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REFLECTIONS ON UNLAWFUL EVIDENCE

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ABSTRACT: The prohibition on the use of evidence obtained in violation of fundamental rights is a deep-rooted doctrine. This is enshrined in our legal system in Article 11 of the Ley Orgánica del Poder Judicial [Organic Law on the Judiciary (LOPJ)], and is in constant jurisprudential evolution with continuous fluctuations, twists and turns, comings and goings. These lines are intended to give an account of some of the most recent pronouncements and, above all, to offer some reflections on the basis of the institution. That piece must be the key, often times forgotten, to consistent development and a practical application which is predictable instead of bewildering.

KEYWORDS: "unlawful evidence" "fundamental rights" "prohibited evidence".

1. Thematic annotation

The doctrine of unlawful evidence has a long tradition. It appeared in our our legal system with the enactment of the Organic Law on the Judiciary of 1985 (LOPJ). Its art. 11.1 was linked to a pronouncement by the Tribunal Constitucional (TC) [Constitutional Court] a few months earlier[123] which recognised its constitutional importance for the first time *(ex* art. 24 CE [Constitución Española: in English, the Spanish Constitution), which it maintains (STC 97/2019, of 16 July[124]) [STC stands for "Sentencia del Tribunal Constitucional", in English: Judgment of the Constitutional Court]. Almost forty years later, the normative text of reference continues to be made up of the fifteen words that make up art. 11.1 LOPJ: "*Evidence obtained, directly or indirectly, by violating fundamental rights or freedoms shall have no effect"*. The whole debate on the contours, limits, modulations, nuances and effects of the doctrine of unlawful evidence must revolve around them. There have been comings and goings; clashes and rectifications;

[122] Many of the ideas expressed in this text are based on and reproduce, with the corresponding updates, passages from previous works prepared for the training courses of the Centro de Estudios Jurídicos [Centre for Legal Studies] of the Spanish Ministry of Justice for the Procuratorial Service (more specifically, one titled *Tratamiento Procesal de la prueba ilícita [Procedural treatment of unlawful evidence]) or* the Consejo General del Poder Judicial [General Council of the Judiciary] for the Procuratorial Service's continuing education program *(Nuevas tendencias en materia de prueba ilícita)* published on the *websites* of the aforementioned institutions.

[123] STC 111/1984, of 29 November, which marked a turning point in what, until then, had been an attitude of absolute autism towards this doctrine (AATC 173/1984, of 21 March and 289/1984, of 16 May).

[124] This is the judgement that analyses the *Falciani* case at a constitutional level. This decision contains a comprehensive overview of the evolution of constitutional jurisprudence on unlawful evidence.

contradictions and coincidences; evolution and fluctuations. In these pages, without any pretence of being exhaustive, I will offer some thoughts on its tormented and continued development. The *Falciani* affair is one of the last stops on this long journey.

That will be the essential guide. But before getting to this subject, it is worth going back to something that is ultimately the essence of the message that this work incorporates: it seems to me essential - and it is a task that is often neglected - to examine where in our legal system we should locate the basis of this unlawfulness of evidence. This is a basic preliminary issue without which the different problems that arise when applying Art. 11.1 LOPJ cannot be resolved in a consistent manner. I believe, moreover, that this is an issue that has not yet been defined in case law. There are rulings that appear that adhere to opposing theses; and, above all, concrete applications appear that seem to be based on an understanding of the unlawfulness of evidence; but they are followed by other case law solutions that obey a quite different conception. Our jurisprudence is in need of a clear position on this point. Without it, we will continue to be subject to fluctuations that are the result of this ambiguity in the foundation of the doctrine. The *Falciani* judgement (STC 97/2019) has in any case clarified some points: in particular the connection with the right to a fair trial, without which the prohibition of use is not triggered.

The literature on unlawful evidence is extremely copious[125]. It would be futile to attempt to give a complete picture. I will use only some basic bibliographic apparatus.

2. A recent example: STS 971/2022, of 16 December

In a purely intuitive and experiential estimation, devoid of any statistical testing or verification, I think that the volume of acquittals as a result of declaring the evidence inadmissible when a violation of a fundamental right is found has decreased in recent years. That is a sign - as I will argue later - that the legal tool partly achieves its objectives. However, it is still relatively common, and not at all unusual, for defendants to be acquitted when the evidence irrefutably pointed to their guilt, due to the application of art. 11 LOPJ. Robust evidence can point to them as such; but it is not possible to base a conviction on them because the legislator forbids the judicial authority from taking them into consideration for having detected an infringement of privacy, the confidentiality of

[125] Suffice it now to mention the monographs by DE URBANO CASTRILLO *and* TORRES MORATO, *La prueba ilícita penal (estudio jurisprudencial), Aranzadi,* 2nd[edition], 2000; *and* by MIRANDA ESTRAMPES, *El concepto de prueba ilícita y su tratamiento en el proceso penal, J.M.* Bosch Editor, Barcelona, 2004, 2nd edition. The work *La garantía constitucional de la inadmisión de la prueba ilícitamente obtenida* by DÍAZ CABIALE Y MARTÍN MORALES (Civitas, 2001) is also appealing for its depth *and* novel approaches. The monograph *La prueba ilícita (un estudio comparado)* by Professor T. ARMENTA DEU (Marcial Pons, 2009) has the virtue of offering a very broad overview of the way in which this theory is handled in a diversity of legal systems with different traditions. To cite two more recent texts which seem to me to be particularly enlightening and which have provided me with very interesting reflections, I would remind you of MORENO ALCÁZAR, M.A. "Un ensayo sobre la importancia de la verdad [An essay on the importance of the truth]" in the collective work *Corrupción pública, prueba y delito: cuestiones de libertad e intimidad*, Thomson Reuters, Aranzadi, Pamplona, 2015, pp. 207 et seq; CUADRADO SALINAS, C., *Fundamento y efectos de la exclusión de la prueba obtenida con vulneración de derechos fundamentales*, Tirant lo Blanch, Valencia, 2021; or FUENTES SORIANO, O, *La prueba prohibida. viejos problemas procesales de las nuevas tecnologías* in the collective book PRIORI POSADA. G. (Coord.), *Justicia y proceso en el S,XXI. Desafíos y tareas pendientes*, Ed. Palestra, Peru, 2019.

communications, the right to the virtual environment, inviolability of the home or any other fundamental right[126].

For purely illustrative purposes, I will echo a recent case decided in cassation. It is probably the last judgement of the year that just ended that has proceeded to the annulment of a conviction, in accordance with the reality of what happened, but based on evidence with a flawed origin: information obtained without respecting the rights to privacy and control access to one's personal information (data protection). This is the judgement to which this synopsis owes its heading.

This was an investigation into burglary offences, some of them violent. One of the assailants had sustained injuries as a result of the confrontation with the residents. The Guardia Civil agents located medical assistance provided in hospitals in the area that would correspond to the treatment for those particular injuries. At one of these hospitals, they found the clinical documentation of the person who turned out to be the perpetrator, as well as the details of the telephone number they were using.

The ruling proclaims the need for the patient's authorisation or judicial authorisation to collect medical data that has not been made anonymous if it is intended to be used in a criminal investigation, by application of LO 3/2018, on data protection, and LO 7/2021, on the protection of personal data used for the purposes of prevention, detection, investigation and prosecution of criminal offences and the execution of criminal sanctions and its regulatory referral to article 16.3 of Law 41/2002, regulating patient autonomy and rights and responsibilities regarding clinical information and documentation. If this other line of investigation had not been opened, this participant, who was acquitted, would not have been identified, in contrast to the conviction of some of his *accomplices*.

Both the Court of First Instance and the Superior Court of Justice, using arguments that are not relevant here, gave legitimacy to the evidence. However, the Supreme Court considered that this intrusive conduct on personal privacy required judicial authorisation and annulled the conviction.

After a complete review of case law precedents with some analogies, and going through a convoluted regulatory maze (Regulation (EU) 2016/679 of the European Parliament and Council, of 27 April 2016, regarding *protection of natural persons with regard to the processing of their personal data and the free movement of such data and* the (EU) 2016/680 of the European Parliament and Council, the title of which is *the protection of natural persons with regard to the processing of personal data by the competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and the free movement of such data,* as well as LO 3/2018, of December 5, regarding *Personal data protection and guarantee of digital rights*, Law 41/2002, of November14 and LO 7/2021, of May 26, on *protection of personal data processed for the purposes of prevention, detection, investigation and prosecution of criminal offenses and execution of criminal sanctions)* the court ultimately concluded that this initial point of investigation was vitiated by nullity, thus invalidating all the evidence obtained as a result of it: "*The police officers, without the authorisation of the right holder and without judicial authorisation, accessed the*

[126] Only fundamental rights and freedoms: i.e. those set out in Art. 15 to 29 CE [Spanish Constitution].

information collected in the hospital medical records, obtaining the identity and incriminating information leading to his conviction.

Specifically, the case file contained the injuries that led the defendant - a few days after the assault - to visit the hospital emergency department. In addition to the objective injuries observed by the doctor, the report included the patient's statement as to how they had been caused, namely that they suffered the injuries as a result of having been hit on the shoulder with a mallet or club and then having been involved in a traffic accident, facts which coincided with the description of the confrontation with one of his victims and the location of the car in which they had fled.

And from the same report, the two pieces of information were obtained which assigned responsibility to the appellant and which the investigation could not obtain by any other means: a) Firstly, the identity of the individual who presented the suggestive injuries and b) The telephone number which allowed the linking of the patient to the facts".

What is the logic behind this conclusion? Is it a kind of compensation to the offender for having had one's own rights affected? Why, then, if they didn't end up being the perpetrator of the robbery, are they not awarded compensation at the same satisfactory level? If they took care of effects originating the robbery, should they return them or can they make them their own?

Only by probing the foundation of the theory can sensible answers to these questions be offered.

3. Exclusion of unlawful evidence: rationale.

As is well known, the origin of the theory of unlawful evidence is to be found in Anglosaxon common law. A well-known American Supreme Court ruling understood the prohibition of the use of evidence obtained in violation of fundamental rights to be implicit in the fourth amendment. The theory gradually became more nuanced and widespread and is now common to all legal systems in Western countries.

It is also known that these precedents coexist with a continental tradition, of which a recognised initial milestone took the form of a speech by BELING *(Prohibitions of Evidence)* delivered at the beginning of the last century on the occasion of the inauguration of an academic year.

The two traditions have come together. In the Anglo-Saxon one—with no shortage of nuances—the utilitarian aspects, more in line with the pragmatic temperament of that world, predominate. The continental one has a more dogmatic, essentialist and ontological foundation.

What are the rationale, scope and limits of this theory? If we do not undertake this in a serious manner, we run the risk - and there are examples of this - of turning the theory into an irrational dogma, and making it the object of an ill-considered idolatry that will turn against the very fundamental rights of the people it is meant to serve.

At the origin of the discourse on the inadmissibility of evidence that has been obtained in violation of rights, there was, although not unanimously, a predominantly

deterrent and prophylactic purpose: effective protection of fundamental rights requires such a drastic measure. The best guarantee to protect fundamental rights, and to avoid the risks of being overridden by investigative zeal, is to deny any value to evidence that is obtained in violation of those rights. In this way, the State, the agent of authority, clearly perceives the futility of such an action, and scrupulous compliance with all guarantees by those involved in the investigation is encouraged.

There is a certain logical inconsistency in the approach: epistemological effects are derived from an ethical question. In some cases of violation of fundamental rights, the consequence of denying the activity evidentiary capacity is consistent with the strict epistemological level. So it is with torture: it is a practice that violates human dignity, but it is also unreliable from the point of view of obtaining the truth: in the words of a classic work, "*a confession made under torment is the expression of pain, not of evidence*. *What is the relationship between pain and truth?*

In many other scenarios, no such relationship can be established. Deducing the invalidity of evidence as a source of knowledge from the infringement of some fundamental right in its collection is an illogical leap. Seizure of drugs during entry into a home without a search warrant is real. Strictly speaking, what would be appropriate is to punish both the drug trafficker thus discovered and the police officer who violated that home without observing the guarantees of the constitution. To deny the existence of the drug would be as much, to use the image of a famous trial lawyer, as to turn a blind eye to the scientific value of the historical discoveries that were made from the study of works that were plundered from Egypt.

It can be agreed that this betrayal of logic is correct to the extent that it is assigned a preventive function. Weighing the values against one another, it is worth sacrificing the possible injustice of not punishing certain offenders in order to make the protection of fundamental rights more effective. The sanction imposed on the law enforcement officer for the violation of these fundamental rights may not be sufficient as a deterrent. Empirically, it is verifiable that the absolute rejection of the evidential value of the elements thus obtained is a more effective measure in the protection of fundamental rights and discourages to a greater extent the temptation of illegal actions.

This, in my view, is the ultimate basis of the theory of unlawful evidence. Often, however, its daily application seems to connect with other origins.

The doctrine of unlawful evidence entails giving up in certain cases true knowledge for the sake of another purpose that requires such a sacrifice. So far, so good. But the sacrifice will be justified when these objectives are actually achieved; not in other cases. The theory of unlawful evidence does not admit an epistemological generalisation if we place the basis in this purpose of being a deterrent in the prevention of possible violations of fundamental rights.

Denying unlawful evidence of its probative value is a balancing of two conflicting values: the need to establish the truth in criminal proceedings and punish the perpetrator, and the preservation of fundamental rights in the most effective way possible in the face of the State's investigative conduct. Preponderance is given to the latter and, as a result, in the collision between the two, the other good is sacrificed: it is admitted, as a levy to be paid for this effectiveness, that some guilty parties may be acquitted.

However, this view is not shared by some commentators. Voices with tremendous authority detach the proscription of unlawful evidence from this instrumental principle and place it in the need for absolute prevalence of fundamental rights and in more ontological reasons. In jurisprudence, there is no clear position that obeys a consciously accepted construction. This lack of reflection leads to fluctuation and contradictions between different pronouncements. Although the subject is of the utmost interest, it is not compatible with either the purpose of these pages or with reasonable length to go into an explanation of such theses[127].

If one tries to base the exclusion of unlawful evidence on hypotheses which are not connected to the deterrent effect, one runs the risk of arriving at unintelligible and unacceptable solutions. The theory of unlawful evidence does not mean that the facts thus known are not true. It simply implies that they cannot be assessed to ensure the cleanliness of the process. This reinforces the principles that the ends do not justify the means and that procedural truth cannot be achieved at any price. But it is true and real that drugs were found in the home, which was unlawfully searched, and that the owner was engaged in drug dealing, although no legal consequences can be drawn from this reality in terms of penalties[128], consequences of a different nature can indeed be drawn from this reality.

The theory of unlawful evidence is based on a balancing of conflicting values. Faced with the dilemma between the right of the state to punish the perpetrator of a crime and the effective protection of fundamental rights, which requires the inadmissibility of evidence obtained in violation of fundamental rights and, consequently, to dispense with punishment and acquit guilty parties in cases where the evidence has been obtained illegitimately, the latter is chosen. The effective preventive protection of fundamental

[127] Examples include DIAZ CABIALE and MARTÍN MORALES, MIRANDA ESTRAMPES, ANDRÉS IBÁÑEZ *(again on motives of the facts). Reply to Manuel Atienza* in "Los Hechos en la sentencia penal", Mexico, 2005, pp. 95 et seq.) or AGUILERA MORALES *(Exclusionary rule and legal process)* in the collective work "Proceso Penal y sistemas acusatorios" coordinated by L. BACHMAIER, Madrid, 2008, pp. 73 et seq.) And in jurisprudence, a recent example of a preference for the more ontological thesis can be found in STS 674/2018, of 19 December: "*It is inexcusable to reflect on the basis of the exclusionary rule. Because the one that is usually attributed in the Anglo-Saxon sphere focuses on the "deterrent effect" that is attributed to it for undesirable practices of the police or, more broadly, of the state apparatus. It does not seem to have been taken up in continental law, even if the reception of the aforementioned rule has been influenced by the aforementioned foreign precedent. On the contrary, on our continent, what it is usually preached is that the basis of rules such as Article 11 of the Organic Law on the Judiciary is the* ***objective protection of the right violated*** *in the unlawful practice, beyond the utilitarian functionality of producing the inhibition of the state apparatus. And that protection is only achieved to the extent that the acts that violate it are deprived of any profitability or effectiveness. Hence, the "flexibilities" proposed for the exclusionary rule (good faith of the person infringing upon the right, inevitability of the discovery or similar) must be prudently redirected to that true basis to ensure that from the infringement of fundamental rights there is no room for achievements in a democratic system which, although they favour the punishment of crime or remove inhibition from the police's conduct, produce the risk of encouraging the weakening of the protection of the rights that our Constitution considers essential".* With this, the ruling seems to depart from the path that timidly began in STS 116/2017, of 25 January *(Falciani),* taking up the gauntlet of the dissenting opinion of STS 569/2013, of 26 June.

[128] This is why, for legal purposes, seized drugs also exist and cannot be returned, without the need for any argumentative acrobatics. Money found in an illegal search could not be confiscated, because confiscation was a sanction (an ancillary consequence today). It is not that the money was non-existent (as stated in STS 1607/1999, of 8 November, however, in a way that does not manage to hide the inconsistency, it does decree the intervention of the narcotic substance discovered), but that, being real, the evidence cannot be used for a conviction.

rights is a preferable value to the punishment of all those responsible for criminal offences in any case and at any cost. The sacrifice is worth it. This is a right decision for criminal policy, although perhaps other reasons might suggest otherwise.

The option is valid for this conflict, but it cannot be extrapolated to other cases, nor does it mean - in this it can degenerate into - that the facts ascertained through illicit evidence are false, or do not exist, or it cannot be said whether they are real or not. When the conflict is not between the right of society to punish the perpetrator of a crime and the protection of fundamental rights, but rather between this generic preventive protection and the right to life - or liberty - of a specific citizen with a name and surname, there is no doubt: the latter must prevail. Therefore, evidence obtained illegitimately can be used to terminate the effects of a crime (seizure of drugs or release of a hostage, to give an eloquent example: a doctrine that would lead one to hold that it would be legally appropriate to abandon the hostage to his fate is a monstrosity[129]).

[129] Some of the arguments contained in the dissenting opinion accompanying STS 569/2013, of 26 June, move in this direction. The surreptitious seizure of the former spouse's digital material had led to the discovery of non-consensual sexual abuse. The Court of Appeal reached a verdict of acquittal on the grounds of unlawfulness of the evidence, which would be confirmed in a cassation with a judgement accompanied by a dissenting opinion. It is based on two facts that are considered decisive: the violation came from a private individual and, furthermore, it was not due to a desire to seek evidence, which made it not fit in with the term *"obtained"* used in art. 11.1 LOPJ: "*In my opinion, these two pieces of information are key to defining the sphere in which the pleasing, in its substance, but very perfectible in its wording, formulation of art. 11.1 LOPJ, which has brought so many beneficial effects to our judicial and police practice. The reasoning may be dismissed as overly-sophisticated. I try to reason why not only does it not seem so to me, but that this interpretation, which has crystallised into a pre-legislative proposal, is more faithful to the philosophy that inspires the principle of prohibiting the assessment of unlawful evidence and entails a more effective and rational protection of fundamental rights. The mandate to optimise the enjoyment of fundamental rights is an elementary rule of exegesis in this area.*
The defendant's right to privacy was breached. However, the declaration of unlawfulness of the evidence does not have a restorative effect on the right that has already been violated. It prevents future attacks. No need for such prevention - deterring the temptation to investigate through illegitimate methods - can be detected, when this was not the motivation behind the initial conduct.
On the other hand, (on an indicative and dialectical level and with the precautions imposed by the presumption of innocence not destroyed, which has nevertheless been treated with, at least, little restraint with regard to one of the complainants who is accused in the judgement without any qualification of committing an offence under art. 197 of the Criminal Code, albeit merely for prejudicial purposes, based precisely on evidence derived from the unlawful one, which gives rise to an understandable complaint in their appeal) another fundamental right which was allegedly violated can be uncovered. Or, rather, two. Its owner is one of the complainants. Both their privacy (images of them in moments of basic privacy have been obtained without their consent) and their (sexual) freedom. A criminal prosecution of the alleged perpetrator will not restore those rights either. But it will compensate and like any penalty, it will have a general preventive effect. Criminal proceedings are not exclusively concerned with the interests of the state. But also citizens' rights, which are sometimes fundamental and connect to issues of commutative and not purely legal justice.
Would we also deny the victim protection on the grounds that the evidence was illegitimate if they had gone to civil proceedings (Law 1/1982) demanding the cessation of the intrusion?
Strictly speaking, the reasoning of the majority judgement and the contested judgement would lead one to affirm that the right action from State apparatus (agents and the Magistrate's Court) in the face of the complaint made would have been that of total abstention given the illicit origin of the evidence presented and the legal impossibility of it having any effect (art. 11.1 LOPJ). In other words, when faced with the victim's justified request to seize other possible similar material, other copies or to search the victim's home to locate and destroy it, both the police and, in particular, the Magistrate's Court should have refrained from acting. This means that for the sake of preventing hypothetical future violations of a fundamental right (the prophylactic purpose of the exclusionary rule, which does not restore the violated right but prevents others),

A healthy realism, so closely related to common sense, must be recovered. To emphasise that the theory of illicit evidence does not mean denying that real facts are not real; nor does it mean denying that certain events exist; or making the truth or otherwise depend upon the procedures followed to obtain knowledge: there are only procedural truths, which can be changed[130].

The theory was born for prophylactic purposes, as a deterrent to behaviour contrary to fundamental rights by state apparatuses. The limits of the theory and its consequences must be faithful to those origins that are compatible with the effort within the criminal process to seek the truth. Rich conclusions can be drawn from this that are undeniably operational in practice. Many of these modulations and consequences are present in American jurisprudence, the birthplace of the theory. However, in Spain and in other legal systems, they have not taken root and there are still many decisions that reflect a myopic vision that blurs the focus of the problem and leads to solutions that, in my opinion, are not accurate and could even bring the theory itself into social disrepute[131].

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it would be consenting to the perpetuation of the current mistreatment of a specific fundamental right of a person with a name and surname. This cannot be the exegesis of this precept".

[130] In this respect, see the intriguing considerations contained in the work of MORENO ALCÁZAR, M.A. *An essay on the importance of truth* in the collective work "Corrupción pública, prueba y delito: cuestiones de libertad e intimidad", Thomson Reuters, Aranzadi, Pamplona, 2015, pp. 207 et seq.

[131] The dissenting opinion in STS 385/2013, of 18 April, is reasoned in a similar way*: "It is becoming necessary... to redraft the doctrine on unlawful evidence, which is already happily established, although unpolished on some points. Not to rethink it, but to go deeper into its foundations and coherently define its contours and consequences from there. Its genesis in our legal system has jurisprudential roots. It was the Constitutional Court that was the first milestone with a well-known ruling at the end of 1984. It then took shape in a single precept of the Organic Law on the Judiciary (apart from purely procedural developments such as the one made in the Civil Procedure Act): Article 11.3, very synthetic and with some ambivalent expressions, or, at least, susceptible to different interpretations. It has been the Courts, particularly the Constitutional Court, that have been delimiting its borders, exceptions, nuances and applications, with solutions that sometimes, at least in appearance, seem contradictory or not entirely coherent.* ***I understand that it is a pending task to clearly identify where our legal system places the basis of this inalienable exclusionary rule.***

Only from this premise can a congruent development be achieved, which in each case respects the ultimate root of the theory (preventive prophylaxis or ontological foundation).

In the joint appeal lodged by the convicted person, we can detect one of the clear excesses that occur in the use of this doctrine: it is a blunder that is incompatible with reason and, therefore, also with the law, to reach the conclusion (although the reasoning built on very common premises may seem perfectly logical) that there are crimes that are null and void! That is to say, those produced on the occasion of a police intervention the origin of which was unlawful eavesdropping. The joint appellant submits that the evidence of those offences (reckless driving, resisting arrest, two counts of assault and battery, driving without a licence) for which they were convicted was also unusable. This police action would not have taken place - and in this he is right - without the wiretaps carried out in violation of art. 18.3 CE. The perception of the offences perpetrated when the police action was triggered as a result of the eavesdropping would also be affected by the nullity. These are facts derived directly from these interventions. There is a causal link.

Such reasoning is nonsense. It could almost be said that according to this thesis (which, I insist, appears as "logical" in a certain exegetical scenario of unlawful evidence) the injuries caused to the police officers are legally "null and void" (!!) as they would be directly linked to investigations that were initiated unlawfully. They would be as unusable as the evidence of the narcotic substance found on the road and allegedly thrown from the vehicle at the time of the police intervention.

In my opinion, there are excesses in the practical handling of this theory, the implementation of which, on the other hand, has brought so many beneficial effects in terms of an effective and not purely rhetorical or symbolic protection of fundamental rights. These excesses are sometimes the result of a certain confusion or lack of clarity as to their basis. It is not now a question of analysing these arguments in the appeal, which, moreover, must remain unchallenged, as the judgement explains in its tenth legal ground. But they are useful for highlighting, as a preamble to my argument, the relative lack of definition of the scope of the doctrine of

If the theory of unlawful evidence tends to prevent future attacks on fundamental rights, verifying that the cases of application of art. 11.1 LOPJ are decreasing will be a sign that the proposed objective is being achieved.

4. Unlawful exculpatory evidence

The aim is to protect society as a whole from possible infringements of fundamental rights by ensuring that they are not compensated in any way. The legislator's choice is intelligible and legitimate: they sacrificed the *ius puniendi* of the state on some occasions, renouncing the punishment of some offenders, for the sake of a worthwhile objective, a greater shield against the potential curtailment of rights.

But when on one side of the scale is not *ius puniendi*, but is instead another current fundamental right that is being violated, it is clear that the result of the balancing must be different. If, through unlawful eavesdropping, I find out where the kidnapped person is, there should be no hesitation in rescuing them. It is immaterial that the enquiry is tainted by the violation of the right to confidential communication. Between the actual freedom of a person deprived of it and the potential protection of the fundamental rights of all, the former has more weight. When I weigh it against the punishment of the guilty, the latter may prevail. Therefore, a proper understanding of the thesis should lead to using the evidence to proceed with the release of the detainee; but not to use it to prosecute the perpetrators.

For the same reason, it makes no sense for evidence that can serve to prove the innocence of the unjustly accused to be dismissed as inadmissible. Here we have another good of greater value at stake: the acquittal of the innocent. Contrary to what some argue, I

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prohibited evidence, the germ of incongruent solutions, sometimes unintelligible to the layman -and to the jurist- and contradictory to one another; and other times -too many- disparate responses, as in this specific case we are now examining. Our legal system is in need of a reflection on the objectives to be achieved with this mechanism of expulsion of evidence obtained in violation of fundamental rights, from which so many benefits have been derived for our procedural system and police and judicial practice, in order to discriminate between the mechanisms that are suitable for these purposes, and those that contribute nothing and only in poor faith and departing from a healthy realism are moderately intelligible (play of unlawful evidence in the appeal for review; compensation for pre-trial detention and unlawful evidence; in dubio in matters of unusable evidence, unlawful evidence that proves innocence that seems to yield to a solid evidentiary framework...).

The opinion is concluded with these paragraphs: "*A finding of unlawfulness of evidence constitutes a failure of the criminal justice system. It can be understood as a sign that the mechanisms to protect fundamental rights are working, but it is still a failure insofar as it means the recognition that a fundamental right has been violated; and that probably due to this malfunctioning it has not been able to crystallise in a resolution adjusted to reality, an aspiration for justice as a superior value. Sometimes when we are dealing with more diffuse state or collective interests, this "failure" becomes more acceptable. But if we think about other issues (corruption, urban planning), more alerts will be raised. Even more so when we are dealing with specific victims who, precisely because of an error in the system, see their well-founded demands for justice rejected; not only legal justice, but also commutative and sometimes quantifiable justice. The consequence is not only a decline in the ius puniendi of the state. Other rights are at stake. And the fact is that a very lax interpretation of the exclusionary clause is not limited to "reinforcing" fundamental rights, but by necessity, by definition this supposed "reinforcement" (the exclusion of lawful evidence does not "restore" the violated right; it only prevents future violations: the declaration of unlawfulness of telephone tapping does not repair the intrusion into privacy, any more than the right to life repairs a conviction for the crime of murder: it deters future attacks but does not restore life) always comes at the cost of "cutting back" other fundamental rights such as the right to use the relevant means of proof and, as a corollary, the right to effective judicial protection. This tax must be paid willingly when a fundamental right is actually violated. I think that here it had to be paid for...".*

believe that there should not be the slightest obstacle to enforce evidence obtained in violation of fundamental rights in favour of the defendant. This was admitted in the Draft Code of Criminal Procedure of 2013, an axiom which, however, has not been taken up in the Preliminary Draft of the Criminal Procedure Act of 2021.

5. The good faith exception

Further consequences can be drawn from placing the theory's foundation in a prophylactic purpose. In order to prevent violations of fundamental rights, there will be no reason to exclude evidence where the actor has acted in good faith; or, in other words, without intent or gross negligence. The word *violation* is to be understood as unlawful and culpable conduct and not merely unlawful. Evidence is not to be dispensed with if the person who opens the neighbour's letter, which contained drugs, and without realising that they were not the addressee, has taken it from their letterbox where the post office employee inadvertently deposited it.

The good faith exception has been admitted by our TC: STC 22/2003, of 10 February. The actions of agents in accordance with formal law, although materially unconstitutional, in unconstitutionality not affirmed by the 'organ called upon to do so, cannot be sanctioned with the inadmissibility of the evidence. They were not required to deviate from the law by presuming that they did not comply with the constitution. They acted in good faith.

In ordinary case law, this question is addressed in STS 489/2018, of 23 October, which seems to operate as an exception, although cases of violation of a fundamental right due to serious negligence must be excluded from its scope.

An appeal was lodged against a conviction for the continuing offence of misappropriation charged against a company director. The main, but not the only evidence came from the data obtained through the non-consensual examination of the computer used by the accused. This included e-mails from the accused which revealed their disloyal conduct towards the company. The examination was carried out by means of a programme that allowed the selection of e-mails by their content without the need to open them. The director had not assumed the obligation to use the computer exclusively for company activities or communications: they had not been prohibited from carrying out communications from there outside their duties in the company, nor had they been warned of a hypothetical reservation by the company of its right to examine such a device. They had therefore neither expressly nor tacitly authorised the company to access the e-mail accounts that they had used. The judgement explains that, for the purposes of deciding on the lawfulness of such evidence, the fact of the ownership of the computer is irrelevant.

Based on this factual framework, the Supreme Court understands that a fundamental right was illegitimately affected, specifically a new generation right that has come to be known as the right to the digital environment.

In the final part of the decision, the Chamber explains why it understands that the good faith exception does not apply, to which it therefore implicitly grants relevance in order to deprive the exclusionary clause of its effectiveness.

In casu, the Second Chamber considers that the company's actions, although not wilful, were not negligent, so that the evidence cannot be salvaged:

"*Anchored in the thesis in favour of the prophylactic purpose, it has been argued that in order to label evidence as unlawful, it must be required, using a criminal parallelism, an unlawful and culpable conduct (even if it is simple negligence). The action, and therefore the evidence, would not be "unlawful" for these purposes when the action has been taken in good faith, with the conviction that the conduct was in accordance with the law and without reprehensible indiligence, indifference or negligence. From this premise, what was known as the good faith exception has been applied by the American Supreme Court; on occasion, precisely on the occasion of jurisprudential pronouncements: agents could not be required to deviate from the provisions of a law that was subsequently declared unconstitutional by the judiciary. However, in the present case, in view of the existing and predominant jurisprudence at the time of the corporate action, the lawfulness of which we are now examining, caution could and should have been exercised: in the absence of a warning that the computer was to be used exclusively for company purposes and without the employee being aware that the company reserved the right to examine it, even if the computer methods used were particularly non-invasive and selective, it was a certain liberty (an indiligence) not to seek the owner's consent or, failing that, judicial authority, beforehand. There was already a body of jurisprudential doctrine that gave ample warning of the dubious legality of this action. A certain audaciousness can be seen in the initiative taken by the company. The evidence is not salvageable; it cannot be used.*

6. Individuals and unlawful evidence

In some jurisdictions the theory of unlawful evidence only operates against agents of the state. There has been some attempt in our doctrine and even in case law to make such distinctions in our system. Today, however, it is clear that art. 11.1 LOPJ must be applied equally to relations between private individuals as it is to relations between the State and citizens. Such a precept does not discriminate in any way and this has been highlighted by the STC of 16 July 2019.

It is a different matter if the connection between the exclusionary clause and Art. 24 EC allows it to be applied only to those cases in which a proceeding is on the horizon, directly or indirectly, in the conduct of infringement of a fundamental right. There will be no exclusion, if the purpose of the infringement of the fundamental right was totally unrelated to a procedural purpose. Burglars who enter the house where they find drugs are not looking for evidence. Therefore, if they are caught by the police, or if the police end up arresting them, there is nothing to prevent the possession of the narcotic substance from being convicted, even if it was found as a result of a violation of the inviolability of the home by private individuals. This is the understanding of the aforementioned ruling of the TC that we have just cited and which settled the *Falciani* matter at the national level by validating the convictions. The initial unlawful collection of evidence of tax fraud offences did not involve the purpose of gathering evidence to be used in a trial.

7. *In dubio* principle and unlawful evidence

How the burden of proof (with all the modulations that would have to be made to justify this terminology, which is classic but controversial in criminal proceedings) should be applied in relation to the unlawfulness of a specific means of proof is a subject that also

lends itself to opposing theses. I understand that opting for the dissuasive purpose of the theory is an invitation to modulate this principle enormously in terms of the factual data that constitute the assumption of evidentiary unlawfulness.

In cases of doubt as to the lawfulness of evidence, does the *in dubio* principle oblige us to disregard it? Does the right to the presumption of innocence mean that we need to consider the means of proof on which the suspicion is based unlawful until proven otherwise?

In my opinion, the answer to both questions must be negative.

It seems very clear to me as far as the presumption of innocence is concerned. It obliges us to presume that a person is innocent as long as there is no evidence of guilt, but it does not and cannot lead us to presume that incriminating evidence is illegitimate as long as there is no proof of its lawfulness.

I do not think it is entirely correct to say - as I have written on occasions - that the burden of proof on the illegitimacy of a means of proof lies with the person who alleges it is illegitimate, so that doubts will have to be resolved in favour of the admissibility of the means of proof. On this point, a certain problem of delimitation of fields arises, similar to that which originated in the matter of exonerating and extenuating, where case law seems to have happily started down a path that will lead to definitively burying the mistaken maxim that exonerating and extenuating circumstances must be as proven as the act itself in order to be taken into consideration. No. This is not the case.

Nor does the factual unlawfulness that determines an evidentiary nullification require *certainty beyond reasonable doubt*.

Neither that, nor the antagonistic position: only if the lawfulness of the evidence is perfectly established, leaving no room for doubt, can such a means of proof be used.

This premise causes another fundamental right that comes into play to suffer in unconsidered terms: the fundamental right to use relevant means of proof. It cannot be limited without a solid evidentiary basis *Item* moreover, I believe that the burden of proof on the illegitimacy of a means of evidence lies with the person who alleges it, so that doubts will have to be resolved in favour of the admissibility of the means of proof. At stake is the fundamental right to use relevant evidence, which cannot be limited without a solid evidentiary basis[132].

The standard of proof must be the prevailing probability. If there are doubts about the lawfulness of a means of proof (e.g., there are doubts about whether the inhabitant gave consent to enter the house: they deny it, while the police officers claim otherwise), the means of proof (findings in the house) may be used if the judicial body believes it is highly probable, but not completely certain, that consent was obtained. If, on the other hand, the evidentiary assessment leads to the conclusion that it is more likely that consent was not given, the evidence must be excluded. The *in dubio* principle is not a guideline based on

[132] A contrary opinion, although focusing on the evidence on evidence in GASCÓN INCHAUSTI *El control de la fiabilidad probatoria*: "prueba sobre la prueba" *in criminal proceedings,* Ed. Revista General de Derecho, Valencia, 1999, pp. 56 et seq.

epistemology, but an ethical criterion. Society gives itself this rule of judgement because it wants to avoid the conviction of an innocent person at all costs.

It seems to me that in the field of inadmissible evidence the same rationale does not apply. Society does not tolerate the conviction of an innocent person. However, it is in a position to admit the conviction of a person proven guilty, even if there is a (not high) margin of doubt as to the lawfulness of the evidence. I understand that the canonical standard of criminal procedure applies to guilt - *certainty beyond a reasonable doubt* - but not to this concomitant question, simply because it does not detect the conflict of values (conviction of an innocent versus acquittal of a guilty person) that is at the basis of this rule.

In case law the issue has not been openly raised and one can find samples of pronouncements that lean more or less clearly toward one option or the other.

The issue lay at the heart of the allegations regarding the nullity of some wiretappings that were carried out in another case, which had given rise to new cases derived from that case in which only relevant testimonies were put together and, therefore, the legality and basis of the chain of telephone tapping could not be verified. At one time this question appeared frequently in case law which, after some hesitation (see SSTS 24 September 2001, 498/2003, 24 April, 1393/2007, 19 February 2008 or 187/2009, 3 March) opted for a counterweighted formula. On the one hand, the invalidity of the evidence was admitted when the legitimacy of each wiretap was not supported by the documentation of the case itself (if, for example, there was no record of the initial official letter, it was understood that the wiretap could have been agreed without sufficient evidence and that this possibility determined the impossibility of using these means of proof). But, on the other hand, it established the need for the defence to announce this type of challenge so that the Prosecutor could offer the necessary means of proof (normally the testimonies that were lacking from the main proceedings) to refute the allegation.

The opinion in favour of declaring the inadmissibility of wiretaps in such cases is, in my opinion, based on an erroneous epistemological assumption: in principle, it should be presumed that judicial and police actions are illegitimate and irregular and violate fundamental rights as long as there is no evidence to the contrary. This premise is not correct, without which any edifice of argument collapses. The assumption must be just the opposite: in the absence of proof to the contrary, it must be assumed that judges, police officers, authorities and civil servants in general act in accordance with the provisions of the law and the Constitution. The burden of proof is on the party claiming otherwise. It cannot be said that since it has not been proven that there was no torture in a police statement, it must be presumed that there was torture and that, therefore, such statement will be null and void; or, as in this case, that since the initial proceedings (which are in another case) are not on record, it must be presumed that either there was no judicial authorisation for the intervention or that the intervention was without motive and unjustified. Neither the principle of the presumption of innocence nor the *in dubio* principle go so far as to require a constitutionally mandated presumption that, unless proven otherwise, the actions of the authorities are illegitimate and unlawful. The principle of the presumption of innocence does not extend its effectiveness to such absurd extremes. Nor does *in dubio* apply in relation to facts that preclude or exclude the validity of evidence. If we want to show that certain statements have been obtained through torture, you have to prove it by providing the relevant means of proof, or a bare minimum of some

proof, at least. And if you want to show that of a piece of evidence is illegitimate, you also have to prove it.

The issue of the level of certainty required for a finding of unlawfulness of evidence sporadically arises again. Contrary to statements such as that of STS 1064/2012, of 12 November: *A person whose guilt has been fully established on the basis of evidence that is likely to be lawful can be convicted*; from the reading of others, such as the recent 184/2022 of 23 February, the opposite principle would follow: the consent of the person concerned to the police to legitimise the inspection by the police of his phone must be fully proven, without the mere witness statement from the officers being sufficient to justify it. A higher standard of proof must be applied to exclude, in terms of reasonableness, the infringement of the right to confidential communication.