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Brendan Bradshaw

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## PART I

‘A discourse of the cause of the evil state of  
Ireland and of the remedies thereof’

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## I

*The medieval legacy*

Historiography has highlighted Ireland's sixteenth-century rebellions and ignored its revolution. The transformation of the island's political personality in the course of the middle Tudor period must be the least remarked-upon change in its whole history. Yet it might be claimed to be the most remarkable. It provided Ireland with its first sovereign constitution, gave it for the first time an ideology of nationalism, and proposed a practical political objective which has inspired and eluded a host of political movements ever since: the unification of the island's pluralistic community into a coherent political entity.

The reason for the neglect lies partly in another remarkable feature of the revolution itself, the circumstances of its accomplishment. It was engineered by Anglo-Irish politicians, in collaboration with an English head of government in Ireland, and by constitutional means, in particular by parliamentary statute. Neither the agents nor the means were looked upon with favour by Ireland's latter-day revolutionaries, nor by those who fashioned Irish history in their image, while the more objective school of Irish historiography became settled in the assumption that the Anglo-Irish and their parliament were forces of reaction rather than of revolution in the sixteenth century. It remains to persuade them to the contrary.

*Late medieval crown policy in Ireland*

The perspective from which the middle Tudor period in Ireland is usually examined tends to obscure its unique significance. The point of reference is established further on, in Elizabethan conquest and colonisation. The middle period is treated as a dark and tangled undergrowth in which the historian gropes for strands of

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continuity with later developments. The uniqueness of the period itself remains unnoticed. That uniqueness emerges only when the point of reference is situated further back, in the period of the medieval Lordship which it definitely terminated. This study begins, therefore, with an attempt to situate the developments which are its main concern in the context of the medieval background from which they emerged. What follows is not a potted history of the medieval Irish Lordship. The perspective used keeps in view the phase which superseded it. Our special interest is in the origins of those problems of government which caused so much political agitation in the course of the sixteenth century, and of those attitudes which gave rise to the sixteenth-century movement for political reform.

Our starting point must be the strategy for the government of its Irish Lordship devised by the English crown in the course of the second half of the fourteenth century. That strategy produced a body of legislation and certain jurisdictional processes which provided the constitutional framework within which political reformers began their search for a solution to the Irish problem in the sixteenth century. Of central importance here are the celebrated statutes passed by an Irish parliament at Kilkenny in 1366.<sup>1</sup>

The purpose of the statutes of Kilkenny has been the subject of long and agitated controversy. Before launching into those troubled waters one relevant point can be made which is beyond dispute. That is that the statutes represent a body of reform legislation. They strove to eliminate abuses over the whole range of government in the Lordship. A legal historian pointed out in a recent study that sixteen out of the thirty-four acts dealt with problems of government common both to England and Ireland,

<sup>1</sup> The significance of the occasion of the Kilkenny enactments has recently been questioned on the grounds that the legislation added little that was new to statutes enacted at various times since the beginning of the century. Our concern here is not with the significance of the event, but with the policy that lay behind the legislation. However, it should be added that despite the legislation's lack of novelty the Kilkenny parliament cannot be deprived of a special significance. It was among the final acts of Edward III's son Lionel, duke of Clarence, preparatory to his departure after five years in charge of the government of the colony. The statutes must be seen, therefore, as reflecting his experience of those five years, and as an attempt to consolidate the arrangements for the government of the Lordship in the light of his imminent departure. This immediate context has a bearing on the long-term significance of the statutes. James Lydon, *Ireland in the later middle ages* (Dublin 1973), pp. 88–97.

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the rights of the church, administrative corruption, problems of criminal and civil law, and of social organisation.<sup>2</sup> Many of these simply took over or adapted English legislation, a fact which emphasises that the statutes of Kilkenny were conceived first of all in the context of a comprehensive policy of government reform in the colony.

However, our main interest is in the remaining eighteen enactments which dealt with peculiarly Irish problems, specifically the relationship between the crown, the Lordship, and the Gaelic community. It may be accepted that the legislation here did not mark a new departure in crown policy but rather 'codified the most important parts of existing legislation'.<sup>3</sup> The question is, what was the effect of this code of legislation, and what was the policy behind it?

The interpretation of one of the most influential historians of medieval Ireland, Edmund Curtis, provides the context in which the modern debate on these issues has taken place. Curtis's thesis has three aspects. In his view the strategic consideration behind the formulation of the statutes was a decision by the Anglo-Norman colonists 'to cut their losses', to call off the conquest of Ireland as a whole and to concentrate instead on consolidating the colony within the area already gained. Secondly, he held, they express the colonists' conception of the political community they were attempting to establish, a conception moulded by deep colonial prejudices. Hence, the Kilkenny statutes moulded a political community in which legislation was concerned with the Englishry alone, in which the Gaelic Irish had no status in law, and in which Gaelic culture and customs were proscribed. The final aspect of Curtis's thesis concerns the constitutional implications of the statutes for the two historic communities of the island. Their effect, he suggests, was to provide a system of legal segregation between a privileged colonial community and a Gaelic community which was so far discriminated against as to be placed entirely outside the law, a system which later writers, under the influence of Curtis, have not hesitated to describe as apartheid.<sup>4</sup>

Subsequent research has substantially modified the last two

<sup>2</sup> G. J. Hand, 'The forgotten statutes of Kilkenny', *Irish Jurist*, n.s., i (1966), pp. 299–312.

<sup>3</sup> Lydon, cit., p. 95.

<sup>4</sup> E. Curtis, *A history of medieval Ireland* (London 1938), pp. 231–6. Idem, *A history of Ireland* (rev. edn., London 1950) pp. 113–17.

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aspects of Curtis's interpretation, those concerning the motives which inspired the clauses about race and culture and the effect of the legislation as a whole on the Gaelic community. Recent writers, among them Curtis's distinguished successor in the chair of medieval history at Trinity College, Dublin, have emphasised the function of the statutes of Kilkenny as a mechanism of government control rather than as an instrument of aggressive colonial prejudice. They were designed partly to meet a situation in which the pressure of an expanding Gaelic community was threatening to undermine the cultural and political identity of a shrinking colonial community, and partly to secure stability in the political relationships between the two. The effect of the statutes was neither to sever the connection between the two communities nor to outlaw the Gaelic one. A study of the manner in which the sanctions on social intercourse worked in practice shows that they constituted a system of control, not a flat prohibition. In fact, formal processes existed to legalise intermarriage on an individual basis, and to grant full political status to members of the Gaelic community by means of patents of denization. Similarly the provisions concerning political relationships between the two communities did not amount to a 'declaration of war' as Curtis maintained. They were designed to curb arbitrary and unauthorised action from the side of the colonial community – by high-spirited border lords, for instance – and with that object in view, to place the domain of political interaction between the two communities under the control of law and of crown government. Finally, in juridical matters, the effect of the legislation was not to outlaw the Gaelic community. Close scrutiny of the operation of the law within the colony shows that the Gaelic Irish both enjoyed protection and had means available to them to institute proceedings in the crown courts.<sup>5</sup> In this view the conception of the colony expressed in the statutes was not one of withdrawal into hostile isolation, but one of practical accommodation to a situation of coexistence. More recently still, a third distinguished Trinity medievalist has challenged the remaining aspect of Curtis's thesis, the strategic consideration lying behind the statutes. He rejects the view that they mark the abandonment of the long

<sup>5</sup> A. J. Otway-Ruthven, *A history of medieval Ireland* (London 1968), pp. 291–4. G. J. Hand, 'The status of the native Irish in the Lordship of Ireland, 1272–1331', *Irish Jurist*, n.s., i (1966), pp. 93–115.

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struggle to reduce the whole island to subjection. He argues that 'it was not in the nature of a king such as Edward III to abandon any part of his patrimony', and he points out that 'both he and Richard II spent large sums of money trying to extend the area in which royal writs were effective'.<sup>6</sup>

In the light of these criticisms, particularly the last one, it must be accepted that Curtis failed to establish the significance of the statutes of Kilkenny for the crown's policy towards the late medieval Lordship. The trouble is that his critics made little attempt to replace Curtis's general interpretative scheme which their criticism cumulatively undermined. That is a task which must now be undertaken, since the import of political and constitutional developments in the sixteenth century cannot be grasped unless their precise relationship to the situation in the late medieval Lordship is grasped.

The fundamental weakness of Curtis's interpretative scheme, to which all the criticisms in their various ways draw attention, is its failure to distinguish between the problems of the colonial community and the problems of the crown in Ireland. It is a truism of colonial administration that the home government will tend to differ from the colonial community in its perception of the problems and priorities of government. The late medieval Lordship of Ireland was no exception. Whereas self-interest narrowed the horizons of the colonists to the area of the substantive colony crown government set the problem of the colony in the context of the Lordship as a whole. Even if the colonists were prepared to have done for good and all with the Lordship outside their own area, the king was not. It is relevant to note, therefore, that the statutes of Kilkenny, and the injunctions that foreshadowed them, promulgated at a Great Council in 1351, were both the products of high-powered expeditions from England, which attempted to grapple with the reformation of the colonial area as an aspect of the larger problem of the government of the Lordship as a whole.<sup>7</sup>

Consideration of the special problem posed by the Lordship reveals the function that the statutes of Kilkenny were designed to fulfil. The peculiar problem of governing the medieval Lordship

<sup>6</sup> Lydon, *Ireland in the later middle ages*, pp. 94–7. Idem, *The Lordship of Ireland in the middle ages* (Dublin 1972), pp. 220–2.

<sup>7</sup> Above, p. 4, note 1.

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was created by the circumstance that a substantial part of it was in the control of Gaelic or Gaelicised Anglo-Norman lords who held their local lordships without a grant of tenure from the crown, and in many cases in defiance of a royal title conferred under feudal law. So long as the crown was incapable of expropriating these, or alternatively of devising a formula for granting them tenure on mutually acceptable terms, the government could not exercise sovereign jurisdiction in their territories.

The statutes of Kilkenny mark an important stage in the development of a system of government designed to cope with this situation. Their special significance in this regard was their exclusive nature. They were framed in such a way as to apply specifically to those 'living amongst the Englishry' because only in the area of the Englishry, the area held under feudal tenure, did the full constitutional relationship of king and subject exist. Only in that area, therefore, did the law provide an effective tool of government, because only there was the crown's claim to sovereign jurisdiction accepted, and only there could the machinery for administering the law operate.<sup>8</sup>

The emergence of this expedient has to be viewed in conjunction with another device of government also developed in the course of the fourteenth century. This addressed itself to the problem of governing the Lordship outside the colonial area. To apply the ordinary processes of government, parliament, statute, the administrative and judicial machinery, to the government of the Irishry, the community which did not possess the status of subjects, was not only politically unrealistic but constitutionally inappropriate. However, it was found possible to make arrangements through which government of the disobedient community might be exercised in a limited way, by means of *ad hoc* agreements with individual local lords, based on the external jurisdictional relationship of protection entered into between an inferior and a superior ruler. Thus in the course of the fourteenth century the government adopted the policy of extracting, wherever possible, formal indentures of submission from local lords in the area of the

<sup>8</sup> This was pointed out as long ago as the early seventeenth century in a highly perceptive analysis of the constitution of the medieval Irish Lordship: Sir John Davies, *The discovery of the true causes why Ireland was never entirely subdued* (London 1612), pp. 119–24. I am grateful to Mr Hans Pawlisch of the Institute of Historical Research, London, for reminding me of the relevance of the work of Davies to my own.

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disobedient Irishry, as it was called. The indentures provided for a simple act of fealty to the king as overlord, an undertaking to abide by the king's peace, and (if practicable) an agreement to render some modest form of tribute, usually by way of military service. They did not impinge on the lord's internal sovereignty. Reciprocally, the act of submission committed the crown to an obligation of protection towards the signatory. Gradually the policy emerged of establishing by this means a legal framework for the conduct of affairs between crown government and the local non-feudal lordships throughout the island. The arrangement was intended to stabilise relationships between the king, the colony and the 'disobedient' community, complementing the provisions within the loyal area under the statutes of Kilkenny. In this context the undertaking of the lord 'to be on the king's peace' was especially important. Through this he not only guaranteed his own peaceful disposition towards the crown and the colony, but – adapting a feature of the Gaelic Brehon Law and, indeed, of legal systems elsewhere – the lord accepted a corporate responsibility for the behaviour of his followers also. At the same time the indentures were intended to provide the basis on which crown government might aspire to exercise a measure of jurisdiction throughout the island, and in particular to fulfil a peace-keeping role.<sup>9</sup>

Thus the statutes of Kilkenny and the device of submission by indenture combined to provide a legal framework within which the Lordship might be governed on the basis of a system of dual government. The special feature of the system to be noted here is that it in no way altered the ambiguity of the existing constitutional situation. The statutes of Kilkenny did not place the inhabitants of the non-feudal lordships beyond the law. They simply acknowledged the fact that they were beyond it. On the other hand, the indentures entered into with the local lords did not concede the validity of their titles. They were purely *ad hoc* agreements, designed to provide a working relationship irrespective of the conflict over tenure. A special characteristic of the system as a whole, therefore, was its provisional and expedient quality. It provided an arrangement for the government of the

<sup>9</sup> On the adoption of this strategy by Richard II and later monarchs, see Lydon, *Ireland in the later middle ages*, pp. 114–24, 133–4. Robin Frame, 'English officials and Irish chiefs in the fourteenth century', *E.H.R.*, xc (1975), pp. 748–77, especially pp. 759–61.



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Lordship in a situation of unresolved conflict, while leaving open to the crown the option of embarking upon a final solution at some future date.

One must, therefore, endorse the criticism of Curtis's view of the statutes of Kilkenny as marking the crown's decision to 'call off the conquest'. However, that is not the end of the matter. As a historian recently observed about another aspect of the Curtis thesis, 'his fault was perhaps more in the terms he used than in the substance'.<sup>10</sup> When one comes to consider what fundamentally the statutes of Kilkenny signify regarding the crown's attitude towards the Irish Lordship, one is driven to the conclusion that Curtis was, after all, right to associate the statutes with the termination of the phase of Anglo-Norman conquest. However, the policy of the crown was more subtle than Curtis suggests. It was rather a question of a shift in emphasis than of a dramatic change in policy. The appearance in the first half of the fourteenth century of the kind of exclusive legislation eventually codified in the statutes of Kilkenny indicates that the main emphasis of crown policy in Ireland had come to centre on consolidating the colony within the area under Anglo-Norman control, and with securing political stability in the Lordship generally. As a corollary, more grandiose notions of conquest and colonisation receded into the background, though they did not entirely disappear from view.

All of this is quite clear from the course of Anglo-Irish relations in the late middle ages. It is true that occasional expeditions from England revived an expansionist policy. However, the strategy informing all of these, with one notable exception, was that of securing the borders of the colonial area. They were set, therefore, in the context of a policy of colonial consolidation rather than of conquest. The exception was Richard II's first spectacular expeditions in 1394–5. But that monarch, having perceived at first hand the enormity of the task, quickly opted for a settlement on the lines indicated above.<sup>11</sup>

Thus Curtis's thesis about the significance of the statutes in the history of the Anglo-Norman conquest, if more carefully formulated, is seen to have substantial validity. What of his thesis

<sup>10</sup> F. X. Martin, 'The coming of parliament' in B. Farrell (ed.), *The Irish parliamentary tradition* (Dublin 1973), p. 42.

<sup>11</sup> Lydon, *Ireland in the later middle ages*, pp. 109–20. Idem, *The Lordship of Ireland*, pp. 231–40.

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concerning their juridical and constitutional implications? As we saw, he was certainly wrong in maintaining that they encompassed the 'outlawry of the Irish race'. The reason for the exclusive nature of the legislation – framed so as to apply to the colonial community alone – was not to place the Gaelic community outside the law but to leave them beyond it. It did not, therefore, create a constitutional distinction but rather took account of political reality. The purpose here was to promote political stability between the two communities, not to exacerbate tension between them. Similarly, the legislation which Curtis viewed as an attempt to segregate the two communities was in reality intended to control intercourse between them.

Despite all of this, however, Curtis was substantially correct in maintaining that the statutes were conducive to political instability and to the alienation of the Irishry. That is not so much because of the provisions of the statutes themselves as because of the dual system of government of which they were an instrument. As such they served to formalise and emphasise the differences between the two communities. Furthermore, the dual system was in an important respect self-defeating as a formula for peace and stability. It shelved the conquest policy without abrogating it, thus aiming to contain the problem rather than to resolve it, to alleviate the symptoms while preserving the cause.

It is true therefore, as Curtis maintained, that the formula devised for the administration of the Irish lordship in the mid fourteenth century served in important respects to exacerbate the problem. At the same time it must be said that Curtis misconceived the source of the tension, and it is crucial to a study of sixteenth-century political reform to appreciate the nature of his misunderstanding. In a nutshell the conflict was not racial or cultural in origin but concerned validity of tenure. Curtis emphasised the legal and social disabilities arising from the failure to accord those of Gaelic ethnic origin full status under the law. However, as we have seen, means were developed for overcoming such difficulties with relative ease. From the mid fourteenth century onwards there is no evidence of resentment over the issue of personal status under the law.<sup>12</sup> Henceforth, the crucial constitutional problem was not the personal status of the Gaelic before the law, but the status of

<sup>12</sup> G. J. Hand, 'The status of the native Irish in the lordship of Ireland, 1272–1331', p. 115.