human rights with a focus on how such remedies help define the respective role of courts and legislatures. In doing so, Roach deftly reconciles the tension between the potentially competing goals of providing remedies while respecting the role of the legislature.

Finally, two chapters focus on executive reactions to, and the impacts of, judicial review in practice. The chapter by Carol Harlow and Richard Rawlings, "Striking Back and Clamping Down: An Alternative Perspective on Judicial Review", contains a methodical study of deliberately "negative" official responses to court rulings. This feeds into discussions of impact and, as the authors note, is an intrinsic part of the emerging law of democracy debates. Next, the illuminating contribution from Maurice Sunkin and Varda Bondy, "The Use and Effects of Judicial Review: Assumptions and the Empirical Evidence", empirically analyses the uses and effects of judicial review in the context of recent initiatives in England to curtail access to judicial review. Sunkin and Varda address three common assumptions: that there has been significant growth in abuse of judicial review procedures; that judicial review necessarily impedes good administration; and that judicial review litigation is unlikely to provide effective redress. In doing so, the authors piquantly illustrate the chasm between political rhetoric and reality and mount a powerful rebuttal of the aforementioned assumptions.

Similarly to the edited collection *Key Issues in Judicial Review* (Federation Press 2014, edited by Neil Williams SC), this collection's value consists not only in the significant contribution to public law scholarship made by each the authors in the individual chapters, but also in the breadth, scope and erudition of the work as an integrated whole. It is an invaluable resource for public law practitioners and scholars alike; in the words of Sir John Laws in the Foreword, it will interest and stimulate thinking lawyers for a long time to come.

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## CRIMINAL DUE PROCESS AND CHAPTER III OF THE AUSTRALIAN CONSTITUTION

*Criminal Due Process and Chapter III of the Australian Constitution*, by Anthony Gray, Federation Press, 2016, 312 pages: ISBN 9781760020767. Softcover $99.00.

Due process is a fundamental human right, a vital aspect of the rule of law and, as Chief Justice Robert French recognised in his 2010 Sir Anthony Mason address, both "indispensable to justice" and "part of our cultural heritage". However, in the absence of a constitutional due process clause, Australian jurisprudence and scholarship in this area is lamentably fractured. The High Court's emerging recognition of procedural fairness as one of the essential characteristics of courts prompts the question: does (and should) Ch III of the Australian *Constitution* give rise to an *implied* due process clause? In *Criminal Due Process and Chapter III of the Constitution*, Professor Anthony Gray argues a resounding "yes".

Gray's book is comprised of seven chapters, each around 40 pages, followed by a brief conclusion. It might, however, be better approached as a book with two parts. In the first introductory half, Gray sets the constitutional scene. He guides the reader expertly through fundamental public law themes and principles, touching on sovereignty, the rule of law and, in particular, the separation of powers. In Chapter 1, Gray brings his focus to the conflict between originalist and progressive approaches to constitutional interpretation. It comes as no surprise that the author favours the latter (the book would be much shorter if one adopted a textual or literal interpretive approach) and he seems to take particular pleasure in asserting that the infamous advocate of "strict and complete legalism", Sir Owen Dixon, "expressly advocated the making of [constitutional] implications" (p 28).

Chapter 2 takes on the complex web of case law concerning the separation of powers and Ch III of the *Constitution*. This is no straightforward task, especially when one's ultimate goal is to identify clear or coherent threads of principle regarding fairness and judicial process. Gray meets this challenge admirably, again guiding the reader through a wealth of precedent without losing sight of his ultimate inquiry or succumbing to the temptations of obsessing over particular cases or over-simplifying the area. Gray readily acknowledges that "it would be naïve to believe there was

entire congruity in the case law … in relation to how a breach of Ch III requirements should and will be identified" (p 77). A few pages later, he surmises: "We can say that a typical characteristic of a court, or of a judicial process, is fairness. Having said that, there is substantial disagreement as to what fairness requires" (p 80).

Having laid these theoretical and doctrinal foundations, in the second half of the book Gray turns his attention to particular aspects of criminal due process, considering whether each is, or should be, the subject of constitutional protection. This is by no means a comprehensive survey, and lawyers seeking a full understanding of criminal process would be advised to look elsewhere. Rather, Gray selects a few particularly problematic and controversial scenarios that have arisen in the criminal sphere, arguing that Ch III can and should be harnessed to preserve due process from legislative curtailment in each instance.

Chapter 3 concerns "Open Courts, Natural Justice and the Right to Confront Accusers". This Chapter opens the way to a discussion of the rise of secrecy in, for example, national security and bikie laws. Both of these legal contexts provide fruitful case studies throughout the second half of the book. One might identify the overarching theme, or core contention, of the book as being that due process is central to the institutional integrity of the Australian judiciary and is thereby entitled to protection under Ch III. This argument is advanced in Chapter 3 and continued in Chapter 4, concerning "The Right to Silence and the Privilege against Self-Incrimination" and Chapter 5, "The Presumption of Innocence".

In Chapter 7, "Mandatory Sentencing", Gray acknowledges that "[t]he fact that mandatory sentencing provisions are bad public policy does not make them unconstitutional" (p 302). He then calls on the High Court to find that "proportionality, fairness and a lack of arbitrariness are key, essential attributes of judicial process" (p 302), and thus alter its present position upholding the constitutional validity of mandatory sentencing regimes. Chapter 6 stands out as dealing with orders that, strictly speaking, are not criminal in nature. Gray argues that civil forfeiture schemes should be considered as punitive and effectively criminal, thereby requiring the core trappings of criminal process under Ch III.

The commendable breadth and depth of Gray's exploration of each topic gives the book valuable appeal to public lawyers, criminal lawyers and those interested in human rights. Moreover, Gray's comprehensive and accessible approach recommends the book to non-experts – including students – in these areas. Each chapter in the second half of the book not only outlines the relevant history – often starting with biblical references – and the current Australian position as reflected in relevant case law; but it sets these discussions in their global context, drawing extensively on how these rights are protected in international instruments and comparable jurisdictions. This approach makes sense, despite the High Court's marked reticence to draw on global experience to interpret the metes and bounds of Ch III. Australian jurisprudence regarding due process as a constitutional concept is in its infancy, but a wealth of international experience and material may be usefully drawn upon.

It cannot be denied that the book advances arguments that many (in some cases, most) public law scholars will dispute. However, whilst the book has considerable value in the breadth, depth and accessibility of its descriptive content, it is Gray's arguments that promote "Criminal Due Process and Chapter III" as an engaging scholarly work.

By way of example, in Chapter 1, Gray offers a considered critique of originalist and literal approaches to constitutional interpretation. This culminates in an argument that "the content of international human rights instruments can, does and should influence the interpretation of requirements of the Australian *Constitution* and, in particular, the separation of powers" (p 38). Then, in Chapter 2, Gray counters the weight of scholarship, not to mention precedent, to argue that a strict separation of judicial and non-judicial powers (akin to the federal separation under the *Boilermakers'* doctrine) "does and should exist at the State level, so significantly simplifying this area of law" (p 82).

These are radical arguments. They command the reader's attention and may well challenge his or her views on how the *Constitution* does, and ought to, operate. At the same time, these arguments are mounted on strong and clearly articulated legal analysis. Gray presents his views with unapologetic force, but with appropriate engagement with counter-arguments and a comprehensive articulation of

relevant case law and constitutional principle. Rather than alienate the sceptical reader, they challenge one to interrogate the doctrine and underlying principles. Due process is undoubtedly "indispensable" to justice and the rule of law, but is a progressive, internationalist approach to interpreting the *Constitution* necessary in order to effectively protect this fundamental notion?

Further scholarship in this field is sure to follow. With *Criminal Due Process and Chapter III of the Australian Constitution*, Gray makes an important and valuable contribution that will challenge readers to consider whether such broadly contextual, progressive interpretations of the *Constitution* are supportable in order to protect fundamental procedural rights, or whether it is simply time that Australia adopted a clear, express due process clause.

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