

# The Right of Peaceful Assembly

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The C.C.L. was established in October, 1963. Its aims are to take up and investigate matters involving freedom of speech, publication, assembly and organisation, as well as police conduct, censorship, immigration and naturalisation and arbitrary discrimination and deprivation of liberty of all kinds.

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## THE RIGHT OF PEACEFUL ASSEMBLY

### THE RIGHT

Before one can make sensible comments about a right such as the right of peaceful assembly, one must make a number of assumptions. One must do this because the right does not exist in a vacuum and cannot be discussed in a vacuum. The first and most obvious assumption that one has to make is that the society in which the right is to be enjoyed is a democratic society. One must next make assumptions as to the basic nature of a democratic society. It is clearly not good enough simply to say that it is a society where the will of the majority prevails; presumably at the height of Hitler's power, the majority of German citizens supported the actions of their Nazi government. Nor is it good enough to say that a society is democratic if its leaders are elected in a democratic manner. No doubt a truly democratic society cannot exist without a system of free elections, but such a society could nonetheless establish what in fact is a tyranny. A police state is nonetheless a tyranny because the majority of citizens approve its actions.

A democratic society must be one where, in addition to the procedure of free elections, the society recognizes certain essential freedoms as basic. No doubt the right to personal freedom is the most important, but after this freedom, the freedom to express and disseminate whatever opinion one has, and to join with others in the public expression of that opinion, must be the most basic in a democratic society. Like the right to personal freedom, these freedoms cannot be unlimited. The right to personal freedom is necessarily subject to the right of society to preserve the security of itself and of its members, and the freedom of speech and of assembly must likewise be subjected to some limitations. Whatever may be the precise nature of those limitations, they cannot simply be based on the fact that the views expressed are those of a minority,

or that a public assembly to express those views will create a strong reaction in the majority. It has been said, and rightly said, that a function of free speech under a democratic system of government is to invite dispute, and free speech may best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Assuming the general right, the nature of the justified limitations is an important and difficult problem.

For modern society, the mere determination of these limitations is not enough. Calm and disinterested decisions as to what rights of demonstration shall be allowed, and what limitations shall be imposed on those rights, are somewhat beside the point when police and demonstrators are battling it out in the streets. In an age when all standards are questioned, and no one can rely upon a continuation of traditional attitudes, the organization of demonstrations, and their handling by the appropriate authorities, become matters of critical importance. Indeed, it may not be going too far to say that the survival of Western democracies as we know them may depend in the last degree on the successful resolution of these problems.

I will not here seek to support the assumptions I have made. Few people would deny that in general terms, a democratic society must involve freedom of speech, and a freedom to assemble to express and impart opinions, and where relevant to criticise the government. It is true that in Australia these basic democratic rights have no affirmative legal basis, and no constitutional guarantee. Nevertheless, they are generally assumed. Indeed, Australia has committed itself to them internationally.

The *Universal Declaration of Human Rights* of 10th December, 1948, which Australia enthusiastically supported, contains in Article 19 a statement of the right to freedom of opinion and expression, and in Article 20, a statement of the right to freedom of peaceful assembly and

association. These rights are also to be found in the International Covenants on Human Rights of 16th December, 1966, for the adoption of which Australia voted in the General Assembly of the United Nations, although it has not as yet ratified them. The rights to freedom of opinion and expression and of peaceful assembly are to be found in Articles 19 and 21 respectively, and in these Articles it is pointed out that the rights carry with them special duties and responsibilities and are therefore subject to restrictions. These restrictions are stated to be those which are necessary in the interests of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others. Assuming then that the right of assembly, involving as it does a right of freedom of expression and opinion, is a basic right in a democracy, where stands Australia?

### THE LAW

Typically enough, Australian law does not deal with these basic rights positively. There is no law and no constitutional guarantee that you have a right of freedom of speech or have a right of peaceful assembly. The existence and extent of these basic rights is to be inferred from restrictive rules; one must look to see what you cannot do, and then assume that you have a right to do what is not negated. A mass of legislation now covers these fields, but one must start with the common law. And the common law, which is still the basis of the relevant law, deals with the matter in a singularly unsatisfactory way. An assembly, be it a procession or a meeting, is of course unlawful if its purpose is to incite violence. This is fair enough, for no society can by its rules approve an assembly which sets out to create violence. But the law goes further. No matter how peacefully a procession or meeting is conducted, it will be unlawful if the natural or necessary consequence of the very holding of the assembly is to produce a breach of the peace, or to give rise to a reasonable ground to fear that a breach of the peace will be committed. And that breach

may not be committed by a person participating in the public assembly; it may be committed by someone who disagrees with the views which are being expressed at the public assembly.

Two of the cases cited in Campbell & Whitmore's book *Freedom in Australia*, at page 116, are good examples of the law in this regard. In the first case, *Beattie v. Citibanks* (1882) 9 Q.B.D. 308, officers of the Salvation Army were arrested and prosecuted for holding an unlawful assembly. It had been the practice of the Salvation Army to hold meetings in the town of Weston-Super-Mare, and an organization which called itself the Skeleton Army was established, and attempted to break up these meetings. The local magistrates issued a notice calling on all persons to desist from assembling in the streets and so causing breaches of the peace. The Salvation Army refused to accept this ruling and continued with their meetings and processions. On appeal, the right to hold the processions and meetings was upheld, it being pointed out that it had not been the intention of the Salvationists to cause a breach of the peace, and that this was not the natural or necessary consequence of their acts. The acts of the Salvation Army did not become illegal because another organization had determined unlawfully to prevent the Salvationists exercising their legal rights.

On the other hand, in *Wise v. Bunning* (1902) 1 K.B. 167, Wise conducted what he called a Protestant crusade in Liverpool, and bedecked himself with beads and carried a crucifix. He made remarks about the Catholic faith which were insulting to Catholics, and the result was something in the nature of a riot. Wise had not himself committed any breach of the peace, and he warned those present at the meetings not to do so. Nonetheless his conviction was upheld, as the natural and necessary consequence of his conduct was to cause breaches of the peace, and indeed it seems that it was held that it was the intended consequence

of his conduct.

Although one can appreciate the decision in each case and the distinction that was made, it can readily be seen how unreal the distinction in practice may be. Is a public meeting to become unlawful because others regard statements made at it as insulting to their own views? The extent to which this law can go can be seen in some extreme cases in recent years in Ireland, where some Jehovah's Witnesses have been held to have acted unlawfully simply because they publicly preached their faith in Irish villages. One feels that the Salvationists would not have been successful in *Beattie v. Gillbanks* if their beliefs or organization had been less acceptable. Indeed later decisions seem to establish that a meeting can be broken up by the police if they have a reasonable apprehension that a breach of the peace will occur, even though that breach may be a reaction against or the result of views quite lawfully expressed at the public meeting. Moreover, the right of the police to break up the meeting is not limited to cases where it is held on a public road or other public place; the right exists even where the meeting is held in a private building.

### **OBSTRUCTION OF TRAFFIC**

The common law upon the subject of public meetings has become less important nowadays, because of the enactment of statutory provisions and regulations which fetter or restrict the right in a variety of ways. In the first place, the obstruction of traffic, whether vehicular or pedestrian, is prohibited by a great number of statutes and regulations. Public meetings are normally held not merely to state or discuss a viewpoint, but to draw public attention to it, and this is an entirely proper use of a public meeting. Indeed such a meeting is often held by people who are otherwise denied the use of newspapers, television or other means of disseminating their views. The right of such people to hold a meeting to ventilate their views may be worthless if the meeting must be held in some

private hall, or in some backstreet where no member of the public will see or hear them. On the other hand, if the meeting is held in some street or public place where there is vehicular or pedestrian traffic, almost inevitably there will be some obstruction of that traffic. Without more, and no matter how lawful the meeting or procession might otherwise be, an offence is committed, and the participants may be arrested by the police. In this, as in many other cases, the police act selectively. In any Australian city, cases can be seen of groups of people obstructing pedestrian or vehicular traffic where the purpose of the group is one which has common approval. Charges of obstruction never result from situations such as this. If on the other hand, the purpose is one which does not have that approval, charges of obstruction often result.

The holding of processions through public streets is often regulated in other ways than by the law as to the obstruction of traffic. In Sydney, Section XII of the Regulations for General Traffic, made under the Metropolitan Traffic Act, provides that no procession other than for funeral purposes shall parade or pass along any public street, and no person shall join or take part in any such procession, unless and until the consent in writing of the Commissioner of Police has been obtained, and then only at the time and by the route specified in that consent. It has been held that this power can only be used for the purposes of regulating traffic: *Ex parte Kaye* 10 S.R. (N.S.W.) 350; but the very nature of a procession, which must obstruct traffic, means that this basic democratic right is completely within the control of the Commissioner, and without any right of appeal or review. Elsewhere in New South Wales, the right to hold processions may be regulated by councils pursuant to the provisions of Section 249 (q) of the Local Government Act, and again without any right of appeal or review. These provisions are much more restrictive than the more publicized provisions operating in Brisbane, where the

law does give a right of appeal to a magistrate. Even if consent for a procession or demonstration is obtained, a variety of other laws might incidentally be infringed by the participants. Thus the contents of placards might well be found offensive, and constitute offensive behaviour. A somewhat extreme example of this was the case of the youth who was paddling a surfboard in Sydney Harbour during the visit of Air Vice-Marshal Ky, and was convicted of offensive behaviour because it was considered that the contents of a placard he was carrying were derogatory of the visitor.

### **DISTRIBUTION OF LEAFLETS**

A right which is obviously ancillary to the right of public assembly is the right to distribute pamphlets and similar literature. The purpose of the assembly is to bring public attention to some matter claimed to be of public interest, and the obvious way in which to inform onlookers what the assembly is all about is to hand literature to them concerning it. This right is one again which is restricted by regulation. The position which obtained in Melbourne until recently is well-known. In New South Wales, Section 249 (u) of the Local Government Act empowers councils to control and regulate, and indeed prohibit, the distribution of handbills and the like in the interests of preventing litter. There is an Ordinance operating in the City of Sydney and in the areas of other councils regulating such distribution, which is selectively, but fortunately seldom, enforced.

When one looks at the law in Australia in relation to the right of public assembly, and I have taken the law in New South Wales as a sample because it is best known to me, it is seen to be, in form, restrictive to an intolerable degree. What should be a right turns out to be entirely dependent upon the uncontrolled and unreviewable discretion of some official or other, the exercise of the discretion often being based on a selection of causes as being good or bad. In fact, in Sydney, the discretions have been exercised fairly

liberally, and scores of processions and public meetings of one kind or another are held with the approval of the Police Commissioner, and every variety of handbill is distributed without let or hindrance, and without prosecution. These circumstances — depending as they do upon the attitudes of individual officials — cannot justify the restrictions. No one would support a law which made the right to vote dependent upon the discretion of some official, even though that official generally exercised his discretion in a benevolent fashion. The right of public assembly should be a right restricted no more than the needs of the community absolutely require. Undoubtedly many people will be inconvenienced by the exercise of the right; most drivers in Sydney will at some time have complained bitterly about a procession which has held them up. Nevertheless a proper balance of a community's needs must involve a recognition of the right of groups of people to demonstrate, and the community's rules should be moulded accordingly.

### **REFORMS NECESSARY**

To achieve a proper balance in Australian law in relation to public assemblies, two kinds of reform are necessary. The first is a constitutional guarantee along the lines of the *Universal Declaration of Human Rights*, or the American Bill of Rights. I will not pursue this course now, for it is clear that if there are ever any substantial constitutional guarantees in Australia it will not be for quite some years, and the problem requires a much more urgent attention. The second kind of reform is a restatement of State and Territorial laws on the subject. I would suggest that this restatement should be of two kinds. The rights involved should be stated positively, and not simply left as something to be inferred from a lack of restriction. The rights being so stated, the restrictions, if any with which those rights are to be qualified, and the enforcement of those restrictions, should be carefully considered, and the

right should not be whittled down further than is absolutely necessary.

Thus there should be a positive right to distribute leaflets of a political or similar nature, with no restrictions other than those applying to literature generally, as, e.g., under the law of defamation. In particular, no restrictions should be imposed on the ground that the handing out of the leaflets will or may cause litter on a public street. No one would dream of prohibiting "how to vote" cards outside polling booths because of the litter they cause; the litter is something that is readily cleaned up and is a necessary concomitant of democratic elections. Likewise the litter caused by other leaflets is a small enough price to pay for the right to bring to public attention complaints or criticism of governmental policy or action.

The right to public assembly should likewise be positively stated, and any restrictions should be realised for what they are, namely, a whittling away of a basic right. In this case however, there would have to be restrictions of some kind imposed. A city like Sydney would grind to a halt if, for instance, every day its main streets were filled for hours with demonstrators. Even if the meetings were to be held in parks, consideration must be given to those people who want to use the parks for their ordinary purpose. The problem is to find a general expression of the qualifications of the right which are justified. I think that this is an almost impossible task, for the circumstances which might have to be considered are so infinitely various that any statement of the qualifications would be too general to be of real use.

To me, the best solution is to have a system of control of processions and demonstrations, but to place the onus on the police to justify publicly any prohibition. In such a system, the organisers would *prima facie* be entitled to hold their march or meeting; before holding it, they would be required to notify the police. Since traffic problems will inevitably be involved, this seems in any event, and does

not impose any hardship. If within some specified period, the police have not brought the matter before a magistrate, the march or meeting can be held; if the police do object to its being held, they can refer the matter to a local court, and there seek to justify their objection. This procedure should not create any administrative problem for the police; they already deal with the same problems out of court, and the occasions when they will want to refer the matter to a court will probably be few. Moreover the Police Commissioner will no longer have to bear the odium of making what may be an unpopular political decision. On the other hand, the organisers will be able to have their case dealt with publicly, and will know why it is sought to prohibit their procession or meeting, and will have an opportunity to rebut the police case.

It may be advisable in any statute setting up such a system for the reasons justifying prohibition to be stated. If this is done, great care must be taken, for there is a strong tendency for the reasons in such cases to be treated as justifying prohibition in all cases, and not merely as requiring the exercise of a discretion. But whatever its precise form, I would suggest that some such system as I have described would be preferable to the system in New South Wales, and should be tried.

## **VIOLENCE AND POLICE**

So far I have not mentioned violence; and it is generally violence which creates the great problems arising out of public demonstrations, whether that violence be on the part of the demonstrators, or on the part of the public. This much I think is clear; there can be no right to hold a violent demonstration, and no community can be expected to approve, or indeed tolerate, such a demonstration. The right which every citizen has or should have is a right of peaceful assembly. No one has a right to force his views on others by violence, and there is no difference in kind between a student forcing his views by violence upon other

citizens, and a policeman violently preventing a student from expressing his views. Thus at Sydney University in 1969 there was the absurd situation of students who held the view that a University Regiment was inconsistent with the free environment of a University forcing their view by violence on other students — members of the Regiment — who presumably held the contrary view. Such an attitude has nothing to do with the notion of civil liberty; indeed, it involves the anti-thesis of that notion.

However the very immaturity of so much student action makes it all the more important that the police should act in a restrained manner when dealing with student violence and provocation. Many student demonstrations pass off without any violence, or with only some minor scuffle. In some demonstrations, violence erupts more or less accidentally. And in others, a group of demonstrators, generally small in number, deliberately set about to produce violence. Once violence has commenced, it would take a well trained and controlled body of police to act in a restrained way. However that is just what the police should be. Police brutality can in no cases be justified. Police violence may in many cases be necessary. Police may often have to stop students by force from pursuing some course of action, or may have to remove them by force from some building or public place. But it is of the greatest importance both for the community and for themselves that violence is only resorted to when absolutely necessary, and then only as far as may be necessary.

It is no part of a policeman's function to punish; his function is to maintain order. Whilst it may be said that the natural reaction of a young policeman to student violence and provocation is violence, and probably excessive violence, this is the very reaction which should be restrained and controlled. That it can be done has been established time and again, not only in London but in Australia. The necessary restraint and control can only be obtained by training, and by the

immediate supervision of senior police officers; the control of demonstrations is a very skilled job, and should not be handled by amateurs. Policemen are not just ordinary citizens; they are for most citizens the image of the law. To allow themselves to be provoked into excessive violence by students is not only a sign of their own failure, but of a failure of the law. The cause of the community, and their own cause, is best served by restraint. It is to be hoped that this attitude, which they have often put into practice in the past, will be adopted by them in the testing times which I am quite sure are to come.