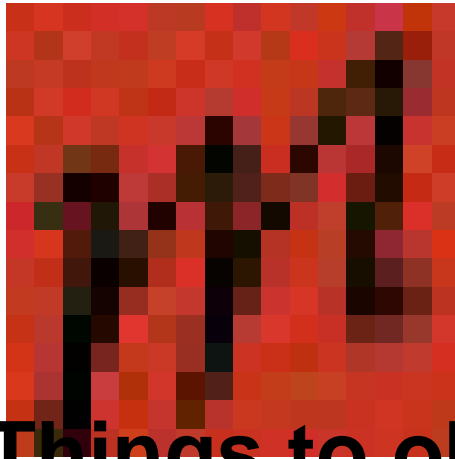


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XXIX.16 Things to observe in the writing of laws

- The Spirit of Law - Book XXIX. On the manner of composing laws -

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Those who have enough breadth of genius to give laws to their nation or to another must be very careful about the manner of shaping them.

Their style should be concise. The laws of the Twelve Tables are a model of precision ; children learned them by heart. [1] Justinian's *Novellæ* are so diffuse that they had to be abridged. [2]

The style of laws should be simple ; direct expression is always better understood than refined expression. There is no majesty in the laws of the late Empire : princes are made to sound like rhetors. [3] When the style of the laws is inflated, they are looked upon as a mere exercise in pomposity.

It is essential that the words of laws evoke the same ideas in everyone. Cardinal de Richelieu conceded that a minister could be accused before the king, but he wanted the accuser to be punished if the things being proved were not significant, [4] which ought to prevent everybody from uttering any truth at all against him, since something significant is entirely relative, and what is significant for one person is not for another.

The law of Honorius punished by death anyone who purchased a freed man as a serf, or would have tried to distress him. [5] Such a vague expression ought not to have been used : the distress one is caused depends entirely on his degree of sensitivity.

When the law must specify a measure, it should as far as possible avoid doing so in terms of money. A thousand causes change the value of currency ; and with the same denomination you no longer have the same thing. Everyone knows the story of the impertinent Roman who would give a slap everyone he ran into and then have presented to them the twenty-five sous of the law of the Twelve Tables. [6]

When in a law the notions of things have been firmly set, it is a mistake to revert to vague expressions. In Louis XIV's criminal ordinance, after the exact enumeration of royal cases, these words are added : "And those which royal judges have in all times judged," [7] which reverts to the arbitrariness which had just been left behind.

Charles VII says he learns that litigants appeal three, four, and six months after the verdict, [8] against the custom of the realm in regions of customary law ; he orders that appeals be immediate, unless there is fraud or deceit by the prosecutor, [9] or unless there is great and obvious cause for hearing the appellant. The end of this law destroys the beginning, and destroys it so thoroughly that later, appeals were made for thirty years. [10]

The law of the Lombards prevents a woman who has taken a nun's habit, though she is not consecrated, from marrying, for, it says, "if a husband who has betrothed a woman to himself with just a ring cannot without crime marry another, *a fortiori the spouse of God or of the Holy Virgin...*" [11] I say that in laws one must reason from reality to reality, and not from the reality to the figure, or from the figure to the reality.

A law of Constantine has the testimony of a bishop suffice, without other witnesses being heard. [12] The prince was taking a terribly short path : he was judging disputes by the persons, and persons by dignities.

The laws are not supposed to be subtle : they are made for people of average intelligence ; they are not an art of logic, but the simple reason of a paterfamilias.

When the exceptions, limitations, and modifications in a law are not necessary, it is much better not to put any in :

such details plunge you into more details.

No change should be made in any law without a sufficient reason. Justinian made it legal to repudiate a husband without the wife's losing her dowry, if for two years he had been unable to consummate the marriage. [13] He changed his law, and allowed the poor fellow three years. [14] But in such a case, two years are as good as three, and three years are not better than two.

When you go so far as to explain a law, the reason has to be worthy of it. A Roman law states that a blind man cannot sue, because he does not see the accouterments of magistracy. [15] Giving such a poor reason, when so many good ones were available, had to be done on purpose.

The jurisconsult Paul says that a child is born perfect in the seventh month, and that the proportion of Pythagoras's numbers seems to prove it. [16] It is singular to judge these things by the ratio of Pythagoras's numbers.

Some French jurisconsults have said that when the king acquired some country, the churches there became subject to *droit de régale*, because the king's crown is round. [17] I shall not discuss here the rights of the king, and whether in this case the reason of civil or ecclesiastical law must yield to the reason of political law ; but I will say that such respectable rights have to be defended by serious maxims. Who has ever seen the real rights of a dignity based on the figure of a sign of that dignity ?

Davila says that Charles IX was declared a major in the Rouen parlement at the beginning of his fourteenth year, because the laws specify counting time from moment to moment, when the matter concerns the restitution and administration of the pupil's assets, whereas it regards the year begun as a complete year when it is a matter of acquiring honors. [18] I have no intention of censuring a provision that so far seems to have had no drawback ; I will say only that the reason they alleged [19] was not the real one : it is far from the truth that the government of peoples is just an honor.

When it comes to presumption, the law's is better than man's. French law [20] regards as fraudulent all of a merchant's transactions in the ten days preceding his bankruptcy : that is the presumption of the law. Roman law inflicted penalties on the husband who kept his wife after adultery, unless he was impelled to it by fear of the outcome of a trial, or the neglect of his own shame : and that is the presumption of man. The judge was required to presume the motives of the husband's conduct, and decide on the basis of a very obscure manner of thinking : when the judge presumes, the verdicts become arbitrary ; when the law presumes, it provides the judge with a fixed rule.

Plato's law, as I have said, would punish the man who killed himself not to escape ignominy, but out of weakness. [21]] This law was flawed in that in the sole case where the criminal could not be induced to admit the motive that had caused him to act, it would have the judge decide on those motives.

As needless laws weaken necessary laws, laws that can be eluded weaken legislation. A law must have its effect, and no one should be allowed to deviate from it by a private agreement.

The Falcidian law specified among the Romans that the heir should always have the fourth part of the inheritance ; another law allowed the testator to prohibit the heir from keeping that fourth part. [22] This is to mock the laws. The Falcidian law became useless, for if the testator wanted to favor his heir, the heir had no need of the Falcidian law ; and if he did not wish to favor him, he prohibited him from invoking the Falcidian law.

Care should be taken that the laws be conceived in a way that they do not clash with the nature of things. In the

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proscription of the prince of Orange, Philip II promises to the person who will kill him to give to him or his heirs twenty-five thousand crowns and nobility : and this as the king's word and as the servant of God. Nobility promised for such an act ! Such an act ordered in his capacity as servant of God ! All of this equally upends notions of honor, of morality, and of religion.

It is rare that one must prohibit something that is not wrong, under pretext of some imaginary perfection.

Laws must embody a certain candor. Made to punish the wickedness of men, they themselves must possess the greatest innocence. We can see a ridiculous petition in the law of the Visigoths [23] by which they obliges the Jews to eat everything prepared with pork, provided they ate none of the pork itself. That is a great cruelty : they were subjected to a law contrary to their own ; they were allowed to keep of their own only what could be a sign to recognize them by.

[1] *Ut carmen necessarium*, Cicero, *Laws*, book II.

[2] It is the work of Irnerius.

[3] [*Rhétteur* : master of eloquence among the Ancients.]

[4] *Political Testament*.

[5] *Aut qualibet manumissione donatum inquietare voluerit*, appendix to the Theodosian code in vol. I of *Oeuvres du Père Sirmond*, p. 737.

[6] Aulus Gellius, book XX, ch. i.

[7] We find in the in the record of this ordinance the motives they had for that.

[8] In his ordinance of Montel-lès-Tours, in the year 1453.

[9] They could punish the prosecutor without any need for disturbing the public order.

[10] The ordinance of 1667 made rulings on this.

[11] Book II, tit. 37.

[12] In the appendix of Father Sirmond to the Théodosian code, vol. I.

[13] Law 1, Codex, *De repudiis*.

[14] See *Authentica, sed hodie*, in the Codex, *De repudiis*.

[15] Law 1, following *De postulando*.

[16] In his *Sentences*, book IV, tit. 9.

[17] [*Droit de régale* = "Droit qui appartient au Roy sur les Benefices. Il consiste à avoir l'administration des revenus des Eveschez durant que le siege est vaquant, et de pourvoir aux Benefices qui y viennent à vaquer pendant ce temps-là." (Furetière).]

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[18] *Della guerra civile di Francia*, p. 96.

[19] *Le Chancelier de l'Hôpital*, *ibidem*.

[20] It is from the month of November 1702.

[21] Book IX of *Laws*.

[22] It is the *Authentica, sed cum testator*.

[23] Book XII, tit. 2, §16.