國立清華大學命題紙

99學年度 科技法律研究所甲、乙組 碩士班入學考試

科目 英文(含文獻評析) 科目代碼 4202; 4302 共 5 頁，第 1 頁 *請在【答案卷卡】作答

一、英翻中：(10%)

(1) *sui generis*

(2) fauna & flora

(3) savoured of champerty

(4) secularization

(5) authorship

二、中翻英：(10%)

(1) 多元文化主義

(2) 基本法

(3) 公共領域

(4) 地理標示

(5) 誹謗

三、請將下列劃線句子翻譯為中文：(15%)

The Korean adoption program dates back to the early 1950s when US servicemen were fathering children with Korean women outside of marriage. Illegitimate, mixed race children, to use the old-fashioned terms, had little place in traditional patriarchal Korean society. These children were severely scorned and abused. Henry and Bertha Holt, founders of what is now known as Holt International, began their international adoption program in Korea with the adoption of eight Amerasian children. Since that time, it's estimated that more than 150,000 children have been adopted from Korea to the US, Australia, Canada, and much of Europe.

Korea, like many other countries, is highly ambivalent by its successful international adoption program, and is increasingly stepping up efforts to encourage more domestic adoption. Through a series of yearly quotas, it is hoped that Korea will be able to reduce international adoption entirely.

四、請閱讀以下文章並以中文回答問題：(30%)

One of the most sacrosanct principles of medical practice in the United States is that physicians have a right to choose their own patients as long as the patient is not in a medical emergency. However, this sort of physician autonomy is not without certain limits—most notably the restrictions found in various federal and state civil rights statutes. No physician or hospital receiving government funding, including Medicare

and Medicaid, may discriminate against potential patients on the basis of race, color, religion, or national origin, and many states have expanded these protections to cover gender and sexual orientation. What remains unclear is whether physicians with bona fide religious objections to treating certain patients are exempt from these proscriptions. A California case, currently on appeal before a state court, may soon decide the matter.

The plaintiff in the case, Guadalupe T. Benitez, is a thirty-three-year-old medical assistant currently living with a same-sex partner in suburban San Diego. She received infertility treatments at the North Coast Women's Care Medical Group starting in August 1999 and running until July 2000, when her physicians, Christine Brody and Douglas Fenton, refused to continue treating her because of her sexual orientation. According to Benitez, Dr. Brody told her that she had "religious-based objections to treating homosexuals to help them conceive children by artificial insemination," while Dr. Fenton refused to authorize a refill of her prescription for the fertility drug Clomid on the same grounds. In response, Benitez filed suit under California's Unruh Civil Rights Act, charging illegal discrimination on the basis of sexual orientation. The case gained widespread attention when the California Medical Association, historically friendly to gay rights, backed the two Christian physicians in their claim that their freedom of religion under the federal and state constitutions trumped the requirements of the state statute. It is the CMA's position that such claims should be addressed on a case-by-case basis, rather than by a blanket rule.

The controversy in Benitez v. NCWC stands at the nexus of two competing approaches to the issue of "conscience" exemptions. On the one hand, most states have statutes that shield medical students and physicians from having to perform procedures, such as abortion and sterilization, to which they object on religious or moral grounds. Several public policy reasons are advanced for these "conscience" clauses: First, highly qualified physicians, forced to compromise their sincerely held religious beliefs, might leave the field of medicine entirely, and similarly, some prospective physicians might choose to pursue other career paths instead. Second, physicians who object to a particular procedure are not in a position to provide the level of emotional and moral support that their patients have a right to expect. In contrast, our society seems highly unwilling to tolerate physicians who refuse or limit service to an entire class of patients, even when they act out of sincere religious beliefs. It is highly unlikely that any court would permit an Orthodox Jewish physician to provide separate waiting rooms for men and women, or allow a Muslim physician to require all female patients to wear head coverings. The Benitez case, however, presents an instance where both an objection to a specific procedure and to a general class of patients overlap. The physicians at NCWC are unwilling to perform a specific procedure on a general class of patients.

Two further concerns in many "conscience" cases are the impact of an exemption on the overall availability of the procedure and the social stigma and discomfort associated with being refused care. What makes the Benitez case highly unusual is that neither of these issues alone appears to justify the denial of a conscience exemption to the health care providers. There is no evidence that discrimination against gays and lesbians at fertility clinics is widespread—this appears to be the only such instance to have arisen in California, and in fact, Benitez quickly found another physician willing to perform the procedure and thereafter gave birth to a son.

Nor does it appear likely that prospective patients will suffer a great deal of embarrassment by allowing a few physicians to opt out. This contrasts significantly with the case of a pharmacist who refuses to fill a birth control prescription. Filling a prescription is an incidental matter to which most women give minimal thought—and which they may need to repeat often and quickly in a variety of geographic locales. Not knowing whether a particular pharmacy fills such prescriptions is the sort of disruptive uncertainty liable to inconvenience many women and even to deter some from seeking contraceptives. In contrast, a patient pursuing fertility treatments might well do considerably more research when choosing a provider. Here, unlike in the pharmacy setting, it is hard to imagine prospective patients walking in off the street for care. If any physicians opting out of performing certain procedures on certain patients publicize their decisions adequately, it appears unlikely that prospective patients will be highly inconvenienced. They will simply go elsewhere.

Finally, it is worth considering whether doctors should be held to the same standards as other providers of public services and public accommodations. The nature of the doctor-patient relationship is fundamentally more intimate than the sorts of interactions that occur between landlords and tenants or innkeepers and guests. (The question does arise as to whether IVF offered to a fertile patient is "health care" or merely a straightforward business deal, but that intriguing question lies beyond the scope of this essay.) One might argue that, as in this case, having physicians with strongly held biases express their views openly would actually do a service to prospective patients—presumably giving them a chance to avoid such providers. In contrast, few patients would want the care of a doctor who greeted them with smiles but secret disapproval. The situation here is further complicated because physicians engaged in fertility treatments often make personal judgments about who will be a fit parent. They often feel a responsibility to the child they are bringing into the world, as well as the parent. No other situation in the business world seems analogous.

That is not to say that Ms. Benitez shouldn't prevail. Rather, it is to argue that if she should prevail, she should do so because we as a society refuse to tolerate medical discrimination against gays and lesbians

in all circumstances as a matter of principle—not because allowing a religious exception to the civil rights statutes will have a significant impact on the health care that they receive. This case pits two incompatible forms of "liberty" against each other. The California appellate court would do well to frame its opinion in terms of such principles, rather than getting bogged down in extraneous questions of health care access.

(1) 請依據本文描述，說明 Benitez v. NCWC 案子的事實內容，不含分析。（15%）
(2) 對於「醫師是否有權以宗教、良心的理由拒絕為同性戀病患做不孕治療」之議題，請依據本文詳列各種考量因素。(15%)

五、請根據下面所摘錄的判決內容以中文回答問題：(35%)

In 2000, the city of New London approved a development plan that, in the words of the Supreme Court of Connecticut, was "projected to create in excess of 1,000 jobs, to increase tax and other revenues, and to revitalize an economically distressed city, including its downtown and waterfront areas." In assembling the land needed for this project, the city's development agent has purchased property from willing sellers and proposes to use the power of eminent domain to acquire the remainder of the property from unwilling owners in exchange for just compensation. The question presented is whether the city's proposed disposition of this property qualifies as a "public use" within the meaning of the Takings Clause of the Fifth Amendment to the Constitution.

Two polar propositions are perfectly clear. On the one hand, it has long been accepted that the sovereign may not take the property of *A* for the sole purpose of transferring it to another private party *B*, even though *A* is paid just compensation. On the other hand, it is equally clear that a State may transfer property from one private party to another if future "use by the public" is the purpose of the taking; the condemnation of land for a railroad with common-carrier duties is a familiar example. Neither of these propositions, however, determines the disposition of this case.

As for the first proposition, the City would no doubt be forbidden from taking petitioners' land for the purpose of conferring a private benefit on a particular private party. Nor would the City be allowed to take property under the mere pretext of a public purpose, when its actual purpose was to bestow a private benefit. The takings before us, however, would be executed pursuant to a "carefully considered" development plan. The trial judge and all the members of the Supreme Court of Connecticut agreed that there was no evidence of an illegitimate purpose in this case. Therefore, as was true of the statute challenged in *Midkiff*, 467 U.S., at 245, 104 S.Ct. 2321, the City's development plan was not adopted "to benefit a particular class of identifiable individuals."

On the other hand, this is not a case in which the City is planning to open the condemned land-at least not in its entirety-to use by the general public. Nor will the private lessees of the land in any sense be required to operate like common carriers, making their services available to all comers. But although such a projected use would be sufficient to satisfy the public use requirement, this "Court long ago rejected any literal requirement that condemned property be put into use for the general public." Indeed, while many state courts in the mid-19th century endorsed "use by the public" as the proper definition of public use, that narrow view steadily eroded over time. Not only was the "use by the public" test difficult to administer (*e.g.*, what proportion of the public need have access to the property? at what price?), but it proved to be impractical given the diverse and always evolving needs of society. Accordingly, when this Court began applying the Fifth Amendment to the States at the close of the 19th century, it embraced the broader and more natural interpretation of public use as "public purpose." Thus, in a case upholding a mining company's use of an aerial bucket line to transport ore over property it did not own, Justice Holmes' opinion for the Court stressed "the inadequacy of use by the general public as a universal test." We have repeatedly and consistently rejected that narrow test ever since.

請問：

(1) 法院在上述判決中怎麼解釋「公共使用」(public use) 一詞？什麼樣的情形符合「公共使用」，可以作為發動徵收之目的，而什麼樣的情形不符合「公共使用」，政府不可以為了此種目的而進行徵收？(20%)

(2) 法院為什麼認為「公共使用」一詞不能解釋為等同於「由公眾所使用」(use by the public)？(15%)