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The Legality of Evidence Obtained in Warrantless Searches: A Debate on Fundamental Rights

The Legality of Evidence Obtained in Searches Without a Warrant: A Debate on Fundamental Rights

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SUMMARY

The debate surrounding the legality of evidence obtained in warrantless searches is one of the most sensitive issues in Brazilian criminal procedure, as it involves the necessary balance between the protection of fundamental rights and the effectiveness of criminal prosecution. The inviolability of the home, guaranteed by Article 5, Section XI, of the Federal Constitution, represents an essential core of individual freedoms, limiting state action and guaranteeing citizens' privacy. However, the Constitution itself allows for exceptions, such as flagrant crime, disasters, the need to provide emergency assistance, and even daytime searches by court order. Therefore, studying the legality of evidence obtained in warrantless searches requires a critical analysis that considers not only the letter of the law and case law, but also the protective function of fundamental rights in a democratic state governed by the rule of law. The search for a balance between public safety and individual guarantees is, therefore, a constant challenge for the Brazilian criminal justice system.

Keywords: Home search. Inviolability of the home. Fundamental rights. judicial determination.

ABSTRACT

The debate over the legality of evidence obtained in searches without a judicial warrant is one of the most sensitive topics in Brazilian criminal proceedings, as it involves balancing the need to protect fundamental rights against the effectiveness of criminal prosecution. The inviolability of the home, guaranteed by Article 5, Section XI, of the Federal Constitution, represents an essential core of individual freedoms, limiting state action and guaranteeing the right to intimidate citizens. However, the Constitution itself allows for proposals such as flagrant crime, disasters, the need to aid, and even daytime searches by judicial order.

Thus, studying the legality of evidence obtained in searches without a judicial warrant requires a critical analysis that considers not only the letter of the law and its protection, but also the protective function of fundamental rights in a democratic state governed by the rule of law. The search for a balance between public safety and individual guarantees is, therefore, a constant challenge for the Brazilian criminal justice system.

Keywords: Home search. Inviolability of the home. Fundamental rights. Court order

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1. INTRODUCTION

The legality of evidence obtained in searches without a warrant is one of the most controversial issues sensitive and debated in the field of Brazilian criminal procedure, precisely because they involve the delicate tension between the investigative power of the State and the protection of fundamental rights of the individual. The Federal Constitution of 1988, in its article 5, item XI, ensures the inviolability of the home, establishing that no one may enter another person's residence without the resident's consent, except in cases of flagrant crime, disaster, provision of assistance or, during the day, by court order. Such provision establishes a guarantee essential to privacy and individual freedom, pillars of the Democratic Rule of Law.

Despite constitutional clarity, forensic practice has revealed situations in which agents state-owned companies carry out searches and seizures without a court order, justifying this by alleged situations of flagrant or urgent nature. This action has been the subject of intense legal debate, especially with regard to the admissibility of the evidence thus obtained. The Supreme Court Federal (STF), for example, when judging Extraordinary Appeal 603,616, with repercussions generally recognized, established the understanding that evidence obtained through violation of domicile without a warrant are unlawful, except in exceptional situations duly justified.

In view of this panorama, this article aims to analyze, in light of the legislation Brazilian and constitutional jurisprudence, the limits of state action in carrying out searches without a warrant, as well as the legal consequences of producing evidence under these circumstances. The aim is to contribute to critical reflection on the contours legal aspects of investigative action and the necessary observance of fundamental rights in criminal proceedings.

2. PRINCIPLE OF INVIOLABILITY OF HOME

The inviolability of the home is a fundamental right expressly guaranteed by Constitution of the Federative Republic of Brazil of 1988. As provided in article 5, paragraph XI: “The home is the inviolable asylum of the individual, no one being able to enter it without consent of the resident, except in the case of flagrant crime or disaster, or to provide assistance, or, during the day, by court order.”

This constitutional provision reflects the concern of the constituent legislator in protecting the private space of the individual's life against undue interference from public authorities. In this

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sense, the home is conceived as an extension of the human personality, being the place in that the right to intimacy, privacy, dignity and freedom is fully exercised individual — all values enshrined in the 1988 Constitution.

CONSTITUTIONAL AND LEGAL BASIS

The principle of the inviolability of the home is closely linked to other rights fundamental rights provided for in Article 5 of the Federal Constitution, such as the right to privacy and private life (item X), due process of law (item LIV), adversarial proceedings and full defense (item LV) and the principle of legality (item II), which establishes that “no one shall be obliged to do or refrain from doing something except by virtue of law”.

At the infra-constitutional level, the Code of Criminal Procedure (CPP) deals with home searches in articles 240 to 250. Article 240, §1, item IV, expressly provides that the search may have the purpose of the purpose of seizing “objects necessary to prove the offense or to defend the defendant”, provided that the legal requirements are met. Article 243 requires that the search and seizure warrant specify the location and the objects sought, in addition to containing the name of the authority that issued it and the legal justification for the measure.

Article 245, caput, of the CPP reinforces the constitutional rule by stating that “the entry into a home, except to provide assistance or, during the day, by order judicial”, adding in §1 the permission to enter without a warrant in cases of flagrant crime. This demonstrates that the general rule is the need for a court order for the entry into residence, with exceptions being interpreted strictly, under penalty of affront to constitutional rights.

The exceptions provided for in the Constitution — flagrant crime, disaster, provision of assistance and daytime court order — these are not open clauses, but exhaustive hypotheses. The entry forced without a warrant, especially under the justification of “well-founded suspicion”, must be assessed with caution, under penalty of allowing undue flexibility of a right fundamental.

The majority doctrine, in this regard, defends a strict and protective interpretation of constitutional exceptions. For Alexandre de Moraes, for example, “the inviolability of the home must be understood as a true guarantee of privacy and freedom, the violation of which can only occur within the strict limits of the Constitution” (MORAES, 2023).

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In the same sense, Guilherme de Souza Nucci highlights that “entry into a home without judicial warrant cannot be supported by mere assumptions or presumptions of crime, under penalty of trivializing constitutional protection.”

Constitutional jurisprudence on the subject

The Supreme Federal Court has repeatedly ruled that the inviolability of the home cannot be relativized based on generic arguments or presumptions. In the trial of Extraordinary Appeal No. 603,616/SP, with recognized general repercussions (Theme 280), the STF established the following thesis:

“Evidence obtained through forced entry into a home without a court order is unlawful, in nighttime, even though based on an anonymous report of drug trafficking, without evidence reasonable evidence of the criminal practice or the occurrence of a flagrant situation.”

In this case, the Court reinforced that a mere anonymous complaint does not justify the violation of the home, making it essential that public agents collect objective and concrete evidence that indicates the flagrant situation. Otherwise, it would be allowing the arbitrary action by the State, with evident violation of the principle of legality and the protection of private sphere of the citizen.

The Superior Court of Justice (STJ) also has consolidated jurisprudence in this regard, highlighting that the legality of the evidence is directly linked to the way it was obtained. Therefore, any evidence derived from an illegal home search is considered null and void, by force of law. of the theory of the fruits of the poisonous tree (doctrina dos fruits of the poisonous tree), predicted in article 157, §1, of the CPP aims to guarantee respect for due process and the fundamental rights.

3. LEGAL EXCEPTIONS TO THE RULE OF INVIOLABILITY

The inviolability of the home is one of the most relevant fundamental guarantees of Brazilian legal system. Provided for in article 5, item XI, of the Federal Constitution of 1988, the rule states that “the home is an inviolable asylum for the individual, and no one can enter it enter without the resident's consent, except in the case of flagrant crime or disaster, or to provide assistance, or, during the day, by court order.” It is an instrument to protect the privacy, intimacy and freedom of citizens against state power.

However, the Constitution itself recognizes exceptional hypotheses that authorize mitigation of this guarantee. There are four cases expressly provided for: (i) flagrant crime, (ii) disaster, (iii) provision of assistance and (iv) court order during the day. The doctrine indicates that these

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exceptions are of restrictive interpretation and should be used only in situations that justify real urgency or need.

The flagrant crime, as provided for in article 302 of the Code of Criminal Procedure, is configured when the agent is committing the crime, has just committed it or is pursued soon after, in situation that indicates that he is the author of the offense. In many judgments, case law has validated the entry into a home without a warrant based on anonymous complaints associated with objective signs — such as a strong odor of a narcotic substance, typical movement of the trafficking, or suspicious behavior. However, the Supreme Federal Court (STF) has required well-founded and duly justified reasons, the mere "generic suspicion" or anonymous complaint unaccompanied by prior due diligence (STF, HC 598.051/SP, 2021).

Disaster, in turn, refers to unforeseen and large-scale events that place lives or property at immediate risk — such as fires, landslides or floods. In these cases, the urgency of the intervention justifies forced entry, including for the performance of administrative or civil authorities.

Providing assistance is another exceptional situation in which entry into home, even without a court order. If there is an imminent risk to the physical integrity of someone inside the residence, the public authority, or even a third party, can enter to prevent damage. Assistance must be immediate and justified by the urgency of the situation, under penalty for misuse of purpose.

Finally, the court order during the day represents the only hypothesis in which entry at home may be authorized without the presence of any urgency, as long as with judicial support. The interpretation of the expression "during the day" has been considered by doctrine and jurisprudence as the period between dawn and dusk, varying according to the circumstances of the location and time of year (CAPEZ, 2021).

4. EVIDENCE OBTAINED WITHOUT A COURT WARRANT

Obtaining evidence through forced entry into a home, without complying with the mentioned legal exceptions constitute an affront to the fundamental right to inviolability and results in illicit evidence, under the terms of article 5, item LVI, of the Federal Constitution and the Article 157 of the Code of Criminal Procedure. The rule is clear: any evidence obtained through unlawful act will be inadmissible in criminal proceedings, and subsequent acts contaminated by this unlawfulness must also be removed, in accordance with the theory of "fruits of the tree" poisoned".

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The jurisprudence of the higher courts has been consolidated in this regard. The STF, in repeated decisions, reaffirms that the legality of evidence obtained by home invasion without judicial authorization or without the configuration of flagrant crime. In paradigmatic judgment, the STF decided that "entry into a home without a court order, even with an anonymous complaint, it is only justified if there are concrete elements that indicate the occurrence of a crime in flagrante delicto" (STF, RE 603,616, 2010).

Otherwise, if the entry is considered legitimate — as in the case of flagrant properly characterized — the evidence collected will be valid. This implies that, even without warrant, provided that constitutional exceptions are respected and the legality of the action, it does not constitute illegal evidence.

It is important to emphasize that there are borderline situations, in which the analysis of the specific case is determining factor in whether or not the evidence is validated. Therefore, it is essential that the authority police officer thoroughly justifies the reasons that led to the measure, demonstrating, for example, the urgency of action, prior indications of criminal activity and the risks of loss of evidence if there was a delay in obtaining a court order.

State action must always observe the principles of due process, legality, proportionality and reasonableness. The relativization of fundamental guarantees, still that in favor of the repression of crime, it cannot become a rule under penalty of establishing a scenario of arbitrariness.

5. CURRENT JURISPRUDENCE ON THE SUBJECT

Brazilian jurisprudence has been consolidated around the idea that the inviolability of domicile (art. 5, XI, of the Federal Constitution) is a fundamental guarantee that can only be relativized in specific hypotheses. The Federal Supreme Court (STF) and the Superior Court of Justice (STJ) have been facing the issue in cases of flagrant crime, trafficking drugs and emergency situations.

The STF, in RE 603.616/RO (Theme 280 of general repercussion), established the thesis that the entry forced at home without a court order is only lawful when supported by well-founded reasons, duly justified a posteriori, that indicate the occurrence of a situation of flagrant crime. This means that mere suspicion or anonymous complaint does not legitimize the home invasion.

The STJ has reinforced this understanding. In several precedents (HC 598.051/SP; AgRg no. HC 673.439/SP), the Court understands that the violation of domicile without a court order and without

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just cause implies the unlawfulness of the evidence obtained, in accordance with art. 5, LVI, of the Constitution.
It is also worth noting that the resident's consent, when invoked by the police authority,
must be free, unequivocal and proven, under penalty of invalidity of the diligence.
Jurisprudence has therefore evolved towards more rigorous control of the legality of evidence.
collected without judicial authorization, recognizing the nullity of illicit evidence due to violation of
fundamental rights, in addition to any possible State responsibilities.

6. CONSTITUTIONAL AND PROCEDURAL IMPLICATIONS

At the constitutional level, the issue is directly related to the inviolability of the
domicile (art. 5, XI, CF/88) and with the inadmissibility of illicit evidence (art. 5, LVI). The
Entry into a home without a court order is only permitted in cases of flagrant crime
crime, disaster, to provide assistance, or during the day, by court order.
Failure to respect these normative guidelines compromises not only the evidence obtained, but the entire
process, taking into account the application of the theory of the fruits of the poisonous tree **(fruits of the poisonous tree),** which is supported by Brazilian doctrine and was accepted by
jurisprudence (HC 88.915/SP, STF). Thus, evidence derived from an illegal search also
are contaminated by illegality.
From a criminal procedural point of view, the Code of Criminal Procedure (art. 157) determines that
illicit evidence must be removed from the process and cannot be used as a basis for a decision
judicial. This guarantees the effectiveness of due process (art. 5, LIV, CF) and the broad
defense (art. 5, LV, CF).
In doctrine, authors such as Aury Lopes Jr. highlight that home protection is a
essential mechanism against state abuses, with the exception (flagrant) being interpreted in a manner
restrictive. Guilherme de Souza Nucci warns that the relativization of inviolability must
always observe proportionality and reasonableness, under penalty of transforming the exception into
rule.
Therefore, the constitutional and procedural implications of the legality of evidence obtained in
warrantless searches point to the need to balance criminal prosecution with
protection of fundamental rights, avoiding arbitrariness and ensuring the legitimacy of
judicial decisions.

7. CRITICAL CONSIDERATIONS AND PROPOSALS

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Analysis of the legality of evidence obtained in warrantless searches reveals a field marked by tensions between public safety and fundamental rights. Although the fight against crime, especially crimes such as drug trafficking, is an imperative of the State, it cannot be admitted that such an objective is achieved through arbitrary violations of inviolability of the home. The effectiveness of criminal prosecution cannot justify the indiscriminate relativization of constitutional guarantees, under penalty of legitimizing practices authoritarian and compromise the credibility of the justice system itself.

Given this situation, some proposals can be put forward:

• **Procedural standardization:** the publication of clear and objective national protocols for entry into homes, in order to reduce subjectivities and limit police discretion.

• **Effective external control:** strengthening the role of the Public Prosecutor's Office and the Public Defender's Office Public in controlling the legality of due diligence, including faster mechanisms of challenge to illegally obtained evidence.

• **Continuous police training:** training aimed at understanding the limits constitutional principles of investigative activity, reinforcing the importance of proportionality, legality and detailed motivation of the actions.

• **Use of recording technologies:** mandatory implementation of body cameras cams) or audiovisual recording in search operations, as a way to ensure transparency and prevent abuse.

• **Valuing lawful evidence:** encouraging modern investigative methods that respect the guarantees, such as police intelligence, data cross-referencing and prior due diligence, in order to reduce dependence on home searches as a central investigative tool.

These measures not only contribute to greater legal certainty, but also strengthen social trust in institutions and prevent crime from being tackled by means incompatible with the Democratic Rule of Law.

8. CONCLUSION

Analysis of the legality of evidence obtained in searches without a warrant reveals the centrality of the inviolability of the home as one of the pillars of the Democratic State of Right. Far from being a barrier to combating crime, this guarantee represents a

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legitimate and necessary limit to state action, preventing investigative power from becoming become an instrument of abuse. The 1988 Constitution enshrines the home as a space of protection of privacy and human dignity, and any exception to this protection must be interpreted strictly, under penalty of weakening the very logic of protecting rights fundamental.

The jurisprudence of the Federal Supreme Court and the Superior Court of Justice has reinforcing that the violation of a home without a warrant can only be admitted in cases exceptional, duly substantiated and proven, as in flagrant crime clearly characterized. This position prevents mere suspicions, anonymous complaints or generic presumptions legitimize arbitrary invasions, which, in addition to weakening trust social in institutions, produce illicit evidence and contaminate the entire process.

From a constitutional and procedural point of view, the inadmissibility of illicit evidence guarantees not only the soundness of the criminal process, but also the preservation of the legitimacy of the justice system itself. Due process, full defense and adversarial proceedings can only be fully exercised when the evidence presented derives from legal proceedings and legitimate. In this sense, the application of the theory of the fruits of the poisonous tree reinforces the idea that there is no room for “shortcuts” that disrespect constitutional guarantees.

At the same time, practical reality shows that the challenge of criminal prosecution is to reconcile investigative efficiency with respect for fundamental rights. The adoption of protocols objectives of action, the requirement for rigorous justification of measures, the strengthening of external control mechanisms of police activity and the use of technologies transparency are possible paths to this balance.

Therefore, it is concluded that the legality of evidence obtained in searches without a judicial warrant must always be analyzed in light of the constitutional principles of proportionality, reasonableness and legality. The relativization of guarantees cannot become a rule, because that would mean the progressive erosion of democracy itself. The best response of the The State, instead of expanding loopholes for exceptions, is investing in investigative techniques modern, in continuing education of public agents and in a criminal process committed to the full protection of fundamental rights.

Thus, preserving the inviolability of the home not only reaffirms the values constitutional rights of freedom and dignity of the human person, as well as strengthening the credibility of the justice system. In a democratic state governed by the rule of law, combating crime means, first of all, ensuring that state action develops within the

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legal limits, reaffirming that justice is only legitimate when it respects the rights that intends to protect.

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