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Judicial Review of Non-Statutory Executive Action [Amanda Sapienza, Federation Press, 2020]

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'Judicial Review of Non-Statutory Executive Action'

Kenny Chng

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Dr. Amanda Sapienza's "Judicial Review of Non-Statutory Executive Action" (The Federation Press, 2020) is an impressive work of scholarship. It provides a comprehensive and in-depth analysis of various aspects of the law relating to judicial review of non-statutory executive action with a specific focus on Australia, engaging with issues ranging from jurisdiction, justiciability, the conceptual basis for judicial review of non-statutory executive action, and the grounds of review and remedies available for judicial review of such action. While the book is directed primarily at Australian law, the quality and detail of the analysis proffered within makes it a worthy read for anyone interested in judicial review and administrative law more generally. This post will offer some reflections provoked by the discussion in this book.

A synthesis of theoretical and doctrinal methodology

First, in its analysis of the law relating to judicial review of non-statutory executive action, the book adopts a remarkable combination of theoretical analysis from the first principles of common law judicial review and rigorous doctrinal discussion with a sensitivity to practical realities – the careful discussion of evidentiary issues in Chapter 7 is a good example of the book's attention to practical realities. Too much attention to theory over doctrine would have risked the discussion becoming overly academic and detached from reality, while the converse might have caused the analysis to lack theoretical depth. The book avoids both dangers and deftly strikes a good balance between the two extremes. Indeed, this strength of the book is especially put on display in its carefully-reasoned conclusions relating to the difficulty of applying certain judicial review grounds to the context of non-statutory executive action, such as the principle against delegation, acting under dictation, and taking into account irrelevant considerations. The classification of the different types of non-statutory action in Chapter 2 into prerogative powers, prerogative capacities, and non-prerogative capacities, drawing from both case law and conceptual analysis, was also a useful methodological device contributing to a fine-grained picture of how the different elements of judicial review would apply to each type of non-statutory action.

Relevance in Australia and even beyond

Second, while the book is specifically directed at Australian law and will indeed be invaluable to public lawyers in Australia, it was striking to observe that significant portions of the analysis offered in this book will be equally relevant to other jurisdictions, especially Commonwealth jurisdictions possessing a common law administrative law heritage. For example, the development in Australian jurisprudence of what Dr. Sapienza calls a substantive approach to justiciability is paralleled in Singapore administrative law as well. The Singapore courts have expressed a similar sensitivity to the context of the specific issue raised in a judicial review application – if legal standards may be brought to bear on the relevant decision, notwithstanding the decision's concern with a subject matter traditionally thought to be non-justiciable, such as the clemency power, the Singapore courts too have expressed a willingness to carry out judicial review nevertheless. Dr. Sapienza's identification of three factors relevant to justiciability (the subject-matter of the decision, effect of the exercise of power, and the nature of the decision-maker) in the context of prerogative powers also provides a useful means of analysing issues relating to justiciability in Singapore law and beyond, as is Dr. Sapienza's important reminder that principles of justiciability are ultimately in service of the courts' constitutional role – in her own words, "conclusions of non-justiciability, which on their face may appear to detract from the constitutional role of a court to enforce the conditions on the exercise of a non-statutory power, are therefore in fact entirely consistent with the broader constitutional structure in which that enforcement is to occur." (p 115)

The book's discussion of the interaction between a supreme written Constitution and the limits of non-statutory executive action will also be particularly instructive for jurisdictions which have been heavily influenced by principles of administrative law originating from the UK, but which adhere to the doctrine of constitutional supremacy, unlike the UK. Indeed, Dr. Sapienza's suggestion that fundamental common law principles such as reasonableness, fairness, and lawfulness can serve as the basis for limiting executive action through judicial review and that these principles are given effect through the Constitution (p 126), provides for a much firmer jurisprudential basis for the exercise of judicial review in a jurisdiction practising the doctrine of constitutional supremacy, as compared to a reliance on theoretical foundations for judicial review articulated within the context of a parliamentary supremacy. On this point, however, one wonders whether Dr. Sapienza's suggestion may potentially also have significant implications for judicial review of statutory executive action. If the common law principles are intertwined with the supreme Constitution in the manner Dr. Sapienza suggests, it may indeed be worth exploring the extent to which these common law (or should one say constitutional?) principles bear on the limits of statutory executive action as well.

Challenges and opportunities

Third, while the book commendably seeks to engage the law of judicial review from first principles and to articulate its conceptual foundations, this might prove to be one of the more contentious portions of the book. As mentioned earlier, Dr. Sapienza identified reasonableness, fairness, and lawfulness as common law principles capable of conditioning non-statutory executive action, and suggested that these principles are in a symbiotic relationship with the supreme written Constitution. These propositions bring Dr. Sapienza into controversial territory – some may question the content of these principles, especially whether the broadly-articulated principle of "lawfulness" provides any meaningful constraint on an analysis of the permissible extent of judicial review of non-statutory executive action, while others may take the view that the common law contains many other principles, such as preventing abuses of power, ensuring consistency, and upholding democratic ideals through fostering public participation.

Such contentions over the content and existence of these principles do have material implications. Indeed, whether one agrees with some of Dr. Sapienza's conclusions will be very much shaped by whether one accepts her identification and articulation of these principles. For example, Dr. Sapienza argued that executive authorities have a free discretion to depart from their own policies, on the basis that the executive is "incapable of imposing legal obligations on itself to take into account certain matters". (p 154) If, however, the common law in tandem with the Constitution is capable of imposing external constraints upon executive power, and if one considers a principle of consistency to be a fundamental common law principle capable of conditioning executive action, then one might think that further constraints ought to be placed on executive discretion to depart from policies to a greater degree than Dr. Sapienza accepted. One could view such a principle of consistency as a component of "lawfulness" or "reasonableness", or perhaps even as a free-standing common law principle. Wherever such a principle is located, the point is that much seems to rest on how one substantiates the common law principles Dr. Sapienza has identified.

The point in highlighting the challenges raised by such controversies should not be misunderstood. These challenges certainly do not mean that one should give up on the enterprise of studying the law of judicial review from a conceptual perspective. Indeed, there is significant value in asking the right questions, even if it may be exceptionally challenging to arrive at clear and uncontested answers to these questions. And this book represents a remarkable effort precisely to ask the right questions and engage these challenges head-on. Also, a recognition of these challenges raises a possible opportunity. A further substantiation of these common law principles might hold significant promise for the development of this already-impressive work. Indeed, such substantiation may help to take the argument in the book even further – in addition to working from the existing grounds of judicial review and analysing their applicability to non-statutory executive action, as the book already does in detail, a substantiation of these common law principles may raise the possibility of making arguments in favour of additional limits on non-statutory executive action that may not yet be adequately captured by existing grounds of judicial review.

All in all, Dr. Sapienza's "Judicial Review of Non-Statutory Executive Action" is an important achievement. Given the general lack of attention to specific issues relating to judicial review of non-statutory executive action, the book will very usefully fill a gap in the literature in Australia and beyond. The book was a pleasure to read, and is highly recommended to anyone interested in insightful analysis of judicial review and administrative law – a description which probably includes all the readers of this blog.

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