3

The Benefits and Challenges of Private Delegation

3.1 Introduction

That private delegation is not unequivocally beneficial for governance is not a novel proposition and ‘nearly every putative benefit of privatization has also been questioned as a liability’.¹ The arguments for and against the involvement of private actors in governance have been well-rehearsed by politicians,² lawyers,³ economists,⁴ social scientists,⁵ and public management theorists.⁶ For two reasons, though, it is important to re-visit that debate here. First, given that the methodology adopted in this book is the comparative legal study of a concrete social phenomenon,⁷ it is important to explore fully the ramifications of this phenomenon in order to give context to the comparison. Second, it is only by fully understanding the aims and challenges of private delegation that it becomes possible to evaluate how successfully each jurisdiction responds to this phenomenon and, in turn, to draw conclusions as to how the law should address this phenomenon.

A debate on private delegation could be structured in many different ways⁸ and, actually, each specific example of private delegation brings its own aims

⁷ Above 1.2.2.
Delegation of Governmental Power to Private Parties

and challenges. For example, prison privatization could be reviewed in conjunction with criminal justice policy and not just as part of the question of privatization more generally.⁹ Here, although comments specific to certain forms of private delegation will be made, the overall focus will be general, considering the purported aims of private delegation, namely efficiency and effectiveness in governance, and the impact of private delegation on democracy, accountability, and human rights. These values are considered individually here, although it is accepted that the categories do not break down so easily. Accountability and human rights are integral to many understandings of democracy,¹⁰ while certain functional theories of democracy understand democracy itself as a form of accountability.¹¹ These three values are not even necessarily separate from delegation’s aims of efficiency—after all, accountability can enhance efficiency. However, although imperfect, these categories nonetheless provide useful touchstones against which to assess the question of private delegation.

Insofar as use of private delegation to promote efficient and effective governance is concerned, it is suggested that a mistake often made is to assume that private delegation will enhance efficiency and effectiveness, rather than realizing that private delegation may enhance efficiency and effectiveness when it is accompanied by a complex array of favourable conditions, such as a strong, supervisory framework and satisfactory market conditions.¹² In relation to accountability, democracy and human rights, essentially the central difficulty created by private delegation seems to be that ‘private actors will escape most traditional constraints most of the time’.¹³ Constraints other than the ‘traditional constraints’ may be effective,¹⁴ but are not always forthcoming.¹⁵ Perhaps, as has been noted, ‘the chief irony of privatization is that proponents tout it as a cure for bad government, but it takes excellent government to make it work’.¹⁶


¹² See, eg, Brown, Potoski and Van Slyke (n 6) 323.
3.2 The Aims of Private Delegation:
Efficiency and Effectiveness

The primary aim of private delegation is to improve the operation of government by enhancing its efficiency or effectiveness. A succinct framework for comprehending the difference between the two values of 'efficiency' and 'effectiveness' has been provided by Yeung, who notes that: ‘[w]hilst effectiveness concerns the extent to which stated goals are achieved, efficiency is concerned with how cost-effectively they are achieved’\textsuperscript{17} Thus, ‘effectiveness judgments are typically made independent of costs’ while the most efficient tool ‘is the one that achieves the optimum balance between benefits and costs’.\textsuperscript{18} In assessing whether private delegation can achieve efficiency and effectiveness, it is helpful to review both the theory and the empirical evidence. Theoretically, private delegation is thought to achieve efficiency and effectiveness in two ways, which can, broadly speaking, be described as managerial and political.\textsuperscript{19} Empirically, however, the available evidence does not always support the theory.

3.2.1 Managerial explanations for efficiency and effectiveness

There are two managerial explanations that are most commonly cited in defence of private delegation: reduction of governmental workloads and the use of specialist experts to decide matters about which government is not knowledgeable.\textsuperscript{20} It is undisputed that the range of areas in which modern governments wield responsibility is vast. This often gives rise to the argument that the sheer volume and technical complexity of the work exceed what government, with its limited staff and resources, can manage alone. In other words, the greater government’s range of tasks, the greater its inefficiencies.\textsuperscript{21} It is said that government suffers from patronage problems and the aspirations of governmental officials toward more profitable work in the private sector\textsuperscript{22}; and governmental actors are condemned as, tightly structured hierarchies insulated from market forces and from effective citizen pressure and therefore free to serve the personal and institutional interests of bureaucrats instead.\textsuperscript{23}

\textsuperscript{17} K Yeung, ‘Privatizing Competition Regulation’ (1998) 18 OJLS 581, 589.
\textsuperscript{18} Salamon (n 8) 23.
\textsuperscript{20} Salamon (n 8) 31.
Delegation of Governmental Power to Private Parties

Use of private delegation provides a vehicle for government to expand public resources through the use of private resources: it may be less expensive to hire private experts on a voluntary basis or a per diem stipend basis, rather than hiring experts as consultants or full-time government employees. In this way, delegation of governmental power to private parties helps to conserve limited governmental resources. Private delegation also injects an important degree of competition into the provision of public services, breaking the monopoly of governmental actors, and potentially improving service quality and customer-orientation. Competition can create incentives and pressures which generate efficiency and effectiveness, since market forces themselves can constitute a form of regulation; the operation of private actors in the wider market may have enabled them to develop economies of scale; and the very process of contracting out or market testing can lead to improvement in quality, due to careful contractual specification of the outsourced services. Linked to this, by facilitating the isolation of tasks, the process of private delegation has the potential to assist in the management of conflicting missions, such as in the immigration context, where authorities such as the Immigration and Naturalization Service in the US are required to prevent illicit immigration while simultaneously welcoming legal immigrants.

Efficiency gains by private performance may also be derived from the different, often more flexible, employment regimes to which private actors are subject, as contrasted with governmental actors. For example, in the US most private employers are permitted to hire permanent replacements for striking workers, which is not permitted for the federal government, while state privatization statutes sometimes acknowledge that employees of private contractors may be subject to different pay scales and employment practices from those that apply to the state personnel system. Moreover, civil service regulations can often make


²⁶ Salamon (n 8) 12.
²⁹ Ibid.
³⁰ CK Leman, ‘Direct Government’ in Salamon (n 8) 48, 57.
³¹ Dolovich (n 9) 500 (noting that prison contractors are not subject to statutory civil service employment protections).
it difficult for government managers to offer competitive compensation packages or to discipline and demote for poor performance. As will be seen in Chapters Four and Five, the impact of this advantage has been restrained in certain contexts, such as in some US states by a civil service mandate and in England by the EU Acquired Rights Directives noted in Chapter Two; nonetheless, where these restraints do not apply, employment factors can bring efficiency gains.

Of the second managerial explanation for private delegation, pursuit of expertise, it has been argued that:

Those performing the operation or constituting a part of the relation to be regulated are likely to have a more urgent sense of the problem and the possibilities of effective solution: experience, and experiment lie immediately at hand.

Use of private prosecutors in qui tam actions in the US is also often considered desirable due to the fact that individuals within a particular industry are likely to have invaluable and unique knowledge as to the existence of fraud within the industry and are better equipped in proving the fraud than public regulators.

Both of these managerial justifications are convincing yet, of course, neither is entirely unproblematic. The workload explanation, for example, can become a self-fulfilling prophecy: if functions are transferred to private actors, government actors will simply fail to develop those specialized resources for performance from which a robust non-delegation policy would result. Additionally, once the function has been transferred to a private actor, even if the private performance is highly unsatisfactory, it can become extremely difficult to transfer the function back to governmental performance due to the expertise and resources that the government has lost in the interim, and the high start-up costs that would be faced trying to resume the activity. Indeed, Arrowsmith has noted that private firms sometimes submit extremely low bids initially, precisely with the purpose of eliminating in-house capacity. Initial cost-savings will only be sustained where the private delegate itself operates in a competitive market, yet frequently there are only a few private actors capable of providing complex governmental services and privatization may simply replace a public monopoly with a private one—a
problem exacerbated by the fact that switching contractors may lead to disruption of public programmes.⁴³

Moreover, in those fields of service or geographic areas in which there are few contractors operating, contracts, once awarded, are often renewed without effective review.⁴⁴ This is something of which private contractors are aware, and it is often recognized that contractual non-compliance need not necessarily mean a loss of the contract.⁴⁵ In the private prison context in the US, Dolovich has noted that contracts have only been rescinded as a result of contractor abuses where the conditions in the prison are sufficiently objectionable to trigger public outcry; otherwise, it is usually easier for government officials to continue with the contract.⁴⁶ Meanwhile, cost-cuttings derived from flexible employment regimes can undermine the quality of performance of functions, especially if labour costs are reduced by cutting salaries and benefits to employees or under-investing in training.⁴⁷ Again in the private prison context in the US, this trend has created particular difficulties, with data on private prisons showing elevated levels of physical violence, traceable in part to the fact that private prisons’ guards are often less well-paid and qualified than their public sector counterparts.⁴⁸

With regard to the expertise argument, often governmental actors will have significant expertise in their policy fields.⁴⁹ However, even in the many instances where private actors will have greater expertise, technical questions such as questions of risk often overlap with determinations of normative policy standards, a task that elected leaders or public administrators are, as representatives of the public, as well if not better placed to decide than private agents.⁵⁰ Excessive dependence on governmental funding has even been shown to result, over time, in decreased innovation on the part of private actors who may have begun with superior expertise.⁵¹ What is also overlooked is that drafting, managing, and

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⁴³ Diller (n 3) 1744.
⁴⁵ Dolovich (n 9) 495.
⁴⁶ Ibid 497–500.
⁴⁷ Ibid 500.
⁴⁹ Aranson, Gellhorn and Robinson (n 19) 23.
supervising government contracts require a significant degree of expertise: if we assume that government is incapable of the expertise required to perform the tasks itself, then we should also be wary of assuming that government is capable of the expertise required to adequately manage contracts for performance of the tasks.52 While ‘generic skills of public management’ may exist, different techniques of private delegation—legislation, contract, and grant—will often require different management skills on the part of government.53

### 3.2.2 Political explanations for efficiency and effectiveness

With regard to the political rationale for private delegation of governmental tasks, it is said that de-politicization creates the possibility of greater flexibility, making it easier for government to experiment, to change course when needed, and to remain responsive to new needs. This is so because government does not have to create an entire administrative structure to implement an initiative54 and the use of private regulators may provide a ‘politically feasible interim route’ for regulation when there is insufficient political consensus for government to establish a new public regulator.55 This use of private delegation can also contribute to governmental effectiveness, as the more involved individuals are in the making of rules and consenting to them, the stronger may be their sense of obligation to abide by them.56

However, whether facilitating governmental action without consensus should be considered beneficial is highly debatable and, in turn, has the potential to undermine democracy and accountability by creating a lack of transparency. This lack of transparency may even facilitate a cynical use of private delegation as a ‘bipartisan tool to grow government programs while pretending that Government is diminishing’.57 Use of private delegation in this way can also enable government to avoid difficult policy choices. For example, extensive use by the Bush government of private military personnel in Iraq, at pay rates several times higher than US military pay rates, has been criticized as having little to do with effectiveness or efficiency, and being ‘more about avoiding tough political choices concerning military needs, reserve call-ups and the human consequences of war’.58

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53 Salamon (n 8) 11.  
54 Ibid 31.  
55 Abramson (n 25) 178 fn 70.  
Delegation of Governmental Power to Private Parties

English context, Walker and Whyte note similarly that private military companies provide an advantage for the government ‘in reducing political exposure when forms of military intervention are undertaken’.⁵⁹ Similarly, use of private regulators in health care and Medicaid in the US has been explained as an attempt to deflect opposition to government regulation.⁶⁰

3.2.3 Ensuring efficiency and effectiveness

Even if it is accepted, however, that reduction of governmental workloads, use of private expertise, or flexibility and de-politicization, have the potential to create effectiveness and efficiency, this does not end the discussion. To ensure return of the cost-savings to the government, ‘the public agent…must incur substantial costs to monitor the private firms’ performance’⁶¹ and it is well-established that cost savings can only be achieved through proper management and monitoring.⁶² Such monitoring costs, along with transactional costs which can be ‘fairly dramatic’,⁶³ are often underestimated⁶⁴ and can significantly undermine cost-savings on any particular delegation project.⁶⁵ The efficiency and effectiveness aims of private delegation may also conflict. Cost savings may be made by profit-seeking private delegates by eliminating inefficiencies, or alternatively, by eliminating attention to an important goal, because it has not been made explicit in the delegation,⁶⁶ or by sacrificing service quality.⁶⁷ There have been examples of prisoner abuse in private prisons in the US, attributable to prioritization of economy with its corresponding extreme rationing and failure to provide proper


⁶³ Leman (n 30) 68.
⁶⁷ Vincent-Jones (n 38) 193.
security.\(^{68}\) In such a case, to return to Yeung’s framework,\(^ {69}\) the performance of the task may be efficient, because cost-effective, yet ineffective overall, because important goals are not achieved.

Where contract is the mechanism of delegation, the risk of replacing effectiveness with efficiency can be reduced with careful contract drafting; although here again, the contract drafter must take care.\(^ {70}\) There is evidence to suggest that PFI contracts in England are routinely being used where it is even more expensive for the government in the long term, as a consequence of the higher cost of private sector borrowing, the profits paid to shareholders, and a failure to actually transfer risk to the private sector.\(^ {71}\) The more complex the contract, the more difficult the drafting and the subsequent monitoring: unlike highly standardized and discrete public services, such as refuse collection, which entail servicing a certain number of locations on a periodic basis, many examples of private delegation involve highly variable operations.\(^ {72}\) To use the example of a group home for emotionally disturbed children, while price per child may be the easiest unit of cost to include in the contract, it is the least effective method for contracting since it completely overlooks the question of what is being delivered by way of care.\(^ {73}\) Performance monitoring is preferable but much more difficult and involves considering, for instance, whether the home is successful in enabling children to function independently in society. However, even discharge rates are not properly indicative of success and rates of recidivism must also be considered.\(^ {74}\) Thus, as will be considered in detail in Chapter Seven, effective contract drafting is possible, but it requires effort, which is not always invested by the relevant governmental authority.\(^ {75}\)

Finally, it must also be acknowledged that empirical studies differ significantly in regard to the amount, if any, of cost savings which can be achieved by private delegation, with the result that the conclusion on this front must be considered to be inconclusive.\(^ {76}\) Indeed, contracting out has been found to ‘increase costs nearly
as often as it reduces them'.⁷⁷ In respect of effectiveness, empirically, the impact of private delegation appears to be similarly inconclusive.⁷⁸ In short, as Donahue has noted: ‘[p]erhaps the most common error in thinking about privatization is to concentrate on potential efficiency gains without considering, in the laborious detail required, how to realize this potential’.⁷⁹ The managerial and political justifications for believing that private delegation can increase effectiveness and efficiency are persuasive, but these goals of private delegation can only be realized where the delegation is monitored and carefully structured and where competitive conditions are maintained.

3.3 Private Delegation and Democracy

When discussing the impact of private delegation on democracy, it is necessary to begin with an understanding of what it is that democracy requires. Democracy, however, is ‘an essentially contested concept’⁸⁰ and to examine its many possible meanings is a task for another day. What is proposed here is significantly more limited: all that is attempted is a consideration of the basic values of five theories of democracy and an illustration of the impact of private delegation on the values of these theories. The theories chosen are participatory democracy (both direct and indirect), liberal democracy, civic republicanism, public choice, and democratic experimentalism, the first four theories being chosen because of their significance in the democratic traditions of England and the US in particular. Given the debate which surrounds the term ‘democracy’ in the EU context, and the nature of the EU more generally,⁸¹ the impact of private delegation on democracy in the EU will then be assessed separately.

Of the legal orders under review, direct participatory democracy is primarily experienced at the US state level and particularly in western states.⁸² It is

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⁷⁷ Brudney and others (n 1) 412.


⁷⁹ Donahue (n 66) 217–18 (emphasis in original). See also Rainey (n 16).


⁸¹ For comments on the contested nature of the EU, see Ch Two above (2.2.3, 2.3.3, and 2.4.3.1).

manifested in initiative processes, which enable voters to propose legislation or constitutional amendments,⁸³ and referenda, which permit citizens to approve or reject statutes or parts of statutes previously enacted into law.⁸⁴ The issues decided using direct democracy mechanisms can range from management of weeds to assisted suicide.⁸⁵ California is particularly reputed for the frequency with which it invokes the referendum procedure.⁸⁶ Meanwhile, indirect participatory democracy is visible in different ways in all three jurisdictions. Liberal democracy and civic republicanism⁸⁷ have had particular relevance in England and the US respectively, while public choice theories have influenced democratic debate in both jurisdictions.⁸⁸ The fifth theory chosen for review, democratic experimentalism, facilitates an examination of private delegation in a less hierarchical understanding of democracy.

3.3.1 Participatory democracy

At its core, a system of participatory democracy requires that ‘[i]ndividuals become involved in government by participating in the common institutions of self-government’.⁸⁹ Participatory democracy can be either direct or, as is more common, indirect⁹⁰: the former involves decisions on substance, whereas the latter involves decisions on representatives who decide on substance.⁹¹

⁸⁴ See, eg, Cal Const Art II s 9.
⁸⁸ Craig (n 87); Feintuck (n 87).
3.3.1.1 Direct participatory democracy

It has been argued that private delegation may promote direct participatory democracy. As Krent has pointed out in the US context, delegation has facilitated individual participation in government in ways other than through congressional and presidential elections... delegations to private groups may be understood as attempts to allow citizens to help govern themselves.92

Private regulation, such as is found in zoning laws granting private landowners the authority to approve or veto certain land uses, for instance, gives citizens opportunities to participate directly in governmental decision-making. As noted above, because certain forms of private regulation provide greater opportunities for affected parties to participate, the decision may be more acceptable to those affected.93

These arguments, however, make the mistake of assuming, for example, that only the landowners are affected by their veto of land uses. In reality, of course, third parties who are denied land use permits will be affected enormously, without having participated in the decision-making. Selective increases in participation will not necessarily increase democracy: indeed, as has been noted in the EU context, ‘partial participation may worsen the position of those not included in the decision-making processes giving rise to justified contempt for the political process’.94 Delegation also often takes place to delegates who do not represent any constituents—such as groups of experts—while participation of one group may be at the expense of another group.95 In addition to the difficulties of determining the extent to which groups represent the interests of their own members,96 many of the groups selected for delegated governmental power will not necessarily be representative of those affected by the particular power. In the US, Lockheed Martin, an advanced technology corporation and leading defence manufacturer,97 is one of the primary private providers of social security services.98 In any event, particularly in the contracting-out context—as will be reviewed in Chapter Five—the selection of private delegates often has nothing to do with ability to increase democratic participation, but with cost concerns.

93 Ibid 178–9 fn 70.
95 Krent (n 92) 111.
While private delegation has the potential to enhance direct participatory democracy therefore, whether it in fact achieves this goal will depend on the choice of private delegate.

3.3.1.2 Indirect participatory democracy

Private delegation tends to reduce the degree to which elected representatives actually govern and enables a third party, over whose choosing the people exercise no control, to govern. Hence, to borrow Salamon’s term, the phenomenon of ‘third-party government’ is created.⁹⁹ For Salamon, the upshot of delegation, is an elaborate system of third-party government in which crucial elements of public authority are shared with a host of non-governmental or other-governmental actors, frequently in complex collaborative systems that sometimes defy comprehension, let alone effective management and control.¹⁰⁰

In simple terms, under private delegation the connections between the taxes citizens pay and the services they receive, and the votes they cast and the laws which govern them, are attenuated.¹⁰¹ This attenuation of links is exacerbated by a number of factors.

First, while participation in the activities of public delegates of legislative, executive or judicial powers, such as administrative or, in the EU, executive agencies, has been facilitated by legal mechanisms in all three jurisdictions at issue, a similar movement has not taken place in respect of private delegates. In the US, for example, the rise of delegation of legislative powers to administrative agencies, discussed in Chapter Two,¹⁰² was accompanied by a system of controls aimed to increase the citizen’s participation in agency law-making, involving administrative procedure acts at both the federal and state levels, freedom of information laws, due process requirements of notice and opportunities for hearings, and judicial review over both substantive and procedural issues.¹⁰³ However, no such controls exist to ensure public participation in law-making by private agents. Indeed, as will be seen in Chapter Five, the processes by which governmental power is delegated to private actors, in particular contract, generally do not even require or invite public participation.¹⁰⁴

Second, it can be difficult to limit the degree of power accorded to private delegates. Proponents of delegation often respond to democracy concerns with the argument that policy-making and policy-implementation can, in fact, be

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⁹⁹ Salamon (n 8) 2.
¹⁰⁰ Ibid (emphasis in original).
¹⁰² Above 2.3.1.1.
¹⁰³ See, eg, 5 USC §§ 552, 553, 554, 706.
¹⁰⁴ Below 5.2.1.2, 5.2.3.2, 5.3.1.1(b), 5.3.1.2, and 5.4.1.2; but see 5.3.2.2.
Delegation of Governmental Power to Private Parties

separated: as long as public officials make policy, democracy is not threatened by having private actors implement policy.¹⁰⁵ However, in reality of course, as will be discussed in greater depth below in the accountability section,¹⁰⁶ how a service provider performs its task involves any number of policy choices over which there is usually no public input.

Third, delegation of power often relieves elected officials of the obligation of exercising the power entrusted to them by the people, transforming the legislator’s ‘responsibility for the laws from a right of the voters to an option of the legislators’.¹⁰⁷ Indirect participatory democracy only works properly if citizens’ elected representatives assume responsibility for the key decisions of government, and if citizens are able to assess the performance of elected representatives. In a system of delegated power, rather than making hard choices themselves, elected representatives are presented with the choice of delegating hard choices to faceless bureaucrats or, indeed, to the private sector. As Justice Scalia has complained:

I foresee all manner of ‘expert’ bodies, insulated from the political process, to which Congress will delegate various portions of its lawmaking responsibility. How tempting to create an expert Medical Commission (mostly MDs, with perhaps a few PhDs in moral philosophy) to dispose of such thorny, ‘no win’ political issues as the withholding of life-support systems in federally funded hospitals, or the use of fetal tissue for research. This is an undemocratic precedent that was set—not because of the scope of the delegated power, but because its recipient is not one of the three Branches of Government.¹⁰⁸

With delegation, elected legislators are able to propose lofty statutory goals but then shift blame to unelected actors when the costs and failures of policies emerge. In situations of failure they may even intervene to investigate, thereby taking ‘credit coming and going’.¹⁰⁹ Furthermore, private delegation may render it difficult for citizens to judge where candidates stand on particular issues from their voting records.¹¹⁰ The overall result is that delegation enables elected officials to ‘rewrite the ground rules of democracy to help entrench themselves in office’.¹¹¹

¹⁰⁶ Below 3.4.
¹¹⁰ Schoenbrod (n 107) 740–41.
¹¹¹ Ibid 740.
3.3.2 Liberal democracy

At its core, liberal democracy emphasizes individual liberty, limited government, and the entitlement of all citizens to equal respect and consideration.¹¹² In its ‘modern’ form, as Feintuck has noted, it involves three core values:

capital (manifested in private property), liberal-individualism (in the form of fundamental freedoms of the person), and collective or community-oriented values (typified by the welfare state social provisions and other interventions related perhaps to the social expectations of citizenship and social solidarity).¹¹³

While the relationship between citizens and the state in a liberal democracy is intended to be ‘public’, relationships between citizens themselves are deemed ‘private’. Furthermore, the relationship between citizen and state is ‘one of reciprocal control and accountability. This pact is monitored through representation itself, and by external agents such as the judiciary’.¹¹⁴ The relationship should also be based on what Rawls has called the ‘fair terms of social cooperation’.¹¹⁵

As was just noted in the context of indirect participatory democracy, private delegation can render it difficult to monitor elected representatives and, as such, can undermine the pact between citizens and the state in the liberal democratic model. While it could appear that private delegation promotes the objective of limited government, in reality, with private delegation, the role of the government is not retracting but evolving, to use the well-known metaphor, from rowing to steering.¹¹⁶ In this role, it does not necessarily reduce its responsibilities, but it does have reduced visibility. While Leman observes of direct government that the ‘physical visibility of its installations and personnel is an important factor in its political viability’,¹¹⁷ Salamon reminds us that indirect mechanisms of governance, such as private delegation, have only medium visibility.¹¹⁸ Judicial monitoring of the pact between the citizen and the state can also be rendered difficult where private delegates evade traditional public law constraints, as will be considered in further detail below in Chapters Six and Seven.

However, perhaps the greatest challenge posed by private delegation to liberal democracy is in the danger that it will lead to increasing preoccupation with ‘the “liberal” element of liberal democracy, or even more narrowly, just the economic...
element of liberalism'.¹¹⁹ In particular, attempts to downplay loss of political participation created by private delegation often highlight citizen participation in a new forum—the market.¹²⁰ As was noted in the discussion of the Citizen’s Charter in Chapter Two, the ‘consumer’ metaphor enables the state to continue to assert its responsibility for the activity in question, but its role is transformed into one of creating and maintaining consumer choice and for regulating quality¹²¹; and ‘[d]imensions of citizenship and opportunities for democratic participation are often lost in the translation of public values and goals to market values and market realities’.¹²² Citizenship, unlike consumer status, is not only a political concept but also has a sociological dimension,¹²³ suggesting full membership of the society, state or community and implying a claim to participate in the processes of democracy.¹²⁴ By contrast, as Freedland notes, ‘consumer status’, deriving from the neo-liberal philosophical tradition, identifies the individual by reference to the individual’s role in the economy, rather than by reference to his or her role in the political society.¹²⁵ Moreover, the analogy between consumer and citizen is imperfect: consumers exercise influence in proportion to their access to information, such information frequently being unavailable in respect of governmental outsourcing.¹²⁶ The consumer metaphor also assumes that citizens have choices regarding which service providers they use—which will, in fact, rarely be the case. Where a local authority transfers its welfare housing provision to a private housing association, those welfare recipients falling under the care of the local authority will usually receive their housing from the authority’s chosen housing association without being granted a choice of different housing associations. Thus private delegation may promote one sub-set of the values of liberal-democracy,


¹²¹ M Freedland, ‘Law, Public Services, and Citizenship—New Domains, New Regimes?’ in M Freedland and S Sciarra (eds), Public Services and Citizenship in European Law (European University Institute, Florence 1998) 1, 10–11.


¹²⁴ Freedland (n 121) 9–10.

¹²⁵ Ibid.

¹²⁶ M Aronson, ‘A Public Lawyer’s Responses to Privatization and Outsourcing’ in M Taggart (ed), The Province of Administrative Law (Hart, Oxford 1997) 40, 58; Schmid (n 51) 315–16; N Flynn and R Common, Contracts for Community Care: Community Care Implementation Documents (Stationery Office, London 1992); Vincent-Jones (n 38) 220–24.
but ‘the preservation of the wider liberal-democratic value-set stands desperately in need of protection’.¹²⁷

### 3.3.3 Civic republican democracy

A civic republican understanding of democracy is also affected by private delegation. Republicanism emphasizes values of deliberation, political equality, universalism, and citizenship,¹²⁸ and these values may be enhanced by delegation of legislative powers to public administrators. Elected bodies such as Congress and Parliament may not be perfectly deliberative, due to constraints of time and expertise. Delegation to agencies and committees, therefore, may ensure a greater degree of deliberation. In the US in particular, as already noted, agency rule-making affords interested citizens an opportunity to voice their views, while the Administrative Procedure Act’s ‘arbitrary’ or ‘capricious’ standard obliges agencies to address the substance of these views, instead of merely aggregating the preferences of interest groups.¹²⁹ Setting aside those situations where agency capture arises, this deliberative conception of delegated lawmaking furnishes a plausible description of what at least some administrators do.¹³⁰ Certain delegations can also enhance a communitarian version of civic republicanism. Faceless bureaucrats, being free from obligations to constituents and election concerns, may be more able than elected representatives to consider national interests over local interests. The federal Sentencing Commission in the US, because its members need not fear being depicted as ‘soft on crime’, is thought to be much more respectful of liberty when promulgating sentencing guidelines than is Congress when it enacts sentencing statutes.¹³¹

However, these arguments do not apply to private delegation, and the four essential values of republicanism are not obviously promoted by private delegation. Private delegates will not necessarily engage in public-regarding deliberation. Sometimes there will be a coincidence between public and private goals—the goal of environmental protection can coincide with private profit where pollution prevention and waste minimization strategies reduce a firm’s consumption of energy and materials, thereby saving costs.¹³² Presumably, both private banks and the general public will desire a stable economy.¹³³ More normally, though, a conflict arises. Returning to the prison example, the private interest of maximizing profit may conflict with the public interest in sound

¹²⁷ Feintuck (n 87) 185.
¹²⁸ Craig (n 87) 334; see also I Honohan, *Civic Republicanism* (Routledge, London 2002) 4.
¹³⁰ Kahan, (n 129) 800–801.
¹³¹ Ibid 801–2.
¹³³ Krent (n 92) 102.
correctional policies: private managers in prisons may choose to lower costs by minimizing staff numbers, hiring under-qualified guards, or providing minimally adequate but substandard care.¹³⁴ Although public choice has taught us not to assume that public actors will act in the public interest, as was discussed in Chapter One, private actors are not even expected to serve the public interest, nor are they subject to institutional norms of professionalism and public service that might militate against the pursuit of mere self-interest or capitulation to narrow private interests.¹³⁵

Other values of civic republicanism also suffer. Political equality requires that all citizens have equal access to the political process but, as already observed in the direct participatory democracy discussion,¹³⁶ private delegation grants greater access to selectively chosen private groups.¹³⁷ There are few opportunities for the dialogue, or discussion of different approaches, required by universalism.¹³⁸ Moreover, if citizenship requires mechanisms for citizen control of national institutions, and also for 'decentralization, local control, and local self-determination',¹³⁹ this is lost where governance is carried out by large-scale private providers who often beat community providers in contract competitions.¹⁴⁰

### 3.3.4 Public choice democracy

Although usually associated with encouraging private delegation, because it 'reduce[s] the ambit of government action',¹⁴¹ even public choice analyses of democracy do not lead inevitably to the conclusion that private delegation is preferable to public performance. For public choice theorists, today's 'political life' can be characterized 'as a world of greed and chaos, or private self-interest and public incoherence'.¹⁴² There are many different schools of public choice thought,¹⁴³ but generally there seem to be three central tenets to a public choice understanding of democracy¹⁴⁴: the 'starting point'¹⁴⁵ is the assumption that 'man is an egoistic,
rational, utility maximizer; faced with this, the next question involves designing institutions in such a way as to ‘harness this ongoing process of individual goal maximization so as to produce the best possible collective outcome; finally, voters participate in democracy through the election of their representatives and are faced with the problem of choosing, while only having imperfect information about their representatives’ policy preferences. For public choice theorists, given these central tenets, bureaucrats and administrators inevitably fail to act in the public interest, because their inclination is to budget-maximize and to increase their jurisdiction and power. Bureaucrats’ preferences will often fail to match those of voters: whether because rational private sector interest groups, with resource advantages over competing groups and the dispersed majority, dominate the policy-making process or because an agency’s values will accord with those of the legislative coalition that established it, but not necessarily those of the current legislature. To respond to these concerns, public choice theorists often point to competition and private performance as a means of counteracting budget-maximization and agency capture. It is thought that competition can ‘redirect [bureaucrats’] attention towards the general welfare of society’ and lead to cost-savings, higher technological efficiency, and greater responsiveness to the public.

Generally, public choice theories have been subjected to significant criticism. As noted above, empirically, the evidence to support their propositions is mixed, and many studies make the mistake of excluding transaction costs from the overall cost estimate of contracting-out. Higher costs may even result from ‘increased fragmentation of services’ and the need for ‘inspection and monitoring of outputs of a multiplicity of agencies’. Indeed, it has been commented that the evidence supporting public choice claims for competition is so unconvincing that it is ‘remarkable [it] became so widespread in the UK and US local government systems during the last twenty years’.

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147 Spence and Cross (n 144) 102.
148 Ibid 100–103; see also SJ Bailey, Public Choice Theory and the Reform of Local Government in Britain: From Government to Governance (Glasgow Polytechnic, Glasgow 1992) 4; Downes (n 143) 214–18, 241–7.
149 Spence and Cross (n 144) 113; Niskanen (n 143) 36–42.
150 Spence and Cross (n 144) 114, 122.
152 Bailey (n 148) 19.
153 Boyne (n 64) 1.
154 Ibid 1, 169.
156 Above 3.2.3.
157 Boyne (n 64) 162–3.
158 Ibid 166.
159 Bailey (n 148) 17.
160 Ibid 18.
161 Boyne (n 64) 167.
Aside from the empirical uncertainties though, from a theoretical perspective it is not self-evident that private delegation provides a solution to the concerns raised by public choice. If bureaucrats, who are at least supposed to act in the public interest, act in their private interest rather than the public interest, how much more likely are private actors, who are not only entitled, but often under fiduciary duties, to act in their own private interest, to act accordingly? In other words, to the potential risk of self-interest dominating governmental decisions is now added ‘the opportunism of profit-seeking market agents’.¹⁶² Even certain public choice theorists acknowledge that, amidst the self-interested motivations of public actors, are also found certain altruistic motivations. Downes attributes four potentially altruistic motivations to public actors: personal loyalty to the government, identification with a specific programme of action, pride in the performance of work, and the desire to serve the ‘public interest’.¹⁶³ For private profit-seeking actors, however, the ‘primary raison d’être is shareholder wealth maximization’.¹⁶⁴ Moreover, much public administration literature suggests that bureaucrats often act in the public interest, if not volitionally, then because legislative oversight and reluctance to increase budgets forces bureaucrats to act in a way that reflects voter preferences.¹⁶⁵

Risks with private delegation, such as contracting-out, include: firms realizing that their contracts will not be renewed and exploiting consumers in the final months or years of the contract; the winning of contracts by companies who hope to make a quick profit without intending to honour their obligations; a company winning a contract and going bankrupt, perhaps because of an excessively low bid, thereby placing the onus on the government to find a replacement; or sometimes, as noted already,¹⁶⁶ given the complexity of some of the tasks subject to delegation, certain firms can build up a monopoly in a particular type of service provision.¹⁶⁷ Private delegation also exacerbates the imperfect information problem identified by public choice theories. As already observed,¹⁶⁸ where regulation is performed by private rather than public actors, voters are likely to have even less information to evaluate the actions of the private delegates than they have for public actors. In sum, with private delegation, ‘the manifestation of the public choice problem will have changed, not the problem itself’.¹⁶⁹

¹⁶² Bailey (n 148) 15.
¹⁶³ Downes (n 143) 214–18, 241–7.
¹⁶⁵ Spence and Cross (n 144) 117–18.
¹⁶⁶ Above 3.2.1.
¹⁶⁸ Above 3.3.1.2.
¹⁶⁹ Bailey (n 148) 15.
3.3.5 Democratic experimentalism

Arguably, the preceding critique falls foul of the criticism that it ‘engrafts premodern notions of control and accountability onto the realities of modern government’.¹⁷⁰ There are many theories of democracy, and there are those who would argue that the models examined here are outdated.¹⁷¹ They would argue that this is an era of complexity and that hierarchical models of democracy, such as are found in the civic republican and participatory theories, are unhelpful for understanding modern societies. What is required instead is a ‘new model of institutionalized democratic deliberation that responds to the conditions of modern life’.¹⁷² To take one example of such a theory, Dorf and Sabel present a model of ‘democratic experimentalism’, according to which, power is decentralized to enable citizens and other actors to utilize their local knowledge to fit solutions to their individual circumstances, while regional and national coordinating bodies require actors to share their knowledge with others facing similar problems. This information sharing increases the efficiency of public administration by encouraging mutual learning, and heightens its accountability through participation of citizens in the decisions that affect them.¹⁷³ Delegations of governmental power to private parties fit quite neatly into this conception of democracy, rather than undermining it.

The central problem with this theory, however, is that it assumes an effective system of gaining access to, and sharing, information. It is actually extremely difficult to gain access to information held by private actors, even if they are acting as delegates of governmental power. The private delegate workforce ‘remains . . . substantially invisible’.¹⁷⁴ As will be seen in Chapter Seven, through private delegation, government can often frustrate the public disclosure purposes of freedom of information legislation, given that such legislation is usually directed to governmental actors and will not apply as readily, if at all, to private actors.¹⁷⁵ In the EU, where right of access to documents is considered to be so important that it is enshrined in Article 255(1) EC, the right seems to be enforceable only against Community actors—the European Parliament, Council, and Commission.¹⁷⁶ Similarly, in the US context, it has been noted by one commentator that:

¹⁷² Ibid 283.
¹⁷⁴ Guttman (n 57) 325.
¹⁷⁶ Below 7.5.
federal government privatization can have a substantial impact on important information that was public while in the government’s hands but becomes secret once it is farmed out to private entities.¹⁷⁷

So, for instance, in January 1998 the US Department of Energy, the federal government’s largest contracting agency, refused to allow nuclear watchdog groups access to documents in the possession of its contractors.¹⁷⁸ Since the Department contracts with private corporations and non-profit organizations to perform over eighty per cent of its work, this has a major impact on the ability of citizens to know what the Department is doing.¹⁷⁹ A ‘democracy cannot function unless the people are permitted to know what their government is up to’.¹⁸⁰ Delegation of governmental power to private parties can render it very difficult to know what government is up to, and even modern accounts of democracy require an adequate system of access to information to be effective.

3.3.6 Democracy in the European Union

Finally, on the democracy issue, it is worth making a few points about the nature of democracy in the EU. Obviously, it is not suggested that the state of democracy in the US or England is without flaw; however, it is undeniable that the EU faces a unique challenge, which requires ‘bridging the gap between transnational governance and its democratic legitimation’¹⁸¹ and it can be difficult to find democratic legitimacy where ‘decisions are produced by the “horizontal” or “vertical” collaboration of representatives with separate bases of legitimation’,¹⁸² as occurs in the EU.¹⁸³ Whether or not the EU is successful in overcoming these challenges to its democratic content is a question for another day.¹⁸⁴ On the one hand, there are those who argue that democracy in the EU is, at best, impaired or incomplete.¹⁸⁵ This may be due to the absence of political responsibility to the Parliament, caused by the ‘ambiguous institutional structure of the European Council and Council of Ministers’.¹⁸⁶ It is said that the EU lacks the

¹⁷⁸ Ibid 27.
¹⁷⁹ Ibid.
¹⁸⁰ Environmental Protection Agency v Mink 410 US 73, 105 (1973) (Douglas J dissenting).
¹⁸³ Above 2.2.3 and 2.3.3.
The Benefits and Challenges of Private Delegation

key institutional structures necessary to fulfil the participatory or deliberative functions performed by elected lawmakers: for instance, given the fragmentation of executive powers described in Chapter Two, there is no government as such which can be held responsible via the electoral process; there are no mass membership European-wide political parties; and there is no European-level mass media. On the other hand, it is also argued that the European Parliament is a very effective ‘controlling parliament’, with ever-increasing lawmaking, appointment, budgetary, financial, and inquiry powers, perhaps overtaking those of national legislatures, which have struggled with increasingly ‘presidential’ governments; and that the Union enjoys stable and well-defined rules on the interactions between institutions, and a civic society that can achieve change through political processes.

For present purposes, it suffices to note that, even if we consider the EU system to be undemocratic, private delegation will not necessarily ameliorate the problem. It may be thought that, if democratic participation in the EU is weak, private delegation will help fill the participatory vacuum. Zeitlin notes that the democratic quality of the Open Method of Coordination—discussed in Chapter Two—would be enhanced by broad and transparent participation by members of civil societies and NGOs. Moreover, the private delegates, to whom the Commission contracts out authority or to which standard-setting is delegated, could constitute an important link between governing elites and the people. Of course, this argument is subject to many of the same doubts raised earlier about the potential of private delegation to enhance direct participatory democracy.

Participation by a select few is attained, but with the cost of ‘adding greatly to complexity and hampering transparency’. European standard-setting bodies have also been criticized on occasion for failing to be either participatory or deliberative in nature. Often, they do not involve adequate consumer, small business or labour interests in their deliberations; and they can be at risk of being

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188 Harlow (n 186) 169.
191 Harlow (n 186) 79 and, generally, 79–107.
194 Above 2.3.3.1.
196 Above 3.3.1.1.
197 Harlow (n 186) 33.
disproportionately influenced by commercial interests.¹⁹⁸ Private delegation will not enhance democratic involvement in the Union and, if anything, has the potential to consolidate the Union’s image as an elitist organization.

3.4 Private Delegation and Accountability

There is no general agreement on the substance of the concept of ‘accountability’ and, as with the task of defining democracy, it is beyond the scope of this book to give an exegesis of its many possible meanings. It is a complex, ‘rather ambiguous and multifaceted notion’,¹⁹⁹ with ‘many different definitions in different contexts and according to different political theories’.²⁰⁰ Davies has identified two elements of a relationship of accountability: responsibility, whether for acts performed oneself or for acts performed by others; and someone to whom the person discharging the responsibility is answerable.²⁰¹ As will be seen, when reviewing the different legal mechanisms of control of private delegates, consideration of this second element becomes particularly interesting: certain legal mechanisms, such as judicial review, render the private delegate directly answerable to the individual citizen, while others, such as contract, are more likely to render the delegate answerable to government.²⁰² Oliver’s popular definition of accountability is also very useful. For her, the concept of accountability provides:

a framework…within which public bodies are forced to seek to promote the public interest and compelled to justify their actions in those terms or in other constitutionally acceptable terms (justice, humanity, equity); to modify policies if they should turn out to have been ill conceived; and to make amends if mistakes and errors of judgement have been made.²⁰³

Oliver only extends her framework to ‘public bodies’, and it is this very limitation on the concept of accountability that is at issue here. Delegation of governmental power to private parties complicates traditional systems of accountability because, as is implicit in Oliver’s statement, most accountability mechanisms relevant to the exercise of governmental power only apply to ‘public bodies’. Consequently,

²⁰⁰ Ibid 360.
²⁰² Below Ch Seven (especially 7.3) and 8.3.2.
as Scott has observed, the ‘role of traditional accountability mechanisms appears to be diminished, it is no longer clear who is accountable, and there are problems with tracing the accountability linkages to the organizations who do the holding to account’.²⁰⁴

As a general matter, there are a number of reasons why traditional concepts of accountability are complicated by private delegation. One explanation lies in the problem of discretion:

Debates over accountability have to grapple with the uncomfortable dilemma of how to give sufficient autonomy to these actors for them to be able to achieve their tasks, while at the same time ensuring an adequate degree of control.²⁰⁵

The granting of ‘sufficient autonomy’ to private actors leads in turn to the difficulties highlighted by principal-agent theory. Where delegations occur, it is the agent, and not the principal, who exercises the most influence, because it is the agent who has greater knowledge of what is happening on the ground. The problem of asymmetric information arises, with one actor, in this case, the delegate, possessing knowledge that another actor, the delegator, does not.²⁰⁶ As a result, there is a danger that private actors will exercise their delegated powers in the pursuit of narrow private interests, rather than public interests.²⁰⁷

Principal-agent difficulties can also be exacerbated where there are ‘networks’ of private delegates engaged in the implementation of a particular programme. This is because, as Salamon explains, networks tend to be pluriform, which means that a diverse range of organizations are engaged, although they have limited experience of cooperating with each other and limited knowledge of each other’s operation styles. Second, they can involve self-referential actors, each with its own interests and frame of reference. Third, networks create asymmetric interdependencies, which means that all actors in a network, including the state, are dependent on each other, but rarely in a fully symmetrical way, so even if they all want the same thing, they may not be able to cooperate fully because they may not all want it with the same urgency or at the same time. Fourth, the dynamism of networks means that all these features change over time, even as the network seeks to carry out its mission.²⁰⁸ The consequence of these attributes is that complex systems of private delegates can render it even more difficult for the government, as principal, to ensure that its objectives are achieved.

The general conclusion of principal-agent literature is that principals can usually mitigate conflicts of interest through careful design of contract²⁰⁹—but they can rarely control agents perfectly.²¹⁰ Just as contract-drafting to achieve

²⁰⁴ Scott (n 14) 46. ²⁰⁵ Ibid 39; see also Schmid (n 51).
²⁰⁷ See also Brown and others (n 6) 327. ²⁰⁸ Salamon (n 8) 13.
²⁰⁹ Brown and others (n 6) 327.
efficiency and effectiveness is challenging, so too drafting contracts to alleviate principal-agent problems is an extremely difficult task—a question which will be explored in depth in Chapter Eight. For example, in theory, while long-term relational contracts can foster mutual trust and reciprocity between the contractor and the governmental actor, they can also undermine competition, with short-term contracts being capable of producing the converse effect. In practice, there is simply no clear empirical position on whether long-term or short-term contracts are preferable.

Another reason for the accountability challenges created by private delegation is found in the very difficult distinction drawn between policy-making and policy-implementation. One of the most popular arguments of proponents of private delegation is that accountability problems can be overcome by establishing a strong distinction between these two activities. As long as public, accountable officials make policy, private actors can implement it. However, as Freeman has pointed out, this ‘analysis assumes that policy making and implementation are easily divisible and that the two functions might be allocated to different authorities. In practice, the distinction is less clear.’

She gives the example of private prison officials who, in the day-to-day management of prisons, will determine when infractions occur, impose punishments, and make recommendations to parole boards, thereby affecting the most fundamental liberty and security interests of the prisoners. It is the person implementing the governmental power who will give it its practical meaning: ‘the distinction between policy making and policy implementation is dubious.’

There are a number of different accountability mechanisms. Scott, for instance, has drawn a distinction between,

- legal accountability (to the courts in respect of the juridical values of fairness, rationality and legality)
- political accountability (to ministers and to Parliament or other elected bodies such as local authorities and via these institutions ultimately to the electorate)

He further distinguishes between administrative accountability, accountability to administrative bodies such as grievance holders, and financial accountability.

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211 Above 3.2.3 and below 8.3.1.
213 Brown and others (n 6) 328.
215 See, generally, Osborne and Gaebler (n 116).
216 Freeman (n 13) 633.
217 Ibid 633.
218 Freeman (n 132) 341.
219 Scott (n 14) 42.
to auditors.²²⁰ Similarly, Vincent-Jones notes that competition and contracting can operate as mechanisms of accountability alongside traditional public law judicial review.²²¹ Distinctions have also been drawn between the power ‘delegated’ by the electorate to their representatives and the power delegated by government to agencies and individuals to perform governmental functions. Two types of accompanying accountability process follow, described respectively as ‘external’ and ‘internal’.²²² In the accountability discussion here, four categories of accountability mechanisms—and their internal and external implications—will be considered: political, legal, financial, and ‘extended’.

3.4.1 Political accountability

Political accountability refers to the ‘amenability of an action or activity to monitoring and control through the political process’²²³. Effective political accountability is necessary for a properly functioning democracy.²²⁴ As already noted in respect of the impact of private delegation on participatory democracy, on the external level of political accountability, private delegation creates problems by shifting responsibility for making important policy choices from elected officials to unelected, unknown private actors.²²⁵ Shifting such decisions outside government allows elected representatives to escape accountability because it allows them to blame delegates for unpopular decisions. Purely private organizations are also subject to only minimal political accountability incentives: their only motivation to act in a politically responsible way is usually to avoid governmental regulation or takeover by elected officials.²²⁶

On the internal level, private delegates are frequently not held accountable to the public actors from whom the power is delegated. Internal political accountability requires accountability to the executive, to the legislature, and to other elected bodies such as local authorities, and via these institutions ultimately to the electorate.²²⁷ The problem is that one of the main justifications for delegation of governmental power, whether to governmental agencies or private actors, is limited governmental resources of time and expertise. In circumstances of limited resources, it cannot automatically be expected that

²²⁰ Ibid. See also Harlow (n 186) 6–24 (discussing political, legal, and audit accountability).
²²¹ Vincent-Jones (n 27) 318.
²²² Davies (n 201) 77.
²²⁴ Davies (n 201) 76.
²²⁶ Abramson (n 25) 182.
²²⁷ Scott (n 14) 42.
the delegation will be monitored by detailed oversight procedures. Studies in the US have shown that:

Legislators lacking the time, expertise, and/or political will to make hard policy choices themselves in an issue area will not magically find these resources when it comes time to oversee the executive.²²⁸

By similar logic, this also leads to a risk of governmental delegators not devising sufficiently detailed guidelines to control the private delegate’s discretionary power: they will have ‘neither the time nor the expertise to micromanage.’²²⁹ Indeed, excessive detail in the language of the delegation may even undermine its very utility by depriving delegates of the flexibility required to get the task done.²³⁰ To avert this risk, the government must engage in ‘aggressive management’²³¹ and adopt ‘enablement skills’ to activate private delegates, orchestration skills to coordinate the many different actors involved, and modulation skills, to ensure appropriate rewards and penalties to elicit cooperative behaviour.²³²

### 3.4.2 Legal accountability

Legal accountability addresses external accountability to citizens through the courts, where individual citizens initiate actions against private delegates, and internal accountability, insofar as government initiates actions against private delegates. For Lord, legal accountability involves two main elements: the rules must be ‘enforceable by an independent judicial authority’ and the legal system must allow ‘any citizen on a basis of equality’ to access a court ‘with a complaint that power-holders are seeking to evade or distort the rules by which they are themselves brought to account’.²³³ Private actors are legally accountable, in accordance with Lord’s understanding, since they are subject to an ‘ad hoc system of civil law accountability and restrictions’.²³⁴ However, the legal systems of all three jurisdictions have developed more overarching mechanisms of legal accountability to ensure that public actors are answerable to an ‘independent judicial authority’ for the policies they issue and the decisions they make. Mechanisms such as judicial review in England and at state level in the US, the federal and state administrative procedure acts in the US, and the principles of proportionality and non-discrimination in the EU, test the actions of governmental actors for compliance with a variety of standards, such as ‘openness, fairness, participation, impartiality, accountability, honesty and rationality’.²³⁵

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²²⁹ Epstein and O’Halloran (n 228) 27.

²³⁰ Above 3.2.2.

²³¹ Kettl (n 5) 6.

²³² Salamon (n 8) 16–18.


²³⁴ Abramson (n 25) 184.

²³⁵ M Taggart, ‘The Province of Administrative Law Determined?’ in Taggart (n 126) 1, 3.
As will be discussed in Chapters Six and Seven though, these mechanisms do not obviously apply to private actors—even if the private actors are wielding governmental power. They also tend not to apply where the source of the power being exercised is contractual, a tendency which is highly problematic in light of increasing use of contract as a delegation mechanism. Freedland has shown that, in England, whether or not the activity will be subject to judicial review ‘depends upon the way the government has chosen to constitute the activity in question’.\textsuperscript{236} Thus if legislation is the mechanism of delegation chosen, the private delegate will most likely be amenable to judicial review, but not if the delegation mechanism is contract. In the US, the definition of ‘state actor’ has been drawn narrowly, so as to exclude almost every species of private delegate from the purview of the Constitution, while delegates outside the federal government also need not comply with statutory regulations monitoring the conduct of executive agencies and employees. US federal government actors are also subject to disclosure requirements,\textsuperscript{237} oversight structures,\textsuperscript{238} conflict of interest and reporting requirements,\textsuperscript{239} and ethical obligations.\textsuperscript{240} Yet, once again, private delegates are exempt from such obligations.

Trying to enhance legal accountability through contractual relationships is an option which will be discussed in Chapter Eight and, as will be seen, is difficult. As Diller has noted,

\begin{quote}
[m]uch work needs to be done to develop model contractual terms that provide effective means of oversight and public input. Moreover, the process of public contracting needs to be examined in a new light if it is to serve as a means of substantive public input, rather than simply as a safeguard against corruption and cronyism.\textsuperscript{241}
\end{quote}

When governmental power is exercised by private actors, it is often placed beyond the reach of traditional legal accountability mechanisms, thereby undermining legal accountability; and without subjecting private delegates to legal restraints, similar to those imposed on public actors, one is left with ‘arbitrary or unreflective governance’.\textsuperscript{242}

### 3.4.3 Financial accountability

The function of financial accountability is to provide ‘protection against corruption, waste, and the illegal disbursement of public funds’.\textsuperscript{243} The importance

\begin{footnotes}
\item[237] 5 USC § 552.
\item[238] 31 USC § 712.
\item[239] See, eg, 18 USC § 201.
\item[242] Krent (n 92) 76.
\item[243] Harlow (n 186) 19.
\end{footnotes}
of financial accountability of public actors has been recognized for some time and hence, for instance, the ancient English office of Comptroller and Auditor General, an officer of the House of Commons responsible for auditing the accounts of government departments and other public bodies.²⁴⁴ In recent times this form of accountability has become increasingly prominent. Hood has traced its rise in the governance structure in England through, for example, the introduction of New Public Management (‘NPM’), which, as was discussed in Chapter Two, entails hands-on professional management, explicit standards and measures of performance, rewards linked to measured performance, control and parsimony in the use of resources, open competition, and private-sector management styles.²⁴⁵ The Citizen’s Charter grants citizens rights as consumers of public services, while the Value for Money audits conducted by the National Audit Office examine quality and performance.²⁴⁶ In the US, most public agencies are subjected to the oversight of such watchdog federal agencies as the Government Accountability Office (GAO), the Comptroller General of which has a duty to investigate ‘all matters related to the receipt, disbursement, and uses of public money’, including conducting audits of expenditures by federal agencies which he believes will ‘help Congress decide whether public money has been used and expended economically and efficiently’.²⁴⁷ Returning to the EU’s unfortunate experience with private delegation, lack of financial accountability was central to the failure of delegation here: defects of control and audit led to the mismanagement of millions of ECUs, which were disbursed for various humanitarian aid and education programmes through private contractors but were used, inter alia, to make up shortfalls in staffing finances.²⁴⁸

Unsurprisingly perhaps, for the most part, financial accountability is delivered more through public management initiatives and policy guidelines than through law and, as such, will not be considered in depth in this book. Briefly, in England, the National Audit Office publishes regular reports on public-private partnerships and PFI arrangements,²⁴⁹ while the Audit Commission audits the activities of local government, including contracting-out activities.²⁵⁰ Audit will not necessarily prevent financial mismanagement, but it can detect it and enable

²⁴⁴ Ibid 18.
²⁴⁷ 31 USC § 712.
guidance to be formulated for future delegation. Meanwhile, in the US, federal government contractors are required to comply with various accounting standards for reporting to government auditors and there are even regular ‘recovery audits’ to recover overpayments made to private contractors.²⁵¹ At the state level, Beermann notes in particular that in Tennessee and Texas private prisons are subject to a high level of financial scrutiny and are required to report to the legislature and produce audited financial statements.²⁵² In all three jurisdictions, as will be considered in detail in Chapter Five, procurement regulations seek to ensure cost-effectiveness.²⁵³ Thus there is clearly an awareness of the need to ensure financial accountability. Nonetheless, in spite of this awareness, financial failures in private delegation continue to occur²⁵⁴ and budgetary reporting systems do not always operate effectively,²⁵⁵ with the result that continuing efforts in this area are always required.

3.4.4 Extended accountability

Of course, the same criticism could be levelled against this accountability critique as could be levelled at the earlier democracy critique of private delegation. The degree to which accountability is undermined by private delegation depends upon one’s understanding of accountability. Again, thus far, all three forms of accountability described have presupposed a hierarchical structure. Many commentators have noted though, that rather than being unaccountable, private delegations can indeed be found to be accountable—if a more complex, ‘extended’ understanding of accountability is adopted.²⁵⁶ Hierarchical or linear accountability can be replaced by ‘networks’ or systems of interdependent or horizontal accountability.²⁵⁷ In this version of accountability, delegation of governmental power may even enhance accountability. So, for instance, Scott has shown how, in England, directors of contracted-out prisons are subject to many of the forms of accountability directed at publicly operated prisons: upwards (legal, to the courts), financial (to the National Audit Office), and horizontal (to the Prisons Inspectorate, the Prisons Ombudsman, and prison visitors). But contracted-out prisons are additionally subject to a further form of horizontal accountability which has been created by a regulatory scheme, with a requirement to account,
day-to-day, to an on-site regulator, a controller, appointed by the Prison Service to monitor compliance with contract specification, and wielding the capacity to levy formal sanctions for breach of contract. Clearly, careful regulation of private delegates can assist in addressing certain of the concerns raised by the lack of judicial review or lack of enforceability of human rights obligations against such delegates. At least, on a practical level, if regulatory measures provide for frequent and random on-site inspections of private prisons, human rights abuses in such prisons may be less likely to occur due to the increased risk of detection.

Freeman notes similarly that:

> a private decisionmaker’s internal procedural rules, market pressures, informal norms of compliance, third party oversight, and the background threat of agency enforcement might hold private actors to account for their performance, even in what seem to be voluntary, self-regulatory systems.

If competition exists, the market may check the actions of private delegates when undertaking functions; while private shareholders or members on the board of directors of public corporations are aware that irresponsible decisions in operating their corporations may undermine their corporations’ ability to compete in the marketplace. Arguably, also, the need for specification of standards associated with contracting-out may ‘sharpen accountability by defining goals, setting targets and monitoring performance’. However, while contracting out may have the potential to ‘sharpen accountability’, that will not be the result where there is ‘inadequate recognition’ on the part of the delegating body that ‘out-sourcing requires specialized internal capacities for contract management and project management’. With an extended accountability model, much hinges on the willingness of governmental delegators to include detailed and adequate controls in their delegation arrangements and, as was noted above, delegators who do not have the time to carry out the primary function themselves often do not spend the time devising detailed oversight mechanisms or detailed delegation instructions. For example, while Scott has pointed to the positive regulatory measures taken in respect of private prisons in England, and Harding has described the UK arrangements in the private prison context as ‘the strongest statute-based accountability structure currently in existence’, Aman has noted in the same context that US states ‘do

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258 Ibid. See also Pozen (n 15) 280–81 for a detailed description of the controls applying to private prisons in the UK.
259 Freeman (n 132) 335.
260 Krent (n 92) 103.
261 Ibid.
262 Craig (n 246) 132.
264 Above 3.4.1.
265 R Harding, Private Prisons and Public Accountability (Open University Press, Buckingham 1997) 40. See also Pozen (n 15) 277 (noting that ‘the United Kingdom has instituted stronger
a poor job of specifying what the state desires (besides low cost).\textsuperscript{266} In the US, regulations may require equivalent standards to those found in public prisons but they do not provide any specific concrete standards by which a comparison of quality can be judged.\textsuperscript{267} Statutes do not always require the appointment of a monitor, while at the national level there is no contract oversight unit within the Federal Bureau of Prisons.\textsuperscript{268} Aman’s review of private state prisons indicates that most regulatory schemes are inadequate to protect human rights, partly due to the fact that privatization of prisons is often undertaken in haste, in the face of budget pressures or court orders to relieve overcrowding in public facilities\textsuperscript{269} and little attention is given to framing the private delegation in a satisfactory regulatory context. Across states there are huge variations, from permanent on-site governmental monitors present in private prisons every day to monitors visiting the prison on an annual or semi-annual basis.\textsuperscript{270}

Similarly, Dolovich notes that the system of accreditation of private prisons by the American Correctional Association (‘ACA’) has had only minimal impact in checking private prison abuses. This is because the ACA’s standards are largely procedural in character and are satisfied by the existence of written procedures rather than evidence of how processes operate in practice, while many of the members of the ACA are drawn from the ranks of experienced corrections officials who empathize with the prison operators, thereby undermining the possibility of rigorous enforcement.\textsuperscript{271} Indeed, even in England, the Inspectorate of Prisons only has the power to make recommendations, not to enforce them, and although its recommendations are usually accepted they are not always implemented.\textsuperscript{272} The English government has also been more reluctant to cancel private contracts for breaches than US governmental agencies.\textsuperscript{273}

As noted in Chapter One, it is beyond the scope of this book to undertake a comparison of regulatory schemes applying to private delegates in the three jurisdictions. It is certainly accepted that effective regulatory schemes can assist hugely in alleviating accountability concerns by creating a system of ‘extended accountability’, but unfortunately the problem may be that the governmental delegator fails to implement such a scheme. Regulation is unlikely to provide a fully comprehensive and adequate substitute for direct human rights compliance, for instance.\textsuperscript{274} Moreover, while frequent and effective monitoring assists

\begin{itemize}
  \item Aman (n 42) 530.
  \item Ibid 531.
  \item Pozen (n 15) 277.
  \item Amon (n 42) 529.
  \item Dolovich (n 9) 491.
  \item Pozen (n 15) 279.
  \item Ibid 275 fn 104 and 280.
\end{itemize}
in reducing abuses, it can be expensive and may result in undermining the cost-
savings anticipated from the use of private delegates.²⁷⁵ Finally, as with all regu-
lation, there is a risk of ‘agency capture’ and the evidence suggests that this has
already occurred to some extent in the US with the ACA.

3.5 Private Delegation and Human Rights

Private delegation has an immediately visible impact on human rights protection.
Private delegates of governmental power enjoy an unusual position in society, and
enjoy the same capacity to interfere with individuals’ human rights as government
enjoys. Private associations, regulating a market or profession, can control access
to jobs and economic opportunity, and can possess, through their disciplinary
power, enormous authority over the economic and social lives of citizens.²⁷⁶
Government contractors exercise discretionary power in all sorts of situations,
with the capacity to infringe any number of citizens’ rights. While government
is usually restricted by common law, statutory or constitutional rights, which
provide an important check on its exercise of power, when the government dele-
gates its power to private bodies it effectively sidesteps the limitations afforded by
these rights. Human rights obligations rarely apply with the same force to private
as to public actors, and by shifting power to the private sector the government can
alleviate itself of human rights concerns, thereby jeopardizing both procedural
and free-standing rights.²⁷⁷

3.5.1 Procedural rights

There are two ways in which private delegation has a negative impact on proced-
ural rights. On one level, private actors are generally not required to provide any
of the procedural protections—notice, hearings, or production of reasons—that
government actors are required to provide. On another level, private delegation
poses a risk to the impartiality of decision-making. Since private delegates usually
have financial motives, there is a constant, strong incentive to sacrifice individual
rights to increase profit.

For most government institutions, provision of procedural protection
is compulsory.²⁷⁸ Federal and state administrative procedure acts in the US

²⁷⁵ Dolovich (n 9) 490.
²⁷⁶ Note, ‘Judicial Control of Actions of Private Associations’ (1963) 76 Harvard L Rev
983, 989.
²⁷⁷ This classification of ‘procedural’ and ‘free-standing’ is borrowed from WW van Alstyne,
1507, 1528.
include a host of procedural requirements for rule-making and adjudication by
government agencies.²⁷⁹ Indeed, because the federal Administrative Procedure
Act 1946 meets or exceeds the requirements of the due process clause of the
Constitution, resort to constitutional rights in agency adjudication is rarely
necessary.²⁸⁰ However, as noted above in the legal accountability discussion, the
scope of this legislation does not extend to all public actors, never mind private
actors—even if they are delegates of governmental power.²⁸¹ Moreover, as will
be discussed in detail in Chapter Six, constitutional due process guarantees
rarely reach private delegates of governmental power, due to the 'state action'
doctrine.²⁸² Similarly, at common law in England, the limits of procedural
obligations of administrative law have been more or less drawn at governmental
bodies.²⁸³ In the EU, procedural protections permeate the system, for example
in competition law and anti-dumping law.²⁸⁴ Article 253 EC imposes a duty
to give reasons that applies to regulations, decisions, and directives adopted
either by the Council, Commission, and Parliament, or by the Council and
Commission alone. Yet whether or not these rights can bind private delegates
poses an intricate and difficult question.²⁸⁵

The second procedural problem created by private delegates is that of biased
decision-making. The importance of the impartiality of the decision-maker is
well-established. At common law, in both the US and England, the principle
forms part of natural justice, often expressed in the maxim nemo judex in causa
sua. It has formed a part of the common law of natural justice in England for cen-
turies,²⁸⁶ and has been used to invalidate numerous decisions of governmental
actors.²⁸⁷ It also remains an important element of constitutional procedural due
process in the US.²⁸⁸ The Supreme Court has held that it violates due process to
subject the 'liberty or property [of any defendant] to the judgment of a court the
judge of which has a direct, personal, substantial, pecuniary interest in reaching
a conclusion against him in his case'.²⁸⁹ The decision-maker who has a direct
financial interest in the outcome of a case presents the clearest instance of parti-
ality. As early as 1610, in Dr Bonham's Case,²⁹⁰ the proposition that no man can
judge a case in which he has a financial interest was established, and decisions of

²⁷⁹ 5 USC §§ 553, 554.
²⁸⁰ JM Beermann, 'The Reach of Administrative Law in the United States' in Taggart (n 126)
171, 183.
²⁸¹ Above 3.4.2; see also below Chs Six and Seven (and in particular, 7.4.1.1 and 7.4.1.2).
²⁸² Below 6.3.1.
²⁸³ Below 7.4.2.1, 7.4.3.1, and 7.4.4.1.
²⁸⁵ Below 6.3.3 and 7.4.1.3.
²⁸⁶ Dr Bonham's Case 77 Eng Rep 646, 8 Coke 114(a) (CP 1610).
²⁸⁷ See, eg, Craig (n 246) 457–65.
²⁸⁸ Tumey v Ohio 273 US 510, 523 (1927); see also Connally v Georgia 429 US 245, 251 (1977).
²⁹⁰ Timey v Ohio 273 US 510, 523 (1927); see also Connally v Georgia 429 US 245, 251 (1977).
decision-makers who have a pecuniary interest in the outcome of the decision are usually invalidated automatically for bias.²⁹¹

Although there is never any guarantee that government will always be objective, neutral and transparent in its dealings, concerns of profit are less likely to arise when governmental actors make decisions. Every decision made by a for-profit private delegate is made by a decision-maker who not only has a pecuniary interest in the outcome but who is additionally usually under a fiduciary duty to prioritize that interest.²⁹² As Feintuck has noted, while it might be debatable whether Friedman was correct to assert that ‘[t]he social responsibility of business is to increase its profits’,²⁹³ it is nonetheless correct to assert that, despite new developments such as corporate social responsibility, ‘the primary purpose of business corporations is the pursuit of profit’.²⁹⁴ The dangers of self-interest on the part of private delegates is often marked where they are entrusted with regulatory tasks²⁹⁵: for example, shortages of non-industry representatives in private standard-setting organizations can create concerns about whether the standards set accommodate health and safety considerations satisfactorily.²⁹⁶ However, even if it is overly-simplistic to treat the decision-making of corporations as the monolithic or unitary pursuit of profit, drawing on management and organizational literature, Bamberger has suggested that firms will often make decisions, using ‘unconscious and invisible routines buried deep within firm structures’, which are not rational or responsive to legal goals and which may seek to avoid outcomes which ‘cause a drag on efficiency’.²⁹⁷

The danger of self-interested decision-making can be even more strikingly illustrated in the involvement of private actors in the administration of the criminal justice system, where a very fundamental right, the right to liberty, is at stake. Private prison operators make decisions affecting the liberty interests of prisoners on a daily basis²⁹⁸—even though they are incapable of removing their own profit interest from these decisions. Particularly grave concerns have been raised in the US regarding the influence of private prison contractors in two contexts: first, in the operation of the prisons and, second, in lobbying for legislative policy on

²⁹¹ Craig (n 246) 457 (‘The courts have long insisted that any pecuniary interest disqualifies the decision maker be he high or low’); Tumey (n 289) 532, 535.
²⁹² Kennedy (n 98) 269.
²⁹⁴ Feintuck (n 87) 166 (emphasis in original).
²⁹⁵ Shapiro (n 60).
sentencing. When reporting on disciplinary conduct to parole boards, the interest of private contractors in the outcome of the parole board proceedings may impair the private official’s objectivity. While, of course, in public prisons, parole board reports can be infected by illegitimate motives such as dislike of particular prisoners, in the private prison context the risk of impartiality is once again intensified by the profit motive. Commentators have even noted that guards have on occasion been encouraged to segregate prisoners for bad behaviour, because when this occurs thirty days are added to the sentence, with corresponding extra earnings for the prison contractor. Dolovich also cites examples of the criteria for categorization of prisoners requiring extremely high security detention being expanded to enable specially designed high security private prisons to be put to full use.

To date, there have been no clear examples of legislative lobbying, but links have been traced between private prison firms and the American Legislative Exchange Council, which drafts model legislation which its legislator-members support in their home jurisdictions. There are also precedents in the US of intensive lobbying by defence contractors, resulting in the amendment of federal government guidelines on arms sales to include a requirement that potential benefits to the nation’s contractors (in addition to benefits to American foreign policy) be considered when deciding whether to grant approval for arms sales. Moreover, Dolovich has noted an increasing trend in US communities to regard private prison-building and operation as a form of economic development. In short, as Mangold has forcefully put it in the context of private provision of foster care services:

It is unsavory to read shareholder information which speaks of ‘investment in vulnerable populations’ and rates of return based on the use of public monies intended to provide room and board payments for abused and neglected children.

### 3.5.2 Free-standing rights

Again, as with procedural rights, it can be difficult to ensure that private delegates are accountable for violations of ‘free-standing’ human rights. As will be discussed

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300 Dolovich (n 9) 523.
302 Dolovich (n 9) 536–7.
304 Ibid 523–6.
305 Ibid 539–42.
in Chapter Six, in England there was some initial hope that section 6(3)(b) of the Human Rights Act 1998, referring to bodies exercising ‘functions of a public nature’, would be interpreted to ensure that private bodies exercising governmental power would be compelled to comply with the human rights standards of the Act.²⁰⁷ Recent House of Lords and Court of Appeal decisions seem to indicate that private delegates are unlikely to be held subject to the Act on a regular basis.²⁰⁸ In the US, the scope of ‘free-standing’ human rights protections are limited in the same way as procedural human rights protections through the state action doctrine, and private actors may discriminate on the basis of race or violate free speech protections, with impunity. Indeed, one commentator, in frustration, has referred to the “remarkable uselessness” of the state action doctrine in constraining the private role in governance.²⁰⁹ In the EU, free-standing rights have the same uncertain application to private delegates as procedural rights, although, as will be considered in Chapters Six and Seven, in EU law the risk to rights protection has been mitigated by other aspects of the EU legal order. As yet, too, in all three jurisdictions, governmental delegators have not been required to ensure human rights compliance on the part of their private delegates.

3.6 Private Delegation and Non-Profits

Before concluding this discussion on the challenge of private delegation, a comment on non-profit private delegates is necessary. It may be thought that many of the risks outlined here are eliminated where the private delegate is a non-profit as opposed to a for-profit actor, as non-profits may be assumed to act for altruistic motives and in the public interest.²¹⁰ In this respect, non-profits often benefit from a high level of trustworthiness.²¹¹ Yet actually, only three of the challenges of private delegation identified here depend significantly on profit-motivation for their validity: the risk posed to civic republican democracy when private delegates make choices for ‘profit’ rather than in the public interest, the budget-maximization concern of public choice, and the risk of impartiality to procedural human rights due to a pecuniary interest in the outcome. It is true that most

²⁰⁷ N Bamforth, ‘The Application of the Human Rights Act 1998 to Public Authorities and Private Bodies’ (1999) 58 CLJ 159, 159 (s 6(3) ‘is intended to catch private (or ostensibly private) bodies which, as a result of the processes of privatization and contracting out, now perform public duties which were formerly the responsibility of government’).
²⁰⁸ See discussion below 6.3.2. and 9.1.1.
²¹⁰ See, eg, Kennedy (n 98) 257.
non-profits will be under a duty to act in furtherance of the purpose for which they have been established: whether governed by a charitable trust, as often occurs in England, or by non-profit corporate law, as usually occurs in the US.³¹² Non-profits are also usually subject to stringent regulatory regimes to ensure their accountability. For example, in most states in the US, the state attorney general has supervisory responsibility over charitable corporations, which includes the power to seek an accounting, to seek dissolution of the charitable corporation for ultra vires acts, and to bring civil actions to remove directors and officers for self-dealing, waste, diversion of assets or other breach of fiduciary duty.³¹³

However, trustees or directors of non-profits will usually be under fiduciary duties to act in furtherance of the purpose for which the non-profit was formed, rather than in the public interest more generally,³¹⁴ with the consequence that delegation to non-profits, as opposed to for-profits, may not significantly reduce risks to public interest decision-making. For instance, Shapiro has noted that when an administrative agency delegates standard-setting to a non-profit, the non-profit’s incentives will not necessarily be consistent with agency objectives as it may have ‘a different set of goals than the agency’.³¹⁵ Even non-profits will be under financial pressures to satisfy donors³¹⁶ or simply to survive.³¹⁷ Rather than behaving opportunistically, a non-profit may avail itself of philanthropic resources to enhance services provided pursuant to a government contract; just as easily, however, the non-profit may channel residual revenue from government contracts into subsidizing other programmes.³¹⁸ Empirical studies have also shown that while non-profits fare favourably against for-profits when compared on cost, they sometimes do not fare so favourably when compared on quality of service provision.³¹⁹ Often, non-profits may have out-dated or rudimentary data systems and lack basic information about their own performance, with the result that many problems go unnoticed or unreported.³²⁰ Non-profits may also behave like conventional monopolists when they become reliant on government contracts.³²¹ Overall, studies have shown that

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³¹³ Beermann (n 32) 1722 fn 9.
³¹⁵ Shapiro (n 60) 407.
³¹⁷ Mangold (n 306) 1316.
³¹⁸ Brown and others (n 6) 327.
non-profits may exhibit similar weaknesses to for-profit organizations, while corruption and misuse of resources are just as much of a concern with non-profits as with for-profits—albeit that the types of regulatory regime noted above may provide a greater deterrent. Finally, non-profits are still capable of making irrational and procedurally unfair decisions, violating human rights, undermining participatory democracy by facilitating avoidance of responsibility by elected leaders, and evading traditional accountability mechanisms.

3.7 The Benefits and Challenges of Private Delegation: An Overview

This chapter has portrayed private delegation in a harsh light, but it is not its position, or indeed, the position of this book, that there are no benefits to governance to be derived from private delegation. Rather, the ‘goal is to grant privatization its due while protecting public sector values’ or, to borrow a phrase from another context, to ensure that delegations of governmental power to private parties ‘serve rather than usurp’ good governance. In order to achieve this end it is, however, first necessary to fully comprehend the challenges posed by private delegation—and it is hoped that that has been achieved, to some degree, by this critique. As was stated at the outset, there is no perfect division between the categories of efficiency and effectiveness, democracy, accountability, and human rights. Underlying each category is a number of issues that repeat themselves and pose challenges for all four categories of values: principal-agent difficulties, lack of transparency, the difficulties of gaining access to information, the difficulties of ensuring that private delegates act in the public interest, the importance of competition, the difficulties of devising effective oversight mechanisms, the challenge of constraining governmental delegators so they do not evade their responsibilities, and the overriding challenge presented by the limits of traditional public law constraints. In the following parts of this book, controls on delegation of governmental power and controls on the private delegates of governmental power will be considered. As each legal mechanism of control of private delegation is considered, its ability to respond to the challenges outlined here will be assessed. In this way, it will become possible to assess how well each jurisdiction currently responds to the complex phenomenon of private delegation, and how each jurisdiction might improve upon its response, in order to better maximize the benefits and minimize the risks identified in this chapter.

322 Schmid (n 51) 318.
324 Verkuil (n 228) 468.