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George Gavan Duffy and the Irish Free State on the International Stage, 1921–1923

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ABSTRACT

This article examines the efforts made by George Gavan Duffy, signatory of the 1921 ‘Anglo-Irish Treaty’ and minister for foreign affairs in 1922, to promote the autonomy of the embryonic Irish Free State as a new member of the international community in the early 1920s. It examines his brief tenure as minister for foreign affairs and his subsequent efforts as an independent TD. Gavan Duffy was convinced that the new state could rapidly advance its autonomy through active engagement and cooperation with allies among the Dominions at regular meetings known as ‘imperial conferences’. This article argues that this strategy was not as obvious in 1922 as it would later appear with the benefit of hindsight. The Irish provisional government, whose relationship with Gavan Duffy was tense, proved unreceptive to his recommendations. This analysis concludes that although these recommendations were based on erroneous details, Gavan Duffy’s instinct proved accurate.

INTRODUCTION

George Gavan Duffy is largely remembered as one of the signatories of the 1921 Treaty and for his later career as a judge of the High Court. His tenure as minister for foreign affairs in 1922 was brief but important in setting the foundations

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of the Irish diplomatic service.¹ This article examines Gavan Duffy's attempts to promote the autonomy and status of the infant Irish Free State as a new actor on the international stage. It focuses on the critical period between his signing of the Treaty in 1921 and his effective withdrawal from politics in 1923.

Analysis of this period provides an insight into Gavan Duffy's expectations and hopes for the new state soon after he reluctantly added his signature to the Treaty. This document declared that the Irish Free State would enjoy the same status as the Dominions, the self-governing colonies of white settlement within the British Empire.² Although the Dominions had made substantial advances in autonomy by the early twentieth century, they were still not recognised by many authorities as being sovereign states.³ This article examines Gavan Duffy's determined efforts to advance the status of the young Irish Free State within the British Commonwealth and on a wider international stage.

GEORGE GAVAN DUFFY

George Gavan Duffy (1882–1951) was the son of Charles Gavan Duffy, a prominent figure in the Young Ireland movement who would emigrate to Australia and briefly enjoy office as premier of the colony of Victoria. George was born in England but spent considerable portions of his youth in European countries including Ireland. His cosmopolitan background and education did not distance him from his Irish nationalist roots. He kept in close contact with Irish affairs, holidayed in Ireland and married an Irishwoman, Margaret Sullivan, in 1908. He also maintained a lifelong love of the Irish language. He corresponded with leading nationalist figures including Arthur Griffith, Countess Markievicz, Count Plunkett and Bulmer Hobson.⁴

Gavan Duffy's legal career began when he qualified as a solicitor in London in 1907. The trajectory of his life and career was changed when he decided to assist in the defence of Roger Casement for his involvement in the 1916 Easter rising. He paid a heavy price for this and was forced to leave his firm of solicitors in London.⁵ In 1917 Gavan Duffy moved to Ireland, qualified as a barrister and became increasingly involved with the Sinn Féin party. This marked the beginning of a political career that would dominate the following six years of his life. Gavan Duffy won a parliamentary seat for Sinn Féin in the 1918 general election and attended the opening of the first Dáil Éireann on 21 January 1919. His

¹Michael Kennedy, "'Civil servants cannot be politicians': the professionalisation of the Irish foreign service, 1919–22", *Irish Studies in International Affairs* 8 (1997), 95–109.

²The use of a capital 'D' when referring to the 'British Dominions' was required by the British government to avoid confusion with the wider term 'His Majesty's dominions', which referred to the British Empire as a whole. See TNA HO 45/20030.

³For example, see Robert E. Ireton, 'L'État libre d'Irlande n'est pas un État souverain', *Annuaire de Legislation Étrangère* 20 (1922), 183–6; P.J. Noel Baker, *The present juridical status of the British Dominions in international law* (London, 1929), 356; Pearce Higgins, *Hall's international law* (Oxford, 1924), 34.

⁴G.M. Golding, *George Gavan Duffy* (Dublin, 1982), 11.

⁵Colum Gavan Duffy, 'George Gavan Duffy', *Dublin Historical Record* 36 (3) (1983), 90–106: 92.

linguistic skills ensured that he was chosen to read out the French text of the declaration of independence issued on that day. His legal and linguistic skills are likely to have underpinned the beginning of a brief diplomatic career. Gavan Duffy spent much of the next two years in continental Europe in an unsuccessful attempt to secure recognition for the self-declared Irish republic.⁶ This ensured that he missed the darkest days of the conflict that engulfed Ireland between 1919 and the truce of 11 July 1921.

Gavan Duffy's legal, political and diplomatic careers came together in October 1921 when he was chosen to join the Irish delegation that travelled to London to negotiate a permanent peace with representatives of the British government. The delegation did not include President Éamon de Valera, a decision that remains controversial, but did include three members of the Dáil cabinet: Arthur Griffith, Michael Collins and Robert Barton. The legal experience of Gavan Duffy and his colleague Eamonn Duggan was an important consideration in their selection as members of the delegation.⁷ Robert Erskine Childers was appointed as secretary and additional legal support was provided by John Chartres, a barrister, diplomat and former civil servant. Also, a legal advisory committee was convened in Dublin to provide further support. It 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.⁸

The British offer of Dominion status demanded a knowledge of British imperial law and the constitutional law of the Dominions, such as Canada and Australia, that few Irish lawyers possessed. Gavan Duffy and other members of the delegation attempted to close this gap by studying works dedicated to the legal implications of Dominion status.⁹ Their principal source was an account of recent constitutional developments in the Commonwealth written by the Australian academic Hessel Duncan Hall. His book *The British Commonwealth of Nations*, published in 1920, was attractive to Irish nationalists because of its emphasis on growing Dominion autonomy and its claims for the equal status of the Dominions with the United Kingdom.¹⁰ Each member of the Irish

⁶See Gerard Keown, 'Knocking on the door: the Irish presence at the Paris Peace Conference of 1919', *Irish Studies in International Affairs* 30 (2019), 41–57.

⁷Frank Pakenham, *Peace by ordeal* (London, 1972), 84.

⁸*Dáil Debates*, vol. T, no. 4, col. 201, 16 December 1921.

⁹This would focus on H. Duncan Hall, *The British Commonwealth of Nations – a study of its past and future development* (London, 1920). See Pakenham, *Peace by ordeal*, 226 and H. Duncan Hall, *Commonwealth – a history of the British Commonwealth of Nations* (London, 1971), 198 and 912.

¹⁰UCD Archives, Kennedy Papers, P4/312, Duncan Hall to O'Rahilly, 10 February 1922. For an example of the influence this text had on the thinking of the 1922 constitution committee, see James MacNeill's memorandum on the role of the Governor-General in UCD Archives, Kennedy Papers, P4/320, memorandum on the powers and duties of the Governor-General, 1922. It should also be noted that quotations taken from this book were used in the debates of the constituent assembly: for example, *Dáil Debates*, vol. 1, col. 379, 18 September 1922 and vol. 1, col. 1255, 5 October 1922. See also Thomas Mohr, 'The Irish question and the evolution of British imperial law, 1916–1922', *Dublin University Law Journal* 39 (2) (2016), 405–27.

delegation that travelled to London in late 1921 carried a copy of this book.¹¹ It is possible that this text may have influenced the decision of some Irish delegates to sign the 1921 Treaty. John A. Costello would later tell Duncan Hall that his book had ‘exactly described what the Irish Delegation wanted in the Treaty – the maximum interpretation of Dominion status’.¹² Duncan Hall welcomed the signing of the Treaty and hoped that his book had ‘helped to smooth the way towards a settlement’.¹³ He added that had he been in London during the British–Irish negotiations he would have offered his services to the Irish delegation.¹⁴ Gavan Duffy certainly admired Duncan Hall’s book and made use of it in early 1922, as minister for foreign affairs.¹⁵

Duncan Hall’s book was not without its critics. In some respects the book exaggerated the position of Dominion autonomy as it existed in the early 1920s.¹⁶ It also presented an optimistic assessment of the immediate prospects for expanding Dominion autonomy through negotiation that placed great emphasis on an anticipated imperial constitutional conference.¹⁷ These considerations had a profound influence on Gavan Duffy’s attitude towards the Commonwealth. He became convinced that the Dominions would inevitably make significant advances in autonomy at the anticipated constitutional conference that would be convened in the very near future.¹⁸

Despite the positive perspective on Dominion status offered by Duncan Hall’s book, Gavan Duffy loyally promoted de Valera’s scheme for ‘external association’ for Ireland, a compromise that offered far greater autonomy. Gavan Duffy joined Robert Barton and a reluctant Arthur Griffith in insisting on a final push for external association in a meeting with the British delegation on 4 December 1921. The British delegation remained adamant, as they had throughout the negotiations, that a settlement based on external association was unacceptable. Gavan Duffy inadvertently brought negotiations to a crisis point when he outlined the basis of his delegation’s preference for external association over Dominion status. He explained ‘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.’¹⁹ This open refusal to remain within the British Empire undermined Irish negotiating strategy and infuriated

¹¹Pakenham, *Peace by ordeal*, 226 and Duncan Hall, *Commonwealth*, 198 and 912.

¹²Duncan Hall, *Commonwealth*, 912.

¹³UCD Archives, Kennedy Papers, P4/312, Duncan Hall to O’Rahilly, 10 February 1922.

¹⁴UCD Archives, Kennedy Papers, P4/312, Duncan Hall to O’Rahilly, 10 February 1922.

¹⁵See George Gavan Duffy to Timothy A. Smiddy, 10 March 1922. Reproduced in Ronan Fanning et al. (eds), *Documents on Irish Foreign Policy, volume 1, 1919–1922* (Dublin, 1998), 408–9. See also Duncan Hall, *British Commonwealth of Nations*, 253–9.

¹⁶For example, Duncan Hall wrote in 1920 that ‘to-day the Dominions have achieved full constitutional independence, and the very idea of limited autonomy is a thing of the past’. Duncan Hall, *British Commonwealth of Nations*, 266. See also Mohr, ‘Irish question and the evolution of British imperial law’.

¹⁷For example, Duncan Hall, *British Commonwealth of Nations*, 198, 200, 230–1, 259–63.

¹⁸For example, see *Documents on Irish Foreign Policy*, vol. 1, 468–77.

¹⁹Pakenham, *Peace by ordeal*, 217.

the British delegation. The final day of negotiations was one of high drama, with Lloyd George presenting a choice between signing the Treaty and the resumption of war. The Irish delegation eventually decided to sign.

Gavan Duffy, in common with other Irish signatories of the Treaty, signed his name in the Irish language: as ‘Seoirse Gabhán Ó Dubhthaigh’. This reflects his lifelong interest in the Irish language in addition to the inherent declaration of a separate cultural identity. This resulted in some unelevating mockery in the House of Commons, with Gavan Duffy described as Mr ‘Doublethigh’.²⁰

Gavan Duffy signed the 1921 Treaty with great reluctance. He was, in fact, the last member of the Irish delegation to agree to do so. He would later explain to the Dáil: ‘My heart is with those who are against the Treaty, but my reason is against them, because I can see no rational alternative.’²¹

MINISTER FOR FOREIGN AFFAIRS

The Dáil finally approved the Treaty settlement by 64 to 57 votes. This opened the way for the formation of an Irish provisional government that would oversee the handover of the 26 counties of the south and west of Ireland before the official formation of the Irish Free State on 6 December 1922. George Gavan Duffy was appointed minister for foreign affairs, a promotion that may have been influenced by his linguistic skills, his experience in trying to gain recognition for the self-declared Irish republic between 1919 and 1921, and his status as a signatory of the Treaty.

As minister for foreign affairs, Gavan Duffy declined to officially become a member of the provisional government. He justified this position on the basis that it was best to keep his nascent Department of Foreign Affairs autonomous in the hope that it could continue to function should relations break down between London and the provisional government.²² This decision may also have reflected Gavan Duffy’s personal preferences and the reality that the Department of Foreign Affairs would have little role to play in the transition of power overseen by the provisional government.

Gavan Duffy was not the first Irish minister for foreign affairs, as the office had already been held by Count Plunkett and Arthur Griffith. The department would not be placed on a statutory footing until its formal establishment as the ‘Department of External Affairs’ in the Ministers and Secretaries Act 1924.²³ Although some sources have largely ignored the significance of Gavan Duffy’s time in office, which lasted only from January to July 1922, others have stressed

²⁰*Hansard*, House of Commons, vol. 151, col. 1366, 8 March 1922.

²¹*Dáil Debates*, vol. T, no. 8, cols 87–8, 21 December 1921.

²²*Dáil Debates*, vol. 1, col. 531, 21 September 1922. W.T. Cosgrave parodied Gavan Duffy’s stance on keeping foreign affairs away from the provisional government at *Dáil Debates*, vol. 1, col. 546, 21 September 1922.

²³Section 1(xi), Ministers and Secretaries Act 1924.

its importance.²⁴ He worked to maintain contact with existing Irish representatives in other countries, attempted to set foundations for a permanent diplomatic service and identified priorities in future foreign policy.²⁵ Michael Kennedy has examined Gavan Duffy's efforts to find a permanent home for his department, his attempts to keep the embryonic diplomatic service from falling apart on the basis of differing opinions on the 1921 Treaty and his struggle to rebuild the foundations of a diplomatic service when the split finally took its toll.²⁶ Gavan Duffy made use of Duncan Hall's book to argue that Dominion precedent permitted the establishment of internationally recognised Irish diplomatic representation abroad that would be independent of the British Foreign Office.²⁷ This would formally become reality in 1924 when Timothy A. Smiddy was recognised as representing the Irish Free State in Washington, DC. Gavan Duffy was a strong advocate of the Irish Free State applying to join the League of Nations as soon as possible and was impatient with delays in achieving this objective.²⁸ He also recommended that the Irish Free State cooperate with other Dominions and take an active role in seeking constitutional reforms on the Commonwealth stage.²⁹

Gavan Duffy's brief tenure as minister for foreign affairs approached its conclusion when he rejected the draft constitution for the Irish Free State that was published in the newspapers on the morning of the Irish election of 16 June 1922. Despite his legal experience, Gavan Duffy was not appointed to the special committee that produced the initial drafts of the constitution and was not invited to join the Irish negotiating team sent to London to give the British government a confidential preview of the chosen draft. The British government was deeply unhappy with the draft constitution, which it saw as 'a complete evasion of the Treaty and a setting up of a Republic with a thin veneer'.³⁰ It demanded a substantial redrafting of the proposed constitution to reflect the realities of the Treaty settlement. Gavan Duffy opposed all the important concessions demanded by the British government. However, his colleagues in government feared that the entire settlement was in jeopardy and that a return to war was a real possibility. The result was a substantial redrafting of the future constitution and the

²⁴For positive assessments of this aspect of Gavan Duffy's career, see G.M. Golding, *George Gavan Duffy* (Dublin, 1982), 27 and Kennedy, 'Civil servants cannot be politicians'. For a more critical assessment, see Denis Gwynn, *The Irish Free State 1922–1927* (London, 1928), 110. Gavan Duffy's contribution to the development of Irish foreign policy receives limited attention in some leading texts. For example, see Patrick Keatinge, *The formulation of Irish foreign policy* (Dublin, 1973), 73.

²⁵For example, see 'Memorandum on the training of candidates for the diplomatic service' and 'The future of our foreign affairs' in *Documents on Irish Foreign Policy*, vol. 1, 435–9.

²⁶Kennedy, 'Civil servants cannot be politicians'.

²⁷UCD Archives, P152/207, Gavan Duffy to Collins, 3 June 1922.

²⁸NAI, Department of the Taoiseach. S3332, memorandum by Gavan Duffy, 22 July 1922 and *Dáil Debates*, vol. 1, col. 534, 21 September 1922.

²⁹*Documents on Irish Foreign Policy*, vol. 1, 468–77.

³⁰TNA, 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.

addition of new provisions concerning the king, the representative of the crown (governor-general), the controversial parliamentary oath and an appeal from the Irish courts to a court in London known as the 'Judicial Committee of the Privy Council'.

Gavan Duffy became convinced that the Irish delegation sent to London to negotiate the provisions of the draft constitution in May and June 1922 had conceded more than was required by the terms of the 1921 Treaty.³¹ Consequently, on 19 June 1922 he wrote to Arthur Griffith to offer his resignation as minister for foreign affairs.³² Griffith managed to persuade him to delay this until the opening of the new Dáil, which would sit as a 'constituent assembly' in considering the draft constitution.³³ The provisional government's decision to commence the winding-up of the Dáil courts in July 1922 proved to be the final straw, and Gavan Duffy duly resigned from office.³⁴

INDEPENDENT TD 1922–1923

Gavan Duffy's keen interest in foreign affairs did not dissipate when he retired to the backbenches as an independent TD between 1922 and 1923. He continued to push for an immediate application to join the League of Nations in late 1922.³⁵ As events transpired, the Irish Free State would not officially join the league until late 1923.³⁶ He was also eager to see the Irish Free State register the 1921 Treaty with the League of Nations, which finally took place in 1924.³⁷ This move was important in countering British claims that the 1921 Treaty was not an international instrument.³⁸ Some commentators have promoted registration of this document as a decisive step in removing all doubt as to its status as an international treaty.³⁹

In reality, it was no such decisive step. The secretariat of the League of Nations did not have the power to refuse to register the documents presented to it by a member state. The league adopted a diplomatic stance by taking a middle

³¹UCD Archives, Gavan Duffy Papers, P152/210, Gavan Duffy to Griffith, 19 June 1922.

³²UCD Archives, Gavan Duffy Papers, P152/210, Gavan Duffy to Griffith, 19 June 1922.

³³See UCD Archives, Gavan Duffy Papers, P152/210, 211 and 212.

³⁴Golding, *George Gavan Duffy*, 26.

³⁵*Dáil Debates*, vol. 1, cols 265–6, 14 September 1922.

³⁶NAI, Department of the Taoiseach, S3332, speech by W.T. Cosgrave on Ireland's admission to the League of Nations, 10 September 1923.

³⁷*Documents on Irish Foreign Policy*, vol. 1, 480 and League of Nations, Treaty Series, XXVI, 10.

³⁸For example, Baker, *Present juridical status of the British Dominions in international law*, 319. Some based their objection on the legal question whether agreements made between constituent parts of the British Empire could be considered as being international in nature. See Alfred Zimmern, *The third British Empire* (London, 1929), 36–7; R.Y. Jennings, 'The Commonwealth and international law', in *British yearbook of international law* 320 (1953), 332; Franklin Berman, 'Treaty-making within the British Commonwealth', *Melbourne University Law Review* 38 (3) (2015), 905–7. Both sides of the argument are set out in Nicholas Mansergh, *The Irish Free State – its government and politics* (London, 1934), 29, 41–2.

³⁹For example, see D.W. Harkness, *The restless dominion* (London, 1969), 63 and Michael Kennedy, *The Irish Free State and the League of Nations, 1919–1946* (Dublin, 1996), 74. For a differing perspective, see Austen Morgan, *The Belfast Agreement – a practical legal analysis* (London, 2000), 64–6.

course between the Irish Free State and the United Kingdom as disputing parties. When the league published the 'Articles of Agreement' or 'Treaty' in its 'treaty series', it also published British objections to the validity of registration together with the response made by the Irish Free State.⁴⁰ The only thing that was settled was that the status of the instrument was disputed by two members of the League of Nations.

Gavan Duffy's attempts to amend the provisions of the draft 1922 constitution of the Irish Free State and, in particular, those that reflected the demands of the 1921 Treaty provoked bitter exchanges with his former colleagues in government. He attended the special sessions of the Dáil, sitting as a constituent assembly, and moved amendments that sought to remove many of the provisions that had been inserted at British insistence.⁴¹

Gavan Duffy's status as a signatory of the 1921 Treaty ensured that his persistence in claiming that the provisions of the draft constitution went beyond the strict demands of that settlement was a source of particular embarrassment. He accused the provisional government of 'weakness' and condemned it for its 'abject surrender' on key provisions of the constitution, including those related to the crown, the governor-general and the deeply controversial parliamentary oath.⁴² His former colleagues responded by accusing him of running away from the responsibilities that he had accepted when signing the Treaty.⁴³ Kevin O'Higgins told the Dáil that 'this Government will not dishonour the signature of Deputy Gavan Duffy, even at the invitation of Deputy Gavan Duffy'.⁴⁴

Gavan Duffy's uncompromising stance on the constitution might appear at odds with his earlier decision, albeit taken with extreme reluctance, to accept the compromise inherent in the 1921 Treaty. His critics lost no time in accusing him of hypocrisy. Gavan Duffy's exclusion from the drafting of the constitution and from the Irish delegation that negotiated its redrafting in London might indicate that he was not entirely trusted by his colleagues even before his resignation as minister for foreign affairs. He made little secret of his dissatisfaction with the Treaty that he had signed in late 1921, and his colleagues appear to have suspected that he would overcompensate by adopting an uncompromising attitude on the constitution.

⁴⁰League of Nations, Treaty Series, XXVII, 449–50. See NAI, Department of Foreign Affairs, 417/105, memorandum by Joseph P. Walshe for the minister for external affairs on 'The Registration of the Treaty', 1 December 1924; Edward J. Phelan, 'The sovereignty of the Irish Free State', *Review of Nations* 3 (1927), 35–49; 37–8. A similarly indecisive tussle was recorded in 1925 over a British–Irish agreement that amended parts of the settlement. League of Nations, Treaty Series, XLIV, 263–9.

⁴¹Each attempted amendment was accompanied by detailed legal arguments whose content, along with the counter-arguments moved by supporters of the Provisional Government, merits a journal article in its own right.

⁴²*Irish Independent*, 25 September 1922, 6.

⁴³*Dáil Debates*, vol. 1, col. 1006, 29 September 1922. See also *Dáil Debates*, vol. 1, col. 548, 21 September 1922.

⁴⁴*Dáil Debates*, vol. 1, col. 648, 25 September 1922.

Gavan Duffy would defend his stance on the constitution by arguing that the provisional government had ignored realistic alternatives to compromising with the British government on the draft constitution in the summer of 1922. He insisted that these alternatives included invoking the compulsory arbitration of the League of Nations.⁴⁵ This argument ignored the reality that the Irish Free State was not a member of the League of Nations during the negotiations on the draft constitution. In the eyes of the international community, the 26 counties would remain a part of the United Kingdom until 6 December 1922 when the final text of the constitution of the Irish Free State formally came into force.

In mid-1922 Gavan Duffy became convinced that the provisional government had chosen the worst possible time to compromise on the draft constitution, as he believed that the British Commonwealth was on the verge of radical constitutional change in the very near future. He was confident that if the provisional government would only wait a few months, an Irish constitution could be extracted that would not contain so many offensive provisions on the crown, governor-general, parliamentary oath and Privy Council appeal. Why was Gavan Duffy so confident that sweeping constitutional changes were about to revolutionise the British Commonwealth?

PROSPECTS FOR CONSTITUTIONAL REFORM WITHIN THE COMMONWEALTH

The 1921 Treaty, which Gavan Duffy had signed, provided that the Irish Free State would enjoy the same status as the Dominions of the British Commonwealth. The Dominions recognised by the 1921 Treaty were Canada, Australia, New Zealand and South Africa. It deliberately omitted the small Dominion of Newfoundland due to its voluntary acceptance of limits on its autonomy and, in particular, its refusal to sign the Paris peace treaties in its own right or to accept individual representation at the League of Nations.

The leaders of the United Kingdom and the Dominions convened approximately every three years at meetings known as 'imperial conferences'. Gavan Duffy believed that rapid constitutional change could be made if the Irish Free State cooperated with the existing Dominions. As mentioned earlier, Duncan Hall's book had convinced him that a special imperial conference dedicated to constitutional reform was about to be convoked in the very near future. This offered the possibility of an enormous expansion of Dominion autonomy that would naturally extend to the infant Irish Free State.

Gavan Duffy drafted numerous memoranda that advocated the need for urgent preparation for a forthcoming imperial constitutional conference.

⁴⁵*Irish Independent*, 25 September 1922, 6; George Gavan Duffy, 'Notice sur la Constitution de l'État libre d'Irlande', *Annuaire de Legislation Étrangère* 20 (1922), 180–3.

He fastened on a decision, known as 'Resolution IX', made by the British and Dominion prime ministers attending the imperial war conference of 1917.⁴⁶ This resolution had marked a decisive rejection of closer constitutional relations between the United Kingdom and the Dominions, a policy known as 'imperial federation'.⁴⁷ However, the 1917 conference recognised that a time of war was not a suitable occasion for the readjustment of the constitutional relations of the component parts of the empire. Consequently, Resolution IX added that any such readjustment 'should form the subject of a special Imperial Conference to be summoned as soon as possible after the cessation of hostilities'.⁴⁸ 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'.⁴⁹ Gavan Duffy was convinced that Resolution IX offered the immediate prospect of constitutional change in the direction of enhanced Dominion autonomy. Consequently, he chose to resist acceptance of a draft constitution that he believed reflected a fossilised image of Dominion status that was on the verge of radical change.

Gavan Duffy was adamant that the Irish Free State should be prepared to lead the Dominions that most favoured enhanced autonomy, most likely South Africa and Canada, at this anticipated imperial constitutional conference. He even proposed that the Department of Foreign Affairs appoint a 'legal secretary' whose main responsibility would be 'to study the constantly growing developments of constitutional practice in the relations between Great Britain and the British Dominions and to get into close touch with the representatives of those interests in the British Dominions which are seeking to reduce British influence and interference to a nullity'.⁵⁰ He also recommended the preparation of a publicity campaign that would counter the propaganda that was sure to develop 'as soon as it is realised by the British Government that Ireland definitely refuses to accept as permanent a place within the British Empire'.⁵¹

Gavan Duffy advocated an immediate convocation of the anticipated imperial constitution conference when the British government rejected the draft Irish constitution in May 1922. He was convinced that all the matters that the British were disputing could be dealt with at this conference and was confident that the Irish Free State would win the support of the existing Dominions, in particular Canada, Australia and South Africa, on all the contested points.⁵²

⁴⁶*Dáil Debates*, vol. 1, cols 538–44, 21 September 1922.

⁴⁷See Mohr, 'Irish question and the evolution of British imperial law'. See also Ged Martin, 'The idea of imperial federation', in Ronald Hyam and Ged Martin, *Reappraisals in British imperial history* (London, 1975), 121–38; Thomas Mohr, 'The United Kingdom and imperial federation, 1900 to 1939: a precedent for British legal relations with the European Union?', *Comparative Legal History* 4 (2) (2016), 1–31.

⁴⁸Parliamentary Papers, 1917, Cmd. 8566, Imperial War Conference 1917, 5 and 60.

⁴⁹Parliamentary Papers, 1917, Cmd. 8566, Imperial War Conference 1917, 5 and 60.

⁵⁰*Documents on Irish Foreign Policy*, vol. I, 468–77.

⁵¹*Documents on Irish Foreign Policy*, vol. I, 468–77.

⁵²UCD Archives, P152/207, Gavan Duffy to Collins, 3 June 1922.

Gavan Duffy's insistence that negotiations with the British government be frozen pending the convocation of this conference was out of touch with reality for a number of reasons, not least the public promise that a draft Irish constitution be published in advance of an Irish general election scheduled for 16 June 1922. Even if full Dominion support on the draft constitution had been forthcoming, and this was itself a dubious assumption, the organisation of an imperial conference would have required many months of preparation. The publication of a draft constitution, as an integral part of the creation of the Irish Free State, simply could not wait. Nevertheless, Gavan Duffy remained convinced that his cabinet colleagues were conceding British demands that went far beyond the terms of the 1921 Treaty, and that they had made a serious blunder in failing to place the draft Irish constitution before an imperial conference. He maintained this stance after his resignation as minister for foreign affairs and insisted throughout the debates of the constituent assembly that all proceedings on the Irish constitution should cease pending the convocation of an imperial conference. Gavan Duffy argued that the existing Dominions were 'vastly better judges than we can pretend to be as newcomers', and that they would demand far more autonomy than was contained in the draft Irish constitution that had returned from London.⁵³

Gavan Duffy's political stance on delaying the completion of the Irish Free State constitution pending an anticipated imperial conference was not only out of touch with political realities but also based on a number of fundamental errors. First, Gavan Duffy may not have fully appreciated the context of Resolution IX, which was primarily aimed at stifling proposals for closer constitutional ties between the United Kingdom and the Dominions, including proposals for imperial federation. Secondly, Gavan Duffy appeared unaware that the prospects for holding an imperial constitutional conference had been stifled even before he had added his signature to the 1921 Treaty. Rejection of imperial federation did not necessarily equate with support for looser constitutional ties. 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'.⁵⁴ Gavan Duffy and his former colleagues in the provisional government were unaware of these developments in the early debates of the constituent assembly. When the provisional government learned of the conclusions reached at the 1921 imperial conference, it became much easier to counter Gavan Duffy's arguments.⁵⁵

⁵³*Irish Independent*, 23 September 1922, 7; *Freeman's Journal*, 23 September 1922, 6.

⁵⁴Cmd. 1474, p. 9, Resolution XIV. See also TNA, CAB 32/6, Imperial Meetings 1921, p. 323.

⁵⁵*Dáil Debates*, vol. 1, col. 1176, 4 October 1922.

In 1922 Gavan Duffy's former colleagues did not share his confidence that other Dominions would fully support the Irish Free State if it demanded greater autonomy within the Commonwealth. Members of the provisional government knew little of Commonwealth politics and could not be certain of gaining cooperation, or even sympathy, from the other Dominions. Irish ministers were certainly aware that elements in the other Dominions also desired to reform Dominion status. However, these represented unknown quantities whose reliability remained uncertain. Opponents of the 1921 Treaty often taunted their domestic opponents with predictions that the Irish Free State would never be treated as an equal at imperial conferences.⁵⁶ Irish supporters of the Treaty publicly rejected these claims but could not be entirely sure that they were not accurate.

The absence of certainty as to Dominion attitudes towards the infant Irish Free State led Kevin O'Higgins to recommend against becoming a 'stalking horse for the left wing of Dominion thought' during the debates of the constituent assembly in 1922.⁵⁷ O'Higgins rejected any policy of forcing the pace for achieving enhanced Dominion autonomy that would result in the Irish Free State 'getting all the kicks and taking all the risks, while other people get any problematical advantage that may be won without either kick or risk'.⁵⁸ Hugh Kennedy, a future attorney general and chief justice of the Supreme Court, was anxious to avoid a position in which the Irish Free State was 'made a "Trying-on room" for Constitutional costumes for the Dominions'.⁵⁹ W.T. Cosgrave was more blunt when he told the constituent assembly 'I do not want any Dominion Statesman to tell me what this Nation requires'.⁶⁰ He added: 'I am perfectly satisfied that we would have done just as well in this country without the assistance of the Dominions' and concluded 'when the day comes that Irishmen are afraid to take responsibility for doing their own business themselves, irrespective of outside influence, then I believe that the cause of Irish nationality is bound to fail'.⁶¹

THE IMPERIAL CONFERENCE OF 1923

The nature of Commonwealth relations remained uncharted territory for Irish governments before 1923. The Irish delegation that attended the imperial

⁵⁶For example, see Anon., *What the Treaty means* (Dublin, 1922), 12. Opponents of the Treaty insisted that the Irish Free State's history and its geographical proximity to the United Kingdom would ensure that restrictive provisions of British imperial law would apply to it, including aspects deemed obsolete in the more distant Dominions. See also *Dáil Debates*, vol. T, no. 3, cols 168–170, 15 December 1921; Robert Barton, *The truth about the Treaty and Document No. 2 – a reply to Michael Collins* (Dublin, 1922), 13 and *What the Treaty means*, 5 and 7.

⁵⁷*Dáil Debates*, vol. 1, col. 1256, 5 October 1922.

⁵⁸*Dáil Debates*, vol. 1, col. 1256, 5 October 1922.

⁵⁹UCD Archives, Kennedy Papers, P4/317, Hugh Kennedy to W.T. Cosgrave, 6 September 1922.

⁶⁰*Dáil Debates*, vol. 1, col. 545, 21 September 1922.

⁶¹*Dáil Debates*, vol. 1, col. 545, 21 September 1922, 547.

conference of 1923 did not arrive in London with any plans to push for constitutional reforms. It is all too easy to condemn this conservative stance with the benefit of hindsight. However, it is important to note that, despite Gavan Duffy's confidence that the imperial conferences could be a useful venue for pursuing constitutional change, there was little actual precedent for this in the early 1920s. In any case, the Irish Free State could not be sure that other Dominions would welcome its attendance at the imperial conferences, let alone support its initiatives, until it actually encountered them for the first time.

David Harkness describes how the Irish delegation approached the imperial conference of 1923 with 'a certain amount of misgiving, and with suspicion'.⁶² The Irish delegation maintained a passive position throughout the conference proceedings apart from some very minor interventions. This reticence can be contrasted with the active stance and significant contributions made at the conferences of 1926, 1929 and 1930. Lord Balfour, a former British prime minister who attended the 1923 conference, noted that the Irish delegation had 'made up their mind that they had come to listen on this occasion and not to offer very much advice'.⁶³ The modest contribution made by the Irish delegation forced Harkness to conclude that the 1923 conference was an 'Imperial recce' for the statesmen of the Irish Free State.⁶⁴ Others have seized upon the passive role played by the Irish delegation to cast a shadow of doubt over the entire Irish contribution to the development of the Commonwealth over the course of the 1920s and 1930s. Ged Martin, responding to Harkness' thesis that the Irish Free State played a vital role in advancing constitutional reform within the Commonwealth after 1926, has argued:

If the Irish Free State, as such, had really been the crucial force for change in the Commonwealth, then it would have been logical to expect such change to stem from the Imperial Conference of October 1923, rather than from that of 1926. In the aftermath of the Civil War, it would have been reasonable for the Cosgrave government to go to London in force, insist that Britain and the Dominions recognise who their true friends were in the south of Ireland, and make appropriate declarations and concessions so as to strengthen the pro-treaty party and help bury the wounds of the Civil War. They might have found a sympathetic response.⁶⁵

This conclusion rests on a number of important assumptions. First, was it obvious to all observers in 1923 that the Dominions were on the cusp of securing important advances in autonomy? The convening of a special constitutional

⁶²Harkness, *Restless dominion*, 53.

⁶³Harkness, *Restless dominion*, 52–3.

⁶⁴Harkness, *Restless dominion*, 55.

⁶⁵Ged Martin, 'The Irish Free State and the evolution of the Commonwealth, 1921–49', in Ronald Hyam and Ged Martin, *Reappraisals in British imperial history* (London, 1975), 210.

conference had, after all, been rejected at the preceding conference in 1921. Second, was it obvious to all that the imperial conferences offered the potential of expediting this process? Previous imperial conferences, which had focused far more on constitutional evolution in the opposite direction in the form of 'Imperial federation', provided little evidence to support such an assumption. Finally, was it obvious to the Irish government in 1922 and 1923 that its involvement at the imperial conferences would expedite this process? As seen earlier, these considerations were not taken for granted by many members of the Irish government in this period. George Gavan Duffy had pushed hard in 1922 for full engagement with the imperial conferences but undermined his own argument by basing it on the promise of a special constitutional conference that had actually lapsed before the signing of the 1921 Treaty.

Most doubts held by members of the Irish government as to the value of attending the imperial conferences began to dissolve in the face of the genuine welcome that the Irish delegation received at the 1923 conference. W.T. Cosgrave, in acknowledging these good wishes, paid particular attention to those given by South Africa. Cosgrave paid Jan Smuts, the prime minister of South Africa, a handsome tribute in declaring that his valuable assistance had helped make an Irish presence possible at an imperial conference.⁶⁶ The Irish delegation would also find friends in the Canadian delegation led by prime minister William Lyon Mackenzie King and supported by Oscar Skelton, a leading academic who would later play a pivotal role in the development of the Canadian Department of External Affairs.⁶⁷

The Irish delegation to the imperial conference of 1923 had not taken a robust position on constitutional matters as they feared being isolated as a 'stalking horse', and consequently must have doubted their chances of success. Yet the Irish delegates would soon witness the Canadians pushing for greater autonomy in key areas and emerging with a degree of success. Proposals that tended towards centralisation, such as plans for a common system of registering patents, for the joint publication of trade statistics and for placing an ad hoc imperial shipping committee on a permanent basis, were all defeated by stubborn Canadian opposition.⁶⁸ The Canadians also had considerable success in defending their autonomy on economic affairs.⁶⁹ They were particularly emphatic in their rejection of all proposals for imperial preference, a system of mutual

⁶⁶Cmd. 1987. For details of Smuts's involvement in seeking a settlement in Ireland, see Joseph M. Curran, *The birth of the Irish Free State 1921–1923* (Tuscaloosa, 1980), 50, 56–7, 60–1, 64, 66.

⁶⁷Skelton was appointed counsellor in the Department of External Affairs in 1924 and became under-secretary in 1925. Robert L. MacDougall (ed.), *Canada's past and present: a dialogue* (Toronto 1965), 68. See also Terry Crowley, *Marriage of minds – Isabel and Oscar Skelton reinventing Canada* (Toronto, 2003) and Norman Hillmer, *O.D. Skelton – a portrait of Canadian ambition* (Toronto, 2015).

⁶⁸Philip G. Wigley, *Canada and the transition to Commonwealth* (Cambridge, 1977), 203.

⁶⁹One exception was the unsuccessful opposition by Canada to the creation of an imperial economic committee. Wigley, *Canada and the transition to Commonwealth*, 203–4.

tariff reductions intended to strengthen imperial unity. This resistance was applauded by the Irish delegation, who feared the impact of imperial preference on the economic development of their infant state.⁷⁰ Although Mackenzie King's principal concern at the 1923 conference rested on the development of an independent Canadian foreign policy, he was also keen to avoid devolving disproportionate control to London.

It now became apparent that George Gavan Duffy's instincts, though based on unfortunate errors, had been generally accurate. Any preconceptions that imperial conferences were completely dominated by the United Kingdom soon disintegrated. The imperial conferences were indeed suitable venues for seeking constitutional reforms and it also became clear that the Irish Free State would not be an isolated 'stalking horse' in pursuing them. In 1922 Gavan Duffy, as minister for foreign affairs, had even identified Canada as a useful ally and urged the provisional government to initiate a close relationship with Ottawa. This made particular sense as the constitutional status of the Irish Free State was linked to that of Canada in key areas under Article 2 of the 1921 Treaty.⁷¹ Gavan Duffy had advocated sending a special delegation to Canada with the objective of 'ascertaining clearly where Canada stands upon the principal constitutional points that interest us'.⁷² He had also recommended the establishment of Irish diplomatic representation at Ottawa for the purpose of 'watching Canadian developments closely and of cultivating actively cordial relations with the best elements in the Dominion'.⁷³ Gavan Duffy had resigned from his post soon after making these recommendations, but his former colleagues were alerted to Canada's value as a potential ally at future imperial conferences. Consequently, the Irish delegation were instructed to seek out the assistance of their Canadian colleagues in matters that the Irish government considered to be of particular importance at the imperial conference of 1923.⁷⁴

The imperial conferences of 1926 and 1930, in addition to the special conference of 1929, saw Irish delegations push for extensive constitutional reforms within the Commonwealth. These initiatives often enjoyed Canadian and South African support. The zenith of this policy of engagement with the Commonwealth was the enactment of the Statute of Westminster of 1931, which opened the

⁷⁰For Irish views on imperial preference see UCD Archives, Kennedy Papers, P4/609, memoranda of 23 February 1923 and P4/909, memorandum by Kevin O'Shiel, undated, and NAI, Department of the Taoiseach, S3332, memorandum by Kevin O'Shiel, September 1923.

⁷¹Article 2 provided that '[T]he position of the Irish Free State in relation to the Imperial Parliament and Government and otherwise shall be that of the Dominion of Canada, and the law, practice and constitutional usage governing the relationship of the Crown or the Representative of the Crown and of the Imperial Parliament to the Dominion of Canada shall govern their relationship to the Irish Free State.'

⁷²For example, see *Documents on Irish Foreign Policy*, vol. I, 472.

⁷³*Documents on Irish Foreign Policy*, vol. I, 472.

⁷⁴See UCD Archives, Kennedy Papers, P4/936, NAI, Department of Foreign Affairs, D3601 and NAI Department of the Taoiseach, S3439.

door to Irish constitutional reforms that were not necessarily compatible with the terms of the 1921 Treaty that George Gavan Duffy had signed with such reluctance.⁷⁵

By 1931, Gavan Duffy had long abandoned his political career. He lost his seat in the Dáil in the general election of 1923, and a subsequent attempt to get elected to the Seanad ended in failure.⁷⁶ He returned to legal practice and by the late 1920s had developed a close relationship with de Valera. Gavan Duffy advised de Valera there was no legal obligation to continue paying land annuities to the United Kingdom, and insisted that the controversial parliamentary oath provided in the 1921 Treaty was not mandatory.⁷⁷ When de Valera came to power in 1932, he proposed to appoint Gavan Duffy as attorney general but was prevented from doing so by internal opposition within his own cabinet. Too many members of Fianna Fáil found Gavan Duffy an unacceptable candidate due to his status as a signatory of the Treaty.⁷⁸ 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 also provided advice on the drafting of the new 1937 constitution that replaced the 1922 constitution of the Irish Free State. He was so enthusiastic about the 1937 constitution that he would write a citizen's guide to it.⁷⁹ In 1946 Gavan Duffy was appointed president of the High Court.

CONCLUSION

George Gavan Duffy signed the 1921 Treaty with great reluctance. His knowledge of the legal and political realities of what Dominion status entailed appears to have been flawed before and after he appended his signature. His fundamental errors lay in exaggerating the autonomy enjoyed by the Dominions and misreading what the British government would be prepared to concede. His conviction that the Irish provisional government had made a 'surrender' in agreeing to place provisions in the draft 1922 constitution that reflected the Dominion settlement resulted in a permanent sundering of relations with former colleagues. This hastened the conclusion of his political career.

In fact, there were indications that Gavan Duffy's political career was troubled before his final break with his pro-Treaty colleagues in 1922. His decision as minister for foreign affairs to remain outside the provisional government,

⁷⁵Thomas Mohr, 'The Statute of Westminster: an Irish perspective', *Law and History Review* 31 (1) (2013), 749–91.

⁷⁶Colum Gavan Duffy, 'George Gavan Duffy', *Dublin Historical Record* 36 (3) (1983), 90–106: 96–7.

⁷⁷Gavan Duffy, 'George Gavan Duffy', 96

⁷⁸Gavan Duffy, 'George Gavan Duffy', 97–8. 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 'The Hon. Mr Justice George Gavan Duffy', available at: <https://www.militaryarchives.ie/collections/online-collections/bureau-of-military-history-1913-1921/voice-recordings/> (18 August 2021).

⁷⁹George Gavan Duffy, *Éire – the new Irish Constitution – the citizen's manual* (Dublin, 1938).

recognised by British authorities as an institution dedicated to fulfilling the 1921 Treaty settlement, was an unusual move for a signatory of that document.

One of the most noteworthy features of Gavan Duffy's brief career as a cabinet minister, external to the provisional government, was his obvious discomfort with this role. He made repeated threats of resignation over a period of just over six months. The first of these occurred in February 1922, less than a month after his appointment, over his offence at a newspaper article written by Collins.⁸⁰ As seen earlier, he made a second threat to resign in June 1922 and finally followed through on a third threat in July 1922.

Gavan Duffy's exclusion from the special committee charged with producing preliminary drafts for the 1922 constitution, notwithstanding his legal experience, could be explained by the pressure of other work commitments. Such considerations cannot explain his exclusion from the negotiating team sent to London in the summer of 1922 to gain approval for the general scheme of the draft constitution. His exclusion from these negotiations is worthy of note in light of his legal, political and diplomatic experience. This might be seen as a continuation of his exclusion by Collins and Griffith from key parts of the preceding negotiations on the 1921 Treaty. Gavan Duffy had complained during these negotiations at the emergence of sub-conferences that tended to exclude him and other delegates from important negotiations led by Griffith and Collins.⁸¹ He had only agreed to accept the 1921 Treaty after all his colleagues, including all members of the Dáil cabinet, had agreed to sign. In 1922 Gavan Duffy's colleagues may have feared that his negotiating stance might have hardened rather than become more moderate with the passage of time.

Gavan Duffy openly admitted that his heart favoured opposition to the Treaty but his reason favoured the settlement on the basis that there were no realistic alternatives.⁸² His colleagues appear to have suspected that his heart and his reason might not be so easily separated. They may have anticipated that Gavan Duffy would attempt to compensate for earlier disappointment by maintaining an uncompromising stance on the impact of the Treaty settlement on the draft constitution. They may also have sensed Gavan Duffy's growing discomfort with his position as a minister, as reflected in his refusal to join the provisional government, disagreement over policies and growing tensions with some of his colleagues.

Gavan Duffy's break with former colleagues resulted in bitter criticism of his stance in the constituent assembly. He did not endure these insults quietly and made biting comments of his own that accused his former colleagues of weakness and surrender.⁸³ As seen earlier, Gavan Duffy's position on the impact of

⁸⁰UCD Archives, Gavan Duffy Papers, P152/196, Gavan Duffy to Collins, 6 February 1922.

⁸¹Pakenham, *Peace by ordeal*, 145, 190, 202.

⁸²*Dáil Debates*, vol. T, no. 8, cols 87–8, 21 December 1921.

⁸³For example, see *Irish Independent*, 25 September 1922, 6.

the 1921 Treaty on the draft constitution was substantially based on his conviction that an imperial constitutional conference was about to be held in the very near future. He persisted in his attacks on the provisional government even after it became clear that plans made in 1917 to hold a constitutional conference had already lapsed by the time he signed the 1921 Treaty. Instead, his attacks focused on alternative arguments such as the possibility of compulsory arbitration by the League of Nations, even though this was not feasible in the legal and political circumstances of 1922.

By contrast, Gavan Duffy's wider recommendation of advancing the autonomy of the Irish Free State by seeking out allies among the overseas Dominions at the imperial conferences proved to be one of the most insightful contributions of his brief political career. This route to constitutional reform was not nearly as obvious to contemporaries in the early 1920s as it would be to subsequent commentators who enjoyed the benefit of hindsight.⁸⁴ 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 recommendations were not helped by the reality that he was clearly mistaken in terms of details. He placed far too much emphasis on getting quick results from an anticipated constitutional conference that would never be convened. Nevertheless, his instincts as to the direction of reform and the prospect of finding common cause with other Dominions proved to have surer foundations.

⁸⁴Gavan Duffy's son Colum Gavan Duffy would later argue that his father's legal arguments before the constituent assembly 'were made before their time'. Gavan Duffy, 'George Gavan Duffy', 95.