Solution (outline) Legal Theory – Fall Semester 2019

> 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 %)
Please explain the distinction of "competence" and "performance". Please give two examples for this distinction from the study of human cognition. Which functions does this distinction serve in current theories of the mind? Why is this distinction important?

Possible answer:
While *competence* refers to our system of knowledge, providing us with the mental capacity to undertake certain tasks, *performance* denotes the usage of this knowledge. The distinction between the two concepts is central insofar as performances (instances of use of knowledge) alone cannot be taken as providing sufficient data for identifying the scope and content of the respective competence (system of knowledge) on which they are based. This is especially so because of the possibility of performance errors, rooted, e.g., in limited memory, emotions, prejudices or distractions. These factors can influence our performance and therefor need to be taken into account, too.

Example of linguistics: The phenomenon of garden path sentences in linguistics shows that while we misunderstand the sentence due to its word order and thereby fall prey to a *performance* error, this does not yet imply that our linguistic competence is equally constrained. In this case, the performance does not adequately mirror the underlying linguistic competence.

Example of moral judgments: In the moral sphere, the performance, thus the use of our system of knowledge, can be observed via moral judgments. However, non-moral factors (such as emotions, biases, or limited attention) can cloud such judgments (think of "I hate her so much that I think it is justified that she got a lower grade in the exam"). Thus, again, performances alone are not sufficient for discerning the moral competence behind them, i.e. the moral faculty.

Question 2 (40 %)
The legal philosopher Hans Kelsen argued in a famous article that "justice" is an "empty concept", a concept devoid of content. Do you agree? Does an analytical account of the content of morality confirm Kelsen's view? What is the content of moral judgements about the justice/injustice of human intentions and actions? Please consider in addition other moral principles, in particular principles of altruism. Are they "empty concepts", too? Or do they possess some identifiable content?

Possible answer:
An analytical account of the content of morality necessitates the study moral judgments. Moral judgments are bound by certain *formal preconditions* such as agency, and the distinction between direct and oblique intentions (as well as the distinction between intended and foreseen effects). Further, the objects of moral evaluation include in particular voluntary acts of agents with consequences for the well-being of other sentient beings. Finally, moral evaluation is to be distinguished from other spheres of evaluation (e.g. aesthetic).
There are some impersonal, universal, abstract and general *foundational principles* that underlie moral judgments, namely the principles of *justice (as proportional equality), altruism,* as well as the *principle of non-instrumentalisation.*
 - *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).
 - An act is *altruistic* if the agent has the direct intention voluntarily to 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 promotion of one's self-interest constitutes the direct intention) is not a

morally good act, even if it leads to beneficial outcomes. On the other hand, an action that is performed with the direct intention to benefit another person but results in harmful consequences is not a morally good action – whereas the intention as such would still be classified as morally good.

- 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 the light of the substantive principles and formal preconditions of human morality outlined here, Kelsen's view that justice is an "empty concept" does not seem to hold true.

Question 3 (20 %)
Some argue in current theories about the evolution of morality that "morality evolved for cooperation". Please discuss this thesis, drawing from current (competing) theories of evolution. In which respect can this thesis be criticised?

Possible answer:
The main focus of evolutionary psychology lies on natural selection, namely the hypothesis that properties of an organism derive from certain genes; genes with the highest reproductive inclusive fitness are evolutionarily favoured, and organisms are said to only possess so-called adaptive traits (thesis of *adaptationism*). Accordingly, evolutionary psychology seeks to identify certain social behavioural patterns as a product of evolution. It is argued that it is evolutionarily useful to engage in social cooperation, e.g. 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*. Thus, the perceived tension between humankind's selfishness and (small group) moral behaviour is resolved.

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, if any, ethical principles of humans can plausibly be taken to be inborn) before one can try to explain how these properties evolved. Thus, one instance of such a functionalist fallacy could be seen in the argument that "morality evolved for cooperation".

Finally, it seems more plausible to 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 %)
What are the gains of a study of the relation between psychology, neuroscience and the foundations of law? What are the limits of this perspective?

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. Contrary to what some theorists assert, there is no compelling evidence that human beings are not autonomous agents. 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.