Criminal Due Process and Chapter III of the Australian Constitution

Anthony Gray

This book articulates the potential of the principle of separation of powers reflected in the structure and text of the Australian Constitution to protect fundamental due process rights. Clearly, the founding fathers did not enact an express bill of rights in the Australian Constitution, and the document contains a limited number of express rights. However, the High Court has accepted as fundamental the doctrine of separation of powers.

While the precise contours of the separation of powers principle are still being drawn, the High Court has found that laws which require, or authorise, a court to exercise power involving a departure from characteristics of traditional judicial process are constitutionally suspect. This is because such a law would undermine a court’s institutional integrity.

While the High Court has been somewhat loath to identify precisely characteristics of traditional judicial process, some indicia – including open courts, ability to review a decision of a lower court for jurisdictional error, the provision of reasons, decisional independence and fairness – have been identified. This book will argue that fundamental due process rights in the criminal law area, such as presumption of innocence, the right to silence, the right to confront accusers, open courts, no effective punishment without conviction, and proportionate rather than mandated sentencing, are so fundamental to a criminal procedure that laws which abrogate these rights and expectations are vulnerable to constitutional challenge.

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