CHAPTER IV

MORE ABOUT THE EVIDENCE OF RIGHTS

1. Introduction[1]

WE honestly believe that facts and evidence are of paramount importance and nevertheless so hard to adequately grasp and produce, that they may justify stating some tenets over and over again. So, if you are already convinced by the previous Chapter, do skip this one. If not, please bear with me to be a little repetitive here.

To successfully defend a right, or prevent or redress a wrong, the facts that support it have to be proved first. Rules just "do not activate themselves,"[2] "all depends on the matter,"[3] and the facts "make a determined substantive rule applicable or not applicable."[4] The scope of a rule and, therefore, its meaning, depend upon the determination of the facts[5]. Facts are ascertained through evidence. As such, it concerns the court "to verify if the alleged fact was proved and represents any of the foundations accepted by law to authorize the measure."[6] Since judicial "control of legality assumes that the facts were properly ascertained and sorted out and sanc-

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[1] See, in general, CARRIÓ, GENARO, *Cómo estudiar y cómo argumentar un caso*, Buenos Aires, Abeledo-Perrot, 1995; CUETO RÚA, JULIO CÉSAR, *Una visión realista del derecho, los jueces y los abogados*, Buenos Aires, Abeledo-Perrot, 2000, pp. 159 et seq.

[2] BINDER, DAVID A. / BERGMAN, PAUL, *Fact Investigation. From Hypothesis to Proof*, Minnesota, West Publishing Company, St. Paul, 1984, p. 2.

[3] LORD DENNING, *The Discipline of Law*, London, Butterworths, 1979, pp. 93 and 97.

[4] BINDER / BERGMAN, *op. cit.*, p. 2.

[5] LEVI, EDWARD H., *Introducción al razonamiento jurídico*, Buenos Aires, EUDEBA, 1964, p. 10.

[6] CNFed, *Lamas*, *LL*, 123:149; *Arroyo*, *LL*, 101: 3.

tions were adjusted to it"[7] "the justice of the solution of the specific case comes from the true explanation of the facts and the law involved in them."[8] Law is conceived to guarantee "that there exists documentary evidence that grants a logical or rational foundation for the decision [and that this] effectively results from reasoning of the evidence. This means evidence in the case and in the context of the case […] A conclusion based on […] abstract evidence can be 'rational', but it is not a rational decision in the case which it is about."[9] "Reality happens to be always one: it cannot be and not be at the same time, or be one way and another simultaneously […] reality as such, whether a fact took place or not, can no longer be subject to an arbitrary power", because "discerning if a fact has been accomplished or not, or deciding that something has happened if it really has not, cannot be left undetermined … in the field of Law there is no room for miracles."[10]

To determine what reality is, it is necessary, at first, "to examine attentively and completely the set of documentation". According to an old axiom at the French *Conseil d'Etat*, we must "make the papers speak"[11]; it is essential that "this evidence be deduced from the dossier".[12] If the necessary principle of law holds that "a certain rationality in life"[13] must be kept

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[7] CSJN, *Fallos* [*Judgments*], 267: 77, 79, *Molinelli*; *Grichener*, 262: 67 and 71, 5th ground and its references.

[8] GUASTAVINO, ELÍAS, *Tratado de la "jurisdicción administrativa" y su revisión judicial*, vol. I, Buenos Aires, Academia Nacional de Derecho y Ciencias Sociales, 1989, 2nd ed., p. 31; in the p. 32 of its 1st ed. he said: "the only way to bring conflicts to justice is to start by acquainting oneself with the truth of the facts"; TAWIL, GUIDO S., *Administración y justicia. Alcance del control judicial de la actividad administrativa*, Buenos Aires, Depalma, 1993, p. 400.

[9] JAFFE, LOUIS, *Judicial Control of Administrative Action*, Little, Brown and Company, Boston-Toronto, 1965, p. 601.

[10] GARCÍA DE ENTERRÍA, EDUARDO, *La lucha contra las inmunidades del poder,* Madrid, Civitas, 1979, pp. 31-32, who reminds us of his art. La interdicción de la arbitrariedad en la potestad reglamentaria. This famous expression is transcribed by TAWIL, *op. cit.*, pp. 392-393.

[11] CORMENIN, M. DE, *Droit administratif*, vol. I, Paris, ed. Pagnerre and Gustave Thobel, 1840, 5th ed., p. 11, note 3, underlining the conscientious and detailed work of the legal advisers who verify, carry out and inform the dossiers.

[12] LETOURNEUR, M., El control de los hechos por el Consejo de Estado francés, *RAP*, nº 7, p. 221.

[13] GOLDENBERG, LEO, *Le Conseil d'Etat juge du fait. Etude sur l'administration des juges*, Paris, Dalloz, 1932, p. 192. See also RIVERO, JEAN, La distinction du droit et du fait dans la jurisprudence du Conseil d'Etat français, in the book *Le Fait*

and applied, then he who decides "in the presence of a matter must, firstly, look for the fair solution, that one that holds 'the particular circumstances of time and place.'"[14] That should be done through "the extent and thoroughness of the verifications"[15], no other alternative is left than taking the indispensable way of "proceeding to quite delicate fact investigations"[16], to "deep fact investigations."[17]

SAINT THOMAS taught about the experimental foundation of human knowledge, and ARISTOTLE asserted the same[18]. LEIBNIZ pointed out that the determining characteristics of empirical facts are inexhaustible, and that the properties of the objects of experience are infinite. As perception is finite - even with all the help of science - it will always be that the objects of the world, which are temporal, will never display their characteristics fully and exhaustively[19]. We never catch the totality of a fact, because it always involved a selection that results from us. Since the information of reality is infinite, each person's reality will necessarily differ from another's.

For magistrates, the research of lawyers and the case files have facilitated their job as fact-finders. However, judges can - and should - pronounce measures to improve the course and outcome of proceedings if they cannot pronounce a conscientious judgment pursuant to the law for want of facts in the case's file. This is a generally accepted principle[20], and

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et le Droit. Etudes de Logique Juridique, Brussels, 1961, pp. 130 et seq.; LETOURNEUR, *op. loc. cit.*

[14] See RIVERO, JEAN, Jurisprudence et doctrine dans l'élaboration du droit administratif*,* in the book *Pages de Doctrine*, vol. I, Paris, LGDJ, 1980, p. 70; Le huron au Palais Royal ou réflexions naïves sur le recours pour excès du pouvoir, *Pages de doctrine*, vol. II, p. 329; Nouveaux propos naïfs d'un huron sur le contentieux administratif, *Etudes et Documents*, number 31, 1979/1980, pp. 27-30. RAFFO, JULIO C., *Introdução ao conhecimento jurídico*, Río de Janeiro, Forense, 1983, pp. 100 et seq., "As circunstancias da conduta". It is the "social reality" that the lawyer must be acquainted with, as CUETO RÚA points out, *op. cit.*, pp. 160 et seq., as well as the "economic reality", pp. 168 et seq.

[15] LETOURNEUR, *op. cit.,* p. 223.

[16] LETOURNEUR, *op. cit.,* p. 225.

[17] LETOURNEUR, *op. cit.,* p. 224.

[18] COPLESTON, F. C., *El pensamiento de Santo Tomás*, México, Fondo de Cultura Económica, 1969, pp. 25-30.

[19] VERNENGO, ROBERTO J., *La naturaleza del conocimiento jurídico*, CDCS, 1973, pp. 19-21.

[20] For example, in France, COLSON, JEAN-PHILIPPE, *L'office du juge et la preuve dans le contentieux administratif*, Paris, LGDJ, 1970, devotes his book to judicial

in Argentina there are cases in which even the Supreme Court itself has produced significant evidence[21]. There are also material reasons that may lead a court to order more discovery. For example, in ordinary proceedings, whose extreme slowness is notorious, facts may change over time. In protection hearings, the expeditious nature of the proceedings may cause evidence to be omitted - at the judge's own discretion - that should not be ignored. It is true that the court often wonders whether it should "drop the judge's mantle and put on the lawyer's gown,"[22] and that every successive court is more reluctant to carry out new inquiries or fact determinations than the previous one. Appellate Courts generally tend, by instinct or principle, to accept the version of facts determined by trial judges. Perhaps they trust them more.

In the end, it is really about the manner and scope of judges' perception of a case's reality - formulated through the evidence - on which they are ready to pass judgment. The less ready they are to inquire into the facts, the less valuable the judgment will be. The more they deepen the factual analysis and evidence production - even at their own initiative - the better service to justice to society. In sum, it is in inquiring about the facts that the most important test of every legal case lies[23].

It is also important to take into account factual changes that are produced through the passing of time[24]. Cases are dynamic, as is the evidence that shows us little by little - but never completely - the reality of facts. When a new piece of evidence is produced, our perception of the facts changes with the case itself.

"Factors can supervene" that modify not only "the initially assumed fact," but also the "applicable rules"[25], "the desired outcome", the determining

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discovery, pp. 97 et seq. Sometimes the parties provoke the court's frustration; something similar is mentioned in CNFed. CA, Chamber IV, *Adecua c/ Enargas*, *LL*, 1998-F, 338.

[21] For example in the case *Saguir y Dib*, *Fallos* [*Judgments*], 302: 1284, year 1980.

[22] LORD DENNING, *The Due Process of Law*, London, Butterworths, 1980, p. 61.

[23] BINDER / BERGMAN, *op. cit.*, p. 134; LEVI, *op. cit.*, p. 5 and its references. Compare LORD DENNING, *The Due Process of Law*, *op. cit.*, p. 62.

[24] ROMBAUER, MARJORIE D., *Legal Problem Solving. Analysis, Research and Writing*, Minnesota, West Publishing Company, St. Paul, 1984, p. 328.

[25] CARRIÓ, GENARO, *Cómo estudiar y cómo argumentar un caso. Consejos elementales para abogados jóvenes*, Buenos Aires, Abeledo-Perrot, 1989, pp. 32-33, § G.

authority, the circumstances around the case[26], the legal political environment[27], the predominant ideas within society and government, and the officers themselves[28]. Besides which, "rules change as they are applied."[29] That is, their meaning changes as they are applied, because they acquire new meanings that were not considered by their authors[30].

Some opinions hold that "judgments must attend the situation existing at the moment the decision is made[31], which makes the process useless in the absence of a current object lay out"[32]; an arguable question if it is expressed as a general rule.

2. Evidence Unity in Different Proceedings

In the various branches of procedural law[33], the rules of evidence are almost the same. In administrative procedural law, there are limited rules

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[26] "The circumstances of conduct": RAFFO, *op. loc. cit.*; reminds us of CUETO RÚA, *op. cit.*, pp. 160 et seq., the need to perceive the social economic reality, pp. 168 et seq. A new social environment can create the prevalence of an interpretative method over another: *op. cit.*, p. 226.

[27] It is the political reality that the lawyer needs to be acquainted with: CUETO RÚA, *op. cit.*, pp. 170 et seq.

[28] It requires the psychological capacity of perception of others: CUETO RÚA, *op. cit.*, pp. 165 et seq.

[29] LEVI, *op. cit.*, p. 12.

[30] A beautiful example is an expression which the Argentine Constitution used mentioning treaties: it said that those treaties were to be executed "*en las condiciones de su vigencia*", which was meant by the Constituent as "such as they are in force", in use, or words to that effect. The Argentine Supreme Court said that its meaning was, instead: "such as they are interpreted and applied by international tribunals", thereby establishing the obligatory application in internal law of international case law and opinions by the competent courts and bodies that each treaty provides. See *Giroldi*, *LL*, 1995-D-462.

[31] *Fallos* [*Judgments*], 216: 147; 243: 146; 244: 298; 259: 76; 267: 499; 308: 1087.

[32] *Fallos* [*Judgments*], 231: 288; 253: 346; 307: 2061; 316: 479, *Bahamondez*; *Caja Complementaria de Previsión para la Actividad Docente*, May 30th, 1995, 2nd ground. The United States Supreme Court does not act in this way in *Roe v. Wade*, 410 U.S. 113, 1973.

[33] Contrary to what we express in the text, there are authors and case law that consider these principles as "not only different, but even opposing." See, *e.g.*, GALLOSTRA, *Lo contencioso-administrativo*, Madrid, 1881, p. 629, quoted by

regarding evidence, which do not provide something very different from regular procedural law. However, the dynamics for giving proof are different. On the one hand, one of the fundamental pieces of evidence has already been produced, or will be produced, during the administrative proceedings, which occur prior to the legal proceedings. On the other hand, questions that are not part of the ordinary proceedings interfere with the administrative decision.

Every proceeding succeeds or fails on the evidence. The solution to each case is determined by the court's perception of the facts presented through the evidence.

3. Creation vs. Application of the Law: Truth and Evidence

There will always be debate as to whether or not judges merely apply law or actually create it. We share the idea that judges create law, since they recognize and determine the facts. It is clear that if a legal solution to a case must be found, that will depend upon the facts to which the law is applied. It is enough that the judge determines whether the situation is "A" or "B" to make the judicial solution change from "A" to "B". The solution changes depending on how the court recognizes or determines the facts. This is the way it works in living law, in any philosophy or legal method, in any legal system and in any country.

As POPPER states, we admit that absolute truths do not exist, not even in physical and natural sciences, let alone in the law. There is one "truth" of the administration, another of the parties in the proceedings, and another of the courts at each successive level. When trials and hearings are finished, will the "truth" be the one of the last judgment? In reality, nobody knows what the truth of a case is. It will always be temporal, or rather, a mere supposition that is always subject to a potential falsity in evidence or otherwise. This fact does not give us a reason to criticize the uncertainty of a subjective court's judgment. Being imperfect does not deprive that find-

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GONZÁLEZ PÉREZ, *Comentarios a la ley de la jurisprudencia contencioso-administrativo*, Civitas, Madrid, 1978, p. 932 and note 7. Those who stand for this difference, as GONZÁLEZ PÉREZ states, *op. cit.*, p. 953, are the "revisers" of justice, with the capacity to refer to the evidence produced at the administrative headquarters and limit the production in court. This would lead to denying access to justice, since it is not useful to resort to it if evidence *ex novo* cannot be produced. This is why the principle should address the amplitude of the production of evidence in court (*op. cit.*, pp. 934 et seq.).

ing of its validity as a supposition or hypothesis, nor of the possibility of finding a final solution.

4. Dispensing the Evidence

It is also important to remember the distinction in regular procedural law between evident fact, fact of common knowledge, fact of official knowledge, or judicial private knowledge.

Evident fact is one that nobody would dare to discuss or ignore[34]. Examples of evident fact are the existence of night and day; the sun, the stars, the calendar[35]; time, life and death. "The evidence is justified because it is absolute, because it is logically irreversible. Even because it cannot be proved."[36] The scope of this concept does not have to be so broad, since "although the party willing to justify these evident facts does not need to prove them, these facts may accept and deserve the evidence presented by the opponent. This is because scientific development shows that facts that were deemed evident have become part of the history of scientific ideas, and, as a consequence, of other new ideas."[37]

A fact of common knowledge is one that everybody knows at a certain time and place[38], such as who the president is. As GUASP states, "Facts of common knowledge are not those officially or privately known by judicial authority, but those which are of general knowledge at the time and place in which the proceedings are taking place."[39] Common knowledge must be known by everyone, and not privately known by the head of a group[40]. In other words, a fact of common knowledge is one that "no one has hesitated about."

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[34] As it is clear, we are speaking about a definite moment in time and space.

[35] SENTÍS MELENDO, SANTIAGO, *Teoría y práctica del proceso*, vol. III, Buenos Aires, EJEA, 1959, p. 103.

[36] CARNELLI, LORENZO, El hecho notorio en el proceso dispositivo, *LL*, 31: 631, 641; *El hecho notorio*, Buenos Aires, 1944.

[37] EISNER, ISIDORO, *La prueba en el proceso civil*, Buenos Aires, 1964, p. 45.

[38] But the plaintiff should better prove the fact he is asserting as notorious, in case the court does not agree with him, as ESGUERRA SAMPER warns, *op. cit.*, p. 44.

[39] GUASP, JAIME, *Comentarios a la ley de enjuiciamiento civil*, vol. II, 2nd part, Madrid, 1947, p. 380.

[40] HELLBLING, ERNST C., *Kommentar zu den Verwaltungsverfahrens Gesetzen*, vol. I, Vienna, Manzsche Verlag, 1953, p. 274.

Judicial private knowledge is what the judge knows, but is not in the case file. Classically, the judge must not use this private knowledge to find the solution to a matter, but can use it to improve the course and outcome of the proceedings. In addition, the judge can try to introduce private knowledge into the dossier in some way, shape or form, which is the only manner in which the judge can take it to the judgment[41]. In other words, the judge can only *try* to transform those suppositions into *evidence*. That is most aptly done when the court questions both parties after oral argument. One of the most striking differences between common law practice and civil or continental law practice is the reluctance some people have towards oral argument and discussion. Only those who have no actual experience in oral argument do oppose it, with the pretext of abstract "reasoning" thus devoid of real factual *knowledge*.

5. Evidence in Discretionary and Regulated Powers[42]

When we deal with regulated powers we must first determine, in view of the different hypotheses of fact contemplated by regulations, which one of them, if at all, is the one before us. This is not a matter of legal or regulatory interpretation, it is a matter of fact determination.

In discretionary powers evidence also determines the solution to the case. All control techniques of discretionary powers are excercised through fact determination and the perception of evidence. We have to establish, in any given case, where indeterminate principles or general principles of law have been violated, whether there was a breach of good faith, of legitimate expectations, reasonableness, proportionality, etc. These questions are evaluated through facts and evidence, too, and they are also recognized at supranational and international levels, such as the American Convention on Human Rights. The case law applying the European Convention on Human Rights also recognizes and has developed them since its beginning[43].

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[41] ALSINA, HUGO, *Tratado teórico-práctico de derecho procesal civil y comercial*, vol. III, Buenos Aires, 1956, p. 249.

[42] Extend in GOLDENBERG, *op. cit.*, chapters VI to X, pp. 148 et seq.

[43] In the TJE the case *Hauptzollamt München-Mitte* (1991), quoted in CHITI, MARIO P., *Diritto Amministrativo Europeo*, Milan, Giuffrè Editore, 1999, p. 317. The principles of reason, proportion, means proportional to ends, etc. are universal and ancient. That is why the European Court has done nothing but repeat what has already been mentioned in national laws. See, for example for German and Portuguese law, SÉRVULO CORREIA, JOSÉ MANUEL, *Legalidade e autonomia contratual*

*6. The "*venire contra factum proprium*" Doctrine*

The best way to interpret the conduct and intention of parties, as well as the validity of their behavior under the law, is to see what they have really done and said. In that vein, the Argentine Supreme Court held that the "doctrine of one's own acts" is related to the "principle of good faith," and together, they set up the fundamental principles of our legal system. The Court stated that "[o]ne of the derivations of the principle of good faith is the right that every citizen has to the veracity of the other and to the loyal and coherent behavior of others, whether they are individuals or the State itself." "The contradictory act of disloyalty is disqualified by law. This has remained shaped in the sayings such as the one that expresses '*venire contra factum propium non valet*' which synthesizes the deep ethical dimension of the principle of good faith."[44] The Supreme Court has also affirmed that it is necessary to require parties to behave coherently, so as to preserve the trust found in the other[45].

7. Evidence in Court

There is a stage prior to evidence production. In Argentine Procedural Law, it is called "anticipated evidence remedies." Under such a scenario, the litigant resorts to justice before prosecuting and requests the production of certain evidence pursuant to the provisions of the code. A very common situation is when the future litigant asks for the seizure of the case file, including documentation, books, etc. In that case, the court must decide, at its own discretion, whether the reasons for the seizure are well founded, or whether the seizure will alter the reality or veracity of the dossier. Further evidence remedies exist that can be leveraged prior to the claim. This is a repetitive situation for the prosecutor: he finds the file, goes through the matter, shapes the claim, and realizes that with the evidence he has, the judge is likely to deny a provisional remedy. Thus, he needs more evidence. Because this process may waste time, it might be

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nos contratos administrativos, Coimbra, Almedina, 1987, pp. 670-673 and its references of the notes 490 et seq. to the German doctrine.

[44] CSJN, *Cía. Azucarera Tucumana*, *JA*, 1989-IV, 429.

[45] CSJN, *Yacimientos Petrolíferos Fiscales c. Provincia de Corrientes y otro*, *LL*-1992-B, 216 et seq., 4th ground *in fine.* This principle is also mentioned as due trust, or guarantee of trust protection.

better to produce evidence privately and, depending on how convincing it is, analyze whether or not it would be possible to obtain a provisional remedy.

Another evidentiary possibility is to resort to the criminal justice system to investigate the conduct of administrative officers or individuals related to the public administration via concessions or privileges. Given the high requirements of Criminal Law to find guilt, facts can be accredited through that process even though they do not justify conviction. They are, however, able to prove certain facts that will, then, be useful as the foundation for the claim presented at another court.

8. Private Production of Evidence[46]

8.1. Testimonies

When it is difficult to produce evidence early in court, it is wise to make use of a variant that, in United States Law, is called the affidavit. Affidavits are testimonials that people give unilaterally, privately, and in written form, and are later incorporated into the documentary evidence. (The same goes for expert reports that can be privately produced and incorporated into the case file to offer the expert as a witness.)

In law, nothing prevents asking a witness in good faith to write out his testimony. That documentary evidence can be strengthened by his testifying as witness, by being summoned to the court to verify his signature and the affidavit's content, by being cross-examined, etc. This is not to say how convincing that evidence will be in court, nor does it include both parties' discovery when that is materially impossible.

9. Evidence Obtained Illegally

It is an essential legal principle that evidence illegally obtained[47] is inadmissible. Thus, a telephone tap executed by the administration or third

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[46] See our *Tratado...*, vol. 4, *El procedimiento administrativo*, *op. cit.*, chapter VI, §§ 7, 19.2, 22.7, 22.8, 26.2; chapter VIII, § 10.1.

[47] Extend in our book *El procedimiento administrativo*, *op. cit*., chapter VI, § 17, "Inadmisibilidad de las pruebas ilegítimamente obtenidas."

parties without legal authorization[48], breaking into a house without legal authorization or exceeding that authorization, production of evidence without control of the opposite party, etc., is inadmissible. This principle also applies to extreme cases, such as testimonies obtained under torture.

This general principle extends to the inadmissibility of "secret" evidence. Such evidence has existed only under very authoritarian regimes in the past, but from time to time it tries to reappear. At that point, it is necessary that courts remain steadfast in holding secret evidence inadmissible.

10. The Informal Argument

There is a legal practice that, with different names and shades, is allowed in some countries and forbidden in others. In the United States it is called *ex parte* communications, *i.e.*, forbidden communications between the magistrate and just one of the parties, excluding the others. In Argentina, administration lawyers exercise this practice more frequently and freely. They speak with judges privately, and explain certain things not introduced in the suit as a matter of evidence. It may occur that this factual situation is so important that the judge cannot help bearing it in mind *in pectore* when he is deciding a case. In sum, the court may deliberate taking into account the factual case argued by the State outside the courtroom, not the real dossier, and this is rarely explicit in the judgment. When the court admits it took practical interests into account, which it sometimes does, it is in fact admitting the *ex parte* argument of the administration. However, the weight of this argument is not comparable to its absence, for in its absence the individual is left with no chance to refute - or even acknowledge - what the administration has said to the court, and what lies behind the proceeding. The inequality and injustice of such proceedings is blatant and of course unconstitutional. The only alternative is to resort to complete transparency. During the closing arguments stage, transparency not only means immediacy and equality between the parties, but also publicity and social control: society should be able to see and judge itself on which evidence the court has decided.

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[48] At the same time, even the legal authorization proceeds with restrictive criteria: *Mille*, CNCrim. y Corr., Chamber IV, *LL*, 1997-C, 416; *Rodríguez*, TOral Criminal number 9, *LL*, 1997-D, 613; *Tellos*, CNCasación Penal, Chamber III, *LL*, 1995-B, 63; *Del Bagno*, TOral Criminal Federal, *Mar del Plata*, *DJ*, 1994-2-453; OLDANO, IRIS, Escuchas Telefónicas, *JA*, sem. number 6163 of 17-XI-99.

11. Evidence and Privacy

Evidence that infringes on personal privacy is much more complex. For example, questions of health are usually protected by the principle of privacy. International administrative tribunals sometimes make use of personal health information *in camera*, but do not incorporate it into the case file[49]. In France, health data is also admissible; the court may request the claimant to give health information, but it is at the claimant's discretion whether he submits it to the court[50]. In law enforcement and military careers, health is essential for promotions and retirements; for this reason, it is very common to find judgments that analyze the reasonability of medical data provided in that regard. In these cases, as well as in others, it seems that the person in such condition has no other choice than to resign his medical privacy in order to have access to justice. This is not a satisfactory solution, but at least the information does not stand the chance of being published if the judgment provides just initials, and not the complete name and surname[51].

In Argentina, to the contrary, courts have delivered in effective judgments with the name and surname of persons suffering from AIDS, which seems to be a privacy infringement[52]; private publications omit those data. The improvements concerning AIDS treatment, together with better pro-

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[49] Thus, IDB Administrative Tribunal. See our *Tratado...*, *op. cit.*, vol. 2, chapter XVI.

[50] CHAPUS, RENÉ, *Droit du contentieux administratif*, 4th ed., Montchrestien, Paris, 1993, pp. 612 and 621.

[51] Another variation was adopted by the Administrative Court of the IMF which assigns each case a conventional abbreviation like "Mr. A" or "Ms. B", making it difficult or impossible for third parties to know who the complaining parties were.

[52] Law 23.798, about prevention and fight against AIDS, in its 2nd Article states that it is not permitted to "*a)* Affect the person's dignity; *b)* Cause any effect of discrimination, stigmatization, degradation or humiliation; *c)* Surpass the legal exceptions restrictive to the medical secret that will always be interpreted restrictively; *d)* Incur in the privacy ambit of any inhabitant of the Argentine Nation; *e)* Individualize people through records or data storage, which, for that purpose, must be codified". Article 6 provides that "The professionals assisting persons who are part of a group at risk to get infected with the immunodeficiency syndrome are compelled to prescribe the diagnosis tests for the direct or indirect detection of the infection"; Article 8 states: "The professional who detects the human immunodeficiency virus (HIV) or presumes that a person carries it, shall inform him about its infectious and contagious character, the means and ways to transmit it and his right to receive the proper assistance."

tection against discrimination, are leading the law to make certain information privileged. Nevertheless, the possibility of healing through the advanced diagnosis aided by the accumulation of data may be placed above the infirm's right to privacy.

12. Forms of Evidence

Parties are completely free to choose what means of evidence they prefer, yet subject to the material possibilities of the court[53]. There are limitations that derive not from the facts, but from discretion: one side may propose witnesses or experts, and the administration choose not to call or designate them, during the administrative pre-trial proceedings (one of the reasons why administrative remedies are not always really useful). In that case, private evidence needs to be produced, and photographs, videos, etc., need to be delivered *beforehand*. So, the individual must guess which evidence he foresees will not be ordered by the administration or the court and therefore have it produced in advance. A great deal of imagination and prevention goes into this process.

12.1. Photographs and Videos

It is wholly appropriate to admit every means of evidence, and within that category fall photographs, which lawyers do not use enough. *Sapere vedere* requires a direct or indirect view of the object in question. If, for example, a visual inspection of certain premises cannot be carried out, photographs and videos can be extremely useful.

Photographs have considerable strength, above all if they are several and different and make it possible to appreciate in different ways what one is trying to describe. If the lawyer wants to introduce photographs into evidence, he must at least sign them and date them, declaring under oath that they were taken at a particular moment and place, or get other evidence to that effect, provide assurance that they have not been tampered with, etc. Even more precautions may be taken, like getting photos notarized or having the pictures taken by a professional photographer in the presence of witnesses. These requirements are becoming more and more necessary, as technical advances allow for the modification of photographs with a computer. The same thing applies to video, in that a transcript should be en-

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[53] COLSON, *op. cit.*, pp. 166 et seq.

closed with it to make for easy reading, along with other verifying elements[54].

12.2. Fax, Telex, etc.

Telex, faxes and other correspondence between parties are also admissible as evidence. Although this is evidence admissible only between the parties, it stays that way as long as both parties keep it confidential. However, if one of the parties makes its correspondence with others public, third parties can then invoke it, because it is then not private any more. In this contorted way and by act of one of the parties, the information becomes public and a problem arises between the parties as to whether one of them could legally make public such private correspondence.

Computer hardware and software, as well as video and digital cameras, are also admissible as evidence. It is always a good idea, though, to be cautious and transcribe the text or images from them and submit them as documents. They should also be notarized.

12.3. Telephone Recordings

12.3.1. Regular Telephone Recordings

Telephone or personal recordings are also admissible, but with some restrictions. Telephone conversations are comparable with correspondence, in that they are private between the parties. Bear in mind, however, that when we write, we are more cautious than when we speak. The other question with recording, is that perhaps it is questionable if one of the parties to a conversation records what the other one is saying, but what happens when the person with whom I speak records me and uses that recording publicly against me? Does that information turn to be of common knowledge and anyone can invoke it as evidence? Decisions to this effect vary considerably.

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[54] Without ignoring the practical difficulties that it represents for every court, direct verification is one of the best ways to perceive reality. For a common experience analysis of a case, see BINDER / BERGMAN, *op. cit.*, pp. 94-98.

12.3.2. Cellular Telephone and Other Recordings

There are judgments that assert that since cellular phone communications are transmitted through waves that are public property, they do not constitute a private communication but rather a public one. This is comparable with a radio transmission, in that a person who listens to it can record it and use it as evidence.

Yet the recording of a personal conversation is a different matter. In spite of the fact that the other party may be unaware of it, such recordings are commonly admitted as valid evidence, meaning it is not considered as being illegally obtained[55]. For instance, if a conversation with an officer is taking place with a recorder turned on in his pocket, what is said can be used as evidence.

12.4. Other Forms of Evidence

There are no provisions restricting the forms of evidence that can be presented, and evidence attained through old or modern techniques can be used. That said, at the beginning, Internet information had some difficulty being admitted by virtue of the technical possibilities and the material convenience of the court. The fear was that if it was offered as evidence that the court consulted the Internet, the decision regarding the admissibility of evidence would be adverse at first[56]. Over time, though, courts have come to invoke and apply technical information available on the Internet[57]. In Uruguay, for example, there are rules for "the electronic dossier", which "will have the same legal force as the traditional dossier" obtained "by conventional means."[58] These rules are a huge step forward, even though precise rules are not established to admit Internet evidence[59].

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[55] Unless a dependent relationship exists, it is required that such recordings not be surreptitious.

[56] The same goes for the Minitel in France: CHAPUS, *Droit du contentieux administratif*, *op. cit.*, p. 607.

[57] For example *abstracts* of medicine taken from *www.medscapemedlineabstract.com*, used by the CNFedCA, Chamber IV, *B. de P., C. E. and other c. Policía Federal Argentina*, *LL*, 25-I-01, p. 3.

[58] DELPIAZZO, CARLOS E., *El procedimiento administrativo electrónico y el acto administrativo automático*, UTE, *Recopilación de conferencias y exposiciones realizadas*, Montevideo, 1999, pp. 39 et seq., p. 47.

[59] DELPIAZZO, *op. cit.*, p. 46.

Evidence obtained through taste, smell, touch and hearing are also admissible[60]. Nonetheless, experts more likely introduce this evidence not directly[61], but with the assistance of experts. This means that the officer present introduces the evidence, but is attended and advised by an expert[62]. The expert evidence can be combined with visual evidence, giving a more complete picture of it[63], without replacing its actual form. Evidence can be presented not only regarding inanimate objects, but also in relation to people[64]. Such evidence can consist of comparisons, measurements, etc., and while such evidence creates a more complete picture of the scene in question[65], a more detailed inspection cannot be carried out without the consent of the person in question[66].

It needs to be noted, however, that evidence collected via visual inspection should never replace reports or certifications[67]. The most favorable fields for visual inspection - in practice - are usually environmental cases[68]. While visual inspection is usually featured as an activity that takes place outside the courthouse[69], parties are also allowed to bring physical evidence in court.

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60 HELLBLING, *op. cit.*, p. 311; Austrian law, Art. 54.

61 This is more likely and usual in practice, but not necessary.

62 HELLBLING, *op. cit.*, p. 311; Austrian Law, Art. 54.

63 The Art. 479 of the national code of civil proceedings states that evidence can be introduced with "the attendance of experts and witnesses to said act." HELLBLING, *op. cit.*, p. 312.

64 HELLBLING, *op. loc. cit.*

65 HELLBLING, *op. cit.*, p. 311.

66 Neither in Austrian law: HELLBLING, *op. cit.*, p. 312.

67 Venezuela Supreme Court, Politico-Administrative Chamber, judgment from 2-8-67, trancribed in BREWER-CARÍAS, ALLAN-RANDOLPH, *Jurisprudencia de la Corte Suprema 1930-74 y Estudios de Derecho Administrativo*, vol. III, *La actividad administrativa*, vol. 1, *Reglamentos, procedimientos y actos administrativos*, Caracas, EJV, 1976, pp. 160-161.

68 CHAPUS, *Droit du contentieux administratif*, *op. cit.*, p. 614. He reminds us that the personal interview can also be used to gather evidence in key moments.

69 TENTOLINI, OTTORINO, *La prova amministrativa*, Milan, Giuffrè, 1950, p. 151.