Introduction

Delegation of governmental power to private parties is neither recent nor new.¹ Lately, its importance and prevalence have steadily increased.² Arms-manufacturers administer social welfare schemes.³ Charities operate governmentally funded welfare housing.⁴ Multinational corporations manage prisons and immigration detention centres and provide electronic monitoring services.⁵ Business groups set regulatory standards.⁶ Non-governmental organizations participate in conflict resolution⁷; and private military firms even interrogate prisoners on behalf of the US military.⁸ In the complex and managerial context of modern government, private non-governmental actors exercise delegated legislative and executive powers as a matter of regularity, and not uncommonly, they exercise judicial power too. This book is about how the law in three jurisdictions—England, the European Union ('EU') and the United States ('US')—responds to this situation.

Adopting a comparative methodology, the aim is threefold: first, to review the legal mechanisms in the three jurisdictions which are used to control delegation of governmental power to private parties; second, to consider those features of each legal system which render it more or less difficult for the legal system to


control private delegation effectively; and third, to comment generally on how the law can be used to control the conditions under which private delegation takes place. Private delegation brings advantages and disadvantages for society and the focus here is on the range of legal responses that can be implemented to create conditions which maximize the benefits and minimize the risks. The benefits usually trumpeted include expertise, innovation, flexibility, and efficiency. Private delegation may even enhance pluralism, by creating representation by interested and affected parties, and increasing citizen participation in governance. Unfortunately, though, these benefits do not come without risks—risks to citizens’ human rights where power is exercised by private bodies who are generally more insulated than government from legislative, executive, and judicial oversight; risks to democracy and accountability with the danger of elected leaders using private delegation to avoid responsibility for controversial policy choices; and even risks to effective governance, where private parties abuse their powers through mismanagement and corruption. Any legal response to the private delegation of governmental power should therefore attempt to harness its advantages, while reducing the risks. There is both a ‘positive’ goal of benefit-enhancement and a ‘negative’ goal of risk-reduction.

As such, the aim of this book is not to challenge the propriety of the increased role for private delegation. This would only be to perpetuate the ‘clash of doctrinal absolutes’ between economists and lawyers, which often dominates discussion of private delegation. Furthermore, as has been noted:

To an extraordinary degree, the positive as well as the normative rationales for or against privatization are not subject to proof in any meaningful sense and, hence, debate over them will continue to resist closure.¹⁰

Thus, no attempt will be made to develop overarching normative criteria—whether on political¹¹ or efficiency¹² terms—regarding the extent to which, if at all, government should delegate its powers to private parties. There will also be no empirical analysis of the differences between public and private performance of governmental functions.¹³ Moreover, this book accepts that delegation of governmental power to private parties is probably here to stay. Nonetheless, as will be

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seen from Chapter Three, the position taken in this book is that that it is difficult to make private delegation work, and, accordingly, normative observations will be made regarding the way in which the law should respond to that challenge.

1.1 Delegation, Governmental Power, and Private Parties

None of the concepts framing this comparative study—‘delegation’, ‘governmental power’, or ‘private parties’—lends itself to easy definition. Within each concept, however, core ideas can be identified, albeit that black-line boundaries are elusive.

1.1.1 Delegation

The use of the term ‘delegation’ in this book is meant to suggest no more than a ‘transfer of authority’,¹⁴ whereby the exercise of power is conveyed from a governmental actor to a private entity in such a way as to confer on the private delegate ‘a degree of legitimacy of action’.¹⁵ It is not necessary for this study to determine whether delegation entails the denudation of the powers of the governmental actor, a question which has occupied English courts,¹⁶ and many of the powers considered here to be ‘delegated’ can also be exercised concurrently by the governmental actor.¹⁷ The term ‘delegation’ is also not intended to imply a hierarchy, whereby power is transferred vertically downward from executive, legislative or judicial actors with ‘the monopoly of legal force’¹⁸ to private agents.¹⁹ In an era of governance,²⁰ which entails ‘self-organizing, inter-organizational

¹⁶ See, eg, Department for Environment Food and Rural Affairs v Robertson [2004] ICR 1289 (EAT) [44] (noted but not determined in [2005] EWCA Civ 138); Huth v Clarke (1890) 25 QBD 391 (DC) 394–5; Blackpool Corporation v Locker [1948] 1 KB 349 (CA).
¹⁷ See, eg, Deregulation and Contracting Out Act 1994 s 69(5)(c).
¹⁹ Contrast Robertson (EAT) (n 16) [45] (‘delegation would imply a vertical transfer’).
networks’,²¹ ‘exchange, dialogue and flow’,²² and ‘interdependence’²³ between public and private actors, such an implication would be highly problematic.²⁴ A hierarchical vision of delegation would also suggest hierarchy in state-individual relationships, rather than reflecting the heterarchy of different spheres of society and the increased fragmentation of society more generally.²⁵ Thus, for present purposes, the focus is on the ‘sharing of authority between public and private’,²⁶ and if a private actor, pursuant to a measure of implementation, acts as a substitute for government, a private delegation can be considered to have taken place.²⁷ There are many techniques by which a delegation of governmental power can be effected,²⁸ but the three primary techniques of delegation which have emerged in the EU, the US, and England—namely, legislation, contract, and grant—will be at the centre of this book’s study.

This understanding of ‘delegation’ could be described as ‘express’ or ‘explicit’, and requires an actual transfer of power.²⁹ Consequently, it tends to exclude what might be described as ‘implied’, ‘implicit’ or even ‘default’³⁰ delegation of governmental powers, which is not derived from a specific ‘transfer of authority’, but which arises where private groups exercise power which might otherwise be exercised by government itself.³¹ The most obvious example is the voluntary self-regulatory association, including, for example, the Advertising Standards Authority in England³² or professional associations such as the American Law

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²² Freeman (n 20) 571.
²³ Ibid 575.
²⁴ Empirical studies have, however, suggested that hierarchical control is more evident in relationships between governmental actors and private actors than in relationships between private actors: see, eg, E-H Klijn, ‘Governing Networks in the Hollow State: Contracting out, Process Management or a Combination of the Two?’ (2002) 4 Public Management Rev 149, 159.
²⁸ See LM Salamon, ‘Governance and the Tools of Public Action: An Introduction’ in Salamon (n 20), 1, 2 (listing the ‘dizzying array’ of tools of ‘indirect’ government which includes loans, loan guarantees, grants, contracts, social regulation, economic regulation, insurance, tax expenditures, and vouchers).
²⁹ See also HWR Wade and CF Forsyth, *Administrative Law* (9th edn, OUP, Oxford 2004) 320 (noting that delegation ‘requires a distinct act by which the power is conferred upon some person not previously competent to exercise it’).
³¹ The use of the term ‘implicit delegation’ here is to be distinguished from the understanding accorded to ‘implicit delegation’ in US federal administrative law in the context of delegating the interpretation of statutory terms to federal agencies: see, eg, *Chevron USA Inc v Natural Resources Defense Council Inc* 467 US 837, 844 (1984).
Institute.³³ These associations devise standards and regulate activities without having been required to do so by government,³⁴ enjoying 'autonomous powers'³⁵ or a 'permissive mandate',³⁶ acquired and developed independently of the institutions of government. With these groups, '[n]o particular relationship with the state is implied'³⁷ and to even assert that these groups are governmental delegates would suggest a normative theory of the state and a view that their activities are somehow inherently governmental. An exploration of the evolution of such powerful private groups is beyond the scope of this book,³⁸ and in particular, as will be seen, the second part of the book has as its focus the primary mechanisms of delegation listed above—legislation, contract, and grant. However, some of the case law discussed in the third part of the book, which considers legal controls on the private delegates of governmental power, has arisen in the context of implied rather than express delegation and the discussion in those chapters regarding the scope of judicial review or human rights obligations could certainly have repercussions for powerful private groups.³⁹

Private delegation, as envisaged here, can give rise to both bipartite and tripartite (or 'trilateral'⁴⁰) relationships, or, alternatively, ‘mission-critical’ and ‘incidental support’ relationships.⁴¹ A tripartite or ‘mission-critical’ relationship exists, for instance, with contracting-out, where the government delegates to a private actor the task of providing a service directly to the public, or where a regulatory task is delegated to a private actor. Meanwhile, a bipartite or ‘incidental support’ relationship is created where the government contracts-in services for its own use.⁴² Even though the private delegate does not have a direct link to the citizen in this context, the function procured may be so integral and essential to the achievement of a governmental objective that it constitutes the exercise of 'governmental power'. Even if the final legal act of decision is taken by a governmental actor, the real discretion may be exercised by the private delegate.⁴³

³⁴ However, these associations are sometimes coerced into regulating by governmental threats of intervention: J Black, 'Constitutionalizing Self-regulation' (1996) 59 MLR 24, 27.
³⁷ Black (n 34) 27.
³⁹ See below 7.4.3–7.4.4.
⁴¹ Kelman (n 11) 286.
1.1.2 Governmental power

The definition of ‘governmental power’ adopted here might be described as an ‘organic’ definition, focusing on the powers that have evolved as ‘governmental’ and reflecting the increasing complexity of the modern state. The understanding is generous, extending beyond Hobbesian notions of defence and peace-keeping powers, and beyond powers that are ‘physically coercive’, to powers of ‘furthering economic and social development, managing the economy, and providing for the welfare of . . . citizens’. It also extends beyond ‘governmental’ in the sense of the executive, and encompasses the powers of all three arms of the state—legislative, executive, and judicial. Thus, ‘governmental power’ is capable of describing a broad range of activities: from delegated law-making, the setting, monitoring, and enforcement of regulatory standards, the operation of private prisons, and the conduct of private policing, to the more mundane discretionary activities of management of government programmes, control over third parties’ access to governmental resources and benefits, control over expenditure of public funds, and performance of certain government-funded services. Given this breadth, it could be argued that alternative terms such as ‘public services’ or ‘governmental functions’ would be more suitable to frame this study since these terms are in certain respects broader in scope than ‘governmental power’: after all, a ‘function . . . can be performed as part of a duty or under a power’. However, such concepts are inadequate to reflect the extensiveness of private delegation and especially the private delegation of core law-making powers that is commonplace, particularly, in the US. Rather, it is the concept of ‘governmental power’, albeit interpreted broadly, which is most appropriate for the task in hand.

1.1.3 Private parties

While the public-private distinction, as one of the ‘grand dichotomies’ of Western thought, can be invoked in many different contexts, for many different
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purposes and in many different senses,⁴⁹ it is well-accepted that any ascriptions of ‘public’ and ‘private’ are inherently indeterminate and lacking in predictive power, whether applied to institutions⁵⁰ or systems of law.⁵¹ Criticized most notably in feminist⁵² and critical legal studies theories,⁵³ and undermined, on the one hand, by public choice theorists who explain legislative and bureaucratic behaviour as the conduct of interest group pressure,⁵⁴ and, on the other hand, by the types of arrangement which are the subject matter of this book,⁵⁵ it is safe to conclude that ‘the boundaries between public and private, never clearly marked, have grown, with time, more faint and less valuable’⁵⁶ That said, as difficult as it is to draw the distinction, it is equally difficult to abandon the concepts entirely,⁵⁷ and the terms ‘public’ and ‘private’ remain ‘meaningful signifiers’,⁵⁸ albeit imperfect, with the

⁵⁵ EM Garcia, ‘Public Service, Public Services, Public Functions, and Guarantees of the Rights of Citizens: Unchanging Needs in a Changed Context’ in Freedland and Sciarra (n 40) 57, 59; see also Freedland and Sciarra (n 40) 1, 3 (public service sector).
⁵⁷ See, eg, JM Balkin, ‘Populism and Progressivism as Constitutional Categories’ (1995) 104 Yale L J 1935, 1968 (noting that ‘the point . . . is not to abolish the distinctions between concepts like public and private power. The goal rather is to understand these boundaries as more flexible’).
⁵⁸ Freeman (n 20) 550; see also Rosky (n 1) 889 (noting that such terms as ‘communities, markets or states’ do not exist in a ‘pure’ form, but refer to ‘tendencies, principles and structures’).
dichotomy recognized in all three legal systems under review.⁵⁹ Many factors are often suggested to distinguish private actors from public or governmental actors, such as differences in ownership,⁶⁰ managerial incentives, organization, and accountability.⁶¹ Private bodies, such as self-regulatory bodies, usually impose their own conditions of membership and expulsion, formulate their own rules, and impose their own discipline.⁶² Private power is also sometimes described as ‘primarily economic in nature’ as opposed to the ‘coercive powers’ of government.⁶³ However, one of the most persuasive or reliable indicators to distinguish between public and private actors is motivation.⁶⁴

The role of the government is to ‘pursue the economic and social welfare of its constituents’⁶⁵ and, even when transacting business, the government’s ‘object is not usually the acquisition of gain, but the furtherance of the welfare of the community’.⁶⁶ As Oliver has observed, public or governmental actors ‘are regarded as being under duties to act only in the public interest as they perceive it to be’⁶⁷; they must not act out of self-interest.⁶⁸ Generally, this concept of ‘public interest’ denotes ‘the requirements of a community (local or national) in its entirety which should not overlap with the specific or exclusive interest of a clearly determined person or group of persons’.⁶⁹ For example, in the English case of Griffiths v Smith, Lord Porter noted that one of the characteristics of a public body was that it was not ‘carrying out transactions for private profit’ and was instead ‘working for the benefit of the public’;⁷⁰ while in Derbyshire County Council v Times Newspapers the House of Lords concluded that a local authority has no interest in its governing reputation sufficient to enable it to sue in defamation.⁷¹ Similarly, in the US, a starting assumption in constitutional analysis, at both state and federal level,

⁵⁹ See, eg, O’Reilly v Mackman [1983] 2 AC 237 (HL) 277 (Lord Diplock); Davy v Spelthorne BC [1984] AC 262 (HL) 276 (Lord Wilberforce); PR Verkuil, ‘Crosscurrents in Anglo-American Administrative Law’ (1986) 27 William and Mary L Rev 685, 685; RS Kay, ‘The State Action Doctrine, the Public-Private Distinction and the Independence of Constitutional Law’ (1993) 10 Constitutional Commentary 329, 330. The distinction has however been described as ‘almost entirely equivocal’ in the EU: J-B Auby and M Freedland, ‘General Introduction’ in M Freedland and J-B Auby (eds), e Public Law/Private Law Divide: Une entente assez cordiale? (Hart, Oxford 2006) 3. 4. See also below 2.3.1.1, 2.3.2.1, 2.3.3.1, and Chs Six and Seven.

⁶⁰ Scott (n 36) 58.

⁶¹ Stone (n 56) 1445–8; see also Oliver (n 50).

⁶² Black (n 34) 28.


⁶⁴ Oliver (n 50) 483–4.


⁶⁷ Oliver (n 50) 483.

⁶⁸ Davies (n 63) 99.


⁷¹ [1993] AC 534 (HL) 549–50. See also Padfield v Minister of Agriculture, Fisheries and Food [1968] AC 997 (HL) 1061; R v Somerset CC, ex p Fewings [1995] 1 All ER 513 (QB) 524 ([a]
is that private actors will act in self-interest, rather than in the public interest; while a delegation is regarded as ‘private’ where ‘interested groups’ have been given authoritative powers. Meanwhile, any delegation of executive, legislative or judicial power to a federal administrative agency is a delegation to a ‘public’ entity, since agencies are regulated in such a way as to ensure they act in the public interest.

Thus, to borrow from Freeman, for present purposes, the term ‘private parties’ will be loosely understood as those actors motivated by either a self-interested pursuit of profit or self-interested promotion of an ideological goal. By adopting this understanding of ‘private actors’, it is not assumed that public actors necessarily always engage in public-regarding conduct or that private actors never behave in a public-regarding manner. However, what is suggested is that the ‘private parties’ at issue in this book are generally identifiable by the fact that they are not normally expected to act in the public interest. Examples include firms, financial institutions, professional associations, trade unions, business networks, advisory boards, expert panels, self-regulatory organizations, and non-profit groups and charities.

Inclusion of this last group, non-profit groups and charities, in the list of ‘private parties’ is considered further in Chapter Three below and is not without difficulty. Non-profit groups and charities have different motivations from those of for-profit organizations and those involved usually ‘believe’ in the non-pecuniary goals of their institutions. Theories of non-profit groups also suggest that they emerge as a solution to the under-provision of public goods or public body has no heritage of legal rights which it enjoys for its own sake) (Laws J at first instance).

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72 See, eg, Richardson v McKnight 521 US 399, 409 (1997). See also CP Gillette and PB Stephan, ‘Richardson v McKnight and the Scope of Immunity after Privatization’ (2000) 8 Supreme Court Economic Rev 103; Council of the City of New York v Giuliani 710 NE2d 255, 260 (NY 1999) (invalidating an attempt by the New York City Health and Hospitals Corporation to sublease a hospital to a private for-profit corporation, noting that such an entity ‘exists to provide maximum economic returns to its shareholders’).

73 Jaffé (n 35) 234; Texas Boll Weevil Eradication Foundation Inc v Lewellen 952 SW2d 454, 471 (Tex 1997).


76 See, eg, Gillette and Stephan (n 72) 111; PW Schroth, ‘Corruption and Accountability of the Civil Service in the United States’ (2006) 54 American J of Comparative L 553.

77 See also Freeman (n 20 above) 551 fn 15.

78 Below 3.6.


80 BA Weisbrod, ‘Toward a Theory of the Voluntary Non-profit Sector in a Three Sector Economy’ in BA Weisbrod (ed), The Voluntary Non-profit Sector: An Economic Analysis (Lexington
that they arise where there is a greater need for trust in the provision of services, such as delivery of food aid, which are difficult or costly to monitor.⁸¹ This trustworthiness is said to derive from the fact that non-profit groups are not driven by profit maximization.⁸² Consequently, recognition of non-profit groups as third or voluntary sector actors is often preferable to their categorization as either ‘public’ or ‘private’. Nonetheless, non-profit groups and charities are motivated by their particular non-pecuniary or ideological goals, rather than by the public interest more generally. As such, their inclusion here as ‘private’ is justifiable. Moreover, as will be seen in Chapter Three, where private delegation is concerned, many of the issues raised with for-profit actors are replicated with non-profit groups or charities, such that their inclusion as ‘private’ is entirely appropriate.

1.2 The Comparative Methodology

In achieving the aim of exploring effective legal responses to private delegation, the methodology used in this book is comparative. A critical review of the legal treatment of private delegation in England, the US, and the EU will be undertaken. The emphasis will be on legal responses that are currently enforceable in the courts of the three systems under review, although historical and political reactions to private delegation will be considered in Chapter Two to provide context.

1.2.1 Justification of the methodology

The debate as to the appropriate use of comparative law is well-rehearsed and shows little signs of abating: comparative law is ‘a diverse tradition, riven by methodological disagreements and differences of emphasis and style’.⁸³ On the issue of transplantation resulting from comparativism, Watson informs us that ‘legal rules move easily and are accepted into the system without too great difficulty’,⁸⁴ while Montesquieu, supported by Kahn-Freund and others,⁸⁵ cautions against the ‘très grand hazard’ of transplantation.⁸⁶ The risks of comparative law derive


⁸¹ Hansmann (n 80) 845–6, 862, 873.
⁸² Ibid 896.
largely from the concern, as articulated by Legrand, that rules and concepts alone actually tell us very little about a given legal system, providing a ‘thin’ rather than a ‘thick’ description⁸⁷ and failing to account for the ‘mentalité’⁸⁸ or ‘mindset’⁸⁹ of each individual legal system. In short, context is all, whether it be cultural,⁹⁰ political⁹¹ or environmental.⁹² The perils of the comparative method are particularly marked in the public law context, which is the primary, although not the sole, focus of this book’s inquiry.⁹³ Public law is often considered to have such ‘particularly deep roots inside a cultural and political framework’⁹⁴ as to render it peculiarly unsuited for fruitful comparative study. In particular, of the current study, it could be argued that delegation of governmental power to private parties is an issue which is so heavily underpinned by political choices as to the appropriate role of government in society, economic choices regarding the efficient expenditure of public funds, and culturally and historically evolved practices regarding provision of public services, as to be completely unsuited for comparative consideration. These cautions are important and very well-taken, yet really justify care in the conduct of the comparative study rather than abandonment of the comparative effort altogether.

First, the use of comparative law, both generally⁹⁵ and specifically in the context of public law,⁹⁶ has been acquiring increasing acceptance. It is difficult to withstand the trend. Courts in all three jurisdictions examined here have availed themselves of the comparative methodology, including in the realm of public law. The ECJ has been described as ‘by nature a “comparative” institution’⁹⁷ which derives its fundamental principles in part from the

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⁸⁸ Ibid 60.
⁹¹ O Kahn-Freund (n 85) 11–12 (referring to distinctions between communist and non-communist countries, and dictatorships and democracies).
⁹² Montesquieu (AM Cohler, BC Miller, and HS Stone, trs and eds), The Spirit of the Laws (CUP, Cambridge 1989) 1, 8–9 (emphasizing the role of such factors as ‘the climate, be it freezing, torrid or temperate’ and ‘the properties of the terrain, its location and extent’).
⁹³ See Ch Eight (discussing private law responses to private delegation).
⁹⁴ C Harlow, ‘Voices of Difference in a Plural Community’ in Beaumont, Lyons, and Walker (n 90) 199, 208; see also Legrand (n 90) 246.
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‘constitutional traditions common to the Member States’,⁹⁸ albeit that the Court is well-known for adopting solutions which further the EU’s objectives.⁹⁹ In the English courts, consideration of international sources has been endorsed on the basis that it may assist both in reaching a different and more acceptable decision to that offered by national law and in achieving uniformity in a ‘shrinking world’,¹⁰⁰ while the Europeanization of English public law has been discussed extensively.¹⁰¹ Even in the US, where courts are traditionally reputed for a suspicion of comparative influences,¹⁰² Justice Breyer, most notably, has championed the cause of comparative analysis, describing the experience of foreign courts in roughly comparable circumstances as ‘relevant and informative’,¹⁰³ noting that the experience of former commonwealth countries reflects a legal tradition that underlies the US constitutional system,¹⁰⁴ and asserting that the experience of other jurisdictions can ‘cast an empirical light on the consequences of different solutions to a common legal problem’.¹⁰⁵ On occasion, Justice Breyer has even received support from other Supreme Court judges in his comparative endeavours.¹⁰⁶ Arguably, therefore, the comparative study of this book takes place in the context of ‘an international market place for judgments’,¹⁰⁷ and as Andenas and Fairgrieve have noted, ‘the courts are pioneers in the use of comparative law. It is for scholarship to follow the lead and take up this challenge’.¹⁰⁸

Second, to some extent, the topic of delegation of governmental power to private parties is especially apt for comparative scrutiny. Increasingly, the private

¹⁰⁴ Ibid.
¹⁰⁷ Andenas and Fairgrieve (n 95) xxviii; see also Lord Cooke of Thorndon, ‘The Road Ahead for the Common Law’ (2004) 53 ICLQ 273, 274.
¹⁰⁸ Andenas and Fairgrieve (n 95) xl.
actors involved in governance are multinational corporations, operating across multiple jurisdictions.¹⁰⁹ Empirical studies have suggested that politics and ideology have a minimal impact on whether governmental actors decide to delegate to private actors, perhaps due to the fact that privatization has ‘become a national, as well as international, phenomenon and a “tool” of governance that now transcends ideological and party lines’.¹¹⁰ Private delegation, having entered ‘a less ideological phase’¹¹¹ is potentially less rooted in cultural idiosyncracies than many other aspects of public administration. For example, private prisons were inaugurated under conservative administrations in the UK and the US, yet withstood the election of the centre-left Clinton and Blair governments, even though, in the latter case, the Labour party had gone on record in the mid-1990s vowing to re-nationalize all prisons on the termination of contracts.¹¹² Linked to this, empirical studies in this area suggest that the challenges faced in the use of private delegation transcend national and cultural boundaries, and similar concerns arise in the international and domestic spheres.¹¹³ In short, the issue of delegation of governmental power to private parties is a common social issue which all legal systems have to address: it is accordingly suitable for comparative scrutiny.¹¹⁴

1.2.2 Explanation of the methodology

In the end, it is the technique and purpose of any comparative enterprise which determines its legitimacy and usefulness. Freedland has identified five techniques and five purposes of comparative legal study,¹¹⁵ and the methodology adopted in this book will adopt one of the identified techniques and will engage with, although not map perfectly, four of the potential purposes. The technique used

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¹¹¹ Brudney and others (n 110) 414.
¹¹³ The concerns are articulated in more detail in Ch Three, but note the similarities in the concerns raised by the following studies: H Schmid, ‘Rethinking the Policy of Contracting Out Social Services to Non-governmental Organizations’ (2003) 5 Public Management Rev 307 (considering contracting-out of home care, foster care, and adoption services in Israel); Brudney and others (n 110); TB Jørgensen and B Bozeman, ‘Public Values Lost? Comparing cases on contracting out from Denmark and the United States’ (2002) 4 Public Management Rev 63; Dean and Kiu (n 2); S Domberger, The Contracting Organization: A Strategic Guide to Outsourcing (OUP, New York 1999).
¹¹⁵ M Freedland, ‘Introduction: Comparative and International Law in the Courts’ in Canivet, Andenas and Fairgrieve (n 95) xv, xvi.
here is a ‘specific topical comparison’,¹¹⁶ which begins with a concrete social problem and, adopting a functional approach, considers which norms or concepts in one system perform equivalent functions to norms or concepts in the other systems in responding to that social problem.¹¹⁷ One danger of this approach is that it overstates the quality of law as a rational response to social problems.¹¹⁸ It is accepted that legal intervention is often fortuitous, with courts only getting involved where a claimant decides to take a case,¹¹⁹ and it is also accepted that law will often exert only a limited influence on actual conduct.¹²⁰ Nonetheless, in the context of delegation of governmental power to private parties, the role of law is important, since, to a large extent, public administration is ‘based in law’,¹²¹ with public law setting ‘the boundaries within which public managers must operate, thereby permitting, authorizing, or requiring a range of actions’.¹²² Reviewing the boundaries within which private delegation operates in England, the EU, and the US is a useful exercise.

As for the four purposes pursued, broadly, one of these purposes entails an expository or descriptive use of comparative law,¹²³ and the other three concern comparative law in its applied form.¹²⁴ In its expository or descriptive form, this comparative study seeks to explore and analyse each jurisdiction’s legal responses to the delegation of governmental power to private parties and any underlying assumptions in these responses.¹²⁵ As for the applied purposes of comparativism, Freedland lists development of the law, whether through legislating in a rational and informed way, enhancing the quality of judicial decision-making, or articulating systems of ius commune.¹²⁶ No such ambitious enterprises are attempted here although, with regard to the last purpose, the timing of this comparative study is apt, given increasing concerns as to how to control private companies,

¹¹⁶ Ibid.
¹¹⁸ Watson (n 84) 4–5.
¹²² Brown, Potoski and Van Slyke (n 12) 325.
¹²³ K Zweigert and H Kötz (T Weir, tr), An Introduction to Comparative Law (3rd edn, Clarendon Press, Oxford 1998) 15 (noting that ‘[t]he primary aim of all comparative law, as of all sciences, is knowledge’).
¹²⁴ See also ibid 16–28 (for a range of applied uses of comparative law).
¹²⁵ Ibid 15–16.
¹²⁶ Freedland (n 115) xvi.
such as private military firms, acting in the international sphere. Generally, though, insofar as this study seeks to identify effective legal responses to private delegation, the aim will be modest and will focus, not on transplantation, but on notions of ‘fertilization’ and ‘cross-fertilization’.

As Beatson has explained, these concepts ‘involve an external stimulus promoting a careful internal evolution within the receiving legal system’. This stimulus will then be accommodated to a greater or lesser degree, depending on existing domestic tradition. To some extent, a search for fertilization accommodates the opposing views of both Watson and Kahn-Freund and, in this way, comparative law can be used to provide a ‘stimulus’ which generates new techniques of problem-solving. Whether the stimulus can be accommodated appropriately by the receiving legal system is then dependent, to adopt Allison’s framework, on whether domestic legal doctrine can adapt to the external influence without imperilling its functions, whether the internal adaptation can be justified in the legal and political theories underpinning the receiving system, and whether domestic institutions and procedures can cope with the proposed doctrinal adaptation. These factors will be considered before conclusions are drawn regarding the suitability of any concepts uncovered in this comparative study for exportation elsewhere.

1.2.3 The choice of jurisdictions

A comprehensive overview of the three jurisdictions is provided in Chapter Two, both to provide context for the comparison and to address the second aim of this book, namely, identifying the factors which influence jurisdictional responses to private delegation. For now, it suffices to note that the choice of jurisdictions has two particularly important justifications. First, given that the private exercise of governmental power is an issue intricately linked to models of governance, these jurisdictions provide interesting scope for comparison. The US provides an example of the so-called traditional Westphalian state, with a federal structure;

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129 Ibid; see also J Bell, ‘Mechanisms for Cross-fertilization of Administrative Law in Europe’ in Beatson and Tridimas (n 128) 147.

130 JWF Allison, ‘Transplantation and Cross-fertilization’ in Beatson and Tridimas (n 128) 169, 171.


132 Legrand (n 90) 241.

133 Allison (n 130) 175–6.

134 See below 9.3.
England is an example of a more unitary state; while the EU offers a unique system of 'restricted vested powers', somewhere between inter-governmentalism and supra-nationalism. England is also the focus here rather than the UK more generally. To a large extent, the legal principles applying in England are representative of those which apply across the UK generally; however, there are certain specific differences, such as the scope of judicial review in Scotland, which have not been explored here. Additionally, the potential implications of devolution for private delegation are beyond the scope of this book.

Second, private delegation has developed differently in all three jurisdictions, such as to provide interesting comparative perspectives. In the US, governmental outsourcing has been around since the 1700s, constituting an important means of poor relief provision, and although direct governmental action was revived with the New Deal, ‘[e]very major policy initiative launched by the federal government since World War II . . . has been managed through public-private partnerships’. In the English context, private initiative was also used as a means of poor relief provision in the 1700s and 1800s, yet, unlike in the US, experienced a demise after World War II, with the expansion of governmental responsibility, only to be resurrected by the Thatcher government in the 1980s. In the EU, by contrast, private delegation seems to have developed in an almost accidental manner. Understaffing during the 1980s and 1990s, as the Commission increased its workload without a corresponding expansion of workforce, provoked extensive outsourcing as it struggled to meet its commitments. Administration and financial management powers were delegated to third parties, and this increased externalization was accompanied by a failure to monitor either the activities or the quality of delegates. The mismanagement and waste of Community resources which resulted from these externalization mistakes contributed to the resignation of the Santer Commission in 1999, the establishment of an investigating Committee of Independent Experts, two special reports, institutional reforms, a White Paper, and a new regulation

137 Oliver, 'Public Law Procedures and Remedies' (n 51) 95, 107–8.
140 Roberts (n 1) 24, 272.
141 Fraser (n 1) 261–80.
144 Ibid 102.
145 Ibid 98.
governing externalization policy, which, as will be seen, envisages a restricted role for private delegation by the Commission.¹⁴⁶ Thus, at the EU level, there is quite a cautious attitude to private delegation, traceable to the Commission’s own difficult experiment with such delegation. This is not to suggest that there have not been outsourcing failures in the other two jurisdictions¹⁴⁷: it is just that such failures have not had equivalently far-reaching political repercussions, and have not undermined overall faith in private delegation.

1.2.4 The scope of the comparison

Jurisdictionally, there are, by necessity, limits to the reach of this comparative analysis. In the US, the focus will be on federal and state law. State law is included since not only is state law often neglected by comparativists and legal commentators¹⁴⁸ but state experience in the realm of public-private enterprises is also often overlooked by public management theorists and economists.¹⁴⁹ Yet state law in the US has much to teach us in this area. Of course, due to constraints of space, it will not be possible to consider the law of all fifty states in depth. Rather, the aim will be to identify trends and notable exceptions to the trends. In the English context, private delegation by both central and local government will be considered. Meanwhile, EU law and English law will be treated as composite systems in their own right, but, where relevant, the impact of EU law on English legal responses to private delegation will be addressed.

Functionally, every effort will be made to ensure that the comparison is broad, since to achieve an effective comparative analysis in this context it is necessary to view the issue of private delegation from a number of different legal perspectives. This is for two reasons. First, it is clearly possible that in one legal system a particular type of control of private delegation is achieved through administrative law, while in another system this control is effectuated through constitutional law. In order to accurately evaluate the response of any system to private delegation, therefore, it is necessary to undertake a multifaceted analysis, which considers the responses of different legal disciplines—constitutional law, regulatory law, administrative law, human rights law, and private law—to private delegation.

Second, a multifaceted perspective in its own right can provide important insights. It eschews the position that any one source of law can, in itself, deal

¹⁴⁷ Schooner (n 8); R Ball, M Heafey, and D King, ‘Private Finance Initiative: A Good Deal for the Public Purse or a Drain on Future Generations?’ (2000) 29 Policy and Politics 95, 106–7; A Pollock and D Price, ‘We are left footing the PFI bill’ The Guardian (London, 27 July 2004).
¹⁴⁹ Brudney (n 110) 394; see also BA Wallin, ‘The need for a privatization process: Lessons from development and implementation’ (1997) 57 Public Administration Rev 11, 11.
adequately with the complexities of private delegation. To give a brief example, controlling the degree of power exercised by private delegates is a task that may require input from constitutional, administrative, and contract law. As will be seen, a judicially developed constitutional non-delegation doctrine can hold that the likelihood of a delegation being invalidated increases where the delegate is empowered to define criminal acts or impose criminal sanctions.¹⁵⁰ Constitutional invalidation no doubt helps to foster a more restrained attitude to private delegation—but it does not suffice in itself. Contractual responses are also required to ensure that, when the power is delegated, there is a satisfactory framework for day-to-day governmental oversight of the delegate. Administrative judicial review could be used to ensure that private parties exercising governmental power are at the very least required to comply with the requirements of procedural fairness and reasonable decision-making. In other words, regulating the degree of power wielded by private delegates requires consideration from a number of legal perspectives.

One omission from this functionally broad approach is a comprehensive review of the different regulatory systems which govern private delegates, such as regulatory regimes for private prisons or private residential homes. So many and varied are the regulatory schemes governing the different activities performed by private delegates that an effective comparison of how private delegates are regulated in the different jurisdictions would entail a work of much greater magnitude.¹⁵¹ For present purposes, therefore, only general comments on the role of such regulatory regimes in the three jurisdictions will be made in Chapter 3. By contrast, however, regulatory controls on the delegation process are considered in detail in Chapter 5, because this type of regulation tends to be overarching with a single regulatory regime governing all contracting-out, regardless of the particular power being delegated.

### 1.3 The Structure of the Book

Structurally, this book is divided into four parts. The first part, discussing ‘Delegation in Context’ consists of Chapters 2 and 3; the second part, which is entitled ‘Controls on Delegation,’ comprises Chapters 4 and 5; while in the third part, ‘Controls on Private Parties’, are found Chapters 6, 7, and 8. The fourth part, ‘Comparisons, Law, and Delegation’ consists of Chapter 9. In most chapters, two questions arise: the first is descriptive and simply asks whether or not the particular legal system is able to achieve any

¹⁵⁰ *Texas Boll Wreevil* (n 73) 472.
¹⁵¹ For comparisons of specific regulatory regimes, see, eg, M Feintuck, *The Public Interest in Regulation* (OUP, Oxford, 2004); R Harding *Private Prisons and Public Accountability* (Open University Press, Buckingham, 1997); Pozen (n 112).
degree of control over private delegation through the particular legal mechanism under scrutiny; the second is normative, and considers whether the control over the private delegation should be exercised by this particular legal mechanism.

Part I lays the foundation for the comparative study. Chapter Two engages in an overview of the three jurisdictions under scrutiny, considering in each the constitutional framework, the distribution of governmental power, and the experience of private delegation. Providing this context facilitates a more accurate examination of the legal controls on private delegation found in each jurisdiction and a more pertinent assessment of whether options found in any particular jurisdiction may have relevance elsewhere. In addition, this chapter provides a framework for the task of exploring why each jurisdiction responds to private delegation as it does. In Chapter Three the starting point for this comparative study, namely the ‘concrete social problem’¹⁵² mentioned above, will be explored. The opportunities created by private delegation for enhancing effectiveness and efficiency in governance, as well as the potential impact of private delegation on democracy, accountability, and human rights, will be explored. By outlining the challenges created by private delegation this chapter also establishes a framework: this time, a framework against which legal responses to private delegation can be evaluated.

The capacity of law to place limits on the creation of private delegation are addressed in Chapter Four, which considers any constitutional restraints existing in the three systems to monitor the ability of governmental delegators to delegate to private actors, such as the US federal and state non-delegation doctrines and the EU principle of institutional balance. The legal controls discussed in this chapter, as constitutional norms, have the capacity to control delegation by the legislative, executive, and judicial institutions of each legal order. In Chapter Five legislative and regulatory constraints on the power to delegate—which tend, in particular, to control executive procurement and grant-making powers—are examined.

Turning then to the legal controls on private delegates of governmental power: Chapter Six examines the extent to which human rights obligations are, and should be, imposed on private parties who are entrusted with government power; Chapter Seven considers the enforcement of the obligations that arise from administrative law—rational, open, and procedurally fair decision-making—against relevant private parties; and in Chapter Eight the implications of private law, primarily contract and tort, for private delegates are assessed. Finally, in Part IV, Chapter Nine, the overall ability of each legal system to respond to the challenge of private delegation will be considered, the interaction between the different forms of legal control will be reviewed, and proposals will be made with regard to achieving effective legal control of delegation of governmental power to private parties.

¹⁵² Above 1.2.2.