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La prueba ilícita: la razón de ser y el derecho de la Unión Europea*

Exclusionary rules of evidence: rationale and European Union Law

RICCARDO BIANCHI
Fiscalía de Milán. Investigador visitante en la Universidad de Valladolid
riccardo.bianchi@uva.es
ORCID: 0009-0004-8638-323X
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Resumen: Análisis, comparación y crítica son las bases de los estudios comparativos. Este trabajo, que se centra en las reglas de exclusión de pruebas, utiliza la comparación entre los sistemas italiano y español con tres objetivos: (a) entender la razón de ser de la exclusión; (b) aplicar las conclusiones al derecho de la Unión Europea para determinar si (b.1) exige la expulsión de ciertas pruebas o (b.2) obliga al juez nacional a no aplicar la regla; (c) y evaluar si los balances realizados por el juez son una solución adecuada en el contexto europeo.
Palabras clave: prueba ilícita; supremacía europea; derechos fundamentales; proporcionalidad

Abstract: Analysis, comparison, and critique are the actions that constitute comparative studies. This work, which focuses on exclusionary rules of evidence, employs legal comparison between the Italian and Spanish systems for three purposes: (a) to understand the rationale behind the exclusion of evidence from proceedings; (b) to apply the conclusions drawn to European law, to determine whether the latter (b.1) requires the exclusion of certain evidence or (b.2) conversely obliges the national judge to disregard the rule; (c) finally, to use the results of the comparison to assess whether judicial balancing is an appropriate solution, even within the European context.
Keywords: illegally obtained evidence; European supremacy; fundamental rights; proportionality

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INTRODUCTION

How are rights capable of being limited? The issue is the result of extensive doctrinal elaboration, and Article 52 of the Charter of Fundamental Rights of the European Union synthesizes its conclusions in relation to Union law.

Limitations require a legal provision, which must not infringe on the essential content of the right and must be necessary and aligned with objectives recognized by Union law or with the need to protect others' rights and freedoms. This must be in accordance with the principle of proportionality. Thus, requirements for restrictions are summarized as follows: legitimacy of the aim pursued, suitability of the measure to the aim, necessity as the absence of alternatives, and strict proportionality. The latter involves balancing conflicting interests to allocate victory and defeat between them in given circumstances (in circumstance X, interest Y prevails).

Having said that, the aim of this work is to employ comparative methodologies to identify the interest that exclusionary rules are intended to protect. The findings will serve to develop considerations related to European law.

1. RIGHTS VS. FACT-FINDING: THE LACK OF BALANCING. STC 114/1984

F. P. N. was peacefully talking on the phone, unaware that his interlocutor was recording the conversation. He should have been more cautious, as the recording ultimately cost him his job, due to professional shortcomings and breaches of loyalty to the company. He challenged the decision, but the judge in Alicante rejected his claims, as did the Supreme Court.

F. P. N. appealed to the Constitutional Court, presenting two claims: violation of Article 18.3 of the Spanish Constitution (secrecy of communications) and infringement of Article 24 (the right to a trial "*con todas las garantías*").

The judges' reasoning (STC 114/1984[1]) followed a labyrinthine path but let us try to figure it out: Article 10.1 of the Spanish Constitution establishes fundamental rights as "*inviolables*"; these include the rights enumerated in Section I, Chapter II, Title I of the Constitution. Article 24.2

[1] STS nº 114/1984 (29th November), nº proc. 167/1984. ECLI:ES:TC:1984:114.

mandates procedures "*con todas las garantías*" and any violation of these procedures would offend the principle of equality (Article 14 of the Constitution) between the parties. Consequently, if an action violates these rights, it is deemed invalid.[2]

Thus, where there is a violation of legality, it is necessary to determine whether this constitutes an infringement of a fundamental right. In fact, not every illegality compromises fundamental legal positions.

The ruling was groundbreaking, a leading case, and the following year it was codified into law: Article 11.1 LOPJ[3]. "Evidence obtained […] by violating fundamental rights or freedoms shall have no effect". But the law goes further: both evidence that is directly obtained by violating fundamental rights and evidence that is gathered indirectly are poisoned[4].

The Court balanced legality against the interest in establishing the facts. The goal was to discover the criterion according to which one prevails over the other when a rule is violated. The judges identified this criterion in fundamental rights.

a) When does fact-finding prevail over legality? When no fundamental right is violated. Evidence is irregular but may be used.

b) When does legality prevail over fact-finding? When a fundamental right is violated. Evidence is irregular and cannot be used.

The weighing that was conducted was not between rights and fact-finding. The statement "the violation of a fundamental right causes the non-usability of evidence" does not balance any rights; it instead sets an external limit to the establishment of the facts. It is this limit that ordinary

[2] The commentator clarified an important difference: the violation of a fundamental right makes the evidence *ilícita*; the use of such evidence in the proceedings infringes the right to a trial *con todas las garantías*. See González Montes, José Luis (2006), "La prueba ilícita", *Persona y Derecho*, 54, p. 368.

[3] Ley Orgánica del Poder Judicial (01/07/1985 nº 6).

[4] For a comprehensive summary on the subject of illegal evidence in Spain, see: Miranda Estrampes, Manuel (2003), "La regla de exclusión de la prueba ilícita: historia de su nacimiento y de su progresiva limitación", *Jueces Para la Democracia*, 43, pp. 53-66; furthermore: Planchadell Gargallo, Andrea (2020), "El largo y tortuoso camino de la prueba prohibida en nuestra jurisprudencia", in Asensio Mellado, José María and Alba Rosell Corbelle (eds.), *Derecho probatorio y otros estudios procesales: Libro homenaje a Vicente Gimeno Sendra*, Madrid, Ediciones Jurídicas Castillo de Luna, pp. 1645-1664.

judges will be called upon to verify: if it is met, then the evidentiary element will be excluded from the body of knowledge.

Balancing two interests means determining in which instances one prevails and when the other does. According to the Constitutional Court ruling 114/1984, there are no situations in which fundamental rights fall apart (when there is a violation of the rules): therefore, they were not balanced against anything.

The solution is not dissimilar to Italy's. Just as in Spain the violation of a fundamental right is grounds for the non-usability[5] of evidence, in Italy the violation of a "prohibition established by law" (Article 191 of the Code of Criminal Procedure) has the same effect[6]. In both cases, the system is rigid, with no room for the ordinary judge to assess which interest should prevail [7]. Unfortunately, verbal forms do not correspond to reality. Or rather, they did until jurisprudential interpretations betrayed the spirit of ruling 114/1984, despite being incorporated into law (Article 11.1 LOPJ).

What differs is the complexity of legal frameworks: the Italian one stands out for its greater detail and variety. It is more detailed because it outlines specific evidentiary prohibitions; it is more varied because there are prohibitions that protect not only constitutional rights but also other interests (for instance, the reliability of the evidentiary element[8]).

For example, flagrancy and escape justify a search initiated by law enforcement. Except for these cases, there is a prohibition on conducting searches. This is provided for in Article 352 of the Italian Code of Criminal Procedure.

By introducing the tool of search into the legal system and setting out its related regulations, the legislator has balanced rights and truth. Therefore, inviolability of the home will yield when it comes to searching

[5] To avoid confusion, I have preferred to use the term "usability" as the translation of the Italian "*utilizzabilità*", and not the more ambiguous "admissibility". In the negative form, the terms are "non-usability" and "*inutilizzabilità*".

[6] See two of the earliest and most important doctrinal writings on the subject: Galantini, Novella (1992), *L'inutilizzabilità della prova nel processo penale*, Padova, CEDAM; Nobili, Massimo (1991), "Divieti probatori e sanzioni", *Giustizia Penale,* 3, pp. 641-651.

[7] Tonini, Paolo and Carlotta Conti (2014), *Il diritto delle prove penali*, Milano, Giuffrè, p. 104.

[8] In Spain as well there are procedural rules that protect interests different from fundamental rights (for example, the prohibition of leading questions), but these are not attributable to the provisions of Article 11.1 LOPJ.

for the *corpus delicti* after flagrancy. The limitation on taking action out of these circumstances is designed to safeguard the individual's rights. But if we look solely at Article 352, we will be unaware of what happens to evidence gathered in breach of this regulation. *In rerum natura*, being illegal and unusable are not bound by any necessary connection. The prohibition protects rights, but ontologically nothing requires a prohibition to be linked to the non-usability of evidence. A legal norm is required: it is Article 191 of the Code of Criminal Procedure, when it comes to a general defect; it is the specific sanction, when it comes to a special defect (for example, Article 271 regarding wiretapping). So, did the legislator weigh rights against the establishment of the facts? No, when it imposes non-usability: here legality and truth were weighed, and this was done by using fundamental right as balancing criterion.

To summarize:

- Legislators establish rules (for searches, wiretaps, forced medical examinations) by balancing rights and the establishment of the fact.
- STC 114/1984 and the Italian Code introduced non-usability by balancing legality and truth.

At this point, a question naturally arises. Is it reasonable to always prioritize legality in the face of a fundamental right's violation?[9]

There are rules that protect fundamental rights. These disciplines impose boundaries: if violated, STC 114/1984 and the Italian Criminal Procedure Code exclude the results of the operations. Was it terribly difficult to respect them? There is nothing that prevents from verifying the fact, provided the rules are respected.

Confirmation is provided by STC 114/1984, which cited foreign jurisprudence effectively and without hesitation. The lesson is Italian and was found in the judgement of the Constitutional Court 34/1973[10]. In a significant passage, the Italian Court proclaimed a "need for legality […] (particularly when it comes to observing the Constitution)".

2. EXCEPTIONS TO EXCLUSIONARY RULES: AN OVERVIEW

[9] De La Oliva Santos, Andrés (2003), "Sobre la ineficacia de las pruebas ilícitamente obtenidas", *Tribunales de Justicia*, 8-9, pp. 91-108.
[10] FJ 3.

Spanish constitutional case law has reached conclusions that are far from the original proclamations: it will give relevance to good faith in the execution of the act, which seems more aligned with a deterrent logic (what matters is discouraging willful abuses by the authorities) rather than with the protection of rights. To sum up, the situations that determine the overcoming of the exclusionary rule are as follows[11].

a) the agents' good faith in obtaining the evidence (STC 22/2003[12]) or the private nature of the person obtaining it (STS 116/2017 and STC 97/2019[13]);

b) with regard to the fruit of the poisonous tree doctrine, the independence of evidence (if the second evidence does not depend on the invalid one, it will be considered valid), the inevitability of discovery (if the invalid act had not been carried out, the second piece of evidence would still have been obtained), the fragility of the link connecting evidence (if there is a long chain of procedural acts between the invalid evidence and the questionable one, it will be excessive to exclude the latter of the timeline), the random nature of discovery (for example, certain illegal wiretaps may reveal a crime different from the one for which they were authorized), and, generally, *la conexión de antijuridicidad* (which requires a balancing between fact-finding and the protection of rights, taking into account the circumstances of the specific case).

Exceptions to the rule cannot be studied analytically in this contribution, except for the subjective element in obtaining evidence.

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[11] See Planchadell Gargallo, Andrea (2014), *La prueba prohibida: evolución jurisprudencial: (comentario a las sentencias que marcan el camino)*, Cizur Menor (Navarra), Thomson Reuters-Aranzadi; Díaz Cabiale, José Antonio and Ricardo Martín Morales (2002), "La teoría de la conexión de antijuricidad", *Jueces Para la Democracia*, 43, pp. 39-49; Lozano Eiroa, Marta (2012), "Prueba prohibida y confesión: la excepción de la «conexión de antijuridicidad»", *Revista General de Derecho Procesal*, 28. Regarding the most recent exception: Carrillo del Teso, Ana (2020), "El diálogo judicial sobre las "listas Falciani": los diferentes criterios de su admisión como prueba", in Asensio Mellado, José María and Alba Rosell Corbelle (eds.), *Derecho probatorio y otros estudios procesales: Libro homenaje a Vicente Gimeno Sendra*, Madrid, Ediciones Jurídicas Castillo de Luna, pp. 419-434. To understand how Spanish case law has been inspired by U.S. law, see: Miranda Estrampes, Manuel (2019), *Prueba ilícita y regla de exclusión en el sistema estadounidense: crónica de una muerte anunciada*, Madrid, Marcial Pons; Alcaide González, José Manuel (2013), *La prueba ilícita penal: decadencia y extinción: jurisprudencia práctica comparada con EEUU*, Alhaurín el Grande (Málaga), Editorial Ley 57.

[12] STC nº 22/2003 (29th February), nº proc. 4400/1999. ECLI:ES:TC:2003:22.

[13] STC nº 97/2019 (16th July), nº proc. 1805/2017. ECLI:ES:TC:2019:97.

Indeed, this work aims at identifying the correct interest protected by the exclusion of evidence, in order to deduce relevant consequences for European law. To achieve this goal, it is important to examine the concept of good faith, and this analysis will be carried out in the following paragraph.

3. EXCLUSIONARY RULES' TELEOLOGY AND THE EUROPEAN COURT OF HUMAN RIGHTS

Good faith is the exception that STC 22/2003[14] created to the exclusion of evidence obtained directly from the violation of a fundamental right.

The court's conclusions ignored a significant fact: maintaining the rule of exclusion for illegal evidence entails certain corollaries that must be respected - among these ones, the violation of a right requires to be objective.[15]

Facing the choice between the use or exclusion of the evidentiary element, the judge responds by determining whether a fundamental right has been unduly violated, regardless of the actor's intent or fault. The subjective element is a matter for a future criminal trial against the violator: the dialectic between prosecution and defense will yield the correct answer. Conversely, introspective analysis is of no interest in the proceeding where the violation occurred, given that evidentiary purposes are indifferent to the good or bad faith of the procedural protagonist. What matters is whether a fundamental right (or a probative prohibition - Article 191 of the Italian Code) has been violated (STC 114/1984 and Article 11.1 LOPJ). Violating a legal right has an entirely objective significance, and even assuming a lack of intent or fault, the outcome would remain unchanged: once the offense has been established, it remains. How could good faith exclude the prejudice to the right?

Having established that good faith is incapable of miraculous pardons, the outcome leads us to an inquiry into the rationale behind non-usability. It is not the deterrent effect, a purpose that belongs to criminal sanctions and is thus unrelated to the exclusion of evidence. Indeed, deterrence does

[14] STC nº 22/2003 (29th February), nº proc. 4400/1999. ECLI:ES:TC:2003:22.

[15] Miranda Estrampes, Manuel (2010), "La prueba ilícita: la regla de exclusión probatoria y sus excepciones", *Revista Catalana de Seguretat Pública*, 22, p. 140. The author highlights the contradiction between STC 22/2003 and 114/1984.

not equate with the protection of legality, as penalizing violations of norms may have no deterrent effect whatsoever (as we have seen in cases of actions conducted without intent or fault). The non-usability is a pathology with physiological purposes: it protects a legality that safeguards rights and, in this way, ensures a fair trial[16]. Non-usability does not prevent; it repairs and protects[17].

In our Europe a need of fairness in trials prevails, enshrined by Article 6 of the European Convention: "everyone is entitled to a fair […] hearing". Prognostic oracles about deterrent effectiveness are insignificant to achieve fairness: if fundamental rights are unduly violated, it does not matter that the exclusion of evidence cannot serve preventive purposes (even if the police acted in good faith). Assuming that undue violation and injustice are synonyms, the former will not undergo metamorphosis due to the operators' good faith: the absence of preventive necessities is not Circe; it does not transform injustice into fairness.

Constitutions address this issue within national borders: Article 111 of the Italian Constitution requires a "fair trial regulated by law". Article 24 of the Spanish Constitution proclaims one "*con todas las garantías*".

Ergo, the sanction of non-usability is procedural rather than substantive; the primary object of protection is legality, and it is crucial to emphasize the value of such legality in safeguarding constitutional rights: a trial would not be fair if it considered evidence obtained in violation of norms that protect fundamental rights... regardless of what the majority of the European Court might think[18]. Indeed, much has been said about good

[16] The constitutional importance is emphasized by Asensio Mellado, José María (2013), "La exclusión de la prueba ilícita en la fase de instrucción como expresión de garantía de los derechos fundamentales", *Diario la Ley*, 8009, p. 2: the author consequently asserts the need for the illegality of evidence to be declared immediately. The doctrinal "dialogue" that this article has created is interesting. See: Gimeno Sendra, Vicente (2013), "La improcedencia de la exclusión de la prueba ilícita en la instrucción (contestación al artículo del Prof. Asencio)", *Diario la Ley*, 8021. The latter article challenges the previous thesis, according to which the *Juez de instrucción* is authorized to exclude invalid evidence. Specifically, the doctrinal work argues that the evaluation of evidence (a phase distinct from its collection) falls under the jurisdiction of the deciding judge.

[17] See Roca Martínez, José María, *Procesos y Prueba Prohibida*, Madrid, Dykinson, S.L., p. 140; Armenta Deu, Teresa (2020), "Prueba ilícita y regla de exclusión: perspectiva subjetiva", in Asensio Mellado, José María and Alba Rosell Corbelle (eds.), *Derecho probatorio y otros estudios procesales: Libro homenaje a Vicente Gimeno Sendra*, Madrid, Ediciones Jurídicas Castillo de Luna, pp. 119-120.

[18] Ölçer, Pinar (2013), "The European Court of Human Rights: The Fair Trial Analysis Under Article 6 of the European Convention of Human Rights", in Stephen Thaman (ed.),

faith, the deterrent effect, legality and rights; and in Strasbourg, certain resonances have inspired the dissenting opinions of Meyer, Pettiti, Spielmann, and Carrillo Salcedo (ruling *Schenk v. Switzerland*, 1988[19]). They objected to the notion that Article 6 of the European Convention does not mandate the exclusion of evidence obtained in violation of the guarantees required by the Convention. The majority, however, deduced it from three observations: that the Court's role is to review the fairness of the criminal proceedings as a whole, that the applicant had great opportunities for cross-examination, and that the improper recording was not the only piece of evidence supporting the conviction. Therefore, the adversarial principle was upheld in this case, but one must wonder how the Court made the entire justice of a trial depend on the dialectic regarding the evidence. How can a trial be fair when evidence that violates a fundamental right has been used?

The Court was less delicate in *Khan v. UK,* 2000[20], as it firmly declared the violation of Article 8 of the Convention: a State that intercepts communications without a legal basis breaks the Treaty. However, the fair trial required by Article 6 was deemed unaffected by the contradictions we observed in *Schenk*. Yet, even in this instance, we hear echoes of our discussions: Judge Loucaides dissented[21].

4. VIOLATION OF A FUNDAMENTAL RIGHT AND BREACH OF LEGALITY

In criminal proceedings, under what circumstances does a violation of a fundamental right occur? Despite expectations, the answer seems straightforward: when rules that aim at protecting constitutional rights are violated. In other words, there is a legality that guarantees rights and the breach originates from its violation. But what kind of legality? Constitutional alone? Or does it also include ordinary one?

Certain Spanish legal literature has put forward a rigid alternative: one or the other kind of legality. It argued that discourse on fundamental rights

Exclusionary Rules in Comparative Law, Dordrecht, Springer, pp. 371-399; with regard to more specific topics, see: Bachmaier Winter, Lorena (2013), "Transnational Criminal Proceedings, Witness Evidence and Confrontation: Lessons from the ECtHR's Case Law", *Utrecht Law Review*, 9, pp. 127-146.

[19] Case *Schenk v. Switzerland* (18/07/1988), ap. nº 10862/1984.

[20] Case *Khan v. UK* (12/05/2000), ap. nº 35394/1997.

[21] For subsequent developments in the case law of the ECHR, see the final paragraph (n°7).

is equivalent to discourse on the Constitution, thereby deducing the relevance of constitutional legality only[22]. The same applies to case law[23]. Other scholars have countered that evidence is affected by illegality due to the violation of any legal norm, but they have then limited the effects of Article 11.1 LOPJ to the violation of fundamental rights alone. The enigma persists. These dichotomies overlook the fact that law and Constitution do not exist in isolation from each other; rather, the former often implements the latter, so that a violation of the law will signify a violation of the Constitution.

Let us consider the concept in the words of the Italian Constitutional Court[24]: the limits imposed by the Code on wiretapping "constitute a legislative implementation" of Article 15 of the Constitution (secrecy of communications).

The difficulty lies in another issue, though: when is the law an implementation of the Fundamental Charter? Authoritative voices have suggested a decisive criterion: one should consider the "constitutional intensity" of the norm[25]. This approach is to be endorsed, but its utility is manifested only at an initial stage, as the "constitutional force" of a norm remains a vague concept; however, when we examine the norms, we can detect it in the manifestations of balancing.

The fact that acts limiting fundamental rights presuppose legitimizing norms has become a refrain in these pages; and it is another leitmotif that norms emerge as a product of a grocer's work: in the halls of legislative power, rights are weighed against repression, and the product is written in the texts of laws. The principles of suitability, necessity, and strict proportionality serve as tools in the creation of legal norms. When applied, these principles shape the norm, and these contributions will be the elements that are endowed with "constitutional intensity".

To illustrate this, we can consider some Italian examples. It is clear that searches may sometimes be ineffective. To evaluate this, both the

[22] For different opinions on the concept, see Miranda Estrampes, Manuel (2004), *El concepto de prueba ilícita y su tratamiento en el proceso penal*, Barcelona, Bosch, pp. 17-27.

[23] E.g. STS nº 1359/1995 (27th September), nº proc. 2801/1994, regarding a nighttime search.

[24] C. cost. 81/1993 (26th February). ECLI:IT:COST:1993:81.

[25] Díaz Cabiale, José Antonio and Ricardo Martín Morales (2001), *La garantía constitucional de la inadmisión de la prueba ilícitamente obtenida*, Madrid, Civitas, pp. 208-234.

general classification of the offense and the specific details of the investigation are important. Having realized this, the legislator carefully considered and determined that in order to conduct a search, there must be a "reasonable ground to believe" that a person, place, or computer system is hiding searched items or data (as outlined in Articles 247 of the Italian Code). If the reasonable ground is lacking, the act is neither useful nor necessary: we are talking about the product of suitability and necessity. The Code then assessed that in certain situations, it is advisable not to disturb the rest of the investigated (or accused) ones, and prohibits the commencement of the act before 7:00 a.m. and after 8:00 p.m. (Article 251.1); but it may be that an objective urgency exists for the investigators, and this alone is sufficient for the prohibition to disappear (Article 251.2). We are now discussing the products of proportionality in the strict sense. Furthermore, the prerequisite for this type of act is, in addition to legality, "jurisdictionality": therefore, a motivated order is required (Article 247.3).

Spanish case law, concerning nighttime searches, does not share these considerations[26].

5. EUROPEAN INTEREST AND NON-USABILITY: CONFORMITY

5. 1. European Union, rights, and exclusionary rules

The words of comparative law have led to a simple yet not obvious conclusion: the protection of legality, as the guardian of fundamental rights, is an undeniable necessity; in this context, criminal sanctions are insufficient, a deficiency that can only be addressed through procedural responses, identified in the non-usability of improperly obtained evidence. This is a simple result because the supporting arguments are straightforward; but it is not an obvious outcome, as it faces illiberal opponents.

Turning our gaze to the supranational sphere, however, the discussion becomes more complex. The European Union's legal system, initially born

[26] For example: STS 1359/1995 (cited above). Instead, in accordance with our arguments, see: Díaz Cabiale, José Antonio and Ricardo Martín Morales (2001), *La garantía constitucional de la inadmisión de la prueba ilícitamente obtenida*, Madrid, Civitas.

from a mercantilist dream but now committed to the protection of rights, claims an actual presence.

In 2000, the Parliament, the Council, and the Commission proclaimed a Charter of Fundamental Rights. Although it was born weak, serving only as an interpretative aid, there was a turning point in Lisbon, when Article 6 of the Treaty on European Union (TEU) endowed the Charter with the same legal value as the Treaties.

Limitations on rights are possible (Article 52 of the Charter), but they require a law that provides for them, pursues objectives approved by EU law or necessitated by the protection of others' rights, and strikes a proper balance between the competing values, all while respecting the essential content of the rights. Furthermore, the Charter exerts effects on Member States "only when they are implementing Union law" (Article 51 Charter).

The refinement of rights within the European legal order boasts a certain history, which is not to be recounted in these pages to recount; nor would a summary of their content, or even the significance of the subjective positions most related to criminal proceedings (presumption of innocence, privilege against self-incrimination, and so forth[27]), be of any utility here. Instead, our aim in this discussion on the Union is to explore the challenges that obstruct the establishment of exclusionary rules within European norms[28]. We will do so by analyzing recent developments.

Firstly, however, a brief preface is necessary. Article 82 (2) TFEU authorizes European rules that govern the mutual admissibility of evidence between Member States. To date, this provision remains merely theoretical. Its implementation is hindered by a resistance that is rooted in the heterogeneity of various national legal systems[29] (as we have already noted between Italian and German law), and by the effects of the principles

[27] For the content of the rights, see Balsamo, Antonio (2018), "The Content of Fundamental Rights", in Roberto Kostoris (ed.), *Handbook of European Criminal Procedure*, Cham, Switzerland, Springer, pp. 99-166.

[28] This article takes a general approach. For a more specific example, see: Bachmaier Winter, Lorena (2023), "Mutual Admissibility of Evidence and Electronic Evidence in the EU", *Eucrim*, 2, pp. 223-229.

[29] Vermeulen, Gert and Wendy De Bondt, Yasmin Van Damme (2010), *EU cross-border gathering and use of evidence in criminal matters. towards mutual recognition of investigative measures and free movement of evidence?*, IRCP-series, Maklu, pp. 121-140.

of subsidiarity (Article 5(3) TEU) and proportionality (Article 5(4) TEU), which govern the Union's actions.[30]

5. 2. *Prokuratuur*: the case

Thefts and acts of violence led to the conviction of H.K., handed down by an Estonian judge. The conviction was mostly based on data related to her electronic communications, which were obtained by the service provider under the authorization of the public prosecutor (as provided by the Estonian Code of Criminal Procedure). The objections brought before the Supreme Court were twofold: (1) that the obligation of data retention imposed on service providers (Article 111 of the Electronic Communications Act) violates Article 15, paragraph 1, of Directive 2002/58, as interpreted in light of Articles 7, 8, 11, and 52, paragraph 1, of the Charter; (2) that the same provisions are infringed by the use of such data in the reasoning for the conviction.

Several European norms, contained within Directive 2002/58, "concerning the protection of privacy and electronic communications", were crucial to the matter at hand. Let us summarize them. The States are obliged to prohibit the interception, storage, and other forms of surveillance of communications and traffic data, unless user consent is obtained (Article 5). Data must be erased or anonymized when no longer necessary for the transmission of a communication. Furthermore, the processing of such data is legitimate for billing, as long as payment can be claimed (Article 6). Article 15 allows legislative limitations on the rights and obligations contemplated by the directive, but under certain conditions: the measure must be necessary, appropriate, and proportionate within a democratic society that aims at prevention, investigation, detection, and prosecution of criminal offenses.

Article 15 is noteworthy because it encapsulates the importance of legislative balancing between the establishment of facts that are criminally relevant and fundamental freedoms. Balancing also means limiting invasive investigative strategies to serious crimes. Even the Estonian Supreme Court did not overlook this crucial point and therefore posed the

[30] Katalin, Ligeti and Balázs Garamvölgyi, Anna Ondrejová, Margarete von Galen (2020), "Admissibility of Evidence in Criminal Proceedings in the EU", *Eucrim,* 3, pp. 201-207.

preliminary question: whether the aforementioned Article 15 restricts access to telephone traffic data to only serious forms of crime.

This query can be rephrased in the language of non-usability: does the directive impose an evidentiary prohibition? To assert that evidence-gathering actions are only permissible against alarming crimes is to exclude them in other instances; it means forbidding, prohibiting, imposing a ban. In this rephrasing, the *Prokuratuur* case reveals its full relevance to our purposes: it allows us to test whether European law imposes rules on the use of evidence upon national legal systems.

The response requires an organized approach and it is useful to analyze the case by distinguishing two different concepts:

a) Evidentiary prohibition (or, more generally, evidentiary rule): it prohibits the use or the method (*an* or *quomodo*) of a certain means of evidence or evidence-gathering procedure. For example, Article 266 of the Italian Code of Criminal Procedure excludes wiretapping for crimes other than those specified.

b) Prohibition of use: it prohibits the evaluation of evidence. A paradigmatic and general example is Article 191 c.p.p., which establishes the non-usability of evidence obtained in violation of legal prohibitions.

Distinguishing between these two concepts is not mere theory but a bifurcation with significant practical consequences. To exclude a piece of evidence, the first prohibition is not enough; the second one is also required. The connection between the two is only contingent (it does not naturally exist), as it requires a legal norm to enforce it (such as the aforementioned Article 191). How does European law regard this distinction?

	EVENT	CONSEQUENCE
11.1 LOPJ	violation of a fundamental right	exclusion of evidence
191.1 CPP	violation of a prohibition established by law	
EU LAW	violation of European law (supremacy)	¿?

Tab. 1 Comparison's results and European law

5. 3. *Prokuratuur*: the arguments

Hungary and Poland asserted the need to respect national sovereignty, arguing that the admissibility of evidence is a domestic matter. However, as the Advocate General observed, the Estonian judge required guidance: in Estonia, the exclusion of evidence depends on compliance with procedural rules and prohibitions (a probative ban), and thus it was necessary to determine when the Union prohibits the acquisition of telephone traffic data in the absence of serious charges.

There are similarities with a previous case of the Court (CJEU *Ministerio Fiscal*, 2018[31]): accessing the civil identity of SIM cardholders does not constitute a serious intrusion into an individual's privacy and, therefore, Article 15 of Directive 2002/58 does not prohibit it. It would be prohibited if the investigative measure were intrusive, but in this case, it was not; these were the European judges' conclusions.

The Estonian Court presented a question that was not entirely new to the Court, which reasoned its judgement (CJEU *Prokuratuur,* 2021[32]) using points that had already been developed in prior cases (CJEU *Tele2 Sverige*, 2016[33]; CJEU *La Quadrature du Net*, 2020[34]).[35]

The judgement is analyzed below according to the proposed framework.

a) Probative Ban.

> Only action to combat serious crime and measures to prevent serious threats to public security are capable of justifying serious interference with the fundamental rights enshrined in Articles 7 and 8 of the Charter, such as the interference entailed by the retention of traffic and location data, whether the retention be general and indiscriminate or targeted.[36]

[31] Case *Ministerio Fiscal* (02/10/2018), C-207/16. ECLI:EU:C:2018:788.
[32] Case *Prokuratuur* (02/03/2021), C-746/18. ECLI:EU:C:2021:152.
[33] Case *Tele2 Sverige* (21/12/2016), C-203/15. ECLI:EU:C:2016:970.
[34] Case *La Quadrature du Net* (06/10/2020), C-511/18. ECLI:EU:C:2020:791.
[35] De Amicis, Gaetano (2021), "La Corte di Giustizia si pronuncia sull'acquisizione dei tabulati telefonici e sull'accesso ai dati delle comunicazioni elettroniche nel processo penale", *Cassazione penale*, 7-8, pp. 2556-2579.
[36] Para. 33.

Access to telephone traffic data reveals intimate aspects of life, such as habits, locations, and people. This leads to the prohibition: a national law that does not restrict the acquisition of such data to the investigation (and prevention as well) of serious crimes is contrary to Union law. If anaphora identifies significant repetitions, then the recurrent use of the word "serious" surely underscores the Court's central message: in the quoted passage alone, the word "serious" appears three times. There are two reasons for this conclusion: legislative proportionality (which requires legitimate objectives and measures that are necessary and proportionate to the objective) and the protection of private life.

To evaluate the seriousness of an investigative measure, what criteria should be applied? The Advocate General proposed considering the types of data examined and the duration of the measure, as long periods of time provide more data. However, the Court responded that even brief periods can offer substantial insights into a person's life.

Further, how should the seriousness of a crime be assessed? The Advocate General advised considering the severity of the penalty, the nature of the crime, the social harm, and the vulnerability of the victim.

It is the judge's task to evaluate the legitimacy of the measure. Given that the public prosecutor is an independent yet partial figure, a legal system that empowers the prosecutor to authorize access to data does not meet the impartiality and neutrality requirements stipulated by European law. The observation was apt, until the familiar judicial proportionality was interpolated:

> It is a requirement of such a review that the court [...] must be able to strike a fair balance between, on the one hand, the interests relating to the needs of the investigation in the context of combating crime and, on the other, the fundamental rights to privacy and protection of personal data of the persons whose data are concerned by the access.[37]

As we will explain in the final paragraph (n°7), in matters of evidence exclusionary rules, the assessment of proportionality should be carried out solely by the legislator, and not by the judge: it is a matter of appropriateness.

[37] Para. 52.

b) Prohibition of Use.

In the absence of European provisions, it is up to the States to establish prohibitions on the use of evidence, a conclusion derived by the Court from the principle of autonomy. The distinction between the two categories of prohibitions is made clear by the judges' words: the States are to set the rules for the evaluation of evidence, even when it is obtained "by general and indiscriminate retention of such data contrary to EU law". However, the protections of rights enshrined by the Union must not be less favorable than those provided for similar situations under national law (principle of equivalence). Additionally, the exercise of rights must not be rendered excessively burdensome (principle of effectiveness). Effectiveness is a valuable concept, as it could be a plausible tool for enforcing prohibitions on use. The Court did not fully embrace this, or did so only partially: while the right to contest evidence is preserved, Union law does not mandate the exclusion of evidence. Therefore, data obtained in violation of European law will only be *inutilizzabili* if the party has not been provided with opportunities to contest the evidence. This is a consequence derived from a strict interpretation of the right to a fair trial.

The European Court of Human Rights' words[38] resonate in the judgement like an echo.

5. 4. *Prokuratuur*: the implications for Italian Law

The previous version of Article 132 of D.lgs. 196/2003[39] was deemed by Italian judges to be compatible with Article 15 of Directive 2002/58. This provision granted the competence for acquiring telephone records to a motivated order of the public prosecutor[40]; there was no restriction to serious crimes. It has been noted that some European judgements anticipated the *Prokuratuur*'s proclamations, but in Italy the prevailing view bypassed them: it emphasized that the Italian prosecutor is an authority endowed with the necessary guarantees and that the assessment

[38] See § 4.
[39] D.lgs. 30/06/2023 nº 196.
[40] Tonini, Paolo and Carlotta Conti (2021), *Manuale di procedura penale*, Milano, Giuffrè, pp. 432-433.

of criminal severity can be made in concrete terms (i.e., the prosecutor can assess proportionality, creating a balancing act subject to judicial review)[41].

The CJEU's *Prokuratuur* ruling has definitively refuted these arguments, demanding a swift legislative response. This intervention was implemented on September with D.L. 132/2021[42], which amends the above-mentioned Article 132. Today, the provision is in line with the Court's requirements, also establishing that its violation results in the non-usability of the obtained evidence.

Meanwhile, uncertainties persisted regarding the fate of evidence acquired in violation of European law. Article 15 of Directive 2002/58 imposes a prohibition on the use of such evidence, as stated by the Court. In Italy, Article 191 Code of Criminal Procedure determines the consequences of violating prohibitions: the non-usability of data and its relevance at any stage of the proceedings; any corrective measures by the preliminary investigating judge are ineffective, as there is no provision for curing the defect. Case law quickly solved the issue by downgrading the decision to a measure with vague terms and no direct effects[43]. This is incorrect. If a CJEU ruling identifies an incompatibility between national and European law, there can be no indirect effect: the ruling is directed at the lower court but generates *erga omnes* and retroactive effects; any state authority, including judges, has the obligation to act to resolve the normative conflict[44].

5. 5. *EncroChat*

A drug trafficking network seemed to hover across European borders, catching the attention of multiple public prosecutors' offices. The Frankfurt office opted for a European Investigation Order (three, two of which were actually supplementary), aiming at obtaining data captured by a trojan infiltrated in encrypted conversations via the EncroChat system[45],

[41] For instance, Cass. 4873/2019 (ud. 25/09/2019).
[42] D.L. 30/09/2021 nº 132 (Article 1). The decree was converted by L. 23/11/2021 nº 178.
[43] Cass. 33116/2021 (ud. 02/07/2021).
[44] Adam, Roberto and Antonio Tizzano, *Manuale di diritto dell'Unione Europea*, Torino, Giappichelli, pp. 351-354.
[45] For an introduction to the topic, refer to: Peralta Gutiérrez, Alfonso and Francisco Javier Parra Iglesias (2021), "Incorporación de prueba penal obtenida en proceso judicial

with France as destination. The cooperation was successful, but the Berlin Regional Court did not overlook the lessons of *Prokuratuur*. A preliminary ruling was requested.

From this lesson, the Berlin Court concluded that (a) it is up to the judge to issue an EIO, (b) limiting it to the investigation of serious crimes supported by facts, and (c) verifying its legitimacy in light of national law, (d) the principle of equivalence, and (f) effectiveness. The investigation must focus on serious crimes, and the order must be based on facts, as required by the principles of proportionality and necessity set out in Article 6 of Directive 2014/41. Furthermore, the principle of equivalence dictates that data collected from an interception which is not ordered by a judge and for a crime which is not justifiable under German law are inadmissible. But the core of the objections lies in the effectiveness of Union law: in Berlin, the judge connected this to the prohibition of using evidence that contravenes European law (illegitimacy of the EIO).

The Advocate General of the Court of Justice responded negatively: the assessment of evidence is an issue outside the scope of the EIO Directive; since it is not covered, the Member States are responsible for regulating it. The Court agreed (CJEU *EncroChat,* 2024[46]), justifying it with the historical principle of autonomy (dating back to CJEU *Rewe-Zentralfinanz*, 1976[47]): establishing procedures for the protection of rights is a free operation for the States, in the absence of European rules; the Member States must only ensure a minimum level of effectiveness and equivalence. From these premises, the usual slogan followed, stating that the exclusion of evidence is inevitable only in the absence of a dialectic on evidence, a refrain to which the reasoning found a normative link: it is Article 14, paragraph 7, of the EIO Directive, which imposes a fair trial in the assessment of evidence.

6. EUROPEAN INTEREST AND NON-USABILITY: THE CONFLICT

extranjero: *casos EncroChat y Sky ECC*", *La Ley Penal*, 149; Rubio Moreno, Felipe (2021), "Caso EncroChat y la prueba resultante de las intervenciones masivas de comunicaciones encriptadas en procesos penales extranjeros", *La Ley Penal*, 153. For a critical analysis of the matter, consider: Oerlemans, Jan-Jaap and Dave van Toor, (2022), "Legal Aspects of the EncroChat Operation: A Human Rights Perspective", *European Journal of Crime, Criminal Law and Criminal Justice*, 30, pp. 309-328.

[46] Case *EncroChat* (30/04/2024), C-178/22. ECLI:EU:C:2024:372.

[47] Case *Rewe-Zentralfinanz* (16/12/1976), C-33/76. ECLI:EU:1976:188.

6. 1. European supremacy

The previous paragraph attempted to identify a European interest protected by the procedural sanction of non-usability. It failed to do so, despite the supranational legal order's protection of legality and rights. However, the relationship between prohibitions on the use of evidence and EU law is not limited to issues of compliance; it can also be examined in reverse: an inquiry into whether such prohibitions are contrary to the supremacy of that legal order.

Autonomous and integrated within national legal systems, the European supernova succeeds in asserting its effective existence, that is so vital that it does not require a national transformation of European laws, as if they were foreign (CJEU *Costa / Enel*, 1964[48]; this also applies to directives). In fact, they are not foreign; rather, they operate within the Member States without any inferiority complex, as it is impossible for national authorities to give priority to a domestic measure over European law. The consequence is the disapplication of any national rule that is not in conformity with the European standard, provided it is directly applicable (CJEU *Simmenthal*, 1978[49]). This concept applies to the fight against crime that harms the Union's financial interests, which Article 325(1) TFEU and Article 1 of the PFI Convention require to be effective[50]. Therefore, national statutes of limitations are inapplicable[51]. But what about prohibitions on the use of evidence, *mutatis mutandis*?

It seems that the answer depends on identifying the interests underlying non-usability, starting with distinguishing between the safeguarding of legality that protects rights and other more problematic cases, especially when such protected interest does not exist.

6. 2. Legality in the protection of rights

[48] Case *Costa / Enel* (15/07/1964), C-6/64. ECLI:EU:C:1964:66.
[49] Case *Simmenthal* (09/03/1978), C-106/77, ECLI:EU:C:1978:49. More recently: CJEU (24/6/2019), *Popławski*, C-573/17, ECLI:EU:C:2019:530.
[50] For example: CJEU *Euro Box Promotion and others* (21/12/2021), C-357/2019. ECLI:EU:C:2021:1034.
[51] Recently: CJEU *Lin* (24/07/2023), C-107/23. ECLI:EU:C:2023:606.

There is no question when the legality of the procedure serves to protect fundamental rights[52]. If the due process prescribed by law is not a European interest that is strong enough to impose exclusionary rules (as stated in the previous paragraph), it will at least be valid to exclude instances of antinomies between national and European law. Therefore, nothing prevents the operation of the prohibition on the use of evidence.

The Grand Chamber has written words that strongly suggest this direction: when a potential antinomy is hypothesized, it is necessary to verify whether the disapplication would be at odds with the protection of fundamental rights[53], which is also valid in criminal proceedings within the scope of European law, including investigations (Article 51 of the Charter)[54].

One case is particularly relevant to us, as it specifically concerns exclusionary rules of evidence. The co-defendants encountered an obstacle in their VAT obligations and did not pay them, steering a criminal organization towards tax evasion. They were intercepted illegally (by an incompetent judge who authorized it), but they could not have avoided conviction even without the intercepted elements, which are to be excluded according to the Bulgarian Code. But there was one exception: a defendant who was incriminated solely by inadmissible statements, but the Bulgarian judge saw in his potential acquittal a violation of the Union's financial interests. Therefore, he referred the preliminary questions.

No disapplication is required, as the Court ruled (CJEU *Dzivev and others*, 2019[55]). The Bulgarian exclusionary rule implements European principles of legality in legal proceedings, which Articles 52 of the Charter and 2 TEU (rule of law) mandate for the protection of fundamental rights enshrined by the EU. Since interception interferes with the right to private life (Article 7 Charter), it is subject to these requirements, without financial interests prevailing over a national prohibition on the use of evidence that reinforces them. Thus, the resulting evidence is entirely inadmissible, *tamquam non esset.*

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[52] For a summary on the importance of fundamental rights, see: Bachmaier Winter, Lorena (2018), "Fundamental Rights and Effectiveness in the European AFSJ", *Eucrim*, 1, pp. 56-63.

[53] CJEU *Lin* cit., para. 100.

[54] La Rocca, Nadia and Alfredo Gaito (2019), "Il controlimite della tutela dei diritti processuali dell'imputato: visioni evolutive dalle Corti europee tra legalità e prevedibilità", *Archivio penale*, 1 (web).

[55] Case *Dzivev and others* (17/01/2019), C-310/16. ECLI:EU:C:2019:30.

6. 3. Problematic hypotheses

Conclusions are valid when rules ensure constitutional freedoms; those just developed become insignificant due to normative sophisms lacking valid reasoning.

Some examples can be found within the Italian legal system. At the outset of an interrogation, the interviewee is warned about the fact that if they make statements regarding facts concerning another's liability, they will assume the role of a witness concerning those facts. If such a warning is not given, the Code prescribes the non-usability of the statements and the inadmissibility of the related testimony (Article 64.3-bis). One would need a map to trace the rationale (and reasonableness, Article 3 of the Constitution) behind the rule; what it might be, however, is not known[56]. Nevertheless, intellectual honesty admits the complexity of imagining that the accused could achieve impunity due to a violation of this rule, especially when the accusation concerns offenses against the Union's financial interests. However, it serves as an excellent theoretical example.

Conversely, it may happen that wiretaps play a decisive role, even in this type of proceeding (the Court of Justice addressed such a case not too many years ago: the already mentioned *Dzivev* judgement). Article 68 of the Italian Constitution requires the authorization of the Member's respective Chamber in order to intercept their communications. The legislator has leniently interpreted Article 68 and implemented it in a rather peculiar way: if the honorable Member happens to intervene in a conversation that is lawfully intercepted, it is up to the Chamber to decide whether the words may be used (Article 6, L. 140/2003). In this eccentricity, the Constitutional Court identifies profiles of unconstitutionality (ruling 390/2007[57]), but only with reference to statements that must be used against the non-honorable citizen. The aforementioned Article 6 regulates the fate of incidental eavesdropping, that is, interceptions of conversations in which the intervention of the parliamentarian occurs by sheer chance: the investigators could not have anticipated their involvement, as the third party being wiretapped was not part of the esteemed circle of the honorable member's usual contacts (had this individual been part of that group, prior authorization from the

[56] Cordero, Franco (2012), *Procedura penale*, Milano, Giuffrè, p. 659.
[57] C. cost. nº 390/2007 (ud. 19/11/2007; dep. 23/11/2007). ECLI:IT:COST:2007:390.

Chamber would have been required). Article 6 introduces a discipline that is foreign to Article 68 of the Constitution, which is devised to prevent the judiciary's persecutory intents against the democratic system, which are unimaginable when it comes to incidental interceptions: the investigators could not have foreseen that intervention. Moreover, the constitutional text sets conditions for "subjecting members of parliament to interceptions", which means laying a net around the channel through which someone communicates or receives; this latter scenario does not exist in the case of incidental eavesdropping: the net, constructed around a third party and not the parliamentarian, simply captures the latter's intrusions. Nevertheless, the cited ordinary regulation is concise: to use their words, authorization from the Chamber is required; if denied, the conversations would be excluded as evidence (*inutilizzabili*), but this outcome could conflict with the financial interests of the Union. Outside of Article 68 of the Constitution, parliamentarians do not enjoy any constitutionally privileged rights compared to ordinary citizens, and Article 6 of L. 140/2003 lies outside of it: it was partially upheld by the Constitutional Court, yet it could be in conflict with the European interests we discussed.

The Court of Justice has articulated more sensible words than those often circulating within the bastions of politics: ensuring the protection of the innocent and guaranteeing the fairness of the procedure are the missions of procedural rules; they are, however, unrelated to sophisticated tactics aimed at securing impunity. Specifically: "The Member States must also ensure that the rules of criminal procedure, laid down by national law, permit effective investigation and prosecution of offences linked to such conduct"[58]. In June 2018, the Grand Chamber declared the incompatibility of the Bulgarian procedural rules on case dismissal with the European legal order[59]: a loophole allowed offenders to evade justice, contrary to the protection of the Union's financial interests (in this case, the charges related to criminal activities involving customs duties). It is complex to determine the consequences of such conflicts when it concerns dismissals and investigation deadlines; it is simpler, however, in the case of the non-usability of evidence: the rule must be set aside.

[58] Case *Dzivev and others* (cited above), para. 29.
[59] Case *Kolev and others* (05/06/2018), C-612/15. ECLI:EU:C:2018:392.

7. THE DANGERS OF JUDICIAL BALANCING

7. 1. Appropriation: rights vs. fact-finding

The exclusion of evidence obtained in violation of a fundamental right has faced erosive attacks over the years. Among these attacks is the devotion to proportionality, which jurisprudence appropriates through interpretations that disregard the legislator's competence (and the Constitutional Court's role as the guardian of laws).

Highlighting the dangers that are hidden by judicial proportionality assessments, as opposed to those prescribed by law, is crucial for European law as well, where proportionality is a relevant concept (consider, for example, the proportionality concerning the use of evidence obtained through a European investigation order[60], or the admissibility of evidence with specific reference to EPPO proceedings[61]).

STC 136/2000[62] concluded a case stemming from a reckless chase through Madrid's streets, aimed at settling scores between drug dealers. It reaffirmed the necessity for a search authorization to be justified by presenting facts: Facts and proportionality are the components of justification; if they are lacking, the inviolability of the home is compromised. For the Court, arguing the proportionality of the measure being authorized by the authorities means addressing:

1. suitability, *id est* the measure's ability to achieve the intended goal;
2. necessity, *id est* the insufficiency of less intrusive means;
3. the balance between the sacrifice endured by the right and the expected benefit.

The requirement that suitability and necessity must be concretely established is nothing new when it comes to the balancing accepted by the Code. The legislative text has prescribed that rights can be limited only if (1.) the restriction is reasonable and (2.) it is unavoidable; this is stated abstractly, and it is a natural consequence that the existence of these requirements is concretely evaluated. When the judge assesses suitability and necessity, they do not ponder anything.

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[60] Daniele, Marcello and Ersilia Calvanese (2018), "Evidence gathering" in Roberto Kostoris (ed.), *Handbook of European Criminal Procedure*, Cham, Switzerland, Springer, p. 368.

[61] Brodowski, Dominik (2023), "Admissibility of Evidence in EPPO Proceedings", *New Journal of European Criminal Law*, 14, pp. 34-42.

[62] STC nº 136/2000 (29th May), nº proc. 77/1996.

The mystery lies in the third assertion, which seems to be a circumlocution for proportionality in the strict sense, but its manifestations should be found in the law, not in judicial assessments[63]. Codes should determine when a measure is disproportionate by imposing limits: for instance, conducting a search at four in the morning is disproportionate, and the law specifies this. Conversely, asking the judge to evaluate the "balance" is akin to handing them a scale, a tool for weighing interests. Balancing two interests involves determining the cases in which one prevails and those in which the other does, based on circumstances (for example, distinguishing between day and night, serious and minor offenses). If the judge identifies and weighs these circumstances, they are authorized to apply their own evaluation in addition to that of the law.

In Spain, this has been legitimized not only by case law[64] but also by a reform. A new design was introduced by *Ley Orgánica* 13/2015[65]. The reform has restored the arsenal of technological investigative measures: wiretapping; access to stored electronic data; searches of computer devices (including spyware); operations by undercover agents online; tracking devices; video surveillance. The new Chapter IV (Title VIII, Book II) introduces this fresh regulation with general provisions on the innovative means of evidence gathering, and Article 588-bis-a proclaims the guiding principles: among them, we find proportionality. Driven by interpretative assistance needs, the provision outlines the parameters within which it must be sought: it must exist between the sacrifice of the fundamental right and the competing public and/or third-party interests. What about the assessment? It is made by considering "all the circumstances of the case", with specific regard to public interest, including the gravity of the offense, its social impact, the technological scope, the intensity of the evidence, and the significance of the result pursued by the measure. We have thus identified the elements involved in discretionary decision-making.

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[63] The proportionality is recognized as an intermediate thesis by López Barja de Quiroga, Jacobo (2019), *Tratado de derecho procesal penal*. Cizur Menor (Navarra), Aranzadi-Thomson Reuters, pp. 1664-1665.

[64] For example, STC 175/1997 (27/10/1997) ECLI:ES:TC:1997:175, STC 200/1997 (24/11/1997) ECLI:ES:TC:1997:200, and STC 239/1999 (20/12/199) ECLI:ES:TC:1999:239.

[65] LO 05/10/2015 nº 13 (*modificación de la Ley de Enjuiciamiento Criminal para el fortalecimiento de las garantías procesales y la regulación de las medidas de investigación tecnológica*).

The principle *ubi lex voluit dixit, ubi noluit tacuit* cannot be applied to these principles, since they are well-established in legal practice for any investigative measure that restricts fundamental rights[66].

It is crucial to note that if a measure is disproportionate, it will lead to the exclusion of the obtained evidence.

In a chronological analysis, two phases of judicial balancing emerge: firstly, the initial balancing conducted by the authority imposing the restrictive measure (as previously discussed); secondly, the subsequent review by a different judge who evaluates the measure's validity.

In Italy, however, in matters of wiretapping, discretionary evaluations do not have room: for instance, Article 266 c.p.p. contains a list that authorizes wiretapping on the part of authorities, and the judge, who is called upon to authorize the measure, only needs to verify that the investigation pertains to one of those specified offenses.

The described scenario is ambiguous, but some Italian scholars have interpreted it as a victory for safeguard-oriented objectives. It has even been presented as a missed model for Italian law, which instead is rooted in rigidity[67]. Proportionality is a vague concept, more suitable for legislative discretion than to the judge's subjection to the law alone.

Moreover, it is an aggravating factor when the legislator advises vague and difficult-to-interpret criteria, which effectively amounts to setting no constraint at all: the true balancing will be up to the judge. Ley 13/2015 is an example [68]. Without meaningful constraints, it is easy for a judge to justify their balancing, a concept that is too imprecise to draw authentic

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[66] Bachmaier Winter, Lorena (2017), "Registro remoto de equipos informáticos y principio de proporcionalidad en la Ley Orgánica 13/2015", *Boletín del Ministerio de Justicia*, 2195, p. 15.

[67] Conti, Carlotta (2007), *Accertamento del fatto e inutilizzabilità nel processo penale*, Padova, CEDAM, pp. 422-433; Giabardo, Carlo Vittorio (2022), "Rilievi comparati sul fondamento morale della disciplina della prova illecita nel processo penale e civile", in Roca Martínez, José María (ed.), *Procesos y Prueba Prohibida*, Madrid, Dykinson, S.L., pp. 57-71; González Cuéllar Serrano, Nicolás (1990), *Proporcionalidad y derechos fundamentales en el proceso penal*, Madrid, Editorial Colex, p. 335.

[68] The vagueness of the requirements is highlighted by Gómez Colomer, Juan-Luis. (2020), "El aumento del intervencionismo público en la investigación del delito. Una reflexión al hilo del acto de investigación criminal de registro remoto de equipos informáticos (coloquialmente llamado del gusano informático)", in Asensio Mellado, José María and Alba Rosell Corbelle (eds.), *Derecho probatorio y otros estudios procesales: Libro homenaje a Vicente Gimeno Sendra*, Madrid, Ediciones Jurídicas Castillo de Luna, pp. 817-852.

limits. We must not forget that we are talking about evidence, and it is comparative law that proves the judges' greed for evidence (this article is dedicated to this).

In conclusion, it is advisable to leave balancing to the abstractness and generality of the law.

7. 2. Another undue appropriation: legality vs. fact-finding

The Pillars of Hercules are still on the horizon, as another hidden danger must be considered. It is an excessive confidence in balancing that has led Spanish judges to appropriate even the legality vs. fact-finding dichotomy: when a violation of a rule occurs, these two aspects are sometimes weighed against each other.

In Spain, the legality relevant to prohibited evidence is the one protecting fundamental rights, and it is the violation of this legality that leads to the non-usability of evidence. This second appropriation allows the judge to retain contaminated evidence if it is deemed a balanced outcome.

Thus, the risks to those rights that are safeguarded by the Constitution become clear.

Spanish voices have warned against the threat of German influence, which shows similar arbitrariness. In Germany, prohibition of evidence and its use are distinguished. There, in order to declare that evidence cannot be used, the judge balances legality with fact-finding, considering the severity of the crime, the merit of the protected interest, the significance of the violation, and the probative value of the evidence. This last criterion is particularly dangerous because it projects perilous scenarios for rights: it is logical that the more intensely constitutional rights are invaded, the more abundant and useful the results will be. Paradoxical examples can sometimes be illustrative: if we were to allow unrestricted wiretapping (disregarding legal norms), it would naturally yield useful evidence that the trial would eagerly use.

Moreover, this approach is difficult to reconcile with a criterion that accompanies it, namely the significance of the violation: it is like this because significant procedural violations can yield highly useful evidence.

It is from these inconsistencies that the governance of discretion takes shape[69].

Doctrinal alarms have proven futile, and STS 811/2012[70] has been seduced by German proportionality. The poisoned tree doctrine requires the interpreter to deem any evidence derived from invalid sources as tainted, and Article 11.1 LOPJ codifies this rule by addressing indirectly obtained evidence[71]. Before the Supreme Court, the defense argued that the preserved evidence should not have escaped the epidemic, complaining about a violation of the presumption of innocence and the right to a fair trial with all due guarantees. German proportionality came to the rescue, "*aplicada en el sistema procesal alemán, en el que ha de tenerse en cuenta la gravedad del hecho y el peso de la infracción probatoria*". The Court noted that the procedural violation was not among the worst ones, while the nature of the charge was severe, so Article 11.1 LOPJ can be disregarded[72].

We have developed these criticisms using comparative strategies, and they can also be applied to certain European rulings. Previously, we addressed some of the early decisions of the ECHR on exclusionary rules; in the subsequent case law of the Court, the choices have not been dissimilar, but only more complex. Overall, the lines of reasoning have aimed at determining whether (1) conventional rights have been violated and, if the answer is affirmative, whether (2) the use of evidence harms the fairness proclaimed by Article 6. The solution has been found in the balancing of interests[73]. Conventional legality gives way when (a) the dialectic regarding the evidence is respected, (b) the conviction provides a

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[69] The severity of the procedural violation demands a successful career, as it could be codified as a criterion for excluding tainted evidence (if the violation is not severe…): De La Oliva Santos, Andrés (2003), "Sobre la ineficacia de las pruebas ilícitamente obtenidas", *Tribunales de Justicia*, 8-9, p. 8. Codified or not, this parameter implies volatile assessments that should be excluded from criminal proceedings.

[70] STS nº 811/2012 (30th October), nº proc. 258/2012.

[71] López-Barajas Perea, Inmaculada (2009), "La eficacia refleja de la prueba prohibida", *Revista General de Derecho Procesal*, 19.

[72] FJ 14.

[73] See Rebollo Álvarez, José Luis (2022), "La prueba ilícita en la jurisprudencia del Tribunal europeo de derechos humanos: de Schenck a Cwik", in Roca Martínez, José María (ed.), *Procesos y Prueba Prohibida*, Madrid, Dykinson, S.L., pp. 45-56; Madrid Boquín, Christa (2017), "La prueba prohibida ante el Tribunal Europeo de Derechos Humanos: luces y sombras del caso Zherdev c. Ucraina", *Revista de Estudios Europeos*, Extra 1, pp. 78-93.

justification on this point, (c) there are additional incriminating pieces of evidence, (d) public interest is deemed paramount, (e) the procedural violation is not severe and (f) the probative value of the evidence is significant. Torture, however, escapes this weighing: at least in this case, no inconsistent evaluations are made.

CONCLUSIONS

The non-usability of evidence remains an underdeveloped subject in the supranational context. It is hindered by the principle of autonomy, that is reinforced by a surprising conception of criminal procedure that reduces fairness to the mere dialectic on evidence.

The obstacles are the manifestation of insurmountable differences between various legal systems. An excellent example is the rigidity of the Italian law as opposed to the flexibility of the German principle of proportionality, which Spanish law has moved closer to. However, the dangers inherent in judicial balancing have been highlighted, dangers that both national legal systems and European Union law should take into account.

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