

Analysis of Validity and Evidentiary Effectiveness of Surreptitious Recordings

María Gabriela Vintimilla Moreno¹, Diego Fernando Trelles
Vicuña², Ana Fabiola Zamora Vázquez³

¹Universidad Católica de Cuenca, Cuenca Ecuador,
mgvintimillam90@est.ucacue.edu.ec

²Universidad Católica de Cuenca, Cuenca – Ecuador,
dtrelles@ucacue.edu.ec

³Universidad Católica de Cuenca, Cuenca Ecuador,
afzamorav@ucacue.edu.ec

Abstract

For the surreptitious recording made by one of the interlocutors to be admitted as evidence in a judicial proceeding, it must meet the requirements of validity and evidentiary effectiveness. In the first case, it is necessary to determine whether the right to personal or family privacy, the right to secrecy of communications, and the guarantee of prohibition of self-incrimination have been violated during the taking of the evidence. In the second assumption, the authenticity of the evidence must be examined, verifying compliance with the requirements demanded the admission of documentary evidence, given that tape and video recordings are considered documents in which it must be accredited that the voice or image corresponds effectively to a specific person. An improper motivation of the judge would lead to the defenselessness of the injured party and consequently the violation of due process, legal certainty, and effective judicial protection.

Keywords: Evidentiary validity, evidentiary effectiveness, right to personal privacy.

Introduction

Surreptitious recordings inserted as evidence in legal proceedings have taken on various nuances around the world. In the U.S., for example, the legality of recordings is determined based on the type of regulations governing the state: “one-party consent laws” and “two-party consent laws.” In the first case, recordings made in secret by one of the co-conspirators are lawful regardless of the consent of the other participants; in the second case, the consent of all parties is required for the recording to be lawful. In this case, consent is determined based on criteria relating to “reasonable expectation of privacy.”

On the other hand, since 1984, Spanish jurisprudence has stated that when the conversation does not deal with the personal or family life of the person, the surreptitious recording is lawful; however, when the subject is limited to that area, the jurisprudence is divided in two directions, since one side defends the lawfulness of the recordings and the other its invalidity.

Similarly, in Colombia, there are two positions: the jurisprudence of the Criminal Chamber of the Supreme Court of Justice maintains that surreptitious recording made by one of the interlocutors does not violate the right to personal privacy, the right to secrecy of communications or the guarantee of self-incrimination, while the Constitutional Court establishes the opposite.

In Ecuador, there is no jurisprudence regarding the validity and evidentiary effectiveness of surreptitious recordings in the civil sphere; however, criminal law prescribes their legality. In the first case, a serious problem has arisen since there are two opposing positions: the first one considers that such evidence is invalid since it violates the right to personal privacy of the person who does not know that he is being recorded, while the second position, which will be demonstrated in the following paragraphs, considers that it is clear that there is no “secret” for the person to whom the communication is addressed, nor does it imply a violation of the right to privacy or the guarantee of non-self-incrimination.

At this point, it is important to emphasize that the inadmissibility by the judge of valid and effective evidence would imply a serious violation of the constitutional rights to due process, legal certainty, and effective judicial protection of the injured party. Therefore, it is essential to analyze whether or not the surreptitious recordings meet the requirements of validity and evidentiary effectiveness to be admitted as evidence in a judicial proceeding. The first assumption urges to determine whether the recording made secretly by one of the interlocutors violates the right to personal and family privacy, the right to secrecy of communications, and the guarantee of prohibition of self-incrimination. In the second assumption, it must be analyzed whether the evidence complies with the requirements of authenticity and credibility issued by the legal regulations in force.

Method

This study was carried out under the qualitative approach, which is oriented to evidence that allows the description of the research problem through the theoretical foundation and bibliographic documentation. The depth of the research is descriptive in scope, which has allowed the research to reveal relevant aspects and characteristics.

The methods used for the development of the present project were inductive-deductive, starting from particular ideas until reaching general systematic and legal dogmatic aspects.

Results

Theoretical background

Assessment of the Validity and Efficacy of the Test

Ecuadorian law establishes that evidence is invalid and lacks evidentiary effectiveness when it is acquired in violation of the Constitution or the law. According to Juan Antonio Rosas Castañeda (2008), validity focuses on verifying whether the evidence obtained violates any constitutional right, while effectiveness focuses on determining whether the evidence is authentic and credible.

In its procurement, the validity of the evidence concerns due process. Formal validity refers to “the conditions of legitimate bodies and the formalities of time, place and manner of obtaining the procedural evidential act” (Ruiz Jaramillo L. B., 2008), while material validity refers to the compatibility that must exist between the content of the judicial decision on evidential matters and constitutional precepts.

Comparative Law Colombia

The Constitutional Court of Colombia states that the evaluation of evidence must comply with the requirements of the constitutional guarantee of due process in its formal and material sense (Decision SU-159/02, 2002). In this sense, both the procedural requirements in the practice of evidence, as well as the legal and constitutional requirements materialize the effective enjoyment of fundamental rights at all stages of the process or even extra-procedurally. However, it is important to point out that if any formal requirement has not been complied with in the taking of evidence, it is possible to correct it, with certain exceptions.

On the other hand, the respect for the fundamental rights covered by the material due process involves a complex analysis since, as Robert Alexy (1993) mentions, no right is absolute; however, sometimes this theory has been distorted in the judicial sphere, reaching the point of provoking the relativism of the rights contemplated in the Constitution. Alexy's thesis is taken up by the Constitutional Court of Colombia and Ecuador; that is, the fundamental rights of individuals can be restricted by the legislator under certain circumstances. However, there is a reality that is impossible to avoid, and that is that individuals, companies, and institutions use the private and public spheres to illegitimately affect other people.

In short, substantive due process requires a weighing judgment between the general interest and the freedoms of individuals, since maximizing

one or the other would imply the arbitrary suppression of any of them because they are inversely proportional to each other. Now, the Ecuadorian State proscribes the scheme of the preponderance of the inalienable rights of individuals; however, the general interest of “doing justice” must be the minimum possible to allow the maximum effectiveness of fundamental rights.

In this context, the truth about the facts in judicial proceedings must be the minimum possible, being necessary to implement the securing of evidence whose exclusive purpose is the protection of the “minimum truth” and by no concept of crime prevention, protection of the victims of crime, or preservation of morals and good customs, much less measures of reparation or restitution.

The Constitutional Court of Colombia analyzed a case in which the petitioner attached to the proceeding a tape recording of a conversation held between himself and a fellow party, the documentation of which was made without the latter's knowledge. In this regard, it held that the right to privacy “in addition to guaranteeing people the right not to be constrained to learn what does not interest them, as well as the guarantee not to be heard or seen if they do not want to, also prevents intimate conversations from being recorded surreptitiously, behind the backs of all or some of the participants (...).” It also considered that the surreptitious recording made by the interlocutor without prior notification to the other participants constitutes a “morally unlawful machination” that violates the right to privacy and that such action represents an abuse “of the confidence of his interlocutor, unrelated to the fact” that his words are being recorded (Sentencia T-003-97, 1997).

Evidence in due process

For all the above, since it is inappropriate to maximize the security measures in pursuit of obtaining the procedural truth, they are limited since they in no way can affect the right to life of persons and neither can they be subjected to cruel, inhuman, and degrading treatment, otherwise they would become punitive measures. A clear example of the above can be verified through Article 76, numeral 7, literal k) of the supreme law, as well as in Article 160 of the General Organic Code of Processes, hereinafter COGEP, which states that one of the basic guarantees of due process is impartiality. Therefore, the judge must direct the “evidentiary debate with impartiality and will be oriented to clarify the procedural truth.”

In this sense, Article 168 *ibidem* establishes that only exceptionally the judge may order *ex officio* the taking of evidence, i.e., the general interest of “obtaining the truth” is limited and motivated and with the exclusive purpose of clarifying the facts, could the judge order *ex officio* the taking of evidence. Note that, if the legal norm were to maximize this general interest, the result would be, in the words of Ruíz (2008), “the annulment of the person's self-government over his body, psyche,

and social or moral life” (p.173). This would imply the violation of their rights and freedoms.

Effectiveness of the test

Regarding the effectiveness of the evidence, specifically the requirement of authenticity, Rosas (2008) determines that this is identified through compliance with the requirements established in the regulations to determine that the evidence has not been altered, manipulated, or vitiated; credibility, on the other hand, is verified by comparing it with other evidence legally incorporated into the process.

In the case of written documents, for example, authenticity is verified by the certainty of the person who signs the writing or who has handwritten it; however, the content of a document without signature can also be declared as true (Ramírez Romero, 2017, p. 212), as in the case of magnetic or video recordings, “photographs, (...), audiovisual, computer or any other electronic evidence elements capable of producing faith” (General Organic Code of Processes, 2015).

Ramírez (2017) states that evidentiary effectiveness “refers to the ability to achieve the desired demonstration with the document, for the conviction of the judge.” Likewise, he states that in order to be admitted, the evidence must be relevant, useful and conducive. Likewise, to be effective, it must be free of defects such as simulation, fraud, physical force, moral force, bribery and lack of opportunity to contradict. In the same sense, Article 160, fourth paragraph of the COGEP, establishes that “evidence obtained employing simulation, fraud, physical force, moral force or bribery lacks evidentiary effectiveness. Likewise, evidence acted without the opportunity of contradiction shall be ineffective.”

Similarly, Clement Duran, states that for a document to be admitted as evidence, the following circumstances must be met: that the document is provided by the plaintiff or defendant or a witness; that there is a direct or indirect relationship with the subject matter of the case; and that the document is provided at the appropriate procedural time. However, it is important to clarify, as Rosas (2008) states, that compliance with these three requirements is not sufficient to declare its evidentiary effectiveness since it is also necessary that “its authenticity is established or presumed.”

As an example, it is possible to cite Article 195 of the COGEP, which deals with the “effectiveness of documentary evidence”, where it is specified that the authenticity can be verified as long as the documents “are not altered in their essential part so that it can be argued falsity.” Likewise, Articles 197, 198, and 214 *ibidem*, provide that a document can only be effective when it has not been challenged, refuted and counteracted by other means of evidence.

As stated by Ramírez Romero (2017), one of the imperative requirements of effectiveness is the authenticity of the document. It is important to emphasize, as mentioned by Devis Echandía (2002), that the evidentiary effectiveness is determined by law, but also established by the judge through the prerogative of free appreciation that he has; in any case, the effectiveness of the evidence is directed to the judge to obtain his conviction.

Validity of surreptitious recordings made by one of the interlocutors

As mentioned in previous sections, there are two opposing theories regarding the validity and effectiveness of surreptitious recordings. The first argues that the interlocutor who records, stores or disseminates a conversation surreptitiously violates the right to privacy, the secrecy of communications and the prohibition of self-incrimination because the owner does not know that he is being recorded and there was only consent to “hear” the message. Therefore, the hidden recording is unlawful and should be excluded from the judicial process.

Likewise, it is stated that there is no violation of the aforementioned rights since there has been no arbitrary or abusive interference, the owner has freely and voluntarily decided to transmit the information to the addressee knowing that the latter is capable of disseminating it at any time. In the first instance, it is important to clarify that whatever the content of the communication is, it is forbidden to arbitrary interference of third parties; that is, although the content does not belong to the intimate personal or family sphere of the interlocutors, the communication per se may not be heard, but recorded or secretly captured by a third party outside the dialogue or fact.

The prohibition is expressed in international instruments such as the Universal Declaration of Human Rights (Art. 12), the International Covenant on Civil and Political Rights (Art. 17), the American Declaration of the Rights and Duties of Man (art. x), and the American Convention on Human Rights (Art. 11). For a minority of comparative doctrine and jurisprudence, if the information surreptitiously recorded by the interlocutor is limited to the sphere of privacy of the individual, the right to personal and family privacy would be violated.

On the contrary, if the information is outside such scope, the action would not represent any infringement. This theory is evidenced by the analysis made by the Court of the Provincial Court of Pontevedra in the incident in which a lawyer who sponsored the case of his client, alleged to have agreed as fees the amount of 6120 euros, a value that allegedly had not been canceled in full.

On the other hand, his client maintained that the real agreed value was 210 Euros; in the present case, there was no written contract to prove the allegations of either party, however, there was a recording of the conversation between the lawyer and client in which the price for the

provision of the professional service was agreed. The lawyer requested the exclusion of such evidence because it violated the right to privacy:

(...) In the present case, there are no indications that the recording evidence is unlawful, even if it was made without the consent or knowledge of the plaintiff, since it has already been made clear that there is a consolidated jurisprudential doctrine, emanating from the Constitutional Court and the Supreme Court, which maintains the lawfulness of recordings of conversations (whether in person, by telephone or by any other means) in which there is direct intervention as long as it does not concern the personal or family life of the other person who is being recorded, even without the latter's authorization, by telephone or by any other means) in which there is direct intervention as long as it does not concern the personal or family life of the other person who is being recorded, even without the latter's authorization. In this regard, the STS 114/1984, of November 29, already mentioned and invoked by the appellant, resolves that “there is no secret for the person to whom the communication is addressed, nor does it imply a contravention of the provisions of Article 18.3 of the Spanish Constitution to withhold the recording by any means of the content of the message”, affirming the STS May 11, 1994 that “... the recording of the words of the accused made by the complainant for the purpose of subsequent disclosure does not violate any right to secrecy, nor to discretion, nor to the privacy of the appellant”. And although this criterion changes when the person being recorded “has been led to the meeting using trickery with the premeditated intention of making him state facts that could be used against him” (STS November 29, 1984 and March 24, 2010), in the present case such trickery is not even invoked, nor could it be deduced from the fact that the recording had been premeditated (Sentencia 59/2017, 2017).

In this regard, an important controversy arises as to “the type of information” that the interlocutor could record and transmit, since the Court states that the right to privacy is not violated “as long as” the information is not of a personal or family nature. Warren and Brandeis (1890), pioneers in the dialectic on privacy, stated that whoever voluntarily externalizes his characters or his thoughts or performs individual actions in front of others, recognizes and admits in advance the possibility that the viewer stores in his memory what he has seen in such a way that he appropriates the information or the images he records. In the same sense, the Constitutional Court of Colombia has stated that when a person walks through public places, “tacitly assumes and recognizes himself before others as an observer and as an observed subject, (...) it becomes clear to him sooner or later that the street is a world full of anonymous figures, (...) where necessarily and fatally everyone is exposed before everyone else” (Sentencia T-1233-01, 2001).

Based on the foregoing, it is necessary to determine whether the recipient can record or document the information and disclose it from

the moment he receives the message, or whether he can only know it. Regarding the documentation or recording of the information, it is clear that if it is the holder who decides to transmit intimacy to the addressee, it is obvious that it must be he who sets limits to how the receiver perceives this information, but by not doing so, “the unconditional authorization granted to observe the aspects that can be preserved of the perception carries implicitly that of recording what is observed in the memory of the observer or in the medium preferred by him to ensure its preservation unless it has been unequivocally excluded” (Rojas Gómez, 2011).

The Test in Spain

For further arguments, it is necessary to refer to ruling 977/1999 issued by the Supreme Court of Spain (Rosas, 2008), which states the following in pertinent terms:

What David recorded was what the defendant exhibited and said to him, that is to say, what he saw with his eyes and heard with his ears. There is nothing else in the recording, and there is no inconvenience for him to transfer those perceptions to a mechanical instrument of image recording that complements and records what the accused said and exhibited in his presence, a recording that corroborates the statements that the minor gave to the police and later in the criminal proceedings.

However, it is imperative to emphasize that information obtained or recorded for tortuous or criminal purposes is invalid, even if it has been freely and voluntarily given by one of the interlocutors; a condition that has been developed by U.S. jurisprudence, which will be analyzed below.

Regarding the dissemination of the content, according to Roland Arazi (2008), the addressee unequivocally chooses to receive the information appropriates it by the will of the issuer; therefore, he has the power to use it in the legitimate expression of his freedom. In the same vein, Dr. Miguel Enrique Rojas (2011), warns that:

except for the aforementioned restrictions, whatever the form of private communication, neither of the subjective ends of the message can have a well-founded expectation that the other will not let it be known to third parties. On the contrary, each one knows that the other can freely provoke or facilitate the access of third parties to the knowledge of the message, and for this he does not need to give prior notice to his interlocutor and much less to obtain the acquiescence of the latter.

It is necessary to emphasize the partial discrepancy with respect to the criterion of individualized person-to-person dissemination of the content; indeed, the disclosure made by the addressee cannot be under the control of the holder; however, it is necessary to limit the diffusive action of the message to the achievement of a legitimate purpose contemplated in the Constitution (in accordance with the principle of

proportionality). In this regard, the Ecuadorian Constitutional Court has stated:

depending on the facts of the case under consideration, when analyzing the right to privacy, when two constitutionally protected legal rights are in conflict, the judge must verify, at least, whether the interference with privacy is provided for in the law, whether a legitimate purpose was pursued and whether it is appropriate, necessary and proportional (Sentencia No. 2064-14-EP/21, 2021).

Comparative jurisprudence has also pronounced itself in this regard. Thus, the Spanish Constitutional Court, from 1984 to the present day, has maintained the argument that there is no violation of the right to privacy or the secrecy of communications when one of the participants is the one who secretly records the private conversation:

In relation to the recording of the private conversation by one of the participants, its validity must be clarified -a different matter is the assessment that can be made of it-, since it is considered that a recording in such circumstances is not subject to the standard of guarantee that protects the secrecy of communications. In effect, the constitutional rule of Article 18.3 is unequivocally aimed at guaranteeing its impermeability by third parties outside the conversationalists, which is indispensable to configure the constitutional offense (...).

According to what has been stated, it is inferred that whoever communicates something to another person does not keep it a secret for him; in this sense, the addressee may dispose of the information that has been entrusted to him and disseminate it in court, since the legally protected good is the “freedom of communications” of the participants, but against third parties outside the dialogue.

Likewise, even if the information refers to the intimate or personal life of the owner, the addressee does not have a legal duty of confidentiality, and to claim this is an undue extension of the right to personal or family privacy since the Constitution does not oblige the addressee to keep secret the thoughts that one individual communicated to another, who in any case, lost the expectation of privacy when he decided to disclose or expose his intimacy.

In the same sense, Spanish Supreme Court Ruling 1215/1994, of September 29, 1994, pronounces:

This Chamber admits the legitimacy of the surreptitious recording of a conversation between persons made by one of them without warning the other, since it does not attack privacy or the right to communications: when a person voluntarily transmits his opinions or secrets to an interlocutor, he knows beforehand that he is stripping himself of his privacy and transmits them, more or less confidently, to those listening, who may use their content without incurring any type of legal reproach (Judgment of March 1, 1996). To claim that the right to

privacy even extends to the interest that certain acts, which the subject has communicated to others, be kept secret by whoever has been the recipient of the communication, is an exaggerated extension of the horizontal effect that could be granted to the right to privacy. In other words: Article 18 of the Constitution does not guarantee the maintenance of the secrecy of the thoughts that one citizen communicates to another (judgment of May 11, 1994). In a similar sense, the rulings of May 30, 1995, February 5, and November 27, 1998.

The same happens when a text or voice message is sent to another person; whoever sends it, is authorizing its storage and disclosure; because he knows or rather “has the expectation” that this message or e-mail will remain in the computer's memory and that the receiver could use it or print it in case he feels harmed, of course, for a legitimate purpose; this circumstance has also been the subject of analysis through U.S. jurisprudence, in the case of *State v. Townsend*

United States

Contrary to the thesis of the present study, the United States Court of Appeals of the United States of America, in a judgment, questioned the act by which one interlocutor records the other in secret and qualified it as an attack on human dignity, stating the following:

When one invites another person to one's home or office one assumes the risk that the visitor may repeat everything he or she hears and observes during the visit. But it does not follow that the one who invites another also accepts the risk that what he saw or heard will be transmitted by photographs or audio-visual recordings. A different interpretation would have pernicious effects on human dignity” (*Dietemann v. Time, Inc.*, 1971).

In the same sense, it was stated:

The moment I decide to talk to another person, I am abandoning any defense of privacy. After all, I am talking to a person and I must know that there is always a risk that that person will talk to others. If so, I might as well assume the risk that I am being recorded. But is this the case, or is there something hidden? The deception is enhanced, because we do not adopt the same attitudes in general when talking to a small number of people as we do when talking to an unknown number. Moreover, one can take the risk of contradicting the sayings of another with some expectation of success; however, it is not the same to contradict my voice or image, so the risk taken is quite different (*Dietemann v. Time, Inc.*, 1971).

Thus, according to this court, the interlocutor of a conversation does not foresee the circumstance by which the information transmitted to the other party will be recorded and disseminated to third parties, consequently inducing the latter not to measure what he communicates, which eventually leads to the violation of an “expectation of privacy.”

However, in the American jurisprudence, there are two positions regarding surreptitious recordings by one of the participants; on the one hand, the states that have a “one-party consent” type of regulation and on the other hand, those that have a “two-party consent” type of statute. In the first case, American jurisprudence considers the consent of only one of the parties to be sufficient for the validity of the surreptitious recording, provided that the person personally participates in the conversation or event and regardless of whether or not it is personal or family information. In the second case, the consent of all parties is necessary for the surreptitious recording to be considered valid. It is important to emphasize that of the 52 states, only 12 have “two-party consent” regulations. In the state of Chicago with “one-party consent” regulations, the jurisprudence was pronounced in the following way:

In November 1994, an ophthalmologist who agreed to be interviewed by “Primetime Live” sued ABC under “the federal wiretapping statute” for videotaping between the doctor and people posing as patients who were equipped with hidden cameras. The U.S. Court of Appeals in Chicago (7th Cir.) rejected the doctor's wiretapping claim because the federal statute provided that only the consent of one party was required, and the undercover patients had consented to the recording (Desnick v. American Broadcasting Companies, 1995).

As can be noted, the evidence is considered valid without further analysis because in some North American states, the discretion of the courts has been limited by means of an express rule of mandatory compliance.

With respect to states with two-party consent statutes, the U.S. courts evaluate the case and verify in the first instance whether or not the information contained in the recording belongs to the intimate personal or family sphere or whether its dissemination was expressly prohibited; if it is not included in this sphere, it is not considered unlawful because it does not meet the regulatory requirement. To better clarify the above, it is possible to refer to Title 9, Chapter 9.73, Section 9.73.030 of the Washington State Legislature (Washington State Legislature, 1950) which prescribes as follows:

Peru

In the same sense, the Constitutional Court of Peru has pronounced that the right to evidence “(...) is composed of the right to offer evidence that is considered necessary, to have it admitted, properly acted upon (...) and to have it evaluated in an adequate way and with due motivation, in order to give it the evidential merit that it has in the sentence” (STC, exp. no. 6712-2005-HC-TC, 2005).

Doctrine

In the first instance, it is important to remember what Eduardo Jauchén (2004) stated regarding investigative acts:

“Private individuals have the right to carry out investigations regarding the commission of crimes, for which they may legitimately use hidden technical means to obtain records in order to present them as evidence before the authority, and this way of proceeding does not affect in any way the right to privacy or the right against self-incrimination, being valid as evidence” (pp. 207-208).

According to Devis Echandía (2002), “It is as important not to have a right as not to be able to prove it”, thus, investigative activities are an integral part of the right to defense, the exercise of which allows the guaranteed right to be revitalized. Likewise, the right to defense, which is a guarantee of due process, includes “having adequate time and means for the preparation of its defense” (CRE, 2008), a precept that includes “investigative activities” as one of the appropriate means to gather evidence to prove an allegation in favor of the individual's subjective rights.

Regarding the investigations carried out by individuals, the Organic Integral Penal Code (COIP, 2014) already provides for such events and allows to appreciate through articles 178, 470, and 471, the position of the legislature in this regard. In other words, every individual has the right to investigate, but the regulation not only gives light to the right to investigate individuals but also refers to the legality of surreptitious recordings, stating that any recording made by those who participate or intervene personally in the event is valid. It is important to clarify that, for third parties outside the conversation, it is expressly forbidden to record, disseminate or reproduce information, not only because it violates the right to privacy, but also because it is considered a crime.

In contrast to the above, Regina Díaz Tolosa (2007) has stated that although the owner indeed assumes the risk of the recipient disclosing to another person what has been entrusted to him, it is unreasonable to consider that the consent to access the information also extends to it being recorded or documented, since no one would choose to expose himself to the constant threat of the information being disseminated by mass media and that in any case it should be differentiated between tacit consent and presumed consent.

Thus, the same constitutional and legal regulations place restrictions on the processing of information, which are outlined in the habeas data regime, the conditions to the exercise of the right to information by massive mechanisms and the legal duty to keep confidentiality; therefore, the argument put forward by Regina Díaz does not fit, since it intends to restrict legitimate purposes such as the exercise of the rights of freedom, the right to the defense that includes the right of individuals

to carry out investigative acts within the limits established by the Constitution, the right to due process, the right to legal certainty, and public order.

Furthermore, it is important to differentiate that the holder is not under “constant threat” not only because there are restrictions against this act, but also because for a threat to existing there must be suitable and unequivocal acts that materialize such circumstance; to assume actions that the recipient has not performed involves a “very hasty attempt to justify a theory at all costs”, since “threaten” according to the “Diccionario de la Lengua Española” (2021) means “To imply by acts or words that one wants to do someone harm”. Therefore, it is necessary to emphasize that obtaining, recording, storing, and disclosing information cannot be done with devious purposes, proving that would not only lead to the exclusion of evidence but also to legal action. “Therefore, it is necessary to emphasize that obtaining, recording, storing and disclosing information cannot be done with devious purposes, since proving this would not only lead to the exclusion of the evidence but also to legal action against the act.

There is no violation of the right to the prohibition of self-incrimination when one of the participants makes a surreptitious recording

The guarantee of non-self-incrimination is established in art. 77.7.c of the CRE (2008), this guarantee derives from the right to defense of citizens, cannot be restricted by any person or by the State and is closely linked to the right to remain silent.

According to part of the doctrine, the surreptitious recording made by the interlocutor, in which the accused declares that he has committed a crime or that he is going to commit it, is considered unlawful because the owner has not been warned about his constitutional right to remain silent and not to incriminate himself, a matter that is of mandatory observance; It is also stated that the sender does not know that he is being recorded and therefore does not know that he is indirectly making a statement that could be used against him, which he would not do if he knew the circumstances mentioned; therefore, the right of the accused not to incriminate himself would be ignored. In this regard, the Provincial Court of Huesca has declared:

We should not recognize the validity of the aforementioned recording because if we did so, in our opinion, we would ignore the right of the defendants not to testify against themselves, and not to confess guilt, enshrined in Article 24 of the Constitution, since the recorded conversation does not arise spontaneously but was provoked by the defendant and his girlfriend with the predetermined intention that it would end up having effects in this proceeding, without the other two defendants having the slightest idea of it, so that, logically, they expressed themselves freely but without being warned of their constitutional and procedural rights as defendants nor of the very fact

that, indirectly, they were making a whole statement, since their manifestations were documented to be contributed to an ongoing criminal proceeding” (Montero Aroca, 1999, cited in Rosas, 2008).

The previous sentence shields its theory in the fact that the information collected by recording does not give the defendant the option to exercise his defense because not only did he not know his rights to remain silent and not to testify about himself, but he declared his guilt as if he were practically in the presence of the judge; which he would not do if he was really confronted with this.

In contrast to the previous theory, it is necessary to note the following, from Art. 77.7.c. of the CRE (2008), which states: “No one may be forced to testify against himself, on matters that may cause his criminal liability.” It follows that in order to violate the guarantee of non-self-incrimination there must be the presupposition of forcing, i.e., the rule is transgressed when there is physical or moral coercion, by the illegitimate promise of an advantage or by deception.

Similarly, in observance of the right to freedom of decision, the accused has the power to testify in the sense that he deems appropriate, even when his statement is self-incriminatory, however, the prosecutor and judge in the corresponding stages, must specify to the accused the precautions established in the regulations, which, for the case of the Ecuadorian state, are prescribed in Art. 508 and Art. 533 of the COIP (2014), norms that specify that it must be an authority who informs about his rights to the processed person excluding, at the same time, any particular and is that this shows the intention of the legislator to implement this guarantee to avoid arbitrary actions of the state subjects to protect the most vulnerable party and banish the authoritarian conceptions of the past. Therefore, the guarantee of the accused to be informed of his rights does not have horizontal effects, i.e., it cannot be demanded from private individuals. In the same sense, Bovino and Pinto expressed (2006):

The rules of guarantee of constitutional ranks, such as the right to defense, and the prohibition of forcing the accused to testify against himself, are not opposable to individuals, since they are constitutional limits that only restrict the prosecutorial powers of public bodies. As follows, it is other fundamental rights that could be invoked to challenge the validity of evidence obtained by private individuals prior to the initiation of the prosecution” (pp. 280-281)

Once again, it is necessary to emphasize that Ecuadorian legislation expressly establishes that only unauthorized third parties or those who do not personally participate in the event being captured are prohibited from recording, storing, reproducing, or disseminating the information (art.178; Art 470; art. 471).

The IACHR Court stated that whatever the type of information, it can be recorded or disclosed by one of the participants without the action being considered a violation of the right to privacy since it can only be so considered when it was a third party who clandestinely intruded to capture and disclose such information. The following is what the Court stated in the Case of Esther et al. v. Brazil (2009):

Article 11 protects conversations made through telephone lines installed in private residences or offices, whether their content is related to the private affairs of the interlocutor or to the business or professional activity he/she carries out. Thus, Article 11 applies to telephone conversations regardless of their content and may even include both the technical operations aimed at recording such content, by recording and listening to them and any other element of the communicative process itself, for example, the destination of outgoing calls or the origin of incoming calls, the identity of the interlocutors, the frequency, time and duration of the calls, aspects that can be ascertained without the need to record the content of the call by recording the conversations. In short, the protection of privacy takes the form of the right to prevent parties other than the interlocutors from unlawfully knowing the content of telephone conversations or other aspects, such as those already mentioned, inherent to the communication process.

Based on the argument of the Inter-American Court, it is clear that no one may arbitrarily or abusively intervene in the conversations of others, much less record or broadcast them, unless he or she actively participates in them. However, it is important to clarify that the confession made by one of the interlocutors becomes invalid when it has been obtained by force or deception.

On the question of the need to inform the accused of his right to remain silent or not to incriminate himself, it should be clarified that this responsibility falls exclusively on the State entities due to the degree of psychological subjection that weighs on the accused because he is confronting the State. Therefore, the State is obliged to apply these measures in order to protect the vulnerable party, to free him from the arbitrariness of public servants and to limit the State's discretionally. The Constitutional Court of Italy has ruled along the same lines:

It is necessary to protect private secrecy, but also the prevention and repression of crime, which is also the object of constitutional protection. And it cannot be said that a telephone interception of the defendant's conversations conflicts with his right to remain silent when accused of a crime, since this right not to answer refers only to the interrogation of the accused and can be applied only when the accused comes into direct contact with the authorities. It tends to reinforce the moral freedom of the accused in view of the state of psychological subjection in which he may feel in relation to the authority, in order to prevent him from possible pressures that may be exerted on him. On the other hand, what

a suspect says in an intercepted telephone conversation corresponds to an entirely different situation, since the subject is not directly confronted with the authority during the conversation, nor is the authority asking him to respond, so the right to silence cannot operate” (Novoa Monreal, 1981, p.135, cited in Rosas, 2008)

In the same line, the Ecuadorian legislation states that “Audio recordings, video images or photographs related to an act constituting an infringement (...) recorded (...) by any technological means (...) in cases where audio or video recordings obtained by one of the intervening parties are disclosed, do not require judicial authorization” (COIP,2014).

At this point, it is noted that there is no violation of the right to privacy, the secrecy of communications, or the guarantee of prohibition of self-incrimination, when one of the interlocutors records or discloses the information conferred to him, not only because people have the right to investigate and attach the evidence for their defense; but, in the face of criminal acts, constitutional guarantees cannot be used to allow impunity for such acts. Likewise, even if it is not a confession of a crime, but information that contradicts malicious arguments of others to affect their interests or those of third parties unjustly, it is necessary to emphasize that the addressee may record it and disclose it in a judicial process without this implying any violation, especially when there is no other way of proving what happened in the process or when it is not sufficient to deduce what is alleged by the injured party.

Effectiveness of surreptitious recordings made by one of the interlocutors

The evidentiary effectiveness of surreptitious recordings is a very different matter since although it has already been demonstrated that the recording and its disclosure in court does not violate constitutional rights, it is the obligation of the individual to submit it in a legal manner, that is, not only must the legitimate origin of the evidence be demonstrated, but it is also necessary to demonstrate its authenticity in a convincing manner. In other words, the recordings must comply with the requirements expressed in the regulations in order to justify that the evidence has not been altered, manipulated or vitiated. Now, there are three types of evidence in the different legislations: documentary, testimonial and expert evidence; therefore, it is necessary to determine which of them is complied with for recordings, film tapes, electromagnetic files, and the like. For this, the legal regulation that solves the question is analyzed in Art. 196 of the COGEP (2015), referring to “Production of documentary evidence in hearing” establishing that the recordings, audiovisual, computational or any other electronic evidence elements must be reproduced in their pertinent part in the hearing. Similarly, Art. 204, regarding “Documentary evidence of large volume or format”, provides that recordings of long duration “shall be

added in a complete manner, adding outlines, summaries, computations or any other similar means that faithfully reproduce them.”

As can be observed, Ecuadorian legislation classifies surreptitious recordings as documentary evidence, in line with what is deduced from the etymological meaning of “document” which prescribes the following: the word “document” comes from the Latin “Documentum” which means “example”, “model”, “lesson”, “teaching”, “proof”, “demonstration of something”, “indication”. “Documentum,” in turn, is formed by the verb “docere” which means “to show”, “to expose”, “to inform”, etc.; and the suffix -ment, from -men, -mentum, which is a noun-former from verbs and indicates “result”, “means”, “instrument”, so a document is “something that serves or is the means or instrument (-ment) to show, inform, or make known (docere) something.”

Regarding the material of the document, Parra states: “It does not matter the material of which the document is made, it can be clay, papyrus, parchment, paper, stone, magnetic tapes, etc.; it can be said that of any material that allows representation” (Treviño Rodríguez, 2021).

By virtue of the foregoing, document or documentary evidence refers not only to writings but to any type of element, including recordings that evidence an act or fact; therefore, for a recording to be valid and effective, it must comply with the requirements of effectiveness provided in the regulations for documentary evidence.

Articles 456 and 457 of the COIP (2014) state that for evidence to be considered authentic, it must have been submitted to a chain of custody accrediting the original state of the recording. However, in case this procedure has not been applied, it will be the proponent who will have the obligation to prove its authenticity. Likewise, Art. 471 prescribes that “the preservation of the integrity of the data record will be required” and the delivery of the recording in its original support, in which case, and if necessary, the prosecutor “will order the transcription of the pertinent part or its reproduction in a trial hearing.” Something important to point out regarding the integrity of the recording is that it requires the interested party to deliver the complete record of the recording without editions of any nature.

Now, if in a written document, the authenticity is verified from the full identification of the signer or signatory; it is logical to deduce that in audio or video recordings, the authenticity is presumed when the injured party has acknowledged his participation in it or, failing that, has not challenged its authenticity. According to Article 477 of the COIP (2014), for the recognition of recordings, videos, photographs, etc., the judge will authorize the prosecutor to exhibit the content in a private hearing in which in addition to the procedural parties and witnesses two experts will attend; the purpose of such hearing will be the identification of the recorded voices by the interlocutors. When this is not possible,

the prosecutor may summon witnesses who claim to know the participants of the video or recording for the recognition, without prejudice to the identification by technical means. According to comparative law, as well as international techniques related to forensic expertise, it is possible to use the voice recognition wheel, which can be applied by the linguistic expert to identify the voices in the recording.

For comparative doctrine and jurisprudence, a “credibility plus” is also necessary, which can be evidenced in two ways: “a) As an object of proof when it is expertly estimated that the image or voice effectively corresponds to the person, b) As a document, when its reproduction of a past event is proven by different evidential means, such as testimony” (Damián Moreno, 1997, as cited in Rosas, 2008).

Ultimately, only when it has been demonstrated that the evidence has met the requirements of validity and evidentiary effectiveness may the judge base his sentence on such evidence.

The inadmissibility of surreptitious recordings leads to a violation of the human rights of the person who proposes them as a means of defense

The right to evidence is a fundamental right, classified as such because it is individual, inherent to the person, of direct application and fully justiciable. It is a right that cannot be suspended even in states of exception. In this regard, the Constitutional Court of Colombia has stated the following:

The right of all persons to present evidence and to challenge the evidence adduced against them in disciplinary proceedings constitutes a fundamental constitutional right, and given that the declaration of inconclusiveness of evidence may entail the violation of the right to defense and due process, with undeniable prejudice to the accused, the investigator must proceed with extreme caution and, in case of doubt, opt for the admission of the evidence” (Sentencia T-393, 1994).

The right to prove includes the power to “secure the instruments or sources of proof, to request means of proof, the admission, practice and evaluation; it also includes the right to propose to the judge arguments of proof and to contradict those that the judge adduces as the basis of his conviction” (Ruiz Jaramillo B. L., 2007).

The purpose pursued in the exercise of the right to prove is the recognition of the procedural truth alleged by each of the parties; the truth that will be admitted or rejected by virtue of the interpretation made by the judge of the law and the conformation of his conviction on the facts from the evidence admitted, practiced and valued after verification of compliance with due process. From the judicial decision, follows then, the adjudication of powers, obligations, sanctions, compensations, indemnifications, assistance services, etc. that affect the life of the people; or as Luis Ruiz explains it (2007):

human dignity is intimately connected to the establishment of legal and factual truth in judicial proceedings. The quality of the existential condition of persons depends to a great extent on the virtue of legal and factual truth”, in virtue of the fact that: “the object of proof is found in all spheres of the life of the person: in the body, in the psyche, in the conscience and in the expressions of social life; in such a way that the exercise of the right to proof both in its obtaining and in its evaluation affects the sphere of the person in all spheres of his existence.”

From the above, it can be deduced that the judge's decision, based on the body of evidence, has a direct impact on the life project of individuals. For Victor Frankl (2001), the first motivation of the human being is to find the meaning of life, finding human value and dignity. Now, what does the projective aspect of the human being consist of? According to Jorge Francisco Calderón Gamboa (2005), the human being, being a being of developing qualities, has the capacity to reach his evolution or essence in attention to four intrinsic dimensions of his person: physical, emotional, intellectual and spiritual.

In the physical dimension, it refers to health, freedom of action, and integrity, among others. In the emotional dimension, it is the relationship of their feelings, emotions, aspirations, concerns, moral afflictions, and so on. In the intellectual dimension, there is reason, conscience, wisdom, mental health, freedom of thought, and expression.

In the same line, the dimension that encompasses in a certain way the three previous ones, since it undeniably has a spiritual dimension in which its relationship with the cosmos, the absolute, the supreme being, with the sense of transcendence, with linear time, or a sense of life is found. In this sense, a person deprived of his life project, in addition to truncating his meaning or transcendence (spiritual dimension), will necessarily affect his feelings and aspirations (emotional dimension), which will lead him to discern by other paths, to perhaps stop his ideas or expression (intellectual dimension), will also affect his freedom to act necessary for his development, in addition to the affectations derived from the previous ones that cause in his health (physical dimension). Therefore, the individual will be a projective being insofar as he projects himself integrally with all his dimensions.

Discussion

It is important to emphasize that the right to life is also considered violated when the right of persons to live with dignity is affected, that is, among other things, when the State allows the materialization of injustice by misrepresentation of “the procedural truth” due to the exclusion of valid evidence that only exposes “the factual fact”. Thus, in the words of the Inter-American Court of Human Rights:

Arbitrary deprivation of life is not limited, therefore, to the illicit act of homicide. It also extends to the deprivation of the right to live with dignity. This vision conceptualizes the right to life as belonging, at the same time, to the domain of civil and political rights, as well as to that of economic, social and cultural rights, thus illustrating the interrelation and indivisibility of all human rights” (Cancado & Burelli, 2005).

Therefore, excluding a surreptitious recording that has met the requirements of admissibility and evidentiary effectiveness and that does not violate constitutional rights as demonstrated, would imply a violation of the right to effective judicial protection, the right to due process, the right to legal certainty, and even the right to a dignified life. The latter, since all rights are interdependent, indivisible and interrelated among themselves (Decision N. ° 146-14-SEP-CC, 2011), thus, the dignified life is achieved through the materialization of subjective rights through judicial rulings that aim to vivify the law whose purpose is justice.

Effective judicial protection is the right that guarantees access to justice; to this end, the judge must observe compliance with the requirements of due process, which includes the right to a defense that includes “having the time and adequate means for the preparation of his defense”, “presenting orally or in writing the reasons or arguments he believes he has been assisted with and replying to the arguments of the other parties; presenting evidence and contradicting that which is presented against him” and receiving duly motivated resolutions from the public authorities (CRE, 2008).

In this sense, the inadmissibility of a lawful piece of evidence legally entered into the proceeding would constrain the interested party to dispense with his own defense. In other words, this would entail taking away the adequate means for the preparation of his defense and would be nothing more than an unreasonable motivation and therefore an erroneous sentence. According to Luis Ruiz (2008), “Due process is also violated at the time of sentencing due to the absence or insufficiency in the motivation of the evidence to establish the procedural truth.”

With respect to lawful evidence considered erroneously unlawful, Ricardo Vaca Andrade (2011) expressed in relation to surreptitious recordings and their valuation in the Ecuadorian State:

One of the issues regarding which there is great confusion among lawyers, prosecutors, judges and other justice operators is related to the recording of voices or images and their use in a judicial proceeding. It is mistakenly believed that a voice recording or filming of images or the recording of a conversation made by a private person who has the character of the interlocutor is unconstitutional because it violates the fundamental rights of the other interlocutors, and illegal because it has been made without a prior order from a competent criminal judge (para. 1).

People who are not properly informed on the subject, for personal or professional convenience, object without further discussion to the validity of these records, arguing that they have not been obtained with the authorization of the criminal judge. Even more serious is that the judges, out of ignorance, convenience or hidden interests, without further analysis, accept the objection and declare the evidentiary invalidity of such records. That is a serious error, as we shall see” (para. 2).

Excluding evidence without further analysis is not only a serious error but also leaves the injured party defenseless and violates his constitutional rights.

Now, with respect to the right to legal certainty, this is established in Article 82 of the Constitution of the Republic and requires the judge to guarantee the right of the parties at all stages of the procedure; therefore, when the judge violates the right to due process for the circumstances specified above, also violates the right to legal certainty, since both rights are closely related to each other, as the Constitutional Court has said:

The right to legal certainty can never be understood as excluding the guarantee of compliance with the rules and rights of the parties in the substantiation of the judicial or administrative proceeding, but concurrent and complementary with the guarantees of due process”.} (210-16-SEP-CC, 2016).

In short, both the admission and exclusion of evidence entail a complex task for the judge, however, he/she must carry out a deep analysis of the specific case and duly motivate each decision he/she makes, since it is necessary to understand that a judicial process ends up affecting the life project of people; even more so, when erroneous sentences are adopted, materializing injustice and affecting the dignified life of citizens by violating their constitutional rights.

Conclusions

In order to determine the validity of an evidence, it is necessary to analyze whether or not it has violated constitutional rights. In the case of surreptitious recordings, it is necessary to examine whether the right to privacy, to secret communications and the right to the prohibition of self-incrimination have been violated; however, the analysis does not end here, since the effectiveness of the evidence must also be determined, which consists of establishing its authenticity and credibility, the latter through the confrontation with other evidence of the process or with the expert opinion.

Surreptitious recordings are unlawful when they have been intercepted, recorded, stored and disseminated by third parties outside the dialogue.

In Ecuador, the right to personal and family privacy is a legal right protected through Articles 178, 470, 471, and 477 of the Organic Integral Penal Code (COIP). From these regulations, it is possible to deduce the intention of the legislator, because according to these articles, only the person who accesses, intercepts, examines, retains, records, reproduces, disseminates or publishes data is punishable, as long as he/she has not personally participated in the dialogue, disseminates or publishes data, provided he has not personally participated in the dialogue or event and does not have the authorization or consent of the owners. In other words, the interlocutors or participants of the event or conversation do not need the authorization or consent of the other to incur in any of the governing verbs and will not be subject to any sanction whatsoever.

Therefore, when the recipient records or documents the conversation or event in a surreptitious manner, there is no violation of the constitutional right to personal and family privacy, the right to secrecy of communications or the guarantee prohibition of self-incrimination. However, the judge must attend to certain limits and compliance with certain requirements specified by Ecuadorian law; comparative doctrine and jurisprudence; and international human rights instruments before declaring their validity and effectiveness.

A minority part of the doctrine states that surreptitious recordings violate the right to personal or family privacy and the secrecy of communications because the interlocutor does not know that he is being recorded and does not measure the information he transmits. From this, it is inferred that all persons must acquire a court order to be able to carry out investigative acts such as recording a conversation. However, the doctrine, in its majority, sustains the lawfulness of surreptitious recordings made by one of the interlocutors by virtue of the fact that the interlocutor is the one who freely and voluntarily transmits the information to the other without forcing or deceit of any kind. At that moment then, the information is stripped of its secret quality, the addressee acquiring the property of such information that can be recorded and disseminated without violating the right to personal or family privacy, the secrecy of communications or the prohibition of self-incrimination. This is not only protected by the right of the recipient to exercise his freedoms, but also by the right of individuals to carry out investigative activities, the right to freedom of evidence and, consequently, the right to defense.

Likewise, it is important to emphasize that there is no “reasonable expectation of privacy” when someone decides to entrust information to another person, since no individual can assure that he has the certainty of the actions of another person. Even worse, when he himself has not known how to keep his own secrets, the owner decides to assume the risk with knowledge of the possible consequences. The antithesis then states that although it is decided to voluntarily transmit the information, the recording has not been authorized. In this respect, it is necessary to

note that the transmitted information is stored in the memory of the addressee who can reconstruct the fact or the message at any time and disseminate it. The same happens with the recording since it will fulfill the same function of reconstruction, but with the only difference that it will allow to appreciate the reality of what has happened.

Regarding the guarantee against self-incrimination, a minority part of the doctrine establishes that admitting the validity of a surreptitious recording implies disregarding the right of persons not to plead guilty, because although there is the possibility that the accused, in the exercise of the right to liberty, may decide to plead guilty. There is also the obligation to previously inform him of his rights not to incriminate himself and to remain silent and the consequences that would result from his statement, which does not occur when the interlocutor records surreptitiously. In this regard, the jurisprudence and doctrine sustain that the obligation to inform about the rights of the accused falls on the State and not on the individuals, thus, it is necessary to clarify that this obligation was conceived to strengthen the moral liberties and avoid possible pressures that could be exerted on the accused, since it is understood that he is in a psychological subjection when he is confronted before the authority, which does not happen among individuals. In addition, “the theory of risk” lies in the risk assumed beforehand by the interlocutor himself when commenting on his criminal actions, knowing that the addressee could transmit such information at any time. In addition, the existence of the criminal act means that the right to privacy, if it exists, succumbs to other related fundamental rights, since the purpose of a constitutional state of rights is not to protect crime.

- In the process of determining the validity of surreptitious recordings made by one of the interlocutors, it must be verified whether the information of the conversation or event falls within the sphere of personal or family privacy or outside this sphere. In the first case, it must be observed whether there was an express prohibition of the owner to record the conversation or event, because if so, the recording is unlawful (when the information does not deal with crimes). Also, the recording and dissemination of this type of information is subject to the restrictions expressed in the habeas data regime, the conditions of the exercise of the right to information by mass media, and the legal duty of confidentiality. Likewise, it must be verified whether the recording and dissemination contemplates a constitutionally legitimate purpose, that is, that it is only used in court for the exercise of the right to defense, or in other cases whose purpose lies in the exercise of the right to freedom of expression or the public interest is involved. In any case (even if the information does not refer to personal or family matters), other requirements must be observed, such as the free and voluntary emission of the message by the owner, that is to say, that the interviewer has not been forced or induced by trickery to testify about facts against him and that the recording has not been made for tortuous or criminal purposes.

- Once the validity of the surreptitious recording has been verified, it is necessary to analyze its evidentiary effectiveness. For this purpose, the judge must verify that the evidence meets the requirements of relevance, usefulness and conduciveness; that it has been specified how, when, who and where the recording of the conversation or event was obtained; that the recording has been provided at the request of one of the parties or by a witness; that the evidence has been submitted at the appropriate procedural moment; that the evidence has been submitted in its original support; that the persons recorded have been fully identified by means of expert opinions or by the recognition of witnesses who know the intervening parties by means of a voice wheel or other forensic phonetic technique and that the evidence has been submitted in its original support; that the evidence is delivered in its original support; that the persons recorded have been fully identified by means of expert opinions or by recognition of witnesses who know the intervening parties by means of the voice wheel or other forensic phonetic technique and that the recording has been made by one of these or by a third party with the authorization of any of the interlocutors, and that the recording has not suffered changes, additions, or eliminations. In short, for the surreptitious recording to acquire evidentiary effectiveness, its authenticity must be presumed or established, a plus of credibility must be added, evidenced through two ways: a) through expert evidence that the image or voice belongs unequivocally to a person b) evidence through different evidentiary means, such as, for example, the testimonial.

- Finally, it is clear that the inadmissibility of lawful evidence legally entered into a judicial process violates the effective judicial protection by leaving the interested party in defenselessness due to improper motivation, this entails a failure to observe the due process, causing in turn the violation of legal certainty as established by the Ecuadorian Constitutional Court, since both rights are interdependent and indivisible from each other. It is obvious then, that the affected party with the arbitrary exclusion of evidence is left defenseless because they “snatch” the means of evidence with which they could demonstrate their arguments and obtain a judicial sentence that allows the materialization of their subjective rights in conflict, this circumstance also affects the life project of the people and therefore their dignified life.

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