Medieval Legal and Political Thought

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From Isidore and the Quran to Maimonides and the Incas

By

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General Introduction

Medieval legal and political thought encompasses the period from approximately 500 CE to 1500 CE. The term "Medieval" signifies a period in the middle–and for us it refers to the legal and political thought from the time of the late Roman Empire to that of the Renaissance. The legal and political thought of the Middle Ages is overwhelmingly characterized by the increasing role that religion played in influencing politics and law. By the high Middle Ages, we find the great theorists, Averroes, Maimonides, and Aquinas linking law to their respective religions of Islam, Judaism, and Christianity.

In my previous book on ancient legal and political thought, "Ancient Legal Thought," I argued that from some of the earliest of times, notably Hammurabi's code from 1750 BCE, ancient legal and political thinking was not primitive either conceptually or normatively. Indeed, a concern for justice and especially for equity was the hallmark of the prefaces that accompanied many legal codes. In addition, I argued that it is a mistake to think that legal and political thought became more humane over time, with the thought of the Greeks and Romans at the pinnacle of that thought. Instead, especially if we looked to China and India in ancient times the story that must be told was not one that fit a developmental picture.

In "Medieval Legal and Political Thought," I argue that the so-called Dark Ages has very significant ideas about the law, especially how violence is to be contained, that makes this early Medieval period anything but "Dark." I also argue that the Christianization and Islamicisation of legal and political thought created almost as many problems as solutions to the increasingly diverse times that arose in the middle of the Middle Ages. And I also argue that the late Middle Ages already held many of the most important legal and political ideas of the Renaissance–showing that there was no clear break from the Medieval to the Modern periods of legal and political thought. Of central importance is the way that the development of the idea of conscience made the natural law theories of the Medieval times a robust set of ideas that is still felt quite strongly today.

My method is largely comparative in two senses. First, ideas from one society are compared to ideas from the same society of a somewhat later time. Second, ideas of one society at a certain time are compared to

ideas on a similar topic from another society at about the same time. Often the comparison is not just between two "Western" societies but between Western and Eastern societies. In this sense this work is meant to be multi-cultural and hence we find significant treatment of Islamic legal and political thought as well as that of Indigenous legal and political thought in the Americas and Africa at the end of the Medieval period.

"Medieval Legal and Political Thought" is not a comprehensive history but rather a set of snap-shots–meant to be representative of the history of Medieval legal and political thought to be sure. The category of "legal and political thought" applies quite broadly here to encompass not only the writings of legal and political theorists and lawmakers, but also the understanding of laws and actual institutions as well as their justifications in the way laws and policies were discussed, discarded, and changed. I will be especially interested in laws concerning criminality, the role of women, and slavery.

I am very grateful to editing, formatting, and indexing help that I received from my daughter, Elizabeth May, as well as for many discussions of nearly all of the topics in this book with my wife, Marilyn Friedman.

PART A:

GERMANIC LAW AND BYZANTIUM

INTRODUCTION TO PART A

The first of the Medieval periods is often called the Dark Ages. As we will see, this is a mischaracterization in that there were exciting legal and political ideas of this period, hardly the wasteland that the image of a dark age calls forth. In addition, the Germanic law codes are often known as "barbaric" codes. Today, if not in earlier eras as well, there is such a strongly negative connotation to the idea of anything barbaric that I will not use that term but talk more straight-forwardly of Germanic law. And finally, the rise of Christianity especially in the early medieval period is often contrasted with what is called "pagan" religion. Once again, because of the strongly negative connotations of the term "pagan" I will not use that term either but refer to the various Germanic views of religion.

"Germanic" will refer to the peoples often said to have a similar heritage who lived north of the Rhine River and eventually "invaded" or simply migrated south into various parts of the Roman Empire, principally the Visigoths, Franks, Burgundians, Lombards, and Anglo-Saxons, as well as to a lesser extent the Bavarians and Alamans. There will be much to contrast between the German laws that were promulgated in the Western Roman Empire and the laws promulgated in the Eastern Roman Empire. Here the term "Byzantine" is used, and despite this term having some negative connotations as well, I will employ this term.

One quite fascinating feature of the early medieval period is that the Germanic people who moved across the Rhine River into the Western Roman Empire did not have a fully developed legal system; indeed they often did not have even a written code of law until they encountered the Romans. The Germanic peoples came to develop written legal codes starting from their unwritten customs, as was also true for various ancient peoples. So, there was a clash between peoples who were just developing written codes of law out of the ancient customs of their people with a Roman society that had one of the most highly intricate legal codes of any

era and was already many centuries old. The way the Germanic codes of law were developed in reaction to the law of the Roman Empire will be seen to be utterly fascinating. This is significantly different from the earlier clash of legal ideas between those of the Roman Empire and the Rabbinic tradition, for instance, since the Rabbinic tradition was actually older than the Roman when they confronted each other.

SECTION I.

JUSTICE AND JURISDICTION

CHAPTER 1

JUSTICE AND EQUITY IN GERMANIC LAW AND BYZANTIUM

Let us begin our first chapter by discussing the Burgundians, a Germanic people who seem to have peaceably settled in Roman Gaul (now principally France) starting in the fifth century CE. The Burgundians were recognized by the Roman Empire as "foederati"–a sovereign nation but existing as part of the Empire. Here is Katherine Drew's account:

> the Burgundians had entered the valley of the Rhone peacefully, and perhaps even at the invitation of the Roman provincials who sought to enlist their military aid, so there was not much incentive for either people to enforce their laws or customs on the other. Since the Burgundians were foederati of the Empire and as such entitled to a part of the lands before held entirely by the Romans, there was naturally much need for a code of law to govern commercial and social relations between the two peoples. The Burgundians were evidently willing to live up to the trust which the Gallo-Romans had put in them when they were practically invited to become their rulers, and we find that the Burgundians did not forcibly subject the Roman population of their kingdom to the Burgundian customary law, but rather they attempted to establish codes of law that would be fair to both Burgundians and Romans.[1]

Thus, we find this provision in the Preface of the Burgundian Code, probably compiled between 483 and 517 CE:

> we command that Romans be judged by the Roman laws just as has been established by our predecessors, let them know that they must follow the form and statement of the written law

[1] *The Burgundian Code*, translated with an introduction by Katherine Fischer Drew, Philadelphia, PA: University of Pennsylvania Press, 1949, 1976, p. 5.

> when they render decisions so that no one is excused on grounds of ignorance.[2]

Romans were to be judged by Roman law and Burgundians by Burgundian law even though these two peoples were living side by side in Burgundy.

In this chapter we will first consider how the Burgundian Code differed from other Germanic codes in the fifth and sixth centuries CE concerning conceptions of justice. Then in the second section we will compare the Burgundian and other Germanic codes to the Roman codes existing at that time, principally the Theodosian Code from the fifth century CE as well as the Laws of the Isaurian era dating from the eighth century CE in Byzantium. In the third section we turn specifically to ideas concerning equity in Germanic codes and the codes of Byzantium. In the fourth section we will examine some of the theoretical writing about justice and equity in this period, from the Visigoth, Isidore of Seville, and also the Roman jurists. Finally, we will turn to the writings of Augustine of Hippo who attempts to provide a distinctly Christian take on justice and equity in this early Medieval period.

I. The Early Germanic Codes

The Preface to the Burgundian Code shows that justice and equity were prime considerations for those who drafted the Code:

> For the love of justice, through which God is pleased and the power of earthly kingdoms acquired, we have obtained the consent of our counts (*comites*) and leaders (*proceres*), and have desired to establish such laws that the integrity and equity of those judging may exclude all rewards and corruptions from themselves.[3]

Notice that in addition to the respect shown to justice, integrity, and equity, there is also a testament to the consent of the counts, the main regional leaders of the Burgundians. It therefore seems that whoever drafted the Burgundian code submitted it first to an assembly (of counts) for approval–this was not a code that was imposed on the Burgundian people from on high.

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[2] Ibid., p. 20.
[3] Ibid., p. 18.

> In a set of additional enactments to the Burgundian Code we find that when there is no law that governs a certain set of facts, the assembly is to be consulted along with the group of counts, the regional political rulers. Since cases of this kind arise within our realm for which no provision has yet been made by law, we decree by the present enactment what ought to be observed among our people following a discussion held with our counts (*comites*).[4]

In addition, we find that provisions are made that bind both Burgundian and Roman political leaders.

> We command this especially, that all counts (*comites*), Burgundian as well as Roman, shall maintain justice in all their decisions; let them avenge and punish severely those who have committed violence, assault, or any crime, so that no one may be presumed to commit such acts within our realm. Let them judge all cases according to the laws so that the judge may be bound by the ordinances of justice as the laws of our ancestors sets forth.[5]

Even though the Burgundians generally allowed Romans to be judged by Roman law, when there was a gap in the laws it was the customary laws of the Burgundians that should be used to judge both Burgundians and Romans alike. In the Burgundian Code justice was the key consideration and justice was defined as deciding cases "according to the laws." When the laws, even the customary laws, are not followed, "the people are debased."[6]

The idea that Romans are to be generally judged by Roman law is repeated throughout the Burgundian Code, for example in the following Edict concerning foundlings:

> Since we have learned at the worthy and laudable suggestion of that venerable man Bishop Gimellus that exposed children whom compassion would cause to be taken in are neglected because those who would shelter the foundlings fear that they would be taken from them by legal charges, and so because of lagging compassion the souls of these children perish wretchedly; whereas, having been moved by the just suggestion which has been raised in this case by our father of

[4] Ibid., p. 93.
[5] Ibid., p. 95.
[6] Ibid., p. 95.

> holy memory, we declare by this proclamation and the provisions of the present edict and we state in this declaration of our law that in this matter the rules of the Roman law be observed among Romans and let such litigation as has arisen between Burgundians and Romans be concluded as has been established by us…[7]

To avoid conflicts of law, Romans are to be bound by Roman law and when Burgundians and Romans are in a legal dispute Burgundian law prevails.

Some of the most significant provisions of the Burgundian Code concern the penalties for judges who abuse the system to the disadvantage of litigants:

> our zeal for equity repudiates from ourselves those things which we forbid to all judges under our rule, let our treasury accept nothing more than has been established by the laws concerning payment of fines. Therefore let all nobles, counselors, bailiffs, mayors of our palace, chancellors, counts of the cities or villages, Burgundian as well as Roman, and all appointed judges and military judges know that nothing can be accepted in connection with those suits which have been acted upon or decided, and that nothing can be sought in the name of promise or reward from those litigating; nor can the parties (to the suit) be compelled by the judge to make a payment in order that they receive anything (from their suit). But if any of those mentioned, corrupted against our laws, or even judging justly, has been convicted of receiving rewards from suits or decisions, and the crime has been proved, let him be punished capitally as an example to all.[8]

The use of the death penalty applied to corrupt judges and other officials extended to all Burgundians as well as to Romans. And it is the concept of equity, of basic fairness in how officials treat litigants, which is the key– indeed it is a "zeal" for equity that is said to motivate the Burgundian Code.

This code, compiled in the late 5th and early 6th centuries, displays such sensitivity to the ideas of justice and equity that it would be a misnomer to call it "barbaric" as this term is used in even some of the most recent translations, albeit perhaps for lack of a better term. Some of the other Germanic codes from this period displayed more or less contact

[7] Ibid., p. 92.
[8] Ibid., p. 18.

with Roman law. The Visigothic code shows perhaps the most contact and the codes of Anglo-Saxons the least. The most original of the Germanic codes is that compiled by the Lombards, which governed most of the Western Roman Empire long after the Franks defeated the Lombards.

Here is part of the Preface to the Edict of Rothair, who was a king of the Lombards:

> The most noble Rothair, king of the Lombards, together with his principal judges, issues this lawbook in the name of the Lord…The collection which follows makes evident how great was and is our care and solicitude for the welfare of our subjects; for we recognize that it is not only the numerous demands of the wealthy which should carry weight, but also the burdensome trials of the poor are important… We desire that these laws be brought together in one volume so that everyone may lead a secure life in accordance with law and justice…[9]

This code of laws was issued in 643 by Rothair and it, along with other Lombard laws, remained in effect until the 10th century. Unlike the Burgundian Code, the Lombard laws remained in effect even after the Lombards were conquered by the Franks in 775.[10]

We can see from the preface of Rothair's Edict that justice was to be even-handed, with the interests of the wealthy as well as the poor considered important. Yet it seems that the Burgundian Code considered the interests of the poor, especially foundlings, to be given strong weight that required judges to show compassion to them but not to those who could help and chose not to do so. It is not completely clear that this is the case since the Burgundian Code has little to say about the wealthy. What is clearer is that the Lombard laws were more comprehensive than the Burgundian Code. As we next see, the Visigothic Code was even more comprehensive than these other two, making it a competitor of the Theodosian Code which governed the affairs of the Romans at this period.

Like the other Germanic codes of law of the early medieval period, the Visigothic Code begins by discussing the role of justice in law-making and law-interpreting.

> In all legislation the law should be fully and explicitly set forth, that perfection and not partiality, may be secured….The

[9] King Rothair, "Rothair's Edict," in *The Lombard Laws*, translated by Katherine Fischer Drew, Philadelphia, PA: University of Pennsylvania Press, 1973, p. 39.
[10] See ibid., p. 21.

> law is the rival of divinity; the oracle of religion; the source of instruction; the artificer of right; the guardian and promoter of good morals; the rudder of the state; the messenger of justice; the mistress of life; the soul of the body politic…The law should be plain, and not lead any citizen to commit error or fraud. It should be suitable to the place and time, according to the character and custom of the state; prescribing justice and equity… For men are better armed with equity than with weapons; and the prince should rather employ justice against an enemy than the soldier his javelin; and the success of the prince will be more conspicuous when a reputation for justice accompanies him…[11]

Here justice is conceived as a moral value that law must aspire toward. In this respect we see already the influence of Roman Stoicism as well as early Christianity that makes early medieval legal and political thought different from the legal and political thought of the late ancient period even though it is still the Roman Empire that plays a crucial role.

We can cite one more of the Germanic codes at the beginning of our study to show the growing influence of theological considerations in the formation of law codes, in this case the law of the Salian Franks, which begins as follows:

> With the aid of God, it was decided and agreed among the Franks and their notables in order that peace be established among themselves, that all increase in litigation be curtailed so that just as the Franks stand out from other peoples living around them by the strength of their arms so also they shall excel them in the authority of their laws. Thus they [the Franks] will provide an end to criminal actions according to the nature of the cause. Therefore from among many men four were chosen…These men, meeting together in three different courts and discussing the causes of all disputes, gave judgment in each case in the following fashion.[12]

Here, we have really two grounds for the authority of law–"the aid of God" and also the agreement or consent of the Franks to be governed by the laws that the chosen four had promulgated.

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[11] *The Visigothic Code*, Title II, sections 1-6, translated by S. P. Scott, Boston: The Boston Book Company, 1910, pp. 5-6.

[12] *The Laws of the Salian Franks*, translated by Katherine Fischer Drew, Philadelphia: University of Pennsylvania Press, 1991, p. 59.

II. The Theodosian Code and Laws of the Isaurian Era

The Theodosian Code compiled in the Eastern Roman Empire can be profitably contrasted with the Germanic codes of the West. This code was promulgated at about the same time as the Burgundian Code, and we can cite a few provisions to see some contrasts with the Germanic codes. While justice had an important place in the legal thought of the Roman Empire, the Theodosian Code makes it clear that it is the emperor, not the judges, who shall have the last word in what counts as the just interpretation and application of the law.

> There must be no dispute concerning an imperial judgment, for it is a kind of sacrilege to doubt whether the person whom the Emperor has selected is worthy. If, therefore, any judge should be found who supposed that his own arrogance should be preferred to the imperial judgment, his office staff shall be compelled to pay five pounds of gold…[13]

And here we see one of the clear differences between at least some of the Germanic codes of law and that of the Roman Empire–it is not an assembly of the people that is the source of law's authority, but the emperor.

As with the Code and Digest of Justinian (promulgated a century later but at the time never recognized as superior to the Theodosian Code), the writings of five Roman Jurists are considered sources of law:

> We confirm all of the writings of Papinian, Paulus, Gaius, Ulpian, and Modestinus, so that the same authority shall attend Gaius as Paulus, Ulpian and the others, and passages from the whole body of his writings may be cited… Moreover when conflicting opinions are cited, the greater number of the authors shall prevail, or if the number should be equal, the authority of that group shall take precedence in which the man of superior genius, Papinian, shall tower above the rest…[14]

As we will see, it will later be Christian authors who are given this status as sources of law, but in the early medieval period Roman jurists before the Christianization of the Empire are those jurists most highly regarded.

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[13] Emperor Theodosius II, *The Theodosian Code*, I.6.9, translated by Clyde Pharr, Princeton, NJ: Princeton University Press, 1952, p. 19.
[14] Ibid., Book I.4.3, p. 15.

Justice and equity are crucial concepts for any legal system, and this is certainly true of the Byzantine legal system of the Eastern Roman Empire. By the time of *The Ecloga*, promulgated in 741, we find that the severity of the Theodosian Code as well as that of Justinian, has been softened. *The Ecloga* begins as follows:

> A selection of the laws compiled in a concise form by Leo and Constantine, the wise and piety loving emperors, from the Institutes, Digest, Code, and Novels of Justinian the Great, and corrected to be more humane… Let those who have been appointed by our piety to judge cases and entrusted with the just weighing of our pious laws consider and understand these things, and conduct themselves accordingly…and by these we hope to restore in us the ancient standard of justice of the state.[15]

Notice here the explicit reference to the correction of the previous codes of the Roman Empire so as to make them more humane. Also note that the authors of *The Ecloga* think that justice has been besmirched and that there is a need to return to "the ancient standard of justice."

The Ecloga was largely a compilation of laws from earlier codes including that of Theodosian and Justinian. But the task of the drafters of the Ecloga and later codes was to make those corrections and changes that brought the law codes into better harmony with the distinctly Christian understandings of mercy, especially for those who were oppressed.

It is thus somewhat surprising that the Ecloga speaks of returning to more ancient conceptions of justice. One possible interpretation here is that certain ancient understandings of law, especially concerning the ancient Athenians, but also some of the much earlier views of the Babylonians and Israelites, tasked the lawgiver with the role of protecting widows, orphans, the poor, and aliens. As I have argued at great length elsewhere, ancient legal codes also stressed that they were authoritative insofar as they were espousing humane treatment especially of those who were weak or oppressed.[16]

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[15] *The Ecloga*, in *The Laws of the Isaurian Era*, translated by Mike Humphreys, Liverpool: Liverpool University Press, 2017, pp. 34-37.

[16] Larry May, *Ancient Legal Thought*, Cambridge: Cambridge University Press, 2019.

III. Equity in the Early Medieval Codes

In the Burgundian Code, as we have seen, a "zeal for equity" is claimed to govern all judges. In addition, integrity is linked with equity as inspiring judges to "exclude all rewards and corruptions."[17] And in the Visigothic Code, we are told that "men are better armed with equity than with weapons."[18] And it is equity again that is appealed to when judges are corrupted:

> If any judge should render judgment for the sake of gain, and direct that anyone should be treated with injustice, he who has been benefitted by the decision of the said judge shall make restitution. And the judge himself, who has thus acted contrary to the precepts of equity, shall surrender to the losing party the same amount of his own property, as he has ordered him to be deprived.[19]

As in the Roman law codes, equity is given pride of place, along with justice, in the Germanic codes.

Yet, equity seems to be given a somewhat broader definition in the Germanic codes than in Roman legal thought. In the Burgundian and Visigothic codes we have just quoted, equity seems to be a matter of fair decision-making, where it is corruption rather than the overly strict justice that is the main concern. Theorists like Isidore of Seville, as we will see, have a conception of equity more closely connected to the Roman ideas.

In the legal code of Alfred the Great, promulgated in the late 9th century, we find that the Anglo-Saxon idea of mercy is given prominence. Here are some provisions:

> Injure ye not the widows and the step-children, nor hurt them anywhere: for if ye do otherwise, they will cry unto me, and I will hear them, and I will then slay you with my sword; and I will so do that your wives shall be widows, and your children shall be step children. If thou give money in loan to thy fellow who willeth to dwell with thee, urge him not as a 'niedling,' and oppress him not with the increase. If a man have only a single garment wherewith to cover himself, or to wear, and he

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[17] *The Burgundian Code*, translated with an introduction by Katherine Fischer Drew, Philadelphia, PA: University of Pennsylvania Press, 1949, 1976, p, 18.
[18] *The Visigothic Code*, Title II, sections 1-6, translated by S. P. Scott, Boston: The Boston Book Company, 1910, p. 6.
[19] Ibid., p. 28.

> give it [to thee] in pledge; let it be returned before sunset. If thou dost not so, then shall he call unto me.[20]

Here these Anglo-Saxon laws display mercy and humaneness even if not specifically identified as forms of equity.

We can also look at the most important of the Roman codes of this period, The Theodosian Code, to see how equity was treated in Byzantium. Here is a provision of Book I of that code:

> When We are persuaded by entreaty to temper or to mitigate the rigor of the law in a special case, the regulation shall be observed that rescripts that are interpreted before the posting of the edict shall have their own validity, and a prior rescript shall not be derogated by a later one… it is necessary that We alone shall investigate an interpretation that has been interposed between equity and the law.[21]

Here equity is connected with the idea of mitigating the rigor of the law. But just a bit later, equity is linked with the proper understanding of justice and the law:

> With reference to those persons that demand that a decision rendered by a governor or by any other judge be invalidated, the examination of the case by Your Sublimity shall proceed under the limitation that if, when the fundamental features of the case have been examined in every detail, it should be clearly evident that the decision departed from law and justice, that decision shall be completely abolished, and the controversy shall come to an end in accordance with equity.[22]

And here equity can allow for the overriding of a statute law if equity is consistent with a broader understanding of justice and the law. Indeed, in a slightly earlier law, equity is linked with the eternal law for its source[23]– hence eternal law in effect overrides statute law if there is a conflict.

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[20] King Alfred, "The Laws of King Alfred," in *Ancient Laws and Institutes of England,* vol. I, edited by Benjamin Thorpe, Cambridge: Cambridge University Press, 1840, p. 53.

[21] *The Theodosian Code*, I.2.3, translated by Clyde Pharr, Princeton, NJ: Princeton University Press, 1952, p. 13.

[22] Ibid., Book I.5.3, p. 16.

[23] See *The Sirmondian Constitutions*, Title 15, in *The Theodosian Code*, I.2.3, translated by Clyde Pharr, Princeton, NJ: Princeton University Press, 1952, p. 485.

IV. Isidore on Equity

In his work, the *Sententiae*, Isidore of Seville has much to say about the nature of equity. In this early 7th century work, Isidore says this about judges:

> There are four ways in which human judgment is perverted: by fear, greed, hatred, and love. By fear when we are afraid to speak the truth out of fear of someone's power; by greed when we are corrupted by the reward of some bribe; by hatred when we are stirred up to be an adversary of someone; by love when we strive to prefer a friend or family member. In these four ways equity is often violated and innocence is often harmed.[24]

Here equity is a feature of good or fair judgment. And Isidore also tells us that impartiality, which is a synonym for equity, is a balancing of justice on one side and mercy on the other.[25]

Isidore is especially concerned with what he calls the "oppressors of the poor." These oppressors "should know that they are deserving of more serious sentences."[26] It seems that the more severe sentences than would otherwise be deserved according to strict justice are also justified on grounds of equity–the intermediate between justice and mercy. While the text is not completely clear in this respect, Isidore seems to capture what other ancient legal theorists had called equity when he seeks that virtue of judges who consider the special circumstances of those people such as the poor. Isidore is also concerned with what he calls "wicked judges" who have the capacity to "maim poor people more gravely than the cruelest of enemies."[27]

In one of Isidore's other major works to survive, the *Etymologies*, he gives the following account:

> People are for the most part unaware of the origin of certain terms. Consequently we have included a number in this work for their informational value… Fair (*aequus*), meaning "naturally just," from 'equity' (*aequitas*), that is after the idea of what is

[24] Isidore of Seville, *The Sententiae*, book III.54.7, translated by Thomas Knoebel, NY: The Newman Press, 2018, p. 207.
[25] Ibid., Book III.52.4, p. 201.
[26] Ibid., Book III.57.1, p. 208.
[27] Ibid., Book III.52.7, p. 204