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Illegal evidence and protection of privacy in adversarial criminal proceedings

Pruebas ilícitas y tutela de la privacidad en el proceso penal acusatorio

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Neida Ulda Viera Herrada
https://orcid.org/0000-0002-3858-6663
nvierah@ucvvirtual.edu.pe
Universidad César Vallejo. Lima, Peru

Abstract

This study examines the incorporation of evidence obtained through irregular procedures in criminal proceedings and analyzes how this practice affects the right to privacy of the person under investigation. A qualitative approach with a descriptive-explanatory design was adopted, based on a critical analysis of specialized doctrine, the current regulatory framework, and applicable case law. As a complement, semi-structured interviews were conducted with criminal law professionals—judges, prosecutors, and lawyers—selected for their experience in the field. The results show the absence of uniform guidelines in the actions of justice operators, which has led to divergent criteria when determining the validity of evidence obtained irregularly. Likewise, it was found that the admission of evidence obtained outside the law weakens the principle of legality, affects the validity of constitutional guarantees, and reduces public confidence in the impartiality of the judicial system. Consequently, there is a need to strengthen regulatory standards and unify jurisprudential criteria in order to preserve the legitimacy of the criminal process and protect the integrity of the individuals involved.

Keywords: judicial proceedings, human rights, criminal proceedings.

Resumen

Este estudio profundiza en la incorporación de evidencias obtenidas mediante procedimientos irregulares dentro del proceso penal acusatorio y analiza cómo esta práctica incide en el derecho a la intimidad del investigado. Se adoptó un enfoque cualitativo con un diseño descriptivo-explicativo, sustentado en el análisis crítico de la doctrina especializada, el marco normativo vigente y la jurisprudencia aplicable. Como complemento, se realizaron entrevistas semiestructuradas a profesionales del derecho penal —jueces, fiscales y abogados— seleccionados por su experiencia en la materia. Los resultados evidencian la ausencia de lineamientos uniformes en la actuación de los operadores de justicia, lo que ha generado criterios divergentes al momento de determinar la validez de las pruebas obtenidas de forma irregular. Asimismo, se constató que la admisión de material probatorio obtenido al margen de la ley debilita el principio de legalidad, afecta la vigencia de las garantías constitucionales y reduce la confianza ciudadana en la imparcialidad del sistema judicial. En consecuencia, se plantea la necesidad de fortalecer los estándares normativos y unificar los criterios jurisprudenciales, con el fin de preservar la legitimidad del proceso penal y proteger la integridad de las personas involucradas.

Palabras clave: pruebas judiciales, derechos humanos, procesos penales.

Introduction

In the realm of the Peruvian accusatory criminal process, there is an ongoing debate regarding the limits of evidentiary activity and its relation to the protection of fundamental rights. One of the most pertinent conflicts centers on the use of evidence obtained through illegal procedures (Gonzales, 2024), particularly during the hearing to review the charges, a stage in which the feasibility of continuing with the trial is determined. The incorporation of such evidentiary elements creates a tension between two equally significant interests: the effectiveness of criminal prosecution and the guarantee of respect for constitutional rights (Stippel & Gonzáles, 2025).

Contemporary doctrine asserts that all evidence collected through acts contrary to the law—such as wiretaps without judicial authorization or searches conducted without a competent warrant—should be excluded, as their use not only infringes on the privacy of the accused but also compromises the validity of the criminal process as a whole (Ferrajoli, 2010). However, judicial practice reveals a different landscape: in certain cases, some courts have exceptionally admitted such evidence, justifying its incorporation under criteria of procedural efficiency or superior public interest (Izaguirre, 2024).

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Both the Peruvian Constitutional Court (TC) and the Inter-American Court of Human Rights (CIDH) have repeatedly emphasized that no procedural action can be based on evidence obtained unlawfully, as its admission violates the principle of legality and undermines public trust in the administration of justice (TC, Exp. N.º 00012-2018-PI/TC, 2019). Nevertheless, normative gaps and permissive judicial criteria persist, hindering the establishment of a uniform standard regarding evidentiary exclusion.

In this context, the present article proposes a critical analysis of the judicial evaluation of illegally obtained evidence during the hearing to review the charges. It integrates a doctrinal and normative examination with the experiences of criminal law professionals, aiming to identify the main points of tension between the pursuit of procedural efficiency and the protection of the right to privacy. The findings of this research will inform guiding principles that contribute to reducing judicial discretion, reinforcing mechanisms for the legal control of evidence, and strengthening the legitimacy of the criminal process.

Methodology

This research adopted a qualitative approach aimed at examining in detail the admission of illegally obtained evidence within the Peruvian criminal process, with a particular emphasis on what occurs during the hearing to review the charges. This methodological choice is justified by the need to gain a deep understanding of the interpretation and application of norms in judicial practice, prioritizing critical analysis over mere quantification of data.

The methodological design constituted a descriptive-explanatory study, non-experimental and cross-sectional in nature, as it addressed the issue at a specific moment without altering or manipulating external variables. To support the analysis, a thorough review of normative sources, specialized doctrine, national and international jurisprudence, and international treaties related to the protection of fundamental rights was conducted. This process allowed for the construction of a solid theoretical framework that served as a basis for evaluating the criteria for the admission of evidence in the Peruvian penal system.

Additionally, semi-structured interviews were conducted with five specialists in Criminal Law, selected through purposive sampling, considering their expertise in analyzing and controlling the legality of evidence. An interview guide was utilized, developed from previously defined analytical categories, to foster a dialogue environment that encouraged critical reflection and the free expression of diverse perspectives.

Regarding ethical considerations, all participants provided their informed consent prior to commencing their participation, ensuring the confidentiality of their identities and the information provided at all times. Furthermore, inclusion criteria were established based on professional experience, while exclusion criteria were directed at preventing interpretive biases. Although the results cannot be statistically generalized, they offer relevant insights for understanding the existing tensions between the pursuit of procedural efficiency and the protection of the fundamental rights of individuals involved in a criminal process.

Results and discussion

I. Contemporary approaches to the exclusion of illegally obtained evidence and its relation to privacy

The current debate regarding the admission of evidence obtained unlawfully within the criminal process has generated extensive doctrinal exchange, as it lies at the intersection of two essential values: the effectiveness of criminal prosecution and the protection of fundamental rights. One of the most influential theories is the so-called "fruit of the poisonous tree" doctrine, developed in U.S. law, which posits that any evidence derived from an illegal source is irreparably tainted and, therefore, must be excluded from the process (Hagelsieb & Champo, 2023). From this perspective, the aim is to prevent the State from benefiting from its own constitutional violations, warning that admitting such evidence during the review hearing would equate to legitimizing serious violations, including infringements on the right to privacy (Medrano, 2023).

In this vein, the exclusion theory maintains that no criminal process can be based on evidence obtained in contravention of the law (Orrillo, 2009; Miranda, 2010). Proponents argue that accepting illegal evidence undermines the authority of the judicial system, diminishes the credibility of justice, and conveys a dangerous message: that the State can violate fundamental rights under the guise of procedural efficiency.

Conversely, the theory of the right to privacy, originally proposed by Warren and Brandeis (1995), emphasizes that any arbitrary intrusion into private life constitutes a direct violation of individual autonomy. This impact is exacerbated when the judicial system, instead of correcting the abuse, validates and incorporates evidence obtained irregularly within the process (Polo, 2022).

Furthermore, the penal garantism defended by Ferrajoli (2010) asserts that unconditional respect for the rights of the accused must be the central axis of the criminal process, such that no procedural goal, no matter how legitimate it may seem, can justify legal or ethical violations. Complementarily, the theory of fundamental rights developed by Alexy (2009) argues that human rights take precedence over any utilitarian reasoning, meaning that procedural efficiency cannot be imposed over constitutional guarantees.

Collectively, these currents converge on an unequivocal conclusion: accepting illegal evidence leads to a structural impairment of due process and a direct violation of the right to privacy. Conversely, its exclusion protects not only the legal position of the accused but also democratic values, reinforces the legitimacy of the judicial system, and ensures that decisions align with the principles of the rule of law.

II. Normative framework and jurisprudential evolution regarding the exclusion of illegally obtained evidence in Peru

In the Peruvian criminal process, the regulation concerning the admission of illegal evidence has been constructed with a clear orientation toward defending fundamental rights. This trend is reflected in key provisions of the Criminal Procedural Code (CPP), such as Article VIII.2 of the Preliminary Title and Article 159, which establish that any evidence obtained in violation of constitutional guarantees lacks legal validity. This protection has been reinforced by significant rulings from the Supreme Court, such as resolutions RN 817-2016 and RN 2900-2016, which determined that the exclusionary rule applies not only in cases of violations of fundamental rights but also when substantive procedural norms are breached, affecting the legitimacy of the process.

This approach coincides with the assertions of Martínez (2024), who, drawing from Mexican experience, argues that the admission or exclusion of irregular evidence requires a reasoned and balanced analysis. In the same vein, Gómez (2023), analyzing the Ecuadorian context, concludes that any constitutional violation is sufficient grounds to invalidate the evidence. This reasoning has also been adopted by Peruvian jurisprudence, as evidenced in Cassation No. 319-2019-Apurímac, where it was recognized that even the infringement of common procedural norms can result in illegal evidence if it directly affects fundamental rights.

Regarding digital evidence, Cuevas (2022) emphasizes that personal privacy must prevail, meaning that any evidence obtained in violation of this right should be discarded. This stance aligns with the "fruit of the poisonous tree" doctrine, widely recognized in comparative law. Thus, the Supreme Court, through RN 2900-2016, declared invalid the elements collected during a search conducted without fiscal presence, eliminating any legal validity of the evidence derived from that irregular act.

However, Peruvian jurisprudence has introduced certain interpretative nuances. In rulings such as RN 2006-2019 and RN 2236-2019, it was established that not all evidence obtained irregularly must be automatically excluded. According to this criterion, it is necessary to evaluate the severity of the infringement and the specific circumstances of the case, especially in situations of criminal flagrancy. This approach is linked to proposal of Villalba (2023) to apply a proportionality criterion that balances procedural efficiency with the protection of fundamental rights.

From a European perspective, authors like Muñoz (2023) and Gutiérrez (2020) warn about the risks of relaxing the exclusionary rule, stating that admitting evidence obtained in violation of rights by state authorities severely erodes the pillars of the rule of law. This issue is also observed in the Peruvian context, where, despite having a solid normative framework, permissive judicial interpretations persist that justify the admission of tainted evidence under the guise of public interest. Castro (2020) argues that this trend could lead to a dangerous relativization of fundamental rights if uniform criteria and precise limits are not established.

National studies by Begazo (2022) and Huerta (2021) demonstrate that admitting prohibited evidence in critical stages of the process, such as the hearing to review charges, can severely compromise essential guarantees such as personal liberty, privacy, and due process. Similarly, Bravo (2022) warns that the freedom of evidence should not be interpreted as a license to admit evidence obtained in violation of constitutional norms, but should be exercised within clearly defined ethical and legal parameters.

III. Current criteria for determining the illegality of evidence: balancing fundamental rights and procedural rules

In the criminal process, determining when evidence should be excluded due to its irregular origin has sparked profound doctrinal debate. A widely supported perspective holds that any evidence obtained through the violation of fundamental rights lacks validity and, therefore, must be excluded from the process. This approach, rooted in garantism, is based on the premise that the Constitution not only delineates the punitive power of the State but also establishes the criteria for evidentiary legitimacy. In this vein, Miranda (2010) emphasizes that the

illegality of evidence is not confined to its presentation in court but encompasses all stages of its acquisition, particularly when essential guarantees of the accused have been violated.

In agreement, Asencio (1990) warns that admitting evidence obtained in contravention of fundamental rights undermines its protective function and weakens the normative force of constitutional guarantees. This stance is closely linked to the principle of legality, as allowing evidence obtained irregularly compromises the validity of the entire procedure. Similarly, Picó i Junoy (1997) argues that incorporating illegal evidentiary material contaminates the trial process, distorts judicial impartiality, and poses a clear risk to the neutrality of the final decision.

Comparative jurisprudence has solidified this stance. In Judgment 114/1984, the Spanish Constitutional Court established that any evidence obtained by violating fundamental rights must be excluded, due to the hierarchical supremacy of such guarantees. This criterion has significantly influenced several Latin American legal systems, including Peru, which adopted the exclusionary rule as an essential tool to safeguard the legality of the process.

In this context, the exclusion of illegal evidence requires special protection for rights such as personal privacy, inviolability of the home, confidentiality of communications, and the prohibition of self-incrimination. Various specialists add that the analysis of illegality should not be limited to constitutional infringements but should also consider superior principles, such as human dignity and judicial impartiality.

However, this model presents practical limitations, as it does not clearly define the cases in which procedural or legal norms are violated that, while not directly affecting fundamental rights, compromise the transparency and validity of the criminal process.

In response, a second, broader doctrinal current posits that any evidence obtained in violation of any legal norm should be considered illegal, without restricting this to constitutional norms. From this perspective, Calderón (2021) argues that strict adherence to all legal rules—whether constitutional, statutory, or regulatory—is essential, as all are part of the normative framework governing judicial conduct. Consequently, any procedural transgression committed by a prosecutor, judge, police officer, or attorney could lead to the exclusion of the evidentiary material.

Supporting this reasoning, Véscovi (1970) asserts that the illegality of evidence does not depend on the hierarchical rank of the violated norm, while Gimeno et al. (1996) emphasize that evidentiary validity is compromised when essential procedural requirements are not met, even if these do not directly affect fundamental rights. This approach encompasses scenarios such as omissions of formalities, absence of required witnesses, lack of fiscal intervention, or non-compliance with protocols in procedures. While these irregularities do not always affect fundamental rights, they compromise procedural legality and should be treated as manifestations of illegal evidence.

Comparative jurisprudence has also reinforced this view. Judgment No. 2647/1990 from the Spanish Supreme Court determined that not only evidence obtained in violation of fundamental rights must be excluded, but also that which infringes essential procedural norms. This criterion broadens the protection of the criminal process by preventing lapses in the chain of custody or in the formalization of procedural acts from going unnoticed.

However, this interpretation requires caution. Not every normative infringement results in an insurmountable illegality; it is necessary to distinguish between minor defects, which are correctable, and substantial transgressions that compromise the validity of the process and the right to due process. Moreover, Peruvian jurisprudence still lacks uniformity in the criteria that determine when a normative violation equates to the infringement of a fundamental right.

IV. The Intermediate stage as a strategic core for refining evidence and safeguarding procedural guarantees

The intermediate stage, regulated by Article 350 of the Criminal Procedural Code (CPP), represents a crucial moment for protecting the validity of the procedure and ensuring due process. At this stage, the judge not only assesses whether the fiscal accusation is adequately substantiated but must also verify the legality of the offered evidence, ensuring respect for constitutional guarantees and the international commitments of the Peruvian State.

From an inter-American perspective, the Inter-American Court of Human Rights established in the Barrios Altos vs. Peru case (2001) that procedural guarantees must operate from the initial stages to early assess the legality and validity of evidence and to avoid irreversible consequences arising from violations of human rights.

In this sense, the hearing to review charges becomes a key space for deciding which evidence can be incorporated and which must be excluded due to its illegal origin. However, Muñoz (2023) warns that, in practice, this hearing has been reduced to a formal procedure in various jurisdictions, increasing the risk of admitting

illegitimate evidence. Similarly, Gómez (2023) argues that the purification of irregular evidence must occur in the early stages of the process, in accordance with Article 8 of the American Convention on Human Rights, which requires effective judicial protection from the initial acts of investigation.

Arias (2021) adds that judges have a constitutional obligation to exclude any evidence that violates fundamental rights, such as the presumption of innocence, personal privacy, or the right to effective legal counsel. Article 159 of the CPP also stipulates that evidentiary elements obtained in violation of constitutional guarantees lack legal value.

Moreover, Calderón (2021) warns that the incorporation of illegal evidence contravenes the principle of legality and Peru's international commitments regarding human rights. This criterion aligns with what the Inter-American Court of Human Rights stated in Loayza Tamayo vs. Peru (1997), where it was established that no evidence obtained through a violation of human rights may be admitted in the criminal process.

From the perspective of legal psychology, Simon (2012) concludes that a judge's exposure to illegal evidence can bias their impartiality, affecting the neutrality of their decision. Consequently, the early exclusion of all illegal evidence is an indispensable guarantee for preserving transparency, judicial impartiality, and the legitimacy of the criminal process.

VI. Practical consequences of incorporating illegally obtained evidence in the hearing to review charges

One of the most sensitive aspects of the criminal process is the protection of privacy, a right recognized both by the Peruvian Constitution and by international human rights instruments. The use of evidence obtained unlawfully directly infringes upon this sphere of intimacy, placing the accused in a position of defenselessness against the punitive power of the State. In this regard, Martínez (2024) warns that it is not possible to justify the admission of evidentiary material obtained through the violation of procedural norms, even when procedural efficiency is invoked as an argument. Similarly, Gómez (2023) contends that any evidence collected through the infringement of fundamental rights must be automatically excluded, particularly when it compromises personal privacy. This author invokes the application of the pro persona principle, which mandates that norms be interpreted in a way that provides the maximum possible protection to human rights, contrasting with the permissiveness that the judicial system sometimes displays toward invasive practices.

Accepting that any evidentiary element is valid as long as it is useful leads to a reductionist view of the criminal process, incompatible with the principles that underpin a constitutional State governed by law. Internationally, the Inter-American Court of Human Rights (IACHR) has stated that any state intervention in the private sphere must meet three essential requirements: it must be provided for by a clear norm, serve a legitimate purpose, and respect a criterion of proportionality between the pursued objective and the resulting impact.

From a comparative perspective, Muñoz (2023), examining the experience of Spanish law, warns that admitting evidence obtained illegally undermines the foundations of the rule of law and weakens the real protection of fundamental guarantees. These findings coincide with the execution of interventions without the corresponding judicial authorization, thus engaging in practices contrary to national standards and incompatible with the commitments that Peru has undertaken regarding human rights.

The inclusion of such evidentiary material in the hearing to review charges produces effects that extend beyond the criminal process, as it legitimizes illegitimate actions and exposes the accused to further violations of their privacy and personal dignity. In some cases, the harm transcends the judicial sphere, impacting their public reputation, family relationships, and even their social environment. In light of this situation, Villalba (2023) proposes applying a case-by-case analysis to evaluate the admission of questioned evidence. However, the findings of this study caution that excessive flexibility could create serious risks, as it might be used to legitimize invasive practices without proper judicial oversight, undermining the essential guarantees of due process.

In line with this critique, Cuevas (2022) develops the concept of “reasonable expectation of privacy,” according to which direct physical harm is not required to constitute a violation. Unauthorized access to personal data, electronic devices, or private communications constitutes an intrusion incompatible with constitutional standards. Additionally, this author supports the application of the "fruit of the poisonous tree" doctrine, which establishes that any element derived from an unlawful acquisition automatically loses its procedural validity. Therefore, it becomes essential for judges at the intermediate stage to exercise thorough control over the admissibility and legality of the evidence presented.

VII. Specialist reflections on the admission of illegally obtained evidence and its impact on privacy in the hearing to review charges

Interviews conducted with five specialists in Criminal Law reveal a concerning consensus: the persistent admission of illegally obtained evidence during the hearing to review charges poses a direct threat to the protection

of privacy and the guarantee of due process. This concern aligns with the observations made by Huerta (2021), who warns that this practice undermines essential pillars of the justice system and weakens the protection of individual rights.

The participants emphasized that the Peruvian judicial system exhibits deficiencies in verifying the legality of evidentiary means, revealing insufficient judicial oversight regarding the legality of the evidence. This finding relates to the analysis carried out by Martínez (2024), concluding that the absence of clear parameters generates inconsistencies in the interpretation and application of procedural norms.

During the fieldwork, some interviewees expressed a certain affinity for the intermediate proposal put forth by Villalba (2023), who argues that not all illegally obtained evidence should be automatically excluded. According to this position, it would be preferable to apply a proportionality test that allows for case-by-case evaluation, weighing the evidentiary value against the magnitude of the impact caused by its acquisition.

However, this position is controversial. Muñoz (2023) and Cuevas (2022) categorically oppose this view, warning that allowing the admission of evidence derived from illegal acts weakens the supremacy of the Constitution, erodes public trust in the administration of justice, and compromises the principles that uphold the democratic State of law. For them, any flexibility in this matter opens the door to abuses and legitimizes invasive practices incompatible with respect for procedural guarantees.

Another recurring point in the interviews was the absence of uniform criteria that allow judges to objectively evaluate the legality of evidence. In line with this concern, Begazo (2022) proposes the need to implement clear and garantist parameters to guide judicial action. Although some authors, like Castro (2020), advocate for the admission of questioned evidence in cases of special gravity by appealing to public interest, the majority of specialists reject this approach, considering that it prioritizes procedural efficiency over the protection of fundamental rights.

Collectively, the interviewees agreed on the need to promote normative and jurisprudential reforms that strengthen the judge's role as a guarantor of constitutional rights. This view is supported by Gómez (2023), who asserts that excluding all evidence obtained through the violation of rights is essential to preserve the integrity of the criminal process. Similarly, Calderón (2021) warns that the incorporation of such evidence not only compromises the validity of the procedure but also erodes the robustness of the democratic model and undermines public trust in justice institutions.

Conclusions

The results of the research indicate that the incorporation of evidence obtained unlawfully in the hearing to review charges poses a direct threat to the enforcement of the principle of legality and to the effective protection of the right to privacy. Although the Peruvian normative framework has made significant strides in regulating evidentiary exclusion, the findings reveal a concerning gap between constitutional design and judicial practice, leading to inconsistencies in the actual application of procedural guarantees.

The doctrinal analysis, along with the testimonies collected, demonstrates that this issue persists due to the presence of functionalist criteria, excessively permissive decisions, and deficiencies in training on fundamental rights among some operators in the criminal justice system. These shortcomings not only affect the accused's right to a fair process and an impartial trial but also weaken the legitimacy and credibility of the justice administration in the eyes of the public.

Moreover, the results reaffirm the urgent need to consolidate a garantist approach in the evaluation of evidentiary elements, where fundamental rights prevail over any argument for procedural efficiency. The ultimate goal of the criminal process should be to protect human dignity and safeguard individual freedoms. Therefore, the hearing to review charges must be understood as a key space for evidentiary refinement, rather than merely a formal instance. At this stage, the judge's role must be active and thorough, rigorously assessing the legality, relevance, and regularity of each piece of evidence, with the aim of excluding any evidence obtained through the violation of constitutional rights.

Finally, this research opens new avenues for future studies aimed at deepening the judicial criteria applied regarding the admissibility of illegally obtained evidence, whether through broader quantitative analyses, specific case studies, or comparisons between different legal systems. Additionally, it highlights the need to promote normative reforms and ongoing training programs for judges, prosecutors, and defense attorneys, which would help standardize exclusionary criteria and strengthen respect for procedural guarantees. Only through these actions will it be possible to consolidate a more legitimate, coherent, and committed criminal justice system concerning the protection of human dignity.

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