

The denial of a right to Judge Ivo Rosa

The rule of law is weakened when one of its representatives, such as the Public Prosecutor's Office, denies citizens the right to question the terms under which an investigation was conducted against them.

Judge Ivo Rosa has been the subject of several criminal investigations. In at least one of them, the police accessed detailed billing information and the mobile phone location of his communication device, his mobile phone. Common to all cases is the fact that the person concerned does not have the procedural status of a defendant.

The controversial issue is whether, with these investigations, the person concerned has the right to access the proceedings in order to know and review the public authorities' access to their communications data.

The Portuguese State is constitutionally bound to guarantee citizens the right of access to justice.

A process that takes place without the scrutiny of the individuals concerned must be compensated by the possibility for those citizens to be aware of the circumstances and requirements that allow the authorities to use secret measures that affect people's right to privacy

and intimacy (provided that such communication is not likely to compromise the investigations carried out by those authorities).

As provided for in the Constitution of the Portuguese Republic (Articles 18(2), 20(1) and 35(1)) and European Union law (Articles 7 and 8 of the Charter of Fundamental Rights of the European Union), the Portuguese State is obliged to notify citizens that their communication data has been used by the judicial authorities in a criminal investigation, so that citizens can determine whether or not its use was arbitrary. This is known as the right to informational self-determination.

This understanding has been repeatedly upheld by several rulings of the Court of Justice of the European Union and also by the Portuguese Constitutional Court.

The Portuguese State violated the right to informational self-determination in two ways: firstly, by failing to notify the person concerned that their communication data had been used in a particular investigation, and secondly, by not allowing them to consult that investigation in order to scrutinise the legality of the use of data relating to their personal and family life.

By not allowing the defendant, who was the target of covert investigation methods (through access to detailed billing and the cellular location of his communications), to consult the proceedings, the Public Prosecutor's Office turned the interpretation of the Constitution of the Portuguese Republic and European Union law on its head.

The rule of law is weakened when one of its representatives, such as the Public Prosecutor's Office, denies citizens the right to examine the terms under which an investigation was conducted against them.

In the case of a judge, who also oversees violations of fundamental rights, the signs of control by the Public Prosecutor's Office over the citizen's decision-making power are worrying.

The prohibition on consulting the case file calls for much more than the absence of procedural transparency; it also calls for an insinuating use of this means of investigation to achieve other ends of control over the justice system.

Judge Ivo Rosa has on his side (and rightly so!) forces that defend his right to informational self-determination.

However, with equal or greater seriousness, in the case of telephone tapping, for example, many hundreds of citizens – whose lives have been scrutinised, from the beliefs they profess to the deepest thoughts and desires of their souls to the simplicity of their daily lives – have been controlled by the powers of the State and remain ignorant of the arbitrariness of which they have been victims.