



---

**FACULTY OF ARTS AND LAW  
SCHOOL OF LAW**

**COURSE NAME:** Constitutional Law  
**COURSE NO:** LA207  
**TIME ALLOWED:** 3 [Three] Hours  
**READING TIME:** 10 [Ten] Minutes  
**NUMBER OF PAGES:** 4 [Four] including cover page  
**NUMBER OF QUESTIONS ON PAPER:** 3 [Three]  
**NUMBER OF QUESTIONS TO BE ANSWERED:** All  
**MARK ALLOCATED FOR EACH QUESTION:** Part 1: 20  
Part 2: 20  
Part 3: 10  
**TOTAL MARKS:** 50 [Fifty]

---

**Topics to be covered**

The examination will cover all units included in the online materials for this course.

**Materials permitted in exam rooms.**

The exam is Open Book. This means that you can bring in text books, personal notes, course materials, copies of legislation, constitutions and judicial decisions whether annotated or not. You are not permitted to bring into the examination room personal computers or books belonging to the USP library.

This examination is worth 50 marks  
This examination is divided into three 'Parts'  
You MUST complete all three parts  
Part One allows internal choice (follow the instructions carefully).  
Part Two provides no internal choice. The question is compulsory.  
Part Three allows internal choice (follow the instructions carefully).  
Ensure you manage your time so that you at least attempt to answer each part.  
It is recommended that you allocate time to each question according to the marks allocated.

Approved J. O. P. (Nos) 23/05/07

**PART ONE: Short answer questions (20 marks total)**

**Question 1.**

In this part you must answer FOUR QUESTIONS ONLY chosen from the following list, (each question will count for 5 marks)

- a) Briefly describe the difference between the ideological and philosophical positions that underlie republican systems and constitutional monarchies.
- b) How does the status of a written constitution as supreme law affect the role of the superior court under that constitution?
- c) Explain the reason why constitutions should be viewed as political documents as well as legal documents. How does this factor affect approaches to interpretation?
- d) Explain the advantages and disadvantages of requiring referendums for constitutional change in South Pacific island countries?
- e) What is the difference between "strict legalism" and a 'generous' approach to constitutional interpretation? Does a generous approach mean that a wide meaning will always be given to the provisions of a constitution?
- f) Briefly describe the theory of constitutionalism and comment on its significance for Pacific island countries.
- g) Briefly describe the difference between constitutional and non-constitutional judicial review.

**Part 2 Compulsory problem question (20 marks)**

**Question 2**

**Assume that Oceania is a Pacific island nation with a written constitution that is stated to be the supreme law of Oceania.**

**Art 15 of the constitution of Oceania provides:**

***15. Freedom from discriminatory legislation***

*(1) All persons are equal before the law and entitled to equal protection under the law.*

*(2) Except as expressly authorised under the provisions of this Constitution, no law and no executive or administrative action of the State shall, either expressly or in its practical application, subject any person or persons to any disability or restriction or confer on any person or persons any privilege or advantage on grounds only of*

*descent, sex, language, religion, political or other opinion, social origin, place of birth, family status, or any of them.*

#### **4. Interpretation of the Constitution**

*This Constitution shall be interpreted and applied in such a way as to achieve the aims of fair and democratic government, in the light of reason and experience and of Oceanic values.*

Equal Rights for Oceania Society (EROS) is an organisation that campaigns for equal rights for minorities in Oceania and has recently launched a national campaign to eliminate unlawful discrimination at all levels of government.

EROS supports the following applicants to bring constitutional challenges to government legislation and policies as outlined below.

- George and Samuel, (a same sex couple) want to bring a constitutional challenge in the Supreme Court on the basis that s1 of the Marriage Act 2000 is in breach of the constitution because it amounts to discrimination on the basis of a person's sex.

The Marriage Act 2000 of Oceania provides in s1  
*"Marriage" means the union of a man and a woman to the exclusion of all others, voluntarily entered into for life.*

The government of Oceania argues the Act does not breach the constitution because it applies equally to all men and women, but EROS argues that the section breaches the constitution because it would allow some couples to marry and prevent others from marrying, purely on the basis of the sex of the persons involved. George and Samuel point to numerous instances in developed countries where same sex marriages are legally recognised.

- Connie and Carla are a same sex couple who want to adopt a baby, but the policy of the Oceania Adoption Agency (a government agency) provides clearly that preference for adoption will be given to married couples. The agency justifies this policy on the basis that children would benefit from having two parents to care for them. Connie and Carla argue that they can provide two parents and that this policy unlawfully discriminates against them on the basis of their family status, since the Marriage Act currently prevents them from getting married.
- Fred and Rose are a man and a woman who have lived together for a very long time and want to adopt a baby. They are not married and do not wish to get married because they are secular anarchists who believe on political and religious grounds that the state and the church should not be involved in their personal relationship. Fred and Rose want to challenge the policy that gives preference to married couples because they argue that they should not be forced into marriage and that they are being discriminated against on the basis of their political and religious opinions.

- Xi Po and Chuan Lo are recent Chinese immigrants to Oceania. They were married in China, and they want to adopt a child but they have been told by the adoption agency that although they are eligible to adopt (being a married couple), that according to the agency's policies, preference is given to placing babies into families of similar racial and ethnic origin. Waiting lists for adoption are quite long in Oceania and Xi and Chuan are concerned that this policy will mean that they will be forced to wait a very long time until a baby of Chinese origin is available; they say they would be happy to adopt a baby of any ethnic origin. They decide to challenge this policy as unconstitutional discrimination on the basis of their descent and social origin.

Please advise the four applicants above as to:

i) What approach the Supreme Court is likely to adopt in interpreting the constitutional guarantee contained in s 15 of the constitution and

ii) In relation to each individual claim:

Whether you think their particular claim is likely to be successful and why or why not.

In answering this question you should ensure that you base your answer upon legal principles of constitutional interpretation rather than personal opinions. You should refer to relevant case law where possible.

### **Part 3 Essay Question: (10 marks)**

Answer ONE ONLY of the essay topics below

#### **Question 3**

a) In certain circumstances the courts will be prepared to recognise that a regime that has taken power unconstitutionally may ultimately need to be recognised as the effective and legitimate government of the country. What tests do the courts apply to make this determination, and why would the courts ever see the need to recognise an unlawful regime?

OR

b) Some proponents of Westminster constitutional theory argue that Bills of Rights are undemocratic because they constrain the sovereignty of parliament and place more power in the hands of the (unelected) judiciary. Analyse this argument and comment on whether you think a Bill of Rights serves a useful purpose in a parliamentary democracy.

-----end of paper-----