

# Wim Decock. *Le marché du mérite: Penser le droit et l'économie avec Léonard Lessius* (Brussels: Zones Sensibles, 2019), 248



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Leonard Lessius was one of the most accomplished philosophers of the Salamanca School whose great contribution to the study of law lies in the use of economic analysis to study legal institutes. The book, which is the subject to the present review, gives account of his scientific achievements. Among many other questions tackled by Lessius, the review discusses the evolution of the *pacta sunt servanda* principle, the morality and legality of interest, price mechanism, competition as well as the economic aspects of the salvation of one's soul. Attention is also paid to influence of Lessius on contemporary and later authors and timelessness of some of his theories.

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In our times it is hard to overlook the popularity of law and economics which is a scientific method or rather an approach that uses economic analysis to study legal institutes. However, this is not a purely modern phenomenon. Ancient philosophers<sup>1</sup>, lawyers<sup>2</sup> and subsequently scho-

lastics scholars often proceeded in a similar way. Nevertheless, few of them have employed this approach to such an extent as Leonard Lessius whose work is the subject of the reviewed book authored by Professor Wim Decock, who was at the time of publication of the book Professor of Roman Law and Legal History at the Catholic University of Leuven, the very city where Lessius lived, lectured and where he also found his resting place. A short review of this book in English has already been published, but

- 1 E.g., The case of the merchant of Rhodes discussed by Diogenes of Babylon, Antipater of Tarsus and Cicero which mentioned *infra*.
- 2 E.g., D. 18.1.1., where Paulus discusses the nature of money and origin of the contract of sale.

the author of this review believes it deserves more thorough discussion.<sup>3</sup>

At the very beginning of the book, the author presents the world in which Lessius lived. It was a world turmoil and changes caused by Reformation and Counter-Reformation, rise of new philosophical and political doctrines as well as overseas discoveries which also had numerous economic implications. All of these posed new challenges for the human spirit, to which contemporary philosophers were trying to find an

as Bernardin of Siena, had a positive attitude toward capitalism. However, this does not satisfy Decock who points out that Weber's work is necessarily imperfect as it simply omits a significant number of sources. A vast body of scholastic literature contradicts the thesis of the hostility of Catholicism towards capitalism. Lessius's magnum opus *De iustitia et iure* alone contains enough material to dispel any doubts about it. In the following chapters of his book the author proves this view by meticulous step by step analysis.



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answer: Among them were the leading Spanish scholastics who formed the famed School of Salamanca.<sup>4</sup> Lessius was deeply influenced by the teachings of this school, not only because at the time the Netherlands was part of the Spanish Empire but also because he himself studied in Rome, where his teacher was no other than Francisco Suárez, one of the leading representatives of the said school. The first chapter also describes other aspects of Lessius life and his rich personality. The author rhetorically asks whether he was an economist, a saint or a lawyer. Based on his voluminous work and commendable conduct one may conclude that he was all that and even much more.

In his famous work *Die protestantische Ethik und der Geist des Kapitalismus*, Max Weber asserted that the Protestant and especially Calvinist ethics significantly contributed to the development of capitalism. It should be noted Weber himself later mitigated this view and acknowledged that certain Catholic authors, such

The third chapter, called *pactum serva*, deals with the origin and development of the doctrine of the general binding nature of contracts from the High Middle Ages to the present day while emphasizing Leonard Lessius's role in this process to which he contributed. Special attention is paid to his argument regarding the binding nature of contracts. In the Middle Ages, their binding nature resulted from the fact that the witness of all covenants among Christians was God himself and his Church. However, in Flanders of Lessius's lifetime religious unity no longer existed. Among those who met and traded on the local markets were Catholics, Anglicans, Lutherans and Calvinists, so the Catholic Church could no longer serve as the guarantor of their contracts. Older scholastics were of the opinion that agreements with heretics were not binding, but Lessius disagreed with them. In his opinion, it is necessary to observe these contracts as well, because the principle *pacta sunt servanda* is contained in the natural law which could only be derogated by the positive law of God contained in the Bible and since the Scripture does not contain the opposite norm the agreements must indeed be kept.

The following part of the book is devoted mainly to issues of economic and moral character. Lessius was not a theorist living in an ivory tower, but a practical

3 Robert Fastiggi, "Wim Decock, Le marché du mérite: Penser le droit et l'économie avec Léonard Lessius," *Journal of Jesuit Studies*, vol. 8, no. 1 (2020), 153–156.

4 For more information on the School of Salamanca cf. e.g.: Alejandro Antonio Chafuen, *Faith and Liberty: The Economic Thought of the Late Scholastics* (Lanham, 2003).

man. He left the lecturing halls of Leuven and set out for Antwerp, which at the time was a bustling trading hub where complicated financial transactions such as discount of promissory notes, transfers of debt-instruments and forwards were already taking place. In case of them, there was a suspicion that they were nothing else than an interest-bearing loan (*mutuum*), which was contrary to the church doctrine of the time. Let

is the purchase of a claim. This claim does not equal money and it could be valued less than its nominal value since it is uncertain. Such conduct does not violate the canonical ban on usury.

The issue of usury, or in today's terms interest, is closely related to that of the fair price. While presenting his opinion of the matter, Lessius uses the hypothetical example of the merchant of Rhodes, which was



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us imagine the following situation. A debtor issued a promissory note in which he promised to pay his creditor 100 florins. Then someone bought the said note for 97 florins and it was subsequently repaid to him. Consequently, he made a profit of 3 florins. However, these 3 florins could be considered an interest and thus a violation of the church doctrine on usury. Lessius refused such a view. He realized that the money or any other goods which are present are of greater value than the goods that are absent because what is present is already at our disposal and is therefore secure. The future, however, as well as future goods is uncertain and therefore less valuable. He expressed this in the following words: *pecunia absens minus valet quam pecunia praesens*. This is nothing else than the application of the phenomenon of time preference known from contemporary economics!<sup>5</sup> However, Lessius does not stop there and goes further in his reasoning leaving the field of economics and returning to that of law. He concludes that liquid assets such as cash are generally preferred to uncertain future money. Therefore, the present case is not an interest-bearing loan, but a sale (*emptio-venditio*), the subject of which

already discussed by the Hellenic Stoics as well as by Cicero who is our primary source on it.<sup>6</sup> According to this example, a merchant from Alexandria arrived on the island of Rhodes, where there is a hunger, with a shipment of grain. Unlike the locals, however, he knows that numerous other ships carrying provision are about to arrive shortly. He therefore solves the dilemma of whether to conceal the arrival of additional supplies and sell his grain for a high price, or whether to disclose their arrival to the inhabitants of the island and thus deprive himself of a hefty profit. The author does not immediately reveal Lessius's opinion on the matter and uses the case to draw a more general picture of argumentation employed by him in similar cases. The fundamental concept of his argumentation is a notion of a fair price, which he basically views the same way as Aquinas.<sup>7</sup> According to him, the fair price

6 Cicero, *off.* 3,12: *Si exempli gratia vir bonus Alexandria Rhodum magnum frumenti numerum advexerit in Rhodorum inopia et fame summaque annonae caritate, si idem sciat complures mercatores Alexandria solvisse navesque in cursu frumento onustas petentes Rhodum viderit, dicturusne sit id Rhodiis an silentio suum quam plurimo venditurus? Sapientem et bonum virum fingimus; de eius deliberatione et consultatione quaerimus, qui celaturus Rhodios non sit si id turpe iudicet, sed dubitet an turpe non sit.*

7 However, there are many deviations among these two authors when it comes to the application of said concept. Cf. Wim

5 Cf. e.g., Shane Frederick, George Loewenstein and Ted O'Donoghue, "Time Discounting and Time Preference: A Critical Review," *Journal of Economic Literature*. vol. 40, no. 2 (2002), 351–401.

is determined by the general valuation of the entities participating in the relevant market, i.e., all traders in a given city, who take into account the rarity of goods, their usefulness, risks associated with them, etc. This mode of price determination is called common estimation (*aestimatio communis*). However, the knowledge possessed by these subjects is imperfect, only God has perfect knowledge, and therefore, as another great scholar of the Salamanca school Juan de Lugo puts it, it is not possible for a person to determine the exact just price of a thing (*valor iustus mathematicus rei*). The author points out the proximity of this approach to the theory of prices for which Friedrich von Hayek received the Swedish National Bank's prize for the development of economics in 1974 in memory of Alfred Nobel better, but falsely known as the Nobel prize for economics.

Given the above said, however, the question arises as to how, in a world where a fixed fair price exists, can businessmen make a profit without sinning. According to Lessius the businessmen are professionals who can estimate what a fair price will be in the future and use this knowledge to their benefit. They use information, both publicly available and private, to estimate future developments. Publicly available information is available to everyone and therefore serves to determine a fair price. However, a private one is known only to certain persons, so one naturally asks whether it is at all justifiable to make use of it. Lessius, following the example of Thomas Aquinas and especially Luis de Molina, is of the opinion that the use of such information is permitted. Thus, the above-mentioned merchant does not sin when he conceals the arrival of other ships from the people of Rhodes and sells his cargo at the current price, which stems from a general estimation based on the shortage of goods. Likewise, according to Lessius, a businessman may even lie to other competitors about the information available to him. Moreover, he does not condemn insider trading either, by pointing out that it is not officially prohibited by regulations. One feels obliged to point out that our contemporary legal situation is somewhat different. However, the harsh-

ness of the conclusions made above is mitigated by the obligations put on the businessmen not to abuse the simplicity (*simplicitas*) of non-professionals. As the author points out, a contemporary lawyer cannot help himself but to see this norm as a means of consumer protection. In short, *nihil novi*.

Every business involves risk, so it is only natural that businessmen try to find ways to mitigate it. One of them is insurance. Already the ancient Romans knew aleatory contracts such as the *fenus nauticum* and it is of little surprise that they were also frequently discussed even by scholars of the Salamanca school such as Domingo de Soto, Luis de Molina, whose contributions the author also represents and, of course, Lessius. The contract of insurance was no longer considered by the late scholastics to be legally or morally problematic. That is why instead of presenting general considerations about insurance, Lessius addresses more specific issues. He bases his reasoning on then-contemporary legal literature devoted to this topic, which he supplemented with his own considerations revealing the same pattern of thinking as in the case of the merchant of Rhodes. He addresses, among others, the question of whether it is possible to conclude so-called late insurance, i.e., to insure against an event that has already occurred, but the parties do not know about it. Let us imagine that a shipowner in Antwerp wants to insure a ship sailing from Chios to Ancona, which has already sunk in the meantime. From the point of view of the *ius commune*, this would be an invalid contract, but it was valid under local law of Antwerp. Lessius considers such a contract to be valid if certain conditions are met. Above all, the parties, especially the insured, must be in good faith, that is they do not know about the shipwreck. There is a time limit after the expiration of which he could no longer claim to be in good faith. This time limit is objectively determinable and is calculated by measuring the distance between the place of the occurrence of the event insured against i.e., the shipwreck and the place of conclusion of the insurance contract which is then divided by the travel time of the information. According to the law of Antwerp the information traveled at a speed of one Roman mile per hour<sup>8</sup>, while other legal systems or scholars used a different speed.

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Decock, "Lessius and the Breakdown of the Scholastic Paradigm," *Journal of the History of Economic Thought*, vol. 31, no. 1 (2009), 59–65.

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<sup>8</sup> 1 roman mile = 1,479 m.

Among other risks involved in business and trade, there is a risk involved in loans advanced to unreliable borrowers in today's terminology subprimes. These financial instruments are and already in Lessius time were commonly traded and naturally a question arose what their just price is. Lessius allowed the seller to sell them at a price determined by the market, even if its actors did not have all the relevant information and the price determined by them was thus based on incorrect assumptions. However, he considered it illicit to sell subprimes of an insolvent debtor without the seller informing the buyer about the fact. It may seem that the general rule applied in the case of the merchant of Rhodes no longer applies. However, according to Lessius, the information about the debtor's insolvency is in fact an information about the quality of goods themselves and in that case the seller is legally and morally obliged to inform the buyer about the deficiencies of the goods., i.e., loan subject to transfer, at the time of purchase. Therefore, he concluded, if someone sells such debt, that is if he transfers it and receives money for it, without informing the buyer of the debtor's insolvency, he commits a fraud.

The chapter on competition does not take the reader to early modern Flanders as he might expect, but to Western Germany in the 1950s and 1960s. It was during the so-called economic miracle (*Wirtschaftswunder*), when competition law developed as a consequence of Nazi dictatorship which preferred cartelization and control to a free market. However, what might seem a rather exotic excursion is not an end in itself. The author aims to demonstrate the intellectual connection between medieval scholastics and West German ordoliberalism represented by such stately figures like Cardinal Joseph Höffner, late Archbishop of Cologne who did much to intellectually underline this connection. The works of his and other authors show that ordoliberalism is or at least originally was not just an economic school of thought, but a complex ideology looking at the economy from a moral, legal and philosophical point of view. Such a holistic view was also shared by scholastics, who like ordoliberals, were mostly socially conservative but economically liberal.

Let us again return to Lessius and his thoughts on competition. It is already the definition of a monopoly

he gives that awakens an interest of a contemporary lawyer or economist. According to him, monopoly is every action aimed at fixing prices of tradable goods. Lessius further subdivides these actions into what we would now call agreements restricting competition and abuse of a dominant position. The author draws attention to the Articles 101 and 102 of the Treaty on the Functioning of the European Union which apply the same division. Unlike many other scholastics, Lessius does not base his condemnation of anti-competitive conduct on the Constitution of Emperor Zeno contained in the Code of Justinian<sup>9</sup> or on other regulations of Roman law, nor does he even quote norms of canon law devoted to competition, but rather on more general moral and legal considerations. He addresses, among others, a case concerning conduct of a businessman who has bought grain and does not sell it until the price rises. Following the example of his colleague and friend Luis de Molina, he at first defends such conduct. After all, whoever does so will make a profit on the basis of his foresight and proficiency in business and there is nothing condemnable about it. In the end, however, Lessius acknowledges that if it serves the general public (*utilitas publica*), public institutions may prohibit such conduct, and the prohibition must be complied with. Likewise, a sovereign may authorize or establish a monopoly. Lessius agrees with de Molina, who states that in the end it is generally beneficial that certain public monopolies exist, because the sovereign uses them to raise funds that he would otherwise have to obtain through other means, mostly taxation. Both scholastics also hold the same view in the case of monopoly book publishers. Based on royal privileges, only the publisher who printed the first edition of a book was allowed to continue producing its copies, after

9 C. 4.59.2 pr.: *Iubemus, ne quis cuiuscumque vestis aut piscis vel pectinum forte aut echini vel cuiuslibet alterius ad uictum vel ad quemcumque usum pertinentis speciei vel cuiuslibet materiae pro sua auctoritate, vel sacro iam elicito aut in posterum eliciendo rescripto aut pragmatica sanctione vel sacra nostrae pietatis adnotatione, monopolium audeat exercere, neve quis illicitis habitis conventionibus coniuraret aut pacisceretur, ut species diversorum corporum negotiationis non minoris, quam inter se statuerint, venumdentur.*

all the term “copyright” is derived from this privilege. This argument was then developed by Juan de Lugo, another scholar of the Salamanca school, who proposed that similar 10-year privilege should be extended to inventors who could thus benefit from the fruits of their skill (*fructus industriae*). It is hard not to see this as a foreshadow of patents and similar intellectual property rights.

The topic of interest has already been mentioned above, but the book returns to it again in Chapter Eight, this time in connection with banking. At the turn of the 16th and 17th centuries, the money-lend-

and, conversely, he who bears the costs is also entitled to the benefits. This principle is already included among the *regulae iuris* contained in *Liber Sextus* issued in 1298 by Pope Boniface VIII. and was often considered the ultimate expression of the principle of equity. Lessius, however, develops his argumentation even further. Not only does he not consider the above-mentioned tripartite agreement to be a violation of the canonical ban on usury, but on the contrary, he considers it to be in the public interest, as the investments made possible by the funds provided lead to prosperity and thus benefit society as a whole.



**The question arose as to how the interest paid by clients to the bank and by the bank to the investors could be justified.**

ing market in Flanders was dominated by Jewish and Lombard bankers who charged high interest rates. The local authorities decided to combat this practice and set up so-called *Monte di Pietà* in Brussels. It was a charitable bank based on Italian example which engaged in pawnbroking. More specifically it advanced loans to the poor at affordable interest rates against collateral. At first sight, the requirement to pay interest may appear to constitute a breach of the canonical ban on usury. After all, this is why many critics opposed the institution at the time, including Cornelius Jansen, the spiritual father of Jansenism. However, Lessius was an ardent supporter and valiant defender of this institution. While doing so, he relied on the works of the Italian Franciscans, because in Italy similar institutions were established a hundred years earlier than in Flanders.

In particular, the question arose as to how the interest paid by clients to the bank and by the bank to the investors could be justified. In this case Lessius primarily invokes the argument of equity. After all, no one is obliged to provide anything to others without receiving something in return. On the contrary, he who obtains a certain advantage must also bear the costs

Whatever topic Lessius addresses he always has one ultimate goal in mind and that is the salvation of the soul. This is also the topic of chapter ten of the book. Protestant theologians strongly opposed the view which was generally accepted in the Middle Ages that the deeds of man are necessary for his salvation. According to them only faith sufficed to achieve this objective. Lessius again firmly defended the Catholic doctrine which is discussed in the most extensive chapter of the entire book aptly called the economics of salvation (*l'économie du salut*). This chapter focuses not only on views of Lessius, but also on the works of other representatives of the School of Salamanca, such as Francisco Suárez and Pedro de Oñate. In their opinion, man enters into a contract with God, according to which he will be saved if he does good deeds. The second of them goes so far as to qualify this contract as *locatio-conductio operarum*, where one undertakes to do good deeds, for which he receives a reward in the form of salvation. One cannot help to see the parallel with the novel *Embezzled Heaven* by Franz Werfel, the main heroine of which also believes she can conclude a contract with God. She promises to finance the studies of her nephew so

he may become a priest and she believes to get indisputable right to salvation in return.

Lessius rejects such a strict contractual qualification. He acknowledges that God is the most righteous and there would not be a problem with performance of the contract on his part. However, this cannot be said about a human who is never able to act in such a way as to fulfill the hypothetical contract properly and to earn salvation. Thus, Lessius considers the biblical references to the covenant between God and people to be metaphorical and not literal.



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Furthermore, Lessius opposes the Protestant doctrine of predestination, which he considers defeatist. On the contrary, he sees the beauty of Catholic teaching in the ability of man to influence his destiny and to estimate, albeit vaguely, his chance for salvation based on his own deeds. This estimate, as well as individual human acts, can be viewed through market logic. It must be emphasized, however, that Lessius never overlooks the primary role of God's grace, to which man responds of his free will by his acts and deeds. These deeds are a manifestation of man's acceptance of God's grace. This concept is an expression of Catholic orthodoxy. In the author's opinion, it is possible that Lessius did not lean towards a more contractualist conception of the process of salvation, as this could lead to an accusation of Semi-Pelagianism<sup>10</sup>, which he had already faced at a younger age, and it was certainly not an experience he wanted to repeat.

The fact that Lessius was a truly versatile scholar is also shown by his work *Hygiasticon* dedicated to a healthy lifestyle. It might seem that to one who is primarily concerned with the questions of the human

soul, the body is foreign. This was not the case of Lessius. He does not understand the body as the opposite of the soul, just as he does not understand the effort to acquire worldly wealth to go against the desire for salvation. After all, all these things can be achieved at the same time and it is even easier if one strives to achieve them together. Whoever acts properly in one area of human life is more likely to do so in others. Here, as anywhere else, Lessius manifests his meritocratic approach. However, such an approach necessitates personal and market freedom, both of

which Lessius vigorously defends. After all, such views resonate with the spirit of capitalism far better than Calvin's teaching of predestination. It is a pity that Max Weber himself cannot be confronted with this work of Professor Decock. However, the same effect will be achieved if at least readers of Weber's work become acquainted with it. Perhaps then they will look at him and his theories a little more critically and if they will learn something from the wisdom of the Oracle of the Netherlands as Lessius is sometimes called, all the better.

The book clearly summarizes voluminous work of Leonard Lessius while primarily focusing on his writings devoted to the legal and moral dimension of economic issues. Furthermore, it does not focus only on him, but presents his work in the context of the opinions of other scholars of the second scholasticism, his opponents and even followers. The storytelling style, in which the author clearly explains complex legal and economic problems, as well as the extensive footnote apparatus, which is not located within the text, but at the end of the book, contributes to the fluency of the text. The book is written in French, which further underlines the reading experience. Therefore, one can only recommend it to all

<sup>10</sup> Pelagianism is a teaching stating that a person can achieve his own salvation by his own means without divine grace.

connoisseurs of law, economics, philosophy, history and their mutual contexts as well as to those who simply enjoy French language.

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