

Constitutional Court Reaffirms Privacy of the Home in Search and Seizure Decision

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A. Introduction: The Fight Against Organized Crime and Fundamental Rights

[1] Since the end of the eighties (and not coincidentally, the end of the Cold War), the fight against so-called "organized crime" has become a prominent political concern in Europe. The growing threat posed by organized crime in Europe is at least partially a result of the same trends of globalization that encouraged businesses and Non Governmental Organizations to act and organize themselves on a transnational scale. In fact, contrary to the assumption that "crime doesn't pay", cross-border criminality pays and pays well, with a booming business in the transfer of weapons, drugs, and migrants workers. These schemes offer profit margins as wide or wider as the traditional international criminal schemes involving money laundering, tax fraud or public-aid fraud.

[2] Many factors contributed to the raise of international crime during the last decade. The most fundamental being the persisting significant disparities of wealth between the EU States and some of the Central/Eastern European Countries and the Third World. The boom has also been fueled by an increasing mobility of persons and capital encouraged by the EU's borderless community and the fall of the Iron Curtain. Wealthy European States have, however, always shown more interest in combating international crime than addressing its root causes. One of the most popular, although not entirely credible, instruments for fighting international crime has been to attempt to restrict mobility with tight immigration and asylum policies and by reinforcing and implementing strict border controls. For several years now European countries have cooperated more closely in these and other criminal matters as part of the "Police and Home Affairs" column of the EU Treaty regime and other international conventions. The intergovernmental approach adopted at the European level has often been criticized as being undemocratic, especially for a lack of transparency, judicial review and respect for human rights.

[3] Organized crime has also played an important role in national political debates. In fact, the reality of international crime has often been used in order to promote security measures at the expense of domestic fundamental rights. In Germany, this swing towards public security interests has been codified in several amendments to the Basic Law that restrict fundamental rights, including limitations on the right to seek asylum and the right to privacy of the home – the so-called *Grosser Lauschangriff*. This approach to the battle with organized crime has been accompanied by the marginalization of fundamental rights and human rights concerns.

[4] Perhaps more significantly, the blind emphasis on minimizing fundamental rights in the political discourse over the fight against organized crime ignores the sometimes desperate needs on the part of the police and investigative courts, which often suffer from a lack of skilled legal and administrative staff, equipment and training. In short, it seems that more spending would offer much more help in combating crime than many legislative reforms which often do little more than jeopardize the citizen's fundamental rights.

B. The Judgment of the Federal Constitutional Court of 20 February 2001

[5] It is the chief virtue of Germany's Federal Constitutional Court's (FCC) judgment of February 20, 2001 to recall that when weighing the interests of law enforcement against restrictions of basic fundamental rights, the balance in favor of the interests of law enforcement cannot always be justified by organizational or budgetary circumstances, no matter the seriousness of the threat to security.

Facts

[6] The complainant's home was ransacked and searched by the police in order to find evidence of criminal activity in which the complainant was presumed to have been engaged. The public prosecutor authorized the search without obtaining a warrant from an independent judge because there was an "urgent" need to conduct the investigation. The search produced no useful evidence. The complainant moved to have the search declared illegal.

The Regional Criminal Court's Ruling

[7] The *Landgericht* (Regional Criminal Court) to which the complainant initially addressed his motion regarding the search held that it was proper for the prosecutor or police to determine that the "urgency" of the investigation permitted a warrantless search. In this respect, the Regional Court concluded that administrative authorities enjoyed

a margin of discretion, subject only to limited judicial review. Since the request for a warrant from the criminal court would have delayed the search and jeopardized its success, the public prosecutor was held to be entitled to authorize the search himself. According to the Regional Criminal Court, this practice did not amount to a systematic evasion of the courts as the complainant retains the possibility to pursue judicial review of the matter *ex post facto*.

[8] The Regional Criminal Court's ruling developed a legal construction that empowers police and prosecutors to encroach upon the inviolability of the home without obtaining authorization from a judge. The Regional Court based this possibility exclusively on the fact that advance judicial authorization is often not available in a reasonable time. Moreover, the Regional Court rendered the *ex post facto* judicial review of such searches a mere formality, finding as it did that such review should be extremely limited. In short, the ruling perfectly justified existing practice in Germany.

The Federal Constitutional Court's Assessment

[9] The FCC did not accept the Regional Criminal Court's construction and rejected: (1) a broad factual justification allowing evasion of judicial control before a search is conducted; and (2) the theory of a limited *ex post facto* judicial review.

[10] In fact, much of the FCC's judgment reads like a recommendation to carefully review the relevant provision of the Basic Law. Article 13 of the Basic Law states:

(1) The home is inviolable.

(2) Searches may be ordered only [a] by a judge or, [b] in the event of danger resulting from any delay, by other organs legally specified; and they may be carried out only in the form prescribed by law.

[11] The FCC recalled that central to Article 13.2 is the desire to preserve a fundamental freedom, specifically the right to privacy of one's home. For this reason, exceptions to the protection offered by Article 13 must be admitted only restrictively. The Court emphasized that any search amounts to an irreversible violation of the freedom guaranteed by Article 13.2. In this light, the judicial review of a proposed search conducted before the search is allowed (*Richtervorbehalt*) has several fundamental functions: first, it allows for an independent examination of the need for a search; second, it is likely to limit the restriction to the necessary extent (*messbar*); and third, it makes the restriction transparent (*kontrollierbar*), since the judge has to explain his decision.

[12] Given the importance of such judicial review, made before a search is permitted, the FCC emphasized that Article 13.2 contains an obligation to ensure that this examination can be properly exercised. The FCC stated that courts and police have to organize themselves in a way that the controlling system foreseen by the Article 13.2 works in the day-to-day law enforcement practice. The FCC also pointed out that the obligation applies not only to courts and police but also to the politically responsible institutions, whether federal, state or local. All are bound, according to the FCC, by the obligation to ensure that restrictions of Article 13.2 are enforced.

[13] Turning to Article 13.2's allowance for the substitution of a judge's warrant with the judgement of the public prosecutor in cases of "emergency", the FCC emphasized that this option constitutes an exception to the general rule which must be interpreted very restrictively. From this, the FCC concluded that the "emergency situation" cannot be justified by mere speculations but must be based on facts. Moreover, the FCC held that the exception cannot be invoked in cases in which the police actually cause the "emergency situation" themselves, by keeping information under disclosure, for example.

[14] Finally, the FCC left no doubt that the use of the "emergency" clause of Article 13.2 is subject to the more general guarantee of judicial review provided by Article 19.4 of the Basic Law, as are all acts taken by public powers. This implies, according to the FCC, that public authorities acting under the "emergency exception" are obliged to document and to explain their decision to invoke the "emergency exception" as, without such documentation, subsequent judicial review of the decision is extremely difficult.

C. The U.S. Supreme Court's Search and Seizure Decision of 20 February 2001

[15] On the same day that the German Federal Constitutional Court issued its judgement reaffirming the fundamental importance of the warrant-search requirements of the Basic Law, the U.S. Supreme Court issued a search and seizure judgment of its own, engaging the same fundamental constitutional themes. In *McArthur v. Illinois*, the U.S. Supreme Court's eight judge majority paid lip service to the fundamental right to privacy of the home established by the Fourth Amendment to the U.S. Constitution, while setting down a precedent that certainly weakens that right, even if only slightly. The lone dissent from Justice John Paul Stevens, with its impassioned description of the importance of the sanctity of the home, is much closer in tone to the Federal Constitutional Court's judgment.

[16] The Supreme Court's judgment in *McArthur v. Illinois*, 531 U.S. ____ (2001) found that the police acted reasonably (thereby upholding the police action) when they refused to permit a resident to enter his home while awaiting a judicial search warrant that would allow the police to search the home. The warrantless seizure allowed the police to eventually obtain drug evidence from the suspect's home. The police argued that they had reason to believe that the home contained evidence of criminal activity and that the suspect, if allowed to enter the home, would have destroyed or hidden that evidence.

[17] In many respects the FCC and Supreme Court decisions are similar. Both recognized the importance of the sanctity of the home and both acknowledged a constitutional requirement for obtaining a search warrant as the primary protection against law enforcement violations of this right. Both Courts worked to clarify the role of an "exigent circumstances" exception to the basic warrant requirement and both engaged in a balancing of law enforcement interests as against privacy interests in their efforts to set the parameters of this exception.

[18] The Courts reached significantly different results on these shared questions. At the heart of the difference lies very different constitutional guarantees. The Constitution's Fourth Amendment, after all, protects only against "unreasonable searches and seizures" of the home, a standard that can be read to presume the state's right to search a person's home as long as the search is reasonable. The Basic Law in Article 13.1, on the other hand, more definitively protects the home, declaring simply that "the home is inviolable." Starting from these different constitutional foundations, the Courts are clearly charged with different tasks. The Supreme Court sought to strike a balance of interests that supports a (more) flexible privacy guarantee while the FCC engaged in outlining the balance of interests with respect to a (more) absolute guarantee of privacy.

For more information:

English language version of the Basic Law on-line:
www.uni-wuerzburg.de/law

FCC Decision online (German):
<http://www.bundesverfassungsgericht.de>