

[This is a pre-publication version. The paper will appear in Cahillane, Gallen and Hickey (eds), *Judges, Politics and the Irish Constitution* (MUP, 2016)]

Administrative Action, the Rule of Law and Unconstitutional Vagueness

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I. Introduction

The rule of law is a political ideal that legal systems can instantiate and against which they can be judged. On the one hand, those to whom the laws are addressed should be capable of following the laws. On the other hand, those in positions of power must implement the laws according to their terms. Only in such a legal system, the ideal holds, can the subjects of state power meaningfully make plans for their lives. Although it is not explicitly mentioned in the Constitution, the courts have frequently referred to the rule of law as an important constitutional value.ⁱ The textual prohibition on retroactive penal sanction and the judicially created rule against vague criminal offences both instantiate the ideal. In this chapter, I argue that more needs to be done to instantiate the rule of law ideal: administrative action potentially undermines the rule of law, since individuals may have no opportunity to tailor their activities to legally binding directives before they are issued. There are tentative indications in the case law that the courts may recognise a new constitutional doctrine constraining legislative grants of administrative power. I critically assess the emergence of this doctrine and seek to influence its development, disentangling it from a confusing association with the rule against the delegation of legislative power. Notwithstanding the absence of any clear textual basis, I argue that recognition of this doctrine would be a legitimate exercise of judicial power.

II. The rule of law and its place in the constitutional order

The rule of law is a contested ideal. Under one conception, the rule of law provides certain formal requirements of a legal system, such as promulgation and non-retrospectivity. The formal conception imposes, at most, very thin requirements as to the content of laws. In contrast, more substantive conceptions of the rule of law ideal include commitments to values such as human rights, justice and democracy.ⁱⁱ These are in addition to (but often in tension with) the formal requirements. There

is thus a spectrum between purely formal conceptions and conceptions that include both formal and substantive requirements. For the purposes of this paper, I adopt a formal conception,ⁱⁱⁱ drawing on Lon Fuller's eight desiderata of the rule of law: (1) there must be general rules; (2) they must be promulgated; (3) they must not be retroactive; (4) they must be clear; (5) they must not be contradictory; (6) they must not require the impossible; (7) they must not be changed too frequently; (8) there must be congruence between the law as written and the law as applied.^{iv} Fuller's desiderata really amount to two propositions: rules should be capable of being obeyed; officials must apply those rules.

People can therefore guide their behaviour with reference to rules, confident that those rules will be applied to them. This protects a genuine (but limited) value: no matter how restrictive the content of the rules, individuals will know that they are secure provided their behaviour is not prohibited by the rules.^v Compliance with the rule of law does not preclude rules having a content that infringes liberty. Moreover, compliance with the rule of law may itself make it more difficult for democratic majorities to implement their projects. Nevertheless, the rule of law protects liberty in the interstices of rules; it respects the dignity of individuals as autonomous agents by allowing them to plan their lives. In a close-knit society, this predictability might be secured through convention rather than posited laws. However, once a legal system develops with officials empowered by law to inflict violence on others, there is capacity for more effective evil. The rule of law is a bulwark against the sort of evil facilitated by legal systems.^{vi} In some situations, of course, the content of the rules might be so evil that it would be better for the legal system to break down, notwithstanding the damage that this would cause to the rule of law.

Joseph Raz has proposed rule of law principles that are similar to Fuller's, but different in a number of respects.^{vii} Most importantly for present purposes, Raz rejects any suggestion that a legal system should consist only of general rules but holds that legally binding directives addressed to specified individuals are permissible provided they are 'guided by open, stable, clear, and general rules.'^{viii} General rules, provided they are not retrospective, leave a gap between creation and application, in which autonomous agents can plan their lives. Directives, in contrast, are effectively retrospective since their moment of application coincides with their moment of promulgation. They serve important purposes but must, says Raz, be made 'within a framework set by general laws which are more durable and which

impose limits on the unpredictability introduced by the [directives].^{xix} This stable framework is created both by the rules that confer the powers and rules that constrain how officials can exercise those powers. This requirement is less onerous than Fuller's eight desiderata, because the penalties and privileges provided by the state through legally binding directives are less significant than criminal penalties. All that is required is that an individual be on notice that some directive, subject to guiding and constraining rules, may be issued. This allows that individual to anticipate likely directives and modify her behaviour accordingly.

The Irish constitutional order instantiates many of these rule of law requirements. Laws must be promulgated;^x penal sanctions cannot be retroactive.^{xi} In *King v. Attorney General*, the Supreme Court held that criminal offences cannot be overly vague.^{xii} Justice Henchy, with whom the other judges agreed, appeared to locate this new rule in Article 38. Hogan characterizes Justice Henchy's judgment as deploying the technique of 'sustained rhetoric leading to an ultimate crescendo' and as a 'legal Philippic regarding the inequities of the section'.^{xiii} The rhetoric obscured the fact that the Supreme Court had posited a new constitutional rule without any clear textual basis.^{xiv}

In the context of legally binding directives, the *ultra vires* doctrine protects the rule of law by ensuring that administrative agencies can only exercise the powers they have been given.^{xv} However, this protection would be seriously undermined if there were no limits to the sorts of powers the Oireachtas could grant to administrative agencies. If a public authority were granted the power to do *whatever* it considers right, it would be all but impossible for individuals to anticipate how that power might be exercised against them. Implicit general constraints (such as rationality and proportionality) have little purchase when the purpose and scope of the power are opaque. There is a significant gap in how the Irish constitutional order protects the rule of law, arising from the lack of any clear constraint on the extent of administrative power that the Oireachtas can grant. Over the past 10 years, however, several judgments suggest the emergence of a new constitutional doctrine prohibiting the grant of overly broad administrative powers. Before analysing that doctrine, we must first disentangle a confusion that has emerged in the case law between administrative and legislative powers.

III. Legislative and administrative powers

Legislation involves general rules directed to general classes of persons; administrative decisions, in contrast, are directed to identified individuals. For instance, the decision as to what types of development require planning permission is a legislative decision; the decision on whether a particular development should be granted planning permission is an administrative decision.^{xvi} The power to legislate is the power to make general rules for others without having to reason from existing validly posited norms.^{xvii} Article 15.2 of the Constitution speaks of the Oireachtas as holding the 'sole and exclusive power of *making laws* for the State'. However, the subsequent reference to 'no other legislative authority' as well as the identification of the legislative power in Article 6 strongly implies that what is exclusively held by the Oireachtas is a legislative power. The Constitution does not grant the Oireachtas any administrative powers. Typically, the Oireachtas creates and grants administrative powers to public agencies. There is no express constitutional prohibition on the Oireachtas doing this. Importantly, when it does so, the Oireachtas does not *delegate* a power (since it does not hold an administrative power to delegate); rather it *grants* a power.

In some cases, the courts have insisted on the difference between administrative and legislative powers. In the early case of *re MacCurtain*, Justice Gavan Duffy rejected the contention that the Attorney General was exercising a legislative power in deciding whether to certify that the ordinary courts were inadequate to secure the effective administration of justice in a particular case.^{xviii} More recently, in *Re Article 26 and the Health (Amendment) (No2) Bill 2004*, the Supreme Court held that the power of the chief executive officer of a health board to remit nursing home charges was not a delegated power to legislate but rather an administrative discretion.^{xix} In two more recent cases, however, the High Court treated grants of administrative power as if they were delegations of legislative power and thereby subject to the *Cityview* limitations on the delegation of power under Article 15.2.^{xx} However, this mischaracterisation prevents the rule of law concerns being properly addressed.

In *Sivsvadze v. Minister for Justice and Equality*, Justice Hogan granted the applicants leave to challenge the constitutionality of section 3 of the Immigration Act 1999, partly on the ground that section 3(11) breached Article 15.2 insofar as it did not specify sufficient principles and policies to guide a ministerial decision on whether to

revoke a deportation order.^{xxi} Justice Kearns heard the full application for judicial review and upheld the constitutionality of section 3(11), distinguishing between a power to make laws and policies, on the one hand, and discretionary decisions made with reference to the facts of a case on the other hand.^{xxii} In drawing this distinction, Justice Kearns seems to have accepted that section 3(11) conferred no legislative power on the Minister: the power to make (and revoke) a deportation decision is administrative. On appeal, the Supreme Court was more explicit on this point.^{xxiii} Murray J (with whom the other members of the Court agreed) held that these powers were administrative in character and that Article 15.2 therefore had no bearing on the constitutionality of section 3(11).

In *Collins v. Minister for Finance*, the Divisional High Court applied Article 15.2 to section 6 of the Credit Institutions (Financial Support) Act 2008, which allows the Minister for Finance to provide financial support in respect of the borrowings, liabilities and obligations of credit institutions.^{xxiv} The nub of Ms Collins's concern was that section 6 allowed too wide a latitude to the Minister. The simple provision that the Minister could provide financial support to credit institutions had enabled the Minister to incur a liability of over €30bn for the State. Justice Hogan introduced the relevance of the non-delegation doctrine in the following way:

While Article 15.2.1° applies generally to all legislation (and thus not just to legislation dealing with appropriations and budgetary matters), it also applies to budget measures such as the annual Appropriation Act. Article 15.2.1° vests the exclusive legislative powers in the Oireachtas and inasmuch as any appropriation for the purposes of Article 11 has to be “by law”, such a law must conform to the requirements of Article 15.2.1°.

This conclusion does not follow from Article 15.2 or Article 11. The provision of financial support to particular institutions is not a legislative act; the fact that it requires an appropriation and that such appropriation must be made by law does not make the provision of financial support to particular institutions legislative in character. Section 6 did not delegate any legislative power.^{xxv}

The delegation of legislative power raises very different issues from the grant of administrative power. Delegation of legislative power does not infringe the rule of law because no obligations are created unless or until the delegated legislative power is actually exercised. Individuals can wait until the delegated legislator actually

makes legislation; they will then be on notice of their obligations and can tailor their activities accordingly. From a rule of law perspective, delegated legislation is no different from primary legislation. The reasons for controlling the delegation of legislative power derive from democratic control not from the rule of law. The *Cityview* test is oriented to those democratic concerns: delegated legislators should not make decisions of principle and policy.

In contrast, the rule of law requires constraint on administrative power so that individuals can reasonably anticipate administrative decisions *before they are made*. This is important because administrative decisions – unlike delegated legislation – become applicable immediately upon being made in a way that is tantamount to retroactivity. Furthermore, the reasons for granting administrative power include allowing administrative agencies to make policy, something prohibited (at least on its face) by the *Cityview* test. The principles and policies test is therefore an inappropriate response to the rule of law concerns raised by the grant of administrative powers.^{xxvi}

IV. Constraints on the grant of administrative power

In *Re Article 26 and the Health (Amendment) (No 2) Bill 2004*, the Supreme Court upheld the power of the CEO of a Health Board to waive or reduce the charge for nursing home care. Although noting that Article 15.2 did not apply, the Court seemed to accept that the administrative power should be subject to a criterion of sufficient specificity to make judicial review a meaningful option. The Act required the CEO to exercise her discretion with reference to the criterion of undue hardship. The Court held that any arbitrary decision or other unlawful misuse of her powers could be subject to judicial review in the ordinary way; therefore, the grant of power was not constitutionally problematic.

In *Dellway Investments Ltd v. NAMA*, the Supreme Court considered a constitutional challenge to the power of the National Asset Management Agency (NAMA) to acquire eligible bank assets.^{xxvii} The appellants had credit facilities from a number of banks. NAMA had purported to acquire these credit facilities, effectively becoming the banker to the applicants. The applicants argued that the definition of ‘eligible bank asset’ was so broad *and* the criteria for its exercise so vague as to give to

NAMA an untrammelled discretion and that this amounted to a breach of the applicants' constitutional property rights. The statutory definition of 'bank asset' is a broad one, principally relating to credit facilities for the direct or indirect purpose of purchasing, exploiting or developing development land.^{xxviii} 'Development land' included land that was intended to be developed even if planning permission would not be required for that development on account of its minor nature.^{xxix} For instance, if a person bought her house with a mortgage and subsequently put a TV dish on the house (an act of development), the loan would be an eligible bank asset that could be acquired from the bank by NAMA. Or if a person used a bank loan to pay for a new gate on a farm, the whole farm would become development land for the purposes of the 2009 Act.

The Supreme Court held that it was, in principle, open to the Oireachtas to provide a broad definition of 'eligible bank asset'. The applicants argued that powers granted to administrative agencies must be sufficiently precise to enable individuals to know in advance whether the power could be exercised and to enable the courts to assess whether the administrative agency had remained within the scope of the power. The Court appeared to accept this requirement but held that it was satisfied by the obligation on NAMA to exercise its powers only for the purposes of the Act, as laid out in section 2, while taking account of the matters listed in section 84(4). This was a misreading of section 84(4). There is no obligation on NAMA to take account of any of the matters listed in section 84(4) – these are just matters which *may* be taken into account. The only real constraint on NAMA's jurisdiction is that section 84 allows (but does not require) NAMA to acquire a bank asset only if it considers it necessary or desirable to do so having regard to the purposes of the Act. It would appear to suffice that any one purpose would be served by acquisition. Given the breadth of some of the purposes (protect the interests of taxpayers, contribute to the social and economic development of the state), this provides little constraint.

As noted above, in *Sivivadze v. Minister for Justice and Equality*, Justice Kearns upheld the apparently unconstrained power of the Minister to revoke a deportation order.^{xxx} He relied on case law that obliged the Minister to consider any reasons put forward for revocation and also consider whether any change in circumstances had occurred that would make deportation unlawful or inappropriate on humanitarian grounds. Justice Kearns also held that generally stated powers must be exercised within the boundaries of the stated objectives of the Act, fairly and in accordance

with natural and constitutional justice. However, the stated objectives of the Act – to make provision in relation to the control of non-nationals – scarcely provides any real constraint. On appeal, Murray J referred to the factors mentioned by Kearns P but did not appear to consider that these were constitutionally required in order to limit the scope of the power granted to the Minister.

In *Collins v. Minister for Finance*, the Divisional High Court upheld the constitutionality of the Minister's power to give credit support to financial institutions on the basis of the provisions of the Act that constrained the Minister's power. The Divisional Court summarised the effect of these as follows:

[T]he Minister can only give financial support where he is of opinion that there is (i) a serious threat to the stability of the banking sector; (ii) the giving of such support is necessary to maintain the stability of the State's financial system and (iii) this is also necessary to restore equilibrium in the wider economy. By fixing the parameters of the Minister's discretion, the section complies with the principles and policies test. It prescribes justiciable yardsticks against which the exercise of that discretion can, if necessary, be judicially evaluated.

This depends on a highly questionable reading of sections 6 and 2 of the Act. Section 6(1) authorises the Minister to provide financial support having regard to the matters set out in section 2, the extent and nature of the obligations undertaken and which might be undertaken in the future and the resources available to him or her. It is settled law that the phrase 'have regard to' does not impose any obligation to conform to or comply with the direction to which regard must be had.^{xxxix} Section 2 does not impose any requirements on the Minister but instead records as a sort of legislative fact that the Minister has the functions under the Act because of the factors listed by the Court at (i), (ii) and (iii). In order to exercise the power under section 6, the Minister must have regard to these facts. But there is no requirement that the Minister be satisfied of any of these factors as a precondition for exercising the powers under section 2.

Although stating that grants of administrative power must be subject to some constraint, the fact that the grant of power in each case was upheld makes it difficult to identify a precise standard that grants of administrative power must meet. One formulation of the standard requires that the grant of administrative power lay

down principles and policies. The other formulation requires that the grant of power must be subject to a criterion that is amenable to judicial review. The courts have been willing to imply criteria into statutory grants of power, sometimes with greater plausibility than others, with the result that these tests were met. In *Collins*, the Divisional High Court read the connection between sections 2 and 6 so as to imply limitations that the legislation, on its face, sought to avoid. It seems unlikely that a court would have adopted such an adventurous reading of sections 2 and 6 if faced with a contemporaneous judicial review challenge to the Minister's decision to issue the bank guarantee.

V. Rule of law constraint on the grant of administrative powers

The formal rule of law respects the dignity of individuals as autonomous agents by providing them with the freedom to make life choices, secure in the knowledge of how the state will respond to those choices. This value is undermined where people cannot know how their actions will be legally treated before they act. Administrative power is problematic since individuals have no opportunity to tailor their activities to legal directives before they are issued. Grants of administrative power may still be permissible, provided they are controlled by criteria that guide individuals as to how the power might be exercised. This imperative is partially met by an *ultra vires* doctrine but also requires limits on the scope of powers that can be conferred.

The rule of law, however, makes it more difficult to realise other values. As a constraint on state power, the rule of law impedes the sort of social projects that depend on state power for their implementation. Sypnowich, for instance, identifies equality- and democracy-based critiques of the rule of law. From this perspective, the rule of law impedes substantive justice and/or the will of the people.^{xxxii} This opposition between the rule of law and projects for social reform has been particularly acute in the context of the administrative state. Epstein bases his objection to the administrative state in terms of a defence of the rule of law, commenting that 'the administrative state gives rise to a peculiar blend of bureaucratic rule and discretion that does not comport with the historical conception of a rule of law, and its central concern with the control of arbitrary power'.^{xxxiii} Brian Tamanaha traces that dynamic from the opposite perspective, showing how rule of law arguments have aligned in support of liberal projects over time, such as

the protection of property interests and – more recently – the imposition of the ‘Washington Consensus’ on developing countries in return for development aid.^{xxxiv}

This opposition can be perceived in the Irish case law. If the courts had required a greater level of constraint on the grants of administrative power, this would have impeded the political projects of deporting foreigners and bailing out banks. To be sure, these projects might not be first on the to-do list of those progressives sceptical of the rule of law. Nevertheless the protection of the rule of law makes it more difficult for democratically elected majorities to achieve their projects. There is little that can be done other than recognise this tension, accept that the rule of law should be protected but also that there are other – sometimes conflicting – values, and consider how best to strike the balance between respect for the rule of law and the achievement of democratically mandated projects. In the remainder of this section, I suggest a judicial approach that meets these competing objectives. It necessarily follows from any test of this type that the Oireachtas would sometimes be unable to grant the sort of administrative power that it wishes to grant. This is the price we pay for conformity to the rule of law.

The Oireachtas should be empowered to give an administrative agency as much power as is necessary to achieve the purposes that the Oireachtas holds for that agency. This leaves to the Oireachtas the democratic choice of which projects should be pursued, but constrains the Oireachtas to empower administrative agencies no more than is necessary to implement those projects. No matter how broad the power, if it is genuinely necessary to meet the purposes set by the Oireachtas, it is permissible. However, it may not be possible to design a grant of administrative power that perfectly allows the administrative agency meet only the purposes that the Oireachtas holds for it. If the Oireachtas chooses to grant an over-inclusive power, then the Oireachtas must impose duties on the decision-maker that provide meaningful constraint, and hence guidance to individuals as to whether the power may be exercised.

Obliging a decision-maker to take certain matters into account constrains that decision-maker (to some extent) and increases (to some extent) the predictability of the decision-maker’s actions. The more matters that the decision-maker *must* take into account, the greater the constraint and the greater the predictability. In contrast, merely *allowing* the decision-maker to take certain matters into account

provides considerably less constraint. Moreover, the more matters that may be taken into account, the less the constraint on the decision-maker. At this point, the damage to the rule of law simply becomes too great to be justifiable by reference to the desirability of effective administration. Reflecting these concerns, the courts should hold unconstitutional powers that are wider than necessary to achieve their purpose, unless the decision-maker is obliged (as distinct from merely authorised) to take specific matters into account when making its decision.

Three clarifications are necessary. First, if this test is to be meaningful, one cannot infer the purpose of the power from the scope of the power. If one took that approach, the scope of the power would always be deemed co-extensive with the purpose for which it was conferred.^{xxxv} The courts should instead infer the purpose of the power from the statute as a whole (including its long title), evidence as to the sorts of cases in which the administrative agency has in fact exercised the power, and common-sense observations about what the purpose of the power is likely to have been. This avoids any difficulty that might be caused by recourse to parliamentary debates or other parol evidence.^{xxxvi}

Second, the courts should show some judicial deference to any assessment by the Oireachtas of what powers are necessary to achieve the purposes that the Oireachtas has set for the administrative agency. The courts should ask whether the scope of the power is reasonably necessary to meet the purpose for which it is being conferred. However, this deference must be checked as otherwise the doctrine would become meaningless.

Third, the constraining factors referred to above should be present in the statute itself that confers the power. The rule of law gives us reason to constrain administrative powers not for the sake of constraint but in order to make the exercise of those powers more predictable for individuals. This does not occur if individuals do not know of the constraints. The courts have consistently held that apparently absolute administrative powers are subject to implied constraints, such as fairness^{xxxvii} and rationality.^{xxxviii} Requirements of rationality and fairness, however, bring little predictability to the exercise of a broad administrative power. A power to make any 'rational and fair' decision would not provide much guidance to those potentially affected, if they even knew who they were. Moreover, it is no answer to a charge of vagueness to read constraints into a statutory provision through the

double construction rule. It is not appropriate for the Oireachtas to seek to 'hide the ball' and require individuals to engage in constitutional litigation so as to discover what constraints applied to the decision-maker. Since this guidance comes after the fact, it does not increase predictability. Long-standing and well-known common law restraints (including those based on previous interpretations of the statute) have some force, but not as much as constraints stipulated in the statute itself.^{xxxix}

This doctrine for the control of administrative powers is fundamentally different from the principles and policies test set out in *Cityview*. It starts from the assumption that the Oireachtas can grant administrative powers. It recognises that the Oireachtas and administrative agencies have very different functions: they are not rival legislators competing to exercise the same role. It does not exclude administrative agencies from a policy-making role. It allows for the grant of very broad administrative powers without any constraining guidance, provided those powers are necessary to achieve the objective that the Oireachtas has set for the administrative agency. Finally, where the power is broader than might be necessary, the test requires constraint but does not preclude the administrative agency from developing principles and policies consistent with that constraint.

Bearing these points in mind, we can reconsider the cases above. The decision in *Re Article 26 and the Health (Amendment) (No 2) Bill 2004* to uphold the CEO's power to waive or reduce charges is unproblematic. The scope of this power was no broader than necessary. Moreover, this limiting criterion was laid down in the statute itself. In the context of *Sivisvadze*, it is problematic that the criteria that guided the revocation power were not laid down in the statute but were instead the result of judicial interpretation. That said, the fact that these interpretations predated the case did reduce the force of the applicants' claim. The obligation on the Minister to revoke a deportation where there is a material change in circumstances is a genuinely constraining factor.

The power conferred in *Dellway* was far wider than conceivably necessary to meet its objective. It is difficult to avoid the conclusion that the Oireachtas was assigning to NAMA the hugely important decision about what types of bank assets should be acquired. Moreover, the constraining factors – as illustrated above – provided little or no constraint. The powers conferred on NAMA would not survive the test suggested in this chapter. *Collins* raises fewer concerns than *Dellway*. The scope of

the power here – although wide – was probably no broader than was necessary to meet its objective. It is troubling that the Court read in constraining factors that probably do not exist on a fair reading of the statute. However, it is significant that the Act was – in substance but not in the precise constitutional sense – emergency legislation. The state was immediately faced with a crisis situation, the possibility of a run on the banks. It is of course questionable whether the bank guarantee was the correct response to that situation, but this is not a rule of law concern. Bearing in mind that there must be a balance between rule of law concerns and the need to facilitate the achievement of democratically endorsed programmes, *Collins* seems an appropriate case in which to favour the latter over the former.

VI. Implications for judicial power

The argument in this chapter has implications for judicial power at two levels. First, some might be troubled at the absence of any clear textual justification for the power of the courts to strike down grants of administrative power. This should not be a concern. The formal rule of law is the quintessential value of legality: a legal system that evinces no commitment to the rule of law is little more than a regime for control of the masses. Judges have a role to play, irrespective of any explicit constitutional authorisation, in ensuring compliance with the rule of law. The Irish courts have accepted this role, on several occasions emphasising the commitment of the constitutional order to the rule of law.^{x1} It provides the best explanation of the prohibition on vague criminal offences, a doctrine likewise lacking any clear textual basis. Rather than unconvincingly cobble together several vaguely related constitutional provisions, it is better to assess the doctrine as a judicial elaboration of the constitutional order's fundamental commitment to the rule of law. The doctrine's justification turns on whether it is a reasonable response to that commitment, consistent with the other objectives of the constitutional order. The doctrine is minimally restrictive of legislative choice while providing a baseline of rule of law compliance for the grant of administrative powers. It would be a justified elaboration of Ireland's commitment to the rule of law.

Apart from the constitutional basis for its existence, the doctrine also has implications for the judicial power in its operation. In policing the boundaries between legitimate and illegitimate grants of administrative power, the courts obtain

power for themselves, arguably at the expense of administrative agencies.^{xli} This concern, however, is offset by a number of factors. The doctrine only controls the means through which the Oireachtas can pursue its objectives. It allows for broad grants of administrative power and requires the courts to be deferential to the assessment by the Oireachtas as to what powers are necessary to meet the objectives of an administrative agency. Moreover, in a legal system where the Government is guaranteed a majority in the legislature, the implications of a declaration of unconstitutionality are less significant. The Government can always secure the passage of new legislation that allows the administrative agency to achieve the same objective, but in a manner that complies with the rule of law. This should assuage concerns about the power that such a doctrine would grant to judges.

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ⁱ *Re Article 26 and the Illegal Immigrants (Trafficking) Bill* 1999 [2000] 2 I.R. 360, 385; *Maguire v Ardagh* [2002] 1 I.R. 385; *Mallak v. Minister for Justice, Equality and Law Reform* [2012] IESC 59.

ⁱⁱ See for instance R. Dworkin, ‘Political Judges and the Rule of Law’ in *A Matter of Principle* (Harvard University Press, 1985).

ⁱⁱⁱ It is more analytically useful than the substantive conceptions, since it focuses on a discrete value of legality rather than merging that value with other values. If one sympathises with more substantive conceptions of the rule of law, one can read this chapter as an inquiry into how Irish constitutional law instantiates the formal aspects of the rule of law.

^{iv} L. Fuller, *The Morality of Law* (Yale University Press, 1967), pp. 46-91.

^v N.E. Simmonds, ‘Straightforwardly False: the Collapse of Kramer’s Positivism’ (2004) 63 *Cambridge Law Journal* 98.

^{vi} L. Green, ‘Positivism and the Inseparability of Law and Morals’ (2008) 83 *NYU Law Review* 1035, pp. 1054-1058.

^{vii} J. Raz, ‘The Rule of Law and its Virtue’ in *The Authority of Law* (Oxford University Press, 1979), pp. 214-219.

^{viii} Raz refers to ‘particular legal orders’ to connote a legal order directed to an individual; I use ‘directives’ to avoid confusion with the other sense of ‘legal order.’

^{ix} Raz, (n. vii) p. 216.

^x Article 25.

^{xi} Article 15.5.

^{xii} *King v. Attorney General* [1981] I.R. 233.

^{xiii} G. Hogan, ‘The Judicial Thought and Prose of Mr Justice Seamus Henchy’ (2011) 46(1) *Irish Jurist* 96.

^{xiv} This principle has been subsequently applied in *Dokie v. Director of Public Prosecutions* [2010] IEHC 110, *Douglas v. DPP* [2013] IEHC 343, and *McInerney v. DPP* [2014] IEHC181. For discussion, see D. Prendergast, ‘*Douglas v. DPP* and the Constitutional Requirement for Certainty in Criminal Law’ (2013) 50(2) *Irish Jurist* 235.

^{xv} In *Kennedy v. Law Society of Ireland (No 3)* [2002] 2 I.R. 458, 486, Justice Fennelly explicitly related this doctrine to the rule of law.

^{xvi} The existence of Private Acts does not fit easily within this account. If they are correctly called legislation, they are a peripheral instance of legislation.

^{xvii} For Gardner, this distinguishes legislative law-making from judicial law-making. J. Gardner, ‘Legal Positivism: 5½ Myths’ in *Law as a Leap of Faith* (Oxford University Press, 2012) p. 40.

^{xviii} [1941] I.R. 83.

^{xix} [2005] IESC 7.

^{xx} The Oireachtas may delegate its law-making power provided that the delegating instrument deals with all matters of principle and policy, leaving only matters of detail to the delegated legislator. *Cityview Press v. An Comhairle Oilúna* [1980] I.R. 381. This is the articulation of the test but it has never been applied by the courts in this way. See O. Doyle, *Constitutional Law: Text, Cases and Materials* (Clarus Press, 2008), [11-19]-[11-28].

^{xxi} [2012] IEHC 137.

^{xxii} [2012] IEHC 244.

^{xxiii} [2015] IESC 53.

^{xxiv} [2013] IEHC 530.

^{xxv} In *McGowan v. The Labour Court* [2013] IESC 2, Justice O'Donnell held that measures that do not breach the principles and policies test are for that reason not legislative in character. This cannot be correct: the character of a power as legislative is in no way affected by the breadth of that power.

^{xxvi} As a foundation for the doctrine, Article 15.2 would be highly insecure, given the Supreme Court's clear recognition in *re Health (Amendment) (No2) Bill 2004* and in *Dellway Investments Ltd* (see below) that grants of administrative power are not subject to Article 15.2. Indeed, the Supreme Court in *Sivivadzė* largely exhausted its consideration of whether section 3(11) granted too much power with its conclusion that Article 15.2 did not apply to the grant of an administrative power.

^{xxvii} [2012] IESC 13.

^{xxviii} National Asset Management Agency Act 1999, s 69 and SI 568/2009 National Asset Management Agency (Designation of Eligible Bank Assets) Regulations 2009, reg 2.

^{xxix} *Ibid*, s4.

^{xxx} [2012] IEHC 244. It might be thought that any rule of law concern is diminished by the fact that section 3(11) can only be exercised in favour of a person. However, rule of law concerns arise just as much in respect of possibly favourable decisions: individuals should know what they are legally entitled to and not have to tailor their activities to anticipate the whim of unfettered bureaucrats. Moreover, the existence of section 3(11) was part of the state's defence of the constitutionality of section 3(1) which provided only for indefinite deportations. In the absence of section 3(11), deportation orders would be permanent and most likely unconstitutional.

^{xxxi} *McEvoy v. Meath County Council* [2003] 1 I.R. 208.

^{xxxii} C. Sypnowich, 'Utopia and the Rule of Law' in D. Dyzenhaus (ed), *Recrafting the Rule of Law* (Hart Publishing, 1999).

^{xxxiii} R.A. Epstein, 'Why the Modern Administrative State is Inconsistent with the Rule of Law' (2008) 3 *NYU Journal of Law and Liberty* 491, p. 495.

^{xxxiv} B.Z. Tamanaha, 'The Dark Side of the Relationship between the Rule of Law and Liberalism' (2008) 3 *NYU Journal of Law and Liberty* 516.

^{xxxv} A similar problem arises in respect of the constitutional review of legislative action. See O. Doyle, *Constitutional Equality Law* (Round Hall, 2004) pp. 117-22.

^{xxxvi} *Molyneux v. Ireland* [1997] ILRM 241; *Crilly v. Farrington* [2001] 3 I.R. 267; *Controller of Patents v. Ireland* [2001] 4 I.R. 229.

^{xxxvii} *East Donegal Co-operative Ltd v. Attorney General* [1970] I.R. 317, 344.

^{xxxviii} *State (Keegan) v. Stardust Compensation Tribunal* [1986] I.R. 658.

^{xxxix} From a rule of law perspective, there would be no difficulty with an administrative agency fettering its own jurisdiction in advance. However, this does raise democratic concerns and is generally prohibited in administrative law. See G. Hogan and DG. Morgan, *Administrative Law in Ireland* (4th ed, Round Hall, 2010) pp. 793-9.

^{xl} (n. 1).

^{xli} For this type of argument, see E. Carolan, 'Democratic Control or High-Sounding Hocus-Pocus? A Public Choice of Analysis of the Non-Delegation Doctrine' (2007) 29 *Dublin University Law Journal* 111.