

LAW'S JUDGEMENT: SOME THOUGHTS*

EL JUICIO DEL DERECHO: *ALGUNAS REFLEXIONES*

William LUCY**

SUMMARY: I. *Amalia on Virtue and Community*. II. *Rodrigo's Questions*. III. *Haris's Tension*.

My first thought is gratitude: I'm grateful to Amalia Amaya, Rodrigo Camarena Gonzalez and Haris Psarras and for taking the time and trouble to engage with *Law's Judgement*.¹ Academic lives seem to be increasingly busy and the time needed to live that kind of life —to read, think, talk and teach— is under pressure from various performance metrics and indicators.² So: I appreciate them making time. I am also grateful for the opportunity to think again about some of the arguments in the book, provoked by their interesting and insightful thoughts and comments. What follows are my thoughts on some of their thoughts.

I. AMALIA ON VIRTUE AND COMMUNITY

I think that modern law's judgment —the way in which we, law's addressees, are assessed by its multiplicity of standards— is abstract. And a brief way of unpacking what I mean by 'abstract' is: it ignores a great deal about our conduct, characters and context when it judges

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** Law School, Durham University; w.n.lucy@durham.ac.uk.

¹ Hart Publishing 2017.

² Two academics have made time to write about this: M Berg & B Seeber, *The Slow Professor* (University of Toronto Press 2016).

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us. Now, I presume that Amalia doesn't disagree with this as an empirical claim, that she accepts that law's abstract judgment (hereinafter *LAJ*) is an obvious but not ubiquitous feature of the major modern legal systems. But it is absolutely plain that she doesn't like it. I'm not certain that I like it either, but I set myself to examine what might be said in its favour in the latter part of *Law's Judgement*. My aim was not to provide an all-round defence of *LAJ*; it was, rather, to see if we could add ballast to the argumentative scales and incline them a little in *LAJ*'s favour. So, although Amalia takes me to offer a 'justification' for *LAJ*, I do not see my own arguments in that way if we mean by 'justification' something like this: an argument or series of arguments which show *LAJ* is of *overwhelming* importance or value.³

For Amalia, *LAJ* is, it seems, of no moral or political value. That is because abstract judgement is not virtuous judgement. The virtuous judge sees "the whole picture, perceives all the morally and legally salient features of the case and miss[es] nothing of relevance"; she is "emotionally attached to the parties [and] will describe and re-describe the case in all its particularity"; she can "specify the values at stake in ways that make them applicable to the situation at hand" and will revise those values when necessary to avoid absurdity or injustice. I have no problem with this as a possible and plausible characterisation of what virtuous judgement might look like in the abstract, or at large. I'm sure that openness to all possible relevant considerations when making decisions, emotional engagement with the parties affected by one's decisions and sensitivity to the values in play in decisions are, in general, commendable.

But this picture of virtuous judgement is not a picture of legal judgement (or even that narrow subfield of it which consists of appellate courts deciding hard cases) in any of the jurisdictions with which I am familiar.⁴ One thing that looms large —overpoweringly

³ Whereas Amalia takes me to be offering a full justification for *LAJ*, another reader of the book suggests that my examination of *LAJ*'s value is altogether too tentative: H Passas, Book Review (2018) 77 *Cambridge Law Journal* 423-427 at 427.

⁴ I would not now say, as I once did, that this replaces law's judgement with another, more ethically sensitive form of judgement: see W. Lucy, Book Review (1999) 19 *Legal Studies* at 427-428 and Alan Norrie's reply at 231-234 of his *Punishment, Responsibility and Justice* (Clarendon Press 2000).

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so— in that limited subfield of legal judgement, but which features only fleetingly in Amalia's characterisation of virtuous judgement is this: the law. That is, the legal doctrines, principles and rules, alongside their alleged underpinning values, the interpretation or application of which is the subject matter of the dispute in an appellate court hard case. It is exactly those principles and rules which prevent judges from being virtuous, in Amalia's sense: they stop judges seeing the whole picture, they exclude some or many or possibly all of the morally salient features of the case and they constitute an interpretive straight-jacket through which the case must be described (so it cannot, legally speaking, be 'redescribed'). The cases I mentioned in *Law's Judgement* to highlight the 'moral jolt' that *LAJ* presents illustrate just this kind of exclusion and limitation; they are shorthand means of highlighting *LAJ*'s morally troublesome nature.

I disagree with Amalia, for now at least, about how we should respond to this: she responds by replacing *LAJ* with *LVI* (law's virtuous judgment) whereas I attempt to examine what moral or political weight *LAJ* might have despite its morally troubling features. This disagreement could well be temporary, since it is not certain that *LAJ* will, in the end, pass muster in moral and political terms; it might have some such credit but that might not be enough to outweigh its moral and political debits. I, however, have not yet given up on *LAJ* and so cannot endorse *LVI*.

As to community, we are in agreement, subject to one caveat. I argue in chapter 6 of *Law's Judgement* that *LAJ* embodies or supports a fairly thin form of community which, as Amalia notes, is egalitarian. It is not "a community in which people are bounded by affective ties and in which there are relations of mutual aid and reciprocal service". I agree with Amalia that that is a worthy ideal, a form of community worth striving for and worth maintaining where it exists. The kind of community that *LAJ* creates is thinner than that, but not without moral standing; furthermore, that thin kind of community may well be a first step to the realisation of thicker, morally more appealing forms of community. The caveat is this: I do not think that our efforts to realise morally appealing forms of community is a zero-sum game, such that realising a thin form of community in some contexts (the juridical, for example) makes impossible the re-

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alisation of other, thicker forms of community in other, related contexts. The sources and forms of community are interconnected, and the means of realising and thwarting its many forms, are various;⁵ while law might be a means of realising and maintaining one such form of community, I hope that is not the only means. Moreover, if we have to rely upon law alone to realise our various ideals of community, then I think we are in trouble.

II. RODRIGO'S QUESTIONS

These are excellent questions and none of them were raised, never mind answered, in *Law's Judgement* which is not to say they are irrelevant. Rodrigo's questions are pressing and absolutely pertinent.

This, I hope, is an accurate paraphrase of the thrust of Rodrigo's first question: are statutory provisions the paradigm instance of rules? And, if they are, is it appropriate to speak of law's *abstract* judgement in a common law legal system, since precedents look more like examples than rules, and abstraction is a notion more fitting for rules than for examples? On the first point, my answer is this: I don't think so. My reason is that, along with most common lawyers, I have a rather loose understanding of what rules are: they are usually relatively general injunctions, although they can of course have very specific content, with an 'internal aspect' displayed by all who accept the rules.⁶ Common lawyers are just as happy to speak about rules in relation to cases —'the rule in *Rylands v Fletcher*' and 'the rule against perpetuities'—⁷ as they are to speak about rules in rela-

⁵ Despite the tidal wave of literature during the last 18 years, one of the best starting points for thinking about these matters is still A Mason, *Community, Solidarity and Belonging* (Cambridge University Press 2000).

⁶ See HLA Hart, *The Concept of Law* (Clarendon Press, 3rd ed, 2012) at, among many other places, 55-56. For the argument that neither Hart nor other positivists properly understood the nature of common law adjudication, which in part echoes Rodrigo's point here, see AWB Simpson, 'The Common Law and Legal Theory' in AWB Simpson (ed), *Oxford Essays on Jurisprudence*, 2nd Series (Clarendon Press 1973) 77-99.

⁷ For the former, see C Witting, *Street on Torts* (Clarendon Press, 15th ed, 2018) ch 18; on the latter, which is really a series of rules some of which now take statu-

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tion to statutory provisions (as in the 'rule' in section 53 (1) (a) of the Law of Property Act 1925 that an interest in land can only be created or disposed of in writing signed by the person creating or disposing of the interest).

Of course, they might be mistaken to do so, although I am not sure that their mistake is that common law 'rules' are always examples while statutory 'rules' are always rules. Insofar as the distinction between rules and examples rests upon specificity, the former always being more specific or detailed than the latter, it is dubious: the common law rule (or example) in *Rylands v Fletcher* is not radically, qualitatively less specific than that in s 53 (1) (a) of the LPA 1925. If the distinction is instead one that turns upon malleability, the thought being that examples provide more interpretative leeway for followers than rules, then that might be so in some instances. But all propositions are ripe for interpretation, particularly those, like propositions of law, that we have to 'apply' to the world. As a football referee, I have to apply the offside rule. That rule can be explained to me in at least two ways: I can be shown instances of the rule being applied by other referees and I can be given the text of the rule. In each case, there is room for interpretation, questions and clarifications. I doubt that there is anything like a qualitative distinction between examples and rules, the difference being at most one of degree.

Does this matter for the arguments of *Law's Judgement*? It might. For if we think there is a bright-line, qualitative distinction between rules and examples, the former always and ever being more detailed and less 'malleable' than the latter, then abstraction will be easier to achieve through rules than via examples. But I am not persuaded that such a bright-line qualitative distinction exists.

Rodrigo's second and third questions raise difficult issues. The problems of implementing the principle of accommodation are the core of his second question and I have no answers to the issues Rodrigo highlights. All I have to say is that he undoubtedly raises the correct issues: cultural accommodation is difficult for law, inso-

tory form, see G Virgo, *The Principles of Equity and Trusts* (3rd ed, Clarendon Press, 2018) ch 4 at 102-104.

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far as the latter is a regime of general rules (or principles or propositions). It remains difficult even for a regime of law that displays no or few of the marks of *LAJ*, since the questions of who belongs and how they belong, and of whether or not that type of belonging is sufficient to merit legal recognition, are just as pressing there. The Western legal systems have excluded and included different groups at different times: animals could once stand trial, but we now think it more appropriate to confer various legal protections upon them; women's entrance into the domain of legal recognition was, in English law, incremental, full standing perhaps not fully confirmed until 1991.⁸ These struggles for inclusion and recognition are the stuff of everyday political action and, I think, will exist in any kind of legal system. How particular legal systems react to them and, ultimately, either accommodate or reject them, is important and interesting.⁹ But law should be only one stop in the journey of these recognition struggles and, in my view, not always the most important one, since legal changes alone do not often completely solve the struggles and injustices which provoke them.

Sovereignty is the fulcrum of Rodrigo's third question, which I think can be paraphrased thus: is *LAJ* a product of sovereignty in the form it exists in the liberal state? That form, as Rodrigo suggests, is this: there is a single and supposedly all-powerful source of law. Certainly, the change from feudal to liberal (or bourgeois, capitalist or mercantile) legal orders was accompanied by changes in the way in which public power was envisaged. That was possibly a transformation from the charismatic power of Kings, Queens and Lords to the power of the 'State', something independent of those whose conduct deployed the power 'it' unleashed.¹⁰ But I'm not sure that

⁸ Although falling into a traditional misogynistic trope of lumping women and animals together, I do so only for reasons of time and space. On animals, see EP Evans, *The Criminal Prosecution and Capital Punishment of Animals* (Faber and Faber 1987); for what might be the last step in the process of fully recognising women's standing in English law, see *R v R* [1991] 4 ALL ER 481 UKHL.

⁹ Note the UK Supreme Court has recently tackled a case very similar to *Masterpiece Cakeshop*: *Lee v Ashers Baking Company Ltd* [2018] UKSC 49.

¹⁰ On the 'invention' of the state, see Q Skinner, *Visions of Politics Volume II* (Cambridge University Press 2002) ch 14.

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state power has ever and always been reducible to a single sovereign source in the Western jurisdictions, many of which are politically complex, being amalgams of different cultures, 'national' groups and, of course, sources of power. Furthermore, this near 'pluri-sovereign' reality was seemingly stumbled upon or hinted at by John Austin, albeit as a matter of legal theory. What, after all, is the conclusion of Austin's search for the sovereign if not this: it's complicated!¹¹ I think that might be Rodrigo's thought, too, and, if so, I share it. What, then, is the relationship between *LAJ* and sovereignty? On a properly nuanced and probably complex view of the latter, I'm sure there is an historical, temporal correlation. As yet, I have no clear idea as to the causal or other connections that might underlie that correlation.

III. HARIS'S TENSION

Haris takes the tension between *LAJ* and a range of moral values as the core of his comment. The tension is between *LAJ*'s failure to see all that is significant about the conduct and character of those it judges and those values which incline us towards an altogether more ethically sensitive —or virtuous, for Amalia— mode of judgement. He thinks that, although I offer some arguments to undermine some of the criticisms of *LAJ* that arise from these values, I nevertheless make too much of this tension. For me, there certainly is a tension; for Haris, there is not (or, as he says, it "is practically non-existent"). Can our disagreement be resolved? Possibly.

One step to accord consists of noting what, exactly, we agree about. Haris and I are certainly in agreement on this issue: that the use of rules as a means of guiding and judging conduct always entails some degree of abstraction.¹² That is because rules *qua* rules must have some degree of generality and generality always, to some degree, overrides particularity. I, like Haris, hold that "abstract judge-

¹¹ See lecture 6 of his *The Province of Jurisprudence Determined*, edited by W Rumble (first published 1832, Cambridge University Press 2009). It is not surprising that this is by far the longest chapter in the book.

¹² See *Law's Judgement* (Hart Publishing 2017) at 16-19.

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ment is a feature of any rule-based mode of action-guidance". Where we might differ, though, is here: I think it is perfectly possible for different systems of rule-based action-guidance to display, across each system as a whole, different degrees or levels of abstraction. They can be, at large, more or less 'abstract'. One of the contrasts I attempted to draw in *Law's Judgement*, albeit hastily, was between the level of abstraction displayed by modern legal systems, which manifest *LAJ*, and the English feudal legal systems. My hunch is that the latter was much less abstract than the former, modern law's embrace of *LAJ* being one of its most distinctive features.¹³ Furthermore, the possibility of more or less abstract systems of rule-governed action-guidance is attested by the contributions to this symposium, Haris's view of such systems occupying a very different place on the 'more or less abstract spectrum' than Amalia's view. Of course, if Haris's view is that there is no such spectrum, that there are simply different—in terms of their content—systems of equally abstract judgement, then he would reject this point. But if he accepts it, where else might we disagree?

Perhaps on argumentative strategy. Haris is absolutely right to note that my responses to many actual and imagined criticisms of *LAJ* operate at the level of specifics rather than generalities, using my discussion of liability in negligence law as an example. My argument in *Law's Judgement* is that this system of liability-responsibility is not unfair or, perhaps more accurately, not as unfair as critics allege. Its moral basis can be found in a not obviously morally mistaken system of outcome responsibility. It seems that Haris does not disagree with the particulars of that argument, but he does find it a little petty-fogging or trivial. He thinks that "a response to... critics in light of the generals rather than the particulars of *LAJ* would be more apt and effective". Haris might well be right about that and he seems well placed to take up that issue himself. But I have what could be a partial defence for this approach, although some might regard it as no defence at all.

¹³ Ibid 19-21. For a fascinating discussion of feudal legality, see Rio, A "Half-Free' Categories in the Early Middle Ages: Fine Distinctions Before Professional Lawyers', ch 5 of P Dresch & J Schiele (eds), *Legalism: Rules and Categories* (Clarendon Press 2015).

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It is this: *LAJ* is hard to talk about in the abstract. One reason for that is that it is there, right in front of our (contemporary or modern lawyers) noses. So close, indeed, that we almost can't see it. Furthermore, not only is it so close, it is also very nearly ubiquitous, albeit not in the sense of being always and ever explicitly in play: its absence is often as telling as its presence, making lawyers suspicious of law's so narrowly drafted that they all but name a person, group or class or bodies of law that lack systematicity or generality. A good way of bringing this very close but not quite ubiquitous feature of the modern legal landscape into focus is to point to particular instances or aspects of it. That is how I began *Law's Judgement* and how, as Haris notes, I respond to a few of the arguments offered by jurists against *LAJ*.

One could dub this a 'bottom up' approach, the 'bottom' being particular juridical instances of *LAJ*. The usual contrast is with a 'top-down' approach which was characterised thus by Jules Coleman: "In top down explanations, the theorist begins with what she takes to be the set of norms that would gain our reflective acceptance... Then she looks at the body of law... and tries to reconstruct it plausibly as exemplifying those norms. Parts of the law... may fail to be plausibly reconstructed... and identified as mistakes".¹⁴ I do not think that one approach or the other is always obviously better nor do I believe that there is an *a priori* truth here to guide us. If Haris accepts that too, then the only thing that sets us apart is our different approaches to *LAJ*. That counts as a genuine difference but it is not, I think, one which will yield a great substantive divergence, generating radically incompatible accounts of *LAJ*'s value.

¹⁴ *Risks and Wrongs* (Cambridge University Press 1992) 8. Coleman's point of contrast is not bottom-up approaches but middle-level theory: *ibid*. In what seems like a previous life I complained about both: see section III of my 'Rethinking the Common Law' (1994) *Oxford Journal of Legal Studies* 539-564.