

The Lost Legal System: Pre-Common Law Ireland and the Brehon Law

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Abstract: Prior to the adoption of common law in Ireland, a native legal system, known as Brehon law, had applied throughout the country. This legal system dated from Celtic times and was passed down orally from generation to generation. It was written down for the first time in the seventh century and survived until the seventeenth century when it was finally replaced by the common law. The Brehon law system was highly complex and sophisticated. Rights were accrued based on societal status and punishment / restitution was based on the status of the person against whom an offence was committed. The legal system was administered by judges but the legal system was essentially self-enforcing with no prisons or police force. This paper will describe the roots of the Brehon legal system and its primary actors and will compare it to the common law system. It will analyse its main facets and subjects and will trace its development through Irish history up until it was finally supplanted as the legal system of Ireland by the common law in the seventeenth century.

Introduction

Today, Ireland is a common law jurisdiction. The legal system in place is very similar to that of England and Wales, Scotland and also other former British colonies. Indeed, some of the legislation and case law which applies in Ireland today dates from pre-independence days, when Ireland was officially part of the United Kingdom of Britain and Ireland.¹ When Ireland gained independence and the Irish Free State was formed in 1922, the Irish leaders created a new legal system. This was modelled on the legal system in place in the United Kingdom, the one exception being the adoption and indeed, supremacy of, a codified single Constitutional document in Ireland.² However, prior to the adoption of the common law, a native legal system was in place for centuries in Ireland, which differed in almost every way from the common law. This is known as Brehon Law, from the Old Irish word *brithemain*, meaning ‘judge’ or ‘jurist’. This system was implemented throughout the island of Ireland, from Celtic times until it was completely supplanted by the common law in the 17th century. This work aims to set out the basics of Brehon law, including its main tenets and personnel. It seeks to do this by explaining how the primary actors in, and principles of, a modern common law system were dealt with under the Brehon system. This comparison seeks to facilitate the comprehension of the legal rules of Brehon law, however, it must be remembered that early Irish society and its structures were very different from modern society, and so a brief explanation of that society must also be given. The paper will trace the development and decline of the Brehon law system and illustrate how early Irish society was regulated. It should be noted, however, that because there is sometimes disagreement between the law texts in which the legal principles are set out and because we cannot be certain of when the principles may have evolved and changed over time, this paper is general in nature, highlighting the primary themes of Brehon law and a number of rules postulated during the time that this law was practised in Ireland, rather than providing an exact chronological examination of the life of this legal system.

Background to, and Beginnings of, the Brehon Law System

There is a level of uncertainty concerning when the Brehon legal system began. A number of manuscripts dealing with various aspects of Brehon law, written in the vernacular Irish language and dating from 14th-16th centuries still exist. These manuscripts are based on older texts, which originated in the 7th-8th centuries.³ However, the legal system represented in these texts had developed from customs and practices that had been passed down orally from generation to generation in the previous centuries. A number of law schools existed across the country of Ireland, where jurists were trained in

¹ On the history of the common law in Ireland and the creation of the new Irish legal system, see Byrne, R. and P. McCutcheon with C. Bruton and G. Coffey, pp. 27-63.

² The current Constitution is the Constitution of Ireland / *Bunreacht na hÉireann* 1937. There were two previous Constitutions in place in Ireland; The Constitution of the Irish Free State / *Bunreacht Shaorstát Éireann* 1922 and a provisional Constitution of *Dáil Éireann*, which was the Constitution of the Irish Republic 1919-1922.

³ See Kelly, F. (1988), p. 1.

Brehon law and learned the rules and principles of Brehon law.⁴ These rules were then later written down in the manuscripts, and the manuscripts were first written and later copied, sometimes by lay jurists and sometimes by monks.⁵ While we cannot know definitively when the Brehon law system actually began, it is clear from references within the texts and the language used in them that the texts reflect a system that was in place in Celtic times, long before its principles were written down during the Christian era and Kelly states that ‘it is clear from linguistic evidence that many of the essentials of the early Irish legal system go back at least as far as the Common Celtic period (c. 1000 B.C.)’, and similarities can be found between the early Irish and early Welsh and other Indo-European legal systems.⁶

Currently, approximately 50 law texts survive, which deal with a wide variety of topics, including medical law, contract law, tort law, environmental law, sports law etc., which provide a fascinating insight into early Irish society.⁷ Most of the texts are accompanied by commentaries and explanatory notes, which were written in by those who copied the manuscripts.⁸ While we have a body of literature from early Ireland, which includes myths, sagas, hagiography and poetry, no foreign account of Ireland exists prior to the work of Giraldus Cambrensis who wrote *Topography of Ireland* in the 12th century,⁹ apart from a number of comments written by St Patrick, patron saint of Ireland, in the 5th century.¹⁰ Therefore, the insight into early Irish society provided in the law texts is invaluable to historians and anthropologists.¹¹

When the Brehon law system was implemented in Ireland, the country was divided into approximately 50 different areas or *túath* and the society was tribal, based on a clan system,¹² and hierarchical. Although there was a High King of Ireland, each of these areas had their own king and the Brehon law was applied in each division.¹³ However, it seems that one only had rights within one’s own *túath*, reflecting the fact that there was generally little travel outside of one’s own community within early Irish society.¹⁴

The Basics of the Brehon Law System

It is interesting to note that some of the rules laid down in these texts are reflected in native Irish writings, including myths and sagas, illustrating their practice and acceptance

⁴ See *ibid*, Chapter 11.

⁵ See *ibid*, pp. 232-238.

⁶ *Ibid*, p. 231.

⁷ See Meroney, H..

⁸ See Kelly, F. (1988), p. 226.

⁹ Cambrensis G. (2000), *The Topography of Ireland*, translated by Thomas Forester, revised and edited with additional notes by Thomas Wright, Cambridge, Ontario: In parentheses Publications, available at: http://www.yorku.ca/inpar/topography_ireland.pdf, last accessed 24/08/10.

¹⁰ See St Patrick, *Confessio*, sections 41-42, available at <http://www.cin.org/patrick.html>, last accessed 24/08/10.

¹¹ See Kelly, F. (1988), p. 3.

¹² For a discussion of the structure of early Ireland, see MacNeill, E. (1935). *Early Irish Law and Institutions*. Dublin: Burns, Oates and Washbourne, pp.129-152.

¹³ See *ibid*, pp.94-97.

¹⁴ See Kelly, F. (1988), pp. 3-6.

in early Irish society.¹⁵ This section will take some main subjects of the common law system such as legislation, case law, judgments and enforcement and show how they were dealt with under the Brehon system.¹⁶

Access to the Law and Status in Early Irish Society

The Irish legal system did not subscribe to the notion of equality before the law and Irish society was hierarchical and inegalitarian.¹⁷ Society was divided into different levels according to class or rank, and a person's legal capacity was inextricably linked to this societal rank. The measure of a person's status was known as his 'honour price' / *lóg n-enech*, the literal translation of which is 'the price of his face'. Brehon law prohibited a person from entering into a legal contract for an amount which exceeded his honour price and he could not go surety for a greater amount either. The honour price was also important in ascertaining the punishment attached to major crimes; a serious offence which was committed against a person of high rank demanded a greater punishment than the same offence committed against a person of lower rank. Rank was also hugely important when it came to the law of evidence, with the oath of a high ranking person automatically outweighing that of a lower ranking person.

Jurists

The Irish jurists of the early Christian period were held to be in direct succession to the Druids, the pagan 'priests'.¹⁸ The story of how the druids were transformed into jurists is told in the introduction to a collection of law texts, entitled *Senchus Már*, translated as the 'Great Tradition'.¹⁹ Jurists were highly regarded in early Irish society but were surrounded by a shroud of myth and magic. The badge of office of the jurist was a torque and if a jurist spoke an untruth, according to legend, it would tighten around his neck and strangle him.²⁰ Indeed, it is stated in *Senchus Már* that blotches would appear on a jurist's cheek if he deviated from the truth.²¹ The jurists advised the king on all legal matters and the king only passed judgement on legal issues after advice from his legal advisor. During the Christian era, the clergy gained a place in the legal system and passed judgment on questions of canon law. As the Brehon legal system progressed, the jurists began to take on a more central role and in the late 12th century legal experts began to serve as judges, as well as advisors and advocates, most particularly in Norman dominated areas.²²

¹⁵ See *ibid*, p. 2.

¹⁶ See Dillon, M.

¹⁷ It is interesting to note that the Introduction of *Senchas Már* discusses the concept of equality before the law, as was prescribed in Roman law, but this concept was not accepted as part of the Brehon legal system.

¹⁸ MacNeill denies the status of Druids as priests – see MacNeill, E., pp.67-69.

¹⁹ See *ibid*, p.82.

²⁰ See Ragan, M. (1999) *Brehon Law and the Primary Law of the Temple of Danann*, available at: <http://www.danann.org/library/law/prim.html>, last accessed 27/08/10.

²¹ See *Ancient Laws and Institutes of Ireland* (1865), Vol. I, p. 25.

²² In relation to the role of jurists and kings as judges, see Gerriets, M. (1988).

Law Schools

A number of law schools existed across Ireland where students were trained in the principles of Brehon law. As with various other kinds of occupations in Ireland at the time, such as medicine, poetry and musicianship, certain families became experts in their field and generations of the same families were trained in the subject of law.²³ Among the most famous law families were the MacAodhagáin/MacEgan, MacFhlannchadha/MacClancy and the Ua Deoráin/O'Doran families, who came to the fore in the post-Norman period, when the influence of the church on the writing of legal manuscripts had declined. The most famous of these was the MacEgan family, who ran a number of law schools in the West and middle of the country and who were also renowned practising jurists, representing the important families in the area.²⁴

'Legislation'

Legislation did not take the same form in the Brehon system as it does under common law. Rather, the legal rules and principles were recorded in law texts and these, along with canon laws and occasional ordinances of kings, formed the basic Brehon law framework. The texts were to be written to 'instruct judges...in the theory and practice of Irish law.'²⁵ As mentioned above, approximately 50 law texts remain, although there are references to various other 'lost texts' in extant texts. The texts that have survived are generally incomplete or corrupt. An additional difficulty in interpreting the texts is that the language in which they were written (Old Irish) is archaic, and in most instances, was even outdated and obscure at the time the manuscripts were copied. Notably, some of the legal information was written in the form of poetry, and some was written in the form of lists of things a jurist needed to know, known as the Triads and the Heptads.²⁶ The most important group of texts, *Senchas Már*, dates back to the 8th century. The *Senchas Már* is especially important because it provides a background to the Brehon legal system. The Introduction offers an explanation for the compilation of the law texts, although it is questionable if this explanation is fact or fable. According to the text, St. Patrick requested that a collection of all pagan laws in Ireland be made in 438 A.D. Laegaire, then king of Ireland, formed a committee, with himself and St. Patrick as members, to revise these laws.²⁷ The result was a new legal code from which, according to the text, everything that clashed with Christianity was removed.

The texts cover many areas of legal practice, including *Airecht* which deals with procedural law, *Di Astud Chor* which deals with contract law, *Bretha Déin Chécht* which covers the area of medical law and more unusual texts, such as *Bechbretha* which provides the legal principles on the subject of beekeeping. Two other texts, *Críth Gablach* and *Uraicecht Becc* deal with the area of status under the law, which, as was seen earlier, was a cornerstone of the Brehon legal system.

²³ See Kelly, F. (1988), pp. 242-263.

²⁴ See *ibid*, pp. 252-263.

²⁵ *Ibid*, p. 242.

²⁶ See *ibid*, pp.53-56.

²⁷ See *Ancient Laws of Ireland* (1865), Vol. I, p. 24.

Case Law

Some of the law texts that still exist today describe in detail procedural issues regarding law cases. Unfortunately, no coherent records of decisions of legal cases or decisions exist and we do not know if they were ever written down or recorded. However, anecdotes relating to, and summaries of, a few famous and important cases are found in native Irish literature. The most famous of these is the copyright case pertaining to St. Colmcille, known in English as St. Columba, which took place in the 6th century. The saint was a prolific scribe with a profound interest in manuscripts. Another monk, named Finian had obtained a copy of the *Vulgate*, the Latin translation of the Bible. Colmcille wanted to copy the manuscript and “borrowed” it without permission and duly made a copy of it. Finian was upset and decided to seek legal redress. The case was referred to the High King of Ireland, Diarmait, who gave judgement in favour of Finian and stated ‘[t]o every cow its calf; to every book its copy’, meaning that Colmcille should return both the original and the copy to Finian, Finian having copyright over it.²⁸

Kelly discusses a law text entitled *Cis lir cenela airechta dochusin la Féniu?*, translated as ‘How many kinds of courts are there in Irish law?’, where the court setting in early Irish society is described. This text envisages rather a formal setting for the court, with the judge, the king and other respected people making up the main body of the court.²⁹ However, legal issues were also frequently discussed in a more informal setting at a fair, called an *óenach*, which was a ‘regular assembly for political, social and perhaps commercial purposes’³⁰ and legal business was also formally undertaken at another kind of gathering called an *airecht*, a ‘meeting of freemen’.³¹

Enforcement and Legal Remedies

One of the most fascinating characteristics of the Brehon law system was that fact that it was essentially self-enforcing. The public administration of justice was not highly developed and no police system existed. In addition, there was no equivalent of a prison system, and judgments were left in the hands of the ordinary people to enforce, although, sometimes a lord or another dignitary would be asked to help enforce a judgment, such as a payment of a fine.³²

Brehon justice was almost exclusively based on a fine / compensation system.³³ A structure of pledges and sureties existed to ensure that the system of fines could function properly. For every wrong adjudged to have been committed, the guilty party was required to pay a certain amount in recompense, depending on the injured party’s rank. There was no real division between criminal and civil law as regards punishment, something we take for granted in common law jurisdictions; rather under Brehon law, both types of wrongs required that compensation be paid. If an individual was injured, the

²⁸ See Kelly, F. (1988), p. 239.

²⁹ See Kelly, F. (1986).

³⁰ Kelly, F. (1988), p. 4.

³¹ See *ibid*.

³² See *ibid*, p. 126.

³³ Kelly states that ‘[t]he authors of the Old Irish law-texts seem to envisage that payment can atone for almost any crime’ but he does go on to discuss other forms of punishment that find mention in the law texts such as hanging and flogging etc. - *ibid*, p. 214.

injurer was also obliged to bring him to his house and have him nursed back to health – this practice was known as ‘sick maintenance’ / *folog n-othrusa*.³⁴

Distrain

If compensation was not forthcoming after a judgement had been handed down, the injured party had the right to formally seize the property of the wrongdoer. This procedure was known as *athgabál* / ‘distrain’. As part of this process, the plaintiff had to give formal notice to the defendant that he intended to distrain his property. The period of notice necessary before the seizure could take place depended on the nature of the wrong committed. Upon receiving notice of the intent to distrain, the defendant could pay the fine, or arrange a surety, or make a pledge to the effect that it would be paid. If he failed to do any of these things with the prescribed notice period, the plaintiff could legally seize his property – normally animals, especially cattle, equal to the value of the amount due. A professional law agent would be present when the property was seized to ensure that the seizure was legitimate.³⁵

Fasting

A notable method of enforcing a judgment which was quite common during the Brehon law period was *troscud* / fasting. This form of judgment enforcement was employed against a person of high rank who had committed a wrong. If compensation was not forthcoming from a person of high rank who had committed a wrong, the wronged party had the right to undertake a fast or a hunger strike outside his house, normally lasting from sunset to sunrise. A fast required that the defendant either pay the fine, or arrange a surety, or make a pledge for payment. If the defendant ate during the plaintiff’s fast he was required to pay double the original amount. The implications of not conceding to a fast were very serious; a person would forfeit the right to be paid compensation for any offence that had been committed against him.³⁶

Satire

Kelly states that ‘[v]erbal assaults on a person are regarded with the utmost seriousness’³⁷ in early Irish society. Indeed, it was believed that a poet had the ability to cause injury, and even death, through satire and therefore, satirisation attracted a high penalty whereby a person’s honour price was due to be paid. Satirisation however, could, at times, be neutralised by the composition of a praise-poem. However, satirisation was also sometimes used as pressure to enforce a judgment. For example, if a fine went unpaid, it was legitimate for the wronged party to satirise the wrongdoer. The wrongdoer then either had to pay that was owed, or make a pledge to do so, to save his honour.³⁸

³⁴ See *ibid*, pp. 130-131.

³⁵ See Binchy, D.A. (1973).

³⁶ See Thurneysen, R. (1925).

³⁷ Kelly, F. (1988), p. 137.

³⁸ See *ibid*, pp. 138-139.

The Decline of Brehon Law

MacNeill suggests that the first signs of the decline of the Brehon law system actually ‘begins with the disturbances of the national order brought about by the Norse invasions’³⁹ and believes that the ‘first clear symptom’ of this decay was in 873 when there was no General Assembly at Tailte, which had been usual before the Norse invasions. In the aftermath of the Anglo-Norman invasion of Ireland in 1169, attempts were made to change various aspects of Irish society, including the legal system. Indeed, as early as 1171, King Henry II of England convened a Council near the settlement of Waterford, where he commented that ‘the laws of England were by all freely received and confirmed.’⁴⁰ However, this was more an exercise in propaganda than a true reflection of the reach of common law. In reality, the common law was coldly received by the native Irish and only gradually spread in acceptance over the next five centuries. In fact, the first Anglo-Normans who came to Ireland became firmly integrated into Irish society and took on Irish customs and practices, rather than forcing their own customs and new legal system onto the Irish people. A 1627 translation of an explanatory note written in a now lost Irish text from 1317 states that:

‘every contry had his peculiar brehan dwelling within itselfe, that had power to decide the case of that contry & to maintaine theire controversies against their neibor-contries;...this was before the lawes of England were of full force in this contry or land. And before the kingdome was devided into shieres.’⁴¹

However, over time, English interest in, and control over, Ireland became stronger. *Poynings’ Law*⁴² was passed in 1494 which sought to give supremacy to English legislation over native Irish laws. While it was not implemented in the rural parts of Ireland, it was effective in the environs of Dublin, ‘the Pale’, the area over which the English had quite a firm hold at this time. Brehon law continued to be practised by the native Irish people around the country. This situation continued until the Tudor era, with the Brehon law and common law systems co-existing in different parts of the country. Eventually in 1541, King Henry VIII of England proclaimed himself to be King of Ireland⁴³ and from that point on the English language, customs and legal system gradually began to be enforced on, and very hesitantly accepted by, the native Irish. Over the next two centuries, the whole framework of Irish society was shattered by invasion and colonisation and the native Irish leaders were either exiled by the English or had submitted to their rule. Kelly comments:

‘The Elizabethan wars, culminating in the Flight of the Earls in 1607, delivered the coup de grâce to native Irish law. The lords who had formerly employed the

³⁹ MacNeill, E., p.21.

⁴⁰ Quoted in O’Mahony, P., p. 4.

⁴¹ The lost text is *Annals of Clonmacnoise* and the translator was Connell Mageoghagan. This translation is quoted in Kelly, F. (1988), p. 53.

⁴² See Kelly, J. (2007).

⁴³ See O’Mahony, P., p.5.

legal families were banished, dispossessed, or had adopted English law. One or two law-schools may have struggled on in remote areas during the 17th century, but by the 18th century they were certainly extinct.’⁴⁴

Without the native Irish *túath* and clan system, Brehon law could not properly function. This lack of the societal apparatus necessary to support the implementation of the Brehon law led its desuetude in the 17th and 18th centuries. Finally, the *Act of Union* in 1800 formally integrated Ireland into the United Kingdom.⁴⁵

Conclusion: The Irish People and the Brehon Law

It seems that the Irish people had a great respect for Brehon law and were eager to implement the legal system and accept its application. This is clear from the statement of Chief Baron Finglas, who, around 1520 compared how the Irish people applied Brehon law and how his fellow English countrymen attempted to impose and apply the ‘English’ common law, in ‘the Pale’, around Dublin. He stated:

‘It is a great abusion and reproach that the laws and statutes made in this land are not observed nor kept after the making of them eight days; which matter is one of the destructions of *Englishmen* of this land; and divers *Irishmen* doth observe and keep such laws and statutes which they make upon hills in their country firm and stable, without braking them for any favour or reward.’⁴⁶

In the same vein, even as late as the 17th century, when the Brehon law system was becoming overtaken by the common law, Sir John Davies, who was the Attorney-General of Ireland under James I of England, commented on how the Irish respected the law and implemented it. He stated:

‘There is no nation of people under the sun that doth love equal and indifferent justice better than the Irish, or will rest better satisfied with the execution thereof, although it be against themselves...’

This respect that the Irish had for Brehon law could be explained by an early Irish law text, a Triad, which states: ‘the three rocks to which lawful behaviour is tied: monastery, lord, kin’.⁴⁷ This simple statement illustrates much about early Irish society and the psyche of the Irish people. It shows that Brehon law permeated the society to a great extent and affected every aspect of a person’s life. To disrespect the Brehon law was to disrespect religion, king and family and therefore the willingness to submit to it was great indeed.

⁴⁴ Kelly, F. (1988), pp. 260-261.

⁴⁵ For a discussion of the period of decline in Brehon law, see MacNeill, E., pp.129-152.

⁴⁶ Quoted in Stopford Green, A., p.317.

⁴⁷ Triad 200 – see Kelly, F. (1988), p. 2.

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