Legislative Council

Tuesday, 5 August 1980

The DEPUTY PRESIDENT (the Hon. V. J. Ferry) took the Chair at 4.30 p.m., and read prayers.

PRESIDENT OF THE LEGISLATIVE COUNCIL

Absence

THE DEPUTY PRESIDENT (the Hon. V. J. Ferry): In occupying the Chair today I do so in the capacity of the Deputy President, and I advise that the President (the Hon. Clive Griffiths) is at present indisposed and is recuperating in hospital.

I am sure all members join with me in wishing him a speedy recovery to good health.

QUESTIONS

Questions were taken at this stage.

DEPUTY CHAIRMEN OF COMMITTEES

Election

THE HON. I. G. MEDCALF (Metropolitan—Leader of the House) [5.02 p.m.]: I move, without notice—

That, in accordance with Standing Order 35, the following members be elected to act as Deputy Chairmen of Committees for the present session: the Hon. R. J. L. Williams, the Hon. T. Knight and the Hon. R. Hetherington.

Members will appreciate the obvious need for this requirement to be attended to as a matter of urgency in view of the absence of the President due to ill-health.

Question put and passed.

COMMITTEES FOR THE SESSION

Election

THE HON. I. G. MEDCALF (Metropolitan—Leader of the House) [5.04 p.m.]: I understand there is a need for one of the committees to hold a meeting as early as possible and I have therefore been requested to place the matter before the House for early consideration by members. Therefore, I move, without notice—

That, in accordance with Standing Order 38, the following members be elected for the present session—

(a) Standing Orders Committee—the Hon. R. J. L. Williams, the Hon. T. Knight and the Hon. R. Hetherington;
(b) Library Committee—the Hon. W. R. Withers and the Hon. R. Hetherington;
(c) House Committee—the Hon. A. A. Lewis, the Hon. R. J. L. Williams, the Hon. L. D. Elliott and the Hon. R. T. Leeson;
(d) Printing Committee—the Hon. H. W. Gayfer and the Hon. F. E. McKenzie.

Question put and passed.

PARLIAMENTARY SUPERANNUATION FUND

Appointment of Trustees

On the motion by the Hon. I. G. Medcalf (Leader of the House), resolved—

That, pursuant to the provisions of the Parliamentary Superannuation Act, 1970-1976, the Legislative Council hereby appoints the Hon. V. J. Ferry and the Hon. N. E. Baxter, to be Trustees of the Parliamentary Superannuation Fund.

ADDRESS-IN-REPLY: SECOND DAY

Motion

Debate resumed from the 31 July.

THE HON. P. M. DOWDING (North) [5.08 p.m.]: I wish to address some remarks to this House and I shall preface them by expressing to my electors my thanks for placing their trust in me and electing me to this Parliament. I am certainly very proud to represent the north of the State as one of its members of parliament. I have a firm interest in all affecting the north.

Some issues which affect that area also affect the rest of the State and indeed the whole country, and I wish to address some remarks to those issues, or at least to one of them. I propose to observe the traditions of this House and speak

in a non-controversial manner, but I wish to speak on a most important subject which we would all profess to have dear to our hearts. That subject is democracy.

The Right Hon. Lord Hailsham of Marylebone, who was formerly Quinton Hogg, spoke at the Sir Robert Menzies Oration in 1978. Those people who are skilled in the art of ranking people as left wing or right wing would be unlikely to place Lord Hailsham in the same category as myself; however, I am happy to adopt some of his remarks in relation to the essence of democracy. He drew a distinction between two types of democracy.

Lord Hailsham said that the first asserts the right of the bare majority to do what it will; that it is proper for a majority to impose on the entire community whatever structures or laws it pleases, guided only by what it concedes to be the general good.

He then proposed that the second denied that right. He said it asserts that minorities and individuals have rights and interests which cannot be overidden by the majority, however large, and he went on to claim that all government, whether popular or authoritarian, is subject to inherent limitations which it can ignore only at its peril. He went on to adopt the second democratic definition as the one of a true democracy.

The point he made was that the essence of a democracy is an acknowledgment of the rights of individuals and the rights of minority groups where the beliefs held by the minority or the individuals do not coincide with the beliefs, interests, or views of the majority.

This issue is of the utmost importance, both in my electorate and in the wider Australian context. Of course, it is very relevant in a number of particular areas and I shall refer firstly to the freedom of assembly.

This freedom has been defended in various works as an ancient and basic right. In the Supreme Court of the United States in the case of Hague v CIO, Mr Justice Roberts said—

> Wherever title of streets and parks may rest they have immemorially been held in trust for the use of the public and time out of mind have been used for purposes of assembly, communicating thoughts between citizens and discussing public questions. Such use of streets and public places has from ancient times been part of the privileges, immunities, rights and liberties of citizens.

It is conceded that the rights of assembly are not absolute, but are subordinate to other principles that guide the community. This is reflected in international laws such as the International Covenant on Civil and Political Rights, to which, incidentally, Australia is not a party. Article 21 reads as follows—

> The right of peaceful assembly shall be recognised. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order, for the protection of public health or morals or the protection of the rights and freedoms of others.

This is reflected further in article 20 of the Universal Declaration of Human Rights which states, "Everyone has the right to freedom of peaceful assembly and association."

It is important to us in this State and, indeed, in the Commonwealth of Australia to note that there is no constitutional or legislative protection given to the right of peaceful and lawful assembly. This contrasts dramatically with constitutions of other countries, including the Constitution of the United States of America and, perhaps less well known, the Constitution of Denmark. Section 79 of the latter Constitution states as follows—

> Citizens shall without previous permission be at liberty to assemble unarmed. The police shall be entitled to be present at public meetings. Open air meetings may be prohibited when it is feared that they may constitute a danger to the public peace.

I am prepared to concede that mere constitutional enactment does not ensure freedom of expression or freedom of assembly; nevertheless, I would urge that there needs to be a clear statutory recognition in every democratic country of the rights of assembly, of freedom of speech, and of all the democratic rights that are important in a democracy.

The debate becomes somewhat clouded when one moves to consider the limits to the exercise of these rights. I remind members of the international covenant which defines the limits to that freedom as being those which are necessary to democratic society in the interests of national security, public safety, or public order. The emphasis is on the word "necessary".

For a very detailed academic work on this subject, I would refer to the joint Nobel Prize winner (Mr F. A. Hayek) who stated—

> The ultimate justification of the confirmative power to coerce (and I interpolate here to coerce in the sense of preventing the freedom of gathering) is that

such a power is required if a viable order is to be maintained and that all, therefore, have an interest in the existence of such a power. But this justification does not extend further than the need.

Again, it is an emphasis on the need to ensure the protection of society.

Need is not synonymous with mere inconvenience; need is not synonymous with temporary inconvenience; and need is not synonymous with inconvenience to traffic patterns or other movements of people. It is an essential protection in democracy that legislation, rules, and powers to coerce should protect a minority and protect the right of that minority peacefully and publicly to express its views.

If outside the provisions of the controversial Police Act one looks at the Western Australian position on unlawful assembly, one finds in the Criminial Code a number of sections which amply cover the position, and sections 62 to 65 make provision for limits to the freedom of assembly.

Section 62 provides that when three or more persons, with intent to carry out some common purpose assemble in such a manner, or being assembled, conduct themselves in such a manner as to cause persons in the neighbourhood to fear, on reasonable grounds, that the persons so assembled will tumultuously disturb the peace or will by such assembly needlessly and without any reasonable occasion provoke other persons tumultuously to disturb the peace, they are an unlawful assembly.

The emphasis in that expression of an offence is, of course, the fear upon reasonable grounds as to the likely result of the gathering.

The Criminal Code then goes on to provide that when an assembly becomes unlawful the persons there gathered are guilty of a misdemeanour. When the unlawful assembly begins to act tumultuously, it is called a riot and the offence is again a misdemeanour, with increased penalties. When persons remain after the proclamation of a riot and the order to disperse has been given, the offence of remaining is serious and carries a penalty of 14 years.

It is clear that in those provisions ample protection is provided for a community and that they take account of the need that a democratic society has to protect itself. However, it is difficult to justify any further provisions which seek to interfere with the right of public or private assembly, particularly when that legislation inhibits any impromptu, peaceful assembly, and, secondly, it proscribes as unlawful conduct any peaceful assembly without prior permission having been obtained. This is a situation which might be compared usefully with the United Kingdom from whence we regard ourselves as drawing much of our legal inspiration and our statutory material. In 1936 in the United Kingdom an Act was passed which provided for certain conduct in relation to public processions. I might say that normally one would expect that conduct which proscribes processions or inhibits processions might be more forcefully expressed and more limited than Statutes which are merely designed to prevent the gathering of three or more persons in a public place without a procession.

Under the United Kingdom Public Order Act of 1936 the Parliament of Westminster allowed the situation of public processions and proscribed in the laws those processions only if the police powers were insufficient to prevent a serious public disorder; then only on the motion of the chief police officer of the district; then only with the approval of the local authority; and then only with the approval of the Secretary of State. At all times the situation is subject to judicial review.

It is worth while reflecting for a moment that in 1936 in England there was serious public disorder. Mosley's men were marching in the area, and in Germany there was a rise of Naziism. No doubt in the minds of English Westminster parliamentarians was a very real concern that the fabric of society was being threatened by these processions; but the responsibility of the true democratic country was to introduce those provisions which are in marked contrast to the laws of this land.

In this land the police powers to ban public assembly or procession are absolute. There is no judicial control of those powers and the powers are very much limited compared with those provided in the English legislation under which such assemblies and processions can be banned only if the police powers are insufficient to prevent serious public disorder.

In this State we have the provision in legislation that "public nuisance" is a ground for the banning of an assembly or a procession. An obstruction that is too great or too prolonged in the view of the relevant officer of police is a ground also. As I have said such provisions do not have any judicial review. It is my respectful submission that the real danger to democracy in this State is that there is a move afoot to inhibit the rights of a minority to express its point of view.

Mr Justice Hope, before he took on that judicial office, in a booklet called *The Right of Peaceful Assembly* stated—

> There should be positive rights, including those to distribute pamphlets and to hold public meetings and restrictions on those rights should be whittled down to a minimum.

He favoured a system of controlled processions and meetings attained by advance notification, but, as in the United Kingdom, the onus would be on the police to justify any prohibition.

In making my submissions, I recognise that there is a great responsibility resting on those who seek to exercise the freedoms, and I acknowledge that the need to protect and respect the rights of peaceful assembly and procession rests on those exercising it, as it does on those seeking to control it. However, with respect I say that the current views exemplified by amendments to Statutes in this State can do nothing to assist in the adoption of the necessary fundamental approach to the existence of those rights.

This is not a trivial or unimportant matter and I believe it represents the essence of a democratic system.

I raise these matters in my speech to this House in the Address-in-Reply debate particularly because of the remarks made by the Hon. John Williams when he moved the Address-in-Reply. With all due respect to his desire to place those who disagree with the majority in the category of criminals or persons worthy of disapprobation, those comments smack more of policies one might expect perhaps from the USSR or Mr Brezhnev or Mr Kosygin, than a democratic Government, and I strongly disapprove of them.

THE HON. P. G. PENDAL (South-East Metropolitan) [5.24 p.m.]: In speaking in this House for the first time I do so with a deep sense of pride, tempered with a sense of responsibility; but also with a sense of gratitude to the people of South-East Metropolitan Province who have sent me here. I hope that in the six years I have ahead of me as their representative here, I will discharge my responsibilities to their advantage and to my honour.

It seems customary, or perhaps even obligatory, for a member of this Parliament of my political persuation to speak at some time during his life here on the time-honoured subject of Commonwealth-State relations. I consciously made it the subject of my maiden speech to underscore its importance in my own thinking. However, I would like to feel that in discussing the matter here today I am not merely raising the problems, for they have been raised and canvassed on many occasions in past years. Rather, it is my intention to put forward what I believe to be some of the concrete solutions to certain of the problems facing the federation of Australia right now.

In my estimation, the state of the federation, which is now 80 years old, is one of serious disarray. Again, in my estimation, that position is likely to deteriorate unless some fairly fundamental changes are made. Without those fundamental changes, and without their being made quickly and effectively, the federation is bound to collapse within a generation.

I begin with the simple premise that such a collapse would be both antidemocratic and, indeed, anti-Australian. I base that assertion on the historical fact that it was the Australian people, by democratic action, who voted in favour of a federation. Simply put, the Australian people voted to have legitimately the best of both worlds; that is, they sought to gain a national identity by permitting a central Government to discharge those functions which could best be done centrally or nationally, while at the same time they—that is, the Australian people—voted to have the State exercise those existing and future functions which could be best discharged on a State-by-State basis.

One does not need to be a constitutional genius to know that almost immediately after its creation the federation began to develop along lines which were quite contrary to the wishes expressed by the voters.

One of the best commentaries in this regard comes from the authors of *Federalism in Canada and Australia: the Early Years*. At page 289 they state:

> Within 14 years of their creation both the Canadian and Australian federations had actually moved significantly away in practice from the apportioning of powers and responsibilities between the centre and the units that had been arranged by the countries' respective fathers. Yet in neither case had the formal constitution of the two sister federations been markedly altered.

That breach of faith—and I believe it does amount to that—with the Australian people is as apparent today as it was when those words were written. Ironically the breach of faith implied in that comment may well provide the mechanism for a healthier federation in the years ahead, for if earlier Governments were responsible for a swing away from a proper apportioning of powers without constitutional amendments, then it stands to reason that a swing back to a true federation also can be achieved without constitutional change.