



George Gavan Duffy and the legal consequences of the Anglo Irish Treaty, 1921–1923

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ABSTRACT

George Gavan Duffy (1882–1951) was a signatory of the 1921 ‘Anglo Irish Treaty’. In the 1930s he enjoyed a notable judicial career and would rise to the position of President of the High Court of Ireland. This article examines a more neglected period of Gavan Duffy’s career. It focuses on his brief parliamentary career as a TD in the early 1920s and, in particular, his involvement in the creation of the Constitution of the Irish Free State. This analysis also examines the reasons for the divergence of Gavan Duffy’s position from that held by other signatories and supporters of the 1921 Treaty. By late 1922 Gavan Duffy had emerged as a determined critic of the Provisional Government and of the draft Constitution of the Irish Free State that emerged from negotiations in London. This analysis focuses on Gavan Duffy’s attempts to amend provisions of the draft Constitution that he believed went further than the strict legal demands of the 1921 Treaty. The conclusion assesses Gavan Duffy’s attitude towards the legal consequences of the 1921 Treaty and his attempts to mitigate their impact on the 1922 Constitution of the Irish Free State.

Keywords: George Gavan Duffy; Anglo Irish Treaty; Irish Free State; 1922 Constitution; Constituent Assembly; King; oath; Privy Council; popular sovereignty.

INTRODUCTION

The centenary of the 1921 Anglo Irish Treaty has seen renewed attention to those who negotiated and signed this historic document. These include George Gavan Duffy who would later become a judge of the Irish High Court in 1936 and its President in 1946. Gavan Duffy’s role in the negotiation and signing of the 1921 Treaty has been covered by numerous works.¹ His legal career as a barrister in the 1920s and 1930s and his subsequent career as a judge have received significant attention in publications that focus on his advisory role in the drafting

1 For example, see Frank Pakenham, *Peace by Ordeal* (Sidgwick & Jackson 1935); Frank Gallagher, *The Anglo Irish Treaty* (Hutchinson 1965); and Joseph M Curran, *The Birth of the Irish Free State 1921–1923* (University of Alabama Press 1980).

of the 1937 Constitution.² Others focus on his legal career that includes involvement in many historic court cases including *State (Ryan) v Lennon*,³ as a barrister, and *State (Burke) v Lennon*⁴ and *Buckley v Attorney General*, as a judge of the High Court.⁵ This article examines a comparatively neglected period of his life that fell between the signing of the 1921 Treaty and his subsequent legal career. It focuses on Gavan Duffy's brief parliamentary career as a Teachta Dála (TD) in the early 1920s and, in particular, on his involvement in the creation of the Constitution of the Irish Free State. This aspect of Gavan Duffy's life is of interest because it witnessed a parting of ways with other signatories and supporters of the 1921 Treaty. It also reveals Gavan Duffy's response to the legal consequences of the document that he signed and his attempts to mitigate their impact on the 1922 Constitution of the Irish Free State.⁶

Gavan Duffy sat in the third Dáil Éireann, sitting as a special Constituent Assembly, that would approve the final text of the Constitution. He proved to be the most prolific representative in moving amendments supported by elaborate legal argument. Most of these amendments concerned provisions relating to the 1921 Treaty, and Gavan Duffy made the most of his position as a signatory in promoting them. His fundamental argument was that the draft Constitution had not made full use of the autonomy provided by the 1921 Treaty. This resulted in a serious clash with former colleagues in the Provisional Government and may also have contributed to the truncation of his parliamentary career. This analysis also examines Gavan Duffy's hopes

2 For example, see Dermot Keogh and Andrew McCarthy, *The Making of the Irish Constitution 1937* (Mercier 2007); Gerard Hogan, *The Origins of the Irish Constitution, 1928–1941* (Royal Irish Academy 2012); and Donal K Coffey, *Constitutionalism in Ireland, 1932–1938 – National, Commonwealth and International Perspectives* (Palgrave Macmillan 2018).

3 [1935] IR 170.

4 [1940] IR 136.

5 [1950] IR 67. See also G M Golding, *George Gavan Duffy, 1882–1951 – A Legal Biography* (Irish Academic Press 1982); Frank Connolly, 'An interim assessment of the late Mr Justice George Gavan Duffy as advocate and judge' [1976] 70 Incorporated Law Society of Ireland Gazette 129–130 and 134; Colum Gavan Duffy, 'George Gavan Duffy' (1983) 36(3) Dublin Historical Record 90 reprinted in (2002) 2(2) Judicial Studies Institute Journal 1; and Gerard Hogan, 'George Gavan Duffy' in James McGuire and James Quinn (eds), *Dictionary of Irish Biography* vol 3 (Cambridge University Press 2009) 510–512.

6 Unless stated otherwise, the numbering of all provisions of the 1922 Constitution of the Irish Free State used by this article follows the numbering used when the Constitution officially came into force on 6 December 1922. The numbering of these provisions changed considerably over the various stages of drafting the Constitution and as a consequence of amendments made during the proceedings of the Dáil sitting as a Constituent Assembly.

on how the infant Irish Free State might augment its autonomy in the years that followed. All these events were of lasting significance to Gavan Duffy himself. This reality was reflected in his decision to create a recording of his memories on this subject, in preference to other aspects of his career, shortly before his death in 1951.⁷

GEORGE GAVAN DUFFY (1882–1951)

George Gavan Duffy was the son of Charles Gavan Duffy, a Young Irelander who would emigrate to Australia where he would rise to the position of premier of Victoria. He was one of a large number of gifted children, including his elder half-brother Frank Gavan Duffy, who would become Chief Justice of the High Court of Australia.⁸ George was born in England but spent considerable portions of his youth in different European countries including Ireland. He would later move into the legal professions when he qualified as a solicitor in London in 1907. He came to prominence in Irish nationalist circles in 1916 when he assisted in the defence of Roger Casement for his involvement with the Easter rising. Casement would be executed for high treason and Gavan Duffy's role in his defence would result in him being asked to leave his firm of solicitors.⁹ The trial deepened Gavan Duffy's involvement in Irish politics and changed the direction of his legal career. In 1917 he moved to Ireland, qualified as a barrister and became increasingly involved with the Sinn Féin party.

Gavan Duffy's parliamentary career officially began when he won a parliamentary seat in Dublin in the 1918 general election. As a member of Sinn Féin he declined to take his seat at Westminster and instead attended the opening of the first Dáil Éireann on 21 January 1919. His linguistic skills ensured that he was chosen to read out the French text of the declaration of independence issued on that day. Gavan Duffy's legal background also ensured that he was appointed to a committee

7 'The Hon Mr Justice George Gavan Duffy' (Military Archives, Voice Recordings).

8 Patrick O'Callaghan, 'Brothers at law: Chief Justice Frank Gavan Duffy and George Gavan Duffy' (2004) 78 *Australian Law Journal* 738.

9 C Gavan Duffy (n 5 above) 92.

charged with drafting a constitution for the Dáil.¹⁰ However, he had little involvement in Dáil proceedings after the opening sessions as he spent much of the next two years in continental Europe in an unsuccessful attempt to secure recognition for the self-declared Irish republic. This ensured that Gavan Duffy missed the darkest days of the conflict that engulfed Ireland between 1919 and the truce of 11 July 1921.

Gavan Duffy's parliamentary career really began in August 1921 when, having returned to Ireland, he attended the debates of the second Dáil Éireann which was now able to meet unmolested thanks to a truce with Crown forces that began on 11 July 1921. For the first time he made a number of significant parliamentary contributions. He reported to the Dáil on his activities in promoting the *Irish Bulletin*, a newspaper dedicated to supporting the struggle for an Irish republic. Gavan Duffy's speech on this subject made some unfortunate references to difficulties in propagating information in the face of the 'octopus' of news agencies run by 'big Jew firms in London'.¹¹ His contributions to the debates of the second Dáil also included an unsuccessful protest against Eamon de Valera's appointment as President in addition to his existing role as 'Príomh Aire', or Prime Minister, on the grounds that it was dangerous precedent to allow such a concentration of power.¹² Gavan Duffy's legal background may also have influenced his opposition to aspects of emergency legislation passed by the Dáil.¹³

In October 1921 de Valera accepted an invitation to send delegates to London to negotiate a permanent peace. De Valera made the controversial decision not to join this delegation himself and Arthur Griffith was appointed in his place to lead the Irish delegation. Griffith

10 Brian Farrell, 'A note on the Dáil Constitution, 1919' (1969) 4 *Irish Jurist* 127. The nature of this document has long been disputed with many arguing that it was only intended to be a constitution for the Dáil and not a constitution for Ireland. For example, Seán McBride wrote, in a submission to the New Ireland Forum: 'In addition, the first Dáil adopted "The Democratic Programme of Dáil Éireann", and a "provisional Constitution of Dáil Éireann". ... Neither of these instruments purported to be a Constitution for the Republic.' University College Cork Archives, O'Rahilly papers, U. 118, Box 6, Submission to the New Ireland Forum, 1984. See also Basil Chubb, *The Constitution of Ireland* (Institute of Public Administration 1966) 8 and *The Government and Politics of Ireland* (Oxford University Press 1974) 62–63.

11 *Dáil Debates*, vol S, no 5, col 53, 23 August 1921. John Kelly comments on 'the dark side of a remarkable judge' in assessing Gavan Duffy's judgment in *Schlegel v Corcoran and Gross* (1942) IR 19. J M Kelly, *The Irish Constitution* 2nd edn (Jurist Publishing 1984) 665. See also Ruth Cannon, 'The bigoted landlord: a re-examination of *Schlegel v Corcoran and Gross*' (2005) 27 *Dublin University Law Journal* 248; and O'Callaghan (n 8 above) 741–742.

12 *Dáil Debates*, vol S, no 5, col 55, 23 August 1921.

13 For example, see *Dáil Debates*, vol 3, col 2526–2532, 26 June 1923.

was joined by two other members of the Dáil Cabinet, Michael Collins and Robert Barton. George Gavan Duffy and Eamonn Duggan were also appointed to the delegation, largely on the basis of their legal expertise.¹⁴ Robert Erskine Childers was appointed as secretary to the Irish delegation. Additional legal support was provided by John Chartres, a barrister, diplomat and former civil servant, and an advisory committee in Dublin that included James Nolan-Whelan, a leading barrister, James Murnaghan, a law lecturer at University College Dublin and future judge of the Irish Supreme Court, and John O'Byrne, a barrister and future attorney general and judge of the Supreme Court.¹⁵

Frank Pakenham concludes that Gavan Duffy, along with the rest of the Irish legal experts, was outclassed by the formidable Lord Birkenhead, who held the office of Lord Chancellor in Lloyd George's Government.¹⁶ In reality, the British offer of Dominion status demanded a knowledge of British imperial law and the constitutional law of Dominions, such as Canada, that few Irish lawyers possessed. Birkenhead had far greater legal supports available in these areas. Erskine Childers had a far better grasp of this field than Gavan Duffy or Duggan thanks to his authorship of his 1911 work *The Framework of Home Rule*, which considered the possibility of granting Dominion status to Ireland in some detail.¹⁷ However, Childers did not have the official status of a delegate and, in any case, by 1921 he was now firmly committed to seeking a political settlement that went far beyond Dominion status.¹⁸ Gavan Duffy along with other members of the delegation attempted to close their gap in knowledge by studying works dedicated to the legal implications of Dominion status.¹⁹ Nevertheless, Gavan Duffy's knowledge of this area of law was always hampered by an intense hostility to a Dominion settlement for Ireland which may have resulted in a lack of objectivity in assessing its legal consequences.

Gavan Duffy embraced de Valera's scheme for 'external association' for Ireland, a compromise that offered far greater autonomy than the

14 Frank Pakenham, *Peace by Ordeal* (Sidgwick & Jackson 1972) 84.

15 *Dáil Debates*, vol T, no 4, col 201, 16 December 1921.

16 Pakenham (n 14 above) 106.

17 (Edward Arnold, 1911).

18 Childers admitted that he had 'passed through the Dominion phase' but concluded that going back to it would be 'an almost impossible and unthinkable thing'. *Donegal Democrat* (Ballyshannon, 1 December 1922) 2.

19 This would focus on H Duncan Hall, *The British Commonwealth of Nations – A Study of its Past and Future Development* (Methuen 1920). See Pakenham (n 14 above) 226; and H Duncan Hall, *Commonwealth – A History of the British Commonwealth of Nations* (Van Nostrand Reinhold 1971) 198 and 912.

familiar model of Dominion status.²⁰ He persisted in championing this constitutional compromise despite repeated British rejections of it during the negotiations in London. Gavan Duffy remained convinced right up to the fateful moment of signing the Treaty that the British delegation would, in the end, accept greater autonomy for Ireland than their repeated offer of Dominion status. He was deeply concerned at the emergence of sub-conferences during the Treaty negotiations which tended to exclude him and other delegates from important negotiations led by Griffith and Collins.²¹ His protests proved to be in vain, a reflection of his lesser standing within the Irish delegation.

Gavan Duffy's subordinate status did not prevent him from decisively influencing the final days of the negotiations. He joined Barton in insisting on a final push for external association in a meeting with the British delegation on 4 December 1921. Michael Collins refused to join this initiative and Arthur Griffith reluctantly agreed to accompany Gavan Duffy and Barton at the last minute. Once again, the British delegation rejected an Irish offer based on external association. Gavan Duffy continued to press this option in the face of British insistence on Dominion status and concluded: 'We should be as closely associated with you in all large matters as the Dominions, and in the matter of defence still more so; but our difficulty is coming into the Empire.'²² This blunt refusal to remain within the British Empire had an electric effect on the British delegation and undermined Irish negotiating strategy. Lloyd George's negotiating stance in the discussions that followed included elements of theatrics, but the reality that the talks were reaching their limits had become all too clear.

On the evening of 5 December 1921 three of the five Irish delegates, Griffith, Collins and Duggan, decided to sign the draft Treaty. The hours that followed, once again, highlighted the secondary nature of Gavan Duffy's membership of the delegation. The three delegates focused their attention on Barton in their efforts at persuasion while largely ignoring Gavan Duffy. Barton was, after all, a member of the Dáil Cabinet, and it was assumed that if he gave way Gavan Duffy would be forced to follow. This assumption proved all too accurate and Gavan Duffy agreed to sign soon after Barton gave in to persuasion.

Gavan Duffy was placed in an unenviable position of having to publicly defend a settlement that he had signed with such reluctance in the Dáil debates that followed. He openly admitted to the Dáil: 'I am not enthusiastic about this Treaty although I am going to support

20 See Thomas Mohr, 'The Anglo Irish Treaty – legal interpretation, 1921–1925' (2021) 66 *Irish Jurist* 1.

21 Pakenham (n 14 above) 145, 190 and 202.

22 *Ibid* 217.

it.’²³ On another occasion he declared: ‘I am going to recommend this Treaty to you very reluctantly, but very sincerely, because I see no alternative.’²⁴ He did admit that the Treaty offered gains to the Irish people, and, in particular, stressed that ‘this Treaty gives them what they have not had for hundreds of years; it gives them power, it puts power of control, power of Government, military power in the hands of our people and our Government’.²⁵ Yet, Gavan Duffy also devoted a considerable portion of his speeches to the perceived shortcomings of the Treaty. He placed particular emphasis on acceptance of the King which he insisted had inflicted a ‘grievous wound upon the dignity of this nation’.²⁶ Gavan Duffy also devoted a considerable portion of his speech to outlining the circumstances under which his signature of the Treaty had been ‘extorted’ from him.²⁷ He joined Robert Barton in arguing that Lloyd George’s ultimatum, stressing the possibility of renewed conflict, ensured that their signatures had been made under duress. Yet, he added that duress was not sufficient cause to reject the Treaty and insisted that its opponents produce a ‘rational alternative’.²⁸ His appeal to opponents of the settlement was also evident in his conclusion: ‘My heart is with those who are against the Treaty, but my reason is against them, because I can see no rational alternative.’²⁹ Gavan Duffy’s position was sincere but opponents of the proposed settlement lost no time in making capital from it. Mary MacSwiney summarised his stance on the Treaty by concluding: ‘He has given weak support to it, but he has acknowledged it is a very pitiful instrument indeed, but that it is better than war.’³⁰

CABINET MINISTER

The Dáil finally approved the Treaty settlement by 64 to 57 votes. This opened the way towards the formation of an Irish Provisional Government that would oversee the handover of the 26 counties of the south and west of Ireland until the official formation of the Irish Free State on 6 December 1922. Michael Collins led the Provisional Government that was recognised by the British Government while Arthur Griffith led a parallel Dáil Cabinet that could be recognised by Irish opponents of the Treaty.

23 *Dáil Debates*, vol T, no 4, col 184, 16 December 1921.

24 *Dáil Debates*, vol T, no 8, col 85, 21 December 1921.

25 *Ibid.*

26 *Ibid.*

27 *Ibid.*

28 *Dáil Debates*, vol T, no 8, col 87–888, 21 December 1921.

29 *Ibid.*

30 *Dáil Debates*, vol T, no 8, col 114, 21 December 1921.

Robert Barton had now moved closer to opponents of the Treaty and consequently could not be considered for a ministerial position in either the Provisional Government or the Dáil Cabinet. Eamonn Duggan was appointed as Minister for Home Affairs, possibly on the basis of his legal background. George Gavan Duffy was appointed as Minister for Foreign Affairs, a promotion that was probably inspired by his linguistic skills and his experience in trying to gain recognition for the self-declared Irish republic between 1919 and 1921. However, his status as a signatory of the Treaty may also have been an important consideration behind this appointment. The signatories of the Treaty had already lost Barton and did not want to lose another of their number.

As Minister for Foreign Affairs, Gavan Duffy decided to join the Dáil Cabinet but not the Provisional Government. Gavan Duffy justified this position on the basis that it was best to keep his embryonic Department of Foreign Affairs autonomous in the hope that it could continue to function should relations break down between London and the Irish Provisional Government.³¹ This decision may also have reflected Gavan Duffy's personal preferences and the reality that the nascent Department of Foreign Affairs had little role to play in the transition of power overseen by the Provisional Government. Gavan Duffy would later emphasise that he had never been part of the Provisional Government to disclaim all responsibility for the draft Irish Constitution that was negotiated with London.³²

One of the most noteworthy features of Gavan Duffy's brief career as a cabinet minister was his obvious discomfort with this role. He made repeated threats of resignation over a period of just over six months. His first threat of resignation occurred in February 1922, less than a month after his appointment, over his offence at a newspaper article written by Collins.³³ As will be seen at a later stage, he would make a second threat to resign in June 1922 and would finally follow through on a third threat to resign in July 1922.

DRAFTING THE CONSTITUTION OF THE IRISH FREE STATE

The 1921 Treaty provided little guidance on the means by which the Constitution of the Irish Free State would be brought into being. The British Government indicated soon after the signing of the 1921 Treaty that the Irish Provisional Government could draft its own Constitution

31 *Dáil Debates*, vol 1, col 531, 21 September 1922.

32 *Ibid.*

33 University College Dublin (henceforth UCD) Archives, Gavan Duffy Papers, P152/196, Gavan Duffy to Collins, 6 February 1922.

as long as it was compatible with the terms of the Treaty and certain promises made to the southern Protestant minority.³⁴ These conditions rendered it necessary to provide the British Government with a confidential preview before the draft Constitution was made public. This reality was conceded by the Provisional Government in February 1922 when the Constitution was still in the early stages of drafting.³⁵

The Provisional Government appointed a special Constitution Committee to create the preliminary drafts of the future Constitution. It produced three alternative draft Constitutions known as Drafts A, B and C. The Provisional Government chose Draft B, which formed the basis of the draft Constitution and reviewed and amended it until the end of May 1922. The draft settled by the Provisional Government and its advisors, known as Draft D, was later brought to London for the anticipated review.

Gavan Duffy played a secondary role in the drafting of the Constitution notwithstanding his legal experience. He was not chosen to serve on the Constitution Committee, and he did not form part of the delegation that brought Draft D to London for the difficult negotiations that followed.³⁶ Nevertheless, claims that Gavan Duffy was not consulted during the drafting of the Constitution are inaccurate.³⁷ He was shown early drafts and consulted by members of the Constitution Committee in preference to other cabinet ministers.³⁸ Gavan Duffy, in turn, attempted to render practical assistance to the Constitution Committee, for example in recommending the consultation of legal experts from the Dominions.³⁹ He also had official access to the evolving text of the draft Constitution when the Constitution Committee finally sent drafts for consideration by cabinet ministers. He was also kept up to date on the negotiations with the British Government in May and June 1922.

Gavan Duffy appears to have shared the general approach taken by the Provisional Government in seeking as short and simple a draft

34 This was confirmed in a letter sent by Lloyd George to Griffith on 13 December 1921 that was later read out in the Dáil. *Dáil Debates*, vol T, no 6, col 21–22, 19 December 1921.

35 National Archives of Ireland (henceforth NAI), Cabinet Minutes, G1/1 2 February 1922 and The National Archives (henceforth TNA), CAB 43/6 22/N/60(6), meeting between the British and Irish signatories, approval of draft Constitution, 26 February 1922.

36 Golding expresses some surprise that Gavan Duffy was not asked to join the Constitution Committee (n 5 above) 24.

37 Mary Kotsonouris, 'The George Gavan Duffy Papers' (2000) 8(4) *History Ireland*.

38 For example, see National Library of Ireland (henceforth NLI), James Green Douglas Papers, Ms 49,581/8/1, George Gavan Duffy to James Douglas, 27 February 1922.

39 NLI, James Green Douglas Papers, Ms 49,581/7/12, George Gavan Duffy to James Douglas, 26 January 1922.

Constitution as possible. He produced a detailed analysis of Draft B with the conclusion that it was too long and recommended substantial changes. Gavan Duffy recommended that 27 of the 81 articles contained in Draft B be cut entirely and recommended amendments to all but one of the remaining articles.⁴⁰ Although Gavan Duffy would later reveal himself as a supporter of the use of religious and natural law principles in the interpretation of constitutional law, there is no evidence that he, as a cabinet minister, pushed for the inclusion of such principles in the 1922 Constitution.⁴¹

The impact of the 1921 Treaty on the draft Constitution depended on the interpretation of article 2 of the former which linked the constitutional status of the Irish Free State to that of Canada in terms of 'law, practice and constitutional usage'. In early 1922 Irish cabinet ministers and their advisors interpreted the provisions of the Treaty as allowing them to unite Dominion law and practice in order to create constitutional provisions that were entirely different from those of the existing Dominions. They believed that a synthesis of 'law' and 'practice' would allow the creation of an Irish Constitution that reflected constitutional realities in the existing Dominions and so avoid inclusion of obsolete legal provisions included in their Constitutions.⁴² However, Collins and Griffith went further in instructing the Constitution Committee to ignore legal institutions reflected in the Constitutions of the existing Dominions that were not actually obsolete such as the appeal to the Judicial Committee of the Privy Council.⁴³

The Constitution Committee followed these instructions and produced draft Constitutions that largely ignored the Treaty settlement and Dominion precedents.⁴⁴ The apparent objectives were to achieve as much autonomy as possible for the future Irish Free State and to produce a Constitution that opponents of the Treaty might be able to accept. Once again, Gavan Duffy was in entire agreement with this approach. In March 1922 he wrote to Collins to argue that if the

40 UCD Archives, Gavan Duffy Papers, P152/199, Gavan Duffy to Collins, 6 April 1922.

41 On Gavan Duffy's support for natural law, see Thomas Mohr, 'Natural law in early twentieth century Ireland – State (Ryan) v Lennon and its aftermath' (2021) 42(1) *Journal of Legal History* 1.

42 For example, see *Dáil Debates*, vol T, no 6, col 47, 19 December 1921. See also Brian Farrell, 'The drafting of the Irish Free State Constitution' (1970) 5 *Irish Jurist* 115, 343 and (1971) 6 *Irish Jurist* 111, 345; Curran (n 1 above) 200–218; and D H Akenson and J F Fallin, 'The Irish Civil War and the drafting of the Free State Constitution' (1970) 5(1) *Eire–Ireland* 10; 5(2), *Eire–Ireland* 42 and 5(4) *Eire–Ireland* 28.

43 NAI, Department of the Taoiseach, S8952, Constitution Committee, report of first meeting, 24 January 1922.

44 Farrell (n 42 above) 345; Curran (n 1 above) 200–218; and Akenson and Fallin (n 42 above).

draft Constitution was ‘as good as the Treaty ... allows it to be, it will knock the bottom out of the Opposition and ... should give a priceless opportunity of uniting the country’.⁴⁵

The decision to minimise the impact of the 1921 Treaty and Dominion precedents ensured that Draft D omitted provisions reflected in the Constitutions of other Dominions, including the parliamentary oath, certain functions of the King and his representative, powers to delay and veto legislation and the appeal to the Judicial Committee of the Privy Council. The text made little more than token references to the Treaty, the representative of the Crown and relations with the Commonwealth in a short section dealing with ‘External Affairs’.⁴⁶ This approach ensured that the British–Irish negotiations on the draft Constitution, that would take place in May and June 1922, would be a sequel, or even a continuation, of the negotiations that preceded the signing of the Treaty. Gavan Duffy’s contributions to the Dáil debates on acceptance of the Treaty in late 1921 illustrate that he was already anticipating the possibility of a future Constitution reversing some of the less acceptable aspects of the settlement that he had just signed. He told the Dáil that the drafters of the Constitution could and should ‘relegate the King of England to the exterior darkness as far as they can’.⁴⁷

One of Gavan Duffy’s most interesting recommendations on the draft Constitution concerned his desire to exclude the only provision of Draft B that made any reference to the Treaty settlement. He recommended the removal of a provision within article 78 of Draft B that recognised that the 1921 Treaty would enjoy force of law. Gavan Duffy argued that this was ‘unnecessary and very undesirable’.⁴⁸ The only concession he was prepared to make to the Treaty settlement was a recognition that the representative of the Crown should sign Irish legislation while making it clear that this person would have no power to refuse to do so. Even here, Gavan Duffy was not prepared to allow this into the Constitution proper and recommended its inclusion in a rider to the Constitution.⁴⁹ He was broadly in agreement with Collins and Griffith in desiring to minimise the impact of the 1921 Treaty on the text of the draft Constitution but went further in putting this approach into practice.⁵⁰

45 UCD Archives, Gavan Duffy Papers, P152/197, Gavan Duffy to Collins, 10 March 1922.

46 NAI, Department of the Taoiseach, S8953, article 78 of Draft B.

47 *Dáil Debates*, vol T, no 8, col 86, 21 December 1921.

48 NAI, Constitution Committee, V13, suggested amendments to the proposed Constitution, 11 April 1922.

49 *Ibid.*

50 NAI, Department of the Taoiseach (n 43 above).

BRITISH–IRISH NEGOTIATIONS ON THE DRAFT CONSTITUTION

Gavan Duffy had always argued against giving the British Government a confidential preview of Draft D before it was released to the public.⁵¹ However, this course would have ensured that inevitable British dissatisfaction with Draft D, which contained no more than token concessions to the Treaty settlement, would have been played out in public rather than in private. The results of the difficult bilateral negotiations over the draft Constitution, assuming that they occurred at all, would also have been exposed to the full glare of public scrutiny. It is unlikely that the Treaty settlement would have survived such an ordeal.

The final text of Draft D was taken to London on 27 May 1922. Gavan Duffy was not invited to join the Irish delegation that travelled to London, which included Arthur Griffith, Michael Collins and Hugh Kennedy as legal advisor. Gavan Duffy was concerned that the Irish delegation, apart from Kennedy, appeared not to fully appreciate the challenge facing them with respect to the draft Constitution. He anticipated that the British Government would be ‘horribly frightened by the bad example that the Constitution gives to the independent elements of the Dominions’. He warned that the British Government would make ‘desperate efforts’ to insert provisions derived from the 1921 Treaty, in particular the parliamentary oath, into the draft Constitution but recommended that Irish negotiators maintain an ‘unyielding attitude’ in the face of ‘idiotic British sentiment’.⁵²

The British Government was quick to reject the draft Constitution presented to them by the Provisional Government on the basis that it was incompatible with the demands of the 1921 Treaty. Lloyd George despaired that they had gone back to the very first day of the Treaty negotiations. He concluded that the draft Irish Constitution was ‘a complete evasion of the Treaty and a setting up of a Republic with a thin veneer’.⁵³ The result was an immediate rise in tensions. The Irish delegation was told that the draft Constitution reflected a refusal to accept Dominion status and was a direct negation of the Treaty signed just over six months earlier.⁵⁴

51 UCD Archives, Gavan Duffy Papers, P152/197, 10 March 1922. See Military Archives (n 7 above).

52 UCD Archives, Gavan Duffy Papers, P152/202, Gavan Duffy to Collins, 26 May 1922.

53 TNA, CAB 43/1 22/N/148(3), meeting of British signatories, 27 May 1922 and CAB 43/7 22/N/162, twenty-fourth meeting of the British signatories (S.F.B.) 24th Conclusions, 27 May 1922.

54 UCD Archives, Gavan Duffy Papers, P152/205, minutes of Cabinet meeting, 3 June 1922.

The British Government began to consider the possibility of a collapse of the Treaty settlement and began to explore possible military responses.⁵⁵

Collins returned to Dublin in early June and proposed to Irish cabinet ministers that they sidestep British objections by publishing a 'skeleton' Irish Constitution with the text of the 1921 Treaty attached in a schedule.⁵⁶ Gavan Duffy proved to be a strong supporter of this scheme and insisted that even the token references to the Treaty and Commonwealth that appeared in Draft D might be omitted from a short Constitution.⁵⁷ Nevertheless, this scheme was soon abandoned as impractical. It anticipated further British–Irish negotiations to fill in details left unsettled by the skeleton Constitution. These piecemeal negotiations on the final form of the Constitution would have proceeded under the full glare of publicity which, once again, would have been deeply embarrassing for both governments.⁵⁸

Tensions were reduced when both sides agreed to a redrafting of Draft D. This meant enshrining a number of key provisions into the Irish Constitution that mirrored those of the existing Dominions while following Dominion practice in the interpretation and application of these provisions.⁵⁹ The result was the inclusion of specific constitutional provisions dealing with the position of the King, the representative of the Crown, the parliamentary oath and the appeal to the Judicial Committee of the Privy Council. Gavan Duffy objected to acceptance of these 'offensive shibboleths'⁶⁰ and concluded that they 'concede more than we are compelled to concede to England by our obligations under the Treaty'.⁶¹ He was particularly offended by the addition of

55 For example, see TNA, CAB 43/1 22/N/148(1), conference of British representatives, 23 May 1922 and CAB 27/153, PGI 21st Conclusions.

56 UCD Archives, Gavan Duffy Papers, P152/204, minutes of Cabinet meeting, 2 June 1922.

57 UCD Archives, Gavan Duffy Papers, P152/208, Gavan Duffy to Collins, 7 June 1922.

58 Gavan Duffy advocated placing the following in a preamble to the skeleton Constitution: 'Some differences of opinion as to the character of those provisions having developed between the British signatories of the Treaty and the Irish representatives, the Provisional Government is making every effort to arrive at a fair and harmonious solution, and the proposed supplementary provisions will be published as soon as possible.' UCD Archives, Gavan Duffy Papers, P152/208, Gavan Duffy to Collins, 7 June 1922.

59 For example, see articles 41, 51 and 60 of the 1922 Constitution of the Irish Free State.

60 *Irish Independent* (Dublin, 25 September 1922) 6.

61 UCD Archives, Gavan Duffy Papers, P152/210, Gavan Duffy to Griffith, 19 June 1922.

a provision that would be known as the ‘Repugnancy Clause’,⁶² that made clear that any aspect of Irish law that was incompatible with the terms of the 1921 Treaty would be rendered ‘absolutely void and inoperative’.⁶³ Gavan Duffy concluded that this provision was ‘thoroughly rotten’, made the Treaty part of the Constitution and also ensured that the Constitution derived its force from the Treaty.⁶⁴

The amended version of the draft Constitution was finally published in the newspapers on 16 June 1922. Three days later Gavan Duffy wrote to Arthur Griffith declaring that he could no longer support the draft Constitution and made clear his intention to resign as Minister for Foreign Affairs.⁶⁵ Griffith managed to persuade him to delay his resignation until the opening of the Constituent Assembly.⁶⁶ In the interim, Gavan Duffy was told not to discuss the draft Constitution until the Constituent Assembly began its work.⁶⁷ Finally, the Government’s decision to commence the winding-up of the Dáil courts proved too much for Gavan Duffy who brought forward his resignation to July 1922.⁶⁸

62 UCD Archives, Gavan Duffy Papers, P152/210, Gavan Duffy to Collins, 14 June 1922. See s 2 of the Constitution of the Irish Free State (Saorstát Éireann) Act 1922 (Dublin) and preamble to the Irish Free State Constitution Act 1922 (Session 2) (Westminster). The use of the term ‘Repugnancy Clause’ for these parallel provisions was created by Leo Kohn. See Leo Kohn, *Constitution of the Irish Free State* (Allen & Unwin 1932) 98. See also Article 50 of the 1922 Constitution of the Irish Free State.

63 The Repugnancy Clause provided: ‘The said Constitution shall be construed with reference to the Articles of Agreement for a Treaty between Great Britain and Ireland set forth in the Second Schedule hereto annexed (hereinafter referred to as “the Scheduled Treaty”) which are hereby given the force of law, and if any provision of the said Constitution or of any amendment thereof or of any law made thereunder is in any respect repugnant to any of the provisions of the Scheduled Treaty, it shall to the extent only of such repugnancy, be absolutely void and inoperative and the Parliament and the Executive Council of the Irish Free State (Saorstát Éireann) shall respectively pass such further legislation and do all such other things as may be necessary to implement the Scheduled Treaty.’ Constitution of the Irish Free State (Saorstát Éireann) Act 1922 (Ir), s 2 and preamble to the Irish Free State Constitution Act 1922 (Session 2) (UK). See also article 50 of the Constitution of the Irish Free State. The term ‘Repugnancy Clause’ was introduced by Kohn in *The Constitution of the Irish Free State* (n 62 above) 98.

64 UCD Archives, Gavan Duffy Papers, P152/209, Gavan Duffy to Collins, 14 June 1922.

65 UCD Archives, Gavan Duffy Papers, P152/210, Gavan Duffy to Griffith, 19 June 1922.

66 UCD Archives, Gavan Duffy Papers, P152/211, Griffith to Gavan Duffy, 20 June 1922.

67 Ibid.

68 Golding (n 5 above) 26.

GAVAN DUFFY IN THE CONSTITUENT ASSEMBLY

Gavan Duffy's objections to the draft Constitution continued to preoccupy him after he resigned from the Dáil Cabinet and sat as an independent TD. He was one of the most active members of the Dáil, sitting as a Constituent Assembly, and prepared a substantial number of amendments for the draft Constitution. However, it is worth mentioning that Gavan Duffy touched on many other subjects during his brief parliamentary career, many of which reflected his interests in legal matters. For example, he did not shy away from questioning the legal basis of military tribunals established during the Civil War and was very active in the debates on the emergency legislation that attempted to fill this legal vacuum.⁶⁹ He also raised objections during the winding-up of the Dáil courts.⁷⁰ Gavan Duffy was deeply concerned with the rights of anti-Treaty prisoners captured during the Civil War and offended the Provisional Government by referring to them as 'political prisoners'.⁷¹ He was firmly opposed to the execution of such prisoners which would become a feature of the conflict. It is difficult to dispute his claim that the execution of four prisoners in Dublin's Mountjoy Prison on 7 December 1922 lacked any legal basis and violated a Constitution that had come into force less than two days earlier.⁷² Gavan Duffy's reaction to the execution of Erskine Childers provoked a particularly emotional debate in the Dáil that culminated in W T Cosgrave accusing him of lacking moral courage.⁷³ The full extent in the collapse of relations became evident in April 1923 when Gavan Duffy's house was raided by the Criminal Investigation Department who were searching for a wanted man, possibly Eamon de Valera. Gavan Duffy's protests in the Dáil met with little sympathy from Kevin O'Higgins who accused him of 'histrionics and mock heroics'.⁷⁴ O'Higgins also mocked Gavan Duffy's absence from home at the time of the search by declaring that he had 'gone to his spiritual home abroad'.⁷⁵

The position of the nascent Irish Government had changed beyond recognition when the Constituent Assembly convened in September 1922. A bitter Civil War had erupted on 28 June 1922 that ended all hopes of compromise and reconciliation with opponents of the Treaty. Griffith and Collins had died the following August leaving W T Cosgrave

69 For example, see *Dáil Debates*, vol 3, col 2526–2532, 26 June 1923.

70 *Dáil Debates*, vol 4, col 1310–1321, 24 July 1923.

71 *Dáil Debates*, vol 1, col 206–209, 13 September 1922.

72 *Dáil Debates*, vol 2, col 51, 8 December 1922.

73 *Dáil Debates*, vol 1, col 2363, 28 November 1922.

74 *Dáil Debates*, vol 3, col 591, 3 May 1923.

75 *Dáil Debates*, vol 3, col 592, 3 May 1923.

to take over leadership of both the Provisional Government and the Dáil Cabinet. The removal of any incentive to placate opponents of the Treaty led Cosgrave to unite these two institutions in September 1922. Soon afterwards, he decided to convoke a new Dáil, sitting as a Constituent Assembly, that would amend and formally enact the draft Constitution that had returned from London. The Provisional Government indicated that it would resign unless certain key provisions were enacted without amendment. These provisions, which might be called the ‘Treaty articles’, included all the provisions concerning the Treaty settlement that had been agreed with the British Government in June 1922.⁷⁶ The outbreak of Civil War prevented the attendance of any opponents of the Treaty in the Constituent Assembly. Nevertheless, there were a few TDs who were prepared to challenge the Treaty articles within the draft Constitution. These included a number of independents and some members of the Labour Party. However, the most active and abrasive critic of these Treaty articles within the Constituent Assembly was George Gavan Duffy.

Gavan Duffy was not content to simply criticise the inclusion of the Treaty articles in the draft Constitution. He produced amendments, with accompanying legal justifications, in respect of almost all of the Treaty articles identified by the Provisional Government. In doing so Gavan Duffy tried the patience of a Provisional Government that was trying to get the best possible deal from the British Government while resisting armed opponents at home. Gavan Duffy’s stance was close to the position that had been adopted by the Provisional Government and its advisors before the British–Irish negotiations on the draft Constitution. He had privately criticised the performance of Irish negotiators as a cabinet minister. Now, having resigned his cabinet post and sitting as an independent TD, he was free to give full rein to his conviction that the Irish negotiators had conceded more on the contents of the draft Constitution than was required by the terms of the 1921 Treaty. Gavan Duffy’s position as a signatory of the Treaty and former minister ensured that he had to face a degree of hostility in his exchanges with his former colleagues, in particular W T Cosgrave, Kevin O’Higgins and Ernest Blythe, that none of the other critics of the Constitution had to endure. His attempts at amendment were criticised for their ‘frightfully bad grammar’.⁷⁷ More seriously, he

76 A list of the ‘Treaty articles’ can be found in NAI, Department of the Taoiseach, S8956A, Kevin O’Higgins to Thomas Johnson, 22 September 1922. These provisions were sometimes called the ‘vital clauses’, for example *Dáil Debates*, vol 1, col 560, 21 September 1922 or the ‘tied Articles’, for example, *Dáil Debates*, vol 1, col 1084, 3 October 1922. Leo Kohn refers to them as the ‘Agreed Articles’, Kohn (n 62 above) 100.

77 *Dáil Debates*, vol 1, col 1669–1670, 18 October 1922.

was accused of running away from the responsibility he took on when signing the Treaty.⁷⁸ Kevin O'Higgins rejected one of his attempts to amend the draft Constitution by declaring that 'this Government will not dishonour the signature of Deputy Gavan Duffy, even at the invitation of Deputy Gavan Duffy'.⁷⁹ W T Cosgrave did not forebear from insisting that the Irish negotiators sent to London to negotiate key provisions of the Constitution had brought back a better draft than if Gavan Duffy had been a member of their team.⁸⁰ On one occasion it was even suggested that Gavan Duffy might try to form his own government to see if he could secure a better Constitution within the limits of the Treaty.⁸¹

The breakdown in relations between Gavan Duffy and his former colleagues was so complete that one opposition TD expressed surprise on one occasion in which government ministers appeared to agree with Gavan Duffy as 'they have always acted on the assumption that whatever Deputy Gavan Duffy favours must be wrong'.⁸² Gavan Duffy did have to endure insults but proved fully capable of dealing out his own biting words. For example, he accused Kevin O'Higgins of 'schoolboy insolence'.⁸³ He condemned the 'poisoned fungus-growth which you will find all through this Constitution'.⁸⁴ Gavan Duffy accused the Provisional Government of 'abject surrender', deplored its 'weakness' and concluded 'It was no part of the Treaty that every time England should say "boo" to the Government the Government should run away.'⁸⁵ His conclusion that the draft Constitution was a 'surrender' and that the Irish delegation that had travelled to London had immediately given way to British demands were particularly bitter words from a person who had endured similar taunts with respect to his own involvement in the negotiations on the 1921 Treaty.⁸⁶

It is also important to recognise that Gavan Duffy's involvement in the debates on the draft Constitution of the Irish Free State was not limited to the provisions that related to the 1921 Treaty that Gavan Duffy had signed some months earlier. He moved amendments on

78 *Dáil Debates*, vol 1, col 1006, 29 September 1922. See also *Dáil Debates*, vol 1, col 548, 21 September 1922.

79 *Dáil Debates*, vol 1, col 648, 25 September 1922.

80 *Dáil Debates*, vol 1, col 549, 21 September 1922.

81 *Dáil Debates*, vol 1, col 761, 26 September 1922.

82 *Dáil Debates*, vol 1, col 1541, 12 October 1922.

83 *Dáil Debates*, vol 1, col 997, 29 September 1922.

84 *Dáil Debates*, vol 1, col 538, 21 September 1922.

85 *Irish Independent* (n 60 above); and *Dáil Debates*, vol 1, col 532, 21 September 1922.

86 For example, one anti-Treaty newspaper referred to the document that Gavan Duffy had signed in 1921 as the 'Treaty of Surrender' *Republic of Ireland* (22 June 1922) 1.

topics as diverse as the definition of Irish citizenship,⁸⁷ the status of women,⁸⁸ courts martial,⁸⁹ Irish language titles⁹⁰ and on allowing members of one house of the Oireachtas to stand for election to the other.⁹¹ Gavan Duffy also joined a special committee within the Constituent Assembly whose work resulted in a substantial redrafting of the provisions on the composition of the Executive.⁹²

Yet, it was Gavan Duffy's interventions on the aspects of the draft Constitution that related to the 1921 Treaty that defined his political stance in 1922 and reflected the full extent of the breakdown in relations with former colleagues. Many of his attempts at amendment were based on an interpretation of the Treaty that permitted a synthesis of the law, practice and constitutional usage of Canada.⁹³ As mentioned earlier, the Provisional Government and its advisors had used a similar approach before the rejection of Draft D during the British–Irish negotiations on the draft Constitution.

The role and position of the King

Many Irish nationalists found it difficult to accept the reality that the future Irish Free State would come into existence as a constitutional monarchy. This included many supporters of the Treaty. Gavan Duffy objected to 'desecrating an Irish Constitution in the twentieth century with the royal relics of England's medievalism'.⁹⁴ Nevertheless, article 12 of the draft Constitution recognised the King as a constituent part of the Oireachtas alongside Dáil Éireann and Seanad Éireann. Kevin O'Higgins openly admitted that 'It is not a particularly pleasant position to be placed in to have to stand over an Article such as Article 12 of the Constitution.'⁹⁵

Gavan Duffy attempted to use the 'synthesis' approach in an unsuccessful amendment that attempted to exclude the King from

87 *Dáil Debates*, vol 1, col 663–664, 25 September 1922.

88 For example, see *Dáil Debates*, vol 1, col 1681, 18 October 1922. Gavan Duffy felt that the draft gender equality clause needed to be redrafted and merited inclusion in a separate article. See NAI, Constitution Committee (n 48 above). See generally, Thomas Mohr, 'The rights of women under the Constitution of the Irish Free State' (2006) 41 *Irish Jurist* 20.

89 *Dáil Debates*, vol 1, col 1420, 10 October 1922.

90 *Dáil Debates*, vol 1, col 1395–1396, 10 October 1922.

91 *Dáil Debates*, vol 1, col 1038, 3 October 1922. This amendment influenced the final wording of article 16 of the 1922 Constitution which has, in turn, influenced article 15.14 of the 1937 Constitution of Ireland.

92 *Dáil Debates*, vol 1, col 1535, 12 October 1922.

93 *Dáil Debates*, vol 1, col 533–534, 21 September 1922 and col 761–81, 26 September 1922. See also *Irish Independent* (n 60 above).

94 *Ibid.*

95 *Dáil Debates*, vol 1, col 760, 26 September 1922.

the Oireachtas.⁹⁶ His efforts were unsuccessful as this provision was identified as one of the Treaty articles on which the Provisional Government would either stand or fall. O'Higgins described his proposed amendment as 'practically equivalent to an invitation to this Dáil to proclaim a Republic'.⁹⁷ Dominion precedent was clear and unambiguous on such matters and the Constitutions of Canada, Australia and South Africa were cited to defeat this amendment.⁹⁸ In a more light-hearted vein, a number of Labour representatives argued that since article 12 of the draft Constitution provided that the King was to be a member of the Oireachtas he should be required to travel to Dublin in order that he might make an 'oath of allegiance' to himself.⁹⁹

Gavan Duffy also moved an unsuccessful amendment to remove the King from article 51 which recognised that 'The Executive Authority of the Irish Free State (Saorstát Éireann) is hereby declared to be vested in the King.'¹⁰⁰ He was also deeply concerned by a provision in article 83 under which the Constitution would come into operation on the issue of a 'Proclamation of His Majesty' not later than 6 December 1922. He recognised that it could be used to argue that the Constitution of the Irish Free State was a 'gift from England'.¹⁰¹

Gavan Duffy's attempts to remove the King from key parts of the 1922 Constitution met with a predictably hostile response from the Provisional Government. W T Cosgrave explained that there was a 'sprinkling' of references to the King in the Constitution because he also appeared in the Treaty that Gavan Duffy had signed. He added that Gavan Duffy may have been 'in his pyjamas and did not read the Article before he signed it'.¹⁰²

The identity of the Irish Free State as a constitutional monarchy was always a difficult matter.¹⁰³ This would later be reflected in the total exclusion of monarchical symbols from the stamps and coins of

96 *Dáil Debates*, vol 1, col 762–763, 26 September 1922.

97 *Dáil Debates*, vol 1, col 759, 26 September 1922.

98 *Dáil Debates*, vol 1, col 759–760, 26 September 1922. See British North America Act 1867, s 17, article 1 of the 1900 Australian Constitution and South Africa Act 1909, s 19.

99 *Dáil Debates*, vol 1, col 1067–1072, 3 October 1922 and *Irish Independent* (n 60 above). Such comments indicate the confusion between the concepts of 'King' and 'Crown' which was common in the Constituent Assembly. This is not surprising when it is observed that the two terms are used interchangeably in the Irish Free State Constitution. See Barra O Briain, *The Irish Constitution* (Talbot Press 1929) 81 and 94.

100 See British North America Act 1867, s 9, article 61 of the 1900 Australian Constitution and South Africa Act 1909, s 8.

101 *Dáil Debates*, vol 1, col 1463, 11 October 1922.

102 *Dáil Debates*, vol 1, col 773–774, 26 September 1922.

103 For example, see Kohn (n 62 above) 114, 179 and 263.

the Irish Free State that were issued in the 1920s.¹⁰⁴ The references to the King in the Constitution were largely removed by the Constitution (Amendment No 27) Act 1936 and completed when the 1922 Constitution was replaced in 1937.

The representative of the Crown

Gavan Duffy was never comfortable with the representative of the Crown in Ireland being called the ‘Governor-General’ following the precedent of the existing Dominions such as a Canada. He objected to the name ‘because it connotes the idea of domination’.¹⁰⁵ As a cabinet minister Gavan Duffy had proposed the ‘British Commissioner’ or the slightly sinister alternative of ‘the British Agent’.¹⁰⁶ He argued in the Constituent Assembly that there was no necessity to put any name into the Constitution and that the matter might be left for determination at a future date.¹⁰⁷ Nevertheless, Ernest Blythe argued that this was an ‘agreed clause’. He accused Gavan Duffy of making unfortunate jokes that the title should be ‘An tAmadán Mór’ (The Great Fool).¹⁰⁸ Accepting the term used in the existing Dominions was seen as increasing the chances of solidarity with the Irish Free State if the office were abused by future British governments.¹⁰⁹

Gavan Duffy also made unsuccessful attempts to amend the provisions of the Constitution concerning the appointment of the Governor-General.¹¹⁰ He also attempted to amend article 24 of the Constitution which concerned the summoning and dissolving of the Oireachtas by the Governor-General in the name of the King. Gavan Duffy wished to add words that clarified that this could only be done ‘on the advice of the Executive Council’. This was deemed unnecessary by the Provisional Government and defeated in the Constituent Assembly.¹¹¹ Gavan Duffy also made unsuccessful efforts to amend

104 See Thomas Mohr, ‘The political significance of the coinage of the Irish Free State’ (2015) 23(4) *Irish Studies Review* 451–479.

105 *Dáil Debates*, vol 1, col 1770, 19 October 1922.

106 UCD Archives, Gavan Duffy Papers, P152/209, Gavan Duffy to Collins, 14 June 1922. He later proposed ‘Commissioner of the British Commonwealth’ in NLI, George Gavan Duffy Papers, MS 15,440/2/40, Orders of the day, 5 October 1922.

107 *Dáil Debates*, vol 1, col 1770–1771, 19 October 1922.

108 *Dáil Debates*, vol 1, col 773–774, 26 September 1922.

109 *Dáil Debates*, vol 1, col 1772–1773, 19 October 1922.

110 *Dáil Debates*, vol 1, col 1776–1779, 19 October 1922.

111 *Dáil Debates*, vol 1, col 1779–1783, 19 October 1922. See also NLI, George Gavan Duffy Papers, Ms 15,440/2/24, Orders of the Day, 25 September 1922.

constitutional provisions concerning the salary of the Governor-General which he considered excessive.¹¹²

The parliamentary oath

The controversial parliamentary oath that would be enshrined in article 17 of the Constitution was never destined to receive an enthusiastic reception in the Constituent Assembly. Gavan Duffy described its inclusion as ‘abominable’ and as ‘one of the outstanding defects’ of the draft Constitution.¹¹³ Kevin O’Higgins admitted that ‘it is not a pleasing task to stand over it, and it is not a pleasant task to submit it here to an Irish Assembly’.¹¹⁴ The Provisional Government stuck to its well-established justification for the existence of the oath within the provisions of the Treaty. Article 2 of the Treaty implied that members of an Irish Parliament would have to swear an oath of allegiance to the King in the same manner as their Canadian counterparts. The Provisional Government stressed that the Irish had improved on the Canadian position in article 4 of the Treaty by securing a wording that pledged fidelity and allegiance to the Irish Constitution and fidelity to the King in a secondary capacity.¹¹⁵

Gavan Duffy noted that Article 4 of the Treaty simply provided that ‘The oath to be taken by Members of the Parliament of the Irish Free State shall be in the following form ...’ and then detailed the form of the oath. He argued that these words, taken by themselves, did not place any legal obligation on members of the Oireachtas to take the oath. The line of reasoning used by Gavan Duffy was often called the ‘whiskey argument’. It received this unusual soubriquet from the popular explanation of the proposition that the oath was optional for members of the Oireachtas. Exponents of this argument maintained that the provision in article 4 of the Treaty as to the form of oath to be taken by members of the Oireachtas was similar to a rule saying that if the members of a certain club wished to take whiskey it had to be ‘John Jameson’s Three Star’. However, the rules of the club did not forbid teetotalism and no rule could be found requiring members to drink whiskey. In the same way, it was argued that no clause of the Treaty required all members of the Oireachtas to take the oath. The Treaty

112 Article 60 of the Constitution of the Irish Free State. For example, see *Dáil Debates*, vol 1, col 1622–1623, 12 October 1922.

113 UCD Archives, Gavan Duffy Papers, P152/209, Gavan Duffy to Collins, 14 June 1922. *Irish Independent* (n 60 above). An earlier draft described the inclusion of the oath as ‘the outstanding defect’ in the draft Constitution. UCD Archives, Gavan Duffy Papers, P152/213, memorandum, ‘Does the draft Constitution surrender more than the Treaty?’, undated.

114 *Dáil Debates*, vol 1, col 1041, 3 October 1922.

115 *Dáil Debates*, vol 1, col 1039, 3 October 1922. See also *Dáil Debates*, vol 3, col 416–417, 25 April 1923.

merely provided that if they chose to take an oath it had to be in the form set out in article 4.¹¹⁶

George Gavan Duffy made full use of his position as a signatory of the Treaty to argue that the British Government had not intended the oath to be mandatory on all members of the Oireachtas. There were few remaining Irish signatories of the Treaty to contradict him on this point. Death had robbed the Provisional Government of Arthur Griffith and Michael Collins while a change in convictions ensured that Robert Barton was unavailable. Eamonn Duggan remained as the only signatory of the Treaty available to the Provisional Government. He was brought into the Constituent Assembly to refute his former colleague and stifle this dangerous amendment. Duggan assured the Constituent Assembly that all parties to the Treaty had been well aware that the oath was intended to be obligatory. It was this reality that had necessitated the lengthy and difficult negotiations as to the wording of the oath. Duggan added that he was in a better position to speak as to the nature of the oath since he, unlike Gavan Duffy, had been present at many of the conferences that had dealt with this matter.¹¹⁷

Despite the emphasis placed by Gavan Duffy on his position as Treaty signatory and as a former government minister, his attempts to circumvent the parliamentary oath were unsuccessful. He hoped that his initiative would 're-stabilise the country' even though the Civil War had already broken out by this date.¹¹⁸ It is worth noting that anti-Treaty TDs had refused to join the debates of the Constituent Assembly which did not impose any parliamentary oath as a condition of attendance.¹¹⁹ Nevertheless, in 1927 Gavan Duffy revived these arguments in advising de Valera that the parliamentary oath was not mandatory.¹²⁰ The 'whiskey argument' was raised again and again after 1922 including the period immediately after 1932 when de Valera came to power.¹²¹ It was raised by Seán MacEntee, Minister for Finance, and by Conor Maguire, Attorney General, during the parliamentary debates on draft legislation that sought to remove the parliamentary oath from the text of the Constitution.¹²² Abolition of the parliamentary oath finally took place with the enactment of the Constitution (Removal of Oath) Act 1933.

116 UCD Archives, Gavan Duffy Papers, P152/213, memorandum (n 113 above) and *Irish Independent* (n 60 above).

117 *Dáil Debates*, vol 1, col 1055–1056, 3 October 1922.

118 *Irish Independent* (n 60 above).

119 *Ibid.*

120 C Gavan Duffy (n 5 above) 96 and reprint 12.

121 For example, see Diarmuid Ó Crudhlaoich, *The Oath of Allegiance* (Maunsell & Roberts 1925) 67–93.

122 *Dáil Debates*, vol 41, col 591–596, 27 April 1932 and col 1010, 29 April 1932.

The power of reservation

Article 41 of the draft Constitution referred to an institution recognised throughout the Commonwealth as the power of 'reservation'. The power of reservation was initiated by the representative of the Crown in a Dominion who could withhold the King's assent to a Bill passed by a Dominion legislature pending the signification of the King's pleasure. It was a delaying measure that could be converted into a permanent veto.¹²³

The Provisional Government had ensured that Draft D omitted all reference to the power of reservation. The British demanded its insertion as a Dominion institution during the Constitution negotiations of 1922.¹²⁴ The power to reserve legislation passed by the Oireachtas was finally recognised in article 41 of the Constitution.

As might be expected, the Provisional Government played down the importance of this feature of the Constitution. Kevin O'Higgins claimed that 'this is a nominal and theoretical veto' and assured the Constituent Assembly that there was no need to take article 41 at face value. He also told the Constituent Assembly that constitutional lawyers now recognised that the power of reservation could no longer be used with respect to legislation concerning internal matters.¹²⁵

As might be expected, George Gavan Duffy proposed an amendment to article 41 during the debates of the Constituent Assembly. This amendment would have declared that the powers of veto in article 41 were obsolete in Canada and, by extension, were also obsolete with respect to the Irish Free State. He concluded: 'If the veto is dead let us say so.'¹²⁶ The Provisional Government could not accept such a fundamental alteration of one of the 'Treaty articles' of the Constitution.¹²⁷ O'Higgins was forced to admit that the power of reservation could still be exercised with respect to legislation that affected the United Kingdom or the existing Dominions.¹²⁸ In taking this position, O'Higgins was repeating the views pressed by Lloyd

123 On some occasions, the royal assent was withheld from a reserved Bill with the full agreement of the Government of the Dominion concerned. This was the case with respect to the Australian Customs Tariff (British Preference) Bill 1906 and the New Zealand Shipping and Seamen (Amendment) Bill 1910. K C Wheare, *The Statute of Westminster and Dominion Status* 4th edn (Oxford University Press 1949) 68–69.

124 During Kennedy and Hewart's redrafting of the Constitution on 6 to 9 June, a new provision, article 39A, was placed in the draft Constitution, which became article 40 of the Anglo Irish Draft and article 41 of the 1922 Constitution. TNA, CAB 43/2 SFB 63, Anglo Irish Draft Constitution.

125 *Dáil Debates*, vol 1, col 1168–1169, 4 October 1922.

126 *Dáil Debates*, vol 1, col 1172, 4 October 1922.

127 *Dáil Debates*, vol 1, col 1171–1172 and 1183, 4 October 1922.

128 *Dáil Debates*, vol 1, col 1168–1169, 4 October 1922.

George and the British law officers during the negotiations on the 1922 Constitution.¹²⁹ Once again, Gavan Duffy was scratching at a sore point that caused serious embarrassment to the Provisional Government. The power of reservation was formally abolished by the Constitution (Amendment No 27) Act 1936.

Popular sovereignty

Article 2 of the draft Constitution, as presented to the Constituent Assembly, provided that legislative, executive and judicial powers were derived from the people. This expression of popular sovereignty was an anomaly among the Treaty articles of the Irish Free State Constitution. The other Treaty articles were placed in the text at the insistence of a British Government that wanted to ensure that the Irish Free State had all the legal accoutrements of a British Dominion. By contrast, article 2 was presented as a Treaty article at the insistence of the Irish Provisional Government. The Provisional Government presented British acceptance of this provision as a significant negotiating victory.¹³⁰ The Provisional Government was determined to protect it from a Constituent Assembly that might not fully appreciate its value.

Article 2, as one of the Treaty articles, should not have been capable of amendment without threatening the continuance in office of the Provisional Government. Nevertheless, it was altered with the reluctant consent of Irish ministers. The provision presented to the Constituent Assembly provided that 'All powers of government and all authority legislative, executive and judicial, are derived from the people.' Gavan Duffy, in association with other TDs, argued that it was necessary to amend this provision to declare that these powers be derived from 'the *Irish* people'.¹³¹ At first, the Provisional Government rejected this as a spurious amendment.¹³² What other people could have been intended in the context of an Irish Constitution? Nevertheless, Gavan Duffy pointed out that the day would come when the provisions of the Irish Constitution would be interpreted by the Judicial Committee of the Privy Council. Fears were expressed as to the possibility that a mischievous Privy Council might interpret the term 'the people' as referring to the people of the Commonwealth, on the basis of their 'common citizenship', in place of the people of the Irish Free State

129 TNA, CAB 43/3 SFC 35, British memorandum on draft Irish Free State Constitution, 20 May 1922.

130 For example, see *Dáil Debates*, vol 1, col 655, 25 September 1922.

131 See UCD Archives, Kennedy Papers, P4/341, private and confidential, 18 September 1922.

132 See UCD Archives, Kennedy Papers, P4/340, Constitution, committee stage, notes, undated.

alone.¹³³ The demand for a specific reference to ‘the Irish people’ was later amended to ‘the people of Ireland’ on the basis that the former might have been interpreted to include all persons of Irish descent from around the globe.¹³⁴ The declaration of popular sovereignty that appeared in article 2 of the 1922 Constitution was reproduced with some amendments in article 6.1 of the 1937 Constitution of Ireland.

The legal supremacy of the treaty

As seen earlier, Gavan Duffy was opposed to any recognition that the Treaty he had signed in 1921 enjoyed force of law.¹³⁵ He wanted to unilaterally change the official name of the document from ‘the Articles of Agreement for a Treaty between Great Britain and Ireland’ to ‘the Treaty between Great Britain and Ireland’.¹³⁶ This was part of his policy of keeping maximum distance between the Treaty that he signed and the Irish Constitution which he argued ‘must be kept as distinct as possible’.¹³⁷

In these circumstances there was little surprise that Gavan Duffy strongly objected to the provisions of the Constitution that would later be known as the Repugnancy Clause. The presence of the Repugnancy Clause, which asserted the supremacy of the 1921 Treaty over all sources of Irish law including the Constitution and amendments to it, had been a contributing factor to George Gavan Duffy’s break with the Provisional Government.¹³⁸ He argued that ‘It makes the Treaty a part of the Constitution and it seems to make the Constitution derive its force from the Treaty.’¹³⁹ Gavan Duffy also believed that ‘it has the air of making our right of freedom of government depend upon and derive from an Agreement with England and gives far too important a place to the Treaty’.¹⁴⁰ He was also keen to emphasise that ‘There is nothing in

133 *Dáil Debates*, vol 1, col 655–656, 25 September 1922.

134 *Ibid* 661.

135 NAI, Constitution Committee (n 48 above).

136 NLI, George Gavan Duffy Papers, MS 15,440/2/94, Draft Constitution of Saorstát Éireann as amended in Committee. Gavan Duffy also wished to remove all reference to the 1921 Treaty in the long title of the Irish statute containing the 1922 Constitution. This was ‘An Act to enact a Constitution for the Irish Free State (Saorstát Éireann) and for implementing the Treaty between Great Britain and Ireland signed at London on the 6th Day of December, 1921’. Gavan Duffy wanted to remove all words after (Saorstát Éireann). NLI, George Gavan Duffy Papers, MS 15,440/2/94, draft Constitution of Saorstát Éireann as amended in Committee.

137 *Irish Independent* (n 60 above).

138 NAI, Department of the Taoiseach, S8955, Gavan Duffy to Collins, 14 June 1924.

139 UCD Archives, Gavan Duffy Papers, P152/209, Gavan Duffy to Collins, 14 June 1922.

140 UCD Archives, Gavan Duffy Papers, P152/213, memorandum (n 113 above).

the Treaty to make it a compact for all time.¹⁴¹ Gavan Duffy appears to have anticipated the possibility of a new revised treaty at some point in the future that would replace the document he had signed. The Repugnancy Clause stood in the way of this evolution.¹⁴² Gavan Duffy's final argument, which he made again and again, was that no provision of the Treaty that he had signed required acceptance of such a provision.¹⁴³

Gavan Duffy made it abundantly clear that he wished to remove the Repugnancy Clause.¹⁴⁴ He believed it to be the worst aspect of the draft Constitution with the single exception of the provisions on the parliamentary oath.¹⁴⁵ Yet, when the Repugnancy Clause finally came before the Constituent Assembly, he made no effort to remove or amend it. The debates on this provision came near the end of the debates of the Constituent Assembly, and Gavan Duffy may have become bruised by the failure of most of his previous efforts. Instead of attempting amendment he simply declared that the Repugnancy Clause was 'a denial of our sovereignty, and is about as bad as it could be, and therefore I do not think we should touch a line of it, as it is a fitting introduction to the emaciated Constitution'.¹⁴⁶

At this stage Gavan Duffy may have been resigned to defeat or believed that it might be wiser to support the attempts at amendment made by others which might have had a greater chance of success. He had considered moving an amendment to article 50 that would have created an unusual mechanism to amend the Constitution without any need for a referendum. This could be used to amend provisions of the Constitution that curtailed 'the natural rights of this free people further or otherwise than those rights shall have been curtailed by Treaty amendments'.¹⁴⁷ It should be recalled that Gavan Duffy did not believe that most of the Treaty articles reflected the strict terms of the Treaty. In the end, Gavan Duffy chose to withdraw this proposal which never had any real chance of acceptance.¹⁴⁸ In September 1922, some months after Gavan Duffy's resignation as cabinet minister,

141 *Irish Independent* (n 60 above).

142 UCD Archives, Gavan Duffy Papers, P152/213, memorandum (n 113 above) and *Irish Independent* (n 60 above).

143 *Dáil Debates*, vol 1, col 533, 21 September 1922 and *Irish Independent* (n 60 above).

144 For example, see NLI, George Gavan Duffy Papers, MS 15,440/2/93, Draft Constitution of Saorstát Éireann Bill 1922.

145 UCD Archives, Gavan Duffy Papers, P152/209, Gavan Duffy to Collins, 14 June 1922.

146 *Dáil Debates*, vol 1, col 1481, 11 October 1922.

147 NLI, George Gavan Duffy Papers, MS 15,440/2/40, Orders of the day, 5 October 1922.

148 *Dáil Debates*, vol 1, col 1239, 5 October 1922.

the Provisional Government had made its own efforts to remove the Repugnancy Clause during secret negotiations with the British Government but without success.¹⁴⁹ The text of the Repugnancy Clause, together with the corresponding provision in article 50, entered the Irish Constitution intact.¹⁵⁰

Gavan Duffy feared that the Repugnancy Clause would impede advances in Irish autonomy. This may have underpinned his strong support for amendments to article 50 that made it possible to amend the Constitution without the need for a referendum for a period of eight years. The change would facilitate the removal of the Treaty articles that Gavan Duffy had attempted to resist. Yet, this proved to be a controversial change to the Constitution because, as events transpired, the period of eight years was substantially extended and, consequently, the referendum provisions never worked as intended. Nevertheless, there is little doubt that a flexible Constitution that could be easily amended by the Oireachtas would facilitate the swift removal of undesirable provisions at an opportune moment. It certainly facilitated the removal of the Repugnancy Clause, in tandem with the removal of the parliamentary oath, by de Valera's Fianna Fáil Government in 1933.¹⁵¹

The legislative supremacy of the Imperial Parliament

In 1922 the Parliament at Westminster was still popularly known as the 'Imperial Parliament'. The term did have some reality as this Parliament retained the power to legislate for any constituent part of the British Empire. Yet, by the early twentieth century it was recognised that, in practice, Westminster could only legislate for the self-governing Dominions with their consent. This reality was reflected in the deliberations of the Imperial War Conference of 1918 when several Dominion premiers emphasised this point.¹⁵² Nevertheless, all the existing Dominion constitutions had come into existence as British 'Imperial' statutes passed at Westminster and the British

149 Thomas Towey, 'Hugh Kennedy and the constitutional development of the Irish Free State, 1922–1923' (1977) 13 *Irish Jurist* 355, 362-4.

150 It is worth noting that the wording of the Repugnancy Clause seemed to overlook the fact that, after a transitional period during which constitutional amendments could be made by the Oireachtas, a referendum was required under article 50 to alter the text of the Constitution. Although this point was initially of some concern to the British Government, no stipulation was placed in the Repugnancy Clause dealing with this potential difficulty. It is likely that they concluded that the effect of the Repugnancy Clause would override the need for holding a referendum. TNA, CAB 43/3 SFC 35, British memorandum on draft Irish Free State Constitution, 29 May 1922.

151 Constitution (Removal of Oath) Act 1933.

152 Henry Harrison, *Ireland and the British Empire, 1937* (Hale 1937) 148.

Government was determined that the same must apply to the Irish Free State. Consequently, the 1922 Irish Free State Constitution was enacted in two parallel statutes, one passed by the Dáil, sitting as a Constituent Assembly, in Dublin and the other by the Parliament at Westminster. This reality of dual creation was recognised by article 83 of the 1922 Constitution itself. Gavan Duffy moved an amendment in the Constituent Assembly that sought to downgrade the British statute and emphasise the supremacy of the one passed in Dublin but, once again, the Provisional Government used its parliamentary support to defeat a challenge to this Treaty article.¹⁵³

Gavan Duffy was also concerned at the prospect that the Imperial Parliament might attempt to pass additional legislation for the Irish Free State after it officially came into existence on 6 December 1922. This remained possible under the law of the time, and Imperial statutes actually enjoyed superior status over those passed by a Dominion parliament, a reality recognised by the Colonial Laws Validity Act 1865.¹⁵⁴ Once again, Gavan Duffy moved an amendment to the draft Constitution based on an argument reliant on a synthesis of ‘law, practice and constitutional usage’.¹⁵⁵ However, on this occasion Gavan Duffy’s argument was fortified by a letter written to *The Times* by Arthur Berriedale Keith, professor at the University of Edinburgh and a leading authority on British Imperial law.¹⁵⁶ He emphasised that Keith was ‘a true blue Briton and not an Irish Rebel’ and yet had recommended the same change now being championed by Gavan Duffy that would emphasise Irish legislative autonomy.¹⁵⁷ Gavan Duffy moved to amend the concluding sentence of article 12 of the draft Constitution by adding the words ‘sole and exclusive’ in order that it would read:

The *sole and exclusive* power of making laws for the peace, order and good government of the Irish Free State (Saorstát Éireann) is vested in the Oireachtas.¹⁵⁸

153 Article 83 of the 1922 Constitution of the Irish Free State provided for ‘The passing and adoption of this Constitution by the constituent assembly and the British Parliament.’ Gavan Duffy wished to replace the words ‘passing and adoption’ with ‘registered’ in relation to the British Parliament. *Dáil Debates*, vol 1, col 1458–1462, 11 October 1922.

154 Colonial Laws Validity Act 1865, s 2.

155 *Dáil Debates*, vol 1, col 778–780, 26 September 1922.

156 *Dáil Debates*, vol 1, col 779–780, 26 September 1922.

157 *Dáil Debates*, vol 1, col 779, 26 September 1922. Gavan Duffy also emphasised Keith’s letter in a newspaper article in which he wrote ‘Fas est et ab hoste doceri’ or ‘it is right to be taught even by an enemy’. *Irish Independent* (n 60 above).

158 Italicised words added by George Gavan Duffy. *Dáil Debates*, vol 1, col 777–781, 26 September 1922.

On this occasion the Provisional Government was actually prepared to consider George Gavan Duffy's proposal. It was true that article 12 was one of the specified Treaty articles, and the Provisional Government did not seem inclined, at first, to accept Gavan Duffy's proposal.¹⁵⁹ In the end, the Provisional Government relented and accepted Gavan Duffy's amendment to article 12.

This amendment, the only significant change made by the Constituent Assembly to the Treaty articles of the Constitution, did not go unnoticed in London. The British Government considered the amended version of article 12 to be a breach of the 1921 Treaty but was unwilling to risk the entire settlement by insisting on its amendment at the eleventh hour. Instead, it decided to add additional provisions to the text of the British statute establishing the Irish Constitution. These included a provision intended to safeguard the right to pass Imperial legislation for the Irish Free State on matters of common concern, as was the case in the other Dominions, while leaving intact the Irish monopoly on legislation affecting the 'peace, order and good government' of the Irish Free State.¹⁶⁰ The power saved by this provision was actually used on a number of occasions after 1922.¹⁶¹

Gavan Duffy's amendment, in referring to the 'sole and exclusive power' of the Oireachtas to make laws for the Irish state would be reproduced in article 15.2.1 of the 1937 Constitution of Ireland. However, with the passage of time the original context of the insertion of these words was largely forgotten. Instead, they provided the basis of extensive case law on the doctrine of separation of powers.¹⁶² Gavan Duffy's amendment proved to be of considerable significance in ways that could not be fully appreciated in 1922.

The Privy Council appeal

Ironically, one of the few Treaty articles that Gavan Duffy did not contest in the Constituent Assembly proved, in practice, to be most threatening to Irish autonomy. The provisions for the appeal to the Judicial Committee of the Privy Council, the supreme appellate court

159 Kevin O'Higgins argued that the presence of the definite article before the word 'power' was sufficient to show that the Oireachtas already had sole and exclusive power to legislate for the Irish Free State. He also pointed out that article 2 of the Constitution provided that all powers within the Irish Free State had to be exercised by organisations established by or under and in accord with that Constitution which clearly did not apply to the Parliament at Westminster. *Dáil Debates*, vol 1, col 780–781, 26 September 1922.

160 Irish Free State Constitution Act 1922 (Session 2), s 4.

161 See Thomas Mohr, 'British Imperial statutes and Irish sovereignty: statutes passed after the creation of the Irish Free State' (2011) 32(1) *Journal of Legal History* 61.

162 For example, see *Cityview Press Ltd v An Chomhairle Oiliúna* [1980] IR 381.

for most of the British Empire, would appear in article 66 of the Constitution. The Privy Council appeal was debated towards the end of the proceedings of the Constituent Assembly and, as seen earlier, Gavan Duffy may have realised that amendments moved by him had little chance of acceptance and preferred to support attempts made by other parties. In any case, Gavan Duffy was less concerned with this provision than with other Treaty articles of the 1922 Constitution even though he did conclude that it was an insult to Irish dignity.¹⁶³ He explained that the reason he had decided not to contest the Privy Council appeal was his conviction that it would be a ‘dead letter’.¹⁶⁴ He concluded that ‘this appeal is a humbug from beginning to end’ and predicted that there would never be an appeal from the Irish courts to the Judicial Committee of the Privy Council.¹⁶⁵ Gavan Duffy’s confidence on this matter proved misplaced. The Irish appeal to the Privy Council did function, and proved to be one of the most controversial aspects of the 1922 Constitution until its final abolition in the mid-1930s. Despite Gavan Duffy’s legal experience, he never fully appreciated the British Government’s intention that the Privy Council serve as arbiter of the Treaty settlement.¹⁶⁶

ALTERNATIVES TO COMPROMISE ON THE 1922 CONSTITUTION

Gavan Duffy’s strong stance on the Treaty articles of the 1922 Constitution could be blamed on his conviction that British Imperial law, as it related to the Dominions, would soon be radically overhauled. He was convinced that an Imperial Constitutional Conference, anticipated in the published deliberations of the Imperial War Conference of 1917, was just around the corner. This was an important consideration in convincing Gavan Duffy that the legal provisions derived from Dominions were being enshrined in the 1922 Irish Constitution at the worst possible moment.¹⁶⁷

Gavan Duffy focused on a decision, known as Resolution IX, made by the British and Dominion Prime Ministers attending the Imperial War Conference of 1917. This resolution recognised that a time of war was not a suitable occasion for the readjustment of the constitutional

163 *Dáil Debates*, vol 1, col 1413, 10 October 1922. Gavan Duffy appeared to class the Privy Council appeal with more minor consequences of the 1921 Treaty. See UCD Archives, Gavan Duffy Papers, P152/213, memorandum (n 113 above).

164 *Dáil Debates*, vol 1, col 1413, 10 October 1922.

165 *Dáil Debates*, vol 1, col 1414, 10 October 1922.

166 See Thomas Mohr, *Guardian of the Treaty – The Privy Council Appeal and Irish Sovereignty* (Four Courts Press 2016).

167 *Dáil Debates*, vol 1, col 538 and 542–543, 21 September 1922.

relations of the component parts of the Empire. However, the resolution added that such a readjustment 'should form the subject of a special Imperial Conference to be summoned as soon as possible after the cessation of hostilities'.¹⁶⁸ Resolution IX also provided that any such readjustment 'should be based upon a full recognition of the Dominions as autonomous nations of an Imperial Commonwealth'.¹⁶⁹

Gavan Duffy advocated an immediate convocation of the anticipated Imperial Constitutional Conference when the British Government rejected Draft D of the future Constitution of the Irish Free State in May 1922. He was convinced that the convening of this anticipated conference would be 'immensely popular in the Dominions' and that it would resolve all of the major points in dispute in the draft Irish Constitution.¹⁷⁰ This argument lost its force when Gavan Duffy was corrected in the press and in the Constituent Assembly on his claims that an Imperial Constitutional Conference remained imminent.¹⁷¹ Attempts at constitutional reforms in the direction of greater Dominion autonomy had actually been defeated at the Imperial Conference of 1921. Moreover the report of that conference appeared to close the door on future attempts at securing constitutional reform when it concluded that 'no advantage is to be gained by holding a constitutional Conference'.¹⁷² The immediate prospect of an Imperial Constitutional Conference that would usher in sweeping changes had collapsed even before Gavan Duffy had signed the Treaty.

The collapse of prospects for a special Imperial Constitutional Conference had little impact on Gavan Duffy's stance on the Constitution. He was convinced that the Provisional Government had failed to consider other viable options to immediate compromise with the British Government on the draft Constitution. These included invoking the compulsory arbitration of the League of Nations.¹⁷³ This ignored the reality that the embryonic Irish Free State was not a member of the League in mid-1922 and, in the eyes of the international community, remained a part of the United Kingdom until 6 December 1922. His alternative recommendation of an appeal to the Dominions

168 Parliamentary Papers, 1917, Cmd 8566, Imperial War Conference 1917, 5 and 60.

169 Ibid.

170 UCD Archives, Gavan Duffy Papers, P152/206, minutes of a Cabinet meeting, 5 June 1922 and P152/207, Gavan Duffy to Collins, 3 June 1922.

171 *Freeman's Journal* (Dublin, 23 September 1922) 6 and *Dáil Debates*, vol 1, col 1176, 4 October 1922.

172 Cmd 1474, 9, Resolution XIV. See also TNA, CAB 32/6, Imperial Meetings 1921, p 323.

173 *Irish Independent* (n 60 above); and George Gavan Duffy, 'Notice sur la Constitution de l'État libre d'Irlande' (1922) 20 *Annuaire de Legislation Étrangère* 180.

was also hampered by the reality that the Irish Free State had not yet joined their ranks at this time. He may, in any case, have underestimated the difficulty in convincing Dominion statesmen that the Irish Free State should not have to accept institutions that were recognised in all of their Constitutions.

Gavan Duffy's final option of having the Provisional Government resign and leaving the British Government 'face to face with Mr de Valera and the opponents of the Treaty' raised a real prospect of renewed war.¹⁷⁴ In 1951 Gavan Duffy would reiterate his conviction that the British Government would have given way on the draft Constitution in the summer of 1922 as 'to denounce the much vaunted Anglo-Irish Treaty of Peace would have been too humiliating a solution'.¹⁷⁵ Although Gavan Duffy's conclusion is open to challenge, it is clear that the events of 1922 continued to preoccupy him until the end of his life.

ENGAGEMENT WITH THE OVERSEAS DOMINIONS

Despite Gavan Duffy's disappointment on the prospect of immediate constitutional reform, he remained a strong advocate of cooperation with the overseas Dominions at future Imperial Conferences. He remained convinced that these conferences offered much potential in advancing the autonomy of the Irish Free State. This proved to be one of Gavan Duffy's most insightful contributions after the signing of the Treaty. This route to constitutional reform was not nearly as obvious to contemporaries as it would be to subsequent commentators enjoying the benefit of hindsight.¹⁷⁶ It was openly rejected by many opponents and supporters of the 1921 Treaty who could not be sure that the restless Irish Free State would find any friends among the overseas Dominions. Gavan Duffy's argument was not helped by serious mistakes and misconceptions, in particular his belief that an Imperial Conference dedicated to constitutional reform was due to be convened in the near future. Yet, although Gavan Duffy was clearly mistaken in terms of details, his instinct as to the direction of reform and the prospect of finding common cause with other Dominions proved to be entirely accurate.

There was little precedent for the Imperial Conferences as a venue for seeking constitutional reform in the early 1920s. This would change as the decade wore on. The Imperial Conferences of later 1920s and

174 Gavan Duffy (n 173 above) 183. Translation provided in Dorothy Macardle, *The Irish Republic* (Irish Press 1951) 725.

175 See Military Archives (n 7 above).

176 Gavan Duffy's son Colum Gavan Duffy would later argue that his father's legal arguments before the constituent assembly 'were made before their time'. C Gavan Duffy (n 5 above) 95 and reprint 10.

early 1930s would culminate in the historic Statute of Westminster Act 1931. The reforms ushered in by this celebrated statute provided the bedrock for the constitutional reforms initiated by de Valera in which Gavan Duffy would also play a role. These would gradually dismantle the settlement initiated by the 1921 Treaty that Gavan Duffy had never fully accepted. The new Constitution of Ireland adopted in 1937 had no legal basis in the Treaty settlement. A British–Irish agreement in 1938 would dismantle the defence provisions of that settlement.¹⁷⁷ The Irish state would finally become a republic and leave the Commonwealth in 1949. Gavan Duffy's instincts on the potential offered by this peaceful avenue for constitutional change would, in the long term, prove to be justified.

CONCLUSION

George Gavan Duffy lost his parliamentary seat in the 1923 general election. This may have been a consequence of perceptions that Gavan Duffy had fallen between two stools. His position as a signatory of the Treaty made him unacceptable to opponents of the settlement while his stance in the Constituent Assembly and the bitter clashes with the Provisional Government may have rendered him unattractive to supporters of the Treaty. Gavan Duffy would later condemn the state of public opinion at the time as taking 'a childlike view of politics' that perceived support or opposition to the Treaty in terms of 'pure white' and 'murky black'. He concluded that anyone who was not 'wholeheartedly with the white or the black' was considered a 'crank', a 'factionist' or a 'Tadhg an dá thaobh' (someone who tries to satisfy both sides).¹⁷⁸ Gavan Duffy's son, Colum Gavan Duffy, would later conclude that it may have been as well that his father lost his parliamentary seat in 1923 as 'his scholarly temperament and his notion of absolute integrity would not have suited him to be an active and successful politician'.¹⁷⁹ Gavan Duffy would attempt to win a seat in the Seanad in the early 1930s but this proved unsuccessful.¹⁸⁰

Gavan Duffy had never been comfortable with his position as a cabinet minister, and his resignation left him an isolated figure whose future in politics was precarious. He remained, as a former cabinet minister, a source of embarrassment to the Irish Government in the Constituent Assembly and afterwards. He did not shy away from revealing that the draft Constitution that had travelled to London had

177 See Eire (Confirmation of Agreements) Act 1938 (UK).

178 See Military Archives (n 7 above). 'Tadhg an dá thaobh' can be literally translated as 'Timothy of both sides'.

179 C Gavan Duffy (n 5 above) 95 and reprint 10.

180 Ibid 96–97 and reprint 12.

been a very different document to the draft that had returned even though this was a strictly confidential matter. His electoral leaflets for the 1923 election declared that the Government ‘threw away in London a splendid Constitution drawn up by their own experts – a Constitution which would have gone a very long way to secure peace in Ireland – and substituted for it a Constitution mangled to the orders of Downing Street’.¹⁸¹ Gavan Duffy would later declare that Griffith ‘at once gave way’ when faced with British pressure and condemned the resulting negotiations as a ‘surrender’.¹⁸²

Gavan Duffy’s poor opinion of the performance of the Irish delegation during the British–Irish negotiations on the draft Constitution underestimate the serious pressure that they faced. His allegations of ‘surrender’ also provided little room for appreciating the negotiating successes achieved at this conference. These included the recognition of Irish popular sovereignty that appeared in article 2 of the Constitution. The inclusion of this provision was particularly significant as opponents of the Treaty had predicted that the British Government would never concede such a provision.¹⁸³ The Irish delegation that had travelled to London in late 1921, including Gavan Duffy, had tried and failed to include such a provision in the text of the Treaty.¹⁸⁴

Gavan Duffy had a poor opinion of the Constituent Assembly of 1922 and would later recount that ‘Only a handful of men made any serious contribution to the debates.’ He regretted the absence of anti-Treaty TDs whose presence, he was convinced, would have resulted in ‘a much improved Constitution’. In their absence, Gavan Duffy could do no more than accuse pro-Treaty Sinn Féin (which would soon become Cumann na nGaedheal) for its ‘amazing docility’ which had left the Provisional Government ‘secure in the solid caucus behind it’.¹⁸⁵ Yet, this party also displayed remarkable solidarity in the context of making unpopular decisions that must also have been personally distasteful to many TDs. Gavan Duffy had been frustrated by an early example of party discipline in the politics of the developing Irish state.¹⁸⁶

181 NLI, George Gavan Duffy, *Is it Fair?* (Dublin, 1923) Call Number: EPH C116.

182 See Military Archives (n 7 above).

183 *Clause by Clause – A Comparison between the ‘Treaty’ and Document No 2, Ireland* (Republic of Ireland 1922) 5.

184 Ibid.

185 See Military Archives (n 7 above).

186 For a contrasting view, see Laura Cahillane, *Drafting the Irish Free State Constitution* (Manchester University Press 2016) 75. A small number of TDs who identified with pro-Treaty Sinn Féin, for example Eoin MacNeill and Liam de Róiste, took an independent line, but overall party discipline in the face of the unpopular Treaty articles was overwhelming.

Gavan Duffy challenged the Provisional Government to publish Draft D that had been taken to London by Irish negotiators.¹⁸⁷ He even made thinly veiled threats that he would publish Draft D himself but warnings from the Provisional Government against breaches of confidence appear to have dissuaded him.¹⁸⁸ Ernest Blythe insisted that publication would set a bad precedent and added that Gavan Duffy had a purely personal motive in urging publication in allowing him 'to run away from the responsibility which he took when he signed the Treaty, and which he has since consistently tried to run away from'.¹⁸⁹ Gavan Duffy was accused of naivety in failing to appreciate that the Irish negotiators who went to London would have to make some concessions on the draft Constitution.¹⁹⁰

The conclusion of his political career saw Gavan Duffy return to work at the bar but political developments soon opened new opportunities. In 1926 Eamon de Valera and his followers left Sinn Féin and formed a new political party known as 'Fianna Fáil'. The following year saw de Valera and his colleagues take the controversial parliamentary oath and enter the Oireachtas. De Valera now had a common goal with Gavan Duffy in seeking to push the legal interpretation of the Treaty settlement to its limits as a prelude to its dismantling. In 1927 Gavan Duffy publicly proclaimed that there was no legal obligation to continue paying land annuities to the United Kingdom and also advised de Valera that the parliamentary oath provided in the 1921 Treaty was not mandatory.¹⁹¹ When de Valera came to power in 1932 he proposed to appoint Gavan Duffy as attorney general but, in the end, declined to do so due to internal opposition within his own Cabinet based on Gavan Duffy's status as a signatory of the Treaty.¹⁹² Nevertheless, the close relationship that developed with de Valera is likely to have influenced Gavan Duffy's appointment to the High Court in 1936.

Gavan Duffy's political career was relatively short-lived and fell between two periods in the legal professions that proved far more successful. Nevertheless, Gavan Duffy's career between the signing of the Treaty in 1921 and the loss of his parliamentary seat in 1923 reveals much about him. One obvious feature was his isolation as a

187 *Dáil Debates*, vol 1, col 762, 26 September 1922.

188 *Dáil Debates*, vol 1, col 641–642, 25 September 1922.

189 *Dáil Debates*, vol 1, col 1006, 29 September 1922. Gavan Duffy would publish an article outlining some details of Draft D but, as it appeared in the French language in a legal periodical published in Paris, it is questionable how many contemporary Irish readers ever accessed it. Gavan Duffy (n 173 above).

190 *Dáil Debates*, vol 1, col 1005, 29 September 1922.

191 C Gavan Duffy (n 5 above) 96 and reprint 12.

192 *Ibid* 97–98 and reprint 14. Gavan Duffy would also come to admire de Valera's 'Document No 2' an alternative to the 1921 Treaty that Gavan Duffy had signed. See Military Archives (n 7 above).

government minister that was evident long before his final resignation. This isolation became even more pronounced in his brief career as an independent TD. He was accused of delusion and of trying to convince the Constituent Assembly that the Treaty had provided for a republic.¹⁹³ Gavan Duffy was also accused of treating the 1921 Treaty like a 'curate's egg' which, being 'excellent in parts', allowed him to pick and choose parts of the Treaty that he liked to the exclusion of those he did not.¹⁹⁴ On other occasions he was simply accused of attempting to 'run away' from the Treaty that he himself had signed.¹⁹⁵

It should be recognised that Gavan Duffy acknowledged that the 1922 Constitution was an important advance for Irish nationalism notwithstanding his conviction it had failed to grasp the full degree of status and autonomy available under the 1921 Treaty.¹⁹⁶ The sincerity of Gavan Duffy's position in 1922 is reflected in the fact that he maintained it until the end of his life. The proceedings of the Constituent Assembly touched him deeply, and he concluded a written account of the Constituent Assembly's acceptance of the Treaty articles with the words 'Hinc illae lacrymae' (hence those tears).¹⁹⁷ Nevertheless, the debates of the Constituent Assembly suggest that he had a flawed understanding of the legal and political consequences of the Treaty that he signed in 1921 with such reluctance. It is also difficult to escape the conclusion that he maintained a deep sense of uneasiness, perhaps even regret, over this settlement. This is not surprising as Gavan Duffy proved to be the last of the Irish delegation to agree to sign the Treaty. It is also worth noting his subsequent justification for the final decision to sign which focused on arguments relating to duress during the last stage of the negotiations coupled with hopes that the drafting of the Constitution of the Irish Free State might mitigate some of the most objectionable features of the Treaty settlement. Gavan Duffy was not alone in hoping that the Constitution would offer a 'second round' in the negotiation of the British–Irish settlement, but he was alone among Irish cabinet ministers in refusing to accept the failure of this stance in the British–Irish negotiations of mid-1922 that produced an agreed draft. Gavan Duffy appears to have treated the deliberations of the Constituent Assembly in late 1922 as a 'third round' in negotiating a settlement. His anticipated Imperial Constitutional Conference, which was never based in reality, even appeared to have offered a 'fourth round'. His opposition to the Repugnancy Clause revealed his

193 *Dáil Debates*, vol 1, col 573, 21 September 1922.

194 *Ibid.*

195 *Dáil Debates*, vol 1, col 1006, 29 September 1922.

196 *Dáil Debates*, vol 1, col 1913–1914, 25 October 1922.

197 Gavan Duffy (n 173 above) 183.

conviction that the 1921 Treaty might be replaced in the near future by a revised British–Irish treaty which might be seen as a ‘fifth round’.¹⁹⁸

Gavan Duffy’s legal arguments in the Constituent Assembly were based on a sincere desire ‘to save something from the wreck of the Constitution on the rocks of Downing Street’.¹⁹⁹ Nevertheless, they were certainly open to challenge and he championed positions that had already been rejected twice, during the negotiations on the Treaty in 1921 and during the negotiations on the Constitution in 1922. He also persisted in a belief, evident during the negotiations on the Treaty and on the Constitution, that the British Government would be prepared to concede a self-governing Irish state with far more autonomy than Dominion status in the early 1920s.

Gavan Duffy was convinced that the British position on the draft Constitution was based on the ‘bad example’ it would set for nationalists within the Dominions.²⁰⁰ He may not have fully appreciated that British resistance had much deeper roots. The British Government needed the world, and its own restless colonies, to see that, although the territory of the future Irish Free State was going to secede from the United Kingdom, it was not going to secede from the British Empire. If the Irish Free State was to look like a Dominion, its Constitution would have to make reference to key institutions that were also mentioned in the Constitutions of all the existing Dominions.

Gavan Duffy’s attitude to the draft Constitution was broadly similar to that of his cabinet colleagues before the draft Constitution was taken to London in May 1922. It was his excessively optimistic perspective on what the British Government might be prepared to accept that set him apart during the British–Irish negotiations that followed. He was also convinced that the Provisional Government had not considered alternatives to compromising with the British Government. These included the convocation of an anticipated Imperial Constitutional Conference and arbitration by the League of Nations. As seen earlier, these apparent options were based on misapprehension and were not realistic possibilities in 1922. These considerations ensured that Gavan Duffy continued to champion positions that his Cabinet colleagues felt obliged to abandon. The result was a permanent sundering of relations with former political allies and a swift conclusion to his political career. Although Gavan Duffy’s subsequent careers as a barrister and judge were far more successful, it is possible that the disputes that characterised his brief political career may have been responsible for a

198 UCD Archives, Gavan Duffy Papers, P152/213, memorandum (n 113 above) and *Irish Independent* (n 60 above).

199 *Dáil Debates*, vol 1, col 1461, 11 October 1922.

200 UCD Archives, Gavan Duffy Papers, P152/202, Gavan Duffy to Collins, 26 May 1922.

reputation for impracticality and pedantry within some sections of the legal professions.²⁰¹ Gavan Duffy's decision in his last days to devote the entirety of a recording of his memories to the politics surrounding the drafting of the 1922 Constitution, which by this stage was long obsolete, suggests that these events preoccupied him until the end. Gavan Duffy admitted that these memories remained painful almost three decades later.²⁰²

Yet, Gavan Duffy's interventions in the Constituent Assembly did have some significant consequences. It is important to remember that not all of Gavan Duffy's proposed constitutional amendments were rejected and some continue to exert influence in Irish constitutional law.²⁰³ It is also possible that Gavan Duffy's involvement in constitutional affairs after 1932, culminating in his involvement in the drafting of the 1937 Constitution of Ireland, may have been partly inspired by his failures in the Constituent Assembly. The new Constitution was uncompromising on principles of popular sovereignty, legislative autonomy and extraterritorial jurisdiction that Gavan Duffy had championed in 1922. It also provided the opportunity for the insertion of declarations of natural law, which Gavan Duffy strongly supported, that distinguished the new Constitution from its predecessor.²⁰⁴ Gavan Duffy proved so supportive of the 1937 Constitution that he would write a citizen's guide to it.²⁰⁵

Gavan Duffy was a strong advocate of cooperation with the overseas Dominions at Imperial Conferences in advancing the autonomy of the Irish Free State. This proved to be one of his most insightful contributions after the signing of the Treaty. As seen earlier, this route to constitutional reform was not nearly as obvious to contemporaries as it would be to subsequent commentators enjoying the benefit of hindsight.²⁰⁶ It was openly rejected by many opponents and supporters of the 1921 Treaty who could not be sure that the restless Irish Free State would find any friends among the overseas Dominions. Gavan Duffy's argument was not helped by serious mistakes and misconceptions, in particular his belief that an Imperial Conference

201 Connolly (n 5 above) 129–130, 134 at 134. Connolly adds that these allegations 'must be taken with a grain of salt' and concludes that they were substantially rooted in 'earlier political antagonism stemming from the Civil War'.

202 See Military Archives (n 7 above).

203 For example, see n 163 above.

204 See n 41 above.

205 Anon [George Gavan Duffy], *Éire – The New Irish Constitution – The Citizen's Manual* (James Duffy 1938).

206 Gavan Duffy's son Colum Gavan Duffy would later argue that his father's legal arguments before the constituent assembly 'were made before their time'. C GavanDuffy (n 5 above) 95 and reprint 10.

dedicated to constitutional reform was due to be convened in the near future. Yet, although Gavan Duffy was clearly mistaken in terms of details, his instinct as to the direction of reform and the prospect of finding common cause with other Dominions proved to be entirely accurate. The Imperial Conferences of the late 1920s and early 1930s did provide the basis for sweeping constitutional change in the form of the Statute of Westminster. This facilitated the dismantling of the Treaty settlement over the course of the 1930s. Gavan Duffy's instincts on the potential offered by this peaceful avenue for constitutional change would prove to be justified, although even he may have been surprised that the settlement he had signed in 1921 would prove to be so transient.