Book XXVI. Of Laws in Relation to the Order of Things Which They Determine

1. Idea of this Book. Men are governed by several kinds of laws; by the law of nature; by the divine law, which is that of religion; by ecclesiastical, otherwise called canon law, which is that of religious polity; by the law of nations, which may be considered as the civil law of the whole globe, in which sense every nation is a citizen; by the general political law, which relates to that human wisdom whence all societies derive their origin; by the particular political law, the object of which is each society; by the law of conquest founded on this, that one nation has been willing and able, or has had a right to offer violence to another; by the civil law of every society, by which a citizen may defend his possessions and his life against the attacks of any other citizen; in fine, by domestic law, which proceeds from a society's being divided into several families, all which have need of a particular government.

There are therefore different orders of laws, and the sublimity of human reason consists in perfectly knowing to which of these orders the things that are to be determined ought to have a principal relation, and not to throw into confusion those principles which should govern mankind.

2. Of Laws divine and human. We ought not to decide by divine laws what should be decided by human laws; nor determine by human what should be determined by divine laws.

These two sorts of laws differ in their origin, in their object, and in their nature.

It is universally acknowledged, that human laws are, in their own nature, different from those of religion; this is an important principle: but this principle is itself subject to others, which must be inquired into.

1. It is in the nature of human laws to be subject to all the accidents which can happen, and to vary in proportion as the will of man changes; on the contrary, by the nature of the laws of religion, they are never to vary. Human laws appoint for some good; those of religion for the best: good may have another object, because there are many kinds of good; but the best is but one; it cannot therefore change. We may alter laws, because they are reputed no more than good; but the institutions of religion are always supposed to be the best.

2. There are kingdoms in which the laws are of no value as they depend only on the capricious and fickle humour of the sovereign. If in these kingdoms the laws of religion were of the same nature as the human institutions, the laws of religion too would be of no value. It is however, necessary to the society that it should have something fixed; and it is religion that has this stability.

3. The influence of religion proceeds from its being believed; that of human laws from their being feared. Antiquity accords with religion, because we have frequently a firmer belief in things in proportion to their distance; for we have no ideas annexed to them drawn from those times which can contradict them. Human laws, on the contrary, receive advantage from their novelty, which implies the actual and particular attention of the legislator to put them in execution.

3. Of civil Laws contrary to the Law of Nature. If a slave, says Plato, defends himself, and kills a freeman, he ought to be treated as a parricide.[1] This is a civil law which punishes self-defence, though dictated by nature.

The law of Henry VIII which condemned a man without being confronted by witnesses was contrary to self-defence. In order to pass sentence of condemnation, it is necessary that the witnesses should know whether the man against whom they make their deposition is he whom they accuse, and that this man be at liberty to say, "I am not the person you mean."

The law passed during the same reign, which condemned every woman, who, having carried on a criminal commerce did not declare it to the king before she married him, violated the regard due to natural modesty. It is as unreasonable to oblige a woman to make this declaration, as to oblige a man not to attempt the defence of his own life.

The law of Henry II which condemned the woman to death who lost her child, in case she did not make known her pregnancy to the magistrate, was not less contrary to self-defence. It would have been sufficient to oblige her to inform one of her nearest relatives, who might watch over the preservation of the infant.

What other information could she give in this situation, so torturing to natural modesty? Education has heightened the notion of preserving that modesty; and in those critical moments scarcely has she any idea remaining of the loss of life.

There has been much talk of a law in England which permitted girls seven years old to choose a husband.[2] This law was shocking in two ways; it had no regard to the time when nature gives maturity to the understanding, nor to that in which she gives maturity to the body.

Among the Romans, a father might oblige his daughter to repudiate her husband, though he himself had consented to the marriage.[3] But it is contrary to nature for a divorce to be in the power of a third person.

A divorce can be agreeable to nature only when it is by consent of the two parties, or at least of one of them; but when neither consents it is a monstrous separation. In short, the power of divorce can be given only to those who feel the inconveniences of marriage, and who are sensible of the moment when it is for their interest to make them cease.

4. The same Subject continued. Gundebald, King of Burgundy, decreed that if the wife or son of a person guilty of robbery did not reveal the

crime, they were to become slaves.[4] This was contrary to nature: a wife to inform against her husband! a son to accuse his father! To avenge one criminal action, they ordained another still more criminal.

The law of Recessuinthus permits the children of the adulteress, or those of her husband, to accuse her, and to put the slaves of the house to the torture.[5] How iniquitous the law which, to preserve a purity of morals overturns nature, the origin, the source of all morality!

With pleasure we behold in our theatres a young hero express as much horror against the discovery of his mother-in-law's guilt, as against the guilt itself. In his surprise, though accused, judged, condemned, proscribed, and covered with infamy, he scarcely dares to reflect on the abominable blood whence Phædra sprang; he abandons the most tender object, all that is most dear, all that lies nearest his heart, all that can fill him with rage, to deliver himself up to the unmerited vengeance of the gods. It is nature's voice, the sweetest of all sounds, that inspires us with this pleasure.

5. Cases in which we may judge by the Principles of the civil Law in limiting the Principles of the Law of Nature. An Athenian law obliged children to provide for their fathers when fallen into poverty;[6] it excepted those who were born of a courtesan,[7] those whose chastity had been infamously prostituted by their father, and those to whom he had not given any means of gaining a livelihood.[8]

The law considered that, in the first case, the father being uncertain, he had rendered the natural obligation precarious; that in the second, he had sullied the life he had given, and done the greatest injury he could do to his children in depriving them of their reputation; that in the third, he had rendered insupportable a life which had no means of subsistence. The law suspended the natural obligation of children because the father had violated his; it looked upon the father and the son as no more than two citizens, and determined in respect to them only

from civil and political views; ever considering that a good republic ought to have a particular regard to manners. I am apt to think that Solon's law was a wise regulation in the first two cases, whether that in which nature has left the son in ignorance with regard to his father, or that in which she even seems to ordain he should not own him; but it cannot be approved with respect to the third, where the father had only violated a civil institution.

6. That the Order of succession or Inheritance depends on the Principles of political or civil Law, and not on those of the Law of Nature. The Voconian law ordained that no woman should be left heiress to an estate, not even if she had an only child. Never was there a law, says St. Augustine, more unjust.[9] A formula of Marculfus treats that custom as impious which deprives daughters of the right of succeeding to the estate of their fathers.[10] Justinian gives the appellation of barbarous to the right which the males had formerly of succeeding in prejudice to the daughters.[11] These notions proceeded from their having considered the right of children to succeed to their father's possessions as a consequence of the law of nature; which it is not.

The law of nature ordains that fathers shall provide for their children; but it does not oblige them to make them their heirs. The division of property, the laws of this division, and the succession after the death of the person who has had this division can be regulated only by the community, and consequently by political or civil laws.

True it is that a political or civil order frequently demands that children should succeed to their father's estate; but it does not always make this necessary.

There may be some reasons given why the laws of our fiefs appoint that the eldest of the males, or the nearest relatives of the male side, should have all, and the females nothing, and why, by the laws of the Lombards,[12] the sisters, the natural children, the other relatives;

and, in their default, the treasury might share the inheritance with the daughters.

It was regulated in some of the dynasties of China that the brothers of the emperor should succeed to the throne, and that the children should not. If they were willing that the prince should have a certain degree of experience, if they feared his being too young, and if it had become necessary to prevent eunuchs from placing children successively on the throne, they might very justly establish a like order of succession, and when some writers have treated these brothers as usurpers, they have judged only by ideas received from the laws of their own countries.[13]

According to the custom of Numidia,[14] Desalces, brother of Gala, succeeded to the kingdom; not Massinissa, his son. And even to this day, among the Arabs in Barbary, where each village has its chief, they adhere to this ancient custom, by choosing the uncle, or some other relative to succeed.[15]

There are monarchies merely elective; and since it is evident that the order of succession ought to be derived from the political or civil laws, it is for these to decide in what cases it is agreeable to reason that the succession be granted to children, and in what cases it ought to be given to others.

In countries where polygamy is established, the prince has many children; and the number of them is much greater in some of these countries than in others. There are states[16] where it is impossible for the people to maintain the children of the king; they might therefore make it a law that the crown shall devolve, not on the king's children, but on those of his sister.

A prodigious number of children would expose the state to the most dreadful civil wars. The order of succession which gives the crown to the children of the sister, the number of whom is not larger than those

of a prince who has only one wife, must prevent these inconveniences.

There are people among whom reasons of state, or some maxims of religion, have made it necessary that the crown should be always fixed in a certain family: hence, in India, proceeds the jealousy of their tribes,[17] and the fear of losing the descent; they have there conceived that never to want princes of the blood royal, they ought to take the children of the eldest sister of the king.

A general maxim: it is an obligation of the law of nature to provide for our children; but to make them our successors is an obligation of the civil or political law. Hence are derived the different regulations with respect to bastards in the different countries of the world; these are according to the civil or political laws of each country.

7. That we ought not to decide by the Precepts of Religion what belongs only to the Law of Nature. The Abassines have a most severe lent of fifty days, which weakens them to such a degree that for a long time they are incapable of business: the Turks do not fail to attack them after their lent.[18] Religion ought, in favour of the natural right of self-defence, to set bounds to these customs.

The Jews were obliged to keep the Sabbath; but it was an instance of great stupidity in this nation not to defend themselves when their enemies chose to attack them on this day.[19]

Cambyses, laying siege to Pelusium, set in the first rank a great number of those animals which the Egyptians regarded as sacred; the consequence was that the soldiers of the garrison durst not molest them. Who does not see that self-defence is a duty superior to every precept?

8. That we ought not to regulate by the Principles of the canon Law Things which should be regulated by those of the civil Law. By the civil law of the Romans,[20] he who took a thing privately from a sacred place

was punished only for the guilt of theft; by the canon law, he was punished for the crime of sacrilege.[21] The canon law takes cognizance of the place; the civil laws of the fact. But to attend only to the place is neither to reflect on the nature and definition of a theft, nor on the nature and definition of sacrilege.

As the husband may demand a separation by reason of the infidelity of his wife, the wife might formerly demand it on account of the infidelity of the husband.[22] This custom, contrary to a regulation made in the Roman laws,[23] was introduced into the ecclesiastic court,[24] where nothing was regarded but the maxims of canon law; and indeed, if we consider marriage as a thing merely spiritual, and as relating only to the things of another life, the violation is in both cases the same, but the political and civil laws of almost all nations have, with reason, made a distinction between them. They have required from the women a degree of reserve and continency which they have not exacted from the men, because in women, a violation of chastity supposes a renunciation of all virtue; because women, by violating the laws of marriage, quit the state of their natural dependence; because nature has marked the infidelity of women with certain signs; and, in fine, because the children of the wife born in adultery necessarily belong and are an expense to the husband, while the children produced by the adultery of the husband are not the wife's, nor are an expense to the wife.

9. That Things which ought to be regulated by the Principles of civil Law can seldom be regulated by those of Religion. The laws of religion have a greater sublimity; the civil laws a greater extent.

The laws of perfection drawn from religion have more in view the goodness of the person that observes them than of the society in which they are observed; the civil laws, on the contrary, have more in view the moral goodness of men in general than that of individuals.

Thus, venerable as those ideas are which immediately spring from

religion, they ought not always to serve as a first principle to the civil laws; because these have another, the general welfare of society.

The Romans made regulations among themselves to preserve the morals of their women; these were political institutions. Upon the establishment of monarchy, they made civil laws on this head, and formed them on the principles of their civil government. When the Christian religion became predominant, the new laws that were then made had less relation to the general rectitude of morals than to the holiness of marriage; they had less regard to the union of the two sexes in a civil than in a spiritual state.

At first, by the Roman law, a husband, who brought back his wife into his house after she had been found guilty of adultery, was punished as an accomplice in her debauch.[25] Justinian, from other principles, ordained that during the space of two years he might go and take her again out of the monastery.[26]

Formerly, when a woman, whose husband was gone to war, heard no longer any tidings of him, she might easily marry again, because she had in her hands the power of making a divorce. The law of Constantine obliged the woman to wait four years, after which she might send the bill of divorce to the general; and, if her husband returned, he could not then charge her with adultery.[27] But Justinian decreed that, let the time be never so long after the departure of her husband, she should not marry unless, by the deposition and oath of the general, she could prove the death of her husband.[28] Justinian had in view the indissolubility of marriage; but we may safely say that he had it too much in view. He demanded a positive proof when a negative one was sufficient; he required a thing extremely difficult to give, an account of the fate of a man at a great distance, and exposed to so many accidents; he presumed a crime, that is, a desertion of the husband, when it was so natural to presume his death. He injured the commonwealth by obliging women to live out of marriage; he injured individuals by exposing them to a thousand dangers.

The law of Justinian, which ranked among the causes of divorce the consent of the husband and wife to enter into a monastery, was entirely opposite to the principles of the civil laws.[29] It is natural that the causes of divorce should have their origin in certain impediments which could not be foreseen before marriage; but this desire of preserving chastity might be foreseen, since it is in ourselves. This law favours inconstancy in a state which is by its very nature perpetual; it shook the fundamental principle of divorce, which permits the dissolution of one marriage only from the hope of another. In short, if we view it in a religious light, it is no more than giving victims to God without a sacrifice.

10. In what Case we ought to follow the civil Law which permits, and not the Law of Religion which forbids. When a religion which prohibits polygamy is introduced into a country where it is permitted, we cannot believe (speaking only as a politician) that the laws of the country ought to suffer a man who has many wives to embrace this religion; unless the magistrate or the husband should indemnify them, by restoring them in some way or other to their civil state. Without this their condition would be deplorable; no sooner would they obey the laws than they would find themselves deprived of the greatest advantages of society.

11. That human Courts of Justice should not be regulated by the Maxims of those Tribunals which relate to the Other Life. The tribunal of the inquisition, formed by the Christian monks on the idea of the tribunal of penitence, is contrary to all good policy. It has everywhere met with a general dislike, and must have sunk under the oppositions it met with, if those who were resolved to establish it had not drawn advantages even from these oppositions.

This tribunal is insupportable in all governments. In monarchies, it only makes informers and traitors; in republics, it only forms dishonest men; in a despotic state, it is as destructive as the government itself.

12. The same Subject continued. It is one abuse of this tribunal that, of two persons accused of the same crime, he who denies is condemned to die; and he who confesses avoids the punishment. This has its source in monastic ideas, where he who denies seems in a state of impenitence and damnation; and he who confesses, in a state of repentance and salvation. But a distinction of this kind can have no relation to human tribunals. Human justice, which sees only the actions, has but one compact with men, namely, that of innocence; divine justice, which sees the thoughts, has two, that of innocence and repentance.

13. In what Cases, with regard to Marriage, we ought to follow the Laws of Religion; and in what Cases we should follow the civil Laws. It has happened in all ages and countries, that religion has been blended with marriages. When certain things have been considered as impure or unlawful, and had nevertheless become necessary, they were obliged to call in religion to legitimate in the one case, and to reprove in others.

On the other hand, as marriage is of all human actions that in which society is most interested, it became proper that this should be regulated by the civil laws.

Everything which relates to the nature of marriage, its form, the manner of contracting it, the fruitfulness it occasions, which has made all nations consider it as the object of a particular benediction, a benediction which, not being always annexed to it, is supposed to depend on certain superior graces; all this is within the resort of religion.

The consequences of this union with regard to property, the reciprocal advantages, everything which has a relation to the new family, to that from which it sprang, and to that which is expected to arise; all this relates to the civil laws.

As one of the great objects of marriage is to take away that uncertainty

which attends unlawful conjunctions, religion here stamps its seal, and the civil laws join theirs to it, to the end that it may be as authentic as possible. Thus, besides the conditions required by religion to make a marriage valid, the civil laws may still exact others.

The civil laws receive this power from their being additional obligations, and not contradictory ones. The law of religion insists upon certain ceremonies, the civil laws on the consent of fathers; in this case, they demand something more than that of religion, but they demand nothing contrary to it.

It follows hence, that the religious law must decide whether the bond be indissoluble or not; for if the laws of religion had made the bond indissoluble, and the civil laws had declared it might be broken, they would be contradictory to each other.

Sometimes the regulations made by the civil laws with respect to marriage are not absolutely necessary; such are those established by the laws, which, instead of annulling the marriage, only punish those who contract it.

Among the Romans, the Papian law declared those marriages illegal which had been prohibited, and yet only subjected them to a penalty;[30] but a Senatus Consultum, made at the instance of the Emperor Marcus Antoninus, declared them void; there then no longer subsisted any such thing as a marriage, wife, dowry, or husband.[31] The civil laws determine according to circumstances: sometimes they are most attentive to repair the evil; at others, to prevent it.

14. In what instances Marriages between Relatives shall be regulated by the Laws of Nature: and in what instances by the civil Laws. With regard to the prohibition of marriage between relatives, it is a thing extremely delicate to fix exactly the point at which the laws of nature stop and where the civil laws begin. For this purpose we must establish

some principles.

The marriage of the son with the mother confounds the state of things: the son ought to have an unlimited respect for his mother, the wife an unlimited respect for her husband; therefore the marriage of the mother to her son would subvert the natural state of both.

Besides, nature has forwarded in women the time in which they are able to have children, but has retarded it in men; and, for the same reason, women sooner lose this ability and men later. If the marriage between the mother and the son were permitted, it would almost always be the case that when the husband was capable of entering into the views of nature, the wife would be incapable.

The marriage between the father and the daughter is contrary to nature, as well as the other; but it is not less contrary, because it has not these two obstacles. Thus the Tartars, who may marry their daughters,[32] never marry their mothers, as we see in the accounts we have of that nation.[33]

It has ever been the natural duty of fathers to watch over the chastity of their children. Entrusted with the care of their education, they are obliged to preserve the body in the greatest perfection, and the mind from the least corruption; to encourage whatever has a tendency to inspire them with virtuous desires, and to nourish a becoming tenderness. Fathers, always employed in preserving the morals of their children, must have a natural aversion to everything that can render them corrupt. Marriage, you will say, is not a corruption; but before marriage they must speak, they must make their persons beloved, they must seduce; it is this seduction which ought to inspire us with horror.

There should be therefore an insurmountable barrier between those who ought to give the education, and those who are to receive it, in order to prevent every kind of corruption, even though the motive be lawful.

Why do fathers so carefully deprive those who are to marry their daughters of their company and familiarity?

The horror that arises against the incest of the brother with the sister should proceed from the same source. The desire of fathers and mothers to preserve the morals of their children and families untainted is sufficient to inspire their offspring with a detestation of everything that can lead to the union of the two sexes.

The prohibition of marriage between cousins-german has the same origin. In the early ages, that is, in the times of innocence, in the ages when luxury was unknown, it was customary for children[34] upon their marriage not to remove from their parents, but settle in the same house; as a small habitation was at that time sufficient for a large family; the children of two brothers, or cousins-german,[35] were considered both by others and themselves as brothers. The estrangement then between the brothers and sisters as to marriage subsisted also between the cousins-german.[36] These principles are so strong and no natural that they have had their influence almost over all the earth, independently of any communication. It was not the Romans who taught the inhabitants of Formosa[37] that the marriage of relatives of the fourth degree was incestuous; it was not the Romans that communicated this sentiment to the Arabs;[38] it was not they who taught it to the inhabitants of the Maldivian islands.[39]

But if some nations have not rejected marriages between fathers and children, sisters and brothers, we have seen in the first book, that intelligent beings do not always follow the law of nature. Who could have imagined it! Religious ideas have frequently made men fall into these mistakes. If the Assyrians and the Persians married their mothers, the first were influenced by a religious respect for Semiramis, and the second did it because the religion of Zoroaster gave a preference to these marriages.[40] If the Egyptians married their sisters, it proceeded from the wildness of the Egyptian religion, which consecrated

these marriages in honour of Isis. As the spirit of religion leads us to attempt whatever is great and difficult, we cannot infer that a thing is natural from its being consecrated by a false religion.

The principle which informs us that marriages between fathers and children, between brothers and sisters, are prohibited in order to preserve natural modesty in families will help us to the discovery of those marriages that are forbidden by the law of nature, and of those which can be so only by the civil law.

As children dwell, or are supposed to dwell in their father's house, and consequently the son-in-law with the mother-in-law, the father-in-law with the daughter-in-law, or wife's daughter, the marriage between them is forbidden by the law of nature, in this case the resemblance has the same effect as the reality, because it springs from the same cause; the civil law neither can, nor ought to permit these marriages.

There are nations, as we have already observed, among whom cousins-german are considered as brothers, because they commonly dwell in the same house; there are others where this custom is not known. Among the first the marriage of cousins-german ought to be regarded as contrary to nature; not so among the others.

But the laws of nature cannot be local. Therefore, when these marriages are forbidden or permitted, they are, according to the circumstances, permitted or forbidden by a civil law.

It is not a necessary custom for the brother-in-law and the sister-in-law to dwell in the same house. The marriage between them is not then prohibited to preserve chastity in the family; and the law which forbids or permits it is not a law of nature, but a civil law, regulated by circumstances and dependent on the customs of each country: these are cases in which the laws depend on the morals, or customs of the inhabitants.

The civil laws forbid marriages when by the customs received in a certain country they are found to be in the same circumstances as those forbidden by the law of nature; and they permit them when this is not the case. The prohibitions of the laws of nature are invariable, because the thing on which they depend is invariable; the father, the mother and the children necessarily dwell in the same house. But the prohibitions of the civil laws are accidental because they depend on an accidental circumstance, cousins-german and others dwelling in the house by accident.

This explains why the laws of Moses, those of the Egyptians,[41] and of many other nations permitted the marriage of the brother-in-law with the sister-in-law; whilst these very marriages were disallowed by other nations.

In the Indies they have a very natural reason for admitting this sort of marriages. The uncle is there considered as the father and is obliged to maintain and educate his nephew as if he were his own child; this proceeds from the disposition of this people, which is good-natured and full of humanity. This law or this custom has produced another; if a husband has lost his wife, he does not fail to marry her sister:[42] which is extremely natural, for his new consort becomes the mother of her sister's children, and not a cruel stepmother.

15. That we should not regulate by the Principles of political Law those Things which depend on the Principles of civil Law. As men have given up their natural independence to live under political laws, they have given up the natural community of goods to live under civil laws.

By the first, they acquired liberty; by the second, property. We should not decide by the laws of liberty, which, as we have already said, is only the government of the community, what ought to be decided by the laws concerning property. It is a paralogism to say that the good of the individual should give way to that of the public; this can never take

place, except when the government of the community, or, in other words, the liberty of the subject is concerned; this does not affect such cases as relate to private property, because the public good consists in every one's having his property, which was given him by the civil laws, invariably preserved.

Cicero maintains that the Agrarian laws were unjust; because the community was established with no other view than that every one might be able to preserve his property.

Let us, therefore, lay down a certain maxim, that whenever the public good happens to be the matter in question, it is not for the advantage of the public to deprive an individual of his property, or even to retrench the least part of it by a law, or a political regulation. In this case we should follow the rigour of the civil law, which is the Palladium of property.

Thus when the public has occasion for the estate of an individual, it ought never to act by the rigour of political law; it is here that the civil law ought to triumph, which, with the eyes of a mother, regards every individual as the whole community.

If the political magistrate would erect a public edifice, or make a new road, he must indemnify those who are injured by it; the public is in this respect like an individual who treats with an individual. It is fully enough that it can oblige a citizen to sell his inheritance, and that it can strip him of this great privilege which he holds from the civil law, the not being forced to alienate his possessions.

After the nations which subverted the Roman empire had abused their very conquests, the spirit of liberty called them back to that of equity. They exercised the most barbarous laws with moderation: and if any one should doubt the truth of this, he need only read Beaumanoir's admirable work on jurisprudence, written in the twelfth century.

They mended the highways in his time as we do at present. He says, that when a highway could not be repaired, they made a new one as near the old as possible; but indemnified the proprietors at the expense of those who reaped any advantage from the road.[43] They determined at that time by the civil law; in our days, we determine by the law of politics.

16. That we ought not to decide by the Rules of the civil Law when it is proper to decide by those of the political Law. Most difficulties on this subject may be easily solved by not confounding the rules derived from property with those which spring from liberty.

Is the demesne of a state or government alienable, or is it not? This question ought to be decided by the political law, and not by the civil. It ought not to be decided by the civil law, because it is as necessary that there should be demesnes for the subsistence of a state, as that the state should have civil laws to regulate the disposal of property.

If then they alienate the demesne, the state will be forced to make a new fund for another. But this expedient overturns the political government, because, by the nature of the thing, for every demesne that shall be established, the subject will always be obliged to pay more, and the sovereign to receive less; in a word, the demesne is necessary, and the alienation is not.

The order of succession is, in monarchies, founded on the welfare of the state; this makes it necessary that such an order should be fixed to avoid the misfortunes, which I have said must arise in a despotic kingdom, where all is uncertain, because all is arbitrary.

The order of succession is not fixed for the sake of the reigning family; but because it is the interest of the state that it should have a reigning family. The law which regulates the succession of individuals is a civil law, whose view is the interest of individuals; that which regulates the succession to monarchy is a political law, which has in

view the welfare and preservation of the kingdom.

It follows hence, that when the political law has established an order of succession in government, and this order is at an end, it is absurd to reclaim the succession in virtue of the civil law of any nation whatsoever. One particular society does not make laws for another society. The civil laws of the Romans are no more applicable than any other civil laws. They themselves did not make use of them when they proceeded against kings; and the maxims by which they judged kings are so abominable that they ought never to be revived.

It follows also hence, that when the political law has obliged a family to renounce the succession, it is absurd to insist upon the restitutions drawn from the civil law. Restitutions are in the law, and may be good against those who live in the law: but they are not proper for such as have been raised up for the law, and who live for the law.

It is ridiculous to pretend to decide the rights of kingdoms, of nations, and of the whole globe by the same maxims on which (to make use of an expression of Cicero)[44] we should determine the right of a gutter between individuals.

17. The same Subject continued. Ostracism ought to be examined by the rules of politics, and not by those of the civil law; and so far is this custom from rendering a popular government odious, that it is, on the contrary, extremely well adapted to prove its lenity. We should be sensible of this ourselves, if, while banishment is always considered among us as a penalty, we are able to separate the idea of ostracism from that of punishment.

Aristotle[45] tells us, it is universally allowed, that this practice has something in it both humane and popular. If in those times and places where this sentence was executed they found nothing in it that appeared odious; is it for us who see things at such a distance to think

otherwise than the accuser, the judges and the accused themselves?

And if we consider that this judgment of the people loaded the person with glory on whom it was passed; that when at Athens it fell upon a man without merit,[46] from that very moment they ceased to use it;[47] we shall find that numbers of people have obtained a false idea of it; for it was an admirable law that could prevent the ill consequences which the glory of a citizen might produce by loading him with new glory.

18. That it is necessary to inquire whether the Laws which seem contradictory are of the same Class. At Rome the husband was permitted to lend his wife to another. Plutarch tells us this in express terms.[48] We know that Cato lent his wife to Hortensius,[49] and Cato was not a man to violate the laws of his country.

On the other hand, a husband who suffered his wife to be debauched, who did not bring her to justice, or who took her again after her condemnation was punished.[50] These laws seem to contradict each other, and yet are not contradictory. The law which permitted a Roman to lend his wife was visibly a Lacedæmonian institution, established with a view of giving the republic children of a good species, if I may be allowed the term; the other had in view the preservation of morals. The first was a law of politics, the second a civil law.

19. That we should not decide those Things by the civil Law which ought to be decided by domestic Laws. The law of the Visigoths enjoins that the slaves of the house shall be obliged to bind the man and woman they surprise in adultery, and to present them to the husband and to the judge:[51] a terrible law, which puts into the hands of such mean persons, the care of public, domestic, and private vengeance!

This law can be nowhere proper but in the seraglios of the East, where the slave who has the charge of the enclosure is deemed an accomplice upon the discovery of the least infidelity. He seizes the criminals, not

so much with a view to bring them to justice, as to do justice to himself, and to obtain a scrutiny into the circumstances of the action, in order to remove the suspicion of his negligence.

But, in countries where women are not guarded, it is ridiculous to subject those who govern the family to the inquisition of their slaves.

This inquisition may, in certain cases, be at the most a particular domestic regulation, but never a civil law.

20. That we ought not to decide by the Principles of the civil Laws those Things which belong to the Law of Nations. Liberty consists principally in not being forced to do a thing, where the laws do not oblige: people are in this state only as they are governed by civil laws; and because they live under those civil laws, they are free.

It follows hence, that princes who live not among themselves under civil laws are not free; they are governed by force; they may continually force, or be forced. Hence it follows that treaties made by force are as obligatory as those made by free consent. When we, who live under civil laws, are, contrary to law, constrained to enter into a contract, we may, by the assistance of the law, recover from the effects of violence: but a prince, who is always in that state in which he forces, or is forced, cannot complain of a treaty which he has been compelled to sign. This would be to complain of his natural state; it would seem as if he would be a prince with respect to other princes, and as if other princes should be subjects with respect to him; that is, it would be contrary to the nature of things.

21. That we should not decide by political Laws Things which belong to the Law of Nations. Political laws demand that every man be subject to the natural and civil courts of the country where he resides, and to the censure of the sovereign.

The law of nations requires that princes shall send ambassadors; and a reason drawn from the nature of things does not permit these ambassadors to depend either on the sovereign to whom they are sent, or on his tribunals. They are the voice of the prince who sends them, and this voice ought to be free; no obstacle should hinder the execution of their office: they may frequently offend, because they speak for a man entirely independent; they might be wrongfully accused, if they were liable to be punished for crimes: if they could be arrested for debts, these might be forged. Thus a prince, who has naturally a bold and enterprising spirit, would speak by the mouth of a man who had everything to fear. We must then be guided, with respect to ambassadors, by reasons drawn from the law of nations, and not by those derived from political law. But if they make an ill use of their representative character, a stop may be put to it by sending them back. They may even be accused before their master, who becomes either their judge or their accomplice.

22. The unhappy State of the Inca Athualpa. The principles we have just been establishing were cruelly violated by the Spaniards. The Inca Athualpa[52] could not be tried by the law of nations: they tried him by political and civil laws; they accused him for putting to death some of his own subjects, for having many wives &c., and to fill up the measure of their stupidity, they condemned him, not by the political and civil laws of his own country, but by the political and civil laws of theirs.

23. That when, by some Circumstance, the political Law becomes destructive to the State, we ought to decide by such a political Law as will preserve it, which sometimes becomes a Law of Nations. When that political law which has established in the kingdom a certain order of succession becomes destructive to the body politic for whose sake it was established, there is not the least room to doubt but another political law may be made to change this order; and so far would this law be from opposing the first that it would in the main be entirely conformable to it, since both would depend on this principle, that THE SAFETY OF THE

PEOPLE IS THE SUPREME LAW.

I have said[53] that a great state becoming accessory to another is itself weakened, and even weakens the principal. We know that it is for the interest of the state to have the supreme magistrate within itself, that the public revenues be well administered, and that its specie be not sent abroad to enrich another country. It is of importance that he who is to govern has not imbibed foreign maxims; these are less agreeable than those already established. Besides, men have an extravagant fondness for their own laws and customs: these constitute the happiness of every community; and, as we learn from the histories of all nations, are rarely changed without violent commotions and a great effusion of blood.

It follows hence, that if a great state has for its heir the possessor of a great state, the former may reasonably exclude him, because a change in the order of succession must be of service to both countries. Thus a law of Russia, made in the beginning of the reign of Elizabeth, most wisely excluded from the possession of the crown every heir who possessed another monarchy; thus the law of Portugal disqualifies every stranger who lays claim to the crown by right of blood.

But if a nation may exclude, it may with greater reason be allowed a right to oblige a prince to renounce. If the people fear that a certain marriage will be attended with such consequences as shall rob the nation of its independence, or dismember some of its provinces, it may very justly oblige the contractors and their descendants to renounce all right over them; while he who renounces, and those to whose prejudice he renounces, have the less reason to complain, as the state might originally have made a law to exclude them.

24. That the Regulations of the Police are of a different Class from other civil Laws. There are criminals whom the magistrate punishes, there are others whom he reproves. The former are subject to the power

of the law, the latter to his authority: those are cut off from society; these they oblige to live according to the rules of society.

In the exercise of the Police, it is rather the magistrate who punishes, than the law; in the sentence passed on crimes, it is rather the law which punishes, than the magistrate. The business of the Police consists in affairs which arise every instant, and are commonly of a trifling nature: there is then but little need of formalities. The actions of the Police are quick; they are exercised over things which return every day: it would be therefore improper for it to inflict severe punishments. It is continually employed about minute particulars; great examples are therefore not designed for its purpose. It is governed rather by regulations than laws; those who are subject to its jurisdiction are incessantly under the eye of the magistrate: it is therefore his fault if they fall into excess. Thus we ought not to confound a flagrant violation of the laws, with a simple breach of the Police; these things are of a different order.

Hence it follows, that the laws of an Italian republic,[54] where bearing fire-arms is punished as a capital crime and where it is not more fatal to make an ill use of them than to carry them, is not agreeable to the nature of things.

It follows, moreover, that the applauded action of that emperor who caused a baker to be impaled whom he found guilty of a fraud, was the action of a sultan who knew not how to be just without committing an outrage on justice.

25. That we should not follow the general Disposition of the civil Law, in things which ought to be subject to particular Rules drawn from their own Nature. Is it a good law that all civil obligations passed between sailors in a ship in the course of a voyage should be null? Francis Pirard tells us[55] that, in his time, it was not observed by the Portuguese, though it was by the French. Men who are together only for a

short time, who have no wants, since they are provided for by the prince; who have only one object in view, that of their voyage; who are no longer in society, but are only the inhabitants of a ship, ought not to contract obligations that were never introduced but to support the burden of civil society.

In the same spirit was the law of the Rhodians, made at a time when they always followed the coasts; it ordained that those who during a tempest stayed in a vessel should have ship and cargo, and those who quitted it should have nothing.

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1. Laws, ix.

2. M. Bayle, in his Criticism on the History of Calvinism, speaks of this law, p. 263.

3. See Leg. 5. Cod. de repudiis et judicio de moribus sublato.

4. Law of the Burgundians, tit. 47.

5. In the Code of the Visigoths, iii, tit. 4, § 13.

6. Under pain of infamy, another under pain of imprisonment.

7. Plutarch. Solon.

8. Ibid., and Gallien, in Exhort. ad Art., 8.

9. City of God, iii. 21.

10. Book ii. 12.

11. Nov. 21.

12. Book ii, tit. 14, § 6, 7, and 8.

13. Father Du Halde on the Second Dynasty.

14. Livy, xxix. 29.

15. Shaw, Travels, i, p. 402.

16. See the Collection of Voyages that Contributed to the Establishment of the East India Company, iv, part I, p. 114. And Mr. Smith, Voyage to Guinea, part II, p. 150, concerning the kingdom of Juida.

17. See Edifying Letters, coll. xiv, and the Voyages that Contributed to the Establishment of the East India Company, iii, part II, p. 644.

18. Collection of Voyages that Contributed to the Establishment of the East India Company, iv, part I, pp. 35, 103.

19. As they did when Pompey besieged the Temple. Dio, xxxvii, 16.

20. Leg., 5, ff. ad. leg. Juliam peculatus.

21. Cap. quisquis 17, quæstione 4. Cujas, Observat., xiii. 19, tom. iii.

22. Beaumanoir, Ancient Customs of Beauvoisis, 18, § 6.

23. Leg. 1. Cod. ad. leg. Jul. de adulteriis.

24. At present they do not take cognizance of these things in France.

25. Leg. ii, § ult., ff. ad. leg. Jul. de adultenis.

26. Nov. 134. Col. 9, cap. x, tit. 170.

27. Leg. 7, Cod. de repudiis, et juricio de morib. sublato.

28. Auth. Hodie quantiscumque. Cod. de repudiis.

29. Auth. Quod hodie. Cod. de repudiis.

30. See what has been said on this subject, in book xxiii. 21, in the relation they bear to the number of inhabitants.

31. See Leg. 16, ff. de ritu nuptiarum, and Leg. 3, § 1; also Dig. de donationibus inter virum et uxorem.

32. This law is very ancient among them. Attila, says Priscus, in his embassy stopped in a certain place to marry Esca his daughter. "A thing permitted," he adds, "by the laws of the Scythians," p. 22.

33. History of the Tartars, part III, p. 256.

34. It was thus among the ancient Romans.

35. Among the Romans they had the same name; the cousins-german were called brothers.

36. It was thus at Rome in the first ages, till the people made a law to permit them; they were willing to favour a man extremely popular, who had married his cousin-german. Plutarch's treatise entitled Questions Concerning the Affairs of the Romans.

37. Collection of Voyages to the Indies, v, part 1. An account of the state of the isle of Formosa.

38. Koran, chapter "On Women."

39. See Francis Pirard.

40. They were considered as more honourable. See Philo, De Specialibus legib. quæ pertinet ad præcepta decalogi, p. 778, Paris, 1640.

41. See Leg. 8, Cod. de incestis et inutilibus nuptiis.

42. Edifying Letters, coll. xiv, p. 403.

43. "The lord appointed collectors to receive the toll from the peasant, the gentlemen were obliged to contribute by the count, and the clergy to the bishop." -- Beaumanoir, 25, §§ 13, 17.

44. De Leg., i.

45. Politics, iii. 13.

46. Hyperbolus. See Plutarch, Aristides.

47. It was found opposite to the spirit of the legislator. See below, xxix. 7.

48. Plutarch in his comparison between Lycurgus and Numa.

49. Plutarch, Cato the Younger.

50. Leg. 11 § ult., ff. ad. leg. Jul. de adulteriis.

51. Law of the Visigoths, iii, tit. 4, § 6.

52. See Garcilasso de la Vega, p. 108.

53. See v. 14; viii. 16-20; ix. 4-7; and x. 9, 10.

54. Venice.

55. Chapter 14, part XII.