

CHAPTER 5

THE METHOD OF CASUISTRY

INTRODUCTION

Conscience in making judicial decisions is a particularly complicated phenomenon which requires a special approach. Throughout the centuries moral philosophers and theologians have developed a discipline which deals with description and resolution of cases of conscience, that of casuistry. "The term 'casuistry' is derived from *casus*, Latin for 'case' and refers to the study of individual 'cases of conscience' in which more than one settled moral principle (or perhaps none) applies. More broadly, casuistry is the use of the 'method of cases' in the attempt to bring ethical reflection to bear on problems requiring the decision and action of some moral agent."¹

The casuistic method by its nature combines prescriptive and descriptive elements which are difficult to separate. The casuistic method is a much larger enterprise than just a description of cases of conscience and the process of moral reasoning. It is directed to educate people to make the right moral decision. Therefore it seems problematic to develop and apply the casuistic method in researching the conscience of judges as a pure descriptive method. Sooner or later it inevitably draws us to make value judgements on how judicial-decision making is carried out. However, despite its mainly prescriptive character the casuistic method can be helpful in achieving a better understanding of what is going on in the courts because the casuistic technique of tackling legal cases has been to a considerable degree adopted by the judges. The method of casuistry is important not only for advising a judge how to reach a just and fair decision under the given circumstances. It can also help to throw light on existing judicial practices.

It may be problematic how far the specific features of judicial casuistry can help us to understand the existing practices in the courts. It is true that not every judge is a casuist, and not every casuist wants to identify himself as such. The judges may be reluctant to show the moral conflicts in the process of the administration of law. All these faults lead to a conclusion that the descriptive value

¹ Bedau H. A. *Making Moral Choices*.- Oxford University Press, 1997. - P. 101.

of the casuistic method may not be so great as its prescriptive significance. Nevertheless, the descriptive significance of the casuistic method may differ from country to country. In countries where the judges give an extensive justification for their decisions, where they can publish their dissenting opinions, and are allowed to make their moral views known to public, the casuistic method has great potential as a tool of exploration of the 'is' of judicial decision-making. In the next parts of the book we will take several courts in which casuistic thinking can be more or less observed. Those observations may be helpful for understanding practices in other courts where the casuistic thinking is not so obvious.

Although the casuistic method was neglected for many decades the impact of casuistry on law was very significant throughout of the Western Europe including Britain.² Up to now the method of casuistry has been applied by judges who never suspected that they have the privilege of being called 'casuists'. The casuistic method has been especially widely adopted in the common law countries where the judges have had and continue to have more discretion in the administration of law, and where the principle of equity has been always respected.

The casuistic method provides a researcher with an ideal pattern of judicial reasoning. Though this pattern can sometimes stand too far away from the real state of affairs it allows him or her to assess the current judicial practice in an already established theoretical framework. The place of abstract moral and legal principles in making judgements, attention to the circumstances, appeal to reason, different ways of interpretation of the established legal rules and new situations which were not envisaged by the lawgiver, - all these have originated in the casuistic thinking.

THE HISTORY OF THE CASUISTIC METHOD

The casuistic method has a long history. As a method moral casuistry finally got its own form shaped in the 14-16th centuries, and reached the peak of its flourishing in the 17th century, after that its influence rapidly declined, and the word 'casuistry' became pejorative. The reasons for rise and decline of what is called High Casuistry will be examined later. It is worthy to notice that the sources of casuistry can be found in Aristotelian philosophy, the rhetoric of Cicero, Roman and canon law, Patristic and Thomistic theology.

The first source of casuistry is Aristotelian moral philosophy. There are several basic ideas of Aristotle which are paramount for the casuistic method.³ Aristotle, following Plato, believed that the social behaviour of persons to a considerable degree is determined by their grasp of the principles of right conduct. Then, disagreeing with Plato, he thought that it is impossible to secure theoretical precision in practical matters, and so ethical reasoning should not aspire to the rigour appropriate to a science in a strict sense of the word. In order to judge what is

² *Conscience and Casuistry in Early Modern Europe*. - Ed. by E. Leites. - Cambridge University Press, 1988. - P. 3.

³ Aristotle. *Ethica Nikomachea*. - Oxford: Clarendon Press, 1925. - VI. V. 1-4, 1140 a-b; VI. VIII. 9, 1142a; VI. XIII. 1-6, 1144b.

a right conduct it is necessary to possess a virtue such as *phronesis* (practical wisdom), the virtue obtained through critical reflection on moral practice. Another important idea was that observance of the rules is not sufficient to do justice. Justice can be done if the law as a body of rules - *nomoi* - is supplemented by equity - *epieikeia* - as a correction of the law in a specific situation according to the exercise of *phronesis*. These major ideas of Aristotle became a theoretical basis for the casuistic method.

The next source of casuistry is the rhetoric of Cicero, particularly his idea that a moral problem has to be resolved by putting forward all relevant arguments and counterarguments in which various moral principles and solutions to analogous cases should be interpreted for maximum persuasive effect. The rhetoric works of Cicero⁴ contained a sample of the future casuistic analysis of the case: concentration on the issue, establishment of relevant moral principles and rules held by conscience, presentation of a set of arguments, and the emphasis on particular circumstances of the case. The influence of Cicero was prominent on casuistry also because his works already contained a set of clearly formulated cases of conscience: that is when a person experiences a moral conflict in application of a certain moral principle or rule⁵. Compiling such a set of cases would become later a primary task of the casuists.

It was Patristic theology through which Christian moral values were brought into casuistry. The ideas of love, compassion mercy and forgiveness become an integral part of Christian casuistic thinking. The contradiction between the Mosaic law and the New Testament teaching already provided a good soil for developing the casuistic approach. Realising the conflict among them, the Fathers of Church, in order to find a solution to the conflicts arising in many aspects of life (marriage, war, commerce, political authority), made a clear distinction between 'commandments' and 'counsels of perfection'⁶. This distinction was to become one of the major interpretative principles of subsequent casuistry.

The contribution of Roman and canon law consisted mainly in developing a systematic approach which was later applied to cases of conscience. A deeper analysis and classification of moral problems by the casuists was directly influenced by the lawyers of Roman and canon law. The casuists accepted the methods of comparison and analogy. Apart from this, Roman and canon law contributed to developing the concept of equity for resolving legal and moral issues. The way the concept of equity was employed in Roman and canon law would be adopted by the later casuists. Its peculiarity consisted particularly in the use of certain interpretative tools in order to make the application of rules equitable. These tools were listed in the *Panormia* of Ivo of Chartes (1092): a) determining the authenticity of a text which contains a rule; b) locating it in a hierarchy of sources; c) examining the sense of the words; d) discovering the local and temporal circumstances that prompted the

⁴Cicero. *De Inventione*. - London: Heinemann, 1949; Cicero. *De Oratore*. - London: Heinemann, 1942..

⁵Cicero. *De Officiis*. - Cambridge University Press, 1869. - Book III.

⁶Clement of Alexandria. *Texts*. - Transl. by G.W. Butterworth. - Cambridge, MA: Harvard University Press, 1919; Ambrose. *On Virginity*. - Toronto: Peregrina Pub., 1980; Gregory of Nyssa. 'On Perfection'. in: *Ascetical works*. - Transl. by V. Callahan. - Washington: The Catholic University of America, 1967.

legislation; e) finding out whether the rule is immutable or mutable; f) finding a just cause not to observe a mutable rule. (PL 161, 50A; 162, 218; 162, 256).⁷ All these tools can be used to adjust the application of rules according to the principle of equity.

The most significant contribution to casuistry was, perhaps, made by Thomas Aquinas. He managed to synthesise all the previous theoretical sources of casuistry. Through development of elaborated set of concepts and notions Thomas Aquinas managed to harmonise different philosophical and ethical traditions. The concepts of 'natural law', 'natural reason', 'conscience', 'prudence', and 'circumstance' were taken by the latter casuists exactly in their meaning in Thomistic theology. Thus, Thomas Aquinas came into the history of casuistry as a great systematiser.

All these historical sources gave finally rise to what is called High Casuistry. The term 'High Casuistry' is used to describe a period in development of practical theology from the composition of confessional books in the 13-14th centuries until the work of Alphonsus Liguori (1696-1787), one of the most prominent theologians in the post-Reformation period of the Roman Catholicism. Apart from in the Catholic countries, casuistry flourished in England in the seventeenth century. The rise of casuistry which took place in Western Europe in that period was caused by historical reasons. The detailed examinations of these reasons would lead us too far away from the subject of our interest. Nevertheless, it is necessary to take into notice of them. The first main reason was the confessional needs of the Roman Catholic Church. According to her doctrine, the Church has power to bind and loose, that is to forgive sins and impute a penance for their committing. This has to be done through the practice of confession - the acknowledgement of one's guilt to other persons or to God. In the Roman Catholic Church it finally led to the appearance of the sacrament of penance. Willing to introduce an order and regularity in administration of the sacrament, the Church moved to establish specific rules concerning the penitent absolution, counsel, and penance. However, because of the variety of sins and related mitigating and aggravating circumstances, the Church needed a practical method which would help priests administer the sacrament of penance. The second main reason for the rise of casuistry was due to social changes in the Western Europe which happened at this time when the Church had still a moral monopoly. Economic and social changes led to the growth of social conflicts which often acquired a religious form. The necessity to solve these conflicts, to reconcile the old moral values with the new historical conditions also promoted the rise of casuistry, especially in England.

Historical changes brought the rise of casuistry, but they also brought its eventual decline. The social transformation in the end of the seventeenth and eighteenth centuries led to the growth of secular tendencies and weakening of the moral authority of the Church institutions. At the same time the Christian religion

⁷ Cited by Jonsen A., Toulmin S. *The Abuse of Casuistry*. - Berkeley: University of California Press, 1988. - P. 116.

itself was influenced by the process which can be called as 'desacramentalisation.' The practice of confession lost its previous significance especially in the public life of society. Cases of conscience became more and more a matter for the private life of the individual. As a result, the need and desire to describe and analyse cases of conscience was significantly diminished. Although the tradition of casuistry never completely died out, it is clear that its influence on moral thought in the nineteenth to the first half of the twentieth centuries was reduced to the minimum. The whole social mentality of that time did not favour its adoption and development. The core of the casuistic method lies in the idea that general rules, whether religious or legal, should be applied in a flexible way. Circumstances affect the applicability of the rules. Casuistry gives more freedom to the decision-makers to determine how far the application of the rules matches particular situations. It so happened that casuistic thinking itself was not acceptable in the world of absolute states in which an individual should obey without any reserve the commands of the sovereign whether embodied in a monarch or collective will.

However, apart from the unfavourable historical context for the development of casuistry, there were also theoretical weaknesses. Firstly, Catholic casuistry considered cases of conscience within the scholastic categories such as the concepts of mortal and venial sins. This scholastic thinking contained the danger of extreme intellectualism and formalism. One of the consequences of the Reformation was the decline of scholasticism. Secondly, the casuistic method degenerated to the unfruitful discussion about a formal principle which allows one to determine the choice between conflicting authoritative opinions on freedoms and obligations.⁸ The attempt to solve this problem in the abstract was basically a deviation from the nature of the casuistic method which is about the merits and individuality of a particular case.

Despite the theoretical weaknesses there are some ideas of Catholic casuistry which can positively contribute to the use of general casuistry in judicial decision-making: Firstly, the primary attention of the casuists concerns the circumstances in which a rule has to be applied. As Juan Azor wrote: "In law, circumstances change everything so that from circumstances the equity of the case can be grasped" (*Institutionum Moralium*, I.XVIII. pp. 43-44. Cologne 1602).⁹ The second important idea is that when there is a serious diversity of opinion about what is the right course of action casuists use a technique of marshalling, comparing, and contrasting different opinions. Thirdly, the main interest of Catholic casuistry lay in exploring cases of doubt. Doubts were understood as inability of the moral agent to give assent to either of two contradictory propositions. Under such a doubt the judgement of conscience was suspended. The task of casuistry was to resolve the doubt by investigation of the circumstances and by recourse to an authoritative texts. Fourthly, the consideration of cases causing doubts was done in the context of a confrontation between rules that were thought of as long settled and emerging conditions that apparently challenge those rules. In order to solve the conflict

⁸ Jonsen A., Toulmin S. *The Abuse of Casuistry*. - P. 164 ff.

⁹ Cited by Jonsen A., Toulmin S. *The Abuse of Casuistry*. - P. 154.



<http://www.springer.com/978-1-4020-0168-0>

Conscience and Love in Making Judicial Decisions

Shytov, A.N.

2001, XVI, 246 p., Hardcover

ISBN: 978-1-4020-0168-0