

Legal Scholarship Around the World: Traditions, Requirements and Relevance of Irish/British/Commonwealth Scholarship

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I. Prologue

The question of what is scholarship necessarily raises the question of who is the scholar.¹ A scholar is a learned or erudite person with “wide learning, originality of thought, and clarity of expression by means of a felicitous style.”² This can be distinguished from the wider term of “intellectual,” which extends beyond those working as academics in universities to, for example, novelists, poets, and other writers who engage in public debate.³ As the context in which the term was coined suggests, an intellectual is a figure that enters into the public arena engaging in public debate. More recently, the concept of intellectual has been recast as a knowledge worker with both “normative-emancipatory and descriptive dimensions.”⁴ The knowledge elite, in universities or beyond, can influence social change because of their organic links with a variety of specific contexts.⁵ Legal scholars can be seen as such knowledge elites, especially given the increasing specialization of the discipline; its strong ties to the professions,⁶ public service,

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1. See Imelda Maher, *Irish Legal Scholarship Abroad: The UK Experience*, in THIRTY YEARS OF LEGAL SCHOLARSHIP: THE IRISH ASSOCIATION OF LAW TEACHERS (Thomas Mohr & Jennifer Schweppe eds., 2011).

2. Basil Markesinis, *Scholarship, Reputation of Scholarship and Legacy*, 38 IRISH JURIST 1, 2 (2003) (modifying the definition in the Oxford English Dictionary referring to the scholar being learned in the classics, especially Greek and Latin).

3. See generally INTELLECTUALS AND THEIR PUBLICS: PERSPECTIVES FROM THE SOCIAL SCIENCES (Christian Fleck et al. eds., 2009).

4. *Id.* at 4.

5. Liam O'Dowd, *Intellectuals and Intelligentsia: A Sociological Introduction*, in ON INTELLECTUALS AND INTELLECTUAL LIFE IN IRELAND: INTERNATIONAL, COMPARATIVE AND HISTORICAL CONTEXTS (Liam O'Dowd ed., 1996).

6. See R. Eyerman, *Intellectuals in Historical and Comparative Context*, in ON INTELLECTUALS, *supra* note 5.

and civil society; and the increasing emphasis on universities being accountable for the public monies that they spend.⁷

One key tension that emerges, which is reflected in the framework Professor Lutz has devised, is the distinction to be drawn between the intellectual and the public intellectual. The distinction is described by Lyon, who sees an intellectual as “a person having a powerful and trained intellect who is inclined to activities or pleasures of the intellect with a fondness for the scholarly activities of thought and reasoning.”⁸ In comparison, a public intellectual is someone who applies those scholarly activities for an entire community in a way that is open and accessible.⁹ This distinction raises the question whether every scholar (as a subset of the wider term “intellectual”) needs to be a public intellectual in that they should reach beyond the audience of the academy to the wider public audience. Even if engagement beyond the academy is not required for all scholars, there is an important question as to the extent to which engagement should be only on the basis of expertise and knowledge.¹⁰ In other words, while the media may regard a professor of law as an expert in all areas of law, this is not necessarily a view shared by the academy.

A further question raised by this notion of engagement is who or what is the public?¹¹ We note the question of audiences (plural) raised by Professor Lutz in his paper—the plural being appropriate. Even within academic writing, authors may often look to address more than one audience. The issue is particularly acute in small jurisdictions where there is a need to write for national audiences while also wanting to bring one’s work to a wider audience through publishing in international journals. The challenge with international journals is making one’s work relevant in wider debates. A further dimension is the expectation for scholars to write about their own legal order, given the extent to which public monies pay for their research. This is in addition to the expectation that universities adhere to the highest international standards and, hence, publish internationally. This potential tension is eased somewhat in the Irish/British/Commonwealth domain where there are real synergies between scholarship in most Commonwealth jurisdictions and a willingness to engage in comparative research, especially for smaller jurisdictions where a paucity of case law encourages analysis of how other jurisdictions have responded to similar problems. That being said, English journals dominate as the top journals with scholars from outside of the United Kingdom looking to publish in those journals. On the other hand, U.K.-based academics seem to show little interest in publishing in other Commonwealth countries (or Ireland). Thus, Commonwealth and Irish scholars must ensure that

7. See, e.g., Steve Hedley, *Growing Managerialism in Irish Universities* 1(1) IRISH J. LEGAL STUD. 117, 121 (2010), available at http://www.ijls.ie/Articles/IJLS_Vol_1_Issue_1_Article_3_Hedley.pdf; GOV’T OF IR., IRISH UNIVERSITIES—RESOURCE MANAGEMENT & PERFORMANCE (2010), available at <http://www.audgen.gov.ie/viewdoc.asp?DocID=1239&CatID=5&StartDate=1+January+2010> (a recent report of the Comptroller & Auditor General on the Irish Higher Education sector concluding, among other things, that there was too little measurement to properly assess performance).

8. E. Stina Lyon, *What Influence? Public Intellectuals, the State and Civil Society*, in INTELLECTUALS AND THEIR PUBLICS, *supra* note 3, at 70.

9. *Id.*; see also Per Wisselgren, *Women and Public Intellectuals: Kerstin Hesselgren and Alva Myrdal*, in INTELLECTUALS AND THEIR PUBLICS, *supra* note 3.

10. *Starkey’s Ignorance Is Hardly Work of History*, THE TIMES HIGHER EDUC., (Aug. 25, 2011), <http://times.highereducation.co.uk/story.asp?sectioncode=26&storycode=417236> (note the letter signed by more than twenty historians objecting to the description of David Starkey as a historian when he was on a panel discussion on the summer riots in English cities).

11. Lyon, *supra* note 8, at 72.

their work resonates with the predominantly U.K.-based audiences if they wish to publish in the top international common law journals outside the United States. Bearing these general considerations in mind, we now turn to reflect on the Lutz framework of analysis.

II. Purpose of Legal Scholarship

Few would disagree with the statement that the purpose of legal scholarship is for the advancement of legal knowledge and understanding. What is perhaps more controversial, but also widely accepted, is that for university academics at any rate, scholarship necessarily involves the dissemination of that scholarship through publication. As McCrudden points out, scholarship takes many forms in the United Kingdom (and Ireland) with doctrinal analysis, socio-legal research, and theoretical analysis co-existing even at times within the same journals.¹² Doctrinal analysis dominated until the radicalism of the early 1970s when law schools—such as those in the Universities of Keele, Kent, and Warwick, as well as the London School of Economics—were influenced by the influx of a group of new scholars. For example, Warwick Law School, when established, recruited a number of scholars who had worked in African law schools, most notably in the University of Tanzania. They were part of the law and development movement of the late 1960s, influenced by the American critical legal studies movement, Marxism, and the law.¹³ Today, doctrinal scholarship probably still dominates with law in context, socio-legal scholarship, and theoretical perspectives no longer seen as “fringe,” but as part of the mainstream of scholarship and legal education.¹⁴ Socio-legal scholarship in particular had benefitted from the increasing emphasis on having impact and the need to show “value for money.” The growing importance of research funding for universities has also increased the importance of (often resource intensive) socio-legal work and inter-disciplinary work, which is of particular relevance to law in context.

In a small jurisdiction like Ireland, there is a strong commitment among the legal academic community to doctrinal exegesis—to inform and understand the state of the law. In the United Kingdom, there is also this imperative, although it is a much more crowded environment where one is inevitably standing on the shoulders (and beside) giants. In Ireland, with only about 140 law academics, the number of experts in any particular field is very small indeed.¹⁵ The position in the United Kingdom is markedly different with the Society of Legal Scholars, the main professional body, having a membership in excess of 3,000.¹⁶

12. See generally Christopher McCrudden, *Legal Research and the Social Sciences*, 122 L.Q. REV. 632 (2006).

13. See THE CRITICAL LAWYERS HANDBOOK (Ian Grigg-Spall & Paddy Ireland eds., 1992) (providing an overview of critical legal studies in the UK).

14. See FIONA COWNIE, *LEGAL ACADEMICS: CULTURE AND IDENTITIES*, at ch. 3 (2004).

15. See Maher, *supra* note 1.

16. See Colin T. Reid, *Response by the Society of Legal Scholars to Wider Choice and Better Protection*, SOC'Y OF LEGAL SCHOLARS OF THE UK & IRELAND (Mar. 23, 2009), <http://www1.legalscholars.ac.uk/pubdocs/responses/Wider-choice-and-better-protection.pdf>; see generally *About the Society of Legal Scholars*, SOC'Y OF LEGAL SCHOLARS OF THE UK & IRELAND, <http://www1.legalscholars.ac.uk/about/index.cfm> (last visited May 20, 2012).

III. Audience

A. ACADEMIC AUDIENCES

There are multiple audiences for scholarship, with the primary audience being academics. Quality of research is a key indicator in the appointments process, tenure, and promotions. Academic publication in key journals is achieved through a process of blind peer review, so producing work that will meet the relevant academic criteria is essential.

There are two academic audiences: those sharing the particular expertise of the author, e.g., antitrust lawyers, and a general academic audience for whom the antitrust scholar must extrapolate from their research on antitrust to bring trends and questions about the nature of law to the attention of a wider audience. Within the particular expert community of antitrust lawyers, it is also necessary to address the particular concerns of the jurisdiction, e.g., writing about Irish competition law for an Irish competition law audience, writing about competition law for a wider competition law audience, and then writing about competition law for a general academic audience.

B. STAKEHOLDERS

The smaller the jurisdiction, the greater the opportunity and expectation that the scholar will also engage with courts, particularly if writing on doctrine, or with policy makers in general, including government, legislatures, and non-governmental organizations (NGOs). Research funders now often look for stakeholder engagement, which may include both publishing a practice piece as well as running stakeholder workshops.

In the United Kingdom, where the Research Excellence Framework (REF) evaluates research and, consequently, government funding for universities for research, impact will, for the first time, be one of the indicators considered.¹⁷ There was discussion initially that this would be accomplished via citation counts, but in the Irish/British/Commonwealth system there is no system of citation count for law journals, leaving the impact of a journal on that basis largely hidden. This is gradually changing. Nonetheless, impact is still one of the criteria being used in the United Kingdom this time around in the REF. Impact refers not to the impact on other academics and their writing, but on the wider policy world. Not every academic has to show impact. Each academic unit will have to submit at least one example and another one for every ten academics. The difficulty with this is that it is not at all clear how causation should be measured. Where a judge names an author in a judgment, then that is clear enough. But in the wide policy context, it is difficult to show how academic publication had direct impact on policy change (the research that is relied on to show impact has to be of a high standard). Thus, in the United Kingdom, the question of impact is a live one and, in time, will affect the answer to the question of “who is my audience?”

17. *Assessment Criteria and Level Definitions*, REF 2014, <http://www.ref.ac.uk/panels/assessmentcriteriaandleveldefinitions/> (last visited May 20, 2012).

IV. Forms of Publication

A. JOURNALS

There are two main forms of scholarship recognized: blind peer-reviewed journal articles and monographs. Within law journals, the Australian Research Council in 2001 sought to categorize all English language law journals on a scale of “A” to “C,” with “A” being the best, to assist with decisions as to quality and research funding for law schools.¹⁸ The lists were drawn up by the Australian Deans of Law Schools, who in turn consulted legal academics from the English-speaking world to comment on the lists. These lists have now been withdrawn partly to allow account to be taken of regional or applied research, given the need to conduct jurisdictionally specific research.¹⁹ The removal of rankings also places an emphasis on the quality of the article itself rather than its location.²⁰

Most U.K.-published journals are not listed on ISI, a bibliographic and citation database,²¹ so quality is determined by reference to reputations—for which there are clearly defined criteria. Research undertaken in 2002 to determine, among other things, the reputation of journals has proven highly influential.²² Most of the top ranked journals—including, for example, the *Modern Law Review*, *Oxford Journal of Legal Studies*, and *Legal Studies*—are associated with either top law schools or academic societies. They are all generalist journals. The *Law Quarterly Review* is seen as doctrinal, the *Modern Law Review* extends to law in context and theoretical research, and the *Journal of Law and Society* is the most socio-legal in its remit. These journals would publish work that is intellectually rigorous, shows originality, is well written, and is of interest to a generalist expert law audience throughout the Commonwealth. Faculty invariably runs the journals. Some are in-house, i.e., the editors are drawn from the faculty of the school where the journal is based. In other cases, the editorial board tender for the post, and tenure is normally five years.

Student-run journals are not prominent in these jurisdictions. Where they do exist, they predominantly publish work by undergraduate and graduate students and are seen as a first step into the publishing world. It should be noted, however, that because peer review of all scholarly journals is blind, graduate students can, and are, published in top journals.

A phenomenon of law journals in recent years is their increasing specialization. This has occurred for a number of reasons. One reason is the increasing emphasis on publication as an output measure for universities that are predominantly reliant on public funding. This means that academics, whose work in the past might have been defined primarily as one of teaching, are now researchers who publish their research and use that

18. See *List of ERA Journals*, MELBOURNE L. SCH. RES. & EXPERTISE, <http://www.law.unimelb.edu.au/index.cfm?objectId=077C45C0-E982-11E0-86FF0050568D0140> (last visited May 20, 2012).

19. See *Frequently Asked Questions*, AUSTRALIAN RES. COUNCIL, <http://www.arc.gov.au/era/faq.htm#2012> (last visited May 20, 2012).

20. *Id.*

21. See *Thomson Reuters (ISI) Web of Knowledge*, THOMSON REUTERS, http://thomsonreuters.com/products_services/science/science_products/a-z/isi_web_of_knowledge/ (last visited May 20, 2012).

22. Kevin Campbell et al., *Journal Publishing, Journal Reputation and the United Kingdom's Research Assessment Exercise*, 26 J.L. & Soc'y 470, 470 (1999).

research to inform their teaching. Thus, the number of academics looking to publish has increased. Second, with the explosion of third-level education in the last generation, the number of law schools and law faculty has also increased exponentially. Finally, there has been an increasing specialization in scholarship where faculty typically develop research expertise in one or two usually related fields and publish exclusively in those areas. There is a need to “talk” to those experts in the field, and even within general fields, there are further specializations. For example, in European Union law, some of the main journals are the *Common Market Law Review* (published in the Netherlands, primarily doctrinal), the *European Law Review* (a wider remit), the *European Law Journal* (law in context, associated with the European University Institute, Florence), as well as *Legal Issues of European Integration* and the *Maastricht Journal of European and Comparative Law*. While these journals may have started out as specialist, they now have the character of generalist journals, albeit within a particular sub-discipline of law, and are supplemented by further specialist journals, such as the *European Human Rights Law Review*, *European Public Law*, the *European Journal of International Law*, and the *European Competition Law Review*, to name a few. There are specialist journals now in all main fields and many sub-fields of law (IT law, IP law, media law, sports law). The impact of this fragmentation of scholarship has been twofold. First, scholars working in some fields, perhaps most notably those in international law, tend not to publish in mainstream journals. Second, scholars have less time to engage in wide debates because keeping up with trends in one’s own discipline has become more demanding. The risk here, of course, is that the synergies between different sub-disciplines are lost and the opportunities to ask the bigger questions about the nature of law, informed by the many diverse fields of law, are reduced.

Finally, academics do contribute to practitioner journals, and there are journals that are of interest both to academic and practitioner audiences. Publication in practitioner journals is good for raising one’s profile, engaging in debates, or contributing to the exegesis of the law. There are some blind peer-review journals that appeal to both audiences, but generally, the sort of article published for an academic audience is of a different nature than that for a practitioner audience.

B. BOOKS

In addition to journals, legal scholars also look to publish four main categories of books. Monographs are erudite books, the first usually being the author’s Ph.D. dissertation revised for publication. University presses have the highest standing. Print runs are small (usually only 1,000). For a small jurisdiction like Ireland, there is high prestige associated with publishing in university presses, but the English imprints are not usually interested in Irish law because of its small audience. Because of the small market, law publishers in Ireland primarily publish academic books that also appeal to the practitioner and/or student markets with academic presses such as Four Courts Press and the small university presses publishing monographs that have an appeal to an academic audience that goes beyond legal scholars.

In addition to monographs, scholars also publish textbooks, which are good for reputation, but depending on how erudite they are may not “count” for research purposes. The same applies to practitioner texts, which may also prove lucrative. Where a textbook is the first book in the field, and hence defines the field or brings a new perspective to bear on

the field, it may be regarded as a scholarly piece of research, not just a teaching tool. In other words, a textbook is capable of being a groundbreaking and definitive text in the field.

As an alternative to journals, edited books are also an important aspect of legal scholarship. Who publishes the book is important because university presses undertake external reviews of the papers. Such collections can be as important as journal articles where the quality of the papers is high and the coherence of the project is clear. This, in turn, depends on the editors.

Academics undertake reports for the government, which may be highly influential. The expectation now, however, is that these reports also inform academic publications where the research is subject to the usual peer review.

C. ELECTRONIC PUBLISHING

The publication of working papers is increasing, notably through Social Science Research Network (SSRN)²³ or in-house working-paper series as a means of wide dissemination. This does not seem to be as widespread or as well-organized as in the United States, although it is becoming increasingly common. While working papers show evidence of research activity and increase profile, they are not counted for the purposes of the REF in the United Kingdom or for promotion purposes in the same way as academic publications that are fully peer-reviewed. Web-based journals that undertake the same peer review process as other journals have similar credibility with the added value of open access.

In the United Kingdom, some institutions actively encourage their academics to undertake media work. Academics do so regularly in Ireland, the United Kingdom, and Australia, where academics are regularly heard on various media. This seems to be an accepted part of the role of the public academic. Promotion criteria usually include some reference to community or contribution, which includes media work. The same applies for work undertaken in relation to professional bodies.

Bloggging is a growing phenomenon for dissemination of academic opinions and ideas. Blogs can be extremely active and are an important way of reaching a wider audience. For example, the human rights blog, Human Rights in Ireland, gets about 1,000 visitors per week, despite the small number of academic human rights lawyers in Ireland.²⁴

D. SPONSORSHIP OF SCHOLARSHIP

The word "funding" tends to be used rather than "sponsorship" in Australia, Ireland, and the United Kingdom. In all three jurisdictions, the government funds research in public universities directly. Additional resources are made available by public funding bodies, such as the Australian Research Council, the Irish Council for the Humanities and Social Sciences, and the Economic and Social Research Council in the United Kingdom. Government departments may also fund research projects. The Law Commission in all three jurisdictions has undertaken in-house research. An increasingly important source of funding is the European Union, where there are regular schemes to facilitate collabora-

23. See generally SOC. SCI. RES. NETWORK, <http://www.ssrn.com/>.

24. HUMAN RIGHTS IN IRELAND, <http://www.humanrights.ie/> (last visited May 22, 2012).

tion between scholars across countries.²⁵ In the United Kingdom, the REF is the main mechanism to determine funding for research. Private funding is indirect in the form of overseas student fees or private foundations like the Rowntree Trust or Nuffield Foundation. Scholarly associations also fund research on a small scale, for example, providing funding to attend conferences and present a paper, or to host a workshop or seminar with to the intention of publishing a special issue of a journal or edited book. The Economic and Social Research Council fund research projects and research centers.

V. Why Do It?

The main reason for undertaking scholarly research and publishing is for the intellectual challenge and the satisfaction in producing quality work. Engaging with scholars in the field through presenting working papers and then responding to comments of the anonymous reviewers and editors of a journal makes for a rigorous, but rewarding experience. Intellectual curiosity drives this process. In addition to this “pull” factor, the “push” factors are that research is the key currency for appointment, tenure (or permanency in the United Kingdom and Australia where tenure no longer exists), and promotion. Compensation is not usually a factor because there is none unless one writes a textbook that is used widely.

There is, of course, a much more prosaic reason for undertaking research: it is part of the job for academics to publish their research. Academics are (rightly) expected to produce and advance knowledge and to disseminate it through publication processes. This point also goes to the professionalization of the legal academy, a topic beyond the scope of this piece.

The opportunity to work with other scholars either through the review process, or through workshops or conferences where work is critiqued, is also an incentive. Most scholars develop networks with like-minded academics outside their institution and rely on them for critical engagement with their work. In addition to colleagues, the network is usually the group with the relevant expertise. These networks are often sustained over long years of research and provide a sometimes virtual and sometimes real-time environment where ideas can be tested and analyzed. In short, these encounters are “the chamber music of scholarship.”

VI. Conclusion

Scholars today bring their research to the public domain along three different axes: first, through publication in peer reviewed journals and in well-regarded academic presses; second, through engagement with practitioners and policy and law-makers, either through bringing scholarly publications to their attention, or more likely, providing additional practitioner and policy pieces based on scholarly work; and third, scholars increasingly play the role of public intellectual through their engagement with media. An important part of the texture of these axes is a combination of the growing specialization of academics, the concomitant risk of wide questions about the nature of law getting lost, and the

25. See generally *Community Research and Development Information Service*, EUR. COMM'N, http://cordis.europa.eu/home_en.html (last visited May 20, 2012).

increasing diversity in approaches to legal scholarship, with, I hope, some of the tensions that have existed between them diminishing and an increasing openness to greater inter-disciplinary scholarship in the light of the desire to answer the “real life” questions that do not sit easily within any single discipline. The challenges that these characteristics generate are that now new, start-of-career academics must not only have a Ph.D., but also at least one article in a peer-reviewed journal when applying for their first job. The relationship between the three axes is under-theorized. This perhaps can be seen best in the debate surrounding how impact can be measured and what the problems are with measurement in this field. With growing managerialism and accountability mechanisms in law schools, the need to show an active research career may mean that the thoughtful, ten-year book is never written. The system no longer seems to support that sort of scholarship, although ironically, this will undermine impact in the longer term.

