

# ‘The Soviet Union did not have a legal system’

## An interview with Jeremy Waldron on the methodology debate, historic injustice and the citation of foreign law

Kees Quist & Wouter Veraart

Professor Jeremy Waldron (born in New Zealand in 1953) is a University Professor at the New York University School of Law. Educated in New Zealand, he took a doctorate in legal philosophy at Oxford. Before switching to NYU in 2006 he was University Professor at Columbia Law School. Waldron has published extensively on jurisprudence and political philosophy. His work is wide-ranging, going from the justification of private property to his well-known opposition to judicial review to various contributions on public debate in the United States, for example on torture. Waldron's article 'Foreign Law and the Modern *Ius Gentium*', published in the *Harvard Law Review* of 2005 led the organizers of the Hague Institute for the Internationalisation of Law (HiIL) conference on 'The Changing Role of Highest Courts in an Internationalizing World' (October 2008) to invite him to speak on the topic of the citation of foreign law (the phenomenon of national judges citing *national* law from other countries). In the context of this conference, we spoke with Waldron about three topics.<sup>1</sup>

Firstly, we dealt with the so-called methodology debate, the discussion that is becoming increasingly prominent within analytical legal philosophy about how to proceed in analyzing the nature of law. Does the question 'what is law?' require a descriptive analysis of the concept of law or a normative exercise in political philosophy? Do we need to hold on to 'traditional' forms of conceptual analysis or should we follow Professor Leiter when he argues for naturalizing jurisprudence?

In the second place we spoke about the role of law in response to historic injustice, especially in relation to the restitution of property rights. On this topic Waldron has argued, in numerous articles, for the so-called supersession thesis: the idea that due to changed circumstances and the passage of time, historic injustices become 'superseded', at least from a legal-philosophical point of view.

The concluding section of the interview is devoted to Waldron's perspective on the subject of the conference, namely the citation of foreign law. It turns out that in the context of this subject Waldron has developed an interesting and novel philosophical interpretation of the old notion of *ius gentium*.

1 The interview took place on October 24, 2008 at the Peace Palace in The Hague. Q = Quist; W = Waldron; V = Veraart.

## Methodology Debate

**Q (= Quist):** I would like to start with the issue of the descriptive or normative nature of jurisprudence. First an important point of clarification. In your contribution to the *Hart's Postscript* volume, 'Normative/Ethical Positivism'<sup>2</sup>, you define normative positivism as 'the thesis that the separability of law and morality (or the separability of legal judgments and moral judgments) is a good thing, perhaps even indispensable from a moral, social, or political point of view and certainly something to be valued and encouraged.' One thing I would like to check is the following. If I read this definition then I conclude from it that you see positivism as a normative position as soon as moral evaluation comes into play. Or would you rather say *any* evaluation, including also epistemic evaluation? Where exactly do you draw the line? Because recently a great deal of attention has been paid to these epistemic values that play a role ...

**W (= Waldron):** Yes, that is right! I had not thought about that. I mean the usual sort of Hobbesian or Benthamite line is that positive law helps to supersede disagreement and that is a valuable thing about positive law. And if it turns out that moral evaluation is not the only site of disagreement, but prudential and epistemic evaluation is too, then you could imagine a positivist answer to your question by saying that whenever there is a disagreement, law operates in the face of disagreement to perform an important function. In fact, I think law often facilitates some disagreements as well. So to that extent, I am prepared to toy with inclusive positivism. And some disagreements framed by law are epistemic inquiries. But clearly framing these inquiries, rather than leaving them unframed, is itself a valuable thing to do, and that is the element of normative positivism that remains in play even if we are talking about inclusive positivism. So, if the law says inhuman punishment is prohibited, we know that the law is inviting people to make moral judgments in that area, but it is closed down to one particular site of disagreement. Before that law was enacted, people might debate punishments for all sorts of reasons, their justice, their efficiency. Now they are required to rivet their attention on inhumanity and on degradingness and to regard those as trumping matters. So the law has settled the disagreement on what disagreements to have, and sometimes the law will do that by indicating questions that are not strictly moral questions, but questions about proportionality or ...

**Q:** My second question is that in a number of places in your work you suggest an intimate conceptual link between the concept of law and the ideal of the rule of law, and you say that that is not just a contingent relation, as Professor Raz would say, but I guess a sort of necessary one?

**W:** Yes.

**Q:** I am wondering how exactly you would conceive of this relationship between the concept of law, on the one hand, and the ideal of the rule of law on the other?

**W:** I see them in the first instance as a package. So that we define law partly by reference to conditions of legality and so we do not understand one first and then

2 J. Waldron, Normative (or Ethical) Positivism, in: J.L. Coleman (ed.), *Hart's Postscript. Essays on the Postscript to 'The Concept of Law'*, Oxford: Oxford University Press 2001, p. 411-433.

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come to the second; we buy them as a package. I have a piece coming out on this in the *Georgia Law Review*. It is called ‘The Concept and the Rule of Law’.<sup>3</sup> The second thing is to say that, nevertheless, they might represent two different views of the same package. So, if you have a car that you drive, then you have to keep it in good shape. Probably by law you are required to have, you know, the exhaust pipe fitted with the emission control and so on. But, quite apart from those requirements, just in order to have a working car you need to have it in good shape and we all understand that some cars work better than others. We also understand that after a while it can work so badly and become so incapable of self-propulsion that it really would not count as a car anymore. But even as it gets over that threshold and it becomes a rudimentary car that can only go ten miles an hour, uses an inordinate amount of gas and is very dangerous, you could imagine that somebody would say ‘Well, nevertheless it is a car.’ And you could imagine that somebody else would say ‘It is coming close to not being a car at all.’ Now, there are two things going on there. There is a little bit of a debate about where the threshold is, so that it ceases to be a car altogether; and there is also a debate about the constant pressure that you would want to improve its fuel economy, improve its safety to make it something that can be safely steered and so on. I believe that with law something similar is true. John Finnis used the statement: ‘The rule of law is the term we give to the conditions under which a legal system is legally in good shape.’

**V (= Veraart):** Fuller-like.

**W:** It is a Fuller-like idea. Exactly right. Now, a legal system could be in such bad shape that it just looks like a legal system but really is not. It has ‘Ministry of Justice’ written above the torture chamber, but it could be procedurally, structurally, formally so defective that it would be a mistake to call it a legal system. But even if it gets over that threshold, the idea of its being in good shape is just the continual upward pressure along the same dimensions. And sometimes when we use the term ‘the rule of law’, we are referring to that upward pressure, even after you have crossed the threshold. But the upward pressure is pressure to move further along certain scales of good shape, good performance that are actually identical with the scales that we would use to decide whether it was a legal system at all. So we want to reduce retroactivity. Why? First of all, because if there is too much retroactivity it ceases to be a legal system. This is Fuller’s point. But even once you have passed that threshold there is continual room for improvement along exactly that dimension. Dimensions for improvement are not something new that you bring in from the outside. It is exactly Fuller’s point. The dimensions for improvement – formally, procedurally, structurally, quite apart from substantively – are exactly the dimensions that you would use in the first instance to decide whether it was a legal system at all.

**Q:** I see. That clarifies a lot. As a last point, I would like to raise the issue of naturalism as put forward by Professor Brian Leiter, because a lot of this discussion presupposes in a certain way the viability of conceptual analysis, does it not? I mean, maybe it is

3 J. Waldron, The Concept and the Rule of Law (September 24, 2008), *Georgia Law Review*, forthcoming; Public Law Research Paper No. 08-50, NYU School of Law, available at SSRN: <<http://ssrn.com/abstract=1273005>>.

to be supplemented by political philosophy, for example, as you argued in your contribution to the *The Oxford Handbook of Jurisprudence and Philosophy of Law*,<sup>4</sup> but, still, it would be an exercise in some sort of conceptual analysis in a very broad way. And I have not yet found your views on this thesis by Prof. Leiter that the role of conceptual analysis should be reduced greatly in legal theory because of Quinean worries about this.<sup>5</sup> I am very curious what your views are about that.

**W:** I am broadly sympathetic to the Quinean worries. I do not think there is going to be any hard and fast line between conceptual analysis and substantive argument. It seems to me that it does not follow that we should stop doing anything that looks like conceptual analysis. It probably argues against the sort of austere form of conceptual analysis where the argument that is often made by Coleman or by Raz is 'Well, that may be true of legal systems but it does not apply to the *concept* of law'.

**Q:** Only necessary characteristics.

**W:** That is right. And I do believe that we have and deploy concepts with Quinean, fuzzy edges. An example I use all the time in the *Georgia Law Review* article is democracy. It is a concept. We use it to divide up the world of political systems. It is heavily value-laden, though that is okay; concepts can be value-laden. We might well say that there are certain necessary conditions that have to be satisfied [for there to be democracy, eds.] but the necessary conditions are themselves a little bit indeterminate. So we might say, for example, that you cannot have a democracy in the modern world without having elections, but, in addition, the elections must be genuine elections, not faked elections; they must be frequent, they must not be rigged and there is the same 'in good shape' pair of ideas with regard to them as there is for law. So I believe for example – and this would be highly controversial and Brian [Leiter, eds.] would say it was not worth sorting it out – that you cannot have a legal system without something recognizable as the processes of courts, hearings and the ability to give arguments. I believe that a legal system is not just any system of command and control but it is a system that ...

**V:** The Soviet Union did not have a legal system?

**W:** I believe that the Soviet Union did not have a legal system.

**V:** That is interesting. A philosopher like Hart would not say that.

**W:** I know.

**V:** So there is a difference?

**W:** That is right. And it does not include the question of allegiance. Maybe a legal system is a bad thing to have. But political systems that have elections behave quite differently from political systems that do not and I believe that systems of governance that work through continual hearings and legal-type procedures in fact operate quite differently. And so to understand a highly litigious society like the United States compared to a society like, I do not know, Saudi Arabia, where the role of litigation and procedures is quite different ... Of course you still have your overarching discipline of political science, but this is a remarkably different approach to

4 J. Waldron, Legal and Political Philosophy, in: J. Coleman & S. Shapiro (eds.), *The Oxford Handbook of Jurisprudence and Philosophy of Law*, Oxford: Oxford University Press 2002, p. 352-381.

5 See B. Leiter, *Naturalizing Jurisprudence. Essays on American Legal Realism and Naturalism in Legal Philosophy*, Oxford: Oxford University Press: Oxford 2007.

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governance and I think we have sold it short by having too casual a form of positivism. I am against casual positivism. I want a quite restrictive definition of law.

**V:** That excludes a lot of countries?

**W:** That is right.

**V:** China, for example?

**W:** China could come close to being excluded. A number of Chinese have been prepared to say 'We do not really have a legal system here. We have things that call themselves laws. We have a ministry that calls itself the "Ministry of Justice". And we have things that call themselves hearings. But that is not yet a securely established legal system.' Now, I think China is on the cusp, like this car I imagined that can barely get around the block, and I believe that Brian Leiter is right if he were to say that there is going to be no clear answer at the margin. But that you *are* at the margin is something that might be acknowledged.

### Changed Circumstances and Historic Injustice

**V:** I am myself working on a project called 'Time Restitution and the Law', which involves a theoretical framework about what the passage of time means for the applicability of law and for questions of restitution of property rights in transitional situations. I am conducting three case studies, one in South Africa, one in Germany, and one in the Netherlands and Austria, all dealing with legal dilemmas of restitution as a response to historic injustice. I think the South African case is intellectually the most interesting and the most difficult. Your work, especially your book *The Right to Private Property*,<sup>6</sup> and your articles on the supersession and redressing of historic injustice,<sup>7</sup> interest me a great deal and I would like to ask you some questions about them.

To start with *The Right to Private Property*, in this book you discuss different underpinnings of this right. You make a fundamental distinction between general rights-based arguments and special rights-based arguments for the justification of private property rights. Special rights-based arguments are contingent on the past (they refer to the legality of past transactions, cf. Nozick with his 'justice in holdings'<sup>8</sup>) and may legitimize very unjust distributions of property rights over the population, whereas general rights-based arguments posit the right to private property as a human right to which everyone should have access. A general rights-based justification of private property rights calls for a redistribution whenever the actual distribution of property rights bars or deprives a part of the population from having and/or exercising these rights. Which one of these two underpinnings do you yourself consider as the most convincing? Reading your book it appears that you are sympathetic towards the general rights-based theory and that you agree with Hegel (among others) that access to private property rights or ownership rights (the con-

6 J. Waldron, *The Right to Private Property*, Oxford: Clarendon Press 1988.

7 See especially J. Waldron, *Superseding Historic Injustice*, *Ethics* (1992) 103, p. 4-28; J. Waldron, *Redressing Historic Injustice*, *University of Toronto Law Journal* (2002) 52, p. 135-160.

8 See R. Nozick, *Anarchy, State and Utopia*, Oxford: Basil Blackwell 1974.

cept can be rather fluid) is a necessary condition for the concrete and free exercise of one's autonomy and the development of one's personality and capacities.

**W:** Yes.

**V:** So you adhere to the general rights-based approach to private property? I have the impression that you try to be neutral in your final conclusion, but at the same time you are quite enthusiastic about this approach, so I would like you to clarify.

**W:** I think it is a fair view. You must understand this was written twenty-five years ago.

**V:** I know, but for me it was very clarifying to read this in order to understand the theoretical basis of your articles on historic injustice.

**W:** Right. I mean, the crucial relation between them is the insistence that the right to private property, whatever it is, must be sensitive to circumstances, particularly the circumstance of more people coming into the world. That is the first point. And the second point is that existing property rights – which is different from the right to private property – must be sensitive to the mechanism of the Lockean proviso or a Nozickean version of the Lockean proviso,<sup>9</sup> so that we cannot ever say that somebody's property rights are fixed in time for all time. What can be defended as my property would depend on what the circumstances of other people are at any given time. So, if other people suddenly washed up onshore here with no property at all, then justifying how we will enforce existing property rights against them would be very difficult. And, I believe, in such a case there should be a redistribution. And maybe not every day, but I believe in many countries – New Zealand is one, Mexico is another –, there have been major redistributions of land. Maybe once a century, maybe sometimes with compensation, sometimes without it.

**V:** What is behind this is the theory that says that private property is important for the development of the human personality.

**W:** Yes, but in addition, there is also just the more mundane, material importance of private property – never mind about human personality, just food and ...

**V:** Of course, but you can give people food ...

**W:** Without giving them property rights. That is right. But sometimes, with regard to historic injustice, one wants to say: we cannot accept any claim by a very small number of original settlers to maintain their rights over five hundred years with utter indifference to changes in the number of people that have to make a living off this land or develop their personalities on this land. We cannot accept that sort of indifference. And so it is the sensitivity of property rights to circumstances that is the key link between what I am doing in my articles on historic injustice and in my book on the right to private property.

**V:** So your sympathy for the general rights-based approach to private property is also a preparation for your position in the debate on historic injustice?

9 The Lockean Proviso is a part of John Locke's property theory as developed in his *Second Treatise on Government* which says that individuals have a right to acquire private property from nature, but must leave 'enough and as good' to others. Nozick's version of the Lockean proviso says that property acquisition is acceptable as long as it does not make anyone worse off than they would have been in a situation without private property.



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**W:** That is exactly right. So, take a country like New Zealand, which at the time of European settlement was inhabited by, say, forty or fifty thousand indigenous people and now, one way or another, an additional one million people have turned up, then the argument from *The Right to Private Property* is that everyone has to move closer together. There is no way in which forty thousand people can maintain the same land. In the past, the South Island of New Zealand, which is about the size of Great Britain, was inhabited by about ten thousand people. It seems to me preposterous to say, in circumstances when there are a million people living there that those ten thousand have eternal rights to that land or their descendants have eternal rights to that land. It is just inappropriate.

**V:** I agree, but this dilemma is in a way the reverse side of the basic historic injustice dilemma, that there were people in the past who were deprived of their property rights in a very unjust way, by legal or other means (for example, in the South African case, but also in Australia and New Zealand), and who are now reclaiming their property rights. But when the injustice occurred generations ago, say fifty years or more, then you have developed a nice argument about why we should be careful in granting those claims.

**W:** Yes, I mean there are two sorts of claims that might be made in respect of the injustice. One would be a claim for compensation, compensation for the injustice. And the second is the claim for the return of the land. Now, what we have to say is that, assuming that the population growth of the modern population is given and there had not been any injustice, there would have to be land redistribution. You cannot have a million people living in a country with no land and ten thousand people who have – it does not matter whether those ten thousand people are black or white. You cannot have that sort of disparity. So, if there had been no injustice whatsoever, there would have to be redistribution. So, therefore, any reparation, any restitution of land is subject to that general requirement.

**V:** The redistribution of land, let us say, is a priority.

**W:** That is right. It is a priority. The redistribution to the living is a priority over the restitution of land. Because, suppose you were to restore all the land to the descendants of the original owners before the injustice, then that would be all done and all finished and then we would say: 'Fine, okay, what do we do next? Well, we have this redistribution on the agenda and we have to do it right away'. Because they have not gone away, the redistributive concerns and the human concerns.

**V:** And in a way, by giving priority to the redistribution, you do more justice towards the claimants in the present moment, because of the changed circumstances.

**W:** That is right.

**V:** In a related argument you made in one of your articles on historic injustice you explained: it may be that the autonomy of the current claimants, the development of their personalities, no longer depends on the success or failure of their historic property claims.<sup>10</sup> It might be that honouring their autonomy now – their right to develop their human capacities – implies completely different strategies.

**W:** Yes, indeed. And I think that is actually quite important. Now, it does have a moral hazard, which means that facts can be established on the ground unjustly and

10 See Waldron, *Redressing Historic Injustice*, p. 157-158.

then take on a life of their own, morally, but that, it is true, is how the world works. And the alternative would be to simply disparage the predicament of people in the modern world and say that their needs and their deprivations do not count in comparison with the importance of the historic injustice.

**V:** But, given this fact, how do you explain that in cases of historic injustice the demand for restitution in kind, the claims for the return of the land or other specific assets (and not the claims for compensation), remain so popular and are so accepted in a certain way?

**W:** Partly because they are a way of vividly marking and noticing the original injustice, and they are very important ways of vividly and realistically acknowledging the past injustice and people feel very strongly about that. Partly because the logic of absolute property rights still remains very effective.

**V:** By the 'logic of absolute property rights' you refer to the special rights-based approach to property rights which justifies (claims to) property rights by pointing to just entitlements based on the legality of past property acquisitions and transactions.

**W:** Yes, that is right, even though no plausible version of that special rights theory could work without a Lockean proviso of some sort.

**V:** It is interesting that politicians often compromise in these cases and try to find a form, a symbolic form analogical to legal solutions when confronted with historic injustice.

**W:** Yes. In New Zealand, for example, they have often used symbolic remedies. So there is a great mountain, the highest mountain of the country, Aorangi/ Mount Cook, and it was part of the land that was ceded by the Maori to settlers and with the reparations package it was given back to the Maori on condition that they instantly deeded it back to the nation as a national park. And just this 'going through the process', in both directions, was symbolic, highly symbolic and hugely important. The other thing, I think, that is important is that the argument for compensation remains undiminished. The compensation continues to accrue day by day, so long as the injustice continues.

**V:** You mean compensation based on the historic injustice claim. So the argument from historic injustice, in a weakened form, continues to be important, whenever restitution in kind does not take place.

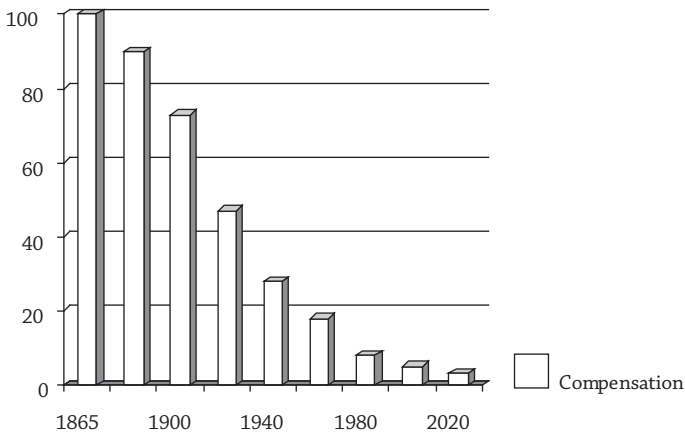
**W:** That is right. I imagine that you could draw a graph and here is 1865, 1880, 1920, 1940, 1960 and so on. And here is where the injustice occurred and for that year this much compensation is owed. And for the next decade this much compensation is owed. But now the population starts to increase, so failing to return the land is less of an injustice. So the compensation is going to become smaller and smaller. That is the way the two arguments interact. In each case you are being compensated for the refusal to return the land, but the refusal to return the land here (*points at point '1980' in the graph*) is hardly an injustice at all because of the redistributive considerations, but a refusal to return the land here (*points at point '1900' in the graph*) is a considerable injustice and when it first happened, it was a massive injustice.

**V:** In real life, many claimants tend to draw a completely different line.



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**Figure 1: Compensation for historic injustice**



**W:** Absolutely.

**V:** We have spoken about situations in which the passage of time was considerable. Now, suppose there is no considerable lapse of time. In that case, do you agree that the most straightforward solution would be to apply the corrective justice mechanism in a legal sense, such as we find within private law?

**W:** Yes. I think the clearest example would be the application of my theory on the Israeli-Palestinian conflict which I have given in an article in *Theoretical Inquiries in Law*.<sup>11</sup> In that piece I consider the Israeli settlements in the Occupied Territories. These settlements have two features which distinguish them from other cases of historic injustice. Number one: the passage of time [since the settlements were set up, eds.] is quite short, in some cases weeks. Number two: the settlers have immediately somewhere to get back to. They can just walk back to the state to which they have a right to return. And Palestinians whose property has been seized or misappropriated in the case of the Israeli settlements are still standing there with their autonomy vested in the same land. So I believe that there is no good argument for the supersession of injustice in those circumstances.

**V:** And what is the turning point? After how many years would the original injustice be superseded?

**W:** Well, I do not believe it is the passage of time itself; it is changes in circumstances that make a difference. You also have these claims in situations where the population remains stable, from one point in time to another, and in those cases the results [in terms of justice, eds.] usually remain the same over time. And sometimes circumstances will change quickly, like in a flood or a draught, and sometimes circumstances will change slowly, just demographically. And also changes in technology make a huge difference as well. I believe also that changes in government and lea-

11 J. Waldron, Settlement, Return and the Supersession Thesis, *Theoretical Inquiries in Law* (2004/2) 5, p. 237-268.

dership make a difference, changes in the representation of the original claimants. Because, for example, in New Zealand, many of these resources were held collectively. Say by tribal governments, in, say, 1865. And they are now being given back to tribes that have no governmental function at all, but that are just like private corporations. Because in New Zealand, different from Canada and the United States, there are no governmental functions exercised by any Maori tribes. So I believe that there is a grotesque injustice, which consists of redressing injustices that took place when a governmental tribal entity was deprived of the resources that it needed to look after its people, and to redress for that now, because we now take the resources away from the New Zealand government which has the duty of looking after all the people and give them back to a private organization, simply because this private organization has a genealogical relation to the governmental tribal community which was originally dispossessed. So, there you have not only a change of circumstances, but a change of identity, which should make a difference.

### Citation of Foreign Law

**Q:** One of the reasons to invite you to the conference was your article 'Foreign Law and the Modern *Ius Gentium*',<sup>12</sup> in which you argue that we need a general theory of citation of foreign law [the phenomenon of national judges citing national law from other countries, eds.] and I was wondering what it was that interested you and made you pick up this topic in the first place and to participate in this debate?

**W:** That's a very long story. I already had just a general interest in it because I am a New Zealander working in the United States and being a New Zealander I am used to using foreign law all the time in the way that Michael Kirby and others explained [at the conference, eds.]. But there I am in the United States and this debate arose. At the time, I was in a reading group that was reading a book by Richard Tuck called *Natural Rights Theories*<sup>13</sup> which is from the 1980s (Tuck is a professor of political philosophy at Harvard) and I was reading it and there were passages on the idea of the *ius gentium*, the law of nations, particularly the older notion, which did not mean the same as international law but which meant the same as a body of world law on crime or delict or rights or anything. It was actually understood in the passages that I was reading from Tuck as a good and useful mode of natural law reasoning. And natural law reasoning should not be sort of philosophical *a priori* but should engage with the experience of mankind in organizing societies and the experience of finding that some arrangements work and some do not, some are stable, some collapse, and so on. So that idea of the *ius gentium* was in my mind from this discussion. Then somebody called me from the *Harvard Law Review* and asked if I had any ideas about how they might organize a symposium and I just said really without thinking: 'I do think that the idea of the *ius gentium* might be helpful in analyzing what is going on in the citation of foreign law.' And they rang back and said: 'Would you write something?' So I did. So this is not a deep-seated interest; this is very contingent. But

12 J. Waldron, *Foreign Law and the Modern Ius Gentium*, *Harvard Law Review* (2005) 119, p. 129-147.

13 R. Tuck, *Natural Rights Theories*, Cambridge: Cambridge University Press 1979.

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then, as these things happen, I had spent a lot of time on the article and then in September 2007 I was invited to deliver the Storrs lectures at Yale Law School and so I decided to devote them to this issue as well. I called them 'Partly Laws Common to All Mankind',<sup>14</sup> which is from a quote from *The Institutes* of Gaius, 'Every community governed by laws and customs uses partly its own law, partly laws common to all mankind'.<sup>15</sup> So those lectures were delivered last year and I am in the process of transforming those into a book. So what you heard today [during Waldron's presentation at the conference, eds.] was a small fraction of all that material, in abstraction from the *ius gentium* idea. But you can see, I think, how it would relate to the *ius gentium* idea, that the notion of consistency can generate a body of common principles that is implicit in the way we are dealing with these issues in the world. And if we wanted to hypostasize or reify that body of implicit principles we might call it *ius gentium*.

**Q:** One of the things I noticed in what you have written is that you relate it to the idea of reflective equilibrium.

**W:** Yes.

**Q:** I mean, almost a sort of natural law kind of reasoning but one that is in a specific way tied to positive rules. So that brings me to the question of how, exactly, you would categorize it. Because in the paper 'Foreign Law and the Modern *Ius Gentium*' you include the warning not to equate it with natural law reasoning, but if you look at what you wrote about Gentili,<sup>16</sup> then it appears that he makes a close connection between the two. He almost equates them, you could say.

**W:** Yes, that is right.

**Q:** So I am very interested in how you conceive of this relationship between natural law in the classic sense, so to speak, and this *ius gentium*.

**W:** It is a very difficult question and, as you know, many gallons of ink have been devoted to it. I think you work at both ends. I think you find that with regard to any body of law, not just *ius gentium*, but certainly with regard to *ius gentium*, there is some equilibrium between moral judgments and positive law. You find this in domestic law – if Dworkin's analysis is correct and I think it basically is – you certainly find it with *ius gentium*: when you are choosing among rival candidates for consensus, you are making partly a moral choice. So from the legal end, even though the *ius gentium* is mostly positive, it is imbued with a strong natural law element. From the other end, when you are engaging in moral judgment, although we have this ideal of moral autonomy, that you think things through for yourself in isolation from any consideration of positivity, I think that is a bad way of engaging in moral judgment. Moral judgment needs to be much more informed by the reality of law and by what has worked in human affairs and what has not, which you cannot always figure out as a philosopher in your study, but you need to inform your moral thought. So, even if natural law thought was moral thought, which I doubt, it would have to

14 Available as podcasts at <[http://cs.law.yale.edu/files/folders/yale\\_u\\_podcasts/default.aspx?ppage=2](http://cs.law.yale.edu/files/folders/yale_u_podcasts/default.aspx?ppage=2)>.

15 Institutes, I. ii.

16 J. Waldron, 'Ius Gentium: A Defense of Gentili's Equation of the Law of Nations and the Law of Nature' (November 2008), NYU School of Law, Public Law Research Paper No. 08-3, available at SSRN: <<http://ssrn.com/abstract=1280897>>.

be leavened with and include a very considerable amount of legal thought. Now, this does not mean that these two processes come to mean the same thing, but they tether in an uneasy and interesting relation to each other.

**Q:** In the first article, 'Foreign Law and the Modern *Ius Gentium*', with which it all started, you make an analogy with science, with the established body of scientific findings. That suggested to me that in a certain way it seems like you accord some sort of epistemic authority to the law of nations and I was wondering whether that interpretation is correct.

**W:** Yes, I mean very limited epistemic authority. And what we might say is that when a consensus becomes established, whether in science or in law, it has no conclusive authority in and of itself. Scientific consensus can be proved wrong. But it would be unthinkable to do science without taking account of the established body of findings, what is happening in other laboratories and so on. It is how we do science: we build slowly, cumulatively; we check and recheck, we duplicate or reduplicate results. In science, there are standards of confirmation, there are, above all, standards of refutation – I'm an old Popperian, philosophically. So there is a reality there against which we can check our results. But, nevertheless, what is checked is whole bodies of complex theory and achievement, not a single hypothesis. And also, I believe, in law, even though there is not the same reality check to decisively refute a theory; nevertheless, we build up in this cumulative way, in exactly the way that the community of scientists does. So I believe very strongly in the community of jurists in the world.

**Q:** As you yourself are aware, of course, there are some rather forceful objections to the practice of the citation of foreign law and maybe to its justification of it as well. One of them is of course the well-known democratic legitimacy objection which is for example voiced very forcefully by Justice Scalia. I am wondering about two things. Firstly, what would be your reaction to this objection? Secondly, why is it such a powerful mentality in the United States? Why is it opposed so strongly there? In other parts of the world it does not seem to be that much of an issue as it is in the States.

**W:** Right. It is partly an issue in the States because people are very sensitive about judicial decision making anyway on democratic grounds, because of the very great constitutional authority given to the courts to make these decisions – which I, as you probably know, oppose on democratic grounds. But, nevertheless, courts have work to do and I think the difference between me and Justice Scalia might well be that he underestimates the international dimension of the work that they have to do, even the non-democratic work that they have to do. There is nothing particularly democratic about what Justice Scalia is doing when he strikes down a piece of legislation, except that he thinks that the only reference point you need is the Framers of the Constitution and the original text. But when the Framers of the Constitution and the text writers were using text which was boiler-plated from other constitutions – maybe not for the 1791 Bill of Rights, but actually the 'no cruel and unusual punishment' was brought in from the English Bill of Rights a hundred years earlier, exactly, word for word, the whole Eighth Amendment is from the English Bill of Rights of 1689 – then there is a common provision, there is a heritage, a tradition that you are drawing on and it is wrong in my view to isolate the American example

‘The Soviet Union did not have a legal system’

of that tradition and say that it has nothing in common with the use of ‘cruel and unusual’ in England or in Canada or anywhere else. And then, when you come to the modern tradition of ‘inhuman and degrading punishment’ or whatever, we need to understand that the use of that language in national constitutions is not just language invented by a New Zealander or a Canadian or a South African. It is language that New Zealand, South African and Canadian legislators are drawing down from the experience of mankind, and I believe that judges who are interpreting that language have to keep faith with that. And there is nothing undemocratic about that. There may be something undemocratic about giving too great an authority to what the judge does with that, but that is a separate issue. So, when you are dealing with some question whether some punishment is cruel or inhuman in various countries, the judge in each case has to ask: is this cruel or inhuman treatment? And, secondly, the political society as a whole has to ask what it will do if the judge says ‘yes’. Now, in the US, what the society would do if the judge says ‘yes’ is to overwrite the legislation. In Great Britain, if the judge says ‘yes’, what will happen will be a declaration of incompatibility and Parliament may have to act. In New Zealand, what the courts will do is that they may make a declaration or maybe look for an interpretation that resolves it. So there are different constitutional consequences of the answer to the first question. But the stuff about foreign law pertains to the way you answer the first question, it does not pertain to the way you answer the second question. Although, you know, there is also a body of comparative constitutional law which argues for strong judicial review among countries on the basis of our mankind’s experience of it in other countries. And I believe that we have a lot to learn in America from looking at the possibilities of weak judicial review in the UK. So this adds a second level to this borrowing.