

privy council; others by the governor 'in the exercise of H.M.'s delegated prerogative'.]

208. THE EARL OF DURHAM: REPORT ON THE AFFAIRS OF BRITISH NORTH AMERICA, 3 January 1839<sup>1</sup>

[Though overwhelmed by the magnitude of his tasks, and their potential benefit to Britain, he had visited only the two Canadas; but from information he concluded that similarity of constitutional difficulties enabled him to extend his report to all the colonies. Of Lower Canada too he had anticipated that 'the common quarrel was the result of some common defect in the almost identical institutions of these Provinces....I expected to find a contest between a government and a people: I found two nations warring in the bosom of a single state; I found a struggle not of principles but of races'. It was an intense all-pervading hatred: the French majority was hardly of democrats, contending for liberal reforms; nor were the English conservatives, opponents of change in a feudal province. The former clung to their old laws; were frugal, honest, courteous; lacked initiative and enterprise and, if educated, chose the professions rather than commerce. The English by contrast, created wealth and employment, improved agriculture, were alienated by religion, language and education from those they despised, and found all attempts at reform blocked in the assembly. The French would not submit to the British Government; nor the English to a dominant French majority in the assembly. The latter complained of imperial policy which had fostered French pretension and racial separation and in self-protection asserted 'that Lower Canada must be English at the expense, if necessary, of not being British'.<sup>2</sup> There was an element of Americanism in their 'loyalism'. Of the two methods of dealing with conquered colonies - the preservation of the pre-conquest identity with minimum change, or 'assimilation' to the metropolitan model, the former had wrongly been followed: in the aftermath of 1776 the policy had been 'to govern colonies by means of division and to break them down as much as possible into petty isolated commun-

1. Sir Charles Lucas (ed.) II, esp. pp.16, 61, 67, 82, 109, 147, 227, 277, 280, 287, 323, 325, 327, 331. The sporadic violence of 1837, the so-called 'rebellions', had attracted attention and demanded inquiry into the breakdown of the 1791 Act. Melbourne may have chosen to send Durham, a political rival, to a graveyard of reputations; but Durham took a generous view of his task as governor general and high commissioner, regarding himself as representative of Victoria and her cabinet rather than the C.O. An architect of the Reform Act (1832), he was an apostle of the new liberalism of Colonial Reform, and took Buller and Wakefield with him (as *kindergarten*, cf. Milner later) on his mission. He saw the reunion of the Canadas as a field for racial cooperation in parliamentary government, as a basis for greater prosperity and improved trade, industry and communications, as a bulwark against annexation to the U.S., and a seedbed for ultimate 'Canadian nationhood'.

2. [Cf. Vol.IV: Elgin to Grey, 30 April 1849, on 'Loyalist' threats to secede over the 'Rebellion Losses' bill: to use 'good bayonets in Saxon hands' to overthrow the 'tyranny' of a French majority].

ities': *divide et impera*.<sup>1</sup> Nor was this consistently done, for in criminal law, immigration and clergy reserves the English influence remained in Lower Canada; and the 'natural collision' of the executive and the assembly, where the latter with full financial power had no voice in administration or influence over officials, was 'aggravated' by race. It was a delusion to establish in 1791 a representative assembly alongside an independent executive, and to imagine that the former would confine itself to legislation and not criticise the policies of those who, however distrusted or condemned, 'retained their offices and their power of giving bad advice'; and each new governor came to depend on this official party, though there was no departmentisation of (or individual identification with) any particular business - 'no responsible head'. To combine representative and non-responsible government, to separate legislature and executive, was an impossible system of colonial government. To maintain a *Canadien* nationality against 'the progressive intrusion of the English race' it was natural that the frustrated assembly should transgress 'our notions of the proper limits of Parliamentary interference' and refuse supplies.<sup>2]</sup>

It is an unhappy consequence of the system which I have been describing that it relieved the popular leaders of all the responsibilities of opposition. A member of opposition in this country acts and speaks with the contingency of becoming a minister constantly before and he feels therefore the necessity of proposing no course and of asserting no principles on which he would not be prepared to conduct the Government if he were immediately offered it.

[Permanently excluded from power, the colonial demagogue indulged in the wildest opinions without the fear of having to implement them. The legislative council only served as 'a *veto* in the hands of public functionaries' on acts of the assembly, though the colony should congratulate itself on the way the upper house had curbed the overthrow of British interests and of order and national liberty: the assembly had even claimed for its resolutions the force of law: temporary Acts, 'tacking', manipulation of the *quorum*, or legislation for public works and 'parish business', entrusted to sub-committees<sup>2</sup> were among its abuses: and the obsession for conflict had prevented wise legislation (as on education). The governor was not the king's representative, but a subordinate of the secretary of state for all

1. One of the few foolish and unhistorical comments in a wise, balanced report. Division in 1791 was the result of a determination to grant representative government to both British and French-Canadians and the latter's fear of sharing it with the British. In the maritime times the separation of New Brunswick and P.E.I. was due to Loyalist suspicion of Halifax, and to the scattered localities of settlements.

2. He found it difficult to understand 'how any English statesmen could have imagined that representative and irresponsible government could be successfully combined' (p.79); or, as Buller put it in 1840, 'Power without representation is not so great an evil as representation without executive responsibility. It is better to be without a fire than to have a fire without a chimney': (*Responsible Government for colonies*, 1926 ed. pp.92-3). 2. [See Vol.II pp.431 ff].

instruction and decision, so he had shifted responsibility to Whitehall - in effect, to the permanent officials. The complete ignorance of the British public and of Parliament made such nominal responsibility 'positively mischievous'; and the frequent changes in secretaries of state thrust decision-making onto permanent C.O. officials.]

The real advisers of the Governor have, in fact, been the Executive Council;<sup>1</sup> and an institution more singularly calculated for preventing the responsibility of the acts of Government resting on any body, can hardly be imagined. It is a body, of which the constitution somewhat resembles that of the Privy Council; it is bound by a similar oath of secrecy; it discharges in the same manner certain anomalous judicial functions; and its 'consent and advice' are required in some cases in which the observance of that form has been thought a requisite check on the exercise of particular prerogatives of the Crown. But in other respects it bears a greater resemblance to a Cabinet, the Governor being in the habit of taking its advice on most of the important questions of his policy. But as there is no division into departments in the council, there is no individual responsibility, and no individual superintendence. Each member of the Council takes an equal part in all the business brought before it. The power of removing members being very rarely exercised, the Council is, in fact, for the most part composed of persons placed in it long ago; and the Governor is obliged either to take the advice of persons in whom he has no confidence, or to consult only a portion of the Council. The secrecy of the proceedings adds to the irresponsibility of the body; and when the Governor takes an important step, it is not known, or not authentically known, whether he has taken the advice of this Council or not, what members he has consulted, or by the advice of which of the body he has been finally guided. The responsibility of the Executive Council has been constantly demanded by the reformers of Upper Canada, and occasionally by those of the Lower Province. But it is really difficult to conceive how a desirable responsibility could be attained, except by altering the working of this cumbersome machine, and placing the business of the various departments of Government in the hands of competent public officers.... [Without departmental

heads the chief secretary's office was confused and congested. In the country districts there was no regular administration; in towns - even (after lapse of a temporary Act) in Quebec and Montreal - there was no municipal government, so necessary for training for central government. The initiation into self-government had taken place 'at the wrong end'. The law was a 'patchwork'; circuits had proved abortive; justice was expensive. The appellate system needed reform. Trial by jury was perverted by racial prejudice and both French and English complained, for 'it provides immunity for every political offence'. Another

1. A body separated from the legislative council in 1791, but only incidentally referred to in §xxxiv of the Act, relating to civil appeals:[p.457].

English institution, the unpaid J.P.'s, had failed to work, for want of care for qualified appointments.]

When we transplant the institutions of England into our colonies, we ought at least to take care beforehand that the social state of the colony should possess those peculiar materials on which alone the excellence of those institutions depends in the mother country....

[He criticised the deficiencies in police, hospitals and schools. He applauded the toleration for religions and the conciliatory role of the catholic priests. He found the clergy reserves divisive but less so than in Upper Canada. He deplored inter-provincial disputes over duties and regretted that the absence of direct taxation had deprived Lower Canada of many institutions 'every civilised community ought to possess'. As for Upper Canada<sup>1</sup> the absence of racial conflict meant 'not two but several parties' with unclear aims. Settlement was dispersed and isolated. The civil list was secured, but there was a 'demand for responsibility in the Executive Government'. Though there was 'very little of family connection', there was certainly a powerful compact of officials to whom successive governors had had to yield: they were strong in property, banking, the legal profession, public office, the judiciary, the magistracy, the anglican church; but when reformers won a majority over (*inter alia*) clergy reserves - on which (and he suggested repeal) 'the prompt and satisfactory decision is essential to the pacification of Canada' for colonial society was hostile to a privileged dominant Establishment, and anglicans would remain a minority - the victory proved empty, for the executive remained in power.] Reluctant to acknowledge any responsibility to the people of the Colony this party appears to have paid a somewhat refractory and nominal submission to the Imperial Government, relying in fact on securing a virtual independence by this nominal submission to a distant authority of the Colonial Department, or to the powers of a Governor, over whose policy they were certain, by their facilities of access, to obtain a paramount influence.

[Most reformers wanted 'an exact transcript' of the British constitution and closer ties with Britain, but a few favoured U.S. options. There had been an extensive programme of public works; but Bond Head's election campaign<sup>2</sup> had resulted in an assembly in which the people had no confidence and which had sought to extend its own life. From this exasperation and irritation had come Mackenzie's 'treasonable enterprise' of 1837.<sup>3</sup> Though the administration of justice was better, the circuits were working and juries showed some integrity compared with Lower Canada, the prosperity of Upper Canada was inhibited by poor communications, debts, lack of opportunities for trade and

1. Of Durham's five months in Canada, only 10 days were spent in the Upper province and much of the material from there was supplied by Charles Buller.

2. By representing all opponents as disloyal and all support as a vote against separation from Britain, Bond Head had personally campaigned and won the election of 1836. 3. The so-called 'rebellion'.

bad financial relations with the other province. There was a suspicion of uncertainty in British policy towards Upper Canada and a strong feeling that its needs were disregarded.

As for the eastern (maritime, or Atlantic) provinces similar institutions required similar remedies: in all 'representative government coupled with an irresponsible executive...the same constant collision...abuse of the powers of representative bodies...want of good municipal institutions...constant interference' by imperial government in local affairs. These colonists were 'backward' in development, all initiatives coming from American settlers, traders and fishermen. Of Newfoundland he had little to report save 'the ordinary colonial collision' of representatives and the executive: if the state of society there made local self-government 'inadvisable', he would agree with an address from its assembly for annexation to Britain. There followed a section on the disposal of waste lands and the obstacles discouraging a valuable emigration from Britain. Though there was no imminent danger of separation, or annexation to the U.S., the removal of administrative grievances and constitutional abuse was urgent - in the two Canadas especially.]

The preceding pages have sufficiently pointed out the nature of those evils, to the extensive operation of which, I attribute the various practical grievances, and the present unsatisfactory condition of the North American Colonies. It is not by weakening, but by strengthening the influence of the people on its Government; by confining within much narrower bounds than those hitherto allotted to it, and not by extending the interference of the imperial authorities in the details of colonial affairs, that I believe that harmony is to be restored, where dissension has so long prevailed; and a regularity and vigour hitherto unknown, introduced into the administration of these Provinces. It needs no change in the principles of government, no invention of a new constitutional theory, to supply the remedy which would, in my opinion, completely remove the existing political disorders. It needs but to follow out consistently the principles of the British constitution, and introduce into the Government of these great Colonies those wise provisions, by which alone the working of the representative system can in any country be rendered harmonious and efficient. We are not now to consider the policy of establishing representative government in the North American Colonies. That has been irrevocably done; and the experiment of depriving the people of their present constitutional power, is not to be thought of. To conduct their Government harmoniously, in accordance, with its established principles, is now the business of its rulers; and I know not how it is possible to secure that harmony in any other way, than by administering the Government on those principles which have been found perfectly efficacious in Great Britain. I would not impair a single prerogative of the Crown; on the contrary, I believe that the interests of the people of these Colonies require the protection of prerogatives, which have not hitherto been exercised. But the Crown must, on the other hand, submit

to the necessary consequences of representative institutions; and if it has to carry on the Government in unison with a representative body, it must consent to carry it on by means of these in whom that representative body has confidence....

[In Britain it was now unthinkable for ministers 'perpetually in a minority' to carry on as the government: just as 'ancient constitutional remedies' (impeachment and the stoppage of supplies) had fallen into disuse as means of parliamentary control over the executive. The colonial proposal of an elective executive council was unacceptable.] Every purpose of popular control might be combined with every advantage of vesting the immediate choice of advisers in the Crown, were the Colonial Governor to be instructed to secure the co-operation of the Assembly in his policy, by entrusting its administration to such men as could command a majority; and if he were given to understand that he need count on no aid from home in any difference with the Assembly, that should not directly involve the relations between the mother country and the Colony. This change might be effected by a single dispatch containing such instructions: or if any legal enactment were requisite, it would only be one that would render it necessary that the official acts of the Governor should be countersigned by some public functionary.<sup>1</sup> This would induce responsibility for every act of the Government, and, as a natural consequence, it would necessitate the substitution of a system of administration, by means of competent heads of departments, for the present rude machinery of an executive council. The Governor, if he wished to retain advisers not possessing the confidence of the existing Assembly, might rely on the effect of an appeal to the people, and, if unsuccessful, he might be coerced by a refusal of supplies, or his advisers might be terrified by the prospect of impeachment.

I know that it has been urged, that the principles which are productive of harmony and good government in the mother country, are by no means applicable to a colonial dependency. It is said that it is necessary that the administration of a colony should be carried on by persons nominated without any reference to the wishes of its people; that they have to carry into effect the policy, not of that people, but of the authorities at home; and that a colony which should name all its own administrative functionaries, would, in fact, cease to be dependent. I admit that the system which I propose would, in fact, place the internal government of the colony in the hands of the colonists themselves; and that we should thus leave to them the execution of the laws, of which we have long entrusted the making solely to them. Perfectly aware of the value of our colonial possessions, and strongly impressed with the necessity of maintaining our connexion with them, I know not in what respect it can be desirable that we should interfere with their internal legislation

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1. i.e. no statute was necessary.

in matters which do not affect their relations with the mother country. The matters, which so concern us, are very few. The constitution of the form of government, - the regulation of foreign relations, and of trade with the mother country, the other British Colonies, and foreign nations, - and the disposal of the public lands, are the only points on which the mother country requires a control.<sup>1</sup> This control is now sufficiently secured by the authority of the Imperial Legislature; by the protection which the Colony derives from us against foreign enemies; by the beneficial terms which our laws secure to its trade; and by its share of the reciprocal benefits which would be conferred by a wise system of colonization. A perfect subordination, on the part of the Colony, on these points, is secured by the advantages which it finds in the continuance of its connexion with the Empire. It certainly is not strengthened, but greatly weakened, by a vexatious interference on the part of the Home Government, with the enactment of laws for regulating the internal concerns of the Colony, or in the selection of the persons entrusted with their execution. The colonists may not always know what laws are best for them, or which of their countrymen are the fittest for conducting their affairs; but, at least, they have a greater interest in coming to a right judgment on these points, and will take greater pains to do so than those whose welfare is very remotely and slightly affected by the good or bad legislation of these portions of the Empire. If the colonists make bad laws, and select improper persons to conduct their affairs, they will generally be the only, always the greatest, sufferers; and, like the people of other countries, they must bear the ills which they bring on themselves, until they choose to apply the remedy....

[It would be absurd to keep an expensive army in a colony just to secure patronage: no system was 'so calculated to fill important posts with inefficient persons as the present'. To secure harmony and to reward loyalty the Crown should 'henceforth consult the wishes of the people in the choice of its servants'. British North Americans were a reliable people 'to whom we should not grudge power'. Harmony would be secured by an assurance that government would in future be carried on 'in conformity with the views of the majority of the assembly'; but the British practice of appropriation only with prior consent of the Crown<sup>2</sup> was necessary to protect the public interest of the people against the 'scramble' for local counter claims.]

The establishment of a good system of municipal institutions throughout these Provinces is a matter of vital importance. A general legislature, which manages the priv-

1. Concession of colonial matters to their own local governments was to be balanced by reservation of imperial subjects to Whitehall and Westminster. But the claim to imperial matters was to mark the evolution to 'Dominion Status' as tariff, commercial treaties, foreign affairs were conceded as essential to the new sense of nationhood [p.570].  
2. This had been since 1713 a standing order (No.57) of the Commons: [Cf. pp.623-4n].

ate business of every parish, in addition to the common business of the country, wields a power which no single body, however popular in its constitution, ought to have; a power which must be destructive of any constitutional balance. [Such power should be limited and diffused as in the States of the Union.] Instead of confiding the whole collection and distribution of all the revenues raised in any country for all general and local purposes to a single representative body, the power of local assessment, and the application of the funds arising from it should be entrusted to local management [though the assemblies would resist this 'sacrifice of power'.] The establishment of municipal institutions for the whole country should be made a part of every colonial constitution; and the prerogative of the Crown should be constantly interposed to check any encroachment on the functions of the local bodies, until the people should become alive, as most assuredly they almost immediately would be, to the necessity of protecting their local privileges....

[Without violence to the natural aspirations of the French but in recognition of their future interest 'isolated in the midst of an Anglo-Saxon world' and of their 'hopeless inferiority' in initiative and enterprise, it was necessary that the character of Lower Canada must be 'that of the British Empire': 'with this end in view the ascendancy should never again be placed in any hands but those of an English population'.<sup>1</sup> But the continuation of absolute government by governor and council<sup>2</sup> would only excite American suspicion, and would necessarily mean weak authority. It would be unfair by manipulation 'to make the English minority an electoral majority'. The answer lay not in federation as he had originally thought, but in amalgamation and reunion which would subject Lower Canada 'to the vigorous rule of an English majority' and would cause the French legitimately to abandon their hopes of a separate nationality: a wider union embracing the maritime colonies might counterbalance separatist tendencies and foster a new sense of nationhood in partnership rather than subordination,<sup>3</sup> would provide opportunities for ambitious men, and stimulate new common interests (e.g. railways) among colonies which at present 'stand to one another in the position of foreign States and of foreign States without diplomatic relations' (he quoted Victoria's father in 1814 in support of union). Assemblies would probably resist the surrender of their powers to a central legislature: if there were no municipal government, he favoured the retention of the assemblies to act with such local powers; but he recommended the immediate reunion of the two Canadas, leaving the other colonies to be admitted voluntarily later. The 1791 Act must be repealed at once.]

As the mere amalgamation of the Houses of Assembly of

1. A reunion had already been decided, without Durham's knowledge, by the prime minister, Viscount Melbourne.

2. By 1 & 2 Vict. cap.9 [see p.547n].

3. A demonstration of Durham's sense of the evolution of the imperial association and a colonial nationalism.



the two Provinces would not be advisable, or give at all a due share of representation to each, a Parliamentary Commission should be appointed, for the purpose of forming the electoral divisions, and determining the number of members to be returned on the principle of giving representation, as near as may be, in proportion to population.<sup>1</sup> I am averse to every plan that has been proposed for giving an equal number of members to the two Provinces, in order to attain the temporary end of outnumbering the French, because I think the same object will be obtained without any violation of the principles of representation, and without any such appearance of injustice in the scheme as would set public opinion, both in England and America, strongly against it; and because, when emigration shall have increased the English population in the Upper Province, the adoption of such a principle would operate the defeat the very purpose it is intended to serve. It appears to me that any such electoral arrangement, founded on the present provincial divisions, would tend to defeat the purposes of union, and perpetuate the idea of disunion....

[The governor might be empowered temporarily to suspend elections in 'unsafe' districts; the legislature should be required to establish a system of elected local government.]

The constitution of a second legislative body for the united Legislature, involves questions of very great difficulty. The present constitution of the Legislative Councils of these Provinces has always appeared to me inconsistent with sound principles, and little calculated to answer the purpose of placing the effective check which I consider necessary on the popular branch of the Legislature. The analogy which some persons have attempted to draw between the House of Lords and the Legislative Councils seems to me erroneous. The constitution of the House of Lords is consonant with the frame of English society; and as the creation of a precisely similar body in such a state of society as that of these Colonies is impossible, it has always appeared to me most unwise to attempt to supply its place by one which has no point of resemblance to it, except that of being a non-elective check on the elective branch of the Legislature. The attempt to invest a few persons, distinguished from their fellow-colonists neither by birth nor hereditary property, and often only transiently connected with the country, with such a power, seems only calculated to ensure jealousy and bad feelings in the first instance, and collision at last....

[But apart from indicating that the union proposed would obviate the need for a dominant English legislative council as a check on the French, he left the form of a new council to Parliament. The imperial government should have the entire administration of public lands; other Crown revenues should be surr-

1. This warning was not heeded in the Union Act [§ xii] which, despite the larger population of Lower Canada, provided for equal representation of the provinces. When after 1851 (by immigration) the British became the majority, their 'Rep. by Pop.' movement became an anti-Union campaign: amendment being blocked by need for a two-thirds majority.

ended for an adequate civil list.]

The responsibility to the United Legislature of all officers of the Government, except the Governor and his Secretary, should be secured by every means known to the British Constitution. The Governor, as the representative of the Crown, should be instructed that he must carry on his government by heads of departments, in whom the United Legislature shall repose confidence; and that he must look for no support from home in any contest with the Legislature, except on points involving strictly Imperial interests.... [As in Britain, the independence of judges should be conceded *quam dui se bene gesserint*; and, similarly to Commons' practice, 'no money bill should be initiated without consent of the Crown'. The provision for clergy reserves should be repealed. Measures should be undertaken to promote emigration from Britain on systematic lines since this would prevent recurrence of disorders and promote harmony.]

The experiment of keeping colonies and governing them well ought at least to have a trial ere we abandon for ever the vast dominion which might supply the wants of our surplus population [and raise up fresh consumers and producers] and perpetuate and strengthen the connection between this Empire and the North American Colonies which would then form one of the brightest ornaments in Your Majesty's Imperial Crown.

209. LORD JOHN RUSSELL: SPEECH MOVING THE BILL FOR UNION, 3 June 1839<sup>1</sup>

Lord Durham has stated that an analogy existed between the representative of the Crown in the Colony and the constitutional responsibility of the ministers in this country. He states that as soon as the ministers of the Crown have lost the confidence of the House of Commons in this country they cease to be ministers, and that they could not go on with the government with a constant minority. He added that it is certainly a most unusual case for a ministry to go on for several months in a minority, and he then attempts to apply that principle to the government of Canada.... [This was contrary to the Commons' fifth resolution (6

March 1837)<sup>2</sup> which had asserted it 'unadvisable' to subject the executive council to the 'responsibility demanded' by the assembly.

That was his motion; and nothing in the Report had shaken his opinion that a Canadian executive council differed from a British cabinet.]

In the first place, there is an obvious difference in matter of form with regard to the instructions under which the Governor of a colony acts. The Sovereign in this country receives the advice of the ministers and acts by the advice of those ministers, and indeed, there is no important act of the Crown for which there is not some individual minister responsible. There responsibility begins and

1. *Hansard* XLVII, 1268-72. Russell was home secretary and leader of the Commons in Melbourne's cabinet. Glenelg had resigned in February and Normanby was at the Colonial Office, but in September he and Russell exchanged offices.

2. [See p.546n.]