

## Holistic Analysis of the Valuation of the Illicit Proof According to the Procedural Law

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**ABSTRACT:***In the present work the object and organs of the proof are analyzed according to the Mexican penal legislation from the descriptive, analytical and correlational perspective of the procedural regulation. With this, it starts from the historical, natural and human theory, analyzing the objects and facts, rights and exceptions; As well as the holistic notion of proof.*

**KEYWORDS:***1. Proof 2. Process 3. Criminal law 4. Judicial system*

### I. INTRODUCTION

With the adversarial system of recent implantation in our country, legal concepts were introduced that, although they were not foreign to the previous system, were not really applied and were technically unknown by the judges and other legal operators, as in the case of the exclusion of unlawful evidence.

Likewise, Mexico has signed and therefore has committed to respect various international treaties, with which Human Rights are protected, reaching this constitutional rank.

Notwithstanding this, due to the situation of violence and insecurity in our nation, some authorities continue to violate Fundamental Rights, which causes illegitimate evidence; that is, legal and illegal evidence.

Therefore, the administrative or jurisdictional authorities must understand that the evidence must be obtained, practiced and accepted under the parameters established by the Political Constitution of the United Mexican States, International Treaties, by the Jurisprudence of the Supreme Court of Justice of the Nation and by the National Code of Criminal Procedures, this to reach the certainty that they are legal evidence and therefore suitable for the Trial Court to reach a due conviction and apply the legal consequences of the crime, based on a real and material truth, which is the interest of the parties.

All this normative framework and especially our Political Constitution, respect for Fundamental Rights is of utmost importance, among them Due Process and Human Dignity, which must be reflected in procedural actions and sentences.

### II. Irregular evidence and illicit evidence

The doctrine maintains that the proofs with vices are divided into two categories: In irregular proofs and illegal proofs; this according to the principles of proof legality, which consists of adhering to the legal formalities in the discharge of the same and the principle of legality, which consists in that the acquisition of evidence, is based on respect for human rights .

## 2.1. The irregular proof

Evidence called as irregular is that obtained in violation of procedural rules, but without violation of fundamental rights;<sup>1</sup> that is, it is the one that violates any ordinary norm other than fundamental rights.

For his part, the scholar E. Jauchen, says that the irregular evidence,<sup>2</sup> are those proofs obtained or produced in clear violation of the procedural norms predisposed for it, since the procedural law is regulatory of the Magna Carta, and any rule that regulates the way of obtaining or producing the evidence is intended to safeguard the guarantees constitutional.

Likewise, Grinover prescribes that in the event that the rule violated by the evidence has been set solely in accordance with interests pertaining to the purpose of the process, the evidence will be simply irregular; on the contrary, if even serving procedural interests, it is placed according to the rights that the law recognizes to individuals, regardless of the process, the evidence will be unlawful.<sup>3</sup>

## 2.2. The wrongful proof

Unlawful evidence has various names from the point of view of doctrine and jurisprudence, such as: "The prohibited evidence", "evidentiary prohibitions", "Evidence unlawfully obtained", "Illegal evidence", "Evidence illegally obtained", "Evidence illegitimately obtained", "Evidence unconstitutional", "Evidence null", "Evidence flawed", "Evidence irregular".<sup>4</sup>

Below I would like to quote various writers who define what is illegal evidence:

According to the scholar Silva Melero, the illicit evidence is the one that threatens the dignity of the people.<sup>5</sup>

Alex Calocca, maintains that the illicit evidence is that obtained or practiced in violation of the fundamental rights of the accused, recognized at the constitutional level or by means of international treaties.<sup>6</sup>

For her part, Dr. María Antonieta Sáenz Elizondo mentions that the illicit evidence is one that in an absolute or relative sense, denies the form agreed in the norm or goes against the principles of positive law.<sup>7</sup>

For Montón Redondo he says that the illicit evidence is the one that is affected by a willful conduct in obtaining it; that is, obtained by unlawful conduct.<sup>8</sup>

Devis Echandía says that the illicit proofs are those that are expressly or tacitly prohibited by law or violate the dignity and freedom of the human person or violate their fundamental rights that the Constitution and the law that protects.<sup>9</sup>

There are two ways to know when an illicit evidence is in front<sup>10</sup>:

1.- Illegitimate proof by legal provision, and

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<sup>1</sup>MIRANDA ESTRAMPES, Manuel, "The illicit evidence: The Rule of evidentiary exclusion and its exceptions", op. cit, p. 143.

<sup>2</sup>JAUCHEN, E., "Treaty of evidence in criminal matters", Rubinzal-Culzoni Editores, Buenos Aires, 2002.

<sup>3</sup>PELLEGRINI, A., cited by, MIDÓN, M. Pruebas Illegal. Doctrinal and Jurisprudential Analysis, p 42.

<sup>4</sup>MIRANDA ESTRAMPES, Manuel, Concept of illegal evidence and its treatment in criminal proceedings, Editorial Ubijus, México, 2013, pp. 59-60

<sup>5</sup>V. SILVA MELERO, The procedural evidence, t I, Editorial Magazine of Private Law, Madrid, 1963, p.69.

<sup>6</sup>CALOCCA, Alex, A first approach to the topic of illegal evidence in Chile, Ius et Praxis (2), 1998.

<sup>7</sup>SAENZ ELIZONOD, María Antonieta, *Unlawful evidence in criminal proceedings*, Journal of Criminal Sciences, Number 6, p. 36

<sup>8</sup>MONTON REDONDO, A., The new means of proof and the possibility of their use in the process, Salamanca, 1977, p. 174

<sup>9</sup>DEVIS ECHANDIA, H., Theory of judicial evidence, T. I, Dike Law Library, Medellín, 1987, p. 539.

<sup>10</sup>SAENZ ELIZONOD, María Antonieta, op cit. p.36.

2.- When the doctrine and jurisprudence determine a proof as unlawful.

The wrongfulness of the evidence is of various degrees, as is the direct wrongfulness and the indirect wrongfulness.

A.- Direct unlawfulness is when the evidence is itself contrary to fundamental rights, which were violated during its production and obtaining.

B.- Indirect unlawfulness is when the evidence is not unlawful in itself, but it is when it is related to an act that is in violation of fundamental rights; that is, it is a reflex effect.<sup>11</sup>

Now, on the contrary, when the evidence can be considered as lawful ?, when it meets the parameters established by the various norms, which may be of different hierarchy within a legal system, such as lawfulness from a conventional source, constitutional lawfulness and legality of ordinary legality.

### **III. Constitutional, legal and jurisprudential basis of the illicit evidence.**

The constitutional basis of the declaration of a proof as illegal and therefore of its exclusion, is established in article 20, A), section IX of our Magna Carta, which literally says:

*Article 20. The criminal process will be accusatory and oral. It will be governed by the principles of advertising, contradiction, concentration, continuity and immediacy.*

*A. Of the general principles:*

*IX. Any evidence obtained in violation of fundamental rights will be void.*

This according to the constitutional reform of June 2008, from which it follows that the sanction that the investigating authority obtains proof of violation of fundamental rights is the absolute nullity of such means, as well as all evidence of it derived.

The Supreme Court of Justice of the Nation through the First Chamber in isolated thesis<sup>12</sup> maintains that all subjects are obliged to respect the fundamental rights of the person in all their actions, which includes the search and offering of evidence, so that the evidence obtained, directly or indirectly in violation of fundamental rights, will not provide any effect, equally affecting the evidence obtained by the public powers, as well as that obtained by an individual.

The First Chamber maintains that the ineffectiveness of the evidence affects not only evidence obtained directly, but also evidence acquired from or as a result of it, even though all constitutional requirements are met.

Likewise, the aforementioned First Chamber rules that the nullity of an illegal evidence is a guarantee of the accused throughout the process<sup>13</sup>, this based:

a.- Constitutional article 14 establishes, as a condition of validity of a criminal sentence, respect for the essential formalities of the procedure;

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<sup>11</sup>FONSECA LUJA, Roberto Carlos, "Illicit evidence: Exclusion rule and admissibility cases", UNAM Institute for Legal Research, p. 32.

<sup>12</sup>Registration Number: 161221, ILLICIT PROOF. THE EVIDENCE OBTAINED, DIRECTLY OR INDIRECTLY, VIOLATING FUNDAMENTAL RIGHTS, DO NOT HAVE ANY EFFECT, Instance: First Chamber, Type of Thesis: Isolated, Source: Judicial Weekly of the Federation and its Gazette, Volume XXXIV, August 201, Subject (s) : Constitutional, Thesis: 1a. CLXII / 201, Page: 226

<sup>13</sup>Registration number: 160509. ILLICIT PROOF. THE RIGHT TO A DUE PROCESS INCLUDES THE RIGHT NOT TO BE JUDGED FROM EVIDENCE OBTAINED IN THE MARGINS OF CONSTITUTIONAL AND LEGAL REQUIREMENTS. Epoch: Tenth Epoch, Instance: First Chamber, Type of Thesis: Jurisprudence, Source: Judicial Weekly of the Federation and its Gazette, Book III, December 2011, Volume 3, Subject (s): Constitutional, Thesis: 1a./J. 139/2011 (9a.), Page: 2057.

b.- The right of the judges to conduct themselves impartially; and

c.- The right to an adequate defense that assists all accused in accordance with article 20, section IX of the Mexican Constitution.

On the other hand, the aforementioned First Chamber of the Supreme Court of Justice in isolated Thesis,<sup>14</sup> mentions that the fundamental right of exclusion of illicit evidence within a process is implicitly contained in articles 14, 16, 17, and 20, section a, section IX, constitutional, in its text prior to the reform of June 18, 2008. In addition, there is no express definition or explicit rule regarding the fundamental right of exclusion from unlawful evidence, especially if the principle of legality.

In accordance with the foregoing, the National Code of Criminal Procedures in its articles 263<sup>15</sup>, 264<sup>16</sup> and 357<sup>17</sup>, from which it clearly follows that the evidence must be obtained, produced and reproduced lawfully, since in case they are obtained in violation of fundamental rights it will be null and void. Which brings various consequences according to the corresponding stage; for example, in the investigation stage, the proof is not admitted outright; at the hearing stage, it is not taken into consideration when passing judgment; In the intermediate stage, the proof is inadmissible.<sup>18</sup>

### **3.1. The various denominations of unlawful evidence**

In the United States of America: Exclusion rule

In Italy: Unusable.

In Spain: Inefficiency and nullity.

France: Nullity

In Germany: Prohibition of valuation or prohibition of use.

Portugal: Nullity

Colombia: Nullity and exclusion

In Brazil: Inadmissibility.

In Chile: Exclusion.

## **IV. Facts whose proof is expressly prohibited by law, irregular and / or illegal evidence and evidence obtained or practiced in violation of fundamental rights**

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<sup>14</sup>Registration Number: 2003885, ILLICIT PROOF. THE FUNDAMENTAL RIGHT OF ITS PROHIBITION OR EXCLUSION FROM THE PROCESS IS IMPLIEDLY CONTAINED IN ARTICLES 14, 16, 17, AND 20, SECTION A, SECTION IX, AND 102, SECTION A, SECOND PARAGRAPH, CONSTITUTIONAL, IN ITS TEXT PRIOR TO THE PUBLIC REFORM IN THE OFFICIAL JOURNAL OF THE FEDERATION ON JUNE 18, 2008. Period: Tenth Period, Instance: First Chamber, Type of Thesis: Isolated, Source: Federal Judicial Weekly and its Gazette, Book XXI, June 2013, Volume 1, Subject (s): Constitutional, Criminal, Thesis: 1st. CXCVC / 2013 (10a.), Page: 603.

<sup>15</sup>Article 263. Data and evidence must be lawfully obtained, produced and reproduced and must be admitted and vetted in the process in the terms established by this Code.

<sup>16</sup>Article 264. Any data or evidence obtained in violation of fundamental rights is considered illegal evidence, which will be grounds for exclusion or nullity. The parties will enforce the invalidity of the evidence at any stage of the process and the judge or court must rule on it.

<sup>17</sup>Article 357. Legality of the evidence The evidence will have no value if it has been obtained through acts that violate fundamental rights, or if it was not incorporated into the process in accordance with the provisions of this Code.

<sup>18</sup>REYES LOAEZA, Jahaziel, The adversarial accusatory system, Mexico, Editorial Porrúa, 2012, pp 21 and 22

The objective of the criminal process is the search for material and historical truth, and for that purpose the parties in the accusatory system can and should go in search of evidence, but the search for that truth cannot be neither arbitrary nor absolute because then justice would be dictated in violation of fundamental principles and guarantees that uphold the constitutional rule of law.<sup>19</sup>

The search for truth in the criminal process has a limit, which is the illicit evidence, this is the last frontier of the criminal process; the border that neither the judge nor the parties can cross.

The unlawful evidence or unlawful evidence refers to evidence obtained in violation of constitutional rights, or even legally guaranteed<sup>20</sup>; that is, it is one obtained or practiced in violation of any fundamental right of the accused or of third parties, recognized at the constitutional level in a country, either directly or by reference to international human rights treaties. For his part, the scholar Silva Melero, considers that the illicit evidence is one that threatens the dignity of people, that is, against human dignity.<sup>21</sup>

The teacher Manuel Miranda Estrampes maintains that the dignity of the person is "the key piece of the concept of illicit evidence: any means of evidence that attempts against it becomes illegal and, therefore, inadmissible"<sup>22</sup>.

For there to be legality in the evidence, it is required that the data and the evidentiary means have been obtained, produced and reproduced also by lawful means.

When it refers to illegal evidence, it must refer to the minimum standards of validity of the fundamental rights of the accused, so that the rules of illegal evidence are linked to the criminal procedural system of the country in which they are developed.

However, the illicit proof is not conceived as an autonomous fundamental right, but as a guarantee to assert the inherent rights of the human being. From this angle, an illicit evidence must not have procedural validity, and in fact, either party may denounce it, however, it will be the judge who will decide the pertinent thing regarding its admission, leaving the door open to the possible approach of a resource.

Devis Echandia says that the illicit proof are those that: "That are expressly or tacitly prohibited by law or attempt against the morals and good customs of the respective social environment or against the dignity and freedom of the human person or violate their fundamental rights that the Constitution and the law protect "<sup>23</sup>

Finally, in the illicit evidence, two fundamental aspects must be considered, consisting of the collective interest of society and the State in the repression of crime and, on the other, respect for the human dignity of the accused.

In the first aspect it refers to prohibited evidence and in the second to evidence obtained illegally.

#### **4.1. Evidence expressly prohibited by law or illegal evidence.**

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<sup>19</sup>There are three great paradigms in the legal and political history of the West: pre-modern rule of law; State of legal law and state of constitutional law, the latter is what interests us; The State of Constitutional Law elevates the Constitution from the programmatic level that it occupied in the State of Legal Law to the world of binding legal norms and, therefore, not only embraces the principle of primacy of the law, but complements it with the principle of the primacy of the Constitution over the law and, therefore, above all the legal system, with the consequent annulment of the law if it, as a whole or in some of its provisions, does not conform to the Constitutional norm.

<sup>20</sup>SENTÍS MELENDO, Santiago, *The Proof*, Editorial EJE, Buenos Aires, 1990.

<sup>21</sup>SILVA MELERO, V., *The Procedural Evidence*, TI, Editorial Magazine of Private Law, Madrid, 1963, p. 69.

<sup>22</sup>MIRANDA ESTRAMPES, Manuel; *The concept of illegal evidence and its treatment in criminal proceedings*, Editor José María Bosch. Barcelona. 1999, p. 18.

<sup>23</sup>DEVIS ECHEANDIA, Hernando *Theory of judicial evidence*, T. I, Dike Law Library, Medellín, 1987, p. 539.

All prohibited evidence is unlawful evidence, therefore the judge must not admit, practice or value as a means of evidence, since such a general prohibition may be for violation of a constitutional norm or legal norm.

The prohibited proofs are those that the positive ordering excludes in consideration of diverse values, but of importance for the social culture of a certain State and therefore they have established it in the superior or inferior norms of the State.<sup>24</sup>

It is a prohibition that expressly arises from the legal system, but it can also arise when it refers to conducts or acts that are prohibited against the preservation of the human species or coexistence with humanistic characteristics.<sup>25</sup>

In relation to the prohibited proofs, the scholar Miranda Estrampes mentions that they are when there is a prohibitive legal norm, so the proof is illegal when the law declares it inadmissible.<sup>26</sup>

On the other hand, Estrampes clarifies that the illicit evidence must be understood as the evidence obtained or practiced in violation of fundamental rights, and irregular evidence would be that obtained or practiced in violation of the procedural regulations that regulate the evidentiary procedure, but without affecting fundamental rights. <sup>27</sup> This conceptual appreciation is of great importance, since the rule of evidentiary exclusion and the recognition of its reflex efficacy must be exclusively predicated on the so-called illicit evidence, while irregular evidence would be subject to the regime of nullity of procedural acts, admitting , in certain cases, its correction or validation. <sup>28</sup>

The prohibited proofs are considered unacceptable means of evidence, therefore the process cannot benefit from them, since it would be to give probative value to the violation of human rights, the Constitution itself, morality and public order.

Master Estrampes uses the concept of "evidentiary prohibition"<sup>29</sup>, when it refers to the evidence expressly prohibited by law, limiting the cases in which it exists in a prohibitive nature, so the evidence is illegal in itself, since the law declares them inadmissible; distinguishing them between:

- a.- General legal prohibitions; and
- b.- Legal prohibitions of a singular nature.

#### **4.2. General legal prohibitions.**

The scholar Serra Domínguez, mentions that there is no general prohibition of a specific means of evidence in the legislation. <sup>30</sup>

For his part, Miranda Estrampes says that in the criminal process there are no generic prohibitions on certain means of evidence and that the only legal prohibitions are those of a singular nature.<sup>31</sup>

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<sup>24</sup>FUENTES RODRIGUEZ, Armando, The accusatory system and illicit evidence, Colombo Panamanian Institute of Procedural Law, 2008, p. 593.

<sup>25</sup>FUENTES RODRIGUEZ, Armando, The accusatory system and the illicit evidence, ..... op. cit.p. 593.

<sup>26</sup>MIRANDA ESTRAMPES, Manuel; The concept of illegal evidence and its treatment in criminal proceedings ..... op. cit.p. 31.

<sup>27</sup>MIRANDA ESTRAMPES, Manuel, The illegal evidence: The exclusion of evidence rule and its exceptions, Revista Catalana de Seguretat Publica. Barcelona. May 2010, p. 133.

<sup>28</sup>MIRANDA ESTRAMPES, Manuel. The unlawful proof ..., op. cit.,. p. 133

<sup>29</sup>MIRANDA ESTRAMPES, Manuel, Concept of illegal evidence and its treatment in criminal proceedings ..... op. cit. p. 80.

<sup>30</sup>SERRA DOMINGUEZ, M; Comments to the civil code and foral compilations, t XVI, vol. 2, directed by Manuel Albaladejo, Editorial Revista de Derecho Privado, Madrid, 1991, pp 95-96.

#### **4. 3. Singular legal prohibitions.**

Among the singular legal prohibitions, the following can be highlighted:

- 1.- Prohibitions that affect the matter under investigation or proof.
- 2.- Prohibitions that affect certain research methods to obtain evidence sources.<sup>32</sup>

The doctrine and the various laws, both national and international, do not accept statements under duress, prohibit in the interrogations of the accused, the use of indirect, impolite or suggestive questions, as well as the use of any kind of coercion or threat or counterclaims.

Therefore, it follows that the use of any means or procedure that tends to limit the freedom and / or spontaneity of the statement of the accused or accused is inadmissible.

The scholar Moreno Catena, says that the absolute prohibition of torture and inhuman or degrading treatment supposes the unlawfulness of all types of conduct or rules that imply or allow an action of this court by any state power.<sup>33</sup>

Quintano Ripolles, maintains that the interrogations coerced by force or deception cannot be taken into account when judging.<sup>34</sup>

For his part, Martin Pallin states that to carry out the interrogations of the people accused of a criminal act, they cannot use, even with the authorization of the person concerned, methods or techniques that may influence the self-determination of the person or that alter the ability to remember or assess the significance of the facts.<sup>35</sup>

The National Code of Criminal Procedures mentions in its articles 360, second paragraph, 361 and 362, that witnesses are exempt from testifying in relation to the facts in the investigation and during the procedure, in cases where criminal liability can be established. , guardians, conservators, wards, spouse, concubine or concubine, people who live permanently with the accused, relatives by blood relationship in an ascending or descending straight line up to the fourth degree and collaterally by consanguinity up to the second degree.

Therefore, the witness may not be compelled to testify, but there is nothing to prevent him from doing so voluntarily, in which case his statements may be assessed for evidentiary purposes.

Now, the problem is to determine what are the consequences that derive from a declaration imposed by the judge, or in those cases in which the witness is not judicially informed of said faculty, being the consequence that said testimony will not be valid and not It may be used as a means of evidence, and must be considered as illicit evidence.

#### **V. Irregular or defective proofs.**

The irregular or defective proof is the one in whose obtaining the ordinary legality has been infringed and has been practiced without the legally established formalities for obtaining and practicing the proof; that is, it does not comply with the provisions or the procedure provided by law.<sup>36</sup>

##### **5.1. Evidence obtained or practiced in violation of fundamental rights.**

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<sup>31</sup>MIRANDA ESTRAMPES, Manuel, Concept of illegal evidence and its treatment in criminal proceedings, op. cit. p. 81.

<sup>32</sup>PASTOR BORGONON, B, Efficiency in the process of the obtained illicit proofs, Justice, number II, 1986, p. 340.

<sup>33</sup>MORENO CATENA, V., Guarantee of fundamental rights in criminal investigation, Journal of the Judiciary, special number II, 1987, p. 134

<sup>34</sup>QUINTANO RIPOLLES, A., Problems of evidence in criminal proceedings, Legal journal of Catalonia, 1980, p. 248.

<sup>35</sup>MARTIN PALLIN, JA, Value of the irregularly obtained evidence in the criminal process, Judicial branch magazine, special issue VI, p. 92.

<sup>36</sup>MARTIN PALLIN, JA, Value of the irregularly obtained evidence in the criminal process, ... op. cit. p. 126

Professor Serra Domínguez distinguishes the following fundamental rights as evidence obtained or practiced in violation:

- a) Those proofs whose performance is illegal by itself; and
- b) Those proofs obtained illegally, but incorporated into the process in a lawful way.<sup>37</sup>

This category of illicit evidence includes, those proofs whose obtaining or production have been violated, some of the fundamental rights of the people enshrined in the Constitution, being called unconstitutional evidence.

The doctrine distinguishes according to whether they are absolute fundamental rights and relative or restrictive fundamental rights.<sup>38</sup>

Absolute fundamental rights are those that are not subject to any limitation or restriction, as in the case of the right to life and physical integrity, as established in article 22 of our Magna Carta, so any violation of the themselves is unconstitutional.

Relative or restrictive fundamental rights<sup>39</sup> are those susceptible to restriction or limitation, such as freedom of work, freedom of information, freedom of expression, printing and transit, for example, find public order and the rights of third parties as a limit, such as is clear from articles 5, 6, 7, and 11 of the Political Constitution of the United Mexican States.<sup>40</sup>

The violation of fundamental rights can take place not only at the time of obtaining the source of evidence, but also at the time of its incorporation and production in the process.

## **5.2. Evidence unlawfully obtained.**

The doctrine of the evaluation of the evidence includes legal and material elements, as well as exceptional circumstances in which the judge must carry out his primary function.<sup>41</sup>

It is important to draw attention to the validity of the evidence unlawfully obtained, regardless of whether the procedure for obtaining the evidence is constitutionally regulated, therefore the following clauses must be understood:

a.- The exclusion rule: It is the jurisprudential exclusionary rule supported by the Supreme Court of Justice of the United States of America, which mentions that the evidentiary materials obtained by the authorities through

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<sup>37</sup>SERRA DOMINGUEZ, M; Comments to the civil code and foral compilations ..... op. cit.pp. 99-100.

<sup>38</sup>MIRANDA ESTRAMPES, Manuel, Concept of illegal evidence and its treatment in criminal proceedingsop. cit.,p. 81

<sup>39</sup>Registration Number: 2002720, PREVIOUS CENSORSHIP. IT IS PROHIBITED BY THE AMERICAN CONVENTION ON HUMAN RIGHTS AS A RESTRICTION ON THE FUNDAMENTAL RIGHTS TO INFORMATION AND FREEDOM OF EXPRESSION, UNLESS THE EXCEPTION CONTAINED IN ITS ARTICLE 13, NUMBER 4, Period: Tenth Courts, Instance: Collegiate Courts of Circuit, Type of Thesis: Isolated, Source: Judicial Weekly of the Federation and its Gazette, Book XVII, February 2013, Volume 2, Subject (s): Constitutional, Thesis: I.4o.A.13 K, (10a .), Page: 1329.

<sup>40</sup>Registration Number: 2003269, FUNDAMENTAL RIGHTS. ITS INTERNAL AND EXTERNAL LIMITS. Epoch: Tenth Epoch, Instance: Collegiate Circuit Courts, Thesis Type: Isolated, Source: Judicial Weekly of the Federation and its Gazette Source: Judicial Weekly of the Federation and its Gazette, Book XIX, April 2013, Volume 3, Subject (s): Constitutional, Thesis: I.4o.A.17 K (10a.), Page: 2110.

<sup>41</sup>FUENTES RODRIGUEZ, Armando, The accusatory system and illicit evidence, op. cit....pp. 595-598.

criminal investigation actions that violate the Constitutional procedural rights recognized by the fourth, fifth, sixth and fourteenth amendments of the Constitution, may not be contributed or considered by the courts.<sup>42</sup>

The exclusionary rule applies primarily with respect to searches and confiscations that violate the Fourth Amendment of the American Constitution.

## **VI. Basis of the exclusion rule.**

In the analysis of the exclusion foundation, it can be done from two theoretical models, namely:<sup>43</sup>

### **6.1. North American model.**

The rules on the admissibility of evidence are determined by the conjunction of a double objective: the search for truth and the imposition of limits on the conduct of members of the police forces.<sup>44</sup>

This model is characterized by the deconstitutionalization of the exclusion rule, being this characteristic of the US criminal procedure system; its origin, the "exclusionary rule" appeared linked to the IV and V Amendments of the Constitution of the United States of America, which prohibit arbitrary searches and arrests without probable cause and involuntary self-incrimination, but over the years The US Federal Supreme Court established that its true and only basis was to dissuade the police forces from carrying out illegal investigations, this deterrent effect is enshrined in the judgments of the US vs. Calender<sup>45</sup> and US vs. Janis<sup>46</sup>. In this resolution, it declares that the purpose of the exclusion of illicit evidence is to avoid unlawful police conduct, in addition to the fact that the rule that excludes evidence obtained in violation of the IV Amendment, tends to guarantee the recognized rights in it through deterrence.

The exclusionary rule, sanctions the exclusion in court of the evidence obtained unconstitutionally, and consequently eliminating the incentive that such bodies may have to act outside the law.

Exclusionary rule is not properly a constitutional right of the individual who invokes it, since the main purpose is the protection of the interests of society.

The US Federal Supreme Court has ruled out the application of the exclusion rule when evidence is obtained by individuals (Burdeau vs. McDowell case)<sup>47</sup> or by foreign police officers outside the United States (US vs. Verdugo-Urquidez case)<sup>48</sup>, who did not apply the exclusionary rule when dealing with evidence obtained by the Mexican police in Mexico) or when the police had acted in good faith (good faith exception).<sup>49</sup>

### **6.2. European-continental model.**

This second model is characteristic of the European-continental system, it recognizes in the exclusion rule a component not only of ethical but constitutional origin.

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<sup>42</sup>FIDALGO GALALRDO, Carlos, *Illegal evidence in the criminal proceedings of the United States of America*, University of Seville, 200, p. 5.

<sup>43</sup>MIRANDA ESTRAMPES, Manuel; *Unlawful evidence: The exclusion of evidence rule and its exceptions*, op. cit., p. 133.

<sup>44</sup>MIJANGOS Y GONZALEZ, Javier; *The doctrine of exclusionary rule in the jurisprudence of the Supreme Court of the United States of America*; Magazine of the Federal Judicial Institute, number II, p.213.

<sup>45</sup>414 US 338, 1974

<sup>46</sup>428 US 433, 1976

<sup>47</sup>256 US, 465, 1921

<sup>48</sup>494 US 259, 1990

<sup>49</sup>MIRANDA ESTRAMPES, Manuel; *Illicit evidence: The exclusion of evidence rule and its exceptions* op. cit., pp 134-135

The very recognition of the rule of law is characterized by the functionalization of all public powers at the service of the guarantee of fundamental rights and their constitutional consecration, being the true foundation of the rule of exclusion of illegal evidence.<sup>50</sup>

For its part, the German Supreme Court elaborated the so-called theory of the legal environment that belongs to this model, exposing the treatise writer Roxin, that when prohibitions on the production of evidence are injured, the possibility of reviewing and evaluating the evidentiary results obtained, they depend on whether the injury essentially affects the appellant's area of rights or whether it is only of minor importance or of no importance to him.<sup>51</sup>

Likewise, the German Federal Constitutional Court elaborated the theory of the three circles or spheres in attention to the degree of affectation in the field of protection of the rights of the personality in relation to the dignity of the human person, both recognized in German law.<sup>52</sup>

In the first sphere of protection, it recognizes an essential sphere of legal protection of the private sphere that is immune to any interference by the public powers in the exercise of *ius puniendi*.

In the second sphere of protection, the admissibility of state interventions will depend on a balance, in compliance with the requirements derived from the principle of proportionality, between the right to privacy and the public interests that, in the field of *ius puniendi*, are the interests of a functional criminal justice administration.

In the third sphere, state interventions would be admitted unlimitedly as they did not exist, affecting the right to free development of the personality.

Now, with respect to the position of the Spanish Constitutional Court in relation to the factors to apply or not a prohibition of evidentiary valuation, it mentions the existence or not of intent or serious negligence in the violation of fundamental rights, establishing the doctrine called "The unlawful connection", which excludes both intentionality and gross negligence, and which places it in the sphere of error, against which deterrence needs cannot be considered indispensable from the perspective of the protection of the fundamental right to secrecy of communications .

In relation to the doctrine of the connection of illegality, the Spanish Constitutional Court has established exceptions in relation to the effectiveness of the illicit evidence and to the direct application of the exclusion rule itself, by maintaining that:

*"Ultimately, it is the need to protect fundamental rights that, on occasions, forces the denial of evidentiary efficacy to certain results when the means used to obtain them are constitutionally illegitimate."*<sup>53</sup>

For the Spanish Constitutional Court, it maintains that whenever there is evidence obtained in violation of fundamental rights, the procedural consequence will be the prohibition of admission and, of course, its assessment.

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<sup>50</sup>FERRAJOLI, Luigi; Right and reason. Theory of criminal guarantee, Editorial Trotta, Madrid, 2013, op. cit. ....p. 537.

<sup>51</sup>ROXIN, C. Criminal Procedure Law, Editors of the port, Buenos Aires, 2000, op. cit. ....p. 192-198.

<sup>52</sup>MIRANDA ESTRAMPES, Manuel; Unlawful evidence: The exclusion of evidence rule and its exceptions, op. cit. ....pp. 136-137.

<sup>53</sup>STC 49/1999.

On the part of our highest court,<sup>54</sup> maintains that due process consists in not being judged by means of evidence obtained outside the constitutional and procedural requirements; that is to say illicit, since being the objective of the process is the search for the truth, by means of an investigation that demonstrates the veracity or falsity of what is argued, therefore it is essential that these constitutional guidelines of due process are respected, translated into the subjective right to access the courts to effectively enforce it and obtain a resolution that resolves the issue debated, through the inclusion of lawful evidence to demonstrate the claim, respecting the rules of assessment of evidence, which once once the conditions and requirements established in the law have been satisfied, its evidentiary scope will be established,

Now, the prohibition of illicit evidence is duly established in the Political Constitution of the United Mexican States, since it prescribes in its article 20, Section A, section IX:

*"... IX. Any evidence obtained in violation of fundamental rights will be void, and ... "*

As well as the provisions of numeral 264 of the National Code of Criminal Procedures that considers any data or evidence obtained in violation of fundamental rights as illicit evidence and will therefore be grounds for exclusion; having to link with the various articles 97<sup>55</sup> and 101<sup>56</sup> of the mentioned national procedural legislation.

In addition to the above, the Supreme Court of Justice prescribes that demanding the nullity of the illicit evidence is a guarantee that assists the defendant in all proceedings, linked with unrestricted respect for due process, to be judged by an impartial judge, such as complement of an effective judicial protection and by virtue of which the adequate defense of the accused is protected.<sup>57</sup>

## **VII. Exceptions to the exclusion rule.**

On the other hand, it is worth mentioning that US jurisprudence has allowed the following exceptions to the exclusion rule, being the following:

a.- The exception of Good Faith: The good faith exception is introduced by the United States Supreme Court in the United States Versus Leon judgment, consisting in those cases in which a police officer has carried out a search and obtained evidence trusting the in good faith in the validity of a judicial authorization granted and

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<sup>54</sup>Registration number: 2008537, ILLICIT PROOF. IF IN THE SAME DILIGENCE TWO DIFFERENT PROBATION MEANS ARE MERGED THAT REQUIRE THE COMPLIANCE OF REQUIREMENTS PROVIDED FOR IN DIFFERENT ARTICLES FOR THEIR VALIDITY OF THE DUE PROCUREMENT AND, THEREFORE, IT IS LEGAL FOR THE ORIGINAL JURISDICTION OR EXCLUSION OF THAT, Epoch: Tenth Epoch, Instance: Collegiate Circuit Courts, Thesis Type: Isolated, Source: Gaceta del Semanario Judicial de la Federación, Book 15, February 2015, Volume (s): Constitutional, Thesis: IL.3o.P.41 P (10a.), Page: 2817.

<sup>55</sup>Article 97. General principle Any act carried out in violation of human rights will be null and void and cannot be rectified or validated, and its nullity must be declared ex officio by the court at the time of warning or at the request of the party at any time.

Acts performed in contravention of the formalities provided for in this Code may be declared null, unless the defect has been remedied or validated, in accordance with the provisions of this Chapter.

<sup>56</sup>Article 101. Declaration of nullity: "When it has been impossible to clean up or validate an act, at any time the court, at the request of the party, in a well-founded and motivated manner, must declare its nullity, indicating in its resolution the effects of the declaration of nullity, and must specify the acts to those who reach nullity for their relationship with the annulled act. The trial court may not declare the nullity of acts carried out in the stages prior to the trial, except for the exceptions provided for in this Code".

<sup>57</sup>Registration number: 160509, ILLICIT PROOF. THE RIGHT TO A DUE PROCESS INCLUDES THE RIGHT TO NOT BE JUDGED FROM EVIDENCE OBTAINED IN THE MARGIN OF CONSTITUTIONAL AND LEGAL REQUIREMENTS, Period: Tenth Epoch, Instance: First Chamber, Type of Thesis: Jurisprudence, Source: Federal Judicial Weekly and its Gazette, Book III, December 2011, Volume 3, Subject (s): Constitutional, Thesis: 1a./J. 139/2011 (9a.), Page: 2057.

which is subsequently declared null, this registration may not be considered as a violation of the Fourth amendment of the Federal Constitution, and therefore the exclusion rule does not apply.<sup>58</sup>

This exception is usually applied when:

- 1.- When the error was made by the judge;
- 2.- When the error was made by a court employee;
- 3.- When the police mistakenly believe that the information given to the judge issuing the search warrant was correct;
- 4.- When the police reasonably believe that the person who granted permission to carry out the search had the authority to give that consent; and
- 5.- When the police action is based on a law that is later declared unconstitutional.<sup>59</sup>

In the case of *León vs. US*<sup>60</sup>, in an event in which the police carried out a search based on a court order that they believed to be valid, but that a higher court later found that the Fourth Amendment had been violated because it had been issued without probable cause. Despite this, the Supreme Court allowed the presentation of the evidence obtained on the occasion of the search, considering that the police had acted in good faith, believing that their actions were covered by a legal injunction, and therefore could not update their exclusion, in said judgment, it is argued that when the police act in good faith, in the belief that their behavior complies with the legal system and does not violate any fundamental right, the exclusion of the evidence thus obtained lacks justification,

The exclusionary rule lacks deterrent efficacy in these cases. This exception has also been applied in an event in which the police action had been carried out under the protection of a law that was later declared unconstitutional (*Michigan vs. De Filippo case*)<sup>61</sup>.

The good faith exception works by neutralizing the application of the exclusion rule itself, protecting the use in the criminal process of evidence that was actually obtained in violation of fundamental rights. This is a true exception to the direct application of the exclusion rule itself.

b.- Exception to reflex efficiency: The American jurisprudence admitted some exceptions to the reflex efficacy of the illicit evidence, which have also been recognized in other laws and legal systems, as a manifestation of a phenomenon of progressive Americanization of the exclusion rule<sup>62</sup>. There are fundamentally three exceptions to reflex effectiveness formulated by North American jurisprudence, namely:

- 1.- The independent source doctrine exception: This exception is a consequence of the very delimitation of the scope of the exclusion rule, if the proof used does not have any connection with the initial illegal evidence, it is not fulfilled the efficiency recognition budget reflects.<sup>63</sup>

For some authors, this doctrine of independent evidence is not an exception to the evidence derived from the illicit evidence, but rather the negative facet of the illicit evidence, as the basic material presupposition for its

<sup>58</sup>MIRANDA ESTRAMPES, Manuel; *Unlawful evidence: The exclusion of evidence rule and its exceptions*, op. cit. ....p. 302.

<sup>59</sup>MIJANGOS Y GONZALEZ, Javier; *The doctrine of exclusionary rule in the jurisprudence of the Supreme Court of the United States of America*, op. cit. ....p. 218.

<sup>60</sup>468 US 897/1984.

<sup>61</sup>443 US 31/1979.

<sup>62</sup>MIRANDA ESTRAMPES, Manuel; *Unlawful evidence: The exclusion of evidence rule and its exceptions*, op. cit. ....p. 54.

<sup>63</sup>MIRANDA ESTRAMPES, Manuel; *Unlawful evidence: The exclusion of evidence rule and its exceptions*, op. cit. ....p. 64.

application, which consists of the existence of a relationship, does not exist causal between the original and the reflected evidence.<sup>64</sup>

In order to appreciate this exception, it is necessary for there to be a disconnection between the original illicit evidence and the derived evidence, therefore it does not operate as an exception to the recognition of reflex effects of the illicit evidence, but rather represents its negative facet by not meeting the basic material for its application, consisting of the existence of a causal relationship between the original and the derived evidence.

The problem arises when it is qualified as independent evidence to one that does not really have this character because it appears linked to an initial illicit evidentiary activity.

This exception was applied, in the case of *Segura vs. US*<sup>65</sup>, in connection with the investigation of a drug trafficking crime, where the police entered a home without a warrant, arresting the occupants and remaining at the scene for several hours until the warrant was obtained, it obtained based on existing data prior to illegal registration, so only those elements that had been found with the initial entry were excluded as evidence, while the discovery was admitted after executing the valid entry command.

In another precedent, *Bynum vs. United States*<sup>66</sup>, a suspect is arrested, who is fingerprinted, after the expert evidence, it is verified that these fingerprints coincided with those that had been taken in another place where a robbery had been perpetrated. However, this expert evidence was declared unlawful because it derived directly from the first evidence, and once the arrest had been declared illegal because it had been carried out without reasonable cause, the police subsequently presented a new expert fingerprint proof that, although it coincided with the Fingerprints found at the scene of the robbery were not connected to those collected after the illegal arrest, as they came from old fingerprints of the detainee that were in the police files.<sup>67</sup>

2.- The inevitable discovery exception: This exception is considered a modality of the inevitable discovery exception. Pursuant to said exception, evidence derived from another that is unlawful or unconstitutional could not be excluded, because the evidentiary result of the first could have inevitably been reached by the normal course of the investigation.<sup>68</sup>

This exception has been appreciated by the North American Supreme Court in the *Nix vs. Williams*<sup>69</sup>, in which during an illegal interrogation the defendant pleaded guilty to a murder and led the police to the place where the body had been buried.

The Court excluded the accused's illegal confession, but not the victim's body as a result of the illegal interrogation, since the latter would have inevitably been found a few hours after the unlawful interrogation, because the police were searching for the body in the same area where finally found.

The scholar Salas Calero maintains that this exception has been subject to critical numbers and has led to different results for its application in court.<sup>70</sup>

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<sup>64</sup>DELGADO DEL RINCON, Luis E, The rule of exclusion of illicit evidence, exceptions and effectiveness, University of Burgos, Spain, p. 13.

<sup>65</sup> 468 US 796, 1984.

<sup>66</sup> 107 US App. DC 109, 274 F.2d 767 (1960).

<sup>67</sup>DELGADO DEL RINCON, Luis E, The rule of exclusion of illegal evidence, exceptions and effectivenessop. cit.,p. 14.

<sup>68</sup>MIRANDA ESTRAMPES, Manuel; Illicit evidence: The exclusion of evidence rule and its exceptions, p. 144.

<sup>69</sup>467 US 431 (1984).

<sup>70</sup>SALAS CALERO, L., "Material and procedural aspects of the accusatory principle: Evidentiary problems, illicit evidence and socially relevant criminal proceedings. The Exclusion of Evidence Unlawfully Obtained in United States Procedural Law," in *Judicial Power Review*, number 66, 2002, p. 386.

But it is undeniably clear from the foregoing that the investigating body certifies that the evidence obtained as a result of a violation of human rights had been discovered by legitimate means and independently of the original wrongfulness.

For his part Velasco Núñez,<sup>71</sup> maintains that from the point of view of the presumption of innocence, this exception is difficult to admit, since it is only based on conjecture, in addition to the fact that the presumption of innocence can only be distorted on the basis of fully accredited data and obtained lawfully.

3.- The exception of the attenuated causal link.- This exception is considered as a modality of the independent source exception and was appreciated, for the first time, in the case of Wong Sun vs. US<sup>72</sup>

In the present exception the existence of the causal link between the illicit evidence and a derived evidence is admitted, but said link is attenuated in such a way that the derived evidence can be admitted and used in court.

For the North American Federal Supreme Court it has established various criteria that allow determining the attenuation of the causal relationship, being the following<sup>73</sup>:

- 1.- The time elapsed between the evidence obtained and the acquisition of the derived illicit evidence. In this case, the more time has passed, the trial court gives it less value.
- 2.- The events that have occurred between obtaining both proofs. The greater the number of actions carried out between the proofs, the greater the possibility that the derived proof will not be contaminated.
- 3.- Depending on the severity of the original violation. The more serious, the more difficult it is to accept the derived evidence before the court.
- 4.- The nature of the derived evidence, when the evidence is practiced with all the guarantees, there are greater possibilities that it will be admitted in court.

### **VIII. Case of the doctrine of the fruit of the poisoned tree.**

The theory of the poisoned fruit, maintains that all that evidence obtained by breaking the constitutional norm or human rights, even when by reflex or derived effect, will be illegitimate as well as the illegal evidence that originated it; that is to say, the initial illicit evidence affects not only itself but everything that derives indirectly.<sup>74</sup>

The original illegality would contaminate the derived evidence, even if it had been practiced without affecting human rights.

The doctrine of the fruit of the poisoned tree is the product of a legal metaphor used to describe the obtaining of evidence as a result of a previous illegal act, which was not adjusted to the formality of the procedure and therefore is inadmissible in court proceedings.

This theory has its origin in American jurisprudence, specifically in the precedent of the *Silverthorne Lumber Co. vs. United States* case of the year 1920, in which case the Supreme Court of Justice annulled the condemnatory resolution of the company that had been illegally raided and in *Where a documentary was*

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<sup>71</sup>VELASCO NUÑEZ, E., *Doctrine and limitations to the theory of the fruit of the poisoned tree in the illicit evidence*, in *General Law Review*, Spain, number 624, September, p. 164.

<sup>72</sup>371 US 471, 1963.

<sup>73</sup>FILDALGO GALLARDO, Carlos, *The exclusion rules of evidence unconstitutionally obtained from the United States of America*, *Courts of Justice*, number 5, p. 17.

<sup>74</sup>FUENTES RODRIGUEZ, Armando, *The accusatory system and illicit evidence...* op cit, p. 598.

obtained that was used in a lawsuit against the company, so the Court recognized the violation of the fourth amendment and decided that, as an illegal source in violation of a fundamental guarantee, it could not be used.<sup>75</sup>

As in the *Brown vs. Illinois* (422 US 590, 1975), in an event in which the accused was illegally detained, although he was informed of his right to remain silent pursuant to the provisions of Amendment V, it was considered that the exclusion also covered confessions made by the accused during his detention, since there was an evident connection between said arrest and subsequent confessions, without the fact that he was informed of his right to silence had sufficient virtuality to break said causal connection.

In a specific case in our nation, the obligation that the evidence provided during the trial will be only those that have been obtained legally, as provided for in articles 14, 17 and 20, section A, section IX, in relation to what is established in the first article of the Political Constitution of the United Mexican States.

The provision established by the Constitution, considered as a rule of exclusion, which proscribes that any evidence obtained in violation of fundamental rights is null, not only applies to everything that is the product of the illegal act of government agents, but also to what it is called secondary evidence, which is typically the "fruit of the poisoned tree."

The doctrine at hand establishes three exceptions where the secondary evidence will be admissible:<sup>76</sup>

1.- Si was discovered as a result of an independent source; being in the case that the analysis must be about the particular act that is alleged as illegal and the exact moment in which the secondary evidence was obtained, in order to determine if indeed this second one was the product of that poisoned tree; that is, the "independent source" assumption applies if the evidence that is alleged to be illegal was obtained based on legal action by government agents;

two.-If it had been inevitably discovered despite the illegal act; In the event that the evidence that is alleged to have been illegal was inevitably discovered despite the illegal act, it is pointed out that the analysis, unlike the previous assumption about the source, must focus on the circumstances of time and place in which it was obtained. the evidence, ruling out that the illegal act had been the only way to obtain the evidence that is alleged as inadmissible; and

3.- The attenuated link between the illegal act and the contaminated evidence; it is relative to the attenuated link between the illegal act and the contaminated evidence; that is to say, it is necessary to clarify that although the contaminated evidence originates by virtue of an illegal act, the analysis of this illegality must be about whether this act that originated the obtaining of the evidence or that relationship is so tenuous that it can be considered free from the effects of the illegal act.

Our Federal Courts, although they do not expressly refer to this theory of the poisoned tree fruit, if they take it into account as a general principle of law that reads as follows: "The main thing follows the accessory", which finds its foundation in Article 14, last paragraph of the Mexican Constitution.<sup>77</sup>

It is considered that if an act or diligence of the authority is flawed and therefore unconstitutional, all acts derived from it, or that are supported by it, or that are in some way conditioned by it, are equally unconstitutional for its origin, and the courts should not give them legal value, since otherwise vicious practices

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<sup>75</sup>251 US 385, 1920.

<sup>76</sup>CRUCES, Priscila, The doctrine of poisoned fruit in Mexico, Acedemia.edu, Mexico, 2015, pp. 304-309.

([http://www.academia.edu/7751155/\\_La\\_doctrina\\_del\\_fruto\\_del\\_%C3%A1rbol\\_envenenado\\_en\\_M%C3%A9xico](http://www.academia.edu/7751155/_La_doctrina_del_fruto_del_%C3%A1rbol_envenenado_en_M%C3%A9xico))

<sup>77</sup>Article 14.- "..... In civil law trials, the final sentence must be in accordance with the letter or the legal interpretation of the law, and in the absence of this, it will be based on the general principles of law.

would be encouraged, the fruits of which would be profitable by those who carry them out and, on the other hand, the courts would become participants in such irregular conduct, by granting such acts legal value.<sup>78</sup>

## IX. Conclusions

Evidence is the backbone of any process, with which the judge issues his sentence accompanied by the due motivation, which is a constitutional requirement and subject of the international treaties to which Mexico is a party.

But some evidence according to the law can be considered illegal, due to the way it is collected, they are the product of constitutional and human rights violations, therefore, the Court cannot be taken into consideration at the time of passing sentence.

But there are exceptions in which, despite the above, they can be taken into consideration, as in the cases of:

a.- The exception of Good Faith: Consistent in that the collector or police officer keeps a record and obtains evidence trusting it in good faith of the validity of a judicial order granted and that it is subsequently declared invalid, therefore the exclusion rules do not apply.

b.- Exception to reflex efficiency: Which is that the evidence used is not related to the initial illegal evidence.

c.- The exception to the unavoidable discovery: It consists in the fact that evidence derived from another that is unlawful or unconstitutional should not be excluded, because the evidentiary result of the first one could have inevitably been reached by the normal course of the investigation.

d.- The exception of the attenuated causal link. - This admits a relationship between illicit evidence and derived evidence, but with the result that derived evidence can be admitted and used in court.

Therefore, it is necessary that the parties to the process are duly trained in relation to legal argumentation, as well as in the different techniques of evidence processing, as well as the common and federal courts fully know the various doctrinal currents of licit evidence and illicit.

Not going unnoticed the importance of the application of the rules of sound criticism in the evaluation of the evidence that is decisive to duly comply with the obligation of the judges to motivate their decisions and with them not only fairer but also muted resolutions will be obtained to the true.

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