

## The British–Irish Negotiations on the Drafting of the 1922 Constitution of the Irish Free State

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### Introduction

The negotiations concerning the text of the future Constitution of the Irish Free State that took place in the summer of 1922 do not receive the level of historical attention devoted to the Treaty negotiations of late 1921. This is unfortunate as the British–Irish negotiations on the 1922 Constitution could be seen as a sequel or even a continuation of the Treaty negotiations. Many Irish nationalists viewed the negotiations on the constitution in these terms in 1922. This ensured that the future constitution was the subject of passionate debate before a single word of it was drafted. The future Constitution of the Irish Free State was raised repeatedly in the *Dáil* debates of late 1921 and early 1922 on the acceptance of the ‘Articles of Agreement for a Treaty signed between Great Britain and Ireland’, popularly known as ‘the Treaty’, signed in London on 6 December 1921. Supporters of the Treaty declared that the future constitution would reflect the full scope of Irish nationalist aspirations.<sup>1</sup> Opponents of the Treaty warned that the constitution would be a crushing disappointment. They argued that the future constitution would have to recognise Dominion institutions including the King, the Governor General and the appeal from the Irish courts to a court in London called the Judicial Committee of the Privy Council.<sup>2</sup>

This chapter will explain the context behind the creation of the draft Irish constitution in 1922 and why the British government insisted that it

<sup>1</sup> For example, *Dáil Debates*, vol. T, no. 3, col. 160, 15 December 1921; no. 4, col. 210, 16 December 1921; no. 5 cols. 257–60, 17 December 1921; no. 7, cols. 60–3 and 71, 20 December 1921; no. 8, cols. 86 and 97, 21 December 1921; no. 9, cols. 130 and 150, 22 December 1921; and no. 10, cols. 194, 199 and 204, 3 January 1922.

<sup>2</sup> For example, *Dáil Debates*, vol. T, no. 3, cols. 163–5, 15 December 1921; no. 6, cols. 24, 27–8 and 38–42, 19 December 1921; no. 8, cols. 116–17 and 126, 21 December 1921; no. 9, col. 154, 22 December 1921; and no. 10, cols. 174 and 181–3, 3 January 1922.

be substantially revised. It will avoid a blow-by-blow account of the negotiations and the evolution of draft constitutional provisions. Accounts that follow this approach are already available.<sup>3</sup> Instead, this chapter will focus on the negotiating strategies developed in Dublin and London to secure key objectives. It will attempt to explain why the pro-Treaty Irish provisional government produced a draft constitution that largely ignored the Dominion settlement at the heart of the Treaty signed in December 1921 and why there was never any real possibility of the British government accepting such a constitution. British rejection of the draft Irish constitution was followed by a short period in which London and Dublin had to face the terrible prospect of a collapse of the Treaty settlement. Contingency plans proved unnecessary when the Irish provisional government agreed to a radical revision of the draft constitution. This chapter will conclude with an assessment of Irish and British priorities in negotiating the draft constitution.

### Creating a Draft Constitution

On 24 January 1922 a ‘constitution committee’ was formally appointed by the Irish provisional government and held its first meeting in Dublin’s Mansion House.<sup>4</sup> It was appointed to create a preliminary draft that the provisional government might adapt into a final text. The committee would eventually present the provisional government with three options – Drafts A, B and C – as the basis of the future constitution. In March 1922 the provisional government would select Draft B, which was adapted over the following three months to produce a new Draft D.

Although some scholars have referred to the 1922 Constitution as ‘Michael Collins’ Constitution’, he only attended two meetings of the drafting committee.<sup>5</sup> Nevertheless, he was officially the chairman and he

<sup>3</sup> One of the best and most detailed accounts is Joseph M. Curran, *The Birth of the Irish Free State, 1921–1923* (Tuscaloosa, AL, 1980), 200–18. For analysis of British–Irish negotiations on the non-contentious aspects of the draft constitution, see Thomas Mohr, ‘British Involvement in the Creation of the Constitution of the Irish Free State’ (2008) 30 *Dublin University Law Journal* 166.

<sup>4</sup> National Archives of Ireland (NAI), S8952, Constitution Committee, report of first meeting, 24 January 1922.

<sup>5</sup> D. H. Akenson and J. F. Fallin, ‘The Irish Civil War and the Drafting of the Free State Constitution’ (1970) 5(1) *Éire-Ireland* 10, 13; 5(4), 28, 64 and speech of Taoiseach Micheál Martin at [https://merrionstreet.ie/taoiseach\\_michel\\_martin\\_td\\_address\\_at\\_academic\\_conference\\_on\\_the\\_centenary\\_of\\_the\\_establishment\\_of\\_the\\_irish\\_free\\_state.html](https://merrionstreet.ie/taoiseach_michel_martin_td_address_at_academic_conference_on_the_centenary_of_the_establishment_of_the_irish_free_state.html) (accessed 16 November 2023).

bore primary responsibility within the provisional government for creating a constitution. Collins, accompanied by Arthur Griffith, gave important instructions at the first meeting of the constitution committee. He told the committee to ignore institutions common to the constitutions of the existing Dominions. Collins specifically asked that the provisions of the Treaty dealing with the King's representative (Governor General), the parliamentary oath and naval defence be omitted from the constitution.<sup>6</sup> He told the committee: 'I would, however, like strongly to emphasise that we must not allow considerations as to whether or not the British pass our Constitution to influence us unduly. The thing is to get the Constitution, then let us fight for it if necessary.'<sup>7</sup>

Members of the constitution committee, acting on their own initiative, decided to insert provisions that made very limited references to the Treaty and the King's representative in Articles 74 and 75 dealing with external relations. Even these token gestures failed to follow Dominion precedent.

One of the most important features that had distinguished Draft B from Drafts A and C was an innovation concerning 'extern ministers' inspired by the Constitution of Switzerland. These extern ministers would be members of the government but need not be members of the Oireachtas. They would not have to signify their acceptance of the Treaty or take the controversial parliamentary oath demanded by that settlement and would not bear responsibility for the conduct of external affairs. It is likely that Collins was attracted to this scheme by the possibility of allowing Éamon de Valera and his supporters into government and thereby healing the divide over the Treaty. The possibility of a coalition government that included opponents of the Treaty was strengthened by an electoral agreement known as the 'Collins-de Valera pact', concluded in advance of the election of June 1922.

The conclusion of the 'Collins-de Valera pact' together with the activities of opponents of the Treaty, including an IRA incursion into the Belleek and Pettigo districts of Northern Ireland, would later be blamed for raising British suspicions as to the good faith of the Irish provisional government during the negotiations on the 1922

<sup>6</sup> Articles 3, 4 and 6 of the Articles of Agreement for a Treaty between Great Britain and Ireland, 1921. NAI, S8952, Constitution Committee, report of first meeting, 24 January 1922.

<sup>7</sup> NAI, constitution committee, S3, first meeting, 24 January 1922.

Constitution.<sup>8</sup> The drafting process had already been complicated by two earlier commitments made by the provisional government in the spring of 1922. The first agreement was made with Irish opponents of the Treaty and included a commitment to publish the draft constitution in advance of an anticipated general election that eventually took place on 16 June 1922.<sup>9</sup> The second complication arose when the provisional government agreed to give the British government a confidential preview of the draft constitution before it was published.<sup>10</sup> These dual commitments reflect the unfortunate reality in which the provisional government found itself in 1922, stuck between the irreconcilable forces of Irish opponents of the Treaty and the British government. As Tom Garvin notes, satisfying both was clearly 'an impossible task'.<sup>11</sup>

As events transpired, the British government rejected the draft constitution when it was presented on 27 May 1922. Prime Minister David Lloyd George described it as 'a complete evasion of the Treaty and a setting up of a Republic with a thin veneer'.<sup>12</sup> Austen Chamberlain, leader of the Conservative party, called it the constitution of 'a republic scarcely covered by the thinnest monarchical varnish'.<sup>13</sup> He concluded that the draft was a negation, rather than an evasion, of the Treaty.<sup>14</sup> The British cabinet soon realised that the Irish provisional government must have instructed the drafters of the constitution to ignore aspects of the Treaty.<sup>15</sup> The entire Treaty settlement now hung in the balance.

<sup>8</sup> NAI, provisional government minutes, 1/1/2, 2 June 1922. Collins blamed the activities of opponents of the Treaty. See León Ó Broin (ed.), *In Great Haste – The Letters of Michael Collins and Kitty Kiernan* (Dublin, 1996), 175 and 183; and *Dáil Debates*, vol. 1, cols. 498–9, 20 September 1922. For Griffith's views see The National Archives [TNA], CAB 43/3 SFC 40, letter from Mr Arthur Griffith to the prime minister, 2 June 1922. Those of Kevin O'Higgins can be found at *Dáil Debates*, vol. 1, cols. 1008–9, 29 September 1922. See also Leo Kohn, *The Constitution of the Irish Free State* (London, 1932), 79; Curran, *Birth of the Irish Free State*, 204; and Alan J. Ward, *The Irish Constitutional Tradition* (Washington, DC, 1994), 175.

<sup>9</sup> *Irish Independent*, 23 February 1922, 5.

<sup>10</sup> TNA, CAB 43/6. 22/N/60(6), approval of draft constitution, 26 February 1922.

<sup>11</sup> Tom Garvin, 1922: *The Birth of Irish Democracy* (New York, 1996), 174–5. See also F. S. L. Lyons, *Ireland since the Famine* (London, 1985), 459; and Oonagh Walsh, *Ireland's Independence* (London, 2002), 95.

<sup>12</sup> TNA, CAB 43/1 22/N/148(3), meeting of British signatories, 27 May 1922.

<sup>13</sup> Robert C. Self (ed.), *The Austen Chamberlain Diary Letters, 1916–1937* (Cambridge, 1995), 190.

<sup>14</sup> TNA, CAB 43/1 22/N/148(3), meeting of British signatories, 27 May 1922.

<sup>15</sup> TNA, CAB 23/30, CAB 31(22), the situation in Ireland, 1 June 1922.

## The Drafting Instructions of the Irish Provisional Government

How had matters reached this impasse? What were the Irish provisional government's strategic priorities in creating and presenting the draft constitution brought to London in May 1922? The provisional government, having agreed to give London a confidential preview, now needed a strategy to justify its draft constitution and ensure that it would emerge largely intact from the negotiations that would follow.

The first and most obvious strategy followed by the provisional government was to interpret the provisions of the Treaty to provide as much autonomy as possible. George Gavan Duffy, minister for foreign affairs and a signatory of the Treaty, used a close reading of the text of the Treaty to argue that there was nothing in the text that suggested the controversial parliamentary oath was mandatory for all members of the Oireachtas.<sup>16</sup> However, as seen earlier, the constitution committee, following their instructions, pushed matters further and substantially excluded references to the King, the Governor General and the Privy Council appeal from the text.

The second strategic departure was based on Article 2 of the Treaty, which linked the constitutional status of the Irish Free State to that of the Dominion of Canada in terms of 'law, practice and constitutional usage'. This important provision was one of the most ambiguous in the entire text of the 1921 Treaty. The term 'constitutional usage' was particularly unclear and was often interpreted as meaning much the same as 'practice'.<sup>17</sup> Nevertheless, it could not be denied that a considerable gap had opened since the mid-nineteenth century between 'law' and 'practice' in the relationship between the United Kingdom and Canada. The provisional government decided that the provisions of the draft constitution would be a synthesis of 'law' and 'practice'. It hoped that the use of a 'synthesis approach' would allow the 1922 Constitution to reflect constitutional realities in the existing Dominions and so avoid inclusion of allegedly obsolete legal provisions.<sup>18</sup>

The final strategic priority was to create constitutional provisions that left the door open to coalition government with opponents of the Treaty.

<sup>16</sup> Gavan Duffy would later resurrect these arguments in the Dáil. See Thomas Mohr, 'George Gavan Duffy and the Legal Consequences of the Anglo-Irish Treaty, 1921–1923' (2023) 73 *Northern Ireland Legal Quarterly* 55, 75–6.

<sup>17</sup> For example, see *Dáil Debates*, vol. T, no. 3, cols. 167–8, 15 December 1921.

<sup>18</sup> Michael Collins had embraced this approach before signing the Treaty in 1921. See Ward, *The Irish Constitutional Tradition*, 172.

As mentioned earlier, this was probably the main consideration behind the choice of Draft B with its provision for extern ministers. This consideration is also likely to have influenced the exclusion of the divisive parliamentary oath from all drafts overseen by the provisional government.

How confident was the provisional government in its ability to persuade London to accept this draft Irish constitution? In late 1922, when the negotiations were long over, two members of the provisional government, Kevin O'Higgins and Ernest Blythe, claimed that they had regarded the draft constitution brought to London as an ambitious opening gambit in a bargaining process with the British government. They referred to it as a 'try on', an overly ambitious opening bid in a bout of high-stakes bargaining. O'Higgins claimed that the Irish delegation had aimed high and so 'we brought over something which we felt ourselves we could not get and which if the position were reversed – if we were in the English position and the English were in ours – we certainly would not concede'.<sup>19</sup> Ernest Blythe also argued that the draft constitution was an unrealistic opening gambit when he told the Dáil: 'I never had any belief whatever that the British would agree to all that was in the draft that was taken over to London, and, for my part, I believe the draft went outside the terms of the Treaty, and was such as we had no right to expect would be agreed to.'<sup>20</sup>

How accurate were assertions that the draft constitution brought to London was merely a 'try on'? Although Collins understood in the spring and summer of 1922 that difficulties might lie ahead with the British government, it is hard to identify his negotiating tactics on the constitution. No document appears to have survived indicating the provisions that Collins was prepared to trade and those on which he was determined to take a stand. In fact, it is clear from the minutes of the provisional government that the final text of the draft constitution was only approved on 25 May, the day before it was brought to London.<sup>21</sup> There was little time for strategy and Collins' attention appears to have been firmly fixed on mollifying opponents of the Treaty and on averting the approaching Civil War.

George Gavan Duffy remained convinced in May 1922 that the Irish delegation that travelled to London with the draft constitution were

<sup>19</sup> *Dáil Debates*, vol. 1, col. 1008, 29 September 1922.

<sup>20</sup> *Ibid.*, col. 382, 18 September 1922.

<sup>21</sup> NAI, provisional government minutes, 1/1/2, 25 May 1922.

seriously under-estimating the task before them. He was convinced that the only member of the delegation that fully appreciated the challenge was Hugh Kennedy, law officer to the provisional government and future Chief Justice of the Irish Supreme Court. In fact, even Kennedy seemed to under-estimate the obstacles facing the Irish negotiators. He had not anticipated that the British government would reject the synthesis approach to drafting the constitution and so insist that the formal law that applied to the Dominions be replicated in the draft Irish constitution. Kennedy, writing six years after the conclusion of the negotiations, still could not bring himself to believe that in signing the Treaty that the Irish negotiators had agreed 'to dance a constitutional *danse macabre* with the bones of an obsolete colonial skeleton'.<sup>22</sup>

### British Strategy and the Draft Irish Constitution

The British government was not ignorant of the nature of the draft constitution that was being prepared by the Irish provisional government in early 1922.<sup>23</sup> Despite this information, it remained difficult for the British government to formulate a strategy when they were dealing with a document whose details they only knew from scattered fragments of revelations and leaks. Nevertheless, several priorities were settled in advance of the anticipated preview of the draft constitution.

The first priority was to ensure that the prime minister, David Lloyd George, be personally present when the draft constitution was delivered to London. Thomas (Tom) Jones, a leading British civil servant who held the post of deputy secretary to the cabinet, later wrote that this was necessary to prevent the rest of the British government from rejecting the draft at first glance.<sup>24</sup> The sense of pessimism of British officials concerning the draft Irish constitution long preceded their first view of the text.

The most important British negotiating priority was ensuring that the future Irish Free State and its constitution adhere to precedents maintained by the existing Dominions. British insistence on sticking closely to Dominion models had been maintained consistently from the beginning of the Treaty negotiations and were reflected in Articles 1 and 2 of that

<sup>22</sup> H. Kennedy, 'The Association of Canada with the Constitution of the Irish Free State' (1928) 6 *The Canadian Bar Review* 747, 754.

<sup>23</sup> TNA, CAB 23/30, CAB 27(22), Constitution of the Free State, 16 May 1922.

<sup>24</sup> T. Jones, *Whitehall Diary* (Oxford, 1971), 199. See also TNA, CAB 23/30 CAB 27(22), the Constitution of the Irish Free State, 16 May 1922.

agreement. The British government was eager to ensure that the future Irish constitution be recognisable as the constitution of a Dominion.<sup>25</sup> Lord Hewart, a signatory of the Treaty who now held the post of Lord Chief Justice of England, concluded that 'very drastic' changes would be required when the draft Irish constitution was discovered not to adhere to this model.<sup>26</sup> Austen Chamberlain even suggested that 'a constitution in harmony with the Empire could be framed *de novo*'.<sup>27</sup>

The British government was aware of the Irish argument that 'law, practice and constitutional usage' in the Dominions should be treated as a synthesis in drafting the 1922 Constitution. This synthesis approach to drafting the Irish Constitution had been anticipated long before the signing of the Treaty. British negotiators were determined to reject this argument and demand that 'law' and 'practice' be treated separately. This meant enshrining core constitutional provisions in the Irish Constitution that mirrored those of the existing Dominions while following Dominion practice in the interpretation and application of these provisions.<sup>28</sup> Practice was, after all, constantly evolving and was often too messy and inconsistent to be translated into legal provisions. Lloyd George would later tell Irish negotiators that safeguards as to practice could not be embodied in a constitution. He made clear, with brutal frankness, that Irish negotiators should have raised such objections before signing the Treaty.<sup>29</sup>

The British government also followed a strategy of linking the fates of the Treaty and the 1922 Constitution. Lloyd George, speaking in the House of Commons on 14 December 1921, made clear the consequences

<sup>25</sup> For example, see TNA, CAB 43/1, SFB 4th, memorandum of Dominion status, 15 October 1921; CAB 23/30, CAB 27(22), the Constitution of the Irish Free State, 16 May 1922; CAB 43/2, SFB 3 memorandum on Dominion status by Lionel Curtis, 17 October 1921; CAB 43/2, SFB 40, memorandum by Lionel Curtis, 10 December 1921; CAB 43/2, SFB 55, note on the draft Irish constitution, 27 May 1922; CAB 43/3, SFC 35, memorandum on the draft Irish constitution, 29 May 1922; CAB 43/2, SFB 59, memorandum on the draft constitution for the Irish Free State, 29 May 1922, and CAB 23/30, CAB 31(22), the situation in Ireland, 1 June 1922.

<sup>26</sup> TNA, CAB 43/1 22/N/148(3), meeting of 27 May 1922.

<sup>27</sup> Ibid.

<sup>28</sup> For example, TNA, CAB 43/1, SFB 4th, memorandum of Dominion status, 15 October 1921, and CAB 43/3, SFC 35, memorandum on the draft constitution of the Irish Free State, 29 May 1922.

<sup>29</sup> TNA, CAB 43/7 22/N/163, interview between the Prime Minister and Mr Griffith and Mr Collins, 1 June 1922.



that would follow if the future constitution were not in accord with the terms of the document signed just over a week earlier. He declared that '[a]ny proposal in contravention of this Agreement [the Treaty] will be ultra vires'.<sup>30</sup> The British prime minister also made clear what would happen if attempts were made to revise the Treaty settlement itself. He had 'no doubt at all' that amendments would be moved in Ireland 'to leave out certain restrictions and limitations and qualifications'. 'Once they are inserted', he warned, 'the Treaty goes'.<sup>31</sup> When the British government rejected the draft constitution in May 1922 it soon became obvious that the entire settlement was in jeopardy. It is difficult to detect any element of bluff or insincerity in this approach. Lloyd George privately predicted a breakdown in negotiations soon after seeing the text of the draft constitution.<sup>32</sup>

British suspicions as to future Irish adherence to the Treaty settlement was a significant feature of preparations for negotiations on the future constitution. The British government became convinced in early 1922 that a device had to be placed in the constitution to ensure that the future Irish Free State would be bound to adhere to the Treaty. This would result in the insertion of the provision in the final text of the 1922 Irish Constitution that would become known as the 'Repugnancy Clause'.<sup>33</sup> This would provide that any Irish law, including the constitution and amendments to it, found inconsistent with the Treaty would be rendered null and void. It should be noted that determination to insert such a device, and the suspicion that underpinned it, long preceded the finalisation of the Collins–de Valera agreement and other events in mid-1922 that might have led to doubts as to Irish good faith with respect to the Treaty settlement.<sup>34</sup> It had also been decided before the signature of the Treaty in December 1921 that the Privy Council appeal should be used to ensure adherence to the settlement.<sup>35</sup>

<sup>30</sup> *Hansard*, House of Commons, vol. 149, col. 42, 14 December 1922.

<sup>31</sup> *Ibid.*, col. 43.

<sup>32</sup> Jones, *Whitehall Diary*, 203.

<sup>33</sup> Section 2 of the Constitution of the Irish Free State (Saorstát Éireann) Act 1922 [Irl] and preamble to the Irish Free State Constitution Act 1922 (Session 2) [UK]. The term 'repugnancy clause' was created by Leo Kohn to refer to these provisions. See Kohn, *Constitution*, 98.

<sup>34</sup> For example, see TNA, CAB 43/2, SFB 40, memorandum by Lionel Curtis, 10 December 1922, and CAB 27/153, CP 3653, report of the attorney-general's committee, 24 January 1922.

<sup>35</sup> Thomas Mohr, *Guardian of the Treaty* (Dublin, 2016), 28–9.

### The Confidential Preview of the Draft Constitution

On 27 May 1922, an Irish delegation led by Collins and Griffith brought their draft constitution to London. They were immediately placed on the defensive when they met British signatories of the Treaty. The British response to the draft constitution was overwhelmingly negative. Lloyd George asserted that it was the constitution of a republic in disguise with no concessions made to the Canadian yardstick. He highlighted the diminution of the position of the King, the absence of any reference to the parliamentary oath, the absence of an appeal to the Judicial Committee of the Privy Council and provisions allowing the Irish Free State to make its own treaties independently of the common foreign policy of the Commonwealth. These were all matters that struck at the very heart of imperial unity. Collins remained ominously silent on receipt of this news. Griffith protested that the draft constitution had been drawn up in a hurry. Nevertheless, he made it clear that the Irish provisional government had intended that the text conform to the Treaty. He was willing to consider any arguments to the contrary but insisted on being presented with specific instances of purported breaches. Lloyd George promised a detailed legal analysis that would illustrate just how far the draft constitution departed from the Treaty.<sup>36</sup> Austen Chamberlain made it clear that the British government desired substantive changes to the draft constitution and not merely the amendment of a line here and there. Lloyd George hinted at a resumption of hostilities if the draft constitution represented the provisional government's final word.<sup>37</sup> In private, Lloyd George reflected that Griffith was 'straight' but he had serious doubts concerning Collins, who he described as 'just a wild animal – a mustang'.<sup>38</sup> Collins wrote to his fiancée, Kitty Kiernan: 'Things are serious – far far more serious than anyone at home thinks. In fact it is not too much to say that they are as serious as they were at the worst stage of the negotiations last year.'<sup>39</sup>

On 29 May, British officials completed a written analysis of the draft Irish constitution that decisively rejected the synthesis approach.

<sup>36</sup> TNA, CAB 43/7, 22/N/162, draft Irish constitution, 27 May 1922.

<sup>37</sup> TNA, CAB 43/6 22/N/60(8), conference on Ireland with Irish ministers, 27 May 1922, and CAB 43/7 22/N/162, meeting between the British and Irish signatories, draft Irish constitution, 27 May 1922.

<sup>38</sup> TNA, CAB 43/1 22/N/148(3), meeting of British signatories, 27 May 1922, and Jones, *Whitehall Diary*, 206.

<sup>39</sup> Ó Broin, *In Great Haste*, 175.

It claimed that strong objections had been made at the most recent imperial conference, a meeting of the governments of the United Kingdom and the Dominions, against any attempt to crystallise the custom and practice of the Dominions in a written document. The analysis concluded that any variation from the accepted constitutional forms could not be sanctioned by the British government without reference to and consent from the imperial conference.<sup>40</sup> The British officials who wrote this analysis knew that imperial conferences required years of advance planning and that it was impossible to convene a new one in the summer of 1922.

Hugh Kennedy drafted a response to the British legal analysis that was intended to defend the synthesis approach to drafting the constitution. Kennedy's memorandum included a lengthy assault on the 'English Common Law' which caused some confusion. It also rejected comparisons between Ireland and the Dominions, which British officials interpreted as an attack on Articles 1 and 2 of the Treaty.<sup>41</sup> The British government was aghast when presented with this memorandum, and negotiations with Kennedy came to an abrupt halt.<sup>42</sup>

The failure of the talks to secure revision of the draft Irish constitution combined with the hostile reaction to Kennedy's memorandum led to a significant rise in political tensions. The British cabinet seemed convinced that the Irish negotiators appeared to have reverted to their pre-Treaty position. It decided that Lloyd George should write directly to Arthur Griffith making clear that the draft constitution was 'wholly inconsistent' with the Treaty and was also incompatible with Dominion status. The letter, sent on 1 June 1922, asked a series of direct questions on whether the Irish Free State would adhere to Dominion positions on citizenship, the position of the Crown, the power to make treaties, the Privy Council appeal and the parliamentary oath. The sixth and final question asked if all members of the Irish provisional government were prepared to sign a declaration accepting the Treaty as required by Article

<sup>40</sup> TNA, CAB 43/3, SFC 35, memorandum on the draft Irish constitution, 29 May 1922, and CAB 43/2, SFB 59, memorandum on the draft constitution for the Irish Free State, 29 May 1922.

<sup>41</sup> TNA, CAB 43/2, SFB 60, observations on the criticism of the British government on the draft Irish constitution, 31 May 1922, and CAB 43/7 22/N/163, interview between the Prime Minister and Mr. Griffith and Mr. Collins, 1 June 1922.

<sup>42</sup> UCDA, P4/1252, Kennedy to Conor Maguire, 10 June 1936 and TNA, CAB 23/30, CAB 31(22), Appendix, draft constitution of Irish provisional government, note on progress of negotiations.

17 of that document.<sup>43</sup> Lloyd George demanded clear answers to all six questions to avoid a breakdown of negotiations.<sup>44</sup> The British government was fully aware that the Irish provisional government was being asked to choose between a break with London or a break with de Valera and other Irish opponents of the Treaty.<sup>45</sup> Lloyd George told his cabinet that the Irish negotiators seemed slow to grasp this reality. He believed that Griffith might have come to this realisation while Collins appeared to remain in denial.<sup>46</sup>

Irish opponents of the Treaty had already presented the provisional government with the same choice in demanding full independence even if it meant a break with London. Harry Boland, a leading Irish opponent of the Treaty, declared in the Dáil 'let us see if in this Constitution the independence of the country can be gained by Parliamentary methods'.<sup>47</sup> Boland also made clear the alternative when he added: 'if the Constitution be such that England cannot accept it, I hold that with the forces of the Republic in the field, when the break comes, we can force England to accept a Constitution satisfactory to all'.<sup>48</sup>

The entire Treaty settlement appeared to be hanging over a precipice by the beginning of June 1922. The provisional government could no longer delude itself over whether it could produce a constitution that would satisfy both the British government and Irish opponents of the Treaty.

### British Proposals in the Event of Breakdown of Negotiations

The British government had long anticipated the possibility of a breakdown of the Treaty settlement and possible courses of action had been under review since at least February 1922.<sup>49</sup> All contingency plans focused on the twenty-six counties of 'Southern Ireland'. They demanded a complete severance of communications between Northern Ireland and the rest of the island imposed by the British military. The proposed

<sup>43</sup> TNA, CAB 43/2, SFB 62, letter from the prime minister to Mr A. Griffith, 1 June 1922.

<sup>44</sup> Ibid.; and TNA, CAB 23/30, CAB 32(22), cabinet meeting of 2 June 1922.

<sup>45</sup> TNA, CAB 23/30, CAB 32(22), cabinet meeting of 2 June 1922.

<sup>46</sup> Ibid.

<sup>47</sup> *Dáil Debates*, vol. S2, no. 13, col. 473, 19 May 1922.

<sup>48</sup> Ibid.

<sup>49</sup> TNA, CAB 27/161, PGI (A) 1.

military frontier might not necessarily have followed the existing border on the island of Ireland.<sup>50</sup>

The earliest plans demanded the complete cessation of all trade and communications between the twenty-six counties and Great Britain, Northern Ireland and other parts of the British Empire. This plan was abandoned as inadequate to compel the Irish provisional government to fall into line.<sup>51</sup> A more radical plan of total naval blockade was later developed with a variation that involved the complete occupation of Dublin.<sup>52</sup> Once again, this would have involved a forcible closure of the border with Northern Ireland. Legal analyses concluded that there was little to prevent such action under the Covenant of the League of Nations. Nevertheless, the authors of this radical scheme recognised that it would expose the British government to serious domestic and international pressure.<sup>53</sup>

By June 1922, the dominant scheme was a compromise between these two plans. This involved the occupation of key Irish ports and the seizure and control of Irish revenue. Once again, there was to be a military closure of communications with Northern Ireland. It was estimated that a small fraction of existing Irish revenue would be left to the provisional government.<sup>54</sup> The objective was to compel the provisional government to concede to British demands without resorting to outright war. Exploratory discussions on this plan within the British cabinet revealed doubts, including a risk of descent into renewed conflict. Hamar Greenwood, chief secretary for Ireland, was convinced that attempts to occupy Dublin would see the city 'burnt in twenty-four hours'.<sup>55</sup> Winston Churchill repeatedly drew analogies between an Irish attempt at secession from the British Empire with that of the Confederate States from the United States of America in the 1860s.<sup>56</sup> Lloyd George feared that British forces occupying the ports would inevitably be drawn into the interior to protect southern unionists.<sup>57</sup>

<sup>50</sup> Jones, *Whitehall Diary*, 208–9.

<sup>51</sup> TNA, CAB 27/161, PGI (A) 5.

<sup>52</sup> *Ibid.*, 5 and 8.

<sup>53</sup> *Ibid.*, 5 and 7.

<sup>54</sup> *Ibid.*, 9; and TNA, CAB 23/30, CAB 31(22), the situation in Ireland, 1 June 1922.

<sup>55</sup> Jones, *Whitehall Diary*, 208.

<sup>56</sup> For example, TNA, CAB 43/7 22/N/162, examination of the draft Irish constitution, 27 May 1922, CAB 43/1, 22/N/148(3), meeting of 27 May 1922 and *Hansard*, House of Commons, vol. 154, col. 2144, 31 May 1922.

<sup>57</sup> Jones, *Whitehall Diary*, 208.

### The Irish Provisional Government and Crisis in the Treaty Settlement

Irish ministers considered the prospect of a breakdown of the Treaty settlement in a series of meetings in early June 1922. Arthur Griffith told a cabinet meeting that 'the position was very serious and the British will not hesitate to go back to war if they are not satisfied on the Constitution'.<sup>58</sup> Michael Collins appeared genuinely shocked by the British rejection of the draft constitution and also contemplated the real prospect of a breakdown of the Treaty settlement.<sup>59</sup> He was in a state of some emotional agitation throughout the negotiations and his own correspondence described the talks as 'bad beyond words', 'really awful' and 'ghastly'. By 1 June, Collins wrote 'I feel I can do no more good here' and returned to Dublin.<sup>60</sup>

Brian Murphy argues that Collins' return to Dublin after the early stages of negotiation 'was tantamount to an admission that he had lost the battle for his own views on the Constitution'.<sup>61</sup> However, his return to Dublin was accompanied by the formation of a new plan that restored his optimism in reaching a settlement. Collins now proposed the radical solution of abandoning the draft constitution whose creation he had supervised. He proposed publishing 'a skeleton Constitution and leaving to the Treaty the points upon which it can speak for itself'.<sup>62</sup> Under this scheme, the detailed document whose creation he had sponsored would be thrown to the winds. Instead, the Irish Free State would develop a constitution that was largely unwritten.

Collins tried to convince his cabinet colleagues that the British government would accept this solution and that the door to coalition with de Valera remained wide open. He argued that the British government would accept the proposal on external ministers and the omission of the oath from the text. Collins also maintained that de Valera, in joining a coalition, would effectively accept the Treaty. He was confident 'that the English will meet us on an unwritten Constitution' and that 'They are

<sup>58</sup> UCDA, P4/205, cabinet meeting, 3 June 1922.

<sup>59</sup> Jones, *Whitehall Diary*, 203.

<sup>60</sup> Ó Broin, *In Great Haste*, 176 and 183.

<sup>61</sup> B. P. Murphy, 'Nationalism: The Framing of the Constitution of the Irish Free State, 1922 – The Defining Battle for the Irish Republic', in J. Augusteijn (ed.), *The Irish Revolution, 1913–1923* (London, 2002), 140.

<sup>62</sup> UCDA, P4/204, cabinet meeting, 2 June 1922.

willing to leave “law” plus “practice” unwritten’.<sup>63</sup> Hugh Kennedy poured cold water on the feasibility of the proposal for a skeleton constitution.<sup>64</sup> The British government had made clear that it required a constitution that was recognisable as that of a Dominion. Only George Gavan Duffy, an increasingly peripheral figure, offered vocal support for Collins’ scheme and continued to support the proposal long after Collins had abandoned it.<sup>65</sup> Collins maintained his skeleton constitution proposal during cabinet meetings on 2, 3 and 5 June, but failed to convince his colleagues.<sup>66</sup> He did not participate in drafting a response to Lloyd George’s six questions, which will be described at a later stage, and he did not join Arthur Griffith when he returned to London on 6 June to resume negotiations. Collins faded from the negotiations and from the drafting of the constitution from this point onwards.<sup>67</sup>

Brian Murphy writes: ‘Why Collins did not go to London for the final constitutional talks is, in many ways, just as intriguing a question as why de Valera did not go to London for the Treaty negotiations.’<sup>68</sup> The comparison is not straightforward. De Valera did not attend the Treaty negotiations and rejected the final settlement produced by them. By contrast, Collins did engage with the negotiations in 1922, albeit at the peripheries, and did accept the revised draft constitution that finally emerged.

Nevertheless, it is difficult to deny that Collins seriously misjudged the drafting of the constitution. Akenson and Fallin note that ‘The Constitution being proposed by Collins went beyond de Valera’s and Childers’ Document No. 2 in its statement of Irish independence and sovereignty’.<sup>69</sup> F. S. L. Lyons writes that the provisional government ‘went as far as they dared in approximating their constitution to the concept of external association’.<sup>70</sup> Michael Laffan concludes: ‘Despite heroic efforts Collins failed in his efforts to smuggle a disguised republic

<sup>63</sup> Ibid.

<sup>64</sup> UCDA, P4/206, cabinet meeting, 5 June 1922.

<sup>65</sup> UCDA, P4/207, Gavan Duffy to Collins, 3 June 1922 and P4/208, Gavan Duffy to Collins, 7 June 1922. See also Mohr, ‘George Gavan Duffy’, 67.

<sup>66</sup> UCDA, P4/204, 205–6.

<sup>67</sup> Collins did attend a meeting in London on 13 June but most of the redrafting had been completed by this time and the main topic for discussion concerned safeguards for southern Protestants.

<sup>68</sup> Murphy, ‘Nationalism’, 140.

<sup>69</sup> Akenson and Fallin, ‘Irish Civil War’, 36.

<sup>70</sup> Lyons, *Ireland Since the Famine*, 458.

into the constitution, he was unable to advance beyond the gains which had been secured during the treaty negotiations the previous December.<sup>71</sup> Collins' fixation on placating opponents of the Treaty had led to a serious misreading of the British negotiating position, which had always sought an Irish constitution with provisions similar to the Dominions on matters such as the King, the Governor General and the Privy Council appeal. This had been made clear by the six questions presented by Lloyd George which required a response from Irish negotiators.

### The Resumption of Negotiations

The period of tension and anxiety that accompanied the 1922 negotiations on the draft Irish constitution were described by some contemporaries as being worse than the negotiations that preceded the signing of the Treaty in late 1921.<sup>72</sup> The negotiations were also complicated by British misgivings as to the Collins/de Valera pact and Irish indignation at sectarian violence in Belfast which frequently intruded into discussions. Collins had declared that 'this gulf is unbridgeable' in the early stages of negotiation and contemplated the possibility of a resumption of armed conflict.<sup>73</sup> Lloyd George also seemed convinced of the likelihood of a break.<sup>74</sup>

The period of tension was finally relieved by the arrival of a taxicab at Downing Street on 2 June 1922 bearing Griffith's response to Lloyd George's six questions. This proved to be a watershed. *The Times* recorded that five minutes later British ministers dispersed with 'smiles of relief on their faces'.<sup>75</sup> Griffith had given satisfactory answers to the six questions subject to certain reservations on the Privy Council appeal that the British government believed could be overcome. He had effectively conceded that major amendments would have to be made to the draft constitution of the Irish Free State.<sup>76</sup> These amendments were negotiated in the days that followed by Hugh Kennedy and Lord Hewart, Lord Chief

<sup>71</sup> M. Laffan, *The Resurrection of Ireland – The Sinn Féin Party 1916–1923* (Cambridge, 1999), 398.

<sup>72</sup> Jones, *Whitehall Diary*, 203; and Ó Broin, *In Great Haste*, 175.

<sup>73</sup> Jones, *Whitehall Diary*.

<sup>74</sup> *Ibid.*, 203 and 208.

<sup>75</sup> *The Times*, 3 June 1922, 8.

<sup>76</sup> TNA, CAB 43/3, SFC 40, letter from Mr. Arthur Griffith to the prime minister, 2 June 1922 and CAB 23/30, CAB 33(22), 2 June 1922.



Justice of England, under the supervision of their respective governments. The resulting text, published on 16 June 1922, was very different to the original draft Irish constitution. Leaks in the drafting process from before June 1922 ensured that the public were aware of this reality.

The King and the Governor General now appeared in multiple provisions of the draft constitution while the Privy Council appeal was recognised in Article 66. Amendments were also made to Articles 46 and 49 to ensure compatibility with the defence provisions of the Treaty. The Irish provisional government decided to adopt a policy where, in the event of British representatives insisting on the insertion of the letter of Canadian law in the constitution, Irish representatives should insist that the practice that applied in Canada should also be explicitly embodied in the constitution.<sup>77</sup> This strategy ensured that three direct references to Canada and one to Australia would appear in the text of the constitution.<sup>78</sup> These amendments would not prove to be particularly significant in practical terms. Far more significant additions included insertion of the text of the Treaty in a schedule to the constitution together with an entirely new 'Repugnancy Clause' which, as mentioned earlier, guaranteed the supremacy of the Treaty over all Irish law including the new constitution. The controversial parliamentary oath was now included in the provisions of the constitution and its obligatory nature for all Irish parliamentarians and members of government was made clear.<sup>79</sup>

The detailed and complicated negotiations that accompanied the redrafting of the provisions of the draft Irish constitution that took place between 6 and 15 June 1922 have been stereotyped as acts of Irish 'surrender', 'capitulation', 'humiliating concession' and 'Turning Tail'.<sup>80</sup> Akenson and Fallin decline to examine these negotiations on the basis that they 'require little description, since they merely consisted of the Irish surrendering to the British objections'.<sup>81</sup> Garvin asserts that on 2 June 1922, 'the Irish gave in completely'.<sup>82</sup> These conclusions as to the latter stages in the British–Irish negotiations reflect unfortunate and inaccurate stereotypes. The absence of realism in the creation of the draft Irish constitution did ensure that many inevitable concessions had to be

<sup>77</sup> NAI, provisional government minutes, 1/1/2, 6 June 1922.

<sup>78</sup> Articles 41, 51 and 60 of the 1922 Constitution of the Irish Free State.

<sup>79</sup> Articles 17 and 55 and second schedule of the 1922 Constitution of the Irish Free State.

<sup>80</sup> Akenson and Fallin, 'Irish Civil War', 53, 55, 58–61.

<sup>81</sup> *Ibid.*, 61.

<sup>82</sup> Garvin, 1922, 175.

made in a short period of time. Yet the Irish negotiators did not concede all British demands and did enjoy negotiating successes of their own. A comprehensive account is beyond the scope of this chapter. Nevertheless, examples include Irish refusal to accept strict adherence to the Canadian model in the method of constitutional amendment, a refusal to link the status of Irish citizenship to imperial legislation and securing cherished provisions emphasising Irish popular sovereignty without any symbolic reference to the King.<sup>83</sup>

On 15 June 1922, the British signatories approved the text of the revised draft constitution. The duration of the negotiations ensured that the provisional government just barely fulfilled its promise to publish the draft constitution in advance of the Irish election of 16 June. The text was published on the morning of the election. Opponents of the Treaty were swift to condemn the draft constitution.<sup>84</sup> Nevertheless, the ensuing election resulted in a decisive majority for parties that supported the Treaty. They won 92 seats while opponents won just 36 out of the 128 seats available. The Treaty and the draft constitution were, for the moment, secure.

## Conclusions

Michael Collins remained convinced during the negotiations of May and June 1922 that the British government had rejected the draft Irish constitution based on suspicions raised by the activities of opponents of the Treaty.<sup>85</sup> Hugh Kennedy blamed the newly appointed law officers, Sir Ernest Pollock and Sir Leslie Scott, who faced Kennedy at various junctures during the course of the constitution negotiations. Kennedy believed that their report on the draft constitution had ‘set the British Cabinet wild with the ideas they suggested, starting with the proposition that we should have taken one of the Dominion models and followed it somewhat slavishly’.<sup>86</sup> Other sources blame the Collins–de Valera pact

<sup>83</sup> NAI, S4285A, Hugh Kennedy to provisional government, 11 June 1922; provisional government minutes, 1/1/2, 12 June 1922; UCDA, P4/365, notes on draft constitution, 1922 and TNA, CAB 43/7 22/N/163, report on draft Irish constitution, June 1922.

<sup>84</sup> See T. Mohr, ‘Opposition to the 1922 Irish Free State Constitution’, [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4487179](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4487179) (accessed 25 November 2023).

<sup>85</sup> See references in n. 8 above.

<sup>86</sup> UCDA, P4/1252, Kennedy to Conor Maguire, 10 June 1936. Pollock and Scott were just two members of a group of legal experts who wrote the relevant report.

for raising British suspicions as to the good faith of the provisional government.<sup>87</sup>

British cabinet records do not support any of these theories. The British government had long assumed that the Irish Constitution should adhere to Dominion models, a position made clear in internal deliberations before and after the signing of the Treaty.<sup>88</sup> Lloyd George privately dismissed the significance of the Collins–de Valera pact in analysing the draft constitution soon after it was brought to London.<sup>89</sup> The fundamental objective of the British government in 1922 was to ensure that the future Irish Constitution could be presented as a Dominion constitution in order that the Irish Free State itself could be presented as a Dominion. Lloyd George summarised the dispute with the Irish provisional government over the draft constitution in the following terms: ‘Are they prepared to accept the constitutional position of the other Dominions or not? That is the issue.’<sup>90</sup> Austen Chamberlain demanded a constitution ‘in harmony with the Empire’.<sup>91</sup> Lloyd George made this position clear in his letter to Griffith sent on 1 June 1922, which concluded that ‘as Ireland no less under the Treaty than before is a member of the Community of Nations known as the British Empire, the other member of that Community cannot permit her to adopt a Constitution that is out of harmony with that under which those members of the Commonwealth enjoy the fullest measure of freedom and security’.<sup>92</sup>

The failure of the Irish provisional government and its negotiators to fully appreciate the negotiating priorities of their opponents was a serious blunder. By contrast, the British government fully understood the Irish desire to obscure Dominion law with Dominion practice and, in so doing, attempt to mollify opponents of the Treaty. Unfortunately, these objectives were incompatible with wider British policy that demanded that the secession of the territory of the Irish Free State from the United Kingdom should not also be seen by the international community as secession from the British Empire and Commonwealth. The British government understood Irish negotiating priorities from the start,

<sup>87</sup> For example, Ward, *Irish Constitutional Tradition*, 175; and Kohn, *Constitution*, 79.

<sup>88</sup> See TNA, CAB 43/1, SFB 4th, memorandum of Dominion status, 15 October 1921, and CAB 43/3, SFC 35, memorandum on the draft constitution of the Irish Free State, 29 May 1922.

<sup>89</sup> TNA, CAB 43/7 22/N/163, examination of the draft Irish constitution, 27 May 1922.

<sup>90</sup> TNA, CAB 43/1 22/N/148(3), meeting of British signatories of the Treaty, 27 May 1922.

<sup>91</sup> *Ibid.*

<sup>92</sup> See TNA, CAB 43/2 SFB 62, letter from the prime minister to Mr A. Griffith, 1 June 1922.

whereas their Irish counterparts only grasped British priorities when the negotiations were well advanced.

One of the most striking features of the negotiations concerns the position of Michael Collins. As seen earlier, the draft 1922 Constitution is sometimes referred to as 'Michael Collins' Constitution' or 'Collins' draft'.<sup>93</sup> The constitution was his project and, although he had little direct involvement in the technical drafting, there can be little doubt that he had the final word in shaping the format of the draft Irish constitution. Yet Collins is striking for his relative absence from the British–Irish negotiations. He faded into the background after the initial exchanges and it was left to Arthur Griffith to take the lead in dealing with the British government. This ensured that Griffith would be blamed by some contemporaries and subsequent historians for the inevitable compromises that followed.<sup>94</sup>

Collins proved willing to ditch the draft constitution in the aftermath of its rejection by the British government and to replace it with a short 'skeleton constitution' published in conjunction with the Treaty. His conviction that the British would accept a largely unwritten constitution that excluded the parliamentary oath and other Dominion features was out of touch with reality. On 2 June, Collins told his cabinet colleagues that, 'on assurances from us they will give us a very liberal interpretation of the Constitution, for they are more concerned with our good faith than with our Constitution'.<sup>95</sup> On the very same day, the British cabinet was discussing possible military responses if the text of the constitution could not be made to conform with their interpretation of the 1921 Treaty.<sup>96</sup> On the other side of the coin, Collins' belief that coalition with de Valera would amount to de facto acceptance of the Treaty by all parties was also out of touch with reality. The draft constitution was not a 'try on', as described by O'Higgins and Blythe, but the product of wishful thinking that focussed almost entirely on satisfying the objectives of opponents of the Treaty while ignoring those of the British government.

George Gavan Duffy was correct in his assessment that the Irish negotiators who travelled to London with the draft Irish constitution had greatly under-estimated the task before them. The Irish negotiators

<sup>93</sup> See Akenson and Fallin, 'The Irish Civil War'; and speech of Taoiseach Martin.

<sup>94</sup> For example, see *The Plain People*, 25 June 1922, 1. See also Akenson and Fallin, 'Irish Civil War', at 58–61; and Murphy, 'Nationalism', 141.

<sup>95</sup> UCDA, P4/204, cabinet meeting of 2 June 1922.

<sup>96</sup> Jones, *Whitehall Diary*, 208–9.

seemed genuinely surprised at the strength of British rejection of the draft constitution. Austen Chamberlain wrote of their reaction in a letter to his sister: 'And they seem – nay, they are – genuinely surprised that we view it so gravely. . . . We are miles asunder & they talk as if we had only to cross the street.'<sup>97</sup>

Irish negotiators realised too late that wider British interests required that constitutional provisions shared by the Dominions be inserted into the draft Irish constitution. There is no evidence of bluff in the stance of the British government, which was fully prepared to take some form of military action if negotiations broke down. Once this became apparent, the Irish negotiators agreed to redraft the text that had been brought to London. They soon found themselves arguing on unfamiliar issues such as the Privy Council appeal, the reservation of Dominion legislation and imperial legislation. The approach taken by the provisional government in creating the draft Irish constitution had largely ignored these legal institutions which resulted in inadequate preparation when the time came to consider their insertion into the text. Consequently, Irish negotiators faced a serious knowledge gap while their opponents had far greater experience and resources at their disposal. In these circumstances, the best that Irish negotiators could do was to demand the insertion of references to practice followed in Canada and Australia in the text of the future Irish Constitution.<sup>98</sup> As mentioned earlier, this was an awkward device that produced few real benefits.

Irish ministers and officials did learn from the experience of the British–Irish negotiations of 1922. When the Irish Free State began to seek constitutional reforms at the imperial conferences of the late 1920s and early 1930s, its politicians and diplomats researched the finer points of constitutional law in the Dominions and made detailed preparations as to how undesirable features could be minimised or removed.<sup>99</sup> The narrowing of this knowledge gap ensured that Irish negotiators travelled to London with a sense of pragmatism as to what could be achieved and a clear understanding of the negotiating priorities of the British government. These features provided the foundations of success in negotiation at the imperial conferences of 1926, 1929 and 1930 that had proved elusive in 1922.

<sup>97</sup> Self, *Austen Chamberlain*, 190.

<sup>98</sup> See Articles 41, 51 and 60 of the 1922 Constitution of the Irish Free State.

<sup>99</sup> See D. W. Harkness, *The Restless Dominion* (Dublin, 1969).