

**THE LAW AND RELIGIOUS MINORITIES IN POST TUDOR
IRELAND : SOME REFLECTIONS AGAINST THE
BACKGROUND OF IRISH LEGAL AND SOCIAL HISTORY**

by

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I.

From the time of the conquest of Ireland by England in the 12th century up to the present time, Ireland has known insurrection and civil war and has been an area of constant crisis for the English — later British — Crown. It has posed problems which, intensified in the Northern Irish burning glass, urgently require solution, especially in our age of international alliances. One might suppose that, with the simultaneous entry into the European Community of the United Kingdom and Eire, this solution should be closer to hand than in the past, especially since we are aware at the present day that neighbouring nations must co-operate, despite the fact that for historical reasons their borders may be anomalous.

Admittedly, there is no ground for such optimism. Practically every week, the newspapers carry reports of bomb attacks, murder and terrorist activities which have occurred in Northern Ireland. Despite the present levels of violence, however, much political, religious, social and legal dissension remains below the surface. The Irish problem of today is just as far from a solution which would be acceptable to both sides as that of almost 180 years ago, when the political union between Great Britain and Ireland was accomplished and just as far as ten years ago when the present phase of unrest which is still providing headlines for the world press set in. If any questions are ever asked on the historical

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genesis of the present situation,¹ what frequently follows is a reduction of the present Irish problem to the denominator of a century-old struggle — still almost incomprehensible to outsiders today — between militant Protestants on the one hand and militant Catholics on the other. Such a reduction is admittedly not erroneous so far as it goes, but it does not fully explore the historical dimension. If one recognises that in Northern Ireland an underprivileged Catholic minority is fighting for rights which the privileged Protestant majority² have enjoyed for centuries, one is starting to get nearer to the heart of the problem. In view of this, it is dangerous for the impartial observer simply to ask why it is that these two groups cannot agree to solve their difficulties by civilised negotiation and compromise. It is of decisive importance to recognise that such a reasoned approach has as yet had no chance to succeed in Northern Ireland, for it is confronted on both sides by almost insurmountable barriers which are built of genuine and understandable fears and of centuries-old prejudices.

The Christian name still as a rule betrays to which denomination an Irishman belongs and there is nothing which is going to sway the Irish Catholic from his conviction that the real reason why he has failed to obtain a job or house is his Catholicism. Conversely, the Irish Protestants see themselves confronted by a minority, who are simply waiting for the day when unification of Northern Ireland with the Republic will enable them to remove from the Protestants their special rights and turn the tables on them. Article 2 of the Constitution of Eire emphasises, as if to endorse this view, that the national territory of the Republic consists of the entire island. Every Northern Irish Catholic is considered a partisan of this constitutional principle. The Northern Irish Protestants fear economic decline should they be incorporated into the Republic: the average income in the Republic is roughly 20% lower than in the North. One will have to wait and see what middle — and long — term effects the Republic's entry to the European Economic Community can have on this attitude. Northern Irish Protestants see the problems of the workers in the industrialised North and fear that, in the event of being

1 A really satisfactory and comprehensively documented history of Ireland has still to be written. An immense bulk of sources expects to be made use of by future generations of scholars of history. In the meantime, the well-known Bibliographies of British History and Irish Historiography (cf. the refs. in T. W. Moody, F. X. Martin, and F. J. Byrne [eds.], *A New History of Ireland*, vol. III: *Early Modern Ireland (1534-1691)*, (1976) [abbreviated here as NHI], at pp. 634-695) are indispensable. A classical work still is R. Bagwell, *Ireland under the Tudors*, 3 vols., (1885-90) and *Ireland under the Stuarts*, 3 vols., (1906-16), and some smaller secondary works are also important: J. C. Beckett, *The Making of Modern Ireland, 1603-1923*, (1966); E. Curtis, *A History of Ireland*, 1936, (6th ed. 1950); R. Dudley Edwards, *A New History of Ireland*, (1972), and T. W. Moody, and F. X. Martin (eds.), *The Course of Irish History*, (4th ed. 1968) (all with several reprints since).

2 Ireland: 32,595 square miles, 4,500,000 inhabitants, 74.7% Catholics, 25.3% Protestants. Northern Ireland: 5,242 square miles, 1,500,000 inhabitants, 65.1% Protestants (29.9% Presbyterians etc., 25.7% Anglicans), 34.9% Catholics. Eire: 27,136 square miles, 3,000,000 inhabitants, 94.9% Catholics, 5.1% Protestants. 1971 census.

incorporated into the Republic, an influx of Catholic immigrants from the less industrialised South would intensify the already obvious unrest in the working-class areas and there is no doubt that the difficulties in Northern Ireland are largely those of the working-class. With relatively low wages, a high rate of unemployment and a demand for reasonably-priced housing which far exceeds the supply they are, because of their economic position, prisoners of their own situation and the moment they see that the small measure of security to which they can still cling is faced with new threats they become the easily incitable victims of fierce passions.³

In this context what interests the legal historian, however, is not primarily the individual and his daily fight for existence: the real focus of attention is the minority group itself which has increasingly demanded, generated and taken over control of the loyalty of its members as they have suffered more and more loss of political power through the gradual withdrawal of rights and through actual as well as legislative discrimination. This process, in fact, takes place in comparable form in many places of the world, but it can be seen particularly clearly in the chosen example of Ireland. Hence, one side wins the upper hand in the fight for political supremacy; this victorious side then passes laws and other regulations which are designed to stabilise and consolidate its supremacy; according to these laws, the terms under which the subordinated live are redefined to fit in with the political claims of the victors, becoming dependent on new prerequisites and regularly undergoing restriction. When the burden of this repressive legislation confirming the supremacy of the new masters becomes unbearable in the social situation, the result is that those suffering under it and those who find themselves without rights come together and stick together in group loyalty to work out solutions. But by this stage, law is not merely a response to a new situation: with its attempt to repackage the entire historical problem, it reacts upon the new social situation, assumes a determining influence in the process and thus itself brings about new realities, sometimes not considered or reckoned with by the new rulers and the legislator.⁴ One of these specifically *Irish* realities has been for centuries and still is⁵ the feeling of solidarity among Northern Irish Catholics, based on the common unifying denominator of their Catholicism. This group loyalty and the resulting deep-rooted feeling of conspiracy against *the others* has in the course of the centuries allowed that rift to appear which makes understanding so difficult and is still adding fuel to the mutual distrust

3 Cf. H. Jackson, *The Two Irelands. The Problem of the Double Minority — A Dual Study of Inter-group Tensions*, (1971).

4 For the English legal system, cf. D. Giesen, *Grundlagen und Entwicklung des engl. Eherechts in d. Neuzeit*, (1973) at pp. 412 ff., 548 ff. A detailed study of the controversial issues which troubled England in the 16th and 17th centuries during the conflicts between the Established Church and Protestant nonconformists on the one hand and legal developments in response to these conflicts on the other hand is: L. W. Levy, *Origins of the Fifth Amendment. The Right against Self-Incrimination*, (1968).

5 Cf. J. Magee, *Northern Ireland: Crisis and Conflict*, (1974).

— and in particular the very deep distrust of the rule of law — *i.e.* the rule of the *others'* law — and which created a situation in which one more and more disadvantaged section of the population could be pushed into the ghetto and attracted to itself all kinds of discrimination with which it still has to live today.

II.

The origin of this can be traced back to the settlement policy which the English crown introduced in Ireland at the beginning of the 17th Century. This colonisation by Protestant settlers from Scotland and England was intended to create what would in the long run be a more reliable basis for the loyalty of Ireland to the Crown than any which the Irish themselves, who even in the religious upheavals of the Reformation had remained Catholic, could ever offer.⁶

What then followed, with the influx of large numbers of settlers from Scotland and England, can be summed up in one sentence: in just two generations practically all Irish landed property passed over into Protestant hands. An entirely new Protestant community came into being which differed fundamentally from the past traditions of Ireland and in which the Catholics of Ulster had virtually no place.⁷ Their uprising against the new rulers of 1641⁸ was crushed not long afterwards and with worse bloodshed by Cromwell in 1652.⁹ After the Restoration of 1660, especially under James II, a more hopeful episode began for the

6 It is well-known, of course, that the discrimination against the Irish did not originate as late as in the time of the religious turmoils during the Reformation period. 31 Edw. III stat. 4 c. 8 (1357 [StR I.360]) is one example (penalisation of inter-marriage between English and Irish), and the *Statutes of Kilkenny* (1366 [H. F. Berry, ed., *Statutes and Ordinances and Acts of the Parliament of Ireland, King John to Henry V*, 1907, at p. 431 ff.]) are just another outstanding example. But the Reformation brought with it the new dimension of religious discrimination by a minority against an overwhelming majority on political grounds, for which *cf.* D. Giesen, 'Repression und Rechtsgefühl. Rechts- u. sozialgeschichtl. Bemerkungen zur Bedeutung des konfessionellen Arguments in der Irlandpolitik der Tudor- u. Stuartzeit', in: *Gedachtnis-schrift H. Conrad*, (1979), at p. 181 ff., with a discussion of many yet unpublished sources from archives in England.

7 *Cf.* Bodl., Rawlinson MS. A 237 fols. 61 ff. (partly printed in *Analecta Hibernica* 3 [1931] 151-218); Conditions to be observed by the British Undertakers [1610], printed in Irish Hist. Docs., ed. E. Curtis and R. B. McDowell, 1943, at p. 128 ff. An interesting study is: T. W. Moody, 'The Treatment of the Native Population Under the Scheme for the Plantation of Ulster', in: *IHS* 1 (1938-9) at p. 58 ff. Also consult M. Perceval-Maxwell, *The Scottish Migration to Ulster in the Reign of James I*, 1973.

8 Yet unpublished material can be found in Bodl., Rawlinson MS. B 507. Another important source, implementing the view one can obtain from R. Bagwell's vols. on the same period, is Bodl., Rawlinson MS. B 482, an ex-post narrative of the 1641 events by an author with R.C. leanings, written, from internal evidence (*ibid.*, II. 33/38) at about 1688/9, with an intention to impugn the Act of Settlement, 1662 (14 & 15 Car. II c. 2 [Stat. Ire. II. 239]) and to justify its repeal by James II's Parliament of 1689.

9 The present author has given an analysis of this period elsewhere (*cf.* note 6, *supra*). An important and yet unpublished source is Bodl., Rawlinson MS. A 14, at p. 172 ff.

Catholics of Ireland, while Protestants soon saw reason to fear the worst:

Popery began to be triumphant, the Lord Deputy and his Privy Council (excepting a very few), the Lord Chancellor, and all the Judges (except three) . . . and the King's Serjeants, the Justices of the Peace, and Sheriffs in each County . . . all violent and eager Promoters of the Romish Religion: The Mass publicly celebrated in every Town; the Friars marching in their Habits undisturbed; the Army reformed to their own Cue, no Man countenanced, or made a candidate for any Preferment, but he that truckled to the See of Rome . . . Protestants . . . began indeed to be under dreadful Apprehensions, and such as wisely foresaw the approaching Miseries, and were in a Capacity to do it, withdrew themselves, their Families, and Effects, into England and Scotland.¹⁰

But all this soon came¹¹ to an abrupt end both with what later became and ever since has been called the Glorious Revolution (1688) and the decisive victory of the House of Orange over King James II in Ireland in 1691.¹²

This date marked the start of what was really the classical era in the history of Protestant supremacy in Ireland, the period of consolidation by administrative,¹³ judicial,¹⁴ and especially by legislative measures of their power and the corresponding discrimination against, and removal of power from, the Catholic population of the country. 'Proposals for

10 'An Apology for the Protestants of Ireland . . .' (1689), in: *A Second Collection of Scarce and Valuable Tracts . . . of the late Lord Somers*, vol. IV, 1750 (B.M., 184 a. 8), at p. 15 ff. (21).

11 A fascinating reading are King James II's communications to his Lord Lieutenant in Dublin (Henry Hyde, Earl of Clarendon), and, a few months later, to Clarendon's successor (Richard Talbot, Earl of Tyrconnell), 1685 ff., Bodl., Rawlinson MS. A 481 fols. at p. 7 ff., and the King's (or his deputy's) Proclamations of 1688-9, published in Dublin, and collected in B.M., G. 6022 and C 21 f. 12.

12 Cf. R. Bagwell, *Stuarts*, III, at p. 287 ff., at p. 293 ff., at p. 309 ff.; J. G. Simms, *Jacobite Ireland*, 1685-91, (1969) at p. 136 ff.; *idem*, *The War of the Two Kings, 1685-1691*, in: NHI, at p. 478 ff.

13 Cf. the Proclamations by William and Mary, at p. 1689 ff., 'To all Their loving Subjects in the Kingdom of Ireland', issuing from Whitehall, collected in B.M., C 21 f. 12, esp. at fols. 52, 110, 116-7, 125, *et passim*, and G. 5869 (14). Also the Journals of the House of Commons (Ireland) give details about how those who, '... had been a notorious Betrayer of the English and Protestant Interest' (C.J. Ire. II. 13) were dealt with (additional examples: *ibid.*, II. 5, at pp. 21-2).

14 In 1692, the Lords of the Admiralty commissioned Dr Oldish and other Commissioners of the Admiralty to proceed against certain prisoners who had served at Sea under a commission from King James II, demanding that, '... they should be Tried as Pyrats, as having no Commission from any King, or Sovereign power whatsoever' (Bodl., Rawlinson MS. A 84, at p. 156 ff. Dr Oldish refused to obey this order since the prisoners in his view '... were not Pyrats neither were they to be prosecuted as Such' (at p. 158) as they had lawfully served on King James's side. Oldish argued with Hugo Grotius and other authorities, when he and some of his colleagues were called upon to answer for their refusal. Oldish unbendingly upheld the view that, '... it is Notorious to the World, that King James was a Lawful King, and acknowledg'd to be so by all' (at p. 162), and that the prisoners could not *ex post* be regarded as pirates '... but [as] Prisoners of War' (at p. 163) which '... would free them from a felonious Intent . . . and Consequently from Pyracy' (at p. 164): '... Upon this Dr. Oldish was removed from his place and Dr. Littleton put in' (at p. 169), a colleague who had proved himself to be more obliging to the new rulers by holding that the prisoners were indeed pirates. This is just one example, from unpublished sources, of many others.

the more effectually Subjugation of the Irish to the Crowne of England¹⁵ as well as parliamentary initiatives against Catholics¹⁶ were abounding at that time.

The first important step was the securing of an exclusively Protestant line of succession through the banning of Catholic pretenders in the *Bill of Rights* 1689 and the *Act of Settlement* 1701.¹⁷ Even today this is binding constitutional law in the United Kingdom.¹⁸ Before taking over a public office one had to take oaths — tightened up as time went on — to the Protestant succession and against the spiritual authority of the Pope, and a declaration had to be made against various Catholic doctrines including trans-substantiation, the sacrifice of the Mass, and the veneration of the Saints.¹⁹ To refuse to sign these avowals meant the loss of office, income, and professional future.²⁰

In order to put a stop to the influence on Irish Catholics of Catholics in other countries, the Irish Catholics were now forbidden by law to have their children educated abroad. The same statute also prohibited the maintaining of their own schools in Ireland.²¹ 'If the young ones be rightly Educated Popery and Irish barbarism will soon be ended', wrote Edward Nicholson, an agent of the Society for the Promotion of Christian Knowledge at that time to his correspondent in London.²² What was at the time the only university in Ireland, now shut its doors to the Irish Catholics completely.²³ The anti-Catholic spirit of the times which reigned amongst the ruling Protestant oligarchy was given further expression in a statute banishing from the land at very short notice all Catholic bishops and other ordinaries, and very nearly all monks, and threatening them with the medieval punishments of High Treason should

15 Bodl., Rawlinson MS. A 238 fols. 20r ff., 135 ff., from internal evidence written at about 1695, contain important proposals.

16 The Commons Jnls. (Ire.) for the time after 1691 make interesting reading as to the ingenuity of parliamentary initiatives against the defeated adherents of James II.

17 *An Act Declaring the Rights and Liberties of the Subject and Settling the Succession of the Crowne*, 1 Will. & Mary, sess. 2 c. 2 (1688/9), StR VI. 142 ff.; *An Act for the Limitation of the Crown and Better Securing the Rights and Liberties of the Subject*, 12 & 13 Will. III c. 2 (1700/1), StR VII. 636 ff.

18 S. A. de Smith, *Constitutional and Administrative Law*, (3rd ed. 1977), at p. 108.

19 *An Act for the Abrogating the Oath of Supremacy in Ireland and Appointing other Oaths*, 3 & 4 Will. and Mary c. 2 ss. 4 and 6 (1691), StR VI. 154 ff. (255) contain the texts of the oath (s. 6) and the declaration (s. 4). The same texts are also to be found in the relevant Irish statutes, e.g. 4 Will. and Mary c. 2 (1692), Stat. Ire. III. at p. 243 ff., or 7 Will. III c. 5 (1695), Stat. Ire. III. at p. 260 ff.

20 E. Curtis, at p. 275 ff.; R. Dudley Edwards, at p. 136.

21 *An Act to Restrain Foreign Education*, 7 Will. III c. 4 (1695), Stat. Ire. III. 254 ff.

22 Bodl., Rawlinson MS. C 743 fol. 73r.

23 T.C.D., an Elizabethan foundation (1591), was, of course, never the place of learning to flock to for Catholics: they had always preferred the universities at Louvain, Salamanca or Paris, and if they read theology, Rome, Douai, Bordeaux, Tournai, Lille, Compostela and Lisbon. A Catholic assessment of what T.C.D. really was set up for can be found among other sources printed by C. Maxwell (ed.), *Irish History from Contemporary Sources* (1509-1610), (1923), at p. 138.

they return to Ireland.²⁴ Only the native lay clergy (registered and under supervision) were permitted to remain in the country; the idea of the rulers being that this concession would itself become redundant within one generation, for no priests were now allowed to come into the country from outside and bishops were banished and deported, thus making new consecrations impossible.²⁵ A statute which was passed in 1702, and which aimed at, 'Strengthening and supporting of the English Interest and the Protestant Religion in Ireland' laid down that any Irish land which at any stage passed into the hands of Protestant landowners was to remain the property of Protestants in the future. To ensure that this law could not be circumvented, it was, at the same time, laid down that leases and tenancy agreements valid for more than one year could now only be contracted by Protestants.²⁶

Finally, by a statute of 1704 the Irish Catholics lost the right to carry out transactions in the most important areas of the law. For almost an entire century they were not able to acquire land, houses and realty rights (e.g. mortgages); consequently they could only sell their property to Protestants; they lost the freedom to testify, and as a result of this could also no longer dispose of their estate by will; if they had not already sold their land to a Protestant during their lifetime there was, according to the law, only one way in which it could be passed down: by an old revived Irish tribal law the land went in equal parts to the surviving sons or, if there were no sons, in equal parts to the daughters or other relatives of the next degree, and on the death of these the same rule was operated and the estate again divided up, thus becoming more and more fragmented with each generation. If, of course, the eldest son of a Catholic landowner became, on his succession, a member of the State Church the succession operated according to English law (the right of the primogeniture) rather than Irish law. In this case it was the eldest son who inherited everything. Finally, in order to protect from the influence of their Catholic parents any children who showed an interest in Protestantism, the High Court of Chancery in Dublin could, if told of this, order that the children receive a Protestant education paid for by their Catholic parents.²⁷

An analysis of law and social conditions at that time shows that this

24 *An Act for Banishing All Papists Exercising Ecclesiastical Jurisdiction, And all Regulars of the Popish Clergy Out of This Kingdom*, 9 Will. III c. 1 (1697), Stat. Ire. III. 389 ff.

25 Bodl., Rawlinson MS. D 839 fols. 119-120 [ca. 1720].

26 *An Act for the Relief of the Protestant Purchasers of the Forfeited Estates in Ireland*, 1 Annæ c. 26 (1702), StR VIII. 75 ff. (Quotation from c. 26 s. 7 [StR VIII. 77]). This Act did not apply to 'any Cottage or Cabbin under the Yearly Value of Thirty Shillings per Annum' (c. 26 s. 10, StR VIII. 77, ss. 17-8, StR VIII. 79), and we know, of course, what those "cabbins" were like (cf. Arthur Young, *A Tour in Ireland*, Part II [Anno 1780], pp. 12-3, 18-9, 23-6, 29, as printed in *English Hist. Docs. 1714-1783*, ed. D. B. Horn and M. Ransome, London 1969, at p. 714 ff. A picture of a cabbin can be found in Moody and Martin, 219.

27 *An Act to Prevent the Further Growth of Popery*, 2 Annæ c. 6 (1703-4), Stat. Ire. IV. 12 ff.

legislation succeeded in effecting many of its aims permanently and in a way which has left a definite mark on the situation today.²⁸

Thus, nobody today denies that the penal legislation — crippling fines with the alternative of imprisonment for those taking part in Catholic services²⁹ and gatherings; imprisonment, deportation and, should they ever try to return clandestinely, ultimately the death-sentence for the Catholic clergy had, to begin with, a considerable effect.³⁰ Anyone who possibly could emigrated to begin a new life elsewhere.³¹ Nevertheless, seen as a whole, this attempt by the new masters of Ireland to use penal sanctions as a weapon in a war of attrition against the religious convictions and needs of the Irish people must, in spite of the unusually large number of emigrants, be regarded as a failure. What was a particular failure was the attempt to drive out the clergy, and ensure through preventing new admittance to the holy orders that those who were left behind would gradually die out. There are fascinating documents pointing to the solidarity between the Irish population and members of the Catholic hierarchy in Ireland who tried hard to attend to the needs of their flock and were under the constant danger of being caught by priest-hunters and discoverers of such wicked Practices [*sic*] as saying Mass, administering the sacraments, preaching and teaching 'in separate Congregations . . . to encourage and advance the Interest of the pretended Prince of Wales'.³² Although the Catholic Church in Ireland was greatly impeded throughout the whole century in its organisation and activities, the number of priests grew steadily, and whereas in England it was only around the middle of the 19th Century that the Catholic hierarchy could be reinstated at all, there were in Ireland by the middle of the 18th Century another twenty-four Catholic bishops with their clergy working in the underground under the jurisdictional responsibility of the papal internuncio in Brussels. This work involved providing for the religious

28 'If you would see Irish grievances, turn over your statute book. Look for the word Ireland, or the word penalty, it is equal which, for where you meet the first, the second inevitably follows; so that you may trace Ireland through the code, as you track a wounded man through a crowd by blood' (Guatimozin [= Frederick Jebb] to Sir C. Wray, Bart., ca. 1779, in: Guatimozin's Letters on the present state of Ireland . . ., London 1779 [B.M., T. 771 (5)]).

29 Already in 1560 the Elizabethan bishop John Jewel had reported to Peter Martyr in Zürich: '*Missae enim nostra memoria nunquam erant in majori pretio: singulae enim nunc aestimantur, in singula spectatorum capita, non minoris quam ducentis coronatis*' (5 March 1560, Zürich Letters, Cambridge 1842, I. 41): *Nihil novi sub luna*, then.

30 This also was a contemporary impression: 'A Sketch of the History of Two Acts of the Irish Parliament . . . to prevent the further growth of Popery . . .', 20 Sept. 1777, London 1778 [B.M., T. 771 (3)]. For a modern view cf. G. Maucaulay Trevelyan, *England under Queen Anne. The Peace and the Protestant Succession*, (1934), at p. 160; and E. Curtis, at p. 133 ff.

31 And that '...on account of the severe execution of the Popery Laws', as the author of the Sketch (cf. n. 30, *supra*, at p. 39) observes. He continues: 'The government of Ireland, during all Queen Anne's reign, were incessantly hampering the Roman Catholics with oaths, imprisonment, and forfeitures, without any other visible cause, but that of their Religion.' (*ibid.*, 40). Neither in 1715 nor in 1745, when the last Catholic hopes of a Stuart restoration faded away, was there any unrest in Ireland, '...so prostrate was the native race' (G. Maucaulay Trevelyan, at p. 162).

32 C.J. (Ire.) II.472.

welfare of the people in a way which was at least partly organised and — one consequence of the repressive legislation with which the legislator had not reckoned — for the close feeling of solidarity existing between the Irish and their Church which still characterises Ireland today and could only recently be seen on the occasion of Pope John Paul II's visit of the country from which in, very early centuries, Christian missionaries went out to preach the gospel to parts of Western Europe. The Church represented, for the Irish of the penal law times, the last remaining link with the happier past of their fathers and at the same time was for them the unifying and encouraging symbol of their future resistance to oppression and foreign rule.

What in the long run had even greater consequences was the legislation directed against the education of Irish Catholics, forbidding them on the one hand, to send their children abroad to be educated and, on the other hand prohibiting the continuance of their own schools in Ireland itself. In this way the Catholics of Ireland were prevented from having any share in the cultured way of life of the small Protestant upper class. For if Irish Catholicism was not dying out of its own accord it was important that the Catholics should at least be kept in a condition of political, social, economic and cultural inferiority.³³ 'Compulsory Laws to force Papists to send their children to our Schools (as some propose)' [*sic*] were never enacted, not only, as one contemporary observer remarked, because they would '... never prevail against Popery'³⁴ or because '... Catholics will not send their children to the English Protestant School', as Thomas Orde observed a generation later,³⁵ but because the Protestant oligarchy was not interested that Catholics should ever again acquire an education which might once again imperil that Protestant supremacy over Ireland. The Hedge Schools owe their origin to these laws against education and their name to the practice of keeping school under the sunny side of a hedge with one boy on the look out for the approach of a stranger or someone who, he judged, might prove to be an informer against them.³⁶

But the part of the repressive legislation which had the most lasting and catastrophic consequences was that which took away from the Irish Catholics everything that was left of their former land and with it all that remained of their former freedom of movement. The fact that they were meanwhile prohibited from acquiring land or taking out long-term leases, the fact that the legislation favoured the selling to Protestants of what was left of their land, and the fact that pressure was exerted on Catholic landowners through numerous regulations, prohibitions and levies, had in the end the effect that the proportion of land in Catholic

33 M. Wall, 'The Age of the Penal Laws', in: Moody and Martin, at p. 226; J. C. Beckett, at p. 159; E. Curtis, at p. 280.

34 Edward Nicholson, Agent of the SPCK, Ireland, to his correspondent in London [ca. 1715], Bodl., Rawlinson MS. C 743 fol. 73r.

35 Bodl., MS. Top. Ireland d. 2-3 [ca. 1786], I.7 ff. (12).

36 P. J. Dowling, *A History of Irish Education. A Study in conflicting Loyalties*, Cork 1971, at p. 86 ff.

hands in Ireland as a whole fell from an original 100% to 22% in 1688, 14% in 1703, and a mere 5% in 1778.³⁷ The number of Catholic families who managed to hold on to their land at the same time as their faith was very small indeed. The majority of Irish had become outcasts in their own country. The Protestant Dean of St Patrick's in Dublin would in those years describe the Catholic dilemma in one of his critical tracts about his own time:

The Catholics of Ireland, in the great Rebellion, lost their Estates for fighting in Defence of their King. The Schismatics, who cut off the Father's Head, forced the Son to fly for his Life, and overturned the whole ancient Frame of Government, Religious and Civil; obtained Grants of those very Estates which the Catholics lost in Defence of the ancient Constitution, many of which Estates are at this Day possessed by the Posterity of those Schismatics: And thus they gained by the Rebellion, what the Catholics lost by their Loyalty.³⁸

Nevertheless, they hoped against hope and trusted to the future although no solution and no comfort were in sight: 'Ancient wrongs still unremedied, and griefs ever fresh from year to year: the seasons returned, but brought no change.'³⁹

Any chance which might perhaps have existed up until 1760 of realising at least in part the political and judicial ideals of the Enlightenment came to a sudden halt with the succession to the throne of England and Ireland of King George III (1760-1820), a Hanoverian and, as was later to become apparent, an unshakeable opponent of emancipation for the Catholics. In the decisive years of the last decades of the 18th Century, when the idea of a greater degree of national independence for Ireland was finally discarded — an idea which was constantly being brought up and eventually developed in the Irish Parliament (1782) by Henry Grattan — it was again the more conservative way of thinking of the Tories that was the determining factor. Unlike the Whigs before them, the Tories did not take as their basis John Locke (1632-1704). Rather were they committed to the tradition of thought developed by Richard Hooker (1554-1600) for the 17th Century, which articulated with authority in the 18th Century by such eminent jurists as William Blackstone (1723-1780), and which defended the existing order against all dangerous innovations.⁴⁰

The important question in 1782, however, was whether the Catholic population of Ireland should also be granted the right to political participation, as Grattan had demanded in 1782. At that time, it was only certain very liberal political individualists who were prepared to grant them this. For influential and conservative men at the top of the Dublin

37 R. Dudley Edwards, at p. 136; Moody and Martin, at p. 189 ff. (201), with an interesting map of Ireland showing the distribution of land between Catholics and Protestants in 1641, 1688 and 1703.

38 Jonathan Swift, Reasons humbly offered to the Parliament of Ireland for Repealing the Sacramental Test, etc. [1733], in: J.S. *Irish Tracts* (1728-33), ed. H. Davis, Oxford 1971, at p. 283 ff. (288).

39 G. Maucaulay Trevelyan, at p. 161.

40 Cf. D. Giesen, *Grundlagen*, at p. 532 ff.

Administration, such as the Chancellor of Ireland, John Fitzgibbon (later to become Lord Clare), the concessions of 1782⁴¹ marked the extreme limit of what could be conceded to Ireland. Any further reforms, and particularly the emancipation of the Roman Catholics, were completely unacceptable.

The fact that this view was ultimately implemented politically (1800) as a result of the impression produced by the events of the French Revolution (1789) was of a decisive significance for the subsequent developments in Ireland. Lord Clare and the Unionists in the Dublin Administration used every means at their disposal to gain a majority in the Irish Parliament for union with Great Britain, which was extremely unpopular in Ireland. This — well rewarded⁴² — majority was found. There was now nothing that the opponents of the union could do to delay the course of events, for in those days anyone who resisted was promptly dismissed once and for all from His Majesty's service. The anti-Unionist and nationalist *vox populi* could no longer express itself freely. Ireland was completely over-run by British troops.

The Act of Union came into effect on 1 January 1801 after being passed in Dublin and Westminster, determined in a total of eight articles the political, ecclesiastical, economic, financial and legal aspects of the Union, and also its wider legal foundations. Now Ireland was amalgamated with Great Britain to form the United Kingdom of Great Britain and Ireland. Ireland was in future represented in Westminster by one hundred Irish members of Parliament. But, as in the past, all parliamentarians had on their first meeting to take the familiar test on the Protestant succession and against the Pope, and make the declaration against transubstantiation and the sacrificial character of the Mass. So once again Catholics were barred from Parliament, and yet another hope of political emancipation had eluded them.⁴³ Moreover, King George III was against further concessions. As far back as 1795 he had expressed doubts as to whether emancipation would be at all compatible with his coronation oath.⁴⁴ In the fight against the revolution what sense could there possibly be in placing still more political power in the hands of the very layers of the population who had demonstrated in Ireland just how rebellious they could be and who, in addition to this,

41 *An Act for the Better Securing the Dependency of the Kingdom of Ireland upon the Crown of Great Britain*, 6 Geo. I c. 5 (1719, StL V. 280), offensive as it was to the national feelings of many Irishmen, was repealed, 22 Geo. III c. 53 (1782, StL XIV. 219), and *An Act that No Parliament be Holden in This Land until the Acts be Certified into England*, 1495, 10 Hen. VII c. 4 (Poyning's Act) (Stat. Ire. I. 44) was modified in such a way that the Crown, although admittedly retaining the right to refuse Irish bills its consent, no longer enjoyed the right to intervene to make amendments (21 & 22 Geo. III c. 47 [*Yelverton's Act*], 1782 [Stat. Ire. XII. at p. 356 ff.]).

42 'Peerages were promised, jobs offered, and straight cash (£7,000 for a seat) made available' (J. S. Watson, *The Reign of George III, 1760-1815*, 1960, at p. 600); also cf. J. C. Beckett, at p. 278.

43 E. Curtis, at p. 347 ff.

44 George III to Lord Kenyon, 7 March 1795, in: *The Eighteenth-Century Constitution (1688-1815)*, Docs. and Commentary, ed. E. N. Williams, Cambridge 1970, at pp. 347-8.

were, as Catholics, plainly incapable of concentrating their loyalty entirely on the King in London? 'A Jacobite impudence!' — this is how the King put an end once and for all to the debate, during a meeting with his cabinet shortly after the Union: 'I consider anyone who repeats such proposals as my personal enemy.' And under George III these proposals never were repeated.⁴⁵

The opponents of equal rights for the Irish Catholics had won, for the Union also became the guarantee of Protestant claims to leadership and Protestant privilege. Emancipation was now scarcely mentioned. Although a generation later, under the forceful influence of Daniel O'Connell, its legal aspects had in fact been almost completely realised, its social aspects have still not been accomplished, and neither has the reconciliation of the two groups of people in Northern Ireland: 180 years after the last events described here. Since then many more events of extremely far-reaching significance have swept across Ireland: the great famine around the middle of the last century, which cost millions of Irish their lives; the struggle in Ulster throughout the remainder of the 19th Century against the Unionists and in favour of Home Rule — connected with the name of Charles Stuart Parnell and supported by a large majority of the Irish population; an Irish self-administration independent from Westminster, and, finally, after a new toughening of British policy on Ireland around the turn of this century, the seven-year civil war between the rival pro-Union and anti-Union sections of the population. This war took place in the years after 1914 and ended, as is well known, with the division of Ireland into Northern Ireland (1921) and the Irish Free State (1922) which, in 1948, became an independent republic.⁴⁶

III.

The Irish problems, however, are still with us and have increased with the judgment that in the present conditions self-government cannot work in Northern Ireland. In an effort to prevent the situation from becoming any worse the British Government is still sending troops into the troubled province as it did a hundred years ago. Nobody has yet come up with a solution which convinces all parties. Great Britain which only recently had to experience the problem of demands for Scottish independence is standing at a cross-roads. Now that the attempt to set up a provincial government which would also be acceptable to the Catholic minority has failed, should Great Britain once again entirely take over the power to govern in Northern Ireland and integrate Northern Ireland into the Westminster system of administration, at the cost of drastic security precautions and the constant danger of a reversion to chaos, or should

⁴⁵ Quotations from J. S. Watson, 401; also *cf. ibid.*, 441-3, 484.

⁴⁶ *Cf.* D. Giesen, 'Zum modernen Irlandproblem. Einige Erwägungen vor dem Hintergrund irischer Rechts- und Sozialgeschichte', (1976) 15 *Der Staat* 15 at p. 485 ff. (500), with further refs.

she prepare to pull out of Ireland completely, having first either negotiated with the Catholics an adjustment of the border to protect the Protestants or having tried to find a total federal solution with the security of the Protestant minority being assured by the constitution?

Integration or withdrawal. There is, in the view of British historians, no third British way out of the Irish legal and social framework into a future European one. Judging by the evidence of legal and social history as described in this paper, one would imagine that the chances of finding a tenable integrationist policy for Ireland are very small. Such a policy must not temporise, for in the present situation in Northern Ireland, every policy which brings delay and waiting leaves the bitter aftertaste of a continuance of the privileges of one side and the legislative and social discrimination against the other, and thus engenders violence by reinforcing the disadvantaged Catholic minority's already deep-rooted distrust of the rule of law of the majority. On the other hand, intervention by the British legislature in order to abolish one-sided privilege in the interests of equal rights would in turn drive the still privileged Protestant majority to the barricades, and there would again be a vicious circle with the passing of legislation withdrawing rights leading to group loyalty amongst those affected. It is here, as elsewhere, the duty of legal and social history to expose the relationship of tension which exists between law and social reality, and contribute to the shaping and further development of the law by recognising that at the centre of every responsible reform is the human being, his confidence in the law and his basic need for freedom ensured by law. These can, however, only flourish — as is shown by the example of Ireland, and could be shown by many other instances — in an atmosphere which is free from prejudice and patronage, and free from legislative and social discrimination.