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### The Boundaries of Difference in Law: A Critique of Radical Incommensurability

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## **The Boundaries of Difference in Law: A Critique of Radical Incommensurability**

*Abstract: Occasionally, in pursuing their adjudicative duties over the course of a legal hearing, judges are called upon to acquire new concepts – that is, concepts which they did not possess at the commencement of the hearing. In performing their judicial role they are required to learn new things and, as a result, conceptualise the world in a way which differs from the way they conceived of things before the hearing commenced. Some theorists have argued that either as a general matter or as a matter specific to judicial practice and the legal context, judges are, with some degree of necessity, incapacitated from acquiring certain kinds of concepts. Such concepts include those possessed by the members of culturally different minority groups. Drawing on contemporary trends in analytic and naturalistic philosophy of mind, this paper explores the extent to which a judge might be incapacitated from acquiring new concepts over the course of a legal hearing and identifies those factors which condition the success or failure of that process.*

*Keywords: judicial understanding, cultural difference, concept acquisition, incommensurability, legal epistemology*

### **I. Introduction**

For a while now, various legal theorists have claimed that judges and other officials within liberal democratic nation states are unable to understand the thought and practice of culturally different minority groups.<sup>1</sup> One way of making sense of assertions such as these is to construe them as involving the claim that judges are unable to adequately *conceptualise* any or certain elements of the thought and practice (and associated material artefacts) of the members of different cultures. They do not and cannot possess an adequate concept of any or some culturally different phenomena. As a result, they cannot maintain true beliefs about these things - they cannot know them and respond appropriately to them - in any significant sense. This is what their lack of understanding consists of.

Because possessing a concept of a thought or practice involves possessing some set of the concepts actually informing that thought or practice, what this claim amounts to is that, in their relations with culturally different groups, judges do not possess and are unable to

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<sup>1</sup> The Australian legal theorist Penelope Pether, for example, has asserted that, 'it is a commonplace of accounts of indigenous culture ... that connection with the land is at its heart, in a way radically incommensurable with the non-indigenous...legal consciousness'. Penelope Pether, Principles or Skeletons? Mabo and the Discursive Constitution of the Australian Nation, *Law Text Culture* 4(1), (1998), 115-145 at 118.

adequately acquire some – perhaps, even any - of the concepts which actually inform the thought and practice of the members of those groups. They do not possess and cannot acquire, what I will term, ‘culturally different concepts’. Culturally different concepts are those concepts which, from the point of view of a judge, are possessed by the members of a culturally different group from, that of the judge.<sup>2</sup> What the theorists in question argue, then, is that a situation of conceptual difference exists, analysable in terms of an interpretively significant – and again, perhaps even a global - difference in the contents of the respective conceptual schemes of the judge and those culturally different minorities which come before her. Further, these theorists argue, some degree of *necessity* obtains in relation to this difference. It cannot be adequately resolved or overcome by the acquisition by judges of the concepts they lack - no matter what circumstances they find themselves in, *qua* judges. We might conceive of this irresolvable difference between the conceptual schemes of the agents in question in terms of an untranslatability or *incommensurability* between those schemes.<sup>3</sup> On this construal, the abovementioned theorists maintain that a significant degree of conceptual incommensurability obtains in the legal sphere as far as culturally different minorities are concerned, comprising both a difference in conceptual schemes and a cognitive-cum-interpretive incapacity as far as overcoming that difference is concerned.

This paper’s aim is to explore the capacity of the modern liberal legal system, through its judicial agents, to understand or conceptualise the thought and practice of culturally different people. It will proceed by means of a philosophically and legally informed engagement with the cultural incommensurabilist viewpoint.

## **II. The radical cultural incommensurability thesis**

With these introductory comments in hand, I want to explore now the limits of judicial interpretive activity by pursuing a systematic critique of what I will term the radical cultural incommensurability thesis. The radical cultural incommensurability thesis maintains that as a matter of theoretical necessity no judge possesses or is able to acquire any culturally different concept. This is to say that the possession or acquisition by a judge of a culturally different concept is theoretically impossible.<sup>4</sup>

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<sup>2</sup> I will also be using the term alien concepts to refer to those concepts which are not, at a given point in time, possessed by judges.

<sup>3</sup> Dorit Bar-on defines cultural incommensurabilism as the view that ‘different cultures view the world through conceptual schemes that cannot be reconciled.’ Conceptual Relativism and Translation, in *Language, Mind and Epistemology: On Donald Davidson's Philosophy*, F. S. G. Preyer, A. Ulfig (Eds.), (1994) 145-170, 145.

<sup>4</sup> In exploring the plausibility of the radical cultural incommensurability thesis, I adopt a physicalist-functionalist account of intentionality, action and a theory-theory account of interpretation, as my possibility-defining theory

The incommensurability invoked by the thesis is *radical* by virtue of being theoretically necessary, general, and global. It is *necessary* in that it is alleged to obtain in all theoretically possible worlds and, therefore, under all theoretically possible epistemic conditions. No circumstances are possible – internal or external to the judge - under which a judge possesses or acquires a culturally different concept. The thesis is *general* in that it applies to all judges and all culturally different agents and associated groups. And it is *global* in that it obtains for all culturally different concepts, together with the propositions, intentional states, and actions informed by those concepts. The thesis alleges that the scheme of concepts maintained by judges and the scheme maintained by culturally different agents have no conceptual content in common right down to the basic conceptual categories which might be argued to structure the very experience of the world maintained by these agents and, further, that nothing can be done by a judge to enable those schemes to have any content in common, no matter what relevant circumstances that judge might find herself in.<sup>5</sup>

Radical cultural incommensurability may be analysed as having two interrelated aspects – that of radical conceptual difference and that of a radical incapacity in relation to concept acquisition.<sup>6</sup> Within the terms of the thesis in question, the latter is entailed by the former. My strategy in this paper will be to explore the plausibility of each of the two elements of the thesis – radical conceptual difference and radical concept-acquisitive incapacity – in turn.<sup>7</sup>

### **III. The limits of conceptual difference**

#### *1. Argument against the necessity of global and general conceptual difference*

Because it is theoretically possible on the physicalist-functionalist account of things adopted here for any or all judges and any or all culturally different agents to possess neuro-physical states fulfilling identical intentional-functional roles within broader neuro-physical systems -

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of things. This is to say that, for the purposes of this paper, I define theoretical possibility and necessity with reference to the set of possible worlds in which that account of things is true.

<sup>5</sup> It follows from this notion of the respective agents inhabiting radically different worlds that not only are judges not in possession of and unable to acquire culturally different concepts but culturally different agents are not in possession of and are unable to acquire any of the concepts possessed by the judge and other members of her culture. This element of the radical cultural incommensurability thesis raises important questions about the very participation of culturally different agents in the legal process. As a dominant societal institution thoroughly informed by dominant societal concepts possessed by the judge, if the legal process is entirely conceptually opaque to culturally different agents one might reasonably ask what it would be that would possibly motivate those agents to engage with that process in the manner that they do.

<sup>6</sup> Bar-on (note 3), 157. The dialectic at work in the radical cultural incommensurability thesis reflects the two aspects of concept acquisition to be discussed below – the degree of conceptual difference obtaining at the commencement of the interpretive encounter and the epistemic conditions obtaining over the course of that encounter.

<sup>7</sup> I will only outline in this short paper the arguments in question. A more detailed elaboration may be found in Chapter 6 of my recent book *Cultural Difference on Trial: The Nature and Limits of Judicial Understanding*, 2010.

and how could it not be? - it is theoretically possible for such agents to possess identical (that is, shared) intentional states and concepts. There is nothing in the physicalist-functionalist picture of things which would rule out a neuro-physical state possessed by a judge and one possessed by a culturally different agent both being such as to be typically caused by the same set of environmental and intentional inputs and typically causing of the same set of intentional and behavioural outputs, given some set of background intentional states - as a possibility, at least. No aspect of that picture of things is inconsistent with such a situation obtaining. And if it is theoretically *possible* for such agents to possess such neuro-physical states in common, then it is not theoretically *necessary* that such agents do not possess such states, as well as the concepts those states realise, in common.

## 2. *Argument against the possibility of global and general conceptual difference*

### a) *Shared interpretive agency concepts*

By virtue of being able to interpret the behaviour of themselves and other agents, all interpretive agents possess some interpretively adequate part of a tripartite psychology (comprising theories of agency, mind and specific agents) which is necessarily informed in part by a core set of agency concepts – concepts such as agent, intentional state, belief, desire, environmental input, behavioural output, causation and the like. The possession of this set of concepts by interpretive agents is supported by scientifically sound evidence that some part of the set are innate and some part is the result of a significantly shared process of socialisation (through appropriately interacting with other agents from birth) *into effective interpretive agency*.<sup>8</sup> Whatever the explanation, it follows that a set of agency concepts exists which is possessed to some degree or other by all interpretive agents no matter what their environmental-intentional trajectories through life, no matter what their race or culture.

We can go further and argue that the possession by all interpretive agents – all judges and culturally different agents - of this shared set of agency concepts is so central to the physicalist-functionalist theory of agency, intentionality and interpretation elaborated here as to constitute a possibility-defining component of that theory. If we accept such argument (and I would urge that we should) then it follows that it is not theoretically possible for any judge and any culturally different agent (let alone all judges and all such agents) *qua interpretive agents* to be globally conceptually different, to hold no concepts in common. On the physicalist-functionalist account of things relied upon here, it is theoretically *necessary* that all judges and all culturally different agents possess some interpretively adequate set of this

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<sup>8</sup> See for example, Susan Carey, *The Origin of Concepts*, 2011.

shared set of agency concepts, as well as some set of the sub-conceptual content of those concepts (concepts are holistic) in common.<sup>9</sup> Judges and other agents can differ in regard to a whole range of other concepts possessed by them – environmental, bodily, intentional, and so on – but not in regard to this set.

Therefore, not only is the radical conceptual difference thesis – the thesis that global general conceptual difference is *necessary* - not plausible within our theoretical schema, but the thesis that global general conceptual difference is *possible* is not plausible either.

*b) Beyond shared interpretive agency concepts – shared innate concepts*

On the account of concept acquisition most compatible with physicalist-functionalism, a concept is acquired by an agent only on the condition that some set of the sub-conceptual content of that concept is possessed by that agent. This set of sub-conceptual content serves as part of the background set of intentional states associated with an agent being caused to hold an intentional state containing the (primary) concept by some or other environmental or intentional input. If this is the case, then it must also be the case that human infants acquire concepts in response to their initial sensory experiences of the world (their initial environmental inputs, whether in the womb or after birth) by means of some set of pre-experiential concepts – that is, by means of an innate concept-acquisitive conceptual repertoire. This is to say that human infants innately - and therefore universally - possess *some or other* set of low-level or core or categorial (perception- and conception-structuring) concepts by which they get the concept acquisition process off and running, by which they build up a conceptual scheme in the face of their experience of the world and their developing reasoning abilities.

On the account of concept acquisition given here there is no other way for human infants to acquire concepts of the environmental phenomena they encounter in the world following birth than by possessing at birth some or other (by definition, innate) categorial conceptual base.<sup>10</sup> Empirical research in developmental psychology on how infants build up a conceptual scheme and worldview supports the existence of such innate categorial concepts.<sup>11</sup> Further,

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<sup>9</sup> Of course, it is possible that interpretive agents possess a range of concepts in addition to these shared agency concepts which are not shared. The set of shared agency concepts is not sufficient in itself to engender a practically adequate understanding of a culturally different action or a practically adequate interpretation of a testimonial action about a culturally different action. Other non-necessarily-shared concepts are also required.

<sup>10</sup> Or the innate potential (a genetic, neurophysiological predisposition, perhaps) to develop such a concept-acquisitive conceptual base automatically over a period following birth.

<sup>11</sup> See for example, Carey (note 8), Elizabeth Spelke, The Origins of Physical Knowledge, in *Thought Without Language*, ed. L. Weiskrantz, 1988, and Anna Shusterman and Elizabeth Spelke, Language and the development of spatial reasoning, in eds. Peter Carruthers, Stephen Laurence, and Stephen Stich, *The innate mind: Structure and contents*, 2005, 89-106.

given the nature of these innate concepts as fundamental to all subsequently acquired concepts, there is theoretically sound reason to think that their possession by human agents continues after infancy and that they are relied upon on an ongoing basis over the course of an agent's life to acquire further concepts in the development of her conceptual scheme. Again, findings in the psychological literature seem to support this.<sup>12</sup>

*c) Beyond shared innate concepts*

It is worth noting that there would be no need to stop here at the set of categorial concepts if there were other concepts – non-categorial and non-agency concepts – the universal possession of which was both solidly empirically evidenced and fundamentally embedded within the physicalist-functionalist schema. For example, there is an interesting body of evidence and argument in linguistics and anthropology pointing to the possession by all human agents of certain non-categorial and non-agency concepts as a nomological matter.<sup>13</sup> Again, were such findings to be sufficiently empirically established and justified as logically central and possibility-defining within the physicalist-functionalist schema these concepts too might find a place in the necessarily shared set of concepts provided for by that schema and might further circumscribe the limits of possible conceptual difference within that schema.

*3. The limits of conceptual difference*

There is, then, a *limit* on the degree of conceptual difference which may obtain between any judge and any culturally different agent who might come before her over the course of a hearing. This limit arises out of the terms of the physicalist-functionalist account of agency, intentionality and interpretation relied upon here, including the findings of our best empirical inquiries into these things. For the physicalist-functionalist, a culturally different agent can be as conceptually different from a judge as is consistent with that agent being an agent (or more specifically, an interpretive agent) according to the possibility-defining terms of that account. This is to say that any such agent can be as different from a judge as is consistent with cogent

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<sup>12</sup> See, Astington, Harris and Olsen, *Developing Theories of Mind*, 1988 p.12 in relation to innate agency concepts. Henry Wellman, Culture, Variation, and Levels of Analysis in Folk Psychologies: Comment on Lillard, *Psychological Bulletin* 123(1), (1998), 33-36 acknowledges the possibility of complex adult agency concepts differing significantly from the simple innate concepts of young children, though not at their sub-conceptual core. On the other hand, Gopnik's Neurathian approach to the possession and development of a theory of agency in an interpretive agent appears to be consistent with the loss of innate agency concepts over time in response to environmental experience and socialisation. Alison Gopnik, Theories and modules: creation myths, developmental realities, and Neurath's boat, in (eds.) Peter Carruthers and P. K. Smith, *Theories of Theories of Mind*, 1996, 169-183.

<sup>13</sup> See, for example, the work of Eleanor Rosch and Anna Wierzbicka. Eleanor Rosch, Linguistic Relativity, in ed. A. Silverstein, *Human Communication: Theoretical Explorations*, 1974. Anna Wierzbicka, *Semantics, Culture, and Cognition: Universal Human Concepts in Culture-Specific Configurations*, 1992.

relevant empirical evidence and as is consistent with the terms of the physicalist-functionalist system of knowledge at large, including the metaphysical doctrine of physicalism itself. Within the physicalist-functionalist framework, the parameters of possible conceptual difference between any judge and any culturally different agent range from there being no conceptual difference at all<sup>14</sup> to there being a degree of conceptual difference consistent with the existence of whatever necessarily shared concepts physicalist-functionalists can soundly argue for. This latter degree constitutes the upper limit of possible conceptual difference for any such agents. No more difference than this is theoretically possible for any such agents. Despite being less than global, the maximal theoretically possible degree of conceptual difference between a judge and culturally different agent may, *whilst it lasts*, be enough to undermine many, if not all, of the cognitive and interpretive endeavours of any judge under any circumstances in relation to such agent. It may be enough to undermine the vast majority of a judge's cognitive and interpretive endeavours over the course of the legal hearing.<sup>15</sup>

#### **IV. The Limits of Concept Acquisition**

According to the physicalist-functionalist account of things, an intentional state containing a concept is typically caused by one of a set of environmental or intentional inputs *but only provided that* an associated set of background intentional states is in place. Where a culturally different concept is not possessed by a judge at the commencement of a hearing, it may be acquired over the course of a hearing if the judge engages in an appropriate cognitive response to appropriate environmental inputs or intentional inputs – which in the context of a legal proceeding means where the judge appropriately engages with or in appropriate *evidence and reasoning*. Again, this is possible only if sufficient sub-concepts of that concept are already possessed by the judge. And such sub-concepts may be acquired, if needed, in the same manner, provided that the judge possesses sufficient sub-concepts of those sub-concepts. A judge may acquire whatever sub-conceptual content of a culturally different concept is necessary for possession of that concept by coming into appropriate cognitive contact with evidence or engaging in reasoning appropriate to acquiring that sub-conceptual content but always on the basis of possessing relevant, lower-order, sub-conceptual content.

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<sup>14</sup> Though it is implausible to think that two agents could be conceptually identical, even within the same conceptual community, nonetheless it is not impossible on a physicalist-functionalist approach.

<sup>15</sup> It is worth keeping in mind here that whilst the existence of necessarily shared agency, categorial or other innate concepts admits of the possibility of substantial conceptual difference it does not *necessitate* substantial conceptual difference. Within the parameters established above, the extent of the conceptual difference which obtains between a judge and culturally different agent depends upon the environmental and intentional trajectories those agents take over the course of their lives. And the nature of those trajectories is a contingent matter depending upon the nature of the environmental and intentional inputs – the evidence and reasoning – those agents are causally subject to over the course of their lives.

In this way a judge may *build up* to possession of a culturally different concept, sub-concept by sub-concept over a period of time. She may acquire a culturally different concept by a multi-staged process of sub-concept acquisition in response to appropriate evidence and reasoning.

Thus, there are two individually necessary and jointly sufficient conditions for acquiring a culturally different concept – the possession of appropriate and adequate sub-conceptual content (or - from the perspective of intentional states - possession-relevant beliefs), on the one hand and appropriate cognitive engagement with appropriate evidence or appropriate reasoning in relation to one's present beliefs, on the other. We can redescribe these conditions in terms of the obtaining of an acquisition-enabling degree of conceptual difference and an acquisition-enabling set of epistemic conditions.<sup>16</sup> If either or both of the conditions necessary for the acquisition by a given judge of a given culturally different concept fail, then that concept cannot be acquired by that judge.

If some or all judges are not properly engaged with appropriate evidence or in appropriate reasoning – that is, if conducive epistemic conditions do not obtain - then those judges will not be able to acquire an associated concept no matter how much of that concept's sub-conceptual content they possess. Likewise, if some or all judges do not possess sufficient of a concept's sub-conceptual content, they will not (whilst that lack continues) be able to acquire that concept no matter what evidence or reasoning they engage with or in. Judicial concept-acquisitive success depends upon the degree of conceptual difference which obtains between the judge and the culturally different concept in question - how much of the sub-conceptual content of that concept she possesses at the commencement of the hearing and how much of that content she has to acquire over the course of the hearing – as well as upon the nature of the epistemic conditions which obtain in relation to the judge and the concept over the course of the hearing.

Those who advocate the radical concept-acquisitive incapacity thesis are committed to arguing that either or both of these conditions necessarily do not obtain for any judge in regard to any and all culturally different concepts. They must, for example, argue that necessarily no judge possesses a set of sub-conceptual content which would enable the acquisition of any culturally different concept under any possible epistemic circumstances - that as a matter of theoretical necessity neither the necessarily nor the possibly shared set of concepts and sub-concepts mentioned in the previous section contains an acquisitively adequate set of the sub-conceptual content of any non-shared culturally different concept.

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<sup>16</sup> The epistemic conditions informing a situation of concept acquisition do not include the degree of conceptual difference which obtains in that situation.

They must hold that a degree and kind of conceptual difference necessarily obtains which - even if they accept the critique of global difference mounted in the previous section - nonetheless disables judges from acquiring any culturally different concept. Alternatively, or additionally, they must argue that necessarily no judge comes into appropriate cognitive engagement with evidence or engage in appropriate reasoning causal of the acquisition of any culturally different concept. This is to say that necessarily, epistemic conditions conducive to the acquiring of any culturally different concept by any judge do not obtain.

I argue that it is not the case that either or both of these conditions *necessarily do not obtain* for any judge and any culturally different concept. On the contrary, the obtaining of both of these conditions, for all judges and all culturally different concepts, is theoretically *possible*.<sup>17</sup>

### *1. The possibility of an adequate conceptual base*

If it turns out that the necessarily or possibly shared set of concepts mentioned in the previous section either necessarily or possibly includes sub-concepts sufficient for the acquisition of *some or other* non-shared culturally different concept, then the incommensurabilist proposition that necessarily any such shared set does not include such sub-concepts will be rendered implausible. Likewise, if it turns out that the necessarily or possibly shared set of concepts mentioned in the previous section either necessarily or possibly includes sub-concepts sufficient for the acquisition of *all* non-shared culturally different concepts, then again the incommensurabilist proposition that necessarily any such set does not include such sub-concepts will fail.<sup>18</sup> Whether a necessarily or possibly shared set of concepts can enable the acquisition of any or all non-shared culturally different concepts in conjunction with appropriate evidence or reasoning is an empirical and interpretive matter to do with the semantic relations which exist between that shared set and the non-shared concept or concepts in question.

What can we say about such concepts and their capacity to enable the judicial acquisition of any or all non-shared culturally different concepts, should conducive epistemic conditions obtain? Let me pursue an argument here in relation to the innate concept-acquiring or categorial concepts which I argued all agents necessarily possess on the physicalist-

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<sup>17</sup> Though not theoretically necessary, of course.

<sup>18</sup> And if we can establish the theoretical possibility of the 'conducive epistemic conditions' condition of judicial concept-acquisition obtaining in relation to any culturally different concept, the theoretical possibility that any judge might acquire any culturally different concept will be confirmed.

functionalist schema.<sup>19</sup> Some set of those categorial concepts provided culturally different agents with a sub-conceptual means to post-natally acquire some set of simple non-innate culturally different concepts in response to those agents' post-natal epistemic conditions. If we accept the theoretical possibility argued for earlier that those same categorial concepts are possessed by all judges and remain functional in those judges in the acquisition of new concepts<sup>20</sup>, then we have grounds for arguing that judges possess as a theoretical *possibility* a sub-conceptual base for the acquisition of some simple set of non-shared culturally different concepts. Further, if we accept (as I argue we should) the possibility that epistemic conditions relevantly analogous – though not necessarily identical – to the post-natal epistemic conditions which obtained for those culturally different agents *might obtain* for any and all judges over the course of a legal hearing, then we are logically committed to the possibility that all judges may acquire any and all of those simple post-natally acquired culturally different concepts, even at the limits of possible conceptual difference, rebutting the revised radical concept-acquisitive incapacity thesis in relation to its denial of the judicial acquisition of, at least, *some or other* set of culturally different concepts.

We need not stop here, though. Given that these simple non-innate culturally different concepts together with the innate categorial concepts provided culturally different agents with a sub-conceptual base for the acquisition of all the non-shared concepts possessed by them, their possible possession by all judges together with the possible judicial possession of the set of innate categorial concepts possessed by culturally different agents opens up the possibility of all judges possessing a sub-conceptual base for the acquisition of any and all culturally different concepts – provided, of course, that it is possible that those judges be subject to acquisitively conducive epistemic conditions analogous to those that enabled the culturally different agents to acquire those concepts in the first place. Having acquired a set of simple non-shared culturally different concepts on the basis of a shared set of categorial concepts, it is possible that any judge might then go on to build up and acquire more complex non-shared culturally different concepts in response to appropriate evidence and reasoning, in a manner analogous to the way the culturally different agents did.<sup>21</sup> Indeed, if her environmental and intentional situation were conducive enough the judge might proceed to acquire *any and all* elements of the culturally different conceptual scheme by pursuing an environmental-

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<sup>19</sup> I refer the reader to Connolly (note 7) for discussion of the other kinds of concepts referred to earlier, which I will pass over here.

<sup>20</sup> As I argued above, there is no sound reason to think that the concept-acquisitive functionality of innate categorial concepts in adults is theoretically impossible. Indeed, there is reason to believe that their functionality in adults follows from their possession as a theoretical necessity.

<sup>21</sup> There is no reason to think that a particular concept-acquisitive trajectory is off limits to a judge, as I shall argue below.

intentional trajectory into that scheme similar to or equivalent to that taken by a culturally different agent.<sup>22</sup>

If, again, we accept the possibility (soon to be argued for) that acquisitively conducive epistemic conditions might obtain for any and all judges over the course of a legal hearing in relation to any or all culturally different concepts, then we are logically committed to the possibility that given their possible possession of the innate categorial concepts possessed by culturally different agents, all judges might acquire any or all culturally different concepts – including a set of practically adequate culturally different concepts as far as her judicial purposes were concerned. This possibility rebuts the revised radical concept-acquisitive incapacity thesis in relation to its denial of the judicial acquisition of any or all culturally different concepts. The judicial acquisition of any part or the whole of the culturally different conceptual scheme remains a possibility here, grounded ultimately in the possible possession of a shared set of innate concept-acquiring concepts, as well as the possibility of conducive epistemic conditions obtaining over the course of the hearing. Of course, the possibility argued for here is a contingent one.<sup>23</sup>

Were we to take the various propositions elaborated here in relation to the possession and functionality of a shared set of innate categorial concepts as not merely contingent possibilities but as central and possibility-defining tenets of the physicalist-functionalist theoretical framework (and one could mount an argument that we should take them as such)<sup>24</sup>, then not only would it be possible for a judge to acquire any and all culturally different concepts under conducive epistemic conditions but it would be necessary that she does, *under such conditions*. Such a theoretical manoeuvre on our part would, in conjunction with other theoretical propositions, not merely enable us to rebut the radical concept-acquisitive incapacity thesis (as the previous possibility-based argument did), but it would also circumscribe the limits of possible judicial concept-acquisitive incapacity. Under the possibility based argument just outlined, it is theoretically possible that either or both of the necessary conditions for judicial concept acquisition fail to obtain.

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<sup>22</sup> It is worth noting here that this capacity to acquire non-shared culturally different concepts would exist even if it turns out that concepts are not initially acquired by infants by means of innate concepts but by some other innate and cross-culturally shared mechanism.

<sup>23</sup> Of course, as a corollary of this possibility it is also possible that all judges and all culturally different agents do *not* possess the same set of innate categorial concepts and that conducive epistemic conditions for acquiring non-necessarily-shared culturally different concepts do not obtain for any judge in relation to any indigenous concept (the union of these two propositions). That is, it is contingently possible for the physicalist functionalist that no judge can acquire any culturally different concept under any possible epistemic conditions.

<sup>24</sup> Again, relevant arguments here would have to do with the degree to which the proposition in question is supported by sound empirical evidence as well as with the degree to which is implicated in the body of other propositions constituting the physicalist-functionalist scheme of knowledge.

And so it is possible on that less circumscribing approach that, even where conducive epistemic conditions obtain a judge may not acquire a culturally different concept by virtue of the possibility of her not possessing an acquisitively adequate sub-conceptual base. However, where it is necessarily the case that the judge possesses an acquisitively adequate sub-conceptual base – as follows from rendering the judicial possession of a functional, universally shared categorial set a theoretical necessity – then necessarily *where conducive epistemic conditions obtain* a judge acquires any and all culturally different concepts.

## *2. The possibility of conducive epistemic conditions*

In order to acquire a concept an agent must either come into appropriate sensory and cognitive contact with a set of environmental phenomena causal of that concept or must engage in a process of reasoning which is causal of the acquisition of that concept, all against the background of a set of conceptually relevant intentional states or, as I have also been terming it, a set of acquisition-adequate sub-conceptual content. Throughout this paper, I have been conceiving of the various environmental, sensory, cognitive, behavioural and other phenomena implicated in the process of judicial concept acquisition, other than the judge's possession of the background set of intentional states or sub-conceptual base in terms of the epistemic conditions surrounding the judge in relation to the acquisition of the culturally different concept in question.

These epistemic conditions may be categorised in terms of the internal capacities of the judge and the external circumstances she is subject to. The former category includes, for example, those conditions to do with the quality of the judge's sensory, cognitive and reasoning apparatus (including her capacity to see and hear properly, as well as her capacity to properly conceptualise sensory data); the quality of the judge's bodily motor skills (including her capacity to seek out and manipulate conceptually relevant evidence, as well as move her body into a state or position conducive to cognitively appropriating that evidence); the quality of the judge's reasoning skills (including, most importantly, her capacity to interpretively reason within the parameters of the various theories of agency and mind mentioned in the previous section); and the quality of the judge's motivation to sensorily and cognitively engage with evidence and to reason appropriately (including the nature and strength of her desires to do so). The latter category includes those conditions to do with the nature of the environmental phenomena which causally interact with the judge (including the identity and amount of the evidence presented to her, as well as the lighting and auditory conditions surrounding her engagement with that evidence); the nature and quality of any

sensory, cognitive or reasoning aids available to the judge and other relevant agents (including the availability of microphones, video conferencing facilities, and computers); and the time available to her for concept acquisition.

It is clear that in acquiring the various culturally different concepts they possess, culturally different agents were subject to one or other of the range of sets of epistemic conditions which are conducive to the acquisition of those concepts. At some point in time, those agents possessed some concept-acquiring set of internal capacities and were subject to some concept-acquiring set of external circumstances. They possessed adequate sensory apparatus and came into appropriate sensory contact with concept-causing evidence under suitable conditions of light and sound, they possessed suitable cognitive and reasoning faculties and properly conceptualised that evidence and reasoned about it, they possessed motor skills which enabled them to behaviourally manipulate that evidence for their concept-acquisitive ends, and they had at their disposal sufficient time to do all of these things and acquire the concepts in question. Further, given that culturally different concepts continue to be acquired by culturally different agents, epistemic conditions conducive to the acquisition of each and every culturally different concept continue to obtain. By virtue of the fact that culturally different agents have acquired and continue to acquire culturally different concepts, it follows that the obtaining of epistemic conditions conducive to the acquisition of every culturally different concept is theoretically possible.<sup>25</sup>

Additionally, given that within the physicalist-functionalist schema there is no 'in principle' difference between the internal capacities and external circumstances a member of a dominant culture (including a judge) may possess or be subject to and those a member of a culturally different minority may possess or be subject to, the possibility of conducive epistemic conditions obtaining for culturally different agents entails the possibility of their obtaining for dominant societal agents, including judges. Because no impossibility attaches within physicalist-functionalism to the obtaining of conducive internal capacities and external circumstances for judges, it follows that it is theoretically possible within that schema that epistemic conditions conducive to the acquisition of any and all culturally different concepts obtain for any and all judges. Nothing within the physicalist-functionalist schema necessitates the isolation of any dominant societal agent, including any judge, from the influence of any of the epistemic conditions causal of a culturally different concept, *given possession of an appropriate sub-conceptual base*.

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<sup>25</sup> No reasonable cultural incommensurabilist would deny this, I think.

Whether or not it is theoretically possible for conducive epistemic conditions to obtain over the course of a legal proceeding (as distinct from obtaining generally), depends upon whether there are any features specific to a legal proceeding which theoretically necessitate the non-obtaining of such conditions as far as the presiding judge is concerned. Quite simply, given a naturalistic account of such proceedings as a complex and interrelated series of actions performed by relevant agents, including the judge and culturally different participants, within the context of some or other external environment, there are not.<sup>26</sup> There is good reason, then, for physicalist-functionalists to maintain that the obtaining of the second of the aforementioned conditions of culturally different concept acquisition – that the judge be subject to conducive epistemic conditions – *is possible* for any or all judges in relation to any or all culturally different concepts. A radical incommensurabilist argument that such condition is not possible – that a failure of conducive conditions is *necessary* - is implausible.

## **V. The limits of judicial concept acquisition**

The acquisition of a culturally different concept by a judge is possible only if both of the two individually necessary and jointly sufficient conditions for that acquisition are possible – namely, that the judge possesses an acquisition-adequate set of sub-conceptual content for that concept and that the epistemic conditions under which the judge thinks and acts are conducive to the acquisition of that concept. Judicial concept acquisition is possible if the degree of conceptual difference which exists between the judge and culturally different concept or culturally different agent in question is not so great as to render acquisition under any epistemic conditions impossible and if epistemic conditions enabling acquisition at that degree of conceptual difference are possible. I have endeavoured to show that, assuming the truth of the physicalist-functionalist account of things offered in this paper, it *is* theoretically possible for both of these conditions to concurrently obtain for all judges and all culturally different concepts - even under conditions of maximal possible conceptual difference - over the course of a legal hearing.

Thus, it is theoretically possible for any judge to acquire any culturally different concept at any possible degree of conceptual difference, *provided that* over the course of the hearing she is subject to conditions which enable her to cognitively appropriate evidence and reason in a manner causal of the acquisition of that concept. It is not the case that all judges are necessarily incapacitated from acquiring any culturally different concept under any epistemic

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<sup>26</sup> I pursue a more detailed argument against such an account of the nature of legal proceedings in Connolly 2010.

conditions, including those obtaining at hearing. The radical concept-acquisitive incapacity thesis is not plausible from the physicalist-functionalist point of view.<sup>27</sup>

## VI. Conclusion

Because both the radical conceptual difference thesis and the radical concept-acquisitive incapacity theses are not plausible, neither is the radical cultural incommensurability thesis which, as we saw, is comprised of these. As far as the limits of incommensurability are concerned in relation to judges and culturally different agents and their concepts, it remains theoretically possible that the non-necessarily-shared part of the conceptual schemes of any judge and any culturally different agent be incommensurable under any theoretically possible epistemic conditions. As a contingent possibility though, this proposition entails that it is also theoretically possible that the conceptual schemes of any judge and any culturally different agent be *commensurable* under certain possible (acquisition conducive) epistemic conditions. The interpretation of culturally different agents by judges and the judicial acquisition of concepts testified about by those agents – even to a practically adequate degree as far as the judge’s determinative purposes are concerned - is a theoretical possibility for a physicalist-functionalist such as myself, even if the maximal possible degree of conceptual difference obtains between the judge and any such agents at the commencement of the interpretive encounter between them. Consequently, the judicial understanding of any and all culturally different actions and the proper determination of legal matters implicating cultural difference is possible on the physicalist functionalist approach. There is no need to be pessimistic about the recognitional and protective potential of the legal system – at least, on metaphysical grounds.

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<sup>27</sup> Indeed, if we step back from the detail of the preceding argument about the limits of judicial concept-acquisitive incapacity and think about what culturally different concepts *are* within the physicalist-functionalist scheme of things, both the consistency of that argument with the basic tenets of physicalist-functionalism and the implausibility of the radical cultural incommensurability thesis becomes clear. For a start, the very idea that there could exist in the world a higher-order phenomenon (namely, a culturally different concept or intentional state), the identity – which is to say, the functional role or content - of which is necessarily unknowable to every actual and possible inquirer who is not a member of a specific cultural group, including those operating within our best sciences, is fundamentally inconsistent with the monistic ontological and epistemological ethos of the physicalist project.