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Marco CECCHI*
Faculty of Law, eCampus University & University of Florence, Italy

REINFORCED REASONING ON A-TYPICAL EVIDENCE. AN ANALYSIS BASED ON THE ITALIAN EXPERIENCE

The atypical evidence (i.e. the evidence not regulated by law) is a kind of evidence that assumes relevance in the Italian system, when – but not only – the process concerns technological innovations or instruments (e.g. videotaping, tracking by GPS, secret agent equipped for sound, trojan virus, AI tools etc.).

A way to manage this peculiar evidence into the judgement is reinforced reasoning. In every juridical situation where this method is feasible, the judge has to adopt a decision technique structured by necessary steps, made up of arguments concerning salient aspects of the case/evidence under his examination and which must be appreciated in order to decide legitimately. These logic-argumentative passages increase the epistemological quality and the transparency of the assessment: and, overall, the value of the pronouncement.

In particular, in front of atypical evidence, the decision maker has to cross three different steps – elaborated by jurisprudence and doctrine – to achieve the right conclusion: and this is precisely what we're going to analyse in the paper.
Keywords: evidence, reinforced reasoning, judgement, tehnological innovations, legitimacy.

1. A-TYPICAL EVIDENCE WITHIN THE ITALIAN CRIMINAL LAW SYSTEM

In Italy, the Criminal Procedure Code – CPC outlines two types of evidence: typical evidence and a-typical evidence. The difference is that the first one is completely regulated by law, while the second one is not legally defined in all its aspects but only in its essential features of legitimacy (*viz.* the legislator delimits solely the *an*, leaving open the *quomodo*).

Jurists have discussed for a long – and, regarding the correct encasing of new technological evidentiary, all today they still argue case by case (*i.e.* new technology by new technology) – about the exact definition of these two categories. Belonging to either category has significant consequences in terms of admissibility and exclusion/usability of evidence in the proceedings.

* PhD, Researcher, ORCID: 0000-0002-7335-2029, e-mail: *marco.cecchi@uniecampus.it*

To be clear, let me give an example. We can talk about identification or recognition. Arts. 213-217 CPC determine how this kind of evidence must be assumed, and – that is the point of our interest, at least at this moment – these articles refer to identification or recognition performed by a human being[1]. So, if it is a person to identify another person (art. 213 CPC), an object (art. 215 CPC) or something else (*e.g.* a voice, a sound or any other element perceptible through sensorial discernment – art. 216 CPC), that's typical evidence. Instead, if the recognition is executed for instance by an animal, assume a dog, we are facing a-typical evidence: because, in this case, the manner of performing the act/activity is not predetermined by law, but it is determined – according to the particularities of the facts, item by item – by the judge after having heard the parties.

The result, in both cases, is the same: a positive or a negative outcome of identification. What changes is the identifier and subsequently the way as evidence runs. It is clear that the mood to recognize someone or something cannot be identical if the performance is man-made rather than dog-made.

So, here lies the demarcation line: a divergence in the legal pre-definition of *modalities of evidence's exercise/assumption*. And, seeing that modalities of evidence's exercise/assumption are arranged to allow judge and parties to evaluate as best as possible the *credibility of the source* and the *reliability of the proof*, we can furthermore observe that evidence legally predefined is normally considered in itself suitable and trustable to

[1] Specifically, "When it is necessary to identify a person, the court shall ask the person who will perform the identification to describe the person and indicate all the details he is able to recall. The court shall also ask him whether he has been previously called to perform the identification, whether before or after the criminal act under prosecution he has seen, either directly or in a photo or otherwise, the person to be identified, whether the latter has been indicated or described to him, and whether any other circumstances may affect the reliability of the identification procedure. […] The person performing the identification shall be asked to leave the room and the court shall call in the room at least two persons that look as similar as possible, also in the clothing, to the person subject to identification. The court shall invite the latter to choose his position among the other participants, making sure that his appearance is as close as possible to what he looked like when he was seen by the person called to perform the identification. When the latter is brought back into the room, the court shall ask him whether or not he can identify any of the persons in the lineup and, in case of an affirmative answer, the court shall ask him to point out the identified person and specify whether he is completely certain of the identification. If there are well-founded reasons to believe that the person called to perform the identification may be intimidated or influenced by the presence of the person subject to the identification, the court shall order that the procedure be performed in a way so that the latter is not able to see the former. The record shall specify the methods employed in the identification procedure, under penalty of nullity. The court may order that the identification be recorded by photo, video or any other devices or procedures. […] When it is necessary to identify the *corpus delicti* or other material related to the offence, the court shall proceed following the provisions [just explained], provided they are applicable. Having obtained, if possible, at least two objects similar to the one to be identified, the court shall ask the person called to perform the identification whether or not he can recognise any of them. In case of an affirmative answer, the court shall ask him to specify which object he has recognised and whether he is completely certain of the identification. […] When ordering the identification of voices, sounds or any other element that may be the object of sensorial perception, the court shall follow the provisions [exposed *supra*], provided they are applicable. […] If more than one person is called to identify the same person or the same object, the court shall proceed by separate actions, taking due care to prevent any communication between the person who has performed the identification and those who still have to perform it. If the same person is required to identify more than one person or object, the court shall order that, in each action, the person or object to be identified be placed among different persons and objects" (Gialuz, Lupária & Scarpa, 2017, pp. 231-233).

establish the facts; conversely, the suitability and trustability of atypical evidence must be ensured by judge and parties with a careful configuration of its manifestation's way.

Well, without pausing on the distinction between the formation of evidence during cross-examination (the golden rule of the adversarial system)[2] and acquisition of evidence already formed (weak contradictory on the proof)[3], now we care to emphasize those that are the fundamental characteristics of atypical evidence.

CPC, Book III, Title I – General Provisions sets up requirements of "Evidence not regulated by law" (art. 189)[4]:

1) aptness to determine/ascertain the facts[5] – it must be concretely able to provide probatory elements that are significant/relevant for judgement and appreciable in their reliability;
2) not compromised of moral freedom[6] – it must remain free the individual capacity of self-determination according to the situation are not allowed practices like hypnosis, lie detector, narcoanalysis *et similia*;
3) duty (for the judge) of hearing the parties on the methods of gathering evidence, preliminary to decide on the admission of this kind of proof[7] – a tailor-made suit is made for atypical evidence, and this operation is not carried out alone by a judge but takes place with the parties' contribution.

These are the conditions of the right to evidence.[8] Wherever there is a need to introduce into the trial probative elements that are not provided for by law, we especially refer

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[2] When the formation of evidence occurs in cross-examination, we have "means of evidence". CPC, Book III, Title II provides seven typical means of evidence: testimony, examination of the parties, confrontations, formal identifications, judicial simulations, expert evidence, and documentary evidence.

[3] To acquire evidence unformed in cross-examination we have "means of obtaining evidence". CPC, Book III, Title III provides four typical means of obtaining evidence: inspections, searches, seizures, and interception of conversations or communications.

[4] The rule reads as follows: "If evidence not regulated by law is requested, the court may introduce it if it is deemed suitable to determine the facts and does not compromise the moral freedom of the person. After hearing the parties on the methods for gathering evidence, the court shall order the admission of evidence". The *Report of CPC's project* affirms that Art. 189 is a "middle road" between the principle of atypicality and principle of legality (*sub-species* precision or clarity principle) of evidence, because "[it] avoids excessive restrictions on the ascertainment of the truth, taking into account the continuous technological development that extends the frontiers of investigation, without endangering the guarantees of defence".

[5] Which facts? The facts are illustrated by art. 187 CPC – Facts in issue: "Facts concerning accusations, criminal liabilities and the determination of either the sentence or the security measure are facts in issue. Facts on which the application of procedural rules depends are also facts in issue. Facts concerning the civil liability resulting from an offence are also facts in issue if a civil party joins the criminal proceedings".

[6] Moral freedom is moreover protected by art. 188 CPC – Moral freedom of the person during evidence gathering: "Methods or techniques which may influence the freedom of self-determination or alter the capacity to recall and evaluate facts shall not be used, not even with the consent of the person concerned".

[7] The decision is contestable through the appeal of closing judgment (art. 586 § 1 CPC).

[8] Right to evidence – indispensable to support defensive and accusatory reconstructions within the process – is an expression of the protagonism guaranteed to lawyer/defence (art. 24 IC) and prosecutor/accuse (art. 112 IC), before a third and impartial judge (art. 111 IC), in our criminal procedural system.

to means, techniques and tools that technological progress makes available for criminal proceedings and that cannot be embedded in any regimented evidentiary typology… otherwise, we have a "label fraud": because this mechanism would be used for circumventing the existing rules by smuggling occurred omissions or irregularities concerning typical evidence as mere atypicality profiles of that evidence.[9]

However, and beyond this or other issues on the subject, there is a very important problem – that arose in the early 2000s – that all today occupies centre stage. The theme is the use of atypical evidence (specifically, atypical means of obtaining evidence – see nt. 3) via instruments attacking fundamental rights and freedoms.

In particular, an aspect extremely sensitive is the following: the assault, through these invasive devices, to rights safeguarded by Art. 13 (personal liberty), 14 (personal domicile) and 15 (inviolability of correspondence and communication) of the Italian Constitution – IC.

It is constitutionally established that these rights and freedoms are, first of all, inviolable and, in addition, protected with a double warranty: a reinforced statutory reserve and a jurisdictional reserve – that is to say, that any compression of them is allowed only in such cases and in such manner as provided by the law and by order of the judiciary stating legally reasons.[10] The undetermined nature of atypical evidence clashes against the guarantees just exposed – that is the main problem.

Jurisprudence (primarily) and doctrine (ensuing case law) have drawn a pattern to face the situation – see *infra*, § 3; and the scheme drafted perfectly intersects a method of evaluation and justification that organizes the judgement (*rectus* a part of the judgement) into several mandatory logic-argumentative steps: the duty, or burden, of reinforced reasoning.

2. A PARTICULAR DUTY OF EVALUATION AND JUSTIFICATION FOR THE JUDGE: THE THEORY OF REINFORCED REASONING

The so-called reinforced reasoning is a method of evaluation (judgement) and justification (explanation/grounds of the pronouncement), developed by jurisprudence (case law) and refined by doctrine (specialist literature), that breaks down the decision into several necessary logic-argumentative steps.

By 'reinforced reasoning' we mean "a formula which, on the one hand, imposes caution [a sort of warning] with regard to certain specific legal profiles related to the decision-making process and, on the other hand, demands that the decision be based on more solid grounds with regard to such questions (*recite* arguments), the verification

[9] If there is a legal framework for that evidence, it cannot be circumvented. Also, the Supreme Court of Cassation recognizes a principle of non-substitutability in this matter: "When the code establishes a prohibition of evidence or an express exclusion of usability, the recourse to other procedural instruments, both typical and atypical, aimed at surreptitiously circumventing such a bar is prohibited" (Cass., Sec. V, September 7, 2015, no. 36080, Sollecito e Knox; see more Cass., Un. Sec., May 28, 2003, no. 36747, Torcasio and Cass., Un. Sec., April 19, 2012, no. 28997, Pasqua).

[10] One guide principle here is proportionality. The act adopted must be proportional to circumstances, and conditions and indispensable to achieve the purpose stated by law; and the sacrifice of the constitutional right or freedom must be justified by the seriousness of the offence.

of which is considered essential for the legitimacy of the assessment issued. […] The peculiar characteristic of this method of evaluation (*i.e.* judgement) and justification (*i.e.* explanation of the decision's reasons) lies in the fact that the judge is required to go through a series of mandatory steps, made up of arguments concerning salient aspects of the case under examination and which must be appreciated (*i.e.* adapted in content to the specifics of the concrete case) in the light of parameters and criteria widely shared and/or consolidated, and intersubjectively verifiable"[11].

So, according to the theory of reinforced reasoning, it becomes unavoidable to go through certain logic-argumentative steps that are indispensable for the concretization of a given juridical case – a juridical case that we can therefore call "a reinforced reasoning juridical case".

To be clear, let me give an example. We can talk about precautionary measures and more exactly pre-trial detention in prison. In this hypothesis, a necessary step in judicial reasoning is the examination – obviously, after having already ascertained all the other prerequisites for the application of a precautionary measure: *i.e.* general conditions of applicability (art. 273 CPC) and precautionary requirements (art. 274 CPC) – of the possibility to adopt a less afflictive measure than imprisonment: such as, for instance, house arrest (with or without an electronic bracelet) or other coercive or interdictory measures (also applied cumulatively). Solely after the evaluation of this salient/fundamental profile, it is permissible to command custody in prison. If this logic-argumentative step is not crossed, the measure is unlawful – null under art. 292 § 2 CPC.

The judge, with autonomous assessment and in the light of the criteria (widely shared and/or consolidated, and intersubjectively verifiable) of proportionality, adequacy and gradualness (art. 275 CPC), must examine this inescapable argument, which can be summarized as follows: "Is it possible to apply a precautionary measure milder than custody in prison, or not?".

This is, in fact, the question that arises from *a contrariis* reading of the letter of art. 292 § 2, lett. c-*bis*) CPC, according to which the order of pre-trial detention in prison must contain "an exposition and independent assessment of the reasons why the elements provided by the defence were considered irrelevant, as well as, in the event of the application of the measure of custody in prison, an exposition and independent assessment of the concrete and specific reasons why the needs referred to in art. 274 cannot be satisfied with other measures".Which other measures? Those referred to in art. 275 §§ 3 and 3-*bis* CPC: "other coercive or disqualifying measures" in general, also cumulative; or "the measure of house arrest with the control procedures referred to in art. 275-*bis* § 1" CPC.

In this 'reinforced reasoning juridical case' – among the various arguments that the judicial authority has to take into consideration – an inevitable logic-argumentative step consists of evaluating (and, consequently, expressly justifying) reasons why pre-trial detention in prison represents the lone adequate and suitable precautionary measure to respond to the pre-trial needs emerging in the concrete case.[12]

[11] Cecchi, 2021, p. 437.

[12] Cecchi, 2021, pp. 549-550.

Well, this way of evaluation and justification of the decision constitutes a model of *stylus curiae* in clear expansion, that involves a plurality of hypotheses in which there are legally relevant situations demanding effective protection and finding their guarantee precisely in the reinforced reasoning of one or more specific and salient/fundamental legal-argumentative profiles of the case.

The reinforced reasoning on atypical evidence is, trivially, the application of the *m(eth) modus decided et justificandi* now exposed in the subject of this paper. Here, the arguments to be necessarily appreciated – oriented by widely shared and/or consolidated parameters and criteria, and inter-subjectively verifiable – are those useful to probe the legitimacy of atypical evidence and, at the same time, the respect of fundamental rights and freedoms.

We are going to show this in the next paragraph.

3. THE REINFORCED REASONING ON A-TYPICAL EVIDENCE; WITH JUST A FEW EXAMPLES

It is time to recall considerations I have already had the opportunity to develop elsewhere.[13].

The theory of reinforced reasoning applied to atypical evidence represents a strengthened protection aimed at avoiding, or at least at making it easier to identify and then penalize, the following two occurrences: a) improper use of art. 189 CPC to circumvent evidentiary rules and typical evidence; b) the unfair infringement of fundamental constitutional rights or freedoms.

It seems consolidated (surely in the pronouncements of apex judicial authorities: *i.e.* Constitutional Court and Supreme Court of Cassation) the pattern of evaluation and justification conceptualized by Prof. Carlotta Conti.[14], with regard to evidence potentially damaging fundamental rights or freedoms safeguarded by the Constitution, and also pertaining to evidentiary activities that could surreptitiously bypass the legislative provisions set for their functioning.

This is an evaluative-justificatory module that can be placed within the paradigmatic theory of reinforced reasoning because it outlines a path with obligatory logic-argumentative steps, oriented by parameters and criteria widely shared and/or consolidated, and inter-subjectively verifiable. Moreover, in this sense, we could also say that we are facing "a complex formation evidence"[15].

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[13] I dealt this topic in Cecchi, 2021, pp. 575-585; and the following reflections largely reproduce what is written there.

[14] The model is an extrapolation and a refinement operated by Carlotta Conti from the "Cartesian clarity" (Conti, 2019, p. 1579; see also Baccari & Conti, 2021, pp. 718-722 and Conti, 2018, p. 1210) decisions of the Constitutional Court (sentences no. 135/2002 and no. 149/2008) and of the Supreme Cour of Cassation (Un. Sec., March 28, 2006, no. 26795, Prisco) about video filming.

[15] We find this expression in Iannucci, 2023, p. 610, who uses it referring to expert evidence; but we think the concept is re-adaptable to our discourse insofar as it refers to "multi-steps/different phases evidence formation".

Adhering to the proposed reconstruction, the mandatory passages of the decisional reasoning are three.[16]; let us see them[17].

(1) Firstly, it is necessary to verify the typicality of evidence or evidentiary activity under discussion. If there is a typical discipline, then art. 189 CPC is not applicable (… unless one wishes to circumvent the law: but then it operates the non-substitutability principle – see no. 9). This latter provision, in fact, works on a residual basis: and represents both the 'release valve' (which includes evidentiary activities and related evidence not regulated by law) and the closing rule of the system (which limits evidentiary activities and related evidence already regulated by law, that cannot be surreptitiously circumvented). So, the first step concerns the identification of a typical discipline within which evidence or evidentiary activity can be framed. If it is identified, it is applied. If it is not identified, one moves on to the next step: the application, or not, of art. 189 CPC.

(2) Secondly, hence, there is a check of art. 189 CPC's applicative prerequisites. Once the requirements of this rule have been verified[18], if the 'atypicality route' is practicable, the final step is opened; otherwise, the assessment is closed at this second level with the affirmation of the legal irrelevance[19] (or, as the case may be, even the illegitimacy) of evidence or evidentiary activity in question – not regulated by law; not classifiable under art. 189 CPC.

(3) Thirdly, and finally, when we can legitimately move within the category of atypical evidence, then it is necessary to make a further examination of the existence of any 'systemic-constitutional evidentiary limits'[20] – *i.e.* limits placed to protect fundamental rights or freedoms safeguarded by the Constitution, the violation of which leads to evidence's unusability: so-called "unconstitutional evidence".

In short, once the preliminary screening has led to the recognition of an effective and legitimate atypicality of the instrument (means or means of obtaining evidence), understood as the impossibility of framing it within the acts already regulated by law, it is essential to carry out a supplementary assessment on limitation of fundamental rights or freedoms provoked by the atypical evidence (act or activity). The *cliché* characterising this third logic-argumentative step unfolds in a judgement that can be further subdivided into three other passages.

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[16] The hypothesis in question represents one of those hypotheses of reinforced reasoning in which the obligatory steps are prodromal to each other. The peculiarity (in terms of argumentation) of this type of assessment also consists in the fact that the three steps are linked to each other by a bond of bias, in the sense that, depending on the result obtained by passing through the antecedent step, one moves on to a subsequent step (consisting of certain arguments and reference parameters) or to another subsequent step (consisting of certain other arguments and reference parameters) or, more drastically, one stops.

[17] See Tonini & Conti, 2014, pp. 196-204.

[18] The requirements are those seen above: aptness to determine the facts; not compromised of moral freedom; duty, for the judge, of hearing the parties on the methods of gathering evidence.

[19] Actually, not every imaginable (non-statutory) instrument is admissible merely because the evidentiary results flowing from it appear useful to the ascertainment.

[20] The question that needs to be asked (and then answered) is "Are there legally relevant situations, interests or juridical relevant goods behind the atypical evidence (act or activity), worthy of protection at constitutional level?".

I) If one is in the presence of a constitutionally enshrined fundamental right or freedom, in the absence of a law regulating the "cases" and the "manners/ways" in which the right or the freedom may be undermined, an injury thereto is not admissible: under penalty of unusability of the (unconstitutional) evidence deriving from illegitimate probative activity.

II) If one is in the presence of an emerging fundamental right or freedom (protected/protectable *ex* art. 2 IC – *e.g.* privacy/confidentiality), it is sufficient a congruously justified measure adopted by a judge or simply by the prosecutor to carry out the evidentiary activity and to derive the relevant evidence. Anyway, the degree of injury suffered by the emerging right or freedom remains open to be reviewed in terms of reasonableness and proportionality.

III) If no fundamental right or freedom provided for or emerging from the Constitutional Charter is involved, then no issues arise as to the 'systemic-constitutional evidentiary limits'. Consequently, the evidence or evidentiary activity, after having surpassed the two previous steps, may legitimately manifest itself in criminal proceedings without crossing this final step.

This is, in summary, the reinforced reasoning on a-typical evidence.

Now, exemplifying with just a few theoretical-practical cases, we can apply what has just been said to some evidentiary activities carried out with atypical means of obtaining evidence that is widespread today: video recordings and, *mutatis mutandis*, virus trojan; the secret agent equipped for sound; tracking by GPS[21].

About video recordings[22], a distinction must be made between communicative and non-communicative videotaped behaviours. We are in the presence of a probative activity that is only apparently atypical if the video recordings result in a mere caption of conversations (communicative behaviour) not accompanied by images: in this case, in fact, the video recordings can be classified as interceptions/wiretapping and, thus, the applicable rules are to be found in art. 266 ff. CPC, which provides full legislative coverage of the right under art. 15 IC. In this hypothesis, therefore, we stop at the first step. On the other hand, if the video recordings apprehend non-communicative behaviour (*i.e.* if they take images and scenes of a person's life), we are in the presence of an evidentiary activity that is to all intents and purposes atypical. In this case, video recordings are an atypical means of obtaining evidence because they are not regulated by law (step 1). Undoubtedly, they represent an instrument that has a significant ascertaining capacity, and they are not detrimental to the moral freedom of those who are unknowingly filmed (step 2). At this point, one must assess the harmfulness of the instrument with respect to constitutionally protected fundamental personal rights or freedom at stake (step 3). Following the statements of the Constitutional Court (sentences no. 135/2002 and no. 149/2008) and the Supreme Court of Cassation (United Sections, March 28, 2006, no. 26795, Prisco), we derive that:

[21] We report, shortly, what can be read in Tonini & Conti, 2014, pp. 466-483, to which we recall also for bibliographical references contained therein.

[22] Video recordings made by video surveillance systems installed by public or private persons are not included in these considerations, because they remain outside of the interceptions' category and they constitute documentary evidence, acquired at trial under conditions established by art. 234 CPC.

I) If video recordings capture life within the home, then they affect the freedom of personal domicile (art. 14 IC) and, in the absence of a specific legal regulation establishing the "cases" and the "ways/manners" in which this fundamental right can be restricted, they cannot be ordered;

II) If the video recordings capture what is happening in reserved places (*e.g.* toilets of a public place; privy of a disco; etc.), then they infringe the right to privacy/confidentiality (an emerging fundamental right, protected under art. 2 IC). Their use is permitted, and evidence gathered in this way may be used, if it is authorized by a judicial authority (judge or prosecutor) with a suitably reasoned order/measure;

III) If the video recordings capture what happens in a place open to the public[23], they do not impact any constitutionally protected fundamental right or freedom and, therefore, they constitute an atypical evidentiary activity that can peacefully be directly realized by police. Having gone through the first two steps, in the latter circumstance, the third step is practically unimportant because no fundamental right is impaired.

About the virus trojan, the remarks made on video recordings are *mutatis mutandis* applicable: starting with the distinction between communicative and non-communicative behaviour captured. In particular, the evaluation and justification grid just outlined must be adapted to the peculiarities of each evidentiary activity that can be carried out by such means of obtaining evidence. Some of these activities (in reality, at present, only communicative acquisitions) have been regulated by law and therefore, since they are no longer atypical evidence, do not concern the three-step reinforced reasoning module that we are going to describe: or rather, we stop at the first step of this module and, having regard to the communicative acquisitions by virus trojan, we refer to the specific legislative discipline (art. 266 §§ 2 and 2-*bis* CPC). The other potential activities of the virus trojan, left out of the codification (*e.g.* keyloggers; screenshots; screencasts; online surveillance; etc.), are instead declinable into the reinforced reasoning format exposed above: each one, obviously, according to its peculiarities.[24].

About secret agents equipped for sound, based on case law (in particular, Constitutional Court, sentence no. 320/2009), it can be said that it is a typical means of obtaining evidence if the investigating authority's listening takes place at the same time as the recording since the presence of the third hidden ear (*i.e.* the investigators' ear) allows the assimilation to wiretap and makes the rules under art. 266 ff. CPC applicable. On the contrary, it is

[23] Constitutional Court (sentence no. 149/2008) has made it clear that non-communicative behaviour *in fact* not confidential, as happens when a window or door is left open and whoever can look inside, even if carried out within the home, is not covered by art. 14 IC.

[24] Let's take videorecording of computer screens (screenshot/screencast) or spying on what one is typing on the keyboard (keylogger). Here, the first two steps are positively overcome and the problem of providing a more or less guaranteeing interpretation of the fundamental rights and freedoms involved opens up with regard to the third step. Two divergent interpretations are possible: one can argue that the usability regime depends on the type of data typed or displayed, which can be considered more or less public (*e.g.* Facebook post ≠ email saved in drafts in the mailbox); one can adopt a lecture that is more sensitive to protection of constitutional rights and freedoms and then consider the aforementioned atypical activities invasive – in constitutionally more (art. 15 IC) or less (art. 2 IC) marked terms – regardless of the type of data captured; and depending on the interpretation one choices, the consequences are quite different.

an atypical evidentiary activity if what is recorded is listened to deferred and not while the secret agent is communicating and recording. In this case, we fall into the category of atypicality because we are outside the hypothesis of interceptions: there is no perception of the communication by a third party extraneous to it (step I). It is evident that the investigative tool is suitable for ascertaining the facts and that there isn't prejudice to the moral freedom of the person subjected to it, voluntarily participating in the communication recorded (step II). The fundamental right involved, as the person recording is not a stranger to the conversation but rather actively contributes to it, is not secrecy (art. 15 IC) but privacy/confidentiality (art. 2 IC). So, an authorization act – if correctly justified – by the prosecutor is sufficient to perform the activity (step III), which generally is realized, on delegation, by police.

Tracking by GPS, it can be observed that is an atypical instrument since that is not regulated by law nor can be included within any typical means of obtaining evidence (step I). Then, tracking by GPS does not affect the behaviour of the subject being followed: the person, on the contrary, is unaware of the following; and insofar as it is related to relevant moments in relation to the crime committed, the evidence is eligible to determine the facts (step II). Furthermore, such probative activity does not violate the secrecy of communications (art. 15 IC), because the flow picked up by the satellite system does not concern secret conversations; it could be argued, however, that there is an impact on freedom of movement (art. 16 IC): with the consequence that such an invasion requires, to be legitimate, a reasoned measure by the judicial authority that authorizes it (step III). Well, Italian jurisprudence – unlike American jurisprudence – does not go through this last step or, even if going through it, does not detect violations of fundamental rights or freedoms. Thus, at a praxeological level, tracking by GPS is currently considered a mere atypical activity workable by police, for which no particular guarantees are required. Theoretically and *de jure contendo* speaking, on the contrary, it should be subject to the scheme we have just outlined *supra*: and, therefore, be authorized in advance by a reinforced reasoning measure that shows the crossing of the essential above-mentioned logic-argumentative passages – especially the third step.

We can stop here with exemplifications.

Beyond whether or not one agrees with the legal choices with which we have illustratively filled in the content of the necessary logic-argumentative steps in the hypotheses listed[25], we believe we can state that the form of reinforced reasoning applied to atypical evidence (act or activity) is extremely functional to resolve in a linear manner the thorny application problems that usually occur in this matter[26].

[25] For example, examining the reconstructive solution put forward with reference to the secret agent equipped for sound, we could ask ourselves whether or not, within the third step, it is reasonable to argue that the presence of the secret agent as a co-participant in the conversation degrades, even for the other participant (unaware of the recording in progress), the protection of the communication: instead of being guaranteed by the secrecy of art. 15 IC, protected in the milder terms of privacy/confidentiality by art. 2 IC.

[26] On closer inspection, the adoption of this method of evaluation and justification does not change the way in which a decision is already made. Indeed, in judgements dealing with atypical evidence, the assessment and the reasoning unfold – at least – in the three obligatory steps we have set out. However, much of this process very often remains in the pen of the decider/judge; and consequently, cannot be reviewed either by the parties (endo-procedural function of the statement of reasons) nor by the public (extra-procedural function of the statement of reasons).

If this method of evaluation and justification is accepted, the judicial decision becomes more transparent and thereby more guaranteed, being more controllable. Indeed, the unwinding of the decisional assessment within mandatory logic-argumentative passages makes the legally legitimate reasons underlying the measure emerge clearly. This greater visibility allows a more open confrontation with arguments put forward by judicial authority: so that, where the interpretative positions taken appear questionable (as in our opinion is, for example, questionable the jurisprudential reconstruction that considers tracking by GPS an instrument not invasive of the right protected under art. 16 IC), it becomes easier to face them and perhaps overcome them with counter-arguments.

All this, in the end, ends up contributing to a better administration of justice.

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