

第一題（本題 50 分）

- (1)請說明何謂「單純事實」(brute fact)，何謂「制度性事實」(institutional fact)？
- (2)憲法保障的基本權，是一種制度嗎？還是「許多種」制度？或者不是制度？
- (3)憲法並未明文提到「遊行」的自由，但我國有「集會遊行法」，請問人民進行「遊行」的活動，是一種「制度性事實」嗎？合法申請獲得許可的遊行，與未申請許可的遊行，有無不同？
- (4)大法官釋字第 445 號曾認為現行集會遊行法的「事前申請許可制」是合憲的。請由哈特(Hart, H.L.A.)的「裁量命題」(discretion thesis)，以及德沃金(Dworkin, Ronald)對其的批判，來檢討討論此一解釋，是大法官在行使裁量(discretion)嗎？還是在解釋「既有」的法律？此一解釋的「見解」正確嗎？並以此一解釋為例，論證說明你認為哈特還是德沃金的學說，比較正確？

釋字 445 號解釋文主要相關內容：「憲法第十四條規定人民有集會之自由，此與憲法第十一條規定之言論、講學、著作及出版之自由，同屬表現自由之範疇，為實施民主政治最重要的基本人權。國家為保障人民之集會自由，應提供適當集會場所，並保護集會、遊行之安全，使其得以順利進行。以法律限制集會、遊行之權利，必須符合明確性原則與憲法第二十三條之規定。集會遊行法第八條第一項規定室外集會、遊行除同條項但書所定各款情形外，應向主管機關申請許可。同法第十一條則規定申請室外集會、遊行除有同條所列情形之一者外，應予許可。其中有關時間、地點及方式等未涉及集會、遊行之目的或內容之事項，為維持社會秩序及增進公共利益所必要，屬立法自由形成之範圍，於表現自由之訴求不致有所侵害，與憲法保障集會自由之意旨尚無抵觸。…」

第二題（本題 50 分）

美國法學家 Drucilla Cornell 在 'Enabling Paradoxes: Gender Difference and Systems Theory' (*New Literary History* 27.2, 1996, pp. 185-197) 一文中探討系統論和解構哲學的關連性，提出如下的看法。請詳細閱讀和參考底下她的論述片段，然後回答以下三個問題：(1)根據 Cornell 的看法，Niklas Luhmann 所主張的系統論的「二階觀察」是否就是一種「解構」？為什麼？(15%) (2)按 Cornell 的分析，「性別」如何構成一個獨立系統？(15%) (3)請從系統論的觀點，說明人們對於「性別系統」的認知，可能對於理解、參與或批判「法律系統」產生什麼影響或衝擊？(20%)

Cornell wrote:

"My argument is that we can best understand the possibility of a cross-fertilization between systems theory and deconstruction by demonstrating how representability and meaning are intertwined so as to allow systems to appear as systems; to show, in other words, how they distinguish themselves or frame themselves so as to be distinct from a frameless, undistinguishable totality that could not be observed. Gender is instead assumed as a totality so that is almost disappears as a system; it becomes difficult for it to be represented as a system and instead is considered, simply, as the way things are. My argument provides a new dimension to the one that Luhmann himself notes in his own systems reading of deconstruction by analyzing more thoroughly the operation of gender as a system; a system that operates to limit the possibility of the representability of woman and, as a result, the status that can be given to "woman" as an observer. Of course, gender is only one example. But I hope to show that by looking more closely at Derrida's deconstruction of the current meaning given to gender hierarchy, we can enrich our understanding of the relationship between deconstruction and systems theory more generally. Luhmann, as I have already indicated, has argued that deconstruction is best understood as second order observing."