

# Irish Scholarship, Irish Law and the Irish Association of Law Teachers

THOMAS MOHR AND JENNIFER SCHWEPPE

## INTRODUCTION

The opening address of the Irish Association of Law Teachers, delivered by Paul O'Higgins was entitled "Does Irish Law Really Exist?". This difficult question has provided fertile material for numerous class discussions in courses on jurisprudence and legal theory. How "Irish" is Irish law? This is also an important question for anyone embarking on an examination of the history of Irish legal scholarship. The entire concept of "Irish legal scholarship" can never be entirely divorced from inevitable questions of identity. What is so unique about the subject-matter of this scholarship and what does an Irish perspective on it really mean? These questions raise inevitable philosophical challenges of defining a concept of "Irishness" that transcends different traditions and backgrounds. There are also serious difficulties that have been handed down by Irish legal history. How realistic is it to speak of "Irish law" when so much of this law has its origins outside the island of Ireland?

In 1922 Hugh Kennedy, who would soon become the first Attorney General of the Irish Free State and later the first Chief Justice of the Supreme Court, wrote the following words with respect to the system of law that had provided the focus of his life's work:

"The great body of law, institutions and forms, called the 'English Common Law'... is not in Ireland a Common Law at all. It is an alien structure imposed by statute, an exotic from which a cutting has been artificially fostered in Ireland but which has not taken root or become acclimatised in any real sense ... The institutions, forms and ceremonials of the English Common Law have never been absorbed by the Irish People or become in any true sense their own. They have remained ... the features of a foreign system and of alien rule."<sup>1</sup>

Many of Kennedy's contemporaries shared this perception that much of the law in Ireland was made up of unsuccessful grafts onto the fabric of the nation.<sup>2</sup> The resulting desire to reconnect Irish law with some kind of

<sup>1</sup> The National Archives/Public Record Office (United Kingdom) CAB 23/30, SFB 60.

<sup>2</sup> Almost identical sentiments were expressed by W.T. Cosgrave in his letter of January

“national spirit” or *Volksgeist* took several forms in the early years of the Irish Free State. Many legal scholars placed significant emphasis on re-establishing a legal system that reflected the perceived values of early Irish law, better known as “Brehon law”. These romantic efforts were doomed from the outset, being based on the hopes and dreams of twentieth century lawyers and not on the realities of a medieval legal system.<sup>3</sup> Some leading figures, including members of the committee that drafted the 1922 Constitution, hoped that the establishment of a new Irish Constitution would see the Irish legal system draw vitality from the legal traditions of continental Europe. They believed that this would permit Irish law to take an independent path from the common law jurisdictions of the British Empire. These objectives also proved to be a source of serious disappointment. The most innovatory provisions of the draft 1922 Constitution were either defeated by the political exigencies of the early 1920s or fatally diluted by a native spirit of conservatism.<sup>4</sup> The third method of “patriating” Irish law concerned the development of a distinctly Irish form of legal scholarship that was felt to be lacking in the early twentieth century.

Hugh Kennedy, writing in the early 1930s, lamented the continuing dependence of Irish law schools on foreign textbooks. He looked forward to the emergence of a new form of Irish legal scholarship that would lead to the “emancipation of our schools of law from the thralldom that has made them negligible wraiths”.<sup>5</sup> He also expressed the hope that future years would witness a flowering of Irish legal scholarship that would inject a new and distinctive spirit of intellectual vitality into Irish schools of law. These dreams of a better future reflected a sense of profound disappointment at the fruits of the first decade of self-government in the Irish Free State.

29, 1923 to the committee charged with creating a system of courts for the Irish Free State:

“The body of laws and the system of judicature so imposed upon this Nation were English (not even British) in their seed, English in their growth, English in their vitality. Their nomenclature were only to be understood by the student of the history of the people of Southern Britain. A remarkable and characteristic product of the genius of that people, the manner of their administration prevented them from striking root in the fertile soil of this Nation”; University College Dublin Archives, Kennedy Papers, P4/1090.

<sup>3</sup> See Thomas Mohr, “Law in a Gaelic Utopia: Perceptions of Brehon Law in Nineteenth and Early Twentieth Century Ireland” in O. Brupbacher et al (eds), *Remembering and Forgetting: Yearbook of Legal History* (Munich: Martin Meidenbauer, 2007), pp.247–276.

<sup>4</sup> Brian Farrell, “The Drafting of the Irish Free State Constitution” (1970) 5 *Irish Jurist* 115 and 343 and (1971) 6 *Irish Jurist* 111 and 345; D.H. Akenson and J.F. Fallin, “The Irish Civil War and the Drafting of the Free State Constitution” (1970) 5(1) *Éire-Ireland* 10; 5(2) *Éire-Ireland* 42 and 5(4) *Éire-Ireland* 28; and Thomas Mohr, “British Involvement in the Creation of the Constitution of the Irish Free State” (2008) 30 D.U.L.J. 166.

<sup>5</sup> Leo Kohn, *The Constitution of the Irish Free State* (Dublin: PUBLISHER, 1932), p.xiii.

Kennedy was disappointed with the quality and quantity of legal scholarship in the early years of the Irish Free State. Even the scholarship on the new Constitution of the Irish Free State, which was intended to represent the most significant break with the legal traditions of the United Kingdom, often failed to measure up to Kennedy's expectations. One of first books published on the Constitution in 1925, John G. Swift MacNeill's *Studies in the Constitution of the Irish Free State*, made extensive reference to the works of A.V. Dicey and Walter Bagehot and emphasised the continuation of links with the British constitutional tradition in the infant Irish Free State.<sup>6</sup> The two most interesting innovations in legal scholarship in the 1920s, the reproduction of the texts of a select number of constitutions of the world<sup>7</sup> and a guide to the Constitution of the Irish Free State aimed at children,<sup>8</sup> did not make a lasting impact. The significance and utility of the former is not always appreciated in the era of Google and Wikipedia. The latter is worthy of mention as the devotion of an entire book to explaining difficult issues of Irish constitutional law to children represents a brave innovation never attempted before or since.<sup>9</sup>

The most impressive work on the 1922 Constitution was Leo Kohn's *The Constitution of the Irish Free State*.<sup>10</sup> Kohn did not shy away from

<sup>6</sup> *Studies in the Constitution of the Irish Free State* (Dublin: PUBLISHER, 1925).

<sup>7</sup> *Select Constitutions of the World* (Dublin: PUBLISHER, 1922). This publication was based on a selection of constitutions of the world examined by the committee that drafted the 1922 Constitution. The challenges facing this committee in obtaining copies of these constitutions and their translation into the English language underscored the necessity for a publication of this type.

<sup>8</sup> Robert N. Tweedy, *Irish Freedom Explained—The Constitution of Saorstát Éireann* (Dublin: PUBLISHER, 1923).

<sup>9</sup> The sense of naïve, yet irresistible, charm that flows through the pages of this book is reflected in the author's attempt to explain Art.5, which placed limits on the awarding of titles of honour to Irish citizens, in terms that would be readily understood by Irish children in the 1920s: "[y]ou are well accustomed to hear of Lord So-and-So or Sir Something-Something in your parish, and many of you will have been brought up to think the holders of such titles must be very high and powerful people who have been rewarded for doing some great service to the country. Sometimes that was so, but sometimes the owner has inherited the title from his father and perhaps his father or some long dead ancestor has been given his title by the English king for doing some harm to the Irish people. For many years past no loyal Irishman would accept a title of honour from the English king however he may have deserved it by working hard for Ireland. Not one of the men and women who took part in the last war with England had an English title. Many good men accepted titles, but Irishmen believed that most of these 'honours' were given and taken as rewards for doing some evil thing or as bribes to get men to do more evil things"; Tweedy, *Irish Freedom Explained—The Constitution of Saorstát Éireann* (PLACE?? PUBLISHER?? 1923), p.56.

<sup>10</sup> Other works on the 1922 Constitution include Darrell Figgis, *The Irish Constitution Explained* (Dublin: PUBLISHER, 1922) and Barra Ó Briain, *The Irish Constitution* (Dublin: PUBLISHER, 1929). These works have never received the attention given to Leo Kohn's book.

examining the major flaws in this Constitution including the absence of constitutional control over public safety legislation and the maintenance of a position under which powers of amendment lay entirely in the hands of the Oireachtas.<sup>11</sup> The introduction provided by Chief Justice Hugh Kennedy is almost as interesting as the book itself. Kennedy made a determined effort to identify the Constitution of the Irish Free State with the new Constitutions of inter-war Europe, in particular the Constitution of Weimar Germany.<sup>12</sup> This emphasis came at the expense of the considerable influence of the Constitutions of the United Kingdom and of the British Dominions on the 1922 Constitution.<sup>13</sup> This represents another example of the need to assert a new identity for Irish law that was felt to be desirable in the early years of the Irish Free State.

Kennedy seized the opportunity provided by this publication to lament the contemporary state of Irish legal and political studies which he perceived as being fixated on the British Constitution and the working of the parliament at Westminster. In the field of legal education, Kennedy lamented that A.V. Dicey's *Introduction to the Study of the Law of the Constitution*<sup>14</sup> had become "an evangel accepted reverently and without criticism or question in our schools (such as they were) of political philosophy and constitutional law".<sup>15</sup> Kennedy blamed this focus on British institutions for the complete subservience of the 1922 Constitution to the whim of the Oireachtas and for the intense conservatism in attitudes towards law reform that he believed had followed the exhaustion of revolutionary ardour. This provided the background for Kennedy's expressions of hope that the future would deliver a new flowering of Irish legal scholarship. He also dared to hope that this development would, in turn, assist in the creation of centres of legal education that were worthy of the new State.<sup>16</sup>

Kennedy did not live to see this much-anticipated blossoming of legal scholarship and legal education in Ireland. Very few Irish legal textbooks were published in the half century that followed his death in 1936.<sup>17</sup> The introduction of the 1937 Constitution did little to change this situation. The spirit of conservatism that followed in the wake of ephemeral revolutionary

<sup>11</sup> Leo Kohn, *The Constitution of the Irish Free State* (Dublin: PUBLISHER, 1932), pp.148–158 and 251–263.

<sup>12</sup> Kohn, *The Constitution of the Irish Free State* (PLACE?? PUBLISHER?? 1932), pp.ix–xi.

<sup>13</sup> Kohn, *The Constitution of the Irish Free State* (PLACE?? PUBLISHER?? 1932), pp.ix–xi.

<sup>14</sup> *Introduction to the Study of the Law of the Constitution*, 1st edn (London: PUBLISHER, 1889).

<sup>15</sup> Kohn, *The Constitution of the Irish Free State* (PLACE?? PUBLISHER?? 1932), p.xii.

<sup>16</sup> Kohn, *The Constitution of the Irish Free State* (PLACE?? PUBLISHER?? 1932), pp.xii–xiii.

<sup>17</sup> One of the notable exceptions was V.T.H. Delaney's *The Administration of Justice in Ireland* (Dublin: PUBLISHER, 1962). Subsequent editions were produced in 1965 and 1970, edited by Vincent Grogan, and in 1975, edited by Charles Lysaght.

zeal made itself felt in many areas. Irish constitutional law was still seen as cleaving to “the time-honoured empiricism of the British Constitution”, despite the introduction of two successive written Constitutions.<sup>18</sup> Many reforms that were eagerly anticipated in the early 1920s never materialised. For example, the eleventh hour deletion of a provision designed to secure the equality of women in the draft 1922 Constitution ensured that the rights of Irish women did not advance, and even deteriorated in certain respects, during the early years of the State.<sup>19</sup> The external origins of much of the statute law of the State was maintained by a tendency to draft Irish legislation according to models that were conveniently supplied by Westminster.<sup>20</sup> It was even asserted in the early decades of the State’s existence that pre-1922 decisions of the House of Lords were binding on the Irish courts and could only be overridden by the Oireachtas.<sup>21</sup> Kennedy would have depressed to read the words of P. A. Ó Síochain who concluded that Irish law in the 1950s remained stuck in:

“[A] period of stalemate even of retrogression in which we have choked in the judicial dust of an old and alien system. We have developed nothing new or individual. We have wandered aimlessly and drifted hopelessly. The tendency has been towards rigidity and consequent unwillingness to depart from law precedent and practice no matter how archaic or useless and unjust.”<sup>22</sup>

The upheavals of the early twentieth century produced two jurisdictions on the island of Ireland. Irish unionists seldom shared the unease expressed by their nationalist counterparts at the external origins of Irish law. Nationalist efforts to identify an Irish *Volksgeist* seemed alien and unreal to members of this community. Metaphors that suggested that the common law was an

<sup>18</sup> Brian Farrell (ed.), *De Valera’s Constitution and Ours* (Dublin: Gill and Macmillan, 1988), p.28.

<sup>19</sup> See Thomas Mohr, “The Rights of Women under the Constitution of the Irish Free State” (2008) 41 *Irish Jurist* 20.

<sup>20</sup> One commentator, writing in the 1950s, noted that “in many instances the Oireachtas has adopted in whole or in part enactments which the British parliament had already passed. In some cases the Irish Acts follow quickly on the British, in others only after an interval of years. Examples of this legislative plagiarism occur all through the period 1922–1948”; J.L. McCracken, *Representative Government in Ireland* (London: PUBLISHER, 1958), p.176.

<sup>21</sup> “Decisions of the House of Lords upon law common to England and Ireland given before the coming into operation of the Constitution of 1922 are of binding force until their effect has been altered by our Legislature”; per Murnaghan J. in *Minister for Finance v O’Brien* [1948] I.R. 91 at 116. Although this assertion was not universally accepted (e.g. see Gavan Duffy J. in *Exham v Beamish* [1939] I.R. at 349) it was raised as recently as the 1980s. See *Irish Shell Ltd v Elm Motors Ltd* [1984] I.R. 200. See Gerard Hogan, “Irish Nationalism as a Legal Ideology” (1986) 75 *Studies* 528.

<sup>22</sup> P.A. Ó Síochain, *The Criminal Law of Ireland* (Dublin: PUBLISHER, 1952), p.5.

exotic plant that had been artificially grafted onto Irish soil could be seen as raising disturbing racial connotations. The creation of new legal institutions in Northern Ireland in the 1920s was a practical enterprise that did not demand any real need to agonise over questions of identity. Nevertheless, the challenges that accompanied the creation of a new jurisdiction were considerable. The difficulties facing members of the legal professions, and other persons involved in legal scholarship and legal education, were summarised in the editorial of the very first volume of the *Northern Ireland Legal Quarterly* published in 1936:

“Since the constitutional changes in 1920 there has been a marked divergence in the law and practice in Northern Ireland from that of England and the Irish Free State. Whilst the law and practice in the various parts of the larger community remained to a substantial degree the same, practitioners had the advantage of sharing in the learning and scholarship of distinguished lawyers made available through the medium of textbooks and other legal publications. Although these sources of knowledge and information are for many purposes still useful and available, the profession in Northern Ireland is faced with the fact that there is a considerable and growing volume of law and practice in regard to which resort to existing textbooks and other legal literature is no longer helpful. The number of legal practitioners in Northern Ireland is not large enough to make remunerative the publication of books on legal matters relating exclusively to Northern Ireland.”<sup>23</sup>

In fact, a number of books on the law of Northern Ireland were published in the inter-war years. These included Sir Arthur S. Queckett’s *The Constitution of Northern Ireland* REFERENCE IN FN which was published in three volumes between 1928 and 1946. Queckett was the first Parliamentary Draftsman to the government of Northern Ireland. The work that dominated a considerable portion of his life was described as “monumental and fundamental” by A.G. Donaldson, one of Queckett’s successors as Parliamentary Draftsman.<sup>24</sup>

The small size of the two jurisdictions on the island of Ireland resulted in a reliance on English textbooks. For many decades this was a unifying feature shared by north and south in the field of legal education. Although English textbooks naturally focused on the law of their own jurisdiction, Irish decisions were occasionally cited. R.F.V. Heuston, the first President of the IALT, ensured that Irish decisions were well represented when he

<sup>23</sup> “Editorial” (1936) 1 *Northern Ireland Legal Quarterly* 4.

<sup>24</sup> Donaldson was one of Queckett’s successors as Parliamentary Draftsman to the government of Northern Ireland.



edited *Salmond on Torts*.<sup>25</sup> Yet, this was a rare exception. For the most part, variations from English law and practice were ignored or relegated to the margins. The solution that was occasionally followed in Northern Ireland was to create special supplements to textbooks on English law. These focused on the areas of difference between the two jurisdictions while recognising the most of the law in the relevant area was held in common.<sup>26</sup> It was an eminently practical solution to the absence of textbooks, yet was seldom replicated south of the border.<sup>27</sup> This consideration provides another illustration of the importance of examining issues of identity in any analysis of “Irish” legal scholarship.

#### LAW JOURNALS IN IRELAND

The last three decades have witnessed an unparalleled period of growth and development in the related fields of legal scholarship and legal education across the island of Ireland. These advances were reflected in the increased professionalisation of law teaching together with the creation of many new centres of legal education across the island. This process was facilitated by the creation of new outlets for the proliferation of Irish legal scholarship.

In 1966 John Maurice Kelly, professor of Roman law and jurisprudence at University College Dublin, led a consortium that took over the title to the *Irish Jurist*. The *Irish Jurist* was a long-established institution in Irish legal publishing since its foundation in 1848. This journal had changed its identity on several occasions. In some periods it acted as a practitioners’ journal. At other times it was used as the title for collections of law reports. The *Irish Jurist*, popularly known as simply “the Jurist”, often combined both roles between the same covers. In the 1960s John Kelly looked to continental Europe for inspiration and modelled a reformed *Irish Jurist* on the German journal *Zeitschrift der Savigny für Rechtsgeschichte*.<sup>28</sup> The Jurist was reborn as a scholarly journal that attracted contributions from leading scholars from all over the world. Although the Jurist examined all facets of Irish law, it never confined itself to jurisprudence emanating from the island of Ireland. This ensured that the journal soon acquired a significant

<sup>25</sup> (London: PUBLISHER, 1977). See William Binchy’s Chapter in this book on “Torts”.

<sup>26</sup> e.g. John Jackson, *Northern Ireland Supplement to Cross on Evidence* (Belfast: PUBLISHER, 1983) and John Stannard, *Northern Ireland Supplement to Smith and Hogan, Criminal Law* (Belfast: PUBLISHER, 1984).

<sup>27</sup> One of the few examples of a supplement to an English text used by law students south of the border was Lee Sheridan, *Challis’ Real Property, Irish Supplement* (London: PUBLISHER, 1956). Irish editions of foreign textbooks have occasionally been produced. For example, Liz Heffernan, Ray Ryan and Edward J. Imwinkelried, *Evidentiary Foundations* (Dublin: PUBLISHER, 2008), whose origins lie in an American text, Edward J. Imwinkelried, *Evidentiary Foundations*, 4th edn (Albany: PUBLISHER, 2005).

<sup>28</sup> See <http://www.irishjurist.com/history.htm>. LAST ACCESSED??

reputation on the international stage. The Jurist also devoted special attention to Irish and international legal history, a stance that it maintains to this day.

The *Northern Ireland Legal Quarterly* was first published in 1936 under the guidance of the Incorporated Law Society of Northern Ireland. The journal was founded in an attempt to ameliorate the problems caused by the belief that the new jurisdiction was too small to support the publication of textbooks on the law of Northern Ireland.<sup>29</sup> As might be expected, the journal was aimed primarily at members of the legal professions. This was reflected in special sections that provided news concerning members of the professions and in a cosy “Apprentice’s Corner” which was aimed at “those still in their teens”.<sup>30</sup> Yet, the editors of the new N.I.L.Q. were acutely aware of the dangers associated with publishing a journal for such a small and close-knit legal community. The first editorial of the new journal admitted:

“In a relatively small area such as Northern Ireland there is a danger of the profession becoming parochial in outlook, of drifting into backwaters, and of permitting the main streams of thought and progress to pass by, leaving it unaffected and untouched.”<sup>31</sup>

The editors expressed the hope that their new publishing initiative would ensure that “constant touch be kept with the developments in law and practice in the wider community, and with the ideas inspiring such developments”.<sup>32</sup> The international outlook maintained by this journal in the early twenty-first century remains consistent with these ideals.

The *Dublin University Law Journal* published its first volume in 1976, having been preceded by the *Dublin University Law Review* in the late 1960s and early 1970s. The D.U.L.J., often pronounced as “dulse”, was produced and published by staff and students at Trinity College Dublin. The new journal placed a special emphasis on law reform from the outset. This was reflected in editorials that kept readers in touch with the valiant attempts of Senator Mary Robinson (as she then was) to enact private members bills on issues of significant social importance.<sup>33</sup> This reforming spirit remains intact in the pages of the D.U.L.J. today.

Alongside this trio of journals lie other generalist journals, such as the *Judicial Studies Institute Journal* and the *Irish Law Times* as well as the two professional journals, the *Law Society Gazette* and the *Bar Review*. A plethora of discipline-specific journals have also emerged, including the *Irish Journal of Family Law*, the *Irish Criminal Law Journal*, the *Medico-Legal Journal of Ireland*, the *Commercial Law Practitioner*, the *Conveyancing*

<sup>29</sup> “Editorial” (1936–1937) 1 N.I.L.Q. 4.

<sup>30</sup> “Editorial” (1936–1937) 1 N.I.L.Q. 4 at 4–5.

<sup>31</sup> “Editorial” (1936–1937) 1 N.I.L.Q. 4 at 4.

<sup>32</sup> “Editorial” (1936–1937) 1 N.I.L.Q. 4 at 4.

<sup>33</sup> “Editorial” (1977) 1 D.U.L.J. 2.



and *Property Law Journal* and the *Irish Employment Law Journal*. Add to these the high quality student journals, such as the *UCD Law Review*, the *Trinity College Law Review* and the *Cork OnLine Law Review*, and one can easily imagine how rich and deep Irish legal scholarship has become.

#### THE “NEW” IRISH SCHOLARSHIP

The late 1970s and early 1980s saw the emergence of a number of seminal texts on Irish law. These texts still form the backbone of any undergraduate reading list, as well as having prominence on the shelves of practitioners. It is appropriate to provide a few examples of these textbooks in order to illustrate the range and significance of this flowering in Irish legal scholarship.

One of the areas most in need of distinct textbooks was Irish land law. This was one of the few areas in which Irish law had always had a distinct identity from its English counterpart. Consequently, doubts as to the “Irishness” of Irish law were not so acute in this field. These considerations ensured that this area of law did attract significant scholarly attention in works written by legal practitioners in the nineteenth century.<sup>34</sup> The early twentieth century saw a decline in the production of books written by legal practitioners, which ensured that this level of attention was not maintained for many decades. This did not change until the late 1970s when John Wylie produced two key texts, *Irish Land Law* and *Irish Conveyancing Law* published with Professional Books.<sup>35</sup> The early editions of these texts examined the law on both sides of the border. This approach mirrored one of the founding principles of the IALT: the progression of Irish legal scholarship with an emphasis on all-island analysis. Unfortunately, the formidable challenges involved in spanning the law of both jurisdictions on the island have prevented subsequent editions of these works from following this laudable approach.

Another key text published around this time was John M. Kelly’s *The Irish Constitution* REFERENCE IN FN in 1980. Those who succeeded him in the production of subsequent editions of this work were uniquely placed to appreciate the “Herculean task” involved in writing the original text.<sup>36</sup> It is not always appreciated that the first edition of this monumental production was a self-published work. This highlighted the challenges in finding outlets for Irish legal scholarship in this period.

Fergus Ryan emphasises the global recognition of the concept and value of the family in his chapter on “Three Decades of Family Law Scholarship

<sup>34</sup> See John Wylie’s Chapter in this book on “Land Law”.

<sup>35</sup> *Irish Land Law* (London: Professional Books, 1975) and *Irish Conveyancing Law* (London: PUBLISHER, 1978).

<sup>36</sup> Gerard Hogan and Gerry White, *The Irish Constitution*, 3rd edn (Dublin: PUBLISHER, 1994), p.xcvii.

in Ireland” in this book. Although the challenges facing this institution are not unique to Ireland, this has not inhibited the idiosyncratic development of Irish family law. This was one area of law in which Irish law and the Irish courts had no hesitation in forging an independent path in the years that followed the foundation of the self-governing Irish State.<sup>37</sup> Nevertheless, practitioners, academics and students had to wait until the publication of Alan Shatter’s *Family Law in the Republic of Ireland* in 1977 for a detailed treatment of this important subject.<sup>38</sup>

Another important development was the publication of *Irish Law of Torts* REFERENCE IN FN in 1981 by Bryan McMahon and William Binchy. Once again, this was an area in which Irish readers had previously been reliant on English publications. Bryan McMahon, later a judge of the High Court, was a founding member of the IALT. William Binchy describes the origins of the first Irish text on the law of torts in his contribution to this book.

Important texts on contract law,<sup>39</sup> company law<sup>40</sup> and many other areas of law soon followed. The founders of the IALT were quick to recognise this “rebirth of Irish legal scholarship”.<sup>41</sup> Yet, it is important to recognise that this flowering did not emerge from a vacuum. The passage of time and the growing impact of Irish constitutional law had reduced the utility of English textbooks for many readers in the Republic. By the mid-1980s Gerard Hogan noted:

“There is virtually no body of law which is immune from the growing volume of constitutional case-law, and its influence on traditional common law subjects such as tort and evidence has been so great that now—perhaps for the very first time—one can almost speak of a distinct ‘Irish law of torts’ or ‘Irish law of evidence’.”<sup>42</sup>

The gradual emergence of new publishing houses that devoted significant attention to Irish legal scholarship also played a pivotal role in facilitating the expansion of this field over the past three decades. These developments are examined in detail by Catherine Dolan et al in their Chapter in this collection.

<sup>37</sup> In the 1950s Gavan Duffy J. stated “[f]or religion, for the family and the children, we have laid our own foundations. Much of the resultant polity is both remote from British precedent and alien to the English way of life and, when the powerful torch of transmarine legal authority is flashed across our path to show us the way we should go, that disconformity may point decisively another way”; *In re Tilson Infants* [1951] I.R. 1 at 15.

<sup>38</sup> *Family Law in the Republic of Ireland* (Dublin: Wolfhound Press, 1977).

<sup>39</sup> Robert Clark, *Law of Contract in Ireland* (London: PUBLISHER, 1982).

<sup>40</sup> Ronan Keane, *Company Law in the Republic of Ireland* (London: PUBLISHER, 1985) and Patrick Ussher, *Company Law in Ireland* (London: PUBLISHER, 1986).

<sup>41</sup> Kevin Boyle and Des Greer, *The Legal System North and South—A Study Prepared for the New Ireland Forum* (Dublin: PUBLISHER, 1984), p.48.

<sup>42</sup> Gerard Hogan, “Irish Nationalism as a Legal Ideology” (1986) 75 *Studies* 528.

As is readily apparent, Hugh Kennedy's dreams of a new flowering of Irish legal scholarship began to cross over the boundaries of reality by the late 1970s and early 1980s. In addition, the last three decades have seen the emergence of more law schools, more law students, and more professional law teachers than any other period in our history. The curricula of Irish law schools have seen a dizzying expansion into new areas of law. There are now more outlets for the publication of Irish legal scholarship than ever before. Changes in law and politics have inevitably influenced much of the legal scholarship of the last three decades. The violence and tragedy of the troubles in Northern Ireland resulted in international scrutiny of aspects of law and legal scholarship emanating from that jurisdiction. The signing of the "Belfast" or "Good Friday" agreement in 1997 was a welcome development that also gave Irish legal scholars a unique opportunity to project a positive image of the island of Ireland to overseas readers. The inclusion of both jurisdictions in the European Economic Communities in 1973 would also have a profound impact on Irish legal scholarship and legal education. The integration of the law of the European Union into the legal systems of both jurisdictions also raised new challenges in determining the identity of "Irish law". The increased influence of international law and international human rights law, in particular the incorporation of the European Convention on Human Rights into domestic law north and south,<sup>43</sup> raises similar questions. These questions are considered in many of the following chapters of this book.

#### THE IRISH ASSOCIATION OF LAW TEACHERS

This period of rapid change and expansion in legal scholarship and legal education saw the emergence in 1979 of the Irish Association of Law Teachers. A visitor to an Irish law school in the 1970s might have been forgiven for concluding that things had not changed a great deal since the days of Hugh Kennedy and Sir Arthur Queckett. Most teaching staff worked on a part time basis and most of the textbooks used by the students focused on English law. Yet, a careful observer would have noted that this state of affairs was already in the process of transformation by the end of the decade.<sup>44</sup> What better time to found an organisation designed to contribute to the evolution of Irish legal education and legal scholarship? The increased professionalisation of law teaching created a need for a collective voice for the growing cohort of men and women who would devote their working lives to this field. It was obvious that the process of

<sup>43</sup> See Human Rights Act 1998 and European Convention on Human Rights Act 2003 respectively.

<sup>44</sup> An interesting reflection from the 1980s on developments in Irish legal education and scholarship can be found in W.N. Osborough, "Scholarship and the University Law School" (1985) 7 D.U.L.J. 24.

change was not limited by political and psychological frontiers that separated north and south. As stated by Kevin Boyle in the foreword to this text, the founders of the organisation refused to allow the political atmosphere of the time to dictate the geographical boundaries of the organisation.

The Irish Association of Law Teachers was brought into existence in a friendly and informal atmosphere with a minimum of pomp and ceremony. The announcement for the first conference set the tone by stating “[f]ormal dress very optional”. A warm invitation was extended to members’ partners, and arrangements were made for their entertainment during the “working-hours” of the conference. At one early meeting, the participants discovered that the absence of chalk prevented speakers from illustrating key points of their audience on the blackboard. Instead, they simply used the condensation on the classroom windows to trace out the necessary words.

The first President of the IALT was R.F.V. Heuston of Trinity College Dublin, who is remembered today for his scholarship on the law of torts<sup>45</sup> and also for his gargantuan contribution to judicial biography in the form of his *Lives of the Lord Chancellors*.<sup>46</sup> Other members of the original Council included Kevin Boyle, Bryan McMahon, Henry Ellis, Desmond Greer, James Brady, Pat Maxwell and John Brehony.

The total membership of the Association was 57 persons at the time of foundation in 1979. Membership would increase three-fold in the same number of years. One of the founding principles of the IALT was inclusiveness, and it has always been open to all persons teaching law in Ireland, irrespective of the nature of the institution to which they belong. Persons teaching in the Regional Technical Colleges, which are known today as Institutes of Technology, the College of Commerce in Rathmines, Dublin, and the NIHE Limerick and Ulster Polytechnic, now the University of Limerick and the University of Ulster respectively, appear on the original membership list created in 1979 in addition to persons from university law schools. The names of persons teaching in professional bodies such as the Law Society of Ireland and the Honorable Society of King’s Inns have always been represented in lists of members.

The healthy representation of scholars from north and south of the border reflected another of the founding principles of the Association. IALT members, conferences and events criss-crossed the border in defiance of the politically charged atmosphere of the times. The Association never attempted to ignore these unfortunate realities. The murder of Edgar Graham, a law lecturer at Queen’s University Belfast, by the IRA in the grounds of the university proved to be one of the main subjects for discussion at the 1983 annual general meeting. Nevertheless, these events

<sup>45</sup> e.g. R.F.V. Heuston and R.A. Buckley, *Salmond and Heuston on the Law of Torts*, 9th edn (London: PUBLISHER, 1987).

<sup>46</sup> R.F.V. Heuston, *Lives of the Lord Chancellors, 1885–1940* (Oxford: PUBLISHER, 1964) and *Lives of the Lord Chancellors, 1940–1970* (Oxford: PUBLISHER, 1987).

were never allowed to sway the cross-border foundations of the Association. The theme of the 1984 mid-year meeting was “Legal Systems—North and South”, a reminder to legal scholars on both sides of the border who too often forget that the nearest “neighbouring jurisdiction” is not England and Wales.

The unease and hostility expressed by Irish nationalists in late nineteenth century with the common law foundations of Irish law has found few echoes in the late twentieth and early twenty-first centuries. The arrival of the common law on the island, in its “first adventure”<sup>47</sup> beyond its jurisdiction of origin, has been used as a unifying, rather than a dividing, feature. These common foundations are seen as connecting the jurisdictions on the island of Ireland to each other and to a wider legal world beyond. This was reflected in the first joint meeting of the Irish Association of Law Teachers with its counterpart on the neighbouring island, the Association of Law Teachers, in 1997.<sup>48</sup> The theme of this meeting, held in Galway, was “The Common Law Tradition”. This common tradition is reflected in the list of the early members of the IALT which included prestigious academics teaching in Great Britain (e.g. Paul O’Higgins, William Twining and John Wylie) and in the United States of America (e.g. Raymond McGuire). This tradition has followed through to recent years, with visitors from a variety of jurisdictions attending the annual meetings of the Association today. A number of former Presidents of the Association have made efforts to improve these links, by attending annual meetings of associations of law teachers in the United States, Canada and Australia.

Annual conferences and mid-year meetings, held in towns and cities all over the island, became highlights in the social calendar of law lecturers almost from the inception of the Association. In 1987 the conference took advantage of the 50th anniversary of the 1937 Constitution to take a searching look at the position and development of fundamental freedoms over the previous half century. The practice was soon established of launching a conference with a challenging address from a distinguished academic, legal practitioner or a senior member of the judiciary. Examples include Thomas Finlay C.J.’s address on the making of law by judges in 1985, Nicholson J. on practical problems encountered in criminal trials in Northern Ireland in 1986 and Francis Jacobs QC, Advocate General of the European Court of Justice, on the role of the ECJ in promoting European integration in 1988. In 1993 the Association was pleased to welcome President Mary Robinson in opening the annual conference at Dublin City University. Conferences themes varied from year to year, one of the more memorable being “Hard Cases and Bad Law” held in 2002 in Queen’s

<sup>47</sup> W.J. Johnston, “The First Adventure of the Common Law” (1920) 36 *Law Quarterly Review* 9.

<sup>48</sup> This theme of the common law linking Ireland to other jurisdictions also provided the inspiration behind a British and Irish legal history conference in 2003.

University Belfast under the stewardship of the then President of the Association, John Stannard.

One of the most important roles of the IALT over the last three decades was to provide opportunities for Irish law teachers to meet each other, discuss their work and even plan areas in which they could collaborate. A survey carried out by the IALT in 1981 led one unnamed respondent to write, “[n]o one seems to know what other academics are working on until their publications appear”.<sup>49</sup> This problem is even more acute three decades later when the numbers of law teachers is so much greater. The Association published a Research Register in 1987, which listed members by name with the following headings: Research Fields; Current Research; Planned Research; Publications Recent/Impending; and Publications Planned. The Association also sought to forge links between academics in 1987 by the establishment of Special Interest Groups in the areas of Civil Liberties, Commercial/Consumer Law, Criminal Law/Procedure/Evidence and Land Use. The aim of the groups was to enable members with similar research interests to work together on projects “more likely to come to fruition when approached on a collaborative rather than on an individual basis”. Unfortunately, these groups seem to have died a natural death, though in the era of funded research which requires cross-institutional buy-in, perhaps the time has come once more to re-ignite the role of the IALT in this regard.

In the last number of years, there has been a huge growth in the number of discipline-specific conferences and organisations, some of a cross-border nature, such as the annual north–south criminology conference. While these conferences are excellent avenues for meeting those researching in similar areas, the IALT is unique in being the host of the only major generalist law conference on the island. Through its annual conferences and mid-year seminars, the contribution of the IALT in creating contacts, inspiring new avenues of combined research and creating a sense of community for law teachers throughout the island of Ireland cannot be quantified.

#### THE IALT AND LAW REFORM

Notwithstanding the importance of the IALT in providing venues for law teachers to meet, it is also important to note that the Association was not founded with the limited ambition of becoming a social club. It should be remembered that the Law Reform Commission was still in its infancy late 1970s. The founders of the IALT saw the task of advancing law reform as also falling on the shoulders of their own Association. In the early years, special sub-groups were created to consider law reform in discrete areas. The Association tried to cooperate with other bodies in pushing this law reform agenda. For example, in 1995 the Association attempted to engage

<sup>49</sup> “Report on Research and Publication Survey” (1981) carried out by Kevin Boyle.



with the Law Society of Ireland in the aftermath of the decision in *Bloomer and Ors v The Law Society and Others* concerning the access of students from Queen's University Belfast to that institution.<sup>50</sup> In 1987 President Frank Watters received a letter from the Fair Trade Commission thanking him for comments on draft sections of a report on the legal professions. The letter apologised for the late response explaining that “[o]ur drink problem [the Irish Distillers merger proposals] has prevented an earlier acknowledgement”. The attempts made by the Association to take an active stance in pushing law reform did meet with initial success. In 1993 the IALT was invited by Minister Mervyn Taylor to participate in the work of the Law Reform Group of the Department of Equality and Law Reform. Raymond Byrne, President of the IALT, attended the very first meeting of this group. The years ahead saw requests from the Law Reform Commission and Dáil working groups for submissions in key areas of law reform. Unfortunately, it proved very difficult for a society of the size and diversity of the Irish Association of Law Teachers to produce the collective submissions required by these bodies. These obstacles have created serious challenges for the Association in maintaining a sustained and consistent stance on particular issues of law reform.

#### THE IALT AND LEGAL EDUCATION

As an association of law teachers it is no surprise that advancing legal education has been a priority for the IALT since its foundation—indeed, one of the aims set out in the Constitution of the Association is to promote excellence in legal education. While the achievements of the IALT in the area of legal research and publishing are tangible, it is less clear what impact the Association has had from a pedagogical perspective. For law teachers, there has always been a tension in the way we teach. In 1982, the Association had a mid-year meeting entitled “Problems of Legal Education in the 1980s”, from which a summary report was produced. The tension was highlighted by John F O'Connor, when he stated:

“The traditional role of the University Law Schools is inseparable from the traditional role of the University as a whole. In relation to law teaching, this (I venture to say) means that members of the law faculties would wish ... ‘to teach law as a broad and liberal education with only the vocational bias inherent in a professional subject, and to remain the maximum freedom to change their curricula and to experiment’. In fact, because many part-time and full-time law teachers are also members of the professions and because there has been to date some general consensus that a ‘Law degree must include “core”

<sup>50</sup> [1995] 3 I.R. 14.

subjects at least (Contract, Tort, Criminal Law, Property, Constitutional Law)', there has been little real change and experimentation."<sup>51</sup>

These concerns remain in the minds of university law teachers today, and are recurring themes at legal education symposia. Lawrence Donnelly in his essay in this collection discusses the increasing emphasis on teaching practical skills to students by way of clinical legal education programmes. Nevertheless, the strain between the professional and academic contexts of law is still very much alive.

From a non-university perspective, the importance of teaching law to non-lawyers has also been identified. The challenges of teaching law in the non-university sector was a major theme in the 1985 conference in University College Galway. Patricia Maxwell, in the 1982 Report states, "[w]e are concerned to bring home to a wide public the fact that law is not a mysterious ritual, and to help them explore the extent to which law impinges upon their work".<sup>52</sup> The universities were slower to grasp this importance, but today in most third level institutions, business, humanities and even sports science students have the option of taking at least one legal subject as part of their undergraduate programme. The increase in interdisciplinary law degrees across third level institutions today, such as law and business, law and languages, law and criminal justice and law and humanities, also emphasises the importance of examining law in context.

One of the major changes in the legal academy since the foundation of the Association has been the enormous rise in numbers of students engaging in postgraduate education. In the early 1980s there were very few LLM students, and even fewer PhD candidates. The IALT in its 1982 Report considered ways to increase the number of students engaging in postgraduate study, by proving "greater encouragement generally, especially financial assistance". At the time of the inception of the Association, few, if any, law lecturers had PhDs. Further, those who did pursue such a qualification did so, not immediately after their undergraduate degrees, but a number of years after entering academia. Today, while An tÚdarás um Ard-Oideachas (the Higher Education Authority) in the Republic has set a target of increasing the number of Masters students to 7,000, and doubling the number of PhD students, the problem of providing financial assistance to these students remains. While the numbers of graduate students have increased, one has to wonder about the career prospects of this large number of highly qualified academics.

<sup>51</sup> Irish Association of Law Teachers *Problems of Legal Education in the 1980s: A summary of papers and discussions from the Association's mid-year meeting held on the afternoon of Wednesday 12 May 1982, at the Law Society, Blackhall Place, Dublin* (IALT, 1982), p.1, citing the Ormond Report, 45–46.

<sup>52</sup> Irish Association of Law Teachers *Problems of Legal Education in the 1980s: A summary of papers and discussions from the Association's mid-year meeting held on the afternoon of Wednesday 12 May 1982, at the Law Society, Blackhall Place, Dublin* (IALT, 1982), p.4.

## THE IALT AND LEGAL PUBLISHING

Readers should not be misled into believing that the current volume is the first venture of the IALT into the realm of publishing. One of the founding principles of the IALT was to facilitate and encourage the production of publications on Irish law. The crucial role of legal publishers in developing Irish legal scholarship was highlighted in the very first meeting of the Association in 1979. Nevertheless, many of the early works produced by the IALT itself were, like the first edition of John Kelly's *The Irish Constitution*, self-published books. This position necessitated the establishment of a Legal Publications Sub-Committee soon after the foundation of the IALT. In 1984 the Association produced its first publication, the *Index to Irish Superior Court Written Judgments 1976–1982*.<sup>53</sup> This volume was fondly known as the “Red Index” after the colour of its cover. Although the Red Index listed reported judgments, its real utility lay in ordering the vast array of unreported judgments delivered in the relevant time period and making them more accessible to researchers. The success of this venture resulted in the creation of a companion volume in 1990.<sup>54</sup> This volume concentrated on unreported judgments produced between 1966 and 1975. This index provided details of the subject-matter of unreported judgments, identified the judge or court that delivered the judgment and also provided details as to where the judgments might be accessed.

The Association placed a great deal of emphasis on the need to improve law reporting in Ireland. This objective provided the theme of at least one mid-year conference which the Council of the IALT meet with the editor of the Irish Reports and members of the Incorporated Council of Law Reporting. The publication of the Red Index provided the impetus behind the decision of the Law Library in 1983 to record each written judgments as it issued. The IALT also provided the inspiration for others to create similar indexes covering reported and unreported judgments.<sup>55</sup> In this way the IALT volumes can be seen as responsible for the preservation of many written judgments that would otherwise have been lost in addition to improving their accessibility. These actions would lay important foundations for the creation of online databases of Irish judgments.

The publication in 1997 of *Concordance of English, Northern Irish and Irish Legislation* REFERENCE IN FN reflected the common links that underpin both jurisdictions on the island and the IALT itself. The aim of this work, written by Brice Dickson, Brian Collins and Deirdre Madden was to bring together references to the most important pieces of legislation in

<sup>53</sup> Jennifer Aston and Maeve Doyle (eds), *Index to Irish Superior Court Written Judgments, 1976–1982* (Galway: IALT, 1984).

<sup>54</sup> Jennifer Aston et al (eds), *Index to Unreported Judgments of the Irish Superior Courts, 1966–1975* (Galway: IALT, 1990).

<sup>55</sup> e.g. Jennifer Aston (ed.), *Index to Irish Superior Court Written Judgments, 1983–1989* (Dublin: General Council of the Bar of Ireland, 1991).

England, Northern Ireland and the Republic of Ireland. The text lays out the legislation relevant to key areas of law in the three jurisdictions, and would have been immensely valuable for any researcher engaged in comparative research in the three jurisdictions in a pre-internet age. The intention behind the *Concordance* was to “make it easier for users in one jurisdiction to see at a glance what the main legislation on a particular topic might be in one or both of the other jurisdictions”.<sup>56</sup> While the job of the researcher is a much easier one today, not only because of the internet, but also the vast amount of scholarship which compares and contrasts key areas of law in the three jurisdictions, it is still a pity that the aim of the authors to produce a second edition of the text did not come to fruition.

The same theme of emphasis on common links led two founding members of the IALT, Kevin Boyle and Des Greer, to prepare *The Legal System North and South* in 1984.<sup>57</sup> This study was created for the New Ireland Forum and reflected the theme of the IALT mid-year meeting of the same year.

The publication of *Leading Cases of the Twentieth Century*<sup>58</sup> was inspired by an IALT conference held in 1999 and was designed to coincide with the millennium celebrations in 2000. This volume was edited by Eoin O'Dell, President of the IALT (1998 to 1999) and included contributions from members of the Council in addition to other participants in the 1999 conference. The book took a multi-jurisdictional approach examining key cases in Irish legal history, such as *State (Ryan) v Lennon*<sup>59</sup> and *X v AG*,<sup>60</sup> in addition to leading cases from other jurisdictions familiar to Irish lawyers such as *Donoghue v Stevenson*,<sup>61</sup> *Woolmington v DPP*,<sup>62</sup> *Roe v Wade*<sup>63</sup> and *Mabo v State of Queensland (No. 2)*.<sup>64</sup>

#### RECENT DEVELOPMENTS IN THE IALT

Notwithstanding the achievements of its early years, it is futile to pretend that the history of the Association has always been plain sailing. The 1980s and early 1990s saw repeated proposals for an IALT law journal that never came to fruition. The failure to bring such proposals to fruition can hardly be seen as a setback for Irish legal scholarship given that the lacuna that was

<sup>56</sup> Dickson, Collins and Madden, *Concordance of English, Northern Irish and Irish Legislation* (Galway: Irish Association of Law Teachers, 1997), p.iii.

<sup>57</sup> *The Legal System North and South* (Dublin: PUBLISHER, 1984).

<sup>58</sup> Eoin O'Dell (ed.), *Leading Cases of the Twentieth Century* (Dublin: PUBLISHER, 2000).

<sup>59</sup> [1935] I.R. 170.

<sup>60</sup> [1992] I.R. 1.

<sup>61</sup> [1932] A.C. 562.

<sup>62</sup> [1935] A.C. 462.

<sup>63</sup> (1973) 410 U.S. 113.

<sup>64</sup> (1992) 175 C.L.R. 1.

then perceived to exist has since been filled by an astonishing growth of the number of Irish journals across a variety of areas of specialisations. A far more serious setback occurred between 2007 and 2009 when no annual conferences or mid-year seminars were held. A rejuvenation process has been underway since 2009 which has seen the election of a new Council, the creation of a new website and logo and the resumption of regular meetings in 2010.

The theme for the 2009–2010 session was celebratory: the Association was now 30 years old, and the mid-year seminar and annual conference considered the impact of the Association on legal scholarship on both sides of the border, as well as the changing nature as to what it means to be a legal academic. Simultaneously, the Association launched two prizes, awarded biennially, which reflect the dual aims of the IALT: legal research and law teaching. The first, the Kevin Boyle Book Prize, named after a founding member of the Association, was awarded in 2010 to Dr Eoin Carolan for his excellent monograph, *The New Separation of Powers: A Theory for the Modern State*.<sup>65</sup> The James Brady Teaching Innovation Prize seeks to foster innovation in the teaching of law at either undergraduate or postgraduate level and is named after another founding member of the Association. This celebratory tone ultimately led to the decision of the Council of the IALT to support this edited collection of essays on the theme of the year.

A dispassionate observer of the rejuvenation of the IALT might, however, raise a number of searching questions about this process. The creation of the IALT was certainly a necessary step in the Ireland of 1979. The question is whether we still need an organisation like the IALT in the early twenty-first century. Other organisations have now taken the lead in pushing the law reform agenda, and it seems that each discipline has its own journal and annual conference. There are now a multitude of Irish law textbooks and Irish law journals. As noted earlier, the social dimension to the IALT is important. Yet, is the *raison d'être* of the IALT now confined to this sphere? The challenges facing law teachers in the 1970s have largely been met. Yet, some of the challenges that existed then still confront academics, and other new challenges that could never have been imagined in 1979 have emerged to take their place.

## CONTEMPORARY CHALLENGES IN LEGAL EDUCATION

In the mid 1980s, the Publications Sub Committee of the Association sought to produce a citations manual for the citation of legal materials for use across Ireland. Unfortunately, it would seem that this particular aim of the

<sup>65</sup> *The New Separation of Powers: A Theory for the Modern State* (Oxford?: Oxford University Press, 2009).

Committee was left unfulfilled, and the existing absence of a uniform system of citation in Ireland is problematic on two levels. First, students at different institutions are taught how to cite in different ways, and are indeed sometimes forced within an institution to adapt to the style insisted on by individual lecturers. Secondly, those of us writing professionally are forced to adapt to the citation guide of individual journals and publishing houses—or different citations styles for journals in the same publishing house. This process can be confusing and is time consuming. The adoption of a uniform system of citation across all institutions and publishing houses in Ireland would go some way to alleviate these problems.

In terms of the “bread and butter” of the job, the following words, written in 1981 by Kevin Boyle,<sup>66</sup> are as apposite today as there were 30 years ago:

“The problems encountered in doing research for those who do undertake it are familiar;

- (a) Time
- (b) Inadequate library resources to hand
- (c) The state of law reporting in the Republic
- (d) Lack of empirical data
- (e) Lack of contact with others interested in their field
- (f) Absence of research assistance
- (g) Queues for secretarial help
- (h) Lack of research funding to do non-library research or for travel to good libraries out of the country.

Those who are senior in the law faculties complain in particular of the administrative load.”

While some of the issues here have been resolved—very few academics, particularly junior ones, require much “secretarial” assistance—many of these issues are still current. There is a glaring lack of empirical data in the vast majority of research fields in Ireland. Libraries, appropriately referred to as the laboratory of legal researchers, remain woefully under-resourced. Funding remains an enormous issue, and problems with administrative loads are no longer the sole preserve of senior members of faculty, but are often shared by the most junior members of staff.

#### CONTEMPORARY AND FUTURE CHALLENGES FOR IRISH LEGAL ACADEMICS

The IALT has witnessed and participated in a period of rapid progress in the related spheres of Irish legal scholarship and Irish legal education over the

<sup>66</sup> Publications Sub-Committee of Irish Association of Law Teachers, *Report on Research and Publications Survey* (PLACE?? PUBLISHER?? 1981).



last three decades. Most of those now working in legal education have only witnessed a portion of this period of transformation. This includes the editors of this volume who crave the indulgence of colleagues whose experience and learning render them much better qualified than us to write this introduction. Yet, the pace of change has been so obvious and inescapable that it is readily apparent, even to those whose years in legal education can be counted on their hands. The relative youth of many people involved in legal scholarship and legal education in contemporary Ireland makes it all the more necessary to pause and take stock of developments in the not too distant past.

Any examination of the work of the last three decades should avoid stumbling into a peroration of blinkered self-congratulation. If the preceding passages have given readers this impression it was certainly not intentional. It is all too obvious that the next 30 years will present serious challenges. Over the next few decades Irish legal scholars will have to strive to provide answers to a number of challenging questions. For example, what do Irish law and Irish legal scholarship actually mean in an era in which national boundaries and even national identities have less and less meaning? Why do works on international law or the law of the European Union that are written by Irish authors continue to use the words “An Irish Perspective” in their titles? Is this nothing more than an indication of the nationality of the authors or have our unique circumstances and history provided us with a unique insight with respect to matters of law? There are a number of powerful arguments in favour of the latter proposition. The law in Ireland has, since the twelfth century, been derived from sources both internal and external. It is true that this is often blamed for creating a traditional sense of antipathy to and detachment from the law. However, this historical background, combined with the small size and population of this island, have ensured that Irish law teachers take a comparative approach to law that is unconscious and almost intuitive. Since the 1960s the Irish courts have cited authorities with increased frequency from common law countries such as the USA, Canada, Australia and New Zealand, while rejecting the contention that the decisions of British courts should be seen as having particular weight.<sup>67</sup> The reports of the Law Reform Commission have, since its foundation in 1975, consistently produced wide-ranging comparative studies. Indeed, the history of Irish law

<sup>67</sup> A good example of the rejection of regarding the decisions of the British courts as enjoying particular authority can be found in the judgment of Walsh J. in *State (Quinn) v Ryan* [1965] I.R. 70 at 126. McCarthy J. made similar statements in *Irish Shell Ltd v Elm Motors Ltd*; “[i]n no sense are our Courts a continuation of, or successors to, the British courts. They derive their powers from a Constitution enacted by the People and would, in my view, find more appropriate guidance in the decisions of courts in other countries based upon a similar constitutional framework than in what, at times, appears to be an uncritical adherence to English precedent”; [1984] I.R. 200 at 227.

over the centuries has to a significant extent been one of learning from the mistakes and successes of other jurisdictions. The “legislative plagiarism” that is often seen as a feature of Irish law has been a source of parody.<sup>68</sup> Yet, how realistic is it to expect that relatively small jurisdictions undertake the same level of new initiatives as jurisdictions with far greater populations and resources? Should we denigrate an ability to recognise the best in the works of our neighbours and to avoid the pitfalls into which they have stumbled? The authors must respectfully disagree with those who maintain that this approach inhibits local initiative.<sup>69</sup> Is this not how all human beings, from the earliest age, learn and adapt to the environment around them?

The new challenges in the related field of legal education are less prosaic, but no less profound. These include managing the relentless expansion of the internet and its impact on scholarship, education and legal publishing. The increased professionalisation of third level education has placed serious pressures on those law teachers who wish to maintain active involvement in the world of legal practice. New methods of teaching, such as clinical education, will demand closer scrutiny. The means by which scholarly research is evaluated continues to be a source of unease and controversy. The desire to improve a system of legal education at a time of shrinking resources transcends all of these issues. A revitalised Irish Association of Law Teachers will play its part in meeting these and other challenges. In 1932 Hugh Kennedy expressed the hope that centres of Irish legal education “may become schools of learning and philosophy of which the nation need not be ashamed, and which may even perhaps discover a message for the distracted world”.<sup>70</sup> There has never been a time of greater need for law teachers to strive in the fulfilment of these worthy goals.

<sup>68</sup> J.L. McCracken, *Representative Government in Ireland* (London: PUBLISHER, 1958), p.176.

<sup>69</sup> For a contrary point of view, Kevin Boyle and Des Greer conclude “[t]he notion that good law reform requires a high degree of comparative law (or at least a drawing on the legal imagination of other law reformers) in many ways prevents the development of a distinct local philosophy”; *The Legal System North and South—A Study Prepared for the New Ireland Forum* (PLACE?? PUBLISHER?? 1984), p.49.

<sup>70</sup> Leo Kohn, *The Constitution of the Irish Free State* (1932), p.xiii.