

## 对外经济贸易大学

### 2007 年硕士学位研究生入学考试初试试题

#### 考试科目：851 法学专业理论

(请注意：此考卷适用于报考法学理论、宪法学与行政法学、民  
商法学、诉讼法学、经济法学专业的考生)

#### 一、中文试题部分 (共 100 分)：

##### (一) 简答题 (每题 5 分，共 25 分)

- 1、民事权利的失效
- 2、肖像权的内容 *P155*
- 3、行政复议和行政裁决的区别
- 4、行政处罚中的听证制度
- 5、职权主义与释明权的关系

##### (二) 法条评析题：(每题 5 分，共 10 分)

#### 1、《个人所得税法》第三条 个人所得税的税率：

一、工资、薪金所得，适用超额累进税率，税率为百分之五至百分之四十五(税率表附后)。

二、个体工商户的生产、经营所得和对企事业单位的承包经营、承租经营所得，适用百分之五至百分之三十五的超额累进税率(税率表附后)。

三、稿酬所得，适用比例税率，税率为百分之二十，并按应纳税额减征百分之三十。

四、劳务报酬所得，适用比例税率，税率为百分之二十。对劳务报酬所得一次收入畸高的，可以实行加成征收，具体办法由国务院规定。

五、特许权使用费所得，利息、股息、红利所得，财产租赁所得，财产转让所得，偶然所得和其他所得，适用比例税率，税率为百分之二十。

2、《反不正当竞争法》第八条 经营者不得采用财物或者其他手段进行贿赂以销售或者购买商品。在帐外暗中给予对方单位或者个人回扣的，以行贿论处；对方单位或者个人在帐外暗中收受回扣的，以受贿论处。

经营者销售或者购买商品，可以以明示方式给对方折扣，可以给中间人佣金。经营者给对方折扣、给中间人佣金的，必须如实入帐。接受折扣、佣金的经营者必须如实入帐。

### (三) 辨析题 (5分)

最高人民法院《关于民事诉讼证据的若干规定》第64条规定，审判人员应当依照法定程序全面、客观地审核证据，依据法律的规定，遵循法官职业道德，运用逻辑推理和日常生活经验，对证据有无证明力和证明力大小独立进行判断，并公开判断的理由和结果。

根据上述规定，是否可以理解为我国法官在民事诉讼中，对判决中所涉及的争议事实作出判断时适用自由心证主义？

### (四) 论述题 (每题15分，共60分)

1. 论无效民事法律行为 P182.
2. 试述辩论主义原则的内容 P46
3. 试述行政诉讼的受案范围
4. 以反垄断法为例说明经济法所倡导的效率原则

二、英文试题部分 (共 50 分) :

请阅读下文, 并按文后的要求将划线部分翻译成中文或回答问题:

短文一:

Sources of Law in Hong Kong

The Basic Law

Nature of the Basic Law

The Basic Law of the HKSAR was enacted by the National People's Congress in accordance with the Constitution of the People's Republic of China. It is akin to a mini-constitution for the HKSAR. It was promulgated on 4 April 1990 and took effect on 1 July 1997 on the establishment of the HKSAR. All the systems and policies practised in the HKSAR must be based on the provisions of the Basic Law. These include the social and economic systems; the system for safeguarding the fundamental rights and freedoms of its residents; the executive, legislative and judicial systems; and the relevant policies. Furthermore, no law enacted by the legislature of the HKSAR may contravene the Basic Law.

The most prominent feature of the Basic Law is the underlying principle of "one country, two systems" whereby the socialist system and policies shall not be practised in the HKSAR, and the previous capitalist system and way of life is to remain unchanged for 50 years.

Under the Basic Law, all the laws previously in force in Hong Kong (that is, the common law, rules of equity, ordinances, subordinate legislation and customary law) shall be maintained, except for any that contravene the Basic Law and subject to any amendment by the HKSAR legislature. National laws of the People's Republic of China shall not be applied in the HKSAR except for a number of such laws relating to defence and foreign affairs which are listed in Annex III to the Basic Law.

Relationship between the Central Authorities and the HKSAR

The National People's Congress through the Basic Law authorises the HKSAR to exercise a high degree of autonomy directly under the Central People's Government. The HKSAR enjoys executive, legislative and independent judicial power, including that of final adjudication, in accordance with provisions of the Basic Law. Although foreign affairs relating to the HKSAR are the responsibility of the Central People's Government, the HKSAR is authorised to conduct relevant external affairs on its own in accordance with the Basic Law. The Central People's Government is also responsible for the defence of the HKSAR, but the responsibility of maintaining public order in the HKSAR is a matter for its Government.

Fundamental rights protected by the Basic Law

The Basic Law details the fundamental rights, freedoms and duties of the residents of the HKSAR. These rights include the right to equality before the law; freedom of speech, of the press and of publication; freedom of association, of assembly, of procession and of demonstration; and the right and freedom to form and join trade unions, and to strike; freedom of movement; freedom of conscience; and freedom of religious belief. The Basic Law also guarantees that the provisions of the International Covenant on Civil and Political Rights; of the International Covenant on Economic, Social and Cultural Rights; and of the International Labour Conventions as applied to Hong Kong will remain in force.

The political structure of the HKSAR

The Chief Executive is the head of the HKSAR and is accountable to the Central People's Government and the HKSAR. He is assisted in policy making by the Executive Council of the HKSAR. The Chief Executive presides over the Executive Council and appoints its members.

The main powers and functions of the Government of the HKSAR (which is headed by the Chief Executive) include the formulation and implementation of policies, the conduct of administrative affairs and the drawing up and introduction of budgets and legislation.

The HKSAR's legislature is the Legislative Council, and the Basic Law prescribes the specific method for forming the Legislative Council and its procedures for voting on bills and motions. Under the Basic Law the Legislative Council's functions include the making of laws, approving budgets and public expenditure and monitoring the work of the Government in general.

提议

开支

监督/查

**The common law and the rules of equity**

Common law and the rules of equity are to be found primarily in the judgments of the superior courts in Hong Kong and other common law jurisdictions. In historical terms, reports of judgments handed down by judges have, since at least the 15th century, established in detail the legal principles regulating the relationship between state and citizen, and between citizen and citizen. There are now some hundreds of thousands of reported cases in common law jurisdictions which comprise the common law. The rights relating to freedom of speech, freedom of assembly, and freedom from arbitrary arrest or imprisonment have been spelt out in cases which were decided more than three centuries ago. As we have seen, these have now been underpinned by provisions in the Basic Law.

概括, 归纳

武断的, 专横的

逮捕, 拘留

尚待再拍, 弄清楚

加强, 巩固

The common law's most distinguishing hallmark is reliance on a system of case precedent, not restricted to judicial decisions generated within any single jurisdiction, but case law from all jurisdictions throughout the common law world. Article 84 of the Basic Law provides that the courts of the HKSAR may refer to the precedents of other common law jurisdictions. In addition, the Court of Final Appeal and the Judiciary of the HKSAR is given power to invite judges from other common law jurisdictions to participate in the judicial processes.

特点

**Statute law 成文法**

The vast majority of statute law in force in Hong Kong is made locally and contained in the Laws of Hong Kong. A great deal of legislation is made under delegated powers. This is called subsidiary legislation. For example, an ordinance may delegate to the Chief Executive in Council (the Chief Executive with the advice of the

Executive Council) the power to make regulations to deal with the details of the implementation of a legislative scheme.

### **Chinese customary law**

Some aspects of Chinese customary law apply in Hong Kong. For example, under section 13 of the New Territories Ordinance (Cap 97) the courts may recognise and enforce Chinese customs or customary rights in relation to land in the New Territories; and Chinese law and custom is recognised in the Legitimacy Ordinance (Cap 184).

### **International law**

Over 200 international treaties and agreements have been applied to Hong Kong. A treaty does not constitute part of Hong Kong's domestic law until given effect by legislation. Nonetheless, it may affect the development of the common law. It may, for example, be resorted to by a court as an aid to interpretation. The rapidly developing rules of customary international law can also become absorbed into the common law.

短文二:

### **The Rule of Law**

The "rule of law" refers to some of the fundamental principles of law that govern the way in which power is exercised in Hong Kong. The rule of law has several different meanings and corollaries. Its principal meaning is that the power of the Government and all of its servants shall be derived from law as expressed in legislation and the judicial decisions made by independent courts. At the heart of Hong Kong's system of government lies the principle that no one, including the Chief Executive, can do an act which would otherwise constitute a legal wrong or affect a person's liberty unless he can point to a legal justification for that action. If he cannot do so, the affected person can resort to a court which may rule that the act is invalid and of no legal effect. Compensation may be ordered in the affected person's favour. This aspect of the rule of law is referred to as the principle of legality.

One corollary of the principle of legality can be summarised as equality before the law. It is fundamental that all persons, regardless of race, rank, politics or religion, are subject to the laws of the land. Further, the rule of law requires that the courts are independent of the Executive. This independence is crucial if impartial rulings are to be given when the legality of acts of government falls to be decided.

Legality and equality before the law are two fundamental facets of the "rule of law". But the principle demands something more, otherwise it would be satisfied by giving the Government unrestricted discretionary powers. A further meaning of the rule of law, therefore, is to be found in a system of rules which restrict discretionary power. To this end the courts have developed a set of guidelines aimed at ensuring that statutory powers are not used in ways which the Legislature did not intend. These guidelines relate to both the substance and the procedures relating to the exercise of executive power. An example of the former is where a court concludes that a decision which purports to be authorised by a statutory power is plainly unreasonable and cannot have been envisaged by the Legislature. An example of the latter is where a decision has been made without according the party affected the opportunity of being heard in circumstances where the Legislature must have envisaged that such an opportunity would have been given. In both cases a court would hold that the decisions were legally invalid.

The Basic Law ensures that the legal system in the HKSAR will continue to give effect to the rule of law, by providing that the laws previously in force in Hong Kong (that is, the common law, rules of equity, ordinances, subordinate legislation and customary law) shall be maintained, save for any that contravene the Basic Law, and subject to subsequent amendment by the HKSAR Legislature.

### 短文三：

#### Arbitration and Alternative Dispute Resolution

Arbitration has been a popular method of dispute resolution in the HKSAR for some time. It is governed by the Arbitration Ordinance (Cap 341), which has two distinct

regimes - a domestic regime derived from English law and an international regime which includes the UNCITRAL Model Law, the model law drafted by the United Nations Commission on International Trade Law. The Arbitration Ordinance was amended in 1996 to give additional powers to arbitrators to facilitate the fair and speedy resolution of disputes by arbitration without unnecessary expense. They also transfer the power to appoint arbitrators from the courts to the Hong Kong International Arbitration Centre. The Arbitration Ordinance was further amended in January 2000 to give effect to an arrangement made in June 1999 with the Mainland authorities to put in place a mechanism by which awards made in the two jurisdictions would be mutually enforceable in court.

Awards made in the HKSAR can be enforced in more than 120 jurisdictions which are signatories to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. The HKSAR's membership has since 1 July 1997 been by virtue of the fact that the People's Republic of China is a signatory to the New York Convention.

The Hong Kong International Arbitration Centre (HKIAC) was established in 1985 to act as an independent and impartial focus for the development of all forms of dispute resolution in the HKSAR and Asia-Pacific. The HKIAC provides information on dispute resolution and arbitrations both in the HKSAR and overseas. It operates panels of international and local arbitrators, and maintains lists of mediators. The HKIAC's premises are in Exchange Square in Central District, where it provides 10 purpose-built hearing and conference rooms and full support facilities. The number of cases involving the HKIAC has substantially increased in recent years. It is anticipated that there will be a further increase in such cases in the future, not only because of the increased popularity of arbitration and mediation as a means of dispute resolution but also because of the growth of the HKSAR as a regional dispute resolution centre.

- 1、 请阅读上文，将划线部分翻译成中文。（15分）
- 2、 请阅读上文，用中文回答下列问题：（35分）
  - (1) 香港法的渊源共有哪些？（5分）
  - (2) “The Basic Law”保护的基本权利有哪些？（5分）
  - (3) 翻译名词“the rule of law”，并结合上文指出其主要含义，以及“the Basic Law”和“the rule of law”之间的关系。（10分）
  - (4) 简要叙述香港的仲裁机制。（5分）
  - (5) 《香港仲裁条例》近年经历了几次修改？简述这些修改发生的时间和主要的修改内容。（5分）
  - (6) 香港国际仲裁机构作出的仲裁裁决能否在其他国家得到承认和执行？为什么？能否在中国大陆得到承认和执行？为什么？（5分）