

## FUNDAMENTAL RIGHTS

### SYLLABUS

**Professor:** Jorge Silva Sampaio

#### Course Description

Fundamental rights, in its broadest sense, is a branch of constitutional law that examines the nature and structure of fundamental rights, as well as the constitutional norms that ascribe them. It also explores whether fundamental rights can be restricted, and if so, what normative constraints apply to such restrictions. This area of law is deeply connected to the theory of norms and legal positions, requiring an understanding of constitutional conflicts, their relation to fundamental rights restrictions, who has the authority to resolve these conflicts, and how they are resolved. Additionally, it involves analysing which constitutional norms regulate restrictive actions and the nature of the constraints they impose.

For example, some of the key questions we will explore in this course include:

- (1) What are fundamental rights?
- (2) How are fundamental rights ascribed, and what fundamental rights exist?
- (3) Can state authorities restrict fundamental rights?
- (4) Are there normative constraints to restricting fundamental rights?
- (5) When is balancing necessary, and how does it relate to proportionality?

#### Course Goals

The primary goal of this course is to provide a purely theoretical and descriptive analysis of fundamental rights. Rather than engaging in normative or empirical inquiries, the aim is to apply the tools and insights of analytical legal theory to develop a value-neutral theoretical explanation of what fundamental rights are. Thus, the key objectives of this course are: (a) to equip students with analytical tools that enable a critical examination of common discourse on fundamental rights, (b) to develop a general theory of fundamental rights that can explain their nature across different legal systems, and (c) to enhance critical thinking and problem-solving skills.

#### Topics

- § 0. Brief introduction to the theory of norms
  - 0.1. Linguistic formulations and norms
  - 0.2. The structure of norms
  - 0.3. Categories of norms
- § 1. The nature of fundamental rights

- 1.1. The concept of fundamental right
  - 1.1.1. Formal and material conceptions
  - 1.1.2. Explanatory and justificatory grounds of fundamental rights
- 1.2. Fundamental rights and human rights
- § 2. Norms of fundamental rights
  - 2.1. Norms ascriptive of fundamental rights
    - 2.1.1. Structure and content of fundamental rights norms
    - 2.1.2. Rules and principles of fundamental rights
  - 2.2. Legal positions ascribed by fundamental rights norms
    - 2.2.1. A Hohfeldian theory of legal positions
    - 2.2.2. Fundamental legal positions
      - 2.2.2.1. Rights, liberties, powers, and immunities
      - 2.2.2.2. Atomic and molecular rights
      - 2.2.2.3. Direct and correlative rights
        - 2.2.2.3.1. Duties not to interfere, to protect and to promote
  - 2.3. Liberty rights and social rights
    - 2.3.1. Normative indifferenciation between liberty and social rights
    - 2.3.2. Positive and negative rights
    - 2.3.3. State duties to promote social interests
    - 2.3.4. Factual limits: the “financial feasibility clause”
- § 3. Norms about fundamental rights
  - 3.1. Norms defining the fundamental rights scope
  - 3.2. Norms regulating the holding of fundamental rights: the prohibition of waive
  - 3.3. Norms on suspension of fundamental rights
  - 3.4. Norms on sanctions for violating fundamental rights
- § 4. Restrictions on fundamental rights norms
  - 4.1. The concept of restriction
  - 4.2. Types of restriction
  - 4.3. Other interferences
  - 4.4. Restrictions, normative conflicts, and defeasibility
- § 5. Conflicts involving fundamental rights norms
  - 5.1. Nature of normative conflicts
  - 5.2. Conflicts resolvable by norms of conflicts
  - 5.3. Conflicts irresolvable by norms of conflicts and balancing
    - 5.3.1. Conditions for Balancing
    - 5.3.2. The Nature of Balancing
    - 5.3.3. Regulation of Balancing
  - 5.4. Constitutional conflicts and defeasibility of fundamental rights norms
- § 6. Constitutional constraints to restrictions on fundamental rights norms
  - 6.1. Hierarchy and constitutional justification
  - 6.2. Formal limits: norms on competence, form, and procedure to restrict fundamental rights norms
  - 6.3. Substantive limits
    - 6.3.1. The prohibition of affecting the essential core

- 6.3.2. The principle of equality
- 6.3.3. The principle of proportionality
  - 5.6.1. The foundation of proportionality
  - 5.6.2. The structure and content of the proportionality principle
  - 5.6.3. Alexy’s “weight formula” and alternatives
- § 7. Comparison between Portuguese, European and International charters of fundamental rights
- § 8. National, European and international judicial protection of fundamental rights

### **Schedule of Topics and Readings**

To be further communicated.

### **Assignments and Grades**

Participation in classes and in a debate (topic: limits to freedom of expression and hate speech) (50%)

Final paper – 6-10 (1.5 spacing) pages (50%)

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