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Marriage Laws in Ireland and on the Continent in the Early Middle Ages

Bart Jaski

§1: INTRODUCTION

In 1074 Lanfranc, archbishop of Canterbury, wrote a letter to Toirdelbach ua Briain, the most powerful Irish king at that time, complaining about the loose marriage customs in Ireland:

In your kingdom a man abandons at his own discretion and without any grounds in canon law the wife who is lawfully married to him, not hesitating to form a criminal alliance – by the law of marriage or rather by the law of fornication – with any other woman he pleases, either a relative of his own or his deserted wife or a woman whom somebody else has abandoned in an equally disgraceful way.¹

His successor in the archbishopric of Canterbury, Anselm, wrote a similar list of complaints to Toirdelbach's son and successor Muirchertach, stating that 'it is said that men exchange wives freely and publicly, just as one exchanges a horse for another'.² Lanfranc and Anselm were not alone in condemning the Irish marriage customs, and with the increasing Anglo-Norman interest in Ireland in the twelfth century, both ecclesiastical and political, more voices joined the chorus of disapproval.³ Notwithstanding the reform of the Irish ecclesiastical organisation in that period which drew the Irish closer to their Christian brothers on the continent, Irish marriage customs were insufficiently tackled and continued to give its people and their Christian faith a dubious reputation. Among other things, this formed an ideal pretext for extensive Anglo-Norman

¹ Glover and Gibson, *The letters of Lanfranc*, 71 (no. 10). See also Lanfranc's letter to king Guthric of Dublin, in *ibid.*, 69 (no. 9). For the new rules on marriage, etc., see *ibid.*, 77 (no. 11: Council of London, 1074/5, vi).

² See Bartlett, *Gerald of Wales*, 43–4.

³ For more examples, see *ibid.*, 43–5.

political intervention, which had already received the stamp of approval from the pope.⁴

It may seem strange that in Ireland, once the torchbearer of Christianity in Europe, such practices as described above were still thriving and condoned. Obviously, Lanfranc and Anselm considered the Irish customs to be out of line with the current teachings of the Church, and it raises the question as to why the Irish had deviated from the norm. To answer this we have to turn to the Irish marriage laws, and discuss whether they are basically a legacy from pre-Christian times, or whether clerical scribes made important contributions to their provisions.⁵

For an appreciation of the degree to which the Irish marriage laws adopted or neglected Christian regulations, we have to compare them with the marriage laws of the rest of Christian Europe at the time they were written down. The majority of the extant Irish law-tracts are usually dated to the eighth century, although certain passages and rules may go back to an earlier date. Prior to this period we do not have any securely datable texts which allow us to trace the developments which led to the final shape of the Irish marriage laws with certainty, and this makes it difficult to determine the Christian influence on these laws, the more so because the material at hand lends itself to different interpretations.

§2: THE LEGAL POSITION OF WOMEN IN SOCIETY

Like Roman and Germanic society, early Irish society was patriarchal, which means that women were ultimately subject to men as regards their social status and their legal rights and protection.⁶ As the Irish laws seem to give women a remarkable degree of liberty in matters such as divorce, some historians have connected the position of women as reflected in the laws and in saga-literature with a supposed free and independent position of women among the Celts.⁷ However, it is perfectly clear from the legal material that a woman was generally dependent on a man: on her husband or the head of the family (her father, brother, uncle, son, or another close

⁴ For a discussion, see Martin, 'Ireland in the time of St Bernard', especially 12–15.

⁵ For an earlier discussion of this subject, see Ó Corráin, 'Marriage', who suggests a strong Christian influence in the Irish marriage laws. See also his 'Irish law and canon law', 157–61, and note the different interpretation offered by Mac Niocaill, 'Christian influences'.

⁶ Ó Corráin, 'Women', 1.

⁷ *Ibid.*, 1–2, and Kelly, *Guide*, 68–9, for examples. For a general discussion, see Davies, 'Celtic women'. For women in saga-literature, see O'Leary, 'The honour'.

male relative).⁸ The main legal tract which deals with the Irish marriage laws and sexual relationships is *Cáin Lánamna* ('Law of Full Pairs'), which is part of the great legal compilation *Senchas Már*.⁹ The premise of *Cáin Lánamna* is that a man and his wife form a 'full pair', and their relationship is similar to a lord and his client or vassal, a church and its monastic tenant, a teacher and his pupil, etc.¹⁰ In all cases these 'full pairs' constitute long-term relationships in which the latter is dependent on the former, but within the relationship specific arrangements apply in which both partners have certain rights and duties.¹¹

The dependency of the woman in this relationship is exemplified in several early Irish law-tracts, which take as a basic rule that a woman has no independent legal capacity, she belongs to the group of persons who are *báeth* ('foolish', 'senseless', 'incapable'). For example, the early Irish law-tract *Córus Bésnai* warns:

You should not buy from the 'foolish' persons that exist according to Irish law: from women, from a forfeit person, from a male slave, from a female slave, from a monastic tenant, from the son of a living father; from an outlander, from a thief.

(*Ní crie di báethaib do-choisín la Féniu: di mnaí, di chimbid, di mug, di chumail, di manach, di mac béo-athar, di deorad, di tháid.*)¹²

⁸ This is also expressed in the Indian *Laws of Manu*, see Kelly, *Guide*, 76. Note also in a Lombard law code of 643: 'No free woman ... is permitted to live under her own legal control, that is, to be legally competent, but she ought always to remain under the control of some man or of the king', see Drew, *The Lombard laws*, 92 (*Rothair's Edict* §204).

⁹ *CIH* 502.79–519.35 (*AL* ii 343–409). It is also edited, with German translation and comments, by Thurneysen, '*Cáin Lánamna*' (references are henceforth to this edition, abbreviated as *CL*). For the style, see Charles-Edwards, 'Review article', 154–5, who refers to it as 'textbook prose', and dates it to c.700–c.750. The main articles which deal with early Irish marriage are Ó Corráin, 'Women' and 'Marriage'; see also Kelly, *Guide*, 68–79. The Irish marriage customs in the Anglo-Norman period are discussed in two articles by Simms, 'Women' and 'The legal position'.

¹⁰ *CL* §§1–3 (*CIH* 502.7–504.25).

¹¹ *CL* pp. 2–13 for discussion. Thurneysen notes that the later glossators and commentators misunderstood the common basis of the various 'full pairs', and even the one who wrote the text is at times inconsistent and confused. This seems to indicate that by the eighth century this legal principle was already subject to change.

¹² *CIH* 536.23–4 (*AL* iii 59). Normalized and translated by McLeod, *Contract law*, 59. Other examples of this kind are at *CIH* 351.24–6 (*Senchas Már*, *AL* i 51–3; Thurneysen, 'Aus dem irischen Recht iv', 177/181, §12); 443.29–444.6 (*IR* 35–6, *Díre* §38); 491.24–6 (*Cáin Aicillne*, *AL* ii 289; Thurneysen, 'Unfrei-Lehen', 375 [§38]); 593.35–8 (Thurneysen, *Bürgschaft*, 11 (§37) = Stacey, 'Berrad Airechta'

These persons are considered *báeth* in the sense that they are incapable of making contracts independently; they cannot do anything without the specific consent or authorization of their 'head' (*cenn*).¹³ Most of them are without sufficient property or status to assume legal responsibility or to engage in legal transactions, a principle which is also expressed in the early eighth century collection of Irish canon law, the *Collectio Canonum Hibernensis*, which enumerates those who are not allowed to act as (paying) surety (the Irish terms are between brackets):

*Non est dignus fideiussor fieri: seruus [mug] nec peregrinus [deorad] nec brutus [drúth] nec monachus [manach], nisi imperante abbate, nec filius [mac], nisi imperante patre, nec femina [ben], nisi domina, virgo sancta.*¹⁴

(Not worthy to act as surety is: a slave, nor an outlander, nor a fool, nor a monastic tenant, unless by the authority of his abbot, nor a son, unless by the authority of his father, nor a woman, unless she is the head of a household, or a holy virgin)

The *domina*, who forms the exception to the rule here (apart from the *virgo sancta*), can be equated with the *bé cuitchernsa* and *cétmuinter* in *Cáin Lánamna* and other Irish legal texts, who are also capable of independent legal action within their marriage.¹⁵ Their exceptional position is related to their control over the property they had contributed to the common household in the marriage. This will be discussed in detail in §4.

215); Meyer, *Triads*, §§150–2. In the glosses 'woman' is usually glossed as '*adal-trach* (concubine) without sons', for which see §7 below. For the basic invalidity of a woman's oath and the limited value of female evidence (cf. *CCH* xvi, §3; xxv, §5), see Kelly, *Guide*, 202 and 207–8.

¹³ For further discussion, see Binchy, 'The legal capacity', and McLeod, *Contract law*, 58–62 and 71–80. McLeod argues at 77–80 that the examples which take women to be *báeth* give the general rule, which is not necessarily the older rule as Binchy proposes; linguistically, they are not older than texts which give exceptions to the rule. We can take this to be the case for the eighth century, but it does not exclude the possibility that a development took place which gave women more contractual freedom.

¹⁴ *CCH* xxxiv, §3 (cf. xxv, §5). It is given as in my quotation by Thurneysen, 'Aus dem irischen Recht v', 368. For discussion on the *Hibernensis*, see Sheehy 'The Bible' and 'The *Collectio*'. In the latter Sheehy argues that the influence of the *Hibernensis* on continental canon law was negligible, but Reynolds, 'Unity', thinks that it was substantial, if often indirect. See Pryce, 'Early Irish canons', for the influence of the *Hibernensis* on Welsh law.

¹⁵ Ó Corráin, 'Marriage', 7.

§3: TYPES OF MARRIAGE

Cáin Lánamna distinguishes three main types of valid relationships or marriages: by betrothal (*airnaidm*), by acceptance or acknowledgement (*aititiu*), and by abduction (*foxal*).¹⁶ The first is subdivided in *lánamnas comthinchuir* ('union on mutual contribution'), *lánamnas mná for ferthinchur* ('union of a woman on man-contribution') and *lánamnas fir for bantinchur co fognam* ('union of a man on woman-contribution with service').¹⁷ The difference between them is based on the amount of property each partner contributed to the marriage fund, which determined his or her respective rights within the marriage.

The same applies to the two types of marriage on *aititiu*, *lánamnas airite for urail* ('union of acceptance by inducement') and *lánamnas fir thathigthe cen urnam, cen urail, cen tarcud, cen tinól* ('union of a frequenting man without work, without inducement, without performance, without contribution').¹⁸ Apart from the intermediate *lánamnas foxail* ('union of abduction') and the vague *lánamnas amsa for faeniul* ('union of wandering mercenaries'), all other sexual relationships between men and women were illegitimate: *lánamnas tothla* or *lánamnas táide* ('union of secrecy'), *lánamnas éicne* ('union of violence'; rape) and *lánamnas genaige* ('union of foolishness'; relationship with an insane person).¹⁹ The family did not consent to these relationships, and the person responsible for its joining was held liable for all matters which involved compensation or financial burden.

Marriages on *airnaidm* and *aititiu* are both approved of by the families involved, but with the former the bride's family received property in the form of *coibche* from the groom, which made it binding, while with the latter no *coibche* was given, and no betrothal took place (see §4). The 'inducement' to which the marriage on *aititiu* refers consists of property, which seemingly constitutes the payment which the woman receives for

¹⁶ CL §4 (CIH 505.19–23) gives ten types of sexual relationships. The threefold distinction is not mentioned, but can be extrapolated from the discussion of the ten types in the rest of the text.

¹⁷ Discussed in CL §§5–20 (first type), §§21–8 (second type) and §29 (third type).

¹⁸ Discussed in CL §33 (*lánamnas airite for urail*), §32 (*lánamnas fir thathigthe*). The two are discussed in reverse order, and sometimes mixed up by later glossators and commentators.

¹⁹ Discussed in CL §34 (*lánamnas tothla/táide*), §35 (*lánamnas éicne*), §36 (*lánamnas genaige*). *Lánamnas amsa for faeniul* is not discussed, but see the remark given in a discussion of all the ten types of unions by Ó Corráin, 'Marriage', 18, who suggests it may be related to a Roman law. Note also Deutr. 24:5 in this respect. The rule that mentally deranged are not allowed to marry is also included in the *Lex Romana Visigothorum*, see Knoch, 'Ehescheidung', 238.

her sexual services, but the man can also visit a woman without any arrangements being made which would create obligations. In marriage on *aititiu* the woman remained partially a member of her paternal family, especially when she did not have any sons (see §7).

Both forms can be compared with proper and informal marriage as they existed in Roman and Germanic society. In Roman marriage *cum manu* ('with hand') the woman was completely subject to her husband, as opposed to marriage *sine manu* ('without hand'), in which the woman still maintained strong legal ties with her paternal family.²⁰ In early medieval Germanic society a distinction was made between marriage by purchase (*Kaufehe*), by mutual consent (*Friedelehe*) and by capture (*Raubehe*). *Kaufehe* was a proper marriage: the level of the brideprice was established, a betrothal followed, and property was exchanged. The public ceremony showed the consent of both families to the union, and signified the transference of the authority (*mundium*) over the bride by her family to her husband. *Friedelehe* was a looser form of marriage (*Fridila*: 'friend', 'beloved'), in which no betrothal or property exchange took place, and consequently the husband had no full authority over his wife; she remained a member of her paternal family.²¹

Raubehe can be defined as marriage by rape or elopement, which could lead to a forced marriage (normally a sexual relationship constituted a marriage), to which the family consented afterwards, but it could also be a way for a young man without sufficient property to gain his bride without the need to 'purchase' her, to which her family tacitly consented.²² Without the consent of the family, this marriage was forbidden, and it was discouraged in later law codes, if not severely punished.²³ It can be equated with *lánamnas foxail* in *Cáin Lánamna*, to which the same observations apply.²⁴

²⁰ Brundage, *Law, sex and Christian society*, 32–8; Gies and Gies, *Marriage and the family*, 18–29; Wemple, *Women in Frankish society*, 15–19. For marriage on the continent I have based myself mainly on these three secondary works. Brundage has copious references to sources and secondary literature; Gies offers a more general discussion, but some subjects are treated in detail; Wemple is essential for women and marriage in Merovingian society. Amt, *Women's lives*, contains excerpts from the most important sources on women in the Middle Ages.

²¹ Brundage, *Law*, 127–9; Wemple, *Women*, 10–15, 34.

²² Brundage, *Law*, 129, 133; Gies, *Marriage*, 54–5. In Roman law *raptus* can refer to both elopement and rape, see Brundage, *Law*, 48.

²³ Brundage, *Law*, 129, 148; Gies, *Marriage*, 55; Wemple, *Women*, 33–4, but cf. 82; King, *Visigothic*, 232–3.

²⁴ See CL §34 (CIH 518.22–7), in which it is put on a par with *lánamnas tothla/táide* ('union of secrecy'), and Power, 'Classes of women', 88–90. Note the similarity between *lánamnas foxail* and Deutr. 22:28–9, and between rape as described in *Gúbretha Caratniad* (Thurneysen, 'Caratnia', 350, §39 = CIH 2197.25–31) and

In the Germanic kingdoms the first year of the marriage could be considered as a trial period, during which the marriage could be terminated unless a child was conceived.²⁵ We have references to temporary or trial marriages in the later medieval period in Wales, Ireland and Scotland, and references in the legal material also suggest that it was known in the early period as well.²⁶

The threefold distinction of proper, informal and abduction marriage in early medieval Irish and Germanic society can be related to their common Indo-European roots, but for a clear picture we have to discuss other features they shared.

§4: BRIDEPRICE AND DOWRY

Of the marriages on *airnaidm* (betrothal), *lánamnas mná for ferthinchur* is usually held to be the oldest form.²⁷ As the man makes the largest contribution, he has the freedom to do as he pleases with the marriage-property, except if it touches upon the basic necessities of life. A primary wife who is of equal status with her husband (*cétmuintir*, see §7) can impugn his disadvantageous contracts via her sons.²⁸ The wife of this type of marriage is essentially *báeth*.

The common form of marriage in *Cáin Lánamna* is *lánamnas comthinchuir*, in which both partners make an equal contribution to the marriage-property in land, cattle, goods for the household, etc.²⁹ As her

Deutr. 22:23-7. For the latter, see Wagner, 'Zu Gúbretha Caratniad §39' and Ó Corráin, 'Women and the law', 50-2. For rape, see Kelly, *Guide*, 134-7.

25 Brundage, *Law*, 131; Wemple, *Women*, 94.

26 Giraldus Cambrensis, *Descriptio Kambriae*, in Thorpe, *The Journey*, 263 (Book ii, ch. 6); Thurneysen, 'Heirat', 126-7; Thurneysen, 'Caratnia', 358. Temporary marriages are forbidden in a commentary at *CIH* 144.10-14, partially also at 25.25-7 (*Heptad* 26, *AL* v 217) and 247.22-3 (*Do Tuasluicud Rudradh*, *AL* v 511).

27 Binchy, 'Legal capacity', 210; Ó Corráin, 'Women', 3.

28 *CL* §§21-2 (*CIH* 512.22-513.6). One can read 'a meic' in the text as referring to her sons or her enforcing sureties. The glossator is uncertain, but considering the importance of sons for a married woman (see below) and the ability of a 'son of a living father' to impugn his father's disadvantageous contracts (Kelly, *Guide*, 80-1; *CIH* 443.21-4 (*IR* 34, *Díre* §37); Thurneysen, 'Caratnia', 311-12, §7 = *CIH* 2193.5-11, 1582.5-9), it seems that the text refers to the wife's sons (cf. *CL* pp. 48-9). The basic dependent position of the 'son of a living father' is the same as a woman in Irish law, and to both about the same exceptions apply, related to possession of property.

29 *CL* §§5-20 (*CIH* 505.35-512.21), cf. *CCH* xlvii, §19 (see Ó Corráin, 'Marriage', 14); Thurneysen, 'Caratnia', 321-2, §14 (*CIH* 2194.9-14); Stokes and Strachan, *Thesaurus Palaeohibernicus* ii, 239-40.

contribution remains her own, the wife enjoys almost the same contractual capacity as her husband, and can undertake legal transactions and responsibilities up to her honourprice (half of that of her husband, and related to his status); neither can undertake important legal transactions without the consent of the other.³⁰ Clearly, the woman of this marriage is no longer *báeth*, and her independent status and prestige are reflected in her position as *bé cuitchernsa* ('woman of condominium'), which is glossed as *ben is comtigerna dó* ('a woman who is co-ruler with him').³¹

If it is correct to regard *lánamnas mná for ferthinchur* as the earlier form, it raises the question as to how the wife was able to secure sufficient property to make an equal contribution to the common household. This property did not come from her own assets. A woman was unable to inherit real estate and become owner; she could only acquire it by work or gift (such as a marriage gift), or inherit it for her lifetime if her father died without leaving any sons.³² This means that a woman would usually obtain property after she had married.

For the woman's property we thus have to look at the share of the brideprice or gift she received. The early Irish sources contain a variety of terms which refer to the dowry, brideprice or a similar marriage-contribution. The most frequently used are *tindscre* and *coibche*; the first appears predominantly in saga-literature, the latter in legal material. It is difficult to establish the exact meaning of either term, as they are often mixed up, and were subject to change later on.³³ *Tindscre* is used on several occasions as a payment for services which are agreed upon beforehand, and seems to have been used as a gift to the woman by the man for her sexual services.³⁴

30 For a woman's honourprice, see Binchy, *Críth Gablach*, lines 125-7 (*CIH* 779.7-8), and note the correction by Greene, *Fingal Rónáin*, 13-14 (at note 91); cf. *CIH* 1607.4-7 (*Uraicecht Becc*, *AL* v 71). A man's loss of status did not affect his wife's status, see *CIH* 427.22-3 (*IR* 65, *Fuidir*-text §5).

31 *CL* §5 (*CIH* 505.36); *CIH* 506.9 (*AL* ii 359).

32 *CCH* xxxii, §§17-19 stipulates that daughters should share equally with sons if land is inherited as a gift, but they cannot become absolute owners. The Irish commentators are in doubt: either the daughters only receive household-goods (*IR* 30), or they share equally with the sons. Both possibilities are given at *CIH* 162.25-31, 736.20-31, etc., see also Kelly, *Guide*, 104-5. For a woman's right to claim land, see *Din Techtugad*, *CIH* 207.22-210.11 (*AL* iv 9-15); Kelly, *ibid.*, 187-8. Land received as *coibche* or *tindscre* (both marriage gifts, see below) is probably what is meant by *orba sliasta* ('land of thigh'), see Ó Corráin, 'Marriage', 12, with references.

33 A discussion of the various terms is at Thurneysen, 'Caratnia', 356-9, 'Heirat', 109-28, 'Aus dem irischen Recht iv', 227-8, and Ó Corráin, 'Marriage', 15-17.

34 For *tindscre* in a legal context, see Thurneysen, 'Caratnia', 356, §44 (*CIH* 2198.22-6); *CIH* 1235.4-13 (= 1486.14 (*O'Davoren's Glossary* no. 540); 2178.26),

Coibche has a firmer place in the legal vocabulary, and is directly related to *airnaidm* (betrothal), which bound a marriage.³⁵ The payment of *coibche* was witnessed by sureties, like most formal and binding contracts.³⁶ If a woman did not fulfil her responsibilities within the marriage, a man could divorce her and the *coibche* had to be returned to him, except land and cattle, which she was allowed to keep.³⁷ Hence the warning of the lawyers not to give an excessive *coibche* to a woman of a bad reputation or of low status, considering the possibility that she would keep most of it herself when it came to a divorce.³⁸ Later texts treat *coibche* as neutral marriage property which the defaulting party would lose at a divorce or as compensation.³⁹

In saga-literature the father often exercises some right over establishing the value of the *coibche*, and is entitled to a share, if not all of it. Hence the legal maxim: 'every father his first *coibche* (*cach athair a cét-choibche*).'⁴⁰ Later texts provide for a share to be given the woman, and this would explain how she was able to make a contribution to the marriage-property equal to that of her husband: the *coibche* was no longer given to her father, but – directly or indirectly – to herself.⁴¹ It may

see Thurneysen, 'Aus dem irischen Recht iv', 227; 987.12–13 = 1197.17–18 (McLeod, *Contract Law: Di Astud Chor* §47); 1491.36–8 (O'Davoren's Glossary no. 691). See also Smith, 'Alphabet' 50 (§18), and 'Senbriathra Fithail', 19 (§4.9); Meyer, *Triads*, §149.

35 Thurneysen, 'Heirat', 109–13; Ó Corráin, 'Marriage', 15. In Meyer, *Triads*, §151, *aurmadma* is glossed 'pósta' (at p. 39); *ben pósta* is the later term for the primary wife (*cétmuintir*; *prímben*).

36 *CIH* 572.9–10 (*Heptad* 81, *AL* v 373).

37 *CIH* 25.13–15 (*Heptad* 26, *AL* v 215, with a misleading translation); 247.21–3 (*Do Tuasluicud Rudradh*, *AL* v 511); *CL* §13 and §30, (*CIH* 508.29–33; 516.9–24), cf. 986.31–3 = 1196.35–7 and 987.12 = 1197.17–18 (McLeod, *Contract Law: Di Astud Chor* §43 and §47).

38 *CIH* 221.18–31 (*AL* iv 57–9); see Power, 'Classes of women', 100.

39 Thurneysen, 'Caratnia', 350, §39 (*CIH* 2197.25–31), with a correction at 368: when a woman did not cry out or give notice after she had been raped, she had to pay her *coibche* and honourprice; *CIH* 4.33–5.32 (*Heptad* 3, *AL* v 133–5); 47.21–48.26 (*Heptad* 52, *AL* v 293–7); 805.2–11; 270.15–271.9 (*Bretha Étgid*, *AL* iii 205–7). The rule that the guilty party forfeited his or her marriage contribution is also present in the continental laws, see Brundage, *Law*, 119 (*Lex Justinianus*); Gies, *Marriage*, 24; Wemple, *Women*, 32, 45.

40 *CIH* 294.40 = 503.22 (*Bretha Étgid*, *AL* iii 315); 1948.9–11 (*Cáin Lánamna*, *AL* ii 347 comm.); 222.8 (*AL* iv 59) = 1471.1 (O'Davoren's Glossary no. 126) = 1866.27; Smith, 'Alphabet', 49 (§17).

41 *CIH* 294.40 (see note above), with the commentary at 295.11–19 (*AL* iii 317), which states that the *coibche* has to be returned to the woman's father after the divorce; 1915.1–22 (*IR* 37–8 (*Díre*, Komm. 1)). See also Ó Corráin, 'Marriage', 15–16, who, however, at 13 still regards marriage with equal contribution to be a

also be that the family made this contribution or dowry of their own accord, called *tinchor* or *tinól* in the legal texts.⁴²

If this theory is correct, it seems that in Ireland the same trend was followed as in the rest of Christian Europe, where a similar development had taken place in the sixth and seventh centuries: first the wife was more or less bought from her family by the payment of a brideprice, later a bridegift was paid to the bride, supplemented by the *Morgengabe*, a payment made after the wedding night in honour of the bride's surrender of her virginity and the acquisition of sexual rights.⁴³ The brideprice or *arrha* became a token payment.⁴⁴ The bridegift and the *Morgengabe* could be paid in money or land; a woman's dowry from her family usually consisted of goods for the household, or treasures among the nobility and kings, over which she retained full ownership when she divorced (without guilt) or when her husband died. The rights of inheritance for women in default of any living brothers could make them the sole heirs of complete estates and fiefs.⁴⁵

The background of this development is probably related to the assimilation of Roman and Germanic marriage customs. In early Rome the brideprice (*coemptio*) had become a token payment, and had been superseded by the dowry of the bride's family (*dos*). In the third century the bridegift (*donatio*), delivered before the actual wedding took place,

common Celtic institution, as it is described by Caesar in ancient Gaul. His equation of this marriage with Roman marriage *sine manu* and German *Friedelehe* is very doubtful, see my discussion at §3.

42 Thurneysen, 'Heirat', 125–8, and *CL* p. 11 (*CIH* 1949.8–12, cf. 1948.7–11). *Tinól* is used in *lánamnas fir thathigthe cen urnam, cen urail, cen tarcud, cen tinól* as property which the man offers to his partner.

43 Brundage, *Law*, 88, 114, 129 for the dowry in Roman and German marriage; Gies, 55–6; Wemple, 44–5. See also King, *Visigothic*, 224–8, 236–7 and Drew, *The Lombard laws*, 84–6. The 'buying' of a wife is particularly well brought out in Anglo-Saxon and Kentish law, see Lucas, *Women*, 63–5 for some explicit examples. In Irish sources there are also a few references of this kind, see Thurneysen, 'Caratnia', 311, §7 (*CIH* 2193.5–6); Hull, 'Milesian invasion'; Best and Bergin, 'Tochmarc Étaíne', 151 (§12, §14), 187 (§17, §19). For a discussion of the similarities between Welsh marriage property arrangements and those in Ireland and on the continent, see Walters, 'European context' and *idem*, *Comparative legal method*.

44 Gies, *Marriage*, 55; Wemple, *Women*, 32, 44; Lucas, *Women*, 62–3. *Arrha* is from Latin *arrhabo*, and was originally a payment made to guarantee the delivery of goods, not unlike the Irish *tindsra*.

45 Wemple, *Women*, 45–7, cf. King, *Visigothic*, 246–9, and Mac Cormack, 'Inheritance'.

became more important, and grew so large that by the mid-fifth century many young men found it impossible to raise it.⁴⁶

As described by Tacitus, the German man still obtained his wife by bride-purchase, the bride made only a gift of arms, but in the early medieval Germanic law codes we see a transition in which the brideprice was partially given to the woman.⁴⁷ Suzanne Wemple argues that the important improvement of economic rights of Merovingian women 'can be traced through the evolution of the brideprice into a bridegift and the granting of power to women to hold and inherit landed property.'⁴⁸ She connects this with the imitation of Roman custom, combined with a wish to protect the weaker members of society (repudiated women and widows) and weaken the power of the family as a legal unit. In the continental law codes of the seventh and eighth centuries the woman's kin has lost almost all control over the marriage settlement.⁴⁹

It seems that in Ireland these changes followed suit, with the result that the wife could make an equal contribution to the common household, which gave her a relatively independent status. By extension, if a woman made the largest contribution to the marriage fund, her husband became dependent on her. This is the case in *lánamnas fir for bantinchur co fog-nam*.⁵⁰ When a woman's father and his sons had all died, she became the

46 Gies, *Marriage*, 21-2.

47 Gies, *Marriage*, 33; Wemple, *Women*, 10-12, 44-5.

48 Wemple, *Women*, 44. For the improving inheritance rights of women, see 45-7. In the earliest medieval law codes and also in later law codes of areas which were largely outside the influence of Roman culture, such as Saxony or Thuringia, the inheritance was still given to the nearest kin of a father who had no male descendants, a system which also prevailed in Ireland.

49 Wemple, *Women*, 44-5. In Ireland clerics also took the initiative to protect women and others who were not allowed to bear arms. In 697 Adomnán, abbot of the influential monastery of Iona, promulgated his *Cáin Adomnáin* (also called *Lex Innocentium*) to this effect. It was guaranteed by all the major and minor Irish kings, and issued severe penalties for those who broke its rules. See Meyer, *Cáin Adomnáin*, for an edition, and Ryan, '*Cáin Adomnáin*', and Ní Donnchadha, 'Guarantor list', for discussion. Note also Bieler, *Irish Penitentials*, 195 (Second synod of St Patrick, xxvii), which advocates that a girl should be free to choose her husband.

50 CL §29 (CIH 515.23-516.11). Charles-Edwards, *Kinship*, 465-7, contrasts this type with marriage in which the man made the main contribution, and suggests that the latter was the usual form among commoners, and *lánamnas comthinchuir* among the nobility. He argues that cattle was essential for the status of a young nobleman, to which his wife partially contributed, whereas a young commoner could not expect to receive any cattle from his family or bride. However, CL §24 (CIH 513.33, 514.5-8), which refers to *lánamnas mná for ferthinchur*, mentions the noble grades as well (cf. CL §20, 512.14-16), and refers to the taking of a secondary wife (see §7 below), while with *lánamnas comthinchuir* both partners are

sole heir of the family-land. As a *banchomarba* ('female heir') she had to take full responsibility for the land and fulfil the duties attached to it; after her death the land reverted to the next-of-kin of her father, who divided it according to proximity of kinship.⁵¹ A *banchomarba* could only preserve her interest in the land for her children if she married one of her father's close relatives, a rule also given in the Old Testament, on which it may have been based.⁵² If she was not able or willing to do so, she could still retain control over the land during her lifetime by marrying a man who did not have sufficient property to match hers, so that she made the major contribution into the marriage. Her husband would be restricted in his contractual capacity, as he had not made a worthwhile contribution to the marriage in the first place.⁵³

The inability to inherit land permanently restricted the independence of women, and made marriage to a heiress unattractive as a political move, unlike feudal Europe, where lands and lordships acquired through marriage had a considerable effect on matters such as succession and political developments. In this respect the developments in Europe were not followed in Ireland, where the family remained the centre of the social and legal structure.

§5: PRECONDITIONS TO A MARRIAGE

The early Irish law-tracts stress that a proper marriage has to be between equals. The regulation of *lánamnas comthinchuir* only applies 'if it is (concluded) with land and cattle and household requisites, and when their

allowed to rent land (*fochraic tire*), which seems especially relevant to commoners (CL §5, 506.16). For these and other reasons, I favour the 'traditional' view.

51 The main text on a woman's right to inherit land is edited by Dillon, 'The relationship'. For a fresh translation of the first part (135-59: 'The kinship poem' = CIH 215.15-218.9), see Charles-Edwards, *Kinship*, 516-19. The second part is at CIH 1153.5-1155.22, etc.

52 CCH xxxii, §19-§20 (cf. Num 27:1-11, 36:8-13), see Dillon, 'The relationship', 150, 176-8 and Ó Corráin, 'Marriage', 10-12 and 'Women and the law', 52-6. Binchy argues for an Indo-European background in 'Family membership', 183-4.

53 At CIH 427.2-4 (IR 64, *Fuidir*-text §4) three men whose honourprice depends on their wives are named: 'a man without property, without possessions who has a female heir [as wife] ... a man [from another kingdom] who pursues his wife's arse across the border ... a fugitive outlaw (*cú glas*, lit. grey wolf).' The translation is from McLeod, *Contract law*, 76-7. Note also the position of Medb as *banchomarba* and wealthy queen in O'Rahilly, *Táin Bó Cúalnge*, lines 1-44, see Weisweiler, 'Die Stellung der Frau', 233-5, cf. Kelly, 'The Táin', 77-84.

partnership is of equal nobility and equal standing'.⁵⁴ Donnchadh Ó Corráin argues that this rule was influenced by the rule of marriage as described in a letter which pope Leo the Great wrote to Rusticus, bishop of Narbonne, in 459. It was later incorporated in canon law, and is cited in full in the *Collectio Canonum Hibernensis*. Leo states that a marriage is legally valid if it is concluded between free-born equals, with a dowry and publicly celebrated. Other texts which refer to the same conditions appear elsewhere in the *Hibernensis*.⁵⁵ We have seen above that *airnaidm* was a formal contract, connected with the man's marriage contribution, and secured by witnesses, which can be equated with the public celebration.

However, it would be going too far to consider *lánamnas comthinchuir* as an innovative product of clerical legal thinking, and highly influenced by the coming of Christianity, as Ó Corráin maintains. As has been argued above, *lánamnas comthinchuir* is a social phenomenon strongly connected with the property the wife was able to control within the marriage, and this is not a development which was brought about by Christianity or clerical lawyers. We may regard the role canon law played in defining these laws as significant, but not in shaping the institution itself. After all, that the partners have to be of equal status is an obvious rule in an hierarchical society such as the Irish – or the Roman or Germanic for that matter. Furthermore, *lánamnas mná for ferthinchur*, in which the bride does not receive a dowry, is also considered to be legally valid according to Irish law.

Leo's letter does not mention that consummation of the marriage was necessary to make it binding, and this was in line with the Roman rule that consent, not intercourse, made a marriage.⁵⁶ This rule was followed by patristic writers, and in general the early Christian theologians did not feel obliged to stress the importance in a marriage of sexual intercourse, which they thought should be practised solely for procreation and experienced without pleasure.⁵⁷ We have seen that in Irish law consent from both families was imperative to make any sexual relationship legal; consummation of the marriage did not play a role in secular law to make it binding.

In early Germanic law cohabitation sufficed to create a bond of marriage, and in an effort to reconcile this rule with Roman law and Christian

⁵⁴ CL §5 (CIH 505.35–6); my translation.

⁵⁵ Ó Corráin, 'Marriage', 13–15; CCH xlv, §19, cf. xlv, §§2–3.

⁵⁶ Brundage, *Law*, 34. Gies, *Marriage*, 21 quotes the legal formula '*nuptias consensus non concubitus facit*'.

⁵⁷ Brundage, *Law*, 57–76, 89–93.

thinking, Hincmar, archbishop of Reims (845–82), put forward a new theory of marriage in which he based himself on the conditions mentioned by Leo the Great, but added that it had to be followed by sexual intercourse.⁵⁸ This compromise was a break from canon law, but it had profound juristical virtues, and helped to relieve the tension between secular and canon law. It was later attacked by the reformists, who returned to Leo's rule, but Gratian in his *Concordia discordantium canonum* (circa 1140) advocated that both consent and consummation were essential to conclude a true marriage.⁵⁹

Hincmar's new theory was written in the context of several marriage disputes among the prime nobility of the Carolingian Empire, and it marks an important step in the Church's increasing involvement in defining the secular laws concerning marriage and sexuality. Among the first problems to be tackled were incestuous marriages. Canon law calculated the degrees of kinship according to the Roman method, and limited its ban on consanguineous marriages usually to four degrees: a person was not allowed to marry any of the children or grandchildren of his grandparents.⁶⁰ This rule was flagrantly disregarded by the Merovingian kings in the sixth century, but king Pepin (751–68), Charlemagne's father, included the canonical regulation of consanguineous marriages in secular law to obstruct the close marriage-ties of the Frankish nobility. On the advice of the pope Pepin adopted the new rule by St Boniface, the papal legate for the Frankish kingdom, which extended the forbidden degrees from four to seven degrees, and also included in-laws and spiritual kin (godparents and godchildren).⁶¹ The disallowing of marriages between

⁵⁸ Brundage, *Law*, 134–6; Gies, *Marriage*, 97 (see 89–97 for Hincmar's role in marriage disputes in which the Church was involved).

⁵⁹ Brundage, *Law*, 188–9, 235–8. The discussion whether consummation was necessary to contract a valid and binding marriage continued after Gratian.

⁶⁰ Brundage, *Law*, 88–9, 130; Gies, *Marriage*, 49–53.

⁶¹ Brundage, *Law*, 140–1; Gies, *Marriage*, 83–7; Wemple, *Women*, 76–8, 80–1. The theory of Jack Goody, *Development*, 42–7, that the Church's extension of exogamy, combined with other restrictions, was a deliberate strategy to limit the chances of offspring among the nobility so that their lands might fall to the Church has not found favour among historians, see Brundage, *Law*, 88 and Gies, *Marriage*, 83–4. Note that the Lombard laws of 643 refer to the seven degrees of kinship in the case of rights to inheritance and succession, and that in 723 the definition of incest was already extended to include in-laws and godparents, see Drew, *The Lombard laws*, 77 (*Rothair's Edict* §153) and 160–1 (*Laws of Liutprand*, §§33–4). St Boniface's interest in marriage rules perhaps dates from his missionary days, during which he was asked about the Christian custom of marriage, and found himself ignorant on the matter, see Wood, 'Pagans and holy men', 358. He also complained about the sexual activities among the clergy, see Brundage, *Law*, 150–1.

close and remoter kin and the power of giving dispensations gave the Church an influential political position which it did not hesitate to use, and this paved the way for further intervention in the secular regulation of marriage.

In Ireland the issue was largely ignored. We have seen that in *lánamnas fir for bantinchur co fognam* parallel cousin marriage was allowed. One of the early Penitentials – probably from the seventh century – condemns the Irish laxity concerning incestuous relationships: ‘Understand what the Law saith, neither less nor more: but what is observed among us, that they be separated by four degrees, they say they have never seen nor read.’⁶² Political propaganda regards offspring of an incestuous relationship – for example a father with his daughter – as inferior, but does not treat the matter in a legal sense.⁶³ The *Banshenchas*, which records the marriages of the prime Irish royalty, gives examples of relationships which would have been regarded as forbidden by the Church in the eighth century and later, such as a king marrying the wife of his brother, the wife of his step-father, or his half-sister, but not of marriages between close kin within the four degrees of consanguinity.⁶⁴ In the letter of Lanfranc quoted above incestuous marriages among the Irish still form a major concern.

§6: DIVORCE

In the regulations concerning divorce the Christian rules profoundly clashed with both Roman and Germanic custom. In Ireland the *Collectio Canonum Hibernensis* expresses some doubt on the matter. It refers to the letter of divorce in the Old Testament (Deutr. 24:1–4), which mentions several reasons why a man can divorce his wife, which were also known in late Roman law.⁶⁵ In the New Testament the letter of divorce is repudiated by Jesus, who takes adultery by a woman to be the sole justification for divorce, but a man was only allowed to remarry after his wife had died; this rule is also followed in the *Hibernensis*.⁶⁶

62 Bieler, *Irish Penitentials*, 197 (xxix), in the canons of the alleged second synod of St Patrick. The historical background is discussed at 255 note 17.

63 For examples, see Charles-Edwards, *Kinship*, 112–15. In saga literature some noteworthy kings are born from incestuous relationships, see McCone, *Pagan past*, 192–3.

64 Dobbs, ‘The Ban-Shenchus’.

65 CCH xlvi, §§8–9; Ó Corráin, ‘Marriage’, 19–20.

66 Mark 10:2–12; Matt. 5:31–2; CCH xlv, §§14–15, 27, 32; xlvi, §§10–12. Knoch, ‘Ehescheidung’, 259–60.

The Irish law-tracts do not accept the latter rule, and still acknowledge divorce by mutual consent, which in *lánamnas comthinchuir* led to the arrangement that each partner’s contribution to the household was taken back again, following a complex set of rules which took into account such matters as who was the owner of the land on which the cattle grazed and who had produced most during the marriage.⁶⁷ The reasons to divorce which do not entail any payment or compensation, because the partner cannot be blamed for his or her circumstance, are more or less the same for man and wife: a heavy affliction or wounding (both mentally and physically, including infertility and impotence), and acceptance of an ecclesiastical function (although clerics were allowed to marry). Absence for a long period, for example, to make a pilgrimage or to go on a military campaign, could amount to a ‘temporary’ divorce, in which the wife probably returned to her family.⁶⁸

The *Heptads* state that a wife could divorce her husband when he had concealed his impotency, if he was so fat that it was impossible to have intercourse, if he mistreated or neglected her, gossiped about her sexual performance to others, took a concubine, or if he turned out to be a homosexual.⁶⁹ A man could divorce his wife if she betrayed him (to others), damaged his honour, persisted in adultery, if she forced an abortion on herself, killed her children or neglected her tasks in the household.⁷⁰

The text in *Cáin Lánamna* states that if the wife causes a divorce because of the last reason, the produce of her labour falls to her husband, but she is allowed to keep land and cattle (which she received as *coibche*), which was probably returned to her father.⁷¹ In later glosses to the text which discusses the reasons as to why a man can divorce his wife the penalties are heavier: the whole of (the value of) the *coibche*, together with a supplemental compensation, had to be paid to the guiltless party. This is not so much meant to give a woman a higher compensation and more independence as to discourage the provocation of a divorce by irresponsible behaviour – perhaps a reaction to the complaints of the Church that Irish men divorced their wives at will. Lanfranc’s letter indicates that the liberal Irish marriage laws were not in favour of women, but on the contrary gave men almost unlimited opportunities to divorce. For a woman, with her socially inferior position, and her dependence on her father, fam-

67 CL §§10–18 (CIH 507.28–511.9), §§26–8 (CIH 514.23–515.16). Ó Corráin, ‘Marriage’, 8–9.

68 CIH 48.27–49.7 (*Heptad* 53, AL v 297–9).

69 CIH 4.33–5.32 (*Heptad* 3, AL v 133–5), cf. 443.21–4 (*IR* 34, *Díre* §37).

70 CIH 47.21–48.26 (*Heptad* 52, AL v 293–7).

71 CL §13 (CIH 508.29–30), see §4 above.

ily or husband, it would have been more difficult to obtain her rights as an individual than a man.

In Roman society divorce had also been possible by mutual consent or for various reasons, such as adultery, impotence, insanity, or capture or enslavement of one of the partners.⁷² The Christian emperor Constantine changed the laws on divorce in 331, but it was still allowed for several reasons. A wife could not divorce her husband on the grounds of adultery, a feature which this law shared with Hebrew and Germanic law, and which exemplifies the sexual discrimination against women.⁷³

Constantine also banned divorce by mutual consent, and stipulated that a specific reason had to be given, but this rule created so many problems that it was reversed by his successor. Fluctuations remained common in the divorce laws of subsequent emperors. In the *Codex Justinianus* of 529 and especially in the supplemental Novels of 536, a wide variety of reasons to terminate a marriage are given, which are remarkably similar to those given in the Irish laws: inability to have a sexual relationship, capture in battle, adultery, homicide, grave-robbery, sorcery, political conspiracy, harbouring and aiding bandits, and activities which endangered the life of the spouse. Seven years later this list was shortened again, and criminal behaviour by the partner was scrapped as a reasonable cause to terminate the marriage, while in supposed unfaithful behaviour the rights of man and wife were now evened out.⁷⁴

In Justinian's laws the Christian concept that marriage was indissoluble is almost completely lacking. In fact, however disapproved of and seen as a way to explore sexual opportunities in remarriage, divorce remained a matter of secular law, into which canonical enactments only slowly and irregularly spilled over.

In the early medieval Germanic kingdoms a man could repudiate his wife for reasons such as adultery, barrenness or having contracted an illness which debarred her from having intercourse with her husband. Divorce by mutual consent was still common in the seventh and eighth centuries.⁷⁵ Church councils in the eighth century gave with persistent inconsistency changing reasons which made divorce acceptable, and it was only in the Council of Friuli in 796 that adultery was seen as the sole justifiable cause to divorce, after which it was forbidden to remarry while the former partner remained alive. The real breakthrough occurred when Charlemagne included this rule in a capitulary in 802, which was con-

⁷² Brundage, *Law*, 38-9.

⁷³ Brundage, *Law*, 53, 94-8, 132.

⁷⁴ Brundage, *Law*, 114-17.

⁷⁵ Brundage, *Law*, 143-5; Gies, *Marriage*, 57; Wemple, *Women*, 42-3. See also Lapidge, 'Debate poem on divorce', for divorce among the Anglo-Saxons.

firmed by his successors.⁷⁶ Regarding sexual impotence the same principle was used: the couple could separate but not marry while both were alive. Henceforth marriage, once concluded, was for life.

These stricter rules which were entered in secular law were soon put into force. Charlemagne's five successive marriages (his divorced wives had not died before he remarried) and six concubines (we know of) were still condoned by the Church, but his great-grandson Lothair II, king of Lorraine (855-69) encountered serious ecclesiastical opposition in his attempts to divorce his wife Teutberga in order to marry his concubine Waldrada. In the course of the proceedings, which lasted twelve years, Lothair accused Teutberga of incest with her brother, who was a cleric, sodomy, procuring an abortion, a previous marriage and sterility, and said that she wanted to enter a convent; he had also been married under duress, without his consent. After initial success, pope Nicholas nullified his efforts, and forbade a divorce with Teutberga under pain of excommunication. The case touched upon sensitive political interests, and became so central to the whole question of the rule of marriage and the Church's involvement, that archbishop Hincmar (see §5) devoted a whole treatise to it. Other famous divorce cases in the ninth century underlined the influential position of the Church in these matters, and resulted in a standard set of rules concerning marriage and divorce by which the nobility and the people at large had to abide.⁷⁷

§7: POLYGAMY AND CONCUBINAGE

In Hebrew, Roman and Germanic society a concubine was usually of a socially inferior status to her consort, and her relationship was less formal than a proper marriage.⁷⁸ In ancient Rome a woman who lived with a male consort for a long time without any marital affection (*maritalis affectio*) was legally speaking a concubine. As polygamy was not allowed, a married man could not take a concubine (in the legal sense). Once concubinage became tolerated, the laws began to define it and treat it as an inferior type of marriage, in which the concubine had fewer rights and less protection than a legitimate wife. Offspring from the relationship belonged to the woman, who had to take almost full responsibility for

⁷⁶ Brundage, *Law*, 144; Gies, *Marriage*, 88; Wemple, *Women*, 77-81. Byzantine law regarded an adulterer to be morally dead, and thus permitted the innocent spouse to remarry, see Brundage, 143-4, note 75.

⁷⁷ Brundage, *Law*, 144-5; Wemple, *Women*, 84-7; Gies, *Marriage*, 88-97 gives a detailed account of Lothair's troubles.

⁷⁸ Brundage, *Law*, 24, 54, 129-30.

them. In due course the distinction between a married wife and concubine diminished.⁷⁹

As civil law forbade marriages between persons of different social classes, the early Church accepted concubinage as such, and as an alternative to marriage and non-marital sex. However, some ruled that a man had to marry his concubine if this was possible, and otherwise repudiate her. Strongest advocate of this opinion was Augustine, who, drawing upon his experiences in his younger days, considered concubinage to be nothing more than legalized fornication. Despite the writings of Augustine, Jerome and others who condemned the Roman institution of concubinage, the first Council of Toledo (c.397–400) decided that men who kept only one concubine had a right to receive communion. Men such as Caesarius of Arles and pope Leo the Great also conceded that it would be impractical to ban concubinage altogether. In short, the Church made her disapproval known, but was not yet in a position to punish.⁸⁰

In the fourth and fifth centuries the legal position of the concubine was further upgraded, which brought her even closer to the position of a legally wedded wife. As courts began to distinguish between a dowry given to a wedded wife and 'loans' or 'gifts' given to concubines, this led to the recognition of the inheritance rights of a concubine's children, who were now entitled to a small portion of their father's estates. Further legislation culminated in concubinage being put on a par with marriage in the *Codex Justinianus*, which gave virtually the same property rights for all natural offspring born from both relationships – a situation which resembles the position of the Irish concubine. In accordance with ecclesiastical rulings concubinage had to create a permanent bond, and men were not allowed to have more than one concubine at a time, but for the rest Justinian did not adopt Christian teachings in his laws on concubinage.⁸¹

We have seen that in early Germanic society besides a proper marriage (*Kaufehe*) a looser relationship without a betrothal or dowry agreement existed (*Friedelehe*). This is not the equivalent of concubinage, which was usually a relationship which a man maintained with a socially inferior woman, without or beside marriage, and which was not by definition a long term relationship. Children from a concubine had no inheritance rights.⁸²

A man could also have a number of legally wedded wives, but by the end of the sixth century polygamy had become uncommon in the

79 Brundage, *Law*, 40–4; Gies, *Marriage*, 21.

80 Brundage, *Law*, 79–80, 98–103; Gies, *Marriage*, 57–8.

81 Brundage, *Law*, 102, 117–18.

82 Brundage, *Law*, 130.

Germanic kingdoms, even among the Merovingians, who had carried it to excess.⁸³ As an alternative, the Carolingian kings kept several concubines, before or during their marriage. Ecclesiastical censure concerning concubinage and informal marriages did not amount to measures forbidding it in secular law, even in and after the period of papal reform in the eleventh century.⁸⁴

At around the eighth century polygamy was a matter of controversy in Ireland, as appears from the legal tract *Bretha Crólige*:

Everyone is paid honourprice for his union according to the custom of the island of Ireland, whether it be manifold or single. For there is a dispute in Irish law as to which is more proper, whether to have many sexual unions or a single one: for the chosen [people] of God lived in plurality of unions, so that it is not easier to condemn it than to praise it.⁸⁵

The manner in which the Irish lawyers discuss the problem and find a solution for it can be said to typify the Irish approach to legal disagreements: a compromise was preferred above one particular ruling. We have already discussed the difference between *lánamnas comthinchuir* and *lánamnas mná for ferthinchur*. The wife in the former was called a *bé cuitchernsa*, in the description of the latter we meet two other titles, in a passage discussing the fact that a man has total freedom of contract, 'except for the sale of clothes and of food and the sale of cows and of sheep if she be a betrothed wife who is not a primary wife (*mad ben air-nadma nabe cétmuinter*).'⁸⁶

Cétmuinter means literally 'head of the household', and is usually translated as 'primary wife'.⁸⁷ The text states that a *cétmuinter* is 'equally good and of equal birth (*commaith 7 comcheníuil*)' – that is, every equally-good person is of equal birth – she disturbs all his contracts if they be

83 Brundage, *Law*, 145; Gies, *Marriage*, 52–3; Wemple, *Women*, 58–70, discusses the influential Merovingian queens.

84 Brundage, *Law*, 145, 183, 206–7, 225; Gies *Marriage*, 87–8; Wemple 78–9, 82–3. For concubinage in Anglo-Saxon society, see Ross, 'Concubinage'.

85 Binchy, 'Bretha Crólige', 45–6, §57 (CIH 2301.35–8). The gloss gives the many wives of Solomon, David and Jacob as examples. In O'Donoghue, 'Advice to a prince', 50/54 (§35) it is said: 'Adultery (*adaltras*) ruins every good name – it is not proper for anyone provided [or: except] he be a king'. *Adaltras* can also refer to sexual intercourse on forbidden days, see Breatnach, *Uraicecht na Ríar*, 124 (note to §6).

86 CL §21 (CIH 512.22–4). Translation by McLeod, *Contract law*, 74.

87 *Cétmuinter* can apply to either spouse, but in this context I use the above translation, to distinguish her from the concubine.

made in ignorance [of their defects].⁸⁸ The difference between a primary wife (*cétmuintir*) and a betrothed wife (*ben airnadma*) is one of descent, similar to that of a wife and a concubine in Roman and Germanic law, but this distinction seems to be slight. It appears that the *ben airnadma* refers to a secondary wife, as the text continues:

When he [the husband] has given *coibche* to a[nother] wife, be it even out of his own property, then this *coibche* is due to the *cétmuintir*, when she fulfills her matrimonial duties in the union. Every concubine (*adaltrach*) who comes despite a *cétmuintir* (for *cend cetmuintire*) is liable to penalty, she pays the honourprice of the *cétmuintir*.⁸⁹

The giving of *coibche* makes clear that this is a betrothed concubine who is married despite (against the wishes of) the primary wife. As this clause is mentioned under *lánamnas mná for ferthinchur*, it suggests that this type of marriage was also relevant to concubines, as the rule that a betrothed concubine has to hand over her *coibche* to the primary wife results in leaving her without any property to bring into the marriage.

We have seen that marriage on *aititiu* did not involve the giving of *coibche* and a betrothal (*airnaidm*), and this applies to both *lánamnas airite for urail* ('union of acceptance by inducement') and *lánamnas fir thathigthe cen urnam, cen urail, cen tarcud, cen tinól* ('union of a frequenting man without work, without inducement, without performance, without contribution').⁹⁰ The woman of the first relationship on acknowledgement is called *ben for airtin n-urala* ('accepted woman on inducement').⁹¹ We do not find this title elsewhere, but we can safely equate her with the *ben aititen* ('acknowledged woman'), who appears in

88 CL §22 (CIH 512.29–31). Translated by McLeod, *Contract law*, 75. He points out that a *díupart*, a contract of which her husband did not know its disadvantage, is meant here.

89 CL §23 (CIH 513.7–8, 14–15). The translation is based on Thurneysen's, who takes for *cend* to mean 'in the place of', but it appears that the *cétmuintir* keeps her position. See CIH 7.29–30 (*Heptad* 6, AL v 143) for the same expression (see §7), Ó Corráin, 'Women and the law', 49, takes this rule to be borrowed from the *Lex Romana Visigothorum*.

90 CL §33 and §32 respectively (CIH 517.33–5; 517.18–21). The commentators to the text in *Cáin Lánamna* take it that the woman of the first type (*airech*: 'concubine') was given goods by way of inducement, which were not given to the woman of second type (*carthach*: 'paramour'; 'lover'), see CIH 517.36–518.1 (AL ii 399). The commentators are sometimes confused between the two relationships, and use the two terms in both cases.

91 CL §4 (CIH 505.21).

the law-tracts *Gúbretha Caratniad* and the so-called *Díre*-text.⁹² The account of the latter is especially interesting, as two types of acknowledged women are mentioned in a section which deals with the question who is entitled to the payment of wergeld (*éraic*) if a woman is killed, to the share of her property (*díbad*) when she dies, and who has to pay for her crimes (*cin*). The text names five categories of women, the first one having the closest ties to her husband, the next being to a larger extent still attached to their parental families.

- 1 *cétmuintir* with sons.
 - 2 *cétmuintir* without sons.
 - 3 the acknowledged woman betrothed by her family (*ben aititen aranaisc fine*).
 - 4 the acknowledged woman who has not been betrothed, who has not been sanctioned [to enter the relationship] (*ben aititen nad-aurnascar nad-forngarar*).
 - 5 the woman who has been abducted in defiance of her father or her kindred (*ben bis for foxul dar apud n-athur no fine*).
- 1 two-thirds of *éraic*, *díbad* and *cin* fall on her sons, one-third on her family.
 - 2 one-half of *éraic*, *díbad* and *cin* falls on her husband, one-half on her family.
 - 3 one-half of *éraic*, *díbad* and *cin* falls on her sons, one-half on her family.
 - 4 two-thirds of *éraic*, *díbad* and *cin* fall on her family, one-third on her 'belly-kin' (*bronnfine*).
 - 5 all of the *éraic* and *díbad* fall on her family, all of her *cin* and children from the relationship to the abductor.⁹³

92 Thurneysen, 'Caratnia', 355, §43 (CIH 2198.20). For the *Díre*-text, see my next note, and CIH 922.13–14 (IR 4, *Díre* §2): '*aititiu* i.e. she is acknowledged in visiting the house [of the man], and she is not a first wife, and she is not betrothed' (*aititiu .i. addaimter in naithig[id] tige, nibi primben 7 ni haurnascar*); my emendation (cf. CIH 1811.3–5). Thurneysen reads: 'as mistress of the house' (*in naithig*).

93 CIH 440.32–442.9 (IR 27–8, *Díre* §§27–32). The translation is based on Powers, 'Classes of women', 81. *Bronnfine* refers to all the sons of this woman (cf. CIH 54.31, 35 (AL v 319)), whether from her husband or another relationship – an indication of her reputation. The *bé cuitchernsa*, the *cétmuintir* and the *adaltrach* with sons belong to the 'lawful women' (*mná dligthecha*) in later commentaries, see Binchy, 'Legal capacity', 220–1 (CIH 974.35–975.21), etc. A *cétmuintir* was always under the rule (*cáin*) of her husband, an *adaltrach* could choose to be under

From this text it emerges that if a marriage produced sons, the ties of the woman with her parental family became looser: her son or sons could take over a part of the responsibility for her, and were thus entitled to a share of the *éraic* and *díbad* when she died.⁹⁴ Hence the higher status of the *cétmuinter* with sons, she held the ideal situation within the Irish marriage. The importance of a wife's sons is illustrated by the rule that the highest compensation (*díre*) was due to a mother whose son became a king, bishop or master sage, as they had the highest honourprice in the Irish legal system.⁹⁵

The *ben aititen aranaisc fine* has an intermediate position between a proper marriage with betrothal and an informal relationship, and appears to be synonymous with the *ben for airtin n-urala*, while the woman who is not betrothed nor sanctioned resembles the woman of the second type of a relationship by acknowledgement. Although the evidence is scanty, it may be suggested that even with an informal relationship by acknowledgement a formal betrothal became necessary, and it seems that this refers to the taking of a concubine in particular. Other texts which discuss the relationship of married women with their husbands, sons and families name her as *adaltrach airnadma* ('betrothed concubine'), and this is also how the *ben aititen aranaisc fine* is glossed in the *Díre*-text itself.⁹⁶ Although relationships by acknowledgement are still referred to in the legal commentaries, it emerges that a concubine had to be properly betrothed, and this already appears in *Cáin Lánamna*, as is discussed above.

It may well be that this was propagated by the Church, although there are also similarities with concubinage as treated in late Roman law. As the term *adaltrach* ('adulteress', from Latin *adultera*) implies, the Church disapproved of concubinage, but as a compromise they may have promoted the proper betrothal of the concubine, to forestall illegitimate offspring, to favour proper marriages and to force men to take the responsibility for the financial burden of a (secondary) wife. This gave concubines – through their sons – a legal and acceptable status; to have a concubine

her son, (paternal) family or husband (*fer a sliasta*: 'man of her thigh'), see *CIH* 443.21–4 (*IR* 34, *Díre* §37).

⁹⁴ If the sons were still under the authority of their father, he, in his turn, would take over their responsibilities. Mother and son formed a *lánamnas* relationship (*CL* §2, *CIH* 503.26–7).

⁹⁵ *CIH* 1964.13–17, see also 922.29–30 (*IR* 8–9, *Díre* §9) and Thurneysen, 'Caratnia', 348, §38 (*CIH* 2197.19–24).

⁹⁶ *CIH* 442.1–2 (*IR* 27, *Díre* §30). Note also *CIH* 240.35–6 (*Di Astud Chirt* 7 *Dligid*, *AL* v 481): '*adaltracha iarna hurnaidm no aidite dia finaib fria firu* (concubines after their betrothal or acknowledgement by their kins to their husbands).'

without sons would not only give her a lower status, it would also be more suspect from a proper Christian viewpoint. Without sons an *adaltrach* had only a limited contractual capacity, because she had only her family (and for a small part her husband) to fall back upon – her legal position was still more that of a daughter than of a wife; legally speaking she was still *báeth*.⁹⁷

Perhaps as a justification for this development, the lawyers suggest that it is permissible to take a second wife when the first one is unable to bear children. A commentary to *Heptad* 6 declares that the *cétmuinter crólige*, who was injured to such a degree that she 'was dead in the law of cohabitation', could be sent back (to her parents) by her husband if she did not recover after a certain period; if this was not possible her husband had to maintain her and compensate her in case he took another wife as his *cétmuinter* (called 'a *cétmuinter* on the neck of another').⁹⁸ Normally, it would seem that an *adaltrach* was not elevated to the status of *cétmuinter*, unless the first *cétmuinter* chose to divorce her man, to which she was entitled when her husband took another wife.⁹⁹ From this it may seem that the main function of the *adaltrach* was to produce sons, but if we meet examples of kings having four, five or six wives with over a dozen sons, it seems that their primary role was to conclude political marriages or that they were held for pleasure.¹⁰⁰

Although concubines were thus legally acceptable, the lawyers make their disapproval felt by giving them an inferior status as compared with the *cétmuinter*, who is held in high esteem, and who symbolizes monogamy and chastity. The Christian virtues were especially promoted among the poets, who were singled out to practise sexual modesty, rather like the clergy; illicit cohabitation would degrade or disqualify a poet.¹⁰¹ In more general terms, the *Collectio Canonum Hibernensis* forbids the Irish to take concubines before or during marriage, and one legal passage goes as far as to say that 'lords, poets, commoners are impaired by illicit

⁹⁷ See Binchy, 'Legal capacity', 217–23 (*CIH* 511.29–512.7; 1808.29–1809.5; 974.35–975.21, etc.), and §2 above.

⁹⁸ *CIH* 7.29–8.20, at 7.37 (*AL* v 145). Repudiation of one's wife because of her infertility is a saga-theme in Knott, *Togail Bruidne Da Derga*, lines 64–7 (§4), and Stokes, *Cóir Anmann*, 343 (§133). In Bieler, *Irish Penitentials*, 88–90 (Penitential of Finnian §41) it is forbidden.

⁹⁹ *CIH* 48.5 (*Heptad* 52, *AL* v 293).

¹⁰⁰ Examples are in Dobbs, 'Ban-Shenchus'.

¹⁰¹ *CCH* xlvii, §15; Meyer, *Cáin Adamnáin*, 12 (§24); Breatnach, *Uraicecht na Ríar*, 105, §6 (*CIH* 2337.13–18). A detailed discussion is in Ó Corráin, Breatnach and Breen, 'The laws of the Irish', 400–5.

cohabitation'.¹⁰² In *Críth Gablach* the grades of commoners and nobility are pictured as legally married to a *cétmuintir* of equal rank.¹⁰³

The higher status of the *cétmuintir* is also evident elsewhere. She is given higher compensation than an *adaltrach* when raped, and better sick-maintenance.¹⁰⁴ *Heptad* 6 recounts among the seven situations when blood is shed without entailing liability or sick-maintenance: 'bloodshed inflicted by a *cétmuintir* through lawful jealousy on an *adaltrach* who has come despite her (*fora ceand*).'. The commentator gives the legal details if an *adaltrach* was not given a warm welcome in her new home:

The *cétmuintir* is completely free from liability for anything she may do during the first three nights short of killing, and retribution is due from her for killing ... the *adaltrach* has the right to inflict damage with her finger-nails and to utter insults and scratchings and hair-tearings and small injuries in general ...¹⁰⁵

One may wonder whether these rules would be remembered if it ever came to blows, but the legal principle in itself is clear enough. The opinion of the Church complies with this, as is expressed in *Córus Bescna*, in which those who are acceptable as lawful firstlings to be given to the Church are mentioned. The text specifically stipulates: 'every first-born of a lawful primary wife (*cétmuintir cóir*)', which the glossator explains: 'lest children of *adaltrachs* or *ben táides* ('secret woman'; harlot) are given to the Church.'¹⁰⁶ In the matter of succession the son of a *cétmuintir* was preferred above the son of an *adaltrach*, unless the latter was clearly better qualified.¹⁰⁷

On the whole, the position of the betrothed concubine can be com-

¹⁰² CCH xlvii, §17-18; CIH 725.30-726.2, 1113.40-1, (cf. 1467.15, 1480.5). See Ó Corráin, 'Marriage', 18-19 for these and other examples.

¹⁰³ Binchy, *Críth Gablach*, lines 144-5, 199-200, 346-7, 410-11, 439, cf. CCH xxxv, §4. See also CIH 45.38 (*Heptad* 50, AL v 287) and Thurneysen, 'Caratnia', 311, §7 (CIH 2193.5-11). Not marrying according to rank involved a larger contribution from the one with lower status, but less rights, see CIH 46.18-22 (*Heptad* 50, AL v 287), and Kelly, *Guide*, 73.

¹⁰⁴ CL §35 (CIH 519.1-4); Binchy, 'Bretha Crólige', 45, §56 (CIH 2301.21-5). For further discussion, see Power, 'Classes of women', 98.

¹⁰⁵ CIH 7.29-30; 8.15-19 (AL v 143, 147). The translation is based on Power, *ibid.*, 84, 87. For lawful jealousy see also CIH 289.31-290.23 = 1645.38-1646.28 (*Bretha Étgid*, AL iii 293-5).

¹⁰⁶ CIH 531.3-7; 10 (AL iii 39), cf. Deutr. 21:15-17.

¹⁰⁷ CIH 1035.6-13 = 1281.4-9 (Thurneysen, *Cóic Conara Fugaill*, 44, §71 = 16, §3) and 1296.32-9; 1300.29-31; 1301.1-8; 1547.2-8, 33-4; 1548.33-40, all glossed fragments from the tract *Maccshlechta*.

pared with that of the concubine on the continent, and in both cases we see that their relationships resemble proper marriages. However, whereas in Ireland concubinage could amount to polygamy, and was openly practiced, the nobility and kings on the continent did not go so far, and were not liable to get complaints like Ruaidrí Ua Conchobair (†1198) about his six wives. According to an annalist the pope offered him the kingship of Ireland and permitted him to keep his six wives if he renounced adultery henceforth, but Ruaidrí preferred sinning above ruling, and thus his descendants lost the kingship.¹⁰⁸

§8: CONCLUSION

From the above discussion it appears that around the seventh or eighth century the marriage laws and customs of Ireland were quite similar to those on the continent. Certain common elements can be explained by common Indo-European roots, such as the various types of marriage, the position of women in the early period, the purchase of a woman by paying a brideprice to her family. The developments which were taking place on the continent in the early middle ages seem to have been followed in Ireland, and it appears that mutual cultural contacts were to a large extent responsible for the shaping of the Irish marriage customs in this period.

Confronted with these developments, the lawyers, unable to draw upon oral tradition in this matter, seem to have turned to scripture, canon law and continental law for a redefinition and restructuring of their laws. That they did not take over the most extreme opinions in those writings testifies to their practical sense. Furthermore, the large and diverse body of material, so full of contradictory rules and confused regulations, could in no sense be considered as a standardized whole which was readily available to be used for the codification of laws. Indeed, in this period the involvement of the Church in secular legislation and law enforcement on these matters was exceptional rather than a matter of course. Moreover, the Irish lawyers, often belonging to the clergy, reasoned that the traditional law had been inspired by the Holy Spirit, which was complemented by Christian law rather than opposed to it.¹⁰⁹ As certain examples given above suggest, they often adapted those rulings closest to their own legal customs and traditions, a tactic which was also employed on the continent.

¹⁰⁸ *Ann. Conn. s.a.* 1233.3.

¹⁰⁹ McCone, 'Dubthach Maccu Lugair', 8-13; Ó Corráin, 'Irish vernacular law'; CIH 232.32-4 (*Di Astud Chirt 7 Dligid*, AL v 453), 478.8-10 (= Hull, 'Bretha im Gatta', 218, §2), etc.

The influence of Christianity on these laws was globally the same in Ireland as on the continent, but whereas on the continent the Church's position changed in the ninth and tenth centuries from voicing opinions to actual legislation in cooperation with secular rulers, its position in Ireland remained passive. Although kings could issue laws, their legislative activities were small and they did not produce any new codes or texts for their own kingdom or the whole of Ireland, and ecclesiastical leaders showed no initiative to remedy the situation.¹¹⁰ As a result, the traditions as encoded in *Senchas Már* and other early texts continued to be the basis for written law, and developments which took place were entered in the existing law-tracts in the form of glosses and commentaries.

The coming of the Vikings may have obstructed contacts between Ireland and the continent in the crucial period of the ninth century, but on the whole it seems that Irish society had already reached its limits to adapt itself to the changing circumstances, and was not able to accept female rights of inheritance and primogeniture which transformed Germanic society so drastically. Irish society remained family based and politically unstable, and did not evolve rapidly enough to deal with the Anglo-Normans, probably the most innovative society at the end of the twelfth century, both politically and militarily. The Anglo-Normans considered the Irish to be backward, their Christian faith suspect, and their marriage customs outrageous. The early Christian culture which the Irish had helped to preserve was now thrown in their faces.

110 For kings issuing laws, see Ó Corráin, 'Nationality', 23-4.