

British Dominions and Foreign Relations

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The British Dominions and Foreign Relations*

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If there is any truth at all in the common statement that the British Constitution is "unwritten" it is a truth which needs somewhat careful explanation. In point of fact, practically the whole operation of government, both in the mother country and abroad, is at the present time carried on under express statutory powers. In a few instances, of which the most important is the conduct of foreign affairs, executive action is based upon the ancient common law prerogative of the Crown, but in all cases, whatever is done, is done in virtue of some definite law capable of ascertainment in the courts. To define the exact legal powers of any organ of government is seldom more difficult, and is usually much easier, in the British Empire than under the highly intricate federal system of the United States.

The assertion that the British Constitution is "unwritten" can only be true in one of two senses. In the first place, the text of our statutory constitutional law is scattered over a large number of statutes instead of being comprised in a single instrument, specially designated as "The Constitution" and protected from easy alteration by an elaborate procedure reserved for that single purpose. But this difference is really only a difference in the form which the writing takes. The law is equally written law in either case. The real element of truth in the popular statement lies in the fact that the actual practice of government under the British system is largely governed by well understood conventions, which enable a modern political democracy to express its will and act upon its will through legal forms that are inherited from the practice of the ancient monarchy. To a large extent this conventional element is necessarily

*This article contains the substance of a lecture delivered at Cornell University on March 12th, 1926.

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present in the operation of all modern governments. In the United States a conspicuous example is to be found in the growth of the political practice which has reduced the original Electoral College to a ceremonial form and made the actual choice of a President depend upon the direct vote of the people. As compared with the American Constitution, the British is "unwritten" in the sense that this conventional element controls the practice of our government to a much larger extent than it does in the United States.

The law itself is always supreme, and no political convention can ever contravene the letter of the law. For this reason the area within which such conventions can be effective is always strictly limited. Great changes have taken place in the character of government in England by a process of purely political development, but no development of conventional practice could (for example) enable the executive to dismiss the judges at will or deprive Parliament of its control over public finance. Practice must always move within the limits laid down for it by law, and an accurate knowledge of the law is essential if we are to understand the practice.

At this point the reader may be tempted to ask what bearing these generalities have upon the subject matter of the present article. Two points should be emphasized in answer. In the first place, there has taken place within living memory, and particularly within the last ten years, a very important change in the conduct of its foreign affairs by the British Empire, and this change has up to the present been accomplished without changing a letter of the law governing the matter. Secondly, this development has now, in my opinion, practically reached the extreme limits possible within the structure of our present constitution. If any further developments are contemplated, except in matters of detail, they will involve fundamental changes in the law which preserves the integrity of the Empire as an international unit.

The executive conduct of foreign affairs under the British Constitution depends upon the principle that it belongs to the prerogative of the Crown to direct and define the relations of Great Britain with all foreign states. Historically this legal rule is a survival of the mediaeval theory which regarded all international relations as being in the nature of personal intercourse between the sovereigns concerned. A treaty was not made between England and France, but between the King of England and the King of France. Upon this principle the Crown alone can determine whether, for example, Great Britain is at peace or war with any particular foreign state, and the statement of the Crown upon such a point is conclusively

binding upon all courts of law. Similarly all diplomatic intercourse with other nations, whether permanent or occasional, is conducted by the Crown through plenipotentiaries of its own choice, and no treaty made with Great Britain becomes an obligation binding in international law until it is ratified by the King's signature, and sealed with the Great Seal. This ratification does not in law require the concurrence of Parliament or of either of the two houses.

The tremendous power thus vested by law in the hands of the Crown is qualified by two other legal rules which in effect compel the Crown to conduct foreign affairs in accordance with the will of Parliament. In the first place the rule that no public money can be either raised or spent except under the authority of an Act of Parliament renders it obviously impossible for the Crown to embark upon any war for which it cannot be sure of obtaining Parliamentary sanction. Secondly no treaty made by the Crown can operate to affect the existing legal rights of British subjects under the ordinary law unless and until the necessary statutory changes are made by legislation passed through Parliament in the usual way. A good example of this rule is to be found in the case of *Walker v. Baird*,¹ decided by the Privy Council upon an appeal from Newfoundland. In that case a treaty had been made between Great Britain and France concerning the special privileges to be granted to French fishermen upon the Newfoundland coast. Certain Newfoundlanders had erected buildings upon the shore which violated the terms of the treaty, and Captain Walker destroyed these buildings in discharge of his duties as senior naval officer upon the station. At the time no legislation had been enacted to implement the international obligation, and the Privy Council held that the existence of the treaty could not by itself serve to justify an act which, apart from the treaty, would undoubtedly have been a tort. Since few treaties of major importance can be concluded which do not at some point affect the legal rights of individuals it follows that in effect the law, and not only the political practice, compels the Crown to conduct foreign affairs in close co-operation with Parliament.

The next point to notice is that in this matter of the conduct of foreign relations the royal prerogative is not delegated to the Governors of the Dominions and Colonies. To a large extent the colonial Governor is a viceroy clothed with the attributes of his sovereign. For example, he gives the royal assent to all legislative acts within his jurisdiction, and he is usually empowered to exercise the prerogative of pardon. He convenes and dissolves the legislature, and in all

¹[1892] A. C. 491.

ordinary matters of executive government he acts as if he were the King himself, and is under no obligation to take instructions from London. But no colonial Governor ever enjoys the full measure of the royal prerogative, and in particular he is never invested with any of the attributes of a sovereign in international law. In relation to the people of his own Dominion he is for most practical purposes equivalent to a King. In the eyes of foreign nations he is not allowed to be anything more than a local official of high rank. He can neither commission diplomatic plenipotentiaries himself nor receive the envoys of other powers. It is scarcely necessary to add that he cannot ratify treaties, declare peace or war, or define in any way the relations of his Dominion to foreign states.

From this it follows that when Dominion statesmen take part as plenipotentiaries in international discussions they must obtain their formal credentials from the Crown in Great Britain, and not from the particular Dominion which in fact they represent. The form of these documents makes it amply clear that the plenipotentiary represents the person of his Sovereign, who undertakes in person to honour all agreements concluded in his name. The parties to the contemplated treaty are invariably described as being the King and the foreign ruler (or republic), and there is not a word in the text of the document to indicate that the bearer represents any particular part of the Empire more than another.

The present law of the British Constitution therefore guarantees to the cabinet in London an effective control over the whole diplomacy of the Empire, in so far as it is conducted through the regular diplomatic channels. In so far as the various Dominion cabinets are able to take a share in this diplomacy they do so by the invitation of the central power and within any limits which it may see fit to lay down. Under the political practice of Great Britain the King can only act in affairs of state upon the advice of his responsible ministers, who are in their turn collectively responsible to the House of Commons and to the country at large. Since it is obviously impossible that the King should accept advice from several distinct ministries in different parts of the Empire, it follows that the exercise of any prerogative not delegated to colonial Governors must in effect be directed by the cabinet of Great Britain. No other cabinet enjoys the right of direct access to the throne. The executive ministry of Canada can deal directly with their own Governor-General, but they can only approach the King through the medium of the Secretary of State for the Dominions.

The law then is perfectly clear. At the same time, following

the traditions of our Constitution, it has been found possible within the limits of the law to establish a practice of inviting the greater Dominions to take as much part in the conduct of foreign affairs as the circumstances of each particular case permit. I will not attempt in the space available to trace the various stages of this development, most of which has taken place within recent memory, but some of the more outstanding features may be briefly summarized. In particular we should note:—

(1)—The participation by Dominion plenipotentiaries in the negotiation and signature of the peace treaties of 1919 and the Washington treaties of 1922.

(2)—The withholding of the King's ratification of these treaties until the approval of the Dominion Parliaments had been obtained.

(3)—The negotiation and signature by a single Canadian representative of the "Halibut Treaty" of 1923 between Great Britain and the United States.

(4)—The admission of the Dominions to separate voting membership in the Assembly of the League of Nations.

(5)—The appointment by the Crown of resident Irish and Canadian ministers to conduct Irish and Canadian business at Washington.

(6)—The resolutions of the Imperial Conference of 1923².

So far we have been dealing with what may be called formal diplomacy—the appointment of fully accredited plenipotentiaries and the negotiation of formal treaties which are strictly binding in international law. To complete the picture it should be added that a considerable amount of international business is conducted in a less formal manner, and that this kind of business can be freely transacted by the Dominions with little or no opportunity for Imperial interference or control. A good example may be found in the tariff agreement concluded between Canada and Germany in 1910. In this case the negotiating representatives were Mr. Fielding, then Canadian Minister of Finance, and the German Consul-General in Montreal. Effect was given to the terms of the agreement by a Canadian Order in Council and by corresponding executive action in Germany.

It will be observed that an agreement of this kind differs both in form and in legal effect from a treaty proper. The negotiators were not provided with the diplomatic commissions technically known as "full powers," and therefore they had no authority to bind their respective sovereigns. No ratifications were exchanged, and there-

²The text of these resolutions will be found at the end of this article.

fore no international obligation was created. A failure to observe the terms of the agreement would not have been a wrong in the eyes of international law, and would have given no occasion for any remonstrance through the usual diplomatic channels. The negotiators acted as representing their official superiors, and in law there was nothing more than a personal undertaking on the part of the executive officials concerned that a certain policy would be carried into effect. The reciprocity agreement which Sir Wilfrid Laurier negotiated with certain American ministers at Washington in 1911 was of the same kind. In this case Sir Wilfrid was defeated at the ensuing general election, and the Conservative government which succeeded him was under no obligation to follow his policy in relation to the tariff. Had the agreement been a treaty it would of course have been binding upon Canada irrespective of any change in her internal government.

In practice a large amount of international business, particularly with the United States, is transacted by Canada in this informal manner. The paths of ceremonial diplomacy are apt to be circuitous and congested, and results in cases of minor importance are more quickly reached by direct correspondence between the executive officials concerned. One consequence of the practice has been to give a quasi-diplomatic status to the consuls-general of the chief European powers in Ottawa and Montreal. These officers carry no diplomatic credentials, since there is no sovereign power in Canada to whom they could be accredited, but in practice much of the business which passes through their hands is diplomatic rather than consular in character.

The practical conveniences of this informal procedure are quite sufficient to justify its employment, so long as its limitations are clearly recognized. But any attempt to disregard these limitations and employ informal methods for the conduct of business involving major issues of policy would undoubtedly lead to very serious difficulties.

So far we have been engaged in studying examples of the part taken by the Dominions in international affairs, whether independently or in co-operation with the mother country. But there is another side to the picture, and it now becomes necessary to examine the instances in which the Dominions have been excluded from taking any part in the negotiation and settlement of diplomatic questions. Out of many instances it will be sufficient to select two—the negotiations which preceded the outbreak of war in 1914 and the conclusion of the Treaty of Lausanne in 1923.

The recently published memoirs of Viscount Grey and Mr. Page, as well as a host of other books, enable us to form a vivid picture of what went on in London during the ten days immediately preceding the outbreak of war between Great Britain and Germany. Without going into any of the controversies that have arisen it is clear that the Foreign Secretary was bearing a physical and mental strain which almost reached the limits of human endurance. All through the day and a large part of the night he was in almost hourly telegraphic correspondence with the British ambassadors in at least six foreign capitals, and he was continually being called upon to receive the ambassadors of the same and other powers in London. None of this work could be delegated. Decisions of the most tremendous importance had to be taken by Sir Edward Grey himself, and foreign ambassadors could not be asked to state their views to subordinate officials. Furthermore he had to keep in the closest touch with the Prime Minister, the Cabinet, and the House of Commons, and unanimity in the Cabinet was not reached until the German armies violated the frontier of Belgium.

It is obvious that in circumstances such as these any attempt to work in consultation with the Dominions would have been an absolute physical impossibility. The High Commissioners who represent the Dominions in London have no diplomatic status, and are not authorised to express the views of their respective governments upon questions of foreign policy. Consultation could only have been by cable, and it was manifestly impossible to deal in this way with a situation which was changing almost from hour to hour. The French or German Ambassador could walk into Sir Edward Grey's room and say:—"These are the views of my government; what are your's?" Clearly it was impossible to reply:—"I should very much like to be able to tell you the British view, but I cannot do so until I have consulted the Prime Ministers of Canada, Australia, South Africa, and New Zealand." To attempt consultation at such a time would have been to work with his right hand tied behind his back.

The moral of this is obvious. In times of international crisis, when vital decisions must be quickly taken, it is necessary for Great Britain to act alone. The resolutions of the Imperial Conference of 1923 cannot be interpreted to cover such a case. Indeed the attempt to devise any formula would be idle, since the impossibility of consultative action is not legal, but physical.

Of course the Dominions cannot be co-erced into following the action of the mother country, nor would any attempt at co-ercion ever be made. At the same time they are faced with the choice between

two alternatives. Either they must accept the decision of Great Britain or they must be prepared to undertake the responsibilities of independence. In 1914 the response to the needs of the mother country was immediate, eager, and entirely spontaneous. If a case should occur in which there was more difference of opinion, it would still be possible for the Dominions to accept the British decision, and thereby preserve the unity of the Empire, without committing themselves to take an active part in the war. This measure of independence is fully recognized, and finds formal expression in the Constitution of the Irish Free State, as well as in the recent Treaty of Locarno. But the refusal to take an active part in the war does not mean that it is possible for a Dominion to be neutral. Neutrality is an attribute of international personality, and is not compatible with any status save that of formal independence. The internal arrangements of the British Empire are not binding upon the enemy, who is entitled to regard it as a unit unless and until some portion is willing to assume the responsibility of independence. It therefore follows that, even if Canada should refuse to take an active part in any particular war, Canadian shipping would still be liable to attack and Canadian citizens in enemy countries would still be liable to be treated as alien enemies.

Let us now turn to consider the case of the Treaty of Lausanne. It will be remembered that Dominion representatives were invited to take part in the negotiation of the peace treaties of 1919 and the group of treaties concluded at Washington in 1922. Furthermore the ratification of these treaties by the King was withheld until the approval of the Dominion Parliaments had been obtained. Why were these precedents not followed at Lausanne?

Again the answer is to be found in the comparative urgency of the issues to be decided. At Paris in 1919 there was no real urgency. The five treaties then concluded are known as the peace treaties, but the expression is somewhat misleading. The real peace was made when the order to cease fire was given on the 11th November, 1918. After that date the enemy was disarmed, his country was occupied, and peace existed in fact. No further resistance was possible and Germany had no option save to accept whatever terms the Allies might choose to dictate. The negotiations which took place at Paris were not really discussions between the Allies and Germany, but internal discussions between the Allies themselves. The real purpose of the five treaties was not to end the Great War; its true object was to settle all the outstanding controversies of Europe in such a manner as to prevent new wars.

The powers which met at Lausanne in the late autumn of 1922 were faced with an entirely different state of affairs. The overthrow of the puppet Turkish government which had signed the Treaty of Sèvres had in effect relegated that instrument to the waste-paper basket. Upon the ruins of the old Turkey the genius of Mustapha Kemal Pasha had built a new and living nation whose capital at Angora could not be over-awed by the guns of the Allied fleets. In the swift campaign of 1922 he had driven the Greeks almost from the gates of his capital into the sea. All Asia Minor north of Syria acknowledged his rule, and his armies stood on the shores of the Dardanelles ready to sweep past the small British and French forces into Europe itself.

In substance the situation at Paris had been reversed. Instead of being in a position to dictate the terms of peace to a defeated and disarmed enemy the Allies were now confronted with a victorious enemy who was ready and willing, if necessary, to continue the war. In neither Great Britain nor France would public opinion have permitted a fresh war with Turkey. The conclusion of a permanent peace was therefore a matter of the first urgency.

In these circumstances it was clearly impossible to invite to Lausanne any representatives save those of the powers directly concerned, and even these were more numerous than was desirable. To have invited Dominion representatives to take part in the negotiations would have been either a superfluity or a waste of precious time. If Dominion statesmen went to Lausanne merely to express their agreement with the British plenipotentiaries their presence was clearly superfluous. If they went to advocate some different policy they would merely have added fresh complications to an already difficult negotiation, and in the end it would have been necessary for Great Britain to insist that her view should prevail. From that dilemma there was no escape.

The same dilemma arises in all cases where the diplomacy of Great Britain deals with those major issues of policy which determine the status of nations or the existence of peace or war. In all these cases the Dominions must inevitably face the alternatives of either accepting the decision of Great Britain or severing the imperial link. During the period of negotiation it is agreed that they are entitled to the fullest information at the command of the Foreign Office and to the fullest opportunity of making their influence felt in the counsels of the home government. But at the end there can only be one decision, and that decision must rest with the British cabinet.

In passing we may observe that the recent innovation of establish-

ing Irish and Canadian legations at Washington does not in any way affect the principle of the diplomatic unity of the Empire. There is nothing to prevent the Crown from being represented by three or more plenipotentiaries instead of by one, and the new ministers, like the British Ambassadors, carry credentials under the King's hand and the Great Seal of the United Kingdom. In all matters of major policy the three must act as one, and the power retained by the London cabinet of recalling any envoy gives it a perfectly effective means of control. The new practice involves no change either in constitutional or in international law. It amounts to nothing more than an administrative arrangement for the more convenient dispatch of certain classes of business.

At this point perhaps it may be possible to summarize briefly what has been said. The whole business of international relations and diplomacy may be roughly divided into two main classes. On the one hand we have the business which does not directly involve questions of high policy. In part this consists of what may be called routine business, that is to say, the settlement of the numerous questions that arise out of the contacts of different executive governments in the discharge of their ordinary duties. In part it may involve matters of very substantial importance, such as the adjustment of tariffs or the negotiation of international agreements upon such questions as maritime law. In each case it has proved possible to concede to the Dominions a substantial autonomy in dealing with this class of business without violating in any degree the principle of imperial unity. Even where the question involved necessitates the conclusion of formal treaties negotiated at international conferences the modern practice is to give the Dominions full opportunity for participation and to insert clauses in the treaty preserving to the Dominions the right of separate adhesion or withdrawal.³

On the other hand we have what may be called the major diplomacy, which decides the issues of peace or war and discusses all those great questions upon which the status or the existence of nations may depend. As the situation at present stands, the decision of these questions rests in the last resort with the British government alone. At the same time it is recognized on all sides that the Foreign Office is under a moral obligation to furnish the Dominion governments with all the information at its command, however confidential, and to invite them to such consultation and conference as the circumstances of

³In such cases it is necessary to distinguish carefully between the *obligation* and the *application* of any particular treaty. The treaty becomes binding upon the whole Empire, but may only apply to a particular portion.

each particular case may admit. No formula can be found to cover all possible contingencies. In some cases, such as the war crisis of 1914, effective consultation may be a physical impossibility. Or again it may happen, as in the case of the Lausanne conference,⁴ that

⁴The following is the text of the resolutions agreed upon at the Imperial Conference of 1923:—

“The Conference recommends for the acceptance of the governments of the Empire represented that the following procedure should be observed in the negotiation, signature, and ratification of international agreements.

The word ‘treaty’ is used in the sense of an agreement which, in accordance with the normal practice of diplomacy, would take the form of a treaty between Heads of States signed by plenipotentiaries provided with Full Powers issued by the Heads of the States and authorizing the holders to conclude a treaty.

I.

1. *Negotiation.*

(a) It is desirable that no treaty should be negotiated by any of the governments of the Empire without due consideration of its possible effect on other parts of the Empire or, if circumstances so demand, on the Empire as a whole.

(b) Before negotiations are opened with the intention of concluding a treaty, steps should be taken to ensure that any of the other governments of the Empire likely to be interested are informed, so that, if any such government considers that its interests would be affected, it may have an opportunity of expressing its views or, when its interests are intimately involved, of participating in the negotiations.

(c) In all cases where more than one of the governments of the Empire participates in the negotiations, there should be the fullest possible exchange of views between those governments before and during the negotiations. In the case of treaties negotiated at International Conferences, where there is a British Empire Delegation, on which, in accordance with the now established practice, the Dominions and India are separately represented, such representation should also be utilized to attain this object.

(d) Steps should be taken to ensure that those governments of the Empire whose representatives are not participating in the negotiations should, during their progress, be kept informed in regard to any points arising in which they may be interested.

2. *Signature.*

(a) Bi-lateral treaties imposing obligations on one part of the Empire only should be signed by a representative of the government of that part. The Full Power issued to such representative should indicate the part of the Empire in respect of which the obligations are to be undertaken, and the preamble and text of the treaty should be so worded as to make its scope clear.

(b) Where a bi-lateral treaty imposes obligations on more than one part of the Empire, the treaty should be signed by one or more plenipotentiaries on behalf of all the governments concerned.

(c) As regards treaties negotiated at International Conferences, the existing practice of signature by plenipotentiaries on behalf of all the governments of the Empire represented at the Conference should be continued, and the Full Powers should be in the form employed at Paris and Washington.

3. *Ratification.*

The existing practice in connection with the ratification of treaties should be maintained.

II.

Apart from treaties made between Heads of States, it is not unusual for agreements to be made between governments. Such agreements, which are usually of a technical or administrative character, are made in the names of the signatory governments, and signed by representatives of those governments, who do not act under Full Powers issued by the Heads of the States: they are not ratified by the Heads of the States, though in some cases some form of acceptance or confirmation by the governments concerned is employed. As regards agreements

the interests of the Dominions are only very slightly involved, and their admission to the council table would only serve to complicate a difficult negotiation without producing any corresponding advantages. Every case must be dealt with on its own merits. Whatever may be the procedure adopted it is clear that in the last resort the decision of the London cabinet must prevail, and its decision must be accepted by the Dominions unless they are prepared to sever the imperial connection and assume the responsibilities of independent states. Without violating the unity of the Empire they are at liberty to refuse active assistance in any war, and furthermore they cannot in practice be compelled to pass the legislation which may in any particular case be necessary to implement the obligations of a treaty. That is the maximum of liberty which, when the great issues of foreign policy are concerned, is compatible with the continuance of the British Empire as a single sovereign unit in the eyes of international law. Beyond that limit a claim for autonomy would amount in substance to a demand for independence. At present there is no likelihood that any body of responsible opinion in any part of the Empire will acquire sufficient strength to put forward such a demand as part of the considered policy of any of the self-governing Dominions.

of this nature the existing practice should be continued, but before entering on negotiations the governments of the Empire should consider whether the interests of any other part of the Empire may be affected, and if so, steps should be taken to ensure that the government of such part is informed of the proposed negotiations, in order that it may have an opportunity of expressing its views."

The Resolution was submitted to the full Conference and unanimously approved. It was thought, however, that it would be of assistance to add a short explanatory statement in connexion with part I (3), setting out the existing procedure in relation to the ratification of Treaties. This procedure is as follows:

(a) The ratification of treaties imposing obligations on one part of the Empire is effected at the instance of the Government of that part.

(b) The ratification of treaties imposing obligations on more than one part of the Empire is effected after consultation between the Governments of those parts of the Empire concerned. It is for each Government to decide whether Parliamentary approval or legislation is required before desire for, or concurrence in, ratification is intimated by that Government.

The report of the Inter-Imperial Relations Committee of the Imperial Conference of 1926 was not issued until the present article was in proof. The proposals outlined in 1923 are worked out in greater detail, but the report contains nothing inconsistent with the arguments which I have advanced, and there is an explicit admission of the fact that the control of all major diplomacy must continue to be vested in the British Cabinet.