CONSTITUTIONAL RIGHT TO PROTEST AND THE FREEMEN ON THE LAND MOVEMENT

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Introduction

This article examines the constitutional right to protest and the limitations which are placed on that right. It then looks at a specific example of a protest group: the Freemen on the Land ("the Freemen") and the ideas underpinning this movement and the manner in which this group is dealt with in court. The Freemen is a disruptive movement which does not recognise the legitimacy of the courts and rejects what might be termed the constitutional consensus. This raises questions in relation to the constitutional right of protest and the extent to which such voices of dissent can be accommodated within a constitutional framework which they regard as illegitimate. Therefore, the very principles which seek to both accommodate and limit such a movement are not recognised by the movement itself.

Constitutional right to protest

While liberty of expression and the right of assembly under the Constitution are protected, both are subject to public order and morality. These rights, like all constitutional rights, must be viewed in light of Article 5 of the Constitution which defines the state as "democratic". Therefore, democratic legitimacy requires the accommodation of views which while awkward do not threaten public order, morality or the authority of the state.

There is a scarcity of constitutional case law in this area. It would appear that where an assembly though lawful in itself, is likely to provoke unlawful activity, it may be curtailed. However, any actions by state actors to curtail such a protest must be proportionate to the threat posed to public order.

Article 40.6.1° states

> The State guarantees liberty for the exercise of the following rights, subject to public order and morality:-
>
> (i) The right of the citizens to express freely their convictions and opinions.
>
> The education of public opinion being, however, a matter of such grave import to the common good, the State shall endeavour to ensure that organs of public opinion, such as the radio, the press, the cinema, while preserving their rightful liberty of expression, including criticism of Government policy, shall not be used to undermine public order or morality or the authority of the State.
>
> (ii) The right of the citizen to assemble peaceably and without arms. Provision may be made by law to prevent or control meetings which are determined in accordance with law to be calculated to cause a breach of the peace or to be a danger or nuisance to the general public and to prevent or control meetings in the vicinity of either House of the Oireachtas.

If a meeting though lawful, is likely to provoke others to commit unlawful acts, that may be sufficient to require its prevention or curtailment.[1] Kelly[2] refers to the Irish text in support of this position "baol briseadh síochana a theacht díobh", the fear or danger of a breach of the peace "coming from them" which appears to envisage a situation in which the meeting itself is not unlawful but it may provoke unlawfulness. Persons who assemble peacefully on the public highway for this purpose are *prima facie* entitled to the benefit of the constitutional guarantee provided pursuant to Article 40.6.1.ii.[3]

Two nineteenth century cases appear to establish that a lawful meeting may be dispersed by force where individuals hostile to its objects threaten a breach of peace though the meeting itself is legal: *Humphries v Connor*[4] in which the removal of an orange lily from the plaintiff was legal where there was risk to public order and *O'Kelly v Harvey*[5] in which a land league meeting was prohibited where there was a threat of violence from a counter-demonstration of Orangemen.

In dispersing an unlawful assembly the police are bound to react in a manner which is moderate and proportionate to the circumstances of the case. In the pre-1937 Constitution case *Lynch v Fitzgerald (No.2)* a protestor was killed by a detective repressing an attempt to disrupt a cattle sale. The Court stated:

> By the law of this country everyone is bound to aid in the suppression of riotous assemblages. The degree of force, however, which may be used in their suppression depends on the nature of each riot, for the force used must always be moderate and proportioned to the circumstances of the case and to the end to be attained.[6]

In *Brendan Dunne v Fitzpatrick*[7] the facts of the case were that the plaintiff furniture store had extended its opening hours leading to protests from other businesses which the Court viewed as constituting picketing. That action of the defendants in picketing the premises of the plaintiff company was not protected by Article 40.6.1° of the Constitution. Budd J. stated that:

> *"The right of the citizens to assemble peaceably and to express their opinions freely are guaranteed only subject to public order and morality. As I read Article 40 the rights are guaranteed only subject to the overriding proviso that in the exercise of such rights public order is not to be disturbed…To my mind, if citizens in the course of an assembly commit a breach of the peace or some other breach of the law, they thereby disturb public order and their actions are not protected by the Constitution in respect of the breach of the law committed.*"[8]

[1] See J.M. Kelly, *The Irish Constitution* 4th ed., 1790.
[2] J.M. Kelly, *The Irish Constitution* 4th ed., p. 1790 (or para.7.5.159)
[3] *DPP v Kehoe* [1983] I.R. 136 at 139
[4] *Humphries v Connor* (1867) 17 Ir. C.L.R. 1.
[5] *O'Kelly v Harvey* (1883) 14 L.R. Ir. 105.
[6] *Lynch v Fitzgerald (No.2)* [1938] IR 382 at 402.
[7] *Brendan Dunne v Fitzpatrick* [1958] IR 29.
[8] [1958] IR 29 at 35

McCarthy J. speaking for the Court of Criminal Appeal in *The People (DPP) v Kehoe*[9], in a case which arose from a violent demonstration outside the British embassy in which Gardaí erected a temporary steel barrier to prevent the crowd from approaching the embassy, stated that:

> *"Clearly, a very large proportion of those taking part in the march were there for the purpose of exercising their constitutional right to express peacefully their social or political opinion. That right is guaranteed by Article 40, s. 6, sub-s. 1(ii), in the following terms:— "The State guarantees liberty for the exercise of the following rights, subject to public order and morality . . . ii. the right of the citizens to assemble peaceably and without arms . . ." [But many were there with offensive weapons] These, as the Court found, were not the accoutrements of peaceful protest"*[10]

Recently, in *Hyland v Dundalk Racing*[11] bookmakers protested outside the entrance to a new horse racing stadium with some protestors carrying placards and with some engaging in jeering and verbal abuse. It was not disputed in this case that the protests were peaceful. It was not suggested that the protests amounted in themselves to breach of the peace or a danger of nuisance to the general public. Hogan J. stated that while patrons attending the race-meeting might have regarded the protestors as a nuisance in the colloquial sense of the term that is not the sense in which the Constitution uses this concept. Nuisance in this sense, the judge stated, refers to activities which make it difficult or impossible for the general public to access amenities e.g. blocking access to a private dwelling or holding late night protests in a purely residential area. Hogan J. stated that the "context and nature of the protest" is also of importance. He stated that the case before him raised the difficult question of where peaceful protest begins and ends and at what point the line between peaceful protest and illegal industrial action is passed.

Hogan J. also drew on the constitutional right of free expression stating at para. 78 that:

> *"In the first place the protestors had a strong interest in communicating their message, especially to the sporting public. They believed – with deep conviction – that they had been wrongly deprived of their contractual rights and that they had been most unjustly treated by Dundalk as a result and that the sporting public would support them if they – the bookmakers – could only inform and educate them in relation to the background facts. These accordingly were views the expression of which were fully was protected by the parallel free speech guarantee contained in Article 40.6.1.i. It followed thus that the protestors had the right to seek to persuade public opinion of the justness of their cause in the sense envisaged by Article 40.6.1 itself: see, by analogy, my own comments to this effect in Cornec v. Morrice [2012] IEHC 376, [2012] 1 I.R. 804 at 818-825."*

Hogan J. also described the protests outside Lansdowne Rd. in 1970 against apartheid era South Africa as the manifestation of constitutionally protected rights of free speech and peaceable assembly. Hogan J. further emphasised the right of freedom of expression in a democratic society in stating at para. 81:

> *"The protestors merely sought for the most part to convey information regarding the background to the dispute. Given that the free exchange of ideas, arguments and views is central to the operation of the democratic State envisaged by Article 5 and is at the heart of the protections of free speech and peaceable assembly contained in Article 40.6.1, the public expression and manifestation of different and dissenting views must - in general, at least - be tolerantly accepted by all."*

[9] *The People (DPP) v Kehoe* [1983] IR 136.
[10] [1983] IR 136 at 139
[11] *Hyland v Dundalk Racing* [2014] IEHC 60; (Unreported, High Court, Hogan J., 19th February 2014).

However, Hogan J. stated at para. 82 that the protests would have been unlawful had there been:

> *"…any effort to dissuade an individual (by, e.g., verbal abuse directed at such an individual) from exercising their lawful right to attend the race meeting would have been plainly unlawful, as would any attempt to interfere with the running of the meeting have been. It would have been likewise unlawful had the protesters committed any acts of trespass or obstructed the entrance to the premises. Here the evidence was that the protesters remained in a public place and it has not been suggested that they committed any acts of trespass on Dundalk's property (or that of other parties) or that they attempted to obstruct any public thoroughfare."*

Hogan J. further stated that the protestors were exercising "core constitutional rights which are at the heart of the free and democratic society guaranteed by Article 5 of the Constitution." However, where protestors had become verbally abusive their conduct was "unlawful" and "depending on the exact language used – might have potentially constituted a breach of the peace."

Hogan J. stated at paras. 87 & 88:

> *"Provided that the protestors otherwise refrained from any overt actions against individuals and the protest remained peaceable and without any acts of trespass and otherwise remained within the law, then if Dundalk had applied for an injunction at the time it would not have been entitled to any such relief, since the core of the protestors' activity was fully protected by the guarantees contained in Article 40.6.1.i (free speech) and Article 40.6.1.ii (peaceable assembly) of the Constitution.*
>
> *Dundalk would, however, have been entitled to have obtained an injunction restraining the use of jeering, insulting language and verbal abuse which was personally directed – and I emphasise these words - at those bookmakers (such as Mr. McCartan) and others who entered the stadium. This does not mean in and of itself that the protest thereby became unlawful. The right of free speech and free assembly are critical constitutional rights and they are vital to the functioning of the free and democratic society posited by Article 5 of the Constitution. The principle of proportionality comes into play here and the right of protest is not to be lost merely because of the regrettable lapses on the part of an undisciplined minority."*

The right of citizens to assemble peaceably and to express their opinions freely are guaranteed only subject to public order and morality[12] The right of assembly may be circumscribed by law where such meetings are calculated to cause a breach of peace or to be a danger or nuisance to the general public or to prevent or control meeting in the vicinity of the Oireachtas.

Persons may be restrained from pursuing a lawful course of conduct because of threatened or actual violence by others. Persons who assemble peacefully in a public place are *prima facie* entitled to the benefit of the constitutional guarantee.[13]

Having regard to the legality of a protest the context and nature of the protest is of importance.[14] The right of protest is also protected by the parallel constitutional guarantee of

[12] *Brendan Dunne v Fitzpatrick* [1958] IR 29.
[13] *The People (DPP) v Kehoe* [1983] I.R. 136 at 139.
[14] *Hyland v Dundalk Racing* at para. 77.

freedom of expression contained in Article 40.6.1.i. Protestors therefore have the right to persuade public opinion of the justness of their cause.

The free exchange of ideas, arguments and views is central to the operation of a democratic State (Article 5) and is at the heart of the protections of free speech and peaceable assembly contained in Article 40.6.1. The public expression and manifestation of different and dissenting views must, in general, be tolerantly accepted by all. Obstructing the entrance to a premises or trespassing are unlawful acts which would render a protest illegal.[15]

Freemen

Freemen dismiss the constitutional consensus and the legal system as a deception perpetrated on a large scale. At the heart of the freemen constitutional framework is the idea that there is a fundamental distinction to be drawn between a natural man or woman and a corporation. When parents register the birth of a child, they are entering a contract with the State to 'sign over the legal title of the baby'. At which point, the child becomes what is referred to as a 'strawman', a fictitious legal entity owned by the State and used as collateral in commercial transactions. Freemen also believe that men and women have the ability to choose which 'law form' they operate under. This state of affairs is thought to be derived from clause 61 of Magna Carta 1215 (a provision omitted from later reissues of the charter). Freemen assert that they are not bound by legislation or commercial law unless they consent. What might be considered lawful demands for example, for payment, to appear in court, to complete the census etc., are merely invitations that may be declined.[16]

Freemen and the Courts

It is widely acknowledged among legal practitioners that "Freemen style arguments" are a relatively common feature of certain types of court proceedings in recent years. The arguments take varying forms, but can essentially be considered a protest against the manner in which the law operates. Hogan J. insightfully described the phenomenon:-

> "*It is, I think, a measure of the desperate straits in which some litigants have found themselves as a result of the collapse in the property market from 2008 onwards that arguments of this kind have been seriously advanced, not only in this case but in other recent cases of the same kind, both here and in other jurisdictions…*"[17]

Trevor Murphy (Solicitor) briefly discusses the Freemen in his article concerning jurisdiction to dismiss proceedings in the superior courts.[18] In relation to the exercise of the jurisdiction to dismiss, he notes that:-

[15] *Hyland v Dundalk Racing* at para. 82
[16] See Andrew Le Sueur, 'Crazy constitutionalism' UK Constitutional Law Association blog, 22 July, 2011, available at: https://ukconstitutionallaw.org/2011/07/22/andrew-le-sueur-crazy-constitutionalism/ (accessed on 17/06/16)
[17] *McCarthy v. Bank of Scotland* [2014] IEHC 340, para.9.
[18] To Strike or not to Strike? A Review of the Jurisdiction to Dismiss Proceedings in the Superior Courts" (2014) 2 C.L.P. 33

> "*[i]n particular, the jurisdiction has been invoked in the context of litigation brought by certain borrowers—in financial difficulty—against some financial institutions where the plaintiff borrowers allege that they do not owe any monies under the relevant loan agreements. This may be on the basis that the particular lending institution was allegedly involved in the "creation of currency" or that the loan was allegedly the subject of a "money for nothing scheme" and is therefore unenforceable as against the borrower. Such claims are being advanced despite the plaintiff borrowers not denying that they received the loan monies, so their position is somewhat paradoxical and difficult to reconcile with the reality of the situation.*"

In *Freeman v. Bank of Scotland* (Unreported, High Court, Gilligan J., 31 May 2013) Gilligan J. acknowledges that the "creation of currency" argument resembles the "money for nothing schemes" discussed in the Canadian case of *Meads v. Meads*[19], and notes the increasing prevalence of such arguments since the economic crisis. In *Freeman v. Bank of Scotland*, Gilligan J. held that such arguments are "frivolous, vexatious and bound to fail".

In May 2013, Dunne J. made an order of committal for contempt of court against a bankrupt individual for failure to cooperate with the official assignee in bankruptcy. As reported in the Irish Times: -

> "*[Mr. Cullen] repeatedly told the judge he did not recognise the court or the Official Assignee in bankruptcy as having any jurisdiction to deal with him unless he was treated under the title, 'Francis, of the family Cullen'.*
>
> *If given that title, he indicated he would proceed to argue the court had no authority to deal with him and he was subject to a "superior court".*"[20]

The newspaper report of the hearing goes on to note that Mr. Cullen stated he was "'a private, sovereign person" who did not consent to being before the court and did not recognise it as having jurisdiction over him.' Given his failure to cooperate, Dunne J. felt there was no option but to hold him in contempt.

In an article appearing in the April 2012 edition of the Law Society Gazette, Keith Rooney B.L., argues that while the "Freemen on the land" ideology may appear harmless, it is a growing cause for concern and is an issue which requires a "strong declaration" from the superior courts. He describes the ideology of the "Freemen" and outlines their approach to the courts and "policy enforcers", ultimately concluding that the approach of the "Freemen" is "delusional".

There is much criticism of those seeking to impart the ideology of the Freemen unto persons in vulnerable situations. Fiona Gartland of the Irish Times describes the "Freeman on the land" movement as one of a number of philosophies which has "sprung up" in recent years.[21] Andrew Robinson B.L. was quoted in the article as saying:-

[19] 2012 ABQB 571. This is the seminal case on dealing with the Freemen and their arguments before the Canadian Courts. It operates as a strong reference tool across jurisdictions.
[20] Irish Times, 15th May 2013, 'Bankrupt businessman sent to Mountjoy for another six months'.
[21] Irish Times, 17th May 2013, 'Lawyers advise against use of groups claiming 'secret formula' to circumvent law'.

> "*To hold yourself out as knowing some kind of secret formula and something about the legal system and then to take a vulnerable person who is facing losing their home or getting a judgment against them and to purport to tell them how they can conduct themselves in court is an appalling thing.*"

It is stated in an article by Derbhail McDonald in the Independent (24th October, 2013) that there were over 100 cases in the previous year in which borrowers used versions of "Freemen" arguments to resist possession by receivers and banks. Gavin Simons, a partner in AMOSS solicitors, was quoted in the same article as saying that "pseudo legal" advisers were doing borrowers more harm than good as "[t]hey profess to have a secret legal remedy that the legal world knows nothing about".

Andrew Le Sueur, of the UK Constitutional Law Association, argues that it is time to take the movement seriously rather than dismissing it as "pseudo-legal woo". He comes to this view in the light of the increasing prevalence of the group and in particular points to events in Birkenhead County Court on the 7th March, 2011 (several hundred freemen stormed the court in an attempt to arrest the judge). Mr. Le Sueur proposes an approach for moving forward:-

> "*A starting point needs to be research into the phenomenon, its impact on public administration and the rule of law. It would be interesting to know whether HM Court and Tribunal Service keep records of hearings disrupted by freemen of the land tactics and what, if any training, magistrates and other judges receive in dealing with freemen*."

He dismisses a strategy advocated by Sunstein and Vermeule ((2009) 17(2) The Journal of Political Philosophy 202) that would use government agents to infiltrate and introduce some "cognitive diversity in the groups that generate conspiracy theories". But suggests that academics and legal professionals – as concerned citizens – should dip into them now and then, to ask some challenging questions and state some facts.[22]

There is of course the possibility that a legitimate legal point may be present somewhere in the "Freemen" style arguments put before the court. While the presentation by the litigant for all intents and purposes may appear to be a "Freemen" protest argument, it may be the case that the litigant has a valid point of law to argue hidden among the convoluted language presented to the court. It is for this reason that the court will, and should be, cautious to dismiss off hand any Freemen litigant.[23] However, where a legitimate legal argument succeeds, the courts are careful to point out that it is that argument which has succeeded and not any "Freemen" style argument.[24]

[22] Andrew Le Sueur, 'Crazy constitutionalism' UK Constitutional Law Association blog, 22 July, 2011, available at: https://ukconstitutionallaw.org/2011/07/22/andrew-le-sueur-crazy-constitutionalism/ (accessed on 17/06/16)

[23] For a discussion of this issue see Tomás Keys, 'Freeman on the Land and Other Organised Lay Litigant Groups – Part 1' (2014) 21 C.L.P. 230, p.233.

[24] See judgment of McGovern J. in *Leeds Building Society v. Brady* [2014] IEHC 346.

Guidance

The most comprehensive guidance on the issue of dealing with the Freeman on the land movement from another jurisdiction is present in the Canadian decision of Associate Chief Justice J.D. Rooke in *Meads v. Meads*[25]. This decision provides a very detailed analysis of what is termed "Organized Pseudo-legal Commercial Argument Litigants" ("OPCA"), encompassing the group – the freeman on the land. Information on the ideology, identity, arguments and approach of the various groups is outlined, followed by a suggested approach which the judiciary and legal profession should, or could, take in dealing with such groups or persons. Associate Chief Justice J.D. Rooke suggests, *inter alia*, that materials that do not conform with required standards could be rejected, or marked as "received" rather than "filed". He states that it may be appropriate that a court adopt specific in-court and security procedures in response to persons who are suspected OPCA litigants in circumstances where there is the potential for court-room threats and disobedience.

Associate Chief Justice J.D. Rooke made an order, in one particular case, allowing public entry, subject to a search and removal of prohibited electronic recording equipment prior to entry. He notes that certain behaviour may constitute contempt of court and it is open to the court to make such orders. He further suggests that a court may

> strike out or dismiss an action, a commencement document or pleading as frivolous, irrelevant or improper or an abuse of process;
>
> strike out a proceeding based on incomprehensible arguments and allegations, where the defendant is "left both embarrassed and unable to defend itself" and the court faces "a proceeding so ill-defined that it is unable to discern an argument, or identify any specific material facts";
>
> apply punitive damages; order cost awards to compensate a party against portions of claim that relate to OPCA concept or argument;
>
> have a single judge preside over the action to ensure effective management of OPCA arguments;
>
> utilise Isaac Wunder orders where relevant;
>
> deny "gurus" (a person influencing or leading the freeman on the land) from acting as representatives or agents, in court;
>
> provide an explanation of court costs, and the court's contempt authority so that it may challenge the belief that there are no potential negative consequences to their adopting OPCA techniques and strategies.

Many of the above recommendations are both relevant and utilised in an Irish context. In a very detailed and pertinent article by Tomás Keys BL, he outlines some practical guidelines for practitioners faced with Freemen arguments, such as reminding the court of the role of a person assisting a lay litigant, and providing assistance to the court with regard to separating the Freemen style arguments from those which may have merit.[26]

[25] 2012 ABQB 571

[26] Tomás Keys, 'Freeman on the Land and Other Organised Lay Litigant Groups – Part 2' (2014) 21(11) C.L.P. 256, p.261-2.

Conclusion

The free exchange of ideas, arguments and views is central to the operation of a democratic state and is at the heart of the protections afforded to free speech and peaceable assembly contained in Article 40.6.1. While the rational basis of arguments of dissenting groups may be challenged, the public expression and manifestation of different and dissenting but deeply held convictions must, in general, be tolerantly accepted by all. However, verbally abusive behaviour or acts of trespass or nuisance are not afforded constitutional protection and may be deemed unlawful. Article 40.6.1 is underpinned by principles of both accommodation and limitation. An assembly which itself is lawful may nonetheless be curtailed if it is likely to lead to unlawful activity and freedom of expression and assembly are subject to public order and morality.

If an individual is disruptive during court proceedings and refuses to recognise its legitimacy, such an act or expression may still be viewed as the free expression of a dissenting view requiring a certain level of constitutional protection. A dissenting view may require constitutional accommodation but also limitation when such views threaten public order or morality. The refusal to accept constitutional norms is a view which itself may require constitutional accommodation. Court procedures seek to find a method of maintaining order in the face of dissenting and disruptive groups, such as the Freemen, based on the circularity of constitutionally accommodating irrational voices which view such constitutional rights as illegitimate. The constitutional limitations which apply to such dissenting voices are not based on a requirement of rationality, but rather order, morality and lawfulness.