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 humor 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.[a] 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

[a] Lib. IX. "on Laws."

every woman, who, having carried on a criminal commerce, did not declare it to the king before her marriage, 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.[b] 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.[c] 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.[d] 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 adulter-

b Mr. Bayle, in his "Criticism on the History of Calvinism," speaks of this law, p. 263.

c See Law 5, in the code "de repudiis et judicio de moribus sublato."

d Law of the Burgundians, tit. 47.

ess, or those of her husband, to accuse her, and to put the slaves of the house to the torture.[e] 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[f] 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;[g] it excepted those who were born of a courtesan,[h] those whose chastity had been infamously prostituted by their father, and those to whom he had not given any means of gaining a livelihood.[i]

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

e In the code of the Visigoths, lib. III. tit. 4, sec. 13.

f Hippolyte; see the "Phèdre" of Racine, act. IV. sc. 2.—Ed.

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

h Plutarch, "Life of Solon."

i Ibid., and Gallienus, in "exhort, ad art." cap. viii.

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.[j] A formula of Marculfus treats that custom as impious which deprives daughters of the right of succeeding to the estate of their fathers.[k] Justinian gives the appellation of barbarous to the right which the males had formerly of succeeding in prejudice to the daughters.[l] 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,[m] 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

[j] "De Civitate Dei," lib. IV.
[k] Lib. II. cap. xii.
[l] "Novell." 21.
[m] Lib. II. tit. 14, sec. 6, 7, and 8.

writers have treated these brothers as usurpers, they have judged only by ideas received from the laws of their own countries.[n]

According to the custom of Numidia,[o] 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.[p]

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[q] 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,[r] 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.

[n] Du Halde "on the Second Dynasty."
[o] Livy, decad. 3, lib. VI.
[p] Shaw's "Travels," vol. i. p. 402.
[q] See the "Collection of Voyages that contributed to the establishment of an East India Company," vol. iv. part I. p. 114. And Mr. Smith's "Voyage to Guinea," part II. p. 150, concerning the kingdom of Judia.
[r] See "Edifying Letters," Let. 14, and the "Voyages that contributed to the establishment of an East India Company," vol. iii. part II. p. 644.

7.—*That we ought not to decide by the Precepts of Religion what belongs only to the Law of Nature*

The Abyssinians have a most severe fast 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.[s] Religion ought, in favor 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.[t]

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[u] 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.[v] 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.[w] This custom, contrary to a regulation made in the Roman laws,[x] was introduced into the ecclesiastic court,[y] 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

[s] "Collection of Voyages that contributed to the establishment of an East India Company," vol. iv. pp. 35 and 103.

[t] As they did when Pompey besieged the Temple. Dio. XXXVI.—Ed.

[u] Leg. ff. "ad leg. Juliam peculatus."

[v] Capite quisquis 17, quæstione 4. "Cujas" observat. lib. XIII. cap. xix. tom. iii.

[w] Beaumanoir "on the ancient customs of Beauvoisis," chap. xviii.

[x] Law of the first Code, "ad leg. Juliam de adulteriis."

[y] At present they do not take cognizance of these things in France.

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.[z] Justinian, from other principles, ordained that during the space of two years he might go and take her again out of the monastery.[a]

[z] Leg. 11, sec. ult. ff. "ad leg. Juliam de adulteriis."

[a] "Nov." 134. Col. 9, cap. x. tit. 170.

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.[b] 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.[c] 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.[d] 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 favors 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

b Leg. 7, "de repudiis, et judicio de morib. sublato."
c Auth. hodie quantiscumque cod. "de repudiis."
d Auth. quod hodie cod. "de repudiis."

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;[e] 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

[e] See what has been said on this subject, in book XXIII. chap. 21, in the relation they bear to the number of inhabitants.

husband.[f] 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,[g] never marry their mothers, as we see in the accounts we have of that nation.[h]

It has ever been the natural duty of fathers to watch over the chastity of their children. Intrusted 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

[f] See law 16, ff. "de ritu nuptiarum"; and law 3, sec. 1, also Digest, "de donationibus inter virum et uxorem."

[g] 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.

[h] "Hist. of the Tartars," part III. p. 236.

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 *i* 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,*j* 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.*k* These principles are so strong and so 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,*l* that the marriage of relatives of the fourth degree was incestuous; it was not the Romans that communicated this sentiment to the Arabs; *m* it was not they who taught it to the inhabitants of the Maldivian islands.*n*

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 always follow the law of nature. Who could have imagined it! Religious ideas have frequently

i It was thus among the ancient Romans.

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

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

l "Collection of Voyages to the Indies," vol. v. part I. An account of the state of the isle of Formosa.

m Koran, chapter "on Women."

n See Francis Pirard.

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.*o* If the Egyptians married their sisters, it proceeded from the wildness of the Egyptian religion, which consecrated these marriages in honor 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

o They were considered as more honorable. See Philo, "de specialibus legib. quæ pertinet ad præcepta decalogi." Paris 1640, p. 778.