

INTERVIEW WITH PROFESSOR JEREMY WALDRON*

Lecciones y Ensayos: —*We usually start with a general question: what is law?*

Jeremy Waldron: —What is law? That's a question that some people say we can't answer, because there are too many things to stress and too much disagreement about the way to arrange them in the definition. I like to think of law in the sense of a legal system first, it's a set of institutions that help define a very general kind of ruling, of the domination of a society, the organization of a society, not by us shouting commands like giving orders to an army, but by an enduring and coherent body of norms, expressed in general terms, interlocking with each other, building up over the ages, and using that as a point of reference for the way the whole society was thinking very much into. So that's how I understand law, so it connects law early on to the Rule of Law in the sense that we understand the concept of law with regards to legal system, legal institutions and law as a certain kind of presence in a society.

Lecciones y Ensayos: —*How did you become so interested in Philosophy, and specially Philosophy of law?*

Jeremy Waldron: —I studied Philosophy first, when I was a young college student, in the late middle ages (laughs) in New Zealand, in the 1970's and I did law secondly as a degree and then I came to Philosophy partly because of my study of law as such but party because of my study of political Philosophy, which if done right it should map pretty clearly onto Legal Philosophy.

Lecciones y Ensayos: —*Why do you think it's important to study Legal Philosophy?*

Jeremy Waldron: —I think it's important just to realise what's distinctly important about law, and to get a sense of the difference that law can make in very general terms, not just the difference of this particular campaign or this particular policy; but the difference it makes to peoples lives generally to have a standing set of rules, intellectually, in the sense that they can organize their lives by. So I do think it's important for people to understand that aspect of law, and that's what I've been doing in my philosophical work for the last 20 years or so.

* This interview was conducted by members of the Editorial Council of the Law Review *Lecciones y Ensayos* on August 24th, 2018. Jeremy Waldron is an University of New York (NYU) professor, where he teaches Legal and Political Philosophy. He attended Otago University, New Zealand, where he graduated with an Bachelor of Arts in 1974 and a Bachelor of Laws in 1978. He has also taught in Princeton University, Oxford University and Columbia University. We would like to thank Prof. Juan Pablo Alonso, President of the Argentinian Academy of Philosophy of Law, for his collaboration to carry out this interview.

Lecciones y Ensayos: —*In connection with our last question, what's the difference in how Philosophy is taught at NYU, regarding its relevancy and depth of study?*

Jeremy Waldron: —It depends on the different courses and different levels and different teachers, so some courses, like the ones I teach on Rule of law, and sometimes just on jurisprudence and sometimes just on human dignity, the courses are reasonably deep but not necessarily philosophically deep, there aren't involved with lots of technical philosophy, they involve a degree of thoughtfulness and the students have to work with historical material. Students have to read Immanuel Kant, Cicero or whatever. But sometimes we try to move back and forth between surface level engagement of particular cases and deep engagement of particular ideas, I'll be talking about that this season in relation with human dignity.¹ Now, other people working in philosophy of law would do work that is more technical and more challenging because it's abstract, a little bit removed from the actual issues that people face. Other courses would be engaged with particular issues of justice and particular concerns and concerns about social justice and concerns about protecting rights and helping minorities. So there really is a whole range of different levels of engagement in Philosophy of law, and it covers a wide variety of topics. And even after you've finished analyzing Legal Philosophy there is another whole area called Legal Theory, which tends to be the abstract part of particular disciplines. So there might be Legal Theory of Tort Law, we do an awful lot of Legal Theory of Process and Constitution at NYU. It's partly because Civil Procedure professors including a man of Argentine extraction, Samuel Issacharoff, and our Constitutional Law professors are very much working with the importance of institutions and the way in which institutions define the decision making that takes place in society. So that area of Constitutional Theory, Procedural Theory, adds an extra layer of understanding.

Lecciones y Ensayos: —*You mentioned the protection of the rights of minorities in the US, where a progressive agenda has been achieved through judicial decisions, for instance, the ban to abortion prohibitions and the legalization of same—sex marriage. Those issues were discussed in the Argentinian Congress, the latter was*

1. Honorary doctorate awarded to Jeremy Waldron by the School of Law of the University of Buenos Aires, URL <https://www.youtube.com/watch?v=3n8AKVie0p0>

approved in 2010 and the other didn't pass the Senate just two weeks ago. Do you think those different experiences can help the discussion over the relationship between the judiciary, democracy and constitutional rights?

Jeremy Waldron: —In the United States a number of State Legislations had legalized same—sex marriage, maybe 12 or 14, we have 50 states, each of those States is semi—sovereign, that is it controls all areas of law except those areas reserved to the Federal Government, so the states have plenary powers, and marriage is under their authority which means the reform of marriage ought to be happening State by State, and it's not a bad idea because it helps with a certain amount of experimentation and it helps progressive states to reassure more conservative states that this is not a disaster, so all over the world, as you know, same—sex marriage has been legalized mostly by legislative decision, and it's right that it should. The institution of marriage changes in result and this institution belongs to the people whose lives are structured by it, they have a right to determine the nature of the change. Maybe we need judicial review of marriage laws if there is some blockage or difficulty, but what we noticed in the United States was that the issue had reached tipping point and public opinion was moving very quickly to the acceptance of same—sex marriage. So probably it was a bad idea for it to be settled by the Courts rather than allowing particular legislations. But I'm a man who believes in the dignity of legislation. I'm a New Zealander, I came to the United States from New Zealand and when New Zealand enacted legislation establishing same—sex marriage, there's a beautiful clip on Youtube that you can look up “New Zealand same sex marriage legislation”² and it shows the joy and the singing and the delight and the civility of the final decision on this matter. The people were taking control of their own institution of marriage, transforming it in a more tolerant and open way and there was something lovely about that.

Lecciones y Ensayos: —*There are some views in Latin America that support strong constitutional controls on the region by the Judicial Power or Constitutional Courts. What's your opinion on those views?*

Jeremy Waldron: —I tend to be doubtful as whether it's always a good idea. But there's a tradition not only in Latin America but all around the world now of Courts

2. New Zealand Parliament passes gay marriage bill - and a love song, URL https://www.youtube.com/watch?v=q9pOJ8Bc_-g

establishing themselves on the forefront of the work the Government has to do on issues of rights, issues of justice and issues about the respect due to minorities, so I don't want to disparage it. I do think that when a Court makes a decision around one of these areas there is a problem with legitimacy. I was talking about this in the Supreme Court³ this morning. The problem is not legitimacy in the sense of "Should they do it or should they not do it?" It's that when the Court makes this decision there will be some people who agree and some people who disagree and the disagreement is not always fascist or oppressive. It's, in good faith, reasonable disagreement. And the question of political legitimacy is: what do you say to the person who lost, the person who disagrees with the outcome, to reconcile that person to the decision? In the case of legislative decisions there are things we can say. We can talk about the fair political process, we can talk about democracy, majority decision. There's something we can say that doesn't require the person to simply give up their views. And so there's a challenge for judicial power to find a way of reconciling on the basis of civility, reconciling those who oppose Court decisions with the decision. So they would not only support them and comply with them and not resist it and not take to the streets or take out weapons, but also that they can reconcile themselves with the dignity of citizenship. So we have to develop things that we can say about the Court position to reconcile those who have lost. And it's no good saying: "well, it was the right decision", because they won't agree with that. Their view is if you wanted the right decision, you should've gone the other way. So we have to talk something about the process or as I believe something about the institution.

Lecciones y Ensayos: —*So could those be the pillars of a judicial reform?*

Jeremy Waldron: —Yes, I think that's exactly right.

Lecciones y Ensayos: —*You have addressed the issue of Constitutional Courts in Latin America, especially regarding the case of Colombia. Have you received any criticism for your views in the matter?*

Jeremy Waldron: — There's always critics because there's a lot of enthusiasm and especially since we're all lawyers, right? Judicial review gives us a special role, a privileged role to play in public decision making. So it's not surprising that law students, lawyers and judges tend to be very enthusiastic. But I also get both from my Latin American students back at NYU and from my friends when I visit here serious

3. The Argentinian Supreme Court of Justice

engagement and pushback and criticism. One of the most powerful responses was from...do you know the Brazilian justice Luís Roberto Barroso? He's a great intellectual. And I spoke at length at a meeting with the Supreme Court, the Constitutional Court, in Brasilia. And he spoke at length and replied, maybe for an hour. It's a very good engagement and so a very serious response. So yes, it's controversial at times.

Lecciones y Ensayos: —*Speaking about judges, what are your views on judicial appointment?*

Jeremy Waldron: —We are facing this issue in the United States at the moment. Having to think about judicial appointment when the nomination comes from a discredited President and a hyper—partisan Senate to do the ratification. So the politics of judicial appointment are always vulnerable. The politics of judicial appointment can very easily become poisoned, they can become toxic, they can become overly politicized. That's if you like the cost of giving the judges a larger role to play in political life. When we gave the legislators a role to play in the political life because we believe in the Rule of law, it became important how we chose the legislators. We are no longer happy with them being appointed like to a House of Lords or something like that. We wanted them to be elected. And when judges are appointed, if the judges are going to be doing political work then there's going to be clouds of political concern about the basis in which they're appointed. Why are we having these conservative judges rather than these liberal judges? 'I didn't vote for that' somebody would say. It can become poisoned and it can effectively involve the infiltration of partisan politics into the politics of the judiciary and it can affect the judges also the justices on the courts and their relations with each other, which can become uncivil and again, hyper—partisan. So there's a general lesson from this: not only there's the challenge about legitimacy that I mentioned before, but there's the fact that the more political work you give judges to do, the more their appointment will be seen as a political matter. And then there's the question of how can this be done fairly and without incivility.

Lecciones y Ensayos: —*What's the impact of the classes on Legal Philosophy and which author/s would you recommend reading in particular?*

Jeremy Waldron: —I teach a course called "Modern Legal Philosophy: The Books" and we read five books during fourteen weeks. So what do we read? We read H.L.A. Hart's *The concept of law*, we read Ronald Dworkin's *law's Empire*, we read

Hans Kelsen's *Pure Theory of Law*—Hans Kelsen was an Austrian jurist from the 1930s—. We read John Finnis and sometimes Lon Fuller. Sometimes even a man that you might never have heard of called Evgeny Pashukanis. He was a Soviet jurist who believed that law was inherently associated with capitalist individualism, because it is all about who in particular has which rights, it is about individual possessions being secured by legal rules and so he suggested that in a socialist community there would be no need for law and law in Russia would be tempered while a socialist community was established, which was fine for a period and then Stalin suddenly decided that he would invoke the idea of socialist legality, which Pashukanis thought was a contradiction in terms and poor old Pashukanis tried to wheel his bicycle back again, said 'yes of course there can be socialist legality' but it was no long before he was liquidated and disappeared in the late 1920s. So there are those modern authors to read, 20th century authors and then for earlier authors I read a lot of Immanuel Kant, and a lot of John Locke and a lot of Montesquieu. On the law those are the earlier modern thinkers, 17th to 19th century thinkers. Sieyès and some of the great constitutionalists. The 18th century was a time of great constitutionalism, so the constitutionalists are very important.

Lecciones y Ensayos: —*You mentioned Ronald Dworkin and some academics refer to you as a contradictor or opponent to Dworkin. Do you feel comfortable with this label?*

Jeremy Waldron: —Oh, Dworkin and I have disagreements on a couple of particular issues: judicial review is one of them, hate speech is another one. He tends to be a free speech person and I tend to believe in some restrictions on hate speech. So we disagree like any two given people who work closely together and agree about some things and disagree about others. I agree overwhelmingly with his jurisprudence and his general body of work. He and I were close friends, close colleagues and he was also my teacher a long time ago when I was at Oxford. So I don't think of myself as an antiDworkin at all.

Lecciones y Ensayos: —*And regarding another thinker, do you feel like your views are specially opposed to another academic?*

Jeremy Waldron: —Specially opposed I don't know. My views are very close to the work of Lon Fuller on the Rule of law and the internal morality of law. So I guess I oppose those who denigrate Fuller (laughs). In the last few years I tend to be a little

critical of the work of H.L.A Hart but I don't think of myself like having these antagonisms or these *vendettas*.

Lecciones y Ensayos: —*For the last 50 years Philosophy has been discussing Iusnaturalism and Iuspositivism. Do you think it is worth it to dedicate another 50 years to this issue? What important lessons have been left by this debate? What other debates within Philosophy of law do you consider to be relevant to discuss?*

Jeremy Waldron: —Those two terms, Iuspositivism and Iusnaturalism are not gonna go away and they are going to help to frame whatever work we do in Philosophy. There is a lot of work still to be done, particularly on the idea that some International lawyers have toyed with that, for a period —and still to a certain extent—, Natural law does serious work in the international ground. We have to ask ourselves: What does that mean? Does Natural law seem to have a notion or existence in the sky? Do we mean that people use Natural law as a way of making Positive law? Do we mean that there's a shared understanding on the present? So I think there is work to be done on that and some of the best work on Natural Law has not been particularly good on that. So John Finiss' book *Natural Law and Natural Rights* published in 1980 is mostly about Ethics, it's not really about law at all.

We have to understand Positive Law, we have to understand how law can have a presence in a society and stands a little bit apart from people's views on justice. I've always thought this is important because people disagree in a society and law has to do its work in the midst of that disagreement and therefore law's demands have to be able to be identified in a way that is relatively independent from people's moral views so it's always seemed to me that we have more work to do on Positivism. The other thing that is important in the *Positive vs Natural Law* debate is what role moral thinking, moral reflection and moral sensitivity play in working like a lawyer or working like a judge. The positivist says 'not much', the Natural lawyer says 'a lot'. That's not really about something called Natural Law. It's just really about the nature of legal reasoning and we haven't yet —I think— got to the bottom of that. Some of the arguments, Locke would say are purely semantic, because you could say judges have to do moral thinking but that's not law and other people say that they have to do moral thinking but it is law. They are agreeing that they have to do moral thinking but we still have to figure out what that moral thinking looks like, how it works and the work that Dworkin did on that is the most important work on the table, his particular theory and interpretation.

Lecciones y Ensayos: —*What would your response be to those who affirm that judges are the only limit to populism?*

Jeremy Waldron: —The limit to populism is democracy, structured, careful and thoughtful democracy. If we set up judges as our salvation from populism, we are giving them a task and a mission that is quite different from the adjudication. So, I'm very, very nervous about that. If we face the populist *upheaval* —in a bad sense— the thing to do is to work out ways of mobilizing non—populist democracy against it.

Lecciones y Ensayos: —*How do you see the influence of the judicial power in presidentialism in Latin America?*

Jeremy Waldron: —You'd know more about that than I do. But the judges that I speak to are conscious that they are having to respond to two things: one is dysfunctional institutions in the other branches of government including corruption and deadlock. And that they also have to respond to some hyper—presidentialism, strong—man presidentialism and they see themselves as having to do that work as a last resort because no one else will. But the reason why they can't take on this issues is that they're not issues that they're supposed to deal with. If they were issues that they're supposed to deal with then the judges would be deadlocked and the judges would be corrupt and the judges' process of appointment would be poisoned. So it's a little bit of a short term solution.

Lecciones y Ensayos: —*Do you think that deliberative democracy and direct—democracy are compatible with your constitutional theory? What are the changes that your theory has experienced regarding this aspect?*

Jeremy Waldron: —Deliberative democracy is certainly compatible. But it's very important when we think about deliberative democracy not to fantasize about it. Deliberative democracy means that we take political decisions in the midst of our debate and deliberation. In the hands of people like Carlos Nino and others there was a thought that deliberation leads to consensus and the politics of deliberative democracy is consensus politics and it seems to me that's wrong. A lot of the progress in my work has been understanding why that's wrong, understanding that deliberation can sometimes widen divisions, can sometimes aggravate dissensus. Deliberation aims at consensus. Certainly you and I aim at consensus whenever we talk about anything. We have to get consensus on the truth. But deliberation can sometimes enhance disagreement at the same time as it enriches disagreement and it gives both sides a better thoughtful

position. So I think deliberative democracy is very important but is no substitute from majority decision—making. Eventually there'd have to be procedures. And we see that in Courts! There are the judges deliberating from morning 'till night and still at the end they have to vote... because they disagree. Because there are issues so contentious even among good faith deliberators. So over the years I've been trying to develop a theory of deliberative democracy that works naturally with a majority rule rather than a theory of deliberative democracy that is in denial of the need for a majority rule.

Lecciones y Ensayos: —To finish, what do you think is the relevance of Philosophy in a lawyer's career? What would your piece of advice be for young students or researchers?

Jeremy Waldron: —In UBA do people have to take a compulsory course?

Lecciones y Ensayos: —*We have to take a semester in Philosophy.*⁴

Jeremy Waldron: Well, I wouldn't think it was important to do much more than that. I think it's very important for those who teach Philosophy to make sure they are aware that they are teaching it to lawyers. And that they are teaching stuff that is supposed to be sensible and helpful to lawyers, thinking about a lawyer's work and constitutional structures, litigation and legal advice. It's different from doing Legal Philosophy in a Philosophy Department and so many of my colleagues are just people that really belong in Philosophy Departments, but come to law School to fit the high salaries (laughs) and I do believe very strongly that we have a responsibility to teach legal philosophy in a way that specifically engages with broader values like constitutionalism, the Rule of Law and the distinctive character of legal governance. But I wouldn't advise people to cram up with a philosophy course, I don't think it's particularly helpful. If you're interested of course but every course that you take has a cost: some other course that you don't take. And one needs to take courses on Corporations, Environmental law... and then you can read a lot of philosophy in connection of the courses that you take... International law, Human Rights law, Anti-discrimination law, even Property law.

Lecciones y Ensayos: —*Well, thank you very much for your time. We really appreciate it.*

3. We are referring to the four compulsory credits students must take in the Department of Philosophy, according to the 2004/2008 curriculum.

Jeremy Waldron: —Most welcome. I enjoyed very much this discussion.