

Chapter XVII

Of Federal Representative Governments.

Portions of mankind who are not fitted or not disposed to live under the same internal government may often, with advantage, be federally united as to their relations with foreigners, both to prevent wars among themselves, and for the sake of more effectual protection against the aggression of powerful states.

To render a federation advisable several conditions are necessary. The first is that there should be a sufficient amount of mutual sympathy among the populations. The federation binds them always to fight on the same side; and if they have such feelings toward one another, or such diversity of feeling toward their neighbors that they would generally prefer to fight on opposite sides, the federal tie is neither likely to be of long duration, nor to be well observed while it subsists. The sympathies available for the purpose are those of race, language, religion, and, above all, of political institutions, as conducing most to a feeling of identity of political interest. When a few free states, separately insufficient for their own defense, are hemmed in on all sides by military or feudal monarchs, who hate and despise freedom even in a neighbor, those states have no chance for preserving liberty and its blessings but by a federal union. The common interest arising from this cause has in Switzerland, for several centuries, been found adequate to maintain efficiently the federal bond, in spite not only of difference of religion when religion was the grand source of irreconcilable political enmity throughout Europe, but also in spite of great weakness in the constitution of the federation itself. In America, where all the conditions for the maintenance of union existed at the highest point, with the sole drawback of difference of institutions in the single but most important article of slavery, this one difference goes so far in alienating from each other's sympathies the two divisions of the Union as to be now actually effecting the disruption of a tie of so much value to them both.

A second condition of the stability of a federal government is that the separate states be not so powerful as to be able to rely for protection against foreign encroachment on their individual strength. If they are, they will be apt to think that they do not gain, by union with others, the equivalent of what they sacrifice in their own liberty of action; and consequently, whenever the policy of the confederation, in things reserved to its cognizance, is different from that which any one of its members would separately pursue, the internal and sectional breach will, through absence of sufficient anxiety to preserve the Union, be in danger of going so far as to dissolve it.

A third condition, not less important than the two others, is that there be not a very marked inequality of strength among the several contracting states. They can not, indeed, be exactly equal in resources; in all federations there will be a gradation of power among the members; some will be more populous, rich, and civilized than others. There is a wide difference in wealth and population between New York and Rhode Island; between Berne, and Zug or Glaris. The essential is, that there should not be any one state so much more powerful than the rest as to be capable of vying in strength with many of them combined. If there be such a one, and only one, it will insist on being master of the joint deliberations; if there be two, they will be irresistible when they agree; and whenever they differ, every thing will be decided by a struggle for ascendancy between the rivals. This cause is alone enough to reduce the German Bund to almost a nullity, independently of its wretched internal constitution. It effects none of the real purposes of a confederation. It has never bestowed on Germany a uniform system of customs, nor so much as a uniform coinage, and has served only to give Austria and Prussia a legal right of pouring in their troops to assist the local sovereigns in keeping their subjects obedient to despotism, while, in regard to external concerns, the Bund would make all Germany a dependency of Prussia if there were no Austria, and of Austria if there were no Prussia; and, in the mean time, each petty prince has little choice but to be a partisan of one or the other, or to intrigue with foreign governments against both.

There are two different modes of organizing a federal union. The federal authorities may represent the governments solely, and their acts may be obligatory only on the governments as such, or they may have the

power of enacting laws and issuing orders which are binding directly on individual citizens. The former is the plan of the German so-called Confederation, and of the Swiss Constitution previous to 1847. It was tried in America for a few years immediately following the War of Independence. The other principle is that of the existing Constitution of the United States, and has been adopted within the last dozen years by the Swiss Confederacy. The Federal Congress of the American Union is a substantive part of the government of every individual state. Within the limits of its attributions, it makes laws which are obeyed by every citizen individually, executes them through its own officers, and enforces them by its own tribunals. This is the only principle which has been found, or which is ever likely to produce an effective federal government. A union between the governments only is a mere alliance, and subject to all the contingencies which render alliances precarious. If the acts of the President and of Congress were binding solely on the governments of New York, Virginia, or Pennsylvania, and could only be carried into effect through orders issued by those governments to officers appointed by them, under responsibility to their own courts of justice, no mandates of the federal government which were disagreeable to a local majority would ever be executed. Requisitions issued to a government have no other sanction or means of enforcement than war, and a federal army would have to be always in readiness to enforce the decrees of the federation against any recalcitrant state, subject to the probability that other states, sympathizing with the recusant, and perhaps sharing its sentiments on the particular point in dispute, would withhold their contingents, if not send them to fight in the ranks of the disobedient State. Such a federation is more likely to be a cause than a preventive of internal wars; and if such was not its effect in Switzerland until the events of the years immediately preceding 1847, it was only because the federal government felt its weakness so strongly that it hardly ever attempted to exercise any real authority. In America, the experiment of a federation on this principle broke down in the first few years of its existence, happily while the men of enlarged knowledge and acquired ascendancy who founded the independence of the Republic were still alive to guide it through the difficult transition. The "Federalist," a collection of papers by three of these eminent men, written in explanation and defense of the new federal Constitution while still awaiting the national acceptance, is even now the most instructive treatise we possess on federal government. In Germany, the more imperfect kind of federation, as all know, has not even answered the purpose of maintaining an alliance. It has never, in any European war, prevented single members of the confederation from allying themselves with foreign powers against the rest. Yet this is the only federation which seems possible among monarchical states. A king, who holds his power by inheritance, not by delegation, and who can not be deprived of it, nor made responsible to any one for its use, is not likely to renounce having a separate army, or to brook the exercise of sovereign authority over his own subjects, not through him, but directly by another power. To enable two or more countries under kingly government to be joined together in an effectual confederation, it seems necessary that they should all be under the same king. England and Scotland were a federation of this description during the interval of about a century between the union of the crowns and that of the Parliaments. Even this was effective, not through federal institutions, for none existed, but because the regal power in both Constitutions was so nearly absolute as to enable the foreign policy of both to be shaped according to a single will.

Under the more perfect mode of federation, where every citizen of each particular state owes obedience to two governments, that of his own state and that of the federation, it is evidently necessary not only that the constitutional limits of the authority of each should be precisely and clearly defined, but that the power to decide between them in any case of dispute should not reside in either of the governments, or in any functionary subject to it, but in an umpire independent of both. There must be a Supreme Court of Justice, and a system of subordinate courts in every state of the Union, before whom such questions shall be carried, and whose judgment on them, in the last stage of appeal, shall be final. Every state of the Union, and the federal government itself, as well as every functionary of each, must be liable to be sued in those courts for exceeding their powers, or for non-performance of their federal duties, and must in general be obliged to employ those courts as the instrument for enforcing their federal rights. This involves the remarkable consequence, actually realized in the United States, that a court of justice, the highest federal tribunal, is supreme over the various governments, both state and federal, having the right to declare that any law made, or act done by them, exceeds the powers assigned to them by the federal Constitution, and, in consequence, has no legal validity. It was natural to feel strong doubts, before trial had been made, how such a provision would work; whether the

tribunal would have the courage to exercise its constitutional power; if it did, whether it would exercise it wisely, and whether the governments would consent to submit peaceably to its decision. The discussions on the American Constitution, before its final adoption, give evidence that these natural apprehensions were strongly felt; but they are now entirely quieted, since, during the two generations and more which have subsequently elapsed, nothing has occurred to verify them, though there have at times been disputes of considerable acrimony, and which became the badges of parties, respecting the limits of the authority of the federal and state governments. The eminently beneficial working of so singular a provision is probably, as M. de Tocqueville remarks, in a great measure attributable to the peculiarity inherent in a court of justice acting as such--namely, that it does not declare the law *eo nomine* and in the abstract, but waits until a case between man and man is brought before it judicially, involving the point in dispute; from which arises the happy effect that its declarations are not made in a very early stage of the controversy; that much popular discussion usually precedes them; that the Court decides after hearing the point fully argued on both sides by lawyers of reputation; decides only as much of the question at a time as is required by the case before it, and its decision, instead of being volunteered for political purposes, is drawn from it by the duty which it can not refuse to fulfil, of dispensing justice impartially between adverse litigants. Even these grounds of confidence would not have sufficed to produce the respectful submission with which all authorities have yielded to the decisions of the Supreme Court on the interpretation of the Constitution, were it not that complete reliance has been felt, not only on the intellectual pre-eminence of the judges composing that exalted tribunal, but on their entire superiority over either private or sectional partialities. This reliance has been in the main justified; but there is nothing which more vitally imports the American people than to guard with the most watchful solicitude against every thing which has the remotest tendency to produce deterioration in the quality of this great national institution. The confidence on which depends the stability of federal institutions has been for the first time impaired by the judgment declaring slavery to be of common right, and consequently lawful in the Territories while not yet constituted as states, even against the will of a majority of their inhabitants. The main pillar of the American Constitution is scarcely strong enough to bear many more such shocks.

The tribunals which act as umpires between the federal and the state governments naturally also decide all disputes between two states, or between a citizen of one state and the government of another. The usual remedies between nations, war and diplomacy, being precluded by the federal union, it is necessary that a judicial remedy should supply their place. The Supreme Court of the federation dispenses international law, and is the first great example of what is now one of the most prominent wants of civilized society, a real international tribunal.

The powers of a federal government naturally extend not only to peace and war, and all questions which arise between the country and foreign governments, but to making any other arrangements which are, in the opinion of the states, necessary to their enjoyment of the full benefits of union. For example, it is a great advantage to them that their mutual commerce should be free, without the impediment of frontier duties and custom-houses. But this internal freedom can not exist if each state has the power of fixing the duties on interchange of commodities between itself and foreign countries, since every foreign product let in by one state would be let into all the rest; and hence all custom duties and trade regulations in the United States are made or repealed by the federal government exclusively. Again, it is a great convenience to the states to have but one coinage, and but one system of weights and measures, which can only be insured if the regulation of these matters is intrusted to the federal government. The certainty and celerity of post-office communication is impeded, and its expense increased, if a letter has to pass through half a dozen sets of public offices, subject to different supreme authorities: it is convenient, therefore, that all post-offices should be under the federal government; but on such questions the feelings of different communities are liable to be different. One of the American states, under the guidance of a man who has displayed powers as a speculative political thinker superior to any who has appeared in American politics since the authors of the "Federalist," [10] claimed a veto for each state on the custom laws of the federal Congress; and that statesman, in a posthumous work of great ability, which has been printed and widely circulated by the Legislature of South Carolina, vindicated this pretension on the general principle of limiting the tyranny of the majority, and protecting minorities by admitting them to a substantial participation in political power. One of the most disputed topics in American

politics during the early part of this century was whether the power of the federal government ought to extend, and whether by the Constitution it did extend, to making roads and canals at the cost of the Union. It is only in transactions with foreign powers that the authority of the federal government is of necessity complete. On every other subject the question depends on how closely the people in general wish to draw the federal tie; what portion of their local freedom of action they are willing to surrender, in order to enjoy more fully the benefit of being one nation.

Respecting the fitting constitution of a federal government within itself, much need not be said. It of course consists of a legislative branch and an executive, and the constitution of each is amenable to the same principles as that of representative governments generally. As regards the mode of adapting these general principles to a federal government, the provision of the American Constitution seems exceedingly judicious, that Congress should consist of two houses, and that while one of them is constituted according to population, each state being entitled to representatives in the ratio of the number of its inhabitants, the other should represent not the citizens, but the state governments, and every state, whether large or small, should be represented in it by the same number of members. This provision precludes any undue power from being exercised by the more powerful states over the rest, and guarantees the reserved rights of the state governments by making it impossible, as far as the mode of representation can prevent, that any measure should pass Congress unless approved not only by a majority of the citizens, but by a majority of the states. I have before adverted to the further incidental advantage obtained of raising the standard of qualifications in one of the houses. Being nominated by select bodies, the Legislatures of the various states, whose choice, for reasons already indicated, is more likely to fall on eminent men than any popular election--who have not only the power of electing such, but a strong motive to do so, because the influence of their state in the general deliberations must be materially affected by the personal weight and abilities of its representatives--the Senate of the United States, thus chosen, has always contained nearly all the political men of established and high reputation in the Union; while the Lower House of Congress has, in the opinion of competent observers, been generally as remarkable for the absence of conspicuous personal merit, as the Upper House for its presence.

When the conditions exist for the formation of efficient and durable federal unions, the multiplication of them is always a benefit to the world. It has the same salutary effect as any other extension of the practice of co-operation, through which the weak, by uniting, can meet on equal terms with the strong. By diminishing the number of those petty states which are not equal to their own defense, it weakens the temptations to an aggressive policy, whether working directly by arms, or through the *prestige* of superior power. It of course puts an end to war and diplomatic quarrels, and usually also to restrictions on commerce, between the states composing the Union; while, in reference to neighboring nations, the increased military strength conferred by it is of a kind to be almost exclusively available for defensive, scarcely at all for aggressive purposes. A federal government has not a sufficiently concentrated authority to conduct with much efficiency any war but one of self-defense, in which it can rely on the voluntary co-operation of every citizen; nor is there any thing very flattering to national vanity or ambition in acquiring, by a successful war, not subjects, nor even fellow-citizens, but only new, and perhaps troublesome independent members of the confederation. The warlike proceedings of the Americans in Mexico was purely exceptional, having been carried on principally by volunteers, under the influence of the migratory propensity which prompts individual Americans to possess themselves of unoccupied land, and stimulated, if by any public motive, not by that of national aggrandizement, but by the purely sectional purpose of extending slavery. There are few signs in the proceedings of Americans, nationally or individually, that the desire of territorial acquisition for their country as such has any considerable power over them. Their hankering after Cuba is, in the same manner, merely sectional, and the Northern States, those opposed to slavery, have never in any way favored it.

The question may present itself (as in Italy at its present uprising) whether a country which is determined to be united should form a complete or a merely federal union. The point is sometimes necessarily decided by the mere territorial magnitude of the united whole. There is a limit to the extent of country which can advantageously be governed, or even whose government can be conveniently superintended from a single centre. There are vast countries so governed; but they, or at least their distant provinces, are in general

deplorably ill administered, and it is only when the inhabitants are almost savages that they could not manage their affairs better separately. This obstacle does not exist in the case of Italy, the size of which does not come up to that of several very efficiently governed single states in past and present times. The question then is, whether the different parts of the nation require to be governed in a way so essentially different that it is not probable the same Legislature, and the same ministry or administrative body, will give satisfaction to them all. Unless this be the case, which is a question of fact, it is better for them to be completely united. That a totally different system of laws and very different administrative institutions may exist in two portions of a country without being any obstacle to legislative unity, is proved by the case of England and Scotland. Perhaps, however, this undisturbed coexistence of two legal systems under one united Legislature, making different laws for the two sections of the country in adaptation to the previous differences, might not be so well preserved, or the same confidence might not be felt in its preservation, in a country whose legislators are more possessed (as is apt to be the case on the Continent) with the mania for uniformity. A people having that unbounded toleration which is characteristic of this country for every description of anomaly, so long as those whose interests it concerns do not feel aggrieved by it, afforded an exceptionally advantageous field for trying this difficult experiment. In most countries, if it was an object to retain different systems of law, it might probably be necessary to retain distinct legislatures as guardians of them, which is perfectly compatible with a national Parliament and king, or a national Parliament without a king, supreme over the external relations of all the members of the body.

Whenever it is not deemed necessary to maintain permanently, in the different provinces, different systems of jurisprudence, and fundamental institutions grounded on different principles, it is always practicable to reconcile minor diversities with the maintenance of unity of government. All that is needful is to give a sufficiently large sphere of action to the local authorities. Under one and the same central government there may be local governors, and provincial assemblies for local purposes. It may happen, for instance, that the people of different provinces may have preferences in favor of different modes of taxation. If the general Legislature could not be depended on for being guided by the members for each province in modifying the general system of taxation to suit that province, the Constitution might provide that as many of the expenses of the government as could by any possibility be made local should be defrayed by local rates imposed by the provincial assemblies, and that those which must of necessity be general, such as the support of an army and navy, should, in the estimates for the year, be apportioned among the different provinces according to some general estimate of their resources, the amount assigned to each being levied by the local assembly on the principles most acceptable to the locality, and paid *en bloc* into the national treasury. A practice approaching to this existed even in the old French monarchy, so far as regarded the *_pays d'états_*, each of which, having consented or been required to furnish a fixed sum, was left to assess it upon the inhabitants by its own officers, thus escaping the grinding despotism of the royal *intendants* and *_subdélégués_*; and this privilege is always mentioned as one of the advantages which mainly contributed to render them, as some of them were, the most flourishing provinces of France.

Identity of central government is compatible with many different degrees of centralisation, not only administrative, but even legislative. A people may have the desire and the capacity for a closer union than one merely federal, while yet their local peculiarities and antecedents render considerable diversities desirable in the details of their government. But if there is a real desire on all hands to make the experiment successful, there needs seldom be any difficulty in not only preserving these diversities, but giving them the guaranty of a constitutional provision against any attempt at assimilation except by the voluntary act of those who would be affected by the change.

Chapter XVIII

Of the Government of Dependencies by a Free State.

Free states, like all others, may possess dependencies, acquired either by conquest or by colonization, and our own is the greatest instance of the kind in modern history. It is a most important question how such