



Ficha de Unidade Curricular

Curso de Mestrado em Direito e Ciência Jurídica Direito Constitucional

1. Nome da Unidade curricular:

Direito Constitucional (turma E)

Tema: Igualdade e Discriminação

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, descriptivo 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 antropologicamente neutro

- 2.1. A mudança de paradigma filosófico
- 2.2. Os objetivos da ciência e a naturalização da ciência jurídica
- 2.3. Modelos antropologicamente 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 preeditiva *a la Ross*

3. Uma teoria da igualdade com relevo prático

- 3.1. Os três empreendimentos: teórico, descriptivo e prescritivo
- 3.2. Poder explicativo, rigor descriptivo 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 descriptiva, 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 descriptiva 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 DESCRIPTIVO

8. Os princípios psicológicos da categorização

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



9. Realismo jurídico e psicologia da semelhança

- 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 preeditivas face a decisões judiciais que venham a ocorrer, testando as suas teorias face a casos concretos.

11. Bibliografia principal:

BÁSICA

- MONIZ LOPES, Pedro. *Relevance and Equality: An Analytical Account*, in The Journal of Contemporary Legal Issues (University of San Diego), 2022, pp. 331-382.
- MONIZ LOPES, Pedro. *The syntax of principles: genericity as a logical distinction between rules and principles*. Ratio Juris, 30 (2017): 471-490.
- COMANDUCCI, Paolo 2010. *Igualdad in Democracia, Derechos e Interpretación Jurídica – Ensayos de Teoría Analítica del Derecho*, P. COMANDUCCI (Auth.), Ara Editores, Lima: 29-44.
- WESTEN, Peter 1982. *The Empty Idea of Equality*. In *Harvard Law Review*, 95: 3: 537-596.
- WESTEN, Peter 1990. *Speaking of Equality – An Analysis of the Retorical Force of Equality in Moral and Legal Discourse*. Princeton, N. J.
- TVERSKY, Amos 1977. *Features of similarity*. Psychological Review, 84(4), 327-352.
- BAER, Susanne, *Equality*, in M. ROSENFELD / A. SAJÓ (eds), *The Oxford Handbook of Comparative Constitutional Law*, 2012.
- GOSEPATH, Stefan, *Equality*, The Stanford Encyclopedia of Philosophy (Summer 2021 Edition), Edward N. Zalta (ed.), URL = <<https://plato.stanford.edu/archives/sum2021/entries/equality/>>.
- GUASTINI, Riccardo 1999. *La Gramática de "Igualdad"* in Distinguendo – Estudios de Teoría y Metateoría del Derecho, R. GUASTINI (Auth.), Barcelona: Guedisa: 193-200.
- CANALE, Damiano / TUZET, Giovanni 2009. *The A Simili Argument: An Inferentialist Setting*, Ratio Juris, 22: 499-509
- FREDMAN, Sandra. *Substantive equality revisited*, International Journal of Constitutional Law, Volume 14, Issue 3, July 2016: 712-738.
- HUSTER, Stefan, *Gleichheit und Verhältnismäßigkeit: Der allgemeine Gleichheitssatz als Eingriffsrecht in JuristenZeitung*, 49. Jahrg., Nr. 11 (3. Juni 1994), pp. 541-549.
- GIANFORMAGGIO, Leticia 1997. “Like” – “Equal” – “Similar”: Are They to be Treated Alike? in Normative Systems in Legal and Moral Theory, Festschrift for Carlos E. Alchourrón and Eugenio Bulygin, E. Garzón Valdés/W. Krawietz/G. H. Von Wright/R. Zimmerling (Eds.), Duncker & Humblot, Berlin: 251-278.
- HOLYOAK, Keith 2012. *Analogy and Relational Reasoning*. In *The Oxford Handbook of Thinking and Reasoning*, Oxford University Press, New York: 234-259.
- NOVAIS, Reis 2023. *Princípios Estruturantes de Estado de Direito*, 2.ª ed., Reimp., Coimbra, Almedina.
- GARCIA, Maria da Glória Ferreira Pinto Dias 2005. “Princípio da Igualdade: Fórmula Vazia ou Fórmula «Carregada» de Sentido?”, in Estudos sobre o Princípio da Igualdade, Almedina, Coimbra, 2005

COMPLEMENTAR

- ALCHOURRÓN, Carlos/BULYGIN, Eugenio, 1991. Fundamentos Pragmáticos para una Lógica de Normas. In Carlos Alchourrón/Eugenio Bulygin, *Análisis Lógico y Derecho*. Madrid: Centro de Estudios Constitucionales:155-167.
- ALCHOURRÓN, Carlos/BULYGIN, Eugenio 2006. Trans. *Introducción a la metodología de las ciencias jurídicas y sociales*. 5th reprint. Buenos Aires: Editorial Astrea (1st ed. *Normative systems in English* 1975).
- AMADO, J. Garcia. 2001. Sobre el Argumento “A Contrario” en la aplicación del Derecho. In *Doxa*, 2001:5-71.
- ARASZKIEWICZ, Michał 2011. Analogy, Similarity and Factors. In *Proceedings of the 13th International Conference on Artificial Intelligence and Law*, New York,: ACM: 100-105.
- ASGEIRSSON, Hrafn 2012. Vagueness, Comparative Value and the “Lawmaker’s Challenge”. In ARSP, 2012, 98: 3: 299ff.



- BENTHAM, Jeremy 1996. *An Introduction to the Principles of Morals and Legislation*, J. H. BURNS and Herbert L. A. HART, eds., Oxford, Clarendon Press.
- BERLIN, Isiah, Equality in Concepts & Categories – Philosophical Essays, Hogarth Press, London
- BIX, Brian 2010. Natural Law Theory, In Dennis PATTERSON (Ed.), *A Companion to Philosophy of Law and Legal Theory*, Oxford, Wiley-Blackwell, 2010: 209-227.
- BROWN, Ann 1989. Analogical learning and transfer: What develops In *Similarity and Analogical Reasoning*, S. VOSNIADOU / A. ORTONY (Eds.), Cambridge University Press, New York: 369-412.
- BULYGIN, Eugenio, 2010. Sobre la Equivalencia Pragmática entre Permiso y no Prohibición in Dx, *Cuadernos de Filosofía del Derecho*, 33: 283-296.
- BULYGIN, Eugenio (1987), *Sobre el Status Ontológico de los Derechos Humanos*, DOXA, 4.
- BULYGIN, Eugenio / MENDONCA, Daniel, 2005. *Normas y Sistemas Normativos*, Marcial Pons: Madrid.
- BURNETT, Dean, 2016. *The Idiot Brain. A Neuroscientist explains what your Head is really up to*. London: CPI Group.
- BRITO, Miguel Nogueira de / HERDY, Rachel / DAMELE, Giovanni / LOPES, Pedro Moniz / SAMPAIO, Jorge Silva 2019. *The Role of Legal Argumentation and Human Dignity in Constitutional Courts*. Proceedings of the Special Workshops Held at the 28th World Congress of the International Association for Philosophy of Law and Social Philosophy in Lisbon, 2017, Archiv für Rechts- und Sozialphilosophie – Beihefte 157, Stuttgart, Franz Steiner Verlag
- CANAS, Vitalino – “Constituição Prima Facie: Igualdade, Proporcionalidade, Confiança (Aplicados ao «Corte» de Pensões)”, in E-Pública, vol. I, n.º 1, 2014
- CUMPA, Javier 2020. *Categories in Philosophy Compass*, 15 (1): 1-11.
- CUMPA, Javier 2021. *The Neutralist Analysis of Similarity* in *Philosophia - Philosophical Quarterly of Israel* 49 (1): 37-47.
- DAVIES, Todd R. 1988. *Determination, Uniformity, and Relevance: Normative Criteria for Generalization and Reasoning by Analogy* In Analogical Reasoning – Perspectives of Artificial Intelligence, Cognitive Science, and Philosophy, D.H. HELMAN (Ed.), Springer, Dordrecht: 227-251.
- DÍAZ, Adrian Rentería, 1997. Silogismo jurídico, argumento “a contrario” y reglas constitutivas, In *Doxa*, 20: 317-330.
- DIVER, Colin 1983. The Optimal Precision of Administrative Rules, In *Yale L. J.*, 1983, 93: 65ff.
- DUARTE, David 2018. *The partial reducibility thesis and its problems* In *Analogy and Exemplary Reasoning in Legal Discourse*, H. KAPTEIN / B. VAN DER VELDEN (Eds.), Amsterdam University Press: 109-122.
- DUARTE, David 2021. From Constitutional Discretion to the Positivist Weight Formula in *Proportionality, Balancing, and Rights* (Jan R. SIECKMANN, Ed.), Cham, Springer
- DUARTE D’ALMEIDA, Luís 2009. Norme Giuridiche Complete, In *Analisi e Diritto*, 2009: 197-212.
- DWORKIN, Ronald, 2000. Sovereign Virtue. The Theory and Practice of Equality, Cambridge: Harvard University Press.
- ECHAVE, Delia Teresa / URQUIJO Maria Eugenia / GUIBOURG Ricardo A., *Lógica, Proposición y Norma*, 7th reprint, Astrea, Buenos Aires, 2008.
- ENDICOTT, Timothy 2011. The Value of Vagueness, in A. MARMOR / S. SOAMES (eds.), *Philosophical Foundations of Language in the Law*, Oxford: 14-30.
- GENTNER, D. 1989. *The Mechanisms of Analogical Learning* In *Similarity and Analogical Reasoning*, S. VOSNIADOU / A. ORTONY (Eds.), Cambridge University Press, New York: 199-241.
- GIANFORMAGGIO, Leticia 1997. “Like” – “Equal” – “Similar”: Are They to be Treated Alike? in *Normative Systems in Legal and Moral Theory*, Festschrift for Carlos E. Alchourrón and Eugenio Bulygin, E. Garzón Valdés/W. Krawietz/G. H. Von Wright/R. Zimmerling (Eds.), Duncker & Humblot, Berlin: 251-278.
- HADFIELD, GILLIAN K. 1994. Weighing the Value of Vagueness: An Economic Perspective on Precision in the Law, in *Cal. L. Rev.*, 82: 3: 541-554.
- HAGE, Jaap 2005. The Logic of Analogy in the Law, *Argumentation*, 19: 401-415.
- HAMPSHIRE, Stuart 1978. Public and Private Morality, in S. HAMPSHIRE et al. (eds.), *Public and Private Morality*, Cambridge, 1978, 23-54.
- HART, Herbert L. A. 1983. Problems of the Philosophy of Law. Pt. 1, essay 3, in *Essays in Jurisprudence and Philosophy*. Oxford: Oxford University Press.
- HART, Herbert L. A. 1994. The Concept of Law. 2nd ed. Oxford: Oxford University Press.
- HINDRICKS, Frank A. 2003. The New Role of the Constitutive Rule. *American Journal of Economics and Sociology*, 62(1): 185-208.
- HOLTON, Richard 2002. Particularism and Moral Theory: Principles and Particularisms In *Aristotelian Society, Supplementary Volume* 76: 191-209.
- HOLYOAK, Keith J. / THAGARD, Paul R. 1989. *A Computational Model of Analogical Problem Solving* In *Similarity and Analogical Reasoning*, S. VOSNIADOU / A. ORTONY (Eds.), Cambridge University Press, New York: 243-266.
- KELSEN, Hans 1934. *Reine Rechtslehre – Introduction to the Problems of Legal Theory: A Translation of the First Edition of the Reine Rechtslehre or Pure Theory of Law* (Trad. Bonnie Litschewski Paulson, Stanley L. Paulson), Clarendon Press (1992).



- KELSEN, Hans 1960. *Reine Rechstlehre*, 2nd ed., 1960, *Pure Theory of Law* (Trad. Max Knight), The Law Book Exchange Ltd., New Jersey (2005).
- KELSEN, Hans 1979. *Théorie Générale des Normes*, Paris, Presses Universitaires de France, 1996 (ed. or. *Allgemeine Theorie der Normen*, Wien, Manz Verlag, 1979, trad. fra. di, de O. Beaudi e F. Malkani).
- MORAIS, Carlos Blanco de 2000. "Os Direitos, Liberdades e Garantias na Jurisprudência Constitucional Portuguesa: Um Apontamento", in O Direito, 132, n.^{os} 2-4
- NIINILUOTO, Ilkka 1988. Analogy and Similarity in Scientific Reasoning. In *Analogical Reasoning – Perspectives of Artificial Intelligence, Cognitive Science, and Philosophy*, D.H. HELMAN (Ed.), Springer, Dordrecht: 271-298.
- NINO, Carlos S. 2003. *Introducción al Análisis del Derecho*, 2.a ed. ampl. e rev., 12.^a reimpr., Buenos Aires, Astrea, 2003.
- PARDO, Anastacio Alemán 1985. *Teoria de Las Categorías en la Filosofía Analítica*, Tecnos, Madrid.
- PARISI, Francesco/ FON, Vincy 2009. Optimal Specificity of Laws: Rules versus Standards, in F. PARISI/V.FON, *The Economics of Lawmaking*, Oxford: 9ff.
- RACHLINKSI, Jeffrey J. 2006. Bottom-Up versus Top-Down Lawmaking, in U. Chi. L. Rev., 73: 933ff.
- RAZ, Joseph, 1972. Legal Principles and the Limits of Law. In *Yale Law Journal* 81(5): 823-54.
- RAZ, Joseph, 1999. *Practical Reason and Norms*. 3rd ed. Oxford: Oxford University Press.
- RAZ, Joseph 2003. *The Concept of a Legal System: An Introduction to the Theory of Legal System*. 2nd ed. Oxford: Oxford University Press.
- RODRÍGUEZ, Jorge L. 1999. Lagunas Axiológicas y Relevancia Normativa. In *Doxa. Cuadernos de Filosofía del Derecho*, 22: 349-369.
- RODRÍGUEZ, Jorge L. 2012. Against defeasibility of rules, in J. FERRER BELTRÁN/G. BATTISTA RATTI (eds.), *The Logic of Legal Requirements – Essays on Defeasibility*, Oxford, 2012: 89ff.
- ROSS, Alf 1968. *Directives and Norms*. The Humanities Press, New York
- RUSSELL, Bertrand 1911. On the relation of universals and particulars. *Proceedings of the Aristotelian Society*, 12, 1-24.
- RUSSELL, Bertrand 1964. *The principle of mathematics*. Cambridge: Cambridge University Press.
- RUSSELL, Bertrand 2001. The problems of philosophy. Oxford: Oxford University Press.
- RYLE, Gilbert. Categories. *Proceedings of the Aristotelian Society*, 38, 189-206.
- SÁNCHEZ, Pedro Fernández. "El Ambicioso Programa de Derechos Económicos y Sociales de la Constitución Portuguesa y su Aplicación Innovadora por el Tribunal Constitucional", in *Revista Española de Derecho Constitucional*, n.^º 127, 2023.
- SAMPAIO, Jorge Silva 2021. Brute Balancing, Proportionality and Metaweighting of Reasons in *Proportionality, Balancing, and Rights: Robert Alexy's Theory of Constitutional Rights*, J. Sieckmann (ed.), Dordrecht: Springer.
- SARTOR, Giovanni 2010. Doing Justice to Rights and Values: Teleological Reasoning and Proportionality, Artificial Intelligence Law, 18: 175-215.
- SCHAUER, Frederick 1991. *Playing by the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and in Life*. New York: Oxford University Press.
- SEARLE, John 1969. *Speech Acts: An Essay in the Philosophy of Language*, Cambridge, 1969
- SEARLE, John 1976. A Classification of Illocutionary Acts in *Language and Society*, 5 (1), 1-23.
- SEARLE, John 1995. *The Construction of Social Reality*. New York: Free Press.
- SEGER, Carol A. / PETERSON, Erik J. 2013. Categorization = decision making + generalization In *Neurosci Biobehav Rev.*, 37(7):1187-1200
- SIEGEL, Stephen A. 2006. *The Origin of the Compelling State Interest Test and Strict Scrutiny* In Am. J. Legal Hist. 48: 355-407.
- SMITH, Linda 1989. *From Global Similarities to Kinds of Similarities: the Construction of Dimensions in Development* In *Similarity and Analogical Reasoning*, S. VOSNIADOU / A. ORTONY (Eds.), Cambridge University Press, New York: 146-178.
- STEINER, Hillel 2013. Directed Duties and Inalienable Rights, In *Ethics*, 123 (2), Symposium on Rights and the Direction of Duties: 230-244
- STRAWSON, Peter Frederick 1974. *Subject and Predicate in Logic and Grammar*, Methuen, London.
- THAGARD, Paul / HOLYOAK, Keith J. / NELSON, Greg / GOCHFELD, David 1990. Analog retrieval by constraint satisfaction In *Artificial Intelligence*, 46 (3): 259-310
- TURNER, Mark 1988. *Categories and Analogies* In *Analogical Reasoning – Perspectives of Artificial Intelligence, Cognitive Science, and Philosophy*, D.H. HELMAN (Ed.), Springer, Dordrecht: 3-24.
- TVERSKY, AMOS / KAHNEMAN, DANIEL 1974. Judgment under uncertainty: heuristics and biases. *Science, New Series*, 185(4157): 1124-1131.
- VON WRIGHT, Georg Henrik 1963. *Norm and Action*. The Humanities Press, New York



- VOSNIADOU, Stella 1989. Analogical Reasoning as a Mechanism in Knowledge Acquisition: a Developmental Perspective In *Similarity and Analogical Reasoning*, S. VOSNIADOU / A. ORTONY (Eds.), Cambridge University Press, New York
- WALDRON, Jeremy 2012. *Dignity, Rank, and Rights*, Oxford University Press, Oxford.
- WESTEN, Drew / BLAGOV, Pavel / HARENISKI, Keith / KILTS, Clint / HAMANN, Stephan 2006. Neural bases of motivated reasoning: An fMRI study of emotional constraints on partisan political judgment in the 2004 U.S. presidential election. *Journal of Cognitive Neuroscience*, 18(11): 1947-58
- WETZEL, Linda 2018. Types and Tokens In *The Stanford Encyclopedia of Philosophy* (Fall 2018 Edition), EDWARD N. ZALTA (ed.), URL = <<https://plato.stanford.edu/archives/fall2018/entries/types-tokens/>>.
- YOVEL, Jonathan 2003. Two Conceptions of Relevance. In *Cybernetics and Systems*, 34:4-5: 283-315.

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**

1. Curricular Unit Name:

Constitutional Law (class E)

Subject: Equality and discrimination

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 a 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
- 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 entitative 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) Written report: 50%.

11: Main Bibliography:

BASIC

- MONIZ LOPES, Pedro. *Relevance and Equality: An Analytical Account*, in The Journal of Contemporary Legal Issues (University of San Diego), 2022, pp. 331-382.
- MONIZ LOPES, Pedro. *The syntax of principles: genericity as a logical distinction between rules and principles*. Ratio Juris, 30 (2017): 471-490.
- COMANDUCCI, Paolo 2010. *Igualdad in Democracia, Derechos e Interpretación Jurídica – Ensayos de Teoría Analítica del Derecho*, P. COMANDUCCI (Auth.), Ara Editores, Lima: 29-44.
- WESTEN, Peter 1982. *The Empty Idea of Equality*. In *Harvard Law Review*, 95: 3: 537-596.
- WESTEN, Peter 1990. *Speaking of Equality – An Analysis of the Retorical Force of Equality in Moral and Legal Discourse*. Princeton, N. J.
- TVERSKY, Amos 1977. *Features of similarity*. Psychological Review, 84(4), 327-352.
- BAER, Susanne, *Equality*, in M. ROSENFELD / A. SAJÓ (eds), *The Oxford Handbook of Comparative Constitutional Law*, 2012.
- GOSEPATH, Stefan, *Equality*, The Stanford Encyclopedia of Philosophy (Summer 2021 Edition), Edward N. Zalta (ed.), URL = <<https://plato.stanford.edu/archives/sum2021/entries/equality/>>.
- GUASTINI, Riccardo 1999. *La Gramática de "Igualdad"* in Distinguendo – Estudios de Teoría y Metateoría del Derecho, R. GUASTINI (Auth.), Barcelona: Guedisa: 193-200.
- CANALE, Damiano / TUZET, Giovanni 2009. *The A Simili Argument: An Inferentialist Setting*, Ratio Juris, 22: 499-509
- FREDMAN, Sandra. *Substantive equality revisited*, International Journal of Constitutional Law, Volume 14, Issue 3, July 2016: 712-738.
- HUSTER, Stefan, *Gleichheit und Verhältnismäßigkeit: Der allgemeine Gleichheitssatz als Eingriffsrecht in JuristenZeitung*, 49. Jahrg., Nr. 11 (3. Juni 1994), pp. 541-549.
- GIANFORMAGGIO, Leticia 1997. "Like" – "Equal" – "Similar": Are They to be Treated Alike? in Normative Systems in Legal and Moral Theory, Festschrift for Carlos E. Alchourrón and Eugenio Bulygin, E. Garzón Valdés/W. Krawietz/G. H. Von Wright/R. Zimmerling (Eds.), Duncker & Humblot, Berlin: 251-278.
- HOLYOAK, Keith 2012. *Analogy and Relational Reasoning*. In *The Oxford Handbook of Thinking and Reasoning*, Oxford University Press, New York: 234-259.
- NOVAIS, Reis 2023. *Princípios Estruturantes de Estado de Direito*, 2.ª ed., Reimp., Coimbra, Almedina.
- GARCIA, Maria da Glória Ferreira Pinto Dias 2005. "Princípio da Igualdade: Fórmula Vazia ou Fórmula «Carregada» de Sentido?", in Estudos sobre o Princípio da Igualdade, Almedina, Coimbra, 2005

SUPPLEMENTARY

- ALCHOURRÓN, Carlos/BULYGIN, Eugenio, 1991. Fundamentos Pragmáticos para una Lógica de Normas. In Carlos Alchourrón/Eugenio Bulygin, *Análisis Lógico y Derecho*. Madrid: Centro de Estudios Constitucionales:155-167.
- ALCHOURRÓN, Carlos/BULYGIN, Eugenio 2006. Trans. *Introducción a la metodología de las ciencias jurídicas y sociales*. 5th reprint. Buenos Aires: Editorial Astrea (1st ed. *Normative systems* in English 1975).
- AMADO, J. Garcia. 2001. Sobre el Argumento "A Contrario" en la aplicación del Derecho. In *Doxa*, 2001:5-71.
- ARASZKIEWICZ, Michał 2011. Analogy, Similarity and Factors. In *Proceedings of the 13th International Conference on Artificial Intelligence and Law*, New York,: ACM: 100-105.



- ASGEIRSSON, Hrafn 2012. Vagueness, Comparative Value and the "Lawmaker's Challenge". In ARSP, 2012, 98: 3: 299ff.
- BENTHAM, Jeremy 1996. *An Introduction to the Principles of Morals and Legislation*, J. H. BURNS and Herbert L. A. HART, eds., Oxford, Clarendon Press.
- BERLIN, Isiah, Equality in Concepts & Categories – Philosophical Essays, Hogarth Press, London
- BIX, Brian 2010. Natural Law Theory, In Dennis PATTERSON (Ed.), *A Companion to Philosophy of Law and Legal Theory*, Oxford, Wiley-Blackwell, 2010: 209-227.
- BROWN, Ann 1989. Analogical learning and transfer: What develops In *Similarity and Analogical Reasoning*, S. VOSNIADOU / A. ORTONY (Eds.), Cambridge University Press, New York: 369-412.
- BULYGIN, Eugenio, 2010. Sobre la Equivalencia Pragmática entre Permiso y no Prohibición in Dx, *Cuadernos de Filosofía del Derecho*, 33: 283-296.
- BULYGIN, Eugenio (1987), *Sobre el Status Ontológico de los Derechos Humanos*, Doxa, 4.
- BULYGIN, Eugenio / MENDONCA, Daniel, 2005. *Normas y Sistemas Normativos*, Marcial Pons: Madrid.
- BURNETT, Dean, 2016. *The Idiot Brain. A Neuroscientist explains what your Head is really up to*. London: CPI Group.
- BRITO, Miguel Nogueira de / HERDY, Rachel / DAMELE, Giovanni / LOPEZ, Pedro Moniz / SAMPAIO, Jorge Silva 2019. *The Role of Legal Argumentation and Human Dignity in Constitutional Courts*. Proceedings of the Special Workshops Held at the 28th World Congress of the International Association for Philosophy of Law and Social Philosophy in Lisbon, 2017, Archiv für Rechts- und Sozialphilosophie – Beihefte 157, Stuttgart, Franz Steiner Verlag
- CANAS, Vitalino – "Constituição Prima Facie: Igualdade, Proporcionalidade, Confiança (Aplicados ao «Corte» de Pensões)", in E-Pública, vol. I, n.º 1, 2014
- CUMPA, Javier 2020. *Categories in Philosophy Compass*, 15 (1): 1-11.
- CUMPA, Javier 2021. *The Neutralist Analysis of Similarity* in *Philosophia - Philosophical Quarterly of Israel* 49 (1): 37-47.
- DAVIES, Todd R. 1988. *Determination, Uniformity, and Relevance: Normative Criteria for Generalization and Reasoning by Analogy* In Analogical Reasoning – Perspectives of Artificial Intelligence, Cognitive Science, and Philosophy, D.H. HELMAN (Ed.), Springer, Dordrecht: 227-251.
- DÍAZ, Adrian Rentería, 1997. Silogismo jurídico, argumento "a contrario" y reglas constitutivas, In *Doxa*, 20: 317-330.
- DIVER, Colin 1983. The Optimal Precision of Administrative Rules, In *Yale L. J.*, 1983, 93: 65ff.
- DUARTE, David 2018. *The partial reducibility thesis and its problems* In *Analogy and Exemplary Reasoning in Legal Discourse*, H. KAPTEIN / B. VAN DER VELDEN (Eds.), Amsterdam University Press: 109-122.
- DUARTE, David 2021. From Constitutional Discretion to the Positivist Weight Formula in *Proportionality, Balancing, and Rights* (Jan R. SIECKMANN, Ed.), Cham, Springer
- DUARTE D'ALMEIDA, Luís 2009. Norme Giuridiche Complete, In *Analisi e Diritto*, 2009: 197-212.
- DWORKIN, Ronald, 2000. Sovereign Virtue. The Theory and Practice of Equality, Cambridge: Harvard University Press.
- ECHAVE, Delia Teresa / URQUIJO Maria Eugenia / GUIBOURG Ricardo A., *Lógica, Proposición y Norma*, 7th reprint, Astrea, Buenos Aires, 2008.
- ENDICOTT, Timothy 2011. The Value of Vagueness, in A. MARMOR / S. SOAMES (eds.), *Philosophical Foundations of Language in the Law*, Oxford: 14-30.
- GENTNER, D. 1989. *The Mechanisms of Analogical Learning* In *Similarity and Analogical Reasoning*, S. VOSNIADOU / A. ORTONY (Eds.), Cambridge University Press, New York: 199-241.
- GIANFORMAGGIO, Leticia 1997. "Like" – "Equal" – "Similar": Are They to be Treated Alike? in *Normative Systems in Legal and Moral Theory*, Festschrift for Carlos E. Alchourrón and Eugenio Bulygin, E. Garzón Valdés/W. Krawietz/G. H. Von Wright/R. Zimmerling (Eds.), Duncker & Humblot, Berlin: 251-278.
- HADFIELD, GILLIAN K. 1994. Weighing the Value of Vagueness: An Economic Perspective on Precision in the Law, in *Cal. L. Rev.*, 82: 3: 541-554.
- HAGE, Jaap 2005. The Logic of Analogy in the Law, *Argumentation*, 19: 401-415.
- HAMPSHIRE, Stuart 1978. Public and Private Morality, in S. HAMPSHIRE et al. (eds.), *Public and Private Morality*, Cambridge, 1978, 23-54.
- HART, Herbert L. A. 1983. Problems of the Philosophy of Law. Pt. 1, essay 3, in *Essays in Jurisprudence and Philosophy*. Oxford: Oxford University Press.
- HART, Herbert L. A. 1994. The Concept of Law. 2nd ed. Oxford: Oxford University Press.
- HINDRICKS, Frank A. 2003. The New Role of the Constitutive Rule. *American Journal of Economics and Sociology*, 62(1): 185-208.
- HOLTON, Richard 2002. Particularism and Moral Theory: Principles and Particularisms In *Aristotelian Society Supplementary Volume* 76: 191-209.
- HOLYOAK, Keith J. / THAGARD, Paul R. 1989. *A Computational Model of Analogical Problem Solving* In *Similarity and Analogical Reasoning*, S. VOSNIADOU / A. ORTONY (Eds.), Cambridge University Press, New York: 243-266.



- KELSEN, Hans 1934. *Reine Rechtslehre – Introduction to the Problems of Legal Theory: A Translation of the First Edition of the Reine Rechtslehre or Pure Theory of Law* (Trad. Bonnie Litschewski Paulson, Stanley L. Paulson), Clarendon Press (1992).
- KELSEN, Hans 1960. *Reine Rechtslehre*, 2nd ed., 1960, *Pure Theory of Law* (Trad. Max Knight), The Law Book Exchange Ltd., New Jersey (2005).
- KELSEN, Hans 1979. *Théorie Générale des Normes*, Paris, Presses Universitaires de France, 1996 (ed. or. *Allgemeine Theorie der Normen*, Wien, Manz Verlag, 1979, trad. fra. di, de O. Beaudi e F. Malkani).
- MORAIS, Carlos Blanco de 2000. "Os Direitos, Liberdades e Garantias na Jurisprudência Constitucional Portuguesa: Um Apontamento", in *O Direito*, 132, n.^{os} 2-4.
- NIINILUOTO, Ilkka 1988. Analogy and Similarity in Scientific Reasoning. In *Analogical Reasoning – Perspectives of Artificial Intelligence, Cognitive Science, and Philosophy*, D.H. HELMAN (Ed.), Springer, Dordrecht: 271-298.
- NINO, Carlos S. 2003. *Introducción al Análisis del Derecho*, 2.a ed. ampl. e rev., 12.^a reimpr., Buenos Aires, Astrea, 2003.
- PARDO, Anastacio Alemán 1985. *Teoría de Las Categorías en la Filosofía Analítica*, Tecnos, Madrid.
- PARISI, Francesco/ FON, Vincy 2009. Optimal Specificity of Laws: Rules versus Standards, in F. PARISI/V.FON, *The Economics of Lawmaking*, Oxford: 9ff.
- RACHLINKSI, Jeffrey J. 2006. Bottom-Up versus Top-Down Lawmaking, in U. Chi. L. Rev., 73: 933ff.
- RAZ, Joseph, 1972. Legal Principles and the Limits of Law. In *Yale Law Journal* 81(5): 823-54.
- RAZ, Joseph, 1999. *Practical Reason and Norms*. 3rd ed. Oxford: Oxford University Press.
- RAZ, Joseph 2003. *The Concept of a Legal System: An Introduction to the Theory of Legal System*. 2nd ed. Oxford: Oxford University Press.
- RODRÍGUEZ, Jorge L. 1999. Lagunas Axiológicas y Relevancia Normativa. In *Doxa. Cuadernos de Filosofía del Derecho*, 22: 349-369.
- RODRÍGUEZ, Jorge L. 2012. Against defeasibility of rules, in J. FERRER BELTRÁN/G. BATTISTA RATTI (eds.), *The Logic of Legal Requirements – Essays on Defeasibility*, Oxford, 2012: 89ff.
- ROSS, Alf 1968. *Directives and Norms*. The Humanities Press, New York
- RUSSELL, Bertrand 1911. On the relation of universals and particulars. *Proceedings of the Aristotelian Society*, 12, 1-24.
- RUSSELL, Bertrand 1964. *The principle of mathematics*. Cambridge: Cambridge University Press.
- RUSSELL, Bertrand 2001. *The problems of philosophy*. Oxford: Oxford University Press.
- RYLE, Gilbert. Categories. *Proceedings of the Aristotelian Society*, 38, 189-206.
- SÁNCHEZ, Pedro Fernández. "El Ambicioso Programa de Derechos Económicos y Sociales de la Constitución Portuguesa y su Aplicación Innovadora por el Tribunal Constitucional", in *Revista Española de Derecho Constitucional*, n.^º 127, 2023.
- SAMPAIO, Jorge Silva 2021. Brute Balancing, Proportionality and Metaweighting of Reasons in *Proportionality, Balancing, and Rights: Robert Alexy's Theory of Constitutional Rights*, J. Sieckmann (ed.), Dordrecht: Springer.
- SARTOR, Giovanni 2010. Doing Justice to Rights and Values: Teleological Reasoning and Proportionality, Artificial Intelligence Law, 18: 175-215.
- SCHAUER, Frederick 1991. *Playing by the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and in Life*. New York: Oxford University Press.
- SEARLE, John 1969. *Speech Acts: An Essay in the Philosophy of Language*, Cambridge, 1969
- SEARLE, John 1976. A Classification of Illocutionary Acts in *Language and Society*, 5 (1), 1-23.
- SEARLE, John 1995. *The Construction of Social Reality*. New York: Free Press.
- SEGER, Carol A. / PETERSON, Erik J. 2013. Categorization = decision making + generalization In *Neurosci Biobehav Rev.*, 37(7):1187-1200
- SIEGEL, Stephen A. 2006. *The Origin of the Compelling State Interest Test and Strict Scrutiny* In *Am. J. Legal Hist.* 48: 355-407.
- SMITH, Linda 1989. *From Global Similarities to Kinds of Similarities: the Construction of Dimensions in Development* In *Similarity and Analogical Reasoning*, S. VOSNIADOU / A. ORTONY (Eds.), Cambridge University Press, New York: 146-178.
- STEINER, Hillel 2013. Directed Duties and Inalienable Rights, In *Ethics*, 123 (2), Symposium on Rights and the Direction of Duties: 230-244
- STRAWSON, Peter Frederick 1974. *Subject and Predicate in Logic and Grammar*, Methuen, London.
- THAGARD, Paul / HOLYOAK, Keith J. / NELSON, Greg / GOCHFELD, David 1990. Analog retrieval by constraint satisfaction In *Artificial Intelligence*, 46 (3): 259-310
- TURNER, Mark 1988. *Categories and Analogies* In *Analogical Reasoning – Perspectives of Artificial Intelligence, Cognitive Science, and Philosophy*, D.H. HELMAN (Ed.), Springer, Dordrecht: 3-24.



- TVERSKY, AMOS /KAHNEMAN, DANIEL 1974. Judgment under uncertainty: heuristics and biases. *Science, New Series*, 185(4157): 1124-1131.
- VON WRIGHT, Georg Henrik 1963. *Norm and Action*. The Humanities Press, New York
- VOSNIADOU, Stella 1989. Analogical Reasoning as a Mechanism in Knowledge Acquisition: a Developmental Perspective In *Similarity and Analogical Reasoning*, S. VOSNIADOU / A. ORTONY (Eds.), Cambridge University Press, New York
- WALDRON, Jeremy 2012. *Dignity, Rank, and Rights*, Oxford University Press, Oxford.
- WESTEN, Drew / BLAGOV, Pavel / HARENSKI, Keith / KILTS, Clint / HAMANN, Stephan 2006. Neural bases of motivated reasoning: An fMRI study of emotional constraints on partisan political judgment in the 2004 U.S. presidential election. *Journal of Cognitive Neuroscience*, 18(11): 1947-58
- WETZEL, Linda 2018. Types and Tokens In *The Stanford Encyclopedia of Philosophy* (Fall 2018 Edition), EDWARD N. ZALTA (ed.), URL = <<https://plato.stanford.edu/archives/fall2018/entries/types-tokens/>>.
- YOVEL, Jonathan 2003. Two Conceptions of Relevance. In *Cybernetics and Systems*, 34:4-5: 283-315.

12: Remarks:

(maximum 1000 characters)

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