Legal Theory

January 13 2015

Duration: 120 minutes

- Please check both at receipt as well as at submission of the exam the number of question sheets. The examination contains 2 pages (this page included) and 6 questions.

Notes on marking

- When marking the exam each question is weighted separately. Points are distributed to the individual questions as follows:

Question 1	10 points	10 %
Question 2	10 points	10 %
Question 3	30 points	30 %
Question 4	15 points	15 %
Question 5	20 points	20 %
Question 6	15 points	15 %
Total	100 points	100 %

We wish you a lot of success!

Question 1 (10%)

Please explain the concept „competence" as distinguished from „performance". Please give an example.

Question 2 (10%)

What are "considered judgements" and what is their function in a theory of moral cognition?

Question 3 (30%)

Please outline some properties of human moral judgment, its content and structure. Which principles would a descriptively adequate account of human moral judgement contain?

Question 4 (15%)

Human rights are intended to apply to all human beings. Does the idea of human rights as universal rights of the whole species contradict central findings of evolutionary theory? Are universalist perspectives irreconcilable with the evolutionary mechanisms that shaped the human mind?

Question 5 (20%)

Which theories on the problem of free will do you know? Please explain their content and scientific merit.

Question 6 (15%)

Is neuroscience relevant for the law?

Outline Solution Legal Theory – HS 2014

Julia Stern and Matthias Hächler

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 weren't expected to write such a detailed text; instead, they should recognise the focus of the questions and write down their thoughts in an accurate and coherent manner and supported by convincing arguments. Keywords, which seem to be of major importance, are set in italics. The added information in the footnotes was not necessary to get the maximum of points, but rather to address and clarify additional topics.

Question 1 (10 %)

Please explain the concept „competence" as distinguished from „performance". Please give an example.

Possible answer:

Competence can be described as the system of knowledge which is the basis by the ability to perform certain tasks. *Performance* on the other hand is the use of this knowledge under specific conditions. In the sphere of language the *garden path sentences* are a good example to show that we have to distinguish between competence and performance of mental abilities. In garden path sentences (*e.g.*: "The horse raced past the barn fell") the human mind is misled by a certain word order. As a result the sentence is misunderstood, but not because of a lack of linguistic competence.

As a result we cannot conclude from a given performance that certain structures of knowledge exist (or are lacking) without taking other factors into consideration that could have an influence on the performance. Performance errors could occur – among other aspects – due to limits of memory capacity, distraction or shift of attention (and not due to lack of knowledge).

The same phenomenon can be observed in the sphere of *moral judgements*. Moral judgement may be clouded by emotions ("I hate him and therefore it is good that he is being punished") or the outcome of a moral judgement may be biased by interests (*e.g*. monetary interests). In these cases the performance of moral judgements is affected.

Question 2 (10 %)

What are "considered judgements" and what is their function in a theory of moral cognition?

Possible answer:

The notion of "considered judgements" is closely related to the concepts of "competence" and "performance". A "considered judgement" is a moral judgement without influences like personal interests, emotions, etc. The moral judgement should be dispassionate, *not biased by interests*, based on a clear perception of the *facts* of the case and take into account *various perspectives of different agents* (empathy can therefore be used as a heuristic tool).

Considered judgments are an instrument of analysis. They should help create a theory of morality through the accurate analysis of moral judgements by providing the needed data for a moral theory.

Question 3 (30 %)

Please outline some properties of human moral judgements, its content and structure. Which principles would a descriptively adequate account of human moral judgement contain?

Possible answer:[1]

A descriptively adequate account of human moral judgement may not be confused with an explanatory adequate account. The latter is often based on certain (descriptive) premises, which are not critically questioned. Having noted this, one can say that human moral judgment does not consist in case-based imperatives, but in several impersonal, general and abstract rules. These rules revert to foundational principles such as *altruism*, *justice*, *equality* and the *principle of non-instrumentalisation*. The following remarks try to clarify the properties and structure of human judgement.

To identify an act as *moral*, several criteria must be met: (1) There must be some sort of agency since *e.g.* raindrops can't be actors when disarranging a new haircut. Instead, the author of an altruistic act has to be an agent. (2) A moral act has to be distinguished from other acts which for example seem to be of purely aesthetic nature (*e.g.* van Gogh painting his "Starry Night"). (3) To qualify an act as an altruistic one, the intention of the agent has to be to foster the well-being of a sentient being. It is possible to differentiate between direct and oblique intentions. This differentiation is relevant for the judgement is altruistic or not. If for example somebody gives her lecture notes to another person who is in need of them in order to help this person the agent has the direct intention to benefit the recipient of the lecture notes. If in fact the agent has the intention to feel good as the main aim of his action, he has only an oblique intention as to benefitting the recipient of the lecture notes. It is a precondition for altruistic action that such action is taken with direct action that benefits other sentient being. The same distinction can be made between intended and foreseen effects.

Further principles include that an act performed with a direct intention to benefit another person, but without beneficial results, may not be not be a morally good action, but this does not change the moral value of the intention as such. In addition, a beneficial act without direct intention to benefit another is despite the beneficial consequences of the act not a moral action.

A distribution is *just* when equal standards are applied to recipients that are essentially equal. In the case of a lack of a criterion of distribution, an equal distribution is a just distribution. If there is a reasonable criterion of distribution, the distribution has to be proportional to the value of the criterion of distribution.

According to the *principle of double effect*, an otherwise prohibited act is permitted if (*a*) the prohibited act is not directly intended. Additionally, (*b*) the bad consequences are foreseen, but (*c*) must not be directly intended; instead, (*d*) the actor intends to achieve a certain good outcome, which (*e*) outweighs the bad consequences, and (*f*) there is no other morally preferable consequence. This principle is only an approximation to the core underlying principles which are in fact based by the imperative not to use human beings as an instrument

Moral judgment is in many ways connected to *emotions* since they may be the product of moral evaluation (like moral pride or shame). But moral judgments are not just expressions of emotions. Moral judgements depend on a structural description of actions that is the basis for the evaluation. This evaluation follows cognitive principles. Therefore, moral judgement has cognitive content. Empathy may perhaps be a precondition of a moral judgement because it can serve as a heuristic tool. It

---

[1] Here, several answers were accepted, as for example an approach that would support *neuroethical emotivism*; important for the correction, evaluation and rating of the answer was the coherence and rigour of the arguments presented.

specially enables an actor to understand what consequences her actions might have for other people. But that does not make moral judgement collapse into empathy.[2]

Moral judgements affect the will as they state how a situation ought to be; this coercion (or in the Kantian term "*Nötigung*") motivates[3] the actor to achieve congruence between the present and the morally targeted situation without dismissing the ability of making a free choice. If an action is qualified as morally good, it may be obligatory or supererogatory (it is morally laudable, but not obligatory). Others have a right to the morally obligatory action. Contrariwise, in the case of a morally bad action, others have the right that this action is not performed and actors have the duty not to perform it. Morally neutral acts are permitted; others do not have the right to interfere in any way. Judgements of the justice of an act create an obligation as well and a right on the side of the patient of an action that the just action is performed.

Question 4 (15 %)

Human Rights are intended to apply to all human beings. Does the idea of human rights as universal rights of the whole species contradict central findings of evolutionary theory? Are universalist perspectives irreconcilable with the evolutionary mechanisms that shaped the human mind?

Possible answer:

The main focus of *evolutionary theory* lies on natural selection. The properties of an organism derive from certain genes; the genes showing the highest reproductive inclusive fitness will be favoured by the evolutionary process. *Evolutionary psychology* deals with this approach and tries to identify certain social behaviour such as the well-meaning affection between parents and children and other congeners as a product of evolution. Following the arguments of the theory's supporters, it is, even for originally selfish mankind, useful to care for children and relatives in order to reach the ultimate goal of reproduction. Small group morality is therefore a way to augment the chances of survival of one's genes, even if the primary bearer should die (an example of these "selfish beneficial acts" can be seen in antelopes which sacrifice themselves to protect the survival of their kin). This is the core of the idea of kin selection.

It is argued that the findings and results of evolutionary science must be taken into consideration when enacting laws because they point at certain limits of regulation, where law might not be the adequate instrument to change human behaviour. The aforementioned thesis that morality merely exists in small groups challenges the idea of universal human rights: Each human being has to be respected as equal and as an end in him- or herself and this respect is not restricted only to closely affiliated beings.

The claim made by evolutionary psychologists does nevertheless not stand on an all too firm ground. On the contrary, it is plausible to rather assume an *evolutionary pluralism* underlying the evolutionary development of organisms since there exist traits that apparently don't increase the chance of reproduction of genes. A theory of adaption alone may not explain the formation of all traits like non-adaptive mutations and adaptive mutations with non-adaptive side effects. It does neglect that evolution depends on other factors as architectural constraints, certain development paths or natural laws as well. Additionally, distant relatives may seem to have more in common with a particular species than

---

[2] *Neuroethical emotivism*, also buttressed by evolutionary theory, states that moral judgements are the product of emotions such as joy or disapproval. Following this theory and opposed to the approach explained above, reasonable arguments for certain structures moral judgement are a concealed attempt to justify a decision already created by certain emotional conditions by hindsight.

[3] One can say that a moral "ought" creates an obligation that is strong enough to motivate a person without any further non-moral interests. This is the very essence of a moral judgement – anything else would be a simple statement about the world.

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*). Another problem arises from the fact that it is unclear who the exact predecessors of human beings were and how their mental capacities have to be classified; furthermore, human beings lack close evolutionary relatives. These problems are particularly pertinent for cognitive abilities because the exercise of almost all cognitive abilities do not leave trails. There are for example no artefacts that could document what linguistic abilities early human beings had.

To name another important point of criticism, one can say that evolutionary psychology suffers from functionalist fallacy. A functional fallacy consists in the assumption that because a trait is promoting inclusive fitness, an organism must in fact possess that trait. As an example, men are assumed to be promiscuous and women monogamous because this seems to contribute best to the reproduction of genes. The fallacy consists in overlooking that one has first to give reasons why some behaviour is regarded as a trait of an organism before one can even think of trying to explain that trait.[4]

With respect to these considerations, universal human rights, which may be based on theories such as a *Universal Moral Grammar* (consisting in the assumption that all human beings have an inborn moral faculty and are guided by the principles of altruism, equality and justice), don't seem to be excluded by evolutionary mechanisms.

Question 5 (20 %)

Which theories on the problem of free will do you know? Please explain their content and scientific merit.

Possible answer:[5]

The topic of free will is of increasing concern for the theory of law not the least because of questions of guilt and responsibility. Some argue, for example, that there are genetic predispositions for crime or malfunctions of inhibitory mechanisms that could cause certain behaviour.

As far as the philosophical discussion on the subject of the free will is concerned, there are three major schools of thought. First there is *determinism* which holds that the existence of a free will is not possible because everything, including every human action is caused. It is assumed that the brain is a physical entity and therefore is subject to the laws of physics. Furthermore, the activity of the brain is responsible for enabling the human mind and in consequence determines every human action. In this conception, freedom can only be imagined as random behaviour.

Proponents of *indeterminism* believe that it is possible to make free choices that determine our actions. Human beings are the authors of their own actions and are not simply determined by causes. They are only inclined, but not determined to act by motives, reasons etc.

Finally, the theory of *compatibilism* holds that determinism is compatible with the idea of human freedom. It is argued that even when choices are determined, the freedom to act according to these choices remains intact. The issue with compatibilism is that it does not provide a satisfying answer for the problem of free will – compatibilism is only concerned with the freedom of action (acting according to one's will) and not with the question whether the choice to act a certain way was determined or not.

---

[4] Some students also mentioned the fact that one may not easily define small groups: Does this concept include only close family members or a whole tribe, a village community or even a nation?
[5] Answers which did not favour indeterminism, but declared determinism or compatibilism as the most adequate approach to the topic of 'free will' have been accepted as well as long as they showed clear and convincing argumentation.

The Libet experiment is regarded as a paradigmatic example on the subject of free will. Libet assumed that the subject can veto the decision (a "free won't").

However, we have to keep in mind that such experiments do not proof the non-existence of a free will. For example, the interpretation of the experiment by Libet himself is not deterministic. Additionally, a deterministic theory with sufficient explanatory power has not been developed yet. It is not plausible to rule out *a priori* the possibility of an indeterministic theory which would account for a core aspect of human experience, autonomous decision making.

It is one of the central lessons of the history of science not to make any a priori assumptions about the structure of the world. There is sufficient reason to exclude the possibility of free will as there is reason to exclude a priori the possibility of an absolute beginning before without antecedent cause as it is assumed in modern big bang theory.

Question 6 (15 %)

Is neuroscience relevant for the law?

Possible answer:

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.

Humans formulate with their mind norms, apply them and ascribe value to action. The legitimation, interpretation and application of the law depend on moral principles. A deeper understanding may be gained by studying questions of a theory of the mind because ethics is a product of the mind.

Another topic is the question about the freedom of 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 connections, 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* couldn't 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 ideals – 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.).[6] As these claims are – under scrutiny – not tenable, another import 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.

---

[6] Some students also mentioned the fact that due to neuroscience, problems in regard to data privacy and human dignity arise: How much information may be read out of a human being until he or she is a mere object in a trial?