with the file of the pretrial investigation, makes a "predictive" offer of imposing a sentence within a certain range if the defendant comes forward with a confession at the trial.[33] If both sides agree and the prosecutor does not veto the deal, the court is bound by the offer.[34] The trial then begins with the defendant making the confession as agreed, and the court may (but often does not) take additional evidence.[35] If everything goes according to plan, the defendant then receives the agreed-upon sentence and the case is closed.[36]

The feature that differentiates this type of a "shortcut to justice" from the guilty plea is the fact that the defendant's consent is not the sole legitimating basis for a finding of guilt. The court relies on the file containing the results of the pretrial investigation,[37] on the defendant's confession, on additional witness testimony, or on a combination of all three. In any event, there is supposed to exist a sufficiently reliable factual basis for the judgment even though no regular trial has been held.

VI. The Role of Exclusion of Evidence in Abbreviated Proceedings

Having obtained an overview of various types of sanctioning options without a full trial, we may return to the question of whether exclusionary rules should play a role in such proceedings. We can again distinguish among the three types of abbreviated procedures as defined above.

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[33] § 257c subsec. 3 German Code of Criminal Procedure.

[34] § 257c subsec. 3 sent. 4 German Code of Criminal Procedure.

[35] § 257c subsec. 1 sent. 2 German Code of Criminal Procedure obliges the court to introduce all evidence that can be relevant for its decision. In practice, however, courts often regard the defendant's confession as a sufficient basis of the judgment.

[36] For a recent empirical study on the practice of *Verständigung* see Karsten Altenhain, Matthias Jahn, Jörg Kinzig, Die Praxis der Verständigung im Strafprozess, 2020.

[37] The court must not base the judgment directly on the file of the pretrial investigation. But the professional judges will have read the file before the start of the trial and obtain from it a certain preconception of the facts of the case.

1. Prosecutorial Sentencing

With regard to prosecutorial sanctioning, we can start from the rule (developed above) that the prosecutor should not base her decisions on evidence that would not be admissible in court. Consequently, proposals for conditional dismissal or pretrial probation and similar sanctioning mechanisms should be made only if the prosecutor can reasonably expect to obtain a conviction at trial based on admissible evidence. If the evidence, minus those items that are likely to be excluded, is not sufficient to prove the defendant's guilt beyond a reasonable doubt, it would be oppressive to propose to the suspect to fulfill certain obligations (such as paying a fine) although he would probably be acquitted if the prosecutor brought the case to trial. So, in the example Case 2, if the prosecutor does not have much evidence for the defendant's involvement in the burglary beyond the inadmissible confession, it would be unethical for her to make the defendant an offer to dismiss his case if he made a payment or provided several hours of unpaid work in a public interest project. It is conceivable that the defendant might still accept the offered disposition in order to get rid of the threat of prosecution or because he wishes to atone for a moral wrong he committed; but the prosecutor should at least candidly tell the defendant that there is a low likelihood that he would be convicted at trial.

As mentioned above, however, the prosecutor has some leeway if the admissibility of illegally obtained evidence is dependent on a balancing of the seriousness of the procedural violation against the interest in truth-finding in the criminal process. Since this balancing must in the last resort be undertaken by the court based on the totality of the circumstances, the prosecutor may act on a reasonable possibility that the evidence will eventually be admitted. She may therefore make the suspect an offer for, e.g., deferred prosecution or conditional dismissal even though she cannot be certain that some illegally obtained evidence would be admitted by the trial court.

2. Formal Acceptance of Guilt

If the defendant enters a guilty plea or accepts a finding of guilt without prior evidence-taking, his declaration, as we have seen,

is regarded as a sufficient basis for conviction. Since no evidence is presented to the court, exclusionary rules logically do not have a direct effect on the proceedings following the guilty plea. But does that mean that grave procedural violations that occurred in the investigation phase become irrelevant if the defendant accepts the prosecutor's offer to plead guilty to a reduced charge or in exchange for a recommendation of a lenient sentence? It is not quite so simple. First, as we have seen above, the prosecutor should not base her charging decision on clearly inadmissible evidence. That rule also extends to decisions concerning the plea bargaining process. Consequently, the prosecutor should be ethically precluded from offering the defendant a plea deal if she knows that evidence critical to the prosecution case would be excluded if the case went to trial.[38] In practice, however, if the prosecutor knows that something "went wrong" during the investigation and that key evidence may be (or: definitely is) inadmissible, she may indeed offer the defendant a particularly attractive deal so as not to lose the case altogether.

That is a problem of prosecutorial ethics, but it may also lead to a legal issue: Can one say that a guilty plea is voluntary if the defendant wrongly assumes that the prosecution has admissible evidence sufficient to prove his guilt, while in fact key evidence is inadmissible? Take Case 2 as an example again: If the defendant mistakenly thinks that his forced confession at the police station can be used against him at the trial and that he therefore does not have the slightest chance of being acquitted, and then pleads guilty – is that plea voluntary? One could argue that the defendant was not forced to plead guilty and that it was his free decision to waive the chance of an acquittal and to acknowledge his guilt. But doesn't voluntariness presuppose having the information necessary to make an intelligent decision? One would probably not hesitate to invalidate a plea if the prosecutor had intentionally misled the defendant about the availability of incriminating evidence. But in some jurisdictions the defense is asked to plead without being given full access to relevant information. The prosecutor may have to disclose evidence that could be used by the defense in its favor at trial, but he need not grant the defense

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[38] See Russell Gold, Beyond the Judicial Fourth Amendment: The Prosecutor's Role, 47 UC Davis Law Review 1591-1665 (2014).

lawyer discovery of incriminating evidence.[39] If the prosecutor's bag of evidence contains mainly inadmissible items, would it count as deception to even make a plea offer to the defense?

The answers to that question may well differ, depending on each jurisdiction's rules on the information that must be available to the defendant before he decides on the plea. But as a general rule, the defense should not be forced to plead "blind"; and in particular the defendant should be alerted to facts that might jeopardize the admissibility of prosecution evidence. Only if the defense lawyer is aware of the relevant facts concerning (potential) inadmissibility and still – based on his own assessment of these facts – advises his client to plead guilty, this may be regarded as a legitimate tactical choice and should be respected as a voluntary plea.[40]

One may have doubts, however, whether there can ever be a valid acceptance of the use of a forced confession as evidence. German law provides that a statement resulting from threats, force, deceit, or other prohibited means is inadmissible even if the defendant later consents to its use at trial.[41] But even that strict standard only rules out the admission of such evidence at trial and does not prevent the defendant, after proper information about the inadmissibility of the prior statement,[42] from making another confession to the same facts. Nor does the ban on using a forced confession stand in the way of the defendant acknowledging guilt, for which he may have independent reasons.

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[39] See, for the United States, the 2002 U.S. Supreme Court decision in U.S. v. Ruiz, 536 U.S. 622 at 623 ("The Constitution does not require the Government to disclose material impeachment evidence prior to entering a plea agreement with a criminal defendant."). See further Jenia I. Turner, Plea Bargaining Across Borders, pp. 40-41 (2009).

[40] There are strong arguments in favor of involving a judge in the plea negotiation process; he could, among other things, make sure that crucial information is not withheld from the defense lawyer. See on this issue Jenia I. Turner, Judicial Participation in Plea Negotiation: A Comparative View, 54 American Journal of Comparative Law 501-570 (2006).

[41] § 136a sec. 3 German Code of Criminal Procedure.

[42] On this requirement, see European Court of Human Rights, Gäfgen v. Germany, case no. 22978/05, Judgment of 1 June 2010, § 182.

3. Penal Orders and Mini Trials

Finally, the question arises whether exclusionary rules have an impact on the various forms of abbreviated trials. To the extent that the judge actually takes evidence before making a decision, it is obvious that she must not use tainted evidence that would not be admissible at a full trial of the matter. But what about the proceeding in which the judge bases the decision only on the written record of the pretrial investigation? In that instance, taking judicial cognizance of the file of the investigation replaces the taking of evidence. The judge must consequently check the file to see whether certain evidence has been obtained illegally and would therefore be subject to exclusion. If that is the case, the judge must not base the decision on this evidence; she may consequently convict the defendant only if the remaining evidence apparent from the file is sufficient to establish his guilt beyond a reasonable doubt.

But perhaps the judge's use of evidence that would be inadmissible at a full trial might be legitimized by the defendant's advance consent? In most jurisdictions, an abbreviated procedure is available only with the defendant's consent. That consent does not refer to a finding of guilt (as in the guilty plea proceeding) but only to the judge's authority to dispense with taking evidence and to rely instead on the information contained in the police file. But does the defendant's consent then imply that the judge should be permitted to use *any* information she can find in the file, including illegally obtained evidence, or only such information as could also be introduced at trial? As a rule, the defendant's consent should be interpreted as extending only to the results of an investigation conducted in accordance with applicable legal rules. Returning to example Case 2, the defendant's declaration that the judge may issue a judgment based on the police file cannot be understood to extend to the confession extorted from him by the threat of force.[43] This may be different only if the defendant and his lawyer were explicitly informed that the file contains evidence

[43] But see Art. 438 subsec. 6-bis Italian Code of Criminal Procedure, providing that the defendant's request to conduct an abbreviated proceeding implies the waiver of certain rules of exclusion of evidence (nullità) except instances of "absolute" invalidity of the evidence.

that is likely to be inadmissible and have nevertheless given consent to the use of that evidence.[44]

The same standard should apply in the "penal order" type of proceeding. Although the prosecutor pre-formulates the judgment, the judge must not authorize it unless it is supported by the results of the investigation as documented in the file. This means that the judge is expected to read the file and examine what admissible evidence would be available at a trial. Only if, based on a summary evaluation, this evidence would be sufficient to support a finding of guilt may the judge issue the penal order. Even in this most abbreviated proceeding, then, the exclusion of evidence plays an important role: It removes illegally obtained evidence from the file on which the judge must base her decision on whether to issue the penal order as requested by the prosecutor.

As with prosecutorial decisions, however, the virtual exclusion of evidence from the file is limited to clear cases. The judge has more leeway if the facts as they appear from the file are such that they require a balancing of conflicting interests before a decision on exclusion can be made. In that situation, the judge should conduct a provisional balancing based on the limited information available at the time, which may lead to acceptance of some evidence that might eventually be excluded after full argument at a trial.

In conclusion, it can be said that a judgment in an abbreviated proceeding (including a penal order) must in the normal course of events not be based on evidence that would be inadmissible at a regular trial.

VII. Practical Problems

Although these rules appear convincing in theory, there are obvious impediments to their application in practice. With regard to prosecutorial sanctioning (VI. 1. supra), the main problem lies in the lack of any exterior control on the prosecutor's decision-making. The question whether the prosecutor takes the (possible) inadmissibility

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[44] The defendant may be given an incentive to agree by a promise of an exceptionally lenient sentence.

of evidence into account is entirely left to her conscientious review of the evidence and her readiness to dismiss a case without any sanction where the admissible evidence would not be strong enough to support a conviction. In theory, the defendant can obtain a judicial decision by rejecting an offer of, e.g., a conditional dismissal, but he will hardly be in a position at this stage to assess the strength of the (admissible) evidence against him and will therefore often not dare to refuse an offer of disposing of his case without a finding of guilt.

With regard to abbreviated dispositions with a finding of guilt (such as penal orders), the most serious problem is the frequent lack of an active defense at this stage of the proceedings. Penal orders, for example, are mostly used in trivial non-serious cases in which the court does not appoint a lawyer for the defendant.[45] And even if there is an abbreviated trial with a hearing before a judge, a defense lawyer may not necessarily take the trouble of studying the prosecution file (if it is available to her at all) but will concentrate on obtaining a lenient sentence for her client. The defense lawyer as the driving force in any argument against the admissibility of evidence will hence normally not be present or at least will not invest much energy in arguing these matters unless she expects the case to go to a full trial.[46]

A further factor working against exclusion of evidence attaining practical relevance is inertia. The abbreviated forms of disposing of criminal cases have been invented for the very purpose of saving judges the effort and time needed for thoroughly reviewing the evidence. Judges will often unquestioningly rely on the police and the prosecution to have conducted a diligent investigation and to have abided by the law in doing so. Unless there are evident violations, or the judge has been alerted to potential evidence problems by the defense lawyer, the judge will assume that the investigation was conducted in accordance with the law and will

[45] For example, in Germany a lawyer must be appointed for the defendant only if a (suspended) prison sentence is to be imposed; § 407 subsec. 1, sent. 2 German Code of Criminal Procedure.

[46] In the U.S., the chance of a successful defense motion to suppress some illegally obtained evidence may be a “bargaining chip” for the defense, leading to conviction with a reduced sentence. Cf. Slobogin (note 16, *supra*), at 375.

accept the information contained in the file as a basis for his judgment.[47] Typically, in an abbreviated process there is no room for an adversarial discussion of issues of evidence law.

VIII. Possible Solutions

What, then can be done to overcome the obstacles to arriving at a decision independently of inadmissible evidence? Two main approaches come to mind.

First, defense counsel should actively participate in abbreviated proceedings. One of the lawyer's functions is to familiarize herself with the information on the case and to alert the judge to possible evidence problems. Yet, although that demand is in line with an ideal system of criminal justice, it is not realistic to expect a lawyer to be appointed in every case, given the large number of petty cases processed in written form.

It will thus mostly remain for the prosecutor or the judge to conscientiously check the materials at his disposal for possible procedural faults that may make evidence inadmissible. If such problems appear from the file, he must decide whether the remaining evidence is strong enough to carry a conviction. If the case has reached the stage of judicial decision-making, there will be instances of doubt in which the judge cannot tell, from only reading the file, whether a procedural fault has occurred and whether it is serious enough to demand exclusion of the ensuing evidence. In this situation, the judge should either – where that is permissible – try to resolve that doubt by hearing individual witnesses who can clarify the matter or decline to decide the case in an abbreviated proceeding and instead set the case for trial. These obligations will undoubtedly make abbreviated dispositions a bit less attractive to practitioners. But since the judgment is issued in the judge's name, he can well be expected to make sure that there is sufficient admissible evidence available to convict the defendant before he finds him guilty.

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[47] For criticism of the German „penal order" proceeding along these lines see Felix Bommer et al., Alternativ-Entwurf Abgekürzte Strafverfahren im Rechtsstaat, 166 Goltdammer's Archiv für Strafrecht (2019) 1-128 at 84-85.

IX. Conclusion

The fact that evidence has been obtained illegally and therefore cannot be used at a trial has repercussions on the resolution of the case in informal criminal proceedings.

First, prosecutors should not rely on inadmissible evidence when offering the suspect an informal disposition, for example, a dismissal of the case without a formal charge in exchange for the defendant making a payment.

Second, a plea of guilty or a similar procedural declaration must be deemed involuntary and void if the defendant made it because he was misled about the admissibility of crucial incriminating evidence at the trial.

Third, a judge in an abbreviated proceeding that leads to a finding of guilt must not base his decision on evidence that would not be admissible at a trial. Because defendants cannot normally themselves assess the admissibility of evidence, and since criminal justice officials may tend to seek a consensual shortcut to judgment without a thorough examination of the evidentiary situation, defense counsel should get involved, whenever possible, in checking the hypothetical admissibility of evidence and alerting prosecutors and judges to possible problems.

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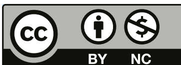

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After zigzagging between extremes, finally common sense? Will Belgium return to reasonable rules on illegally obtained evidence?

Depois de ziguezaguear entre os extremos, finalmente senso comum? Bélgica retornará às regras razoáveis sobre ilicitude probatória?

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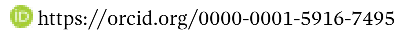
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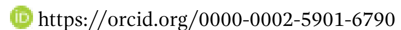
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"Just as every cop is a criminal
And all the sinners saints
As heads is tails
Just call me Lucifer
'Cause I'm in need of some restraint"
(The Rolling Stones – Sympathy for the Devil)

Abstract: In the absence of statutory rules on the matter, Belgian courts traditionally applied a strict exclusionary rule for illegally gathered evidence and its fruits. The Court of Cassation in 2003 made a spectacular U-turn and prohibited exclusion of illegally obtained evidence by criminal courts, with only very limited exceptions. Parliament subsequently incorporated these judge-made principles

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into a binding statutory rule. As a new Code is about to be debated in Parliament, the time is right to question the "normalisation" of law enforcement officers' disrespect for the rules. The Rule of Law will be restored by making exclusion of illegally gathered evidence the rule, but exceptionally allowing its use upon consideration of the conflicting interests.

Keywords: Illegally obtained evidence; Admissibility; Fair trial; Exclusionary rule; Codification.

Resumo: *Diante da omissão de normas sobre a questão, as cortes belgas tradicionalmente aplicavam regras rígidas de exclusão de provas obtidas ilegalmente e suas derivadas. A Corte de Cassação em 2003 alterou drasticamente tal posição e proibiu os tribunais de excluir as provas ilícitas, salvo exceções bastante limitadas. O Legislativo então incorporou esses princípios em uma regra legal obrigatória. Considerando os debates legislativos sobre um novo código, o momento é adequado para discutir a normalização do desrespeito às regras pelos agentes estatais. O Estado de Direito será restaurado com a consolidação da regra de exclusão das provas ilícitas, mas com a possibilidade de utilização excepcional a partir de ponderação de conflito de interesses.*

Palavras-chave: *provas ilícitas; admissibilidade; justo processo; regra de exclusão; codificação.*

I. Introduction: the end of the napoleonic era

Napoleon Bonaparte introduced a series of codes, but the Code of Criminal Procedure (1808) has never been considered a highlight.[3] Upon gaining independence in the 19th Century, Belgium kept using this French Code with the intention of replacing it by one of its own: a Belgian code.[4] In 2020, it still has that intention... Of course, the 'Napoleonic' Belgian Code

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[3] C. Van Den Wyngaert, P. Traest, S. Vandromme, *Strafrecht en strafprocesrecht,* Antwerpen, Maklu, 2017, 13.

[4] J. Monballyu, *Zes eeuwen strafrecht, de geschiedenis van het Belgische strafrecht (1400-2000)* (Six Centuries of Criminal Law, the History of Belgian Criminal Law (1400-2000)), Leuven, Acco, 2006, 47-55.

of Criminal Procedure (CCP) has undergone many changes, very often under pressure of the European Court of Human Rights, which insists on an explicit and specific legal base for government intrusion upon citizens' rights. The matter of evidence was hardly regulated by the old code and the European Court of Human Rights has always been quite reluctant to seem to be interfering too much.[5] Hence the matter was left to Belgian courts and doctrine. In the early 21st Century the highest court in the criminal justice system, the Court of Cassation, made a remarkable U-turn on the exclusionary rule for illegally obtained evidence. Except in very rare situations, courts are now obliged to use illegal evidence. Parliament codified this rule in 2013. This contribution is mainly a description for foreign readers of the remarkable Belgian situation. Upon a request from the Belgian government, an expert committee has, however, issued a draft for a new code and Parliament is expected to start discussing it in 2021. It proposes an adjustment of the statutory rules on this fundamental issue. Hence we end with some personal reflections on this proposal.[6].

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[5] It uses the standard clause that Article 6 E.C.H.R. "*does not lay down any rules on the admissibility of evidence as such, which is primarily a matter for the regulation under national law. It is not for the Court to determine particular types of evidence –for example, evidence obtained unlawfully in terms of domestic law –may be admissible. The question which must be answered is whether the proceedings as a whole, including the way in which the evidence was gathered were fair*." (ECtHR (Grand Chamber) 10 March 2009, n.4378/02, Bykov/ Russia, § 88, see also ECtHR 12 July 1988, Series A no. 140, Schenk/ Switzerland, § 45; ECtHR 9 June 1998, Reports 1998-IV, Teixeira de Castro/ Portugal, § 34).

[6] This is a somewhat subjective, we would say 'principled but pragmatic' approach. It is based on our belief that both the absolute exclusionary rule and its opposite (the compulsory maximal use of illegally gathered evidence to convict suspects) fail to strike a proper balance between the conflicting interests at stake. For a legal system to be coherent, the principle is that rules should be applied and exceptions to that principle require a justification that can be checked. However, the 'rules to be applied as much as possible' do not only cover the rules of procedure to be respected by law enforcement, but also the substantive criminal law to be enforced. That entails a complex balancing act. We wonder which use of an exclusionary rule would lead to a 'maximal application of the rules'. The crux is that we think that statutory law should indicate which interests should be taken into account, but that, except for extreme situations like torture, the judge of the facts is best placed to consider the appropriate balance in the specific case (infra).

II. General Principles of Belgian Criminal Procedural Law

The Belgian legal system is embedded in a civil law tradition. Statutory legislation is the main source of law for both criminal law and criminal procedure. The system is mainly inquisitorial, although the number of accusatorial features is increasing. The pre-trial stage is still characterised by its mainly secret and inquisitorial nature, while the trial stage is public and the principles of adversarial argument apply.

At the pre-trial stage, two types of investigations can be distinguished: the preliminary investigation and the judicial inquiry. A preliminary investigation is led by the public prosecutor, a judicial inquiry by an (impartial and independent) investigating judge under the supervision of the Indictment Chamber of the Court of Appeal. A judicial inquiry is required as soon as a victim files a civil complaint with the investigating judge or when an investigative measure has to be carried out that belongs to the sole competence of the investigating judge. Measures belonging to the sole competence of the investigating judge are typically measures which are considered very privacy-intrusive and far-reaching (e.g. home searches, wiretaps, covert computer searches, ...). However, privacy-intrusive measures are increasingly shifting towards the public prosecutor's office. The investigating judge can authorise any measure that the public prosecutor may also authorise. The vast majority of the criminal cases (approximately 95%) is however dealt with by means of a preliminary investigation.

Since the procedural regime in case of a judicial inquiry is burdensome and entails an especially complex procedure at the end of the investigative stage, Parliament introduced a simplified intermediate procedure called the "mini judicial inquiry" (art. 28*septies* CCP). In this procedure the intervention of the investigating judge is limited to a one-off authorisation (or refusal) to carry out an investigative measure. As a result, an increasing amount of investigative measures belonging to the exclusive competence of the investigating judge no longer require the start of a judicial inquiry: in spite of the use of the intrusive measure, the investigation remains with the public prosecutor. Nevertheless, even if the public prosecutor only filed a limited request for such a mini judicial inquiry, the investigating judge always retains the option of taking over the

whole investigation and starting a judicial inquiry. Additionally, certain specific investigative measures are excluded from the mini judicial inquiry and thus always require a judicial inquiry.[7]

Under the principle of equality of arms, the parties are granted access to all evidence that has been collected, at the latest once the investigation is completed. This ensures the fairness of the proceedings and allows the parties to prepare their case. In more general terms, the prosecution should add all elements to the case file which could be relevant to establish the truth about what happened.[8] Law enforcement authorities should also be sufficiently transparent about how they conducted their investigation, about its results and how the evidence encountered has been handled. In the investigation phase, the procedure is essentially a written one. Law enforcement officers write official reports on the investigation measures they carry out and must include them in the case file. However, Belgian law lacks general statutory provisions on which information should be included in the official report.[9] Adequate transparency is required, to allow the parties to the proceedings to verify the reliability of the evidence and the legality of the investigation and to raise potential problems before the court.[10]

Belgium has rather few explicit rules on assessment of evidence. Once evidence is allowed in court, judges can freely assess the reliability and weight of the evidence put before them and are only bound by their 'deep-down conviction' *(innerlijke overtuiging – l'intime conviction)*.[11] Specific exceptions to the free assessment of evidence are rare. The following types of evidence should be sufficiently corroborated by

7 Such as a home search (Constitutional Court 21 December 2017, n° 148/2017).

8 Court of Cassation 30 October 2001, AR P.01.1239.N, *Arr. Cass.* 2001, 1815.

9 C.Conings, *Klassiek en digitaal speuren naar strafrechtelijk bewijs*, Antwerp, Intersentia, 2017, 360-361; T. Decaigny, *Tegenspraak in het vooronderzoek*, Antwerpen, Intersentia, 2013, 361.

10 An important difference exists between evidence and police information which is only used to start or direct the investigation. *Infra* Evidence vs. police information.

11 S. De Decker, F. Verbruggen, "Across the River and Into the Poisonous Trees. From exclusion to the Use of Illegally Gathered Evidence in Criminal Proceedings in Belgium", in *The XIIIth World Congress of Procedural Law: the Belgian and Dutch Reports,* Antwerpen, Intersentia, 2008, 65.

additional elements of proof: statements of anonymous witnesses[12], statements made by teleconference[13], statements of an offender assisting the authorities ('*rewarded* turncoat'')[14], the results of a polygraph test[15] and evidence obtained via a civilian undercover agent[16]. The principle of free assessment concerns the probative value, it does not allow the judge to alter the content of the evidence or official reports in the case file.[17]

III. Definition Illegally Obtained Evidence

1. Illegality

If a judge is confronted with illegally obtained evidence, the question arises whether such evidence is admissible in court. Before answering this question, we will clarify under which circumstances evidence is considered to be 'obtained illegally'. The Court of Cassation clearly defined 'illegally obtained evidence' in 2004.[18] Evidence is considered illegal if it has been gathered (i) by committing an offence, (ii) in violation of criminal procedural law, (iii) in violation of the right to privacy (art. 8 ECHR), (iv) in violation of the rights of the defence (art. 6 ECHR) or (v) in violation of the right to human dignity. The grounds of illegality are often interchangeable. For instance, most offences will infringe upon criminal procedural legislation, violations of human dignity will often be covered by a criminal offence and most infringements upon

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12 Art. 189*bis* CCP.

13 Art. 112*bis* §6 CCP.

14 Art. 216/4 CCP.

15 Art. 112*duodecies* §10 CCP.

16 I.e. not a sworn police officer, especially trained for such missions: Art. 47*novies*/3 §3 CCP.

17 S. De Decker, F. Verbruggen, "Across the River and Into the Poisonous Trees. From exclusion to the Use of Illegally Gathered Evidence in Criminal Proceedings in Belgium", in *The XIIIth World Congress of Procedural Law: the Belgian and Dutch Reports,* Antwerpen, Intersentia, 2008, 65.

18 Court of Cassation decision of 23 March 2004, AR P.04.0012.N, *RABG* 2004, 1061, with comment by F. Schuermans as confirmed in Court of Cassation decision of 21 November 2006, AR P.06.0806.N.

criminal procedural law will also entail a violation of the right to privacy since the interference with private law will not be *in accordance with the law* as required by article 8 ECHR

The category of violation of criminal procedure legislation is furthermore not limited to specific formal rules of procedure. The prosecutor and investigating judge have a statutory duty to safeguard the loyalty or integrity of the evidence gathering process.[19] Evidence gathered in a disloyal manner must be considered as 'illegally obtained', e.g. when a formal procedure is deliberately averted from its purpose to render illegally obtained evidence legal ('evidence laundering', a pretended 'accidental' discovery of evidence which was actually 'staged')[20] or when the entire criminal investigation is based on the assumption that someone is guilty of an offence[21]. The latter situation will of course also run afoul of the presumption of innocence and will thus be in breach of the right to a fair trial.

Electronic evidence can be altered easily and is very volatile by nature. Yet Belgian law lacks specific technical rules on how it should be gathered and treated. Rules do exist on the circumstances in which law enforcement agencies can access electronic evidence, but there is no detailed legal regime for technical requirements regarding the execution of a search for digital evidence, nor clear requirements regarding the tools which may be used to perform such searches. Criminal procedural law only refers to '*suitable technical means*'[22], which should be used to gather and preserve digital evidence to ensure its integrity and confidentiality. Guidelines seem to exist at the level of the public prosecutors' office and police forces but they are not accessible to the public.[23] The statutory

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[19] Art. 28*bis in fine* CCP and art. 56 CCP.

[20] Brussels 10 December 2010, *JT* 2011, 54; Corr. Brussels 8 December 2009, *JT* 2010, 6-13, with comment.

[21] Mons 26 november 2014, *JT* 2015, n. 6607, 467.

[22] Art. 39*bis* §8 CCP and 90*septies* §1 CCP.

[23] J. Kerhofs, P. Van Linthout, *Cybercrime 3.0*, Brussels, Politeia, 2019, 235. Guidelines also exist at the European level. The *Electronic Evidence Guide,* which has been created at the level of the Council of Europe is a basic guide for police officers, prosecutors and judges containing *guidelines* on the handling of digital evidence in all phases of the criminal investigation, prosecution

requirement to use '*suitable technical means*' entails that if a judge deems the specific technical tools used be the investigators 'unsuitable', e.g. when electronic data are altered while executing a search (such as when the configuration of the computer system under investigation is changed), the evidence will have been 'illegally obtained'. This will inevitably entail difficult factual and technical discussions.

2. Illegality: committed by whom?[24]

Evidence is not only considered to be have been obtained illegally when the criminal prosecution authorities engaged in the illegal action. Illegal gathering of evidence by a private person may also affect its use in a criminal procedure. The Court of Cassation, however, only considers such evidence as 'illegally obtained' if two conditions are met: (i) the person who committed the illegality is the one who reported the offence to the law enforcement authorities and (ii) he or she engaged in the illegal action to obtain goods or information with the intention of using it as evidence in a criminal case.[25]

If the person who reported the offence to the authorities came across the data or goods by accident – albeit in an illegal manner, e.g. by burglary – said data or goods will not be considered 'illegally obtained' and can therefore simply be used as evidence in a criminal case.[26] The same is true for the data or goods that were handed over

and during trial. It is based on best practices and national and international standards in the countries which are a party to the Cybercrime Convention. The guide is available at https://rm.coe.int/09000016809efd7f.

[24] S. De Decker, F. Verbruggen, "Across the River and Into the Poisonous Trees. From exclusion to the Use of Illegally Gathered Evidence in Criminal Proceedings in Belgium", in *The XIIIth World Congress of Procedural Law: the Belgian and Dutch Reports,* Antwerpen, Intersentia, 2008, 70-71; R.Verstraeten, *Handboek Strafvordering,* Antwerpen, Maklu, 2012, 987-988.

[25] Court of Cassation decision of 17 January 1990, *Arr.Cass.* 1989-90, no. 310; Court of Cassation decision of 23 March 2004, AR P.04.0012.N, *RABG* 2004, 1061, with comment by F. Schuermans; Court of Cassation decision of 21 November 2006, AR P.06.0806.N.

[26] Court of Cassation decision of 9 December 1997, *RW* 1997-98, 1441.

to law enforcement authorities by a person who was not involved in the illegal action.[27]

The Court also distinguishes between the actual illegal gathering of evidence and the mere illegal discovery of an offence. In the latter case, the person (including foreign authorities) who discovered the offence can report it to Belgian law enforcement authorities. This will not affect the legality of the evidence that is subsequently gathered by the Belgian law enforcement authorities.[28]

3. Evidence vs. police information

In a broader sense Belgian courts distinguish illegally obtained evidence from 'police information' which is only used to start or direct the criminal investigation and is not used by the trial judge to establish his deep-down conviction on the existence of the offence or the criminal liability of the defendants.[29]

Evidence must always be subjected to judicial scrutiny[30] and adversarial proceedings. By contrast, *police information*, i.e. information from police sources which the enforcement authorities do not (wish to) disclose and the exact origin of which is therefore typically unknown (informer, anonymous source, independent foreign investigation[31], ...), will not be subjected to full judicial control on whether the procedural rules applicable to the gathering of such information have been respected. Police information can therefore only serve to launch the criminal investigation

[27] Court of Cassation decision of 14 February 2001, *JT* 2001, 593; Court of Cassation decision of 18 May 2011, AR P.10.2049.F, ECLI:BE:CASS:2011:ARR.20110518.17.

[28] Court of Cassation decision of 30 May 1995, *Arr. Cass.* 1995, n. 267, *JLMB* 1998, 488, with comment by F. Kuty; Court of Cassation decision of 2 April 2008, AR P.07.1744.F, *JT* 2008, 390, with comment by F. Kuty; Court of Cassation decision of 18 May 2011, AR P.10.2049.F.

[29] V. Vereecke, "Politionele informatie ontsnapt aan de Antigoon-toets" (comment on Court of Cassation decision 28 Februari 2017), *T. Strafr.* 2017, n. 4, 269.

[30] F. Schuermans, "Cassatie bevestigt bijzonder statuut politionele aanvangsinformatie", *Juristenkrant* 2015, n. 306, 2.

[31] Court of Cassation decision of 18 April 2017, AR P.16.1292.N, ECLI:BE:CASS:2017:ARR.20170418.12 .

and steer its course. It can for instance help selecting places or persons as a target for surveillance or searches, whereas the actual evidence will only be gathered in the course of the surveillance or the search. In the same sense, the Court of Cassation has considered that "*information gathered by the police that may give rise to further investigation is only ordinary information that must be verified by a preliminary or judicial investigation*".[32]

Police information can only be challenged by defendants who can make it plausible that it has been obtained in an irregular manner. Mere ignorance of the origin of the information does not prevent it from being used to start or direct the investigation: that is not in itself sufficient to establish an irregularity. The Court of Cassation indeed held repeatedly that art. 6 ECHR does not preclude information of unknown origin from being taken into account as 'steering information', a basis for subsequent gathering of 'real' evidence, as long as it does not appear that the information has been gathered irregularly.[33] This has been criticised as offering too much scope for 'evidence laundering'.[34]

When a defendant makes it plausible that the police information was gathered in an illegal way, the law enforcement authorities will have to clarify how the information was obtained. If they do not succeed in establishing the legal origin of the information, the judge will assume it has been obtained in an irregular way[35]. The rules on the use of illegally obtained evidence (threefold test, *infra*) do not apply to illegally obtained

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[32] Court of Cassation decision of 27 September 2016, AR P.15.0852.N, ECLI:BE:CASS:2016:ARR.20160927.3.

[33] Court of Cassation decision 21 January 2003, AR P.01.1121.N; Court of Cassation decision 5 February 2013, AR P.12.0673.N; Court of Cassation decision 10 September 2013, P.13.0376.N; Court of Cassation decision 1 December 2015, AR P.15.0905.N, ECLI:BE:CASS:2015:ARR.20151201.4; Court of Cassation decision 27 September 2016, AR P.15.0852.N, ECLI:BE:-CASS:2016:ARR.20160927.3. See also: F. Schuermans, "De zoektocht naar of de jacht op de oorsprong van de politionele informatie als start van een strafrechtelijk vooronderzoek", *T. Strafr.* 2014, n.1, 48.

[34] That is why experts suggest abolishing this distinction, see paragraph VII. below.

[35] V. Vereecke, "Politionele informatie ontsnapt aan de Antigoon-toets" (comment on Court of Cassation decision 28 Februari 2017), *T. Strafr.* 2017, n. 4, 270.

police information. The judge only verifies whether the right to a fair trial would be violated if the police information is used.[36]

IV. Use of illegally obtained evidence

1. From exclusion to admission

Traditionally (from the 1920s onwards) the courts and doctrine stressed that illegally obtained evidence could not be used in court against the suspect.[37] From 2003 onwards, the Court of Cassation, however, drastically curtailed the exclusionary rule (developing the so-called Antigoon-theory)[38], and actually turned the tables: it made exclusion of illegally obtained evidence the exception rather than the rule. On several occasions, the Constitutional Court has condoned this new approach.[39]

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[36] Court of Cassation decision 28 February 2017, AR P.16.0261.N, ECLI:BE:-CASS:2017:ARR.20170228.3; Court of Cassation decision of 18 April 2017, AR P.16.1292.N, ECLI:BE:CASS:2017:ARR.20170418.12 (in relation to information coming from a foreign investigation).

[37] Court of Cassation decision of 12 March 1923, *Pas.* 1923, I, 233; Court of Cassation decision of 10 December 1924, *Pas.* 1924, I, 66; Court of Cassation decision 8 January 1945, *Pas.* 1945, I, 81; Court of Cassation decision of 24 May 1948, *RW* 1948-49, 51, with comment; Court of Cassation decision of 13 May 1986, AR 9136, *Arr.Cass.* 1985-86, 1230, concl. J. Du Jardin; Court of Cassation decision of 4 January 1994, AR 6388, *Arr.Cass.* 1994, 1, concl. J. Du Jardin, *R. Cass.* 1994, 75, with comment by P. Traest, *RW* 1994-95, 185, with comment by F. D'Hondt; Court of Cassation decision of 24 April 1996, AR P.96.0350.F, *Arr.Cass.* 1996, 334; Court of Cassation decision of 9 December 1997, AR P.97.1329.N, *Arr.Cass.* 1997, 1330; Court of Cassation decision of 23 December 1998, AR A.94.0001.F, *Arr.Cass.* 1998, 1166; Court of Cassation decision of 13 January 1999, AR P.98.0412.F, *Arr.Cass.* 1999, 28.

[38] It owes its name to a legendary figure in Antwerp folklore who had provided the codename for the police action in the course of which the illegal gathering of evidence had happened: Court of Cassation decision of 14 October 2003, AR P.03.0762.N, *Arr.Cass.* 2003, 1862, *RABG* 2004, n. 6, 333, with comment by F. Schuermans, *RCJB* 2004, n. 4, 405, with comment by F. Kuty, *RW* 2003-04, 814, concl. M. De Swaef, *T.Strafr.* 2004, n. 2, 129, with comment by P. Traest.

[39] Constitutional Court 22 December 2010, n. 158/2010, B.7. It treated the issue in a remarkably succinct matter: after reminding that the European Court of Human Rights repeatedly had decided that the use of evidence was mainly a

In 2004, the new approach was codified for the first time, but only in relation to evidence obtained abroad.[40] In 2013, and once more without much legislative debate, a new article 32 was introduced in the Preliminary Title of the Code of Criminal Procedure (hereinafter: PT CCP), which codified the Antigoon doctrine.

Under art. 32 PT CCP the judge may declare illegally obtained evidence *inadmissible only* if:

(i) statute law explicitly mentions nullity as the sanction for neglecting the formality;

(ii) the irregularity affects the reliability of the evidence; or

(iii) the use of the illegally obtained evidence would violate the right to a fair trial.

Said three grounds for exclusion of evidence have to be considered as exclusive: only in the given three scenarios the evidence can and has to be excluded.[41] As Maes points out[42], neither the Court of Cassation, nor the drafters of article 32 CCP have given theoretical reasons or invoked an explicit underlying vision on the function of the exclusionary rule to justify why it should be limited to these three grounds. The ratio, both behind the Court of Cassation's U-turn and Parliament's decision to codify it, seems to be an increasing irritation with suspects and defendants invoking

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matter of member state law and that the use of evidence gathered in violation of article 8 ECHR did not necessarily lead to a violation of article 6 ECHR, it stressed that the corresponding clauses in the Belgian constitution did not explicitly contain such a ban on the use of evidence either. An implicit ban in the constitution's article on the protection privacy was ruled out, because it was the intention of its framers to strive for maximal coherence between the fundamental rights protection under the Belgian constitution and that under the ECHR; see also: Constitutional Court 27 July 2011, n. 139/2011.

[40] Art. 13 of the Statute of 9 December 2004 concerning mutual assistance in criminal matters, *Official Bulletin* 24 December 2004.

[41] See in the same sense: Court of Cassation decision of 12 October 2005, AR P.05.0119.F., *JT* 2006, 109, *JLMB* 2006, 585, *Pas.* 2005, 1904, *Rev.dr.pén.* 2006, 211, *T.Strafr.* 2006, 25, with comment by F. Verbruggen. By introducing art. 32 PT CCP, the legislator explicitly wanted to codify the existing case law of the Court of Cassation. (*Parl. St.,* Kamer, B.Z. 2010, DOC 53-0041/001, p. 3 and Parl. St., Kamer, 2012-2013, DOC 53-0041/002, pp. 2-3).

[42] E. Maes, "Onrechtmatig verkregen bewijs en het integriteitsprincipe in het voorstel voor een nieuw Strafwetboek", *NC* 2020, 499.

procedural errors and a perception – not really backed up by empirical examples – that many guilty persons would profit from the strict rules on procedural errors while their interests have not really been harmed.[43] Neither the judiciary, nor the legislative body ever really addressed the issue that poorly drafted and incoherent legislation on procedural rules may be a cause of law enforcement authorities' errors. Commentators pointed out that this remarkable leniency towards sloppy law enforcement and the judiciary stands in contrast to the increasingly strict application of procedural rules with regards to suspects and defendants, e.g. with regards to procedural deadlines and formalities.[44]

2. Statutory Nullity

The CCP hardly ever provides nullity as a sanction for failing to meet a procedural formality (*infra*). There always has been much case law on the 'exclusionary/admissibility rule' and the legislation concerning procedures for intrusive investigative measures has become ever more detailed and extensive. That makes it all the more striking how little legislative attention has been paid to the appropriate sanction for illegally obtained evidence. To a certain extent this can be explained by the fact that, originally, the code's drafters assumed that including procedural formalities in statute law was sufficient to guarantee the respect thereof. It appeared self-evident that what happened outside of the bounds of the law, would be inadmissible in subsequent criminal proceedings.[45] This is why the CCP did not contain the initial 'exclusionary rule' and furthermore seldom explicitly provides nullity as a sanction for failing to meet a procedural formality.[46] Nullity sanctions were included to stress that a certain requirement was important

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[43] Parl. St., Kamer, B.Z. 2010, DOC 53-0041/001, p. 3.

[44] F. Verbruggen, "Voorwoord (Preface)" in J. Huysmans, '*Legitieme verdediging*' (Legitimate defence), Antwerp, Intersentia, 2017, v.

[45] B. De Smet, "Stromingen in het stelsel van nietigheden. Nieuwe criteria voor de uitsluiting van onrechtmatig verkregen bewijs", *T.Strafr.* 2005, (248) 249, who refers to F. Hélie, *Traité de l'instruction criminelle*, Brussels, Bruylant, 1863, III, 766.

[46] S. De Decker, F. Verbruggen, "Across the River and Into the Poisonous Trees. From exclusion to the Use of Illegally Gathered Evidence in Criminal

even though it could at first sight appear to be rather trivial.[47] Since the U-turn in the case law in 2003, Parliament has included only few nullity sanctions in the CCP (*infra*), because nullity leaves absolutely no margin for appreciation for the judge. Lawmakers seem unwilling to take a stance and prefer to leave it to the judges to balance the interests at stake. For the same reason, one of the few nullity sanctions which was provided by law (in relation to the wiretap, which was introduced in 1993 with quite some reluctance and distrust towards law enforcement at the time) has been abolished in 2016.[48] Parliament indeed considered that the consequences of the nullity sanction were too dramatic and disproportionate in the serious cases for which wiretaps are used.[49]

It should be noted, however, that case law did develop a category of so-called "substantial formalities". Although not accompanied by a statutory nullity sanction, judges considered those formalities nevertheless to be essential. Would a violation of said formalities lead to exclusion of evidence? Following a Court of Cassation decision of 16 November 2004, it did not seem to be relevant whether a formality was considered substantial or not. The consequences of a violation of said formality had to be assessed in the same manner.[50] This therefore seemed to make the distinction between substantial and non-substantial formalities practically irrelevant. However, in 2013 the Court of Cassation did accept that a breach of a specific category of substantial formalities should lead to the exclusion of evidence: those relating to the organisation of courts

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Proceedings in Belgium", in *The XIIIth World Congress of Procedural Law: the Belgian and Dutch Reports,* Antwerpen, Intersentia, 2008, 66.

47 Report on behalf of the committee, *Parl.St.* Kamer 2012-13, n. 53K0041/003, 60; C. Conings, *Klassiek en digitaal speuren naar strafrechtelijk bewijs,* Antwerp, Intersentia, 2017, 374-375.

48 Art. 66 of the Statute of 5 February 2016 amending criminal law and criminal procedure and laying down various provisions on justice, *Official Bulletin* 19 February 2016.

49 Explanatory Memorandum, *Parl.St.* Kamer 2015-16, nr. 54K1418/001, 62.

50 Court of Cassation decision of 16 November 2004, AR P.04.0644.N., *RABG* 2005, 504, *RW* 2005-06, 387, with comment by P. Populier, *T.Strafr.* 2005, 285, with comment by R.Verstraeten and S. De Decker, *Vigiles (N)* 2004 (excerpt), 171, with comment by F. Schuermans, confirmed in Court of Cassation decision of 15 November 2005, AR P.05.1275.N.

and tribunals.[51] The case concerned a home search which was mandated by a judge who did not have the power to authorise those searches.[52] Though it seemed like an important correction, this case law was explicitly abandoned when Parliament introduced art. 32 PT CCP.[53] Later case law confirmed that even in case of a breach of substantial formalities relating to the organisation of courts and tribunals, no exception applies.[54]

Whether judges consider a procedural safeguard to be substantial or not, has therefore become irrelevant. Only the violation of legal requirements explicitly accompanied by a statutory nullity sanction will automatically lead to exclusion of the evidence obtained. The sanction of nullity is currently only linked to some specific requirements for the seizure of real estate (art. 35*bis* CCP), testimony by a witness granted full

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[51] Court of Cassation decision of 24 April 2013, AR P.12.1919.F, ECLI:BE:-CASS:2013:CONC.20130424.3, *JT* 2013, n. 6524, 416, concl. D. Vandermeersch, with comment by L.Kennes, *RABG* 2013, n. 14, 1013, concl. . D. Vandermeersch, with comment by V. Vereecke, *T. Strafr.* 2013, n. 6, 382, with comment. As implicitly introduced in Court of Cassation decision of 26 January 2013, AR P.10.1321.F, ECLI:BE:CASS:2011:ARR.20110126.4, *RDPC* 2012, n. 1, 82, with comment by D. Dillenbourg, *T. Strafr.* 2011, n. 4, 268, with comment by F. Schuermans.

[52] See as well: C Conings, *Klassiek en digitaal speuren naar strafrechtelijk bewijs,* Antwerp, Intersentia, 2017, 26 and 370.

[53] Report on behalf of the committee, *Parl.St.* Kamer 2012-13, n. 53K0041/010, 4-6; Report on behalf of the committee, *Parl.St.* Kamer 2012-13, n. 53K0041/015, 3-4. See as well: M.A. Beernaert "Les princesses de l'hôtel Conrad et la loi *Antigone*" (comment to Court of Cassation decision of 23 September 2015), *JLMB* 2016, n. 16, (762) 763; C. Conings, *Klassiek en digitaal speuren naar strafrechtelijk bewijs,* Antwerp, Intersentia, 2017, 372.

[54] Court of Cassation decision of 10 June 2014, AR P.14.0282.N, ECLI:BE:-CASS:2014:ARR.20140610.4, *NC* 2015, 196, with comment by B. Verstraeten, P. Vermoote, *T.Strafr.* 2015, n. 4-5, 227, with comment by L.Delbrouck, K. Truyen; Court of Cassation decision of 23 September 2015, AR P.14.0238.F, ECLI:BE:CASS:2015:CONC.20150923.4, *RDPC* 2016, n. 1, 72. See as well: M.A. Beernaert, "Les princesses de l'hôtel Conrad et la loi *Antigone*" (comment to Court of Cassation decision of 23 September 2015), *JLMB* 2016, n. 16, 762-764); L.Delbrouck, K. Truyen, "Artikel 32 V.T.Sv.: meer dan een loutere facelift" (comment to Cass. 10 June 2014), *T.Strafr.* 2015, n. 4-5, (228) 229-230; P. Vanwalleghem, "Antigoon geldt ook voor wettelijk geregeld bewijs", *De Juristenkrant* 2014, n. 292, (7) 7. B. Verstraeten, P. Vermoote, "De onderzoeksrechter buiten saisine: een (proactieve) cowboy?" (comment to Court of Cassation decision of 10 June 2014), *NC* 2015, (197) 203.

anonymity (art. 86*bis* and 86*ter* CCP) and when performing a polygraph test as of 1 January 2021 (new version of art. 112*duodecies* CCP which should take effect on said date).

Furthermore, statute law provides for an explicit sanction when statements are made during questioning which infringes the rules on questioning in violation of the right to legal assistance. Art. 47*bis in fine* CCP stipulates that no person can be convicted based on statements he made in breach of the right to and rules on prior confidential consultations and the assistance of a lawyer during questioning. This is, however, not strict nullity: such statements can for instance be used to convict third persons.

3. Unreliability of evidence because of the illegality

As a second rule, judges must exclude illegally obtained evidence when the irregularity taints its reliability. Of course, judges always take reliability into account, also when assessing the probative value of legally obtained evidence. However, when the judge assesses the probative value of legally obtained evidence, unreliable evidence will not be 'excluded' in the strict sense of the word, i.e. it will not be declared inadmissible. Rather, the judge will simply decide not to rely on said evidence in deciding upon the defendant's guilt.

A prime example of evidence that may be unreliable as a result of the way in which it was gathered, is evidence that is dependent on the free will of the person providing it, notably witness statements and confessions. The reliability could clearly be tainted by illicit pressure or influence from the police.[55] However, also other types of evidence can be unreliable due to irregularities. DNA tests for instance are regulated in detail.[56] A violation of these rather technical regulations may just as well affect the reliability of the test results.[57]

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[55] S. De Decker, F. Verbruggen, "Across the River and Into the Poisonous Trees. From exclusion to the Use of Illegally Gathered Evidence in Criminal Proceedings in Belgium", in *The XIIIth World Congress of Procedural Law: the Belgian and Dutch Reports,* Antwerpen, Intersentia, 2008, 76-77.

[56] Royal Decree 4 February 2002, *Official Bulletin* 30 March 2002.

[57] S. De Decker, F. Verbruggen, "Across the River and Into the Poisonous Trees. From exclusion to the Use of Illegally Gathered Evidence in Criminal

4. Violation of the right to a fair trial

The third ground for exclusion is the most important one in practice. The Court of Cassation has set out a number of criteria to determine whether evidence obtained in an irregular manner must be excluded to ensure the right to a fair trial.[58] It confirmed these criteria after the introduction of art. 32 PT CCP.[59] In the assessment, the judge may in particular take into account:

- the intentional or inexcusable nature of the rule-breaking by the investigators,[60]
- the seriousness of the irregularity in comparison to the seriousness of the offence under investigation,[61]

Proceedings in Belgium", in *The XIIIth World Congress of Procedural Law: the Belgian and Dutch Reports,* Antwerpen, Intersentia, 2008, 76-77.

[58] Court of Cassation decision of 23 March 2004, AR P.04.0012.N, *RABG* 2004, 1061, with comment by F. Schuermans; Court of Cassation decision of 12 October 2005, AR P.05.0119.F., *JT* 2006, 109, *JLMB* 2006, 585, *Pas.* 2005, 1904, *Rev.dr.pén.* 2006, 211, *T.Strafr.* 2006, 25, with comment by F. Verbruggen; Court of Cassation decision of 31 October 2006, AR P.06.1016.N, *T.Strafr.* 2007, n. 1, 53, with comment by F. Schuermans and comment by J. Van Gaever; Court of Cassation decision of 23 September 2008, AR P.08.0519.N, *T.Strafr.* 2009, n. 3, 151, noot F. Schuermans; Court of Cassation decision of 5 June 2012, AR P.11.2100.N, ECLI:BE:CASS:2012:ARR.20120605.5, *NC* 2013, 439, with comment; Court of Cassation decision of 28 May 2013, AR P.13.0066.N, ECLI:BE:CASS:2013:CONC.20130528.9, *RABG* 2014, n. 1, 29, with comment by V. Vereecke, *RW* 2013-14, n. 41, 1616, with comment by B. De Smet

[59] Court of Cassation decision of 5 January 2016, AR P.15.1103.N, ECLI:BE:-CASS:2016:ARR.20160105.7, *RW* 2015-16, 1.

[60] Beernaert writes that the question whether the violation of the rules happened intentionally or not, might be relevant when deciding on disciplinary sanctions for those who broke the rules, but should not be decisive to determine what should happen to illegally gathered evidence. (M. Beernaert, "La preuve en matière pénale: principes généraux", in: *Droit pénal et procédure pénale*, Bruges, La Charte, looseleaf, (1) 20, n.43.) Maes convincingly responds that, to the extent that the exclusionary rule aims at underpinning the integrity of the criminal justice system, it does matter: intentional misbehaviour does justify a stronger reaction from the judge. (E. Maes, "Onrechtmatig verkregen bewijs en het integriteitsprincipe in het voorstel voor een nieuw Strafwetboek", *NC* 2020, 496).

[61] Court of Cassation decision of 12 June 2019, n.. P.18.1001.F, *Rev. dr. pén. entr.,* 2019, 289, ECLI:BE:CASS:2019:ARR.20190612.1: the rights of the

- the fact that the illegally obtained evidence only relates to a material element of the existence of the offence, and not to the involvement of a specific person in committing the offence,
- that fact that the irregularity is of a purely formal nature,
- the impact of the irregularity on the freedom or right that the violated norm is intended to protect.

This list is not exhaustive. The Court of Cassation also refers to the respect police forces had for the loyalty principle enshrined in the CCP as a factor that judges can take into consideration in the exercise of their discretion.[62] On several occasions, it has also taken into account circumstances which cast doubt on the reliability of the evidence obtained because of concerns as to the impartiality of the person who conducted the investigation.[63] This consideration differs from the second ground for exclusion because it need not be established that the reliability of the evidence has indeed been tainted. The fact that circumstances cast serious doubt on the reliability of the evidence suffices to conclude that its use would lead to a breach of the right to a fair trial.

The criteria are indicative, they are not binding, nor is any single one of them decisive. For instance, the fact that law enforcement agencies committed the irregularity intentionally does not necessarily

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defence can be balanced with the interest of society when assessing whether the trial is fair: Court of Cassation decision of 30 April 2014, n. P.13.1869.F. ECLI:BE:CASS:2014:ARR.20140430.2.

[62] Court of Cassation decision of 5 November 2014, AR P.14.1170.F, ECLI:BE:-CASS:2014:ARR.20141105.4 .

[63] Court of Cassation decision of 25 October 2016, AR P.15.0593.N, ECLI:BE:-CASS:2016:ARR.20161025.5; Court of Cassation decision of 12 June 2019, AR P.18.1001.F, ECLI:BE:CASS:2019:ARR.20190612.1. See in the same sense: ECtHR 19 February 2019, n. 25253/08, Rușen Bayar/Turkey: "*The Court reiterates that in determining whether the proceedings as a whole were fair, regard must be had to whether the rights of the defence have been respected, in particular whether the applicant was given the opportunity of challenging the admissibility and authenticity of the evidence and of opposing its use (see Panovits v. Cyprus, no. 4268/04, § 82, 11 December 2008). In addition, the quality of the evidence must be taken into consideration, including whether the circumstances in which it was obtained cast doubt on its reliability or accuracy*."

lead to exclusion of the resulting evidence.[64] The judge should take into account all the elements of the case to decide whether the use of the illegally obtained evidence would be contrary to the right to a fair trial. As a general rule, the judge is, however, not obliged to include all of the abovementioned criteria in the assessment and is free to use other criteria.[65] In a 2018 decision, the Court of Cassation seemed to imply that in the assessment the judge must include the criteria that the parties to the proceedings have raised.[66] In the same sense, the European Court of Human Rights has ruled that the right to a fair trial presupposes effective judicial control. The suspect must therefore be given the opportunity to challenge the admissibility and authenticity of the evidence. However, this possibility should not be purely theoretical and illusory. The judge must take a concrete position on the arguments raised and provide an appropriate response to the crucial points raised.[67]

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[64] Court of Cassation decision of 31 October 2006, AR P.06.1016.N, *T.Strafr.* 2007, n. 1, 53, with comment by F. Schuermans and comment by J. Van Gaever.

[65] See by way of example: Court of Cassation decision of 31 October 2006, AR P.06.1016.N, *T.Strafr.* 2007, n. 1, 53, with comment by F. Schuermans and comment by J. Van Gaever.; Court of Cassation decision of 5 June 2012, AR P.11.2100.N, ECLI:BE:CASS:2012:ARR.20120605.5, *NC* 2013, 439, with comment; Court of Cassation decision of 28 May 2013, AR P.13.0066.N, ECLI:BE:CASS:2013:CONC.20130528.9, *RABG* 2014, n. 1, 29, with comment by V. Vereecke, *RW* 2013-14, n. 41, 1616, with comment by B. De Smet; C. Conings, *Klassiek en digitaal speuren naar strafrechtelijk bewijs*, Antwerp, Intersentia, 2017, 367-368; T. Decaigny, "Bever, beroepsgeheim en bewijs" (comment to Court of Cassation decision 9 May 2007), *T.Strafr.* 2008, n. 2, (98) 100; B. De Smet, "Criteria en subcriteria voor de beoordeling van onregelmatigheden inzake de bewijsverkrijging" (comment to Court of Cassation decision 28 May 2013), *RW* 2013-14, (1620) 1624; P.Vanwalleghem, "Antigoon redt Kelkbewijs niet", *Juristenkrant* 2013, n. 272, 1 and 7; R.Verstraeten, S. De Decker, "Antigoon sluit de achterpoort, maar opent een raam" (comment to Court of Cassation decision 16 November 2004), *T.Strafr.* 2005, n. 6, (289) 290.

[66] *A contrario* reasoning based on the Court of Cassation decision 9 January 2018, AR P.17.0411.N, ECLI:BE:CASS:2018:ARR.20180109.3, *VAV* 2018, n. 2, 12, with comment by L. Brewaeys: "*It follows that, in the absence of a written submission to that effect, the court is not required, when assessing whether the use of evidence is contrary to the right to a fair trial, to consider all those criteria.*"

[67] ECtHR. 19 February 2019, n. 25253/08, Rușen Bayar/Turkey.

Whereas the broad, non-decisive and non-exhaustive criteria seem to leave a wide judicial discretion when assessing whether the right to a fair trial is breached, in practice it is mainly used to deny there is such a breach.[68] Evidence is almost never excluded in court nowadays.[69]

5. Fruits of the poisonous tree

The Court of Cassation has always stood by the "fruit of the poisonous tree doctrine": if the conditions for exclusion are fulfilled, this entails not only that the original illegally obtained evidence but also its fruits must be excluded.[70] If the original illegal action is covered by any of the three grounds for compulsory exclusion, judges cannot take into consideration "neither directly nor indirectly" any evidence found as a consequence of the original error. Nonetheless, both national judges[71] and

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[68] Critical about this practice and the absence of a fundamental debate on the 'balancing act' of courts: L. Kennes, "L'impertinente Antigone ou le défaut de pertinence du critère d'équité pour décider de l'exclusion d'une preuve irrégulière", *Journal des Tribunaux*, 2018, 2-9 and F. Kuty, "La nullité d'un élément de preuve pour contravention au caractère équitable de la procédure. L'essoufflement de l'article 6 de la Convention de sauvegarde des droits de l'homme et des libertés fondamentales", *Liber amicorum Patrick Henry*, Bruxelles, Larcier, 2019, 15-43.

[69] The Antigoon doctrine which had its origin in criminal procedure, even made its way into other branches of law: J. Van Doninck, *Het lot van onrechtmatig bewijs (The faith of illegal evidence)*, Antwerp, Intersentia, 2020, xvi + 380 p. Some lower labour law courts are resisting pressure from the Court of Cassation to extend the Antigoon-case law to social law matters (conflicts between employers and workers, dismissal cases): see on illegal GPS-monitoring of workers, which was excluded by the lower court: K. Rosier, "Illégalité d'un système de traçage G.P.S. et preuve irrégulière", *JLMB* 2020, 1353-1356.

[70] Court of Cassation decision of 16 June 1987, *Arr. Cass.* 1986-87, nr 627; Court of Cassation decision of 22 May 2001, *T. Strafr*. 2002, 36; Court of Cassation decision of 30 March 2010, *T. Strafr.* 2010, 276, with comment by K.Beirnaert K. Beirnaert.

[71] Court of Cassation decision of 15 January 2019, n. P.18.0790.N, ECLI:BE:CASS:2019:ARR.20190115.3, *Pasicrisie Belge* 2019, 84-87: a final decision by a court had found that a search was illegal. Defendants alleged that the wiretap in their separate case had been based on this illegal initial search and should be considered illegal, too. In vain: the courts decided that there had been enough other elements to justify the wiretap warrant and refused to declare it null and void.

the European Court of Human Rights[72] have accepted that 'other evidence' was unrelated to the illegally gathered evidence, that metaphorically it was 'fruit of a different tree' and that the unrelated evidence was sufficient to found a conviction. The decisions on pre-trial preventive detention also seem to be 'a different tree': the Court of Cassation stresses that illegally gathered information can[73] and often even should[74] be used by judges deciding on the arrest or the continued detention on remand of suspects.

6. Which judge can or must exclude the illegal evidence?

Under the existing CCP, which provides for two types of criminal investigation (preliminary investigation and judicial inquiry), the moment in the procedure at which the evidence will be excluded may differ. At the end of the judicial inquiry, the so-called pre-trial chambers (like the Chamber of Indictment of the Court of Appeals) should eliminate the illegally gathered evidence (art. 235*bis* CCP). The idea was to avoid that the trial judge would still be psychologically influenced by the evidence he is supposed to ignore. However, if the issue has not been raised in the pre-trial stage, it will still be possible to raise it at the actual trial. Furthermore, the Court of Cassation has suggested that exclusion of illegally obtained evidence by the pre-trial chambers is only possible in case of nullity or violation of the right to a fair trial. The second ground, unreliability caused by the irregularity of the gathering, cannot be judged

[72] E.g. ECtHR (Grand Chamber) 1 June 2010, n. 22978, Gäfgen/Germany.

[73] The mere fact that an irregularity has been committed at the opening of the inquiry does not necessarily mean that it has emptied the rights of defense of the accused of their very substance. It does not follow from any legal or treaty provision that serious indications of guilt gathered during an irregular search must necessarily be excluded by the judge in charge of the control on the preventive detention, nor that this judge cannot decide to take them into consideration. (Court of Cassation decision of 29 May 2019, n. P.19.0546.F, ECLI:BE:CASS:2019:ARR.20190529.4).

[74] The fact that the user of a call number has been identified in violation of Article 46bis CCP does not authorise the pre-trial chambers, ruling on preventive detention, to disregard this information, except in the three cases where Article 32 PT CCP provides for such a sanction. (Court of Cassation decision of 6 February 2019, n. P.19.0097.F, ECLI:BE:CASS:2019:ARR.20190206.3)

by the pre-trial chambers, as it requires an assessment of the probative value of the evidence and this is not their task. It should be left to the trial judge.[75] Regardless, the overwhelming majority of investigations are preliminary investigations conducted by the public prosecutor, which are not subject to the supervision of the pre-trial chambers, so any decision on exclusion or admission of illegally gathered evidence will be taken by the trial court. There is an important exception, though: if so-called special investigative methods have been used (undercover agents, secret visual surveillance, but not wiretap or covert search in IT-systems) the pre-trial Indictment Chamber will perform a control of legality even after a preliminary investigation (art. 235*ter* CCP). The pre-trial proceedings are not open to the public and the procedure is organised in such a way as to allow judicial control without revealing too much about the methods and technical means used or the identity of the people involved in the covert police operations.

7. No exclusion of exculpatory evidence[76]

In one situation illegally gathered evidence is always admissible: if the evidence is exculpatory, suspects can always rely on it.[77] It does not matter whether suspects or defendants were personally involved in the illegal actions or not.[78] For instance, when a witness statement containing some exculpatory information is illegal (e.g. violation of the public nature of the court sessions), the suspect can use the information in his defence

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[75] Court of Cassation decision of 3 April 2012, *Pasicrisie* 2012, 745; Court of Cassation decision of 19 May 2015, AR P.14.0921.N, *T. Strafr*. 2015, 261; in Court of Cassation decision of 4 April 2017, n. P.16.0351.N. it clarified that even if the pre-trial judge found the reliability was no problem, parties can still raise this issue before the trial judge, who is free to decide on the matter.

[76] S. De Decker, F. Verbruggen, "Across the River and Into the Poisonous Trees. From exclusion to the Use of Illegally Gathered Evidence in Criminal Proceedings in Belgium", in *The XIIIth World Congress of Procedural Law: the Belgian and Dutch Reports*, Antwerpen, Intersentia, 2008, 72-73.

[77] Court of Cassation decision of 12 November 1997, *Rev.dr.pén.* 1998, 586.

[78] R.Verstraeten, *Handboek strafvordering* (Companion to criminal procedure), Antwerp, Maklu, 2007, no. 1739, 870.

all the same.[79] As it happens, evidence which is exculpatory for one of the suspects can indeed be quite damaging for another suspect. Judges will have to consider it in favour of the former, but ignore it when dealing with the latter. That is easier said than done.

V. No Help From Above: Acquiescence From The European Courts

The Court of Cassation took the initiative to admit illegally gathered evidence routinely and exclude it only rarely. The new rule was subsequently written into the CCP by the Belgian Parliament and unsuccessfully challenged before the Belgian Constitutional Court. Hence, opponents who hoped to reverse or mitigate the current rule, could only attempt to challenge it at the European level. However, the European Court of Human Rights in Strasbourg has always been reluctant to meddle with member state rules on evidence. It has held that – at least for very serious offences and if the defendant had been given enough opportunity to challenge it – the Belgian practice did not violate the ECHR.[80]

A new front was opened, when in 2015 the European Union's Court of Justice in Luxembourg (hereinafter: CJEU) surprised everyone by stating in its *WebMindLicenses Kft*-judgement that if rules of EU law, including the EU Charter of Fundamental Rights, have been violated in the collection of evidence, the principle of effectiveness of Union law requires that member state judges exclude the evidence.[81] This prompted the Belgian Constitutional Court to ask for clarification in a preliminary question': if the CJEU found that Belgian rules on the compulsory retention of metadata by telecom and internet service providers for subsequent access and use by law enforcement (ICT traffic and location data) violated

[79] Court of Cassation decision of 3 November 1999, *T.Strafr.* 2000, 255, with comment by J. Meese.

[80] First the Antigoon case law (ECtHR 28 July 2009, n. 18704, Lee Davies/ Belgium.), subsequently art.32 PT CCP (ECtHR 31 January 2017, n. 40233/07, Kalneniene/Belgium, *T.Strafr*. 2017, 112, with comment by C. Van De Heyning.)

[81] European Court of Justice 17 December 2015, Case C-419/14, ECLI:EU:C: 2015:832, §§ 68 and 86-89.

the EU Charter of Fundamental Rights, did that create an obligation for Belgian judges to exclude all evidence resulting from such access and use of the data?[82] Could at least past cases be saved in which it had been assumed – wrongly, as it turned out – that the practice was not illegal under EU law?

In its somewhat sibylline judgement of 6 October 2020, the CJEU adopted a strict approach regarding the (il)legality, but a mild one regarding the use of illegal evidence.[83] Under the principle of primacy of EU law over national law, the CJEU claims the exclusive right to set temporary limits on the effect of any illegality, "*in exceptional cases, on the basis of overriding considerations of legal certainty, allow the temporary suspension of the ousting effect of a rule of EU law with respect to national law that is contrary thereto*".[84] National (constitutional) courts are not entitled to set temporal limits on a declaration of illegality and in this case the CJEU itself refused to do it. The Court was more flexible, however, with respect to the subsequent "*use in criminal proceedings, of information and evidence obtained as a result of the general and indiscriminate retention of traffic and location data*" in breach of EU law. According to the CJEU, as EU law currently stands, "*it is for member state national law alone to determine the rules relating to the admissibility and assessment, in criminal proceedings against persons suspected of having committed serious criminal offences, of information and evidence obtained by such retention of data contrary to EU law*".[85] It is remarkable that the CJEU only seems to refer to said national autonomy in relation to proceedings concerning '*serious criminal offences*'. The Court therefor still leaves the question open whether a breach of EU

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[82] Constitutional Court 19 July 2018, n. 96/2018; Cfr. F.Verbruggen, S.Royer, H. Severijns, "Reconsidering the blanket-data-retention-taboo, for human rights' sake? Belgian Constitutional Court offers CJEU chance to explain its puzzling Tele2 Sverige AB-decision", *EULawblog* 1 October 2018: https://europeanlaw-blog.eu/2018/10/01/reconsidering-the-blanket-data-retention-taboo-for-human-rights-sake/

[83] European Court of Justice (Grand Chamber) 6 October 2020, Joined Cases C-511/18, C-512/18 and C-520/18, ECLI:EU:C:2020:791.

[84] European Court of Justice (Grand Chamber) 6 October 2020, Joined Cases C-511/18, C-512/18 and C-520/18, ECLI:EU:C:2020:791, § 216.

[85] European Court of Justice (Grand Chamber) 6 October 2020, Joined Cases C-511/18, C-512/18 and C-520/18, ECLI:EU:C:2020:791, § 222.

law in relation to a less serious offence should indeed lead to exclusion of the illegally obtained evidence further to the principle of effectiveness of EU law. The CJEU furthermore stresses that the EU law principle of effectiveness, may be achieved "*not only by prohibiting the use of such information and evidence, but also by means of national rules and practices governing the assessment and weighing of such material, or by factoring in whether that material is unlawful when determining the sentence.*"[86] However, the CJEU omits to clarify under what circumstances the illegality should at least affect the weight of the evidence or sentence to be imposed. For Belgium, article 32 PT CCP denies the trial judges the right to exclude the evidence, but is silent about taking the illegality into account in weighing the evidence or at sentencing. The CJEU warns that the evidence should nevertheless be excluded from criminal proceedings if the suspects "*are not in a position to comment effectively on that information and that evidence and they pertain to a field of which the judges have no knowledge and are likely to have a preponderant influence on the findings of fact*."[87] This does not seem to differ from the existing Belgian exclusionary rule if the right to a fair trial would be affected.

VI. Alternative Ways To Sanction Investigative Misbehaviour

In extreme cases of investigative misbehaviour, judges can opt for the ultimate procedural sanction: the *inadmissibility* of the criminal proceedings as a whole.[88] In Belgium this 'sledge hammer' is rarely used[89],

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[86] European Court of Justice (Grand Chamber) 6 October 2020, Joined Cases C-511/18, C-512/18 and C-520/18, ECLI:EU:C:2020:791, § 225.

[87] European Court of Justice (Grand Chamber) 6 October 2020, Joined Cases C-511/18, C-512/18 and C-520/18, ECLI:EU:C:2020:791, §§ 226-227.

[88] Court of Cassation decision of 12 June 2019, P.18.1001.F.

[89] Court of Cassation decision of 10 February 2016, P.15.1505.F, ECLI:BE:-CASS:2016:ARR.20160210.5, *Rev. dr. pén.* 2016, 841; Court of Cassation decision of 12 June 2019, P.18.1001.F, ECLI:BE:CASS:2019:ARR.20190612.1. The Court of Cassation has made it very difficult for trial courts to use this sanction. It stated that "*as a rule, the sanction for the irregularity of evidence does not consist in the inadmissibility of the public action, but in the obligation for the judge to set aside the irregular elements and then to base his decision only on the other elements of evidence that may exist, insofar as they have been obtained in*

mainly in cases of extreme bad faith of the investigators[90] and of police provocation (entrapment). Offences are provoked if the intention to commit the offence was generated or reinforced – or endorsed when the suspect no longer wanted to commit the offence – by a police officer or a third person acting at the request of the police.[91] The Court of Cassation stressed that judges cannot base the inadmissibility on "*the sole circumstance that a rule relating to the administration of proof, the disregard of which is sanctioned criminally, has not been complied with; it*

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a regular manner without simply stemming from the irregular elements or being inseparably linked to them; on the other hand, the judge may only declare the public action inadmissible if it is established that, despite having set aside the irregular evidence, it remains absolutely impossible for the court to decide on the admissibility of the public action with respect for the right to a fair trial guaranteed by Article 6 ECHR." (F. Kuty, N. Colette-Basecqz, E. Delhaise, O. Nederlandt, H.D. Bosly, L. Kennes, D. Vandermeersch, "Chronique semestrielle de jurisprudence 2020/1", *Revue de Droit Pénal et de Criminologie*, 2020, 582, referring to Court of Cassation decision of 20 November 2018, AR P.18.0688.N, ECLI:BE:CASS:2018:ARR.20181120.5, *Rechtskundig Weekblad* 2018-2019, 1661.See also: L. Kennes, and D. Holzapfel, "La déloyauté d'un enquêteur peut justifier l'écartement des procès-verbaux rédigés par celui-ci sans pour autant impliquer l'irrecevabilité des poursuites", *JLMB* 2020, 1468-1477.

[90] Inadmissibility should be used when the investigation has been disloyal from the outset, the rights of defence of the suspect repeatedly violated seriously and definitively and the defendants have been irremediably deprived of their right to a fair trial. (Court of Appeals Brussels 10 December 2010, *JT* 2011, 54.) It would also be pronounced if the judicial inquiry has been completely coloured by the partiality of the investigating judge. Cfr.: Court of Cassation decision of 31 May 2011, AR P.10.2037.F, ECLI:BE:-CASS:2011:ARR.20110531.1, *JT* 2011, 583, opinion J. Genicot, with comment by M.A. Beernaert, *JLMB* 2011, 1524, with comment by A. De Nauw; cfr also K. Beirnaert, "Het recht van verdediging en de onmogelijkheid de regelmatigheid van de procedure te controleren: staat de ontvankelijkheid van de strafvordering niet op het spel?" (comment on Court of Cassation decision of 30 March 2010), *T.Strafr.* 2010, 277-281. Y. Liègeois and B. De Smet, "*Twintig jaar zuivering van nietigheden tijdens het gerechtelijk onderzoek. Tijd voor verandering of opfrissing van het systeem*", *RW* 2019-20, 8 point out: "*In some cases it is impossible to filter the illegally obtained elements from the evidence and to continue the procedure without them. Then the judge must declare the prosecution inadmissible if the first link of the procedural chain is compromised. If an offense is detected by the use of techniques which are incompatible with the law or general principles of law, there is no evidence for the judge to use.*"

[91] Art. 30 PT CCP.

is not otherwise when the irregular proof constitutes the sole or determining basis for the identification of the offender."[92]

Furthermore, the person who gathered the evidence may be *criminally liable*. This depends on the nature of the illegal action. If the conduct is punishable by law (e.g. conducting a search or a wiretap without a warrant is a criminal offence), this person can be prosecuted. Sometimes the identity of persons is protected by law (informers and undercover agents: art. 47*octies* and art. 47*decies* CCP). Although the public prosecution service can reveal their identity if crimes were committed, it cannot be forced to do so by judges, if it decides the identity should be protected. Belgium is probably unique in the world, in the sense that any public authority can incur criminal liability (article 5 Criminal Code). That includes the federal state: it could be held criminally liable for the behaviour of investigators, prosecutors or judges.

Persons who have been unfairly dealt with, can also *hold the state liable under tort law* for any loss that the illegal evidence gathering has caused them. They will have to demonstrate the causal relation between the illegal evidence and their material or moral loss before a civil court (art. 1382 Civil Code).

VII. Potential Use of Illegally Obtained Evidence in the Framework of Out of Court Settlements

The prosecution can also propose to solve the case out of court, by way of financial settlement or mediation.[93] Since out of court settlements always require the suspect's consent, a suspect who believes that the prosecution service has based its case on illegal evidence which should be excluded, can refuse to accept. However, as most of the times illegal evidence can still be used, there is nothing that would prevent its use to convince a suspect to accept a settlement. Indeed, by making generous settlement offers to suspects, the prosecutors can avoid judicial scrutiny of rule breaking in the course of the preliminary investigation. Judges do

[92] Court of Cassation decision of 23 January 2019, P.18.0623.F, ECLI:BE:-CASS:2019:ARR.20190123.12 .

[93] Articles 216*bis* and 216*ter* CCP.

have to validate the settlement if a judicial inquiry has been initiated or if the case was already pending before the criminal court.

VIII. FINAL REMARKS[94]

Privileging material truth-finding and punishment of perpetrators over the procedural protection of individual rights, Belgium has made it very difficult for judges to exclude illegally gathered evidence.[95] That this system seems compatible with European (human rights) law, does not mean there is no room for improvement.

We do not advocate a return to the old strict exclusionary rule. There are good reasons to mitigate it, without the overcompensation of current Belgian law. The underlying rationale of the exclusion of illegally obtained evidence has always been and remains that this sanction will have a dissuasive effect on overzealous police officers, prosecutors and perhaps even investigating judges. In real life this type of sanction may not reduce the unwanted behaviour as much as it would stimulate creativity in searching ways to avoid the sanction, e.g. 'evidence laundering' by third parties.[96] Moreover, the distance – both in terms of time and psychologically – between the illegal action and the potential exclusion of the evidence is considerable. Under Belgian criminal procedural law, the people behaving improperly during the investigation are rarely called to answer in person at the trial for their procedural misbehaviour. For unintentional, inadvertent breaking of the rules by investigators, one should not expect too much of a deterrent effect for exclusion as a

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[94] This is on update of the analysis from: D. De Decker, F. Verbruggen, "Across the River and into the Poisonous Trees. From Exclusion to Use of Illegally Gathered Evidence in Criminal Proceedings in Belgium", in The XIIIth World Congress of Procedural Law: the Belgian and Dutch Reports, Antwerp, Intersentia, 2008.

[95] E. Cape, J. Hodgson, T. Prakken and T. Spronken, "Procedural rights at the investigative stage: towards a real commitment to minimal standards" in E. Cape, J. Hodgson, T. Prakken and T. Spronken (eds.), *Suspects in Europe. Procedural rights at the investigative stage of criminal process in the European Union*, Antwerp, Intersentia, 2007, (1) 14.

[96] *Supra* III.1.From exclusion to admission.

sanction. The biggest policy problem is that a consistent application of the exclusionary rule produces results which both practitioners and public opinion find hard to swallow. The exclusionary rule is mostly – or only – to the advantage of 'guilty' suspects. When a case does not entail criminal proceedings, innocent persons whose rights were violated, will not benefit from this sanction. In conclusion, the exclusion of reliable, but illegally gathered evidence does not always sanction or reward the right persons. Sometimes admitting the evidence does make sense.[97]

The current Belgian system lacks coherence. On the one hand it is legalistic to the extreme, in the sense that it links obligatory exclusion to the violation of a formality for which statutes explicitly provide nullity. This is rather peculiar, as everyone knows that in Belgian statutory law such provisions are very rare. One could say the Court of Cassation passed the buck to Parliament, which should provide nullity for every formality which it deems essential. So far, the suggestion has fallen on deaf ears. On the other hand the current rules turn on the criterion of the right to a fair trial as a kind of panacea. The Belgian standards – which used to be relatively high – are reduced to the absolute minimum level of Strasbourg case law. As such, violations of the right to privacy do not entail an infringement on the right to a fair trial.[98] Belgium took Strasbourg case law, which should be an absolute minimum states should never fall below, and turned it into the only standard and consequently into the maximum level of protection.[99]

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[97] See F. Verbruggen, "Vindt het spook van Antigoon rust? Franstalig "schoonmoedersarrest" als slotluik van de nieuwe cassatierechtspraak over de uitsluiting van onrechtmatig bewijs" (French-language "mother-in-law decision" as the capstone for the exclusion of illegally obtained evidence. Comment on the Court of Cassation decision of 12 October 2005), *T.Strafr.* 2006, (26) 27-28.

[98] ECtHR 12 May 2000, Khan / U.K.; ECtHR 25 September 2001, P.G. and J.H. / U.K.; ECtHR 5 November 2002, Allen / U.K.; ECtHR 9 December 2004, Van Rossem / Belgium. See for instance: Court of Cassation decision 19 April 2016, P.15.1639.N, ECLI:BE:CASS:2016:ARR.20160419.3.

[99] F. Verbruggen, "Vindt het spook van Antigoon rust? Franstalig "schoonmoedersarrest" als slotluik van de nieuwe cassatierechtspraak over de uitsluiting van onrechtmatig bewijs" (French-language "mother-in-law decision" as the capstone for the exclusion of illegally obtained evidence. Comment on the Court of Cassation decision of 12 October 2005), *T.Strafr.* 2006, (26) 29-30.

One can understand that the Belgian authorities are concerned that ever more detailed procedural rules in combination with more adversarial style defence tactics will lead to trials in which procedural discussions overshadow the merits and the substantive issues of criminal law. Is this a nostalgic longing for trials with debates centred more on the defendants and less on the investigators? Much as we appreciate this concern, we would like to warn against phobic traits in the judicial dislike of defence arguments related to procedural errors. Any pharmacologist knows that small doses of poison can sometimes be beneficial for an organism. Still, the Belgian criminal justice system's appetite for poisoned fruit can be dangerous, if not lethal, in the long run. It is unduly lenient for sloppy performance and even for mischievous practices by investigators.

Rather than the (individual or general) deterrence of investigators, it should be the overall image of the criminal justice as trustworthy and the exemplary 'proper, lawful' behaviour of those representing it, that should guide the legal regime for illegally gathered evidence. Like other authors, we have suggested that Parliament should make exclusion the rule again, but allow judges to use the evidence in a number of exceptional situations.[100] Unlike now, investigators who infringe the rules should not be sure from the outset that their illegal actions will not affect the evidence and judges should explain why they do use evidence in spite of the fact that it was illegally gathered.

Now that Belgium is finally getting rid of the Napoleonic CCP and considering the adoption of a new one, Parliament should grasp the opportunity to redress matters. Whether the proposal for a new CCP will eventually be adopted, remains to be seen.[101] In any event, its drafters

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[100] C.Conings, *Klassiek en digitaal speuren naar strafrechtelijk bewijs (Classical and digital searches for criminal evidence)*, Antwerp- Cambridge, Intersentia, 2017, 737 a.ff. and 760.

[101] It involves abolition of the archaic, dysfunctional jury trial system, used only in 0,007 percent of cases, but politically a sacred cow. That common sense proposals are controversial in Belgium, is also apparent in the resistance against a single system of criminal investigation led by the prosecution service under judicial control. The judge-inquisitor would disappear: whether or not investigators would be allowed to infringe fundamental rights would be decided by judges who are not conducting the investigation themselves. The spokespeople of the union of investigating judges are now actively

are intent on changing the rules on illegal evidence.[102] Normality would be restored in the sense that legal rules must be followed and if they are not, as happens with illegally gathered evidence, the principle is that it should not be used *à charge*.[103] The Drafting Committee is right in stressing that under the Rule of Law, a state cannot take as a norm that illegally gathered evidence should be used. Information gathered in violation of the rights of the defence, the right to privacy, the right to a private life, the integrity of persons, in violation of rules on the competence of judges and courts or in violation of the secrecy of journalistic sources, should be excluded, as well as information derived from it ('fruit of the poisonous tree' will be poisoned).

However, the drafters do not envisage a return to the old strict exclusionary rule: judges will be allowed to make exceptions. They should consider the seriousness of the violation, the legal interest at stake and other circumstances of the specific case to allow the use when

> 1° it is not the result of an intentional and unjustifiable violation of the protected legal interest,
>
> 2° the seriousness of the legal rule or interest that was affected in the specific case does not outweigh the interest of society in prosecuting the evidence and punishing the perpetrator and
>
> 3° the use of the evidence is not detrimental to the integrity of the criminal justice system.

'campaigning' to keep the status quo with some minor changes. Belgian politicians, even though continuously talking about change and progress, tend to be very conservative in their approach of the country's dysfunctional criminal justice system.

[102] The draft is not yet public, as the Bill is being scrutinised by the Council of State. The main lines were already presented to Parliament at public hearing and written down by the Committee's co-ordinator, prof.dr. R. Verstraeten: Cfr. R.Verstraeten, A.Bailleux, “”Het voorstel van een nieuw Wetboek van strafvordering: algemene beginselen en fase van het onderzoek (The proposal for a new CCP: general principles and the investigation stage)”, in: *Themis Straf- en strafprocesrecht, academiejaar 2018-19*, Bruges, Die Keure 2019, 172-176. The text is said to have inspired a Bill proposed by individual Members of Parliament: https://www.dekamer.be/flwb/pdf/55/1239/55K1239001.pdf

[103] The existing principle that it can be used by the defence, i.e: *à décharge*, would be made explicit in statute law. *Supra* III.7.

In addition to this broad discretion to judge the appropriateness of excluding or using illegally gathered evidence, there are two instances in which judges have an absolute obligation to exclude. This would be more strict than the case law of the European Court of Human Rights[104]: evidence which results from inhuman and degrading treatment must always be excluded. The other will prove even more controversial (and might be amended by Parliament): if the law required authorisation (a warrant) by a judge for an investigative action and such authorisation has not been obtained. Less serious violations could be the basis for exclusion if the judge feels they are detrimental to the integrity of the criminal justice authorities.

Since the integrity of the criminal justice system is at stake, not just the rights of the specific individual, exclusion is due regardless of whether the person requesting the exclusion was personally affected by the illegal action. If only the rights of someone who is not being prosecuted have been violated, for instance by an illegal search, the evidence can be excluded and the defendants could 'profit' from this.

The drafters reject the distinction made between 'police information' on the one and 'evidence' on the other hand, since they believe the two are often inextricably linked. It does distinguish, as

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[104] Whereas the European Court of Human Right is unambiguous case for torture, on evidence produced by inhuman and degrading treatment, it depends on the bearing of the violation on the outcome. (ECtHR (Grand Chamber) 11 July 2006, n. 54810/00 Jalloh/Germany, § 105 (for torture), but in § 107: "*the general question whether the use of evidence obtained by an act qualified as inhuman and degrading treatment automatically renders a trial unfair can be left open*" because in the specific case (§ 108) "the *Court finds that the use in evidence of the drugs obtained by the forcible administration of emetics to the applicant rendered his trial as a whole unfair.*" Later (ECtHR (Grand Chamber) 1 June 2010, n. 22978/05, Gäfgen/Germany, § 178) it clarified: "*Article 3 may therefore also require, as a rule, the exclusion from use at trial of real evidence which has been obtained as the result of any violation of Article 3, even though that evidence is more remote from the breach of Article 3 than evidence extracted immediately as a consequence of a violation of that Article. Otherwise, the trial as a whole is rendered unfair. However, the Court considers that both a criminal trial's fairness and the effective protection of the absolute prohibition under Article 3 in that context are only at stake if it has been shown that the breach of Article 3 had a bearing on the outcome of the proceedings against the defendant, that is, had an impact on his or her conviction or sentence.*"

the Court of Cassation has always done, between the knowledge of the existence of offence (which is not affected by the illegality) and the actual use of illegal evidence. Only if the initial knowledge has its origin in torture, inhuman or degrading treatment, any prosecution would become impossible.

The new rules would have as a consequence that debates on how far the authorities can go will once again take place in open court, but not that serious criminals would be acquitted because of minor bureaucratic errors. Intentional wrongdoing will have more consequences than unintentional mistakes. The trial judge[105], which will have heard all the interested parties, is best placed to balance the conflicting interests and decide what is best for society.[106] Unlike now, the investigators will not know from the outset that whatever happens, the evidence will always be used. Such uncertainty can only be a stimulus to respect the law. That is what officers have sworn to do, anyway.

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[105] Exclusion at the pre-trial stage is no longer envisaged by the proposal.

[106] At this point we see things slightly differently from Maes, who, like many others, fears that a casuistic approach leads to legal uncertainty and unequal treatment. She thinks that either statute law or the Court of Cassation should develop more detailed rules (E.Maes, "Onrechtmatig verkregen bewijs en het integriteitsprincipe in het voorstel voor een nieuw Strafwetboek", *NC* 2020, 499 (and the authors mentioned in footnote 58) and 504). We think that exceptionally some legal uncertainty can be functional: the rule breaking law enforcement authority cannot rest assured that the illegal evidence can be used regardless, the defendant (who is not necessarily the victim of the rule breaking) has an incentive to raise the issue and provoke a debate on the integrity of the evidence gathering, but should not necessarily know in advance with absolute certainty that the evidence can never be used. 'No peace for the wicked' (at least not until the end of the trial), one could say. Or rather: 'less peace than under the current regime of article 32 PT CCP'.

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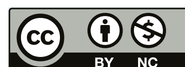

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Inutilizzabilità delle prove e delitto di tortura nel sistema processuale italiano

Evidence's prohibition on use and incrimination of torture in the Italian criminal procedure

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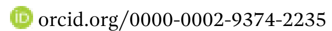
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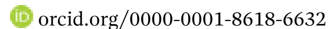
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Abstract: Gli autori esaminano la nuova fattispecie di inutilizzabilità introdotta nel codice di procedura penale italiano contestualmente all'inserimento nel codice penale della previsione che incrimina la tortura. Dopo aver tratteggiato le origini della disciplina e i connotati dell'illecito, affrontano le questioni di carattere processuale per rivolgere l'attenzione su un tema particolarmente complesso e dibattuto che attiene alle conseguenze che l'inutilizzabilità può produrre non soltanto sull'atto compiuto in violazione di un divieto, ma anche sugli altri atti ad esso collegati e, in particolare, sulle prove raccolte nel processo inquinato da condotte di tortura.

Parole chiave: Reato; Tortura; Prova; Inutilizzabilità.

Abstract: *The Authors examine the prohibition on use newly introduced in the criminal procedure code along with the new incrimination of torture's conduct,*

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introduced in the penal code. After having summarized the normative origins and the crime's outlines, Authors deal with its processual issues in order to draw attention about a particularly complex and debated problem: the consequences of the prohibition on use on a deed performed breaking the prohibition, and its consequences on other logically or juridically connected deeds (in particular, on evidences gathered in a trial corrupted by torture acts).

Keywords: *offense; torture; evidence; prohibition on use.*

Sommario: 1. Premessa. - 2. Alle origini della normativa italiana contro la tortura. - 3. L'incriminazione della tortura. - 4. L'inutilizzabilità di informazioni e dichiarazioni ottenute con la tortura. - 5. Tortura e inutilizzabilità derivata. 6. Considerazioni conclusive.

1. Premessa.

La pratica della tortura, ossia l'inflizione o la minaccia di un male nei confronti di una persona per muoverla a collaborare nell'accertamento dei fatti, ha caratterizzato, anche se in tempi ormai remoti, la struttura del rito penale, soprattutto nella tradizione inquisitoria, tanto che processo penale e tortura hanno condiviso lo stesso percorso lungo secoli di storia[3].

Soltanto lo stimolo del movimento illuminista diede avvio al progressivo abbandono delle regole d'*ancien regime* e al ripudio di un simile strumento di indagine, tanto violento quanto inaffidabile[4].

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[3] Per l'inquadramento della questione sotto il profilo storico è interessante richiamare le ricostruzioni di MANZINI, Vincenzo, *Trattato di diritto processuale penale italiano*, vol. I. Torino: Utet, 1931, p. 5 e ss. e di CORDERO, Franco *Procedura penale*, IX ed. Milano: Giuffrè, 2012, p. 24: il confronto tra le due opere permette di notare come la condanna di tale "aberrante istituto" (Manzini, *Trattato*, cit., p. 5) sia comune, nonostante la siderale distanza che separa la concezione del processo penale propugnata dai due Autori (il primo estensore del Codice Rocco del 1930, espressione giuridica di una visione politica totalitaria dello Stato; l'altro strenuo avversario di tale modello processuale e ispiratore della concezione accusatoria alla base del codice vigente).

[4] Chiarissime le parole di BECCARIA, Cesare, *Dei delitti e delle pene*. Milano: Mondadori, 1991, p. 41 «fortunato sintetizzatore e divulgatore delle dottrine filosofico-sociali del secolo XVIII» (MANZINI, Vincenzo, *Trattato*, cit., p. 16).

Fino a quel momento, era ben radicata, e pressochè incontrastata, l'idea che il corpo dell'inquisito fosse materia vile sulla quale incrudelire, dal punto di vista psichico prima ancora che da quello fisico[5], per vincerne la resistenza. Essendo l'imputato il depositario della verità[6], la pratica dei tormenti era diffusa nei tribunali, socialmente condivisa nei principi e accreditata dalla scienza criminalistica[7].

Le origini remote, le suggestioni offerte da questa tematica e l'imponente mole di materiale sedimentato in anni di studi impediscono, in questa sede, anche la più rapida digressione[8].

Conviene limitarsi a dire, in guisa di premessa, che lo sviluppo di una differente concezione del rapporto tra l'autorità giudiziaria e

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[5] La tortura, infatti, aveva inizio con una mera pressione psicologica: i giudici inquisitori procedevano con gradualità, cercando di provocare la confessione senza arrivare al tormento vero e proprio: si mostrava anzitutto all'accusato la camera dei supplizi con i suoi vari marchingegni, invitandolo a confessare. Poi, in caso di diniego, lo si denudava e si applicavano ai pollici e alle gambe gli strumenti del tormento - viti, lamelle di ferro, tenaglie - senza però infliggere dolore. Solo in caso di perdurante rifiuto a confessare, si procedeva: con l'avvertenza, tuttavia, sempre ripetuta nelle dottrine del tardo Medioevo di limitarsi a reiterare la tortura per non più di tre volte, con dovuti intervalli (cfr. ALESSI, Giorgia, *Il processo penale. Profilo storico*. Roma - Bari: Laterza, 2001, p. 71).

[6] FOSCHINI, Gaetano, *Sistema del diritto processuale penale*, II ed., vol. I. Milano: Giuffrè, 1965, p. 435.

[7] Si pensi che i trattatisti dell'epoca si erano esercitati persino in minuziose ricostruzioni della soglia indiziaria sufficiente per sottoporre l'imputato ai tormenti e sulla descrizione degli stessi (a titolo esemplificativo, si veda la descrizione dei vari *gradi* della tortura riportata in MANZINI, Vincenzo, *Trattato*, cit., p. 44, con puntuali richiami ad opere di criminalisti del tempo; sul formalismo della tortura, anche ALESSI, Giorgia, *Il processo penale*, cit., p. 71).

[8] Sul principio per cui l'imputato nel processo penale non può essere obbligato a contribuire all'accertamento dei fatti, cfr., per tutti, GREVI, Vittorio, Nemo tenetur se detegere. Interrogatorio dell'imputato e diritto al silenzio nel processo penale italiano. Milano: Giuffrè, 1972; MAZZA, Oliviero, *L'interrogatorio e l'esame dell'imputato nel suo procedimento*. Milano: Giuffrè, 2004; LUPARIA, Luca, *La confessione dell'imputato nel sistema processuale penale*. Milano: Giuffrè, 2006; per ulteriori citazioni e richiami di dottrina e giurisprudenza sul tema dell'imputato nella dimensione probatoria, sia consentito il rinvio a COLAIACOVO, Guido, L'imputato, in SPANGHER, Giorgio; MARANDOLA, Antonella; GARUTI, Giulio; KALB, Luigi (a cura di), *Procedura penale. Teoria e pratica del processo*. Torino: Utet, 2015, p. 294 e ss.

l'individuo ha limitato fortemente i poteri della prima sul secondo, tanto che i termini della questione sono ormai orientati dal riconoscimento di diritti e tutele che regolano le intrusioni e gli strumenti di coercizione e impediscono la strumentalizzazione della persona *ad eruendam veritatem*[9]. Questi principi, che permeano tutto il sistema processuale, coinvolgono necessariamente anche il diritto delle prove, ad evitare che l'esigenza di investigare e raccogliere gli elementi necessari per la repressione del crimine prevarichino oltremodo i diritti di libertà del singolo e, prima tra questi, l'inviolabilità della propria persona. Anche in questo ambito, dunque, la ricerca di un punto di equilibrio impone al legislatore, innanzitutto, di escludere strumenti inutilmente invasivi; poi, di regolare quelli ammessi secondo un criterio di proporzionalità tra il fine perseguito e la compressione degli interessi confliggenti[10]; infine, di apprestare rimedi idonei a reprimere le violazioni delle previsioni che tutelano i diritti fondamentali e a togliere valore processuale al materiale in quel modo raccolto.

Il codice di procedura penale italiano attualmente vigente individua nella sanzione della inutilizzabilità la reazione che presidia il rispetto delle regole probatorie ed espelle le prove raccolte in violazione dei divieti

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[9] Sulla questione particolare dell'intangibilità fisica del corpo dell'imputato e le relative deroghe consentite per fini investigativi e probatori, ALESCI, Teresa, *Il corpo umano fonte di prova*. Padova: Cedam, 2017.

[10] Il principio di proporzionalità si va affermando nel panorama giuridico contemporaneo quale cardine delle disposizioni che incidono sui diritti fondamentali (in tema, NEGRI, Daniele, Compressione dei diritti di libertà e principio di proporzionalità, in AA.VV., *Diritti della persona e nuove sfide del processo penale*. Milano: Giuffrè Francis Lefbvre, 2019, p. 55). In ambito europeo è comparso per la prima volta, come criterio regolatore dell'attività investigativa a seguito del recepimento della direttiva 2014/41/UE sull'ordine europeo di indagine: l'art. 7 del d. lgs. 21 giugno 2017, n. 108 stabilisce, infatti, che l'ordine di indagine non è proporzionato se dalla sua esecuzione può derivare un sacrificio ai diritti dell'imputato, dell'indagato o di altre persone coinvolte dal compimento degli atti richiesti, non giustificato dalle esigenze investigative o probatorie del caso concreto, tenuto conto della gravita' dei reati per i quali si procede e della pena per essi prevista (in tema, SPAGNOLO, Paola, L'ordine europeo di indagine penale, in MARCHETTI, Maria Riccarda; SELVAGGI, Eugenio (a cura di), *La nuova cooperazione giudiziaria penale*. Padova: Cedam, 2019, p. 288).

stabiliti dalla legge (art. 191 c.p.p.)[11]. Tali divieti, infatti, tratteggiano le direttrici epistemologiche ed etiche sulle quali si fonda l'opzione cognitiva, escludendo non soltanto gli strumenti privi di attitudine euristica, ma anche quelli che, pur idonei a perseguire un simile scopo, incontrano uno sbarramento innalzato dalla necessità di rispettare i diritti dell'individuo[12].

Questa impostazione comporta il netto rifiuto della tortura quale strumento investigativo e impone l'allestimento di un apparato normativo teso a reprimere eventuali abusi degli inquirenti con sanzioni particolarmente efficaci e dissuasive, tanto dal punto di vista sostanziale, che dal punto di vista processuale.

2. Alle origini della normativa italiana contro la tortura.

L'unanime condanna della tortura è consacrata in trattati e convenzioni che sin dal 1948 si sono susseguiti nel panorama internazionale, imponendo agli Stati aderenti di prevedere espressamente una incriminazione di tale condotta[13]. Non è fuori di luogo ricordare, tuttavia, che, a prescindere dalle sollecitazioni sovranazionali, un chiaro obbligo di penalizzazione era già contemplato dall'art. 13, comma 4, Cost.,

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[11] Sul punto, CONTI, Carlotta, L'inutilizzabilità, in MARANDOLA, Antonella, *Le invalidità processuali.* Profili statici e dinamici. Torino: Utet, 2015, p. 98.

[12] In questo senso, CONTI, Carlotta, *L'inutilizzabilità*, cit., p. 98.

[13] A titolo esemplificativo, si possono richiamare la Dichiarazione universale dei diritti dell'Uomo del 1948, lo Statuto di Roma sulla Corte penale internazionale, l'art. 3 della Convenzione europea dei diritti dell'uomo e, soprattutto, la Convenzione contro la tortura e altre pene o trattamenti crudeli, inumani o degradanti approvata dall'Assemblea generale O.N.U. il 19 dicembre 1984, ratificata dall'Italia con l. 3 novembre 1988, n. 498, e l'art. 3. Quest'ultima, all'art. 4 impone agli Stati aderenti di adeguare il loro diritto penale attraverso l'introduzione di sanzioni adeguate a reprimere gli atti di tortura. Il divieto di tortura, peraltro, ha assunto carattere di norma cogente e la relativa incriminazione rientra tra i *crimina iuris gentium* di competenza della Corte penale internazionale (NEGRI, Stefania, "Violazioni strutturali" e ritardo nell'esecuzione delle sentenze CEDU: il caso *Cestaro c. Italia* e l'incerta introduzione del reato di tortura nel codice penale italiano. *Diritto penale e processo*, Milano, n. 12, p. 1659, 2016).

in forza del quale, appunto, «è punita ogni violenza fisica e morale sulle persone comunque sottoposte a restrizioni di libertà»[14].

Nella dimensione legislativa il problema appariva risolto soltanto parzialmente: scomparsa da tempo da codici e leggi di diritto processuale quale possibile strumento per la indagini o la ricerca della prova, la tortura non aveva ancora assunto le sembianze del reato[15].

Eppure, con preoccupante frequenza, le cronache italiane lasciano emergere – talvolta in maniera quasi impercettibile, altre volte in modo più clamoroso - episodi di indagini basate su metodi violenti[16] che, peraltro, a volte rivelavano una furia cieca tesa solo a produrre sofferenze nella vittima, piuttosto che a facilitare il rilascio di dichiarazioni utili per le indagini[17].

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[14] In questo senso, PELISSERO, Marco, L'introduzione del delitto di tortura nell'ordinamento italiano, in GIARDA, Angelo; GIUNTA, Fausto; VARRASO, Gianluca (a cura di), *Dai decreti attuativi della legge "Orlando" alle novelle di fine legislatura*. Padova: Cedam, 2018, p. 225, e PEZZIMENTI, Carmela, Tortura e diritto penale simbolico: un binomio indissolubile. *Diritto penale e processo*, Milano, n. 2, p. 154, 2018.

[15] In realtà, come più volte sostenuto dal Governo italiano nel corso delle interlocuzioni con gli organi sovranazionali, condotte di tal fatta ben potevano essere inquadrate in una pluralità di previsioni del codice penale - come, ad esempio, i delitti di abuso d'ufficio (art. 323 c.p.), percosse (art. 581), lesioni personali (art. 582), sequestro di persona (art. 605), arresto illegale (art. 606), indebita limitazione della libertà personale (art. art. 607), abuso di autorità contro arrestati o detenuti (art. 608), perquisizioni e ispezioni personali arbitrarie (art. 609), violenza privata (art. 610) - tutte però accomunate dalla mitezza del trattamento punitivo e dalla blanda capacità dissuasiva, come osservato anche dai giudici dei diritti fondamentali (sul punto, NEGRI, Stefania, "Violazioni strutturali", cit., p. 1660).

[16] Su questo versante, è particolarmente interessante il giudizio di revisione che si è celebrato dinanzi alla Corte d'appello di Perugia che ha assolto il condannato, coinvolto in vicende di terrorismo, dopo aver accertato che la sua confessione era stata estorta con metodi brutali (App. Perugia, 15 ottobre 2013. Disponibile in *http://www.archiviopenale.it/tortura--corte-d-app-perugia-26-novembre-2013-(ud-15-ottobre-2013)-triaca-con-osservazioni-a-prima-lettura-di-f-loschi/contenuti/3202*).

[17] Tra i tanti casi, si può ricordare la vicenda di Stefano Cucchi: arrestato perchè sospettato di aver violato la normativa in materia di stupefacenti, Stefano Cucchi rimaneva vittima di un brutale pestaggio in una caserma dei Carabinieri e decedeva alcuni giorni dopo in un reparto di ospedale nel quale era stato ricoverato. L'*iter* processuale, che si è concluso a oltre dieci anni di

Proprio la necessità di adeguarsi finalmente alla Costituzione e agli altri impegni assunti in sede sovranazionale ha imposto all'Italia di intervenire sul codice penale con una novella che ha inserito il delitto di tortura e la relativa istigazione a commetterla. La spinta a colmare la lacuna è venuta da una condanna pronunciata dalla Corte europea dei diritti dell'uomo che ha censurato l'ordinamento italiano, ai margini di una eclatante vicenda giudiziaria, nella quale gli ostacoli alle indagini frapposti dalle forze di polizia e il decorso del tempo avevano comportato, per l'intervenuta prescrizione, l'impunità di autori di gravissimi reati commessi in danno di persone private della libertà personale[18]. La decisione dei giudici dei diritti fondamentali ha ravvisato due carenze: l'inadeguatezza strutturale del sistema discende dal fatto che rende difficoltosa, se non preclude addirittura, la possibilità di sanzionare gli atti di tortura e fa venir meno qualsiasi effetto deterrente[19].

La l. 14 luglio 2017, n. 110 ha agito, dunque, nella duplice dimensione del diritto penale sostanziale e del diritto processuale: per un verso, ha inserito due nuove incriminazioni, finalizzate a punire la tortura e l'istigazione a commetterla; per altro verso, ha introdotto altre previsioni tese a sterilizzare i contributi investigativi raccolti attraverso metodi violenti. A tali disposizioni, che costituiscono il "cuore" dell'intervento normativo se ne affiancano altre che impongono l'estradizione ed escludono l'immunità per coloro che sono ricercati per crimini di tal fatta ovvero, specularmente, impediscono il respingimento, l'espulsione e l'estradizione di coloro che ne siano vittime. L'intervento normativo – si

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distanza dal fatto, ha consentito di accertare che le responsabilità degli autori del reato – che non avevano agito per finalità "investigative", ma per pura brutalità – furono nascoste anche a causa dell'atteggiamento tenuto dai superiori e da manovre tese a sviare le indagini.

[18] C. eur. dir. uomo, 7 aprile 2015, Cestaro c. Italia, in *Cassazione penale*, Milano, n. 10, p. 3796, 2015, e successivamente, C. eur. dir. uomo, 22 giugno 2017, Bartesaghi e altri contro Italia, *ivi*, n. 10, p. 3773, 2017, entrambe relative agli episodi accaduti in occasione del G8 di Genova del 2001. Sul tema, COLELLA, Angela, C'è un giudice a Strasburgo. In margine alle sentenze sui fatti della Diaz e di Bolzaneto: l'inadeguatezza del quadro normativo italiano in tema di repressione penale della tortura. *Rivista italiana di diritto e procedura penale*, Milano, n. 4, p. 1801; NEGRI, Stefania, "Violazioni strutturali", cit., p. 1657.

[19] PEZZIMENTI, Carmela, Tortura e diritto penale simbolico, cit., p. 154.

è lucidamente osservato – è stato tanto cauto nella repressione penale delle condotte quanto "vigoroso" nel trattamento processuale delle informazioni raccolte attraverso l'uso di queste pratiche, e la nuova previsione sull'inutilizzabilità di informazioni e dichiarazioni estorte con la tortura stimola diverse riflessioni[20].

La norma interpolata nell'art. 191, comma 2-*bis*, del codice di rito, infatti, mira a rendere impermeabile il processo rispetto ai risultati informativi provenienti da condotte lesive dei diritti fondamentali. Dunque, se è su questo versante che il legislatore ha introdotto le novità più significative, è opportuno soffermarsi su tale innesto e su eventuali conseguenze di più ampio respiro nel campo del diritto delle prove. Si prospetta, all'orizzonte, un nuovo terreno di scontro sul quale tornano a misurarsi le teorie del *male captum, bene retentum*, da una parte, e dei "frutti dell'albero avvelenato", dall'altra. La prima afferma che le regole che assegnano valore di prove alle informazioni prodotte nel processo sono tutte contenute nella legge processuale, senza che assuma rilevo la natura illecita della loro raccolta se non è la legge processuale ad assegnare rilievo a tale violazione[21]; la seconda sostiene che determinati vizi che affliggono una prova non possono non incidere sulle prove che da questa "dipendono"[22].

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[20] In effetti, se dal punto di vista sostanziale, l'intervento legislativo è stato sottoposto a notevoli critiche, dal punto di vista processuale si sostiene che ben più incisivi sono gli strumenti di tutela della vittima di tortura che non patisce alcuna conseguenza probatoria sfavorevole dalla confessione estorta (CASSIBBA, Fabio, Brevi riflessioni sull'inutilizzabilità delle dichiarazioni estorte con tortura ai sensi del nuovo art. 191, comma 2-*bis*, c.p.p., *Diritto penale contemporaneo*, Milano, n. 4, p. 109, 2018).

[21] Nel nostro ordinamento manca una disposizione come quella contenuta nel codice di rito brasiliano all'art. 157, che esclude l'utilizzabilità delle prove illecite, intendendo tali le prove assunte in violazione di una norma costituzionale o di legge ordinaria e colpisce con identica sanzione anche le prove che da tali condotte derivino, eccezion fatta qualora non sia evidenziato il nesso tra le une e le altre ovvero quando la prova avrebbe potuto essere acquisita attraverso una diversa e lecita fonte. A tale divieto corrisponde, nella Costituzione, l'art. V, comma LVI, in forza del qualesono inammissibili le prove ottenute con metodi illeciti. Sul tema, ROSSO NELSON, Rocco Antonio Rangel, La prova illecita nell'ordinamento processuale penale brasiliano, *https://archiviodpc.dirittopenaleuomo.org/upload/5017-nelson2018a.pdf*.

[22] FERRUA, Paolo, Prove illegittimamente acquisite: passato ed avvenire di un'illustre teoria. *Diritto penale e proc*esso, Milano, n. 9, p. 1249, 2020.

3. L'incriminazione della tortura.

Conviene muovere da un breve inquadramento della previsione incriminatrice, al fine delinearne i tratti caratteristici, utili per l'analisi della materia processuale. L'integrazione della fattispecie di reato costituisce, infatti, il presupposto per l'applicazione della nuova fattispecie di inutilizzabilità ad esso collegata.

L'art. 613-*bis* c.p., collocato tra i delitti contro la libertà individuale, punisce chiunque con violenze e minacce gravi, ovvero agendo con crudeltà, cagiona acute sofferenze fisiche o un verificabile trauma psichico a una persona privata della libertà personale o affidata alla sua custodia, potestà, vigilanza, controllo, cura o assistenza ovvero che si trovi in condizioni di minorata difesa. Non conta il fine perseguito: oltre alla tortura "giudiziaria" cadono nella previsione pure tormenti tesi soltanto ad umiliare o annichilire la vittima, benchè la previsione di inutilizzabilità delle informazioni estorte sia destinata ad operare prevalentemente in relazione a condotte del primo tipo. A sottolineare l'intento del legislatore di colpire con efficacia le condotte in discorso è la parallela introduzione di una previsione "complementare" – l'art. 613-*ter* c.p. – che punisce in modo severo già la mera condotta istigatoria del pubblico ufficiale o dell'incaricato di pubblico servizio[23].

Un rapido esame della fattispecie consente di affermare che si tratta di una incriminazione dall'ampio spettro operativo che – si può dire in una prospettiva di sintesi – mira a stigmatizzare le condotte di violenza, fisica o morale, compiute da una persona che riveste una posizione di preminenza, nei confronti di un'altra che si trova rispetto all'agente in una posizione di soggezione[24]. Deve trattarsi, comunque, di condotte che, pure

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[23] Per l'inquadramento della previsione, PELISSERO, Marco, L'introduzione del delitto di tortura, cit., p. 225 e PEZZIMENTI, Carmela, Tortura e diritto penale simbolico, cit., p. 155 e ss.

[24] Le prime applicazioni pratiche confermano questa tendenza e, peraltro, confermano che, a prescindere dalla *occasio legis*, non sono avvenute per sanzionare in via esclusiva condotte delittuose di componenti delle forze dell'ordine. Ad esempio, nel caso di Cass., sez. V, 8 luglio 2019, n. 47079, in *Cassazione penale*, Milano, n. 6, p. 2340, 2020, con osservazioni di CAROLEO GRIMALDI, Nunzio, alcuni minorenni avevano reiteratamente compiuto incursioni notturne in danno di una persona affetta da disturbi psichiatrici.

isolate, si rivelino particolarmente crudeli: l'intensità dell'aggressione è, infatti, il tratto che distingue questo reato da altre figure simili.

Ancorchè ispirata dall'intenzione di delimitare con precisione il campo applicativo dell'incriminazione, per evitare che possa essere d'ostacolo allo svolgimento delle ordinarie attività di indagine penale, la trama della disposizione rischia però di complicare il lavoro dell'interprete, se è vero quanto si è detto a proposito di un eccesso nella individuazione delle modalità d'azione[25].

Dunque, la fattispecie penale è costruita come reato comune, che può essere compiuto da chiunque, e richiede, sotto il profilo soggettivo, il dolo generico[26]. Qui, l'Italia si è discostata dalle disposizioni sovranazionali che, invece, richiedono sia il dolo intenzionale, sia il dolo specifico[27] e mettono al bando soltanto la cosiddetta "tortura di Stato" ossia la tortura diretta ad acquisire gli elementi necessari per le indagini penali[28].

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[25] In questo senso, PELISSERO, Marco, L'introduzione del delitto di tortura, cit., p. 233, e PEZZIMENTI, Carmela, Tortura e diritto penale simbolico, cit., p. 156. È un difetto che riverbera conseguenze negative anche sul versante processuale: come si vedrà, infatti, la puntuale individuazione delle condotte penalmente rilevanti è fondamentale anche per delineare il campo applicativo della sanzione di inutilizzabilità degli atti raccolti attraverso la tortura.

[26] In realtà, come ricorda PELISSERO, Marco, L'introduzione del delitto di tortura, cit., p. 229, nel corso dei lavori preparatori la maggior parte dei disegni di legge prevedeva l'introduzione di un reato proprio, sulla falsariga, quindi, delle previsioni sovranazionali. Per un'ampia e puntuale ricostruzione dell'*iter* legislativo, COLELLA, Angela, La repressione penale della tortura: riflessioni *de iure condendo*. Disponibile in *https://archiviodpc.dirittopenaleuomo.org/upload/1406048334COLELLA_2014a.pdf*

[27] In questo senso è chiarissimo ancora l'art. 1 della Convenzione del 1984 (sul punto, PELISSERO, Marco, L'introduzione del delitto di tortura, cit., p. 242).

[28] Ad esempio, secondo l'art. 1 della Convenzione del 1984, la tortura indica qualsiasi atto mediante il quale sono intenzionalmente inflitti ad una persona dolore o sofferenze forti, fisiche o mentali, al fine segnatamente di ottenere da essa o da una terza persona informazioni o confessioni, di punirla per un atto che essa o una terza persona ha commesso, o è sospettata aver commesso, di intimorirla o di far pressione su di lei o di intimorire o di far pressione su una terza persona, o per qualsiasi altro motivo fondato su qualsiasi forma di discriminazione, qualora tale dolore o sofferenze siano inflitte da un agente della funzione pubblica o da ogni altra persona che agisca a titolo ufficiale, o su sua istigazione, o con il suo consenso espresso o tacito. Sulla scelta del legislatore di non perseguire soltanto la "tortura di Stato", Cass., sez. V, 8 luglio 2019, n. 47079, cit.

Quest'ultima, comunque, è oggetto dello specifico trattamento penale descritto dal secondo comma, che inasprisce la pena qualora il fatto sia compiuto da un pubblico ufficiale o da un incaricato di un pubblico servizio, con abuso dei poteri o in violazione dei doveri inerenti alla funzione o al servizio[29]. In questa declinazione, infatti, la norma consente di reprimere soprattutto aggressioni compiute in occasione di attività di polizia e si collega direttamente con gli eventi dai quali è scaturita la novella.

Numerose, dunque, sono le situazioni contemplate dal legislatore, ma le più significative, dall'angolo visuale del processualista, sono quelle relative al compito di custodia, vigilanza o controllo affidato al soggetto agente e alla privazione della libertà personale della vittima. È immediato, infatti, il collegamento con la coercizione processuale – precautelare o cautelare – ed esecutiva e con la correlata necessità di garantire una specifica e ulteriore protezione -– in rima con l'art. 13 Cost. – per coloro che siano privati della libertà personale. Poichè, tuttavia, non può escludersi che la cattura dell'imputato o del condannato e l'esigenza di evitare la sua fuga richiedano, oltre la privazione della libertà, anche metodi energici, a volte imposti dalla necessità di vincere eventuali resistenze, il legislatore ha introdotto una peculiare precisazione, contenuta nel terzo comma, che esclude l'applicazione della norma qualora le sofferenze derivino unicamente dall'esecuzione di legittime misure privative o limitative di diritti.

4. L'inutilizzabilità di informazioni e dichiarazioni ottenute attraverso la tortura.

La ricaduta processuale del compimento di condotte di tortura nel corso delle investigazioni è l'inutilizzabilità del materiale raccolto dagli inquirenti.

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[29] Secondo PELISSERO, Marco, L'introduzione del delitto di tortura, cit., p. 242, non dovrebbe trattarsi di una circostanza aggravante, ma di una fattispecie autonoma: la soluzione risolverebbe una pluralità di questioni interpretative e consentirebbe di dare maggiore significato al disvalore insito nelle condotte di prevaricazione provenienti da esponenti ella pubblica autorità. In questa ottica, ad esempio, consentirebbe di superare i problemi determinati dal bilanciamento con eventuali circostanze attenuanti, che rischierebbe di obliterare il particolare disvalore legato alla qualifica soggettiva dell'autore (sul tema, PEZZIMENTI, Carmela, Tortura e diritto penale simbolico, cit., p. 155).

La inidoneità probatoria delle dichiarazioni raccolte in questo modo sarebbe desumibile già da altre previsioni: dall'art. 188 c.p.p. che tutela la «libertà morale della persona nella assunzione della prova», in generale, e dall'art. 64, comma 2, c.p.p., per quanto concerne, in particolare, l'imputato[30]. Anzi, mentre alla stregua di queste disposizioni l'inutilizzabilità delle informazioni *ex* art. 191 c.p.p. scaturisce dal semplice uso di mezzi diretti all'effrazione psichica, l'inutilizzabilità prevista dal nuovo comma 2-*bis* presuppone la ricorrenza di tutti gli elementi che compongono la correlata fattispecie di reato (le "sofferenze fisiche" o il "verificabile trauma psichico", la molteplicità delle condotte, la violazione della dignità). Ne consegue che la previsione sanziona una sottofattispecie di lesione della libertà morale della persona più articolata e dunque meno agevole da accertare[31].

Al di là dell'indubbio valore simbolico della novella, quale sottolineatura della centralità della dignità della persona nel processo[32], essa in primo luogo positivizza l'assunto – in verità ben consolidato sia in dottrina che in giurisprudenza – secondo cui qualsiasi dichiarazione estorta è inutilizzabile nel processo, ma soprattutto, – nell'affermare che

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[30] L'art. 188 c.p.p. afferma che «non possono essere utilizzati, neppure con il consenso della persona interessata, metodi o tecniche idonei a influire sulla libertà di autodeterminazione o ad alterare la capacità di ricordare e di valutare i fatti», mentre in tema di interrogatorio dell'imputato l'art. 64 comma 2 c.p.p. specifica che «non possono essere utilizzati, neppure con il consenso della persona interrogata, metodi o tecniche idonei a influire sulla libertà di autodeterminazione o ad alterare la capacità di ricordare e di valutare i fatti». Del resto, già sotto la vigenza del previgente codice del 1930 la dottrina, pur in assenza di previsioni normative espresse, tendeva a estromettere dal processo contributi probatori estorti con metodi simili a quelli che oggi sono contemplati dall'art. 613-*bis* c.p. Ad esempio, secondo CORDERO, Franco, *Procedura penale*, cit., p. 619, «nemmeno sotto il vecchio codice costituivano prova le emissioni verbali eterodeterminate, ma era arguibile dal sistema, mancando previsioni *ad hoc*».

[31] GREVI, Vittorio; ILLUMINATI, Giulio, Prove, in CONSO, Giovanni; GREVI, Vittorio; BARGIS, Marta (a cura di), *Compendio di procedura penale*, IX ed. Padova: Cedam, 2018, p. 319, secondo i quali la precisazione potrebbe rivelarsi addirittura controproducente, prestandosi ad essere erroneamente intesa nel senso che la libertà di autodeterminazione risulti pregiudicata solo in presenza di comportamenti particolarmente gravi e reiterati come quelli descritti dal codice penale.

[32] CASSIBBA, Fabio, Brevi riflessioni sull'inutilizzabilità, cit., p. 114.

dichiarazioni e informazioni ottenute mediante il delitto di tortura non sono «comunque» utilizzabili – vuole chiarire che l'inefficacia probatoria delle stesse si proietta anche al di là del loro impiego nella sentenza.

Quanto alla natura della patologia che colpisce dichiarazioni e informazioni acquisite tramite tortura, si tratta, innanzitutto, di una inutilizzabilità riconducibile nella categoria delle inutilizzabilità "patologiche", o inutilizzabilità-sanzione, che derivano dalla violazione di uno specifico divieto probatorio. Il vizio, pertanto, non potrà essere sanato, ma, anzi, dovrà essere rilevato, anche d'ufficio, in ogni stato e grado del procedimento, a prescindere dalla scelta di definire il rito nelle forme del rito abbreviato o del patteggiamento e da eventuali accordi tra le parti sulla acquisizione di atti al fascicolo per il dibattimento[33]. L'inutilizzabilità opererà poi in qualsiasi altro tipo di giudizio non soltanto penale, ma anche di diversa natura, come ad esempio nel procedimento di prevenzione[34].

L'unica deroga prevista alla radicale irrilevanza processuale del prodotto di queste condotte è rappresentata dal loro impiego nel processo a carico dei torturatori qualora le dichiarazioni o le informazioni debbano essere spese contro coloro che hanno commesso il delitto e al solo fine di provarne la responsabilità penale[35]. La previsione è peraltro superflua, oltre che di imprecisa formulazione, perché qualsiasi atto probatorio inutilizzabile nel suo contenuto informativo, non può non valere logicamente a provare che l'atto stesso è stato compiuto, in questo caso come corpo del reato[36].

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[33] Sul rilievo delle invalidità processuali negli accordi per l'acquisizione di atti, BRONZO, Pasquale, Accordi sul fascicolo e vizi degli atti. *Cassazione penale*, Milano, n. 11, p. 3764, 2020.

[34] Tanto in ossequio all'insegnamento di Sez. un., 25 marzo 2010, n. 13426, in *Cassazione penale*, 2010, p. 3049, con nota di BELTRANI, Sergio, *Intercettazioni inutilizzabili e procedimento di prevenzione: la fine di un equivoco*.

[35] UBERTIS, Giulio, *Sistema di procedura penale*, vol. II. Milano: Giuffrè, 2020, p. 228; così anche GREVI, Vittorio; ILLUMINATI, Giulio, Prove, cit., p. 319.

[36] C. eur. dir. uomo, 30 giugno 2008, Gäfgen c. Germania [GC], ricorso n. 22978/05, in *hudoc.echr.coe.int*: per un commento, MAFFEI Stefano, Il mantello della legge. Male captum, bene retentum e dottrina del «ritrovamento inevitabile» in una recente pronuncia della Corte Europea dei diritti dell'uomo, in *Studi in onore di Mario Pisani*. Milano: Giuffrè, 2010, vol. 2, p. 349 ss.

L'operatività della previsione, proprio per il suo peculiare significato è collegata all'accertamento della commissione di una condotta rilevante ai sensi dell'art. 613-*bis* c.p. E non potrebbe essere diversamente alla luce della scelta legislativa di fare esplicito riferimento a quanto ottenuto "mediante il delitto di tortura"[37]. Tuttavia, questo non significa che condotte lesive della libertà morale dell'indagato o di una persona sentita nel corso di una indagine penale che non integrino la fattispecie delittuosa in discorso non siano parimenti 'inutilizzabili' ai sensi delle altre disposizioni normative prima ricordate[38]. Il rapporto tra queste previsioni allora può essere descritto come quello tra un'area più ampia, perimetrata dagli artt. 188 e 64 c.p.p., che al suo interno ne contiene una più ristretta, delimitata dall'art. 191, comma 2-*bis* c.p.p.

Viene da chiedersi, in primo luogo, quale tipo di valutazione il giudice sia chiamato a compiere e di quali strumenti egli disponga per accertare il compimento della tortura e, in secondo luogo, quali rimedi abbia la persona condannata all'esito di un processo in seno al quale è stata utilizzata la tortura qualora tale situazione divenga nota dopo il passaggio in giudicato della sentenza.

Nulla quaestio nell'ipotesi in cui il reato sia stato accertato con sentenza passata in giudicato: qui il precedente consente facilmente la diagnosi di inutilizzabilità della dichiarazione estorta e, dunque, l'espulsione dal compendio probatorio del materiale inquinato.

Più complicata, invece, è la situazione che si verifica in assenza di un accertamento definitivo del reato. Si tratta, peraltro, di ipotesi destinate ad essere piuttosto frequenti nella pratica: l'accertamento richiede comunque la celebrazione di un processo *ad hoc*, che correrebbe parallelo a quello in seno al quale le informazioni o le dichiarazioni dovrebbero essere utilizzate.

D'altro canto, la stessa commissione del delitto di tortura potrebbe divenire nota o comunque essere denunciata a distanza di molto tempo:

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[37] *Contra*, tuttavia, CASSIBBA, Fabio, Brevi riflessioni sull'inutilizzabilità, cit., p. 113.

[38] Ad esempio l'uso di tecniche di ipnosi, senza alcuna coercizione della persona, anzi col suo consenso o su sua richiesta, rientreranno nel campo di applicazione dell'art. 188 c.p.p.

si tratta di reati che maturano in contesti poco penetrabili dall'esterno, e non è difficile che in quel momento il procedimento pregiudicato dalla condotta illecita si sia ormai concluso.

Nella prima ipotesi – ossia quando la sanzione di inutilizzabilità debba operare rispetto all'impiego delle dichiarazioni ottenute attraverso condotte di tortura in un procedimento penale non ancora concluso – il giudice può e deve compiere ogni accertamento necessario per verificare in completa autonomia il compimento di comportamenti simili in danno dell'imputato o di testimoni. A tal fine, l'indagine potrebbe svolgersi, sulla falsariga di quanto dispone l'art. 500, comma 5, c.p.p, per l'accertamento di condotte illecite volte ad inquinare prove dichiarative, nel contesto di un procedimento incidentale[39]: l'oggetto di prova in questo caso sarebbe costituito da fatti materiali rilevanti ai fini dell'applicazione di una norma processuale, ai sensi dell'art. 187, comma 2, c.p.p.

Nella seconda ipotesi, invece, l'uso della tortura emerge quando ormai la decisione basata sulle informazioni illecitamente ottenute è già passata in giudicato e, pertanto, occorre rivolgere lo sguardo verso le impugnazioni straordinarie e, precisamente, alla revisione. Anche qui, tuttavia, la soluzione è agevole soltanto in presenza di una sentenza di condanna definitiva a carico dei torturatori, che consentirebbe di esperire il rimedio ai sensi dell'art. 630, lett. d), c.p.p. In tal caso, alla corte d'appello spetta verificare in che modo la commissione del reato abbia inciso sulla statuizione impugnata, individuando nell'economia complessiva delle valutazioni compiute sull'intero compendio probatorio quale sia stato il rilievo delle prove acquisite attraverso la tortura.

[39] Si tratta di una ipotesi eccezionale di recupero probatorio di dichiarazioni rese nelle indagini preliminari da persone che poi vengono sentite come testimoni in dibattimento: ai sensi del quarto comma dell'art. 500 c.p.p. «Quando, anche per le circostanze emerse nel dibattimento, vi sono elementi concreti per ritenere che il testimone è stato sottoposto a violenza, minaccia, offerta o promessa di denaro o di altra utilità, affinchè non deponga ovvero deponga il falso, le dichiarazioni contenute nel fascicolo del pubblico ministero precedentemente rese dal testimone sono acquisite al fascicolo del dibattimento e quelle previste dal comma 3 possono essere utilizzate». Il successivo comma 5 precisa che «sull'acquisizione di cui al comma 4 il giudice decide senza ritardo, svolgendo gli accertamenti che ritiene necessari, su richiesta della parte, che può fornire gli elementi concreti per ritenere che il testimone è stato sottoposto a violenza, minaccia, offerta o promessa di denaro o di altra utilità».

Qualora, invece, una simile sentenza manchi, l'accesso al giudizio di revisione diviene più complicato: la giurisprudenza interpreta l'art. 630 comma 1 lett. d) c.p.p. – che ammette la revisione «se è dimostrato che la condanna venne pronunciata in conseguenza di falsità in atti o in giudizio o di un altro fatto previsto dalla legge come reato» – nel senso che il rimedio sia attivabile solo in presenza una sentenza di condanna che accerti la commissione del reato che ha determinato la decisione da rimuovere, salvo che in quel procedimento sia intervenuta una causa estintiva che abbia impedito un tale accertamento nel merito[40].

E tuttavia, una impostazione simile – nella quale l'ingiustizia della condanna si somma alla impunità degli autori del reato – lascerebbe senza rimedio statuizioni che poggiano sulla violazione di diritti fondamentali: occorre quindi saggiare ogni possibilità interpretativa per giungere comunque alla rimozione del giudicato.

In questa prospettiva, la lett. c) dell'art. 630 c.p.p., che consente la revisione in presenza di una "prova nuova", può essere individuata quale punto di partenza. In questa ottica, la commissione del reato di tortura costituisce il *quid novi* da provare poichè la dimostrazione che le investigazioni sono state inquinate da una simile condotta aprirebbe la strada all'applicazione dell'art. 191, comma 2-*bis*, c.p.p. e alla conseguente eliminazione dal compendio probatorio degli elementi acquisiti mediante tortura. L'accertamento del reato costituisce, come detto poc'anzi, un fatto rilevante per l'applicazione di una norma processuale. Nella fase rescissoria del giudizio di revisione, il giudice dovrebbe nuovamente esprimersi, alla luce di questa nuova conformazione del fascicolo del dibattimento, sulla penale responsabilità dell'imputato.

In ogni caso, a fronte dell'accertata commissione del delitto di tortura, si pone il problema di verificare in concreto quali siano le conseguenze che discendono dall'espunzione del materiale acquisito mediante il suddetto reato dal compendio probatorio. Si ritiene che l'eliminazione di tali elementi imponga comunque di valutare sulla base di ciò che residua la sussistenza della penale responsabilità dell'imputato non potendo estendersi l'effetto invalidante fino a escludere in radice la

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[40] Cass., sez. V, 24 giugno 2009, n. 40169, in *Cassazione penale*, Milano, n. 2, p. 632, 2012.

possibilità di emettere una sentenza di condanna se la stessa possa reggersi su prove immuni dall'effetto inquinante della tortura. Sviluppo coerente di tale impostazione nei giudizi di impugnazione è la conseguenza che la censura incentrata sulla violazione dell'art. 613-*bis* c.p. deve – nella prospettiva di quella valutazione controfattuale nota come "prova di resistenza"[41] – delineare la capacità dimostrativa dell'elemento da espellere e la sua incidenza ai fini della decisione[42].

Resta da chiarire, infine, la sorte di eventuali contributi probatori favorevoli all'imputato. Da questo punto di vista, la questione appare riconducile al dilemma in materia di intercettazioni inutilizzabili e alla possibilità di superare i vizi della procedura e la conseguente inutilizzabilità del materiale captato qualora le conversazioni contengano elementi favorevoli all'imputato. Da tempo in dottrina si pone il quesito se l'inutilizzabilità probatoria operi incondizionatamente, e sia dunque configurabile in ogni caso il divieto di valutazione di qualsiasi prova acquisita *contra legem*, oppure se possa configurarsi una deroga per l'ipotesi in cui i dati probatori risultino favorevoli alla difesa. Nonostante né il testo dell'art. 191 c.p.p. né quello delle previsioni speciali di inutilizzabilità sparse nel nostro codice di rito offrano argomenti utili in tal senso, qualcuno ammette – per ragioni etiche più che giuridiche[43] – la

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[41] Secondo la Suprema Corte, qualora si lamenti l'inutilizzabilità o la nullità di una prova dalla quale siano stati desunti elementi a carico, il motivo di impugnazione deve illustrare, a pena di inammissibilità per aspecificità, l'incidenza dell'eventuale eliminazione del predetto elemento ai fini della cosiddetta "prova di resistenza". Ciò in quanto è sempre necessario valutare se le residue risultanze, nonostante l'espunzione di quella inutilizzabile, risultino sufficienti a giustificare l'identico convincimento. Secondo tale impostazione, gli elementi di prova acquisiti illegittimamente diventano irrilevanti ed ininfluenti se, nonostante la loro espunzione, le residue risultanze risultino sufficienti a giustificare l'identico convincimento (*ex plurimis*, Cass., sez. fer., 6 agosto 2019, n. 44878, in *Guida al diritto*, Milano, n. 48, p. 101, 2019). Sul punto, anche *infra*, § 5.

[42] In senso contrario, ROMANELLI, Bartolomeo, Delitto di tortura e inutilizzabilità probatoria, in GIARDA, Angelo; GIUNTA, Fausto; VARRASO, Gianluca (a cura di), *Dai decreti attuativi*, cit., p. 263, secondo il quale una diversa conclusione sarebbe coerente anche gli arresti dei giudici dei diritti fondamentali, e CASSIBBA, Fabio, Brevi riflessioni sull'inutilizzabilità, cit., p. 115. Sul punto, *infra*, § 5.

[43] CORDERO, Franco, Il procedimento probatorio, in *Tre studi sulle prove penali*. Milano: Giuffrè, 1963, p. 143.

possibilità di impiego *pro reo*, ad esempio per le ipotesi in cui la sanzione presidi interessi extraprocessuali, e la nega recisamente solo quando invece è posta a tutela della affidabilità gnoseologica dei dati acquisiti al processo[44]. Nel nostro caso una utilizzabilità *pro reo* appare decisamente opinabile, anche alla luce dal fatto che informazioni e dichiarazioni estorte con la violenza e la minaccia da persone fisicamente e psicologicamente prostrate presentano l'ulteriore problematica relativa alla loro scarsa attendibilità[45].

Siccome poi, come detto, la tortura è stata costruita come reato comune – mentre la "tortura di Stato" è punita come una autonoma fattispecie – è possibile che la condotta in discorso sia tenuta anche da soggetti diversi da pubblici ufficiali che agiscono "nell'interesse" di altre parti processuali. In altri termini, una situazione simile si verificherebbe qualora le dichiarazioni fossero estorte su mandato dell'imputato al fine di precostituirsi prove in suo favore. Anche qui, dunque, ove fosse accertata la commissione del reato, il materiale raccolto sarebbe colpito dalla previsione di inutilizzabilità[46].

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[44] GALANTINI, Novella, *L'inutilizzabilità della prova nel processo penale*, Padova: Cedam, 1992, p. 77. In altre ricostruzioni, si ipotizza una utilizzabilità *in favorem* (solo) per in presenza di una sanzione riguardante il *quomodo* acquisitivo in quanto in tal caso il risultati probatorio potrebbe essere ottenuto attraverso una condotta rispettosa del dato normativo (LOZZI, Gilberto, *Lezioni di procedura penale*. Torino: Giappichelli, 2018, p. 201). La dottrina maggioritaria esclude, tuttavia, una limitazione generale (ossia in assenza di limitazioni specifiche) della operatività della sanzione in relazione alla direzione di impiego (*contra* o *in favorem*).

[45] Ritiene precluso l'utilizzo *pro reo* anche ROMANELLI, Bartolomeo, Delitto di tortura e inutilizzabilità probatoria cit., p. 264, secondo il quale una diversa soluzione potrebbe incentivare il ricorso alla tortura al fine di precostituire prove liberatorie e proprio o altrui beneficio.

[46] A titolo esemplificativo, si può segnalare che la Corte europea dei diritti dell'uomo ha censurato l'uso probatorio della registrazione di dichiarazioni di un soggetto rese mentre veniva sottoposto a tortura dagli altri membri dell'organizzazione criminale, puntualizzando che il divieto di utilizzo delle dichiarazioni sotto tortura per non minare l'equità complessiva del processo non deve essere limitato ai casi di violenza commessi da un pubblico ufficiale, ma pure da un terso privato cittadino (C. eur. dir. uomo, 5 novembre 2020, Cwick c. Polonia).

5. Tortura e inutilizzabilità derivata

Dicevamo che l'art. 191, comma 2-*bis*, c.p.p., nel ribadire l'inutilizzabilità probatoria delle dichiarazioni e informazioni ottenute attraverso condotte di tortura, già desumibile dal combinato disposto degli artt. 188, 64 comma 2 e 191 comma 1, c.p.p. vale soprattutto a sottolineare – nell'avverbio «comunque» – che l'irrilevanza va oltre il loro impiego diretto in sentenza, essendo esse inidonee a "fare prova" in qualsiasi contesto procedimentale[47]. Facile comprendere i motivi di tale sottolineatura: le dichiarazioni estorte con la tortura quasi mai affiorano alla luce del giudizio dibattimentale e solitamente restano nascoste tra le carte del fascicolo del pubblico ministero, incidendo sulle sorti del processo attraverso la loro influenza sull'orientamento delle indagini e sulla raccolta del materiale probatorio piuttosto che attraverso la loro diretta valutazione nella decisione finale.

Si tratta di un profilo importante, anche per la valenza preventiva della sanzione di inutilizzabilità, alla cui *ratio* non è estraneo un effetto *dissuasivo*, ossia di prevenzione delle violazione della regole, oltre che di rimedio alle violazioni già consumate. Le sanzioni processuali rappresentano un fondamentale deterrente per i soggetti che curano la provvista probatoria dall'agire *contra legem*: chi trasgredisce alla regola non può sperare di avvantaggiarsi del risultato ottenuto[48].

La clausola va tuttavia intesa giudiziosamente, alla luce dei principi del nostro sistema processuale. Il fatto che la dichiarazione estorta sia "comunque" inutilizzabile implica che la stessa, oltre a non poter essere spesa in sentenza, non possa essere utilizzata neppure in modo "indiretto", e cioè posta a fondamento di atti istruttori che richiedano per il loro legittimo compimento una particolare giustificazione: una intercettazione, una perquisizione, un sequestro di corrispondenza, un provvedimento

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[47] Anzi, come si è già ricordato, ogni dichiarazione estorta o resa in stato di costrizione è giuridicamente inesistente come prova, poiché la libertà del volere è elemento essenziale e costitutivo di ogni dichiarazione resa nel processo, come osservava Cordero già sotto l'impero del vecchio codice ed in assenza di qualsiasi comminatoria di invalidità (*supra*, nt. 30).

[48] CASSIBBA, Fabio, Brevi riflessioni sull'inutilizzabilità, cit., p. 166; in argomento, volendo BRONZO, Pasquale, *Il fascicolo per il dibattimento*. Poteri delle parti e ruolo del giudice. Milano: Cedam, 2017, p. 270.

ammissivo di incidente probatorio. Tanto vale anche per atti di natura non istruttoria, ovviamente: neppure misure cautelari o proroghe delle indagini possono validamente basarsi su informazioni processualmente inutilizzabili. Sintetizzando, l'inidoneità probatoria che discende dalla sanzione riguarda, oltre alla sentenza, ogni altro contesto "decisorio" all'interno del procedimento[49].

L'avverbio "comunque" e il riferimento alle "informazioni" oltre che alle "dichiarazioni" evoca un effetto riflesso della sanzione processuale molto simile a quello che il nostro codice stabilisce in tema di notizie coperte da segreto di Stato, laddove prevede che l'opposizione del medesimo, «confermata con atto motivato dal Presidente del Consiglio dei Ministri, inibisce all'autorità giudiziaria l'acquisizione e l'utilizzazione, anche indiretta, delle notizie coperte dal segreto» (art. 202, comma 5, c.p.p.).

Non ci sarebbe neppure bisogno di precisarlo, a rigore, accedendo alla ricostruzione propugnata da tempo dalla dottrina più accreditata, secondo la quale le norme sulla "prova" compendiate nel libro terzo del codice di rito non valgono solo per la fase del giudizio, ma devono valere anche per le indagini preliminari[50]. Letto in questo modo, il comma 2-*bis* dell'art. 191 c.p.p. sarebbe una norma pedagogica, di chiarificazione, utile nella misura in cui sottolinea come in casi del genere i vizi probatori siano in grado di inquinare il processo ben prima che esso giunga alla sentenza.

Con una avvertenza, però: non è che il "vizio" che affligge la dichiarazione estorta si propaghi agli atti istruttori successivi e da essa

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[49] «La sentenza che decida sulla base di una prova nulla, inutilizzabile o materialmente inesistente non è affetta da alcun tipo di invalidità derivata; è semplicemente viziata nella motivazione, in quanto, omessa quella prova, la motivazione collassa» (FERRUA, Paolo, Prove illegittimamente acquisite, cit., p. 1255).

[50] GREVI, Vittorio - ILLUMINATI, Giulio, *Prove*, cit., p. 305. Quando il legislatore, nella disposizione che prevede che le informazioni provenienti dai confidenti della polizia rimasti anonimi non possono essere «acquisite né utilizzate», ha sentito il bisogno di precisare che «l'inutilizzabilità opera anche nella fasi diverse dal dibattimento» (art. 203 comma 1-*bis* c.p.p.) reagendo ad una giurisprudenza piuttosto lassista, ha esplicitato una conclusione che era già desumibile dal sistema (in tema, volendo, BRONZO, Pasquale, Le modificazioni in tema di informazioni confidenziali, in LATTANZI, Giorgio (a cura di) *Guida al giusto processo*. Milano: Giuffrè, 2002, p. 177 ss.).

dipendenti; accade, piuttosto, che le informazioni frutto di tortura non sono in grado di giustificare il compimento dell'atto istruttorio che richieda una particolare motivazione, come una perquisizione, che ove fondata su tali atti risulterebbe affetta da nullità *ex* art. 125 comma 3 c.p.p. Una invalidità *originaria*, dunque.

Il divieto neointrodotto è stato interpretato nel senso che la tortura renda inutilizzabili le dichiarazioni estorte «non solo in vista della prova della responsabilità penale o, comunque, della veridicità dell'affermazione del fatto oggetto delle dichiarazioni, ma anche come spunto investigativo per la ricerca di altri elementi probatori. In breve, la violazione del divieto di impiegare la tortura a fini confessori o di raccolta di dichiarazioni fa scattare l'inutilizzabilità derivata di ogni elemento di prova reperito a partire dalle informazioni estorte»[51].

In realtà, non sembra che il legislatore del 2017 abbia creato un'ipotesi di propagazione di inutilizzabilità delle prove ottenute tramite la tortura (come pure avrebbe potuto fare). Si può qui solo accennare al pluriennale dibattito in ordine alla figura della "inutilizzabilità derivata": una parte della dottrina ritiene applicabile alla inutilizzabilità un meccanismo di diffusione, simile a quello che l'art. 185 c.p.p. prevede per le nullità, in virtù del quale il vizio di una prova si trasmette a prove successivamente raccolte ove tra le due sussista un nesso di dipendenza[52]; secondo una diversa impostazione, invece, nessuna invalidità derivata potrebbe avere ad oggetto atti probatori. La "dipendenza" di cui parla l'art. 185 c.p.p. è infatti una dipendenza di tipo giuridico, predicabile tra due atti quando – per legge – uno costituisca il presupposto necessario per il compimento dell'altro. È quanto accade per un atto di impulso processuale (come la citazione a giudizio) e gli atti del giudizio conseguente, che non può *mai* verificarsi per le prove, che non sono legate da alcuna connessione

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[51] CASSIBBA, Fabio, Brevi riflessioni sull'inutilizzabilità, cit., p. 11. In questa impostazione, affinché i materiali probatori reperiti grazie alla tortura siano utilizzabili, gli organi inquirenti dovrebbero «dimostrare che il loro reperimento non è in alcun modo il frutto della violazione del divieto di tortura e della coartata collaborazione processuale dell'imputato».

[52] NOBILI, Massimo, *La nuova procedura penale*. Bologna: Clueb, 1989, p. 157 s.; COMOGLIO, Luigi Paolo, *Perquisizione illegittima ed inutilizzabilità derivata delle prove acquisite con susseguente sequestro*. *Cassazione penale*, Milano, n. 5, p. 1547, 1996.

giuridicamente necessaria, né tra loro, né rispetto alle decisioni che su di esse si fondino[53].

Il caso paradigmatico è quello della perquisizione illegittima che conduca ad un sequestro[54]: secondo la teoria cd. del *male captum*, *bene retentum* il vizio della perquisizione non inficerebbe il sequestro compiuto secondo le regole; diversamente, secondo la opposta *poisonous tree's fruit doctrine*, non sarebbe consentita l'acquisizione di quanto rinvenuto a seguito di una ricerca condotta in spregio delle previsioni che la disciplinano.

A quest'ultima conclusione può giungersi, evidentemente, solo a patto di concepire come un nesso di natura causale quello che consente la propagazione del vizio da una prova all'altra. Il fondamento normativo è rinvenuto nell'art. 191 c.p.p., leggendo l'espressione "prove acquisite" nel significato di "prove ottenute, reperite o raccolte" violando divieti legali: sarebbero perciò inutilizzabili tutte le prove che derivino, sulla base di un rapporto causale, da una violazione; non solo le prove vietate, ma «più in generale tutte quelle che siano l'esito di una violazione della legge»[55].

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[53] CORDERO, Franco, *Tre studi sulle prove penali*, Milano: Giuffrè, 1963, p. 171, secondo il quale la valutazione in una decisione processuale di una prova invalida – nulla o inutilizzabile, o inesistente, come sarebbe una dichiarazione estorta tramite tortura – si risolve in ogni caso in un vizio della motivazione della decisione stessa. In senso conforme, SCELLA, Andrea, *Prove penali e inutilizzabilità.* Uno studio introduttivo, Torino: Giappichelli, 2000, p. 199; FERRUA, Paolo, Perquisizioni illegittime e sequestro: una singolare decisione di inammissibilità con effetti dissuasivi. *Giurisprudenza costituzionale*, n. 5, 2019, p. 2589.

[54] Sulla questione si sono pronunciate dapprima le Sezioni unite, con una pronuncia contraddittoria, che negava in concreto ma teoricamente ammetteva la configurabilità di un simile meccanismo di propagazione (Cass., sez. un., 27 marzo 1996, Sala, in *Diritto penale e processo*, Milano, 1996, p. 1125), e poi la Corte costituzionale, che ha invece escluso l'applicabilità dell'art. 182 c.p.p. alla invalidità che si manifesti come inutilizzabilità (C. cost., 27 settembre 2001, n. 332, in *Giurisprudenza costituzionale*, Milano, n. 5, p. 2821, 2001) ed ha successivamente ribadito che un meccanismo di derivazione della inutilizzabilità, stante il principio di tassatività, avrebbe bisogno di una previsione normativa espressa (C. cost., 3 ottobre 2019, n. 219 in *Giurisprudenza costituzionale*, Milano, n. 5, p. 2589, 2019, con nota di FERRUA, Paolo, *Perquisizioni illegittime e sequestro*, cit.

[55] In una variante di questa impostazione, il vizio della inutilizzabilità di una prova verrebbe "trasmesso" solo a quegli atti istruttori il cui legittimo

A parte la seria controindicazione dell'estrema difficoltà che è possibile incontrare nella verifica di un nesso causale tra due o più prove, questa impostazione è priva di riscontro normativo: il verbo «acquisire» nell'art. 191 c.p.p. ha una caratura tecnica ineludibile, e un effetto di invalidazione a catena, come quello ipotizzato dai fautori della tesi dell'albero avvelenato, avrebbe richiesto ben altra e più precisa espressione.

Dichiarazioni o informazioni ottenute nei modi descritti dall'art. 613-*bis* c.p. – da considerarsi giuridicamente inesistenti – non possono essere adoperate in alcuna decisione (anche) istruttoria, del giudice o del p.m., per la quale il codice richieda una espressa giustificazione. Ma è solo in questo senso che possiamo assistere ad una sorta di "propagazione" della inutilizzabilità delle informazioni estorte nel procedimento penale.

In ogni caso, nessuna norma del nostro codice - neppure il comma 2-*bis* interpolato nell'art. 191 - può impedire che le dichiarazioni o le informazioni in discorso vengano "usate" come strumento puramente euristico. Il nesso tra una conoscenza rilevante (e magari processualmente non spendibile) e i passi investigativi successivi orientati in base ad essa è storico o psicologico, ma non giuridico.

È stato affermato che, per un'efficace "sterilizzazione" delle informazioni ottenute attraverso tortura, il legislatore avrebbe dovuto prescrivere la distruzione della documentazione, sulla falsariga di quanto previsto per le intercettazioni illegali. Tuttavia, misure simili, solitamente previste a tutela degli interessi extraprocessuali violati, sono poco adatte quale espediente per evitare che le indagini si avvantaggino di quelle informazioni o che il giudice ne sia condizionato psicologicamente: a parte che la distruzione presuppone qui l'accertamento definitivo del reato di tortura, il punto è che misure del genere rischiano non di eliminare ma di occultare, di rendere inverificabili i profitti investigativi delle pratiche illecite.

L'enfasi della formulazione non deve neppure indurre a ritenere che la mera presenza delle dichiarazioni estorte attraverso la tortura nello scacchiere istruttorio sia in grado di inquinare il giudizio e

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compimento dipende dalla ricorrenza di determinati presupposti di fatto, come intercettazioni o perquisizioni (CAMON, Alberto, Le prove, in CAMON, Alberto; CESARI, Claudia; DANIELE, Marcello; DI BITONTO, Maria Lucia; NEGRI, Daniele; PAULESU, Pierpaolo, *Fondamenti di procedura penale*, Milano: Cedam, 2019, p. 319).

conseguentemente la decisione: come si è anticipato, non diversamente da tutte le altre ipotesi in cui si voglia far valere l'uso decisorio di una informazione inutilizzabile, occorre sottoporre la decisione al consueto *test* di resistenza. In senso contrario, non è mancato chi ha letto la nuova norma nel senso che «ogni decisione giudiziaria e, segnatamente, la sentenza di condanna nei confronti della vittima di torture che tengano, comunque, conto delle dichiarazioni estorte sono affette, integralmente, da un'invalidità irrimediabile, che non può essere aggirata in sede d'impugnazione, attraverso il "test di resistenza"»[56]. Si tratta, tuttavia, di una tesi difficilmente sostenibile: la dichiarazione estorta è probatoriamente inesistente, ma questo non significa che essa invalidi *ex se* la decisione; piuttosto, la sentenza che tragga fondamento dalla dichiarazione è affetta, in questa misura, da un vizio di motivazione, ma essa può essere confermata in appello o in sede di revisione sulla base di altre prove legittimamente acquisite e del tutto irrelate a quella ottenuta tramite tortura[57].

Semmai il problema – relativo ad ogni prova invalida, sia nulla che inutilizzabile – è se il test di resistenza possa farlo anche la Corte di cassazione, come afferma la Suprema Corte, o se invece in quel caso il giudice di legittimità in realtà pretenda, sbagliando, di sostituirsi al giudice di merito, ripercorrendone il convincimento[58].

Alla base della ricostruzione teorica ora accennata potremmo rinvenire considerazioni, non irragionevoli, attinenti segnatamente all'incidenza della tortura sull'affidabilità delle informazioni consegnate al processo: certe pratiche sono capaci di generare contesti di intimidazione in grado di inquinare anche attività investigative o probatorie diverse ed ulteriori rispetto a quella in seno alla quale sono state poste in essere; e tuttavia, l'antidoto a questo possibile effetto perturbante non può che essere una valutazione giudiziale particolarmente prudente ed attenta delle prove che possono esservi state esposte.

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[56] CASSIBBA, Fabio, Brevi riflessioni sull'inutilizzabilità, p. 114.

[57] CORDERO, Franco, *Procedura penale*, cit.. p. 633; conforme FERRUA, Paolo, Prove illegittimamente acquisite, cit., p. 1255.

[58] In argomento, cfr. CAPONE, Arturo, Il principio di decisività dei vizi della sentenza nel controllo della corte di cassazione, in *Cassazione penale*, Milano, 2004, p. 1463 ss.

Sullo sfondo, c'è la comprensibile preoccupazione di interpretare la normativa nazionale in modo da prevenire condanne a Strasburgo, ma in questo caso, al di là degli effettivi spazi interpretativi, pare che si tratti di una preoccupazione non motivata. É vero che la Corte europea ha affermato che si può ritenere iniquo un processo, per lesione degli artt. 3 e 6 comma 1 C.e.d.u., in ragione del fatto che sia stata impiegata una dichiarazione estorta con tortura, ancorchè la stessa non costituisca prova decisiva ai fini della condanna[59]; ed è vero che i giudici di Strasburgo – che di solito lasciano agli Stati un ampio margine di apprezzamento nel costruire regole di esclusione o di valutazione della prova – postulano qui una sorta di divieto istruttorio (a differenza degli altri casi in cui, in presenza di attività probatoria lesiva di altri diritti protetti dalla Convenzione, segue il test della *sole or decisive evidence rule*). La violazione del divieto di tortura di cui all'art. 3 C.e.d.u. fa parte, infatti, del "nocciolo duro" delle tutele apprestate dalla Convenzione, inderogabile anche in caso di emergenza, e in linea di principio non "bilanciabile".

E tuttavia, secondo la giurisprudenza europea l'inosservanza dell'art. 3 C.e.d.u. è una condizione sì necessaria ma non sufficiente a rendere iniquo il processo[60]. Pur essendo improbabile che la Corte escluda una violazione dell'art. 6 C.e.d.u in presenza di pratiche di tortura, nel

[59] C. eur. dir. uomo, sez. I, 30 aprile 2015, Shamardakof c. Russia, § 153 che «*réitère sa jurisprudence selon laquelle l'utilisation d'éléments de preuve recueillis par la violation de l'un des droits absolus constituant le noyau dur de la Convention jette toujours de graves doutes quant à l'équité de la procédure, même si le fait d'avoir admis ces éléments comme preuves n'a pas été décisif pour la condamnation du suspect*» (ribadisce la propria giurisperudenza secondo la quale l'uso di prove ottenute dalla violazione di uno dei diritti assoluti costituenti lo zoccolo duro della Convenzione solleva sempre *seri dubbi* - corsivo nostro - sull'equità del procedimento, anche se il fatto di aver ammesso questi elementi come prova non fosse decisivo per la condanna del sospettato).

[60] Cfr. C. eur., G. C. 11 novembre 2006, Jalloh c. Germania, § 99 in *Cassazione Penale*, Milano, 2006, p 3843: «*an issue may arise under Article 6 § 1 in respect of evidence obtained in violation of Article 3 of the Convention, even if the admission of such evidence was not decisive in securing the conviction*» (un problema *può* – corsivo nostro - sorgere ai sensi dell'articolo 6 § 1 riguardo alle prove ottenute in violazione dell'articolo 3 della Convenzione, anche se l'ammissione di tali prove è stata non decisivo per ottenere la condanna). Peraltro nel caso di specie la corte aveva ritenuto decisiva la prova estorta.

case law di Strasburgo non mancano precedenti in questo senso[61], anche della Grande Camera[62]. Sembra perciò lecito affermare che l'impiego di prove ottenute attraverso tortura rappresenti un «grave indice di iniquità della procedura»[63], ma non una condizione automatica della stessa.

In questo senso, se il giudice d'impugnazione – rilevata l'inutilizzabilità – confermasse la condanna motivando su altre prove, residuerebbero al più spazi per ritenere violato l'art. 3, ma non anche – di riflesso ed automaticamente – l'art. 6 C.e.d.u..

Viceversa, escludere la praticabilità della prova di resistenza per qualsiasi sentenza nella quale compaia in motivazione una dichiarazione ottenuta con la tortura significherebbe non solo introdurre una categoria di prove "anti-convenzionali" di cui non c'è traccia nella normativa ordinaria, ma rassegnarsi ad una sorta di effetto immunizzante della legge penale: commessa la tortura, il responsabile del reato per accertare il quale si è ricorsi alle sevizie non sarebbe più in alcun modo individuabile[64].

Un autentico significato innovativo del comma 2-*bis* può essere rinvenuto, piuttosto, nella esclusione della possibilità che da quelle pratiche possano derivare informazioni suscettibili di costituire valide *notitiae*

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[61] C. eur., sez. I, 17 gennaio 2012, Alchagin c. Russia, § 73: «*having regard to the foregoing, and, in particular, the applicant's own confession during the trial itself, the Court is unable to conclude, in the circumstances of this particular case, that the use of the applicant's confession statement made at the pre-trial stage rendered the proceedings against him wholly unfair*» (tenuto conto di quanto precede e, in particolare, della confessione del ricorrente durante il processo stesso, la Corte non è in grado di concludere, nelle circostanze di questo caso particolare, che l'uso della dichiarazione di confessione del ricorrente resa nella fase istruttoria ha reso il procedimento contro di lui del tutto ingiusto).

[62] Nel caso già citato Camera Gäfgen c. Germania, §§ 10-46.

[63] SPAGNOLO, Paola, Il modello europeo delle garanzie minime e il regime delle invalidità: un binomio conciliabile?, in MARANDOLA, Antonella, *Le invalidità processuali*, cit., p. 56. Peraltro, le conclusioni variano generalmente e si allineano al criterio della *sole or decisive evidence* quando le pratiche lesive dell'art. 3 c.e.d.u. siano configurabili non come tortura bensì come trattamento inumano e degradante, (C. eur. dir. uomo, 11 luglio 2006, Jalloh c. Germania, § 106-107): il confine tra le due figure è però alquanto sfumato, evidentemente.

[64] E' appena il caso di notare che la resistenza della motivazione della condanna dovrà essere saggiata eliminando, oltre alla prova derivante dalla tortura anche le prove che siano frutto di atti istruttori invalidi, in quanto motivati sulla base delle informazioni desunte da quella dichiarazione.

criminis, in grado di dare inizio a nuovi procedimenti penali, a carico della stessa persona che quelle pratiche abbia subito o di terzi. Una "generica" comminatoria di inutilizzabilità probatoria, come quella contenuta nel primo comma dell'art. 191 c.p.p., non varrebbe ad escludere con sicurezza questa possibilità: l'atto dell'iscrizione di una notizia nell'apposito registro non ha i tratti di una 'decisione': non c'è alcuna utilizzazione probatoria dell'informazione, perché manca una delibazione di fondatezza; se pure volessimo intravedervi una qualche delibazione, saremmo comunque al di fuori del procedimento[65].

Nella preclusione all'impiego delle informazioni in questione quale notizia di reato può insomma ravvisarsi il significato effettivamente precettivo di quella formula sanzionatoria "rafforzata" secondo cui essi non sono «comunque utilizzabili»: un regime analogo a quello dei documenti contenenti dichiarazioni anonime che, a mente dell'art. 240 c.p.p. non possono essere «in alcun modo utilizzati» o delle denunce anonime delle quali l'art. 333 c.p.p. afferma che «non può esser fatto alcun uso»[66].

6. Considerazioni conclusive.

La novella del 2017, dunque, è un segnale forte, soprattutto a fronte di una recrudescenza del fenomeno delle "morti di Stato". Difficile, tuttavia, concludere l'*excursus* con un giudizio positivo sulla introduzione della nuova fattispecie. Al forte significato simbolico della novella, infatti, non sembra corrispondere un apparato di tutele che protegga la persona – imputato o testimone – da aggressioni tanto gravi e

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[65] Per questi rilievi, GABRIELLI, Chiara, Captazioni illecite come notizia di reato: dai ripensamenti del legislatore alle prime risposte della giurisprudenza., *Cassazione penale*, 2008, p. 1312.

[66] Peraltro, da una denuncia anonima gli inquirenti possono trarre spunto per svolgere attività investigative dirette ad acquisire, nelle forme prescritte dal codice di rito, una notizia di reato (cfr. APRATI, Roberta, *La notizia di reato nella dinamica del procedimento penale*, Napoli: Jovene editore, 2010, p. 55 e, più di recente, NOCERINO, Wanda, Le denunce anonime come strumento di indagine. Un difficile equilibrio tra efficienza e garanzie. *Diritto penale e processo*, Milano, n. 12, p. 1607, 2017): la conclusione vale anche in relazione ad informazioni estorte con la tortura che non valgono ai fini dell'iscrizione, come detto, ma consentono di dare avvio all'attività di ricerca di una *notitia criminis*.

l'accertamento processuale da possibili infiltrazioni di materiale acquisito attraverso condotte di tal fatta.

La novella sembra avere, più che altro, l'obiettivo – solo parzialmente raggiunto – di rassicurare l'interlocutore sovranazionale.

Analizzando l'art. 191, comma 2-*bis*, c.p.p., in effetti, si nota subito come la scelta di discostarsi in più punti dalla trama normativa di trattati e convenzioni nella redazione dell'incriminazione riverberi conseguenze negative anche sul versante processuale. La complessa formula contenuta nell'art. 613-*bis* c.p. rende complicato in tale dimensione l'accertamento del presupposto dal quale scaturisce la peculiare ipotesi di inutilizzabilità in questione. Essa inoltre si inserisce in un contesto nel quale operano già dispositivi collaudati, come quelli compendiati negli artt. 188 e 64 c.p.p., senza apportare vantaggi aggiuntivi significativi.

La disciplina rischia di compromettere anche il potenziale di deterrenza della previsione normativa. La sanzione di inutilizzabilità, infatti, non appare accompagnata da altre previsioni di supporto che ne regolino la applicazione e le sue conseguenze: come detto, la mancanza di una disciplina che chiarisca le modalità attraverso le quali, in assenza di un giudicato di condanna, accertare il compimento di atti di tortura affida all'interprete la gestione di uno snodo strategico senza, tuttavia, dotarlo degli strumenti processuali necessari. Parimenti opinabile appare la scelta di non regolare espressamente l'incidenza di una condotta rilevante ai sensi dell'art. 613-*bis* c.p. ai fini del giudizio di revisione.

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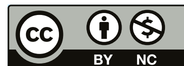

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Admissibility of Statements Obtained as a Result of "Private Torture" or "Private" Inhuman Treatment as Evidence in Criminal Proceedings: Emergence of a New European Standard?

Admissibilidade de declarações obtidas como resultado de "tortura privada" ou tratamento inumano "privado" como prova no processo penal: surgimento de um novo parâmetro europeu?

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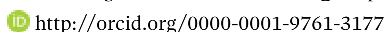
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Abstract: This article presents a critical approach to the position of the European Court of Human Rights on the admissibility of evidence (recorded statements) obtained as a result of "private torture or inhuman treatment", while such recordings were produced outside of and for purposes other than the criminal proceedings. In accordance with the recent judgment of the Court (case Ćwik v. Poland), the use of this evidence in the criminal proceedings conducted against a third party, not against a tortured person, renders such proceedings as a whole automatically unfair, in breach of Article 6 of the European Convention on Human Rights. In the author's opinion, the ECtHR does not attach adequate importance to the fact that the use of such evidence cannot have any impact on the scope or level of protection against torture or other forms of cruel treatment, provided in the framework of criminal proceedings. It is argued in this paper that recorded statements produced prior to criminal proceedings and not for purposes of those proceedings by private individuals, without the instigation, consent, or acquiescence

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of public officials, by methods contrary to Article 3 of the Convention, shall be admissible evidence. Consequently, the European Court should not have questioned the admissibility of such evidence, but rather assess the fairness of criminal proceedings as a whole.

Keywords: criminal proceedings; admissibility of evidence; torture; European Convention on Human Rights, fair trial.

Resumo: *Este artigo apresenta uma análise crítica da posição firmada pelo Tribunal Europeu de Direitos Humanos sobre a admissibilidade da prova (declarações gravadas) obtidas como resultado de "tortura privada ou tratamento inumano", quando essa gravação tenha sido produzida fora de um processo criminal e não a ele direcionada. Conforme a visão do Tribunal, recentemente assentada (caso Ćwik v. Poland), o uso dessa prova em um processo criminal conduzido contra terceira pessoa, não contra a pessoa torturada, acarreta que esse processo seja automaticamente considerado injusto, em violação do art. 6 da Convenção Europeia de Direitos Humanos. Sustenta-se que a decisão do Tribunal não ponderou adequadamente a importância do fato de que o uso dessa prova não pode ter qualquer impacto na finalidade ou no nível de proteção contra a tortura ou outras formas de tratamento cruel, conforme as diretrizes do processo penal. Afirma-se que as declarações gravadas produzidas por indivíduos privados, sem o consentimento ou autorização de agentes públicos, anteriormente ao processo penal e não a ele dirigidas, por métodos contrários ao artigo 3 da Convenção devem ser consideradas provas admissíveis. Consequentemente, o Tribunal Europeu não deveria ter questionado a admissibilidade dessa prova, mas verificado a adequação do processo penal em sua integralidade às diretrizes do justo processo.*

Palavras-chave: *processo penal; admissibilidade da prova; tortura; Tribunal Europeu de Direitos Humanos; processo justo.*

Introduction

The article aims to answer the question of whether under Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms[2] criminal proceedings can be considered fair if

[2] Council of Europe Convention on the Protection of Human Rights and Fundamental Freedoms, adopted on 4 November 1950. Hereafter referred to as "the Convention" or "ECHR".

they rely on statements obtained outside the proceedings through torture or inhuman treatment conducted only by "private individuals" and not through investigative authorities or other public officials involved in obtaining them. Accordingly, the study seeks to assess the admissibility of evidentiary use of recorded statements (declarations), expressed during private interrogations as a result of the aforesaid unlawful methods, if such records were subsequently secured, or obtained by investigative authorities through lawful activities. The level of protection from torture, inhuman or degrading treatment or punishment to be ensured by investigative or judicial authorities in criminal proceedings is fundamental in addressing this question. Consequently, a few specific questions can be framed: does the standard of fair criminal proceedings only prohibit the use of evidence obtained in violation of Article 3 of the Convention by public officials, upon their consent or acquiescence or by other person acting in an official capacity, or does the prohibition also extend to evidence obtained by private individuals, as long as such evidence is collected with the intent of using it in pending or future criminal proceedings? Finally, there is the most far-reaching question of whether evidentiary use of recorded statements obtained by private individuals outside of and other than for the purpose of use in criminal proceedings would violate the standard of fairness of the proceedings.

In order to answer the above questions, it is essential to determine the subjective scope of application of such evidence, namely whether recorded statements forced in private acts of torture or inhuman treatment are intended as evidence in proceedings against the person who made the statement or against a third party. In the author's view, the use of such evidence in proceedings against the victim of treatment contrary to Article 3 ECHR would undermine his/her right to silence.

However, it is argued in this paper that the European standard of fair trial does not prohibit the use of such tainted evidence (recording of private interrogations) in the proceedings conducted against a third person if it is obtained outside those proceedings and not for the purposes of those proceedings.

Having analyzed the aforesaid problems will help tackle a more general question: Is there a European standard already established in this area, or is it yet to be fully developed?

The article consists of two main chapters. The first one concerns the admissibility of evidence obtained by public officials in violation of Article 3 of the Convention. In this section the European standard on this issue is also compared to universal one, stemming from UN international treaties. The second chapter focuses on the admissibility of statements obtained under the same prohibited methods but by private individuals. This section also contains a critical analysis of the judgment of the ECtHR delivered in the *Ćwik v. Poland* case as well as reasons put forward in the joint dissenting opinion of two judges attached to this judgment. In the end, the author presents his own concept of assessing the fairness of criminal proceedings in which the court relied on private evidence obtained in the circumstances occurring in *Ćwik v. Poland*.

1. Restrictions on admissibility of evidence obtained by public officials in violation of Article 3 ECHR

Neither the Convention nor any other international agreement concluded between the member states of the Council of Europe regulates the admissibility of evidence in criminal proceedings. The European Court of Human Rights[3] has repeatedly held that the issue of admissibility of evidence in criminal proceedings is beyond its assessment capability when examining complaints regarding a fair criminal trial guaranteed under Article 6 ECHR. Therefore, any use of an illegally obtained evidence in criminal proceedings should result in the assessment of the fairness of the proceedings as a whole rather than the assessment of admissibility of such evidence.[4] Despite this general declaration, the Court makes an exception for evidence obtained in violation of prohibition of torture, inhuman or degrading treatment or punishment, expressed in Article 3 ECHR. The case-law of the ECtHR concerning

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[3] Hereafter referred to as "ECtHR" or "the Court".

[4] ECtHR judgment of 12th July 1988, *Schenk v. Switzerland*, appl. no. 10862/84, § 46; ECtHR [Grand Chamber] judgment of 10th March 2009, *Bykov v. Russia*, appl. no. 4378/02, §§ 88-90. See also: HOFMAŃSKI, Piotr; WRÓBEL, Andrzej, Artykuł 6. In: GARLICKI Lech (org.). *Konwencja o ochronie praw człowieka i podstawowych wolności. Tom I. Komentarz do artykułów 1-18*, Warsaw: C.H. Beck Publishing, 2010. p. 338.

the fairness of criminal proceedings that use evidence (explanations or testimonies) obtained by investigative authorities (public officials) in violation of the prohibition set forth in Article 3 ECHR is fairly abundant and relatively consistent. The ECtHR firmly and clearly holds that the use of statements extracted by torture or inhuman or degrading treatment invariably renders the proceedings unfair, regardless of the significance of the evidence for the determination of the facts in the case.[5] In the case of *Jalloh v. Germany,* the Court proved the above thesis, arguing that "any other conclusion would only serve to legitimate indirectly the sort of morally reprehensible conduct which the authors of Article 3 of the Convention sought to proscribe or, as it was so well put in the United States Supreme Court's judgment in the *Rochin* case..., to 'afford brutality the cloak of law.'"[6] Only exceptionally, if the person subjected to treatment contrary to Article 3 ECHR remained silent during the interrogation (gave no statement), the Court considers charges under Article 6 ECHR inadmissible. Thus, the only reason for assessment of such a complaint brought under Article 6 ECHR as inadmissible is when the interrogated person failed to supply any evidence which could be used against him or her in the criminal proceedings.[7]

Statements obtained through foreign legal assistance for the use in the criminal proceedings will also render such proceedings unfair if the applicant proves a "real risk" of collecting the evidence in violation of Article 3 ECHR.[8] That the ill-treatment affected a third party (a witness)

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[5] See, *inter alia*, ECtHR [Grand Chamber] judgment of 11th July 2006, *Jalloh v. Germany*, appl. no. 54810/00, §§ 99, 105; ECtHR [Grand Chamber] judgment of 1st June 2010, *Gäfgen v. Germany*, appl. no. 22978/05, § 166; ECtHR judgment of 11th February 2014, *Cĕsnieks v. Latvia*, appl. no. 9278/06; §§ 65-66; ECtHR [Grand Chamber] judgment of 13th September 2016, *Ibrahim and Others v. the United Kingdom*, appl. nos. 50541/08, 50571/08, 50573/08 and 40351/09, § 254.

[6] ECtHR judgment of *Jalloh v. Germany*, § 105.

[7] ECtHR judgment of 15th October 2019, *Mehmet Ali Eser v. Turkey,* appl. no. 1399/07, §§ 41-42.

[8] ECtHR judgment of 25th September 2012, *El Haski v. Belgium*, appl. no. 649/08, §§ 81-88. On this issue, see: WĄSEK-WIADEREK, Małgorzata, Model zakazów dowodowych z perspektywy Konwencji i orzecznictwa ETPCz. In: SKORUPKA Jerzy; DROZD Anna (org.). *Nowe spojrzenie na model zakazów dowodowych w procesie karnym*, C.H. Beck Publishing, Warsaw. 2015, p. 26-27.

and not a defendant is irrelevant, so is the fact that illegal methods of interrogation were employed by officials from another country.[9] Furthermore, the transfer (extradition or deportation) of an individual to another criminal jurisdiction for trial runs a risk of “flagrant denial of justice” and, therefore, violates Article 6 ECHR if there is a real possibility of the person being subjected to criminal proceedings that admit evidence obtained by torture or inhuman treatment. Who has been the source of the evidence is irrelevant. What is significant is the use of the method of interrogation contrary to Article 3 ECHR.[10]

The Court’s stance on real evidence directly obtained through torture or inhuman or degrading treatment is less firm. There is no case-law of the ECtHR on the admissibility of real evidence obtained directly through torture. However, in *El-Haski v. Belgium* case, the Court said, although only *obiter dictum,* that it should be assessed in the same manner as statements obtained under torture.[11] A different standard seems to apply to real evidence obtained through other forms of ill-treatment. In the aforesaid case of *Jalloh v. Germany,* the Court held that the use of such evidence did not automatically render the criminal proceedings unfair in all circumstances. However, if this is the case, the Court is required to assess the fairness of the entire proceedings, taking into account the significance of the evidence to the facts, the defendant’s ability to challenge its admissibility before the court, as well as the criterion of public interest in criminal prosecution.[12] Likewise, criminal proceedings

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[9] THIENEL, Tobias. The admissibility of evidence obtained by torture under international law. *European Journal of International Law*, v. 17, n. 2, 2006, pp. 362-363.

[10] See, ECtHR judgment of 12th February 2012, *Othman (Abu Qatada) v. United Kingdom,* appl. no. 8139/09, §§ 263-287; ECtHR judgment of 24th July 2014, *Al-Nashiri v. Poland*, appl. no. 28761/11, §§ 662-569; ECtHR judgment of 24th July 2014, *Husayn (Abu Zubaydah) v. Poland*, appl. no. 7511/13, §§ 552-561.

[11] ECtHR judgment of 25th September 2012, *El Haski v. Belgium*, appl. no. 649/08, § 85.

[12] ECtHR judgment of *Jalloh v. Germany*, §§ 105-108; see also ECtHR judgment of 22 October 2020, *Bokhonko v. Gorgia*, appl. no. 6739/11, §§ 94-99 (in this case the main evidence - drugs were extracted from the applicant’s rectum during the search constituting ill-treatment in accordance with the applicant’s arguments).

are not automatically deemed unfair because of the use of evidence collected indirectly through inhuman treatment (the so-called "fruits of the poisonous tree"). According to the Court, such a trial may be presumed unfair, yet such presumption may be challenged taking into account the specific circumstances of the case.[13]

All in all, with reference to statements obtained in violation of Article 3 ECHR directly by public functionaries, with their consent or permission, the European standard is unambiguous: irrespective of the procedural setup, the use of such evidence in a criminal trial, as well as exposing a person to proceedings in which such evidence can be made use of (for example, in case of extradition or expulsion), constitutes a violation of Article 6 ECHR.

Such an interpretation of Article 6 ECHR has much in common with the universal standard arising from Articles 1 and 15 of the UN Convention against Torture.[14] The definition of torture provided therein makes clear references to acts "committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity." The exclusionary rule expressed in Article 15 thereof prohibits the use as evidence of any statement made under torture in any proceedings, except against a person accused of torture as evidence that such a statement was made. However, the UN Convention does not refer this prohibition to evidence obtained as a result of less

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13 ECtHR judgment of *Gäfgen v. Germany,* §§ 178-188. On the ambiguity of the case-law on this issue: JASIŃSKI, Wojciech; CHOJNIAK, Łukasz. The Admissibility of Evidence Obtained by Torture and Inhuman or Degrading Treatment in Criminal Proceedings. Overview of European and Polish Standards. In: FENYVESI, Csaba; HERKE Csongor (org.). *Pleadings. Celebration Volume of Professor Tremmel Florian's 70th Birthday.* 148 Studia Iuridica Auctoritate Universitatis Pecs Publicata I (2011). Pecs 2011. pp. 128-130. It is unclear whether this standard applies also to real evidence obtained indirectly through torture. The case-law does not answer the question whether the real evidence shall always be inadmissible, irrespective whether obtained directly or indirectly as a result of torture.

14 United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by General Assembly Resolution of 10 December 1984. Hereafter referred to as "the UN Convention" or "CAT".

severe forms of ill-treatment, such as inhuman or degrading treatment.[15] In this respect, the wording of the UN Convention differs from the soft-law 1975 UN Torture Declaration.[16] Still, given the wording of sentence two of Article 16 the UN Convention, some authors argue that for the purposes of Article 15 of the same instrument, inhuman treatment should also be deemed equivalent to torture. This would mean that also statements forced through ill-treatment which is not torture are subject to the exclusionary rule contained in this provision.[17] This view is not commonly supported in the literature.[18]

Like in the Strasbourg human rights protection system, the exclusionary rule set out in Article 15 CAT covers any statements obtained by torture, including those made by third persons (e.g. witnesses) and not only by defendants in criminal proceedings. Moreover, the exclusionary rule also concerns statements extracted in the same manner by public officials from another country.[19] On the other hand, given the definition of torture contained in Article 1 of the UN Convention, the exclusionary rule

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[15] See, GRAFFIN, Neil J. The legal consequences of ill-treating Detainees held for Police Questioning in Breach of Article 3 ECHR. *European Journal of Current Legal Issues*, v. 20, n. 2, 2014, p. 4.

[16] Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment Adopted by General Assembly resolution 3452 (XXX) of 9th December 1975. Article 12 of the Declaration states that “Any statement which is established to have been made as a result of torture or other cruel, inhuman or degrading treatment or punishment may not be invoked as evidence against the person concerned or against any other person in any proceedings”.

[17] See opinions of the Committee Against Torture (“CAT”) delivered in reporting procedure and referred to by PATTENDEN Rosemary. Admissibility in criminal proceedings of third party and real evidence obtained by methods prohibited by UNCAT. *International Journal of Evidence and Proof,* v. 10, n. 1. 2006, p. 8, footnote 62.

[18] As reported by Giuliana Monina, different approach is taken by CAT in an individual complaint procedure and this approach also prevails in academic literature. See: MONINA, Giuliana. Article 15. Non-Admissibility of Evidence Obtained by Torture. In: NOWAK, Manfred; BIRK Moritz; MONINA Giuliana (org.). *The United Nations Convention Against Torture and Its Optional Protocol. A Commentary*. Oxford University Press 2019. pp. 437.

[19] THIENEL Tobias, op. cit., pp. 356, 360.

under its Article 15 does not apply to the conduct of private individuals. Private acts of torture would not be excluded pursuant to this provision.[20]

Universal standard of protection of human rights is also created by International Covenant on Civil and Political Rights[21]. The ICCPR does not contain any general rules on admissibility of evidence. However, Article 14 para. 3 (g) of the ICCPR provides for the right not to be compelled to testify against himself or to confess guilt. Thus, forced statements of a defendant shall not be admissible evidence. Furthermore, the Human Rights Committee derives a similar exclusionary rule from Article 7 of the Covenant. It seems to cover not only statements obtained by torture but also by other forms of cruel treatment.[22]

In conclusion, the Strasbourg Court challenges the fairness of any proceedings which make evidentiary use of statements obtained by public officials, both as a result of torture and other forms of conduct prohibited under Article 3 ECHR, regardless of the relevance of such impugned evidence to the determination of the facts of the case. In this respect, the Strasbourg standard seems more rigorous than the universal one defined in the UN Convention, the latter applying the exclusionary rule directly and unequivocally only to statements forced by torture. The European standard covers also real evidence obtained directly or indirectly as a result of treatment contrary to Article 3 of the ECHR. However, the Court's approach to real evidence obtained by ill-treatment that is not sufficiently severe to qualify as torture is less strict. When examining such cases, the Court assesses the fairness of the proceedings as a whole.

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[20] SCHARF, Michael P. Tainted Provenance: When, If Ever, Should Torture Evidence Be Admissible?, *Case Research Paper Series in Legal Studies. Working Paper 07-27, September 2007*, p. 21.

[21] International Covenant on Civil and Political Rights adopted by United Nations General Assembly on 16 December 1966. Thereafter referred to as "ICCPR".

[22] GENERAL COMMENT NO. 20: ARTICLE 7 (PROHIBITION OF TORTURE OR OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT) adopted at the forty-fourth session (1992), para. 12; GENERAL COMMENT NO. 32, ARTICLE 14: RIGHT TO EQUALITY BEFORE COURTS AND TRIBUNALS AND TO A FAIR TRIAL), adopted at the ninetieth session, (2007), CCPR/C/GC/32.

2. Admissibility of evidence obtained by private individuals applying methods contrary to Article 3 ECHR.

The procedures of some European countries allow fact-finding in a criminal trial based on the so-called private evidence, meaning documents, statements, or recordings made by private individuals outside criminal proceedings. Sometimes only "private" evidence gathered outside a criminal trial and for purposes other than the trial can be admitted.[23] Some jurisdictions, including Poland, permit evidentiary use of information, e.g. recordings, collected by private individuals with the intention of using it later in criminal proceedings.[24] Given the foregoing, the question posed in the title of this paper should be asked, namely whether the Strasbourg standards of fair trial allow the use in criminal proceedings of private evidence collected by methods violating the prohibition defined in Article 3 ECHR. Apparently, in order to provide the correct answer to this question two situations need to be distinguished. First, the use in a criminal trial of the so-called "find," i.e. a piece of evidence, such as a recording containing statements extracted by torture or inhuman treatment, however, produced entirely without any connection with the trial, outside the trial, and for purposes other than the trial; and, second, the use in a criminal proceedings of information (recordings of statements) obtained by private individuals applying similar methods as those named above but with the intention of using them in the trial.

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[23] Article 393 § 3 of the Polish Code of Criminal Procedure as applicable until 30th June 2015 stated that "All private documents prepared outside of the criminal proceedings and not for their purpose, including statements, publications, letters and notes, may be read out at the trial".

[24] The current wording of Article 393 § 3 of the CCP reads as follows: "All private documents drawn up *outside criminal proceedings*, including statements, publications, letters and notes, may be read out at the trial". However, due to ambiguous wording of Article 168a of the Code of Criminal Procedure, it is not clear whether this provision applies fully to private evidence obtained as a result of serious criminal acts. See: SOLODOV, Denis; SOLODOV, Ilia. Legal safeguards against involuntary criminal confessions in Poland and Russia. *Revista Brasileira de Direito Processual Penal*, Porto Alegre, vol. 6, n. 3, pp. 1673-1676. On admissibility of private evidence in selected European countries, see: BOJAŃCZYK, Antoni. Dowód prywatny w postępowaniu karnym w perspektywie prawnoporównawczej. Warsaw: Wolters Kluwer Publisher, 2011. pp. 21-177.

2.1. Judgement in Ćwik v. Poland

Until November 2020, this problem had not been solved in the European system of protection of human rights. Yet, based on some comments by the Council of Europe Commissioner for Human Rights or the Secretary General of the Council of Europe, they can be said to incline towards inadmissibility of evidence obtained using methods contrary to Article 3 ECHR, regardless of who has employed the prohibited methods.[25] A review of the dissenting opinions of ECtHR judges to the Grand Chamber's judgment on the absence of violation of Article 6 ECHR in the case of *Gäfgen v. Germany* leads to a similar conclusion.[26]

The issue in question has been recently decided for the first time in the case of *Ćwik v. Poland.*[27] The domestic court determined the facts of the case, inter alia, on the basis of a recorded "interrogation" of K.G. who, together with the applicant, had engaged in the unlawful practice of smuggling cocaine from the USA to Poland. K.G. and the applicant had come into conflict with other members of their organized crime group. That led to K.G.'s abduction by the other members of the group and torturing him to elicit information on the location of the smuggled cocaine and cash. In the course of K.G.s' "interrogation" carried out in the presence of, but not only, the leader of the criminal group, A.H., and a M.W., and recorded at the instruction of L.P., K.G. disclosed the place where the cocaine and the cash had been concealed. K.G. was later released from the abductors by the police, who also secured the recording. The recording was then used as evidence in the criminal proceedings conducted against the applicant (Ćwik), who pleaded not guilty and refused to give explanations during the trial. The domestic court determined the facts on the basis of various pieces of evidence, including the testimony

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[25] See: Comments by the Council of Europe Commissioner for Human Rights and the Secretary General of the Council of Europe referred to in: PATTENDEN, Rosemary. Admissibility in criminal proceedings of third party and real evidence obtained by methods prohibited by UNCAT. *International Journal of Evidence and Proof,* v. 10, n. 1. 2006. p. 12.

[26] ECtHR judgment, *Gäfgen v. Germany*: joint partly dissenting opinion of judges Rozakis, Tulkens, Jebens, Ziemele, Bianku and Power, in particular para. 2 of the opinion

[27] ECtHR judgment of 5th November 2020, *Ćwik v. Poland*, appl. no. 31454/10.

of L.P. and M.W. "interrogating" K.G., as well as on a transcript of the recording, which, in the opinion of the court, constituted "an important item of evidence confirming the credibility of L.P. and M.W. with regard to K.G.'s and the applicant's involvement in the cocaine business, as well as confirming the applicant's guilt".[28] In the course of the criminal proceedings against the applicant, K.G. was not heard because he was hiding and his whereabouts could not be established. The domestic court which examined the appeal and the applicant's pleas against evidentiary use of the recording of K.G.'s "interrogation" held that the exclusion of statements extracted by torture, as set forth in Article 171 § 7 of the Code of Criminal Procedure,[29] did not apply if coercive interrogation, as in the examined case, was conducted by private individuals.[30] At this point, it needs to be clarified that in accordance with the Polish law applicable at the time, it was permitted to disclose during the trial all private documents produced outside the criminal proceedings and not for the purpose of those proceedings.

In that case, the ECtHR found a violation of Article 6 para. 1 ECHR and stated, simply put, that the current case-law standard, as discussed elsewhere in this paper, should also be applied to "private evidence." Before moving on to assessing the Court's view, it should be stressed that this judgment was delivered by the Chamber of the ECtHR. The Polish government did not avail itself of the opportunity to appeal against the judgment to the Grand Chamber of the ECtHR. Consequently, it became final on 5 February 2021. The judgment was handed down with a majority of 5:2 votes. Of course, the sole fact of majority voting does not undermine

[28] ECtHR judgment, *Ćwik v. Poland*, § 23.

[29] This provision clearly states that "Explanations, testimonies and statements made in circumstances precluding freedom of speech or obtained against the prohibitions mentioned in § 5 [i.e. prohibition to influence statements of a testifying person by means of force or illicit threat], may not constitute evidence".

[30] Such interpretation of this provision was also presented in legal literature: JASIŃSKI, Wojciech. Nielegalnie uzyskane dowody w procesie karnym. W poszukiwaniu optymalnego rozwiązania. Wolters Kluwer Publishing, Warsaw 2019. pp. 581-582; RUSINEK, Michał. Zakazy odnoszące się do sposobu dowodzenia. In: SKORUPKA Jerzy (org.) *System Prawa Karnego Procesowego. Dowody. Tom VIII, cz. 2,* Wolters Kluwer Publisher. Warsaw 2019. p. 2229.

the solidity of the judgment. However, it proves the discrepancy of views of Strasbourg judges on this extremely difficult problem. Despite strong arguments put forward in the judgment, it can hardly be regarded as determining and clarifying, in a firm and exhaustive manner, the standard on the admissibility of "private evidence". The position of the majority of the Court's judges seems to neglect certain vital arguments in favor of the opposite view. Regrettably, the joint dissenting opinion of the two judges who voted against ascertaining the violation of Article 6 para. 1 ECHR in this case does not exhaust the argumentation, although it does outline the normative context behind their decision more broadly.

The very essence of the Court's opinion is expressed in Section 89 of the judgement where the Court finds that the principle established in the case-law on the inadmissibility of statements extracted by a public official using methods contrary to Article 3 ECHR "is equally applicable to the admission of evidence obtained from a third party as a result of ill-treatment proscribed by Article 3 when such ill-treatment was inflicted by private individuals, irrespective of the classification of that treatment". In the opinion of the Court, the domestic court failed to consider the fact that the evidence had been obtained in violation of the absolute prohibition. In the judgment, the Court emphasized that the protection against conduct proscribed under Article 3 ECHR is the state's positive obligation, also when inflicted by private individuals. This assertion was supported by reference to multiple rulings on the state's positive obligations, including procedural ones, arising from Article 3 ECHR.[31]

Furthermore, the Court underlined that evidence obtained under torture should be excluded "to protect the integrity of the trial process, and, ultimately, the rule of law itself". Quoting the *Othman (Abu Qatada) v. The United Kingdom* case, the ECtHR stated that "no legal system based on the rule of law can countenance the admission of evidence – however reliable – which has been obtained by such a barbaric practice as torture" and that "torture damages irreparably the trial process".[32]

All in all, the ECtHR refrained even from verifying the legitimacy of the other applicant's complaint in respect to the fairness of his trial,

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[31] ECtHR judgment *Ćwik v. Poland,* §§ 63-67.

[32] ECtHR judgment *Ćwik v. Poland*, § 74.

i.e. one concerning failure to examine K.G., the victim of the torture, in the course of the proceedings. In the Court's view, the very admission of the impugned transcript into evidence in the criminal proceedings against the applicant rendered the proceedings as a whole unfair, in breach of Article 6 para. 1 ECHR.[33]

Meanwhile, the dissenting judges referred to the definition of torture contained in Article 1 of the UN Convention, stressing that the exclusionary rule under Article 15 of the Convention applies only to acts which can be directly or indirectly attributed to public officials. Accordingly, it does not concern acts performed by private individuals. The dissenting judges also made references to the provisions of the Rome Statute of the ICC, which do not automatically exclude evidence obtained in violation of "internationally recognized human rights", since their inadmissibility depends on whether (a) the violation casts substantial doubt on the reliability of the evidence; or (b) the admission of the evidence would be antithetical to and would seriously damage the integrity of the proceedings (Article 69.7 of the Rome Statute of the ICC).

The dissenting opinion also highlights that restrictions of admissibility of evidence are an exception, hence they require a detailed justification, which, as a rule, is not needed for admission of evidence. Judges Wojtyczek and Pejchal also emphasized the significance of the principle of free assessment of evidence and linked it to the principle of free admission of evidence. Finally, both dissenting judges concluded that there were no grounds for the application of the same standards to evidence obtained through ill-treatment by private individuals and to evidence obtained by public officials. They supported this thesis by two arguments. First, for evidence obtained by public officials in violation of Article 3 ECHR, the risk of the unfairness of the proceedings comes from the possibility of using evidence which is false or fabricated. Such risk does not exist when the evidence is gathered without any involvement of public authorities. Second, unlike in case of applying exclusionary rule to tainted evidence produced by public officials, the extension of this rule to "private evidence" obtained in similar circumstances does not reinforce the protection against ill-treatment. Thus, "the acceptance of evidence

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33 ECtHR judgment *Ćwik v. Poland*, §§ 91-93.

like that in question in the instant case does not encourage torture by private parties".[34] In addition, the judges stressed that the case should be approached differently if the recording had been used in the criminal proceedings against K.G. Due to protection of the right to remain silent, this type of evidence should be considered inadmissible.

2.2. Critical remarks to the judgment of the ECtHR in Ćwik v. Poland

The position expressed by the ECtHR in the case can hardly be shared. In general, the view of dissenting judges should be endorsed. However, as pointed out elsewhere, both the view expressed by the majority of the Court as well as the position formulated in the dissenting opinion do not seem to make allowances for all arguments and circumstances which should be considered when establishing a standard for fair criminal proceedings in which a private recording of statements extracted by torture or inhuman treatment was admitted as evidence.

The majority who voted in favor of the violation of Article 6 ECHR did not attach sufficient importance to the fact that the recording had objectively existed before the proceedings against the applicant were instigated and was not used in proceedings against the person subjected to torture. The recording had been made outside of the criminal proceedings and not for the purpose thereof. Moreover, and crucially, it was produced without any connection with the activities of public officials. Obviously, the prohibition of torture is unquestionable and constitutes a mandatory rule (*ius cogens*) of international law. In other words, it is absolute and cannot be derogated from.[35] The status of *ius cogens* is sometimes also conferred on the exclusionary rule contained in Article 15 of the UN Convention,[36] although the question remains controversial. At the same

[34] ECtHR judgment Ć*wik v. Poland*, § 12 of the dissenting opinion.

[35] See, however, a discussion on its scope and attempts to find some arguments against the absoluteness of this prohibition in certain, exceptional circumstances – a discussion following *Gäfgen v. Germany* judgment: GREER, Steven. Is the Prohibition against Torture, Cruel, Inhuman and Degrading Treatment Really 'Absolute' in International Human Rights Law? *Human Rights Law Review* 2015. pp. 1-37. (advance access published on January 30, 2015).

[36] See, PATTENDEN, Rosemary. Admissibility in criminal proceedings of third party and real evidence obtained by methods prohibited by UNCAT.

time, the universal definition of torture in the UN Convention is linked to acts, or at least the acquiesce, of public officials or other person acting in an official capacity.

The main argument put forward in the *Ćwik v. Poland* judgment was that "torture evidence" devastates the integrity of the trial process and, consequently, the rule of law itself. This view, expressed in the *Othman (Abu Qatada) v. the United Kingdom* case, deserves full support. However, in this case, it was applied by the ECtHR to evidence obtained as a result of treatment defined as torture in Article 1 of the UN Convention Against Torture (CAT), i.e. treatment "inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity". As clearly transpires from paragraph 266 of the *Othman (Abu Qatada) v. the United Kingdom* judgment, the Court found support for its reasoning in Article 15 CAT, which, no doubts, applies only to evidence obtained by torture as defined in Article 1 of this Convention. Moreover, in this case, the applicant's deportation could be assessed as silent acceptance of the known and widely applied practice of torture administered by Jordanian public officials towards witnesses and defendants in criminal proceedings. It would mean the tolerance for intentional ill-treatment inflicted by state officials for the purpose of gathering evidence to be used in the trial.

Unfortunately, in *Ćwik v. Poland* one cannot find convincing arguments why the same exclusionary rule shall be automatically applied to a private recording produced by members of the organized crime without any intention to use it as evidence in the future criminal proceedings while such a recording was found by chance by the police. Relying solely on the *ius cogens* character of torture prohibition is not sufficient here since in international law it relates to torture as defined by Article 1 CAT. Thus, the only convincing argument could be based on the standard of positive

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International Journal of Evidence and Proof, v. 10, n. 1. 2006. p. 8, and the decision of the Committee Against Torture referred to therein: COMMITTEE AGAINST TORTURE decision of 21 November 2002, P.E. v. France, Comm. No. 193/2001, U.N. Doc. A/58/44, at 135 (CAT 2002), para. 6.3.; See, however, the opposite view: SCHARF, Michael P. Tainted Provenance: When, If Ever, Should Torture Evidence Be Admissible?, *Case Research Paper Series in Legal Studies. Working Paper 07-27, September 2007*. pp. 23-24.

obligations of state-parties of the ECHR to provide effective protection against all forms of ill-treatment, including those administrated by private individuals. However, as will be argued further on, admission of the said recording as evidence in criminal proceedings cannot be assessed as an act of tolerance for ill-treatment inflicted between private individuals.

In its judgment in *Ćwik v. Poland,* the Court rightly emphasized that the prohibition set forth in Article 3 ECHR had previously been referred in the case-law not only to public officials but also to private individuals. Particularly, in cases concerning extradition or expulsion, the Court examines whether transferring a person to another jurisdiction may expose him or her to a real risk of maltreatment by private persons.[37] Therefore, states parties to the ECHR are not only obliged to refrain from conduct referred to in Article 3 ECHR but also take positive measures to protect persons subject to their jurisdictions from ill-treatment, as well as by other private individuals.[38] The scope of the state's positive obligations is not only confined to prevention but also covers an appropriate procedural response to ill-treatment of a private person by another.[39] Such obligations are met by the implementation of effective prosecution of such conduct. States must also evolve their legal systems in a way that does not foster tolerance of private persons' conduct contrary to Article 3 ECHR.[40]

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37 See, in particular, ECtHR [Grand Chamber] judgment of 29 April 1997, *H.L.R. v. France*, appl. no. 24573/94, § 33-44. In this case the risk of the applicant's ill-treatment, if deported to Colombia, emanated from drug traffickers. The Court did not find a violation of Article 3 of the Convention since in its opinion no real risk of ill-treatment was established. See also the judgment of the ECtHR of 16th June 2016, *R.D. v. France*, appl. no. 34648/14, §§ 43-45.

38 See, *inter alia,* ECtHR judgment of 31st May 2007, *Šečić v. Croatia*, appl. no. 40116/02, § 53. Protection from ill-treatment administrated by private actors is also considered as part of "positive obligations" stemming from Article 16 of the CAT. Failure to act by the police officers, although they had been informed of the immediate risk of ill-treatment that a person was facing, is implying 'acquiescence' within the meaning of Article 16 of the Convention: COMMITTEE AGAINST TORTURE decision of 21 November 2002, Hajrizi Dzemajl et al. v. Yugoslavia, Comm. No. 161/2000, U.N. Doc. CAT/C/29/D/161/2000 (2002), para. 9.2.

39 See *inter alia* ECtHR judgment of 25th June 2009, *Beganović v. Croatia,* appl. no. 46423/06, §§ 66 and 69.

40 ECtHR judgment of 23rd September 1998, *A. v. UK*, appl. no. 25599/94, § 22.

In the context of the case-law at hand, a question arises of whether the use of evidence obtained outside criminal proceedings (prior to their instigating) by private individuals as a result of ill-treatment may be perceived as the establishment by the state of a legal framework for tolerating the collection of evidence by private individuals in violation of Article 3 ECHR, and thus for tolerating such conduct in general. Before responding to this question, however, it should be noted that the situation discussed above should not be treated on a par with exposure of a person to ill-treatment by private individuals as a result of handing that person over to another jurisdiction (country). Should this be the case, the state party to the ECHR has the means to prevent the real and prospective ill-treatment. In contrast, if the investigative or judicial authorities obtain already existing evidence containing a recorded statement by a person subjected to ill-treatment, the implications are quite different: the state has no possibility of preventing a violation of Article 3 of the Convention; it may merely fulfil its positive obligation to prosecute the torturer.

Returning to the obligation to develop a legal system that does not foster tolerance of conduct violating Article 3 ECHR, the following conclusions must be drawn. It seems that tolerance of ill-treatment would occur if domestic law allowed admission of private evidence collected through such treatment for the purpose of criminal proceedings, i.e. when private individuals act intentionally to make evidentiary use of statements obtained through inflicting violence. In the author's view, inadmissibility of such evidence in a criminal trial can be justified on grounds of Article 3 ECHR. The opposing view that the exclusionary rule applies exclusively to evidence obtained by public officials would lead to an unacceptable conclusion that the investigative and judicial authorities may acquiesce to or tolerate the methods of collecting private evidence in violation of Article 3 ECHR in order to use the evidence later on in criminal proceedings as authorized by a competent judicial body. To cite a metaphor used in the judgment *Jalloh v. Germany*, in this way brutality would be afforded "the cloak of law" by the judicial authority (the court) which admitted the evidence, being aware that probative statements had been extracted in a disgraceful manner just for the purpose of the criminal trial. The admission of such evidence in the criminal trial could be compared to the "acquiescence of a public official" within Article 1 of the UN Convention

against Torture. In the case in question, the acquiescence would come from the court admitting the statements extracted in such a manner for the purposes of the trial. This would stand in contradiction with the state party's obligation of taking positive action to protect persons from treatment violating Article 3 ECHR and suffered from private individuals.

What raises doubts, however, is the position contained in the judgment in the case of *Ćwik v. Poland*, demanding the same approach to a situation when a tainted evidence (recording of statements) is produced outside the criminal proceedings, before its initiation, and, more importantly, for other purposes. The recording referred to in the case was a typical "find." It had objectively existed before the launch of the criminal proceedings against the applicant Grzegorz Ćwik; it had been secured in the course of lawful action of the Police (search); and its use in the criminal trial could not in any way reduce K.G.'s protection against torture or inhuman treatment. On the other hand, as rightly noted in the dissenting opinion accompanying the judgment, refusal to use this evidence in the trial could not have enhanced K.G.'s protection from inhuman or degrading treatment by the members of the criminal group who "interrogated" him. At the same time, one should bear in mind that the admission of the recording as evidence in the criminal proceedings increased chances of effective prosecution of organized crime. As follows from the Court's judgement, the torturers identified in the recording were prosecuted in another criminal proceedings, which needs to be considered an adequate procedural response and the fulfilment of Poland's positive obligations towards K.G. arising from Article 3 of the Convention.

However, arguments expressed in the Court's justification of the judgment deserve one more critical remark. The Court combined the question of the admissibility of evidence with the assessment of its reliability. This approach, also adopted in many other rulings of the ECtHR, is at least debatable. The assessment of the admissibility of evidence is performed *a priori*; in Poland and some European countries it is formal in character. It should not entail the examination of the reliability of evidence. If the two areas are mixed (admissibility of evidence and assessment of the reliability of evidence), it may have an adverse effect on the procedural rights of the parties, which should naturally participate in the taking of evidence admitted in the trial and should be able to either

challenge or support its reliability at this procedural stage.[41] Still, in some legal systems, the stage of admission of evidence is non-adversarial, meaning that it is based on the judicial authority recognizing or rejecting a motion of evidence, frequently in a written form and outside the public hearing. Meanwhile, the justification of the judgement in *Ćwik v. Poland*, especially Section 74, leads to the conclusion that in the opinion of the ECtHR the recording of "private torture" must be excluded as evidence because it is unreliable. The ECtHR stated that the use of such evidence automatically makes the criminal proceedings against the applicant unfair without taking into consideration whether other evidence admitted by the domestic court was fully legal and sufficient for justifying the applicant's conviction. In effect, if the exclusion of tainted evidence from the trial, as argued elsewhere, may not, in any case increase protection of the author of the recorded statements from ill-treatment, and the important argument for inadmissibility of this evidence is its unreliability, then the domestic court was right to consider it admissible and proceed with the assessment of its reliability. It should be underlined that the ECtHR does not lose the possibility of reviewing the fairness of the criminal proceedings due to the fact that the conviction was based on evidence declared admissible but, at the same time, obtained in circumstances jeopardising its reliability. In numerous cases in which the guilt of the sentenced person was established on the basis of testimonies of crown witnesses or *incognito* depositions, the Court did not focus on the admissibility of evidence but merely indicated the necessity of a careful, thorough examination of such depositions, taking into account their unique character, as well as their importance for fact-finding.[42] Such an approach, known as "the

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[41] This aspect is rightly noticed in: JASIŃSKI, Wojciech. Nielegalnie uzyskane dowody w procesie karnym. W poszukiwaniu optymalnego rozwiązania. Wolters Kluwer Publishing, Warsaw 2019. p. 170. Of course, this problem does not exist if the national law unequivocally prohibits admission of evidence collected in violation of the law.

[42] ECtHR decision of 25th May 2004, *Arnold G. Cornelis v. the Netherlands*, appl. no. 994/03 (with reference to the use of testimony of a witness granted immunity); ECtHR judgment of 11th February 2002, *Visser v. the Netherlands*, appl. no. 26668/95, §§ 43-52 (with reference to the statement of an anonymous witness). However, this approach was also criticized in the literature: TRECHSEL, Stefan; SUMMERS, Sarah, J. Human Rights in Criminal Proceedings, Oxford University Press, Oxford 2006. p. 313.

sole or decisive rule", is frequently applied by the Court not only in cases involving anonymous witnesses or crown witnesses but also with reference to untested evidence (hearsay witnesses). With regard to this type of evidence, it is underlined by the ECtHR that "its admission will not automatically result in a breach of Article 6 § 1 [of the Convention]. At the same time, where a conviction is based solely or decisively on the evidence of absent witnesses, the Court must subject the proceedings to the most searching scrutiny."[43] Therefore sufficient counterbalancing factors should be in place, including measures that permit a fair and proper assessment of the reliability of that evidence[44].

A similar holistic approach is also applied to evidence obtained in breach of respect for private life. When called upon to assess the case in which a secret recording gathered in the course of a covert operation was admitted as evidence, the Court did not focus on its admissibility but on the fairness of the proceedings as a whole. The ECtHR underlined the necessity to examine "whether the applicant was given the opportunity of challenging the authenticity of the evidence and of opposing its use".[45] Furthermore, it emphasized that "the quality of the evidence must be taken into consideration, including whether the circumstances in which it was obtained cast doubt on its reliability or accuracy."[46]

Finally, what is of crucial importance here, the standard of "general assessment of fairness", although with extreme caution, is also applied by the ECtHR to cases in which domestic courts relied on real evidence obtained by inhuman or degrading treatment[47] as well as

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[43] ECtHR judgment of 15 December 2011, *Al-Khawaja and Tahery v. The United Kingdom*, appl. nos. 26766/05 and 22228/06, § 147.

[44] Ibidem.

[45] ECtHR [Grand Chamber] judgment of 10th March 2009, *Bykov v. Russia*, appl. no. 4378/02, § 90. The same approach was applied in many subsequent cases. See, for instance: ECtHR judgment of 3 March 2016, *Prade v. Germany,* appl. no. 7215/10, §§ 33-35; ECtHR judgment of 5 December 2019, *Hambardzumyan v. Armenia,* appl. no. 43478/11, §§ 75-77.

[46] Ibidem.

[47] ECtHR judgment *Jalloh v. Germany*, §§ 106-107. The ECtHR stated: "It cannot be excluded that on the facts of a particular case the use of evidence obtained by intentional acts of ill-treatment not amounting to torture will render the trial against the victim unfair, irrespective of the seriousness of the offence

on real evidence gathered thanks to the statements forced by inhuman treatment of an interrogated suspect.[48]

Looking again at the circumstances of the case of *Ćwik v. Poland*, it should be concluded that since the evidentiary use of the recording could not have had any impact on K.G.'s protection from torture or any other forms of ill-treatment, emphasis should have been laid on the assessment of the fairness of the proceedings as a whole. After all, the transcript of the recording admitted in evidence was intended to corroborate the testimonies of the members of the criminal group who had been involved in the recorded "interrogation," and K.G. was not heard in the course of the proceedings. Accordingly, the key issue in the light of Article 6 ECHR was not the admission of the evidence but rather the review of the fairness of the criminal proceedings as a whole, also in view of the manner in which the domestic court assessed the evidence in the form of a transcript of the recording and its relevance to the determination of the facts.

To sum up, the automatic application of the exclusionary rule concerning statements extracted by ill-treatment by public officials to evidence obtained in similar circumstances by private individuals for purposes other than criminal proceedings is not substantiated by the necessity to respect the standard set by Article 3 ECHR. Moreover, if such evidence is used in proceedings against a third party, not being subjected to ill-treatment (like in *Ćwik v. Poland* case), its admissibility cannot be questioned by invoking the protection of a defendant against self-incrimination and his or her right to silence. This position does not limit the Court's competence to examine compliance of criminal proceedings with the requirements of a fair trial. The Court should examine the fairness of the proceedings as a whole, with particular emphasis laid on

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allegedly committed, the weight attached to the evidence and the opportunities which the victim had to challenge its admission and use at his trial. [...]. In the present case, the general question whether the use of evidence obtained by an act qualified as inhuman and degrading treatment automatically renders a trial unfair can be left open."

[48] ECtHR judgment *Gäfgen v. Germany,* §§ 173-188. See also: LAI HO, Hock. The Fair Trial Rationale for Excluding Wrongfully Obtained Evidence, In: GLESS Sabine; RICHTER Thomas (org.). Do Exclusionary Rules Ensure a Fair Trial? A Comparative Perspective on Evidentiary Rules. Ius Gentium: Comparative Perspectives on Law and Justice 74. Springer Open, pp. 285-288.

the reliability of admitted "private evidence" and its role in establishing the circumstances of the case.

Nevertheless, the above assertion does not lead to the overall approval of arguments put forward in the dissenting opinion. First, it appears to reinforce the conviction that the universal standard arising from Articles 1 and 15 of the UN Convention, as well as from the Rome Statute of the International Criminal Court (ICC), is the one which should have a limiting effect on the development of the European standard of a fair trial in terms of admission of evidence obtained as a result of ill-treatment. In fact, even though the Court should interpret the ECHR with regard to universal standards, in the view of the lack of a legal definition of torture in the conventions of the Council of Europe, the Court is entitled to assume a higher level of protection against ill-treatment than the one set in the universal human rights protection system. As already mentioned, even a cursory analysis of the ECtHR's judgments in terms of state's positive obligations to ensure protection against ill-treatment leads to a conclusion that the relevant Strasbourg standard is currently stricter and, in the specific circumstances described above, may be directly applied to acts of private individuals as well. Consequently, the idea expressed in the dissenting opinion that the scope of the prohibition of torture does not go beyond the provisions of the UN Convention,[49] seems to question the existing trend in the case-law of the ECtHR.[50] Therefore, considering this standard of case-law, I believe that in specific circumstances, i.e. when private individuals ill-treat a person to illicit statements with the intention to subsequently use them in a criminal trial, the exclusionary rule discussed in the first part of this paper should apply.

On the other hand, it is worth noting that the liability of the state for torture inflicted by private individuals is also applicable to a limited extent under the UN Convention. This is the case when such acts are committed "with the consent or acquiescence of a public official or other person acting in an official capacity."[51] The authors of the dissenting

49 ECtHR judgment *Ćwik v. Poland*, § 4 of the dissenting opinion.

50 See ECtHR judgments indicated in footnotes 37-40.

51 For interpretation of this term, see: ZACH, Gerrit. Article 1. Definition of Torture. In: NOWAK, Manfred; BIRK Moritz; MONINA Giuliana (org.). *The*

opinion highlighted it in the last paragraph of Section 9 thereof. They find that even if the acquiescence to torture could be expressed *ex post facto*, this type of acquiescence did not occur in the examined case. This opinion is by far correct, yet at the same time, it supports the idea that the acts of private persons in violation of Article 3 ECHR (and simultaneously aimed to obtain admissible evidence for the purpose of a criminal trial) may be considered in terms of the creation of a legal framework that does not guarantee adequate protection against ill-treatment in this respect.

Reference to a ruling of the Extraordinary Chambers in the Courts of Cambodia (ECHCC)[52] in the dissenting opinion is not fully convincing, either. It is necessary to keep in mind the context of the line of thought contained in the decision of the ECHCC. By relying on teleological interpretation, the ECHCC argued for a broader understanding of the exception from the exclusionary rule contained in the last sentence of Article 15 of the UN Convention. Yet, its intention was to enable broader use of evidence forced by torture in the proceedings against persons accused of the torture. Thus, the reason to apply such an interpretation was to allow more effective prosecution of the torturers.[53] Still, even this approach was met with criticism.[54] In this context, the cited § 75 of the ECHCC's decision can hardly be recognized as supporting the dissenting opinion.

It is also noteworthy that, when recalling applicable international standards, the dissenting judges pointed to a rather general exclusionary rule expressed in Article 69.7 of the Rome Statute of the ICC, which does

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United Nations Convention Against Torture and Its Optional Protocol. A Commentary. Oxford University Press 2019. pp. 61-62.

[52] Thereafter referred to as "ECHCC".

[53] ECHCC (TRIAL CHAMBER) decision of 5th February 2016, case no. 002/19-09-2007/ECCC/TC. §§ 71-78. See also attempts to find a flexible interpretation to the exception to the exclusionary rule in order to make prosecution of perpetrators of torture and their superiors more effective: SCHARF, Michael P. Tainted Provenance: When, If Ever, Should Torture Evidence Be Admissible?, *Case Research Paper Series in Legal Studies. Working Paper 07-27, September 2007*. pp. 19-27.

[54] MONINA, Giuliana. Article 15. Non-Admissibility of Evidence Obtained by Torture. In: NOWAK, Manfred; BIRK Moritz; MONINA Giuliana (org.). *The United Nations Convention Against Torture and Its Optional Protocol. A Commentary*. Oxford University Press 2019. pp. 439-440.

not imply the automatic inadmissibility of evidence obtained in violation of internationally recognized human rights. However, at least the doctrine finds that the content of this provision determines that statements forced by torture or other forms of cruel treatment are inadmissible.[55] Note that the definition of torture contained in Article 7.2(e) of the Rome Statute of the ICC does not imply that this kind of treatment occurs only if inflicted by a public official or at his or her consent. However, the substantive definition of torture is determined by the scope of the ICC's personal jurisdiction.[56]

The remaining arguments advanced in the dissenting opinion are worthy of approval. They refer to the circumstances of the case, i.e. to the fact that this was a piece of private evidence in the form of recorded statements obtained through inhuman treatment, albeit outside of and for purposes other than the criminal proceedings. The dissenting judges did not analyze any other situation discussed in this paper, namely the forcing of evidence by private individuals with the intention to subsequently use it in criminal proceedings, since such circumstances did not occur in the case of *Ćwik v. Poland*. Nevertheless, the firm assertion that the definition of torture does not go beyond the provisions of the CAT permits a conclusion that the dissenting judges do not extend the exclusionary rule to acts of private individuals, regardless of the circumstances and the purpose for which the evidence was obtained. This interpretation of the dissenting opinion is further supported by the judges' search for grounds for non-admission of evidence forced by "private torture" in the proceedings against the tortured person in the general obligation to respect the right of protection against self-incrimination rather than in the prohibition contained in Article 3 ECHR.[57]

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[55] KUCZYŃSKA, Hanna. Prawo dowodowe w postępowaniu przed Międzynarodowym Trybunałem Karnym. In: SKORUPKA Jerzy (org.) *System Prawa Karnego Procesowego. Dowody. Tom VIII, cz. 2,* Wolters Kluwer Publisher. Warsaw 2019. pp. 1727-1728.

[56] PATTENDEN, Rosemary. Admissibility in criminal proceedings of third party and real evidence obtained by methods prohibited by UNCAT. *International Journal of Evidence and Proof,* v. 10, n. 1. 2006. pp. 9-10.

[57] ECtHR judgment of *Ćwik v. Poland*, § 12 of the dissenting opinion. It states as follows: "In any event, protection against self-incrimination does not justify per se a general exclusionary rule disqualifying evidence obtained through

Conclusions

Undoubtedly, the ECtHR judgment in the case of *Ćwik v. Poland* will mark the beginning of a new chapter in the discussion of the European standard that should apply to admission in criminal proceedings as evidence of statements forced by torture or inhuman or degrading treatment by private individuals. Although the position of the Court is unambiguous, one may not overlook the solid arguments expressed in the dissenting opinion. It seems that this was precisely the case in the studied judgment. The majority in favor of the violation of Article 6 para. 1 ECHR failed to consider all possible aspects of obtaining the evidence. Therefore, it seems reasonable to find that the pertinent European standard in this area is *in statu nascendi.*

The article adopts a critical view of the judgment of the ECtHR. The Court did not attach adequate importance to the fact that the recording of "private torture", used as evidence in the domestic proceedings, had been made outside of and for purposes other than the criminal proceedings. Furthermore, it was admitted into criminal proceedings conducted against a third person, not against the victim of torture. In my view, these circumstances should render such evidence admissible. Consequently, the Court should not have questioned its admissibility but rather assessed the fairness of the criminal proceedings as a whole, also taking into account (i) the extent to which the defendant had been able to challenge the reliability of the evidence (the transcript of the recording to be precise), (ii) whether the domestic court had examined the evidence with reasonable care and (iii) what the role of the evidence was in fact-finding. The Court was in a position to make full use of well-established case-law concerning the assessment of the fairness of the criminal proceedings in which untenable evidence had been used, i.e. "the sole or decisive evidence doctrine."

However, evidence obtained through "private torture" or other forms of ill-treatment, i.e. collected by the same vile methods by private individuals, albeit for the purpose of criminal proceedings, should be

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ill-treatment of one person, if this evidence is to be used in proceedings against another person."

treated differently. In my view, this different approach is necessitated by the requirement of the state to meet its positive obligations pursuant to Article 3 ECHR.

Finally, I am convinced that statements forced by any form of ill-treatment, also administrated by private individuals, can never be used against a defendant being a victim of this ill-treatment. An opposing view would violate the right to silence and privilege against self-incrimination.

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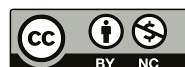

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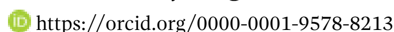
Exclusión de la prueba pericial científica (de baja calidad epistémica) en fase de admisibilidad en procesos penales de tradición románica-continental: Diálogo entre dos culturas jurídicas

Exclusion of the scientific expert evidence (low epistemic quality) in the admissibility in criminal proceedings of civil law tradition: Dialogue between two legal cultures



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Resumen: En este trabajo analizamos los criterios de exclusión de la prueba pericial científica de baja fiabilidad epistémica proveniente de dos culturas jurídicas diversas: *common law* y *civil law*. Se desarrolla la relación entre ambos grupos de criterios para afirmar que los criterios Daubert pueden ser aplicables en los sistemas de enjuiciamiento del *civil law* cuando se trate de casos claros. La libertad de incorporación de medios de prueba, el derecho a la prueba y el debido proceso son limitaciones que impiden una aplicación amplia de la exclusión probatoria en estos casos.

Palabras clave: Fallo Daubert; prueba pericial; reglas de exclusión.

Abstract: *In this paper we analyze the exclusion criteria of scientific expert evidence of low epistemic reliability from two different legal cultures: common*

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law and civil law. We develop the relationship between both groups of criteria to argue that the Daubert criteria may be applicable in civil law when dealing with clear cases. The freedom of proof, the right to evidence and due process are limitations that prevent a broad application of the exclusion of evidence in these cases.

Keywords: *Daubert decision; expert evidence; exclusionary rules.*

Sumario: Introducción; 1. La inquietud que nos deja el fallo Daubert; 2. La exclusión probatoria por falta de fiabilidad epistémica en los ordenamientos del *civil law*. ¿Cómo ha sido tratada por el derecho procesal continental? *2.1 La prueba pertinente. 2.2. La prueba idónea y útil. 2.3. Relevancia como utilidad, ¿un primer nexo?*; 3. La exclusión probatoria y la normatividad de la libertad de incorporación de la prueba; 4. ¿Es posible la recepción del fallo Daubert en los procesos penales románico-continentales?; Conclusiones; Bibliografía.

Introducción

La prueba pericial científica cada vez más está presentando importancia en los procesos judiciales[2]. En efecto, desde un punto de vista tradicional, ya Mittermaier señalaba que la intervención de los peritos ha de tener lugar en una causa criminal cuando "se presentan ciertas cuestiones importantes, cuya solución, para poder producir convencimiento en el ánimo del juez, requieren el examen de hombres (sic) provistos de aptitud y de conocimientos facultativos y especiales"[3]. Por su parte, según Serra, la principal función de los peritos es la de facilitar las máximas de experiencia técnicas especializadas al juez. No se trataría en este sentido, de un medio de prueba más, sino de un medio de corregir la deficiencia técnica, lógica del juzgador[4].

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[2] Así, Alcoceba (2018), p. 220.

[3] Mittermaier (2006), p. 181.

[4] Serra (1969), p. 364.

El incremento del uso de expertos en los procesos judiciales es una manifestación del rol que se les atribuye en la sociedad en general[5]. Además, dicho incremento es un síntoma de la importancia que se la ha otorgado a la especialización funcional en nuestra época[6].

El auge de la cientificidad ha traído consigo la problemática de producción de ciencia de baja calidad epistémica, con los correspondientes efectos perniciosos que pueden generar en los procedimientos judiciales. El más notorio de ello, según dan cuenta estudios, es el efecto persuasivo o "sesgo de cientificidad" o "mito de la infalibilidad"[7] que posee la prueba pericial científica, por el solo hecho de serlo, que tiende a elevar la apreciación de su valor epistémico más allá del que realmente puede extraerse a partir del análisis de su metodología y conclusiones. Así, algunos teóricos de la prueba ya comienzan a hablar de una sobrevaloración epistémica y semántica de la prueba pericial científica[8], especialmente presente en disciplinas científicas complejas[9]. ¿Se deben adoptar medidas de resguardo al interior de los procedimientos judiciales para que la prueba pericial científica no sea valorada de forma indebida? ¿En qué momento procesal?

A partir de los años 2000, los procesos penales iberoamericanos han experimentado una gran cantidad de modificaciones o reformas, incorporando elementos de la justicia penal de los Estados Unidos y Reino Unido[10], en combinación con instituciones históricas de la tradición románica-continental. El objeto era aproximar la justicia penal a los modelos de procesos acusatorios puros, so pretexto de una mayor rapidez y publicidad de los enjuiciamientos penales, con todo lo que ello puede significar para los poderes probatorios de las partes y del juez[11] y, en definitiva, para la calidad de la decisión jurisdiccional. Una de esas manifestaciones ha sido atribuir a la fase intermedia de los

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[5] Dwyer (2008), p. 2.

[6] Dwyer (2008), p. 2.

[7] Gascón (2013), p. 182.

[8] Gascón (2013), p. 182; Valenzuela (2017), p. 106.

[9] Duce (2010), p. 49.

[10] Según Jimeno (2013), pp. 202 y 207, esto también ha ocurrido en Europa.

[11] Véase, Picó, Joan (2008), pp. 130 ss.

procesos penales el momento procesal idóneo para discutir acerca de la admisibilidad de la prueba, a través de la aplicación de reglas de exclusión basadas en fundamentos epistémicos y extraepistémicos[12]. Se trataría, entonces, de un momento procesal de selección de prueba o de depuración del acervo probatorio abstracto[13], de forma que solo sean rendidos e incorporados en el juicio oral los medios de prueba epistémicamente relevantes y que no hayan sido obtenidos con infracción a los derechos fundamentales.

La cuestión de la exclusión de la prueba pericial científica de baja calidad epistémica no ha sido tratada con suficiente atención por el Derecho procesal continental. Entre otras razones, porque la relevancia de la cuestión se manifiesta a partir de la segunda mitad del siglo XX, con el "boom" del conocimiento científico aplicado a los procesos judiciales.

En el ámbito anglosajón, la cuestión se ha debatido intensamente luego de la decisión *Daubert v. Merrel Dow Pharmaceuticals* de la Corte Suprema de los Estados Unidos[14]. Dicho fallo se refiere a los criterios de cientificidad de la prueba pericial, que permitan su exclusión en la fase de admisibilidad a la manera de un filtro de calidad epistémica de la prueba. Lejos de considerar la decisión Daubert el fruto de una discusión interna, algunos autores destacan que los problemas enfrentados en la sentencia son extremadamente importantes en todos los sistemas procesales[15], más allá de una determinada y precisa cultura jurídica. La cuestión se vuelve más compleja cuando se ahonda en los fundamentos y justificaciones de la existencia de dichas normas probatorias en uno u otro sistema, y la extensión de sus alcances, por notorias diferencias entre ambos tipos de culturas.

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[12] Cuando hablamos de fundamentos epistémicos, estos solo dicen relación con facilitar la búsqueda de la verdad en cuanto finalidad de la etapa probatoria. Por su parte, los fundamento extrapistémicos buscan cautelar otros intereses de importancia para la decisión justa, más allá de la mera averiguación de lo sucedido.

[13] Así, Vera (2017), p. 158.

[14] Supreme Court, Daubert v. Merrel Dow Pharmaceuticals (92-102), 509 U.S. (1993), june 28, 1993. Una crítica germinal respecto de las cuestiones epistémicas del fallo pueden verse en Vera (2018), pp. 43 y ss.

[15] Taruffo (2008), p. 99.

¿Es posible aplicar el criterio de la cientificidad para admitir/ excluir la prueba pericial en el contexto de los procesos penales románico-continentales?

La finalidad de este trabajo es reflexionar acerca de si es posible hacer una traslación del cuestionamiento de la exclusión de la prueba pericial por baja calidad epistémica en sede de admisibilidad –como se ha puesto de manifiesto en el "evidence" anglosajón a través de fallo Daubert– a procesos penales de ordenamientos jurídicos románicos-continentales, sobre la base de iguales justificaciones y fundamentos. Lo anterior, poniendo atención en si dicha problemática ha sido o no conocida por nuestro derecho procesal y, acto seguido –de ser así– valorando la posibilidad de existencia de ciertos rasgos comunes en la materia entre ambas tradiciones jurídicas. De esta forma, se intentará dar cuenta acerca de la posibilidad de construir un diálogo entre ambas culturas normativas, a través de la vinculación que puede existir entre el término fiabilidad epistémica de la cultura anglosajona y el de utilidad de la prueba del derecho procesal continental.

1. La inquietud que nos deja el fallo Daubert

En Estados Unidos, a partir de los años 1960, la prueba pericial deja su lugar residual para empezar a tomar una mayor relevancia. Ello, entre otras razones, por el gran poder de convicción que presenta la pericia científica para dar por acreditado los hechos[16], especialmente cuando dicha prueba se rinde frente a un jurado.

Los padres de los menores Jason Daubert y Eric Schuller, en 1984, entablaron una demanda civil por daños en contra de Merrel Dow Pharmaceuticals Inc., ante la Corte del Estado de California, alegando que la causa de las malformaciones congénitas de sus hijos había sido la ingesta materna –durante la gestación– del medicamento "Bendectin", cuya patente pertenecía a dicha farmacéutica.

La demandada alegó que dicho fármaco no era teratogénico, por lo que no podría ser la causa de las malformaciones. Para ello presentó la

[16] Bachmaier (2009), p. 119.

declaración de un médico especialista en Epidemiología con una amplia acreditación en relación con los daños producidos por la exposición a sustancias químicas y biológicas. En efecto, dicho especialista afirmó que no existían estudios publicados que demostraran una correlación estadística significativa entre la ingesta del medicamento y las malformaciones de los menores. A su turno, los demandantes presentaron testimonios de sus propios expertos que afirmaban que dicho medicamento podría posiblemente causar daños congénitos.

La corte del distrito decidió que el testimonio experto presentado por los actores no era concluyente precisamente, porque se afirmaba que el fármaco "posiblemente" había causado las malformaciones, declarando que el criterio jurídico adecuado para admitir o excluir una prueba científica era la "aceptación general" del área relevante de los principios subyacentes, en consonancia con el estándar Frye[17].

En este sentido, se estimó que los estudios epidemiológicos previos presentados por los demandantes debían ser inadmitidos, porque no habían sido publicados o sujetos a una evaluación por pares.

Los demandantes apelaron respecto de esta decisión que, a su turno, fue confirmada por la Corte de Apelaciones del noveno circuito estadounidense, asumiendo "la aceptación general de la comunidad científica de referencia" como el estándar de admisión de las pruebas periciales.

Finalmente, el caso llegó a la Corte Suprema de los Estados Unidos en el año 1993. Los demandantes argumentaron que las Reglas Federales de Evidencia (en adelante FRE) habían superado el criterio o estándar Frye, de momento que la valoración de este tipo de prueba correspondía exclusivamente al jurado y no a los jueces que deciden sobre la admisibilidad de prueba. En el otro extremo, los demandados afirmaron que los jueces tenían la responsabilidad de asegurarse que todas las pruebas admitidas fuesen relevantes y fiables.

La Corte Suprema de los Estados Unidos resolvió por unanimidad la cuestión jurídica central del caso, declarando que no era exacto interpretar las regulaciones de la FRE a la luz del estándar Frye. En efecto, según la corte, el texto normativo no hacía referencia explícita ni implícita a la

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17 Al respecto, véase, Gardner/Anderson (2013), p. 483.

"aceptación general del área de conocimiento" como criterio de admisión. Sin embargo, los jueces para valorar la admisibilidad debían entender el texto de las FRE, de acuerdo con el criterio de la fiabilidad probatoria, tomando como referencia la validez científica del método utilizado por el experto. Acto seguido, la Corte Suprema procedió a indicar a manera de recomendación o sugerencia una serie de factores para valorar la cientificidad de la prueba. De esta forma, sin ser exhaustivo, se indicaron los siguientes cuatro factores o criterios: "a) si la teoría o técnica puede ser o ha sido sometida a prueba, lo que constituiría un criterio que comúnmente distinguiría a la ciencia de otro tipo de actividades humanas; b) si la teoría o técnica empleada ha sido publicada o sujeta a la revisión por pares; c) el rango de error conocido o posible, si se trata de una técnica científica, así como la existencia de estándares de calidad y su cumplimiento durante su práctica; y, Finalmente, d) si la teoría o técnica cuenta con una amplia aceptación de la comunidad científica relevante"[18].

El Fallo Daubert pone de manifiesto la conveniencia de evitar los efectos perjudiciales de que una prueba pericial de baja calidad epistémica pueda ser rendida en juicio, no solo dificultando la búsqueda de la verdad, sino también pudiendo generar sesgos en relación con su valoración. Se propone, de esta forma, excluir la prueba pericial que adolezca de fiabilidad, y que pueda generar una falsa impresión de la realidad como ha sucedido, por ejemplo, con la prueba del polígrafo. En efecto, de todas las decisiones importantes que se suelen citar en los Estados Unidos en la materia, parece ser que el fallo Daubert es el único que establece un estándar de cientificidad de la prueba pericial[19].

Para Zuckermann y Roberts, es preferible considerar "*expert evidence*" como un tópico organizado de conocimiento a partir de aspectos de autoridad epistémica, de la trasparencia del proceso inferencial, y de la durabilidad de la confianza social en la legitimidad de los veredictos en lo penal[20]. En este sentido, la decisión Daubert asumiría una noción de perito limitada desde el punto de vista continental: solo circunscrita

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[18] Un desarrollo más extenso y pormenorizado puede verse en Vázquez (2015), p. 91 ss. También, Bachmaier (2009), pp. 124 y ss; Sánchez (2019), pp. 221 ss.

[19] Alcoceba (2018), p. 235.

[20] Roberts y Zuckerman (2010), p. 469.

al experto de ciencias "duras"[21], aun cuando con posterioridad se ha hecho una aplicación extensiva hacia áreas técnicas[22] que no deja, por tanto, de ser un poco forzada. Es decir, el experto del caso Daubert solo sería un perito científico y–*prima facie*– no quedarían incluidos en él los peritos versados en artes u oficios. Aquí hay una diferencia contextual importante que a veces pasa inadvertida: *in ovo*, los alcances de la decisión Daubert solo afectan a un tipo de prueba pericial denominada científica. Por ello no ha de extrañar que algunos autores continentales denuncien la idoneidad y necesidad de contar con una decisión "Daubert", pero con criterios referidos a las ciencias sociales, culturales y/o humanistas[23].

2. La exclusión probatoria por falta de fiabilidad epistémica en los ordenamientos del *civil law*. ¿Cómo ha sido tratada por el derecho procesal continental?

Parece de toda lógica que la "seudo prueba pericial", débil epistémicamente, sea excluida del juicio, como acertadamente muestra la evolución del fallo Daubert. Sin embargo, este tipo de exclusión no es algo propio ni menos originario de la cultura anglosajona. La tradición procesal continental realizaba una labor análoga a partir de las nociones de "pertinencia", "idoneidad", "utilidad" de la prueba, como una forma de protección de la economía procesal en relación con la correcta inversión de los fondos públicos destinados a la administración de justicia[24]. Sin embargo, los ordenamientos jurídicos del *civil law*, en su mayoría, no contienen una definición legal de lo que es ciencia para

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[21] Sobre el concepto de "hard sciences" y "soft sciences" véase, Sánchez (2019), pp. 44 ss.

[22] Así, en la decisión del 1999 de la Supreme Court *In Kumho Tire Co. v. Carmichae*l (119 S. Ct. 1167 (1999).

[23] Taruffo (2008), p. 286.

[24] Devis Echandía (1988), p. 133: "Puede decirse que éste (principio de la pertinencia, idoneidad o conducencia y utilidad de la prueba) representa una limitación al principio de la libertad de la prueba, pero es igualmente necesario, pues significa que el tiempo y el trabajo de los funcionarios oficiales y de las partes en esta etapa del proceso no debe perderse en la práctica de medio que por sí mismos o por su contenido no sirvan en absoluto para los fines propuestos y aparezcan claramente improcedentes o inidóneos"

los efectos de la prueba pericial[25], cuestión que impide enfrentar la materia –desde el exclusivo plano de un mandato normativo– a partir del dilema de la demarcación[26].

Ahora, sí conviene advertir que la exclusión probatoria por motivos epistémicos ha sido abordada en la tradición continental desde la perspectiva de una relación entre el medio de prueba y el *"thema probandum",*y no necesariamente teniendo como objeto el área disciplinar del cual emana el medio de prueba. Ello, sin duda, dificulta el análisis. Las escasas reglas de exclusión especiales en materia de prueba pericial parecieren apuntar a requisitos subjetivos o de credibilidad del perito (seriedad y profesionalismo, por ejemplo, como se afirma en Chile). Desde esta perspectiva, la idoneidad de la producción epistémica de la ciencia, arte u oficio que profesa el perito es una cuestión que se ha valorado indirectamente en sede continental.

Pues bien, en lo que sigue analizaré brevemente las nociones de pertinencia, idoneidad e utilidad y nos preguntaremos si por medio de sus contenidos es posible invocar la exclusión probatoria por falta de calidad epistémica de la prueba pericial científica.

2.1 La prueba pertinente

La doctrina ha señalado que el vocablo pertinencia expresa una relación entre el medio de prueba y el *thema probandum*. Según Montero, la pertinencia exige que el hecho que se prueba a través del medio de prueba tenga relación con el objeto del proceso[27]. El concepto de pertinencia, por su parte, presupone el empleo de categorías procesales como objeto del litigio, pretensión, excepción, etc., todos conceptos no conocidos por la tradición anglosajona.

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[25] Alcoceba (2018), p. 226.

[26] Una forma en enfrenta la depuración epistémica de la prueba pericial es asumiendo que sólo la prueba que emane de un área denominada "ciencia" pueda superar los filtros de admisibilidad. Ello nos llevaría a intentar delimitar o trazar una frontera entre lo que es ciencia y lo que no, cuestión que en filosofía de denomina "dilema de la demarcación". Un mayor detalle al respecto, véase en Vázquez (2015), pp. 87 ss.

[27] Montero (2005), p. 151. En igual sentido, Jauchen (2006) p. 24.

La prueba pertinente se debe referir a los hechos que constituyen la causa de pedir de la pretensión ejercitada por el demandante o a los hechos con que el demandado ha ampliado el objeto del debate[28]. En una versión más depurada, algunos autores indican que la pertinencia exigiría una doble relación de idoneidad, tanto con el *thema probandum* como con el enunciado fáctico en específico sobre el cual versaría la prueba[29]. En efecto, parte de la doctrina distingue entre pertinencia funcional y material, debiendo ambas ser satisfechas por el medio de prueba respectivo. La pertinencia funcional supone que los medios de prueba sean de realización posible, mientras que el aspecto material de la misma estaría referido a que el resultado de la prueba tenga relación respecto del objeto de la decisión[30].

En principio, se podría excluir el concepto de pertinencia de la discusión tratada en este trabajo porque, en un sentido bien estricto, la prueba pericial científica de baja calidad epistémica generalmente estará referida al objeto del juicio. Por ejemplo, como cuando se afirma que por medio del polígrafo es posible probar la autoría de un delito por parte del acusado. En este sentido, para mí, la fiabilidad de la prueba científica es una cuestión distinta a las versiones más estrictas de la pertinencia en materia de derecho procesal continental, por ello no daría cabal cobertura a estos casos.

2.2 La prueba idónea y útil

La inutilidad e inidoneidad, como conceptos procesales que permiten una exclusión probatoria, han sido elementos utilizados y conocidos en diversos ordenamientos jurídicos. Por ejemplo, el artículo 283.2 de la Ley 1/2000, 7 de enero "Ley de Enjuiciamiento civil española" (en adelante LEC), señala expresamente que "*tampoco deben admitirse, por inútiles, aquellas pruebas que, según reglas y criterios razonables y seguros, en ningún caso puedan contribuir a esclarecer los hechos controvertidos*". Según Montero, la inutilidad en sentido estricto puede atender a dos tipos

[28] Montero (2005), p. 151.

[29] Sánchez (2019), p. 205.

[30] Montón (1999), p. 198.

de razones. En primer lugar, cuando el medio de prueba es inadecuado respecto del fin que se persigue. En segundo lugar, cuando el medio de prueba es superfluo. Lo primero sucedería cuando el medio probatorio no es adecuado para verificar con él las afirmaciones de hecho que pretenden ser probadas por las partes; lo segundo, "bien porque se han propuesto dos pruebas periciales con el mismo fin, bien porque el medio de prueba ya se había practicado antes". Como el mismo autor advierte, muchas veces se emplean por la jurisprudencia indistintamente las nociones de pertinencia y utilidad como sinónimos[31], generándose con ello una confusión que no es posible justificar al interior de la doctrina procesal. Por otro lado, como también se puede advertir del desarrollo procesal de este concepto, muchas veces se confunde una cuestión epistémica con una cuestión competencial. Es decir, si la prueba sirve o no para saber la verdad de lo sucedido y la necesidad de su utilización por parte del juez. Para Sánchez, la utilidad estaría vinculada a la idoneidad del medio de prueba para generar información respecto de los enunciados fácticos que se alegan[32].

Ahora, necesidad y utilidad son términos diversos porque apuntan a perspectivas diferentes. El primero, vincula al juez con el conocimiento aportado; el segundo, el conocimiento aportado con el *thema probandum*. La necesidad es una cuestión quizá más propia de la problemática que Stein trata en su monografía clásica referida al conocimiento privado del juez[33]. La utilidad, por su parte, parece presentarse de una manera genuinamente epistemológica.

En Alemania, según el §244, III StPO, los requerimientos de prueba pueden ser rechazados bajo cuatro grandes supuestos. Uno de ellos es en caso de inutilidad. Esto es cuando el medio de prueba es completamente inidóneo o es inasequible. El medio de prueba será completamente

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[31] Montero (2005), p, 156.

[32] Sánchez (2019), p. 209.

[33] Stein (1990), p. 7. En efecto, la problemática radica en dar importancia en la información que haya obtenido el juez, que sea relevante para decidir la cuestión, cuyo origen se encuentre fuera del juicio o forme parte de su conocimiento privado. En principio, esta posibilidad se rechaza, argumentando que el juez necesita de prueba rendida en el juicio para poder fundar su decisión conforme a ella. Mayores antecedentes de la discusión pueden verse en Vega (1993), pp. 50 ss.

inidóneo si se puede afirmar con seguridad, con independencia del curso de obtención de prueba, que el resultado no puede derivarse del antecedente probatorio[34]. La completa idoneidad debe apreciarse de forma restrictiva, y muy cautelosa[35]. Entre otras razones, porque implica una anticipación de la valoración probatoria, cuestión que en sí misma es peligrosa y ha sido advertido tanto por la jurisprudencia como por la doctrina[36]. Igualmente, debe ser apreciada en sí misma, con prescindencia de otros medios de prueba, debiendo existir una seguridad en su concurrencia[37]. Para Peters, la completa inidoneidad de un testigo puede basarse en cuestiones físicas (sordera, ceguera), psíquicas (enfermedad mental) o morales (enemistad con el acusado)[38]. Según Göbel, la completa inidoneidad podría estar relacionada con la credibilidad o memoria en el caso de los testigos, pero en circunstancias muy específicas[39]

En cuanto al dictamen de expertos, según Roxin, "un perito no es completamente inidóneo cuando no puede declarar sobre la culpabilidad o inocencia, sino solo sobre la mayor o menor probabilidad de la comisión del hecho o de la afirmación que constituye el objeto de la prueba". Agrega que de "ninguna manera se puede equiparar el valor probatorio reducido o dudoso a inidoneidad completa del medio de prueba". En cambio, "tanto un vidente como un dictamen parasicológico son completamente inidóneos como medios de prueba"[40]. Para Sánchez, las prueba basadas en el tarot o en el horóscopo se excluirían por inútiles porque, aunque se trate de pruebas pertinentes, "es por todos sabido que es imposible conocer científicamente unos hechos pasados o futuros mediante métodos adivinatorios"[41]. En igual sentido se pronuncia Volk en relación con la parasicología[42].

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[34] Volk (2002), pp. 192 ss; Kindhäuser (2006), p. 264.

[35] Peters (1985) p. 309.

[36] Kühne (2015), p. 508.

[37] Göbel (2013), p. 175.

[38] Paters (1985), p. 309 y 310.

[39] Göbel (2013), p. 175.

[40] Roxin (2000), p. 387.

[41] Sánchez (2019), p. 210.

[42] Volk, (2002), p. 193.

Para Cordero, en Italia, sería prueba inidónea la observación de los pájaros practicada en Roma por los augures, por los oráculos, en sesiones espiritistas o astrológicas o luego en los juicios del féretro[43].

Como se ve, el cuestionamiento de la exclusión de la prueba pericial por baja calidad epistémica ya era una problemática conocida por los ordenamientos procesales continentales sobre la base de los conceptos de utilidad e idoneidad de la prueba. Aunque claro, sin la completa riqueza que la integración de la Epistemología aporta conceptualmente al "evidence" anglosajón. Pero sí, con la ventaja de una herencia procesal históricamente muy prolongada en el tiempo.

2.3 Relevancia como utilidad, ¿un primer nexo?

Algunos autores han señalado que la prueba es relevante cuando permita fundar sobre los hechos un juicio de probabilidad. La idoneidad de la prueba para generar una posible y/o probable convicción puede ser denominada como relevancia o utilidad de la prueba[44]. En este mismo sentido, la relevancia o utilidad de la prueba está en estrecha relación con la importancia, idoneidad y eficiencia de los antecedentes probatorios para generar un grado de confirmación del enunciado fáctico debatido[45]. La doctrina también ha puesto de manifiesto que la relevancia no puede ser determinada por un solo parámetro, presenta diversas acepciones y solo una de ellas estaría vinculada con cuestiones empíricas[46]. Precisamente esta última es la que permite la exclusión de prueba en los casos en que ella es manifiestamente superabundante o superflua[47]. Binder concibe la exclusión probatoria como el ejercicio de una potestad de policía de los tribunales en los casos de prueba inútil, impertinente, superabundante o ilícita. Por su parte, en la hipótesis de inutilidad, la prueba no contiene

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43 Cordero (2000), p. 47.

44 Cafferata (1998), p. 22.

45 Jauchen (2006), p. 25.

46 Maier (1996), p. 93. Para el mismo autor, ocurriría en el caso de los hechos notorios y sus significados próximos como cuando se permite excluir la prueba por evidente o manifiestamente superabundante o superflua.

47 Maier (1996), p. 93.

información referida a las hipótesis fácticas debatidas, a diferencia de la prueba impertinente, que contiene información pero esta no está referida al *thema probandum*[48].

Por su parte, Taruffo señala que "la relevancia es un estándar lógico de acuerdo con el cual los únicos medios de prueba que deben ser admitidos y tomados en consideración por el juzgador son aquellos que mantienen una conexión lógica con los hechos del litigio, de modo que pueda sustentarse en ellos una conclusión acerca de la verdad de los hechos"[49]. En este sentido, el jurista italiano considera que dicha conexión lógica es cognitivamente instrumental, pues serán medios de prueba relevantes aquellos que puedan ofrecer una base cognitiva para establecer la verdad de un hecho en el litigio, es decir, una información sobre tal hecho que sea superior a cero[50]. Para May, en el Reino Unido, relevancia es un concepto difícil de definir, pero más o menos puede significar que la prueba es relevante si sus efectos pueden hacer más o menos probable la existencia de cualquier hecho que pueda ser vinculado a la inocencia o culpabilidad del acusado[51].

Ingram, en Estados Unidos, señala que la relevancia es la conexión que existe entre un hecho que se ofrece para ser probado y el asunto que se tiene que probar[52]. Igualmente, Nemeth indica que la prueba relevante debe tener una conexión o nexo lógico entre un valor probatorio inherente y una proposición que busca ser probada[53]. El Model Code of Evidence en su Regla 1 define prueba relevante como aquella prueba que tiene alguna tendencia en razón de probar cualquier asunto material incluyendo opiniones ("*opinion evidence*") y testimonios de oídas ("*hearsay evidence*")[54]. La regla 401 de las FRE señala que la prueba es relevante si: a) tiene alguna tendencia para hacer los hechos más o menos probables

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[48] Binder (1999), p. 258.

[49] Taruffo (2008), p. 38.

[50] *Ibid*, p. 38.

[51] May (1999), p. 8.

[52] Ingram (2012), p. 46.

[53] Nemeth (2001), p. 6.

[54] Nemeth (2001), p. 6.

de lo que sería sin la prueba, y b) el hecho es de importancia para la determinación de la acción[55].

Por último, como advierte Taruffo, el término relevancia es común a los diversos sistemas probatorios[56]. Si bien no se pueden deslindar y separar completamente las nociones de relevancia y de utilidad o idoneidad de la prueba, pareciera ser que los déficits epistémicos de la prueba pericial han de ser circunscritos más propiamente a los segundos. Entre otras razones, por el contenido que presenta el concepto de relevancia, que trasunta la diferencia de culturas jurídicas.

3. La exclusión probatoria y la normatividad de la libertad de incorporación de la prueba

La libertad de incorporación de los medios de prueba, – no como principio epistémico propugnado por las corrientes abolicionistas, sino más bien en cautela de intereses extraepistémicos como el derecho a la prueba, el debido proceso[57], economía procesal, derecho de tutela judicial, etc.,– aconsejan que las limitaciones probatorias y las reglas de exclusión sean limitadas y excepcionales. Quizá en ello radica que no haya sido objeto de discusión en sede de admisibilidad probatoria la exclusión de la prueba pericial de baja calidad epistémica, porque *prima facie*, ello quedaría dentro del margen de lo tolerable al tratarse de prueba, *estricto sensu*, relevante y en definitiva ser un tema más propio de la valoración probatoria. También hay que tener presente que el concepto de "regla de exclusión" tiene un marcado origen anglosajón, cuyos procesos penales tienen una fase de admisibilidad probatoria bastante delineada, pero

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[55] Las FRE dispone "*Rule 401 – Test for Relevant Evidence. Evidence is relevant if:(a) it has any tendency to make a fact more or less probable than it would be without the evidence; and, (b) the fact is of consequence in determining the action*".

[56] Taruffo (2008), p. 40. En relación con el *common law*, véase, Roberts y Zuckerman (2010), p. 99 ss.

[57] Véase, Taruffo (2008), p. 56 y 57: "Por consiguiente, el derecho a presentar todos los medios de prueba relevantes que estén al alcance de las partes es un aspecto esencial del derecho al debido proceso y debe reconocerse que pertenece a las garantías fundamentales de las partes".

que igualmente ha sido recepcionado por sistemas jurídicos romínicos-continentales al constituir una respuesta frente a problemáticas comunes.

Parece claro que, en el derecho procesal penal iberoamericano, la exclusión de prueba de baja calidad epistémica se ha de articular sobre la base del concepto de prueba útil o inútil o prueba idónea o inidónea. Y, desde esta perspectiva, parece un esfuerzo innecesario en la materia realizar definiciones estipulativas o disquisiciones basadas en categorías anglosajonas, especialmente cuando no se fundamenta el cambio de nomenclatura.

La relación que se pueda hacer entre los contenidos del fallo Daubert y los conceptos continentales de prueba útil o idónea generan dos grandes cuestionamientos: ¿es posible excluir prueba de baja calidad epistémica en los casos de ordenamientos que no contengan expresamente la posibilidad respecto de la prueba inútil o inidónea? Por otro lado, en aquellos ordenamientos que sí contengan dicha hipótesis de exclusión, ¿se debe excluir toda prueba poco fiable o es necesario atender a una gradualidad para excluir la prueba manifiestamente poco fiable?

Ambos cuestionamientos están permeados por cómo se insertan las reglas de exclusión en el sistema de normas probatorias, especialmente, en lo que refiere a la admisibilidad.

A mi modo de ver, el derecho a la prueba en relación con el debido proceso son fuertes antecedentes para asumir que el principio en la materia es la libertad de incorporación de medios de prueba y, solo por excepción, la exclusión de la misma en sede de admisibilidad. Este es el principio general reafirmado por la historia de las instituciones procesales de cuño románico-continental. Además, porque pueden haber cuestiones competenciales de por medio (por lo demás no ausentes en el *common law*[58]), pues –como se afirma en Alemania–hay que ser cauteloso con la exclusión de la prueba inútil en sede de admisibilidad, porque ello puede significar un adelantamiento de la valoración probatoria propia de la fase de juicio[59]. Por lo demás, es conocida la tendencia probatoria de la Revolución Francesa a favorecer las "libertades" en materia de prueba, pues parecía ser que ello era una cuestión demasiado compleja para

[58] Véase, Denbeaux/Risinger (2003), p. 23.

[59] Kühne (2015) p. 508.

someterla a las riendas del legislador y sujetarla a corsés normativos[60]. En efecto, como bien nos aporta la discusión en el ámbito anglosajón, la "probabilidad de alcanzar una decisión correcta respecto de la verdad sobre los hechos aumenta en la medida en que lo hace la información de lo ocurrido"[61]. Según Ferrer, el principio esencial en sede de admisibilidad es la de obtener un conjunto de prueba lo más rico posible, entendiendo que ello se satisface cuando el proceso judicial facilita la incorporación al proceso del máximo número de pruebas relevantes[62]. Según Laudan, "excluir pruebas relevantes, y no redundantes, por la razón que sea, disminuye la probabilidad de que personas, en principio, racionales lleguen a conclusiones correctas"[63].

En sede continental, el alcance de las reglas que rigen la admisión probatoria, si bien contemplaban fundamentos epistémicos, no son ni los únicos ni los más importantes. También está presente la intención de limitar las facultades judiciales, la economía procesal, y la correcta inversión de los fondos públicos en la administración de justicia. Sin embargo, abundante literatura pone de manifiesto que los ideólogos de la Revolución Francesa tuvieron acceso a las obras inglesas[64], por lo que no sería nada de raro que las reglas de exclusión probatoria en el ámbito continental tengan como antecedentes obras anglosajonas, como las de Bentham.

Ahora, desde el punto de vista epistémico, el fallo Daubert atribuye al juez de la fase intermedia (que conoce de la admisibilidad) el rol de "guardian" o "*gatekeeper*" de la prueba, función a partir de la cual tiene como tarea retener los antecedentes de baja calidad epistémica. Sin afirmarlo expresamente, el fallo Daubert asume que un jurado compuesto por legos o laicos presenta menores competencias cognitivas que un solo juez letrado para reconocer una prueba pericial científica de mala calidad, que pueda estar amparada por el sesgo de la "cientificidad" o

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60 Damaska (2015), p. 37.

61 Ferrer (2010), p. 12; Laudan (2013), p. 46. Ferrer (2007), p. 68.

62 Ferrer (2007), p. 68.

63 Laudan (2013), p. 46.

64 Andrés (1992), p. 279; Vásquez Sotelo (1984), p. 456.

"mito de la infalibilidad"[65] antes señalado. Por ello se haría necesario adoptar un cierto paternalismo epistémico para proteger al jurado de creencias equivocadas. Con ello el fallo Daubert transfiere la problemática de la prueba científica desde la valoración que hace el jurado hacia la admisibilidad de la prueba[66].

Lo anterior, a mi parecer, no es replicable en los jueces de las fases intermedias en los ordenamientos jurídicos continentales, entre otras razones, por diferencias contextuales importantes como la esencialidad de la justicia por jurados en el *common law*[67], a diferencia de lo que sucede en el ámbito del *civil law* con algunas excepciones (p. ej., procedimiento por Jurado en España, Argentina y Brasil). La cuestión no es baladí, pues el jurado no debe motivar su veredicto, por lo que es dable suponer que los sesgos de la prueba pericial puedan llegar a ser más intensos que aquellos presentes en jueces que deben motivar la valoración probatoria que realizan[68] operando, esto último, como un mecanismo de control indirecto de la calidad epistémica de la prueba. En Chile, en materia penal, el Tribunal del Juicio Oral en lo Penal debe hacerse cargo de toda la prueba producida, incluso de aquella que hubiere desestimado, indicando en tal caso las razones que hubiere tenido en cuenta para hacerlo (artículo 297 inciso final Código procesal penal chileno).

En estrecha relación con lo anterior, también hay que destacar que el fallo Daubert asume como modelo implícito de pericia fiable aquella proveniente de las ciencias duras (especialmente prueba de ADN[69]), lo

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[65] Gascón (2013), p. 182. Para Dwyer (2008), p. 2.

[66] Dwyer (2008), p. 2.

[67] Según Fletcher y Sheppard, el jurado consiste en doce personas legas, no adiestradas en el derecho, que tiene el poder de deliberar sobre la base de la prueba y decidir la responsabilidad de las partes en juicio civil, o sobre la culpabilidad o inocencia en el juicio penal, en ambos casos, por el voto de la unanimidad de sus miembros o cerca de la misma. Véase, Fletcher y Sheppard, (2005), p. 245. En el mismo sentido, respecto de la diferencia entre los sistemas jurídicos, véase, Bachmaier (2009), pp. 119 ss; Jimeno (2013), pp. 217 ss.

[68] Así, Duce (2010), p. 49.

[69] Berger (2011), p. 129: "*Daubert and DNA match very well. Indeed, it has been suggested that the advent of DNA profiling may have paved the way for the Supreme Court's opinion in Daubert*". En este sentido, Faigman, (2001), p. 111.

cual dificulta su aplicación a productos derivados de las ciencias sociales, humanas o "blandas", incluso cuando posterior al fallo se extendió su aplicación a ámbitos técnicos[70]. Taruffo señala que sería necesario una especie de "Daubert" de las ciencias no empíricas, con el objetivo de establecer un conjunto de reglas que puedan ser aplicadas por los jueces para controlar la validez de los conocimientos ofrecidos por esa ciencia y su utilidad probatoria[71]. Pero además, y dejando al margen lo anterior, es posible afirmar que en un proceso penal tipo, con jueces legos, donde se conoce de la exclusión probatoria en la fase intermedia, el juez a cargo de decidir la admisión probatoria enfrenta variados problemas que cuestionan la posibilidad de encontrarse en una "mejor posición epistémica" para detectar la prueba de baja calidad en relación con los jueces que conocen del juicio oral. Por ejemplo, en la fase de admisión probatoria está ausente la posibilidad de valorar conjuntamente o de forma coherencial los medios de prueba[72], precisamente porque ellos no se han rendido aún. De igual forma, no existe un periodo de prueba sobre alguna discusión que pueda darse en relación con la admisión de determinados medios de prueba ("prueba sobre prueba"). Por último, es muy difícil que un juez se forme una opinión sobre la calidad epistémica de la pericia si las pruebas no se han rendido aún ni han sido incorporadas a juicio de forma contradictoria y resguardando el derecho de defensa del imputado. Por todo lo anterior se ha dicho que la decisión de admisibilidad del medio de prueba solo puede resolverse hipotéticamente[73].

Así, todo lo que tenga que ver con la valoración de la prueba y la decisión del asunto, en un contexto normativo que obligue a los jueces a motivar sus decisiones, no debe ser abordado anticipadamente en el

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Gascón (2013), p. 181 señala: "Los avances han sido particularmente espectaculares en el campo de la genética forense, que ha marcado un antes y un después en la resolución de numerosos problemas judiciales, como la investigación biológica de la paternidad, la identificación de personas o la investigación de indicios, es decir, el análisis de muestras biológicas de interés criminal, como manchas de sangre, saliva, esperma o pelos".

[70] Taruffo (2013) p. 208.

[71] Taruffo (2008), p. 286. En el mismo sentido, Sánchez (2019), pp. 238 y s.

[72] Valenzuela (2017), p. 105.

[73] Taruffo (2008), p. 39.

momento de la selección del material probatorio[74]. Aun cuando se pudiere llegar a hacer un uso abusivo del carácter "pericial" de ciertas pruebas en el juicio—que sucede lamentablemente más a menudo de lo que fuera deseable—no estoy seguro que dicha cuestión práctica pueda ser una limitante jurídicamente justificada para la libertad de incorporación de medios de prueba en el marco de la finalidad de la búsqueda de la verdad de lo sucedido. Mas bien parece un riesgo a tolerar, especialmente si el ordenamiento jurídico dispone de medidas de contención en la fase de juicio oral.

Todo lo expresado anteriormente fundan razones atendibles para estimar, en el ámbito continental, que la *libertad de prueba o libertad de incorporación de la prueba es la regla general frente a la cual hacen excepción las reglas de exclusión*. Estas últimas, con un manifiesto carácter restrictivo[75] por afectar el derecho a la prueba.

Así, por ejemplo, en el artículo 148 del Código procesal penal modelo para Iberoamérica se señala que *"se podrá probar todos los hechos y circunstancias de interés para la correcta solución del caso y por cualquier medio de prueba permitido"*, agregando luego que *"un medio de prueba, para ser admitido, debe referirse, directa o indirectamente, al objeto de la averiguación y ser útil para el descubrimiento de la verdad"*. De igual forma, se puede predicar de la fase intermedia del proceso penal chileno que contiene una cláusula de cierre ratificando la libertad de incorporación de prueba: *"Las demás pruebas que se hubieren ofrecido serán admitidas por el juez de garantía al dictar el auto de apertura del juicio oral"* (art. 276 parte final CPP chileno) Por lo demás, y a mayor abundamiento, este es un principio que también se encuentra contenido en las FRE, de cual la decisión Daubert interpreta una de sus normas. El artículo 402 del mismo dispone: *"Relevant evidence is admissible unless any of the following provides otherwise: the United States Constitution; a federal statute; these rules; or other rules prescribed by the Supreme Court. Irrelevant evidence is not admissible"*. En efecto, la provisión de que toda la prueba relevante es admisible, con ciertas excepciones, y que la prueba que no es relevante no es admisible, "es una presuposición contenida en toda la concepción de un sistema de

[74] Ferrer (2007), pp. 42 ss.

[75] Así, también, Cordero (2000), p. 46.

prueba racional"[76]. Desde esta perspectiva, no solo cuestiones normativo-jurídicas sino también epistémicas aconsejan asumir como principio que "toda prueba relevante es admisible", y solo excepcionalmente no lo es cuando haya referencia legal expresa al respecto basada en la protección de intereses extraepistémicos.

4. ¿Es posible la recepción del fallo Daubert en los procesos penales románico-continentales?

La decisión Daubert equipara conocimiento científico ("*scientific knowledge*") con fiabilidad ("*reliability*")[77], cuestión que es criticada por Haack, entre otras razones, por el carácter honorífico que puede otorgarse al términos científico, en cuyo caso se generaría una tautología y una asimilación injustificada entre estos dos conceptos. Siendo así, la fiabilidad como criterio no permitiría discriminar entre buena o mala ciencia[78]. De otro lado, si la cientificidad se utiliza en un sentido descriptivo, se podría generar el problema de la imposibilidad de atribuir incompetencias o falencias epistémicas a los exponentes de ciencias "duras", en circunstancias que expertos de ciencias no empíricas pueden llegar a ser serios e investigadores fiables. Según la misma autora: "*... not all, and not only, scientist are reliable inquirers; and not all, and not only, scientific evidence is reliable*"[79]. Así, la epistemóloga destaca que "la ciencia tiene una posición epistémica distinguida, pero no privilegiada"[80].

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[76] Thayer (1898), p. 264.

[77] Según Ndreu (2006), p. 464., la decisión Daubert equipararía fiabilidad ("reliability") con veracidad ("trustworthiness")

[78] Haack (2014), p. 111: "*if «scientific» is used honorifically, it is tautology that genuinely scientific evidence is reliable; but trivial verbal truth is of no help to judge trying to screen proffered scientific testimony for reliability*".

[79] *Ibid*, p. 111.

[80] Haack (1997), p. 189. Agrega: "Según nuestros criterios de evidencia empírica ha sido, en general, una tentativa cognoscitiva con éxito. Pero es falible, revisable, imcompleta e imperfecta; y al juzgar dónde ha tenido éxito y dón de ha fallado, en qué áreas y en qué momentos es epistémicamente mejor o peor, recurrirmos a criterios que no son intrínsecos de la *ciencia* ni simplemente determinados por ella".

Si bien es cierto la decisión Daubert, con sus fundamentos epistémicos, logra instalar en la discusión de la admisibilidad probatoria el criterio de la fiabilidad, deja abierta la cuestión del sentido y alcance del concepto. Se dan algunos indicadores, pero bajo ningún punto se resuelve la cuestión de forma concluyente. Ahora, ello no necesariamente es del todo inconveniente, pues esa misma amplitud permite a los jueces la emisión de decisiones sobre admisibilidad mucho más depuradas y sofisticadas[81]. Precisamente es la complejidad de la cuestión, y su amplitud, la que no ha logrado del todo instalar en la jurisprudencia norteamericana el criterio de la fiabilidad como filtro de admisión[82]. Sin embargo, creo injusto descartar del todo en nuestros ordenamientos románico-continentales el criterio de fiabilidad que sugiere la decisión, aunque de todas maneras con un carácter restringido[83]. Entre otras razones, por la potencia normativa del derecho a la prueba y por las diferencias contextuales donde nace la fiabilidad como criterio que dota de contenido a la regla de exclusión de la FRE.

El fallo Daubert ha hecho gráfica una cuestión escasamente tratada por el derecho procesal continental: los sesgos que puede producir en la decisión judicial ciertos dictámenes periciales de baja calidad epistémica. Quizá ha sido una cuestión escasamente tratada o advertida en sede continental, entre otras razones, por la oficialidad, imparcialidad[84], y cierta "neutralidad" que asiste a los peritos cuando se considera que presentan una posición auxiliar a la función jurisdiccional[85] (facilitadores de conocimiento experto necesario para la resolución del objeto del juicio).

Sin embargo, los criterios de solución que se han ofrecido a partir del fallo Daubert, a mi parecer, no son del todo consistentes para

[81] Sanders (2003), p. 938.

[82] Sanders (2003), p. 938.

[83] Así también, Sánchez (2019), p. 241.

[84] Véase, Vázquez (2015), p. 140.

[85] Por ejemplo, Gimeno Sendra señala que el informe pericial es un acto de investigación o prueba por el que determinados profesionales cualificados por sus especiales conocimientos científicos, técnicos o artísticos y designados por el Juez, le "...auxilian o aportan máximas de la experiencia, de las que pudiere carecer, a fin de obtener una mejor comprensión sobre la naturaleza y tipicidad del hecho, así como la responsabilidad penal del autor".Véase, Gimeno (2008), p. 310.

adoptarse *in toto en* nuestros ordenamientos jurídicos. Especialmente cuando existen en el Derecho procesal continental conceptos doctrinales que intentan dar una solución a la problemática planteada como el de prueba "idónea" o prueba "útil", y parecen tener un mejor rendimiento bajo el prisma sistemático jurídico de las reglas que se ocupan de la prueba en los procesos judiciales de herencia románica-continental.

¿Ello significa que el "fallo Daubert" es insignificante para la exclusión de la prueba pericial de baja calidad epistémica en nuestros ordenamientos procesales penales?

No. También en esto hay que ser cautos. Si bien en el ámbito continental era conocida la inadmisión de prueba pericial por baja calidad epistémica, las reglas parecían girar sobre la base de la ausencia de ciertas características del perito, con un carácter muy particular.

El principal rendimiento "continental" del fallo Daubert, a mi modo de ver, se dará en la fase de valoración probatoria pues, en realidad en los sistemas del *civil law*, ese es el verdadero momento en que la validez científica de las pruebas es evaluada por el juez[86]. Esta es la posición que, hasta el momento, se ha sostenido en los países europeos[87]. Sin embargo, ello no impide que la discusión del fallo Daubert también pueda aportar ciertas luces en la fase de admisión, especialmente en los casos de ordenamientos jurídicos que cuentan en sus procesos penales con un momento de selección de prueba distinto al del juicio oral. Igualmente, en aquellos países iberoamericanos que cuentan con enjuiciamientos por jurado.

En efecto, el concepto de fiabilidad puede servir para dotar de contenido al término de prueba pericial "útil" o "idónea", pero solo en un sentido débil. Es decir, a partir de todo lo expresado, una prueba pericial manifiestamente poco fiable puede ser considerada una prueba inútil o inidónea. Y ello acaece, a mi modo de ver, cuando el sustento teórico en el cual se basa la disciplina de la cual es parte el dictamen pericial impide que las conclusiones aporten algún tipo de probabilidad lógica o cuantitativa en relación con el grado de confirmación de los hechos discutidos en el pleito. Ello, ya sea en el caso concreto, ya sea porque *ex*

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[86] Taruffo (2008), p. 100.

[87] Sánchez (2019), p. 214.

ante el área disciplinar no es capaz de ofrecer el resultado esperado en relación con la corroboración del enunciado fáctico. Esto es lo que sucede con el polígrafo o con los peritajes psicológicos de credibilidad de adultos.

La "debilidad" de la noción de fiabilidad para ser un filtro de exclusión contundente puede justificarse, entre otras razones, en los elevados problemas epistémicos que presenta dicho concepto en relación con el resto de derechos que asisten a las partes en relación con la prueba. A este respecto, por ejemplo, Stein pone en relación la calidad epistémica de la prueba con ciertos derechos que asisten al imputado, afirmando que la prueba científica que no logre satisfacer el estándar Frye debe ser excluida siempre que se rinda en contra del acusado en juicio criminal[88].

Otro de los cuestionamientos epistémicos que aconsejan una cierta cautela en la exclusión de la pericia científica poco fiable es la asunción de que el conocimiento científico presenta una mayor solidez epistémica que el conocimiento no científico, cuestión que la doctrina ya observa como algo dudoso o erróneo[89], según afirmaba. Es decir, el análisis de la fiabilidad de la pericia no debiera ser algo muy distinto al análisis general de la calidad epistémica de otras pruebas, – no científicas – como la prueba testimonial, sobre la base de la superación de la creencia y de la coherencia[90]. En este sentido, no hay razones epistémicas que justifiquen que la opinión de expertos sea valorada de una forma separada a como se entienden probados los hechos por medios de prueba basados en conocimiento no experto[91]. Lo que un experto aporta son consejos especializados sobre las generalizaciones apropiadas para aplicar a un conjunto particular de hechos, y cómo esas generalizaciones deberían aplicarse mejor, así como la propia conclusión del experto sobre la aplicación de esas generalizaciones[92]. Desde esta perspectiva, el no experto puede como mínimo observar

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88 Stein (2013), p. 257.

89 Gascón (2013), p. 183.

90 Valenzuela (2017), p. 106.

91 Dwyer (2008), p. 75. En contra, Nieva (2010), p. 285.

92 Dwyer (2008), p. 78. Agrega: "To talk about evidence of opinion as being quite distinct from evidence of fact may therefore have been a wrong turn in the development of evidence jurisprudence. It creates unnecessary difficulties for us in forming a correct understanding of how the court assesses evidence, and particularly expert evidence".

cómo la credibilidad, la relevancia y el peso probatorio de ciertos nodos o átomos se utilizan en el argumento y se combinan con las diversas líneas de inferencias, sin comprender necesariamente si la prueba y la valoración realizada por el experto es semánticamente correcta[93]. Esto, por lo demás, es bastante coherente con la asunción de Haack acerca de que el método científico no es más que un refinamiento del pensamiento cotidiano ("*a refinement of everyday thinking*")[94]. En este sentido, no existe un método científico (exclusivamente científico) como se asume en el fallo Daubert[95]. De ahí que solo sea factible y aceptable jurídicamente que, si se desea emplear la falta de fiabilidad como criterio de exclusión de la prueba pericial en sede de admisibilidad, esta deba estar referida a casos claros, debiendo admitirse la prueba pericial frente a la duda sobre la fiabilidad epistémica. En términos Hartianos, la exclusión de la prueba pericial por inutilidad debiera estar referida al núcleo semántico de la expresión "falta de fiabilidad epistémica" y no extenderse a los casos que pudieran situarse en la zona de penumbra o periferia difusa.

Por lo demás, lo anterior se aviene de mejor forma con que la titularidad jurisdiccional de la decisión acerca de los hechos recaiga en el juez y no en el perito. En el ámbito continental se expresa lo anterior con el brocardo latino que grafica la posición del juzgador frente al experto: el juez es, precisamente, *peritum peritorum*[96]. De igual forma es coherente con la importancia que en nuestros sistemas de enjuiciamientos tiene la libertad de incorporar medios de prueba como corolario del derecho a la prueba y del debido proceso.

Una amplitud normativa de la regla de exclusión que nos permita excluir cualquier caso de pericia científica cuya fiabilidad se ponga en duda puede generar un "sesgo de admisibilidad" de aquellas pruebas que hayan pasado el filtro, que puede afectar a los jueces que conocen del juicio oral. El peligro de ello es que una pericia declarada admisible, por ser tal, puede llevar a creer que ya no es necesario su análisis en cuanto prueba, de la metodología empleada, de sus conclusiones, de la forma

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[93] Dwyer (2008), p. 100.

[94] Haack (2003), p. 93 ss.

[95] Haack, (2014), p. 111.

[96] Véase, Muñoz Sabaté (2016), p. 86.

como apoya un determinado enunciado fáctico y, finalmente, como ello es utilizado por el juez en su decisión sobre los hechos[97]. Lo anterior, por supuesto, no es admisible en el diseño continental de la decisión fáctica cuya titularidad jurisdiccional exclusiva recae en el juez, y no puede adelantarse a la fase de admisibilidad.

Conclusiones

La prueba pericial científica cada vez más está presentando importancia en los procesos judiciales. Ello, sería una consecuencia de la relevancia social que ha experimentado el conocimiento experto, que ha penetrado en diversas áreas del desenvolvimiento de las personas. El aumento exponencial de áreas de especialización funcional, con el consiguiente aumento de especialista en dichos ámbitos, ha generado la necesidad de emplear criterios que nos permitan distinguir entre "buena" o "mala" ciencia, con el objeto de extraer de los procedimientos judiciales la prueba pericial científica de baja calidad epistémica. Ello, con la finalidad de evitar una decisión errónea sobre los hechos basadas en las mismas probanzas, como resultado de la operatividad del "mito de la infalibilidad"[98]o "sesgo de cientificidad".

En el ámbito anglosajón, la decisión *Daubert v. Merrel Dow Pharmaceuticals* de la Corte Suprema de los Estados Unidos, constituye un "leading case" que se refiere a los criterios de fiabilidad o cientificidad de la prueba pericial científica, cuya ausencia genera la posibilidad de excluir la prueba en fase de admisibilidad.

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[97] Berger (2011), p. 1125: "*When the evidence is admitted it is then labeled "reliable" because, according to Daubert, expert testimony must be reliable in order to be deemed admissible. That should not, however, mean that no further analysis of the evidence is required. Admissibility and sufficiency determinations rest on more than satisfaction of a reliability component; they require careful attention to what the evidence proves and how the trier of fact will use it*". En el mismo sentido, Sánchez (2019), p. 242, llama a ser cuidadosos en aplicar los criterios Daubert pues, con ello, se puede imponer un doble examen respecto de la prueba científica, a diferencia de lo que sucedería con el resto de las pruebas. Para mí, ello podría abonar la creación de un sesgo de admisión respecto de la prueba pericial que ha superado el filtro de admisibilidad.

[98] Gascón (2013), p. 182.

Las problemáticas que refleja el fallo Daubert son generales y aplicables a todas las tradiciones jurídicas, por lo que merece la pena preguntarse si el desarrollo contenido en dicha decisión puede o no ser aplicable a los procesos penales de la tradición románica-continental.

El derecho procesal continental ha abordado la cuestión de la exclusión de la prueba sobre la base de los conceptos de pertinencia, prueba idónea, prueba útil, prueba relevante. En especial, la inadmisión sobre la base de la baja calidad epistémica de la pericia es una cuestión que ha tratado de forma más precisa a través de los conceptos de prueba útil y/o idónea, entendido ello como la capacidad del medio de prueba de aportar información epistémica relevante para la prueba de los hechos del caso, en relación con el establecimiento de un cierto grado de probabilidad ya sea lógica o cuantitativa.

En consideración a lo anterior se puede establecer una relación entre el concepto de fiabilidad epistémica de la prueba pericial, derivada de la cientificidad discutida en el fallo Daubert, y la noción de utilidad y/o idoneidad de la prueba en el ámbito continental. Sin embargo, se hace necesario precisar los alcances del vínculo, especialmente por la gradualidad ínsita a la estimación de la capacidad epistémica de los medios de prueba que se pueden aportar a los procesos judiciales.

A mi parecer, el derecho a la prueba en relación con el debido proceso son fuertes antecedentes para asumir que el principio en la materia es la libertad de incorporación de medios de prueba y, solo por excepción, la exclusión de la misma en sede de admisibilidad. Este es el principio general reafirmado por la historia de las instituciones procesales de cuño románico-continental, con una gran cantidad de manifestaciones positivas, y por lo demás algo no desconocido para la tradición probatoria del *common law*.

De otro lado, las diversas críticas que se han hecho a los presupuestos epistémicos del fallo Daubert aconsejan, sin desconocer su importancia en la materia, ser cautelosos a la hora de fundar exclusiones probatorias en sus asunciones.

Así, la respuesta al cuestionamiento origen de este trabajo es afirmativa: el fallo Daubert sí presenta un rendimiento en sede de admisibilidad en nuestros ordenamientos procesales penales de la tradición románica-continental. Pero ello debe matizarse.

Si se quiere utilizar la falta de fiabilidad y/o cientificidad como criterio de exclusión epistémica de la prueba pericial, esta solo debe estar referida a casos claros, reservándose la valoración de los casos dudosos para la fase de juicio oral. En otras palabras, la exclusión de la prueba pericial por inutilidad está referida al núcleo semántico del concepto "falta de fiabilidad epistémica" y no se extiende a los casos que pudieran situarse en la zona de penumbra o periferia difusa. Esta conclusión, por lo demás, es coherente con que la titularidad jurisdiccional sobre la decisión de los hechos recaiga sobre el Tribunal que conozca del juicio oral, impidiéndose con ello que la admisibilidad probatoria se transforme en un prejuzgamiento de la cuestión.

En todo caso, las diversas prerrogativas en juego–especialmente el derecho a la prueba– generan que deben ser declaradas admisibles en juicio las pericias que aporten un dato que este referida a la determinación de la probabilidad de acaecimiento de la hipótesis, aunque sea en un mínimo grado. Será materia de juicio oral determinar si esta pericia podrá ser una prueba que aporte datos que permitan una condena más allá de toda duda razonable, cuestión que sin duda no puede ser abordada adecuadamente en sede de admisibilidad.

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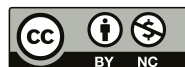

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Reconhecimento fotográfico e presunção de inocência

Photographic Eyewitness Identification and the Presumption of Innocence

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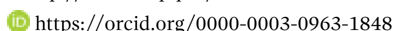

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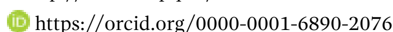

Resumo: O reconhecimento de pessoas é uma prova importante para o processo penal, entretanto, inocentes podem ser reconhecidos por crimes que não cometeram. Procedimentos adotados para o reconhecimento podem aumentar a probabilidade de um falso reconhecimento, como a apresentação de um único suspeito (show-up), ou múltiplos suspeitos ao mesmo tempo (álbum de suspeitos). Neste contexto de manifestas irregularidades, o reconhecimento por método fotográfico é tido como pouco confiável no Brasil, sendo preferível o reconhecimento presencial. Neste artigo, a partir do diálogo entre a epistemologia jurídica e da psicologia do testemunho, considerando pesquisas e experimentos, refletimos sobre as vantagens e possibilidades da realização

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de reconhecimento por método fotográfico como forma facilitar um procedimento de alinhamento justo. São apresentados dados empíricos da psicologia experimental que confirmam resultados do método fotográfico para reconhecimento e, ao final, com base neles, são apresentados argumentos para a sua adoção rumo à construção de um processo penal brasileiro de contornos democráticos, que assegure alcance efetivo à presunção de inocência.

Palavras-chave: psicologia do testemunho; epistemologia jurídica; prova penal; reconhecimento fotográfico; presunção de inocência.

Abstract: *Eyewitness identification is an important criminal evidence for the justice system, however, innocent people can be identified for crimes that they did not commit. Procedures adopted for recognition may increase the likelihood of false identification, such as the presentation of a single suspect (show-up), or multiple suspects at the same time (suspects album). In a context of patent irregularities, eyewitness identification through photographs are believed to be less reliable in Brazil, where the live identification is preferred. In this paper, from legal epistemology and psychology of testimony, we approach the advantages and possibilities of photo eyewitness identification as a method to enable a fair lineup procedure. Empirical data from experimental and cognitive psychology are presented that confirm the results of photographic method for eyewitness identification and, in the end, arguments are presented for the adoption towards the construction of a Brazilian democratic criminal code, which ensures effective reach to the presumption of innocence.*

Keywords: *psychology of testimony; legal epistemology; criminal evidence; photographic eyewitness identification; presumption of innocence.*

1. Introdução

Quando se trata da determinação dos fatos no contexto da justiça criminal, o reconhecimento de pessoas é prova a que se oferece protagonismo. Embora um conjunto probatório possa apresentar uma série de outros elementos, é usual que investigadores, acusadores e magistrados atribuam considerável relevância ao fato de um sujeito ter sido apontado pela vítima/testemunha como autor do delito. Mais ainda quando essa

indicação vem acompanhada por um elevado grau de certeza ("Estou 100% convicto de que foi esta a pessoa que me assaltou"), ou quando se relata o fato com riqueza de detalhes. A sobrevaloração dessa combinação de elevada confiança e detalhes fartos, por sua vez, descansa na crença equivocada de que a memória humana funcionaria como uma máquina filmadora, capaz de armazenar de modo não problemático todos os fatos vividos por alguém (Loftus, 2005).

Segundo o senso comum, sem maiores dificuldades, a memória seria capaz de entregar o conteúdo dos fatos vividos a qualquer momento. No entanto, como amplamente já sinalizado pelos autores deste artigo e outros pesquisadores (Vieira, 2019; Machado; Moretzsohn; Burin, 2020) definitivamente esta não é uma boa descrição de como a memória humana funciona (Cecconello, Ávila & Stein, 2019). O registro, o armazenamento e a recuperação de seu conteúdo enfrentam dificuldades não desprezíveis. Quanto mais tempo passa do momento em que o fato se deu, por exemplo, maior a probabilidade de descompasso entre o que aconteceu e o que será oportunamente relatado. A qualidade das informações gravadas na memória é *degradável, flexível e maleável*, não sendo correto esperar que somente sujeitos com problemas cognitivos possam oferecer relatos pouco precisos do que viveram ou testemunharam.

Em vista disso, é preciso considerar o risco das falsas memórias, que podem ser a recordação de informações que não ocorreram, ou o reconhecimento de um inocente como sendo erroneamente autor de um crime. A falsa memória não é uma mentira, não se confunde com a deliberada intenção de faltar com a verdade. Nas falsas memórias, por contaminação do *registro*, *armazenamento* ou na tentativa de se *recuperar* o fato ocorrido, falta correspondência entre o que aconteceu e o que é recordado (Stein, 2009). O fato ocorrido é *x*, mas a vítima/testemunha, por variáveis que atuam dificultando o registro, o armazenamento ou a recuperação, recorda *y* e, por isso, relata *y*. A falsa memória acompanhada da sinceridade do relato provoca um *erro honesto*; um descompasso entre o relatado e o ocorrido que é, inobstante, bem intencionado. Na mentira, vale esclarecer, para continuar com o mesmo exemplo do fato *x*, a vítima/testemunha recorda *x* e relata deliberadamente o fato *y*. O descompasso entre o relatado e o experenciado por ela não é bem intencionado, mas desonesto.

É ilusório, portanto, esperar da memória um funcionamento regular infalível. Com isso, não estamos negando valor epistêmico à memória, mas destacando a importância de se distinguir a memória *tal como ela é* da memória que *gostaríamos que fosse*: a reconstrução dos fatos no processo penal será tanto mais confiável a medida em que mais nos acerquemos da primeira e nos distanciemos da segunda.

No que refere especificamente à prova de reconhecimento, a preservação do mito da "memória-máquina filmadora" significa aquiescer a falsos negativos e a falsos positivos, isto é, à absolvição de culpados e à condenação de inocentes. De outro lado, compreender as limitações constitutivas da memória humana torna necessária a tomada de uma série de providências no âmbito probatório – seja no que refere à produção, seja no que refere à valoração probatória, seja, finalmente, no que se refere à adoção de uma decisão sobre os fatos[3]. Entre essas providências, os autores deste trabalho entendem constar a consideração do reconhecimento na modalidade fotográfica como alternativa séria a ser discutida. A utilização de fotografias/imagens do suspeito não deve ser descartada tão rapidamente, sobretudo se se almeja reduzir o risco de se condenar inocentes injustamente (Cecconello; Stein, 2020; Matida, 2020). Essa afirmação pode parecer contraintuitiva para aqueles que estão cansados das notícias sobre casos em que o uso de fotografia veio acompanhado de manifestas ilegalidades. A desconfiança diante do uso de fotografias para o reconhecimento é perfeitamente justificada no atual estado de coisas de seletividade penal no qual nos encontramos.

No entanto, é pensando justamente em reverter esse cenário de esvaziamento de garantias dos investigados/acusados que nos dedicaremos a oferecer argumentos favoráveis ao reconhecimento fotográfico. Em

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[3] Em razão do limite de espaço, a relação entre *standard probatório* e provas dependentes da memória não será analisada. Mas é inegável que a constatação da falibilidade da memória traz importantes consequências para a resposta sobre se um *standard probatório* adequado ao processo penal pode ou não ser superado por uma hipótese fática seja única e exclusivamente uma prova dependente da memória, como a palavra de alguém ou o reconhecimento realizado por alguém. É entendimento de um dos autores deste artigo de que não é possível, por exemplo, superar o *standard probatório* elevado que o processo penal merece a partir de um reconhecimento de pessoa. Sobre o tema, ver Matida, 2019.

definitivo, não é qualquer coisa que pode ser considerado reconhecimento fotográfico e aqui cuidaremos dos requisitos que, se presentes, fazem dele um modo de conferir contornos mais efetivos à presunção de inocência a que todos os cidadãos têm direito. A confiabilidade do resultado de um reconhecimento depende da realização de um alinhamento justo, no qual nenhum de seus componentes tenha destaque sobre os demais presentes. Tendo isso em consideração, como assegurar, para cada reconhecimento a ser realizado presencialmente nas unidades policiais a disponibilidade de uma pluralidade de pessoas semelhantes entre si? Esperar que estas condições sempre se dêem para a realização da modalidade presencial é, no mínimo, irreal (Matida, 2020, Matida; Nardelli, 2020).

Isso nos leva a ter de encarar de frente o reconhecimento fotográfico e investigá-lo com mais cautela. Ele pode ser uma alternativa viável às inafastáveis limitações práticas do reconhecimento presencial. Ademais, fotográfico ou presencial, a confiabilidade do reconhecimento depende da implementação de um alinhamento que seja justo. Estas observações iniciais tornam evidente, mas não custa explicitar, que a prática conhecida como "álbum de suspeitos" não será aqui defendida. Justo ao contrário: abordar seriamente a temática do reconhecimento fotográfico implica rechaçar de pronto práticas odiosas como o álbum de suspeitos e a exposição de imagens dos suspeitos displicentemente extraídas das redes sociais.

Dessa feita, a partir da epistemologia jurídica e da psicologia do testemunho, propomos o aprofundamento dos debates sobre o reconhecimento fotográfico. Da epistemologia jurídica deve-se a preocupação com a revisão de regras e práticas probatórias capazes de dotar a determinação dos fatos de sistemas jurídicos concretos de maior *porosidade à verdade dos fatos*[4]. Essa preocupação com a verdade é precisamente o que justifica

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[4] Sobre esta acepção de "epistemologia jurídica", ver Matida; Herdy (2016), p. 209: "(...) nesta segunda acepção, a Epistemologia Jurídica reflete preocupações com o conhecimento dos fatos, e não do direito. Não se trata de problematizar a produção de conhecimento jurídico. A questão que interessa é a justificação das proposições sobre os fatos que integram o raciocínio do julgador no momento em que se lhe exige uma decisão sobre quem merece a tutela jurisdicional no caso individual. Essa forma de entender a Epistemologia Jurídica requer um retorno à Epistemologia Tradicional enquanto disciplina filosófica. Enquanto os epistemólogos em geral ocupam-se da justificação

a aproximação com a psicologia do testemunho[5]. O franco diálogo com a psicologia do testemunho é mais do que adequado à redução de erros judiciários, a medida que profissionais daquela área é que vêm se dedicando a realizar pesquisas e experimentos sobre como a memória humana efetivamente funciona e, assim, podemos conhecer suas potencialidades e suas limitações. O adequado tratamento da prova de reconhecimento depende, portanto, da soma de resultados que a epistemologia jurídica, a psicologia do testemunho e uma alta dogmática processual penal é capaz de produzir[6].

Dito isso, nosso trajeto argumentativo contemplará, no item 2, a apresentação de problemas associados ao reconhecimento fotográfico no Brasil, os quais, à continuação, serão contrastados com procedimentos baseados em evidência, desenvolvidos a partir de experimentos e pesquisa científica. A exigência de um alinhamento justo, que não incremente a sugestividade de um procedimento que inerentemente já é sugestivo, como é o caso do reconhecimento, será tema do item 3. Os argumentos trazidos neste item servirão a demonstrar que o alinhamento do suspeito com pessoas sabidamente inocentes é condição necessária para que se

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de uma proposição fática p, os epistemólogos jurídicos ocupam-se da justificação de uma proposição p quando esta é uma informação relevante para a decisão judicial. Concretamente, a Epistemologia Jurídica é um tipo de Epistemologia Aplicada - um estudo sobre o sistema jurídico como uma prática institucional que tem como um de seus objetivos a busca pela verdade". Um dos autores deste artigo considera-se integrante desta específica maneira de abordar o problema da determinação dos fatos no ambiente do processo. Aproveitamos para listar Prado (2014, 2019), Badaró (2019), Herdy (2016), Nardelli (2019), Ramos (2018), Badaró (2018) e Vieira (2020) como outros expoentes da epistemologia jurídica no cenário nacional.

[5] Sobre o necessário diálogo entre a adequada determinação dos fatos no ambiente dos tribunais e a psicologia do testemunho, ver Matida, Nardelli e Herdy (2020), Badaró (2019) e Ramos (2018).

[6] A necessidade de diálogo entre as diversas áreas de conhecimento também é reconhecida por Giacomolli; di Gesu (2008), ao fazerem referência à "falência do monólogo científico". Além de Nereu Giacomolli e Cristina di Gesu, Aury Lopes Jr. (2020), Alexandre Morais da Rosa (2020), Gustavo Badaró (2016), e Mariângela Tomé Lopes (2011) são exemplos de dogmáticos processualistas penais preocupados com a construção de pontes com outras áreas de conhecimento como estratégia de redução dos riscos de condenação de inocentes.

possa conferir qualquer valor, reduzido que seja, ao resultado do feito. Finalmente, no item 4 apresentaremos argumentos favoráveis ao reconhecimento fotográfico. Dito aqui, muito sucintamente, é a ausência de um alinhamento justo, e não o emprego da fotografia em si o que deve nos causar justificada preocupação. O reconhecimento fotográfico despontará, neste último item, como uma alternativa procedimental não apenas compatível, mas necessária ao sistema de justiça criminal de corte garantista. Nosso compromisso com a redução de erros judiciários, com o risco de se condenar inocentes, é o que precisamente justifica a necessidade de se conceder um olhar mais depurado ao reconhecimento fotográfico.

2. Problemas do reconhecimento de pessoas no Brasil

No Brasil, o reconhecimento fotográfico é comumente referido como um procedimento informal que antecede o reconhecimento presencial. Ou seja, caso a vítima ou testemunha reconheça o suspeito por foto realiza-se um reconhecimento presencial (Stein; Ávila, 2015). Ângelo Gustavo[7] e Thiago Braga Brum[8] tiveram seus rostos conhecidos por imagens extraídas de redes sociais, sem que se realizasse qualquer controle quanto à qualidade e características das imagens. Já Bárbara Quirino[9] e Tiago Vianna Gomes[10] tiveram seus rostos reconhecidos por fotografia enviada à vítima por *whatsapp* e posteriormente reexibida por álbum de suspeitos. Nem a diferença de estatura de 15cm entre Tiago e a descrição que a vítima ofereceu do real perpetrador da conduta foi bastante para que fosse descartado como suspeito; nem a localização em outra cidade

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7 Sobre o caso de Ângelo Gustavo: https://www1.folha.uol.com.br/cotidiano/2020/11/familia-tenta-provar-inocencia-de-jovem-condenado-apos-ser-reconhecido-por-foto-de-rede-social.shtml. Acesso em nov. de 2020.

8 Sobre o caso de Thiago Braga Brum: https://mi.tv/br/programas/em-nome-da-justica-s01e11-tiago-rafael. Acesso em nov. de 2020.

9 Sobre o caso de Bárbara Quirino: https://ponte.org/barbara-querino-a-babiy-como-a-justica-condenou-uma-jovem-negra-sem-provas/. Acesso em nov. de 2020.

10 Sobre o caso de Tiago Vianna Gomes: https://iddd.org.br/jovem-negro-condenado-apos-falso-reconhecimento-tera-caso-julgado-pelo-stj/ Acesso em nov. de 2020.

de Bárbara na data do fato, corroborada por fotos e testemunhas de defesa, foi suficiente para derrotar seu reconhecimento pela vítima, que se aferrou ao "cabelo parecido" de Bárbara e a real culpada. E embora Bárbara e Tiago tenham sido absolvidos em decisões que reconheceram a fragilidade probatória em que suas condenações injustificadamente se apoiaram, o mesmo não se pode dizer de Ângelo Gustavo e Thiago Braga Brum, os quais ainda aguardam julgamento – aquele preso, à espera de revisão criminal; este em prisão domiciliar, à espera do recurso especial. Casos como esses colocam em destaque o pouco – o nada, a bem dizer – que é tido como suficiente para condenações criminais no Brasil (Matida; Nardelli, 2020).

Esse "nada", no que refere ao reconhecimento, expressa-se na admissão do desregrado uso de imagens que, por seu turno, é combinado ao reconhecimento presencial que ocorre primeiro na delegacia, depois em audiência sob os cuidados do magistrado. Significa dizer que, no Brasil, vítimas e testemunhas são submetidas a reconhecer os suspeitos diversas vezes: sobrepõe-se a exibição de fotos/imagens dos suspeitos em múltiplos momentos (*whatsapp* com a vítima a caminho da delegacia e álbum de suspeitos já na delegacia, por exemplo) à exposição presencial dos rostos de suspeitos em unidade policial e depois em juízo. Tal repetição em juízo seria devida à proibição de se condenar com base em elementos informativos (produzidos exclusivamente em etapa investigatória). Essa prática serviria a sanar eventuais irregularidades praticadas na fase preliminar, de modo que a repetição do ato seria uma espécie de antídoto a vícios anteriores. O que dizer sobre as nossas práticas?

Nada mais contraepistêmico porquanto contrário às descobertas feitas pela psicologia do testemunho. Do ponto de vista cognitivo, o reconhecimento é um procedimento *irrepetível*. Quando um crime é praticado, a vítima/testemunha armazena em sua memória uma representação mental do autor e, posteriormente, é solicitada a prestar declarações bem como realizar o reconhecimento. A descrição dos fatos oferecida pelos envolvidos e a identificação da autoria dos responsáveis por comportamentos juridicamente proibidos são recursos aos quais confere-se destacada importância, de sorte que não se trata de qualquer exagero afirmar que a determinação dos fatos na justiça criminal depende, em grande medida, da memória humana. Contudo, embora

testemunho[11] e reconhecimento sejam espécies do gênero provas dependentes da memória, não se pode perder de vista que seus processos cognitivos são diferentes entre si. A repetibilidade do procedimento de sua produção representa uma dessas diferenças: quando técnicas de entrevistas adequadas são aplicadas, é possível que as informações recuperadas sejam relatadas pela vítima/testemunha repetidas vezes, sem que, necessariamente, haja prejuízo quanto à fidedignidade de seu conteúdo. O mesmo não se pode afirmar do reconhecimento, dado tratar-se de *procedimento inerentemente sugestivo*.

Nele, a vítima/testemunha é apresentada a um ou mais rostos para que se decida se um dos rostos corresponde ao rosto visto quando o delito era cometido. Ou seja: o testemunho parte da memória da vítima/testemunha em sentido ao mundo externo; por outro lado, o reconhecimento parte do mundo externo em sentido à memória (Cecconello; Ávila; Stein, 2018). Assim, uma vez que um rosto é reconhecido como sendo do autor do delito, a memória original para aquele rosto é alterada e reconhecimentos subsequentes estarão, desde logo, comprometidos. A função da memória humana é aprender, não recordar de delitos; sendo assim, ao reconhecer um rosto, o cérebro "aprende" que este rosto – seja de um inocente, seja do culpado – corresponde ao próprio autor do crime (Cecconello; Stein, 2020).

Achados empíricos reforçam a irrepetibilidade do reconhecimento. Steblay e Dysart (2016) realizaram experimento em que verificaram que quando o reconhecimento inicial era falso (seleção de um inocente no lugar do culpado), os reconhecimentos subsequentes apresentavam a tendência de reconhecer o mesmo suspeito inocente, mesmo quando este era apresentado ao lado do real autor do fato. Esforços como estes feitos pela psicologia cognitiva demonstram que o resultado de um reconhecimento atual está comprometido pelos reconhecimentos que lhe precederam. Isso joga por terra o valor epistêmico do reconhecimento

[11] O termo "testemunho" é empregado aqui em um sentido mais amplo. Tal como na psicologia do testemunho se estabelece, trata-se de testemunho o relato oferecido por qualquer pessoa que tenha vivido ou presenciado um fato/evento. Logo, os relatos trazidos pela vítima, pelo ofensor, por testemunhas são considerados "testemunhos". Há, portanto, diferença entre esse significado mais amplo e o significado técnico-jurídico do termo.

feito em juízo, pois é incapaz de anular efeitos deletérios de reconhecimentos incorreta e anteriormente realizados (Steblay; Dysart, 2016, Wells et al, 2020).

No Brasil, o reconhecimento a partir de fotografia é realizado de dois modos: o *show-up* e o álbum de suspeitos. No *show-up* fotográfico, apresenta-se uma foto do suspeito à vítima/testemunha, que é solicitada a dizer se é ou não o autor do delito (Stein; Ávila, 2015). Seja presencial ou fotográfico, o problema do *show-up* reside na falta de alternativa para que a vítima/testemunha possa comparar rostos. Em um show up a vítima pode chegar a reconhecer o suspeito como autor do crime simplesmente em razão de apresentar características semelhantes ao autor (o mesmo corte de cabelo, por exemplo). O *show-up* é um procedimento notoriamente sugestivo e, por representar grande risco a falsos reconhecimentos, é constantemente desaconselhado por pesquisadores como procedimento de reconhecimento (Cecconello; Stein, 2020; Clark, 2012; Wells et. al., 2020;).

Além do *show-up*, o álbum de suspeitos também é recorrentemente utilizado nas investigações criminais. Trata-se de peça fundamental da rotina policial. Por meio dele, uma pluralidade de suspeitos é apresentada ao mesmo tempo. Se uma vítima de roubo procura ajuda em uma delegacia, a ela será exibido um álbum com inúmeros indivíduos previamente selecionados pelas autoridades policiais. Não há clareza quanto ao que serve de razão para que alguém passe a compor um álbum de suspeitos.

O caso de Luiz Carlos da Costa Justino, violoncelista da Orquestra da Grota, ilustra a falta de transparência quanto ao que serve de critério para a inclusão da fotografia de alguém no álbum de suspeitos. Justino foi abordado depois de uma apresentação na região das Barcas, em Niterói (Rio de Janeiro). É possível perceber, em realidade, a sucessão de arbitrariedades presentes no caso, já que tampouco se pode compreender o que, exatamente, Justino fazia, que pudesse ter sido interpretado como "atitude suspeita". Abordado após o término de sua apresentação musical, Justino foi conduzido à delegacia em razão de mandado de prisão preventiva expedido por um roubo de celular e dinheiro ocorrido em 2017. Sua participação em ação realizada por quatro pessoas foi determinada pela seleção de sua foto num álbum de suspeitos. Mas como a sua foto

foi parar ali? Essa foi uma das perplexidades enfrentadas pelo magistrado André Nicolitt ao deferir *habeas corpus* impetrado a favor de Justino.

> *Precisamente sobre o caso, causa perplexidade como a foto de alguém primário, de bons antecedentes, sem qualquer passagem policial vai integrar álbuns de fotografias em sede policial como suspeito.*
>
> *(...) Da análise dos termos de declarações (0000029) e do relatório do inquérito (0000044) às fls. 46, percebe-se que no mesmo dia a vítima registrou o fato e já lhe foi apresentado um álbum de suspeitos. Se este álbum não foi constituído de uma prévia investigação sobre os fatos, o que levou a supor que certos indivíduos possam ter participado do crime, este álbum de suspeitos só pode significar na acepção do Dicionário Aurélio, um álbum de pessoas que "inspiram desconfiança.* (Decisão de revogação de prisão preventiva de André Nicolitt, TJ-RJ, Comarca de São Gonçalo, Proc. n. 0021082-75.2020.8.19.0004, p. 5).

O caso de Tiago Vianna Gomes também merece ser recordado ao se tratar da prática de álbum de suspeitos. Em recente decisão do HC 619.327/RJ[12], o Superior Tribunal de Justiça, sob a relatoria do Min. Sebastião Reis Junior, pôs um fim à injusta condenação de Tiago, condenado por roubo a mão armada de uma motocicleta, ocorrido em 2017. Tampouco no caso de Tiago pode-se indicar a partir de que momento sua fotografia passou a integrar um dos álbuns de suspeitos então exibido à vítima. Fato é que, como não há controle dos critérios para ingresso, nem do momento a partir do qual a autoridade policial tem a obrigação de exclusão, apesar de ser absolvido por um processo de receptação (anterior ao processo de roubo), a foto de Tiago continuou a ser reiteradamente exibida a vítimas aleatórias, a despeito de que houvesse discrepância entre as características do culpado descritas pelas vítimas e as de Tiago. Era uma questão de tempo para que o procedimento do álbum, sugestivo por excelência, gerasse seus "frutos". Tiago foi reconhecido nada menos que oito vezes.

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[12] O caso contou com a participação do Instituto de Defesa do Direito de Defesa (IDDD) e do Innocence Project Brasil na condição de *amicus curiae*. Para mais informações sobre o caso, acesso ao inteiro teor do HC 619.327/RJ, do *amicus curiae* do IDDD, ver: https://iddd.org.br/jovem-negro-condenado-apos-falso-reconhecimento-tera-caso-julgado-pelo-stj/

> *Que Tiago tenha sido reconhecido oito vezes diz mais sobre o risco de falsos reconhecimentos que ronda a população preta e pobre brasileira e muito menos sobre a confiabilidade da informação gerada. Sintoma disso é que, mesmo depois da absolvição por um primeiro processo de receptação, a fotografia de Tiago continuou a ser reiteradamente oferecida a vítimas que, com a memória acometida por decurso de tempo, estresse, efeito da raça diferente, entre outras variáveis, acabaram por apontar Tiago como autor dos delitos. Vale ressaltar que as vítimas que reconheceram Tiago chegaram a descrever o autor do fato com base em características físicas destoantes das de Tiago" (Matida; Nardelli, 2020).*

Em síntese, seria ilusório esperar diferente, porque em circunstâncias de patente arbitrariedade, ser novamente reconhecido é questão de sorte/azar, uma "verdadeira roleta russa" (Matida; Nardelli, 2020). É de se notar que o emprego dos álbuns de foto suspeitos é terreno franqueado às arbitrariedades, tanto porque inexistem critérios para a inclusão/exclusão das imagens, quanto porque há verdadeira lacuna quanto aos protocolos que devem ser seguidos para que a maneira de se conduzir o ato não represente, em si mesma, um fator de contaminação da memória da vítima/testemunha. A acurácia do resultado depende da adoção de critérios e protocolos para o uso de fotografias.

Importa ainda destacar que a prática do álbum combina-se à "visão de túnel".

> *Visão de túnel é uma tendência humana natural que tem efeitos particularmente perniciosos no sistema de justiça criminal. Por visão de túnel, referimo-nos a um 'compendio de heurísticas comuns e falácias lógicas' as quais estamos todos suscetíveis, que conduzem os atores do sistema de justiça criminal a focarem no suspeito, selecionarem e filtrarem as provas que construirão o caso para a condenação, ao mesmo tempo que ignoram ou suprimem as provas que apontam para longe da culpa. (Findley; Scott, 2006)*

Ou seja: não bastasse o simples emprego de tão questionável procedimento, a ele sobrepõe-se a visão de túnel. O álbum é comumente utilizado como ponto de partida da investigação criminal. Investigadores partem da suposição de que a imagem do autor está catalogada e poderá

ser verificada a partir de uma exibição sem maiores cuidados, o que acaba por desviar a atenção que outros elementos informativos também deveriam ganhar. São os estereótipos raciais e sociais que terminam por sedimentar a crença de que a apresentação do álbum com tantos suspeitos já será suficiente para solucionar o caso em questão. A robustez do conjunto informativo é comprometida porque se atribui excessivo valor ao resultado de um procedimento que em nada contribui à aproximação à verdade dos fatos.

Tanto é assim que os pesquisadores da psicologia do testemunho têm justamente recomendado que o reconhecimento não seja o primeiro procedimento da investigação (Wells et al., 2020). O reconhecimento deve ser consequência de outras informações colhidas no decorrer da investigação, não seu ponto de partida. Assim, uma vez outros elementos informativos apontem para um suspeito, aí sim, o reconhecimento deverá ser realizado; vale ressaltar, sempre de acordo com a exigência do alinhamento justo.

3. Alinhamento justo, instruções e ausência de feedback's

Em primeiro lugar, "alinhamento" opõe-se a "show-up". Alinhamento é procedimento por meio do qual se exibe o suspeito à vítima/testemunha na companhia de outras pessoas, evitando-se com isso, a efeito radicalmente sugestivo de se mostrar uma única pessoa (*show-up*). Como vimos anteriormente, há inclusive experimentos que dão conta de demonstrar que a apresentação de uma única pessoa fará que seja ela a tendencialmente selecionada nos próximos reconhecimentos, pouco importando se ela é ou não a culpada. A técnica de se alinhar uma pluralidade de pessoas pretende eliminar essa primeira e radical sugestionabilidade da memória da vítima/testemunha, evitando, com isso, a implantação em sua memória do rosto daquela pessoa que lhe fora exibida individualmente. Para usar os termos adequados e anteriormente mencionados, quer-se evitar a formação de uma *falsa memória* e a produção de um *erro honesto* a partir dela.

O alinhamento de uma pluralidade de pessoas é técnica válida para evitar falsas memórias e erros honestos. Mas não basta que haja simples alinhamento. É preciso que ele seja *justo*. Em um alinhamento justo, o

suspeito é apresentado em meio a pessoas não suspeitas[13] (geralmente, totalizando seis). Para que o alinhamento seja eficaz, os não suspeitos devem ser sabidamente inocentes e, assim como o suspeito, devem atender à descrição da vítima/testemunha, de modo que o suspeito não se destaque entre os demais (Wells; Olson, 2003). Primeiro falaremos da exigência de ausência de destaque e, em seguida, da condição de que os outros integrantes do alinhamento sejam não suspeitos, isto é, sabidamente inocentes.

Em primeiro lugar, sempre que haja destaque não se estará a promover um alinhamento justo, mas tão-somente um alinhamento formal que não protege inocentes do risco de serem falsamente apontados. Utilizando o caso de Bárbara Quirino como exemplo, se em lugar de ter sido exibida por *show-up* através fotografia enviada pelo *whatsapp* à vítima, Bárbara tivesse sido exibida numa fila de pessoas brancas ao seu lado, ou de pessoas que não tinham o mesmo cabelo volumoso que foi descrito como característica da culpada pela vítima e que era preenchida por Bárbara, também não seria possível afirmar, nestas hipóteses, que seu alinhamento fora justo. O alinhamento em que somente uma pessoa preenche as características descritas pela vítima/testemunha como sendo as características do culpado/da culpada não é um alinhamento justo porque a própria composição do alinhamento cria a tendência de que uma pessoa inocente seja apontada em razão da simples coincidência – neste caso, triste coincidência – de que ela seja a única a ostentar um traço ou característica notada pela vítima/testemunha como sendo uma característica culpado/da culpada. Além disso, a ausência de destaque permite que a vítima/testemunha compare entre diferentes atributos dos rostos, sua decisão não será baseada em característica isolada senão que em múltiplas (Wixted et al, 2018).

Em resumidas linhas, ter cabelo volumoso, tatuagem, ser de determinada raça ou etnia, usar *pearcing*, não pode servir a, por si só, transformar pessoas em suspeitas de delitos. O efeito perverso de que a justiça criminal promova meras semelhanças com o culpado/a culpada a fatores dignos de suspeita é contribuir, no limite, à uma lógica que

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[13] Usaremos como sinônimos os termos “pessoas não suspeitas”, “fillers” e “dublês”.

criminaliza raça, etnia, manifestações culturais. O cabelo volumoso de Bárbara, que expressa empoderamento do povo preto, nunca poderia ter sido suficiente à sua seleção como suspeita. Se se convalidam reconhecimentos como esse, ao fim e ao cabo, a mensagem que o sistema de justiça criminal estaria a transmitir à sociedade é de que basta pertencer a um grupo anteriormente categorizado como suspeito a partir de generalizações espúrias e discriminatórias ("negros de periferia"), pouco importando o indivíduo. Estados democráticos são incompatíveis com estas práticas.

No que refere à condição de não suspeitos das pessoas que são exibidas em conjunto com o suspeito, isso se deve à redução dos riscos de falsos reconhecimentos. Daí que, se se utiliza a técnica do *show-up*, sempre que o suspeito fosse um inocente estar-se-ia a contribuir para a sua injusta seleção como culpado. Quando se alinha o suspeito com pessoas sabidamente inocentes a probabilidade de um falso reconhecimento é distribuída entre as probabilidades de a vítima escolher algum não suspeito (Cecconello; Fitzgerald; Stein, no prelo; Wells; Smalarz; Smith, 2015). O reconhecimento de alguém sabidamente inocente (que são tecnicamente chamados de *fillers*) é resultado que não prejudica a investigação pois não se corre o risco de que ela seja ajustada a uma direção equivocada. O uso de *fillers*, que em realidade representam hipóteses fáticas as quais os investigadores sabem serem falsas, evita o cenário de erros judiciários reproduzidos a partir do álbum de suspeitos, por exemplo. No álbum, todo e qualquer sujeito é tido como um potencial suspeito; todo e qualquer apontamento tende a abrir uma linha investigativa que, aliada à visão de túnel há pouco descrita, servirá a cravar um erro judiciário. Por outro lado, a seleção do suspeito em procedimento que lhe apresentou na companhia de pessoas sabidamente inocentes e com ele semelhantes produz uma informação que deverá ser considerada pelo investigador cuidadoso.

Ainda sobre alinhamentos justos é sumamente importante que sejam utilizadas instruções adequadas às vítimas e testemunhas. Vítimas e testemunhas tendem a acreditar que caso não reconheçam um rosto estarão prejudicando o trabalho policial, por essa razão, é importante informar que o autor do delito pode estar ou não entre os rostos e que não reconhecer alguém é, sim, uma resposta possível (Steblay, 2013).

Também é importante evitar qualquer *feedback* confirmatório, como quando o investigador diz à vítima/testemunha que ela apontou a pessoa que a polícia tinha em mente. *Feedbacks* como esse têm o efeito de inflar o grau de confiança que a vítima originalmente tinha no resultado, de modo que, a partir da confirmação oferecida pelo investigador, ela passa a ter um grau de confiança superior ao que originalmente tinha após ter efetuado o apontamento (Steblay; Wells; Douglass, 2014). Será esse grau de confiança inflado que a vítima/testemunha relatará quando perguntada sobre ele; como sabemos, ele poderá contribuir à injusta condenação de um inocente. Elevados graus de confiança não são, por si só, conclusivos sobre o conteúdo verdadeiro da memória. Sobre o perigo de se supervalorar um grau de confiança elevado, vejamos o caso de Janet Burke[14]. Vítima de estupro no fim da década de 80, Janet apontou Thomas Haynesworth como seu algoz, relatando ter 100% de certeza quanto à autoria. Nas palavras de Janet, referindo-se ao momento em que esteve na presença do acusado, em audiência:

> *Eles (os policiais) o trouxeram. Assim que o vi comecei a me descontrolar. Parecia que eu estava revivendo a experiência de novo na frente de cem pessoas. Me lembro de ter apontado para o Thomas e ter dito 'tenho 100% de certeza de que é ele*[15]*.*

Assim, tanto há que se ter cuidado para não se inflar o grau de confiança da vítima/testemunha em momento subsequente à produção do feito, quanto é mais do que conveniente que se tenha também cautela à hora de valorar o grau de confiança por ela oferecido. No caso de Janet, ao mesmo tempo em que se atribuiu valor excessivo à confiança por ela relatada, foram deixadas de lado, à hora da valoração, importantes variáveis capazes de contaminar a sua memória. O *fator estresse*, o *efeito da raça diferente*, o *efeito do foco na arma* são apenas algumas das variáveis que no caso concreto foram desprezadas à hora de atribuir valor probatório ao reconhecimento realizado pela vítima.

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[14] O estupro de Janet Burke foi conteúdo do episódio seis da série "O DNA da Justiça", que apresenta casos reais nos quais a atuação do Innocence Project Estados Unidos assegurou revisões criminais.

[15] *"O DNA de Justiça", ep. 6, Netflix.*

Pelo que foi exposto, fica evidente a importância da realização de reconhecimento que observe as condições de (a) um alinhamento justo, essas, por seu turno, combinadas (b) ao oferecimento de instruções adequadas, capazes de prevenir eventual efeito compromisso que a vítima/testemunha seja capaz de sentir, correlacionando a continuidade da investigação ao apontamento de alguém. Além disso, também vimos o quão releva (c) eliminar o oferecimento de *feedbacks* à vítima/testemunha, pois a flexibilidade da memória ocasiona a maleabilidade do grau de confiança.

A observância da reunião destes conselhos representa *condição necessária* e *não suficiente* para que se confira qualquer valor probatório, reduzido que seja, ao reconhecimento efetuado – seja ele presencial ou fotográfico: é condição necessária porque ausentes não se garante mínima confiabilidade ao resultado (dado que o próprio sistema de justiça estará contribuindo a falsos positivos), é condição insuficiente porque ainda quando todos as recomendações sejam seguidas, como a memória humana é falível, sempre se imporá a necessidade de que aquele reconhecimento seja corroborado por outros elementos probatórios extraídos de fontes independentes.

4. Reconhecimento fotográfico, uma alternativa a ser levada a sério

O uso de fotografias no reconhecimento de pessoas recebe constantes críticas no Brasil e no mundo. Uma pesquisa feita na Inglaterra perguntou a 406 pessoas que a qualquer momento poderiam ser selecionadas para compor o Júri qual método de reconhecimento tinham como mais confiável: 82% dos participantes responderam que o reconhecimento presencial era a alternativa mais confiável (Price *et al*, 2019). Some-se a ela, uma análise das legislações relativas a reconhecimento de cinquenta e quatro países demonstrou que, embora a maioria não especifique a preferência por um método de reconhecimento, quando o fazem, em geral, optam pelo reconhecimento presencial (Fitzgerald; Rubínová; Juncu, 2020). Estes resultados, todavia, não servem a concluir que o método presencial seja necessariamente melhor: em geral, membros do júri possuem pouco conhecimento sobre psicologia do testemunho (Desmarais; Don

Read, 2011) e a maior parte das legislações do mundo sobre reconhecimento de pessoas não acompanha as recomendações científicas para a realização do procedimento (Fitzgerald; Rubínová; Juncu, 2020). Assim, para concluir se o procedimento presencial é espistemicamente melhor, é preciso verificar os resultados de pesquisas empíricas.

Quanto às objeções levantadas no contexto brasileiro, os casos reais mencionados neste artigo ilustram as notáveis irregularidades que circundam o uso de fotografias para se viabilizar a identificação do autor do delito. O envio de fotografias às vítimas/testemunhas via *whatsapp*, a exibição de fotografias despadronizadas de redes sociais, o álbum de suspeitos tornam merecidas as críticas ao reconhecimento fotográfico. Dois tipos de razões emprestam justificado fundamento às críticas ao aproveitamento de tais reconhecimentos: do ponto de vista *epistêmico*, não conduzem à verdade; do ponto de vista *político-garantista*, debilitam as garantias processuais penais do investigado/acusado, fazendo com que, desde o princípio da investigação sejam tomados como se culpados fossem, o que dificulta sobremaneira o exercício do direito de defesa no curso do processo, ao mesmo tempo em que facilita injustas condenações como seu desfecho. Enquanto o mero apontamento de alguém em tão deploráveis condições procedimentais seja considerado bastante para a sua qualificação como suspeito, é fato que a presunção de inocência não está a desempenhar limite ao abuso estatal como deveria.

Mas é precisamente porque nos preocupamos com o efetivo alcance dos direitos dos cidadãos quando investigados/processados que esclarecemos que a defesa do reconhecimento fotográfico não implica naturalização de ilegalidades cometidas na investigação. A modalidade fotográfica será oferecida aqui como alternativa que pode ser desenvolvida a oferecer resultados epistemicamente confiáveis, mas que, sem dúvidas, devem ter sua produção protocolizada e regulada institucionalmente. Fechada a porta para as arbitrariedades cometidas em sede de produção do reconhecimento de pessoas (HC 598.886/SC, relatoria Min. Rogerio Schietti), não se está agora a deixar janela aberta para estas mesmas arbitrariedades a partir da defesa ingênua de um desregrado reconhecimento por fotografia. Definitivamente, este não é o caso.

Assim, nesta seção apresentaremos argumentos a favor do método de reconhecimento fotográfico aliado à técnica de alinhamento justo.

Serão expostas evidências advindas de pesquisas científicas empíricas as quais demonstram que o reconhecimento fotográfico é um método tão eficaz quanto o reconhecimento presencial. A continuação, argumentaremos no sentido de que o reconhecimento fotográfico consiste em método com maior viabilidade para o alinhamento justo, se comparado ao reconhecimento presencial. Por fim, abordaremos alguns desafios à efetiva implementação de um reconhecimento fotográfico justo no Brasil.

Como é de conhecimento dos que se interessam pela psicologia do testemunho, são inúmeras as variáveis que podem influenciar o reconhecimento. Sendo assim, pesquisadores têm feito uso de experimentos científicos, pois permitem controlar variáveis, isolando-as e com isso assegurando a validade de cada achado. Uma pesquisa pode, por exemplo, expor 100 participantes à mesma cena de crime e, após decorrido o mesmo o período de tempo de uma semana para todos os integrantes, testá-los organizados em distintos grupos: a uma metade expõe-se a foto do suspeito; à outra o suspeito é apresentado no modo presencial. Não se pode perder de vista a vantagem de que, no experimento, a identidade do autor do delito é previamente conhecida pelos pesquisadores, sendo possível verificar se a vítima/testemunha exposta a um suspeito culpado foi capaz de reconhecê-lo (*reconhecimento correto*), bem como se quando apresentada a um suspeito inocente conseguiu deixar de apontar algum deles (*rejeição correta*). A preferência pelo reconhecimento presencial depende da verificação de achados empíricos que demonstrem que o reconhecimento presencial efetivamente promove melhores resultados quando comparado ao reconhecimento fotográfico, isto é, que o reconhecimento presencial apresenta melhores taxas de reconhecimento e rejeição corretos de forma replicável por diferentes estudos.

Não é o caso, pois os achados empíricos não demonstram, de forma consistente, que o reconhecimento presencial sempre produz melhores resultados quando seus resultados são comparados aos do reconhecimento fotográfico. No experimento de Egan et al. (1977), 98% dos participantes conseguiram reconhecer corretamente o suspeito quando presencialmente exibido, comparados aos 85% na exibição por foto. No entanto, no experimento de Kerstholt; Koster; Van Amelsvoort (2004), as taxas de reconhecimento correto foram de 69% para o método presencial em face dos 75% para a modalidade fotográfica. Ainda cabe

asseverar que, neste experimento, as taxas de rejeição correta foram de 43% para o reconhecimento presencial, bastante inferior aos 71% apresentados pelo reconhecimento fotográfico. Uma revisão detalhada das pesquisas comparativas – isto é, que comparam reconhecimento presencial e fotográfico – não demonstra uma vantagem consistente de um método sobre outro: em alguns casos o reconhecimento presencial apresenta vantagens, noutros o reconhecido fotográfico, o que autoriza a conclusão de que ambos os métodos levam a resultados similares (Fitzgerald; Price; Valentine, 2018).

Um dos argumentos que frequentemente se apresenta a favor do reconhecimento presencial é que ele permite observar rostos por diferentes ângulos (Rubínová et al, 2020). Como um caminho intermediário projetado para superar a limitação da fotografia foi desenvolvido método de *exibição da rosto por vídeo*, em formato semelhante ao da fotografia de um documento, apresentando busto, rosto, por diversos ângulos, de modo a possibilitar a observação do rosto com maior profundidade e detalhes (Fitzgerald; Rubínová; Juncu, 2020; Rubínová et al., 2020). A despeito da direção a qual o senso comum apontaria, outra vez, inexistem vantagens substanciais de um método sobre o outro (Fitzgerald; Price; Valentine, 2018). As taxas de reconhecimento correto no experimento de Rubínová *et al.*(2020) foram de 31% em um alinhamento no método presencial, e 29% em um método de vídeo; enquanto as taxas de rejeição correta foram de 66% no método presencial e 63% no método de vídeo.

Ademais, ainda entre os argumentos favoráveis ao reconhecimento presencial está o fato de que ele permitiria a observação de todo o corpo do suspeito, enquanto vídeo e foto limitar-se-iam ao busto das pessoas apresentadas no alinhamento. Sobre isso, há pelo menos duas considerações a serem feitas: em primeiro lugar, ainda que o corpo de uma pessoa possa auxiliar no reconhecimento, as maiores informações sobre a identidade de alguém estão presentes em seu rosto (Bruce; Young, 2012). O rosto de uma pessoa carrega diversas informações como idade, gênero, e até mesmo inferência de classe econômica, além de detalhes que tornam a imagem de um rosto única, mas são difíceis de descrever, como o formato dos olhos e a espessura dos lábios (Bruce; Young, 2012; Fiske; Taylor, 2013). O resultado da pesquisa realizada por Rubínová e seus colaboradores (2020) confirmam a considerável eficácia do

reconhecimento fotográfico pois o reconhecimento correto da exibição do suspeito presencialmente e de corpo inteiro girou em 38%, contra os 45% de acerto no reconhecimento pela modalidade fotográfica. Em segundo lugar, a descrição oferecida pela vítima/testemunha antes que se realize o reconhecimento servirá a registrar as características que, em sendo percebidas por ela, sejam relevantes; inclusive para excluir, em alguns casos, pessoas que apresentem características manifestamente incompatíveis com o que foi descrito previamente pela vítima/testemunha. A presença de suspeitos com estatura manifestamente discrepante à estatura descrita pela vítima/testemunha não se justifica, dado que a altura é característica inalterável na fase adulta.

O fato de que o reconhecimento presencial não apresenta resultados efetivamente melhores do que o reconhecimento fotográfico também chama atenção dos pesquisadores. Uma explicação plausível é que as condições de estresse e curta duração do evento dificultam o registro de características de um rosto que nunca vimos antes. É diferente recordar um rosto já visto a recordar um rosto desconhecido (Rubínová et al., 2020); daí, inclusive, a importância de se compreender o deletério efeito da repetibilidade do reconhecimento.

Além da paridade de resultados dos reconhecimentos nas modalidades presencial e fotográfico, cabe considerar o estresse que o momento do reconhecimento pode causar seja na vítima/testemunha, seja no suspeito. Na pesquisa de Brace et al. (2009), por exemplo, 70% das testemunhas julgaram que o reconhecimento presencial gerou mais estresse que o reconhecimento via vídeo. Já a pesquisa de Dent; Stephenson (1979) comparou respostas de crianças para alinhamentos presenciais e fotográficos, verificando que além da ausência de vantagens substanciais do reconhecimento presencial quando comparado à modalidade fotográfica, o nível de ansiedade das crianças foi maior neste método. Nas palavras dos autores, "a maioria das crianças expostas ao alinhamento presencial demonstrou nervosismo, vergonha ou medo. Duas crianças demonstraram-se tão receosas a ponto de não conseguirem terminar a tarefa"[16].

Finalmente, ainda importa considerar a ansiedade do suspeito. Inocente ou culpado, é plausível que demonstre ansiedade. O suspeito

[16] Dent; Stephenson, 1979, p. 198 (tradução livre).

culpado pode se mostrar ansioso porque sabendo que cometeu um crime, é consciente do risco de que venha a ser reconhecido e que, a consequência disso, venha a ser condenado. Quanto ao suspeito inocente, seu estado de ansiedade é igualmente plausível, dado que, uma vez seja erroneamente reconhecido acabará pagando por um crime que não cometeu. Finalmente, ainda no que concerne ao fator ansiedade, também é previsível que em um alinhamento presencial, os componentes inocentes (*fillers*) possam apresentar mais calma, uma vez que a sua seleção não representará maiores consequências o que, por sua vez, pode acabar produzindo destaque do suspeito – seja ele culpado ou inocente. Em um estudo realizado por Fabian, Stadler e Weltzels (1996) participantes inocentes foram exibidos como se fossem suspeitos em um alinhamento presencial. O experimento consistia em lhes apresentar a pessoas que não presenciaram qualquer delito, mas que deveriam identificar quem mais lhes aparentasse ser o culpado. O desfecho foi que estes suspeitos – inocentes porém ansiosos – foram de fato os escolhidos. A razão oferecida pelos participantes foi a aparência de destacada ansiedade e insegurança quando comparados aos demais. Estudos mais recentes (Flowe; Humphries, 2011, Flowe, Klatt; Colloff, 2014 e Weigold; Wentura, 2004) confirmam a correlação entre *mostrar-se ansioso* e *parecer culpado* aos olhos dos que selecionam o suspeito.

Finalmente, cabe o reconhecimento presencial também apresenta dificuldades de ordem prática. Uma pesquisa com mais de 18.000 casos reais na Inglaterra verificou que 52% dos procedimentos de reconhecimento presencial não foram realizados devido ao não comparecimento da testemunha/vítima, do suspeito, ou em razão da dificuldade de se encontrar *fillers* para compor o alinhamento (Pike; Brace; Kyan, 2002).

Não há razões para se esperar por um cenário mais otimista para o reconhecimento presencial com alinhamento justo em terras brasileiras. Como assegurar que em cada delegacia de polícia haverá pessoas semelhantes ao suspeito a disposição da realização de reconhecimentos? É simplesmente irreal supor que o desenho institucional da etapa investigatória possa depender da sorte de se ter disponíveis pessoas com as mesmas características físicas que a vítima/testemunha elencou como sendo as ostentadas pelo suspeito à espera da realização do reconhecimento, delegacias afora. E ainda que se pudesse pensar numa espécie de banco

de dados de "*fillers* em potencial" para a composição de alinhamentos justos presenciais, sempre haveria o desafio de se lograr reunir cinco outras pessoas; cinco fontes de outros compromissos a partir de agendas; cinco vidas diferentes para a realização de um único reconhecimento. Todo o cotidiano de uma unidade policial giraria em torno de se montar reconhecimentos presenciais, como se não existissem outros elementos probatórios que lhes devesse importar.

O reconhecimento por foto (ou vídeo) não apresenta estas dificuldades práticas, pois apenas a presença da vítima/testemunha seria necessária para a sua realização. Para tanto, seria possível refletir sobre a criação de bancos de fotos de não suspeitos; de imagens de pessoas que pudessem ser apresentadas como *fillers* pois sabidamente inocentes da prática daquele delito em questão (por exemplo, pessoas que vivam em outras regiões, países, ou mesmo, imagens geradas a partir de programas que elaboram versões semelhantes ao próprio suspeito). Em procedimentos como estes, caberia ao responsável pelo reconhecimento tomar foto do suspeito (padronizada como todas as fotos pertencentes ao banco de dados) para então, com auxílio de *software,* pudesse buscar e selecionar não suspeitos similares para a composição de um alinhamento justo, sem destaques. Evidente que a criação de um sistema como este teria custos iniciais importantes, mas a séria comparação entre seus resultados com os resultados gerados por práticas como o *show-up* e o odioso álbum de suspeitos serviria a fortalecer não apenas sua conveniência, senão que a sua urgência.

O que gostaríamos de enfatizar é a imprescindibilidade de um alinhamento justo, de instruções adequadas e de ausência de *feedbacks*. São condições mínimas para se conferir contornos efetivos à presunção de inocência de todo e qualquer cidadão diante do risco de ser injustamente condenado. Se o alinhamento justo é mais fácil em reconhecimentos fotográficos, e se reconhecimentos presenciais não oferecem resultados consistentemente mais acurados aos reconhecimentos fotográficos, não estaríamos errando ao nos aferrarmos, a ferro e fogo, à defesa do reconhecimento presencial? Quando as evidências científicas apontam numa direção, a manutenção dos mesmos pontos de vista não nos tornaria equivalentes aos juízes que decidem por convicção íntima? Nosso entendimento é de que sim.

Conclusão

Há, todavia, muito o que se debater sobre como realizar o reconhecimento fotográfico. Por ora, nossa pretensão foi de reduzir a *dissonância cognitiva* (Ritter, 2019) que o assunto envolve; a rejeição que práticas odiosas como a utilização de fotografias despadronizadas, sem o mínimo controle sobre sua proveniência, modo de exibição e quanto ao tempo pelo qual estará sob o domínio estatal é devida, mas o reconhecimento fotográfico não se confunde necessariamente com isso. Para tanto, o percurso aqui realizado passou por uma revisão da literatura oferecida pela psicologia do testemunho que contemplou pesquisas e experimentos cujos resultados servem a demonstrar a viabilidade do reconhecimento fotográfico. Isso porque, como foi trazido aqui, a despeito de uma atitude inicialmente cética e desconfiada (daí a dissonância), não há substanciais vantagens epistêmicas na adoção do reconhecimento presencial em detrimento do reconhecimento fotográfico. Não se justifica, portanto, toda a rejeição atribuída ao uso de fotografias.

Tendo isso em vista, nosso objetivo foi de singelamente contribuir a preparar o terreno para as reflexões absolutamente necessárias à construção de protocolos, bem como de ajustes legislativos que reconhecimentos epistemicamente confiáveis merecem de nós. Falar sobre reconhecimento fotográfico não é avalizar manifestas irregularidades, mas preencher de regras e protocolos lugares onde, nos dias de hoje, as arbitrariedades comodamente ainda imperam e contribuem às tormentosas condenações de inocentes.

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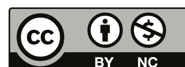

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Fundamentos de Direito Processual Penal

Fundamentals of Criminal Procedure

Los juicios paralelos en España: El efecto adverso de la libertad de información en la publicidad mediata

Parallel trials in Spain: The adverse effect of freedom of information on the principle of publicity

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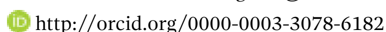
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Resumen: La metodología informativa de los medios de comunicación ha experimentado una evolución notable motivada por el impacto de las nuevas tecnologías en el sector de la comunicación. Esto ha propiciado que la cobertura informativa sobre los asuntos judiciales se intensifique hasta generar el fenómeno mediático de los denominados juicios paralelos. Así, nos encontramos ante un fenómeno de carácter extrajudicial que tiene la entidad suficiente para producir serias injerencias dentro de un proceso penal. El objetivo de este trabajo es analizar, desde la perspectiva procesal, la incidencia de los juicios paralelos en relación con el principio de publicidad examinando, posteriormente, el papel que desempeñan las oficinas de comunicación del Poder Judicial español en la transmisión y difusión de la información judicial como una de las eventuales soluciones para paliar, eventualmente, los efectos perniciosos de los juicios paralelos en el proceso. Con esta finalidad pretendemos dar respuesta a varios interrogantes: ¿Es la justicia mediática el efecto adverso del inadecuado ejercicio de las libertades informativas? ¿Se ha producido una inversión en el principio de publicidad para el sujeto investigado? ¿Son las oficinas de comunicación una solución a los juicios paralelos?

Palabras-clave: Juicios paralelos; principio de publicidad; información judicial; oficinas de comunicación; proceso penal.

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Abstract: *The informative methodology of the media has undergone a remarkable evolution caused by the impact of new technologies in the communication sector. This has led to an intensification of the coverage of information on judicial issues generating the media phenomenon of the so-called parallel trials. Thereby, we face an extrajudicial nature phenomenon that is significant enough to produce serious interference in a criminal process. The objective of this work is to analyze the incidence of parallel trials in relation to the principle of publicity from the procedural perspective, examining, subsequently, the role played by the communication offices of the Judiciary of Spain in the transmission and dissemination of judicial information as one of the possible solutions to mitigate, eventually, the pernicious effects of parallel trials in the process. To this end, we intend to answer several questions: Is media justice the adverse effect of the inadequate exercise of informational freedoms? Has a reversal in the principle of publicity for the investigated subject been produced? Are communication offices a solution to parallel trials?*

Keywords: *Parallel trials; principle of publicity; judicial information; communication offices; criminal process.*

Sumario: Introducción. 1. En torno a la justicia mediática: los juicios paralelos. 1.1. La verdad noticiada y la verdad procesal. 2. Del principio de publicidad procesal al principio de publicación de los medios periodísticos. 3. La información judicial en el proceso penal español: las oficinas de comunicación. 3.1. ¿Qué información se puede facilitar durante el proceso? 3.1.1. Fase de instrucción. 3.1.2. Fase de juicio oral. 3.2. Nuevos retos para las oficinas de comunicación. Conclusiones. Bibliografía.

Introducción

En la actualidad, los medios de comunicación desempeñan una función informativa esencial, actuando como los intermediarios naturales[2] entre la Administración de Justicia y el ciudadano, cuando los procedimientos judiciales presentan un indudable interés informativo.

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[2] Tal y como indica la STC 30/1982, de 1 de junio, FJ 4º.

Dicho interés deviene de multitud de factores muy diversos que se manifiestan en el contenido esencial del derecho a la información, legitimando, de esta forma, el ejercicio de las libertades informativas sobre cuestiones relativas a la Administración de Justicia[3].

En este sentido, la labor de los medios de comunicación ha ido adquiriendo, de forma progresiva, un papel fundamental en la formación de la opinión pública[4] y, consecuentemente, en la imagen y confianza que la sociedad tiene en la Justicia. El conflicto se produce cuando la información proporcionada contiene una serie de elementos que provocan una disociación entre la realidad judicial y la realidad informada que se proyecta en los diversos medios de comunicación social, existiendo, en consecuencia, un gran consenso en el parecer de jueces y magistrados que opinan[5], en un 91% de los casos, que los medios de comunicación no reflejan con objetividad el quehacer judicial.

Es evidente que la publicación de hipótesis y suposiciones en los medios de comunicación es una simple consecuencia de la libertad de prensa que constituye, tal y como indicó el Tribunal Supremo español, la divisa de toda sociedad democrática[6]. No obstante, el problema es patente y persistente cuando la cobertura informativa sobre los asuntos judiciales puede hacer aparecer como culpables, ante la sociedad, a personas que

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[3] En torno a la relación entre el derecho a la información y la justicia penal resulta interesante la reflexión realizada por HUERTAS MARTÍN, Isabel. Proceso penal y comunicación en el siglo XXI: el inevitable juicio paralelo, el prescindible juicio paralelo show. En: RODRÍGUEZ GARCÍA, Nicolás; CARRIZO GONZÁLEZ-CASTELL, Adán; LETURIA INFANTE, Francisco Javier (Dirs.) *Justicia penal pública y medios de comunicación,* Valencia: Tirant lo Blanch, 2018, p. 429 y ss.

[4] Sobre esta cuestión CAMARA NERY, Arianne. *Considerações sobre o papel da mídia no processo penal.* Trabalho de fim de curso - Pontifícia Universidade Católica Do Rio de Janeiro, Rio de Janeiro, 2010.

[5] Dato obtenido de la VI Encuesta a la carrera judicial elaborada por Sigmados (Encuesta de ámbito nacional a todos los jueces o magistrados en servicio activo 2015). Disponible en: http://www.poderjudicial.es/cgpj/es/Poder-Judicial/Consejo-General-del-Poder-Judicial/Actividad-del-CGPJ/Encuestas/Encuestas-a-la-Carrera-Judicial/VI-Encuesta-a-la-Carrera-Judicial--Encuesta-de-ambito-nacional-a-todos-los-jueces-o-magistrados-en-servicio-activo--2015-. Acceso en: 09/07/2020.

[6] Así lo establece la STS 854/2010, de 29 de septiembre.

solo están o han sido investigadas y que, como tal, tienen a su favor una serie de garantías procesales que, eventualmente, pueden ser quebrantadas a través de los denominados "juicios paralelos".

Nos encontramos, por lo tanto, ante una problemática de carácter extrajudicial cuyas consecuencias generan graves repercusiones en el ámbito procesal, las cuales, se ven notablemente agraviadas al tratarse de un fenómeno carente de regulación en España que, durante varias décadas, ha sido advertido tanto por la jurisprudencia como por la doctrina jurídica. Por ello, el planteamiento de la cuestión desde la perspectiva del principio de publicidad procesal se hace necesaria e imprescindible atendiendo a las vicisitudes que los juicios paralelos generan en torno al mismo.

En el presente artículo nos proponemos analizar la proyección del principio de publicidad como garantía procesal y la inversión de dicho principio como consecuencia del inadecuado ejercicio de la libertad de prensa, centrando nuestra atención en las oficinas de comunicación de la Administración de Justicia como una de las soluciones que, partiendo de la propia institución, tienen la capacidad y entidad suficiente para paliar los efectos perniciosos derivados de la publicidad mediata, entendiendo por esta la posibilidad de que la colectividad pueda tener acceso al proceso penal, no de forma directa, sino a través de la labor informativa desempeñada por el medio de comunicación[7].

Para la consecución de tal fin nos planteamos una serie de preguntas a las que pretendemos dar respuesta: ¿Es la justicia mediática una consecuencia adversa del inadecuado ejercicio de la libertad de información? ¿Se produce una inversión del principio de publicidad? ¿Qué información se puede difundir por los medios de comunicación en cada fase del proceso? Y, por último, ¿son las oficinas de comunicación una solución?

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[7] En torno a la publicidad mediata CAMARENA ALIAGA, Gerson W. *Medios de comunicación y poder judicial. Tratamiento penal y procesal frente a los juicios paralelos.* Cizur Menor: Aranzadi, 2018, p. 184 y ss.

1. En torno a la justicia mediática: los juicios paralelos.

Los juicios paralelos se desenvuelven en un marco general que engloba todas aquellas informaciones tendenciosas y fragmentadas[8] que carecen del requisito de la veracidad informativa y que se encuentran orientadas a crear estados de opinión en el receptor de la noticia. De esta forma y aunque la información facilitada tenga, al menos, un origen jurídico, el fenómeno se desarrolla de forma paralela al ámbito judicial[9], en una sede que no le es propia[10], originándose, así, la justicia mediática como el resultado inevitable del proceso o juicio paralelo iniciado por el medio de comunicación.

En torno a la aproximación conceptual de este fenómeno, es oportuno aclarar que nos encontramos ante un concepto evolutivo y en constante cambio, motivado, entre otras razones, por la irrupción de las nuevas tecnologías en el ámbito comunicacional, lo que ha supuesto una importante transformación no solo en la metodología informativa, sino también en el impacto y extensión de los juicios paralelos.

En relación con lo señalado, Leturia Infante pone de manifiesto que no existe un consenso sobre el contenido esencial de los juicios paralelos, afirmando que dicha figura “podría vincularse al seguimiento publicitado de un hecho aparentemente delictivo, realizado por la prensa

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[8] Como indica CARRETERO SAN JUAN, Maite; CORTÉS BECHIARELLI, Emilio. Juicios paralelos: el conflicto entre el poder judicial y los medios de comunicación en el proceso penal. *Diario La Ley,* n. 8902, p. 1-18, 2017; la información que conforma el juicio paralelo es sesgada, fragmentada y fuera de contexto, sustituyéndose la información por especulación.

[9] Para un análisis general del fenómeno de los juicios paralelos puede consultarse las siguientes referencias: LÓPEZ GUERRA, Luis. Juicios paralelos, presunción de inocencia y jurisprudencia del Tribunal Europeo de Derechos Humanos. *Teoría y derecho: revista de pensamiento jurídico,* Valencia, n. 24, p. 34-49, 2018; CARRILLO, Marc. Derechos fundamentales y poder judicial en la sentencia de la manada. *Teoría y derecho: revista de pensamiento jurídico,* Valencia, n. 24, p. 64-91, 2018; FERNÁNDEZ GARCÍA, Emilio. Juicios paralelos, imparcialidad de los tribunales y opinión pública: repercusiones en la vida política y en las resoluciones judiciales. *Teoría y derecho: revista de pensamiento jurídico,* Valencia, n. 24, p. 211-219, 2018.

[10] Sobre la perversión de la función informativa/formativa LATORRE LATORRE, Virgilio. *Función jurisdiccional y juicios paralelos,* Madrid: Civitas, 2002, p. 108 y 109.

al margen del cauce institucional"[11]. En sentido contrario se manifiestan Droguett González y Walker Silva al afirmar que los juicios paralelos son legales y necesarios como resultado del correcto ejercicio de las libertades informativas[12]. Esta aseveración, a nuestro juicio, debe ser matizada, ya que, a pesar de desempeñar una función esencial dentro de una sociedad democrática, la labor comunicacional debe estar, en todo caso, sujeta a unos parámetros éticos o deontológicos, propios de la profesión, cuyo cumplimiento no daría lugar a la problemática que está siendo objeto de estudio en este trabajo. No obstante, la realidad es bien distinta y como resultado de dicha omisión la cobertura informativa referente a un conflicto jurídico contendrá todos los elementos pertinentes para originar el fenómeno citado.

En este aspecto, podemos definir los juicios paralelos como aquellos procesos mediáticos, de carácter inquisitivo y sin garantías, sustentados en medios de investigación tendencialmente incriminatorios y con efectos peyorativos para la presunción de inocencia, los cuales son obtenidos frecuentemente de modo ilícito o irregular, vulnerando los derechos fundamentales y garantías procesales de las partes[13].

Así, los juicios paralelos no se deben configurar como el resultado de la libertad de información, sino como el paradigma del inadecuado ejercicio de las libertades informativas[14], generando una clara distorsión

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[11] Como indica LETURIA INFANTE, Francisco Javier. La problemática de los juicios paralelos en la jurisprudencia y doctrina española. *Revista Ius et Praxis,* Chile, n. 2, p. 23, 2017.

[12] DROGUETT GONZÁLEZ, Carmen y WALKER SILVA, Nathalie. El derecho a ser informado sobre los asuntos de interés público: defensa de los juicios paralelos en Chile: Problemas y soluciones. *Revista Chilena de Derecho,* Chile, v. 47, n. 1, p. 32 y ss, 2020.

[13] SAN MIGUEL CASO, Cristina. La cobertura mediática en el sistema de la estrategia de la defensa penal. En: RODRÍGUEZ GARCÍA, Nicolás; CARRIZO GONZÁLEZ-CASTELL, Adán; LETURIA INFANTE, Francisco Javier (Dirs.) *Justicia penal pública y medios de comunicación,* Valencia: Tirant lo Blanch, 2018, p. 372.

[14] Siguiendo a ORENES RUIZ, Juan Carlos. Juicios paralelos y prensa digital. En: GAVARA DE CARA, Juan Carlos; DE MIGUEL BÁRCENA, Josu; RAGONE, Sabrina (Dir./Coord.). *El control de los cibermedios.* Barcelona: Bosch Editor, 2014, p. 91.

para el proceso penal[15] que alimenta a una opinión pública insatisfecha con el funcionamiento de la Administración de Justicia y de la que progresivamente se ha ido generando una peligrosa y alarmante *justicia del pueblo* que, para Quintero Olivares, "es diferente de la justicia de los juristas y ni siquiera coincide con el objetivo de alcanzar la verdad"[16]. El juicio paralelo tiene, en palabras de Cortés Bechiarelli, "escaso agrado por lo jurídico, y supone la confluencia de un buen número de intereses que no entroncan, por más que se quiera, con el fundamento de la labor jurisdiccional de un Estado de Derecho"[17].

1.1.- La verdad procesal y la verdad noticiada

La finalidad de estos procesos paralelos debe ser analizada desde una doble perspectiva: por un lado, debemos atender a la rentabilidad económica que busca lograr el medio de comunicación a través de la cobertura informativa sobre el asunto judicial, y, por otro, se debe poner el acento en la creación de estados de opinión en el receptor de la noticia que, mediante la verdad noticiada, asume una realidad judicial paralela y sin garantías.

Es importante, llegados a este punto, realizar una somera distinción entre la verdad noticiada y la verdad procesal por el impacto que lo transmitido tiene, como verdad noticiada, en el receptor de la información, pues la formación del juicio paralelo no solo traerá consecuencias negativas para el sujeto investigado, sino también, para la Administración de Justicia en su conjunto.

Al respecto, los juicios paralelos menoscaban la imagen de nuestro sistema judicial minando la confianza de los ciudadanos en la institución, generando una expectativa de sentencia y originando una

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15 Como establece OTERO GONZALEZ, María del Pilar. *Protección penal del secreto sumarial y juicios paralelos,* Madrid: Centro de estudios Ramón Areces, 1999, p. 32.

16 En palabras de QUINTERO OLIVARES, Gonzalo. *La justicia penal*, Elcano: Aranzadi, 1998, p. 32.

17 Como indica CORTÉS BECHIARELLI, Emilio. Juicios paralelos y derechos fundamentales del justiciable. *Anuario de la Facultad de Derecho. Universidad de Extremadura,* Cáceres, n. XXI, p. 126, 2003.

errónea concepción del proceso que se está llevando a cabo a través de la verdad noticiada, la cual, puede definirse como "aquellos hechos que, por estimarse noticiables, o si se prefiere, por ser de actualidad, se publican en los medios de comunicación tanto gráficos como audiovisuales[18]". Al respecto, la información puede tener un origen ilegitimo o ser obtenida sin las garantías adecuadas, lo cual, se materializará en la inexistencia de la debida diligencia del informador.

En consecuencia, la verdad noticiada no es sinónimo de veracidad informativa, pues si bien es cierto que ambas se desarrollan en el mismo ámbito y por los mismos actores, la veracidad de la información requerirá, con carácter previo a la difusión de la información, la diligencia debida del informador. Por el contrario, la verdad noticiada se corresponde con aquella información que, sin contrastar y de manera fragmentada y descontextualizada, dibuja la realidad judicial en base a unos intereses previos.

Desde la perspectiva jurídica, la verdad procesal se construye "a través de una investigación consistente en recabar medios de prueba con total sometimiento a las normas procesales previstas tanto en la Constitución como en la Ley de Enjuiciamiento Criminal"[19]. En virtud de lo indicado, se ha manifestado el Tribunal Constitucional al estimar que "la búsqueda de la verdad, incluso suponiendo que se alcance, no justifica el empleo de cualquier medio, ya que la verdad no puede alcanzarse a cualquier precio. La justicia obtenida a cualquier precio termina no siendo justicia"[20].

Sobre este extremo, es imprescindible resaltar el tratamiento que realiza Wach sobre la verdad en el proceso, al mantener que "la comprobación de la verdad no es la finalidad del proceso civil y no puede

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[18] En palabras de RODRÍGUEZ RAMOS, Luis. La verdad y las verdades en el proceso penal. ¿Hacia una justicia dependiente de los medios de comunicación?. *La Ley: Revista jurídica española de doctrina, jurisprudencia y bibliografía*, Madrid, n. 5, p. 1506 – 1512, 2002.

[19] El citado autor RODRÍGUEZ RAMOS, Luis. La verdad y las verdades en el proceso penal ¿Hacia una justicia dependiente de los medios de comunicación? *La Ley: Revista jurídica española de doctrina, jurisprudencia y bibliografía*, Madrid, n. 5, p. 1506 – 1512, 2002.

[20] STS 79/2012, de 9 de febrero, FJ 7.2º y 11.6º.

serlo. Esa comprobación es un resultado contingente. La verdad material solo es imaginable como finalidad del proceso, en un procedimiento oficial, esto es, en un proceso que no solo da margen a una reconstrucción completa de la situación de hecho, sino que establece la máxima de la libre investigación como un deber oficial de los órganos del Estado. Y ello solo puede suceder cuando el objeto del proceso es de interés público. En el proceso civil la naturaleza jurídico-privada de ese objeto elimina la máxima de la 'libre investigación' y, con esto, la finalidad del proceso consiste en la comprobación objetiva del verdadero estado de cosas"[21].

Tradicionalmente, la verdad procesal ha sido tratada por nuestro Tribunal Constitucional en relación con la veracidad informativa, al establecer que "no es constitucionalmente aceptable estimar que los informadores incumplieron el deber de diligencia en el desempeño de su labor, con apoyo exclusivo en el solo dato de que el resultado final de las investigaciones llevadas a cabo en el proceso penal fuera distinto al expuesto o transmitido por los autores de la noticia, pues la veracidad de la información difundida acerca de los hechos objeto de investigación penal no puede equipararse con la correlación entre aquella y la verdad procesal alcanzada conclusiva o finalmente en la causa penal"[22].

En virtud de lo indicado, la veracidad informativa no puede equipararse a la verdad procesal, ya que ello significaría asimilar la veracidad de la información con el resultado alcanzado en el proceso penal, lo que, sin duda alguna, generaría graves inseguridades jurídicas en los conflictos planteados en torno a la veracidad informativa. En consecuencia, podemos concluir que, la verdad noticiada, tampoco, debe equipararse, en modo alguno, a la verdad procesal. De hecho, ambas son contrarias y representan una clara antítesis.

Mientras que la verdad procesal se obtiene dentro de una serie de garantías que implican alcanzar la verdad solo a través de medios legítimos y constitucionales, la verdad noticiada se caracteriza por elaborarse sin ningún tipo de garantías para el receptor de la noticia, que, recibirá de

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[21] Sobre el tratamiento de la verdad en el proceso, resulta fundamental el estudio y las digresiones que realiza WACH, Adolf. *Conferencias sobre la ordenanza procesal civil alemana* (Trad. E. Krotoschin), Buenos Aires: Ediciones Jurídicas Europa-América, 1958, p. 224 y ss.

[22] STC 158/2003, de 15 de septiembre, FJ 6º.

forma errónea la verdad noticiada como si de la verdad procesal se tratase, siendo este el principal problema de la confrontación entre ambas.

La falta de correspondencia entre la verdad noticiada y la verdad procesal obedece, en términos jurisprudenciales, al igual que en el caso de la veracidad, a una cuestión de seguridad y lógica jurídica. No obstante, "ambas verdades se interfieren recíprocamente, generando en ocasiones perversos sinergismos que llegan a convertir en principal, el proceso mediático por tener en esta sociedad más relevancia la apariencia que la realidad"[23].

Así, la elaboración de una noticia constituye, por lo general, el resultado de una reconstrucción o interpretación de hechos reales[24] en la que intervienen distintos factores que pueden conducir a versiones dispares sobre una misma realidad[25]. Por esta razón, uno de los efectos que, consecuentemente, produce la verdad noticiada es la confusión en el receptor de la información que equipara lo recibido a la verdad obtenida en el proceso en un nuevo escenario de posverdad[26].

Por otro lado, la reiteración de esta conducta generaría la distorsión del proceso judicial[27] y la creación de un juicio paralelo, ya que la información que origina un proceso mediático de carácter

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[23] Como establece RODRÍGUEZ RAMOS, Luis. La verdad y las verdades en el proceso penal ¿Hacia una justicia dependiente de los medios de comunicación?. *La Ley: Revista jurídica española de doctrina, jurisprudencia y bibliografía*, Madrid, n. 5, p. 1506 – 1512, 2002.

[24] STC 297/2000, de 11 de diciembre, FJ 10º.

[25] STC 99/2011, de 20 de junio, FJ 5º.

[26] Tal y como lo califica BUENO DE MATA, Federico. El principio de publicidad procesal ante la tecnología: juicios mediáticos, redes sociales y big data. En: RODRÍGUEZ GARCÍA, Nicolás; CARRIZO GONZÁLEZ-CASTELL, Adán; LETURIA INFANTE, Francisco Javier. (Dirs.). *Justicia penal pública y medios de comunicación,* Valencia: Tirant lo Blanch, 2018, p. 480 y ss.

[27] En torno a esta cuestión GUZMÁN FLUJA, Vicente Carlos. Juicios paralelos en las redes sociales y proceso penal. *IDP: revista de internet, derecho y política.* n. 27, p. 54, 2018. https://doi.org/10.7238/idp.v0i27.3148. sostiene que "lo que puede y debe hacerse es establecer las reglas que impidan que el juicio paralelo mediático, así como los estados de opinión pública que producen, llegue a influir en el juicio penal, así como garantizar que la libertad de información se ejerce conforme a las reglas éticas de respeto a lo que sucede en el juicio oral, sin tergiversarlo, sin distorsionarlo, sin adelantar conclusiones a partir de los datos que van apareciendo".

extrajudicial no es la información veraz, sino aquella información fragmentada, descontextualizada y orientada a la satisfacción de unos intereses concretos, ajenos a la Administración de Justicia, que conforman la denominada verdad noticiada.

2. Del principio de publicidad procesal al principio de publicación de los medios periodísticos

El principio de publicidad procesal representa, en la actualidad, un pilar fundamental en la concepción moderna de la justicia penal, siendo una de las contribuciones más meritorias del pensamiento ilustrado[28]. La implantación de este principio en el ordenamiento jurídico tenía como objetivo reformular la concepción de la justicia propia del Antiguo Régimen[29] y orientar el nuevo sistema procesal hacia una justicia transparente, más participativa y, a todas luces, más justa.

Por esta razón, la publicidad en el proceso se formuló, desde sus orígenes, como un mecanismo de control sobre la actividad jurisdiccional en la que la labor de jueces y magistrados se encontraba sometida al control ciudadano[30]. En la línea indicada, Couture señaló la importancia de este principio definiéndolo como "el instrumento de fiscalización popular sobre la obra de magistrados y defensores", afirmando que, en este sentido, "el pueblo es el juez de los jueces"[31].

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[28] Sobre el origen del principio de publicidad puede consultarse WYNESS MILLAR, Robert. *Los principios formativos del procedimiento civil* (Trad. C. Grossmann), Buenos Aires: Ediar S.A. Editores, 1945, p. 185 y ss; y para realizar un estudio más profundo sobre el movimiento reformista del siglo XVIII, RENEDO ARENAL, María Amparo. *Problemas del imputado en el proceso penal,* Madrid: Editorial Universitaria Ramón Areces, 2007, p. 69 y ss.

[29] PEDRAZ PENALVA, Ernesto. Publicidad y derecho al debido proceso. Publicidad y derecho de acceso a la información contenida en los ficheros de datos jurisdiccionales. En: GUTIÉRREZ-ALVIZ CONRADI, Faustino. (Dir.), *Criminalidad organizada ante la justicia,* Sevilla: Universidad de Sevilla, 1996, p. 161.

[30] Siguiendo a ASENCIO MELLADO, Jose María. El proceso penal con todas las garantías. *Revista Ius et veritas*, Lima, n. 33, p. 239, 2006.

[31] COUTURE, Eduardo. *Fundamentos del Derecho Procesal Civil,* Buenos Aires: Depalma, 1990, p. 192 y 193.

No obstante, para la consecución de esta labor fiscalizadora sobre la actividad jurisdiccional es preciso que el principio de publicidad logre su máximo alcance superando las barreras impuestas por la publicidad inmediata. Así, el Tribunal Constitucional español ha manifestado, en varias de sus sentencias, la necesidad de que el principio de publicidad se proyecte sobre la generalidad de un público, más allá, de las limitaciones físicas o de espacio que implica la sala de vistas, argumentando que "el principio de la publicidad de los juicios, garantizado por la Constitución (art. 120.1), implica que estos sean conocidos más allá del círculo de los presentes, pudiendo tener una proyección general. Esta proyección no puede hacerse efectiva más que con la asistencia de los medios de comunicación social, en cuanto tal presencia les permite adquirir la información en su misma fuente y transmitirla a cuantos, por una serie de imperativos de espacio, de tiempo, de distancia, de quehacer, etc., están en la imposibilidad de hacerlo. Este papel de intermediario natural desempeñado por los medios de comunicación social entre la noticia y cuantos no están, así, en condiciones de conocerla directamente, se acrecienta con respecto a acontecimientos que por su entidad pueden afectar a todos y por ello alcanzan una especial resonancia en el cuerpo social"[32].

De esta forma, la presencia de los medios de comunicación en la sala de vistas es necesaria para satisfacer los objetivos de este principio, pudiendo afirmar, en consecuencia, que la proyección general del principio de publicidad se alcanza a través de la denominada publicidad mediata[33]. Así, el Tribunal Constitucional ha reconocido un derecho preferente a los medios de comunicación en virtud de la función informativa que tienen atribuida, sin que el mismo pueda entenderse como un privilegio discrecional para aquellos.

Sobre esta cuestión se ha manifestado Montero Aroca considerando que la publicidad debe acomodarse a los tiempos, y, por ello, no se puede desatender a los medios de comunicación social por la función que desempeñan. En opinión del citado autor "el proceso público es aquel al que pueden tener acceso los medios de comunicación que se constituyen

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[32] Así se establece en la STC 30/1982, de 1 de junio, FJ 4º.

[33] LATORRE LATORRE, Virgilio. *Función jurisdiccional y juicios paralelos,* Madrid: Civitas, 2002 p. 108.

como una especie de representantes del público y como tales, tienen sus mismos derechos, pero no más"[34].

En torno al principio de publicidad, es preciso destacar la evolución que, dicho principio, ha experimentado con el paso del tiempo[35], transformación que se ha llevado a cabo, entre otros factores, por la difusión y creciente mecanización de los medios de comunicación social, pasando así, de una publicidad inmediata a una publicidad mediata que acerca el funcionamiento de la justicia a toda la población, reforzando el control de estos sobre la actividad judicial.

Desde la perspectiva que nos ocupa, podemos definir la publicidad mediata como una vertiente del principio de publicidad procesal que se encuentra conformada por la información judicial suministrada por los medios de comunicación que actúan como intermediarios naturales entre la Administración de Justicia y los ciudadanos, sin la necesidad de la presencia física de estos en la sala de vistas.

Sin embargo, es conveniente matizar que, la relación que se genera entre los medios de comunicación y los ciudadanos, en torno a la publicidad mediata no está exenta de controversia, constatándose, como ha señalado el Tribunal Supremo, "un distorsionado entendimiento del principio de publicidad procesal, garantía procesal del constitucionalismo liberal que está siendo reemplazada, con mucha más frecuencia de lo tolerable, por una publicación del proceso"[36].

Esta afirmación invita a reflexionar sobre la inversión que el principio de publicidad[37] ha experimentado, en virtud de la dimensión

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[34] Vid. MONTERO AROCA, Juan; GÓMEZ COLOMER, Juan Luis; MONTÓN REDONDO, Alberto; BARONA VILAR, Silvia. *Derecho jurisdiccional I,* Valencia: Tirant lo Blanch, 2008, p. 400.

[35] Al respecto puede consultarse la reflexión realizada por NIEVA FENOLL, Jordi. Los juicios paralelos: su complejo encaje constitucional. En: MIR PUIG, Santiago; CORCOY BIDASOLO, Mirentxu (Dir.), *Protección penal de la libertad de expresión e información: Una interpretación constitucional,* Valencia: Tirant lo Blanch, 2012, p. 224.

[36] STS 14/2018, de 16 de enero.

[37] Aspecto señalado por PERAL PARRADO, María. La presunción de inocencia y la defensa efectiva: la responsabilidad de los medios y de los periodistas. *Revista del Consejo General de la Abogacía Española,* Madrid, n.111, p. 28, 2018.

social adquirida por el asunto judicial pues, lo que originariamente era un derecho del justiciable, en la actualidad, el principio de publicidad deja paso a un equívoco principio de publicación en el que la información proporcionada sobre el conflicto jurídico responde a unos intereses extrínsecos a la Administración de Justicia pues, como señaló Couture, "la malsana publicidad, el escándalo, la indebida vejación de aquellos que no pueden acudir a los mismos medios porque su propia dignidad se los veda, pueden no solo invalidar esa garantía sino también transformarla en un mal mayor. La prudencia debe acudir en ese punto en auxilio de la justicia"[38]. De esta forma, el principio de publicación del proceso debe ser entendido como la distorsión del principio de publicidad procesal que se produce como consecuencia del inapropiado ejercicio informativo de los medios de comunicación sobre los asuntos judiciales. Tal y como indicó el Tribunal Supremo en la sentencia 1394/2009, de 25 de enero: "La garantía que ofrece el principio de publicidad deja paso así a un equívoco principio de publicación, en el que todo se difunde, desde el momento mismo del inicio de las investigaciones, sin que el acusado pueda defender su inocencia. (...) No podemos olvidar, además, que en el proceso penal convergen intereses de muy diverso signo. Y no faltan casos en los que ese tratamiento informativo despliega una repercusión negativa que llega a ser igualmente intensa y alcanza a otros bienes jurídicos, recrudeciendo el daño inicialmente ocasionado por el delito"

Este planteamiento que realizamos calificando a la denominada "justicia mediática" como el efecto adverso de la publicidad mediata, debe ser sometido a examen con una serie de cautelas, pues, indudablemente, la distorsión del principio de publicidad es ocasionada por factores externos al proceso, cuya influencia puede repercutir, notablemente, en el estigma social del sujeto investigado.

Resulta conveniente considerar que el desequilibrio que produce la publicidad mediata en el fundamento original del principio de publicidad entronca con lo que podríamos denominar la pseudopublicidad judicial, ya que, en realidad, la información suministrada mediante la función informativa de los medios de comunicación puede no contener

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[38] Vid. COUTURE, Eduardo J. *Fundamentos del Derecho Procesal Civil,* Buenos Aires: Depalma, 1990, p. 192 y 193.

las garantías constitucionales propias que la hagan verídica y objetiva y, en consecuencia, la función de los medios de comunicación en el ámbito judicial se ve empañada por la confluencia de intereses económicos y sociopolíticos que perturban el principio de publicidad de las actuaciones judiciales.

Por lo expuesto anteriormente, y ante las evidentes vicisitudes que plantea esta problemática, resulta determinante reforzar, desde la propia Administración de Justicia, la función informativa que desempeñan las oficinas de comunicación[39] a lo largo de todo el proceso. Alcanzar la máxima proyección del principio de publicidad no debe recaer, exclusivamente, en actores con réditos ajenos al proceso, razón por la cual es oportuno realizar un análisis sobre el desempeño de los gabinetes de comunicación de la Administración de Justicia con el objetivo de resaltar y fortalecer su labor comunicacional frente a la ciudadanía, como una de las eventuales soluciones para evitar la publicidad pseudoinformada y, en consecuencia, la formación de nuevos juicios o procesos paralelos.

3. La información judicial en el proceso penal español: las oficinas de comunicación.

La creación de las oficinas de prensa se ha producido de forma paulatina y gradual hasta establecerse, en la actualidad, un sólido y fuerte sistema de gabinetes de comunicación en la Administración de Justicia.

Hasta hace relativamente poco tiempo, en España no existía una regulación que estableciese un cauce específico y determinado para la transmisión y difusión de la información relativa a los asuntos judiciales, situación que se reproducía, igualmente, en países de nuestro entorno como Francia, Portugal e Italia[40].

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[39] DEL RIEGO, Carmen. Frente a los juicios paralelos, información y rigor. *Cuadernos de periodistas: revista de la Asociación de la Prensa de Madrid,* n. 39, p. 52, 2019. Disponible en: http://www.cuadernosdeperiodistas.com/media/2020/02/42_53-Carmen-del-Riego-1.pdf. Acceso en: 17 nov.2020.

[40] Sobre esta cuestión puede consultarse las líneas de FERNÁNDEZ MARTÍNEZ, Juan Manuel. El derecho a la libertad de expresión del juez, límites en consideración a su “status de especial sujeción” y en relación con las garantías procesales y derechos objeto de protección respecto a los intervinientes en el

A nivel nacional, el origen de los gabinetes de comunicación se remonta al año 1981 con la primera oficina de prensa adscrita al Consejo General del Poder Judicial (en adelante CGPJ). No obstante, en ese mismo año, el CGPJ, en su primera memoria anual de la institución[41] puso de manifiesto la urgente y acuciante necesidad de dotar de las correspondientes oficinas de prensa al Tribunal Supremo, a la Audiencia Nacional, a las Audiencias Territoriales y al Tribunal Central del Trabajo, con el objetivo de lograr una mayor transparencia informativa acorde a la difusión de una información responsable, pretensión que se concretó, cinco años más tarde, en el acuerdo del pleno del CGPJ de 5 de noviembre de 1986[42].

El proceso de implantación de las oficinas de prensa se inició escalonadamente incorporando las mismas en el Tribunal Supremo y en los Tribunales Superiores de Justicia de Valencia, Cataluña, Galicia, y Extremadura. Posteriormente, en los primeros meses de 2004 se abrieron cinco Gabinetes de Comunicación, cuatro en los Tribunales Superiores de Justicia de Madrid, Castilla-La Mancha, Baleares y el País Vasco, y uno en la Audiencia Nacional[43].

En el año 2004, 9 de los 17 Tribunales Superiores de Justicia ya contaban con sus correspondientes oficinas de comunicación que, en su temprana implantación, arrojaban resultados bastante positivos sobre la labor informativa correspondiente al tribunal en el que estuvieran

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proceso. Los gabinetes de comunicación y su papel como cauce institucional de información. En: FRESNEDA PLAZA, Felipe (Dir.), *Justicia y Medios de Comunicación, Cuadernos de Derecho Judicial,* Madrid: Consejo General del Poder Judicial, n. 16, 2006, p. 199 y ss.

41 Puede consultarse la memoria del Consejo General del Poder Judicial de 1981 en ZURITA PINILLA, Agustín. Oficinas de prensa en la Administración de justicia. *Revista del Poder Judicial,* La Laguna, n. extra 13, p. 238 y 239, 1990.

42 Puede consultarse íntegramente el acuerdo del pleno del Consejo General del Poder Judicial en ZURITA PINILLA, Agustín. Oficinas de prensa en la Administración de justicia. *Revista del Poder Judicial,* La Laguna, n. extra 13, p. 239, 1990.

43 Así lo refleja el Protocolo de comunicación de la Justicia del año 2004, p. 3. Disponible en: http://www.poderjudicial.es/cgpj/es/Poder-Judicial/Tribunales-Superiores-de-Justicia/TSJ-Cataluna/Actividad-del-TSJ-Cataluna/Protocolos-y-convenios/Protocolo-de-Comunicacion-de-la-Justicia---Aprobado-por-el-Pleno-del-7-de-julio-de-2004. Acceso en: 03/07/2020.

adscritos. Esta circunstancia motivó que la comisión de comunicación acordara el 31 de mayo de 2004 la creación del resto de los gabinetes de comunicación, previendo que, en enero de 2005, habría gabinetes en el Tribunal Supremo, la Audiencia Nacional y en los 17 Tribunales Superiores de Justicia de las Comunidades Autónomas. Actualmente, esta previsión es una realidad.

Las razones que motivaron la formación de las oficinas de prensa pivotaron, principalmente, en el limitado acceso que tenían los periodistas a la información relevante sobre los asuntos judiciales considerados de interés público para la ciudadanía. Así, Zurita Pinilla ponía de relieve que "no parece de recibo que una importantísima parte de la producción judicial de nuestro país quede en el más puro anonimato, bien por la desidia de la Administración de Justicia, bien por la escasa preparación de los periodistas, bien por el interés de determinados medios de información de resaltar el suceso judicial y las resoluciones llamativas por el escándalo que despiertan"[44].

Por otro lado, existía cierta preocupación cuando un juez o magistrado realizaba declaraciones públicas que pudieran, eventualmente, poner en entredicho la imparcialidad del órgano enjuiciador, ya que, como indicó Fernández Martínez, la información judicial, por la entidad de su contenido y las posibles repercusiones de su difusión, debían canalizarse a través de los gabinetes de comunicación[45].

De esta forma, el citado autor sostenía que "era urgente descargar al juez del compromiso de tener que exponer públicamente los aspectos relevantes de aquello que estaba llamado a resolver y encomendarlo a alguien que, respetuoso con los valores en juego,

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[44] Siguiendo a ZURITA PINILLA, Agustín. Oficinas de prensa en la Administración de justicia. *Revista del Poder Judicial,* La Laguna, n. extra 13, p. 233-234, 1990.

[45] En palabras de FERNÁNDEZ MARTÍNEZ, Juan Manuel. El derecho a la libertad de expresión del juez, límites en consideración a su "status de especial sujeción" y en relación con las garantías procesales y derechos objeto de protección respecto a los intervinientes en el proceso. Los gabinetes de comunicación y su papel como cauce institucional de información. En: FRESNEDA PLAZA, Felipe (Dir.), *Justicia y Medios de Comunicación, Cuadernos de Derecho Judicial,* Madrid: Consejo General del Poder Judicial, n. 16, 2006, p. 212.

pudiera hacerlo ya no solo sin menoscabo de la información sino, antes, al contrario, reforzándola"[46].

En línea con lo indicado, otro de los motivos que propició la creación estructural y funcional de las oficinas de comunicación fue, sin duda alguna, fortalecer y consolidar la imagen de la justicia, cuya percepción por la ciudadanía aún sigue siendo un reto para la estrategia comunicacional de la Administración de Justicia, debido, entre otras razones, a que se trata de un poder desconocido para la sociedad en su conjunto, que lo percibe como oscuro, complicado e incomprensible[47].

Por lo tanto, los gabinetes de comunicación surgieron como una necesidad que pretendía dar respuesta a todas aquellas deficiencias que, en su faceta externa, se venían postergando durante décadas. Sin embargo, es conveniente aclarar que las oficinas de prensa no surgieron para ser la solución que erradicara todas las deficiencias *ad extra* del sistema judicial, sino para establecer un sólido sistema comunicacional en el que se garantizase la veracidad, la objetividad y la transparencia de la información derivada de un conflicto jurídico. Por esta razón compartimos la opinión de Zurita Pinilla cuando afirma que "la panacea de estos males no la tiene en exclusiva la creación de las oficinas de prensa, pero al menos, estaremos colocando las bases de una información más objetiva, por no discriminatoria y por abarcar otros campos de la actividad judicial, que andan hoy en precario, cuáles son los órdenes civiles, contenciosos y sociales. La selección de la información si podrá recaer en el periodista

[46] El citado autor FERNÁNDEZ MARTÍNEZ, Juan Manuel. El derecho a la libertad de expresión del juez, límites en consideración a su "status de especial sujeción" y en relación con las garantías procesales y derechos objeto de protección respecto a los intervinientes en el proceso. Los gabinetes de comunicación y su papel como cauce institucional de información. En: FRESNEDA PLAZA, Felipe (Dir.), *Justicia y Medios de Comunicación, Cuadernos de Derecho Judicial,* Madrid: Consejo General del Poder Judicial, n. 16, 2006, p. 201.

[47] Tal y como determina el Protocolo de Comunicación del Poder Judicial del año 2020, p. 6. Disponible en:http://www.poderjudicial.es/cgpj/es/Poder-Judicial/Tribunal-Supremo/Oficina-de-Comunicacion/Protocolo-de-Comunicacion-de-la-Justicia/. Acceso en: 03/07/2020.

de tribunales y, en principio, la sociedad estará en condiciones de poseer más y mejor información"[48].

Los gabinetes de comunicación han logrado, con el paso del tiempo, cumplir en gran medida el objetivo de su creación, convirtiéndose en la piedra angular de la política de comunicación del CGPJ y actuando como el cauce institucional entre la Administración de Justicia y los medios de comunicación. Para ello, se han convertido en una fuente oficial y fiable de información a la que deberán acudir asiduamente los medios periodísticos para obtener todos aquellos datos judiciales que deban ser objeto de difusión y transmisión a la opinión pública. Por otro lado, asistimos a una nueva realidad impulsada por la presencia de las citadas oficinas en las redes sociales, lo que facilita e inspira un acercamiento de la institución a la sociedad a través de una comunicación más fluida entre ambos, sin ningún tipo de intermediario, pudiendo el ciudadano consultar de forma directa la fuente primaria de la información judicial.

3.1. ¿Qué información se puede facilitar durante el proceso?

Para dar respuesta a esta cuestión, las oficinas de comunicación, en el desempeño de sus funciones, deben facilitar a los medios de comunicación la información más relevante sobre aquellos asuntos jurídicos que hayan suscitado un cierto interés general[49] en la opinión pública.

En este sentido, un asunto judicial se considerará de interés "cuando despierte la atención de los medios de comunicación por las personas que intervienen, el objeto del proceso, la relevancia del hecho objeto del procedimiento, la relevancia jurídica de las resoluciones dictadas y/o las normas jurídicas aplicadas, la previa existencia de informaciones

[48] Tal y como indica ZURITA PINILLA, Agustín. Oficinas de prensa en la Administración de justicia. *Revista del Poder Judicial,* La Laguna, n. extra 13, p. 234, 1990.

[49] Sobre esta cuestión GARCÍA ARÁN, Mercedes. Libertad de información y procesos penales en curso. *Teoría y derecho: revista de pensamiento jurídico,* Valencia, n. 24, p.18, 2018.

periodísticas sobre el mismo, incluso en su fase policial, o se considere que es de interés para la ciudadanía"[50].

La definición contenida en el párrafo anterior es sumamente significativa al establecer, de forma indirecta, la prelación sobre el interés suscitado. Es decir, un asunto se considerará de interés cuando, en primer lugar, despierte la atención de los medios de comunicación, y, en segundo lugar, se considere de interés para la ciudadanía. Coincidimos en esta singular idea, ya que, el interés que un asunto pueda despertar en la opinión pública viene predeterminado tanto por la selección de la información que decide tratar, como por la orientación, sesgo ideológico o mensaje que el medio de comunicación[51] pretenda transmitir en la difusión de la información. A ello se suma, además, la imposibilidad de negar, por regla general, interés noticioso a hechos o sucesos de relevancia penal[52] por lo que la información judicial que puede ser objeto de difusión alcanza, en el proceso penal, ciertas particularidades atendiendo a las distintas fases del proceso en la que nos encontremos.

3.1.1.- Fase de instrucción

La fase de instrucción en el proceso penal español se caracteriza por el carácter reservado de sus diligencias, de forma que el secreto sumarial[53] se configura como un límite informativo en la fase inicial del proceso. No obstante, esta afirmación debe ser matizada ya que la restricción informativa opera de forma parcial, afectando, únicamente, a

[50] Tal y como señala el Protocolo de comunicación del 2020, p. 8. Disponible en: http://www.poderjudicial.es/cgpj/es/Poder-Judicial/Tribunal-Supremo/Oficina-de-Comunicacion/Protocolo-de-Comunicacion-de-la-Justicia/. Acceso en: 03/07/2020.

[51] LAZZARI DA SILVEIRA, Felipe. Mídia, medo e controle: Ensaio sobre o papel da mídia na dinãmica do recrudescimento do sistema penal. *Cadernos de Comunicação,* v.20, n.2, p.1-21, 2016.

[52] Así lo determina la STC 178/1993, de 31 de mayo, FJ 4º.

[53] Sobre la naturaleza jurídica del secreto sumarial puede consultarse RODRÍGUEZ BAHAMONDE, Rosa. *El secreto del sumario y la libertad de información en el proceso penal,* Madrid: Dykinson, 1999, p. 253.

aquellos elementos o datos que se encuentran bajo secreto, evitando así generar reservas u obstáculos en el ejercicio de las libertades informativas[54].

Por lo tanto, las oficinas de comunicación, previa autorización del juez de instrucción, podrán difundir a los medios de comunicación la información que, no teniendo un carácter reservado, sea de relevancia para la formación la opinión pública. Así, datos como la situación procesal acordada tras la toma de declaración, el número de testigos que han declarado o la identidad de los sujetos investigados pueden ser difundidos a los medios periodísticos[55]. Sin embargo, la previsión que realiza el Protocolo de comunicación sobre la eventual difusión de la identidad de los investigados requiere, en nuestra opinión, ser matizada, pues no clarifica, en modo alguno, la forma en la que esta información debe ser transmitida, es decir, si la identidad se puede manifestar abiertamente o si, por el contrario, dicha información está sujeta a ciertas restricciones con la finalidad de salvaguardar la presunción de inocencia y el honor del sujeto.

Se trata, por lo tanto, de modular el ejercicio de dicha labor informativa[56] estableciendo el método que sea más garante para procurar,

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[54] Sobre esta cuestión la STC 13/1985, de 31 de enero, determinó en su FJ 3º que: "El secreto del sumario no significa, en modo alguno, que uno o varios elementos de la realidad social (sucesos singulares o hechos colectivos cuyo conocimiento no resulte limitado o vedado por otro derecho fundamental según lo expuesto por el art. 20.4 de la C.E.) sean arrebatados a la libertad de información, en el doble sentido de derecho a informarse y derecho a informar, con el único argumento de que sobre aquellos elementos están en curso unas determinadas diligencias sumariales. De ese modo, el mal entendido secreto del sumario equivaldría a crear una atípica e ilegítima 'materia reservada' sobre los hechos mismos acerca de los cuales investiga y realiza la oportuna instrucción el órgano judicial, y no sobre 'las actuaciones' del órgano judicial que constituyen el sumario".

[55] A estos datos se suman otros contenidos en el Protocolo de Comunicación de la Justicia del año 2020, p. 10. Disponible en: http://www.poderjudicial.es/cgpj/es/Poder-Judicial/Tribunal-Supremo/Oficina-de-Comunicacion/Protocolo-de-Comunicacion-de-la-Justicia/. Acceso en: 05/07/2020.

[56] En torno a la relación de la publicidad procesal y el derecho a la información LETURIA INFANTE, Francisco Javier. La publicidad procesal y el derecho a la información frente a asuntos judiciales. Análisis general realizado desde la doctrina y jurisprudencia española. *Revista chilena de derecho,* Chile, v. 45, n. 3, p. 647-673, 2018.

por un lado, la difusión de la información, protegiendo, por otro lado, los derechos del investigado[57]. Se debe mostrar, sobre esta cuestión, una posición cautelosa en cuanto a la transmisión, difusión y publicación de la identidad del sujeto ante la opinión pública por las consecuencias que la revelación de esta información pudiera ocasionar en la esfera personal del sujeto.

3.1.2.- Fase de juicio oral

El principio de publicidad procesal alcanza, en la fase de juicio oral, una proyección significativa, ya que, con carácter general, esta fase será pública a excepción de las limitaciones contenidas en la Ley de Enjuiciamiento Criminal cuando así lo exijan razones de seguridad y orden público, o la adecuada protección de los derechos fundamentales de los intervinientes.

En esta fase del proceso los medios de comunicación audiovisuales adquieren un mayor protagonismo frente al medio de comunicación escrito pero, a pesar de ello, no existe una norma concreta que regule el acceso de estos medios a la sala de vistas. Con la publicación del citado protocolo de comunicación se aporta una solución parcial[58] a los múltiples interrogantes que se planteaban en torno al desempeño de la labor audiovisual de estos medios, de forma que se establecen unas pautas concretas y determinadas que actuarán en un doble plano: por un lado, como garantías para un desempeño más óptimo de la función informativa y, por otro, como límites

[57] Sobre la relación existente entre los juicios paralelos y la vulneración de los derechos del investigado puede consultarse AMARILLO VOZMEDIANO, María de la Fe. Juicios paralelos y derechos del investigado y el encausado. *La ley penal: revista de derecho penal, procesal y penitenciario,* n. 142, p. 3 y ss, 2020.

[58] Estas pautas contempladas en el Protocolo de Comunicación del año 2020 establecen los criterios para la grabación de imágenes de los intervinientes en la vista oral. Estos consistirán principalmente en el consentimiento previo para la grabación de los sujetos y en una serie de limitaciones para salvaguardar la imagen de testigos protegidos, víctimas o miembros del jurado. Igualmente se establecen unas reglas mínimas referentes a los periodos de grabaciones y a los planos generales autorizados. Para más información sobre este extremo puede consultarse la p. 16 en esta dirección web: http://www.poderjudicial.es/cgpj/es/Poder-Judicial/Tribunal-Supremo/Oficina-de-Comunicacion/Protocolo-de-Comunicacion-de-la-Justicia/. Acceso en: 05/07/2020.

que permitirán salvaguardar, en la medida de lo posible, la imagen y el honor de los intervinientes en el proceso.

3.2. Nuevos retos para las oficinas de comunicación

En la actualidad, el papel que desempeñan las oficinas de prensa reviste una especial y merecida consideración en el ámbito informativo. No obstante, es preciso señalar que las perspectivas de futuro obligan a las mismas a seguir trabajando de forma unánime y constante en aras a la plena consecución de los nuevos retos que se presentan.

Indudablemente, el primer desafío al que se enfrentarán estas oficinas consistirá en seguir elaborando estrategias de comunicación que se centren en mejorar y reforzar la imagen que los ciudadanos tienen de la Justicia y, en consecuencia, propiciar un aumento de la confianza de la ciudadanía en la institución. Este reto, perenne desde su creación, deberá guiar las políticas de comunicación que se adopten en un futuro. Sin embargo, es necesario dar un paso más y profundizar en los motivos que originan una imagen distorsionada de la Justicia en España.

Es evidente que gran parte de esa distorsión se ha debido a la tergiversación informativa de la que, en numerosas ocasiones, hemos sido receptores. Las informaciones tendenciosas orientadas a intereses particulares o económicos han ido confeccionando una panorámica disoluta en donde la Administración de Justicia y el papel desempeñado por sus operadores ha sido criticado y cuestionado en numerosas ocasiones[59].

De hecho, el progresivo empeoramiento en la concepción que la ciudadanía tiene de la Administración de Justicia se ha puesto de manifiesto en los distintos barómetros de opinión[60] que, año tras año, han

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[59] Sobre esta cuestión es interesante la puntualización realizada en el Protocolo de comunicación del Poder Judicial en el que se manifiesta que “la gran mayoría de los ciudadanos no tienen a lo largo de su vida contacto con la Administración de Justicia, por lo que es a través de los medios de comunicación como se crean los estados de opinión que luego inciden de forma directa en la visión que la ciudadanía tiene de la Justicia”.

[60] Al respecto puede consultarse el estudio realizado por TOHARIA, José Juan. *Opinión pública y justicia. La imagen de la justicia en la sociedad española,* Madrid: Consejo General del Poder Judicial, 2001, p. 84 y ss., quien sostiene que

ido arrojando peores resultados de valoración, conceptuando a la justicia como una institución incomprensible para la sociedad.

Esta circunstancia invita a proponer un cambio en la política de comunicación que no se ciña exclusivamente a la trasmisión de la información judicial por todas las vías de comunicación posible. Se trata, en consecuencia, de adoptar nuevos mecanismos de comunicación[61], desde una perspectiva más pedagógica, con la finalidad de acercar el funcionamiento del sistema judicial, las labores que desempeñan los jueces y la interpretación de las leyes, desde edades más tempranas.

En este sentido, las Fuerzas y Cuerpos de Seguridad llevan años desarrollando diversas campañas de comunicación basadas en conceptos muy claros y didácticos, con las que pretenden acercar la institución a la ciudadanía y reforzar el compromiso que adquieren con aquella. Esta misma pretensión podría ser adoptada por los gabinetes de comunicación[62] mediante la elaboración de campañas visuales de corta duración en la que la Administración de Justicia, a través de un lenguaje claro y sencillo, pueda acercarse a la ciudadanía, poniendo especial énfasis en aquellos aspectos que puedan reforzar y potenciar su imagen. Así no solo se lograría dar un paso más en la metodología informativa que, hasta el momento, han utilizado las oficinas de prensa, sino también establecer un contacto mucho más directo con los ciudadanos mediante la difusión de mensajes con un vocabulario menos técnico y especializado dirigido a un público general.

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la evaluación negativa no se debe a la percepción de un progresivo empeoramiento actual de la Justicia, sino a la gradual toma de conciencia de la mala situación global y de fondo de esta. El autor señala que no se trata de que los españoles piensen que desde los años 90 la Justicia haya ido continuamente a peor, sino que a medida que se ha extendido el conocimiento y familiarización con su situación real se ha ido generalizando la conciencia de sus deficiencias. No es, pues, en definitiva, la realidad la que ha empeorado: es la percepción de esa mala realidad la que se ha concretado y extendido.

[61] GARCÍA MOLINA, Pablo. Medios de comunicación y juicios paralelos. En: ÁLVAREZ ALARCÓN, Arturo; GARCÍA MOLINA, Pablo (Dirs.). *Tendencias actuales del Derecho Procesal,* Granada: Comares, 2019, p. 50-53.

[62] Sobre esta cuestión resulta interesante la propuesta realizada por RAMÍREZ ORTIZ, José Luis. La justicia penal en la sociedad digital. *Teoría y derecho: revista de pensamiento jurídico,* Valencia, n. 24, p. 62 y 63, 2018.

En la realización de este nuevo reto el empleo de un lenguaje claro y sencillo desempeñará un papel fundamental para la consecución del objeto pretendido, ya que, entre otras muchas razones, la incomprensión que padece nuestro sistema de justicia radica en la utilización de términos técnicos, propios del ámbito profesional, que no adquieren la debida comprensión por el ciudadano medio. Esta circunstancia no obsta para que el empleo del lenguaje técnico se siga utilizando por los profesionales del derecho, pero si es necesario que, de cara a lograr una mayor comprensión por parte de la ciudadanía, se emplee un lenguaje más sencillo y cotidiano, en lo que respecta al ámbito comunicacional, que logre llegar a un mayor número de ciudadanos.

Por último, la consecución de estas perspectivas de futuro no será posible sin la dotación de los recursos humanos y materiales suficientes para todas las oficinas de prensa que integran el engranaje informativo del Poder Judicial.

Por supuesto, esta dotación debe reforzarse de la forma más igualitaria posible teniendo en cuenta las necesidades individuales de cada oficina y la circunscripción territorial en la cual se encuentra adscrita. En relación con lo dicho, Orenes Ruiz[63] sostiene que las exigencias de personal se van a ver necesariamente incrementadas en aquellos Tribunales Superiores de Justicia cuya circunscripción se extienda al territorio de varias provincias. Para estos supuestos compartimos la propuesta que realiza el citado autor al sostener que el gabinete de comunicación debe contar con delegados en las distintas Audiencias Provinciales o, al menos, en aquellas que tengan una significativa carga de trabajo.

La implementación de esta propuesta facilitaría la labor informativa de la oficina de prensa, mejorando su cobertura informativa a través de la distribución equitativa del trabajo, lo que permitiría contar con un mayor número de profesionales encargados de llevar a cabo las funciones informativas orientadas a la consecución de los objetivos pretendidos.

Es ineludible, en cuanto a la profesionalización de las oficinas de prensa, hacer una breve mención a la formación en materia judicial que deben de adquirir las personas que trabajan en las mismas, ya que no

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[63] Siguiendo a ORENES RUIZ, Juan Carlos. *Libertad de información y proceso penal. Los limites,* Cizur Menor: Aranzadi, 2008, p. 107.

solo deben tener conocimientos suficientes en materia periodística, sino que deben tener, a su vez, una adecuada formación de la terminología jurídica que les permita ser rigurosos en el desempeño de su labor para transmitir la información de manera objetiva y veraz.

Acorde a lo establecido compartimos el criterio de Ronda Iglesias cuando dice que "la especialización es más acuciante en el campo del periodismo de tribunales y que el rigor informativo resulta imprescindible, por los errores que pueden generar en daños muy superiores a los que se producen en otras esferas"[64].

Conclusiones

Al comienzo de este estudio, planteábamos una serie de cuestiones en las que, si bien afirmamos que la labor informativa desempeñada por los medios de comunicación es necesaria para que el principio de publicidad procesal adquiera, a través de la denominada publicidad mediata, la proyección y virtualidad requerida, la falta de concordancia en los intereses y finalidades de la Administración de Justicia (basados en reforzar su imagen, aumentando la confianza de los ciudadanos en el sistema judicial) y de los medios de comunicación (orientados a lograr una mayor rentabilidad económica e influencia social) originan que la justicia mediática sea el efecto adverso del derecho a la información en el escenario judicial de la publicidad del proceso.

Esta circunstancia se manifiesta en la inversión que el principio de publicidad ha experimentado, en virtud del alcance mediático

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[64] Afirmación realizada por RONDA IGLESIAS, Javier. La especialización del periodismo judicial. *Revista Latina de Comunicación Social,* Tenerife, n. 39, 2001. Disponible en: https://www.redalyc.org/pdf/819/81939407.pdf. Acceso en: 09/07/2020. El autor añade en su artículo el siguiente ejemplo: confundir en una noticia la denominación del material con el que se ha fabricado un puente puede molestar al ingeniero encargado de la obra y poco más. Pero, el perjuicio personal es mucho mayor si por error se atribuye a alguien la comisión de un hecho delictivo o se le implica en un acontecimiento deleznable y se da como noticia por la radio, prensa y televisión. Puede asegurarse que, en el ámbito de los tribunales, el periodista trabaja con material sensible, lo que hace más necesario y exigible el rigor, la exactitud y la profesionalidad.

y la dimensión social adquirida por el asunto judicial, ya que lo que originariamente era un derecho del justiciable, en la actualidad se puede convertir, eventualmente, en una rémora e influir de forma negativa en el desarrollo del debido proceso, cuya influencia puede repercutir, notablemente, en el estigma social del sujeto investigado.

Por ello, las oficinas de comunicación de la Administración de Justicia juegan un papel fundamental en el correcto y adecuado desempeño de la labor comunicacional, no solo por ser la fuente directa de una información objetiva, veraz y neutral, sino por configurarse, en la actualidad, como un recurso resolutivo con la capacidad de mitigar, en la medida de lo posible, los lances derivados del inapropiado ejercicio de las libertades informativas originarias de los juicios paralelos. Se trata, en consecuencia, de invertir la tendencia mediática y pseudojurídica derivada de la formación de los procesos mediáticos, mediante la consecución de nuevos retos y nuevas políticas de comunicación que realcen la imagen de la Administración de Justicia, logrando un aumento de la confianza de la ciudadanía en la institución. Para la consecución de tal fin, será necesario adoptar nuevas políticas de comunicación dirigidas al ciudadano medio a través del empleo de un lenguaje accesible, sin olvidar, en ningún caso, la apuesta por la comunicación directa que informe sobre la realidad procesal, salvaguardando las garantías que le son propias al principio de publicidad y evitando, así, la publicación del proceso.

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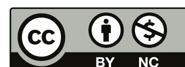

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Tribunal do júri virtual: em busca da harmonização entre as soluções emergenciais ocasionadas pela pandemia do novo coronavirus e a observância dos preceitos constitucionais

Virtual jury court: seeking harmonization between the emergency solutions caused by the pandemic of the new coronavirus and the observance of constitutional precepts

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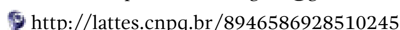
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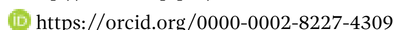
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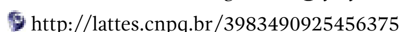
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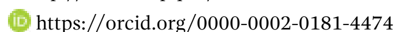
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Resumo: O Poder Judiciário brasileiro tem buscado promover as devidas adequações às mudanças causadas pelo novo coronavírus (Sars-CoV-2), com a realização de audiências e diversos outros atos processuais, mediante instrumentos de videoconferência. Este artigo aborda a

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proposta do Conselho Nacional de Justiça (CNJ) de virtualização, nesse período, das sessões do tribunal do júri, à luz dos preceitos constitucionais sobre a matéria. A problematização centra-se na busca pela harmonização entre as soluções emergenciais surgidas no contexto pandêmico com as diretrizes encartadas na Recomendação nº 62/2020 do referido órgão de controle interno do Poder Judiciário. Discutem-se questões variadas, com ênfase no debate constitucional, sobre critérios afetos ao tribunal do júri, como o prejuízo argumentativo, a proeminência do procedimento especial e a aplicabilidade das disposições legais de videoconferência ao rito sob análise, além daquelas atinentes ao sigilo das votações e da incomunicabilidade dos jurados, com apontamentos para medidas desencarceradoras. A partir de metodologia fundada em revisão de literatura especializada, com abordagem qualitativa, formula-se um juízo crítico acerca da inconstitucionalidade da pretensão de virtualização do procedimento especial do júri, proposta que se deu especialmente sob o pretexto inadequado de efetivação do princípio constitucional da razoável duração do processo.

Palavras-Chave: Tribunal do júri; Virtualização; Pandemia do novo coronavírus; Videoconferência; Júri virtual.

Abstract: *The Brazilian Judiciary has sought to promote the appropriate adaptations to the changes caused by the new coronavirus (Sars-CoV-2), with the holding of hearings and several other procedural acts, using videoconferencing instruments. This article addresses the proposal of the National Council of Justice (CNJ) for virtualization, during that period, of the sessions of the jury court, in the light of the constitutional precepts on the matter. The problematization focuses on the search for harmonization between the emergency solutions that arose in the pandemic context with the guidelines included in Recommendation nº 62/2020 of the referred internal control body of the Judiciary. Various issues are discussed, with emphasis on the constitutional debate, on criteria related to the jury's court, such as the argumentative prejudice, the prominence of the special procedure and the applicability of the legal provisions of videoconferencing to the rite under analysis, in addition to those related to secrecy of the votes and the incommunicability of the jurors, with notes for not incarceration measures. Based on a methodology based on a review of specialized literature, with a qualitative approach, a critical judgment is formulated about the constitutionality of the intention to virtualize the jury's special procedure, a proposal that took place especially under the adequate*

pretext of effect of the constitutional principle of reasonable duration of the process.

Keywords: *Jury court; Virtualization; Pandemic of the new coronavirus; Video conference; Virtual jury.*

Introdução

O tribunal do júri, previsto na Constituição Federal (CF) de 1988 como direito e garantia individual, tem por essência a participação dos membros integrantes do seio social em importante parcela de atuação do Poder Judiciário, como mecanismo de procedimentalização de julgamentos que incidem sobre os crimes dolosos contra a vida, matéria elementar à conjuntura civilizacional, com envergadura constitucional de cláusula pétrea.

Diante de seu sobrelevado jaez na sistemática do Poder Judiciário brasileiro, surge a idealização de sua virtualização como uma tentativa de nova formatação – de caráter supostamente provisório –, motivada pelo atual cenário da pandemia da Covid-19, que vem produzindo nefastos efeitos por todos os recantos do globo terrestre.

O Poder Judiciário brasileiro tem buscado promover as devidas adequações às mudanças causadas pelo novo coronavírus (COVID-19), com a realização de audiências e diversos outros atos processuais, mediante instrumentos de videoconferência. As novas tecnologias digitais estão sendo de grande valia para a compatibilização das atividades jurisdicionais que, diante da alta demanda processual, não podem restar paralisadas, especialmente por se tratar de algo que se afigura essencial.

Com efeito, vem sendo discutida no âmbito do Conselho Nacional de Justiça (CNJ) a provável implementação das atividades do tribunal do júri de maneira virtual, em que a proposta seria, de maneira sucinta, a realização do plenário através de plataforma digital de videoconferência. A problemática surge a partir daí, porquanto há grande discussão, na doutrina nacional, acerca da possibilidade de um tribunal do júri virtualizado, e dos seus consectários, notadamente os questionamentos sobre eventuais prejuízos ao réu.

Embora não haja previsão para o fim das medidas de contenção da pandemia (isolamento social, quarentena e distanciamento social), e o consequente retorno às atividades presenciais, sob a justificativa da alta propagação do vírus causador da enfermidade epidêmica em locais que impliquem aglomeração de pessoas, a proposta de realizar o plenário do tribunal de júri por videoconferência tem provocado discussões acaloradas.

Trata-se de uma interpretação jurídica, em que será levado em consideração argumentos que sustentam a tese da ilegalidade da sessão do júri ser realizada por meio de videoconferência, bem como eventuais argumentos a favor[3]. Entre as argumentações despendidas, avista-se desde a impossibilidade de virtualização até a suscitação de sua inconstitucionalidade. Tais circunstâncias estão relacionadas especialmente à interpretação e à aplicabilidade dos princípios que emanam do texto constitucional e que perfazem as características do tribunal do júri, a dizer: a plenitude de defesa, o sigilo das votações e a soberania dos vereditos. Tema de inequívoca atualidade e relevância, a virtualização de procedimentos processuais encontra terreno fértil para discussões acadêmicas inovadoras, como é o caso da proposta de virtualização do tribunal do júri.

O objetivo deste artigo é enfrentar reflexivamente as propostas atuais do CNJ sobre a matéria, com o intuito de responder ao seguinte questionamento: no cenário da problematização, seria possível – e de que forma – harmonizar soluções emergenciais advindas do contexto pandêmico com os preceitos constitucionais sobre o tribunal do júri?

A partir do desenvolvimento teórico-argumentativo sobre a capacidade ou não de um tribunal do júri virtual, buscar-se-á a produção de uma análise dos posicionamentos doutrinários já lançados à luz dos atos normativos respectivos, com esteio na revisão da literatura especializada – levantamento bibliográfico e histórico –, abordagem sob a perspectiva qualitativa e sem a pretensão de esgotar a matéria, mas tão só de prestar um contributo aos estudos no âmbito do direito processual penal.

[3] CRUZ, Rogerio Schietti; LUNARDI, Fabrício Castagna; GUERREIRO, Mário Augusto Figueiredo de Lacerda. *Tribunal do júri com apoio de videoconferência:* pela ética do discurso. Consultor Júridico, 2020.

1. O cenário da pandemia e a proposta de realização de sessões virtuais do Tribunal do Júri

O mundo está vivenciando uma situação de extrema excepcionalidade com a chegada do vírus causador da Covid-19, doença que vem protagonizando um dos maiores surtos epidemiológicos já registrados, deixando um rastro de mortes no mundo. Em vista disso, o mundo inteiro foi obrigado a adequar-se às medidas preventivas e de isolamento, a fim de minorar a propagação do vírus até que se produza uma vacina ou venha a se descobrir um protocolo medicamentoso eficiente, o que mudou drasticamente o cenário econômico e político do mundo, e principalmente do Brasil, que sofre grande pressão com a crise econômica e o colapso no seu sistema de saúde.

Não só a economia e a saúde amargam os impactos da pandemia, mas o Poder Judiciário teve de passar por uma remodelação no seu modo de atuar, sobremodo no que diz respeito à realização de audiências presenciais. Ademais, a pandemia repercutiu no aumento do número de demandas judiciais – especialmente no âmbito criminal –, sobrecarregando ainda mais o Judiciário – já deficitário –, o qual é acionado para os problemas que surgem nesse período.

Percebe-se que, ainda que com grande dificuldade, o judiciário vem encontrando formas de exercer sua atividade sem interrupção. Importante instrumento é a tecnologia, que vem auxiliando o Poder Público de forma grandiosa. E mais, ainda que o atendimento ao público tenha sido restrito, a judiciário, através do Conselho Nacional de Justiça, vem minimizando os impactos editando resoluções que visam orientar o magistrado nesse período extraordinário[4]. E mais, não se pode deixar de falar dos impactos ocasionados pela pandemia, tais como prazos suspensos, audiências presenciais canceladas e sessões de julgamentos suspensas. Tudo isso gerou grande atraso na atividade jurisdicional, em que o público foi o maior prejudicado.

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[4] Sobre isso: LIBER, Gabriel Henrique Araújo; RAINHO, Murilo Teixeira. Audiências virtuais na pandemia do coronavírus e seus reflexos no âmbito dos juizados especiais cíveis. *ETIC,* v. 16, n. 16, 2020.

A fim de evitar o acúmulo de demandas processuais e dar fluidez ao trabalho, o Poder Judiciário lançou mão de instrumentos tecnológicos, com a chancela do CNJ, o qual tornou cabível a realização de audiências através de videoconferência. Tal fato foi ratificado com a edição da Resolução nº 314/2020, que estabeleceu diretrizes gerais para o trabalho remoto de servidores em geral e magistrados, mediante a realização de atos processuais através de meios digitais.

A medida tomada pelo CNJ evitou que o Poder Judiciário entrasse em colapso – e consequentemente houvesse um desabastecimento considerável da função jurisdicional, o que seria de extrema prejudicialidade à sociedade –, tornando necessária a virtualização dos procedimentos processuais em todo o país. Os operadores do direito, no momento extraordinário que se atravessa, tiveram de se transformar para garantir a efetiva entrega da prestação jurisdicional, sem, contudo, prejudicar os direitos fundamentais dos indivíduos – com ênfase no acesso à justiça –, nem comprometer a celeridade processual.

Além da Resolução nº 314/2020, já mencionada, vale destacar que o CNJ também editou a Recomendação nº 62/2020, trazendo a possibilidade da audiência virtual nos casos criminais que envolvem acusados presos e estabelecendo diretrizes de desencarceramento no período, por motivação sanitária. O citado órgão de controle interno do Poder Judiciário, no início da pandemia, vislumbrou uma proposta de realização de sessões do tribunal do júri de forma virtual, através de mecanismos de videoconferência, a fim de que fosse garantida a celeridade processual e a efetivação do princípio da duração razoável do processo[5].

A despeito disso, importa mencionar que as sessões do tribunal do júri tornaram-se de impossível realização, naturalmente em face das medidas de contenção de contágio, tendo inicialmente, inclusive, o próprio órgão censor do Poder Judiciário emanado proibição específica para a realização das sessões, sob o fundamento da proteção à saúde pública.

Todavia, deve-se ter em mente que as sessões do tribunal do júri não podem ser suspensas indefinidamente, já que o acusado tem o

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[5] BRASIL. Conselho Nacional de Justiça. Disponível em: <https://www.cnj.jus.br/tribunal-do-juri-cnj-apresenta-ao-legislativo-propostas-para-desburocratizar-julgamentos/>. Acesso em: 22 de dez. 2020.

direito constitucional de ser julgado em tempo razoável, não podendo ser prejudicado por circunstância a que não deu causa, situação que se agrava de forma considerável quando o réu aguarda o julgamento encarcerado.

Posteriormente, surge a proposta de realização das sessões do tribunal do júri por meio de mecanismos de videoconferência, tendo como fundamento a maior efetividade nos julgamentos de crimes dolosos contra a vida. Para o CNJ, o tribunal do júri é um procedimento excessivo e formalista, o que prejudica a celeridade processual e a duração razoável do processo.

Com efeito, o fundamento central da proposta se alicerça em alguns preceitos constitucionais, tais como a duração razoável do processo e a celeridade processual. Para os que sustentam essa possibilidade – que chegou a ser ventilada em minuta de Resolução encaminhada com voto de aprovação por parte do Conselheiro Relator, o que conta com o apoio da Associação dos Magistrados Brasileiros (AMB) –, o contexto da pandemia em que o país se encontra e o excessivo número de réus presos que aguardam julgamento fazem exsurgir uma situação alarmante, o que legitimaria a adoção, por parte do Poder Judiciário, de medidas extraordinárias (Ato Normativo nº 0004587-94.2020.2.00.0000 – CNJ).

Em contrapartida, parcela considerável da literatura especializada prontamente rechaçou a proposta, sob a alegação de inobservância de preceitos constitucionais. Diante do embate travado, este escorço acadêmico se propõe ao exame contrastado dos argumentos espargidos, em busca de eventual harmonização entre as proposições.

2. A emergencialidade da solução apontada e a inobservância dos preceitos constitucionais sobre o tribunal do júri

A Constituição tem por finalidade estabelecer, organizar e ser o sustentáculo de algo que se pretende instituir, a dizer, a conjuntura estatal, representada na ideia republicana de ordenamento jurídico. Por isso, especialmente em seus elementos orgânicos, há um detalhado arranjo dos poderes, com a limitação de seus exercícios, devido à necessidade de se observar a soberania popular.[6]

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[6] Sobre isso: MELCHIOR, Antonio Pedro. Crítica científica de "Redefinindo o trânsito em julgado a partir da soberania dos veredictos: a coisa julgada

Nessa perspectiva, a par de uma interpretação teleológica da CF, o tribunal do júri intenta permitir que os indivíduos participem ativamente na efetivação do Estado Democrático de Direito. Pensando na garantia e na efetivação dos direitos fundamentais, a Carta Política instituiu o tribunal do júri como garantia fundamental e sob proteção constitucional.[7]

Como direito fundamental, o tribunal do júri deve ser visto como uma garantia necessária à efetivação dos direitos do indivíduo, tais como a dignidade da pessoa humana e o direito à vida, entre outros.[8] Na visão de Lenio Streck, o Estado Democrático de Direito alicerça-se em dois pilares: *i*) o pilar da democracia, sem a qual há inibição ao respeito à concretização de direitos; e *ii*) o pilar dos direitos fundamentais, que restaria prejudicado sem o pilar da democracia, porquanto a ausência do primeiro configuraria fator impeditivo à "realização dos direitos fundamentais-sociais", bem assim "não há direitos fundamentais-sociais – no sentido que lhe é dado pela tradição", de modo que "há assim uma copertença entre ambos" – democracia e direitos fundamentais.[9]

Por isso, qualquer instituição inovadora de procedimentos pertinentes ao tribunal do júri deve guardar estrita observância aos preceitos constitucionais, mesmo que o argumento preponderante esteja atrelado à necessidade de adequação do Poder Judiciário ao cenário da pandemia. As sessões do tribunal do júri são repletas de formalidades, necessárias para a observância dos seus princípios pilares, motivo pelo qual adentraremos nas imbricações acerca da compatibilidade da proposta com as disposições constitucionais, bem como no contexto de aplicabilidade da normatização infraconstitucional que dialoga com a matéria.

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parcial no tribunal do júri". *Revista Brasileira de Direito Processual Penal,* Porto Alegre, vol. 6, n. 2, p. 1059-1078, mai./ago. 2020; RODRIGUES, Paulo Gustavo. Redefinindo o trânsito em julgado a partir da soberania dos veredictos: a coisa julgada parcial no tribunal do júri. *Revista Brasileira de Direito Processual Penal,* Porto Alegre, vol. 6, n. 2, p. 873-910, mai./ago. 2020.

7 RANGEL, Paulo. *Tribunal do júri:* visão linguística, histórica, social e jurídica. São Paulo: Atlas, 2018, p. 276.

8 TUBENCHLAK, James. *Tribunal do júri*: contradições e soluções. Rio de Janeiro: Forense, 1991, p. 69.

9 STRECK, Lenio Luiz. *Jurisdição constitucional e hermenêutica*: uma nova crítica do direito. Rio de Janeiro: Forense, 2004, p. 151.

2.1 Breves considerações sobre a inconstitucionalidade formal e material da proposta

Preliminarmente, verifica-se que a proposta do CNJ para realizar as sessões do tribunal do júri virtual não encontra amparo na legislação vigente. Ao revés, o que se visualiza, de pronto, é a ausência de competência legislativa para tratar sobre matéria de direito penal ou direito processual penal, conforme interpretação advinda da própria CF, em seu art. 22, inciso I, que destina privativamente as matérias em referência ao âmbito do Poder Legislativo da União.

Por ser órgão administrativo integrante do Poder Judiciário, o CNJ não possui competência para legislar sobre matéria processual, inclusive sobre uma garantia instituída pela CF. O artigo 92, inciso I-A, da Carta Magna deixa claro que o CNJ faz parte do Poder Judiciário, devendo ser visualizada, tal disposição, como uma limitação à atuação do órgão. Somente seria possível se houvesse delegação por parte da União através de Lei complementar, o que não houve. Sobre o assunto, Novelino explica que:

> A competência privativa pode ser objeto de delegação. Inspirada no modelo germânico, a Constituição permitiu que a União, por lei complementar, autorize os Estados a legislar sobre questões específicas das matérias de sua competência privativa (artigo 22, parágrafo único)[10]

O procedimento do tribunal do júri, tratando-se de competência privativa da União, aloca-se na esfera de competência legislativa do Congresso Nacional, cabendo ao Supremo Tribunal Federal a interpretação final da CF. Se tal atribuição fosse exercida pelo CNJ, visualizar-se-ia sua atuação como verdadeiro legislador positivo, o que apresenta dissonância com a ideia de separação e equilíbrio dos Poderes da República.

A CF institui as matérias que cabem ao CNJ, consoante disposições previstas no art. 103-B, § 4º, incisos I a VII, de modo que não figura, neste rol, qualquer regramento acerca de atuação no sentido proposto.

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[10] NOVELINO, Marcelo. *Direito Constitucional*. Rio de Janeiro: Forense, 2009, p. 543.

Com efeito, a partir desse raciocínio, não poderia o CNJ fundamentar sua proposta na duração razoável do processo quando não houver observância ao próprio devido processo (constitucional) legal, previsto como regra matriz na CF e pilar para todos os outros princípios processuais penais e constitucionais, infraconstitucionais, expressos ou implícitos.

Ainda que em tempos excepcionais, o devido processo legal deve ser observado, tendo em vista sua natureza garantidora. Nestor Távora e Rosmar Alencar discorrem acerca do referido princípio, assentando a consagração da tipificação do processo com a completude de seus atos essenciais. Para os mencionados autores, "a pretensão punitiva deve perfazer-se dentro de um procedimento regular, perante a autoridade competente, tendo por alicerce provas validamente colhidas, respeitando-se o contraditório e a ampla defesa".[11]

Por isso, não basta alegar a situação excepcional da pandemia e a duração razoável do processo para propor as sessões do tribunal do júri de forma virtual; é necessário, além disso, analisar eventuais violações em que consequentemente tal formato incorrerá, inclusive a inconstitucionalidade da proposta, uma vez que o órgão administrativo não é competente para legislar sobre os procedimentos, tampouco para alterá-los.[12]

Nessa linha, forçoso o reconhecimento, *ab initio*, diante de motivação formal, da impossibilidade da proposta, por recair sobre ela a pecha da inconstitucionalidade por vício de incompetência para tratar sobre a matéria, o que, no entanto, não encerra o debate sobre as questões substanciais que permeiam o presente estudo.

2.1.1 As garantias do sigilo das votações e da incomunicabilidade dos jurados

Outra problemática enfrentada com a proposta das sessões em formato virtual é a observância do sigilo das votações, princípio norteador

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[11] TÁVORA, Nestor; ALENCAR, Rosmar Rodrigues. *Curso de direito processual penal*. Salvador: JusPodivm, 2019, p. 88.

[12] SIMÃO, Diego de Azevedo. *Júri por videoconferência é inconstitucional*. Consultor Jurídico. Disponível em: <https://www.conjur.com.br/2020-jun-24/diego-simao-juri-videoconferencia-inconstitucional>. Acesso em: 26 jul. 2020.

e essencial para a formalidade do tribunal do júri[13]. Demais disso, verifica-se que a realização das sessões de modo virtual enfrenta óbice de grande magnitude, já que extenua qualquer controle quanto à incomunicabilidade dos jurados, a teor do que dispõe o art. 466, §§ 1º e 2º, do Código de Processo Penal (CPP).

A existência da garantia do sigilo das votações reveste-se de natureza defensiva ao próprio Conselho de Sentença, blindando-o contra a violação de seu próprio voto. Com o fito de acautelar a formação livre da convicção dos juízes leigos, repele-se a eclosão de quaisquer origens de constrangimento, defluindo de tal garantia a salvaguarda da formação e da manifestação da sentença.[14]

Malgrado o sigilo das votações, em tese, permaneça no formato virtual, não há como garantir a incomunicabilidade do Conselho de Sentença, uma vez que não haverá fiscalização para evitar o contato entre o conselho. Decerto, a determinação legal de incomunicabilidade dos julgadores leigos obtempera a vedação de quaisquer manifestações da posição dos juízes leigos, evitando-se a influência aos demais jurados por ocasião da tomada de decisão, devendo ser objeto de advertência "pelo juiz no momento do sorteio para composição do conselho de sentença e [...] certificada pelo oficial de justiça, além de que sua violação acarreta nulidade do julgamento".[15]

Sem que haja um controle acerca da incomunicabilidade da comissão e do sigilo das votações, sublinha-se que haverá violação ao sistema adotado pelo ordenamento jurídico penal, qual seja o sistema da íntima convicção do Conselho de Sentença, em que a incomunicabilidade dos jurados e o sigilo traduzem os instrumentos de proteção

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13 RANGEL, Paulo. *Tribunal do júri:* visão linguística, histórica, social e jurídica. São Paulo: Atlas, 2018, p. 213.

14 PORTO, Hermínio Alberto Marques. *Júri:* procedimentos e aspectos do julgamento, questionários. São Paulo: Saraiva, 2005, p. 22.

15 Sobre isso: VASCONCELLOS, Vinicius Gomes de; GALÍCIA, Caíque Ribeiro. Tribunal do júri na justiça criminal brasileira: críticas e propostas de reforma para a restituição de sua função de garantia no processo penal democrático. *Revista Eletrônica de Direito Processual*, v. 13, n. 13, p. 1-28, 2014.

da livre formação da opinião dos jurados, que não deverão sofrer influência alguma.[16]

Daniel Bialski afirma ser de difícil verificabilidade o respeito ao princípio em comento, especialmente pelo fato de que não se deve esquecer que a incomunicabilidade significa que "os jurados não podem conversar com outras pessoas sobre o caso, nem debater algo relacionado ao que foi dito no julgamento" [17], o que torna praticamente impossível de controle e aferição quando se trata da realização do ato em ambiente virtual.

Deste modo, vislumbram-se inúmeras conjecturas maculadoras do processo em demasiado prejuízo à defesa, a qual será submetida aos riscos da quebra da incomunicabilidade da comissão e quanto ao sigilo nas votações[18], pois o Poder Judiciário, da forma como foi proposta, mostra-se impossível fiscalizar todos do conselho, ou mesmo de garantir concretamente que não haverá qualquer quebra.

2.2 Prejuízo ao exercício da argumentação e o direito à autodefesa

Além das mais variadas ofensas aos direitos constitucionais penais e processuais penais, as sessões realizadas virtualmente acarretam prejuízo ao exercício da argumentação, considerando que, ainda que seja utilizada, em grande parte da atuação no âmbito jurídico, a técnica – que por diversas vezes prepondera no âmbito do tribunal do júri –, o conselho também leva em consideração a postura dos tribunos, por ocasião de suas exposições orais, em que há a transmissão conjugada de fatores emocionais, retóricos e jurídicos[19].

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[16] Sobre isso: LUCINDO, Micheline Amorim. *A incomunicabilidade dos jurados no tribunal do júri brasileiro.* Monografia em Direito. Centro Universitário de Brasília (UniCEUB) Brasília, p. 1-54, 2009.

[17] NUÑEZ, Izabel; NEWTON, Eduardo Januário. *O que será do tribunal do júri após a pandemia da covid-19?* Consultor Jurídico (ConJur). Disponível em: <https://www.conjur.com.br/2020-mai-12/newton-nunez-tribunal-juri-pandemia>. Acesso em: 26 jul. 2020.

[18] GOMES, Márcio Schlee. Sigilo das votações e incomunicabilidade: garantias constitucionais do júri brasileiro. *Revista do Ministério Público,* Porto Alegre, nº 67, p. 35-59, set. 2010.

[19] Ibidem.

O fenômeno jurídico, em sua vastidão de complexidades, pode ser compreendido, em algumas de suas definições operacionalmente úteis, a partir de concepções diversificadas, a exemplo do que se pondera sobre a arte e a técnica no direito, duas significações que se entrelaçam de forma bastante contundente quando o assunto é o tribunal do júri.[20]

Enquanto arte, o exercício do direito se propõe à missão de convencer aqueles que se incumbem do dever decisório, a exemplo do emprego do modelo de retórica aristotélica baseada no *ethos*, no *páthos* e no *logos*[21], quando argumentativamente se constroem discursos baseados nas premissas do tribuno ou réu digno de fé, permeado por circunstâncias apaixonantes e/ou baseadas na lógica silogística, sem olvidar outros recursos que venham a lograr emoções naqueles a quem se direciona a atividade jurídica.[22]

A técnica diz respeito ao manejo adequado do "conjunto de meios e de procedimentos que tornam prática e efetiva a norma jurídica"[23], a par das disposições que compõem o ordenamento jurídico, reportando-se às fontes do direito em busca dos meios disponíveis no direito positivo para o alcance de seus desideratos.

No tribunal do júri – e na atuação diária, de modo geral –, arte e técnica (e ciência) caminham *pari passu*[24]. Entrementes, tem-se, ontologicamente, por ocasião do processo de tomada de decisão por parte dos juízes leigos – jurados –, a prevalência do direito em sua acepção arte, sobretudo pelo fato de essa decisão ser regida pela íntima convicção dos respectivos julgadores, tornando despicienda qualquer fundamentação[25].

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20 Sobre isso: MACIEL, José Fábio Rodrigues (coord.). *Formação humanística em direito*. São Paulo: Saraiva, 2012.

21 AMARAL, Sérgio Tibiriça; PEREIRA, Allan Aparecido Gonçalves. A arte do convencimento e o tribunal do júri. *Revista Intertemas*. v. 15, n. 15, p. 1-68, 2008.

22 NASCIMENTO, Joelson Santos. *A relação entre lógica, páthos e ethos na arte retórica de Aristóteles*. Anais de Filosofia Clássica, vol. 9, nº 17, 2015.

23 NADER, Paulo. *Introdução ao estudo do direito*. Rio de Janeiro: Forense, 2014, p. 214.

24 AMARAL, Sérgio Tibiriça; PEREIRA, Allan Aparecido Gonçalves. A arte do convencimento e o tribunal do júri. *Revista Intertemas*. v. 15, n. 15, p. 1-68, 2008.

25 OLIVEIRA, Heitor Moreira de; ATAÍDES, Maria Clara Capel de. *Hermenêutica e Direito:* Um olhar fenomenológico da performance. Anais do IV Congresso

Não estar-se-á falando que o tribunal do júri é mero espetáculo, considerando que trata da liberdade do acusado. O que o artigo visa demonstrar é que, além da técnica utilizada, tais como a utilização de teses e argumentos favoráveis ao acusado, a defesa e o ministério público utilizam das emoções dos julgadores para garantir que sua tese seja vencedora.

Com efeito, ainda que a tecnologia esteja auxiliando bastante o Poder Judiciário na pandemia, como visto na definição alhures, não se pode perder de vista que o tribunal do júri não só é composto pela técnica processual das partes, mas toda a emoção presenciada pelos jurados, a postura e os gestos corporais exercem influência no momento em espeque, de modo que não se pode olvidar o fato de que os juízes naturais da causa se deixam levar pela voz e pelos demais elementos desse contexto, emanados dos atores processuais.[26] São detalhes que os meios tecnológicos não conseguem captar em sua plenitude, pois há limitações evidentes.[27]

O direito à defesa do acusado deve ser observado e garantido com todas as formalidades de praxe que naturalmente circundam a sistemática presencial do tribunal do júri[28], uma vez que haverá a presença de todos os envolvidos, bem como das testemunhas, e os jurados podem presenciar, de fato, a emoção vivenciada pelas partes, além de outros sentimentos e técnicas apropriadas, que só podem exercer efetivamente o seu desiderato de maneira presencial.

A esse respeito, tem-se o escólio de Marcelo Leal, que sustenta a necessidade da manutenção da sistemática presencial, sobretudo em razão de os jurados levarem em consideração "o calor do momento e as emoções do autor e da vítima", pois os julgadores constitucionalmente atribuídos aos crimes dolosos contra a vida não se baseiam apenas no

de Fenomenologia da Região Centro-Oeste (eixo temático 5: Fenomenologia, arte e cultura). Goiânia: NEPEFE/FE-UFG, vol. 1, n. 1. 2011.

[26] GARAPON, Antoine. *Bem julgar:* ensaio sobre o ritual judiciário. Lisboa: Instituto Piaget, 1997, p.72.

[27] MONTEIRO, Paloma Abreu. *O corpo nos rituais jurídicos:* cultura, vestimenta e tatuagem nos tribunais do júri e varas criminais do Rio de Janeiro. Dissertação de mestrado. Programa de Pós-Graduação Stricto Sensu em Direito Constitucional da Universidade Federal Fluminense - PPGDC/UFF, 2015.

[28] LOPES JR., Aury. *Direito processual penal.* 16. ed. São Paulo: Saraiva, 2019, p. 206.

tecnicismo e “fundam seus julgamentos nos sentidos, todos eles. A voz do advogado e sua entonação, a presença do réu em plenário, a emoção passada pelas testemunhas e outros sentimentos que só presencialmente se pode adquirir”.[29]

É evidente que a ocorrência das sessões através de videoconferência demandará prejuízos em escalas de elevado grau, sobremaneira ao acusado, uma vez que o contato imediato entre o réu e os jurados nesses momentos é imprescindível, dada a importância de o conselho sentir as emoções transmitidas pelas partes, o que implicitamente se arraiga às fundações do sistema do júri. Portanto, deve ser respeitada a sua razão de ser.[30]

A ausência de contato entre as partes limita as suas possibilidades argumentativas, uma vez que o meio tecnológico não possui o condão de transmitir em sua totalidade as características próprias da ideia do direito-arte. Como consectário lógico, percebe-se que a ampla defesa – princípio estampado na CF – ampara a defesa da incompatibilidade da proposta, na medida em que haverá restrição ao exercício das práticas envolvidas e que perfazem o direito de defesa.

Além disso, visualiza-se que o próprio direito à autodefesa – isto é, a “defesa de um direito (no caso a liberdade) feita pelo próprio titular do direito”[31] – restará minorado, porquanto ainda que participando por videoconferência, o acusado não terá como exercitar com amplitude seu relevante papel de contribuir com suas versões e emoções sobre o fato[32], o que configura uma possibilidade concreta de modificação da convicção da junta.

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29 NUÑEZ, Izabel; NEWTON, Eduardo Januário. *O que será do tribunal do júri após a pandemia da covid-19?* Consultor Jurídico (ConJur). Disponível em: <https://www.conjur.com.br/2020-mai-12/newton-nunez-tribunal-juri--pandemia>. Acesso em: 26 jul. 2020.

30 Ibidem.

31 Sobre isso: PICCOLO, André Gustavo Bevilacqua. A supremacia da autodefesa: os limites da defesa técnica no processo penal constitucional. *Revista da Defensoria Pública da União*, v. 1, n. 1, 2018.

32 BULOS, Lammêgo Uadi. *Constituição federal anotada*. São Paulo: Saraiva, 2002, p. 1456.

Com o devido acatamento aos entendimentos dissonantes, a permissibilidade para que o tribunal do júri seja considerado um procedimento de julgamento meramente técnico é de enorme nocividade, sem levar em consideração a importância do aspecto artístico no seu contexto.

Sobre isso, sobreleva-se a avaliação de Daniel Bialski, ao apontar que o julgamento presencial possui contextos extremamente diferenciados dos atos praticados no modo virtual, pois "detalhes comportamentais podem fazer a diferença, seja no olhar ou reação", o que influi na forma como se valoram as posturas, os gestos e as exposições orais[33]. Para o citado autor, que conclui seu traçado pela impossibilidade de realização das sessões do júri em formato virtual, tem-se uma enorme diferenciação entre as formas presencial e virtual, uma vez que "virtualmente tudo se altera em todos os aspectos e as emoções não são tão perceptíveis". Por fim, ressalta a impossibilidade de se garantir um julgamento íntegro e justo.[34]

Nota-se que não é necessária tão somente a efetivação da defesa técnica, através de uma argumentação completa, que repasse as emoções trazidas pelas partes, mas também a autodefesa, que pode ser representada pelo direito de presença.[35] Tal direito consiste na possibilidade de o réu tomar posição sobre o material produzido, sendo-lhe garantida, inclusive, a imediação com o defensor, o juiz e as provas.[36]

Sobre o direito à autodefesa, André Nicolitt arremata:

> O direito de se defender perante o juiz não pode ser exercido plenamente se entre homens existe uma máquina. O juiz, que

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[33] BIALSKI, Daniel. *Tribunal do Júri por videoconferência inviabiliza defesa, avaliam advogados*. Consultor Jurídico, 2020. Disponível em: <https://www.conjur.com.br/2020-jul-06/tribunal-juri-videoconferencia-inviabiliza-defesa-avaliam-advogados>. Acesso em: 26 jul. 2020.

[34] BIALSKI, Daniel. *Tribunal do Júri por videoconferência inviabiliza defesa, avaliam advogados*. Consultor Jurídico, 2020. Disponível em: <https://www.conjur.com.br/2020-jul-06/tribunal-juri-videoconferencia-inviabiliza-defesa-avaliam-advogados>. Acesso em: 26 jul. 2020.

[35] PERELMAN, Chaïm; e OLBRECHTS-TYTECA, Lucie. *Tratado da argumentação:* a nova retórica. Tradução: Maria Ermantina de Almeida Prado Galvão. São Paulo: WMF Martins Fontes, 2014, p. 363.

[36] Sobre isso: ALVES, Danielle Peçanha; MASTRODI NETO, José. Tribunal do júri e o livre convencimento dos jurados. *Revista Brasileira de Ciências Criminais,* v. 116, p. 1-19, 2015.

> não raro se esquece de sua condição humana e da condição humana daquele que está sob seu jugo, que não raro deixa de ver o homem que está atrás do número dos autos, com maior facilidade ainda se perderá na insensibilidade quando entre ele e o homem em julgamento estiver uma máquina que apenas aproxima duas dimensões muito distantes.[37]

Tal problemática ainda mais se agrava quando envolve réus presos, em que há o direito de presença garantido ao acusado, sob pena de suspensão do julgamento, conforme dispõe a regra do art. 457 do CPP. As sessões por meio de videoconferência não garantirão a amplitude da defesa, haja vista a inobservância de variadas questões que obstam a ampla possibilidade de defesa, incluindo o direito de autodefesa, que compreende também o direito de presença.

3. Especialidade do rito do júri e inaplicabilidade das disposições de videoconferência previstas na legislação processual

Diz a regra estatuída no art. 2º, § 2º, da Lei de Introdução às Normas do Direito Brasileiro (LINDB), que a novel legislação que versa sobre matéria preexistente de forma especial não modifica nem revoga a lei que já habitava anteriormente o ordenamento jurídico. Sob a ótica das lições preliminarmente apreendidas nos estudos jurídicos, a exegese aplicada a este dispositivo guarda relação com a ideia de impossibilidade de contradições e incoerências no ordenamento jurídico, bem assim com os aprofundados estudos doutrinários sobre os mecanismos de resolução das falsas antinomias.[38]

A partir disso, tem-se que é possível a coabitação de normas materialmente conflitantes, pois destinadas a aplicabilidades diversas. Estatui-se, a partir dessa premissa, o princípio da especialidade, que figura como importante sustentáculo da teoria do ordenamento jurídico,

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[37] NICOLITT, André. *Manual de processo penal*. Belo Horizonte: D'Placido, 2018, p. 735.

[38] BOBBIO, Norberto. *Teoria do ordenamento jurídico*. 6. ed. Trad. Maria Celeste C. J. Santos. Brasília: Universidade de Brasília, 1995, p. 81.

conferindo harmonia entre as legislações que, indiscutivelmente, têm suas respectivas interpretações e aplicações destinadas às situações especificamente interligadas com sua justificativa e razão de existir.[39]

Portanto, com fundamento no princípio da especialidade, a doutrina e a legislação processual penal consideram o júri como um rito de procedimento especial, no qual devem ser observadas todas as regras apropriadas. É evidente que as disposições previstas para o procedimento comum não se revelam, *a priori*, aptas a ensejar sua aplicação descomedida, como é o caso do interrogatório através de videoconferência na segunda fase – *judicium causae* – do rito especial em testilha.

Essa conjuntura de ideias nos leva à assertiva de que não se pode basear a realização das sessões virtuais do tribunal do júri na previsão que possibilita ao interrogatório ser realizado mediante videoconferência no procedimento comum.

Acerca da especialidade do tribunal do júri, assim decidiu a Quinta Turma do Superior Tribunal de Justiça (STJ), por ocasião do julgamento do Recurso Ordinário em *Habeas Corpus* nº 52.086/MG:

> Os artigos 406 e seguintes do Código de Processo Penal regulamentam o procedimento a ser seguido nas ações penais deflagradas para a apuração de crimes dolosos contra a vida, assim, rito especial em relação ao comum ordinário, previsto nos artigos 394 a 405 do referido diploma legal. Por conseguinte, e em estrita observância ao princípio da especialidade, existindo rito próprio para a apuração do delito atribuído ao recorrente, afastam-se as regras do procedimento comum ordinário, previstas no Código de Processo Penal, cuja aplicação pressupõe, por certo, a ausência de regramento específico para a hipótese.

O julgado acima mencionado, que foi retirado de uma breve análise jurisprudencial no site do Superior Tribunal de Justiça, reafirma a necessidade de observar as regras do tribunal do júri, em que eventual mitigação na realização da sessão virtual poderá ocasionar violação às garantias processuais penais. Ainda que o CPP estabeleça a possibilidade de

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[39] NADER, Paulo. *Introdução ao estudo do direito*. Rio de Janeiro: Forense, 2014, p. 15.

interrogatório por videoconferência no procedimento comum ordinário, não cabe tal interpretação extensiva ao tribunal do júri, ante uma série de garantias e direitos que devem ser observados através da formalidade do procedimento, além de configurar manifesto prejuízo ao acusado, ensejador da atração da cláusula *pas de nullité sans grief*, no sentido de afirmar o reconhecimento da nulidade do ato por gerar situação em detrimento do acusado.[40]

Aury Lopes também leciona acerca da impossibilidade de interpretação extensiva ou analógica nas formalidades do tribunal do júri, pois as regras trazidas pela CF e pelo CPP asseguram não só a especialidade do júri, mas também as garantias instituídas por este. Para o festejado autor, a sistemática legal do júri "está desenhada nos arts. 406 a 497 do CPP, tendo sido substancialmente alterada pela Lei nº 11.689/208. A competência do júri é assim muito bem definida no art. 74, § 1º, de forma taxativa e sem admitir analogias ou interpretação extensiva.[41]

As lições de Paulo Rangel também são enfáticas:

> No júri, o contato pessoal dos jurados com as testemunhas e o réu é fundamental para que possam ser captadas as reações deste às perguntas que lhe são formuladas. Ademais, a virtualidade do interrogatório do réu lhe retira a possibilidade ter contato presencial com os jurados, que são os juízes naturais da causa.[42]

Com efeito, evidencia-se que as regras concernentes ao procedimento comum ordinário, no que diz respeito ao interrogatório por videoconferência, não devem ser ampliadas ao procedimento do júri, o qual trata de matéria de maior complexidade e especificidade.

Aqui a maior obstaculização à possibilidade de realização das sessões do tribunal do júri através de videoconferência – em virtude das especificidades do procedimento e em razão de o júri ter como principal defesa do réu as idiossincrasias que envolvem a liturgia com a exposição

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[40] ALENCAR, Rosmar Rodrigues. *Teoria da nulidade no processo penal*. São Paulo: Noeses, 2016, p. 139.

[41] LOPES JR., Aury. *Direito processual penal*. São Paulo: Saraiva, 2020, p. 1.243.

[42] RANGEL, Paulo. *Tribunal do júri:* visão linguística, histórica, social e jurídica. São Paulo: Atlas, 2012, p. 125-127.

de emoções pelas partes – reside na impossibilidade do contato presencial dos julgadores com as testemunhas e com o réu, situação que resta especificada na legislação e amparada na literatura processualista especializada sobre a especialidade do rito do júri. Nesse contexto, expõe Iorio Forti:

> O júri popular foi criado para julgar os crimes de emoção, sentimentais, de paixão, e não bandidos de alta periculosidade. O tribunal do júri sempre serviu para um tipo de criminalidade em cidade pequena, onde a comunidade conhece as circunstâncias do fato, o próprio acusado.[43]

Ante tais particularidades, o tribunal do júri não pode ser visto como mero julgamento técnico, nem abrangido por outras tonalidades que envolvem a atuação dos profissionais do direito e das próprias partes envolvidas nos feitos de sua competência. É evidente que o julgamento do júri popular é dotado de características peculiares e que as regras previstas para o procedimento comum ordinário, quando incompatíveis com o procedimento do júri, não devem ser utilizadas, como é o caso da possibilidade de videoconferência e – *mutatis mutandis* – de sessões virtuais.

As sessões virtuais acabarão ofendendo não só as garantias previstas para o tribunal do júri, tornando o julgamento ainda mais oneroso para o réu, que terá a plenitude de defesa reduzida. Urge salientar que a proposta do CNJ não encontra substrato de plausibilidade para a sua concretização, seja pela ausência de competência para legislar sobre direito processual penal, seja em virtude de inúmeras violações às garantias constitucionais que um tribunal do júri virtual poderia acarretar.

Não nos parece razoável a tentativa de ampliar regras que são próprias do procedimento comum ordinário e inaplicáveis ao procedimento do júri, sob a alegação da duração razoável do processo. Esta, como garantia constitucional voltada também aos acusados, não pode ser interpretada às avessas, para representar uma restrição dos direitos defensivos.

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[43] Sobre isso: FORTI, Iorio Siqueira D'Alessandri. O tribunal do júri como garantia fundamental, e não como mera regra de competência: uma proposta de reinterpretação do art. 5º, XXXVIII, da Constituição da República. *Revista Eletrônica de Direito Processual* – REDP, v 3, n 3, p. 1-19, 2009.

Ainda que seja necessária a observância da duração razoável do processo, este direito não deve ser utilizado como fundamento para a violação de diversas outras garantias constitucionais e procedimentais que fazem parte da estrutura do devido processo legal afeto ao tribunal do júri, não podendo ser afastadas, nem mesmo em razão do cenário atual.

4. Em busca de uma solução harmonizadora: prisões preventivas, razoável duração do processo e razoável duração da custódia cautelar

Diante do impasse entre o fato de a proposta de realização de sessões virtuais ser contrária aos preceitos constitucionais, de um lado, e da não realização de sessões do tribunal do júri em virtude das medidas sanitárias gerar prejuízos, sobretudo aos acusados presos, de outro, é preciso refletir em busca de uma solução que harmonize tais circunstâncias.

Há diversos meios de garantir a duração razoável do processo, ou até mesmo minimizar os efeitos da pandemia ao réu que se encontra preso ou aguardando julgamento em liberdade. Como teoricamente alicerçado alhures, não é a realização da sessão do tribunal do júri de modo virtual que irá garantir ao réu a observância de todos os princípios basilares do procedimento especial.

Pensando nisso, apresenta-se como solução harmonizadora a possibilidade da revisão das prisões cautelares durante o período de pandemia, conforme os ditames da Recomendação nº 62/2020 do CNJ, a qual traz a seguinte redação em seu art. 4º:

> Art. 4º Recomendar aos magistrados com competência para a fase de conhecimento criminal que, com vistas à redução dos riscos epidemiológicos e em observância ao contexto local de disseminação do vírus, considerem as seguintes medidas:
>
> I – a reavaliação das prisões provisórias, nos termos do art. 316, do Código de Processo Penal, priorizando-se:
>
> a) mulheres gestantes, lactantes, mães ou pessoas responsáveis por criança de até doze anos ou por pessoa com deficiência, assim como idosos, indígenas, pessoas com deficiência ou que se enquadrem no grupo de risco;

> b) pessoas presas em estabelecimentos penais que estejam com ocupação superior à capacidade, que não disponham de equipe de saúde lotada no estabelecimento, que estejam sob ordem de interdição, com medidas cautelares determinadas por órgão do sistema de jurisdição internacional, ou que disponham de instalações que favoreçam a propagação do novo coronavírus;
>
> c) prisões preventivas que tenham excedido o prazo de 90 (noventa) dias ou que estejam relacionadas a crimes praticados sem violência ou grave ameaça à pessoa;
>
> II – a suspensão do dever de apresentação periódica ao juízo das pessoas em liberdade provisória ou suspensão condicional do processo, pelo prazo de 90 (noventa) dias.

Verifica-se que com a nova sistemática da Lei nº 13.964/19 houve também a implementação da possibilidade de revisão da prisão preventiva quando decorrido o prazo de 90 (noventa) dias, conforme dispõe o art. 316, parágrafo único, do CPP. De fato, há diversas outras medidas que possibilitam ao réu proteção à saúde, sem que a demora no julgamento o prive de sua liberdade por tempo maior do que o devido e legalmente permitido.

Esse é um movimento legislativo que vem ocorrendo desde a reforma que introduziu a monitoração eletrônica no ordenamento jurídico brasileiro e remodelou as disposições sobre as medidas cautelares diversas da prisão, com a Lei nº 12.403/2011. No entanto, o que se visualiza na praxe da área criminal é, em certa medida, uma resistência por parte de alguns julgadores e Tribunais em acolher essas modificações legislativas desencarceradoras, que constituem agendas de direitos humanos e fundamentais.

Ainda que o CNJ entenda pela possibilidade e viabilidade da realização das sessões do tribunal do júri de maneira virtual, há diversos questionamentos que acabam obstando a proposta, tal como a disponibilidade de instrumentos tecnológicos para o Conselho de Sentença, bem como a fiscalização acerca do sigilo das votações e a incomunicabilidade dos jurados.

Como fatos que acabam prejudicando o réu, eles possibilitam margem para argumentações no sentido de se buscar a anulação do júri,

em virtude da inobservância das normas procedimentais. Por isso, não parece razoável permitir que o réu se submeta a tamanho ônus, quando o Poder Judiciário pode adotar medidas extraordinárias e efetivas, como por exemplo a suspensão das sessões, a revogação das prisões preventivas quando desnecessárias e a depender da natureza da infração penal, a fim de que não ocorram prejuízos para ambos os lados. Outro exemplo que pode ser extraído de medidas extraordinárias é a própria Recomendação nº 62/2020 do CNJ, a qual estabelece diversas orientações aos juízes singulares.

A Recomendação nº 62/2020, exarada pelo CNJ, encontra largo amparo na doutrina, porquanto colige uma teia de princípios e ideários que representam, com precisão, os rumos que concretamente devem ser abraçados pelo sistema de justiça penal brasileiro, com a imposição de estrito acatamento do princípio da razoável duração da prisão cautelar.

Conquanto teoricamente a prisão figure como medida de extrema excepcionalidade[44], faz-se necessário aplicar com mais intensidade as medidas cautelares diversas da prisão, previstas no art. 319 do CPP, bem como a substituição, sempre que viável, da prisão preventiva pela domiciliar – a qual poderá ser cumulada com as medidas cautelares já mencionadas –, por ser medida impositiva ao legítimo respeito ao princípio da razoável duração do processo[45].

No cenário atual de pandemia, com inúmeras mortes e altíssimo grau de contaminação, deve-se pensar em medidas garantistas[46] e desencarceradoras, por se tratar de uma questão humanitária, e não em medidas que visam a uma “eficiência” a todo custo do sistema penal, como é o caso do júri virtual, ao atropelo dos preceitos constitucionalmente previstos, desconsiderando a formalidade que abraça o procedimento especial do júri e dando-lhe interpretações descompassadas com a legislação de regência.

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[44] PRADO, Luiz Regis; SANTOS, Diego Prezzi. *Prisão preventiva*: A contramão da modernidade. Rio de Janeiro: Forense, 2018, p. 111.

[45] KARAM, Maria Lúcia. Prisão e liberdade processuais. *Revista Brasileira de Ciências Criminais,* São Paulo, v. 2, 1993, p. 87.

[46] FERRAJOLI, Luigi. *Garantismo:* uma discussão sobre direito e democracia. Rio de Janeiro: Lumen Juris, 2012, p. 58.

O ordenamento jurídico brasileiro, bem como a Recomendação nº 62/2020 emanada pelo CNJ, permite a revisão das prisões preventivas que se encontrem em prazo excessivo de cumprimento, com o amparo de toda a legislação processual que propicia medidas desencarceradoras e acautelatórias, atingindo, portanto, sua finalidade precípua.

Não há, conforme a proposta de virtualização do júri do CNJ, a intenção de garantir o princípio da duração razoável do processo ao réu, mas tão somente acelerar as demandas do tribunal do júri, com o impacto da violação aos preceitos constitucionais pertinentes, o que deve ser coibido com veemência.

5. Posicionamentos a favor da realização da sessão do tribunal do júri virtual

Como se percebe, a pandemia trouxe diversos impactos – negativos e positivos – na justiça brasileira, considerando que esta teve que se adequar a situação excepcional que o país está enfrentando. Um dos grandes desafios, tanto para a efetivação da celeridade processual quanto para o cumprimento de metas do judiciário, foi a suspensão dos prazos e sessões do tribunal do júri.

Pode-se trazer que o posicionamento daqueles que advogam a favor da realização do tribunal do júri é sustentado no princípio da continuidade da prestação jurisdicional, o qual encontra-se previsto no artigo 93, inciso XII[47]. Inclusive, aos que se filiam a possibilidade da sessão do júri virtual, há como fundamento o artigo 185, § 2º, do Código de Processo Penal, o qual dispõe a possibilidade de o juiz realizar o interrogatório do réu por meio de sistema de videoconferência, em situações excepcionais. O argumento é de que a pandemia se tornou "situação excepcional" e a sessão virtual é medida apta a atender as finalidades do processo penal e seus princípios norteadores[48].

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[47] ALMEIDA, Marcelo Pereira de. PINTO, Adriano Moura da Fonseca. Os impactos da pandemia de COVID 19 no Sistema de Justiça – algumas reflexões e hipóteses. *Revista Juris Poiesis.* Rio de Janeiro. Vol. 23 - n° 31, pg. 01-15, 2020.

[48] BRASIL. Superior Tribunal de Justiça. Recurso Ordinário em Habeas Corpus nº 83.318/RJ, Rel. Ministro Ribeiro Dantas, Quinta Turma, DJe 01/08/2017.

Ao contrário dos que entendem pela impossibilidade da implantação sessão virtual, os apoiadores dessa medida extraordinária entendem que não haverá qualquer violação aos princípios processuais penais, visto que o acusado estará presente em todos os atos processuais, o que maximiza a sua participação e efetiva o contraditório e ampla defesa[49]. Sobre eventuais adaptações ao tribunal do júri, Aury Lopes leciona que:

> É verdade que o Tribunal do Júri é cláusula pétrea da Constituição, art. 5º, XXXVIII, mas isso não desautoriza a crítica, pois o mesmo dispositivo consagra o júri, mas com a “organização que lhe der a lei”. Ou seja, remete a disciplina de sua estrutura à lei ordinária, permitindo uma ampla e substancial reforma, desde que assegurados o sigilo das votações, a plenitude de defesa, a soberania dos veredictos e a competência para o julgamento dos crimes dolosos contra a vida[50].

De todo modo, é notório que nas sessões presenciais do júri há certa obstacularização quando uma testemunha não comparece, em razão de residir em comarca distante, como também a impossibilidade da presença do réu, ou vítima, ou do próprio defensor. São questões que podem ser, de certa forma, sanadas pela sessão virtual, ainda que somente no período da pandemia. Ora, a implementação da sessão através de videoconferência, por parte dos seus defensores, ocasiona maior celeridade processual e garante ao réu respeito às garantias constitucionais[51].

Sabe-se que o processo penal é regido pelos princípios da publicidade, do contraditório e ampla defesa, os quais serão devidamente

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[49] CRUZ, Rogerio Schietti; LUNARDI, Fabrício Castagna; GUERREIRO, Mário Augusto Figueiredo de Lacerda. *Tribunal do júri com apoio de videoconferência*: pela ética do discurso. Consultor Jurídico, 2020. Disponível: <https://www.conjur.com.br/2020-jun-29/opiniao-tribunal-juri-apoio-videoconferencia>. Acesso em: 22 de jun. 2020.

[50] LOPES JR., Aury. Direito processual penal. 17. ed. São Paulo: Saraiva, 2020, p. 471.

[51] CRUZ, Rogerio Schietti; LUNARDI, Fabrício Castagna; GUERREIRO, Mário Augusto Figueiredo de Lacerda. *Tribunal do júri com apoio de videoconferência:* pela ética do discurso. Consultor Jurídico, 2020. Disponível: <https://www.conjur.com.br/2020-jun-29/opiniao-tribunal-juri-apoio-videoconferencia>. Acesso em: 22 de jun. 2020.

efetivados com a realização da videoconferência. São diversas as vantagens trazidas pelos defensores do uso da sessão virtual, em que haverá, ainda, redução dos desgastes pelos jurados, os quais devem obrigatoriamente comparecer no fórum, ainda que não sejam escolhidos[52].

Sobre isso, Schietti, Lunardi e Guerreiro apresentam algumas observações:

> Lembre-se que, no sistema tradicional (em que há presença física das pessoas a serem ouvidas na instrução), durante a primeira fase do procedimento (sumário da culpa), vítima, testemunhas e réu podem ser ouvidos por carta precatória, ou seja, em juízo diverso daquele que julgará a causa. Vale dizer, sem o uso da videoconferência as presenças do réu e do seu advogado nas oitivas restam dificultadas (se o advogado não se deslocar para a outra comarca, é nomeado um defensor, que geralmente não tem contato com o réu, para acompanhar a oitiva). Com as audiências de instrução por videoconferência, o réu e o seu advogado ou defensor poderão estar presentes virtualmente em todas essas oitivas durante a instrução do processo[53].

Como o tribunal do júri comporta todos os atos em uma sessão só, percebe-se que a celeridade do processo não será prejudicada. Sobre a celeridade do tribunal do júri, Goulart afirma que:

> Embora a produção da prova em plenário importe necessariamente a realização de uma sessão mais demorada, o tempo de duração do trâmite processual será menor e, portanto, menos desgastante para acusado, vítimas e testemunhas, já que serão convocados uma única vez para a sessão de instrução e de julgamento[54].

A concentração dos atos processuais viabiliza a celeridade sem perder a segurança jurídica do ato[55] e, consequentemente, eventual sessão

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[52] Ibidem.

[53] Ibidem.

[54] GOULART, Fábio Rodrigues. *Tribunal do júri:* aspectos críticos relacionados à prova. São Paulo: Atlas, 2008, p. 145.

[55] SCHELEDER, Adriana Fasolo Pilati; FOLLE, Ana Júlia Cecconello. *As novas tecnologias e a uniformização do processo eletrônico*: vantagem e desvantagens.

virtual não ocasionará qualquer óbice à ampla defesa e contraditório, pois ao acusado será possibilitado a presença em todos os atos, inclusive acompanhar os depoimentos das testemunhas e vítima.

Destarte os argumentos contra, é possível verificar que os defensores trazem soluções e argumentos aceitáveis e fortes, considerando que, de fato, o Poder Judiciário deve, constantemente, adequar-se às situações excepcionais, sem que isso ocasione atraso nas demais e no direito do réu em ter um devido processo legal e célere. A tecnologia vem ganhando força na atual era digital[56], proporcionando que o acusado participe mais ativamente de todos os atos processuais, sem que isso lhe cause qualquer desgaste.

Não se pode deixar de afirmar que há diversos fatores que obstaculizam a celeridade processual, tal como a testemunha que reside em outra comarca, o defensor que não pode comparecer à audiência de instrução e julgado, e é nomeado defensor dativo - o que acaba prejudicando a ampla defesa do acusado -. São questão que podem ser resolvidas quando apresentada a possibilidade de sessão virtual do júri, considerando que ao acusado será possível participar de todos os atos processuais, bem como lhe será garantido defesa técnica e a publicidade do ato[57].

Considerações finais

Não obstante o momento de extrema excepcionalidade atravessado pelo mundo, diante das considerações e reflexões propostas neste texto, sustenta-se que o tribunal do júri virtual não é a melhor solução para a equalização entre evitar a paralisação da tramitação dos feitos e a necessidade de fidelidade aos preceitos jurídico-constitucionais que

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Disponível em: <http://publicadireito.com.br/artigos/?cod=e3998932e2e851de>. Acesso em: 22 de dez. 2020.

[56] ALMEIDA FILHO, José Carlos de Araújo. *Processo Eletrônico e Teoria Geral do Processo Eletrônico*. Rio de Janeiro: Forense, 2007, p. 12.

[57] CRUZ, Rogerio Schietti; LUNARDI, Fabrício Castagna; GUERREIRO, Mário Augusto Figueiredo de Lacerda. *Tribunal do júri com apoio de videoconferência:* pela ética do discurso. Consultor Jurídico, 2020. Disponível: <https://www.conjur.com.br/2020-jun-29/opiniao-tribunal-juri-apoio-videoconferencia>. Acesso em: 22 de jun. 2020.

envolvem a questão. Logo, diante de sua missão constitucional e democrática, se entende pela impossibilidade de mitigação do direito de defesa do réu, através da virtualização do procedimento especial.

Há outras resoluções para o problema que podem minimizar os danos causados pelo cenário pandêmico, sendo uma delas a revisão das prisões preventivas aos réus presos, com a aplicação, sempre que possível e dentro dos limites da Recomendação nº 62/2020 do CNJ, de outras hipóteses legais como a prisão domiciliar e as medidas cautelares diversas da prisão.

Em resposta ao quesito introdutório, defende-se que, diante da problematização aqui exposta, o disposto no parágrafo anterior seria a possível forma de harmonizar soluções emergenciais advindas do contexto pandêmico com os preceitos constitucionais sobre o tribunal do júri, porquanto a virtualização do procedimento apresenta-se bastante temerária, ante a plausibilidade do raciocínio lógico-jurídico acerca de sua incompatibilidade com a CF e com as normas processuais, considerando a inobservância das regras trazidas ao procedimento especial do júri, bem como a impossibilidade de o CNJ dispor de tal modo sobre a matéria, em sede de processo penal.

Por isso, tal solução, ainda que sob o fundamento do princípio da duração razoável do processo, não merece prosperar, pois não se deve utilizar a justificativa da celeridade processual para violar as garantias individuais do júri que naturalmente servem de substrato ao acusado.

A solução mais adequada, atualmente, é aguardar que as sessões sejam realizadas, seguindo as orientações sanitárias, em um ambiente adequado e seguro para todos os presentes no momento, quando assim determinado pelas autoridades competentes, conferindo-se, neste período, os meios alternativos trazidos pela Recomendação nº 62/2020 do CNJ, como a revisão das prisões preventivas, a suspensão das sessões até que a situação se estabilize e aplicação da prisão domiciliar, quando preenchidos os requisitos.

Nos casos de extrema necessidade da manutenção da custódia cautelar, é possível que o Poder Judiciário adote providências extraordinárias, a fim de que o julgamento possa ser realizado de forma presencial, porém seguindo todas as orientações e instruções de saúde, tais como o distanciamento entre os presentes, o uso de máscaras adequadas, proteção

facial de acrílico – *face shield* –, adoção de medidas de higiene por meio da disponibilidade de álcool 70º INPM em gel, entre outras medidas sanitárias eficazes.

A melhor alternativa no momento atual é a adoção de medidas que, de fato, efetivem as garantias instituídas pelo tribunal do júri, não sendo a melhor alternativa a sua realização virtualmente. Os direitos e garantias fundamentais são muito caros para que se permita, em qualquer momento de excepcionalidade, seu vilipêndio, quando há soluções alternativas ao cenário apresentado.

As disposições constitucionais do tribunal do júri – art. 5º, inciso XXXVIII, alíneas a (plenitude de defesa), b (sigilo das votações), c (soberania dos veredictos) e d (competência para o julgamento dos crimes dolosos contra a vida), da CF/88 – ostentam aspecto substantivo, com íntima aproximação aos postulados da proporcionalidade e da razoabilidade, a demandar do Estado uma atuação pautada pela recomendação de posturas equilibradas entre a aplicação da lei penal e processual penal, a par de sua adequação às realidades e inovações sociais, mas sempre esgrimidas pela irradiação dos direitos fundamentais, a afastar, no caso, o aparente avanço tecnológico que se traduz em debilidade do procedimento especial.

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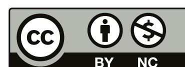

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Persecução penal: investigação, juízo oral e etapa recursal

Criminal prosecution: investigation, public oral trial and appeal

Decisão de admissibilidade da denúncia no Superior Tribunal de Justiça: uma pesquisa quali-quantitativa

Decision on the admissibility of criminal complaints in the Brazilian Superior Court of Justice: a quali-quantitative research

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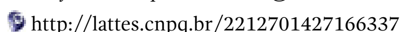

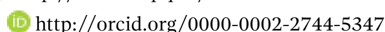

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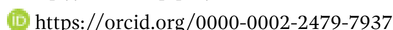

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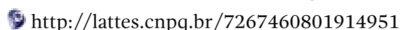

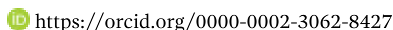

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Resumo: Trata-se de análise de discurso do Superior Tribunal de Justiça (STJ) em relação ao juízo de admissibilidade da denúncia. Busca-se entender se a jurisprudência do STJ encontra eco no texto constitucional quanto à necessidade de fundamentação das decisões judiciais. Foram levantados 107 julgados no interstício de 2008 a 2019, em que se pretendeu compreender a evolução no entendimento jurisprudencial a respeito da necessidade de fundamentação da decisão de recebimento da denúncia após a edição da Lei n. 11.719/08. A metodologia utilizada é de caráter quantitativo e qualitativo. O estudo aponta que o STJ vem apresentando uma resposta inadequada ao texto constitucional, pois o juízo de admissibilidade como decisão judicial requer uma fundamentação à luz do art. 93, IX, da Constituição Federal e do art. 315 do Código de Processo Penal.

Palavras-chave: Processo penal; Decisão judicial; Fundamentação; Juízo de admissibilidade; Denúncia.

Abstract: *This is an analysis of the discourse of the Brazilian Superior Court of Justice (STJ) in relation to the judgment confirming the admissibility of the criminal prosecution. It seeks to understand whether the STJ's jurisprudence finds an echo in the constitutional text regarding the need to substantiate judicial decisions. 107 of them were raised in the interstice from 2008 to 2019, after the enactment of Law no. 11,719/2008. We intended to understand the evolution in the jurisprudential comprehension on the need to justify the decision whether to admit or not the criminal prosecution. The methodology used is both quantitative and qualitative. The study points out that the STJ has been presenting an inadequate response to the constitutional text, since the admissibility judgment as a judicial decision requires a justification in the light of article 93, IX, of the Brazilian Federal Constitution and of article 315 of the Criminal Procedure Code.*

Keywords: *Criminal procedure; Judicial decision; Judgment of admissibility; Reasoning; Criminal prosecution.*

Introdução

A presente pesquisa tem como objetivo analisar a jurisprudência do Superior Tribunal de Justiça (STJ) entre os anos de 2008 a 2019 quanto

à necessidade de fundamentação da decisão judicial referente ao juízo de admissibilidade (recebimento da denúncia ou queixa), previsto no art. 399 do Código de Processo Penal (CPP), nos termos da minirreforma de 2008. Busca-se entender se a jurisprudência encontra eco no texto constitucional quanto à necessidade de fundamentação das decisões judiciais (art. 93, IX, Constituição Federal - CF).

Parte-se do pressuposto que a decisão que recebe a denúncia se trata de um ato judicial de caráter decisório, e por isso, necessitaria fundamentação. Diante disso, tem-se por objetivo observar de que forma o Superior Tribunal de Justiça (STJ), órgão judicial constitucionalmente encarregado da verificação de aplicabilidade uniforme da legislação federal, está se pronunciando sobre o assunto.

Para além de uma abordagem quantitativa, que procurou verificar o número de julgados entre os anos de 2008 e 2019, também procurou se apontar, do ponto de vista qualitativo, as razões de decidir nos acórdãos pesquisados no referido interregno, para, então, baseando-se no método hipotético-dedutivo, e também com lastro em análise documental e bibliográfica, verificar se a resposta dada pelo STJ está de acordo com o texto constitucional no que tange à necessidade de fundamentação.

Na atual sistemática do CPP, o juízo de admissibilidade da denúncia ocorre em dois momentos, conforme os art. 395 e art. 399 do CPP. No primeiro momento, o juízo, não rejeitando liminarmente, deve receber a denúncia, interrompendo o prazo prescricional previsto no art. 117, I do Código Penal (CP), para em seguida determinar que o acusado seja citado para responder por escrito à acusação. Após a resposta defensiva, o juízo realiza um novo juízo de admissibilidade da acusação, com base no conteúdo apresentado pela defesa, tendo como base o art. 397 do CPP. É justamente sobre o art. 399 do CPP que esta pesquisa se debruça, e que é objeto do primeiro item deste trabalho.

Em um segundo ponto, aborda-se o percurso metodológico realizado no presente estudo, começando pela coleta de dados realizada no sítio eletrônico do STJ para, em seguida, mostrar os resultados e discussão decorrentes do material coletado, sob o ponto de vista quantitativo. Após, faz-se a análise qualitativa dos julgados, com a finalidade de se verificar as razões de decidir no tocante à análise do art. 399 do CPP.

Por fim, constata-se um paradoxo existente na jurisprudência do STJ em relação à necessidade de fundamentação do juízo de admissibilidade da acusação, o que não é compatível com o texto constitucional.

1. Juízo de admissibilidade da acusação e o processo penal em três etapas.

Na redação original do CPP de 1941, o juízo de admissibilidade da denúncia ou da queixa era estabelecido nos termos do revogado art. 43, o qual determinava que a denúncia seria rejeitada quando os fatos narrados não constituíssem crime, quando já tivesse sido extinta a punibilidade ou quando não existissem condições para o exercício da ação processual penal.[4] O exame preliminar da acusação estava atado à discricionariedade do magistrado, pois se tinha como praxe o recebimento automático da acusação[5]. Vale lembrar que, nesta época, o interrogatório sucedia à citação válida do acusado, que somente depois apresentava defesa prévia, muitas vezes limitada à mera apresentação de rol testemunhal, já que nova oportunidade de serem analisadas as questões processuais ligadas à validade da relação processual penal somente aconteciam no momento da sentença.[6]

Da promulgação do CPP até o final do século XX, tentou-se adequá-lo aos textos constitucionais, como também às diretrizes internacionais apresentadas ao mundo no pós-guerra. Todavia, estes movimentos reformistas esbarravam – e ainda esbarram - em uma resistência ideológica autoritária, de forma a não admitir a mudança do papel do juiz no processo penal[7].

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[4] A redação deste artigo, com pouquíssimas modificações, encontra-se no art. 395 do CPP, em razão das mudanças trazidas pela Lei n. 11.719/2008.

[5] ZILLI, Marcos. O povo contra... As condições da ação penal condenatória. Velhos problemas. Novas ideias. *Cadernos Jurídicos*, São Paulo, a. 17, n. 44, p.147-162. Jul-Set/2016, p. 149

[6] Neste sentido, cf. GOMES FILHO, Antônio Magalhães. *A motivação das decisões penais*. 2. ed. São Paulo: Revista dos Tribunais, 2013, p. 206.

[7] PRADO, Geraldo. Crônica da reforma do Código de Processo Penal Brasileiro que se inscreve na Disputa da Policia pelo Sentido e Fundação da justiça criminal. In: COUTINHO, Jacinto Miranda. CARVALHO, L. G. Grandinetti

No final dos anos 1990, formou-se uma comissão de reforma do CPP para que, em 90 dias, ela estivesse apta a rever os anteprojetos apresentados anteriormente pela Comissão de Reforma de 1992[8] e exibir propostas viáveis à discussão. Esta nova comissão foi presidida pela Prof. Dra. Ada Pellegrini Grinover[9] e teve como objetivo apresentar reformas pontuais: "a reforma total teria a seu favor a completa harmonia do novo sistema. Mas seria inexequível operacionalmente", principalmente em razão da "morosidade própria da tramitação legislava dos códigos, a dificuldade prática do Congresso Nacional [...]"[10]. Foram apresentados 11 anteprojetos, dentre os quais se destaca, neste artigo, o relativo às modificações no procedimento comum ordinário e sumário, com o intento de equilibrar garantia e eficiência, deixando-o mais ágil e funcional, de modo a melhor preservar os direitos do acusado, mas sem perder de vista sua finalidade[11].

Em um primeiro momento, apenas os anteprojetos sobre prisão especial e o interrogatório do acusado tornaram-se leis[12]. A partir de 2005, a tramitação dos Projetos de Lei oriundos desta comissão ganhou fôlego em decorrência da realização do "Pacto de Estado em Favor de um Judiciário mais Rápido e Republicano", realizado em dezembro de 2004.

Castanho de. (Org.). *O novo Processo Penal à Luz da Constituição*. Rio de Janeiro. Lumen Juris. 2011, p. 8-9.

[8] Em 1992 foi designado ao Ministro da Justiça Celio Borja a criação de uma comissão que apresentasse alternativas à legislação vigente (CPP e CPC). A comissão responsável pela reforma do CPP foi presidida pelo Min. do STJ Luiz Vicente Cernicchiaro e secretariada por Sidnei Agostinho Beneti. A comissão pretendi realizar reformas pontuais. No âmbito do procedimento ordinário havia uma proposta que buscava o aprimoramento através de um contraditório prévio do recebimento da denúncia, com base nos princípios da oralidade.

[9] Comissão Grinover teve como demais integrantes: Petrônio Calmon Filho (Relator) Antônio Magalhães Gomes Filho, Antônio Scarance Fernandes, Luiz Flavio Gomes, Miguel Reale Júnior, Nilzardo Carneiro Leão e Renê Ariel Dotti (Portaria n. 61 de 20 de janeiro de 2000 – Ministério da Justiça).

[10] GRINOVER, Ada Pellegrini. A reforma do código de processo penal. *Revista Brasileira de Ciências Criminais*, São Paulo. v. 31, jul-set. 2000, p. 66.

[11] GRINOVER, Ada Pellegrini. A reforma do código de processo penal. *Revista Brasileira de Ciências Criminais*, São Paulo. v. 31, jul-set. 2000, p. 66.

[12] A prisão especial foi instrumentalizada na Lei n. 10.258/01. Em relação ao interrogatório publicou-se a Lei n. 10.792/03.

O então Ministro da Justiça, Marcio Thomaz Bastos[13], defendeu a ideia de que se buscassem Projetos de Leis que já tivessem sidos debatidos e que pudessem apresentar uma modificação real na estrutura criminal. Assim, deu-se prosseguimento aos seguintes Projetos de Leis: n. 4207/01 (procedimentos); n. 4203/01 (Tribunal do júri); n. 4205/01 (provas); e, por fim, n. 4208/01 (medidas cautelares).

Os três primeiros foram aprovados e transformados, em 2008, nas Leis n. 11.689, n. 11.690 e n. 11.719, fazendo com que o CPP passasse por uma minirreforma[14], não estruturante, com a qual buscou equilibrar a função persecutória estatal ao processo igualitário e democrático previsto na CF[15]. A Lei n. 11.719 reformulou o procedimento comum, em especial o ordinário, que passou a servir como modelo para os demais, previstos ou não no CPP, introduzindo o processo penal em três etapas: investigação preliminar, admissibilidade da denúncia e produção probatória[16].

Pós-minirreforma, o CPP passou a determinar a realização do juízo de admissibilidade da acusação, extirpando assim o recebimento automático da denúncia. Conforme a exposição de motivos da Lei n. 11.719/08, e ao mesmo tempo seguindo o histórico das tentativas de reformas, buscou-se determinar o recebimento da denúncia em dois momentos: o primeiro em caráter liminar, com a análise da aplicação (ou não) do art. 395 do CPP; depois, após resposta à acusação, seria feita a análise pormenorizada dos requisitos da pretensão acusatória, com base no art. 397 do CPP[17].

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[13] BASTOS, Marcio Thomaz. Reformar o processo penal. *Folha de São Paulo*. Disponivel em: < https://www1.folha.uol.com.br/fsp/brasil/fc2411200316.htm>. Acesso em 05 abr. 2020. .

[14] SANTIAGO, Nestor Eduardo Araruna. Princípio da duração razoável do processo e direito processual penal: uma leitura estrutural da mini-reforma. In: SALES, Gabrielle Bezerra; JUCÁ, Roberta Laena Costa. (Org.). *Constituição em Foco*: 20 anos de um novo Brasil. 1 ed. Fortaleza: LCR, 2008, p. 237-246.

[15] ZILLI, Marcos. O pomar e as pragas. *Boletim do IBCCRIM*, São Paulo, ano 16, n.188, jul. 2008, p. 02

[16] PRADO, Geraldo. *Prova penal e sistema de controles epistêmicos*: A quebra da cadeia de custodia das provas obtidas por métodos ocultos. São Paulo: Marcial Pons, 2014, p. 45.

[17] Exposição de motivo nº 23 do Ministério da Justiça. Publicada no diário da Câmara dos Deputados em 30 de março 2001. Disponível em: <http://

Durante a tramitação do Projeto de Lei n. 4.207/2001, que resultou na Lei n. 11.719/2008, acrescentou-se ao art. 396 do CPP o termo "recebê-la-á", fazendo que, com isso, surgisse uma dúvida a respeito do momento em que ocorreria o recebimento da denúncia. A modificação legislativa, finalmente aprovada, criou uma contradição entre o art. 396 e o art. 399, tendo em vista que ambos preveem o recebimento da acusação, e desde já estabelecendo ser ilógica a existência de dois recebimentos[18]. A partir daí, a doutrina passou a estabelecer posicionamentos distintos a respeito do momento de recebimento da denúncia, com o consequente exercício do juízo de admissibilidade.

De acordo com o primeiro posicionamento, e como tal posto na exposição de motivos do Projeto de Lei n. 4.207/2001, o recebimento ocorreria em dois momentos (art. 396 e art. 399). No primeiro momento, o juízo, não rejeitando liminarmente, deve receber a denúncia, interrompendo o prazo prescricional previsto no art. 117, I do CP, para em seguida determinar a citação do acusado para responder por escrito à acusação. No segundo momento, após a resposta defensiva, o juízo realizaria novo recebimento da acusação, adotando um modelo de juízos progressivos[19]. Esta tese é sustentada na doutrina de Grinover, Gomes Filho e Scarance Fernandes[20], bem como por Eugenio Pacelli[21], que ainda acrescenta não haver exigência constitucional para o exercício da ampla defesa antes da ação penal.

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imagem.camara.gov.br/Imagem/d/pdf/DCD30MAR2001VOLI.pdf#page=634>. Acesso em: Acesso em 05 abr. 2020

[18] BADARÓ, Gustavo Henrique. Rejeição da denúncia ou queixa e absolvição sumária na reforma do código de processo penal: atuação integrada de tais mecanismos na dinâmica procedimental. *Revista Brasileira de Ciências Criminais,* São Paulo, v. 17, n. 76, jan./fev. 2009, p. 132.

[19] BADARÓ, Gustavo Henrique. Rejeição da denúncia ou queixa e absolvição sumária na reforma do código de processo penal: atuação integrada de tais mecanismos na dinâmica procedimental. *Revista Brasileira de Ciências Criminais*, São Paulo, v. 17, n. 76, jan/fev 2009, p. 132.

[20] GRINOVER, Ada Pellegrini. GOMES FILHO, Antonio Magalhães. FERNADES, Antônio Scarance. *As Nulidades no processo penal.* 11 ed. São Paulo: Revista dos Tribunais, 2009, p. 87.

[21] PACELLI, Eugenio. *Curso de processo penal.* 18 ed. São Paulo: Atlas, 2014, p. 684

Outra corrente entende que só há um recebimento, e este ocorreria nos termos do art. 396 do CPP. Nucci[22], Silva Junior[23], Rosa[24], Lopes Jr.[25] e Giacomolli[26] defendem que, em uma leitura sistêmica do CPP, todos os atos de decisão (art. 363, 366 e 397 do CPP) ocorrem antes do art. 399, logo, não há que se falar em recebimento neste momento, pois já havia sido recebida na fase do 396 do CPP, o que não impede que o juiz analise se há a possibilidade de absolvição sumária, nos termos do art. 397. Complementa Choukr[27] que se o recebimento ocorresse apenas no art. 399, "seria o ápice de concessão ao modelo abstrato do direito de ação".

O terceiro e último posicionamento é endossado por Geraldo Prado[28], Jacinto Coutinho[29], Lenio Streck[30] e Gustavo Badaró[31], que sustentam que o momento de recebimento da denúncia deveria ser o da fase

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[22] NUCCI, Guilherme de Souza. *Código de Processo Penal comentado*. 12 ed. Rio de Janeiro: Editora Forense, 2016, p. 780.

[23] SILVA JUNIOR, Walter Nunes da. *Reforma tópica do processo penal*: inovações aos procedimentos ordinário e sumário, com o novo regime das provas, principais modificações do júri e as medidas cautelares pessoais (prisão e medidas diversas da prisão). 2 ed. Rio de Janeiro: Renovar, 2012, p. 106.

[24] ROSA, Alexandre Morais da. *Guia do processo penal conforme a teoria dos jogos*. 5 ed. Florianópolis: Emais, 2019, p. 395.

[25] LOPES JR., Aury. *Direito Processual Penal.* 16 ed. São Paulo: Saraiva, 2019, p. 728.

[26] GIACOMOLLI, José Nereu. *Reformas (?) do Processo Penal:* considerações críticas. Rio de Janeiro: Lumen Juris, 2008, p. 74

[27] CHOUKR, Fauzi Hassan. *Código de Processo Penal:* comentários consolidados & critica jurisprudencial. 8 ed. Belo Horizonte: D'Plácido, 2018, p. 892.

[28] PRADO, Geraldo. Sobre procedimentos e antinomias. *Boletim do IBCCrim*, São Paulo, n. 190, set. 2008. p.4-5

[29] COUTINHO, Jacinto Nelson de Miranda. *Reformas parciais do processo penal: breves apontamentos críticos*. Empório do Direito. 2015. Disponível em: <https://emporiododireito.com.br/leitura/reformas-parciais-do-processo-penal-breves-apontamentos-criticos>. Acesso em 20 abr. 2020.

[30] STRECK, *Lenio. O impasse na interpretação do artigo 396 do CPP*. Disponível em: <https://www.conjur.com.br/2008-set-18/impasse_interpretacao_artigo_396_cpp>. Acesso em 03 abr. 2020.

[31] BADARÓ, Gustavo Henrique. Rejeição da denúncia ou queixa e absolvição sumária na reforma do código de processo penal: atuação integrada de tais mecanismos na dinâmica procedimental. *Revista Brasileira de Ciências Criminais*, São Paulo, v. 17, n. 76, jan/fev. 2009, p.133.

do art. 399 do CPP, isto é, após a apresentação da resposta à acusação. E para isto ocorrer deveria haver uma interpretação corretiva, ab-rogante, a qual excluiria a mesóclise "recebê-la-á". Na mesma esteira, Paulo Rangel[32] aponta que a expressão "recebê-la-á" não significa a realização do juízo de admissibilidade, mas sim um ato físico de ter em mãos a peça acusatória.

A hipótese de recebimento nos termos do art. 396 não possui "sotaque constitucional"[33], pois, no texto da CF há regra expressa de que sejam assegurados aos acusados em geral o contraditório e a ampla defesa (LV, art. 5º da CF). O juízo fundamentado de admissibilidade só deve ocorrer na fase do art. 399 do CPP, após o oferecimento da resposta à acusação, com sua análise nos termos do art. 397. Este artigo é o referencial que determina a regra de vinculação de fundamentação do juízo de admissibilidade do caso penal. Além disso, a possibilidade de rejeição da denúncia mesmo após a apresentação da resposta à acusação não preclui, sendo que permanece aplicável o art. 395 do CPP, por se tratar de questão de ordem pública.

Mesmo assim, parte da doutrina sustenta a desnecessidade de fundamentação, uma vez que já existiria prova pré-constituída e, consequentemente, haveria justa causa para a ação penal[34]. Silva Jr.[35] aponta que a liturgia do CPP determina que a fundamentação quanto ao recebimento da acusação será realizada no momento em que a defesa postular, em sede resposta à acusação (art. 396-A), sobre a ausência de condições da ação processual. Eugênio Pacelli[36] assegura que a decisão de recebimento da

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[32] RANGEL, Paulo. *Direito processual penal*. 27 ed. São Paulo: Atlas, 2019, p. 858

[33] COUTINHO, Jacinto Nelson de Miranda. Dogmática crítica e limites linguísticos da lei. *Revista do Instituto de Hermenêutica Jurídica*, Belo Horizonte, v. 1, n. 3, 2005. p. 43.

[34] NUCCI, Guilherme de Souza. *Código de Processo Penal comentado*. 12 ed. Rio de Janeiro: Forense, 2013, p. 780. Entretanto, o autor afirma ter o legislador perdido a chance de instituir o recebimento motivado.

[35] SILVA JUNIOR, Walter Nunes da. *Reforma tópica do processo penal*: inovações aos procedimentos ordinário e sumário, com o novo regime das provas, principais modificações do júri e as medidas cautelares pessoais (prisão e medidas diversas da prisão). 2 ed. Rio de Janeiro: Renovar, 2012, p. 176

[36] PACELLI, Eugenio. *Curso de processo penal*. 21 ed. São Paulo: Atlas, 2017, p. 700.

denúncia deve ser realizada nos termos da decisão de pronúncia, guardada as devidas convergências.

De outra sorte, Lopes Jr. e Rosa[37], Rangel[38], Gomes Filho[39] e Badaró[40] entendem que o recebimento deve ser fundamentado, conforme preceitua o texto constitucional, sob pena de imposição da sanção de nulidade. Não se trata de mero despacho, vez que a decisão de recebimento da acusação (art. 399, CPP) causa verdadeira mudança de *status* processual para o acusado, que deve se ver apto a ter argumentos suficientes para contrapor o conteúdo do recebimento. A fundamentação da decisão, que deve demonstrar a justificativa motivada por parte do magistrado, não precisa ser complexa e minuciosa, mas deve ser *exauriente* e *explícita* quanto aos pontos argumentados na peça defensiva.

Em outras palavras, o que se espera do juiz natural é que analise cuidadosamente os elementos informativos trazidos pela acusação na peça inicial, bem como os argumentos e documentos acostados pela defesa, mormente os que digam respeito a uma abreviação do curso da ação penal por meio da absolvição sumária (art. 397, CPP). A partir deste cabedal probatório, o juiz deverá se pronunciar sobre a possibilidade de continuidade da persecução penal, impondo-lhe a justificação de sua decisão, de modo a possibilitar o exercício do contraditório, ainda que em grau impugnativo, pela parte que entenda ter sido prejudicada pela decisão.

Portanto, o juízo de admissibilidade consiste na análise, pelo juiz, da peça acusatória, nos termos do art. 41 do CPP, e dos argumentos apresentados na resposta à acusação (art. 396-A do CPP), sobre a existência de condições mínimas da ação processual penal (art. 395 CPP), como também sobre as situações de absolvição sumária (art. 397 CPP),

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[37] LOPES JR., Aury; ROSA, Alexandre Morais da. Quando o acusado é VIP, o recebimento da denúncia é motivado. <Disponível em: https://www.conjur.com.br/2014-nov-14/limite-penal-quando-acusado-vip-recebimento-denuncia-motivado>. Acesso em: 05 abr. 2020.

[38] RANGEL, Paulo. *Direito processual penal*. 27 ed. São Paulo: Atlas, 2019, p. 577

[39] GOMES FILHO, Antônio Magalhães. *A motivação das decisões penais*. 2 ed. São Paulo: Editora Revista dos Tribunais, 2013, p. 172

[40] BADARÓ, Gustavo. *Processo Penal*. 3 ed. São Paulo: Revista dos Tribunais. 2015, p. 603

nas quais, fundamentadamente (IX, art. 93 da CF c/c art. 315 do CPP), o juiz aponte a existência da pretensão acusatória.

Neste momento é que existe o juízo de admissibilidade da denúncia, o que motiva uma análise sobre seus aspectos quantitativo e qualitativo, a partir da jurisprudência do STJ. Muito embora não tenha sido objeto da pesquisa, seja porque lhe é posterior, seja porque houve suspensão de seus efeitos pelo STF, o art. 3º.-C, acrescentado ao texto do CPP pela Lei n. 13.964/2019, diz textualmente que o momento de recebimento de denúncia ou queixa é o do art. 399, fazendo cessar a competência do juiz de garantias.

2. Percurso metodológico: do quantitativo ao qualitativo

A fim de estabelecer parâmetros para identificar o discurso em torno do juízo de admissibilidade da denúncia, utilizou-se a pesquisa de julgados em matéria criminal no sítio eletrônico do STJ. Lançando mão dos critérios disponibilizados na aba de pesquisa jurisprudencial do *site*, foram pesquisadas decisões proferidas - e não necessariamente publicadas - entre os períodos de 20/08/2008 a 05/08/2019.

A escolha temporal se deu em razão da vigência da Lei n. 11.719/2008 em 20 de agosto daquele ano, com término da pesquisa em agosto de 2019, por se tratar de trabalho originariamente construído para ser apresentado como requisito parcial à aprovação de disciplina cursada no Programa de Pós-Graduação em Direito Constitucional na Universidade de Fortaleza.

Restringiu-se a busca às ações de Habeas Corpus (HC) e Recurso Ordinário em Habeas Corpus (RHC) julgados pela 5ª e 6ª Turmas e pela 3ª Seção do STJ, órgãos responsáveis por julgar processos criminais. Por fim, como indexação colocou-se o termo "habeas corpus", evitando as classes processuais que não fossem HC ou RHC. Partiu-se do pressuposto que a contestação a respeito da ausência de fundamentação do juízo de admissibilidade da acusação é mais trabalhada do ponto de vista processual nestes dois institutos, em que o trancamento da ação penal é perseguido, possibilitando resultados mais adequados para a análise quali-quantitativa.

Utilizou-se o termo *juízo de admissibilidade da acusação*, substituindo as preposições "de" e "da" pelos conectivos adj2 e prox10, por exemplo,

juízo adj2 admissibilidade adj2 acusação e *juízo prox10 admissibilidade prox10 acusação*. A exclusão das preposições, conforme orientação no próprio *site* do STJ, tem por objetivo filtrar de forma mais eficiente o resultado da pesquisa, refinando-a com base em critérios científicos e eliminando ao máximo a imprecisão. E o substantivo *acusação* foi substituído por *denúncia*, seguindo a mesma sistemática, com alternância dos conectivos.

Utilizando os termos *juízo adj2 admissibilidade adj2 denúncia,* foram encontrados 7 acórdãos. Por conseguinte, ainda com o termo *denúncia*, mas com o conectivo *prox10*, foram encontrados 16 acórdãos. Usando o termo de pesquisa *juízo adj2 admissibilidade adj2 acusação,* foram encontrados 183 acórdãos; modificando o conectivo para *prox10,* foram encontrados 207 acórdãos. A coleta e sistematização dos dados prescindiu de aporte tecnológico além do já utilizado para obtenção dos resultados que se apresentam mais adiante. De qualquer modo, uma organização mínima por assunto foi realizada, com anotação manual dos dados obtidos. Posteriormente foram feitas duas revisões dos dados, não havendo discrepância entre eles.[41]

O primeiro filtro realizado foi em relação à classe processual (HC ou RHC), no que foram extraídos 204 acórdãos sem repetição, sendo realizada uma nova triagem para excluir processos oriundos do Tribunal do Júri, já que, nestes casos, o juízo de admissibilidade se dá pela prolação da decisão de pronúncia ou da sentença de impronúncia. Restaram 107 acórdãos, cuja análise abrangeu leitura completa da ementa e votos; contudo, alguns julgados apresentam melhor compreensão na ementa do que no próprio teor do voto.

Finalizada a coleta dos dados, foram elaboradas algumas diretrizes para a investigação tanto qualitativa, quanto quantitativa: i) tipo de processo; ii) ocorrência de divergência; iii) trancamento da ação penal

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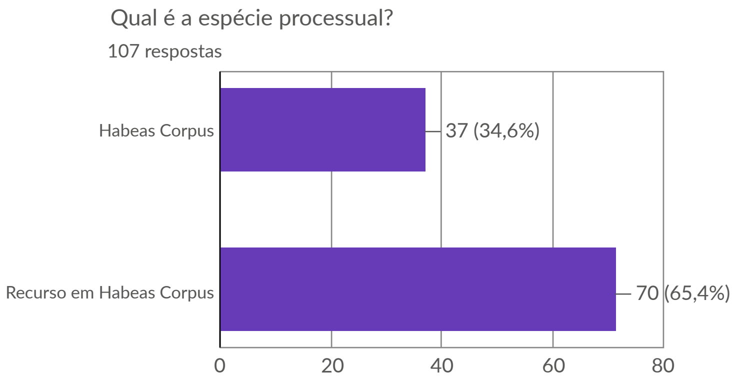
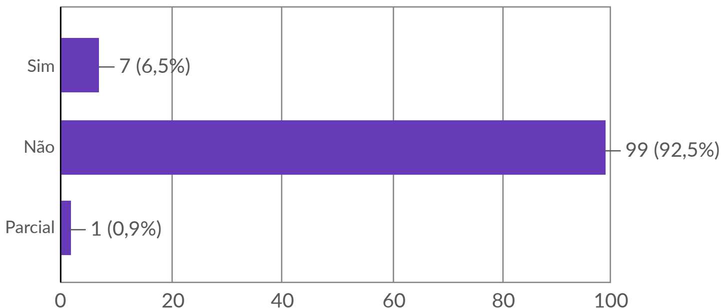
[41] Embora utilizando-se de metodologia ligeiramente distinta, com outras expressões-chave de pesquisa e com quantitativo superior (145) ao analisado neste trabalho (107), o artigo escrito em coautoria por Antônio Santoro, Mauro Borges Neto e Nilo Pompílio da Hora chega às mesmas conclusões deste trabalho no tocante à insubmissão destas decisões à necessidade de fundamentação, em descompasso com o texto constitucional. (SANTORO, Antônio Eduardo Ramires; BORGES NETO, Mauro Leibir Machado; DA HORA, Nilo César Martins Pompílio. A (in)exigibilidade da decisão que ratifica o recebimento da denúncia: uma análise da jurisprudência do Superior Tribunal de Justiça. *Revista Direitos Fundamentais & Justiça*, Belo Horizonte, a. 13, n. 40, p. 85-113, jan./jun. 2019).

originária; iv) referência ao art. 93, IX da CF no corpo do acórdão; v) órgão do STJ responsável pelo julgamento. Com relação à existência ou não de divergência, verificou-se que tal dado é relevante para demonstrar que ela não ocorreu, ou seja, em 100% dos resultados obtidos os votos foram por unanimidade.

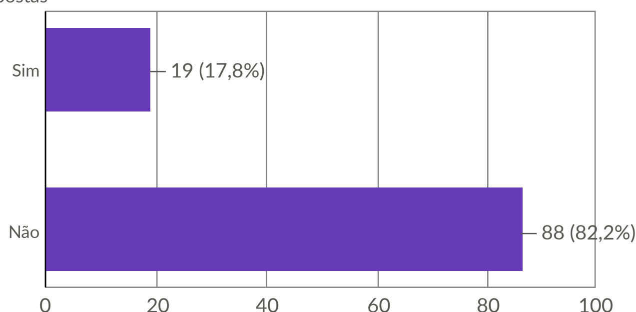
No que se refere ao tipo de processo, observou-se que a maioria dos acórdãos analisados são de RHC, representado 65,4% dos julgados analisados. Os HC representaram 34,6%, o que sugere a efetivação da jurisprudência defensiva do STJ em relação a não aceitar HC substitutivo de RHC.



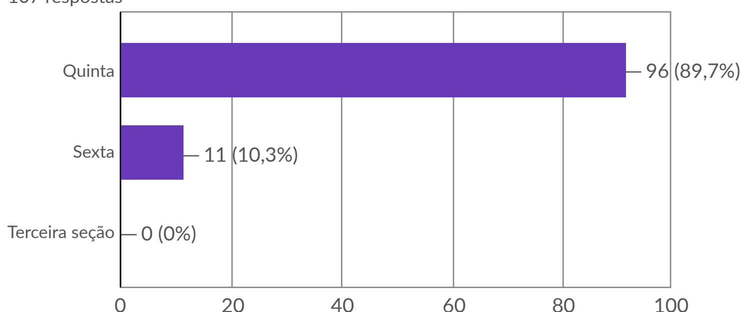
Buscou-se também saber se dentre os julgados houve trancamento da ação penal. Em 92,5 % dos acórdãos não ocorreu o referido trancamento do processo penal, por fundamentos que serão analisados no tópico terceiro deste estudo.



Depois, investigou-se se nos julgados houve citação do comando normativo constitucional do art. 93, IX da CF. Em 82,2% dos acordãos analisados não houve qualquer menção à obrigataoriedade da fundamentaçao das decisões.



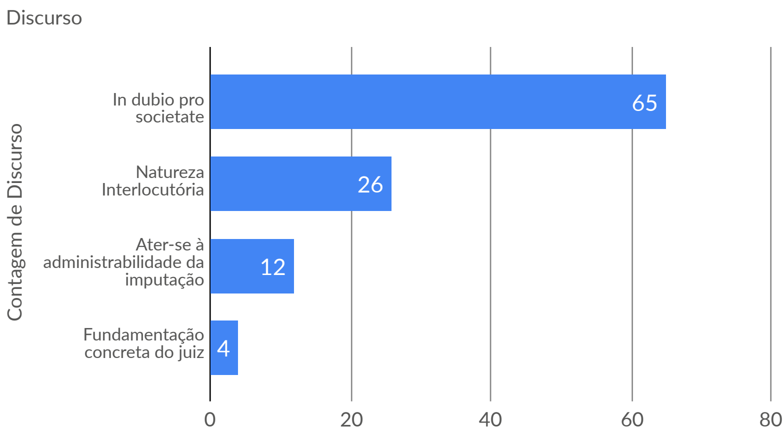
Por fim, buscou-se identificar qual orgão julgador dentro do STJ possuía maior incidência dos julgados referentes ao art. 396 do CPP. A maioria dos julgados é oriunda da 5ª Turma, representando um percentual de 89,7%. Na 6ª Turma há apenas 10,3 % dos julgados e em relaçao à 3ª Seção não houve nenhum julgado.



No próximo tópico será feito o estudo qualitativo dos acórdãos, de modo a saber o "estado da arte" do discurso em relação ao juízo de admissibilidade da acusação no âmbito do STJ.

3. O discurso do STJ em torno do juízo de admissibilidade da denúncia

O debate toma forma ao serem analisados os 107 acórdãos, dos quais destacam-se quatro expressões que foram selecionadas por serem repetitivas nos julgados, a saber: i) *in dubio pro societate*; ii) a decisão de recebimento possui natureza interlocutória cautelar; iii) o juízo deve ater-se à admissibilidade da imputação; e, por último, iv) o argumento da exigência da fundamentação em concreto:



O discurso mais utilizado nos julgados pesquisados[42] entendeu que na fase do juízo de admissibilidade vigora o *in dubio pro societate,* isto é, na dúvida quanto à existência da pretensão punitiva, deve ser a decisão em favor da sociedade, com o prosseguimento da acusação, uma vez que não deve se falar em encerrar o "*jus accusationis* do Estado", com ressalva nas hipóteses de manifesta carência de justa causa.

O discurso em torno do *in dubio pro societate* apresenta falha em sua estrutura jurídica. Em primeiro lugar, a única presunção que se tem no processo é da inocência (art. 5º, LVII da CF, art. 8º, 2, da CADH). Não existe densidade normativa para que se eleve o referido brocado ao

[42] Destaca-se o julgado STJ. *RHC n. 88.892/MA*. 5ª Turma. Rel. Ministro Ribeiro Dantas. 20 fev. 2018.

patamar de princípio constitucional, tendo em vista ser todo princípio portador de uma regra que o sustenta[43]. O argumento *in dubio pro societate* é tão paradoxal que há decisões em que ele é utilizado tanto para conceder a ordem[44] como também para negá-la. Aponta-se como uma "gambiarra retórica"[45] utilizada por comodismo dos julgadores em escapar da obrigação de fundamentar as decisões judiciais e, mais do que isso, manter consolidada a mentalidade inquisitória no Brasil.

Na estrutura dialética que envolve o processo penal, o que se põe em dúvida é, tão somente, a acusação[46] e não a presunção da inocência do acusado. Ao pairar dúvidas quanto à existência de pretensão acusatória, deve-se absolver o acusado por falta de provas, ou, em um estágio inicial, recusar-se o recebimento da denúncia. A ação processual penal é guiada pela busca da certeza (verdade), e a presunção da inocência tem como função a produção da incerteza[47], assim, na dúvida *in dubio pro reo*.

A aplicação do argumento do *in dubio pro societate* passa a ser considerado um contrassenso ao texto constitucional. Por isso, sua aplicação só se justifica por uma negação a ele, em decorrência da existência de ranços inquisitórios nos atores da persecução criminal[48] e também do magistrado

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[43] FERRAJOLI, Luigi. Constitucionalismo principialista e constitucionalismo garantista. Trad. André Karam Trindade. *In*. STRECK, Lenio Luis. KARAN, André Trindade (Org). *Garantismo, hermenêutica e (neo) constitucionalismo*: um debate com Luigi Ferrajoli. Primeira parte. Porto Alegre: Livraria do Advogado, 2012. p. 39.

[44] No HC n. 426.706/MG, julgado pela 5ª Turma do STJ, utiliza o discurso em torno do *in dubio pro societate para* concedeu a ordem de ofício para trancar parcialmente ação processual penal quanto a um dos crimes imputados

[45] ROSA, Alexandre Morais da. KHALED JR., Salah H. *In dubio pro hell:* profanando o sistema penal. 3 ed. Florianopolis: Emais, 2018, p. 137.

[46] PACELLI, Eugênio. O processo penal como dialética da incerteza. *Revista de Informação legislativa*. Brasília, n. 183, jul.-set., 2009, p.74.

[47] PRADO, Geraldo. *Prova penal e sistema de controle epistêmicos*... Obra citada. p. 17.

[48] SANTIAGO, Nestor E. A.; BRAGA, I. F.; MAMEDE, J. M. B.; FRANCO, B. S. D.; XIMENES, L. M. P. Dúvida e processo penal: procedimento do tribunal do júri, decisão de pronúncia e o *in dubio pro societate*. *Católica Law Review*, Lisboa, v. III, n. 3, p. 43-61, 2019. p. 56

Em segundo momento, foram diagnosticados 26 julgados,[49] em que o discurso decisório aponta para a natureza interlocutória da decisão do juízo de admissibilidade e, com isso, passa a não exigir sua fundamentação. Tal entendimento é incompatível com o texto da Constituição Federal, uma vez que em seu bojo assegura a todo acusado o direito ao devido processo legal (art. 5º, LIV) e a efetivação desta garantia passa por uma fundamentação da decisão judicial (art. 93, IX).

O simples fato de se imputar criminalmente a alguém um fato típico penal já produz efeitos estigmatizantes, e a apresentação da acusação, que nem sempre vem a reboque de uma investigação preliminar, traz ao imputado as consequências das penas processuais[50]. Assim, torna-se necessário um maior rigor no filtro da pretensão acusatória, sendo necessário proteger o acusado das penas processuais provocadas pela acusação[51].

Destarte, o juízo de admissibilidade da denúncia é de natureza decisória, o que pode parecer redundante, mas numa leitura da CF – toda decisão deve ser fundamentada, sob pena de nulidade - e da Lei n. 11.719/08, que inclui uma fase intermediária ao qual o juízo, ao verificar a existência da pretensão acusatória, poderá transformar o cidadão em acusado, devendo este suportar toda a carga do etiquetamento; logo, não se pode falar em ausência de conteúdo decisório. Tal necessidade de fundamentação do juízo de admissibilidade representa um avanço no não só para o direito de defesa, mas para o próprio contraditório.

O terceiro argumento pinçado, repetido em 12 acórdãos, entende que o juízo deve se atentar aos pressupostos processuais, das condições da ação penal, bem como da materialidade e autoria delitivas, isto de

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[49] Destaca o seguinte trecho "Com efeito, nos termos da jurisprudência desta Corte Superior, é perfeitamente admissível e válido o recebimento da denúncia sem fundamentação" (STJ. HC n. 166.337/SC. 5ª Turma. Rel. Minª. Laurita Vaz, 12 de junho 2012. p. 3)

[50] As penas processuais são definidas por Aury Lopes Jr. como a elevada carga que o sujeito passivo deve suportar durante o processo, dentre estas destaca os "estigmas social e jurídica, angústia e sofrimento psíquico, constrangimento inerente à submissão ao exercício do poder estatal etc". (LOPES JR. Aury. *Direito processual penal*. 16. ed. São Paulo: Saraiva, 2019, p. 730)

[51] ZILLI, Marcos. O povo contra... As condições da ação penal condenatória. Velhos problemas. Novas ideias. *Cadernos Jurídicos*, São Paulo, n. 44, p.147-162, jul.set. 2016.

maneira sucinta, para que se atenda no mínimo possível à Constituição[52] no que tange à necessidade de fundamentação.

Ao endossar tal entendimento, transforma-se o juízo de admissibilidade em um instituto de natureza meramente procedimental, isto é, apenas um despacho judicial, de caráter meramente impulsionador do processo. Aponta que o recebimento da denúncia não exige uma cognição complexa, mas tão somente se deve constatar a "regularidade da peça acusatória inicial".

Entretanto, a decisão proferida no juízo de admissibilidade da acusação não possui caráter definitivo, mesmo que de absolvição ou rejeição, o qual ainda estará pendente de impugnação naquele e nesta poderá novamente ser apresentada. O juízo de admissibilidade trata de um juízo provisório da culpabilidade[53], isto é, de uma probabilidade que poderá ou não ser confirmada em sentença. Assim, pretende nesta fase intermediária verificar se há viabilidade da propositura da ação processual penal, em que deve ser feita à luz do princípio da estrita jurisdicionariedade, verificabilidade e da comprovação empírica da acusação[54].

Por fim, em apenas quatro acórdãos[55] foi exigido que a decisão deveria apresentar de maneira pormenorizada se estariam presentes os pressupostos para a deflagração da persecução penal. Tal entendimento cumpre o comando normativo constitucional do dever de fundamentação

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[52] STJ. *HC Nº 248.795/PB*. 6ª Turma. Rel. Ministra Maria Thereza de Assis Moura. 19 ago. 2014.

[53] GIACOMOLLI, Nereu José. *O devido processo Penal*: abordagem conforme a Constituição Federal e o Pacto de São José da Costa Rica. 2 ed. São Paulo: Editora Atlas, 2015, p. 235.

[54] FERRAJOLI, Luigi. *Direito e razão*. 4 ed. São Paulo: Revista dos Tribunais, 2014, p. 558.

[55] Destaca o seguinte trecho "É certo que não se pode exigir, nesta fase do procedimento, uma cognição plena da matéria elencada pela defesa, visto que uma decisão de mérito só será possível após a regular instrução do processo. Contudo, em contraponto, não se pode confundir fundamentação concisa com ausência de fundamentação. A análise da resposta à acusação merece, sim, uma manifestação concreta do Juiz." (STJ. RHC n. 59.930/SP. 6ª turma. Rel. Min Sebastião Reis Júnior. 04 jun. 2016. p. 7.). Ver, ainda: STJ. RHC n. 60.705/PE. 5ª turma. Rel. Min Ribeiro Dantas. 05 out. 2017; STJ. RHC n. 74.176/RJ. 5ª turma. Rel. Min Reynaldo Soares da Fonseca. 22 nov. 2016.; STJ. HC n. 253.920/MG. 6ª turma, Rel. Min Maria Thereza Assis Moura. 05 ago. 2014.

das decisões, isto é, do controle empírico da acusação. E tal compreensão é imposta pelo art. 93, IX da CF, com detalhamento maior tanto no § 2º do art. 315 do CPP.

Portanto, a decisão de recebimento da denúncia deve ser fundamentada, não permitindo que o julgador aponte apenas o ato normativo sem explicar relação com o fato ou que não enfrente todas as questões suscitadas pela defesa.

Considerações Finais

A pesquisa demonstrou que dos 107 acórdãos analisados, 65 destes apontaram que no juízo de admissibilidade da denúncia vigora o argumento do *in dubio pro societate*. Já em 26 julgados, a decisão da fase intermediária possui natureza interlocutória. Outros 12 determinaram que o juiz deve se ater às condições da ação processual para que se apresente fundamentação sucinta sobre o recebimento ou rejeição da denúncia. Por fim, em 4 julgados entendeu-se que o juiz deve apresentar fundamentação concreta.

Desta forma, o STJ, ao majoritariamente entender que no juízo de admissibilidade da denúncia vigora *in dubio pro societate* e consequentemente reforçar a desnecessidade de uma fundamentação, mina uma das bases do constitucionalismo garantista. A Constituição Federal, ao determinar em seu art. 93, IX, que toda decisão judicial deve ser fundamentada, procura assegurar uma garantia ao acusado em entender que o juiz está exercendo sua função de maneira imparcial e racional nos termos do sistema legal vigente.

O processo penal tem como escopo a proteção das garantias fundamentais e a proteção do jurisdicionado, regulando o poder punitivo estatal. Assim, o juízo de admissibilidade da acusação estabelecido pela Lei n. 11.719/08 é estruturado para prover um controle maior sobre a denúncia, a fim de evitar a proliferação de acusações temerárias.

Nesta medida, em uma leitura do texto constitucional a decisão sobre o juízo de admissibilidade possui caráter decisório, uma vez que o CPP deixa claro a existência de uma fase intermediária entre a investigação preliminar e a instrução probatória e esta mudança do status (de

investigado para acusado) necessita de uma demonstração racional por parte do estado-juiz[56]. Posto isto, o juiz, ancorado no art. 93, IX da CF, e agora também no § 2º. do art. 315 do CPP, deve fundamentar a decisão.

Conclui-se que o Superior Tribunal de Justiça oferece uma resposta inadequada ao texto constitucional ao entender que o juízo de admissibilidade seria apenas uma fase discricionária, a qual o juiz poderia prosseguir com a persecução penal, mesmo no estado de dúvida.

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[56] Muito embora não tenham se valido de pesquisa quantitativa, mas meramente documental, as conclusões de Marcelo Souza e Jussara Jacintho são neste mesmo sentido. (SOUZA, Marcelo Serrano; JACINTHO, Jussara Maria Moreno. O recebimento implícito ou tácito da denúncia no processo penal como hipótese de violação aos princípios do devido processo legal e da motivação das decisões. *Revista Direito Penal, Processo Penal e Constituição*, Brasília, v. 2, n. 1, p. 556-571, jan./jun. 2016)

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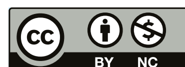

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Teoria da Prova Penal

Criminal evidence theory

Da Necessidade de Corroboração Probatória para a Reconstrução de Sentidos em Diálogos Obtidos por Interceptações Telefônicas

The Need for Evidential Corroboration for the Reconstruction of Meanings on Dialogues Obtained by Telephonic Interceptions

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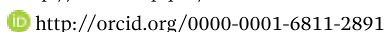
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Resumo: O presente estudo pretende abordar a questão da reconstrução de sentidos de diálogos obtidos a partir de interceptações telefônicas. Assim, na primeira parte apresenta conceitos da semiótica e da epistemologia para, na segunda parte, aplica-los a um caso real. Tudo a fim de responder a dois questionamentos: (i) a reconstrução de sentidos de textos, palavras ou frases pode se dar de maneira independente do contexto de sua utilização?; (ii) como é possível conhecer o contexto de uma comunicação? A metodologia utilizada é a revisão bibliográfica de escritos da semiótica e da epistemologia, utilizando-se caso real para ilustrar.

Palavras-chave: Prova; Gravações; Epistemologia aplicada ao processo penal; Semiótica aplicada ao processo penal; Peso da prova combinada.

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Abstract: *The present study is aimed to deal with the reconstruction of meanings of intercepted dialogues. Being so, on the first part, it presents concepts of semiotics and epistemology; on the second part, those concepts are applied to a real case. All of that aiming to answer two questions: (i) is the reconstruction of meanings of texts, words or sentences independent of the context of its use? (ii) how is it possible to get to know the context of the communication? The methodology used is the analysis of bibliography on semiotics and epistemology, using a real case as example.*

Keywords: *Evidence; Recordings; Epistemology applied to criminal procedure; Semiotics applied to criminal procedure; Weight of combined evidence.*

Sumário: Introdução. 1. As palavras, frases e textos como símbolos. 1.1 A semiótica e os símbolos. 1.2. Lições da epistemologia: a necessidade de maior completude do material probatório. 2 O problema e formas de solução. A necessidade da prova do contexto para a interpretação da linguagem. 2.1 O problema. 2.2. A indexicalidade do som, o simbolismo da linguagem e a necessidade de busca de sentidos possíveis. 2.3. A busca pela corroboração das hipóteses e o peso da combinação de provas. Considerações finais. Bibliografia.

Introdução

O uso da linguagem está em toda a interpretação e aplicação do Direito. Curiosamente, entretanto, a teoria geral do direito preocupou-se muito nas últimas décadas em desenvolver teorias e doutrinas a respeito da interpretação da linguagem no plano da aplicação do direito (isto é, interpretação dos textos normativos), mas pouco ou quase nada[2] a respeito da reconstrução de sentidos relacionados a provas que envolvam a linguagem[3].

[2] Constitui exceção a essa afirmação o artigo de FANTINI, Daniel Fabio. "Interceptação Telefônica e Linguagem". *Revista Brasileira de Ciências Policiais*, v. 3, n. 1, p. 11-25, jan/jun 2012, em que o autor trabalha com as ideias de Searle para abordar os aspectos relacionados aos atos de fala indiretos nos diálogos obtidos mediante interceptações telefônicas.

[3] As referências à semiótica feitas no presente artigo possuem escopo muito menor do que aquele conferido por parte da doutrina, por influência de

Assim, apesar de reconhecida a polissemia das palavras, a independência de sentidos e a necessidade de escolha entre sentidos possíveis por parte do intérprete no campo da interpretação de textos legais, pouca atenção foi dada para esses mesmos atributos quando tais interpretações dizem respeito à atribuição de significados à linguagem utilizada em diálogos obtidos a partir de interceptação de comunicações telefônicas.

Duas são as perguntas fundamentais: (i) a reconstrução de sentidos de textos, palavras ou frases pode se dar de maneira independente do contexto de sua utilização?; (ii) como é possível conhecer o contexto de uma comunicação?

O presente estudo pretende responder tais questionamentos partindo de conhecimentos da semiótica, para demonstrar que a linguagem, como conjunto de símbolos que é, possui atribuição de significados arbitrária, que dependem do contexto da comunicação e de hábitos coletivos

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CORDERO, Franco. *Procedura Penale.* 9ª. Ed. Milão: Giuffrè, 2012, p. 574. O autor refere a uma aplicação geral da semiótica ao campo probatório, referindo-se ao que chama de "semiótica das provas"; para o autor, a questão centra-se em que é "fenômeno atípico e estatisticamente minúsculo a ciência [conhecimento] direta", de modo que, fazendo referência à teoria carneluttiana dos "equivalentes sensíveis" (CARNELUTTI, Francesco. *La Prova Civile*. 2a. ed. Roma: Edizioni dell'Ateneo, 1947, p. 122), sustenta que as provas seriam "signos do fato a ser conhecido". No mesmo sentido, adotando a ideia de CORDERO, LOPES JR., Aury. *Direito Processual Penal.* 17ª. Ed. São Paulo: Saraiva Educação, 2020, p. 557. MORAES, Ana Luísa Zago de. "Prova Penal: Da Semiótica À Importância Da Cadeia De Custódia". *Revista Brasileira de Ciências Criminais*. Vol. 132, p. 117–138, 2017. Não me parece a melhor solução, todavia, reduzir todo o campo da prova à semiótica. Afinal, como os próprios semiólogos se referem, a semiótica não se preocupa em saber "se o unicórnio existe ou não (...): ao passo que é importante saber como, em um certo contexto, a forma significante 'unicórnio' recebe um determinado significado em base a um sistema de convenções linguísticas" (ECO, Umberto. *La Struttura Assente.* Introduzione alla Ricerca Semiologica. Milano: Ed. Bompiani, 1968, p. 34). O papel de preocupar-se com a busca do que realmente ocorreu, com a qualidade das provas e dos raciocínios formulados, é, na minha opinião, da epistemologia, e não da semiótica. Minha referência à semiótica no presente estudo, portanto, é bastante mais modesta: pretendo socorrer-me dessa justamente no sentido proposto por ECO, isto é, para reconhecer que a linguagem, esta sim, possui atribuição de significados arbitrária (na medida em que os símbolos, como será visto, não possuem conexão causal com a natureza, mas sim com convenções), de modo que a mera existência de símbolos (como, por exemplo, a palavra "unicórnio") deve, necessariamente, passar por um processo de reconstrução de sentidos para que se possa reconstruir o conteúdo, por exemplo, de um diálogo.

de referência. Assim, sem provas robustas a respeito dos contextos e hábitos envolvidos em uma comunicação, de forma clara e corroborada, qualquer tentativa de atribuição de significados pode ser, também dentro de um processo, bastante perigosa.

1 As palavras, frases e textos como símbolos

1.1 A semiótica e os símbolos

A semiótica é o campo do conhecimento que se preocupa com o estudo dos signos, "em todas as suas formas de manifestações, (...), normais ou patológicos, linguísticos e não linguísticos, pessoais ou sociais"[4]. Há muita discussão a respeito do significado de um *signo* (debate esse que refoge completamente ao escopo do presente trabalho), mas de maneira direta e concisa pode-se dizer que se trata de "um objeto que "está por outro [*stands for another*] para alguma mente"[5], "uma expressão que aponta para o conteúdo fora do próprio signo"[6]. O signo "deve ser capaz de estar conectado (...) a outro signo do mesmo objeto, ou ao próprio objeto"[7]. Isso é, a uma ideia ou diretamente a um objeto.

A relação dos signos com os objetos ou com as ideias, entretanto, nem sempre é igual. De acordo com Peirce, os signos podem ser divididos em três categorias, a saber, índices (*indexes*), ícones ou símbolos[8].

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[4] MORRIS, *Signification and Significance.* A Study of the Relations of Signs and Values. Cambridge-Massachusetts, The MIT Press, 1964, p. 1.

[5] PEIRCE, Charles. "On the nature of Signs". [1873]. In: HOOPES, James (org.). Peirce on Signs. Chapel Hill e Londres: The University of Carolina Pressa, 1991, p. 313. Como adverte NÖTH, Winfried. *Handbook of Semiotics.* Bloomington & Indianapolis, 1990, p. 79, muitas foram as definições a respeito de signos. Adoto aqui a nomenclatura de PEIRCE, que é perfeitamente adequada para o escopo do presente trabalho.

[6] HJELMSLEV, Louis. *Prologomena to a Theory of Language.* Trad. Fracis Whitfield. Londres: The University of Wiscosin Press, 1969, p. 45.

[7] PEIRCE, Charles. "Some Consequences of Four Incapacities. [1868]. In: HOUSER, Nathan; KLOESEL, Christian (orgs.). *The Essencial Peirce.* Vol. 1. Bloomington: Indiana University Press, 1992, p. 40.

[8] PEIRCE, Charles. Sign. [1901]. In: HOOPES, James (org.). *Peirce on Signs.* Chapel Hill e Londres: The University of Carolina Press, 1991, p. 519.

Os índices são aqueles que possuem uma relação causal automática com a realidade, variando de acordo com essa. É o caso, por exemplo, de uma radiografia, cujo resultado varia em função de o osso estar ou não quebrado, e de uma fotografia, em que, de acordo com o que se apresenta diante da câmera, o resultado final varia (uma pessoa sai de olho fechado ou de olho aberto na fotografia, a depender de como estava no momento em que a fotografia foi tirada).

Os ícones, de seu turno, possuem uma relação de semelhança com a ideia ou o objeto, não dependendo diretamente da realidade e nem variando com ela. Uma pessoa que faz um retrato pode desenhar a outra pessoa sorrindo, ainda que ela esteja posando séria, sem sorrir[9]. Uma pessoa pode desenhar um unicórnio, ainda que unicórnios não existam.

Os símbolos, por fim, não possuem relações causais ou automáticas com a realidade (o "mundo lá fora"), mas sim com convenções que são previamente estabelecidas. É o caso de uma placa de "sentido proibido"[10]: na Itália, tal indicação é representada por um círculo vermelho com um retângulo branco na horizontal colocado no centro. Se tal placa fosse utilizada no Brasil não teria sentido algum para os brasileiros, visto que a mesma indicação, aqui, é representada por uma seta preta cortada por um traço vermelho diagonal.

Um diálogo gravado, portanto, possui caráter de índice e de símbolo. O primeiro porque a gravação varia de acordo com os sons que ocorreram na realidade: se alguém fala mais alto, a gravação regista um som mais alto, se alguém nada diz, a gravação regista o silêncio. E de símbolo porque as palavras, expressões e frases são determinadas de acordo com convenções previamente estabelecidas.

A questão central demonstrada pela semiótica em relação aos símbolos é que esses possuem um sentido ou outro somente em determinada sociedade, em determinado grupo, em determinado contexto temporal

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[9] Usando o exemplo de Mona Lisa e da Sra. Giocondo, ECO, Umberto. *La Struttura Assente*. Introduzione alla Ricerca Semiologica. Milano: Ed. Bompiani, 1968, p. 108.

[10] ECO, Umberto. *La Struttura Assente*. Introduzione alla Ricerca Semiologica. Milano: Ed. Bompiani, 1968, p. 108.

e cultural. Afinal, a ligação entre o significante e o significado é *arbitrária*[11] – depende justamente de convenções previamente estabelecidas.

Um mesmo signo pode carregar, portanto, diversos sentidos[12]. A palavra *eco,* para um físico, significa o fenômeno de um som que bate em um anteparo e retorna; para um piloto de avião, a palavra *eco* significa a letra *e*. Para um médico, a palavra *eco* é a versão reduzida da palavra *ecografia*, de modo que quando um gastroenterologista comunica a um colega que solicitou uma *eco abdominal* esse não pensará se tratar de um pedido pela letra *e* ou de um pedido para que o paciente emita um som diante de um anteparo.

O contexto da comunicação pode determinar, ademais, a utilização das palavras e frases em sentidos *denotativos* ou *conotativos*. Grosseiramente, pode-se dizer que os sentidos denotativos são os literais, e os conotativos são os sentidos figurados. Assim, quando alguém diz que outra pessoa é grande, em sentido literal estará dizendo, por exemplo, que se trata de alguém alto ("você viu o filho de Fulano recentemente? Nossa, ele cresceu muito rápido, está muito grande!"); ao passo que, em sentido figurado, poderá estar dizendo que se trata de uma pessoa com enorme importância ("Fulano é um grande do processo penal").

Apesar da pluralidade de sentidos denotativos e conotativos que uma palavra pode possuir, há, em um contexto e em um local específico, sentidos mínimos em que uma palavra ou expressão vêm utilizados.

A língua, como já mencionado, assim como qualquer outro sistema de símbolos, parte de hábitos coletivos, ou mesmo de convenções[13], em uma relação de dupla influência: assim como a língua afeta os hábitos coletivos de atribuição de sentidos aos símbolos, também os hábitos coletivos

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[11] ECO, Umberto. *La Struttura Assente.* Introduzione alla Ricerca Semiologica. Milano: Ed. Bompiani, 1968, p. 35. No mesmo sentido, abordando a linguagem, SAUSSURE, Ferdinand de. *Cours de Linguistique Générale.* [1915]. 3a. ed. Payot: Paris, 1931, p. 75.

[12] Conforme MORRIS, Charles. *Signification and Significance.* A Study of the Relations of Signs and Values. Cambridge-Massachusetts, The MIT Press, 1964, p. 3, "signos (...) admitidos como tendo significação diferem bastante no tipo de significação que possuem".

[13] SAUSSURE, Ferdinand de. *Cours de Linguistique Générale.* [1915]. 3a. ed. Payot: Paris, 1931, p. 75-76; ECO, Umberto. *La Struttura Assente.* Introduzione alla Ricerca Semiologica. Milano: Ed. Bompiani, 1968, p. 34.

afetam a língua, que vai se alterando com a passagem do tempo. Daí que os símbolos linguísticos sejam, por um lado, imutáveis – na medida em que um só indivíduo não pode alterar os hábitos coletivos –, e, por outro lado, mutáveis[14] – na medida que, com o passar do tempo, diversas podem ser as alterações dos hábitos coletivos que influenciarão a atribuição de sentidos.

A relação entre os sentidos mínimos e a polissemia das palavras e símbolos em geral podem ser vistas com o exemplo da palavra "cachorro", que poderia denotar tanto um dogue alemão quanto um poodle (isso sem falar em diversos sentidos conotativos). Por outro lado, "cachorro" não pode ser interpretado como o sinônimo de uma hortênsia, ou de um abajur. E justamente aí aparecem os sentidos mínimos[15].

Apesar de os signos poderem ser vistos como "transportadores de sentidos"[16], portanto, a significação é um processo[17], que envolve, naturalmente, o signo em si (e, naturalmente, quem ou o que o criou), mas também a *interpretação*. O que é importante notar desde logo é que a semiótica, nesse sentido, preocupa-se em entender como "a forma significante 'unicórnio' recebe um determinado significado com base em um sistema de convenções linguísticas"[18]; e não em saber "se o unicórnio existe ou não (...)"[19].

1.2 Lições da epistemologia: a necessidade de maior completude do material probatório

Se a semiótica não se preocupa com saber se o que é descrito pela linguagem existe ou não, é preciso recorrer-se, em um processo que se

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14 SAUSSURE, Ferdinand de. *Cours de Linguistique Générale*. [1915]. 3a. ed. Payot: Paris, 1931, p. 82.

15 ÁVILA, Humberto. *Teoria dos princípios:* da definição à aplicação dos princípios jurídicos. 18a. Ed. São Paulo: Malheiros Editores, 2018, p. 54.

16 HJELMSLEV, Louis. *Prologomena to a Theory of Language*. Trad. Fracis Whitfield. Londres: The University of Wiscosin Press, 1969, p. 44.

17 ECO, Umberto. *La Struttura Assente*. Introduzione alla Ricerca Semiologica. Milano: Ed. Bompiani, p. 31.

18 ECO, Umberto. *La Struttura Assente*. Introduzione alla Ricerca Semiologica. Milano: Ed. Bompiani, p. 34.

19 ECO, Umberto. *La Struttura Assente*. Introduzione alla Ricerca Semiologica. Milano: Ed. Bompiani, p. 34.

baseia em conhecer o que realmente ocorreu para atribuir consequências jurídicas, para algum outro ramo do conhecimento que tenha tal preocupação. Tal ramo é justamente a epistemologia, o ramo da filosofia que estuda a obtenção de conhecimento[20]. A epistemologia, naturalmente, não substitui a teoria jurídica, mas serve para buscar melhorar nossas "regras ou, melhor, linhas mestras para a condução de uma apuração [*inquiry*]"[21], reconhecendo quais ambientes "apoiam [*are supportive of*] e quais são hostis em relação à apuração bem-sucedida"[22].

Uma dessas questões é saber como, dentro e fora de um processo, ocorre o aumento do grau de justificação de uma determinada hipótese. Como é possível dizer que a afirmação "cigarro causa câncer" está mais justificada epistemicamente do que "extrato de casca de laranja mata o coronavírus"? E a epistemologia sugere três eixos centrais para tal aumento de corroboração. O primeiro é a prova direta da própria hipótese [*suportiveness*]; o segundo, quão seguro é o "encaixe" da prova em questão com o que já sabemos previamente, independentemente da hipótese [*independent security*][23]. E em terceiro lugar, a quantidade de provas relevantes incluídas na busca, a chamada *comprehensiveness*[24]. E os três eixos estão absolutamente interligados[25].

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[20] Sobre a epistemologia aplicada ao processo penal vide BADARÓ, Gustavo. *Epistemologia Judiciária e Prova Penal*. São Paulo: RT, 2019, esp. pp. 131 e ss.

[21] HAACK, Susan. *Manifesto of a Passionate Moderate*. Chicago: University of Chicago Press, 1993, p. 130-131.

[22] HAACK, Susan. *Manifesto of a Passionate Moderate*. Chicago: University of Chicago Press, 1993, p. 130-131.

[23] HAACK, Susan. *Evidence and Inquiry*. 2a. Ed. New York: Prometheus Books, 2009, p. 132.

[24] HAACK, Susan. *Evidence and Inquiry*. 2a. Ed. New York: Prometheus Books, 2009, p. 132.

[25] O funcionamento, segundo HAACK, Susan. *Evidence and Inquiry*. 2a. Ed. New York: Prometheus Books, 2009, p. 129 e ss., pode ser comparado a um jogo de palavras cruzadas. As entradas no jogo devem não só "satisfazer" as dicas dadas, mas também as palavras que se entrecruzam. Se, preenchendo a cruzadinha, imagina-se que no espaço de quatro letras a palavra seja "amor" (cruzando-se com a palavra "omelete", tendo o "m" em comum), será necessário verificar se a entrada, independentemente de qualquer coisa, "satisfaz" a dica. Se essa for, por exemplo, "tipo de pneu utilizado em automobilismo", não haverá suporte para definir que a palavra é, de fato, "amor". Entretanto, não dependerá somente disso, mas também da correção da entrada da

A *comprehensiveness*[26], que auxiliará no presente ensaio, diz respeito à completude tendencial do material probatório. Isso quer dizer que qualquer apuração dos fatos que realmente pretenda apurar os fatos deve ter o fim de incluir, tendencialmente[27], todas as provas relevantes[28]. Isso não quer dizer, naturalmente, que as provas devam ser obtidas a qualquer custo, desrespeitando as regras do jogo, pois a apuração dos fatos, apesar de ser o fim principal do procedimento probatório, não é o único fim desse e nem do processo; quer, isto sim, dizer que, aumentando a *comprehensiveness,* aumenta-se a qualidade da apuração e do grau de justificação: "um conjunto probatório maior (...) é geralmente um indicador melhor do *truth-value* de uma hipótese do que um menor".[29]

A pandemia do coronavírus, em 2020, pode dar um bom exemplo: diante da pandemia, os cientistas passaram a formular e a testar hipóteses a respeito do comportamento do vírus, da sua estrutura, bem como de como criar substâncias e/ou formas de exterminá-lo. Iniciou-se, assim, uma apuração, feita por diversas pessoas, em diversos lugares do mundo. Tal apuração não começou, entretanto, do zero. Afinal, já existiam conhecimentos previamente confirmados ao longo do tempo por diversos outros experimentos e testes, por exemplo, a respeito da gravidade, da osmose, da estrutura da proteína, da estrutura de determinadas substâncias etc.

Se um cientista cria, portanto, a hipótese de que o coronavírus possui uma camada de gordura que envolve a sua cápsula, utilizará os conhecimentos disponíveis na data de hoje, para predizer que o detergente será capaz de destruir tal camada. O evento será submetido a

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palavra "omelete". Ou seja, p. "omelete" dependerá de "amor" e vice-versa, e cada uma dessas dependerá de suas dicas. Quanto mais essas se "complementarem", mais justificado estará o preenchimento.

[26] HAACK, Susan. *Evidence and Inquiry*. 2a. Ed. New York: Prometheus Books, 2009, p. 132.

[27] Digo "tendencialmente" porque muitas das provas relevantes podem ser desconhecidas ou inacessíveis, mas as provas relevantes disponíveis devem, tendencialmente, fazer parte da apuração, a fim de que essa seja o melhor possível.

[28] HAACK, Susan. *Manifesto of a Passionate Moderate*. Chicago: University of Chicago Press, 1993, p. 68.

[29] GOLDMAN, Alvin I. *Knowledge in a Social World*. Oxford: Oxford University Press, 1999, p. 292.

experimentos, buscando isolar tal fator. Se a predição se confirmar, a hipótese terá recebido um grau de suporte. Se não se confirmar, será necessário construir outras hipóteses. Será que essa camada de gordura do coronavírus possui alguma proteção ou algum tipo de resistência ao detergente? Será que a camada não é de gordura? Será que estávamos certos em pensar que o detergente é eficiente para destruir a gordura?[30]

O que a ciência faz, então, é contar com diversas pessoas, em diversos lugares, fazendo hipóteses a respeito de determinados fatos, buscando explicações e, posteriormente, confirmações a respeito do que acontece(u) no mundo lá fora – algo que leva tempo. Quanto mais pesquisas forem estabelecidas ao longo do tempo, maior será o número de provas relevantes, aumentando a *comprehensiveness* e, também, a qualidade da busca epistêmica. Em abril de 2020, o uso da medicação X para o tratamento do coronavírus ainda não passara por testes; encontrava-se recém na etapa das hipóteses e das testagens iniciais[31].

A aplicabilidade disso para o direito – e para o tema do presente estudo – é enorme. Quando uma prova isolada aponta em algum sentido, a apuração envolverá não somente a utilização de conhecimentos prévios,

[30] Veja-se que a segurança independente e a prova direta do caso podem afetar-se reciprocamente. A hipótese do detergente destruindo a gordura afetará o grau de confirmação das hipóteses do experimento sobre a existência de gordura na cápsula do coronavírus, mas poderá acabar determinado uma corroboração a respeito dos limites do detergente; antes se acreditava que o detergente era efetivo contra os tipos de gordura A, B e C, mas tal pesquisa levantou suspeitas de que pode ser que não seja dessa forma. Tais conhecimentos sobre o coronavírus estavam, em abril de 2020, recém sendo hipotizados, ao contrário, por exemplo, da associação do cigarro com câncer de pulmão, hipnotizada muitos anos atrás, já se encontrava em abril de 2020 testada durante mais de 30 anos, em diversos tipos de estudos, em diversos lugares do mundo e com diversos sujeitos.

[31] Em condições normais, aliás, os medicamentos passam por diversas etapas de testes antes de chegarem ao mercado, a fim de que seja aumentada a corroboração sobre a segurança de sua utilização. No Brasil, primeiro são feitos testes em animais (estudos pré-clínicos); após, iniciam-se os estudos clínicos, divididos em quatro fases (a primeira com vinte a cem indivíduos, a segunda com cem a trezentos e a terceira com mil a três mil). Para poder ser comercializado, o medicamento deve passar nas três primeiras, ficando, em seguida, na quarta fase, em período de farmacovigilância. As etapas descritas a seguir estão disponíveis, p. 16 e ss. [www.abto.org.br/abtov03/Upload/file/manual_do_transplantado/Farmacovigilancia.pdf]. Acesso em 16.04.2020.

que podem ser demonstrados equivocados, mas também podem ser falseados totalmente pela produção de outras provas.

O ponto pode ficar claro a partir de um exemplo. Imagine-se uma ligação interceptada que inicie com uma pessoa atendendo e a outra simplesmente dizendo: "vou te matar", desligando em seguida. Poder-se-ia concluir desde logo, e sem qualquer contexto, tratar-se de uma ameaça? Como a hipótese da ameaça não poderia ser descartada desde logo, essa teria que ser apurada, mediante a produção de outras provas.

Imagine-se, então, que, mediante a produção de outras provas, descobre-se o seguinte contexto: o homem que efetuou a ligação ficara sabendo que a sua ex-namorada, depois de 6 meses da separação, assumira um namoro com outro homem. A frase isolada "vou te matar", então, poderia ter seu sentido reconstruído mediante o seguinte diálogo:

> *Homem: Você está mesmo namorando???? Não signifiquei nada para você?*
> *Mulher: Minha vida não é da sua conta.*
> *Homem: Conheço seus horários e sua rotina.*
> *Mulher: Você está me ameaçando?*
> *Homem: Não estou ameaçando. Estou avisando. Vou te matar.*

Imagine-se, por outro lado, que a produção de outras provas revelasse não esse contexto de um namoro terminado, mas o contexto de um escritório de advocacia, em que se descobrisse que se tratava de dois(duas) sócios(as), sendo que um(a) sócio(a) sempre esquecia de enviar um relatório mensal para o cliente e sempre era cobrado(a) pelo(a) outro(a) sócio(a) por isso. O sentido do diálogo poderia, neste caso, ser reconstruído da seguinte forma:

> *Sócio(a) 1: Não vai me dizer que você esqueceu de novo de mandar o relatório para o cliente?!?!*
> *Sócio(a) 2: MEU DEUS!*
> *Sócio(a) 1: Estou avisando. Vou te matar!*

Naturalmente, as mesmas palavras "vou te matar" ganham, aqui, por conta do contexto, um sentido totalmente diferente. Afinal, esse demonstraria que não se trata de uma ameaça, mas sim da utilização da

expressão "vou te matar" de uma forma figurada, com o sentido de "estou bravo(a), chateado(a) com você". E o mesmo poderia ocorrer caso as ulteriores provas produzidas em relação à gravação demonstrassem se tratar de um contexto entre dois amigos(as), quando um(a) houvesse postado uma fotografia do(a) outro(a) nas redes sociais:

> *Amigo(a) 1: Você postou aquela fotografia nossa? Eu estou com uma cara horrorosa!*
> *Amigo(a) 2: Agora já foi! [Risos].*
> *Amigo(a) 1: Sacanagem! [Risos].*
> *Amigo(a) 2: Você não viu a próxima que eu vou postar!*
> *Amigo(a) 1: Nem pense nisso. Estou avisando. Vou te matar!*

Em qualquer dos três exemplos, seria imprescindível, portanto, para a compreensão do sentido, a obtenção de "toda a conversa". Entretanto, em casos reais, como o que será apresentado no capítulo que segue, nem sempre a totalidade do contexto está estampada em um só elemento de prova, isto é, em uma só ligação. E muitas vezes o contexto que ressai de uma só ligação, pela falta de *comprehensiveness,* traz um resultado de corroboração muito baixo.

Assim, a título de resumo do presente item, pode-se dizer que a lição da epistemologia para o presente estudo é que é imprescindível para a efetiva reconstrução de sentidos a busca pela maior *comprehensiveness,* isto é, para a maior completude possível do material probatório e da combinação de elementos de prova. Afinal, sem isso, uma prova isolada, ou mesmo um palpite sobre o sentido possível desprovido de provas, pode levar a resultados e interpretações desastrosos.

2 O problema e formas de solução. A necessidade da prova do contexto para a interpretação da linguagem

2.1 O problema

A interceptação telefônica (ou interceptação em sentido estrito) recebe atenção da doutrina principalmente em relação à sua definição como "captação da comunicação telefônica alheia por um terceiro, sem o

conhecimento de nenhum dos comunicadores"[32], tratando-se de meio de obtenção de prova irrepetível por sua natureza[33]. Discutem-se, em geral, os requisitos para o deferimento da interceptação[34], a duração legalmente autorizada para a medida[35], a necessidade ou não de transcrição dos diálogos obtidos e o procedimento para sua execução, desde a decretação até a inutilização.

A doutrina, com razão, coloca bastante ênfase na necessidade de que o resultado obtido a partir da interceptação seja submetido a contraditório diferido "tão logo se considere que o conhecimento do resultado da diligência não importará em prejuízo ao prosseguimento das investigações ou do processo"[36]; tudo isso a fim de que possa "discutir a prova em todos os seus aspectos"[37]. Entre tais aspectos, entretanto, o destaque é dado à (i)licitude da prova, à idoneidade técnica da operação, à autenticidade, à identificação ou não da própria voz etc.[38]

Por outro lado, não resta abordada, em geral, questão que, na minha opinião, possui máxima importância: como seria possível conhecer o sentido de um diálogo, ou de palavras empregadas? É possível

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[32] LIMA, Renato Brasileiro de. *Manual de Processo Penal.* 8ª. Ed. Salvador: JusPodivm, 2020, p. 813. Em sentido análogo, PRADO, Geraldo. *Limite às Interceptações Telefônicas e a Jurisprudência do Superior Tribunal de Justiça.* Rio de Janeiro: Lumen Juris, 2005, p. 50. BADARÓ, Gustavo. *Processo Penal.* 8ª. Ed. São Paulo: RT, 2020, p. 592; CAMBI, Eduardo. "Interceptação Telefônica - Breves Considerações Sobre A Lei 9.296/1996". *Revista de Processo*, vol. 118, Nov – Dez. p. 143–148, 2004.

[33] LOPES JR., Aury. *Direito Processual Penal.* 17ª. Ed. São Paulo: Saraiva Educação, 2020, p. 283.

[34] LIMA, Renato Brasileiro de. *Manual de Processo Penal.* 8ª. Ed. Salvador: JusPodivm, 2020, p. 827. No mesmo sentido, vide BADARÓ, Gustavo. "A Boca do Leão: Validade das Interceptações Telefônicas Decretadas com Base em *notitia criminis* anônima". *Revista dos Tribunais*, vol. 927, 2013, p. 529-553.

[35] LOPES JR., Aury. *Direito Processual Penal.* 17ª. Ed. São Paulo: Saraiva Educação, 2020, p. 263-264.

[36] LIMA, Renato Brasileiro de. *Manual de Processo Penal.* 8ª. Ed. Salvador: JusPodivm, 2020, p. 847.

[37] BADARÓ, Gustavo. *Processo Penal.* 8ª. Ed. São Paulo: RT, 2020, p. 611.

[38] Em sentido similar, LIMA, Renato Brasileiro de. *Manual de Processo Penal.* 8ª. Ed. Salvador: JusPodivm, 2020, p. 848; BADARÓ, Gustavo. *Processo Penal.* 8ª. Ed. São Paulo: RT, 2020, p. 611.

simplesmente a quem ouve uma gravação ou lê a transcrição de um diálogo simplesmente acessar o seu sentido diretamente? Como saber se a reconstrução dos sentidos de um diálogo obtido em interceptação telefônica espelha, de fato, o sentido empregado pelas pessoas que dialogavam?

Depois de, nos itens anteriores do presente artigo, trabalhar com casos ideias, para chegar no ponto central do presente estudo utilizarei dois diálogos reais, retirados do contexto de interceptações telefônicas feitas na Operação Costeira, deflagrada no Rio Grande do Sul pela Polícia Federal em 2009[39], investigando a ocorrência de operações ilegais de câmbios. Não pretendo analisar o caso, ou a forma como cada um dos atores se comportou, mas tão somente tomar dois diálogos reais (com nomes alterados) emprestados, a fim de questionar a forma como os possíveis sentidos poderiam, em tese, ser atribuídos, para um e para outro lado.

DIÁLOGO 1
B - Viu.
A - Ham.
B O João não quis cebola naquele preço. Ele quer o preço que o coisa deu aí... que o secretário deu pra ele. Tá?
A - Ahm... só um pouquinho...
B - Tá.
A - É que... é que esse preço é à vista que nós podemos fazer o saco, entendeu?
B - Eu sei, eu sei, é que eu dei aquele preço pra o... o combinado pois é...
A - Sim, não, mas então deixa quieto, é que aquele preço é à vista, né? Não tem como fazer.
B - Tá bem.

DIÁLOGO 2
(...)
C - Hum, fechei, fechei com o Pedro 26 e meio de alface.
D - Hã, hã.
C - Aí ele vai acertar terça-feira, 198 aqui, bom né?

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[39] Processo 5022583-62.2012.4.04.7100, que tramitou na 7ª. VF de Porto Alegre. O processo já se encontra baixado, transitado em julgado, sendo seu acesso público e irrestrito. Os nomes das pessoas foram omitidos e/ou alterados.

D - Sim, ele pegou em vez de peso, verde.
C - Não, esse é outro negócio sabe, ele pegou.
D - Ah, outro.
C - 6 e meio e esse, esse que eu te falei antes, só de noite ele vai me confirmar, sabe?
D - Tá.
C - Ele tem que ver se vai se concretizar o negócio, e, e, só que daí.
D - E o dos, dos pesos.
C - Sim, esse ele vai me confirmar de noite se vai fechar o negócio dele, né.
D - Hã, hã.
C - Tá sem preço, ele não reclamou nada, só de noite vai me dar a resposta, daí agora ele me ligou e pediu uns 26 e meio, daí fiz 198 pra terça-feira.
D - Hã, hã.
C - Entendeu.
D - Hã, hã, tá.
C - E daí, daí acho que por enquanto não vou fechar nada né, lá embaixo, vamo ver amanhã como vai se comportar.

Apresentado tal caso, nos itens que seguem abordarei os inúmeros desafios que tais diálogos podem significar.

2.2 A indexicalidade do som, o simbolismo da linguagem e a necessidade de busca de sentidos possíveis

O primeiro ponto, considerando a indexicalidade dos sons, é saber quais palavras foram pronunciadas, de fato, pelas pessoas que falavam ao telefone; e isso a fim de que eventual transcrição seja fidedigna, correspondente à realidade[40]. Caso haja uma falha nessa primeira etapa,

[40] Apesar da referência legal à "possibilidade" de gravação (art. 6º. § 1º. da lei 9296/96), no atual estágio de desenvolvimento das tecnologias entendo que tem razão BADARÓ, Gustavo. *Processo Penal.* 8ª. Ed. São Paulo: RT, 2020, p. 606, para quem "todas as interceptações devem ser gravadas, sob pena de impossibilitar o exercício do contraditório e da ampla defesa em relação ao seu conteúdo" (no mesmo sentido, SANTORO, Antonio Eduardo Ramires;

naturalmente, todo e qualquer processo de interpretação posterior já estará fadado ao fracasso. As palavras que foram ditas nada mais são do que parte da própria indexicalidade do áudio: variando as palavras, varia, também, o áudio, devendo isso ser refletido na transcrição.

Em um caso ocorrido nos Estados Unidos[41], por exemplo, o policial Jim Barton alegou ter chegado em casa e encontrado sua esposa morta, efetuando ligação para a central de emergências (911). Após 10 anos sem que fossem encontrados suspeitos, uma equipe de *cold cases* reanalisou a gravação da ligação para a central de emergências, tornando-se central para o caso saber se Jim teria dito, na ligação, "*I gotta call for help*" ("preciso ligar para pedir ajuda") ou "*I gotta call Phelps*" ("preciso ligar

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TAVARES, Natália Lucero Frias; GOMES, Jefferson de Carvalho. "O protagonismo dos sistemas de tecnologia da informação na interceptação telefônica: a importância da cadeia de custódia". *Revista Brasileira de Direito Processual Penal,* v. 3, n. 2, p. 605-632, 2017, p. 616. Apesar de o art. 6º. § 1º. da lei 9296/96 referir que, uma vez gravada, "será determinada a sua transcrição", a jurisprudência vem adotando o entendimento de ser desnecessária a transcrição integral dos diálogos. Nesse sentido, por exemplo "PROCESSUAL PENAL. AGRAVO DE INSTRUMENTO. CERCEAMENTO DE DEFESA. INDEFERIMENTO DE DILIGÊNCIA PROBATÓRIA. OFENSA REFLEXA. INTERCEPTAÇÕES TELEFÔNICAS JUDICIALMENTE AUTORIZADAS. DEGRAVAÇÃO INTEGRAL. DESNECESSIDADE. AGRAVO IMPROVIDO. I - Este Tribunal tem decidido no sentido de que o indeferimento de diligência probatória, tida por desnecessária pelo juízo a quo, não viola os princípios do contraditório e da ampla defesa. Precedentes. II - No julgamento do HC 91.207-MC/RJ, Rel. para o acórdão Min. Cármen Lúcia, esta Corte assentou ser desnecessária a juntada do conteúdo integral das degravações das escutas telefônicas, sendo bastante que se tenham degravados os excertos necessários ao embasamento da denúncia oferecida. III - Impossibilidade de reexame do conjunto fático probatório. Súmula 279 do STF. IV - Agravo regimental improvido" (STF, 1ª. Turma. Agravo Regimental no AI 685878. Rel. Min. Ricardo Lewandowski, j. em 05/05/2009, dj 12/06/2009). Parece-me ter razão, ademais, LIMA, Renato Brasileiro de. *Manual de Processo Penal.* 8ª. Ed. Salvador: JusPodivm, 2020, p. 846, ao afirmar que apesar de não haver "necessidade de transcrição total das gravações, é dever do Estado disponibilizar a integralidade das conversas captadas, sendo inadmissível a sua seleção pelas autoridades da persecução de partes dos áudios interceptados". Retornarei ao ponto no final do presente item.

[41] Uma notícia sobre os desdobramentos do caso pode ser vista em https// www.cleveland19.com/story/33286227/thomas-jim-barton-guilty-plea/. Último acesso em 17/07/2020, às 20, p.01. O caso foi objeto do episódio *Chief Suspect,* da série *Forensic Files,* temporada 11, episódio 23, transmitido em 20/12/2006.

para o Phelps"). Jim acabou condenado, entendendo-se que a referência seria a seu meio-irmão, William Phelps, que, de acordo com investigações ulteriores, teria sido contratado pelo policial para "dar um susto" na sua esposa, tendo acabado por matá-la.

Uma vez feitas as transcrições a partir dos dados obtidos a partir da interceptação, ou simplesmente guardados em gravações, passa-se à fase de busca pela interpretação de sentidos possíveis, isto é, de reconstrução de sentidos. E o problema que se coloca, então, é o seguinte: sabendo que os símbolos não possuem uma relação causal automática com os fatos do "mundo lá fora", como é possível distinguir uma mensagem cifrada, cujo intuito é justamente ocultar a prática de atos ilícitos, de uma mensagem comum, fruto de uma comunicação ordinária do dia a dia?

É importante notar, nesse passo, que incumbe às autoridades a busca pelo entendimento do hábito coletivo da comunicação em questão, algo que, conforme demonstrado no item anterior, somente pode ser feito mediante a obtenção de novas provas e da combinação entre vários elementos. O mero fato, em si, de alguém comunicar-se com outrem em linguagem cifrada, ou em alguma linguagem que não seja entendida pela autoridade policial, por exemplo, não configura qualquer ilicitude.

Em primeiro lugar, deve-se ter em conta toda a pluralidade de sentidos literais possíveis para aquele contexto[42]. É certo que um texto que menciona a palavra "cachorro" faz com que o proprietário de um dogue alemão faça a associação "cachorro = dogue alemão", ao passo que um proprietário de poodle faz a associação "cachorro = poodle"[43]. Ambos são sentidos literais, denotativos, pois tanto o dogue alemão quanto o poodle são cachorros[44]. Nos diálogos acima, está-se referindo, de fato, a cebolas

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[42] Sobre interpretação e pluralidade de sentidos quanto à interpretação de textos legais, vide GUASTINI, Riccardo. *Interpretare e Argomentare*. Milão: Giuffrè, 2011, p. 39.

[43] Isso, conforme abordado em PAULA RAMOS, Vitor de. "Respeite as Regras!". *Revista da Faculdade de Direito Dom Alberto*, v. 1, p. 40-57, 2013, por si só traz alguns problemas para a interpretação de textos legais, visto que uma regra de condomínio que determine que cachorros sejam carregados no colo dentro do elevador soará muito natural para o dono de um poodle, mas absolutamente bizarra e irrealizável para o dono de um dogue alemão.

[44] Daí que ECO, Umberto. *Dire Quasi la Stessa Cosa*. Milão: Bompiani, 2003, p. 35 refira que "a sinonímia seca não existe". Afinal, se o "tradutor italiano de

e alfaces? Ou se trataria de alguma linguagem cifrada? A palavra "peso" está empregada como o nome de uma moeda ("peso argentino", "peso uruguaio"), ou como peso no sentido de "pesado" ou "leve"?

Reconhecendo-se que uma só palavra pode, também, possuir sentidos denotativos e conotativos, deve-se, também, analisar se as palavras estão sendo utilizadas em sentidos denotativos ou conotativos. Em um dos livros mais importantes da história da literatura brasileira, Grande Sertão: Veredas (João Guimarães Rosa), o leitor acompanha a travessia de Riobaldo por diversas estradas, veredas. A palavra "estrada" tem, em língua portuguesa, indubitavelmente o sentido literal de um caminho, de um percurso por onde se pode passar para ir de um lugar a outro; na obra, entretanto, utiliza-se tal palavra em um sentido conotativo, significando a "estrada da vida"[45]. O leitor que capte somente o sentido denotativo da estrada perderá, portanto, o sentido conotativo, a referência à vida.

Da mesma forma, nos diálogos acima, "lá embaixo" pode referir-se realmente a algo que está em uma altura menor (em um porão, em um sótão), ou a algo, por exemplo, em localização geográfica de menor altitude (como quando se diz que alguém que vai da Serra para o nível do mar vai "descer" para a cidade).

A combinação de uma palavra com outra já pode, também, atrair sentidos diferentes para uma expressão. Novamente, duas ou mais palavras juntas podem ter um sentido literal associado, como é o caso das palavras "panela de pressão". A palavra panela, sozinha, denota o recipiente em que se cozinha; a pressão, sozinha, refere-se ao conceito físico, da relação entre uma força e a área. Ao fazer-se referência a "panela de pressão", entretanto, faz-se referência a um tipo específico de panela, que utiliza a pressão alta para diminuir o tempo de cocção.

La peste tivesse dito que o doutor Rieux havia visto nas escadas o cadáver de um mamífero roedor, não teria feito (...) um bom serviço ao texto original" (ECO, Umberto. *Dire Quasi la Stessa Cosa*. Milão: Bompiani, 2003, p. 87), ainda que "mamífero roedor" seja uma definição de "morcego".

[45] Os exemplos são inúmeros da palavra "estrada" no sentido conotativo de "vida". É o caso, ainda na literatura brasileira, de Morte e Vida Severina (de João Cabral de Melo Neto); no cancionário brasileiro, da mesma forma, fala-se a respeito de Travessia, na canção homônima de Milton Nascimento, e da Infinita Highway, na canção homônima de Engenheiros do Hawaii.

Há outros casos em que as palavras, quando associadas, gerarão um sentido conotativo. Novamente em língua portuguesa, a palavra "boi" é utilizada para denotar um animal bovino de sexo masculino. A expressão "boi de piranha", entretanto, trás consigo, em algumas regiões do Brasil, um sentido conotativo, da ideia derivada de um boi que, por sua especial fraqueza ou pouco valor, seria sacrificado para que o rebanho pudesse atravessar um rio; o "boi de piranha" entraria primeiro n'água, sendo entregue às piranhas, sendo, assim, sacrificado para que o resto do rebanho pudesse passar em segurança. A expressão, portanto, tem o sentido conotativo de casos em que algo de pouco valor é sacrificado para que outro(s) mais valiosos sejam preservados.

Nos diálogos acima, portanto, em tese, as palavras associadas "26 e meio de alface" e "ele vai (...) acertar 198 aqui" podem denotar e conotar muitas coisas. Por exemplo: "26,5kg de alface", "26,5 pés de alface", "26 sacos e meio de alface" etc.; "198 reais em alface", "198 dólares em alface", "198 caixas de alface" etc.

Por fim, diversas frases combinadas em um texto, em um livro, ou em qualquer conjunto de símbolos, podem possuir um sentido global diferente de cada símbolo individual. O leitor de *A Caverna,* do escritor português José Saramago, somente compreenderá a relação do oleiro Cipriano Algor, sua filha e genro com a alegoria da caverna ao final do livro, pois somente nos últimos capítulos as informações necessárias para tal interpretação são dadas. O leitor que chegar somente à metade do livro, portanto, poderá compreender o sentido literal e o conotativo das palavras e das frases, mas não poderá compreender o sentido do todo.

Nos diálogos acima, por outro lado, ao contrário do que ocorre com um livro ou um filme, a totalidade de informações necessárias para a interpretação correta não está necessariamente nos diálogos havidos. O diálogo 1, acima, analisado somente do ponto de vista interno, demonstra um todo coerente, mas assim mesmo não necessariamente representa, de fato, uma mera compra e venda de cebolas. E o diálogo 2, cuja interpretação isolada possui elementos incoerentes – por exemplo, "ele pegou em vez de peso, verde" –, não confirma, de maneira isolada, a prática ou não de algum ilícito.

Surgem aqui duas consequências extremamente importantes, que permitirão um maior rigor epistêmico no tratamento dos diálogos obtidos

mediante interceptações. A primeira é que todas as interceptações devem ser objeto de gravações[46], e tais gravações devem ser integralmente mantidas[47], pelo menos até que seja possível a realização de contraditório[48].

Se assim não fosse – e caso se permitisse uma "filtragem" do material[49] destruindo-se o restante sem outros cuidados –, no exemplo dado acima, formulada uma hipótese durante a investigação, a destruição do restante do material não permitiria que tal hipótese fosse colocada em dúvida ou criticada. Assim, por exemplo, permitindo-se a destruição

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[46] BADARÓ, Gustavo. *Processo Penal.* 8ª. Ed. São Paulo: RT, 2020, p. 606; SANTORO, Antonio Eduardo Ramires; TAVARES, Natália Lucero Frias; GOMES, Jefferson de Carvalho. "O protagonismo dos sistemas de tecnologia da informação na interceptação telefônica: a importância da cadeia de custódia". *Revista Brasileira de Direito Processual Penal,* v. 3, n. 2, p. 605-632, 2017, p. 616.

[47] Nesse sentido, PRADO, Geraldo. *Prova Penal e Sistema de Controles Epistêmicos.* A quebra da cadeia de custódia das provas obtidas por métodos ocultos. São Paulo: Marcial Pons, 2014, p. 79. No mesmo sentido, PRADO, Geraldo. *A cadeia de custódia da prova no processo penal*. São Paulo: Marcial Pons, 2019, p. 124; SOUZA, Lia Andrade; VASCONCELLOS, Vinicius. "A cadeia de custódia da prova obtida por meio de interceptações telefônicas e telemáticas: meios de proteção e consequências da violação". *Revista Da Faculdade De Direito* (UFPR), v. 65, p. 31-48, 2020, p. 39. Não abordo em profundidade aqui o problema da forma como as gravações devem ser custodiadas, bastando, para o escopo do presente artigo, referir a necessidade de *autenticação* no sentido estadunidense. Na regra 901 das *Federal Rules of Evidence,* nesse sentido, vai dito que, para que um elemento de prova seja considerado autêntico, a parte que o apresenta tem o ônus de oferecer provas suficientes para amparar uma decisão [*to support a finding*] de que o item "é o que a parte afirma ser". Sobre o tema vide ALLEN, Ronald J.; KUHNS, Richard B.; SWIFT, Eleanor; SCHWARTZ, David S.; PARDO, Michael S. *Evidence*. Text, problems, and cases. 5a. ed. Frederick: Kluwer, p. 187; MUELLER, Christopher B.; KIRKPATRICK, Laird C. Evidence. [1988]. 5a. ed. Frederick: Kluwer, 2012, p. 1083. A cadeia de custódia é um dos elementos para tanto, mas, como refere BADARÓ, Gustavo. "A cadeia de custódia e sua relevância para a prova penal". In: SIDI, Ricardo; LOPES, Anderson B. (orgs.) *Temas atuais da investigação preliminar no processo penal*. Belo Horizonte: D´Plácido, p. 517-538, 2018, p. 529, no contexto das interceptações telefônicas "confundiu-se a cadeia de custódia, entendida como a documentação da cadeia de custódia - ainda que de algo imaterial - como o conteúdo das conversas telefônicas – com a própria existência da fonte de prova".

[48] BADARÓ, Gustavo. *Processo Penal.* 8ª. Ed. São Paulo: RT, 2020, p. 611.

[49] A expressão é de LOPES JR., Aury. *Direito Processual Penal.* 17ª. Ed. São Paulo: Saraiva Educação, 2020, p. 657.

prematura do material, um diálogo que revelasse, no exemplo dado acima, um comércio normal de alfaces e cebolas poderia ser eliminado, fazendo com que os demais diálogos parecessem, isoladamente, mais suspeitos ou mais incriminadores.

A segunda consequência, derivada da primeira, é que para o pleno exercício da defesa e do próprio direito à prova, a defesa deve ter acesso integral às gravações[50]. Afinal, "trechos de conversa [que], para uma parte, possam não ter interesse para a prova, (...) para a outra parte podem ser de extrema relevância"[51]. O acesso à integralidade das gravações possibilitará a formulação de hipóteses alternativas para os sentidos possíveis aos diálogos. Em outras palavras, sem o acesso integral, a defesa não teria condições de utilizar outras das gravações obtidas no mesmo contexto de interceptação para arguir diverso "uso dado a estas palavras pelas pessoas investigadas, no contexto da investigação"[52]; por exemplo, no caso acima,

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[50] Nesse sentido, o STJ já reconheceu violar o direito à prova e à paridade de armas a ausência de manutenção da integralidade do material colhido na investigação (STJ, 6ª. Turma. HC 160.662/RJ. Rel. Min. Assusete Magalhães, j. em 18/02/2014, dj 17/03/2014). Nesse sentido, referiu a corte que "[a] pesar de ter sido franqueado o acesso aos autos, parte das provas obtidas a partir da interceptação telemática foi extraviada, ainda na Polícia, e o conteúdo dos áudios telefônicos não foi disponibilizado da forma como captado, havendo descontinuidade nas conversas e na sua ordem, com omissão de alguns áudios. (...) A prova produzida durante a interceptação não pode servir apenas aos interesses do órgão acusador, sendo imprescindível a preservação da sua integralidade, sem a qual se mostra inviabilizado o exercício da ampla defesa, tendo em vista a impossibilidade da efetiva refutação da tese acusatória, dada a perda da unidade da prova". No mesmo sentido, STJ, 6ª. Turma. REsp 1.795.341/RS. Rel. Min. Nefi Cordeiro, j. 07/05/2019, dje 14/05/2019, em que a corte referiu que "deve ser facultado à defesa a integralidade das conversas advindas nos autos de forma emprestada, sendo inadmissível a seleção pelas autoridades de persecução acerca das partes a serem extraídas, mormente quando atestado no Tribunal de origem a existência de áudios descontinuados, sem ordenação, sequencial lógica e com omissão de trechos da degravação, como ocorre nestes autos". Para comentários a respeito da jurisprudência do STJ sobre o tema, vide ÁVILA, Gustavo Noronha; BORRI, Luiz Antonio. "A Cadeia de Custódia da Prova no 'Projeto de Lei Anticrime': Suas Repercussões em um Contexto de Encarceramento em Massa". *Direito Público*, v. 89, p. 114-132, 2019, p. 121.

[51] BADARÓ, Gustavo. *Processo Penal*. 8ª. Ed. São Paulo: RT, 2020, p. 611.

[52] FANTINI, Daniel Fabio. "Interceptação Telefônica e Linguagem". *Revista Brasileira de Ciências Policiais*, v. 3, n. 1, p. 11-25, jan/jun 2012, p. 17.

demonstrando, por outros diálogos obtidos no mesmo contexto de interceptação, que a palavra "peso" vinha utilizada habitualmente no sentido de quilogramas (e não no de moedas, como "peso argentino").

Uma vez efetuadas e mantidas as gravações, entretanto, o problema não estará resolvido; e isso porque será necessário, para fazer a interpretação adequada, uma excelente apuração dos fatos, combinando-se os diálogos obtidos pela interceptação com outras provas. É o que será abordado no capítulo a seguir.

2.3 A busca pela corroboração das hipóteses e o peso da combinação de provas

Sabendo-se que o valor dos símbolos, como a linguagem, depende de que se entenda o contexto da sua criação, deve-se necessariamente recorrer à combinação de provas. Afinal, sendo relevante para a determinação de sentidos saber o hábito coletivo da comunicação em questão, é necessário reconhecer a qual contexto pertence aquela comunicação[53]. Quem são as pessoas? Em que situação foram gravadas? Em que local? Em que época? E a grande dificuldade, como mencionado, é que, em casos reais, os contextos e os elementos indispensáveis para a interpretação dificilmente estarão *integralmente* nas ligações gravadas.

Retornando-se ao caso real, das cebolas e alfaces, dever-se-ia, de fato, apurar se as pessoas em questão, de fato, vendem cebolas ou alfaces. E, ainda, que vendam, se tais vendas de cebolas e alfaces, de fato, são o objeto principal de seu comércio, ou se são usadas como forma de mascarar práticas ilícitas.

Três seriam os fatos que teriam que ser provados, portanto, a fim de que nos diálogos acima fosse possível utilizar o diálogo como prova da prática de algum ato ilícito: (i) que a venda de cebola ou de alface, naquele contexto de comunicação, não significaria, de fato, a venda de cebolas ou de alfaces; (ii) que, naquele contexto, significaria alguma transação ilícita; (iii) que a transação ilícita *mencionada* realmente teria ocorrido da forma como descrita no áudio.

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[53] FANTINI, Daniel Fabio. "Interceptação Telefônica e Linguagem". *Revista Brasileira de Ciências Policiais*, v. 3, n. 1, p. 11-25, jan/jun 2012, p. 17.

Formada a hipótese de que “cebola” ou “alface”, nesse contexto, significaria outra coisa, portanto, seria necessário, submeter tal hipótese a provas, seja para confirmá-la, seja para afastá-la.

Caso, por exemplo, fosse demonstrado que as pessoas em questão não vendem cebolas ou alfaces, isso significaria um passo no sentido da corroboração de não se estar tratando, de fato, de compra e venda de cebolas. Por outro lado, caso as pessoas em questão, de fato, vendessem cebola e alface, a hipótese do uso da palavra no sentido literal não poderia ser descartada, devendo ser objeto de outras provas.

Da mesma forma, se alguém combinasse a entrega de diversos sacos de cebola ou de diversos pés de alface para outrem em determinado lugar e em determinado horário e dia, aparecendo somente com um envelope na mão, no dia e horário combinados, haveria corroboração no sentido de *não se tratar de cebolas* ou *alfaces*.

Imaginando-se, a seguir, que as provas demonstrem não se tratar de “cebolas” ou “alfaces”, passar-se-ia à busca pelo sentido real. Imaginam-se, então, a hipótese de que “cebolas”, na comunicação em questão, signifique *euros* e de que “alface” signifique *dólares*. Como testar essa hipótese, para confirmá-la ou refutá-la? Novamente mediante o recurso à prova combinada – afinal, o mero fato de “cebola” não significar “cebola” e “alface” não significar “alface”, no contexto em questão, com efeito, não se trata, isoladamente, como já mencionado anteriormente, da prova de algum fato ilícito (o sujeito pode, por exemplo, chamar algum produto *lícito,* para fins de sua comunicação, de cebola ou de alface).

Por fim, ainda que haja provas de que cebola significa, de fato, *euros,* e de que *alface* significa *dólares,* e de que uma transação de venda ilícita de *euros* ou de *dólares* seja descrita em um telefonema, é necessário corroborar o que é dito com o que, de fato, é feito. Isso principalmente diante de símbolos, como a linguagem, cuja característica, como visto, é da inexistência de relação causal automática com a realidade. Alguém que *fala que vai vender dólares ilicitamente* não necessariamente, de fato, *vende* dólares ilicitamente.

Novamente, tal diferenciação somente poderá ser feita mediante o recurso da prova combinada, isso é, com a busca pela maior completude. Nesse passo, é importante destacar um ponto extremamente importante, salientado pela epistemologia: um *elemento de prova* pode ter um peso

muito maior dentro de um *conjunto probatório* do que o peso que teria sozinho[54], isto é, individualmente[55]. Afinal, o "encaixe" de uma prova na outra aumenta o grau de corroboração de conjunto[56]. No caso dos diálogos obtidos a partir de interceptação telefônica isso é bastante visível.

Usando os casos acima, mesmo que não exista *uma prova* (um elemento) que possa, individualmente, ser suficiente para superar o grau necessário para a condenação, o peso das provas combinadas, em um conjunto, pode ser suficiente.

Se, por exemplo, se verifica que os sujeitos em questão não vendem cebolas ou alfaces, que eles aparecem em diversas gravações combinando encontros para entrega em que são dados envelopes, se a cotação passada por telefone não tem relação com a cotação de cebolas ou alfaces, mas é muito próxima à cotação de dólares e euros etc., poder-se-á chegar, com o conjunto probatório, a um grau de corroboração suficiente.

Se, por outro lado, a hipótese de tratar-se de euros ou dólares não vier corroborada por outras provas, ou se, ao testar a hipótese, houver hipóteses contrárias que não sejam superadas, o conjunto não permitirá que se conclua pela prática do crime em questão.

A importância da prova combinada, em resumo, é cabal. Voltando-se ao exemplo da troca de mensagens entre os sócios, dado no item anterior, imagine-se se todo o diálogo tivesse sido travado por telefone, tendo somente a última frase sido enviada por Whatsapp e, por uma infeliz coincidência, o sócio que esquecera de enviar o relatório tivesse sido, 20 minutos depois da mensagem, assassinado. O sócio sobrevivente, quando encontrada a mensagem, certamente seria visto com muita suspeição, de

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54 HAACK, Susan. *Evidence Matters*. Science, Proof, and the Truth in the Law. New York: Cambridge University Press, 2014, p. 208-238.

55 Sobre a valoração da prova individualmente e em conjunto, vejam-se, por todos, FERRER BELTRÁN, Jordi. *La Valoración Racional de la Prueba*. Madrid: Marcial Pons, 2007, esp. pp. 126 e ss. e TARUFFO, Michele. *La Prova nel Processo Civile*. Milão: Giuffrè, 2012, pp. 207 e ss.

56 O STJ já decidiu, por exemplo, que "(...) a condenação (...) encontra-se fundamentada nos diálogos interceptados e também em outras provas produzidas durante a instrução criminal, notadamente na prova testemunhal, não havendo que se falar em condenação lastreada exclusivamente nas provas obtidas pela interceptação telefônica". STJ, 5ª. Turma, HC 384.524/SP, Rel. Min. Felix Fischer, j. em 16/05/2017, DJ 25/05/2017.

modo que seria imprescindível produzir outras provas para verificar se realmente se tratava de uma ameaça ou não.

A necessidade de busca pela completude tendencial do material probatório, além de provas a respeito do contexto de produção desse, possibilitará, portanto, e entre outras coisas, a análise do "hábito coletivo" de referência, confirmando-se ou refutando-se, com novas provas, também a ocorrência ou não dos fatos.

Chegados a esse ponto, para concluir, é necessário finalizar respondendo os dois questionamentos formulados ao início: (i) a reconstrução de sentidos de textos, palavras ou frases pode se dar de maneira independente do contexto de sua utilização? Claramente, por tudo o que foi exposto ao longo do presente artigo, não, pois tratando-se de símbolos, não há relação automática com a realidade, sendo necessário o conhecimento a respeito do contexto de comunicação relevante; e (ii) como é possível conhecer o contexto de uma comunicação? Mediante a busca pela completude tendencial do material probatório, além de provas a respeito do contexto de produção desse.

Conclusões

A gravação de uma ligação telefônica possui elementos de indexicalidade e de simbolismo, sendo necessário atentar para ambos na busca de sentidos para a linguagem utilizada.

A tentativa de formação de hipóteses a respeito dos sentidos é bastante salutar, e parte de qualquer processo de apuração dos fatos, mas não pode, em relação aos símbolos, ser suficiente para que uma hipótese possa ser considerada provada.

É necessário, antes de qualquer coisa, manter as gravações efetuadas, pelo menos até que seja possível o contraditório, dando-se acesso integral à defesa. Após, para a adequada reconstrução de sentidos, é necessária a análise individual de cada prova, de modo que o intérprete busque entender os contextos em que as palavras, frases e conversas são utilizadas; para isso recorrendo a sentidos denotativos e conotativos do hábito comum, de eventuais coletividades, ou mesmo de duas pessoas.

Uma vez formuladas hipóteses, essas devem ser testadas e retestadas, mediante o aporte de novas provas: a maior completude do material probatório poderá afastar algumas e corroborar outras, sendo certo, de qualquer forma, que o *standard* probatório aplicável deverá, em qualquer caso, ser superado, a fim de que seja possível a condenação[57].

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[57] Sobre *standards* probatórios vide CLERMONT, Kevin M. *Standards of Decision in Law.* Durham: Carolina Academic Press, 2013, esp. p. 11; BADARÓ, Gustavo. *Epistemologia Judiciária e Prova Penal.* São Paulo: RT, 2019, p. 237.

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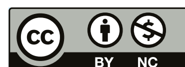

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Considerações sobre as condenações injustas fundamentadas em provas periciais: análise do *Innocence Project*, do *National Registry of Exoneration* e mecanismos para redução de erros periciais

Considerations on wrongful conviction based on forensic evidence: analysis by the Innocence Project, the National Registry of Exoneration and mechanisms for reducing forensic errors

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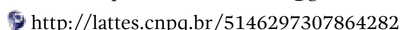

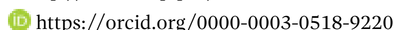

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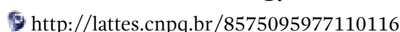

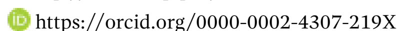

Resumo: Este artigo pretende analisar a relação entre as provas periciais e as condenações injustas. Trata-se de tema ainda pouco explorado no Brasil, mas com amplo debate nos EUA. Por essa razão, utiliza-se

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como base o modelo estadunidense para responder às seguintes questões: 1) Quais são as principais organizações e bases de dados estadunidenses relacionadas às reversões de condenações injustas? 2) Quais os reflexos da abordagem estadunidense no Reino Unido, no Canadá e no Brasil? 3) Como as provas periciais relacionam-se às condenações injustas? 4) Existem critérios aplicáveis às provas periciais que possam ser implantados no Brasil com vistas a diminuir a chance de erros periciais e interpretações equivocadas por parte dos julgadores? Espera-se apresentar o ponto e o contraponto no uso da prova pericial, abordar o mérito de organizações que buscam reverter condenações injustas e sugerir critérios para aprimorar a forma como os peritos dialogam com os julgadores.

Palavras-chave: Prova; Pericial; Condenação; Inocência.

Abstract: *This article aims to analyze the relationship between expert evidence and wrongful convictions. It is a topic that is still little explored in Brazil, but with a wide debate in the USA. For this reason, it is used as the basis of the American model to answer the following questions: 1) What are the main American associations and databases related to the reversals of wrongful convictions? 2) What are the reflexes of the American approach in United Kingdom, Canada and Brazil? 3) How do expert evidence relate to wrongful convictions? 4) Are there criteria applicable to expert evidence that can be implemented in Brazil in order to reduce the chance of expert errors and misinterpretation by the judges? It is expected to present the point and the counterpoint in the use of expert evidence, to address the merits of associations that seek to reverse wrongful convictions and to suggest criteria to improve the way the experts dialogue with the judges.*

Keywords: *Proof; Expert; Conviction; Innocence.*

1. Introdução

Na atividade estatal de dirimir conflitos e regular algumas das condutas presentes no corpo social, o julgador baseia-se em *standards*[3].

[3] Conforme VASCONCELLOS, Vinicius Gomes de. *Standard* probatório para condenação e dúvida razoável no processo penal: análise das possíveis contribuições ao ordenamento brasileiro. *Revista Direito GV*, v. 16, n. 2, maio/

Independentemente da adoção de *standards* ou de quais *standards* se adote[4], quando há um julgamento, dois tipos de erros são possíveis de ocorrer: condenar um inocente ou absolver um culpado. Ambos os erros devem ser evitados, tanto no procedimento penal como no cível. Na esfera penal, entende-se que o erro em condenar um inocente traz um prejuízo ao tecido social maior em comparação com o erro em absolver um culpado[5]. Dentre as várias diferenças do procedimento cível e penal, uma que se destaca é a desigualdade que existe entre as partes, na esfera penal, o que não se observa, como regra, na esfera cível, bem como as consequências no caso de uma condenação. Prova disso são os princípios incorporados na hermenêutica jurisprudencial como a presunção de não-culpabilidade e a ampla defesa.

Em que pesem os mecanismos já existentes, percebeu-se necessária a criação de organizações com a finalidade de levar aos tribunais casos que já transitaram em julgado, porém nos quais se verificou que houve algum erro de julgamento e consequente condenação injusta, em sede penal.

Toma-se o gancho para se mencionar o *Innocence Project*, organização norte-americana com a finalidade de instar os tribunais, via revisão criminal, a analisar casos já transitados em julgado; porém, com fatos e provas novas capazes de demonstrar a inocência daquele condenado.

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ago. 2020, p. 2, a função de um *standard* é delimitar quando determinado fato pode ser considerado como provado. Em que pese não haver previsão expressa quanto a *standards* no ordenamento pátrio, cada julgador apresenta os critérios do que considera razoável para resolver essa tarefa. Dado o subjetivismo da solução nacional, o autor defende a adoção do *standard* da prova além da dúvida razoável como um meio de aprimorar o sistema processual penal com critérios lógicos e objetivos.

4 CLERMONT, Kevin M. *Standards of decision in law*: psychological and logical bases for the standard of proof, here and abroad. Durham: Carolina Academic, 2013, p. 16-31, apresenta os três principais *standards* de prova existentes nos EUA, que são o *standard* da prova além de uma dúvida razoável, da evidência clara e convincente e do balanço de probabilidade.

5 Por exemplo, ALLEN, Ronald J. Los Estándares de Prueba Y Los Límites Del Análisis Jurídico. In: VÁZQUEZ, Carmen (ed.). *Estándares de Prueba y prueba Científica*. Madrid: Marcial Pons, 2013, p. 49, argumenta que nos casos penais a política é proteger os inocentes tornando mais difícil a tarefa de condenar alguém.

Em um levantamento exploratório realizado no buscador Google percebe-se uma discrepância entre a quantidade de estudos desenvolvidos sobre o tema das condenações injustas no Brasil em relação ao resto do mundo.

Em recente dissertação nacional sobre as provas testemunhais Fernandes reforça a ausência de dados no Brasil sobre condenações injustas.

> “Ocorre que, no Brasil, diferentemente dos Estados Unidos, não há dados sistematizados sobre condenações revistas, o que dificulta, de certo modo, que a temática suscite grandes debates e desperte movimentos políticos e jurídicos para a tomada de medidas preventivas, já que a amplitude das consequências dessas práticas errôneas são pouco conhecidas”[6].

Desta forma, verificou-se a necessidade de buscar fontes estrangeiras para a pesquisa sobre as condenações injustas. Em que pese os estudos existentes, um ponto que permanece sem uma estimativa confiável é sobre o percentual de condenações injustas, sendo que os percentuais relatados variam de 1% a 15%[7].

Os meios utilizados para se provar que houve uma condenação injusta são vários; porém, o uso das provas periciais é significativo. Entretanto, ocorre situação inversa, quando a prova pericial é utilizada de forma indevida para fundamentar condenações identificadas posteriormente como injustas.

Em um primeiro momento apresenta-se o *Innocence Project*, a principal organização voltada a levar aos tribunais casos considerados como erros judiciais; as origens os reflexos do *Innocence Project* em vários países, inclusive no Brasil; e o *National Registry of Exonerations*, base de dados que engloba não somente os casos tratados no *Innocence Project* mas

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[6] FERNANDES, Lara Teles. *Standards Probatórios e Epistemologia Jurídica*: uma proposta interdisciplinar para a valoração do testemunho no processo penal. Dissertação (mestrado) – Universidade Federal do Ceará, Faculdade de Direito, Programa de Pós-Graduação em Direito, Fortaleza, 2019, p. 143.

[7] POVEDA, Tony G. Estimating Wrongful Convictions. *Justice Quarterly*, v. 18, n. 3, 2006, p. 703.

todo aquele onde se vislumbra a ocorrência de uma condenação injusta revertida. Após, apresentam-se as fontes de erros periciais que geraram condenações injustas, seguindo-se de dois mecanismos, complementares, adotados em ordenamentos estrangeiros com vistas a diminuir a ocorrência de condenações injustas lastreadas em provas periciais: a Trilogia Daubert, nos EUA e três princípios adotados pela ENFSI e seguidos pela maioria dos países europeus.

O artigo seguirá a metodologia hermenêutica, com raciocínio dedutivo preponderante, com revisão bibliográfica aos autores nacionais e estrangeiros além da consulta à base de dados norte-americana do *National Registry of Exonerations*, com a análise dos dados de 1989 a 2019.

2. Innocence Project

2.1. Origens

O *Innocence Project*[8] foi implementado pela primeira vez na Escola de Direito Benjamin N. Cardozo, em 1992, por Barry C. Scheck e Peter J. Neufeld[9]. O projeto, fundado como uma *non-profite legal clinic*, um escritório jurídico sem fins lucrativos, algo semelhante a um projeto desenvolvido nos escritórios-modelo existentes nas faculdades de direito brasileiras, se concentra no uso de testes de DNA com a finalidade de provar a inocência de presos com condenações já definitivas. A participação dos estudantes sempre foi essencial para viabilizar todas as atividades necessárias como a triagem e revisão dos casos, incluindo realizar transcrições, interpretar relatórios médicos e produzir as peças recursais. Desde 2003, o projeto é gerido por uma organização sem fins lucrativos independente ligada à Escola de Direito Benjamin N. Cardozo.

Antes da criação do *Innocence Project* o exame de DNA já havia sido utilizado com a finalidade de reverter condenações injustas, sendo

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[8] INNOCENCE PROJECT. *Innocence Project*.

[9] CARDOZO LAW. *The Innocence Project*.

que a primeira exoneração com o uso do exame de DNA[10] deu-se em 14/08/1989, no caso Gary Dotson, condenado pelo suposto estupro de Cathleen Crowell[11] [12]. Na noite de 09/07/1977, Cathleen Crowell, então com 16 anos, foi encontrada por uma viatura policial, ao lado de uma estrada nas proximidades de um shopping próximo ao seu trabalho, em um subúrbio de Chicago, com as roupas sujas e desarrumadas. No relato inicial, ela narrou que, enquanto atravessava o estacionamento do shopping, ao sair do trabalho, um carro com três homens interceptou-a e jogaram-na no banco de trás do carro, sendo ela violentada por um dos homens, além de provocar cortes na região do abdômen com cacos de vidro de uma garrafa quebrada de cerveja. Ela foi levada ao hospital, onde se constataram cortes superficiais no abdômen e manchas de sêmen nas roupas íntimas. Durante a investigação, Cathleen Crowell foi instada a realizar a identificação do agressor com base em um livro com várias fotos. De acordo com a descrição inicialmente apresentada por ela o investigador insistiu para que ela observasse uma foto em particular, de Gary Dotson, sendo que ela o reconheceu como o autor do estupro e das lesões. Com base no reconhecimento Gary Dotson foi preso, processado e condenado, em julho de 1979, a uma pena entre 25 a 50 anos. Em 1985, Cathleen Crowell, sentindo-se culpada, revelou que havia inventado toda a história com receio de que engravidasse do namorado com o qual havia mantido, naquela noite, relações sexuais consensuais. Além disso, para tornar a história crível, rasgou suas roupas e realizou os cortes superficiais no abdômen. Apesar das declarações de Cathleen Crowell, os promotores do caso entenderam que ela estaria mentindo.

[10] Esse foi o primeiro caso de uma exoneração após revisão criminal. A primeira absolvição com base no exame de DNA também foi a primeira condenação com base no mesmo exame. Esse caso apresenta relatos em diversas fontes como, por exemplo COBAIN, Ian. *Killer breakthrough*: the day DNA evidence first nailed a murderer. Trata-se dos estupros e homicídios de Lynda Mann, em 1983, e de Dawn Ashworth, em 1986. Inicialmente Richard Buckland foi preso e confessou o homicídio de Dawn Ashworth mas negou o primeiro crime. Sir Alec Jeffreys, geneticista que descobriu as denominadas regiões de tandem do DNA participou das investigações e, com base no material genético existente no local de crime, excluiu a participação de Richard Buckland e identificou Colin Pitchfork como autor dos dois homicídios.

[11] WARDEN, Rob. *First DNA Exoneration*.

[12] THE NATIONAL REGISTRY OF EXONERATIONS. *Gary Dotson*.

Em 1987, Gary Dotson obteve a oportunidade de ser defendido por um advogado proeminente, que encomendou a realização de exames de DNA nas vestes de Cathleen Crowell. Os exames de DNA eram novidade e o advogado havia ouvido falar da existência e uso dos referidos exames na Inglaterra. Em 15/08/1988, os exames de DNA excluíram Gary Dotson como fonte e incluíram o namorado à época de Cathleen Crowell. Um ano depois, em 14/08/1989, a promotoria aceitou peticionar pela anulação da condenação.

Após a criação do primeiro *Innocence Project* começaram a surgir, nos demais estados americanos, projetos com a mesma finalidade. Pode-se citar, como exemplos a California, em 1999[13]; New England, em 2000[14]; Minnesota, em 2001[15]; New Orleans, em 2001[16]; Florida, em 2003[17]; Texas, em 2006[18]; e Pennsylvania, em 2008[19].

Em 2004, os responsáveis pelos diversos projetos existentes decidiram instituir o *Innocence Network*, uma rede integrada que conta, atualmente, com 67 associações localizadas em todo o mundo, sendo 55 localizadas nos EUA e 12 localizadas fora dos EUA. A missão da rede integrada é fornecer serviços legais e de investigação gratuitos a indivíduos que buscam provar a inocência de crimes pelos quais foram condenados e trabalham para corrigir as causas de condenações[20].

2.2. Reflexos do Innocence Project no mundo

O *Innocence Project* ultrapassou as fronteiras americanas e inspirou a criação de projetos semelhantes em vários locais do mundo.

Em 1993 foi criado, no Canadá, uma associação sem fins lucrativos, denominada *Association in Defense of the Wrongly Convicted* (AIDWYC),

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[13] CALIFORNIA INNOCENCE PROJECT. *California Innocence Project*.

[14] NEW ENGLAND INNOCENCE PROJECT. *New England Innocence Project*.

[15] INNOCENCE PROJECT OF MINNESOTA. *Innocence Project of Minnesota*.

[16] IPNO. *Innocence Project New Orleans*.

[17] INNOCENCE PROJECT OF FLORIDA. *Innocence Project of Florida*.

[18] INNOCENCE PROJECT OF TEXAS. *Innocence Project of Texas*.

[19] PENNSYLVANIA INNOCENCE PROJECT. *Pennsylvania Innocence Project*.

[20] THE INNOCENCE NETWORK. *About the Innocence Network*.

implementado na *Osgoode Hall Law School*. Em 2000, a AIDWYC alterou sua denominação para *Innocence Canada* e, desde 1993, auxiliou na exoneração de 23 indivíduos[21]. Um dos casos mais conhecidos e emblemáticos foi o da exoneração de Glen Eugene Assoun, em 01/03/2019, após passar dezessete anos preso pela morte de Brenda Way, em 12/11/1995. Dois pontos foram fundamentais para a condenação de Assoun: a existência de falsos testemunhos e o uso de métodos tendenciosos por parte dos investigadores, como ignorar a investigação conduzida por Dave Moore, policial comunitário da Real Polícia Montada do Canadá (RCMP). Durante uma investigação sobre o assassino serial chamado Michael McGray, preso pelo homicídio de sete pessoas, Dave Moore descobriu que McGray, no momento do assassinato de Brenda Way, vivia a poucos metros de onde o homicídio ocorreu e se mudou dois dias após a morte, deixando os seus pertences para trás. Dave Moore reuniu as informações e as evidências; contudo, os arquivos entregues a seus superiores foram ignorados e destruídos, tanto na RCMP como pela Polícia Regional de Halifax[22].

O Reino Unido conta, atualmente, com o *Innocence Network* UK (INUK), projeto iniciado em 2004[23], com a finalidade de auxiliar no estabelecimento de projetos de inocência nas universidades do Reino Unido, semelhantes às existentes nos Estados Unidos. Não se trata da primeira iniciativa do Reino Unido sobre o tema, uma vez que, desde 31/03/1997 existe a *Criminal Cases Review Commission* (CCRC)[24], com a missão de verificar a existência de condenações injustas, quando já houve recurso apreciado pelo tribunal. Caso a CCRC identifique que se trata de uma possível condenação injusta, é possível a devolução para que o Tribunal reanalise o caso, através de um novo recurso. Naughton[25] critica a forma de operar da CCRC, uma vez que a comissão pode encaminhar o caso ao Tribunal de Apelação quando considerar que existe uma "possibilidade

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21 INNOCENCE CANADA. *Innocence Canada*.

22 NIMENS, R. *Glen Assoun*: One of Canada's most disturbing wrongful convictions.

23 NAUGHTON, Michael. *Wrongful Convictions and Innocence Projects in the UK*: help, hope and education. Web Journal of Current Legal Issues, v. 3, 2006.

24 CCRC. *Criminal Cases Review Commission*.

25 NAUGHTON, Michael. *Wrongful Convictions and Innocence Projects in the UK*: help, hope and education. *Web Journal of Current Legal Issues*, v. 3, 2006.

real" de que a sentença não seja confirmada pelo Tribunal de Apelação, se encaminhada. Ou seja, cria-se uma "camisa de força estatutária obrigando-os a adivinhar o entendimento do tribunal de apelação".

2.3. Innocence Project Brasil

O *Innocence Project* Brasil, com sede em São Paulo, iniciou as atividades em dezembro de 2016[26] e até 2019 contava com dois casos de exonerações. O primeiro caso foi o da condenação de Atercino Ferreira de Lima Filho a 27 anos de reclusão pelo abuso sexual dos filhos, sendo que ele permaneceu onze meses preso.

O segundo caso de reversão de uma condenação realizada por intermédio do *Innocence Project* Brasil, em parceria com a Defensoria Pública do Ceará, ocorreu no caso conhecido como o do "maníaco da moto". Em 2014 a polícia cearense procurava o autor de uma série de estupros que ocorreram em bairros de Fortaleza, quando soube que uma criança de onze anos de idade, que havia sido atacada, reconheceu a voz de Antonio Claudio Barbosa de Castro como sendo do homem que a havia agredido. Após a prisão de Antonio Claudio cinco das oito vítimas reconheceram-no, em que pese os policiais que realizaram a prisão de Antonio Claudio afirmarem que ele não poderia ser o autor dos crimes uma vez que apresentava estatura bem menor do autor e a polícia já dispunha de imagens de câmeras de vigilância que gravaram a abordagem realizada e o indivíduo em cima da moto. Das cinco vítimas que inicialmente reconheceram Antonio Claudio, quatro delas voltaram atrás, apenas mantendo o reconhecimento a criança de onze anos. Isso foi o suficiente para que Antonio Claudio fosse condenado a nove anos de reclusão por estupro de incapaz[27]. Para a reversão da condenação, que se deu no dia 29/07/2019, após o cumprimento de cinco anos de condenação, foi essencial a realização de exame pericial nos vídeos, com a finalidade de estimar a altura do autor dos estupros, que concluiu que

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[26] INNONCENCE PROJECT BRASIL. *Innocence Project Brasil*.

[27] G1 GLOBO. *Vítima de estupro disse em depoimento que homem condenado injustamente no Ceará não era autor do crime*.

o mesmo apresenta cerca de 1,84 m, quinze centímetros a mais que a altura de Antonio Claudio[28].

2.4. Ampliação do modelo do Innocence Project para as Defensorias Públicas

O segundo caso relatado no item anterior mostra quão benéficos podem ser parcerias entre o *Innocence Project* Brasil e as Defensorias Públicas. Além da atuação de organizações não governamentais, as Defensorias Públicas têm um papel essencial na atual em prol da reversão de condenações injustas e deveriam contar com mecanismos de investigação em paridade de armas com o órgão acusador, o Ministério Público.

Vejamos o caso de Israel de Oliveira Pacheco, que ganhou repercussão midiática como sendo o primeiro no Brasil onde uma revisão criminal apresentada ao STF fundada no exame de DNA foi julgada procedente, resultando na absolvição[29]. Em 14/05/2008, na cidade de Lajeado/RS houve a invasão de uma residência, roubo de alguns bens e estupro de uma das moradoras. Durante as investigações a vítima e a mãe da vítima reconheceram Israel de Oliveira Pacheco como autor das condutas. A vítima e a mãe relataram também que apenas um homem havia ingressado na residência. As investigações apontaram a participação de Jacson Luis Silva como coautor do roubo; contudo, teria permanecido na parte externa da residência. A conduta delituosa deixou como vestígio no interior da residência manchas de sangue em uma colcha. Conforme relatos do primeiro Defensor Público do caso, Tiago Rodrigo dos Santos,

> "... na época, houve auto de apreensão de pedaço de colcha do local do crime que constava a existência de manchas de sangue. O

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[28] G1 GLOBO. *Vítima de estupro disse em depoimento que homem condenado injustamente no Ceará não era autor do crime.*

[29] Existem julgados anteriores proferidos por tribunais de justiça onde o exame de DNA foi usado como prova nova para o deferimento da revisão criminal. Por exemplo, na revisão criminal 70012499000, do TJ/RS, julgada em 28/04/2006, por quatro votos a três os desembargadores consideraram que a prova nova trazida, no caso, o exame de DNA que demonstrou que o condenado não era o pai dos gêmeos a que deu à luz a vítima, era apta a desconstituir a condenação por estupro.

> Defensor solicitou ao Juiz que oficiasse o Departamento Médico Legal sobre a possibilidade de se fazer a análise de DNA dessa amostra. 'O exame resultou negativo e comprovou que Israel não estava no local do crime. Mesmo assim, o juiz de então condenou Israel porque a vítima o reconheceu em audiência de instrução. A partir daí houve recurso. Mesmo comprovando que o DNA não correspondia ao do réu, o acórdão do TJ/RS entendeu que o DNA tinha sido positivo e não negativo'".[30]

Desta forma, após o julgamento pelo TJ/RS, Israel de Oliveira Pacheco foi condenado a 11 anos e 6 meses de reclusão, em regime inicial fechado, pela prática dos crimes de estupro e roubo com causa de aumento por emprego de arma e em concurso de pessoas. Jacson Luis Silva foi condenado pelo crime de receptação. A Defensoria Pública do Estado do Rio Grande do Sul ingressou com pedido de revisão criminal, uma vez que o laudo pericial do Instituto Geral de Perícias do Rio Grande do Sul concluiu que o material genético presente no colchão era de Jacson Luis da Silva e não de Israel de Oliveira Pacheco. O pedido de revisão criminal foi negado sob o argumento de que prevaleceria a palavra da vítima no reconhecimento de Israel e que a prova pericial não havia excluído a presença de Israel do local do fato. Seguiu-se ingresso com recurso especial, no STJ, que reconheceu a nulidade do julgamento da revisão criminal por cerceamento de defesa, uma vez que a defesa não foi regularmente intimada para a sessão de julgamento. Em novo julgamento o TJ/RS manteve a condenação. Por fim, ingressou-se com recurso extraordinário perante o STF, cujo resultado do julgamento pela Primeira Turma foi pelo provimento do recurso e consequente absolvição de Israel, por maioria[31]. Interessante observar que dos cinco ministros que participaram do julgamento três votaram pelo provimento e dois pelo não provimento. Dada a importância desse julgamento, primeiro no qual o exame de DNA serviu como fundamento para a reversão da condenação pelo STF analisemos o entendimento de cada um dos ministros.

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[30] CARVALHO, Nicole. *Caso Israel*: DPE/RS obtém absolvição pelo STF de cidadão que foi condenado por estupro mesmo com prova de DNA negativo para o crime. 19/12/2018.

[31] STF. *RHC 128.096/RS*. Primeira Turma, relator Ministro Marco Aurélio, julgado em 18/12/2018.

No primeiro dia do julgamento, em 04/09/2018, votou o relator, Ministro Marco Aurélio, no sentido de prover o recurso, com base no resultado do exame de DNA que excluiu o perfil genético de Israel Pacheco[32]. No mesmo dia, votou o Ministro Luís Roberto Barroso, que divergiu do entendimento do relator, não conhecendo do recurso, baseado no fato de que havia um recurso criminal julgado improcedente pelo TJ/RS e que não mencionava a existência de cerceamento de defesa[33]. Em seguida o julgamento foi interrompido em razão do pedido de vista pela Ministra Rosa Weber.

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[32] "De acordo com o relator do recurso, ministro Marco Aurélio, os laudos periciais revelaram a incompatibilidade do material biológico com o perfil genético de Israel Pacheco, tornando 'insubsistentes as premissas lançadas para respaldar condenação'. Ele concluiu que uma possível constatação do não envolvimento no crime implica a absolvição do recorrente, "não surgindo como a consubstanciar nulidade processual". O relator frisou que, conforme a acusação, Israel foi o único a ingressar na residência da vítima, mas considerou que a superveniência de prova técnica desconstitui essa versão, 'tornando inviável assentar, acima de qualquer dúvida razoável, a participação do paciente no contexto delituoso, por sinal a revelar estigma praticamente insuplantável'. Segundo o ministro, embora a palavra da vítima nos crimes contra a dignidade sexual apresente "acentuado valor probatório", não pode se sobrepor à conclusão da prova técnica, que comprovou que o sangue coletado no local do estupro seria de Jacson, 'prova nova a corroborar a inocência do paciente'. Conforme o relator, a situação de dúvida leva à absolvição, considerado o princípio da não culpabilidade. Ele também destacou que, com a conclusão da prova pericial, não subsiste a condenação por roubo, tendo em vista que, segundo a denúncia, teria sido cometido pelo mesmo autor do delito sexual, no mesmo local. Por essas razões, votou pelo deferimento do recurso para absolver Israel Pacheco, nos termos do artigo 386, inciso IV, do Código de Processo Penal (CPP), segundo o qual o juiz absolverá o réu, mencionando a causa na parte dispositiva, desde que reconheça estar provado que não concorreu para a infração penal". Conforme STF. *1ª Turma*: Pedido de vista suspende julgamento de recurso interposto com base em laudo de DNA,

[33] "O ministro Luís Roberto Barroso não acolheu os argumentos da Defensoria Pública. Ele ressaltou que a primeira e a segunda instâncias da justiça gaúcha foram convergentes em condenar o recorrente e observou que a única divergência foi a dosimetria da pena, reduzida para 11 anos e 6 meses de reclusão, em sede de apelação. O ministro lembrou que a DPE-RS ajuizou um primeiro pedido de revisão criminal que foi julgado improcedente. 'Esse julgamento foi anulado pelo STJ que considerou que o TJ havia incorrido em cerceamento de defesa no processo de julgamento da revisão criminal e não no processo original', disse. Segundo ele, contra a decisão do STJ, a Defensoria interpôs o RHC objetivando o reconhecimento da inocência do condenado. Ele avaliou que a DPE pretendia que fosse reconhecida a inocência do réu em sede de

O julgamento foi retomado no dia 25/09/2018, com o voto da Ministra Rosa Weber, que decidiu no mesmo sentido do relator e reforçou que a prova pericial produzida com o exame de DNA foi fundamental para excluir o perfil de Israel Pacheco e incluir o perfil do corréu Jacson Luis no caso em tela e em outros dois casos abertos de estupros na região[34]. Em seguida, o julgamento foi suspenso novamente, em virtude do pedido de vista pelo Ministro Alexandre de Moraes.

O julgamento foi retomado no dia 23/10/2018, com o voto do Ministro Alexandre de Moraes e nova suspensão, em razão do pedido de vista do Ministro Luiz Fux. O Ministro Alexandre de Moraes votou no sentido de conhecer e não prover o recurso ponderando que o reconhecimento de Israel Pacheco pela vítima e pela mãe da vítima era consistente e que a prova pericial permitia apenas afirmar que o corréu Jacson Luis havia estado em algum momento do local, mas não excluía a possibilidade de Israel Pacheco ser o autor do estupro[35].

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revisão criminal e sem pronunciamento do Tribunal de Justiça. 'Isso não me parece que sequer fosse possível', salientou. Por fim, o ministro verificou que houve um segundo pedido de revisão criminal no TJ-RS que foi julgado improcedente, 'sem nenhuma imputação de cerceamento de defesa'. Por essas razões, o ministro julgou prejudicado o RHC, tendo em vista a superveniência do julgamento da segunda revisão criminal a qual, conforme o ministro, 'foi ajuizada na pendência desse HC'". STF. *1ª Turma*: Pedido de vista suspende julgamento de recurso interposto com base em laudo de DNA.

[34] "Para ela, o laudo pericial alterou o contexto probatório, o que impossibilita a manutenção do decreto condenatório. Após analisar os autos, a ministra constatou, entre outros pontos, que a condenação foi balizada, nas instâncias ordinárias, pelo reconhecimento da vítima e pela delação do corréu Jacson Luis. No entanto, segundo ela, o laudo pericial indicou que o sangue encontrado no local pertencia a Jacson, fato que 'retira toda a credibilidade da sua delação'. A ministra também verificou que o auto de reconhecimento foi lavrado sem a assinatura das testemunhas presenciais, uma exigência do artigo 226, inciso IV, do Código de Processo Penal (CPP). Por fim, a ministra Rosa Weber observou que o mesmo laudo pericial permitiu a identificação de Jacson em outros dois crimes de estupro que teriam ocorrido na mesma cidade, quase na mesma época do crime em questão. Ela salientou, ainda, que o exame realizado por meio de amostras inseridas no banco de perfis genéticos do Estado do Rio Grande do Sul é autorizado pelo artigo 9º da Lei de Execuções Penais (LEP). 'Assim, a realização e a conclusão do laudo pericial não padecem, *a priori*, de vício legal', destacou". STF. *Novo pedido de vista adia julgamento de recurso interposto com base em laudo de DNA*.

[35] "Na sessão desta terça-feira (23), o ministro Alexandre de Moraes apresentou voto-vista pelo desprovimento do recurso e a consequente manutenção da

O último voto foi proferido no dia 18/12/2018, pelo Ministro Luiz Fux, seguindo o relator e a Ministra Rosa Weber, invocando a existência de dúvidas além do razoável[36], cabendo, dessa forma, o benefício da dúvida ao réu[37].

O caso Israel mostra como a busca por reversões de condenações injustas deve ser realizada por intermédio de uma rede integrada por iniciativas não estatais, como o *Innocence Project* Brasil, bem como com o uso do aparato estatal, como a Defensoria Pública. Observa-se, no caso Israel, que a prova da inocência foi o exame de DNA realizado pelo Instituto

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condenação. O ministro salientou que o réu foi reconhecido pela vítima e por sua mãe como tendo sido o autor dos delitos de roubo e estupro. Ele destacou que, em dois momentos distintos, o réu foi reconhecido como autor por parte da vítima. Observou, ainda, que os depoimentos da vítima e de sua mãe são coerentes, sem alteração de versão, e em momento algum é mencionada a presença do corréu Jacson no local. Para o ministro, o fato de ter sido encontrado sangue de Jacson no local do crime não permite chegar à conclusão de que ele teria sido o autor do estupro, mas apenas que esteve no local e que isso pode ter ocorrido antes ou depois do crime. Segundo ele, não há nos autos qualquer elemento que indique haver algum motivo escuso para que a vítima apontasse um ou outro como autor do estupro. 'Até por que, o sangue não foi encontrado na vítima. O que o sangue no local dos fatos demonstra é que ele esteve lá em algum momento. O que a vítima e sua mãe atestam é que uma única pessoa praticou o roubo e o estupro'". STF. *Suspenso julgamento de recurso em que Defensoria pede absolvição de condenado com base em DNA*.

[36] Em que pese não haver no nosso ordenamento jurídico *standards* como no sistema norte-americano, existem julgadores e doutrinadores que defendem a adoção de um critério dessa natureza para que o juiz possa condenar o réu. Nesse sentido, VASCONCELLOS, Vinicius Gomes de. *Standard* probatório para condenação e dúvida razoável no processo penal: análise das possíveis contribuições ao ordenamento brasileiro. *Revista Direito GV*, v. 16, n. 2, maio/ago. 2020, e1961.

[37] "O julgamento foi concluído com a leitura do voto-vista do ministro Luiz Fux no sentido de absolver Israel Pacheco. Fux entendeu que uma condenação deve ser 'clara como a luz' e verificou que o processo está extremamente intrincado. 'Li o processo e os laudos que foram apresentados e cheguei à conclusão de que a dúvida, para além do razoável, deve se operar favor do réu', ressaltou, ao parabenizar o trabalho da Defensoria Pública gaúcha. Fux acompanhou o voto do relator, ministro Marco Aurélio, que, em 4/9, considerou que o surgimento de nova prova técnica (o exame de DNA) comprovando que o sangue era do corréu gera dúvida razoável sobre a autoria e torna inviável a condenação de Israel Pacheco. Ele votou pela absolvição com base no artigo 386 do Código de Processo Penal (CPP)". STF. *1ª Turma do STF provê recurso interposto com base em laudo de DNA e absolve condenado.*

Geral de Perícias do Rio Grande do Sul[38], o que demonstra a neutralidade esperada dos órgãos periciais. Os órgãos de perícia criminal devem atender aos pedidos de exames pericias tanto do Ministério Público como da Defensoria Pública, mantendo-se equidistantes tanto da acusação como da defesa. Com a finalidade de fortalecer a produção probatória baseada em exames periciais, sugere-se que a Defensoria Pública realize convênios com instituições de ensino superior, públicas e privadas, para suprir a carência de profissionais na árdua tarefa de estudar e triar os diversos casos existentes.

3. *The National Registry of Exonerations* e as causas de condenações injustas

Uma excepcional fonte de consulta sobre reversões de condenações no território americano é o registro nacional de exonerações, criado em 2012, com a finalidade de coletar, analisar e disseminar informações sobre exonerações ocorridas desde 1989[39]. Até a data de 22/12/2019 constavam 2.533 exonerações, sendo identificados cinco fatores que levaram à condenação: identificação errônea (29%), perjúrio ou falsa acusação (59%), falsa confissão (12%), evidência forense falsa ou mal interpretada (24%) e má conduta do agente estatal (54%)[40]. Uma vez que a condenação injusta pode estar lastreada em mais de um fator, o somatório

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[38] Ultrapassa o escopo do presente artigo a análise do modelo mais adequado de disposição institucional dos órgãos de perícia criminal no sistema de persecução penal. O ordenamento jurídico confere autonomia funcional, técnica e científica ao perito criminal de natureza oficial, conforme Lei nº. 12.030/2009 e dispositivos do CPP, como, por exemplo, no artigo 6º, II com a apreensão dos objetos que compõem o exame do corpo de delito e no artigo 276, que trata da nomeação dos peritos. Contudo, existem discussões se os órgãos de perícia criminal podem implantar a autonomia necessária para o desenvolvimento dos seus trabalhos de forma neutra e isenta inseridos na mesma estrutura organizacional das polícias judiciárias ou se devem compor órgãos próprios, bem como se esses órgãos deveriam estar vinculados ao Secretário de Segurança Pública ou Ministro da Justiça, à outra secretaria ou ministério, ao Ministério Público ou diretamente ao Poder Judiciário.

[39] THE NATIONAL REGISTRY OF EXONERATIONS. *The National Registry of exonerations*.

[40] THE NATIONAL REGISTRY OF EXONERATIONS. *% Exonerations by Contributing Factor*.

dos percentuais será superior a 100%. De fato, as condenações ocorrem, na sua maioria, em decorrência de mais de um fator[41].

Verifica-se que os percentuais apresentados não são homogêneos quando relacionados aos tipos penais, conforme se observa na figura 1.

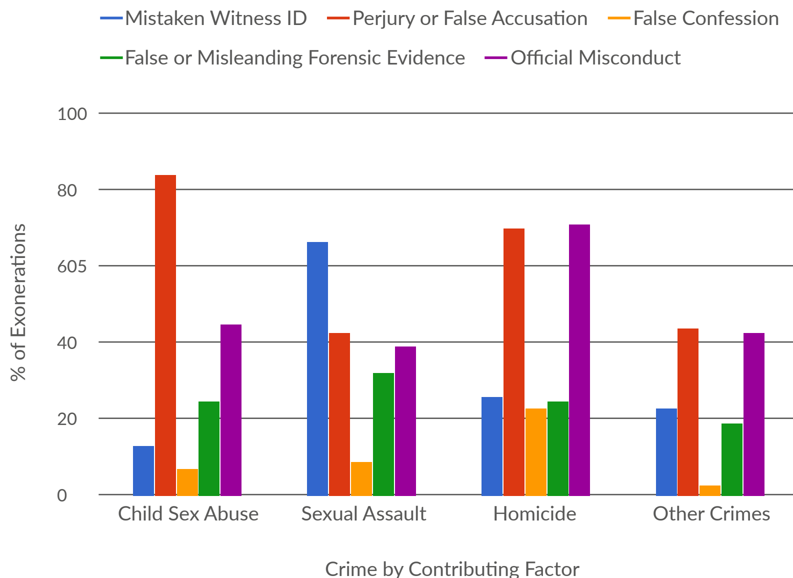

Figura 1. Percentuais de exonerações distribuídos conforme os tipos penais (abuso sexual de crianças, crimes sexuais, homicídio e outros crimes) e fontes que fundamentaram as condenações injustas (identificação errônea, falsa acusação, falsa confissão, evidência forense falsa ou mal interpretada e má conduta do agente estatal)

Fonte – The National Registry of Exonerations[42]

No caso de abusos sexuais a crianças, o principal fator de condenações injustas são as falsas acusações; nos crimes sexuais são as

[41] LAPORTE, Gerald. Wrongful Convictions and DNA Exonerations: understanding the role of forensic science. *National Institute of Justice Journal*, v. 279, abr., 2018, p. 16-17.

[42] THE NATIONAL REGISTRY OF EXONERATIONS. *% Exonerations by Contributing Factor*.

identificações errôneas; nos homicídios as falsas acusações e a má conduta dos agentes estatais equiparam-se como as principais. Interessante observar que nos tipos penais abordados na figura 1 a falsa confissão encontra-se com o menor percentual de incidência.

Em números absolutos, foram observadas 607 exonerações nas quais a prova pericial serviu de fundamento, de forma isolada ou juntamente com outras provas, para a condenação, sendo que, em cerca de 30% (182 exonerações) a causa da condenação foi somente a prova pericial[43]. O quadro 1 apresenta os quantitativos de exonerações com base nos fatores responsáveis pelas condenações injustas.

Fator	Número de exonerações
Prova pericial	182
Prova pericial e mais um fator	170
Prova pericial e mais dois fatores	145
Prova pericial e mais três fatores	100
Prova pericial e mais quatro fatores	10

Quadro 1. Exonerações conforme fatores (prova pericial falsa ou interpretada de forma inadequada, erro na identificação testemunhal, falsa confissão, falsa acusação, má conduta oficial) responsáveis pelas condenações, entre os anos de 1989 a 2019, conforme dados disponíveis em *The National Registry of Exonerations* (2020)

Fonte: AUTORES, 2020

4. Como as provas periciais auxiliam na revelação, mas também embasam condenações injustas

Em cerca de 45% dos casos de reversões de condenações injustas por meio do *Innocence Project*, o uso de alguma prova pericial contribuiu

[43] THE NATIONAL REGISTRY OF EXONERATIONS. *Browse Case*: Detailed View.

para a condenação[44]. Da consulta ao registro nacional de exonerações, em 24% das exonerações a prova pericial foi utilizada como fundamento para a condenação injusta, o que perfazem 607 exonerações, na data de 22/12/2019[45].

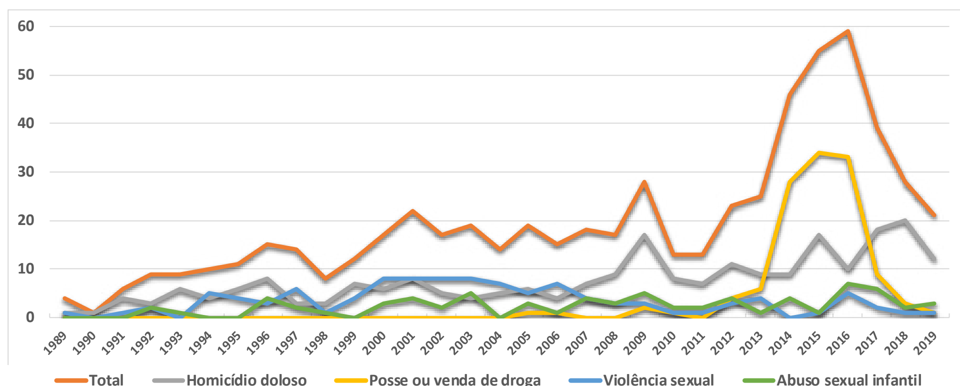

Figura 2. Exonerações, no total e separadas pelos quatro maiores quantitativos, por ano, nas quais a prova pericial foi um dos fundamentos para a condenação injusta, conforme dados disponíveis em *The National Registry of Exonerations* (2020)

Fonte: AUTORES, 2020

A figura 2 apresenta a evolução no número total de exonerações por ano e as exonerações separadas pelos quatro tipos penais que juntos representam cerca de 89% de todas as exonerações que constam no banco de dados. O tipo penal referente à posse ou venda de drogas merece consideração especial uma vez que consta com elevados quantitativos de exonerações em razão dos trabalhos desenvolvidos nos anos de 2014 a 2016. Isso porque, das 123 exonerações em relação a esse tipo penal, 95 ocorreram nesses três anos.

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[44] INNOCENCE PROJECT. *Overturning Wrongful Convictions Involving Misapplied Forensics*.

[45] THE NATIONAL REGISTRY OF EXONERATIONS. *Browse Case*: Detailed View.

Da etiologia das provas pericias apresentadas de maneira a embasar condenações injustas, o *Innocence Project*[46] classifica-as em cinco grupos: disciplina forense não confiável ou inválida, validação insuficiente do método, testemunho pericial falso[47], erros e má conduta. Contudo, essa não é a única classificação existente, sendo apresentada outra com quatro grupos: erros no exame forense, baseada em métodos não confiáveis ou não demonstrados, expressos com confiança exagerada ou de maneira a enganar e mediante fraude[48]. A partir das duas classificações existentes, percebe-se que os erros periciais se dão com base em três grupos: falhas no método/técnica, que pode ser não confiável, validado de forma insuficiente ou não demonstrado; falhas na aplicação ou execução do método/técnica, subdividas em erros ou na confiança exagerada do perito; e falhas de conduta, como por exemplo o cometimento de fraude ou falsa perícia.

No primeiro grupo a falha está no método/técnica, que não é confiável, válido; ou seja, quando aquele método ou técnica não apresenta consistência; bem como quando a disciplina forense apresenta consistência, contudo ainda não houve validação suficiente.

No segundo grupo constam falhas na aplicação ou na execução do método/técnica, o que abrange o denominado testemunho enganoso e erros de execução. O testemunho enganoso do perito ganha grande relevância no modelo judicial americano, no qual o perito é instado a se manifestação na forma de um testemunho. Podemos trazer para a nossa realidade essa causa como sendo a apresentação de laudos periciais e pareceres técnicos com lacunas, de maneira a trazer dúvidas, muitas simplificações ou dubiedade interpretativa. Subdivide-se essa causa em quatro formas: simplificação demasiada,

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[46] THE NATIONAL REGISTRY OF EXONERATIONS. *% Exonerations by Contributing Factor*.

[47] No sistema jurídico do *common law*, do qual fazem parte os EUA e Inglaterra, o perito é visto como uma testemunha especializada; enquanto que no sistema jurídico da *civil law*, do qual fazem parte o Brasil, demais países da América do Sul e Central, além dos países da Europa continental, o perito não é visto como testemunha. Optou-se por manter o termo "testemunho" pois essa é a terminologia empregada quando se consulta o *National Registry of Exonerations*.

[48] THE NATIONAL REGISTRY OF EXONERATIONS. *Glossary*.

exagero na correlação ou relação entre as evidências e o fato, omissão no significado da análise e omissão quanto às limitações do método. Nos erros de execução, um exemplo muito comum se dá quando há mistura de amostras ou contaminação.

No terceiro grupo temos falhas de conduta do produtor da prova pericial ou porque apresentou resultados sem a realização dos exames ou porque omitiu resultados que seriam desfavoráveis a determinada tese acusatória. Dois exemplos recentes e muito divulgados sobre falhas de conduta do produtor da prova pericial são os que envolveram as peritas em química Annie Dookhan e Sonja Farak. Annie Dookhan apresentou resultados de análises que não haviam sido feitas, em milhares de casos, no período de 2003 a 2011, bem como manteve conduta próxima à acusação, o que demonstrou que ela não era neutra. Sonja Farak tornou-se dependente química o que fez com que adulterasse milhares de substâncias químicas submetidas à análise; bem como trabalhasse sob influência das referidas substâncias, no período de agosto de 2004 a janeiro de 2013[49].

West e Meterko[50] realizaram um estudo das condenações injustas com exonerações possíveis graças ao uso do exame de DNA, no período de 1989 a 2014, e apresentam como técnicas periciais fontes de erros a serologia, a análise microscópica de pelos, a análise de marcas de mordidas, a aplicação incorreta do exame de DNA, o uso de cães farejadores, a análise de impressões digitais, a análise de marcas de calçados, o uso do resultado do teste do polígrafo, análise de pelos caninos, análise de fibras, análise envolvendo metalurgia e geologia, análise de espuma polimérica, análise de marcas de pneus e comparação de locutores.

O quadro 2 apresenta os tipos penais com os respectivos quantitativos totais e os quantitativos de condenações onde o único fator da condenação foi a prova pericial.

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[49] COMMONWEALTH OF MASSACHUSETTS. *Drug Lab Cases Information*.

[50] WEST, Emily; METERKO, Vanessa. Innocence project: DNA exonerations, 1989-2014: review of data and findings from the first 25 years. *Alb. L. Rev.*, v. 79, 2015, p. 746-756.

Classificação	Número de exonerações	
	Total	Prova pericial como único fator para a condenação (% sobre o total)
Homicídio doloso	238	38 (16%)
Posse ou venda de droga	123	118 (96%)
Violência sexual	107	2 (2%)
Abuso sexual infantil	72	3 (4%)
Homicídio culposo	17	5 (29%)
Incêndio	12	9 (75%)
Roubo	11	1 (9%)
Ataque	6	1 (17%)
Abuso infantil	5	3 (60%)
Tentativa de homicídio	4	0 (0%)
Rapto	3	0 (0%)
Conspiração	2	0 (0%)
Partícipe em homicídio	1	0 (0%)
Arrombamento / entrada ilegal	1	0 (0%)
Abuso de adulto dependente	1	1 (100%)
Ofensa à justiça militar	1	0 (0%)
Infrações de trânsito	1	1 (100%)
Posse ou venda de arma	1	0 (0%)
Outros crimes violentos	1	0 (0%)

Quadro 2. Exonerações conforme os tipos penais, entre os anos de 1989 a 2019, conforme dados disponíveis em *The National Registry of Exonerations*[51]

Fonte: AUTORES, 2020

[51] THE NATIONAL REGISTRY OF EXONERATIONS. *Browse Case*: Detailed View.

Com base nos dados apresentados no quadro 2 verifica-se que algumas condutas apresentam percentual elevado de condenações injustas às quais a prova pericial foi o único fator para a condenação. Retirando os casos de abuso de adulto dependente e infração de trânsito, onde somente houve uma exoneração, a conduta que apresentou o maior percentual de condenações baseadas unicamente na prova pericial, em comparação com aquelas onde a prova pericial foi um dos fatores foi a posse ou venda de drogas. Em 118 das 123 exonerações a condenação deu-se somente com base no exame pericial. Uma análise superficial dos casos pode levar à errônea conclusão de que o exame pericial apresentou um resultado que, posteriormente, mostrou-se equivocado, advindo ou do uso de uma técnica não confiável ou então em razão de uma falha na aplicação da técnica. Contudo, não foi essa a razão. A análise dos casos mostrou que a condenação foi muito célere, fundamentada nos exames de constatação de drogas, com o uso de testes de campo e/ou colorimétricos. Em virtude da celeridade para a condenação os órgãos periciais não haviam apresentado os exames laboratoriais, denominados no Brasil de exames definitivos. Assim, pode-se afirmar que a falha não está na técnica adotada, mas sim no procedimento judicial de aceitar como fundamento para a condenação o resultado de testes sabidamente presuntivos, que não foram concebidos como um método definitivo para a identificação daquela substância e servem para que os órgãos policiais tenham o mínimo de fundamento para a tomada de decisões imediatas[52].

No Brasil segue-se o mesmo procedimento: dois exames, um de constatação, presuntivo, onde são identificados grupos funcionais; e outro exame denominado definitivo, onde é possível identificar a substância com base em análises provenientes de mais de uma técnica[53]. O exame de constatação da natureza e quantidade da substância é considerado como uma modalidade que traz um mínimo grau de segurança para algumas medidas de restrição da liberdade, pois serve

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[52] UNODC. *Rapid Testing Methods of Drugs of Abuse*.

[53] UNITED STATES DEPARTMENT OF JUSTICE. *Scientific Working Group for The Analysis of Seized Drugs (SWGDRUGS) Recommendations*. Versão 8.0, 13/06/2019, p. 14-19.

para o estabelecimento da materialidade delitiva para se legitimar o auto de prisão em flagrante, deferimento da prisão preventiva e recebimento da denúncia. O exame definitivo é necessário para a demonstração da materialidade delitiva para ensejar a condenação[54]. Contudo, o STJ prevê uma hipótese excepcional, na qual o exame preliminar serve como prova da materialidade delitiva apta a fundamentar a condenação, quando "permita grau de certeza idêntico ao do laudo definitivo"[55].

A exceção criada é perigosa e gera conclusões equivocadas, uma vez que os Ministros da 3ª Seção entenderam que "o laudo preliminar de constatação, assinado por perito criminal, identificando o material apreendido como cocaína em pó, entorpecente identificável com facilidade mesmo por narcotestes pré-fabricados, constitui uma das exceções em que a materialidade do delito pode ser provada apenas com base no laudo preliminar de constatação"[56]. Esse equivocado entendimento vem sendo utilizado como paradigma para embasar condenações onde não há suporte científico para se afirmar que aquela substância é de fato cocaína[57]. Estamos diante de uma fonte potencial de condenações indevidas cuja causa é a interpretação errônea por parte dos julgadores do exame pericial que consta nos autos.

LaPorte[58] analisou 133 exonerações nas quais a fundamentação se deu com base no uso do exame de DNA, com quantitativos por ano apresentados na figura 4.

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[54] Esse entendimento é aceito de forma majoritária nos tribunais. Por todos, STJ, HC 350.996/RJ, Rel. Min. Nefi Cordeiro, 3ª Seção, j. 24/08/2016, DJe 29/08/2016.

[55] STJ, do EREsp 1.544.057, 3ª Seção, j. 26/10/2016, DJe 09/11/2016.

[56] STJ, do EREsp 1.544.057, 3ª Seção, j. 26/10/2016, DJe 09/11/2016.

[57] NETO, Claudio Saad; SILVA, Erick Simões da Camara e. *A perícia criminal no contexto da legislação brasileira*. In: Ciências Forenses: uma introdução às principais áreas da criminalística (Org. Jesus Antonio Velho, Gustavo Caminoto Geiser, Alberi Espíndula). 4 ed. Campinas: Millennium, [no prelo].

[58] LAPORTE, Gerald. Wrongful Convictions and DNA Exonerations: understanding the role of forensic science. *National Institute of Justice Journal*, v. 279, abr., 2018, p. 13.

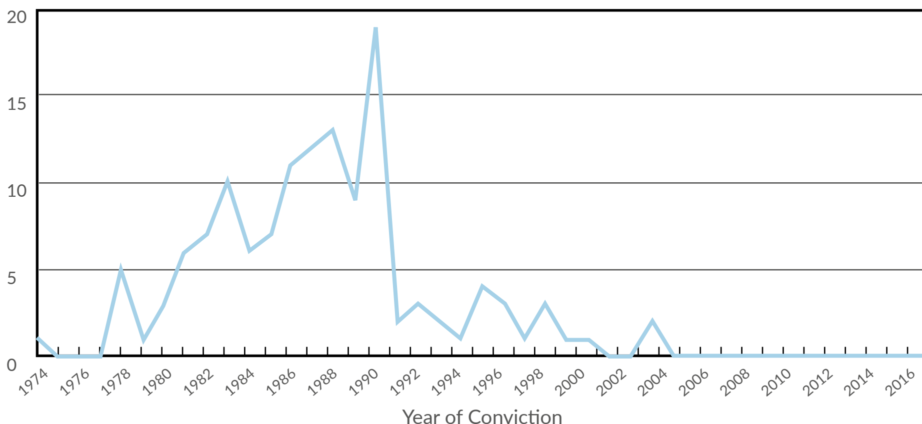

Figura 4. Número de exonerações as quais a prova pericial foi fonte que fundamentou a condenação injusta, conforme os anos e na qual a exoneração foi realizada com o uso do exame de DNA

Fonte: LAPORTE[59]

A análise da figura 4 desperta um questionamento. Por que houve uma queda substancial no número de exonerações com o uso do exame de DNA a partir de 1991? Não há somente uma razão, mas sim um conjunto de fatores. Por um lado, houve um significativo avanço e disseminação do exame de DNA, baseado na reação em cadeia da polimerase (PCR); e por outro lado, o incremento no uso das ciências forenses para a produção de provas periciais, nas décadas de 1970-1990 levou ao aumento nos erros de análise e dúvidas quanto à possibilidade dos julgadores lidarem com as evidências forenses, uma vez que superestimavam a objetividade e certeza das evidências científicas[60]. As condenações injustas baseadas em provas periciais geraram um movimento que defendia a mudança

[59] LAPORTE, Gerald. Wrongful Convictions and DNA Exonerations: understanding the role of forensic science. *National Institute of Justice Journal*, v. 279, abr., 2018, p. 15.

[60] IMWINKELRIED, Edward J. The Standard for Admitting Scientific Evidence: a critique from the perspective of juror psychology. *Villanova Law Review*, v. 28, 1983, p. 563.

de paradigma quanto aos critérios de assunção da prova pericial[61], o que culminou, em 1993, com o julgado Daubert[62].

O uso de técnicas e métodos com a denominação de periciais, contudo, sem respaldo científico adequado são as causas principais de provas periciais que alicerçam condenações injustas. Questiona-se a amplitude da conclusão, bem como a validade de métodos e técnicas periciais que visam identificar a fonte de determinado vestígio como, por exemplo, os exames de amostras de cabelos, confrontos microbalísticos, exames em marcas de pneus e exames em marcas de mordidas.

Vejamos o caso da condenação de Robert Lee Stinson, baseada em um exame pericial em marcas de mordidas[63]. Em 03/11/1984, Ione Cychosz, uma senhora de 63 anos, foi estuprada, esfaqueada e espancada até a morte, sendo o corpo encontrado em um terreno baldio, próximo à casa da vítima. Os vestígios existentes eram material genético, na forma de espermatozoides, em pequena quantidade para a identificação, além de oito marcas de mordida, produzidas antes da morte, no corpo da vítima. Durante a investigação houve a oitiva de diversos indivíduos, inclusive Robert Lee Stinson, com 21 anos, vizinho do terreno baldio onde o corpo da vítima foi encontrado. Os investigadores contaram uma piada e perceberam, enquanto Stinson ria, a ausência de um dente da frente, bem como um dente torto, o que foi suficiente para que fosse preso. Durante o julgamento, em 1985, dois odontólogos forenses foram ouvidos. O primeiro deles, Johnson, afirmou que as marcas de mordida "tinham sido feitas por dentes idênticos", na comparação com os padrões de Stinson. O segundo odontólogo forense, Raymond Rawson, afirmou que as evidências do caso apresentavam "alta qualidade" e eram "muito poderosas". Contudo, os especialistas não explicaram o fato de Stinson não apresentar dente em um local onde havia ausência nas marcas de mordida. A defesa de Stinson não questionou a qualificação dos peritos

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[61] RISINGER, D. Michael; DENBEAUX, Mark P.; SAKS, Michael J. Exorcism of Ignorance as a Proxy for Rational Knowledge: the lessons of handwriting identification "expertise". *University of Pennsylvania Law Review*, v. 137, 1989, p. 779-780.

[62] *Daubert versus Merrell Dow Pharmaceuticals Inc*. 509 U. S. 579, (1993). Disponível em: <http://www.supremecourt.gov>. Acesso em: 16 jan 2020.

[63] THE NATIONAL REGISTRY OF EXONERATIONS. *Robert Lee Stinson*.

forenses e não apresentou perito contratado[64] para contrapor as afirmativas dos odontólogos forenses. A não apresentação de perito contratado pela parte se deu, principalmente pela dificuldade em conseguir peritos, uma vez que Johnson havia apresentado o referido caso em uma conferência, antes do julgamento, e muitos dos especialistas foram contaminados com as conclusões apresentadas. Durante a oitiva, Stinson apresentou relatos inconsistentes quanto ao seu paradeiro no momento da morte de Ione Cychosz e, após três dias de julgamento, foi condenado à prisão perpétua por homicídio em primeiro grau (doloso e com premeditação).

Na apelação a defesa alegou que os peritos não tinham credibilidade e que a defesa não foi efetiva, isto porque, na primeira instância, o advogado participou apenas por duas semanas, não teve tempo de preparar uma defesa adequada e havia conflito entre o acusado e o advogado. A apelação foi negada e a sentença condenatória de Stinson transitou em julgado. O caso de Robert Lee Stinson foi aceito pelo *Innocence Project* de Wisconsin em 2005. Foram realizados exames de DNA no material genético existente no suéter da vítima, na forma de saliva e sangue, com resultados pela exclusão de Stinson[65]. Além disso, as marcas de mordidas foram reexaminadas por quatro peritos distintos e todos concluíram pela exclusão de Stinson. Promovida a revisão criminal em 2009, os argumentos foram aceitos e a condenação revertida. Interessante observar que o promotor do caso, ouvido durante a revisão criminal, afirmou que à época "ninguém no estado de Wisconsin tinha feito um caso de homicídio por estupro como este antes", e "então, estávamos, de fato, reinventando a roda". O material genético colhido no local do estupro e homicídio de Ione Cychosz foi inserido no banco de dados de perfis genéticos, o que possibilitou encontrar o autor dos fatos, Moses Price Jr, em 2012.

5. Mecanismos para diminuir erros trazidos com o uso inadequado de provas periciais

Após analisar como os exames periciais podem lastrear condenações injustas, buscam-se mecanismos para reduzir tais ocorrências.

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[64] No ordenamento brasileiro representado pela figura do assistente técnico.

[65] Em 1984 referidos exames não eram possíveis, em razão da pouca quantidade de material existente para análise.

Para isso, deve-se dotar o responsável pelo andamento do procedimento judicial de meios para identificar se naquele exame pericial há falhas no método/técnica, na aplicação ou execução ou de conduta. Atualmente, no sistema jurídico anglo-saxão, o mecanismo mais utilizado pauta-se na Trilogia Daubert e apresenta os contornos traçados a partir de três julgados norte-americanos: Daubert *versus* Merrell Dow Pharmaceuticals Inc.[66], em 1993; General Eletric Co. *versus* Joiner[67], em 1997; e Kuhmo Tire Co. *versus* Carmichael[68], em 1999. Em linhas gerais, a Trilogia Daubert baseia-se na premissa de que cabe ao julgador a tarefa de realizar a filtragem da prova, utilizando-se o termo *gatekeeping*, assumindo que tal prova pode ser levada ao tribunal com o *status* de prova pericial, somente após a inquirição do perito pelo julgador, que se baseia em alguns critérios. No julgado Daubert *versus* Merrell Dow Pharmaceuticals Inc os critérios apresentados foram: se a teoria ou a técnica em questão pode ser (e foi) testada, se foi submetida à revisão por pares e publicação, se há taxa de erro conhecida ou potencial e manutenção de padrões de controle operacionais, e se conquistou ampla aceitação dentro de parcela relevante da comunidade científica[69]. Mas, como os critérios não são taxativos nem exaustivos, outros surgiram em complementação, como, por exemplo:

> "1. As questões objeto de análise pericial foram pesquisadas e obtidas naturalmente e diretamente fora da investigação, ou seja, independente do litígio?
>
> 2. O perito extrapolou injustificadamente uma conclusão sem fundamento a partir de uma premissa aceita?
>
> 3. O perito apresenta devidamente inventariadas as explicações alternativas óbvias?

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[66] *Daubert versus Merrell Dow Pharmaceuticals Inc*. 509 U. S. 579, (1993). Disponível em: <http://www.supremecourt.gov>. Acesso em: 16 jan 2020.

[67] *General Eletric Co. versus Joiner*. 522 U.S. 136 (1997). Disponível em: <http://www.supremecourt.gov>. Acesso em: 16 jan 2020.

[68] *Kuhmo Tire Co. versus Carmichael*. 526 U. S. 137 (1999). Disponível em: <http://www.supremecourt.gov>. Acesso em: 16 jan 2020.

[69] *Daubert versus Merrell Dow Pharmaceuticals Inc*. 509 U. S. 579, (1993). Disponível em: <http://www.supremecourt.gov>. Acesso em: 16 jan 2020.

> 4. O perito é tão cuidadoso em seu trabalho profissional regular como foi na consulta judicial paga?
>
> 5. Os resultados apresentados pelo perito encontram-se em acordo com resultados esperados pelo campo do saber objeto da perícia?"[70]

Alcoceba Gil defende que não cabe ao Direito receber da ciência de forma passiva uma interpretação sobre os fatos, mas também deve participar de maneira ativa na demarcação sobre o que pode ser considerado como conhecimento científico e o que não deve ser considerado como tal, seguindo os critérios atribuídos na Trilogia Daubert[71]. Contudo, tais critérios não estão imunes a críticas, sendo seus fundamentos filosóficos considerados frágeis e a "articulação da ideia de confiabilidade no que tange às provas" estar longe "de ser transparente"[72].

Knijnik defende que no Brasil os critérios Daubert já encontram guarida legal, a partir da leitura do artigo 473, inciso III c/c artigo 479, ambos do CPC/2015[73]. Desta forma, no artigo 473, III, ao se mencionar que no laudo pericial deve conter a demonstração de que o método utilizado é aceito de forma predominante pelos especialistas daquela área do conhecimento, estaria o legislador pátrio adotando o critério de aceitação geral em moldes semelhantes ao critério Frye americano[74]. Contudo, a partir da leitura do artigo 479, defende que "a norma processual delegou

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[70] GRIVAS, Christopher R., KOMAR, Debra A. Kumho, Daubert and the nature of scientific inquiry: implications for forensic anthropology. *Journal of Forensic Science*, Nova Jersey: John Wiley & Sons, v. 53, n. 4, jul., 2008, p. 773 (tradução livre)

[71] ALCOCEBA GIL, Juan Manuel. Los estándares de cientificidad como criterio de admisibilidad de la prueba científica. *Revista Brasileira de Direito Processual Penal*, Porto Alegre, v. 4, n. 1, jan./abr. 2018, p. 238.

[72] HAACK, Susan. *Perspectivas Pragmatistas da Filosofia do Direito*. São Leopoldo: UNISINOS, 2015, p. 180, 204-220.

[73] KNIJNIK, Danilo. *Prova pericial e seu controle no direito processual brasileiro*. São Paulo: Revista dos Tribunais, 2017, p. 39.

[74] Esse critério foi concebido no caso Frye *versus* United State (54 App. D. C. 46, 293 F. 1013), julgado pela Corte de Apelação do Estado de Colúmbia, em 1923. De acordo com o julgamento, a admissibilidade se dá quando aceitável na respectiva comunidade científica. Sentença disponível em: <http://www.daubertontheweb.com/frye_opinion.htm>. Acesso em: 15/11/2020.

ao juiz a faculdade de avaliar o método pericial”[75], uma vez que o juiz deverá considerar as conclusões do laudo, levando em consideração o método utilizado pelo perito.

No que toca aos países europeus, temos a Rede Europeia de Institutos de Ciências Forenses (ENFSI), criada em 1995 e que conta com 71 membros de 38 países[76]. Esse organismo publica uma série de documentos com diretrizes que devem ser implementadas nos países membros. No documento denominado ENFSI *Guideline for Evaluative Reporting in Forensic Science* traçam-se as diretrizes para a confecção dos laudos periciais[77]. Para que o laudo pericial possa ser utilizado como fonte da prova pericial no tribunal é necessário que o perito tenha sido formalmente instado a se manifestar e que o perito avalie os achados com relação a proposições concorrentes específicas, definidas pelas circunstâncias do caso. Além disso, a avaliação dos resultados deve ser feita com base na probabilidade como medida da incerteza. A probabilidade é uma medida racional do grau de convicção na verdade de uma hipótese baseada em circunstâncias[78]. Adotam três princípios para a interpretação dos resultados forenses: a interpretação se dá em uma estrutura de circunstâncias, a avaliação dos resultados deve ser feita com base na proposição de ambas as partes e considera-se a probabilidade das evidências dadas as proposições[79] [80].

No primeiro princípio afirma-se que a interpretação dos resultados se dá com base em uma estrutura de circunstância, que se apresentam em um contexto e são necessárias para uma avaliação adequada pelo perito. Isso não significa que o perito tenha que ter acesso a todas as informações

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[75] KNIJNIK, Danilo. *Prova pericial e seu controle no direito processual brasileiro*. São Paulo: Revista dos Tribunais, 2017, p. 41.

[76] ENFSI. *About ENFSI*.

[77] ENFSI. *Forensic Guideline*.

[78] ROBERTSON, Bernard; VIGNAUX, G. A.; BERGER, Charles E. H. *Interpreting Evidence*: evaluating forensic science in the courtroom. 2 ed. West Sussex: John Wiley & Sons, 2017, p. 11.

[79] EVETT, Ian. Towards a uniform framework for reporting opinions in forensic science casework. *Science & Justice*, v. 38, n. 3, 1998, p. 201-202.

[80] EVETT, I. W.; JACKSON, G.; LAMBERT, J. A.; MCCROSSAN, S. The impact of the principles of evidence interpretation on the structure and content of statements. *Science & Justice*, v. 40, 2000, p. 235.

disponíveis no caso, mas, tão somente, aquelas consideradas como relevantes para que realize a interpretação com o mínimo viés.

O segundo princípio informa que a avaliação dos resultados deve ser feita com base em proposições e não com base somente em uma proposição. Dito de outra maneira significa que as evidências devem ser ponderadas com base nas proposições de ambas as partes, pois, dessa forma, é possível realizar o balanço das proposições, comparando-as. Suponha que a probabilidade das evidências estarem presentes em determinado cenário trazido pela defesa seja muito baixa, por exemplo, de uma em um milhão. Porém, tome que a outra proposição, trazida pela acusação, também apresenta baixa probabilidade, por exemplo, de uma chance de ocorrência em cem mil. A apresentação somente como conclusão de que a probabilidade de ocorrência das evidências tomando a hipótese trazida pela defesa é muito baixa, da ordem de uma chance para um milhão, trará um impacto no julgador muito diferente do que a apresentação na forma comparativa, dividindo-se uma probabilidade pela outra. Nesse caso a conclusão pericial seria no sentido de que é dez vezes mais provável a observação das evidências frente à proposição da acusação do que frente à proposição da defesa. Nada mudou nos exames periciais realizados, somente a maneira de se expressar para os destinatários.

O terceiro princípio orienta que se deve considerar a probabilidade das evidências estarem presentes conforme a proposição analisada e não a probabilidade da proposição com base nas evidências, constituindo a denominada falácia do acusador[81] a análise, por parte do perito, da probabilidade de ocorrência da proposição tomando-se as evidências existente. Por exemplo, vamos supor que foi encontrado material genético em um local de crime e que esse material genético apresente correspondências com o material genético usado como padrão de comparação. Caberá ao perito manifestar-se quanto à probabilidade de que as evidências, no caso, as correspondências, existam, partindo da proposição de que as amostras apresentam a mesma fonte; em seguida analisar a probabilidade de que as evidências existam partindo da proposição de que as amostras

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[81] Sobre a falácia do acusador, também denominada de transposição da condicional, ROBERTSON, Bernard; VIGNAUX, G. A.; BERGER, Charles E. H. *Interpreting Evidence*: evaluating forensic science in the courtroom. 2 ed. West Sussex: John Wiley & Sons, 2017, p. 17-18.

não apresentam a mesma fonte; e mensurar a razão de verossimilhança, pela divisão de uma probabilidade pela outra. Não cabe ao perito manifestar-se quanto à probabilidade de as amostras serem da mesma fonte partindo da hipótese de que houve a correspondência, considerando-se tal abordagem como a falácia do acusador.

No Brasil não há previsão no ordenamento jurídico de uma fase em que o julgador decida se a prova técnica ou científica que se pretende produzir pode ser assim considerada em razão do método adotado. O que há são critérios para se deferir a produção ou admiti-la no processo. Como regra, toda prova obtida por meio ilícito deve ser inadmitida, independente de se tratar da esfera cível ou penal[82]. Restringindo para a produção da prova pericial, esta será indeferida, além da hipótese de ilicitude, na esfera cível, quando não depender de conhecimento especial, quando for desnecessária em razão da existência de outras provas ou quando a sua produção for impraticável, conforme artigo 464 do CPC. Já na esfera penal será negada a produção da prova pericial quando for considerada desnecessária ao esclarecimento da verdade, conforme artigo 184 do CPP, com exceção para o exame de corpo de delito, que se considera de indispensável produção, de acordo com o artigo 158 do CPP.

A inovação trazida nos artigos 473, inciso III e 479 do CPC/2015 foi a de reforçar ao julgador que é possível valorar a prova pericial com base no método adotado e, ao se aferir o método adotado, pode-se considerar os critérios Daubert, os princípios adotados pelo ENFSI, bem como outros critérios. Mas, não se trata de uma inovação, uma vez que o julgador nacional podia se valer desses critérios, na esfera penal ou na esfera cível, mesmo antes da edição do CPC, em 2015; não como critérios de admissão da prova pericial, da forma como ocorre no procedimento norte-americano, mas sim como critérios de valoração da prova pericial[83].

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[82] Não afirmamos que toda prova obtida por meio ilícito deve ser inadmitida ou desentranhada do processo, uma vez que, na esfera penal, é possível o uso de prova ilícita para se demonstrar a inocência do acusado.

[83] Conforme PRADO, Geraldo. *A cadeia de custódia da prova no processo penal*. São Paulo: Marcial Pons, 2019, p. 29, seguindo trajetória distinta do sistema inglês, fortalecemos o momento da valoração da prova em detrimento do momento da produção da prova. No mesmo sentido ABELLÁN, Marina Gáscon. Prueba Científica: un mapa de retos. In: VÁZQUEZ, Carmen (ed.). *Estándares de Prueba y prueba Científica*. Madrid: Marcial Pons, 2013, p. 191, apresenta

Entretanto, o aperfeiçoamento no sistema de aferição da prova pericial não passa somente pela atuação do julgador na valoração dos laudos periciais produzidos. Também há que se lembrar de outras abordagens com vistas à diminuição das falhas no método/técnica, melhoria na aplicação ou execução da técnica e diminuição de falhas de conduta.

No caso das falhas no método/técnica, a implementação de sistemas de gestão da qualidade e procedimentos operacionais padrões específicos para cada tipo de exame pericial geram bons resultados ao se normatizar a utilização de métodos e técnicas confiáveis, válidas e consistentes[84].

Para as falhas na aplicação ou na execução do método/técnica a Lei nº. 13.964/2019 trouxe procedimentos e atribuiu responsabilidades no que tange à cadeia de custódia, nos artigos 158-A a 158-F. A cadeia de custódia apresenta finalidade dúplice, de "propiciar maior grau de precisão ao *decisum*, o qual há de refletir um discurso coerente acerca dos fatos"[85] e como um mecanismo garantidor do contraditório, pois dá às partes e em especial à defesa, o direito de rastrear as fontes de prova[86], assegurando a integridade e a identidade da prova material[87], ou seja, que o objeto coletado seja o mesmo analisado pelo perito criminal ou disponibilizado para exame pelo assistente técnico.

No Brasil não é rara a ocorrência de locais de crime sem o devido isolamento, bem como com a equivocada ideia de que a cadeia de custódia deve ser iniciada somente quando o vestígio ingressa no órgão oficial de

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dois sistemas: um que prescinde de um controle de admissibilidade científica da prova, realizando somente o controle de admissibilidade processual; e outro no qual ambos controles são realizados durante a fase de admissibilidade. O primeiro sistema é adotado em regra pela Europa e o segundo pelos EUA.

[84] GARRIDO, Rodrigo Grazinoli; ARAUJO, Katia. Sistemas de Gestão da Qualidade em Laboratório de Genética Forense. *Espacios*, v. 35, p. 3-8, 2014.

[85] GIACOMOLLI, Nereu José; AMARAL, Maria Eduarda Azambuja. A cadeia de custódia da prova pericial na Lei nº 13.964/2019. *Revista Duc In Altum Cadernos de Direito*, v. 12, n. 27, mai./ago., 2020, p. 75.

[86] PRADO, Geraldo. *A cadeia de custódia da prova no processo penal*. São Paulo: Marcial Pons, 2019, p. 67-69.

[87] SABINO, B. D.; GIOVANELLI, A.; BORGES, R.; GARRIDO, R.G. De que forma a análise forense de drogas pode afetar os Direitos Humanos Fundamentais?. *Revista Brasileira de Ciências Criminais*, v. 95, 2012, p. 198.

perícia criminal. Sem a preservação e o devido tratamento dos vestígios todo o desenrolar do processo restará comprometido.

A mudança nesse cenário somente ocorrerá com treinamentos de todos os agentes públicos envolvidos no isolamento e nas demais etapas de tratamento dos vestígios, com vistas a evitar que ocorram contaminações tanto de terceiros como dos agentes estatais, o que compromete o resultado dos exames periciais. Como o próprio nome diz, a falha em uma das etapas da cadeia trará consequências nas etapas posteriores, desde erros em análises na identificação de um indivíduo até cenários que culminem com a condenação de um inocente.

No terceiro grupo, das falhas de conduta do produtor da prova pericial, entende-se que as medidas acima elencadas contribuem para a diminuição de falhas dessa natureza, aliadas a padrões rígidos de responsabilização administrativa, cível e penal.

6. Considerações finais

O artigo foi desenvolvido com vistas a responder aos seguintes questionamentos: 1) Quais são as principais organizações e bases de dados estadunidenses relacionadas às reversões de condenações injustas? 2) Quais os reflexos da abordagem estadunidense no Reino Unido, no Canadá e no Brasil? 3) Como as provas periciais relacionam-se às condenações injustas? 4) Existem critérios aplicáveis às provas periciais que possam ser implantados no Brasil com vistas a diminuir a chance de erros periciais e interpretações equivocadas por parte dos julgadores?

1) O *Innocence Project* representa a principal organização estadunidense que busca a reversão de condenações injustas e serviu como semente para a criação de diversas organizações nos mesmos moldes, tanto nos EUA como em outros países. Ao se basear na análise de DNA para fundamentar o pedido de revisão criminal, verifica-se como a ciência pode ser utilizada de forma positiva na busca por um sistema de justiça criminal menos suscetíveis a erros. Sugere-se a implantação do modelo do *Innocence Project* nas Defensorias Públicas estaduais, do Distrito Federal e da União, em parceria com instituições de ensino superior, para suprir a carência de profissionais na árdua tarefa de estudar e triar os diversos casos existentes. Quanto à base de dados de reversões temos o *National*

Registry of Exoneration, que armazena dados de reversões de condenações desde 1989, engloba os casos do *Innocence Project* e foi usada nesse artigo para analisar os quantitativos de condenações injustas fundamentadas em exame pericial, de forma isolada ou em conjunto com outras fontes.

2) A atuação do *Innocence Project* foi seguida por diversos países, culminando com a criação do *Innocence Network* que conta com 67 associações norte-americanas e estrangeiras, inclusive o *Innocence Project* Brasil, criado no final de 2016. Essa rede disponibiliza serviços legais gratuitos com a finalidade de provar a inocência em todo o mundo. No Brasil, não foram observadas iniciativas semelhantes ao *National Registry of Exoneration*, o que representa uma lacuna de informações que deve ser suprida.

3) Com base na análise do *National Registry of Exoneration* e do *Innocence Project* as provas periciais relacionam-se com as condenações injustas de duas formas antagônicas: servem para fundamentar uma condenação injusta, presente em cerca de 25% das condenações injustas que constam na base de dados; mas também são um poderoso meio de prova para se reverter condenações injustas.

O uso das várias áreas do conhecimento para identificar uma condenação injusta mostra-se muito claro, principalmente quando se analisam os resultados do *Innocence Project* e o uso dos exames de DNA. No Brasil, em que pese já existir julgados, inclusive um pelo STF, no sentido de aceitar o exame de DNA como prova robusta para lastrear o provimento de revisão criminal, ainda há resistência dos julgadores, sendo que alguns entendem que deve prevalecer a prova testemunhal, conforme o voto do Ministro Alexandre de Moraes no RHC 128.096/RS.

4) A mudança de paradigma quanto ao papel do julgador na admissibilidade das provas periciais no sistema norte-americano, a partir de 1993, com a criação dos critérios Daubert, afetou diretamente diversos ordenamentos jurídicos. Na Europa a partir de 1995, com a criação do ENFSI, discutiu-se qual deveria ser a melhor forma dos peritos apresentarem os resultados das análises, o que gerou a adoção de três princípios interpretativos. No Brasil, com a edição do CPC/2015, o artigo 473, inciso III e o artigo 479 reforçam a possibilidade do julgador valorar as provas periciais com base no método adotado, considerando-se, por exemplo, os critérios Daubert e os princípios adotados pelo ENFSI.

As falhas na prova pericial que ocorrem para motivar condenações injustas podem ser classificadas como falhas no método/técnica, na aplicação ou execução do método/técnica e de conduta. No Brasil, as ações que visam diminuir tais falhas passam pela implementação de sistemas de gestão da qualidade e procedimentos operacionais padrões específicos para cada tipo de exame pericial; pelo o aperfeiçoamento da cadeia de custódia da prova pericial instituído com a inserção dos artigos 158-A a 158-F, através da Lei nº. 13.964/2019; e com a imposição de padrões rígidos de responsabilização administrativa, cível e penal dos profissionais responsáveis pela produção dos exames periciais.

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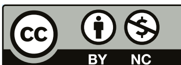

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Medidas Cautelares

Preventive measures

A aplicação de medidas cautelares pessoais em audiências de custódia: um olhar a partir da prisão em flagrante de pessoas em situação de rua[1]

Provisional measures' application in custody hearings: a study based on homeless people' arrests

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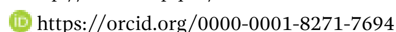
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Resumo: O artigo partiu da pergunta: como ocorre a aplicação de medidas cautelares pessoais nos encontros presenciais entre atores jurídicos e pessoas em situação de rua em audiências de custódia? Realizou-se pesquisa de campo no Núcleo de Prisão em Flagrante e Audiências de Custódia de Salvador, em dois períodos do ano de 2018, coletando dados em distintos contextos de demanda por ordem na cidade, para entender os sentidos conferidos por juízes, promotores e defensores em relação às medidas cautelares em espécie. Dentre a observação de audiências com 69 custodiados, a pesquisa teve como amostra operacional casos de 19 pessoas em situação de rua. Em relação a estes, também foi realizada análise documental dos 19 autos de prisão em flagrante e 52 processos pretéritos, entre ações penais e autos de prisão em flagrante, que constavam como registros criminais. Expandindo

[1] O presente trabalho foi realizado com apoio da Coordenação de Aperfeiçoamento de Pessoal de Nível Superior - Brasil (CAPES) - Código de Financiamento 001.

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a análise para além da mera ausência ou insuficiência de fundamentação nas decisões e analisando a técnica do "paredão" como procedimento informal de audiência, problematizou-se as funções não declaradas que vêm sendo atribuídas às medidas cautelares, a depender do contexto de demanda punitiva, e a conformação da lógica da "prisão a médio prazo". O trabalho conclui que as medidas tidas como alternativas, além de não serem debatidas sob os critérios legais de cautelaridade, exercem uma função de antecipação punitiva e se inserem na gestão sociorracial urbana, apresentando conexões mais profundas com a prisão preventiva, que é mantida em seu horizonte.

Palavras-chave: Medidas cautelares diversas da prisão; Audiência de custódia; Pessoas em situação de rua; atuação judicial.

Abstract: *The article's question is about how provisional measures are applied in encounters between legal actors and homeless people in custody hearings, based on the procedural of debating and deciding. Data collection took place at the Núcleo de Prisão em Flagrante e Audiências de Custódia in Salvador, in two periods of the year 2018, to understand the meanings conferred by judges, prosecutors and defenders regarding provisional measures in kind. Among the observation of hearings with 69 in custody, the research had as an operational sample cases of 19 people living on the streets. In relation to these, a documentary analysis was also carried out of the 19 flagrant arrest records and 52 past cases, including criminal actions and flagrant arrest records, which were recorded as criminal records. Expanding the analysis beyond the mere absence or insufficiency of reasoning in the decisions and analyzing the "paredão" technique as an informal hearing procedure, the hidden features that have been attributed to the provisional measures were analyzed, in each context of punitive demand, along the logic of "perspective prison". The work concludes that the measures considered as alternatives, in addition to not being discussed under the legal criteria, exercise a punitive anticipation function and are inserted in the urban socio-racial management, presenting deeper connections with the pre-trial prison, which is maintained in its horizon.*

Keywords: *Provisional Measures; Custody Hearings; Homeless people; Judicial procedure.*

Sumário: Introdução; 1. Entre debates orais e decisões judiciais: observação de audiências de custódia e análise de autos de prisão em flagrante; 2. Além da soltura: pensando as medidas cautelares

diversas após a implementação das audiências de custódia; 3. Atores jurídicos na gestão de medidas cautelares específicas e a lógica da "prisão a médio prazo". 3.1. Os sentidos das medidas cautelares pessoais nas interações em audiências de custódia: o que escapa dos registros oficiais. 3.2. O controle da circulação mediado pelo judiciário: algumas pistas a partir da cautelar "proibição de acesso ou frequência a determinados lugares". 3.3. Entre a aplicação automatizada e a "insuficiência as medidas cautelares": a relegitimação do cárcere na lógica da "prisão a médio prazo". Considerações Finais; Referências.

Introdução

As audiências de custódia foram implementadas em 2015, visando garantir o cumprimento da Convenção Americana de Direitos Humanos e do Pacto Internacional de Direitos Civis e Políticos, dos quais o Brasil é signatário desde 1992, conforme os decretos 678/1992 e 592/1992. O acórdão do Supremo Tribunal Federal (STF) na ADPF 347 determinando a obrigatoriedade da realização das audiências conferiu maior legitimidade para a Resolução nº 213/2015 do Conselho Nacional de Justiça (CNJ). O órgão mobilizou o judiciário a fim de possibilitar o cumprimento das finalidades primordiais do instituto processual: a cessação de atos de maus tratos ou tortura e a promoção de um espaço democrático de discussão sobre a legalidade da prisão, com análise do cabimento, da necessidade e da proporcionalidade de aplicação de medidas cautelares, preferencialmente, diversas da prisão (PAIVA; LOPES JR., 2014).

Com a Resolução nº 26/2015 do Tribunal de Justiça da Bahia (TJBA), a cidade de Salvador, que já tinha o Núcleo de Prisão em Flagrante (NPF), foi uma das primeiras a realizar audiências de custódia à luz do rito procedimental prescrito pelo CNJ. Neste cenário, o contato presencial obrigatório entre juízes, promotores, defensores e pessoas presas em flagrante abriu caminhos de investigação sobre a prática dos atores processuais[3] quando se decide o destino de alguém que tenha sido preso em flagrante.

[3] Nesta pesquisa, a expressão "atores processuais" será utilizada como sinônimo de "atores jurídicos" e "atores institucionais" para se referir a promotores,

O contexto de recrudescimento punitivo, na conjuntura de avanço neoliberal, é marcado pelo grande encarceramento que, na América Latina, é sustentado pelo uso indiscriminado da prisão preventiva contra sujeitos pertencentes a históricas categorias de indesejáveis ou "classes perigosas", conformando o que Zaffaroni (2011) chamou de sistema penal cautelar. Contudo, conforme ampla literatura criminológica, a tentativa de adoção de medidas alternativas penais ou à prisão acabaram tendo mais efeito de ampliar as teias do sistema punitivo do que de reduzir o uso da prisão (COHEN, 1979; CARVALHO, 2010a; KARAM, 2010).

No campo do processo penal, a reforma promovida pela Lei 12.403/2011 acabou promovendo um indesejado desvirtuamento das alternativas à prisão, risco que já era apontado como pela doutrina, haja vista a tradição inquisitorial que modela atuação de grande parte dos atores jurídicos (CARVALHO, 2010b; LOPES JR, 2013; VASCONCELLOS, 2013). Em relação às audiências de custódia, diversos relatórios institucionais e pesquisas acadêmicas[4] vêm apontando desde o início da sua implementação pelo CNJ, as limitações práticas que emperram a concretização das finalidades almejadas pela Comissão Interamericana de Direitos Humanos.

Esse artigo é um desdobramento de uma pesquisa de mestrado, que partindo de questões mais amplas tentou aprofundar os estudos sobre o controle penal da pobreza no contexto urbano, problematizando as portas de entrada no cárcere (ROMÃO, 2019). A escolha metodológica de adotar as audiências de custódia como local da pesquisa de campo permitiu analisar o momento estratégico entre a prisão em flagrante e a produção da decisão de decretação de prisão cautelar ou restituição de liberdade, aproveitando o acesso ao *corpus* documental que é produzido no entorno deste ato judicial.

defensores públicos e juízes, os sujeitos que participam da audiência representando órgãos públicos que intervêm, de forma mais ou menos direta, na produção de documentos oficiais.

[4] Ver os Relatórios Fim da Liberdade (IDDD, 2019), Audiência de custódia, prisão provisória e medidas cautelares: obstáculos institucionais e ideológicos à efetivação da liberdade como regra (CNJ, 2018) e Tortura Blindada (CONECTAS, 2017), além dos artigos de Camila Dias e Laís Kuller (2019), Carolina Ferreira (2017) e Yuri Teixeira (2019).

Aqui pretende-se analisar como atores processuais se comportam no momento de debater e decidir sobre a aplicação de medidas quando estão diante de pessoas em situação de rua, seguindo a pista de Salo de Carvalho (2010a) que aponta o caminho metodológico de estudar grupos mais expostos ao encarceramento, a fim de analisar o potencial desencarcerador de medidas alternativas. Dessa forma, este artigo partiu da questão: como ocorre a aplicação de medidas cautelares nos encontros presenciais entre atores jurídicos e pessoas em situação de rua em audiências de custódia?

A pesquisa de campo foi realizada no Núcleo de Prisão em Flagrante e Audiências de Custódia de Salvador, em dois períodos do ano de 2018, a fim de garantir uma razoável heterogeneidade de casos, considerando que Salvador apresenta diferentes dinâmicas de circulação urbana e atuação das forças de ordem entre o verão e outras épocas do ano. A fim de obter um *universo geral de dados*, foram observadas 69 audiências de custódia, a fim de colher dados sobre uma dinâmica mais ampla em relação ao objeto da pesquisa. No que se refere ao *universo de análise*, foram estudados casos de 19 pessoas em situação de rua, com observação de audiências de custódia e análise documental dos 19 autos de prisão em flagrante e 52 processos pretéritos – entre ações penais e autos de prisão em flagrante –, que constavam como registros criminais.

Segundo a doutrina processual penal crítica, a oralidade processual provocaria um melhor conteúdo decisório (PRADO, 2005), ampliando e efetivando espaços de resistência ao criminalizado, com uma maior possibilidade de esclarecimento de fatos, individualização de condutas e resgaste de histórias de social dos sujeitos e do próprio contexto conflitivo. Através das audiências de custódia, onde supostamente a objetificação de um criminalizável deveria ser soterrada, a análise da aplicação de cautelares pessoais, nesta pesquisa, considera que o racismo também é produtor de uma racionalidade, que rege a constituição das ações, a normalização e a compreensão das relações (ALMEIDA, 2018).

Com a percepção de que o sistema de justiça penal é um mecanismo atravessado por relações sociorraciais, mobiliza-se a raça[5] enquanto

[5] Mbembe (2017) compreende a raça em sua dinâmica histórica e sócio--política (MUNANGA, 2003), uma vez mitigada a noção biologicista antes

categoria de análise, vez que substantiva e complexifica não só o debate sobre a oralidade, mas o estudo da função social complexa da punição, em seu âmbito repressivo e "positivo" (FOUCAULT, 2014). Ao aprofundar a análise sobre a conformação dos discursos, das práticas punitivas e de seus efeitos (PIRES, 2017), a abordagem teórico-metodológica situa o controle da população de rua nos processos de criminalização antinegra da pobreza, uma vez que a experiência negra contemporânea está inserida na gramática da antinegritude, na qual sua posição estrutural na sociedade conforma o paradigma de humanidade e cidadania (VARGAS, 2017).

O trabalho apresenta o entendimento de promotores e juízes sobre medidas cautelares pessoais em espécie – cuja aplicabilidade prática é tradicionalmente ignorada enquanto objeto de pesquisa – compreendendo os ditos e os não ditos que permeiam os debates orais e os documentos escritos que culminam em uma decisão judicial, em busca de elementos que escapam das explicações tradicionais fornecidas pela sanção jurídico-formal (BATISTA, 2003ab). Com isso, foi possível ainda expandir a análise para além da mera ausência ou insuficiência de fundamentação, problematizando as funções não declaradas que vêm sendo atribuídas às medidas cautelares na gestão da circulação urbana e as dificuldades de se romper com a lógica da "prisão a médio prazo".

1. Entre debates orais e decisões judiciais: observação de audiências de custódia e análise de autos de prisão em flagrante

Pesquisar no âmbito do judiciário, durante as suas práticas cotidianas, se justifica pelo interesse de tentar acessar a realidade como ela é, como fruto do próprio cuidado com os dados empíricos. Isso realça a importância do diálogo metodológico com pesquisas sobre aplicação do direito oriundas de outros campos. A antropóloga Mariza Peirano (2014)

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encampada com um discurso que se pretendia cientificista – especialmente até meados do século XX. O filósofo também critica um pretenso "racismo sem raça", no qual violências contemporâneas tentam se blindar do seu conteúdo discriminatório e hierarquizante, mas que na verdade representa um aprimoramento da discriminação (MBEMBE, 2017).

destaca como a teoria é reinventada constantemente pelo contato com novos dados e novas experiências de campo.

Algumas vantagens metodológicas podem ser obtidas da antropologia do Estado, que acumulou reflexões metodológicas no curso dos estudos sobre aspectos da organização estatal, como processos eleitorais, cenas judiciais ou funcionamento de órgãos do Poder Judiciário, por exemplo (BEVILÁCQUA, 2001). Ao buscar observar atores jurídicos no exercício regular de suas funções, diante de uma pessoa recém-presa, a pesquisa lidou com o risco concreto de alteração das performances dos atores, caso interferissem na coleta de dados na observação, o que esterilizaria a própria análise.

Nas audiências de custódia do NPF[6], em situações usuais, é frequente a circulação de outros pesquisadores, estudantes e profissionais das diversas instituições, jurídicas ou de assistência psicossocial, presentes naquele espaço. Além da dificuldade gerada por essa rotatividade, a coleta de dados nas audiências públicas seria profundamente prejudicada com a revelação da identidade de pesquisador a cada pessoa que circula nestas cenas específicas. Essa opção metodológica ampliou o olhar sobre a interação entre atores jurídicos e pessoas presas em flagrante, permitindo problematizar os momentos entre audiências e os atos informais que ocorrem à revelia do procedimento estabelecido pela Resolução 213/2015 do CNJ. Contudo, a adoção da técnica encoberta de coleta de dados nas audiências foi relativizada, já que se restringiu aos atores diretamente envolvidos com os momentos mais sensíveis de observação[7].

Manuela Abath Valença e Marília Montenegro (2020) descrevem como a prática sequencial de atos judiciais, atravessadas por um

[6] A Resolução 16 de 14 de agosto de 2019 do TJBA transformou o Núcleo de Prisão em Flagrante e Audiências de Custódia (NPF) em Vara de Audiência de Custódia, que fora instalada em 20.09.2019.

[7] Apenas na minha primeira entrada na sala de audiência, fui conduzido por um servidor do judiciário, que me apresentou ao membro da magistratura em atividade naquele dia – que faz parte do total de quatro magistrados que se revezaram durante os dias em que estive no campo – momento em que apresentei rápida e suscintamente a pesquisa, de modo a preservar a viabilidade da técnica encoberta de coleta de dados. Em todos os dias ingressei simultaneamente a outros estudantes e profissionais das equipes de assistência jurídica ou psicossocial.

ritmo acelerado, por um interesse em antecipar o fim do expediente e por metas a serem batidas, constituem um ambiente mais informal que propicia, a depender do caso, um tratamento jocoso com o crime praticado e as pessoas envolvidas no conflito que está por trás da prisão em flagrante. Naquela pesquisa fica evidente algo que também constatei em outra oportunidade (ROMÃO, 2019): a importância metodológica dos momentos de não gravação do ato judicial, a partir das frestas analíticas sobre as interações pessoais e suas verbalizações que não são registradas nos documentos processuais escritos.

A observação semiestruturada, ao permitir o acesso ao ocasional e acidental, lida com a espontaneidade das cenas que podem afetar uma pesquisa qualitativa, como apontam Marconi e Lakatos (2003). Por isso, foi uma técnica adequada para acessar os ditos e não ditos que circundam as audiências de custódia. A elaboração prévia de um formulário não rígido com quesitos destinados se destinou apenas a guiar a coleta de dados, que foi feita com o uso de um caderno de campo, no qual se inseria as informações, os relatos, as percepções e as frases dos sujeitos envolvidos na pesquisa. Em seguida, esse registro era transcrito de forma digitalizada para os formulários de encontros em audiências e para o arquivo de anotações gerais, no qual se produziu uma categorização dos achados da pesquisa.

Buscando o contato com uma heterogeneidade maior de casos e com sujeitos mais diversos, a pesquisa de campo foi dividida em dois períodos do ano de 2018, contemplando tanto o período marcado pelo auge das festas de rua que marcam a vivência na cidade – janeiro e março –, com impactos no comércio e na atuação das forças de ordem, quanto em um momento de maior retração em relação àquele – setembro e outubro. Em toda a pesquisa, observei audiências de custódia envolvendo 69 pessoas presas, 04 juízes, 03 defensores públicos, 03 promotores de justiça e advogados diversos[8], a fim de trabalhar qualitativamente com amostras de

[8] Em relação a representantes de profissões jurídicas, a flexão do gênero apresentada neste artigo não condiz necessariamente com a realidade, tendo em vista a estratégia de não facilitar possível identificação de quem foi objeto de observação. Assim, uma limitação do presente trabalho decorre de não ter aprofundado a atuação generificada na advocacia, promotoria ou

um *universo geral* (PIRES, 2014), referente a todas pessoas que receberam medidas cautelares diversas ou foram presas preventivamente.

Os atores institucionais atuavam de forma constante e em revezamento, em uma baixa rotatividade,[9] o que justifica a pouca quantidade desses sujeitos em um período razoável, em que as etapas de coleta se distanciam em seis meses. Para o objeto da pesquisa, isso permite uma interpretação sistemática da condução das audiências e da produção de decisões judiciais.

No que se refere à amostra operacional, enquanto uma determinada quantidade apta a esclarecer aspectos gerais das questões de pesquisa (PIRES, 2014), foram observadas audiências de custódia e analisados documentos processuais de 19 pessoas em situação de rua distintas conduzidas ao órgão judicial. Como o deslocamento no campo pretendia uma compreensão sobre o dentro e o fora das audiências de custódia, também foram observados atendimentos psicossociais do Programa Corra pro Abraço (PCPA), uma das instituições multiprofissionais que interagem com a Central Integrada de Alternativas Penais, prevista pela Resolução 213/2015 do CNJ.

Os atendimentos psicossociais eram realizados primordialmente após as audiências, contando com o apoio de servidores do judiciário e também da magistratura, que era provocada pelo Programa para priorizar a garantia de um acolhimento multiprofissional em vez do uso da prisão preventiva. A equipe multiprofissional tinha como público pessoas em situação de rua, com uso abusivo de drogas ou com necessidades referentes à saúde mental.

A proposta do Programa consistia ainda no esforço de evitar uma maior fragilização dos vínculos e o isolamento de algum assistido

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magistratura durante a interação com pessoas presas e nos processos de tomada de decisão.

[9] Também constatado por Daniel Fernandes e Elmir Duclerc (2020) e pelo Ministério da Justiça (2016). Atualmente, com a transformação do Núcleo de Prisão em Flagrante em Vara de Audiência de Custódia, com base na Resolução 16/2019 do Tribunal de Justiça, há uma concentração de funções da magistratura. Entre setembro e o início de 2020, atuou um juiz substituto e só posteriormente assumiu uma juíza titular. Ambos encontrar uma conformação sobre os modos de fazer que se desenhou entre 2015 e 2019.

eventualmente preso, além de ser um articulador de rede de serviços que pudessem atender às suas demandas psicossociais. Isso contribuía para que o PCPA recebesse informações do cartório ou da assessoria dos defensores públicos sobre a existência de APFs referentes ao seu público, razão pela qual o Programa foi uma importante fonte de dados para esta pesquisa, ao facilitar a observação de audiências envolvendo pessoas em situação de rua.

Na primeira etapa de observação, entre janeiro e março de 2018, em um período de 24 dias úteis, compareci ao NPF em 14 dias úteis[10] e realizei observação de 7 (6 homens e 1 mulher) pessoas distintas que foram presas em situação de rua. Dentre essas 7, acompanhei o atendimento psicossocial de 6 delas (5 homens e 1 mulher) e observei audiências de custódia de 5 (4 homens e 1 mulher) delas. Em relação a 4 pessoas em situação de rua, foi possível assistir tanto as suas audiências de custódia quanto o seu atendimento psicossocial.

Na segunda fase de coleta de dados, entre setembro e outubro de 2018, dentre os 24 dias úteis do período, visitei o NPF em 18 dias úteis, observei 12 pessoas em situação de rua distintas (todos homens), entre 7 atendimentos psicossociais e 7 audiências. Em relação a 2 pessoas em situação de rua, pude observar tanto o atendimento psicossocial quanto a audiência de custódia. Em ambos os períodos, a retirada do campo se deu quando se percebeu a ausência do surgimento de novos fatos relevantes, em compasso com a necessidade de cumprir os prazos para finalizar a pesquisa.

Durante a pesquisa, as decisões judiciais eram realizadas majoritariamente pela forma escrita, sendo comum que a pessoa presa saísse da sala de audiência de custódia sem saber qual seria o seu destino, entre a liberdade e a prisão. A análise documental, junto à experiência da observação, exigiu uma maior atenção em relação aos vestígios e ao exercício do poder que pudessem "evidenciar o modo como as pessoas percebem elas mesmas e os outros, definindo-se e posicionando-se no

[10] A primeira metade desses dias se refere ao período imediatamente anterior aos dias de carnaval, que por uma opção metodológica não entraram na pesquisa. A segunda metade se refere às duas semanas seguintes à festa de rua, quando já haviam sido retomadas as atividades ordinárias no órgão judicial, com a presença dos atores jurídicos alocados naquela unidade.

espaço social" (OLIVEIRA; SILVA, 2005, p. 247). Esses documentos historicizam o passado recente e, entre seus silêncios e excessos, pode-se aprender mais sobre seus autores, especialmente através do que dizem sobre os "outros", atentando ao desafio de perceber os códigos do racismo que estão atravessados por discursos pretensamente neutros que conformam a dogmática jurídica e a atuação judiciária (BERTÚLIO, 1989; ALEXANDER, 2012).

Conforme André Cellard (2014), a pesquisa documental envolve enfrentar diversos obstáculos e armadilhas situados nos limites intrínsecos de uma fonte que representa vestígios da atividade humana, com atravessamentos políticos e sociais diversos. Uma pesquisa no presente, que pode observar um documento judicial sendo produzido na prática de atores jurídicos, ganha outra dimensão de análise, complexificando também os pareceres orais em audiências, que costumam ser reduzidos a termo de forma bastante sucinta e genérica nos autos de prisão em flagrante. Dessa forma, foi possível analisar a produção de silenciamentos e a mediação judicial na construção da narrativa em um documento histórico que é o processo (OLIVEIRA; SILVA, 2005). Em atenção ao que está oculto, nas entrelinhas, é que foi possível estudar o controle da pobreza urbana em Salvador, mediado pela aplicação de medidas cautelares alternativas e sua relação com a prisão.

No curso da pesquisa, foi importante considerar a relevância de problematizar questões que decorrem da presença de um debate sobre a reiteração delitiva, algo verificado em diversos estados (CNJ, 2018) e que acaba constituindo uma das variáveis jurídicas mais importantes para a decretação de prisão preventiva (LAGES; RIBEIRO, 2019). Por conta disso também foram analisados registros criminais anteriores, produzidos entre 2013 e 2018, referenciados nos APFs e que se relacionavam às pessoas em situação de rua[11]. O acesso a estes e aos demais documentos,

[11] O limite temporal de cinco anos foi estabelecido para garantir a viabilidade da coleta e análise, evitando se distanciar do contexto presente do controle urbano em Salvador, tomando como parâmetro o prazo relativo aos efeitos da reincidência. Essa coleta foi importante, considerando que entre as 19 pessoas presas em situação de rua, 14 já tinham sido presas anteriormente. Além dos 19 APFs recém-chegados ao NPF, analisei 52 processos anteriores à nova prisão. O acesso a estes documentos, sem restrições de sigilo, se deu através de consulta processual no portal eletrônico do Tribunal de Justiça da Bahia.

sem restrições de sigilo, se deu através de consulta processual no portal eletrônico do Tribunal de Justiça da Bahia. Essa coleta foi importante considerando que entre as 19 pessoas presas em situação de rua, 14 já tinham sido presas anteriormente.

Esse foi o quadro metodológico que permitiu a análise do processo de aplicação de medidas cautelares pessoais pelos atores processuais em audiências de custódia, entre pareceres orais e decisões escritas. A interseção de técnicas metodológicas, cruzando dados da observação com dados da análise documental contribuiu para, dentro das limitações de uma pesquisa qualitativa (CRESSWELL, 2014), apresentar uma generalização teórico-analítica sobre discursos e práticas na gestão de mecanismos punitivos que constituem parte do controle urbano que é mediado pelo judiciário.

2. Além da soltura: pensando as medidas cautelares diversas após a implementação das audiências de custódia

No contexto em que a ADPF 347 foi julgada procedente pelo STF, em 2015, reconhecendo o “estado de coisas inconstitucional” do sistema carcerário brasileiro, em razão de uma violação sistemática de direitos fundamentais derivada do que a criminologia denomina de era do grande encarceramento brasileiro, o CNJ, através de atos e políticas institucionais, estimulou a adoção de alternativas penais. Além de elaborar resoluções regulamentando a justiça restaurativa e as audiências de custódia, realizou dois Fóruns Nacionais de Alternativas Penais (FONAPE), em 2014 e em 2016. Neste último, que aconteceu na cidade de Salvador, o presidente da Comissão Interamericana de Direitos Humanos, James Cavallaro, ressaltou a importância das audiências de custódia e destacou a necessidade de enfrentar o uso desnecessário da prisão preventiva na grave realidade carcerária brasileira, alertando que naquela data o país tinha um número de presos cautelares maior que o total de presos em 1995[12].

[12] Como resultado deste evento, foi a elaborada a Carta de Salvador, que traz entre os resultados: “[...] Item 2. Propor ao CNJ a reformulação e *o fortalecimento da política judiciária para as alternativas penais*, prevista na Resolução nº 101/2009, alinhando-a com o futuro projeto do Sistema Nacional de

O então presidente do CNJ, ministro Ricardo Lewandowski, assinou uma carta de intenções com a Comissão Interamericana de Direitos Humanos (CIDH) para fortalecer uma mentalidade do judiciário compromissada com os direitos humanos. Na ocasião, também influenciou o órgão brasileiro para que editasse as Regras de Tóquio elaboradas pela ONU em 1990, que orientam a elaboração de medidas não privativas de liberdade.

A doutrina processual penal visualiza as audiências de custódia como o instrumento de garantia de direitos fundamentais, especialmente por possibilitar que se evitasse descabidas decretações de prisão preventiva e por abrir espaço de oralidade para um debate acerca da real necessidade de aplicação de medidas cautelares diversas, com participação de todos os sujeitos processuais envolvidos (SOARES, 2018).

Um ano antes da implementação desse instituto processual, enquanto o Brasil registrava 41% de presos sem condenação, na Bahia esse percentual chegava a 64% (DEPEN, 2016). Segundo dados mais recentes à época da coleta de dados para esta pesquisa, a Bahia seguia como um dos estados com maior percentual de presos sem condenação, com 58%, dividindo a quinta posição com Minas Gerais (DEPEN, 2017)[13].

Tanto em documentos de pesquisas institucionais e eventos acadêmicos quanto nos diálogos cotidianos entre quem circula no judiciário e no sistema prisional, tem sido mencionado que a implementação das audiências de custódia, em 2015, pode estar relacionada a uma redução percentual da prisão preventiva para homens e mulheres, conforme dados

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Alternativas Penais – SINAPE. Item 3. *Reconhecer o êxito da política judiciária de audiências de custódia para fins de redução do encarceramento provisório e proteção dos direitos e garantias fundamentais*, e esclarecer à sociedade os seus reais objetivos, que não se confundem com a liberação indiscriminada de pessoas em conflito com a lei". (grifamos)

[13] Entre 2019 e junho de 2020, nota-se ausência de relatórios periódicos do Departamento Penitenciário Nacional, que unifica os dados dos estados brasileiros. Tomando como parâmetro a divulgação periódica de dados pela Secretaria de Administração Penitenciária (SEAP), sobre a ocupação das unidades prisionais masculinas e femininas do estado da Bahia, verifica-se que esse percentual orbitava a marca dos 46%, em 17 de março de 2020, algo que ainda se verifica em 08 de junho de 2020, mesmo após a Recomendação 62 do CNJ frente à pandemia de coronavírus.

do CNJ[14], do Departamento Penitenciário Nacional (2014, 2016, 2017, 2018 e 2019) e da Secretaria de Administração Penitenciária da Bahia (SEAP). Conforme dados da Defensoria Pública (2019), entre 2015 e 2018, a taxa de decretação de concessão de liberdade provisória para homens e mulheres, nas audiências de custódia em Salvador, foi de 51%. Contudo, o mesmo relatório destaca que apenas 4,8% de todas as pessoas que foram conduzidas ao Núcleo de Prisão em Flagrante, hoje transformado em Vara de Audiência de Custódia, receberam liberdade sem qualquer restrição.

É preciso aprofundar o olhar sobre os dados da prática judiciária nas audiências de custódia, sem perder de vista a realidade carcerária das unidades prisionais, a fim de não cair em uma mistificação dos números que camuflem o concreto e persistente sofrimento que decorre diretamente da atuação do poder judiciário. Uma análise mais efetiva das audiências de custódia fica prejudicada por não haver uma sistematização satisfatória de dados do período anterior ao qual elas foram implementadas, o que dificulta saber exatamente quais foram as mudanças na atuação dos órgãos jurídicos em relação à decretação de prisão preventiva.

Em todo caso, pode-se afirmar que a manutenção de uma média de mais da metade – 57% – de presas sem condenação, para as mulheres, e 48%, para os homens em julho de 2020[15], nos dá mais um sinal de que não há uma redução expressiva no uso da prisão preventiva, Salvador, mesmo que possa ter havido uma redução quantitativa do percentual de decretação de prisão cautelar em audiências de custódia.

Ademais, é preciso pensar a redução da lógica carcerária para além da diminuição da aplicação da prisão preventiva, considerada isoladamente. A Lei 12.403/2011 entrou em vigor com a promessa de tornar a liberdade a regra no processo penal. As medidas cautelares diversas da prisão, ou

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[14] Disponível em: https://paineis.cnj.jus.br/QvAJAXZfc/opendoc.htm?document=qvw_l%2FPainelCNJ. qvw&host=QVS%40neodimio03&anonymous=true&sheet=shSISTAC. Acesso em 11.03.2020.

[15] Os dados são referentes ao relatório do dia 14.07.2020 da Secretaria de Administração Penitenciária da Bahia, tendo sido desconsiderados os números sobre medida de segurança, por não haver detalhamento da natureza cautelar. Disponível em: http://www.seap.ba.gov.br/sites/default/files/dados/2020-07/PRESOS%20CONDENADOS%20E%20PROVIS%C3%93RIOS%20-%2014-07-2020.pdf

medidas cautelares pessoais, foram ampliadas em um rol extenso no art. 319 do CPP[16] para serem alternativas à decretação de prisão preventiva.

Entretanto, a dificuldade de romper a densa cultura inquisitória do Ministério Público e do judiciário (CARVALHO, 2010b) mantém altos níveis de encarceramento cautelar no país. A prática judiciária inverteu largamente esta finalidade aplicando as medidas em alternativa à própria liberdade. Pessoas, que antes teriam condições de ter liberdade plena durante a investigação ou o processo, agora ficam obrigadas a cumprir medidas que restringem direitos e liberdades, como circular livremente, transitar entre municípios, frequentar eventos culturais nas ruas, na hora que quiser, e não ser rastreado eletronicamente ou confinado em casa.

Ao investigar a potencialidade de redução de impacto carcerário das medidas desencarceradoras, no contexto de penas alternativas, Salo de Carvalho (2010a, p. 373) problematizou os entraves à superação efetiva da lógica prisional. Segundo o autor, a expansão as propostas de alternativas penais deve ser objeto privilegiado de um "debate responsável sobre os níveis de encarceramento e os efeitos amplificadores dos substitutivos penais", e acrescenta, "sobretudo se o objetivo é diminuir os enormes danos que o encarceramento em massa tem produzido, em termos de custos de vidas humanas, no Brasil". Afinal, o uso crescente de alternativas penais foi contemporâneo às alterações legislativas que enrijeceram o cumprimento de pena e expandiram a prisão cautelar, facilitando a entrada e dificultando a saída do sistema carcerário, a partir dos anos 1990, década que tem a Lei de Crimes Hediondos como um marco na expansão sem precedentes da populacional prisional nas décadas seguintes[17] (CARVALHO, 2010a).

A inversão ideológica das finalidades de direitos humanos e as possibilidades de mistificação e equívoco na constituição de alternativas concretas à prisão, trabalhadas exaustivamente pela crítica criminológica, demandam, ainda, não se desviar de um olhar sobre as consequências

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[16] Outras legislações penais especiais trazem medidas específicas, como é o caso da Lei Maria da Penha e as medidas protetivas.

[17] Entre 1990 e 2014, esse acréscimo foi de 575% (DEPEN, 2016). Isso se manifestou de forma ainda mais gravosa às mulheres, entre as quais houve um crescimento 656% entre 2000 e 2016 contra 293%, entre os homens, no mesmo período (DEPEN, 2018).

dessas medidas (COHEN, 1979). Mesmo bem-intencionadas, podem levar a mais repressão e coerção, na atualização neoliberal da gestão da vida negra em liberdade.

3. Atores jurídicos na gestão de medidas cautelares específicas e a lógica da "prisão a médio prazo"

No livro "Vigiar e Punir", embora não seja o principal objetivo de sua análise, Michel Foucault (2014) deixa pistas sobre o papel de mediação do judiciário no que ele chama de "sistema polícia-prisão". Ao analisar como a vigilância se expande para fora dos muros da prisão, o autor vai nos informar que essa instância é decisiva para o manejo da delinquência, em um controle diferencial das ilegalidades. Embora tenha contato com uma parcela ínfima do poder punitivo filtrada pelas agências policiais (ZAFFARONI, 1991), o judiciário, sem pisar nas ruas, vai ter uma função no controle da circulação de pessoas. É o que se vê na conformação de "perfis criminais", na definição de quais ações vão ser selecionadas para prosseguir o percurso de criminalização ou na produção de distintas respostas punitivas ao que foi carimbado como crime.

A partir da relevância do papel exercido pelos juízes no âmbito do controle jurídico-penal, como também situa Roberto Bergalli (2015), que passo a apresentar algumas reflexões das práticas em audiências de custódia que dialogam com as decisões proferidas por escrito, especialmente no que se refere aos "modos de fazer" relacionados à aplicação de medidas cautelares pessoais. A relevância metodológica da instância judicial, contudo, não restringiu o olhar à magistratura, mas aos demais atores institucionais que se fazem presente naquela cena jurídica – promotoria e defesa técnica – e além de contribuir para o conteúdo decisório, complexificam o olhar sobre os silêncios e os ditos da narrativa processual (OLIVEIRA; SILVA, 2005).

3.1 Os sentidos das medidas cautelares pessoais nas interações em audiências de custódia: o que escapa dos registros oficiais

Nas audiências de custódia observadas em Salvador, o entendimento dos atores processuais sobre as medidas cautelares pessoais

pode ser notado em três situações ligadas ao momento de análise sobre a decretação ou não de uma prisão cautelar. Na primeira, fundamenta-se a continuidade da prisão sem mencionar o porquê de medidas menos gravosas não poderem ser utilizadas. Ou seja, há uma ausência completa de fundamentação sobre a liberdade plena. Na segunda, os atores simplesmente dizem, sem justificar e de forma genérica, que as medidas alternativas não são suficientes para o caso e partem para os argumentos selecionados para justificar a necessidade da manutenção da custódia (reiteração, periculosidade, ordem pública etc.). Na terceira, essas cautelares são um argumento autônomo na análise do cabimento e da necessidade da prisão preventiva.

"As medidas cautelares diversas da prisão revelaram-se ineficazes". Esta frase se faz presente de forma recorrente nos pareceres orais do Ministério Público e são reproduzidas, com alta frequência, nas decisões judiciais escritas, para concluir que o cárcere é o destino que não se pode evitar. Como a reiteração criminosa demonstra o "fracasso" das alternativas penais, entre aqueles que tiveram a liberdade concedida em outro momento, é o suposto "sucesso" da lógica prisional que vai superar aquele fracasso ao conter o sujeito, em que pese o sucesso concreto do cárcere seja a produção da reiteração delitiva ou da reincidência (FOUCAULT, 2014).

O abandono da cautelaridade – cuja finalidade é de garantia da viabilidade de um processo penal, na tutela da instrução, para não prejudicar a colheita de provas, ou na aplicação de eventual pena, para impedir um risco concreto de fuga – também atinge a aplicação das cautelares diversas da prisão. Por via indireta, tem-se uma expectativa entre promotores e juízes que as cautelares alternativas cumpram uma espécie de prevenção especial negativa, que evite a prática de novos crimes, expandindo o conteúdo do texto legal do já citado do art. 282, inciso I, do CPP. Essa intenção se mostra de forma generalizada às espécies de medidas.

A cena do "paredão"[18] é fundamental para entender como as medidas cautelares são vistas pelos atores institucionais. Na segunda

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[18] Em Salvador, os atores jurídicos adotaram, pelo menos até o segundo semestre de 2019, esta prática para os casos em que vislumbram uma possível restituição da liberdade sem maior análise. A partir de um filtro prévio realizado

etapa do campo, notei que as audiências demoravam muito para começar, mesmo com os atores processuais presentes no NPF. O que ocorria era um bloco de "audiências informais", os "paredões", para depois, em outro bloco, começarem as audiências de custódia, sob o rito formal – seguindo uma ordem de intervenções dos atores, de questionamentos e com a gravação audiovisual do ato e a elaboração de um Termo de Audiência que é juntado no APF.

No caso da cena do "paredão" em Salvador, faz-se uma análise preliminar dos APFs da pauta de audiências, selecionando aqueles que se referem a crimes sem violência física ou arma de fogo, como receptação, tráfico de drogas (quando pouca a quantidade de drogas, a partir de critérios subjetivos dos atores processuais), furto e ameaça. Ou seja, aqueles em que se entendia que a restituição da liberdade não demandaria uma maior análise. Pelos critérios de seleção, as pessoas em situação de rua têm chance razoável de vivenciar isso, já que furto, receptação e tráfico de drogas são tipos penais que vêm muito a calhar na exposição acentuada desse grupo à prisão. Das 11 pessoas em situação de rua que foram recolocadas em liberdade, 05 foram ouvidas em "paredão" quando conduzidas presas ao NPF.

Reduz-se a potencialidade das audiências de custódia, abandonando o objetivo de prevenção à tortura e maus tratos, enquanto se consagra a finalidade de decisão entre liberdade e prisão, sem que se fuja ao binômio que tende a condicionar essa liberdade em quase todos os casos. As decisões decorrentes dos paredões, em regra, homologam a prisão e aplicam medidas cautelares diversas, sem que se debata a legalidade da prisão e a proporcionalidade e necessidade das medidas cautelares (inclusive fiança a pessoas em situação de rua). Com isso, desvirtua-se o escopo garantidor da necessidade do contato presencial que, enquanto

sobretudo pelo Ministério Público e pelo judiciário, realizava-se um "acordo", onde se vê uma participação reduzida ou suprimida da defesa, de um lado, e um protagonismo do Ministério Público, de outro. Como não há registro e nem oitivas padronizadas e gravadas, o sinal é verde para lições de moral e esporros de toda sorte, perguntas invasivas e desconectadas com o fato, muitas vezes com o intuito de traçar o perfil criminoso da pessoa presa. Luan Rosário (2018) e o IDDD (2019) também registraram a ocorrência desse ato informal no mesmo ambiente judicial.

elemento humanizador da fase processual, objetiva a construção de uma decisão mais adequada (CORDEIRO; COUTINHO, 2018).

Essa forma de tomada de decisão supostamente negociada, em prol da liberdade, não nos leva a comemorar o inverso de uma condenação *drive-thru* em mesa de audiência.[19] A dinâmica própria em torno dos debates sobre a aplicação dessas medidas cautelares diversas consolidou a importância de estudá-las enquanto pena antecipada, na expansão do controle a céu aberto (AUGUSTO, 2010), que, longe de suplantar o encarceramento, se soma a ele. A preocupação acerca do grau de restrição de liberdade e das funções não declaradas que podem fazer de uma medida cautelar uma pena *soft*, é negociada, nem sempre entre acusação e defesa, mas entre acusação e judiciário ou entre a acusação e ela mesma, já que era recorrente a ausência da Defensoria Pública e, por vezes, do próprio judiciário, em muitos destes atos informais. Stanley Cohen (1979) oferece uma lente criminológica para entender que a suavidade do sistema pode ser mais aparente que real, mascarando intenções coercitivas e as suas consequências.

Com o passar dos dias, o filtro de seleção dos APFs para selecionar quem deve passar pelo "paredão" nem sempre ocorria previamente e, às vezes, entre uma audiência formal e outra, os atores processuais decidiam que tal caso podia ter a análise abreviada via "paredão". Assim, parte dos expectadores das audiências acabavam assistindo alguns desses procedimentos informais, de modo que o ato se tornou mais corriqueiro, ainda que houvesse uma frequência e intensidade distinta, a depender dos atores processuais envolvidos.

A defesa técnica, acossada no contexto do grande encarceramento e dos apelos punitivos que aproximam o judiciário da "segurança pública", tem como grande objetivo evitar a prisão a qualquer custo, diante das violências no cárcere brasileiro. As alternativas ao cárcere são utilizadas

[19] Algo já ensaiado na prática judiciária brasileira. Em uma audiência de custódia no Acre não se viu uma aplicação de pena negociada, em tese, mas um julgamento sumário, em que a denúncia foi oferecida pelo Ministério Público, a defesa preliminar apresentada pelo advogado e a condenação foi decidida, tudo em minutos. Disponível em https://www.jota.info/justica/justica-acre-condena-reu-em-tres-dias-apos-prisao-em-flagrante-29072016. Acesso em 13.12.2018.

por ela como redução de danos, ainda que estejam restringindo direitos de quem teria plenas condições de responder a uma imputação em liberdade. Na correlação de forças, restrições outras à liberdade podem ser aplicadas com uma renúncia parcial dos direitos ao contraditório e à ampla defesa.

Para os juízes, as cautelares podem assumir uma aparência de benesse, uma "chance" caridosamente concedida por eles a quem poderiam ter enviado maldosamente para uma unidade prisional. Isso pode ser manejado sem qualquer função declarada às alternativas, ou como uma "quase-prisão" ou com a aplicação de várias medidas com intenções retributivistas e até com ideias correcionalistas. Luís Carlos Valois (2015) critica como atores jurídicos transformam direitos em "benefícios", o que inverte a gramática e modifica a relação perante aqueles que preenchem as condições para exigir um direito, que não pode ser negado uma vez presentes os requisitos legais.

A ideia de que poderiam ter enviado à prisão pressupõe um exercício de poder com a imensa arbitrariedade que ele pode conter, especialmente no cotidiano da atuação judiciária que lida com os sujeitos situados na zona do não-ser[20], para quem a prisão é sempre uma possibilidade. João Vargas (2017) avança nessa discussão teórica discutindo como a antinegritude produz uma violência estrutural que mantém o desrespeito à vida e à liberdade negra, independentemente dos avanços de cidadania, como as garantias individuais tributárias do liberalismo. Embora fundamentais para buscar limitar o poder, elas esbarram na desumanização que conforma a noção de sujeito de direitos.

O contato presencial entre juízes, promotores e pessoas presas também pode reforçar uma postura de autoridade desregrada que se exerce negando ou concedendo um prêmio ou um favor, em vez de garantir o direito à liberdade ou decidir pela prisão apenas sob critérios objetivos e

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[20] Fanon (2008) trabalhou como o racismo e a racialização do mundo produziram a interdição do sujeito, vez que o negro é aquilo que "não é", ou seja, habita uma zona do não-ser, de desumanização, que constitui a zona do ser, habitada por não negros, com pleno respeito de sua condição humana. O amplo campo de violações possíveis – alheio aos avanços mais básicos de garantia formal de direitos – a pessoas passíveis de serem vinculadas ao rótulo de bandido segue esse percurso de hierarquização sociorracial fruto da cisão provocada pelo colonialismo entre o portador de um mal e o portador de atributos humanos.

legais. Em uma audiência que observei na primeira etapa do campo, um promotor de justiça requereu diversas cautelares, sem proporcionalidade, por achar que dois guardadores de carro, negros, a serviço da prefeitura, detidos com cartelas falsas de estacionamento, estavam muito "abusados" na cidade. Juízes e juízas, ao concederem a "chance" de responder em liberdade, deixavam claro a discricionariedade ao julgar, como foi exposto em outra audiência: "não quero mais ver você aqui. Se aparecer aqui é prisão preventiva", reforçando o peso negativo apriorístico que atribuem a uma nova detenção, que ignora prisões ilegais e abusos de poder[21].

No segundo período de campo, a inclinação para se requerer ou decretar mais medidas cautelares ou medidas mais restritivas se pautava pelos registros anteriores. Quando foi possível observar alguma proporcionalidade na aplicação das cautelares a quem já respondia a outros processos, o recolhimento noturno – muitas vezes com forte carga moralista – e o monitoramento eletrônico eram vistos como uma alternativa à prisão preventiva, em que pese não houvesse fundamentação específica para cada uma das medidas. A cautelar era imposta como medida de castigo, como uma sanção antecipada quando se estava diante alguém que se entendesse merecedor de uma retribuição imediata.

Seguindo o padrão generalizado na prática judiciária, diante do silêncio do CPP, a duração das medidas é incerta[22], e, no caso do recolhimento domiciliar noturno, muitas vezes era ignorado se a pessoa tinha trabalho fixo ou qual o seu horário de trabalho, algo exigido pelo artigo 319, inciso V, do CPP, a fim de que se possa restringir os dias de folga. O viés disciplinante da punição de reduzir a vida ao deslocamento trabalho-casa,

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[21] Manuela Valença e Marília Montenegro (2020), analisando cenas de audiências de custódia nas cidades de Recife e Olinda e as limitações desse instituto para lidar com casos de violência doméstica contra a mulher, também expõem situações de ameaça de uso da prisão preventiva contra o flagranteado ou de desconsideração com a vítima.

[22] No período de realização da pesquisa, ainda não havia sido sancionada a Lei 13.964/2019, que passou a prever, no art. 316, § único, o prazo de 90 dias para revisão da necessidade de manutenção da prisão preventiva pelo órgão emissor da decisão. Ainda que entendamos que este prazo deve ser aplicado também às medidas cautelares menos graves, ele não se confunde com a definição de um prazo limite para duração de medidas cautelares em geral, tal como ocorre com a prisão temporária prevista na Lei 7.960/1989, a qual prevê uma sanção legal para o caso de inobservância do limite temporal.

era assim atravessado pelo efeito desejado de mera contenção, de provocar uma "quase-prisão" em casa – especialmente quando junto à limitação de fim de semana e proibição de frequência determinados lugares, sendo que estas últimas, além de cautelares, também figuram como penas estabelecidas em lei, conforme os artigos 43, 47 e 48 do Código Penal.

3.2 O controle da circulação mediado pelo Judiciário: algumas pistas a partir da aplicação da cautelar de "proibição de acesso ou frequência a determinados lugares" no verão de Salvador

Durante o verão, na primeira etapa do campo, a postura inquisidora de promotores e juízes esteva diretamente relacionada a um controle associado às festas populares ou de largo, que marcam decisivamente a vivência na cidade, e ao carnaval. Havia um consenso sobre aplicar o que chamavam de "todas" as cautelares, quando não se prendia. Normalmente, era um "pacote" entre quatro e seis, se houvesse fiança: apresentação bimensal em juízo para informar e justificar atividades e ser intimado de eventual ato do processo; proibição de ausentar-se da Comarca; proibição de frequentar festas populares; limitação de fim de semana; e recolhimento domiciliar noturno das 22h às 6h.

Isso não significou uma redução do uso da prisão preventiva. Houve uma tendência maior também de manter as pessoas encarceradas, com os mesmos juízes atuando nas duas etapas da pesquisa. Em relação à população de rua, o número de pessoas mantidas presas, dentro do *universo de análise*, caiu de 71%, para 25%, na segunda etapa da pesquisa. Não há diferenças significativas, nos dois períodos, em relação aos dados sobre registros criminais anteriores e os crimes cometidos, tendo se mantido o protagonismo do furto.

Pessoas presas nos bairros Itapuã, na Liberdade ou na Pituba, distantes entre si; vendedores ambulantes, motoristas, atendentes, mecânicos ou desempregados; crimes de tráfico, furto, estelionato ou roubo; flagrantes ilegais ou legais; prisões com emprego ou não de tortura. A firmeza de uma postura diferenciada dos atores processuais no verão independe do que levou as pessoas ao NPF, das circunstâncias e do local da sua prisão, bem como da sua circulação na cidade – onde se fixam territorialmente ou trabalham. A aplicação abusiva de cautelares ou prisão

preventiva teve em comum a criminalização de jovens negros e pobres. As festas de largo ou festas populares, como são conhecidas diversas celebrações pagãs, religiosas ou profanas, como o carnaval, a Segunda Gorda da Ribeira, a Lavagem do Senhor do Bonfim e a Festa de Iemanjá, ocorriam em locais muito distantes do território em que se deu a prisão da maior parte dessas pessoas.

A Lei 12.403/2011 fala em "proibição de acesso ou frequência a determinados lugares quando, por circunstâncias relacionadas ao fato, deva o indiciado ou acusado permanecer distante desses locais, para evitar o risco de novas infrações". Essa cautelar estabelece o fim de evitar novas infrações, repetindo um requisito de constitucionalidade duvidosa do inciso I do art. 282 do CPP,[23] vinculando-o ao controle em um território que deve estar ligado ao fato criminoso supostamente praticado.

Dentro de uma perspectiva metodológica que desnaturaliza os elementos jurídicos, é necessário compreender, por trás das aparências de cada evento, a complexidade sociorracial urbana e as dinâmicas entre o local e a totalidade, como propõe metodologicamente a criminologia crítica (MELOSSI, 2012), bem como perceber como alguns dispositivos e instrumentos jurídicos – ainda que colocados como neutros – desenvolvem uma função de marcadores de espaço (MBEMBE, 2017). A utilização dessa medida cautelar para funções ocultas pode ser uma pista para expandir horizontes para além de uma análise dogmática autorreferenciada, revelando como mecanismos de controle se relacionam com a produção de territorialidades urbanas (ROMÃO, 2019).

O filósofo camaronês Achille Mbembe compreende o controle da circulação inserindo a raça como uma categoria de análise no estudo foucaultiano sobre a era da segurança, voltando-se para a conjuntura do século XXI, explicando que "os processos de racialização têm como objetivo marcar estes grupos de populações, fixar o mais possível os limites nos quais podem circular, determinar exatamente os espaços que podem ocupar" (MEBEMBE, 2017, p. 71). Trata-se, segundo o autor, de um

[23] "Art. 282. As medidas cautelares previstas neste Título deverão ser aplicadas observando-se a: I – necessidade para aplicação da lei penal, para a investigação ou a instrução criminal e, nos casos expressamente previstos, para evitar a prática de infrações penais".

controle medido de circulação em nome de uma idealizada segurança geral, no qual o racismo produz o diferente e o situa para fora da zona do ser.

A sobrerrepresentação negra também está na situação de rua. No censo nacional realizado pelo Governo Federal, em 2008, 64% eram negros. Em Salvador, segundo estudo do Projeto Axé de 2017, esse número vai a 88%. É necessário destacar que, segundo o IBGE, os negros são 75% dos mais pobres e apenas 17% dos mais ricos no país[24]. Entre a produção neoliberal da miséria e o direito à cidade – toma-se a estatística para além de um retrato. Situar o controle da circulação em um estudo crítico ao funcionamento das agências do sistema penal envolve considerar a construção da negação enquanto sujeito a corpos negros, a fim de compreender dinâmicas de um controle penal tão diferenciado.

A interpretação de "determinados lugares" como "festas populares, bares, prostíbulos, bocas de fumo e casa de jogos de azar" – mencionadas em atacado em algumas decisões – se aproveita de uma persistente tradição moralista, que se alia à demanda por ordem atual de controle da densidade urbana e gestão da circulação negra. Especialmente quando não se procede a avaliação prévia da liberdade plena nem de requisitos centrais como a relação com o fato, ocorrência de flagrante forjado e relatos de torturas, como observado. Isso deve servir de alerta para aguçar criticamente a discussão sobre a possibilidade de uma interpretação extensiva no momento de aplicação de medidas cautelares pessoais (CASTRO, 2017). O contato com a atuação empírica dos atores jurídicos e o entrelaçamento entre saberes processual penal e criminológico pode contribuir decisivamente.

A prisão anterior, independente das suas circunstâncias, parece dialogar com os efeitos não meramente repressivos do registro ou das "passagens" na rua, que instrumentalizam uma segregação. Em uma audiência no mesmo período, disse um promotor para um rapaz negro que, apesar de "reiterar", receberia uma liberdade condicionada: "É quase prisão, viu? Prisão em casa. Parece liberdade, mas não é. Não vai ter ninguém filmando, mas você vai ser abordado (na rua). Vão perguntar se você tem passagem... E se você mentir... Sabe que é pior...". A oralidade

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[24] Disponível em: https://biblioteca.ibge.gov.br/visualizacao/livros/liv98965.pdf. Acesso em 29.11.2018.

no procedimento informal do "paredão" explicita o que os códigos da linguagem jurídica pretendem blindar. Para dificultar, reduzir, separar a "boa" da "má circulação" (FOUCAULT, 2008), a lógica do "recinto fechado" de que fala Mbembe (2017), ao delimitar os espaços pelo racismo, desterritorializa se encobrindo como uma benesse de liberdade.

O judiciário, no campo criminal, costuma ter uma relação de indiferença perversa com o lugar da população em situação de rua. Nos termos da geografia de Milton Santos (2014), talvez seja uma indiferença com o lugar e um intenso interesse pelo território. A declaração comprovada – em juízo – de ter residência fixa em algum território da cidade é condição elementar de cidadania, seja para um tratamento mais humanizado, seja para a efetivação de direitos no campo do processo penal.

A intensidade desta constatação se demonstra no fato de a Defensoria Pública ter tido que tecer uma estratégia, no Núcleo de Prisão em Flagrante, de não revelar a situação de rua de alguns de seus assistidos durante as audiências, uma vez que ela por si só tem se configurado como um risco concreto de manutenção da prisão. Isso levou a aplicação do recolhimento noturno domiciliar em um caso.

Em outros dois casos, mesmo os juízes reconhecendo as condições de vida na rua e restituindo a liberdade, essa medida apareceu, não se sabe se intencionalmente, por automatismo ou por reprodução de uma decisão pré-moldada. Em uma dessas audiências, o promotor chegou a cogitar o requerimento dessa cautelar. Dois homens em situação de rua haviam sido presos por roubo. Ao que respondia ação penal por tráfico de drogas, o ator processual pediu prisão. Ao que estava sendo preso pela primeira vez, ele pretendia pedir uma medida em liberdade mais gravosa, mas desistiu em tom de lamento: "recolhimento... não dá nem pra pedir porque ele mora na rua". Mesmo assim, o juiz aplicou a medida na decisão escrita, sem sequer especificar o horário, que normalmente é fixado entre 22h e 06h.

O monitoramento eletrônico surgiu de forma mais intensa na segunda etapa do campo, quando se fez mais presente nos debates dos atores processuais e nas falas das equipes psicossociais e servidores do cartório. Em outubro, após avaliar o caso de um assistido como de difícil soltura, pelo crime e pelo perfil dos demais atores processuais, um dos representantes da DPE-BA perguntou a um dos juízes se já tinha aplicado

monitoramento eletrônico para quem vive na rua e se entendia cabível aplicá-lo. Recebeu uma resposta negativa: "Como que vai monitorar se não tem endereço?".

A perspectiva causal-explicativa, a desumanização dos sujeitos e a desconsideração sobre as histórias de vida, que predominam na sala de audiência, afetam a própria atuação da DPE-BA. A tentativa de atuação de redução de danos para evitar a prisão leva a considerar opções que aumentam a exposição a violências de controle formal e informal, através de um instrumento que no Brasil bebe de uma histórica naturalização da subjugação dos corpos negros (PIRES, 2015).

3.3 Entre a aplicação automatizada e a "insuficiência das medidas cautelares": a relegitimação do cárcere na lógica da "prisão a médio prazo"

Uma pesquisa do CNJ (2018), envolvendo cinco estados[25] e o Distrito Federal, destacou que as medidas cautelares diversas mais aplicadas dizem respeito à facilitação da localização dos acusados pela justiça na continuidade do processo, como o comparecimento periódico em cartório para informar e justificar atividades e a proibição de se ausentar da comarca. De um total de 716 cautelares aplicadas nas audiências observadas, a mais frequente foi a de comparecimento periódico em juízo (34,4%), mesmo que não se apresentasse algum indício concreto de que a liberdade poderia acarretar fuga ou outra obstrução da justiça. Em Salvador, entre os anos de 2017 e 2018, segundo o Relatório da Defensoria Pública do Estado da Bahia (2019), esse percentual é de 48,7%.

Aury Lopes Jr. (2013) aponta como esta medida pode afetar o controle da vida cotidiana, inclusive por não haver limitação legal do período de comparecimento – se semanal, diário, mensal etc. Apesar de a prática judiciária reduzir o cumprimento a uma assinatura da pessoa investigada ou acusada em uma planilha com seu nome[26] – ignorando a

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[25] Rio Grande do Sul, Paraíba, Tocantins, Santa Catarina e São Paulo – e no Distrito Federal.

[26] Momento em que se aproveita para garantir abreviar o processo de cumprimento de atos processuais, como por exemplo, mandados de citação e intimações.

parte de "informar e justificar atividades" – está legitimada uma carga de possibilidades de vigilância mediada pelo poder judiciário, que pode se concretizar, a depender de como se desenhe as atividades das equipes de atenção psicossocial. Segundo a Resolução 213/2015 do CNJ, a Central Integrada de Alternativas Penais deve manter relatórios reportando ao judiciário suas atividades de fiscalização do controle e encaminhamentos à assistência social.

Em geral, a aplicação das medidas cautelares alternativas não costuma ser fundamentada nas decisões, não se encontrando as razões que levaram os juízes a decidir por elas, dentro dos critérios legais do art. 282 do CPP e das finalidades específicas[27] que constam em algumas das cautelares diversas do art. 319 do CPP (FERNANDES; DUCLERC, 2020; VASCONCELLOS, 2013). No I FONAPE, o CNJ havia fixado enunciados para determinar que a análise da liberdade plena deveria anteceder à da liberdade condicionada, além de exigir uma fundamentação específica para cada medida cautelar aplicada[28].

Em relação ao *universo de análise* da pesquisa, metade das decisões justificaram, ainda que de forma genérica, a imposição de cautelares e, embora proferidas por juízes diferentes, as redações são idênticas neste ponto. Quando houve fundamentação expressa na decisão para aplicação das cautelares, com a exceção de um caso, ela se referiu a uma necessidade de garantia da ordem pública, vinculada a garantir a futura aplicação da lei penal ou garantir a persecução penal. Em que pese a inconstitucionalidade da "ordem pública" (LOPES JR., 2013), mesmo quando utilizada junto a estes argumentos, haveria a necessidade de demonstração concreta que a liberdade plena pudesse impedir o regular processamento ou eventual cumprimento de pena, sob pena de não existir uma cautelaridade.

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[27] A "proibição de se ausentar da Comarca" apresenta uma finalidade instrumental específica (necessidade ou conveniência da instrução criminal). O "comparecimento periódico em juízo" e o" recolhimento domiciliar" noturno não acrescentam finalidades particulares. A "proibição de manter contato com uma pessoa determinada" não deixa de demandar uma finalidade de cautela probatória, diante do lugar que a vítima tradicionalmente ocupa no processo penal.

[28] Desde a Lei 13.964 de dezembro de 2019, o CPP explicita isso no artigo 282, §6º.

O Superior Tribunal de Justiça (STJ) já elaborou o Informativo Jurisprudencial nº 411, em 2009, apresentando uma tese com base em diversos julgados na qual um estrangeiro sem bens, trabalho e família no país não pode sofrer presunção sumária de fuga[29]. O então relator da Operação Lava Jato no STF, ao rechaçar um argumento de presunção abstrata de fuga, decidiu, em 2017, no Habeas Corpus 127.186, que "o fato de o agente ser dirigente de empresa que possua filial no exterior, por si só, não constitui motivo suficiente para a decretação da prisão preventiva". Mas, na era do monitoramento incessante à distância, para os sujeitos historicamente associados à "má" circulação, não ter um endereço para servir ao controle pode ser visto como algo fatal, um indício puro e simples de fuga.

Isso passa longe das diretrizes do Protocolo I da Resolução 213 do CNJ, que ao tentar limitar a extensão da aplicação das medidas, pretende assegurar, no item X, a não penalização da pobreza, especialmente no caso de situação de rua, em que "a conveniência para a instrução criminal ou a dificuldade de intimação para comparecimento a atos processuais não é circunstância apta a justificar a prisão processual ou medida cautelar".

Em um dos casos do *universo de análise*, Adriano[30] foi solto em audiência após os atores institucionais concordarem que o fato imputado não passava de uma contravenção penal, em vez de um roubo, como sustentava a polícia. Os argumentos expostos para as cautelares alternativas não encobrem a automaticidade da sua aplicação. Uma vez selecionado pelas agências criminalizantes, seja por qual motivo for, independente da reiteração, já se abre espaço para expandir o controle em liberdade. Apesar de constar no APF o indicativo de uma situação transitória da rua, em audiência não foi revelada essa informação. O peso da reiteração se percebe na forma que o juiz avalia a sua liberdade: não pelo fato de a contravenção penal não permitir uma custódia cautelar, mas pela ausência de registros criminais:

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[29] Disponível: https://ww2.stj.jus.br/jurisprudencia/externo/informativo/?acao=pesquisar&livre=PRESUN%C7%C3O+DE+FUGA&operador=e&b=INFJ&thesaurus=JURIDICO&p=true. Acesso em 07.01.2018.

[30] Os nomes citados ao longo das referências aos dados de campo são apenas representativos, a fim de preservar a identidade das pessoas.

> Os depoimentos e documentos juntados às folhas 01/32, colhidos no auto de prisão em flagrante revelam que as condições pessoais dos autuados conduzem a uma medida judicial alternativa à prisão, vez que tecnicamente primários, *Adriano sequer registra passagens por delegacias, além de possuírem* (sic) *endereço certo*, apresentando-se a concessão de liberdade provisória como a medida mais adequada à hipótese. *Impõe-se, todavia, a aplicação das medidas cautelares diversas da prisão*, a fim de resguardar-se a futura aplicação da lei penal, se for o caso, e de evitar prejuízo à instrução do processo judicial, garantindo-se a ordem pública, e adotando-se a devida proporcionalidade entre o que o caso apresenta e a medida judicial decretada. Por tais razões, aplico em desfavor dos autuados as medidas cautelares previstas no art. 319 do CPP, quais sejam, *comparecimento bimenstral* (sic) *em juízo*, para informar e justificar as suas atividades, proibição de ausentar-se da Comarca em que estiver residindo quando a permanência seja conveniente ou necessária para a investigação ou para a instrução, *recolhimento domiciliar noturno das 22hs às 06hs*, além do encaminhando dos autuados ao Programa 'Corra para o Abraço' (grifamos).

A negação ao acesso à justiça e os processos de criminalização fazem o sistema de justiça criminal ser o único ramo do judiciário que se aproxima da população de rua. Quem vive na rua quando pensa em judiciário pensa primeiro em justiça criminal, em risco à liberdade. O mecanismo de controle à distância, às vezes silencioso e inerte, revela sua força quando ocorre uma prisão, seja por um fato novo ou por algum processo anterior, que a pessoa mal teve condições de acompanhar, pelas dinâmicas da vida na rua. Muitas pessoas convivem com processos criminais em curso ou mesmo execuções penais em andamento, não raro com sentenças transitadas em julgado, sem que elas saibam disso. Segundo uma supervisora do Programa Corra Pro Abraço (ROCHA, 2018), 57% das demandas dos assistidos são referentes à justiça, muitas delas relacionadas a medidas cautelares[31].

[31] O Programa busca oferecer acolhimento a pessoas em situação de violação de direitos e demandas psicossociais e, através de uma atuação em rede, viabiliza ações de promoção de cidadania primordialmente nas esferas da saúde, da justiça, da assistência social e da educação e da justiça). Essa constatação da supervisora levou a criar uma equipe no NPF, em 2016, com a finalidade

A prisão em flagrante por um novo crime parece a principal forma de se cumprir indiretamente um mandado de prisão por descumprimento de medida cautelar alternativa ou por condenação em ação penal e driblar o "endereço incerto" que frustra algumas criminalizações secundárias. O discurso da "insuficiência das cautelares" tenta ocultar o próprio sucesso de funções latentes das alternativas que reforçam a instituição prisional, com uma concreta possibilidade de voltar à prisão que se mantém sempre presente (COHEN, 1979).

Além da reiteração delitiva, o discurso de que as alternativas à prisão foram desrespeitadas foi bastante utilizado nas manifestações dos atores jurídicos. As pessoas em situação de rua – além de evitar ir à justiça, a qual associam primeiramente à prisão – não têm muitas possibilidades de deslocamento periódico de ida e retorno, seja mensal ou trimensal, ao bairro de Sussuarana, quase ao norte da região do Miolo de Salvador, onde fica o Fórum Criminal. As medidas, ao serem aplicadas independente da sua possibilidade de cumprimento diante das condições das pessoas, legitimam a manutenção na prisão por um fato posterior, mesmo que seja um furto sem prejuízo, protagonista nas trajetórias de criminalização analisadas[32].

As medidas cautelares perdem seu ideal de alternativa ao se referenciar constantemente à prisão. O sucesso, o fracasso e até a resposta a ambos giram em torno do cárcere. No contexto de criminalização da população de rua, a liberdade condicionada é muitas vezes uma prisão retardada. Para além da benevolência, a boa "chance" de deixar alguém em liberdade, as funções da prisão são reafirmadas (especialmente de

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inicial de evitar uma maior fragilização dos vínculos e o isolamento de algum assistido eventualmente preso, ou possibilitar o início de um novo contato para acompanhamento na rua.

[32] Na análise dos dados documentais, o furto foi o protagonista nas trajetórias de criminalização, entre materiais de alumínio, ferro ou cobre que encontram e alimentos que buscam. As prisões anteriores apresentam muitas semelhanças entre si e, em alguns casos, se tratam de uma habitualidade de crimes sem prejuízo em estabelecimentos alimentícios ou lojas, nas ruas ou em shoppings. Manoel, Humberto e Airton se sobressaem na quantidade de vezes em que foram presos de forma idêntica durante a subtração de bens alimentícios ou de higiene pessoal em estabelecimentos privados. Latas de azeite, chocolates, bebidas, carnes, queijos, entre outros, quase sempre imediatamente recuperados.

contenção, expressamente defendida por promotores e juízes na prisão preventiva), de modo que a rede da punição se expande, afinando a malha (COHEN, 1979). A antecipação punitiva através da prisão preventiva, no contexto da governamentabilidade neoliberal, ganha um *plus*, com os efeitos punitivos das cautelares diversas, se não imediatos, a médio prazo.

Em vez de uma simples pena material aplicada desde já, a custódia cautelar pode configurar uma espécie de "prisão a médio prazo", na qual a prisão é ideologicamente reforçada com o "fracasso" programado de cautelares inexequíveis a quem vive na rua e está fora do padrão de inserção no capital. Este pressupõe uma territorialização fixa e sob os paradigmas liberais, bem como um trabalho fixo. A lógica de aplicação de medida alternativa que tende a um insucesso, com superveniência da prisão, se apresenta como um mecanismo de controle articulado à transitoriedade que é própria do viver e da circulação da população de rua. O que ela tem de quase certa, diante da precariedade da liberdade dos corpos negros com territorializações transitórias, pode ter de mais dura, uma vez relegitimada (ROMÃO, 2019). Revertê-la pode ser mais difícil, já que a pessoa desperdiçou suas "chances", demonstrando que as alternativas foram insuficientes para conter o que então se constata, a sua "personalidade voltada para o crime".

A ampliação das possibilidades de encarceramento adquire uma dimensão menos relacionada ao fato imputado que as condições de vida das pessoas e quem elas são, o que as coloca em exposição acentuada à criminalização secundária. Logo, há um efeito latente de "prisão a médio prazo" nessas medidas cautelares aplicadas sem proporcionalidade, seguindo o binômio prisão–condição à liberdade. Se uma medida desencarceradora já se mostraria suspeita pela pergunta se a prisão pode acontecer, uma vez ela aplicada, mais grave parece ser a situação das cautelares impostas à população de rua, onde a pergunta se transforma em quando ela vai acontecer. Como diz Nilo Batista (2011, p. 08), "toda legitimação do poder punitivo acaba repercutindo no lombo estereotipado dos suspeitos de sempre".

Considerações finais

O desenvolvimento do trabalho, como mencionado acima, partiu da pergunta seguinte de pesquisa: como ocorre a aplicação de medidas

cautelares pessoais nos encontros presenciais entre atores jurídicos e pessoas em situação de rua em audiências de custódia? O caminhar da pesquisa permitiu inferir que a finalidade de redução do encarceramento deve ser pensada de forma dinâmica, especialmente pela regra de se condicionar a liberdade às medidas cautelares pessoais, com o risco perene de prisão preventiva e com o hábito do judiciário de não conceder a liberdade plena diante do que entende como reiteração criminosa.

A observação da experiência dos "paredões" no NPF contribuiu para ampliar os entrelaçamentos das duas técnicas de pesquisa adotadas. O estudo dos APFs e de outros documentos jurídicos adquiriu outro nível de desconfiança, ao tempo que a mediação das narrativas e dos discursos de outros atores nos processos mostrou como as audiências de custódia fraturam silêncios, mas também produz inúmeros outros. O judiciário se vale de um controle da escrita que blinda o poder punitivo e instrumentaliza o pacto de silenciamento que encobre privilégios e violências. Na gestão da circulação, mediada entre prisão preventiva e cautelares diversas, os "paredões" são um mecanismo governamental que, sob o discurso da "chance", expande o controle, tanto nas inquirições e reprimendas informais quanto na aplicação arbitrária de cautelares diversas.

A forma de produção de documentos em audiências de custódia serve à legitimação do sistema punitivo e do *status quo* que orienta a operacionalidade real das agências de criminalização secundária. O documento que mais se espera no NPF, a decisão judicial, tende a ser repetitivo, como já o era antes dos encontros presenciais entre juízes e pessoas presas. Aproveitando diversos parágrafos de outras decisões, em pouco espaço, individualiza, quando o faz, a fundamentação sobre a homologação do flagrante e a aplicação de cautelares.

Nesse cenário, a forma que se chega à aplicação de medidas cautelares diversas da prisão em espécie não só desconsidera um debate sério sobre cautelaridade. Há tanto a ausência de fundamentação escrita quanto a revelação, na audiência de custódia, de intenções, tradicionalmente ocultas no discurso formal dos documentos judiciais, mobilizadas arbitrariamente como a real justificativa para restringir liberdade, embora isso seja camuflado pela ideia de concessão de uma "chance", uma benesse a quem não teve a prisão mantida.

O processo de decisão sobre a liberdade, entre os debates orais e os atos informais na sala de audiências, também se vale da construção etiológica de perfis fadados à contenção, de imediato ou a médio prazo, traçados pelas narrativas processuais. As pessoas em situação de rua se forem presos por outro fato, não importa o qual nem suas circunstâncias, o que resta é destino do cárcere cujo uso não se descarta. A reiteração criminosa que encobre a exposição acentuada ao encarceramento legitima o agravamento das condições de vida na rua, servindo perversamente de argumento para restringir mais direitos em liberdade, especialmente no verão, sem que se fundamente no suposto fato criminoso ou atenda o requisito da cautelaridade.

Uma compreensão crítica acerca dos registros criminais evidencia que este argumento não contribui para fazer que medidas cautelares sejam de fato uma alternativa à prisão. Do comparecimento em juízo e proibição de frequentar festas ao recolhimento noturno ou monitoramento eletrônico, as possibilidades de detenção têm se ampliado e se aproximam de distintas formas da população de rua.

A função da cautelar alternativa como punição antecipada abre espaço para uma maior legitimação e reforço da via prisional, que serve a estratégias variadas de controle da circulação urbana. Mesmo que a pessoa tenha cumprido parcialmente ou mesmo todas as condições em liberdade, uma nova prisão continuará a oferecer a confortável constatação de que as cautelares foram insuficientes para inibir o “comportamento voltado para o crime” daqueles que mais uma vez vão presos.

A prisão cautelar está sempre em órbita, especialmente para a população de rua. A prisão que volta com força, não mais preocupada em corrigir – tarefa delegada às equipes multiprofissionais (BATISTA, 2003b) – procura garantir uma contenção, ou seja, uma neutralização justificada na redutiva análise positivista em torno da “reiteração delitiva” de alguém que não se corrigiu pelas medidas cautelares diversas.

A lógica da “prisão a médio prazo” coloca as cautelares diversas e a prisão preventiva como eixos que hoje estão indispensavelmente conectados no controle da circulação da população de rua, atualizando os mecanismos de controle antinegro que precariza as liberdades, na gestão da coexistência densa na cidade negra de Salvador. Os pequenos furtos servem de instrumento para a gestão populacional entre a prisão-depósito

e a aplicação de medidas cautelares arbitrariamente impostas, que servem a funções ocultas e atendem a demandas por ordem (BATISTA, V., 2011).

As medidas cautelares diversas da prisão não produzem apenas efeitos repressivos, mas em sua função "positiva", de configurar verticalmente as relações sociais, assume funções ocultas de marcadores de espaço (FOUCAULT, 2014; MBEMBE, 2017). Esse controle diferenciado depende de algumas variáveis que podem ser mais exploradas de forma mais aprofundada em outra pesquisa. Dentro das limitações desta pesquisa, no verão, pode-se perceber que a cautelar de proibição de frequentar festas populares e até a aplicação de fiança, sabendo os atores processuais da situação de rua dos seus destinatários, agem sob distintas formas para limitar a circulação em liberdade.

A conjuntura atual, de maior recrudescimento punitivo, enfrenta uma pandemia com consequências ainda incertas para o processo penal. Inicialmente, o CNJ – por meio da Recomendação nº 62 e da aprovação do ato normativo 4117/63 em 10 de julho de 2020 – contribuiu para evitar que as audiências de custódia fossem realizadas por videoconferência. A própria continuidade das audiências de custódia, alvo constante de propostas de retrocesso, está ameaçada, em um momento chave para as persistentes tentativas de tornar regra o meio audiovisual.

As reflexões sobre o tratamento objetificado, que passou dos papeis trocados em plantões judiciais para salas de audiências, contribuem para complexificar os desafios em torno da redução da lógica do cárcere e da promoção de direitos também em situações de não realização de audiência de custódia, uma vez que atravessam de forma decisiva o processo de tomada de decisão sobre a aplicação de medidas cautelares.

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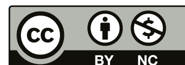

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Execução Penal

Criminal Execution

“Liberados”, porém, não livres: um olhar para o cumprimento de pena em regime aberto na cidade de São Paulo

“Released”, yet not free: an overview of the parole (system) in the city of São Paulo

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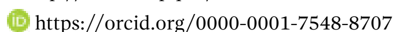
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Resumo: Este artigo, utilizando como método a observação participante e a análise documental de provimentos e documentos judiciais relacionados à execução da pena em meio aberto no estado de São Paulo, tem como propósito elaborar descrições e reflexões sobre o regime aberto e da prática do comparecimento periódico em juízo. Partindo da contextualização acerca dos regimes de invisibilização do cumprimento de pena em regime aberto identificados na pesquisa, o artigo apresenta alguns aspectos da organização judiciária da execução da pena em São Paulo e em seguida descreve cenas e elementos do comparecimento periódico em juízo em dois setores diferentes do fórum criminal da Barra Funda, o maior fórum criminal da América Latina, localizado na cidade de São Paulo.

Palavras-chave: Justiça Criminal; Execução Penal; Regime aberto; Comparecimento periódico em juízo.

Abstract: *Using the methodology of participant observation and documentary analysis of provisions and court documents related to the execution of penalties outside prisons in the state of São Paulo, this article aims to develop descriptions and reflections on the parole and the practice of periodic mandatory court appearance.*

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[1] Mestranda em Direito e Desenvolvimento pela Escola de Direito da Fundação Getúlio Vargas (FGVSP). Graduada em Direito pela Faculdade de Direito de São Bernardo do Campo (FDSBC).

Starting with the contextualization of the regimes/mechanisms that render invisible the parole as a type of penalty, the article presents some aspects of the judicial organization for the enforcement of court decisions in the state of São Paulo and it also describes events (scenes) and elements of the mandatory court appearance in two different sectors of the criminal court of Barra Funda, located in the city of São Paulo – the biggest criminal courthouse in Latin America.

Keywords: *Criminal Justice; Penal Execution. Parole; Periodic Mandatory Court Appearance*

Sumário: Introdução; 1 - Trajetos anteriores e métodos de pesquisa empírica mobilizados; 2 - A (des) organização judiciária da execução da pena em meio aberto na cidade de São Paulo; 3. A circulação entreaberta do portão "F" e apontamentos a partir das observações participantes. Considerações e reflexões finais. Bibliografia.

Introdução

O complexo judiciário Ministro Mário Guimarães, inaugurado em 15 de setembro de 1999, o fórum criminal da Barra Funda, está localizado na cidade de São Paulo e é também conhecido como o maior fórum criminal da América Latina (TJSP, 2012)[2]. O fórum criminal da Barra Funda é uma estrutura arquitetônica que se destaca na paisagem da cidade de São Paulo devido ao seu tamanho e também pela intensa circulação diária de pessoas. Além disso, durante as manhãs nos dias úteis, caracteriza-se por filas de pessoas que se deslocam de diversas localidades do estado (e até do país), sob chuva ou sol, aguardando o horário de abertura do fórum para o público em geral que se inicia às 13h[3].

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[2] Notícias veiculadas à época da inauguração do fórum criminal da Barra Funda por canais de comunicação que circularam principalmente no meio jurídico como o Conjur ou veículos de assessoria de comunicação institucional do governo do estado de São Paulo atribuíram a ele a característica de maior fórum da América Latina:<https://www.conjur.com.br/1999-dez-07/maior_complexo_criminal_america_latina_inaugurado> e <https://www.saopaulo.sp.gov.br/ultimas-noticias/covas-inaugura-forum-criminal-ministro-mario-guimaraes-1/>. Acesso em: 24 abril. 2020.

[3] O fórum criminal da Barra Funda foi fechado para circulação do público em geral desde março de 2020, assim como as obrigações de comparecimento

De acordo com estimativa do Tribunal de Justiça de São Paulo referente ao ano de 2012 (TJSP, 2012), cerca de cinco mil pessoas costumavam passar, por dia, até o início da decretação das medidas sanitárias e de saúde pública decorrentes da pandemia da COVID19, pelo complexo judiciário da Barra Funda.

Estas pessoas estão conectadas àquele espaço e à justiça criminal brasileira de formas distintas: há pessoas que estão presas e são levadas para comparecer em audiências nas mais de trinta varas judiciais do fórum, policiais militares que trabalham no controle de entrada e saída das portarias principal e adjacentes, familiares que buscam informações de parentes que estão em situação de prisão, estagiários e estagiárias de direito que cumprem suas jornadas, funcionários e funcionárias de empresas terceirizadas encarregadas do serviço de limpeza e muitas outras pessoas.

É neste contexto de intensa circulação diária no fórum criminal da Barra Funda que estão inseridas as pessoas que já estiveram presas e, por progredirem em suas condenações, passam a viver sob cumprimento de pena em meio aberto, sendo as espécies desta forma de cumprimento e que serão consideradas para este artigo: o regime aberto[4] (RA), a liberdade condicional (LC)[5] e o sursis (suspensão condicional do processo)[6].

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em juízo foram suspensas e assim permaneceram até o fechamento deste texto. Disponível: <https://www.tjsp.jus.br/Noticias/Noticia?codigoNoticia=60603>. Acesso em: 17 jun. 2020.

[4] O artigo 114 da Lei de Execução Penal define regime aberto da seguinte forma: “Somente poderá ingressar no regime aberto o condenado que: I - estiver trabalhando ou comprovar a possibilidade de fazê-lo imediatamente; II - apresentar, pelos seus antecedentes ou pelo resultado dos exames a que foi submetido, fundados indícios de que irá ajustar-se, com autodisciplina e senso de responsabilidade, ao novo regime”.

[5] O livramento condicional (LC) tem fundamentação legal no Código Penal (artigo 83) e na Lei de Execução Penal (artigos 131 a 146) e se trata de uma das espécies de cumprimento da pena em meio aberto que submete a pessoa presa à análise de uma série de requisitos que são classificados pela lei como “pessoais” e “objetivos”. O livramento é *condicional*, porque caso o judiciário considere que a pessoa sob essa medida não a esteja cumprindo em acordo com as determinações judiciais da concessão, a pessoa poderá voltar ao regime anterior de cumprimento de pena e o tempo que viveu sob LC não será contabilizado como tempo de pena efetivamente cumprida.

[6] O sursis ou suspensão condicional do processo tem disposição legal no artigo 89 da Lei 9.099/95: “Nos crimes em que a pena mínima cominada for igual

Neste sentido, cabe salientar que a execução da pena no Brasil é caracterizada por um sistema progressivo, que estabelece gradações entre os regimes de cumprimento de pena que são geralmente definidas através do perfil e ações da pessoa que se encontra sob privação de liberdade. Ao mesmo tempo, a execução de pena é caracterizada por ser jurisdicional, uma vez que as instituições do poder judiciário atuam diretamente sobre ela por meio de decisões judiciais, petições e pareceres (GODOI, 2015, p. 55).

Este artigo, portanto, busca contribuir para a produção de conhecimento sobre a execução da pena no Brasil. Considerando a afirmação de Rafael Godoi (2015) que "geralmente, os estudos de fluxo da justiça criminal alcançam apenas o julgamento, de modo que as execuções das penas permanecem por demais opacas aos cientistas sociais" (GODOI, 2015. p.55), essa opacidade também ressoa nas pesquisas em direito, especialmente quando o estudo da execução penal recai sobre as formas de cumprimento de pena em meio aberto.

É importante frisar que a pesquisa e a escrita deste artigo foram realizadas majoritariamente antes da decretação do estado de calamidade pública em decorrência da pandemia da COVID-19. Desde março de 2020, a circulação das pessoas sob cumprimento de pena em meio aberto, no estado de São Paulo, foi interrompida, de forma que as obrigações para o comparecimento em juízo foram suspensas e assim permaneceram até o fechamento deste texto.

Ainda que a circulação das pessoas em cumprimento de pena em meio aberto no fórum criminal da Barra Funda fosse visível, até o mês de março de 2020, para quem transitava nas proximidades do fórum, já havia uma dificuldade de se compreender a dimensão e o alcance da pena aberta na vida destas pessoas no estado de São Paulo e no Brasil como um todo. De maneira semelhante, o período de fechamento dos fóruns e a interrupção do comparecimento periódico em juízo para as

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ou inferior a um ano, abrangidas ou não por esta Lei, o Ministério Público, ao oferecer a denúncia, poderá propor a suspensão do processo, por dois a quatro anos, desde que o acusado não esteja sendo processado ou não tenha sido condenado por outro crime, presentes os demais requisitos que autorizariam a suspensão condicional da pena" e uma das condições para seu cumprimento pode ser o comparecimento periódico em juízo (artigo 89, parágrafo 1º, IV).

pessoas em cumprimento de pena em meio aberto, inseriram e seguem reverberando novos significados acerca das punições em meio aberto, os quais não poderão ser desenvolvidos neste artigo.

No âmbito do Levantamento de Informações Penitenciárias do Departamento Penitenciário Nacional (BRASIL, 2017, p. 24)[7], 0% das pessoas privadas de liberdade no estado cumpriam pena em regime aberto. Enquanto que nos dados públicos da Secretaria de Administração Penitenciária de São Paulo (SAPSP) sequer há informações sobre este regime –, e as informações mais recentes disponíveis nas estatísticas da SAPSP indicavam que, em dezembro de 2017, o total da população carcerária no estado era de 225.874 pessoas. Dentre estas, cerca de 35.814 homens e 2.333 mulheres cumpriam pena em regime semiaberto e há a possibilidade que, dentre uma série de caminhos possíveis para percorrerem no cumprimento de pena, tenham progredido para o regime aberto[8].

A Lei de Execução Penal (LEP) prevê que o regime aberto e a pena de limitação de fim de semana devem ser cumpridos em estabelecimentos penais denominados como Casas de Albergado[9] e São Paulo está

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7 Os dados prisionais mais recentes divulgados pelo Departamento Penitenciário Nacional (DEPEN) tem como referência os meses de janeiro a junho de 2019, porém estes dados não foram divulgados junto à metodologia de sua coleta, por isso, optou-se por utilizar como referência os dados do DEPEN referentes à 2017. No entanto, no que se refere ao estado de São Paulo das informações relativas ao primeiro semestre de 2020 constam que no estado havia um total de 218.909 pessoas presas: 45.200 estavam presas sem condenação, 140.292 em unidades de regime fechado e 32.151 em unidades de regime semiaberto. Estes dados estão apresentados no formato de um painel interativo e disponíveis em <https://app.powerbi.com/view?r=eyJrIjoiMjU3Y2RjNjctODQzMi00YTE4LWEwMDAtZDIzNWQ5YmIzMzk1IiwidCI6ImViMDkwNDIwLTQ0NGMtNDNmNy05MWYyLTRiOGRhNmJmZThlMSJ9> Acesso em: 14 de janeiro de 2021.

8 Estas estatísticas prisionais da Secretaria de Administração Penitenciária de São Paulo encontram-se disponíveis em: <http://www.sap.sp.gov.br/sap-dados/estatisticas.html>. Acesso em 09 fev. 2020.

9 As Casas de Albergado são descritas pela LEP como prédios em espaços urbanos e que devem ser construídos a uma certa distância de outros estabelecimentos prisionais. Eles devem “caracterizar-se pela ausência de obstáculos físicos contra a fuga”, conforme o artigo 95 da LEP. No mais, a LEP descreve que estes espaços devem contar com local para acomodação das pessoas albergadas, assim como locais que ofereçam cursos, palestras e locais de orientação e fiscalização. Para constatações de uma pesquisa empírica em

entre os estados brasileiros que não possuem este tipo estabelecimento penitenciário[10]. Neste sentido, o Levantamento de Informações Penitenciárias do Departamento Penitenciário Nacional (BRASIL, 2017) alerta em sua metodologia de coleta de dados que:

> "(...) não são contempladas neste relatório as pessoas monitoradas exclusivamente pelo Poder Judiciário, uma vez que os dados são coletados com os órgãos penitenciários. Um exemplo é a parcela da população privada de liberdade em regime aberto que tem vínculo direto com as Varas de Execução Penal, sem o intermédio do órgão penitenciário" (INFOPEN 2017, p. 06).

Já no ano de 2018, o Conselho Nacional de Justiça (CNJ) apresentou o dado de que cerca de 6.339 pessoas cumpriam pena em regime aberto nas Casas de Albergado em todo o país. Observa-se que a própria organização de dados do poder judiciário realizada via CNJ se utiliza de metodologia similar ao INFOPEN, na medida que igualmente não contempla informações sobre as pessoas que estão em cumprimento de regime aberto fora destes estabelecimentos penais. De acordo com o documento:

> "(...) não estão incluídas as prisões domiciliares como substitutivas do regime aberto, com ou sem medidas cautelares, em razão da definição conceitual e metodológica adotada a respeito das pessoas privadas de liberdade" (CNJ, 2018, p.44).

Neste cenário de imprecisão das estatísticas oficiais e dos fatores que colaboram para a existência de mecanismos e de um regime de invisibilização do cumprimento de pena em regime aberto, acrescenta-se dois outros componentes: o julgamento do Recurso Extraordinário

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uma casa de albergado em período posterior próximo à aprovação da LEP, ver a pesquisa de Alzira Baptista Lewgoy (1990) sobre suas observações no albergue feminino de Porto Alegre na década de 80.

[10] Além de São Paulo, outros estados como Alagoas, Amapá, Distrito Federal, Espírito Santo, Mato Grosso, Pará, Pernambuco, Piauí, Paraná, Rio Grande do Norte, Santa Catarina, Sergipe e Tocantins também não possuem estabelecimentos penais específicos para cumprimento de regime aberto e limitação de finais de semana (INFOPEN, 2017, p. 19).

(RE) nº: 641.320/RS[11] pelo Supremo Tribunal Federal (STF) e o espaço e interpretações que as doutrinas jurídicas reservam para tratar desta modalidade de punição.

Esta decisão do STF determinou que a não existência de estabelecimento penal exigido por lei não pode ser mobilizada como justificativa única para impedir a progressão de regime das pessoas presas. Neste contexto, o STF apontou alguns caminhos a a serem utilizados pelos tribunais estaduais e federais como alternativas ao encarceramento em estabelecimentos inadequados como, por exemplo, o uso de tornozeleiras eletrônicas, a prisão domiciliar, o comparecimento periódico em juízo, dentre outras medidas que inclusive podem sercumulativas entre si.

Considerando as doutrinas jurídicas sobre execução penal, autores como Renato Marcão (2012; 2015), Guilherme de Sousa Nucci (2018), Alexis Couto de Brito (2018) e Rodrigo Duque Estrada Roig (2018) oferecem explicações específicas sobre o como a lei trata dos requisitos exigidos para a progressão ao regime aberto atrelado a estabelecimento penal próprio e indicam medidas que podem ser adotadas diante da inexistência desses espaços.

Alexis Couto de Brito (2018, *online*) define que o regime aberto "é fundado na autodisciplina e responsabilidade do condenado para com a comunidade com que convive", relembrando que há poucas instalações específicas para o cumprimento da pena aberta no país e apresenta o estado de São Paulo como um exemplo por não possuir nenhuma Casa de Albergado. Nesse sentido, Rodrigo Duque Estrada Roig (2018, *online*), entende a não existência de estabelecimento apropriado como uma "omissão esta que importa em transgressão do princípio da legalidade, da coisa julgada e consequente desvio de execução", explicando seu entendimento de que nessas situações a prisão domiciliar deverá ser a medida adotada quando as pessoas em regime aberto progredirem sob tais condições.

Já autores como Renato Marcão (2012; 2015) e Guilherme de Sousa Nucci (2018) descrevem que a adoção de medidas não encarceradoras em espaços prisionais propriamente ditos para pessoas em regime aberto

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[11] A íntegra da decisão do STF no RE 641.320/RS encontra-se disponível em: < http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=TP&docID=11436372>. Acesso em: 07 fev. 2020.

resultam em "impunidade e ao descrédito do direito penal" (NUCCI, 2018, p. 142) e "uma vergonha!" (MARCÃO, 2012, p. 72). Guilherme de Sousa Nucci, por exemplo, ao fazer referência ao baixo número de Casas de Albergado estruturadas no Brasil, observa que o estado de São Paulo é um exemplo no que se refere às altas taxas de pessoas sob regime aberto e que as Casas de Albergado, por sua vez, seriam uma "ilustre desconhecida da maioria das Comarcas" (NUCCI, 2018, p. 142) e entende que, por conta desse fator:

> "Nem é preciso salientar que não há a menor chance de fiscalização adequada, de modo que é impossível saber se o condenado recolhe-se, em sua casa particular, nos horários determinados pelo juiz, bem como o que faz durante o seu dia inteiro. Se não há interesse político nesse regime, é preciso extirpá-lo da lei, substituindo-o por outra medida, possivelmente o regime semiaberto, com dois estágios, mas não se pode conviver com a lei sem implementá-la." (NUCCI, 2018, p. 142).

Levando em consideração os mecanismos de invisibilização da pena em meio aberto apresentados nesta breve introdução, este texto foi organizado em mais quatro seções. A primeira delas descreve os trajetos e os métodos de pesquisa empírica mobilizados neste artigo; a segunda traça um panorama da organização judiciária da execução penal na cidade de São Paulo; a terceira se ocupa da descrição da observação participante e seus achados; e na última seção, serão apontadas breves considerações e reflexões finais acerca da integralidade do artigo.

1. Trajetos anteriores e métodos de pesquisa empírica mobilizados

O presente artigo é inspirado por um repertório anterior a um exercício de sistematização de uma pesquisa de campo que se refere ao período em que a pesquisadora trabalhou no Instituto Terra Trabalho e Cidadania – ITTC, prestando atendimento às mulheres *migrantes* que passaram pela prisão na cidade de São Paulo[12]. Assim, este repertório é o

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[12] Me refiro ao Projeto Migrantes Egressas (PME) do ITTC que iniciou suas atividades formalmente em março de 2017 e permanece em funcionamento sob

substrato da construção da narrativa e de grande parte dos argumentos aqui apresentados, de forma que são trazidos em retrospectiva e cujas fissuras são demarcadas, na medida do possível, com a pesquisa empreendida especificamente neste artigo.

Ao passar mais de dois anos atendendo diariamente na cidade de São Paulo mulheres com antecedentes penais, a pesquisadora observou que as decisões judiciais concessoras da progressão para o regime aberto costumavam estar acompanhadas de um texto padronizado contendo oito condições que as pessoas passariam a estar submetidas uma vez que saíssem do cárcere. Eram elas: comparecer ao fórum criminal da Barra Funda, ou ao Fórum da Comarca onde residisse, para comprovar seu endereço e o chamado "efetivo exercício de atividade lícita"; não mudar de residência sem autorização prévia do juízo responsável; recolher-se em repouso noturno (das 22h às 6h) todos os dias, incluindo sábados, domingos e feriados; "não frequentar locais de reputação duvidosa"; não ingerir bebidas alcoólicas; não sair da comarca que residisse sem autorização judicial; iniciar uma ocupação profissional lícita em até noventa dias.

Dentre estas condições observadas e que eram dispostas de formas similares em decisões de juízes e juízas diferentes, a exigência que mais preocupava as mulheres atendidas pela pesquisadora era a condição relativa ao comparecimento periódico ao fórum, o que também denominavam coloquialmente como *assinar no fórum*[13].

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o nome "Projeto Mulheres Migrantes". Faço menção e agradeço à Kim que foi minha principal companheira de trabalho, comprometimento e aprendizados nos dois anos e meio de PME. Utilizei a expressão "prestar atendimento" de forma genérica propositalmente, em vista de que a nossa rotina de atendimento era composta por atividades muito diversas entre si, uma delas por exemplo era consultar e informar sobre processos judiciais, mediar demandas junto a instituições como as defensorias públicas e unidades prisionais. Sobre este trabalho de atendimento, consultar o documento "*Caminhos da liberdade: orientações para o atendimento a mulheres migrantes em conflito com a lei*". Disponível em: <http://ittc.org.br/wp-content/uploads/2019/10/caminhos-da-liberdade-ittc.pdf>. Acesso em 11 junho 2020.

[13] A Lei de Execução Penal (LEP) em seu artigo 115 dispõe que o regime aberto pode ser concedido também utilizando-se das seguintes condições, sendo que o inciso IV corresponde à prática de *assinar no fórum*: "I - permanecer no local que for designado, durante o repouso e nos dias de folga; II - sair para o trabalho e retornar, nos horários fixados; III - não se ausentar da cidade

Algumas das funções exercidas pela pesquisadora no ITTC era orientar as mulheres que procuravam o instituto, a partir da leitura dos processos judiciais, sobre os locais e a periodicidade que deveriam comparecer em juízo. Além disso, se encarregava de acompanhar pessoalmente algumas pessoas até repartições judiciais ou em audiências admonitórias[14] na justiça federal para solucionar dúvidas e, ainda, auxiliar diversas vezes na resolução de problemas como atrasos na data de comparecimento em juízo ou ter a carteira de assinaturas perdida ou furtada[15].

Este artigo, inspirado pelas pesquisas que fazem uso do método da "observação participante", se propõe a investigar a pena aberta no estado de São Paulo a partir de um olhar para o fórum criminal da Barra Funda e especialmente, ao anexo judiciário do portão "F", o qual será descrito nos parágrafos seguintes, em conjunto com a pesquisa de normas judiciárias, provimentos, materiais no site do Tribunal de Justiça de São Paulo (TJSP) e de pesquisas relacionadas.

Os métodos, descrições e reflexões apresentadas neste texto apostam em novas formas de retratar as instituições do sistema de justiça e seus gargalos, ou seja, as desigualdades profundas existentes entre as leis, a prática das instituições e a vivência das pessoas submetidas às punições em meio aberto. Oscar Vilhena Vieira (2007), ao tratar da temática da desigualdade e das subversões do estado de direito aposta em mudanças nas estratégias de atuação:

> "Seria ingênuo atribuir aos sistemas jurídicos a capacidade de produzir sua própria eficácia, mas seria igualmente equivocado

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onde reside, sem autorização judicial; IV - comparecer a Juízo, para informar e justificar as suas atividades, quando for determinado".

[14] A audiência admonitória tem previsão no artigo 160 da LEP no que se refere à suspensão condicional da pena, mas é também utilizada como momento processual no qual o judiciário definirá, em detalhes, como se dará o cumprimento de pena em meio aberto.

[15] Neste contexto de atendimento, o que mais chamava atenção no tocante às mulheres acompanhadas e que *assinavam no fórum* é que esta fiscalização, a depender da situação, era entendida por algumas mulheres como um dos principais obstáculos que as impedia de voltar aos seus países e por outras, como o que viabilizava a permanência delas no Brasil (ITTC, 2019).

> desconsiderar as potencialidades dos novos atores de promover mudanças sociais através do emprego de estratégias legais. Mesmo um sistema jurídica frágil pode prover mecanismos que, se usados a tempo, aumentarão a imparcialidade e o igual reconhecimento de sujeitos de direitos" (VIEIRA, 2007, p. 48)

As ideias e proposições específicas para este artigo se iniciaram quando em uma manhã de 2020, a protagonista do estudo de caso empreendido no âmbito de dissertação de mestrado[16], que se encontra em cumprimento de pena em regime aberto, ligou para a pesquisadora informando que estava com receio de ir *assinar no fórum,* porque estava com alguns dias de atraso em relação à data que deveria ter comparecido. A pedido dela, a pesquisadora acompanhou-a no mesmo dia até o portão "F" do anexo judiciário da Barra Funda.

Ao chegar ao portão "F", a pesquisadora notou que ela já estava na parte de dentro da repartição aguardando para ter a sua carteira de comparecimento assinada. Foi perguntado ao segurança que estava do lado de dentro do portão se poderia entrar para encontrá-la, mas ele informou que acompanhantes não tinham permissão para entrar.

A pesquisadora permaneceu do lado de fora esperando ela sair enquanto conversaram por meio de mensagens de áudio. Ao mesmo tempo, esteve atenta às movimentações ao redor e impressionou-se com a quantidade de pessoas que chegavam ali, assim como com a dinâmica dos policiais militares e seguranças terceirizados(as) assumindo funções não condizentes com seus escopos de trabalho, como solucionar dúvidas processuais e encaminhar pessoas para outras repartições judiciárias.

Inspirada por estes acontecimentos, a autora foi algumas outras vezes ao fórum da Barra Funda, mais especificamente ao portão "F", porque não pôde ultrapassá-lo. Direcionada por um dos seguranças que trabalhavam lá, - uma figura extremamente solícita -, foi até a entrada principal do fórum da Barra Funda requerer uma autorização de entrada

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[16] Esta pesquisa de dissertação de mestrado recebe financiamento da Fundação de Amparo à Pesquisa do Estado de São Paulo (FAPESP) e é desenvolvido no âmbito do programa de Direito e Desenvolvimento da FGVSP, sob orientação de Maíra Rocha Machado.

no portão. Lá conversou com três pessoas de três departamentos diferentes e, por fim, recebeu a informação de que a autorização de entrada somente poderia ser fornecida a partir da apresentação de uma petição ao juiz corregedor.

Em razão dos empecilhos descritos e do tempo decorrido, a pesquisadora desistiu desistir da solicitação, e optou por restringir a observação às movimentações do anexo judiciário pelo lado de fora do portão "F" e a um departamento do fórum criminal da Barra Funda, o "DECRIM 3 – Liberados" – cujo acesso se dá pela entrada principal do fórum e trata-se de uma subdivisão do Departamento Técnico de Apoio ao Serviço das Execuções Criminais (DECRIM), específico do próprio fórum da Barra Funda, responsável pelo processamento das execuções criminais de pessoas em regime aberto, liberdade condicional e sursis.

Os percursos da "observação participante" empreendida para este artigo se relacionam com a elaboração de Bárbara Lupetti (2017, p. 91) sobre o método e sobre como a pesquisa se constrói "conforme se caminha no trajeto da pesquisa de campo". Neste sentido:

> "a relação interpessoal e a própria subjetividade do(a) pesquisador(a) são partes constitutivas desse método de trabalho, e que, por isso mesmo, quando vamos falar em observação participante, vamos falar em uma pesquisa que presume um envolvimento pessoal do(a) pesquisador(a) com as pessoas do campo".

Para isso, a trajetória da pesquisadora como alguém que já havia circulado nestas mesmas repartições judiciais como estagiária de direito, advogada ou assistente de projeto no ITTC em diferentes períodos precisou ser considerada. Assim, agregar a perspectiva de pesquisadora a esta trajetória exigiu um importante processo crítico de estranhar o que era familiar ali, assim como refletir cada momento da observação e lidar com situações de encontro com pessoas que faziam parte das vivências anteriores da pesquisadora, especialmente como assistente no ITTC.

Bárbara Lupetti (2017) ao refletir sobre o uso do método da "observação participante" nas pesquisas em direito, aponta a centralidade do movimento de "estranhar e desnaturalizar as nossas próprias práticas" (LUPETTI, 2017, p. 92) e resgata as constatações do sociólogo Gilberto

Velho (1978) acerca da importância da pessoa pesquisadora inserir em seu horizonte de pesquisa uma reflexão permanente sobre seu próprio lugar. Desta forma, estranhar o que lhe é próximo passa a ser uma verdadeira necessidade de quem pesquisa, assim como parte intrínseca ao processo de investigação e interpretação do campo.

Por todo o exposto, alguns dos percursos das observações realizadas para este artigo podem ser ilustradas por meio de situações como: observar as filas do portão "F" e as ações dos trabalhadores(as) do pátio interno; empreender conversas rápidas com familiares que aguardavam parentes saírem do atendimento; alguns reencontros com mulheres migrantes; breves diálogos com funcionários(as) do fórum; o acompanhamento de um homem para retirar a carteira da execução penal pela primeira vez; assim como outras situações.

2. A (DES) ORGANIZAÇÃO JUDICIÁRIA DA EXECUÇÃO DA PENA EM MEIO ABERTO NA CIDADE DE SÃO PAULO

Duas siglas similares, que podem também aparentar serem erros de digitação, são relevantes para compreender o funcionamento da execução criminal no estado de São Paulo, são elas: DECRIM e DEECRIM.

O DECRIM é o Departamento Técnico de Apoio ao Serviço das Execuções Criminais (DECRIM), criado pela Resolução 340/2007, é exclusivo ao fórum criminal da Barra Funda. Nele estão inseridas cinco Varas de Execução Criminal (VEC's). Este é o departamento responsável pela tramitação de processos de execução da pena físicos e também digitais.

Foi possível compreender a estrutura geral do DECRIM após uma conversa com uma funcionária que trabalhava há mais de trinta anos como servidora do judiciário paulista e há muitos anos no setor administrativo da execução criminal do fórum da Barra Funda. A funcionária apresentou à pesquisadora uma tabela com a estrutura do DECRIM de sua própria elaboração, e que usava em seu dia a dia de trabalho.

Há seis tipos de DECRIM específicos ao fórum criminal da Barra Funda. O DECRIM I é responsável pelo protocolo e autuação de guias de recolhimento (físicas e digitais); o DECRIM II – Presos é responsável pelos processos de execução de homens em regime fechado e semiaberto

de pessoas presas das seguintes unidades: Presidente Venceslau I e II, Penitenciária de Avaré, CRP Pres. Bernardes; o DECRIM III – Liberados (réus soltos); o DECRIM IV – Penas Alternativas; o DECRIM V – Gabinete subdivide-se em: apoio ao gabinete, SERVEC I (penitenciária Reginópolis I e II e penitenciária e CDP de Cerqueira Cesar), SERVEC II (mulheres presas da Capital e penitenciária de Casa Branca), SERVEC III (penitenciárias II e III e centro de progressão de Franco da Rocha); DECRIM VI – Medida de Segurança.

Por outro lado, o DEECRIM, Departamento Estadual de Execuções Criminais, foi criado em 2013 por meio da Lei Complementar Estadual nº 1.208/2013[17]. A lei, além de criar o departamento, também o distribuiu entre as unidades regionais nas 10 sedes administrativos do TJSP, chamadas de Regiões Administrativas Judiciárias (RAJ)[18]. Assim, com a vigência da lei, os processos de execução criminal passaram a ser processados eletronicamente e distribuídos entre as unidades regionais, enquanto os que já estavam em andamento permaneceram sob tramitação física nas varas que já haviam sido destinados.

A responsabilidade de cada subsetor do DEECRIM pelo processamento das execuções não está organizada em uma única resolução ou lista, pois ela é atualizada conforme novas unidades prisionais são inauguradas ou fechadas. Desde 2012, o CNJ já indicou essa situação como parte de um cenário problemático da execução criminal em São Paulo:

> "há, como se percebe pelos documentos anexos, uma série de resoluções acerca da distribuição e redistribuição da competência, que é alterada, constantemente, por Resolução do Conselho da magistratura, o que, inclusive, já foi objeto de pedido de providências por parte do Ministério Público estadual neste Conselho" (CNJ, 2012, p. 06).

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[17] O texto integral da lei encontra-se disponível em: < https://www.al.sp.gov.br/repositorio/legislacao/lei.complementar/2013/original-lei.complementar-1208-23.07.2013.html>. Acesso em: 25 ago. 2020.

[18] O mapa das regiões administrativas judiciárias (RAJ) encontra-se disponível em: < https://www.tjsp.jus.br/QuemSomos/QuemSomos/RegioesAdministrativasJudiciarias?d=1581685294469>. Acesso em: 14 fev. 2020.

A mesma funcionária da execução criminal na Barra Funda, explicou que em relação ao DEECRIM não há um documento que compile essas competências, de forma que cada unidade prisional tem como referência resoluções ou normativas distintas que estabelecem sua unidade regional correspondente. Dessa maneira, observa-se um fenômeno que parece superficialmente resultar em uma desorganização para as instituições que atuam e também prejuízos para pessoas que se encontram presas ou sob cumprimento de pena em meio aberto.

O "DECRIM III – Liberados", um dos subdepartamentos do DECRIM, é o setor responsável pelas pessoas que o TJSP denomina como "réus soltos" (em regime aberto, liberdade condicional e sursis). Situado no 2º andar do fórum criminal da Barra Funda, nele funcionam a terceira e a quarta vara de execuções criminais, responsáveis pela tramitação de processos físicos e eletrônicos.

No dia a dia, antes do início da decretação de medidas de contenção da COVID-19, o DECRIM III era caracterizado pelas filas de pessoas no período da tarde e por uma grande circulação de pessoas *liberadas* que eram obrigadas a comparecer, pois haviam saído há pouco tempo de unidades prisionais e deveriam retirar suas carteiras da execução penal pela primeira vez. Depois de retirada, o que pode acontecer no segundo ou até no terceiro comparecimento, essas pessoas passavam a *assinar no fórum* no anexo do portão "F" ou em outras unidades conveniadas pelo TJSP, conforme os endereços próprios que declaravam neste primeiro atendimento.

Na capa da carteira de comparecimento, há a insígnia do poder judiciário paulista e abaixo dela está escrito "caderneta referente a *benefícios*[19]" com duas linhas vazias (para preencher qual *direito* esta pessoa usufrui); a próxima página contém um espaço vazio para que

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[19] Embora não se tratem de benefícios, mas direitos de pessoas sob cumprimento de pena conforme previsões na legislação federal competente: "Parte dos direitos previstos na Lei de Execução Penal são diretamente relacionados à progressão da pena em sentido amplo, ou seja, às dinâmicas de transformação do cumprimento da pena com maior ou menor liberdade. São direitos subjetivos na execução penal, chamados vulgar e incorretamente de benefícios prisionais, a progressão de regime, o livramento condicional, a remição, a saída temporária, a comutação e o indulto." (CACICEDO, 2018, p. 417).

sejam preenchidos os dados pessoais e inserida uma foto 3x4; as folhas seguintes se destinam a anotações e carimbos das datas que a pessoa foi ao fórum e quando deverá retornar.

Em resumo, a caderneta é uma mera carteira de papel sujeita a todos os percalços da vida como molhar, rasgar, ou perder. Ao mesmo tempo, também é o documento comprobatório que as pessoas carregam consigo comunicando que elas seguem sendo punidas.

O cenário do cartório do DECRIM III era de pilhas de processos impressos em estantes, nas mesas e também no chão, com vários volumes amarrados. A maioria dos processos estavam identificados com folhas de sulfite coladas com códigos, em caixa alta, utilizados pelos(as) funcionários(as) do DECRIM III para se atentarem a informações importantes, como a data do término do cumprimento de pena (TCP) relativa a um processo de execução.

Conversando com dois escreventes do DECRIM III em dias distintos, a pesquisadora foi informada que lá tramitavam cerca de 60 mil processos de execução criminal físicos, 11 mil processos de execução eletrônicos e que no cartório trabalhavam treze escreventes, sendo que as demais pessoas funcionárias eram estagiárias ou contratadas como terceirizadas.

Em 2012, o CNJ realizou diagnóstico sobre o funcionamento da execução criminal em São Paulo, levando em consideração tanto a inspeção nos estabelecimentos prisionais quanto o funcionamento dos cartórios e a tramitação de processos da execução penal. Os aspectos apontados no diagnóstico do CNJ em 2012, embora tenha focalizado apenas as pessoas em cumprimento de pena em estabelecimentos penais propriamente ditos, permaneceram latentes ainda em 2020, quando se verificava a execução criminal por meio da observação empírica realizada no DECRIM III. Um exemplo é que, entre 2012 e 2020, uma das principais mudanças que afetou a organização judiciária foi a migração para a tramitação eletrônica de processos, mas não por completo, quando se observa que mais de 60 mil processos físicos permanecem em tramitação no DECRIM III.

O defensor público do estado de São Paulo e autor Patrick Lemos Cacicedo (2018), ao tratar do funcionamento das varas de execução penal do Brasil, as define nos seguintes termos:

> "O cotidiano nas varas de execução penal no Brasil demonstra que o funcionamento da maior parte destas é verdadeiramente caótico, como apontou relatório do Conselho Nacional de Justiça. Para além de um funcionamento burocrático e irregular, trata-se de verdadeira violação de direitos com efeitos concretos sobre a liberdade das pessoas sob jurisdição, uma vez que os pedidos de efetivação de direitos demoram meses ou anos para serem analisados, em frontal violação tanto ao art. 196 da Lei de Execução Penal, quanto à determinação constitucional de duração razoável do processo." (CACICEDO, 2018, p. 417).

Além dos aspectos apontados por Cacicedo, não há uma quantidade adequada de funcionários(as) para lidar com a alta demanda de trabalho (CNJ, 2012, p. 06). Ademais, conforme afirmou uma escrevente que tirou algumas das dúvidas da autora sobre o funcionamento do departamento, "para dar andamento [nos processos], seria necessário que todas as pessoas viessem aqui com certa frequência por conta do volume de trabalho", se dirigindo a um senhor que estava lá e que relatou que como não era acompanhado por uma pessoa advogada, ele ia pessoalmente a cada quinze dias até o cartório para se certificar se a extinção da punibilidade havia sido declarada ou não em seu processo.

No período da tarde, fazendo uso dos poucos computadores disponíveis para o atendimento no balcão, servidores(as) e estagiários(as) organizavam-se em escala e realizavam os atendimentos das pessoas que esperavam em duas portas distintas: uma porta correspondia à fila das pessoas que cumprem pena em meio aberto e a outra porta destinada para advogados(as) e estagiários(as) de direito.

No corredor do cartório, havia várias folhas de sulfite coladas com os dizeres: "favor não colocar os pés na parede, grato(a)", mensagem direcionada às pessoas que passavam parte de suas tardes na fila aguardando para retirar a carteira do comparecimento periódico. A pesquisadora foi informada por outra funcionária do cartório que aproximadamente 400 pessoas por semana, entre homens e mulheres, se dirigiam ao DECRIM III para retirar pela primeira vez a carteira da execução criminal. Além dessas 400 pessoas, outras compareciam por conta de terem perdido a carteira - ou qualquer outro problema similar - e terem obtido autorização judicial para retirarem uma nova.

Por exemplo, um homem que foi acompanhado pela autora no DECRIM III para retirar a carteira pela primeira vez, disse que o tratamento que eles recebem como *liberados* no fórum é justamente para relembrar que já estiveram presos. Ele disse que estava receoso em entregar o termo de comparecimento que assinou no final do ano anterior, porque estava rasgado e amassado, de forma que não sabia se os(as) funcionários(as) aceitariam, embora processualmente sua situação estivesse completamente regularizada para dar início ao cumprimento do regime aberto.

Ele relatou também que das outras vezes que respondeu a processo criminal e precisou assinar a cada três meses, frequentemente ia até o fórum na data que deveria e chegando lá, via o tamanho das filas e acabava desistindo. Muitas vezes, segundo ele, esperar na fila era perder um dia de trabalho, assim como não era fácil ser relembrado o fato de que era um "ex preso".

Neste cenário do DECRIM III, acrescenta-se também o componente da circulação de pessoas que já cumpriram pena ou familiares que buscam esse cartório pedindo para consultar processos físicos mais antigos e também para fazer a solicitação de certidões de execução criminal. Um exemplo desse tipo de atendimento é que algumas pessoas tirando dúvidas no cartório do DECRIM III, inclusive mulheres migrantes que a pesquisadora já as conhecia, estavam questionando os(as) funcionários(as) do balcão sobre o motivo de permanecerem assinando, já que a data do término de cumprimento de pena já havia sido atingida.

A resposta obtida neste dia dos(as) funcionários(as) no cartório era que o carimbo na carteira era fornecido "no automático" no portão "F", espaço que será melhor descrito no tópico seguinte. Na prática, isso significa dizer que os(as) funcionários(as) do portão "F", devido à grande circulação de pessoas, não realizavam uma efetiva busca da situação processual das pessoas que iam assinar. Além disso, na mesma ocasião a pesquisadora ouviu a orientação de que, contraditoriamente, o término do cumprimento de pena não necessariamente corresponde à data que a pessoa termina de cumprir pena, mas depende de uma sentença judicial de extinção da punibilidade e enquanto isso, era recomendado que seguissem assinando e buscassem o atendimento da Defensoria Pública ou de uma pessoa advogada.

3. A circulação entreaberta do portão "F" e apontamentos a partir das observações participantes

Captura de tela da Rua José Gomes Falcão, número 227, a partir da ferramenta *Google Earth* da fila do portão "F" (imagem de julho de 2019)

O portão "F" do fórum criminal da Barra Funda é uma estrutura anexa ao Complexo Judiciário Mário Guimarães[20], cujo funcionamento abriga alguns serviços específicos da justiça criminal no estado. No portão "F", permanece entreaberto durante o horário comercial, há três placas com informações distintas ao público: a placa ao centro possui os dizeres "Fiscalização de liberados/Decrim (P.A.D e Sursis)/ Deecrim 1ª RAJ"[21]; enquanto a placa localizada à direita indica que ali também fica localizada uma das unidades das Centrais de Penas e

[20] A estrutura anexa do portão "F" está localizada na Rua José Gomes Falcão, 156 no bairro da Barra Funda em São Paulo. Uma pesquisa pelo local por meio da ferramenta Google Earth permitiu a visualização da entrada e de uma aglomeração de pessoas em frente, que revelam o intenso fluxo principalmente daqueles e daquelas que iam até lá para *assinar no fórum*, solucionar dúvidas ou buscar informações sobre parentes ou pessoas próximas presas ou com pendências com a justiça criminal.

[21] As pessoas que estão em liberdade condicional na cidade de São Paulo costumam ser encaminhadas para o comparecimento periódico diretamente no Conselho Penitenciário que fica no prédio da Secretaria de Administração Penitenciária no centro da cidade.

Medidas Alternativas (CPMA) de São Paulo[22]. A terceira placa refere-se ao atendimento da Defensoria Pública do Estado de São Paulo no local, que distribui senhas das 10h às 12h e atende tanto a execução criminal (VEC) quanto às demandas relacionadas ao que a Defensoria intitula como atendimento inicial criminal (AIC) e às audiências de custódia e inquéritos policiais (DIPO)[23].

Em frente ao anexo do fórum da Barra Funda, durante os dias da semana, até março de 2020, destacava-se uma fila de pessoas à esquerda do portão (pessoas que aguardavam para "assinar") e outra fila à direita (pessoas que aguardavam para retirada de senhas para atendimento da Defensoria Pública). Entre as duas filas estava situado o portão que permanecia entreaberto e apoiado em um tijolo grande de pedra. "Olha como eles deixam o portão, se a pessoa for gorda ou usar cadeira de rodas não consegue passar e vai ser mais humilhada" (sic), descreveu uma mulher que aguardava o genro sair do atendimento na Defensoria Pública, com quem a pesquisadora permaneceu um tempo conversando.

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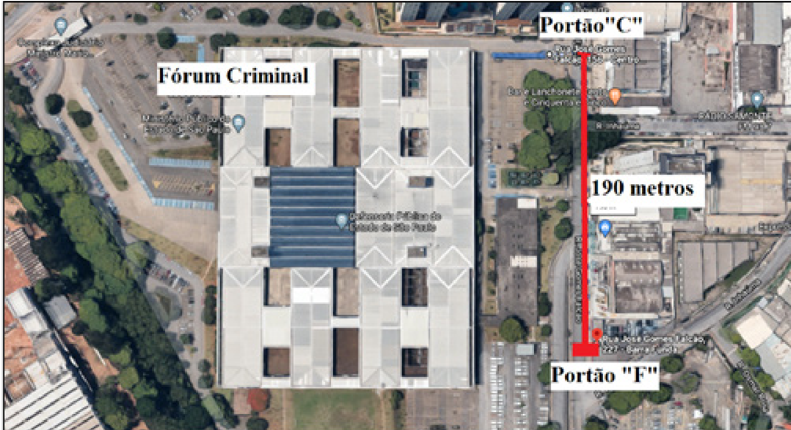
[22] A Central de Penas e Medidas Alternativas (CPMA) Barra Funda tem fluxo livre para entrada via portão "F" do anexo judiciário. Foi inaugurada em 01 de setembro de 1997, com a seguinte competência, conforme a SAP: "As Centrais de Penas e Medidas Alternativas (CPMA) são responsáveis pelo acompanhamento e execução do Programa de Prestação de Serviço à Comunidade (PSC), que encaminha apenados para diferentes instituições, onde cumprem a pena de acordo com a profissão, graduação, conhecimentos ou habilidade que já possuíam anteriormente". Disponível em: <http://www.sap.sp.gov.br/crsc/penas-alternativas.html>. Acesso em: 08 fev. 2020.

[23] O funcionamento desses três braços da DPESP no portão "F", VEC, AIC e DIPO, tiveram início em 01 de agosto de 2018. Um *banner* na entrada principal do fórum da Barra Funda direcionava as pessoas para o portão "F", informando sobre a distribuição diária de senhas das 10h ao 12h (com exceção do DIPO que é até às 18h). No caso da VEC, o atendimento se iniciava às 10h no caso de processos do interior de São Paulo e às 13h para os casos da capital.



Captura de tela em 3D via *Google Earth* do trajeto da fila do portão “C” ao portão “F” na Rua José Gomes Falcão. A imagem foi editada pela autora.

Onze da manhã de um dia bastante chuvoso e a fila de pessoas aguardando para assinar já alcançava o portão “C” do fórum quando os homens e mulheres começaram a ser chamados pelo segurança terceirizado[24], encarregado de controlar o fluxo de entrada, de dez em dez pessoas: “senhores, carteirinha na mão, por gentileza, tirem os bonés e acompanhante não entra” (sic). Quando alguma pessoa acompanhante perguntava se podia entrar, ele reforçava com frases como “só pode acompanhante, se mostrar o documento que comprove a necessidade de acompanhante” e acrescentava, “não precisa ter medo, é só assinar a carteirinha” (sic). Às onze e cinquenta e cinco, a pesquisadora contabilizou um total de 135 pessoas que entraram para assinar – quase todos homens, embora houvesse observado também cerca de 20 mulheres, entre elas algumas mulheres trans e travestis.

Conforme a fila andava, as dez pessoas passavam do portão principal e aguardavam em um pequeno pátio intermediário em uma nova fila: a da revista pessoal e de seus pertences, cujo controle e comando era exercido por dois policiais militares. Nesse meio tempo, do lado de

[24] As empresas de segurança responsáveis pelos funcionários terceirizados que atuavam no fórum criminal neste período eram a “Yolo Security” e “Seal Segurança Privada”.

fora, as pessoas que estavam prestes a entrar se preparavam retirando seus bonés[25] ou colocando calça comprida, já que bonés e bermudas não eram "permitidos" dentro do fórum. Já as pessoas acompanhantes se afastavam para aguardar do lado oposto da rua, local que não contava com cobertura para dias chuvosos como aquele ou lugares para sentar.

Outras pessoas ficavam na fila apenas guardando lugar para outras, como foi o caso de dois jovens entregadores de aplicativo que chegaram com suas mochilas de entrega, retiraram as carteiras da execução do bolso e trocaram de lugar na fila com outras pessoas, sob o propósito de passarem o menor tempo possível ali e voltarem ao trabalho.

O controle de entrada das pessoas que chegam à entrada do portão "F" do fórum da Barra Funda é realizado pela polícia militar e pelas empresas contratadas para fazer a gestão e proteção dos espaços do fórum. A Portaria 9.344/2016 do TJSP é a normativa que estabelece o plano de segurança do tribunal e também os protocolos de acesso para seus edifícios, como o fórum criminal da Barra Funda. Há na portaria, disposições como *"[o] acesso aos prédios deverá ser limitado, preferencialmente, a uma única entrada e saída"* (artigo 3º) ou *"[r]espeitando-se as estruturas de cada edificação, a segurança deve ser organizada de maneira que todos os que adentrarem as unidades controladas sejam submetidos ao crivo da segurança"* (artigo 2º). Todas as pessoas que entram no fórum se submetem ao detector de metais e também à revista de seus pertences, principalmente àquelas que são consideradas como "público em geral"[26].

[25] A não permissão do uso do boné dentro de repartições judiciais, a partir da observação no portão "F", me pareceu ter duas conotações distintas: por um lado, a justificativa da não permissão está atrelada a segurança do local, principalmente porque há monitoramento por câmeras (desde 2019, o TJSP ampliou o sistema de monitoramento eletrônico dos fóruns por meio do Sistema Integrando de Monitoramento, disponível em: <https://www.tjsp.jus.br/Noticias/Noticia?codigoNoticia=56743>) e por outro, há também a conotação de que o não uso do boné relaciona-se ao respeito ao espaço, outra regra atrelada a esta é à proibição que pessoas vestidas com bermudas ou sem camisa adentrem o prédio. Um outro fato é que alguns dos seguranças da empresa terceirizada de segurança usavam boné dentro do fórum, já que o boné era parte do uniforme.

[26] A referência ao público em geral é necessária, já que o fluxo de entrada no fórum criminal da Barra Funda e também nos demais fóruns é diferenciado para quem exerce a advocacia ou é estagiário de direito certificado pela OAB,

Em frente ao portão, não havia um balcão de atendimento para que as pessoas pudessem de imediato compreender o que deveriam fazer ali ou solucionar dúvidas básicas como o horário de atendimento, quantas senhas da Defensoria Pública eram distribuídas diariamente, se estavam sofrendo algum risco de regressão à prisão por terem atrasado dias da data que deveriam ter comparecido ao fórum ou qualquer outro tipo de dúvida. O balcão ficava na parte de dentro do portão, no pequeno pátio localizado antes do detector de metais, de forma que o fato dele permanecer entreaberto e controlado por seguranças privados(as) e policiais militares gerava uma falsa impressão de que as pessoas não poderiam entrar para solucionar suas dúvidas.

No primeiro dia em que a pesquisadora esteve lá, sequer havia um(a) funcionário(a) responsável por esse balcão no pequeno pátio da entrada. Isso exigia que seguranças da empresa privada e a Polícia Militar assumissem o papel de fazer uma pré triagem das pessoas, solucionando dúvidas rápidas. O policial militar de plantão, em uma das ocasiões presenciadas, exercia esse papel de forma intimidadora com frases como "cidadão, vai entrar pela saída?" (sic). Em outros momentos, na mesma manhã, ele reagiu de forma atenciosa às dúvidas e aos documentos processuais que outras pessoas mostraram para ele.

Um episódio simbólico que a pesquisadora presenciou no decorrer da observação foi quando um segurança da empresa terceirizada, o mais solícito às demandas que lhe eram apresentadas (inclusive a da pesquisadora sobre a possibilidade de entrar no espaço), saiu de dentro do edifício em direção ao detector de metais com uma feição visivelmente irritada.

Não foi possível aferir a origem de sua irritação, mas foi possível ouvi-lo dizer aos demais seguranças privados e policiais militares que estavam lá: "vocês sabem qual é nosso trabalho aqui? Parar ali na frente e

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embora estejam submetidos à revista, a observação na Barra Funda (tanto na entrada central do edifício quanto no portão "F") permitiu notar que há um controle mais rigoroso, que na prática significa tirar todos os pertences da bolsa, ir e voltar do detector, caso este apite, etc. para o chamado "público em geral". Cabe dizer que funcionários(as) do Tribunal de Justiça, assim como pessoas magistradas não são obrigadas a passarem por este tipo de revista e no fórum criminal da Barra Funda, também podem fazer uso de uma entrada que fica na parte dos fundos do edifício.

ficar ali, só isso. A gente não tem que ver processo, prestar informações e quando a gente fala que não é nossa função, ainda estamos errados" (sic). Os policiais militares e demais seguranças o aplaudiram discretamente. Passados alguns minutos dessa cena, uma pessoa, provavelmente em cumprimento de pena, foi na direção deste segurança com um papel e fez uma pergunta. Ele novamente pareceu esquecer a irritação de minutos atrás, pegou o papel, olhou e orientou a pessoa de forma bastante solícita.

Ainda no primeiro dia, enquanto observava pelo lado de fora e conversava com Eliane[27] pelo celular, a pesquisadora percebeu que, conforme as cadeiras eram ocupadas, uma funcionária passou uma espécie de caixa e recolheu as carteiras de assinaturas de todas as pessoas que estavam sentadas. Cerca de quinze ou vinte minutos depois, Eliane contou que chamaram seu nome, ela pegou a carteira de volta, já carimbada, e caminhou em direção ao portão que dava para a rua– enquanto isso, atrás dela saíram outras pessoas que, no mesmo ritmo, ouviam seus nomes serem chamados pelo(a) funcionário(a), pegavam suas carteiras e iam para a rua, enquanto outras seguiam aguardando na fila do lado de fora.

Outro ponto observado foi que a fiscalização de tantas pessoas ao mesmo tempo fazia com que aquele momento se resumisse apenas em "receber o carimbo na carteirinha", o que colaborava para o entendimento da ausência de um atendimento básico neste espaço, já que qualquer dúvida era encaminhada para a Defensoria Pública ou outro órgão responsável. Além disso, demonstra uma atuação bastante ausente do próprio judiciário, o qual poderia instrumentalizar este momento para auferir questões como possíveis mandados, término do cumprimento de pena, erros na elaboração dos cálculos da execução da pena, etc.

Considerações e reflexões finais

O Brasil enfrenta uma série de problemas metodológicos e políticos no que se refere à produção de dados oficiais que retratem as características e as altas taxas de encarceramento no país. Este artigo, ao

[27] Nome fictício da protagonista do estudo de caso que investigo na pesquisa de dissertação de mestrado.

propor empreender uma investigação sobre as punições em meio aberto, identificou que estas problemáticas também podem ser transpostas ao contexto estudado, sendo possível afirmar que o cumprimento de pena em meio aberto caracteriza-se nos contornos de mecanismos e um verdadeiro regime de invisibilização, o qual foi descrito no decorrer deste artigo em pelo menos três camadas: a de produção de dados e relatórios oficiais, das doutrinas jurídicas e por fim, da observação *in loco* de espaços do fórum criminal da Barra Funda, um dos maiores fóruns criminais da América Latina e localizado no estado brasileiro com o maior contingente carcerário.

A invisibilização foi observada, em primeiro lugar, diante da dificuldade de mapear a quantidade e as condições das pessoas que cumprem pena em meio aberto no Brasil, especialmente sob regime aberto, quando elas não se encontram vinculadas a um estabelecimento penal propriamente dito, e portanto, foi identificado que elas não são retratadas em relatórios oficiais periódicos como do próprio DEPEN e do CNJ.

Em segundo lugar, a partir de uma pequena amostra de doutrinas jurídicas, foi possível também identificar que as doutrinas se limitam a descrever as prescrições legais, sem se aproximar necessariamente das dimensões reais que estas punições acarretam nas vidas das pessoas e no sistema de justiça criminal.

Por fim, esta terceira camada da invisibilização, acessada por meio das incursões em campo, forneceu uma série de pistas de que a esta forma de punir são despendidos menores recursos no âmbito da organização institucional do sistema de justiça criminal, o que gera por sua vez, muitas filas, excesso de trabalho para funcionários(as) do fórum e dentre outras situações descritas no decorrer do artigo.

Em razão dos desdobramentos da pandemia da COVID-19 e do consequente completo fechamento e posterior retomada gradual do fórum criminal da Barra Funda, é possível apontar uma nova camada de invisibilização a ser aprofundada por pesquisas futuras. Durante quase todo o ano de 2020, pessoas que já estavam em cumprimento de pena em meio aberto e outras que saíram das prisões no decorrer do ano, foram desobrigadas a se deslocar ao fórum para retirar suas carteiras de assinatura ou para terem seus cumprimentos de pena fiscalizados.

Neste sentido, esta nova camada deste regime de invisibilização das penas em meio aberto ocasionada pela pandemia pode viabilizar um

novo olhar para entender os efeitos que a interrupção no comparecimento trouxe para as pessoas apenadas, seus núcleos familiares e para o próprio funcionamento do judiciário, período este que exigirá um balanço crítico acerca dessas práticas e como elas podem precisar serem reformuladas para um período pós-pandemia.

É importante dizer que as escolhas dos métodos de pesquisa adotados e algumas pistas sobre estes mecanismos de invisibilização foram inspiradas por um repertório prévio de experiências da presente pesquisadora, conforme relatado no decorrer do texto. Neste sentido, fazer uso do método da observação participante no fórum criminal da Barra Funda (local que já tinha ido inúmeras vezes como estagiária ou advogada) exigiu um exercício de "reflexividade crítica", conforme conceituado por Bárbara Lupetti (2017, p. 86). Por um lado, foram estas vivências que contribuíram para a curiosidade de investigar a temática, e por outro, em se tratando de espaços e até mesmo de pessoas conhecidas, a atuação enquanto pesquisadora exigiu impor estranhamentos e distâncias ao campo. Somente este exercício viabilizou lançar novos olhares e perspectivas à circulação e trâmites em espaços do fórum criminal da Barra Funda.

No que se refere aos achados da pesquisa, observa-se que a problemática central deste artigo foi descrever algumas minúcias deste complexo regime de invisibilização das penas em meio aberto, o qual deve ser lido à luz dos significados que as instituições do sistema de justiça atribuem à noção de privação de liberdade. Esta, por sua vez, acaba restrita, principalmente, ao período de prisão em estabelecimentos penais, enquanto acessar o fazer cotidiano das instituições de justiça, como descrito, pode proporcionar novos contornos do que significa ou não a privação de liberdade.

Esta noção, desta maneira deixa de observar que a prisão como instituição social não opera sozinha como sistema de controle, ela se conecta a outras instituições e mecanismos sociais de forma que a pena em meio aberto produz sofrimentos e gera repercussões na vida das pessoas punidas, nas pessoas que trabalham mobilizando as malhas do sistema de justiça e no próprio funcionamento das instituições que compõem a justiça criminal, configurando-se como outra forma de privação de liberdade, a de "liberados", porém não livres.

Cenas como as filas intermitentes dentro e fora do fórum da Barra Funda durantes os dias da semana, as pilhas de processos físicos e virtuais que aguardavam movimentações de um número limitado de servidores(as) públicos(as) atuantes nestes setores, a extensão do tempo da punição vivida pelas pessoas para além da data do término de cumprimento de pena, as complexas atuações dos seguranças terceirizados(as) e policiais militares no controle de entrada e saída dos espaços fórum, corroboram para vislumbrar as dimensões cotidianas e do sofrimento que estas punições impõem às pessoas e ao próprio sistema de justiça criminal.

O elemento temporal da punição em meio aberto, já trabalhado em outros estudos como de Carmen Fullin (2018), ao tratar do cumprimento da pena de prestação de serviços à comunidade para mulheres, e Ricardo Campelo (2019), que investigou o monitoramento eletrônico de pessoas presas no Brasil, é central para a descrição do sofrimento que estas formas de punição produzem.

No caso do regime aberto, observou-se que muitas vezes, pessoas passam anos comparecendo periodicamente ao fórum para terem suas cadernetas carimbadas, mas muitas vezes sequer tendo uma garantia de que terminarão de cumprir suas penas na data registrada no processo de execução penal. As próprias pessoas que cumprem pena e seus círculos afetivos acabam por organizar suas rotinas de assinatura nas datas registradas na caderneta, independentemente de eventuais compromissos como de trabalho e de saúde, assim como aguardavam longos períodos em filas debaixo de chuva ou sol, sem um lugar adequado para necessidades básicas como sentar, tomar água, usar banheiros, enquanto, ao mesmo tempo, são intensamente relembradas das discriminações às quais estão sujeitas uma vez que carregam antecedentes penais em suas trajetórias quando se deparam com o tratamento degradante que alguns policiais, seguranças e funcionários(as) lhes destinam.

Embora este artigo não tenha se proposto a discutir amplamente o regime aberto ou até mesmo a execução da pena em meio aberto em si mesma, a pesquisa empírica em direito permitiu sobretudo ampliar o olhar para os regimes de invisibilização do cumprimento de pena em meio aberto. Assim, a pesquisa empírica se mostrou como uma ferramenta possível a ser utilizada e explorada em investigações neste campo. De forma semelhante, permitiu concluir que, diante de todos os elementos

apresentados, a gestão da execução penal para pessoas privadas de liberdade fora de unidades prisionais é mobilizada pelo sistema de justiça criminal de forma a condicionar pessoas que cumpriram suas penas à um ciclo no qual são vistas e tratadas como "liberadas", porém sem um horizonte de um alcance efetivo de suas liberdades, mesmo diante da data fim das condenações que foram submetidas.

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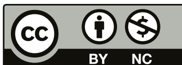

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