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APRESENTAÇÃO

A **Revista Internacional CONSINTER de Direito** é uma publicação de cariz periódico do **CONSINTER – Conselho Internacional de Estudos Contemporâneos em Pós-Graduação** que tem por objetivo constituir-se num espaço exigente para a divulgação da produção científica de qualidade, inovadora e com profundidade, características que consideramos essenciais para o bom desenvolvimento da ciência jurídica no âmbito internacional.

Outra característica dos trabalhos selecionados para a **Revista Internacional CONSINTER de Direito** é a multiplicidade de pontos de vista e temas através dos quais o Direito é analisado. Uma revista que se pretende internacional tem o dever de abrir horizontes para temas, abordagens e enfoques os mais diversos e, através deste espaço, colaborar com um melhor diálogo acadêmico.

Resultado de um trabalho criterioso de seleção, este volume que agora se apresenta destina-se a todos aqueles que pretendem pensar o Direito, ir além da sua aplicação quotidiana, mas sem deixar de lado o aspecto prático, tão característico das ciências.

Capítulo 02

DIREITO PÚBLICO

SHARING WITHOUT JUDICIAL AUTHORIZATION OF FINANCIAL INTELLIGENCE REPORTS AND SERENDIPITY

COMPARTILHAMENTO SEM AUTORIZAÇÃO JUDICIAL DE RELATÓRIOSDE INTELIGÊNCIA FINANCEIRA E A SERENDIPIDADE

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Alexandre Coutinho Pagliarini[1] – https://orcid.org/0000-0001-5257-2359
Alexander Haering Gonçalves Teixeira[2] – https://orcid.org/0000-0003-0249-9995

Abstract

This paper presents a study on serendipity or chance encounter in criminal proceedings. Initially, through a bibliographic analysis of the topic, it appears that the better part of legal doctrine believes that proof of a crime related to the main crime being investigated must be admitted. Then, the current jurisprudence of the STF and STJ is analyzed, which dismisses imprisonment as punishment for fortuitous crime and advocate the broad admission of evidence, even if there is no such connection. Subsequently, the judgment of RE 1055941 / SP is analyzed, in which the STF considers the evidence obtained through serendipity as valid evidence. In the end, it was possible to conclude that based on the aforementioned ruling, there needs to be a connection between the infraction sought and the one found casually. It is considered fundamental for the attribution of evidential value to the element found fortuitously the absence of deviation of purpose in the execution of the investigative measure or the clear existence of connection between the infractions. For the development of this article, bibliographical research and review were used, and the analysis of legal doctrine and jurisprudence were fundamental to achieve the objective of the proposed research.

Keywords: Criminal proceedings. Serendipity. Limit the random encounter of evidence. Lawfulness of evidence.

Resumo

Este trabalho apresenta um estudo sobre o tema da serendipidade ou encontro fortuito de provas no processo penal. Inicialmente, através de uma análise bibliográfica do tema, constata-se que a doutrina majoritária entende que deve ser admitida a prova de crime

[1] Pós-Doutor em Direito Constitucional pela Universidade de Lisboa. Doutor e Mestre em Direito do Estado pela PUC-SP. Professor Titular dos cursos de Mestrado e Graduação em Direito da UNINTER. Advogado, Consultor Jurídico e Palestrante. *E-mail:* alexandrecoutinhopagliarini@gmail.com /.

[2] Mestrando em direito pelo Centro Universitário Internacional UNINTER. Especialista em Direito Aplicado pela Escola da Magistratura do Paraná – EMAP. Graduado em Direito pelo UNICURITIBA. Advogado. Assessor de apoio para assuntos jurídicos da 5ª Região Militar. *E-mail*: alexander.haering.teixeira@gmail.com.

conexo com o crime principal que esteja sendo investigado. Em seguida, analisa-se as jurisprudências atuais do STF e do STJ, as quais dispensam a reclusão como punição para o crime fortuito e propugnam a ampla admissão da prova, ainda que não haja a referida conexão. Na sequência, é analisado o julgado do RE 1055941/SP, em que o STF considera como prova válida aquela obtida por meio da serendipidade. Ao final, foi possível concluir que a partir do referido julgado, a prescindibilidade da conexão entre a infração buscada e a encontrada casualmente. Considera-se como fundamental para a atribuição de valor probatório ao elemento encontrado a existência de desvio de finalidade na execução da medida investigativa ou a inexistência de conexão entre as infrações. Para o desenvolvimento deste artigo foram utilizadas pesquisa e exploração bibliográfica, tendo a análise da doutrina e da jurisprudência sido fundamentais para alcançar o objetivo da pesquisa proposta.

Palavras-chave: Processo Penal. Serendipidade. Limite no encontro fortuito de provas. Licitude da prova**.**

Summary: Introduction; 1. Fortuitous evidence discovery theory or serendipity; 2. The fortuitous evidence discovery theory; 3. Dominant position in the STF judgment; 4. Final Considerations; References.

INTRODUCTION

In this paper, we seek to analyze how the Brazilian doctrine and jurisprudence deal with the evidence discovered on a fortuitous event, also known as serendipity. In particular, the limits presented by legal doctrine and the inconsistent manner in which the higher courts resolve, in the specific case, the questions pertinent to the theme will be reviewed.

The justification for this research is the absence of any legal regulation on the subject, entirely dependent on the doctrine and on the jurisprudence to fill the gap. Therefore, the importance of the doctrine for the solution of the controversy that is the object of this article demonstrates the need for it to be constantly studied. In addition, this issue has been brought up frequently in the judicial agenda of recent years, especially with the increase of crimes discovered, by accident, in the activities of the Federal Revenue Service.

Firstly, a bibliographic review of the theme will be carried out, in order to contribute to the systematization and the understanding of legal concepts to be applied in the absent of legislation. Therefore, the review method will demonstrate how legal doctrine studies and proposes the resolution of problems related to the subject, in particular the criterion of the connection between crimes as a way of differentiating the evidence that can be lawfully used in criminal proceedings.

Then, the most recent jurisprudence of the higher courts will be analyzed, with the central observation that it disagrees with the doctrinal proposition and advocates the unlimited application of the evidence discovered by chance. A specific analysis of the controversies about serendipity will also be carried out in the financial intelligence reports of the Federal Revenue of Brazil (RFB).

Despite the jurisprudential permissiveness and following the legal doctrine position, the central hypothesis of this paper is that it is possible for Brazilian

jurisprudence to adopt criteria that limit the use of fortuitous evidence, with the foremost aim of avoiding the cross-cutting use of evidence that infringes on fundamental rights.

Thus, starting from the premises, we may conclude that the results obtained with this research point to the necessity of applying the legal doctrine criteria – explored below – by the Brazilian criminal courts, contributing to a shift in jurisprudence. Therefore, it is our understanding that evidence obtained through serendipity should not be allowed outside those parameters, ensuring the protection of fundamental liberties.

1 THE FORTUITOUS DISCOVERY OF EVIDENCE OR SERENDIPITY

The fortuitous discovery occurs in the probatory phase, when the proof of a certain criminal offense is obtained from the search regularly conducted in the investigation of another crime (GOMES, CUNHA, 2009, p. 474). However, such conceptual delimitation is purely a legal doctrine one, since the Legislator failed to provide the necessary regulation for this case, losing the opportunity to exercise its Constitutional role, providing legal norms when they are necessary (PACELLI, 2015, p. 218). However, if we take as a basis the Brazilian legal system, when the Federal Revenue agent, during the investigation of a certain crime, encounters other criminally punishable behaviors, the agent must also act in the investigation of these other crimes. Not doing so could be considered an omission and could give rise to criminal prosecution for the crime of prevarication.

Usually, the fortuitous discovery occurs in the case of preventive measures taken during the investigation phase, such as search and seizure or interception of communications (SIQUEIRA, 2016: 213). However, its incidence is not restricted to these measures, as it is possible for a crime to be discovered accidentally in the testimony of witnesses.

Renato Brasileiro de Lima (2017, p. 273) understands that the central element to be considered is the common unfolding line of the investigation. In this way, the elements discovered during a search and seizure measure that are not related to the investigated fact or do not result from it should be considered fortuitous discoveries or serendipity.

Following legal doctrine classification, we may speak of objective and subjective serendipity. The former, considered more common, occurs when a new crime is uncovered during the investigation of a previous one, such as in the event of a drug trafficking charge that leads to the discovery of murder or manslaughter (STF, HC 129678 / SP). The latter occurs when it is accidentally discovered that the author of the investigated fact does not coincide with the original suspect. Finally, there can be a combination of the two (*serendipidade mista*), when, in the course of the investigation, the authority discovers the practice of different facts by a person unrelated to the current investigation.

Furthermore, consideration of the common unfolding line of the investigation is the main criterion for assessing the legality of the measure and the possibility of using the information as evidence, in the strict sense, as basis for conviction.

The evaluation of the possibility of using the evidence obtained by chance depends, according to dominant legal doctrine, on the criteria of the common unfolding line of the investigation and the connection between the reported crimes. There is a part of the doctrine that defends the absolute inadmissibility of the evidence obtained by chance. For Lopes Jr. (2016, p. 356), to admit that information obtained through search and seizure or breach of confidentiality be used as evidence of different crimes from those initially investigated implies deviation from the causal link of the evidence.

Lopes Jr. argues that such measures, as they imply an infringement of the fundamental right to privacy, require the limitation of their effects since the judicial act that authorizes the measure must be fully linked to the request made and, more importantly in this case, to the material collected, directed to a specific and determined fact (LOPES JR, 2016, p. 356). In this sense, admitting the wide and unrestricted use of any and all information obtained by chance could give room for the use of invasive evidential means in a transversal way (ARANHA, 2006, p. 186). As an example, there could be a request for interception of communications under a drug trafficking charge, when, in fact, the authority would like to obtain information about the existence of a crime about which it does not have sufficient evidence. Therefore, the legal objectives of restrictive measures become fluid, allowing for abuse and misuse of purpose. Therefore, the prohibition on the use of fortuitous evidence would fulfill the purpose, common to other evidential illegalities, of control and improvement of persecutory police activities (PACELLI, 2015, p. 341). For the author, it is important to observe whether the police activity has deviated from the common line of investigation in an abusive way. For example, in a search for wild animals that ends up with police turning over cabinets and drawers for the seizure of documents such abuse is clear.

The author argues, however, that if abusive deviation does not occur, the use of evidence must be authorized, since it has already been produced and care must be taken so that the theory "does not become an instrument for safeguarding criminal activities" (PACELLI, 2015, p. 367). Therefore, if there is an abusive conduct on the part of the investigation, the evidence will be illegal (LIMA, 2017, p. 285). However, it cannot be said that all the evidence found randomly, without abuse of power, can be used. In reality, even if the authority acted in accordance with the legal limits of its exercise of power, the extrapolation of the object of the decreed measure and the need to control police activity still persists. The legal doctrine separates the hypotheses of chance discovery of evidence between first and second-degree serendipity. The first hypothesis concerns the finding of evidence on facts that have a connection or continence relationship with the main fact investigated. Second-degree serendipity, in turn, occurs when the evidence discovered has no relation to the fact that was intended to be proved. The connection and continence

that lead to the recognition of first-degree serendipity are those provided for in the Code of Criminal Procedure (CPP), which imply modification of the competence to judge the crime (from state to federal court, for instance). In these situations, the proof of one fact directly influences the proof of the other, either due to the influence of time or place, or the connection between crimes or even due to the agents concerted action.

Precisely as a result of the relationship between crimes or between their evidence (in the case of the evidential connection of item 76, item III, of the CPP), the greater part of the legal doctrine admits the use of the evidence obtained by chance regarding a related or contained crime. Baltazar Jr. (2006, p. 259) points out that the fact investigated is not yet fully outlined, making it impossible to demand a strict correspondence between the fact investigated and the result of the investigation; therefore, if the facts are within the approximate contours of the investigation, the evidence should be used. In fact, it cannot be said that the investigative measure has overreached when a co-author of the same offense, a crime committed in the same circumstances, or an offense whose evidence is closely related to the other is discovered. In reality, the connection implies the existence of a link between two crimes, so that it is advisable to merge the proceedings so that the judge has a perfect view of the evidence (TOURINHO FILHO, 1979, p. 387). In this situation, preventing the use of the evidence, just because it is a chance discovery, would be equivalent to preventing the judge from seeing the whole picture. Antônio Scarance Fernandes (2007, p. 149) understands that this criterion corresponds to a “midpoint” between the total inadmissibility of the evidence discovered randomly and the protection of the prosecutorial interests of the State.

The facts discovered due to second-degree serendipity, in turn, have no connection with the fact initially investigated, which is why the evidence cannot be used. In reality, in the case of a discovery that does not really have a connection with the initial crime, especially considering the broad hypotheses of connection provided for in the legislation, its use is forbidden due to the great probability of deviation from the regular course of the measure.

What is observed, therefore, is that the dominant legal doctrine imposes two limits on the use of fortuitous evidence: the absence of abusive deviation from the common line of developments and the existence of a connection between the object investigated and the crime accidentally discovered. It can be affirmed that, once the connection between the facts is verified, the use of fortuitous evidence must be admitted; absent the connecting link, the fact discovered by chance will only count as *notitia criminis*.

2 THE FORTUITOUS EVIDENCE DISCOVERY THEORY

From Lima's understanding (2014, p. 185), it appears that when an interception of communications is carried out, where all conversations of an investigated person are captured during a certain period of time, there is no way of knowing, beforehand, the possible criminal conduct practiced by the subject. Thus,

if conversations are found that report a crime different from the one that gave rise to the judicial authorization of surveillance, such scenario configures what the doctrine calls chance discovery of evidence or serendipity.

Gomes (2009, apud SIQUEIRA, 2009, p. 10) conceptualizes serendipity as “something like going in search of one thing and discovering another (or others), sometimes even more interesting and valuable”. Its origin is in the English word serendipity, which would have the meaning of discovering things at random. According to the author, “Serendip was the old name of the island of Ceylon (now Sri Lanka). The word was used in 1754 by the English writer Horace Walpole, in the fairy tale The Three Princes of Serendip, who always made discoveries of things they were not looking for”.

Therefore, serendipity can be summed up as the act of finding things when looking for others. For the study of its application in criminal proceedings, see the following example brought by Oliveira (2014, p. 366): imagine an investigative procedure aimed at sources of evidence of environmental crime, “(...) police officers, armed with a search and seizure warrant, they enter a certain residence for the fulfillment of the order (...) “. In a case like this, the lawfulness of the procedure is strictly linked to the purpose for which the aforementioned order was issued, since, according to the author, it is expected that the agents, when violating the home of others, only seek wild animals.

Thus, if the police start to search drawers and cabinets, finding sources of evidence for another infraction (example: money laundering), such conduct would constitute a deviation from the original purpose of the judicial act, which, according to Oliveira (2014, p. 374) would be the cause of the illegality of the evidence collected.

It should be noted that, although the author does not expressly say as much, such a procedure on the part of state agents would not, in fact, constitute a casual discovery, but rather a purposeful discovery of evidence without judicial authorization to do so, as the agents acted with the intention to find them.

Therefore, according to Oliveira (2014, p. 375), there is a chance or casual discovery of evidence when, in the course of an investigative procedure legally authorized to collect evidence for criminal proceedings, there are evidential elements referring to an different offense from the one that was in the judicial authorization, without the purpose of deviating from the measure. According to the author, the definition of the theory is also the limit of its application, because the elements of different infractions must have happened in a casual way, otherwise, the proof is illicit, as the discovery will not have been casual, but purposeful. Having established what is the object of the theory, as well as the essential requirement for the validity of the evidential element found casually – absence of deviation of purpose – we now proceed to identify when the evidence found casually is considered evidence for the purpose of sustaining a condemnatory decree.

Initially, it should be noted that – according to Gomes (2009, p. 474) there are two types of serendipity: first and second degrees. For the author, the first degree

would be the casual discovery of evidence of a related infraction (there is a connection or continence) with the one initially sought; the second-degree serendipity, on the other hand, would be the discovery of evidence of a criminal offense totally unrelated to the one initially sought. Recalling that, as highlighted by Oliveira (2014, p. 193), there is only a chance discovery when there is no deviation in purpose.

Taking into account the occurrence or not of connection between the infraction sought and the one found accidentally, there are two theories about the legal nature of the elements found incidentally.

One position, defended by Nucci (2013, p. 246) and Gomes (2009, p. 475), is that in order to constitute an evidence and therefore to be able to support the condemnatory decree, serendipity must be first-degree. In other words, there must be a connection (or continence) between criminal offenses: the one originally sought and the one found accidentally. For this point of view, if there is a connection (or continence) between the infractions, the elements found can effectively serve as evidence and justify a condemnatory decree. According to Lima (2014, apud GOMES, 2010, p. 275), if there is no such connection, the elements found could not justify a condemnatory decree on their own. Therefore, this reasoning has given the legal nature of *notitia criminis* to elements collected casually in the course of, for example, a telephone interception, when there is no connection or continence between the infractions and may serve to initiate an investigation to ascertain the disconnected infraction discovered casually, with a view to investigating other sources of evidence, but not as a focal basis for conviction.

Lima (2014, p. 285) explains that, even in this understanding, although there is no connection, the evidence casually uncovered cannot be considered illegal, because the context in which the informational elements were found is valid (as long as there is no deviation in purpose). Therefore, there is no attribution of legal nature to the evidence, which can function as legitimate *notitia criminis*.

In the scope of the higher courts, the Superior Court of Justice (STJ) ruled as much, in a notable ruling:

> *(...) The discussion regarding the connection between the fact investigated and the fact found by chance only arises in the case of a past criminal infraction, as far as future infractions are concerned, the heart of the controversy will be regarding the lawfulness or not of the law evidence used and from which it became aware of such criminal conduct. Habeas corpus denied ". (STJ – HC: 69552 PR 2006 / 0241993-5, Judgment Date: 06.02.2007, T5 – Publication: DJ 05/14/2007 p. 347).*

Before reading the excerpt of the decision above, it is noticeable that the Superior Court of Justice does not require the connection between the infractions when it comes to discovering an infraction that will still be practiced (future infraction), because in this case, the State could not remain inert before the potential

occurrence of crime. On the other hand, it could be inferred that there is a need for connection when it comes to past infractions.

However, in the same judgment, the STJ decided that "(...) considering that, on the one hand, the State, through its investigative bodies, violated someone's privacy, it did so with constitutional and legal support, which is why the evidence it was consolidated lawful (...) ". According to Lima (2014, p. 293), in this excerpt, the STJ demonstrates the needlessness of the connection between the infractions in any hypothesis, be it a past or future infraction, as it is enough that the violation of the intimacy has been allowed in a lawful manner so that the elements found by chance are also considered as legitimate sources of evidence.

3 DOMINANT POSITION IN THE SUPREME FEDERAL COURT JURISPRUDENCE

In 2019, the Supreme Federal Court (STF) debated an unfolding of the case in which the Federal Revenue Office (RFB) instituted tax proceedings against the company under the suspicion that tax evasion was taking place.

In the course of the procedure, the RFB, without judicial authorization, directly requested the bank statements with the company's bank transactions (art. 6 of LC n. 105/2001).

In possession of the statements, the Tax Authorities found that there was indeed tax evasion and, as a result, it initiate administrative tax proceedings against the company and made the definitive constitution of the tax credit. Up to this point, only an administrative-tax process (collection of taxes and fines) was initiated. It so happens that the Federal Revenue Service, after the administrative procedure and constitution of the tax debt, forwarded to the Federal Prosecution Service(MPF) a "Tax Representation for Criminal Purposes (RFFP)", with the data regularly obtained in the course of the inspection and sent in confidentiality by the bank.

It is worth mentioning that it is the duty of the RFB to forward tax representations for criminal purposes to the Public Prosecutor's Office if it ascertains the practice of a criminal offense, as provided for in art. 83 of Law n. 9.430/96:

> *Art. 83. Tax representation for criminal purposes related to crimes against the tax order provided for in art. 1 and 2 of Law N. 8,137, of December 27, 1990, and crimes against Social Security, provided for in art. 168-A and 337-A of Decree-Law N. 2,848, of December 7, 1940 (Penal Code), will be forwarded to the Public Ministry after the final decision, at the administrative level, under the tax requirement of the corresponding tax credit issued.*

The Prosecutor General of the Republic, based on this information, brought criminal charges against the accused for tax evasion (art. 1, I, of Law 8.137/90):

Art. 1 It is a crime against the tax order to suppress or reduce tax, or social contribution and any accessory, through the following conducts: I – omitting information, or making a false declaration to the fiscal authorities; (...)

Penalty – imprisonment for 2 (two) to 5 (five) years, and a fine.

In his defense, the defendant argued the illegality of the evidence collected (bank statements) alleging that there had been a breach of bank secrecy without judicial authorization. Thus, these data could not be used by the Public Prosecutor's Office in criminal proceedings.

Since 2016, there was no longer any doubt that the tax authorities can directly request bank information. This is provided for in art. 6 of LC 105/2001 and was considered constitutional by the STF. The question, as already said, was whether these data could be shared with the Public Prosecutor's Office for criminal proceedings.

In 2019, the STF consolidated that it is legitimate for the Federal Revenue of Brazil (RFB) to share the inspection procedure that it carried out to determine the tax debt with the criminal prosecution agencies for criminal purposes (Federal Police, Public Prosecutor's Office, etc.), without prior judicial authorization. "STF. Plenary. RE 1055941/SP, Rel. Min. Dias Toffoli, tried on 12.04.2019 (general repercussion – Theme 990) (Info 962)".

The Constitution of the Republic guarantees the inviolability of intimacy and private life (art. 5, X) and the inviolability of data (art. 5, XII). As a result of these guarantees, the constitutional text protects financial data, bank secrecy and fiscal secrecy. However, this guarantee is not absolute.

Whether in Brazilian constitutional law or in comparative law, fundamental rights cannot serve as a protective shield against the practice of illicit activities. That is not the purpose of individual guarantees, of public freedoms. In view of the fact that a deviation in purpose is not allowed, there is no longer any doubt that these inviolabilities can be compromised if exceptional, reasonable and proportional situations exist.

The lawful protection of the exercise of fundamental rights is provided for in the Universal Declaration of Human Rights (UDHR). In its art. XXIX, the document affirms both the purpose and the relativity of individual rights. In the end, it subjects the exercise of individual rights and freedoms to the limitations established by law. In view of this relativistic character, it can be concluded that there is no unconstitutionality in the provision of exceptional restrictions on public freedoms, including intimacy, privacy and data confidentiality, provided that the purpose is to guarantee the rights and freedoms of other members of society following reasonable demands of the law, morals, public order and the well-being of a democratic society.

The exceptional relativization of public freedoms, within reasonable criteria, can be enacted by all three constitutional Powers, except when there is an express judicial reserve clause, which is not the situation at hand. In the case of financial

secrecy, there is mainly an international purpose of defending integrity, combating organized crime and corruption.

The STF, when judging, on 02/24/2016, ADIs 2390, 2386, 2397 and 2859 and RE 601314/SP, declared that it is possible for the RFB to have access to generic data. Furthermore, if there are indications of irregularities and the legal assumptions are present, the institution of a supervisory procedure was allowed, admitting the breach of fiscal and banking secrecy, to verify whether or not there is an illegality. In this judgment, the STF understood that the provision of art. 6 of LC 105/2001, which relativized financial secrecy and data confidentiality, met the requirements of exceptionality, reasonableness and proportionality.

In compliance with international standards, this sharing, a mechanism of financial intelligence, had a dual purpose: to avoid non-compliance with tax rules and to combat criminal practices. Not allowing the full information of the inspection procedure, with all the tax and bank data from which materiality and evidence of authorship have been verified, goes against the legal mechanism of relativization.

There is no sense in producing lawful evidence, obtained in accordance with the Constitution and legislation, and not allowing sharing with the author of the criminal action. The sharing of this evidence, obtained through a regular procedure, is nothing more than typical borrowed, lawful evidence. Only the essential information will be sent. The lawful evidence produced during the procedure that gave rise to the definitive assessment of the tax and brought evidence of the authorship of a material crime against the fiscal order must be forwarded. This is because only after the definitive tax entry, in accordance with Statement 24 of the Binding Precedent of the Supreme Court, the materiality of the offense is confirmed:

> *Binding Precedent 24-STF: No material crime against the tax order, provided for in article 1, items I to IV, of Law 8,137 / 90, before the definitive assessment of the tax.*

The RFB can send everything – data, evidence, information – that led it to arrive at the definitive assessment of the tax, as it is necessary for the constitution of materiality in the criminal offense. The rest, as is already done, is either returned to the taxpayer or destroyed. Any excess, any formal or material deviation from this action, must be combated and may be stricken by the Judiciary. What is being said is that there is no unconstitutionality or illegality in the sharing between the RFB and the Public Prosecutor's Office of the evidence and data essential to the conformation and the tax entry.

In the appeal examined by the STF (RE 1055941/SP), a criminal conviction using proof of the inspection procedure obtained by the RFB and sent to the MPF was discussed. Despite this, the STF decided that the judgment and the definition of the thesis should cover not only the procedures shared by the RFB but also the reports sent by the Financial Intelligence Unit (UIF), formerly known as Council for Financial Activities Control (COAF). For most Justices, it was important to examine

the possibility of sharing or not in both hypotheses (RFB and UIF). In both situations, the sharing mechanism, the recipient of the data, the legislation applied and the international commitments are the same. Thus, if the STF did not concomitantly examine the situation of the UIF, this could generate more doubts than legal certainty. In addition, it is not uncommon for the RFB to act with information provided by the UIF. The conclusion of the STF for the sharing of data from the RFB also applies to the financial intelligence reports of the UIF and the latter can, without judicial authorization, share the financial intelligence reports with the Police and the Public Prosecutor's Office with the purpose of using such data in criminal proceedings.

The STF, in this same trial, took advantage of the debate on the topic and established the thesis that the sharing of the financial intelligence reports of the UIF with criminal prosecution bodies for criminal purposes is also constitutional, without the requirement of prior judicial authorization. "STF. Plenary. RE 1055941 / SP, Rel. Min. Dias Toffoli, tried on 12.04.2019 (general repercussion – Theme 990) (Info 962)".

The activity of the UIF must occur within legal limits. If an agency asks for information, the UIF must return the response within the exact limits that it could carry out if it were spontaneous. It cannot extrapolate as it does not have the powers to do so. The UIF will search the database, which is pre-existing and renewed daily, to verify and inform what information it has gathered. Thus, Justice envisioned that there was no unconstitutionality or illegality in the activities of the UIF, either spontaneously or in the face of an eventual request. Thus, the intelligence report that is sent to the Public Prosecutor's Office must receive the same treatment as any piece of information. Otherwise, the jurisdictional control of the accusatory system provided for in the CPP would be undermined. The STF decided not to establish, in this ruling, the probative value of the financial intelligence report, that is, whether it would be possible to convict only on the basis of it or if it would only be a means of obtaining further usable evidence.

As explained by Justice Alexandre de Moraes, in his vote:

> *(...) it would not be the case for us to fix, from now on, the probative value of the intelligence reports. I do not think it is possible to affirm outright that intelligence reports would only be a means of obtaining evidence, because, in the information and data, there may be documentary evidence that was sent to the FIU and that, should be freely valued by the magistrate, according to his conviction. I, therefore, make this caveat.*

In summary, the theses established by the STF on the subject were as follows: (i) It is constitutional to share the financial intelligence reports of the UIF and the entire inspection procedure of the Federal Revenue of Brazil (RFB), which defines the tax entry, with the institutions of criminal prosecution for criminal purposes, without the obligation of prior judicial authorization, and the

confidentiality of information must be safeguarded in formally established procedures and subject to subsequent judicial control. (ii) The sharing by the UIF and the RFB, referring to the previous item, must be made only through formal communications, with guarantee of confidentiality, certification of the recipient and establishment of effective instruments for determining and correcting any deviations. "STF. Plenary. RE 1055941 / SP, Rel. Min. Dias Toffoli, tried on 12.04.2019 (general repercussion – Theme 990) (Info 962)".

4 FINAL CONSIDERATIONS

Firstly, a bibliographic analysis of the theme was carried out, in order to systematize the understanding of legal concepts to be applied in the silence of the law. Therefore, this review sought to demonstrate how legal doctrine classifies serendipity and proposes the resolution of problems related to the subject, in particular the criterion of the connection between crimes as a way of differentiating the evidence that is lawful in criminal proceedings.

Then, the most recent jurisprudence of the higher courts was analyzed. Through the analysis of the legal controversies about serendipity in the financial intelligence reports of the Federal Revenue of Brazil, we concluded that current jurisprudence disagrees with doctrinal propositions and advocates the unlimited use of the evidence discovered by chance, with little regard to fundamental liberties.

According to our initial hypothesis, we demonstrated that there are reasonable criteria to be followed by Brazilian legislators and by jurisprudence to limit the use of fortuitous evidence, even considering the absence of legislation to that effect. The main foundation of such limitation is the prohibition of fortuitous evidence that violates fundamental rights, as proposed by the greater part of the legal doctrine.

By classifying serendipity as objective and subjective, as well as outlining first-degree and second-degree serendipity, the legal doctrine provides a series of distinctions that may help the delimitation of legal and illegal evidence found casually, also allowing for evidence to be used as *notitia criminis*. Such evidence must conform to fundamental principles of human rights and to principles of criminal prosecution, following reasonable distinctions aimed at limiting the prosecutorial power of the State without compromising its constitutional role.

In that sense, the limitation of lawful use of evidence found through serendipity allows for a better balance between the fundamental liberties of the accused and the protection of society. In any case, the topic requires further study and should be the subject of further discussions in scientific research and in the jurisprudence of the Superior Courts.

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