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Judicial decision-making: case studies from Biblical times and now

The Rt Hon Lady Rose of Colmworth DBE

GRAY'S INN

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One thing we know about Biblical times is that there was a lot of litigation. In Exodus chapter 18 verses 13 to 26 we hear how Moses' father-in-law, Jethro saw Moses sitting from morning until the evening judging cases brought to him by the people. Jethro asks Moses "What is this thing that you are doing? Why do you sit alone and all the people stand by you from morning to evening?" And Moses replies "Because the people come to me to enquire of God when they have a matter. They come to me and I judge between one and another, and I do make them know the statutes of God and his laws".

Jethro is concerned that Moses will wear himself out with all this judging so he suggests to Moses that rather than attempting to hear all the cases himself, he sets up a judiciary made up of different levels of judges. Jethro tells him, if you do this, you will be able to bear up and all these people will go home in peace. Moses realises that this is sound advice, he appoints judges and the passage concludes: "... and they judged the people at all seasons: the hard causes they brought unto Moses, but every small matter they judged themselves."

There are many occasions in the Bible where God emphasises the need for justice not only generally in our dealings with each other but more explicitly in a litigation setting. The 9th of the 10 Commandments is of course, "Thou shalt not bear false witness against thy neighbour" and the opening verses of Isaiah admonish "Learn to do well, seek judgment, relieve the oppressed, judge the fatherless, plead for the widow."

But there are also more specific discussions which are directed at what we would now call 'judgecraft' – how judges should conduct hearings and what needs to happen in order for a hearing to be fair.

At the beginning of Deuteronomy, when the Children of Israel arrive at the River Jordan Moses recalls to them how, 40 years earlier he had instructed the judges he had appointed following Jethro's advice. Moses says "I charged your judges at that time saying "Hear the causes between your brothers, and you shall judge rightly between a man and his brother and the stranger that is with him. You shall recognise no face in judgment (meaning you must be unbiased), You shall hear the small as well as the great and you shall have no terror of any man for judgment is God's."

These verses in Deuteronomy sparked a lively discussion among the Rabbis recorded in the Gemara. Rabbi Hanina says that Moses' instruction to the judges "Hear the causes between your brothers and you shall judge," is a warning to a court that it may not hear the statement of one litigant before the other litigant has arrived at the hearing. The Rabbi also says that the instruction is clearly directed by Moses not only at the judges but at the people generally. This shows he said that it is also the litigant's responsibility to make sure that the case is conducted fairly in the presence of both parties – an early example of the obligation on the litigating parties to make sure that the overriding objective is fulfilled.

There was also a recognition very early on in Talmudic times of the value of the process of litigation in resolving a dispute, even for the litigant who loses at the end of the day. In Sanhedrin 7a, Shmuel picks up on Jethro's comment after his advice to Moses that if he sets up a judiciary, "all these people shall also go to their place in peace". Shmuel says to Rav Yehuda: "Even the person who loses the case should go happily on his way because if justice is served, all the litigants, not only those who emerge victorious, can leave in peace".

With that goal ringing in our ears, I want to focus on two biblical accounts of what we would recognise as litigation and compare the process of deciding them with the process of judicial decision making today.

The first is the account of the inheritance dispute involving the daughters of Zelophehad in the Book of Numbers Chapter 27 verses 1 onwards. The story is told in two parts and both have interesting parallels to judicial decision making today.

For those of you who don't instantly have that Chapter to mind, let me recap the story. In the first instalment, the daughters of Zelophehad come to Moses. The passage opens by describing how they stood before Moses and before Eleazar the priest, and before the chieftains and all the community at the entrance of the tent of meeting. The daughters say that their father died in the wilderness leaving no sons, only the five daughters. They want to know if they, the daughters, should inherit their father's land or whether the land should pass to their father's brothers. The passage continues:

And Moses brought their cause before the Eternal One. And the Eternal One said to Moses, saying, “The daughters of Zelophehad speak right: thou shalt surely give them a possession of an inheritance among their father’s brethren; and thou shalt cause the inheritance of their father to pass unto them.”

So far so straightforward. But, as I said, there is a sequel a couple of weeks later in Numbers Chapter 36. Something happens which strikes fear into the heart of every judge. What happens is that after Moses has delivered his ruling, a consequence of the ruling becomes apparent that no one had thought about at the time. The family of Zelophehad come back to Moses and point out how the ruling interacts with another rule which was that when a woman marries, all her property becomes that of her husband. If the daughters of Zelophehad inherit their father’s land as Moses had held they should, and then they marry men from other tribes of Israel, the land will go to their husbands’ tribes and will be lost forever to the tribe to which they and their father belonged. Moses decides that the uncles have a good point. He tweaks his earlier ruling so that the daughters still inherit the land but they must only marry within the clan of their father’s tribe. The passage then closes with Moses saying that every daughter inheriting an estate from the tribes of Israel shall become wife to someone from the clan of her father’s tribe.

Let me pick out a few points from this account and draw some parallels with modern day decision making.

The first point to make is that it is always very clear in the story that Moses recognises the nature of the question he is being asked to decide at both the first and the second stage of the dispute about Zelophehad’s inheritance. The question he is being asked to decide is not: should the daughters of Zelophehad inherit their father’s land? What he is being asked to decide is a very different question. It is the question: when a man dies with only daughters and no sons, should his daughters inherit his land or should his brothers inherit? The reason why that is a very different question is that it is a pure question of law. It does not depend on the merits or demerits of the daughters or on how close or not they were to their father. This is made explicit at the end of the second part of the account when Moses gives his ruling about the need for them only to marry within their tribe. Moses does not stop at saying that the daughters of Zelophehad must marry within the tribe. He goes on to re-express the ruling as a general principle: “Every daughter inheriting an estate from the tribes of the Israelites shall become wife to someone from the clan of her father’s tribe.” So this is the essence of the judicial ruling – it does not just determine the dispute before the judge but it sets the rule for people in the same situation.

We have all been reminded of the importance of legal rulings arising from case law in the judgment of the Supreme Court in the *UNISON* case.¹ That case held that the regulations setting fees for bringing a claim in the employment tribunal were ultra vires. Lord Reed described in his judgment the impact assessment document that had been published by the Government in May 2012. This is the document in which

the Government sets out what it believes is the proper balance in terms of paying for the tribunal service between what the parties are required to contribute by way of tribunal fees and what the taxpayer should contribute through general taxation. In setting out the assumptions on which that balance was based, the Government had said in its impact assessment that there are “no positive externalities for society from the consumption of tribunal services by litigants”. In other words, the impact assessment said, the use of employment tribunals does not lead to any gains to society beyond the gains that are enjoyed by the consumers who use the tribunals and the people who get paid to provide the tribunal services. It was therefore fair the Government said that the parties should pay a greater share through higher fees and the share paid by general taxation should be less.

The Supreme Court disagreed, as I think Moses would have disagreed. As Lord Reed said, access to the courts is not of value only to the particular individuals involved. That is most obviously true of cases which establish principles of general importance. When, for example, Mrs Donoghue won her appeal to the House of Lords in *Donoghue v Stevenson* in 1932 the decision established that producers of consumer goods are under a duty to take care for the health and safety of the consumers of those goods. This was one of the most important developments in the law of this country in the 20th century. To say that it was of no value to anyone other than Mrs Donoghue and the lawyers and judges who were paid to be involved in the case would be absurd.

As Lord Reed said, “Every day in the courts and tribunals of this country, the names of people who brought cases in the past live on as shorthand for the legal rules and principles which their cases established. Their cases form the basis of the advice given to those whose cases are now before the courts, or who need to be advised as to the basis on which their claim might fairly be settled, or who need to be advised that their case is hopeless”. He pointed out that the written case lodged on behalf of the Lord Chancellor in the appeal before the Court itself cited over 60 cases, each of which bears the name of the individual involved, and each of which is relied on as establishing a legal proposition. The Lord Chancellor’s own use of these materials refute the idea that taxpayers derive no benefit from the cases brought by other people.

I don’t know if the children of Israel later referred to “the rule in *Zelophehad*” when sorting out their inheritance disputes. But I like to think those plucky daughters did live on in the same way as Mrs Donoghue.

The case of the daughters has particular interest to me because as a High Court Judge in the Chancery Division, I heard a number of difficult inheritance disputes. The case that made me lose more sleep than I think any other case I have heard so far in my judicial career was the case of *re the Henry Hand Will Trust*.² The parties to the case were two sets of cousins. The claimants were the adopted children of Kenneth Hand who had died. Part of his estate was property which he had held under a trust created by a will made by his grandfather in 1946. A clause in that will

left the grandfather's property to "the child or children" of later generations. At the time the will was made in 1946, legislation dealing with adoption meant that where a will referred to children that must be interpreted as not including adopted children. That was because the general adoption regime at that time regarded adopted children as remaining legally the children of their natural parents and not legally becoming the children of their adoptive parents.

Later legislation completely turned this around so that adopted children are now treated exclusively as the children of their adoptive parents. But in all the later statutes dealing with adoption there was tucked away in a Schedule a saving provision which provided that the new legislation did not affect any will or instrument drawn up before the changes came into effect.

It was therefore clear, and accepted by the adopted children of Kenneth Hand, that under English domestic law, they could not inherit the part of their father's estate that had come to him under the will – their father would have to be treated as having died without any children and their cousins would inherit their share. However, Kenneth's adopted children relied on their rights under Article 8 ECHR and s 3 of the Human Rights Act 1998 to read down the legislation to override this discriminatory provision.

There were some features about the case that are similar to the points raised by the daughters of Zelophehad. The first was at the hearing before me in the *Hand* case, the adopted children and their cousins provided witness statements and gave evidence about how well or badly the adopted children had been integrated into family life from their childhood onwards. There was evidence about how many holidays they had spent with the family, how often they wrote to their parents, how involved they had been in family get-togethers and so forth. I held that that was all irrelevant. To say that the right of adopted children to inherit their parents' property was dependent on them being good children would itself be discriminatory given that natural children do not have to establish any such relationship in order to inherit. In ancient times, as now, inheritance outside the terms of a will does not depend on the closeness of the emotional bond between the generations but only on the blood relation. Moses does not therefore distinguish between the five daughters on the basis of how many times they invited their father to Friday night dinner, nor does he compare how many Seder nights they spent with him as compared with their uncles.

More importantly, the *Henry Hand* case also shared another similarity with the case of the daughters of Zelophehad in that I had in effect to hear it twice. The case turned on whether the claimants' reliance on the Human Rights Act to override the domestic saving provision was ruled out because it would amount to a retrospective application of that Act – the Act came into force only in 2000 and the will was made in 1946. At the first hearing both parties relied on an earlier High Court judgment on a similar point. In that case, the judge had held that in deciding whether to apply the Human Rights Act retrospectively, the court can strike a balance having regard to all the circumstances of the case and conclude whether it would be fair to apply the statute retrospectively in the particular case.

At the first hearing before me, the parties therefore argued the case on how I should strike that evaluative assessment having regard to the features in the case they pointed to as favouring their clients. In the course of preparing my judgment, however, I came to the conclusion that that earlier High Court approach was wrong and it was not really a balancing exercise at all. The Human Rights Act either does or does not apply retrospectively and the House of Lords had held in *Wilson v First County Trust* that it does not.³

I therefore wrote to the parties and have them back for a second hearing to reargue the case. In the end I held that there had been a breach of the adopted cousins' Convention rights and that reading down the adoption legislation would not amount to an impermissible retrospective application of the Act. The point at which it became relevant to decide whether Kenneth Hand had any children was when he died, not when the will was originally drafted. He had died only in 2008 once the Act was in force.

Let me turn to another important similarity between the precedent setting nature of Moses' ruling on the daughters of Zelophehad with present day litigation. One striking feature of the scene setting at the start of the first episode in the Book of Numbers is that the author emphasises the daughters put their case not just to Moses in his tent but in front of everyone. The daughters, the Bible says, stood before Moses, and before Eleazar the priest, and before the princes and all the congregation. The fact that justice is dispensed in public and not just in a private conversation is important. Similarly, today there are only very limited circumstances in which hearings can take place in private – usually where children are involved or where there are issues of national security.

This point arose in another inheritance case that I dealt with. This was an application to the High Court for the approval of a variation of a valuable trust fund comprising a large portfolio of property in Central London. In court before me were five counsel appearing on behalf of various groups of descendants, including children as yet unborn, affected by the proposed variation which was being carried out for tax reasons. I had no problem with approving the variation. The problem came with their request that their names all be anonymised in the judgment and that I should order that the court file be closed to public access. I did not see why it should all be secret – people's tax affairs are a legitimate matter of public interest.

However, all the counsel were urging me very strongly to make the order. There was no one in front of me putting forward arguments as to why the anonymising order should not be made. Nonetheless it was of course a matter for my discretion and I refused to make the order. After giving them permission to appeal, I wrote to the then Master of the Rolls alerting him to the case and suggesting the Court might like to give directions to make sure that there was someone there when the appeal came on to put the other side of the case. The Court of Appeal then directed the appellants to give notice of the appeal to the Press Association Injunctions Alert Service. This is a commercial service operated by the Press Association subscribed

to by the national media organisations. It can be used to notify them of an intention to apply for an order that may affect their rights under article 10 of the Human Rights Convention by prohibiting or restricting the reporting of legal proceedings. The Court of Appeal also invited the Attorney General to appoint an advocate to the Court to help on two particular issues.

By the time the matter came before the Court of Appeal a number of media organisations had intervened with the permission of the Court including the BBC, ITN, Times Newspapers Ltd and the Press Association.

The Court largely upheld my decision that there was no justification for blanket anonymity but granted more limited protection for the child beneficiaries.⁴ The Court stressed that the principle of open justice had long been considered to be of the utmost importance. It is necessary because the public nature of the proceedings deters inappropriate behaviour on the part of the court. It also maintains the public's confidence in the administration of justice. It enables the public to know that justice is being administered impartially. It can result in evidence becoming available which would not become available if the proceedings were conducted behind closed doors or with one or more of the parties' or witnesses' identity concealed. It makes uninformed and inaccurate comment about the proceedings less likely. The courts must be vigilant when asked to make incremental incursions into the general principle of open justice, which was what the court was being asked to sanction here.

Let me turn now to perhaps the most famous judgment delivered in the Tanakh – the judgment of King Solomon in the First Book of Kings Chapter 3. The story is of two women who come before Solomon each claiming that she is the mother of the living newborn boy and that the other is the mother of a dead newborn boy. When Solomon commands that the baby be cut in two and shared between them, the real mother reveals herself by begging the king to spare the child even if it means giving him up to the other woman. This of course is a very different kind of case from the daughters of Zelophehad. There is no legal principle involved, the judge's task is simply to work out which of the parties is telling the truth and which is not.

One remarkable feature of the story is that whereas Moses asked God directly what the answer was to his case, the passage does not describe Solomon as asking directly for God's guidance to help him to work out which of the women to believe. Solomon resolves the case of the two women using his own wits and, importantly his understanding of human nature rather than relying on some supernatural element or intervention. Elsewhere in the Bible there are descriptions of the kind of trial by ordeal that we are familiar with from the Middle Ages - or from Monty Python sketches. One odd example is at the start of the Book of Numbers with the Sotah Ritual. This occurs when a man has a fit of jealousy and suspects his wife of infidelity. There is a complicated ritual that she has to undergo where some sacred water is put in an earthen vessel, some earth from the floor of the Tabernacle is added to it plus some curses are written down and then rubbed off into the water. She has to drink the water. If she is indeed guilty of infidelity, her belly will

immediately distend, and her thighs shall sag. But if she is not harmed from drinking the water, that shows that she is not guilty and all is well – though I suspect that relations between her and her husband might be a little frosty for some time after.

All rather strange. But I take heart from the fact that the authors of the Bible and the people who devised the Sotah ritual, specified that the results should be that way round. I like to think that they realised that in fact it was very unlikely that drinking the water disgusting though it might be, would lead to the particular horrible consequences they describe. It was more likely, regardless of whether the wife had in fact strayed, that her husband's jealousy would be disproved. It is rather better in that respect than the old medieval way of establishing whether a suspect was a witch. A rope was tied around the waist of the accused and she was thrown into a river or deep pond. If she floated, it was deemed that she was a witch in league with the devil, rejecting the baptismal water. If she sank, she was innocent but unfortunately dead.

Today there is still a large dose of ritual involved court proceedings, not only in the robes we wear but in the oaths that are sworn during proceedings. I noticed particularly when I was sitting in the Crown Court as a recorder how, at the moments of greatest tension during the criminal trial, there is some oath or form of archaic language used. The words sound as if they have been handed down to us from ancient times though like most of these things they were probably invented by the Victorians. For example, after the speeches and the summing up, when the jury is sent out to deliberate, the jury bailiff swears or affirms that "I will keep this jury in some private and convenient place, I will not suffer any person to speak to them nor will I speak to them myself concerning the trial this day unless it be to ask them if they are agreed upon their verdict". That is not how we usually talk but the element of otherworldliness that it brings somehow suits the solemnity of the moment for both the defendant and the jurors. It also has a ritualistic element that emphasises that the jury bailiff is not there as an ordinary person but is taking on an important and time honoured task.

As far as deciding who is telling the truth in the witness box, judges do have to rely on our wits and our understanding of human nature though we have rather more documentary evidence and DNA evidence available to us than Solomon did. I am aware of one instance though where a bit of a Solomonic trick was played to reveal a dishonest witness, though the trick was played by counsel rather than by the judge. In *BskyB v HB Enterprises*⁵ the key factual witness for the Defendant was a Mr Galloway. In his witness statement he said that he had an MBA degree from Concordia College based in St Johns in the US Virgin Islands. He gave detailed evidence about his course of study at Concordia College, the length and frequency of classes he had attended and a project he had worked on mainly at a facility set up on the campus called the Coca Cola Building. For some reason, someone on the opposing side smelled a rat and a solicitor from Herbert Smith was promptly dispatched to the US Virgin Islands. It later transpired that, according to the

evidence from that solicitor and also from the Minister of Education of St Johns, that there never had been a Concordia College on the Island; or a Coca Cola building. Concordia College was in reality a website which sold on-line degrees conferred within 24 hours on anyone who made an application and paid the required fee. The Judge went on to say that this was demonstrated by an application which was made on the same website for an MBA degree for a dog "Lulu" belonging to counsel for the Claimant. Without any difficulty Lulu was able to obtain a degree certificate in identical form to that produced by Mr Galloway. In fact, the judge tells us, the dog actually got better marks than those given to the witness and received the same glowing testimonial from the President of the College that the witness had produced to the court. The serious point that the Judge made was that the witness was a man who could lie without any palpable change in his disposition or any outward signs of unease. He demonstrated, the judge said, an astounding ability to be dishonest.

Finally I want to close by drawing what I think is the most important comparison between the story of Moses and the daughters of Zelophehad, the story of King Solomon and the two women and their babies and the various cases that I and my judicial colleagues deal with every day. My main reaction to all of them is how marvellous it is to see that in those ancient times people used the law and the courts to resolve their problems. Zelophehad's brothers could just have pushed those daughters out of the way and taken the land by force. The stronger mother in King Solomon's court could have just taken the live baby away with her. All those people that Jethro saw queuing up all day and night waiting for their hearing before Moses could have resolved their disputes by violence. They *would* have done so if they had not had confidence in Moses as a judge and if they had not recognised the importance for the wellbeing of their community of finding a way to resolve disputes peacefully.

In hundreds of courts and tribunals across the country every day, the people still come to have their disputes resolved. It is a privilege and an honour at every level of the judiciary to be entrusted with that task. Generally, the process works and, as Jethro predicted in his advice to Moses, all these people go to their homes in peace. We must all play our part in ensuring that the rule of law that the Bible recognises as the key to a peaceful community continues to flourish.

¹ *R (oao UNISON) v Lord Chancellor* [2017] UKSC 51.

² *In the Matter of the Henry Hand Will Trust* [2017] EWHC 533 (Ch).

³ *Wilson v First County Trust Ltd (No 2)* [2003] UKHL 40.

⁴ *MN v OP and others* [2019] EWCA Civ 679.

⁵ *BskyB Ltd and another v HP Enterprise Services UK Ltd and others* [2010] EWHC 86 (TCC), and para 178.