

THE LEGAL DISPUTE BETWEEN JEPHTHAH AND THE ELDERS

by

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Jephthah the Gileadite, whose story is told in chapter eleven of the Book of Judges, is primarily known for his infamous vow (see now Marcus, 1986). Yet, Jephthah was also a successful general, an effective negotiator, and an astute diplomat. Notwithstanding these accomplishments, Jephthah early in his career was the victim of fraternal rivalry, and had to suffer the indignity of being driven out of his ancestral home by his younger half-brothers.¹ It is this episode which is the focus of this article. We will try to answer the question of how these younger brothers of Jephthah were able to dispossess him so readily.

The solution is no doubt to be found in Jephthah's background. However, Jephthah was not disinherited simply because he was the son of a prostitute (*ʿiššāh zōnah*, verse 1), or as the brothers euphemistically termed her 'another woman' (*ʿiššāh ʾaḥeret*, verse 2), because in ancient Israelite law the inheritability of children depended not on the mother, but on the father. We believe that the answer lies in the fact that Jephthah had originally been adopted by his father Gilead. When Gilead died, Jephthah's half-brothers challenged his adoption in court, and they succeeded in having his adoption revoked and annulled.

We start with the premise that, whatever the real reason for Jephthah's disinheriting, it must have had a legal basis, and there must have been court proceedings in which the elders participated. This is indicated by the following considerations:

First, Jephthah is throughout the story portrayed as a military strongman. He is described as a *gibbôr ḥayil* 'an able warrior',² gains

1. Parallels in other ancient Near Eastern literatures to the epic motif of a hero being driven out by his brothers and prevailing in the end, have been shown by Tadmor, 1966, p. 345, and Greenstein & Marcus, 1976, pp. 76-77.

2. The fact that this epithet is applied to Jephthah at the beginning of the story is quite significant. It represents a characteristic which Jephthah possessed from the very start, and

fame through his military exploits, and he is the man the elders want to take over as commander during the Ammonite emergency. The brothers then could not have driven him out by force. They must have done so through a legal process.

Second, that this process involved the elders is explicitly stated by Jephthah when he accuses them of being responsible for his banishment: "Jephthah replied to the elders of Gilead, 'You are the very people who rejected me and drove me out of my father's house'" (verse 7). As a legal procedure, disinheriting would have to take place before a court, and the court would be constituted by elders.³ The brothers initiated the disinheriting proceedings, but it was the elders in their role as a juridical court who pronounced the verdict and ruled against Jephthah. There is hence no conflation of traditions here, as believed by some scholars (e.g., Burney, 1918, pp. 303–4; Richter, 1966, p. 494) who point to verse 2 which states that the brothers drove Jephthah out, and verse 7 which implies that Jephthah was banished by the elders.

Thirdly, when the brothers make their complaint against Jephthah, the Peshitta version twice uses the third person instead of the second person of the Masoretic text. Instead of the Hebrew "you shall not inherit," and "you are the son of another woman" (verse 2) the Syriac translation has: "he shall not inherit" and "he is the son of another woman." This use of the third person singular indicates that, at least one ancient tradition viewed the brothers as addressing a third party, and is additional evidence that the brothers brought their claim before a court.

If there was a court hearing, what happened in court? Since there is no evidence to assume that the elders were corrupt, or arbitrarily ruled against Jephthah, we are entitled to ask what was the legal justification for the brothers' suit and the elders' subsequent ruling to disinherit Jephthah?

not one which will only be earned later. In this respect Jephthah's epithet is akin to the epithets applied to other biblical characters such as Ehud and Eglon who are termed respectively "a left-handed man" and "a very stout man" (Judges 3:15, 17). Or Abigail who is called "intelligent and beautiful," whereas her husband is described as "a hard man" (1 Sam 25:3). All these epithets are not only meaningful for their respective stories, but were obviously not acquired later. So if Jephthah is termed "an able warrior" in the first verse, that is the characteristic which the author wishes to convey to us that Jephthah has throughout the story including the period of time before his expulsion.

3. This was as true for ancient Israel as it was for the rest of the ancient Near East. We note an Old Babylonian letter (Lutz, 1917, p. 13 = Marcus, 1981, p. 37) where the writer says he assembled twenty elders of the city in order to disinherit a young man who had run away.

As mentioned above, it could not have been because he was the son of a 'prostitute' or of 'another woman' despite the text ostensibly using this as the justification: "They said to him, 'You shall have no share in our father's estate, for you are the son of another woman'" (verse 2), because in ancient Israelite law the inheritability of children depended not on the mother, but on the father. For example, children from a woman other than the first or favored wife, and children from a concubine, were entitled to a share in the inheritance.⁴

This fact is illustrated in numerous cases in the Bible, both in narrative and in legal passages. Some narrative examples: Ishmael, the son of the slave-girl, Hagar, was legally entitled to a share of Abraham's inheritance, and would no doubt have received it had Sarah not cast him out (Gen 21:10). Other children of Abraham's concubines also received inheritance gifts (Gen 25:6). The sons of Jacob's concubines, Bilhah and Zilpah, rank equally with those of his wives as ancestors of tribes (Gen 35:23–26). An example from the legal corpus is in Deut 21:15–17 where a first born son of a non-favorite wife is held to be entitled to his proper privileged inheritance.

Since in all these cases the children of all these different classes of women inherit in one form or another, Jephthah's brothers cannot have meant "son of another woman" literally. Otherwise the disinheriting would have been clearly illegal (this is in fact the opinion of some medieval Jewish commentators, e.g., Kimhi [1160–1235], and Abravanel [1437–1508]), and the elders should not have ruled in their favor.

But what about son of a prostitute? Since we know that prostitutes could marry (Lev 21:7, 14), there does not seem to be any reason why a son of a prostitute could not inherit just like a son of any other class of woman. In Mesopotamian law the possibility that such a son could inherit was taken into consideration by the Sumerian laws of Lipit Ishtar (section 27, see Pritchard, 1967, p. 160), which legislates that when a childless married man has children by a prostitute those children will be his heirs.

Now Jephthah's case is slightly different than the case described in the Lipit Ishtar law. In his case Gilead's wife subsequently bore him children.

4. For a contrary view see Eichler, 1985, p. 422. Note that in Mesopotamian law the right of the sons of a concubine to inherit was not guaranteed by law, but depended solely upon the wishes of the father. Thus in the Code of Hammurabi (see Pritchard, 1969, p. 173), sections 170 & 171 deal with the case of a father recognizing as his sons the children born to him by a slave girl. Were he to acknowledge them, they would be considered among his heirs. But if he fails to acknowledge them, they have no claim to his estate.

The Lipit Ishtar law does not consider the eventuality of the former barren wife bearing children, and the subsequent status of the prostitute's child.

According to Mendelsohn (1954, p. 119), such a case was handled according to local custom, and as applied to Jephthah's case, local Gileadite custom must have been to support the sons of the natural wives and disinherit all others. But this is only conjecture, and the biblical examples cited above concerning slave-girls and concubines would make the existence of even such a local custom quite dubious.

We are left with the conclusion that the legal grounds for the brothers disinheriting Jephthah do not rest on the status of his mother, being 'another woman' or 'a prostitute'. If not, then on what do they rest? We believe that they rest on the fact that Jephthah had originally been adopted by their father Gilead. When Gilead died, the brothers challenged the adoption presumably on the grounds that a prostitute's son could not be adopted, and they succeeded in having his adoption revoked and annulled in court.

That Jephthah had been adopted can be demonstrated by the legal terminology which Jephthah employs in his dialogue with the elders when they come to him, in their capacity of representatives of Gileadites, to enlist his aid against the Ammonites. Jephthah at first refuses their request. The refusal is couched in a rhetorical question format which not only underlines Jephthah's rejection of their offer but indicates his incredulity that, considering what the elders, in their capacity as a legal court, did to him, they would have come to him for aid (see Marcus, 1989). Jephthah complains to the elders that he has been unjustly disinherited because his legal status in the household had been questioned and rejected, and he will not return with them until this status is restored.

Jephthah uses terms which legally indicate revocation and annulment of adoption agreements; and when he imposes the conditions for his return he uses a term which legally indicates restoration to a *status ante* in these same adoption agreements.

The terms which indicate revocation and annulment are the verb *šānē*², lit. 'to hate' and the verb *gērrēš*, lit. 'to drive out'. Jephthah says to the elders: "did you not hate me (*šānē*²), and drive me out (*gērrēš*) from my father's house?" (verse 7). Both these verbs have special connotations in legal proceedings and can be elucidated by ancient Near Eastern adoption contracts. These contracts nearly always have revocation clauses indicating the eventualities should one party not keep his or her

part of the contract. It is no mere coincidence, then, that the precise Akkadian semantic cognates of the Hebrew words of our text (*šānē*³ and *gērrēš*), actually occur in these revocation clauses.

The Akkadian cognate of Hebrew *šānē*³ is *zēru*, and it also literally means 'to hate'. However, in the revocation clauses of adoption contracts it means 'to reject' (Marcus, 1981, p. 40). Some examples follow.

1. From the *Ana Ittishu* practice texts (III, iv:40–43 = Landsberger, 1937, pp. 49–50), dating from the Old Babylonian period: "If (an adopted son) rejects (*izzer*) his father, he shall forfeit whatever he has brought with him."

2. From the *Code of Hammurabi*, #193 (see Pritchard, 1969, p. 175): "If an adopted son of a *girseqûm*-functionary or of a *sekretum*-priestess, discovered his natural parents, then, after rejecting (*izēr*) his foster father and his foster mother, he has run off to his natural parents' home, his eye shall be plucked out.

3. From an adoption contract from Ugarit circa 14th century B.C.E. (Nougayrol, 1955, p. 55, lines 7–14) [names omitted]: "If the adopter wants to reject (*izēr*) the adoptee as his son he must pay him 100 silver shekels. But if the adopted son wants to reject (*izēr*) his adopted father, he will wash his hands (*qātēšu imassi*), and go off into the street (*ina sūqi ipaṭṭar*) [that is, he will be disinherited]."

4. From a "brotherhood" adoption contract from Ugarit circa 14th century B.C.E. (Nougayrol, 1955, p. 75, lines 8–16 = Kilmer, 1974, p. 180) [names omitted]: "If the adoptee rejects (*izēr*) [that is, wishes to terminate the relationship of] his adopter as his brother, he will seize his ears and go free (*uznēšu iṣabbat u ipaṭṭar*) [he will be disinherited]. But if the adopter wants to reject (*izēr*) the adoptee as his brother, he must pay 1000 silver shekels to the adoptee and his sons, and then he, the adoptee, may go free."

Our examples show the usages of *zēru* in revocation clauses in Mesopotamian contracts, and since *šānē*³ is its precise Hebrew semantic equivalent, we believe that *šānē*³ likewise has the meaning 'to reject' in our context.⁵ Jephthah complains to the elders that he had been unjustly disinherited by his brothers, and treating the court as if it itself had

5. The verb *šānē*³ has this meaning in other contexts as well. A good example is Gen 26:27 where Isaac protests to Abimelek: *maddûa' bā'tem ʿēlāy we'attem šenē'tem ʾōfī watešallehūnī me'ittekem*, "Why have you come to me seeing that you both rejected and expelled me." In his 1978 dissertation on the verb *šānē*³, Branson dealt fully with the legal aspects of this term in areas such as breach of contract in marriage, law courts, personal relationships, and international diplomacy.

brought the brief against Jephthah, he says *halō⁷ šenē⁷tem ʔōtī* “did you not reject me?” That is, did you not reject my legitimacy (as an adopted son)?

Jephthah next complains that the court had driven him out from his father’s estate, *wetegārrešūnī* “you drove me out.” Obviously, this driving out was not a physical one (particularly since Jephthah was a *gibbōr ḥayil* ‘an able warrior’), rather a legal one.⁶ Jephthah was legally driven out from his father’s estate. To ascertain the nature of this legal expulsion we compare the Akkadian semantic parallel of Hebrew *gērrēš* ‘to drive out’, which is *ṭarādu*. Although not as common as *zēru*, this verb is found in at least one extant Mesopotamian legal text involving adoption.

The text is in the previously cited Old Babylonian *Ana Ittishu* material (III, iv 10–16 = Landsberger, 1937, p. 48): “If (the adoptee) has afterwards revolted, run away, and fled, he is expelled (*ṭarādu*) from his sonship (*ana mārūtīšu itrušu*); he is removed from his heirship (*ana aplūtīšu issuḥšu*)⁷ [that is, he will be disinherited].”

Since *ṭarādu* in this context means ‘disinheriting’, and *gērrēš* is its exact semantic parallel, then Jephthah’s complaint to the elders would be that they had disinherited him. Not only did they reject (*šānē⁷*) his legitimacy as an adopted son, but they also disinherited him (*gērrēš*). This is precisely what we were informed happened in the beginning of the passage: the sons disinherited Jephthah (*wayegārrešū ʔet Yiptāḥ*), and said that he would not share (*lō⁷ tinḥal*) in their father’s estate.

The third legal phrase which is found in our passage, and for which semantic parallels also occur in adoption contracts, is the phrase *lehāšīb ʔet* ‘to restore’, ‘to return’. Jephthah uses this phrase in verse 9 as part of a condition without which he will not agree to go with the elders. This phrase is the semantic equivalent of Akkadian *turru ana* ‘to return to’, ‘to restore’ which, in the context of adoption contracts, means to ‘reinstate’.⁸

An excellent example of the usage of the Akkadian phrase is seen in an adoption contract from Nuzi circa 15th century B.C.E. (Speiser, 1930,

6. Jephthah was at least a generation older than the brothers. He would certainly have had friends and allies. If he was able to defeat the Ammonites he certainly would know how to “take care” of his brothers. Hence since Jephthah was a capable warrior the only way the brothers could get rid of him was *through legal means not through force*. See also our remarks in note 2 above.

7. This latter phrase is the one most usually found in adoption contracts for expressing disinheriting. For examples, see Marcus (1981), 37–43.

8. For other Hebrew examples of *lehāšīb ʔet* meaning “to restore, to reinstate,” see Gen 40:13, 21 (to restore butler to office); 2 Sam 19:12 (to reinstate David); Isa 1:26 (restoring judges); and Jer 15:19 (reinstating Israel as God’s people).

pp. 38–39), where a father who had previously disinherited a son now wishes to reinstate him. The phrase used for the reinstatement is *ana mārūtīm uttēr* lit. “to restore to sonship.” The relevant sections of the text (lines 3–7) are as follows: “(as regards my son), I at first annulled his relationship, but now I have reinstated him as an adopted son (*ana mārūtīmma uttēršu*). He is the elder son and a double share he shall receive.”

Since Hebrew *lehāšīb* ^ʔ*et* is the exact semantic equivalent of Akkadian *turru ana*, Jephthah, by making the condition ^ʔ*im mešībīm ʔattem ʔōī*, requests from the elders that he be reinstated in his father’s house as a son. That is the condition for which he is willing to go and fight for Israel. And that is the condition to which the elders agree (verse 10).

Jephthah’s use of these three legal phrases, *šānē*^ʔ, *gērrēš*, and *lehāšīb ʔet*, having to do with revocation, disinheriting, and restoration have important implications. Not only do we have here additional corroboration of the existence (usually doubted, see Donner, 1969, pp. 111–12, and Tigay, 1971, pp. 298–301) of adoption in ancient Israel, but we can assert quite confidently that Jephthah had originally been adopted by his father Gilead.

But how do we deal with the fact that the text clearly states that Gilead fathered Jephthah (*wayyōled Gilād ʔet Yiptāh*, verse 1)? Does not the occurrence of the verbal form *wayyōled* ‘he fathered’ negate our thesis that Jephthah was adopted by Gilead?

One solution is to translate *wayyōled* differently. Thus, Feigin (1931, p. 188), actually translated *wayyōled* not ‘he fathered’, but ‘he adopted’. He pointed out that the *Hiphil* can have a declarative force as in the forms *hiršia*^c, *hišdīq*, *heʔešim* and others, and has this force in *wayyōled* ‘and he declared Jephthah as a child’, that is, ‘he adopted Jephthah’. In this interpretation Gilead was not Jephthah’s natural father, but he had adopted him prior to his wife having children herself.

But it is more probable that *wayyōled* be interpreted in accordance with its normal usage elsewhere, i.e., ‘to father’, ‘to engender’, and that indeed Gilead was Jephthah’s natural father. If so, why then would he have adopted Jephthah? The reason is clear. Considering the mother’s profession as a prostitute, the certainty of Gilead’s paternity could not have been assured. In fact, Gilead somewhat anticipated the later objection of his own sons. They argued that since Jephthah’s mother was a prostitute he was not entitled to inherit because he may have been, by virtue of his mother’s profession, not “son of another woman” but “son of another man”! To legally confirm his paternity of Jephthah, Gilead also adopted him. This type of adoption by a family member is usually termed legitimation.

The major difference between adoption and legitimation is whether the child is son of an outsider or not. If he is the son of an outsider, he is adopted; if he is already, in one form or another, within the family he is legitimated. For example, a man or a woman could make a grandson legally his or her own son (Jacob with Ephraim and Manasseh, Gen 48:5; and Naomi with Obed, Ruth 4:16–17). Joseph legitimated his great-grandsons, the sons of Machir, Gen 50:23. Mordechai made his niece Esther his own daughter, Esth 2:7, and Gilead legitimated his own son Jephthah.⁹

If Jephthah was indeed legitimated by Gilead what was the basis for the brothers' suit against him? The brothers did not dispute the fact that Jephthah had been legitimated, but they argued that Jephthah, as the son of a prostitute, should not originally have been legitimated. In their opinion a prostitute's son could not be adopted or legitimated. Hence Jephthah's legal standing in the family should be reexamined and his adoptive status revoked. Obviously the elders agreed with the brothers because they ruled for them against Jephthah.

This decision by the Gileadite elders does not seem to be one which would have been universally accepted in the ancient Near East. The evidence we have of at least one neo-Babylonian adoption text would seem to disagree with the Gileadite ruling. This text (San Nicolo, 1935, pp. 16–17 = Pritchard, 1969, p. 547), dating from the sixth century B.C.E., records the adoption of the son of a prostitute. The first part (lines 1–16) of the text reads as follows:

Innin-shumu-ibni, son of Nabu-ahhe-shullim, came to his sister Balta, daughter of Nabu-ahhe-shullim, and made the following declaration: "Give me Dannu-ahhe-ibni, your seventeen day old son. I will rear him, and he will be my son. Balta agreed, and gave him her seventeen day old son Dannu-ahhe-ibni for adoption. He was written down as the secondary heir (*tartennu*) to his son Labashi. As long as Balta is engaged in prostitution she will raise Dannu-ahhe-ibni. When Balta gets married (Innin-shumu-ibni) shall pay Balta the costs [itemized in the text] she expended for the feeding and rearing of Dannu-ahhe-ibni.

This particular contract deals with the adoption of the infant son of a prostitute who will nevertheless look after the infant until such time as she gets legally married. In return the adopter will pay her expenses. The

9. Parallels to these legitimation agreements are found elsewhere in the ancient Near East (see Mendelsohn, 1958, p. 182). For example, in a Ugaritic adoption contract (Nougayrol, 1955, pp. 70–71), dated in the 14th century B.C.E., a grandfather makes the son of his daughter his son and heir.

relationship of the adopted child to the adopter's natural son is spelled out: the adopted son is to be the secondary heir (*tartenmu*). This is standard language for adoption contracts which nearly always makes provision for the adoptee *vis à vis* present or future natural children of the adopter (see Donner, 1969, pp. 90, 95, and examples in Pritchard, 1969, pp. 219–20).¹⁰ Were this provision to have been applied to Jephthah's case then, after children were born to Gilead's wife, Jephthah should have had the standard rights of inheritance and should not have been dispossessed. Of course Jephthah's case was even stronger since he was also Gilead's natural son. At any event, it is this principle of the rights of adopted children that Jephthah claims the elders had violated, and which the latter, in the course of the negotiations, promise to rectify.

To sum up, the disinheriting of Jephthah was not based solely on the fact that he was the son of a prostitute. Rather it followed from legal action of the brothers contesting Jephthah's adoption. Jephthah's adoption, or more correctly his legitimation, had been legally revoked and annulled and, as a condition for leading the Israelite forces against the Ammonites, Jephthah insisted on being reinstated as a legitimate son, and having his legal rights to his father's estate restored to him. The elders conceded and Jephthah, having won his case on appeal, returned to fight for Israel.

10. The frequency in the ancient Near East with which hitherto childless adoptive parents had natural children themselves has been discussed by Kardiman (1958), pp. 123–26.

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