CHAPTER 12

The Treaty: An Historical and Legal Interpretation

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> *Article 1, Anglo-Irish Treaty:*
> *Ireland shall have the same constitutional status in the Community of Nations known as the British Empire as the Dominion of Canada, the Commonwealth of Australia, the Dominion of New Zealand, and the Union of South Africa, with a Parliament having powers to make laws for the peace, order and good government of Ireland, and an Executive responsible to that Parliament, and shall be styled and known as the Irish Free State.*

The constitutional status granted by the Treaty went far beyond the arrangement which had been provided for in the Government of Ireland Act, 1920, which was essentially a home rule arrangement. However, it was less than the status of a republic, which the Irish side had originally sought. It was also somewhat less than the idea of 'external association', which was formulated subsequently by Éamon de Valera, who believed the new Irish state could be sovereign and separate from the Commonwealth while still 'associated' with it. Although external association would have provided the appearance of a more separate state (and therefore the hope was a more sovereign state), essentially the major difference between this position and the position of the Free State was, in reality, symbolic.

Dominion status itself was a vague concept in 1921. In practice, this effectively meant internal autonomy, despite the relics and symbols of colonial subordination which persisted. There was confusion over the

exact powers of the governor general, in particular the question as to whether the United Kingdom government could exercise any control through this position in relation to the assent to legislation. While the dominions had virtually full control over domestic matters, their external powers were unclear. They did not have the power to legislate with extra-territorial effect and they had only begun to establish a power to make treaties (something which the Irish Free State already had a head start on). The key here was that the Treaty recognised dominion 'usage' and 'practice' and not just the (often obsolete) law. That division between what is practised and what is 'law' is still a feature of the British system today and can be seen, in particular, in relation to powers which are theoretically held and exercisable by the monarch but are, in fact, exercised by the prime minister or the government. It was well recognised at the time that dominion 'practice' went beyond the limits of the law and it was a big step to grant to Ireland the same usage and, therefore, the same level of autonomy that the dominions had secured for themselves in practice.[1] Also, as the dominions went on to carve out new areas of autonomy for themselves these would apply to the fledgling dominion as well.

Leo Kohn has aptly described the constitutional status of the new state as follows:

> In substance this implied full internal self-government, unrestricted fiscal autonomy, the right to maintain an Irish Police Force and an Irish Army subject only to the control of the Irish Parliament. In the sphere of external relations, it involved the concession of the new international status of the British Dominions, the right to enter into agreements with foreign States, freedom from obligations arising from treaties not specifically approved by the Irish Parliament, full discretion in the matter of Irish participation in British wars, and, lastly, membership of the League of Nations. In form it connoted the conclusive recognition of Irish internal sovereignty.[2]

The words 'Community of Nations known as the British Empire' are used here, whereas the words 'group of nations forming the British Commonwealth of Nations' is used in Article 4. There is no difference between the two and it is unclear why two different formulae would be

used in the same document but the word 'Commonwealth' had only just begun to be used to describe the dominions.

The name *Saorstát Éireann*, which was translated as 'Irish Free State', is an assertion of the sovereignty of the state. The appellation was the official title which was given to the state at the first session of Dáil Éireann in 1919 and then also in the Treaty. While literally translated it means 'free state of Ireland', its broader meaning is that of an Irish republic. There was no established direct translation into Irish of the word republic besides the word *saorstát* but the word *poblacht* had been created as a Gaelicisation of the word. Rather than base the name of the state on a foreign loan word, it was evidently decided, in 1919, to use a 'truer' Irish term. The word *poblacht* was used in the 1916 proclamation but the Declaration of Independence and the other documents from 1919 had all favoured *saorstát*. The word *saorstát*, the 'alternative neologism based on purer Gaelic roots', was also used on official headed paper, including that which was used by de Valera in 1921 in order to provide credentials for the plenipotentiaries who negotiated the Treaty.[3]

In *Peace by ordeal*, Frank Pakenham refers to a 'fragment of dialogue' between Arthur Griffith and Max Aitken, Lord Birkenhead, during the Treaty negotiations, where Griffith commented: 'You may prefer to translate "Saorstát Éireann" by "Free State" (instead of republic). We shall not quarrel with your translation.'[4] Birkenhead answered: 'The title, Free State, can go into the Treaty.'[5] It is unclear whether the British truly understood the connotations of the Irish word. This may have felt like a secret coup to the Irish but, particularly with the passage of time, it seems the true connotations of the title have been forgotten in Ireland. Indeed, the name 'Free State' or 'Free Stater' later became a derogatory term directed towards 'partitionists'.

The name of the state is something which caused confusion for a number of decades following this and still many Irish people are confused about the official name of the state. In 1937, when the new Constitution was promulgated, the Irish Free State was still legally in existence and, because of the External Relations Act of 1936, Ireland was still within the Commonwealth. A decision was taken to rename the state: Éire, or Ireland (but not Republic of Ireland). There are a number of probable reasons for the avoidance of the word republic at this time: firstly, Ireland was still partitioned and it may have been felt in some quarters that the

declaration of a republic without having achieved a united Ireland would be a betrayal of the Easter Rising of 1916; the use of the word might also have angered unionists in the North and the state, supporters of dominion status in Ireland, and the British. Also, at the time, declaring a republic would have meant leaving the Commonwealth and it suited Ireland, for economic reasons, to remain within this entity. However, de facto independence had already been achieved with the passing by the British parliament of the Statute of Westminster in 1931, which gave autonomy to the dominions, and in 1945, in response to a question in the Dáil about the status of the state, Taoiseach Éamon de Valera replied, with what became known as his 'Dictionary Republic' speech, that Ireland was a republic in everything but name. In fact, it was not until 1949 that Ireland officially became a republic with the passing of The Republic of Ireland Act, 1948, which provided a legislative basis for the description of the state as a republic. However, the Constitution remains unchanged and the name of the state remains Éire or Ireland.[6]

> *Article 2:*
> *Subject to the provisions hereinafter set out the 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.*

During the Treaty negotiations, Lord Birkenhead suggested Canada as a model for the Irish Free State but this was not the first time Canada had been mentioned as a model for Ireland. In 1886, when framing his home rule bill, Prime Minister W.E. Gladstone took inspiration from the colonies and decided that his bill was 'strictly and substantially analogous' to the Canadian constitution.[7] Erskine Childers, in *Framework for home rule*, also argued for a development along Canadian lines.[8] At the time of the negotiations, the Irish were unsure whether they would obtain the same level of autonomy which the dominions had secured for themselves in practice and, presumably, the insertion of the guarantee that the relationship between the Irish Free State and Britain would be identical to

that of Canada and Britain was designed to reassure the Irish.[9] As noted above, the specification of dominion usage and practice in the Treaty was crucial. For example, in Canada this meant unrestricted legislative autonomy since the royal legislative power had not been used for such a long period in Canada that it had generally been agreed to be extinct.[10] In writing about the choice of linking the Irish Free State to Canada in particular, Hugh Kennedy, who was the Irish state's first attorney general, explained that:

> The reason was that during the period of more than fifty years which had elapsed since Canada as a group of British Colonies had received her constitution by the enactment of the British North America Act, 1867, Canada had outgrown her colonial status as well as her constitution, and in the gradual evolution of law practice and constitutional usage had reached national stature and exhibited marks of national sovereignty. Canada is, in fact, the great example to-day of the truth of the statement that no man can set bounds to the onward march of a nation, even by a written constitution.[11]

On the Irish side, there was a feeling that because constitutional usage had been secured, this would allow the new Irish state to avoid the strict dominion forms and law. On the British side, it was felt that linking the Irish Free State to Canada would mean that dominion forms would have to be followed to a certain extent. For example, there seems to have been a presumption that the royal prerogatives of appointing ministers, summoning and dissolving parliament etc would be maintained in the Irish Free State. However, the subsequent Irish Free State Constitution completely ignored the royal prerogatives and thus the Irish hope that the use of Canada would enable Ireland to gain further autonomy was gradually borne out.

As far as Kennedy was concerned, the link with Canada was crucial to securing autonomy within the agreed framework: 'The fact thus appears that Canada provided the key to the problem for solution by the parties to the negotiations, the problem, namely, how the association of Ireland with the Community of Nations known as the British Empire might best be reconciled with Irish National aspirations.'[12] Two things, in particular, impressed Kennedy about Canadian practice – the right to

separate diplomatic representation which had been asserted by Canada for some years and the right which had been asserted by Canada to have a controlling voice in the selection of the representative of the Crown.

One issue which Kennedy questioned, however, was whether an issue would later arise through case-law on whether Canadian usage would have to be ascertained to decide points of Irish law: 'This may possibly give rise to legal questions in the future throwing upon our Courts the burden of ascertaining from authoritative Canadian sources Canadian law practice or constitutional usage for the purpose of deciding such questions.'[13] But it seems this never happened.

> *Article 3:*
> *The representative of the Crown in Ireland shall be appointed in like manner as the Governor-General of Canada and in accordance with the practice observed in the making of such appointments.*

Interestingly, the title of governor general is not insisted upon in the Treaty. During the negotiations, the Irish successfully argued for the absence of a title in the Treaty itself and it was agreed that this would be settled later when the Constitution was drafted.

Drafts A and B of the 1922 Irish Free State Constitution both contain a short identical section containing one article on external relations. This article provides, among other things, that the representative of George V will 'be styled Commissioner of the British Commonwealth, and shall be appointed only with the previous assent of the Aireacht [Executive Council] of Saorstát Éireann.'[14] It was specified that he would sign acts which have been passed by the Oireachtas 'to signify the assent of His Majesty the King.'[15] Historically, high commissioners were envoys of the Imperial government appointed to manage protectorates or groups of territories not fully under the sovereignty of the British Crown, for example Cyprus. Evidently, the Irish wished to distance themselves further from the Crown colonies, which were administered by a governor general, in order to show that the Irish Free State was a sovereign state in itself. Presumably, the name 'commissioner' rather than governor general was supposed to play down the possible significance of this figure. However, when the Constitution was brought to London in May 1922, the British refused to agree to this and the title governor general went into the constitution.

This article of the Treaty states that the Irish figure should be appointed in the same manner as the governor general of Canada. This meant that the appointment would be made by consultation between both governments. However, the practices which developed around the governor general in the Irish Free State differed considerably from that of Canada and many of the formalities were dispensed with. For example, the governor general of the Irish Free State was never greeted with a gun salute; secondly, after a couple of half-hearted efforts, the practice of the opening of parliament adhered to in the dominions was suspended; thirdly, the Cabinet was not regarded as responsible if the governor general spoke out on a public issue as it would be in Canada; finally, even the practice in relation to the sending of despatches to London differed.[16] As one writer has put it: 'One is therefore led to the conclusion that the office of the Governor-General of the Irish Free State, due essentially to the fact that the Free State was an entity *sui generis* in the Commonwealth, was in practice rather a ceremonial Presidency of a Republic than a Governor-General of a real Dominion.'[17]

> *Article 4:*
> *The oath to be taken by Members of the Parliament of the Irish Free State shall be in the following form:—*
>
> *I _____ do solemnly swear true faith and allegiance to the Constitution of the Irish Free State as by law established and that I will be faithful to H.M. King George V., his heirs and successors by law, in virtue of the common citizenship of Ireland with Great Britain and her adherence to and membership of the group of nations forming the British Commonwealth of Nations.*

This is the controversial oath, which provided that Irish members of parliament swore true faith and allegiance to the Constitution of the Irish Free State and fidelity to the king. As was later continuously repeated by members of the Irish government both during the Treaty discussions and the Constitution debates, this was not the 'full-blooded' oath which members in other dominions had to swear. The general Commonwealth oath was: 'I AB do swear that I will be faithful and bear true allegiance to His Majesty King X', with the words 'So help me

God' sometimes added on at the end. The Irish oath had to be sworn to the Irish Constitution and faithfulness is all that was required for the king. In comparison, the dominion oath provided that members of parliament would swear true allegiance to the Crown. It seems that allegiance to the Crown was a much more serious matter than simply swearing to be faithful.[18]

Ironically, de Valera's alternative to the Treaty, 'Document No. 2' (which set out his 'external association' proposition), originally contained a surprisingly similar oath: 'I do swear to bear true faith and allegiance to the Constitution of Ireland and to the Treaty of Association of Ireland with the British Commonwealth of Nations, and to recognise the King of Great Britain as head of the Associated States'.[19] However, recognition of the king was not as significant as swearing faithfulness.

In the end, this was the article of the Treaty which was most problematic. It was not until de Valera broke with Sinn Féin and founded a new republican party (Fianna Fáil) that most anti-Treaty republicans reluctantly subscribed to the oath and took their seats in the Free State Dáil in 1927.

> *Article 5:*
> *The Irish Free State shall assume liability for the service of the Public Debt of the United Kingdom as existing at the date hereof and towards the payment of war pensions as existing at that date in such proportion as may be fair and equitable, having regard to any just claims on the part of Ireland by way of set off or counter-claim, the amount of such sums being determined in default of agreement by the arbitration of one or more independent persons being citizens of the British Empire.*

This rather vague article required the Irish Free State to pay a 'fair and equitable' share of the UK's public debt and war pensions. However, a major difficulty later arose in relation to the lack of precision in this provision and the failure to define what exactly constituted the 'Public Debt'. It is another provision which also originally formed part of de Valera's alternative to the Treaty. His slightly different version provides, rather sensibly, that if the sums are not agreed then they would be subject to independent arbitration:

> That Ireland shall assume liability for such share of the present public debt of Great Britain and Ireland and of the payment of war pensions as existing at this date as may be fair and equitable, having regard to any just claims on the part of Ireland by way of set off or counter claim, the amount of such sums being determined, in default of agreement, by the arbitration of one or more independent persons being citizens of Ireland or of the British Commonwealth.[20]

During the negotiations on the Treaty, it seems the Irish side was content not to settle the detail of the financial liability but it is clear that the Irish delegation wished for an independent tribunal to be set up to decide on the sum owed.[21]

Once the dust had settled after the Civil War in Ireland, the arguments began about the state's liability under this provision. The Irish argued that they should be compensated by the British for over-taxation in the past, as well as for destroyed industries and the millions of emigrants lost to the state over the years. A memorandum written by the secretary of the Irish Department of Finance, Joseph Brennan, in 1925 on this issue contains various arguments for the reduction of the figures sought by the British and comes to the conclusion that due to the amount of over-taxation in the past, nothing now should be owed.[22]

An interim arrangement was reached in February 1923, referred to as the Hills/Cosgrave pact.[23] It included British funding of and guarantees for land purchase (from the Anglo-Irish landlord class) and the Irish Free State agreed to pay the land annuities (the monies loaned by the British government to the tenant farmer class to purchase the land, which amounted to about £3 million per annum at the time). The deal was done in secret, however, and was never ratified by the Dáil. The question of the liability for the land annuities was a difficult one as it was not specifically mentioned in the Treaty and it was unclear if it should be regarded as 'Public Debt' under Article 5 or whether it was simply a separate legal debt.

A more favourable financial settlement was eventually negotiated in 1926 after the Boundary Commission report. In December 1925, as part of an agreement signed in London, the Irish Free State was released from its obligations under Article 5 but, in return, assumed liability for malicious damage done since 1919. A final settlement was then reached

in 1926, which determined the remaining financial issues. However, the question of the land annuities remained unsettled and while the Irish agreed in 1926 that these would be paid in full, further agitation on the issue meant that, by 1932, de Valera refused to pay, thus sparking the Economic War (1932–1938) between Ireland and Britain. This eventually came to an end with the Anglo-Irish Agreement which provided for a one-off payment of £10 million for the remaining annuities and also saw the return of the Treaty ports (see below).[24]

> *Article 6:*
> *Until an arrangement has been made between the British and Irish Governments whereby the Irish Free State undertakes her own coastal defence, the defence by sea of Great Britain and Ireland shall be undertaken by His Majesty's Imperial Forces. But this shall not prevent the construction or maintenance by the Government of the Irish Free State of such vessels as are necessary for the protection of the Revenue or the Fisheries.*
>
> *The foregoing provisions of this Article shall be reviewed at a Conference of Representatives of the British and Irish Governments to be held at the expiration of five years from the date hereof with a view to the undertaking by Ireland of a share in her own coastal defence.*

This article can be read in conjunction with the following article, the effect of which was to protect Britain from any threats which might occur due to a sudden withdrawal of coastal defences. While the Irish side resisted this provision, arguing that an invasion of Ireland was unlikely and that no naval defence was required, British fears prevailed.

Notwithstanding limitations imposed on the Free State's ability to engage in coastal defence activities, Britain supplied twelve armed trawlers to the Free State's coastal patrol service; as Eunan O'Halpin notes, to 'prevent gun-running' and to make sea transport available for army units.[25] O'Halpin further comments that while this development represented 'a clear contravention of article 6 of the Treaty', the limitations attaching thereto were circumvented by the British.[26] This was achieved by classifying the vessels given by the British as 'revenue vessels', which were permissible under Article 6 of the Treaty.[27] However, the quid pro

quo, in this regard, was that such vessels 'should not be used against foreign ships outside British or Irish territorial waters'. [28]

The article was removed along with Article 7 in 1938 during the Anglo-Irish negotiations in London.

Article 7:

The Government of the Irish Free State shall afford to His Majesty's Imperial Forces:—

(a) In time of peace such harbour and other facilities as are indicated in the Annex hereto, or such other facilities as may from time to time be agreed between the British Government and the Government of the Irish Free State; and

(b) In time of war or of strained relations with a Foreign Power such harbour and other facilities as the British Government may require for the purpose of such defence as aforesaid.

This article was designed to address a vital British national interest as well as a significant, and understandable, British fear: that Irish independence would pose a threat to British security. The effect of the article was to ensure that an independent Ireland would not be free to conduct an entirely independent Irish defence policy. The background to this article was the traditional Irish revolutionary practice of entering into alliances with the enemies of Britain: Spain under Philip II, Napoleonic France, or Germany under the kaiser. The effect of Article 7 was to ensure Britain's security against the danger that hostile foreign powers might attempt to use Ireland as a base from which to launch an attack on her.The military clause in Article 7 attracted little attention during the debates on the Treaty. This might seem surprising, in view of the demands imposed on the Free State by the article in general and by the second part of the article in particular. The first part provided for the retention by Britain of three bases at Berehaven and Queenstown (Cobh), County Cork, and Lough Swilly, County Donegal, but the second part had a far wider potential significance for the future of the Free State and its population: 'The Government of the Free State shall afford to His Majesty's Imperial Forces in time of war or of strained relations with a foreign power such harbour and other facilities as the British Government may require for the purposes of such defence.'

If this clause were to take effect, it would make it impossible for the Free State to avoid becoming involved in Britain's wars, irrespective of the wishes of the population. There was no limit to the facilities the British government might demand, not merely in wartime, but even at a time of 'strained relations' unilaterally defined by Britain. The British would decide, while the Free State would have no say in how its territory would be used, as the clause makes clear: 'The Government of the Free State shall [our emphasis] afford to his Majesty's Imperial Forces …'

One explanation of the fact that this menacing clause in Article 7 attracted little or no hostile attention when the Treaty was being discussed in the Dáil is that it was difficult, if not impossible, for deputies to imagine Britain becoming involved in an international crisis or strained relations with a foreign power, given the circumstances prevailing in December 1921 and January 1922 when Britain had recently emerged triumphant from a world war and an economic slump had overtaken Europe.

The abolition of Articles 6 and 7 was brought about during the Anglo-Irish negotiations in London in 1938. The most significant outcome of these negotiations was the British agreement to evacuate the three naval bases retained by Britain under the terms of the Anglo-Irish Treaty. Taoiseach Éamon de Valera, who led the Irish delegation, was then free to put into practice his policy of neutrality during the Second World War. As Ronan Fanning points out, the key element of this policy was that 'Ireland would be free to pursue an independent foreign policy … insofar as that policy did not represent a threat to Britain's vital strategic interests.'[29] A benevolent neutrality involving considerable logistical assistance to Britain was as far as de Valera was prepared to put into practice his theory of Anglo-Irish interdependence. Having induced the British side to abandon Article 7 of the Treaty, he ensured that the Irish state would not be involved involuntarily in Britain's wars.

> *Article 8:*
> *With a view to securing the observance of the principle of international limitation of armaments, if the Government of the Irish Free State establishes and maintains a military defence force, the establishments thereof shall not exceed in size such proportion of the military establishments maintained in Great Britain as that which the population of Ireland bears to the population of Great Britain.*

John P. Duggan comments that the ability of the new state 'to raise its own defence force was conceded as a necessary condition of the signing of the Treaty itself' and further observes that this right was not conceded in the home rule acts of 1914 or 1920.[30] O'Halpin emphasises that in the aftermath of the signing of the Treaty, Britain's initial concern 'was not to restrict the size of the provisional government's army but to strengthen it', owing to concerns that the anti-Treaty IRA would be able to defeat Provisional Government forces in the event of armed confrontation.[31] To prevent this, Britain was content to make available all weapons and supplies which the Provisional Government requested to engage in its campaign against the anti-Treaty IRA.[32] At the start of hostilities in June 1922, with the outbreak of the Civil War, Provisional Government forces comprised 'about 10,000 men under arms'. [33]

Notwithstanding the reality that observance by the Provisional Government of the terms of Article 8 were not zealously enforced by the British, the economic cost and related financial burdens of the Civil War forced the Free State government to undertake a drastic reduction in army numbers following the Civil War. These numbers had quadrupled to 60,000 'between the autumn of 1922 and April 1923', which J.J. Lee refers to as 'a major administrative feat'.[34] However, when the process of demobilisation commenced, the category referred to as 'other ranks' was reduced to 32,821 by 17 November 1923 and this figure was further reduced to 13,306 by 31 March 1924.[35] The officer class was cut by 1,000 in December 1923 and a further 1,000 in March 1924, with others having their rank reduced.[36] By November 1925, the number of army personnel in all ranks was 17,439.[37]

> *Article 9:*
> *The ports of Great Britain and the Irish Free State shall be freely open to the ships of the other country on payment of the customary port and other dues.*

This article was also included in de Valera's alternative to the Treaty and it places on a legal footing the presumption in international law that ships may enter ports of foreign jurisdictions on certain conditions. The Irish side recognised the need for coastal harmony between the two countries and there was no opposition to this article.

It appears the concern was mainly to prevent any restriction on trade as an earlier version of the provision read as follows: 'Neither Great Britain nor the Irish Free State shall impose restrictions for protective purposes upon the flow of transport, trade and commerce between Great Britain and Ireland.'[38]

> *Article 10:*
> *The Government of the Irish Free State agrees to pay fair compensation on terms not less favourable than those accorded by the Act of 1920 to judges, officials, members of Police Forces and other Public Servants who are discharged by it or who retire in consequence of the change of government effected in pursuance hereof.*
>
> *Provided that this agreement shall not apply to members of the Auxiliary Police Force or to persons recruited in Great Britain for the Royal Irish Constabulary during the two years next preceding the date hereof. The British Government will assume responsibility for such compensation or pensions as may be payable to any of these excepted persons.*

This seemingly innocuous provision was the subject of considerable litigation in the years following the acceptance of the Treaty. The provision was elaborated on in the Irish Free State Constitution in Article 78 which provided that: 'Every such existing officer who was transferred from the British Government by virtue of any transfer of services to the Provisional Government shall be entitled to the benefit of Article 10 of the Scheduled Treaty'. Article 76 also included judges within the remit of the Treaty provision.

The cases which arose were all concerned with the amount of compensation payable to the British civil servants who had transferred back to Britain from Ireland or who had retired upon the creation of the new state, but they became important in relation to the bigger questions around the state's relationship with the appeal to the Judicial Committee of the Privy Council. The appeal was not something which had been included in the Treaty and during the negotiations on the Constitution, it was vehemently resisted by the Irish side, which expressed fears in relation to the possibility of former Ulster unionist leader Sir Edward Carson

and his allies sitting in judgment on Irish cases.[39] In particular, Griffith pointed to the fact that the Judicial Committee comprised persons who had used their positions for 'party political purposes hostile to the Irish people'.[40] This, he noted, had 'aroused keen indignation and antipathy to the Tribunal of which they are members'.[41] In addition, he observed that the great volume of Irish litigation was concerned with 'very small money interests' and thus the appeal would be 'a rich man's appeal which may be used to the destruction of a man not well off'.[42] He stated that he did not think the insertion of the appeal to the Privy Council in the Constitution was a necessary incident of the Treaty position. However, the British insisted that the appeal would have to apply to the Irish Free State as it did in the other dominions but reassured the Irish that the practice would be akin to that in South Africa, where a limited appeal was in place, and also by encouraging Irish hopes that the appeal would soon be abolished.[43] Thus the appeal was inserted into Article 66 of the Irish Free State Constitution, providing that 'nothing in this Constitution shall impair the right of any person to petition His Majesty for special leave to appeal from the Supreme Court to His Majesty in Council or the right of His Majesty to grant such leave'.

There had been a series of cases on the issue of compensation but the most significant case was that of *Wigg and Cochrane v Attorney-General* in 1927.[44] The case involved an interpretation by the Supreme Court of Article 10 of the Treaty, on the issue of the amount of compensation payable to the British civil servants who had transferred back to Britain from Ireland or who had retired upon the creation of the new state and also on Article 78 of the Constitution. Two questions had to be considered: whether these provisions guaranteed a personal right or whether this was non-justiciable as a treaty obligation between international actors; and also, was this personal right a right to a minimum amount of remuneration, or was it simply a guarantee to have remuneration calculated in the manner guaranteed under the Government of Ireland Act? In both the High Court and the Supreme Court, it was decided that Article 78 of the Constitution guaranteed a personal right but the courts differed on the nature of the right. Mr Justice James Meredith's decision in the High Court essentially meant that since a constitutional right was at issue, the pensions were not a gift of the minister for finance but rather were enforceable and would be determined in the courts. The government appealed this to the Supreme

Court, where the judgment was more nuanced. While Mr Justice Charles O'Connor confirmed the right in Article 78, he also clarified that it was 'not a right to any particular sum or sums of money, or to have these moneys calculated in any particular way, but a right to the benefit of an agreement by the Irish Free State on terms not less favourable than those accorded by the Act of 1920'.[45] He held that the right was 'to be treated in a like manner as a Civil Servant under the British scheme of Government'.[46] In his view, 'it was not intended by the Treaty to give Civil Servants rights of action for the recovery of compensation. The creation of such rights would completely alter their status as servants of the Crown.'[47] This effectively reversed the High Court's decision and meant that the minister for finance had the authority to determine the pension amounts. However, there was strong dissent from Mr Justice William Johnston who felt that the case was broadly about the constitutionally guaranteed rights flowing from Article 10 of the Treaty and, in his view, if the government was to be allowed to disregard this aspect of the Treaty then it undermined the whole agreement. The case was appealed to the Privy Council where the decision of the Supreme Court was reversed.

Martin Maguire explains the effect of the judgment well:

> This judgement sent shock waves through the governments in Dublin and in London. Under the British administration civil servants were by law employed 'at the pleasure of His Majesty' and status and pensions were by gift rather than by right. It was also the British view that the Irish Free State was not the creation of revolution but was a devolved government, created by Westminster legislation, continuous with the former administration. The Privy Council decision implied that the Irish Free State was in fact a break with the former British administration. Far more seriously, from a financial point of view, the decision also meant there was now a group of civil servants within the British and Irish system whose status and security were far superior to their colleagues' and were in fact under-pinned by constitutional guarantees.[48]

However, following the controversial result, it emerged that a mistake of fact had occurred and the Judicial Committee was forced to rehear the case. The mistake was the actual date upon which the civil servants had

been transferred. Nevertheless, the committee upheld its original decision but the Irish government refused to accept this decision. Moreover, even members of the House of Lords (in its legislative capacity) spoke out against the decision of the Privy Council.[49] In the eyes of the Irish government, this was a betrayal of the position which had been originally promised to it since it was led to believe that the appeal would not be of great consequence and that judges who were seen as partisan, such as George, Lord Cave, who gave the judgment, would not sit on Irish appeals. The case had become much more than a dispute over pensions. The result on the narrow issue of compensation was unfavourable to both the British and Irish governments and so they decided to come to an agreement on the matter of compensation to be paid and essentially to by-pass the judgment of the Privy Council. Both parliaments passed acts which, in effect, revised Article 10 of the Treaty – the Civil Servants (Transferred Officers) Compensation Act, 1929 (Ireland) and the Irish Free State (Confirmation of Agreement) Act, 1929 (Britain), which granted the more favourable terms to civil servants with the British government agreeing to pay the difference.[50]

The case also had much wider consequences in terms of increasing the calls for the abolition of the appeal to the Privy Council. The Irish argued that the case had demonstrated an anti-Irish bias on the part of the court and the matter was repeatedly raised during the Imperial conferences. In 1931, the Statute of Westminster was passed which, in repealing the Colonial Laws Validity Act of 1865, gave full legislative autonomy to the dominions, and so in 1933 the appeal was unilaterally abolished by the Irish government as part of de Valera's campaign to dismantle the Treaty.[51]

Article 11:
Until the expiration of one month from the passing of the Act of Parliament for the ratification of this instrument, the powers of the Parliament and the government of the Irish Free State shall not be exercisable as respects Northern Ireland and the provisions of the Government of Ireland Act, 1920, shall, so far as they relate to Northern Ireland, remain of full force and effect, and no election shall be held for the return of members to serve in the Parliament of the Irish Free State for constituencies in Northern Ireland, unless a resolution is passed by

both Houses of the Parliament of Northern Ireland in favour of the holding of such elections before the end of the said month.

Under this article, the terms of the Treaty were deemed to apply to the entire island, notwithstanding the provisions of the Government of Ireland Act, 1920. In this regard, a scheme of home rule within the Free State was being proposed, but David Fitzpatrick observes that 'loyalist interests were protected by the opt-out clause' which provided that in the event of the Northern parliament addressing the monarch 'within a month of the Treaty's ratification, its powers were to be perpetuated', with the limitation that such powers could be circumscribed by either the convening of the Council of Ireland or the establishment of a boundary commission, both captured by Article 12.[52] When an address before the Northern Ireland parliament in December 1922 petitioned King George V to allow it to opt out of the jurisdiction of the Free State, Article 12, which was represented as a penalty clause upon Northern Ireland, was triggered.[53] Article 12 was abrogated by the 1925 Tripartite Agreement (see below), which made the 1920 partition permanent.

Article 12:
If before the expiration of the said month an address is presented to His Majesty by both Houses of the Parliament of Northern Ireland to that effect, the powers of the Parliament and Government of the Irish Free State shall no longer extend to Northern Ireland, and the provisions of the Government of Ireland Act, 1920, (including those relating to the Council of Ireland) shall, so far as they relate to Northern Ireland, continue to be of full force and effect, and this instrument shall have effect subject to the necessary modifications.

Provided that if such an address is so presented a Commission consisting of three persons, one to be appointed by the Government of the Irish Free State, one to be appointed by the Government of Northern Ireland and one, who shall be Chairman, to be appointed by the British Government shall determine in accordance with the wishes of the inhabitants, so far as may be compatible with economic and geographic conditions, the boundaries between Northern Ireland and the rest of Ireland, and for the purposes of the Government of Ireland

Act, 1920, and of this instrument, the boundary of Northern Ireland shall be such as may be determined by such Commission.

The idea of a boundary commission to adjust the frontier between Northern Ireland and the Free State originated in a proposal put forward by Prime Minister David Lloyd George and Thomas Jones, principal assistant secretary to the British Cabinet, to Arthur Griffith, the leader of the Irish delegation, on 9 November 1921. At this point, the chances of concluding a Treaty appeared remote. The proposal was put to Griffith in the absence of the other Irish negotiators and was outlined in a document drawn up by Lloyd George and Jones. The document made provision for what would happen if Northern Ireland refused to accept the principle of a parliament for all-Ireland. In that case, it would be necessary to revise the boundary, and a commission set up to do this 'would be directed to adjust the line both by inclusion and exclusion so as to make the boundary conform as closely as possible to the wishes of the population'.[54] Griffith assented to this proposal because he was led to believe that the commission outlined in the document would be likely to settle the Ulster Question permanently in favour of the Free State. He told de Valera that the commission arrangement would give 'most of Tyrone and Fermanagh, and part of Armagh, Derry and Down, etc' to the Free State.[55] When the British side presented a draft treaty to the Irish negotiators on 16 November 1921, the boundary commission envisaged in this would 'determine in accordance with the wishes of the inhabitants the boundaries between Northern Ireland and the rest of Ireland'. This benign version of the role of the boundary commission, from a Free State point of view, was part of a clever strategy devised by Lloyd George and Jones to entice Griffith and the other Irish negotiators to sign the Treaty.

However, the terms of the boundary commission clause in Article 12 of the Treaty which Griffith and the other negotiators signed on 6 December 1921 differed radically from those envisaged in the versions Griffith had been shown. The chairman of the three-person commission provided for in the Treaty was to be appointed by the British government, and the boundary was to be determined in accordance with the wishes of the inhabitants, but such wishes had to be 'compatible with economic and geographic conditions'. Thus, a process which originally

seemed straightforward was now open to an unpredictable variety of interpretations and made to depend in the final analysis on the character and outlook of a chairman appointed by one of the two contesting parties. As de Valera remarked in a letter to Frank Pakenham in 1963, the trap in the Treaty version of the boundary clause – the qualifying phrase 'so far as may be compatible with economic and geographic conditions' – was used ultimately to nullify, as a whole, the provision 'in accordance with the wishes of the inhabitants'.[56]

On his return to Dublin on 3 December 1921 for the final meeting between the Treaty delegates and the Dáil cabinet, John O'Byrne, the legal adviser to the Irish delegation, warned Griffith that the boundary clause did not mean what Griffith thought it did (a major reduction of the territory of Northern Ireland), and that it was too vague to admit of a single unequivocal interpretation. O'Byrne suggested an alteration of the clause which would at least delimit the territorial units to be considered in applying it. Pádraic Colum, who recorded this episode as a biographer of Griffith, was puzzled that Griffith did not argue for the kind of alteration suggested by O'Byrne during the meeting with the Dáil cabinet on 3 December. The only explanation that Colum could think of was that the meeting was so preoccupied with the oath, the Crown and the empire that nobody adverted to the unsatisfactory formulation of the boundary clause.[57]

No representative of the Provisional or Free State administration publicly interpreted Article 12 as promising anything less than a radical reduction of the area governed by the Northern parliament. Michael Collins, for example, assured Bishop Edward Mulhern of Dromore that the boundary would be adjusted 'on the basis of fairness' and that the boundary commission would be obliged to proceed on the basis of self-determination principles, and that no doctrine of the Northern government could take south and east Down, including Newry, 'away from the Irish Government'.[58] The reality of what was going to happen when the boundary commission got to work was hinted at by Lloyd George ten days following the signature of the Anglo-Irish Treaty. During a House of Commons debate on the Treaty on 16 December 1921, Lloyd George emphasised that the economic and geographic qualifications contained within Article 12 of the Treaty would curtail the boundary commission's latitude in relation to any substantial transfer of territory

from Northern Ireland to the Free State.[59] This interpretation should be understood in the light of the fact that, in 1920, when a parliament was established in Belfast, the British government gave guarantees to the unionist leadership that the six-county area would remain inviolable. Unionist support for the Government of Ireland Act of 1920 was given 'on the clear understanding, unanimously sanctioned by Lloyd George's Cabinet, that the Six Counties, as settled after the negotiations [on the 1920 Act] should be theirs for good and all, and there should be no interference with the boundaries'.[60] One of Lloyd George's peculiar talents was to deceive both parties to a dispute by encouraging each to believe that measures he was introducing to resolve this dispute would benefit each of them to the detriment of the other.

Free State leaders who were involved in the Treaty negotiations, for example Collins and Griffith, and Ernest Blythe, who was not, persisted in maintaining that the boundary clause was weighted in favour of the Free State, and that the British government had taken a definite political decision to give them two of the six counties, or the greater part of three. Blythe foresaw a truncated Northern Ireland consisting of Belfast and the rest of County Antrim, the greater part of counties Down, Derry and Armagh, and possibly a portion of Tyrone.[61] It is difficult to reconcile these public stances with the contrary views expressed in the British parliament by Lloyd George at the same time. There is evidence of a wide gap between the public discourse of Free State ministers and their actual views on what a boundary commission would involve. A telling example of this can be discerned from the firm assertion by W.T. Cosgrave in the Dáil on 20 July 1923, following his appointment of Eoin MacNeill as the Free State Boundary Commissioner. Cosgrave declared that the Free State government 'cannot possibly ignore the discontent and dissatisfaction of those supporters of the Free State in the North who are kept against their will and wish out of the jurisdiction of the state to which they do not belong'.[62] Here, Cosgrave had in mind the entire nationalist majorities of counties Tyrone and Fermanagh as well as parts of counties Armagh and Down.[63] This contrasts with his talks with Northern Prime Minister Sir James Craig on 17 July, only three days prior to making his Dáil commitment to border nationalists and to uphold their rights as enshrined in Article 12 of the Treaty. On 30 July, Craig informed his cabinet that 'during his interview with Mr. Cosgrave

the latter referred personally to the Boundary Commission and stated that in view of the coming [Free State] elections it was necessary for him [Cosgrave] to have a political cry etc'.[64]

The boundary clause in Article 12 is the most significant component of the Anglo-Irish Treaty for the reason that the Irish delegates would not have subscribed to the Treaty unless they had been persuaded by their British counterparts that major adjustments to the boundary to the benefit of the Free State would follow from the implementation of Article 12. This point was emphasised by Cosgrave in 1924, at a time when some of those who had been signatories to the Treaty on the British side were openly proclaiming that the implementation of Article 12 by a boundary commission could result in merely minor adjustments to the boundary. Cosgrave observed that had the same British signatories amplified such opinions during the Treaty negotiations, the Irish plenipotentiaries would not have signed the Treaty. Cosgrave was suggesting that the revisionist British interpretation of Article 12 was deliberately concealed from the Irish side during the negotiations, which implied that the boundary-commission component of Article 12 was a dishonest device on the part of Lloyd George to get the Treaty over the line.[65]

The Tripartite Agreement of December 1925

The leak by the conservative London newspaper, the *Morning Post*, of 7 November 1925, of the Boundary Commission's recommendations, caused outrage in the Free State and the nationalist North.[66] Impelled by this, W.T. Cosgrave sought to limit the damage to his government's position which was threatened by the debacle, particularly by the recommendation that parts of east Donegal be ceded to Northern Ireland. This contrasted with the expectation that large tracts of the North would be ceded to the Free State. Cosgrave persuaded British Prime Minister Stanley Baldwin, British Chancellor of the Exchequer Winston Churchill, commission chairman Judge Richard Feetham and Northern Ireland boundary commission representative J.R. Fisher to agree to the suppression of the Boundary Commission's report, and the abrogation of Article 12 of the Treaty which provided for the establishment of a Council of Ireland. This made permanent the partition of the island of Ireland as defined by the Government of Ireland Act, 1920. This

arrangement had the effect of rendering nugatory Articles 13, 14 and 15 of the Treaty. In accepting the status quo, Cosgrave pledged 'neighbourly comradeship with Craig's Government'.[67] The terms of the Tripartite Agreement concluded between the governments of the Free State, Great Britain and Northern Ireland on 3 December 1925 were unanimously approved by the British houses of parliament and, following a vote, in the Dáil and the Seanad.[68]

> *Article 13:*
> *For the purpose of the last foregoing article, the powers of the Parliament of Southern Ireland under the Government of Ireland Act, 1920, to elect members of the Council of Ireland shall after the Parliament of the Irish Free State is constituted be exercised by that Parliament.*

The provisions of this article were contingent upon the provisions of Article 12. The Council of Ireland as captured by Article 12 was never convened. This was due to the Tripartite Agreement of 1925 (see above), which set aside the provision of Article 12 which mandated the convening of a Council of Ireland.

> *Article 14:*
> *After the expiration of the said month, if no such address as is mentioned in Article 12 hereof is presented, the Parliament and Government of Northern Ireland shall continue to exercise as respects Northern Ireland the powers conferred on them by the Government of Ireland Act, 1920, but the Parliament and Government of the Irish Free State shall in Northern Ireland have in relation to matters in respect of which the Parliament of Northern Ireland has not power to make laws under that Act (including matters which under the said Act are within the jurisdiction of the Council of Ireland) the same powers as in the rest of Ireland subject to such other provisions as may be agreed in manner hereinafter appearing.*

As an address was presented to King George V by both houses of the Northern Ireland parliament, the link between Northern Ireland and the Free State as provided for in Article 12 was nullified.[69] The Council of Ireland provision was nullified by the Tripartite Agreement of 1925 (see

above), which maintained the scope of the existing border, as defined in the Government of Ireland Act, 1920.

> *Article 15:*
> *At any time after the date hereof the Government of Northern Ireland and the provisional Government of Southern Ireland hereinafter constituted may meet for the purpose of discussing the provisions subject to which the last foregoing article is to operate in the event of no such address as is therein mentioned being presented, and those provisions may include:—*
> *(a) Safeguards with regard to patronage in Northern Ireland;*
> *(b) Safeguards with regard to the collection of revenue in Northern Ireland;*
> *(c) Safeguards with regard to import and export duties affecting the trade or industry of Northern Ireland;*
> *(d) Safeguards for minorities in Northern Ireland;*
> *(e) The settlement of the financial relations between Northern Ireland and the Irish Free State.*
> *(f) The establishment and powers of a local militia in Northern Ireland and the relation of the Defence Forces of the Irish Free State and of Northern Ireland respectively;*
>
> *and if at any such meeting provisions are agreed to, the same shall have effect as if they were included amongst the provisions subject to which the Powers of the Parliament and Government of the Irish Free State are to be exercisable in Northern Ireland under Article 14 hereof.*

Due to the address to King George V and the Tripartite Agreement of 1925 (see above), the provisions of Article 15 were never implemented.

> *Article 16:*
> *Neither the Parliament of the Irish Free State nor the Parliament of Northern Ireland shall make any law so as either directly or indirectly to endow any religion or prohibit or restrict the free exercise thereof or give any preference or impose any disability on account of religious belief or religious status or affect prejudicially the right of any child to attend a school receiving public money without attending the*

> *religious instruction at the school or make any discrimination as respects state aid between schools under the management of different religious denominations or divert from any religious denomination or any educational institution any of its property except for public utility purposes and on payment of compensation.*

This provision is very similar to earlier provisions which had been contained in the various home rule bills and the Government of Ireland Act, 1920. However, those earlier enactments had contained a prohibition on the 'establishment' of any religion whereas this clause simply prohibits its 'endowment'. Furthermore, the earlier enactments had also placed a prohibition on making any religious belief or ceremony a condition of a valid marriage but this is not dealt with here. This omission led to controversy in the House of Commons during debates on the issue. Earlier provisions had also prevented an Irish parliament from interfering with the constitution of a religious body without the approval of its governing body. Another important distinction between this provision and earlier versions is that this article adds the important prohibition of discrimination in respect of educational bodies and grants to schools.

The prohibition on the diversion of religious property except for public utility purposes and the requirement of compensation had been included in the earlier legislation and was significant given that the Irish Free State Constitution drawn up later did not contain a right to private property. This article was followed up by Article 8 in the Irish Free State Constitution which provided:

> Freedom of conscience and the free profession and practice of religion are, subject to public order and morality, guaranteed to every citizen, and no law may be made either directly or indirectly to endow any religion, or prohibit or restrict the free exercise thereof or give any preference, or impose any disability on account of religious belief or religious status, or affect prejudicially the right of any child to attend a school receiving public money without attending the religious instruction at the school, or make any discrimination as respects State aid between schools under the management of different religious denominations, or divert from any religious denomination or any educational institution any of its property except for the purpose of

roads, railways, lighting, water or drainage works or other works of public utility, and on payment of compensation.

Article 17:
By way of provisional arrangement for the administration of Southern Ireland during the interval which must elapse between the date hereof and the constitution of a Parliament and Government of the Irish Free State in accordance therewith, steps shall be taken forthwith for summoning a meeting of members of Parliament elected for constituencies in Southern Ireland since the passing of the Government of Ireland Act, 1920, and for constituting a provisional Government, and the British Government shall take the steps necessary to transfer to such provisional Government the powers and machinery requisite for the discharge of its duties, provided that every member of such provisional Government shall have signified in writing his or her acceptance of this instrument. But this arrangement shall not continue in force beyond the expiration of twelve months from the date hereof.

On 14 January 1922, a meeting of the members elected to the House of Commons of Southern Ireland (largely correspondent with the Second Dáil) took place at the Mansion House, Dublin, in order to approve the Treaty and a Provisional Government was elected under the chairmanship of Michael Collins. The Provisional Government took up office two days later on 16 January 1922 and became the de facto government as Dublin Castle, the centre of British administration in Ireland, was handed over. The Westminster parliament had not yet formally appointed the new Irish ministers or conferred the government with any powers. Thus, it was still a 'provisional' government, from the British perspective at least. This power was conferred following the Irish Free State (Agreement) Act, 1922, which was passed on 31 March 1922.[70] This Act gave the force of law to certain provisions of the Treaty and, in relation to Article 17 in particular, it provided that the British government could, by orders in council, transfer powers to the Provisional Government of Southern Ireland, that the Parliament of Southern Ireland would be dissolved within four months from the passing of the Act, and that elections would be held for 'the House of the Parliament' to which the Provisional Government would be responsible.

On 1 April 1922, an order in council was then passed, entitled the Provisional Government (Transfer of Functions) Order, 1922, which in pursuance to this article of the Treaty, transferred the administration of public services in Southern Ireland from existing government departments and officers to the departments and officers of the Provisional Government. This order transferred the full authority of the state within Southern Ireland to the Provisional Government, including all the laws that applied to Southern Ireland when under British rule. The ministerial appointments became official and were announced in *Iris Oifigiúil*, the new gazetteer of the Irish government, on 4 April 1922.

> *Article 18:*
> *This instrument shall be submitted forthwith by His Majesty's Government for the approval of Parliament and by the Irish signatories to a meeting summoned for the purpose of the members elected to sit in the House of Commons of Southern Ireland, and if approved shall be ratified by the necessary legislation.*

The ratification of the Treaty is something which has caused quite a bit of confusion. In international law, ratification may take different forms but because this instrument specified the particular method of its ratification, then this was the only method by which it could be validly ratified. However, when writing about the debates in the Dáil of January 1922, during which the Treaty was approved, some commentators refer to the approval as formal ratification.[71] Similarly, the approval of the British parliament in December 1921 has been mistaken for ratification.

In late January 1922, a question was put to Michael Collins by one of the members of the Constitution Committee as to whether the Treaty would be ratified before the Constitution was finished.[72] D.H. Akenson and F.P. Fallin have written that this question of ratification 'so disturbed Collins that he and Hugh Kennedy soon left for London to press for the Treaty's immediate ratification'.[73] The writers maintain that Lloyd George eventually agreed to Collins's demand, on the understanding that the draft Constitution would be shown to the British cabinet before being published. They claim that Lloyd George kept his bargain and that the Treaty was ratified by the Irish Free State (Agreement) Act on 31 March 1922.[74]

However, another confusion seems to have arisen here in that section 1(5) of that Act specified that it was not the act for ratification of the Treaty. This was due, for the most part, to the fact that the 'Ulster month' (the period during which Northern Ireland could opt out of Irish independence as provided for in the Treaty) would begin on formal ratification, so instead it was decided that formal ratification would occur when the Constitution was being promulgated and the month could run from then. Instead, the purpose of this Act was to fulfil the Treaty obligations in relation to the formal handing over of power to the Provisional Government under Article 17. Formal ratification was thus completed by the British in December in the Irish Free State (Constitution) Act, 1922, to which the Constitution forms a schedule.[75] On the Irish side, the Treaty was ratified by the Irish Free State Constitution Act in the same month.[76] By this Act, the Treaty was also made part of Irish law because of the incorporation of the Treaty into the constitution.[77]

In summary, therefore, the Treaty essentially provided for the following points:

1. Ireland was to become a self-governing dominion, like Canada
2. The British Crown would be head of state and would be represented by a governor general figure
3. Members of the Irish parliament would have to swear an oath of allegiance (to the Constitution – and faithfulness to the king)
4. The Irish Free State would assume some responsibility for the payment of the Imperial debt
5. For its own security, Britain would retain the Treaty ports and the size of the Irish army would be limited
6. Northern Ireland would have the option of remaining within or separating from the Irish Free State and arrangements were made for both possibilities

In reality, the document seems too pithy and lacks the detail one would imagine would be required for an agreement which sets out the new status of a country. It is evident, therefore, that the provisions were simply the main points of an otherwise oral understanding.[78] For example, it is never actually provided for in the Treaty that the Irish Free State would draft its own Constitution, which would govern and set out the actual

constitutional position of the state. But, of course, it was understood by both sides that this would happen. The only place the Constitution is mentioned in the Treaty is, in fact, in the oath. Neither is it expounded in the Treaty that any Constitution would be inferior to the Treaty itself or that were any conflict to arise, the Treaty would be held to be supreme. However, it was evidently always understood by both sides that the Treaty would, in fact, be superior to the Constitution and that the Constitution would set out the law along the lines of what had been agreed in the Treaty.[79]

Imperial Conferences (1923 and 1930) and Their Implications for the Stability of the Anglo-Irish Treaty

Two Imperial conferences, one in October and November 1926, the other in 1930, had particular significance for the status of the Irish Free State as a distinct dominion comparable to Australia, New Zealand, Canada and South Africa.

The Imperial Conference of 1926 brought together the South Africans and Irish in a joint endeavour to define the future of the Commonwealth and 'in so doing to place beyond argument the freedom and equality of the dominions'.[80] There was strong pressure from both delegations to devise a formula adequately descriptive of the Commonwealth as it was in 1926. What emerged was, as F.S.L. Lyons puts it, 'one of the great landmarks in the Constitutional history of the empire', as Great Britain and the dominions were defined as: 'autonomous Communities within the British Empire, equal in status, in no way subordinate to one another in any aspect of their domestic or external affairs, though united in a common allegiance to the Crown, and freely associated as members of the British Commonwealth of Nations'. [81]

The 1930 Imperial Conference, in which the Irish delegation led by Minister for External Affairs Patrick McGilligan played a leading part, reached its climax in the Statute of Westminster, which received the royal assent on 11 December 1931. The statute implemented a resolution taken in 1930 at the Imperial Conference. The Statute of Westminster laid down that the British parliament could no longer legislate for any of the dominions, and that dominions could repeal or amend any Act

of the British parliament that affected them. The statute also provided that no law made by the parliament of a dominion should be void and inoperative on the grounds that it was repugnant to the law of England. The parliament of a dominion was granted the full power to make laws having extra-territorial operation. Significantly for the Free State, the statute provided that no future Act of the British parliament should extend to a dominion unless it was expressly declared in that Act that the dominion had requested it and consented to its enactment. This was interpreted by Winston Churchill, who was, at this stage, a Conservative backbencher, as meaning that it would allow the Free State to repudiate the terms of the Anglo-Irish Treaty. Churchill argued that the Irish Free State should be excluded from any provision of the Statute of Westminster that might allow it to evade or repudiate the terms of the Treaty. W.T. Cosgrave believed firmly that the statute was subordinate to the Anglo-Irish Treaty, that the Treaty could be altered only by consent and that the Irish government viewed it with 'solemnity'.[82] However, shortly after the Statute of Westminster took effect, Cosgrave's administration was replaced by a Fianna Fáil one led by de Valera, who welcomed the outcomes of the 1926 and 1930 Imperial conferences as facilitating his scheme for dismantling the Anglo-Irish Treaty.

De Valera was barely in office when he began his campaign to dismantle the Treaty. His first move was to remove the oath to be taken by members of the Free State parliament. This was the oath prescribed in Article 4 of the Treaty. A second component of de Valera's campaign was to suspend land annuity payments to the British exchequer. In May 1933, the Removal of Oath Bill became law.

A further major attack on the Treaty involved taking the Crown out of the Constitution by diminishing the powers of the governor general, the Crown's representative. In 1932, the holder of that office, James McNeill, was dismissed or allowed to resign. His successor, Domhnall Ua Buachalla, a country shopkeeper, was installed, not in the Viceregal Lodge but in a suburban house, his main responsibility being to sign acts of parliament. The British government, in common with W.T. Cosgrave, challenged de Valera's right to dismantle the terms of the Treaty without British agreement. However, in 1935, the British Privy Council, in its judgment in *Moore v Attorney General*, settled the issue, making it clear that before 1931 the Irish Free State parliament had not been competent

to abrogate the Treaty but as a consequence of the Statute of Westminster, it had acquired the necessary power to do so. The substance of the decision of the Privy Council was summarised: 'The simplest way of stating the situation is to say that the Statute of Westminster gave to the Irish Free State a power under which they could abrogate the Treaty, and that, as a matter of law, they have availed themselves of that power'.[83] In this way, the Privy Council confirmed its own abolition with respect to the Irish Free State with respect to all other constitutional amendments aimed at dismantling the settlement imposed by the Anglo-Irish Treaty. The process of dismantling the Treaty culminated in the passage of a new Constitution in 1937. The Constitution of Ireland/Bunreacht na hÉireann made the articles of the Anglo-Irish Treaty irrelevant.

Notes

1 See Thomas Towey, 'Hugh Kennedy and the constitutional development of the Irish Free State, 1922–1923' in *Irish Jurist*, xii (1977), p. 354.
2 Leo Kohn, *The Constitution of the Irish Free State* (London, 1932), p. 50.
3 John Coakley, '"Irish Republic", "Eire" or "Ireland"? The contested name of John Bull's other island' in *Political Quarterly*, lxxx, no. 1 (Jan.–Mar. 2009), pp. 49–50.
4 Frank Pakenham (Lord Longford), *Peace by ordeal: an account from first-hand sources of the negotiation and signature of the Anglo-Irish Treaty 1921* (3rd ed., London, 1962), p. 244.
5 Ibid.
6 See Laura Cahillane, 'Éire, Ireland or the Republic of Ireland – what's in a name?' in *Irish Law Times*, xxiii (2005), p. 303.
7 See A.J. Ward, *The Irish constitutional tradition: responsible government and modern Ireland, 1782–1992* (Dublin, 1994), p. 62.
8 See Erskine Childers, *Framework for home rule* (London, 1911).
9 Hugh Kennedy wrote: 'Canada was chosen because of the great advance that has been made by that Dominion on the road to liberty in association.' (Select working papers, 1922 (University College Dublin Archives (UCDA), Hugh Kennedy Papers, P4/308)).
10 A.B. Keith, letter to *The Times*, 16 June 1922, as quoted in Alexander Brady, 'The new dominion' in *Canadian Historical Review*, iv, no. 3 (Sept. 1923), p. 204.
11 Hugh Kennedy, 'The association of Canada with the Constitution of the Irish Free State' in *Canadian Bar Review*, vi (1928), p. 750.
12 Ibid., p. 749.
13 Ibid., p. 752.
14 Article 79 in Draft B and Article 78 in Draft A.

15 Ibid.
16 See Brendan Sexton, *Ireland and the Crown, 1922–1936: the governor-generalship of the Irish Free State* (Dublin, 1989), p. 178.
17 Ibid., pp. 178–9.
18 During the Dáil debates on the Treaty, Ernest Blythe argued that faithfulness was not identical with fealty (*Dáil Éireann deb*., T, no. 10, 194 (3 Jan. 1922)).
19 See Michael Collins, *The path to freedom* (3rd ed., Cardiff, 1996), p. 42.
20 'Proposed Treaty of Association between Ireland and the British Commonwealth presented by Eamon de Valera to Dail Eireann' (Document No. 2), Jan. 1922 (http://www.difp.ie/docs/Volume1/1921/218.htm) (3 Apr. 2018).
21 See 'Memorandum by the Irish Representatives', 22 Nov. 1921 (http://www.difp.ie/docs/Volume1/1921/199.htm) (3 Apr. 2018).
22 '£117 millions in respect of public debt and £12 millions in respect of war pensions. They proposed to add a further amount of £27 millions as compound interest on these amounts at 5 per cent. during the four years following the Treaty. Thus the actual total of the British claim is £157 millions' ('Memorandum by Joseph Brennan on Article 5 of the Anglo-Irish Treaty', 30 Nov. 1925 (http://www.difp.ie/docs/1925/Financial-concessions-on-Article-5-of-the-1921-Treaty/694.htm) (3 Apr. 2018)).
23 'Text of financial agreements between the Irish Free State government and the British government', 12 Feb. 1923 (http://www.difp.ie/docs/Volume2/1923/372.htm) (3 Apr. 2018). Major John Walter Hills was financial secretary to the British Treasury from 1922 to 1923.
24 See Nicholas Mansergh, *The Irish Free State – its government and politics* (London, 1934), ch. xiv and Donal P. Corcoran, *Freedom to achieve freedom: the Irish Free State 1922–1932* (Dublin, 2013), ch. 10.
25 Eunan O'Halpin, *Defending Ireland: the Irish state and its enemies since 1922* (Oxford, 2000), p. 15.
26 Ibid.
27 Ibid.
28 Ibid., pp. 15–16.
29 Ronan Fanning, 'The evolution of Irish foreign policy' in Michael Kennedy and J.M. Skelly (eds), *Irish foreign policy 1919–66: from independence to internationalism* (Dublin, 2000), p. 311.
30 John P. Duggan, *A history of the Irish army* (Dublin, 1991), p. 121.
31 O'Halpin, *Defending Ireland*, p. 15.
32 Ibid.
33 Ibid., p. 16.
34 J.J. Lee, *Ireland 1912–1985: politics and society* (Cambridge, 1990), p. 99.
35 Ibid.
36 Ibid.
37 Duggan, *Irish army*, pp. 150, 155. Over five years, the total numbers of army personnel as constituted on 31 March each year was: 1923, 48,176; 1924, 16,382; 1925, 15,838; 1926, 15,522; and 1927, 11,572.

38 *Dáil Éireann deb*., T, no. 4, 183 (16 Dec. 1921).

39 Record of negotiations on Irish Constitution entitled 'Conference on Ireland', May 1922 (The National Archives, London (TNA), Cabinet Office Files (CAB) 43/7, pp. 93–8).

40 Letter from Arthur Griffith to the prime minister, 2 June 1922 (TNA, CAB 24/137, p. 74). Presumably, he means Carson and John, Lord Atkinson, who were also criticised by Thomas Jones (principal assistant secretary to Lloyd George) for being involved in politics as judges (see Thomas Jones, *Whitehall diary*, iii: *Ireland, 1918–1925*, ed. Keith Middlemas (London, 1971), p. 204).

41 Griffith to the prime minister, 2 June 1922.

42 Ibid.

43 Barra Ó Briain has given the following explanation of the South African position in relation to the Privy Council appeal: 'The general rule is that no leave is given where the question is one that can best be determined in South Africa, or if it is essentially a South African question, no matter how important it may be' (see Barra Ó Briain, *The Irish Constitution* (Dublin, 1929), p. 120). It has also been described in a South African legal textbook as follows: 'The privy council will not readily grant leave to appeal. It will not do so in cases raising questions of a local nature; it may do so in cases raising serious constitutional questions. Very few appeals indeed are heard from the appellate division of the supreme court by the privy council' (see W.P.M. Kennedy and H.J. Schlosberg, *The law and custom of the South African constitution* (London, 1935), p. 376).

44 *Cahill v Attorney General* [1925] IR 70; *Londsdale and Others v Attorney General* [1928] IR 35; *Fitzgibbon and Others v Attorney General* [1930] IR 49; *Cassidy and Others v Attorney General* [1930] IR 65; (1924) 58 ILTR 131 (HC); [1925] 1 IR 149 (SC); [1929] AC 242 (PC). A more complete version of Meredith's judgment at first instance may be found as an appendix to the first appeal to the Privy Council; [1927] 1 IR 285 at 293.

45 [1925] 1 IR 149, at 161–2.

46 Ibid.

47 Ibid.

48 See Martin Maguire, *The civil service and the revolution in Ireland, 1912–38: shaking the blood-stained hand of Mr Collins* (Manchester, 2008), p. 190.

49 The dominions secretary stated in the House of Commons 'that the interpretation placed in Art. 10 by the Judicial Committee was not in conformity with the intentions of those who had framed the Settlement'. In addition, Lord Birkenhead stated that Lord Cave, who had presided over the court, had admitted that the conclusion he had drawn was 'probably wrong in law'. He also stated that 'this being so, the Irish Free State in his opinion had a constitutional right to amend the error by Irish legislation agreed with the British Parliament' (*Hansard 5* (*Lords*), lxxi, 808-56 (25 Apr. 1928)).

50 20 Geo. 5, c. 4.

51 The Colonial Laws Validity Act, 1865, had previously prevented colonies from enacting any legislation which would contradict legislation emanating from

Westminster. The Irish had argued the Act did not apply to Ireland in any case as Ireland was not a colony. The legality of the action was confirmed by the Privy Council in the case of *Moore v Attorney General* [1935] IR 472 and [1935] AC 484. The judgment was somewhat contradictory from an Irish perspective because while it declared that the legal origin of the Irish Constitution was the British Act rather than the Irish one – an argument which was never accepted in Ireland – it also held that, consequently, the Statute of Westminster meant the Irish Free State now had full legislative autonomy and could, therefore, abolish the appeal.

52 David Fitzpatrick, *The two Irelands: 1912–1939* (Oxford, 1998), p. 107.

53 *Belfast News-Letter*, 7 Dec. 1922.

54 Pakenham, *Peace by ordeal*, pp. 177–8; Jones, *Whitehall diary*, p. 164.

55 Arthur Griffith to Éamon de Valera, 9 Nov. 1921 (National Archives of Ireland (NAI), Dáil Éireann series files (DE) 2/304/8).

56 Éamon de Valera to Lord Longford, 25, 27 Feb. 1963 (National Library of Ireland, Erskine Childers Papers, MS 7848/302/2-10).

57 Pádraic Colum, *Arthur Griffith* (Dublin, 1959), pp. 295–8.

58 Michael Collins to Bishop Edward Mulhern, 28 Jan. 1922 (NAI, Department of An Taoiseach (DT) S 1801/2), cited in Paul Murray, *The Irish Boundary Commission and its origins 1886–1925* (Dublin, 2011), p. 106.

59 *Hansard 5* (*Commons*), cxlix, 314-15 (16 Dec. 1921).

60 John Kendle, *Walter Long: Ireland and the Union, 1905–20* (Dublin, 1992), pp. 191, 198.

61 Notes on Blythe's election address, 1923, (UCDA, Ernest Blythe Papers, P24/621(a)). Blythe's views regarding the desirability of a boundary commission subsequently changed. He came to view the establishment of the commission as an act of folly and expressed his regret that the government to which he belonged had participated in the commission's proceedings. Significantly, Blythe believed that any award of territory to the Free State would serve to consolidate partition and would give rise to further partition due to the division of counties.

62 *Dáil Éireann deb*., iv, 1226 (20 July 1923).

63 Ibid.

64 Northern Ireland cabinet conclusions, 30 July 1923 (Public Record Office of Northern Ireland, CAB 4/84/9).

65 *Dáil Éireann deb*., xii, 2502 (15 Oct. 1924).

66 Murray, *Boundary Commission*, pp. 192–3.

67 David Harkness, *Northern Ireland since 1920* (Dublin, 1983), p. 40.

68 The agreement was approved by way of the Ireland (Confirmation of Agreement) Act, 1925 (*Hansard 5* (*Commons*), clxxxix, 309-63 (8 Dec. 1925); *Hansard 5* (*Lords*), lxii, 1229-71 (9 Dec. 1925)). The Treaty (Confirmation of Amending Agreement) Act, 1925, gave effect to the Tripartite Agreement in the Free State. It was passed in the Dáil by 71 votes to 25 (*Dáil Éireann deb*., xiii, 1653-769 (10 Dec. 1925)). The Seanad passed the legislation by 35 votes to 7 (*Seanad Éireann deb*., vi, no. 4, 123-242 (16 Dec. 1925)).

69 *Belfast-Newsletter*, 8 Dec. 1922.
70 12 & 13 Geo. V, c. 4.
71 For example, Nicholas Mansergh has written that the Treaty was formally ratified on 14 January 1922 (Mansergh, *Irish Free State*, p. 39).
72 It is evident that this confusion did not exist at the time and that all sides knew that approval had not meant ratification.
73 D.H. Akenson and F.P. Fallin, 'The Irish Civil War and the drafting of the Irish Constitution' in *Éire-Ireland*, v, no. 1 (1970), p. 20.
74 12 & 13 Geo. V, c. 4.
75 13 Geo. V, c. 1, session 2.
76 No. 1 of 1922.
77 The Constitution also specifies in the preliminary that any laws or provisions which are inconsistent with the Treaty are invalid.
78 Unwritten conventions are a feature of the British tradition (see A.V. Dicey, *General characteristics of English constitutionalism: six unpublished lectures*, ed. Peter Raina (Oxford, 2009), p. 67).
79 'The procedure was that the Provisional Government should decide on the draft of its Constitution and then there should be a meeting with the British government at which it should be agreed that this draft did not conflict with the Treaty' (Record of negotiations on Irish Constitution (TNA, CAB 43/7, p. 61)).
80 F.S.L. Lyons, *Ireland since the Famine* (London, 1973), p. 508.
81 Ibid.
82 Michael Laffan, *Judging W.T. Cosgrave* (Dublin, 2014), p. 266.
83 Per Sankley, L.C. [1935] I.R. 472 at 486-7 and [1935] A.C. 484 at 499, cited in Thomas Mohr, 'The Privy Council appeal as a minority safeguard for the Protestant community of the Irish Free State, 1922–1935' in *Northern Ireland Legal Quarterly*, lxiii, no. 3 (Oct. 2012), p. 392. The Privy Council's verdict permitted the Free State parliament to amend the Constitution based on the provisions of the Statute of Westminster 1931, which did not prevent this course of action.