

The Economic and Social Review, Vol. 39, No. 3, Winter, 2008, pp. 257–265

Book Review

WILLIAM KINGSTON, 2007, *Interrogating Irish Policies*, Dublin: Dublin University Press, 148 pages.

Interrogating Irish Policies draws together 10 of the author's papers published between 1976 and 2006 and adds a concluding chapter written specially for this volume. It provides a fascinating and thoroughly unique perspective on a range of important issues that are normally dealt with in isolation (when considered at all). Amongst these are how innovative lawmaking can substitute for microeconomic intervention, and why the latter is almost invariably chosen in Ireland; the appropriate role of the public sector bureaucracy and how it can be re-engineered to function more efficiently; and aspects of Irish STI (science, technology and innovation) policy, and particularly how innovative treatment of Intellectual Property issues can be used to expand the level of commercial innovation in Ireland. In the author's world view, these seemingly diverse issues form a coherent whole. The current debate on public-sector efficiency and the massive increase in Irish STI funding over recent years combine to make the present volume both timely and valuable.

Having completed an MA in History at UCD, Bill Kingston came to the Trinity College School of Business in 1969, courtesy of a research fellowship awarded to expand a research paper on "Invention and Monopoly" into his first book. Since then his focus has been on entrepreneurship (including unproductive entrepreneurship, i.e. rent seeking), innovation and intellectual property rights. The writing of that paper and his move into the arena of economics and political science were stimulated by his encounter with the writings of Joseph Schumpeter. Schumpeter's star has of course risen in recent times as his work on "creative destruction" has been followed up by evolutionary economists like Nelson and Winter and endogenous growth theorists such as Aghion and Howitt. Indeed, Nobel laureate Robert Solow – whose macroeconomics is largely Keynesian – has recently remarked that "today, some sixty years after their deaths, Schumpeter's star probably outshines Keynes's."¹ Schumpeter remains the economist most cited by Kingston.

¹ http://economistsview.typepad.com/economistsview/2007/05/robert_solow_on.html

The author's world view, as it appears from this volume, might be synthesised as follows:

- The fundamental problem of democracy, as the framers of the US constitution recognised, is that its service to the public good will be damaged if captured by "faction", or what today would be termed vested interests. This vulnerability to the demands of special interests is accentuated by Ireland's multi-seat proportional representation voting system. The power of interest groups increases the importance of the civil service as defender of the public good, which can only be articulated by those who are largely independent of special interests. As in Schumpeter, the bureaucracy must be in a position to evolve principles of its own and be sufficiently independent to assert them. It must be a power in its own right. In Thomas Jefferson's phrase, it is a new "body of magistracy".
- The way the Irish system has evolved has prevented or eroded the ability of the public service to fulfil this role. Instead, the public service as currently configured sides with politicians and special interests in preferring microeconomic interventionism to the construction of appropriate and innovative legal structures, even though – in the author's view – the latter can generally achieve desired social outcomes more efficiently. Hence, there is a need to re-engineer civil-service structures to allow it to fulfil its appropriate role more efficiently.
- The choice between intervention and appropriate legal structures receives particular attention in the case of Science, Technology and Innovation, where an appropriate and innovative Intellectual Property rights regime is argued to be crucial to incentivise indigenous firms to engage in patent-oriented R&D activity and wean Ireland off its dependency on US foreign direct investment.

The remainder of this review follows this three-part structure in explaining and assessing Kingston's position and the policy innovations he advocates to counteract the problems he identifies in the current regime.

Democracy, Vested Interests and the Civil Service

In Chapter 2 – "The Lemmings of Democracy", first published in 1976 – Kingston notes that democracy, which allocates power to voter numbers, can promote growth when it serves as a counterbalance to the power that independent wealth, by its very nature, possesses. This argument was developed in greater detail later in a highly-regarded book by Usher (1981). A more recent formulation by Acemoglu, Johnson and Robinson (2005) argues that:

Economic institutions encouraging economic growth emerge when political institutions allocate power to groups with interests in broad-based property rights enforcement, when they create effective constraints on power-holders, and when there are relatively few rents to be captured by power-holders.

Even in this benign state, however, we run into the difficulty, enunciated well by Garret FitzGerald (2000), that:

Democratic national governments tend to be subject to such strong pressure from vested interests within their own territories that many of their decisions operate against the interests of society as a whole.

The Irish electoral system increases the power of vested interests for a number of reasons, including the fact that “because it makes it so difficult for any party to obtain an overall majority, Irish governments have always been vulnerable to rent-seeking by small groups which control a mere few seats”.²

Because of a mistaken “belief in the superior wisdom of the state” that prevails in Ireland, interventionism is typically preferred to innovative lawmaking in this country.³ Three problems arise in this regard: (i) “civil servants have shown themselves to be poor protectors of the public interest in negotiations with private-sector entrepreneurs”; (ii) *regulatory capture* is frequent in interventionist regimes, and (iii) interventionism is favoured by the bureaucracy because it increases its power.

The argument with respect to the first point is that “public sector employees, who can neither gain nor lose much as a result of any outcome, are no match for individuals who eat, sleep and dream the task in hand because they can gain so much from it”. A relevant example that springs to mind in this regard was the necessity for the recent hugely-expensive buyout of the West Link toll bridge. For these reasons, Kingston is generally suspicious of Public Private Partnerships and cites on page 11 an unintentionally hilarious intervention by the then-Taoiseach castigating Irish firms for wanting only profits without risk. A prime example of *regulatory capture* was provided by the revelations – hugely damaging to the Department of Agriculture – that emerged from the Beef Tribunal. And as an example of how the bureaucracy struggles to maintain and expand its powers, the author tells the story of the origins of the Business Expansion Scheme. Having failed to convince the Irish government of the merits of such proposals, his ideas were later adopted by the UK. “When John Bruton was Minister of Finance, he wanted to copy what had by then become a considerable success in Britain, but the IDA resisted because they feared it would reduce rent-seeking firms’ dependence on them for grants. However, Bruton got his way and BES schemes are still being operated in Ireland” (page 12). However, “while the relief was explicitly intended to take the place of state grants, in service industries it is only obtainable in association with an IDA grant, which cannot just be for a feasibility study” (page 62).

The author is critical on numerous occasions of the scope for rent seeking provided by EU Regional Aid allocations (e.g. pages 34, 53, 117), suggesting that a greater impact on competitiveness could have been achieved had they been used to reduce PRSI – which would not of course have been allowed. These echo concerns expressed at the time by Sean Barrett (1992/93) and indeed by the Department of Finance itself on Ireland’s Marshall Aid allocations in the post-war period (Fanning, 1978, chapter 10).⁴

² He notes (page 116) that PR might assist in counterbalancing interest groups if there were strict limits on payments to political parties. Without them, it leaves the system even more vulnerable to special interests than do other voting arrangements.

³ “Belief in the Superior Wisdom of the State” (Chapter 1, first written in 2006) explores the origins and strength of this belief.

⁴ He argues that economic convergence between rich and poor EU states cannot be brought about by financial transfers, but only by differential property rights. In proposing this, he is forced of course to the view that the Irish boom has been driven solely or largely by US inward FDI.

While one can sympathise with this, my own view is that Ireland's expenditures of EU funds were more productive and that might be recognised at this abstract level because they brought back on stream the necessary infrastructural projects that had been put on hold during the fiscal retrenchment of the late 1980s. The author has come to recognise however (page 1) the value of the EU in helping to surmount the difficulties identified by Garret FitzGerald above. "In the Irish case", he notes, "the EU, with all its faults, has provided such a constraint for nearly two-thirds of all legislation". Numerous other examples spring to mind of how the EU has helped thwart clientalist policies; one pithy one being its refusal to have Kerry and Clare included as part of Ireland's "Objective 1" BMW region.

The Role and Efficiency of the Civil Service

Markets, the author notes, are man-made artefacts, based largely on property rights. Much market failure, he suggests, is in fact legal failure: the failure of those in power to construct appropriate frameworks for market activities (page 30). "Developing new kinds of law, to generate an environment within which individuals acting freely in their own interest also serve the public good, is always an alternative to intervention" (page 60). Laws which generate effective property rights, he argues, would prevent politicians from benefiting their constituents directly, would ensure that bureaucrats could not exercise power without responsibility, and would remove from powerful lobbies the fulcrum they need to exert leverage.

He provides numerous examples (page 36) of where the state has intervened at low levels of effectiveness, "which must be damaging to civil service morale because it asks the civil service to do things that others can do better. In contrast, formulating the detail of laws within which individuals acting in their own interest are forced to serve the public good is a task which only a public bureaucracy can perform".

He goes into depth in a number of thought-provoking cases. The 2001 report of the Ombudsman noted that "the planning system is in crisis because the authorities lack resources to police conformity with permissions". This led to calls for a major expansion in the number of employees in Planning Offices around the country. The problem could have been solved, he suggests however (page 88), by nothing more than a one-line amendment to the law, analogous to the law which imposes stamp duty on many kinds of contracts. "The Courts will almost never consider a document which should have been properly stamped but which has not been.... If a building contract which was not in exact compliance with planning permission was made similarly unenforceable, the policing of permissions would be done by builders, architects, sub-contractors etc., with no cost to the state, and more meticulously than by any planning inspector, as they would not otherwise have an enforceable contract."

He has a similar practical solution for the scandals that have arisen with respect to companies whose beneficial ownership could not be identified.⁵ Noting that "limited liability is not a right but a privilege granted by society for a public purpose", he argues that there is no reason why society should not require, as a position of granting this privilege, that the identity of anyone taking advantage of it should be publicly known" (page 90). A one-line amendment to the relevant law could make any agreement in

⁵ He mentions various Revenue cases and the Greencore and Telecom Éireann scandals of the 1990s. To these can be added the Jackson Way case that featured prominently in the Flood Tribunal.

relation to a limited company non-justiciable (i.e. unenforceable through the Courts) to the extent that it had the intention of hiding the company's beneficial ownership. "No bank would put up money", he notes, "if the legal position was that neither an investor nor anyone fronting for him would be able to provide it with an enforceable lien on collateral".

The major policy innovation he suggests to promote innovative lawmaking over intervention is to develop a small elite group in each government department whose only function would be to suggest how changed or new legislation could contribute to solving a particular problem before any decision is taken about it (page 12). Whilst recognising (page 36) that the electoral system is not well-suited to producing politicians with the intention and ability to withstand pressures to intervene, at present they receive no such alternative advice. And in the present straightened economic circumstances, the likely cost effectiveness of any such innovations that make it through the system might create a snowball effect.

He has two further radical proposals for public-sector reform. The first (in Chapter 3) – on the determination of public-service pay – I will avoid for reasons of space. The second – for a Whistleblowers' Charter – is discussed at greater length (in Chapters 6, 7, 8 and 11, written between 2001 and 2007) and appears to be of fundamental importance. He argues that it could have prevented some of the major public-service failures of recent times, many of which had tragic consequences and cost the state substantial sums of money. These include the transfusions of lethal blood, illegal charges for long-stay institutional care, police criminality in Donegal, the PPARS health-service payroll system, electronic voting machines, the failure of the Revenue Service to stand up to then-Taoiseach C.J. Haughey, the corruption of the system by Justice Minister Sean Doherty, the failure to advise a judge of the Special Criminal Court when his tenure had come to an end (making the resulting decisions of the court illegal), the Brendan Smith case which brought down a government, and the declaration of unconstitutionality of the statutory rape law.

All of these, he suggests, are indicative of a public-service environment which incentivises both the evasion of responsibility and inappropriate compliance with the wishes of the system's political masters. The blame is attached to the environment itself; he sees the response of individual public servants as completely rational within that environment.

The nature of the modern civil service, he argues, is that the task of a department can never be other than secondary to the career security of the individuals employed in it, and the rewards for success by no means balance the penalties for failure. In this case, what counts is the avoidance of attributable failure, and the main techniques for achieving this are the proliferation of committees and constant movement of senior personnel. Amongst the factors which have reduced the independence of the civil service are the new limitations on the term of office of departmental heads and changes to the system of making top appointments. On the first point, the possibility of new and lucrative careers starting in their fifties means that senior civil servants cannot be indifferent to the wishes of Ministers who hold appointments to lucrative quangos in their gift or to those of powerful businessmen with whom they come in contact. That this is the case is obvious from the report of one of the British inquiries into the causes of the Iraq war. It recommended that the post of chairman of the Joint Intelligence Committee should never again be held by anyone other than an official "who is demonstrably beyond influence and thus probably in his last post". On top-level

appointments, the offer of three names to Ministers for senior appointments “obviously makes ambitious civil servants more compliant with their wishes.”

The author produces a clearly thought-through model for how a Whistleblowers’ Charter might work. It proposes an Ombudsman with the power to release any civil servant from their secrecy obligations upon demonstration of good cause and would have the power to award the whistleblower the option to retire on pension if his or her career suffered as a result. Of course, the very existence of such a scheme would force supervisors to act on internal complaints since otherwise they themselves would be blamed for having the failures become public knowledge. “Those in charge would have done the right thing, not because they wanted to, but in fear lest some individual who was protected in this way might shout ‘Stop!’” (page 85). Such a system would have needed only a few individuals who took the responsibilities of their departments seriously to save the country from the problems and costs associated with the present regime.⁶

Alternative kinds of reform, he concludes, which try to make public administration mimic private sector efficiency on the basis of ‘technical rationality’ are quite secondary in importance to this. And it is hard to disagree.⁷

Intellectual Property Rights and Science Technology and Innovation Policy

The author has a particular interest in the area of intellectual property rights (IPR). He notes how Ireland sleep-walked into ratifying the Paris Convention for the Protection of IP in 1925 without recognising that the Convention had not been devised with the interests of small and poor countries in mind, and of how we have followed the same path ever since. He is particularly critical of the TRIPS agreement within the WTO when, “in effect, 12 corporations made public law for the world”. On this, he is in accord with the views of Jagdish Bhagwati (1998) – one of the world’s foremost free traders.

It would have been valuable however, in his discussion in Chapter 3 of Mjoset’s well-known 1992 report for NESC – which contrasted Ireland’s poorly-developed national innovation system to that of the Nordic countries – to see the evidence on whether this resulted primarily from differing IPR regimes. Nor is the “varieties of capitalism” literature discussed (Hall and Soskice, 2001), which holds that the system of IPR must fit with the rest of the make-up of the economic system, including corporate governance, labour and inter-corporate relations, competition policy and skill formation processes. This literature suggests that these institutional complementarities, in liberal market economies on the one hand and coordinated

⁶ Chapter 6 deals extensively with the case of the whistleblower whose revelations led to the resignation of the entire Jacques Santer European Commission, and who has written that “whistle blowing is not a necessary evil. It is a guarantee against the persistence of structurally endemic fraud and irregularities. It is an illusion to think that stricter regulations and a perfect audit policy can wipe out all major irregularities” (which further supports the author’s mantra that “if we do not get the laws right, intervention will not work, and to the extent that we get them right, it is unnecessary”).

⁷ His proposals have been criticised by some in the civil service on the grounds that they would damage group cohesion. On group cohesion versus the public good, however, he points (page 128) to the behaviour unearthed by the Medical Council’s Fitness to Practice Committee which investigated how the three obstetricians asked to look into the conduct of Drogheda’s Dr. Neary came to provide the latter with glowing references.

market economies on the other, give rise to distinctive forms of innovation and comparative institutional advantages.

Chapter 5 (written in 1989, long before Science Foundation Ireland was established) warns that “spending public money on science only tends to produce more science, not competitive products. The alternative – creative lawmaking – is arduous, gives no scope for empire-building, and produces less money for *fundamental* research.” I have argued, in Barry (2005), that while the SFI strategy fits well with the recent growth in global offshoring of R&D functions by US MNCs, on its own it is unlikely to achieve what then Enterprise Minister Mary Harney hoped from it, that it would represent the genesis of a process out of which will emerge “our own Michael Dell or Bill Gates”. And a recent conversation I had with the Director of one of SFI’s Centres for Science, Technology and Engineering confirmed that he too is unsure of how this outcome might be expected to emerge.

As in the other areas considered, the author has a number of innovative ideas to propose. Noting that while the link between invention and innovation (“a new idea turned into concrete reality”) is strong in the case of pharmaceuticals, it is weak in many other sectors (page 98). The classical patent system protects innovation only indirectly, through protecting inventions, and so caters only for firms which are at the leading edge of world technology “since only these will have economically relevant ‘teachings’ that are not anticipated by earlier publications in the scientific literatures” (page 100). Hence it is biased in favour of countries that are home to most of the leading technological industries. Furthermore, since at present a patent is effectively no more than a license to litigate, its value depends on the size of the owner’s purse.

The author instead advocates Direct Protection of Innovation (DPI) for which the qualification for protection is simply “non-availability in the country/region in the ordinary course of trade”. The DPI proposal also includes the notion that the state will take a hand in policing the monopolies that it grants. At present it would be legal for Ireland to establish its own DPI arrangements, and until these were copied in other countries it would have a unique advantage in respect of innovation.⁸

Noting that a 2001 study done for the EU found that every patent owned by small European firms in the US that was of any value was infringed there, he also presents proposals for patent litigation insurance, which have attracted interest in some other EU states. His proposal makes use of the fact that “contingency fee arrangements” are available in the US, where the client company has no liability to pay its own lawyers but, if the case is won, the law firm is entitled to a large share of the damages awarded. Clients have to pay all related costs such as document discovery, however, and these can be substantial enough to scare off most small firms and universities. His proposal is that the Irish authorities set up a programme to fund these incidental costs when an Irish company has found a US law firm that is prepared to take its case. All the cover Irish agencies would need would be provided by the US legal firm’s decision to invest its own resources in the case. Such an initiative, he suggests, would greatly increase the incentive for Irish firms to engage in patent-oriented R&D activity.

⁸ He notes the success of US “Orphan” drug protection – for development of drugs for diseases suffered by relatively few patients – where protection is granted not for the concept of the new drug nor even for laboratory proofs that it is effective, but only for the fully developed and tested drug, ready to go onto the market. This protection, which can be put into effect outside of the TRIPS framework, has resulted in a twelve-fold increase in the relevant drugs.

To bring the story right up to the present time, Kingston (2008) notes that Article 118 of the Lisbon Treaty gives qualified majority voting power to Brussels “to provide uniform intellectual property rights protection throughout the Union ... and for the setting-up of centralised Union-wide authorisation, coordination and supervision arrangements”. This will reduce competition and innovation in IP lawmaking, to the particular detriment, he argues, of smaller countries and firms.

Conclusions

I am not convinced that “developing new kinds of law ... is *always* an alternative to intervention” (italics added) and that it can correct all market failures. The author provides a strong case though that it should *always be considered*, and that it could be very cost effective. His case for the cost-effectiveness and other beneficial effects of a Public-Service Whistleblowers’ Charter is also very convincing.

Creative lawmaking however would obviously need to be as carefully monitored as microeconomic interventions, given that regulatory capture appears as widespread in lawmaking as elsewhere. The now widely-discredited property tax shelters of recent years spring to mind. The author himself notes (page 115) that “the record in the US shows that after about its first century and a half, laws increasingly tended to be shaped by those who could benefit from them”. Path dependence in the system imparts a huge element of stasis and his “Lemmings of Democracy” jeremiad is correct in noting that no individual crop of elected politicians could be expected to initiate or support changes such as a reduction in Dáil numbers or partial movement towards an electoral list system, even if widely agreed by society to be beneficial.

The policy-reform literature provides some glimmer of hope. The “force of ideas” argument posits that intellectuals and opinion makers play a role in convincing politicians and/or the electorate that particular policy changes can be beneficial. The Bayesian-updating argument suggests that crises can be fruitful: if there is incomplete information concerning the mapping between policy choice and outcomes, and if policymakers’ perceptions are biased in favour of one set of policies, a crisis can force them to change their view of the world while minor downturns can be more easily rationalised as due to external factors.

Finally, there is one dimension to the role of the public service that I think the author overlooks. He emphasises the ‘autonomy’ element necessary to counteract clientalism and corruption. Ó Riain (2004), following Evans (1995), argues the need for this autonomy to be ‘embedded’ (in the case of the industrial development agencies – in agency clients and constituencies). This recognises that the public-sector bureaucracy acts both as a buffer and channel of communication between private enterprise and government. Private interests’ lobbying of government might most often be aimed towards achieving benefits for themselves at the expense of others. At times, though, it might also convey genuinely useful asymmetric information that can trigger positive-sum government responses. An efficiently-functioning bureaucracy can assist in distinguishing one form of lobbying from the other. Creative lawmaking alone is unlikely to offer the flexibility to be able to respond rapidly to emerging market opportunities and changing factor-market conditions.

I will conclude with a brief note on style. As the author accepts, some references in the earliest written chapters have been overtaken by events and there is a fair amount of repetition since the various chapters were written for different readerships. The valuable ideas expressed in this book deserve a broad audience and its appeal would

have been broader, I think, if it had been re-worked into a through-written monograph rather than presented *as is*, as a collection of essays.

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