

# THE PROBLEM OF JURAL TYPOLOGY IN TRIBAL SOCIETIES: PRE-CONTACT AMERICA AND GAELIC IRELAND - A CASE STUDY

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## Introduction

This article focuses upon a comparison between the Irish Brehon legal system, and that of pre-contact America, in terms of charting legal evolution and in particular the development of jural typologies. It suggests that these two cultures when compared offer relatively “pure” examples of legal evolution of this type of culture. They illustrate a special hybrid point on the evolutionary spectrum between what Durkheim would call mechanical and organic social solidarity and offer a unique opportunity to test jural typologies for tribal systems. Furthermore, we shall argue that Gurvitch’s typology offers a solution to many of the problems of describing, categorising and explaining legal systems of this kind.

The areas examined cover the broad range of relationships and interactions within the society. We shall consider the relationship between the individual and the group or what we would in modern parlance describe as citizenship. Land ownership and property rights in general will be given special consideration as they are not only indicative of the group/individual relationship but also of relations between individuals. Continuing the theme of relationships between individuals, we shall explore the role of women and other groups that are generally considered to be the most vulnerable members of any group. Finally, we shall consider the concepts of justice that are prevalent in our subject cultures. These factors are accepted indices of legal evolution and will be used to test the jural typology proposed by this paper. Jural typologies are classificatory schemes for legal systems which try to categorise them according to certain key features in the hope of working out how legal systems grow and develop. (The features focussed

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upon and the view taken of development depends very much on the typology in question as we shall see below).

### *The Story of Jural Typologies*

The quest for an adequate jural typology has occupied sociological jurisprudence since the first interactions between law and sociology. In the early days of the sociological enterprise, Durkheim and his followers took an eclectic view of the study of law, making use of many cultures and time periods and viewing them all as rich sources of the data essential to their research - as social facts. Ultimately, these researches produced Durkheim's theories on law and in particular his concept of legal evolution. Early variations of this concept centred upon the nature of social solidarity, whether solidarity is mechanical or organic, and the repressive *versus* restitutive divide between primitive and modern societies. Essentially Durkheim held that there are two fundamental laws of penal evolution, the qualitative and the quantitative. The quantitative law states that the intensity of punishment is greater the more closely societies approximate to a less developed type and the more the central power assumes an absolute character. The qualitative law dictates that deprivations of liberty, and of liberty alone, which vary in time according to the seriousness of the crime, tend more and more to become the normal means of social control. (The most elaborate of Durkheim's expositions of his theories on penal evolution can be found in Durkheim 1899-1900)

This division has been strongly criticised by both sociologists and anthropologists (E.g. Merton 1934: 319; Schwartz and Miller 1964: 627; Diamond 1971; Dubow 1974; Lukes 1972. For a comprehensive review of the writings of Durkheim see also Cotterrell 1999). Some of the most extensive criticisms and those which will be the focus of this paper can be found in Gurvitch's *Sociology of Law* (Gurvitch 2001) His argument is that Durkheim's work was flawed for three reasons: firstly, his classification of the forms of sociality is too simplistic; secondly, the connection between law and organised restraint is questionable; and finally, law is not a universal symbol of all forms of sociality.

To this later writers could add criticisms influenced by post-modern thinking such as critiques of his historical evidence and the influence of colonialism (for example Garland 1992: 37-61). It is, perhaps, Durkheim's failure to develop a functional typology that leads to later writers' focus on the development of the so-called 'modern systems' alone, and a tendency in the later sociology of law to avoid the

use or development of jural typologies generally. Specifically, Barnes has suggested that after the Malinowski/Radcliffe-Brown dispute legal evolutionary typologies became unpopular (Sawyer 1961). The Malinowski/Radcliffe-Brown dispute concerned an argument about the applicability of Durkheim's concept of collective/automatic law enforcement. (For a neat pen picture of their debate see: Malinowski 1961: Radcliffe-Brown 1935: 47-48.) However, this was only one manifestation of the broader conflict between the two, which was the major philosophical difference in their approach to anthropology and social research. Malinowski emphasised fieldwork and the importance of gaining an understanding of the motivations of individuals within a society, which, he argued, led to an insight into why particular cultural traditions arose. Radcliffe-Brown on the other hand, focused on the collective not the individual. He tried to understand the social pressures which shaped individual actions, and sought to discern over-arching theories about these pressures which could explain the evolution of social institutions and traditions. Thus, Radcliffe-Brown supported Durkheim's views that punishments assuaged the collective conscience in primitive societies, but Malinowski disagreed. An additional clear example of their differences in approach can also be seen in their attitude toward ritual and religion. Malinowski argues that ritual is an anxiety-relieving activity directed toward the achievement of a practical goal in circumstances where the technical capabilities of the actor do not render the outcome of the activity certain. Religious activities, in contrast, have no practical goal.

While in the magical act the underlying idea and aim is always clear, straightforward, and definite, in the religious ceremony there is no purpose directed toward a subsequent event. It is only possible for the sociologist to establish the function, the sociological *raison d'être* of the act. The native can always state the end of the magical rite, but he will say of a religious ceremony that it is done because such is the usage, or will narrate an explanatory myth. (Malinowski in Needham 2003: 32).

Radcliffe-Brown, in contrast, is concerned that Malinowski's distinction between religion and ritual is based solely on the reported motivation of the native individual. He is very sceptical of this approach stating:

The reasons given by the members of a community for the customs they observe are important data for the anthropologist.

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But it is to fall into grievous error to suppose that they give a valid explanation of the custom. (Radcliffe-Brown 1939: 25)

In addition to this methodological scepticism, he posits an alternative explanation of rituals as a symbolic display in response to social expectations, or in other words rituals are a symbolic cultural idiom which permits the actor to demonstrate that they are adhering to the social norms of their group. (Radcliffe-Brown 1939: 41) If we translate this to the discussion of legal evolution, we find a fundamental tension between considering whether we should investigate the individual's perceptions of their legal system or try to explain it from a collective point of view.

With such methodological uncertainty as to how to proceed at the heart of the discourse it is little wonder that the attempt to find a generalised approach to primitive legal evolution withered away. Although later work focuses upon the development of specific areas of law in modern Western-Liberal type social situations, there are notable exceptions to this general trend. Weber, for example, made a significant contribution to the understanding of jural typology by adding as an additional classificatory criterion, an analysis of the degrees of irrationality and rationality in the conceptions of law and power characteristic of various societies (Weber 1947. For two contrasting analyses of the conceptions of rationality and irrationality in the work of Weber see: Kronman 1983, esp. chap. 4; Schluchter 1981.) From this viewpoint, Weber distinguishes between legal systems which are penetrated entirely by the supernatural, and those which are relatively or entirely rationalised; he further classifies systems as charismatic, traditional or based on rational powers. Weber also pointed out that the law assumes a different character depending on whether it is formulated and applied by, prophets/divines, by jurists, by owners of patrimonial power, or by a bureaucracy of specially trained jurists. Weber's analysis was certainly profound and allowed for much greater complexity than the Durkheimian model. However, his model failed to integrate these partial and, so to speak, widely dispersed observable aspects of a society in a holistic descriptor/explanation of types of inclusive societies where these juristic features were well established as functions and protectors of the equilibrium of particular social groups. Similar deficiencies can be found in many of the other typological or quasi-typological theories. At this point, we shall briefly explore these theories.

Josef Kohler's pioneering work on the legal systems of what he called the "half-cultured" peoples greatly transformed the methodological approach of legal

sociology. Kohler introduced a new scientific rigor particularly through the selection of definite historical or ethnological territories for monographic inquiries, in the course of which arrangements observed elsewhere are treated as suggestive material for supplying gaps and starting possible explanations. Kohler's work is interesting because, according to his view, neither the mere fact of a 'low standard' of culture, nor the fact that a certain legal custom precedes another in point of time in some cases, establishes the natural sequence of development. The process of development must be studied in cases in which it is sufficiently clear, gaps in other cases have to be supplied accordingly, and the working together of distinct institutions, especially in cases when there is no ethnic connection, has to be especially noticed. (Kohler 1969.<sup>1</sup>) As we shall see later, the difficulty with this approach is that the desire to examine discrete areas leads inevitably to explanations which deal with only limited areas of law in complete jural typologies. We shall now look at the work of one of Kohler's followers - Pound.

Roscoe Pound proposed five stages of legal development in 'The Scope and Purpose of Sociological Jurisprudence' (Pound 1911-12). The initial stage is known as the 'primitive stage'; in this, law is concerned with peace-keeping within the community group. The second stage or 'strict stage' is the point in evolution where law is the prime agency concerned with social regulation. This softens in the next stage to a concern with equity. In this third stage, the 'equity stage', law is concerned with ethical solutions to legal controversies. The fourth evolutionary stage, which is known as 'maturity' law, is concerned with equality and security in contractual and property rights. Finally we have the 'socialization stage' where the purpose of law is maintaining and furthering society.

However, Pound's wider scheme for legal sociology renders this typology problematic. Pound is, in fact, only concerned with formal courts, and his own working goal was to make contemporary courts heed the reality of particular social groups. His focus was on the development of systems of the Anglo-American

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<sup>1</sup> Kohler was a tremendously prolific author producing in excess of 2,000 works in this field: see A. Kohler 1984. However, very few of these are readily available in English, so we are focusing on his major work on Legal Philosophy which is available in translation and is indicative of the general trends and themes of his work.

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type and the influence their development and current sociology can have on the judicial function. This makes it inappropriate as an evolutionary typology for many “tribal” systems as few had or have formal court systems which fit with the Anglo-American model.

Henry Sumner Maine would appear at first glance to avoid this difficulty as his work looks specifically at the development of the social grouping through a number of stages, from family, to house, to tribe, to state (Maine 1956). However, this work is also problematic because it has focused on comparing systems contemporary to himself with ancient Roman systems (primarily because the Roman system had the largest body of written evidence of any of the historical systems).<sup>2</sup> This created a difficulty in modelling tribal systems. These are not comparable with the Roman model, because the system of the Roman *familia* is somewhat different to most tribal kinship systems, and would not, for example have provided Maine with a means of modelling a matrilineal society. It is also inappropriate to compare formal written legal systems with those which are orally transmitted in this way.<sup>3</sup> Furthermore, since Maine was trying to move from Roman law to modern European influenced law he presupposed a particular evolutionary path.<sup>4</sup> Tribal systems with no connection to the European legal tradition are unlikely to conform to this model. In other words the problem is that in his approach European legal evolution is the norm.

The work of another follower of Kohler, Robert Lowie, deals explicitly with the concept of so called ‘primitive’ legal systems and their role in legal evolution.

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<sup>2</sup> However at the time at which he was writing Maine, despite his undoubted scholarship in the field of Classics, did not have the benefit of access to analysis of some of the texts which are now considered central to understanding the formation of Roman law, for example the earlier Greek Code of Gortyn.

<sup>3</sup> This is because the different types of sources to be accessed would require vastly different research methodologies. Maine’s methods are not appropriate for the laborious and complex exercise of constructing comparators between the two. For a simple example of different methodologies at work which illustrates this point see Monaghan and Just 2000: 14-21.

<sup>4</sup> It is also worth noting that by modern standards of classical scholarship Maine’s work must inevitably be flawed as it cannot take account of what we now know of the history of Roman law before its codification and the influence of Greek thinking on Roman law.

Spurred by Kohler's teaching it is unsurprising that Lowie's work focuses on the discrete area of criminal law and the idea that the kin of someone offended against will punish the offender, or an offended group will punish an offending group. This, he claims, inevitably leads to the development of the state. He proposes three stages for this development: an early stage where the law contains many legal fictions, a stage marked by a concern for equity, then finally a legislative stage. Whilst he does offer specific examples, his work tends to focus on only one type of law in each culture and is therefore inadequate for use as an overall jural model. Lowie was a proponent of cultural relativism. He believed that the history of the sharing of traits between cultures was the key to understanding institutions, not some notional idea of legal evolution (Lowie 1927)

Thus it is unsurprising that Malinowski does not offer a theory of evolution or a typology, although he does offer his theory of the reciprocal nature of relationships in tribal cultures. He considered it vital to solve the problem of the nature and causes of primitive law because he recognised that tribal societies on the whole do not have the structures or institutions found in developed systems. Rather the force of law resides in every basic role relationship, in the reciprocity and mutuality within societal institutions, and in institutional relationships acting upon the individual. Radcliffe-Brown also looks at the factors influencing the development of legal systems but focusing on the group level. He offers a number of influencing factors: magic and religion, judgement or arbitration by consent carried out by respected figures, and centralized political authority (Malinowski, 1961: lxvii-lxxi; Radcliffe-Brown 1948 and 2002).

After this work studies on legal evolution among tribal societies lose impetus, as does the search for typologies. As Nader has pointed out, the trends of analysis promulgated by some of the early scholars make it very difficult to compare legal systems or create typologies.

We may begin our sketch by noting that it was a common belief among eighteenth-century intellectuals interested in the study of man that certain general principles of law (*the* law as Frenchmen or Englishmen knew it) were universal, although differentially reflected in any particular legal system. By the twentieth century a raging debate was under way as to whether all societies had law. This was largely a definitional debate hinging on the question: What is law? If law is defined in terms of procedure as Radcliffe-Brown and his adherents define it, "social control through the systematic application of the (physical) force of politically organized society" ..., then not all societies could be said to have law: for example, the

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Adamanese, the Yurok, and the Ifugao. If, however, law is defined in the broadest sense as "most processes of social control," as Malinowski is alleged to define it, then all societies may be said to have law. However, at this point one would have to take into account the charge that this use of the term "law" renders it meaningless, or identical with social control. Nor was this debate of theory concerned solely with the domain of "law." The attempt to distinguish between law and custom revealed a further confusion as to what custom was as well.... Whether law and custom were considered one and the same depended upon whether custom meant culture (in Tylor's sense), customary behaviour, or social norms - the "ought" or ideal aspects of culture. (Nader 1965: 4)

However, one typology that has been virtually forgotten avoids many of the pitfalls of these other models (Hunt 2001). That is Gurvitch's typology, which is expounded in his seminal work *Sociology of Law*. Gurvitch offers a seven point typology of jural systems, three of which are of particular relevance to 'tribal' societies.

Gurvitch begins by considering the legal systems of poly-segmentary societies (tribal groups) having a magical-religious base. These societies are characterised by the prevalence of clan groupings centred upon totems. These are the societies that are built upon the gift relationship. Jural activity is penetrated by the supernatural (magical) working through a complex network of clans and societies, and religion holds sway over concepts of the penal and the idea of royalty. These systems are marked out by a number of factors. Firstly, all power is either theocratic (in the clan) or charismatic (from pre-eminent individuals in the religious secret societies). Secondly, acts formulating, applying and sanctioning the law have a mysterious character. Thirdly, any appropriation of things is penetrated by the supernatural. Finally, social law focuses on communion and good relations between individuals.

He then moves on to consider legal systems of societies given homogeneity by the theocratic-charismatic principle, that is, those led by high priests or kings under whom the diverse clans have unified. This is the stage at which the clans unify under the influence of a Priest/King, either by joining into one family grouping or by a process called 'cynoecism' in which partially integrated families become tied to a territorial base. These systems are characterised by very rigid legal systems because they are believed to have Divine origin. Yet on the other hand laws can be applied arbitrarily if a moral or religious matter is raised or if a case particularly

touches upon the mind of the leader. Additionally, there may be what we describe as civil law elements in tandem with the religion based courts.

Finally, Gurvitch considers legal systems of societies given homogeneity by the pre-eminence of the domestic-political group, or what is sometimes described as a relatively rationalized system. This is the last of the categories that could be related to tribal systems. In these systems the family bond dominates and is tied to economic activity related to owning a territorial base. These systems have the following characteristics: (a) social law may be subordinated to the individual right of the chief landowner; (b) there is a confusion between legislation and administration on one hand and economic management on the other; (c) law is free of the intervention of the State (as we would describe it) whether codified or not it is still primarily based in custom and applied by the popular benches; (d) sociality is based in community; and (e) the rise of the community causes the decline of the influence of religion and magic over law. Gurvitch's special insight is to recognise that none of these types can be found in total purity and to acknowledge that this lack of purity is simultaneously the force and limitation of sociological types. Typologies remain to some extent abstract and general; they should be viewed as a spectrum and as systems classified on the balance of the factors present thus supplying points of support for the historian's efforts of individualization. Hence, although in historical terms there is some idea of evolution or forward progression in these characterisations, this does not equate with superiority of one stage over another, but is rather a general description of changing social characteristics.

Two legal cultures are examined in this paper, namely, those of First Nations (particularly Iroquois) and Brehon. Our First Nations study focuses on the Iroquois because of the weight of evidence available and also because their traditional geographic location meant that they were among the first North American tribes contacted. These societies show the appropriateness of Gurvitch's model, containing as they do elements of the first and second categories mentioned above.

Durkheim himself made some study of First Nations culture (Durkheim and Mauss 1963; Durkheim 1995), but he was constrained by the historical knowledge and viewpoints of his own time, and did not aim primarily to analyse these cultures in terms of their legal regimes. Similarly, Brehon law has remained relatively untouched by sociological and historical legal analysis. Both therefore have much new material to offer modern scholars. In presenting this work the author suggests one way of reading this source material to scholars who are not familiar with it in the hope that they may be stimulated to produce their own readings.

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### 2. *Methodology and Aims of this Paper*

This article adopts a historical/anthropological approach to comparing what we know of the ancient Brehon law of Ireland<sup>5</sup> and what is known of the pre-colonial laws of the First Nations within Gurvitch's framework, which the author believes is the most appropriate jural typology. It is hoped that this demonstration, carried out in the spirit of Durkheim's own methods but incorporating Gurvitch's insights, will demonstrate the strength of Gurvitch's mode of analysis as a tool for understanding tribal societies. These have proven problematic for many typologies because they are unique legal ecosystems. We will make these comparisons by examining a number of key legal areas, namely, conceptions of citizenship, land ownership and property rights in general, the role of women and other groups which are generally considered to be the most vulnerable members of society, and, finally, concepts of justice. In the rest of this section we shall explore further why and how it is possible to compare these unique legal systems. It should be noted that this examination is not chronologically concurrent, that is, we are not examining the First Nations and Ireland as contemporaries. However, it has never been a prerequisite of the sociological method that the societies being compared be contemporaneous.<sup>6</sup>

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<sup>5</sup> The dates of this law, or *Fénechas* are unclear although it was certainly in existence before 438 AD because the *Annals of the Four Masters* and other authoritative Irish texts confirm that in the period 438-441 it was written down and purified by a committee of nine persons selected by Laegaire the King of Ireland at the behest of St. Patrick. Their goal was to remove from the body of the law anything that was contrary to Christian teaching. (The committee is believed to have included these two illustrious persons Patrick and Laegaire.) *Fénechas* reached its zenith somewhere in the early 7<sup>th</sup> century. After the Council of Whitby it gradually declined in influence as more and more of Irish life became dominated by the Penitentials (religious laws originating in Rome) as opposed to the native legal traditions which continued on in a changed form until extinguished by the Acts of Tanistry as described below. The text of the Annals and other key Brehon texts can be found in translation (with links to the Irish text) at: <http://www.ucc.ie/celt/publishd.html> (07/04/07)

<sup>6</sup> There is a broad range of estimates as to how long First Nations systems had been in place before discovery (sic):

The traditional system of Irish law is popularly known as the Brehon law after its judges, but is more properly called the *Fénechas* (which roughly translated means law of the *Féne*, or law of the free land tillers, a term which hints at its historical roots as part of the custom and tradition of Irish tribal life.) It predates the Plantation, that is, the settlement of Ireland by non-Gaelic immigrants, by many centuries. There is a difficulty in dating the precise scope of its span. Although first written down according to the ‘Annals of Ulster’ some time during the high kingship of Laegaire (428-463 C.E.) as a result of a ‘purification’,<sup>7</sup> it is believed that there were uncounted centuries of oral legal tradition before that. It is also difficult to know exactly when Brehon law was extinguished<sup>8</sup> though it is fairly clear that it enjoyed its golden age somewhere in the late 6<sup>th</sup> and early 7<sup>th</sup> centuries.

Law here is being given its widest interpretation, that is, the one posited by Durkheim himself, of empirically observable social facts which reflect the morality and state of social solidarity of a given culture (Cotterrell 1999: 12-13). Much of what is known of Brehon law emerges from the surviving teaching texts of the Brehons themselves; these represent the codification of general custom and practice. First Nations law whilst rarely written, and administered by a much less formal system, is a similar body of general custom and practice. We shall now consider why these two systems are suitable for comparison.

The similarities between these two systems are not trivial but, equally importantly, nor are their differences.<sup>9</sup> Both, as will be shown here, display many similar attitudes with regard to concepts of property, justice and citizenship. However, the Brehon system, which operated both before and after the introduction of

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October 12, 1492, is not the first day of First Nations history. Indeed, mounting evidence (some of it from a Pennsylvania habitation site) shows Native America to be at least 50,000 years old and, based on the Hueyatlaco site at Valsequillo, Mexico, perhaps as much as 250,000 years old (Johanson 1998: 112).

<sup>7</sup> Above note 5.

<sup>8</sup> Below note 10.

<sup>9</sup> Interestingly, for our purpose, one of the earliest descriptions of the life and habits of the Native Peoples of New England describes them as being very like the wild Irish of the same period: Morton 1637.

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Christianity to Ireland, had clearly moved far beyond the trappings of a totemic system and into Gurvitch's second stage which is not so clearly the case with the First Nations examples. Both cultures are complex, diverse societies with strong martial and hunting elements. Whilst the Brehon system has been totally dismantled, the First Nations, who have remained sovereign entities under federal jurisdiction within the USA, are still evolving their legal systems. This enables us to develop a unique map of how such legal cultures might develop if they are cross-compared.

As a system for governing tribal groups, Brehon law had much more in common with the law of First Nations America than it had with its largest immediate neighbour. Although one might imagine that more profitable comparisons could be made between Irish law and the English jurisprudence this is not the case. At the height of the Brehon system in the 6<sup>th</sup> Century the English approach and the Irish approach to a number of basic concepts differed. This is because the kinship system, and hence the nature of society itself was not the same. For example communal kin tenure which was the norm in Ireland had no place in Saxon law. (Lancaster 1958: 359) Ireland operated a system called *tanistry* based on the idea that real property belonged to and was controlled by the whole kin group and that the chief was elected by that group to act as their leader and steward of the land.<sup>10</sup> This meant a different type of social hierarchy operated in Ireland because there was no guaranteed ability to pass political power from one generation of an immediate family to the next. Furthermore, English law can be seen as one of the paradigms which those seeking to generate taxonomies have drawn upon – so it offers comparatively little in the way of new insights into those taxonomies.

Berresford Ellis and other commentators suggest that the most suitable comparator for the Celtic Druidic family of legal systems of which Brehon system was the longest survivor (the others having been overtaken by Roman invasion) are the

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<sup>10</sup> The Irish system of inheritance, tanistry, was one of the last elements of Brehon law to be dismantled was not rendered invalid in Irish courts until *The Case of Tanistry* in 1607. (The original report of this case can be found in Davies Reports, 28, but a more easily accessible record can be found in Newark 1952) Even so, despite this case, the practice remained so widespread that in 1611 among the Acts thought fit to be proposed before the next Parliament was 'An Act to extinguish Tanistry' (Irish State Papers 1611: 190.). Furthermore, in 1613 a commission investigating the new plantation of Wexford sought to find out whether land was held by descent or by tanistry (Irish State Papers 1613: 437).

Hindu Brahmins, and there is some linguistic evidence to suggest that they share a common heritage (Berresford Ellis 1994: 49; also Drew 1987: 50-51). However, this possible consanguinity has made the Brahmin system an inappropriate exemplar for our purposes since the goal of this paper is to show the strength of Gurvitch's typology, and the probative weight of the evidence would be less if it could be argued that it described the legal frameworks of systems from the same cultural root.

As a comparator with the unified Brehon system I posit throughout this article the legal system of the First Nations. A danger here is that the independent nations of pre-Columbian North America become homogenised in a way which neglects both the historical record and the legitimate claims to recognition of the modern First Nation communities. This is a particular danger given the generation of key sources during conflict between First Nation and colonizing communities. As we will also find in relation to pagan and Christian conflict in the generation of Brehon law, these conflicts can provide misleading sources. I have adopted two approaches to reduce these problems. Firstly, although drawing on material from a variety of First Nation communities, most of the material to be used comes from the Iroquois language group. A relatively detailed analysis of a legal system cognate with a broader family of First Nation systems is more rewarding than a necessarily more superficial consideration drawing equally upon a broader range of systems. Secondly, in light of the raging debate concerning who are the best holders and teachers of First Nations culture, every effort has been made to use either Native primary sources or respected and established non -Native ones. There has been some difficulty with sources in the past, particularly those influenced by concepts of Manifest Destiny.<sup>11</sup> This influence lead to the treatment

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<sup>11</sup> That is the idea that the First Nations were a decaying and inferior people, who would naturally be superseded by Western peoples and cultures who were, as they themselves viewed it, predestined to take over the land in much in the way that the children of Israel were predestined to possess Canaan in the Old Testament. This concept was used to justify expansionism into the American West, and was prevalent even in American academia, albeit in more diverse forms, for some time. It first appears in the writings of John L. Sullivan in the Democratic Review where he suggested that it was America's destiny to overspread the whole continent because Providence sanctioned the spread of republican democracy. Sullivan wrote on these themes on a number of occasions but a representative sample is Sullivan 1839.

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of Native peoples as historical curiosities and resulted at times in both offensively conducted and inaccurate field work.

Brehon law is a much less contested field, being purely concerned with historical events not a still living culture, but again only the most established and respected translations have been used. However, even these must be treated with caution as some writers postulate that the written tradition we have is not an accurate reflection of that which went before because the pagan Brehons were prevented from recording the vast bulk of their teachings by religious prohibition. Even when they did commit their teachings to writing it was usually in the form of a symbolic aide-memoire, as we shall discuss later. All the records we have date from the later Christian period and it is reasonable to think that the influence of the Roman Catholic church (in contrast to the earlier native Celtic church) had altered the nature of the original laws. Thus, there is an arguable case for suggesting that in fact the written versions we possess have been distorted by the later portions of the Christianizing process which permitted them to be written down in the first place. This contention is supported by the fact that later Christian scholars were often hostile to the perceived paganism of the Brehons (who traditionally had been a special class of Druids).

By the time the Celts started to commit their fabulous wealth of learning, their mythology, history and philosophies to writing not only had their world become very much reduced in size but they had become Christian. In fact, the very act of becoming Christian was the means whereby the Druidic proscription against committing their knowledge to writing was overcome. Yet in this process, the general Christian attitude to the Druids was inimical. (Berresford Ellis 1994: 70)

Nevertheless there is every reason to believe that these documents portray the learning of the Christian Brehons. We note only that we should treat them as documents of their own time and be cautious of treating them as representative of the Brehon system across the whole of its history.

### Conceptions of Citizenship

Since Brehon law and First Nations law were designed to relate to tribal systems, the bundle of rights and duties linked to a nation state that is the modern concept of

citizenship, is not a feature (Faulks 2001: 1-5). However, there is an analogous concept of rights or obligations arising from membership of a tribal or family group, that is, a kinship relation.

The Irish tribes were organised in the following fashion. The largest functional unit was the *túath* or tribe, which held its own lands (also called *túath*). In theory Ireland originally contained around one hundred *túath*-sized plots of land (MacNeil 1935: 96; Bryne 1973: 7 estimates 150 however). Often all the members of a *túath* claimed descent from one distant original ancestor, possibly a quasi-mythical or even divine progenitor. The next largest unit was the *clann* or house, which means all those descended from one common ancestor. Membership of the same *clann* implied a closer and more recent blood relationship than membership of the same *túath*. (The word *clann* is still in use in modern Irish and, although usually it signifies family generally, it can be used to signify extended family, as opposed to *clann teaghlach*, which specifically means immediate family.) A similar concept to that of the *clann* is the *fine*.<sup>12</sup> *Fine* usually means a group of people claiming common descent from the same great-grandfather and living in the same general area. However, it could often be applied in a wider sense similar in meaning to the word *clann*. This group is very important in the ancient texts and could, acting as a body, control land alienation, pay legal duties for its members or even claim compensation if a member was killed. The next grouping in a decreasing scale is the *sept*. Again this is a group of families claiming descent from a common ancestor. The degree of kinship here is much closer than in the *clann* or *fine*. In later times members of the same *sept* would have shared a common surname. *Sept* is an imported word brought into use relatively late in the Brehon period. Finally, the basic community unit was that of the family.

Maternal kinship and the rights and responsibilities of maternal kin depended on the formality of the marriage arrangements: the more formal the arrangement, the greater a woman's severance of her kin relations. (Binchy 1936: 16-75) However, maternal kin retained full responsibility for the upbringing of children of the marriage if the father was an outsider or in some way unfit to perform normal

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<sup>12</sup> Brehon law of the *Fine* and the social relations which arise out of it are complex issues discussed in some length in Bryant 1923: Chaps. 7-9. Although Bryant's work is an excellent early translation of and commentary on the texts it should, because of the date of its composition and the obvious nationalist aspirations of its writer, be read in tandem with a more modern text, e.g. Kelly 1988: especially 1-15.

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parental duties or the mother was a prostitute. By contrast, maternal kin had no obligations towards children if they were begotten against the wishes of the woman's father or the progeny of rape or if the mother was insane, a slave or sick, under any of which circumstances the child was the sole responsibility of paternal kin.

This is an interesting example of how the flexibility of Gurvitch's system aids our analysis since we can still see this as a society where the domestic group re-enforced by land ties is dominant. It may even be viewed as having strong indications of the third (relatively rationalised) jural category but I would argue that we can reject this characterisation because the patriarchal element is less important than is usual in category three systems.

Much of this may be characterised as being based on opinion connected to systems indicative of mechanical social solidarity, for example, the idea of some distant common quasi-mythical ancestor. However, there are also elements, which raise the question of a morality of interdependence. The provisions freeing maternal kin from responsibility for children when the mother, is ill, raped etc., can all be interpreted as having regard to the fact that this family is already socially or economically handicapped by its responsibilities to the mother; and would therefore function better as part of the social unit if not further burdened by caring for the child. Similarly, restrictions on alienation of land (considered in the next section) could be viewed as recognition that all the members of the *fine* hold a rights interest in the land collectively, and that proper functioning of the group requires that they all have a say in the decision-making process. These features recognising interdependence would seem embryonic examples of organic solidarity and illustrate that, whilst Durkheim or Weber's systems would have difficulty with this society, it concurs with Gurvitch's model, which is capable of modelling systems displaying features of both mechanical and organic social solidarity.

First Nations kinship relations followed a similar pattern, which can loosely be described as nation, tribe, band (or village) and family. However, there were also additional clan bonds. Clan members claimed descent from, or a special relationship with some totemic figure usually an animal.<sup>13</sup> These totem based

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<sup>13</sup> This can usefully be compared to the Irish tradition of claiming descent from semi-mythical ancestors often endowed with god-like abilities. An example of this is the relationship of the clans of Ulster with Lugh of the Long-arm, which is the root of the *Cú Chulainn* saga. Or it may also be compared to the Irish tradition of

bonds extended across whole nations and occasionally even into related nations (as in the Iroquois Confederacy). Kinship relationships followed matrilineal descent. The seminal study on kinship which uses the Iroquois and related tribes as the prime model for one of its two archetypes of kin relationship is (Morgan 1870; Morgan 1851 also records a large amount of ethnological material on the Iroquois) His key observation is that kin relationships are very open and expansive with all relations of the same side of the family, generation, and gender being accorded the same titles and respect regardless of actual degree of relationship. Thus, for example among the Seneca of the Iroquois Confederacy all female relatives of the same generation as one's parents on the father's side are referred to as "aunt" and on the mother's side as "mother". (For an instructive brief summary of the whole system of naming, see Tooker 1979: 131-134.) This system of classification is evidence of a tightly bound community where ideas of collectivism are strong and close kin relations within the broader group are highly regarded.

In both the Iroquois and Brehon systems all rights within the territory of the tribe were conferred as a result of bonds of kinship, be they blood bonds, or bonds of adoption. The practice of adoption or fosterage is common to both these societies and, although the procedures differed, the basic intent of strengthening social bonds was the same. This places the societal relationships within the first and second of Gurvitch's categories since there is both a magico-religious element in the idea of descent from a totem but also a recognition that by socially sanctioned ritual or practice the kin group could be extended, other than by marriage, to those without a blood connection. A First Nations example of adoption can be seen in the so-called Mourning Wars of the Haudenosaunee, or from the same culture the more formal adoption procedures laid down by 'The Great Binding Law' of the Five Nations Confederacy. The Mourning Wars were instigated at the behest of the Clan Mother to furnish persons literally to replace deceased members of the tribe (Johanson 1998: 124-125). It should be noted that traditional adoptions entailing full integration into a clan are again on the upturn as part of the drive to regenerate tribal life.<sup>14</sup> Acceptance into the tribe is signalled, as can be seen from

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claiming a special relationship to some animal or tree that they then treated as a totem although in later times Christianity and the natural course of evolution caused this to die out to a great extent in Ireland. For further information on Irish clan totems, see McDonald 1992.

<sup>14</sup> Many tribal constitutions now obtain provision for adopting adults with limited tribal ancestry who wish to reconnect with the tribe. For example see the Hopi Law and Order Code <http://www.narf.org/nill/Codes/hopicode/enroll.htm>

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'The Great Binding Law', by the ritual of bestowing a name (usually that of the deceased person). Mourning, of course, is not the only cause of adoption as these articles of the Confederacy Constitution, 'The Great Binding Law' show:

69. Any member of the Five Nations who through esteem or other feeling wishes to adopt an individual, a family or number of families may offer adoption to him or them and if accepted the matter shall be brought to the attention of the Lords for confirmation and the Lords must confirm adoption.

70. When the adoption of anyone shall have been confirmed by the Lords of the Nation, the Lords shall address the people of their nation and say: Now you of our nation, be informed that such a person, such a family or such families have ceased forever to bear their birth nation's name and have buried it in the depths of the earth. Henceforth let no one of our nation ever mention the original name or nation of his or her birth. To do so will be to hasten the end of our peace. (University of Oklahoma Law Center n.d.)

It can be seen from this example that adoption and the assimilation of adopted members as full tribal members was seen as one of the tenets of tribal and inter-tribal harmony. Llewellyn and Hoebel record a similar culture of adoption among the Cheyenne (Llewellyn and Hoebel 1941: 2-6). In their narrative an elderly member of the tribe adopted the warrior who had wrought vengeance for him against the Crow warriors who had murdered his own children in battle.<sup>15</sup> Llewellyn and Hoebel also record the story of a woman who was adopted as the Aunt of a child. In their commentary on this event they note that kinsmen of any degree (not just children) were always socially desirable (Llewellyn and Hoebel 1941: 250).

Adoption could occur under the Brehon laws either by payment of an adoption fee (*lóg fóesma*) or by invitation in which case the adopted person was known as *fine*

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<sup>15</sup> It is notable that he constrained the soldier societies to go into battle on his behalf by making himself a pauper and enduring hardship before the community. There is a parallel here with the Irish tradition of distraint in which a wronged person compelled a person of rank responsible for the wrong to appear before a Brehon by fasting (*troscud*) on their doorstep (Kelly 1988: 182).

*thacair* or kinsman by summoning. He was permitted only such rights as the adoption agreement allowed unlike the First Nations examples we have seen where the adoption confers full kin status. This difference perhaps reflects the more formalised legal arrangements prevalent in Ireland.

However, non-blood relations in Irish society generally occurred in the form of fosterage, which was a widespread arrangement on all levels of Irish society (Kelly 1988: 86-91; Bryant 1923: 37-55). This may be indicative of a more consciously political desire to maintain group cohesiveness as conceptions of kinship also extend beyond blood kin to wider fosterage relationships. This shows recognition of the importance of community and puts them in the second stage.

There were two types of fosterage; the first was fosterage for affection (*altramm serce*), which was exactly what its name suggests. The second was fosterage for a fee and was strictly governed by the law, being somewhere between a boarding school education, fosterage and apprenticeship in modern western terms. The terms and conditions of fosterage for all the ranks of Irish society are laid down in the text '*Cáin Iarraith*' (Hancock et al. 1865-1901, ii: 147-193). This is not to suggest that fosterage was purely a financial arrangement as it undoubtedly strengthened the social bonds of Irish society. A notable example of this bond can be seen in the ancient epic the '*Táin Bó Cúalnge*'. When the hero Cú Chulainn and his foster brother Fer Diad are forced to go against each other in battle they are most reluctant to do so and when Cú Chulainn eventually kills Fer Diad he is distraught by the turn of events:

Cuchulainn picked him up and carried him back across the river.  
He laid him down gently and then lay down himself for he was  
weak from his wounds. He stared sadly at the body of his foster  
brother.

'You should have listened to me, Ferdia,' he whispered. 'Then  
you would still be alive.' (Mac Uistin 1989: 84)

Kinship relations also govern status within both societies although much less so in First Nations society. The connection between kin relations and status is especially weak in the North Eastern tribes which are our concern here, the emphasis being placed instead on a combination of kin relations and personal status gained through virtuous acts. Even among the North Western tribes who have a strict system of hereditary rank it is dependent upon an idea that noble and generous acts could

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cause one to be reincarnated into an aristocratic house in a future life. (Johanson 1998: 228-230) This disparity is probably due to lower levels of early industries and trades in America as many of the status groups in Irish society were related to specific professions (professional persons enjoy a lesser form of *nemed* or noble sacred status: Kelly 1988: 10) which were passed on via heredity or fosterage which usually therefore naturally occurred between those of a similar if not identical social status. Thus, the various classes were bound together within their ranks by bonds of fosterage, and information could be shared between related trades by a returning fosterling. This practice is a clear illustration of the link between kinship and rank but also adds the additional factor of profession which to some degree is synonymous with kin status. This again is a possible indication of the factors that affect the balance between mechanical and organic social solidarity. That is, the shift between mechanical and organic solidarity is marked by status gradually becoming primarily identified with function as opposed to kin relation as society becomes more differentiated in terms of roles. Gurvitch's model where systems can have elements of both is particularly useful in describing the Brehon system where kin status and function status may overlap. This shows that Gurvitch is correct in his characterisation of stages one and two and the mixed elements of the Irish system support his comments on never finding any model in its purity.

There is some suggestion that both societies also contained classes of slaves, but the status of these is unclear. Above and beyond the payment of fines for injury to slaves laid down in Irish law their rights and treatment seem to depend very much on the individual owner. Slaves could gradually improve their status by becoming more valued members of the group. (Kelly 1988: 95-97) Captives and hostages of war could, as we have already seen when considering the Mourning Wars, become kinsmen with rights in the First Nations. In Ireland, however, captives were often criminals from inside the tribe who had not been ransomed by their families. They could thus be restored to some degree of citizenship by having their debts paid. (Kelly 1988: 215) Hostages of war in Ireland were normally taken for strategic reasons to secure continued submission of a vanquished enemy, or, occasionally, as a means of enforcing justice outside the jurisdiction. (Kelly 1988: 173-176) Their legal status is therefore not an issue, partly because they do not form a significant portion of Irish society, and more importantly because their well-being is intrinsic to their function so the need for legal protection did not in practice arise. These provisions for the payment of fines for damage to slaves and as a means of making reparation for criminal offences, as well as the notion of political hostages acting as sureties for political agreements suggest that Gurvitch is correct in seeing some civil law elements developing in stage two.

It can be seen that the essential prerequisite of citizenship rights within both our subject societies is kinship. If considered in terms of blood relationship, this suggests quite a naive world-view. However, the complexities of the issue of adoption and fosterage in both the subject societies indicate that they could occur as means of strengthening the social bonds; this would indicate that group harmony and proper functioning of the whole were of prime importance. The fact that this can happen often, to consciously mediate differences within the social group, is strong evidence of an embryonic organic understanding of social solidarity and demonstrates that Gurvitch is correct in his observations about the importance of rapprochement.

### Land Ownership.

This section concentrates on land ownership and the duty to grant hospitality among the tribe from communal property or the private property of the chief. Private property in the form of chattels was recognised in both these societies, and although generosity and hospitality ranked as the cardinal virtues this did not appear to impinge on private rights to chattels. This can be interpreted as a balanced approach to individual as against group rights, compatible with Durkheim's organic model of social solidarity. However it makes much greater sense within Gurvitch's model. For in the First Nations, hospitality is the act of the charismatic leader within a gift culture and for Ireland it is the duty of the land owner still interconnected with the only partially unified family groupings.

In Ireland although each tribe held its land in common, real property was divided up among individuals provided they fulfilled their tribal duties or performed other services for the tribe.<sup>16</sup> Even when persons gained rights to hold land for private

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<sup>16</sup> Details on the use of land and inheritance of land can be found in the ancient text the *Senchas Már* or as it is sometimes called the *Senchus Mor*. The information here is taken from Kelly 1988: 99-110. Bryant (1923) covers the area but dispersed over many chapters and mixed in with other law on social obligations. This is of course much how the Brehons would have thought of it but is not helpful for the modern scholar seeking to investigate a particular theme. Her comments specifically on the *Geilfine* (Bryant 1923: 125-171) are however, extensive and include much of the anthropological comment on the system available at the time she was writing.

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usage, this was not a perpetual arrangement that implied ownership of the land in any sense that would be familiar to modern land lawyers. Portions of the tribal land also came into the possession of each successive king for their private use, and a portion was additionally always laid aside for the maintenance of the sick and otherwise infirm. There was a complex relationship known as the *geilfine*, which governed the subdivision of land. This was designed in such a way as to leave younger children under the control of the father but to ensure that they enjoyed his enlarged share of the communal estates, while giving elder children a smaller share but a greater measure of independence.

The chief acted as steward of the land for his kinsfolk. They could hold him responsible for any misuse that might be made of the land should he become an absentee landlord. His kinsmen could also forbid him from selling land to those outside the kin group. If he came into possession of non-kin land, a portion of that was also forfeit to his kin should he wish to sell or bequeath it. A chief was permitted make private income by renting out cattle or other livestock to the members of the tribe holding lands. However, it was the duty of the chief or king to provide hospitality from his own store for those who needed it.

It is this strong connection with family and ancestry in land-holding which is at the root of the social and legal importance of land holding as a communal rather than private activity in Irish culture. This phenomenon may have had as its original source the belief that the land was given to the people as a whole by the generosity of some divinity. According to a well-known folkloric tradition Ireland was given to the Sons of Mile, the quasi-mythical ancestors of the Gaels, by the Three Sisters (Goddesses) Banba, Fodhla and Erui, whose names are often given to the country itself. This belief only declined when Ireland adopted Christianity, an event that may be said to mark the beginning of a transition from stage one to stage two. Finally, there is a strong tradition of co-operative farming of both arable and grazing lands. This system was often utilised by poorer farmers. In the case of arable land, labour was shared but not the land or its produce - this was co-operative not communal farming.

The First Nations system also does not contain a concept of land ownership in terms that would be recognisable to modern land lawyers, but rather one which places it firmly in stage one where all appropriation of goods is penetrated by the supernatural. The land was regarded in a spiritual fashion as the Mother of the People, and the communal inheritance of all, hallowed as the resting-place of the

ancestors. Thus, when he is required to remove his people from their ancestral lands to a reservation Chief Seattle replies:

We will ponder your proposition and when we decide, we will let you know. But should we accept it, I here and now make this condition, that we will not be denied the privilege without molestation of visiting at any time the tombs of our ancestors, friends and children. Every part of this soil is sacred in the estimation of my people. Every hillside, every valley, every plain and grove, has been hallowed by some sad or happy event in days long vanished.

Even the rocks, which seem to be dumb and lifeless as they swelter in the sun along the silent shore, thrill with the memories of stirring events connected with the lives of my people. And the very dust upon which you now stand responds more lovingly to their footsteps than to yours, because it is rich with the blood of our ancestors and our bare feet are conscious of the sympathetic touch. (Nerburn 1994: 75)

Tatanka Yotanka expressed the First Nations connection with the land perfectly when he said:

Look at me and look at the earth. Which is the oldest, do you think? The earth, I was born on it..It does not belong to us alone: it was our fathers', and should be our children's after us. When I received it, it was all in one piece, and so I hold it. If the white man takes my country where can I go? I have nowhere to go. I cannot spare it, and I love it very much. (Miller 1995: 245)

The concept of holding land for the good of the community not for personal gain was shared by both groupings. There is even some evidence of lands being allotted for farming for the common good in a way similar to the Irish *túath* system among the First Nations. Surplus was definitely managed so that it returned to the tribe for the use of those who would otherwise have no food or for the provisioning of soldiers.

Farming was, therefore, always in the purview of women. So fundamental was this rule that it was firmly reiterated in the

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provisions of the Great Law that recognise women's ownership of the land and agriculture. Women's mound farming was not horticulture or gardening as many scholars insist on calling it, but agriculture on a massive scale....

Female work crews, under the team leadership of an elected manager, worked communal fields, although in what was probably a post-contact behaviour, families might work individual plots and keep the produce for themselves.

Women managed the harvests and surpluses and oversaw the distribution of all food supplies, including game garnered in the hunt. (Upon returning from the hunt, the men would turn over their game to the Clan Mother.) Because it dealt with food, Clan Mothers were in charge of the famous Haudenosaunee hospitality that freely feed and accommodated visitors. By logical extension of food distribution rights, passing war parties depended upon resident Clan Mothers to feed them. (Johanson 1998: 120-121)

The practical detail here may be different but the underlying principle is the same in both systems. A representative of the tribe, either Chief or Clan Mother, controls the usage of the land to maximise the benefit for the tribe as a whole. However, we should not allow the fact that they may also have felt spiritual connections to the land or some blood affinity with those with whom they shared it to obstruct our sense that this system of land control and property distribution consists of individual rights, interconnected in a complex system. These are rights systems that are in many respects comparable to the rights systems of even the most advanced and socially differentiated modern states. Gurvitch is correct in pointing out the complexity of these regimes. Perhaps it is worth noting the general decline in what anthropologists would call the belief in magic in Ireland as compared to America. The Irish land system as it progressed through time had increasingly less to do with concepts of a mystical relationship between people (through a shared totem) and between people and land (through the idea of a divine gift of the land), and more to do with ideas of civil obligation and religious charity.

## The Role Of Women and Other Groupings Usually Perceived as Vulnerable

Perhaps because both of our subject societies are perceived as having had an essentially martial character it is often assumed that therefore the role of women (or indeed of the ill or differently-abled) was very much devalued. This is, however, an over-simplification of a complex body of law and to some extent a projection of our own cultural biases onto the past. This is a difficult area to examine because in the selection of the groups to be considered we inevitably end up using similar categories to modern western discrimination law. However, in some senses this makes the subject all the more instructive because the treatment of these groups is usually viewed as an indicator of the level of advancement of a legal system. Under most typologies we expect them to be most poorly treated under tribal “primitive” systems.

Under the Brehon laws married women or those under the protection of a male superior, be that father or son, were without legal capacity for many purposes. The male superior was supposed to care for the woman, doing all her business in the world and asserting her rights in her stead. However, to focus solely on this aspect is to ignore many features of Brehon law, which show that women were often treated as equal members of the community (Kelly 1988: 68-79; Bryant 1923: 320-321). For example, although a wife may not have been able to make a contract without her husband’s consent, chief wives (either a sole wife or the senior wife in a polygynous relationship) could impugn contracts made by their husbands which were ill-advised or disadvantageous and either partner in a marriage of equal property could dissolve the others contracts. Even wives of lower status could impugn bad bargains made by their husbands if they concerned food, clothing, cattle or sheep. Women could also inherit property if their fathers had no sons and in this circumstance they had the same rights as any male landowner. Furthermore, if a woman of property married an outsider or a man without land, the positions were reversed and she was superior to him.

Apart from property there were other factors which can give a woman legal capacity, the most notable among these being the holding of a special position of importance in the *túath*. Important female roles included a woman who held back the streams of war, a hostage ruler, a female wright, a female physician, a woman revered by the *túath* and a woman who was abundant in miracles, which probably means a female hermit (Kelly 1988: 77).

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The position of women as rulers and military leaders is less clear. Although the sagas abound with powerful female figures and some of them are portrayed as warrior queens, notably Medb of Connaught in the *Táin Bó Cúalnge*, there is little evidence to support this in the legal texts. There are some obscure passages in the *Bretha Crólige* that may refer to women of this status, but that is all (Binchy 1978: 2294.35-2295.4). It is perhaps worth noting at this point that some commentators feel that in the earliest days of Brehon law the status and rights of women would have been much more explicitly equal to that of men. This is based upon observations of other Celtic societies across Europe who are known to have shared Druidic culture before the Roman conquest (Markle 1991), and also arises from the hypothesis that Christianization led to increasing Romanisation in terms of culture and intellect as the influence of the centralised Roman church grew. (Berresford Ellis 1994: 91-97). Kelly, however, suggests that the influence of the church actually helped raise the status of women (Kelly 1988: 77). However, since his evidence for this is the proliferation of women in the accounts of the mission of Patrick, it is again arguable that a distinction should be made between the native Celtic church and the Roman Catholic church. Furthermore, the fact that women were permitted to freely convert suggests that it is more Patrick's own cultural biases (or his desire to shake the biases of the non-Irish he was reporting to) which make this noteworthy, not the role of women in Irish society.

It is difficult to draw any definitive conclusions about the position of women in ancient Ireland. We can only say that their primary role was usually that of part of a domestic household, although it also appears that beyond the domestic situation they were free to take to professions and gain their independence in this manner if the opportunity arose. Whilst this indicates a firmly stratified social structure it does not necessarily indicate one abusive or inconsiderate of the individual rights of women. It would seem that there were some exceptional categories of women who performed special roles within the society and also that the harshness of the strict law was often ameliorated in practice by exceptions (for example the role of the female heir). This would concur almost perfectly with stage two where people have value and importance if they contribute to the community bond.

The role of women in First Nations America was much more clearly defined as being totally equal and at times superior to that of their male kinsmen. They did not suffer to any degree the disabilities of their Irish counterparts in relation to property or profession. Indeed, so central and valued was their role that early feminist writers in America latched onto Native culture as a possible model for the future. One writer even went so far as to suggest that Iroquois culture was a

matriarchate. (Gage 1893) Another commentator, himself of the Dakota nation, describes the traditional role of women as follows:

In the woman is vested the standard of morals of our people. She is the silent but telling power behind all of life's activities. She rules undisputed in her own domain. The children belong to her clan, not the clan of the father. She holds all the family property, and the honour of the house is in her hands. All virtue is entrusted to her, and her position is recognised by all.

Possessed of true feminine dignity and modesty, she is expected to be the equal of her mate in endurance and skill, and to share equally in the arduous duties of daily life. But she is expected to be superior in spiritual insight.

She is the spiritual teacher of the child, as well as its tender nurse, and she brings its developing soul before the great Mystery as soon as she is aware of its coming. It is her responsibility to endow her child with nature's gifts and powers, for we believe that from the moment of conception to the end of the second year, it is her spiritual influence that counts for most. (Ohiyesa 1911)

This is of course a slightly idealised picture but the fact remains that First Nations women were in every respect equal to their male counterparts. Their equality is guaranteed by their importance in the gift-giving relationship which is at the basis of status in perfect accordance with stage one.

The protection of other minorities from discrimination was also a reality in both systems. The Brehon law provides a surprisingly large degree of protection for the physically and mentally disabled. (Kelly 1988: 91-94; Bryant 1923: 287-308) Not only were their relatives obliged to care for them but also others were forbidden to mock or satirise their disability. This protection from satire even extended to those with physical blemishes. The insane were also protected from exploitation and abuse. A notable feature is that epileptics were considered competent provided they had no other unsoundness of mind. This is quite startling given that until relatively recently many modern systems considered epilepsy a form of insanity. Epileptics were also afforded the protection of a guardian to prevent them injuring themselves or others during seizures. (Binchy 1978: 1180.23)

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The situation in the First Nations was reasonably similar although here we are referring not so much to written law as to general customary protection. The spirit that informs the two systems is the same. Both communities sought to strengthen themselves by protecting their weakest members. Ohiyesa, the well known Dakota physician, put the Native regard for compassion and charity thus:

At such feasts the parents often gave so generously to the needy that they almost impoverished themselves, thereby setting a good example to the child of self-denial for the public good. In this way, children were shown the big-heartedness, generosity, courage, and self-denial are the qualifications of a public servant, and from the cradle we sought to follow this ideal.

The young boy was encouraged to enlist early in the public service, and to develop a wholesome ambition for the honours of a leader and feastmaker, which could never be his unless he proved truthful and generous, as well as brave, and ever mindful of his personal chastity and honour.

As to the young girls, it was the loving parents' pride to have their daughters visit the unfortunate and the helpless, carry them food, comb their hair, and mend their garments. The name Wenonah, bestowed on an eldest daughter, means Bread Giver, or Charitable One, and a girl who failed in her charitable duties was held to be unworthy of the name. (Ohiyesa 1911)

The tribe is essentially an extended family unit and thus care of the weakest members is of prime concern in both our subject cultures. This is strongly indicative of an individual rights social structure to a limited degree, concerned with social harmony and integration. Thus, the gift giving relationship in stage one easily extends into the provision of wider rights, and remnants of stage one combine with customary law and the focus on community in stage two to grant the weak rights.

## Conceptions of Justice

This section concentrates on conceptions of justice rather than court systems or formal modes of government. This is not because examples of the latter are difficult to find, but rather because there is a degree of concurrence in the systems of almost all tribal groupings, including many which do not belong to this hybrid classification, and the analogy might therefore prove misleading. Moreover the First Nations did not operate a formal court structure per se and therefore it would make little sense to engage in that type of analysis.

Leadership roles, which included acting as “judges” in both cultures, were awarded to members of the kinship group on the basis of merit gained by either reputation for wisdom or formal study. Steps were taken to avoid nepotism. Also the government systems were finely tuned to respond to the desires of the kin grouping, as expressed through formal and informal channels. It should be noted that leaders were usually treated as merely the first among equals. This often led to confusion when dealing with outsiders from other nations who did not understand the reciprocal nature of the kinship dynamic. It is interesting to note that the Five Nations Confederacy for example, as their constitution shows (Constitution n.d.) had a nominal head just as the five provinces of Ireland had one nominal High King (traditionally The O'Neill of Ulster). Perhaps any lack of central government in First Nations America as compared to Ireland is merely a question of scale?

One final but engaging comparison is that the legal texts of both these societies were originally written in symbolically significant form. The Iroquois, for example, encoded key points of their important oral traditions into shell or later bead belts and decorations generally referred to as *wampum*. Contrary to popular tradition these belts were not a form of currency, (although Europeans certainly did trade with Native peoples using beads), but a highly sophisticated system of recording events, agreements, orations etc., through metaphorical patterns and symbols as is indicated in the Iroquois Constitution. The Iroquois tradition is that Hiawatha (Aionwantha) was the first to use *wampum* belts, as a memory aid. This is significant as Hiawatha was the spokesman of Deganawidah, founder of the Confederacy and framer of the Great Binding Law (Wallace 1946; see also a detailed account of how the First Nations conceptions of liberty influenced American democracy in Grinde and Johansen 1991). It is reputed that Deganawidah required a speaker because of his uncontrollable stammer brought about by the fact that he had double rows of teeth. The earliest Irish legal texts were recorded again using the symbolic Celtic alphabet called Ogham after the

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Celtic god of wisdom who is credited with inventing it. The markings do represent letters but they also had additional symbolic meanings (McSkimming 1992). In other words any educated person could read the words but only a Brehon could interpret them. Again only key elements of the tradition are recorded.

This use of a special form of writing may be attributed to some notion of the sacredness of law but it also has the interesting practical feature of ensuring that long years of study and acculturation are required before one can begin to interpret the legal texts.

Finally, and not surprisingly, given the primarily oral nature of their cultural transmission systems, both cultures prized oratory above all other skills in legal and social affairs. In Ireland poets (who were required to compose poems, stories and histories/genealogies as well as recount them) were accorded *nemed* status (Kelly 1998: 43-49). Furthermore, like Brehons they were a remnant of the Druid class. Interestingly, Binchy also seems to suggest that the pre-eminent law schools actually combined the poetic and legal roles (Binchy 1955: 4-6 and 1958 44-54 discussed Kelly 1988: 246). In the First Nations oratory was similarly prized indeed their skill was so great that they were compared to the great Roman orators of the classical period by early white commentators. (Johansen 1998: 156). This reverence for oratory suggests a high value placed on consensus in social life according well with Gurvitch's analysis of the importance of community in sociality.

The primary concern of both justice systems is restoration not retribution. As we have seen there are too many elements of mechanical solidarity in these societies to consider them totally or even mostly outside that category and belonging to the class of organically united societies. Nevertheless the restitutive nature of their justice systems does not fit easily with classification among systems reflecting mechanical solidarity and thus they do not comply well with Durkheimian analysis. Many of the surviving Brehon law texts deal with the appropriate restitution to be made when an injury is caused or a slight inflicted (a stage two civil law element) (Kelly 1988: 214 and Bryant 1923: 215-244 and 331-340).<sup>17</sup> The Brehon system

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<sup>17</sup> Bryant's translations and analysis focus on fines as being a law of tort and more specifically a criminal law of tort. Whilst this does convey an idea of proportionate restitution for culpability to the modern western reader it is a projection of our legal ideas and it is therefore perhaps more accurate to try to envisage fines simply

can be explained in a simplified version in the following terms. Every upstanding member of society was possessed of an honour price. If someone injured or killed him, or acted against him in some unlawful way, then he was entitled to restitution by way of a fine, the value of which was proportional to the seriousness of the offence and the victim's honour price. If you committed some offence against another, then you or your clan had to pay the fine, and in addition you often lost part of your own honour price.

There were no judicial executions after the middle of the fifth century C.E., since these had been removed from Irish law by the judgement of the royal poet Dubhthach Mac ua Lugair in the case concerning the murder of Odhran, charioteer to St. Patrick. Dubhthach agreed that under Mosaic Law, which had the same basic principles as the pre-Christian Brehon law, Odhran's killer should be put to death, but under the new Christian teachings Patrick should also forgive him and gain heaven for his soul. However, in practice this judgement means that no Brehon would ever again render a death penalty, since there was no one of St. Patrick's spiritual standing to guarantee the culprit's absolution, and placing someone's immortal soul in peril was considered as disproportionate and therefore unfairly repressive punishment. This is a clear example of religion outweighing the supernatural and typical of stage two. As the commentator of the '*Senchus Mor*' put it:

At this day we keep between forgiveness and retaliation, for, as at present no one has the power of bestowing heaven, as Patrick had that day, so no one is put to death for his intentional crimes, and placed on the sea for his unintentional crimes and those of unnecessary profit; and service is required of him for his unfulfilled contract and covenant. (Irish Law Commissioners: 9-15)

Although there later develops law around a death penalty it is clear that as far as the secular law is concerned it is a punishment of last resort should the normal system of fines fail. Furthermore, it also seems to be primarily a tool of canon law where presumably either the intention is both to kill and damn or it is assumed that

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as fines but determined by the complex system of honour prices and other equitable frameworks.

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the ministrations of the Church before the execution will secure the soul (Kelly 1988: 216-217).<sup>18</sup>

Another important element of ancient Irish law, which lent strength and gravitas to its efficiency as an agent of social cohesion, was the belief that Brehons were divinely constrained to give proper and just judgements.

However, before the coming of Patrick, there had been remarkable revelations. When Brehons deviated from the truth of nature, there appeared blotches on their cheeks; as, first, of all, on the right cheek of Sen Mac Aige whenever he pronounced false judgement, but they disappeared again when he passed a true judgement.

Connla never passed a false judgement through the grace of the Holy Spirit which was upon him...

Morann never pronounced a judgement without having a chain around his neck. When he pronounced a false judgement, the chain tightened round his neck. If he passed a true one, it expanded down upon him. (Irish Law Commissioners: 19-24)

Although this is still couched in the language of supernatural intervention, the fundamental element here is that law was a moral/religious institution to be relied upon and believed in as equitable adjudicator in all social disputes. This element of belief is core to the Durkheimian view of law, morality and religion, and perfectly accords with Gurvitch's analysis of law being governed between the supernatural and the religious.

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<sup>18</sup> It may also be worth considering that because this type of canon law did not arise until several hundred years after Patrick's framing of the *Fènechas* as a general law of Ireland and because the vast bulk of examples come from around the same time or after the formal Romanisation of the Celtic Church at the Synod of Whitby that this should not properly be considered Irish Brehon law at all but Roman Catholic Canon Law. We have already mentioned the deleterious Romanising effect of Catholic Christianization in relation to the role of women and it may be that there is a more general case to be made for it altering Brehon law as a whole. This however, invites a historical and indeed theological debate, an adequate exploration of which is beyond the scope of this paper.

Their First Nations counterparts mirrored this belief in the justice and truth of the legal system. Again the object of the legal system was to promote justice and thereby secure tribal unity. Ohiyesa records what he terms the ‘Indian love of justice’ as follows:

...we Indian people had councils which gave their decisions in accordance with the highest ideal of human justice.

Though the occurrence of murder was rare, it was a grave offence, to be atoned for as the council might decree. Often it happened that the slayer was called upon to pay the penalty with his own life.

In such cases, the murderer made no attempt to escape or evade justice. ...He was thoroughly convinced that all is known to the Great Mystery, and hence did not hesitate to give himself up, to stand trial by the old and wise men of the victim’s clan.

Even his own family and clan might by no means attempt to excuse or defend him. But his judges took all the known circumstances into consideration, and if it appeared that he slew in self defence, or that the provocation was severe, he might be set free after a thirty days’ period of mourning in solitude. This ceremonial mourning was a sign of reverence to the departed spirit. (Ohiyesa: 1911)

The notable feature of this account was that it was felt appropriate to deliver oneself up to the proper authorities and to trust their judgments because it was felt that otherwise supernatural intervention would occur. This is less visibly influenced by the interference of formal religions. However, the judges do not merely act repressively. They seek to make fair and equitable judgements by taking the evidence including that of mitigating circumstances into account, as one would expect to see in a culture classed as promoting organic social solidarity. This shows that once again Durkheimian analysis is too simplistic while Gurvitch gives a clearer picture.

Ohiyesa then goes on to additionally note that stealing and lying, were seriously frowned upon, and concludes:

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Other protection than the moral law there could not be in an Indian community, where there were neither locks nor doors, and everything was open and easy of access to all comers. (Ohiyesa: 1911)

The underlying basis of this conception of justice as the need for tribal cohesion is nowhere clearer than in the case of the Mi'kmaw (Micmaq). This is evident even in their very language:

Bernie Francis, a respected Mi'kmaw linguist, was recently asked by the Union of Nova Scotia Indians to explore the concepts of justice embedded in the language. He identified four key concepts: *ilsutekek*, *wi'kupatimk*, *Nijketekek*, and *apiksiktuek*. *Ilsutekek* can be translated to make right or to judge correctly, according to the nature of a misdeed or injury. *Wi'kupatimk* has been translated as a feast but refers more specifically to a ceremony of reconciliation. *Apiksiktuek* (that which forgives) and *nijketekek* (that which heals) describe a paradigm of reconciliation and justice. Healing flows naturally from forgiveness; forgiveness is preferable to confrontation. (Johanson 1998: 195-196)

So the root of all justice in both our systems was the redress of wrong and the maximisation of tribal harmony. Surely this is the very archetype of a society based on organic social cohesion and effective group interaction promoted by a strong individual rights culture? On the other hand we must balance this against the obviously mechanistic features of the societies studied, namely a relatively undifferentiated cultural scene. A sensible solution to this apparent dichotomy would be to abandon the schemata which bind us to this separation in favour of one which allows for mixed states i.e. Gurvitch's. This is desirable if we are to extend the utility of such schemes and reap the benefits of a sociological viewpoint.

### Conclusions

It has been demonstrated that there have been legal systems that have not properly fallen into any of the traditional jural typologies. As this paper has shown, this

failure of classification can be remedied by adopting Gurvitch's more sophisticated and complex model. In our case studies we have seen that kinship relations did not fit neatly into models of organic or mechanical social solidarity because they are hybrid systems showing features of both. But they could be successfully modelled by Gurvitch's scheme which permitted steps between segmented family bonds and unification under a Priest King. In relation to land holding, we have seen that it is not underpinned by private rights but by complex social bonds which have a root in mysticism and which in Ireland have also changed specifically to encompass ideas of social cohesion and commonality. Again Gurvitch's flexible approach allows for a much clearer description and classification of these arrangements by accepting that no model will be found in its 'pure' form but that one can consider the dominant tone or tenor of the system. In relation to women and the differently-abled, contrary to what would be expected from most standard typologies which would presume they would be poorly treated by 'primitive' systems, there is actually a great degree of personal freedom and protection afforded by law. This is achieved by a blending of traditional customary 'law' and what would be viewed as a more developed focus on individual rights. A less rigid approach allows for more accurate modelling of these situations. Finally, and perhaps most tellingly in favour of Gurvitch's model, is the fact that neither of these tribal systems places retribution at the core of its penal system but rather there are strong ideas of restitution. None of the Durkheimian-influenced models could satisfactorily deal with this occurrence but Gurvitch's does simply by recognising that cultures are not static and will be in a state of growth and change in accordance with their own social facts. Thus, whilst general models of development can be described it is to be expected that they will almost never be found in their pure, or perhaps more accurately static state.

If however, any progress towards a greater understanding of legal evolution is to be made then the preservation and analysis of further tribal legal cultures that may currently be in a transitional state is required. Gurvitch's model allows us to more sympathetically describe and model these legal cultures and with greater nuance than previous typologies. These important systems in flux should be studied and it is hoped that this paper shows that they can be without forcing them into static classifications.

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