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*Prof. Dr. António Goucha Soares*

*Jean Monnet Chair Professor of European Law,*

*Technical University of Lisbon*

ONCE UPON A TIME IN AMERICA

*Dr. Henrique Sousa Antunes*

*Catholic University of Portugal, Faculty of Law*

UNCOVERING THE UNDERCOVER AGENT

*Prof. Dr. Jose Lobo Moutinho*

*Catholic University of Portugal, Faculty of Law*

## UNCOVERING THE UNDERCOVER AGENT

*Prof. Dr. Jose Lobo Moutinho*  
*Catholic University of Portugal, Faculty of Law*



Jose Lobo Moutinho graduated from the Catholic University of Portugal with a Law Degree in 1986, and a Masters degree in Legal Sciences in 1990. A member of the Faculty of Law at the Catholic University of Portugal since 1989, specializing in Criminal Law and Criminal Procedure, he also teaches post graduate courses at the University. He has participated in Government Review Committees on the Highway Code (1992-3) and the Code of Criminal Procedure (1996-1997). He is currently preparing a Ph.D. dissertation in Legal Sciences, which will look at the distinction between the singularity and plurality of crimes committed by the same actor. His recent publications were written on Criminal Law and Criminal Procedure.

### ABSTRACT OF LECTURE

For some, the use of undercover agents poses a true “dilemma” between effectiveness and fairness. In *Teixeira de Castro v. Portugal*, the European Court of Human Rights stated that “the use of undercover agents must be restricted and safeguards put in place even in cases concerning the fight against drug-trafficking. While the rise in organized crime undoubtedly requires that appropriate measures be taken, the right to a fair administration of justice nevertheless holds such a prominent place that it cannot be sacrificed for the sake of expedience.”

The European Court’s decision gives rise to reflection on its meaning within Portuguese law - is the use of such measures admissible and, if so, in what circumstances? It is necessary, in a word, to uncover the undercover agents in Portuguese Law.

## UNCOVERING THE UNDERCOVER AGENT

### 1. Introduction

#### A. The case *Teixeira de Castro v. Portugal* (ECHR, 44/1997/828/1034)

##### 1) The case

In June 1998, the European Court of Human Rights (ECHR) ruled on a case coming from the Portuguese Jurisdiction.<sup>1</sup>

The main facts were the following:

In connection with an operation monitoring drug trafficking, two plain-clothes police officers approached a first individual, V.S., on a number of occasions. He was suspected of petty drug trafficking in order to pay for drugs – mainly hashish – for his own consumption. They had tried unsuccessfully to get to his supplier by offering to buy several kilograms of hashish from him.

A certain night they went to his home saying that they were now interested in buying heroin. V.S. mentioned the name Teixeira de Castro as being someone who might be able to find some; however, he did not know the latter's address and had to obtain it from F.O. All four then went to the Teixeira de Castro's home in the purported buyer's car. Teixeira de Castro came outside at the F.O.'s request and got into the car where the two officers, accompanied by V.S., were waiting. The officers said that they wished to buy 20 grams of heroin and produced a roll of banknotes.

Teixeira de Castro agreed to procure the heroin and, accompanied by F.O., went in his own car to the home of another person, J.P.O. The latter obtained three sachets of heroin, one weighing ten grams and the other two five grams each, from someone else and, on his return, handed them over to Teixeira de Castro in exchange for money.

Teixeira de Castro then took the drugs to V.S.'s home; V.S. had in the meantime returned there and the two police officers were waiting outside. The deal was to take place in the house. The officers went inside at V.S.'s invitation; Teixeira de Castro then took one of the sachets out of his pocket, whereupon the two officers identified themselves and arrested him, V.S. and F.O. They searched all three and found the applicant to be in possession of another two sachets.

Our Supreme Court considered that there was “undoubtedly, heavy insistence – bordering on persistence – on the part of the PSP officers.” The Court, however, considered it quite ‘natural’ that this should have occurred. The officers knew that V.S. was a drug user, and through him they intended to reach the supplier. Having failed with hashish, they turned to heroin and in this way were led to Teixeira de Castro who responded favorably to their proposals, since he wished to gain profit “by exploiting one of the greatest social evils of modern times, which destroys both the mental and physical health of the men of the future, which attacks and corrodes their most noble feelings of duty and shakes the solid foundations of family life.” “The PSP officers – the Court concluded – were able, in this way, to justify their