

## Duffy, George Gavan by Gerard Hogan

Duffy, George Gavan (1882–1951), politician and judge, was born 21 October 1882 at Rose Cottage, Rock Ferry, Cheshire, the eldest son of Sir Charles Gavan Duffy (qv), nationalist politician and prime minister of Victoria, Australia (1871–2), and his third wife, Louise Hall of Rock Ferry, who was the niece of his second wife, Susan Hughes (d. 1878). His siblings included Louise Gavan Duffy (qv), revolutionary and teacher. His half-brother Sir Frank Gavan Duffy (1852–1936) was chief justice of Australia. George's mother, Louise, died in 1889 and George himself was subsequently raised by three of his half-sisters, who had travelled from Australia to France to keep house for their father at the Villa Guillory in Nice, where George was raised. He learnt to speak fluent French and Italian, and he received his early education at the Petit Séminaire. He was then educated at Stonyhurst College, the Jesuit public school in Lancashire, and took a three year post-school course known as 'philosophy' in lieu of attending a university.

**Early career** Duffy qualified as a solicitor in London in 1907, and married Margaret Sullivan (1876–1967), the daughter of A. M. Sullivan (qv) (d. 1884), on 23 December 1908. There were two children of the marriage, a daughter and a son, Colm, who became a noted legal scholar in his own right, and the librarian of the Law Society of Ireland.

Duffy had occasional contact with the leadership of Sinn Féin after his marriage, but he first came to prominence as solicitor for Roger Casement (qv) during his trial for treason in 1916. The Casement trial seems to have affected him deeply, for he afterwards moved to Ireland and was called to the bar by the King's Inns in 1917. He became deeply immersed in Irish political life, and was elected for Sinn Féin for Dublin County South in the 1918 general election. His considerable linguistic ability meant that he was ideally suited to act as an envoy for the republic, in which capacity he joined Sean T. Ó Kelly (qv). As dáil representative in Paris he published articles and pamphlets in the French press that caused the British government considerable embarrassment; he was declared *persona non grata* in September 1920 following his publication of a letter to the French prime minister Georges Clemenceau in protest against the treatment of Terence MacSwiney (qv) in prison. He then moved to Rome, and throughout Europe, constantly urging support for the Irish cause.

**The Treaty** In October 1921 he was appointed by Éamon de Valera (qv) as one of the Irish plenipotentiaries to negotiate with the British government, presumably because of his legal expertise. Although alone of the negotiators he did not believe in Lloyd George's threat of renewed war if the proposed terms were not accepted, he nonetheless felt morally bound to sign when the other plenipotentiaries had done so. His attitude to the treaty was best summed up by his own eloquent speech in the dáil on 21 December 1921: 'I do not love this

Treaty now any more than I loved it when I signed it, but I do not think that that ... is an adequate motive for rejection to point out that some of us signed the Treaty under duress, nor to say that this Treaty will not lead to permanent peace. It is necessary before you reject the Treaty to go further than that and to produce to the people of Ireland a rational alternative. My heart is with those who are against the Treaty, but my reason is against them, because I can see no rational alternative.' (*Dáil Debates*)

**Political differences and defeat** Duffy was appointed minister for external affairs in the provisional government in January 1922. He quickly became disillusioned with that government, and matters came to a head when the dáil courts were summarily disbanded in July 1922 in response to an order of Judge Diarmuid Crowley (qv), of the dáil supreme court, directing the release of the son of Count Plunkett (qv), who had been held (along with other republican prisoners) following the outbreak of the civil war. Duffy resigned in protest, objecting that the government had abolished the dáil supreme court rather than meet an application for habeas corpus in open court. The conduct of the civil war further disillusioned him, and he was one of the courageous voices in the dáil who objected to the summary execution (sometimes without trial) of prisoners held by the Free State government.

The extent to which Duffy had parted company with the government was evidenced when Free State forces raided his private home at 39 Mespil Road in April 1923 – apparently in a search for de Valera – and took away certain private papers. Duffy's dignified protest in the dáil was met with a robust and cynical response by Kevin O'Higgins (qv), minister for home affairs. By this stage Duffy had drifted towards a position of constitutional opposition to both the treaty and the Free State government. While his contributions to parliamentary debate were impressive and constructive, he was not reelected when he stood as an independent candidate in the 1923 general election.

**Career at the bar** Following his defeat, Duffy concentrated on his career at the bar. After he published in 1925 a new edition of *The Irish justice of the peace* by Sir James O'Connor (qv), his practice began to grow considerably. By this stage, he had gravitated towards de Valera, and was advising him on the controversial issues of the oath of allegiance and the land annuities. He was one of the first members of the bar to recognise the possibilities of judicial review offered by the 1922 constitution and thus appeared in a series of cases dealing with questions such as internment without trial, the nature of the judicial power, and the extent to which pre-1922 law was carried over into the independent state. He took silk on 29 May 1929; reflecting his long-standing enthusiasm for the language, his call to the inner bar took place entirely in Irish. He subsequently subscribed to the declaration of judicial office in Irish.

When Fianna Fáil came into office in 1932 de Valera wished to appoint Gavan Duffy as attorney general. The rest of the government were opposed: they could not accept a signatory of the treaty, and Conor Maguire (qv) (d. 1971) was appointed instead. There were some compensations, as Gavan Duffy was thereafter leading counsel for the state in some of the major Blueshirt cases of the 1930s, most notably *Re O'Duffy* [1934] (*Irish Reports*) and *The State (Ryan) v. Lennon* [1935] (*Irish Reports* 170). Though in the latter case the supreme court upheld the legality of constitutional amendments passed by the oireachtas providing for the constitution (special powers) tribunal (a military court with the power to try civilians from which there was no right of appeal), the court stressed that the oireachtas had no power to amend the treaty. This must certainly have been one of the factors behind de Valera's decision to have a new constitution put before the people. Gavan Duffy was one of the limited number of persons with whom de Valera consulted extensively over the drafting of the new constitution, and many of his suggestions were taken on board by the drafting committee. For his part Gavan Duffy was a huge admirer of the 1937 constitution and was one of the first to see the enhanced possibilities for judicial review afforded by it.

**Gavan Duffy as judge** Appointed a judge of the high court on 21 December 1936, he was appointed president of the high court on 30 April 1946. He gave leading judgments in almost every branch of the law, but it is in the realm of constitutional law that he made his most notable contribution. Two particular judgments stand out. In *The State (Burke) v. Lennon* [1940] (*Irish Reports* 136) Gavan Duffy held that the internment provisions of part VI of the Offences against the State Act 1939 were unconstitutional and were contrary to the guarantee of personal liberty in article 40.4.1. As a result of this decision the government felt obliged to release all IRA prisoners currently in detention. It is believed that some of the released prisoners instigated the raid on the Magazine Fort in Phoenix Park. This resulted in a major security alert, and the oireachtas passed new (slightly amended) internment legislation. This legislation was then referred by the president, Douglas Hyde (qv), to the supreme court under article 26 of the constitution – the first occasion in which this procedure was utilised – and a majority of that court upheld the legislation.

The other case in which he gave a notable judgment was the Sinn Féin funds case, *Buckley v. Attorney General* [1950] (*Irish Reports* 67). This arose from the oireachtas having enacted the Sinn Féin Funds Act (1947). This act identified certain pending litigation brought by Mrs Margaret Buckley (qv) on behalf of Sinn Féin, to recover certain funds lodged in court by trustees of Sinn Féin in the immediate aftermath of the civil war. The 1947 act directed the high court to reject the claim and to transfer the moneys to a new board, Bord Cisti Sinn Féin, which would then apply them to charitable purposes. Duffy held that this legislation was unconstitutional, since it required the courts to dismiss a claim on the merits without a hearing, and also violated the constitution's principles

regarding the separation of powers. This impressive judgment was confirmed on appeal by a seminal decision of the supreme court.

On the debit side was Gavan Duffy's decision in *Schlegel v. Corcoran and Gross* [1942] (*Irish Reports* 19), perhaps the most notorious decision ever given by an Irish court. Here Mrs Schlegel, a devout Irish catholic, had refused to allow the assignment by the existing tenant of the lease of three ground-floor rooms in her family home in Harrington Street, Dublin (which her late husband had used for the purposes of his dental practice), to Mr Gross, on the ground that he was Jewish. Her evidence was that she had objected because she 'could not have an anti-Christian living in the house where I live'. Section 56 of the Landlord and Tenant Act (1931) enabled the courts to dispense with the consent of the landlord if the latter had unreasonably refused consent, but a critical consideration was the fact that the premises in question constituted part of Mrs Schlegel's family home. Noting that the parties would have to share certain facilities, Gavan Duffy proceeded to reject Mr Gross's contention that Mrs Schlegel's refusal was unreasonable in language that was plainly objectionable: 'Anti-Semitism ... far from being a peculiar crotchet, is notoriously shared by a number of other citizens ... the antagonism between Christian and Jew has its roots in nearly two thousand years of history and is too prevalent as a habit of mind to be dismissed off-hand, in a country where religion matters, as the eccentric extravagance of a bigot, without regard to the actual conditions under which consent was withheld.'

Cannon, in an excellent and sensitive treatment of this decision, has pointed to the fact that even the later Equal Status Act 2000 exempts the leasing of a dwelling which is part of a family home from the scope of anti-discrimination legislation, thereby acknowledging the importance of personal autonomy in areas directly affecting a citizen's personal life. She nevertheless deplored the language and tone of the judgment, which, in the words of John Maurice Kelly (qv), displayed the 'dark side of a remarkable judge'.

Some of Gavan Duffy's strong feelings on religious issues come across in his judgments in *Cook v. Carroll* [1945] (*Irish Reports* 585), upholding the right of a priest not to be compelled to give evidence about matters imparted to him in confidence, and in *Re Tilson* [1951] (*Irish Reports* 1). The latter case (which has been much misunderstood by historians) concerned a dispute between a husband and wife concerning the religious upbringing of their children. The husband had agreed before the marriage that the children would be brought up as catholics, but later sought to repudiate that agreement. Gavan Duffy held (correctly) that the old common-law rule of paternal supremacy in such matters had not survived the enactment of the 1937 constitution and that the husband had entered into a binding agreement. He did so, however, in terms that implied that Roman catholicism had some privileged status in Irish law. Though the judges of the supreme court upheld Gavan Duffy's conclusions, they were careful to distance themselves from his remarks and his reasoning.

Gavan Duffy gained a remarkable reputation as a judge. His elegantly written judgments, while at times over-ornate in style, are striking in their originality. They helped to carve out a distinctive Irish jurisprudence that departed from the English tradition of legal positivism, and his belief in the fundamental values enshrined in the constitution contributed very significantly to the evolution of constitutional jurisprudence and the development of judicial review. Gavan Duffy died in Dublin, in St Vincent's private nursing home, 96 Lower Leeson Street, on 10 June 1951, having suffered from lung cancer.

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*Dáil Debates* (1921–3); *Irish Reports* (1923–51); *Irish Law Times and Solicitors' Journal*, lxxiii (1929), 129; lxxi (1937), 3; lxxx (1946), 129; lxxxv (1951), 146; *Ir. Times*, 11 June 1951; Frank Gallagher, 'An interim assessment of the late Mr Justice George Gavan Duffy as advocate and judge', *Gazette of the Law Society of Ireland*, lxx (1976), 177; G. M. Golding, *George Gavan Duffy, 1882–1951: a legal biography* (1982); Gerard Hogan, 'The Sinn Féin funds judgment fifty years on', *Bar Review*, ii (1997), 375; Gerard Hogan, 'A fresh look at Tilson's case', *Irish Jurist*, xxxiii (1998), 311; Gerard Hogan, 'The supreme court and the reference of the Offences against the State (Amendment) Bill 1940', *Irish Jurist*, xxxv (2000), 238; Ronan Keane, 'Across the Cherokee frontier of Irish constitutional jurisprudence: the Sinn Féin funds case', E. O'Dell (2000), *Leading cases of the twentieth century*, 185; Gerard Hogan, 'Directive principles, socio-economic rights and the constitution', *Irish Jurist*, xxxvi (2001), 174; ODNB; Kenneth Ferguson (ed.), *King's Inns barristers 1868–2004* (2005); Ruth Cannon, 'The bigoted landlord: a re-examination of *Schlegel v. Corcoran and Gross*', *Dublin University Law Journal*, xxvii (2005), 248.

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