J Waldron, 'The concept, the rule, and the essence of law', lecture at St Edmund Hall, Oxford, 28 April 2014

This was an interesting lecture. Waldron made five main claims:

(1) It's not always very clear whether a truth about law is a *conceptual* truth about law or not.
(2) Work in general jurisprudence has tended to over-emphasise the importance of finding *conceptual* truths about law.
(3) There are important *non-conceptual* truths about law.
(4) There is more than one concept of law.
(5) There is reason to doubt the importance of doing general jurisprudence.

In the space of an hour, the defence of these claims was necessarily pretty brief. But some interesting arguments were made. Let's take each claim in turn.

As to (1), Waldron introduced this point by reminding us of his work on the rule of law and dignity.[1] He has argued that by following the rule of law, in the sense of conforming to Lon Fuller's eight desiderata, a legal system treats people with *dignity*. In brief, it does so by treating people as having a capacity for planning their life. By publicly giving people rules which are to some extent clear, possible to comply with, etc., in advance, the law treats people with dignity.

Then he asked: if this is true, is the connection between the rule of law and dignity a *conceptual* truth about law? The question was prompted by an argument made by Jules Coleman. Coleman writes:[2]

> the fact that a thing, by its nature, has certain capacities or can be used for various ends or as a part of various projects does not entail that all or any of those capacities, ends, or projects are a part of our concept of that thing.

Coleman gives the example of a hammer: 'a hammer is the kind of thing that can be a murder weapon, a paperweight, or a commodity'.[3] But, Coleman claims, the fact that a hammer can be used as a paperweight does not make that fact part of our *concept* of a hammer. For this reason, Coleman argues that 'autonomy, dignity, and welfare…are external to the concept of law; law happens to be the kind of thing that can serve them well' but these capacities are not part of our *concept* of law.[4] On this view, Waldron's argument about dignity, even if correct, does not deliver a conceptual truth about law.

Here Waldron professed an uncertainty, prompted by his question and by Coleman's reasoning, about how to determine whether some truth about law is a *conceptual* truth or not. He mentioned different understandings of what a concept is: linguistic (a concept is given by the *meaning* of a word); psychological

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[1] J Waldron, 'How law protects dignity'.
[2] J Coleman, *The practice of principle* (OUP, 2001), 194.
[3] Ibid.
[4] Ibid, 195.

(concepts are ways of thinking); and classificatory (concepts are ways of classifying instances of some thing). He also noted, and briefly discussed, some relevant work on this question by Joseph Raz.[5] Ultimately, it wasn't clear to me what the upshot of this discussion was; the main points seemed simply to be that (a) it's not at all easy to provide an analysis of what is a conceptual truth about *x* and what is not and (b) a convincing analysis of this has not been provided by those working in general jurisprudence.

Waldron is right to point out the difficulty in distinguishing between conceptual and non-conceptual truths about law. It's not clear why law's capacity to serve dignity does not enter into its *concept*. However, it's also important not to over-emphasise borderline cases. We do have an intuitive grasp across many instances of what goes to the definition of a concept and what doesn't. If someone sincerely said that it's part of the concept of a game that the players must be able to state the rules in three different languages, we'd know that they didn't have the concept of a game (or the concept of a concept).

Let's take (2) and (3) together. (3) is indisputably correct. Even if we thought that the fact that law often employs coercion was not a conceptual truth about law, it's still an important one: it is of great moral significance that the law often employs coercion. Given that (3) is true, we needn't worry too much about (2), though it might be worth pointing out that Raz clearly accepts that (3) is true.

Waldron's argument for (4), he said, was basically an endorsement of Ch 1 of Finnis' *Natural Law and Natural Rights*. In Waldron's words, the argument was that since different inquirers have different purposes in classifying phenomena, these different purposes will generate different concepts. I'm not sure that the relationship between an inquirer's purposes and her conceptual analysis is quite as fluid as this. It's not clear that just by adopting a different purpose we'll generate a different concept. If I'm a sociologist and you're a philosopher and we're both working on 'knowledge', we might have different purposes, but we needn't have different analyses of the concept of knowledge. In some cases, it's clear that differences in purpose should not lead us to the conclusion that different concepts will be generated. If I'm a sociologist, I might want a rough-and-ready analysis of knowledge so that I can get on with doing some field work. But the fact that I've adopted a rough analysis of knowledge for practical reasons surely doesn't itself imply that there is more than one concept of knowledge.[6]

The discussion of (5) was based on Waldron's discussion in 'Can there be a democratic jurisprudence?'[7] There he writes:

> There are lots of books written about football, by which I mean the game played in American high schools and colleges and organized at a professional level by the NFL…There are also lots of books written about football, by which I mean the game Americans call "soccer," played all over the world by teams like Manchester United and Dynamo Kiev.There are lots of books, too, written about football, which was what we

[5] See J Raz, 'Can there be a theory of law?'
[6] See also T Macklem, 'Ideas of easy virtue'.
[7] http://www.law.emory.edu/fileadmin/journals/elj/58/58.3/Waldron.pdf

used to call Rugby Union in New Zealand when I was growing up. And no doubt there are many books written about football and also books written about football (in the senses in which "football" is used colloquially to refer to Rugby League and Australian Rules, respectively).

The start of the punchline is that *there are few if any books written about football 'as such'*. Few people would find books about 'football as such' interesting. It wouldn't be very interesting to say things like: 'All football involves the concept of possession of the ball'. Studies of the concept of 'offside in general' would be relatively dull. The end of the punchline is that the study of *law in general* - i.e. general jurisprudence – is similarly uninteresting. Better – more interesting – to study the theory of 'law in democratic societies' or 'tort law in America'.

One might have some doubts about this analogy with different kinds of football. First, the person offering an analysis of 'football as such' is more like the person who is offering an analysis of what *the laws of physics* and 'law' in the sense of *the human institution of law* have in common than the person who is doing general jurisprudence. Second, there is the simple point that we might think that general truths about such a fundamental human institution as law *are* likely to be much more interesting than general truths about football.