Outline Solution Legal Theory – HS 2015

The following outline solution is not meant to include the only possible answers to the exam questions, but to illustrate one approach among others. Furthermore, the students were not expected to write such a detailed text; instead, they should recognise the core aspects of the questions and write down their thoughts in an accurate and coherent manner and supported by convincing arguments.

Question 1
What is the mind-body problem and why is it relevant for the study of the law?
10%

The mind-body problem describes the problem of explaining how mental states are related to physical states, given that the human body is a physical entity and the mind seems to be non-physical. The problem was addressed by René Descartes, resulting in Cartesian Dualism. The mind-body problem is relevant for the study of the law because of the issue of mental causation: A mental state can be the reason to act in a certain way. E.g. we can accept the moral obligation not to kill X because it is against the moral value of human life. Thus, we wouldn't kill X though there are situations in which it is completely (physically) possible for us to kill X. A mental state can lead to a certain action or omission. In our example it is the decision not to kill X though we are able to. Or we can even decide to protect X's life if it is endangered and we have the means to do so. But how can a mental state have physical effects? Mental states seem to be qualitatively different than physical states. Mental states are subjective, qualitative, intentional whereas actions of our body are caused by factors, which are subject to the law of physics. It is therefore difficult to grasp the connection between these different processes. In conclusion, we need a theory, which can explain the relationship between mental states and social behaviour, including norm-based behaviour.

Question 2
What is the content of the "poverty of stimulus argument"? Why is it important for the study of moral cognition?
15%

The poverty of stimulus argument describes the idea that what cannot be learned must be inborn. "Inborn" does not mean that the structure or capacity is fully present at time of birth. It may require environmental stimulation in order to develop its full potential. A cognitive structure must be inborn if it cannot be acquired by "input" through learning or experience. "Learned" means acquired through study, repetition, and conscious effort. The term "poverty of stimulus" was coined by Noam Chomsky in his theory of an universal grammar. Concerning language acquisition of small children he argues that small children are not specifically taught all elements of a language and still acquire the capacity to speak and understand it at an early age. Most notably, they are only exposed to an impoverished linguistic input and still acquire the capacity to correctly identify language patterns that cannot be learned by only using evidence at hand alone. This means that children are born with an innate cognitive structure generating language (a system of principles that generate infinite numbers of linguistic expressions) allowing them to understand and be able to apply complex grammatical structures. Another important argument in favour of the poverty of stimulus argument stems from the sphere of vision such as the existence of certain visual illusions like the Kanisza Triangle. Although we are not trained to see triangles, we still all see them. Meaning that the capacity to see those visual illusions must be inborn.

In the sphere of moral judgement it can be argued that children "intuitively" know what is morally right or morally wrong without being taught. From a very early age children are able to differentiate between moral norms and conventional norms (the former having volitional consequences and – in case of violation – leading to feelings such as guilt or shame). This capacity develops despite the fact that is impossible to teach children the exact content of a moral principle such as the principle of altruism. It is therefore not plausible to conclude that children acquire these complex capacities by being taught or instructed. The poverty of stimulus argument is especially important for the study of moral cognition because it is an argument for the theory of universal moral grammar. The universal moral grammar is an analogous construction to the theory of universal grammar of language. The proponents of this theory argue that the universal moral grammar is an inborn, universal and uniform moral faculty across the species, which contains a set of principles that can generate an infinite number of moral judgements.

Question 3
What are the main principles determining the content of the human moral judgment? 30%

Possible answer:
In order to grasp principles that structure human moral judgements, it is necessary to define the properties of moral acts. A moral act must be deliberately carried out by an *agent*, *i.e.* a human being. It is to be *distinguished from other acts* (for example such of only aesthetical nature, *e.g.* Raphael conceptualising the "Stanza della Segnatura"). Moral acts are necessarily directed against a certain class of objects (among others *sentient beings*). Actions may be carried out with *direct* and/or *oblique intentions* (as well as *intended* and/or *foreseen effects*).
There are some impersonal, abstract and general foundational principles that underlie und determine moral judgments and lead to certain universal conclusions (namely the principles of *altruism*, *justice* and *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, a morally good act will be neutralised even if it leads to a beneficial outcome, if it is only performed with an oblique intention to foster the well-being of another person (for example in the cases where only self-interest or the interests of a third party are directly intended); at the same time, an action, performed with the direct intention to benefit another, that leads to harm, may not be called 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 of goods in the cases where the recipients are essentially equal. If the distribution is based on a reasonable criterion, it has to be proportionally performed with regard to the actual value of the criterion itself. If no reasonable criterion exists, an equal distribution is a just distribution. The *principle of non-instrumentalisation* consists in the imperative that human beings may not be used 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 and thought to be a guideline to determine the permissibility of actions which are normally forbidden. For this purpose, the following conditions must be met: The prohibited act and its negative consequences, though foreseen, must not be intended by the agent. Furthermore, a good result which outbalances the bad outcome must directly be aimed at while being morally preferable to any other consequence.
As for *emotions*, it is correct to say that they play an important role in the life of sentient beings, being the product of moral evaluation and, as a heuristic tool, enabling an agent to

understand what his actions might imply for other persons. However, they do not constitute the evaluation itself: Moral judgements may be traced back to an adequate description of a specific action and the rational analysis of the elements that define an act as a possibly moral one. As the guiding principles are of a cognitive character, moral judgements show cognitive content as well.[1]
Moral judgements lead to *volitional consequences*; they establish an obligation – they show how a specific situation, compared to the present state, *ought* to be – without referring to any further, non-moral sources of motivation. At the same time, the ability to freely choose between different options is not eradicated. If an act is *morally good*, its performance may be obligatory (which enables others to claim the performance of the act) or supererogatory, *i.e.* morally laudable, but not obligatory (others do not have the right to claim the performance). If an action is *just*, its performance is obligatory and others have the right to claim the fulfilment of the duty as well. If an act is *morally bad*, an agent may not perform it (and others have a right that the agent refrains from doing it). If it is morally neutral, the agent may choose freely whether he wants to perform it.

Question 4
Some recent theories argue that human rights are "moral illusions". What are the main arguments of these theories? What do you think of these theories?
20%

Possible answer:
Subjective rights consist in a *bundle of normative positions*: A bearer of a right is granted the privilege of performing an act or may claim the performance/omission of an action. The addressee of the claim has a corresponding duty and a no-right of urging the right-bearer to act. *Human rights* can be understood as moral or legal rights (the latter being secured by legal sanctions) leading to a specific claim which is linked with central values deserving protection such as life, integrity, dignity etc. This claim is attributed to everyone since they seem to have to be treated as equals.
This approach has been contested by some exponents of neuroscience: In the core, it is assumed that the human mind automatically comes to certain wrong and illusory conclusions due to its own structure. As an example in the field of visual cognition, one could refer to the Kanisza-triangle: Although it is clear that no triangle is actually drawn, the mind assumes the existence of a triangle due to the arrangement of other forms and shapes within the pictorial composition. One prominent example is the *"mental gizmo"-thesis*. Central to it is the assumption that the human mind is split in two parts (*dual-process-model*): *Fast thinking*, based on heuristics, biases and framing, manages the challenges of everyday life, but is not able to produce accurate and reliable answers. This task is performed by deliberate *slow thinking*. Errors occur when fast thinking is not controlled by slow thinking. On the basis of these assumptions, some argue that human rights are the product of the emotionally biased process of fast thinking. To substantiate this allegation, the results of the trolley-problem-experiments are mentioned: Here, only the actions consisting in direct contact with the victim (such as the footbridge-problem) seem to be prohibited. Due to the detection of the activity of a certain brain area relevant for emotional decision-making (VMPFC) in combination with the personal and thus emotionally charged scenarios, it is assumed that these reactions are hard-wired fast thinking. Deontological arguments are thus a simple *ex-post*-rationalisation of such

[1] Here, other views on the exact role of emotions were possible as well, *e.g. neuroethical emotivism*: According to this theory, moral judgements are *ex-post*-rationalisations since human decisions are already determined by emotional states (*e.g.* fear). From this point of view, it is an act of self-deception to talk of rational evaluation of cases as well as principles that could determine moral behaviour.

judgements. From this point of view, human rights are cognitive illusions; they are necessarily experienced, given the structure of the mind, are leading astray, but can and have to be corrected by the more rational slow, *i.e.* utilitarian thinking.
However, *this position is not beyond dispute*: First of all, one might consider that the different evaluations of the trolley problems may be traced back to the distinction between directly intended and foreseen effects. At the same time, choosing the option of causing less harm does not provide a proof that utilitarian thinking is generally correct; it is also not evident why utilitarianism should be a more adequate description of moral evaluation than practical reasoning. Brain imaging studies do not prove the point, given the theory dependence of data and the problem of reverse influence. Furthermore, utilitarianism is itself based on certain preconditions, namely the equality of all human beings and the thus necessary equal treatment. But this principle cannot be justified by utilitarianism itself. Utilitarianism has non-consequentialist, deontological preconditions. At this point, there are two possible conclusions: (1) If deontological thinking is fast thinking, then utilitarian thinking must be fast thinking, too, since it is based on the former; or (2) utilitarian thinking is slow thinking, but then, deontological thinking has to be slow thinking as well as it is the basis of utilitarianism. In both cases, the theory leads to internal contradictions.
A more coherent approach to the foundation of human rights could be found in the *mentalist theory of a universal moral grammar* where certain principles such as justice and altruism are thought to exist within the cognitive system of every human being. Only such principles might provide a stable ground for the formulation of norms.

Question 5
It is sometimes argued that neuroscience and the theory of mind is ultimately of no relevance for the understanding of the law. What speaks for, what against this position? 25%

Law cannot be described as something existing in the world as a physical entity, e.g. like a stone or a tree. The law is a creation of the human mind and the human mind is a product of brain functions. Understanding the human mind and its origins may help to understand aspects of the law. Therefore it seems clear that a theory of the human mind will also affect the theory of the law by providing insights into the structures of the human mind and possibly answer the question of whether or not cognitive structures determine the law. The legitimation and the 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 and hence influence the law by defining general principles of moral conduct that, in turn, are relevant for the law.

An important topic in this context is the problem of free will. It is necessary to determine if human beings are agents of their own actions or if these actions are just the product of causal factors, which lead to a certain result. The criminal law is based on the ideas of guilt and responsibility. If we would accept the theory that there is no free will, sanctions with the aim of prevention would be obsolete. The same is true for the private law: The main concept of private autonomy and the principle of *pacta sunt servanda* could not fulfil their purpose if we deny the possibility of free choices. Also in the sphere of human rights difficult problems arise. Human rights are about defending – among other ideas-freedom. If our will is not free, this does not seem to make sense.

Neuroscience may also play an important role – some claim – when it comes to forensic use. (e.g. techniques such as fMRI scans may provide answers to questions such as whether the

defendant is lying or insane etc.) As some these claims (e.g. lie detection) are – under scrutiny – not tenable, another important aspect of the theory of neuroscience and the law is to acquire the tools to criticise false assertions about the impact of neuroscience on the law.