

## EQUALITY: THREE QUESTIONS FOR WILLIAM LUCY\*

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*IGUALDAD: TRES PREGUNTAS PARA WILLIAM LUCY*

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### I

Professor William Lucy's book *Law's Judgement* (LJ)<sup>1</sup> explores a highly relevant, yet surprisingly neglected topic: the abstraction as a component of contemporary law (bourgeois or liberal law, as opposed to feudal law). Although the mere concept of the rule of law seems to suggest that rules must be abstract and that judges must apply and interpret them as impartially as possible, there is no much literature on the topic, and LJ fills this gap.

Is the law's abstraction from context, needs, abilities, virtues or vices of particular persons something morally valuable? Lucy answers in the positive and shows how *Law's abstract judgement* (LAJ) is connected with three particular conceptions of dignity, equality, and community. In this piece, I focus on equality over the other values. In the rest of this paper, first I am going to provide a brief overview of the book. Then, I will point out what I consider to be the most significant contributions of the book regarding the connection between Law's abstract judgment and equality. Later, I will ask three questions so we can illustrate further points of the book and engage in a critical discussion of LJ.

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<sup>1</sup> William Lucy, *Law's Judgement* (Oxford Hart Publishing 2017). Referred to as 'LJ' with accompanying page numbers in the text.

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## II

Lucy argues that there are three features in the abstract judgment of liberal law (LJ, 4-5). The first feature is the *presumptive identity* component. Addressees are conceived as ‘identical abstract beings’ with same (i) capacities and (ii) entitlements. There are neither privileges nor discrimination. In fact, Lucy argues ‘there is almost no better way of attempting to ensure equality than by taking the presumptive identity component seriously’ (LJ, 14). The second is the *uniformity* component (isonomy). General and objective standards apply equally to all. Finally, the third is the *limited avoidability* component. The application of such standards is strict, and only in rare instances by a small number of ‘exculpatory claims.’ These exceptions are subject to a reasonableness scrutiny. Thus, the first feature relates to the idea of its *subjects*, i.e., legal person, the second to the *standards* (mainly rules) that form part of the systems that are applied to all addresses, and the third to the unusual *scenario* in which the general standard is not applied.

Lucy convincingly argues that LAJ is morally significant and it safeguards some conceptions of the value of equality. Firstly, abstraction is unavoidable because of the generality of rules. Any liberal legal system will need to deal with the issue of abstraction as rules are general standards. Even if LAJ is a historical institutional form, it remains a typical feature of liberal law for two reasons. (i) All liberal legal systems are formed by *general*, abstract rules that ignore particularities and (ii) any dispute needs a *subject-matter* to identify the applicable standard (LJ, 17), i.e., they subsume the particular into the general.

Secondly, certain instances of abstraction and impartiality – openness and lack of prejudice (LJ, 97) are not only conceptually unavoidable but also morally virtuous (LJ, 72). Judges are impartial to subjects, but only in the context of partial rules determined by the values of a particular legal system (LJ, 98-100). Moral agents can always question the content of rules, but abstraction and impartiality help to treat disputants as ‘formally equal abstract bearers’ (LJ, 102). That is, they are treated equally just because they are members of the legal community, regardless of their gender, status,

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religion or ethnicity. In brief, Lucy makes clear that we should not confuse a complaint about the particular content of laws with a complaint about abstraction or impartiality as features of *LAJ*.

### III

Just by analyzing *LAJ* as a question of *institutional* design, the book is an enormous theoretical contribution to understand the different conceptions of equality in jurisprudence. Although the book takes the common law tradition as a paradigm, it is also of great theoretical and practical significance for Latin America. Theoretically, for instance, Latin American constitutions protect equality before the law in a formal sense, but they have also incorporated substantive equality provisions aiming to redress the historical exclusion of women, aboriginals, and other ethnic groups by recognizing *special* rights.<sup>2</sup> Lucy's work is insightful because, even in a substantive equality approach, this special treatment needs to be specially justified (LJ, 16, 188). Also, the components of uniformity and presumptive identity are unavoidable as indigenous rights, for instance, apply to all indigenous, regardless of their own particularities.

Practically, Lucy's work is also a significant contribution to the connection between the abstraction of rules and equality before courts of law. For example, The Mexican Supreme Court discussed for almost two years, with no agreement reached, about the nature of statutory judicial precedents. One question was, precisely, whether precedents are "norms" even if they are not *abstract* standards but concrete decisions.<sup>3</sup> Lucy's work can inspire us to argue that judges safeguard the ideal of equality before the law by applying standards uniformly to 'identical abstract beings' (LJ, 4), even if precedents are the outcome of *particular* decisions.

<sup>2</sup> Roberto Gargarella, 'Equality' in Rosalind Dixon and Tom Ginsburg (eds), *Comparative Constitutional Law in Latin America* (Edward Elgar 2017) 176, 181 & 191.

<sup>3</sup> C.T. 182-2014, *Sesión pública ordinaria del Pleno de la Suprema Corte de Justicia de la Nación celebrada el lunes 25 de mayo de 2015* [Session of the Plenum of Mexican Supreme Court of 25 May 2015.], 4, 11, 21, 24.

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In addition to the general analysis of *LAJ* as a ‘particular, possibly historically unique legal institutional form’ (LJ, 246), the book makes an array of more specific contributions to the discussion of impartiality and equality. Because of space constraints, I will analyze only two. The first is the *principle of accommodation*. This principle refers to the possibility that a legal system may protect some groups whose values differ from the values of the majority (LJ, 107). The *strong* version of the accommodation principle holds that ‘good evidence of difference defeats any legal claim’ while the *weak* version holds that ‘good evidence of difference [must] be admitted in court’ (LJ, 108.) This principle requires proving membership of a group other than citizenship. Individuals can be part of several communities, but the ultimate membership is that of citizenship.

The second contribution is Lucy’s analysis of equality and his particular conceptions of equality in connection with *LAJ*. He rejects the thin conception of equality of ‘like cases must be treated alike’ because the principle is not normatively useful; we need a substantive account to know what differences are legally relevant (LJ, 167, 170). He also rejects Luck Egalitarianism, i.e., the conception of equality based on distributive justice and the difference between choice (free will) and circumstances (determined by luck). He questions the blurred distinction between choice and circumstances (LJ, 174-177), and the focus on the distribution of things without tackling the question of equal standing (LJ, 182).

In contrast, he advances a *Social and Political Ideal of Equality* aimed at abolishing hierarchy and exclusion. This is a substantive conception of equality formed by the four themes of equal standing, worth, entitlement (bundle of rights) and opacity —i.e., formal membership is what is relevant, no life-auditing (LJ, 186). This conception is complemented with the dworkinean Right to Equal Concern and Respect— ‘where concern requires to treat human beings as capable of suffering and frustration and respect to treat them as intelligent human beings with conceptions of their lives.’<sup>4</sup> Together both conceptions serve to link equality with dignity, the first being a

<sup>4</sup> Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press 1978) 272.

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matter of membership to a group, the latter an individualistic notion that requires respect to any human being (LJ, 203).

#### IV

Bearing in mind these contributions, I have three questions for Professor Lucy:

- 1) Throughout the book, Professor Lucy seems to have statutory provisions as the paradigm of rules. He mentions that 'law is part of the enterprise of subjecting human conduct to the governance of *rules*' (LJ, 38, emphasis added). In turn, rules must be among other things, intelligible, known in advance (LJ, 38-42) and, more importantly, imply a degree of *abstraction* that ignores particularity (LJ, 16-17). However, in passing, he notes that equality provisions are interpreted in light of precedents, but these are subject to 'elaboration' and their meaning is 'never determined solely by precedents' (LJ, 167).

Then, it is puzzling to ascertain that *LAI* could be instantiated in 'pure' common law adjudication where precedents are the sole guiding source for human behavior. There are no pre-existing statutory provisions or explicit canonical rules. In fact, scholars as Grant Lamond have argued that rather than a rule-based system, the common law is a case-by-case approach for deciding cases.<sup>5</sup> Similarly, Barbara Levenbook has argued that precedents are best understood as *examples*, rather than rules.<sup>6</sup> While categorization is present in both, reasoning by rules and examples, the latter seems to suggest a lesser degree of abstraction, and apparently explains the potential flexibility that common law judges have when interpreting and applying precedents.

<sup>5</sup> Grant Lamond, 'Do Precedents Create Rules?' (2005) 1 *Legal Theory*.

<sup>6</sup> Similarly, Barbara Levenbook has argued that precedents are best understood as examples, rather than rules: Barbara Levenbook, 'The Meaning of A Precedent' *Legal Theory* (2000) 185. Levi raised the same claim although with different arguments: E. Levi, 'An Introduction to Legal Reasoning' (1948) 501 *University of Chicago Law Review*.

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Nevertheless, it would be controversial to say that the law, as conceived in LJ, seeks to subject human conduct to the governance of examples. How can a citizen know the standards in advance when precedents are always subject to 'elaboration' and bi-directional analysis between the precedent and the case at hand that may lead to distinct interpretations? Can LAJ's abstract and predictable conception of rules be reconciled with the flexibility and case-by-case approach of pure common law adjudication?

- 2) Regarding the *principle of accommodation* and the *limited avoidability* component, Lucy states that 'considerable work needs to be done so as to distinguish between the culture of career criminals and terrorists, on the one hand, and that of various religious, ethnic, and other groups, on the other' (LJ, 108). One can argue, for instance, that the presence and consequences of colonialism on indigenous people distinguish their ethnic groups from the rest of the citizens and thus being an indigenous person is a valid reason to avoid the application of some standard. The consequences of colonialism would be the *group membership* that differentiates a group from the majority, at least in the weak version of the principle of accommodation.

Nevertheless, the 'evidence' of membership relevant to apply the principle of accommodation seems to be paradoxical, or at least not a matter of proof at all. If the allocation of membership is a subjective entitlement given by self-identification, it may be used illegitimately to avoid the rigor of the law. In contrast, if its needed an external or 'objective' proof, it may subject the individuals or the group to the tyranny of the majority, e.g. the officials or expert witnesses do not consider the group a 'real' indigenous community or 'serious' religion (e.g., Scientology), or the indigenous community does not consider the individual as a member.

This question is not only fascinating from a philosophical perspective but is part of everyday indigenous religious rights litigation. Think of the landmark Colombian case *T-523-97*,<sup>7</sup>

<sup>7</sup> T-523-97, 15 October 1997, Carlos Gaviria Díaz.

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where the Court held that whipping a convicted murderer was not cruel or unusual punishment when imposed by the *Páez*—an indigenous community— but a culturally diverse way of expiation. Or the recent U.S. case of *Masterpiece Cakeshop v. Colorado Civil Rights Commission*,<sup>8</sup> where the Court ruled that freedom of religion could exempt a Christian baker from abiding non-discrimination laws and thus allows him to reject service to gay wedding couples.

How, then, is membership proved to justify the principle of accommodation? Also, once membership is accepted in a trial, how should judges adjudicate between cultural and diversity claims, on the one and, and legal equality, on the other, on the understanding that both claims are valuable from the standpoint of a particular legal system?

- 3) The third and last question is connected to the previous one and relates to the tension between legal pluralism and sovereignty. Judges must be impartial, but only in light of partial rules developed by a *unique* legal system. In this sense, *LAJ* is an expression of the liberal state where the locus of sovereignty is only one. By contrast, in a feudal or pre-liberal region there is no sovereignty but an array of loci of power. Similarly, in a pluri-national state, such as Bolivia,<sup>9</sup> there are several nations, and legal pluralism is recognized as a right, thus there are several normative systems inside a country that are not always subordinated to a single legal authority.

Does the simultaneous membership to the legal community and other normative systems grounded on ethnic or religious connections threaten the sovereignty as hallmark of the liberal nation-state? Lucy could reply that, ultimately, it is the constitution—as an expression of sovereignty—that grants such rights. Still, this would trigger the never-ending debate about whether rights are ‘created’ or ‘recognized’ by the law. If rights are created, then the ultimate membership is indeed citizenship, but if rights are recognized, then the ultimate membership is human-

<sup>8</sup> 584 U.S. (2018).

<sup>9</sup> Bolivian Constitution of 2009, Articles 1, 2, 9.2, 14.2, 98, and 178.1.

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ity since rights-bearers are individuals with inherent dignity regardless of the positive law.

These questions are the vehicle to engage in a critical analysis of LJ, a bright, critical and innovative work that defends and explains the normative project of liberal law. Perhaps we could think of a normative order beyond law and challenge our 'institutional imagination' (LJ, 253). However, before doing this, Lucy takes the necessary effort seriously to comprehend *LAJ* inside the liberal law. By doing this, he brings a thought-provoking book from which readers of the north and global south, critics as well as supporters of the *LAJ* will benefit.