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LECTURE THE SECOND.

OF CIVIL, POSITIVE, OR INSTITUTED LAW.

HAVING treated of that primeval moral Law, to which all men are naturally subjected by their Creator, and the means of attaining to the knowledge of it, I proceed now to take a general view of the works of human legislators.

These positive institutions are termed Civil Law, as being not universal, like the former; but, according to the expression in the Imperial Institutes*; *proprium ipsius civilatis, peculiar to some political community or state; thus, it is there added, we may speak of the civil law of the Athenians, of the Romans, or any other people. They suppose therefore the existence of civil society, and consequently lead us first to inquire what is understood to be a nation, using its own laws, and describing by its boundaries the sphere of their operation.

This wants, the fears, and the natural sociability of man-kind, co-operating with united strength, so forcibly call upon us to associate for mutual defence and accommodation, that it is difficult to conceive, there ever existed a number of individuals, living together in the same territory independently, and

* L. I. c. 1. le. 1.
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without any order or government; which Plato seems to treat as an utter impossibility. Barbeyrac indeed affirms to recount instances of this kind; and Puffendorf agrees, that it was not peculiar to ancient Sicily, to have such inhabitants as Homer describes, holding no public assemblies, observing no general laws, or order of government, each bearing sway in his own family, and careless of the conduct and concerns of others. It is equally pertinent to remark, that this account, even by so early an author, is introduced among poetical wonders, and adventures exciting admiration. Such state of life, if it ever existed, must have been of short duration; for the opinion of Aristotle, which he so often and confidently repeats, " Cronos 
 καταγωνισθεὶς ἄμαχος," is not easily refuted. Whether a desire of mere security, or a precept of the comforts and conveniences of life, influenced the first founders of commonwealths, each of these ends was unattainable by an unconnected multitude, at least unless we could suppose not one, but even all men, to excel and be confirmed in virtue, above temptation, and above suspicion. Reason, therefore, dictated the necessity of civil associations.

Before I proceed to define these associations, called nations or states, I shall consider two points, not improper for previous enquiry; one concerning what ought to be deemed the immediate or efficient cause of political union at the origin thereof, the other respecting the right of migration from an established commonwealth.

Firstly then I would observe, that this promptitude, this aptness to civil life, which I have described as implanted in our

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natures, and approved by reason, rests only in matter of indubitable. That which originally constitutes a nation, is common content, felt or expected; for every state must have had some origin, before which it did not exist as such, however uncertain or remote the period. The people then assumed relations, which they had not before, which were no part of their natural condition, and which were the result of their own free agency.

Neither would it weaken the foregoing argument, if I should add, that the becoming members of civil society is an act from which man ought not morally to abstain; for nature and reason point it out to him as the will of his Creator. But still obedience thereto is an operation of the human will.

It is common content therefore, expressly or virtually given, which actually forms and ratifies civil associations. The other matters are reasons only, however strong, impelling that content.

Here I cannot but take notice, that the celebrated commentator on the laws of England forms to speak of the origin of society as a distinct thing from that of a civil government, professing he cannot believe there ever was a time when there was no such thing as society. If he refers to economical relations, to parental authority, and stipulated mastership and service between individuals; if he means what may be termed domestic society, or even such intercourse as the famenics of country and manners must produce; then the scriptural account of the primitive ages, certainly (as he alleges) confirms his and the universal opinion. For was the non-existence of such society ever asserted or supposed? Does this affect the present inquiry? Surely the question relates only to civis union; any degree whereof, however rude, is absolutely indispensable from some kind of civil laws and government. These cannot be disjoined even in idea, and must for their validity be referred to one and the same original.

"Ταύτα δ' ου αρχαίοι διαδιδόμενοι, ζητηνέναι ἄκατα γείνοντας ἀναθημάτων ἀνευρέσατ' ἄκατον γείνοντος." Παλαιὸς καὶ ἀληθευόμενος ἀληθεύομεν αληθευόμενος.
6 Paff. b. vii. c. 1. § 5. Of ob. 1. x. 111. 56c.
The author indeed declares, that when society is once formed, government results of course. But society is not formed, the relations of civil life do not begin, till government is erected. Even supposing (for the sake of being more periphrastic) that men's intention of forming a civil community, was taken as a previous stipulation, before they agreed on the constitution of any kind of government, still they would not really become a state; society would not be actually formed, notwithstanding the former vote, till the date of political superiority and subjection. Civil society therefore implies the coevality of civil government.

That elegant writer contrasts society with an "unconceived state of nature." Hence he appears by society to mean political association or connexions: for the rights and relations of private life are not excluded from a state of nature. If this be the meaning, then the scriptural account has been understood so differently from the sense for which he alleges it, that the patriarchal age is one of the influences cited by Barbevray to shew there was a time when men lived exempt from civil government and laws.

However the historical fact may be of a social contract, government ought to be, and is generally considered as founded on consent, tacit or express, on a real, or pactum compac. This theory is a material basis of political rights; and as a theoretical point is not difficult to be maintained. For what gives any legislature a right to act, where no express consent can be shown? What, but immemorial usage? and what is the intrinsic force of immemorial usage, in establishing this fundamental or any other law, but that it is evidence of common acquiescence and consent? Not that such consent is subsequently revocable, at the will even of all the subjects of the state, for that would be making a part of the community equal in power to the whole originally, and superior to the rulers thereof after their establishment.

But why indeed should an express social contract appear so strange as never to have happened in any age or country? A multitude of wandering families might perhaps at the same time fix their abode, build their contiguous huts, and establish an arbitrator of their differences, or agree on some rude principles of civil order. But since such contract is rarely, if ever, contended for as an historical fact, to ridicule the probability of it is rather a superfluous attempt, though not of an alarming tendency, when it comes from so respectable a writer as Dr. Tucker, who, in a matterly manner, maintains an implied contract of equal validity with the most positive stipulation, as to all good political deductions; nor are we more apprehensive, when the same pleasantries are indulged by the celebrated Commentator, who, though he declines speaking of the origin of government, admits in terms the natural equality of mankind.

I have here been speaking of the original formation or cement of any civil society or state. For, as to the second point, respecting the right of migration, I am far from maintaining, that any consent, tacit or express, is essential to induce the duty of subjection from individuals born under an established government.

The obligation of natural law is of universal extent and perpetual duration. The duties also of civil life, though not indeed equally permanent or sacred, cannot, I apprehend, be discarded at pleasure; and that no individual has a moral right to cast off his allegiance to the state, and migrate into another country, or enter into the service of the foreign powers. I do not meddle with the question, whether colonies have any right, and in what situation of affairs, to separate from the superior state: as to which point I have met with nothing sufficient to inform my judgment; but as to individuals, they cannot cease to be under the protection of government, and of course owe subjection to it, while they are carrying such design of spontaneous exile into execution. To obey also the lawful commands of our civil governors, is a duty binding on
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Million generally exists or not, he refers to the municipal institutions of each country to determine; and this he holds to be the just criterion, even in the case of such who are being of foreign birth, to associate themselves to any established commonwealth. Hence it may be inferred, that in the opinion of this writer, who made such deep researches into first principles, there is at least no repugnance to natural morality, in municipal laws, which, like those of Mucovsby, by a general restraint, or, like those of England, provide a specific mode to be occasionally used of preventing the migration of any one or more citizens.

The same author affirms, that, where there is a general licence of migration, those who remove ought in duty and honour to signify their projected departure, unless there is good reason to believe, that it will not be a matter of national concern. He maintains, that persons in employment ought to have the express consent of the ruling powers, whose territories they purpose to abandon: and he agrees with Grotius', that we ought not, from principles of moral obligation, to desert and renounce our country, appraised with public debts, involved in calamities, or threatened with invasion. But in one point they differ. Grotius affirms, that such migrations ought not, without the consent of government, to be made in companies very large and numerous, in as much as it is one thing to draw water out of a river, and another to divert the course of it. Such depopulation would be ruinous to the state, and defeat the ends of civil society: and on moral occasion, what is necessary to obtain the end, has the force of law. This sentiment, however, Puffendorf strenuously opposes, arguing, that what is lawful for one, is lawful for many; but with left them of reason, for both this and the former points, in which they are unanimous, seem to stand on the same foundation, a due and conscientious regard to be had to the public safety and prosperity.

2. B. viii. c. 11.
3. B. ii. c. 5. 124.

The confidence. To these considerations may be added that of gratitude, which is too much excluded from political and national concerns; and another principle, virtuous in itself, and laudable under due regulations, I mean that love of our country, which should incite us to promote its welfare and defence.

Any restraint indeed on the power of migration, is repugnant to the pugnacry which Cicero pronounces on the ancient laws of Rome. "O furia praetoria atque divinitor, sum inde a principio Romani nominis a majoribus nefarii comparata, ne quis nefando plur quam unum civitatis efficat (difficilitate) me usum civitatum varietatum juris habant mercede 9] ne quis civitatis mutuatur, nescio in civitate maneat brutum. Eius: eum sunt fundamenta firmissima nefaria libertatis, fui quemque juris et retinuendi et dissimulandi effe dominum." It is true likewise, that among the Roman laws of a more recent date, we find it written: "De fid. quod civitatis cuum consexit faculti,/s habet eff. But Grotius, in explaining this and another passage in the Digests to the same effect, shows that the licence in effect was only to remove from one part of the Roman state to another, and was founded in political expediency. And although Mr. Locke* maintains, that a child is born a subject of no country or government, yet, sincerely professing a general deference to his opinions, I shall assert, that the laws of this country from to have reason on their side, when they speak of natural-born subjects, and when they confer allegation due from the time of protection afforded. Without regard had to the possession of lands or other property.

Is shewing how subjection to any state may cease and determine, Puffendorf* describes it as one mode, when a man by permission of his own commonwealth, voluntarily removes into the territories of another, and forfeits himself and his effects there, and the hopes of his future fortunes. But whether such per-
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Law of Nations, or may relate separately to the one particular state, and are then termed Civil or Municipal Law. It is the latter which establishes the various relations of civil life, and accordingly regulates the conduct of the citizens towards each other. This must be done by precepts of general extent and influence, controlling the private judgments of individuals, which would often be erroneous, and always breed confusion, unless the intentions of the law are understood. The necessity of rules infers the necessity of political superiority, and indeed some have begun their description of a state by calling it a conjunction of persons governing and governed; and others speak of the fitness of civil society and civil government as the main point to be demonstrated: "Sine imperio (saepe Cicero) nec dominus ullus, nec dictator, nec unus, nec hominem universum genus, nec versus natura, nec ipse mundus potest." On these principles it has been affirmed, that magistracy is by the law of nature, reason requiring men that they cannot well submit without civil society, nor civil society without government.

The several kinds of magistracy will be treated of in the next Lecture.

The rules affecting this great relation of governors and subjects, especially such as constitute the legislative authority, are the fundamental laws, the primary part of internal polity: the other branch whereof respects the conduct of private citizens to each other, and will be chiefly kept in view in the sequel of the present disquisition.

The necessity of adding to the supreme and primeval law of nature (treated of in the preceding Lecture) a system also of positive laws, will further appear, by briefly considering them as divided into such as denote and punish offenses, and establish the rights of property.

Farl. iv. Law

Law of nat. prelim. § 1. and b i. 5. 1. c. i. § 1. 5. 1.

Bibl. 36.
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To preclude the partial judgment of private sufferers, the public force must, in the prosecution of offenders, be directed by the public wisdom. The positive laws must accurately define the species of crimes, and their respective punishments. Thus, by explicit declarations, a more lively dread of temporal coercion is awakened, the consciences of brutish and inconsiderate men are more alarmed, and violence and wrong are more effectually restrained from annoying civil life.

The same necessity of positive laws appears from viewing society in another light; that is, in regard to property. When the spontaneous produce of nature was found inadequate to the wants of any community, agriculture was rewarded with a permanent right in the improved soil. As men advanced in civilization, arts and commerce introduced, on the solid and rational foundation of common benefit to all, various other subjects of property. All these were to be regulated and modified by positive institutions. It was necessary not only to exempt them from intentional malice, fraud, and violence, but also to elucidate the several rights from honest doubts and scruples, and to determine inevitable litigations.

Society therefore induces a large accession of positive laws, all of which are available by consent. But this consent must be explained. Sometimes it refers to the general concurrence given or implied to the constitution of the legislative power; sometimes to the people immediately, or by delegation, participate in that authority; and sometimes, long and uniform custom, begets a fiction, as evidence of universal approbation and acquiescence. For in most countries, I believe, a distinction has been observed between laws expressly enacted, and such as are ratified by usage. The former are commonly reduced to writing; but may, like those of Lacedemon, be committed only to memory. Laws ratified by custom, are generally the most ancient, and esteemed highly sacred, having been approved by the experience of ages. The Roman lawyer, therefore, well informs the principle, on which the authority of custom is grounded, who writes, "Incerteput consectutum pro lege non inmerito expeditur. (et loco justi quod dictor moribus constitutum.) Non cum tibi leges nullius aedile ex consili nobis existent, quos iuris, quem quid judicio populii recepta sani, morato et oc, quos sine illo scripto, populos probavit, sancitantes omnes: nam quid interept, sibi frangit populum voluntatem siue declarat, eius debitis tibia et justitiae?"

Customs are very frequently spoken of as unwritten law, although they have long ceased to depend solely on tradition and practical observance, being recorded in authentic testimonials. But they are so determined, because their ratification is referred to the tacit consent of the people, and that for a long duration; whereas other laws are expressly declared at the time of their enactment.

We are next led to inquire into the subject matter of positive or instituted laws, which in general may be said to be the actions of those for whom the laws are made. Civil ordinances therefore contain duties of moral and of positive obligation. By obedience to the former, the subjects must become better men as well as better citizens: the latter are founded in experience. Whatever is just, is indeed inextricably connected with utility rightly understood. But some regulations are so far simply beneficial, that they have no antecedent in forcement in the system of morality. Hence civil laws have been called mixedly and merely human. The former are founded on some rule of the supreme law, rational or revealed, to which all men are essentially subject. Thus the laws which punish theft, or which provide for reparation of injuries, may be referred to the moral precept, "alterum non ofedere, although the modes be of men's invention. The laws merely human are such, for example, as those which determine the courts in which inestimable estates shall be transmitted by descent.

"D.L. c. 3. l. 52. p. l. 15.

"Hook. Ext. Pol. 5. l. 9. 15.
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We are not however to imagine it practicable, that moral perfections can be enforced by civil functions. There are duties of piety, humanity, and fidelity, which must be, and always are, left to the influence of religion. This Passendorf's very reasonably accounts for, as well becaus the controversies about them would be very perplexed and intricate, as to prevent the multiplication of litigious suits, and also that the good and virtuous might not be deprived of the most valuable part of their character, the doing well out of reverence to their Creator, without regard to the fear of human penalties; for this they must necessarily lose, when there is no distinction made, whether a man doth well out of love to virtue, or out of fear of punishment. Therefore averse, ambitious, hypocritical, and many other vices, unless they produce some external enormity, are unnoticed by human laws. The Lex Julia de ambitu among the Romans, extended only to those who, from ambitious motives, were guilty of bribery at elections, or some other open and flagrant act.

And here I shall venture to quote the expression of an author (who seldom deserves commendation) when he calls the law of nature the unwritten civil law; the meaning of which may be, that positive institutions, depending on the fundamental rules of general morality, look and exactly hope for an unconstrained obedience to those rules, which it is not in their power to exact. But where the same writer measures right and wrong absolutely by positive ordinances; where he argues, that because men on their entrance into civil society bind themselves to obey the commands of the sovereign power, and thus being obliged to obedience before they know what will be commanded, are therefore obliged universally and in every respect; here he plainly aims to subvert the foundations of morality. But the sophistry admits of a ready answer: for men do not enter into society with a view of superseding or disenfranchising themselves from the laws of nature, but the chief end of civil government, on the contrary, is, that those laws may be protected from violation, and secured by additional sanctions. When civil laws therefore grossly and manifestly contradict that supreme law, to which all men are essentially subject, such immoral or religious ordinances ought in conscience to be disobeyed. But in such cases we should receive the clearest and most decisive convictions; and sometimes perhaps distrust our own rather than the public judgment.

Another caution may be inferred from what has been before observed, that where the civil laws lay no particular restraint, we are not always to interpret such silence into substantial permission, but only that the matter, being not proper for their interference, is left to the divine coercion.

As, however, we ought not to overthrow natural equity by consequences drawn from arbitrary institutions, so on the other hand we ought not always nor haphazardly to allege some general principle of moral duty, which may probably admit of restrictions and exceptions, in opposition to special provisions of municipal law. This notion at least has prevailed among very celebrated jurists; and is illustrated by the following example: That the author of any damage ought in conscience to repair it, is a general tenet of ethics. Now if we extend this rule to the case of a debtor, who makes default of payment at the time appointed, by means whereas of the creditor suffers some extraordinary detriment, such application of the maxim is laid to be unjust. The municipal law appoints the satisfaction by the regular computation of interest for the loan. To make debtors liable for such accidental damages, would breed endless trouble.

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B. viii. c. 1, 5, 7, and c. 2, 4, 44. * Necis sive bonorum servum, qui hispropria legem legibus rerum in se manifestas, hab at illum creaverit praeiudicium, non esse suum nonne ene; sed legibus servandum nonesse, quibusque praebet discrimen normas defensorum ad naves, fidis, liberis, etc. respectibus repositis, habere leges; reservatili causibus, quae, etc. Lobbes them cited.

D. Domns' Tracts of law, c. 2, § 5, 3, and 52. § 4, 22, p., p. 3, 4, 6. and
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CIVIL legislators have no rightful authority to forbid what the law of nature enjoins, or to join what that forbids. But they may lay an interdict on things permitted only by the law of nature. They may restrain natural liberty by creating an accession of positive duties. It is the opinion of the celebrated Commentator on the Laws of England, that such civil institutions affect the conscience with an obligation only by submitting to the penalty if levied: which general assertion he illustrates from those provisions in this country which are usually denominated the game laws. It may be very just in this singular case to consider the prohibition as merely conditional, either to forbear, or to pay the mulct, for no right of property seems invaded, nor the welfare of the community disturbed. It might however be difficult to find an influence parallel to the foregoing. Obedience to all such laws as are not, according to the intention of the authors thereof, conditional, though merely positive, tends to the good of the society, which is the duty of every citizen to promote, in return for the common protection afforded, and because of the moral necessity he is under to fulfill his compacts and engagements, and consequently to obey whatever is ordained by the supreme legislature, not being contrary to the divine law of reason and religion.

Generally also the political expediency of the positive law is manifest. Where, for example, the positive regulations, enacted to improve the public trade, revenues, and manufactures, are violated and licensed, that nation is evidently interested in the transgression. Here, then, I apprehend it is not sufficient to discharge the conscience, to be ready to satisfy the penalty on detection. Thus also every citizen ought, according to his ability, to benefit the society of which he is a member. If, according to the laws of his country, he is appointed to a burdensome, but necessary, office, amid the various capacities of civil life, there is a duty (I do not say how strong) of serving it. To pay the fine falls short of the obligation, unless where the intention of the lawgiver is, according to the former distinction, merely conditional; or where the person appointed has a just, not a self-indulgent, pretext for exonerating himself. Thus moral and civil duty are in general inseparably interwoven, though differing both in nature and degree.

Having thus far treated of the subject matter of civil laws, I shall next consider them as consisting of two essential parts; namely, the definitive, declaring what things are to be done or forborne; and the sanction, either generally or specifically determining the consequence.

The sanction of civil laws, it is well known, much oftener consists in punishment than reward: for which the learned and ingenious Puffendorf mentions two reasons; first, because the secure enjoyment of natural and civil rights of itself largely compensates obedience; secondly, because if particular remunerations were bestowed, no stock would be sufficient for so profuse a bounty. This reasoning has its weight: but the fact, as to the occurrence of it, may be more obviously accounted for. Legislators expect that there may be some transgressors; but that the bulk of their subjects will conform to their institutions: if all the obedient were to receive reward, judicial business would be the general occupation of mankind.

It has also been remarked, that the infliction of evil is more operative than the poffeffion of good. This perhaps, as to the
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disposition of most men, may be true; but it does not immediately follow, that the terms of one are more efficacious than the allurements of the other, when both are at an equal distance, and in some degree of uncertainty. Present uncertainties, the forcible simulation of the will, may be occasioned as well by the absence or privation of some desired object, proposed for the reward of obedience, as by the terror of impending vengeance, threatened for the punishment of transgression. The compulsory quality therefore of human laws, or, more properly speaking, the moral necessity of complying with them, may be produced by means of punishment or professed reward. Each of them at different fusions actuates the will.

The virtual effects of law (as Modestins writes) are to injoin, to forbid, to permit, and to punish. Where the laws are silent, and where they are express, permission is equally to be ascribed to them, as to matters not restrained by the rules of natural morality and religion. Nor is there any want of obligatory force in such cases. For what the laws permit me to do or enjoy, they virtually prohibit others from obstructing, on the peril of their disobedience. In all these things we may trace and respect the conduct of legislators, as the character of private individuals also is marked by what they do, and what they abstain from doing. Where there are but few restraints in matters permitted by the law of nature, and a moderate ascension only of juristic duties, there legal liberty abounds, and there legislators have executed their important trust with midnights and reserve.

So far as civil laws, in regard either to their subject matter or their function, are merely positive, so far they are justly liable to variation, and ought in some measure to be adapted to the exigence of the times, and the dispositions of the people—

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* V. Locke on Hum. Disc. b. i. c. 21.
* Puff. b. i. c. 6, 11; Deoff. serv. libri.
* Puff. b. i. c. 6. 4. 13. 14. 2. 22. 25.
* D. L. 4. p. 4. 7.

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"cura pro moribus, et equid estiam pro temporebus, seque mun
tuta."

To discern the fitness of political institutions, is the noblest exer
cition of human prudence; and has of old been thought the most necessary occasion of implying the co-operation of divine affiance. Hence the Pagans of every country devised their legis
gators; and hence that device of ancient Mythologists, rec
cited by Plato’s, was framed to shew, that it requires a nature more than human, to regulate perfectly the establishment and well-being of civil society. Another passage of the same ge

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the principal rule of interpretation is the reason of the law. Hence we must be careful to regard comprehensive, not partial, principles of equity; not such as are only applicable to, or derived from, the very angular coincidence of complicated circumstances in the case to be solved. This would be wandering in an endless labyrinth, and would banish certainty from judicial decisions. We must weigh the evil to be redressed, the remedy and relief to be promoted, and sometimes the consequences of determination on one side or the other, as they may affect individuals and the public. For the end of civil laws in general is to promote the welfare of the community, the same must be had in view in establishing their construction. "Omnes legis..."

ad commodum reipublicae referri opusset, et ex utile utilitate commiri, non ex frequentibus, quae in litteris sit, interpretari.

The last general consideration to be mentioned in respect to civil laws, is the period of their existence. They may then be repealed, either expressly, or by implication, founded on diffusae "Rex "etiam "etiam superflua legislation, sed etiam tanta confusio mensur per diffusum..."

"Rex"

The meaning of which is, that, when the law descends to particulars, each more special provisos must be understood as exceptions to any general rules laid down to the contrary; and the general rules must not (voice versa) be allegato in conformation of the special provisos. This notion also of the Civilians is adopted by us, as conveyed in the following uncouth expressions: "generali..."

The observations may contribute to form a general idea of civil, positive, or instituted law.

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