Article received in December 2017 and accepted for publication in April 2018

FUNDAMENTAL RIGHTS AND CITIZENS' RIGHT TO SECURITY[1]

DIREITOS FUNDAMENTAIS E DIREITOS DOS CIDADÃOS À SEGURANÇA

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Abstract

This article corresponds to part of the Final Project of the 2016-2017 Joint Staff Course. It aims to analyse how the balance between the right to freedom and security is influenced by police activity in response to terrorist threats. Using a qualitative investigative strategy, the study aims to analyse the national legal framework and how it relates to police activity in response to the unpredictable threat of terrorism. Generally, we concluded that Police activity is significantly influenced by terrorism at the time of an attack, at which point there is usually a reactive use of restrictive measures, which have a significant impact on the balance between the right to freedom and the right to security.

Keywords: Rights, Security, Freedom, Terrorism, Police.

Resumo

O presente artigo teve como objetivo analisar de que forma o equilíbrio entre o Direito à liberdade e à segurança é afetado pela atividade policial em resposta à ameaça terrorista.

Seguindo uma estratégia de investigação qualitativa, orientamos a investigação tendo em conta o enquadramento jurídico nacional, relacionando-o com a atuação policial em resposta à imprevisível ameaça do terrorismo. Genericamente, concluímos que a atividade policial é

How to cite this paper: Fonseca, J. & Gonçalves, M., 2018. Fundamental Rights and Citizens' Right to Security. *Revista de Ciências Militares,* May, VI(1), pp. 405-425.
Available at: https://www.ium.pt/cisdi/index.php/en/publications/journal-of-military-sciences/editions.

[1] Article adapted from the individual research work carried out in the 2016/2017 Joint Staff Course. The defence took place in July 2017 at the Military University Institute.

significativamente influenciada pelo terrorismo aquando da ocorrência de atentados, altura em que se recorre, quase sempre de forma reativa, à implementação de medidas restritivas com assinalável impacto no equilíbrio do Direito à liberdade e à segurança.

***Palavras-chave**: Direitos, Segurança, Liberdade, Terrorismo, Polícias.*

Introduction

As stated in Article 2 of the Constitution of the Portuguese Republic (CRP), Portugal is "[…] a democratic state based on the rule of law, the sovereignty of the people, plural democratic expression and political organisation, respect for and the guarantee of the effective implementation of the fundamental rights and freedoms […]. As such, the country places particular emphasis on fundamental rights, and an exhaustive list of rights is inscribed in part I of the Constitution.

It is within the above framework of multiple fundamental rights that Article 27 of the CRP recognises the right to freedom and security as fundamental rights. Therefore, it is critical that those rights are balanced to guarantee both the goals of the State and the wellbeing of its citizens.

The current international context is marked by significant changes in the universe of threats and by multi-risk societies, with particular emphasis on the threat of terrorism. Thus, it is critical that the police mission is redefined in a sustained manner that safeguards the national assets and aligns with the global interests (Lourenço et al., 2015, p. 36). This means that managing the balance between freedom and security is a highly complex task for Security Forces (SecF).

Against this background, it is especially timely to analyse how the balance between the right to freedom and the right to security is influenced by the police's response to the threat posed by terrorism. Because the State is responsible for guaranteeing the fundamental rights of its citizens, in order to guarantee the constitutional right to security it may be required to take measures that restrict citizens' freedoms, as is already the case in several European countries such as France and Belgium.

Therefore, it is our belief that, in addition to being of interest to the researcher, this line of research will also be relevant to the organizations that operate in the Portuguese security sector.

To that end, the object of our research, the right to freedom and security, had to be narrowed due to the wide-ranging nature of the topic and to avoid diluting our analysis, as advised by Hernandez Sampieri (2003, cited in Santos et al., 2016, p. 44). Thus, bearing in mind the length restrictions and the timeframe in which the work had to be completed, the research topic was narrowed to the analysis of the right to freedom and security provided for in article 27 of the CRP, and further narrowed to the analysis of the threat of terrorism and the measures implemented by the *Guarda Nacional Republicana* (GNR). The general objective

of our research is to analyse how the balance between the right to freedom and security is influenced by the police's response to terrorist threats. To achieve this, we defined the following Specific Objectives (SO):

- SO1: Analysing the relationship between the right to freedom and the right to security and the underlying framework;
- SO2: Identifying the principles and limits of police action;
- SO3: Identifying the national strategy for combating terrorism;
- SO4: Identifying the security measures taken vis-à-vis the threat of terrorism and its implications for the right to freedom and security.

In order to organize the work in a logical sequence, in addition to an initial phase where we addressed the research methodology, the paper is divided into several subchapters that frame fundamental rights in the context of the current legislation. We focused in particular on the right to freedom and security and the principles of the Rule of Law to identify and contextualize the current legal framework and to understand the relationship between the right to freedom and the right to security. We also situate the role of SecF within the framework of fundamental rights, identifying and analysing the principles and limits of police activity in terms of the legal framework. We also provide a brief description of terrorism and terrorist strategies, and examine how they relate to the right to freedom and security to ascertain the difficulties that can emerge from implementing measures that could come into conflict with the fundamental rights provided for in the Constitution.

1. Literature Review

The topicality of the issue under analysis required that we assess the state of the art by identifying other works on the same subject and by conducting a literature review, which focused on works by renowned authors to avoid following spurious lines of investigation (Santos et al., 2016, p. 45).

The first of those works, *Por uma Liberdade com Responsabilidade* by Nabais (2007), contains reflections and critiques on fundamental rights. The author also addresses the cost of those rights, arguing that "It is not news to anyone that the universe of fundamental rights has been expanded and rendered so complex that it may as well extend to infinity" (2007, p. 103).

Nor can we fail to mention the work by Canotilho (2008), *Estudo Sobre Direitos Fundamentais*, which lists a number of fundamental rights issues and includes a subchapter of particular interest to our investigation: "Terrorism and Fundamental Rights".

The legal part of the research also relied on authors who published important work, such as Gouveia's *Manuais de Direito Constitucional, Volumes I e II* (2014), which provides a detailed explanation of fundamental rights in the Portuguese legal system, and the annotated edition of the CRP by Canotilho and Moreira, volumes I and II (2014).

To analyse terrorism and its implications for the right to freedom and security, we mainly consulted foreign works such as Meisels' The Trouble With Terror – Liberty, Security, and The

Response to Terrorism (2008), a major work that attempts to explain the extent to which the terrorist threat leads to changes in police behaviour and activity, resulting in the restriction of freedom as the price to pay for security.

We must also mention the work by Northouse (2006), *Protecting What Matters – Technology, Security, and Liberty since 9/11*, which addresses two distinct lines of thought. One puts the emphasis on security and accepts that constitutional changes may be required to combat terrorism, whereas the other prioritises the right to freedom to prevent terrorism from achieving its true goal.

Still regarding the state of the art, we identified several research studies, one of which, a paper elaborated by Ferreira (2014) for the 2013/2014 Joint Staff Course (CEMC), specifically addresses the topic of Fundamental Rights and Citizens' Right to Security. The study mainly aims to understand how enforcing the right to security can infringe on citizens' right to freedom. In the author's opinion, the two rights are inseparable and must be kept in constant balance. Portela (2007) also addressed fundamental rights, providing a comparative analysis of antiterrorism law in several countries and its impact on fundamental rights. Finally, the work by Fernandes (2011), "O Direito Penal do Inimigo: Reconfiguração do Estado de Direito" addresses the relationship between the need to guarantee peace and security and the rights, freedoms, and guarantees provided for in the CRP.

The fact that there is already another paper on exactly the same topic we were assigned poses an additional challenge because our goal is to offer an innovative and distinct approach that can enrich the scientific body of knowledge on a highly relevant topic. Therefore, we decided to include the phenomenon of terrorism in our study.

The fact that some of the information related to the measures taken in combating terrorism is classified is one of the study's limitations, of which we are aware. Still, we believe that this distinct approach could be advantageous, and that the study could provide a good starting point for future research on a highly current, sensitive, and relevant issue for all citizens.

2. Methodology

The methods used in our investigation generally followed the guidelines provided in the *Orientações Metodológicas para a Elaboração de Trabalhos de Investigação*, a document elaborated and published by the Military University Institute (IUM) in January 2016, as well as the provisions of the *Norma de Execução Permanente* (NEP) *Académica No. 010* issued in September 2015. The book Social Research Methods by Alan Bryman was also consulted in the study.

The study used a qualitative research strategy, which relied on descriptive methods to elaborate a theory based on the data that was collected and analysed.

When defining the methodological path, we took in to account that "the application of the scientific method to research work has several advantages, such as: systematisation of data, credibility of results, and acceptability by the scientific community" (Santos et al., 2016, p. 14).

The work began with an exploratory phase in which we assessed the "stateoftheart" through a literature review that focused on previous works on the topic under analysis, which played an pivotal role in the study by helping define the objectives.

The analytical phase consisted of a documentary analysis of the national and international literature. After the data were collected, they were analysed according to the five stages defined by Guerra (Guerra, 2006, pp. 69-86 cited in Santos et al., 2016, p. 121): transcribing, reading, summarising, descriptive analysis, and interpretative analysis.

Finally, after analysing and evaluating the results, we elaborated the conclusions and made recommendations based on the research conducted.

3. Data and Results Analysis

3.1. Principles of the Democratic Rule of Law

The history of the Rule of Law is marked by the following principles: the principle of the dignity of the human person; the principle of juridicity and constitutionality; the principle of separation of powers; the principle of legal certainty and the protection of trust; the principle of equality; and the principle of proportionality (Gouveia, 2013, p. 703). For the purposes of this article, we will focus on the principle of proportionality because, according to Canotilho (2003, p. 272), its most important area of application is the restriction of rights, freedoms, and guarantees through the actions of public authorities.

The question that must always be asked when applying this principle is whether the result of an intervention is proportional to its coercive burden (Canotilho, 2003, p. 270). This is essentially an equation of means and ends, and requires an assessment of whether or not the means used are disproportionate to the ends to be achieved.

According to Gouveia (2013, p. 743) "the principle of proportionality consists of an internal material limitation to legal and public action" and is the core element of the Rule of Law. This principle is divided into three sub-principles: the principle of appropriateness, the principle of necessity, and the principle of proportionality strictu sensu (Canotilho and Moreira, 2014a, p. 392).

Thus, when a measure is developed, the appropriateness of that measure must be evaluated in terms of the purpose to be achieved, considering that there must always be a protected legal asset and a circumstance that requires intervention or decision (Miranda, 1999, p. 127). As for necessity, it must be assessed if an intervention is unavoidable, and if the same purposes could be achieved by other means less burdensome to citizens' rights, freedoms, and guarantees. Finally, with regard to proportionality in the strict sense, a balance must be struck between the costs and benefits once a measure has been deemed appropriate and necessary.

Article 266 (2) of the CRP states that administrative bodies and agents must act with respect to the principle of proportionality in the exercise of their functions. It is clear, then, that the Public Administration, as Canotilho and Moreira explain (2014b, p. 801), "should pursue the legal goals and the public interest according to the principle of 'just measure',

choosing, among the measures deemed necessary and appropriate to achieve those ends and to pursue those interests, those that imply less restrictions, sacrifices, or disruptions to the legal position of its citizens".

Thus, it is clear that the principle of proportionality, also known as the principle of prohibition of excess, applies to all acts by public authorities, compelling the legislature, and the government in general, to avoid intervening disproportionately in the legal sphere of citizens (Canotilho, 2003, p. 273).

This point is of vital importance because it is the real question that must be asked when attempting to balance the right to freedom and the right to security. Implementing any security measure that could restrict a fundamental right is a highly complex task due to the legal framework for its implementation.

In fact, ensuring that the means employed to guarantee citizens' security comply with the principle of proportionality, that is, that they are appropriate, necessary, and rational, is a mandatory, necessary, and highly sensitive task because we could easily be dealing with restrictive mechanisms that could, in part, call into question fundamental rights such as citizens' right to freedom.

3.2. The Right to Freedom and Security

It is important to bear in mind that the CRP provides for an exhaustive and diversified list of fundamental rights, divided into 68 articles, which are grouped into three headings and aim to guarantee the legal protection of persons / citizens.

The proliferation of fundamental rights is such that some authors warn of the risk of trivialising them to the point where distinguishing between fundamental rights and those that are truly fundamental becomes impossible (Nabais, 2007, pp. 103).

The right to freedom and security is enshrined as a fundamental right in Article 27 of the CRP. This inspired us to explore the intent of the legislator in combining these two rights in the same article.

First, we must contextualise the concept of the right to freedom by adopting the definition proposed by Canotilho and Moreira (2014a, p. 478), which describes the right to freedom as "the right to physical freedom, freedom of movement, that is, the right not to be detained, imprisoned, or to have one's movements restricted, except in cases provided for by law".

However, the right to freedom is not an absolute right, but rather a fundamental right included in the category of "rights, freedoms, and guarantees", and as such is subject to the restrictions set out in the Constitution, which should never exceed what is necessary to protect other constitutionally foreseen rights (Canotilho and Moreira, 2014a, p. 479).

As for the concept behind the right to security, it generally means that citizens can exercise their rights in safety and without interference, free from threats or aggression. Furthermore, the right to security encompasses two dimensions: "the right to defend oneself in the face of aggression by public authorities and the right to be protected by the public authorities against aggressions or threats by third parties" (Canotilho and Moreira, 1993, p. 184). These two

dimensions are the negative dimension and the positive dimention, respectively (Clemente, 2015, p. 45).

The fact that the legislator included the right to liberty and the the right to security under the same article of the CRP reveals that those rights are interdependent and interrelated, and that they must be kept in constant balance so that both are guaranteed fully and harmoniously. Nevertheless, there is undoubtedly an opposition between the two, which could imply advancing one right at the expense of the other (Pereira, 2004, p. 38).

3.3. Security Forces and Fundamental Rights

By contextualising the relationship between SecF and fundamental rights, we will essentially be analysing the positive dimension of the rights under study, that is, the right of protection against aggressions or threats from third parties, which is granted by the State to its citizens.

A State that cannot guarantee the democratic order, the rights of its citizens, and its own security has no reason to exist. Therefore, the democratic rule of law includes a legally enshrined and regulated internal security system to safeguard the rights of its citizens, which entails a constant effort to maintain the required balance between security and freedom.

Therefore, the State has both the duty and the obligation to guarantee the protection of its citizens against aggression. This guarantee is enforced by the SecF under Article 272 of the CRP, which expressly states that one of the functions of the police is to defend citizens' rights, naturally articulated with the right to security (Canotilho & Moreira, 2014b, p. 859). This means that there is an obligation by the State to protect these fundamental rights, which compel the police to act (Sampaio, 2012, p. 117).

Therefore, the duty of protection means that the actions of the SecF are not only restrictive, but must be a means to protect fundamental rights. It can be said, then, that the right to police assistance is a fundamental right that serves to protect citizens' other fundamental rights (Sampaio, 2012, p. 118). Therefore, fundamental rights do more than impose limits on police activity, but are themselves the goal of the police function.

Thus, if citizens' fundamental rights are at risk, and especially if their security is at stake, the State is not only able to intervene through its police forces but is required to do so because this is a legally protected interest of the holder of the fundamental right in question.

The above duty to guarantee police protection and the obligation to ensure citizens' security can never justify any violations of the legislation on fundamental rights, although, admittedly, striking a balance between freedom and security is an increasingly complex task for the State and its police forces (Sampaio, 2012, p. 121).

For that reason, the SecF must make greater efforts to guarantee the right to security without violating the right to freedom, and must constantly adapt to the current reality to be able to intervene effectively, without, however, jeopardising the rights, freedoms and guarantees provided by law.

Law enforcement carries out its activities within this complex legal framework. If, on the one hand, the police's actions could potentially harm fundamental rights, on the other hand,

they must do whatever is necessary to ensure the public interest in question while interfering as little as possible with the rights of citizens, always in strict compliance with the legislation in force.

As the then General Commander of the GNR, General Viegas (1998, p. 198) highlighted at the international seminar on Human Rights and Police Effectiveness, "the State's has the duty to strike the right balance between the responsibility of guaranteeing citizens' freedom as well as their security, without however jeopardising the exercise of other fundamental rights. This is a highly complex task, especially for SecF, because law enforcement agents are the ones who must enforce the authority of the State, which is precisely where most fundamental rights violations can occur, while guaranteeing that those rights are safeguarded".

If the current constitutional framework is maintained due to the new global challenges, risks, threats, and uncertainty, which are both multiple and disquieting (Lourenço et al., 2015, p. 13), this complex security context could easily have implications for the balance between freedom and security, a relationship in which citizen's freedom hangs on the one side, and their security and that of the State hangs on the other.

3.4. Principles and Limits of Police Action

It should be noted at the outset that, as provided for in Article 272 (2) of the CRP, crime prevention must respect the rights, freedoms, and guarantees of citizens, and that the police is always subject to the principles of legality and the prohibition on going beyond what is necessary.

The above principles imply that police actions are subject to the provisions defined in the law and the principle of legality, and that they must not go beyond what is strictly necessary, but must comply with the requirements of necessity, enforceability, and proportionality, proportionality being the most important, to the point that some authors consider that "Law is proportion" (Miranda, 2012, p. 312).

However, this interpretation is not entirely straightforward. According to Silva (Silva, 1993, cited in Sampaio, 2012, p. 127), "the law cannot provide for the multiple daytoday situations and myriad circumstances in which the police is called upon to intervene". Along the same lines, Sérvulo Correia argues that "the unlimited plurality of circumstances in which the danger to public interest requires preventive action by the Government is not compatible with the requirement of providing a legal classification of all possible conduct" (Correia, cited in Sampaio, 2012, p. 128). In contrast, Moreira and Canotilho (2014b, p. 860) consider that not only must all police actions have a legal basis, individual measures must also be defined by law.

Considering these different interpretations of the same issue, one can easily understand the difficulty that the police experience in the face of unpredictable, rapidly developing situations that can occur at any time and that require an immediate response that complies with the legislation in force.

Article 272 (3) expressly states that any actions undertaken by the police to prevent crime must respect citizens' rights, freedoms, and guarantees, and that this must be done in

compliance with the provisions of the Constitution or the law (Canotilho and Moreira, 2014b, p. 861).

Due to the emergence of new and complex threats and to the duty to protect and manage the balance between freedom and security, the SecF have put in place new preventive mechanisms capable of effectively guaranteeing citizens' security as well as their freedom. For example, the GNR Strategic Plan[2], refers to "Knowledge and Innovation" as one of the institution's values, which entails the "acquisition of essential knowledge for 'intelligent development' that will improve citizens' security and freedom by promoting innovation in policing [and] anticipating threats and risks that jeopardise constitutionally consecrated rights, freedoms, and guarantees" (n.d., p. 55).

Thus, it is crucial to ensure that threats, no matter how real and menacing they are, are not used to justify violations of citizens' rights. In fact, as Miranda (2003, p. 660) points out, "security is the environment of Law but it can never prevail over Law itself".

We are aware, then, that in this legal framework characterised by a multitude of rules, policing is a high-risk activity that requires SecF personnel to make complex decisions in the face of constantly changing and unexpected situations.

Therefore, even when faced with a complex threat, the actions of the police will have to comply with the principles of the democratic rule of law, especially the principle of proportionality. Thus, situations such as indefinite imprisonment, wiretapping or searches without a court order, discrimination on the grounds of nationality, race, or religion, or the Armed Forces (AAFF) taking on policing roles outside the situations foreseen in the law are always blatant attacks on the rule of law (Miranda, 2003, p. 660).

According to the then Deputy Inspector General of Internal Administration, Prosecutor Vicente de Almeida (1998, p. 74), the effectiveness of the police cannot, under any circumstances, be increased at the expense of citizens' rights, freedoms, and guarantees, and the measures taken by law enforcement cannot violate constitutionally protected rights.

In fact, notwithstanding the above, SecF must take the appropriate measures at the right time, ensuring effective policing and safeguarding citizens' rights, bearing in mind that when fundamental rights are at stake, both interference and omissions can have serious consequences. The above leads us to conclude that police inaction may also constitute an unconstitutional restriction of fundamental rights (Sampaio, 2012, p. 120). Therefore, the limits on policing must constantly adapt to the current threats in order to effectively guarantee citizens' freedom and security.

Figure 1 depicts and summarises the complexity of the roles performed by SecF. Those roles are represented by a triangle with the CRP as the top vertex and the obligation of protection and proportionality as the other two vertices, guaranteeing a balanced and effective overlap between the two basic elements of the rule of law.

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[2] *Estratégia da Guarda 2020*, available from: http://www.gnr.pt/estrategia.aspx

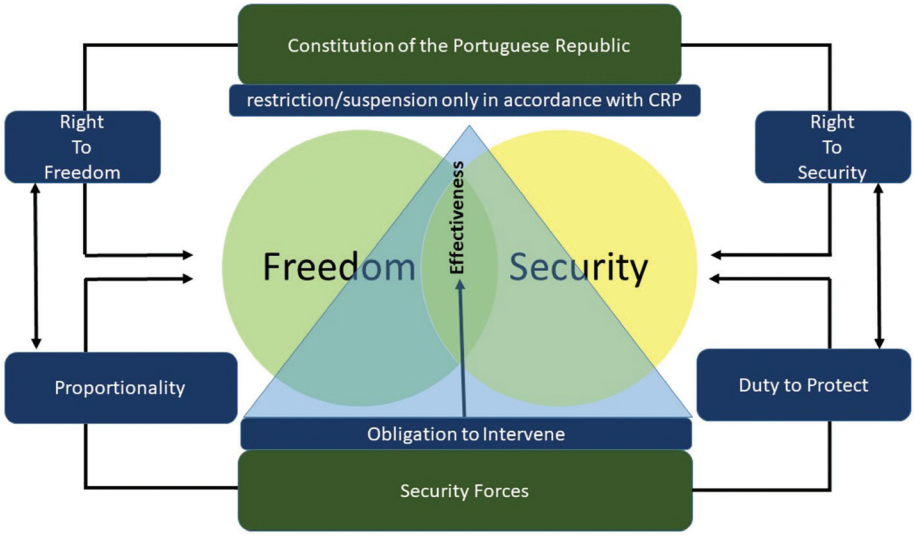

Figure 1 – Freedom and Security

3.5. Terrorism and Fundamental Rights

The complexity of this phenomenon stems from the modus operandi of terrorists, which makes combating terrorism an extremely difficult task, especially for democratic constitutional states, which naturally safeguard the guarantees and freedoms of their citizens. In light of this, Pereira (2004) – Minister of Internal Administration in the 17th and 18th Constitutional Governments – considers that in the fight against terrorism "democratic states are undeniably at a 'disadvantage' in relation to dictatorial or totalitarian states. The latter have no limits on restricting or suppressing individual freedoms to combat terrorism, and may even rely on state terrorism or covert terrorism to achieve their goals". A clear example of this is the fact that the SecF had previously signalled several of the terrorists involved in the recent bombings in London and Paris, but were still unable to stop them.

In the face of this difficulty, some authors, such as Günther Jakobs (German criminalist, known for his concept of Criminal Law of the Enemy), argue for the adoption of two different models of criminal law, one for ordinary citizens and the other, with its own rules that restrict fundamental rights, for certain individuals classified as "enemies" (Jakobs and Meliá, 2007, p. 49). This model, called the criminal law of the enemy, proposes measures to combat terrorism that strongly limit the rights, freedoms, and guarantees of individuals classified as "potential threats", preventively eradicating them from states.

Due to the current global security instability, the ideology that underlies the criminal law of the enemy has been able to influence the policies of several countries such as the US or France. This model poses serious risks because it relies on a stereotypical image of what constitutes a "terrorist" that is "based on ethnic and religious factors and economic, social and cultural divides" (Fernandes, 2011, p. 54) and that is thought to be, at the very

least, detrimental to the survival of the democratic rule of law in its current form. The main question that we must ask is whether the democratic rule of law will provide the necessary tools to effectively combat terrorism or whether there will be a need to reformulate it.

This discussion has become so critical in the internacional scene that since 2001 there have been two lines of thought in the US: one that prioritises security and considers that unless the constitutional limits on the power of the State are changed, the country will not be prepared to combat terrorism and guarantee a safe society that can enjoy its freedoms; and one that emphasises freedom and argues that restricting freedoms and guarantees will weaken and undermine the democratic and constitutional system that is the cornerstone of a country as great as the US (Northouse, 2006, p. 19). The discussion was triggered by the implementation of the *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism*[3] act (USA PATRIOT ACT 2001), a legal tool approved in the US in response to the 2001 attacks.

Therefore, it is undeniable that both the actions of the police and the legal framework must adjust proportionally to this new reality and this new threat in order to guarantee citizens' security. This will inevitably lead to implications for individual freedoms.

For Canotilho (2008, p. 233), "terrorism sows terror in the founding structures of constitutional law", generating criticism against a culture of protectionism by the State, which leads to pressure to revise the constitutional texts especially where they address citizens' freedoms and guarantees.

The actual issue, and it is a complex one, is how to define the limit to limits because that is where the difference between protection and violation of freedoms could reside (Portela, 2007, p. 968).

3.6. National Strategic Plans and Courses of Action

After the issuance of the European legislation on terrorism, Portugal defined a National Counter-Terrorism Strategy (ENCT)[4] that highlights terrorism as one of the most serious threats to the survival of the European area of freedom, security, justice, and the democratic rule of law. The document is a "critical instrument to combat a phenomenon that poses a serious threat to the democratic rule of law, is increasingly delocalised, and has complex technological means at its disposal, streamlining the fight against terrorism and keeping constantly up-to-date on the nature of the phenomenon" (PCM, 2015).

The ENCT established the following strategic goals: to detect, to prevent, to protect, to pursue, and to respond. The document establishes several lines of action and multi-stage plans to achieve them, expressly stating that this strategy must be carried out in strict compliance with the principles of necessity, adequacy, proportionality, and effectiveness, respecting civil liberties, the rule of law, and freedom of scrutiny, in compliance with the

[3] This document was the basis for the amendments to almost all the legal diplomas on national security, which restricted individual freedoms in exchange for protecting America from terrorism.

[4] Resolution of the Council of Ministers No. 7-A/2015 of 19 February – Published in Diary of the Republic, 1st series – No. 36 – 20 February 2015.

European Convention for the Protection of Human Rights and Fundamental Freedoms of the Council of Europe (PCM, 2015). Thus, the terrorist threat cannot be used to justify jeopardising citizens' fundamental rights to safeguard the right to security.

In fact, these lines of action show that it is imperative to cooperate, coordinate, share and analyse information, develop and implement plans of action, and discuss and ensure interoperability between the various control systems. This paper will focus on these lines of action in an attempt to understand the impact of the measures taken by SecF on fundamental rights, following the implementation of the ENCT.

With the entry into force of the ENCT, there was a need to adjust the national legislation, and a legislative package considered critical for the fight against terrorism was approved and published, a global, articulated action in line with the five objectives defined in the ENCT (Fazenda, 2017).

Implementing the ENCT is a priority objective that has not yet been achieved in full even though it was set down in 2015. In order to achieve it, some strategic guidelines have been defined that require the efforts of all services and SecF (SSI, 2017, p. 227). This indicates that it is extremely difficult to implement any measures that may restrict citizens' fundamental rights, which may be the reason why the ENCT has not been fully implemented yet.

3.7. Terrorism, Police Activity, and the Impact on the Right to Freedom and Security

There is no doubt that terrorism is one of the greatest concerns for States and their SecF. However, despite being a dominant issue today, terrorism is not a new phenomenon (Pereira, 2016, p. 69), but one that has become global after the 2001 attacks due to the means employed, the number of victims, the target, and the consequences of the attacks in the international scene. Up to that point, terrorist actions had been circumscribed to certain countries and the material consequences did not have impact and visibility on a global scale. It can be said, then, that in the 21st century, terrorism has taken a new dimension linked to fundamentalist interpretations (Martins, 2010, p. 34), ceasing to be a phenomenon limited to a particular region or country and becoming a global problem, which is the responsibility of the entire international community. Figure 2 shows that the number of deaths from terrorist attacks in Europe has decreased when compared to the 1970s and 1980s, although there has been an upward trend since 2015.

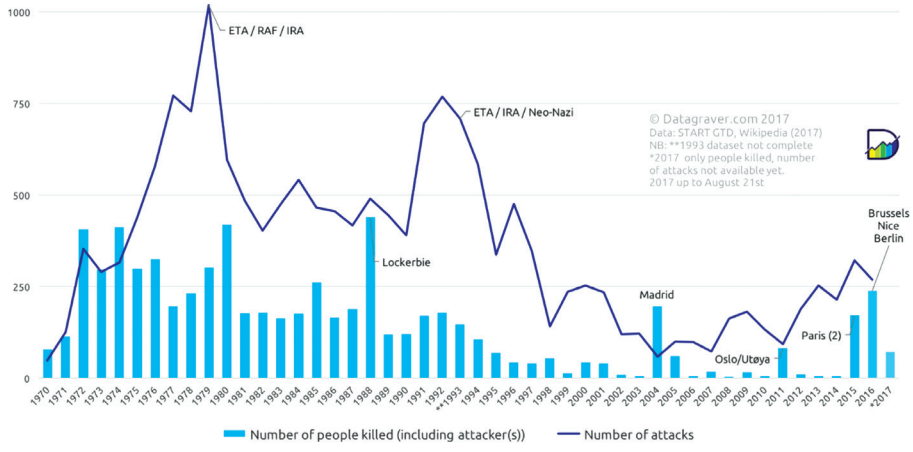

Figure 2 – Number of deaths in terrorist attacks in Western Europe (1970-2017)

Source: Datagraver (2017).

Interestingly, Figure 3 shows that the number of arrests has increased while the number of attacks has decreased. These numbers lend themselves to multiple interpretations and speculation, and could suggest that SecF are becoming more effective and that even with fewer attacks they are now more proficient in making a significant number of arrests or, on the other hand, we could be witnessing a securitization phenomenon with the adoption of extraordinary measures in response to terrorist attacks.

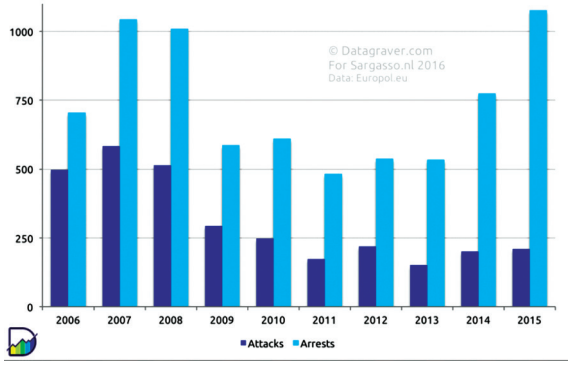

Figure 3 – Terrorism Attacks and Arrests in the EU (2006-2015)

Source: EUROPOL (2016).

The 2016[5] Annual Internal Security Report (RASI) states that Portugal faces the same national threats as other countries in the same geostrategic and geopolitical space, with emphasis on the threat of terrorism, leading to an increase of the threat level in several EU countries (SSI, 2017, p. 71). The National Defence Strategic Concept, approved by the Council of Ministers Resolution No. 19/2013 of 5 April, lists terrorism as one of the main global threats to national security, bearing in mind that Portugal, as a Western democracy, is a potential target for international terrorism (PCM, 2013, p. 1985).

3.7.1. The Importance of Information and Constitutional Difficulty

The information produced by the Information System of the Portuguese Republic (SIRP) is instrumental in addressing the threat that has been identified and in guaranteeing that Portuguese police is effective in combating it. Any shortcomings and constraints in this system limit and weaken the operational performance of the police in the prevention of terrorism, since law enforcement depends largely on access to accurate and timely information and much of it is protected by the fundamental rights enshrined in the CRP.

On this matter, the President of the Supervisory Board of the Information System of the Portuguese Republic (CFSIRP) stated that "In Portugal, if there is a concrete suspicion of a criminal act, or if a crime is reported, the Judicial Police (PJ) can request a court order. However, in the preventive phase the Information Services are not allowed to capture location or traffic data. They cannot set up wiretaps because the constitution states that this is the purview of the criminal process and requires an order issued by a judge, and the constitutional court has decided that this also includes any telecommunication data" (Pinto, 2017).

This leads to the perception, which has been identified as a major concern, that the Portuguese Information Services do not have the same instruments as their counterparts because the constitution does not legally allow them.

Given this recognised difficulty, the approval of a legal document that allows the Information Services to access metadata[6] is currently being discussed. Let us recall that, as early as August 2015, the Constitutional Court declared unconstitutional a law that would have extended the powers of the Portuguese Republic Information System (SIRP), allowing it to access metadata such as banking information, tax information, and traffic and location data for text messages and calls. The diploma was declared unconstitutional because it violated Article 34 (4) of the CRP[7], jeopardising the principle of inviolability of correspondence. In addition, the National Commission for the Protection of Data (CNPD) (2015, p. 22) issued an opinion on 26 June 2015, stating that the proposed law would constitute "a gross infringement on the right to privacy and to the protection of personal data and, consequently, on the right to freedom. It legitimates an intrusion that violates the structuring values of the Democratic Rule of Law".

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[5] RASI2016 includes criminal records between January and December 2016.

[6] Metadata are markers or points of reference that encompass information in all its forms, and summarise information about the form or content of a source.

[7] "The public authorities are prohibited from interfering in any way with correspondence, telecommunications or other means of communication, save in the cases in which the law so provides in matters related to criminal procedure."

The degree of complexity involved in interpreting these issues is illustrated by the fact that, when ruling on the same proposal, the Parliamentary Committee for Constitutional Affairs, Rights, Freedoms, and Guarantees (CACDLG) (2015, p. 15) considered that "since there are no objections, it is our opinion that proposed Law No. 345/XII/4 meets the constitutional and procedural requirements to be discussed and voted in plenary".

In 2016, in the face of the constraints listed by the Constitutional Court, the then president of the Observatory for Security, Organized Crime, and Terrorism (OSCOT), Pereira (2016), argued that a constitutional review was necessary and that "intelligence services must at the very least have access to metadata. The Portuguese services are the only ones in Europe that do not have access to these data, and therefore, a solution must be studied to overcome this problem while respecting the decision of the Constitutional Court". Moreover, he defended the necessity of "amending the Constitution to allow the intelligence services to conduct preventive interceptions on an exceptional basis to prevent terrorist attacks".

Pereira defended this position as early as 2004, considering that there should be an extensive reform at the level of information, stating that "a democratic regime over 25 years old cannot rejoice in having an information system that does not infringe upon the rights, freedoms and guarantees of its citizens, but that is not equipped to respond to complex challenges such as terrorism", adding that "a system that only succeeds in not committing violations is a useless system that misuses taxpayers' money" (2004, p. 47). The words may have been harsh, but they exposed the actual issue, the constraints on the fight against terrorism, and the relationship between those constraints and fundamental rights.

The issue of providing the Intelligence Services with access to metadata illustrates the difficulty for a democratic State with a moderate threat level to adopt any measures that restrict fundamental rights (Fazenda, 2017). This example shows that the adoption of legal measures that could potentially restrict the fundamental rights of citizens is always a divisive matter that elicits much discussion and garners diametrically opposed interpretations and perspectives.

3.7.2. Measures adopted by the police

It is in this somewhat diffuse, controversial, and protectionist framework that Portugal has been putting into practice its ENCT, focusing especially on detection, prevention, and protection against terrorist threats. To that end, the SecF have operationalized the strategic measures set out in the ENCT through its policing models, with emphasis on the integrated model of proximity policing (SSI, 2017, p. 198). In order to operationalise the ENCT, the GNR, responsible for 94% of the national territory, has implemented some measures: it enhanced its intelligence system; strengthened the structures responsible for producing, coordinating, and sharing internal and external information; intensified national and international cooperation; reinforced the means of production, processing, and analysis of information (Couto, 2017), as illustrated in Figure 4.

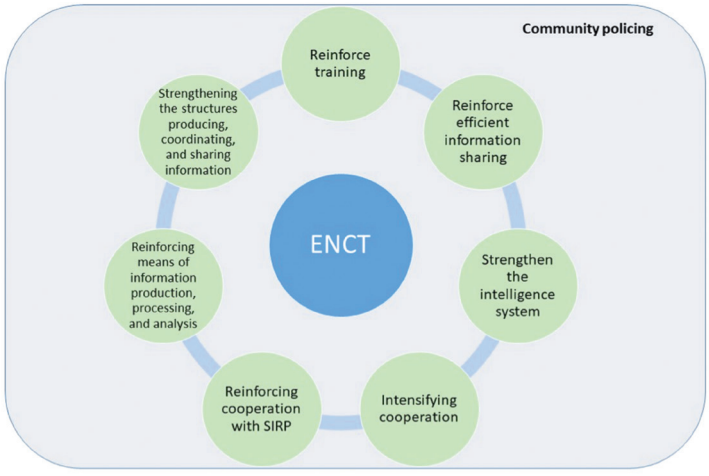

Figure 4 – Measures taken by the GNR following the ENCT

The measures that have been taken have been shown to have no impact on the fundamental rights of citizens and do not put in jeopardy citizens' right to freedom.

Another document that must be included in this analysis because it is instrumental for the definition of national policies is the Programme of the XXI Constitutional Government 2015-2019. The document describes the security environment as an environment characterised by multiple risks and unpredictable threats, therefore planning and evaluation are essential to ensure that appropriate, feasible, and acceptable measures are taken to address those risks and threats (Governo, 2015, p. 51).

The above programme states that the "new threats and new risks imply a welldefined strategic orientation, implemented in a coherent manner through a policy based on a properly coordinated, effective, and operational internal security system" (Governo, 2015, p. 55). To that end, the Government is committed to strengthening international cooperation and to increasing the effective coordination of the security forces and services, seeking to eliminate redundancies and ensuring that the common functions of security forces and services are articulated and managed in an integrated manner.

Although the threat of terrorism is a major concern, the government programme clearly states that fundamental rights must be at the core of European policies, and that any political proposal that aims to restrict the freedom of movement of European citizens cannot be accepted. The document also defines key areas, one of which aims to improve the quality of democracy by "strengthening the protection of fundamental rights, which can now be jeopardised in new ways by the tools of the information society" (Governo, 2015, p. 41). In short, the Government Programme expresses concern about the threat of terrorism and specifies that the performance of its SecF should be based on cooperation, articulation, and

rationalisation, without providing for any changes to policing that could have implications for citizens' right to freedom.

This analysis must naturally take into consideration the national security context since, as stated in RASI2016, there have been less than three crimes related to terrorist organizations and national terrorism under Articles 2 and 4 of Law No. 52/2003 of August 22, and there have been six crimes related to other terrorist organizations and international terrorism under Articles 3 and 5 of the same law. This is a very small number when compared to a universe of 16,761 reports of serious and violent crimes (SSI, 2017, p. 18). This reality influences the political measures that can be taken and the degree to which citizens accept the implementation of measures that restrict their rights, so it may be worth noting that Portugal is ranked as the third most peaceful country in the world.

This means that Portuguese citizens are not overly concerned with the threat of terrorism, as demonstrated by the 2016 Eurobarometer report for Portugal, which states that only 2% of the Portuguese surveyed indicated terrorism as a major problem for the country, whereas the European average is 14%.

Nevertheless, under extraordinary circumstances, the political leadership has adopted exceptional measures on a case-by-case basis. For example, the Government, through Council of Ministers Resolution No. 19/2017 of 04 April, vis-a-vis the current context of threat and for reasons of national security, decided to temporarily reset the borders of the country during the visit of His Holiness Pope Francis in May 2017. A measure that had an impact on people's freedom of movement, but that was considered necessary to ensure that the police could effectively guarantee citizens' security (PCM, 2017, p. 1705).

For that reason, because Portugal has a moderate threat level and is even considered one of the most peaceful countries in the world, it has difficulty producing, passing, and accepting measures and policies that could interfere with citizens' fundamental rights, given that they are not willing to relinquish their constitutional rights in exchange for something they do not see as a major concern, which naturally hinders the implementation of any strategy. This is illustrated by the fact that the Government has so far failed in its attempt to pass legislation allowing the Intelligence Services to access certain information on its citizens, which does not occur in countries where the threat and terrorist alert levels are high. Furthermore, analysing the measures adopted by the GNR after the ENCT was issued revealed that care was taken not to interfere with citizens' right to freedom, and that the measures focused mainly on cooperation, information and training.

The Prime Minister of the United Kingdom Theresa May's statement, on 4 June 2017, in the wake of the 3 June attacks in London, clearly expresses the above interpretation that "It is time to say enough is enough", recognising the need to be more forceful and "to review Great Britain's counter terrorism strategy to make sure that the police and security services have all the powers they need" (2017). This confirms that democratic states are reactive in terms of how they deal with terrorist attacks, revealing the real weakness in "overly" protective systems vis-à-vis a new distinct threat that sows chaos and terror across states, ultimately endangering the guiding and founding principles of the rule of law.

Conclusions

This study was carried out at a time when the fight against terrorism is a priority, and a discussion has been ongoing regarding the possibility and necessity of extending the access of SecF to information that will allow them to be more effective in guaranteeing the exercise of the right to security provided for in the Constitution.

Because our goal was not to conduct an exclusively theoretical analysis, as this has already been done, we endeavoured to study a current issue that is highly relevant and that has an impact on the performance of SecF, and, consequently on fundamental rights. Therefore, we narrowed the research topic to the right to freedom and security, which we contextualised in relation to the threat of terrorism and its impact on policing.

As for the research findings, we provided the legal framework for the right to freedom and security and analysed their relationship. We found several authors who argue that there is a proliferation of fundamental rights, which have accumulated over time, making our legal system too protective, with the added complication that a fundamental right can only be restricted or suspended under the terms provided for in the Constitution and to safeguard another fundamental right. It is within this framework that the right to liberty and security coexist, and it was possible to conclude that a balance between the two is necessary, and that that is the reason why the legislator combined them under the same article. The right to freedom is not an absolute right, and the State has the duty of not only respecting the fundamental rights, but also of guaranteeing that they are effectively promoted.

We framed the activity of SecF within the CRP and identified its principles and limits. We were then able to conclude that the protection of citizens is a duty and obligation of the State, carried out through its police forces, which, when faced with a threat, are not only able to intervene but are required to do so. Therefore, fundamental rights do more than impose limits on police activity, but are one of its goals, and the SecF have the duty to intervene in a timely, effective manner and in strict compliance with the legal principle of conciseness and prohibition of excess. It is clear that a threat, however devastating its consequences may be, can never justify disproportionate police action that is not provided for by law and that violates citizens' rights.

Subsequently, we established a link between terrorism, police activity, and fundamental rights, and briefly addressed counter-terrorism strategies. We concluded that Europe, and consequently Portugal, has been expressing, albeit usually in a reactive way, its concern for terrorism, which is clear from the many documents on the issue. This multiplicity of legal provisions that explicitly safeguard the duty of guaranteeing the fundamental rights result in making the European intentions unclear, and even confusing and difficult to implement for Member States with different realities and threat levels. In the case of Portugal this difficulty is exemplified by the fact that, in 2017, guidelines are still being defined to implement the ENCT issued in 2015, which had the following strategic goals: to detect, to prevent, to protect, to pursue, and to respond.

We were also able to conclude that the constraints in the adoption of restrictive measures that can provide the SecF with mechanisms to prevent terrorism are linked to the fact that Portugal is ranked as one of the most peaceful countries in the world and that it has never been the target of a terrorist attack. The difficulty in effecting any legal changes that might restrict fundamental rights and upset the balance between freedom and security limits the actions of the police in the fight against terrorism, as illustrated by the constraints that the Constitution imposes on accessing crucial information for the prevention of this type of threat. Regarding the effects of the ENCT on police activity, we ascertained that the measures adopted by the GNR following the ENCT, and in the face of the threat of terrorism, did not result in any restrictions of fundamental rights and were based almost entirely on cooperation and coordination, with special emphasis on intelligence.

We thus concluded that police activity is significantly influenced by terrorism when attacks occur, and that restrictive measures are implemented in a reactive manner in response to those attacks.

Furthermore, it is extremely difficult to take a political position that destabilises the balance between freedom and security in favour of security, especially in countries where citizens do not see terrorism as a major concern, and thus do not accept restrictions on rights that were acquired over time. Thus, the balance is guaranteed by the SecF, who handle complex and risk-filled situations on a case-by-case basis, and often operate at the limit of the limits of controversial and non-consensual issues.

As for the study's **contribution to the knowledge**, we found that the legal framework in force, even with the several changes that were enacted after 2015, imposes limits on the police's ability to prevent terrorism, and that the SecF act operate in the field of coordination, cooperation, and exchange of information. In fact, even if the legal mechanisms are prepared to respond effectively to a terrorist attack, they may prove to be insufficient to prevent it, as was the case in other countries where the SecF were only provided mechanisms that allowed them to act in a more effective manner, albeit at the cost of some constitutionally foreseen rights, after attacks had already occurred.

Our ambitious **recommendation** is that the legal changes required are enacted to ensure that the SecF can act effectively in the prevention of terrorism, especially in regards to access to information outside the scope of criminal proceedings, so that we do not have to wait until an attack occurs for the indispensable legal changes to be made in reactive manner, as has already occurred, and continues to occur, in other European countries.

The **limitations** of our work consist in the enormous difficulty in accessing information related to terrorism, which was clear from the fact that our request for an interview with the French entities was declined, and that the reason given for not participating in the study was the sensitive nature of the topic. We suggest that future studies carry out a comparative analysis of the mechanisms and measures employed by the SecF of the main European countries to assess their impact on the right to freedom and their contribution to a safer EU in compliance with its founding principles.

Works cited

Bryman, A., 2012. *Social Research Methods*. 4th Ed. United States of America: Oxford University Press.

Canotilho, J. G. & Moreira, V., 1993. *Constituição da República Portuguesa Anotada*. Revised 3rd Ed. Coimbra: Coimbra Editora.

Canotilho, J. & Moreira, V., 2014a. *Constituição da República Portuguesa Anotada*. Volume I. 4th Ed. Lisbon: Coimbra Editora.

Canotilho, J. & Moreira, V., 2014b. *Constituição da República Portuguesa Anotada*. Volume II. 4th Ed. Lisbon: Coimbra Editora.

Canotilho, J., 2003. *Direito Constitucional e Teoria da Constituição*. 7th Ed. Coimbra: Almedina.

Canotilho, J., 2008. *Estudos sobre Direitos Fundamentais*. 2nd Ed. Coimbra: Coimbra Editora.

Clemente, P., 2015. *Cidadania Polícia e Segurança*. Lisbon: Instituto Superior de Ciências Policiais e Segurança Interna.

Comissão Nacional de Proteção de Dados, 2015. *Parecer sobre a Proposta de Lei n.º 345/XII/4.ª* (GOV). Lisbon.

Comissão Europeia, 2016. *Eurobarómetro Standart 86 – Relatório Nacional 2016*. Brussels: European Commission.

Couto, M., 2017. Comandante Geral da GNR. [interview]. Lisboa (09 May 2017).

Datagraver, 2017. *People Killed By Terrorism Per Year in Western Europe 1970-2017*. [electronic image]. Available from: http://www.datagraver.com/case/people-killed-by-terrorism-per-year-in-western-europe-1970-2015, [Accessed 2 May 2017].

EUROPOL, 2016. *Europol Reports: Terrorism in The EU 2006-2015*. [electronic image] Available from: http://www.datagraver.com/case/europol-reports-terrorism-in-the-eu-2006-2015, [Accessed 2 March 2017].

Fazenda, H., 2017. Secretária Geral do Sistema de Segurança Interna. [interview]. Lisbon (17 May 2017).

Fernandes, H., 2011. *O Direito Penal do Inimigo: Reconfiguração do Estado de Direito?* Master's thesis in Law. Faculty of Law of the University of Porto.

Ferreira, J., 2014. *Direitos Fundamentais e Direito dos Cidadãos à Segurança*. Individual Research Work prepared in the 2013-2014 Joint Staff Course. Institute of Higher Military Studies.

Gouveia, J., 2013. *Manual de Direito Constitucional – Volume II*. 5th Ed. Coimbra: Almedina.

Gouveia, J., 2014a. *Manual de Direito Constitucional – Volume I*. 5th Ed. Lisbon: Almedina.

Gouveia, J., 2014b. *Manual de Direito Constitucional – Volume II*. 5th Ed. Lisbon: Almedina.

Governo, 2015. *Programa do XXI Governo Constitucional 2015-2019*. [pdf] Lisboa: XXI Constitutional Government. Available from: http://www.portugal.gov.pt/media/18268168/programa-do-xxi-governo.pdf, [accessed 15 March 2017].

Guarda Nacional Republicana, s.d. *Estratégia da Guarda 2020*. Lisbon: Divisão de Planeamento Estratégico e Relações Internacionais.

IEP, 2017. *Global Peace Index 2017*. [electronic image] Available from: http://visionofhumanity.org/app/uploads/2017/06/GPI-2017-Report-1.pdf [accessed 01 June 2017].

Independent, 2015. *The Safest Places to Travel in the World*. [online] London: Independent. Available from: http://www.independent.co.uk/news/world/americas/safest-places-to-travel-the-15-most-peaceful-countries-in-the-world-a6748256.html [accessed 02 April 2017].

Inspeção Geral da Administração Interna, 1998. Seminário Direitos Humanos e Eficácia Policial. In: Inspecção-Geral da Administração Interna. Lisbon, November 1998.

Jakobs, G. & Meliá, M., 2007. *Direito Penal do Inimigo – Noções e Críticas*. Porto Alegre: Livraria do Advogado.

Lourenço, N., Lopes, F., Rodrigues, C., Costa, A. & Silvério, P., 2015. *Segurança Horizonte 2025*. Lisbon: Colibri.

Martins, R., 2010. *Acerca de "Terrorismo" e de "Terrorismos"*. Lisbon: National Defence Institute

May, T., 2017. *Jornal da Uma* [TV programme]. RTP1, 04 April 2017.

Meisels, T., 2008. *The Trouble With Terror – Liberty, Security, and the response to Terrorism*. United States of América: Cambridge University Press.

Miranda, J., 1999. *Direitos Fundamentais – Introdução Geral*. Lisbon: n.n.

Miranda, J., 2012. *Manual de Direito Constitucional – Direitos Fundamentais*. 5th Ed. Coimbra: Coimbra Editora.

Miranda, J., 2003. Os Direitos Fundamentais e o Terrorismo: Os fins nunca justificam os meios, nem para um lado, nem para outro. *Revista da Faculdade de Direito da Universidade de Lisboa*, pp. 649-661.

Nabais, J., 2007. *Por uma Liberdade com Responsabilidade*. Coimbra: Coimbra.

Northouse, C., 2006. *Protecting What Matters – Technology, Security, and Liberty since 9/11*. Washington, D.C.: Brookings Institution Press.

Pereira, R., 2004. Terrorismo e Insegurança – A resposta portuguesa. *Revista do Ministério Público*, 98, pp. 37-51.

Pereira, R., 2016. *Em Nome da Lei* [radio programme]. Rádio Renascença, 02 April 2016.

Pereira, J., 2016. Terrorismo Transnacional. In: Borges, J. & Rodrigues, T., Ed., 2016. *Ameaças e Riscos Transnacionais no Novo Mundo Global*. Lisboa: Fronteira do Caos. Chapter 3.

Pinto, P., 2017. *Grande Entrevista* [TV programme]. RTP3, 05 April 2017.

Portela, I., 2007. *A segurança e a escolha do inimigo: o efeito double-bind do 11-S. Uma análise comparada da legislação antiterrorista*. PhD thesis in Constitutional Law. Universidade de Santiago de Compostela.

Presidência do Conselho de Ministros, 2013. *Conceito Estratégico de Defesa Nacional* (Resolution of the Council of Ministers No. 19/2013 of 05 April), Lisbon: Diary of the Republic.

Presidência do Conselho de Ministros, 2015. *Aprova a Estratégia Nacional de Combate ao Terrorismo* (Resolution of the Council of Ministers No. 7 – A/2015 of 19 February), Lisbon: Diary of the Republic.

Sampaio, J. , 2012. *O dever de proteção policial de direitos, liberdades e garantias*. 1st ED. Coimbra: Coimbra Editora.

Santos, L. e Lima, J. (Coord.), 2016. *Orientações Metodológicas Para a Elaboração de Trabalhos de Investigação*. Lisbon: Military University Institute.

Sistema de Segurança Interna, 2017. *Relatório Anual de Segurança Interna 2016,* Lisbon: Internal Security System.