Fundamental rights and unlawfully obtained evidence.

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Fundamental rights are rights of defense against state powers or criminal prosecutions. GILMAR FERREIRA MENDES *sustain*) that "as a defense rights, fundamental rights ensure the sphere of individual freedom against unlawful interference by the Public Power, whether they come from the Executive, the Legislative or even the Judiciary". PAULO DE SOUZA MENDES precisely defines the contours and importance of the subject:

> *"The old aphorism that criminal procedure is an applied constitutional right has every reason to be in the field of obtaining evidence. Or it is not true that the Constitution raised the category of fundamental rights to the reconciliation of evidence with the dignity of the human person. The multiple constitutional guarantees of criminal proceedings include the prohibitions of proof implied in the nullity of 'all the evidence obtained through torture, coercion, offense against the person's physical or moral integrity, abusive interference in private life, at home, in correspondence or in telecommunications' (art. 32, nº 4, CRP) ".*[2].

Among the fundamental rights and guarantees described in art. 5º of the Constitution of the Brazilian Republic of 1988 is the right to the inadmissibility of evidence obtained by illegal means (LVI - evidence obtained by illegal means is inadmissible in the process), just one of the multiple faces of the modern conception of the principle of due process, also assured there. The elevation of the guarantee to the status of constitutional rule is of vital importance, since some authorized voices, until recently, maintained the admissibility of the proof exactly in the face of the absence of

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[2] As proibições da prova no processo penal. Intervenção em Jornadas de Direito Processual Penal e Direitos Fundamentais. Coord. PALMA, Maria Fernanda. Coimbra: Almedina, 2004, p. 137: *"A velha máxima de que o processo penal é direito constitucional aplicado tem toda a razão de ser no campo da obtenção de meios de prova. Ou então não é verdade que a Constituição elevou à categoria de direitos fundamentais a conciliação das provas com a dignidade da pessoa humana. Nas múltiplas garantias constitucionais do processo criminal cabem as proibições de prova subentendidas na cominação da nulidade de 'todas as provas obtidas mediante tortura, coacção, ofensa da integridade física ou moral da pessoa, abusiva intromissão na vida privada, no domicílio, na correspondência ou nas telecomunicações' (art. 32, nº 4, CRP)"*

constitutional prohibition (by all, Franco Cordero, whose famous study on the then recent German construction, asked: Divieti probatori nella Constituzione?).

It is necessary to immediately demarcate the concept of admissibility, a vital category for the problem of illicit evidence, which requires a previous judgment regarding the possibility of using a means of proof and the admissibility of material collected in criminal procedures. ANTONIO MAGALHÃES GOMES FILHO argues that the "admissibility of the evidence ... consists of a prior valuation by the legislator, aimed at preventing elements from spurious sources, or evidence of reputable reputation, from entering the process and being considered by the judge in the reconstruction of the facts..."[3].

It is important to note that the doctrine has always taken into account the different legal consequences of introducing inadmissible evidence into the process, as MARIA THEREZA ASSIS MOURA tells us, regarding the distinction between illegal, illicit and illegitimate evidence:

> *"Nuvolone concludes that the evidence is illegal whenever it characterizes violation of legal norms or general principles of the order, of a procedural or material nature. Illegal evidence is genus, of which illegitimate and illicit evidence are species.*
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> *In addition to this distinction, according to the nature of the violated rule, there is another one as to the moment of transgression: while in illegitimate evidence, illegality occurs at the time of its production in the process, illicit evidence presupposes a violation at the time of obtaining the evidence, previous concurrently with the process, but always externally to this"*[4].

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[3] Direito à prova no processo penal. São Paulo: Editora Revista dos Tribunais, 1997, p. 95.: "*admissibilidade da prova...consiste numa valoração prévia pelo legislador, destinada a evitar que elementos provenientes de fontes espúrias, ou meios de prova reputados inidôneos, tenham ingresso no processo e sejam considerados pelo juiz na reconstrução dos fatos...*"

[4] A ilicitude na obtenção da prova e sua aferição. Disponível em http://www.ambito-juridico.com.br/site/index.php?n_link=revista_artigos_leitura&artigo_id=5070.:

"A distinção é relevante, na seguinte medida: a violação do impedimento configura, em ambos os casos, uma ilegalidade; mas enquanto no primeiro caso haverá um ato ilegítimo, no segundo caso haverá um ato ilícito. Partindo dessas premissas, conclui Nuvolone que a prova é ilegal sempre que caracterizar violação de normas legais ou de princípios gerais do ordenamento, de natureza processual ou material. A prova ilegal é o gênero, de que são espécies as provas ilegítimas e ilícitas. A par dessa distinção, segundo a natureza da norma violada, outra há quanto ao momento da transgressão: enquanto na prova ilegítima a ilegalidade ocorre no momento de sua produção no processo, a prova ilícita pressupõe uma violação no momento da colheita da prova, anterior ou concomitantemente ao processo, mas sempre externamente a este".

Evidently, to reach this point, the doctrine had to evolve a lot in the last two centuries, and especially in the last decades. The academic treatment of the subject was, to say the least, superficial, and the limitations of the evidence were restricted to torture, the use of violence, or the ability to testify. The well-known work of JEREMÍAS BENTHAM already dealt with the subject in 1823. Even about a hundred years later, the traditional study of MALATESTA brought little innovation to the subject.

The limitations in evidence admissibility have their genesis, it is always worth emphasizing, from the consecration of the due process, whose most remote and important reference can be extracted from the well-known article 39 of the Magna Carta of King John I, from the year 1215: "No free man shall be seized or imprisoned, or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any way, nor will we proceed with force against him, or send others to do so, except by the lawful judgment of his equals or by the law of the land.". Later, in 1354, Eduardo III reissued the Charter, now with the express use of "due legal process". Article 7 of the 1789 Declaration of the Rights of Man and the Citizen provided:

> *"7. No person shall be accused, arrested, or imprisoned except in the cases and according to the forms prescribed by law. Any one soliciting, transmitting, executing, or causing to be executed, any arbitrary order, shall be punished. But any citizen summoned or arrested in virtue of the law shall submit without delay, as resistance constitutes an offense."*

The United States officially met the expression with the 5th Amendment of the Bill of Rigths, in 1791:

> *"Amendment V*
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> *No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation"*

In fact, it is important to emphasize that the inquisitorial system itself knew limitations to the law of evidence, as PERFECTO IBÁÑEZ explains:

"However, the truth is that the inquisitorial process also knew rules, among others, that just a single evidence is not authorized for the application of torture.".[5]

The mention of the legal evolution of due process is not unnecessary, since the consolidation and normative effectiveness of the principle was more complex than its formal adoption in documents and treaties. As an example, the Italian constitutional reform, which coined the expression “fair process”, concluded by the need to expand the content and coverage area of the guarantee, which completes no less than approximately 800 years.

The enlargement of the content of the due process of law begins practically parallel to the expansion and consecration of fundamental rights, especially after the Second World War. This is MIGUEL CARBONELL's connection:

> *“*
> *"The catalogs of rights that emerged at the end of the 18th century (the Declaration of the Rights of Man and the Citizen of 1789 and the Bill of Rigths of the United States Constitution of 1787 are the two landmark documents at that stage), they are expanding in successive decades. The last station in this fantastic story is that constitutional texts are issued with broad substantive mandates for the State, many of them written in the form of fundamental rights. This is a trend that worsens from the 70s of the 20th century and that gives rise to Constitutions that are not limited to establishing powers or separating public powers, but rather contain high levels of 'material' or substantive norms that condition the actions of the State...”*[6].*

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[5] Prueba y convición judicial en el proceso penal. Buenos Aires: Hammurabi, 2009, p. 183. (*“Con todo, lo cierto es que el proceso inquisitivo también conoció reglas, entre otras, la de que cualquier indicio no habilitada para la aplicación de la tortura”).*

[6] Presentación. In El principio de proporcionalidad en el Derecho contemporâneo. Coord. CARBONELL, Miguel e CASTRO, Pedro P. Grádez. Lima: Palestra Editores, 2010, p. 9. (*“Los catálogos de derechos que surgen a finales del siglo XVIII (la Declaración de los Derechos del Hombre y del Ciudadano de 1789 y el Bill of Rigths de la Constitución estadunidense de 1787 son los dos documentos señeros en esa etapa), se van expandiendo em las décadas sucesivas. La última estación dentro de esa historia fantástica es la que se expiden textos constitucionales com amplios mandatos substantivos para el Estado, muchos de ellos redactados en forma de derechos fundamentales. Se trata de una tendencia que se agudiza a partir de los años 70 del siglo XX y que da lugar a Constituciones que no se limitan a establecer competencias o a separar a los poderes públicos, si no que contienen altos niveles de normas ‘materiales’ o substantivas que condicionan la actuación del Estado...).*

It is perfectly comprehensible that a progressive alteration of the fundamental guarantee rules, which incorporates contents of individual protection and restraint of exercise of power, especially, the limitation of persecution provokes a radical alteration of the understanding of the concept and the purposes of the criminal process And starting from the new standard, created with special force for the demands of humanization of the post-war, concretized at the end of the criminal process as an instrument of reconstitution of a fact considered as criminal and imputed to somebody, asserting it to be an individual right this full exercise of a set of guarantees against the possibility of arbitrary application of penal sanctions.

The association between process and guarantees has been consolidated in academic thought, which only this new criminal process has come to guarantee to the individual, from the moment in which civilization concluded that the response to the phenomenon of crime cannot be achieved through repression without ethical boundaries or moral guidelines, legally established. GÓMEZ COLOMER, regarding the Spanish criminal procedure, affirms that the recognition of the prohibitions of evidence has, fundamentally, two effects:

> "On the one hand, the guarantee effect, since a correct theory on the prohibited test contributes effectively to a better protection of the fundamental rights of the accused or accused guaranteed by the Constitution that orders that democracy; and on the other hand, and not last, the dissuasive effect, by which it is ensured that the conduct of the criminal prosecution authorities, especially during the investigation of the crime and particularly those carried out by the police, will be adjusted to the same Constitution "[7].

Therefore, on criminal proceedings respecting human rights, the accusation of committing of a crime is not carried out without the imposition of express and clear limits on the activity of the State. CLAUS ROXIN points out as tasks or goals of the criminal process the obtaining of a decision on the punishment of the accused "materially correct, obtained in accordance with the legal system and which restores legal peace".

[7] Temas dogmáticos y probatórios de relevancia en el proceso penal del siglo XXI. Buenos Aires: Rubinzal Culzoni Editores, 2010, p. 22. (*"Por un lado, el efecto garantista, ya que uma correcta teoria sobre la prueba prohibida contribuye eficazmente a uma mejor protección de los derechos fundamentales del imputado o acusado garantizados por la Constitución que ordena esa democracia; y por outro lado, y no em último lugar, el efecto disuasorio, por el que se asegura que las conductas de las autoridades de persecución penal, sobre todo durante la investigación del crimen y particularmente las realizadas por la policía, serán ajustadas a la misma Constituición").*

FIGUEIREDO DIAS, in his classic work, highlights that the purpose of the criminal process is to obtain a decision with three essential qualities: "to be achieved in a procedurally admissible and valid way, to be fair according to substantive law; make the declared right safe and stable"[8].

In this legal scenario, the search for truth has lost its position as the sole end of the criminal process for the protection of the rights of the accused individual, due to the constitutional limitations to the activity of state prosecution. That is the conclusion of MUÑOZ CONDE, noting that "the statement that the object of the criminal process is the search for material truth must be relativized, and, of course, it can be said, without fear of being wrong, that in the rule of law in no case should the truth be sought at all cost or at any price"[9]. According to him, *" the object of the criminal process is to obtain the truth only and to the extent that legally recognized means are used for this. Thus, one speaks of a 'forensic truth' that does not always coincide with the material truth itself. This is the price that must be paid for a criminal process that is respectful of all the guarantees and human rights characteristic of the social and democratic State of Law"*[10].

Redefined, then, the concept and the importance of truth in the process, the speeches that invoke it as a pretext for the sacrifice of individual guarantees lose support, as there is no alleged conflict between such principles (search for truth and respect for guarantees), simply by the fact that the search for the truth can only be carried out with respect to the fundamental guarantees of the citizen accused under the democratic rule of law. This does not mean, in any way, to maintain that the criminal process must be conducted disregarding the search for the truth, but it becomes necessary to precisely define the importance of this activity, with the outlines demarcated according to the rights of defense of the accused individual. There is no space here for reproducing debates about

[8] Direito Processual Penal. Primeiro Volume. Coimbra: Coimbra Editora, 1974, p. 49.

[9] La búsqueda de la verdad en el proceso penal. Publicação da Universidad Pablo d'Olavide. Sevilla, 1999, p. 53. (*...la afirmación de que el objeto del proceso penal es la búsqueda de la verdad material debe ser relativizada, y, desde luego, se puede decir, sin temor a equivocarse, que en el Estado de Derecho en ningún caso se debe buscar la verdad a toda costa o a cualquier precio.)*

[10] Idem, ibidem. (*"o objeto del proceso penal es la obtención de la verdad solo y en la medida en que se empleen para ello los medios legalmente reconocidos. Se habla así de una 'verdad forense' que no siempre coincide con la verdad material propiamente dicha. Este es el precio que hay que pagar por un proceso penal respetuoso con todas las garantías y derechos humanos característicos del Estado social y democrático de Derecho*")

the concepts of material truth and procedural truth, as well as the concept of truth. LUIGI FERRAJOLI is right in stating that "the 'truth' of a scientific theory and, generally, of any argument or empirical proposition is always, in short, a non-definitive, but contingent, not absolute truth, but relative to the state of knowledge and experiences carried out in the order of things spoken of, so that, whenever the 'truth' of one or more propositions is stated, the only thing said is that these are (plausibly) true for what we know about them, that is, in relation to the set of confirmed knowledge we have of it "[11].

Overcoming the myth of material truth, it must be understood that the truth in criminal proceedings, as stated by FERRAJOLI, should be nothing more than the knowledge of the imputed fact reconstructed from the set of data obtained (evidence), being, then, from this premise, it is possible to admit the legitimacy of the judicial provision that "affirms the 'truth' of one or several propositions" "(plausibly) true for what we know about them, that is, in relation to the set of confirmed knowledge we have of it". It seems clear that the definition removes any naive (or malicious) presumption that one would be at the end of the criminal proceeding always in the face of "the truth", but only of the truth related to the judicially obtained knowledge, with respect to the limits imposed for the acquisition of this "knowledge" on the investigation procedure.

The limits established to the search for the truth are, for this very reason, irrevocable, whose disrespect generally delegitimizes the judicial decision and specifically can generate the nullity of the process. The more powerful the instruments of invasion of privacy available to the State, the more frequent the measures of deprivation of property and freedom of individuals and the greater the criminal penalties applied, the more density and effectiveness should be given to the procedural guarantees of the accused person. Constitutional rules guaranteeing citizens' rights serve to ensure a certain balance between the State (police, accuser, judge) and the individual, often defended also by the State itself, in precarious conditions.

Thus, the increasing intervention of the state requires the awareness that fundamental rights must be preserved through a fortification of constitutional guarantees, under penalty of an even greater imbalance in the unequal relationship between the state and the individual. It is only possible to think about the effectiveness and legitimacy of prosecution with absolute respect for the individual's guarantees. HASSEMER correctly

[11] Direito e razão. Teoria do garantismo penal. São Paulo: Editora Revista dos Tribunais, 2002, p. 42.

supports the impossibility of accepting the discourse that opposes the interests of criminal prosecution and the right of freedom of the accused, when he affirms: "effective can now be only a criminal prosecution if it treats the authors with dignity and freedom" [12]*. However, we are gradually witnessing an erosion of citizens' fundamental guarantees.*

Along with this new horizon, the whole matter of the scope and limits of fundamental rights in the field of evidence gained another reflection in Brazil, in 2008, with the alteration of the regulation of the law of evidence, which even establishes a new paradigm, considering the evidence as illicit. obtained in breach of constitutional or legal precepts. Historically, doctrine - followed by jurisprudence - has always distinguished, as highlighted above, the effects of illicit and illegitimate proof.

However, as GUSTAVO BADARÓ maintains, from the new regulation, "for the characterization of the illicit evidence, no distinction was made between the nature of the violated rule, whether of material or procedural law" and concludes by defining as illicit evidence "the evidence obtained, admitted or produced in breach of constitutional guarantees, whether that ensure public freedoms or that establish procedural guarantees" [13]. The effects, therefore, are identical: inadmissibility of proof and prohibition of valuation.

These are the factors that determine another point of observation on the subject of **unlawfully obtained evidence**, its definition and consequences.

[12] HASSEMER, Winfried. Direito Penal Libertário. Trad. Gilmar Ferreira Mendes. Belo Horizonte: Del Rey, 2007, p. 119.

[13] Processo Penal. Rio de Janeiro: Campus Elsevier, 2012, p. 287/289. ("para a caracterização da prova ilícita, não se fez, qualquer distinção entre natureza da norma violada, se de direito material ou processual" ... "as provas obtidas, admitidas ou produzidas com violação das garantias constitucionais, sejam as que asseguram liberdades públicas, sejam as que estabelecem garantias processuais".)