

THEFT, PENITENTIALS, AND THE COMPILATION OF THE EARLY IRISH LAWS¹

THE Irish laws have long been valued because they describe the pre-Christian institutions inherited by early Christian Ireland and preserve archaic elements of Indo-European society. In his masterly work on the laws, D. A. Binchy emphasized the resistance of compilers of the law-texts to Christianization of the Irish laws and stated that the laws were compiled when 'writing in the Latin alphabet had seeped into the secular law-schools from the monasteries', implying that the law-schools were independent of monastic learning. However, he noted that one of the main questions about the laws is whether clerics or Christianized lay jurists compiled the texts.² Recent work has indicated that clerics participated in the compilation of law-texts, has stressed the Christian rather than the indigenous material in the texts and has concluded that the laws were 'the work of a single class of learned men who were as well versed in Scripture as in the legal lore of their ancestors'.³ As a result, the position that the laws were compiled in secular schools quite independent of monasteries is now difficult to maintain. Yet to a certain extent the differences between these two approaches to the laws is more one of emphasis than substance, since no one denies that the compilers possessed a thorough understanding of indigenous law, had accepted Christianity, and were familiar with at least some Christian literature. Indeed, evidence of ecclesiastical influence is most frequently found in the use of Mosaic law, which, as Binchy noted, helped to justify preservation of Irish law when it conflicted with Christian teaching.⁴ A fragmentary law-text, *Bretha im Gatta* 'Judgments about theft', illustrates the close relationship between ecclesiastical and vernacular legal texts by adopting rules from passages in the *Collectio Canonum Hibernensis* (CCH)

¹Research for this paper was begun while I was a Visiting Research Associate at the School of Celtic Studies, 1986–7. I am grateful for the use of their excellent research facilities. I would also like to thank Dr R. B. MacDonald, Dept of Theology, St Francis Xavier University, for his assistance. An earlier version of the paper was presented at the Celtic Studies Association of North America Conference held jointly with the Celtic Colloquium at University of California at Los Angeles in April 1988.

²The phrase quoted is from 'Corpus iuris Hibernici – incipit or finit amen?', *Proceedings of the Sixth International Congress of Celtic Studies* (Dublin 1983) 149–64, p. 154. In this same article, p. 163, he raises the possibility of clerical involvement in the compilation of the laws. He used phrases very similar to the one quoted in 'Linguistic and legal archaism in Celtic law-books', *Celtic law papers* ([ed. D. Jenkins], Aberystwyth and Brussels 1973) 111–20, p. 112 (originally published in 1959), and in a number of his other articles.

³D. Ó Corráin, L. Breatnach, A. Breen, 'The laws of the Irish', *Peritia* 3 (1984) 382–438.

⁴D. A. Binchy, 'The linguistic and historical value of the Irish law-tracts', *Celtic law papers* (ed. Jenkins) 73–107, pp. 96–9. He also referred to the promulgation and compilation of the laws in 'secular law-schools' in 'The date and provenance of *Uraicecht Becc*', *Ériu* 18 (1958) 44–54, p. 54.

and in turn influencing rules in the Old Irish Penitential while presenting vernacular Irish law.⁵ This text indicates that the compilation of a secular Irish law-text was closely related to the compilation of ecclesiastical texts, although none the less the laws reflect the pre-Christian institutions which make them such a rich and valuable historical source.

The Irish Penitential tradition, extending from at least the early sixth to the late eighth century, allows one to trace the influence of Mosaic and indigenous law on the evolution of penalties for theft specified by ecclesiastics.⁶ The very earliest Penitentials show no influence of Mosaic law, while those of Finnian, Columbanus, Cummean and Theodore show only a slight influence on penalties for theft. Strict adherence to Mosaic law about theft is first found in the eighth-century text, CCH, and subsequently in *Bretha im Gatta* and in the Old Irish Penitential. Native, rather than Mosaic, law about theft appears in text IV of the Irish Canons. Significantly, text III of these canons strongly and explicitly defends the use of the Old Testament to justify claims to tithes and first fruits.⁷

CCH, the Irish Canons and other texts containing either indigenous law or Mosaic law are preserved within a manuscript tradition originating in the eighth century and distinct from the manuscript tradition of contemporary Penitentials, which do not show the influence of these types of law.⁸ Apparently, at least some ecclesiastics developed an interest in these two types of law during the period of the compilation of the law-texts, the seventh and early eighth centuries. The association between them is repeated in the Irish law-texts, which declare that both Mosaic and indigenous law were valid and appropriate sources for legal rules. It appears that during the seventh century clerical acceptance of Mosaic law was connected with the preservation of indigenous Irish law.

Although other topics will be mentioned, the rules on theft are treated in most detail here because they provide by far the richest information, most likely because no fundamental conflict existed between Mosaic, Irish and Christian attitudes to the offence. In contrast, the sexual mores of the Old Testament and early Irish society differed too greatly from the mores of the contemporary Church for these laws to be easily accepted in the Penitentials, although the Church was not immune

⁵V. Hull (ed. and transl.), 'Bretha im Gatta', *Zeitschrift für celtische Philologie* 25 (1956) 211–25; H. Wasserschleben (ed.), 'Collectio Canonum Hibernensis', *Die irische Kanonensammlung* (Leipzig 1885).

⁶Not all Penitentials in this tradition were composed in Ireland. I have used those in D. A. Binchy, 'The Old Irish Penitential', in L. Bieler, *The Irish Penitentials* (Dublin 1975), and Theodore's Penitential in J. T. McNeill and H. M. Gamer, *Medieval handbooks of penance* (New York 1938, 1965). Texts compiled outside of Ireland are included because they influenced, or were influenced by, Irish texts. The early penitential texts compiled in Wales influenced later Irish Penitentials, while Theodore drew on earlier Irish texts and his Penitential influenced later Irish texts.

⁷Ó Corráin, *Breatnach*, Breen, *Peritia* 3 (1984) 409.

⁸Bieler, *Penitentials*, 20–24.

to such influence. Similarly, the Mosaic penalty for murder was generally death, and was hardly compatible with the goal of the Penitentials, the redemption of the living sinner.

I

The following Old Testament passages were used as sources for the penalties for theft in Penitentials, CCH and *Bretha im Gatta*, and are presented here for the reader's convenience.⁹

If a man steals an ox or a sheep and kills it or sells it, he shall pay five oxen for an ox, and four sheep for a sheep. He shall make restitution; if he has nothing, then he shall be sold for his theft. If the stolen beast is found alive in his possession, whether it is an ox or an ass or a sheep, he shall pay double. Exodus 22:1-4

If a man delivers to his neighbour money or goods to keep, and it is stolen out of the man's house, then, if the thief is found, he shall pay double. Exodus 22:7

Whoever steals a man, whether he sells him or is found in possession of him, shall be put to death. Exodus 21:16

He shall restore the ewe fourfold, because he did this thing, and had no pity. 2 Samuel 12:6

Do not men despise a thief if he steals to satisfy his appetite when he is hungry? And if he is caught, he will pay sevenfold; he will give all the goods of his house. Proverbs 6:30-31

II

The early Welsh Penitentials employ a fairly simple system of penalties which shows no direct influence of the Old Testament. However, as Kottje has noted, the later Penitential of Finnian and texts influenced by it reflect some influence of the Old Testament, although they do not strictly adhere to Mosaic law.¹⁰

In the Penitentials preceding Finnian's, penances for theft range from three periods of forty days to three years, depending on whether or not the thief was a monk, and on the seriousness of the crime. The reliance on seven days, forty days, or some fraction or multiple of forty days for the duration of penance for minor transgressions implies a Christian, but not specifically Old Testament, origin. Penalties of half a year to three years are prescribed for more serious thefts, and occasionally a text prescribes simple restitution of the stolen goods (but not the multiple restitution of Exodus). Since the penitent could hardly continue to enjoy

⁹All references to the Bible are to the Revised Standard edition of 1953. Joshua 7:22-6 is mentioned in CCH, but since it is not referred to elsewhere it is not relevant to the discussion here.

¹⁰R. Kottje, *Studien zum Einfluss des Alten Testaments auf Recht und Liturgie des fruhen Mittelalters (6.-8. Jahrhundert)* (Bonn 1970) 12-14.

the fruits of the theft, return of the stolen goods to their owner should probably be assumed even when not specified, without implying any reliance on Mosaic law. The following passages give three examples of early penalties for theft.

And he that commits theft shall do penance for half a year; twenty days on bread only; and, if possible, he shall restore the stolen goods; thus shall he be restored to the church.¹¹

A monk who has stolen a garment or any (other) thing shall do penance for two years as stated above, if he is a junior; if a senior, one entire year. If, however, he is not a monk, likewise a year, and especially the three periods of forty days.¹²

He who steals food shall do penance for forty days; if a second time, for three forty-day periods; if a third time, for a year; if a fourth time, he shall do penance in permanent exile under another abbot.¹³

Although Finnian assigns a period of penance of a year or two like the earlier Penitentials, he adds a new element, the requirement of fourfold restitution of stolen animals.

If a cleric commits theft once or twice, that is, steals his neighbour's sheep or hog or any animal, he shall do penance an entire year on an allowance of bread and water and shall restore fourfold to his neighbour.¹⁴

Both Exodus 22:1 and 2 Samuel 12:6 require fourfold restitution of sheep (although neither mentions the hog), so this passage could be influenced by either.

Penitentials influenced by Finnian show no direct reliance on the Old Testament, and in fact penalties in them are further removed from the requirements of Mosaic law. The addition of the ox in the following passage from Columbanus's late sixth-century Penitential makes his list of animals resemble the passage from Exodus somewhat more closely than Finnian's. None the less, Columbanus seems to have consciously rejected the requirement of 2 Samuel and Exodus for multifold restitution by requiring only simple restitution of the stolen goods.

If any layman has committed theft, that is, has stolen an ox or a horse or a sheep or any beast of his neighbour's, if he has done it once or twice, let him first restore to his neighbour the loss which

¹¹Bieler, *Penitentials*, 'First synod of St Patrick', 57 § 15.

¹²ibid., 'Preface of Gildas on penance', 61 § 6.

¹³ibid., 'Synod of North Britain', 67 § 4.

¹⁴ibid., 'Penitential of Finnian', 83 § 25.

he has caused, and let him do penance for three forty-day periods on bread and water.¹⁵

A reference to fourfold restitution of goods found in Cummean's mid-seventh-century Penitential contains no reference to animals, thus reducing the association with either Exodus or 2 Samuel.

He who plunders another's goods by any means, shall restore fourfold to him whom he has injured.¹⁶

A similarly loose reliance on Mosaic law may appear in the following passage from Theodore's Penitential.

Money stolen or robbed from churches is to be restored fourfold; from secular persons, twofold.¹⁷

Exodus 22:7 requires twofold restitution of money or goods stolen when left on deposit in a third party's house, so that while this passage probably reflects the influence of the Old Testament it adapts fourfold restitution to new circumstances, and deviates from the circumstances stated in Exodus for twofold restitution.

In another passage Theodore recommends restitution, but does not specify a rate, and he seems mainly concerned with reconciliation between the victim and the criminal.

Whoever has often committed theft, seven years is his penance, or such a sentence as his priest shall determine, that is, according to what can be arranged with those whom he has wronged. And he who used to steal, when he becomes penitent, ought always to be reconciled to him against whom he has offended and to make restitution according to the wrong he has done to him; and [in such case] he shall greatly shorten his penance. But if he refuses, or is unable, let him do penance scrupulously for the prescribed time.¹⁸

The Penitentials occasionally mention special penalties for theft of consecrated goods or for theft of goods from churches, but while there seems to be a logical development of the penalties for ordinary theft from one text to another, no such development is apparent for theft of consecrated goods. Cummean deals with theft of consecrated goods by means of a modification of the penalties for ordinary theft. While earlier Penitentials often required that penance be carried out in confinement, Cummean restricts the use of penance in confinement to theft of consecrated goods.

¹⁵ibid., 'Penitential of St Columbanus', 103 § 19. A paragraph on theft by a cleric uses very similar language and also does not require multiple restitution, although the period of penance is longer (ibid., 101 § 7).

¹⁶ibid., 'Penitential of Cummean', 119 § 5.

¹⁷McNeill and Gamer, *Handbooks of penance*, 'Penitential of Theodore', 186.

¹⁸ibid., 187.

He who steals consecrated things shall do penance as we have said above, but in confinement.¹⁹

In contrast, 'Three Irish Canons', which discusses only offences against the Church, prescribes very severe penances.

If anyone in any way breaks into the place of keeping of the chris-mal of any saint, or a place of keeping for staves or cymbals, or takes away anything by robbery, or in any way injures a man, he shall make sevenfold restitution and remain through five years in hard penance in exile abroad.

If anyone breaks into the place of keeping of a Gospel book or removes anything by robbery, he shall make sevenfold restitution, on account of the sevenfold grace of Christ and on account of the seven ecclesiastical ranks; but he shall also remain through seven years in hard penance in exile. . . .²⁰

Sevenfold restitution is required in Proverbs 6:31, but the circumstances of the theft there bear no resemblance to the situation described here. Another severe punishment is found in the eighth-century Old Irish Penitential.

Anyone who plunders an altar or shrine, or steals a Gospel-book, seven years' penance. If it be a bell, or a crozier or service-set, it is forty years on bread and water.²¹

In summary, while the penitentials show some influence of the Old Testament the texts show no tendency to adhere closely to Mosaic law. In fact, texts later than Finnian's show less direct influence of the law of the Old Testament and may develop their penalties from Finnian's without further reference to the provisions of the Bible.

III

In sharp contrast to the limited influence of the Old Testament shown in the penitentials discussed above, CCH relies heavily on Mosaic law both to state laws which the Church found attractive and to justify the retention of the Irish practices that might otherwise be seen to conflict with Church doctrine.²² CCH provides a relatively extensive discussion

¹⁹Bieler, *Penitentials*, 'Penitential of Cummean', 119 § 7.

²⁰*ibid.*, 'Three Irish Canons', 183 § 1-2.

²¹Binchy, 'Old-Irish Penitential', 267 § 7.

²²On this see Ó Corráin, Breatnach, Breen, *Peritia* 3 (1984) 394-400. Further to this, although the Church forbade marriage between first cousins, Ó Corráin has shown that the ecclesiastics who compiled CCH turned to Numbers 26:28-34 to justify a female heir marrying her parallel cousin. Such a marriage allowed a daughter to inherit when sons were lacking without alienating land from the paternal lineage, an arrangement both the Israelites and the Irish found attractive (D. Ó Corráin, 'Irish law and canon law', in *Ireland and Europe: the early Church* (ed. P. Ní Chatháin and M. Richter, Stuttgart 1984) 157-66, pp. 157-60).

of theft which explicitly quotes and then discusses the Old Testament passages, although it also refers to the text of earlier penitentials. Later texts, *Bretha im Gatta* and the Old Irish penitential, show a similar reliance on the Old Testament for rules about theft. CCH includes the following passage in its discussion of the punishment of theft.

De furto graviter puniendo

a. Exodus: Si quis furatus fuerit bovem aut ovem vel vendiderit, quinque boves pro uno bove restituet, et quatuor oves pro una ove; sic et vacca. Si non habuerit, quod pro furto reddet, venundabitur et ipse. Si inventum fuerit apud eum vivens, quod furatum est, sive bos sive asinus sive ovis, duplum reddet. Si pecuniam mortalem quis furatus fuerit, duplum reddet. b. Item in eodem: Si quis furatus fuerit hominem et si vendiderit, convictus noxae, morte morietur.²³

As Ó Corráin, Breatnach and Breen pointed out in their discussion of this chapter, comparison with the Vulgate shows that the first three sentences quote Exodus 22:1–4.²⁴ The phrase *sic et vacca* is added. The sentence beginning *Si pecuniam mortalem* is possibly based on Exodus 22:7 about theft of one person's money or goods from another's house, or on Theodore's interpretation of it. The Vulgate's phrase *pecuniam aut vas* is replaced by *pecuniam mortalem*, which may be a Latin rendering of the Irish term *marbdil*, literally dead chattels, used to distinguish inanimate movables from livestock, *beodil*. The last sentence quotes Exodus 21:16. The following passage from the rather lengthy discussion in CCH should be noted because of its influence on subsequent tests.

Aliquando duplum redditur, ut de inmundis animalibus et substantia mortali reddi solet, aut si inventum fuerit vivens animal apud eum, qui furatus est. Aliquando quadruplum, ut de ove diximus. Aliquando quintuplum aliquando septuplum, ut in Proverbiis legitur: Deprehensus autem septuplum reddet. . . .²⁵

' . . . Sometimes double is paid, as is paid for unclean animals and inanimate possessions, or if the living animal which he has stolen is found in his possession. Sometimes fourfold, as we said about sheep. Sometimes fivefold, sometimes sevenfold, as is read in Proverbs: If he is caught he will pay sevenfold.'

CCH does not confine itself to the Old Testament for rules about theft. Chapters six and seven of Book xxix discuss theft from a church.

²³CCH, xxix cap. 3.

²⁴Ó Corráin, Breatnach, Breen, *Peritia* 3 (1984) 413–14. References to the Vulgate are from *Bibliorum Sacrorum iuxta Vulgatam Clementinam nova editio* (1951).

²⁵CCH, xxix cap. 5. *Substantia mortalis* is presumably parallel to *pecunia mortalis* and Irish *marbdil*.

Primum furtum in ecclesia peractum vice tamen reddi et peniteri ad iudicium sacerdotis, et hoc pro indulgentia ecclesiae facit. Et si secundo factum fuerit, duplo vel quadruplo reddi. . . .²⁶

'The first theft carried out in the church [is] to be paid and punished according to the judgement of a priest, and he makes this in accordance with the clemency of the church. And if he has done it a second time, double or fourfold [is] to be paid. . . .'

Here the authors may have turned to the Penitential of Theodore, which prescribes fourfold restitution of goods stolen from a church. Chapter seven, however, provides far more severe penalties for theft from a church where the bones of martyrs rest: lots are to be cast to determine whether the thief is mutilated, jailed or sent into exile.²⁷ Finally, in chapter eight, the text quotes from the first synod of Patrick and the Penitential of Finnian which we have seen above. The juxtaposition of different rules is not problematic. Penitentials were often eclectic; in fact, the epilogue to the Penitential of Theodore explicitly urges its readers to use other Penitentials, and relies on their ability to determine the best of conflicting rules.²⁸

The acceptance of the detailed rules of Exodus as expressed in CCH seems to have become part of an Irish legal tradition. *Bretha im Gatta* contains rules on theft derived from chapter five of book xxix of CCH, which has been cited above.²⁹

There are four rules in regard to penalty fine (i.e. in the case of theft) in accordance with the law of nature and of scripture: double the equivalent in the case of inanimate chattels, horses and pigs; four times the equivalent in the case of sheep [four for one]; five times the equivalent in the case of cows and oxen. Sevenfold compensation to a dignitary [that is divided between God and man] as is said in the judgments of Solomon.³⁰

While this passage follows the discussion of Exodus in CCH, it adapts Mosaic law to Irish society. CCH had added the cow to the ox and sheep of Exodus, and specified twofold restitution of *inmundis animalibus* or unclean animals, which probably provided for the pig. *Bretha im Gatta* explicitly mentions the pig and substitutes the horse for the ass

²⁶CCH, xxix cap. 6.

²⁷CCH, xxix cap. 7.

²⁸McNeill and Gamer, *Handbooks of penance*, 'Penitential of Theodore', 213. Bette Crigger remarked in conversation that the structure of many law-texts is more intelligible if they are regarded as compilations of various authorities' views on each subject, regardless of contradictions between them, to be used as reference works. This structure also seems to describe CCH and many of the Penitentials very well.

²⁹Hull, *ZCP* 25 (1956) 218, notes that this passage is from Mosaic law and that a similar passage appears in CCH and the Old Irish Penitential. Ó Corráin, Breatnach, Breen, *Peritia* 3 (1984) 413–15, discuss the relationship between these passages.

³⁰Ó Corráin, Breatnach, Breen, *Peritia* 3 (1984) 413, quoted from *Bretha im Gatta*.

which Exodus and CCH mention in the context of twofold restitution.³¹ Twofold restitution of inanimate chattels, *marbdil*, is equivalent to the requirement in CCH with respect to *pecunia mortalis*.

Bretha im Gatta introduces a penalty of ecclesiastical origin when it requires sevenfold restitution to a dignitary. CCH discusses sevenfold restitution as one of the many types of penalties for theft found in the Bible, and the Three Irish Canons required sevenfold restitution of stolen consecrated goods.³² In *Bretha im Gatta* this form of restitution is to be made whenever goods are stolen from a dignitary, (the translation given by Ó Corráin, Breatnach and Breen for *nemed*, a complex term which can refer to a sanctuary or to high-status individuals, but seems best taken in reference to the latter here).³³ This portion of the law-text relies less closely on the Old Testament than the remainder of the passage, but the deviation clearly serves the interests of the privileged in Irish society, not least members of the Church, and further indicates that the compiler of this legal text was familiar with ecclesiastical literature.

Ó Corráin, Breatnach and Breen showed that the compiler of the eighth-century Old Irish Penitential was familiar with the material of *Bretha im Gatta*, indicating that it was incorporated into an ecclesiastical tradition.³⁴

Anyone who makes a habit of thieving and stealing through covetousness and graspingness, Theodore says, seven years' penance therefor. According to Cummine Fota it is a year the first time, two the second time.³⁵

If anyone steals a sheep, he must restore four sheep in its place; if an ox, five oxen; if a horse, two horses in its place; if a pig, two pigs in its place, If each of these animals be kept in the thief's possession alive, he pays double, that is, a beast in addition to the other. He pays double also for inanimate chattels, that is a (second) chattel together with the original chattel.³⁶

³¹ However, the adaptation to Irish conditions is not complete; restitution of the horse is only twofold, but it was a prestige animal. Complete adaptation to Irish conditions would surely reflect the special position of the horse in Irish society, and would not penalize its theft less than the theft of a cow. While the compilers of this text were willing to adapt the rules of the Old Testament, they seem to have been reluctant to introduce a penalty, such as fourfold or fivefold restitution of horses, which would have openly contradicted the provisions of the Bible. Elsewhere less reluctance is shown. In his edition of 'Bretha im Gatta', Hull appends a passage specifying fourfold compensation for horses, which may be from a commentary on theft (Hull, *ZCP* 25 (1956) 223-4). Moreover, part of Columbanus's deviation from Exodus was to apply the same penalty to the theft of horses as to oxen and sheep.

³² Bieler, *Penitentia*, 'Three Irish canons', 183 §§ 1-2; CCH, xxix cap. 5.

³³ See T. Charles-Edwards and F. Kelly (ed. and transl.), *Bechbretha* (Dublin 1983) 107-9; and K. McCone, 'Notes on the text and authorship of the early Irish bee laws', *Cambridge Medieval Celtic Studies* 8 (1984) 45-50, p. 48, for a discussion of this term.

³⁴ Ó Corráin, Breatnach, Breen, *Peritia* 3 (1984) 413.

³⁵ 'The Old Irish Penitential', in Bieler, *Penitentia*, 266 § 2.

³⁶ *ibid.*, 266 § 3.

Only this Penitential and *Bretha im Gatta* explicitly mention the horse and pig in this context, implying that the author was familiar with *Bretha im Gatta* as well as Cummean's and Theodore's Penitentials and CCH. Not only does the Irish law on theft show the influence of Biblical law, but ecclesiastics obviously had access to a text which contained indigenous law.

IV

The mingling of Mosaic and indigenous law found in *Bretha im Gatta* is also demonstrated in texts of ecclesiastical origin predating the compilation of CCH, the Irish Canons. Ó Corráin, Breatnach and Breen have pointed out the use of Mosaic law in Text III of the Irish Canons which cites the requirements in Exodus, Deuteronomy and Leviticus that tithes and first fruits be paid, a proscription which was well suited to promoting the interests of the Church within Irish society.³⁷ Significantly, Text IV of the Irish Canons makes use of the indigenous Irish law regarding theft.

. . . everyone who has dared to steal or seize those things that belong to a king, a bishop, or a scribe, or to commit any (other crime) against them, caring little about despising them, shall pay the value of seven female slaves or do penance for seven years with a bishop or a scribe.³⁸

In Irish law, a king, a bishop and a scribe had an honour-price of seven *cumals*, literally 'female slaves', so that this text reflects the Irish penalty of payment of honour-price to an individual in compensation for theft.³⁹ Strict adherence to Irish law also required restitution of stolen goods, and most likely that is to be understood here.

Text V of the Irish Canons discussing hospitality is of special interest, since it cites the Bible and hagiography to justify the obligation of providing hospitality, a strong concern of Irish law-texts. Irish law required payment of honour-price for refusal of hospitality (*esáin*), and the sums the Irish Canons require to be paid are expressed in female slaves and are related to the honour-prices of the victims, although the method by which these penalties are calculated is not identical with that of Irish law.⁴⁰

The strong influence of indigenous law on the Irish Canons contrasts with slight reliance on it in the Penitential texts discussed above. Similarly, only slight influence of Mosaic law can be found in these Penitentials. Some references which are consistent with Irish law are very

³⁷ Ó Corráin, Breatnach, Breen, *Peritia* 3 (1984) 409–410. The requirement to pay tithes is also found in the law-text *Córus Béscnai* (ibid., 408).

³⁸ Bieler, *Penitentials*, 'Irish canons IV', 171 § 9.

³⁹ *Críth Gablach*, lines 121–4.

⁴⁰ See *Críth Gablach*, lines 24–5, 121–2, 135–6; Bieler, *Penitentials*, 'Irish Canons', 175 §§ 7–11.

general and could derive from many legal systems. References to bride-price, *dos*, are found in several Penitentials, and McNeill suggested that they might reflect native law. Bieler notes that bride-price was common in most Indo-European societies and Exodus 22:16 requires payment of *dos* by a man who has seduced a virgin.⁴¹ The latter should probably be assumed to be the source of the reference in the Penitentials, although its compatibility with Indo-European practice may have encouraged its adoption. The requirement in Finnian's Penitential that a murderer make satisfaction to the friends of the deceased is a prescription found in many legal systems, although Bieler interprets the requirement that the murderer 'compensate his (the victim's) father and mother . . . by filial piety and obedience', as equivalent to the Irish custom of *goire*, or support of parents.⁴²

The Penitential of Columbanus contains a passage which may well have been influenced by the Irish law of sick-maintenance but again the text at this point is so general that it does not allow for certainty in this regard and indeed, Exodus 21:18-19 contains somewhat similar prescriptions.⁴³

In summary, the use of indigenous law in the Irish Canons contrasts sharply with its use in the Penitentials. In the latter, passages resembling indigenous law deal only with procedures common to many primitive legal systems, while the Irish Canons clearly draw directly from Irish law when they vary the penalties with the rank of the victim and specify payment in female slaves. Similarly, the Penitentials made much more limited use of Mosaic law than the Irish Canons. The Irish Canons date from the seventh century and they would demonstrate with certainty a simultaneous reliance on Irish and Mosaic law at that time except that some uncertainty exists as to whether the various Irish Canons containing Mosaic and Irish law were composed as a unitary text. While Bieler, like Wassersleben, grouped the various texts of the Irish Canons together when editing them, he noted that there is no certain evidence that the texts were composed as one unit and that they were not presented as a continuous text in the manuscript transmission.⁴⁴ However, the Irish Canons have been preserved in a manuscript tradition in which CCH is the central text, and the Irish Canons and other texts also relying

⁴¹ McNeill and Gamer, *Handbooks of penance*, 37. See Bieler, *Penitentials*, 240, for a brief note. References to bride-price or marriage payment occur in Bieler, *ibid.*, 'First synod of Patrick', 57 § 22; 'Book of David', 71 § 5; 'Penitential of Finnian', 91 § 44; 'Penitential of St Columbanus', 103 § 16.

⁴² *ibid.*, 'Penitential of Finnian', 83 § 23.

⁴³ See D.A. Binchy, 'Sick-maintenance in Irish law', *Ériu* 12 (1934) 78-134, for a discussion of the Irish institution in which he notes the passage from Exodus and assumes that it is the source of such references as this in the penitentials. He notes the similarity of the passage in Exodus to rules on sick-maintenance in Hindu and Germanic law and assumes that the Irish preserve the more primitive law from which these other rules evolved (p. 78).

⁴⁴ Bieler, 8.

on Mosaic and indigenous law are transmitted with it.⁴⁵ Among the other texts are the *Liber ex Lege Moysi*, a collection of excerpts from Mosaic law, the *Canones Adamnani* which give rules on clean and unclean food influenced by Old Testament proscriptions, and the *Canones Wallici*, which include rules from Welsh law. The earliest manuscript of this tradition is dated c.800, so that it is not a late drawing together of similar texts.⁴⁶ Even if the Irish Canons were not a unitary text in the first part of the seventh century, by the eighth century they were part of a manuscript tradition which included texts reflecting both indigenous and ecclesiastical law.

V

Just as some ecclesiastical texts and law-texts justify and make use of both Mosaic and indigenous law, mythopoeic and historically reliable discussions of the compilation of the laws show clerics and men of secular learning working together. Although these discussions provide no direct evidence, they indirectly support the general picture of creation of law-texts from both ecclesiastic and indigenous sources. In addition they often provide us with evidence of the time, place and persons involved in compiling some of these texts, allowing us to evaluate them as historical evidence.

Two texts show ecclesiastics co-operating with men of secular learning, if not with jurists, and one shows them working with the support of kings. Liam Breatnach has argued that *Bretha Nemed* was compiled by three kinsmen, a bishop, a poet and a judge in Munster between 721 and 742.⁴⁷ Both Binchy and Breatnach accept the historical validity of the introduction to *Cáin Fhuithirbe* in determining that the text was promulgated by kings at an assembly in Munster c.680. Breatnach and Binchy also tend to accept the evidence of *Cáin Fhuithirbe* regarding the compilers of the texts. Breatnach provides evidence that Díblíne and Banbán, named as compilers of the text, were ecclesiastics. A Cummean is also mentioned who is likely the compiler of the so-called Penitential of Cummean, and although that man died some two decades before the text was promulgated, Breatnach believes he may have participated in the initial stages of a lengthy process of compilation. The text also states that a certain Amairgen was consulted about the law. As Binchy pointed out, this Amairgen appears also in the introduction to the *Dinnsheanas* as its author. Breatnach notes that he is identified as Amairgin mac Amalgaid meic Maíl Ruain dona Déisib in the late

⁴⁵Bieler, 20–27. The first two Irish Canons, which are not important to the discussion here, were transmitted in different manuscripts within the tradition from those containing Canons III, IV and V. These three do occur in the same manuscripts, those designated Biii and C by Bieler.

⁴⁶Bieler, 23.

⁴⁷L. Breatnach, 'Canon law and secular law in early Ireland: the significance of *Bretha Nemed*', *Peritia* 3 (1984) 439–59, p. 459.

introduction in one manuscript of the text, but he has not been able to identify him further.⁴⁸

While it can be dangerous to place too much weight on myth as historical evidence, the patently unhistorical description of the compilation of the *Senchas Már*, which Binchy has discussed at length, may be instructive. The most developed and latest tradition associates nine persons with the compilation of the text: three bishops (one of whom was Patrick), three judges and three kings. The earlier texts name a poet as author, either Fergus Fili or Dubthach moccu Lugair, 'chief poet of Ireland'. All versions associate the compilation with Tara, King Loígaire and Patrick. These people could not possibly have compiled the *Senchas Már*, which dates from the seventh, not the fifth, century, but the traditions do indicate the same co-operation between secular and clerical scholars found in historically valid descriptions of the origin of law-texts.⁴⁹ In the seventh century, compilation of law-texts by ecclesiastics and those familiar with indigenous law may have been the normal procedure. The participation of kings may have been required to give the laws necessary authority.⁵⁰ The legend may attempt to increase the status of the text by exaggerating its antiquity and associating it with Patrick and Loígaire, without departing from the institutional situation in which law-texts were compiled.

The story which provides the motive for the compilation of the *Senchas Már*, while as historically unlikely as the description of its compilers, may also reveal some truths about the motives of the compilation of law-texts.⁵¹ It relates that kings concerned about the difficulty of reconciling the Christian doctrine of forgiveness with the need to punish criminals arranged the murder of Patrick's charioteer. Dubthach, who had been converted to Christianity, was required by Patrick to pass judgement on the murderer, but he feared he would offend Patrick's honour if he did not demand punishment and would offend God if he did not forgive the murderer. The punishment chosen reflected an ingenious compromise; the murderer was put to death, but was forgiven by Patrick, so that he obtained heaven.

Without being historically true, the story may none the less reflect some of the issues the Church had to settle with regard to law. By the seventh century, law-enforcement must have become a problem for both clerics and Christian rulers. When Christians had formed isolated communities in a pagan society, law-enforcement most likely presented

⁴⁸L. Breatnach, 'The ecclesiastical element in *Cáin Fhuithirbe*', *Peritia* 5 (1986 [1989]) 36-52 at 46-8; Binchy, *Ériu* 18 (1958) 51-4.

⁴⁹Binchy, *Studia Celtica* 10-11 (1975-6) 17.

⁵⁰The Church urged kings to govern forcefully and ecclesiastical influence in the laws would lead us to expect an expanded legal role for kings, but at least on the surface the laws do not give kings such a role. However, the role of kings in the legal process was greater than Binchy has stated. See M. Gerriets, 'The king as judge in early Ireland', *Celtica* 20 (1988) 29-52, for discussion of one aspect of this problem.

⁵¹Binchy, *Studia Celtica* 10-11 (1975-6) 17-20.

few difficulties. The early Penitentials indicate that wrongdoers could be required to reform and undertake penance, or be expelled from the Church and the community.⁵² Once all of society was nominally Christian, expulsion of the unrepentant was no longer a practical solution and other forms of punishment were needed.

The New Testament urged the forgiving of sins, and elsewhere in Europe the Church occasionally acted to mitigate the severity of law-enforcement.⁵³ However clerics were familiar with harsh Mosaic and Roman penalties and we might suspect that rather than being concerned about a lack of mercy, Irish customs such as compensation for murder offended many of them.⁵⁴ In addition, accommodation between Christian teaching and Irish practice on subjects such as marriage had to be made, and practical men would have recognized that the Irish would not automatically alter their customs on the acceptance of Christianity. Even if Christianity condemned polygamy, the legal issues raised would have to be addressed as long as men continued to practise it. The rules of the earlier Penitentials and the principles of the New Testament would have been inadequate.

Justification of Mosaic law allowed for law-enforcement and for retention of many Irish customs, but it was incomplete and required indigenous law to supplement it. While both bodies of law were created within essentially tribal societies so that they had many points of similarity, many aspects of Mosaic law, such as the extensive use of the death penalty, were foreign to Irish law as well as antithetical to Christian forgiveness; the main advantage of Mosaic law over Irish law was the sanctity it derived from its place in the Bible. A major purpose of the justification of the use of Mosaic law may have been to support use of that other body of natural law, Irish law. A commentary on the tale of Dubthach's judgement notes that since no one now alive has the power to grant heaven, the murderer is to be allowed to make a payment as the penalty for his crime, so that ultimately indigenous law prevailed.

VI

In summary, examining the Penitentials on the subject of theft shows that during the seventh century, ecclesiastics drew on both the Old Testament and indigenous law. By the eighth century, use of the Old Testament as a source for penalties had become part of both ecclesiastic and secular texts. The interest of ecclesiastics in both types of law is shown by a manuscript tradition originating before the end of the eighth century in which texts with both types of influence were collected. The Irish

⁵²Note the frequent references to excommunication in Bieler, *Penitentials*, 'First Synod of St Patrick', 54-9 and in particular § 17.

⁵³See the discussion in E. James, 'Beati pacifici: bishops and the law in sixth-century Gaul', in *Disputes and settlements law and human relations in the West* (ed. J. Bossy, Cambridge 1983) 25-46.

⁵⁴See Ó Corráin, Breatnach, Breen, *Peritia* 3 (1984) 390-91, where some of the evidence for clerical approval of the death penalty is noted.

Canons and the law-texts acknowledge both indigenous and Mosaic law as natural law, valid because of the inherent goodness of their framers. Both the historically reliable and the mythical descriptions of the process of compilation of the texts show co-operation between ecclesiastics and secular jurists which would have allowed use of Mosaic and indigenous law. The conclusion that clerical acceptance of Mosaic law was associated with acceptance and compilation of indigenous law seems reasonable.⁵⁵

Clearly, individuals with a thorough understanding and acceptance of Christian literature, in other words ecclesiastics, participated in the compilation of the law-texts, so that *Bretha im Gatta* reflects a clerical tradition of referring to Mosaic law about theft. It is equally clear that the compiler of *Bretha im Gatta* preserved Irish law about theft. While compilation of the laws in independent native schools as posited by D. A. Binchy must be rejected, his following statement remains true.

For the student of early institutions the Irish law-tracts have a peculiar importance in that they provide lengthy accounts of primitive legal rules and remedies of which we find only vestigial survivals in the oldest records of other civilizations.⁵⁶

Clerics had the opportunity to influence and censor indigenous law, but the Irish law-texts retain the peculiar importance which Binchy valued so highly.

MARILYN GERRIETS

St Francis Xavier University, Antigonish, Nova Scotia

⁵⁵Kottje concludes his study of the influence of the Old Testament by noting that he has demonstrated Irish interest in the Old Testament but has been unable to explain why the Irish were so open to its influence (*Einfluss des Alten Testaments*, 109). Understanding why the Irish were so receptive to Mosaic law might help explain why they preserved law-tracts which give such extensive and detailed discussion of institutions. However, it is quite possible that the desire to preserve Irish institutions encouraged acceptance of Mosaic law, since the rationale for accepting it seemed to justify accepting any natural law.

⁵⁶D. A. Binchy, 'Distrain in Irish law', *Celtica* 10 (1973) 22-71, p. 22.