Australian government denounces High Court for upholding Constitution

Mike Head
11 December 2023

The Albanese Labor government has openly lashed out at Australia's supreme court, essentially accusing it of deliberately putting criminal "perpetrators" on the streets as a result of its ruling that their previous indefinite detention was unconstitutional.

In an interview on Sunday with the *Herald Sun*, a witch-hunting Murdoch tabloid, Home Affairs Minister Clare O'Neil condemned the High Court for ordering the release of nearly 150 immigration detainees who had been incarcerated illegally for years.

"I had them all in detention, and the High Court forced us to release them, and we had no choice but to follow that," O'Neil declared. "I really need people to understand that the High Court decided to put these people on the street."

In effect, O'Neil, speaking on behalf of the government, denounced the seven judges for unanimously upholding even the limited protection of basic democratic rights in the country's 1901 Constitution.

Reflecting its colonial origins, that constitution has no bill of rights. But it does contain a formal separation of executive and judicial powers, which bars governments from arbitrarily imprisoning or otherwise punishing people without a judicial process, except during wartime.

O'Neil's attack on the judges has serious political and historical implications. It represents another lurch toward authoritarian forms of rule under conditions of mounting social and political disaffection in the working class.

The separation of powers is a fundamental principle designed to protect the population from despotic and dictatorial rule. A precept of the bourgeois-democratic revolutions, it was forged from centuries of struggle against feudal and absolutist monarchies from the 1215 Magna Carta onward.

Those struggles led to the English Civil War of the 1640s that overthrew the absolute monarchy and its Star Chamber of imprisonment, torture and executions, and the American Revolution of 1776, which overturned British colonial repression.

While the fervently right-wing Liberal-National Coalition, led by Peter Dutton, has played a vicious part in whipping up this atmosphere, the Labor government has sought to outdo it. O'Neil previously reiterated Labor's opposition to the release of any of the detainees, slandering them as "disgusting."

Now, she has gone even further to attack the High Court itself for its November 8 order that keeping the detainees incarcerated was unconstitutional and amounted to illegal imprisonment.

O'Neil also accused six released detainees of committing "crimes" for which they have been arrested and locked away, but not convicted. By doing so, one of the Labor government's most senior cabinet ministers trashed another basic democratic principle, that of innocent until guilty, as well as blatantly prejudicing the detainees' chances of anything like a fair trial.

"I'm certainly sorry that crimes have been committed by perpetrators who belong to this cohort of people and anyone else in the community," O'Neil said. "You can't read a newspaper and hear about crimes being committed like this and not feel anything."

No evidence against any of the detainees has been produced in court, let alone tested. But O'Neil pronounced them guilty, based on newspaper reports. Those reports are part of a rabid demonisation of the detainees, many of them refugees, all of whom have been literally branded as murderers and rapists.

The *Australian*, a Murdoch flagship, reported that O'Neil's "apology" occurred because: "Six of the 148 released detainees have been arrested after committing offences including indecent assault, drug possession, theft, trespass, breaching curfew, parole and reporting conditions."

In this barrage of vague charges, the word "alleged" appears nowhere! The police accusations are presented as facts, insinuating the guilt of all six detainees of serious offences, overturning the notion of placing evidence before a court.

From what little has been reported in the corporate media about the six defendants, they include highly vulnerable members of society, brutalised and traumatised by years in unlawful indefinite detention, often after fleeing brutal wars, starvation or persecution.

They are being vilified by the Labor government, acting in concert with the Liberal-National opposition and the complicit media. The aim is to justify the imposition of police-state measures that essentially place the detainees in new forms of indefinite detention, flouting the High Court's order and setting precedents for broader use.

These measures have been rammed through both federal parliament in record time by bipartisan agreement over the past two weeks without even a semblance of debate. They include shackling released detainees in electronic ankle bracelets, potentially for life, and a "preventative detention" system to re-detain people based on what offences the police assert they might commit in the future.

O'Neil's tirade against the court is all the more serious because at least three legal challenges have been launched already against the shackling legislation, and more are expected, including against the preventative detention laws. Those challenges are based on expert legal opinion that the legislation is no less unconstitutional than the previous form of indefinite detention.

In that context, O'Neil's attack on the judges prejudices the hearing of those constitutional cases. Moreover, it can be seen as a warning to the court not to strike down the government's laws or any other repressive legislation, such as the citizenship-stripping bill that the government and the Coalition also pushed through parliament last week.

Both bills are blatant efforts to defy High Court rulings that it is unconstitutional to punish people by executive decree without a court order, whether it be to detain them or cancel their citizenship, thus depriving them of fundamental civil and social rights.

Under the preventative detention bill, all that is required is for an immigration detainee to have been previously convicted, in either a foreign or domestic court, of what is classified as a "serious violent or sexual offence" and for the immigration minister and a court to decide that there is just "a high degree of probability" that "the offender poses an unacceptable risk of seriously harming the community by committing" such an offence.

This amounts to punishment for a thought crime, based on an accusation of what the person might do in the future, not on what they have actually done. On this basis, people can be re-detained for three years at a time, possibly for the rest of their lives.

On both the detention and citizenship-stripping laws, successive Coalition and Labor governments fought vehemently, all the way to the High Court, to defend their arbitrary powers. Before parliament shut down last week for the summer, the two ruling parties teamed up to restore such powers, flying in the face of legal opinion.

Last week, constitutional law expert Professor George Williams warned that the new preventative detention laws would likely be challenged in the High Court on three counts. First, they applied to people convicted in foreign courts. Second, they applied to people "who may have finished serving their sentence years ago and already are in the community." Third, they only applied to a "specific cohort of people—those people who cannot be deported from Australia."

It must be said, however, that no faith can be placed in the High Court to protect the rights of the detainees or anyone else. For three decades, the court sanctioned the shameful practice of indefinite incarceration of asylum seekers and other non-citizens denied visas.

That regime resulted from the cruel system of mandatory detention of all asylum seekers arriving by boat, which was pioneered by the Keating Labor government in 1992. It set a global precedent for anti-refugee measures internationally.

In its November 28 judgment, setting out the reasons for its November 8 ruling, the High Court maintained the underlying 1992 regime of mandatory refugee detention. Under that system, nearly 1,000 people are still in indefinite detention, despite domestic protests and condemnations by UN human rights bodies.

The judges also said their ruling did not prevent the re-detention of people if it became "practicable in the reasonably foreseeable future" to remove them from Australia. And the court advised that detention could be reimposed via a preventive detention law, opening the way for the Labor-Coalition bill.

Similar detention laws could be introduced against anyone accused of conduct or views deemed an unacceptable threat to "community safety" or "national security." Governments internationally are seeking to outlaw protests against the Gaza genocide, falsely accusing participants of antisemitism, "hate speech," or aiding terrorism.

These events point to a foul political atmosphere, full of unproven allegations, being incited by the ruling parties and the media. All the politicians involved are also backing Israel's US-backed murderous assault on the Palestinian people, bombing hospitals, schools, universities and homes in barefaced defiance of international law.

O'Neil's broadside underscores the warnings made by the WSWS that fundamental legal, political and democratic rights are under direct attack. Repressive mechanisms are being put in place to preserve capitalist rule against the mounting development of mass opposition to war, widening social inequality and deteriorating living conditions.