

TEMPLE CHURCH: A REFLECTION

LONDON, 1 JULY 2012

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First lesson: The Book of Wisdom 5:1-6

"Then shall the just stand with great constancy against those that have afflicted them and taken away their labours. These seeing it, shall be troubled with terrible fear, and shall be amazed at the suddenness of their unexpected salvation. Saying within themselves, repenting, and groaning for anguish of spirit: These are they whom we had some time in derision and for a parable of reproach. We fools esteemed their life madness and their end without honour. Behold how they are numbered among the children of God, and their lot is among the saints. Therefore we have erred from the way of truth, and the light of justice hath not shined unto us, and the sun of understanding hath not risen upon us."

Second lesson: Luke 10:25-37

"And behold a certain lawyer stood up, tempting him and saying, Master, what must I do to possess eternal life? But he said to him: What is written in the law? How readest thou? He answering, said: Thou shalt love the Lord thy God with thy whole heart and with thy whole soul and with all thy strength and with all thy mind: and thy neighbour as thyself. And he said unto him: Thou hast answered right. This do: and thou shalt live.

But he willing to justify himself, said to Jesus: And who is my neighbour? And Jesus answering, said: A certain man went down from Jerusalem to Jericho and fell among robbers, who also stripped him and having wounded him went away, leaving him half dead. And it chanced, that a certain priest went down the same way: and seeing him, passed by. In like manner also a Levite, when he was near the place and saw him, passed by.

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But a certain Samaritan, being on his journey, came near him: and seeing him, was moved with compassion: And going up to him, bound up his wounds, pouring in oil and wine: and set him upon his own beast, brought him to an inn and took care of him. And the next day he took out two pence and gave to the host and said: Take care of him; and whatsoever thou shalt spend over and above, I, at my return, will repay thee.

Which of these three, in thy opinion, was neighbour to him that fell among the robbers? But he said: He that shewed mercy to him. And Jesus said to him: Go, and do thou in like manner."

The lessons today from the Book of Wisdom and the Gospel of Saint Luke remind us of three things essential to a just world. In the words of the Book of Wisdom, they are "the way of truth", "the light of justice" and "the sun of understanding".

None of these is tied to a specific branch of Judaism or Christianity or any other system of religious belief. However, as Durkheim demonstrated, it is human to seek and revere the sacred, so it is possible to speak of faith and justice in the one breath. Shared values captured in the simple metaphors of illumination — "the way of truth", "the light of justice" and "the sun of understanding" — underpin many ways of understanding the world.

Different ways of understanding the world can intersect surprisingly. There was a celebrated case in my home State of Victoria years ago in which the plaintiffs challenged the constitutionality of a law which provided financial aid for the educational activities of church schools. Appearing for the plaintiffs, opposed to funding church schools, was Neil McPhee QC. He was a

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celebrated advocate, widely considered to be a most formidable and cunning cross examiner who regularly got the better of witnesses. In any event, one morning McPhee was to cross examine a nun who was, as I recall it, the principal of a Roman Catholic school and a Mother Superior in respect of a group of teaching nuns. She was a most dignified witness and he approached her with kid gloves. Somehow, in the course of some questions, they got onto the topic of prayer. She volunteered the information that she and her fellow nuns prayed "every day". He then enquired mildly, "Sister, what sort of things do you pray for?" "Well," she said, "this morning we prayed for you Mr McPhee." McPhee subsequently admitted that this was a good example of "asking one question too many".

The expression in the first lesson today, "the way of truth" suggests both that truth is something exterior to the self to be valued as we make our way through life, and that truth is part of our interior selves, a way of being which helps us calibrate right and wrong, commands moral choices and esteems the pursuit of virtue. In either sense, "the way of truth" points to shared values and the role of community in human affairs. This is not to deny that, for the saintly among us, introspection and meditation may be "the way of truth".

The rule of law is predicated upon shared norms, the transgression of which may involve physical punishment or other sanctions, or the enforcement of one person's right against

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another's impingement on those rights. Hence the importance of "evidence", which, in its most metaphysical verbal sense, means the quality of making something clear. Lawyers are all familiar with evidence, as testimony, through witnesses and documents building up a clear picture of something which happened in the past leading to a jury verdict or a judgment.

Many lawyers have experienced what is called in today's reading "the sun of understanding", that moment when the accretion of evidence allows one or other standard of proof in the common law system to be satisfied. Each of those standards operates to give as much of a guarantee as is humanly possible that an accused or defendant is treated fairly before adverse consequences are visited upon him or her as part of the legal process. This is partly the source of the responsibility on all advocates to understand and apply the forensic techniques in which they are trained. There is accumulated wisdom in much of the court-craft in which advocates are acculturated.

This leads me back to "the way of truth". There is a maxim about courts of law: *res iudicata pro veritate accipitur*. It can be translated as: a thing adjudged is accepted for the truth. The maxim is profoundly uncompromising, especially in our times when Continental philosophers have given fresh currency to the idea that truth is relative. The maxim would appear just as capable of applying to civil law systems as it does to common law systems.

In another famous Australian case, known colloquially as the *Bank Nationalisation Case*, one of our most famous judges, later the Chief Justice, Sir Owen Dixon, referred to that maxim. He said¹:

"There are few, if any, questions of fact that courts cannot undertake to inquire into. In fact it may be said that under the maxim *res iudicata pro veritate accipitur* courts have an advantage over other seekers after truth. For by their judgment they can reduce to legal certainty questions to which no other conclusive answer can be given."

The truth to which the maxim refers is not a poet's "Truth" — it does not double with "Beauty" as in Keat's Ode, nor is it connected with "purely untellable things": the hardness of life, the long experience of love of Rilke's Ninth Elegy.

Equally it is not the truth of a mystic philosopher like Simone Weil who said "The need for truth is more sacred than any other need". This was a deeply personal, even introspective, truth expressed aphoristically. Nor is the "truth" of the maxim equivalent to an historian's sense of truth.

When comparing historians and lawyers, F W Maitland said:

"The lawyer must be orthodox otherwise he is no lawyer; an orthodox history seems to me to be a contradiction in terms."

¹ *Bank of New South Wales v The Commonwealth* (1948) 76 CLR 1 at 340; [1948] HCA 7.

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Clearly there are many answers to Pilate's famous question.

Truth for the purposes of the rule of law is not to be found in the mob or at the other end of the spectrum in divine revelation or inspiration. Truth established in a court room is the product of a practical human endeavour circumscribed by the particular question or controversy before the court and severely restricted by the issues framed for a trial by reference to the law, including the laws of evidence. A judge's authority to decide a justiciable issue is limited by that framework. Establishment of truth in a court room calls upon human capacities for perspicacity, constancy, empathy and fairness applied to a particular set of facts and the inferences to be drawn from those facts. The truth established thus is not necessarily perfect truth or complete truth, if such a thing were ever possible in relation to a past deed or event. It is, however, severe truth to be applied for the purposes of exoneration on the one hand, or punishment, sanction or redress on the other.

Advocates are crucial in the court room because they mediate the process, the outcome of which is legal certainty in respect of some specific human transgression or conflict presented for resolution according to the law. For the law to be authoritative in society, legal certainty must correspond with justice. The maxim expresses a singular reality which binds us to past and future generations of lawyers because law depends for its continuing authority on a constructive dialectic between continuity and change.

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Truth in the law tests to the utmost the capacities of all those for whom it is a calling.

Let me conclude by saying that what the maxim expresses is reason enough to turn back to the words from The Book of Wisdom and to renew our own individual and collective efforts to keep "the light of justice" shining.