CHAPTER ONE

CONSTITUTION 'FROM BELOW' IN IRELAND: 1848–1922

> *The principle I state and mean to stand upon is this: that the entire ownership of Ireland, moral and material, up to the sun and down to the centre, is vested of right in the people of Ireland; that they, and none but they, are the landowners and lawmakers of this island . . . Let laws and institutions say what they will, this fact will be stronger than all laws and prevail against them, the fact that those who own your lands will make your laws and command your liberties and your lives.*
>
> – James Fintan Lalor, 1848[1]

> *That the first and last principle of the Irish Citizen Army is the avowal that the ownership of Ireland, moral and material, is vested of right in the people of Ireland.*
>
> – Constitution of the Irish Citizen Army, 1914[2]

A decade of popular militancy immediately preceded and decisively shaped the formation of the Irish Free State and the drafting of the Irish Free State Constitution in 1922. What has been termed the 'Irish Revolution' (1913–23) adhered to the conservative postcolonial trajectory outlined and critiqued by the Afro-Caribbean psychiatrist and theorist Franz Fanon, in which a nationalist party gradually substituted itself for a mass anticolonial and social movement.[3] The Sinn Féin party effectively reasserted the principle that the masses are incapable of governing themselves, notwithstanding ample evidence to the contrary in the form of self-governing communities, arbitration courts, and soviets. This had important implications, most notably in terms of the 'detached complicity' between nation-building elites and the established market

[1] Cited Leo Kohn, 1932, *The Constitution of the Irish Free State*. London: G. Allen and Unwin Ltd, p. 26.
[2] 'Constitution of the Irish Citizen Army' in D. J. Hickey and J. E. Doherty, 2003, *A New Dictionary of Irish History*. Dublin: Gill and MacMillan, p. 221.
[3] On the argument that nationalism is an insufficient response to colonialism see Fanon, 2001, *The Wretched of the Earth*. London: Penguin; see also Balakrishnan Rajagopal, 2003, 'International Law and Social Movements: challenges of theorising resistance' in *Colombia Journal of Transnational Law*, 41:2, pp. 397–433, pp. 423–6.

economy.[4] Sinn Féin's leadership did not view the classic laws of market, property, and contract as problematic per se, rather their having being formerly skewed against 'the Irish people'. Thus, its constitutionalism envisaged the silent reproduction of market law and the strident defence of an Irish nationalist, often specifically Catholic, culture. This national constitutionalism, as was common in many postcolonial jurisdictions, was most clearly expressed in family law, notably resulting in a remarkably enduring defence of patriarchal relations.[5]

Popular militancy in Ireland, notably between 1917 and 1923, occurred alongside a global wave of worker militancy in the aftermath of the Russian Revolution of 1917. The nationalist movement's waging a guerrilla campaign against British rule occurred alongside Sinn Féin's creation of a state within a state while broad swathes of civil society boycotted established institutions and disrupted existing patterns of domination. Trade union militancy escalated, resulting in numerous general and local strikes as well as a number of worker soviets. With the retreat of law enforcement in 1919, farmers and labourers engaged in midnight campaigns of intimidation, cattle-driving, and assault in order to expropriate and redistribute land. Concomitantly, a network of popularly elected, local arbitration courts sprung up, notably to decide the terms of land redistribution. Sinn Féin sought to restrain agrarian agitation or class conflict, notably through a more formal 'Dáil Court' structure, oriented towards the preservation of property rights. This politics of justice 'from below' from mid-1920 onwards anticipated the conservative, contested reformation of the former judicial system in the Irish Free State as well as the role socio-economic rights would play in the making of the 1922 constitution.

In critically assessing the socio-economic rights discourses of this formative period, both Fanon's writings as well as contemporary actors remind us to pay attention to the perspectives of non-party actors within the mass movement.[6] The various social agents involved in these intersecting anti-colonial, agrarian, and social conflicts created a diversity of manifestoes, programmes, and constitutions, many of which articulated contending 'socio-economic rights' discourses. These

[4] Sinn Féin (Irish: Ourselves). Fanon, 2001, *The Wretched of the Earth*, p. 65.
[5] See Kennedy, 2006, 'Three Globalisations of Law and Legal Thought', pp. 30–1.
[6] 'The people's effort can be seen only by knowing something of their lives and their relationship to our underground government and armed resistance. We who fought effected a small part of the total energy induced . . . ' Ernie O'Malley, 2008 [1936], *On Another Man's Wound*. Dublin: Anvil Books, p. 21.

included the Constitution of the Irish Citizen Army (1913), the Proclamation of the Irish Republic (1916), the Sinn Féin Manifesto (1918), as well as the Dáil Constitution and Democratic Programme (1919). Different social groups coincided on attempting to appropriate 'socio-economic rights' discourse, to rearrange its terms in keeping with their priorities and interests and, in doing so, to silence those elements of the discourse inimical to those interests. What 'the ownership of Ireland' would mean in practice was a particularly sharp locus of conflict amongst socialist revolutionaries, agrarian agitators, property owners, clergy, soldiers, and nationalist party politicians. Future constitution-makers would reference these revolutionary-era texts and discourses as well as the more specific terms of sovereignty, nationalism, socialism, distributivism, and natural law theory animating them.

The latter half of this chapter analyses the emergence of Ireland's anticolonial movement, its relationship to economic conditions and social struggles and, in particular, its implications for the creation of alternative sites of justice and the articulation of alternative concepts of socio-economic rights. I wish to begin however by situating these formative struggles and discourses within a longer historical, world-systemic context. Ireland's legal institutions and ideas had a dialectical, or co-constitutive, relationship to its incorporation into the historical capitalist world-system and to concomitant socio-political struggles over what was a complex colonising process.[7] Existing medieval institutions came to be appropriated by a Protestant landlord caste in the seventeenth and eighteenth centuries before wholesale land transfers to a Catholic owner-occupier class in the late nineteenth century preceded their appropriation of the legal field in the twentieth. Significantly, albeit less observably, the close-knit communities of Irish peasant society often found formal law and property rights to be irrelevant.[8] A diverse range of customary dispute-resolution practices existed on the rundales and ranches and it was through these sites of justice that the mass agrarian conflicts of the nineteenth century were conducted. Long before the 'Irish Revolution' then, Irish people had popular experience creating alternative sites and practices of conflict resolution as well as distinguishing between law and justice.

[7] Eamonn Slater and Terrence McDonough, 2008, 'Marx on Nineteenth-Century Colonial Ireland: Analysing Colonialism beyond Dependency Theory' in *NIRSA Working Paper Series*, 36, pp. 1–35.

[8] Éanna Hickey, 1999, *Irish Law and Lawyers in Modern Folk Tradition*. Dublin: Four Courts, pp. 8, 150.

REVOLUTION AND RIGHTS IN IRELAND AND THE HISTORICAL CAPITALIST WORLD-SYSTEM

Emerging in sixteenth-century Europe, the capitalist world-system gradually incorporated Ireland as a semi-periphery within Britain's regional economy.[9] In economic terms, the process aided England's drive toward hegemony and led to Irish industrialisation, especially in linen production, but at the cost of eliminating indigenous wool production and thereby limiting capacities for future industrialisation. It transformed the countryside, occasioning land clearances and tenant farming while also creating conditions for mass emigration and periodic famine. Politically, incorporation into the world-system initially occasioned a range of colonising strategies, including genocide, plantation, Anglicisation, and enforcing religious conformity, but ultimately came to be mediated by a new ethno-class division in which land ownership became the salient basis of inequality.[10] The late seventeenth-century settlement imposed by England established a propertied Protestant minority as rulers, with core support, over the mainly unpropertied Catholic majority, among whom the folk memory of illegitimate land confiscations remained potent.

During the 1800s, Ireland was even more effectively incorporated into the newly hegemonic British Empire's free trade cycle of accumulation. Following customs and monetary union in 1825, the Irish pound was tied to sterling and almost free trade conditions followed.[11] The country's proto-industries collapsed in the ensuing competition with rapidly industrialising rivals; the economy shifted to the export of food and primary commodities such as wool and leather. Between 1816 and 1920, as rising demand in Britain's cities raised beef prices by more than 300 per cent, Irish agricultural production correspondingly

[9] Denis O'Hearn, 2001, *The Atlantic Economy: Britain, the US, and Ireland*. Manchester: Manchester University Press. While Ireland would normally be classed as a 'semi-periphery' within world-systems analyses, the word 'periphery' is sometimes used here to better emphasise peripheralisation as an evolving, relational process rather than a fixed status.

[10] The European wars of religion following the Protestant Reformation coincided with the English conquest of Ireland. The ensuing persecution of Catholicism transformed the priest into the personification of political and religious resistance to English rule. This synthesis was, for a time, to become basic to Irish nationalism. Seán Ó'Faoláin, 1980, *The Irish*. New York: Penguin, pp. 105, 119.

[11] The gold standard secured cattle exports as well as the Irish banks' investing grazier/merchant proceeds in the City of London, with associated implications for Dublin Castle's pursuing balanced budgets and parsimony in public expenditure. See Conor McCabe, 2011, *Sins of the Father: Tracing the decisions that shaped the Irish economy*. Dublin: History Press. See also Raymond Crotty, 1986, *Ireland in Crisis: A study in capitalist colonial underdevelopment*. Dingle: Brandon Press.

shifted from labour-intensive tillage to livestock rearing. During the period 1825–70, cattle exports jumped from 76,000 to 451,000 per year, sheep exports from 50,000 to 681,000. By the 1910s, no less than 97 per cent of Irish exports went to Britain.[12]

By the early 1900s, Southern Irish industry remained comparatively small-scale – only 130 companies employed more than one hundred employees – and predominantly centred on agricultural processing, brewing, and distilling. Farming accounted for more than half of the population's direct employment and, indirectly, provided the main source of income for Irish towns' and cities' tertiary services. Incorporation into the world-system occasioned an internal peripheralisation as the densely populated, small farm and rundale (common field) plains of Connacht and the western seaboard counties came to provide labour and young livestock for the larger, exporting ranches of Munster and Leinster in the south and east. The Irish banking cartel reinvested the proceeds of the graziers' cattle-trade in the city of London, thereby severely limiting domestic capacities for investment or diversification in both industry and agriculture.

The acceleration of world-systemic incorporation processes, notably land clearance and de-industrialisation, accentuated associated conditions of mass unemployment, emigration, and at times starvation. During the nadir of the Great Hunger (1845–52), more than one million people died from starvation and disease and a further one million emigrated. Ireland's experience of the golden age of liberal capitalism thus anticipated the late nineteenth-century imperial-peripheral famines of India, China, Brazil, Ethiopia, Korea, Vietnam, the Philippines, and New Caledonia, during which some thirty to sixty million people died.[13] Long term, the population of the island of Ireland declined from eight million in 1800 to four million in 1900, a figure that remained unchanged until the late twentieth century.[14] Among European experiences of industrialisation, moreover, the Irish 'flight from the land' (or the export of cheap labour-power to the world-system's

[12] See O'Hearn, 2001, *The Atlantic Economy*, pp. xi, 104, and 114.
[13] See Mike Davis, 2000, *Late Victorian Holocausts: El Nino Famines and the Making of the Third World*. London: Verso.
[14] On the uniqueness of Ireland's population implosion among Western nations, see Lars Mjoset, 1992, *The Irish Economy in Comparative Institutional Perspective*. Dublin: National Economic and Social Council, pp. 62–7. Today, the population of the island of Ireland is approximately 6.5 million, comprising 4.6 million in the Republic of Ireland and 1.8 million in Northern Ireland.

cores) was unique insofar as those fleeing did not go to native cities but rather foreign ones.[15]

Throughout the nineteenth century, the development of core-periphery relations was the subject of intense contestation. Politically, the caste-like quality of landlordism, both in terms of class relations and religious distinctions, was already well established. The landlords and their agents emerged as a powerful and relatively autonomous part of the colonising regime, protecting their interests from tenants (and the landless) primarily through their control of the colonial administration at Dublin Castle as well as their ambiguous political allies at Westminster.[16] Correspondingly, the mass of the working population consisted of agrarian farmers and landless labourers.

The emergent, indigenous capitalist class tended to be rooted in medium- and small-scale enterprise servicing the wider British regional economy. By the early 1900s, the country's major property interests, including banks, graziers, railway companies, breweries, and dairies as well as a newly emerged middle stratum of 'native' owners of small business and medium-sized farms, supported reproducing, deepening, and accelerating these core-periphery linkages. Again, these groups found support in Dublin Castle, notably in its adherence to low taxation and expenditure in order to maintain the integrity of the Irish currency on the gold standard, thereby securing financier/grazier exports of livestock and capital to the City of London. Contesting this class's dominance, an urban, politically organised working class had emerged by the early twentieth century.

In Ireland, as in other (semi-)peripheries, 'anti-systemic' conflict combined both 'social' and 'national' movements, with the latter proving dominant. Not atypically in predominantly agrarian colonies, secret society traditions surfaced whenever inhabitants required physical force to intimidate landlords or their agents into lowering rents, tithes, or other exactions as well as stopping evictions.[17] Secret societies such as the Whiteboys, Defenders, Hearts of Oak, Ribbonmen, and Thrashers tended to remain diffuse in the countryside and organised around local, short-term aims. In contrast, 'national' advocates in urban areas adopted rigid, centralised organisational forms and advocated long-term goals, chiefly Irish variations on the republican and nationalist

[15] Evanne Kilmurray, 1988, *Fight, Starve, or Emigrate*. Dublin: Larkin Unemployed Centre, p. 8.
[16] Slater and McDonough, 2008, 'Marx on Nineteenth Century Colonial Ireland', p. 18.
[17] For a detailed case-study of a landlord's assassination in Co. Roscommon during the Famine, see Peter Duffy, 2007, *The Killing of Major Denis Mahon*. London: Harper.

ideologies then flourishing in the wake of the 1789 French Revolution and the 1848 European Revolutions.[18]

Republicanism in Ireland incorporated radical democratic, secular, and levelling aims. Inspired by the French Revolution and by Tom Paine's defence of its achievements in *The Rights of Man*, the Constitution of the Society of United Irishmen (1797) stated its first aim as 'forwarding a brotherhood of affection and a communion of rights and a union of power among Irish men of every religious persuasion'.[19] In the popular imagination, republicanism came to be associated with labourer and tenant interests in lowering rents, ending tithes, and land redistribution.[20] Again, in the 1840s, the romantic nationalist 'Young Ireland' movement contained articulate intellectuals, notably James Fintan Lalor, who advocated a general rent strike in order to compel land redistribution to the native peasantry.[21] The nationalist movement as a whole, however, tended to emphasise unity around an Irish identity (Gaelic, Catholic, and peasant) that was nostalgic, conservative, and estranging to many Protestants, particularly in the northeast.[22] Social tensions surfaced periodically, but unity in the face of the external enemy countered the articulation of workers', women's, or others' specific interests.

After the Famine and the failed 1848 Rebellion, Irish republicans such as the Irish Republican Brotherhood (IRB; or Fenians) adopted clandestine, militant means to advance their goal of independent statehood for Ireland, at times identifying this goal with a radical social

[18] The French Revolution redounded throughout the capitalist world-system, and changed people's basic conceptions of what politics was about. Over the following century, at least three previously fringe ideas became mainstream: that social change is normal and desirable; that the proper institution to manage the course of social change is the state; and that states receive their legitimacy from an entity known as 'the people'. Immanuel Wallerstein, 1989, 'The French Revolution as a World-Historical Event' in *Social Research*, 56:1, pp. 33–52.

[19] Note that a majoritarian understanding of rights, based on collective solidarity, is advanced here. Without 'brotherhood', 'communion', and 'union', 'every reform of Parliament must be partial, not National . . . and insufficient for the freedom and happiness of this country'. 'Constitution of the Society of United Irishmen of the City of Dublin' in Richard Musgrave, 1802, *Memoirs of the Different Rebellions in Ireland*. Dublin: Parchbank. pp. 231–4, p. 232. Paine's manifesto appeared in Dublin in March 1791, and in eight months it sold 40,000 copies, twice the sales in England. Peter Linebaugh, 2003, 'On the Bicentennial of the Hanging of Thomas Russell'. Available at: www.counterpunch.org/2003/10/21/on-the-bicentennial-of-the-hanging-of-thomas-russell/. See also Ó'Faoláin, 1980, *The Irish*, p. 91.

[20] Nancy Curtin, 1994, *The United Irishmen: Popular Politics in Ulster and Dublin, 1791–1798*. Oxford: Oxford University Press, pp. 119–20.

[21] F. S. L. Lyons, 1973, *Ireland since the Famine*. Collins: Glasgow, pp. 108–9.

[22] Andrew Flood, 2010, 'How not to make a revolution: Young Ireland, the Chartists, and 1848'. Available at: www.anarchism.pageabode.com/andrewnflood/revolution-young-ireland-1848.

programme capable of generating agrarian and working-class support.[23] The Fenian insurrection of 1867, quickly repressed, identified the necessity of a radical mass movement for future republican success.[24] The Proclamation of the Irish Republic (1867) declared the organisation's aims as 'founding a Republic based on universal suffrage, which shall secure to all the intrinsic value of their labour', arguing that '[t]he soil of Ireland, at present in the possession of an oligarchy, belongs to us, the Irish people, and to us it must be restored'.[25] In late nineteenth-century conditions of economic recession, as landlord-tenant conflict on a mass scale escalated, the IRB proved central to landless labourers' and tenants' organising in the Irish National Land League and waging 'land wars', periods of mass direct action against rents and evictions and for land ownership and redistribution. While harbouring radical elements, the Land League and its successor organisations were supported mainly by farmers having usufruct of at least some land, as distinct from the landless.[26]

Over the same period, 'constitutional nationalists', so-called because of their adherence to representative politics in the British parliament, represented a small though growing male, property-owning franchise. The blocked political system administered from London fostered a credibility crisis for the conventional channels for participation in Ireland.[27] Constitutionalists could parley militant forms of resistance to secure concessions on national independence (or 'Home Rule') in the course of negotiations with the metropole. Of the most consequential of these reforms, Daniel O'Connell's securing of Catholic enfranchisement proved essential to the creation of a nationalist, mass party tradition in Ireland.[28] Moreover, between 1880 and 1910, the Irish Parliamentary Party, a disciplined, electoral machine of the

[23] Owen McGee, 2005, *The IRB: The Irish Republican Brotherhood from The Land League to Sinn Féin*. Dublin: Four Courts Press.

[24] On the parallels between Fenian insurrectionary methods and contemporary forms of political violence in Europe, particularly the transition from Blanquism to guerrilla campaigns in Italy, see Niall Whelehan, 2012, *The Dynamiters: Irish Nationalism and Political Violence in the Wider World*. Cambridge: Cambridge University Press, p. 8, pp. 61–2.

[25] 1867 Proclamation cited in Alan O'Day, 1998, *Irish Home Rule, 1867–1921*. Manchester: Manchester University Press, p. 8; for a critique of republican constitutionalism, see Tom Garvin, 2008, 'An Irish Republican Tradition?' in Iseult Honohan (ed.), *Republicanism in Ireland: Confronting Theories and Traditions*. Manchester: Manchester University Press, pp. 23–30.

[26] It was, as Tom Garvin put it, 'a movement dominated by a nascent rural petite bourgeoisie'. 1986, 'The Anatomy of a Nationalist Revolution: Ireland, 1858–1928' in *Comparative Studies in Society and History*, 28 (3), pp. 468–501, p. 479.

[27] Jim Smyth, 'Moving the Immovable', p. 120.

[28] Garvin, 1996, *1922*, p. 190.

Anglo-Irish and Catholic nationalist gentry under the leadership of Charles Stewart Parnell and later John Redmond, negotiated successive Liberal and Conservative governments' regulation and subsequent abolition of the established Anglo-Irish landlord caste.

Anti-systemic struggles and mass mobilisations prompted strategic efforts by the British state and Dublin Castle aimed at Anglicisation, pacification, control, and peripheral reconstitution.[29] A national system of primary education was introduced in 1831 while a Poor Law system, based solely on 'indoor relief' in a network of workhouses, followed in 1838. Land transfer and redistribution, however, paralleling the experience of British India, functioned as perhaps the single most important form of intervention.[30] At the turn of the twentieth century, under the auspices of the Irish Land Commission and Congested Districts Board occurred the wholesale transfer of landlord estates to a newly dominant stratum of 'native' small- and medium-sized owner-occupier farmers. A large 'coolie' class of labourers, however, remained landless and impoverished. The expansion of the Poor Law to include medical treatment, the introduction of old age pensions, and the development of insurance schemes against unemployment and illness marked Ireland's welfare state as advanced in European terms but very narrowly focussed.[31] Social policy interventions thereafter typically concentrated not on distributive (social welfare) or consumption-based (education, health, and housing) policies but on production (land redistribution).[32]

The Catholic Church played an important role both in the development of welfare institutions and in the wider process of conservative pacification. Unlike in continental Europe and the Spanish or Portuguese colonies, the Church in Ireland was not popularly identified

[29] While the 1848 Revolutions unleashed social and national unrest across Europe, no major upheaval hit Great Britain, notwithstanding the presence of well-organised radical forces. The British Tories had discovered 'enlightened conservativism', the granting of minor concessions repeatedly over time to convince sufficient numbers that substantive change was occurring. It proved to be a more effective means of quelling revolt than physical repression. Immanuel Wallerstein, 2014, 'Anti-systemic Movements, yesterday and today' in *Journal of World-Systems Research*, 20: 2, pp. 158–72, p. 159.

[30] Kennedy, 2006, 'Three Globalisations of Law and Legal Thought', p. 36.

[31] Ireland's highly agrarian workforce combined with Church and medical profession opposition to free GP schemes ensured coverage for unemployment and sickness insurance was below average. Mel Cousins, 2005, *Explaining the Irish Welfare State*. New York: Mellen Press, pp. 22–4.

[32] Cousins, 2005, *Explaining the Irish Welfare State*, p. 24. See also Michelle Norris and Tony Fahey, 2011, 'From Asset Based Welfare to Welfare Housing? The Changing Function of Social Housing in Ireland' in *Housing Studies*, 26 (3), pp. 459–69, pp. 460–4.

with the ruling class. On the contrary, it mediated social relations among landlord, tenant, and labourer and asserted its authority to negotiate with the colonial administration on behalf of the native population, some 95 per cent of whom were Catholic. Founded in 1795, the Catholic seminary at Maynooth, Co. Kildare attracted early on clericalist refugees from the French Revolution who advanced a remarkably conservative theology of obedience to the throne.[33] Late nineteenth-century Irish Catholicism was further distinguished from Southern European Catholicism in its deeply conservative ultramontanism, or deference to papal-episcopal authority ahead of secular alternatives.[34]

The growth of secular national and social movements after 1848 prompted Pope Leo XIII's *Rerum Novarum* (1870), a conciliatory encyclical decrying the harsh conditions of industrial work, exhorting owner-worker cooperation as part of the natural order of things and, in the meantime, advocating Christian resignation and respect for public order for the working class.[35] In contrast, outside of the north-eastern counties, which were predominantly Protestant and unionist, organised Catholicism in Ireland was comparatively unchallenged. The Catholic hierarchy's strict policing of the population's sexuality, in particular, existed in a direct affinity with the emerging property regime that demanded consolidation and singular inheritance (primogeniture); 'illegitimate' relationships could spawn confusion over succession rights and rights to land, with potentially disastrous consequences for the preservation of family property.[36]

Politically, the Church's hierarchy, typically drawn from the more affluent farming strata, aligned itself with constitutional nationalism, providing a reservoir of organised labour-power to its advancement. The Church functioned as a conservative bulwark against the articulation of class conflict, opposed militant struggle, and pronounced

[33] Ó'Faoláin, 1980, *The Irish*, p. 105.
[34] See Roy Foster, 1988, *Modern Ireland: 1600–1972*. London: Penguin, pp. 386–7.
[35] The encyclical's chief architect was Luigi Taparelli D'Azeglio, an Italian Jesuit central to the Thomist revival of the nineteenth century. Responding to the industrial revolution as well as the social revolutions of 1848, Taparelli saw in subjective Cartesian thinking the roots of the surrounding conflict between capitalism and socialism. Heralding Thomas Aquinas as the only means to true metaphysics, he advocated 'social justice', thereby coining the phrase, as well as the principle of subsidiarity, according to which each level of society, recognising their respective rights and duties, are to cooperate rationally rather than resort to competition or conflict. See John Moloney, 1991, *The Worker Question: a new historical perspective on 'Rerum Novarum'*. Dublin: Gill and MacMillan.
[36] Hickey, 1999, *Irish Law and Lawyers in Modern Folk Tradition*, p. 141.