

## THE WESTERN AUSTRALIAN CONSTITUTION IN ITS BRITISH IMPERIAL CONTEXT

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Constitutions such as the WA act of 1889 should not be taken for granted. England did not and still does not have a written constitution. Debate about 'the constitution' entered political discourse in the seventeenth century and was at the heart of the disputes that led to the English Civil War precisely because the constitution had not been embodied in any single statute. When several of the American colonies broke away to form the United States, they had to write their own Constitution. Its content was based partly on understandings of the English constitution as modified by the 'Glorious Revolution' of 1688, and partly on philosophical debates among the 'Founding Fathers' embodied in *The Federalist Papers*. Even when a Constitution was enacted in 1789, uncertainties about the extent of federal power led to the adoption of a series of ten amendments, the so-called 'Bill of Rights'. The former British colonies enacted no such enumerated lists of rights; it is merely understood by judicial convention that the 'rights of free-born Englishmen' were implicitly embodied in the written acts that gave self-government to Canada, New Zealand and Australia. What we call the constitution of Canada was in fact a piece of legislation enacted by Parliament, the British North America Act of 1867. In theory such pieces of constitutional legislation could only be modified by further acts of the British Parliament, which is why Canadians made such a fuss over the 'repatriation' of their constitution a few years ago.

Old histories of the British Empire assert that Britain had learned from the American experience that institutions of self-government were vital if future revolutions were to be avoided. In fact it would be along time after the American Revolution before any more experiments in self-rule were attempted (apart from the Maritime colonies of Canada and some West Indian colonies that had possessed legislatures before the American revolt). In the 1830s self-governing municipal governments appeared in Upper Canada, followed closely by the first Australian city government in Adelaide. Not until failed revolutions in Upper and Lower Canada in 1837-38 was the issue of colonial self-government revisited in the Durham Report. Lord Durham's recommendations paved the way for an orderly path to responsible government – the system whereby a colonial prime minister backed by a majority in a Legislative Assembly would automatically have the acts of that Assembly endorsed by the governor (except in matters of foreign policy and defence).

## **The Politics of nineteenth-century British grants of responsible government.**

Histories of ex-colonies like New South Wales, British Columbia and New Zealand often present the attainment of responsible government as a victory for democracy won by the hard-fought struggles of colonists. In reality complex politics in Britain lay behind the extension of the system.

After defence requirements of the French Revolutionary and Napoleonic Wars (1792-1815) raised taxes to an unsupportable level, successive British governments pursued aggressive policies of retrenchment (what might today be called economic rationalism). The paramount objective of fiscal policy was to lower government expenditure. At home this meant cutting welfare through acts such as the new Poor Law of 1834.

In the colonies the policy of retrenchment expressed itself in a drive to make colonial government pay for itself through taxation. It had been precisely that kind of policy that had led to the American Revolution back in the 1770s. New taxes aimed at paying the expenses of the 'French and Indian War' (1756-63) had outraged American colonists, who raised the cry of 'no taxation without representation'. In the mid-nineteenth century British governments tried a different tack. They allowed self-government in return for the promise that colonial legislatures would pay everything except the army and navy. A series of British acts of parliament in the 1850s extended self-government to the Australian and South African colonies, as well as New Zealand. In 1867 most of Canada was federated into a single self-governing Dominion—an act that saved even more expense for the British taxpayer.

In a broad sense it might be said that Liberal Governments more vigorously pushed devolution, but there were many exceptions. Benjamin Disraeli's Conservative government (1874-1880) pursued policies of devolution almost as vigorously as governments headed by Disraeli's archrival, William Gladstone.

## **White man's democracy.**

From one point of view the acts creating responsible governments in the colonies were truly liberal, inasmuch as they extended voting rights to people who had not previously possessed them. From another point of view, the acts established what some historians have termed '*Herrenvolk democracies*'. That is to say, they allowed one section of the population—men over twenty-one with specified educational and property qualifications—to rule the rest of the population. In New Zealand, South Africa, Canada and Australia, this meant governments voted in by adult white males, ruled the destinies of indigenous people. For Canadian Indians, this meant dispossession from land coveted by white farmers. In Australia it meant giving white settlers control over Aboriginal people. In South Africa it laid the basis for policies of segregation and *apartheid*.

The illiberal implications of these Liberal policies did not go unnoticed at the time. Historian Linda Colley has shown in *Britons Unite* how nineteenth-century notions of what it meant to be British were underpinned by a self-image of Britain as a 'land of the free'. After the slave trade was abolished in 1807 and slavery made illegal in 1833, the British were fond of comparing their love of liberty with the Americans' maintenance of a slave-owning society. In the 1840s the Secretary of State for

Colonies, Earl Grey, explicitly declared that no distinction of colour or race would be allowed by law anywhere in the British Empire. Yet it was precisely such laws that the masters of many colonial legislatures wanted to pass. New Zealanders wanted the right to buy land guaranteed to Maori owners by the Treaty of Waitangi. Colonists in New South Wales and Victoria wanted to bar immigration by British subjects from India and Hong Kong. Colonists in South Africa aimed to confine African people to small reserves.

In an effort to get round Britain's explicit commitment to equality before the law a number of cunning subterfuges were adopted. For example, when the government of Natal decided in the early 1860s to put its whole African population of about 100,000 persons under 'Native Law', the British government agreed with two provisos:

- 1) Africans would have the right to apply for exemption from Native Law, thereby gaining the full rights of British subjects; and
- 2) A Reserve Fund of £5000 per year was set aside to pay for the welfare of the African inhabitants of Natal.

Although only a handful of Africans ever succeeded in winning exemption from Native Law, these measures sufficiently cleared the conscience of Lord Palmerston's Liberal government, so the Colonial Office approved the measures. In this way the equality before the law gradually eroded.

### **Wars and uprisings and metropolitan politics complicate the situation**

The next complication that arose for Britain's policy of colonial self-rule came with the Maori Wars in New Zealand. Maori resistance to white settlement first flared in the late 1840s; a full-blown war erupted in the 1860s. This was a costly and lengthy contest. The recent work of historian James Belich has shown how the Maori virtually fought the British to a standstill. (At one point more colonial and British regular forces were tied down fighting the Maori than would be available to send to France at the beginning of World War I.) At war's end, the bills were enormous. Gladstone as British Chancellor of the Exchequer demanded that New Zealand make a significant contribution to paying them. This gave his rival, Disraeli, an opportunity to declare his passionate commitment to the Empire and its settlers the world over. However, this was merely imperialism for media consumption. Disraeli, as much as Gladstone, worried about the expensive consequences of reckless colonial assaults on indigenous people. An interesting result of the Anglo-Maori War was that the settler government of New Zealand attempted to assuage British concern over the plight of the Maori by instituting four seats in parliament to be elected solely by Maori voters. It can be reasonably argued that New Zealand's treatment of the Maori as political equals stems from this constitutional provision that gives the four Maori representatives the power to make or break governments in close elections.

Even as the Maori War dragged on, another crisis arose that tested Britain's commitment to self-rule for white settlers. Governor Edward Eyre of Jamaica panicked when West Indians marched on Mourant Bay to protest against the unjust labour practices of white sugar planters. (Yes, this was the same Eyre who had once been a Protector of Aborigines on South Australia's Murray River and later made a name for himself as an explorer of Western Australia.) The brutal measures he took to

suppress the rising provoked a scandal in Britain. Some leading intellectuals such as Charles Dickens and Thomas Carlyle defended Eyre, while a vocal humanitarian lobby demanded that he be tried for violations of human rights. While Eyre escaped a trial, he was recalled and the British government took away Jamaica's institutions of self-government. It reverted to a Crown Colony because the British Parliament feared that Jamaican planters might provoke future uprisings that would be expensive to suppress.

The Jamaican experience was fresh in the minds of British politicians of all parties when another crisis arose in Natal, South Africa. When an African chief, Langalibalele, refused to register guns in the possession of his people, a colonial expeditionary force marched against him. Fearing capture and death, the chief tried to escape with his people to the mountains of Lesotho. When the colonial militia caught up to him, four whites died in a brief skirmish. In retaliation, the militia stormed on, committing numerous well-documented atrocities. The captured chief was led in chains through the capital, Pietermaritzburg, whose white citizens spit and cheered his progress to gaol. Next the governor, Benjamin Pine, announced that as 'Supreme Chief' of the Africans of Natal he would try Langalibalele by Native Law.

When Natal's Bishop, J. W. Colenso, brought these injustices to the attention of public opinion in Britain, the recently elected Conservative government led by Disraeli determined it must act. Speakers in the House of Lords laughed and jeered when they were informed that instead of bringing British civilization to Natal, Governor Pine had become a Zulu chief. The Colonial Secretary, Lord Carnarvon decided that Natal, like Jamaica had proved itself to be unfit for self-government. Sir Garnet Wolseley, chief military trouble-shooter for the Empire went to Natal with instructions to bamboozle the white colonists into giving up the limited institutions of self-government they possessed. This he accomplished with great style, while at the same time reporting that the military might of the neighbouring Zulu kingdom posed a threat that the small colonial forces probably could not repel in case of an invasion. In a futile effort to spare his government a repeat of the Maori Wars, Lord Carnarvon tried to bundle the various South African colonies and republics into a single nation on Canadian lines. His longer-term hope was that the proposed confederation of South Africa would meet its defence requirements instead of making them a burden on British taxpayers. Alas the outcome of these manoeuvrings was a costly war with the Zulu that (along with a bad war in Afghanistan) partly responsible for the downfall of Disraeli's last government.

### **Worries about Western Australia**

These experiments with colonial self-government formed the backdrop to negotiations over the Western Australian act of 1889. The permanent officials of Britain's Colonial Office had long memories. They wished very much to avoid the mistakes of New Zealand, Jamaica and Natal. In particular they did not want another bunch of settler cowboys stirring up the local population. In the 1880s the indigenous population of Western Australia probably outnumbered the white settlers. There had already been disquieting reports of abuses and atrocities in the northwest. In the end the Colonial Office permitted a grant of self-rule on the condition that serious money guaranteed just treatment of

the Aboriginal population. Section 70 of the constitution act stipulated that £5000 or 1 per cent of the colony's revenue (whichever was the greater) must be spent on measures for the welfare of the native population. This provision was borrowed directly from Natal, and was yet another device for getting round Britain's theoretical commitment to equality before the law. Naturally the hope that a whites-only electorate in Western Australia would do the right thing by the indigenous population was soon disappointed. From its inception the 'responsible government' of the colony campaigned vigorously for repeal of the obnoxious section 70. By 1998 the tides of racism and imperialism were both running strongly in Great Britain. There was no longer a will in the Colonial Office to pay even lip service to equal justice. Colonial Secretary Joseph Chamberlain not only allowed repeal of Western Australia's section 70, he also advised the founding fathers of the Australian Commonwealth to implement their desired White Australia policy by subjecting non-white people to exclude non-white people through Natal's device of a dictation test. And then the real problems began.