Old Testament Borrowings in Early Irish Law

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EARLY Irish law, or Brehon law, is the body of laws that was in use in Ireland and much of Scotland from probably 500 CE or earlier, through the medieval period and in some instances into the early modern period. There is a remarkably large corpus of extant texts, which far surpasses in quantity that of any other medieval legal system. Corpus Iuris Hibernici (Binchy 1978), which assembles almost all of the known texts and fragments in diplomatic transcription, runs to some 2,343 large pages. Supplementary texts are collected in A Companion to the Corpus Iuris Hibernici (Bretnach 2005), where they occupy almost another 100 pages. The language of the earliest parts of the texts is Old Irish with some text in Middle Irish, and many have yet to be translated into English.

Based on linguistic dating, it is believed that the texts began to be written down in the seventh century, and the canonical parts of most texts are dated to this and the following century (Kelly 1988, 1). However, none of the extant manuscript copies are from such an early date, which brings the question of deliberate and accidental scribal interference with the texts into play. In many cases, the earliest, canonical, texts are preserved in manuscripts where the canonical text is clearly distinguished from later commentary and gloss by differentiation in script, but this is by no means always the case. For example, Crith Gablach (Binchy 1941) clearly consists of material from one canonical text combined with short extracts from other canonical texts and occasional interpolations from the medieval compiler (Neil

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McLeod pers comm). However, the manuscript witnesses (three incomplete copies, all contained within the composite Trinity College Dublin MS H.3.18) provide no visual assistance in identifying which portions of the text fall within which category.

As with many other early medieval legal systems, the primary focus of early Irish law was on compensation and restitution, rather than punishment or rehabilitation. When a person wronged another, the law’s primary concern was that the wronged party and his kin group receive restitution and be compensated for their loss or disadvantage. The law’s interest in the offender was primarily to ensure that he and his kin group provided the restitution and compensation (Kelly 1988, 214). It was only when this process malfunctioned that early Irish law sanctioned other outcomes, including, rarely, the death penalty and outlawry. There was no police force, but a developed court system: Fergus Kelly (1986) describes the court procedure, including the layout of the open-air court, expounded in a surviving text.

As a system combining judgement-based authorities (bretha) with statute-like rechtge and cāin provisions, the legal system as a whole could be considered comparable to present-day common law systems.

The core parts of the surviving early Irish legal texts are dated linguistically to the seventh and eighth centuries but are, on the whole, preserved in glossed compilations of the fourteenth to sixteenth centuries, which were probably used in law schools. With some exceptions, what survive to us today are manuscripts in which a word, phrase or sentence of an early legal text is reproduced and glossed with several lines of commentary which may date as early as the eighth century or as late as the sixteenth. In some cases the glosses and commentaries themselves have been glossed. This layering of text provides a valuable opportunity to comprehend the development over centuries of a legal system and the influences on it.

For instance, it seems clear that Latin grammarians had an impact on the style of some texts. Many employ the question-and-answer format, as in Crít Gablach’s

Cid ara n-eperr Crít Gablach? Ní anse ...

‘Why is it called Crít Gablach? Not difficult ...’ (Binchy 1941, 1.1)
Similarly the etymological and pseudo-etymological explanations of words, including legal terms, owe something to the influence of the Latin grammars which were undoubtedly known by the law texts’ authors, and indeed sometimes share their manuscripts. Many scholars believe that the law texts were written down by clerics, and there is evidence that this was indeed so in some cases (Kelly 1988, 233–234).

On the other hand, there does seem to be some distinction between what we might term the traditional, vernacular or secular legal texts (many of which contain Christian references indicative of an ecclesiastical milieu) and the specifically ecclesiastical law texts such as Cáin Adomnáin (Márkus 1997) or Cáin Domnaig (Hull 1966). In the latter class of texts, penalties which differ markedly from the traditional are introduced, such as mutilation and the death penalty, together with specific offences which offend against the church rather than against individuals or society at large. An important contrast here is that the traditional vernacular laws seem, allowing for the society in which they existed, to be humane and largely fair, with their emphasis on compensation and restitution and many practical accommodations, while the ecclesiastical texts tend more towards punishment, in some cases inhumane, combined with fines payable to the church rather than (or in addition to) the victim.

Acknowledging that there is a complex relationship between law texts of Christian, clerical origin and the texts to which I have applied the term of convenience ‘traditional’, which may themselves have been transmitted through the medium of clerics, I wish now to consider specifically the influence of the church within the traditional vernacular laws. Specifically, I want to address the ostensible similarities between certain aspects of early Irish laws and Old Testament law.

Donnchadh Ó Corráin in 1987 published an article titled ‘Irish vernacular law and the Old Testament’, in which he set out what he suggested was evidence that early Irish lawyers did not ‘preserve[] essentially unchanged their inheritance from pre-history’ (Ó Corráin 1987, 284) but rather that ‘[t]he legal books of the Old Testament had a formative influence on Irish vernacular law’. A large part of his argument relates to what we might term ‘window dressing’, cosmetic additions to the legal texts that imply association with Old Testament principles and
values but do not represent actual legal provisions. Another example of this practice, not discussed by Ó Corráin, may be mentioned briefly. Both *Di Astud Chor*, ‘On the securing of contracts’, and the Introduction to the *Senchas Már* refer to Adam’s exchange of the world for an apple as an example of inadequacy of consideration not rendering a contract voidable (McLeod 1992: 36). While this may be an apt analogy for the principle, the principle is central to contract law in ancient and modern legal systems and not derived from the Genesis example.

In particular, Ó Corráin discusses the example of Caí Cainbrethach, the mythological Irish jurist who was claimed to have delivered judgements according to the law of Moses. He concludes that ‘the message, which is expressed both symbolically and in an explicit rational statement, is clear: Irish law has drawn heavily on the Pentateuch’ (Ó Corráin 1987, 291). However, the attachment of this ‘message’ to early Irish law does not mean that the law itself did actually draw, heavily or otherwise, on the Pentateuch. It is an exercise in claiming credibility and pedigree. While Ó Corráin asserts that ‘[t]he texts bear out this assertion’, there is little evidence to that effect. That is, the texts bear signs of the attempt to legitimise by overt reference to the Old Testament, but they do not, with one exception, which I will address presently, bear signs of legal provisions that have been influenced by the Old Testament.

The principal example which Ó Corráin advances is the Old Testament institution of the ‘city of refuge’. Ó Corráin argues cogently that the term and concept are transplanted to the church in Ireland, resulting in the Irish term *cathair attaig* (Ó Corráin 1987, 296–300). He then goes on to suggest that the traditional Irish provision of a stay of ten days to a surrogate defendant in respect of distraint derives from Old Testament provisions related to refuge. In this he follows an Old Irish commentator, but concedes that there ‘does not seem to be any precise authority for [the commentator’s] statements in Scripture’ (Ó Corráin 1987, 301). In fact the traditional Irish provision is fully integrated into a complex four-fold scheme for the exercise of distraint, which allows stay periods of one, three, five and ten days. A process of distraint which did not allow a period of stay for the surrogate defendant to attempt to rectify the situation would be rather pointless. The ten-day stay can scarcely be externally derived.
Further, he suggests that the so-called ‘precinct’ (*maigen dígona*) of a landowner, the area in which any offence will result in compensation of his honour price in addition to any penalty for the offence itself, derives from the *suburbanum* of Numbers 35:3, which extends immunity over the property of a city of refuge (Ó Corráin 1987, 305–306). He suggests that in Ireland the provision was extended to include high-status persons outside the church. He then retreats somewhat: ‘[t]his is not to say that the whole concept of precinct comes from clerical and biblical ideas (its origin is obscure, to say the least of it)’ (Ó Corráin 1987, 306). Indeed the precinct seems to be an integrated part of the early Irish honour-based legal system, and there is no basis for suggesting its derivation from the Old Testament.

In essence, then, Ó Corráin has here evinced no evidence of Old Testament influence on legal provisions themselves. For such evidence, we need to turn to the late-seventh-century fragmentary law text *Bretha im Gatta* or ‘Judgements concerning stolen objects’ (Ó Corráin & others 1984, 413f; Hull 1956). Here we have a very distinctive prescription of restitution for theft:

> Atát cethair huidi for éraic íar fir aiccnid 7 screpta: diából n-aithgena i marb-dile 7 i n-eochu 7 mucca; cetharda i curcha; a cethuir i n-óen-cuíced in aithgin i mbú 7 i dumu; as-renar secht diából do nemud i ngait a séoit cobadail eter Día 7 duine amail as-berr i mibrethaib solman.

‘There are four degrees in regard to éraic-payment according to the attestation of nature and of Scripture: double restitution for inanimate chattels and for horses and pigs; fourfold for sheep; four for the one-fifth of the restitution for cows and for oxen; a sevenfold amount is paid with joint participation by God and man, to a dignitary for theft of his property, as is said in the judgements of Solomon.’ (Hull 1956, 217–218)

This provision (as noted by Kelly 1988, 147) has a very close parallel in the Vulgate version of Exodus 22:1–4:

> Si quis furatus fuerit bovem aut ovem et occiderit vel vendiderit quinque boves pro uno bove restituet et quattuor oves pro una ove [...] (in both Latin and English) Si inventum fuerit apud eum quod furatus est vivens sive bos sive asinus sive ovis duplum restituet.

‘If someone steals an ox or a sheep and has slaughtered or sold it, he repays five oxen for one ox and four sheep for one sheep ... If the
In both passages, the ordinary twofold restitution for theft is increased in the case of bovine or ovine livestock which has been disposed of. In both passages, the increase is to fourfold restitution for sheep and to fivefold restitution for cattle. The resemblance here is sufficiently close and the provision sufficiently distinctive that it is very likely that the provision is borrowed from Exodus into Bretha im Gatta. We have some hint as to the likely route of this borrowing in the Collectio Canonum Hibernensis, an Irish collection which assembles a range of ecclesiastical texts:

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, sive bos sive asinus sive ovis, duplum reddet. Si pecuniam mortalem quis furatus fuerit, duplum reddet.

‘If someone steals an ox or a sheep and has sold it, he repays five oxen for one ox and four sheep for one sheep; the same for cows. If he does not have that for the theft of which he repays, it is just as though it had been sold. If the theft is discovered in his home and that which is stolen is alive, whether ox or ass or sheep, he repays double. If someone steals an inanimate chattel, he repays double.’ (Wasserschleben 1885, 99: my translation)

In the Hibernensis, we see a recounting of the Exodus provision, but with important additions. Firstly, the compiler feels that it is important to add cows to the scheme. The Latin bovem can of course include cows as well as oxen, but it looks as though perhaps in Ireland the term may have been interpreted as meaning only oxen. The cow was such an important commodity in Ireland that in any case its separate listing would have been a sensible precaution. It seems likely that the inserted words, sic et vacca, have been slightly displaced in the text, as it is fairly clear that the restitution for cows was five-fold, matching that for oxen, not that for sheep. Secondly, the compiler adds the provision for inanimate chattels. It seems likely that this double restitution for inanimate chattels was the reparation applicable in all cases of theft before the importation of the more complex scheme for livestock from Exodus. In any case, the compiler, in
recounting Exodus’s provisions for livestock, felt that it would be helpful to add the detail regarding inanimate chattels from the vernacular law.

A similar provision appears in the Old-Irish Penitential, where Chapter 3 paragraph 3 tells us:


‘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 chattel together with the other.’ (Gwynn 1913, 154; Bieler 1975, 266)

We can therefore conclude that the complex Exodus-derived provision was in fairly general circulation in clerical circles, and that the blending of Exodus’s provisions on the theft of livestock with the vernacular provision on the theft of inanimate chattels was well established.

There is a further reflection of this provision, albeit somewhat oblique, in the ninth-century ecclesiastical law Cán Domnaig, ‘The Law of Sunday’. Here we read that:

It é a fhéich .i. cetheóir samaisci la dfísi a thimthaich co nneoch tecmai leiss eter ech 7 set 7 is fiach gaite bis inna muin .i. ocht n-unghi mani dílsigter no mani fácaítar la nnech ad-fhíri 7 is cummae.

‘These are his fines, namely four heifers, together with forfeiture of his apparel along with whatever may happen to be with him, including horse and chattel. The fine for theft is in addition, namely eight ounces, if they are not handed over or if they are not left with the person who acts as identifier.’ (Hull 1966, 162–163)

In this case, the subject matter is unpaid fines. The early Irish legal system regarded failure to pay a fine as theft. In this case the fine is four heifers, which equates to two ounces of silver, plus eight more ounces for theft. As the unpaid fine consists of cattle (heifers), the restitution for its theft is five-fold, as laid out in Bretha im Gatta. The total restitution is ten ounces of silver, the equivalent of twenty heifers, five times the original fine.
The presence of this provision in Cáin Domnaig shows how embedded the variable scale of restitution for theft of various livestock became in the early Irish legal system. So we can say with reasonable certainty that variable restitution for theft of livestock was a provision originating in Old Testament law which was thoroughly incorporated into early Irish law. This probably occurred at an early date, given its integral presence in the late-seventh-century Bretha im Gatta.

An important question that arises is why the Old Testament provision on restitution for theft was imported into a traditional legal system that otherwise appears to have resisted influence from this quarter. The provision itself probably provides the answer to this question. It would have been of great importance to the Christian church, as it provided churches with a means of increasing their wealth rapidly. The multiple restitution was of course available to any party whose livestock had been stolen, but it is churches which are most likely to have had the largest herds at this period. They would have had large herds not merely because churches were effectively the largest settlements, with proportionally more mouths to feed, but also because they had an additional need for cattle that was peculiar to them: to provide vellum (calf-skin) for manuscripts which not only recorded texts but also ostentatiously displayed the power and wealth of the churches in such deluxe productions as the Book of Kells and its forerunners. It may be no coincidence that the other livestock whose restitution is featured, sheep, provided a secondary (somewhat inferior) material for manuscript production in the form of sheepskin. Given the increasing power and influence of the Christian church in Ireland from the late sixth century, it seems likely that one or more churches exerted sufficient influence, whether by making some sort of deal with kings, or by directly influencing jurists, to insinuate this provision into Bretha im Gatta when it was included in the Senchas Már.

In the fifty or so years following the writing of Bretha im Gatta, a further important development took place. The ‘proclaimed law’, Cán Adomnáin, was promulgated throughout most of Ireland and vast swathes of Scotland in 697 (Ní Dhonnchadha 1982). This law, for the first time in the history of Ireland, introduced penalties for certain crimes that were payable not to the victim or his kin but to an independent third party. The new fines, which were to be paid in addition to the traditional
penalties to the victim, were payable to the church of Iona (Ó Néill and Dumville 2003). It seems quite extraordinary that such a law would be accepted by a society which had hitherto known no such provisions. The status text *Críth Gablach* hints at complicity on the part of kings and jurists, when it sets out the rights of kings as including the right to promulgate cána, proclaimed laws. Indeed, it cites as an example *Cáin Adomnáin* (Binchy 1941 §38), which may well have been the only example yet in existence when *Críth Gablach* was composed very early in the eighth century. Our extant copies of *Cáin Adomnáin* show that 91 kings and senior churchmen were signatories to its promulgation, so there was certainly widespread support, whether coerced or freely given, in powerful quarters for this new style of law.

Given that multiple restitution for theft of cattle was already entrenched in *Bretha im Gatta* at the time of *Cáin Adomnáin*’s promulgation, there is another dimension to the new kind of law embodied by *Cáin Adomnáin*. The treatment of unpaid fines as theft has been noted above. It is likely that some offenders did not have sufficient readily available disposable wealth to pay the new fines to the church of Iona in addition to the pre-existing restitution to the victim. Fines seem to have generally been payable in cattle, as in the *Cáin Domnaig* example cited above. Thus, any of *Cáin Adomnáin*’s unpaid fines would likely attract the multiple restitution provisions under *Bretha im Gatta*. It is not difficult to envisage a snowballing effect, where the wealth of churches steadily increased.

One might postulate many reasons for possible influence of Old Testament law on early Irish legal provisions. Given that the only direct influence noted to date is that of Exodus on *Bretha im Gatta*’s restitution provisions, the most likely reason would appear to be the opportunity that it afforded for enrichment of the churches. With the Christian church’s influence on Irish society at this period reaching such extremes that various church groups were contending with each other for control of secular powers, it seems most likely that an enterprising church organisation, such as that of Armagh, under whose influence the *Senchas Már* was compiled, saw an opportunity to increase the church’s wealth by insinuating this provision into the laws. The precise means by which this was accomplished will probably never be known, but it is a far from unlikely result in the environment of shifting
allegiances and power balances that prevailed in seventh-century Ireland.

REFERENCES
Bieler, Ludwig 1975 The Irish Penitentials, Dublin Institute for Advanced Studies.
Binchy, D. A. 1978 Corpus Iuris Hibernici, Dublin Institute for Advanced Studies.
Breanach, Liam 2005 A Companion to the Corpus Iuris Hibernici, Dublin Institute for Advanced Studies.
Gwynn, E. J. 1913 An Irish Penitential, Ériu 7, 121–195.
Márkus, Gilbert 1997 Cáin Adomnáin, University of Glasgow: Department of Celtic.
McLeod, Neil 1992 Early Irish Contract Law, The University of Sydney Celtic Studies Foundation.
Ó Néill, Pádraig & David Dumville 2003 Cáin Adomnáin and Canones Adomnani, University of Cambridge: Department of Anglo-Saxon, Norse and Celtic.