The So-Called Refusal to Assess Evidence in the Scholarship and Case Law

La llamada valoración negativa de la prueba en la doctrina y la jurisprudencia

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Abstract

This paper analyzes the so-called refusal to assess evidence in the Chilean criminal process. For this purpose, the most relevant case law of the higher courts in favor and against this possibility is presented, while also explaining the doctrine's stance in this regard. In conclusion, the reader is provided with a position in favor of such refusal to assess evidence, understanding it as a mechanism to safeguard the effective protection of fundamental guarantees in obtaining evidence, beyond the exclusionary rule of evidence.

Keywords: *criminal process; probatory law; illicit evidence; evidence valoration*.

Resumen

El trabajo analiza la llamada valoración negativa de la prueba en el proceso penal chileno. Para ello, se presenta la jurisprudencia más relevante de los tribunales superiores tanto a favor como en contra de dicha posibilidad, exponiendo además la postura de la doctrina nacional. Como conclusión, se ofrece al lector una posición favorable a dicha valoración negativa, al entenderla como un mecanismo destinado a resguardar la efectiva protección las garantías fundamentales en la obtención de prueba, más allá de la regla de exclusión de prueba.

Palabras claves: *proceso penal; derecho probatorio; prueba ilícita; valoración de la prueba*.

INTRODUCTION

It is recurrent that the problems assailing legal theorists tend to have little or no practical application. The sophistication required for treating legal institutions adequately

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does not seek to restrict legal discussion to hypotheses relevant to public opinion; if so, the autonomy of the legal reasoning would be subject to external criteria of debatable legitimacy.

However, in other occasions, the relevance of certain problems dealt with by the doctrine reaches a considerable practical interest. In such moments, the plentiful case law that usually accompanies such discussions, usually reflects the different conflicting voices that this topic raises in the literature. How to deal with the illegal evidence in the Chilean criminal process, and specifically the role of the criminal trial courts in such discussion, is a good example of this.

In this regard, the reader will recall the well-known case "armas de San Antonio", which took place some time ago. The facts of the case, widely reported by the press at the time, originated from an identity check carried out on the occupants of a vehicle with all the windows tinted traveling through the district of El Tabo. When checking the occupants, and later, when searching the vehicle, the police personnel found inside the vehicle several firearms, abundant ammunition, cash and other items whose possession is legally prohibited.

In this regard, the legal discussion focused on the legality of the search of the vehicle in which the defendant was transporting the weapons and, consequently, on the legality of the evidence seized.

After discussing the admissibility of this evidence upon request for exclusion of evidence made by the defense at the preliminary hearing, the Court of Appeals of Valparaíso finally ratified the admissibility of the evidence, allowing it to be included in the decision opening the trial and consequently to be offered at the oral trial.

Notwithstanding this decision, the Oral Criminal Court of the city of San Antonio absolved the defendants. The basis for reaching this conclusion is summarized in the ninth recital of the decision, in which the court explicitly stated its opinion of "*refusing to assess the evidence presented at trial*." In this regard, the Court pointed out that the statements made on the stand by the police officer in charge of the procedure "*showed his attempt to justify a procedure outside the legal margins*."

In order to reach such a conclusion –as stated in the eleventh recital of the decision– the Court adduced "*doctrinal, textual and systematic reasons*." As justification for this, they continue, it is necessary to recognize that the fundamental rights established in Chilean law are protected, what imposes on the court –as a jurisdictional entity– a duty to not become an accomplice to a breach of these guarantees, such as the one that would have occurred when controlling the identity and subsequently arresting the defendants.

The government authorities expressed their concern with this decision. In this regard, the then government spokeswoman, Cecilia Pérez, pointed out that: "Chileans are weary of the Judicial Branch surprising everyone with some statements (SIC) and not doing what they have to do, which is to do justice. Or have Chileans forgotten the case in San Antonio of a

vehicle full of weapons, whose judge let the person go free because the evidence was not sufficient?".[1]

As expected, the acquittal was challenged for nullity, an appeal that was heard by the Court of Appeals of Valparaíso. In this regard, by means of a decision issued on August 6th, 2019, the Court of Appeals accepted the appeal filed by the Public Prosecutor's Office against the final decision previously issued by the Oral Criminal Court of San Antonio. The decision ordered a new oral trial to be held by a not involved court. In the substantive part of the decision, the Court of Valparaíso rejected that the court could refuse to assess the evidence that was previously admitted in the decision opening the trial.

The decision declaring the nullity did not prevent the defendants from being acquitted again in the second oral trial, with the trial court once again upholding the possibility of the Court of refusing to assess the illicit evidence.

The mentioned disparity of criteria between the Oral Criminal Court and the Court of Appeals of Valparaíso exposes the complexity of the issue and the different positions the literature and jurisprudence have thereon.

As will be explained throughout this article, the decision of the trial court judges, which was rejected by the respective Court of Appeals, is part of a controversial line of decisions which has been developed for more than a decade by the higher courts, seeking to solve the problems related to the unlawful origin of some pieces of evidence, which –nonetheless– are incorporated at the trial hearing.

Next, the position of Chilean doctrine in this regard will be presented, followed by an analysis of the decisions issued by the higher courts of justice that have resolved about the possibility of refusing to assess unlawfully obtained prosecution evidence. Finally, it is necessary to state the reasons allowing to reach a conclusion on the validity of the thesis described.

I. CONCEPT AND SCOPE OF THE SO-CALLED REFUSAL TO ASSESS EVIDENCE

First of all, we need to specify the content and scope of what case law has call refusal to assess evidence.[2]

In this regard, it is worth emphasizing an aspect that is somehow obvious: this concept is not envisaged in the current legislation, but it is, in principle (and at least regarding its name), a creation of the Chilean case law. Case law understands refusal to assess evidence as the activity of the trial court judge aimed at disregarding as evidence able to raise conviction in the court that which is produced in the oral trial and which source is related to breaches in the defendant's fundamental guarantees committed by criminal prosecutors. This refusal

[1] LA TERCERA (2019): https://www.latercera.com/nacional/noticia/vuelco-caso-armas-san-antonio-anulan-juicio-absolvio-imputados/771607/

[2] As has been argued, it is not entirely clear what the Court means when using the expression "refusing to assess the evidence". See ARISTEGUI (2020), p. 192.

to assess evidence is reflected in the final decision and must necessarily be substantiated, case by case.

In this sense, we must bear in mind an essential to the discussion: the refusal to assess evidence differs from the exclusion of evidence (exclusionary rule), both in its effects and in the procedural opportunity in which both institutions operate.

Thus, according to the provisions of article 276, paragraph 3 of the Code of Criminal Procedure (CPP by its Spanish acronym), the exclusion of evidence due to its illicit origin is a mechanism that operates in the preliminary hearing, whose effect –as we know– is to prevent an unlawfully obtained piece of evidence invoked by the prosecutor in his accusation, from reaching the knowledge of the Oral Criminal Court. In this regard, by excluding from the opening order the evidence contaminated by illicitness, any contact of the Oral Criminal Court with it is prevented, thus avoiding the contamination of the Oral Criminal Court.

On the contrary, the refusal to assess evidence does not operate at an intermediate stage but at the oral trial itself[3] and only if the evidence that was produced and challenged was previously admitted by the guarantee court judge or by the Court of Appeals, respectively. This way, and unlike what happens with the exclusionary rule, when the judge decides to negatively assess the challenged evidence, the trial court itself (who previously received and processed the challenged evidence) decides not to give weight to it in its final decision, disregarding it as a suitable means to create reasonable conviction. In this latter case, the Oral Criminal Court does not exclude evidence, but, afterwards on trial, this evidence is not assessed.

As will be discussed below, despite the *sui generis* denomination adopted by our courts, the refusal to assess evidence is closely related to the "prohibitions of assessing evidence", widely recognized by the doctrine and case law in German criminal procedural law, and which, as we have mentioned, are appropriate in Chilean law as a residual mechanism for protecting guarantees in criminal proceedings.

II. THE REFUSAL TO ASSESS EVIDENCE IN THE DOCTRINE

As expected, the discussion on the refusal to assess evidence in Chilean literature originates in the years after implementing the criminal procedure reform.

In fact, as we will see, the doctrinal discussion was not initially about the case law creation we analyzed here, but rather about a potential procedural sanction for evidence that was erroneously admitted in the preliminary hearing. Although it is possible to find positions that date back to the early years of the reform, stances seeking to address the problem from the case law perspective have emerged especially in recent years. In the following we will deal with them.

[3] Notwithstanding, it is possible to extend this institution to those decisions adopted by guarantee judges, either during the investigation stage or in special proceedings, and when they must rule on the basis of evidence unlawfully invoked. In this regard, see CORREA (2018), pp. 155 *et seq*.

2.1 The stance in favor of the refusal to assess evidence in the literature

In his monograph about the treatment of unlawful evidence, Hernandez[4] points out that it is improper for the Oral Criminal Court to assess elements of evidence that were obtained through violation of fundamental guarantees, and which were not excluded in the preliminary hearing.

According to the author, this conclusion is based on art. 276 CPP, a provision that goes beyond the role of excluding or not evidence, by enshrining a general prohibition on assessing evidence obtained in violation of fundamental guarantees. A rule that is applicable, consequently, to the oral trial.[5] In this way, the Oral Criminal Court –notwithstanding the fact that the Court cannot exclude evidence– it should not refrain from analyzing the lawfulness of the evidence offered before it, being possible for it not to assess evidence that was unlawfully obtained.[6]

In a similar vein, we decide in a recently published article[7] to recognize the possibility of the Oral Criminal Court of not assessing prosecution evidence that was unlawfully obtained. This situation allows us to recognize in our legal system an institution that is typical in German law: the existence of prohibitions on assessing evidence. This residual possibility is consistent with the duty of every court exercising jurisdiction in criminal matters not to assess evidence obtained in violation of guarantees. The omission of this duty would give rise to a new infringement of guarantees to the detriment of the defendant, this time by basing a jurisdictional decision on illicit evidence.

2.2. The stance against the refusal to assess evidence in the literature

In our country, one of the first voices against the possibility of the Oral Criminal Court of examining the lawfulness of the evidence when assessing it was Julián López.[8] In his renowned textbook, López argues that the Oral Criminal Court must assess all the evidence submitted at trial as to its merit to form a conviction, without exception.

To reach this conclusion, the author argues that questioning the lawfulness of the origin of the already submitted evidence means to put at risk the very structure of the system for the treatment of illicit evidence enshrined in the CPP, which grants this function exclusively to the guarantee judge in the preliminary hearing.[9] This would undermine the functions of said judge by ultimately placing the examination of the unlawfulness of evidence in the Oral Criminal Court.

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[4] HERNÁNDEZ (2002), pp. 89 *et seq*. and HERNÁNDEZ (2008), p. 60. In the same vein, DONOSO (2008), pp. 39 *et seq*.

[5] HERNÁNDEZ (2002), p. 90.

[6] HERNÁNDEZ (2002), p. 90.

[7] CORREA (2018), pp. 162 *et seq*.

[8] HORVITZ & LÓPEZ (2004), pp. 200 *et seq*. In this sense, see ECHEVERRÍA (2010), pp. 72 *et seq*.

[9] HORVITZ & LÓPEZ (2004), pp. 200 *et seq*.

In addition, the author resorts to a textual argument to support his position, pointing out that the law has not given the court such attribution, and thus that possibility would exceed the functions expressly granted by the law.[10] Finally, the author refers to the challenge mechanisms established in the CPP, which allow to solve errors made by the guarantee judge when deciding on the exclusionary rule. In this sense, López argues, the appeal for annulment [*recurso de nulidad*] is the *only* procedural mechanism allowing the defense to challenge such errors, in the event that the trial court had assessed the challenged evidence in its conviction.[11]

In a recently published article,[12] Jorge Cortés-Monroy has raised an interesting criticism of the notion and basis of the so-called "refusal to assess evidence."

In this regard, the author first argues that once the evidence has been admitted in the preliminary hearing, the Oral Criminal Court would be obliged –in accordance with article 297 CPP– to assess and consider in its final judgment all the evidence produced.

This author argues that the discussion on the exclusion of evidence raised in the intermediate stage of the trial would share the elements of *res judicata* with respect to the refusal to assess the evidence expressed in the final judgment. Thus, if a court decides to refuse to assess the evidence, he concludes, "it is in fact ruling on an issue that has already been decided by the guarantee judge."[13] Consequently, to question the lawfulness of the evidence by the trial court would be banned.[14]

Secondly, the author affirms, also on the basis of *res judicata*, and considering that the refusal to assess evidence shall have effects only once the decision opening the trial is a final decision, that such an activity would violate the content of an unchallengeable and irrevocable decision,[15] thus contravening the aforementioned limit.

Thirdly, the author resorts to the history of the CPP to argue that the legislator decided to limit the possibility of challenging the decision opening the trial exclusively to the filing of the appeal by the prosecution, thus not allowing the court –he concludes– to exclude evidence that has been admitted by the guarantee judge.

As a last argument, Cortés-Monroy argues (in a similar vein as López), based on the principle of legality that governs the courts, since the Oral Criminal Court is not empowered to exclude evidence obtained in violation of fundamental rights, this possibility would be forbidden in its regard, otherwise, it would be acting outside the scope of its competence.[16]

In an equally recent work, Juan Pablo Aristegui has shown his position against oral courts refusing to assess the evidence in the final decision. In support of his position, the author states, first of all, that once the refusal to assess the evidence has been carried out, the

[10] HORVITZ & LÓPEZ (2004), pp. 201 *et seq*.

[11] HORVITZ & LÓPEZ (2004), p. 203.

[12] CORTÉS-MONROY (2018), pp. 661-692.

[13] CORTÉS-MONROY (2018), pp. 684 *et seq*.

[14] CORTÉS-MONROY (2018), pp. 683 *et seq*.

[15] CORTÉS-MONROY (2018), pp. 685 *et seq*.

[16] CORTÉS-MONROY (2018), pp. 687 *et seq*.

trial court, whether deliberately or not, "will find it necessary to cover the real reasons for its decision with shadows and rationalize its justification." Thus, he continues, such a possibility would affect the justification of the court's decision on the facts.[17]

Thus, he concludes, since the trial court could not assess the questioned evidence, this would lead to justify "evidentiary inferences along the same line indicated by the evidence (that was subject to the refusal to assess), but with a lower degree of corroboration." Such exercise would be applied –he continues– to those set of facts that do not reach the degree of probability sufficient to consider the hypothesis proven.[18]

The foregoing would have a direct impact –he goes on to state– on the appeal for annulment. Since the court's assessment of evidence cannot be controlled by means of this appeal, the aforementioned "overvaluation" of the evidence would not be controllable by this means. As a consequence of the foregoing, to claim the infringement of guarantees will lack of the necessary substantiation, preventing the requirement of the necessary importance to make the nullity action admissible.[19]

III. THE REFUSAL TO ASSESS EVIDENCE IN THE SUPERIOR COURTS CASE LAW

The Supreme court, as well as the different Courts of Appeals in the country, have maintained different positions regarding the possibility of granting the evidence a refusal of assessment, most of them being in favor of such possibility. Both positions will be analyzed below.

3.1 Decisions accepting a refusal to assess evidence

One of the first opportunities in which the Supreme Court decided in favor of a refusal to assess evidence illegally obtained, corresponds to the decision Rol Nº 3.570-06, pronounced on September 20th, 2006,[20] a decision that in paragraphs 14 to 16 provides various grounds supporting the referred possibility.

Regarding the facts giving rise to this ruling, after carrying out an identity check in accordance with the provisions of article 85 of the CPP, and after verifying the identity of the defendant, the police searched the defendant's car without authorization and exceeding the scope of application of such identity check. From inside the car, the police obtained the drugs that later served as incriminating evidence against the defendant. This evidence, it should be noted, was not excluded at the preliminary hearing, as the Guarantee Court considered that it had been obtained in accordance with the law.

[17] ARISTEGUI (2020), p. 193.

[18] ARISTEGUI (2020), p. 193.

[19] ARISTEGUI (2020), p. 195.

[20] *Ministerio Público con P.R.C.E.* (2006).

Subsequently, the Oral Criminal Court decided to acquit the defendant accused of the crimes charged, considering –disagreeing with the guarantee judge– that the prosecution evidence was obtained without the police having the necessary authorization to do so.

In dismissing the appeal for annulment filed by the Public Prosecutor's Office against this decision, the highest court held that the possibility of subtracting evidentiary value in the final decision to the evidence provided and produced in the oral trial because of its unlawfulness of origin, refusing to assess evidence, allows to fully comply with the reasoning requirements of the final decision. In this regard, the ruling held that the "dismissal" due to unlawfulness is, in fact, an evidentiary assessment. Thus, it concludes:

> The merit or evidentiary assessment of the evidence was reduced, what (...) satisfies the requirements of substantiation of the decision and cannot be considered, as the appellant claims, an act of exclusion thereof, but on the contrary, is precisely the reasoned and logical intellectual process, which (...) has been made by the judges.

Finally, and consistent with the above, the Court rejects in its decision that when the Oral Criminal Court refuses to assess the evidence implies disregarding what was previously decided by the guarantee judge in the decision opening the trial (which, let us recall, refused to exclude the evidence questioned by the defense), since this decision:

> [Although] it establishes the means of evidence to be presented at the oral trial hearing, its assessment with a view to deciding the controversy is the exclusive faculty of the judges called by law to resolve it, that is, the Judges of the relevant Oral Trial Court.

In the following years, the Second Chamber of the Supreme Court repeatedly expressed itself in favor of the possibility of refusing to assess the evidence given at trial, whose obtention is linked to an act violating fundamental guarantees, paradigmatically an illegal detention.[21] However, such case law, beyond recognizing this possibility, did not elaborate on the reasons for reaching such a conclusion.

Almost a decade after the aforementioned decision, in case Rol Nº 23.683-2014, the Supreme Court provided new grounds for supporting the refusal to assess evidence by the Oral Criminal Court.[22]

Specifically, the highest court held on that occasion, that since the detention of the defendant has been declared illegal, the unlawfulness is linked to all the outcomes arising therefrom, which –the court argues– means "*extending the exclusion by refusal to assess evidence produced in the relevant hearing*." This conclusion allows to apply the Fruit of the Poisonous Tree Theory, refusing to assess every evidentiary element connected to an unlawful act.

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[21] See Supreme Court case *Ministerio Público con E.V.O.* (2015). In the same sense, the vote of Justice Muñoz and Justice Valderrama, contained in the Supreme Court decision case *Canales Espinoza contra Tribunal Oral en lo Penal de Iquique* (2018). In the same vein: *Ministerio Público con R.H.A.G.* (2019); *Ministerio Público con R.A.C.P.* (2016).

[22] *Ministerio Público con S.E.A.R. (2014).*

Likewise, the Court held on that occasion, that the assessment in the decision of the evidentiary background linked to an illegality, covered with illegality, implies:

> the materialization of the breach of constitutional guarantees of the defendant which ensure his right to due process, and that the decision pronounced by the court is the result of a rational and fair investigation and procedure, since this requirement implies that each authority acts within the limits of its own powers, as provided for in Articles 6 and 7 of the Political Constitution, which in this case clearly did not happen, a breach that can only be remedied declaring the nullity of the judgment and the preceding trial (...).

Subsequently, by decision Rol Nº 6.783-2017, dated April 17th, 2017, the Second Chamber of the highest court again expressed itself in favor of the possibility of making a refusal to assess the prosecution's evidence,[23] stating (Paragraph 5°) that such theory constitutes: "one more instance –additional to the first audience after the arrest procedure and the preliminary hearing– to discuss and prove the unlawfulness of the prosecution's evidence".

In the opinion of the Court, this has formed a uniform case law in this regard.

Although most of the decisions of superior courts on the issue that summons us have been pronounced by the Supreme Court hearing about the nullity provided for in article 373 letter a) of the CPP, in the decision pronounced in case Rol Nº 3.103-2017, the Court of Appeals of Santiago validated the possibility adopted by the trial court, refusing to assess the evidence obtained as a result of an illegal action,[24] pointing out:

> That (...) it is necessary to emphasize that all the grounds of the decision point to the unlawfulness of the police procedure, first, in relation to the alleged buyer of the drug, then to discard the hypothesis of flagrancy and finally to estimate that when entering and searching of the home of the defendants, the police [carabineros] exceeded their powers, acting illegally (sic). In this scenario, the challenged decision contains the grounds justifying not to assess the evidence, (...) and for this reason, since there is a logical reasoning for it, it is not reasonable to demand that the judges weigh what they discarded for having been obtained in violation of constitutional guarantees.

In a decision issued a few years ago, the Court of Appeals of Valparaíso in *Ministerio Público con B.C.E.* (2017), validated the possibility of the Oral Criminal Court to refuse to assess the prosecuting evidence illegally obtained. In this regard, it is reaffirmed the transversal validity of the fundamental guarantees in the criminal process, by holding that:

> the conviction established in article 340 of the Code of Criminal Procedure, must be achieved in accordance with the evidence produced and incorporated in accordance with the law, with unrestricted adherence to our legal system and always respectful of

[23] *Ministerio Público con D.V.C. (2017).*

[24] *Ministerio Público con J.A.R. y otra* (2017).

> the constitutionally recognized guarantees, with evidence obtained in line with said respect because only in this way is it possible to be certain that judicial decisions are not based on illicit means (...) to hold otherwise implies forcing the judge to assess and decide based on evidence that was knowingly created in violation of constitutional guarantees, which is unreasonable and deviates from the sense of justice.

Secondly, the appellate court ruled out the alleged impossibility of discussing again a matter already settled in the preliminary hearing, stressing that admitting and assessing evidence are two concepts that are distinguishable from each other:

> the Oral Criminal Court (...) must rule on the ineffectiveness of the unlawful evidence, even if that was already discussed before the Guarantee Court in the opportunity established in article 276 of the Code of Criminal Procedure, because although admissibility was discussed in that court, it is the task of the Oral Criminal Court to discuss the ineffectiveness of unlawful evidence as a problem of assessment, since there is where the evidential value of evidence arises.

Finally, in a recent decision (case Rol Nº 375-2019), the Court of Appeals of Valparaíso ruled in favor of refusing to assess those elements of illicit evidence erroneously admitted in the intermediate stage, recognizing that there is a real imperative addressed to the trial court judges in this regard.[25] Specifically, it held that when:

> verifying that unlawful evidence provided at the trial, the Criminal Court must refuse to assess it, being able to examine the existing evidence, under the principle of immediacy and contradictory evidence; it is not possible for the judges to form their conviction on the basis of evidence that they consider was obtained illegally. Article 276 of the Code of Criminal Procedure prevents judges from assessing positively evidence obtained in violation of the constitutional guarantees of the defendant.

Likewise, the referred Court of Appeals dismissed on that occasion one of the main objections raised by the doctrine to this theory, referring to the compatibility of the refusal to assess evidence with what was previously decided at the preliminary hearing. In this regard, the Court ruled out a *res judicata* effect, since the need to prevent a conviction from being based on a violation of guarantees was paramount:

> The circumstance that there has already been a previous decision on the matter by the guarantee judge is not an obstacle to decide the refusal to assess illicit evidence. Moreover, the Oral Criminal Court must disregard this evidence, since otherwise would lead to conclude that said court must rule in the awareness and knowledge of the violation of constitutional and procedural guarantees of the defendant. In view of this duty, it is impossible to conclude that a judgment of acquittal, under these conditions, violates the res judicata referred to in letter g) of article 342 of the Code of Criminal Procedure, since, as indicated above, in this respect said cause cannot be configured.

[25] *Ministerio Público con M.J.B. y otros* (2019).

3.2 Decisions rejecting the possibility of refusing to assess the evidence

On other occasions, the superior courts have ruled against the possibility of allowing the trial court to make a refusal to assess evidence obtained in violation of guarantees, previously admitted in the decision opening the trial. Thus, in case Rol No. 2.521-2008, the highest court held:[26]

> That (...) it seems necessary to emphasize that the oral court cannot exclude evidence if this was not done in the court of the preliminary stage, nor can it refrain to assess the evidence legally produced and incorporated in the oral trial hearing, as the defense seems to suggest, since the legislator orders to take charge of all the evidence produced, without prejudice, of course, that it can reject some of it indicating the reasons thereof.

Likewise, against accepting the refusal to assess evidence, if it was admitted preliminary hearing, the Court of Appeals of La Serena pointed out in decision Rol Nº 319-2012 that the Court:

> (...) does not agree with the statement made by defense that the oral court and this Court should refrain from assessing such evidence, since the evidence was accepted and incorporated into the trial, without any reproach, and should be analyzed and assessed like any other evidence added to the case file.

In another decision, the Court of Appeals of Santiago in *Ministerio Público con E.E.B* (2017), has understood that the effect generated by a refusal to assess evidence is similar to that of the evidentiary exclusion generated as a consequence of applying article 276 of the CPP, thus being improper. In the words of the court:

> This Court notes that the court a quo made what is called by the case law of our courts as 'refusal to assess the evidence', which in fact configures a form of unlawful exclusionary rule by the oral criminal court, under the pretext of avoiding its analysis because it considers that such evidence has been obtained in violation of constitutional guarantees (...).

Secondly, the Court of Santiago stated on that occasion that the assessment of the evidence in charge of the Oral Criminal Court does not allow for examining the origin of the evidence presented before that court. To this end, the court made several arguments which, given their relevance to the discussion, will be reproduced below:

> (The) assessment (of the evidence) constitutes an activity of the judge with the purpose of determining the degree of support or refutation that certain set of evidence gives to the legally relevant hypotheses, not including in such examination questions that could lead to establish that certain evidence was inappropriate. What is relevant to be assessed in relation to a piece of evidence is its degree of corroboration or refutation of the factual propositions. Therefore, when the court refuses to assess an evidence that it considers unlawful, it is not

[26] *Ministerio Público con F.A.R.S.* (2008).

> strictly speaking assessing an intrinsic characteristic of the evidence produced, but the means through which said evidence was obtained, which in this case is inappropriate, since articles 297 and 342 letter c) of the cited code would be breached (...).
> EIGHTH: The above statement does not imply that the judges called to assess evidence have an alleged duty to consciously rule based on the violation of constitutional guarantees. It is only that, considering how the system was designed, the Oral Criminal Court in Criminal Matters is the only one called to weigh or assess the evidence rendered in the oral trial and this is not only a prerogative, but an unavoidable duty.

Finally, in relation to the distribution of functions throughout the criminal process, the Court rejected on that occasion that the Oral Criminal Court could control the lawfulness of the evidence as to its origin, concluding that the court should refrain from conducting any analysis in this regard:

> "*The eventual contravention of fundamental guarantees when obtaining evidence is controlled by several mechanisms in the law, either when requesting for an exclusion, which can be submitted before the Guarantee Court, as provided for in Article 276, or before the Supreme Court when hearing the appeal for annulment under the aforementioned ground of letter a) of article 373, but it does not have this power of the Trial Court, which must limit itself to assessing it, whether one likes it or not, in the sense of granting it merit or not when proving the fact that it the evidence intends to prove. In other words, for the Oral Court it should be indifferent how the evidence was collected, not because this circumstance is indeed indifferent, but because this is not the task entrusted to the court by law, but a different one, referring to the decision about the persuasive force that the evidence has*."

The appellate court concludes, that the refusal to assess evidence is a "label fraud", inasmuch as such activity would conceal an exclusionary rule.

Finally, an important part of the doctrine's arguments to oppose to the refusal to assess evidence were recently taken up by the Court of Appeals of Valparaíso in decision Rol Nº 1.337-2019, *Ministerio Público con M.O.M.* (2019), referring to the aforementioned case "armas de San Antonio", when accepting the appeal for annulment filed by the Public Prosecutor's Office against the (first) acquittal sentence issued by the Oral Criminal Court of San Antonio.

In order to accept the appeal, the Court first held that *res judicata* would have operated regarding to the exclusionary rule; so the oral court could not rule on the already elucidated legality of the first hearing after an arrest procedure, the source of the alleged evidentiary illegality.[27] Therefore, the appellate court concluded, at the moment of refusing to assess part

[27] In his vote, Justice Droppelmann points out –dissenting from the majority vote– that in this case it is not possible to test the triple identity of *res judicata*, given that the discussion on the unlawfulness of the evidence submitted to the guarantee judge is different from assessing the evidence that the judges must carry out. Likewise, he affirms that the requirement of evidentiary reasoning used by the majority vote based on the provisions of articles 297 and 342 letter c) CPP is only applicable in the case that the facts of the accusation are considered proven; and not if these are not considered established, in which case, he continues, "the provisions

of the evidence offered by the prosecutor, the Oral Criminal Court would have disregarded what had been previously decided "going back to stages prior to the oral trial, without even such unlawfulness having emerged from the presentation of the evidence itself in the oral trial."

Finally, the Court held that the judges, far from making a refusal to assess the evidence, had omitted to evaluate it, which would be a breach of the requirements of article 297 CPP. The foregoing would constitute a lack of foundation in the reasoning used by the judges when acquitting the defendants.

Having described the position of the doctrine and the case law on the subject, it is now necessary to determine the suitability of the thesis analyzed here.

IV. RECOGNIZING THE FUNDAMENTAL GUARANTEES IN THE CHILEAN CRIMINAL PROCEDURE AND THE MECHANISMS PROTECTING THEM

As Roxin has argued, the criminal process is the seismograph of the Political Constitution of the State.[28] Precisely as a result of the intense prosecutorial activity carried out by the Public Prosecutor's Office against the defendant, the legal systems compatible with the rule of law have enshrined a series of mechanisms allowing –although not completely eliminating any affectation of fundamental guarantees– but to regulate the requirements justifying the state intervention aimed at clarifying conducts that constitutes crimes.

Already in the Message sent by the Executive to the Parliament at the time the draft Code of Criminal Procedure was introduced, the relevance that the legislator attaches to the protection of guarantees was emphasized, pointing out the importance of:

> Dealing with the criminal procedural reform in order to, through it, strengthen the guarantees. (This) constitutes (...) a task required by the principles of fundamental rights. The reform of the criminal procedure will, by the same token, mean a greater day-to-day enjoyment of human rights.

Specifically, for determining specifically those rights that may be affected in the framework of a criminal proceeding, it is relevant to highlight the regulation of article 19 of the Political Constitution, as well as that established in article 14 of the International Covenant on Civil and Political Rights[29] and article 8 of the American Convention on Human Rights.[30]

At the legal level, our legislature has enshrined a broad catalog of guarantees that all defendants enjoy, contained –basically– in articles 93 and 94 of the CPP. It is also relevant to recognize the quality of defendant from the first action of the procedure directed against him,

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of the second paragraph of article 297 must be applied which, lowering the legal requirements, only obliges to give the reasons for which the evidence was rejected, without requiring its assessment."

[28] ROXIN (2006), p. 10.

[29] Signed on December 16th, 1966 and ratified on February 10th, 1972.

[30] Signed on September 22nd, 1969 and ratified on August 21st, 1990.

in accordance with the provisions of article 7, paragraph 1 of the CPP, as well as the so-called scope of defense enshrined in article 8 of the CPP, which reinforces the right to legal assistance and intervention of said professional in the criminal procedure from its first action.

With regard to gathering evidentiary material, a central aspect of this work, those guarantees that are especially susceptible to being violated by the prosecuting authorities during the course of a criminal investigation are particularly relevant. Among these are the right to physical and psychological integrity (article 19 No. 1 CPR); the right to remain silent (article 8 g) ACHR); the right to inviolability of the home (article 19 No. 5 CPR); the right to inviolability of communications (article 19 No. 5 CPR); and the right to legal defense (article 19 No. 3 inc. 2 CPR, article 14.3 d) ICCPR, article 8 d) ACHR).

The effectiveness of the system of protection of fundamental guarantees established in our legislation includes not only the recognition of rights in favor of the defendant, but also requires –in order to be effective– to stablish preventive and repressive control mechanisms aimed at avoiding and punishing, respectively, any breach of the rules of evidence gathering by the police.

Preventive control mechanisms are established as concrete legal requirements for collecting and subsequently using evidentiary material within the framework of legality. If those requirements are breached, the evidence obtained will have a defect of origin. Consequently, when a violation of a rule of evidence gathering is found, the legal system considers various remedies aimed at sanctioning such violation. These repressive mechanisms include not only procedural tools, but also tools comprising criminal, civil and administrative sanctioning laws, which are generally aimed at the offending police officers.

An essential mechanism for safeguarding guarantees, of a preventive nature, is the clause of general protection of guarantees applicable to the process of production of evidence, enshrined in article 9, paragraph 1 of the CPP. By means of this rule, the prosecuting bodies are required to have the necessary prior judicial authorization as an unavoidable requirement to carry out any procedural action affecting the rights of the defendant. The possibility of affecting the defendant's guarantees by practicing multiple investigative proceedings that do not require the defendant's consent, makes it necessary to require such authorization as a necessary requirement to be carried out.

Likewise, in a system such as the one enshrined in the CPC, where the collection of evidence by the Public Prosecutor's Office with the help of the police must be carried out in accordance with the rules established by the current legal system, the legislator has established strict requirements regulating in detail the mechanisms by which such evidence may be legally obtained (fundamentally the rules of Title I of Book II of the CPC).

On the other hand, in order to ensure the respect and validity of the guarantees established in favor of the defendant in the face of their breach, the legislator has established different reactive mechanisms for controlling and sanctioning an illegality already committed, linked to the process of evidentiary production. Among these it is worth mentioning:

a. The guarantees' caution hearing [*cautela de garantías*], regulated in Article 10 CPP, aimed at reestablishing the defendant's guarantees, in case they are affected or there is a threat of affectation thereto.

b. Procedural nulity [*Nulidad procesal*], regulated in arts. 159 and following of the CPP.

c. The exclusionary rule due to unlawfulness, possibility recognized mainly in article 276, paragraph 3 of the CPP.

d. The appeal for annulment, established in arts. 372 *et seq.* of the CPP, especially the grounds for proceeding with the same established in arts. 373 a) and 374 b), c) and d) of the CPP.

The outlined normative framework demonstrates the enormous importance that the legislator has given to respecting fundamental guarantees in criminal proceedings. This importance reflects –as we shall see– that a transversal system for safeguarding the legality of evidence, which transcends a specific procedural opportunity is stablished.

V. MECHANISMS FOR CONTROLLING THE LAWFULNESS OF THE EVIDENCE ENSHRINED IN THE CPP

Unlike its predecessor, the CPP consecrated for the first time in our system an exclusionary rule of evidence in attention to the illicit origin thereof., namely, in article 276 inc. 3° CPP. We know that this rule plays its role *directly* in the intermediate stage or preparation of the oral trial, excluding those elements of evidence that were obtained by the prosecuting bodies with disregard for fundamental guarantees. The effect of applying this rule, whose detailed study exceeds the scope of this work, consists in the purification of the prosecution's evidence, preventing from including in the decision opening the trial what was illegally obtained, and thus, preventing it from reaching the trial court's knowledge.

Once this effect has been consummated by a final decision, it could be argued –in line with the doctrine and case law rejecting the refusal to assess evidence– that the work of the oral trial court regarding the treatment of illicit evidence is constrained by the prior decision of the guarantee judge pronounced in the preparatory hearing. Thus, any examination of the unlawfulness of evidence by the trial court would imply a hidden review of the previous decision. This argument is misleading.

In fact, although in the regulation of the Oral Trial the legislator (logically) has not established a rule equivalent to article 276 CPP, it has not completely deprived the trial court of the possibility of examining the legality of the evidence given before it.

The examination of the legality of the evidence in the oral trial hearing is a real possibility, contemplated by the legislator. However, this possibility can be classified as fragmentary, reducing its applicability to a couple of specific hypotheses.

In the first place, article 334, paragraph 2 of the CPP, a rule preventing the introduction of documents and records of the investigation into the oral trial, despite being in any of the hypotheses that exceptionally authorize their incorporation (articles 331 and 332 of the Code of Criminal Procedure), if said documents or records were obtained in violation of fundamental guarantees.

Secondly, article 336 CPP, which authorizes to admit at trial the so-called "evidence not requested in a timely manner", allowing the intervening parties to dispute the

authenticity, veracity and integrity of the new evidence offered, an aspect that can be linked to an examination of evidentiary legality based on its origin.

These rules demonstrate the legislator's intention not to prevent the Oral Criminal Court from coming into contact with contaminated evidence, which is impossible at this point, but rather to prevent illegally obtained evidentiary material from forming the basis of a conviction. The possibility in these cases of contamination of the Oral Criminal Court is tolerated by the legislator, in order to protect a higher interest.

VI. PROHIBITIONS OF ASSESSING EVIDENCE AS A RESIDUAL MECHANISM FOR CONTROLLING GUARANTEES IN THE AREA OF EVIDENCE GATHERING

As far as this work is concerned, the hypothesis of evidentiary exclusion, recognized in the second part of the third paragraph of article 276 CPP, shall be contrasted with the regulation of evidentiary unlawfulness established in different procedural stages. In this sense, it is important to bear in mind that the rule of evidentiary exclusion does not solve all the difficulties related to evidentiary unlawfulness arising throughout the criminal process, and there are numerous problems to which this rule provides no solution.[31]

Thus, our legislation does not establish –for example– how a court should act when facing unlawful evidence in the hearing of the abbreviate procedure [*procedimiento abreviado*], a mechanism that, as we know, does not contemplate a discussion stage on the unlawfulness of the evidence supporting the accusation. Thus, should the express acceptance of the background of the investigation that, in accordance with article 406 paragraph 2 of the Code of Criminal Procedure, should be understood as a waiver of the right to challenge the unlawfulness of the evidence in the hearing of article 411 of the Code of Criminal Procedure? Is it reasonable to deprive the trial court of the possibility of not basing a final decision on evidence that was unlawfully obtained?

Similar questions are repeated in the ordinary procedure: should the guarantee judge do nothing if illicit evidence is presented when resolving about, for example, a request for imposing a precautionary measure promoted after declaring the illegality of the detention, simply arguing that "it is not the procedural opportunity to discuss such matters"?

Regarding the oral trial, the problem referred to the treatment of those evidential elements erroneously included in the decision opening the trial, despite suffering from any of the causes of evidentiary exclusion contemplated in article 276 CPP,[32] or those situations in which the evidential illegality is revealed for the first time in the trial hearing is not expressly regulated by the legislator. In this regard: Should the Oral Criminal Court turn a deaf ear to the presence of manifestly unlawful evidence, arguing that such discussion is temporarily out of order?

[31] In this regard see CORREA (2018), pp. 155 *et seq*.

[32] See CERDA (2010), p. 148; HORVITZ & LÓPEZ (2004), p. 197.

Certainly not. Any court that must base a judicial decision on evidentiary elements is entitled to examine the origin thereof and, thus, the legality of the background supporting it. Thus, in the event that the court finds a violation of guarantees with regard to the obtention of evidence, it must necessarily refrain from assessing such evidence. For this purpose, it is not necessary to expressly invoke a rule of evidentiary exclusion, but it is sufficient to require the courts to subject their actions to respect for the rights and guarantees recognized by our legal system.

Indeed, as illustrated by the comparative experience that will be analyzed below, the non-existence of legal provisions regulating the treatment of unlawful evidence in general or in a specific procedural opportunity has not prevented the recognition of this theory in other legal systems. In these cases, the need to provide the court with an effective remedy that allows it to control the lawfulness of the means of evidence that will support a judgment is imposed –generally through case law– given the indifference of the legislator.

In this respect, and in the absence of a general regulation on the subject in the Criminal Procedure Ordinance of 1877, since the beginning of the last century[33] the doctrine and later the German case law has solved the problem referred to the illicit origin of the elements of evidence collected by the police, by means of recognizing the so-called evidentiary prohibitions, the most relevant of which corresponds to the prohibitions of evidence assessment, whose effect lies in preventing illicitly obtained means of evidence from being considered as elements of conviction by the judge in the definitive decision.[34]

In order to grant comprehensive protection to the Fundamental Guarantees throughout the criminal proceeding, the majority doctrine,[35] as well as the jurisprudence of the Federal Constitutional Court,[36] have held that evidentiary prohibitions may be declared by the court at any stage of the criminal proceeding.

Finally, it is the duty of the court, when recognizing a prohibition of assessment in a specific case, to explain in its decision the grounds for reaching such a conclusion, the same obligation that falls on the court with criminal jurisdiction in the Chilean system, when deciding to refuse to assess some means of evidence.

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[33] BELING (1903), *passim*.

[34] See CORREA (2018), pp. 146 *et seq*.; LÖWE-ROSENBERG (2016), Introduction Section L. Rdn. 7; JAHN (2008a), pp. C 1 – C 128, p. C 31; PITSCH (2009), p. 78; ROGALL (1999), p. 126; WOHLERS (2016), p. 434.

[35] DALLMEYER (2008), p. 78 *et seq*.; DENCKER (1994), p. 670; DENCKER (1977), pp. 53 and 75; EISENBERG (2015), marginal numbers 334, 356 and 635; HENGSTENBERG (2007), pp. 30 *et seq*.; MAUL & ESCHELBACH (1996), p. 69; PITSCH (2009), p. 83; ROGALL (2011), p. 536; ROGALL (1999), p. 130; ROGALL (1979), pp. 7 *et seq*.; SCHLOTHAUER (2002), pp. 761 *et seq*.; STÖRMER (1994), p. 625; STÖRMER (1992), pp. 241 and 394.

[36] See in this regard: BVerfGE 44, 353 (383, f.); 34, 238 (238, ff.); OLG Frankfurt, NStZ 1988, 425; JAHN (2008b), p. 282.

VII. PROHIBITIONS ON THE ASSESSMENT OF EVIDENCE AT THE ORAL TRIAL HEARING: THE SO-CALLED REFUSAL TO ASSESS EVIDENCE

As I have previously argued,[37] following a line of argument previously defined by Hernández,[38] the Oral Criminal Court should not assess those elements of evidence linked to an infringement of Fundamental Guarantees, regardless of what was previously decided in the intermediate stage.

In the event of depriving the court of the possibility of carrying out such an examination of evidentiary legality, the judge would be forced to consciously rule based on a violation of guarantees, an unacceptable matter in any legal system intending to effectively safeguard the guarantees.[39] In effect, allowing any assessment of a given piece of evidence at the trial stage, regardless of the lawfulness of its origin or production, under the formalistic pretext that the trial court is not empowered to examine the lawfulness of evidence already incorporated, would give rise to an internal incoherence of the system, generating a lack of protection of guarantees at the oral trial stage.

The aforementioned is reaffirmed by the case law of the Supreme court, court that in case Rol Nº 23.683-2014, held (Paragraph 9°) that:[40]

> (...) when the trial court judge assesses in the trial and in the decision that was pronounced the referred antecedents covered with illegality, it incurred in the breach of the constitutional Guarantees of the defendant that ensure his right to a due process and that the decision pronounced by the court is the result of a rational and fair investigation and procedure, since said requirement supposes that each authority acts within the limits of its own powers (...).

The very structure of the system of evidentiary unlawfulness of the CPP prevents the Oral Criminal Court from being empowered to exclude evidence erroneously admitted in the preliminary hearing, except for the exceptions mentioned above.[41]

Nevertheless, *exclusion and assessment* of evidence are two distinguishable concepts in terms of their effects and consequences. The preclusion referred to the exclusionary rule that affects the Oral Criminal Court does not prejudge the possibility of preventing the evaluation of certain evidence in the final judgment. This aspect, we understand, is included within the trial court's own prerogatives when assessing the evidence in the final judgment.

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[37] CORREA (2018), p. 164.

[38] In the same vein, DONOSO (2008), pp. 39 *et seq*.; HERNÁNDEZ (2002), p. 60, footnote No. 3; HERNÁNDEZ (2002), pp. 89 *et seq*.

[39] HERNÁNDEZ (2002), p. 90.

[40] *Ministerio Público con S.E.A.R.* (2014).

[41] As the Supreme Court has repeatedly held, evidence erroneously accepted at the preliminary oral hearing cannot be excluded, either *ex officio* or at the request of the parties, by the Oral Criminal Court. See *Ministerio Público con E.F.S. y otro* (2003); *M.A.G.M. con A.E.B.O.* (2005); *Chuica Lebien y Santana Barra* (2004); *Ministerio Público con R.A.V.I.* (2005); *Ministerio Público con F.A.R.S.* (2008); *Ministerio Público con M.G.B.* (2011). In the literature see DONOSO (2008), p. 39.

In this regard, it should be noted that the existence of prohibitions of evidence is not entirely alien to our procedural legislation, expressly recognizing its origin in the case of article 220 final paragraph CPP. This provision contemplates a set of objects and documents that cannot be seized in the framework of a criminal investigation. The final paragraph of this rule establishes the consequences derived from violating the aforementioned prohibition, stating that "[i]f at any time during the proceedings it is found that the objects and documents seized are among those included in this article, they may not be assessed as evidence in the relevant procedural stage."

As can be seen, the CPP has recognized in this hypothesis a procedural sanction other than the exclusion for cases in which evidence is obtained with breach of the provisions therein. In fact, if the legislator had wanted to assimilate the situation in which objects and documents are erroneously seized with the exclusionary rule, he would have made direct reference to the procedural opportunity in which such possibility is discussed, as established in article 132 final paragraph CPP, which expressly dissociates the declaration of illegality of the detention with the effect of *res judicata*, in relation to the requests for exclusionary rule that are made in a timely manner, in accordance with the provisions of article 276 CPP.

As in the case just described, the response to the problems of evidentiary unlawfulness generated outside the preliminary hearing can be resolved by means of the recognition of prohibitions of evidentiary assessment, a figure equivalent to the refusal to assess the evidence.

VIII. LEGAL GROUNDS FOR THE EVIDENTIARY PROHIBITION IN THE CHILEAN LAW

According to the thesis defended here, any court that must base a judicial decision on the assessment of evidence is entitled to examine its lawfulness. Thus, in the event that the court finds an illegality with regard to its procurement or production, it must necessarily refrain from assessing such evidence, even in absence of an express provision to that effect. There are several grounds for reaching this conclusion.

At the supra-legal level, the prohibition of assessment is based on the obligation of every State organ (established in article 6° inc. 1°, in relation to article 5° inc. 2° of the Political Constitution) to submit its actions to the protection of the Fundamental Rights established in the Constitution and the International Treaties, which is an imperative for the judge, enforceable in the presence of a breach of guarantees established throughout the procedure.

Thus, to allow the assessment of a certain piece of evidence in the oral trial, arguing that the flaw it suffers could be subsequently remedied by the higher courts hearing an appeal for annulment, would generate an internal incoherence of the system: it would violate the respect that the legislator has conferred to the aforementioned guarantees throughout the criminal process, forcing the court to knowingly rule using illicit evidence, with the consequent expense of resources that implies repeating the trial.

As previously outlined, the legal basis allowing our system to recognize prohibitions of assessment (*v.gr.*, to refuse to assess the evidence) on the elements of evidence incorporated

into the trial that can be traced to a violation of guarantees, is found in article 297 CPP, a provision forcing the court to take charge of all the evidence produced when assessing evidence. This obligation expressly includes evidence that is rejected, regardless of the reasons for it, thus paradigmatically including evidence that is refused to be assessed or whose results are unreliable. In all these cases, the court must indicate the reasons considered. Only by means of such substantiation will the requirement of article 342 letter c) of the CPP be fulfilled.

IX. ¿REPETITION OF A SETTLED DISCUSSION? NOT NECESSARILY

Detractor of the position defended here have argued that the discussion on the origin of the evidence in the oral trial would mean reviving an already resolved discussion, promoted in a previous stage of the proceeding. Although this observation does not attack the ultimate basis of recognizing prohibitions of assessment in the oral trial, must be contextualized.

In this regard, it is worth mentioning that in many cases the illicit origin of a certain piece of evidence will be unknown to the participants and the court at the preliminary hearing, since the discussion on exclusion promoted there is limited to the background information available at that time, which can be traced back to certain pieces of the investigation file. The possibility of presenting evidence to prove unlawfulness is not recognized (so far) by our legislator. Thus, it can be assumed that, on some occasions, it will be at the trial hearing, after examining and cross-examining witnesses, the defendant and experts, that the court will become aware of circumstances previously unknown and that could reveal a previously unknown unlawfulness of origin. The discussion on the origin of a piece of evidence, in this case, will be based on elements previously ignored and not presented in the preliminary hearing, thus overcoming the objections raised.

In this sense, the Court of Appeals of Valparaíso, held in the aforementioned judgment Rol Nº 1.920-2017, *Ministerio Público con B.C.E.* (2017), that:

> to hold an opposing position (to suppress any examination of evidentiary lawfulness in the oral trial) would imply that, if during the course of the oral trial there is information that evidence has been obtained in violation of constitutional guarantees, which could not be detected in the hearing before the judge, it could not be controlled by the judges of the instance as to its unlawfulness and ineffectiveness in the assessment (...).

Now, what should definitely be forbidden for the Oral Criminal Court is the possibility of recognizing an evidentiary prohibition based on the same background information previously submitted in the preliminary hearing and dismissed as support for an evidentiary exclusion. Such a situation is in fact similar to a covert appeal against the decision opening the trial; an unacceptable scenario within the scope of application of the thesis defended here.

Thus, the interpretation proposed here seeks to limit the examination of evidentiary lawfulness to the merits of the evidence submitted to avoid repeating a past discussion. The

foregoing, we emphasize, does not exempt the court from the possibility of finding and, consequently, sanctioning an evidentiary illegality.

X. REFUSAL TO ASSESS EVIDENCE AND EXCLUSIONARY RULE: ¿A "LABEL FRAUD"?

As previously stated, the main argument against the refusal to assess evidence is that this mechanism would be, in reality, a disguised evidentiary exclusion. In other words, it would be a label fraud aimed at altering the decision adopted by the guarantee judge in the preliminary hearing. This argument is incorrect.

In this regard, it should be borne in mind that our system clearly differentiates between *exclusion* and *assessment*, as two different procedural mechanisms, whose effects and consequences, although they share common elements, cannot be automatically equated.

First, the exclusion of evidence is a tool for suppressing pieces of evidence, whose effects affect directly the oral trial hearing, when the evidence already excluded by a final decision cannot be presented at the trial. Therefore, the Oral Criminal Court will have no contact with the evidence previously excluded.

The legal consequence of accepting any of the hypotheses regulated in art. 276 of the CPP is –in all cases– the same: the exclusion of such evidence from the decision opening the trial (art. 277 e) CPP), preventing the inclusion of such evidence at the oral trial hearing. Thus, as recognized by the case law,[42] art. 276 CPP acts as a rule of evidentiary admissibility, which regulates the incorporation of evidence in later stages of the proceedings. This rule says nothing about the assessment of the evidence admitted, much less about how to treat the evidence not controlled in the preliminary hearing, an aspect on which –as already mentioned– the court has expressly granted powers to control the evidentiary legality.

The aforementioned difference becomes evident precisely in one of the arguments given by Aristegui against recognizing a refusal to assess evidence: the contamination of the court is an effect caused by recognizing a prohibition of evaluation, effect that cannot be attributed to the exclusion of evidence. Thus, it is clear that although both are two mechanisms aimed at safeguarding respect for fundamental guarantees, their consequences and effects are not comparable.

Finally, it should be recalled that a procedural system usually enshrines different tools to achieve the same objective. For example, in civil proceedings, a violation of *res judicata* can be challenged in different ways (paradigmatically by means of an exception, an appeal in cassation [*casación en la forma*], and even, in some cases, by means of an action for review [*recurso de revision*]). These mechanisms do not oppose or exclude each other but complement each other in order to protect a value considered essential by the legislator, even though the consequences of using one or the other mechanism may differ. In criminal proceedings, the defenders of the alleged incompatibility of ways to allege evidentiary illegality should, consequently, criticize the existence of the ground of nullity of article 373 letter a) CPP, as a

[42] *Ministerio Público con C.R.G.* (2010) (Par. 14°).

mechanism for reviewing erroneous evidentiary inclusions in the court in charge of preparing the oral trial, already discussed and final, since the discussion on the ground of nullity invoked would correspond, to a large extent, with an issue already settled.

In accordance with this position, in a recently pronounced decision (*Rol* No. 375-2019), the Court of Appeals of Valparaíso held (Recital 7°) that:[43]

> Article 276 of the Code of Criminal Procedure prevents judges from positively assessing evidence obtained in violation of the constitutional guarantees of the defendant. The fact that there has already been a previous decision on the matter by the guarantee judge is not an obstacle for deciding the refusal to assess illicit evidence. Moreover, the Oral Criminal Court must disregard this evidence, since the contrary would lead to the conclusion that said court must rule in the awareness and knowledge of the violation of constitutional and procedural guarantees of the defendant.

In the same vein, the Court of Appeals of Valparaiso ruled in the decision Rol Nº 1.920-2017, *Ministerio Público con B.C.E.* (2017), pointed out:

> That, in this way, the decision of the judges a quo, in terms of denying evidentiary value to the evidence, both in terms of the statement of the police officers and the findings does not imply ignoring or reviewing what was resolved by the Guarantee Court and which is contained in the decision opening the trial, but it is linked to the assessment and probative value thereof, in relation to the decision of the controversy, which by the way is an exclusive faculty, established by Law, of the Judges of the Oral Trial Court, with the freedom and the limits contained in article 297 of the Code of Criminal Procedure.

XI. THE ALLEGED EVIDENTIARY COMPENSATION AS AN ARGUMENT AGAINST THE REFUSAL TO ASSESS EVIDENCE

It has been argued that recognizing evidentiary prohibitions would lead the Oral Criminal Court, when forced to dismiss relevant prosecution evidence, to try to distribute its probative value among the remaining incriminating elements. In this way, the argument continues, the conviction would become unassailable, since the Court would not have the power to examine the trial court's assessment of the evidence in a nullity proceeding.

Although this argument is interesting, it is not convincing. The first thing to point out in this regard is that the alleged redistribution of evidence is mere speculation, lacking any empirical support. In fact, there is no reason whatsoever to infer such a consequence from the refusal to assess certain evidentiary elements. On the contrary, what is logical and to be expected, if the Oral Criminal Court decides to refuse to assess certain evidence, is to consequently base its conviction exclusively on the remaining means of evidence. Of course,

[43] *Ministerio Público con M.J.B. y otros* (2019).

the refusal to assess one or more pieces of evidence will not affect the uncontaminated evidence, which is *a priori* susceptible of being the basis for a conviction.[44]

Secondly, the argument is based on the assumption of a subjective interpretation of the standard of criminal evidence, whose validity is –at least– questionable. In this regard, Accatino[45] has correctly argued that the traditional interpretation, which rules out to control by the action of nullity the sufficiency or insufficiency of the evidence to consider a certain empirical statement as proven according to the standard of proof, should be reviewed.

Indeed, the alleged rejection of a review, by the court hearing about the nullity, of the facts to be proven is a commonplace that must be relativized. Therefore, as another author has argued,[46] it is impossible to defend the logical separation between the factual findings and the legal assessment as a delimiting criterion of nullity: when a legal rule is applied to a fact that is insufficiently accredited, we would be, in reality, applying incorrectly the law.

In this sense, the cause of nullity set out in 374 letter e) stands as the possibility of challenging the evidentiary conclusions, in case they are insufficient or defective in light of the conditions prescribed by article 297 of the CPP.

XII. UNINTENDED CONSEQUENCES: CONTAMINATION OF THE ORAL CRIMINAL COURT

The decision on the model to be adopted for treating illicit evidence is primarily up to the legislator, and if there is no decision in this regard, to the case law. Thus, the two models mentioned in this article represent different and complementary mechanisms for sanctioning evidentiary unlawfulness, whose common element lies –ultimately– in the fact of preventing a criminal court from sustaining a conviction on illegally obtained evidence.

In this sense, the advantages of the evidentiary exclusion model –the primary tool for cases of evidentiary unlawfulness in our criminal procedure system–, over the model of evidentiary prohibitions, lies mainly in its effects. Evidentiary exclusion implies that the trial court has no contact at all with the evidence contaminated by unlawfulness, thus preventing it from being –consciously or unconsciously– considered in the resolution of the case.[47]

On the contrary, in those cases where the examination of the unlawfulness of the evidence is carried out by the same court in charge of adopting a decision based on the questioned evidence (as it happens in Germany, and partially in Chile, according to what has already been exposed), a contact of the court with the contaminated evidence is inevitable.[48]

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[44] In this regard, it is interesting to note the decision case *Ministerio Público con S.M.B.* (2012), Rol Nº 597-2017 of the Court of Appeals of Concepción, in which the court, in response to an appeal for annulment filed on the grounds of art. 374 letter e) CPP, analyzes the ability of the evidence submitted at trial to prove the facts, and finally, to reach the standard of proof necessary to convict.

[45] ACCATINO (2009), p. 355.

[46] CORTEZ (2006), pp. 136 *et seq*.

[47] Of course, in cases of high public connotation it could be complex for the judge not to have any contact with the illicit evidence, since its content could have been previously disseminated through the press.

[48] In this sense has been pointed out in German law. See WOHLERS (2016), p. 433.

In this respect, it could be intuited –as has been explained– that faced with this dilemma, a court may try to *compensate* the evidence that it is not possible to assess with the remaining elements; in order to reach the same condemnatory conclusion. But this assertion is excessive. The consequences of the court's contamination are uncertain, and have not been –so far– properly studied, and cannot be taken for granted.

However, the benefits provided by a system in which every criminal court in charge of issuing a decision can prevent illicit evidence from supporting a judicial decision outweigh the disadvantages that it could generate.

CONCLUSIONS

This paper concludes that our legislator has not established a single mechanism to deal with the various problems associated with the treatment of evidence obtained unlawfully. On the contrary, although our Code of Criminal Procedure establishes an exclusionary rule for unlawfulness, this provision must be duly complemented in order to adequately address problems related to the treatment of unlawful evidence outside the intermediate stage.

Respect for fundamental guarantees, as the basis and material criterion of justification of the exclusionary rule in our system, constitutes in turn the material basis for recognizing prohibitions on the assessment of evidence in the oral trial. This solution makes it possible to generate a coherent system for treating unlawful evidence at different stages of the criminal proceeding, preventing the conviction from being based on unlawfully obtained material, and thus avoiding a new breach of those guarantees of which every defendant is a holder.

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