

QUESTION 67

Injustice on the part of a Judge in Judging

Next we have to consider the vices which are opposed to commutative justice and which consist in words by which one's neighbor is harmed: first, those vices have to do with judicial proceedings (*quae pertinent ad iudicium*) (questions 67-71) and, second, verbal harms (*nocumenta verborum*) that are done outside of judicial proceedings (questions 72-76).

On the first topic there are five things that need to be considered: first, injustice on the part of a judge in judging (question 67); second, injustice on the part of an accuser in accusing (question 68); third, injustice on the part of the defendant (*reus*) in his own defense (question 69); fourth, injustice on the part of a witness in testifying (question 70); and, fifth, injustice on the part of an attorney in offering a defense (question 71).

On the first topic there are four questions: (1) Can someone judge justly an individual who is not subject to him? (2) Is a judge permitted, because of what is presented before him, to deliver a judgment that runs contrary to a truth that he knows? (3) Can a judge justly condemn someone who has not been accused? (4) Can a judge licitly soften a punishment?

Article 1

Can someone justly judge an individual who is not subject to him?

It seems that someone can justly judge an individual who is not subject to him:

Objection 1: Daniel 13:45ff. says that Daniel condemned by his own judgment the elders who had been convicted of false witness. But those elders were not subject to Daniel; in fact, they themselves were judges of the people. Therefore, someone can licitly pass judgment on an individual who is not subject to him.

Objection 2: Christ was not subject to any man; in fact, he was the King of kings and Lord of lords. But He gave Himself up to the judgment of a man. Therefore, it seems that someone can licitly judge an individual who is not subject to him.

Objection 3: In accord with the laws, each individual is assigned to a court (*forum*) according to the nature of his transgression (*delictum*). But sometimes the transgressor is not subject to the one who presides over the court of the place in question, e.g., when he belongs to another diocese or when he is exempt. Therefore, it seems that someone can judge an individual who is not subject to him.

But contrary to this: In commenting on Deuteronomy 23:25 ("If you go into your friend's corn ...), Gregory says, "You cannot put the sickle of judgment to a matter that seems to have been entrusted to another."

I respond: A judge's decree (*sententia iudicis*) is, as it were, a particular law made in a particular case. And so just as, according to the Philosopher in *Ethics* 10, a general law should have coercive force, so, too, a judge's decree should have a coercive force by which both parties are constrained to obey the judge's decree; otherwise, judgment would not be efficacious.

But in human affairs it is only someone who exercises public power who has coercive power licitly. And those who exercise such power are thought of as superior to those over whom, as over subjects, they receive the power—whether they have it as ordinary power or by being specially commissioned (*sive habeant potestate ordinare sive per commissionem*).

And so it is clear that no one can judge anyone unless the latter is in some way his subject, either through a special commission or through ordinary power.

Reply to objection 1: Daniel received the power to judge those elders as a power commissioned by a divine impulse (*quasi commissam ex instinctu divino*). This is signified by what it says in that place, viz., that "the Lord raised up the spirit of a young boy."

Reply to objection 2: In human affairs some individuals can of their own accord subject themselves to the judgment of others, even though those others are not superior to them; for instance, this is clear in the case of those who promise to abide by the judgments of arbiters. And the reason why it is necessary for an arbiter's judgment to be fortified by a penalty is that arbiters, who are not superiors, do not of themselves have a full power of coercion.

So, then, Christ by His own accord likewise subjected Himself to human judgment, just as Pope Leo likewise subjected himself to the judgment of the emperor.

Reply to objection 3: The bishop in whose diocese someone commits a transgression becomes that individual's superior by reason of the transgression, even if the individual is exempt—unless perhaps he commits his transgression in a matter that is exempt [from the bishop's authority], e.g., in the administration of the goods of an exempt monastery. However, if someone who is exempt commits theft or homicide or something else of this sort, then he can be justly convicted by the ordinary.

Article 2

Is a judge permitted, because of what is presented before him, to deliver a judgment that runs contrary to a truth that he knows?

It seems that a judge is not permitted, because of what is presented before him, to deliver a judgment that runs contrary to a truth that he knows:

Objection 1: Deuteronomy 17:9 says, "You shall come to the priests of the Levitical race and to the one who will be judge at that time, and you shall ask of them, and they will show you the truth of the judgment." But sometimes certain things are presented that are contrary to the truth, as when something is attested to by false witnesses. Therefore, a judge is not permitted to judge in accord with what is presented and argued for when it is contrary to a truth that he himself knows.

Objection 2: In judging, a man ought to be conformed to the divine judge, since, as Deuteronomy 1:17 says, "God is a judge." But as Romans 2:2 says, "God is a judge in accord with the truth," and in Isaiah 11:3-4 it is predicted of the Christ that "he will not judge according to the vision of the eyes, nor will he reprove according to the hearing of the ears; instead, he will judge the poor in justice and he will reprove the lowly of the earth with equity." Therefore, a judge ought not to issue a decree which accords with what is argued in his presence but which runs contrary to what he himself knows.

Objection 3: Arguments are required for judgment (*in iudicio probationes requiruntur*) in order that the judge might have confidence (*fides*) concerning the truth of the matter; hence, in matters that are more notorious judicial proceedings are not required—this according to 1 Timothy 5:24 ("Some of men's sins are manifest prior to judgment"). Therefore, if a judge knows the truth on his own, he does not have to pay attention to the arguments that are brought forward, but instead can deliver a decree that accords with the truth that he knows.

Objection 4: As was established in the First Part (*ST* 1, q. 79, a. 13), the name 'conscience' implies an application of knowledge to an action (*nomen conscientiae importat applicationem scientiae ad aliquid agibile*). But to act contrary to conscience is a sin. Therefore, a judge commits a sin if he delivers a decree in accord with what has been alleged and contrary to what he knows in conscience to be true (*contra conscientiam veritatis*).

But contrary to this: In commenting on Psalm 118 Augustine says, "A good judge does nothing by his own discretion, but instead makes his pronouncements according to the laws and in accord with the right." But this is to judge in accord with what is presented and proved in judicial proceedings. Therefore, a judge must judge in accord with things of this sort and not according to his own discretion.

I respond: As has been explained (a. 1), judging belongs to a judge insofar as he is administering

public power. And so in judging he should be informed not by what he knows as a private person, but by what is made known to him as a public person.

Now this is made known to him both *in general* and *in particular* (*in communi et in particulari*):

(a) *in general*, through public laws, both divine and human, against which he should not allow any arguments.

(b) *in a particular matter*, through records (*instrumenta*) and witnesses (*testes*) and other legitimate documentation of this sort, which he ought to follow in judging rather than what he himself knows as a private person. However, he may be aided by what he knows as a private person in examining more stringently the arguments that have been brought forth, in order that he might be able to discover their weaknesses. Still, if he is unable to refute those arguments by legal standards (*eas non possit de iure repellere*), then, as has been explained, he must follow them in rendering his judgment.

Reply to objection 1: The first part of the quoted passage is about a question that is to be asked of the judges, in order that it might be understood that the judges should judge the truth in accord with what has been presented before them.

Reply to objection 2: It belongs to God to judge by His own proper power. And so in judging He is informed by the truth that He Himself knows and not by what He receives from others. The same line of reasoning holds for Christ, who is true God and true man.

Other judges, by contrast, do not judge by their own proper power. And so the arguments are not parallel.

Reply to objection 3: The Apostle is speaking of a case in which something is manifest not only to the judge but to the judge along with the others, so that the defendant can in no way deny the crime, but is immediately convicted by the very evidentness of his deed.

However, if it is manifest to the judge but not to the others, or to the others but not to the judge, then a judicial inquiry (*iudicii discussio*) is necessary.

Reply to objection 4: In those things that pertain to his own proper person, a man should inform his conscience from his own knowledge. However, in those things that pertain to the public power, he ought to inform his conscience in accord with what can be known in a public judicial procedure, etc.

Article 3

Can a judge pass judgment on someone even if there is no other accuser?

It seems that a judge can pass judgment on someone even if there is no other accuser:

Objection 1: Human justice is derived from divine justice. But God judges sinners even if there is no accuser. Therefore, it seems that one man can condemn another man in a judgment even if no accuser is present.

Objection 2: An accuser is required in judicial proceedings in order to bring a crime before the judge. But sometimes a crime can come before a judge in some way other than by an accusation, e.g., by a denunciation or by a report or, again, if the judge sees it himself. Therefore, a judge can condemn a man in the absence of an accuser.

Objection 3: The deeds of the saints are narrated in Sacred Scripture as certain exemplars of human life. But as clear from Daniel 13, Daniel was both accuser and judge in opposition to the wicked elders. Therefore, it is not contrary to justice if (a) someone condemns another individual as a judge and (b) he himself is the accuser.

But contrary to this: In expounding what the Apostle says about fornication in 1 Corinthians 5:2, Ambrose comments, "It is not the judge's role to condemn in the absence of an accuser. For because Judas was not accused, our Lord did not cast him off, even though he had been a thief."

I respond: A judge is an interpreter of justice. This is why the Philosopher says in *Ethics* 5 that “people have recourse to a judge as to a sort of living justice (*ad quandam iustitiam animatam*).” But as was established above (q. 58, a. 2), justice is ordered toward another and not toward oneself. And so a judge must adjudicate between two individuals, and this occurs when one of them is the plaintiff (*actor*) and the other is the defendant (*reus*). And so in the case of crimes, a judge cannot condemn someone by a judgment unless that individual has an accuser (*accusator*)—this according to Acts 25:16: “[I answered them that] it is not the custom of the Romans to condemn a man until the one who is accused has his accusers present and gets the opportunity to defend himself, in order that he might clear away the crimes with which he has been charged (*locumque defendendi accipiat ad abluenda crimina quae ei obiiciebantur*).”

Reply to objection 1: In His own judgment God uses the conscience of the sinner as an accuser—this according to Romans 2:15 (“... with their thoughts accusing, or even defending, one another”).

Or else, God also uses the evidentness of the deed in its own right—this according to Genesis 4:10 (“The voice of your brother Abel’s blood cries out to me from the earth”).

Reply to objection 2: *Public infamy* takes the place of an accuser. Hence, a Gloss on that passage from Genesis 4 (“The voice of your brother Abel’s blood ...”) says, “The evidentness of the crime that has been committed does away with the need for an accuser.”

By contrast, as was explained above (q. 33, a. 7), in the case of a *denunciation* what is intended is not the punishment of the sinner, but his correction, and so nothing is being done *against* the one whose sin is denounced; instead, it is being done *for* him. And so no accuser is necessary in such a case.

Now punishment is inflicted for rebellion against the Church, which, since the rebellion is *manifest*, plays the role of an accuser.

However, a judge cannot, on the basis of *what he himself sees*, proceed to issue a decree except in accord with the order of public judicial proceedings.

Reply to objection 3: As was explained above (a. 2), in judging God proceeds from His own knowledge of the truth, but a man does not. And so a man cannot simultaneously be accuser, judge, and witness in the way that God is.

Now Daniel was an accuser at the same time that he was a judge in the sense, explained above (aa. 1-2), of being an administrator of the judgment of God, whose impulse he was moved by.

Article 4

Can a judge licitly soften a punishment?

It seems that a judge can licitly soften a punishment:

Objection 1: James 2:13 says, “Judgment without mercy to the one who does not practice mercy!” But no one is punished for not doing something that he is licitly able not to do. Therefore, any judge can licitly practice mercy by softening a punishment.

Objection 2: Human judgment ought to imitate divine judgment. But God softens the punishment of those who are repentant, since, as Ezekiel 18:23 says, “He does not will the death of a sinner.” Therefore, a human judge is likewise able to soften the punishment for someone who is repentant.

Objection 3: Each individual is permitted to do what is advantageous for someone and does not harm anyone. But to absolve a guilty individual from punishment is advantageous to him and does not harm anyone. Therefore, a judge can licitly absolve a guilty individual from punishment.

But contrary to this: Deuteronomy 13:8-9 says of the one who urges others to serve alien gods, “Neither let your eye spare him to pity and conceal him, but you shall presently put him to death.” And

Deuteronomy 19:12-13 says of the murderer, “He shall die, and you shall not have mercy on him.”

I respond: As is clear from what has been said (aa. 2-3), there are two things, insofar as they pertain to the proposed question, that have to be considered concerning a judge. One of them is that he has the role of adjudicating between the accuser and the defendant, whereas the other is that he makes a decree of judgment not on his own, but as a public authority.

Therefore, there are two ways in which a judge is prevented from being able to absolve a guilty party from punishment:

The first has to do with the *accuser*, since sometimes the right for the accuser has to do with the guilty party’s being punished—for instance, because of some injury that has been committed against him—and the softening of this punishment does not fall to the discretion of any judge, since every judge is obligated to render to each individual what is the right for him (*quilibet iudex tenetur ius suum reddere unicuique*).

In the second way, he is prevented by the *republic*, whose power he is administering and whose good involves the punishment of evildoers.

Still, in this regard lower judges differ from the highest judge, viz., the ruler, to whom the public authority has been committed in the most complete way (*cui est plenarie potestas publica commissa*). For a lower judge does not have the power to absolve a guilty party from punishment in a way that is contrary to the laws imposed upon him by a superior. Hence, in *Super Ioannem* 19:11 (“You would not have any power against me ...”) Augustine says, “God had given Pilate power such that he was under Caesar’s power, lest he should be altogether free to absolve the accused.”

By contrast, as long as the one who suffered the injury wishes to forgive it, the ruler, who has complete power within the republic, can licitly absolve the guilty party if he sees that this would not be harmful to the public welfare.

Reply to objection 1: A judge’s mercy has a place in those matters which are left to the judge’s own discretion and in which, as the Philosopher points out in *Ethics* 5, it belongs to a good man to tend toward meting out less punishment. However, in those matters that are determined by divine or human law, it is not the judge’s place to practice mercy.

Reply to objection 2: God has the supreme power of judging, and whatever is done sinfully against anyone pertains to Him. And so He is free to remit punishment, especially since sin deserves punishment mainly because it is against Him. However, He does not remit punishment except in accord with what befits His goodness, which is the root of all laws.

Reply to objection 3: If a judge remitted punishment in a disordered way, he would inflict harm on the *community*, for which it is expeditious that bad deeds be punished in order that sins might be avoided. Hence, Deuteronomy 13:11 adds, after the punishment of the seducer, “... in order that all Israel hearing may fear, and that no one might do anything like this any more.”

In addition, he would harm *the person on whom the injury had been inflicted* and who receives compensation through a sort of restitution of honor in the punishment of the one who inflicted the injury.