

# THE ECONOMICS AND ETHICS OF CELTIC IRELAND

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The laws which the Irish use are detestable  
to God and so contrary to all laws that  
they ought not be called laws...<sup>1</sup>

King Edward I of England (1277)

For thousands of years the Gaelic speaking territories of north-western Europe were home to a polycentric legal order that has been of great interest to Austro-libertarian theorists in the field of free-market legal reform (Rothbard, *For a New Liberty*, 1970). This ancient legal system, known as «Brehon law» after the caste of professional judges called Brehons who wrote and upheld the laws, was best preserved on the island of Ireland where it remained in place from pre-history up until the 17<sup>th</sup> century.

To understand the economics and ethics of this early Irish legal system one must first detach oneself from the modern setting of ultra-individualistic liberal-socialist Europe. It is impossible to explain Brehon law without simultaneously introducing the reader to the social, political and cultural set-up within which the system of Brehon law existed or what Prof von Mises would have called its thymology.<sup>2</sup> For example, there were multiple competing legal schools co-existing in ancient Ireland, a point that might instantly confuse many readers unless one explains how such institutions were radically different in both

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<sup>1</sup> Peden (1977).

<sup>2</sup> Mises (1957, p. 266), «While naturalistic psychology does not deal at all with the content of human thoughts, judgments, desires, and actions, the field of thymology is precisely the study of these phenomena.»

theory and practice from their modern counterparts. The Brehon legal system also advanced a scholarly oral tradition and a unique legal language of its own which took over seven years to master. As a result there are few surviving legal texts so I shall be drawing heavily upon manuscripts from the 14<sup>th</sup>-16<sup>th</sup> centuries detailing the period from the 7<sup>th</sup>-8<sup>th</sup> centuries. These texts include wisdom texts, sagas, praise-poetry, saints' lives, and monastic rules which were recorded and preserved by a class of professional poets who held the most powerful position in Irish society at the time.

Let me first introduce the political setting of the period in question. The basic territorial area in ancient Ireland was the *túath* which may best be understood as the tribal lands of an extended family. There was on average approximately 150 kings or chieftains who ruled their respective *túatha*. Some kings were the subjects of other kings in a system of over-lordship but many kingdoms formed trade and, as we shall see, rights granting treaties with each other. Although there were at times powerful kings who held whole provinces under their authority, no king ever became the *Ard Rí* or «high king» of all Ireland. During this time the Irish population hovered around 400,000 inhabitants and the size of each kingdom was typically 3,000 people. Ireland was densely forested until after the English conquest of Ireland and the on-set of the industrial revolution and the population during the reign of Brehon law was largely rural with exceptions for the many monasteries and the occasional Viking settlements in later periods.

The cultural-legal institutions of ancient Ireland have been summed up under the following headings: tribal, rural, hierarchical, in-egalitarian, family-orientated, Christian and honourable (in the sense that the society was obsessed with honour, oaths, reputations and hospitality). This is in complete contrast to the unitary, urbanised, egalitarian and individualist society of our time (Binchy, *Early Irish Society*, 1953). For Austro-libertarians, the most fascinating feature has been the intense private-property centred focus which lay at the heart of the entire political-legal institutional set up.<sup>3</sup>

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<sup>3</sup> «Thus ownership of property in all its forms was the basis of a man's legal status and marked the extent of his participation in and protection within the legal system» (Peden 1977, p. 87).

To be clear to those who may confuse legal polycentrism and the institutional implementation of the anarcho-capitalism advocated by Murray Rothbard, I wish to pause first to clarify. Even though there was a polycentric legal order in ancient Ireland, there were still forms of taxation within the túatha and private property was not held as an absolute. With ownership of property came responsibilities and obligations that go beyond what Rothbardian libertarians would usually deem ethical. The meaning of legal polycentrism is simply that the law itself is not handed down by the king, not that there necessarily be no king. The law was formulated by a class of poets who were members of various competing legal schools. Even though the king could not make the laws, the polycentric legal order found agreement that the natural organisation of society was monarchy. The king of each túath could legally expect the direct loyalty of his servants, particularly in times of war, and a special tax to fund these endeavours. The king's responsibilities included *Slógad* (War), *Cairde* (Treaties- rights extensions) and *Óenach* (Assemblies). To explain how these functions formed the structure of ancient Irish society I shall begin by introducing the reader to an overview of how the polycentric legal system operated.

So to begin, who had rights in the túath and how were they earned? Well, not everyone had rights, a horrifying thought in today's hyper-egalitarian world. Foreigners or outsiders did not necessarily have rights for example. There were three types of foreigners who were essentially outcasts, namely *Ambue*, *Cú glas* and *Murchoirthe* who were all different classifications of outlaws whether debtors or men without honour or exiles from foreign lands. Rights were based on a complex code of honour. If one had honour, one had rights and if one lost one's honour one could be expelled from society. How one acquired honour is quite complex and we will discuss that later on.

Ancient Ireland is unique in that the legal system provided for a financial compensation for nearly all infringements of rights. The penalties varied and were determined by a variety of factors such as the rank or honour-price of the victim within the community. A person's status or honour price, known as the *log n-enech* or «price of his face», was determined largely by his wealth. Provincial kings

for example were given an honour price of 42 milking cows. A compensatory honour price could be paid for murder, satire, serious injury, the refusal of hospitality, theft, violation of his protection, animal trespass, and minor damage to property.

This legal system operated on a basis of oath and testimony. The inegalitarian nature is now in open relief in how this system worked. High ranking members of society commanded an oath that weighed more than the lower ranking members.<sup>4</sup> The native Irish never subscribed to the Roman principle of all citizens being equal before the law (Kelly, 2009, p. 7). Thus, in a situation where it was «my word against your word» the higher ranking person won.

Class could be divided roughly into two groups: the *nemed* and the non-*nemed*. *Nemed* is a word that has a connotation of «sacredness» or «holiness». It was thought that the more honourable you were the more «holy» and closer to God you were. In a proto-Christian understanding of existence, the ancient Irish embraced a hierarchical structure of society or what later Christians described as the hierarchy of being, the «*scala naturae*». This is the scholastic concept of an ascending order of beings in the universe, comprising inanimate matter, plants, animals, and rational human beings; above them are the immaterial created spirits or angels; and finally God, whose essence is immeasurably more sublime than that of any creature.<sup>5</sup> Each level in this hierarchy is complete in its own perfection, while each preceding level depends on the beings above it; and all levels totally depend upon God. As Saint Augustine wrote, «*non essent omnia, si essent aequalia*»<sup>6</sup> or «if all things were equal, all things would not be.» It is this inequality that the ancient Irish embraced which, after all, makes the division of labour possible and thus allows civilisation to exist. The introduction to one legal text entitled *Senchas Már* even proclaimed that the world had numerous problems before the creation of that text. Among those problems

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<sup>4</sup> Three law texts dealing mainly with rank in early Irish society have survived: *Críth Gablach*, *Uraicecht Becc* and *Míadlecht*.

<sup>5</sup> Fr. John Hardon, *Modern Catholic Dictionary* (Hardon).

<sup>6</sup> Saint Augustine, *The Confessions of Saint Augustine* (Augustine).

was that everyone was in a state of equality and this was a problem the text sought to resolve!

The *nemed* class held certain privileges which allowed it to retain its honour when confronted with the law. Once a claim was made against an individual there were various ways of getting the offender to court to atone for his offence. One way was the institution of distraint where the person's cattle was essentially kidnapped and herded off his land until he agreed to appear in court. For the *nemed* class however, such an intrusion brought great dishonour and would affect their status and thus, since they were generally the wealthy end of society, they would use violence against the distrainers to protect their honour. To over-come this problem the plaintiff could fast against him, for example, whence he would wait outside his home and fast and pray till the offender submitted to see the case in a court of law.<sup>7</sup> This in turn weakened the honour of the *nemed*, particularly if he did not submit to the courts to have the case heard as he would be seen to be unjust and acting in a manner inappropriate to his status.

Upon this honour system was built the system of surety-giving, or insurance, which laid the foundation upon which the entire contract-rights based structure of ancient Irish society was built. Later I will go into details of how it worked, but for the time being it can be said that one may enter into a contract only with regards how much weight, or perhaps one should say how much value, your honour is worth. One cannot enter a contract that is higher than one's honour-price. For large purchases one must seek other individuals to throw the weight of their honour in behind yours so that the chance of default was spread more evenly across the community in accordance with your honour. Your honour could be considered the ancient equivalent of have a credit rating! In the case of a king, however, the Wisdom Texts advise against going surety, or insuring with your honour, a contract made by a king for if he defaults it will be difficult for you to drag him to court because of his high rank and his resistance to the distraint of his cattle. Various methods were devised to

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<sup>7</sup> The institution of fasting for justice existed in other ancient cultures such as India too.

circumvent this awkward situation such as a «whipping boy» could be chosen to take the brunt of a king's default. The whipping boy's cattle could be distrained instead of that of the king, the shame of distraint would be avoided on the king but he would still be under social pressure to attend court to ensure that he did not lose his honour price.

There are many circumstances in which a person's ranking may be changed. If a *nemed* behaves in a manner unbecoming to his status or fails to carry out his obligations, his rank is reduced. In the case of a king, for example, his rank is reduced, or in other words, he is stripped of his honour-price if he displays cowardice in battle. The same holds true for a stumbling (sexually immoral) bishop, a fraudulent poet and a dishonest lord. When one loses one's honour-price, one is degraded to what is called a «small person» i.e. a commoner. Most interestingly is the individualisation of honour-price reduction. The reduction of a man's rank incredibly does not involve his family despite the intense emphasis on familial ties.

In contrast to the Patricians of early Rome or the Brahmins of India, the early Irish *nemed*s were not a closed caste. It was possible to become a *nemed*. According to the text *Uraicecht Becc*, elevation in rank may result from man's art (*dán*) or husbandry or God-given talent. He then quotes the important legal maxims «a man is better than his birth» (*ferr fer a chiniud*)<sup>8</sup> and «an art is better than an inheritance of land» (*ferr dán orbu*).<sup>9</sup> Even in modern Gaelic, there exists a phrase which was used to describe the class system. «*Ní bhíonn uasal ná íseal ach thuas seal thíos seal*» translated literally as «there are not nobles nor commoners, but only those who are up for a while, and those who are down for a while», demonstrating the transient nature of the actual content of the strata of society in ancient Ireland.

To understand ancient Irish law one must first understand the kin-group, or *derbfine*, whose members are all descendants through the male line of the same great-grandfather. A kin-group possesses very considerable legal powers over its members. Each kin-group

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<sup>8</sup> Binchy, *Corpus Iuris Hibernici*, 1978.

<sup>9</sup> *Revue Celtique*, Paris 1870-1934.

has its own kin-land (*fintiu*) for which every legally competent adult male in the group has some degree of responsibility. A man may own land independent of his kin, and is free to dispose of it as he sees fit, but no-one can sell his share of the kin-land against the wishes of the rest of the kin.

So how exactly did the kin insurance-surety system work? The kin-group may have to pay for the crimes and debts of its members. So if an offender absconds—and he has no son or father from whom reparation can be extracted—his kin becomes liable. If payment is not forthcoming voluntarily, the plaintiff can distrain cattle from a kinsman of the offender, using a special form of distraint. An offender who has involved a kinsman in liabilities must subsequently make good the loss incurred. If he fails to do so he may be ejected by the kin, thereby losing his legal rights in society. One who evades his obligations to his kin cannot be given protection, even by a person of nemed rank. Although it may sound overly punitive, such rules generate tremendous social and legal pressure to conform to the rules of society under the penalty of social expulsion and ostracism. This principle of kin-liability was one of the many rules unfamiliar to the Anglo-Normans, and there were frequent references in English documents of the 13<sup>th</sup>-17<sup>th</sup> centuries to the Irish custom of «*kincofish*» meaning «liability for the crimes of a kinsman».<sup>10</sup>

When a member of a kin-group is illegally killed, his or her kinsmen get a share of the *éraig* or «body-fine.» If the culprit fails to pay, the kinsmen are expected to prosecute a blood-feud against him. The crime of *finfal* «killing a kinsman» breaches the solidarity of the kin-group, and is therefore particularly abhorred. The kin-slayer forfeits his share of the kin-land, but is still under obligation to pay for the crimes or debts of other kin-members.

The head of the kin is known as the *ágae fine* or *cenn* (or *conn*) *fine*. He is chosen by election among the kin-members on the basis of his superior wealth, rank, and good sense. It is notable that the Irish kings were in general not strictly hereditary kings like elsewhere in Europe, but that the king was chosen from the broad

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<sup>10</sup> Kelly, (2009), p. 13.

circle of family members in the kin-group. The king spoke for his kin at public occasions, such as an assembly or court of law. He gave pledges on behalf of his kin to ensure the fulfilment of any responsibility which kin-members may have towards the king, Church or poets.<sup>11</sup> As public representative of his kin, he is open to satire if a kinsman fails to discharge his obligations. For example, a poetess may legally satirise him if one of his kinsmen allows her pledge to become forfeit. He may also take on responsibility for an unmarried kinswoman on the death of her father. He pays any fines which she may incur, and receives half of her *coibche* «bride-price» if she marries.<sup>12</sup>

Unlike many other legal systems, the king himself does not live above the law. The king's position within the *derbfine* (kin-group) is dependent upon him being «honourable» which is strictly determined by custom. If he loses his honour he loses his position and becomes a commoner. Ways he may lose his honour include him being unjust, being defeated in battle, showing cowardice in battle, extortion, kin-slaying, if he tolerates satire, if he defaults on his oath, if he does not maintain a retinue and if he has an imperfect body.<sup>13</sup>

Many early law-codes were put together at the instigation of powerful kings. For example, the Anglo-Saxon law was codified at the direction of Kings Alfred and Ine. The Emperor Justinian did the same for Roman law, King Hammurabi for the Assyrian law, Kings Rothari and Liutprand for Lombardic law. By contrast there is little evidence of royal involvement in the composition of the Old Irish law-texts. In general, the formulation of the law seems to have been in the hands of a legal class (with strong clerical links) which had some degree of national organisation and was not under the control of any particular king. As Professor Gerard Casey mentions, it was of great benefit that the political

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<sup>11</sup> Binchy, *Corpus Iuris Hibernici*, 1978. In this text he is described as *aire coisring* «lord of obligation» (lit. «of drawing together») on account of his duties on behalf of his kin.

<sup>12</sup> Note that men paid a woman's family for her hand in marriage, the opposite of the dowry system operated in other ancient cultures.

<sup>13</sup> According to the Wisdom Texts, the necessity for the king to be beautiful was very important in ancient Ireland.



fragmentation of this small country was so radically decentralised since it provided a setting of legal polycentrism to flourish.<sup>14</sup>

The law-texts of the various Saints and scholars that I have been referencing thus far are the remnants of the codes of theory and practice that were originally written to instruct judges. There were a number of centres of legal knowledge at which such instruction could be obtained, but there is no longer any firm evidence of their location at the period of the composition of the law-texts (7-8<sup>th</sup> centuries). In the 9<sup>th</sup> century *Triads of Ireland*, however, there are references to the monasteries of Cloyne, Cork and Slane as legal centres. The law-text *Senchas Már* that I have repeatedly mentioned, which translates literally as «Great Tradition», was a text put together in the Northern midlands of the island. Prof. Binchy has suggested that some other law-texts emerged from a «poetico-legal» school (Binchy, *Early Irish Society*, 1953). He refers to this group as the *Nemed* collection of texts, and points to their pre-occupation with the rights and duties of «men of art», especially poets. Other law-texts appear to have been members of other competing schools with differing emphasis on Ecclesiastical law. After the Norman invasion, clerical involvement in the formation of the law decreased as the law came to be propagated by an elite group of families who maintained a high standard of ancient Gaelic and Latin.

The law was enforced through a complex system of suretyship, pledging and distraint rather than by a king and his officials. The

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<sup>14</sup> As Prof. Casey notes (Casey, 2010):

Kelly attributes this low- or non-involvement of the kings in the law-making process to what he terms the «political fragmentation» of the country at the time of their composition/redaction, clearly seeing this as a negative point and assuming without grounds for so doing, a prior state of non-fragmentation. Kings could, however, issue emergency legislation (after defeat in battle or in the presence of a plague). If the king was not involved in law-making, neither was he involved in law-implementation. This was done via a tort-like process involving suretyship, pledging and distraint.

Irish society in the historic period up to the seventeenth century constitutes one of the best examples of a functioning anarchic society. Irish law was the product of a body of private and professional jurists (called *brithim* or *brehons*) and was flexible and capable of development to response to evolving social conditions (Peden 1977, p. 82).

king may enforce «emergency» ordinances which bind his túath after defeat in battle or after a plague. These are ordinances voiced at an assembly (óenach) which are confirmed by a king who takes pledges for their observance. The king also enforces ordinances of traditional law and of ecclesiastical law by taking pledges from his subjects, which are forfeit in the event of non-compliance. The wisdom texts have a vision for the role of the king such that a king should enforce the law in a general way by suppressing robbers, crushing criminals and preventing lawlessness (McNeill, 1935).

When a conflict arose between túatha, for example if a member of one túath was killed by a member of another, there was a system of legislative alliances that allowed for the peaceful resolution of the conflict. If the kings in the respective túatha were each subordinate to the same over-king, then the injured party could appeal to the court of the over-king for there to be justice. This would normally involve the payment of the body-fine (cró) to the injured party from the aggressor. The subordinate king goes to the court of the over-king and takes a hostage representing the culprit. To release this hostage, the culprit must pay the body-fine. One seventh of this goes to the hostage. Of the remainder, one third stays with the over-king, one third goes to the victim's kin, and one third goes to the victim's lords (*flaithi*). The subordinate king is responsible for dispensing the payment to the kin and the lords, and he himself receives one third of the lords' third. A subordinate king and the over-king both receive payment for their part in the enforcing of the law. Using this incentive system, crimes were eagerly pursued.

The king's role may be summarised in his three main functions. He acted as president of the assembly, he was commander of the armed forces in times of war and he was charged with promulgating the law.<sup>15</sup> Prof. Casey notes that while the Irish had kings who had a role in enforcing compliance to the law, it is important to realize that they were not lawmakers. Moreover, they could, in fact, be

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<sup>15</sup> McNeill, Eoin, *Early Irish Laws and Institutions*, «the chief function of a king of a túath were three: he was president of the assembly, commander of the forces in war, and judge in the public court.» D.A. Binchy has however, argued that the evidence of the law-texts does not substantiate MacNeill's view of the king as a public judge.

sued, just as any other freeman albeit with difficulty (Casey, 2010). With regards the legal system he has some role in relation to judgement in important cases. He —along with the bishop and chief poet— is described as «the cliff which is behind the courts for judgement and for promulgation». So it seems that the judgement (although it is formulated by a judge or judges) is promulgated by the king, or other dignitary.<sup>16</sup>

So, what sort of economic system arose from the application of Brehon law to the day-to-day life of the ancient Irish? Well, for the average small farming peasant, he was advanced a fief of stock or land by a big landowner or a lord in return for food-rent. If a client pays the rent fully for at least seven years, the fief becomes his property on the lord's death. Here we see an early example of homesteading, or perhaps more accurately squatters rights being legally enforced in ancient Ireland. This base client is required to perform a fixed amount of manual labour (*drécht gállnae*) for his lord. He must join the reaping party (meithel) in his lord's cornfields, and must help in the construction of the rampart about his lord's *dún* (*fortified dwelling*). The possession of clients provided the lord with status, as well as food-rent and services. With this grant, the lord could expect winter hospitality at the peasant's homestead. *Cáin Lánamna*<sup>17</sup> describes the relationship between a lord and his base clients as that between a husband and wife or the Church and its monks. A lord may lose his honour price if he refuses hospitality, shelters a fugitive from the law, tolerates satire, eats food known to be stolen, betrays his honour in some way or if he fails to fulfil an obligation to his clients.

The early Irish Church was not merely an organisation of pious and learned men and women: it also owned a great deal of land and other wealth. Between 7-8<sup>th</sup> centuries, organised paganism was gradually relegated to obscurity by the influence of Christianity. Over time, high-ranking clergy came to be treated as superior to kings. A religious legal jury emerged. There were churchmen whose evidence could not be overturned, even by a king. The Churchmen in question were called *suí*, a bishop and a hermit

<sup>16</sup> Kelly, Fergus, *Peritia* 5 (1986), 74-106.

<sup>17</sup> *Cáin Lánamna*, The law of Lanam.

(*deorad Dé*- exile of God). The latter is especially revered for his ability to perform miracles and is obliged to act as an enforcing surety (*naidm*) in cases where a contract has been bound by the gospel of Christ or by the heavenly host. The *Penitential of Finnian*<sup>18</sup> lays down spiritual, financial and practical atonements to be undertaken by a cleric who murders a layman. He must go into exile for ten years, of which seven are spent in penance and abstinence. He must then return, compensate the bereaved kinsmen, and offer himself to the parents of his victim, saying «Behold, I am in place of your son, I will do for you whatever you tell me.»

As with the *nemed-persons*, the cleric's status depends on his possessing the necessary qualifications and behaving in a proper manner. The relationship between the Church and the rest of society was seen in terms of a contract according.<sup>19</sup> If a Church building is allowed to become a den of thieves or a place of sin it can be destroyed without penalty. A sexually stumbling bishop loses his *nemed*-status «because purity is required of a bishop». A cleric who has impregnated a woman may become laicised and take on responsibility for the child. Triad gives the three ruins of a Túath as being a «dishonest lord, an unjust judge, a lustful priest» (has society changed much since then?). Offences committed by a cleric against a layman are paid in the usual manner.

The only lay professional who has full *nemed* status is the poet. All other professionals are counted as *dóernemed* or «sacred but unfree». The poet's most important functions are to satirise and to praise. His high status reflects early Irish society's deep preoccupation with honour: it is damaged through satire and increased through praise. In many ways, the honour system for this deeply spiritual people acted much like as if there was a higher power adjudicating in disputes. The Gaelic obsession with honour can be summed up with the words of a 16<sup>th</sup> century English historian who described the Irish as «greedy of praise and fearful of dishonour».<sup>20</sup>

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<sup>18</sup> Saint Finnian.

<sup>19</sup> Kelly, Fergus, *A Guide to early Irish Law*, p. 41. In particular, Prof. Kelly references the ancient text *Bretha Nemed toisech* for this.

<sup>20</sup> Stanihurst, quoted E. Knott, *Irish Classical Poetry* (Dublin 1960) 73.

According to the ancient texts, the effects of poetry could be devastating. It could cause facial blemishes and poets are said to be able to «rhyme to death» both men and animals. They also hold the power of prophesy. According to the ancient texts, poets derive their skill from «encompassing knowledge which illuminates, breaking of marrow and chanting from heads» (Watkins, 1963). There were two strata of poets, the *Filí* and the *Bairds*. The *Baird* were inferior in status and accomplishment in comparison with the *Filí*. The essential difference between the *Filí* and the *Baird* is that the latter lacks professional training.

The degree to which the *Filí* was involved in the theory and practice of the law in the early Irish period is difficult to assess. Possibly the jurists, (*brithemain*) originated as an offshoot from the parent order of *filid*. It appears that a separation of law and poetry had not taken place in some law schools since the pen of the poet was so decisive in ensuring compliance. The poet is entitled to use his power of satire in law enforcement across boundaries. Enforcing the claims for members of a *túath* is among the three prerogatives of a chief poet.

Verbals assaults on a person are regarded with the utmost seriousness. To satirise, in Gaelic, is the word «*áerad*» or «*rindad*», both of which have the basic meaning «to strike» or «to cut», which indicates the destructive power satire is seen to hold. It is said to cause blisters or even death (Robinson, 1912). There are two types of satire: justified and unjustified. The honour of a satirised king may be restored by either a praise poem, *moladh donigh coir* meaning «praise which washes away satire», or through addressing the cause upon which the satire was made. The poem is normally directed at the head of a kin for if he tolerates unjust satire he loses his honour price. If justified he must pay whatever fine (*éraig*) he owes or give a «pledge to save his honour». The pledge indicates his willingness to discharge his liabilities or to submit the case to arbitration. The list of types of satire which require payment of the victim's honour-price include the following; mocking a person's appearance, publicising a physical blemish, coining a nickname which sticks, composing a satire, repeating a satire composed by a poet in a distant place, taunting, wrongfully accusing another of theft, publicising an untrue story which

causes shame and even satirising a dead person. A poet is not entitled to payment for a false praise-poem on the grounds that false praise is equivalent to satire.

Satire can legally be used by a *filí* to exert pressure on a wrongdoer to get him to obey the law. However, to satirise anyone without just cause is a serious offence, requiring the payment of the victim's honour-price. Authors of law-texts seek to punish this misuse of the magic power of satire by reducing or even cancelling the poet's status. The illegal satirist is treated with deep hostility in religious material: the satirist or «*cáinte*» is doomed to spend all eternity up to his waist in the black mires of hell, along with sorceresses, brigands, preachers of heresy, and other miscreants. The *cáinte* is the embodiment of shamelessness in ancient Ireland.

Much stress is placed on the duty of hospitality in the laws, wisdom-texts and sagas. To refuse food and shelter where it is due is to be guilty of the offence of *esáin* (*lit. Driving away*) and requires compensation appropriate to the injured party's rank. A monastery from which guests are turned away loses its legal status. Its buildings can be damaged or destroyed without compensation.

An important principle of Irish law is the right of a freeman to provide legal protection for a certain period of time to another person of equal or lower rank. This fitted in well with the Catholic Church's tradition of *asylum* in and around a monastery.<sup>21</sup> Hence, the Old Irish word *termonn* (from Latin *terminus* «limit», extent [of the monastic lands]) developed into its modern meaning of «sanctuary, refuge or monastery.» To kill or injure a person under protection is to commit the crime of *díguin* «violation of protection». This entails payment of the protector's honour-price, as well as the appropriate payment to the victim or his kin. A freeman is also felt to exercise permanent protection over his own house and its environs. If a person is killed or injured within this area the culprit is guilty of *díguin* against the householder. It was illegal- even for a cleric or layman of *nemed* rank- to give protection to various categories of absconder however, e.g. a runaway wife or slave, a

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<sup>21</sup> *Die irische Kanonensammlung*, Wasserschleben, Leibzig 1885, bk 28, *De Civitatibus refugii*, «on cities of refuge».

fugitive killer, an absconder from his kindred and even a son who fails to look after his father.

With regards theft, the early Irish adhered to a very complex compensatory system. Some of it was lifted straight out of the Bible. For example, «if a man steals a sheep he must give back four sheep» stems directly from Canon law, Exodus 22: 1. There were several important factors in determining the severity of a crime. These include questions like where the theft took place, the value of the stolen objects, the rank of the owner of the stolen object and the rank of owner of the land where theft took place. The habitual thief loses his rights in society. A woman who steals is not entitled to receive payment (*díre*) or honour-price (*lóg n-enech*) for any offence committed against her. A man who steals loses his entitlement to sick-maintenance (*othrus*) or fines for injury (*féich*). A house which has been turned into a den of thieves can be destroyed without compensation.

Of interest to many libertarian theorists is the ancient Irish view of who owns stolen goods. The sale of stolen goods is included in the list of contracts that are invalid, even if bound by sureties. A man who receives stolen goods is referred to as *fer medóngaite* or «a man of middle theft». In true libertarian fashion, he is guilty of a crime only if he is aware that the goods were stolen which must be subsequently returned to the rightful owner (Rothbard, *The Ethics of Liberty*, 1982). If a thief brings stolen goods into another's house, he must pay half the householder's honour-price (as well as the usual fine to the owner of the good (Kelly, 2009, p. 148)). An Old Irish quotation from an otherwise lost portion of text refers to stolen property found in a tree. The accompanying commentary states that it becomes the finder's property if he does not know who the owner is; if he does know he himself is guilty of theft. Here we see classical Lockean property rights theory being implemented centuries before Locke put pen to paper.

The Celtic honour system gave rise to essentially a form of virtue legislation. A person who witnesses an offence without attempting to prevent it may be guilty of a crime, what the ancient texts call a «crime of the eye» or «*cin súilo*». Such an offence is one of four things that debase a lord and his family. The law is taken

to its ultimate conclusion that «everyone who looks on at an offence consents to it».<sup>22</sup> Ecclesiastical legislation was particularly harsh on this matter. According to *Cáin Adomnáin*, translated as the holy laws of the ancient Irish Saint Adomnán, the onlooker who witnesses the slaying of an innocent child and who does not attempt to save him «with all his might» is deemed as guilty as the perpetrator of the crime.<sup>23</sup> If a man intervenes, but fails to stop the crime there is no penalty and clergy, women, children and the insane are exempt from this obligation

Most treaties are made in the form of «*Cor bél*», which literally means «treaty of mouth». Commercial undertakings, agreements to marry, agreements to foster children, agreements to engage in co-operative farming and agreements to enter clientship are all taken in the form of a verbal treaty. The law requires that a contract must be formally witnessed and bound by sureties. A person cannot contract independently for a contract greater than his honour price. If he wishes to enter such a contract he must get permission from his kin.

There were various grades of judges competent in different areas. These included *Óes dána*, otherwise known as the judges for craftsmen and *Brithem bérla Féine* looked after traditional law & poetry. *Brithem trí mbérla* were the best judges as they had knowledge of «three languages»: Canon law, Poetry and Traditional law. The Brehons of Ireland were divided into several tribes and families such as the McKiegans, O'Deorans, O'Brisleans McTholies. Every king had his peculiar brehon dwelling within his túath. Each túath had its own official judge, *Brithem túaithe*, who presumably was appointed by the king. The judge was in constant attendance of the king. The brehon derived the greatest part of his income from the king.

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<sup>22</sup> *Aitínech gach aircsinach*, CIH 1315.15-8. One can see that with this custom of «crime of the eye», the Irish were already well prepared for the Christian interpretation of virtue, epitomised by Christ's call to men for chastity: «*But I say to you, that whosoever shall look on a woman to lust after her, hath already committed adultery with her in his heart.*» Mathew 5: 28, Douay-Rheims Bible.

<sup>23</sup> *Cáin Adomnáin*. The Rothbardian libertarian may see such a law as being grossly unjust, but do not forget that Hoppe's polycentric sociology permits for such laws (Hoppe, 2001).



The question may be asked, how did other trained products of the law-schools survive? Having no official position, such men earned a living by arbitrating between two (or more) parties who had previously agreed to abide by their decision. They charged a fee which they justified by calling for «the payment for legal language». Others taught in law-schools. No doubt, much like today, many came from wealthy families. According to the Wisdom texts, the three blemishes of a judge were said to be foolishness, ignorance and negligence.

The courts system itself was also quite intricate. To reduce the chance of error, many cases were decided by more than one judge. There is a saying in the Wisdom texts that «A free people (*sáeraicme*) should have two judges». Brehons had to themselves an obscure and unknown language which none could understand except those that studied in the special schools they had.<sup>24</sup> Seven main areas of legal knowledge were studied: rights of sons, rights of monks or monastic clients, rights of lordship, rights of marriage, rights of kinship and *Cairde* (Treaties between *Túatha*). The island was dotted with Brehon Law schools of learning.....

The ingenious polycentric nature of the ancient Irish legal system provided a clear incentive for good judgement since a judge had to give a pledge of at least five ounces of silver in support of his judgement. His judgement was not valid unless he swore on the Gospel that he would utter only the truth. If he refused to do so he was no longer regarded as a judge within the *túath*, and the particular case is referred to the king or the bishop. The legal maxim «*Cach brithemoin a báegul*»<sup>25</sup> sums this up nicely which means «to every judge his error.» If his judgement was challenged and he could show it to be correct, the judge himself was entitled to a *cumul* (female slave) from the complainant in

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<sup>24</sup> Conell Mageoghagan, *Anal Clon, s.a.* 1317. «This *fenechus* or brehon law is none other than the sivil (sic) law, which the brehons had to themselves in an obscure & unknown language, which none could understand except those that studied in the open schools they had, whereof some were judges and others were admitted to plead as barresters.» Conell, writing in 1317, is referring to the Irish lawyers of the preceding century.

<sup>25</sup> Kelly (2009), p. 54: «Every judge must bear the responsibility for any mistake which he makes.»

addition to his normal fee. A mistake or oversight on the part of a judge can be remedied by his paying a fine, but for a more serious breach of duty, he was deprived of his office and his honour-price. This was his punishment, for example, if he passed judgement after hearing only one side of a case. To the ancient Irish, one of the three falsehoods that God avenged most on a túath was a false judgement secured by bribery.

In the Irish Saga *Táin Bó Cúailnge*, Queen Medb is the real leader of Connacht, and occasionally partakes in the fighting herself. In the Wisdom texts they praise the reticence, virtue and industry of women and say that the «Three steadiness of a good woman are: a steady tongue, a steady virtue and a steady housewifery» (Éigen, 9<sup>th</sup> Century). On the other hand, women are censured for sexual promiscuity, making spells, illegal satires and thieving.

The inertness and enduring strength of the ancient Gaelic law is demonstrated in the fact that despite the best efforts of powerful Christian clerics, divorce and bizarre marriage arrangements still remained in place. In total there existed nine forms of sexual union. These included a union of joint property, a union of a woman on man-property, a union of a man on a woman-property, a union of a man visiting (with kin consent), a union without kin consent with a woman running away with man, a union where a woman allows herself to be abducted, a union where a woman is secretly visited (without kin consent), a union of rape and finally a union of insane persons. Prof Kelly notes that polygamy was permitted and was probably practiced widely (Kelly, 2009, p. 70). The Church opposed polygamy but with limited success.

In the case of a child born of a union forbidden by a girl's father, the man alone was responsible for raising the child. In ancient Irish society, the husband was felt to purchase his bride from her father. Divorce was permitted, which again indicated the lack of penetration of Christianity into the legal schools in comparison to medieval Europe. In a divorce the share due to each depends on the status of the marriage, the amount of property brought into it by each partner, and the proportion of the household work (*aurgnam*) borne by each. A woman who leaves her husband without just cause is classed as an absconder. Such a woman has

no rights in society, and cannot be harboured or protected by anybody, of whatever rank.

There are seven grounds for men to divorce their wife. They include unfaithfulness, persistent thieving, a woman inducing an abortion on herself, a woman bringing shame on his honour, a woman smothering her child and finally, and puzzlingly, «if she brings without milk through sickness». Similarly, there are grounds for divorce for a woman. If she is repudiated for another woman, if her husband fails to support her, if he spreads a false story about her, if he circulates a satire about her and if he tricked her into marriage by sorcery. A husband may strike his wife to correct her, but she may divorce him if his blow causes a blemish. Sexual failings on behalf of the husband are also a cause for concern. If he is impotent or sterile, if he becomes so fat he is unable to have intercourse, if he is practicing homosexuality, «If he spurs the marriage bed and prefers to lie with little boys», if he has a lack of reticence about sexual relationship with his wife and if he receives holy orders (mutual obligations) the wife has the right to divorce her husband.

There is much mythology surrounding the allegedly high legal status of women in ancient Ireland. Women were in fact generally without independent legal status. They were debarred from acting as a witness in court. They were prohibited from making a valid judgement without the permission of her superior (usually her husband or father). Their status was largely in agreement with other early legal systems «her father protects her in childhood, her husband protects her in youth, and her sons protect her in old age; a woman is never fit for independence».

If a crime is committed or debt incurred by an unmarried woman it is normally paid by her father (or kin if he is dead). The status of marriage determines who pays. There also existed bizarre and largely malicious traditions such as the right of a chief wife to inflict injury on her husband's second wife (non-fatal injury for a period of three days). Humorously, but what is also very disturbing, is that the second wife can only scratch, pull hair, speak abusively and inflict other minor injuries in her defence. A crime against a woman is regarded as a crime against her guardian (husband, father, son, or head of kin). A woman's honour and

purity is prized and the full honour-price of her guardian must be paid in compensation if a woman is kissed against her will.

Despite her lack of independence in many ways, there were also exceptions to the rule.

Under certain circumstances a woman may give evidence in court. This is the case when she is in danger of death at childbirth, as is the evidence of a sick man facing death, being unlikely to lie given the nearness of eternal retribution. Even in a marriage into which a woman has brought little or no property, she can «disturb» (i.e. Impugn) her husband's disadvantageous contract (*dochor*) provided she is a chief wife. One reform towards a more private-property orientated society that was brought about through Christianity was the gradual allowance of a woman to donate personal items to the Church, thus affirming her exclusive right over certain items. This, over-time, opened the gate for a gradual logical extension of her property rights into other areas.

At the bottom of society were the slaves. The male slave (*Mug*) and the female slave (*Cumul*) were typically prisoners of war, foreigners picked up by slave traders, debtors and the children of parents who sold their kids into slavery. Originally there was not any legal restriction against ill-treatment or even death at the hands of their master. However, the slave-owner also bore some risk. The master must pay for any crime which the slave commits. Reciprocally, the master is entitled to offences committed against him. A runaway slave «absconder» cannot be given protection even by a high-ranking *nemed*. If a freewoman allows herself to be impregnated by a slave, she alone is responsible for rearing the child.

The effect of Christianity on ancient Irish society can be seen in the effect it had on the law. Even though, as I have already explained, Brehon law was incredibly immune to change and heavily engrossed in tradition, Catholicism became a powerful instrument of change that successfully brought about reforms that libertarians would generally recognise as positive. Saint Patrick, the patron saint of Ireland, himself being originally a slave, sought to free the slaves and sex with slave women was quickly legislated against. Over time aspects from the laws that did not conform to Christianity were abolished. One immediately noticeable effect

was that it raised the status of women as the Church sought to make it a more serious offence to kill a woman than to kill a man, rather than the opposite. The penalty for such a crime was to have your hand and foot cut off before being then put to death.<sup>26</sup> Other reforms like the elevation of monastery abbots and bishops to a higher level than kings curbed the growth of regal power and the establishment of *tearmonn* or asylum on monastic grounds ensured for fairer trials.

The currency system revealed in the law texts and other documents is extremely complex. The value of an article or the amount of a fine may be given in terms of *cumals*,<sup>27</sup> *sets*, cattle or ounces of silver. Sometimes a combination of two or three currencies is used. For example, the honour-price of the lowest grade of king was seven female slaves. Originally this presumably meant that seven female slaves were actually handed over to the king for a breach of his honour-price. But it is clear that from the 7<sup>th</sup> century onwards some other currency may be substituted for female slaves. The unit of area also became known as the *cumal*. The value of a *cumal* of land ranges from 24 milch cows for best arable land down to 8 dry cows for bogland. From reading the ancient texts it is difficult to determine exactly how big an area it was. It is obvious that the area a *cumal* represented was originally equivalent to what one female slave would purchase.

In the local economy it is difficult to draw a dividing line between barter and sale as early Christian Ireland did not have a system of coinage. The first coins began to appear only about 1000AD in Dublin, one of the main trading ports. Cattle were undoubtedly the most common form of currency in the period of the law-texts. Even after the coinage was introduced by the Norsemen in the early 10<sup>th</sup> century, and re-introduced by the Anglo-Normans in the early 13<sup>th</sup> century, cattle continued to be the normal currency of the Irish. One can only imagine how complicated it must have been to determine the relative value

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<sup>26</sup> *Cáin Adomnáin*, the fines for mere injury to a woman are similarly heavy.

<sup>27</sup> Confusingly, *cumal* is occasionally used in the Old Irish law-texts (7<sup>th</sup>-9<sup>th</sup> centuries) as a general term meaning «value, price, payment» rather than a fixed unit of value.

of different currencies which must have been continually revised through-out the year with regards failed and successful harvests.<sup>28</sup> For this reason alone, the ancient Irish faced extreme uncertainty which made substantial capital accumulation a near impossibility. The annals record a nearly perpetual series of wars and famines where cattle were slaughtered on mass, thus annihilating the medium of exchange in the process.

It is of note that the ancient Irish appear to have developed a reasonably advanced system of financial instruments. Prof Fergus Kelly explains the different types of ancient financial instruments as follows: *Ón (úan)* corresponds to *commodatum* (a loan for use) of Roman law and *Airliciud* corresponds to the *mutuum* (a loan for consumption) although *Airliciud* is seen to conflict with the Church's ban on usury. Lending was discouraged in the *Wisdon* texts as it was seen as a high risk for the lender. Furthermore, the law of lending clearly distinguishes a loan for a fixed period (*fri airchenn*) and an open loan (*fri anairchenn*).<sup>29</sup> The latter is compared with God's gift of life to man which can be called back at any time (Kelly, 2009, p. 118).

Most of the farmland in a *túath* was kin-land, otherwise known as *fintiu*. When kin-land was being divided, each heir got a share which he would work with the help of his wife (or wives), sons, daughters, and perhaps servants or slaves. Each heir farmed as an individual, but his fellow kinsmen had some control over what he did with the land. He could not sell his kin-land without the permission of the rest of the kin. If he became an *esert* (absentee) and neglected to fence his holding properly, a near kinsman (*fine comocuis*) could be distrained to do the job in his stead. The man who made a surplus through successful farming or the practice of a profession could acquire further land. Thus there was a strong financial incentive to be productive. A portion of the land in each *túath* was attached to the office of kingship and therefore became the property of each king as he succeeded

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<sup>28</sup> The difficulties of determining relative prices were, in practice, simplified due to the *Cumul's* monetary role as the unit of account. Debts were denominated in *Cumul's*, and settled in any number of alternative exchange media (Howden, 2009).

<sup>29</sup> For a detailed description of how open loans can disrupt an economy see (Huerta de Soto, 2006).

to the throne. Some of this land may be assigned to the *Brithem* (judges), chief poet, and physician. Much of the land belonged to the Church and some of it was rented out to Church clients.

Frederick Engels thought that the land of the early Irish *derbfine* was held in common by the «tribe» (Engels, 1884) and used this erroneous fact to frame his theory of the anthropological evolution of property. He did not realise that it was not a tribe, but a kin-group that was in control. The 1865-1901 edition of the *Ancient Laws of Ireland* almost always translated *fine* as «tribe» rather than «kin-group». This misled Engels and other modern political thinkers into believing that land was held in common by all members of the *túath* in early Ireland. In fact, early Irish society clearly attached great importance to the principle of the private ownership of property, and even extended it to mines and fishing-rights areas that are not even recognised today. Just like the discredited works of Margret Mead glorifying «the noble savage», Engels theory of communism in ancient Ireland can be totally disregarded as erroneous.

As we have seen, the Early Irish Legal system was a polycentric property-based institution with a complex and detailed legal code. It is a testament to its coherence that it lasted thousands of years largely unchanged and that it managed to assimilate wave upon wave of invaders into its customs. Indeed the English Lord Chancellor Gerrard, in his 1577 Notes of his Report on Ireland, wrote denouncing the «English degenerates» who immigrated to Ireland and «embraced the Irish Brehon law instead of the sweet English government of justice.» The Irish culture was so attractive that the invaders (the Vikings, the Normans, the English and countless waves of other invaders going back into the obscure depths of ancient history) were famously described as becoming «More Irish than the Irish themselves». It may be argued that the Brehon legal system was so rigid and traditional that its inability to alter may have been its downfall however. The lack of clearly defined property-rights within the *derbfine*, for example, no doubt stunted economic development and hindered capital accumulation. The most glaring technological disadvantage of the Irish was their lack of a stable currency however. Cattle were the primary unit of exchange until the ultimate conquest of the last

northern chieftains in the 16<sup>th</sup> century. However, to those who cling to the Hobbesian view that without a legal monopoly of the law civilisation could not exist, the Brehon legal tradition of ancient Ireland challenges the reality of such a theory.

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