
Legal Theory

04 January 2017

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 4 questions.

Notes on marking

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

Question 1	15 points	15 %
Question 2	40 points	40 %
Question 3	25 points	25 %
Question 4	20 points	20 %
Total	100 points	100 %

We wish you a lot of success!

Question 1 (15 %)

What are "considered judgements"? Why do they play an important role in the theory of moral cognition?

Question 2 (40 %)

What are in your view central principles guiding moral judgement? Please explain your choice.

Question 3 (25 %)

There are theories that argue that the human mind is not adapted to universal human rights. These theories argue with evolutionary mechanisms like natural selection. What do you think of these theories? How do they relate to other evolutionary theories you know?

Question 4 (20 %)

Are the theory of mind, neuroscience and moral psychology helpful to understand the foundations of ethics and law? Please discuss. Please identify in which concrete sense, e.g. as to the understanding of human rights, such an approach may turn out to be fruitful.

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Outline Solution Legal Theory – HS 2016

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 (15 %)

What are "considered judgements"? Why do they play an important role in the theory of moral cognition?

Possible answer:

A "considered judgement" is a moral judgement which is not influenced by emotions, not biased by personal interests, dispassionate, based on a clear perception of the facts of the case and which takes into account various perspectives of different agents (empathy can thereby be used as a heuristic tool).

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

The notion of "considered judgements" is closely related to the concepts of "competence" and "performance". Competence is the system of knowledge, performance is the use of such knowledge. Performance errors can occur due to curtailment of memory capacity, distraction, emotions, biases or shifts of attention. Because of this possibility of performance errors, the performances are by themselves not sufficient to fully reveal the respective underlying competence. Thus, the distinction between competence and performance is crucial.

In the linguistic sphere, garden path sentences are a good example to show that we have to distinguish between competence and performance of mental abilities. The same phenomenon can be observed in the sphere of moral judgements. Moral performance consists of moral judgements, but they could be influenced by e.g. non-moral factors and, therefore, do not by themselves provide sufficient data for fully establishing the content of our moral competence (i.e. the moral faculty).

Question 2 (40 %)

What are in your view central principles guiding moral judgement? Please explain your choice.

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. aesthetical). 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.

In the answer to this question, one might also have presented a different approach of moral judgements, such as neuroethical emotivism. Whatever the approach presented, the principles argued for should have been explained by examples (a part which is not included in the solution outlined above).

Question 3 (25 %)

There are theories that argue that the human mind is not adapted to universal human rights. These theories argue with evolutionary mechanisms like natural selection. What do you think of these theories? How do they relate to other evolutionary theories you know?

Possible answer:

The main focus of some evolutionary theories 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*.

It is argued that the findings of evolutionary science must be taken into account when enacting laws because they point at certain limits, where regulation might not be the adequate instrument to change human behaviour. The thesis that morality merely exists in small groups challenges the idea of universal human rights, according to which *each* human being (not only closely affiliated ones) has to be respected as equal and as an end in itself.

The achievement of this approach is that it takes into account the importance of human beings as part of natural history. Its claims do nevertheless not stand on an all too firm ground, given 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. Evolution also 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 nature of the evolutionary process. Within such a theory and in light of the above 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 in-born moral faculty and are guided by the principles of altruism, equality and justice), don't seem to be excluded by evolutionary mechanisms.

Question 4 (20 %)

Are the theory of mind, neuroscience and moral psychology helpful to understand the foundations of ethics and law? Please discuss. Please identify in which concrete sense, e.g. as to the understanding of human rights, such an approach may turn out to be fruitful.

Possible answer:

Ethics and law are creations of the human mind. 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. It thus seems clear that a theory of 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 findings of a theory of mind are especially relevant in the sphere of human rights. If there are uniform and universal principles, such as justice or care, it is necessary to implement them in the construction of law. Justice can thereby provide the foundational cognitive component of human rights. Via a theory of justice, the theory of mind is highly relevant for a theory of human rights. Moreover, being based on innate cognitive elements of human beings indicates the universal epistemic access to the idea of human rights, suggesting their universal rather than relative nature.

An important topic in this context is the problem of free will. It is necessary to determine whether human beings are agents of their own actions or if these actions are just the product of causal and determined factors. Human rights are to a certain extent about defending the freedom of individuals. If there is no such thing as making free decisions about leading a life in certain way, these rights lose their purpose. The criminal law is based on the ideas of guilt and responsibility. If we accepted that there is no free will, sanctions with preventive aims would become obsolete. The same is true for 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.

Neuroscience may also 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.

However, the importance of the theory of mind for law does not imply that there is a shortcut from the former to the latter. The description of the structure of the human mind, containing an innate moral faculty with substantive foundational principles, does in itself not provide a justification for the normativity of such principles. If there are no good reasons speaking against them, it seems (from a standpoint of constructive scepticism) however reasonable to also assume their legitimacy. Moreover, when it comes to concrete moral or legal norms, there is necessarily constructive work involved, starting from such foundational principles but not being determined by them. There is thus no naturalistic fallacy involved when looking at how the structure of human mind influences ethical and legal theory.