



FACULDADE DE DIREITO
Universidade de Lisboa

Ficha de Unidade Curricular

Curso de Mestrado em Direito e Ciência Jurídica **Direito Constitucional** **«Igualdade e Discriminação»**

1. Nome da Unidade curricular:

Direito Constitucional (**turma E**)

2. Informação Complementar:

Duração: Semestral Anual
Horas de Trabalho: 504
Créditos ECTS: 18

3. Docente responsável e respetiva carga letiva na unidade curricular:

Pedro Moniz Lopes – 2h semanais

4. Outros docentes e respetivas cargas letivas na unidade curricular:

N/A

5. Objetivos de aprendizagem (conhecimentos, aptidões e competências a desenvolver pelos estudantes):

- Análise conceptual e forte componente teórica para a compreensão da igualdade fora de discursos puramente retóricos e elípticos
- Capacidade de distinção entre três planos distintos da igualdade: teórico, descritivo e prescritivo;
- Domínio de modelos teóricos para aplicação do princípio de forma rigorosa;
- Compreensão das condições, limitações e vieses em ações comparativas e juízos jurídicos e morais;
- Capacidade crítica e desconstrução de decisões jurisprudenciais e “leading cases”, bem como de textos doutrinários;
- Desenvoltura científica para a realização de trabalhos dogmáticos.

6. Conteúdos programáticos:

I. INTRODUÇÃO

1. Introdução

- 1.1. Igualdade e constitucionalismo
- 1.2. Ambiguidades da «igualdade» na teoria jurídica
- 1.3. Igualdade: sentido e referência
- 1.4. As limitações da fórmula canónica

2. Um enquadramento realista não antropológicamente neutro

- 2.1. A mudança de paradigma filosófico
- 2.2. Os objetivos da ciência e a naturalização da ciência jurídica
- 2.3. Modelos antropológicamente ricos com espaço para «armchair philosophy»
 - 2.3.1. Enunciados e normas: uma visão não cognitivista
 - 2.3.2. Atividade interpretativa e teorias da interpretação
- 2.4. Interpretação jurídica e comportamento humano: mente e contexto



2.5. O realismo jurídico: a modernização de uma teoria preditiva *a la Ross*

3. Uma teoria da igualdade com relevo prático

- 3.1. Os três empreendimentos: teórico, descritivo e prescritivo
- 3.2. Poder explicativo, rigor descritivo e operatividade prescritiva
- 3.3. O foco na «decisão judicial» (*adjudication*) e na produção legislativa

II. EMPREENDIMENTO TEÓRICO

4. Desambiguação da «igualdade»

- 4.1. As peças da igualdade
 - 4.1.1. Identidade
 - 4.1.2. Comparação
 - 4.1.3. Semelhança
 - 4.1.4. Relevância
 - 4.1.5. Classes e categorias
 - 4.1.6. Igualdade
- 4.2. Igualdade descritiva, igualdade prescritiva e igualdade «declarada»
- 4.3. Normas jurídicas como «classificadores de relevância»
- 4.4. Ambiguidades da igualdade prescritiva
- 4.5. Igualdade e supressão de dissemelhanças irrelevantes
- 4.6. A igualdade descritiva como uma questão de modelos de categorização

5. Igualdade, analogia e a fortiori

- 5.1. Diferenças entre igualdade e analogia
- 5.2. Igualdade e desigualdade; analogia e desanalogia
- 5.3. O modelo inferencial da analogia
- 5.4. Relevância causal e relevância pragmática
- 5.5. Igualdade e *a fortiori*

6. Modelos de medição de semelhança

- 6.1. O modelo de TVERSKY como base
- 6.2. Aperfeiçoamentos: «alinhamento» e «correspondência»
- 6.3. Semelhança relevante
- 6.4. Semelhança suficiente

7. Igualdade prescritiva e «inclusividade ótima»

- 7.1. Sobreinclusividade e subinclusividade normativas
- 7.2. Relevância causal e relevância declarada

III. EMPREENDIMENTO DESCRITIVO

8. Os princípios psicológicos da categorização

- 8.1. A teoria dos protótipos
- 8.2. Economia cognitiva e estrutura da realidade percebida
- 8.3. O nível básico das categorizações

9. Realismo jurídico e psicologia da semelhança



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- 9.1. Vieses cognitivos na comparação
- 9.2. Direcionalidade: sujeito e referente
- 9.3. Diagnosticidade: os termos de comparação (e a comparação entre os termos de comparação)

10. Realismo jurídico e prescrições de relevância

- 10.1. Prescrições de relevância e teorias do direito
- 10.2. Prescrições de relevância e vieses cognitivos
- 10.3. Prescrições de relevância e autoridades supremas

IV. EMPREENDIMENTO PRESCRITIVO

11. Modelos transparentes de relevância

- 11.1. Teses de relevância e hipóteses de relevância
- 11.2. Modelo dual de regras e princípios
- 11.3. Categorias nas regras e categorias nos princípios

12. Uma conceção deflacionista de igualdade prescritiva

- 12.1. Uma conceção deflacionista de igualdade prescritiva
- 12.2. Paralelos prescritivos com os princípios da categorização
 - 12.2.1. Estrutura da realidade percecionada e aptidão
 - 12.2.2. Economia cognitiva e necessidade
- 12.3. Relevância e derrotabilidade: a diferenciação dos «iguais declarados»
- 12.4. Refinamento do argumento da «discriminação»
- 12.5. Redução de decisões entimemáticas e controlo jurisdicional

7. Demonstração da coerência dos conteúdos programáticos com os objetivos da unidade curricular:

A pressuposição de modelos teóricos nos conteúdos programáticos (análise conceptual e realismo jurídico), permite ao aluno adotar esses pressupostos ou procurar divergir dos mesmos adotando outros (feminist jurisprudence, critical race theory, etc). A interdisciplinaridade subjacente numa temática tão relevante de direito constitucional, permite a escolha de várias perspetivas de análise e sujeita o aluno ao debate crítico e ao teste de solidez das teorias que desenvolve, como é de esperar num mestrado científico.

8. Metodologias de ensino:

Unidade curricular em regime de seminário clássico.

- 1. Exposição do docente responsável de principais temáticas da disciplina e problemas carentes de resolução.
- 2. Escolha de temas de relatório e calendarização de exposições orais, sujeitas a debate crítico do docente e demais alunos;
- 3. Apresentação ao docente responsável de abstract e lista de bibliografia, para avaliação preliminar;
- 4. Elaboração de relatório final.

9. Avaliação:

- (i) Participação oral durante seminário: 25%
- (ii) Exposição oral de tema: 25%
- (iii) Relatório escrito: 50%

10. Demonstração da coerência das metodologias de ensino com os objetivos de aprendizagem da unidade curricular:

As metodologias de ensino são coerentes com os objetivos de aprendizagem na medida em que o seminário promove o debate a respeito dos pressupostos e filiações teóricas em que as questões da igualdade e discriminação se



colocam. O aluno é incentivado, quer a discutir criticamente dogmas e paradigmas científicos previamente estabelecidos, quer a defender as traves-mestras da teoria que adote, quer a formular proposições preditivas face a decisões judiciais que venham a ocorrer, testando as suas teorias face a casos concretos.

11. Bibliografia principal:

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COMPLEMENTAR

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12. Observações:

(máximo 1000 caracteres)

NOTA: este mapa é preenchido tantas vezes quantas as necessárias para descrever as diferentes unidades curriculares.

Curricular Unit Sheet

Master's Degree Program in Law and Legal Science Constitutional Law «Equality and discrimination»

1. Curricular Unit Name:

Constitutional Law (class E)

2. Complementary Information:

Duration: Semester Annual
Work hours: 504
Credits ECTS: 18

3. Responsible Academic staff and respective workload in the curricular unit:

Pedro Moniz Lopes – 2h/week

4. Other academic staff and respective workloads in the curricular unit:

N/A

5. Learning outcomes of the curricular unit:

- Conceptual analysis and strong theoretical component for understanding equality outside of purely rhetorical and elliptical constitutional discourses
- Ability to distinguish between three distinct settings of equality: theoretical, descriptive, and prescriptive
- Mastery of theoretical models for applying the principle in a rigorous manner;
- Understanding of the conditions, limitations and biases in comparative actions and legal and moral judgments;
- Critical capacity to deconstruct jurisprudential decisions and leading cases, as well as doctrinal texts;
- Scientific resourcefulness to carry out scholarly work.



6. Syllabus:

I. INTRODUCTION

1. Introduction

- 1.1 Equality and constitutionalism
- 1.2 Ambiguities of "equality" in legal theory
- 1.3 Equality: meaning and reference
- 1.4. The limitations of the canonical formula

2. A non-anthropologically neutral realist framework

- 2.1 The change of philosophical paradigm
- 2.2. The goals of science and the naturalization of legal science
- 2.3 Anthropologically rich models with room for "armchair philosophy"
 - 2.3.1. statements and norms: a non-cognitivist view
 - 2.3.2. interpretive activity and theories of interpretation
- 2.4. legal interpretation and human behavior: mind and context
- 2.5. Legal realism: the modernization of a predictive theory à la Ross

3. A theory of equality with practical relevance

- 3.1. The three undertakings: theoretical, descriptive and prescriptive
- 3.2 Explanatory power, descriptive rigor, and prescriptive operativity
- 3.3 The focus on "judicial decision" (adjudication) and legislative production

II. THEORETICAL UNDERTAKING

4. Disambiguation of "equality"

- 4.1. The pieces of equality
 - 4.1.1 Identity
 - 4.1.2 Comparison
 - 4.1.3. similarity
 - 4.1.4. relevance
 - 4.1.5. classes and categories
 - 4.1.6. Equality
- 4.2 Descriptive equality, prescriptive equality and "declared" equality
- 4.3 Legal rules as "relevance sorters"
- 4.4 Ambiguities of prescriptive equality
- 4.5 Equality and the suppression of irrelevant dissimilarities
- 4.6. Descriptive equality as a matter of categorization models

5. Equality, analogy and a fortiori

- 5.1 Differences between equality and analogy
- 5.2 Equality and inequality; analogy and disanalogy
- 5.3 The inferential model of analogy
- 5.4 Causal relevance and pragmatic relevance
- 5.5. Equality and a fortiori

6. Similarity measurement models

- 6.1. the TVERSKY model as a basis
- 6.2 Improvements: "alignment" and "matching"
- 6.3 Relevant similarity
- 6.4. Sufficient similarity

7. Prescriptive equality and "optimal inclusiveness"

- 7.1. Normative overinclusiveness and underinclusiveness



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7.2. Causal relevance and stated relevance

III. DESCRIPTIVE UNDERTAKING

8. The psychological principles of categorization

- 8.1. The theory of prototypes
- 8.2. Cognitive economy and the structure of perceived reality
- 8.3. The basic level of categorizations

9. Legal realism and the psychology of similarity

- 9.1. Cognitive biases in comparison
- 9.2. Directionality: subject and referent
- 9.3. Diagnosticity: the terms of comparison (and the comparison between terms of comparison)

10. Legal realism and relevance prescriptions

- 10.1. Prescriptions of relevance and theories of law
- 10.2. Prescriptions of relevance and cognitive biases
- 10.3. Prescriptions of relevance and supreme authorities

IV. PRESCRIPTIVE UNDERTAKING

11. Transparent models of relevance

- 11.1. Theses of relevance and hypotheses of relevance
- 11.2. Dual models of rules and principles
- 11.3. Categories in rules and categories in principles
- 12.A. Deflationary conception of prescriptive equality
- 12.1. A deflationary conception of prescriptive equality
- 12.2. Prescriptive parallels with the principles of categorization
- 12.2.1. Structure of perceived reality and fitness
- 12.2.2. Cognitive economy and necessity
- 12.3. Relevance and defeasibility: the differentiation of "stated equals"
- 12.4. Refinement of the "discrimination" argument
- 12.5. Reduction of entimatic decisions and jurisdictional control

7. Demonstration of the syllabus coherence with the curricular unit's objectives:

The assumption of theoretical models in the syllabus (conceptual analysis and legal realism), allows the student to adopt these assumptions or seek to diverge from them by adopting others (feminist jurisprudence, critical race theory, etc.). The underlying interdisciplinarity in such a relevant topic of constitutional law allows for the choice of various perspectives of analysis and subjects the student to critical debate and to the test of the soundness of the theories he or she develops, as is to be expected in a scientific master's program.

8. Teaching methodologies (including evaluation):

Curricular unit in a classic seminar format.

- 1. Presentation by the teacher in charge of the main themes of the discipline and problems in need of resolution.
- 2. Choice of report topics and scheduling of oral presentations, subject to critical debate by the teacher and other students;
- 3. Presentation of abstract and bibliography list to the professor in charge for preliminary evaluation;
- 4. Preparation of a final report.

9. Demonstration of the coherence between the teaching methodologies and the learning outcomes:

The teaching methodologies are consistent with the learning objectives insofar as the seminar promotes debate on the theoretical assumptions and affiliations in which the issues of equality and discrimination are raised. Students are encouraged either to critically discuss previously established scientific dogmas and paradigms, to defend the mainstays of the theory they adopt, or to formulate predictive propositions in the face of judicial decisions that may occur, testing their theories against concrete cases.



10: Evaluation:

- (i) Participation during seminar: 25%.
(ii) Oral presentation of topic: 25% (iii) Written report: 50% (iv)
(iii) Written report: 50%.

11: Main Bibliography:

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12: Remarks:

(maximum 1000 characters)

NOTE: this map can be filled in as many times as necessary to describe the different curricular units.