

# On Being a Judge – Jethro’s Lesson

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**F**REQUENTLY ONE CANNOT but marvel at the audacity of Scripture.

The “Portion” of the Pentateuch traditionally named “Jethro” and covering Exodus chapters 18-20 contains what in the eyes of many is the most consequential event in Biblical narrative: Mount Sinai, the Tablets and the Decalogue – a universal moral gift as well as an ethical imperative. But the careful reader will note that Mount Sinai and the Decalogue are squeezed between the trappings of a relatively advanced legal order: immediately before Sinai, an elaborate and detailed system of courts and judges is put in place. And immediately after Sinai, an even more elaborate and detailed legal code is laid down. Sinai, on this reading, with all its majesty and indescribable emotions (the text refers to the people as “seeing the sounds”), is firmly situated within *Nomos*.<sup>1</sup>

For some, this vise of law is a vice of law, something about which to lament or, at best,

to accept as an historical contingency resulting from the frailty of humans unable to live up to the moral expectations embodied in the Decalogue without the props of judges and an implementing legal code. *Nomos*, on this reading, is a reflection of the Fall of Man. To others, Revelation sanctifies *Nomos*, and thereby provides a magnificent vehicle for Man’s Ascent and a medium through which generations to come can share in Sinai. You do not have to pick between these two poles or the many other possibilities to acknowledge the audacity of the text in intertwining so tightly Revelation which is magisterial, unique, experiential and direct, together with Law which is prosaic, repetitive and mediated.

Audacity does not end here. In Exodus 18, Jethro visits his son-in-law Moses in the desert some time after the exit from Egypt and, probably, shortly before Mount Sinai.

Exodus 18 is divided into distinct parts. The first seems to deal with the personal: A

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<sup>1</sup> The Greek ‘*Nomos*,’ meaning ‘custom’ or ‘law,’ in English usage also means simply ‘the law’ or ‘the law of life.’



family affair, the reuniting of Moses not only with his father-in-law but with his wife and two sons after a lengthy period of separation.<sup>2</sup> The second part of the chapter deals with affairs of State – a meeting of two leaders in which the older and more experienced, Jethro, advises the younger one, Moses, in matters of statecraft, namely the setting up of a functioning judicial system.

Clearly in the general biblical narrative of the Old Testament, Moses is the principal protagonist whose knowledge of God was second to none. By contrast, Jethro is a minor figure at best. And yet, audaciously, the text treats this Gentile, the Priest of Midian, with great respect and it falls to him to instruct Moses in the rudiments of Statecraft, to advise him on the setting up of a system of first, second, third and even fourth instance judges (or perhaps administrative prefects) and to give him guidelines for the selection of and the qualities necessary for a good judge. Moses listens and accepts all this good counsel. Before Moses' experience on Mt. Sinai, an institutionalized legal system comes into being.

Whatever your religious sensibilities, it is surely intriguing to reflect on the qualities that this text, which has played such a pivotal role in the unfolding of Western civilization, ascribes to the Judge, a central function in any legal system.

In this essay I will offer some possible meanings to the judicial virtues in which Jethro instructs Moses. But before addressing what is explicit in the text, I will argue that by juxtaposing the personal, familial narrative of Exodus 18:1-12 with the professional, institutional narrative of Exodus 18:13-27, the text seeks to impart an additional, essential virtue of the judge which Jethro cannot explicitly state.

Some readers may wish to refresh their memory of this famous narrative. The translation is the classic King James' Version.

## EXODUS 18

<sup>1</sup>When Jethro, the priest of Midian, Moses' father in law, heard of all that God had done for Moses, and for Israel his people, and that the LORD had brought Israel out of Egypt; <sup>2</sup>Then Jethro, Moses' father in law, took Zipporah, Moses' wife, after he had sent her back, <sup>3</sup>And her two sons; of which the name of the one was Gershom; for he said, I have been an alien in a strange land: <sup>4</sup>And the name of the other was Eliezer; for the God of my father, said he, was mine help, and delivered me from the sword of Pharaoh: <sup>5</sup>And Jethro, Moses' father in law, came with his sons and his wife unto Moses into the wilderness, where he encamped at the mount of God: <sup>6</sup>And he said unto Moses, I thy father in law Jethro am come unto thee, and thy wife, and her two sons with her. <sup>7</sup>And Moses went out to meet his father in law, and did obeisance, and kissed him; and they asked each other of their welfare; and they came into the tent. <sup>8</sup>And Moses told his father in law all that the LORD had done unto Pharaoh and to the Egyptians for Israel's sake, and all the travail that had come upon them by the way, and how the LORD delivered them. <sup>9</sup>And Jethro rejoiced for all the goodness which the LORD had done to Israel, whom he had delivered out of the hand of the Egyptians. <sup>10</sup>And Jethro said, Blessed be the LORD, who hath delivered you out of the hand of the Egyptians, and out of the hand of Pharaoh, who hath delivered the people from under the hand of the Egyptians. <sup>11</sup>Now I know that the LORD is greater than all gods: for in the thing wherein they dealt proudly he was above them. <sup>12</sup>And Jethro, Moses' father in law, took a burnt offering and sacrifices for God: and Aaron came, and all the elders of Israel, to eat bread with Moses' father in law before God.

This is where the narrative break occurs, the family and social rituals end and the Summit begins.

<sup>2</sup> The classical commentators dispute the length of the separation of Moses from his wife, but the majority view is that it was not brief. See Nachamanides' commentary on the Torah to Ex. 18:1; cf. Num. 10:29.

<sup>13</sup>And it came to pass on the morrow, that Moses sat to judge the people: and the people stood by Moses from the morning unto the evening. <sup>14</sup>And when Moses’ father in law saw all that he did to the people, he said, What is this thing that thou doest to the people? why sittest thou thyself alone, and all the people stand by thee from morning unto even? <sup>15</sup>And Moses said unto his father in law, Because the people come unto me to enquire of God: <sup>16</sup>When they have a matter, they come unto me; and I judge between one and another, and I do make them know the statutes of God, and his laws. <sup>17</sup>And Moses’ father in law said unto him, The thing that thou doest is not good. <sup>18</sup>Thou wilt surely wear away, both thou, and this people that is with thee: for this thing is too heavy for thee; thou art not able to perform it thyself alone. <sup>19</sup>Hearken now unto my voice, I will give thee counsel, and God shall be with thee: Be thou for the people to God-ward, that thou mayest bring the causes unto God: <sup>20</sup>And thou shalt teach them ordinances and laws, and shalt shew them the way wherein they must walk, and the work that they must do. <sup>21</sup>Moreover thou shalt provide out of all the people able men, such as fear God, men of truth, hating covetousness; and place such over them, to be rulers of thousands, and rulers of hundreds, rulers of fifties, and rulers of tens: <sup>22</sup>And let them judge the people at all seasons: and it shall be, that every great matter they shall bring unto thee, but every small matter they shall judge: so shall it be easier for thyself and they shall bear the burden with thee. <sup>23</sup>If thou shalt do this thing, and God command thee so then thou shalt be able to endure, and all this people shall also go to their place in peace. <sup>24</sup>So Moses hearkened to the voice of his father in law, and did all that he had said. <sup>25</sup>And Moses chose able men out of all Israel, and made them heads over the people, rulers of thousands, rulers of hundreds, rulers of fifties, and rulers of tens. <sup>26</sup>And they judged the people at all seasons: the hard causes they brought unto Moses, but every small matter they judged themselves. <sup>27</sup>And Moses let his father in law depart; and he went his way into his own land.



Before dealing, then, with verses 21 *et seq.* which deal explicitly with the qualities of the Judge, I want to suggest an homiletical interpretation which I derive from the structure of the text, its *economia*.

At first blush it does, indeed, seem that the

two parts of the narrative have little to do with each other. But there is, I believe, an hidden connection between the two which goes directly to the theme of the judicial function.

Turning to the twelve verses of Part I, consider first the emphasis on family: Jethro’s familial relationship to Moses is mentioned no less than six times: Father-in-law – again and again. The fact that he was bringing with him his daughter, Moses’ wife and her children, is repeated twice. The etymologies of the children’s names are also given. Family seems to be central. At the end of the day’s proceedings Jethro must have been perplexed. Towards the Priest of Midian Moses executes the duties of the host to perfection. But towards the father-in-law? And the wife? And the children? The text is as striking by that which it does not contain as it is by that which it does. There is not the slightest evidence of spousal and paternal warmth and affection. There is no sign of empathy, of joy, of family rejoicing.

We might feel that Moses felt obliged to contain his feelings in the context of a State Visit. I doubt if this explanation is entirely persuasive, especially in the context of a narrative which puts such emphasis on the familial.

We should not be altogether surprised by Moses’ reaction, or rather lack of it. It is quite common for great leaders of collectivities to be poor parents: So much time for the People, so little time for the people. But in Moses’ case it is not only the Absent Father syndrome which is at play. It is his innate personality, the gifts and burdens of an unusual birth and of an even more unusual upbringing.

Moses’ knowledge of God was, and has forever remained, superior to any other human’s, and his moral rectitude, even when it threatened his life and privileges, as evidenced by the episode of killing the cruel slave-master (Ex. 2:12), is beyond doubt. But there is little in the text to suggest that he was a warm and affective person. He rarely displays affection to the people he leads, exasperating as they are.

For the most part, this shy, taciturn and reticent man who was brought up as a prince in the palace of Pharaoh, is judgmental and detached. Moses is aware of his communicative deficiencies. He strenuously resists the mission imposed on him at the site of the Burning Bush, pleading that he is not a Man of Words (Ex. 4:10), and God appoints Aaron as his intermediary. Though homiletic explanations abound to explain what may appear as a physical disability, there is little in the ensuing story to suggest any disability in Moses' diction. Moses can lead by virtue of a charismatic authority deriving from his stature and his status in the eyes of God. But his distance and affective reticence are always in evidence and at times a self-acknowledged disability in his connection to his people.

Jethro would not, thus, be altogether surprised by the reception he received, even though he does not forget to announce his daughter and grandchildren.

Any feelings on the matter he keeps to himself. But the next day when he sees Moses sitting to judge, and that *the people stood by Moses from the morning unto the evening*, he must have been appalled and he says to Moses: *The thing that thou doest is not good. Thou wilt surely wear away, both thou, and this people that is with thee: for this thing is too heavy for thee; thou art not able to perform it thyself alone.* Jethro's administrative wisdom is self-evident.

But may I impute two other considerations to Jethro?

The first is to Jethro the father and grandfather who is about to re-entrust his daughter and two grandchildren to Moses. (As the father of seven daughters, I am sure that, creature of his culture, he was also very

attached to his two male grandchildren.) What life are they to have with a husband and father who is by nature non-affective if, on top of this, he spends his days, *from the morning unto the evening*, sitting in judgment? *The thing that thou doest is not good* for you, he says to Moses, but it is, he must be thinking, also not good for Zipporah, Gershom and Eliezer. Jethro, the Priest of Midian, can give Moses, the leader of the Children of Israel, advice on Statecraft. But Jethro the father-in-law knows what every wise grandparent knows – never advise, unasked, your children on how to bring up their children. And, thus, the wise man's consideration as to a proper equilibrium between the public and the private (oh, yes), between duty to People and duty to family, between responsibility and affection, camouflages itself as statesmanship.

*The thing that thou doest is not good. Thou wilt surely wear away, both thou, and this people[.]* The second consideration I would want to attribute to Jethro is one that touches not on the relation between Moses and his family but between Moses and his people. *And thou shalt teach them ordinances and laws, and shalt shew them the way wherein they must walk, and the work that they must do.* As teacher instructing them on God's Law there can be no superior to Moses and likewise as the highest instance of appeal and final arbiter of the *hard causes*.<sup>3</sup> But is Jethro simply concerned with burden sharing, with administrative effectiveness and managerial efficiency when he suggests that both Moses and the people will wilt under the pre-Jethro reform? Could it be that Jethro simply could not bring himself to tell Moses that he,

3 There is even a slight preference here for the Civil Law over the Common Law tradition. Moses, it seems, imparted his instruction of the law through the judicial process: *And Moses said unto his father in law, Because the people come unto me to enquire of God: When they have a matter, they come unto me; and I judge between one and another, and I do make them know the statutes of God, and his laws.* Jethro would rather that he laid them out *ex ante*: *And thou shalt teach them ordinances and laws, and shalt shew them the way wherein they must walk, and the work that they must do.*

Moses, was not suitable as a Judge of people? That warmth, empathy, human and humane sensibility are indispensable for the judge and the judged, for the act of judging and for the legitimacy of judging? Could it be that Jethro feared that the wilting that would have ensued was not simply physical, Moses sitting and the people standing all day in long queues, but also spiritual? That the severe Moses would lose faith in Nomos by seeing its corruption in the daily affairs of humans, as would his people eager to follow God’s (oft difficult) strictures when confronted with a judge who may appear not to understand or empathize with their difficulties?

Could Jethro have also understood that it is often the case that he who instructs the law should not administer its application in its day-to-day manifestations, and this was all the more true when the law giver has the personality dispositions Moses displayed?

Note how, under the new scheme, the judiciary which was set up *judged the people at all seasons: the hard causes they brought unto Moses, but every small matter they judged themselves.* Without much attention or fuss Moses is insulated from direct contact with the people in the process of judging. It is *they*, the judges, who bring the hard causes to Moses, not the people directly. Presumably, after Moses decides the hard causes, he informs the judges who brought the cause to him, and they hand down the final decision to the people. Hidden in this text we have an early system of Preliminary Preferences and Preliminary Rulings.<sup>4</sup> Hidden in the text we have, too, an important lesson about judges and judging.



There is nothing hidden about verses 21 @ 22:

<sup>21</sup>Moreover thou shalt provide out of all the people

[1] able men,

[2] such as fear God,

[3] men of truth,

[4] hating covetousness;

and place such over them, to be rulers of thousands, and rulers of hundreds, rulers of fifties, and rulers of tens: <sup>22</sup>And let them judge the people at all seasons.

What are the qualities of the Judge, so clearly identified as a ruler?

Let us not spend time on the obvious, the quality of integrity encapsulated in *men of truth*. What, however, of the virtue that comes immediately after: *hating covetousness*. The original Hebrew simply says hating *betza*. *Betza* is not an easy word to render in other languages. Young’s Literal Translation renders it as hating “dishonest gain.” This is close to Luther: *dem ungerechten Gewinn feind*, and the Spanish *aborrezcán las ganancias deshonestas*.

The Vulgate takes a different tack translating the phrase thus: *oderint avaritiam* which is somewhat closer to King James as well as to the Louis Segond French translation: *ennemi de la cupidité*. Most other renditions move between these two poles.

The first approach, taken by Luther and the Spanish translators, focuses on a good judge’s hate for *dishonest gain*. This may be significant in two ways. The first would be a generic exhortation to the judge to ferret out any ill gotten gain that comes before him in judgment and, of course, to personally refrain from dishonest gains through bribes. This, too, could be behind the translation/interpretation of the Vulgate, King James and those who render *betza* as “avarice” or “covetousness”: a concern not to appoint judges who would be tempted, or who may raise the suspicion of being tempted, to tilt justice for their own financial gain.

4 A variant of which persisted then for millennia in the practice of inter-Rabbinical Responsa.

Taking a bribe is the most egregious form of judicial abuse. But could the text have had that in mind? After all in the immediately preceding words the Judges are charged to be *men of truth*. Men of truth do not take bribes and men of truth in any event abhor ill-gotten gains. So Luther, Young's Literal and those who follow in their wake give a meaning to hating *betza* which does not add much to that which we already know. The Vulgate and King James seem closer to the original by insisting that the good judge not simply hate *dishonest gains* (which would be a product of being a man of truth) but that the good judge not be avaricious or covetous *per se* – whether the money be ill-gotten or not.

Indeed, *betza* in the Hebrew can mean simply money, though usually used in a slightly pejorative context. Hating Mammon and being materially modest are, then, one of the traits of the Judge on which Jethro insists. Why so? Rabbi Elazar Hamodia gives one of the most pertinent and exquisite exegeses. "That they [the judges] should not be concerned by the effect of their decisions on their own wealth." Elazar Hamodia is not concerned so much by the crass dishonesty which is involved in a bribe. He is concerned by the altogether more subtle, and often sub-conscious, influence a man's wealth might have on his ability to construe the law independently and impartially if that interpretation may affect his own position adversely. In this he goes even further than *nemo debet esse iudex in propria causa*.



Much more difficult is the construction of the first phrase – *able men*. Able in what department, we may ask? The Hebrew *Anshey Chayil*

("men of *Chayil*") is as difficult to render as is *Betza*, but it surely means more than "able men" in the King James' Version, more than *Hombres capaces* is the Spanish rendition and in similar vein the French *Hommes capables*. Luther renders *Redlichen Leuten* which is, again, not quite on the mark since it fits too closely with the "men of truth" that comes immediately after.<sup>5</sup> The Vulgate is closest to the original Hebrew in rendering *anshey chayil* as *viros potentes*. *Ish Chayil* is frequently used in a military context, which connotes virtues such as valor and great personal fortitude. One of the most famous usages of the appellation *Chayil* is in Proverbs 31:10 referring to a woman of *Chayil*. The translators struggle again. The Italian (CIE) is interesting: *Una donna perfetta chi potrà trovarla?* Perfection is a lot more than simply being "able" – though if you care to read the rest of Proverbs 31, the woman in question may, in certain cultural contexts, indeed be as close to perfection as one could imagine. But I doubt if we can expect of our judges, even of our Judges, perfection! *Qui peut trouver une femme vertueuse?* is the French (Louis Segond) translation. Virtue would certainly be an ingredient of *Chayil*. (Why the French translator prefers Virtue when describing the Woman of *Chayil* and Ability when describing the Judges would be a subject for another essay.) The Vulgate is, again, close to the Hebrew in rendering *Chayil*, in this context too, as pertaining to power: *aleph mulierem fortem quis inveniet procul et de ultimis finibus pretium eius*.

Proverbs 31:10 is part of the Jewish prayer book, and is recited every Friday night at the family table. Though construed by some as a metaphor for the relationship between God and Israel, it is usually recited by grateful fam-

<sup>5</sup> We should not be too critical of Luther. After all, in an indirect sense all renditions ultimately go to the integrity of the judge. The text, however, is more subtle in giving characteristics that are not so obviously and directly related to integrity. This is important because it teaches us about the less obvious forms in which the integrity of the judicial process may be compromised.

ilies to the *Mater Familias*. The most classical rendition in English is *Woman of Valor*.

That judges should be “able” as (even the otherwise majestic) King James’ Version suggests – professional, knowledgeable – is a commonplace. But in what ways do judges need fortitude and valor? Why would they need to be *viros potentes*?

One theme (shades of Luther) goes, again, to integrity: they must be strong and brave to decide justly without fear of retaliation by other men. It is, if you wish, the other side of the bribery coin: just as they should not pervert justice for personal gain, they should not pervert justice from personal fear. Here, too, one could object and say that this interpretation does not add to the subsequent words – “men of truth”. Surely the quality of “men of truth” which is part of Jethro’s prescription would be enough to guarantee against this perversion of justice too? Yes, but there is something morally different between the Judge who perverts justice by taking a bribe and the judge who perverts justice out of fear – maybe even fear for his life. The latter would surely be judged less harshly. However, since the effect on justice is the same, whatever the motive, the text teaches us that it is not enough for the judge to be honest, but he must also be fearless – be a man, or woman, of valor. *Ish Chayil!*

There is an additional aspect to judging which requires fortitude, decisiveness and valor. It is in the process of deciding. Unlike lawyers who advocate for one party, unlike professors who, like spectators in a chess match, “kibitz” on the sideline, the judge has to take a decision, look in the face of those against whom his decision goes and live with the (internal) consequences of his decision.

Anyone who has made the transition from being professor to judge will have lived this existential difference between teacher and judge – especially when the judging involves actual parties and is not simply a decision on a point of law.<sup>6</sup> I would add that one needs, too, fortitude and valor not to fudge one’s decision, to speak with a clear voice and not hide behind ambiguities and ambivalences.



To discuss the concept of Fear of God would, I suspect, take us to theological spheres too remote from the seats of justice in our present day secular states. I would just like to mention that the Hebrew word *Yirah* has a depth which is not captured by the rendition “fear” in English, *timore* in Italian, *Gott fürchten* in German, *craignant Dieu* in French et cetera. *Yirah* means a form of fear coupled with awe and respect.

Religion aside, then, what virtue would be the secular, modern equivalent to Jethro’s God fearing judge? I put this question from time to time to my Harvard Law School Bible class students.<sup>7</sup> Many wonderful answers are given, but I shall mention just a few which have the virtue of standing in slight tension with each other without being mutually exclusive.

The first would be a state of mind that seeks the spirit of justice behind all legal discourse and which should be integral to the judicial process. The judge’s ethical sensibility, my students argue, should always be his or her guide in construing legal rules.

Another would be the state of mind which respects the spirit behind the law and the need to subordinate one’s own inclina-

6 The closest I have lived that experience has been serving as arbitrator in intergovernmental disputes. I imagine that the conflicts are even starker for judges.

7 The class, now in its sixth year, meets weekly to study the Pentateuch so that over one year all five books are covered. The class brings together Americans and non-Americans, men and women, Jews and Gentiles, believers, agnostics and atheists et cetera. The only common denominator is love of and respect for Scripture.

tions in respect of that spirit. The spirit behind the law should be the judge's guide in exercising the judicial discretion which almost always exists.

It is easy to see how these sensibilities correspond to some of the central strands and debates in legal theory.

A third approach would consider the secular equivalent of fear of God as the spiritual courage required to stave off cynicism, a state of mind most corrosive to the soul. This, of course, should not be read as an invitation to shut down critical faculties. But given the limited ability of the law to render full justice in all cases, Judges may rapidly develop a cynicism towards the very function they are charged to fulfill.

But it is the last consideration which I like most. Judges, even more than doctors and tenured professors, are surrounded by respectful and deferential interlocutors. Judges speak down to others, often literally. Unlike politicians, they often serve for life and are not subject to the discipline of political process. In their courts they enjoy monarchical powers. When sitting in the highest courts they are structurally infallible. Many of them do not, in fact, fear God. They are, thus, the prime candidates for that fearsome human vice of *hubris*. A judge suffering from *hubris* cannot be judge. Thus my favorite interpretation is the one which seeks the modern secular equivalence of fear of God, in that elusive human virtue of humility.



We have seen that an attentive reading of the text suggests that the good judge has qualities which go beyond ability and integrity, important as these may be. How do we find men and women with such qualities? Jethro's answer is surprising. This is a case where every translation I examined (admittedly only a dozen or so) misconstrued one of the most exquisite choices of the text.

The King James version begins verse 21 thus: *Moreover thou shalt provide out of all the people able men et cetera*. Louis Segond: *Choisis parmi tout le peuple des hommes capables et cetera*. The New English Version: *But select capable men from all the people, et cetera*. The Italian (CIE): *Invece sceglierai tra tutto il popolo uomini integri, et cetera*. The Vulgate: *Provide autem de omni plebe viros potentes, et cetera*.

Only Luther comes close to the surprising choice in the original Hebrew: *Sieh dich aber unter dem ganzen Volk um nach redlichen Leuten, et cetera*. Jethro's unusual choice for the opening phrase of verse 21 *Atah Techezeh* is neither "provide," nor "choose," not even "select" – for all of which there are common alternatives. *Techezeh* is a form of seeing, but one that is frequently used in the sense of a (divinely) inspired vision. Divining who will be a good judge requires an inspired vision since being a good judge, in the eyes of the wise Jethro, requires inspiration too. 