Australian High Court further erodes free speech

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Two far-reaching decisions handed down last week by the High Court, Australia's supreme court, have effectively given the federal and state governments, and local councils, carte blanche to impose laws and regulations that suppress political free speech.

One ruling backed the power of the city council in Adelaide, the South Australian capital, to ban the handing out of leaflets in a city pedestrian shopping mall, and the other approved the federal government's prosecution of an Islamic man for sending allegedly "offensive" letters to the families of Australian soldiers killed in Afghanistan.

Taken together, the rulings eviscerate the supposed implied freedom of political communication in the Australian Constitution. The constitution contains no bill of rights, or any other guarantee of basic democratic rights. During the 1990s, however, the High Court declared that the document implicitly prohibited laws that blocked political discussion within the framework of the current parliamentary order, unless the laws served a "legitimate end" of government. Even that narrow and limited protection of free speech has now been effectively nullified.

Prime Minister Julia Gillard's government intervened in both cases, urging the judges to allow federal, state and local authorities to outlaw expressions of opinion deemed to be "offensive" or a threat to business or public convenience. The intervention was part of escalating moves by the Labor government to boost the police powers to monitor and muzzle political dissent, building on the police-state provisions already introduced by the previous Howard Liberal government, with Labor's backing, under the cover of the so-called "war on terrorism".

In the *City of Adelaide* case, two brothers—Christian evangelist preachers—challenged council by-laws, under which they had been convicted for the offence of "preaching, canvassing or haranguing" in the city's Rundle Street pedestrian mall without a council permit. The by-laws also banned the handing out of "any handbill, book, notice, or other printed matter".

Obviously, these laws can be used to prevent anyone, including political organisations, from campaigning for support or distributing printed material. The judges themselves conceded that the by-laws prohibited activities that could be "directly or indirectly relevant to politics or government."

But, with one dissent, the judges claimed that the by-laws served the "legitimate end" of shielding the public from disturbance. The language of their judgments was extraordinarily sweeping. Chief Justice Robert French, for example, declared that the by-laws protected "the ability of people using the roads and public places to go about their business unimpeded and undistracted by preaching, haranguing and canvassing, and the unsolicited tender of literature from strangers."

Other judges appealed to the need to maintain "unimpeded" use of roads, even though Rundle Mall is a pedestrian precinct closed off to traffic. Justices Susan Crennan and Susan Kiefel said the by-law was a valid measure to "secure the safe and convenient use of roads." According to this broad standard, any supposed interference with the "convenience" of road users, including pedestrians, can be outlawed.

Judges cited last year's High Court ruling that a Palm Island Aboriginal leader, released on parole on trumped-up "riot" charges, could be gagged from speaking to the media (see: "Australia's supreme court upholds free speech ban on Palm Island leader"). They reiterated that there was no "absolute" or "personal" right of political communication. The implied constitutional freedom related solely to the "need to

maintain the system of representative government which the Constitution mandates." In other words, political views that in any way challenge the parliamentary framework or the underlying capitalist order are not protected at all.

Similar declarations appeared throughout the judgments in the other case, where a self-styled Muslim cleric, Man Haron Monis, was charged with using the postal service in a "menacing, harassing or offensive way"—a federal crime that carries a potential two-year jail sentence. His "crime" was to send letters denouncing the war in Afghanistan to the families of Australian soldiers who died there.

Again, the six judges in the *Monis* case all agreed that the legislation restricted political communication. However, three judges—Crennan, Kiefel and William Gummow—declared that the legislation was valid because it protected "people from the intrusion of offensive material into their personal domain". This potentially sets a precedent for outlawing expressions of political views if any other person was upset by them.

Three judges dissented, among them Chief Justice French, who disagreed with the federal government's submission that the postal legislation only affected "the outer fringes of political discussion". The same charge, he pointed out, could apply to a wide range of material posted on the Internet that some people would regard as "unreasonable, strident, hurtful and highly offensive."

One of the three dissenting judges, Justice Dyson Heydon, actually went further than the majority by calling for the scrapping of the implied freedom of communication altogether. He agreed that Monis's letters fell within the scope of the implied freedom, as defined by previous High Court cases, but said the result showed "how flawed" the law was. The entire line of cases, dating back to the 1990s, should be overruled, Heydon stated.

Because the court was formally split three to three, the High Court's rules meant that the verdict of the lower courts against Monis was upheld, clearing the way for him to be convicted and jailed. The outcome signals a marked shift from a 2004 ruling, in *Coleman v Power*, where the court, by a four to three majority, quashed charges of using "threatening, abusive, or insulting words" in a public place, laid against a man who had publicly accused a police officer of being corrupt.

Despite the enormous implications of these High Court rulings, and the Gillard government's advocacy of them, there has been virtually no reportage in the mass media, let alone any opposition. This is another chilling warning of the readiness of the Australian establishment, including the courts, to undermine fundamental democratic and legal rights as it confronts growing popular alienation and hostility to the policies of governments, federal and state.