

# The Fathers as Gatekeepers

## *Ancient Irish Laws and the Divorce Referendum of 1995*

by Frances Devlin Glass

*L'auteure estime que les hommes de lettres ont sous-estimé l'intérêt des féministes pour les vieux codes légaux de l'Irlande, par ailleurs libéraux envers les femmes et qu'il serait temps de*

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*produire une édition féministe des lois de l'Irlande médiévale et ancienne qui se rapportent au mariage et au divorce.*

For a nation which has in the past two centuries sought to define itself by recourse to the ancient past, symbol-analysts/manipulators in Ireland have acted uncharacteristically in failing to claim what is a remarkable fragment of its ancient heritage, its dark ages pre-Christian marriage laws. The Brehon laws appear to have been the most liberal in the western world in relation to divorce and marriage, and survived operationally until the seventeenth century, though strongly contested (and influenced) by the canon lawyers throughout the Dark and Middle Ages.

The failure to claim this law-tract heritage is in part testimony to the enduring power of the Roman Catholic Irish church, its policies on family life, and the principles enshrined in Article 41 (Chapter 12, Part II) of Eamonn de Valera's constitution of 1937,<sup>1</sup> but also, and this is less well attested, to the zeal of the academic gatekeepers, the linguists and historians (mainly but not exclusively male), who have implied that the laws' importance to women has been "exaggerated" (Kelly 68; see also O Corráin). Their deflections and the national avoidance of this intriguing fragment of history are, I believe, a matter of considerable importance to women. It is the intention of this article to enter this "no-go" area of Irish culture, and to ask questions about why feminists<sup>2</sup> have not been more active in reclaiming this history and confronting the academic and clerical gatekeepers.

Ireland in 1995 was the last remaining western democracy to disallow divorce. An earlier referendum to allow divorce had been resoundingly defeated in 1986 by two-thirds of the electorate. When on 24 November 1995, the Divorce Referendum was carried by the narrowest of margins (less than half of one per cent of all the votes cast

by 61 per cent of the eligible population), much more was at stake than the right to end marriages. Although what was voted was conservative by the standards of other countries (the legal right to divorce after five years of separation), the slim majority represents a major rebuff to Catholic church control over legislation, and a further wedge between civil and ecclesiastical powers (closely identified in Ireland both in the constitution and in practice). More importantly, it represents a significant challenge to the devaluation of women's autonomy in the Irish Constitution.

Ironically, however, opinion polls prior to the referendum indicated that, in addition to predictable support from older men, both clerical and lay, the no-case was supported by more women than men, who apparently feared that lifting the ban would bring rewards for adulterous husbands, impoverish women and children, make them dependent on welfare (which would result in higher taxation), and make it possible for women to be ejected from their homes involuntarily. Similar arguments were mounted by conservatives when the first of the modern divorce laws was enacted in England in 1857. In Ireland in the 1990s, as in England in the 1850s, "the dangerous sex was not female but male" (Stone 384), and conservative defence of the *status quo* focussed on how to protect women from unregulated adultery, and from alleged male predilections for sexual novelty and a preference for serial polygamy. These social ills were assumed to be the inevitable outcomes of a view of male sexuality which had been naturalized, the belief that men had more intense libidinous drives than women. Paternalistic materialists also urged that legislation based on the religious views of the indissolubility of marriage constituted a protection of standard of living for women and their dependent children. Stone notes that even those who supported the nineteenth-century reforms, upper-middle-class women, were often doing so not for feminist reasons but were more concerned about protecting their property as wives and achieving custody rights than with equity issues, curiously both matters which the ancient laws address in equitable terms.

An index of how marginalized Ireland has been within western history and philosophy of ideas by the double colonialization (the Church from the fifth century onwards and English and Scots settlers from the end of the sixteenth century) is that the general histories of divorce and marriage laws which exist (see Corbett; Thomas; Brundage; Ingram; Phillips; Shanley; Stone) deal with antecedent Jewish, or Roman law, or make passing references to ancient Mesopotamian law tracts (all of which constitute entrenched misogynistic legal systems), but are silent on ancient Irish law which was recorded after the

advent of Christianity but which encodes a civil law which is often liberal and at odds with the teachings of patristic scholars on marriage. The codes were practised until the twelfth century (MacCurtain and O Corráin), and actively glossed until as late as the seventeenth century (Kelly). These legal tracts, then, have remained securely in the hands of Irish language and history scholars, and antiquarians.

In the discussions leading up to the Divorce Referendum, I was surprised to find no references whatever to the Old and Middle Irish law-texts. My introduction to this subject came in the form of a modest populist text, Power's

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***A woman had the power to initiate divorce on a variety of grounds: if the husband fails to support her, or has tricked her into marriage by sorcery, or if he physically assaults her in such a way as to cause a blemish; if he becomes so fat he cannot engage in intercourse.***

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*Sex and Marriage in Ancient Ireland.* He expressed puzzlement, with which I fully concur, that although there is a body of data on the subject of sex and marriage between the fifth century when Christianity reached Ireland until the arrival of the Normans in the twelfth century, that the time for a modest monograph is "long overdue." He assumed that the public reticence about sex and embodiment was due not only to the influence of the Church but to the economics of late marriages which have been traditional in Ireland, and to powerful collective codes of silence in relation to "sex-talk" (5–6). While Power's anatomization of his own culture is doubtless cogent, there are other political agendas being served by the silence to which he alludes.

Power's methodology is simple, even simplistic, and vulnerable to the critique of the specialist in language (Old and Middle Irish) or medieval history (see MacCurtain and O'Corráin). In a process which has become more familiar in the hands of new historicists, he juxtaposes legal discourses with literary ones, and allows the one category to inform the other. The weakness of this methodology is the question of the extent to which both the laws as recorded and the myths represent historical realities or are merely the academic exercises of a learned class. Furthermore, Power tends to read the mythic literature in literal-minded ways. However, although his book does not pretend to be scholarly, he demonstrates a formidable acquaintance with the main scholarship. Although modern scholars complain of Power's lack of expertise (often without naming him), this reader of both Power's and the scholars' accounts of the laws finds them in substance not different, though one would have to note that Power is an enthusiast rather than a scholar. What may be more to the point is that Power intends to make cultural interventions of a liberal, and feminist, kind.

Although Donncha O Corráin does not identify the tradition of scholarship with which he engages adversarially (see MacCurtain and O Corráin), like Daniel Binchy, he has in his sights the work of the middle and late nineteenth-century social theorists like J. J. Bachofen (*Das Mutterrecht*, 1861), Lewis Henry Morgan (*Ancient Society*, 1871) and Frederick Engels (*The Origin of the Family, Private Property, and the State*, 1884) whose work was often taken to be proto-feminist before the social Darwinist assumptions of these theorists were exposed and questioned by many marxist-feminist critics, among them, feminists such as Martin and Voorhies, Janeway, and Rosalind Coward. O Corráin asserts magisterially: "Early Irish society was patriarchal: the legal and political life was governed by men" (1). While this is undoubtedly true (all ancient systems of laws have been transmitted via patriarchalized scribes; indeed, the Irish law tracts would not exist but for the literacy of the Romanized and patriarchalized monks who transmitted them), nonetheless, as any casual scrutiny of ancient law texts with gender issues at the forefront of one's consciousness will reveal, there are degrees of patriarchalization.

The lifelong power of fathers, the *patria potestas*, and of husbands in Roman Law to dissolve marriages (Corbett), or the power conferred on husbands in the Codex Hammurabi<sup>3</sup> to punish wives to the point of death, more deeply entrench and institutionalize misogyny than the contractual system which Kelly describes as existing in the *Cáin Lánamna*. Despite being technically deemed without independent legal capacity except in unusual cases (Kelly), a woman (even granting it was only those of a certain class<sup>4</sup>) under this legal code had the power to initiate divorce on a variety of grounds: if she is repudiated for another woman (and this entitles her to stay in the house); if the husband fails to support her, or circulates satires about her or is indiscreet about their intimate sexual relations, or has tricked her into marriage by sorcery, or if he physically assaults her in such a way as to cause a blemish; if he is sterile, impotent, practices homosexuality, or enters holy orders (presumably a post-Christian addition), or becomes so fat he cannot engage in intercourse (Kelly), or if either party becomes mad or incurably ill (MacCurtain and O Corráin). A husband may divorce his wife for "unfaithfulness, persistent thieving, inducing an abortion on herself, bringing shame on his honour, smothering her child, and being without milk through sickness" (Kelly 75). In addition, there are the eleven circumstances on which temporary respite from a marriage is permissible, including "seek[ing] a child" if one or other partner is infertile (Kelly 75). Once divorced, the assets were equitably divided on the basis of what each partner brought into the marriage, with division of goods and money acquired after marriage being divided in half.

What is notable in the exegeses that exist on the law tracts is the ways in which scholarly lineages emerge: O Corráin follows Binchy's ameliorist (and church-friendly) social Darwinism very closely, and it is a narrative which

is ideologically based on the notion that the culture which generated the laws was an Indo-European one (for which read “necessarily patriarchal”). Binchy is committed to proving that it is under the influence of Christianity that the ameliorization of the place of women occurs:

In a society of [the Indo-European] kind, women have at first no independent legal capacity. They cannot inherit property (save in exceptional circumstances), they cannot perform any juristic acts without the authorization of some man or group of men whom the law regards as their guardians. Students of

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***If indeed it was Roman—or canon—lawyers who effected the ameliorization after the advent of Christianity, how are the liberality of the ancient Irish divorce laws to be explained? They have no precedent in Roman or canon law.***

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Roman law are familiar with the *perpetua mulierum tutela*, and this institution can be paralleled in almost every ancient system. In the course of time the status of women is progressively raised. They are first accorded a limited capacity: they can inherit and dispose of chattels, some of their contracts may be made without authorization, they can bring suits and be admitted as witnesses in court proceedings.... The line of development extends from original total incapacity to equal or virtually equal capacity with men; the concluding stage is that the legal position of the female adult is equated to that of the male adult, as least as far as private law is concerned. This change is always one of the proofs of a highly developed legal civilization and depends on the progress of the latter rather than on the period of history. (207–8)

Despite the assurance of the claims made here, Binchy later admits that dating the evidence is problematic (texts of a sort designated A and those designated B are organized thematically rather than historically), except for the glosses on both groups (named C) which have to be of a later date. To a large extent, Binchy’s theory is driven by the need to use archaic Irish evidence to refute the notion of a “primitive matriarchy” à la Bachofen. A further argument can be advanced to critique his claims: if indeed it was Roman—or canon—lawyers who effected the ameliorization after the advent of Christianity, how are the liberality of the ancient Irish divorce laws to be explained? They have no precedent in Roman or canon law.

O Corráin uncritically adopts both the premise of an Indo-European patriarchal social order and an inversion of that in the form of a putative matriarchy which he is at pains to dismiss. This leads to much seemingly common sense speculation:

A second type of marriage is known as *lanamnas for ferthinchur*, a marriage in which the preponderance of the marriage goods is provided by the husband. This is an older form of marriage, probably less common in the late seventh and early eighth centuries, and must have been the usual type of marital arrangement in the older, more patriarchal stage of society.

... It would seem, in the very early period, that men had very wide rights of divorce whilst women had few at all, if any. (O Corráin 3–4)

O Corráin briefly pays lip-service to a debate about whether the Brehon laws might bear the mark of pre-patriarchalized, pre-Celtic thinkers, only to dismiss the suggestion as a “matter for debate among scholars” (2).<sup>5</sup> Indeed, the jury is out on this issue, feminist scholarship being a relatively new player in the field of Irish language studies and medieval history. However, it seems to me that the laws and the assumptions made about them by their guardians need to be re-read in the light of changing paradigms in a wide range of disciplines which have been the subject of feminist hermeneutics (Martin and Voorhies; Sacks; Sanday; Lerner; Ehrenberg; Condren) since second-wave feminism.

O Corráin’s and Binchy’s binaries, *patriarchal/matriarchal* cry out to be deconstructed. It seems possible to me that the wrong question is being asked, and that their shared social Darwinist premise of patriarchal beginnings ameliorated by Christian ideals of gender equity could usefully be queried. What is curious in O Corráin’s argument and rhetoric is the slippage between what O Corráin asserts forcibly and his ways of describing the laws which he is so keen to style as “patriarchal” but whose “latitudinarianism” he admires. Let us take the following passage which occurs strategically early in the article and which presumably is intended to logically govern the argument of the essay, rendering that which is offered evidence for the following more general contentions:

Early Irish society was patriarchal: the legal and political life was governed by men. This was the case amongst the Indo-European communities from which most of the early European societies, including the Irish, inherited their social systems. In such a patriarchal society, women have no independent legal capacity. They can perform no legal act without the permission and authorization of a man or a group of men. When a woman is young, she is under the authority of her father; when married, under the authority of her husband; when she is old (and her husband is dead), she is under the authority of her sons; if she is a spinster or a widow without sons, she is under the authority of the head of her family, usually her brother. And, of course, if she is a nun, she is under the authority of the church. (MacCurtain and O Corráin 1)

Before positing a third position, one not envisaged by O Corráin's binarism (his opposition of matriarchy as some inevitable alternative to patriarchy), we need to examine his evidence more closely. It is instructive to see how O Corráin describes one of the most extraordinary features of this legal system:

In the end of the seventh century the normal type of marriage is that known as *lámna comhincuir*, the marriage in which both parties, the man and the woman, jointly contribute to the marriage goods. Though these are held in common for the duration of the marriage, each of the partners retains the ultimate ownership of what he or she contributed. In Irish law there is no such thing as common marital property. As the law-tracts say, if it is a marriage of joint contribution with land and stock and household equipment and if the couple come of the same social class—the wife is known as “a woman of joint dominion,” “a woman of equal lordship.” No contract or business dealing of one of them is valid or legally binding, without the consent of the other.... In addition, the husband and wife can dissolve each other's bad or unprofitable contracts. Apart from what they contribute to the joint marriage fund, the husband and the wife may retain their own separate personal and private property and the woman's right to private property within marriage is clearly set out in the laws. As far as this personal property is concerned, a woman may buy, sell and lend up to a certain legal amount. She does not require her husband's permission and he can make no complaint about the matter: if the husband uses up or spends any of her property, he must restore it if she raises a complaint. If they dissolve their marriage, each partner receives back what each contributed to the marriage in the first place and the natural increase of their property which took place in the course of the marriage is divided between them according to fixed proportions. This division is relatively complex in practice but the principles are clear enough. (2)

What is described here, which substantially concurs both with Kelly's more detailed later study and Power's popularization, is an account of a legal system which in its legal expression (if not in fact) worked exquisitely equitably, and significantly, *contractually*, in matters of property for both men and women. In this society one imagines that accountants, far from having a narrow bean-counting function, contributed to the psychic and social well-being of the family. The exact reckoning of wealth which is attested to here, and the calculations of contributions to the marriage could be only advantageous at the point of the marriage breakdown. The fact, too, that children were routinely fostered in order to cement alliances between *riúath* (tribe or petty kingdom) meant that another source of angst at the point of marital breakdown, custody, did

not complicate divorce. It is clear, though, that such a system was designed to work optimally for that high-class group of people who married a person of exactly the same social standing, or alternatively, for those lower in the social strata whose marriages were within the same rank. Differences of rank introduced complications which the lawyers relished, and codified. O Corráin's evidence, then, constitutes a set of discourses which are internally contradictory and which raise more questions than they answer about the uses to which these ancient discourses might be put by contemporary feminists.

Even though Fergus Kelly's scholarly *A Guide to Early Irish Law* meets the needs of the general reader, it is flawed by its brotherly side-stepping of feminist agendas and its repetition of a view of history and patriarchy which more recent feminist scholarship suggests might be due for the application of a feminist hermeneutics of suspicion. It is, I suggest, time for a new edition of relevant parts of the *Senchas Már* and *Cáin Lámna* (the “law of couples”) by a team which should include a feminist language scholar, jurist, and historian. The possibility of reclaiming what appears on face value to be the most liberal set of laws on marriage and divorce in the western tradition from the point of view of women would seem to be an important gynocritical and deconstructive project.

*Dr. Frances Devlin Glass is a Senior Lecturer in the School of Literary and Communication Studies, Deakin University (Geelong and Melbourne, Australia). Her research interests are in Australian and Irish literatures, feminist literature and theory, especially ancient myths.*

<sup>1</sup>Fitzpatrick and Dillon argue that, although the language of debate on divorce in Ireland has tended historically and in recent times to be doctrinal, moral, and Church-driven, nonetheless social and cultural factors have constituted influential impediments to divorce legislation being enacted, notably the actual and symbolic significance of the agrarian economy the fact that discourses on individual human rights are not highly developed in Ireland, and the nexus between nationalism and “traditional” moral values. However, mass media commentators on the referendum seem unanimous that the Church is the most coherent and organized forum articulating the anti-divorce case.

<sup>2</sup>Condren does give some space to the Brehon Laws, but her account is uncritical.

<sup>3</sup>The best-known of the ancient Mesopotamian Law Codes, dating from about 1729 BCE in the Old Babylonian Dynasty.

<sup>4</sup>O Corráin in MacCurtain and O Corráin argues that the ideal system of marriage in which a woman enjoyed “equal lordship” (which conferred equitable property rights) with her husband was extended in the ninth and tenth centuries to women of lower grades, effectively to the majority of women.

<sup>5</sup>Kelly echoes both Binchy and O Corráin and goes further

in claiming that the theory that the Indo-European conquerors borrowed customs from their pre-Celtic precursors has no basis in his view.

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## MARGO HEARNE

### Children of Ireland

While watching children's soccer in America  
one day  
I noticed all the care and food and stuff pushed  
their way  
At half-time, half an orange, at quarter time, a  
drink  
then more food and fruit juice  
it made me think  
of days I used to hurtle through the fields of  
summer  
chasing hurling balls and footballs  
how I dashed a handball  
against the side of some old barn,  
at noontime, with Jim, had a great swing to my  
arm

I don't remember, ever, sucking on an orange  
and as for drinking fruit juice?  
Well, we'd cut across the fields for milk  
swinging an old can  
had it filled each day, drinking as we ran  
Were often chased by cattle  
Irish ones are wild  
unlike tame beef bovines  
sleepy-eyed and mild.

Sometimes, of course, we'd race inside and  
turning on the tap  
would hop from foot to foot while we waiting  
for the cup  
to fill, which, with a gulp was dry  
then we'd flash outside  
drops falling through the air  
to catch the flying, windswept air about us  
and race away  
and never look behind us as we ran.

Margo Hearne emigrated to Toronto from Ireland in 1971, moved west via Banff, Elkford, Kasba Lake, N.W.T., and has lived in Masset, Queen Charlotte Islands/Haida Gwaii since 1974. She has been published in Peter Gzowski's Morningside Papers (1989), the Guardian Weekly, and various local papers.