



Solution (outline) Legal Theory – fall semester 2018

This solution is not meant to include the only possible answers to the exam questions. Moreover, students were not expected to write such a detailed text; instead, they should recognize the core aspects of the questions and express their thoughts in an accurate and coherent manner, supported by convincing arguments.

Question 1 (20 %)

There is a controversial discussion about „nature and nurture“. There are very different viewpoints about the question of whether a certain trait, property or faculty of human beings is inborn or not. Please identify a crucial methodological tool to answer this question. Please explain its content using an example.

Possible answer:

The longstanding debate surrounding “nature and nurture” – in the context of which Locke famously compared the mind to a *tabula rasa*, i.e. a blank slate – gained new traction in the second half of the 20th century, due to novel findings in disciplines such as social and cognitive psychology, biology and linguistics. One methodological tool to assess whether a certain trait, property or faculty is inborn or not, would be, according to Chomsky, the so-called “Poverty of stimulus” argument. It concludes that, if a capacity cannot be acquired through learning or experiential inputs, it must be inborn. This does not mean that such an inborn capacity is already fully established at the time of birth: It may still need triggers in order to evolve into its mature forms – but the disposition is innate.

Example of linguistics: In his Universal Grammar theory, Chomsky holds that the linguistic elements that children acquire cannot all be traced back to inputs of experience or learning processes. Still, the ability to understand and speak a language is already exhibited at very early ages. Despite the impoverished linguistic input, young children prove able of identifying correct language patterns, dealing with complex grammatical structures. This suggests that the linguistic faculty is an inborn cognitive capacity, containing a set of principles from which an infinite number of grammatical expressions can be derived.

Example of vision: In the Kanisza Triangle, as our seeing the triangles cannot be traced back to learning processes or prior experience, it appears that this perception is based on an inborn visual capacity.

Question 2 (40 %)

Please outline central characteristics of human moral judgement. Which principles and concepts are important? What are the arguments for your conclusion?

Possible answer:

In order to grasp principles that structure human moral judgements, it is necessary to define the *formal preconditions of moral evaluation*:

- Agency is a necessary precondition of moral evaluation.
- Moral evaluation is to be distinguished from other kinds of evaluation (e.g. aesthetic). There is a distinct moral dimension of human cognition, which is a distinguishing aspect of human beings.
- The objects of moral evaluation include in particular voluntary acts of agents with consequences for the well-being of other sentient beings.
- In morally evaluating actions, the distinction between direct and oblique intentions (as well as the distinction between intended and foreseen effects) is relevant.

There are some impersonal, universal, abstract and general *foundational principles* that underlie moral judgements, namely the principles of *altruism*, *justice (as proportional equality)* as well as the *principle of non-instrumentalisation*.

- An act is to be defined as an *altruistic* one if the agent has the direct intention to voluntarily foster the well-being of a sentient being. Therefore, an act that is only performed with an oblique intention to foster the well-being of another person (e.g. when the direct intention is the fostering of self-interest) is not a morally good act, even if it leads to beneficial outcomes; at the same time, an action which is performed with the direct intention to benefit another but leads to harmful consequences cannot be called morally good (while the intention as such would still be classified as morally good).
- *Justice* refers foremost to distribution (and restitution in the case of disturbed distribution); it consists in the application of equal standards of distribution to essentially equal recipients. It requires



proportional equality between the reason for an action and the action itself according to a distributive criterion that is reasonable for the sphere concerned. If no such criterion exists, an equal distribution is just (e.g. distribution of a birthday cake in class).

- The principle of *non-instrumentalisation* consists in the imperative that one may not use human beings as mere tools in order to achieve one's own goals. This leads to the duty to respect every person as an end in herself. The *principle of double effect* is an approximation to this concept. It states that an otherwise forbidden action is permissible if: The prohibited act and its negative consequences, though foreseen, must not be directly intended; the good results must directly be intended and must outbalance the bad effects; and no morally preferable alternative action exists.

In addition, moral judgments have *emotional* and *volitional consequences*. *Emotions* are the *product* of moral evaluation (e.g. pride, shame) and can be used as a *heuristic tool* (e.g. empathy), enabling an agent to understand what her actions might imply for others. However, they do not constitute the evaluation itself: Moral judgements involve an adequate description and a rational analysis of the decisive elements of an action. As the guiding principles are of cognitive character, moral judgements show *cognitive* content as well. Moral judgements also lead to *volitional consequences*: they affect the will of agents by establishing an *obligation* – they show how a specific situation, compared to the status quo, ought to be. At the same time, they do not determine actions, as the ability to freely choose between options is not eradicated. If an act is morally good, its performance is obligatory or supererogatory, i.e. morally laudable but not obligatory. If an action is just, its performance is obligatory. If an act is morally bad, it is prohibited to perform it. If an act is morally neutral, the agent may freely choose whether she wants to perform it or not.

Question 3 (20 %)

Please outline two alternative approaches to the evolutionary explanation of human moral cognition. Which one do you find more plausible and why?

Possible answer:

The main focus of evolutionary psychology lies on natural selection. The properties of an organism derive from certain genes; the genes with the highest reproductive inclusive fitness will be favoured by the evolutionary process; and organisms only have traits that are adaptive (thesis of *adaptationism*). Evolutionary psychology deals with this approach and tries to identify certain social behaviour as a product of evolution. Following the arguments of the theory's supporters, it is, even for selfish mankind, useful e.g. to care for relatives in order to reach the ultimate goal of reproduction. *Small group morality* and altruism towards one's kin are therefore ways to augment the chances of survival of one's genes, even if the primary bearer should die. This is the core of the idea of *kin selection*.

However, there are some influential alternative approaches in evolutionary theory. Natural selection is not the only factor influencing evolutionary processes. Some of the existing traits apparently do not increase the chance of reproduction of genes. There are non-adaptive mutations and adaptive mutations with non-adaptive side effects. Likewise, there are not only micro-mutations but also rapid changes are possible where small genetic changes may have far-reaching effects, c.f. the evolution of the eye. Also, exaptation, i.e. the co-option of existing traits for a new function, may underlie certain traits. Furthermore, evolution depends on other factors, such as architectural constraints, certain development paths or natural laws.

For the evolution of cognition, particular difficulties exist. Distant relatives may have more in common with a particular species than more closely related organisms. Often, there are certain traits which derive from a common ancestor, but are dissimilar in their functionality (homologous structures) or which are functionally similar just because of comparable environmental requirements (analogous structures). Moreover, it is unclear who the exact predecessors of human beings were and how their mental capacities can be classified; furthermore, human beings lack close living evolutionary relatives. These problems are particularly pertinent for cognitive abilities because their exercise does not leave trails. There are e.g. no artefacts that could document the linguistic abilities of early human beings.

Another important point of criticism holds that evolutionary psychology suffers from *functionalist fallacy*, which consists in jumping from the adaptive function of a trait to the conclusion that an organism must in fact possess that trait. It overlooks that one first has to establish what properties an organism indeed has (e.g. what ethical principles of humans can plausibly be taken to be inborn) before one can try to explain how these properties evolved.

Thus, it is plausible to rather assume a theory of *evolutionary pluralism* underlying the evolutionary development of organisms and to acknowledge the stochastic, non-deterministic nature of the evolutionary



process. Within such a theory and in light of the above considerations, a wide array of possibilities exist, how human cognition can be structured. This includes the possibility of a human moral faculty that underlies principles of justice and altruism.

Question 4 (20 %)

Are neuroscience, cognitive science and moral psychology relevant for a theoretical understanding of the law?

Possible answer:

Law is a creation of the human mind. Granted that our human mind supervenes, at least in some minimal sense, on the brain, the study of our brain through cognitive (neuro-)science may thus better our understanding of the human mind, its functioning and its origins. Therefore, it seems clear that a theory of the human mind and its cognitive foundation will also affect our moral psychology and theory of law.

The human mind formulates and applies norms and ascribes value to actions. The legitimation, interpretation and application of laws depend on ethical principles. It is the task of a theory of mind to define in which way moral principles are the product of the human mind and depend on a specific faculty.

Neuroscience may play an important role – some claim – when it comes to forensic use (e.g. techniques such as fMRI scans on criminals). As some of these claims are not plausibly tenable, another important task of the theory of neuroscience and the law is to define the limits of the impact of neuroscientific tools on the law.

If there are such universal, substantive principles as justice and care, structuring an inborn cognitive moral faculty, this not only implies essential equality of human beings with regard to the moral core of our human nature, but they also provide the cognitive foundation for human rights: They allow for universal epistemic access to the idea of human rights, providing strong grounds for assuming that a critique of human rights on the basis of human psychology remains unconvincing. Through them, the theory of mind is directly relevant for the justification of human rights.

Moreover, such a picture presupposes the possibility of *free will*, the ability of human beings to freely decide about their conceptions of a good life. This has various implications for the legal sphere: The purpose of human rights is based upon the assumptions of such a free will; criminal law and the application of sanctions rely on the concepts of responsibility and guilt; the idea of private autonomy and *pacta sunt servanda* depend on the assumption that human beings are in a position to make free choices.

However, there is no naturalistic fallacy involved in judging these insights about the human mind to be relevant for a theory of ethics and law. *Being part* of the structure of human mind does not yet *normatively justify* such substantive principles. Justification presupposes normative theory. From a position of constructive scepticism, it still seems reasonable to assume their legitimacy as long as no valid, principled objections against them can be identified. While such principles can figure as foundational starting points, additional constructive work by normative theory is required in order to arrive at concrete formulations and interpretations of moral and legal norms.