Book XXIX. Of the Manner of Composing Laws

1. Of the Spirit of a Legislator. I say it, and methinks I have undertaken this work with no other view than to prove it, the spirit of a legislator ought to be that of moderation; political, like moral good, lying always between two extremes.[1] Let us produce an example.

The set forms of justice are necessary to liberty, but the number of them might be so great as to be contrary to the end of the very laws that established them; processes would have no end; property would be uncertain; the goods of one of the parties would be adjudged to the other without examining, or they would both be ruined by examining too much.

The citizens would lose their liberty and security, the accusers would no longer have any means to convict, nor the accused to justify themselves.

2. The same Subject continued. Cecilius, in Aulus Gellius,[2] speaking of the law of the Twelve Tables which permitted the creditor to cut the insolvent debtor into pieces, justifies it even by its cruelty, which hindered people from borrowing beyond their ability of paying.[3] Shall then the cruellest laws be the best? Shall goodness consist in excess, and all the relations of things be destroyed?

3. That the Laws which seem to deviate from the Views of the Legislator are frequently agreeable to them. The law of Solon which declared those persons infamous who espoused no side in an insurrection seemed very extraordinary; but we ought to consider the circumstances in which Greece was at that time. It was divided into very small states; and there was reason to apprehend lest in a republic torn by intestine divisions the soberest part should keep retired, in consequence of which things might be carried to extremity.

In the seditions raised in those petty states the bulk of the citizens either made or engaged in the quarrel. In our large monarchies parties are formed by a few, and the people choose to live quietly, In the latter case it is natural to call back the seditious to the bulk of the citizens, and not these to the seditious; in the other it is necessary to oblige the small number of prudent people to enter among the seditious; it is thus the fermentation of one liquor may be stopped by a single drop of another.

4. Of the Laws contrary to the Views of the Legislator. There are laws so little understood by the legislator as to be contrary to the very end he proposed. Those who made this regulation among the French, that when one of the two competitors died the benefice should devolve to the survivor, had in view, without doubt, the extinction of quarrels; but the very reverse falls out; we see the clergy at variance every day, and like English mastiffs worrying one another to death.

5. The same Subject continued. The law I am going to speak of is to be found in this oath preserved by Æschines:[4] "I swear that I will never destroy a town of the Amphictyones, and that I will not divert the course of its running waters; if any nation shall presume to do such a thing, I will declare war against them and will destroy their towns." The last article of this law, which seems to confirm the first, is really contrary to it. Amphictyon is willing that the Greek towns should never be destroyed, and yet his law paves the way for their destruction. In order to establish a proper law of nations among the Greeks, they ought to have been accustomed early to think it a barbarous thing to destroy a Greek town; consequently they ought not even to ruin the destroyers. Amphictyon's law was just, but it was not prudent; this appears even from the abuse made of it. Did not Philip assume the power of demolishing towns, under the pretence of their having infringed the laws of the Greeks? Amphictyon might have inflicted other punishments; he might have ordained, for example, that a certain number of the magistrates of the destroying town, or of the chiefs of the infringing

army, should be punished with death; that the destroying nation should cease for a while to enjoy the privileges of the Greeks; that they should pay a fine till the town was rebuilt. The law ought, above all things, to aim at the reparation of damages.

6. The Laws which appear the same have not always the same Effect. Cæsar made a law to prohibit people from keeping above sixty sesterces in their houses.[5] This law was considered at Rome as extremely proper for reconciling the debtors to their creditors, because, by obliging the rich to lend to the poor, they enabled the latter to pay their debts. A law of the same nature made in France at the time of the System proved extremely fatal, because it was enacted under a most frightful situation. After depriving people of all possible means of laying out their money, they stripped them even of the last resource of keeping it at home, which was the same as taking it from them by open violence. Cæsar's law was intended to make the money circulate; the French minister's design was to draw all the money into one hand. The former gave either lands or mortgages on private people for the money; the latter proposed in lieu of money nothing but effects which were of no value, and could have none by their very nature, because the law compelled people to accept of them.

7. The same Subject continued. Necessity of composing Laws in a proper Manner. The law of ostracism was established at Athens, at Argos,[6] and at Syracuse. At Syracuse it was productive of a thousand mischiefs, because it was imprudently enacted. The principal citizens banished one another by holding the leaf of a fig-tree in their hands, so that those who had any kind of merit withdrew from public affairs.[7] At Athens, where the legislator was sensible of the proper extent and limits of his law, ostracism proved an admirable regulation. They never condemned more than one person at a time; and such a number of suffrages were requisite for passing this sentence that it was extremely difficult for them to banish aperson whose absence was not necessary to the state.[8]

The power of banishing was exercised only every fifth year: and indeed, as the ostracism was designed against none but great personages who threatened the state with danger, it ought not to have been the transaction of every day.

8. That Laws which appear the same were not always made through the same Motive. In France they have received most of the Roman laws on substitutions, but through quite a different motive from the Romans. Among the latter the inheritance was accompanied with certain sacrifices[9] which were to be performed by the inheritor and were regulated by the pontifical law; hence it was that they reckoned it a dishonour to die without heirs, that they made slaves their heirs, and that they devised substitutions. Of this we have a very strong proof in the vulgar substitution, which was the first invented, and took place only when the heir appointed did not accept of the inheritance. Its view was not to perpetuate the estate in a family of the same name, but to find somebody that would accept of it.

9. That the Greek and Roman Laws punished Suicide, but not through the same Motive. A man, says Plato, who has killed one nearly related to him, that is, himself, not by an order of the magistrate, not to avoid ignominy, but through pusillanimity shall be punished.[10] The Roman law punished this action when it was not committed through pusillanimity, through weariness of life, through impatience in pain, but from a criminal despair. The Roman law acquitted where the Greek condemned, and condemned where the other acquitted.

Plato's law was formed upon the Lacedæmonian institutions, where the orders of the magistrate were absolute, where shame was the greatest of miseries, and pusillanimity the greatest of crimes. The Romans had no longer those refined ideas; theirs was only a fiscal law.

During the time of the republic, there was no law at Rome against suicides; this action is always considered by their historians in a

favourable light, and we never meet with any punishment inflicted upon those who committed it.

Under the first emperors, the great families of Rome were continually destroyed by criminal prosecutions. The custom was then introduced of preventing judgment by a voluntary death. In this they found a great advantage: they had an honourable interment, and their wills were executed, because there was no law against suicides.[11] But when the emperors became as avaricious as cruel, they deprived those who destroyed themselves of the means of preserving their estates by rendering it criminal for a person to make away with himself through a criminal remorse.

What I have been saying of the motive of the emperors is so true, that they consented that the estates of suicides should not be confiscated when the crime for which they killed themselves was not punished with confiscation.[12]

10. That Laws which seem contrary proceed sometimes from the same Spirit. In our time we give summons to people in their own houses; but this was not permitted among the Romans.[13]

A summons was a violent action,[14] and a kind of warrant for seizing the body;[15] hence it was no more allowed to summon a person in his own house than it is now allowed to arrest a person in his own house for debt.

Both the Roman and our laws admit of this principle alike, that every man ought to have his own house for an asylum, where he should suffer no violence.[16]

11. How to compare two different Systems of Laws. In France the punishment for false witnesses is capital; in England it is not. Now, to be able to judge which of these two laws is the best, we must add that

in France the rack is used for criminals, but not in England; that in France the accused is not allowed to produce his witnesses, and that they very seldom admit of what are called justifying circumstances in favour of the prisoner; in England they allow of witnesses on both sides. These three French laws form a close and well-connected system; and so do the three English laws. The law of England, which does not allow of the racking of criminals, has but very little hope of drawing from the accused a confession of his crime; for this reason it invites witnesses from all parts, and does not venture to discourage them by the fear of a capital punishment. The French law, which has one resource more, is not afraid of intimidating the witnesses; on the contrary, reason requires they should be intimidated; it listens only to the witnesses on one side, which are those produced by the attorney-general, and the fate of the accused depends entirely on their testimony.[17] But in England they admit of witnesses on both sides, and the affair is discussed in some measure between them; consequently false witness is there less dangerous, the accused having a remedy against the false witness which he has not in France. Wherefore, to determine which of those systems is most agreeable to reason, we must take them each as a whole and compare them in their entirety.

12. That Laws which appear the same are sometimes really different. The Greek and Roman laws inflicted the same punishment on the receiver as on the thief;[18] the French law does the same. The former acted rationally, but the latter does not. Among the Greeks and Romans the thief was condemned to a pecuniary punishment, which ought also to be inflicted on the receiver; for every man that contributes in what shape soever to a damage is obliged to repair it. But as the punishment of theft is capital with us, the receiver cannot be punished like the thief without carrying things to excess. A receiver may act innocently on a thousand occasions: the thief is always culpable; one hinders the conviction of a crime, the other commits it; in one the whole is passive, the other is active; the thief must surmount more obstacles, and his soul must be more hardened against the laws.

The civilians have gone further; they look upon the receiver as more odious than the thief,[19] for were it not for the receiver the theft, say they, could not be long concealed. But this again might be right when there was only a pecuniary punishment; the affair in question was a damage done, and the receiver was generally better able to repair it; but when the punishment became capital, they ought to have been directed by other principles.

13. That we must not separate Laws from the End for which they were made: of the Roman Laws on Theft. When a thief was caught in the act, this was called by the Romans a manifest theft; when he was not detected till some time afterwards, it was a non-manifest theft.

The law of the Twelve Tables ordained that a manifest thief should be whipped with rods and condemned to slavery if he had attained the age of puberty; or only whipped if he was not of ripe age; but as for the nonmanifest thief, he was only condemned to a fine of double the value of what he had stolen.

When the Porcian laws abolished the custom of whipping the citizens with rods, and of reducing them to slavery, the manifest thief was condemned to a payment of fourfold, and they still continued to condemn the non-manifest thief to a payment of double.[20]

It seems very odd that these laws should make such a difference in the quality of those two crimes, and in the punishments they inflicted. And, indeed, whether the thief was detected either before or after he had carried the stolen goods to the place intended, this was a circumstance which did not alter the nature of the crime. I do not at all question that the whole theory of the Roman laws in relation to theft was borrowed from the Lacedæmonian institutions. Lycurgus, with a view of rendering the citizens dextrous and cunning, ordained that children should be practised in thieving, and that those who were caught in the act should be severely whipped. This occasioned among the Greeks, and

afterwards among the Romans, a great difference between a manifest and a non-manifest theft.[21]

Among the Romans, a slave who had been guilty of stealing was thrown from the Tarpeian rock. Here the Lacedæmonian institutions were out of the question; the laws of Lycurgus in relation to theft were not made for slaves; to deviate from them in this respect was in reality conforming to them.

At Rome, when a person of unripe age happened to be caught in the act, the prætor ordered him to be whipped with rods according to his pleasure, as was practised at Sparta. All this had a more remote origin. The Lacedæmonians had derived these usages from the Cretans; and Plato,[22] who wants to prove that the Cretan institutions were designed for war, cites the following, namely, the power of bearing pain in individual combats, and in thefts which have to be concealed.

As the civil laws depend on the political institutions, because they are made for the same society, whenever there is a design of adopting the civil law of another nation, it would be proper to examine beforehand whether they have both the same institutions and the same political law.

Thus when the Cretan laws on theft were adopted by the Lacedæmonians, as their constitution and government were adopted at the same time, these laws were equally reasonable in both nations. But when they were carried from Lacedæmon to Rome, as they did not find there the same constitution, they were always thought strange, and had no manner of connection with the other civil laws of the Romans.

14. That we must not separate the Laws from the Circumstances in which they were made. It was decreed by a law at Athens that when the city was besieged, all the useless people should be put to death.[23] This was an abominable political law, in consequence of an abominable law of nations. Among the Greeks, the inhabitants of a town taken lost their

civil liberty and were sold as slaves. The taking of a town implied its entire destruction, which is the source not only of those obstinate defences, and of those unnatural actions, but likewise of those shocking laws which they sometimes enacted.

The Roman laws ordained that physicians should be punished for neglect or unskilfulness.[24] In those cases, if the physician was a person of any fortune or rank, he was only condemned to deportation, but if he was of a low condition he was put to death. By our institutions it is otherwise. The Roman laws were not made under the same circumstances as ours: at Rome every ignorant pretender intermeddled with physic; but among us, physicians are obliged to go through a regular course of study, and to take their degrees, for which reason they are supposed to understand their profession.

15. That sometimes it is proper the Law should amend itself. The law of the Twelve Tables allowed people to kill a night-thief as well as a day-thief,[25] if upon being pursued he attempted to make a defence; but it required that the person who killed the thief should cry out and call his fellow-citizens. This is indeed what those laws, which permit people to do justice to themselves, ought always to require. It is the cry of innocence which in the very moment of the action calls in witnesses and appeals to judges. The people ought to take cognizance of the action, and at the very instant of its being done; an instant when everything speaks, even air, countenance, passions, silence; and when every word either condemns or absolves. A law which may become so opposed to the security and liberty of the citizens ought to be executed in their presence.[26]

16. Things to be observed in the composing of Laws. They who have a genius sufficient to enable them to give laws to their own, or to another nation, ought to be particularly attentive to the manner of forming them.

The style ought to be concise. The laws of the Twelve Tables are a model of conciseness; the very children used to learn them by heart.[27] Justinian's Novellæ were so very diffuse that they were obliged to abridge them.[28]

The style should also be plain and simple, a direct expression being better understood than an indirect one. There is no majesty at all in the laws of the lower empire; princes are made to speak like rhetoricians. When the style of laws is inflated, they are looked upon only as a work of parade and ostentation.

It is an essential article that the words of the laws should excite in everybody the same ideas. Cardinal Richelieu[29] agreed that a minister might be accused before the king, but he would have the accuser punished if the facts he proved were not matters of moment. This was enough to hinder people from telling any truth whatsoever against the minister, because a matter of moment is entirely relative, and what may be of moment to one is not so to another.

The law of Honorius punished with death any person that purchased a freedman as a slave, or that gave him molestation.[30] He should not have made use of so vague an expression; the molestation given a man depends entirely on the degree of his sensibility.

When the law has to impose a penalty, it should avoid as much as possible the estimating it in money. The value of money changes from a thousand causes, and the same denomination continues without the same thing. Every one knows the story of that impudent fellow at Rome[31] who used to give those he met a box on the ear, and afterwards tendered them the five-and-twenty pence of the law of the Twelve Tables.

When the law has once fixed the idea of things, it should never return to vague expressions. The ordinance of Louis XIV[32] concerning criminal matters, after an exact enumeration of the causes in which the king is

immediately concerned, adds these words, "and those which in all times have been subject to the determination of the king's judges"; this again renders arbitrary what had just been fixed. Charles VII says[33] he has been informed that the parties appeal three, four, and six months after judgment, contrary to the custom of the kingdom in a country where custom prevailed; he therefore ordains that they shall appeal forthwith, unless there happens to be some fraud or deceit on the part of the attorney,[34] or unless there be a great or evident cause to discharge the appeal. The end of this law destroys the beginning, and it destroys it so effectually, that they used afterwards to appeal during the space of thirty years.[35]

The law of the Lombards does not allow a woman that has taken a religious habit,[36] though she has made no vow, to marry; because, says this law, "if a spouse who has been contracted to a woman only by a ring cannot without guilt be married to another, for a much stronger reason the spouse of God or of the blessed Virgin." Now, I say, that in laws the arguments should be drawn from one reality to another, and not from reality to figure, or from figure to reality.

A law enacted by Constantine[37] ordains that the single testimony of a bishop should be sufficient without listening to any other witnesses. This prince took a very short method; he judged of affairs by persons, and of persons by dignities.

The laws ought not to be subtle; they are designed for people of common understanding, not as an art of logic, but as the plain reason of a father of a family.

When there is no necessity for exceptions and limitations in a law, it is much better to omit them: details of that kind throw people into new details.

No alteration should be made in a law without sufficient reason.

Justinian ordained that a husband might be repudiated and yet the wife not lose her portion, if for the space of two years he had been incapable of consummating the marriage.[38] He altered his law afterwards, and allowed the poor wretch three years.[39] But in a case of that nature two years are as good as three, and three are not worth more than two.

When a legislator condescends to give the reason of his law it ought to be worthy of its majesty. A Roman law decrees that a blind man is incapable to plead, because he cannot see the ornaments of the magistracy.[40] So bad a reason must have been given on purpose, when such a number of good reasons were at hand.

Paul, the jurist, says[41] that a child grows perfect in the seventh month, and that the ratio of Pythagoras' numbers seems to prove it. It is very extraordinary that they should judge of those things by the ratio of Pythagoras' numbers.

Some French lawyers have asserted that when the king made an acquisition of a new country, the churches became subject to the Regale, because the king's crown is round. I shall not examine here into the king's rights, or whether in this case the reason of the civil or ecclesiastic law ought to submit to that of the law of politics; I shall only say that those august rights ought to be defended by grave maxims. Was there ever such a thing known as the real rights of a dignity founded on the figure of that dignity's sign?

Davila says[42] that Charles IX was declared of age in the parliament of Rouen at the commencement of his fourteenth year, because the laws require every moment of the time to be reckoned, in cases relating to the restitution and administration of a ward's estate; whereas it considers the year commenced as a year complete, when the case is concerning the acquisition of honours. I am very far from censuring a regulation which has been hitherto attended with no inconvenience; I

shall only notice that the reason alleged is not the true one; it is false, that the government of a nation is only an honour.

In point of presumption, that of the law is far preferable to that of the man. The French law considers every act of a merchant during the ten days preceding his bankruptcy as fraudulent:[43] this is the presumption of the law. The Roman law inflicted punishments on the husband who kept his wife after she had been guilty of adultery, unless he was induced to do it through fear of the event of a lawsuit, or through contempt of his own shame; this is the presumption of the man. The judge must have presumed the motives of the husband's conduct, and must have determined a very obscure and ambiguous point; when the law presumes, it gives a fixed rule to the judge.

Plato's law,[44] as I have observed already, required that a punishment should be inflicted on the person who killed himself not with a design of avoiding shame, but through pusillanimity. This law was so far defective that in the only case in which it was impossible to draw from the criminal an acknowledgment of the motive upon which he had acted, it required the judge to determine concerning these motives.

As useless laws debilitate such as are necessary, so those that may be easily eluded weaken the legislation. Every law ought to have its effect, and no one should be suffered to deviate from it by a particular exception.

The Falcidian law ordained among the Romans, that the heir should always have the fourth part of the inheritance; another law suffered the testator to prohibit the heir from retaining this fourth part.[45] This is making a jest of the laws. The Falcidian law became useless: for if the testator had a mind to favour his heir, the latter had no need of the Falcidian law; and if he did not intend to favour him, he forbad him to make use of it.

Care should be taken that the laws be worded in such a manner as not to be contrary to the very nature of things. In the proscription of the Prince of Orange, Philip II promises to any man that will kill the prince to give him, or his heirs, five-and-twenty thousand crowns, together with the title of nobility; and this upon the word of a king, and as a servant of God. To promise nobility for such an action! to ordain such an action in the quality of a servant of God! This is equally subversive of the ideas of honour, morality, and religion.

There very seldom happens to be a necessity of prohibiting a thing which is not bad under pretence of some imaginary perfection.

There ought to be a certain simplicity and candour in the laws; made to punish the iniquity of men, they themselves should be clad with the robes of innocence. We find in the law of the Visigoths[46] that ridiculous request, by which the Jews were obliged to eat everything dressed with pork, provided they did not eat the pork itself. This was a very great cruelty: they were obliged to submit to a law contrary to their own; and they were obliged to retain nothing more of their own than what might serve as a mark to distinguish them.

17. A bad Method of giving Laws. The Roman Emperors manifested their will, like our princes, by decrees and edicts; but they permitted, which our princes do not, both the judges and private people to interrogate them by letters in their several differences; and their answers were called rescripts. The decretals of the popes are rescripts, strictly speaking. It is plain that this is a bad method of legislation. Those who thus apply for laws are improper guides to the legislator; the facts are always wrongly stated. Julius Capitolinus says[47] that Trajan often refused to give this kind of rescripts, lest a single decision, and frequently a particular favour, should be extended to all cases. Macrinus had resolved to abolish all those rescripts;[48] he could not bear that the answers of Commodus, Caracalla, and all those other ignorant princes, should be considered as laws. Justinian thought

otherwise, and he filled his compilation with them.

I would advise those who read the Roman laws to distinguish carefully between this sort of hypothesis, and the Senatus Consulta, the Plebiscita, the general constitutions of the emperors, and all the laws founded on the nature of things, on the frailty of women, the weakness of minors, and the public utility.

18. Of the Ideas of Uniformity. There are certain ideas of uniformity, which sometimes strike great geniuses (for they even affected Charlemagne), but infallibly make an impression on little souls. They discover therein a kind of perfection, which they recognize because it is impossible for them not to see it; the same authorized weights, the same measures in trade, the same laws in the state, the same religion in all its parts. But is this always right and without exception? Is the evil of changing constantly less than that of suffering? And does not a greatness of genius consist rather in distinguishing between those cases in which uniformity is requisite, and those in which there is a necessity for differences? In China the Chinese are governed by the Chinese ceremonial and the Tartars by theirs; and yet there is no nation in the world that aims so much at tranquillity. If the people observe the laws, what signifies it whether these laws are the same?

19. Of Legislators. Aristotle wanted to indulge sometimes his jealousy against Plato, and sometimes his passion for Alexander. Plato was incensed against the tyranny of the people of Athens. Machiavel was full of his idol, the Duke of Valentinois. Sir Thomas More, who spoke rather of what he had read than of what he thought, wanted to govern all states with the simplicity of a Greek city.[49] Harrington was full of the idea of his favourite republic of England, while a crowd of writers saw nothing but confusion where monarchy is abolished. The laws always conform to the passions and prejudices of the legislator; sometimes the latter pass through, and only tincture them; sometimes they remain, and are incorporated with them.

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1. Aristotle, Politics, iv. 11.

2. Book xx. 1.

3. Cecilius says that he never saw nor read of an instance in which this punishment had been inflicted; but it is likely that no such punishment was ever established: the opinion of some civilians, that the law of the Twelve Tables meant only the division of the money arising from the sale of the debtor, seems very probable.

4. De Falsa legatione.

5. Dio, xli.

6. Aristotle, Politics, v. 13.

7. Plutarch, Dionysius.

8. See xxvi. 17, p. 223, above.

9. When the inheritance was too much encumbered they eluded the pontifical law by certain sales, whence come the words sine sacris hæreditas.

10. Laws ix.

11. Tacitus, Annals, vi. 29.

12. Rescript of the Emperor Pius in Leg. 3, §§ 1, 2, ff. de bonis eorum qui ante sententiam mortem sibi consciverunt.

13. Leg. 18, ff. de in fus vocando.

14. See the Law of the Twelve Tables.

15. Rapit in jus. -- Horace, Sat., i. 9. Hence they could not summon those to whom a particular respect was due.

16. See Leg. 18, ff. de in jus vocando.

17. By the ancient French law, witnesses were heard on both sides; hence we find in the Institutions of St. Louis, i. 7, that there was only a pecuniary punishment against false witnesses.

18. Leg. 1, ff. de receptatoribus.

19. Ibid.

20. See what Favorinus says in Aulus Gellius, xx. 1.

21. Compare what Plutarch says in the Lycurgus with the laws of the Digest, title De furtis; and the Institutes, iv, tit. 1, §§ 1, 2, 3.

22. Laws, i.

23. Syrian., in Hermog.

24. The Cornelian law De Sicariis, Institutes, iv, tit. 3, de lege Aquilia, § 7.

25. See Leg. 4, ff. ad leg. Aquil.

26. Ibid.; see the decree of Tassillon added to the law of the Bavarians, de popularib. Legib. art. 4.

27. Ut carmen necessarium. -- Cicero, De Leg. ii, 23.

28. It is the work of Irnerius.

29. Testament. Polit.

30. Appendix to the Theodosian code in the first volume of Father Sirmond's works, p. 737.

31. Aulus Gellius, xx. 1.

32. We find in the verbal process of this ordinance the motives that determined him.

33. In his ordinance of Montel-les-Tours, in the year 1453.

34. They might punish the attorney, without there being any necessity of disturbing the public order.

35. The ordinance of the year 1667 has made some regulations upon this head.

36. Book ii, tit. 37.

37. In Father Sirmond's appendix to the Theodosian code, i.

38. Leg. 1, Cod. de repudiis.

39. See the authentic sed hodie, in the Cod. de repudiis.

40. Leg. 1, ff. de Postulando.

41. Sentences, iv. 9.

42. Della guerra civile di Francia, p. 96.

43. It was made on November 18, 1702.

44. Laws, ix.

45. It is the authentic sed cum testator.

46. Book xii, tit. 2, § 16.

47. See Julius Capitolinus, in Macrinus, 13.

48. Ibid.

49. In his Utopia.