

Australia's supreme court upholds free speech ban on Palm Island leader

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Australia's High Court last week dismissed a challenge by Palm Island Aboriginal leader Lex Wotton to parole conditions that ban him from speaking to the media or attending public meetings on the island without the permission of government officials.

Wotton has been subjected to what amounts to political censorship since being released on parole in July 2010. He had received a six-year sentence in 2008 for participating in a "riot" on the island after the death in police custody of Cameron ("Mulrinji") Doomadgee in November 2004.

All seven judges ruled that the prohibitions imposed on Wotton did not breach an implied constitutional freedom of political speech. The decision has far-reaching implications. It underlines the ease with which governments and security agencies can override the supposed protection of free speech in the Australian Constitution.

The logic of the court's decision went well beyond prohibitions imposed on prisoners and parolees. The ruling could justify new legislation, or the use of existing laws, to seriously impinge on political dissent. Protests, for example, could be banned, supposedly on safety or other "legitimate" grounds, as could any political activity or writing deemed to be a threat to the "constitutionally prescribed system of government."

Six judges accepted that the bans on Wotton did limit political communication, but said they were "proportionate" to the "legitimate" purpose of ensuring "community safety and crime prevention". One judge went further, denying that the restrictions even infringed Wotton's free speech.

On November 26, 2004, about 400 outraged Aboriginal residents of Palm Island, on the edge of the Great Barrier

Reef, 65 kilometres from Townsville, stormed the island's police station. It was a week after Doomadgee, a 36-year-old worker and father, was found dead in a police cell, just an hour after he had been locked up, unlawfully, for the minor offence of "causing a public nuisance".

The protest was triggered by the belated release of an autopsy report indicating that Doomadgee had died of internal bleeding after his liver was torn in half, his spleen ruptured and four ribs broken by a heavy blow. Despite the terrible injuries, which were consistent with a police bashing, the report claimed that his death was accidental.

Fuelling the anger was the fact that the killing was part of a familiar pattern. Since 1980, more than 300 indigenous people have died in custody in Australian prison cells or police lockups. Historically, despite occasional judicial and parliamentary reviews, the legal system has repeatedly sanctioned more than two centuries of violence, starting with massacres, poisonings and other killings designed to drive Aboriginal people off the land.

During the Palm Island disturbance, police fled from the police station, which was then set on fire. After about four hours of turmoil, in which no police were seriously injured, Wotton urged the crowd to go home, and they did.

Backed to the hilt by the Queensland state Labor government, the police invoked emergency powers and flew in at least 80 heavily-armed officers, who took control of the island, closed roads and launched widespread raids on homes.

The Queensland authorities charged Wotton with one of the most serious offences on the statute books. Under s 65 of the state's Criminal Code, anyone who, "being riotously assembled" destroys any building is liable to life imprisonment. Otherwise, the maximum penalty for participating in a riot (an "unlawful assembly" of people who act so tumultuously that they "disturb the peace") is three years.

Nearly 20 other island residents were charged over the alleged riot, some of whom were jailed for up to two years. By contrast, the police officer responsible for Doomadgee's death, Senior Sergeant Chris Hurley, was acquitted of manslaughter despite two coroners' reports, which both concluded that Hurley had assaulted Doomadgee.

Wotton is a former elected municipal councillor on Palm Island where he was born in 1967. In his Parole Board application, Wotton said he wanted to resume his political activity. He stated that since his arrest he had committed himself to the use of legal and political avenues to express anger over the history of Palm Island (previously a penal institution) and the injustices and difficulties faced by its residents. These activities had included giving media interviews, co-authoring book chapters on Palm Island, and delivering speeches at universities and public events.

In his High Court challenge, Wotton objected to three parole conditions, imposed under section 132 of the Queensland Corrective Services Act. One specified that he "not attend public meetings on Palm Island without the prior approval of the corrective services officer." Another prohibited him "from speaking to and having any interaction whatsoever with the media." The third banned him, or anyone acting on his behalf, from receiving any "direct or indirect payment or benefit" from the media.

Section 200 of the same legislation also makes it a criminal offence for a journalist to interview or obtain a statement from a prisoner, including a parolee, without the written approval of authorities.

In the High Court, the federal Labor government of Prime Minister Julia Gillard joined the state Labor government of Premier Anna Bligh in opposing Wotton's challenge, making clear Labor's determination to defend the censorship imposed on him.

Five judges held that both Corrective Services Act sections effectively burdened freedom of communication about government or political matters, but that the sections were nevertheless each "reasonably appropriate" and "compatible with the maintenance of the constitutionally prescribed system of government."

Without any elaboration, the judges said section 132 served the "legitimate end" of "community safety and crime prevention". Section 200 legitimately permitted the Parole Board to set conditions it considered "reasonably necessary" to ensure "good conduct" and stop a parolee committing an offence, such as speaking to a journalist.

Another judge, Justice Susan Kiefel, insisted that the

implied constitutional freedom was "not a personal right", but a principle that protected the political and constitutional order itself. Justice Dyson Heydon went further, voicing scepticism in the implied right to free political communication and, in any case, denying that the ban imposed on Wotton infringed it.

All the judges said Wotton, or journalists, could have applied to the chief executive of Queensland Corrective Services for permission to conduct a media interview, but had not done so. Apart from sanctioning such a procedure, which itself subjects freedom of speech to government control, this suggestion soon proved illusory. Hours after the High Court decision, Wotton's legal team issued a request for him to be interviewed by a journalist from National Indigenous Television (NITV). Parole officials quickly refused permission for the interview.

There has been little media response to the court's ruling, despite its broad implications for press and political freedom. Limited comments were reported from civil liberties lawyers. Human Rights Law Centre executive director Phil Lynch said creating a criminal offence for journalists to speak to parolees was an unacceptable limit on free speech.

During the 1990s, when the High Court first elaborated an implied constitutional freedom of political communication, some in the legal profession promoted illusions that an important protection had been created, partially remedying the lack of any bill of rights in the Australian Constitution. Over the past decade, however, the judges have increasingly approved of deep inroads into basic democratic rights, including free speech and no detention without trial, particularly against asylum seekers and under the rubric of the "war on terrorism".

Now, a judicial precedent has been set that could be used against anyone, in a wide range of circumstances, not only parolees, who seeks to criticise and oppose government policy.



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