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# **Constitutional rights limits and the principle of proportionality in the case law of the Portuguese Constitutional Court**

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Justice of the Constitutional Court of Portugal

Dear Mr. President of the Constitutional Court of the Republic of Bulgaria,  
Professor Boris Velchev,

Dear Mr. President of the Court of Justice of the European Union, Justice  
Koen Lenaerts,

Dear colleagues,

Ladies and gentlemen,

**1.** First of all I would like, on behalf of the President of the Constitutional Court of Portugal, Professor Manuel da Costa Andrade and on my own, to thank you, Mr. President (the President of the Constitutional Court of Bulgaria), for the invitation to participate in this international conference dedicated to celebrate the 25<sup>th</sup> anniversary of the Constitutional Court of Bulgaria, and also for the opportunity to address such a distinguished audience.

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<sup>1</sup> In the preparation of this text the author was assisted by Jorge Pação, Legal advisor in the Judge Chambers of the Constitutional Court of Portugal



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Unfortunately, due to a prior commitment that he was unable to change, our President could not attend this conference. This is sad not only for institutional reasons, but mainly because Professor Manuel da Costa Andrade is one of our most renowned Portuguese criminal law professors and he would certainly have much more interesting ideas to share with you on the topic of the protection of fundamental citizen's rights and national security in the modern world than myself.

In fact, as a criminal law professor, and now as the President of the Constitutional Court, Justice Manuel da Costa Andrade has a structured thinking on the issue of constitutional rights and national security. For instance, in his inaugural speech, pronounced just recently, last 27<sup>th</sup> of July, he emphasized that the rule of law is facing emerging risks in modern societies and warned against the temptation to disseminate in our legal system exceptional laws and measures that can only be justified by the fight against terrorism – what he called the risk of “colonization” of common criminal procedural law by anti-terrorism legislation.

**2.** So far the Constitutional Court of Portugal has not been called very often to rule on issues related to national security laws and measures.

Only last year the court has taken its first decision specifically related to those matters, regarding a provision contained in a law enacted by the Portuguese Parliament on the availability and accessibility of communications data – commonly referred as metadata - for use by law enforcement agencies and intelligence services in the fight against terrorism (Ruling No. 403/2015).



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In short, the Court ruled that metadata – traffic and location communications data, as well as related data necessary to identify the subscriber or user – are to be considered personal data and that under article 34 (4) of the Portuguese Constitutional those data can only be accessed by criminal investigation authorities in the course of an actual criminal investigation. But not prior to it, by law enforcement agencies and intelligence services in an anticipative criminal investigation.

This decision reveals the contradiction between the fundamentals of the liberal democratic state – and our civil liberties tradition based on the recognition of defensive constitutional rights – and the repression needs of the current “state of exception”; between a criminal law of the citizen (Bürgerstrafrecht) and a criminal law of the enemy (Feindstrafrecht).

But it also raises the question on whether constitutional rights limits must be explicitly foreseen in the written Constitutional - as it is stated in article 18 (2) of the Portuguese Constitution - or can be “extracted” from other constitutional principles and values.

As in many other countries, a theory of constitutional rights and its limits, based on constitutional reasoning as the process of identifying the conditions under which one or two or more competing rights or principles takes precedence on the facts of specific cases, is becoming predominantly accepted by the Portuguese Constitutional Court. And in that perspective any constitutional right or principle may be limited by another constitutional right or principle.

No one will dare to dispute that the promotion of national security is in the public interest and that this interest entitles the legislator to impose limits



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on constitutional rights; the question is how far can we go in order to promote national security without compromising the necessary balance between that activity and the protection of constitutional rights.

**3.** Despite the negligible Portuguese Constitutional Court case-law on national security and the limits to its pursuit before constitutional rights, there is no doubt that in future cases the question will be examined by the Portuguese Constitutional Court mainly according with the principle of proportionality or the principle of prohibition of excessiveness.

As for the application of such principle, the Portuguese Constitutional Court has produced a significant number of decisions, some of them of particular significance whether in the theorization of the principle, whether in terms of its concrete application.

This is also due to the inclusion in the Portuguese Constitution of multiple references to the principle of proportionality [e.g. 18 (2), 19 (4), 226 (2)], which makes the principle of the prohibition of excessiveness a “general principle of limitation of the public power”(Ruling No. 187/2001; Ruling No. 73/2009). In short, as stated by the Court: "the rule of law can only be a proportional one" (Ruling No. 387/2012).

In any event, in regard to restriction on constitutional rights, the Portuguese Constitutional Court has undertaken the principle of proportionality in its narrow sense as the main limit of restrictions on fundamental rights. In this sense, article 18 (2) of the Constitution stands out, which provides:

*“The law may only restrict rights, freedoms and guarantees in cases expressly provided for in the Constitution, and such restrictions must be*



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*limited to those needed to safeguard other constitutionally protected rights and interests.”*

And although not always by reference to article 18, the fact is that the Constitutional Court of Portugal has been deciding grounded on the principle of prohibition of excessiveness with considerable regularity, and does so since the beginning of the ' 80's (e.g. Ruling No. 25/84; Ruling No. 85/85), making use of the three tests/sub-principles that form the principle:

- i) Suitability / Appropriateness: the need to adapt the means to the ends (*Adequação; Geeignetheit*).

A measure shall be considered unsuitable if it is "indifferent, innocuous or negative" for the pursuance of the intended purpose (Ruling No. 623/2008).

- ii) Necessity: the means must be necessary or essential (*Necessidade; Erforderlichkeit*)

The Court must find out “whether there were, in this case, alternative means for achieving the same purpose; if among these means, there were differences on the level of burden for the addressees of the restrictive measures; and, finally, if it was chosen, among them, the most benign or less burdensome (Ruling No. 623/2008).

- iii) Proportionality in the strict sense: implying a “just measure” (*Proporcionalidade em sentido estrito; Verhältnismäßigkeit im engeren Sinne*)



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Evaluation of the measure's costs and benefits. The measure will be considered disproportional if its positive results are inferior to the sacrifices involved (e.g. Ruling No. 159/2007; Ruling No. 173/2009).

On this matter, Ruling n. º 634/93 is particularly accurate on summing up this "three-part test":

"The proportionality principle is divided in three subprinciples: principle of suitability (restrictive measures of rights, freedoms and guarantees must be a mean to achieve the intended purposes, safeguarding other constitutional rights); principle of necessity (these restrictive measures must be required to achieve the intended purposes, considering the legislature does not have other means less restrictive in order to achieve the same end); proportionality in a narrow sense (excessive, disproportionate measures may not be adopted to achieve the intended purposes)."

It is also important to mention Ruling No. 632/2008, in which the Constitutional Court of Portugal held three clarifications on the implementation model of the principle of proportionality:

- i) Regarding the proportionality in a narrow sense test, the court must measure "the relationship between the burden effect of the adopted measure and the specific relevance of the gain of public interest that such measure aims to achieve".



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- ii) The Court established precedence rules on the “three-part test”: precedence of the more abstract test over the test closer to the specific circumstances of the case: 1. ° suitability; 2. ° necessity; 3. ° proportionality in a narrow sense.
- iii) The principle of proportionality (and its “tests”) is applicable not only to the acts of the administrative function, but also regarding the exercise of the legislative function.

Still on the content of the proportionality principle, two references should be made to the following assumptions of the Portuguese Constitutional Court:

- i) The Portuguese Constitutional Court, has been including the *reasonableness test* within the proportionality in a narrow sense test, considering that the measure shall be disproportionate if the relationship between the sacrifice of the measure and its benefit to public interest is unreasonable.
- ii) The Constitutional Court has been recognizing another sub-principle on the proportionality principle: the “determinability test” which means that the restrictions on fundamental rights must be determinable, being sufficiently precise and allowing the recognition of their concrete content and its effects.



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In conclusion, although the opportunities for the Portuguese Constitutional Court to decide on national security matters and its relationship with restrictions on constitutional rights have been minimal, the Court has a relevant ruling background on the principle of prohibition of excess, which certainly will prove to be crucial on national security cases that may be raised before the Constitutional Court, which may not forget the contributions of the case-law of the ECJ and ECHR on the configuration principle of proportionality, grounded on several European legal cultures and on different legal systems (civil law *versus* common law).