注意：考試開始鈴響前，不得翻閱試題，並不得書寫、畫記、作答。

國立清華大學 109 學年度碩士班考試入學試題

系所班組別：科技法律研究所
甲組(科技專業組)

科目代碼：4602

考試科目：文獻評析(含中文文獻及英文文獻)

一作答注意事項一

1. 請核對答案卷（卡）上之准考證號、科目名稱是否正確。
2. 作答中如有發現試題印刷不清，得舉手請監試人員處理，但不得要求解釋題意。
3. 考生限在答案卷上標記「由此開始作答」區內作答，且不可書寫姓名、准考證號或與作答無關之其他文字或符號。
4. 答案卷用盡不得要求加頁。
5. 答案卷可用任何書寫工具作答，惟為方便閱卷辨識，請儘量使用藍色或黑色書寫；答案卡限用 2B 鉛筆畫記；如畫記不清（含未依範例畫記）致光學閱讀機無法辨識答案者，其後果一律由考生自行負責。
6. 其他應考規則、違規處理及扣分方式，請自行詳閱准考證明上「**國立清華大學試場規則及違規處理辦法**」，無法因本試題封面作答注意事項中未列明而稱未知悉。

國立清華大學 109 學年度碩士班考試入學試題

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一、請閱讀以下兩則新聞節錄，以中文回答問題 (20%)

(一) **The WIRED Guide to Net Neutrality**

WIRED

Klint Finley 05.09.2018 07:00 AM

Net neutrality is the idea that internet service providers like Comcast and Verizon should treat all content flowing through their cables and cell towers equally. That means they shouldn't be able to slide some data into "f ast lanes" while blocking or otherwise discriminating against other material. In other words, these companies shouldn't be able to block you from accessing a service like Skype, or slow down Netflix or Hulu, in order to encourage you to keep your cable package or buy a different video-streaming service.

The Federal Communications Commission spent years, under both the Bush and Obama administrations, trying to enforce net neutrality protections. After a series of legal defeats at the hands of broadband providers, the FCC passed a sweeping net neutrality order in 2015. But in December 2017, the now Republican-controlled FCC voted to jettison that order, freeing broadband providers to block or throttle content as they see fit unless Congress or the courts block the agency's decision.

Net neutrality advocates have long argued that keeping the internet an open playing field is crucial for innovation. If broadband providers pick favorites online, new companies and technologies might never have the chance to grow. For example, had internet providers blocked or severely limited video streaming in the mid-2000s, we might not have Netflix or YouTube today. Other advocates highlight the importance of net neutrality to free expression: a handful of large telecommunications companies dominate the broadband market, which puts an enormous amount of power into their hands to suppress particular views or limit online speech to those who can pay the most.

Most large broadband providers promised not to block or throttle content ahead of the ruling, and the FCC argues that traditional antitrust laws will stop providers from hobbling their competitors. But net neutrality advocates worry that we'll soon see fast lanes appearing on the internet. A broadband provider might, for example, allow some companies to pay for priority treatment on broadband networks. The fear is that, over time, companies and organizations that either can't afford priority treatment, or simply aren't offered access to it,

will fall by the wayside.

(二) **The Year We Fought to Get Net Neutrality Back: 2019 Year in Review**

Electronic Frontier Foundation

https://www.eff.org/deeplinks/2019/12/year-we-fought-get-net-neutrality-back-2019-year-review

By Katharine Trendacosta and Ernesto Falcon

December 21, 2019

Ever since the FCC repealed net neutrality protections in 2017, we've been fighting to return as many protections to as many Americans as possible. In 2019, the battles in the courts and Congress both kept those committed to a free and open Internet very busy.

Mozilla v. FCC Takes Center Stage

The court case over the FCC's 2017 repeal of net neutrality protections bookended 2019. At the very beginning of the year, the Court of Appeals for the D.C. Circuit heard the case of Mozilla v. FCC, in which civil society, local governments, and Internet companies of all sizes took on the FCC and the large ISPs. The former was arguing for protections based on how the Internet really works, the dangers posed to the public without net neutrality, and on behalf of the vast majority of Americans who supported the 2015 Open Internet Order. The latter was arguing in favor of one of the most unpopular decisions in Internet history and for the enrichment of giant companies at the expense of a free and open Internet.

The oral arguments lasted for hours, with the lawyer representing public interest groups pointing out how the FCC was flatly incorrect about how the Internet works. The technical distinctions relied on by the FCC were wrong at best and intentionally dishonest at worst.

Mozilla's lawyer, Pentelis Michalopoulos, argued that the FCC and ISP argument that net neutrality was protected by the many internet service competitors made no sense. The idea is that companies will act in accordance with net neutrality principals because if they didn't, people would switch to a provider who does. Except, of course, most Americans have little to no choice in their broadband provider. And, as Michalopoulus argued, history has shown that ISPs have both the incentive and ability to block, throttle, and engage in other net neutrality violations.

22 states and the District of Columbia also joined in suing the FCC, because the so-called restoring Internet Freedom Order also tried to ban states from protecting their residents by enacting their own laws. As the states' lawyer and many others have been saying for quite a while: the FCC can't have its cake and eat it too on this. It can't abdicate its responsibility and then try to dictate that no one else steps into the vacuum it created.

The effects of Verizon throttling Santa Clara County's firefighters during a state of emergency also made themselves heard. It threw into stark relief how public safety is tied to net neutrality protections. While the FCC argued that there was no evidence of concrete harms, that argument was clearly ridiculous as it is premised on the idea that the FCC should only act once someone has already died not to prevent the shown possibility of death.

Eight months after oral arguments concluded, the court finally delivered its decision. The decision was ultimately mixed. While the majority of the FCC's order was upheld, the court instructed the agency to hold hearings to address three areas it concluded the FCC had failed to adequately consider: public safety, pole attachment rights, and the subsidy program Lifeline.

In good news for advocates of a free and open Internet, the court also unequivocally rejected the FCC's attempt to preempt—ban—state net neutrality laws. The court didn't mince words on preemption, stating that the "Commission ignored binding precedent by failing to ground its sweeping Preemption Directive—which goes far beyond conflict preemption—in a lawful source of statutory authority. That failure is fatal."

This means that states can pass their own net neutrality laws without the 2017 FCC order standing in their way. While there might be other challenges, they'd be case-by-case challenges and not simply enforcement of a ban. This also means that the FCC's challenge to California's sweeping and comprehensive net neutrality law is much weaker than it was before this decision because ISPs and the Department of Justice can no longer rely on the FCC's unlawful order.

The House Passes the Save the Internet Act, Leaving Net Neutrality in the Hands of the Senate

During the rest of the year, the Save the Internet Act was making its way through Congress.

The Save the Internet Act would make the protections of the 2015 Open Internet Order permanent, giving us the real net neutrality we deserve. In April, the Save the Internet Act passed the House of Representatives by a vote of 232-190, leaving it up to the Senate to follow suit. But, despite net neutrality's popularity, the Senate hasn't taken up the bill yet. You can still tell your Senators to vote for the Save the Internet Act.

In the two years since the FCC repealed the 2015 Open Internet Order, the Senate voted to overturn that vote, the House has voted for a bill that would make those protections permanent, and state legislatures and governors have passed laws and signed executive orders with net neutrality protections. All of this happened because super majorities of the public have demanded that their elected officials represent their interests and protect their Internet access. With each win, we have chipped away at the behind the scenes industry lobby led by a small number of large ISPs who wish the public would just go away and let them rent seek over an essential service that many of them hold a monopoly on. But we will never give up and we will continue to fight for your right to a free and open Internet in the courts, in Congress, and in the states.

問題：

1. "Net Neutrality" 的意義是什麼？ 特定業者或政府對 "Net Neutrality" 的態度如何？為何會有如此的立場？(10%)
2. 缺少 "Net Neutrality" 的網際網路，將對一般民眾和社會造成什麼影響？美國與台灣的狀況會有不同嗎？有什麼不同？(10%)

二、請閱讀以下文章，並以英文回答問題：(20%)

Digital Accountability Symposium: Social Media Accountability or Privacy? A Socio-Political Perspective from India

By Shakuntala Banaji (Opinio Juris, Dec. 18, 2019)

In late 2018, WhatsApp awarded us one of 20 misinformation and social science research awards for an independent study of the different types of misinformation leading to mob lynching in India, the users of WhatsApp who pass on or flag disinformation and misinformation, and the ways in which citizens and experts imagine solutions to this problem. We have summarised our research elsewhere. In this post, we will focus specifically on the entanglement between issues of algorithmic and platform accountability, censorship, and privacy in the context of India. Currently, some of these issues are being heard in the

Supreme Court of India, with important implications for users, industry and the role of misinformation-linked violence and hate speech in the future of democracy.

Social media accountability, along with privacy and free speech/censorship issues, have to be seen within broader socio-political contexts. Indian society suffers deep social fractures related to divisions along caste, religion, gender and class lines. After the post-independence decades when a broad socialist vision guided government planning and anti-discrimination laws began to threaten centuries of male and Brahmin privilege, a political backlash has ensured that discrimination and inequality are not only practised but upheld through various wings of the state. The privatisation of core public sector units and the gradual shift from an agricultural to a service-based economy since the late-1980s exacerbated pre-existing poverty, creating a slow-burn anger across swathes of the public different to the anger felt by those who had seen their privileges potentially eroded through pro-poor and caste-reparative policies. The far-right Hindu majoritarian Bharatiya Janata Party (BJP), winner of the 2014 and 2019 elections, has harnessed, manipulated and mobilised both types of anger against vulnerable citizens – Dalit Bahujan (lower caste groups), Adivasis (indigenous groups), women, Muslims, Christians, other ethnic and linguistic minorities, and LGBT+ groups – leading to a spate of atrocities so deep and lasting that it can only be called a 'culture'.

At the same time, since the early 2000s Internet connectivity has increased due to a coincidence of various factors, including but not limited to: telecom service providers competing and driving down tariffs; spectrum being awarded at a fixed, low cost; and a drop in the price of mobile phones. India has emerged as one of the largest markets for Facebook, Google, WhatsApp, and other social media applications. Even though internet penetration in India is a relatively small percentage of its population, India still represents a 400 million user base for WhatsApp and promises to grow even higher.

In this context, social media platforms and cross platform applications such as Facebook, Twitter, and TikTok are heavily used by far-right political trolls and millions of individuals who systematically engage in hate speech and disinformation. The tactics of these far-right trolls include: targeting and abusing specific citizens who are influential on social media – including pro-democratic or anti-misogyny activists, student leaders, journalists, academics, film personalities, and fact-checkers (especially through threats of sexual violence against women); the manipulation of trends and the deliberate misuse of hashtags; and mass

complaints against rights-based and anti-discrimination social media users to get their posts taken down or accounts suspended.

This systematic, politically motivated abuse of social media takes place very openly. Nevertheless, neither social media companies nor government agencies have acted against the worst offenders (indeed, many of the offenders are close to the ruling party and even followed by ministers or the prime minister himself). Since little to no action is taken by social media companies even when the identities of the disseminators of hate speech and disinformation are clearly known, we very much doubt that removing encryption from some cross-platform applications (such as WhatsApp) or diluting user privacy in others would lead to positive changes. On the contrary, removing encryption would serve the interests of anti-democratic forces and adversely affect the valuable work of human rights activists and investigative journalists, whilst also invading ordinary users' privacy and affecting numerous businesses that depend on encryption for security and privacy for their clients/users.

However, we also argue that social media companies must take stronger measures against hate speech and disinformation since their technologies play a direct role in the loss of hundreds of lives from vulnerable groups and the degradation of the quality of life of millions of women. Although some of these companies have been registering tremendous profits they have given little back to the citizens who have contributed to their growth. In the same vein in which these companies have committed to actively engage in fighting child pornography, they need to commit to actively engage in fighting hate speech, incitement and violent misinformation against women and minoritized citizens.

Possible steps could include specific changes to the applications (e.g. restricting sharing to one group), cross-stakeholder collaboration (e.g. banning unauthorised versions of applications), making it easier to report hate speech, and taking more proactive punitive action against those found guilty of hate speech. Technology companies must invest in long-term strategies in partnership with grassroots civil society organisations that are committed to constitutional and human rights values, including investment in fact-checking at the local level through diverse dissemination channels, investment in critical digital media literacy for both children and adults, and creating human and social infrastructures in countries that have a large user base – for example, editorial teams of qualified and well-paid moderators, crisis managers and personnel to liaise with both vulnerable user groups as well

as local law enforcement agencies.

Too often, the debate around privacy and security vs. accountability is framed as a binary choice. It is entirely possible for governments and social media companies with the political will to do so to take a wide range of steps to effectively challenge the spread of violent disinformation and hate speech without having to resort to the removal of encryption from their services.

Questions:

1. According to this article, why does the author discuss the issues of social media accountability and privacy within Indian broader socio-political contexts? (5%)
2. What is the main argument of the author? Do you agree with the author's opinion and why? (15%)

三、請閱讀以下新聞，以中文回答問題 (30%)

微軟告鴻海 9 頁訴狀暗藏絕招
作者：陳良榕,黃亦筠
2019/03/27 天下雜誌 669 期

三月八日，美國微軟公司具狀向美國加州北區聯邦地方法院起訴，控告鴻海集團違反雙方在二○一三年所簽訂的保密專利授權協議(Confidential Patent License Agreement)。鴻海董事長郭台銘因此在三月十二日上午召開臨時記者會，痛訴此一訴訟的本質是微軟以霸權心態，向手機供應鏈施壓。

他表示，主要是 Android 侵犯到微軟專利權，是美國和美國公司的戰爭，是微軟和 Google 的戰爭。

「你微軟和 Google 去告，你不敢跟它收費，反過來跟品牌廠收費、跟代工廠收費，這是微軟的霸權心態，過去獨霸 PC 時代的心態，」他怒批。

頭戴國旗棒球帽，穿著板橋慈惠宮贈與的紅色背心，郭台銘帶著怒意，在兩個小時記者會滔滔不絕，從亡妻一路講到中美貿易戰，中間甚至拿出女兒的作業紙。

爭議 1：告的不是侵權，是違約

一位了解內情的業內人士認為，鴻海記者會根本在「模糊焦點」，「(從訴狀看）從頭到尾，(微軟）不是說他侵權，是他沒有執行合約，只是單純要執行一個商業合約，像是租車、租房子一樣。」

一位在電子業工作多年的科技律師，看完這份九頁的訴狀之後表示，微軟訴狀的重點，在於說服法官，鴻海是「惡意違約」。

訴狀指出，從一三年四月一日，微軟與鴻海簽下保密專利授權協議，該協議允許鴻海在一定期限之內，在「協議涵蓋的產品」使用微軟的專利；而鴻海也同意，每半年繳交權利金報告（Royalty Reports），包含產品數量，以便計算權利金總數。如果有爭議，則由一個獨立公正的會計事務所稽核。

根據微軟訴狀，鴻海提供給微軟的二〇一四年度權利金報告並不正確。而且，此後從一五年起，就不曾依約於每年一月三十日及七月三十日向微軟提出半年度報告。了解內情的業界人士表示，簽約後，鴻海只有第一年乖乖繳錢。

即便查核會計師多次以書信、電話要求鴻海提供查核所需的簿冊、報告與相關資訊，以及可以進入鴻海營運場所進行實地調查的日期，鴻海卻從未提供、甚至拒絕配合。

「合約有個爭議仲裁的條款，他也不理，」業界人士表示，「微軟能做的都做了，最後只能去法院。」

微軟告錯對象了嗎？

郭台銘一直強調一點，微軟告錯對象。

首先，他認為，微軟主要告的是使用 Android 系統的手機。因此，真正的被告，該是鴻海子公司、香港上市的富智康。

因為小米等Android系統的手機代工由富智康負責，鴻海主要生產採用iOS的蘋果手機。因此，基本上 Android 跟鴻海沒有直接關係。

富智康董事會代理主席池育陽也幫腔說，這場起訴對鴻海來說，「是遭到池魚之殃。」

然而，熟知內情人士指出，這個授權協議涵蓋範圍不只 Android，「現在的電子裝置或多或少會使用我們專利，不是微軟的、就是 Android、Chrome（用於筆電、智慧電視），」除了蘋果的 iOS 裝置之外。

更重要的是，該人士表示，這個專利授權合約當初微軟是跟鴻海簽的，「當然找簽約的當事人啊。」

接下來，鴻海集團還有另一種說法。

爭議2：代工廠有付權利金的責任嗎？

針對微軟訴狀，池育陽解釋，第一，智慧財產權過去是品牌廠負責，不關代工廠的事。他解釋，一般代工廠提供工程製造服務給品牌廠商，都有清楚定義產品智慧財產權和設計權，「有任何智慧財產的主張，依合約來說都是品牌廠商來負責。」

第二，品牌廠要求不要付錢給微軟。

「我們這幾年做的 Android 手機，全球前五大品牌佔八四%，我們（品牌）客戶都是有

頭有臉，」池育陽強調。

他表示，微軟第一次有這個主張是在二○一一年，之後接續和手機廠商有過談判，協商至今八年，富智康都是第一時間和品牌廠聯繫。

「關於這件事情，我們所有客戶都正式要求我們，不能代替他們協商和支付，也不能透露產品相關訊息給微軟，」池育陽強調，他甚至拿出一名客戶的聲明函，對現場媒體念出。

「過去從二○一一年都是這樣的情形，所以昨天（收到那份訴狀）對我們是很大的surprise！」池育陽表示。

微軟訴狀載明，除了鴻海，還有數十家公司，包括廣達、和碩、仁寶等台灣代工廠也簽了一樣的授權協議。

「難道其他人沒有（一樣的）顧慮嗎？」業界人士反問。他表示，微軟與簽約廠商「雙方都同意，會用到微軟專利的產品，把數量報出來就好了，不會特別要求把品牌廠商的名字放進來。」

他解釋，合約內還有一個「排除條款」，如果品牌客戶與微軟已另有協議，已經交了授權金就可以排除，也就是所謂的「unlicensed device」。但一般狀況，代工廠會先付授權金，再看之後怎樣處理，不一定每次都可以轉嫁回品牌廠。

爭議3：第8頁「查核條款」成為殺招

看過微軟訴狀的科技律師，都不約而同指出，這份訴狀最關鍵的部份，其實藏在第八頁的最後一段。

微軟訴狀清楚寫著「因為鴻海延誤、而且拒絕配合微軟之前的稽核與查詢要求」，因此請求法院命令鴻海必須在「法院監管的證據開示程序」(court-supervised discovery)中，直接揭露相關簿冊、文件。

現居矽谷的前聯發科法務長許維夫解釋，實際運作起來，會是在法官監督下，派遣公正第三人，一般都是會計師，到鴻海去查所有可能的證據，包括帳本跟所有出貨紀錄。調查範圍包山包海，等於把鴻海整個翻一遍。

「一般訴訟不會做到這個程度，」許維夫說。

「我覺得微軟的律師非常有創意，」益思科技法律事務所合夥律師劉承慶笑著說。

微軟緊抓著授權合約裡頭常被忽略的「查核條款」大做文章，告訴法官「鴻海不交報告、不讓我查」。

這個訴訟策略的高明之處在哪裡？劉承慶解釋，一般專利侵權訴訟勞民傷財，「但這回微軟他完全避開這塊，抓一個查核條款，告你違約，而且很容易舉證。」

微軟可能成功進行人格謀殺

劉承慶刊登在外貿協會發行的《經貿透視》雙週刊（三月底出刊）的評論〈不再形同具文的契約查核條款——從微軟告鴻海案談起〉一文寫著：

「如果.....對微軟所提出的指控，包括多年來不按時提交權利金報告（多次違反簿冊提供義務），以及在長達近兩年的期間內阻撓、拒絕查核會計師進行實地調查（長期違反查核配合義務），鴻海均無法提出合理解釋，那麼微軟很可能就已經成功地對於鴻海進行了一次完美的『人格謀殺』。」

一旦美國法官傾向微軟，同意進行極嚴格的「法院監管的證據開示程序」，這幾個字，可能成為未來鴻海的「緊箍咒」。

因為，一旦法院核可微軟要求，日後只要鴻海在法院監督下提出的資料，如有不實、隱瞞、甚至拖延時間，都算是「妨礙司法公正」，「在美國是很嚴重的，」劉承慶說。

「等於要鴻海脫光光給微軟看。這反而是（這個訴訟）最關鍵的，」許維夫說。

真到這地步，鴻海該付給微軟的權利金，也將在法院命令下，連本帶利地付出去，很難拖欠。

問題：

1. 就本案件而言，「侵權」和「違約」的差異的標的是指什麼？(10%)
2. 為什麼會有「告錯人」的狀況？您認為哪間公司才應該是正確的被告？理由為何？(10%)
3. 「查核條款」在法律上的意義是什麼，違反的效果是？「查核條款」與新聞中提到美國法的「法院監管的證據開示程序」有什麼關聯，為什麼會很嚴重？請述明理由。(10%)

四、請閱讀以下敘述，以中文回答問題 (30%)

為杜絕與防治傳染病，行政機關可依相關法令採取不同措施阻絕傳染病的擴散。然眾多措施中，因「強制隔離」對人身自由可能產生極大且不可逆的限制與傷害，故引發諸多爭論。其中，強制隔離是否適用法官保留原則，是司法院大法官釋字第690號與部分大法官的爭論焦點。請你讀完以下釋字解釋理由書與不同意見書的摘錄後，回答相關問題。

按：法官保留原則是指應由法官審查與准駁對人身自由造成影響或侵害的強制處分。

司法院大法官【釋字第690號】解釋理由書摘錄：

「人民身體之自由應予保障，為憲法第八條所明定。惟國家以法律明確規定限制人民之身體自由者，倘與憲法第二十三條之比例原則無違，並踐行必要之司法程序或其他正當法律程序，即難謂其牴觸憲法第八條之規定（本院釋字第六0二號及第六七七號解釋參照）。....

鑒於各種傳染病之發生、傳染及蔓延，危害人民生命與身體之健康，政府自應採行適當之防治措施以為因應。為杜絕傳染病之傳染及蔓延，九十一年一月三十日修正公布之傳染病防治法（下稱舊傳染病防治法）第三十七條第一項規定：「曾與傳染病病人接觸或疑似被傳染者，得由該管主管機關予以留驗；必要時，得令遷入指定之處所檢查，或施行預防接種等必要之處置。」（下稱系爭規定）。所謂必要之處置，係指為控制各種不同法定、指定傳染病之傳染及蔓延所施行之必要防疫處置，而不以系爭規定所例示之留驗、令遷入指定之處所檢查及施行預防接種為限。九十二年五月二日制定公布溯自同年三月一日施行之嚴重急性呼吸道症候群防治及紓困暫行條例（已於九十三年十二月三十一日廢止）第五條第一項明定：「各級政府機關為防疫工作之迅速有效執行，得指定特定防疫區域實施管制；必要時，並得強制隔離、撤離居民或實施各項防疫措施。」可認立法者有意以此措施性法律溯及補強舊傳染病防治法，明認強制隔離屬系爭規定之必要處置。.....而強制隔離使人民在一定期間內負有停留於一定處所，不與外人接觸之義務，否則應受一定之制裁，已屬人身自由之剝奪。

法律明確性之要求，非僅指法律文義具體詳盡之體例而言，立法者於立法定制時，仍得衡酌法律所規範生活事實之複雜性及適用於個案之妥當性，從立法上適當運用不確定法律概念而為相應之規定。如法律規定之意義，自立法目的與法體系整體關聯性觀點非難以理解，且個案事實是否屬於法律所欲規範之對象，為一般受規範者所得預見，並可經由司法審查加以認定及判斷者，即無違反法律明確性原則（本院釋字第四三二號、第五二一號、第五九四號及第六０二號解釋參照）。又依憲法第八條之規定，國家公權力對人民身體自由之限制，若涉及嚴重拘束人民身體自由而與刑罰無異之法律規定，其法定要件是否符合法律明確性原則，固應受較為嚴格之審查（本院釋字第六三六號解釋參照），惟強制隔離雖拘束人身自由於一定處所，因其乃以保護人民生命安全與身體健康為目的，與刑事處罰之本質不同，且事涉醫療及公共衛生專業，其明確性之審查自得採一般之標準，毋須如刑事處罰拘束人民身體自由之採嚴格審查標準。又系爭規定雖未將強制隔離予以明文例示，惟系爭規定已有令遷入指定處所之明文，則將曾與傳染病病人接觸或疑似被傳染者令遷入一定處所，使其不能與外界接觸之強制隔離，係屬系爭規定之必要處置，自法條文義及立法目的，並非受法律規範之人民所不能預見，亦可憑社會通念加以判斷，並得經司法審查予以確認，與法律明確性原則尚無違背。

.....

人身自由為重要之基本人權，應受充分之保護，對人身自由之剝奪或限制尤應遵循正當法律程序之意旨，惟相關程序規範是否正當、合理，除考量憲法有無特別規定及所涉基本權之種類外，尚須視案件涉及之事物領域、侵害基本權之強度與範圍、所欲追求之公共利益、有無替代程序及各項可能程序之成本等因素，綜合判斷而為認定

（本院釋字第六三九號解釋參照）。強制隔離既以保障人民生命與身體健康為目的，而與刑事處罰之本質不同，已如前述，故其所須踐行之正當法律程序，自毋須與刑事處罰之限制被告人身自由所須踐行之程序相類。強制隔離與其他防疫之決定，應由專業主管機關基於醫療與公共衛生之知識，通過嚴謹之組織程序，衡酌傳染病疫情之嚴重性及其他各種情況，作成客觀之決定，以確保其正確性，與必須由中立、公正第三者之法院就是否拘禁加以審問作成決定之情形有別。且疫情之防治貴在迅速採行正確之措施，方得以克竟其功。傳染病防治之中央主管機關須訂定傳染病防治政策及計畫，包括預防接種、傳染病預防、疫情監視、通報、調查、檢驗、處理及訓練等措施；地方主管機關須依據中央主管機關訂定之傳染病防治政策、計畫及轄區特殊防疫需要，擬訂執行計畫，並付諸實施（舊傳染病防治法第四條第一項第一款第一目、第二款第一目規定參照）。是對傳染病相關防治措施，自以主管機關較為專業，由專業之主管機關衡酌傳染病疫情之嚴重性及其他各種情況，決定施行必要之強制隔離處置，自較由法院決定能收迅速防治之功。另就法制面而言，該管主管機關作成前述處分時，亦應依行政程序法及其他法律所規定之相關程序而為之。受令遷入指定之處所強制隔離者如不服該管主管機關之處分，仍得依行政爭訟程序訴求救濟。是系爭規定之強制隔離處置雖非由法院決定，與憲法第八條正當法律程序保障人民身體自由之意旨尚無違背。

系爭規定未就強制隔離之期間予以規範，及非由法院決定施行強制隔離處置，固不影響其合憲性，惟曾與傳染病病人接觸或疑似被傳染者，於受強制隔離處置時，人身自由即遭受剝奪，為使其受隔離之期間能合理而不過長，仍宜明確規範強制隔離應有合理之最長期限，及決定施行強制隔離處置相關之組織、程序等辦法以資依循，並建立受隔離者或其親屬不服得及時請求法院救濟，暨對前述受強制隔離者予以合理補償之機制，相關機關宜儘速通盤檢討傳染病防治法制。」

許宗力大法官的部分不同意見書摘錄

「....系爭傳染病防治法規定所涉對曾與傳染病病人接觸或疑似被傳染者人身自由之剝奪，與本院過去解釋涉及人身自由剝奪不同之處，在於不具處罰性，而係以保護人民生命安全與身體健康為目的，因此一般將之歸類為所謂的「照護性人身自由的剝奪」(fürsorgerliche Freiheitsentziehung）類型。精神病患之人身自由的剝奪，亦同此類型。這類型人身自由之剝奪，是否因不具處罰性質，就可以不要求法官保留？這是本件主要爭點所在。

本號解釋多數意見採否定見解，認為系爭規定所涉人身自由的剝奪毋須法官保留。蓋「強制隔離既以保障人民生命與身體健康為目的，而與刑事處罰之本質不同，故其所須踐行之正當法律程序，自毋須與刑事處罰之限制被告人身自由所須踐行之程序相

類。」…

本席同意，系爭照護型人身自由之剝奪確實與處罰型人身自由之剝奪有別，尤其沒有犯罪嫌疑或違法的烙印加諸身上，原則上不會額外對被隔離者的名譽、人格產生傷害，但畢竟還是人身自由之剝奪！如果人身自由確屬其他自由權保障的基本前提，具無比重要性，而法官保留具有透明、公開、客觀、迅速介入等特性，有防止行政可能濫權的作用，讓人身自由被不法剝奪之機率減至最低，則本席看不出照護型人身自由之剝奪有不適用法官保留的正當理由，除非我們天真認為照護型人身自由之剝奪絕不可能濫權。

當然，如前述，多數意見詳列了若干不採法官保留之理由，以捍衛系爭規定之合憲性。但這些理由，本席認為沒有一項站得住腳，簡單說明如下：

就第一點而言，本席絕不否認疫情防制貴在迅速的真實性。問題是，法官保留與迅速並不必然矛盾，因法官保留有事前、事中（也可說是事後）之分，遇急迫情事，主管機關仍非不得先實施隔離處分，合理時間內再尋求法官的同意即可，故所謂法官保留可能緩不濟急的說法，並不正確。

其次是專業或功能最適的理由。這一點乍視之下似具說服力，但也經不起檢驗。首先指出者，法官保留並不是要求以法官的非專業認知取代主管機關的專業決定，毋寧，法官保留主要功能在於使事件透明化，使行政機關對剝奪人身自由的理由，不得不必須作詳盡說理，公開接受反方的質疑與檢驗，再由未預設立場，居於客觀、公正第三者立場的法官作成決定，法官即使不具專業知識，也非不能藉助其他專家的第二專業意見，審查剝奪人身自由之必要性。而無論法制上允許法官採何種審查密度，比起不採法官保留，而完全任諸行政機關的專業決斷，總較能防杜行政濫權剝奪人身自由的弊端發生。....

至於多數意見所持最後一點補充理由，本席則認為最弱、最不具說服力，委實說根本就不應提出。多數意見之所以認為系爭規定不違反正當程序原則，如前述，理由是何況主管機關作成強制隔離處分時，本就應遵循行政程序法所規定之相關程序，且不服主管機關之決定者，仍有依行政爭訟程序尋求救濟之機會。然則，遵循行政程序法之相關程序規定，以及給予尋求司法救濟的機會這兩者，本就是任何基本權的限制所應一體遵循、適用的最低限度程序，而自從本院在釋字第 384 號解釋揭示人身自由「乃行使憲法上所保障其他自由權利之前提，為重要之基本權」的立場以來，剝奪人身自由本就應比限制其他自由權利適用更嚴格的程序，即使不適用最嚴格意義的法官保留，至少也不至於僅僅適用與限制其他自由權利相同的低標程序。..

當然，多數意見也明白指出，強制隔離所須踐行之正當程序，毋須與剝奪刑事被告人身自由之程序相類，而是由主管機關依其專業知識，「通過嚴謹之組織程序」，衡酌疫情之嚴重性及其他狀況，作成客觀之決定。據此，似乎多數意見也認為強制隔離

應踐行比一般程序嚴格一點的「嚴謹之組織程序」。所稱「嚴謹之組織程序」為何，多數意見固未多所著墨，但可推測應係指組成多元專家委員會之類的組織程序。姑不論這類委員會之組織程序尚未能提供與法官保留相同的透明、公開、客觀、公正、迅速介入等功能，即使根據這種相對較為寬鬆的標準審查，系爭規定其實亦難滿足其要求。因再怎麼將傳染病防治法從頭讀到尾，根本找不到任何針對強制隔離決定所量身裁製，特別設計之「嚴謹組織程序」規定。多數意見對傳染病防治法這項缺陷其實亦瞭然於心，所以才會在文末另籲請主管關宜明確規範決定施行強制隔離相關之組織、程序等辦法，以資依循。但多數意見既然主張強制隔離之實施應通過「嚴謹之組織程序」，才符合正當程序，就應邏輯一貫地勇敢宣告系爭規定因未設有「嚴謹之組織程序規定」而違憲。不料卻仍捨此不為，寧願對系爭規定之合憲性百般呵護，以籲請主管機關檢討改進為滿足。

本席固然主張法官保留，但也絕不是一個法官保留的教條主義者，事實上，本席可以接受刑事被告與非刑事被告之人身自由限制，所須踐行之司法程序或其他正當法律程序，「非均須同一不可」的立場，換言之，只要能有一個可以讓法官及時介入審查的機會，以減少濫權，即使與依職權事前移送法官審查、事後適當合理時間內移送法院追認的嚴格意義法官保留有別，本席也認為可以勉強通過正當程序原則的嚴格審查。

最後，本席對本件多數意見最感到不解的是，即既已提出強制隔離應遵循「嚴謹（行政）組織程序」，才符合正當程序要求，則對未能滿足此一程序要求的系爭規定，為何未作任何理由交代，就任其輕騎過關，而只敢籲請主管機關朝此方向檢討修法？又如果認定系爭法律合憲，又如何能指示「建立受隔離者或其親屬不服得及時請求法院救濟」此一更高標的修法方向？合憲之餘的進一步法律修改，難道不屬政策形成範疇，而須歸政治部門掌理嗎？司法者在此說三道四，難道不會遭致越俎代庖、逾越權限的質疑？....」

問題：

1. 請問，為何司法院大法官釋字第690號解釋理由書認為強制隔離不須適用法官保留原則？(10%)
2. 請問，許宗力大法官部分不同意見書如何反駁上述解釋理由書的看法？請簡述其理由。(10%)
3. 請問，你贊成哪一方的看法？理由為何？(10%)