2-2023

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Legal Studies (2023), 1–18
doi:10.1017/lst.2023.7

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The Society of Legal Scholars

RESEARCH ARTICLE

Re-examining judicial review of delegated legislation

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(Accepted 5 January 2023)

Abstract

The usage of delegated legislation as a means of governance deserves significant attention, in view of the enormous impact that it is capable of having on the lives of citizens. While reforms to the process of parliamentary scrutiny are an important means of minimising the inappropriate usage of delegated legislation, this paper explores the possibility of drawing more fruitfully upon judicial review as an additional control mechanism. It undertakes a theoretical analysis of what makes delegated legislation distinct from primary legislation and other types of executive action for the purposes of judicial review, with a view towards identifying the proper normative orientation of judicial review of delegated legislation – upholding the moral requirements of delegation relationships and safeguarding democratic accountability and the rule of law. It then argues that existing grounds of review applied towards delegated legislation go some way towards but are inadequately directed at this normative orientation. Drawing inspiration from Irish and US jurisprudence, the paper critically evaluates several possible means of filling this doctrinal space, and concludes that the non-delegation doctrine and a rule of law-based ground of judicial review directed at exercises of delegated law-making power can supplement the law of judicial review of delegated legislation.

Keywords: administrative law; judicial review; delegated legislation; rule of law

Introduction

Delegated legislation (also called subsidiary legislation) is a common feature in common law jurisdictions. Regulations, by-laws, and rules, inter alia, are all forms of delegated legislation.[1] Despite this variety of terms, they all share a common trait. Contrary to first impressions, delegated legislation is not enacted by the legislative branch. Indeed, in contrast to primary legislation, which does issue from the legislature, delegated legislation is enacted by executive authorities under legislative powers delegated to them by the legislature.[2]

It is understandable why delegated legislation has become a popular means of governance. The proliferation of delegated legislation can be partially explained by the general expansion of the executive state in jurisdictions around the world.[3] But delegated legislation provides certain specific advantages

†Assistant Professor, Yong Pung How School of Law, Singapore Management University. The author is deeply grateful to Professor Aileen McHarg, Durham Law School, Durham University, Professor Farrah Ahmed, Melbourne Law School, University of Melbourne, and the anonymous reviewers for their very helpful comments and suggestions. All mistakes and omissions remain entirely the author's responsibility.

[1]Interpretation Act 1965 (Singapore), s 2(1); S Pywell 'Something old, something new: busting some myths about statutory instruments and Brexit' (2019) (Jan) PL 102.

[2]HWR Wade and CF Forsyth *Administrative Law* (Oxford University Press, 11th edn, 2014) pp 731–732, EC Page *Governing by Numbers: Delegated Legislation and Everyday Policy-Making* (Bloomsbury, 2001) p 20.

[3]R Mitchell 'Focus: 2019 Hong Kong protests: political origins and legal ramifications' (2020) 50 HKLJ 463 at 467.

to government authorities. It allows government authorities to issue legally enforceable regulations without having to go through the usual processes that ordinary Acts of Parliament would have to undergo.[4] This advantage of speed and flexibility was used to great advantage during the Covid-19 pandemic – indeed, some of the most important pieces of legislation issued by governments around the world to combat the pandemic were delegated legislation.[5] Other advantages of delegated legislation include its ability to capitalise upon the technical expertise of executive authorities, as well as the greater opportunities for experimentation which it provides.[6]

Given the practical importance of delegated legislation, the regulation of delegated legislation deserves attention. One major means of regulation is parliamentary scrutiny. It has been suggested, however, that the adequacy of parliamentary scrutiny as a meaningful check is questionable.[7] Commentators have noted that parliamentary scrutiny of delegated legislation suffers from various defects, including lack of time for meaningful examination, government control of Parliament's agenda, and the inadequacy of remedies available.[8] Reforms of the parliamentary scrutiny process to address these problems ought to be undertaken. But at the same time, it is worthwhile exploring alternative mechanisms of control that can apply in parallel.

The focus of this paper is on exploring the regulation of delegated legislation through a different mechanism: judicial review. It is trite that delegated legislation is susceptible to judicial review.[9] The existing grounds of review that have been applied against delegated legislation, however, are substantially similar to the grounds of review that have been formulated for application against executive action more broadly. The question which arises is whether there is any possibility of taking into account, through judicial review, the unique nature of delegated legislation vis-à-vis executive action more generally. Might the unique nature of delegated legislation require doctrines of judicial review framed specifically to address the distinctive concerns it raises?

This paper will seek to discuss this question through a theoretical and comparative analysis. It will set the context by describing what delegated legislation is, its practical importance, and the problems arising from its usage. It will then move to briefly consider the possibility of parliamentary control of delegated legislation as a means of addressing these problems, with a view to making a case for judicial review as an alternative mechanism of control.

It will next seek to understand from a theoretical perspective how delegated legislation is conceptually distinct from primary legislation and other types of executive action for the purposes of judicial review. The paper will argue that delegated legislation is conceptually distinct from primary legislation on the basis that it implicates the moral requirements of delegation relationships, as do other types of executive action. Given the work that Farrah Ahmed has done on the nature of delegation relationships and their connection to judicial review of executive action,[10] a question that arises for investigation is how these ideas on the nature of delegation translate specifically to the context of delegated *legislation*. The paper will suggest that delegated legislation, as compared to other types of executive action, raises

[4]P Craig *Administrative Law* (Sweet & Maxwell, 8th edn, 2016) pp 435–436; C Himsworth 'Subordinate legislation in the Scottish Parliament' (2002) 6(3) Edinburgh Law Review 356; J King 'The province of delegated legislation' in E Fisher et al (eds) *The Foundations and Future of Public Law* (Oxford University Press, 2020) p 156.

[5]See for example the Health Protection (Coronavirus) Regulations 2020, SI 2020/129 and the Covid-19 (Temporary Measures) (Control Order) Regulations 2020 (Singapore).

[6]Craig, above n 4, pp 435–436; Himsworth, above n 4; Page, above n 2, pp 21–22; King, above n 4; E Carolan 'Democratic accountability and the non-delegation doctrine' (2011) 33 Dublin University Law Journal 220.

[7]There are ongoing studies on the adequacy of such parliamentary controls. Indeed, the Hansard Society is undergoing one at the time of writing: see https://www.hansardsociety.org.uk/projects/delegated-legislation-review.

[8]Craig, above n 4, pp 440–442; Hansard Society *Delegated Legislation: The Problems with the Process* (Hansard Society, 2021); Pywell, above n 1. This is discussed further in Part 2 below.

[9]Craig, above n 4, p 455; Wade and Forsyth, above n 2, p 737. See *Bank Mellat v Her Majesty's Treasury (No 2)* [2013] UKSC 39 at [44], per Lord Sumption for an elaboration of the circumstances in which the courts will exercise caution in reviewing delegated legislation.

[10]F Ahmed 'The delegation theory of judicial review' (2021) 84(4) Modern Law Review 772.

https://doi.org/10.1017/lst.2023.7 Published online by Cambridge University Press

unique concerns of democratic accountability and the rule of law that inhere especially to the making of general rules of conduct.

With the theoretical foundation thus laid, the paper will argue that existing grounds of review that have been applied towards delegated legislation are principally directed at upholding the moral responsibilities of delegates, but as yet insufficiently take into account the distinctive concerns of democratic accountability and the rule of law raised by delegated legislation. Drawing inspiration from Irish and US jurisprudence, the paper will explore several possibilities by which this doctrinal space can be filled: (1) the major questions doctrine; (2) the non-delegation doctrine; and (3) a novel rule of law-based ground of review directed at exercises of delegated law-making power. The paper will ultimately argue in favour of adopting the second and third possibilities as means of regulating the conferral of delegated law-making power and the exercise of such power respectively.

The analysis offered in this paper is envisioned to be relevant across common law jurisdictions with a shared heritage of English administrative law – indeed, it will engage with the jurisprudence of various common law jurisdictions including Australia, Ireland, Singapore, the UK, and the US. The paper will also demonstrate sensitivity to constitutional context by taking into account the differences between common law jurisdictions adhering to the doctrine of constitutional supremacy and those adhering to parliamentary supremacy.

1. The promises and problems of delegated legislation

While delegated legislation has sometimes been termed 'secondary legislation', its practical importance is anything but secondary. Some of the most important pieces of legislation promulgated recently have been delegated in nature. For example, the Health Protection (Coronavirus) Regulations 2020 in the UK, issued under the Public Health (Control of Disease) Act 1984, conferred upon executive authorities wide-ranging powers to detain and isolate people for the purposes of reducing the transmission of Covid-19 in the UK.[11]

Notwithstanding the usefulness of delegated legislation, concerns have been raised about its usage. Indeed, the issues surrounding delegated legislation have been described as 'one of the most significant constitutional challenges of our time'.[12] For one, many have expressed concerns about the usage of delegated legislation to address matters of major policy – matters which have significant economic or political implications and which are of general significance for citizens.[13] As Edward Page pointed out, while not all delegated legislation concerns matters of major policy, some of it does indeed touch upon such issues.[14] For instance, the UK Childcare Act 2016 granted the Secretary of State a considerable degree of law-making power to, inter alia, create criminal offences relating to the disclosure of information on the eligibility of children for free childcare, and even depart from the maximum penalty prescribed in the Act for such offences simply by promulgating further regulations.[15] There is an abundance of further examples of such 'skeleton legislation' – legislation conferring upon executive authorities vaguely-worded law-making powers effectively granting them the power to decide matters of major policy.[16] Such usage of delegated legislation runs counter to the traditional conception of the relationship between primary and delegated legislation – that matters of major policy ought to be debated in Parliament and ultimately expressed in primary legislation, with delegated legislation being confined to specifying matters of detail.[17]

[11]See Health Protection (Coronavirus) Regulations 2020, SI 2020/129, regs 4, 5, 7, 8, for example.

[12]Hansard Society, above n 8, p 5.

[13]Page, above n 2, p 25; King, above n 4, p 150.

[14]Page, above n 2, pp 48–61.

[15]Childcare Act 2016, ss 2(2)(h), 2(6); Pywell, above n 1, at 114.

[16]See also the European Union (Withdrawal) Act 2018, s 20(2), which contains numerous examples of such powers. Craig, above n 4, p 436; King, above n 4, p 150; Hansard Society, above n 8, p 8; Pywell, above n 1, at 117. The same issue obtains in Australia: see G Appleby 'Challenging the orthodoxy: giving the court a role in scrutiny of delegated legislation' (2016) 69 Parliamentary Affairs 269 at 272.

[17]Hansard Society, above n 8, p 9.

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This usage of delegated legislation to govern matters of major policy is problematic on the basis of democratic principle. Indeed, decisions concerning such issues ought to receive a full airing in Parliament, and ought to be undertaken in a way that ensures the relevant decision-makers are democratically accountable. Accordingly, when one notes that delegated legislation is often subject only to limited parliamentary scrutiny, one may be concerned about the democratic credentials of such legislation when used to govern matters of major policy.[18] These issues are raised most starkly by 'Henry VIII' clauses – clauses which confer upon executive authorities the power to amend primary legislation through delegated legislation.[19] Such clauses, purporting as they do to grant executive authorities the power to override the decisions of an elected body, raise obvious issues of democratic legitimacy.[20]

In a closely-related vein, certain usages of delegated legislation can raise rule of law concerns. Indeed, the vagueness of skeleton legislation confers a significant degree of discretion to executive authorities, causing it to exist in tension with the rule of law principle against unfettered discretion. Further, delegated legislation can raise problems of access to law. The vagueness of delegations can make it more challenging for individuals to apprehend the law governing their situations.[21] And as Gabrielle Appleby pointed out with the benefit of the Australian experience, where delegated legislation applies retrospectively, with no consultation and in the face of political opposition, the rule of law problems are quite self-evident.[22]

2. The relevance of judicial review as a control mechanism

The question that arises is how the promise of delegated legislation can be harnessed while keeping in check the problems that can arise with its abuse.

One primary means by which delegated legislation can be controlled is through parliamentary scrutiny. Indeed, delegated legislation is sometimes required to be laid before Parliament, and can be made subject to an affirmative or negative resolution by Parliament.[23] These measures ensure that delegated legislation receives scrutiny through parliamentary debate. These measures are further enhanced by the work of specialised committees such as the Joint Committee on Statutory Instruments in the UK, which studies the legality of delegated legislation, as well as the Delegated Powers and Regulatory Reform Committee, which studies the propriety of primary legislation delegating law-making powers to the executive.[24] The reports produced by such committees serve as an intra-institutional check on delegated legislation.

However, many have expressed scepticism about the efficacy of parliamentary scrutiny as a meaningful check. JD Hayhurst and Peter Wallington pointed out that real-world experience suggested that many issues with the legality of delegated legislation which were raised by litigation were not picked up through parliamentary processes.[25] Criticisms of parliamentary oversight of delegated legislation have been strongly-worded: 'palpably unsatisfactory' and 'woefully inadequate' are among the terms that have been used.[26] A common concern with parliamentary scrutiny as a check is the lack of parliamentary time devoted to the scrutiny of delegated legislation – a problem which can be exacerbated through the usage of emergency procedures allowing delegated legislation to become law even before being laid before Parliament, as long as parliamentary approval is received within a certain time.[27]

[18]Page, above n 2, pp 22–23; Appleby, above n 16, at 273; H Punder 'Democratic legitimation of delegated legislation – a comparative view on the American, British and German law' (2009) 58(2) International and Comparative Law Quarterly 353 at 355–356, 365–366.

[19]Craig, above n 4, p 436; Hansard Society, above n 8, p 12.

[20]NW Barber and AL Young 'The rise of prospective Henry VIII clauses and their implications for sovereignty' (2003) (Spr) PL 112 at 113–114.

[21]Appleby, above n 16, at 273; Himsworth, above n 4, at 358.

[22]Appleby, above n 16, at 273.

[23]Craig, above n 4, pp 440–441.

[24]JD Hayhurst and P Wallington 'The Parliamentary scrutiny of delegated legislation' (1988) (Win) PL 547 at 552.

[25]Ibid, at 573.

[26]Pywell, above n 1, at 113.

[27]Craig, above n 4, p 442; Hansard Society, above n 8, p 18; Pywell, above n 1, at 111. See Appleby, above n 16, for examples of how this feature of delegated legislation has been used to further the government's agenda in Australia.

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The government's control of Parliament's agenda can also limit the scrutiny which delegated legislation receives,[28] as also does the 'take it or leave it' process which delegated legislation is often subject to – a process which does little to encourage effective scrutiny and instead fosters a 'rubber-stamping' attitude, as Stephanie Pywell pointed out.[29]

These problems with parliamentary scrutiny of delegated legislation have been well-ventilated. Indeed, at the time of writing, the Hansard Society is undertaking a review of the UK's system of delegated legislation with a focus on how the parliamentary scrutiny mechanisms can be enhanced.[30] Such studies can go a long way towards improving the usage of delegated legislation. But aside from a systematic reform of parliamentary scrutiny processes, another avenue by which the usage of delegated legislation can potentially be controlled is judicial review. Indeed, judicial review, with its classical focus on ensuring the legality of executive action, is prima facie suitable as a supplement to parliamentary scrutiny in checking the usage of delegated legislation.[31] The subsequent sections will explore this possibility.

3. Theorising judicial review of delegated legislation

In evaluating judicial review as a means of controlling the usage of delegated legislation, it is crucial first to understand what the normative orientation of such judicial review ought to be – in other words, what should judicial review of delegated legislation be directed towards achieving? This section will seek to proffer a theoretical account of what the normative orientation of judicial review of delegated legislation ought to be, with a view towards evaluating the fit of existing grounds of judicial review with this normative orientation and exploring opportunities for development.

In thinking about the proper normative orientation of judicial review of delegated legislation, it is important to address two questions: (1) what distinguishes delegated legislation from primary legislation for the purposes of judicial review?; (2) what distinguishes delegated legislation from other types of executive action for the purposes of judicial review? The answers to these questions will provide insights into the values that judicial review of delegated legislation ought to serve.

(a) Distinguishing delegated legislation from primary legislation

Delegated legislation can look very much like primary legislation. Indeed, it can shape the scope of power of executive authorities, prescribe legal obligations, create offences, and stipulate sentences for offences. The question of how primary legislation and delegated legislation are distinct took on a particular salience in the UK context – whether Acts of the Scottish Parliament ought to be characterised as primary or delegated legislation had important implications for the scope of judicial review available against them.[32] While this issue has since been settled by the UK Supreme Court in *AXA General Insurance Ltd v Lord Advocate*,[33] the literature that developed in response to this issue is nevertheless quite useful in understanding how one ought to characterise the difference between primary and delegated legislation.

Aileen McHarg's account of the distinction between primary and delegated legislation is particularly instructive.[34] She first identified a common method of characterising this distinction: primary legislation is the ultimate source of authority as expressions of the sovereign Parliament, while delegated legislation owes its existence and authority to primary legislation.[35] This might be thought to

[28]Hansard Society, above n 8, p 16.

[29]Pywell, above n 1, at 109.

[30]Hansard Society, above n 8, p 6.

[31]See Hayhurst and Wallington, above n 24, at 576; King, above n 4, p 151.

[32]See A McHarg 'What is delegated legislation?' (2006) (Aut) PL 539 and T Mullen 'The AXA Insurance case: challenging Acts of the Scottish Parliament for irrationality' (2010) 8 Scots Law Times 39 for an in-depth discussion of these questions. In particular, see Mullen at 43.

[33]*AXA General Insurance Ltd v Lord Advocate* [2011] UKSC 46.

[34]McHarg, above n 32.

[35]McHarg, above n 32, at 541.

https://doi.org/10.1017/lst.2023.7 Published online by Cambridge University Press

be an uncontroversial proposition, especially within the context of jurisdictions such as the UK which adhere to the doctrine of parliamentary sovereignty.

However, calling this method a 'source-based approach', McHarg argued that there were several issues with taking such an approach to distinguish the two types of legislation. For one, a source-based approach would encounter difficulties when applied to jurisdictions possessing supreme written constitutions, since it would suggest that in such jurisdictions where law-making power is delegated by the constitution, there can be no primary legislation at all.[36] As McHarg pointed out, even Acts of Parliament would be characterised as delegated legislation on such an approach in these jurisdictions.

McHarg argued that the better view was that delegated legislation was distinct from primary legislation on two grounds. First, delegated legislation, being authored by executive authorities, does not carry the same weight of democratic legitimacy as primary legislation.[37] Secondly, and more crucially, delegated legislation is susceptible to the constraint of fulfilling the specific purposes for which power was conferred upon the executive authorities – indeed, even broad powers to legislate for 'peace, order and good government' are not entirely unfettered and have to be exercised for such purposes, as Laws LJ held in *R (on the application of Bancoult) v Secretary of State for the Foreign and Commonwealth Office*.[38] This constraint is not applicable to primary legislation. On this basis, McHarg concluded that Acts of the Scottish Parliament ought to be characterised as primary legislation.[39]

It is clear that McHarg's approach relies primarily on the constraints upon delegated power to specify the difference between primary and delegated legislation – delegated powers must be used to further the purposes of the delegator. Building upon this idea, Ahmed's recently-proposed delegation theory of judicial review is particularly useful in substantiating what the precise constraints upon delegated powers are. Ahmed offered an interpretive theory of judicial review – in her view, the grounds of judicial review in administrative law can be explained as a means of holding administrators to their moral duties as delegates of Parliament or the Crown.[40] She argued that there are three types of delegation relationships, which each impose different moral duties upon delegates: (1) mandate delegation, which requires the specific instructions of delegators to be fulfilled with little discretion accorded to delegates; (2) effectuate delegation, which calls upon delegates to give concrete form to the general or abstract purposes of the delegator; and (3) expressive delegation, which requires delegates to express the character, beliefs, or attitudes of the delegator.[41]

Ahmed proposed that the various grounds of judicial review can be understood as directed at holding administrators to the moral duties expressed in each of these types of delegation relationships, and argued that this theory of judicial review coheres well with existing judicial review doctrine and has predictive and normative value, inter alia.[42] To be clear, Ahmed's argument was not directed specifically at the context of delegated legislation. Nevertheless, should one accept that the key distinction between delegated legislation and primary legislation is that delegated legislation must further the specific purposes of the delegator, as McHarg argued, then it becomes readily apparent that Ahmed's delegation theory of judicial review is particularly apt for translation to this context.

Accordingly, we have discerned that the principal distinction between primary and delegated legislation is that delegated legislation must further the specific purposes of the delegator. These purposes can constrain the exercise of delegated power by imposing moral duties on delegates. These constraints do not apply to primary legislation. This is helpful in framing how delegated legislation ought to be approached for the purposes of judicial review. Indeed, as will be observed later, this account of the

[36]Ibid, at 544–545.

[37]Ibid, at 555–556.

[38]*R (on the application of Bancoult) v Secretary of State for the Foreign and Commonwealth Office* [2001] QB 1067 at 1103; McHarg, above n 32, at 558.

[39]McHarg, above n 32, at 560; see also Mullen, above n 32, at 43–44.

[40]Ahmed, above n 10, at 777–780.

[41]Ibid, at 781–783.

[42]Ibid, at 808–810.

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distinction between primary and delegated legislation justifies the present judicial practice of reviewing delegated legislation on a similar basis as other types of executive action.

(b) Distinguishing delegated legislation from executive action

Yet, as an account of the proper normative orientation of judicial review of delegated legislation, the account offered in the previous section remains incomplete. Indeed, this account of what distinguishes delegated legislation from primary legislation does not distinguish delegated legislation from other types of executive action. What then makes delegated legislation distinct from other types of executive action, for the purposes of judicial review?

The answer is relatively straightforward. Delegated legislation is distinct from other types of executive action principally on the basis that it is are similar in substance to primary legislation – indeed, it comprises published general rules which are capable of shaping the scope of legal powers and specifying legal rights and duties, extending even to the provision of criminal offences and punishments.[43]

In view of the fact that delegated legislation is distinct from other types of executive action on this basis, two important implications follow. First, the capacity of delegated legislation to serve as general rules of conduct means that it attracts the concern of democratic legitimacy in a unique manner as compared to other types of executive action. Indeed, Lockean political theory suggests that the legislative function, which involves the creation of general rules binding on all citizens on pain of sanctions, represents a particular kind of intrusion on individual liberty which would have to be legitimised by being promulgated through elected decision-making bodies.[44] This would ensure that the decision-making bodies responsible for such general rules are accountable to the people for their decisions.[45] Indeed, as Charleton J held in the Irish Supreme Court decision of *Náisiúnta Leictreach Contraitheoir Eireann Cuideachta Faoi Theorainn Ráthaíochta v The Labour Court, The Minister For Business Enterprise & Innovation, Ireland and the Attorney General* (*NECI*), '[e]lected representatives owe a responsibility to the Irish people to legislate for them and this cannot be abdicated by any indolent or ill-defined delegation to a subordinate authority'.[46] Delegated legislation, as a product of executive authorities, has a more distant link with the sources of democratic legitimacy as compared to primary legislation, thereby raising unique concerns as to its democratic credentials.

Second, the distinctive nature of delegated legislation also implicates rule of law concerns in a manner unique from other types of executive action. As Eoin Carolan has pointed out, the rule of law requires that the creation of general rules of conduct must comply with certain principles in order to safeguard against arbitrary government action.[47] These principles are neatly captured by Lon Fuller's well-known account of the eight requirements of the internal morality of law, which include requirements that laws have to be made at the appropriate level of generality, be publicly accessible,

[43]R Baldwin and J Houghton 'Circular arguments: the status and legitimacy of administrative rules' (1986) (Sum) PL 239 at 242, 281. See for example Interpretation Act 1965 (Singapore), s 20(a)(i): 'authority to provide that a contravention thereof shall be punishable by a fine not exceeding $2,000 or with imprisonment for a term not exceeding 12 months or both as may be specified in the subsidiary legislation'; Interpretation Act 1965 (Singapore) s 26: 'An act is deemed to be done under any Act or by virtue of the powers conferred by any Act or in pursuance or execution of the powers of, or under the authority of any Act, if it is done under, or by virtue of, or in pursuance of, subsidiary legislation made under any power contained in the Act'. Interesting legal issues can also arise around the question of the precise legal status of administrative rules: see Craig, above n 4, pp 465–466, Wade and Forsyth, above n 2, pp 733–736.

[44]J Locke *The Second Treatise of Government* (1690); Carolan, above n 6, at 225–226; DH Ginsburg and S Menashi 'Presidential power in historical perspective: reflections on Calabresi and Yoo's the unitary executive: nondelegation and the unitary executive' (2010) 12 University of Pennsylvania Journal of Constitutional Law 251 at 254–255.

[45]Carolan, above n 6, at 225; see also E Carolan 'Democratic control or "high-sounding hocus-pocus"? A public choice analysis of the non-delegation doctrine' (2007) 29 Dublin University Law Journal 111.

[46]*Náisiúnta Leictreach Contraitheoir Eireann Cuideachta Faoi Theorainn Ráthaíochta (NECI) v The Labour Court, The Minister For Business Enterprise & Innovation, Ireland and the Attorney General* [2021] IESC 36 at [19], per Charleton J.

[47]Carolan, above n 6, at 226.

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and cannot have retroactive effect, inter alia.[48] Being general rules of conduct, delegated legislation also implicates the rule of law concern of certainty more strongly than other types of executive action, so much so that the courts have exercised their discretion not to quash delegated legislation for procedural defects on the ground that doing so may lead to uncertainty in administration.[49] Accordingly, in addition to democratic legitimacy, compliance with the rule of law serves as an additional and related source of legitimacy for such general rules.[50]

To be clear, this is not to say that ordinary executive action is incapable of raising concerns of democratic legitimacy and the rule of law. Regular executive action can certainly raise serious concerns in this regard – for instance, unchecked executive discretion over a wide range of conduct is severely corrosive to the rule of law. Rather, the point sought to be made here is simply that delegated legislation, as a unique species of executive action, raises democratic legitimacy and rule of law concerns in a manner *distinct* from other types of executive action, given its nature as published general rules of conduct capable of shaping legal powers and specifying legal rights and obligations.

4. Assessing prevailing judicial review doctrine

The discussion in the preceding section yields two helpful considerations in thinking about the normative foundation of the law on judicial review of delegated legislation. First, as products of delegated power for specific purposes, the nature of delegation places certain constraints upon the usage of delegated legislation – thereby distinguishing delegated legislation from primary legislation. Ensuring that these constraints upon the exercise of delegated powers are complied with provides a normative grounding for judicial review of delegated legislation. Second, as general rules of conduct capable of specifying rights and duties as well as prescribing sanctions, the concerns of democratic legitimacy and rule of law that are implicated where law-making is concerned would apply in a unique manner to delegated legislation as compared to other types of executive action.

These considerations can be further distilled into more concrete implications for the law of judicial review of delegated legislation. First of all, insofar as the grounds of judicial review of executive action more broadly can be theoretically founded upon the moral duties imposed on delegates, as Ahmed suggests, it stands to reason that judicial review of delegated legislation can be conducted on similar grounds to judicial review of executive action.

This is indeed the approach that courts have taken towards judicial review of delegated legislation. Courts have subjected delegated legislation to review on the basis of the usual grounds of review against executive action.[51] For example, the courts have invalidated delegated legislation falling outside the scope of or conflicting with the parent primary legislation, and also where statutory procedural obligations set out in primary legislation were not followed in the promulgation of delegated legislation.[52] The courts have displayed a willingness to invalidate delegated legislation on this ground even if the relevant empowering provision in primary legislation was worded very broadly – for example, in *Commissioners of Customs and Excise v Cure & Deeley Ltd*, the court held that the

[48]L Fuller *The Morality of Law* (Yale University Press, revd edn, 1969) ch 2. See also Appleby, above n 16, for an expression of concern about delegated legislation being used in a retroactive manner.

[49]*R v Secretary of State for Social Services, ex p Association of Metropolitan Authorities* [1986] 1 All ER 164; Page, above n 2, p 30.

[50]JL Mashaw *Greed, Chaos, and Governance: Using Public Choice to Improve Public Law* (Yale University Press 1999) p 142; Carolan, above n 6, at 226.

[51]*R (Asif Javed) v Secretary of State for the Home Department and Another* [2001] EWCA Civ 789; see also *R (Rights of Women) v Lord Chancellor and Secretary of State for Justice* [2016] EWCA Civ 91; Craig, above n 4, p 455; Wade and Forsyth, above n 2, pp 737–745; King, above n 4, pp 169–170.

[52]*R (C) v Secretary of State for Justice* [2009] QB 657; *R v Secretary of State for Transport, ex p Richmond LBC* [1994] 1 WLR 74; *R v Inland Revenue Commissioners, ex p Woolwich Equitable Building Society* [1990] 1 WLR 1400; *DPP v Hutchinson* [1990] 2 AC 783; *Agricultural, Horticultural and Forestry Industry Training Board v Aylesbury Mushrooms Ltd* [1972] 1 WLR 190; *Patchett v Leathem* (1949) 65 TLR 69; *Cheong Seok Leng v Public Prosecutor* [1988] 1 SLR(R) 530. See also Craig, above n 4, p 454; Wade and Forsyth, above n 2, pp 737–738; McHarg, above n 32, at 550–551.

https://doi.org/10.1017/lst.2023.7 Published online by Cambridge University Press

words 'appear to them to be necessary' did not confer unfettered discretion upon executive authorities.[53]

Courts have also applied the improper purpose ground of review against delegated legislation. This ground of review tracks easily onto the context of delegated legislation – indeed, since delegated law-making powers are granted to fulfil certain purposes, using these powers for other purposes would render them unlawful.[54] Thus, in *R (Public Law Project) v Lord Chancellor (Office of the Children's Commissioner intervening)*, the Supreme Court found that the exclusion of a group from the right to receive civil legal services on the basis of a residence requirement by way of delegated legislation was ultra vires, on the basis, inter alia, that the imposition of such a requirement fell outside the purpose of the empowering legislation.[55]

In addition, the irrationality ground of review has been applied to delegated legislation.[56] In *R (Asif Javed) v Secretary of State for the Home Department and Another*,[57] the Court of Appeal accepted that delegated legislation could be challenged on this ground, and proceeded to hold that the Home Secretary's order designating Pakistan as a place with no risk of persecution was irrational.[58] The courts have even suggested that a common law duty of consultation ought to be applicable in certain circumstances to the making of delegated legislation – in *Bank Mellat v Her Majesty's Treasury (No 2)* (*Bank Mellat*), Lord Sumption suggested that if a duty to give prior notice to a directly-affected party and to hear what it had to say would arise in relation to an ordinary executive decision, the same position ought to obtain even if the decision had to be made by way of delegated legislation.[59] The courts have also accepted that delegated legislation can give rise to legitimate expectations, such that a subsequent change of position therein can be rendered unlawful.[60]

Finally, constitutional principle has been invoked by the courts in their review of delegated legislation.[61] For instance, in *R (UNISON) v Lord Chancellor (Equality and Human Rights Commission and Another intervening) (Nos 1 and 2)*, the Supreme Court invalidated an order seeking to introduce fees for the filing of claims and appeals in the employment tribunals, on the ground that such an order would impede the constitutional right of access to justice, and would thereby require clear parliamentary authorisation.[62]

What this brief survey of the law on judicial review of delegated legislation highlights is that it is based substantially on the general grounds of review for all types of executive action. This is understandable when one takes into account Ahmed's delegation-based account of the normative orientation of judicial review. If the general grounds of judicial review are already based on the constraints inherent in the nature of delegated power, then these grounds surely translate naturally to the context of judicial review of delegated legislation.

However, this means that the prevailing grounds of review only at best tangentially address the distinctive democratic legitimacy and rule of law concerns that distinguish delegated legislation from other types of executive action. One may suggest that the applicability of a duty to consult to the making of delegated legislation goes some way towards addressing these concerns. The problem, however, is that such a ground of review would do so only in a very limited manner – indeed, Lord Sumption in

[53] *Commissioners of Customs and Excise v Cure & Deeley Ltd* [1962] 1 QB 340.

[54] Wade and Forsyth, above n 2, p 745.

[55] *R (Public Law Project) v Lord Chancellor (Office of the Children's Commissioner intervening)* [2016] UKSC 39. See also *R (Rights of Women) v Lord Chancellor and Secretary of State for Justice* [2016] EWCA Civ 91.

[56] Craig, above n 4, p 457; Wade and Forsyth, above n 2, p 743; *Kruse v Johnson* [1898] 2 QB 91.

[57] *R (Asif Javed) v Secretary of State for the Home Department and Another* [2001] EWCA Civ 789.

[58] Ibid, at [73].

[59] *Bank Mellat v Her Majesty's Treasury (No 2)* [2013] UKSC 39 at [46], per Lord Sumption. See also Punder, above n 18, at 374.

[60] *R (BAPIO Action Ltd and Another) v Secretary of State for the Home Department and Another* [2008] UKHL 27, per Lord Rodger of Earlsferry and Lord Mance.

[61] Craig, above n 4, pp 455–456; Wade and Forsyth, above n 2, pp 739–740, Page, above n 2, p 30.

[62] *R (UNISON) v Lord Chancellor (Equality and Human Rights Commission and Another intervening) (Nos 1 and 2)* [2017] UKSC 51.

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Bank Mellat acknowledged that 'the courts have been reluctant to impose a duty of fairness or consultation on general legislative orders which impact on the population at large or substantial parts of it, in the absence of a legitimate expectation, generally based on a promise or established practice', and his Lordship's willingness to impose such a duty in the case at hand was substantially influenced by the fact that the statutory instrument in question was targeted specifically at Bank Mellat.[63]

This brings us neatly to the second concrete implication for judicial review of delegated legislation raised by the theoretical discussion earlier. Indeed, the normative similarity between judicial review of delegated legislation and judicial review of executive action more broadly – grounded as they both are on the nature of delegated power – ought not to obscure the important point that there *are* significant differences between delegated legislation and other types of executive action. The distinctive concerns that delegated legislation raises in relation to democratic legitimacy and the rule of law are features which the law on judicial review of delegated legislation ought to take cognisance of – especially when one observes that the problems with delegated legislation highlighted in Part 2 tend to revolve around these characteristics.

This is not to say that judicial review should be the sole means by which these concerns should be addressed. Rather, the point is simply to suggest that any reflection on the normative orientation of the law on judicial review of delegated legislation ought to recognise these unique concerns – and that it might be worthwhile to explore the extent to which these concerns can shape judicial review doctrine. The next section of this paper will undertake this exploration.

5. Proposing a development in judicial review doctrine

The preceding section opened up for discussion the possibility of developing the law on judicial review of delegated legislation to address the unique concerns of democratic legitimacy and the rule of law raised by delegated legislation.[64] The question then is what shape such a development could take.

(a) The major questions doctrine?

One candidate that arises for attention is the major questions doctrine – a doctrine that has gained traction in US Supreme Court jurisprudence. The major questions doctrine was recently discussed and affirmed by the US Supreme Court in *West Virginia v Environmental Protection Agency*[65] (*West Virginia*). In this case, the key issue was whether the US Environmental Protection Agency (EPA) had the power, under its discretion to determine the 'best system of emission reduction' in the Clean Air Act, to promulgate rules which would amount to a fundamental restructuring of the overall mix of electricity generation in the US to reduce reliance on coal.

Drawing from precedents such as *Food and Drug Administration v Brown & Williamson Tobacco Corp*,[66] Chief Justice Roberts affirmed the existence of a major questions doctrine. This doctrine was based on a presumption that Congress would intend to make major policy decisions for itself; a presumption in turn grounded both in the separation of powers and 'a practical understanding of legislative intent'.[67] The doctrine required that when faced with a claim of a highly consequential scope of delegated power, the relevant agency 'must point to "clear congressional authorization" for the power it claims'.[68]

On the facts, Roberts CJ found that the major questions doctrine was indeed implicated. The power claimed by the EPA amounted to a transformative expansion of its authority, such that the EPA could even force coal power plants to stop generating power altogether. Indeed, Roberts CJ thought that it

[63] *Bank Mellat v Her Majesty's Treasury (No 2)* [2013] UKSC 39 at [44], per Lord Sumption.

[64] See Carolan, above n 45, for an account of how the non-delegation doctrine serves democratic ideals by preventing factionalism and enhancing accountability.

[65] *West Virginia v Environmental Protection Agency*, 597 US ___ (2022).

[66] *Food and Drug Administration v Brown & Williamson Tobacco Corp*, 529 US 120 (2000) at 159.

[67] *West Virginia v Environmental Protection Agency*, 597 US ___ (2022) at 19.

[68] Ibid, at 19.

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was not plausible that Congress would leave to agency discretion the decision of how much coal-based generation there should be over the coming decades, being a decision of great economic and political significance.[69] Accordingly, any claims to possess powers with such economic and political significance would have to be buttressed by clear congressional authorisation.[70] Unfortunately for the EPA, such congressional authorisation could not be found.[71]

Described as such, the major questions doctrine is an interpretive principle. It is also a prima facie plausible solution to the problem identified in this paper. It would directly further the normative concern of democratic accountability. Indeed, by limiting the permissible scope of delegated law-making power, the existence of such a doctrine would help ensure that decisions bearing major political or economic consequences would be taken by the legislature. It would also help to safeguard the constitutional separation of powers by policing a clear demarcation between legislative and executive powers.

However, what *is* a 'major' question that would trigger the application of the doctrine? A determination of which questions are major and which are not ultimately rests in an assessment of which functions are properly reserved to the legislative branch and which are the domain of the executive branch. The major questions doctrine is premised then on the possibility of drawing a clear demarcation between legislative and executive power. Yet, the articulation of such a distinction may be less straightforward than one might think.

A pair of decisions from common law jurisdictions will help to illustrate this point. The High Court of Australia in *The Commonwealth v Grunseit*[72] (*Grunseit*) was confronted with a ministerial direction under the National Security Act requiring male refugee aliens to perform service which the Minister for the State of the Interior was of the opinion that they would be capable of performing. A key issue the court had to decide was whether this direction had legislative character and therefore had to comply with procedural requirements on presentation before Parliament. In deciding this question, the court held that 'the general distinction between legislation and the execution of legislation is that legislation determines the content of a law as a rule of conduct or a declaration as to power, right or duty, whereas executive authority applies the law in particular cases'. Applying this test, the court held that the ministerial direction at hand amounted merely to an application of a general rule to particular circumstances and was therefore not legislative in nature – it did not change the content of the law by extending or limiting it and did not create a new rule of conduct.[73]

The Singapore High Court in *Cheong Seok Leng v Public Prosecutor*[74] (*Cheong Seok Leng*) accepted this test but reached a different conclusion on the executive action at issue. In this case, the Minister for Home Affairs had assigned civil defence duties to the Vigilante Corps. This assignment was subsequently challenged on the ground, inter alia, that it had legislative effect and therefore had to comply with the procedural requirements applicable to delegated legislation. Applying the *Grunseit* test, the court held that this assignment had legislative effect – 'it was intended to charge the Vigilante Corps with additional functions and duties which, but for the assignment, it would not have had', and amounted to a determination of 'the content of the Vigilante Corps Act as a rule of conduct or a declaration of the duties of the Vigilante Corps'. This meant, therefore, that the assignment was invalid, since the procedural requirements which it would have to comply with were not fulfilled on the facts.[75]

It should be apparent from these decisions that it can be challenging to articulate precisely just where the boundary between making law and executing the law lies. Indeed, as Richard White has argued, it is difficult to draw clear distinctions between legislative and executive power – it is difficult to 'execute the law without in some way also legislating and adjudicating'.[76] Along similar lines, Ivor

[69]Ibid, at 25.
[70]Ibid, at 20–28.
[71]Ibid, at 28–31.
[72]*The Commonwealth v Grunseit* (1943) 67 CLR 58.
[73]Ibid, at 82–83.
[74]*Cheong Seok Leng v Public Prosecutor* [1988] 1 SLR(R) 530.
[75]Ibid, at [44].
[76]R White 'Separation of powers and legislative supremacy' (2011) 127(Jul) Law Quarterly Review 456 at 460.

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Jennings noted that 'administrative action so often partakes of both legislative and executive characteristics', leading to his conclusion that there is no real distinction between these powers.[77] The challenges of distinguishing between these two functions, exacerbated by the complexity of the modern administrative state, means that it will be difficult to specify judicially manageable standards for a doctrine framed in such a manner, as Carolan has argued.[78]

Further, the major questions doctrine fundamentally rests on a problematic picture of administrative governance – that is, that executive authorities serve as a mere 'transmission belt' for the legislature, executing and carrying out policy decisions taken by the legislature.[79] However, as Justice Stevens of the US Supreme Court pointed out in *Whitman v American Trucking Associations, Inc*, it is clear that administrative agencies play a much bigger role in modern administration than this model suggests – they do make rules and engage in policy-making.[80] As Jeff King has argued, '"everyday policy-making" is plainly expected under delegated powers', with the consequence that it is quite widely-accepted in practice for delegated legislation to also play a policy-making function.[81] Modern administration is now so complex that the zone of 'technical detail' traditionally entrusted to administrative authorities has expanded significantly, such that the exercise of what one may have thought to be a mere 'filling up of detail' now in truth involves 'the same kinds of policy choices, interest balancing, and power struggles that attend real lawmaking by real legislatures'.[82]

The question that arises then is whether it is possible for legal doctrine to further the important interests served by the major questions doctrine, yet avoid the fundamental difficulty of having to draw distinctions between the functions properly exercised by the legislative and executive branch.

It is proposed that a possible way of doing this is to avoid a focus on the nature of the *functions* which can properly be delegated, but rather to direct one's attention towards ensuring that the *conferral* and *exercise* of delegated law-making power complies with rule of law standards. Indeed, if important law and policy-making functions will inevitably be exercised by executive authorities, then a more fruitful emphasis for judicial review would be to ensure that the conferral and exercise of these functions is performed in accordance with the rule of law. This can be done by way of two separate doctrines: a doctrine directed at ensuring that delegations of law-making power comply with the rule of law, and another doctrine directed at ensuring that exercises of delegated law-making power comply with the rule of law.

(b) Conferring delegated law-making power in accordance with the rule of law

Doctrines directed at ensuring that delegations of law-making power must comply with rule of law standards can be found in various common law jurisdictions. These doctrines have been usually termed non-delegation doctrines, capable of rendering impermissible certain delegations of law-making power.[83] While the 'non-delegation' descriptor may prima facie suggest some overlap with the major questions doctrine, the analytical focus of such doctrines is quite different. Non-delegation doctrines are focused not so much on the nature of the function sought to be exercised by the executive authority – as the major questions doctrine is – but rather on the *manner* by which law-making power is delegated. No matter the subject matter of the delegated power, non-delegation doctrines hold that delegations of law-making power cannot be unconstrained and vague, and that

[77] I Jennings *The Law and the Constitution* (University of London Press, 5th edn, 1959) p 294.

[78] Carolan, above n 6, at 229; Carolan, above n 45, at 129.

[79] Carolan, above n 45, at 116.

[80] *Whitman v American Trucking Associations, Inc*, (2001) 531 US 457 at 488–489, per Justice Stevens; E Fisher 'Risk regulation and the rule of law: searching for "intelligible principles" in the administrative state' (2001) 3(2) Environmental Law Review 139 at 144–145.

[81] King, above n 4, p 160.

[82] Ginsburg and Menashi, above n 44, at 273; Carolan, above n 45, at 117.

[83] For the avoidance of doubt, this is not a reference to the *Carltona* doctrine: see M Freedland 'The rule against delegation and the Carltona doctrine in an agency context' (1996) (Spr) PL 19 and R Gregson 'When should there be an implied power to delegate?' (2017) (Jul) PL 408 for a discussion of this doctrine.

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they must specify sufficient guidance for executive authorities in their exercise of delegated law-making powers.

There are a variety of ways by which a doctrine of non-delegation can be articulated. One notable example can be found in Irish Supreme Court jurisprudence. Indeed, the Irish courts have held that the exclusive vesting of legislative power in the Irish legislature found in Article 15 of the Irish Constitution mandates the acceptance of a non-delegation doctrine.[84] The prevailing requirements of this doctrine were first articulated in the seminal case of *Cityview Press v an Chomhairle Oilina* (*Cityview Press*).[85] In *Cityview Press*, one of the arguments made before the Irish Supreme Court was that the Oireachtas had impermissibly delegated its law-making powers to the Industrial Training Authority by empowering it to impose a levy upon employers in certain designated industries to fund industrial and commercial training. In addressing this argument, the Supreme Court formulated the 'principles and policies' approach: 'the test is whether that which is challenged as an unauthorised delegation of parliamentary power is more than a mere giving effect to principles and policies which are contained in the statute itself'.[86] If so, then any purported exercise of such delegated power would be unconstitutional. Applying this test, the court in *Cityview Press* found that there had been no unconstitutional delegation of law-making authority, since the primary legislation in question had contained 'clear declarations of policies and aims', and the levy power granted to the Industrial Training Authority amounted to no more than 'adding the final detail which brings into operation the general law which is laid down by the section'.[87]

The focus of the 'principles and policies' test on ensuring that delegations of law-making power are not unconstrained became clearer in the wake of the recent Irish Supreme Court decision of *NECI*.[88] Faced with a challenge to Chapter 3 of the Industrial Relations (Amendment) Act 2015 alleging that it was an unconstitutional delegation of law-making authority, MacMenamin J affirmed the applicability of the 'principles and policies' test, explaining that it is 'best understood as a means whereby, recognising the present day realities of the administrative state, the Oireachtas, when it delegates power by law, does so only in a manner that the delegate or subordinate body does not, itself, become a legislator'.[89] MacMenamin J suggested that the proper inquiry that the test involves would benefit from a 'negative recasting' – specifically, the 'principles and policies' test should require a court to ask 'whether the absence of such principles and policies actually trespasses on the power of the Oireachtas'.[90] In answering this question, judges ought to adopt a holistic consideration of the entire Act, and ultimately direct their minds to the issue of 'whether there are sufficient limiting principles and policies so as to confine the area of choice'.[91] In a similar vein, Charleton J in a concurring judgment held that the 'principles and policies test' essentially requires '[l]imited delegation for an express purpose and with sufficient guidance to an assured outcome, or an outcome within a defined and limited range, or discretion within a limited assessment'.[92] Applying this approach, both judges agreed that the challenged Act did not fall foul of Article 15, on the basis that the power vested in the Labour Court by the Act was constrained within a prescribed legislative framework and subject to safeguards and guidelines – all of which served to narrow the choices available to the decision-maker.[93]

[84] *Laurentiu v Minister for Justice* [1999] IESC 47; Carolan, above n 45, at 115–116; Carolan, above n 6; R Fanning 'Reflections on the legislative process following Leontjava v Director of Public Prosecutions & Others' (2004) 39 Irish Jurist 286.

[85] *Cityview Press v an Chomhairle Oilina* [1980] IR 381; Carolan, above n 6, at 221.

[86] *Cityview Press v an Chomhairle Oilina* [1980] IR 381.

[87] Ibid.

[88] *NECI v The Labour Court* [2021] IESC 36.

[89] Ibid, at [53], per MacMenamin J.

[90] Ibid, at [67], per MacMenamin J.

[91] Ibid, at [69], per MacMenamin J.

[92] Ibid, at [26], per Charleton J.

[93] Ibid, at [91]–[137], per MacMenamin J; [34], per Charleton J.

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Doctrines similar to the Irish 'principles and policies' test can be found elsewhere in the common law world – for instance, the 'excessive delegation' doctrine formulated by the Supreme Court of India is substantially similar to the 'principles and policies' test.[94] Further, the Irish 'principles and policies' test was formulated by reference to the 'intelligible principle' test of the US Supreme Court.[95] The 'intelligible principle' test holds that a delegation of law-making power would be constitutional as long as Congress has laid down an intelligible principle to which the delegate is required to conform.[96] This test, however, has not been applied with great vigour in the US. As the majority opinion of the US Supreme Court in *Gundy v United States* noted, the standard required by the doctrine was 'not demanding', with the effect that the court had 'over and over upheld even very broad delegations'.[97] Scholars have remarked that the non-delegation doctrine in the US is essentially moribund – while the doctrine remains on the books, it is hardly enforced by the courts.[98]

Suggestions as to how a non-delegation doctrine ought to be framed have also been made in academic literature. For instance, Appleby has argued within an Australian context that the courts can perform a meaningful role in checking the usage of delegated legislation by placing substantive and procedural limits upon the delegation of law-making power.[99] She proposed, as a substantive limit, that delegations of law-making power in primary legislation have to be sufficiently precise[100] – a proposal which clearly bears some resemblance to the 'principles and policies' and 'intelligible principle' tests. The procedural limit she proposed was for the court to instate a requirement for parliamentary approval before delegated legislation comes into force.[101]

A non-delegation doctrine, no matter what specific form it may take, helps to further democratic accountability, though admittedly in a less direct fashion than the major questions doctrine – indeed, to the extent that a non-delegation doctrine is grounded upon safeguarding the separation of powers, such a doctrine would help ensure that the primary responsibility for law-making rests in the legislature. But the link between the rule of law and the non-delegation doctrine would be more direct. The doctrine ensures that delegated law-making powers are meaningfully constrained by law, furthering the fundamental rule of law principle that legal powers must have legal limits. Such a doctrine also furthers the rule of law interest of clarity by requiring that delegations of law-making power cannot be unacceptably vague.

The key advantage of a non-delegation doctrine is that it is capable of achieving these objectives in a manner that does not require the court to enter into the difficult territory of distinguishing between functions which are properly legislative or executive in nature. By shifting the focus away from complex questions of institutional balance to the concept of legal constraint, a non-delegation doctrine falls more properly within the expertise of judges, who would already be accustomed to thinking in such terms in the context of judicial review.

One might argue, however, that one difficulty with a non-delegation doctrine is that it is principally targeted at identifying impermissible *delegations*. In other words, it renders impermissible certain delegations of law-making power in *primary* legislation, which then naturally bears consequences for delegated legislation purportedly made under such power. One might, therefore, argue that a non-delegation doctrine will have less salience in a jurisdiction adhering to the doctrine of parliamentary supremacy such as the UK.[102] Indeed, it is telling that the jurisdictions examined earlier which saw the

[94]See for example *In Re: Delhi Laws Act, 1912*, 1951 AIR 332; *Harishankar Bagla v State of Madhya Pradesh*, 1954 AIR 465; *Avinder Singh v State of Punjab*, 1979 AIR 321.

[95]*Mistretta v United States*, (1989) 488 US 361; *Panama Refining Co v Ryan*, (1935) 293 US 388; *ALA Schechter Poultry Corp et al v United States*, (1935) 295 US 495.

[96]See also *Gundy v United States*, 588 US ___ (2019).

[97]Ibid, at 16, per Justice Kagan.

[98]Carolan, above n 6, at 236–237; CR Sunstein 'Nondelegation canons' (2000) 67 University of Chicago Law Review 315 at 322; T Halper 'To delegate or redelegate: is that the question?' (2021) 10 British Journal of American Legal Studies 335 at 336.

[99]Appleby, above n 16, at 280–281.

[100]Ibid, at 281.

[101]Ibid, at 282.

[102]This is a difficulty that would apply equally to the major questions doctrine.

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articulation of a doctrine of non-delegation – Ireland and the US – both adhere to the doctrine of constitutional supremacy.

This difficulty is not an insuperable one. Indeed, a doctrine of non-delegation can be adapted for use within the UK by effectuating it as an interpretive principle akin to the principle of legality – for instance, the courts could presume that Parliament will not delegate unfettered legislative powers unless it makes express its intent to do so. The courts in the UK have already adopted similar interpretive principles to address problems raised by the usage of delegated legislation. For example, the courts in the UK have scrutinised Henry VIII clauses strictly and accorded them narrow constructions, resolving any ambiguities against the executive.[103] Accordingly, such a doctrine can be a valuable device in ensuring that delegations of law-making power comply with rule of law standards across a variety of constitutional contexts.

(c) Exercising delegated law-making power in accordance with the rule of law

In addition to ensuring that the *conferral* of delegated law-making power is performed in accordance with the rule of law, it is worth considering whether the law of judicial review can also contribute to ensuring that the *exercise* of such law-making powers coheres with the rule of law. The focus in this regard would shift from the permissibility of *delegations* of law-making power at the level of primary legislation, and towards the lawfulness of specific *exercises* of law-making power by executive authorities. The classic grounds of judicial review of executive action, discussed earlier, are obviously also applicable in this space – the question here is whether *more* can be done to better account for the unique concerns raised by delegated legislation.

One possibility would be the acceptance of what has been called the 'new non-delegation doctrine'.[104] This doctrine, originating in the US, would require delegated law-making powers to be exercised 'in a manner that promotes the rule of law, accountability, public responsiveness, and individual liberty', as Lisa Schultz Bressman described.[105] Accordingly, as long as there are clear and specific standards guiding and limiting the exercise of delegated law-making powers, then even if these standards are self-imposed, the authority's exercise of law-making powers ought not to be impugned.[106]

Before exploring the specifics of how such a doctrine may operate, it is important to first address the criticisms which have been directed against it – after all, should the criticisms prove fatal, the doctrine would be a non-starter to begin with. Most notably, this 'new non-delegation doctrine' was rejected by the US Supreme Court in *Whitman v American Trucking Associations, Inc*, on the ground that such a doctrine was constitutionally unsound: '[t]he idea that an agency can cure an unconstitutionally standardless delegation of power by declining to exercise some of that power seems to us internally contradictory'.[107] The response to this criticism is that this doctrine, in the form that is proposed here, would do no such curing of 'unconstitutionally standardless' delegations. Indeed, the doctrine proposed here would apply in tandem with the non-delegation doctrine discussed earlier. The non-delegation doctrine would render 'standardless' delegations of law-making power unlawful, while the doctrine discussed here would be directed at lawful delegations of law-making power which were nevertheless *exercised* in a manner contrary to the rule of law.

Carolan also expressed some concerns about the 'new non-delegation doctrine'. In his view, the trouble with this doctrine is that it focuses exclusively on the rule of law concern raised by delegated legislation, while neglecting 'the issues of democratic accountability and institutional balance'.[108] The response to this concern is – again – that on the approach suggested by this paper, this doctrine would

[103] *McKiernon v Secretary of State for Social Security* [1989] 1 WLUK 519.

[104] Carolan, above n 6, at 239.

[105] L Schultz Bressman 'Schechter Poultry at the millennium: a delegation doctrine for the administrative state' (2000) 109 Yale Law Journal 1399 at 1402.

[106] Carolan, above n 6, at 239–240.

[107] *Whitman v American Trucking Associations, Inc*, (2001) 531 US 457 at 472–473.

[108] Carolan, above n 6, at 241.

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not operate on its own. It would operate in conjunction with a non-delegation doctrine which would help to further the normative concern of democratic accountability. Insofar as considerations of institutional balance are relatively de-emphasised by both of the doctrines proposed here, it is suggested that this is a necessary compromise – indeed, any adventure into complex questions of institutional balance would run squarely into the problems outlined earlier in articulating a clear distinction between legislative and executive functions. The proposals in this paper in fact align well with Carolan's conclusion on the proper way forward for judicial review of delegated legislation: he ultimately argued that looking forward, 'the courts could concentrate on the more familiar task of enforcing the substantive values which have been partially attributed to the non-delegation doctrine: the rule of law; principles of publicity, certainty and generality in legislation; fairness in the exercise of discretionary powers; and so on'.[109]

Since the 'new non-delegation doctrine' is not rendered a non-starter by these criticisms, then given that it is based on ensuring that exercises of law-making power cohere with the rule of law, the next issue that arises for consideration is what standards of the rule of law ought to be adopted. It is suggested that one can have useful recourse to Fuller's well-known eight requirements of the internal morality of law as a starting point. Fuller argued that law possesses an internal morality distinguishing the rule of law from arbitrary power, and that this internal morality can be specified in eight moral requirements: laws must have generality of application; laws must be promulgated and accessible; laws should not have retroactive effect; laws must be clear; there should be no contradictions between laws; laws cannot require the impossible; laws must be certain and constant through time; and there must be congruence between official action and the declared rule.[110] These moral requirements are inherent in the nature of law – indeed, if there were a total failure of any of these requirements, Fuller suggested that the resultant legal system could not properly be characterised as a legal system at all.[111]

These requirements are clearly applicable to delegated legislation. For instance, the concern of constancy through time is captured by the courts' willingness, mentioned earlier, to find that delegated legislation is capable of giving rise to legitimate expectations. While all the requirements are relevant in principle, three of them can be focused on for a rule of law-based ground of review directed against delegated legislation: the requirements of clarity, accessibility, and non-retroactivity. These three requirements address the rule of law problems posed specifically by the usage of delegated legislation, and can provide the doctrinal substantiation of such a ground of review – that is, whether the usage of delegated legislation is unlawful will depend upon whether any of these requirements have been contravened.

It is useful at this juncture to sketch out briefly how such a ground of review can be substantiated. The doctrinal content of such a ground of review can draw upon existing jurisprudence in common law administrative law. Commencing with the requirement of clarity, the courts in the UK have already accepted that if delegated legislation is so vague that its meaning cannot be ascertained with reasonable certainty, it will be invalidated.[112] Indeed, the High Court in *Kay Tabernacle v Secretary of State for Defence* recognised that the principle of vagueness 'is established in both Strasbourg and domestic jurisprudence', with the effect that delegated legislation that is 'so vague or imprecise as to have unforeseeable application' would be unlawful.[113] The proposed ground of review would supplement this already-accepted legal principle with a refreshed theoretical grounding.

As for accessibility, the importance that the common law has traditionally accorded to the accessibility of law was recognised by the Singapore High Court in *Cheong Seok Leng* in the context of delegated legislation.[114] Holding that the assignment of civil defence duties to the Vigilante Corps indeed

[109]Carolan, above n 6, at 251.
[110]Fuller, above n 48, ch 2.
[111]Ibid.
[112]Craig, above n 4, p 457; Wade and Forsyth, above n 2, pp 741–742.
[113]*Kay Tabernacle v Secretary of State for Defence* [2008] EWHC 416 (Admin). See also *Percy v Hall* [1997] QB 924.
[114]*Cheong Seok Leng v Public Prosecutor* [1988] 1 SLR(R) 530.

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had legislative effect, the High Court emphasised the importance of ensuring that delegated legislation had to be published – the public has 'a right to know or be informed of subsidiary legislation affecting them and this right may be said to be inherent in the legal system' since a person's liberty should not be 'indirectly curtailed by laws and regulations unknown or inaccessible to him'.[115] Accordingly, the High Court held that the requirement of publication of delegated legislation specified in section 23(1) of the Interpretation Act was a mandatory one, such that non-compliance with the requirement would render the legislation invalid.[116]

The court's reasoning here suggests that where there is a statute specifying a requirement of publication of delegated legislation, such a requirement ought to be interpreted as a mandatory requirement instead of a directory one. Going further, however, even in the absence of a statutory requirement of publication, it is suggested that the rule of law concern of accessibility justifies the imposition of a requirement of publication even at common law, with the effect that delegated legislation must be published and made reasonably accessible unless there are strong reasons justifying non-publication. The requirement of accessibility can be seen as related to the preceding one of clarity. Indeed, even published delegated legislation would not be accessible in a meaningful sense if its contents are excessively vague. It is also conceptually aligned with Appleby's proposed procedural limit upon the usage of subsidiary legislation – that the courts should impose a requirement of parliamentary approval before delegated legislation comes into force – insofar as it is also concerned with ensuring that delegated legislation receives a reasonable degree of publicity.

The third requirement of non-retroactivity is a widely-accepted principle of the rule of law. The most odious form of retroactive laws, as Fuller recognised, would be laws imposing criminal punishment in a retroactive manner – prohibitions against such laws have been enshrined in written constitutions.[117] Delegated legislation seeking to impose criminal punishment in a retroactive manner should therefore be rendered invalid under this ground of review. How then should delegated legislation having retroactive effect beyond the imposition of criminal punishment be treated? As Appleby noted, delegated legislation has been used in such a manner in Australia to deny permanent visas retroactively to refugees arriving in Australia by boat, with the intention of deterring such asylum seekers.[118] Due to the retroactive effect of these regulations – pending applications for protection visas were also captured by these regulations – a large number of refugees was affected. Such usage of delegated legislation, while not going to the extent of imposing criminal punishment retroactively, clearly raises rule of law concerns as well. To take into account such usages of delegated legislation, it is suggested that a requirement of non-retroactivity ought to extend beyond the imposition of retroactive criminal punishment. Nevertheless, in recognition of the fact that not all usages of retroactive legislation are equally odious, this requirement ought to be satisfied if the executive authority in question is able to offer a rational justification for its usage of retroactive legislation.

(d) Overall proposal

Thus, in order for judicial review to more directly address the distinctive concerns of democratic accountability and the rule of law raised by delegated legislation, this paper proposes the development of judicial review doctrine to regulate both the *conferral* of delegated law-making power and the *exercise* of such power. The non-delegation doctrine and the novel rule of law-based ground of review discussed earlier are directed respectively at these objectives and ought to be accepted in law.

The acceptance of this proposal brings several advantages. First, as compared to the regular administrative law grounds of review, the proposed doctrines would be able to address more directly the unique democratic accountability and rule of law implications that delegated legislation raises vis-à-vis other types of executive action. As a matter of substance, these doctrines would go further

[115]Ibid, at [57]–[59]; see also *Lim Chin Aik v R* [1963] MLJ 50.
[116]*Cheong Seok Leng v Public Prosecutor* [1988] 1 SLR(R) 530 at [75]–[76].
[117]See, for example, the Constitution of the Republic of Singapore, Art 11(1).
[118]Appleby, above n 16, at 270.

https://doi.org/10.1017/lst.2023.7 Published online by Cambridge University Press

than the usual administrative law grounds of review. The non-delegation doctrine specifies an interpretive principle providing additional texture to an assessment of whether delegated legislation is ultra vires. While one might argue that the ground of irrationality may be broad enough to cover the three rule of law requirements of the novel rule of law-based ground of review, the crucial difference is that irrationality would not specifically target these requirements, making the proposed ground of review valuable as a targeted means of addressing the problems with delegated legislation. More fundamentally, such a ground of review would have the advantage of drawing express attention to the special context of delegated legislation, providing a useful foundation for the further development of specific jurisprudence in this regard.

Further, should one indeed accept the importance of imposing constraints on the usage of delegated legislation by way of judicial review, the proposed doctrines bear several advantages over the major questions doctrine. For one, by focusing on *how* delegated law-making power is conferred and exercised, the proposed doctrines will not be susceptible to the fundamental difficulty that the major questions doctrine encounters – the drawing of boundaries around the nature of functions which can be permissibly delegated and those which cannot. Further, the proposed doctrines avoid the unrealistic assumption of a 'transmission belt' model of the administrative state lying at the heart of the major questions doctrine. Instead, they recognise that executive authorities are independent actors within the administrative state entrusted with making important policy decisions, and they seek to ensure that these authorities receive and exercise delegated law-making power in a manner that coheres with the rule of law.

Finally, the proposed doctrines would cohere with the normative orientation of judicial review more broadly. If the law of judicial review is indeed normatively oriented towards upholding the moral duties of delegates, as Ahmed argued, the proposed doctrines cohere well with this normative foundation. If Parliament, the primary institution entrusted with law-making, can be legitimately presumed to legislate in a manner compliant with the rule of law, then it stands to reason that it intends any law-making power that it delegates to comply with the same rule of law requirements, as an expression of its own attitudes towards law-making.

Conclusion

In sum, this paper has sought to study how judicial review may be more fruitfully drawn upon as a means of addressing the myriad problems surrounding the usage of delegated legislation. Through a theoretical discussion of what makes delegated legislation distinct from primary legislation and other types of executive action, this paper suggested that the normative orientation of judicial review of delegated legislation ought to take into account the moral requirements of delegation relationships, as well as the unique concerns of democratic accountability and the rule of law applicable to the making of general rules of conduct.

With the theoretical foundation laid as such, this paper argued that the existing grounds of review that have thus far been applied to delegated legislation are principally directed at upholding the moral responsibilities of delegates, but as yet insufficiently take into account the distinctive concerns of democratic accountability and the rule of law raised by delegated legislation. The paper considered several possibilities by which this doctrinal space can be filled, and concluded ultimately that the acceptance of a pair of doctrines directed at the *conferral* and *exercise* of delegated law-making powers is a possible way ahead for judicial review doctrine.

One should not entertain illusions about these proposals being a panacea for all the difficult problems arising from the usage of delegated legislation. Yet, these proposed doctrines can be added tools to facilitate judicial supervision of the usage of delegated legislation, working in tandem with other solutions such as reforms of the parliamentary scrutiny of delegated legislation. Indeed, the scale and complexity of the problems posed by delegated legislation may demand precisely such a multi-faceted response.

Cite this article: Chng K (2023). Re-examining judicial review of delegated legislation. *Legal Studies* 1–18. https://doi.org/10.1017/lst.2023.7