

## CHAPTER XXX

### MERITS OF THE FEDERAL SYSTEM

I do not propose to discuss in this chapter the advantages of Federalism in general, for to do this we should have to wander off to other times and countries, to talk of Achaia and the Hanseatic League and the Swiss Confederation. I shall comment on those merits only which the experience of the American Union illustrates.

There are two distinct lines of argument by which their Federal system was recommended to the framers of the Constitution, and upon which it is still held forth for imitation to other countries. These lines have been so generally confounded that it is well to present them in a precise form.

The first set of arguments point to Federalism proper, and are the following:—

1. That Federalism furnishes the means of uniting commonwealths into one nation under one national government without extinguishing their separate administrations, legislatures, and local patriotisms. As the Americans of 1787 would probably have preferred complete State independence to the fusion of their States into a unified government, Federalism was the only resource. So when the new Germanic Empire, which is really a Federation, was established in 1871, Bavaria and Wurtemberg could not have been brought under a national government save by a Federal scheme. Similar suggestions, as every one knows, have been made for re-settling the relations of Ireland to Great Britain, and of the self-governing British colonies to the United Kingdom. There are causes and conditions which dispose independent or semi-independent communities, or peoples living under loosely compacted governments, to form a closer union in a Federal form. There are other causes and conditions which dispose the subjects of one gov-

ernment, or sections of these subjects, to desire to make their governmental union less close by substituting a Federal for a unitary system. In both sets of cases, the centripetal or centrifugal forces spring from the local position, the history, the sentiments, the economic needs of those among whom the problem arises; and that which is good for one people or political body is not necessarily good for another. Federalism is an equally legitimate resource whether it is adopted for the sake of tightening or for the sake of loosening a pre-existing bond.

2. That Federalism supplies the best means of developing a new and vast country. It permits an expansion whose extent, and whose rate and manner of progress, cannot be foreseen to proceed with more variety of methods, more adaptation of laws and administration to the circumstances of each part of the territory, and altogether in a more truly natural and spontaneous way, than can be expected under a centralized government, which is disposed to apply its settled system through all its dominions. Thus the special needs of a new region are met by the inhabitants in the way they find best: its special evils are cured by special remedies, perhaps more drastic than an old country demands, perhaps more lax than an old country would tolerate; while at the same time the spirit of self-reliance among those who build up these new communities is stimulated and respected.

3. That Federalism prevents the rise of a despotic central government, absorbing other powers, and menacing the private liberties of the citizen. This may now seem to have been an idle fear, so far as America was concerned. It was, however, a very real fear among the great-grandfathers of the present Americans, and nearly led to the rejection even of so undespotic an instrument as the Federal Constitution of 1789. Congress (or the President, as the case may be) is still sometimes described as a tyrant by the party which does not control it, simply because it is a central government: and the States are represented as bulwarks against its encroachments.

The second set of arguments relate to and recommend not so much Federalism as local self-government. I state them briefly because they are familiar.

4. Self-government stimulates the interest of people in the affairs of their neighbourhood, sustains local political life, edu-

cates the citizen in his daily round of civic duty, teaches him that perpetual vigilance and the sacrifice of his own time and labour are the price that must be paid for individual liberty and collective prosperity.

5. Self-government secures the good administration of local affairs by giving the inhabitants of each locality due means of overseeing the conduct of their business.

That these two sets of grounds are distinct appears from the fact that the sort of local interest which local self-government evokes is quite a different thing from the interest men feel in the affairs of a large body like an American State. So, too, the control over its own affairs of a township, or even a small county, where everybody can know what is going on, is quite different from the control exercisable over the affairs of a commonwealth with a million of people. Local self-government may exist in a unified country like England, and may be wanting in a Federal country like Germany. And in America itself, while some States, like those of New England, possessed an admirably complete system of local government, others, such as Virginia, the old champion of State sovereignty, were imperfectly provided with it. Nevertheless, through both sets of arguments there runs the general principle, applicable in every part and branch of government, that, where other things are equal, the more power is given to the units which compose the nation, be they large or small, and the less to the nation as a whole and to its central authority, so much the fuller will be the liberties and so much greater the energy of the individuals who compose the people. This principle, though it had not been then formulated in the way men formulate it now, was heartily embraced by the Americans. Perhaps it was because they agreed in taking it as an axiom that they seldom referred to it in the subsequent controversies regarding State rights. These controversies proceeded on the basis of the Constitution as a law rather than on considerations of general political theory. A European reader of the history of the first seventy years of the United States is surprised how little is said, through the interminable discussions regarding the relation of the Federal government to the States, on the respective advantages of centralization or localization of powers as a matter of historical experience and general expediency.

Three further benefits to be expected from a Federal system may be mentioned, benefits which seem to have been unnoticed or little regarded by those who established it in America.

6. Federalism enables a people to try experiments in legislation and administration which could not be safely tried in a large centralized country. A comparatively small commonwealth like an American State easily makes and unmakes its laws; mistakes are not serious, for they are soon corrected; other States profit by the experience of a law or a method which has worked well or ill in the State that has tried it.

7. Federalism, if it diminishes the collective force of a nation, diminishes also the risks to which its size and the diversities of its parts expose it. A nation so divided is like a ship built with water-tight compartments. When a leak is sprung in one compartment, the cargo stowed there may be damaged, but the other compartments remain dry and keep the ship afloat. So if social discord or an economic crisis has produced disorders or foolish legislation in one member of the Federal body, the mischief may stop at the State frontier instead of spreading through and tainting the nation at large.

8. Federalism, by creating many local legislatures with wide powers, relieves the national legislature of a part of that large mass of functions which might otherwise prove too heavy for it. Thus business is more promptly despatched, and the great central council of the nation has time to deliberate on those questions which most nearly touch the whole country.

All of these arguments recommending Federalism have proved valid in American experience.

To create a nation while preserving the States was the main reason for the grant of powers which the National government received; an all-sufficient reason, and one which holds good to-day. The several States have changed greatly since 1789, but they are still commonwealths whose wide authority and jurisdiction practical men are agreed in desiring to maintain.

Not much was said in the Convention of 1787 regarding the best methods of extending government over the unsettled territories lying beyond the Alleghany mountains.<sup>1</sup> It was, however, assumed that they would develop as the older colonies had de-

<sup>1</sup> In 1787, however, the great Ordinance regulating the North-West Territory was enacted by the Congress of the Confederation.

veloped, and in point of fact each district, when it became sufficiently populous, was formed into a self-governing State, the less populous divisions still remaining in the status of semi-self-governing Territories. Although many blunders have been committed in the process of development, especially in the reckless contraction of debt and the wasteful disposal of the public lands, greater evils might have resulted had the creation of local institutions and the control of new communities been left to the Central government.<sup>1</sup> Congress would have been not less improvident than the State governments, for it would have been even less closely watched. The opportunities for jobbery would have been irresistible, the growth of order and civilization probably slower. It deserves to be noticed that, in granting self-government to all those of her colonies whose population is of English race, England has practically adopted the same plan as the United States have done with their western territory. The results have been generally satisfactory, although England, like America, has found that her colonists have been disposed to treat the aboriginal inhabitants, whose lands they covet and whose persons they hate, with a harshness and injustice which the mother country would gladly check.

The arguments which set forth the advantages of local self-government were far more applicable to the States of 1787 than to those of 1887. Virginia, then the largest State, had only half a million free inhabitants, about the present population of St. Louis. Massachusetts had 450,000, Pennsylvania 400,000, New York 300,000; while Georgia, Rhode Island, and Delaware had (even counting slaves) less than 200,000 between them.<sup>2</sup> These were communities to which the expression "local self-

<sup>1</sup> The United States is proprietor of the public domain in the Territories, and when a new State is organized the ownership is not changed. The United States, however, makes grants of wild lands to the new State as follows:— (1) Of every section numbered 16 (being one thirty-sixth of all) for the support of common schools. (2) Of lands to endow a university. (3) Of the lands noted in the surveys as swamp lands, and which often are valuable. (4) It has usually made further grants to aid in the construction of railroads, and for an agricultural college. The grants commonly leave the United States a much larger landowner within the State than is the State itself, and when all the dealings of the National government with its lands are considered, it is more justly chargeable with squandering the public domain than the States are.

<sup>2</sup> I give round numbers, reduced a little from the census of 1790.

government" might be applied, for, although the population was scattered, the numbers were small enough for the citizens to have a personal knowledge of their leading men, and a personal interest (especially as a large proportion were land-owners) in the economy and prudence with which common affairs were managed. Now, however, when of the forty-four States twenty-seven have more than a million inhabitants, and four have more than three millions, the newer States, being, moreover, larger in area than most of the older ones, the stake of each citizen is relatively smaller, and generally too small to sustain his activity in politics, and the party chiefs of the State are known to him only by the newspapers or by their occasional visits on a stumping tour.<sup>1</sup>

All that can be claimed for the Federal system under this head of the argument is that it provides the machinery for a better control of the taxes raised and expended in a given region of the country, and a better oversight of the public works undertaken there than would be possible were everything left to the Central government.<sup>2</sup> As regards the educative effect of numerous and frequent elections, it will be shown in a later chapter that elections in America are too many and come too frequently. Overtaxing the attention of the citizen and frittering away his interest, they leave him at the mercy of knots of selfish adventurers.

The utility of the State system in localizing disorders or discontents, and the opportunities it affords for trying easily and safely experiments which ought to be tried in legislation and administration, constitute benefits to be set off against the risk, referred to in the last preceding chapters, that evils

<sup>1</sup> To have secured the real benefits of local self-government the States ought to have been kept at a figure not much above that of their original population, their territory being cut up into new States as the population increased. Had this been done—no doubt at the cost of some obvious disadvantages, such as the diminution of State historical feeling, the undue enlargement of the Senate, and the predominance of a single large city in a State,—there would now be more than two hundred States. Of course in one sense the States are no larger than they were in the early days, because communication from one part to another is in all of them far easier, quicker, and cheaper than it then was.

<sup>2</sup> It must be remembered that in most parts of the Union the local self-government of cities, counties, townships, and school districts exists in a more complete form than in any of the great countries of Europe.—See Chapters XLVIII.—LII. *post*.

may continue in a district, may work injustice to a minority and invite imitation by other States, which the wholesome stringency of the Central government might have suppressed.

A more unqualified approval may be given to the division of legislative powers. The existence of the State legislatures relieves Congress of a burden too heavy for its shoulders; for although it has far less foreign policy to discuss than the Parliaments of England, France, or Italy, and although the separation of the executive from the legislative department gives it less responsibility for the ordinary conduct of the administration than devolves on those Chambers, it could not possibly, were its competence as large as theirs, deal with the multiform and increasing demands of the different parts of the Union. There is great diversity in the material conditions of different parts of the country, and at present the people, particularly in the West, are eager to have their difficulties handled, their economic and social needs satisfied, by the State and the law. How little Congress could satisfy them appears by the very imperfect success with which it cultivates the field of legislation to which it is now limited.

These merits of the Federal system of government which I have enumerated are the counterpart and consequences of that limitation of the central authority whose dangers were indicated in last chapter. They are, if one may reverse the French phrase, the qualities of Federalism's defects. The problem which all federalized nations have to solve is how to secure an efficient central government and preserve national unity, while allowing free scope for the diversities, and free play to the authorities, of the members of the federation. It is, to adopt that favourite astronomical metaphor which no American panegyrist of the Constitution omits, to keep the centrifugal and centripetal forces in equilibrium, so that neither the planet States shall fly off into space, nor the sun of the Central government draw them into its consuming fires. The characteristic merit of the American Constitution lies in the method by which it has solved this problem. It has given the National government a direct authority over all citizens, irrespective of the State governments, and has therefore been able safely to leave wide powers in the hands of those governments. And by placing the Constitution above

both the National and the State governments, it has referred the arbitrament of disputes between them to an independent body, charged with the interpretation of the Constitution, a body which is to be deemed not so much a third authority in the government as the living voice of the Constitution, the unfold of the mind of the people whose will stands expressed in that supreme instrument.

The application of these two principles, unknown to, or at any rate little used by, any previous federation,<sup>1</sup> has contributed more than anything else to the stability of the American system, and to the reverence which its citizens feel for it, a reverence which is the best security for its permanence. Yet even these devices would not have succeeded but for the presence of a mass of moral and material influences stronger than any political devices, which have maintained the equilibrium of centrifugal and centripetal forces. On the one hand there has been the love of local independence and self-government; on the other, the sense of community in blood, in language, in habits and ideas, a common pride in the national history and the national flag.

*Quid leges sine moribus?* The student of institutions, as well as the lawyer, is apt to overrate the effect of mechanical contrivances in politics. I admit that in America they have had one excellent result; they have formed a legal habit in the mind of the nation. But the true value of a political contrivance resides not in its ingenuity but in its adaptation to the temper and circumstances of the people for whom it is designed, in its power of using, fostering, and giving a legal form to those forces of sentiment and interest which it finds in being. So it has been with the American system. Just as the passions which the question of slavery evoked strained the Federal fabric, disclosing unforeseen weaknesses, so the love of the Union, the sense of the material and social benefits involved in its preservation, appeared in unexpected strength, and manned with zealous defenders the ramparts of the sovereign Constitution. It is this need of determining the suitability of the machinery for the workmen and its probable influence

<sup>1</sup> The central government in the Achaian League had apparently a direct authority over the citizens of the several cities, but it was so ill defined and so little employed that we can hardly cite that instance as a precedent.

upon them, as well as the capacity of the workman for using and their willingness to use the machinery, which makes it so difficult to predict the operation of a political contrivance, or, when it has succeeded in one country, to advise its imitation in another. The growing strength of the national government in the United States is largely due to sentimental forces that were weak a century ago, and to a development of internal communications which was then undreamt of. And the devices which we admire in the Constitution might prove unworkable among a people less patriotic and self-reliant, less law-loving and law-abiding, than are the English of America.

## CHAPTER XXXI

### GROWTH AND DEVELOPMENT OF THE CONSTITUTION

THERE is another point of view from which we have still to consider the Constitution. It is not only a fundamental law, but an unchangeable law, unchangeable, that is to say, by the national legislature, and changeable even by the people only through a slow and difficult process. How can a country whose very name suggests to us movement and progress be governed by a system and under an instrument which remains the same from year to year and from century to century?

By the "Constitution" of a state or a nation we mean those of its rules or laws which determine the form of its government, and the respective rights and duties of the government towards the citizens and of the citizens towards the government. These rules, or the more important among them, may be contained in one document, such as the Swiss or the Belgian Constitution, or may be scattered through a multitude of statutes and reports of judicial decisions, as is the case with regard to what men call the English Constitution. This is a distinction of practical consequence. But a still more important difference exists in the fact that in some countries the rules or laws which make up the Constitution can be made and changed by the ordinary legislature just like any other laws, while in other countries such rules are placed above and out of the reach of the legislature, having been enacted and being changeable only by some superior authority. In countries of the former class the so-called Constitution is nothing more than the aggregate of those laws—including of course customs and judicial decisions—which have a political character; and this description is too vague to be scientifically useful, for no three jurists would agree as to which laws ought to be deemed political. In such countries there is nothing either in