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Consilii non fraudulenti nulla obligatio. Lawyers' Liability and Legal Ethics in Lessius's *De iustitia et iure*

1. *Introduction*

The purpose of this short contribution is to highlight some historical aspects of a subject that has drawn increasing attention in recent years, namely the liability of lawyers and their professional ethics. One of the richest traditions concerning the professional duties of lawyers can be found in the moral-theological works of the so-called "teólogos-juristas" of the early modern period[1]. This observation may surprise the modern reader, since the separation of law and religion is one of the constitutional cornerstones of Western-styled, secularized legal states at the outset of the twenty-first century. However, as eminent legal historians have shown, the situation was different for many centuries, especially before the period of the French revolution, so that the origins of many legal principles and large pieces of our substantive law lie in a Christian moral-religious context. The development of liability regimes for lawyers is a case in point. This will become apparent from the present discussion of some relevant passages on the deontology of lawyers in the

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[1] On the importance of the "teólogos-juristas", who are also referred to as members of the "second scholastic" or the "School of Salamanca", for the development of legal doctrine in the early modern period, see e.g. M. Bellomo, *The Common Legal Past of Europe 1000-1800* (Studies in Medieval and Early Modern Canon Law, 4; Washington DC, CUA Press, 1995) 226-232. For a recent overview of the literature on the School of Salamanca, see J.L. Egío – C.A. Ramírez Santos, *Conceptos, autores, instituciones. Revisión crítica de la investigación reciente sobre la Escuela de Salamanca (2008-19) y bibliografía multidisciplinar* (Madrid, Dykinson, 2020).

work "On justice and law" (*De iustitia et iure*) by the Southern Netherlandish Jesuit Lenaert Leys, alias Leonardus Lessius (1554-1623). Lessius is now generally considered as a major representative of the "School of Salamanca" in the Low Countries and a bridge-builder between the legal and moral theological traditions in the early modern period[2].

Drawing on the *ius commune* and scholastic authors, Lessius developed a general theory of liability for counselors and for lawyers, in particular, that left its mark on subsequent debates. It is perhaps no coincidence that we find in Lessius a problem statement (*dubium*) explicitly devoted to the question of the professional liability of advisors such as lawyers. Because of his successful consulting practice, Lessius was himself known as the "Oracle of the Netherlands." He was a widely acclaimed counselor to the businessmen on the Antwerp Stock Exchange, and the confessor of many noble unknowns from the high society of his day. In his *De iustitia et iure*, Lessius discusses liability in tort (*iniuria*) in general, followed by a number of specific issues. The seventh special issue reads as follows: "Does an obligation to make restitution arise on the basis of the damage caused by slight fault or lightest fault committed in the exercise of the profession or the giving of advice?"[3]. This question provides Lessius with an opportunity to explain his views on several facets of the lawyer's professional morality: his general liability, liability for incompetence, and duty of abstention in highly questionable affairs.

2. *General liability for gross fault (*culpa lata*)*

From a theologian-jurist such as Lessius one cannot expect simplistic answers to complex questions. Following the scholastic method, he makes distinctions and brings nuances. His argument makes use of the late medieval *ius commune* terminology of liability law, which admits of different degrees of fault (*culpa*): *culpa lata* or *gravis*, *culpa levis* and *culpa levissima*[4]. Following in the footsteps of Sylvester Prierias (c. 1456-

[2] For biographical details on Lessius, see the introduction (p. xxi-l) in W. Decock - N. De Sutter, *Leonardus Lessius. On Sale, Securities and Insurance*, (Sources in Early Modern Economics, Ethics and Law, 10; Grand Rapids, CLP Academic, 2016).

[3] L. Lessius, *De iustitia et iure* (Paris, Rolinus Thiery, 1606) lib. 2, cap. 7, dub. 7, p. 69: *Utrum nascatur obligatio restituendi ex damno culpa levi vel levissima in officio vel consilio dando commissa.*

[4] J. Sampson, *The Historical Foundations of Grotius' Analysis of Delict* (Studies in the History of Private Law, 13; Leiden - Boston, Brill/Nijhoff, 2018) 62-82; J. Hallebeek - T. Wallinga, *Fons et origo iuris, versio belgica. Een*

1523), a theologian, and Martín de Azpilcueta (1491-1586), a canon lawyer, Lessius defines these concepts as follows[5]: *culpa lata* or gross fault is the fault that corresponds to violating the standard of care that people of the same "condition" or class always and everywhere respect. An example of gross fault is leaving a borrowed book unwatched outside on the sidewalk. Mild fault (*culpa levis*) corresponds to a lack of the care that can be expected of the more careful practitioners, while the lightest fault (*culpa levissima*) arises from a failure to observe the utmost care employed by the most careful. Lessius states that, unless by virtue of special contractual provisions, one is only liable in conscience for *culpa lata*, because by nature no one should be expected to be more careful than the people of his class[6].

Lessius thus argues that in the forum of conscience no one can be held liable for slight or lightest error in the exercise of his profession. No one must be more prudent and careful in his profession or craft than other people of his class usually are. Lessius explicitly gives the example of lawyers' liability: a lawyer should not be more careful or prudent than good lawyers usually tend to be[7]. Thus, if you lose your case because the lawyer did not perform what an exceptionally learned and extraordinarily diligent lawyer would perform, you cannot hold your lawyer accountable – provided he acted in good faith – since the average lawyer would have acted similarly in the same case. The lawyer can only be liable for gross misconduct. Yet, Lessius does nuance this general rule. Suppose that the lawyer praises his extraordinary competence and explicitly states that he will render an extraordinary performance. Then he is liable to compensate for damages on the grounds of light and minor fault, at least if, by his grand statements, he was able to win over a client who explicitly asked for such a high level service, and that client therefore no longer bothered to look for a better lawyer[8]. However, the

historische inleiding tot het vermogensrecht (Amsterdam, VU Press, 2013) 207-216; R. Feenstra, *Romeinsrechtelijke grondslagen van het Nederlands privaatrecht* (Leiden, Brill, 1994) 188-191, nrs. 310-314.

[5] Lessius, *De iustitia et iure*, lib. 2, cap. 7, dub. 7, nr. 23, p. 69.

[6] Lessius, *De iustitia et iure*, lib. 2, cap. 7, dub. 7, nr. 24, p. 69: "Quando non intercessit aliquis contractus, non oritur obligatio restitutionis ratione damni dati (saltem in foro conscientiae) nisi ex culpa lata, non autem ex levi vel levissima".

[7] Lessius, *De iustitia et iure*, lib. 2, cap. 7, dub. 7, nr. 31, p. 71: "V.g. advocatus non tenetur esse diligentior aut prudentior, quam passim boni advocati esse solent. Unde si contingat te cadere causa, eo quod non praestitit quod doctissimus et diligentissimus praestitisset: tamen bona fide praestitit quod solent diligentes et docti in similibus causis, non tenetur ad restitutionem".

[8] Lessius, *De iustitia et iure*, lib. 2, cap. 7, dub. 7, nr. 32, p. 71.

lawyer is not liable for compensation for the entire loss, but only for the value of the hope for a more than average service.

3. *The (limited) risk of giving advice*

Lessius then elaborates on the specific problem of liability for advice (*consultatio*) in the context of professional practice. Following in the footsteps of Juan de Medina (1490-1547), a theologian from Alcalá de Henares known for his influential treatise on penance, restitution and contracts (*De poenitentia, restitutione et contractibus*), Lessius argues that the jurist, theologian, pastor, confessor, preacher or other professional adviser can only be held liable for gross fault or gross ignorance[9]. Lessius gives the example of the liability for advice of the confessor: he is liable to pay damages when he claims that a certain contract is permissible when it is not, at least when his negligence or lack of competence can be called serious. Indeed, by virtue of one's office and profession, one is bound to know certain things and to avoid certain mistakes. Moreover, clients expect to deal with a competent person, so that the incompetent consultant who nevertheless provides advice is in fact misleading the client[10].

At the same time Lessius severely limits the liability of consultants in general. He who advises on the basis of an *opinio probabilis* cannot be held liable for damages, any more than he who simply expresses his personal opinion without intending to advise or who indicates that he has doubts and is not certain himself. Moreover, Lessius believes that a client who seeks advice from an expert who is actually competent in another field must himself be liable for any damage he may suffer on the basis of this advice, at least if he knows or should know that the adviser is not competent in this field[11]. Lessius defends this position on the basis of the principle that whoever knowingly suffers damage must blame the

[9] Lessius, *De iustitia et iure*, lib. 2, cap. 7, dub. 7, nr. 33, p. 71: "Dico secundo, qui praebet consilium, tenetur ad restitutionem damni sequuti ratione ignorantiae crassae vel culpae latae, si erat parochus, confessarius, concionator, theologus, iurisconsultus vel eius professionis, ad quam talis consultatio spectabat. Ita Ioan. Medina, Cod. de restit. q.7".

[10] Lessius, *De iustitia et iure*, lib. 2, cap. 7, dub. 7, nr. 33, p. 71: "Probatur primo, quia talis ex officio et professione tenebatur hoc scire et in respondendo, hunc errorem vel negligentiam vitare, et non fecit: ergo censetur causa damni sequuti. Secundo, quia ratione suae professionis vel officii, habetur sufficiens ab eo, qui consilium petit: ergo si non sit sufficiens, et tamen respondeat, decipit alterum".

[11] Lessius, *De iustitia et iure*, lib. 2, cap. 7, dub. 7, nr. 34, p. 71.

fault on himself. This is a principle that Lessius often applied in the resolution of concrete cases, which led to his economic thinking often being perceived as unduly liberal[12].

Nevertheless, Lessius' plea for prudence and vigilance on behalf of the client fits well with the tradition of the *ius commune*. According to a Roman legal principle (D. 50.17.47*pr*.)[13], adopted as a rule of canon law by Pope Boniface VIII (VI 5.13.62)[14], "no obligation arises from an advice that is not fraudulent" (*consilii non fraudulenti nulla obligatio*). The early modern jurists appear to have unanimously followed these Romano-canonical principles. Thus the Southern Netherlandish jurist Johannes Wamesius (1524-1590), professor at the University of Louvain and a highly sought-after consultant[15], stated that giving advice (*consilium*) did not fall under the *mandatum* sensu stricto and therefore could only give rise to liability in cases of fraud[16]. Following an early modern, additional gloss to Accursius's earlier gloss to D. 3.2.20[17], Wamesius extended the scope of this principle to services of recommendation (*commendatio*)[18]. In fact, he could also have linked this rule to D. 17,1,12,12, where letters of recommendation are considered as

[12] W. Decock, 'A historical perspective on the protection of weaker parties: Non-state regulators, colonial trade, and the market for junk bonds (16th-17th centuries)', *The Optional Instrument and the Consumer Rights Directive – Alternative Ways to a New Ius Commune in Contract Law*, eds. A. Keirse - M. Loos (Antwerpen - Oxford, Intersentia, 2012) 49-64.

[13] D. 50.17.47*pr*. in D. Godefroy (ed.), *Corporis Iustinianaei Digestum novum* (Lyon, Horatius Cardon, 1604) tom. 3, col. 1883: "Consilii non fraudulenti nulla obligatio est. Caeterum si dolus et calliditas intercessit, de dolo actio competit". It should be noted that the precise wording of the maxim ("Consilii non fraudulenti nulla obligatio") cannot yet be found in D. 17.1.10.7, as is suggested in D. Liebs, *Lateinische Rechtsregeln und Rechtssprichwörter* (München, C.H. Beck, 2007) 51, nr. 70.

[14] VI 5.13.62, in *Corpus iuris canonici emendatum et notis illustratum*. Gregorii XIII iussu editum (Romae, in Aedibus Populi Romani, 1582) (= ed. Gregoriana), col. 841: "Nullus ex consilio dummodo fraudulentum non fuerit obligatur".

[15] W. Druwé, 'Loans and Credit in the Canon Law Consilia of Wamesius (1524-1590)', *Tijdschrift voor Rechtsgeschiedenis* 85 (2017) 230271.

[16] J. Wamesius, *Responsa sive consilia ad ius forumque civile pertinentia* (Antwerp, Aertssens, 1651), centuria 2, cons. 58, p. 211, nr. 7.

[17] Gl. *Non mandat* ad Gl. *Exhortatur* ad D. 3.2.20 in: D. Godefroy (ed.), *Corporis Iustinianaei Digestum vetus* (Lyon, Horatius Cardon, 1604) tom. 1, cols. 353-354. Vgl. Gl. *nullam esse actionem* ad D. 16.3.1.14 in *Corporis Iustinianaei Digestum vetus*, tom. 1, col. 1607.

[18] Wamesius, *Responsa sive consilia*, centuria 2, cons. 62, p. 226-227, nrs. 5-6.

non-binding[19]. The French jurist Pierre Grégoire (c. 1540-1597) argued in his influential *Syntagma iuris universi* that the careful choice of good counsel was made all the more urgent by the principle of D. 50.17.47 *pr*. Indeed, the client alone bore the brunt of bad advice, not his lawyer, at least if the latter had acted in good faith[20]. Similar views were expressed by French natural lawyers such as Jean Domat (1625-1696) and Robert-Joseph Pothier (1699-1772)[21]. In the Northern Netherlands we can see that legal scholars such as Cornelis van Bijnkershoek (1673-1743) [22] rabidly defended the Roman principle *consilii non fraudulenti nulla obligatio*. Otherwise, who would be willing to give advice, Bijnkershoek asked rhetorically[23].

However, Lessius adds a rule which should guarantee the protection of the interests of third parties: in principle, the client is himself responsible for his careless choice of a bad adviser, but the consultant who, by giving advice in a field unknown to him, e.g. concerning a contract, indirectly causes damage to third parties, is in any case directly liable for this damage with regard to third parties. After all, these third parties do not knowingly and intentionally expose themselves to damage[24]. The fact that the consultant, through no fault of his own, did not have the expertise he was looking for cannot be held against third

[19] D. 17.1.12.12 (with gloss *Quia commendandi*) in Godefroy (ed.), *Corporis Iustinianaei Digestum vetus*, tom. 1, col. 1644.

[20] P. Grégoire, *Syntagma iuris universi* (Venezia, Zenari, 1593), part. 3, lib. 47, cap. 7, p. 675, nr. 8: "Caeterum provide deligendi sunt consultores, qui periti sint in ea re quae deliberatur. Quia consilium in caput tantum consulentis, non eius qui consilium dat, vertitur. Et consilii non fraudulenti nulla est obligatio. Quia consilium non imponit necessitatem, et quilibet explorare debet, an consilium sibi expediat. Qui consilium dat, quod melius sibi videtur dicit, si mala fide non consulat: ideo non tenetur ob bonam fidem. Si autem ea absit, tenetur".

[21] J. Domat, *Les loix civiles dans leur ordre naturel* (Luxemburg, Chevalier, 1702) vol. 1, lib. 1; tit. 15, sect. 1, par. 13 ("du conseil et recommendation"), 138; R.J. Pothier, *Traité du contrat de mandat*, chap. 1, sect. 2, art. 1, par. 6 ("l'affaire ne doit pas concerner le seul intérêt du mandataire"), nrs. 15-16, in A. Dupin (ed.), *Œuvres de Pothier* (Paris 1824) vol. 4, 215-216.

[22] B. Sirks, 'Cornelis van Bijnkershoek as Author and Elegant Jurist', *Tijdschrift voor Rechtsgeschiedenis* 79 (2011) 229-252.

[23] C. van Bijnkershoek, *De rebus varii argumenti*, cap. 2, in *Opera omnia* (Napoli, J. de Dominicis, 1767) tom. 3, p. 423: "In omnibus publicis privatisque causis valere debet illud Ulpiani in l. 47, ff. de reg. iur. consilii non fraudulenti nulla obligatio est, etiam nunc, quum consilium ei, cui datur, non expediat, ut recte addit Gajus in l. 2, par. ult. ff. mandat. Si quis rebus in arduis consilium desideret, plures sunt, qui dare possunt, sed nemo unus eventum praestiterit; si et hunc exigas, ecquis erit, qui consilio suo tibi adesse velit? vel duo, vel nemo".

[24] Lessius, *De iustitia et iure*, lib. 2, cap. 7, dub. 7, nr. 34, p. 71.

parties, because ultimately nobody can interfere in matters in which he is not familiar. This immediately brings us to the next important point in Lessius' discourse, namely the liability of the lawyer for lack of competence.

4. *Liability for incompetence: "imperitia culpae adnumeratur"*

Lessius holds that the lawyer who, through incompetence (*imperitia*) or negligence (*negligentia*), loses a case that his client should have manifestly won – particularly in a so-called "just cause" (*iusta causa*) – is fully liable for the resulting damage[25]. Indeed, ex officio, the lawyer is bound to know the law when he advertizes himself as a competent lawyer and wants to be paid accordingly. In a difficult case, the lawyer must also make a greater effort than in a more easy case. Here again Lessius expresses a view that was widespread in his time. It essentially stems from the Roman maxim that "incompetence is tantamount to fault" (*imperitia culpae adnumeratur*) (D. 50.17.132; Inst. 4.3.7)[26]. By extension, Bartolus de Saxoferrato applied this principle, which was originally developed in the specific context of *locatio conductio* (e.g., D. 19.2.9.5) to damages arising from bad advice delivered by an incompetent lawyer[27].

In the early modern era, the application of *imperitia culpae adnumeratur* to damages caused by incompetent counsel became commonplace. Thus Pierre Grégoire states that lawyers must always keep in mind that God will hold them accountable at the final judgment for wrong or bad advice resulting from their ignorance (*per ignorantiam*)[28]. He therefore exhorts them to be more careful than they would spontaneously be inclined to be. Grégoire argues that the lawyer in the court of conscience is bound to make reparation when the judge, on

[25] Lessius, *De iustitia et iure*, lib. 2, cap. 31, dub. 8, nr. 47, p. 370: "Respondeo et dico primo, quando ex negligentia vel imperitia ipsius cliens iusta causa excidit, tenetur de damno, quod ipsi inde obvenit. Ratio est, quia lege iustitiae tenetur suo clienti pro causae conditione diligentiam praestare, ut si sit difficilis, si magni momenti, tenetur magis laborare quam si facilis vel parvi momenti. Similiter ex officio tenetur esse instructus convenienti peritia, cum pro ideoneo advocato se gerat et ut talis stipendia exigat, vide supra cap. 7 dub. 7".

[26] Liebs, *Lateinische Rechtsregeln und Rechtssprichwörter* 98, nr. 19. However, in the Godefroy-edition, the numbering is different (nr. 174), see D. 50.17.174 in: Godefroy (ed.), *Corporis Iustinianaei Digestum novum*, tom. 3, col. 1915: "Imperitia culpae adnumeratur".

[27] Bartolus de Saxoferrato, *In secundam Digesti veteris partem commentaria* (Venezia 1570) fol. 110r.

[28] Grégoire, *Syntagma iuris universi*, part. 3, lib. 47, cap. 7, p. 676, nr. 12.

the basis of his advice, pronounces a judgment that is harmful to his client. After all, incompetence equals fault (*non culpa caret imperitus*)[29]. One is liable when one undertakes a task for which one is not competent, and knows or should know that that lack of expertise will harm the client. In Arnold Vinnius's (1588-1657) commentary on Justinian's Institutes we read that someone who pretends to be an expert is liable if he causes damage due to lack of professional competence[30]. Meanwhile, the Frisian jurist Jacob Bouricius (1544-1622), in his *Advocatus*, the first systematic work on the professional ethics of lawyering in the Low Countries, had expressed exactly the same point of view regarding incompetent lawyers[31].

5. *The lawyer as the first judge*

In addition to the issue of the lawyer's liability for erroneous counsel, Lessius addresses other aspects of lawyers' professional ethics, especially in a section of his *De iustitia et iure* explicity devoted to the deontology of lawyers[32]. These include the lawyer's duty to represent the poor, the question of involvement in dubious cases, and the issue of whether the lawyer in a criminal case may discredit the witnesses by revealing their hidden crimes. Also under discussion is the question of the lawyer's liability for representing a case that is manifestly unjust or wrong (*causa iniusta*). This question is related to one of the main tasks traditionally entrusted to the lawyer, namely to act as a judge before a judge. The lawyer is the first person who, as a kind of judge, must express his opinion on the legitimacy of the claim or defense. Although Lessius himself does not go into detail on this theme, his contemporary Bouricius devotes an extensive discussion to it. According to Bouricius, the first two duties of the lawyer are as follows: 1) to dissuade the parties from fighting their dispute in court; 2) to act as "first judge" by rejecting or accepting the case. The typically Romano-canonical exhortation to settle disputes out of court deserves a treatment in itself that is not at issue

[29] Grégoire, *Syntagma iuris universi*, part. 3, lib. 47, cap. 7, p. 676, nr. 12.

[30] J. Hallebeek, *Lijf ende goedt. De juridische bescherming van de menselijke persoon en diens vermogen. Een schets van de westerse rechtsgeschiedenis* (Amsterdam, VU Press, 2016) 439.

[31] J. Bouricius, *Advocatus* (Leeuwarden, J.Jansonius, 1643), traduit par J. Nauwelaers (Brussels, Bruylant, 1942) 37: "De l'avis général des docteurs, l'avocat qui, par une impéritie caractérisée ou par négligence, perd la juste cause de son client, a l'obligation, tant en conscience qu'en droit, de réparer le préjudice subi par celui-ci".

[32] Lessius, *De iustitia et iure*, lib. 2, cap. 31.

here[33]. In contrast, the lawyer's duty to act as first judge deserves our full attention. This responsibility is strongly emphasized in deontological treatises such as that of the Frisian jurist Bouricius, but also in practical *decisiones* literature, e.g. by Paul van Christijnen alias Christinaeus (1553-1631), an influential jurist from the Southern Netherlands[34].

The lawyer must take his duty of first judge particularly seriously – both in the interests of his client and in the interests of himself and his profession. According to Bouricius, the lack of judicious rejection of certain cases by many of his confrères is the main reason why the legal profession is seen in such a bad light by intelligent and virtuous people. Indeed, by advocating unjustified cases for profit, lawyers forfeit not only their own credibility but also that of their confrères, even in the eyes of their despicable clients[35]. The lawyer who pleads unjust cases endangers his soul's salvation and incurs the wrath of God[36]. Bouricius believes that the lawyer who does not properly carry out his duties as first judge can only miss the point: if he pleads an unjustified case and wins, he is bound to make reparation to the other party; if he loses an unjustified case, he is bound to make reparation to his own client[37].

With this sober conclusion we return to Lessius. Lessius also states unequivocally that the lawyer who pleads an unjustified case can only lose by doing so[38]. As soon as the lawyer realizes that he is pleading an unjust case, he is obliged to pay compensation to the other party. If his client is in good faith, but the lawyer does not inform him of the unfair nature of his claim, then the lawyer is also obliged to make amends to his own client. Thus, the lawyer has every interest in taking seriously his duty as first judge. Like Bouricius, Lessius further advises the lawyer against yielding to the pressure of a party who knowingly wants to plead

[33] See the contributions in *Forme stragiudiziali o straordinarie di risoluzione delle controversie nel diritto comune e nel diritto canonico*, eds. P.A. Bonnet and L. Loschiavo (Napoli, Edizioni Scientifiche Italiane, 2008).

[34] P. Christinaeus, *Practicae quaestiones resque in supremis Belgarum curiis iudicatae observataeque* (Antwerp, H. Verdussen, 1626) tom. 2, tit. 6, decis. 99, p. 194, nrs. 9-17. On Paul van Christijnen, see A. Wijffels, 'Christinaeus' *Practicae quaestiones*', *The Formation and Transmission of Western Legal Culture. 150 Books that Made the Law in the Age of Printing*, eds. S. Dauchy et al. (Cham, Springer, 2016) 177180.

[35] Bouricius, *Advocatus* 46-47.

[36] Bouricius, *Advocatus* 40.

[37] Bouricius, *Advocatus* 42.

[38] Lessius, *De iustitia et iure*, lib. 2, cap. 31, dub. 8, nr. 48, p. 370: "Quando tuetur causam quam advertit esse iniquam, tenetur ad restitutionem omnium damnorum, quae parti obveniunt ratione illius patrocinii, ut expensarum factarum, et eorum omnium quae per litem amisit".

an unjust case. The lawyer should drop such a client[39]. Furthermore, the case of a *causa iniusta*, out-of-court dispute settlement offers no way out. Lawyers and other counsel who discover during the procedure that they are defending a wrong case commit a grave sin when they try to persuade the other party to come to an amicable settlement out-of-court in the form of a settlement agreement (*transactio*). For a settlement presupposes that the case is still doubtful, which is not the case with a *causa iniusta*.

6. Nachleben*: from Lugo to Liguori*

The deontological tradition for which Lessius stands remained extraordinarily resilient in the centuries that followed the publication of his work. In the seventeenth and eighteenth centuries, countless jurists and moral theologians continued to devote reflections to the duties of the lawyer-counselor. In the Catholic tradition the deontological reflections in the work "On Justice and Law?" by Juan de Lugo (1583-1660), a jurist by training, are worth mentioning. Following in the footsteps of Lessius, Lugo in his *De iustitia et iure* discusses the deontology of several professions, including that of lawyers. His exposition of civil liability on the grounds of bad advice is meticulous and systematic, although he seems to pay more attention to the liability of the doctor than to that of the lawyer[40]. Lugo deals with the deontology of the lawyer and the notary together, going into much more detail than Lessius[41]. He follows Lessius's view that the professional cannot be held liable on the basis of the slightest error, unless he lures a client by advertising his exceptional expertise[42]. Even more than Lessius, Lugo addresses the complicity of consultants in the instigation or commission of offences[43].

[39] Lessius, *De iustitia et iure*, lib. 2, cap. 31, dub. 8, nr. 49, p. 370. Compare Bouricius, *Advocatus* 42: "Si le client insiste et le presse, l'avocat doit refuser son concours et ne pas courir les dangers dont on vient de parler. Ainsi du moins, il ne souillera pas son âme, ce qui arrivera si, flattant son client de fallacieux espoirs, il le précipite dans la procédure et lui cause des frais et des soucis".

[40] J. de Lugo, *Disputationes de iustitia et iure* (Lyon, P. Prost, 1646) tom. 1, disp. 8, sect. 7 (*Ex quali culpa in officio commissa oriatur obligatio restituendi?),* 224-226.

[41] De Lugo, *De iustitia et iure*, tom. 2, disp. 41, 678-685.

[42] De Lugo, *De iustitia et iure*, tom. 1, disp. 8, sect. 7, nrs. 90-91, p. 224.

[43] De Lugo, *De iustitia et iure*, tom. 1, disp. 19, sect. 1, 525-536. Note that in the moral-theological tradition the concept of *consilium* towards the end of the nineteenth century was approached almost exclusively from the point of view of the problem of participation in criminal activities; e.g. G. Waffelaerts (1847-1931), *Tractatus de iustitia*, vol. 2 (Bruges 1886) 258-260, nrs. 281-284 (referring to

A good example of how this tradition of theological-juridical thinking about the deontology of legal professions was also successful in the Protestant world in the seventeenth century is provided by the legal-theological treatise *Forum conscientiae sive tractatus theologico-juridicus*, written by Johannes Van der Meulen (1635-1702), judge at the Council of Brabant[44]. He too addressed the issue of the moral duties of lawyers. At times, however, he showed himself to be more understanding than the early modern jurists and theologians we have hitherto analyzed. Probably because of his own long experience in court practice, he pointed out that even the most competent and dedicated lawyer can lose a case because of the incompetence of the judge (*imperitia judicis*)[45]. Moreover, even if the judge and the lawyer are competent, they may still make an occasional mistake and not be held liable. Nobody is free from mistakes and sudden blackouts. If the case is lost, it will be due to "human frailty", or even to the client, who should have consulted a better lawyer[46]. On this last point, he thus shares the point of view of Lessius, Grégoire and Bijnkershoek. Only in the case of manifestly incompetent or frivolous advice, or when the lawyer is an impostor who has bought his doctoral title, he is obliged to pay damages, according to Van der Meulen.

In the eighteenth century, a standard work on moral theology was published by Alfonso de' Liguori (1696-1787), a lawyer and theologian from Naples who was later crowned patron saint of the moral theologians. In his *Theologia moralis*, Liguori provided a relatively small section on the duties of the lawyer in which he very briefly summarised the discussions of his predecessors. In light of the exceptional influence of this work until far in the twentieth century, it deserves due attention. The following questions are dealt with in Liguori's account: 1. the conditions for practicing the profession; 2. the persons who are not

Lugo), and A. Lehmkuhl (1834-1918), *Casus conscientiae* (Freiburg i. Br. 1913[4]) 373-374, casus 225. As early as the early modern period, one finds extensive expositions on the criminal aspects of counsel; e.g. D. Tuschus, *Practicae conclusiones iuris in omni foro frequentiores* (Frankfurt, Kempffer, 1621) tom. 2, concl. 762-763, p. 124-125.

[44] W. Decock, 'The Law of Conscience in the Reformed Tradition: Johannes A. Van der Meulen (1635-1702) and his *Tractatus theologico-juridicus*', *Conscience in the Legal Teachings of the Protestant and Catholic Reformations*, eds. M. Germann - W. Decock (Leipzig, Evangelische Verlagsanstalt, 2017) 87-110.

[45] J. Van der Meulen, *Forum conscientiae seu jus poli, hoc est tractatus theologico-juridicus* (Utrecht, A. van Someren, 1693), part. 1, quaest. 22, p. 314.

[46] Van der Meulen *Forum conscientiae seu jus poli*, part. 1, quaest. 22, p. 313-314: "Secundo enim casu ex animi sui sententia secundum ingenii sui modulum ac prout ejus conscientiae dictavit, consilium dedit, quod si erravit forte, humanae imbecillitati id imputandum, cui condonandum est. jo. Cliens quoque sibi imputet, quod illum et non alium consuluerit".

allowed to practise the profession; 3. unjust cases; 4. the poor's access to a lawyer; 5. pleading a less probable case; 6. the obligation to make restitution; 7. the *pactum de quota litis*; 8. remuneration of the lawyer's services; 9. sins against the profession[47]. With regard to the defence of unjust cases, he is more or less of the same opinion as Lessius: the lawyer is obliged to pay damages to the other party and to his own client, unless the client was aware of the unjust nature of his claim[48]. In any case, Liguori also attaches importance to the lawyer's role as first judge[49]. The first advice that the lawyer must give to his client concerns the fairness and probability of his legal claim.

Liguori criticises lawyers in particular for abusively prolonging the procedure and demanding excessive fees[50]. Among the sins against the profession he also counts lack of competence, neglect of knowledge of local legislation and customary law, defending an unjustified case, excessive use of delaying tactics that manifestly violate the interests of the other party, bribery of witnesses, acting as a lawyer for both parties, serving in the same case as both lawyer and judge, forgery, twisting the law, quoting false or abolished legislation, use of derogatory, dilatory exceptions, excessive remuneration, advising the conclusion of usurious contracts, and breach of confidentiality. Consequently, the lawyer is liable for the damage suffered by both his client and the opposing party as a result of his lack of competence (*imperitia*), depravity (*malitia*) or negligence (*negligentia*). As for the standard of care, Liguori notes that it must be concretised according to the case, since not every case is equally demanding.

Although Liguori's discussion of the duties of the lawyer was concise, it reverberated for a long time among jurists and theologians alike, even in the Low Countries. In his 1951 book on the history of the legal profession, Bernard Hermesdorf not only quotes Bouricius but also Liguori. Precisely when he discusses the lawyers' liability for lack of competence, Hermesdorf refers to "Saint Alphonsus"[51]. Meanwhile, a number of lexicons had seen the light that should make the work of Liguori more accessible, for example the *Lexicon theologiae moralis* from

[47] A. de Liguori (ed. Gaudé), *Theologia moralis* (Roma, Ex typographia vaticana, 1907), tom. 2, lib. 4, cap. 3, dub. 3 (*Quod sit officium advocati?),* p. 641.

[48] de Liguori (ed. Gaudé), *Theologia moralis*, tom. 2, lib. 4, cap. 3, dub. 3, nr. 223/1°, p. 643.

[49] de Liguori (ed. Gaudé), *Theologia moralis*, tom. 2, lib. 4, cap. 3, dub. 3, nr. 223/4°, p. 644.

[50] de Liguori (ed. Gaudé), *Theologia moralis*, tom. 2, lib. 4, cap. 3, dub. 3, nr. 226/11°, p. 646.

[51] B.H.D. Hermesdorf, *Licht en schaduw in de advocatuur der Lage Landen* (Leiden, Brill, 1951) 53.

1846. In it, a number of the lawyer's duties were taught to the reader in question and answer form. For example, the first question reads, "What are the requirements that the lawyer must fulfil?" Based on Liguori, the answer is: "Required are knowledge, a just cause, loyalty and a just price"[52]. These are requirements that by now were commonplace, also in the deontological literature from non-Catholic quarters. Thus, the Reformed legal practitioner Johannes van der Linden (1756-1835) states in *De ware pleiter* (1827) that accepting unjust cases can only lead to a loss of credibility[53]. Furthermore, he emphasises the importance of the lawyer's expertise in positive law, natural law and Roman law[54].

7. *Concluding remarks*

In a Christian legal culture such as that of early modern Europe, conscience and the all-seeing eye of God always play a role in the background, also in the development of a professional ethics for lawyers[55]. The borderline between the issue of lawyers' liability and the development of a deontological code for the *officium nobile* was wafer-thin in the early modern period. Out of concern for law and justice, authors such as Lessius explicitly addressed issues of lawyers' liability. The question of professional liability as a result of giving harmful advice was central, leading to a reinforcement of the *ius commune* principle that "no obligation arises from an advice that is not fraudulent" (*consilii non fraudulenti nulla obligatio*). However, careful attention was required not only of the lawyer, but also of his client. The lawyer's task as first judge implied an increase in his liability for accepting dubious cases. Advising a client to take legal action in an unjust case was not tolerated, as was the unnecessary prolonging of procedures. Finally, in light of the professionalisation of the legal profession, it is not surprising that over

[52] R. Vercellensis, *Lexicon theologiae moralis, ex operibus S. Alphonsi Mariae de Ligorio depromptum* (s.l. 1846), s.v. *advocatus*, 30.

[53] J. Van der Linden, *De ware pleiter* (Amsterdam, P. den Hengst, 1827) 18. On Van der Linden, cf. T. Wallinga, 'Johannes van der Linden and his draft Code for Holland', *Fundamina. A Journal of Legal History* 16 (2010) 563-577. His views on professional ethics are discussed in R. Verkijk, 'De eer van de stand', *Geschiedenis van de advocatuur in de Lage Landen*, eds. G. Martyn - G. Donker - S. Faber - D. Heirbaut (Hilversum, Verloren, 2009) 171-190.

[54] Van der Linden, *De ware pleiter* 28.

[55] E. Döhring, *Geschichte der deutschen Rechtspflege seit 1500* (Berlin, Duncker & Humbolt, 1953) 156-162. On the metaphor of the all-seeing eye of God and its importance for the development of Western legal culture, see M. Stolleis, *Das Auge des Gesetzes. Geschichte einer Metapher* (München, C.H. Beck, 2004).

time the emphasis on liability for lack of competence increased. In addition to knowledge of essential moral principles, customs, legislation and case law, this competence was considered to consisted first and foremost of a thorough education in the *ius commune*, i.e. the combination of Roman and canon law, supplemented by a reasonable understanding of natural law.

Summary: This contribution highlights the development of an ethics for lawyers in the work of Leonardus Lessius (1554-1623), a theologian-jurist from the Southern Netherlands. Drawing on the *ius commune* and scholastic predecessors, Lessius foremostly addressed the question whether lawyers were responsible for giving harmful advice. He reinforced the *ius commune* principle that "no obligation arises from an advice that is not fraudulent" (*consilii non fraudulenti nulla obligatio*). Lessius also emphasized the lawyer's task as first judge, which implied an increase in his liability for accepting dubious and unjust cases. Advising a client to take legal action in an unjust case was not tolerated, as was the unnecessary prolonging of procedures. Lessius also insisted on lawyers' duty to be well-trained and educated. In light of the professionalisation of the lawyer's profession in the early modern period, it is probably not surprising that he put heavy weight on the adage, based on the *ius commune*, that "incompetence is tantamount to fault" (*imperitia culpae adnumeratur*). The paper ends by giving a taste of how Lessius's doctrine of legal ethics was handed down to other jurists and theologians, from the seventeenth century Netherlands to eighteenth century Italy.

Sommario: Questo contributo mette in luce lo sviluppo di un'etica per gli avvocati nell'opera di Leonardus Lessius (1554-1623), teologo-giurista dei Paesi Bassi meridionali. Attingendo allo *ius commune* e ai predecessori della Scolastica, Lessius affrontò principalmente la questione se gli avvocati fossero responsabili nel dare consigli dannosi. Egli rimise in auge il principio dello *ius commune* che "nessun obbligo nasce da una consiglio non fraudolento" (*consilii non fraudulenti nulla obligatio*). Lessius sottolineò inoltre il compito dell'avvocato come primo giudice, ciò che comporta un aumento della sua responsabilità per l'accettazione di casi dubbi e ingiusti. Non era tollerato consigliare a un cliente di intraprendere un'azione legale in un caso ingiusto, così come l'inutile prolungamento dei processi. Lessius insisteva anche sul dovere degli avvocati di essere ben formati e istruiti. Alla luce della professionalizzazione della professione di avvocato nella prima età moderna, probabilmente non sorprende che egli abbia dato un peso notevole alla massima, basata sullo *ius commune*, che "l'imperizia equivale a colpa" (*imperitia culpae adnumeratur*). Il contributo termina dando un assaggio di come la dottrina etico-giuridica di Lessius sia stata trasmessa ad altri giuristi e teologi, dai Paesi Bassi del Seicento all'Italia del Settecento.

Key Words: Leonardus Lessius; legal ethics; lawyers' liability; School of Salamanca.

Parole chiave: Leonardus Lessius; etica giuridica; responsabilità degli avvocati, Scuola di Salamanca