

壹、申論題 (70%)

一、賴德布魯赫(Radbruch, Gustav)曾經在其所著《法哲學》中，針對「規範」(norm)與「指令」(imperative)，提出下列的陳述，

"It may best be illustrated by any sentence combining a norm with an imperative, when normative contents appear in imperative form. 'Do your duty!' Let us separate the meaning of that sentence from what carries it, the declared from the declaration. We then get, on the one hand, an existential structure, definite in time and space, brought about and effective by way of causation, a sequence of tones which sounds here and now, originating in a certain psychological process in the speaker and producing another such process in the listener. On the other hand, we get a nontemporal, nonspatial, noncausal content of significance, a moral necessity which is valid independently of the place, the time, and the effectiveness of that declaration."

[From Gustav Radbruch, *Legal Philosophy*, in Lask, E., Radbruch, G., & Dabin, J. (1950). *The Legal Philosophies of Lask, Radbruch, and Dabin*. Translated by Kurt Wilk, Harvard University Press, 43-224, 83.]

請回答下列問題：

(一)請以這段陳述為基礎，說明賴德布魯赫「法規範論」(theory of legal norm)的要旨。(本小題 20 分)

(二)請在賴德布魯赫的法規範論基礎上，討論其對「法學知識論」(epistemology of legal science or legal studies)的意義。(本小題 15 分)

二、「法律與道德之間是否有必然關連？」這個問題，一直是法理學家們爭論的核心議題，尤其是有關「法律的有效性」(the validity of law)是否必然地取決於道德，更是最主要的爭辯焦點。請回答下列問題：

(一) 請就哈特(H.L.A. Hart)與凱爾森(Hans Kelsen)對「法律與道德之關係」以及「法律的有效性」的主張，詳述並比較兩人主張的異同。(本小題 17 分)

(二) 請就富勒(Lon L. Fuller)與德沃金(Ronald Dworkin)對「法律與道德之關係」以及「法律的有效性」的主張，詳述並比較兩人主張的異同。(本小題 18 分)

貳、名詞解釋 (30%)

一、哈伯瑪斯(Jürgen Habermas)之「法論述理論」(the Discourse Theory of Law) (本題 10 分)

二、行動中的法律(law in action) (本題 10 分)

三、能力取徑(capacity approach)的正義論(本題 10 分)

試題隨卷繳回