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New Beginnings: Constitutionalism & Democracy in Modern Ireland

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Reviewer:

Michael Kerr

Bill Kissane's third book on the origins of democracy and the state in modern Ireland offers a challenging vision to constitutionalists in Ireland, one which will no doubt spark much debate, criticism and serious reflection amongst Irish historians, political scientists and constitutional lawyers. The title of the book is *New Beginnings*, but Kissane's argument that the nodal points in Irish constitutional history are the consequence of Irish nationalist state-building failures, as well as the legacy of partition, is consistently and convincingly made throughout. He takes the position that Irish nationalism is not a value system that pervades all of Irish constitutionalism, but that Irish constitutionalism is an autonomous part of Irish political culture, where a blend of constitutionalist and nationalist values produced a distinct form of constitutionalism in the 20th century. He argues that while constitutions are 'external' to the political system in the sense that the issues from which they derive their authority, such as revolution, independence and set of values broadly representative of society, are outside of the political spectrum, they are 'internal' in the sense that they shape the distribution of power across government institutions. In the case of modern Ireland, as the religious, nationalist and patriarchal values that gave Irish constitutions their 'external' authority came unstuck, the ways in which the constitution distributed power across those institutions is fundamental to our understanding of how it was challenged at different points in contemporary Irish history, and the outcome of those challenges.

Kissane addresses the question of why Irish politicians have seen constitutions as a device for making the state more manageable, as opposed to furthering, underpinning and consolidating democracy. By this he means that despite the consistent influence of the Westminster model and British democracy on Irish constitutionalism, Ireland's constitutional trajectory illustrates that, out of the party system that emerges from the civil war, Fianna Fáil used constitutionalism to consolidate its hegemonic position within the Free State and subsequently the Republic of Ireland. In doing so, he focuses on five turning points in the Irish state-building venture. These points are attempts at 'new beginnings', but they actually represent the 'incompleteness' of Irish state-building and the absence, to date, of any constitutional formula for consolidating the state by addressing and managing the ethno-national divisions that led to partition and created a polity in the south that became constitutionally premised on its own disestablishment at some future point. Public consciousness of 'a revolution incomplete' is reflected in both the Gaelic, nationalist and Catholic nature of constitutionalism and change in modern Ireland, and the irredentist obligation placed upon successive Irish governments by Éamon de Valera's 1937 constitution, which rejected the 1920/21 settlement and institutionalised the state's claim to Northern Ireland. So Irish constitutionalism revolved around Fianna Fáil's struggle to consolidate the state, and the task of squaring the circle of past state-building failures was largely ignored.

The first 'new beginning' is the revolutionary period of 1916/23, which saw British rule forcibly challenged in Ireland, 26 counties of Ireland ceasing to be an integral part of the UK, the partitioning of Ireland through the Government of Ireland Act 1920, and civil war between pro-treaty and anti-treaty forces in the south. These are the formative years of Irish constitutionalism and democracy, 'from home rule to Sinn Féin', when the ideals of revolutionary republicanism clashed with the reality of the deeply-divided society that was Ireland at the beginning of the 20th century, and the Hobson's choice the British government faced in attempting to settle rival claims to self determination in Ireland. The second period deals with the 1922 constitution, which continued the Home Rule tradition of viewing minority rights as integral to democracy. But this constitution was born out of the legacy of the Government of Ireland Act. As Kissane puts it, the 1916 republic (and Sinn Féin) found its nemesis in partition. This document suffered from the tension between its ambition to mark a 'new beginning' and its subordination to the Anglo-Irish Treaty, yet the objective of its drafters was to engage in a form of constitutionalism that delivered a degree of independence with the aspiration that nationalist objectives would be achieved when the Irish could move 'from treaty to constitution'. This was anathema to anti-treatyites, therefore the Free State emerged from a contested constitution with rival claims of monarch and republic clashing, and a 'winner takes all' mentality gestated at the heart of the Irish political system and prevailed.

The third moment is the repeal of the 1922 constitution and its replacement with the 1937 constitution, which was legitimised by plebiscite. Bunreacht na hÉireann attempted to deal with the past by renouncing

Ireland's unionist past and the British constitutional legacy that came with it. Here Kissane argues that the document was significant by the symbolic disjuncture it represented in Anglo-Irish relations and its rejection of the 1922 'from treaty to constitution' formula. Rather than heralding a new beginning, it represented an ultra-conservative attempt to consolidate the state system by reflecting public consciousness over the failures of the revolutionary period. It signified a break with the Free State's home rule origins, representing continuity rather than radical change or any sort of democratic constitutional experimentation. Articles two and three set out the nationalist position of what became the Republic of Ireland, thus de Valera's constitution sought to secure domestic stability and provide a framework for Irish unification. Critics viewed these articles as a constitutional time bomb; an impediment to bringing the six counties of Northern Ireland into a future 32-county governmental framework. More so, the Gaelic, nationalist and Catholic nature of de Valera's new republic was confirmed through this inward-looking constitutional engineering, making the south considerably less attractive to northern unionists than it had ever been. Kissane argues that this moment represents a symbolic shifting away from things past, through an attempt to move the state away from its revolutionary origins and consolidate central government. Critics labelled the constitution 'confessional', and while unionists in Northern Ireland had done little to mask their attempts to establish a Protestant state for a Protestant people, the 1937 constitution made it difficult to refute arguments that it had created a mirror image of its northern counterpart. Dissenting voices did exist but they were only heard during the next moment in Ireland's constitutional history, when both partition and the Catholic nature of the state began to unravel amidst internal and external challenges. Ireland had an identity crisis that the constitution not only failed to regulate but actually provoked. Kissane argues that 'values once thought harmonious became antagonistic, as people were forced to emphasise the secular or the religious components of their identity, or the sub-national versus the national identity.

By 1972 the nationalist and Catholic social values reflected in the 1937 constitution were outdated. The imposition of direct rule from Westminster, following the Northern Ireland government's failure to politically reform and redress the security crisis it faced after the outbreak of the troubles in 1969, and the emergence of the Provisional Irish Republican Army presented the Irish government with a set of constitutional dilemmas that it proved incapable of meeting within the short timeframe that the British government had set for the establishment of a new political order in Northern Ireland. The 1973 Sunningdale Agreement challenged the Irish government to address its constitutional obligation to unite Ireland, and at the same time exposed the archaic and outmoded nature of the 1937 constitution, as it faltered on the issues of consent, self determination and partition, not to mention the constitutional changes that would be necessary to transform the republic into a state that moderate unionists might be tempted to join in the right circumstances ' issues such as divorce, contraception and censorship. The Irish government's discussions over the idea of drafting a new constitution for a 'new 32-county beginning' were reactionary, and while willing in theory, the government backtracked when faced with the challenge of the possibility of British disengagement from Northern Ireland between 1974 and 1976. The fact that the 1937 constitution could only be changed by referendum reinforced its authority, and that of Fianna Fáil, and undoubtedly sharpened the Fine Gael-Labour coalition government's sense of vulnerability as it entered the uncharted waters of the Sunningdale Agreement, with the ambitious all-Ireland structures it envisaged. Against Conor Cruise O'Brien's advice, Minister for Foreign Affairs Garret FitzGerald overzealously pursued the 1937 constitution's irredentist claim to Northern Ireland through the Sunningdale process, while fudging the constitutional divisions over the conflicting conceptions of identity in both parts of Ireland that the peace process threw up. Key to this debate, with respect to Kissane's fifth new beginning, were articles two and three which, as O'Brien argued at the outset of the troubles, had to be removed if Ireland was ever to be unified by consent.

Finally, while the 1998 Belfast Agreement marked a new beginning for Northern Ireland and a new era in Anglo-Irish relations, it marked a significant turning point in Irish constitutionalism too. This constitutional moment signified a point of no return in Anglo-Irish relations when governments in both Westminster and Dublin were able to address the constitutional issues that had undermined Northern Ireland's first consociational government. Kissane argues that the agreement promotes a 'treaty to constitution' process in three ways: should a culture of power-sharing develop then this will strengthen Northern Ireland's

constitutional identity within the UK or a united Ireland; the absence of violence and the changes made to articles two and three frees the Republic of Ireland to consider less reactionary and more consensual constitutional change; and should these positive developments continue and a vote for unification takes place then the possibility of a new constitutional beginning could emerge.

Of course one could take many of Kissane's arguments and apply them to Northern Ireland, as its existence illustrates failures of British state building, constitutionalism and state consolidation. He raises the question as to whether the Belfast Agreement can combine the treaty and constitution elements that may be required to see it function as the equivalent of a constitution for Northern Ireland. There is no doubt that progress has been made in Northern Ireland in this direction. The Belfast Agreement, in the constitutional context of Kissane's thinking, clearly reflects the rival national identities of the deeply divided society that Northern Ireland remains today, and in doing so successfully regulates them within a consociational framework that operates both internally and externally, with its all-Ireland and UK wide dimensions. Although he does not explicitly say it, Kissane's book shows that in constitutional terms both the Republic of Ireland and Northern Ireland are for the first time not significantly out of step with each other, and that this has much to do with the incremental revisionism that has taken place in Irish constitutionalism, moving from Bunreacht na hÉireann to the Belfast Agreement, and reflecting the reality that the British and Irish governments are partners in Europe, partners in Northern Ireland, and rather comfortable bedfellows in the Anglo-Irish archipelago where they peaceably coexist.

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