Chapter 23

Can There Be a Theory of Law?

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"Why not?" you may ask. And indeed few challenge the possibility of theorizing about the law, if that is taken to mean "engaging in theoretical debates" about the law. Yet the thought that there can be a theory of law, that is, a set of systematically related true propositions about the nature of law, has been challenged, and from several directions. None of the challenges is entirely successful. But through examining some of them we gain a better understanding of what a theory of law can be, and how its success can be established.[1]

I will be using "a theory of law" in a narrow sense, as referring to *an explanation of the nature of law*. It is a sense central to philosophical reflection about the law throughout its history. But in choosing this narrow understanding of "theory of law" I do not mean to dispute the appropriateness of other theoretical investigations about the law, some of which I have dabbled in myself on other occasions, nor to deny them the title of theories of law.[2] My choice to use the term in the narrow sense explained here is purely a matter of terminological convenience.

Therefore, as here understood a theory of law provides an account of the nature of law. The thesis I will be defending is that a theory of law is successful if it meets two criteria: first, it consists of propositions about the law which are *necessarily* true, and, second, they *explain* what the law is.

All theories aim to be successful, or at least to be more successful than their rivals. To understand what theories are we need to understand what it would be for them to be successful, that is, what it would be for them to be what they aim to be. When discussing what a legal theory is I will assume that we are concerned with understanding the character of wholly successful theories, that is, of theories which meet the two conditions. The second and third sections of this chapter will discuss the two conditions. The first section aims to clarify the relationship between the thesis as stated above and the traditional way of understanding the task of legal theory as explaining the concept of law. The remaining sections (fourth to sixth) examine several difficulties with the idea that there can be a theory of law in general, a theory which since true is necessarily true of the law wherever and whenever it is to be found. The problems there examined arise out of the changing nature of concepts, out of the dependence of law on concepts, and out of the alleged impossibility of understanding alien cultures, using alien concepts.

Essence and Concept

What is the relation between the concept of a thing and its nature?

Concepts, as objects of philosophical study, as the target of conceptual analysis or elucidation, are a philosophical creation (Raz 1998: 254–5). Here is an example of one nonphilosophical use (quoted from the *Oxford English Dictionary*): " 'Techniques of testing product concepts in advertising could conceivably become as important as new physical research techniques have been to the chemical and metals industries' (*1970*

C. Ramond in R. Barton *Handbk. Advertising Managem.* xxii. 19).'' Here ''product concepts'' means something like ideas about possible products. There is, however, a common core to the philosophical and nonphilosophical uses. They relate to how people conceive certain objects or phenomena.

Metaphorically speaking, concepts (and from now on I will confine myself to the philosophical use of the term, and will feel free to suggest emendations of it) are placed between the world, aspects of which they are concepts of, and words or phrases, which express them (the concepts) and are used to talk about those aspects of the world. Some writers exaggerate their proximity to words and phrases and identify them with word – or phrase – meaning. Others associate them closely with the nature of their objects, the nature of what they are concepts of. When Ryle wrote about *The Concept of Mind*, or Hart *The Concept of Law* they meant, in advancing explanations of the concepts of mind and of law, to offer explanations of the nature of mind and of the law. Ryle opens his book by saying: ''This book offers what may with reservations be described as a theory of the mind'' (Ryle 1949: 9). Hart opens with: ''My aim in this book has been to further the understanding of law, coercion, and morality as different but related social phenomena'' (Hart 1961: v). For them, as for many other philosophers, there was no difference between an explanation of concepts and of the nature of things of which they are concepts. Some may even claim that there is no conflict between these two ways of understanding concepts, a view which dates back at least to the beginning of the twentieth century and the growth of ''conceptual analysis'' as a prime method of philosophical inquiry, which was often equated with analysis of the meanings of words and phrases.

The view I will advance allows that there is some truth in both approaches. But both are mistaken and misleading. Concepts are how we conceive aspects of the world, and lie between words and their meanings, in which they are expressed, on the one side, and the nature of things to which they apply, on the other.

The law offers an easy illustration of the non-identity of concepts and (word) meanings. Hart's *The Concept of Law* does not explain, nor does it aim to explain, the meaning of the word ''law.'' It has nothing to say about divine law, mathematical or logical laws, laws of nature, nor many others. Nor do I think that it is a partial explanation of the meaning of the word. ''Law'' is not ambiguous, and *The Concept of Law* does not explain one of its meanings. When used in legal contexts ''law'' bears the same meaning as in other contexts. Nor is it plausible to think that its univocal meaning is explained by a list of alternatives, as if saying that ''law'' means what it means in legal contexts, *or* what it means in religious contexts, *or* what it means in mathematical contexts, and so on. The word is used in all these contexts to refer to rules of some permanence and generality, giving rise to one kind of necessity or another.

Those who offer explanations of the concept of law usually do mean, as Hart did, to explain the nature of a familiar social institution. It would have been possible for a language to contain a word which refers to this social institution and to nothing else. It may be mere accident that we do not have such a word, though there are good historical-intellectual explanations why ''law'' has the meaning it has. But things being as they are the meaning of the expression ''the law'' is not (identical with) the concept of law which Hart, and other philosophers of law, sought to explain.

Of course we express the concept, use it, and refer to it by using words. But we need not use the word ''law'' or ''the law'' to refer to it. We could talk of the law by talking of the system of courts and legislature and the rules they endorse in a state, for example. And we could do so in a large number of other ways. Most importantly, we rely on context, linguistic and nonlinguistic, to determine whether we are talking of the right sort of law when talking of law, or whether we are talking of scientific or other laws. The availability of context to determine reference establishes that there is no need for concepts to be identified by the use of specific words or phrases.

I will make two assumptions about concepts: first, I will assume that we can explain what they are by explaining what it is to have and understand them. That is, we explain a particular concept by setting out the conditions under which it is true of people that they have and understand that concept. Second, I will assume that concepts differ from each other by the information

required to have and understand them, and by the skills and abilities involved in their possession. I call these assumptions, for in making them I am deviating from the ordinary meaning of "concepts," narrowing it down, and fashioning it in accordance with the way it is normally used in philosophical writings. Normally, rather than always, for the philosophical use is not uniform, and because in any case we should keep the freedom to deviate from philosophical usage where it would make sense to do so.

Those who, like Hart and Ryle, emphasize the close connection between concepts and the nature of things can be said to be implicitly committed to the view that a complete understanding of a concept consists in knowing and understanding all the necessary features of its object, that is, of that of which it is a concept. I will follow them in equating complete mastery of a concept with knowledge and understanding of all the necessary features of the objects to which it applies. Thus, complete mastery of the concept of a table consists in knowledge and understanding of all the essential properties of tables, and so on.

Is it an objection to this view that complete mastery of one concept can be identical with complete mastery of another without the two concepts being identical? Not necessarily. It is an objection only if we individuate concepts by the conditions for their complete mastery. Let me explain.

The concepts of an equilateral triangle and of an equiangular triangle are not the same concepts, but the necessary features of equilateral triangles are the same as those of equiangular ones. The necessary features of the one kind of triangle are the same as the necessary features of the other. We can accept that complete mastery of these concepts involves knowing that they apply to the same triangles, knowledge that the conditions for their complete mastery are the same. But they apply to the same triangles in different ways, for different reasons, the one because they are equilateral, while the other because they are equiangular.

How does this difference manifest itself? Primarily by the fact that concepts are individuated not merely by the conditions for their complete mastery, but also by the minimal conditions for having them. One may have the concept of an equilateral triangle without realizing that it is part of the nature of such triangles to be equiangular. Admittedly, one's understanding of the concept will then be incomplete. But then the notion of complete understanding, as explained above, is very demanding. Most of the concepts we have and understand we master and understand incompletely. What one cannot fail to know, if one has the concept of equilateral triangles, is that the concept applies only to triangles with equal sides. This is where the two concepts (of equilateral and equiangular triangles, in the example) differ. They differ in the minimal conditions for their possession. For, of course, someone who does not know that the concept of equiangular triangles applies only to triangles with equal sides may still have (an incomplete mastery of) that concept. But if someone does not know that they apply to all and only triangles of equal angles then that person does not have the concept at all.

Following this line of thought I will maintain that an explanation of a concept has four parts:

1 Setting the conditions for the knowledge involved in complete mastery of the concept, which is the knowledge of all the essential features of the thing it is a concept of.
2 Explaining the understanding involved in complete mastery of the concept.
3 Explaining the conditions for minimal possession of the concept, that is, those essential or nonessential properties of what the concept is a concept of, knowledge of which is necessary for the person to have the concept at all, however incomplete his or her mastery of it may be.
4 Explaining the abilities required for minimal possession of the concept.[3]

The first condition determines what the concept is a concept of. But all of them together determine the identity of the concept.

As with other aspects of this inquiry my use of "minimal conditions for the possession of a concept" is partly responsive to our normal notions, and partly a stipulative regimentation of these notions. It allows that people may know things about concepts, while not having these concepts. One may know that N is an animal without having the concept of N. One may know that

mauve is a color without having the concept, or that snakes lay eggs without having the concept of a snake. As this last example shows, knowledge that is inadequate for even minimal possession of a concept may be knowledge those who have mastered the concept (incompletely) may not have.

The mention of knowledge of nonessential properties as among the possible conditions for minimal possession of the concept is meant to allow that people may have knowledge which is sufficient to enable them to use the concept correctly in the circumstances of their life, but which is not true of it in all conditions. They may rely on the fact that swans that they have come across are white as crucial to their ability to identify swans. That may be part of what would justify judging them as having the concept.[4]

These considerations allow that people can refer to concepts which they do not possess. But this seems obvious for independent reasons as well. Reference to a concept need not employ any of its necessary features. For example, given that yesterday my friends discussed the concept of cruelty I can refer to it as the concept my friends discussed yesterday. I need know nothing more about it to successfully refer to it. They also allow that people may possess a concept and yet fail to recognize that it is identical with another, or think that there is only one, where there are two (the minimal conditions for the possession of the concepts of ''water'' and of ''twater'' are the same,[5] though the concepts are not identical since the conditions for their complete mastery differ).

It is possible for any person to invent or develop a new concept. Some concepts which emerge in that way make their way into the general culture, usually more or less modified along the way. But for the most part concepts exist independently of any one of their users. For the most part, we learn concepts, rather than invent or develop them. It must be so. Given the richness of our concepts and the limits of our abilities it is not possible for anyone to invent or modify more than a fractional margin of them. Given their role in communication it would be self-defeating to do so. The fact that for the most part concepts are there independently of any one of us does not mean of course that they are independent of us collectively. The conditions fixing the identity of particular concepts are idealizations constructed out of our conceptual practices, that is, out of the use of those concepts in general. They need not reflect any individual's practice. While it is impossible for a concept that no one knows anything about to exist, it is possible that no one has a completely correct understanding or knowledge of a concept, or indeed of any concept, including the concept of a concept.

Furthermore, while the conditions for concept possession are what they are because of our conceptual practices, it does not follow that we can identify the concept an individual uses, or intends to use, except by reference to our knowledge of what concepts there are. In part this is due to the fact that, with rare exceptions, when people use a concept, or try to, they intend to use a concept that is there (the one normally expressed by the word they use, etc.). Identification of intentions generally depends on (defeasible) presumptions of normality invoked by their manifestations (if you walk to the door then you intend to do so, unless some circumstances defeating the presumption obtain; if you say ''I will open the door'' then you mean what is normally meant when the sentence is uttered in like circumstances, unless some circumstances defeating the presumption obtain). Similarly, when you utter words to express a concept you express the concept that would normally be used when those words are uttered in those circumstances, unless defeating conditions obtain. Knowledge of the concept is presupposed in identifying the use of a concept. The speaker's intention to use the concept is identified by reference to presumptions of normality which presuppose such knowledge.

The preceding remarks show (1) how people can have incomplete understanding of concepts they possess, (2) how they can make mistakes about such concepts, including (3) mistakes about the identity of the concepts they possess and use.

These sketchy and rather dogmatically stated remarks were meant to explain why explaining a concept is close to explaining the nature of what it is a concept of (see the first condition of concept identity above), and yet why the two tasks differ (see the other conditions). They also explain why I regard the explanation of the nature of law as the

primary task of the theory of law. That the explanation of the concept of law is one of its secondary tasks is a result of the fact that part of the task of explaining the nature of law is to explain how people perceive the law, and therefore, where the law exists in a country whose population has the concept of law, it becomes relevant to know whether the law is affected by its concept.

Can the Law Change its Nature?

A theory consists of necessary truths, for only necessary truths about the law reveal the nature of the law. We talk of ''the nature of law,'' or the nature of anything else, to refer to those of the law's characteristics which are of the essence of law, which make law into what it is. That is those properties without which the law would not be law. As the *Oxford English Dictionary* explains, the nature of a thing consists of ''the essential qualities or properties of a thing; the inherent and inseparable combination of properties essentially pertaining to anything and giving it its fundamental character.''

Naturally, the essential properties of the law are universal characteristics of law. They are to be found in law wherever and whenever it exists. Moreover, these properties are universal properties of the law not accidentally, and not because of any prevailing economic or social circumstances, but because there is no law without them. This does not mean that there are no social institutions, or normative systems, which share many of the law's characteristics, but do not have the essential properties of the law. When surveying the different forms of social organization in different societies throughout the ages we will find many which resemble the law in various ways. Yet if they lack the essential features of the law, they are not legal systems.

This way of looking at the question may give rise to the suspicion that something has gone wrong right at the beginning of the inquiry. It seems to presuppose something which is plainly false. It presupposes that law has – indeed that it must have – an unchanging nature. But is not that a mistake? Surely – the objection runs – the nature of the law changes. Think of the law and the legal cultures of the Roman Empire, of European countries during feudalism, or in the age of absolutism. ''Law'' had different meanings during these different periods, and the modern Western notion of law differs from all of them. What was essential to the law of one period was absent in the law of another period. A theory of law which overlooks these facts cannot be a good theory.

But can the law change its nature? No doubt the law of any country can change, and does change. Moreover the institutions and practices of a country which constitute its law may lose the properties which are essential to the law. If that happens the result is not that the law changes its nature, but that the country no longer has a legal system (though it may have an institution which is not unlike the law in some or even many respects).

How do I know that the nature of law cannot change? That is a misconceived question. Following a well-established philosophical practice, I am using the term ''the nature of law'' and related terms such as ''essential properties'' to designate those properties which any (system of) law must possess to be law. This practice deviates from the way ''the nature of'' is sometimes used in nonphilosophical English. But it is important not to get hung up on terminological questions. The question is whether the law has essential properties, thus understood. And if it does, does understanding them enjoy a special role in understanding what the law is?

This reply to the objection that the inquiry is based on a false presupposition is not the end of the matter. It leads directly to a new criticism. It leads to a charge of arbitrariness, a charge of arbitrary verbal legislation which obscures important points. The use of ''essential properties'' and of ''nature'' which I propose to follow obscures the fact that in reality the nature of law changes with time, and therefore it obstructs rather than helps the development of a theoretical or philosophical account of law.

There is something right, as well as something wrong, in this objection. As has already been admitted, the use of ''essential properties'' and of ''the nature of . . . '' which I briefly delineated is not the only use these terms have. It is perfectly in order, indeed true, to say that with the rise of capitalism the nature of the state has undergone

a profound change. Or to say that the absolute protection of property and contract has become an essential function of the state. "The nature of X," in other words, is often used to refer to properties of X which are taken to be of great importance, even though they are not definitive of the identity of X, that is, even though X will not cease being what it is without them. It will merely undergo radical change.

When Jeremiah asks "Can the Ethiopian change his skin or the leopard his spots?" (Jeremiah 13:23) is he assuming that the change is metaphysically impossible or conceptually inconceivable (for he thinks that a spotless leopard is no leopard, etc.) or just that it is impossible as a matter of fact? There is no answer to the question. In most communication and thought the distinction is rarely drawn, nor is there any reason to draw it. It is not surprising, however, that the distinction is of philosophical importance. Therefore it is not surprising that philosophers have established a technical meaning for the terms, and I will follow it. Doing so does not prejudge the questions: does the law have a nature, in that sense of the word? And if so, is it illuminating to investigate it? It is true, of course, that there is no point in using this philosophical terminology unless the answer to these questions is affirmative. The only point I have been arguing for so far is that the fact that the notions of essential properties, and of the nature of something, are philosophical notions does not in itself disqualify them, nor does it in itself impugn the enquiry into the nature of law.

Does the Law Have Essential Properties?

It is time to return to the argument: defining the object of a theory of law as a search for an explanation of the nature of law threatens to lead to its immediate abandonment, for it raises an obvious objection to the enterprise. I have conceded that it is part of our common understanding of the law that its nature (when that word is understood as it usually is) changes over time, both with changes in social and political practices, and with changes in culture, in philosophy, or more generally, in ways of understanding ourselves and our societies. Does not that show not only that the philosophical notion of the nature of a thing or of its essential properties is absent from our common discourse, but also that it has no application, or at least that it does not apply to the law? If this is so then by setting itself the goal of accounting for the nature of law legal theory condemns itself to inevitable failure. The argument that this is indeed the fate of legal theory so understood is simple: over time we have been happy to operate without the philosophical distinction between essential and nonessential properties, so that whenever changes in the character of the law or in our ideas or ways of understanding it so required we changed our concept of law. And this was true of any changes, however great. Does this not show that the thought that the law has a fixed nature is an illusion?

As it happens this argument is not a good one. It is not generally the case that belief that something has essential properties is a precondition of it having such properties. If being made of H_2O is of the nature of water then this is so whether or not people believe that it is so, and whether or not they believe that water has essential properties. More specifically, what counts is not the common understanding of expressions like "the nature of law," nor even the fact that the concept of law changes over time. What counts is the nature of the institution which the concept of law (i.e., the one we currently have and use) designates. To make its case the objection has to show that our concept of law (as it is at the moment) does not allow for the application of the (philosophical) notion of essential properties to the law, that is, that the law has no essential properties.

Prima facie the evidence points against the objection. It is part of our understanding of the law that certain social institutions are instances of law whereas others are nonlegal.[6] The distinction between the legal and the nonlegal is part and parcel of those of our practices which determine the concept of law. We know that the regulations of a golf club are not a legal system, and that independent states have legal systems. I know that an Act of the British Parliament is legally binding, but a resolution of my neighbors to deny any nonresident access to our street has no

legal validity. And so on. Moreover, while the distinction is not marked by the presence of the same linguistic cues, it is fairly stable, used by lawyers, politicians, bureaucrats, and lay people, in a whole variety of contexts, always in the same way, always referring to the same set of practices and institutions. Indeed some may add that the very talk of "changes occurring in the concept of law" shows that once such changes occur it is no longer the same concept. It is a case of a new concept replacing the old one though they happen to share the same term.[7] Rather than challenging the thought that the law is marked by essential properties, talk of a change in the concept seems to confirm the thought – it seems to presuppose it.

This can be seen, of course, as a trivial point. The understanding of a concept includes an understanding of what determines what falls under the concept and what does not. In itself this does not show that the law has essential properties, that is, properties without which there can be no law. As we are often reminded, the concept of law may be a family resemblance concept.[8] Not all the items designated by a family resemblance concept share a common property, and *ipso facto* they do not have essential properties.

I believe that the news of family resemblance concepts has been much exaggerated. A family resemblance concept is meant to be an unstructured concept. It applies to some instances in virtue of their possession of a set of features, say A, B, C; it applies to other instances in virtue of a different, partly overlapping, set of features, say B, C, D; to others still in virtue of a set of features still further removed from the instances we started with, say C, D, E, and so on. I doubt that many concepts are of this kind. Elsewhere I have argued that the concept of a game, a paradigm of a family resemblance concept, is not a family resemblance concept after all (Raz 1999: ch. 4). While the meaning of many terms in natural languages cannot be given by a set of properties essential to their application, they usually have a core meaning with a structured set of extensions. This is why "root" can be used to refer to the root of the question, or "school" to a school of thought.

To some extent this debate is beside the point, beside our point. The notion of a family resemblance was developed by Wittgenstein in an argument against too regimented a way of accounting for the meanings of words and expressions. But the essential properties of law which legal theory is trying to give an account of are not invoked to account for the meaning of any term or class of terms. We are inquiring into the typology of social institutions, not into the semantics of terms. We build a typology of institutions by reference to properties we regard, or come to regard, as essential to the type of institution in question.

The distinction between inquiring into the meaning of terms and into the nature of institutions is often lost on legal theorists, perhaps in part because social institutions depend on the existence of complex practices including practices which can be broadly called linguistic, that is, practices of discussing certain matters by reference to aspects of these institutions. By coincidence it could happen that there are terms which derive their meanings exclusively from their employment to designate a central aspect of a particular social institution. In such a case the tasks of explaining the nature of the institution and explaining the meaning of the terms will be closely allied. Fortunately this is not the case with "law." While legal scholars sometimes write as if they think that the term is exclusively used to refer to the law of states, and courts, and so forth, the truth is otherwise. "Law" is employed in relation to sciences, grammar, logic, language, and many other areas. Moreover, while the law, that is, the law as we are interested in it, is replete with technical terms (e.g., "fee simple," "intestate") and other ordinary terms are used within the law with a technical meaning (e.g., "shares," "bonds," "equity") these are terms specific to one legal system or to a type of legal system. The general terminology of the law is no more specific to it than the word "law" itself. It consists of terms like "person," "status," "property," rights," "duties," which are part of the common terminology of practical discourse in general.[9]

Not only is the general terminology used to talk about the law common to practical discourse generally, but there is no single way in which we always mark that it is the lawyer's law that we have in mind when we talk of people's rights and duties, about what they are entitled to do or required to do, of benefits they enjoy or liabilities

or risks they are subject to. Sentences of these kinds and many others can be used to assert how things are according to law, or how they are morally, or by the customs of the place, and so on. It is always possible to clarify which statement is made by prefacing one's words with "according to law" or by other devices. But most commonly we leave it to the context to clarify what exactly is being stated (and, of course, often we prefer not to disambiguate our meaning). It follows from these observations that while in the course of giving an account of the nature of law one may well engage in explaining the meaning of certain terms, the explanation of the nature of law cannot be equated with an analysis of the meaning of any term.

What then is an account of the nature of law, of its essential properties? We are trying, I have suggested, to explain the nature of a certain kind of social institution. This suggests that the explanation is part of the social sciences, and that it is guided or motivated by the considerations which guide theory construction in the social sciences. In a way this is true, but this way of making the point may encourage a misguided understanding of the enterprise. It makes it sound as if some abstract theoretical considerations determine the classification of social institutions, considerations like theoretical fruitfulness, simplicity of presentation, deductive or computational simplicity, or elegance.

Considerations like these may indeed be relevant when a classification, a typology, or a concept is introduced by academics for the purpose of facilitating their research or the presentation of its results. The notion of law as designating a type of social institution is not, however, part of the scholarly apparatus of any learned discipline. It is not a concept introduced by academics to help with explaining some social phenomena. Rather it is a concept entrenched in our society's self-understanding. It is a common concept in our society and one which is not the preserve of any specialized discipline. It is used by each and all of us to mark a social institution with which we are all, in various ways, and to various degrees, familiar. It occupies a central role in our understanding of society, our own as well as other societies.

In large measure what we study when we study the nature of law is the nature of our own self-understanding. The identification of a certain social institution as law is not introduced by sociologists, political scientists, or other academics as part of their study of society. It is part of the self-consciousness, of the way we conceive and understand our society. Certain institutions are thought of as legal institutions. That consciousness is part of what we study when we inquire into the nature of law.

But why should we? Is it not our aim to study the nature of law, rather than our culture and its concept of law? Yes and no. We aim to improve our understanding of the nature of law. The law is a type of social institution, the type which is picked up – designated – by the concept of law. Hence in improving our understanding of the nature of law we assume an understanding of the concept of law, and improve it.

Parochial or Universal?

At this point a new objection may be raised. Does not the fact that we study the nature of an institution which is picked out by *our* concept of law make the inquiry parochial rather than universal? Talk of *the* concept of law really means *our* concept of law. As has already been mentioned, the concept of law changes over time. Different cultures have different concepts of law. There is no one concept of law, and when we refer to the concept of law we just mean our concept. Therefore, to the extent that the inquiry is limited to the nature of law as understood in accordance with our concept of it, it is a parochial study of an aspect of our culture rather than a universal study of the nature of law as such. Far from coming together, as has been suggested above, the study of the nature of law as such and of our self-understanding (in as much as it is encapsulated in our concept of law) are inimical to each other. Some people may develop the point further to the conclusion that there is no such thing as "the nature of law as such." To claim otherwise is to commit the mistake of essentialism, or of objectification. Others would merely conclude that the study of the nature of the thing (the law) and of our concept of it are not as closely related as has been suggested above, and that one must choose which one to pursue.

Common though this line of thought is, it is misguided. Think of it: we and other cultures have different concepts; not only different concepts of law. What makes some of them alternative concepts of law, whereas others are concepts of government, religion, tribes, or whatever but not of law? What accounts for the difference? What makes a concept "the so-and-so concept of law" (e.g., "the medieval concept of law")? Ignoring the occasions on which "the concept of . . . " is used to refer to the common opinions which people held about the law (the medieval concept of law being the views about the law, its role and function, common in medieval Europe), different *concepts* of law are concepts of *law* in virtue of their relations to our concept of law. Most commonly these are relations of similarity (X's concept of law is a concept of a social institution very much like, though not quite the same as, what we understand by law), or of a common origin (our concept of law developed out of the medieval concept, etc.). The point to note is that it is our concept which calls the shots: other concepts are concepts of law if and only if they are related in appropriate ways to our concept.

Let us accept that what we are really studying is the nature of institutions of the type designated by the concept of law. These institutions are to be found not only in our society, but in others as well. While *the concept* of law is parochial, that is, not all societies have it, our inquiry is universal in that it explores *the nature* of law, wherever it is to be found. Even so the charge of parochialism is liable to reappear in a new form. Is it not the case that the institution of law is to be found only in societies which have the concept of law (i.e., our concept of law)? Since it has been allowed earlier that the concept of law as we know it has developed in the West in modern times, and is certainly far from a universal feature of human civilization, a theory of law which concentrates on the nature of law, in the sense explained above, is relevant to modern Western societies only. It may be universal in a formal sense. In the philosophically stipulated sense of "the nature of law" the inquiry applies to all the legal systems which ever existed or that could exist. But this way – my imagined objector goes on to say – of rebutting the charge of parochialism is a pyrrhic rebuttal. The inquiry, when successful, is universally valid for a narrow concept of law, the modern Western concept of law. It is relevant not to all legal systems, as the term is usually – and nonphilosophically – understood, which include the law of the Aztecs, of the countries of medieval Europe, of the Roman Empire, or of China in the fifth century BC and so on. The philosophical inquiry would have to exclude those, as they do not conform to the modern, capitalist, or postindustrial, concept of law.

Put in this form the objection is based on a mistaken understanding of our concept of law. One way in which it has been changing over the last two or three centuries is to make it more inclusive and less parochial. As our knowledge of history and of the world has expanded, and as our interest in history, and our interaction with other parts of the world, have become more extensive, the concept of law has developed to be more inclusive. Admittedly, it responds not only to our interest in other societies, but also to our understanding of ourselves and our society, and the two may conflict. Features which seem to us central in ourselves and in our society may be lacking in other societies. Their importance to us in our societies tends to encourage forging more parochial concepts. To some this factor appears to be the only or the dominant factor influencing our concepts. This leads to further (or reformulated) objections to the universalist ambition of philosophical theories.

Some theorists take parochialism in their stride and allow it to fashion their theories. The outstanding example of a legal theory of this kind is R. M. Dworkin's. From the beginning he saw his theory as a theory of the law of the United States and of the United Kingdom. Of course it may be true of other legal systems as well. But it is not its declared ambition to be universal.[10] One reason elaborated by Dworkin in justification of this modest ambition is the fact that the concept of law is part of the practice of law (Dworkin 1986: ch. 1). Dworkin has pointed out that courts of law are sometimes confronted with issues which force them to reflect about the nature and boundaries of the law. They may refer to philosophical theories in answering these questions, and their answers and arguments buttressing them are on a par with philosophical discussions of these issues. This is not to say that their answers and

discussions are as good as philosophical theories. They may be better or worse. The point is that they are engaged in the same enterprise as philosophers. Their conclusions rival philosophical conclusions: if they disagree then one is wrong and the other may be right.

It is tempting to reinforce the point just made by adding that while often courts will not attend to theoretical disputes about the nature of law since nothing in contention between the parties turns (or was claimed to turn) on disagreements about the nature of law, nevertheless any court's decision presupposes some view or other about the nature of law. This seems to me to go beyond what the evidence warrants. The fact that if challenged to defend an action of mine I will have to advance theoretical arguments does not establish that I already have a theoretical view of one kind or another. I may have none, not even implicitly, and I may not be committed to any.[11] One cannot infer that people have certain beliefs, or beliefs of a certain description, just because they should have them. And while the courts may be committed to the view that there is some way of justifying their decisions, they are not committed to any view about which way justification lies.

It is wiser, therefore, not to reinforce the observation that the courts sometimes engage in a theoretical argument about the nature of law with the further point that all their decisions presuppose a view about the nature of law. The observation itself, however, is correct and beyond dispute.[12] What lessons should we learn from them? Dworkin suggests that this establishes that law and legal philosophy are part of the same, self-reflective, practice. This implies that American legal philosophy is part of American law, that legal philosophy when studied in an American university is related to legal philosophy as studied in Italy in the same way that property law studied in an American university relates to property law studied in Italy. They are studies of analogous parts of the law, but are basically very different enterprises: an account of property law, or an aspect of it, may be true of Italy and false of the USA. Similarly a theory about the nature of law may be true of the USA, but false of Italy. If it is true of both countries this is a contingent result of some historical developments which could have been otherwise. Theories of law, in other words, are necessarily parochial.

Whether or not they are parochial, this argument does not prove that they are. Perhaps it is no exaggeration to say that any issue, from astrophysics to economics to biblical exegesis, can be relevant to some legal decision or another. This would not show that any of those studies are part of American law in America and of Chinese law in China. The fact that a certain theoretical issue is material to a court's decision would only show that the court should aim to get the matter right, to learn from the discipline concerned how things stand in the matter at issue. It does not show that by engaging in economic, sociological, or biblical arguments courts can change the conclusions of those disciplines, that the fact that they come to some conclusion in these areas makes those conclusions true in economics or sociology, and so on. Nor will this conclusion change if in some country or another once a court has taken a decision based on such grounds it would not be open to challenge on the ground that it got its economics, and so forth, wrong.

All this is plain enough, but is it not different with legal theory? While the courts have no special authority in economics or political science, do they not have special authority regarding the concept of law? The answer is that it depends. Consider, by way of analogy, the same question raised about the notion of an undertaking. A case may turn on whether or not one person undertook to perform a service for another. Has the law authority to decide what counts as undertaking to do something? Yes and no. The courts have authority to decide when the law of their country would view an action as a binding undertaking. But the notion of an undertaking has life outside the law. And the court has no authority to decide what is an undertaking in that sense. I do not mean to say that it is precluded from forming a view on the matter, or from relying on that view. It may be required by law to form such a view since the plaintiff in a case may be entitled to relief only if the defendant has undertaken (in the ordinary sense of the word) to perform a service for him or her. The point I am urging is that if the court gets this wrong its decision would not change the nature of undertakings, any more than if it

gets an economic argument wrong its decision can change economic theory.

If things look differently in the case of an undertaking than in economics this is because a mistaken decision of the court may be the first step towards the emergence of a special technical sense of undertaking in the legal system concerned. That may be so even if the court did not mean it that way, even if it meant simply to find out what is an undertaking in the ordinary sense of the word. It is the same with the concept of law as it is with the concept of an undertaking. Of course, unlike the concept of an undertaking the concept of law applies only to the law. But like the concept of an undertaking it is a common concept in our culture which applies not only to our law but to the law of other countries, now as well as in the past or the future. It also applies to law in fiction, and in hypothetical cases. In short it is not a concept regarding which the courts have special authority. When a decision turns on a correct elucidation of the concept the courts try to get it right, as they do when it is about an undertaking, or about an economic argument. If they fail this may lead to the emergence of a technical sense for the term in that legal system. But it will not lead to a change in the notion of law. The claim that a theory of law is parochial because legal theory is part of legal practice is misguided. Legal theory is not part of legal practice, at least not in the sense required to establish its parochial nature.

Can There be Law Without the Concept of Law?

Another argument for the parochial nature of legal theory turns on the claim that there is no law in a society which does not have the concept of law. Since I have admitted that the concept of law (i.e., our concept of law) is parochial and that not all societies which had law also had our concept of law, it follows that not all of them had institutions recognized as law by our concept. A theory of law which aims to explain the nature of the institutions and practices which our concept of law recognizes as law is therefore only nominally universal. It applies to all that our concept recognizes as law, but our concept fails to recognize as law many legal systems for the reason that they did not have our concept of law, and there is no law without the concept of law.

We have to distinguish two versions of the argument. One claims that there cannot be law in a society which does not have a concept of law. According to it societies which do have some concept of law can have institutions and practices which are clear instances of the concept of law (as we have it). The other, more radical version claims that only societies which have our concept of law can have institutions and practices which are instances of the concept of law that we have. To make its conclusion good the radical version of the objection has to show that no society which does not have our concept of law can have a legal system, as that institution is understood by our concept. That is an unlikely claim, which can be easily refuted by example, by simply pointing to some faraway society, say that of Egypt in the fourth century BC, which did not have our concept of law, but had the institutions which that concept recognizes as legal.

Even the weaker claim – that there cannot be law in a society which does not have some concept of law – is probably mistaken. The rest of this section is devoted to an examination of this weaker claim. Remember the following three theses:

First, that the concept of law (our concept) is local in the sense that while some societies have it, others do not.

Second, that there is no law in a society which does not have a concept of law (though it need not have our concept).

Third, that a successful theory of law, being a correct account of a type of institution designated by a concept of law, applies only to institutions which prevail in cultures which possess the concept of law which designates the type of institution the theory explains.

Together they lead to the conclusion that there are many valid theories of law, each applicable to a different type of social institution, picked out by a different concept of law. A theory of the institutions picked out by our concept of law applies

only to the law in societies which have (or had) our concept of law.

I have already endorsed the first of these propositions. We undermine the strong version of the argument by rejecting the third premise. To refute the weak version one has to show that there is no reason to accept the second premise. Undermining the second premise also undermines the third, which presupposes it. So let us examine the second premise, and with it the conclusion that legal theory understood as the study of the nature of the institutions identified as law by the (i.e., our) concept of law is valid only of legal systems equipped with some concept of law. I will argue that it is not the case that only a society with a concept of law can be governed by law.

What would it be like for law to exist in a society which does not have a concept of law? It would mean that they would not think of its law as law. It is true that we have law and that we think of it as law. But is it not possible for a society which has a legal system not to be aware of it as a legal system? I will argue that it is.

This means that in legal theory there is a tension between the parochial and the universal. It is both parochial and universal. On the one hand it is parochial, for it aims to explain an institution designated by a concept that is a local concept, a product of modern Western civilization. On the other hand it is a universal theory for it applies to law whenever and wherever it can conceivably be, and its existence does not presuppose the existence of its concept, indeed it does not presuppose the existence of any legal concept.

H. L. A. Hart, in *The Concept of Law*, argued that it is necessary for a satisfactory account of law to explain how the law is perceived and understood by the people who live under it. To use his terminology – which in general I will avoid as it is open to diverse and confusing interpretations – he argued that a legal system cannot exist in a country unless at least part of its population has an internal attitude to the law, regards the law from the internal point of view, or accepts the law as a guide to its behavior – these being alternative descriptions of the same attitude. This claim of Hart, perhaps the central claim of his theory of law, has since been widely accepted. But its meaning is much in dispute. I think that Hart was right to insist that it is in the nature of law that in general its existence is known to those subject to it, and that normally it plays a role in their life.

I say ''normally'' for it is of course possible for people to disregard the law, to be mindless of its existence. But that condition is abnormal not only, if at all, in being rare. It is abnormal because it is of the essence of law that it expects people to be aware of its existence and, when appropriate, to be guided by it. They may not be. But that marks a failure in the law. It shows that it is not functioning as it aspires to function.

I find nothing amiss in personalizing the law, as I just did in the previous paragraph. We do refer to the law as imposing requirements and duties, conferring rights and privileges and so on. Such expressions are unexceptional. The law's actions, expectations, and intentions are its in virtue of the actions, expectations, and intentions of the people who hold legal office according to law, that is, we know when and how the actions, intentions, and attitudes of judges, legislators, and other legal officials, when acting as legal officials, are to be seen as the actions, intentions, and expectations of the law. They, acting as officials, express the demand and the expectation that people be aware of the law and that they be guided by it.

Hart, in describing the internal attitude which legal officials necessarily have, and which others are expected to have, strove to identify only those aspects of their attitude to the law which are essential to its existence. He saw no conflict between the fact that officials and others in every society with law adopt the internal point of view towards the law and the universal character of the law. And in a way he was right. There is no contradiction between the two. But I think that while his views are compatible with my emphasis on the parochial nature of the concept of law he was unaware of these implications.

The question is: does people's awareness of rules of law mean an awareness of them as rules or an awareness of them as rules of law? Need they, in other words, possess the concept of law in order to be members of a political community governed by law? Hart assumed, and surely he was right, that in our cultures the concept of law is available to all, that most people have a fairly

good general grasp of it. He has identified certain features as the uncontroversial core of the common understanding of the concept of law. His own account of the concept merely deepens our understanding by drawing out some of the implications of the concept as it is commonly understood, the concept of law as we have it.

But our possession of the concept is logically independent of the fact that we live in a political community governed by law. We could have had the same concept had we lived in a state of nature. We might then have used the concept to understand the difference between the law-free society we inhabit and the condition of other countries which do live under legal systems, and the difference between the current state of our society and what it might have been or may become. Contrariwise it would seem that Hart is not committed to the view that to live in a society governed by law we need be aware of the concept of law, beyond an awareness of the rules which in fact constitute the law of our society.

I am, of course, asserting here that the concept of a rule, or a variant of it, is not a concept of a type of the social phenomena we take the law to be, that it is not any kind of concept of law. Of course, the word ''law'' designates, among other things, rules or norms, and the concept of a rule probably emerged from a concept of a law which did not separate natural law from customary practices, nor either of them from a normative law. But these features are not sufficient to make it *a* concept of law, of the family that ''our'' concept of law is a paradigm of, for I take it to be paradigmatic that a family of concepts designates types of normative systems, and of social institutions rather than a single norm or rule. Once we accept that concepts of law are concepts of normative systems/social institutions, it is easy to see that the fact that individuals in such societies did possess the concept of a rule does not show that they had a rudimentary grasp of some concept of law, unless the concept existed at the time. True, one cannot have the concept of a legal system without having the concept of a rule, and the latter concept can feature in a rudimentary grasp of the nature of a legal system. But individuals can have a rudimentary grasp of a concept only if it exists. Incomplete mastery is incomplete mastery of something there can be complete mastery of at that time. Hence, in establishing that there can be no law without its subjects having the concept of a rule Hart has not shown that there can be no law without the concept of law.

By way of contrast Dworkin's theory of law assumes that an awareness of the concept of law is necessary for the existence of law in any society. For him the law is an interpretive practice which exists only in societies which are aware of the nature of that practice and of its interpretive character, and thus possess the concept of law.[13] In this, however, Hart's position is the correct one. Our concept of law does not make an awareness of it in a society a precondition of that society being governed by law. I will illustrate this point with one example only.

Jewish religious rules and practices are rich and diverse. They did, at an earlier stage of their development, govern the life of independent Jewish communities, and, in more recent times, they governed many aspects of life in Jewish communities in many parts of the world. Whenever theocratic autonomous Jewish communities existed or may exist they would be subject to law, that is, Jewish religious law. But the concept of law is not part of the Jewish religion, and where such communities existed in the past they often existed in societies whose members did not possess the concept of law. Jewish religious thought and doctrine encompasses much more than law. It encompasses what we regard as comprehensive systems of law, ethics, and religion, areas which though overlapping are also, in our eyes, distinct. To the Orthodox Jew of old there is no division within Judaic doctrines which captures the divisions indicated by ''our'' concepts of law, religion, and ethics. Yet beyond doubt theocratic Jewish communities did have a legal system even though they lacked the concept of law, or at any rate some of them (those which had not learnt it from other cultures) lacked it.

I believe that much the same is true of some other religious systems. ''Our'' concept of law is probably alien to the culture of Islamic theocracies, but it would be absurd to think that Iran, for example, does not have a legal system, or that its having a legal system depends on Iranians having acquired the concept of law before their Islamic revolution, or through their acquaintance with the law of other countries. Rather, the correct

conclusion is that while the concept of law is itself a product of a specific culture, a concept which was not available to members of earlier cultures, this does not show that those cultures did not have law. The existence of law requires awareness by (at least some) members of the society of being guided by rules, awareness of disputes regarding the meaning of the rules, and regarding claims that they have been breached, being subject to adjudication by human institutions, and – in many, though not necessarily all cases – awareness that the rules, or some of them, are the product of deliberate rule-creation by some people or institutions. But none of these features is unique to the law. They are shared by it and many other social structures, such as religions, trade unions, and a variety of associations of many kinds. Therefore, awareness of these features does not presuppose awareness of them as aspects of a legal system. And there is nothing else in the concept of law which requires that people be aware of their institutional structure as a legal system in order for their institutions to constitute a legal system. Notice, however, that there is a discrepancy between my use of the example of Jewish religious law and the more abstract argument I provided. The argument rejected the second premise mentioned above, that is, the premise that law can exist only in a society which has some concept of law, on the ground that (1) the correct proposition that law can exist only in a society in which at least part of the population accepts its rules and is guided by it does not yield the second premise as a conclusion; and (2) that the example of Jewish law shows that our concept of law does apply to legal systems which do not have our concept of law. The example is not sufficient by itself to show that our concept of law identifies as legal systems practices existing in societies which had no concept of law whatsoever. That would be more difficult to show by example. The case rests on the absence of a reason to think otherwise, given the rest of the argument.

We can therefore conclude that the charge, or the ready admission, that a theory of law must be parochial, for it can apply only to countries which possess our concept of law, or to countries which possess some concept of law, is mistaken. The law can and does exist in cultures which do not think of their legal institutions as legal, and a theory of law aims to give an account of the law wherever it is found, including in societies which do not possess the concept of law.

On the Alleged Impossibility of Understanding Alien Cultures

I have argued that while the concept of law is parochial, legal theory is not. Legal theory can only grow in cultures which have the concept of law. But its conclusions, if valid at all, apply to all legal systems, including those, and there are such, which obtain in societies which do not have the concept of law.

This conclusion has been criticized from a slightly different direction. The fact that concepts emerge within a culture at a particular juncture is often seen as a vindication of some radical philosophical thesis such as relativism, or postmodernism, or ethnocentrism. In particular it is taken to show our principled inability to understand, or at any rate to understand completely, alien cultures. In fact it shows little, certainly not that concepts can only apply to phenomena which exist in cultures which have those concepts. Consider, for example, the notion of "the standard of living." It may well not have been available to people in medieval Europe. But there is nothing in this fact to invalidate discussions of the effect of the Wars of the Roses on the standard of living in Lancashire. People would enjoy the same standard of living whether or not they were aware of the notion, or of the measurement of their own standard of living. The same is true of many other economic notions.

Some concepts are different. Arguably since gifts are gifts only if intentionally given *as such* there cannot be gifts among people who do not possess the concept of a gift. As we saw, something like this is true of rules. People are not guided by rules unless they are aware of them as rules. But, and that is the crucial point, they need not be aware of rules as legal rules in order to be guided by rules which are in fact legal.

On reflection there is nothing surprising in this. Of crucial importance is the fact that concepts like that of the law are essential not only to

our understanding of the practices and institutions of our own societies, but also to our understanding of other societies. In our attempts to understand societies with cultures radically different from ours we encounter a conflict. On the one hand, to understand other societies we must master their concepts, for we will not understand them unless we understand how they perceive themselves. But, on the other hand, we cannot understand other cultures unless we can relate their practices and customs to our own. Their concepts will not be understood by us unless we can relate them to our own concepts. How can this conflict be resolved? It seems to land us in an impasse which forces us to admit the impossibility of truly or completely understanding alien cultures.

This pessimism is, however, unjustified. We can meet both conditions for understanding alien cultures. While there may be a tension between the need to understand them in terms of some of our concepts, even though they do not have those concepts, and the need to understand how they understand themselves, that is, in terms of concepts which we do not have, there is no contradiction here. Both conditions can be fully met. Far from being irreconcilable they are interdependent. That is, the understanding of alien cultures requires possession of concepts which apply across the divide between us and them, concepts which can be applied to the practices of other cultures as well as to our own. Reliance on such concepts is necessary to make the alien cultures intelligible to us. They are required to enable us better to understand their concepts which we do not share.

Let us examine the argument to the contrary, the pessimistic argument. The fact that some cultures do not possess all of our concepts, and that they possess concepts which we do not have, makes them alien. If we need to rely on concepts which they do not possess in our attempt to understand them, as we commonly do, then our attempts are doomed to failure. They fail, the argument goes, to satisfy the other condition of understanding a culture, that is, that one must understand how its members understood themselves. This condition requires, so the argument continues, understanding the alien culture from inside, that is, using only concepts which were available to its members, only concepts that they used in understanding themselves.

Where does the pessimistic argument go wrong? It overlooks the ways in which we acquire many of the concepts that we muster. Concept acquisition often results from a combination of establishing, through explicit explanation or by observing how they are used by others, relations between them and other familiar concepts on the one hand, and learning their use by osmosis, by using them or observing their use, being set right by others when one makes a mistake, or, more commonly, observing through the reactions of others that one's use of the concept was not altogether happy. Let us call those two ways, often interrelated and not clearly distinguished in practice, learning by definition and learning through imitation. It is sometimes thought that some concepts are learnt one way and some another. Color concepts are thought to be examples of concepts acquired by imitation, by ostension. Mathematical concepts, and generally abstract concepts, are thought to be learnt through definitions. In fact it is reasonable to suppose that all our concepts which have use outside narrowly delimited groups of users and purposes of use[14] are learnt through a combination of both methods. To acquire the concept of red one needs to know that it is a color concept, that it is a perceptual concept, that nothing can be both red and green all over, and other matters one is likely to learn partly through definitions. To acquire the number concept "two" one needs to know that when two drops of water merge there is only one drop of water there, and to have other knowledge likely to be acquired partly by imitation.

I am not arguing that any single stage in the process of acquiring the concept, like the ones I mentioned, depends on only one or the other of the two methods. Most, perhaps all, of them can succeed through either method. I am saying, however, that it is humanly impossible to acquire concepts generally except through a combination of both methods.

Some people who share these views about concept acquisition may find in them further argument for the pessimistic conclusion about our alleged inability to understand alien cultures. But this seems to me to overlook the role of

imagination and thought experiments in the process of learning and understanding. In principle we can understand alien cultures because we can acquire their concepts, provided we have a substantial enough body of data to allow learning by imitation, either real imitation of one who visits or joins the alien culture, or through imaginative and sympathetic engagement with and reflection on reports of the nature of the culture and its habits, and other historical data. Naturally the material available about that culture may be insufficient. It may leave gaps in our mastery of its concepts and our understanding of its ways. But these are practical, not principled, limitations.

Our understanding of alien cultures will, however, remain incomplete until we can relate their concepts to ours. Why is this a necessary condition of understanding? After all, it may well be that none of the members of the alien culture understands our culture. If they can understand their own culture, as surely they can, without relating it to ours why cannot we do the same? The short answer is: because we, unlike them, know and understand our culture. Given our situation we cannot understand the alien culture without relating it to ours. Here is an analogy: native French speakers have complete mastery of French, even if they have no knowledge of English. But native English speakers who study French as a foreign language cannot understand it if they do not know what "*un homme*," "*une maison*," "*plaisir*," and so on, mean in English.[15]

There is an asymmetry here between one's knowledge of French and one's knowledge of English. Only when the English speakers' command of French and its relations to English reaches very high levels of subtlety and expertise, or when it is reflective knowledge leading them to reflect about the similarities and the differences between the languages, does it become appropriate to say that their understanding of English is improved by their deep knowledge of French. For ordinary English speakers who study French for practical purposes and are not inclined to reflect on its nature, no such benefit occurs: that is, their knowledge of French is improved by their growing ability to translate French into English. But their knowledge of English is not affected. This asymmetry is the main manifestation of what I will call "the route-dependence" of understanding in general. We understand new things by relating them to what we already understand, even though had we started somewhere else we could have gained an understanding of those things without understanding how they relate to what we in fact know. Moreover, while in some ways, and under some conditions our newly acquired understanding can deepen or improve what we understood already, it need not do so.

The route-dependence of understanding is sometimes stated by saying that we understand whatever we understand from our personal "point of view." While there is nothing wrong in applying this overused expression in this context, it can have unfortunate connotations. For some people it carries associations of blinkers, of limitations, and distortions. If we can understand alien cultures *only* from our point of view it shows – or so it is alleged – that we do not understand them as they really are, that our understanding is imperfect and distorted. After all, we understand the alien cultures through *our* modern Western perspective, relying on *our* notions and on *our* knowledge of history and of many cultures not known to members of the cultures which we are studying. So our understanding of their cultures differs from their own understanding of their own cultures, and cannot be altogether objective, or perfect, or something like that.

The example of a native English speaker acquiring French was meant to disprove that thought. To be sure, it is difficult to acquire perfect command of a second language, which is learnt after one has acquired one's first language. But it is possible in principle, and in practice as the examples of people like Conrad and Nabokov show. To master a second language one has to relate it to one's first language, whereas a native speaker of that second language need know no other. Nevertheless, in principle both can have perfect command of that language. I have explained the fact that while they arrive at the same destination only one of them must, to get there, know how what is to that person the second language relates to his or her first language by saying that understanding (and explanation) are route-dependent. But until we understand why this is so we cannot be confident that route-dependence does not affect the possibility of perfect knowledge, or its objectivity. This

is a topic for another occasion. Let us take stock of the conclusions tentatively arrived at so far.

We have already traveled some way from the goal of establishing the possibility of legal theory. That was made necessary because the challenge to the possibility of theory depends on assumptions with much wider ramifications. Now we have to travel even further afield. To establish the possibility of a theory of law, a theory which explains the nature of law, we need to examine some issues concerning the function of explanation. The aim of the examination would be to vindicate the conclusion tentatively arrived at in this chapter (at the end of the previous section), namely, that legal theory has universal application, that it – when successful – provides an account of the nature of law, wherever and whenever it is to be found. The objectivity and universality of the theory of law is not affected by the fact that the concept of law (which is our concept of law) is parochial and not shared by all the people nor by all the cultures which live or lived under the law.

That conclusion was based on the claim that to understand an alien culture and its institutions we need to understand both how its members understand themselves, and how their concepts, practices, and institutions relate to ours. This means that to understand alien cultures we must have concepts whose application is not limited by the boundaries of our culture, which apply to alien cultures as well as to our own. I neither have argued nor will argue that our culture has the intellectual resources which make it possible, with good will and sympathetic imagination, to understand alien cultures. I take it for granted that that is so. I have argued that if we have these resources, and if such understanding is possible, then the concept of law is one such concept. I have argued for that by the use of the example of theocratic societies, and the fact that we apply the concept of law to their institutional arrangements. The concept of law is among the culture-transcending concepts. It is a concept which picks out an institution which exists even in societies which do not have such a concept.

That does not establish that a theory of law is in principle possible, or that if it is possible it can achieve objective knowledge, rather than provide a blinkered way of understanding those alien cultures, albeit the best understanding which can be achieved from our subjective point of view. To positively establish the possibility of a theory of law we need to examine the nature of explanation and of objectivity. The reflections here offered do, however, remove some misunderstandings which sometimes lead people to doubt the possibility of such a theory.

Notes

1 This chapter uses material and ideas included in "On the Nature of Law" (Raz 1996) and in "Two Views of the Nature of the Theory of Law" (Raz 1998).

2 Notable among them are theories about the appropriate form or content that legal institutions should have, and theories about the concepts and principles which govern various legal areas (property, commercial law, torts, contract, etc.).

3 In the present chapter I will not dwell on the role of understanding ability in concept possession. My assumption is that understanding consists in knowing important relations among the essential properties of the things the concepts apply to, and among them and some other properties. I mention skill and abilities to indicate that for possession of a concept the verbal or conceptual abilities which manifest themselves in giving explanations of the concept or its use are not sufficient. It requires some nonverbal skills or abilities as well, abilities which manifest themselves in its correct use, rather than in any explanation of it.

4 Note that not all essential properties are used in identifying instances or occurrences of the things they are essential properties of. Some essential properties are useless for identificatory purposes. It may be an essential property of real tennis that it is the ball game first developed in France in the fourteenth century, but normally you cannot identify a game of real tennis as being that by reference to that property. Furthermore, properties which can be used for identification often are not essential properties. Possibly the only essential property of water is that it is H_2O. But few people use that to identify water. Finally, often we rely on nonessential properties to identify instances of concepts. They may be reliable marks of instances of the concept in all normal circumstances. Note also that there is no reason to suppose the same property is used to identify items falling under the concept by everyone who has the concept. Some essential properties may be used in this way by some people, and not be used, indeed

not be even known to others who nevertheless have mastered the concept some other way.

5 On these concepts see Putnam (1985).

6 Here and in what follows I will use "law," as it is often used, to refer sometimes to a legal system, and sometimes to a rule of law, or a statement of how the law is on a particular point. Sometimes I will use the word ambiguously to refer to one or the other of these, as it does not matter for the purposes of the discussion of this chapter which way it is understood.

7 Compare a different case: the way the meaning of "knight" changed in the Middle Ages. "Knight," the *Oxford English Dictionary* explains, means (among other things):

> 3. . . . : A military servant or follower (of a king or some other specified superior); later, one devoted to the service of a lady as her attendant, or her champion in war or the tournament; . . .
>
> This is logically the direct predecessor of sense 4, the "'king's knight" having become the "knight" par excellence, and a lady's knight being usually one of knightly rank.
>
> 4. Name of an order or rank. a. In the Middle Ages: Originally (as in 3), A military servant of the king or other person of rank; a feudal tenant holding land from a superior on condition of serving in the field as a mounted and well-armed man. In the fully-developed feudal system: One raised to honourable military rank by the king or other qualified person, the distinction being usually conferred only upon one of noble birth who had served a regular apprenticeship (as page and squire) to the profession of arms, and thus being a regular step in this even for those of the highest rank.

No one would deny that changes of meaning of this kind occur, but while there is no harm in referring to them as changes in the concept of a knight there is no reason to regard them as anything other than a case in which one concept has replaced another.

8 Some regard the fact that law is a vague concept as another reason for denying that it makes sense to talk of the essential properties of law.

9 It is not clear whether any philosopher of any stature ever supposed otherwise. Bentham's account is accompanied by a penetrating analysis of the semantic explanation of normative terms (see Bentham 1970; Hart 1982). But its purpose is to show that his account of the law is semantically legitimate. It does not establish that he thought of it as an explanation of the meaning of the word "law" in English. Clearly Hart never meant to offer a semantic analysis of the word law (Hart 1961: ch. 1). It is strange that R. M. Dworkin, who did not make the mistake himself, thought that Hart and many others were guilty of it. For my own previous repudiations of this view see Raz (1995) among other places. Many other philosophers of law were less sensitive to the issue and did not discuss it directly. Yet the general character of their work would suggest that they did not think of themselves as providing a semantic analysis of the word "law." It would be strange to attribute such a view to Hobbes, or to Locke, or Kant or Hegel, for example.

10 These comments are offered as an interpretation of a point on which Dworkin's views are not altogether clear.

11 This matter turns in part on the pragmatic character of explanation (including justificatory explanations) which cannot be discussed here.

12 During the 1960s countries of the British Commonwealth saw a series of decisions regarding the validity of *coup d'état*, secession, and the like which took the courts deep into theoretical disputes, leading in turn to a spate of theoretical discussions in the journals.

13 Though it is possible that all his theory requires is that those living in a society subject to law regard the law as instantiating some interpretive concept or another rather than the concept of law specifically.

14 Such as the names of widgets in the building trade. Or some theoretical terms in science.

15 These are examples, which do not imply that our native English speakers must have a perfect ability to translate French into English to qualify as French speakers. Only that they need to have some such ability.

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