

A Sermon

Preached
in the Chapel

of

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by

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‘When mankind sees a good thing, it will have it and keep it’ (T R Glover). This is certainly true of the legend of Solomon’s judgement. Tales which have the same core plot as 1 Kings 3:16-28 abound. A variant, with King David and Solomon as the leading characters, circulated in the Arab world. While that story was not worked into the Qumran, it was preserved in the 10th century Arab book of songs, the *Kitab al-Aghani*, and remained part of the poetic lore.

In a story absorbed into the Indian Jātaka tales, the false mother is a she-devil, and this explains her interest in a child not her own. The future Buddha has a line drawn on the ground and asks both pretenders to take hold of one of the child’s arms; the baby will go to the woman who drags it over the line. The future Buddha consults the audience, who assure him: ‘The hearts of mothers are tender’, allowing him to give preference to the woman who yields.

In the 13th ct., the Chinese poet Li Quianfu turned a much older folktale into a verse play entitled ‘The History of the Lime Circle Used by Pao the Governor as a Skilful Stratagem for Discovering the Truth’. The play is praised for its outstanding lyrical beauty. The conflict here is between a ‘woman of pleasure’, whose businessman lover has been overjoyed when she gave birth to his child, and a woman who, after the father’s murder, claims the child in order to secure the accompanying inheritance. The true mother refuses to pull the child’s arm over the lime line and is accused of contempt of court. She appeals to the judge to acknowledge the rectitude of her position, showing a typical Chinese mother’s virtue of protectiveness, and ultimately prevails.

The Eastern stories went West, and together with the Bible version became popular raw material for numerous

retellings and adaptations for the stage, not to mention Hollywood movies. Given the countless representations in fine art, one could almost tell the story of Western art on the basis of works showing the two mothers aghast at the view of the baby held under a sword ready to strike.

There has been much to interest modern scholarship in the story and in its manifold echoes and reflections, interpretations and adaptations; these have occupied biblical commentators and philologists, as well as historians of art and literature. Game theory specialists see Solomon tackling a case of 'incomplete information'. The complex of 'Judgement of Solomon' contributions seems emblematic of our intellectual world in all its richness and diversity. There is an equally diverse range of possible approaches in revisiting the story. As a lawyer, I shall look at the judicial decision-making in 1 Kings 3:16-28 from the legal point of view.

Solomon's jurisdiction is based on the fact that the two mothers are prostitutes. Had they been married, it would have been for the fathers to claim the child; in the absence of fathers, the dispute is referred directly to the King. Unlike the Indian or Chinese stories, the biblical version does not specify the false mother's motive or interest. This might have been of a pecuniary nature, since children could be sold and thus commodified.

When one speaks of Solomonic justice today, one often implies an ideally equitable regard for both parties' positions, a balanced solution which does justice to both sides. But our story is not about distributive justice at all. Solomon is aiming at a binary decision, a 'nothing or all'. Today, we seem increasingly reluctant to see 'all or nothing' as a desirable resolution of disputes. If a contemporary judge were faced with similarly conflicting

claims, he or she might consider ordering joint or alternating custody – one month this mother, one month the other, an apparently more benign, or – to use a misnomer – more ‘Solomonic’ solution. There is a widespread tendency, I think, to favour, in more and more contexts, proportionalism over binary decision making.

Since time immemorial, legal and societal norms have been of a binary nature – sacred and profane, legal and illegal, guilty or innocent, fair or unfair. But at the same time we have in countless instances sought – and continue to seek – to refine, and thereby break up, such clear dichotomies. Mitigating circumstances and proportionality of punishments or governmental acts are among the concepts which allow a grading of decisions. It is difficult to identify precisely the causes of the ever-growing willingness to replace binary decisions, such as the one arrived at by Solomon, by granting at least something to each of the conflicting parties. A possible factor may be what I would call the ‘natural law’ fallacy. The physical world, on the human scale, is of a gradual nature: ‘Nature hath not seed nor shell, she is but one, and that is well’ (*‘Natur hat weder Kern noch Schale, Alles ist sie mit einem Male’*, Goethe). We may try to mirror the graduality, the fluidity of the natural world, when we avoid the hard ‘Yes’ or ‘No’, and substitute a gentler ‘a little for each’. But law is not a product of nature, it is a product of, indeed a part of, culture. Law is a social artefact. Trying to imitate the continuum of nature does not guarantee that we progress towards a better legal order. Not all decisions lend themselves to a convincing proportionalization. At the same time, we must resist any nostalgic temptation to idolize the archaic Yes/No-formula.

For Solomon, it was a binary issue. The typical archaic

law suit is not about a judicial ‘ruling’ that overcomes a controversy by sensibly re-ordering the matter; it is trial deciding between two contradictory claims. Only one claim can be lawful – which is it? There have been judicial procedures which settled such questions without fact-finding in the modern sense. One might draw lots – a method well known in Solomon’s time (1 Samuel 10:17—24) – or one might appeal for direct divine intervention, which would manifest itself in the outcome of a physical test or a battle between the parties (trial by battle). Another method once employed was compurgation, requiring the production of character witnesses in a specified number (wager of law).

If we see Solomon aiming at a decision based on the true facts, his ‘game form’ will hardly convince modern theorists. For the reaction of each of the parties there could have been a false positive as well as a false negative. The true mother could have been hard-hearted, and the false mother a truly humane woman. While Solomon would have mis-identified the birth-mother, he could be credited with giving the baby to the woman who truly cared, in the best interest of the child. But what if both mothers had yielded to each other, or indeed consented to the killing, both seeing the child rather dead than going to the adversary? Solomon would have been stumped.

Solomon’s test is so obviously unsafe that Talmudic commentators felt compelled to assume that his judgement was based on prior divine inspiration. The ‘test’ would have been no more than a somewhat dramatic way of announcing what Solomon had understood to be God’s will for the case at hand. Without endangering the life of an innocent child, Solomon would have communicated a *iudicium dei*, which could not be wrong. Textual support

was found in the phrase, ‘the wisdom of God was in Solomon’. This interpretation, that Solomon had identified the true mother beforehand, diminishes the tale. It removes the high drama that qualified the story for the intellectual heritage of mankind. A lawyer would also object to Solomon’s relying on what is called private knowledge of the judge, information which has not come through the procedural formalities for the taking of evidence. Since the Middle Ages, judges have been warned against the use of private knowledge, because it blurs the distinction between the role of a judge and that of a witness. The divine origin of Solomon’s wisdom must vex lawyers all the more, for they can hardly warm to the idea that numinous inspiration ensures that a court gets its decision right.

All our stories invoke an idea, or ideal, of motherhood. While in reality there are mothers of all sorts, both loving and uncaring ones, empirical observation may well support the assumption that mothers do go to great lengths to protect their children, and so it may have been in Solomon’s time. The Jewish story-teller certainly relies on the strength of motherly affection.

It was thought more likely that the true mother would yield rather than the one whose interest in the child was fuelled by greed, emotional need, or sheer malice. For a modern court this would be good enough, insofar as the issue is controlled by the ‘balance of probability’ standard. This standard means that ‘a court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the event was more likely than not’ (*Lord Nicholls, In re H (Minors) [1996] AC 563 at 586*). For a lawyer, the balance of probability standard provides the method of overcoming a situation of incomplete

information. We transform incomplete information into judicial, or procedural, truth.

In those rare cases where we cannot find a higher probability of truth for the facts as asserted by one of the parties (*non liquet*), we have specific rules for creating a basis for the judgment. We give preference to the party in possession of the object under dispute (*melior est conditio possidentis*). This rule, however, would have favoured the woman who, since the night-time swap, had been in possession of the living child; she was identified by Solomon's test as the false mother.

It is a fine tradition that at this time of the year, in line with the mission statement of our College, we commemorate the faithful departed. The term primarily refers to men who have fallen in war. Hearing a story that turns on the strength of motherly affection may remind us of the unsung mothers. For each of the fallen, there is a mother, a mother who in painful travail brought her son into this world, a mother who has done her best to raise and educate her child, not least by fostering the faith to which we say the fallen have remained true. What would mothers not give to prevent their sons from 'departing' before their time? When we commemorate the faithful departed, is it not appropriate to spare a moment for all those mothers, then and now, who learn that they will never again see their sons – or nowadays also daughters –, or will see them coming home in caskets? 'The hearts of mothers are tender'.

The frightening test devised by Solomon in his ruthless quest for truth, seen from a modern lawyer's perspective, would violate the two women's right to a fair trial, to a due process, as enshrined in the Human Rights Act and in the European Convention of Human Rights (Art. 6). The use

of subterfuge to elicit information that the authorities are unable to obtain otherwise amounts to ‘improper compulsion’ (ECHR, *Allan v. the United Kingdom* [GC], no. 25424/09, ECHR 2013). It would be easy, today, to drag Solomon, or more precisely the kingdom over which he rules, before the European Court of Human Rights. Solomon himself might even face criminal charges, and the mother, although victorious, could sue for compensation for pain and suffering inflicted by post-traumatic stress disorder.

All this is progress indeed. We deliberately moderate and control our pursuit of truth and justice by procedural safeguards. We take into account, and provide for, the eventuality that judges misbehave. We know that not all judges are blessed with the wisdom of Solomon. Regarding the issue of judicial quality control, one may note that there was no appeal against Solomon’s judgement.

Our procedural safeguards are meant to prevent a miscarriage of justice, but they are no substitute for the main, and indeed indispensable, impetus behind a fair exercise of judicial power, or of any power for that matter. A Roman jurist defined ‘justice’ as the unremitting determination to do the right thing (*Iustitia est constans et perpetua voluntas ius suum cuique tribuendi*, Ulpian 1 reg. D. 1.1.10 pr.). Justice is not a state of affairs, a specific distribution of assets or qualities – it is a state of mind, an intention which has become instinctive. In short, justice is a virtue. Our story illustrates the virtue of King Solomon, a world leader of his time. But the virtue here displayed is not a virtue just for rulers, or high judges. Read as an invitation, an encouragement, to aspire to the virtue of

justice, 1 Kings 3:16-28 is an invitation to everyone.*

* In my preparations I have been kindly helped by Jonathan Katz, Ian Maclean, and Fitzroy Morrissey.