

CHAPTER 3

AQUINAS'S THEORY OF CONSCIENCE AND LEGAL REASONING

INTRODUCTION

A typical definition of the concept of legal reasoning has been given by Neil McCormick. Legal reasoning for him "is the process of argumentation as a process of justification."¹ Bengoetxea who is influenced by MacCormick insists on the separation of moral and technically legal argumentation.² Although legal argumentation can contain moral argumentation there is still an area of judicial decisions which is free from moral judgements. Therefore, legal reasoning does not necessarily involve moral arguments, and consequently, can be carried out without judgements of conscience. But the problem arises of whether, in the course of arriving at a legal decision, the judge's resolution to disregard any moral reasons is already a sort of moral judgement?

To clarify this point, let us consider an example of application of a Traffic Offences Code, which is full of technical rules, by three separate judges. They have to apply the same rule when fining a person for non-observance of a speed limit. All three judges when giving their judgements use the same justification - they refer to the same rule of the Code which sanctions the measure against the offender. An external observer would say that they use the same legal reasoning, and they do not resort to any moral arguments except that a sanction is established by law, and they must apply it. Nevertheless, they have different motives for applying the rule. One judge applies the rule because he believes that it is his duty as a judge to apply rules correctly, and in his opinion the rule he is applying is relevant. Another judge applying the same rule thinks that the application of the rule would be better for him, and allows him to escape from the criticism of those on whom his position and promotion is dependent. He understands that there is another rule which it would be

¹ McCormick N. *Legal Reasoning and Legal Theory*. - Oxford: Clarendon Press, 1994. P. 19.

² Bengoetxea J. *The Legal Reasoning of the European Court of Justice*. - Clarendon Press, 1993.

more correct to apply, but because of the fear of causing criticism he prefers a safer way. Finally the third judge who applies the same rule applies it because he just does not like the face of the offender, for example his beard. He thinks that the rule he applies is severe enough to make the offender unhappy. This judge thinks also that the rules exist only for fools and he is not bound by any of them. He uses his intellect to deceive an external observer that he is rigidly applying rules which he in fact despises.

If we take the internal side of legal reasoning, the intentions and motives of the judges, it becomes clear that the legal reasoning of these three judges differ significantly from each other. In this example the first judge followed his conscience, the second being aware of the requirement of conscience did not obey it. The third judge did not even pay attention to his conscience at all. Nevertheless they use the same legal argument. I allow myself to make a judgement that among these three judges the first judge who applies the law for conscience sake is the best, and his legal reasoning is better than the reasoning of two others. Another might agree with this or not, but everyone has to draw the same conclusion: legal reasoning can be guided and moved by conscience.

The relevance of Aquinas's theory of conscience to legal reasoning consists particularly in that it provides a justification of legal reasoning based on the judgements of conscience. One can draw the implication from Aquinas's ideas on conscience that legal reasoning without conscience is bad reasoning, or rather it is a perversion of reasoning. For Aquinas, legal reasoning is a sort of practical reasoning which is based on general moral principles and which pursues the good of people. Every judgement which is guided by willingness to achieve any good is a judgement of conscience. It is an essential characteristic of legal judgements that they must pursue the good of people. Legal reasoning which does not pursue common good in fact is against conscience for, according to Aquinas, it is the fundamental requirement of conscience that every legal decision can be directed to the good of people.

INTERPRETATION OF LEGAL RULES AND CONSCIENCE

There are at least two major implications of Aquinas's theory of conscience considered in the previous chapter of the book. The first implication is that the judicial duty to apply the law is itself a requirement of conscience. It is based on his fundamental presupposition that every positive legal rule which is just is binding on the conscience of the individual.³ Because a judge is not just an ordinary citizen but a magistrate whose position is established by positive law, he has an additional duty to observe positive law. A judge is obliged by his conscience to administer the law in good faith.

The second major implication of Aquinas's theory of conscience is his teleological vision of law as an instrument towards good. Any legal rule to be

³ *Summa Theologiae*. I-II. 96. 4.

applied must be interpreted in the light of the ultimate goal which that rule pursues. The grasp of the ultimate goal is done by conscience, and consequently, any act of application of a legal rule must involve a judgement of conscience in relation to the suitability of that rule in the given situation. Before law is administered it must be correctly interpreted by the judge in relation to the circumstances of the case. Because the validity of positive law is dependent on its correspondence to natural law,⁴ the interpretation of legal rules must be in accordance with natural law. A judge cannot apply a rule of positive law whose application to the case would be unjust.⁵ The function of adjudication lies not so much in determination *in abstractio* whether the rule is just or not, as determination whether the application of the rule would be just in a particular case. This approach to legal rules constitutes the substance of the method of casuistry adopted in this book.

The doctrine of Aquinas helps to meet the problem of how far the judges should go in their interpretation of the legal rules. The basic requirement is that the application of a rule should be a realisation of the idea of justice and equity as it is expressed in natural law. This requires a judgement of conscience on what would be just and equitable in a particular situation. But in order to do that, a judge must already have conceived the idea of justice and equity in his or her conscience. When a strict application of a legal rule would lead to injustice the task of the judges is to give an interpretation of the rule which would prevent the negative effect of its application.

The meaning of a teleological interpretation of legal rules can be well illustrated on the example of *Elmer's case*⁶ discussed in detail by Ronald Dworkin in his *Law's Empire*.⁷ Were Aquinas one of the judges of the highest court in New York, he would be apparently among the majority of the judges who decided that a man who had murdered his relative in order to get the inheritance should not have right to get it even if he had been named in the will. Giving their decision the judges of the court appealed to the teleological argument: "It would be absurd to suppose that the New York legislators who originally enacted the statute of wills intended murderers to inherit, and for that reason the real statute they enacted did not have that consequence."⁸ Aquinas himself would prefer to appeal directly to the secondary precepts of natural law, such as 'none should profit from his (her) wrongdoing'. However, this does not change the essence of the reasoning of the judges in this particular case. Whether they wanted to or not, they appealed to the conscience of the legislators which would not allow them to issue an unjust rule. Of course, many judges even do not come near to the idea that their reasoning found one of its first justifications in the theological writings of a mediaeval scholar. They probably would be even more surprised to find that even on a such specific question as abortion their approach reflects one developed by this

⁴ *ibid.*, I-II. 95. 2.

⁵ *ibid.*

⁶ *Riggs v. Palmer*. 115 N.Y. 506, 22 N.E. 188 (1889).

⁷ Dworkin R. *Law's Empire*. - Harvard University Press, 1986. - P. 15ff.

⁸ *ibid.*, p. 19.

theologian seven centuries ago.⁹ The essence of this approach consists in finding a just balance which has to be struck between different rights and claims, interests and responsibilities. This search for the balance is one of the characteristic features of the decisions made by the European Court of Human Rights and many constitutional courts of the world.¹⁰

Thus, in relation to the interpretation of the positive legal rules, Aquinas's teaching on conscience provides an interpreter with a distinct approach to assessing the applicability and limits of the force of legal rules in a particular situation. This approach is called *casuistry*, which has unfairly acquired a pejorative meaning since the times of Blaise Pascal.¹¹ Casuistry is a moral science which deals with cases of conscience and with the problem of application of general moral norms to particular situations. The contribution of Aquinas to casuistry consists particularly in developing concepts of natural law, natural reason, prudence, circumstance, and conscience itself.¹² The method of casuistry, its brief historical outline and essence will be developed in Part II of the book.

The teleological approach of Aquinas has to solve several difficulties. There might be a conflict between a general principle of natural law as it is conceived by the conscience of a judge and the explicit requirements of a rule of positive law. A judge who is required by a state law to apply a certain rule might find that his conscience requires the opposite. The conflict would not be so sharp providing that the judge has a discretion to deviate from application of the rule in certain situations. However, in the situation where the judge is compelled to apply an unjust rule the issue of disobedience may arise. This issue is related to the problem of the moral responsibility of the judges.

Another difficulty is a possibility of error of conscience, that is a wrong comprehension of what natural law requires in a particular situation even if we accept Aquinas's idea of natural law. Aquinas dealt sufficiently with both problems: moral responsibility and erroneous conscience, and this is exactly where his theory can fill the gaps in the psychological version of natural law developed by Petrazyski. We shall start first with the consideration of the problem of moral responsibility.

CONSCIENCE AND THE MORAL RESPONSIBILITY OF JUDGES

The main suggestion of Aquinas's concept of conscience for judicial decision-making is that the conflict between the moral convictions of a judge and the requirements of a legal rule to be applied is not so much a conflict between conscience and law, as a conflict of two moral duties of the same conscience. Therefore a judge is *morally* responsible for both following his moral convictions and obedience to the requirements of his office. It is necessary to note that the term *responsibility* is apparently not what was used by Thomas Aquinas. For this term

⁹ Johnsen A., Toulmin S. *The Abuse of Casuistry*. - Berkeley: University of California Press, 1988. - P. 4.

¹⁰ See Part III of the book.

¹¹ Johnsen A., Toulmin S. *The Abuse of Casuistry*. - P. 11.

¹² *ibid.*, p. 123ff.

came into broad use in the languages of Western culture only in the seventeenth century. It does not mean, however, that Aquinas was unfamiliar with the idea of responsibility which related to the consequences of a moral act. The idea of moral responsibility was conceived as expressing a special relationship of the moral agent to his or her actions which bring about moral consequences in the form of praise and blame imposed by the conscience of the judge himself or by the conscience of the society.¹³

According to Aquinas, one of the features of conscience is that it does not pass its judgement only on what must be done, it passes its judgement also on what has been done. In other words the role of conscience is to blame and to praise. When a judge follows his conscience, his conscience approves his behaviour, when he acts against his conscience then conscience accuses him, and even, as Aquinas wrote, can torment him.¹⁴ At this point, there is identity between Petrazycki's vision of a moral imperative and Aquinas's concept of conscience. The commands of conscience are invincible. It does not mean, however, that if the conscience of a judge comes into conflict with the explicit requirement of a legal rule, he must reject this rule in favour of his conscience, for as we have seen, Aquinas thought that conscience obliges the subjects of the positive law to obey that law faithfully. The problem arises of how far the judges must be faithful to the positive law even though they have different moral convictions.

It might be that the role of conscience in making judicial decisions would not be so strong if the responsibility of the judge to his own conscience is not supported by his responsibility to society, which is directly based on the public nature of judicial office. The relationship between social responsibility and the conscience of a judge is another important aspect where the theory of Aquinas may contribute. The connection between conscience and social responsibility, according to the Thomistic theory, is based on the idea that the judgements of conscience represent the experience which is known to every moral person. The moral experience of the judges is not totally unfamiliar to other members of the society, for every human being shares the knowledge of natural law. The difference may lie only in how this law is applied. Because everyone does share or ought to share a similar experience of conscience, especially in relation to grasp of the first moral principles, and moreover, because everyone does share, although ought not to, a similar experience of sin, especially in relation to disobedience to the commands of conscience, everyone is able to understand more or less the motives and intentions of the other person. The moral responsibility of the judges is not split into two parts: responsibility before the individual conscience and the conscience of society. The Thomistic vision of moral responsibility is holistic. It does not mean that Aquinas did not see that the conscience of the individual and public conscience may dissent, and it is not necessarily the individual conscience which is wrong. He pointed at the way the conflict can be solved.

¹³ *ibid.*, I. 83. 1.

¹⁴ Thomas Aquinas. *Summa Theologiae*. I. 79. 13.

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