Frage Nr.	Antworten	Frage Nr.	Antworten
1.01	a. (+) b. (–) c. (+)	**1.16**	a. (–) b. (+) c. (+)
1.02	a. (–) b. (+) c. (+)	**1.17**	a. (–) b. (+) c. (+)
1.03	a. (–) b. (–) c. (+)	**1.18**	a. (+) b. (+) c. (–)
1.04	a. (+) b. (+) c. (+)	**1.19**	a. (–) b. (+) c. (–)
1.05	a. (–) b. (–) c. (+)	**1.20**	a. (+) b. (–) c. (+)
1.06	a. (–) b. (+) c. (–)	**1.21**	a. (–) b. (+) c. (+)
1.07	a. (+) b. (–) c. (–)	**1.22**	a. (–) b. (+) c. (–)
1.08	a. (+) b. (+) c. (+)	**1.23**	a. (+) b. (+) c. (+)
1.09	a. (–) b. (–) c. (–)	**1.24**	a. (+) b. (–) c. (–)
1.10	a. (+) b. (+) c. (+)	**1.25**	a. (–) b. (–) c. (–)
1.11	a. (–) b. (+) c. (–)	**1.26**	a. (+) b. (+) c. (+)
1.12	a. (–) b. (–) c. (–)	**1.27**	a. (+) b. (–) c. (+)
1.13	a. (–) b. (–) c. (+)	**1.28**	a. (+) b. (–) c. (+)
1.14	a. (+) b. (+) c. (+)	**1.29**	a. (+) b. (+) c. (–)
1.15	a. (+) b. (+) c. (+)	**1.30**	a. (+) b. (+) c. (–)

Part 2 (further questions), 180 points

To note:

With these kinds of questions, it is neither possible nor reasonable to classify *one* single solution as 'the' correct one. The following answers represent one correct solution among others that has been awarded the maximum number of points.

The points assigned to each argument are indicated in brackets. Often it is not necessary to state all arguments in order to reach the maximum number of points.

2.01.

Lösung

a. Ehrlich would call this living law (alternatively: societal law, organisational law); law that directly emerges from society, the source of this law is not the state as a legislator.
ISP-led spam filters show that on the Internet, there is law that is not created directly by a (formal) lawgiver with regulatory effects on society. This validates Ehrlich's thesis that law is not created *exclusively* through (positive) legislation by a (formal) lawgiver (or a court sentence), but that it can also emerge directly from society, under the form of living law. Consequently it shows that – like Ehrlich says – law does neither start nor end with the state.
(pro genanntem Aspekt 1 Punkt, max. 5 Punkte)

b. Coercion (and Imperium) Theory v. Recognition Theory.
In Eugen Ehrlich's concept/recognition theory, enforcement is not a central element of the law. The decisive criterion therefore is the recognition of a norm as a legal norm by the members of an association. To him, law is something that is accepted voluntarily by the society. Societal law (living law) represents the main source of law for Ehrlich and it is closely related to other social norms such as custom, religion etc. This concept is radically different, because at that time, the reigning theory (e.g. of Rudolf von Jhering) was the coercion theory. Coercion that is enforced by the state constitutes law's absolute criterion. A legal provision without coercion is like "a fire that doesn't burn".
In addition to that, at that time, theories of law were very much focused on conflict solving, seeing the law as an instrument to resolve conflict, whereas Ehrlich sees several layers of the law and something that emerges from society itself and provides for an organisational structure. This organisational structure and law that functions as a kind of inner order of association is already important *before* it comes to conflicts. It is something that provides for a structure of coexistence between people before it comes to conflict. Conflict resolution is only important at a second stage where jurists come into play.
(pro genanntem Aspekt 1 Punkt, max. 10 Punkte)

2.02

Lösung

a. For Durkheim, the division of labour is a consequence of a historic evolution. The indicators of the increasing division of labour are the growth of the population, bigger cities, higher population density and technological development: new means of transport and new means of communication.
(pro genanntem Aspekt 1 Punkt, max. 4 Punkte)

b. DoL leads to increasing individualism. Durkheim stresses the tension between the social sphere and individual autonomies. While individuals benefit and depend on the social sphere, modern society is characterised by individualisation. ("The individual gets from society the best part of himself […] Society exists and lives only in and through individuals")
The key problem of modern society is the relationship between individual and society.
What keeps society together, how can the idea of cohesion [2 Punkte, da Hauptaspekt] in social relations and a social order be preserved in a situation of increasing individualisation and division of labour. In his work after "The Division of Labour" Durkheim saw the value of individual dignity as a source of social cohesion.
(pro genanntem Aspekt i.d.R. 1 Punkt, max. 6 Punkte)

c. - Mechanical solidarity: Based on similiarities between persons, shared religious and moral convictions; existed under conditions of segmented social differentiation (repressive law).

- Organic solidarity: Depending on the division of labour and professional specialisation, relationships of mutual interdependencies; existing under conditions of functional differentiation (restitutive law).

(je 1 Punkt pro Begriff und 3 Punkte pro Erklärung, total 8 Punkte)

2.03

Lösung

a. For Durkheim, "society is a reality sui generis; it has its own peculiar characteristics, which are not found elsewhere". Society therefore has an autonomous existence that is completely detached from the individuals. Society has its own beliefs and emotions that are different from the ones of the individuals. They may become visible in acts of individuals, but they don't originate in them, instead they originate in society as a whole.
Consequently, society is not just the sum of individuals but something on its own. As opposed to Durkheim, Ehrlich sees society as associations without its own distinct beliefs etc. and says that "a social association is a plurality of human beings […]".
(pro genanntem Aspekt 1 Punkt, max. 5 Punkte)

b. Durkheim rejects the idea of a social contract because according to him, there is no unity in modern society. The idea of a social contract is irreconcilable with the principle of the division of labour. Because for a social contract to be feasible, all individual wills would have to agree at any given time to the common foundations of the social organization. As a consequence, every individual consciousness would have to deal with political problems in all its generality. Individuals therefore would have to play a "double role": the role of a member of society and the role of the statesman at the same time.
(pro genanntem Aspekt 1 Punkt, max. 7 Punkte)

2.04 Lösung

a. Weber used an ideal-typical research method. He distinguished ideal types of legal orders depending on the presence of formal/substantive and rational/irrational qualities of the law so it was possible to conduct scientific observations and comparisons. These ideal types do not actually exist in reality, but are abstract intellectual creations of Weber, who identified elements which he thought were common in certain legal orders and then created ideal types. This allowed him to compare the actually existing legal orders with the ideal types, see differences between them and try to find explanations for these differences.
Also accepted: Webers concept of sociology: "interpretative understanding" of social action (Verstehende Soziologie)
(pro genanntem Aspekt 1 Punkt, max. 4 Punkte)

b. The described decision-making process reminds of the so called Kadi Justice which serves as an example of a substantive irrational decision-making process, which has a low degree of generality and also a low degree of differentiation. Substantive irrationality is case oriented and concerned only with the equities of the individual situation. The Kadi makes his decisions in specific situations on the basis of ethical or religious value judgements without being concerned with the question of generality and the criteria that he uses don't come from a differentiated legal sphere.
However, in the described example, the "judge" develops a case law, thus developing a certain generality. The fact that he bases his decision on the sharia - hence on religious values, indicates that the criteria that he uses don't come from a differentiated legal sphere. Therefore Weber would probably classify the described process of decision-making as substantive rational.
(pro genanntem Aspekt 1 Punkt, max. 6 Punkte)

c. (3 Punkte; je ein Punkt für Nennung [logically formal rationality, formal irrationality, substantive rationality] inkl. korrekte Angabe der beiden "degrees")

		Degree of Generality of Legal Norms	
Degree of Differentiation of Legal Norms		*High*	*Low*
	High	Logically Formal Rationality	Formal Irrationality
	Low	Substantive Rationality	Substantive Irrationality

2.05	First, he uses the term rationality in the context of the development of capitalism while exploring the reasons for which capitalism first emerged in Europe. Weber studied why capitalism first emerged in Europe and assumed that this had to do with the rationality of European Law. For Weber, capitalism presupposes rationalisation, while both labour and the use of capital are rationalised. Rationalisation of labour took place when the worker replaced the craftsman and the owner of the firm entered the scene (supplying tools for the worker and assuming the risks). This was a precondition for the mechanisation of work with the goal of saving labour costs, hence rationalising labour. Rationalisation of the use of capital was a consequence of rational accounting methods and rational price setting for the purpose of profit. Second, he uses the term rationality to classify how rational a legal order is in terms of law-finding and lawmaking. The more decisions refer to rules that are general and universal, the more rational a legal order is. (pro genanntem Aspekt 1 Punkt, max. 10 Punkte)

2.06	Lösung a. e.g. -limitations on working hours -freedom to organize union -bargain for wages -protection from layoffs -social security Generally speaking: instances of juridification processes in a sphere of social labour previously subordinated to the unrestricted power of disposition and organization exercised by private owners of the means of production. (pro Beispiel 1 Punkt, total 3 Punkte) b. For Habermas, the last wave of juridification leads to the welfare state, hence the state is responsible for the happiness of individual human beings and has to take care of them. The ambiguity lies in the gain and loss of individual freedoms. On the one hand, the last wave of juridification improved the situation of the poor, of the workers who suffered from the consequences of early capitalism. On the other hand these measures that were introduced also limit their freedom. As an example, Habermas names social security or the assistance of social workers: Aid from the state presupposes that certain preconditions are met and these have to be checked by civil servants. This leads to intrusions into the claimant's personal sphere. Habermas also mentions the effects of bureaucratization and monetarization. Bureaucratization means that everything is now part of a bureaucratic procedure that regulates every step according to certain rules. Monetarization: Whereas in a pre-modern society, it was actual human warmth of neighbours or family that could ease hardship, it is now only money that you can get from the state and its civil servants. (pro genanntem Aspekt 1 Punkt, max. 10 Punkte)

2.07	Lösung a. All areas other than the courts belong to the periphery, e.g. legislation but also private acts, namely contracts. The periphery is not subject to compulsory operation. It is the zone of contact with other systems of society. It is in the periphery that irritations are translated into legal forms – or not. Here the system demonstrates its autonomy by not having to decide and protects the centre. (pro genanntem Aspekt 1 Punkt, max. 3 Punkte) b. Lex mercatoria is law that is produced by the economy, not by the legal system as state law. Centre/periphery helps to understand how such law enters the legal system. This distinction sets us free from state centrism and permits to integrate types of law that Ehrlich calls living law. Privately produced law emerges in the contact zone of the periphery. In a hierarchic concept state law would be the only relevant law. (pro genanntem Aspekt 1 Punkt, max. 6 Punkte)

2.08	Lösung a. The law's function is to generalise and stabilise normative expectations in society: Legal norms are generalised normative expectations. Law contributes to the reduction of complexity because things can be anticipated and planned, which is crucial for other systems, above all economy. (3 Punkte) b. The function of politics is to guarantee the possibility of collective binding decisions. The political system provides the possibilities to actually enforce the legal decisions. Law is only obeyed if means of enforcement are potentially available. On the other hand the legal system is responsible for the production of decisions determining the conditions under which physical force can be applied. (3 Punkte)

2.09	Lösung a. - Only nation states can be constitutional subjects, not international organisations or transnational regulatory regimes or private transnational regimes, because: - Constitutions beyond the nation state lack a social substrate that could provide a suitable object for a constitution. - Norms of transnational regimes exert only regulatory functions, not genuine constitutional ones (no constitutional review, not reflexive) - They are unable to realise the interplay between the different arenas of public opinion and binding decision-making processes - They cannot enshrine legal norms in democratic processes (1 Punkt pro Argument, max. 4 Punkte) b. Possible answers: - Transnational human rights - Global economic constitution - Transnational regime constitutions - Lex mercatoria, lex sportiva, lex digitalis - Corporate constitutionalism (corporate codes of conduct) - Global administrative law - Constitutionalisation of (public) international law - ius cogens (1 Punkte pro Element, max. 3 Punkte)

2.10

Lösung

a. According to Teubner, every function system is internally differentiated into an organised-professional and a spontaneous sphere. In the economic system, corporations build the organised-professional sphere and the consumers (forming consumer organisations, labour unions, NGO's, envirionmentalism, internet activism) build the spontaneous sphere
(pro genanntem Aspekt 1 Punkt, max. 4 Punkte)

b. For Teubner, this distinction is very important in his theory of societal constitutionalism. He argues that "reflexive politics is realised in different ways in each of the two spheres". That means that each sphere processes information differently, which also reveals what he calls the "motivation-competency dilemma" [2 Punkte, da Hauptaspekt]. Corporations have a lot of knowledge (competence) in their field of activity. For example, they know exactly how much it would cost to change production processes in a way that would reduce damaging effects on the environment. Civil society has the potential to bring together millions of people around the world who are highly motivated to fight against the injustices that are caused by polluters of the environment.
An important question is how the two spheres are able to interplay mutually. For Teubner, the democratic quality of each social sector depends on this mutual interplay. Importantly the organised sphere does not receive direct input from the spontaneous sphere. Rather, the spontaneous sphere may only indirectly influence the organised sphere through consumers' decisions to stop buying the products of a TNC at issue. Indeed, consumers play an instrumental role since their consumption decisions may build up pressure that may force TNC to strengthen the limitative functions in their internal constitutions. In the end, this can lead to a "bottom-up constitutionalisation" where elements from the spontaneous sphere influence the organised-professional sphere.
(pro genanntem Aspekt 1 Punkt, max. 10 Punkte)

2.11	Lösung a. Code is so powerful because it can fulfil legislative and executive functions at the same time without being limited by any type of separation of powers. (3 Punkte) b. As opposed to real space, code is not deliberated over in a discursive political process. It is not enacted by the constitutionally competent legislative body. Instead, the actor who defines the architecture of technology also defines the rights and constraints existing within this architecture and on the Internet. Therefore threats to communicative freedom stem from private companies, rather than state action. In addition to that, effects of code are not dependent on enforcement at all because it even works when the person constrained does not even know that the constraint exists, because it executes itself. (7 Punkte)

2.12	Lösung a. i)"Outside the nation state"; beyond territorial borders of states and ii) "Outside international politics"; beyond politics in other spheres of society (economy [lex mercatoria], sports [lex sportiva], internet etc.) (1 Punkt pro "direction" und 1 Punkt pro Beschreibung, max. 4 Punkte b. Possible answers: - Reebok, producing shoes without child labour - Production of environmentally friendly products e.g. from recycled materials. Done by Quicksilver/Roxy and H&M - Generally speaking: Corporate Codes of Conduct (1 Punkt pro Beispiel, max. 2 Punkte)

2.13	Lösung a. The broadcasting would have been allowed under the exception of fair use. (Alternatively: consent) (1 Punkt) b. e.g. - Technology can only apply strict rules (without exceptions) which creates uncertainties. - Intervention ex ante is strictly prohibited when done by the state whereas filter technologies have the effect of ex ante censorship. - Surveillance that is automated often goes unnoticed. - Piracy surveillance is delegated from the content owners to Internet intermediaries while the burden of proof is reversed: The consumer carries the burden of proof instead of the content owner. (pro genanntem Aspekt 1 Punkt, max. 6 Punkte)

2.14 Lösung

a. The three types that exist are i) dispute between an indigenous community and a non-indigenous third party, ii) dispute between an indigenous community and one of its individual members, iii) dispute between two indigenous communities.
The central problem that requires clarification is the definition of the indigenous community that can legitimately assert control or property rights in a knowledge asset. There exists no legally binding definition of "indigenous peoples" at the international level. Hence the question is raised if self-identification of a group as indigenous is enough.
Alternatively also accepted: It has to be decided how indigenous laws and customs and modern law should interface. Should this collision of laws be resolved within a framework of indigenous laws or customs or within a framework of modern law?
(4 Punkte)

b. It has to be decided how indigenous laws and customs and modern law should interface. Should this collision of laws be resolved within a framework of indigenous laws or customs or within a framework of modern law?
Alternatively also accepted: The central problem that requires clarification is the definition of the indigenous community that can legitimately assert control or property rights in a knowledge asset. There exists no legally binding definition of "indigenous peoples" at the international level. Hence the question is raised if self-identification of a group as indigenous is enough.
(3 Punkte)

c. Since the Mabo case, Aboriginal people putting forward a native title claim have to prove: 1. The existence of a distinct community; 2. A traditional connection with or occupation of the land at issue under the laws and customs of the group; 3. The maintenance of this connection.
(5 Punkte)

d. It is problematic, because Aboriginal claimants bringing a native title case before a court have to accept that their claim will be squeezed into the doctrinal frame of native title that is provided by Australian common law. The consequence of this "choice" of modern law as the framework for resolving such a dispute is losing epistemological sovereignty [2 Punkte, da Hauptaspekt] since indigenous laws and customs are subjugated under the categories imposed by Australian common law.
(4 Punkte)

2.15	Lösung a. By including the freedom of the art into the catalogue of fundamental rights, the law guarantees the autonomy of art. Therefore any legal definition of art contradicts this constitutionally guaranteed freedom/autonomy of art. The paradox is that law cannot define what art/the autonomy of art is without at the same time violating this autonomy. When the law of the state guarantees the freedom of art that is exactly what happens: A heteronomous definition of the autonomy of art through the law of the state. (3 Punkte) b. By introducing an asymmetry one can de-paradoxify the legal concept of art. This asymmetry is created by distinguishing a legal concept of art from a social concept of art [2 Punkte, da Hauptaspekt]. In that case art remains autonomous and any legal definition of art is only provisional: It is only momentary and serves the pragmatic purpose of deciding legal cases which require a preliminary answer to the question whether art is art or not. (pro genanntem Aspekt i.d.R. 1 Punkt, max. 5 Punkte) c. Teubner refers to the paradox of self-reference [2 Punkte, da Hauptaspekt]: Every rule of national law has to be justified by another rule; in the end we have to apply law to law. What is the justification of constitutions? The paradox is being externalised into politics. According to Teubner, strategies to unfold paradoxes are hierarchisation, temporalisation and externalisation. (pro genanntem Aspekt i.d.R. 1 Punkt, max. 5 Punkte)

2.16	Lösung The fragmentation of international law often produces many overlapping rules that may even contradict each other, because rules on the same issues originate from different bodies, e.g. WTO produces rules to regulate international trade that might conflict with regional or bilateral rules or agreements of free trade. This leads to inefficiency of international law. Inefficiency of a normative order leads to self-help (where possible) or the emergence of alternative normative structures, that Teubner calls regimes (=normative orders that exist at a global level independently from nation states). One can distinguish between formally institutionalised regimes, which are still influenced by nation states, e.g. WHO, and private transnational regimes that are institutionalised outside a formal legal setting and without involvement of states or intergovernmental organisations. The latter is mainly driven by transnational corporations. (pro genanntem Aspekt 1 Punkt, max. 11 Punkte)