# Comparative exclusionary rules - Portuguese and Brazilian perspective

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## Introduction

The Portuguese law adopted the German conception of the *Beweisverbote*. Nevertheless, it received also the influence of the American case law, which encompasses the exclusionary rule and the "fruit of the poisonous tree doctrine".

## I.1. Portuguese case law

The first time the fruit of the poisonous tree doctrine was recognized in the Portuguese case law was by the Oeiras Judicial Court's decision from 5th of March 1993: "*the nullity of the first evidence affects the second, correspondingly implying that the judge cannot obtain any conclusion from the latter*"[1]. Subsequently, the fruit of the poisonous tree was declared in several judgments, as was the need to impose restrictions on it. Both issues have already deserved joint consideration within the constitutional case law.

In what concerns constitutional case law, the important decision from 24th of March 2004[2] of the Constitutional Court should be mentioned, whose ruling was again asserted by means of its summary decision from 11th of January 2008[3]. The decision

[1] Sentença do 3.º Juízo, de 5 de março de 1993, Proc. n.º 777/91, 2.ª Secção (cf. Espírito Santo, 1992: 78).
[2] Acórdão do Tribunal Constitucional n.º 198/2004, de 24 de março de 2004 (Moura Ramos); cf. *Elementos de estudo*, 2010: 645-676.
[3] Decisão Sumária n.º 13/2008, de 11 de janeiro de 2008 (Maria Lúcia Amaral); cf. *Elementos de estudo*, 2010: 630-645.

dealt with the issue whether the provision of Article 122 No. 1 of the Portuguese Criminal Procedure Code, given the nullity of performed wiretapping, can authorize the use of different evidence, distinct and subsequent to the wiretapping, such as confessional declarations of the defendants that would not exist if the defendants had knowledge of the invalidity of the wiretapping[4]. Referring to the doctrine originating from the landmark case *Wong Sun v. United States*, the Portuguese Constitutional Court asserted the full validity of the fruit of the poisonous tree doctrine[5], yet considering that, in the particular case, the invalidity of the primary evidence was not affecting a later confession, provided that it was of free and informed nature, thus constituting an independent act of free will[6]. With reference to Article 122, the Portuguese Constitutional Court stated that "*this rule makes interpretative room where relationships of dependency or production of legal results (Art. 122, No. 1 of the Portuguese Criminal Procedure Code refers dependent acts or acts affected by the invalid act) have to be looked for, which, based upon rational principles, require projection of the same value that affects the prior act*"[7]. Eventually, the Constitutional Court ruled that "*the comprehension of Article 122, No. 1 of the Criminal Procedure Code underlying the contested decision, according to which this article provides the possibility to balance the relevance of subsequent evidence, without declaring their invalidity, when declarations of confessionary nature are at issue, proves to be in accordance with the Constitution, thus not containing any interpretative overlapping regarding that rule as to bring about offense to the provision of the invoked constitutional precepts*"[8].

### I.2. Portuguese legal theory

Already previous to the present Portuguese Criminal Procedure Code from 1987, Jorge de Figueiredo Dias had defended that the "*doctrine the Germans call by the name* Fernwirkung des Beweisverbots *and the Americans by the name fruit of the poisonous tree*"[9] was obviously settled in Article 32 of the Constitution of the

[4] *Elementos de estudo*, 2010: 660.
[5] *Elementos de estudo*, 2010: 664.
[6] *Elementos de estudo*, 2010: 670.
[7] *Elementos de estudo*, 2010: 671-672.
[8] *Elementos de estudo*, 2010: 675-676.
[9] Figueiredo Dias, 1983: 208.

Portuguese Republic from 1976.

In his monograph on evidentiary prohibitions, Manuel da Costa Andrade examined the fruit of the poisonous tree doctrine and the corresponding mitigations in the USA[10] and in Germany[11]. Concerning the solution recommended by American courts and commentators, he stated that the independent source "*justifies the admissibility of secondary evidence whenever it was or could have been gathered autonomously and legally beyond the exclusionary rule that affects the primary evidence. Yet being necessary to determine the particularly strict requirements demanded by American courts to admit a hypothetical causality. That will only occur in cases where the secondary evidence, being produced independently and legally, can be considered as* '*imminent, but in fact unrealized source of evidence (inevitable discovery exception)*'."[12]

Helena Morão deals with the exclusion of evidence, though criticizing the relevance of hypothetical courses of investigation as a comparative pattern for admission of evidence[13]. Similarly Paulo Pinto de Albuquerque accepts the constraints on the fruit of the poisonous tree, while refusing to call upon hypothetical courses of investigation and especially the 'inevitable discovery' doctrine[14]. For my part, I recognize that it is not acceptable to call upon hypothetical course of investigation without proper reflection, otherwise the preventive meaning of evidentiary prohibition would turn out inefficient. However, taking into consideration the restrictions to the use of 'inevitable discovery' doctrine imposed gradually by the American case law, this turns out to be the most adequate for the balancing approach involved in given cases.

### I.3. Portuguese legal basis for the fruit of the poisonous tree doctrine

Yet the technical and legal issue on how the legal basis for the fruit of the poisonous tree doctrine is constituted within the Portuguese legal system has still to be

[10] Costa Andrade, 1992: 172.
[11] Costa Andrade, 1992: 178.
[12] Costa Andrade, 1992: 172.
[13] Morão, 2006: 612.
[14] Pinto de Albuquerque, 2011: Article 126.

addressed. More often than not, Article 122 No. 1 of the Criminal Procedure Code is quoted: "*Nullities render invalid the act in which they occurred, as well as those acts depending on the former and capable of being affected by the nullities*." This reference is nevertheless doubtful, given the autonomy of the evidentiary prohibitions and hence their independence with respect to the system of procedural nullities, within which Article 122 itself is inserted.

Furthermore, the Portuguese Constitutional Court had already the occasion to demonstrate, by means of the decision from 24th of March 2004[15], that the generic assertion of the safeguards of the rights of defense, such as contained in Art. 32 No.1 of the Constitution of the Portuguese Republic, "*would be sufficient for considering included among those defense rights the right to have excluded from the case the illegal evidence itself (once rendered inefficient, invalid or null), regarding values of constitutional relevance. That being so, No. 8 of that same Article 32 does no more than emphasizing and making unquestionable this right to exclusion, as a specific and inseparable dimension of a criminal procedure with full defense guarantees. As for the values (as set out in Art. 32 No. 8) to which the Constitution attributes such an importance, it would make no sense if the evidence that affects them and that had been obtained under violation of the rules that allow the constraint of these same values, produced valid consequences that fell short of the nullity of these pieces of evidence.*"[16]

Turning again to the legal theory, Helena Morão considers that it is not necessary to rely on Article 122 No. 1 of the Criminal Procedure Code to support a regulatory base for the fruit of the poisonous tree doctrine, inasmuch as the constitutional base contained in Article 32 No. 8 of the Constitution would suffice[17].

In previous writings I tried to support the fruit of the poisonous tree doctrine in Article 122 No. 1 of the Criminal Procedure Code[18], however that position in fact was not in line with my backing of a full technical independence of evidentiary prohibitions in view of the regulation of procedural nullities. For this reason I think

[15] Acórdão do Tribunal Constitucional n.º 198/2004, de 24 de março de 2004 (Moura Ramos).
[16] *Elementos de estudo*, 2010: 663.
[17] Morão, 2006: 596-601.
[18] Sousa Mendes, 2000: 99 and Sousa Mendes, 2004: 153.

that the reference to Art. 122 No. 1 of the Criminal Procedure Code can only serve as an *a fortiori* argument.

### II.1. Brazilian legal system

In the Brazilian law, the Federal Constitution from 1988 deals with illegal evidence in Article 5, which provides in paragraph LVI that "*evidence obtained by illegal means is not admissible for procedural purposes*"

On the other hand, Act No. 11.690 from 2008 introduced the following rule to the Brazilian Criminal Procedure Code (Article 157): "*Illegal evidence, herein understood evidence obtained through violation of constitutional or legal provisions, is not admissible, and should be removed from the case*".

The Brazilian Criminal Procedure Code does not detail prohibited evidence, thus obligating the judge to analyze all relevant statute law while admitting and valuing the evidence produced by the different parts, so as to conclude whether or not this evidence was obtained under violation of fundamental rights, liberties and guarantees, laid down in constitutional or other legal rules, thus being considered as illegal evidence.

### II.2. Brazilian legal theory

The Brazilian legal theory is divided into several lines of thought, from the endorsement of admission of illegal evidence – imposing as an alternative remedy the punishment of those who obtained it by ilegal means (*male captum, bene retentum*) – to the opposite viewpoint, where the use of the illegal evidence is completely inadmissible (exclusionary rule as a factual sanction against offending officers), passing through intermediate positions of admissibility of illegal evidence depending on a case specific basis judgment of proportionality (exclusionary rule as a tool for the protection of fundamental rights).

### II.3. Brazilian legal basis for the fruit of the poisonous tree doctrine

As far as the fruit of the poisonous tree doctrine is concerned, the Brazilian Criminal Procedure Code in its Article 157, as amended by means of Act No. 11.690/08, provides in the first paragraph that "*evidence derived from illegal evidence is also inadmissible, unless the nexus between one and another has not been proven, or the derived evidence can be obtained through a source that is independent from the first"*. Therefore, the Brazilian legal system accepts absolutely the fruit of the poisonous tree doctrine and its limitations. Nevertheless it confuses the independent source and the inevitable discovery.

**QUOTATIONS**

AA.VV.
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