

University College London

**NONJUDICIAL ADMINISTRATIVE JUSTICE IN
LATIN AMERICA: A CASE STUDY OF THE
CHILEAN COMPTROLLER-GENERAL**

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I, Guillermo Jiménez confirm that the work presented in this thesis is my own. Where information has been derived from other sources, I confirm that this has been indicated in the thesis.

ABSTRACT

The design of appropriate institutional arrangements to satisfy the demands for legal accountability has been a pervasive challenge since the emergence of the modern administrative state. While some commentators have celebrated the development of increasingly searching judicial techniques to control bureaucratic power, others have expressed their preference for nonjudicial forms of administrative justice. Recent literature has explored the development of a rich accountability landscape inhabited by numerous institutions that complement and sometimes substitute for courts in the task of securing administrative compliance with the rule of law. This study examines the Chilean Office of the Comptroller-General as one of these nonjudicial institutions of administrative justice. The contribution of this legal accountability institution is particularly remarkable considering the Latin American context, which is characterised by strong presidential government, authoritarian experiences, and fragile bureaucratic capacities. This thesis suggests that this organisation represents an attractive institutional incarnation of the idea that legal accountability, and particularly administrative justice, could be realised through non-court arrangements. Adopting a socio-legal approach, this case study uses historical and archival data along with in-depth interviewing methods to explore the evolution and current performance of the Chilean Comptroller-General as an instance of nonjudicial administrative justice.

The thesis looks at historical and current uses of legality within the administrative process in Chile and also its use in the interaction of public bureaucracy with other branches of government, as well as private affected parties. Addressing the historical evolution of the institution, the emergence, consolidation, and critical junctures for the Chilean Comptroller-General are analysed. In addition, the current contribution of the office to legality within the administrative process, and the delimitation of its role from the judicial function are examined. Overall, the thesis aims to shed light on the possibilities and limits of nonjudicial administrative justice in the modern Latin American state.

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INTRODUCTION

This thesis is about the influence of legality on the administrative process in the complex and large-scale modern state. Ever since the emergence of the administrative state, there has been contention about the desirability of imposing legal, and particularly judicial, constraints upon public bureaucracies.¹ To an important extent the debate has revolved politically around whether commentators display enthusiasm or distrust in respect to ever-expanding administrative powers. The debate is also linked with conflicting preferences for legal or political forms of accountability for the executive branch. This thesis focuses on the institutional aspect of this debate; that is, it explores the question of on which arrangements and procedures we should rely in order to secure administrative action that is simultaneously effective and law-compliant.

Going beyond traditional court-centred approaches, this debate on the interactions between law and administration has been recently enriched by a growing interest in mapping and researching a broader range of accountability bodies, encompassing an ever-growing accountability landscape. Remarkably, this includes a number of nonjudicial institutions of legal accountability and administrative justice.² These studies, which are on a variety of institutions of administrative justice, have enabled researchers to engage fruitfully in comparative institutional analysis of judicial and nonjudicial forms of accountability in order to assess their influence upon the administrative process.³ Furthermore, some recent studies have focused on the development within administrative agencies of practices, measures, and processes of legal accountability, which could be labelled as internal administrative law.⁴ Arguably, these institutional arrangements and practices could offer additional channels to realise traditional legal values such as

¹ See for instance the discussion on red and green light theories of administrative law in Carol Harlow and Richard Rawlings, *Law and Administration* (3rd edn, CUP 2009) ch 1. See also Donoughmore Committee, 'Report of the Committee on Minister's Powers' (1932) Cmnd 4060; Gordon Hewart, *The New Despotism* (Greenwood Press 1975); James Landis, *The Administrative Process* (Greenwood Press 1974); Jerry Mashaw, *Bureaucratic Justice: Managing Social Security Disability Claims* (Yale University Press 1983); Cass R Sunstein, 'Lochner's Legacy' (1987) 87 Columbia Law Review 873.

² This body of scholarship goes from classics such as Walter Gellhorn, *Ombudsmen and Others. Citizens Protectors in Nine Countries* (Harvard University Press 1966) to contemporary studies such as Peter Cane, *Administrative Tribunals and Adjudication* (Hart 2010).

³ See for example Marc Hertogh, 'Coercion, Cooperation, and Control: Understanding the Policy Impact of Administrative Courts and the Ombudsman in the Netherlands' (2001) 23 Law & Policy 47; Jeff King, *Judging Social Rights* (CUP 2012) ch 3.

⁴ Mashaw, *Bureaucratic Justice* (n 1); Nicholas R Parrillo (ed), *Administrative Law from the Inside Out: Essays on Themes in the Work of Jerry L Mashaw* (CUP 2017).

consistency, predictability, and reasoned argument in administrative decision-making.⁵ Departing from exclusive emphasis on external control of bureaucracies, these studies argue that robust democratic government in modern societies require a mix of outside-in and inside-out accountability arrangements.⁶ Certainly, courts have been a key component in the enterprise of enquiring into the sources of legitimation for the growth of the modern administrative state. But it is sometimes overlooked that this task has been complemented by a combination of further internal and external institutional arrangements.⁷ The literature has undertaken the mission of updating the legacy of legal functionalists, legal realists, and critical legal scholars who have emphasised the plurality of legal forms that exist in the contemporary state.⁸

I. THEMES AND CLAIMS

Drawing upon the above-mentioned public law tradition, this dissertation aims to introduce further nuances in the existing literature on securing administrative justice and legal accountability through nonjudicial institutions. It will do so by empirically exploring the role played by the Chilean Comptroller-General as a nonjudicial institutional device for legal accountability in the Latin American context. This thesis sets out to give an account of the historical evolution of the Comptroller-General as a safeguard against executive abuse of power and also a mechanism to promote administrative efficiency, and to explain its distinctive function as a legal accountability arrangement operating alongside courts. Adopting a broad institutional approach, I will explore whether the institution has provided genuine legal accountability and which features account for this. I will argue that a long-term perspective provides a generally positive image of the institution's contribution to the rule of law and sound governance, and that this portrait can be confirmed by looking at current practices of government in Chile. Despite several low points in its 90 years of operation, the institution has had an overall positive impact on the country's institutional stability and culture of legality. I

⁵ Gillian E Metzger and Kevin M Stack, 'Internal Administrative Law' (2017) 115 Michigan Law Review 1239.

⁶ Sidney A Shapiro and Ronald F Wright, 'The Future of the Administrative Presidency: Turning Administrative Law Inside-Out' (2011) 65 University of Miami Law Review 577.

⁷ Adrian Vermeule, 'Bureaucracy and Distrust. Landis, Jaffe and Kagan on the Administrative State' (2017) 130 Harvard Law Review 2463.

⁸ Harry Arthurs, *'Without the Law': Administrative Justice and Legal Pluralism in Nineteenth-Century England* (University of Toronto Press 1985); Robert W Gordon, 'Book Review: Without the Law II - "Without the Law:" Administrative Justice and Legal Pluralism in Nineteenth-Century England, by Harry W.Arthurs' (1986) 24 Osgoode Hall Law Journal 421.

will suggest that several institutional features explain this. Among others, I will look at factors such as the capacity to mediate the competition between the executive branch and Congress for the control of bureaucracy, the development of an internal bureaucratic culture, the embeddedness in administrative processes, the acquisition of expertise in administrative matters and its proximity to primary administrators, and the facilitation of independent forums for external contestation of administrative action.

Some of those features suggest the Comptroller-General's family resemblance to the French *Conseil d'Etat*. The latter institution has traditionally been a focal point for studying alternative institutional forms of subjecting administrative power to legality.⁹ Its mixture of legal and non-legal features along with its quasi-judicial and quasi-administrative location and its balance of expertise and independence have attracted the attention of legal theorists and public lawyers interested in non-court arrangements for securing legality and sound governance in the modern state.¹⁰ It is not only the formal arrangements that govern the *Conseil* that have attracted the attention of commentators, but also its adaptive historical evolution and the distinctive legal culture it has promoted.¹¹ Its study has thus encompassed both legal functions and powers and the actual operation of the institution. In this thesis, I will attempt to place the Comptroller-General in the comparative accountability landscape as a relevant institution that shares some of these features with the *Conseil d'Etat* but is less well known and whose contribution is still a matter of debate.

The Office of the Comptroller-General is a relatively opaque and unknown institution, even for contemporary Chilean legal and political commentators. Political and legal observers often overlook bureaucratic or administrative institutions and processes, tending to focus on more visible institutions such as legislatures, presidents, or high courts. Moreover, the sui-generis character of the Comptroller-General conspires against

⁹ CJ Hamson, *Executive Discretion and Judicial Control: An Aspect of the French Conseil D'etat* (Stevens 1954); Lon L Fuller, *The Morality of Law* (Rev ed, Yale University Press 1978); Mashaw, *Bureaucratic Justice* (n 1); Cane, *Administrative Tribunals and Adjudication* (n 2).

¹⁰ Christopher F Edley, *Administrative Law: Rethinking Judicial Control of Bureaucracy* (Yale University Press 1992); Stephen G Breyer, *Breaking the Vicious Circle: Toward Effective Risk Regulation* (Harvard University Press 1993); John WF Allison, *A Continental Distinction in the Common Law: A Historical and Comparative Perspective on English Public Law* (Rev ed, OUP 2004).

¹¹ Charles Freedeman, *The Conseil d'Etat in Modern France* (AMS Press 1968); John Bell, *French Legal Cultures* (Butterworths 2001); Bruno Latour, *The Making of Law: An Ethnography of the Conseil d'Etat* (Polity 2010).

making insightful comparisons with counterpart bodies elsewhere. Even more importantly, however, two prevalent narratives have obscured the importance of this institution in the Chilean political system. On the one hand, observers' excessive reliance on formal rules and procedures downplays the importance of a body that works in less visible settings and whose influence is evident in informal and everyday interactions. This narrative could also be linked to a characteristic liberal predisposition to make a narrow equation of legality with courts and adversarial processes and to focus on constitutional frameworks.

On the other hand, there is a narrative that emphasises the obstructive role played by the Comptroller-General in political controversies. From this critical-left perspective, the office is merely another legal artefact for protecting individualistic interests against progressive social policy driven by the executive branch. Of course, the experience during the Allende presidency in which the Comptroller-General was fiercely accused of obstructionism was a key moment for this critical approach towards the institution. Adopting a socio-legal approach that favours digging behind the formal surface but simultaneously takes seriously the value of legality, this thesis attempts to mediate between these two competing narratives on the Comptroller-General. It will reveal an institution that, on the one hand, has played a consequential role in promoting governmental action under the rule of law beyond what the formal rules could suggest. It will also show an institution that, with all its defects, has had a role that cannot be described as a mere obstruction to administrative action and as protective of private interests.

II. METHODOLOGY

In terms of methodology, this in-depth study of law, politics, and public administration adopts a socio-legal approach. In traditional legal empirical research fashion, the study touches upon crucial dimensions of public law scholarship: institutional mapping, and actual operation and effectiveness of accountability mechanisms.¹² This study could also be described as an example of the rising interest in institutional theory in public law.¹³

¹² Simon Halliday, 'Public Law' in Caroline Hunter (ed), *Integrating Socio-Legal Studies into the Law Curriculum* (Palgrave Macmillan 2012).

¹³ Rogers M Smith, 'Political Jurisprudence, The "New Institutionalism," and the Future of Public Law' (1988) 82 *The American Political Science Review* 89; Philip Selznick, 'Institutionalism "Old" and "New"'

This research uses institutionalism in two senses. On the one hand, the historical sections draw inspiration significantly from historical institutionalism and its concern with diachronic studies on development, continuity, and change of institutions over time. In this study I place special emphasis on long-term timeframes to avoid myopic conclusions derived from a narrow focus on particularly controversial events during single historical periods.¹⁴ Adopting a historical institutional perspective, I explore the evolution and actual operation of institutions focusing on formal documents and also on culture and practices.¹⁵

This study also uses institutional realism as a methodological framework.¹⁶ It will explore the interconnection between the Comptroller-General as a legal institution and its broader social context. Therefore, empirical research will be a crucial element in this enquiry. Rather than ideal-types and abstract institutions, I will examine an actually existing institution operating in a real-world setting. Although I use comparative institutional analysis to assess the advantages and shortcomings of alternative accountability arrangements – the Comptroller-General and courts – this will be done in an empirically informed manner using history and qualitative data to contextualise the examination adequately. In other words, I will be drawing upon categories and ideas developed by institutional theorists such as Neil Komesar,¹⁷ but I will attempt to overcome the persuasive criticism raised about him based on his lack of realistic accounts of actually existing institutions by taking into account real institutional performance.¹⁸

My research design consists of a single-case study in which the unit of analysis is the organisation and processes of the Office of the Comptroller-General of Chile, that is, a public organisation responsible for the legal oversight of administrative action and

(1996) 41 *Administrative Science Quarterly* 270; Edward Rubin, 'The New Legal Process, the Synthesis of Discourse, and the Microanalysis of Institutions' (1996) 109 *Harvard Law Review* 1393.

¹⁴ Smith (n 13) 99.

¹⁵ Peter Cane, *Controlling Administrative Power: An Historical Comparison* (CUP 2016) 13–5.

¹⁶ Richard H Pildes, 'Institutional Formalism and Realism in Constitutional and Public Law' (2014) 2013 *The Supreme Court Review* 1.

¹⁷ Neil K Komesar, *Imperfect Alternatives: Choosing Institutions in Law, Economics and Public Policy* (The University of Chicago Press 1994).

¹⁸ Thomas Merrill, 'Institutional Choice and Political Faith' (1997) 22 *Law & Social Inquiry* 959; Gregory Shaffer, 'Comparative Institutional Analysis and New Legal Realism' (2013) 2013 *Wisconsin Law Review* 607.

process.¹⁹ In terms of time-boundaries, this thesis will focus on two periods combining synchronic and diachronic approaches. On the one hand, it will adopt a diachronic approach to the study of the development of the institution since its inception in the first decades of the twentieth century. On the other hand, a closer inspection will be made of the operation of the Comptroller-General and its impact on public administration under recent democratic rule.

The research strategy has been chiefly of a qualitative nature.²⁰ At the data collection stage, I used many data sources to secure triangulation and to capture a broad range of experiences. I conducted fieldwork in Santiago, Chile, at two different opportunities during my research. I first visited Santiago between October and November 2015, and then between April and May 2016. During my fieldwork, I conducted archival work in the National Public Library and the Comptroller-General Library. These archives have provided me with Annual Reports containing summaries of cases and statistical figures, media reports of key events, and academic work. I have also had access to materials held in the Library of the National Congress such as official records of congressional proceedings recording discussion of crucial pieces of legislation, impeachment debates, and other legislative congressional procedures.

I also conducted 40 semi-structured elite interviews with key actors about the Comptroller-General Office and related institutions.²¹ Anonymity was secured for all of them. Due to the process-tracing nature of my research, I used purposive and snowball sampling techniques. My interview sample comprised the following subjects:

- (a) Individuals with experience as legal advisors for the Presidency and Ministerial Departments with large-scale interaction with the Comptroller-General in rulemaking processes;

¹⁹ Robert Yin defines a case study as ‘an empirical inquiry that investigates a contemporary phenomenon in depth and within its real-life context’. See Robert K Yin, *Case Study Research: Design and Methods* (4th edn, SAGE 2008) 18. See also Alexander L George and Andrew Bennett, *Case Studies and Theory Development in the Social Sciences* (MIT Press 2005) ch 1, 6 and 11.

²⁰ Lisa Webley, ‘Qualitative Approaches to Empirical Legal Research’ in Peter Cane and Herbert M Kritzer (eds), *The Oxford handbook of empirical legal research* (OUP 2012).

²¹ For a definition of semi-structured interviews, see Alan Bryman, *Social Research Methods* (4th edn, OUP 2012) 471. For the use of elite interviewing in case-study methods, see Oisín Tansey, ‘Process Tracing and Elite Interviewing: A Case for Non-Probability Sampling’ (2007) 40 PS: Political Science & Politics 765.

- (b) Individuals with experience as officials or authorities within the Comptroller-General – three of these had served in the highest office within the institution; and
- (c) Individuals with experience of giving advice to public and private organisations (NGOs and private law firms) dealing with Comptroller-General adjudication.

Some of those professionals were also law professors with an interest in public law. It is also worth mentioning that three interviewees had experience serving as Justices in the Constitutional Tribunal or the Supreme Court. For a detailed record of the interviewees' profiles, see Appendix I.

III. CONTRIBUTION OF THIS STUDY

This thesis sets out to make contributions in three areas. In the first place, it aims to introduce new insights into the relationship between law, politics, and the administrative process in general. Contemporary administrative law systems show a variety of institutional arrangements designed with the aim of ensuring that public bureaucracies comply with legality. They usually combine courts in an array of institutional forms with other agencies of legal accountability such as ombudspersons, prosecutors, and Comptrollers-General. This 'administrative justice landscape' raises pressing questions about the virtues and shortcomings of legal and political accountability models; external and internal forms of administrative justice; and global and local models of accountability. Against this backdrop, this study purports to provide empirical insights that will facilitate discussions across these dimensions, as well as comparative institutional analysis on alternative machinery of administrative justice and its proper role and location within the accountability networks that characterise modern government.

Secondly, this thesis seeks to offer useful materials for broadening the lively ongoing discussion of judicialisation or legalisation of politics in Latin America. In this region, public bureaucracies and legal institutions have traditionally been perceived as weak, ineffectual, and even corrupted. Moreover, public agencies have inherited an authoritarian legacy that still endures. In this context, along with an agenda of judicial reform, nonjudicial agencies have been operating for the last two decades. Prosecutors and ombudspersons in countries such as Brazil, Colombia, and Peru are well-researched instances of this phenomenon. Against the background of legal and political science

scholarship, recent studies have explored the extent to which these agencies can foster democratic practices and advance rule of law values. This study aims to contribute to this vibrant debate by examining what may well be one of the strongest illustrations of a horizontal accountability institution in Latin America: the Chilean Comptroller-General. This might help broaden the debate on judicialisation of politics in Latin America.

Finally, this study aspires to make a contribution in relation to previous studies on law and politics in Chile. Excellent investigations into law and politics in Chile have been published in recent years. Faúndez has focused on the dysfunctional character of the legal institutions (the Comptroller-General and the Supreme Court) in Chile in the 1970s.²² Hilbink, in turn, has concentrated on the performance of the judiciary, revealing its political conservatism behind a disingenuous apoliticism.²³ Focusing on the Chilean dictatorship, Barros has polemically argued that there were legal limits on the operation of the Military Junta that ruled until 1990.²⁴ Finally, Siavelis has examined the relations between the President and Congress after the return to democracy.²⁵ However, the role of the Office of the Comptroller-General has not been adequately examined. Even for academics and practitioners within the country, it remains a source of ‘closed, dark, windowless procedures’ that might need fresh air and light, to paraphrase JAG Griffith’s opinion on the mandate to the Franks Report in Britain.²⁶ The current accounts of law and politics in the country are inevitably unsatisfactory since they neglect the considerable reliance of the Chilean public law system on the role of this institution of legal accountability. In fact, while there have been recent studies on the financial accountability dimension of the Comptroller-General,²⁷ the legal accountability side of the institution has been mostly neglected. This investigation addresses that deficit. In fact, this piece of research attempts to fill a gap in the study of the system of public law in the country,

²² Julio Faúndez, ‘The Fragile Foundations of Administrative Legality - Chile between 1932 and 1973’ (2007) 2 *Journal of Comparative Law*; Julio Faúndez, ‘Chilean Constitutionalism before Allende: Legality without Courts’ (2010) 29 *Bulletin of Latin American Research* 34.

²³ Lisa Hilbink, *Judges Beyond Politics in Democracy and Dictatorship: Lessons from Chile* (CUP 2007).

²⁴ Robert Barros, *Constitutionalism and Dictatorship: Pinochet, the Junta, and the 1980 Constitution* (CUP 2002).

²⁵ Peter Siavelis, *The President and Congress in Postauthoritarian Chile: Institutional Constraints to Democratic Consolidation* (Pennsylvania State University Press 2000).

²⁶ JAG Griffith, ‘Tribunals and Inquiries’ (1959) 22 *The Modern Law Review* 125, 127; Richard Rawlings, *Grievance Procedure and Administrative Justice: A Review of Socio-Legal Research* (Economic and Social Research Council 1987) 8.

²⁷ Carlos Santiso, *The Political Economy of Government Auditing: Financial Governance and the Rule of Law in Latin America and beyond* (Routledge-Cavendish 2009); OECD, *Chile’s Supreme Audit Institution: Enhancing Strategic Agility and Public Trust* (OECD 2014).

casting light on previous contributions concerned with the traditional three branches of government.

IV. STRUCTURE

The thesis is divided into three parts. In Part I, I set the scene by introducing the conceptual and legal background that will guide the subsequent chapters. Chapter 1 will examine how the notion of accountability and the idea of administrative justice have been used to understand the emergence and functions of nonjudicial accountability institutions. I discuss three main functions that connect nonjudicial accountability bodies with elected authorities, primary decision-makers in public bureaucracies, and the public at large. The operation of nonjudicial accountability institutions within various accountability channels and the increasing interest in internal legality developed within administrative processes will be stressed. Chapter 2 also has an introductory character. It will explain in some detail the legal setting in which the Chilean Comptroller-General currently operates, focusing on the organisational arrangements and the legal powers of the office. Once the contextual materials are presented, I turn to the in-depth analysis of the case study.

Focusing on the case study, Part II of the thesis traces the historical evolution of the office and comprises the following three chapters. Chapter 3 reconstructs the emergence of the Comptroller-General Office in the 1920s as an executive tool for the modernisation of public administration and presidential control of bureaucracy. It will show how this model of the executive-centred Comptroller-General moved towards a more autonomous location as a result of the rise of congressional political pressure on the executive branch of government. Following this, chapter 4 will examine the operation of the office during the socialist government of Salvador Allende in the early 1970s – a critical juncture in the evolution of the institution. Here, I will assess the accusations of politically biased obstructionism that were raised against the Comptroller-General at the time. Chapter 5, in turn, will look at its role during the military dictatorship that governed the country between 1973 and 1990. This chapter reveals a complex relationship between the Comptroller-General and the Military Junta. It can be characterised by the office's initial collaboration, its attempt to set constraints, and its eventual focus on mere survival. In contrast to what a narrow reading of constitutional and legal provisions might suggest, these historical chapters reveal the operation of an influential institution that represents a distinctive understanding of administrative legality.

Finally, in Part III I will examine the role of the office in contemporary practices of government in Chile. In Chapter 6 I will examine the channels of communication between the Comptroller-General and public officials in the central government in the ex-ante review of administrative rulemaking. In fact, drawing on studies about the impact of legal accountability machinery, this chapter assesses the influence of the institution on bureaucratic behaviour. Based on interviews with key actors in these processes, I discuss a number of functions that the Comptroller-General is performing through its power of ex-ante legal scrutiny, such as promoting deliberation, facilitating coordination within the executive branch, preventing litigiousness, among others. Chapter 7 will look at the Comptroller-General as a litigation forum, exploring how the office has constituted a site in which private individuals and groups can challenge administrative action. Contrasting it with ordinary courts, I discuss the extent to which the office meets pressing demands of independence, expertise, accessibility, and finality. The final chapter –Chapter 8– analyses the pervasive problem of delimitation of jurisdictional boundaries between the Comptroller-General and courts. After considering recent precedents and analysing the comparative advantages of both institutions, I suggest a principle of coordination that recommends judicial restraint when reviewing Comptroller-General determinations.

PART I CONCEPTUAL AND LEGAL CONTEXT

CHAPTER 1. NONJUDICIAL ACCOUNTABILITY AND ADMINISTRATIVE JUSTICE

This chapter outlines a conceptual framework for exploring the role of the Chilean Comptroller-General as a nonjudicial institution for holding bureaucracies to account in the Latin American context. In this region, a vibrant debate on the best way to promote governmental accountability through legal institutions has been going on for the last 30 years. This discussion on legal accountability and institution building has had to face a challenge posed by the peculiarities of the state and public bureaucracies in the region. In fact, from its emergence during the first decades of the twentieth century, the Latin American administrative state has developed somewhat paradoxical features. On the one hand, it has been characterised by frail bureaucratic institutions unable or unwilling to cope with intolerable levels of inequality and poverty. Yet on the other hand, the region has also witnessed an at times brutal and powerful authoritarian state that has mainly targeted the vulnerable population. Too weak to benefit its communities adequately, but aggressively authoritarian when it comes to oppression and political persecution, the Latin American administrative state represents a challenge to institutional design that purports to enhance accountability through law. In general terms, here the aspiration should be to design legal machinery that promotes strong, but not authoritarian administrative states and, simultaneously, to make them capable of protecting rights but not susceptible to capture by vested interests.

The larger aim of this study is to bring to light the phenomenon of nonjudicial bodies of administrative justice in Latin America and assess their features as an institutional alternative to courts. In a region where legality and the judiciaries have often been viewed with scepticism and distrust, it does not seem to be a mere coincidence that a myriad of nonjudicial legal machinery has emerged. When compared with research on courts, nevertheless, the nonjudicial terrain is relatively uncharted. Indeed, nonjudicial actors such as comptrollers, auditors, ombudsmen, *defensores del pueblo*, and public prosecutors have had functions in the politics of the region that still need to be further examined. This research attempts to contribute to the mapping of non-court accountability institutions in the region, adding a new layer of experience to that provided by recent case studies on ombudspersons, national human rights institutions, and public prosecutors.

This chapter is divided into three main sections. The first section will briefly set out the discussion about the role of law in the development of the administrative state in Latin America. The section closes by discussing the work on horizontal accountability by Argentine political scientist Guillermo O'Donnell. The second section explains that nonjudicial accountability arrangements have been traditionally set up in order to pursue three kinds of goals, namely the facilitation of processes of political accountability, the enlargement of access to dispute resolution forums, and the enhancement of effective administrative action. The last section discusses the notion of administrative justice. This is a contested concept in the literature on law and public administration. Although different approaches to the notion can be found, ambiguity, circularity, and overlap seem pervasive. The aim of the section is to briefly review this literature, and indicate how it could guide research about the Chilean Comptroller-General.

I. LAW AND BUREAUCRACY IN LATIN AMERICA

Diverse perceptions of the proper relationship between legality and a growing administrative state have appeared in Latin American debates. Unsurprisingly, discourses about legal accountability mechanisms have also emerged as a response to the dysfunctional political institutions of the past and present. The main aim of this section is to highlight that despite the lively debate during the last few decades, further research regarding nonjudicial legal accountability institutions is much needed.

An infamous aspect of Latin American state apparatuses is their authoritarianism.²⁸ It has been suggested that, perhaps paradoxically, Latin American administrative states may be characterised by bureaucracies that to a large extent have been ineffective in delivering public goods but are 'efficacious repressive machines'.²⁹ Yet there have been some connections between the cognitive capacity of the public administrations and their repressive powers.³⁰ In fact, the countries where the most advanced Latin American

²⁸ Guillermo A O'Donnell, *Modernization and Bureaucratic-Authoritarianism; Studies in South American Politics* (Institute of International Studies, University of California 1973).

²⁹ Guillermo A O'Donnell, *Democracy, Agency, and the State: Theory with Comparative Intent* (OUP 2010) 149.

³⁰ I borrow the expression 'cognitive capacity' from Laurence Whitehead, who defines it as 'the sustained organization to collect, process, analyse and deliver the types of information about society needed for a modern state to monitor and interpret the impact of its measures, and to adjust them or reformulate them when they prove ineffective or counter-productive'. See Laurence Whitehead, 'State Organization in Latin

bureaucracies existed at the beginning of the century, that is, those of the Southern Cone (in particular Argentina, Uruguay, and Chile), were the very same countries where repression was most effectively performed.³¹ In other words, there was a gloomy shift from a relatively robust Latin American administrative state towards an authoritarian national security state. Indeed, Whitehead has pointed out that ‘processes *internal* to the pattern of state expansionism were very important in contributing to the emergence of the “national security” form of state organisation, and also to its subsequent disintegration’.³² In this context, the introduction of legal accountability mechanisms should take very seriously the risk of the authoritarianism that exists even in bureaucracies with limited capacities.

A. Distrust of Legality

Throughout most of the twentieth century, legal accountability – understood as institutional arrangements to render the executive accountable to legal bodies such as courts – was viewed with distrust by the Latin American supporters of stronger state institutions including administrative apparatuses. Their main interests were economic development and broadening the channels of political participation, particularly through labour unions.³³ Legality was not seen as a tool for achieving social justice, but rather as an obstacle.³⁴ They looked with particular suspicion at the judiciary due to its record of support for conservative policies. As Hilbink notes, in the Chilean case, judges ‘opposed the government’s actions towards more social justice and egalitarianism from the 1930s forward’.³⁵ Similarly, another observer remarks that ‘the rule of law and formalism legitimated judicial decisions limiting state intervention in the economic field aimed at achieving substantive justice’.³⁶ It is probable that because of this, progressive forces viewed legal accountability as playing a minor role in their plans to build an administrative state in the region between the 1930s and the 1970s. Liberal legality was

America since 1930’ in Leslie Bethell (ed), *The Cambridge History of Latin America*, vol 6 Latin America since 1930: Economy, Society and Politics (CUP 1994) 46–7.

³¹ *ibid* 48–50.

³² *ibid* 92 [Emphasis in the original].

³³ See Julio Faúndez, *Marxism and Democracy in Chile: From 1932 to the Fall of Allende* (Yale University Press 1988).

³⁴ See for instance Eduardo Novoa, *El derecho como obstáculo al cambio social* (4th edn, Siglo Veintiuno Editores 1980).

³⁵ Hilbink (n 23) 66.

³⁶ Hugo Frühling, ‘Law in Society: Social Transformation and the Crisis of Law in Chile, 1830-1970’ (PhD diss, Harvard University Law School 1984) xxii.

seen as a symbol of the very type of organisation over which they wanted to prevail. As Laurence Whitehead has pointed out:

[L]iberal mechanisms of public accountability and restraint had never been very strongly developed. In some cases they were identified with the protection of pre-1930 oligarchies, and it was therefore considered “progressive” to sweep them away, in order to extend opportunities to a wider array of social forces. Moreover, they were simply seen as obstacles to the necessary processes of state-building.³⁷

Similarly, Javier Couso has claimed that during the first half of the twentieth century, ‘[there was] a perception within progressive circles of law and courts as mostly irrelevant – if not hostile – to social transformation’.³⁸ This situation was exacerbated by the emergence of radical politics in the 1960s. In fact, it has been suggested that ‘the penetration of Marxist thought during the second half of the century transformed this indifference [towards liberal legality] into outright hostility’.³⁹ What is more, legal machinery was viewed with scepticism not only by radical left wing activists. Perhaps surprisingly, this attitude was shared even by reformist lawyers sponsored by the American government. During the 1960s, Law and Development, a ‘movement comprising a group of US legal academics concerned with understanding the role of law in developing countries’,⁴⁰ was more interested in law as a tool of social and economic progress than as a machinery for rendering the government accountable. As David Trubek succinctly explains:

Development policy stressed economic matters not because planners were uninterested in political democracy or social development, but because those who cared about such matters thought they would follow from economic growth. This meant that within this vision it was possible to accept – if not favour – various forms of bureaucratic authoritarian rule while professing allegiance to ideas of democracy and promotion of individual freedom.⁴¹

³⁷ Whitehead (n 30) 91–2.

³⁸ Javier Couso, ‘The Changing Role of Law and Courts in Latin America: From Obstacle to Social Change to a Tool of Social Equity’ in Roberto Gargarella, Pilar Domingo, and Roux Theunis (eds), *Courts and Social Transformation in New Democracies. An Institutional Voice for the Poor?* (Ashgate 2006) 63.

³⁹ Couso (n 38).

⁴⁰ Julio Faúndez, ‘Law and Development Lives On’ (2011) 2011–12 Legal Studies Research Paper <<http://ssrn.com/abstract=1950125>>.

⁴¹ David M Trubek, ‘The Rule of Law in Development Assistance: Past, Present and Future’ in David M Trubek and Alvaro Santos (eds), *The New Law and Economic Development: A Critical Appraisal* (CUP 2006) 75.

During this period, Chile, in particular, combined strong democratic practices with a fragile institutionalisation of legal machinery. Between 1932 and 1973 there were uninterrupted presidential and parliamentary elections in the country. Notably, writing about the political scene in 1960, Robert Dahl classified Chile as an inclusive polyarchy together with Uruguay and Costa Rica, in contrast to Colombia and Venezuela (near-polyarchies), and Argentina, Bolivia, Brazil, Ecuador, and Peru (non-polyarchies).⁴² This democratic practice nonetheless contrasted with the strength of Chile's legal accountability arrangements. Faúndez asserts, for instance, that 'the political elite consistently refused to establish an effective system of administrative justice'.⁴³ Furthermore, it has been argued that the Chilean political regime combined 'a meticulous concern for administrative legality, a ruthless style of governance, and an absence of effective judicial remedies to protect citizens from abuse of power by the executive'.⁴⁴ Hence, although the Chilean administrative state was one of the more robust in the Latin American context during the period,⁴⁵ apparently the same could not be said about its judicial institutions in public law matters.

B. Legal accountability in the Latin American return to democracy

The debate about legal accountability took on new force with Latin America's return to democracy in the 1980s and early 1990s. Under the umbrella notion of 'rule of law promotion', discourses about democratisation and human rights coincided with the economic liberalisation agenda. Indeed, to an important extent, awareness of the importance of legal accountability mechanisms was raised by the brutalities of the Latin American dictatorships.⁴⁶ Certainly, courts and other bodies could hardly have prevented the coming to power of terrible dictators, but it was agreed that after their demise, it was necessary to put in place strong institutional safeguards for the protection of human rights and democracy. On the other hand, actors within the business sector, supported by powerful international financial institutions (IFIs), pressured for more efficient protection of property rights, greater stability of contracts, and keeping state intervention at arm's length. In a similar vein, global economic liberalisation and internationalisation of

⁴² Robert Alan Dahl, *Polyarchy: Participation and Opposition* (26 print, Yale Univ Press 1998) 84–5.

⁴³ Julio Faúndez, *Democratization, Development, and Legality: Chile, 1831-1973* (Palgrave Macmillan 2007) 3.

⁴⁴ *ibid* 8.

⁴⁵ Whitehead (n 30) 10; O'Donnell, *Democracy, Agency, and the State* (n 29) 149.

⁴⁶ Couso (n 38) 64.

capitalist development has represented a source for promotion of legal reforms in the last few decades.⁴⁷ Consequently, from the 1990s onwards, many Latin American countries have viewed the confluence of the project of democracy and human rights with the project of free markets with a common value: the rule of law.⁴⁸ Their shared emphasis on the rule of law was then a key prompt for reform and creation of new legal accountability machinery in the region.

Thus, in the last two decades, significant action has taken place in the area of legal accountability at both the academic and the policy level in Latin America. From the point of view of policy, along with judicial reforms in areas such as criminal justice, professionalisation of the judiciary, and alternative dispute resolution, there have been initiatives aimed at reinforcing the role of courts in holding state actors accountable.⁴⁹ The tools for this have been the enhancement of the independence of high courts by new appointment and tenure rules, the creation of constitutional courts, and the expansion of judicial review powers, among others. In academic debate, increasing attention has been paid to the role of courts as political actors.⁵⁰ The literature has emphasised the role courts play in arbitrating inter-branch conflicts and protecting individual rights at the constitutional level.⁵¹ Moreover, the significance of judicial review for social change has attracted the interest of a number of scholars.⁵² Attention has also been paid to the less formalised, cultural dimensions of legal and judicial phenomena.⁵³ As can be seen, both academic and policy debates have emphasised court-centred initiatives for strengthening legal accountability in the region. Remarkably, the previous scepticism about the compatibility of strong judicial constraints with the development of a progressive administrative state seems almost forgotten. This might explain why the role of

⁴⁷ Pilar Domingo, 'Judicial Independence and Judicial Reform in Latin America' in Andreas Schedler, Larry Diamond, and Marc Plattner (eds), *The Self-Restraining State: Power and Accountability in New Democracies* (Lynne Rienner Publ 1999) 164–5.

⁴⁸ Trubek (n 41) 11.

⁴⁹ Linn A Hamnergren, *Envisioning Reform: Improving Judicial Performance in Latin America* (Pennsylvania State University Press 2007) 20.

⁵⁰ Diana Kapiszewski and Matthew M Taylor, 'Doing Courts Justice? Studying Judicial Politics in Latin America' (2008) 6 *Perspectives on Politics* 741, 741–67.

⁵¹ Gretchen Helmke and Julio Ríos-Figueroa (eds), *Courts in Latin America* (CUP 2014) [arguing that there is a shift in Latin America from traditional inconsequential courts to courts as central political players].

⁵² Roberto Gargarella, Pilar Domingo, and Theunis Roux (eds), *Courts and Social Transformation in New Democracies: An Institutional Voice for the Poor?* (Ashgate 2006).

⁵³ Javier Couso, Alexandra Huneeus, and Rachel Sieder (eds), *Cultures of Legality: Judicialization and Political Activism in Latin America* (CUP 2010) 6 [defining legal cultures as the 'contested and ever-shifting repertoires of ideas and behaviours relating to law, legal justice, and legal systems'].

alternatives to judicial accountability has remained largely under-theorised and little understood.

C. O'Donnell's horizontal accountability

One important exception to the above-mentioned disregard for the non-court side of legal accountability in Latin America is the work of political scientist Guillermo O'Donnell. Indeed, since the return to democracy, the Latin American debate on accountability institutions has been largely influenced by O'Donnell's work on horizontal accountability. What is important for this study is his emphasis on the relevance of nonjudicial institutions of accountability, which should operate alongside traditional branches of government.

O'Donnell argues that horizontal accountability comprises traditional bodies such as courts, legislatures, and executive bodies, yet it also particularly extends to an array of monitoring agencies, such as ombudspersons, accounting offices, comptrollers, *Conseils d'Etat*, *fiscalías*, *contralorías*, and the like.⁵⁴ Interestingly, O'Donnell asserts that the latter institutions rank higher than the traditional machinery when it comes to the accountability challenges that Latin American countries currently have to tackle. In fact, he claims that '[t]hese agencies, unlike the older ones, were invented not so much having in mind overall balances of power but rather specific, but still quite general, risks of encroachment and/or corruption'.⁵⁵ In terms of process, traditional branches act reactively and intermittently, whereas mandated agencies proceed in a proactive and continuous manner. Additionally, the former's interventions are costly and trigger highly visible conflicts, while specialised accountability bodies focus largely on prevention and deterrence. In terms of expertise, moreover, traditional branches are seen as partisan in political conflicts and appear to be a deficient accountability device, whereas new accountability agencies act upon professional criteria, and possess 'capabilities to examine complex issues of policy'.⁵⁶ In sum, O'Donnell states that benefits can be

⁵⁴ Guillermo A O'Donnell, 'Horizontal Accountability in New Democracies' in Andreas Schedler, Larry Diamond, and Marc Plattner (eds), *The Self-Restraining State: Power and Accountability in New Democracies* (Lynne Rienner Publ 1999) 39; Guillermo A O'Donnell, 'Horizontal Accountability: The Legal Institutionalization of Mistrust' in Christopher Welna and Scott Mainwaring (eds), *Democratic Accountability in Latin America* (OUP 2013) 45.

⁵⁵ O'Donnell, 'Horizontal Accountability: The Legal Institutionalization of Mistrust' (n 54) 45.

⁵⁶ O'Donnell, 'Horizontal Accountability: The Legal Institutionalization of Mistrust' (n 54).

expected from the operation of agencies of horizontal accountability, since they work in a more flexible, efficient, and expert manner.

In O'Donnell's view, specialised accountability agencies are not necessarily court substitutes. They should operate within a broad network of agencies that oversee executive action at different levels and with different purposes. Some agencies, for instance, should aim to collect and disseminate information, while other bodies can use that information and take action against agencies that have contravened legal boundaries. O'Donnell claims that effective horizontal accountability requires 'a whole network of state agencies, culminating in high courts, committed to preserving and eventually enforcing horizontal accountability, if necessary against the highest powers of the state'.⁵⁷ As a result, designers of horizontal accountability frameworks need to pay special attention to coordination issues in order to avoid excessive overlap and unforeseen loopholes.

The importance of O'Donnell's ideas lies in his emphasis on non-traditional institutions of accountability in the Latin American context rather than in his originality.⁵⁸ He detected the absence of discussion on such agencies in the region, provided a definition for them, and pointed out some contributions that they could make to democratic governance and the rule of law. His insights coincided with the broader phenomenon of new interest in legal accountability institutions once democracy had returned to most of the countries of the region. Yet not enough attention has been paid at either theoretical or descriptive level to the nonjudicial agencies of accountability. Given the explicit stress placed on these agencies by the influential work of O'Donnell, this may appear surprising. Moreover, these agencies also seem significant at the institutional design level. Indeed, as David Landau has recently stated while discussing the Colombian case, '[t]he proliferation of an array of institutions and actors other than courts and designed to temper or improve democracy may be one of the most important recent developments in constitutional design'.⁵⁹

⁵⁷ *ibid* 47.

⁵⁸ As we will see, the literature on nonjudicial bodies of administrative justice is extensive in Europe and the United States, and actually predates O'Donnell's work.

⁵⁹ David Landau, 'Checking Institutions and the Institutional Control of Politics' <<http://www.iconnectblog.com/2013/12/checking-institutions-and-the-institutional-control-of-politics/>>. The topic has recently reached the Inter-American System of Human Rights. Indeed, the Inter-American

Perhaps to some extent following the path opened up by O'Donnell, other voices have recently advocated for more research in the area. For instance, after surveying the literature on Latin American judicial politics, Kapiszewski and Taylor suggested some topics for future research. Importantly, they recommended examining a broader set of actors, such as public prosecutors, ombudsmen, auditors, and councils of state in judicial politics.⁶⁰ They also recommended that research shift from the traditional area of high courts and constitutional courts towards ““everyday” or “routine” justice carried out by lower courts, which can be more socially relevant and certainly influence judicial politics’.⁶¹ In a similar vein, in connection with the study of social accountability in Latin America, Peruzzotti and Smulovitz suggest that further and systematic investigation is needed regarding agencies such as the Brazilian public prosecutor and recently created ombudspersons, because they are interestingly broadening the channels for popular oversight over public authorities.⁶² Another push for research in the area of nonjudicial actors of accountability comes from Couso, Hunneus, and Sieder, as they invite us to move beyond court-centric studies in order to capture a fuller picture of the legal cultures in the region.⁶³

II. NONJUDICIAL LEGAL ACCOUNTABILITY AND ITS GOALS

The central interest of this study is nonjudicial oversight agencies such as comptrollers, corruption commissions, prosecutors, and ombudspersons. Usually constitutionally entrenched and sometimes even regarded as fourth branches of government, nonjudicial accountability agencies challenge traditional notions of the separation of powers.⁶⁴ Moreover, especially in presidential regimes, they are situated at arm's length from

System has recently decided two cases of disqualification of Mayors, in 2011 and 2014 respectively. In both cases, administrative sanctions were imposed against elected officials in Venezuela and Colombia. In the Venezuelan case, the sanction of disqualification for standing for public office was decided by the *Contraloría General*, while in the Colombian case it was imposed by the *Procuraduría General*. See *López Mendoza v Venezuela* (Merits, Reparations, and Costs) Inter-American Court of Human Rights Series C No 233 (1 September 2011) and *Petro Urrego v Colombia* (Precautionary Measure) Inter-American Commission of Human Rights, Precautionary Measure 374-413 (18 March 2014).

⁶⁰ Kapiszewski and Taylor (n 50) 754.

⁶¹ *ibid* 755.

⁶² Enrique Peruzzotti and Catalina Smulovitz, ‘Social Accountability – An Introduction’ in Enrique Peruzzotti and Catalina Smulovitz (eds), *Enforcing the Rule of Law. Social Accountability in the New Latin American Democracies* (University of Pittsburgh Press 2006) 21.

⁶³ Couso, Hunneus, and Sieder (n 53).

⁶⁴ John Ackerman, ‘Understanding Independent Accountability Agencies’ in Susan Rose-Ackerman and Peter L Lindseth (eds), *Comparative Administrative Law* (Edward Elgar Publishing 2011).

judicial, executive, and legislative bodies alike. Thus, they have an unclear status within political and legal accountability channels. In these circumstances, how do they contribute to the endeavour of holding public bureaucracies accountable? What types of public accountability functions – political, administrative, or legal – do these institutions perform?

Mark Bovens' narrow notion of accountability as a specific social relation will guide the following discussion. He defines accountability as 'a relationship between an actor and a forum, in which the actor has an obligation to explain and to justify his or her conduct, the forum can pose questions and pass judgement, and the actor may face consequences'.⁶⁵ This concept offers an appropriate synthesis of what can be seen as an increasing convergence in the literature of some basic elements that can be found in every accountability arrangement.⁶⁶ It must be highlighted that I also adopt the view that the institutional arrangements that we label as 'accountability' are instruments for the achievement of certain goals. Indeed, these arrangements are not usually seen as intrinsic goods, but as means for accomplishing valuable ends.

In particular, in this section I will claim that, perhaps due to their hybrid character, nonjudicial institutions usually operate within political, legal, and administrative accountability arrangements. From this viewpoint, they are expected to facilitate political processes of political accountability, to strengthen and broaden channels of legal accountability, and finally to enhance efficiency and accuracy in administrative decision-making. In the following section I will examine these goals in more detail.

⁶⁵ Mark Bovens, 'Analysing and Assessing Accountability: A Conceptual Framework' (2007) 13 *European Law Journal* 450.

⁶⁶ Richard Mulgan, 'The Processes of Public Accountability' (1997) 56 *Australian Journal of Public Administration* 25; Richard Mulgan, '"Accountability": An Ever-Expanding Concept?' (2000) 78 *Public Administration* 555; Colin Scott, 'Accountability in the Regulatory State' (2000) 27 *Journal of Law and Society* 38; Mark Bovens, Robert E Goodin and Thomas Schillemans, 'Public Accountability' in Mark Bovens, Robert E Goodin and Thomas Schillemans (eds), *The Oxford Handbook of Public Accountability* (OUP 2014); Jerry Mashaw, 'Accountability and Institutional Design: Some Thoughts in the Grammar of Governance' in Michael D Dowdle (ed), *Public Accountability. Designs, Dilemmas and Experiences* (CUP 2006); Jerry Mashaw, 'Structuring a "Dense Complexity": Accountability and the Project of Administrative Law' [2005] *Issues in Legal Scholarship*.

A. The Political Accountability Function

Political accountability is often considered as promoting democracy, that is, popular control of those holding public office. In other words, accountability ‘provide[s] democratic means to monitor and control government conduct’.⁶⁷ From this perspective, accountability regimes should generate enough information about administrative agencies’ performance to facilitate monitoring by their political principals. They should also stimulate the agents to adhere willingly to the goals and means defined by the elected actors.

Particularly in Westminster political systems, nonjudicial accountability agencies perform an auxiliary role in respect to legislatures. In this sense, it may be asserted that they operate within political accountability networks. They may indeed play a useful role in detecting administrative failure and also in providing expert advice and reliable information in order to strengthen the monitoring functions of political entities such as parliaments or parliamentary committees. Although these institutions do not usually have powers to exert direct control over administrative agencies, bodies such as ombudspersons or auditors intervene in accountability processes by wielding partial powers such as seeking and verifying information.⁶⁸ This is clearly the case with the British National Audit Office (NAO). This agency is usually regarded as an auxiliary institution acting on behalf of its political principals either the legislature⁶⁹ or a combination of parliament and the treasury.⁷⁰ Something similar can be said of at least some forms of ombudspersons. As Elliot argues, they may be viewed as ‘part of the political as opposed to the legal arrangements for holding government to account’.⁷¹ Accordingly, from this perspective the importance of nonjudicial agencies of accountability resides in their collaboration with elected, political branches of government in holding administrative agencies to account.

⁶⁷ Bovens (n 65) 460.

⁶⁸ Mulgan, ‘The Processes of Public Accountability’ (n 66).

⁶⁹ Tony Prosser, *The Economic Constitution* (OUP 2014) 52.

⁷⁰ Terence Daintith and Alan Page, *The Executive in the Constitution: Structure, Autonomy, and Internal Control* (OUP 1999) 194.

⁷¹ Mark Elliot, ‘Ombudsmen, Tribunals, Inquiries: Re-Fashioning Accountability Beyond the Courts’ in Nicholas Bamforth and Peter Leyland (eds), *Accountability in the Contemporary Constitution* (OUP 2013) 246.

Being partially administrative bodies, the relationship of nonjudicial accountability agencies with the executive and its head, the President, is particularly difficult to grasp. Presidential ambitions of controlling these agencies have been grounded on their administrative character. Since presidents are usually endowed with powers over the whole public administration, it has been argued that these agencies cannot be completely autonomous from presidential oversight. In the US, for instance, the independence of such administrative bodies has triggered controversy. In the 1970s and early 1980s, ‘oversight frameworks’ laws enacted to endow agencies such as the Comptroller-General with powers for checking abuse in the executive branch were unsuccessfully challenged on constitutional grounds.⁷² In Latin America the presidential influence may be even stronger, since some of these agencies have or have had an historical role as internal control machinery. Additionally, comptrollers and prosecutors have played a role in ensuring that bureaucratic channels of vertical accountability are respected. As a result, they may be seen as instruments of presidential control over sometimes fragmented bureaucracies, preventing detrimental decentralisation.⁷³

In sum, from the point of view of political accountability, nonjudicial agencies might play an instrumental role in collaborating with political or elected bodies – legislatures and/or presidents – in monitoring the behaviour of unelected bureaucrats. But as we will immediately see, they can also be viewed as a means for safeguarding the interests of private individuals and groups.

B. The Contestability Function

Accountability mechanisms can be understood as means to uphold legality or the rule of law. They are expected to prevent corruption, the development of concentrations of power, and the infringement of rights. According to Jerry Mashaw:

[i]n a legal accountability regime, public officials are responsible to individuals and firms, about their respect or lack of respect for legal requirements or legal rights through processes of administrative and judicial

⁷²Charles Tiefer, ‘The Constitutionality of Independent Officers as Checks on Abuses of Executive Power’ (1983) 63 Boston University Law Review; Lawrence Lessig and Cass R Sunstein, ‘The President and the Administration’ (1994) 94 Columbia Law Review 1 [distinguishing these agencies from other positive independent regulatory agencies, and arguing that while the latter are unconstitutional if separated from the presidential control, oversight agencies such as the Comptroller are not].

⁷³ See Tom Ginsburg, ‘Administrative Law and the Judicial Control of Agents in Authoritarian Regimes’ in Tom Ginsburg and Tamir Moustafa (eds), *Rule by Law. The Politics of Courts in Authoritarian Regimes* (CUP 2008).

review, judged in accordance with law, resulting in either validation or nullification of official acts (and sometimes compensation for private parties affected by official illegality).⁷⁴

Similarly, focusing on the institutional features of the processes of legal accountability, Jeff King identifies the following attributes: opportunity to challenge a decision or the lack thereof, independence of the adjudicator, obligation to apply public rules, a duty to give determined reasons, and the existence of remedies which are final.⁷⁵

Nonjudicial agencies have a role to play in those arrangements. Although legal accountability is usually associated with courts, several agencies may actually be put in place to make sure that abuse of power is prevented or, if boundaries are crossed, punished. As Patrick Birkinshaw puts it, since justice may be achieved by judicial and nonjudicial bodies, the question is ‘how the values which inform the idea of law such as fairness, equal protection, integrity, decency and deprecation of arbitrariness are given fuller [institutional] expression.’ In other words, according to him, the task is to find devices to best express the ideals [of legality, fairness, accountability, and responsiveness] in a changing state structure’.⁷⁶

From the legal accountability perspective, a difference between judicial and nonjudicial mechanisms may be that the latter promise broader access to complaints, since there are various factors that may block access to courts: financial reasons, willingness to litigate, justiciability issues, and narrow conceptions of legal entitlements.⁷⁷ Nonjudicial agencies may perform better in a number of those aspects since fewer financial and technical hurdles are usually encountered in their procedures. As a result, people who are unable to resort to courts may have smooth access to this alternative justice machinery.

It may be argued that as they have developed in the context of the administrative state, nonjudicial institutions are also better equipped to address grievances based on technical

⁷⁴ Mashaw, ‘Accountability and Institutional Design: Some Thoughts in the Grammar of Governance’ (n 66) 120.

⁷⁵ Jeff King, ‘The Instrumental Value of Legal Accountability’ in Nicholas Bamforth and Peter Leyland (eds), *Accountability in the Contemporary Constitution* (OUP 2013).

⁷⁶ Patrick Birkinshaw, *Grievances, Remedies, and the State* (2nd edn, Sweet & Maxwell 1994) 4–8.

⁷⁷ Walter Gellhorn, *When Americans Complain: Governmental Grievance Procedures* (Harvard University Press 1966) 28–35.

and massive impact regulatory schemes, such as environment, planning law, health care, social security, public employment, and so on. Furthermore, their closer contact with administrative agencies may make them better attuned to the intricacies of these regulatory regimes. Consequently, larger numbers of people potentially affected by these schemes are natural users of the ‘bureaucratic’ nonjudicial agencies of legal accountability.⁷⁸

Finally, in a typically Latin American development, these agencies may contribute to public interest cases. Indeed, as demonstrated by the experience of some Latin American nonjudicial agencies of oversight, the social accountability dimension is vital in their functioning. In this sense, the representation of excluded interests may be a prime role of agencies in the region.⁷⁹ Notably, the internal ethos of the institution could also have a relevant impact. For instance, evidence shows that the public prosecutor’s staff in Brazil – a key player in the judicialisation of politics in the country – has embraced an activist political culture.⁸⁰

One of the most pressing problems for nonjudicial agencies of accountability is the lack of clarity regarding their position and function in the broader legal accountability landscape.⁸¹ For instance, whether they are expected to substitute, complement, or compete with courts is often a disputed matter. Although some degree of overlap may not be undesirable,⁸² the absence of clear jurisdictional boundaries can provoke confusion in the public. Thus, aggrieved people can find it difficult to identify the court or agency that will provide the best remedy for their problem. Also, a cacophony of legal authorities may cause uncertainty as to what the law requires from public administration. Convolved

⁷⁸ I am borrowing the label from Peter Cane’s distinction between ‘bureaucratic’ and ‘high-profile’ judicial review, according to which the former concerns ‘review of street-level bureaucratic decisions’, while the latter relates to ‘issues of wide public interest that may be politically controversial’. See Peter Cane, ‘Understanding Judicial Review and Its Impact’ in Marc Hertogh and Simon Halliday (eds), *Judicial Review and Bureaucratic Impact. International and Interdisciplinary Perspectives* (CUP 2004).

⁷⁹ Enrique Peruzzotti and Catalina Smulovitz (eds), *Enforcing the Rule of Law: Social Accountability in the New Latin American Democracies* (University of Pittsburgh Press 2006).

⁸⁰ Arantes describes the ideology of the members of the agency as ‘political voluntarism’, which means ‘a belief in the institution’s protective role in a society that is incapable of defending itself and in a context of a representative political power that is corrupt or incapable of fulfilling its duties’. See Rogerio Arantes, ‘Constitutionalism, the Expansion of Justice and the Judicialization of Politics in Brazil’ in Rachel Sieder, Line Schjolden, and Alan Angell (eds), *The Judicialization of Politics in Latin America* (Palgrave Macmillan 2005) 250.

⁸¹ Cane, *Administrative Tribunals and Adjudication* (n 2) 257.

⁸² David A Hyman and William E Kovacic, ‘Why Who Does What Matters: Governmental Design, Agency Performance, the CFPB and PPACA’ (2014) 82 *George Washington Law Review* 1463ff.

legal frameworks might be particularly damaging to Latin American administrative bodies that are characterised by their limited bureaucratic capacities. Even worse, it opens up gaps that could enable paralysing strategic litigation by powerful actors defending vested interests.

As Elmendorf has pointed out, nonjudicial accountability agencies may play a particularly interesting role alongside constitutional courts.⁸³ In his view, '[i]t is worth asking what problems or synergies might arise from courts and counterparts working side by side'.⁸⁴ One of the problems that may arise is the emergence of an overly intrusive set of accountability bodies losing the nuances offered by nonjudicial bodies.⁸⁵ Yet there are also opportunities for complementarities. Constitutional courts could ensure that elected bodies do not encroach upon the competences of nonjudicial accountability agencies, and that these bodies in turn do not exercise their investigatory powers in a disruptive manner. Furthermore, constitutional courts may well take advantage of the findings and recommendations of these nonjudicial bodies. Lastly, the very existence of constitutional courts could remind nonjudicial agencies of their lower level of operation, preventing them from playing an unjustifiably high political role.⁸⁶

To sum up, whereas from a political accountability perspective nonjudicial agencies might be seen as connecting bureaucrats and their elected principals, from the point of view of legal accountability they are viewed as opening channels of communication between administrators and the public in general. In contrast with these two perspectives, I now turn to the final goal of nonjudicial accountability arrangements, which has to do with the internal operation of bureaucracies.

C. The Pedagogic Function

Accountability arrangements can promote effective and accurate administrative policy implementation. In other words, they are expected to 'enhance the learning capacity and effectiveness of public administration'.⁸⁷ Indeed, these arrangements should encourage

⁸³ Christopher Elmendorf, 'Advisory Counterparts to Constitutional Courts' (2007) 56 *Duke Law Journal* 953.

⁸⁴ *ibid* 1037.

⁸⁵ *ibid* 1037–9.

⁸⁶ *ibid* 1041–2.

⁸⁷ Bovens (n 65) 462.

publicity, openness, and reflexivity in the administrative process, because their features can improve administrative capabilities in the long run. From this perspective, the main concern is ensuring the permanent delivery of adequate service by administrative agencies. As Bovens puts it, accountability ‘offers a regular mechanism to confront administrators with the information about their own functioning and forces them to reflect on the successes and failures of their past policy’.⁸⁸

Accordingly, auditors, inspectors, and comptrollers are sometimes viewed as instances of mechanisms of administrative accountability.⁸⁹ What makes them administrative rather than political or legal is nonetheless not completely clear. The reason may lie in the standards they apply, since these agencies not only apply legal rules and principles, but also assess administrative behaviour against broader standards of probity, efficiency, and effectiveness. Another explanation may derive from the fact that the procedures they conduct are neither trial-type (courts) nor deliberative (parliaments). Rather, they conduct some form of what might be called inspectorial or investigative procedures.⁹⁰ The term ‘administrative’ might also refer to the internal position of the checking agency within the public bureaucracy. Thus, unlike external monitoring developed by courts and parliaments, what seems to characterise them is internal or quasi-internal supervision. Furthermore, these watchdog agencies may be termed ‘administrative’ because they do not take place within principal-agent relations or, in other words, vertical or upwards accountability relationships. This means that they do not intervene as superiors to the accountable actor. From this viewpoint, they are administrative because they ‘stand in no direct hierarchical relationship to public organizations and have few powers to enforce their compliance’.⁹¹ In short, here the account is given ‘to a broadly parallel institution’.⁹² In my view, the administrative nature of these bodies derives primarily from the inspectorial procedures they conduct and their location in proximity to administrative structures.

Indeed, the prime reason for creating nonjudicial legal accountability agencies has not only been the restriction, but also the enhancement of administrative capacities in light of

⁸⁸ *ibid* 464.

⁸⁹ *ibid* 456.

⁹⁰ For discussion of inspectorial or investigative procedures, see Harlow and Rawlings (n 1) ch 12.

⁹¹ Bovens (n 65) 460.

⁹² Scott (n 66) 42.

the enlargement of governmental responsibilities. The purpose of establishing bodies such as comptrollers and ombudspersons has traditionally been to subject administrative action to legal rules and principles, without impairing the classical bureaucratic values of efficiency and accuracy in policy implementation. They have historically operated with the aim of making administrative and rule of law values compatible.

Considering the enabling orientation of these institutions, in a context of public bureaucracies of limited capabilities and dysfunctional judiciaries such as Latin America, the attractiveness of nonjudicial agencies of accountability is apparent.⁹³ For instance, their hybrid character – sharing elements of both judicial and administrative bodies – may translate to a more fluid dialogue with bureaucracies. In other words, these agencies may possess enhanced capacities for understanding administrative procedures, and more suitable powers to collect arcane information, detect systematic malfunctioning, and single out situations of corruption. In this regard, although institutionally detached, they may even be embedded within public administration, facilitating their prophylactic role.

Additionally, in the face of poor judicial performance, they can supply more reliable legal interpretations of highly technical regulatory schemes. Pilar Domingo has pointed out that a damaging problem in judiciaries in Latin America is the lack of ‘predictability of legal proceedings’.⁹⁴ This may undermine the capacity of bureaucracies to anticipate legal challenges to their policies, and equally the capacity to learn from previous legal failures in litigation. In contrast, specialised nonjudicial bodies with better legal and managerial capacities could provide more consistent and predictable legal precedents.

Nevertheless, the proximity between administrative and accountability bodies also generates risks. First, these agencies may be prone to authoritarianism. Certainly, this is an especially corrosive objection in the Latin American context. Crisp, Moreno, and Shugart, for instance, have argued that these agencies do not enhance accountability for the public because they do not provide additional channels for representation of politically

⁹³ Gellhorn (n 77) 44 [‘without exception, every country that leans heavily on ombudsmen or other administrative critic has strengthened its civil service in the process of solacing those whom civil servants have offended’].

⁹⁴ Domingo (n 47) 155.

neglected interests.⁹⁵ Instead, due to their lack of real independence from executives, they usually function as a façade of democratic accountability. Thus, in their view, nonjudicial accountability agencies are an instrument for nondemocratic, authoritarian rule.⁹⁶ Similarly, Ginsburg has referred to nonjudicial bodies such as the Chinese Censorate and the Russian Procuracy as illustrations of authoritarian tools of hierarchical control over public bureaucracies.⁹⁷

A second important danger is excessive intrusiveness. As Gellhorn has claimed, ‘awareness that someone is constantly peering over their shoulders causes some public servants to become too timid instead of too bold’.⁹⁸ As a consequence, one of the perils of the working of accountability being too close to administrative officers is ‘insipid administration’.⁹⁹ This risk is particularly acute in the context of Latin American Comptrollers-General, who are frequently too scrupulously concerned with ‘legalism and frugality, sometimes maintained at the expense of rationality and fairness’.¹⁰⁰ This could easily result in a sluggish administration impacting negatively on the transformative role that should be expected from them, particularly in contexts of poverty and inequality.

III. ADMINISTRATIVE JUSTICE INSIDE-OUT

Administrative justice is another key concept in discussing institutional arrangements to hold executive power to account. Generally conceived, this concept refers to the normative idea that administrative actions must correspond with fairness or justice requirements. However, a distinction between substantive and institutional approaches to administrative justice can be drawn. Whereas the former emphasises the principles or values that constrain and structure administrative procedures and action, the latter perspective additionally includes reflections on the institutions and procedures that are more likely to achieve those goals in certain contexts. In the following section, I will offer a typology of approaches to the concept of administrative justice, identifying substantive

⁹⁵ Erika Moreno, Brian Crisp, and Matthew Shugart, ‘The Accountability Deficit in Latin America’ in Scott Mainwaring and Christopher Welna (eds), *Democratic Accountability in Latin America* (Oxford University Press 2003).

⁹⁶ See, against, Ackerman (n 64) 266.

⁹⁷ Ginsburg (n 73).

⁹⁸ Gellhorn (n 77) 51–2.

⁹⁹ Gellhorn (n 77).

¹⁰⁰ Arturo Valenzuela, *The Breakdown of Democratic Regimes: Chile* (Johns Hopkins University Press 1978) 15; Hammergren (n 49) 199.

and institutional views. Within the latter category I examine approaches focusing either on judicial and nonjudicial redress mechanisms (external approaches), or on the primary decision-maker (internal approaches).

A. Substantive Approaches

Substantive approaches focus on administrative justice as a set of values or principles that should guide administrative behaviour in its interaction with citizens. Denis Galligan, for instance, claims that the notion of administrative justice ‘refers to a set of values and principles that have come to be accepted by the mature democracies of Europe and beyond, and aspired to by the less mature’.¹⁰¹ He goes on to claim that

[a]dministrative justice consists of a set of principles designed specifically to regulate the relationship between the citizen and the state in the context of government administration... They deal with notions such as the right to be heard and to be treated in accordance with fairness and due process; they draw on ideas of participation in a variety of contexts and insist on openness and transparency; they stipulate a legal basis for the actions of administrative bodies, require equal treatment, and prohibit certain forms of discrimination; and they impose restrictions on the exercise of discretion.¹⁰²

As can be seen, from this perspective, the idea of administrative justice overlaps considerably with the entire notion of administrative law. In another piece, Galligan sees administrative justice as a normative model of administrative action that emphasises fair treatment of individuals – in opposition to bureaucratic administration.¹⁰³ According to this viewpoint, while bureaucratic administration aims to maximise the common good, administrative justice pursues fairness in the treatment of each person. In other words, Galligan seems to regard bureaucratic administration as reflecting a utilitarian perspective focused on the promotion of the general or collective interest, whereas administrative justice aims to protect counter-majoritarian individual rights or dignity. Criticising this dignitarian approach, Michael Adler claims that ‘[a]lthough Galligan accepts that the bureaucratic administration model is the “natural and dominant” model, he argues that efforts should be made to curb its natural hegemony in order to support the (morally

¹⁰¹ DJ Galligan, ‘Authoritarianism in Government and Administration: The Promise of Administrative Justice’ (2001) 54 *Current Legal Problems* 79, 80–1.

¹⁰² *ibid* 81.

¹⁰³ DJ Galligan, *Due Process and Fair Procedures: A Study of Administrative Procedures* (OUP 1996) ch 8.

superior) administrative justice model'.¹⁰⁴ Furthermore, Adler has rejected Galligan's notion 'because of its normative commitment to one, among several, competing conceptions of administrative justice and because of its failure to recognise the opportunity costs associated with its realisation'.¹⁰⁵

Harlow and Rawlings have also shown scepticism of this substantive orientation. They argue that this perspective goes beyond the traditional top-down approach (focusing on courts and tribunals) and the new bottom-up approach that focuses on primary decision-making. Indeed, they point out that '[t]his already broad remit is complicated by the view of administrative justice as a set of values, which far exceed the simple Franks formula of openness, fairness and impartiality'.¹⁰⁶ Persuasively, Harlow and Rawlings conclude critically, remarking that '[t]hese often conflicting values set an impossibly wide agenda'.¹⁰⁷

B. Institutional Approaches

Institutional approaches emphasise the institutions that at different stages either make first-instance decisions or review them. Although these approaches still consider administrative justice as a substantive goal, they broaden the inquiry by ascertaining the institutions or mechanisms to which the responsibility for promoting administrative justice should be allocated. In other words, the authors who follow this approach ask which institutions perform better and in what settings, in terms of making administrative justice more likely.¹⁰⁸ Following this orientation, Halliday and Scott assert that '[a]dministrative justice may be conceived as comprising the norms, processes, and institutions governing the exercise of [delegated] administrative powers'¹⁰⁹. The notion, accordingly, embraces both substantive principles and the design of institutional arrangements for materialising them.

¹⁰⁴ Michael Adler, 'Understanding and Analysing Administrative Justice' in Michael Adler (ed), *Administrative Justice in Context* (Hart Publishing 2010) 152.

¹⁰⁵ *ibid.*

¹⁰⁶ Harlow and Rawlings (n 1) 483.

¹⁰⁷ *ibid.*

¹⁰⁸ For general discussions on the need to focus on institutional arrangements and not merely on values in public law, see MJC Vile, *Constitutionalism and the Separation of Powers* (2nd edn, Liberty Fund 1998); Komesar (n 17).

¹⁰⁹ Simon Halliday and Colin Scott, 'Administrative Justice' in Peter Cane and Herbert Kritzer (eds), *The Oxford Handbook of Empirical Legal Research* (OUP 2010) 471.

Research on the institutional dimension of administrative justice tends to focus on either the primary decision-makers or the reviewing institutions. Adler, for instance, distinguishes two approaches.¹¹⁰ For him, whereas justice *in* administration ‘sees administrative justice in terms of the justice of routine administrative decisions’, the administrative law approach ‘sees administrative justice in terms of the principles formulated by courts and other redress mechanisms’.¹¹¹ Adopting a syncretic position, Adler views administrative justice as combining both perspectives. Halliday and Scott also see the division between decision-making (comprising production and application of rules) on the one hand, and review (including judicial and nonjudicial mechanisms) on the other, as a starting point. They claim that this divide ‘helps us understand two discrete ways in which the notion of “administrative justice” is employed [...] as referring to the justice of the primary administrative process [and] as referring to a subsystem of dispute resolution within the overall architecture of the legal system’.¹¹² As we will see in the following section, these two aspects have generated quite distinctive pieces of research that can be examined on their own.

1. The external perspective

A traditional locus for discussing the institutional aspect of administrative justice is in respect to review or complaint-handling mechanisms including courts and other accountability entities. The starting point here has been the typical green-light dissatisfaction with court-centred mechanisms of legality review of administrative action. As a response to this unease, new channels for airing grievances were opened during the twentieth century, which often operated as an alternative to classic judicial review. Under the banner of administrative justice, particularly in Britain, numerous studies have examined and assessed these non-court mechanisms that have arisen in many policy areas.

Research on this external dimension has focused on the following aspects: first, it has charted the variety of institutions located in the administrative justice landscape.¹¹³ Secondly, it has attempted to go beyond the formal description of their procedures and to

¹¹⁰ Adler, ‘Understanding and Analysing Administrative Justice’ (n 104) 154.

¹¹¹ *ibid.*

¹¹² Halliday and Scott (n 109) 472.

¹¹³ Rawlings, *Grievance Procedure and Administrative Justice* (n 26); Michael Adler, ‘Administrative Justice in the UK Emerges from the Shadows’, *Administrative Justice in Context* (Hart Publishing 2010).

examine the dynamics and operation of these entities using quantitative, qualitative, and ethnographic work.¹¹⁴ A third line of research in respect to reviewing mechanisms relates to the decisions of citizens about whether to use administrative justice devices. Attention has been paid to the practical and attitudinal obstacles users face, and to their motivations when seeking redress.¹¹⁵ Fourthly, research has focused on the impact of external arrangements on primary decision-makers.¹¹⁶ As Adler puts it, external approaches to administrative justice tend to assume that adjudicatory decisions have direct influence on bureaucratic behaviour.¹¹⁷ Focusing on impact, external approaches might address this criticism by scrutinising the extent to which review judgments influence primary decision-makers, the extent to which primary decision-makers are prone to external authority, and whether the organisational environment enables them to conform to review decisions.

2. The internal perspective

As a reaction to an apparently excessive reliance on external mechanisms of administrative justice, since the early 1980s there has been a new interest in viewing primary decision-making as the central location for administrative justice. A crucial influence in this shift in orientation was Jerry Mashaw's seminal work, *Bureaucratic Justice*.¹¹⁸ The distinction between internal and external approaches to administrative justice is of critical importance for this perspective. Indeed, the most salient feature of Mashaw's contribution is his search for an internal law of the administration, in contrast with the set of external controls called administrative law. According to Mashaw, the latter is not only irrelevant to what happens inside administrative agencies, but also ineffective in terms of symbolic guidance for administrative behaviour.¹¹⁹ Mashaw emphasises instead 'an internal law of administration that guides the conduct of those who make routine decisions more effectively than the external controls so beloved of administrative lawyers, who look to courts and – to a lesser extent – to tribunals and other forms of accountability, such as ombudsmen, for judgments that will secure the achievement of administrative justice'.¹²⁰ Ambitiously, Mashaw concludes that 'the

¹¹⁴ Halliday and Scott (n 109) 479.

¹¹⁵ *ibid* 477–8.

¹¹⁶ *ibid* 480.

¹¹⁷ Adler, 'Understanding and Analysing Administrative Justice' (n 104) 154.

¹¹⁸ Michael Adler, 'Fairness in Context' (2006) 33 *Journal of Law and Society* 615.

¹¹⁹ Mashaw, *Bureaucratic Justice* (n 1) 14.

¹²⁰ Adler, 'Fairness in Context' (n 118) 619.

challenge is...to view the administrative process, like the judicial and legislative processes, as somehow in pursuit of justice and the general welfare; to see “administration”, like “democracy” and “the rule of law”, as a motivating ideal’.¹²¹

As a result, Mashaw’s definition of administrative justice looks not only to external legal controls, but also focuses on primary decision-making. He defines administrative justice as ‘those qualities of [an administrative] decision process that provide arguments for the acceptability of its decisions’.¹²² Mashaw identifies three models from which he derives these justice arguments: a bureaucratic rationality model according to which decisions are legitimated by showing that they are ‘accurate and efficient concrete realizations of the legislative will’; a professional treatment model that suggests that decisions are legitimate when they ‘provide appropriate support or therapy from the perspective of relevant professional cultures’; and a moral judgment model that focuses on whether decisions were ‘fairly arrived at when assessed in the light of traditional processes for determining individual entitlements’.¹²³ His final suggestion is to seek an appropriate mixture of these different models.¹²⁴

In the concluding chapter of *Bureaucratic Justice*, Mashaw returns to his search for internal administrative justice by discussing how to design a bureaucratic institutional alternative to external controls. This arrangement should deliver ‘technical competence plus the comfort of legitimating symbolism’.¹²⁵ He wonders whether this extraordinary office could produce an internal body of law superior to external legality in terms in coherence, effectiveness, and legitimating symbolism. Mashaw describes the institution he has in mind with these words:

Suppose, for example, that there were a superbureau: an institution that combined a ‘judicial chamber’ with something like the functions of the General Accounting Office, the Office of Management and Budget, the Administrative Conference, the Justice Department’s Office of Legal Counsel, and the (now defunct) regulatory office. Functionally, this bureau would supervise the drafting of administrative legislation, review the competence of agency policy analysis, audit administrative performance in the field, provide binding counsel on managerial technique and hear in the final instance complaints of maladministration. And suppose this bureau

¹²¹ Mashaw, *Bureaucratic Justice* (n 1) 15.

¹²² *ibid* 24–5.

¹²³ *ibid*.

¹²⁴ *ibid* 77; King, *Judging Social Rights* (n 3) 95–6.

¹²⁵ Mashaw, *Bureaucratic Justice* (n 1) 226–7.

became the aspiration of the crème de la crème of the public managerial class and was also populated occasionally by academic students of administration and highly regarded private managers, that it gained a reputation for competence and integrity as well as for ultimate deference to statutory expression of democratic political power. In short, a symbol of ideal administration. [...] But we have as yet no clear vision of such a superbureau or how its symbolism might reorient the meaning of justice or the rule of law.¹²⁶

In this study on the office of the Comptroller-General in Chile, I will be exploring the extent (if any) to which this institution might be seen as an illustration of this Mashawean administrative justice superbureau that can remedy the practical and symbolic limitations of external forms of administrative law.

IV. CONCLUSION

I began this chapter by stressing my concern about the traditional authoritarianism of the Latin American administrative state. Assuming that we embrace some of the ideals of social justice behind the administrative state, what are the institutional safeguards that can be adopted against actual or potential authoritarianism? And which legal arrangements make it more likely that public bureaucracies will be directed towards the purposes democratically mandated by the people?

We have seen that in Latin America, as elsewhere, the builders of the administrative state were sceptical of the legal constraints imposed by courts upon administrators. However, after the tragic experience with the dictatorships in the region, a more receptive attitude to the values of the rule of law has emerged. Yet although adherence to values such as fairness, due process, participation, transparency, reasonableness, and so on seems to be greater now than in the mid-twentieth century, the distrust of courts and their compatibility with the administrative state in some circles remains. In this context, nonjudicial accountability institutions promise to complement, and sometimes substitute for, judicial arrangements. Some enthusiastic commentators emphasise their potential contribution to processes of political accountability, broadening access to grievances, and the enhancement of the quality of administrative process. These nonjudicial bodies may even be viewed as a superior form of accountability to that provided by courts. O'Donnell

¹²⁶ *ibid* 226–7. Notably, Mashaw describes an idealised organisation with striking resemblance to the French *Conseil d'Etat*.

in Latin America and many others elsewhere have asserted that nonjudicial bodies might operate with acute bureaucratic expertise and more proactively and flexibly, and can intervene in a less partisan manner than their judicial counterparts. These organisations would be, as a result, less prone to encroaching on the development of a progressive administrative state.

Are nonjudicial accountability institutions a better remedy for administrative authoritarianism? Or are they merely a suitable complement to courts? In this latter case, when should we employ them instead of courts? Although I do not provide answers to these questions, in this thesis I attempt to offer some empirically informed insights based on the actual operation of a nonjudicial accountability institution that may help to respond to them. Indeed, the case of the Chilean Comptroller-General seems a suitable case study for testing many assumptions in administrative justice literature about the role of judicial and nonjudicial forms of legal accountability.

The preceding discussion – based on the accountability and administrative justice literature – has set out the potential benefits and also the potential setbacks of nonjudicial accountability bodies. When all is said and done, whether the benefits or the weaknesses of these dimensions are more likely to hold in practice can only be determined in a concrete context considering the agency's actual institutional features, its historical background, and its role in the broader political system. In this thesis, through an empirical study of the Chilean Comptroller-General, I intend to identify some of the factors that make more likely the manifestation of the above-mentioned benefits and dangers.

CHAPTER 2. THE COMPTROLLER-GENERAL AND ITS LEGAL FRAMEWORK

This chapter is primarily concerned with explaining the current Office of the Comptroller-General from a legal perspective. To do this, it introduces the current distinctive institutional features of the Comptroller-General as a nonjudicial institution for the promotion of administrative justice. By examining the formal arrangements of the office, I will set the scene for the enriched, contextual analysis offered in the core chapters of the thesis, where I will place the office in its historical and political contexts. In this sense, this chapter provides the legal background necessary to move on to the following chapters.

What is revealed by this preliminary analysis is a hierarchical and monocratic institution whose institutional features are secured by quite rigid rules; it is an organisation that enjoys a high degree of formal independence, and possesses a variety of accountability powers. In addition, the office's distinctive legal powers will be introduced. These powers comprise ex-ante review of administrative decision-making and dispute resolution powers consisting of issuance of binding legal opinions interpreting administrative legality.

I. BASIC PROVISIONS

A. Constitutional regulation

The basic provisions governing the Comptroller-General are entrenched in the Chilean Constitution. In contrast to other accountability agencies in Latin America, this is not a recent feature of Chilean constitutional law.¹²⁷ Indeed, the agency was given constitutional status in 1943, that is, 15 years after it was founded. The current Constitution – enacted in 1980 – introduced a complete new chapter governing the Comptroller-General. These provisions regulate the main tasks of the institution, the appointment and prerogatives of the head of the office, and the procedure of ex-ante legality review of administrative action (*toma de razón* procedure).

¹²⁷ For instance, the influential Brazilian Public Prosecutor was created in 1934 as an auditing and oversight institution, but was only granted constitutional status in 1988. See Maria Teresa Sadek and Rosangela Batista Cavalcanti, 'The New Brazilian Public Prosecution: An Agent of Accountability' in Christopher Welna and Scott Mainwaring (eds), *Democratic Accountability in Latin America* (OUP 2003) 203.

The Constitution also mentions the Comptroller-General elsewhere, such as in the provisions regulating the impeachment procedure against the office-holder (Articles 52[2c] and 53), the review of legislative decrees enacted by the President (called ‘decrees with force of law’, Art 64) and the review of unauthorised payment or expenditure decrees in case of emergency (Art 32 number 20). Finally, the Constitution establishes that any further detailed regulation of the internal organisation, procedures, and powers of the agency requires a super-majority law (Art 99[4]). This entails that legislation regarding the agency has to be approved by a majority of 4/7 of the elected senators and deputies, respectively (Art 66[2]). Furthermore, to make changes to the legal framework of the office, a mandatory ex-ante review by the Constitutional Tribunal must be performed (Art 93 n.1). As can be expected, this means that it is rather cumbersome to pass new legislation in this area.

B. The Organic Law

As mentioned above, the 1980 Constitution provides that an Organic Law will establish the organisation, procedures, and powers of the Comptroller-General Office. Yet contemporary legislatures have been unable to pass a body of law regulating the institution in a systematic manner. Indeed, the current organic law regulating the Comptroller-General is contained in decree with force of law 2421, of 10 June 1964.¹²⁸ This piece of legislation was enacted long before the current Constitution entered into force in 1980, and consequently, a super-majority did not approve it, as is now mandated. This old Organic Law is still valid because the Constitution provides legal validity to previous statutes that regulated matters in respect to which a super-majority is now required.¹²⁹ But its dated nature is widely regarded as undesirable, reflecting a lethargic legislature incapable of providing basic legislation governing administrative action and a lack of political consensus as to the Chilean model of administrative justice.¹³⁰

Containing more than 100 provisions, the 1964 Organic Law regulates the agency in detail, especially in relation to financial practices and formalities. Many of these rules

¹²⁸ This decree systematised the previous law 10336 of 1952, and the subsequent modifications thereof.

¹²⁹ See Fourth Transitory Provision of the Constitution.

¹³⁰ Alejandro Silva Bascuñán, *Tratado de derecho constitucional*, vol IX (Editorial Jurídica de Chile 1997) 190.

have become obsolete. While hundreds of detailed provisions regulate payments and expenditure, there are only a handful of provisions that succinctly regulate the essential legal powers of the office. As a result, this law offers little guidance when it comes to resolving interpretive problems regarding the scope of the Comptroller-General's mission and powers.

A number of other statutes regulating public administration refer to the Comptroller-General and grant it additional powers. For instance, the Civil Service Act 1989 grants public employees the right to complain to the Comptroller-General in the case of their rights being encroached upon by an illegal action.¹³¹ This entails that the office is the natural forum for public employment adjudication. Another example is the Organic Law of the National Congress, which imposes on public entities and public enterprises a duty to provide information to congressional committees or individual members of Congress, upon request. This piece of legislation provides that the Comptroller-General will decide whether a public enterprise can refuse to release information, and will impose disciplinary sanctions in case of infractions.¹³² The recent Regulation of Lobby Act also gives powers to the Comptroller-General in case authorities fail to comply with disclosure requirements imposed by the law. While in the case of central government officers the office can just propose the imposition of a disciplinary sanction, in the case of municipal authorities the Comptroller-General can impose the sanction himself.¹³³ A final example among many is the Law on State Financial Administration, which contains the rules governing the Comptroller-General's powers of financial oversight and auditing.¹³⁴ In short, there is a complex web of laws regulating the institution that complement and update its obsolescent Organic Law.

¹³¹ Article 160, Law 18834 Concerning Civil Service Regulations.

¹³² Articles 9 and 10, Law 18918 Organic of the National Congress.

¹³³ Articles 15 and 17, Law 20730 on Lobby Activities.

¹³⁴ See Articles 52 and 53, Decree Law 1263 Concerning the Financial Administration of the State.

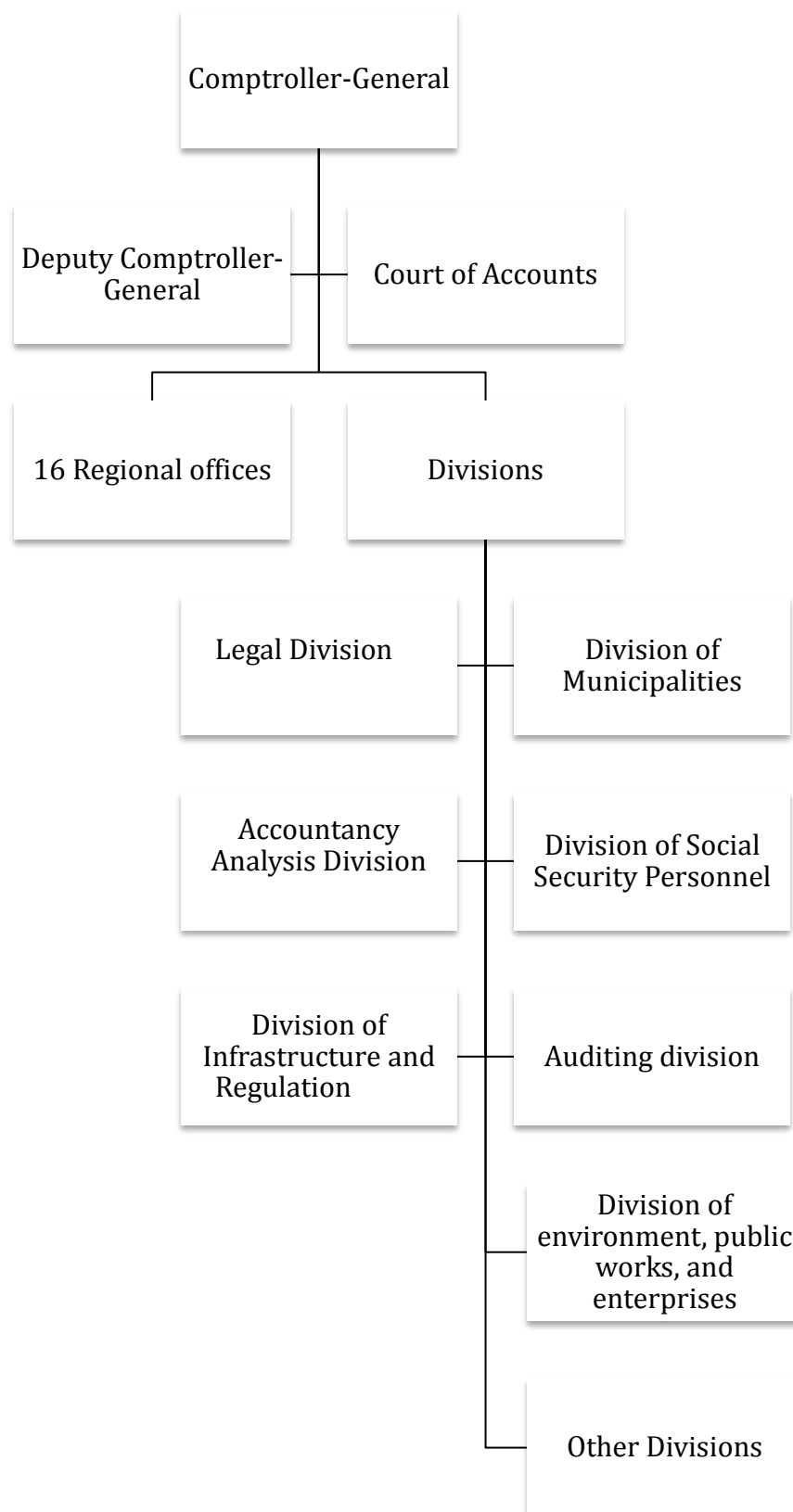


Figure 1: Basic Organigram of the Comptroller-General Office

II. ORGANIC STRUCTURE

A. Hierarchical arrangements

The office is a single-headed institution presided over by the Comptroller-General of the Republic (Art 2 Organic Law). In this sense, it is comparable to some ombudspersons and Comptroller-General offices elsewhere. It departs from the collegiate model of institutions such as the French *Conseil d'Etat*. Below the office-holder, the institution's arrangements follow a hierarchical pattern. The second highest authority within the office is the Deputy Comptroller-General, who is a subordinate official appointed by the Comptroller-General and must replace him during absence (Art 2, 4, 27). The law requires that both authorities hold a law degree (Art 2), and the Comptroller-General in particular needs legal experience of at least ten years (Art 98 Constitution). Moreover, under the office's organic law, both authorities are entitled to the rights and tenure secured to judges by the laws of the country (Art 4). In other words, the two highest officers of the institution are isolated against political pressure from the other branches of government.

The single-headed character of the office entails a strong reliance on the personal traits of its chief authority. This organisational feature is usually associated to the need for institutional energy and increased levels of activity.¹³⁵ This assumedly 'active virtue' of the institution –shared by the tribune model of ombudspersons- seems to suggest a more vigorous approach to the office's supervisory functions. But it may also invite administrative lethargy and, even worst, personalism or cult to personality.¹³⁶

Below the Comptroller-General and his deputy, a variety of specialised departments have been established. These units are subordinated to the Comptroller-General, as the law defines them as dependent on him (Art 2.6), and their holders and all employees of the office remain in their posts as long as they have the exclusive confidence of the Comptroller-General (Art 3.2). In other words, the head of the office has the power to appoint, promote, or remove any officer within the institution, with independence from any external authority. This feature imprints in the organisation its characteristic hierarchical nature. Although some departments are mentioned in the Organic Law, the

¹³⁵ The classical locus is Federalist 70. See Alexander Hamilton, James Madison and John Jay, *The Federalist* (Belknap Press of Harvard University Press 2009).

¹³⁶ Gellhorn (n 77) 48–50.

Comptroller-General has the broad discretion to create new units, rearrange the existing ones, and define their tasks and operative conditions (Art. 2.2, 2.7, and 5.4).

In addition, the operation of the office is geographically decentralised through local offices in every region of the country. Currently, there are 16 such regional offices. These have no autonomy and must strictly follow the precedents set out at the central level. If any novel question of law arises, they have to refer it to the respective department at the central level. Regional Comptrollers are not required to have legal training. Thus, although most of them currently hold law degrees, some have other professional backgrounds such as public management or accountancy.¹³⁷

A two-tier Court of Accounts is also embedded within the office. The Deputy Comptroller-General constitutes the Court of Accounts in First-Instance and hears indictments against public functionaries that have misused public funds (Art 107). A head of department or head of regional office acts as prosecutor (Art 107 bis). The affected party can appeal first-instance decisions to the Court of Accounts in Second-Instance, composed of the Comptroller-General and two external ad-hoc judges.¹³⁸ Despite being within the Comptroller's Office, commentators view this two-tier tribunal as pertaining to the judiciary and subordinated to the Supreme Court.¹³⁹ The main reason for this is characteristically formalist, as it is argued that the institution is performing a typically adjudicatory function.

Membership of the institution reached 2,000 employees in 2013 (1,992 in 2016), with the majority of them holding a university qualification, and 68.2% of the staff holding a professional degree. Although the institution possesses a characteristic multi-disciplinary nature, lawyers compose almost a quarter of the office's professional staff. In 2013, the office had 1,375 professional staff, of which 23% were lawyers (321 officers). Public managers constituted the second largest group, comprising 17.5%, while business managers followed in third place with 7.7%.¹⁴⁰ Other professions represented in the office include architects, civil engineers, and accountants. As will be seen, the distribution of

¹³⁷ Information as of 28 September 2017.

¹³⁸ The ad-hoc judges are proposed by the Comptroller-General and appointed by the President of the Republic for a four-year term (Art 118).

¹³⁹ Silva Bascuñán, *Tratado de derecho constitucional* (n 130) 215.

¹⁴⁰ Contraloría General de la República, 'Cuenta Pública 2014' (2015).

these professions varies according to the different departments and sub-departments within the institution.

B. The Head of the Office

Both the executive and the legislative branches of government participate in the appointment of the Comptroller-General as head of office. According to Article 99 of the Constitution, the President of the Republic appoints the head of the office, with agreement from the Senate if supported by three-fifths of its active members. A constitutional amendment in 2005 increased the quorum for this decision, which used to require only a simple majority. The current provision forces the President to seek inter-party and inter-branch agreement before appointing the Comptroller-General. As we will see in the Introduction to Part III, it has been the case in recent times that the office is presided over by a candidate favoured by the opposition parties.

Until recently, it was suggested that there was a political convention stipulating that Comptroller-General appointment should be based on seniority.¹⁴¹ Between 1952 and 1997, Comptroller-Generals were largely appointed according to this convention. In fact, with the exception of the appointment of Sergio Fernández in 1978 for three months during the Pinochet dictatorship, all office-holders during this period were serving as Deputy Comptrollers-General when appointed as head of the office.¹⁴² The rule was broken when, in 2002, the President decided not to appoint the deputy Comptroller-General but instead the head of the Legality Review Department, the centre-left Gustavo Sciolla. Thus, even in this case, it was a senior officer who was promoted to the highest post within the office. Yet, as we will see in the Introduction to Part III, for the last two appointments the convention has been totally discarded, as outsiders have been selected to lead the institution.

The 2005 Constitutional Reform also reduced the tenure of the office-holder to a non-renewable eight-year period. Before the amendment, the Comptroller-General served until reaching 75 years of age. Yet the current timeframe is in line with the historical record, which shows that office-holders have generally remained in the post for

¹⁴¹ Silva Bascuñán, *Tratado de derecho constitucional* (n 130) 196.

¹⁴² This includes five Comptrollers-General: Enrique Bahamonde (1952), Enrique Silva Cimma (1959), Hector Humeres (1967), Osvaldo Iturriaga (1978), and Arturo Aylwin (1997).

approximately eight years each. Also, the eight-year period is apparently designed to detach the Comptroller-General tenure from the presidential period, which is four years without the right to stand for re-election.

According to the Constitution, the Comptroller-General is required to have held a law degree for at least ten years. Since the establishment of the office, most of the office-holders have been lawyers and, more specifically, administrative law experts. Indeed, a number of them have developed careers as scholars as well as attorneys. Although some have attempted to pursue political careers after their service in the office, generally Comptrollers-General have been viewed as apolitical, bureaucratic authorities. The Constitution also states that to be appointed as head of the office, a person has to be over 40 years of age and hold the right to vote.

The Constitution stipulates strict removal rules. The office-holder can be removed only by impeachment commenced in the Chamber of Deputies for notorious dereliction of duties (Art 52.2.c) and decided by the majority of the active members of the Senate (Art 53.1). These provisions regulating proceedings and charges are the same ones that apply to the members of the superior courts of justice, including Supreme Court justices. At the inception of the office, the President had the power to remove the Comptroller-General as he was regarded as a dependent officer. However, the protections favouring this officer were strengthened in 1943 when the institution was granted constitutional status. Only once have impeachment proceedings against a Comptroller-General taken place, and on that occasion they resulted in the removal of Agustín Vigorena in 1945.¹⁴³ This exceptional case suggests that these provisions have secured strong protection against attacks from the political branches of government.

Therefore, the Comptroller-General enjoys a high degree of independence from the President and Congress. The Constitution also provides functional mechanisms to resolve disputes between the Comptroller-General Office and the judiciary. According to current rules, it is for the Senate to resolve jurisdictional disputes between the office and the higher court of justice (Art 53.3), while disputes between the office and lower courts are

¹⁴³ Impeachment proceedings against judges have been exceptional as well. There have been fewer than a dozen cases and only once was a judge eventually removed from office. This occurred in 1992.

to be adjudicated by the Constitutional Tribunal (Art 93 number 12). In the few cases that have arisen thus far, the position of the Comptroller-General has always been upheld by either the Senate or the Constitutional Court.

Current constitutional and legal provisions do not secure budget independence for the office. This entails that the executive and the legislature have to define the budget allocated to the office every year. Yet between 1959 and 1977, the Comptroller-General enjoyed a budget protected by law. These rules ensured the office a budget of 0.42% of the Annual National Expenditures Budget. These protections were eliminated by the Pinochet government amid neoliberal reforms reducing the size of the state and following a series of clashes with the Office, as we will see in chapter 5.

C. Sub-Departments

The Office of the Comptroller-General covers a variety of functions such as auditing, disciplinary investigations, and accounting, among others. In order to carry out these tasks, the organisation is divided into a series of departments and committees. To illustrate the point, I will focus on its main regulatory review function, which is concentrated in two sub-units within the office: the Legal Department, particularly its Committee IV, and the Infrastructure and Regulation Department. The importance of these units derives from the fact that they perform the most important functions in terms of legal interpretation.

The primary unit in charge of legality review tasks is the Legal Department. Two senior lawyers – the chief and the deputy chief of the division – head this department. They, in turn, supervise the work of specialised internal committees, each of them having an independent docket. The Comptroller-General directly appoints these senior officers. Aside from its chief officers, this department comprises approximately 40 lawyers assigned to six Committees, each of which has responsibility for one or more specific areas of public administration. Unlike other units within the institution, in this department no other professions, such as economists, accountants, public administrators, or civil engineers, are represented. It is exclusively composed of lawyers.

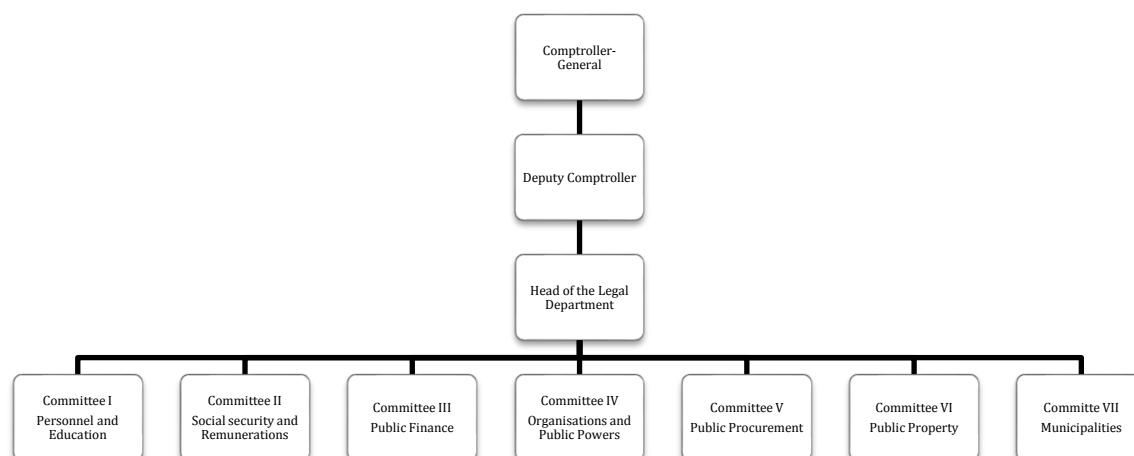


Figure 2: Legal Department Structure

Among the seven committees that comprise the legal division, Committee IV has historically been the most prestigious. Importantly, this reputation is well reflected in the salaries of the approximately seven permanent members. Traditionally, this office was conceived as a sort of elite unit, where the most experienced officers would arrive after a long career serving in different posts within the institution. These officers thus used to have a panoramic view of the operations of the Comptroller-General, as well as the functioning of the public bureaucracy they oversaw. In other words, this unit represented the pinnacle of a successful career inside the institution. However, that tradition has to an important extent lost its force, and nowadays the unit's staff mixes senior and junior officers in a more balanced manner. This change was triggered by changes introduced by Comptroller Ramiro Mendoza during his tenure.¹⁴⁴ Moreover, some contemporary members of this office have had experience outside the office as primary decision-makers in ministerial and other agencies in the executive branch.

While other committees review more routine decisions, such as employment and public procurement cases, Committee IV is primarily in charge of the most complex cases. The difficulty of the cases assigned to this committee explains the leading character that it still embodies. Consistent with this, they have primary responsibility for the scrutiny of

¹⁴⁴ See Introduction to Part III.

administrative rulemaking and also for delivering legal opinions upon the request of other departments and outsiders. Therefore, the members of this committee simultaneously exercise preventive review of executive rulemaking and a-posteriori adjudicatory functions.

Another department that importantly engages in legal review is the Infrastructure and Regulation Department (DIR). This is a specialised department, independent of the Legal Division, which also includes a number of internal committees. A multi-disciplinary organisation in nature, this body combines lawyers and other professionals. The primary task of this office consists of checking a wide range of regulatory processes, such as price setting procedures in utility industries (telecom, water, electricity, and so on) and urban planning processes. Like Committee IV, DIR is also highly regarded as a result of the technical competence of its members and the complexity of its caseload.

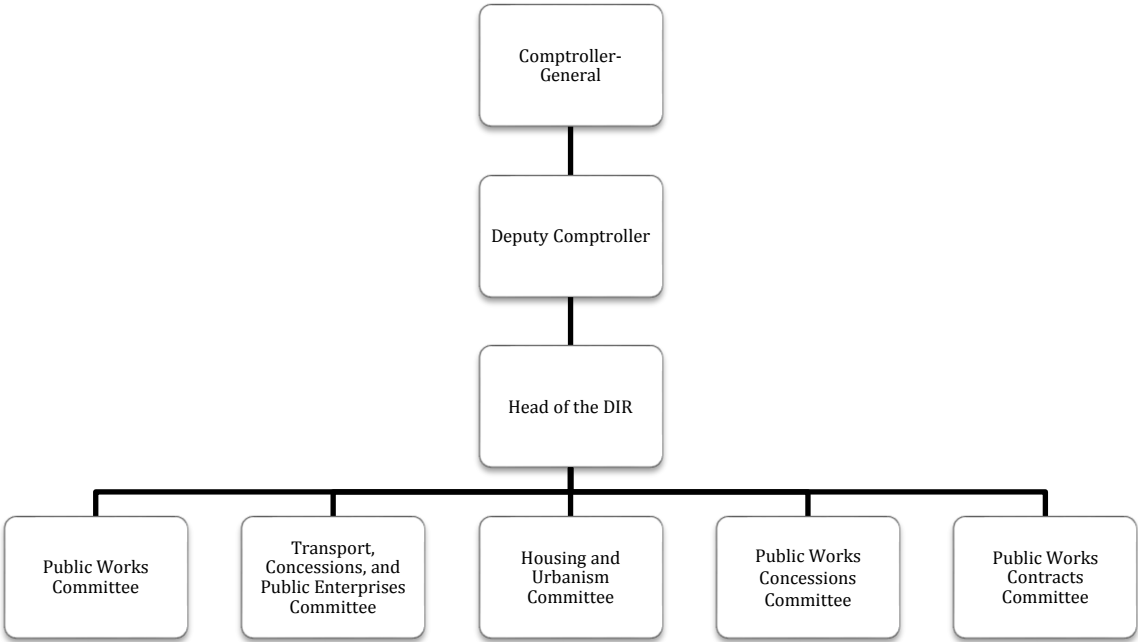


Figure 3: DIR structure

III. MANDATE AND POWERS

A. Multi-tasking

Generally speaking, Comptroller-General Offices operate in a number of jurisdictions, performing auditing tasks.¹⁴⁵ They are usually members of the Commonwealth Model of financial oversight institutions – as opposed to the Court Model.¹⁴⁶ Their main aim is to ensure financial regularity in governmental activities. Operating within political accountability networks, these institutions also channel information to the legislature in order to facilitate political scrutiny of executive action. However, as will be seen, the Chilean Office of the Comptroller-General departs from this model, since it is entrusted with the additional mission of ensuring compliance of the administrative agencies with legal standards.¹⁴⁷ In other words, in contrast with its counterparts elsewhere, the Chilean agency is not only a supreme audit institution, but also a legal accountability body.

Concretely, the Constitution sets out a number of tasks to be performed by this institution. Indeed, five main tasks for the Comptroller-General are indicated in Art 98 of the Constitution. The first task involves legality review. Using broad language, the constitutional provision states that the Comptroller-General shall exercise the review of the legality of the acts of the public administration. The second task relates to financial control. The Constitution provides, in particular, that the Comptroller-General is to oversee the collection of revenues and the expenditure of public funds by the central government, municipalities, and other public agencies. Thirdly, in a related matter, the institution is charged with examining and judging the accounts given by individuals who administer public funds. Fourthly, the Comptroller-General is responsible for keeping the general accounting of the nation. Lastly, in a final open clause, the Constitution stipulates that the organic law of the agency might provide for new tasks to be performed by the Comptroller-General. In short, it might be said that the institution has two main functions: legality review on the one hand, and financial control on the other.

¹⁴⁵ For an overview of similar institutions in the UK – the Comptroller and Auditor General, and the National Audit Office – see Daintith and Page (n 70) 194–5; Prosser (n 69) 51–7.

¹⁴⁶ Santiso (n 27).

¹⁴⁷ A similar case is found in Israel's State Comptroller. See Suzi Navot, *The Constitution of Israel: A Contextual Analysis* (Hart Publishing 2014) 175–80.

The latter category includes, among others, oversight of the collection of revenues and expenditure, auditing the budget process, and producing and registering financial information. In general terms, the aim of these powers is to ensure financial regularity in the budgetary process. The former category refers to powers of legal interpretation and adjudication. These powers encompass, among others, the power to decide on the legality of administrative action prior to its final enactment, the power to issue interpretive rulings when a legal provision with an impact on administrative agencies is ambiguous, the power to intervene in disciplinary proceedings against public servants, and the power to adjudicate financial maladministration cases. The aim of these powers is to provide an authoritative decision about the content of the law regulating public administration in a particular situation.

B. Powers of financial oversight

Before examining in some detail the legal powers of the office, I will briefly outline the financial aspect of the Comptroller-General. At its inception, it was conceived exclusively as a financial oversight institution.¹⁴⁸ As is still the rule elsewhere, the Comptroller-General was above all a specialist agency in charge of monitoring the financial behaviour of government departments. Its foundational statute in 1927 brought together two different models of auditing. The financial character of the institution is illustrated by the fact that the constitutional amendment that granted it constitutional status in 1943 mentioned only its financial powers.

Audit agencies can be defined as ‘autonomous state organisations tasked with scrutinising public spending and overseeing government finances, usually on behalf of the legislature’.¹⁴⁹ Their positive function consists of ensuring ‘the robustness and effectiveness of financial management, government accounts and control systems’.¹⁵⁰ Additionally, they also perform preventive functions by deterring ‘government abuse and misuse of public resources’.¹⁵¹ In short, audit agencies take place as part of efforts to strengthen administrative capabilities and to discourage corruption. In the context of the audit institutions, the Chilean Comptroller-General appears to be a hybrid institution,

¹⁴⁸ See Chapter 3.

¹⁴⁹ Santiso (n 27) 2.

¹⁵⁰ *ibid.*

¹⁵¹ *ibid.*

adopting features from both the Anglo-American monocratic model and the French court model of auditing.¹⁵² On the one hand, like the Anglo-American model, a single superior authority heads the Chilean agency. But the Chilean Comptroller-General differs from its common law counterparts in terms of the aim of its oversight functions. Unlike traditional comptrollers that focus on ex-post auditing and performance auditing, the Chilean agency focuses on ex-ante control and emphasises compliance control. Furthermore, the Chilean Comptroller-General diverges from the French Court of Accounts model, which is based on a collegiate body that operates as an administrative tribunal. But it resembles the French model in two aspects. First, it privileges legal and financial compliance over performance auditing, and secondly, its links with the judiciary and the legislatures remain ambiguous.¹⁵³

Currently, the office's financial powers are regulated in some detail, but in an untidy manner, in its Organic Law. Here, it suffices to mention the main provisions. According to the Organic Law, the Comptroller-General has exclusive jurisdiction to investigate, examine, review, and make determinations regarding every public credit and public debt (art 7). According to this provision, it is also within his remit to examine and to make judgments about the accounts given by public servants that keep, manage, collect, or spend public funds or goods, or about the accounts given by any other individual under oversight. The statute mentions a number of tools available to the Comptroller-General to perform its financial powers. For instance, Article 9 establishes that the institution has the power to require any authority, or public servant, to provide relevant information. It also states that the office can give instructions to administrative agencies regarding the exercise of its monitoring powers. The same provision further adds that the Comptroller-General can impose sanctions on any authority that does not comply with its requests or instructions. Similarly, Article 15 stipulates that any person that gives false testimony to the office will be punished according to the Criminal Code. A final example may be found in Article 21, which provides that the Comptroller-General can request reports, statements, or information from any public officer under its supervision.

¹⁵² *ibid* 49ff.

¹⁵³ There is a third model that is hybrid in a different sense. This is the German and Scandinavian model, where there is 'an agency with collegial decision-making similar to that found in tribunals, headed by a board of auditors, but without jurisdictional authority or quasi-judicial powers'. See *ibid* 50.

The Comptroller-General can carry out audit examinations in order to ensure compliance with legal provisions, and to protect the public treasury and administrative probity (Article 21A). Yet the Organic Law introduces considerable nuance by declaring that, in exercising its legality or auditing functions, the Comptroller-General ‘must not evaluate the merit or convenience of political or administrative decisions’ (Article 21B). As we will see, this limitation was the price paid by the Comptroller-General in order to see its audit functions recognised in the statute book in an amendment to its organic legislation in 2002.¹⁵⁴

Unsurprisingly, experts have recommended the Chilean government to reform the Comptroller-General, adopting a focus on ex-post and performance auditing.¹⁵⁵ This is in line with New Public Management ideas about public sector reform. As Santiso explains, ‘[t]he trend in public policy is to move away from rigid compliance with formal bureaucratic rules, to the achievement of policy objectives, reflected in the increased focus on performance auditing over compliance control’.¹⁵⁶ A recent OECD report, for instance, has placed ‘attention on possible changes to the functional focus on ex ante control of legality (*toma de razón*) and the concentration of ex post audit on legal compliance’.¹⁵⁷ These voices have been increasingly considered in Chilean academia, and might possibly influence future reform. However, these ‘technocratic concerns’ have had a more sceptical reception from scholars who have pointed out the political role performed by the institution in its recent history.¹⁵⁸

IV. EX-ANTE LEGALITY REVIEW

A. Basic provisions

Legality review (*toma de razón*) is the most characteristic power of the Chilean Comptroller-General. This is the only power of the office regulated in some detail in the Constitution. It is a scrutiny process of executive rules or decisions before their promulgation based on abstract legality. Abstract, here, means that the scrutiny is not dependent on concrete litigation or controversy involving the administrative action at

¹⁵⁴ See Introduction to Part III.

¹⁵⁵ Santiso (n 27) 119–20.

¹⁵⁶ *ibid* 15.

¹⁵⁷ OECD (n 27) 17.

¹⁵⁸ Faúndez, ‘The Fragile Foundations of Administrative Legality - Chile between 1932 and 1973’ (n 22) 93–4.

stake.¹⁵⁹ It is currently enshrined in Article 99 of the Constitution, which provides that in exercising its function of legal control, the Comptroller-General Office will check on decrees and administrative resolutions in the cases provided by legislation.

In brief, the formal mechanics of this checking procedure are as follows. Once an administrative department has adopted a written decision, the respective authority has to submit it to the Comptroller's Office for legal review.¹⁶⁰ Within a 15-day period (unless an extension is given), the checking institution has to review and approve (or decline to approve) the proposed executive action. If the Comptroller-General considers it compliant with the law, it will uphold the decree or resolution and return the accompanying file to the respective agency, enabling it to officially promulgate the rule or decision. However, if the Comptroller-General concludes that the rule is unlawful, it will turn it down and the administrative agency will not be able to promulgate the decision under review. In this latter scenario, the administrative procedure will simply conclude at that point.

However, under Article 99 of the Constitution, the President is allowed to state her disagreement with the Comptroller's judgment, and insist on the decree or resolution.¹⁶¹ In this case, the procedure will continue, but the final outcome will depend on further considerations. At this point, we have to distinguish between two situations. If the decree or resolution was originally rejected on legality grounds (that is, violation of statutes), the executive will prevail with finality. In this case, the Comptroller-General ought to uphold the decision, but the office must refer the entire file to the Chamber of Deputies, which can in turn scrutinise the action on policy grounds. If, however, the measure was rejected on constitutionality grounds, the President is not allowed to insist, and only the Constitutional Tribunal can make the final decision. In this latter case, the President can react to an adverse Comptroller-General determination by referring the dispute to the Constitutional Tribunal, which will have the last word on the matter.

¹⁵⁹ Here, I am adapting the terminology of Alec Stone Sweet. See Alec Stone Sweet, *The Birth of Judicial Politics in France: The Constitutional Council in Comparative Perspective* (OUP 1992).

¹⁶⁰ See Articles 12 and 17 of the Decree 7912 Concerning the Organisation of Secretaries of State.

¹⁶¹ See more details below.

B. Types of administrative actions under review

The constitutional provisions that govern this procedure indicate what kind of administrative actions the Comptroller-General must review. The most important group includes ‘decrees and resolutions that, according to the law, shall be handled by the Comptroller-General’ (Article 99). These are different forms of secondary or subordinated legislation. The distinction between decrees and resolutions refers to decisions adopted by the President of the Republic or on its behalf (decrees) and decisions adopted by executive agencies (resolutions), respectively. Decisions of both individual and general effect are included in the review procedure. A typical example of a decision that has to be submitted for this review is a regulation (*reglamento*) that implements the provisions of a statute.

However, there are a number of exceptions.¹⁶² In fact, it must be noted that the Constitution does not itself establish which decrees and resolutions should be reviewed by the Comptroller-General. The Constitution merely states that the regulation of this matter is for the Organic Law governing the institution. As a result, the specific definition of the rules to be submitted to the Comptroller-General for examination is determined by legislation. The office’s Organic Law defines a first important filter. Article 10.5 declares that the Comptroller-General may exempt from review any decrees and resolutions that it sees as ‘not essential’. In practice, for efficiency reasons, since the 1960s the Comptroller has exercised this power with the purpose of exempting the generality of administrative decisions from review, excluding those related to topics explicitly singled out by the office.¹⁶³ This entails that only the most important decisions adopted by administrative agencies have to undergo the Comptroller’s legal scrutiny. Still, it has been estimated that over 50% of administrative regulations and orders are not exempted from this checking mechanism.¹⁶⁴

¹⁶² For a traditional explanation of the exempted actions, see Enrique Silva Cimma, *Derecho administrativo chileno y comparado. Introducción y fuentes* (4th edn, Editorial Jurídica de Chile 1996) 194ff. For a contemporary discussion, see Luis Cordero, ‘La Contraloría General de la República y la Toma de Razón: Fundamento de Cuatro Falacias’ (2007) 69 *Revista de Derecho Público* (U. de Chile).

¹⁶³ Currently, exclusions from revision are regulated by Resolution 1600/2008 of the Comptroller-General.

¹⁶⁴ Enrique Rajevic and María Fernanda Garcés, ‘Control de Legalidad y Procedimiento de Toma de Razón’ in Visnja Tomicic and Cristián García (eds), *Un Mejor Estado para Chile: Propuestas de Modernización y Reforma* (Consortio para la Reforma del Estado 2009) 618.

A second group of exemptions derives from statutes that exclude the Comptroller's review regarding specific administrative agencies.¹⁶⁵ A case in point is the significant exclusion of municipalities from this review mechanism.¹⁶⁶ It is not easy for the executive to pass legislation ousting this legality check. In fact, according to the Constitutional Tribunal, a statute excluding a decree or resolution from the Comptroller-General's review has to be approved by a 4/7 super-majority.¹⁶⁷ A third group does not consist of actual exclusions, but of exceptions to the preventive character of the Comptroller's check. In fact, Congress – again, by super-majority vote – may postpone legality review, enabling the administrative authority to enact with immediate effect an administrative order in case of emergency. This is the case with the so-called 'urgency decrees', whose promulgation does not prevent the Comptroller's check, but only entails delayed scrutiny, as the review will take place after the administrative decision at stake enters into force.¹⁶⁸

The discussion so far has concerned administrative actions, i.e. individual orders or general regulations whose effects are subordinated to statutory law. However, the Comptroller-General can also examine presidential regulations that have the 'force of statutory law', that is, those that can exceptionally regulate matters falling within the legislature's domain.¹⁶⁹ The particularity of these so-called 'decrees with force of law' is that they have the same legal force as regulations passed by Congress.¹⁷⁰ They can actually repeal or modify congressional legislation.¹⁷¹ The power to enact this sort of legislation is entrenched in Article 32 n. 3 and Article 64 of the Constitution.¹⁷² These

¹⁶⁵ Carlos Carmona, *El principio de control. El control externo, jurídico y no jurisdiccional de la administración* (Universidad de Chile 2005) 11.

¹⁶⁶ Article 53 Organic Law of Municipalities.

¹⁶⁷ See Constitutional Tribunal Decision (1987) Rol 45; Constitutional Tribunal Decision (1988) Rol 63; Constitutional Tribunal Decision (2003) Rol 384.

¹⁶⁸ For an explanation of 'decrees of urgency', see Silva Cimma, *Derecho administrativo chileno y comparado* (n 162) 230–3.

¹⁶⁹ For an examination of this kind of power, see, John M Carey and Matthew Soberg Shugart, 'Calling out the Tanks or Filling out the Forms?' in John M Carey and Matthew Soberg Shugart (eds), *Executive decree authority* (CUP 1998). They define decree as 'the authority of the executive to establish law in lieu of action by the assembly'.

¹⁷⁰ Bermúdez (n 146) 47–8.

¹⁷¹ These powers to make 'decrees with force of law' are comparable to the Henry VIII powers in Britain, but in Chile there is no parliamentary scrutiny regarding the exercise of these powers. Even closer to Chilean arrangements are the French *ordonnances*. See Catherine Elliott, Catherine Vernon, and Eric Jeanpierre, *French Legal System* (2nd edn, Pearson Longman 2006) 72–3; L Neville Brown and John Bell, *French Administrative Law* (5th edn, Clarendon Press 1998) 12–3.

¹⁷² The current Constitution explicitly authorises Congress to delegate to the President the power to enact decrees 'with force of law', but this was not the case before 1980. At that time, the Constitution was silent regarding this legislative practice. As a result, it was unclear if the Comptroller-General had jurisdiction for reviewing this type of regulation. For that reason, when Congress delegated regulatory powers, it often

provisions stipulate that the executive can request congressional authorisation to regulate matters that otherwise could only be regulated by congressional legislation. In any case, the delegation cannot cover certain topics such as individual rights, issues that require super-majority approval, and the internal organisation of institutions that have constitutional status, such as the Comptroller's office.

Although there is no congressional scrutiny of the decrees enacted under these delegated powers, under Article 99 of the Constitution the Comptroller-General must examine these decrees, rejecting them if they exceed or contravene the legislative delegation or infringe the Constitution.¹⁷³ There is no presidential power of insistence if the Comptroller-General turns down a decree with force of law. If the President disagrees with the adverse determination, she has to refer the dispute to the Constitutional Tribunal (Article 93 n. 4). If, on the other hand, the decree was unlawfully upheld by the Comptroller-General, members of Congress could also bring the case to the determination of the Tribunal.

In short, the Comptroller-General's legality review concentrates on major pieces of secondary legislation. Executive decrees regulating matters of legislative domain are also included in the jurisdiction of the office. In this sense, this scrutiny process is the primary mechanism for ensuring the legality of government rules.¹⁷⁴ But it also includes other administrative decisions such as appointments, urban plans, environmental permits, disciplinary sanctions, and even constitutional declarations of emergency, among others.

C. Participants

The paradigmatic institutional actors that participate in the procedure are administrative agencies, which seek to enact the rules or decisions under review. These administrative authorities include the President of the Republic and all the bodies that comprise the

provided explicitly that the Comptroller was endowed with powers for checking whether the secondary legislation was consistent with the enabling statute. For an account of this practice, see Manuel Daniel, *El Control Jurídico de la Administración. Nociones Fundamentales* (Editorial Universitaria 1960) 36ff. For a brief overview of the constitutional debate about the constitutionality of the delegation of legislative powers under the former 1925 Constitution, see Federico Gil, *The Political System of Chile* (Houghton Mifflin 1966) 100–1.

¹⁷³ Alejandro Silva Bascuñán, *Tratado de derecho constitucional. Congreso Nacional. La función legislativa*, vol VII (Editorial Jurídica de Chile 2000) 84–5.

¹⁷⁴ There are remarkable parallels with the scrutiny performed by the Joint Committee on Statutory Instruments. See Edward C Page, *Governing by Numbers: Delegated Legislation and Everyday Policy-Making* (Hart Publishing 2001) ch 8.

central administration. However, a number of other authorities do not fall within the purview of this legality review procedure. Indeed, some regulatory agencies, such as the Central Bank and the municipalities among others, are excluded. But it is still the case that most of the components of the Chilean public administration fall under the Comptroller-General's oversight via this checking mechanism.

An interesting aspect of the legality review procedure is whether affected parties can challenge or offer support to administrative decisions in this forum. In other words, the issue here is whether non-governmental organisations have a say. Neither the Constitution nor the Comptroller's Organic Law explicitly regulate the issue of private party access. Yet a long-standing practice recognises the possibility for affected parties to intervene. As early as the 1960s, a leading commentator explained that 'there is no procedure for this remedy, but in practice it is accepted, and on occasions the Comptroller-General has adopted decisions rejecting administrative decisions on grounds raised precisely by interested parties'.¹⁷⁵ The commentator pointed out that when it comes to regulations of general interest – that is, administrative rules – it is very difficult when directly affected parties only come to know through the media that a procedure of this kind is being conducted.

Currently, both officers and litigants report that affected parties' participation is just a matter of informal contacts between the regulators, the regulated, Comptroller officers, and third parties. However, in legal terms, the right to make petitions in the legality review process is remarkably weak.¹⁷⁶ For instance, the Comptroller-General has decided that the lodging of ex-parte briefs does not interrupt the process, and that neither his office nor the regulators have to meet the concerns raised by affected third parties.¹⁷⁷ Thus, private parties can be heard, but there will not necessarily be an adversarial process. This discouraging attitude to private party participation is explained by the fear of excessive judicialisation of this legality review process.¹⁷⁸

¹⁷⁵ Daniel (n 171) 43–4.

¹⁷⁶ Luis Cordero, 'La jurisprudencia administrativa en perspectiva: Entre legislador positivo y juez activista' (2010) *Anuario de Derecho Público* UDP 165, 183.

¹⁷⁷ Ruling 27272 (2008).

¹⁷⁸ Alejandro Vergara, 'El rol de la Contraloría General de la República: Desde el control de legalidad a los nuevos estándares de buena administración', *Contraloría General de la República. 85 años de vida institucional (1927-2012)* (Contraloría General de la República 2012) 106–7.

D. Standard of review

The decrees or regulations examined by the Comptroller-General through this procedure are judged under legal and constitutional standards. This implies that administrative decisions are assessed in light of statutory and constitutional provisions (Constitution, Art 99). Underpinning its nature as an independent legal check and not an advisory body, the Comptroller-General is not allowed to review the merits of the decision under examination (Organic Law, Article 21 B).¹⁷⁹ However, there is a long-standing view that the check of the Comptroller-General must go beyond mere legality. An influential scholar, for instance, has argued that in this procedure the administration is required to demonstrate not only the legality of the measures but that the outcome is the right solution for addressing the social problem at stake.¹⁸⁰ Thus, from this viewpoint, the scrutiny should encompass both legality and merit. More recently, some scholars have argued that the examination under the legality review procedure should embrace broader notions of good administration, and not only formal legality.¹⁸¹

The Comptroller-General lacks investigatory powers during the legality review procedure. Yet it can request officers of any administrative department to provide information related to the service (Organic Law, Article 9). Additionally, it is a well-established practice that the office can require supporting factual evidence before deciding on the legality of an administrative decision.¹⁸²

E. The insistence mechanism – the presidential override

The influence of the Comptroller-General over public administration is significant. One reason for this is that it works very closely with administrative agencies. But its main source of power resides in the fact that it can paralyse administrative action, including presidential regulations. This may be surprising, because this checking body does not have the last word on the legality of administrative acts. As already mentioned, if the

¹⁷⁹ See Andrés Bordalí and Juan Carlos Ferrada, *Estudios de Justicia Administrativa* (Lexis Nexis 2008) 34–5.

¹⁸⁰ Eduardo Soto-Kloss, ‘La toma de razón y el poder normativo de la Contraloría General de la República’, *La Contraloría General de la República. 50 años de vida institucional 1927-1977* (Contraloría General de la República 2012) 203.

¹⁸¹ Vergara (n 178) 106.

¹⁸² See, for instance, cases mentioned in Javier Millar, ‘Alcance del control de legalidad. Su evolución a propósito de los actos administrativos requisitorios, durante 1970-1973’ (2000) 11 *Revista de Derecho* (Universidad Austral de Valdivia).

Comptroller-General rejects an executive decision on legality grounds, the President can, under certain conditions, insist on overriding the Comptroller's determination. This mechanism is often called 'presidential insistence'. If the rejection is based on constitutionality grounds, the President can request that the Constitutional Tribunal adjudicates the dispute.

Currently, presidential insistence is regulated at both the constitutional and the legal level (Constitution, Article 99; Organic Law, Article 10). In particular, Article 99 reads:

In the exercise of the function of control of legality, the Comptroller General will register [*tomará razón*] all decrees and resolutions that, in accordance with the law, must be processed by the Office of the Comptroller General of the Republic or will object [*representará*] to the illegality which they may display; but he will have to process them when, despite his objection, the President of the Republic insists with the signature of all of his Ministers, in which case he shall send a copy of the respective decrees to the Chamber of Deputies. In no event will he process the decrees of expenditure that exceed the limit specified in the Constitution and he will submit a complete copy of the record to the same Chamber.

It shall also correspond to the Comptroller General of the Republic the register [*tomar razón*] of the decrees with force of law, having to object them [*representarlos*] when they exceed or contravene the delegatory law or are contrary to the Constitution.

If the objection has place with respect to a decree with force of law, a decree that promulgates a law or a constitutional reform for departing from the approved text, or a decree or resolution for being contrary to the Constitution, the President of the Republic will not have the power to insist, and in the case that he is not satisfied with the objection of the Office of the Comptroller General of the Republic, he will have to forward the records to the Constitutional Court within ten days, so that this Court resolves the dispute.¹⁸³

It has been argued that this procedure expresses a non-legalistic conception of political disagreements.¹⁸⁴ While a legalist conception conceives a disagreement as a technical controversy to be solved in a technical forum, a political or reflexive conception claims

¹⁸³ Translation by constituteproject.com

¹⁸⁴ Fernando Atria, 'Legalismo y reflexividad: La contraloría como modelo', *La Contraloría General de la República y el Estado de Derecho. 75 años de Vida Institucional 1927-2002* (Contraloría General de la República 2012). This view seems to be inspired by discussions around legislative overrides in commonwealth constitutionalism. For this discussion, see Stephen Gardbaum, 'The New Commonwealth Model of Constitutionalism' (2001) 49 *The American Journal of Comparative Law* 707; Aileen Kavanagh, 'The Lure and the Limits of Dialogue' (2016) 66 *University of Toronto Law Journal* 83; Aileen Kavanagh, 'A Hard Look at the Last Word' (2015) *Oxford Journal of Legal Studies*; Jeff King, 'Rights and the Rule of Law in Third Way Constitutionalism' (2015) 30 *Constitutional Commentary* 101; Mark V Tushnet, 'Judicial Activism or Restraint in a Section 33 World' (2003) 53 *University of Toronto Law Journal* 89.

that political controversies must be decided – in the last instance – by political bodies such as presidents or parliaments.¹⁸⁵ From this viewpoint, the importance of the presidential override is that it makes it politically costly for the President to take her preferred course of action. But the device does not prevent her from having the last word.¹⁸⁶ Therefore, if the President insists, she will escalate the conflict, transforming it from a technical legal controversy to a political disagreement in which public opinion and other political actors might be engaged. This new dimension of the conflict, however, will be informed and enriched by the perspective of the Comptroller-General and other technical instances that may have been heard in the meantime.

In concrete terms, in politically controversial times, the President has intensively exercised her powers to prevail over the Comptroller's opposition by insisting on its previous determinations. One such period was Salvador Allende's socialist government in the 1970s.¹⁸⁷ However, this complex institutional device has not been used in the last few decades. Indeed, the last time a decree of insistence was enacted by the executive was in 1990, just after the end of Pinochet's dictatorship, when the President of the Republic intended to remove the head of a public university. An explanation for the President's unwillingness to exercise his override power may lie in the relative consensual politics that have been commonplace in Chile since Pinochet's dictatorship. Unlike in previous decades, disagreement among the political elites concerning the boundaries of legality has not reached critical levels. An alternative explanation may simply be that it is very rare for the Comptroller-General to reject administrative decisions.¹⁸⁸ In the historical chapters of this thesis, these changes in the interactions between the executive and the Comptroller-General will be examined and the institutional and political reasons for these transformations explored.

¹⁸⁵ Atria (n 184) 331.

¹⁸⁶ *ibid* 333.

¹⁸⁷ See Chapter 4.

¹⁸⁸ Garcés and Rajevic (n 1) [the authors link the low number of rejections and the absence of decrees of insistence in the last few decades].

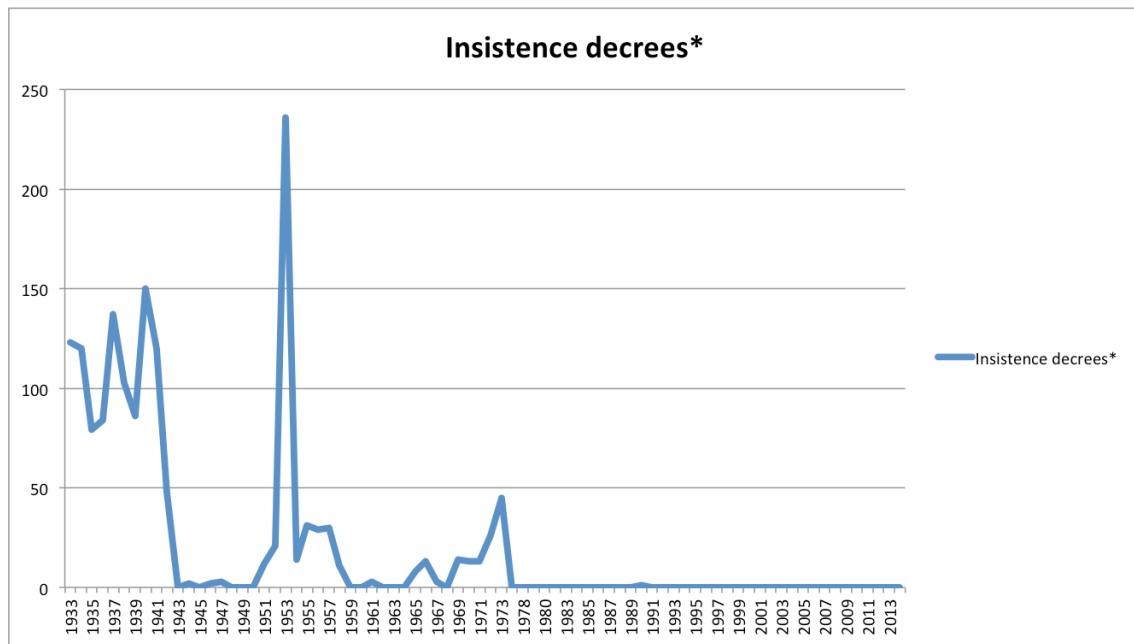


Figure 4: Insistence Decrees, 1933-2013

V. THE POWER OF DISPUTE RESOLUTION

A. Basic provisions

The dispute-resolution function of the Office of the Comptroller-General is based on its power to provide legal opinions interpreting administrative legality. The office's interpretive power (*potestad dictaminante*) might be defined as the power to issue binding legal opinions in case of doubts or uncertainty about the proper interpretation of the statutes that regulate public services. Unlike the ex-ante power of legality review (*toma de razón*), there are no constitutional provisions regulating this interpretive power. Nevertheless, although with different language, it has been regulated in the Comptroller's Organic Law since the inception of the institution. However, as will be seen in chapter 3, the contemporary features of this power only crystallised in the 1950s.

It is currently primarily contained in Article 6 of the Comptroller's Organic Law in the following terms:¹⁸⁹

It is only for the Comptroller-General to report about salaries, rewards, allocations, evictions, pensions, retirements [...] and in general about the matters related to the statute of public employees, and about the functioning of public services under its oversight, in order to ensure the proper application of the statutes and the regulations that govern them.

¹⁸⁹ See also articles 5.3, 9, and 19 of the Organic Law.

Equally, it is for the Comptroller-General to inform about any other issue related to or that may relate to the expenditure or commitments of public funds, as long as doubts arise over the proper application of the respective statutes.

The Comptroller-General shall neither intervene nor report on issues that either by their nature are of litigious character or that fall under the domain of the courts of justice, or that fall under the remit of the State Defence Council, notwithstanding the powers that, regarding judicial matters, this law grants to the Comptroller.

According to the foregoing, only the decisions and reports of the Comptroller-General of the republic could be invoked as administrative jurisprudence in the matters referred to in Article 1.

This somewhat confusing provision has been interpreted in the following manner. On the one hand, it ensures an interpretive domain for the Comptroller-General in matters relating to public administration. It conceives the institution as the primary interpreter of administrative legality. Its determinations, moreover, are binding on administrative officers and institutions – they constitute ‘administrative jurisprudence’. On the other hand, the interpretive powers of the office must not invade the judicial domain. Although it offers no guidance for drawing boundaries, the provision assumes the separation between administrative issues and judicial disputes. Certainly, there are historical reasons for interpreting the provision in this way. As said, for decades the Comptroller-General has acted as a court substitute due to the restricted regime of judicial review in the country, and the ambiguity of this legal provision has allowed political actors to justify the office’s adjudicatory functions.¹⁹⁰

B. Aims and functions

In principle, this power operates regardless of any concrete administrative decision. Originally it was not designed as a power to challenge administrative action directly, but instead a power to give authoritative interpretations of the statutes that govern the use of administrative power. Over the years, though, the function has become more complex. Currently, through its statements, the Comptroller-General can render interpretative opinions about the rules that regulate the civil service, solve conflicts of jurisdiction among public bodies, coordinate internal control procedure of administrative agencies, and, importantly, adjudicate disputes between public bodies and private parties.¹⁹¹

¹⁹⁰ See Chapters 7 and 8.

¹⁹¹ Raúl Letelier, ‘La Contraloría General de la República’ in Christian Viera, Jaime Bassa and Juan Carlos Ferrada (eds), *La Constitución Chilena. Una revisión crítica a su práctica política* (LOM 2015).

Beyond academic disagreement about boundaries, today the Comptroller-General operates as a site for the protection of rights against administrative action on a daily basis.¹⁹²

According to the literature, the aim of this power is to ensure that public law is properly and uniformly interpreted and applied across administrative agencies. In exercising this power, the Comptroller-General operates as a centralised interpretive forum.¹⁹³ As a consequence, this institution may reduce with general effect the uncertainty and ambiguity of legislation, avoid further litigation, and make administrative action more predictable.¹⁹⁴ In addition to its interpretive role, the institution has also performed more ambitious, creative tasks. For instance, some commentators have explained that the Chilean Comptroller-General office has acted as a ‘positive legislator’, filling the gaps left by a legislature unable to provide enough basic general regulation for the public administration.¹⁹⁵

An illustration of this creative power is the role of the Comptroller-General in administrative procedures.¹⁹⁶ Indeed, through its interpretive function, the office filled numerous gaps of the Chilean regime of administrative procedures before the promulgation of a general piece of legislation in 2003. According to some commentators, the institution has played a ‘generalising role’.¹⁹⁷ By adjudicating complaints from individuals or answering requests from agencies asking for clarification of questions of law, the Comptroller-General constructed a complete regime of administrative procedure in the absence of statutory legislation. Drawing upon the constitutional right of petition,

¹⁹² José Miguel Valdivia, ‘Reflexiones sobre las acciones en derecho administrativo’ in Adrián Schopf and Juan Carlos Marín (eds), *Lo público y lo privado en el derecho. Estudios en homenaje al profesor Enrique Barros Bourie* (Thomson Reuters 2017) 351.

¹⁹³ Cordero, ‘La jurisprudencia administrativa en perspectiva: Entre legislador positivo y juez activista’ (n 176) 171.

¹⁹⁴ Letelier (n 191); Cordero, ‘La jurisprudencia administrativa en perspectiva: Entre legislador positivo y juez activista’ (n 176) 180ff.

¹⁹⁵ Cordero, ‘La jurisprudencia administrativa en perspectiva: Entre legislador positivo y juez activista’ (n 176) 180ff.

¹⁹⁶ Jaime Jara, ‘La Contraloría General de la República y su contribución al surgimiento y evolución del procedimiento administrativo en Chile’ (2013) 78 *Revista de Derecho Público* (U. de Chile); Mario González, ‘El procedimiento administrativo en Chile. Aporte de la Contraloría General’, *La Contraloría General de la República y el Estado de Derecho. 75 años de Vida Institucional 1927-2002* (Contraloría General de la República 2012); Pedro Pierry, ‘Las transformaciones del derecho administrativo en el siglo XX’ (2002) XXIII *Revista de Derecho* (Universidad Católica de Valparaíso) 377, 389.

¹⁹⁷ Jara (n 196) 64.

it has developed a right to obtain a response from administrative agencies. According to the office, the administrative bodies have a duty to provide a proper response to petitions filed by citizens.¹⁹⁸ Furthermore, the administrative response has to meet certain requirements such as being written, timely, and conclusive. It also has to be serviced to the affected party. Other important areas developed by this body have been publicity, means of internal review, and due process in disciplinary proceedings and in public procurement.¹⁹⁹ More recently, when the legislature has intervened providing statutory legislation, it has taken inspiration from the rules and principles already elaborated by the office. Even after the enactment of the Chilean Administrative Procedure Act 2003, the Comptroller-General has continued to play a leading role in the clarification of alleged obscurities in the law.²⁰⁰ Further areas of involvement are local government,²⁰¹ government information and advertising,²⁰² urban planning,²⁰³ probity and conflict of interests,²⁰⁴ state enterprises,²⁰⁵ and public procurement,²⁰⁶ among many others.

This feature echoes the function performed by the *Conseil d'Etat* in France. Bell explains, for instance, that 'the role of the *Conseil d'Etat* has very much been to supplement the rules laid down by the legislator' since '[its function] is both to create and enforce standards'.²⁰⁷ Similarly, Hamson indicates that the French institution has created a body

¹⁹⁸ *ibid* 77.

¹⁹⁹ *ibid* 70.

²⁰⁰ Jara (n 196). The Comptroller-General has issued interpretive statements regarding matters such as the scope of the law, the content of the principles of procedure, the means of invalidation by the administration itself, internal complaints procedures, administrative inaction, and so forth.

²⁰¹ José Fernández, 'La Contraloría General de la República en relación a las Municipalidades', *Contraloría General de la República: 85 Años de Vida Institucional* (Contraloría General de la República 2012).

²⁰² Cristobal Osorio and Gerardo Ramírez, 'La comunicación y difusión de las políticas públicas de gobierno. Aspectos constitucionales, legales y presupuestarios' (2016) 85 *Revista de Derecho Público* (U. de Chile) 141.

²⁰³ José Fernández, 'Contraloría y urbanismo' (2013) 78 *Revista de Derecho Público* (U. de Chile) 51; Camila Boettiger, 'El principio de la buena fe en la jurisprudencia de la Contraloría General de la República en materia urbanística' (2009) 19 *Actualidad Jurídica* 309.

²⁰⁴ Flavio Quezada, 'Los conflictos de intereses en la jurisprudencia de la Contraloría General de la República a la luz de los tratados internacionales contra la corrupción' in Manuel Nuñez (ed), *Internacionalización del Derecho Público. Actas de las XLII Jornadas de Derecho Público*. (Legal Publishing 2015); Julio Pallavicini, 'El principio de probidad administrativa en la jurisprudencia de la Contraloría General' (2013) 78 *Revista de Derecho Público* (U. de Chile) 117.

²⁰⁵ Diego Pardow and Rodrigo Vallejo, 'Fiscalización y transparencia en las empresas del Estado: ¿Es más sinónimo de mejor?' (2009) 71 *Revista de Derecho Público* (U. de Chile) 220.

²⁰⁶ José Luis Lara and Carolina Helfmann, 'La contribución de la jurisprudencia contralora al desarrollo y delimitación de los principios de la contratación administrativa', *Contraloría General de la República. 85 años de vida institucional (1927-2012)* (2012); Claudio Moraga, 'La Contraloría General de la República y la contratación administrativa' (2013) 78 *Revista de Derecho Público* (U. de Chile) 79.

²⁰⁷ Bell, *French Legal Cultures* (n 11) 156.

of precedents ‘to secure a proper and decent standard of behaviour in the French administration’.²⁰⁸ As Edley put it, the *Conseil d’Etat* has developed ‘extrastatutory doctrines of quasi-constitutional administrative law’.²⁰⁹

Policy Areas	2010	2011	2012	2013	2014
Civil service issues	5802	7087	6335	7679	7494
Administrative organisation and powers	1420	1914	2346	2602	2680
Public employment and social security	2055	2196	1542	1821	1970
CGR powers	1302	1078	1282	1348	1466
Public works, housing, and urban planning	759	759	708	732	898
Economic, financial, and tariff issues	302	626	343	309	301
Public property and land	193	195	223	320	357
Budget and accounting regulations	95	122	106	101	135
Access to information	127	65	53	68	39
Other issues	2195	1809	1479	1449	1601
Total	16260	17862	16429	18442	18955

Table 1: Legal Opinions by Policy Areas²¹⁰

Unlike the Chilean judiciary, the Comptroller-General has a strong doctrine of precedents.²¹¹ Based on a narrow reading of the Chilean Civil Code, the courts usually maintain that their rulings apply only to the case under consideration. Judicial decisions thus do not have general application, and courts in their reasoning do not abundantly cite them. This implies that it is not difficult to find contradictory decisions within the same court. The Comptroller-General, in contrast, usually makes constant and profuse references to its previous decisions on the same issue. It also declares explicitly when a criterion has changed. This practice is based on a reading of the office’s organic law, as

²⁰⁸ Hamson (n 9) 126–7; Edley (n 10) 242.

²⁰⁹ Edley (n 10) 242.

²¹⁰ Source: Comptroller-General Annual Reports

²¹¹ Urbano Marín, ‘La jurisprudencia administrativa de la Contraloría General y su relación con la de los tribunales y de otros organismos estatales’, *Contraloría General de la República: 85 Años de Vida Institucional* (Contraloría General de la República 2012); Gastón Astorquiza, ‘A propósito de la Contraloría General de la República y de su quehacer interpretativo del ordenamiento jurídico. Criterios’ in Contraloría General de la República (ed), *La Contraloría General de la República y el estado de derecho. 75 años de vida institucional (1927-2002)* (2nd edn, Contraloría General de la República 2012).

Article 6 states that only its decisions could be invoked as binding administrative precedents. For the purpose of keeping its precedents up to date, it administers an enormous database containing its previous decisions on a range of topics.²¹² As a result, practitioners usually consult the office's database in order to anticipate the Comptroller-General's and administrative agencies' action.

C. Access

As for access, Organic Law Article 5[3] provides a general clause that allows for intervention by public and private parties. It stipulates that the Comptroller-General will issue 'interpretive statements' (*dictámenes*) upon the request of affected parties, heads of public services, or any other authorities. A well-established reading of this regulation is that both public agencies and private parties can ask the Comptroller-General to issue statements whereby it provides authoritative interpretations of administrative legality. Also, the office usually issues statements about the legality of administrative decisions if it detects an illegality. In these cases, it intervenes upon its own initiative.²¹³

This interpretive power has become increasingly important in the last few decades because it further allows private avenues to challenge administrative decisions. Thus, while ex-ante legality review is conducted mainly through a procedure with limited private party participation, the exercise of this interpretative power enables private individuals to voice grievances and complaints against the administration.²¹⁴ For instance, as Table 2 shows, between 2007 and 2014 over 70% of the cases involving interpretative powers were initiated by petitions from private parties or public employees.

Petitioner	2007	2008	2009	2010	2011	2012	2013	2014
National Congress	186	227	220	146	161	136	137	98
Jurisdictional bodies or collaborators	232	369	457	242	113	108	96	148

²¹² The origin of the use of precedents in the office is essentially bureaucratic rather than judicial. Former Comptroller-General Enrique Silva Cimma reports that as a result of internal bureaucratic needs, a crucial device for the institution's doctrine of precedents was created in the 1950s. Roberto Benfeld, a European immigrant, developed an inventory of the legal decisions adopted by the office and cross-references in order to avoid contradictions that were hitherto occurring, since no such system existed. Until then, it was impossible to know what the body had decided on a particular issue. See Enrique Silva Cimma, *Memorias privadas de un hombre público* (Editorial Andrés Bello 2000) 119; see also Marín (n 30) 149.

²¹³ For a critical discussion of cases involving municipalities, see Samuel Tschorne, 'Comentario de la jurisprudencia del año 2004: Derecho administrativo' (2005) 2 *Revista de Derecho* (Universidad Adolfo Ibáñez) 844, 844–61.

²¹⁴ Bermúdez (n 170) 403ff.

Ministries, public services, universities, and state companies	1068	1274	1747	1746	2160	1788	1949	2117
Municipalities and mayors	1277	1497	1451	1116	1446	1351	1528	1807
		1661	1872	1043	1106		1078	1065
Private parties and public employees	7755	6	1	5	0	9806	8	6
Comptroller-General (internal requests)	552	855	551	228	120	46	42	62
	1107	2083	2314	1391	1506	1323	1454	1488
Total	0	8	7	3	0	5	1	8

Table 2: Types of Petitioners²¹⁵

Private access to the Comptroller-General's remedies through this procedure is not only a matter of fact, but also a matter of law.²¹⁶ Since 1974 the Comptroller-General has accepted jurisdiction to intervene if the request is based upon a previous refusal or a delayed response by an administrative agency.²¹⁷ In other words, the affected party first has to seek relief before the primary decision-maker, and only subsequently before the Comptroller-General. Of course, this criterion echoes the rule of the 'prior decision' in French administrative law.²¹⁸ Today's access, however, is even greater. In March 2013, Comptroller Mendoza issued a new statement determining the rules governing standing to request an interpretive opinion from the Comptroller-General.²¹⁹ According to the new scheme, government bodies can request the office's legal opinions only in respect to matters that fall under their jurisdiction or that have a direct impact on their powers. Moreover, they must previously submit a legal report drafted by their internal advisors and clearly and precisely state their request. Private parties and administrative officers, in their personal capacity, on the other hand, can only request legal opinions in respect to affairs in which they have rights or specific interests, either individual or collective, at stake. Although this represents a narrow view of locus standi, it entails the abandonment of the need for a previous complaint against the administration in order to lodge a request with the Comptroller-General. Moreover, the new regulation gives discretion to the institution to issue a legal opinion – when the nature and the circumstances of the case

²¹⁵ Source: Comptroller-General Annual Reports.

²¹⁶ For a narrow approach to direct private access, see Marín (n 211) 150–1. He argues that, unlike public bodies, private parties cannot file abstract inquiries to the office, but can file complaints in case of an adverse decision. Civil servants in turn can complain by invoking Article 154 Law 18834.

²¹⁷ Ruling 24841 (1974). A contemporary application of the same criteria can be found in ruling 61598 (2011).

²¹⁸ Brown and Bell (n 171) 165–6.

²¹⁹ Ruling 24143 (2015).

call for it – despite the failure of the complainant to meet the previously mentioned conditions. Hence, this last provision opens up the possibility for public interest standing before the office.

D. Legal authority and limits

Compliance with the Comptroller-General's rulings is mandatory for administrative agencies. They are not mere guidance or advisory opinions. Indeed, Article 9 of the Organic Law states that the Comptroller-General's 'interpretive opinions are binding to the respective officers, in the case or cases they refer on'. Also, Article 19 states that lawyers, and in-house counsel in every department of the public administration or in institutions under the oversight of the Comptroller-General, that do not represent the government in courts will be subjected to the technical supervision of the office, whose jurisprudence and resolutions must be observed. Disobedience of the legal interpretation issued by the office may result in disciplinary or even criminal proceedings.²²⁰ In other words, they cannot be enforced directly, but through disciplinary proceedings.²²¹

In practical terms, the Comptroller-General's statements consist of clarifications of legal provisions. According to the office's doctrine, these rulings merely declare what is already implicit in the law. As they are mere interpretations, they do not change the law.²²² As a result, it has been argued that these interpretations have retroactive effect. In other words, they merely declare the proper interpretation that the statute has possessed ever since its enactment.²²³ Nevertheless, the office can quite flexibly reconsider its own interpretive opinions.²²⁴ Thus, in contrast to the judiciary, the principle of *res iudicata* does not apply the interpretations issued by the Office of the Comptroller-General. As a commentator put it in 1963, the office has the duty to actively seek the right interpretation

²²⁰ Cordero, 'La jurisprudencia administrativa en perspectiva: Entre legislador positivo y juez activista' (n 176) 170. It has been argued that this mandatory effect is narrower than what is usually asserted by the office. See Eduardo Aldunate, 'La evolución de la función de control de la Contraloría General de la República' (2005) 26 Revista de Derecho (Pontificia U. Católica de Valparaíso).

²²¹ Marín (n 211) 153.

²²² Luis Cordero, 'Nulidad y dictaminación de Contraloría. Nuevas formas de declaración de ilegalidad. Comentario a las sentencias del caso CMPC' (2013) Anuario de Derecho Público UDP 256, 264–5.

²²³ Julio Pallavicini, 'Control de constitucionalidad de la Contraloría General de la República' (2010) 72 Revista de Derecho Público (U. de Chile) 108, 127; Iván Aróstica, 'Notas sobre los dictámenes de la Contraloría General de la República' (1989) XX Jornadas de derecho público (U de Valparaíso) 531, 541.

²²⁴ However, Soto-Kloss has adopted the extreme position that Comptroller-General cannot depart from its prior opinions. See Eduardo Soto-Kloss, 'Acerca de la obligatoriedad de los precedentes en la actividad administrativa del estado' (1999) 26 Revista Chilena de Derecho 399.

of the law and address reconsideration petitions filed by affected parties because ‘it is not possible to persist in error if subsequently one becomes fully aware of it’.²²⁵ To avoid harming legitimate expectations, the office has recently developed a doctrine according to which its reconsiderations only apply prospectively.

The Organic Law states an important limit to the otherwise very extensive powers of the Comptroller-General. Article 6.3 states that the office shall neither intervene nor report on issues that either by their nature are litigious in character or are subjected to the jurisdiction of the courts of justice. These issues, the provision adds, fall within the remit of the Council of Defence of the State, the agency in charge of the legal representation of the treasury before the courts. According to the traditional interpretation, this provision sets the boundaries within which the Comptroller-General office can act. Beyond that, it would be interfering in the other branches’ remit.²²⁶ The boundaries between the courts and the Comptroller-General will be discussed in detail in chapter 8.

VI. CONCLUSION

This chapter has provided an overview of the structure, functions, and powers of the Office of the Comptroller-General. I will highlight the main points that have emerged in my account of the office. First, we have seen that the institution is governed by rigid legal arrangements – difficult to modify without a high degree of political and inter-institutional consensus. This has also entailed the survival of old-fashioned legal structures with little room for adjustment to new circumstances. Secondly, the institution enjoys a high degree of independence from the other branches of government. Although a component of the executive branch, it is conceived as autonomous from the President of the Republic. This independence is reflected in the appointment, tenure, and everyday operation of the institution. The Comptroller-General is equally independent of the judiciary and Congress. Its constitutional status has prompted some commentators to regard it as a fourth branch of government within the Chilean political system. Internally, the office displays a hierarchical structure, concentrating power in the head of the office. Yet a large bureaucracy works within the institution. For historical and functional reasons, some departments possess a greater reputation. Among these, I have mentioned the Legal

²²⁵ Ruling 62927 (1963) cited by Marín (n 211) 153.

²²⁶ Enrique Silva Cimma, *Derecho administrativo chileno y comparado. El control público* (Editorial Jurídica de Chile 1995) 172.

Department and the Infrastructure and Regulation Department. They illustrate the weight of legal functions in the institution and the specialisation and expertise of its units.

Thirdly, the Comptroller-General can be described as a multi-tasking institution. It performs financial and legal accountability functions, and its role as a financial oversight body is a feature shared with comparable organisations elsewhere. What is distinctive about the Comptroller-General is its legal accountability role. It intervenes in reviewing major government rules and other administrative decisions before their promulgation, wielding a remarkable veto power. To avoid the risk of administrative deadlock, under certain conditions, the executive branch can override adverse Comptroller-General determinations. The institution also performs adjudicatory functions, acting as an arbiter in disputes among public bodies or between them and private parties. This dimension of the office has been developed by interpreting its ambiguous organic legislation with the view of broadening access to the limited forms of administrative justice existing in Chile.

In brief, the Office of the Comptroller-General has developed as a hybrid institution that has adapted to demands for legality in a context of dysfunctional administrative justice arrangements. The body has operated in order to serve distinctive legal values such as consistency, rule interpretation, impartiality, publicity, and access to aggrieved parties, among others. Its unplanned growth has given the office some distinctive organisational and functional features that make it an institutional creature worth of closer inspection. Such an inspection will be carried out in the rest of this thesis.

PART II HISTORICAL TRAJECTORY

CHAPTER 3. THE EMERGENCE OF THE CUSTODIAN OF EXECUTIVE LEGALITY, 1927-1970

Adopting a historical institutional perspective, this chapter examines the transformation of the Comptroller-General Office over half a century. The institution developed alongside the growth of the administrative state in Chile. Indeed, it emerged as a by-product of the development of modern, executive-centred forms of government. Yet it cannot be conceived as a mere tool of executive power. This chapter shows that the emergence of the Comptroller-General as a main actor in the Chilean political arrangement can only be explained as an unintended consequence of institutional competition between the executive branch and the legislature.

The chapter examines the functioning of the institution during a period in which Chile resumed relatively stable practices of government after some years of institutional turmoil. It is revealing that, although it began with an institutional crisis, seven uninterrupted presidential terms followed. Yet this does not mean that these were completely peaceful times for the institution. On occasion, the office was under strain and even came under outright attack from both Congress and the executive. This feature allows an examination of the office both in routine contexts and also in situations in which the political stakes were high.

The chapter is divided into two main sections. The first section examines the origins of the office in the context of political crisis that triggered the enactment of the Constitution of 1925 and the establishment of the Office of the Comptroller-General in 1927. This part covers approximately the first decade and a half of the institution. The second section explores the transformation of the Comptroller-General into a custodian of legality in partnership with Congress. This part focuses on the role of the institution from the 1940s to the 1960s, just before the socialist government of Salvador Allende in 1970, which will be the theme of the next chapter.

I. ORIGINS

A. The Constitution of 1925: strong executive and accountability gap

To understand the origins of the Office of the Comptroller-General, it is necessary to examine briefly the political background of its establishment. The institution was created against the backdrop of the transformation of the Chilean political regime from quasi-parliamentarian practices to a strong Presidential government. The main instrument for bringing about these new arrangements was the Constitution of 1925. Two features of the Constitution are particularly important for understanding the subsequent role of the Comptroller-General: the concentration of power in the executive branch and the lack of adequate mechanisms against abuse of executive power.

Indeed, two years before the establishment of the Comptroller-General in 1927, a new Constitution replaced the old Constitution of 1833, which had been in force for almost 100 years, since the beginning of the Republic. The new 1925 Constitution was brought about by a political and economic crisis that triggered profound institutional instability in the early 1920s. At the time, public opinion regarded the relationship between the President and Congress as unbalanced and reflecting an irregular form of parliamentarianism.²²⁷ As a commentator put it, ‘the crisis and the final breakdown of the oligarchic state in the early 1920s had produced a deep feeling of discontent among Chileans about the parliamentary system, the politicians, and the so-called aristocratic frond [sic]. Parliamentarianism was morally, intellectually, and politically completely discredited, according to most testimonies’.²²⁸ In addition, this dysfunctional political process was hampering the capacity of an already weak public administration to deliver the services that the new urban population was urgently demanding. The offices of the executive were completely ‘deranged’.²²⁹ Under the influence of party politics and the relentless involvement of Congress, ministries had no authority to correct faults, and they lacked the stability and continuity needed to carry out their tasks effectively.

²²⁷ Julio Heise, *Historia de Chile. El Período Parlamentario, 1961-1925. Fundamentos histórico-culturales del parlamentarismo chileno*, vol 1 (Editorial Andrés Bello 1974); Julio Heise, *Historia de Chile. El Período Parlamentario, 1961-1925. Democracia y gobierno representativo en el período parlamentario*, vol 2 (Editorial Andrés Bello 1982).

²²⁸ Patricio Silva, *In the Name of Reason: Technocrats and Politics in Chile* (Pennsylvania State Univ Press 2008) 55–6.

²²⁹ Carlos Estévez, *Reformas que la Constitución de 1925 introdujo a la de 1833* (Universidad de Chile 1942) 12.

Against this backdrop, in 1920 Arturo Alessandri was elected as President of the Republic, leading a broad platform representing popular and middle-class interests.²³⁰ His programme incorporated a number of policy innovations, such as social legislation, a Labour Code, income tax, and, generally, the strengthening of the executive branch. Alessandri also promised a constitutional reform that would put an end to oligarchic practices, shifting power from Congress to the Presidency.²³¹ In his annual addresses to Congress in 1921, 1922, and 1923, President Alessandri reiterated his intention of conferring more powers to the executive so that the interaction with Congress would be in ‘harmony’.²³²

After months of deep political emergency and two unsuccessful Military Juntas, Alessandri was called back to power in March 1925 with the mandate of implementing comprehensive institutional reforms including the enactment of a new Constitution, which was finally approved in a referendum on 30 August 1925.²³³ The main driving force behind the arrangements of the 1925 Constitution was the concentration of power in the executive branch and, consequently, the strengthening of the bureaucracy.²³⁴ In fact, reacting against a relatively lengthy period of irregular parliamentarianism that triggered factionalism and political paralysis, the new Constitution set out to restore presidential government.²³⁵ The executive branch was granted large legislative powers. The President was also confirmed as the head of government and as the ultimate chief of public administration. Any trace of parliamentarian power to tinker with ministerial appointments, and any leeway for incursion into executive territory, was removed from the Constitution.²³⁶

²³⁰ Julio Heise, *Historia constitucional de Chile* (3rd edn, Editorial Jurídica de Chile 1959) 144.

²³¹ Carlos Andrade, *Elementos de derecho constitucional chileno* (2nd edn, Editorial Jurídica de Chile 1971) 17–8.

²³² *ibid* 19.

²³³ Carlos Andrade, *Reforma de la Constitución Política de la República de Chile de 1980* (Editorial Jurídica de Chile 1991) 23.

²³⁴ Estévez (n 229) 4.

²³⁵ Faúndez, *Democratization, Development, and Legality* (n 43) 65ff.

²³⁶ Mario Bernaschina, *Manual de derecho constitucional*, vol 2 (Editorial Jurídica de Chile 1951) 34, 52–3; Estévez (n 229) 13.

As to mechanisms for checking executive abuse, the regulation of the judiciary deserves special mention.²³⁷ The Constitution of 1925, importantly, strengthened the judiciary, especially by reinforcing its independence from the executive in the appointment, monitoring, and removal of judges. The Constitution placed the Supreme Court over the rest of the courts and tribunals of the country as the highest court of the land. Yet the judiciary were endowed with no powers to scrutinise administrative action. Indeed, although the Supreme Court was granted a narrow power to declare that a legal provision was inapplicable in a particular case on constitutionality grounds, in general the judiciary were confined to criminal and civil disputes only. In other words, they were excluded from the more politicised area of judicial review of administrative action. Instead, the Constitution set out an exclusive administrative jurisdiction in charge of entertaining complaints against political or administrative authorities.²³⁸ Article 87 provided for the establishment of special administrative tribunals, in the following terms:

Article 87. Administrative Tribunals will be formed with permanent members, to settle claims brought against arbitrary acts or decisions of the political or administrative authorities and whose cognizance is not conferred on other tribunals by the Constitution or laws. Legislative Acts shall define their organisation and powers.

The decision to establish administrative tribunals in the 1925 Constitution can be understood as a political compromise between those supporting a stronger state and those opposing it and demanding legal safeguards for the protection of private interests. Indeed, the latter position was emphasised when Article 87 was discussed in the drafting committee. During the debate, the author of the motion asserted that private individuals and public servants needed more protection since executive power was increasing on a daily basis.²³⁹

However, the institutional position of these administrative tribunals remained unclear. It was uncertain whether they were envisaged as independent or subordinate to the Supreme Court. Under a particularly strong conception of the separation of powers principle, the more accepted interpretation was that ordinary courts were banned from interfering with

²³⁷ Faúndez, *Democratization, Development, and Legality* (n 43) ch 6; Hilbink (n 23).

²³⁸ José Guillermo Guerra, *La constitución de 1925* (Establecimientos Gráficos Balcells & co 1929) 462–5; Alejandro Silva Bascuñán, *Tratado de derecho constitucional. La Constitución de 1925*, vol 3(2) (Editorial Jurídica de Chile 1963) 423–31.

²³⁹ Rolando Pantoja, *La jurisdicción contencioso-administrativa: decisiones legislativas al año 2001* (Fundación Facultad de Derecho (Universidad de Chile) 2001) 40.

administrative decision-making unless legislative provisions explicitly empowered them. Therefore, without legislative implementation of Article 87, there was no other independent check on executive action.

Legislation implementing Article 87 was nonetheless never enacted, bringing about a situation in which ordinary courts held that they lacked jurisdiction for adjudicating disputes between private parties and administrative bodies. In fact, according to well-established judicial doctrine, tribunals available for adjudicating those public law disputes could only be created by special legislation. While Congress enacted a few statutes setting out specialised tribunals responsible for dealing with specific disputes between administration and private individuals, generally Article 87 became a dormant clause, bringing about a huge accountability gap in the Chilean system of control over administrative power that persisted throughout most of the twentieth century.²⁴⁰ Bearing this in mind, it is not at all surprising that, as we will see, the Office of the Comptroller-General would assume a role as a legality reviewer in order to fill the accountability gap left by the inactivity of the legislature.²⁴¹

B. Kemmerer's financial reforms²⁴²

The Comptroller-General Office was an Anglo-American legal transplant onto Latin American soil. Although it is true that the statute governing the office's organisation and procedures incorporated 'practices stretching back to the colonial period'²⁴³, the main influences on the initial design of the Chilean Comptroller appear to have come from the British Comptroller-Auditor General and its counterpart in the United States.²⁴⁴ In fact, the office was established after hearing advice from a mission of US advisers. They recommended a number of institutional reforms, including the creation of a new auditing

²⁴⁰ Faúndez, *Democratization, Development, and Legality* (n 43) 139ff; Junta de Gobierno (ed), *Los Tribunales Contenciosos Administrativos. Antecedentes para su Estudio* (Armada de Chile 1982).

²⁴¹ Faúndez, 'Chilean Constitutionalism Before Allende' (n 22).

²⁴² In this section I draw heavily on the excellent historical research done by Paul Drake. See Paul W Drake, *The Money Doctor in the Andes: The Kemmerer Missions, 1923-1933* (Duke University Press 1989).

²⁴³ *ibid* 103; Sonia Pinto, Luz María Méndez, and Sergio Vergara, *Antecedentes históricos de la Contraloría General de la República* (Contraloría General de la República 1977).

²⁴⁴ Enrique Correa, *La contraloría. El presupuesto del estado. Su control* (Talleres Gráficos San Rafael 1928) 8–20.

office that loosely followed the blueprint of the Budget and Accounting Act of 1921 that had established the General Accounting Office of the United States.²⁴⁵

Between 1923 and 1931, the Kemmerer Missions – composed of US economic consultants and headed by Professor Edwin Kemmerer from Princeton University – advised various Latin American governments in Colombia, Chile, Ecuador, Bolivia, and Peru on monetary, banking, and fiscal reform. The main motivation for these Andean countries to request Kemmerer’s financial advice was to improve their credit profile.

The Kemmerer Mission visited Chile between July and October 1925 in the middle of debates about the new Constitution. The economic crisis was the main reason for the Chilean government to request Kemmerer’s services. The reform proposals submitted to the government were specifically directed at both the banking and the fiscal systems. As the proposals put forward by the US economists received cross-party support, it is not surprising that most of the pieces of legislation were rapidly enacted without relevant amendments. The organic bill of the Comptroller-General, though, was the most remarkable exception. Kemmerer conceived the creation of the Comptroller-General from the perspective of financial auditing; the mission never actually viewed it as a legal accountability body. The explicit purpose pursued in the creation of the institution was to oversee the operation of the new arrangements put in place with respect to the budget process. Additionally, the Comptroller-General was expected to purge the untidy previous organisational setting in the field, in which ‘several uncoordinated institutions with overlapping functions and jurisdictions had exercised tardy and haphazard fiscal control’.²⁴⁶ Since introducing a single, powerful monitoring institution had been a policy under consideration even before Kemmerer arrived, the mission’s recommendations just added more force to previous governmental initiatives.²⁴⁷ The Comptroller-General was also expected to generate additional and more reliable financial information. This would optimise governmental policy-making and implementation, particularly in the economic

²⁴⁵ For overviews of the US office at the time, see Roger R Trask, *Defender of the Public Interest: The General Accounting Office, 1921-1966* (US General Accounting Office 1996); Frederick C Mosher, *The GAO: The Quest for Accountability in American Government* (Westview Press 1979) ch 2 & 3.

²⁴⁶ Drake (n 242) 103.

²⁴⁷ Enrique Silva Cimma, *Derecho Administrativo Chileno y Comparado. El Servicio Público* (Editorial Jurídica de Chile 1995) 291.

domain. Furthermore, data produced by the agency would facilitate access to foreign credit by the Chilean state.

The approval and setting in motion of the Office of the Comptroller-General was a particularly intricate business.²⁴⁸ In fact, ‘the comptroller, of all Kemmerer’s projects, took the longest to come into being’.²⁴⁹ The main reason for this seems to be the distrust with which the traditional bureaucracy looked at the newly proposed agency. Paul Drake indicates that ‘some commentators and government officials called for a return to the old fiscalizing system’.²⁵⁰ Anticipating criticism that would be voiced throughout the life of the institution, ‘critics complained that the comptroller was too powerful, complicated, and unwieldy’.²⁵¹ Walter Van Deusen, a North American advisor who helped to adapt the original draft to Chilean law, nicely illustrates the challenges faced by the initiative in a postal communication with Kemmerer:

The translation [of Kemmerer’s project] was so poor that some parts none of us could understand. I have heard that the poor translation was intentional to make more difficult the passage and putting into effect the law, as many of the government officials were very much opposed to the law. It would have been impossible to have passed the law through Congress. Fortunately the present government wants to clean house, and they can dictate this project under the authority of a law recently passed by Congress authorizing the consolidation of offices.²⁵²

It was only in February 1927, almost two years after the mission’s visit to Chile, that the first regulation of the Comptroller-General was enacted.²⁵³ This law was not directly enacted by the legislature, but it was established by presidential decree as delegated legislation. The decree followed Kemmerer’s proposal, though a commission headed by the superintendent of banks adapted it to national legislation.²⁵⁴ However, further refinement was needed. Thus, on Kemmerer’s advice, the government hired the services of US public accountant Thomas Lill with the mandate of collaborating in the practical activation of the institution. His work enabled the enactment of a second regulation in December 1927 that gave the agency a more stable legal framework.²⁵⁵ Finally, additional

²⁴⁸ Pinto, Méndez, and Vergara (n 240); Correa (n 241).

²⁴⁹ Drake (n 242) 103; Correa (n 244) 18.

²⁵⁰ Drake (n 242) 104.

²⁵¹ *ibid.*

²⁵² *ibid* 103-4; See also Pinto, Méndez, and Vergara (n 240) 5.

²⁵³ Decree with force of law 400bis (26 March 1927).

²⁵⁴ Correa (n 244) 18.

²⁵⁵ Decree with force of law 2960bis (30 December 1927).

regulations in 1932 and 1933 provided the office with its final legal structure for the decades to come.²⁵⁶

Therefore, by the beginning of the 1930s, the constitutional and economic arrangements of the country had changed remarkably, underpinning a new model of government dominated by the President. The executive had been notably strengthened in its interaction with Congress, and also possessed more effective tools to exercise leadership over the bureaucracy. As we will see, the Comptroller-General reflected new constitutional understandings.

C. The technocratic ethos

The Comptroller-General emerged as a by-product of the growth of the modern Chilean developmental state in the early decades of the twentieth century.²⁵⁷ The institution was established under the influence of a developmental and technocratic ethos. This period witnessed a genuine constitutional moment not only because it coincided with the enactment of a new Constitution, but also because of long-term institutional and cultural changes that were taking place at the time. One of the assumptions was that the state had a protective role that could only be fulfilled through administrative action and organisation.²⁵⁸ This entailed a new conception of the state and politics.

In the context of the new 1925 Constitution, the tendency to grant the executive – instead of the legislature or the judiciary – broad oversight powers over the bureaucracy is no surprise. A commentator writing at the time, for instance, argued in favour of setting out ex-ante and ex-post financial control over the bureaucracy in the Comptroller-General as a component of the executive branch.²⁵⁹ In his view, the executive branch represented capacity, intelligence, responsibility, and continuity of judgment. According to this observer, the legislature, on the contrary, embodied delay, incompetence, and irresponsibility. The task of the judiciary, in turn, was to adjudicate disputes between private parties and should be confined to that task. Courts' expertise rested in adjudicating

²⁵⁶ Decree Law 258 (26 July 1932) and Organic Decree 935 (24 April 1933).

²⁵⁷ Patricio Bernedo, 'La prosperidad económica bajo Carlos Ibáñez del Campo 1927-1929' (1985) 24 *Historia* 5.

²⁵⁸ Mario Góngora, *Ensayo histórico sobre la noción de estado en Chile en los siglos XIX y XX* (Editorial Universitaria 1986) 83, 88; Adolfo Ibáñez, 'Los ingenieros, el estado y la política en Chile. Del Ministerio de Fomento a la Corporación de Fomento 1927-1939' (1983) 18 *Historia* 83, 48–9.

²⁵⁹ Correa (n 244) 123–5.

disputes between conflicting private interests. Affairs concerning public funds, however, had to do with the public interest, and this was a type of task beyond judicial capacities.

This new technocratic, pro-executive ideology is well illustrated by the figure of the Chilean lawyer and politician Pablo Ramírez.²⁶⁰ He headed the Comptroller-General Office at its inception in 1927. Even more importantly, he directly influenced the appointment of his successors until the early 1950s. Ramírez's ideological commitments help explain the institutional culture of the office at the time. These commitments may be summarised by the project of 'building a strong and efficient state [by isolating] public administration completely from political activities in order to avoid its subordination to parliamentary debates and party interests'.²⁶¹

Ramírez studied law at Universidad de Chile, where he was a disciple of Professor Valentín Letelier – a leading public law scholar. Early on, he joined the more collectivist side of the centre-left Radical Party. In 1912, Ramírez was elected deputy, obtaining his first relevant political job in Congress. Being highly critical of the traditional bureaucracy of the parliamentary regime, he strongly promoted wide-ranging administrative reform.²⁶² In his opinion, the government 'lacked essential powers for ruling'.²⁶³ In 1925, taking advantage of his fluency in the English language, he began collaborating with the Kemmerer Mission. The same year, he started advising the Minister of Interior Carlos Ibáñez, who was convinced that a team of young, professional, middle class, apolitical technocrats was needed in order to implement Kemmerer's proposals and state reform at large.²⁶⁴ Aged 40, Pablo Ramírez was appointed as Minister of Finance, with the mandate of implementing a financial reorganisation and the overhauling of public administration. In this position, he reorganised numerous administrative services, introduced private management techniques, implemented new financial legislation, and set in motion the Comptroller-General.²⁶⁵ As can be seen, Ramírez's ideas echoed the 'scientific

²⁶⁰ For biographical details of Pablo Ramírez, the influential first Comptroller-General, see Patricio Silva, 'Pablo Ramírez: A Political Technocrat Avant-La-Lettre' in Miguel A Centeno and Patricio Silva (eds), *The Politics of Expertise in Latin America* (Macmillan 1998); Jaime Esponda, *Pablo Ramírez: el chileno desconocido* (RIL 2013).

²⁶¹ Silva, 'Pablo Ramírez: A Political Technocrat Avant-La-Lettre' (n 260) 54.

²⁶² Silva, *In the Name of Reason* (n 228) ch 2.

²⁶³ Esponda (n 260) 73.

²⁶⁴ *ibid* 117–8; Silva, *In the Name of Reason* (n 225) 73.

²⁶⁵ Esponda (n 260) 150.

management' approach to bureaucracy developed in the US in the late nineteenth and early twentieth centuries, which conceived public administration as 'a form of management analogous to private-sector management'.²⁶⁶

Pablo Ramírez's most important project was to mastermind the setting in motion of the Office of the Comptroller-General.²⁶⁷ His preference for technical personnel is reflected in the subsequent appointments in the institution, showing a marked preference for engineers over 'the lawyer element which previously monopolized [administrative] offices'.²⁶⁸ At the very outset of the institution, he served in the joint positions of Comptroller-General and Minister of Finance (between March and July 1927). As minister, he then recommended the appointment of Kenneth Page, the second officer heading the institution, and continued the installment of the office on the advice of Thomas Lille.²⁶⁹ Page, who was previously a broker in the Valparaíso stock exchange, occupied the office for only five months between July and December 1927. He resigned after entering into controversy with Minister Ramírez, and returned to the private sector.²⁷⁰ The third head of office to be appointed was Rodolfo Jaramillo, a young professional close to Ramírez.²⁷¹ An engineer specialising in railways and with ample experience in the public sector, he stayed in office for one year between 1928 and 1929. Afterwards, between January and November 1929, the office was headed by Edecio Torreblanca, who had also studied engineering, was a member of the Radical Party, and occupied a number of high posts in public administration.²⁷² In turn, he was succeeded by Miguel Solar, who had a long career in public bureaucracy before joining the Comptroller-General as head of office between 1929 and 1932.²⁷³ A lawyer was appointed after Solar's resignation in 1932. This was Gustavo Ibáñez, who had vast experience in the Ministry of Finance and headed the Comptroller-General Office for six and a half years between 1932 and 1938.²⁷⁴ Thus, in its initial years, the Comptroller's

²⁶⁶ Cane, *Controlling Administrative Power* (n 15) 451; Vile (n 108) ch 10.

²⁶⁷ Esponda (n 260) 154.

²⁶⁸ Silva, *In the Name of Reason* (n 228) 75.

²⁶⁹ Esponda (n 260) 187.

²⁷⁰ Virgilio Figueroa, *Diccionario Histórico Biográfico y Bibliográfico de Chile*, vols 4–5 (Balcells & Co 1931) 454.

²⁷¹ Virgilio Figueroa, *Diccionario Histórico Biográfico y Bibliográfico de Chile*, vol 3 (Balcells & Co 1931) 565–7.

²⁷² Figueroa (n 267) 910–2.

²⁷³ *ibid* 853–4.

²⁷⁴ Figueroa (n 271) 514.

Office was staffed by people who shared a technocratic mindset that contrasted with the generally more legalist socialisation of their counterparts in the judiciary.

Comptroller-General	Term in office	Background
Pablo Ramírez	26 March 1927 - 21 July 1927	Lawyer – Finance Minister
Kenneth Page	22 July 1927- 14 Dec 1927	Stock market broker
Rodolfo Jaramillo	5 Jan 1928 - 8 Jan 1929	Engineer – Civil servant
Edecio Torreblanca	9 Jan 1929 - 5 Nov 1929	Engineer – Civil servant
Miguel Solar	7 Nov 1929 - 22 Feb 1932	Civil servant
Gustavo Ibáñez	23 Feb 1932 - 31 Dec 1938	Lawyer – Civil servant
Agustín Vigorena	5 Jan 1939 - 18 Dec 1945	Lawyer - Law professor

Table 3: Heads of the Comptroller-General Office, 1927-1945

As the 1929 economic crisis shocked the country, Ramírez had to resign and was even impeached by Congress for political harassment against members of the Council of Defence of the State – the office representing the state before the judiciary. Thereafter, the influence of Ramírez over the Chilean bureaucracy somewhat faded. However, a decade later, when his close friend lawyer Agustín Vigorena was appointed as Comptroller-General in 1939, Ramírez resumed his position of influence.²⁷⁵ As we will see, in a critical event, Comptroller Vigorena was successfully impeached in 1945, and Pablo Ramírez again managed to influence the appointment of his successor. Indeed, former Court of Appeal Judge Humberto Mewes, who was brother-in-law to Ramírez and a fellow member of the Radical Party, was convinced by Ramírez to accept the position despite the fact that he was rather inexperienced in administrative law.²⁷⁶ Comptroller Mewes remained in the highest position within the office between February 1946 and June 1952, when he resigned after being threatened with impeachment by the opposition.²⁷⁷

In conclusion, the influence of the technocratic ideology of the time could be perceived during the initial years of the Comptroller-General from the late 1920s onwards. According to some historians, the foundations of a system of presidential statism were laid in this period.²⁷⁸ In other words, an entire administrative structure under the

²⁷⁵ Esponda (n 260) 320.

²⁷⁶ *ibid* 340; Silva Cimma, *Memorias privadas de un hombre público* (n 210) 147–8.

²⁷⁷ Armando De Ramón, *Miembros de los Poderes Ejecutivo, Legislativo y Judicial*, vol 3 (Ed Univ Católica de Chile 2003) 130; Silva Cimma, *Memorias privadas de un hombre público* (n 210).

²⁷⁸ Bernardino Bravo, *Régimen de gobierno y partidos políticos en Chile 1924-1973* (Editorial Jurídica de Chile 1986) 172–3.

immediate control of the President was created, concentrating power in the executive branch. Hence, technocracy and authoritarianism appeared to be well imprinted in the institutional culture of the organisation in its early years. This also helped the office to gain acceptance and credibility in the eyes of the executive branch, and arguably facilitated further expansion of its influence in the coming decades.

D. The formation of the key features of the office

After examining the context of the establishment of the office and the institutional and personal forces that drove its initial years, it is time now to look briefly at the manner in which legal regulations shaped the institution and its main procedures. I will focus here on three aspects: the appointment and removal of the head of the office and the rest of his personnel; the power of ex-ante legality review; and the interpretive power of the office. This section will focus mainly on regulations enacted between 1927 and 1932, since they provided the legal foundations of the office. These provisions were enacted during tumultuous times, and, predictably, they were the result of practically unfettered executive discretion. In other words, Congress did not participate in the making of any of them. As expected, there are no records of the debate surrounding these pieces of legislation and, additionally, the institutional context of their enactment explains their marked pro-executive bias. In line with my previous remarks, then, the picture that emerges is one of an institution that is conceived as a tool of presidential control of the bureaucracy.

1. Independence and recruitment

The office's independence, including its institutional location, appointment, tenure, and removal of its head, has been a crucial aspect in the design of Comptroller-General offices elsewhere. The regulation on which the Chilean office was modelled – the US Budget and Accounting Act of 1921 – has been described as 'the culmination of a movement to ensure that the nation's auditing officers were independent of executive control'.²⁷⁹ In the nineteenth century, independence was a contested aspect of the office's organisation because of its special quasi-judicial authority. This function required a 'complex balance among presidential power, congressional prerogative, and the need for agency

²⁷⁹ Trask (n 245) 1.

independence'.²⁸⁰ In other words, because of its legal accountability role, since its origins the institution has always had some sort of relative independence from presidential control.²⁸¹ Later, the 1921 Act also sparked controversy in this respect. During the legislative debate there was serious disagreement about the degree of independence granted to the office and its institutional location. Eventually, provisions were approved establishing that the President, with the advice and consent of the Senate, would appoint the head of the office; it was also set out that there would be a fixed term for the Comptroller General and a strict procedure – involving Congress intervention – for removing him from office.²⁸²

In contrast, under the original model, the Chilean Comptroller-General Office – contained in the Decrees of 1927 and 1928 – was not conceived as an independent institution. Rather, it had a position subordinate to the President. The rules concerning the appointment and removal of the Comptroller-General and his staff are instructive in this regard. They represent the highest level of presidential control over the office. At that point, the power to appoint the Comptroller-General rested exclusively with the President, and the regulations explicitly stated that he was directly accountable to the President for the due performance of his duties.²⁸³ Echoing a rule contained in the act governing its US counterpart,²⁸⁴ the 1927 decree nonetheless stated that the Comptroller-General 'shall be independent of every ministry and any other state departments'.²⁸⁵ Yet it is worth noting that this rule did not confer the office with independence from the President.²⁸⁶ Its purpose was merely that of shielding the office from the influences of other executive departments, and ensuring a direct, unmediated relation with the President. The status of the Comptroller-General was intended to be that of a ministry but sheltered against political instability.²⁸⁷ Therefore, the entire scheme reflected intense presidential control.

²⁸⁰ Jerry Mashaw, *Creating the Administrative Constitution: The Lost One Hundred Years of American Administrative Law* (Yale University Press 2012) 40–2.

²⁸¹ Lessig and Sunstein (n 72) 17–8; Cane, *Controlling Administrative Power* (n 15) 163.

²⁸² Trask (n 245) 41–2.

²⁸³ See Article 2 DFL 400bis; and Article 2 DFL 2960bis.

²⁸⁴ See Section 301.

²⁸⁵ Article 1.

²⁸⁶ See Art 12 a) Decree 7912, Concerning the Organisation of Secretaries of States, which stipulates that the Comptroller is directly dependent on the President of the Republic.

²⁸⁷ Correa (n 244) 157–61.

Presidential influence was not confined to the head of the office. Under the 1927 decree, the power to appoint, suspend, or remove any employee of the office was held by the head of the office, who had to give an account of its exercise to the President.²⁸⁸ The 1928 decree went even further. It provided that the Comptroller-General, the Deputy Comptroller, and the Inspector-General would be presidential appointees. Additionally, it was stated that the Comptroller had the power to appoint the rest of the staff ‘with the written approval of the President’.²⁸⁹ Clearly, this latter decree represented a legal framework meaning that less autonomy was conceded to the office.²⁹⁰ In fact, the 1932 decree returned to the original regulation, eliminating the requirement for written presidential approval to hire staff.²⁹¹

The decree of 1927 stayed silent on the removal of the Comptroller-General, entailing that the President could remove the officer at will. Later, evidencing loose American influence, the decree of 1928 provided that the Comptroller-General would remain in office for six years, and could be reappointed.²⁹² However, generally, the officer was to serve at the President’s discretion as in the previous arrangement. The 1932 regulation considerably altered the tenure and removal provisions. It repealed the fixed term for the officer and, furthermore, it innovated the shielding of the Comptroller-General with the protections against dismissal accorded to the justices of the higher courts of justice. Indeed, the 1932 decree indicated that ‘the Comptroller-General and the Deputy Comptroller-General shall enjoy the privileges and tenure that the laws ensure for the members of the Highest Courts of Justice’.²⁹³ This meant that these officers would be guaranteed to hold office during good behaviour and could be removed only through a judicial procedure initiated by presidential petition. In this way, this regulation weakened the control of the President over the office, and strengthened its independence.

²⁸⁸ Article 39.

²⁸⁹ Article 5.

²⁹⁰ See Correa (n 244) 160.

²⁹¹ Article 3.

²⁹² Article 2. Under the Budget and Accounting Act of 1921, the Comptroller-General would hold office for 15 years, and would not be eligible for reappointment. Moreover, the officer had to retire after reaching 70 years of age. Finally, a special removal procedure was regulated according to which Congress could remove the Comptroller in case of incapacity or bad behaviour (see section 303).

²⁹³ Article 5.

In short, despite the original divergence with its US counterpart, by 1932 the office exhibited a fair degree of independence, although it did have strong links with the President as he exclusively appointed the office-holder. However, the Comptroller-General had the power to appoint the rest of his staff without external influence. This officer would remain in office during good behaviour and could only be removed for cause through a judicial procedure. Therefore, like its American counterpart, these latter institutional arrangements started to recognise the quasi-judicial authority of the institution.

2. Ex-ante legality review

The most characteristic power of the modern Comptroller-General is its power to exercise mandatory ex-ante review of executive decision-making, together with the power of the President to override a negative ruling by the office. Although it exhibits some vestiges of nineteenth century regulations, the modern form of this power was predominantly shaped by piecemeal evolution during the years under study.

Certainly, some sort of ex-ante review procedure preceded the creation of the Comptroller-General.²⁹⁴ Indeed, three of the main legal statutes governing financial scrutiny of administrative activity in the nineteenth century contained a version of this mechanism.²⁹⁵ All these rules conferred the Comptroller's predecessors with the power of legality clearance, though it was confined to expenditure and appointment decrees. This checking device entailed the authority to paralyse (*'representar'*) the implementation of the administrative decision at stake. The President, in turn, had the counter-power to override the veto by insisting on his original decision. The reviewing body had also a duty to report to the legislature in case the President exercised his insistence power, in order to enable the assembly to hold the executive politically responsible for a potential infringement of the law. In contrast with the contemporary mechanism, however, the laws governing the insistence power did not require the President to be supported by his entire cabinet of ministries in order to override a veto.

²⁹⁴ Enrique Silva Cimma, *Apuntes de derecho administrativo*, vol 1 (Editorial Universitaria 1959) 179–81.

²⁹⁵ The Ordinance of the Superior Court of Accounts and High Accounting Office of 1839 conferred a comparable power to the High Accountant (Article 3, numbers 6 to 9). Again, a similar power was granted to the Court of Account as successor of the High Accountant in the Law of Organisation of the Offices of the Treasury of 1875 in Article 3 numbers 6 and 7. Lastly, the Organic Law of the Court of Account of 1888 contained a comparable power in Article 5 number 10.

Until 1891 the insistence power was scarcely used, if ever, probably because of the non-existence of real controversies between Presidents and overseers.²⁹⁶ From that point on, however, the Court of Accounts adopted an activist approach, going beyond control over payment decrees by expanding its examinations to every decree.²⁹⁷ This attitude caused a series of constitutional clashes with ministers and Congress as the Court was accused of invading the political sphere.²⁹⁸ Then, in 1920, Congress passed law 3620, which reformed the Court of Accounts. The law officialised previous practice establishing that the Court must control the legality of decrees in general – not only payments – and required the signature of the entire Cabinet to issue a decree of insistence.²⁹⁹

Unsurprisingly, the decree of 1927 that created the Comptroller-General departed from this traditional scheme, and reinforced the binding nature of the legality check on presidential decision-making. In fact, reflecting the influence of Kemmerer, this decree did not contain a mechanism for presidential override.³⁰⁰ As they wanted to reinforce the technical over the political aspects of government, the Kemmerer Mission advisers were against insistence.³⁰¹ Thus, this regulation merely stated that every payment required prior authorisation by the Comptroller-General, and that this had to take into account both legality and the justification of the expenditure.³⁰² Yet the regulation did not mention legality review, veto, insistence, or the involvement of Congress.

In October 1927, however, French public law professor Gastón Jeze visited Chile, and had a notable impact on the future regulation of the legality review procedure.³⁰³ His views diverged from Kemmerer's in key aspects. Among other things, he suggested that drafters make the Comptroller-General's veto a relative device instead of an absolute one. This entailed that the President could override the office's veto in exceptional circumstances. Jeze argued that a technical body would be realistically unable to go

²⁹⁶ Hildalgo Ceballos, *Estudio histórico y positivo de los decretos de insistencia* (Imprenta Roland 1946) ch 4.

²⁹⁷ *ibid* 39–40.

²⁹⁸ *ibid* 44–52.

²⁹⁹ *ibid* ch 6.

³⁰⁰ Correa (n 244) 167.

³⁰¹ *ibid* 167–8.

³⁰² Article 17 and 18.

³⁰³ Thomas R Lill, *Comparación de las opiniones expresadas por monsieur Gastón Jeze y el doctor Edwin Walter Kemmerer referentes a la Contraloría, contabilidad oficial y el presupuesto* (La Ilustración 1928).

against the presidential political power. As the absolute veto would end up eroding the overseer's public standing, this relative veto was actually a better tool for keeping the technical and political spheres clearly separated. As expected, these suggestions were welcomed by executive officers but were strongly opposed by Kemmerer's representatives.³⁰⁴

Reflecting some of Jeze's views, the decree of 1928 returned to the traditional model but with some remarkable variations.³⁰⁵ First, the scope of the legality review was broadened, encompassing not only payment decrees but also every sort of presidential decree.³⁰⁶ Of course, this was consistent with the solution arrived at in the 1920 law. Secondly, it expressly provided that the Comptroller-General had to check the constitutionality and legality of the decrees. Thirdly, by requiring the President to sign the insistence decision together with all his ministries, the law confined his self-defence power. In other words, the President had to show that she possessed enough political support to override the Comptroller's vetoes. Yet it would be wrong to deduce from these modifications an intention to tame the powers of the executive. In fact, they were complemented by changes that made the power of the Comptroller-General negligible. In order to reject a presidential decree, negative decisions had to be endorsed simultaneously by the Comptroller-General and the Deputy Comptroller-General, both of which were appointed and removed directly by the President. Thus, the veto power of the office was considerably weak. Moreover, the 1928 decree did not incorporate the engagement of Congress in case of use of the power of insistence by the President. It only demanded the office to register in its Annual Report to the President the cases in which the power was utilised.

The 1932 decree in turn kept the main features of the previous regulation. Apparently, it contained no radical changes.³⁰⁷ Nevertheless, as we have seen, this decree had enlarged the independence of the office from executive interference, so the institutional context against which this review power was now operating was different and actually somewhat reinforced its legal authority. By then, legality review consisted of a procedure conducted

³⁰⁴ *ibid* 15.

³⁰⁵ Correa (n 241) 167–8.

³⁰⁶ Article 8.

³⁰⁷ Article 8.

by a semi-independent institution encompassing all decrees, involving legality and constitutionality scrutiny, subject to presidential override, and entailing duties to report to Congress in the case of insistence.

In 1935, for the first time, impeachment procedures were initiated against ministries for unlawful use of their insistence powers.³⁰⁸ Although the impeachment was eventually unsuccessful, it reveals the importance of use of ‘pre-emptive insistence’ (*decretos nonatos*) at the time, as this was the indictment’s main ground. Pre-emptive insistence was a mechanism used by the executive branch to shield decrees from Comptroller-General review and thus accelerate administrative action. Aware of the probable legal objection of the office, the respective ministry sent the original decree together with an insistence decree. Thus, the Comptroller-General was ordered to uphold the executive action immediately without further scrutiny. More than 100 pre-emptive insistence decrees were enacted between 1933 and 1943, as the Comptroller-General supported the practice.³⁰⁹ Observers, however, criticised this pattern, depicting it as a subversion of the rule of law and the system of legality review.³¹⁰ In their view, the proper operation of the mechanism required a genuine disagreement over the legality of the decree. Therefore, the President was not allowed to act with awareness of the unlawfulness of his action.³¹¹ Soon afterwards, the Comptroller-General disallowed the use of pre-emptive insistence decrees and the practice ended. This shift signalled the transformation of the Comptroller-General from a *de facto* legal advisor to an independent legal overseer.

3. Interpretive power

Finally, another distinctive power of the Chilean Comptroller-General is its power to issue binding legal pronouncements interpreting the legislation governing the administrative process. In contrast to the previous features of the office examined, the

³⁰⁸ Ceballos (n 296) 78–83.

³⁰⁹ Leopoldo Macías, *Los decretos de insistencia* (Talleres Gráficos Simiente 1946) 55.

³¹⁰ See Ceballos (n 296) ch 9; Macías (n 309) 53–8; Silva Cimma, *Apuntes de derecho administrativo* (n 294) 188–9; Patricio Aylwin, *Manual de derecho administrativo. Parte general* (Editorial Jurídica de Chile 1952) 185–6; Patricio Aylwin, *Derecho administrativo*, vol 1 (Editorial Universitaria 1962) 65.

³¹¹ Pre-emptive insistence could be compared to ‘legislative preemptive override’ in the so-called ‘commonwealth model of constitutionalism’; see Gardbaum (n 184). While the Chilean literature focuses on alleged presidential illicit intention, Gardbaum has highlighted the defects of this mechanism in terms of lack of focus and insufficient political cost to be paid. For a similar approach to the pre-emptive insistence problem, see Atria (n 184) 332–3.

origin of this power does not rest in colonial times nor in the Kemmerer Mission plans, but in legal reforms passed in 1932 and complemented thereafter.

In the legislation of the nineteenth century, there is no clear precursor to this power. In the Ordinance of the Superior Court of Accounts and the High Accounting Office of 1839, we found an indication of a similar power in the hands of the High Accounting Office. It conferred on this official the power to ‘issue the reports that the Ministers of State and the High Courts of Justice may request’.³¹² But the scope of this power was considerably narrower than the contemporary. Certainly, it did not encompass pronouncements about the correct interpretation of legal rules governing administrative agencies. In fact, the provision mandated the High Accountant to consult the President of the Republic in the case of doubts about the ‘proper meaning to be given to laws, regulations, decrees and any other provisions connected with the accounts trials’.³¹³ Presidential interpretations of the law were binding on the High Accountant and not the other way around.

A slightly comparable power is found in the Organic Law of the Court of Accounts of 1888. This regulation stated that it was for the Court of Accounts to issue the reports requested by the President within its jurisdiction.³¹⁴ It also empowered the court to request the advocate general (*Fiscal*) to give legal opinions whenever appropriate.³¹⁵ Indeed, one of the most remarkable legal minds at the time, Advocate General Valentín Letelier, forged his reputation as a key figure in administrative law based on his legal opinions given to the Court of Accounts.³¹⁶ Nonetheless, despite its historical importance, this power is hardly equivalent to the modern broader interpretive power of the Comptroller-General.

As with the ex-ante legality review, the decree of 1927 did not include the power of the office to give legal opinions. The decree of 1928 nevertheless did rule on this matter in Article 7, providing that it was a duty of the Comptroller-General to issue legal opinions

³¹² Article 3.12.

³¹³ Article 3.17.

³¹⁴ Article 5 number 13.

³¹⁵ Article 8 number 4.

³¹⁶ See Letelier’s groundbreaking work, Valentín Letelier, *Dictámenes de Don Valentín Letelier: Fiscal Del Tribunal de Cuentas 1891-1918* (Eduardo Larraín and Díaz eds, La Ilustración 1923).

concerning budget issues whenever requested by administrative officers.³¹⁷ Thus, this interpretive power confined itself to financial and budgetary matters. It was not a power of general reach. Even though these legal opinions were binding on administrative officers, they could appeal against these rulings before the President through the respective minister.³¹⁸ This rule, consequently, again shows the presidential overtones of the organic decree of 1928.

The 1932 decree, finally, included the interpretive power of the Comptroller-General.³¹⁹ But this regulation expanded it beyond financial and budgetary matters, incorporating issues concerning ‘the organisation and functioning of public services’ and ‘the powers and duties of public employees’, among other matters. This was a crucial step towards the transformation of the office into a legal oversight institution. These provisions moreover recognised its powers to interact with state officers or private petitioners in order to request further information or issue orders. Similarly, the law empowered the Comptroller-General to give legal opinions on matters concerning civil service employees such as salaries, pensions, retirement, and so on if ‘doubts about the correct application of the corresponding statutes arise’. Thus, the power of the office to give binding legal interpretations of administrative legality began to adopt sharper features. Lastly, unlike the prior legislation, the 1932 decree established that the legal opinions of the Comptroller-General had not merely advisory character but were ‘mandatory for the corresponding officials, in the concrete case or cases to which they refer’. Furthermore, it is important to note that the appeal to the President in case of disagreement was eliminated, enlarging again the separation between the Comptroller-General Office and the Presidency.

II. TRANSFORMATION

During the 1940s, the place of the Comptroller-General within the Chilean accountability landscape was radically transformed. On the one hand, the office was entrenched in the Constitution in 1943. This granted it a unique status among the branches of government. On the other hand, in 1945 Congress removed Comptroller-General Vigorena by

³¹⁷ There is a slightly similar rule in the Budget and Accounting Act of 1921, section 312 b.

³¹⁸ Correa (n 19) 167. Correa claims that by the 1930s this power had not been used.

³¹⁹ Article 7.

impeachment for deficiencies in scrutiny of the presidential powers.³²⁰ As a result of this event, Congress signalled that ‘a more comprehensive scrutiny of the legality of government decrees’ was constitutionally required.³²¹ Under this new legal accountability model, the Comptroller-General may be conceptualised as an instrument of congressional influence over the bureaucracy. The main task of the office in qualitative terms was conceived of as holding the executive to account – especially in the exercise of its regulatory powers. As a result of this shift, by the 1960s the institution was seen as a fourth branch of government by political and legal observers.

Some contextual factors that characterised the Chilean political scene by the 1940s and 1950s should be borne in mind. First, despite the concentration of power in the executive branch brought about by the 1925 Constitution, tensions between Presidents and Congress persisted, which imposed a certain restraint on executive policy-making power.³²² Secondly, there was increasing demand by a growing middle class for ‘public activity in welfare, health care, education and government-owned enterprises’.³²³ As a result, this period witnessed a significant expansion in state bureaucracy. For instance, between 1925 and 1945, employment in the central administration almost doubled, from 33,877 to 59,645.³²⁴ Thirdly, mainstream political parties politically supported this transformation into a developmental state, especially the Radical Party, which advocated ‘welfare state interventionist’ policies.³²⁵ Finally, the role of courts at the time has been labelled as ‘conservative’, by which is meant that despite an ideology of apoliticism and an institutional disconnection from public law matters, judges adopted reactionary attitudes when called into action.³²⁶ In short, then, the period reveals an expanding state bureaucracy responding to growing social demands, but restrained by Congress and, to a lesser extent, by courts.

³²⁰ Faúndez, *Democratization, Development, and Legality* (n 43) 117.

³²¹ *ibid* 121.

³²² Brian Loveman, *Chile: The Legacy of Hispanic Capitalism* (3rd edn, Oxford University Press 2001) 196.

³²³ *ibid* 199–200.

³²⁴ Germán Urzúa and Ana María García, *Diagnóstico de la Burocracia Chilena, 1818-1969* (Editorial Jurídica de Chile 1971).

³²⁵ Yves Dezalay and Bryant G Garth, ‘Chile: Law and the Legitimation of Transitions - from the Patrimonial State to the International Neo-Liberal State’ (American Bar Foundation 1998) ABF Working paper 9709 13–6; Góngora (n 255) 122; Rodrigo Henríquez, *En ‘estado sólido’. Políticas y politización en la construcción estatal: Chile, 1920-1950* (Ediciones UC 2014) ch 3 & 4.

³²⁶ Hilbink (n 23) ch 2.

A. The constitutional amendment

A key event in the transformation of the Comptroller-General was the constitutional reform of 1943. It primarily aimed to reduce the powers of Congress in respect to public expenditure legislation, but incidentally enshrined the office into the Constitution.³²⁷ Being the first amendment introduced to the 1925 Constitution, it was discussed and approved in the final years of the Second World War, together with other pieces of legislation concerning economic emergency. Although it was introduced in Congress during the term of President Juan Antonio Ríos – a member of the Radical Party – its rationale long preceded his administration. Indeed, the idea of limiting the powers of the legislature regarding public expenditure can be traced back to the anti-legislature arguments supporting the Constitution of 1925. In particular, a comparable bill was introduced into the legislative process in 1934, but Congress rejected it in the final reading in 1941.³²⁸ On that occasion, the parties from the Left blocked what they viewed as dictatorial measures that debilitated the representative assembly in favour of the executive. Eventually, despite the rejection, the bill was reintroduced in Congress in 1942 by a group of senators with the support of President Ríos.

Behind this proposal lay a concern about the inorganic growth of bureaucracy and the underfunded rise of salaries and other economic benefits to certain groups.³²⁹ The assumption was that the legislative process was too prone to engaging in pork-barrel politics and waste, hence the powers of Congress in financial matters had to be reduced.³³⁰ There was also a concern about illegal expenditure by the executive through the use of the insistence mechanism. Therefore, the bill's objective was twofold. On the one hand, it was aimed at eliminating the power of Congress to introduce motions entailing expenditure. Only the executive was allowed to introduce bills triggering disbursement of monies. On the other hand, it was intended to block the use of the insistence mechanism – which allowed the President to override the Comptroller-General's vetoes – in relation to expenditure decrees. The predicament tackled by the reform was the practice of ordering payments without legal backing, and once the Comptroller-General vetoed it on legal grounds, then the President insisted on overriding the ruling. As a result, this gave

³²⁷ Law of Constitutional Reform 7727 (23 November 1943).

³²⁸ Bernaschina (n 233) 61–2.

³²⁹ 'Chilean Senate, 14th Ordinary Session' (1942) 568.

³³⁰ 'Chilean Senate, 16th Ordinary Session' (1942) 618.

rise to executive expenditure that had not been authorised by Congress. Expectedly, the usual excuse for this was that urgent, extraordinary circumstances required the executive to respond even without explicit prior legal permission. In reaction to this scenario, the bill abolished executive insistence in relation with expenditure decrees, but permitted extraordinary expenditure for a maximum of 2% of the authorised annual budget in case of emergency.

The entrenchment of the Comptroller-General into the Constitution was an ancillary issue to these arrangements. In fact, the original bill of 1934 contained no provision about the office. The idea of entrenching this accountability institution into the Constitution was suggested by senators during the legislative process that concluded without success in 1941, but the proposal remained in the 1942 bill. Thus, originally the constitutionalisation of the office was a parliamentary proposal.

The idea of curtailing Congress's powers came up against robust criticism. The Socialist Party, for instance, criticised the motion, arguing that Congress ought not relinquish the tools it had to advance social justice or defend the interests of the salaried class, adding that the bill was a step towards legal dictatorship.³³¹ Similarly, the Communist Party claimed that the definition of expenditure and finance were essential tasks of Congress. Liberal, Conservative, and far-right representatives, on the contrary, supported the bill, stressing the need for a strong executive that would be able to resist pressure from the political parties.³³² Despite the heated debate, there was agreement on the fact that excessive use had been made of the insistence mechanism by prior administrations. Yet government officials repeatedly claimed that President Ríos had pledged not to use his override power.³³³ Eventually, the majority considered that the restriction on the use of insistence in respect to expenditure decrees struck the right balance between the limitations imposed on Congress and the powers of the executive.

The final text of the amendment contained just two references to the Comptroller-General. First, the office and its main functions were enshrined in Article 21 of the

³³¹ 'Chilean Senate, 29th Ordinary Session' (1942).

³³² See 'Chamber of Deputies, 44th Ordinary Session' (1943) 1835.

³³³ See for instance the speech of the Minister of Justice at 'Chamber of Deputies, 26th Ordinary Session' (1943) 1014.

Constitution. Secondly, it was established that the Chamber of Deputies had the power to impeach the Comptroller-General in the same terms as to the judges of the Higher Courts of Justice, that is, in case of manifest dereliction of duties. The deputies introduced the latter aspect of the amendment during the legislative discussion, as it was not included in the original bill.³³⁴ This was one of the few ideas of the deputies that were ratified by the Senate. In the opinion of a Radical Party senator, the power to impeach the Comptroller-General was the logical implication of enshrining the office as a constitutional organ.³³⁵

Two other proposals in relation to the Comptroller-General were debated, but neither of them achieved enough support. The first motion was aimed at explicitly introducing within the functions of the office the task of carrying out legality review of the acts of the executive branch.³³⁶ The reasons for the rejection of that motion remain vague. While some regarded it as unnecessary or futile as it was of the essence of the Comptroller-General to rule on the legality or illegality of executive decrees, others feared that this rule might transform the institution into a parallel Supreme Court.³³⁷ The second motion was intended to block the presidential power to insist on overriding a Comptroller decision in the case of decrees exhibiting manifest illegalities. This was probably viewed as an excessive constraint on executive action. The Conservative deputy Manuel Díez presented both pro-Comptroller proposals, but they were rejected without detailed deliberation.³³⁸

There was no extensive deliberation on the core provisions for the Comptroller-General. The argument given in support of its introduction into the Constitution was simply that the office did not exist at the time of the 1925 Constitution, and therefore an update of the constitutionally entrenched organs was needed. It was also mentioned that the inorganic growth of bureaucracy had given rise to gaps in the control of some newly created agencies, and therefore a broader remit for the operation of the office as a legal regulator of the administrative process and as a Court of Accounts was desirable.³³⁹

³³⁴ 'Chamber of Deputies, 36th Ordinary Session' (1943) 1616.

³³⁵ 'Chilean Senate, 56th Ordinary Session' (1943) 2151.

³³⁶ 'Chamber of Deputies, 40th Ordinary Session' (1943) 711.

³³⁷ 'Chamber of Deputies, 48th Ordinary Session' (1943) 1964.

³³⁸ *ibid.*

³³⁹ 'Chilean Senate, 16th Ordinary Session' (n 330) 618.

Although no further substantive reasons were provided, it can be argued that political actors assumed that, in practice, the Comptroller-General had begun to play a role of constitutional importance, and that this function had to be protected by constitutional provisions. Also, there was probably another consideration in the mind of policy-makers at the time. As the constitutional amendment entailed strengthening the powers for economic regulation of the executive, a stronger safeguard in case of abuse was needed. This in turn required fortifying the independence of the Comptroller-General, as it was the only institution with oversight powers over the administrative process.

B. Removal by impeachment

The impeachment of Comptroller Agustín Vigorena marked the demise of the technocratic model of the Comptroller-General, according to which it was a collaborator with rather than an external constraint on the executive.³⁴⁰ A prestigious public law scholar and office-holder since 1939, Vigorena was convicted and removed from office in an impeachment trial in 1945, just two years after the constitutional reform. The Senate passed its judgment by 23 votes against 21. As the government had no control of the Senate, the decision was divided across political lines, with a Conservative majority supporting the impeachment. In the Senate the case was discussed over ten sessions that took place in December 1945. This has been the only case of a Comptroller-General being removed by impeachment proceedings in the office's history.

The deputies leading the impeachment before the Senate were members of the Liberal and the Conservative Parties.³⁴¹ They opened their indictment by invoking the principles of democracy and of separation of powers. Although conceding that the President had legitimate regulatory powers, they insisted that they had to be exercised within legal boundaries. The precise function of the Comptroller-General was to ensure compliance with legality, as its organic law instructed the review of constitutionality and legality of presidential decrees. The accusers interpreted the 1943 reform as making the office-holder directly accountable to Congress. They asserted that even though the importance and functions of this oversight body were expanded, control over it was conferred to the

³⁴⁰ See Faúndez, *Democratization, Development, and Legality* (n 43) 121.

³⁴¹ 'Chilean Senate, 14th Extraordinary Session' (1945).

Chamber of Deputies as it could impeach the office-holder for manifest dereliction of duties.

On the whole, the impeachment was based on accusations of passivity in the review of executive activity on the economic sphere.³⁴² According to the indictment, Vigorena had frequently upheld presidential decrees that regulated matters reserved by the Constitution for congressional laws. For instance, without prior legislative authorisation, the President created administrative departments; regulated the internal arrangements of some other bodies; and expanded the powers and autonomy of the commission in charge of internal commerce and of setting the prices of basic goods. Furthermore, the accusers held that the President had unlawfully imposed taxes and duties on private enterprises. They argued that some other measures promulgated under international war commitments infringed property rights and economic liberties protected by the Constitution. Besides, the President exceeded legislative delegations for regulating some affairs by decrees with force of law. He also established mediation mechanisms in case of labour conflicts without prior legal delegation. Instead of vetoing such unconstitutional acts, the Comptroller-General endorsed them, bringing legitimacy to unlawful executive action, according to the accusers. Furthermore, breaching his duties, Comptroller Vigorena had upheld decrees of economic emergency without verifying whether the factual conditions for the exercise of such power were met. Moreover, he endorsed decrees that exceeded the limit of 2% of the yearly budget required by the Constitution. Lastly, Vigorena was accused of irregularities in the management of his own office.

The Comptroller-General's response was quite detailed.³⁴³ He explained why he had not blocked presidential decisions in the cases raised by the accusers. This required him to expound on rather complicated statutory schemes that gave the executive sweeping administrative powers. Indeed, at times, he suggested that the accusers lacked proper understanding of regulatory arrangements that empowered the executive branch to implement policy expeditiously. Comptroller Vigorena thus insinuated that the impeachment was grounded on oversimplifications based on archaic private law conceptual categories and understandings. Later, he insisted on the different role of the

³⁴² *ibid* 470–88.

³⁴³ 'Chilean Senate, 15th Extraordinary Session' (1945).

law in private and public. In his view, while the former privileged stability, the latter favoured flexibility. Hence, in administrative law, statutory provisions were inevitably complemented by administrative regulations that could be easily adapted to social necessity and changing reality. According to Vigorena, the role of the Comptroller-General in this process was crucial, and would be severely undermined if Congress second-guessed its legal judgments.³⁴⁴

Two other arguments deserve closer inspection. In relation to economic emergency decrees, Vigorena claimed that his office was not in a position to scrutinise matters of fact such as the concurrence of urgent circumstances³⁴⁵ or the existence of strikes aimed at subverting public order.³⁴⁶ On the other hand, he fiercely argued that legality review of administrative action was his exclusive function, just like the judiciary's function was to adjudicate private disputes. Therefore, according to Vigorena, it was illegitimate for Congress to scrutinise the content of his decisions. In fact, he claimed that '[j]udges in the case of disputes between parties, and the Comptroller-General in the case of application of administrative legality are absolutely sovereign, hence both are unimpeachable in this regard'.³⁴⁷ He cautioned that it was dangerous for Congress to declare that a particular interpretation of the law entailed dereliction of duties, because if that were the case, judges and the Comptroller-General would have to ascertain the opinion of the majority of Congress before deciding what was legal or illegal.³⁴⁸ In other words, Vigorena was clearly pointing to the infringement of the principle of separation of powers.

Furthermore, Vigorena maintained that the indictment was a threat to the independence of his office since it risked becoming a mere echo chamber for other branches' conceptions of legality.³⁴⁹ Contrasting the technical nature of the functions of the office and the political nature of the legislature, Vigorena maintained that what was at stake was whether the legality review function of the Comptroller-General was subordinated to the

³⁴⁴ 'Chilean Senate, 22th Extraordinary Session' (1945) 727–8.

³⁴⁵ 'Chilean Senate, 16th Extraordinary Session' (1945) 537.

³⁴⁶ 'Chilean Senate, 21th Extraordinary Session' (1945) 694.

³⁴⁷ 'Chilean Senate, 16th Extraordinary Session' (n 345) 537.

³⁴⁸ *ibid* 541.

³⁴⁹ *ibid* 543.

‘subsequent political appreciation of a majority of Congress’.³⁵⁰ In his view, for the concurrence of ‘manifest dereliction of duties’, a factual disciplinary infraction rather than disagreement in legal interpretation had to be found. In sum, in Vigorena’s opinion, the impeachment would lead to the dominance without the counterweight of one branch –the legislature – upon the others – the Comptroller-General, the judiciary, and the executive.³⁵¹

The latter part of Vigorena’s defence sparked a bitter reaction in the accusers. Deputy Santa Cruz, for instance, argued that the Comptroller-General could not be equated to a judge. Moreover, he remarked that even judges were impeachable for wrong interpretations of the law.³⁵² After recalling that the 1943 constitutional reform made the institution accountable to Congress, Santa Cruz asserted that Vigorena’s thesis amounted to delusions of grandeur. He said that it was unacceptable that the Comptroller-General had the last word in matters of legal or constitutional interpretation. The deputy went on to claim that it could not be right that there was no institution that could render the Comptroller-General accountable for his indolent attitude to reviewing administrative decrees.³⁵³ The accusers also claimed that Vigorena represented a weak safeguard against abuse of executive power. In their view, Vigorena illegitimately excused himself by invoking social necessity and changing circumstances for disregarding the law, and this was intolerable in a democratic republic.³⁵⁴

On the Senate’s floor, the senators reiterated the foregoing arguments for and against the impeachment.³⁵⁵ The majority argued that Vigorena had shown complicity with executive abuse of power. A minority of moderate members claimed that the Senate should not second-guess the legal interpretation carried out by the Comptroller-General. More radical members of Congress in turn asserted that the impeachment masqueraded as a political attack on government by reactionary forces. Eventually, the vote went against Vigorena, who was removed from office. The long-term consequences of the

³⁵⁰ *ibid* 544.

³⁵¹ *ibid* 547–50.

³⁵² ‘Chilean Senate, 18th Extraordinary Session’ (1945) 618–9.

³⁵³ *ibid* 621.

³⁵⁴ ‘Chilean Senate, 22th Extraordinary Session’ (n 344) 730–5.

³⁵⁵ ‘Chilean Senate, 23th Extraordinary Session’ (1945) 748–70.

impeachment were even more important, however, since they dramatically changed the relationship between the Comptroller-General Office, the President, and Congress.

C. A new conception of the office

Two pieces of legislation enacted in 1950 and 1962, respectively, stand out in the transformation of the Comptroller-General. Law 9687 of 1950 crystallised changes in attitudes to the office by increasing congressional influence over it, whereas Law 14832 of 1962 attempted to reduce the burden that the office was imposing on administrative action but without diminishing its role within the administrative process.

1. Increasing congressional influence

Law 9687 of 1950 strengthened the Comptroller-General to a large extent. Passed by Radical Party president Gabriel González, this law was originally merely intended to set a new remuneration scheme for the staff of the office,³⁵⁶ but it eventually encompassed further aspects that loosened the presidential bearings on the office. Moreover, the legislative debate spelt out new shared understandings about the institution's role.

To begin with, this law provided that the appointment of the Comptroller-General by the President required Senate endorsement.³⁵⁷ Not contained in the original bill, this was a remarkable change in the appointment procedure. Deputy Hector Correa (Conservative Party) proposed this modification during the legislative process and argued for it in the following terms:

[The aim is] that the Comptroller be a personality that can gain broad agreement in order to be appointed... The function of the Comptroller-General is essential for the good operation of our institutions and is complementary to the action of Congress, since its purpose is to ensure that in practice the executive complies with the laws enacted by parliament. Therefore, it is just logic that both the executive and Congress give consent to the appointment of the Comptroller-General.³⁵⁸

Against this motion, some Radical Party members unsuccessfully complained that the intervention of the Senate might politicise the appointment procedure, and that it might

³⁵⁶ 'Chamber of Deputies, 27th Ordinary Session' (1950) 1196.

³⁵⁷ Article 2 of law 9687.

³⁵⁸ 'Chamber of Deputies, 27th Ordinary Session' (n 356) 1230.

inhibit the Comptroller-General from acting against the will of the majority and, in turn, inhibit the Senate from impeaching the office-holder in case of abuse.³⁵⁹

The law of 1950 also introduced some elements that provided Congress with leverage against both the executive and the Comptroller-General itself in the legality review process. The law imposed an additional duty to report to Congress immediately after the issuance of an insistence decree, providing that the Comptroller-General should ‘give an account to the National Congress and the President of the Republic of these decrees within 30 days from their issuance, submitting a full copy of them and the supporting documentation’.³⁶⁰ Therefore, in contrast to previous regulation that required the office to report during the following year, according to the new law Congress had to be informed in the short term.

In addition, after this law was instituted, all the elements of the contemporary interpretive power emerged. According to this legislation, the legal opinions of the Comptroller-General would be known as pronouncements (*dictámenes*), and it was recognised that they might be issued ‘at the request of any interested party or of the chiefs of service or of any other authorities’.³⁶¹ As a result, it was confirmed that not only public officers but also private parties could activate the opinion-giving power of this checking institution. This law also conferred the Comptroller-General with the exclusive power to provide legal opinions about financial and budgetary matters, issues concerning the Public Employment Statute, and, in general, matters that related to ‘the functioning of the public services that constitute the civil administration of the state for the correct applications of laws and ordinance governing them’.³⁶² The explicit reference to the jurisdiction to provide legal opinions emphasised the nature of expertise in legal affairs that the office had adopted over the years. Moreover, the remit of its legal opinions encompassed the most relevant issues that might be raised during administrative processes.

³⁵⁹ *ibid* [Schaulshon]. See also ‘Chilean Senate, 27th Ordinary Session’ (1950) 1334 [Senator Faivovich and Durán against Senate involvement].

³⁶⁰ Article 13.3. Writing in 1946, Macías criticised Congress passivity in the scrutiny of insistence decrees. He suggested a series of factors explaining the attitude of Congress, such as lack of procedures and insufficient information; see Macías (n 306) 46-7; 51-2; 61-3.

³⁶¹ Article 7.

³⁶² Article 8.

This law, moreover, concerned itself with the delimitation of the jurisdiction of the Comptroller-General and other public entities, particularly the Council of Defence of the State (CDS).³⁶³ It provided that the Comptroller-General should not intervene in affairs that ‘for its nature were properly litigious, or that are under the consideration of the courts of justice’.³⁶⁴ Thus, judicial matters were within the CDS’s remit instead of the Comptroller-General, which should focus on administrative legality. Thus, whereas administrative agencies were the constituency of the latter, the courts of justice were the customers of the former. It can be argued that this allocation of functions strengthened the institutional position of the Comptroller-General in front of the bureaucracy, especially taking into account the following phrase inserted in the same provision: ‘Only the decisions and opinions of the Comptroller-General shall be taken as administrative jurisprudence’. This entailed that only Comptroller determinations constituted binding precedents on the administrative authorities. Just as the decree of 1932 widened the distance between the President and Comptroller-General, it can be argued that this 1950 law further separated the oversight process (in which the Comptroller-General and administrative agencies operated) from the judicial process (in which courts and the CDS operated).

In addition to issues such as rising salaries and improved working conditions (Articles 9, 13, 15), this law increased the Comptroller’s powers of internal organisation (Article 6 and 7), extended the time limits for conducting legality review, increased the duty to report to Congress (Article 5), and imposed upon the office’s staff a duty of ‘exclusive dedication’ in order to encourage professionalism and impartiality (Article 10). In support of the latter measure, the Conservative deputy Correa indicated that ‘it sought to ensure that Comptroller officers were absolutely independent of and impartial towards [executive] public services’, adding that joint positions in the executive and the

³⁶³ Strictly speaking, this rule was introduced as executive regulation by decree 346 (13 February 1928), the aim of which was to delimitate the remit of the legal department of the Comptroller-General and the Council of Defence of the State. Writing in 1928, Enrique Correa explains that this regulation was intended to avoid executive departments mistakenly requesting legal opinions from the wrong office. In other words, it intended that ‘their functions were well defined’. According to Correa, this same rule promoted the creation of a body of precedents that would constitute ‘administrative jurisprudence’ and might clarify the law governing the administrative process. Correa even asserted that considering the disorder and controversies sparked by it, the existence of the Council was unwarranted. See Correa (n 244) 168–9. According to the administrative regulations, the participation of one of these two bodies precluded the intervention of the other; see Silva Cimma, *Apuntes de derecho administrativo* (n 294) 215.

³⁶⁴ Article 8.2.

Comptroller-General might result in ‘an esprit de corps, a solidarity, a collegiality that undermine the supervisory function’ of the office.³⁶⁵ Thus this law and its legislative debate reveal a concern about strengthening the independence and the institutional capacities of the Comptroller-General. It indeed sought to enlarge the distance between the office and the executive.

Finally, revealing a concern about delay, this 1950 regulation imposed on the Comptroller-General a duty to report to the Chamber of Deputies every six months about decrees whose legal review had lasted more than the time limit of 20 days established by law, indicating the reasons for the delay.³⁶⁶ As we will see, this rule reveals a pervasive concern about delay and sluggishness in the Comptroller-General’s decision-making process.

In fact, the legislative debate also reveals a concern about the negative impact of Comptroller-General checks on prompt administrative action. Legislators voiced concerns that the review process might render administrative decision-making excessively sluggish. A case in point is the debate and eventual rejection of a motion proposing the automatic approval of administrative decrees in case of delay in the review procedure.³⁶⁷ During the debate, some left-wing congressmen proposed this mechanism as a way of unblocking the administrative process and balancing the relationship between the Comptroller-General and the executive branch. Some even accused the office of undue encroachment on administrative action and criticised the absence of arrangements for holding the Comptroller-General accountable.³⁶⁸ Similarly, a Liberal deputy expressed his concerns about granting excessive power to an already powerful office. He censured ‘the way the Comptroller-General polemicized with public officers’ and claimed that the institution did not behave as a technical officer but as ‘a political authority that jumps into the press, [and] enters the fray to sermonize other officers because he is always right as he is a fourth branch of government whose resolutions cannot be discussed’.³⁶⁹ Another congressman pointed out the office’s frequent delays,

³⁶⁵ ‘Chamber of Deputies, 27th Ordinary Session’ (n 356) 1229.

³⁶⁶ Article 13.4.

³⁶⁷ ‘Chamber of Deputies, 27th Ordinary Session’ (n 356) 1201ff, 1224.

³⁶⁸ *ibid* 1201, 1205–6, 1226–7.

³⁶⁹ *ibid* 1205–6.

and argued that the Comptroller-General was not supervising; in reality it was co-administering the country.³⁷⁰

The majority, however, rejected the proposal and defended the role of the Comptroller-General as an oversight body. Disapproving the automatic approval mechanism, Deputy Correa asked his colleagues what interest they could have in lifting the safeguards against illegal executive decrees, considering that those checks ensured compliance with the laws that Congress itself enacted. He called for a nonpartisan approach and emphasised the importance of ‘having an institution that is above politics giving securities to everybody’.³⁷¹ Another Liberal deputy – García Burr – sided with him, saying that the Comptroller-General was ‘the defence that country and the citizens have against the excesses of the executive branch’.³⁷² Similarly, a Christian Democrat senator strongly opposed the motion, stating that it might nullify the operation of the office:

Comptroller-General rulings are of concern for the country as a whole; they concern the stability, efficacy, and functioning of the democratic regime, and that is the deep and intellectual foundation underlying the existence of the Comptroller-General: Making judgments over the constitutionality and legality of the decrees issued by the government. If this judging power is jettisoned and substituted for an automatic approval, the theoretical conception underpinning the Comptroller as an institutional and democratic body in Chile would be destroyed.³⁷³

Therefore, despite admitting that delay was a real problem, the proposal was rejected because it might have jeopardised a vital safeguard mechanism against abuse of administrative power.³⁷⁴ Based on a positive assessment of the contribution of the Comptroller-General, it was agreed that the best approach to the delay issue was to increase internal flexibility within the office and extend the time limits for the legality review procedure.³⁷⁵

Overall, this statute shows the consolidation of the Comptroller-General as the main tool for legal control over the ever-expanding Chilean executive branch. The legislative

³⁷⁰ *ibid* 1227. See similar opinions at ‘Chilean Senate, 27th Ordinary Session’ (n 161) 1337–48 [Socialist senators Allende and Maira].

³⁷¹ ‘Chamber of Deputies, 27th Ordinary Session’ (n 356) 1225–6.

³⁷² *ibid* 1226.

³⁷³ ‘Chilean Senate, 27th Ordinary Session’ (n 359) 1342 [senator Tomic].

³⁷⁴ ‘Chamber of Deputies, 27th Ordinary Session’ (n 356) 1627.

³⁷⁵ ‘Chilean Senate, 27th Ordinary Session’ (n 359) 1344–7.

discussion reveals that the legislature regarded the institution as a partner in the task of holding the executive accountable.³⁷⁶ Besides, the nonpartisan tone of the debate suggests that the office enjoyed a fairly cross-party good reputation in Congress. In brief, by the 1950s the Comptroller-General was increasingly perceived by political actors as an independent and influential branch of government.

2. Delay and lethargy

Twelve years later, another piece of legislation altered important aspects of the institution. In 1962, the right-wing president Jorge Alessandri passed Law 14832 amid an atmosphere of discrediting of the bureaucracy and encouragement of private initiative. This law was crafted on the advice of the Comptroller Enrique Silva and former Comptroller Enrique Bahamonde, who closely assisted Congress throughout the drafting process.³⁷⁷ The primary aim of this piece of legislation was to reduce the legal burden that the office's scrutiny entailed for executive action. As a senator put it, the bill sought 'to avoid useless paperwork, to abbreviate procedures, [and] to eliminate the procedure of preventive control of decrees and resolutions over matters of minor importance'.³⁷⁸ Therefore, an interest in speeding up administrative decision-making underlay the bill.

During the debate, Senator Álvarez explained the political background of the bill. He mentioned the notable rise in the number of acts submitted for legality review. While in 1957 the office had processed 178,451 acts, 209,218 were handled in 1958 and 221,325 the following year. Therefore, the rate of increase was more than 10,000 decrees and resolutions a year. Moreover, the office was also in charge of accounts trials, the oversight of adherence to civil service regulations, disciplinary proceedings, and judging on 'loads of requests by authorities and private parties'.³⁷⁹ The Comptroller-General was unable to cope with so many demands.

Some aspects of the law stand out. On the one hand, the law granted the Comptroller-General the power to exclude some acts from scrutiny. The excluded decrees or resolutions would be those regarded by the Comptroller-General as 'non-essential', such

³⁷⁶ 'Chamber of Deputies, 27th Ordinary Session' (n 356) 1211.

³⁷⁷ 'Historia de la Ley 14832' (Biblioteca del Congreso Nacional) 9, 19, 30, 70, 104–5.

³⁷⁸ *ibid* 54–5.

³⁷⁹ *ibid* 21.

as medical leave, paid leave, or other leave entitlements. The exclusion could be temporary and might be revoked at any time. In order to exercise this power, the Comptroller had to issue an order giving reasons supporting the measure and indicating substitute forms for overseeing the legality of the excluded acts. Furthermore, the office had to give an account to the Chamber of the Deputies each time it used the excluding power.

On the other hand, the law granted the President the power to enact ‘decrees of urgency’, reducing the time that the Comptroller-General had to complete their review, as well as ‘decrees of immediate application’, postponing a review after the enactment of regulation. Concretely, decrees of urgency could be issued in the case of measures that would be ineffective if not applied immediately. This fact had to be explicitly stated in the decree. The consequence of the issuance of these decrees was to reduce the timeframe for carrying out the review to just 15 days, or even five days in special circumstances. Decrees of immediate application went even further. They could enter into force with no prior legality check by the Comptroller-General. However, they had to be submitted to ex-post review within 30 days. In the case of detection of illegalities, the office would report to the President if the act was issued by a subordinate, or to the Chamber of Deputies if the decision were of presidential nature. The measures that could be implemented under this scheme were those related to setting prices of basic goods; measures of international exchange; and measures of internal organisation in the health or education sectors.

These changes, however, did not entail a severe downgrade in the office’s role as a legality watchdog organisation. Rather, they represented an exercise of balance between legal accountability and administrative expeditiousness. Moreover, Congress took the opportunity to strengthen its links to the Comptroller-General. In fact, during the debate in Congress, the communication channels between the two institutions were fortified. For instance, following a motion by a Christian Democrat deputy, it was provided that under some conditions, congressional requests would have priority in the Comptroller-General’s docket (Article 14). The congressional debate also reveals the institution’s positive reputation. One moderate senator, for example, claimed that although the Constitution did not provide it explicitly, the Comptroller-General had ‘become [...] a new power of the state, that along with the other three classic powers – the executive, the

legislature and the judiciary – constitute the pillars of our republic’s organisation’.³⁸⁰ Later, a communist deputy supported the bill, asserting that the Comptroller-General ‘has acted correctly many times and that the outcomes of its contribution have had transcendental importance for the better order of public administration and the oversight of irregularities’.³⁸¹ He also added that authorities of the office, such as Vigorena, Mewes, and Silva, ‘have contributed to ensuring the prestige of the administration’.³⁸² A Conservative deputy made similar statements praising the Comptroller-General’s role within the Chilean political system, and emphasising that it ‘represented one of the more effective bodies in our democratic regime in respect to rights, the rule of law in public services, and the civil service’.³⁸³

D. The Golden Age of the Comptroller-General

1. The office under Ibáñez’s authoritarianism

The new understanding of the Comptroller-General as a partner of Congress and a check on presidential power is well illustrated by the office’s performance during the second Ibáñez administration (1952-1958). After more than a decade of centre-left Popular Front alliances, Carlos Ibáñez personified an authoritarian populist leadership.³⁸⁴ He campaigned to get rid of corruption and promised strong government to address the decline of public morality. In the second half of Ibáñez’s term in particular, the country underwent serious social unrest as the economy markedly deteriorated. In order to address this, Ibáñez often used executive powers declaring states of siege or zones of emergency, and intervened in labour conflicts. In a remarkable study on the role of the legal institutions on Chilean politics, Lira and Loveman observe that Ibáñez constantly faced legal challenges by the Comptroller-General against his authoritarian use of executive power.³⁸⁵ Ibáñez and his adherents believed that the Comptroller and other institutions did not allow the executive to implement his policies.³⁸⁶ As a result, President Ibáñez felt

³⁸⁰ *ibid* 20.

³⁸¹ *ibid* 59.

³⁸² *ibid*.

³⁸³ *ibid* 72.

³⁸⁴ For an account of the Ibáñez administration, see Tomás Moulian, *El gobierno de Ibañez. 1952-1958* (FLACSO 1986).

³⁸⁵ Elizabeth Lira and Brian Loveman, *Poder judicial y conflictos políticos, Chile: 1925-1958* (1st edn, LOM Ediciones 2014) 628–9.

³⁸⁶ *ibid* 578.

he was ‘a prisoner of legality’ and, consequently, unable to exert control over public bureaucracy.³⁸⁷

A set of events illustrates the conflicts among these branches of government. The first important clash took place in 1954, when Ibáñez declared state of siege while Congress was in recess.³⁸⁸ Once legislative activities resumed, however, Congress denied its ratification. Initially the executive disdained the negative decision by Congress, but shortly afterwards, Ibáñez decided to put an end to the state of emergency by decree. This infuriated congressmen, since it entailed ‘overlooking the fact that Congress had already ended the state of siege’.³⁸⁹ Supporting the interpretation of Congress, the Comptroller-General rejected the decree, stating that the state of siege had finished with the Congress’s declaration. Facing the threat of impeachment, Ibáñez’s Minister of Interior submitted to the opinion of Congress and the Comptroller-General, and clarified that the decree was issued in observance of the decision of the legislature, and not in exercise of autonomous executive power.

Another example concerns decrees granting powers to administrative bodies to screen trade union representatives on political grounds.³⁹⁰ In 1955 Ibáñez enacted a decree commanding provincial governors to ensure that Communist Party members could not run for leadership in trade unions.³⁹¹ This executive regulation also directed police forces to provide intelligence information concerning communist influence on trade unions, yet, remarkably, precluded any labour tribunal supervision. The Comptroller-General, however, rejected the decree, asserting that the oversight of trade unions was within the remit of labour tribunals. Unsurprisingly, the President overrode the ruling.³⁹² Later, however, the Chamber of Deputies pressured the government to repeal the decree and eventually put an end to the policy.

Similarly, in 1956 a group of Radical Party deputies initiated impeachment proceedings against President Carlos Ibáñez for abusing his insistence power, among other causes.

³⁸⁷ Gil (n 171) 98–9; Bravo (n 275) 173–4.

³⁸⁸ Lira and Loveman (n 385) 604–13.

³⁸⁹ *ibid* 610.

³⁹⁰ *ibid* 631–3.

³⁹¹ Decree 4161, Ministry of Interior, 1955.

³⁹² Decree 207, Ministry of Interior, 1955.

They argued that between 1952 and 1955, Ibáñez had issued more than 60 insistence decrees in order to override negative rulings by the Comptroller-General.³⁹³ Many of the decrees insisted upon by Ibáñez were related to irregular recruitment and promotions. According to the accusers, this was connected with nepotism and favouritism towards friends and allies. Perhaps even worse, other illegal decrees had been made in order to enlist supporters in the intelligence agencies, presumably so as to facilitate repression. Eventually, after political compromise, the impeachment was rejected.³⁹⁴ Another example relates to accusations of corruption. Here, the Comptroller-General blocked unlawful endowments of state-owned land that allegedly benefited the President's sympathisers. The office disallowed the decrees because they infringed on legal procedures.³⁹⁵ Despite intense negotiation and a public dispute with the government, the Comptroller-General maintained its position concerning the unlawfulness of these endowments. The office also intervened against banishment decrees. In this case, as a reaction to riots against the rise of charges in public transport in 1957, the executive issued a number of decrees banishing protesters from the main cities. The Comptroller-General rejected some of those executive orders because of regulatory irregularities.³⁹⁶ Although the rulings were crafted on rather narrow legal grounds, they nevertheless contributed to the increasing corrosion of the political legitimacy of the President. In fact, by then it was apparent that constant encounters with the Comptroller-General and Congress had put in motion an unrelenting process of political delegitimisation of the Ibáñez government.³⁹⁷

Annoyed by the constant legal obstacles raised by the Comptroller-General,³⁹⁸ Ibáñez attempted to circumvent its supervision, especially concerning detention orders.³⁹⁹ Instead of issuing formal executive decrees – subjected to the office's scrutiny – the government decided simply to issue written 'orders' that were not submitted to review. This eluded a likely negative ruling. Perhaps surprisingly, the judiciary supported this evading strategy, holding that under state of siege, a written order by the President and

³⁹³ Lira and Loveman (n 382) 651–3.

³⁹⁴ 'Chamber of Deputies, 30th Ordinary Session' (1956).

³⁹⁵ 'Decretos de tierras devolvió la Contraloría' *El Mercurio* (8 February 1958); 'Contraloría devolvió 45 decretos sobre arrendamientos de las tierras magallánicas' *El Mercurio* (9 February 1958). See *El Mercurio* editions through 20 February 1958.

³⁹⁶ Lira and Loveman (n 385) 681.

³⁹⁷ *ibid* 695.

³⁹⁸ For an account of the tense relationship between both institutions, see Silva Cimma, *Memorias privadas de un hombre público* (n 212) 199–219.

³⁹⁹ Lira and Loveman (n 385) 640–5.

the respective minister was sufficient to legitimate a detention order; it was not necessary to enact a formal decree. According to a contemporary commentator, this entailed that the detainees lost the only safeguard against abuse embodied in the legality review of the Comptroller-General.⁴⁰⁰

Of course, there is an irony in the fact that the institution created by Carlos Ibáñez as a collaborator or adviser to the President in 1927 became a mechanism against Ibáñez's own abuses of power in his second presidential period, 30 years later. It seems that Ibáñez was not aware of the new role of the institution. Indeed, compared to the governments before and after him, Ibáñez's use of insistence decrees seems extraordinary. While the previous president, Gabriel González (1946-1952),⁴⁰¹ had insisted upon fewer than 20 decrees, and the subsequent president, Jorge Alessandri (1958-1964), insisted upon only three, Ibáñez used the mechanism more than 350 times (see above figure 4). This helps explain his dramatically hostile relationship with the Comptroller-General.

2. The fourth branch of government

By the late 1950s, the Comptroller-General's reputation as an institutional actor was already considerably high. It was no longer just an ancillary body collaborating with the executive in the financial arena only. The office had responded to an increasing demand for legality and, as a result, had consolidated itself as an independent authority exercising the essential functions of rule interpretation and application in the political domain. It had become the primary custodian of administrative legality.

The new public role of the institution captured media attention. An article in March 1958 explained the functions of the Comptroller-General to the public and outlined a profile of its chief officers.⁴⁰² It emphasised the independence of the office, its technical competence, the political neutrality of its director, and his high salary in comparison with

⁴⁰⁰ Elena Caffarena, *El Recurso de Amparo Frente a Los Regímenes de Emergencia* (Ed Jurídica de Chile 1957). This is cited in Lira and Loveman (n 385) 643.

⁴⁰¹ It is worth noting that in a controversial decision in 1950, the Comptroller-General even rejected a decree of insistence under the argument that it regulated a matter within the remit of Congress and, therefore, was not a mere nullity but an inexistent act. Although not consistently applied, this doctrine suggests a dramatic restriction to the insistence power's scope. See Iris Vargas, 'El Decreto de Insistencia y la Doctrina Mewes: Límites del Decreto Supremo y la Nulidad de Derecho Público Ipso Jure en la Constitución de 1925' (2000) 27 *Revista Chilena de Derecho* 439.

⁴⁰² 'La Contraloría General de la República. Reportaje a hombres y problemas' *El Mercurio* (9 March 1958).

other positions within the state bureaucracy. José María Navasal – the author of the note and a prestigious journalist – described the Comptroller-General as the ‘highest guardian of legality in Chile’. He compared Chile to its neighbours, pointing out the respect for the Comptroller-General as a factor that explained Chilean stability in contrast to the generalised turmoil in the rest of the region. In addition, Navasal emphasised the way ‘an institution that began simply as a body reviewing fiscal accounts became decisive in every aspect of administrative activity’. In his view, the key aspect was that, despite occasional disagreement and public criticism, executive officers had accepted its rulings and respected its authority. An op-ed piece by Eugenio Moncía in May 1959 also pointed to the transformation of the office.⁴⁰³ He argued that the Comptroller-General had become ‘a control power of enormous supervisory jurisdiction whose gears are intertwined within the structure of public administration’. Praising the appointment of Enrique Silva as a Comptroller-General, Moncía resorted to frequent criticism of the supposedly excessive power of the office. His central claim focused on the role of the institution during the Ibáñez administration, wondering what could have happened had not the institution intervened to counterweight the excesses of the executive. He recalled its independence and strength in resisting the attacks by the Ibáñez administration, concluding that the critical aspect was the judicious manner in which the office had exercised its power.⁴⁰⁴

The shift in the understanding of the Comptroller-General’s role was also reflected in constitutional law scholarship. The literature traditionally conceived the institution as a mere component of the public finance system,⁴⁰⁵ but now new approaches were emerging. In his leading textbook, Professor Mario Bernaschina – a Comptroller-General officer at the time – included it within his description of separation of powers and the ‘four functions of government’: legislative, executive, judicial, and the oversight function. The latter was a check on administrative activity and consisted of securing the conformity of executive action to legality. In his view, this function was normally

⁴⁰³ Eugenio Moncía, ‘La contraloría general y don Enrique Silva C’ *El Mercurio* (21 May 1959).

⁴⁰⁴ See similar panegyric on former comptrollers in Alejandro Tinsly, ‘Un gran funcionario’ *El Mercurio* (25 May 1959); ‘Contraloría General de la República [Editorial]’ *El Mercurio* (28 January 1967).

⁴⁰⁵ For instance, Gabriel Amunátegui, *Manual de derecho constitucional* (Editorial Jurídica de Chile 1950) 511–3; Andrade (n 228) 565–7.

allocated to an organ independent of the other branches and to the Comptroller-General in Chile.⁴⁰⁶

A similar view could be found among political science commentators. Explaining the Chilean political context in the 1950s and 1960s, Arturo Valenzuela highlighted the role of the office. Remarkably, he defined the Comptroller-General as ‘a guarantor of legalism’ and ‘the most unusual branch of the Chilean government’. Providing a more nuanced description, Valenzuela depicted the institution as follows: ‘a prestigious organisation, the Contraloría commanded respect from most Chilean civil servants, who feared its scrupulous championship of legalism and frugality, sometimes maintained at the expense of rationality and fairness’.⁴⁰⁷ He also emphasised the interpretive role of the office by explaining that ‘[i]n a society with numerous and complex laws and sharp ideological division, an agency such as the Contraloría had evolved as an interpreter of existing legislation’.⁴⁰⁸ Focusing on the impact of the institution on local government, Valenzuela had previously explained that the Comptroller-General exerted a relevant indirect influence based on its symbolic and rule interpretation authority.⁴⁰⁹ In another influential work, Federico Gil provided a similar account. He defined the Comptroller-General as ‘a very important agency in the Chilean government, and one with unique powers on the American continent’.⁴¹⁰ Echoing Navasal’s opinion, he concluded that it ‘is an alert custodian of legality and a vigorous and efficient instrument capable of curbing, if necessary, the excesses of a President constitutionally endowed with a great deal of power’.⁴¹¹

The operation of the Comptroller-General also attracted the attention of foreign scholars researching law and development in the late 1960s. American scholar Steven Lowenstein, for example, recommended paying closer attention to new forms of legal practice taking

⁴⁰⁶ Mario Bernaschina, *Manual de derecho constitucional*, vol 1 (Editorial Jurídica de Chile 1955) 207–8, 214–5. This account remains influential in Chilean contemporary scholarship; see Silva Bascuñán, *Tratado de derecho constitucional* (n 130) 192.

⁴⁰⁷ Valenzuela (n 100) 14–5.

⁴⁰⁸ *ibid.*

⁴⁰⁹ Arturo Valenzuela, *Political Brokers in Chile: Local Government in a Centralized Polity* (Duke University Press 1977) 32–42.

⁴¹⁰ Gil (n 172) 97.

⁴¹¹ *ibid* 97–8.

place in the country such as lawyers seeking rulings from the Comptroller-General.⁴¹² He expressed an upbeat view of the potential role of the office in the expansion of the rule of law in the country:

In Chile, where family, friends and regional attachments demand strong loyalties, new, impersonal institutions governed by law are needed to which loyalties can be transferred; the abstract values of truth and justice, the equal application of law, and merit standards must gain precedence over parochial loyalties if development is to proceed. [...] institutions such as the Contraloría General are examples of movement in this direction, but it will have to be accelerated; the legal profession, defenders of law, must lead the way toward equal justice and treatment under law.⁴¹³

Unsurprisingly, the institution attracted young professionals and academics. A technocratic legal elite in the Legal Department represented the essence of the institution.⁴¹⁴ It encompassed academics teaching public law and other legal disciplines at university level. In the late 1950s, the institution changed the recruitment policy and hired bright young students – many of them from the University of Chile, the most influential higher education institution.⁴¹⁵ Thus, a new generation of future leading scholars and policy-makers was trained in the Comptroller-General. Participants remember it as a ‘graduate school’ in public law.⁴¹⁶ Enrique Silva Cimma – who served as Comptroller-General between 1959 and 1967 – is the best expression of this atmosphere of academic and technocratic elite within the institution.⁴¹⁷ Comptroller Vigorena had invited him to join the office as Silva had been his legal theory student at the University of Chile in 1939. He started as an assistant but rapidly rose within the organisation. In 1945 he published a groundbreaking monograph on the institution,⁴¹⁸ and in 1949 was appointed as professor of administrative law at the University of Chile. Following this, he was appointed Deputy Comptroller-General in 1952 and head of the office in 1959. Simultaneously, he was selected as director of the public law seminar at University of Chile. There, he encouraged the publication of monographs on public law

⁴¹² Steven Lowenstein, *Lawyers, Legal Education, and Development. An Examination of the Process of Reform in Chile* (International Legal Center 1970) 36.

⁴¹³ *ibid* 71. He also suggested using cases linked to the office in new materials for legal education; see *ibid* 163–6; 196.

⁴¹⁴ Urbano Marín, ‘El trabajo jurídico y la experiencia histórica’ (Contraloría General de la República, 2011) 2.

⁴¹⁵ Dezalay and Garth (n 325) 17.

⁴¹⁶ Marín (n 414) 3; Mónica Madariaga, *Testimonios. La verdad y la honestidad se pagan caro* (Edebé 2002) 23.

⁴¹⁷ See Silva Cimma, *Memorias privadas de un hombre público* (n 212).

⁴¹⁸ Enrique Silva Cimma, *La Contraloría General de la República* (Nascimento 1945).

issues linked with the work of the office.⁴¹⁹ Following Silva Cima's appointment, it was evident that more lawyers of the office were also legal academics.⁴²⁰ In addition, he participated in the creation of the Institute of Political Science and Administration – an innovative institution of civil service research and training.⁴²¹ Lastly, he also developed a political career in the Radical Party, and was later appointed as a President of the Constitutional Tribunal in 1971, and Foreign Affairs Minister and Senator in the 1990s.

Comptroller-General	Term in office	Background
Humberto Mewes	7 Feb 1946 – 14 Jun 1952	Lawyer – Court of Appeal Judge
Enrique Bahamonde	16 Sep 1952 – 11 May 1959	Lawyer – Former Deputy CGR
Enrique Silva-Cimma	15 May 1959 – 31 Jan 1967	Administrative law professor – Former Deputy CGR

Table 4: Heads of the Comptroller-General Office, 1946-1967

III. CONCLUSION

The story this chapter has told could be described as a virtuous institutional circle.⁴²² A virtuous circle in the life of a public institution would involve few internal changes and small substantive initial successes that might lead to enhanced prestige. This, in turn, might ignite greater substantive successes and further congressional willingness to delegate authority; this could eventually attract better personnel, and then better outcomes, and so on and so forth. Certainly, the experience of the Chilean Comptroller-General in this period does not fit this description with perfect accuracy, but some core elements certainly seem to apply. Indeed, this chapter has traced the milestones in the transformation of the Comptroller-General into a consequential custodian of legality.

As we have seen, at the outset the institution was conceived as a presidential tool in view of the far-reaching modernisation of the Chilean bureaucracy. Later, however, critical events changed the orientation of the institution. The 1943 constitutional amendment entrenched the office in the Constitution; the successful impeachment against Comptroller Agustín Vigorena for exercising weak supervision of executive action in 1945 increased reliance on congressional authority; and finally, significant changes in the

⁴¹⁹ Marín (n 414) 4.

⁴²⁰ Silva Cima, *Memorias privadas de un hombre público* (n 212) 181.

⁴²¹ *ibid* 182; Lowenstein (n 412) 211.

⁴²² Breyer (n 10) 79.

legal arrangements of the office were introduced, reinforcing its status. All these events resulted in strengthening the influence of Congress on the operation of the office. Finally, due to the contribution of the institution to providing legal discipline for Chilean public bureaucracy, and especially its role in arbitrating conflicts between the legislature and the executive branch, it consolidated its reputation as a fourth branch of government in the 1950s and 1960s.

According to legal historian Bernardino Bravo, the Comptroller-General was able to resist presidential power because of its institutional autonomy, which was based on 'its own internal hierarchy'. This shielded it from politically and ideologically motivated appointments and interventions.⁴²³ Conceiving the legislature as a passive institution captured by self-serving political parties, Bravo argued that the function of supervising administrative action rested with the Comptroller-General instead of in the dysfunctional legislature.⁴²⁴ Julio Faúndez, on the other hand, emphasised partnership with Congress. In his view, in this period, compliance with the office was dependent on cordial relations between Congress and the executive. From this viewpoint, the Comptroller-General was a proxy of the legislature that helped secure moderation in presidential policies. Although conceding some positive consequences of these arrangements, Faúndez claims that an important defect was the unclear rationale behind the legal accountability functions of the office. In his view, the Comptroller-General was not an adequate substitute for judicial review of administrative action. Even worse, perhaps, it might have been the main reason why administrative tribunals were never put into motion in the country.⁴²⁵ In Faúndez's view, all of this would have undesirable consequences for the future government of Salvador Allende, as we will see in the next chapter.⁴²⁶

⁴²³ Bravo (n 278) 173.

⁴²⁴ *ibid* 180.

⁴²⁵ Rolando Pantoja, 'La inexplicable ausencia de una justicia administrativa en el estado de Chile' (2005) 13 *Revista de Derecho del Consejo de Defensa del Estado* 27, 33.

⁴²⁶ Faúndez, *Democratization, Development, and Legality* (n 43) 126.

CHAPTER 4. THE COMPTROLLER IN THE ALLENDE PRESIDENCY, 1970-1973

In this chapter, I will focus on a critical period of recent Chilean political history: the socialist government of Salvador Allende between 1970 and 1973. In particular, I will explore an idea about the contribution of nonjudicial institutions of administrative justice to social change, namely the distinctively functionalist idea that nonjudicial bodies of administrative justice could build more constructive relationships with the administrative state than the courts.⁴²⁷ This will be done by focusing on the operation of the Comptroller-General Office under Allende's socialist government.

Functionalists could expect that an institution like the Comptroller-General would be highly deferential towards Allende's collectivist policy reforms, and that it could even have served the regime as a legitimating device. Yet history actually shows that the office was a key institutional actor for the political opposition to the socialist reforms of the period. Moreover, although the procedures of the Comptroller-General and its legal mindset could appear 'extremely deferential',⁴²⁸ as a matter of fact the intervention of the office was quite instrumental in undermining the legitimacy of the executive branch. Far from the functionalist ideals of Allende's legal advisors, the Comptroller-General was not merely rubber-stamping the policies of the executive. Indeed, it did not show any more consideration to the executive than what might be expected of judges.

As we have seen in previous chapters, in the early 1970s Chile did not have a fully-fledged system of judicial review of administrative action. At the time, the Chilean system combined legal review of administrative action by an autonomous administrative body – the Comptroller-General – with partial and exceptional judicial review of administrative

⁴²⁷ A main feature of Functionalism is that it displays a robust support for the administrative state. In contrast to views that emphasise judicial control of executive power, functionalism 'sees in administrative law a vehicle for political progress and welcomes the administrative state'. Functionalism's main institutional concern was to find an appropriate incarnation of their sympathy to the administrative state and distrust of judges, on the one hand, and the need for respecting legality, on the other. Therefore, as Harlow and Rawlings explain, functionalism 'focused on alternatives to courts'. See John Willis, 'Three Approaches to Administrative Law: The Judicial, the Conceptual, and the Functional' (1935) 1 *The University of Toronto Law Journal* 53; Martin Loughlin, *Public Law and Political Theory* (OUP 1992) ch 4, 6, and 8; Martin Loughlin, 'The Functionalist Style in Public Law' (2005) 55 *University of Toronto Law Journal* 361; Harlow and Rawlings (n 1) ch 1.

⁴²⁸ Faúndez, 'The Fragile Foundations of Administrative Legality - Chile between 1932 and 1973' (n 22).

action by the ordinary courts. These arrangements potentially left considerable room for action through the political process.

The experience of the Allende period may suggest that a strong functionalist model of legal accountability is undesirable. On the one hand, this period proves that court substitutes such as the Comptroller-General may exhibit the same kind of reactionary political biases as the judiciary. For instance, Eduardo Novoa – the main legal advisor to Allende and a prestigious legal scholar – argued that the institution was of critical importance in making it impossible for Allende to successfully implement his reforms.⁴²⁹ On the other hand, it may be argued that there is no substitution to the judicial role in structuring potential political conflicts in legal terms. Indeed, it has been suggested that the *sui generis* role of the Comptroller-General and the subsequent absence of an articulated model of judicial review contributed to the collapse of democracy in Chile in 1973. Julio Faúndez has argued that a problem of the Chilean political system was that it ‘excluded courts from key areas of public policy, thus generating a dislocated legal system in which judges were experts in private law matters, but had no experience in resolving issues of public policy’.⁴³⁰ He also maintains that the absence of judicial review was a serious weakness of the legal system, viewing the Comptroller-General as an inadequate substitute.⁴³¹

This chapter will examine the clashes between the Allende administration and the Office of the Comptroller-General in order to evaluate the extent to which the functionalist expectations for nonjudicial accountability institutions were unmet by its behaviour during the times of crisis undergone by the country between 1970 and 1973. The first section will explain Allende’s political programme of radical economic transformation, and why the government opted for administrative rather than legislative implementation. The second part will then give an account of the constitutional showdowns between the Comptroller-General and the executive branch during the period, and show how they

⁴²⁹ Eduardo Novoa, ‘El difícil camino de la legalidad’, *Los resquicios legales. Un ejercicio de lógica jurídica* (Ediciones Bat 1992); Eduardo Novoa, *¿Vía legal hacia el socialismo? El caso de Chile 1970-1973* (Editorial Jurídica Venezolana 1978).

⁴³⁰ Julio Faúndez, ‘Democratization through Law: Perspectives from Latin America’ (2005) 12 *Democratization* 749, 755–6.

⁴³¹ Julio Faúndez, *Democratization, Development, and Legality: Chile, 1831-1973* (Palgrave Macmillan 2007) 225; see also Julio Faúndez, ‘Chilean Constitutionalism before Allende: Legality without Courts’ (2010) 29 (1) *Bulletin of Latin American Research*.

illustrate the possibilities and limits of the powers of the office. In the conclusion, I will suggest that the criticisms of the role of the Comptroller-General during the Allende period, although sound in some respects, should not prevent us enquiring further about the function of the Comptroller-General as an institution of administrative justice along functionalist lines.

I. THE CHILEAN ROAD TO SOCIALISM

When the socialist president Salvador Allende took power in November 1970, the Comptroller-General was the main legal institution that could obstruct his policies. But there were few reasons to expect that the obstacles to Allende's Popular Unity coalition would be insurmountable or that the Comptroller-General would be particularly hostile to collectivist policies. Furthermore, the absence of judicial review by a conservative or even reactionary judiciary may have offered optimistic prospects, at least in respect to the legal arena. The main difficulty, as we will see in what follows, appeared to be the political and not the legal process.

A. The political context

Chilean Marxist parties had participated in politics during most of the twentieth century.⁴³² However, their most important success came in 1970, after six years of a mildly reformist Christian Democratic government, when Chile's electorate decided to move further to the left and elected Salvador Allende. He was the first President from a Marxist coalition elected in the country. His Popular Unity coalition comprised disparate political inclinations: the moderate pro-Soviet Communist Party, the more radical and Cuban-inspired Socialist Party, the traditionally social-democratic Radical Party, and other lesser reformist political groups. Although Salvador Allende was a socialist, he had to make significant efforts to satisfy the different nuances that his coalition represented.⁴³³

⁴³² Faúndez, *Marxism and Democracy in Chile* (n 33).

⁴³³ For general accounts of the period, see Peter A Goldberg, 'The Politics of the Allende Overthrow in Chile' (1975) 90 *Political Science Quarterly* 93; Paul Sigmund, *The Overthrow of Allende and the Politics of Chile, 1964-1976* (University of Pittsburgh Press 1977); Valenzuela (n 100); Robert J Alexander, *The Tragedy of Chile* (Greenwood Press 1978); Sergio Bitar, *Transición, socialismo y democracia. La experiencia chilena* (1st edn, Siglo XXI Editores 1979); Nathaniel Davis, *The Last Two Years of Salvador Allende* (Tauris 1985); Gonzalo Martner, *El gobierno del presidente Salvador Allende 1970-1973* (Editorial LAR 1988).

Crucially, Allende was elected as a minority President. He achieved a narrow victory with 36.2% of the vote, with the centre-left Christian Democrat candidate Radomiro Tomic attaining 27.8% and the right-wing candidate Jorge Alessandri 34.9%.⁴³⁴ This was possible because there was no runoff presidential election in the Chilean electoral process. According to the Constitution, if no candidate obtained an absolute majority, Congress had to select the candidate to be appointed as President of the Republic. The Chilean tradition was that Congress would choose the candidate who secured more votes, but as this election was highly polarised, it was doubted whether the legislature would follow convention. After arduous negotiations with the Christian Democrats (CDP), Allende was ratified as President of the Republic in October 1970. However, in exchange, the CDP had a condition: a constitutional amendment clarifying and strengthening the scope of certain constitutional rights such as political participation, education, and freedom of expression. Yet no major changes in terms of state organisation and institutions were included in the bill.⁴³⁵

Allende had no clear majority in Congress either, but neither did any of the other contending political groups, since initially there was no cohesive opposition. In the congressional election of 1969, one year before the presidential election, Allende's Popular Unity coalition gained 43.9% of the vote, while the Christian Democratic Party and the conservative National Party secured 29.8% and 20% respectively. In the next election in 1973, Popular Unity – now the coalition in power – achieved 43.9% of preferences, while the opposition obtained 54.2% in total, with 28.5% for the CDP and 21.1% for the National Party.⁴³⁶ All this meant that Allende's capacity to pass legislation was rather weak at the time of taking office. In fact, his coalition hitherto controlled only 38% of the Chamber of Deputies and 46% of the Senate.⁴³⁷ Consequently, party politics were highly unstable, with no party able to take control of Congress of its own accord.

With some justification, the Popular Unity interpreted the political scenario in a rather sanguine way. They viewed the core of their programme as supported not only by the Popular Unity voters but also by a considerable sector of the Christian Democrats.⁴³⁸ In

⁴³⁴ Valenzuela (n 100) 40.

⁴³⁵ Faúndez, *Marxism and Democracy in Chile* (n 33) 188–200.

⁴³⁶ The figures are from Valenzuela (n 100) 85.

⁴³⁷ Novoa, *¿Vía legal hacia el socialismo? El caso de Chile 1970-1973* (n 429) 6–7.

⁴³⁸ *ibid* 7.

fact, there was extensive convergence between their political agendas; the main reason for not striking an agreement with the CDP was the conflicting strategic views between the moderates and radical sectors within the Popular Unity.⁴³⁹ This made Allende's adherents regard their support within the population as majoritarian.

Bearing in mind the fragile position of the Chilean economy at the time, it is no surprise that economic reform was a priority in the Popular Unity's programme. It included the nationalisation of strategic natural resources and key national industries, and the speeding up of the agrarian land reform. Crucially, Allende's promise was that all these reforms would be approved in conformity with Chilean legal procedures. In sum, he committed himself to pursue socialist reforms under the law.⁴⁴⁰

Indeed, in contrast with the Cuban revolution that brought about a socialist regime after guerrilla warfare, Allende vowed to ensure a transition to socialist government within the traditional legal framework of the country. This strategy of non-violent, institutional socialist revolution was termed the 'Chilean road to socialism' (*Vía Chilena al Socialismo*).⁴⁴¹ Based on a strong confidence in the flexibility of the political system and the docility of the legal institutions, Allende set out to introduce a number of radical socialist policies such as nationalisation of copper mining foreign companies, expropriation of the major manufacture industries, redistribution of land in the agriculture sector, and socialisation of the financial system.⁴⁴²

B. Legal constraints

By the 1970s, the landscape of legal institutions in Chile was multifaceted but disjointed. Although there was no proper public law jurisdiction, several organs of legal interpretation and adjudication played a significant role. Before giving more details of the legal confrontations that the Allende government faced, I will outline some features of

⁴³⁹ Faúndez, *Marxism and Democracy in Chile* (n 33) 201.

⁴⁴⁰ See Joan E Garcés, 'Chile 1971: A Revolutionary Government within a Welfare State' in Kenneth Medhurst (ed), *Allende's Chile* (Hart-Davis 1972) [an early account by one of Allende's closest advisors].

⁴⁴¹ José Antonio Viera-Gallo, 'The Legal System and Socialism' (1972) 1972 Wisconsin Law Review 754; Manuel Antonio Garretón (ed), *Revolución y legalidad: Problemas del estado y del derecho en Chile* (CEREN - UC 1972).

⁴⁴² Faúndez, *Marxism and Democracy in Chile* (n 33) 193–4.

the four most relevant bodies at the time:⁴⁴³ the Supreme Court, the Constitutional Court, the Council of Defence of the State, and the Comptroller-General.

As said previously, the ordinary judiciary did not possess general judicial review jurisdiction in Chile.⁴⁴⁴ The Supreme Court had recognised this fact in several instances. However, exceptionally, judges involved themselves in challenges to the executive exploiting the ambiguities of the legislation. First, the Supreme Court had an expansive view of its disciplinary powers over the rest of the judiciary, including supposedly autonomous administrative tribunals. In this way, the court occasionally heard challenges to otherwise final administrative decisions by broadly interpreting its appellate jurisdiction. Secondly, the judiciary could utilise criminal law and private law procedures for public law purposes. For instance, judges were able to initiate criminal investigations and order the suspension of administrative action as a collateral measure. They could also make interim injunctions in a private law proceeding before deciding on its jurisdiction. The judiciary could take advantage of its considerable independence from the executive and strategically exploit these procedural tools depending on the interests at stake. Yet, all things considered, the judiciary was seen as lacking a major role in policy-making.⁴⁴⁵

The constitutional amendment that created the Constitutional Tribunal was promulgated in January 1970, just months before the election that brought Allende to power.⁴⁴⁶ However, the Tribunal initiated its operation more than a year after. The need for a Constitutional Tribunal arose in 1967 because of a dispute between the President and Congress concerning the enactment of a constitutional reform on expropriation rules.⁴⁴⁷ At that time, due to the absence of constitutional adjudication, the Comptroller-General decided the disagreement pragmatically, but stated that he did not have formal authority to adjudicate disputes between the executive and Congress. As a result, the President decided to introduce a bill creating such a body with the responsibility of resolving inter-branch disputes between the legislature and the executive. Private parties had no access

⁴⁴³ Sigmund (n 433) 17.

⁴⁴⁴ For an overview, see Hilbink (n 23) ch 3.

⁴⁴⁵ Garcés (n 440) 45–6; Goldberg (n 433) 95–6.

⁴⁴⁶ For details, see Sergio Verdugo, ‘Birth and Decay of the Chilean Constitutional Tribunal (1970–1973)’ (2017) 15 *International Journal of Constitutional Law* 469. In its composition and functions, the Chilean Tribunal was comparable to the French Constitutional Council; see Stone Sweet (n 159).

⁴⁴⁷ Enrique Silva Cimma, *El Tribunal Constitucional de Chile: 1971-1973*, vol 38 (2nd edn, Cuadernos del Tribunal Constitucional 2008) ch 2.

to the Tribunal. The Tribunal was composed of five members; three were appointed by the President with the agreement of the Senate, and two by the Supreme Court.⁴⁴⁸

The Council of Defence of the State (CDS), in turn, was a body mainly responsible for litigation on behalf of state interests.⁴⁴⁹ However, it also performed an important advisory role to the President of the Republic. Twelve law-trained members with prestigious careers in the country comprised the head office of this Council. They enjoyed relevant tenure protections, as only the President, with the consent of the Senate, could remove them. Apart from the collegiate office, there were numerous lawyers in charge of litigating particular cases that composed the institution. Given its independence, and the reputation of its members, the Council played a legitimating function as well.⁴⁵⁰ This was particularly relevant since some pieces of legislation required the issuance of an advisory legal opinion by the Council before the exercise of some administrative powers. This was the case, for instance, for enacting requisition or intervention decrees. During most of the Allende period, Eduardo Novoa, a career lawyer, headed the Council. The rest of the Council members were of rather conservative propensities.

Lastly, the Office of the Comptroller-General was perhaps the main actor in the legal battles between business interests, the opposition, and the executive. Legislators and private parties challenged administrative action before this office, especially through the ex-ante review procedure. The Comptroller-General operated under the direction of comptroller Héctor Humeres (1967-1977) during most of the Allende government and even during the initial years of the Pinochet dictatorship. Having entered the office in 1949, Humeres served as Deputy Comptroller-General under the administration of one of the most brilliant Comptrollers, Enrique Silva, who held office between 1959 and 1967. The appointment of Humeres was somewhat politically controversial. When Silva retired in 1967, it was expected that his Deputy Comptroller-General would be appointed. But Chilean president Eduardo Frei delayed the nomination as he intended to nominate a candidate from his own party, the Christian Democrats. Some of the names considered by Frei as candidates were renowned lawyers such as Arturo Aylwin, Manuel Daniel, and

⁴⁴⁸ *ibid* ch 3.

⁴⁴⁹ For a historical account of the institution, see Gonzalo Vial, *Consejo de Defensa del Estado: 100 años de historia* (El Consejo 1995).

⁴⁵⁰ Novoa, *¿Vía legal hacia el socialismo? El caso de Chile 1970-1973* (n 429) ch 5.

Máximo Pacheco – all Christian Democrats – and University of Chile Faculty of Law dean Eugenio Velasco from the Radical Party. After six months of negotiations, Humeres decided to send a resignation letter to the President, pressuring him to announce his nomination to the Senate as the new head of office. The message conveyed to public opinion by Humeres' resignation attempt was that the President was politicising an autonomous institution by seeking to appoint an adherent as Comptroller-General. The President could not give support to such insinuations and eventually nominated Humeres to the position on 11 August 1967. Hector Humeres remained in office for almost eleven years, until 31 December 1977, when he resigned in the middle of an acrimonious dispute with some sectors within the dictatorship.

Nevertheless, at the time the legal philosophy of the office emphasised a collaborative and enabling attitude to state action. Indeed, the 1970 Annual Report of the Comptroller-General Office outlined a fairly progressive conception of its role within the Chilean system of legal accountability.⁴⁵¹ Its approach to legal interpretation contrasted sharply with the formalistic approach of the judiciary. To begin with, the statement emphasised the institution's permanent concern with adaptation to the evolution of the state and society. Then, it stated that following research and experience, the office had adopted a functional orientation to its mission. This meant, among other things, embracing purposive legal interpretation, collaborative work with public administration, and the promotion of the social role of the state. The statement compared administrative legality with private law. It argued that 'administrative legality cannot be constructed the same way as private law. The essential moral or ethical content of the latter differs from the purposive and active character of the former, whose main role is to collectively achieve [...] goals oriented to the common good'. In private law, literal reading of a provision is only secondarily complemented by purpose and history. In contrast, the Comptroller-General emphasised purposive interpretation, which is the most appropriate tool for constructing modern legislation, essentially active, often seeking to remedy emergencies, in which purpose dominates over the subtleties of text, and in which a changing social reality requires permanent adaptation of the law to circumstances. From this viewpoint, 'administrative legality is a means and not an end in itself', and it has to be flexibly adapted to an evolving reality as far as the text and purpose allows it.

⁴⁵¹ 'Memoria anual correspondiente al año 1970' (Contraloría General de la República 1971).

C. The implementation of the economic programme

1. The legislative route

Of course, the main obstacle to the execution of Allende's programme was that his progressive agenda of economic transformation needed endorsement by the legislature. The beginning was promising. Early on, Allende obtained unanimity in Congress to pass a constitutional amendment nationalising foreign copper mining industries. This reform was carried out by constitutional amendment in 1971. It granted the legislature the power to nationalise natural resources or productive assets if the interests of the community required it. Also, the constitutional reform directly nationalised foreign copper mining industries, establishing a procedure for determining the payment of compensation to the owners.

The operation had an important legal dimension. Indeed, the Comptroller-General played a significant role in setting out the compensation (if any) to be paid to the companies affected by the measure. Additionally, a special tribunal was set in operation to hear complaints by affected firms.⁴⁵² More concretely, the Comptroller-General was entrusted with responsibility for defining the compensation to be granted to foreign companies. In determining the compensation, the office had to take into consideration a figure representing the allegedly excessive profit gained by the companies to be set by the President of the Republic. In other words, while the Comptroller-General was responsible for setting the compensation, a previous stage – determining the existence of excessive profits – was the responsibility of President Allende. In 1971, the Comptroller-General decided that in most of the cases, no compensation was owed, since the companies had previously obtained excessive profits (as set by the executive). Then, as expected, the companies challenged this decision before the Special Copper Tribunal created by the constitutional reform. A Court of Appeal judge, the director of Internal Revenues Office, and the president of the Central Bank composed this tribunal. It upheld the Comptroller-General's decision, finding that although the institution made minor procedural mistakes, they did not have an influence on the final outcome. It also held that the President's

⁴⁵² See Silva Cimma, *El Tribunal Constitucional de Chile: 1971-1973* (n 443) 326–8; Sigmund (n 429) 153–5; Davis (n 429) 31–2.

decision regarding excessive profits was of political character, so not amenable to judicial review.⁴⁵³

The auspicious character of this precedent, however, may be deceptive. As the nationalisation measure could have a negative impact on foreign policy, Allende originally planned to share responsibility for it with Congress, particularly in respect to compensation and excessive profit estimates.⁴⁵⁴ In fact, in the original bill, the latter determination had a rather technical nature. First, the entire responsibility regarding the compensation due to the companies would be delegated to the Comptroller-General, as it was viewed as an independent and apolitical body. Moreover, the sympathies of the then chief of the office – Hector Humerez – were perceived to be with the opposition rather than with the executive. Secondly, legal provisions tightly structured the Comptroller's discretion. Lastly, his decision could be challenged before a special tribunal. As can be seen, Allende did not actually want to have the direct influence on the determination of excessive profit that he ended up having.

The opposition in Congress, on the other hand, could not politically afford to be perceived by the electorate as protecting foreign economic interests. As such, they had to support the nationalisation. However, they chose to make the executive exclusively responsible for its implementation and, additionally, force him to pay the cost in terms of foreign policy. Thus, Congress amended the bill and allocated the responsibility regarding the determination of excessive profit to the President instead of the Comptroller-General. As a result, the government shared with the opposition any political gains in terms of the popularity of passing the constitutional amendment by which Chile had recovered its most valuable natural resource. Yet the executive alone bore the costs in terms of international reputation as a rule-of-law compliant government.

2. The administrative alternative: the policy of 'legal loopholes'

The nationalisation of copper mining industries showed the difficulties with the legislative approach even when there was a chance of agreement with the opposition.

⁴⁵³ Although this put an end to the dispute as a matter of Chilean law, as expected the companies brought the case to international courts. See Eduardo Novoa, *La batalla por el cobre. Comentarios y documentos* (Ediciones Quimantú 1972).

⁴⁵⁴ Here I follow Julio Faúndez, 'A Decision without a Strategy: Excess Profits in the Nationalisation of Copper in Chile' in Julio Faúndez and Sol Picciotto (eds), *Nationalisation of Multinationals in Peripheral Economies* (Palgrave Macmillan 1978).

Perhaps this was taken into account when designing the implementation of the rest of the programme. Indeed, although he announced the introduction of a series of bills in Congress for economic reform, President Allende could not actually rely on the legislative strategy. He simply did not have the votes to pass such legislation. Facing this scenario, he decided to implement further policies via executive authority.

Several factors explain Allende's reliance on executive action. First, this strategy could assist negotiation with the opposition in Congress. Viewed from this perspective, it was a complementary rather than a substitutive course of action. Furthermore, Allende had confidence in the flexibility and deliberative virtues of the political system, and, perhaps excessively, in his own persuasive powers and leadership. Secondly, Chilean institutional architecture and tradition created incentives for exercising strong presidential leadership. The enactment of secondary legislation by the President and administrative agencies was largely legally accepted. Also, it was widely believed that the principle of separation of powers required that the judiciary should not scrutinise administrative action. Judicial activity was generally viewed as limited to private law and criminal law matters. Finally, the few forums for challenging administrative action – the Comptroller-General and a few special or ad-hoc tribunals – exercised their review powers, giving considerable leeway to executive discretion.

The option for executive implementation was theoretically defended and practically articulated by Professor Eduardo Novoa.⁴⁵⁵ Regarded as Allende's key legal advisor, he was a well-known legal scholar, highly critical of the forms and substance of the Chilean legal system at the time. He condemned the liberal principles reflected in the law, and the bourgeois interests it protected. He supported an instrumental view of law according to which legal institutions should reflect the political ideas of the time, not create obstacles to social change. Instead, they should facilitate policy implementation by democratically elected political authorities.

⁴⁵⁵ Eduardo Novoa, *Los resquicios legales. Un ejercicio de lógica jurídica* (Ediciones Bat 1992); Novoa, *El derecho como obstáculo al cambio social* (n 34); Cristian Villalonga, *Revolución y ley: la teoría crítica del derecho en Eduardo Novoa* (Globo 2008); Alejandro Polanco, 'El difícil camino de la legalidad. Vigencia y validez de los resquicios legales y su aplicación en el programa económico de Salvador Allende. Chile, 1970-1973' (2013) 1 *Revista Historia y Justicia*.

Eduardo Novoa advised Allende to pursue his policies by executive action, minimising the potential obstacles presented by the judiciary and the Comptroller-General.⁴⁵⁶ Drawing on his views on the contradictory nature of the legal system, he believed that there was sufficient authorisation in valid legal provisions for effective executive action in economic matters.⁴⁵⁷ At least in the short term, it was unnecessary – according to Novoa – to obtain explicit enabling legal powers from Congress. This was termed the strategy of ‘legal loopholes’ (*Resquicios Legales*).⁴⁵⁸

In addition to being a professor of criminal law and legal theory at the University of Chile, Novoa was president of the Council of Defence of the State – after a lifelong career in the institution. Novoa was a career member of the institution, and was appointed as its president by Salvador Allende in 1970. Precisely because all its members but Novoa were members of the opposition, this was the ideal forum for the defence of Popular Unity legal strategy.

The main objective of Allende’s economic policy was to bring basic industries under state control.⁴⁵⁹ This entailed the establishment of a sector of state property for essential means of production, which would exist in parallel to private and mixed property sectors. There were three main means for achieving this goal: direct expropriation, the purchase of shares in private companies, and transitory executive measures (called requisitions and interventions).

The first strategy consisted of direct expropriation of private companies. According to the Chilean Constitution, expropriation measures required previous legislative authorisation founded on public interest. An adequate compensation for the affected party was also mandatory under the law. Various statutes authorising expropriation could be found in Chilean legislation at the time. Decree Law 520, for instance, authorised an administrative

⁴⁵⁶ Faúndez, *Marxism and Democracy in Chile* (n 33) 201–3; Sigmund (n 429) 133.

⁴⁵⁷ Viera-Gallo (n 441).

⁴⁵⁸ This was and still is a very controversial expression in Chilean politics. It was originally used against Allende by the right-wing media, claiming that the government was twisting the law. Later, Novoa reclaimed the term, emphasising the ‘legal’ dimension of it. He maintained that by using the term the opposition implicitly conceded the legality of Allende’s policy. Currently the term is often used in public debate to signal executive violations of the rule of law. For a contemporary discussion of the legal loopholes idea in the context of the use of law as a means for social change, see Fernando Atria, *Veinte años después: neoliberalismo con rostro humano* (Catalonia 2013) 227–30.

⁴⁵⁹ Bitar (n 433).

agency to expropriate industrial or commercial companies in the case of industrial standstill or disobedience of administrative mandates to produce.⁴⁶⁰ These latter provisions were eventually a key piece in the Allende nationalisation policy.

The second strategy entailed the direct purchase of shares in private companies by the Chilean main development state agency – *Corporación de Fomento de la Producción* (CORFO). The implementation of the policy involved a process of participation by both the directive council and the director of the agency. According to this process, only after an agreement had been reached within the CORFO council could the director implement the purchasing measures. As an economic development agency, this body had had extensive previous experience in selling and purchasing shares in private companies since its creation in 1939. The only difference from previous practice was probably the scope and purpose of the policy. The notorious advantage of this approach was that the Comptroller-General had no jurisdiction over the CORFO operations governed by private law, as in this case.⁴⁶¹ Therefore, these measures did not have to go through the rigorous ex-ante legality review procedure of the office.

Finally, the government also actively used transitory administrative measures as instruments for its economic policy. These measures were ‘requisitions’ and ‘interventions’. Typically, requisitions were administrative measures established for dealing with shortages of basic goods in the market as a consequence of disruption in the production or distribution of commodities. If an authority ordered a requisition, she took on herself the buying and/or selling of goods on behalf of the respective firm. Of course, this was an unsuitable means for permanently acquiring property due to its interim character. However, the peculiarity in Chilean legislation up to this point was that not only commodities but also an establishment itself could be requisitioned. Intervention orders, or back-to-work decrees, on the other hand, were administrative measures designed for dealing with a standstill in a factory caused by industrial action or strikes. In this case, the administration could demand the resumption of production and appoint a provisional manager. Thus, as a result of this measure, the management of the business

⁴⁶⁰ Novoa, *¿Vía legal hacia el socialismo? El caso de Chile 1970-1973* (n 429) 38.

⁴⁶¹ *ibid* 39; Villalonga (n 451) 134–5.

would be taken over by government. Decisively, all these transitory measures had to be sent to ex-ante legality review by the Comptroller-General.

In consequence, Allende did not have to wait for an unlikely legislative authorisation in order to initiate his economic policy. He could take advantage of the variety of options inadvertently provided by Chilean legal institutions and regulations. In its actual operation, however, these institutions would have to overcome quite difficult hurdles.

II. THE COMPTROLLER-GENERAL AS AN OBSTACLE

Against the expectations of Allende and his advisors, legal institutions and particularly the Comptroller-General played a crucial role in paralysing or delaying the implementation of the Popular Unity programme. In this section, I will outline the main features of these disputes between the executive branch and legal accountability bodies.

A. Nationalisation by private law means

Once in power, the Allende government pursued its nationalisation agenda quite aggressively. His first tool was the purchase of shares by contracts governed by private law. Implementing the recently approved constitutional nationalisation clause, in 1971, CORFO – the main development state agency in the country – purchased shares in private companies that were involved in natural resources such as nitrates, iodine, iron, and coal.⁴⁶² The same approach was adopted for the acquisition of industrial firms. In February 1972, CORFO announced the purchase of shares in 91 large companies that the executive wanted to transfer to the state sector.⁴⁶³

Crucially, although initially Allende pledged to introduce a legislative bill, eventually the scheme chosen for the massive nationalisation of the financial system consisted of the purchase of shares by CORFO.⁴⁶⁴ Allende actually never introduced the bill in Congress.⁴⁶⁵ This nationalisation programme was implemented quite rapidly. By 1971, the government had taken 53.2% of private banks into public ownership. By mid-1972,

⁴⁶² Silva Cimma, *El Tribunal Constitucional de Chile: 1971-1973* (n 443) 119–20.

⁴⁶³ Novoa, *¿Vía legal hacia el socialismo? El caso de Chile 1970-1973* (n 425) 38–9.

⁴⁶⁴ Silva Cimma, *El Tribunal Constitucional de Chile: 1971-1973* (n 443) 121–2.

⁴⁶⁵ Villalonga (n 22) 135; Novoa, *¿Vía legal hacia el socialismo? El caso de Chile 1970-1973* (n 5) 25 (arguing that government could not follow this path because of the reactionary opposition in the legislature).

all small and midsize banks had become state-owned, and the participation of CORFO in the first and second largest banks was 71.5% and 46% respectively.⁴⁶⁶

Not surprisingly, the opposition disapproved of this strategy on political and legal grounds. It was argued that the effectiveness of the method was based on the coercion used against the owners. From this viewpoint, the executive had blackmailed them, the threat being that worse conditions would be offered if enabling legislation were passed.⁴⁶⁷ Besides, critics claimed that the Allende government utilised other measures to ‘asphyxiate’ the banks, such as excessive reduction of the interest rate, withdrawal of all state deposits from private banks, and appointment of permanent delegates in all banks, and that minor irregularities were abruptly detected and penalised by state inspectors.⁴⁶⁸

In addition, the opposition maintained that several aspects of the operation patently departed from legal standards and procedures.⁴⁶⁹ For instance, it was claimed that the purchase of shares did not fit the tasks assigned to CORFO by its organic legislation. The agency was acting outside the scope of its powers. However, the executive rightly replied that it was not innovating at all, as CORFO had been involved in similar operations many times before. Secondly, critics contended that the decision-making procedure was irregular because the CORFO council had not granted its consent before the director commenced the actions, as required. Conceding the lack of previous council consent, CORFO replied that the body had ratified the purchases ex-post, thus correcting the irregularities in the procedure. In respect to this latter charge, the Comptroller-General explicitly upheld the interpretation of the state agency through decision 13592 in 1971.⁴⁷⁰

The most serious allegation, however, related to antitrust legislation. On 21 January 1971, the Chamber of Deputies set up an investigatory committee to examine the legality of the policy of nationalisation of banks. In fact, especial attention was paid to the risks that the operation posed to the formation of monopolies in the financial sector. The chief of the legal department of the Antitrust Commission, Waldo Ortúzar, was summoned to give

⁴⁶⁶ Novoa, *¿Vía legal hacia el socialismo? El caso de Chile 1970-1973* (n 425) 25–6.

⁴⁶⁷ Eugenio Velasco, ‘Special Lecture Series—The Allende Regime in Chile: An Historical and Legal Analysis: Part II’ (1976) 9 *Loyola of Los Angeles Law Review* 711, 718.

⁴⁶⁸ *ibid.*

⁴⁶⁹ Novoa, *¿Vía legal hacia el socialismo? El caso de Chile 1970-1973* (n 425) 30–3.

⁴⁷⁰ *ibid.* 33; Silva Cimma, *El Tribunal Constitucional de Chile: 1971-1973* (n 447) 121.

testimony to the investigatory commission. In his statement he claimed that the operation infringed antitrust legislation because it would lead to the formation of a monopoly in favour of CORFO.⁴⁷¹

The deputies then decided to submit the issue for further investigation to the Antitrust Commission itself. Nevertheless, the commission – composed of the president of the Supreme Court, the Superintendent of Banks, and the Superintendent of Public Limited Companies – did not agree with Ortúzar's legal opinion and claimed that it lacked jurisdiction over the controversy since its remit did not cover state sector but only private sector operations.⁴⁷² Due to the inactivity of the Commission, the judiciary was called into action. Indeed, exceptionally, the dispute was escalated to the Supreme Court by a disciplinary action filed against the Commission. Unsurprisingly, handing down its decision on 30 August 1972, the court embraced Ortúzar's approach and ordered the Commission to decide the substance of the issue.⁴⁷³ Although the dispute returned to the Commission as soon as June 1973, the body did not take further action; it was only in January 1974 – after the military coup – that it decided to resume the investigation. Eventually, under new institutional arrangements, in May 1975 the successor of the Commission decided to file criminal indictments against the CORFO officials who participated in the banks' nationalisation. As most of the prosecuted officials had gone into exile after the 1973 coup, the investigation did not result in actual criminal sentences.⁴⁷⁴ However, the case demonstrates that even the weaker instruments for implementing Allende's policies could be undermined by the courts in spite of the absence of formal judicial review proceedings.

B. Nationalisation by public law means

Decree Law 520 in 1932 played a critical role in the process of nationalisation by public law means. Enacted under state of exception in 1932, this regulation was the central piece in the Chilean regulatory architecture for the public control of the production and distribution of basic goods.⁴⁷⁵ From an institutional perspective, its main feature was the

⁴⁷¹ Novoa, *¿Vía legal hacia el socialismo? El caso de Chile 1970-1973* (n 429) 26.

⁴⁷² This was also the approach supported by the CDS presided by Eduardo Novoa, see *ibid* 27, 29–30.

⁴⁷³ Velasco (n 467) 718; Patricio Bernedo, *Historia de la libre competencia en Chile 1959-2010* (Fiscalía Nacional Económica 20014) 57.

⁴⁷⁴ Novoa, *¿Vía legal hacia el socialismo? El caso de Chile 1970-1973* (n 429) 31. On this episode, see also Bernedo (n 469) 53–8; Villalonga (n 451) 134–9.

⁴⁷⁵ Henríquez (n 325) ch 6.

creation of an administrative agency (later called the Directorate of Industry and Commerce, DIRINCO) with a bureaucratic structure under the leadership of an administrator appointed by the President. This executive agency was endowed with robust regulatory powers through which it could declare that a commodity was a basic good and, consequently, set a maximum price for it. Notably, the agency also had powers to expropriate enterprises and take over their administration in the case of defects in the production or in the supply of basic goods. As the activity of the agency depended on the government's general economic policy, it played a passive role during more liberal Chilean administrations (1932-38 and 1960-70), while taking a more active approach between 1938 and 1952, under the influence of the Popular Front, a left-wing coalition. As we will see, Allende's Popular Unity, in turn, used DIRINCO and its formidable regulatory powers to implement its nationalisation policies, that is, to transfer private enterprises to the state sector.⁴⁷⁶

At the beginning of his mandate, Allende used administrative action to deal with situations of economic emergency. Rather than a deliberate economic policy, this was a reaction to external pressures from both business and workers' mobilisation. In fact, it has been argued that the opposition and the economic interests it represented were attempting to boycott Allende's policies. Enrique Silva, hitherto President of the Constitutional Tribunal, observed that 'it was evident that the industrial infrastructure was underutilised, so the supply was limited in order to keep prices artificially high'.⁴⁷⁷ An example of this was the expropriation of *Bellavista Tomé* Textile Mill.⁴⁷⁸ The owners of the factory had decided to stop production as soon as Allende took office because of their fear of his economic agenda. As a reaction to this, a month into Allende's rule, the executive decided to seize control of the firm, invoking Decree Law 520. This was the first company expropriated by the new government.⁴⁷⁹

The labour movement was also pressuring the government to take increasingly radical action. Indeed, Novoa admitted that although the original action of the executive was aimed simply at dealing with the boycott of the business class and the US diplomacy,

⁴⁷⁶ *ibid* 234.

⁴⁷⁷ Silva Cimma, *Memorias privadas de un hombre público* (n 212) 336.

⁴⁷⁸ Peter Winn, *Weavers of Revolution: The Yarur Workers and Chile's Road to Socialism* (OUP 1986).

⁴⁷⁹ Novoa, *¿Vía legal hacia el socialismo? El caso de Chile 1970-1973* (n 429) 20, 38.

workers were also demanding that every important firm be brought into the state sector.⁴⁸⁰ Labour pressure consisted of factory occupations by the workers, which paralysed production and resulted in a call for public control of the firms. The reaction of the executive to this was complicated. On the one hand, some officials may have seen the occupations favourably, since they gave them hands-on experience of the challenges that nationalisation policy might entail.⁴⁸¹ But, on the other hand, lacking guidelines on how to proceed, officials found it difficult to refuse workers' demands even when they were legally unsupported.⁴⁸² As Faúndez summarises, '[u]pon taking office, the government had no time to ponder the intricacies of law and the legal system. During its first months in office, it faced a wave of strikes, factory occupations, and land invasions that demanded immediate action. Its legal strategy was, consequently, largely shaped by its response to these events'.⁴⁸³

The legal framework for administrative action was quite poorly defined. Administrative requisitions were poorly regulated by an almost obsolescent legislation, both in terms of procedure and substance. As a result, legal rules created unnecessary discretionary powers and serious risks of arbitrariness. In addition, the regime of legal control of the administration was also highly deficient.⁴⁸⁴ Notably, many institutional actors believed that in exercising its legal review powers, the Comptroller-General could assess neither the merits nor the factual basis of administrative decisions. From this viewpoint, this light-touch approach was a foundation of the Chilean system of administrative control, confirmed by a long-standing practice. Thus, departures from this traditional doctrine in subsequent decisions by the Comptroller-General were perceived as reflecting an ideological bias.⁴⁸⁵

However, perhaps surprisingly, the initial reaction of the legal institutions was acceptance of the administrative instruments used by the Allende government. Responding to a request by the Chamber of Deputies, the Comptroller-General upheld the use of Decree

⁴⁸⁰ *ibid* 41.

⁴⁸¹ *ibid*.

⁴⁸² Faúndez, *Marxism and Democracy in Chile* (n 33) 265; Velasco (n 463) 714–5.

⁴⁸³ Faúndez, *Democratization, Development, and Legality* (n 43) 205–6 (notes omitted).

⁴⁸⁴ Silva Cimma, *El Tribunal Constitucional de Chile: 1971-1973* (n 443) 123–5.

⁴⁸⁵ *ibid* 127–8.

Law 520 as an instrument of economic policy.⁴⁸⁶ The same was true of the Council of Defence of the State that initially supported the legality of this strategy.⁴⁸⁷

However, the political opposition fiercely resisted the use of these powers of interference in private business. A number of legal arguments were developed. Some critics argued that Decree Law 520 was unconstitutional insofar as it authorised government to take private property without due compensation.⁴⁸⁸ In their view, requisitions represented an infringement of individual rights protected by the Constitution. Others claimed that even though the powers could be lawful, the concrete implementation by the Allende administration was contrary to law. For instance, Eugenio Velasco – the former dean of the University of Chile’s Faculty of Law – argued that requisitions could be accepted only if their targets were basic goods. But these measures had to be emphatically disallowed if they were directed at industries, as the executive intended. Likewise, Velasco maintained that requisitions could be lawfully used as interim measures, but not as a way of transferring firms to the state sector. In respect to back-to-work decrees, Velasco argued that their purpose had to be to put an end to a labour conflict, not the entirely different goal of nationalisation of a private company.⁴⁸⁹ In sum, there was severe disagreement on the use of requisitions as instruments of economic policy.

Some critics focused on the attitude of the Office of the Comptroller-General. The influential administrative law scholar, Eduardo Soto-Kloss, for instance, strongly criticised the institution for upholding the legality of requisitions of industries.⁴⁹⁰ Inquiring into the historical foundations of the measures, he suggested that only the requisition of basic goods was authorised by legislation. Requisition of firms, by contrast, was unlawfully introduced by an executive order in 1945. Soto-Kloss criticised the office for not vetoing such an enabling regulation at that early stage. In addition, he condemned the current approach of the Comptroller-General, distinguishing requisitions that were a form of punishment against an economic offence from requisitions whose goal was to

⁴⁸⁶ Ruling 13529 (26 February 1971). See Silva Cimma, *Memorias privadas de un hombre público* (n 212) 337.

⁴⁸⁷ Vial (n 449) 79.

⁴⁸⁸ Novoa, *¿Vía legal hacia el socialismo? El caso de Chile 1970-1973* (n 429) 38.

⁴⁸⁹ Velasco (n 463) 714–5.

⁴⁹⁰ Eduardo Soto-Kloss, ‘Sobre la legalidad de las “requisaciones de industrias”’ (1972) 13 *Revista de Derecho Público* (U. de Chile) 61.

prevent a distortion in the market. Drawing on this distinction, Soto-Kloss suggested that only the former was authorised by law subjected to criminal law principles. According to this viewpoint, requisitions could be ordered only if a seller refused to sell articles previously declared as basic goods. However, the measure could not be adopted as a general means to tackle speculation or hoarding.⁴⁹¹

Despite these doctrinal criticisms, the use of requisition continued, and the scope of the operation was substantial indeed. Between November 1970 and November 1972, the Popular Unity government issued 202 interventions and 126 requisitions, totalling 328 such administrative measures, most of them based on Decree Law 520.⁴⁹² In another account, it is claimed that the enactment of intervention decrees increased steadily during the Allende government. While only one intervention decree was enacted in 1970, 60 were issued in 1971, 113 in 1972 and finally 219 in 1973.⁴⁹³ In an estimate of the impact of the policy on the national economy, economist Gonzalo Martner suggests that ‘overall, by late 1971 the state controlled an area of state property that accounted for 23% of the industrial gross product’ of the country.⁴⁹⁴

Form of Control	November 1970	December 1971	December 1972	May 1973
State ownership*	31	62	103	165
Under intervention or requisition	–	39	99	120
Total	31	101	202	285

Table 5: State-Controlled Industrial Establishments, 1970-1973⁴⁹⁵

The magnitude of the nationalisation policy affected the attitude of the Comptroller-General towards the executive. In fact, it has been argued that the checking institution changed its approach to the exercise of these regulatory powers when it noticed that the executive was using them as a general regulatory policy.⁴⁹⁶ Thus, after initial recognition

⁴⁹¹ Eduardo Soto-Kloss, ‘La requisición de industrias en la jurisprudencia de la Contraloría General de la República ¿Una hipóstasis jurídica?’ (1973) 2 Estudios Jurídicos.

⁴⁹² Valenzuela (n 100) 64; Novoa, *¿Vía legal hacia el socialismo? El caso de Chile 1970-1973* (n 429) 42.

⁴⁹³ Enrique Brahm, *Propiedad sin libertad: Chile 1925-1973* (Ediciones Universidad de Los Andes 1999) 230.

⁴⁹⁴ Martner (n 433) 130.

⁴⁹⁵ Loveman (n 322) 253.

⁴⁹⁶ Silva Cimma, *Memorias privadas de un hombre público* (n 212) 339.

of the validity of the use of these executive powers, the Comptroller-General started to carry out increasingly more comprehensive scrutiny. The office now began to request evidence of the facts invoked by the executive, and elaborated innovative doctrines to strike down administrative decisions. As a result, the Comptroller-General started to reject executive decrees in respect to economic policy more often. This was especially frequent with requisition orders and expropriations of industries.⁴⁹⁷

However, the truth is that the Comptroller-General did not wait long to develop stricter scrutiny. A landmark decision was adopted in respect to the expropriation of *Industria Lanera Austral* – a textile mill – just five months after Allende took office in February 1971.⁴⁹⁸ According to the government, this industry was rapidly decreasing its production, reaching a dramatic 5% of its usual levels. The executive took the decision to expropriate the industry after DIRINCO officers in the region attested that the industry was in total standstill. Despite the fact that the CDS ratified the legality of the action, the Comptroller-General actively engaged in the review process. While reviewing the decree, the institution received a complaint from individuals close to the company asserting that the mill was actually not in standstill. Exceptionally, the Comptroller-General instructed two inspectors to verify *in situ* what the actual facts were. Considering the reports from DIRINCO, the complainants, and the inspectors, the office decided to disapprove the administrative resolution due to not being able to establish the existence of actual standstill in the production.⁴⁹⁹ Thus, against mainstream opinion, the office set aside administrative action based on disagreement on questions of fact. This decision was taken just three months after the first expropriation took place during the Allende administration. The executive, however, insisted on its decision since, in its opinion, the DIRINCO officers had properly verified the existence of industrial standstill.⁵⁰⁰

⁴⁹⁷ The Council of Defence of the State also shifted its official position on Allende's regulatory powers. The change seems to have occurred when it became clear that these means were being used to establish a state sector rather than to solve short-term economic problems. According to this viewpoint, what was at issue was 'the entire system of law' that the government wanted to modify in a revolutionary manner by strategic invocation of the law. Eduardo Novoa, the president of the council and advisor to Allende, resigned from the institution in late October 1972 after a political clash with the rest of the councillors. See Vial (n 445) 81–5.

⁴⁹⁸ See discussion in Raúl Espinosa, 'La Contraloría General y el proceso de cambios' (1972) 8 *Revista de la Universidad Técnica del Estado* 15, 24.

⁴⁹⁹ Ruling 10554 (11 February 1971).

⁵⁰⁰ Decree 104 of Ministry of Economy (1971) insisted by Decree 206 (20.02.1971)

Also in 1971, the Comptroller-General set aside a number of DIRINCO resolutions that requisitioned several other textile mills.⁵⁰¹ Again, there was a dispute about the factual basis of administrative action. The office repeatedly asserted that in order to approve the action it had to be satisfied that the conditions for the exercise of the administrative powers had been obtained. This required DIRINCO to display technical reports demonstrating that (i) there existed obstacles – not counting factory occupation by the labour force – to basic goods supply; (ii) the obstacle was capable of causing a shortage; and (iii) there was a causal connection between the shortage and the industry's output decrease. As DIRINCO did not corroborate all this, the Comptroller-General proceeded to reject the respective resolutions. But the executive once again insisted because it considered that the legal requirements for exercising its powers were satisfied.⁵⁰²

In 1972, we find several further clashes between the executive and the Comptroller-General.⁵⁰³ In the legality review process, the office disapproved a number of back-to-work decrees in order to deal with paralysis caused by industrial action. In some cases, the administrative action targeted state companies in the transport sector. Yet the Comptroller-General rejected the decrees because this sort of administrative reaction was useless for tackling strikes in the public sector.⁵⁰⁴ Furthermore, in other cases, the checking institution held that it was against the law to issue back-to-work decrees in the case of illegal occupation of the factory by the workers. According to the office, in these cases, the only route open to the administration was criminal prosecution, not administrative action.⁵⁰⁵ Lastly, the Comptroller-General vetoed a decision to appoint a provisional manager in a manufacturing firm because there was a parallel judicial procedure regarding the occupation of the establishment by the workers.⁵⁰⁶ In all these cases, Allende and his ministers decided to insist and overrule these adverse rulings. Interestingly enough, the last case justified the issuance of an insistence decree due to the need to avoid further damage to the national economy and shortages as a result of the standstill of the firm.

⁵⁰¹ 'Memoria anual correspondiente al año 1971' (Contraloría General de la República 1972) 50–1. See resolutions 532, 533, 534, 535, 536, 537, 541, 542, 543, 544.

⁵⁰² Decree 871 of Ministry of Economy (30 September 1971).

⁵⁰³ 'Memoria anual correspondiente al año 1972' (Contraloría General de la República 1973).

⁵⁰⁴ Ruling 37596 (1972) on the legality of decree 782 (1972) of Ministry of Interior, among others.

⁵⁰⁵ Ruling 4325 (1972) on the legality of decree 69 (1972), of Ministry of Labour; insisted by decree 84 (1972).

⁵⁰⁶ Ruling 39671 (1972) on the legality of decree 819 (1972), of Ministry of Labour; insisted by decree 832.

Another set of cases were related to requisitions.⁵⁰⁷ The Comptroller-General rejected most of the decrees on grounds of incomplete supporting evidence. According to the office, the evidence was insufficient because DIRINCO did not demonstrate the presence of industrial standstill, a market shortage, or a causal link between those circumstances. This was the case regarding firms in the fishing, food, and beverage sectors.⁵⁰⁸ Nonetheless, the executive decided to insist because it disagreed with the factual assessment of the institution.

Finally, one of the most controversial cases was probably the requisition of Industry of Copper Manufactures (MADECO).⁵⁰⁹ According to DIRINCO, the requisition was justified because of the copper shortage. In this case, the Comptroller-General did not challenge the factual assessment of the administration. Instead, it focused on the rationality of the measure, arguing that the requisition was not a suitable means to deal with the shortage. The institution considered that it would be preferable for the state either to expropriate the firm or to purchase shares on it. Alternatively, DIRINCO could set production goals that the firm had to meet. According to the office, if the goal was to tackle a shortage emergency, these suggested measures would be preferred to a requisition. Moreover, the Comptroller-General made clear that requisition was an illegal means to achieve the goal of nationalisation of industries. Indeed, it maintained that this instrument was essentially transitory and *a fortiori* unable to sustain a takeover by the state.⁵¹⁰

By 1973, the doctrine of the Comptroller-General in respect to Allende's economic policy was well established. Composed of a number of strict guidelines, it provided a rather narrow framework for administrative action. This was clearly outlined in the annual report for the year 1973.⁵¹¹ First, it stated that the executive must not issue requisitions

⁵⁰⁷ 'Memoria anual correspondiente al año 1972' (n 503) 49–52.

⁵⁰⁸ See rulings 68664 (1971), 77715 (1971), 24824 (1972), 9646 (1972), and 40153 (1972), among others.

⁵⁰⁹ See discussion in Espinosa, 'La Contraloría General y el proceso de cambios' (n 71) 25–6.

⁵¹⁰ Ruling 18447 (15 March 1972).

⁵¹¹ 'Memoria anual correspondiente al año 1973' (Contraloría General de la República 1974) 41–60. See also Javier Millar, 'Alcance del control de legalidad. Su evolución a propósito de los actos administrativos requisitorios, durante 1970-1973' (2000) 11 *Revista de Derecho* (Universidad Austral de Valdivia) (arguing that the foundations of the modern approach of the comptroller to legality review reside in the period 1970-1973).

decrees as a reaction to illegal occupation of factories, because this was a matter for criminal law courts. Secondly, it asserted that, as requisition decrees were transitory measures, they could not be used for bringing industries into the state sector. In other words, they could not be deployed as an instrument to carry out nationalisation policy. Thirdly, even within their proper remit outside the nationalisation sphere, requisition decrees had to be precise and unambiguous. The Comptroller-General would not approve generic or nonspecific requisitions. Fourthly, the office imposed minimum information requirements to issue a requisition decree by holding that administrative agencies must provide evidence that there was a distortion in the distribution of commodities before engaging in this kind of action. Similarly, the office stated that in order to issue requisition or back-to-work decrees, the executive must provide evidence of either industrial action in the firm, standstill in the production, a reduction in production of basic goods, or the existence of shortage. Fifthly, the administration was not allowed to extend the requisition of one industry to another even if they were operating in partnership. Finally, the administrative authority could not put into practice a requisition if the Comptroller-General had rejected the respective decree, even in case of urgency. In sum, the doctrine of the Comptroller-General in relation to economic policy revealed that the avenues for lawfully implementing the economic policy of the Popular Unity were practically blocked.

III. THE DECREE OF INSISTENCE AND THE TIME FOR POLITICS

However, as already seen, the Comptroller-General did not have the last word in disputes with the executive. In most of the cases of disagreement with the office, Allende decided to issue insistence decrees in order to continue with the implementation of his policies.⁵¹² The government usually – but not always – gave reasons for the promulgation of decrees overruling the Comptroller's adverse decisions. On occasion, executive officials invoked pressing public interests or economic interests that justified departing from legal technicalities, or just appealed to an alternative interpretation of the law. According to Eugenio Velasco – once candidate to head the Comptroller-General – insistence decrees had worked fairly well in previous decades, but the executive branch was now using them illegitimately. He maintained that the decrees were 'utilized by the Allende government

⁵¹² Sigmund (n 16) 206; Brahm (n 60) 235 (claiming that the Comptroller review was a poor remedy for the affected individuals).

to complete its illegal requisitions and “interventions” of factories, mines, shopping centers, and farms’.⁵¹³ What Velasco was suggesting seems to be that the mechanism was not strong enough to deter a government determined to infringe the rule of law.

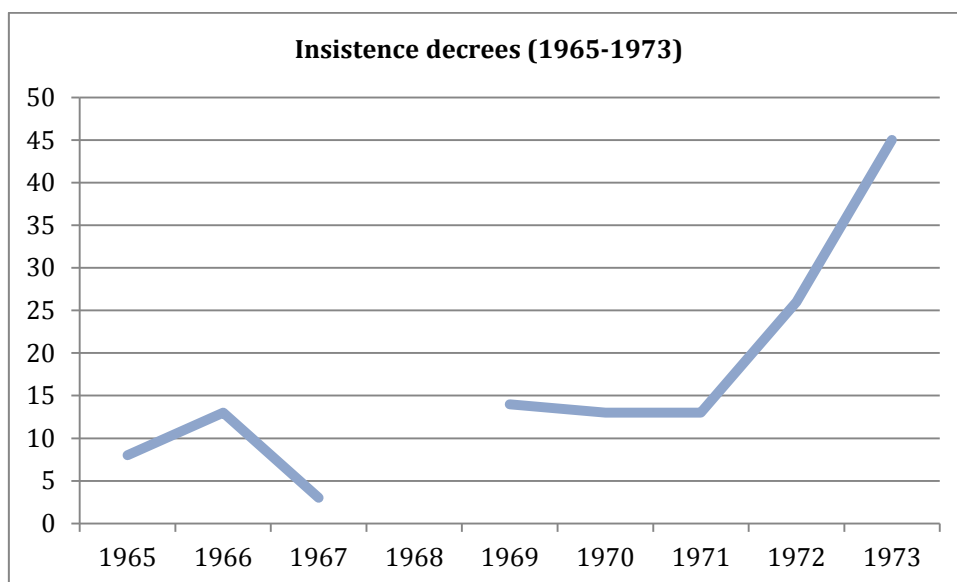


Figure 5: Insistence decrees between 1965 and 1973⁵¹⁴

	1965	1966	1967	1968	1969	1970	1971	1972	1973	1974
Decrees submitted	13973	14661	12904	10669	18460	19084	20864	21162	21565	19826
	8	2	8	2	4	7	8	2	4	9
Decrees rejected					17820	19764	26909	30316	28600	-
Insistence decrees	8	13	3	-	14	13	13	26	45	-
Emergency decrees	21	21	14	-	-	26	26	31	20	-

Table 6: Legality Review and decrees of insistence, 1969-1974⁵¹⁵

Certainly, due to the insistence mechanism, the adverse rulings did not paralyse government action in relation to its nationalisation policy. Yet continuous and public legal

⁵¹³ Velasco (n 467).

⁵¹⁴ Data for the year 1968 is missing, as the respective Annual Report is reported as lost.

⁵¹⁵ Sources: Comptroller-General Annual Reports, and Daniel Rojas Escobar, ‘Los decretos de insistencia: su régimen actual’ (LLB dissertation, Universidad de Chile 1977).

defeats enormously jeopardised executive credibility. As Allende had made respect for legality a core element of his political narrative, acrimonious disputes with the primary interpreter of administrative legality was genuinely corrosive of one of the pillars of Popular Unity public standing. Also, institutional criticism of Allende's economic policy on legal grounds considerably increased the political costs that the government was incurring for its adamant attitude in respect to the scope of the nationalisation endeavour. In particular, legal clashes with the Comptroller-General rapidly reverberated on Congress. Indeed, as a result of the issuance of insistence decrees, impeachment procedures against the Minister of Economy, Pedro Vuskovic, were initiated in the Chamber of Deputies in September 1971.⁵¹⁶ This forced the executive to soften its position regarding nationalisation of private business and, as a result, the Christian Democrats agreed with the executive to retire its support for the impeachment. The price to be paid was that the government pledged that legislation authorising any further nationalisation would be negotiated in the legislature, and that no further executive action entailing transfer of private companies to state ownership would take place.⁵¹⁷ Thus, the legal obstacles raised by the Comptroller-General had a very significant impact on the political arena indeed.

The Popular Unity parties, however, were unable to reach a deal among themselves to introduce a new bill on nationalisation of industries in Congress. The Christian Democrats interpreted the breach of the promise of a new bill as an act of political aggression. As a reaction to this, they submitted a constitutional amendment to Congress that ostensibly restricted the regulatory powers of the executive.⁵¹⁸ The bill targeted every aspect of Allende's economic policy, with the purpose of impeding advances via executive action without legislative engagement. The constitutional provisions put forward by the Christian Democrats declared any further government purchase of shares in private industries null and void. Moreover, they removed the powers to issue requisition and intervention decrees from the executive. Lastly, they stated that any further nationalisation would require an act of Congress authorising the takeover of a private industry.⁵¹⁹ In consequence, these rules pushed the executive to ensure agreement in

⁵¹⁶ Davis (n 433) 58–9.

⁵¹⁷ Faúndez, *Marxism and Democracy in Chile* (n 33) ch 12.

⁵¹⁸ Alexander (n 433) 285.

⁵¹⁹ Faúndez, *Marxism and Democracy in Chile* (n 33) ch 12.

Congress before taking any new action towards additional expansion of state ownership. Under the pressure imposed by the opposition, the executive branch was ready to propose its own nationalisation bill. Naturally, Allende's proposal was far more generous than the Christian Democrats' bill, but because of delays, it was evidently unlikely that the executive would obtain the support needed to approve the bill in the legislative process.

The Christian Democrat constitutional amendment bill triggered an additional iteration of the clashes between the executive branch and the Comptroller-General.⁵²⁰ This time, the dispute revolved around questions of legislative procedure. During the legislative process there was a sharp disagreement between government and opposition in respect to the proper steps that had to be followed to approve the amendment in the face of a partial executive veto. Indeed, although Congress approved the restrictive CDP nationalisation bill, the executive decided to veto a number of its provisions. In addition, the President replaced these provisions with new ones and attempted to clarify some aspects of the amendment bill through supplementary provisions. However, a majority in Congress rejected the veto, initiating a dispute over the procedure that should be followed subsequently. The opposition maintained that the bill originally approved by Congress – that is, before the executive veto – should be enacted as law in its entirety. The President, however, claimed that Congress's overriding veto did not entail the approval of the regulation favoured by the opposition, since the Constitution required the insistence of Congress by a two-thirds supermajority. Otherwise, the executive argued, there was simply no regulation at all in respect to that matter.

Additionally, the procedure to solve the disagreement was also disputed. Indeed, President Allende maintained that the Constitutional Tribunal should adjudicate the dispute, whereas the opposition believed that the only way out was to call a referendum in which the people could have a say. According to the opposition, the referendum should include disputed procedural points and also the government nationalisation policy as a whole. Based on a narrow reading of the constitutional rules defining the Constitutional Tribunal jurisdiction, the congressional opposition believed that the tribunal did not

⁵²⁰ For materials on this dispute, see Andrés Echeverría and Luis Frei (eds), *La lucha por la juridicidad en Chile. 1970-1973* (3), vol 3 (Editorial del Pacífico 1974); for a discussion, see also Velasco (n 463) 729–31.

possess jurisdiction in cases of constitutional amendment, but only regarding the ordinary legislative procedure.

Nonetheless, Allende submitted the procedural dispute to the Constitutional Tribunal in May 1973, and some weeks afterwards the judges handed down their opinion.⁵²¹ Supporting the congressional approach, the majority of the tribunal held that they lacked jurisdiction to decide this kind of constitutional dispute. Interpreting its powers restrictively, the ruling argued that the tribunal could intervene in respect to issues connected with the ordinary legislative procedure, but never in cases stemming from a constitutional amendment procedure. As a result, although siding with the opposition, the tribunal did not address the substantive point at issue over the procedure to follow in order to enact the reform.

In a situation of dramatic legal uncertainty, the executive decided that the bill could be promulgated but only regarding those aspects in which there was agreement with Congress. This way, the executive maintained, none of the branches of government would be imposing its will over the others. However, this interpretation was to be challenged once more on legal grounds. As the promulgation was implemented by an executive decree, the Comptroller-General had to approve it before official enactment. In sharp contrast with the reticent attitude of the Constitutional Tribunal, the Comptroller-General took a position in respect to the substantive dispute, strongly disagreeing with the executive.⁵²² In July 1973, Comptroller Humeres concluded that the executive was not authorised to promulgate the reform in a partial manner. According to the office, just two alternatives were available to the executive: either promulgation of the entire bill as passed by Congress, or a referendum. Otherwise, the behaviour of the President of the Republic was unconstitutional. Accordingly, the Comptroller-General had definitely rejected the solution put forward by the executive to the constitutional showdown with Congress, exposing Allende once again to accusations of operating outside the rule of law.

⁵²¹ Constitutional Tribunal Decision (1973) Rol 15. Justice Veloso dissenting.

⁵²² Ruling 50782 (02 July 1973).

As expected, this new adverse ruling was immediately used against Allende in Congress. Instead of initiating impeachment procedures for infringement of the Constitution, on 22 August 1973 the Chamber of Deputies issued a declaration denouncing ‘a serious breakdown of the constitutional and legal order of the Republic’.⁵²³ The deputies’ statement censured the executive for unlawfully attempting to promulgate only a fragment of the constitutional amendment. Additionally, the declaration accused the executive of repeatedly disobeying legal decisions from the Comptroller-General and the judiciary. The constitutional showdowns between the executive, on the one hand, and the Comptroller-General and the courts, on the other, were used as a perfect excuse for this declaration of illegitimacy issued by the lower house of Congress. Indeed, opposition legislators based the declaration on the allegedly constant infringements of the rule of law. Critically, the declaration by the Chamber of Deputies was addressed not only to the President but also to the Armed Forces. Thus, a veiled call to military intervention could be inferred. Allende replied, saying exactly that: he accused the opposition of calling the armed forces to break their duty towards the government.⁵²⁴

At this point, even Eduardo Novoa – Allende’s most assertive legal advisor – had lost confidence in implementing socialist reform via legal channels. Government officials accused the opposition and international actors of deliberately undermining the political and economic stability of the country. A month later, on 11 September 1973, the military bombed the palace of government and violently took power, ending one of the more stable democracies in the continent.

IV. THE CRITIQUE OF THE COMPTROLLER-GENERAL

Exasperated by what he regarded as disloyal hostility, Eduardo Novoa – the main legal advisor to Allende – strongly criticised the role played by Comptroller Hector Humeres. Novoa, and other critics condemned the way that, in several instances, the head of the office had overstepped the legal boundaries of its jurisdiction.⁵²⁵ It is worth noting that

⁵²³ See the Chamber of Deputies’ Resolution in Echeverría and Frei (n 120).

⁵²⁴ Velasco (n 467) 731.

⁵²⁵ In what follows I draw heavily on Novoa, ‘El difícil camino de la legalidad’ (n 429); Julio Vega, *Introducción a la Juseconomía* (Editorial Andrés Bello 1972) 193–5; Espinosa (n 498).

they raised similar complaints against the involvement of the judiciary, and especially the Supreme Court, in reviewing administrative action.⁵²⁶

First, Novoa claimed that the Comptroller-General had scrutinised not the legality, but the ‘administrative policy’ underlying the decrees under examination. Second, he maintained that the office had questioned the factual basis of the executive decisions. He argued that in the legality review procedure, the Comptroller-General lacked the powers to evaluate the facts on which the decision of the executive was founded. He was not authorised to engage in fact-finding activities, or to assess the evidence presented by the executive. Nor was the Comptroller-General legally endowed with powers to call witnesses and invoke their statements against those of the executive. According to Novoa, these were essentially judicial powers that the office could not wield unless an explicit legal rule stated so. Thirdly, the Comptroller-General could not act as an administrative tribunal, hearing complaints against an authority filed by private parties. It was illegal for the Comptroller-General to require the executive to respond to these complaints, and for him to adjudicate in case of disagreement. Finally, Novoa accused the Comptroller-General of elaborating legal doctrines tailored to the Allende government in order to undermine the implementation of their policies on ideological grounds.

Eduardo Novoa was concerned about the powers and institutional structure of the Comptroller-General Office. He believed that the appointment procedure was not fit for the purpose of choosing an expert public lawyer of good judgment, able to guarantee impartiality in political controversies. As the Constitution required agreement between the President and the Senate for appointing the office-holder, he believed that there was a real risk of settling for the least threatening candidate: a career employee that had reached a high position not due to skills, but because of his seniority within the organisation.

Novoa argued that, given the power of the Comptroller-General, this flawed nomination scheme was extremely dangerous, as the office-holder was granted with lifetime tenure. Moreover, it was extremely difficult to make him accountable in case of misconduct. His

⁵²⁶ Raúl Espinosa, ‘La requisición de los monopolios textiles y un fallo de la Corte Suprema’ (1972) 7 *Revista de la Universidad Técnica del Estado* 89.

decisions were strictly personal, since he could choose his closest advisors and clerks; he was not bound by the professional advice of the office's staff; and he had unfettered disciplinary powers over every employee of the office. There was no system for airing employees' complaints. It has been claimed that the impact of this autocratic model on the institution at large was disastrous. Critical reflection and independent judgment within the organisation were discouraged, while sycophants and submissive personalities were stimulated, resulting in an increasing environment of mediocrity. Thus, the head of the office held considerable internal power, and was strongly criticised for it.

Even more importantly, unlike judicial decisions, the interpretations of the office generally had a considerable impact on executive decision-making and the citizenry as a whole. Furthermore, these rulings stemmed from just one person instead of a collegiate organisation, as was the case in the Supreme Court. Unlike the Supreme Court's decisions, the Comptroller's judgments did not result from a process of collective deliberation and compromise. Within the Comptroller-General's Office, there was no room for dissidents. Therefore, the political persuasion of the chief of the office was critical for explaining and predicting the behaviour of the organisation. On top of all of this, the Comptroller-General took advantage of ambiguities in the legislation and exercised powers beyond his legal remit.

Novoa suggested that the excessive powers of the Comptroller-General had had a detrimental impact on executive decision-making. He maintained that the power of the office was considerable, since the office could initiate disciplinary proceedings and impose sanctions on administrative officers. Given this, even ministers preferred to enquire into the Comptroller-General's opinion in advance before embarking on any risky course of action. As these were informal consultations, it was easy for the office to exceed legal procedures and jurisdiction. As a result, this legal watchdog ended up invading the remit of the government, according to Novoa.

According to this critic, the opposition of the Comptroller-General to Allende's policies was quite simply ideological. He claimed that officers from the judiciary and the Comptroller-General believed that the law must always be interpreted in order to perpetuate the capitalist system. They used their institutional positions as weapons at the service of the bourgeois ideology. In his view, Popular Unity's officials had 'endured

every form of obstruction from the Comptroller' and he believed that the outcomes of the legality review procedure could be explained only as the expression of the ideological sympathies of the head of the office.

Novoa acknowledged that, theoretically, there were remedies for correcting the failures of the Comptroller-General in exercising his power. However, he argued that those safeguards were insufficient and ineffective. On the one hand, the office was not accountable to any other state organisation. The only way to complain about the Comptroller's decisions was to protest to the public. On the other hand, Novoa asserted that the recourse to decrees of insistence, was no real remedy since Presidents reasonably avoided using them due to the reputational costs they imposed. They feared public accusations of incurring illegality or infringement of the rule of law.

Although disagreeing with the policies promoted by Popular Unity, Sergio Micco has also adopted a critical stance towards the Comptroller-General.⁵²⁷ He claims that the office should not have engaged in merits review of Allende's economic policy. In his view, the Comptroller-General should only have examined the legality and constitutionality of administrative action.⁵²⁸ Micco concedes that the executive branch was violating basic rule of law principles including property rights, but he maintains that this was no excuse for a technical body to invade the political realm in a partisan manner.⁵²⁹ In addition, he argues that the protection of individual interests against adverse administrative action was a function for the judiciary, and not for the Comptroller-General.⁵³⁰ However, he admits that this opened up an enormous jurisdictional problem because of the absence of judicial bodies with powers to adjudicate such disputes.

V. CONCLUSION

This chapter has shown the effective use of the Comptroller-General – what could have been regarded as a functionalist promise of administrative justice – as legal opposition to a political programme of radical progressive change. It might well be concluded that if there was any hope for the constructive operation of the Comptroller-General, the

⁵²⁷ Sergio Micco, 'Unidad Popular, resquicios legales y quiebre jurídico-institucional chileno. Tomos I y II' (Universidad de Concepción 1987).

⁵²⁸ *ibid* 224.

⁵²⁹ *ibid* 232.

⁵³⁰ *ibid* 234–5.

experience of the Allende government definitively provides evidence that it was unfounded. Of course, defenders of the *status quo* and vested interests might be content with the results,⁵³¹ but a different attitude could be expected from functionalist thinkers who favoured administrative state and collectivist policies.

However, the chief factor explaining the crisis in Allende's Chile was not obstruction of political change by legal institutions. Rather, it was the incapacity of the political process to deal with political conflict, open channels for compromise and negotiation, and eventually reach agreement.⁵³² It is undeniable that at various points legal institutions – particularly the Comptroller-General – were deployed for ideological, partisan purposes. It is also true that the institution in particular took decisions that were legally flawed. Yet that was not always the case. In the context of a legal system lacking judicial review of administrative action, it was implausible to expect a merely formalistic approach to legal review by an institution of central importance such as the Comptroller-General. In that setting, it does not seem sensible to claim that the office was overstepping its responsibilities when it examined the facts underlying a decision, or when it disallowed the use of transitory measures for implementing an all-out policy of nationalisation of basic industries. Furthermore, a merely formalistic review would not have enabled the Comptroller-General to perform the legitimating role that legal accountability is expected to play.⁵³³

Moreover, as Julio Faúndez has suggested, the alternative to the Comptroller-General would have been a fully-fledged system of judicial review. For a government promising social change through law, there was no option to disregard any form of legal checks, and considering the intervention of the Supreme Court during this period and afterwards, judicial review would probably have been even worse. Although the Comptroller-General legal review implied a delay in policy implementation, it at least enabled the President to insist on his agenda and bring the issue into the political process in Congress. If political

⁵³¹ For instance, Alfredo Jocelyn-Holt, 'La Contraloría General de la República: Su sentido histórico' (2015) 137 *Estudios Públicos* 133, 144 (suggesting that the office played a key role in avoiding a socialist dictatorship in Chile).

⁵³² Valenzuela (n 100) 81–2.

⁵³³ See the critical remarks on the legitimization function of law in EP Thompson, *Whigs and Hunters. The Origin of the Black Act* (Penguin Books 1975) 263.

support was then unattainable, that seems to evidence a problem with the political power of the government to pursue its agenda.

Finally, further inquiry is needed to determine the possibilities and limits of the Comptroller-General as a functionalist institution of administrative justice. Although constitutional showdowns bring to light the remarkable aspects of an institution, it is also relevant to examine its operation in ordinary times. To state it in somewhat functionalist terms, to grasp a full picture of the Comptroller-General, it is desirable to "take a closer look at its routine interactions with bureaucracy, and at the social interests that are more frequently served by their processes.

CHAPTER 5. THE COMPTROLLER UNDER DICTATORSHIP, 1973-1990

This chapter explores the role of the Comptroller-General during the military dictatorship of Augusto Pinochet between 1973 and 1990. The authoritarian regime that followed the 1973 coup d'état in Chile lasted until 1990 and rapidly destroyed the main pillars of the institutional architecture of the country. Congress was closed, political activity was forbidden, and a full reengineering of the constitutional system was started. The adherents of the Allende government were persecuted, exiled, tortured, and in many cases killed. From the beginning of the authoritarian period, however, legal institutions – the judiciary and the Comptroller-General – remained almost untouched by the Military Junta. This was unsurprising, since the Comptroller's Office and the Supreme Court, in Paul Sigmund's words, 'practically invited' the military to carry out the coup d'état.⁵³⁴

The judicial branch of government offered no resistance to political power during the dictatorship. Indeed, the judiciary 'immediately accepted the new authoritarian law-making process'.⁵³⁵ The courts did not provide protection against the furious repression unleashed immediately after the 11 September coup. In fact, most of the writs of habeas corpus filed on behalf of detainees were rejected (only 10 out of 5,400 were accepted). Judges did not exercise their investigatory powers and easily accepted the unconvincing explanations provided by government officials. As Constable and Valenzuela have argued, the ideological biases of judges and their formalistic training and narrow conception of the legal process seem to have been factors that explain this judicial docility. Similarly, Lisa Hilbink has suggested that judicial behaviour under authoritarianism in Chile is explained by institutional factors. She describes the judiciary as 'a highly autonomous bureaucracy [that] gave strong incentives for judges to play, primarily if not exclusively, to the Supreme Court'.⁵³⁶ This resulted in conformity and conservatism within the institution. The Supreme Court's hierarchical control over the rest of the judiciary impeded judges from developing a liberal understanding of their role as protectors of rights and public liberties. In terms of institutional ideology, Hilbink emphasises the judiciary's anti-politics mentality, which conceived the judicial role as a

⁵³⁴ Sigmund (n 433) 187.

⁵³⁵ Pamela Constable and Arturo Valenzuela, *A Nation of Enemies: Chile under Pinochet* (Norton 1993) 127.

⁵³⁶ Hilbink (n 23) 34–6.

defence of conservative political principles. The protection of other political values was regarded as unprofessional, jeopardising the political neutrality of the institution.⁵³⁷ Therefore, according to Hilbink, ‘hierarchy and paternalism, an elitist disdain for politics, and a preference for uniformity and order over pluralism and tolerance’ were cultivated by the institutional arrangement and ideology of the Chilean judiciary.⁵³⁸

Could the same charges be levied against the Office of the Comptroller-General? What role did the institution play in the Pinochet period? There is no consensus on these questions. Some believe that the office showed its independence and strength in extremely hostile times. A reputed historian claims, for instance, that unlike the judiciary, the Comptroller-General cannot be accused of being servile or obsequious to the Pinochet dictatorship.⁵³⁹ Two foreign observers seem to agree with that view, maintaining that the institution ‘created not a few problems to governments acting outside legality [and that] the military government of Augusto Pinochet was no exception, as a series of conflicts between the State and the Contraloría confirmed’.⁵⁴⁰ Finally, the opinion of Patricia Arriagada, speaking as a Deputy Comptroller-General, should be noted. On one occasion she held that the attitude of former Comptroller Héctor Humeres in resisting a politically sensitive but illegal decree by Pinochet was an epoch-making event for the independence of the office.⁵⁴¹ Yet others have interpreted this very same event, along with the subsequent appointments of two successive comptrollers by Pinochet, as defining the office as an ‘authoritarian enclave’ bequeathed to the transitional period that began in 1990.⁵⁴² As will be seen, this chapter examines events that enable us to have a more a nuanced evaluation of the role of the office during this period.

In fact, the Chilean experience shows that the behaviour of the Comptroller-General was quite similar to that of courts in authoritarian regimes. For instance, the office was used

⁵³⁷ *ibid* 38.

⁵³⁸ *ibid* 227.

⁵³⁹ Jocelyn-Holt (n 531) 144.

⁵⁴⁰ Benny Pollack and Ann Matear, ‘Dictatorship, Democracy and Corruption in Chile’ (1996) 25 *Crime, Law and Social Change* 371, 381–2 note 2.

⁵⁴¹ ‘Contralora(s) Patricia Arriagada: Trabajar en la Contraloría supone ser absolutamente independiente’ *Diario U. de Chile* (18 April 2015) <<http://radio.uchile.cl/2015/04/18/contralora-s-patricia-arriagada-trabajar-en-la-contraloria-supone-ser-absolutamente-independiente/>> accessed 30 July 2016.

⁵⁴² Santiso (n 27) 113.

to ‘establish social control and sideline political opponents’.⁵⁴³ It was also deployed to ‘bolster [the] regime’s claim to “legal” legitimacy’.⁵⁴⁴ Furthermore, the Comptroller-General played a role in ‘strengthen[ing] administrative compliance within the state’s own bureaucratic machinery and solv[ing] coordination problems among competing factions within the regime’.⁵⁴⁵ Thus, differences between Comptroller-Generals’ and courts’ reactions to authoritarianism are hard to find. Yet this chapter also shows that the office had relevant clashes with the military. Despite all its collaboration, the regime was highly distrustful of the Comptroller’s office and actively attempted to bypass it. There is also evidence that Pinochet’s legal advisors regarded the legal review dimension of the Comptroller-General as an obstacle to the neoliberal reforms they had set out to implement. Moreover, it is revealing that this contrasted with their more positive view of the functions of the judiciary.

This chapter is divided into three main sections. The first section outlines the collaboration between the Comptroller-General and the new regime in the months that followed immediately after the 1973 coup d’état. In the second section, some of the key clashes of the office with the Pinochet dictatorship are discussed. Here, a more self-assertive attitude is revealed. Finally, the process of design of a new Comptroller-General in the new constitutional architecture of the regime is examined. As a result, an ambiguous attitude of the regime towards the institution will emerge. Before that, I will outline the most comprehensive discussion of the role of the institution yet, namely that elaborated by political scientist Robert Barros.

I. A CHECK ON EXECUTIVE ACTION ON BEHALF OF THE JUNTA

Robert Barros has produced a provocative work about the interaction between the Chilean military dictatorship and legality. Against conventional accounts of the Chilean authoritarian regime as a monocratic dictatorship centred on Pinochet, Barros argues that the internal operation of the Junta as an institutionalised collegiate body, governed by unanimity rule, prevented the emergence of a single-man dictatorship. But incidentally,

⁵⁴³ Tom Ginsburg and Tamir Moustafa, ‘Introduction: The Functions of Courts in Authoritarian Politics’ in Tom Ginsburg and Tamir Moustafa (eds), *Rule by law: the politics of courts in authoritarian regimes* (CUP 2008) 4.

⁵⁴⁴ *ibid.*

⁵⁴⁵ *ibid.*

Barros also examines the existence of external checks on the military government.⁵⁴⁶ He suggests that the Comptroller-General played a crucial role in enforcing the pre-eminence of the Junta as a collective body over the executive branch embodied in Augusto Pinochet. I will later show that this view represents an unconvincing oversimplification, but in this section I will outline Barros' account in more detail.

The Chilean Junta comprised four members, representing the Armed and Police Forces of the country. General Augusto Pinochet from the Army, Admiral José Toribio Merino from the Navy, General Gustavo Leigh from the Air Force, and General César Mendoza from the National Police Force – *Carabineros* – comprised this collective body. According to an earlier command issued by the Junta itself, it concentrated the 'supreme authority of the nation'.⁵⁴⁷ Later on, the Junta clarified that this authority entailed the exercise of constituent, legislative, and administrative powers, excluding only the judicial power that remained to be exercised in the form and with the independence established in the 1925 Constitution.⁵⁴⁸ Constituent and legislative powers were to be exercised only by unanimity of the members of the Junta,⁵⁴⁹ while executive power was to be exercised by Pinochet himself as the President of the body.⁵⁵⁰ Consequently, Barros argues that the Junta – not Pinochet – was the highest political body in the country above the executive branch.

In Barros' account, the Comptroller's Office and the Supreme Court operated as external constraints on the political power of the military. Barros concedes that when there was unanimity among the four members of the Junta, they were able to override any decision taken by external checking institutions. Yet he remarks that 'the Junta was not always in agreement' and that 'within those realms regulated by law, the Supreme Court and the Contraloría did present a formal limit upon the prerogative powers of the military regime'.⁵⁵¹ Although this hardly created proper external accountability, Barros maintains that it 'had significant consequences for power relations within the Junta'.⁵⁵²

⁵⁴⁶ See Barros (n 24) especially ch 3.

⁵⁴⁷ Decree law 1 (18 September 1973).

⁵⁴⁸ Decree law 128 (16 November 1973).

⁵⁴⁹ Decree law 128 (16 November 1973).

⁵⁵⁰ Decree law 9 (12 September 1973).

⁵⁵¹ Barros (n 24) 82–3, 86.

⁵⁵² *ibid* 87.

Indeed, focusing on the institutional dynamics within the Junta, Barros's argument is that the role of the Comptroller-General was to ensure that the executive respected the legal framework designed by the Junta:

Since statutory law could not be modified by executive decree, the executive could only act beyond standing legal boundaries by first working new legislation through the [collegiate action of the] Junta. In this manner, by assuring the superiority of the statutory law over acts of administration, the Contraloría indirectly safeguarded the Junta's powers before Pinochet within the domain of issues subject to preventive legal review.⁵⁵³

Additionally, Barros claims that the contribution of the Comptroller-General as a watchdog of Junta-Executive relations was greater than that of the Supreme Court. His starting point is that while the target of the Comptroller-General was the executive, the court was focused on the Junta itself. Thus, the impact of the former was larger because the executive alone, that is, Pinochet, did not possess the powers 'with which to unilaterally override a negative ruling by the *Contraloría*'.⁵⁵⁴ In contrast, if acting unanimously, the Junta was able to forestall judicial intervention by exercising its powers of constitutional amendment. On the other hand, whereas the legality review procedure of the Comptroller-General was compulsory and could veto executive decision-making, judicial review powers could be exercised only after a private party challenged a decree-law before the judiciary. Taking this into account, Barros concludes that the Comptroller-General 'placed a more significant constraint upon the prerogative powers of the military' and that 'the judiciary could not stand as a significant limit on the military regime'.⁵⁵⁵ Moreover, he argues that the rigid Chilean understanding of both the notion of separation of law and politics, and the principle of separation of powers, along with the existence of a nonjudicial body reviewing the acts of the executive, resulted in further judicial inhibition in holding the government to account.⁵⁵⁶

Thus, Robert Barros offers a very sanguine portrait of the legal framework of the Chilean dictatorship. This enables him to conclude that there were institutional and ongoing constraints upon Pinochet's powers, and that '[t]he checks given by the Junta were

⁵⁵³ *ibid* 110–1.

⁵⁵⁴ *ibid.*

⁵⁵⁵ *ibid* 112–3.

⁵⁵⁶ *ibid* 113–4.

structured by the unanimity rule, the separation of executive and legislative powers, and were reinforced by the 1980 constitution'.⁵⁵⁷ Furthermore, Barros asserts that 'the Chilean dictatorship was subject to and constrained by legal institutions of its own making'.⁵⁵⁸

Concerning the Comptroller-General in particular, Barros maintains that, in spite of its initial collaborative attitude, it exercised fiscal and legal oversight without 'subsequent interruption during the whole period of military rule'.⁵⁵⁹ Importantly, he also downplays the scope of the matters exempted from compulsory legal review by the office.⁵⁶⁰ In fact, he describes the institution as operating under – by and large – normal circumstances and imposing a degree of accountability upon the military:

During the sixteen and a half years of military rule, hundreds of thousands of administrative acts were submitted to the *Contraloría*'s legal department for legal and constitutional review. Each year, thousands of decrees were returned to ministries and agencies because of legal defects, and on many occasions anticipation of the *Contraloría*'s tremendous power caused legal advisors considerable anxiety. In general, the *Contraloría* functioned normally under the military government. On no occasion did Pinochet make use of the *decreto de insistencia* [insistence-decree to override comptroller's veto] to force the implementation of unconstitutional and/or illegal administrative acts.⁵⁶¹

In the following sections, however, a more complex picture will be presented. Perhaps surprisingly given Barros's claims, they will expose the Comptroller-General as being under significant pressure from the executive, and arguably eventually being defeated by Pinochet.

II. COLLABORATION

The Comptroller-General's collaborative attitude during the initial years of the dictatorship can be illustrated by examining two aspects of the relationship with the government. The first aspect relates to the mutual concessions made by both bodies in order to re-establish normality in public bureaucracy. Indeed, while at the beginning the Junta granted more powers to the office, the Comptroller-General provided helpful expert

⁵⁵⁷ *ibid* 313.

⁵⁵⁸ *ibid*.

⁵⁵⁹ *ibid* 108.

⁵⁶⁰ See *ibid* 109.

⁵⁶¹ *ibid*.

advice to the Junta. The second aspect that reveals the collaborative relationship between the Comptroller-General and the Junta concerns the passivity of the former regarding overt violations of human rights. The office deliberately decided not to use its powers of ex-ante legality review in respect to political repression, and this certainly facilitated the consolidation of authoritarianism at the beginning of the military rule.

A. Mutual concessions

1. ‘Normalising’ administration

One of the first measures taken by the Junta once in power was to announce that the Comptroller-General and the judiciary were to remain untouched.⁵⁶² Although the Junta made considerable staff redundancies across the whole public sector, the judiciary and the Comptroller-General were notable exceptions.⁵⁶³ Indeed, decree law 6, of September 1973, explicitly declared that every position in the public sector was to be held in interim character, with the only exceptions being the judiciary and the Office of the Comptroller-General. Certainly, however, the Supreme Court and the Comptroller-General retained powers to suppress political agitators within their ranks.

Former Comptroller-General authorities report that a handful of politically motivated dismissals took place in the office’s Legal Department – the main bureau comprised exclusively of about 30 legal experts (see chapter 2).⁵⁶⁴ Although recognising pressure from the Junta, one of them also pointed out that the then head of office – Héctor Humeres – reached a deal with the military according to which he could take responsibility for the officers who supported Allende and who remained in his institution. The same observer points out that for harder cases – that is, cases of individuals directly involved in political actions supporting the Allende regime – Humeres decided to commission them to provincial branches of the institution. In other cases, officers who opposed the regime were commissioned to posts that were isolated from the functioning of the central government, or they simply abandoned the institution after a couple of years.

⁵⁶² Sigmund (n 433) 248.

⁵⁶³ *ibid* 265.

⁵⁶⁴ This section is informed by interviews with two former senior Comptroller-General officers serving in the office at the time.

Soon after the coup, Pinochet announced that the new administration would rely on the assistance of the Comptroller-General.⁵⁶⁵ But in order to be an effective collaborator in building the foundations of the new regime, the institution needed further powers. This was explicitly discussed a few days after the coup between the Junta and the office's authorities. As a result, the Junta conferred the office with special powers. Its organic law was modified in order to enhance the office's legal capabilities.⁵⁶⁶ The aim was to make administrative action more dynamic, regular and efficient by centralising and strengthening the Comptroller-General's supervision. Concretely, these rules focused on three areas. First, they provided the body with full access to administrative information. To this end, disciplinary powers were granted in case officials refused to provide the requested information, and it was stated that exemption to publicity clauses did not apply against this oversight body. Secondly, the regulation widened the scope of the institution's powers, including under its remit every type of administrative entity and, particularly importantly, state company. Thirdly, it granted the office the power to set up control units within the organisations under its supervision, and it provided that these departments were technically subordinated to the Comptroller-General.

The Junta wished to use the institution for auditing Allende's economic policies, especially the financial condition of nationalised firms. However, the outcomes were not as expected by the regime. Although the office found inefficiencies and even waste, it did not detect large illegalities in the management of the nationalised companies. According to one observer, the military rulers were disappointed and even frustrated at the result of the investigations. Additionally, the Military Junta wanted to use the Comptroller-General as a tool to tighten up their grip on Chilean bureaucracy. A former officer and later Pinochet minister recalls that hundreds of 'ideological agitators', allegedly responsible for causing chaos and misrule, could have been found at different levels of Chilean bureaucracy. She maintained that Pinochet, with the help of Comptroller Humeres, was able to fire more than 300 of these public employees from different administrative agencies in the country.⁵⁶⁷

⁵⁶⁵ Madariaga (n 413) 24–5.

⁵⁶⁶ Decree Law 38 (2 October 1973). Later, other regulations enhanced the powers of the office. See, for instance, Decree Law 1141; and Decree Law 1263.

⁵⁶⁷ Madariaga (n 416) 29.

The conferral of additional powers to the Comptroller's Office by the Junta can be explained by the need to normalise the administrative structures and processes after the coup d'état. However, it also shows the sentiment of gratitude and respect that the military officials held for the Comptroller-General due to its contribution to the legal struggle against the Allende government, as seen earlier in Chapter 4. Additionally, as will be shown next, in terms of personnel, the boundaries between the government and the Comptroller-General were at times blurred, since officials were serving simultaneously on both sides of the divide.

2. Legal advisors for the new government

The collaborative role of the office during the period is also illustrated by the fact that legal experts trained in the Comptroller-General Office played a key role in designing and running the new legal architecture of the country. Indeed, due to expertise in public administration and governance, the institution was a natural source for staff that adhered to the new authoritarian government. First of all, the Comptroller-General generously deployed his power to commission officers in detached service in the executive. Thus, for instance, replying to a request for collaboration by the Defence Minister, Comptroller Humeres commissioned officers for every state secretary in order to help the new authorities and legal advisors with the normalisation of administrative action. Moreover, he promised to give prompt responses to the queries of administrators.⁵⁶⁸

A former senior officer recalls that he was appalled by the fact that colleagues were serving simultaneously at both the Comptroller-General and the central government.⁵⁶⁹ Numerous Comptroller officers were working as legal advisors either directly to the Junta or to the legislative commissions set up to draft future sector-specific legislation.⁵⁷⁰ These cases involved individuals that shared the ideology of the regime, but not all of them did. Many conceived of themselves merely as bureaucrats advising on technical legal matters. In fact, one former officer who served at the Comptroller-General Office at the time narrates the collaboration in slightly less politicised terms. He explains that the military needed advice on the law governing the civil administration of the country because most of the authorities and their advisors had experience in military matters only. Moreover,

⁵⁶⁸ See ruling 75700 (1973).

⁵⁶⁹ Interview with former senior Comptroller-General officer.

⁵⁷⁰ Barros (n 24) ch 2 [explaining the importance of these advisory bodies].

he explains that his own work was focused on coordinating civil personnel that remained in sector-specific areas, performing similar work as before the military coup.

However, the existence of political adherence – not merely technical cooperation – at the highest level seems undeniable. The situation of Mónica Madariaga is a case in point. She was a former senior Comptroller-General officer in the Legal Department, and afterwards, Pinochet's chief legal aide and ultimately Minister of Justice between 1977 and 1983. In fact, Madariaga was a key actor as a senior legal advisor at the office during the Allende government.⁵⁷¹ From the beginning of Allende's government in 1970, she was mainly dedicated to cases of industrial action in public enterprises. In an interview in 1985, she admitted that at that time she favoured a military coup in the country.⁵⁷² She added that she took up her job in the Comptroller-General as a front-line role wherein she could defend the political values she supported. Madariaga is regarded as one of the architects of the legal doctrine used by the Comptroller-General to oppose Allende's 'legal loopholes'.⁵⁷³ She admitted that 'with [her] attitude, [she] defended or believe to be defending the legitimate property rights of the owners of industries against the illegitimate action of the workers, who through violent means were appropriating the enterprises and taking them over'.⁵⁷⁴

When the coup came, Madariaga was commissioned by Comptroller Humeres to serve as a representative of the office in the National Commission for Administrative Reform (CONARA), a body set up by the Junta to give advice on administrative issues.⁵⁷⁵ She then moved to the presidential office of legal advice. From this position she played a critical role in providing reasons for rejecting the adoption of a system of rotation in the leadership of the Junta, thus helping to concentrate power on Pinochet to the detriment of the other members of the body.⁵⁷⁶ Generally, based on her acquaintance with public law issues acquired as an advisor in the Comptroller-General, she helped Pinochet to dress up in legal language his takeover of the Junta. As Constable and Valenzuela explain, '[w]ith support from conservative legal experts, who argued that the state needed a clear

⁵⁷¹ Madariaga (n 416) ch 3.

⁵⁷² Monica González, 'Mónica Madariaga pide perdón' (1985) 9 *Análisis* 16.

⁵⁷³ See Chapter 4.

⁵⁷⁴ González (n 572).

⁵⁷⁵ Madariaga (n 416) 30.

⁵⁷⁶ *ibid* 33; Barros (n 24) 53.

separation of power to function effectively, [Pinochet] urged his colleagues to make him the chief executive, while they would act as the legislature'.⁵⁷⁷ These commentators emphasise the role of people like Madariaga within Pinochet's civilian staff. Indeed, she is described as a 'sharp legal factotum [...] who helped construct an imposing juridical rationale for dictatorial rule'.⁵⁷⁸ As Pinochet's chief legal advisor, she engaged in intense debates with advisors to the other members of the Junta, who occasionally opposed Pinochet's wishes.⁵⁷⁹ As will be seen later, her experience in the Comptroller-General's office may explain her stance regarding this institution during the deliberation of the new Constitution.

The case of Hugo Araneda, on the other hand, illustrates the limitations in the influence of Comptroller officials over executive policy during the Pinochet period.⁵⁸⁰ He was the Deputy Comptroller-General when Allende's government was overthrown, and was considered by the Junta as a candidate to be appointed Minister of Economy during those early days. He was a specialist in finance and the budget process, so his profile fitted the post. Yet as he was above all a lawyer and his economic views were traditionalistic, some University of Chicago educated economists rapidly took the lead, and pressured the government not to appoint him. Eventually, he was discarded from the shortlist, a 'Chicago boy' economist was appointed, and Araneda went back to the office, where he retired in 1979. This shows that the influence of Comptroller-General officers had natural limitations when entering into conflict with the interests of the young neoliberal economists of the new regime. More importantly, it reveals the growing perception that the office represented outdated, collectivist attitudes to state action that the regime wanted to eradicate.

B. The Comptroller-General's passivity

The office's cooperation with the Junta in the early years of the dictatorship was not only carried out by active involvement in the governance of the country. It also involved failure to exercise its powers of legal control in respect to gross human rights violations. While monitoring a potentially unassailable bureaucracy and providing legal advice could be

⁵⁷⁷ Constable and Valenzuela (n 535) 66.

⁵⁷⁸ *ibid* 80.

⁵⁷⁹ Madariaga (n 416) 34–9.

⁵⁸⁰ Ascanio Cavallo, Manuel Salazar and Oscar Sepúlveda, *La historia oculta del régimen militar: Chile 1973-1998. Memoria de una época* (5th edn, Grijalbo 1999) 21–2, 162; Madariaga (n 413) 28.

viewed as forms of collaboration that were plausibly indispensable in order to normalise the country, the office's docility in protecting the rights of the population had the natural effect of eroding its own legitimacy as the primary custodian of administrative legality. In what follows I will briefly explain how this institution failed to perform its ex-ante legality review powers in respect to crucial human rights issues, and also its weakness in protecting public service rules, one of the core aspects of the office's remit.

1. Ousting the ex-ante legality review

At the time, as today, the main legal weapon of the Comptroller-General was the ex-ante legality review procedure. In fact, it was through this procedure that the office held Allende accountable in regards to his industrial nationalisation policy. According to this procedure, the most important administrative decisions had to undergo legal examination by the Comptroller-General before promulgation.⁵⁸¹

The legality review procedure was suspended in the months immediately after the coup d'état. In fact, during September and December 1973, the Junta submitted decrees to the Comptroller-General, but only for the record, not for legality scrutiny.⁵⁸² This meant that the institution recorded them in its files, but did not perform a proper legal examination or exercise its potent veto power. As a result, during the initial months of the dictatorship, the main features of the legal framework of the regime were set up without legal challenges.

However, the passivity of the office did not stop there. Another technique to avoid legal controversies with the government was deployed. As scrutiny of every administrative regulation issued by public bureaucracy would paralyse the operation of the Comptroller-General, its organic law authorised the office to exempt from review matters that were 'non-essential'.⁵⁸³ Indeed, this provision was invoked after the coup d'état, in order to facilitate military repression. In fact, resolution 1100 (10 November 1973) by Comptroller Humeres, enacted two months after the coup, stated that decisions regarding national security such as arrests, confiscations, and expulsions were to be exempted from

⁵⁸¹ For regulatory details, see Chapter 2, and for the Allende period, see Chapter 4.

⁵⁸² Comisión Nacional de Verdad y Reconciliación, 'Informe de la Comisión Nacional de Verdad y Reconciliación' (Comisión Nacional de Verdad y Reconciliación 1991) 56; Barros (n 24) 46–7, 108.

⁵⁸³ See explanation in Chapter 3.

legality review by the office.⁵⁸⁴ In other words, in Humeres' view, they were non-essential administrative matters.

The impact of this measure did not pass unnoticed. In fact, in 1975, the Cooperation Committee for Peace (*Comité de Cooperación para la Paz*) requested that the Comptroller-General repeal resolution 1,100.⁵⁸⁵ This Committee was a civil society organisation comprising several representatives of churches, with the purpose of defending victims of the violence during the first years of the dictatorship. In its request, the Committee emphasised the connection between the rule of law and the existence of means for legal control of administrative action. They reminded the office that the Chilean system relied heavily on the ex-ante review, a feature that made Chile well known and respected abroad, they remarked. The Committee refuted the idea that this scheme was valid only in times of normality – not during constitutional emergencies. The petition conceded that the Comptroller-General was endowed with the power to exempt some non-essential decisions from review, but compellingly argued that issues regarding constitutional rights such as personal liberty, the right to remain in national territory, and the right to property should be regarded as of critical importance. Therefore, the Committee asserted, these matters should not have been regarded as non-essential by Comptroller Hector Humeres. In particular, the petition was motivated by 'irregularities detected in the execution of measures and by the increasing numbers of affected people, which makes it unfounded to assert that they are isolated or insignificant cases'.⁵⁸⁶ After mentioning cases of illegal arrests, expulsions, and confiscations, the petition requested that Humeres set aside his resolution and issue a new regulation establishing that arrests, expulsions, and confiscations must be submitted to compulsory ex-ante review.

International organisations were also concerned with the Comptroller-General's passive response to authoritarianism. Between 1974 and 1977, the Organisation of American States (OAS) issued several reports requiring explanations from the Chilean regime in relation to the situation of human rights in the country. In its first report in 1974, the OAS highlighted that the Comptroller-General had been 'one of the most distinctive

⁵⁸⁴ Constable and Valenzuela (n 535) 129; Barros (n 24) 109 note 37.

⁵⁸⁵ Formal Request to the Comptroller General from Cristián Precht, 'Solicita se modifique la resolución 1.100, de 10 de noviembre de 1973' (1975) <<http://www.memoriachilena.cl/archivos2/pdfs/MC0043515.pdf>> accessed 27 December 2015.

⁵⁸⁶ *ibid.*

institutions of the constitutional regime of justice in Chile'.⁵⁸⁷ Although it was still formally functioning, the OAS inspectors reported that few essential elements of the institution survived, since it had temporally lost its main powers for protecting human rights.⁵⁸⁸ Even though the oversight body was still in operation, its supreme rule-of-law function had temporally disappeared, and its powers hardly went beyond the formal ones of a notary, the report remarked.⁵⁸⁹ In its second report on the situation of human rights in the country, the OAS strongly criticised the exceptions the Comptroller-General was affording to decrees concerning matters of importance from a human rights perspective, such as arrests, expulsions, and confinements.⁵⁹⁰ The OAS asked the government for clarification regarding the legal sources for these decisions, and details about how those powers had been used. However, the government did not provide any information, although they did reply in January 1977 explaining the allegedly legal basis for the exceptions to legality review. However, the OAS insisted on its warning regarding the unjustifiable self-restriction of an institution of such importance in the country and the continent for the protection of fundamental rights.⁵⁹¹

The attitude of the Comptroller-General was to some degree hypocritical. Indeed, a senior officer recalls that Humeres was concerned by the fact that the executive was illegally failing to submit to review decisions on politically motivated dismissals. The officer remembers that Humeres commissioned him to convince Deputy Interior Minister Enrique Montero either to resume the submission of this sort of decree or, alternatively, enact a law excluding them from review. Thus, Humeres' main concern was not the substantive protection of rights, but the respect for procedural forms. The reaction of the government to the request was a violent refusal, suggesting that Humeres had no authority to impose conditions upon them.

⁵⁸⁷ 'Informe sobre la situación de los derechos humanos en Chile' (Inter-American Commission of Human Rights 1974) <<http://www.cidh.oas.org/countryrep/Chile74sp/Indice.htm>> accessed 30 July 2016.

⁵⁸⁸ *ibid* §15.

⁵⁸⁹ *ibid* §16.

⁵⁹⁰ 'Segundo informe sobre la situación de los derechos humanos en Chile' (Inter-American Commission of Human Rights 1976) § 4-6. <<http://www.cidh.oas.org/countryrep/Chile76sp/Indice.htm>> accessed 30 July 2016.

⁵⁹¹ 'Tercer informe sobre la situación de los derechos humanos en Chile' (Inter-American Commission of Human Rights 1977) <<http://www.cidh.oas.org/countryrep/Chile77sp/indice.htm>> accessed 30 July 2016.

Eventually, in 1977, Comptroller Humeres modified resolution 1100, that is, two years after the request by human rights organisations. Indeed, in July, he issued resolution 600 stating that some national security issues were ‘essential’. As will be seen below, the relationship between the Comptroller-General and the government reached its lowest point that year, and Humeres’ decision reveals a less docile attitude. The new resolution included as reviewable the following acts: cancellation of nationality status, detentions carried out under emergency regimes, presidential pardons, prohibition to engage in determined professional activities, and expulsion orders on national security grounds.⁵⁹² Accordingly, some critical decisions were reintroduced within the remit of the Comptroller’s legal supervision.

Yet in January 1978, Comptroller Sergio Fernández – a close aide to Pinochet who held office for only four months between January and April – reinstated the old restrictive criterion. He enacted resolution 113, stating that the following matters were exempted from legality review: detentions carried out during emergency regimes and expulsion orders or prohibition from entering the country on state security grounds. As will be seen in the following section, although he only held office for a few months, his aim was clear: to re-establish the docility of the office to governmental power.

2. Purge in the public administration

Political repression took many forms, one of which was purges in the state sector. This is particularly important since one of the main tasks of the Comptroller-General had historically been to interpret legality concerning civil service and labour protection in the public sector. Between 1973 and 1980, 150,000 individuals serving in the public sector were dismissed by the new regime. The central government was reduced by half, while public bureaucracy in general went from 700,000 in 1973 to 550,000 in 1980.⁵⁹³

Unsurprisingly, the education sector was severely affected. Hundreds of university lecturers were dismissed for political reasons during the first years of the dictatorship. Indeed, in October 1973, the Junta appointed military officials with extensive powers to

⁵⁹² See resolution 600, art. 6 letter E.

⁵⁹³ Constable and Valenzuela (n 535) 189, 236; Azun Candina, *Clase media, estado y sacrificio: la Agrupación Nacional de Empleados Fiscales en Chile contemporáneo (1943-1983)* (LOM Ediciones 2013) 160.

run all universities in the country. Their task was to ‘extirpate’ Marxists who had allegedly spread their ideology and hatred across the classrooms.⁵⁹⁴ A 1976 United Nations report examined the restructuring of the universities in the country, indicating that the restructuring process caused the firing of more than 200 lecturers, many of which were well-known for their independent political opinions.⁵⁹⁵ The report asserted that academics regarded as ‘nonconformist’ in teaching matters were at permanent risk of being removed from their jobs. It was also reported that the Comptroller-General was instrumental to the policy implemented by government. Indeed, the office interpreted university regulations as granting university presidents and deans with powers for dismissing academics if the ‘superior interest’ of the university required it, in order to ensure normal operation, or simply to restructure necessities. This contrasted sharply with the attitude of the office in the late 1960s, described by one observer as protective of ‘the universities against arbitrary governmental intervention’.⁵⁹⁶

However, closer inspection of some of the cases in which the Comptroller-General intervened does not reveal an unremittingly subservient attitude. The office actually required the authorities to at least respect legal procedure and forms. For instance, with ruling 79534 (8 October 1973), the office registered a decree appointing pro-government rectors to state universities, but declared that the powers granted were illegal. It must be noted that at the time, the legality review procedure was suspended, so the ruling could not veto the executive order. Another example is ruling 87859 (3 December 1974), in which the Comptroller-General rejected a decree issued by the director of the University of Chile appointed by the Armed Forces. The decree that was questioned by the office dismissed university personnel as part of the crackdown on academic freedom. The office found that the authority failed to show that the affected functionaries were fully informed of the procedure against them. In other cases, the Comptroller-General enforced social security and employment regulations. For instance, in Ruling 6757 (28 January 1976), it held that the appointed director of the University of Chile was not allowed to make a post redundant if it was held by a woman entitled to maternity leave. Similarly, in Ruling

⁵⁹⁴ Constable and Valenzuela (n 530) 249–50; see also Paul Meyers, ‘La intervención militar de las universidades chilenas’ (1975) 241 *Revista Mensaje* 379.

⁵⁹⁵ ‘Informe del grupo de trabajo ad-hoc para investigar la situación actual de los derechos humanos en Chile; presentado conforme a la resolución 7448 de la Asamblea General’ (United Nations 1976) 117 <<http://www.bibliotecamuseodelamemoria.cl>>.

⁵⁹⁶ Lowenstein (n 412) 93 note 2.

33060 (11 May 1976), the Comptroller-General found that although university deans possessed discretionary powers to fire personnel, they must respect labour protections.

Above all, the role of the institution in these cases consisted of reminding the administrative authorities of the need to conform to legal formalities before taking action against political opponents. If there was a valid legal provision blocking a decision, the office pointed that out, and rejected the decree. Although this attitude reflects little more than a reminder that such legal provisions had to be repealed or modified in order to proceed with the implementation of authoritarian policies, because of its legalism the Comptroller-General Office was increasingly perceived by military authorities as an obstruction to expeditious governmental policy.

III. HOSTILITY

By 1977 the Comptroller-General had become gradually less passive. Not surprisingly, the reaction from the government was open hostility to the office. This section analyses the clashes between the Comptroller-General and the authoritarian regime, and the way they impacted on the institution's independence. In general, it will describe the political tensions between Comptroller Hector Humeres and some groups within the military government. These frictions reached their peak in late 1977, and led to the demise of Humeres after ten years serving as Comptroller-General. After that, in a strategy of survival, the office adopted a predominantly timid attitude, avoiding public showdowns as much as possible.

A. The Comptroller's independence and the demise of Humeres

By 1977 the institution was increasingly viewed by the regime as an obstacle to the profound economic reforms the latter was implementing. The government considered that the office was unduly interfering in the process of policy implementation. They may also have regarded it as troublesome and a scandalmonger in especially difficult political circumstances. However, there were some precedents in previous years. For instance, a clash occurred in 1974 when Comptroller Humeres refused to submit observations to Pinochet privately as the latter wished, probably in order to avoid public criticism.⁵⁹⁷ In

⁵⁹⁷ Cavallo, Salazar, and Sepúlveda (n 575) 512 note 9.

subsequent years he also had confrontations with ministers and other high-ranking officials in the areas of finance, economics, housing, and public health.⁵⁹⁸

In 1977, a Comptroller-General investigation ended up with the Provincial Treasurer of Santiago being imprisoned for three months.⁵⁹⁹ The office detected that the Treasurer acted with discretion in reaching deals with well-resourced taxpayers, but reduced state revenues by around US\$7,000,000. According to the Comptroller-General, in these types of cases, statutory regulations neatly structured treasurer decision-making, so he was not allowed to act on his own discretion. Neither was he allowed to use his discretion in cancelling or postponing the collection of tax revenue. After investigating the case and considering the seriousness of the infringements incurred by the officer, the Comptroller-General recommended that the Finance Minister remove him from his position, and also filed a criminal action in the ordinary courts.

As a result of cases like this, newspapers supporting the military regime began to harass Humeres.⁶⁰⁰ Various media outlets were publishing letters from the public complaining about the behaviour of the office-holder. As doubts about the identity of the authors of the letters were raised, it was suspected that government officials were orchestrating an offensive against Humeres. Considering the situation unacceptable, he asked the courts to initiate criminal proceedings on national security grounds against people harassing him. Yet this did not appease the critics. Hermógenes Pérez de Arce, director of a widely read newspaper and an influential supporter of the regime, rejected Humeres' complaints and endorsed the opinion of his letter-writers. He labelled the Comptroller-General a 'gigantic octopus' that made everything sluggish and paralysed decision-making.⁶⁰¹ Defenders of the office, however, believed that the attacks were triggered by hostility against what was perceived as a statist institution that was alien to the country's now neoliberal economy.⁶⁰² According to the press, this was especially relevant, considering the discussion about the new constitutional regulation of the institution that was simultaneously taking place.⁶⁰³

⁵⁹⁸ *ibid.*

⁵⁹⁹ Jaime Moreno Laval, 'Contraloría-Tesorería. Criterios en pugna' [1977] *Revista Hoy* 18.

⁶⁰⁰ Jaime Moreno Laval, 'Las querellas del Contralor' [1977] *Revista Hoy* 15.

⁶⁰¹ Cited in *ibid.*

⁶⁰² *ibid.*

⁶⁰³ See section IV below.

Against this background, it came as no surprise that budget protections in favour of the office were eliminated in the same year. This protection dated back to the Golden Age of the office. In 1959, a statutory regulation had safeguarded the Comptroller-General's budget against fiscal reductions, ensuring that no less than 0.39% of the expenditure estimated in the Annual Budget Law had to be appropriated to the office.⁶⁰⁴ The Military Junta modified this law in November 1974 and again in 1975 to weaken the budget protection.⁶⁰⁵ The Junta eventually decided to abolish the shielded budget entirely in November 1977.⁶⁰⁶ As a result, a keystone institutional safeguard of the office's independence was entirely destroyed.

While some public opinion applauded the blitz against the office, others criticised it. An editorial piece in *El Mercurio* – the main newspaper in circulation – recommended going beyond mere budget modification. In fact, it encouraged a full reconsideration of the role of the institution within the regime.⁶⁰⁷ Yet in the same newspaper, a former Chilean diplomat censured the assault against the independence of the Comptroller-General.⁶⁰⁸ He criticised the reversal of the original policy towards the office, blaming the economic advisors of the government for the situation.

Facing growing pressure from the regime, Comptroller Humeres decided to take early retirement in December 1977.⁶⁰⁹ The media reported that Humeres had told senior officers within the institution that his retirement had been triggered by the budget reduction brought about by the Junta. Indeed, as a consequence of the legal modifications, the office's budget for 1978 was cut by 17% compared to 1977. In an interview in mid-December, Humeres declared that he 'was not tired', and that 'physically and mentally he was fit to remain in the job'.⁶¹⁰ This suggested that the reason for retirement was political. Furthermore, in a very provocative statement, Humeres implicitly complained

⁶⁰⁴ Decree with Force of Law 42, Hacienda (24 November 1959).

⁶⁰⁵ Decree Law 728 (5 November 1974) and Decree Law 1273 (29 November 1975).

⁶⁰⁶ Decree Law 2053 (1 December 1977).

⁶⁰⁷ 'Recursos y facultades de la Contraloría General' *El Mercurio* (12 December 1977).

⁶⁰⁸ Daniel Schweitzer, 'Jubilación del Contralor' *El Mercurio* (19 December 1977).

⁶⁰⁹ 'Contralor se acoge a jubilación' *El Mercurio* (7 December 1977).

⁶¹⁰ 'Contralor: "No niego ni afirmo nada" Razones de su retiro.' *El Mercurio* (17 December 1977).

about the assaults from the executive, and the shift in its approach towards the office based on changing attitudes to economic policy:

[W]hen a new presidential administration begins, most of the employees are inexperienced and they do not adequately understand the running of public administration. As the Office of the Comptroller-General is the custodian of this knowledge about public affairs, at the beginning they turn to it. Yet over the years the heads of departments and senior officers acquire experience and then they do not sympathise with the office anymore. [Nevertheless] the Comptroller-General's contribution is relevant in every country, no matter the degree of state intervention in the economy or in other aspects of public life, because this entity is the custodian of the legality of the country and that has been understood from liberal to socialist regimes in the past.⁶¹¹

By 1977, Pinochet had considerably enlarged his power. Indeed, he was granted the title of President of the Republic, standing above his military colleagues within the Junta. He held the concentration of executive power, while the Junta as a whole exercised legislative and constituent power. However, Pinochet was also facing some difficulties. As a result of the political repression, there was mounting internal and international pressure on the regime.⁶¹² In December 1977, the United Nations passed a resolution condemning the Chilean regime for violations of human rights. Perhaps surprisingly, Pinochet decided to call a referendum asking for popular support against this act of 'international aggression'. Through the plebiscite, Pinochet was seeking to counteract international pressure about human rights violations in the country, and also internal political disagreement within the military. Reflecting the manipulative rationale behind the move, the government provided no more than a couple of weeks for 'public deliberation', scheduling the referendum for 4 January 1978.

As we have seen, during the year, Comptroller Humeres had been involved in several clashes with the regime. Perhaps considering that his retirement was close and relying on opposing forces within the military regime, he decided to take a firm stance against the referendum. Indeed, just before the referendum – on 28 December – Humeres confidentially reported to the government that the respective decree 'lacked legal foundations and, therefore, he could not uphold it'.⁶¹³ The only alternative was to approve

⁶¹¹ *ibid.*

⁶¹² The election of President Carter in the US in late 1976 caused a dramatic rise in international pressure on Chile in multilateral forums; see Constable and Valenzuela (n 535) 106, 172.

⁶¹³ Cavallo, Salazar, and Sepúlveda (n 575) 160.

the call as a legislative measure. However, while Pinochet himself was allowed to enact a simple executive decree, a legislative measure required the unanimity of the Junta. Humeres was aware of the impossibility of obtaining unanimity in this matter, considering the disagreement among the members of the Junta. In fact, two other members of the Junta disagreed, and forcefully rejected Pinochet's proposal. He, however, had already taken a decision: 'The people [...] must choose between the champion of Chile's honour and her foreign detractors,' he stated.⁶¹⁴

The Comptroller-General did not actually officially discard the decree that called the plebiscite. Rather, they returned it to the executive for reconsideration. This was a standard technique deployed by the office in order to initiate negotiations on the terms of the decree with the executive branch legal advisors. Attempting to downplay the controversy, the press reported that this was a routine issue, illustrating the point by claiming that almost 9% of the 163,277 documents submitted to the Comptroller-General for review in 1977 had been 'returned' by the office.⁶¹⁵ Yet the reasons provided by Comptroller Humeres for returning the decree were not merely formal.⁶¹⁶ The first reason was that this was not one of the cases foreseen by the Constitution for calling a referendum. As this mechanism was exceptionally permitted by the Constitution, Humeres rejected the use of analogical interpretations. Secondly, the Comptroller-General argued that the executive could not hold a referendum on the 'legitimacy of the government' without the approval of the Junta. Thirdly, Humeres pointed out that it was illegal to make participation in the referendum compulsory, as the decree ordered in different ways. Finally, he asserted that there was no budgetary authorisation for implementing the referendum. Therefore, the Comptroller-General engaged in constitutional and substantive legal scrutiny of the executive decree, and his reasons were far from routine.

As Pinochet's advisors were aware that Humeres had filed his papers for early retirement, they hastened to process all the paperwork to grant the retirement as soon as possible, in

⁶¹⁴ Constable and Valenzuela (n 535) 67.

⁶¹⁵ 'Gobierno pedirá hoy reconsiderar parecer jurídico sobre la consulta' *El Mercurio* (2 January 1978).

⁶¹⁶ See 'Los fundamentos del ex contralor Héctor Humeres' *El Mercurio* (3 January 1978). Similar points against the government's request for reconsideration were raised by reputed jurists; see 'Opinión de 4 juristas' *El Mercurio* (3 January 1978).

order to be able to appoint a new, submissive Comptroller-General.⁶¹⁷ Of course, this was crucial for obtaining approval to proceed with the plebiscite. The day after Humeres' announcement of the illegality of the call to referendum, Sergio Fernández – a loyal aide to Pinochet and then Minister of Labour – was appointed as new Comptroller-General.⁶¹⁸ Thenceforth, just a couple of days later, the government requested that the office re-examine its original pronouncement on the referendum.⁶¹⁹ In its request for reassessment, the executive claimed that it 'had accepted the main recommendations and observations made by the Comptroller-General'.⁶²⁰

Blatantly, Comptroller Fernández was quick to accept the government reconsideration request and uphold the legality of the decree. In his pronouncement, he declared that the Ministry of the Interior had submitted to the points raised by the Comptroller-General, and had consequently modified the decree at issue.⁶²¹ Thus, the barriers to proceeding with the referendum were lifted. However, doubts concerning the real changes in the decree remained. Indeed, the very same day of the referendum, even pro-government newspapers reported that the original and the corrected decrees were identical.⁶²² On 4 January 1978, the referendum finally took place, and unsurprisingly the Pinochet option prevailed.⁶²³ The referendum was carried out under absolutely irregular conditions in terms of registers, political participation, and freedom of the press.⁶²⁴ Despite its ostensible unfairness, the referendum enabled Pinochet to begin a new stage in his plan to design an institutional framework that would legitimate his regime in the long term. The position of the Comptroller-General under the new constitutional architecture was increasingly precarious.

B. Neutralisation and co-optation

From the Comptroller-General's point of view, the consequences of the controversy about the plebiscite were far-reaching. A series of showdowns between Comptroller Humeres and the government ended with the former taking early retirement, provoking an

⁶¹⁷ Constable and Valenzuela (n 530) 67; Cavallo, Salazar, and Sepúlveda (n 575) 161–2.

⁶¹⁸ 'Sergio Fernández, nuevo contralor' *El Mercurio* (29 December 1977).

⁶¹⁹ 'Gobierno pedirá hoy reconsiderar parecer jurídico sobre la consulta' (n 615).

⁶²⁰ *ibid.*

⁶²¹ 'Contralor cursó nuevo texto' *El Mercurio* (3 January 1978).

⁶²² 'El decreto supremo de la consulta. Los considerandos son iguales a los del anterior' *El Mercurio* (4 January 1978).

⁶²³ Constable and Valenzuela (n 535) 68.

⁶²⁴ *ibid* 67.

important shift in the office. The increasingly assertive attitude of the office towards the regime ceased, and a more timid approach was adopted.

The appointment of former minister Sergio Fernández as Comptroller-General between January and April 1978 had a threefold reason for Pinochet: first, to approve the call to plebiscite; secondly, to reinstate exemptions from review to decisions concerning national security; and thirdly, to approve other politically relevant decrees under discussion with former Comptroller Humeres.⁶²⁵ Still, it is reported that Fernández did not interfere with routine operations in non-political matters, and that he did not disturb the staff. His role was to reduce the assertiveness of the institution rather than to start a shutdown operation. For instance, in exchange for the new, less assertive outlook of the office, he rewarded the office's personnel by improving their working conditions in terms of salary and hierarchy.

After Fernández, Pinochet appointed Osvaldo Iturriaga as Comptroller-General. He had not been a brilliant official within the institution, but he had exactly the profile the regime was seeking. A former colleague describes him as an unexceptional lawyer of right-wing convictions. Another colleague depicts him as a person of reserved personality who moved the institution inwards. Similarly, a government lawyer regarded him as an individual with weak personality. Certainly, Iturriaga represented no threat to the authoritarian government. Yet during the final years of the dictatorship, the opposition also supported Iturriaga, because there were far worse alternatives to him. In fact, some candidates for head of the office were overtly authoritarian, and, for age reasons, they had the potential to remain in office for a dozen years more, impacting the forthcoming democratic transition. Iturriaga, by contrast, was docile and was close to retirement.

The appointment of Iturriaga also meant that the balance of power between the Junta and Pinochet tipped further towards the latter. Indeed, Humeres had frequently sided with Air Force General Gustavo Leigh, and had provided legal reasons in support of his positions during the continuous clashes between Pinochet and Leigh within the Junta. Leigh constantly opposed Pinochet's strategies. A breaking point occurred when the former

⁶²⁵ The following account is based on interviews with a former senior Comptroller-General officer, a mid-level officer at the time, and a senior government lawyer.

gave an interview to an Italian newspaper in July 1978, criticising the lack of a clear timetable for the end of the dictatorship. Doubtlessly, this challenged Pinochet's leadership within the Junta, and in reaction, Pinochet decided to remove Leigh. Therefore, Pinochet's legal advisors drafted a decree declaring Leigh disqualified from remaining in the body.⁶²⁶ The newly appointed Comptroller Iturriaga easily approved the dismissal decree. Controversially, however, the decree declared General Leigh medically unfit to continue serving in the Junta. This was suspicious grounds for removal, and Leigh considered challenging the decision. But the presence of the Comptroller-General and the president of the Supreme Court in the ceremony of appointment for the new member of the Junta dissuaded Leigh from following that route.⁶²⁷ The Comptroller-General was no longer a site for challenging Pinochet's determinations.

The story of Comptroller Humeres' demise seems to confirm scepticism about the commitment of the authoritarian leaders to constitutionalism,⁶²⁸ and raises doubts about Barros' account outlined at the beginning of this chapter. The events just described suggest that extra-institutional and institutional factors are important in the operation of legal accountability institutions. As Martin Shapiro has argued, the response by legal officials to changes from democratic to authoritarian regimes 'may be more about the minds of the judges than the design of institutions'.⁶²⁹ Particularly in hostile circumstances, the contribution of these bodies to the respect of the rule of law and the protection of human rights depends, to a large extent, on the political leadership of its authorities.⁶³⁰ At the institutional level, the foregoing story raises questions about the monocratic structure of the Comptroller-General. The design of single-headed institutions has been traditionally explained in terms of institutional energy. However, even though monocratic institutions might entail valuable higher activity levels and flexibility, they can also be more easily co-opted by the political institutions overseen by them, especially under conditions of political authoritarianism. My previous account of the interactions

⁶²⁶ Madariaga (n 413) 92–3.

⁶²⁷ Cavallo, Salazar, and Sepúlveda (n 575) 200.

⁶²⁸ See, for instance, Mark Tushnet, 'Authoritarian Constitutionalism' (2015) 100 Cornell Law Review 391, 431–2.

⁶²⁹ Martin Shapiro, 'Courts in Authoritarian Regimes' in Tom Ginsburg and Tamir Moustafa (eds), *Rule by law: the politics of courts in authoritarian regimes* (CUP 2008) 331–2.

⁶³⁰ *ibid* 332.

between the office and the military suggest that the latter risk held true in the case of the Chilean Comptroller-General under the Pinochet dictatorship.

IV. THE COMPTROLLER-GENERAL IN THE NEW CONSTITUTION

Just a few days after the coup d'état, the Military Junta commissioned a group of jurists for the task of studying, elaborating, and proposing a draft for a new Constitution.⁶³¹ By December 1973, the *Comisión de Estudios de la Nueva Constitución* (Commission for the Study of the New Constitution or CENC) was operating with eight permanent members, all lawyers who sympathised with the new regime. The primary ideas for the new Constitution were based on reactions to the Allende government.⁶³² Members suggested proposals such as the proscription of Marxist parties and individuals, introducing a runoff presidential election to avoid minority governments, and to strengthen the constitutional protection of property rights. Other ideas focused on reinforcing the position of the Supreme Court by creating administrative tribunals under its supervision, and allocating broad constitutional review powers to the Court instead of the Constitutional Tribunal. Lastly, in legal accountability matters, it was also necessary to confer to the Comptroller-General the power to enforce its own decisions to forestall executive noncompliance. This set the tone for the discussions in the years to come. The new Constitution was ratified by another plebiscite plagued by procedural irregularities in September 1980, and it entered into force in March 1981.

This final section will examine the view of the authoritarian regime about the role of the Comptroller-General in the new constitutional framework. For this purpose, it will provide an account of the discussion about the office's powers and functions in the drafting committee. Also, it will briefly look at the amendments introduced in 1989 in the negotiations between the government and the opposition.

A. The debate over the Comptroller-General

At the outset, there was no clear blueprint for the new constitutional features the Comptroller-General should possess. The office had been granted constitutional status in 1943, but these constitutional provisions were rather patchy. As an illustration, the Constitution did not provide for the ex-ante legality review procedure – its most

⁶³¹ Barros (n 24) 88 ff.

⁶³² See Barros (n 31) 226–7.

distinctive institutional feature. In these circumstances, the initial task was to design rules that better reflected the actual role of the office in Chilean political arrangements. However, there was no consensus beyond this broad purpose.

Two conflicting forces seem to have been on display during the discussion. On the one hand, some participants wished to see constitutional provisions that recognised the Comptroller-General as a main branch of government comparable to the executive, the judiciary, and Congress. This position reflected recent history, especially the role of the office during the Allende period. Thus, for these participants, the new Constitution ought to reinforce the current powers of the institution and, furthermore, enhance them in order to bring legal recognition to the fact that this organisation was the main administrative justice body in the country. On the other hand, however, there were forces strongly opposing the Comptroller-General. The antagonism to it stemmed from its association with the interventionist state that preceded the Pinochet regime, and also from its recent controversies with the military regime. The lack of a well-defined rationale underpinning the Comptroller-General also caused scepticism about its real contribution to public governance. From this perspective, it was recommended that the Constitution should allocate judicial review powers to the ordinary judiciary, and suppress the office's legal accountability functions. In what follows, both views will emerge, and we will see that, remarkably, neither of them eventually prevailed.

The first mention of the Comptroller-General in the discussion was incidental. It occurred when the Commission was examining the future arrangements of the judicature, specifically whether administrative tribunals were to be created.⁶³³ This issue had been debated especially fiercely in Chilean constitutional doctrine since the enactment of the 1925 Constitution. This time, the Commission was considering whether to create administrative tribunals under the jurisdiction of the Supreme Court, or simply to grant judicial review powers to the ordinary courts.⁶³⁴ As these issues had an evident connection with the Comptroller-General, the commissioners invited administrative

⁶³³ See 289th session, 3 May 1977.

⁶³⁴ There were two groups of advisors to the CENC in this area. One group was working on a proposal for the regulation of the judiciary in the constitution, while another group was working on legislation about administrative tribunals. The former proposed to make it explicit in the constitution that the administrative tribunals were subordinated to the Supreme Court, whereas the latter preferred to leave the issue to legislative definition. See also 295th session, of 26 May 1977.

lawyers early on to give evidence about the impact of the proposed administrative tribunals on the powers of this institution. Although it was not a straightforward statement, the response pointed to the elimination of the ex-post legal review powers of the office.⁶³⁵

The debate continued in the following sessions as a discussion on whether the Comptroller-General or the Supreme Court was the best mechanism for legality review of administrative power. While some commissioners wanted to make it explicit in the Constitution that legal review of administrative action was under the jurisdiction of the Supreme Court, others rejected the idea of ‘transforming the Supreme Court into a sort of Comptroller-General’.⁶³⁶ As expected, the commissioners who backed the conferral of judicial review of administrative action to the Supreme Court invoked the rule of law principle, arguing that it required the highest instance of legal control in the country to be the Supreme Court. In turn, the commissioners opposing the transfer of powers from the Comptroller-General to the Supreme Court explained that this might impinge on administrative action, as it would probably encourage private litigation. Furthermore, it could overload the Supreme Court docket.

Suddenly, however, former Comptroller-General officer Mónica Madariaga – then Minister of Justice – interrupted this debate, and required the Commission to suspend its deliberation on the judiciary in order to focus exclusively on the Comptroller-General.⁶³⁷ A new priority for the CENC was set: they first had to define the new role of the Comptroller-General, and only afterwards consider the features of the judiciary. In her internal communication, the Minister pointed out that this institution had thus far successfully filled in for the lack of administrative tribunals in the country. She added that this merited defining its powers before examining the administrative tribunals, making sure that its specialisation, capabilities, and efficiency would not be impinged. The rules concerning the institution should be made more precise and up-to-date, and its

⁶³⁵ The proposal, however, also considered collaboration of the Comptroller-General with the administrative tribunals for facilitation of access to information. It is noteworthy that the proposal envisioned a mechanism of insistence – similar to that of the Comptroller – as taking place in the future judicial review procedure. See 290th session, 10 May 1977.

⁶³⁶ Commissioner Raúl Bertelsen was strongly for it, whereas commissioners Sergio Diez and Luz Bulnes were against. See 297th session, 14 June 1977, and 303rd session, 5 July 1977.

⁶³⁷ See 306th session, 19 July 1977.

enforcement powers strengthened. The message seemed clear: whatever the concrete features of the future administrative tribunals, they must not weaken the powers of the Comptroller-General. Quite the reverse: the powers of the office must be reinvigorated.

The commissioners half-heartedly welcomed the ‘invitation’ from the government to prioritise the Comptroller-General, and interpreted their new mandate in narrow terms as consisting of just delimitating the remit of the administrative tribunals vis-à-vis the Comptroller-General. Their first step was to analyse a dated proposal drafted in 1973 by the Comptroller-General Office, in which a set of new constitutional provisions were recommended.⁶³⁸ Probably the most controversial aspect of this document was the request for new disciplinary powers to deter noncompliance. The commissioners reacted with distrust to these ideas. They regarded them as technically deficient and thought that the proposition did not clarify the functions of the office in relation to other public institutions such as the judiciary, the Constitutional Tribunal, and Congress. Moreover, the document was unable to set limits on the insistence mechanism, one of the most debated aspects of the institution during the Allende period.

Comptroller Hector Humeres then submitted an up-to-date document to be discussed in the following sessions.⁶³⁹ In presenting the proposal, he set out the background of his position, emphasising that the Junta had thus far enlarged the office’s powers. Humeres explained that the office reflected the synthesis of two disparate public law traditions: the French and the American. According to Humeres, the institution was characterised by its independence, unity, and general character. He also pointed out the professional and technical nature of the office, and concluded by outlining the main innovations of his proposals. First, he recommended strengthening the enforcement powers of the office by granting it disciplinary powers over the entire public administration. Secondly, he suggested endowing the institution with explicit ex-post powers to annul administrative decisions, something the office had in fact been doing for a long time. In this respect, he hinted at a division of labour between the Comptroller-General, which was in charge of annulment cases, and the judiciary, responsible for state liability cases. During the exposition, Minister Madariaga emphatically supported Humeres’ stance. She found it

⁶³⁸ See 306th session, 19 July 1977.

⁶³⁹ See especially the 307th session, 19 July 1977, and 309th session, 2 August 1977.

more worrying to grant annulment powers to the judiciary than to grant them to the Comptroller-General, since the latter had experience and technical and legal capabilities. Her concern was also that the judiciary did not possess robust knowledge of administrative law, so they tended to adjudicate cases by applying private law doctrines, with dysfunctional outcomes.

The Commission, however, was not entirely convinced by Humeres and Madariaga's arguments. Although they admitted the contribution of the Comptroller-General to checking abuse during the Allende administration, the commissioners feared that the institution had become too powerful and unfettered a body. It was very clear for them, for instance, that the insistence mechanism – which was a limitation on the Comptroller-General's powers – should be retained in the Constitution. They opined that 'in a moment of discrepancy between the administration and the Comptroller-General, the government stance should prevail'.⁶⁴⁰ According to some commissioners, the risk of illegal action was symmetrical. While it was certainly possible for the President to engage in illegal actions, so was it for the Comptroller-General, and they preferred to place their trust in the executive than in the oversight institution. Furthermore, there was opposition to conceding ex-post annulment powers to the office. According to most of the commissioners, this belonged to the judiciary, not the Comptroller-General, as they were judicial functions. It was also argued that it was inconvenient to grant the same body ex-ante and ex-post powers. Besides, the Commission was uncomfortable with conferring disciplinary powers, since this could entail a severe restriction on the hierarchical control within public administration. Consequently, the Commission's uneasiness was triggered by the office's potential invasion of the remits of both the executive and the judiciary. They definitely did not wish to create an accountability superbureau.

Scepticism rose even further after hearing the opinions of administrators and experts who were asked to give evidence before the Commission.⁶⁴¹ Predictably, they rejected the

⁶⁴⁰ See 308th session, 27 July 1977.

⁶⁴¹ See sessions 310 to 316, which took place between 3 August and 20 September 1977. Among the expert witnesses were the director of the Office of National Planification (ODEPLAN), the director of the National Commission for Administrative Reform (CONARA), the Minister of Economy, the Vice-President of the National Development Agency (CORFO), the chief legal advisor of the Central Bank, the directors of the Agencies of Supervision of banking and financial services respectively, the Minister of Finance, and the President of the Council of Legal Defence. Finally, some public law professors were also heard by the commission.

proposals of giving the Comptroller-General merit review powers. Some of them were worried about the possibility of the office meddling with the management and particularly the privatisation of state enterprise. The invitees admitted that the Comptroller-General had not hitherto interfered with the government's policy reforms, but a reason for this was that the Junta had the powers to overrule any decision with which it disagreed, and they feared that in the near future this might not continue. Several invitees said that the powers given to the Comptroller-General after the 1973 coup were only justified for the exceptional circumstances of the moment. Those powers, it was felt, should be removed soon, and certainly they must not be introduced into the Constitution. Similarly, as they regarded the Comptroller-General as a component of an interventionist state, they were concerned about keeping such a social-state element in the new neoliberal constitutional architecture of the country. Finally, concerns were also voiced about usurpation by the Comptroller-General of functions corresponding to other branches of government, such as the judiciary and Congress. Some invitees accused the office of attempting to transform itself into an Administrative Tribunal, or even an Administrative Supreme Court.⁶⁴² They feared that the Comptroller-General could be an excessively severe judge of the administration,⁶⁴³ one invitee claiming that its interference had provoked sluggish administrative decision-making, since administrators were fearful of being sanctioned by the office for making a wrong decision.⁶⁴⁴

At that point, the Commission had already reached consensus about the ideal features of the institution in the new constitutional architecture. Soon, a formal communication was received, in which the Junta let the Commission know its preference for a minimalist approach to the regulation of the office.⁶⁴⁵ Moreover, the Commission strongly rejected the idea of Minister Madariaga recognising the power to engage in purposive interpretation of administrative legality.⁶⁴⁶ This led Madariaga to confess that while working in the office during the Allende period, she had narrowly interpreted the law in

⁶⁴² See, respectively, the opinions of the President of the Council of Defence of State in the 313th session, and Professor Evans in the 314th session.

⁶⁴³ See the opinion of Professor Jorge Guzmán in the 316th session.

⁶⁴⁴ See the opinion of Minister of Finance Sergio de Castro in the 313th session.

⁶⁴⁵ See 317th session, 27 September 1977.

⁶⁴⁶ See 318th session, 28 September 1977.

order to sabotage government programmes.⁶⁴⁷ However, she asserted that this legal boycott must not happen against the current authorities.

Raúl Bertelsen – a conservative constitutional-law scholar – was the strongest and most articulated critic of broadening the role of the Comptroller-General in the new Constitution. He maintained, for instance, that the office ‘was born and grew in an era in which the Chilean state was increasingly interventionist, in the negative sense of the term, that is, meaning socialising, enervating [individual] initiative’.⁶⁴⁸ He perceived a risk in enhancing an accountability body that corresponded to a socialist or interventionist conception of the state, because this might entail ‘introducing a distorting factor in the [new market] economy’.⁶⁴⁹ According to Bertelsen, the role of the Comptroller-General should consist of supervision rather than control. In his view, whereas ‘supervision’ entailed a fire alarm role, that is, monitoring administrative action and reporting misconduct to political or judicial bodies, ‘control’ meant having the last word in matters of legal interpretation.⁶⁵⁰ In a previous session, he even suggested the replacement of the Comptroller-General with a weaker mechanism such as an ombudsman in charge of monitoring the administrative process on behalf of Congress.⁶⁵¹

Thereafter, the discussion turned to the regulatory details, as a new minimalist proposal was introduced.⁶⁵² Furthermore, the idea of establishing safeguards for the independence of the Comptroller-General was questioned. Jaime Guzmán – a close adviser to Pinochet – argued for enhancing the influence of the President in the appointment and the removal of the head of office.⁶⁵³ He maintained that a more flexible approach was needed, since the removal of a Comptroller through impeachment was highly unlikely. As can be seen,

⁶⁴⁷ See 319th session, 4 October 1977.

⁶⁴⁸ See 319th session, 4 October 1977.

⁶⁴⁹ See 319th session, 4 October 1977. Bertelsen reiterated this argument many times during the debate. In the 321st session, for instance, he maintained that ‘[we] want to react in Chile against undue state interventionism, [but] there is a risk that if we do not proceed also against this excessive control, we will find ourselves with a fresh administrative apparatus, yet a supervision system operating according to old-fashioned categories’.

⁶⁵⁰ See 319th session, 4 October 1977.

⁶⁵¹ See 308th session, 27 July 1977.

⁶⁵² See 321st session, 18 October 1977.

⁶⁵³ See, especially, the 322nd session, 25 October 1977, and the 326th session, 9 November 1977. It is worth noting that, perhaps surprisingly, Bertelsen argued for maintaining strong securities against political interference.

the Commission was already convinced that the main task in the design of the institution was to reduce the risk of paralysis in executive decision-making.

Yet this distrust was not fully crystallised in the new Constitution. Even though the Commission was persuaded that the Constitution should provide for a minimum role for the Comptroller-General, eventually the position of the office was strengthened in the definitive provisions compared to the 1925 Constitution. First, a new chapter of the Constitution was dedicated to the office. Besides, not only the financial powers but also the legality review powers of the Comptroller-General were given constitutional status. Secondly, the new Constitution provided that the basic organisation of the office could only be modified by a legislative super-majority. This entrenched the existing statutory arrangements governing the institution. Finally, the 1980 Constitution established that a former head of office should be selected as an appointed senator. This recognised that the office played a political and not merely technical role in the country. These later reforms severely restricted the chances for future reduction of the powers of the institution. As a result, perhaps ironically considering the commissioners' views about the office, in the 1990s the Comptroller-General was perceived as a strong component of the authoritarian legacy of the military rule.

B. The Comptroller-General in the 1989 constitutional reform

Following the timetable set by the Junta, in 1988 a plebiscite took place in order to decide whether Pinochet's rule should continue for a further period of eight years or a new civilian government should be elected. In a historical decision, the outcome of the plebiscite favoured the latter option. This meant that a new election had to be held in order to vote for a civilian President. In this election, the centre-left opposition obtained victory again. However, as the constitutional architecture was absolutely unfit for the new democratic regime, months before the end of Pinochet's formal rule in 1989, constitutional negotiations began between the victorious coalition and moderate groups within the authoritarian regime. Two aspects of the accorded reforms had an impact on the Comptroller-General's functions: the broadening of judicial review by the ordinary courts, and the incorporation of the office into the Council of National Security.

As previously stated, since 1925 the Chilean Constitution had denied general judicial review powers to the ordinary courts. Although they were never established by the

legislature, the Constitution provided for special administrative tribunals to hear complaints against administrative action. Despite doctrinal agreement on the need for some form of judicial review of government action, the original text of the 1980 Constitution did not innovate in this matter. In fact, even though the Commission drafted provisions allocating judicial review powers to the ordinary judiciary, the Junta removed these powers of legal control from the ordinary courts and returned to the old formulation, stating that special administrative tribunals would hear the complaints against administrative agencies. This entailed that, in the Constitution enacted in 1980, the ordinary judges remained without general jurisdiction to adjudicate these types of cases.⁶⁵⁴

During the 1989 negotiation, this issue was part of the compromise. Negotiators were in agreement on granting judicial review powers to the ordinary courts and, as a consequence, eliminating any reference to ‘the special administrative tribunals’ from the Constitution. Overcoming the Junta’s reluctance, the legal profession and the courts rapidly understood that the modification had automatically recognised the jurisdiction of the judiciary, with the exception of cases explicitly allocated to special tribunals by the statutory provisions. The important point is that this new scenario was the origin of the jurisdictional clashes between the Supreme Court and the Comptroller-General that ensued from 1990 onwards, and it brought about further uncertainty in terms of the legality review functions of the latter.⁶⁵⁵

The office had a more central role in the discussions about the National Security Council (COSENA), a key authoritarian institution in the original scheme designed by Pinochet. In the initial framework, this body was conceived as the institution responsible for guaranteeing that the political values of the Pinochet regime would not be wiped out under the new democratic administration. This was an authoritarian organisation, comprising a majority of military members, which was able to overrule decisions by the elected branches. Indeed, COSENA had the ambiguous power to ‘make representations’ to any constitutional authority in case some event, decision, or issue could seriously impinge the

⁶⁵⁴ Arturo Aylwin, ‘Efectos de la reforma del art. 38, inciso 2º, de la Constitución Política sobre régimen de los contencioso administrativo’, *La reforma constitucional de 1989. Estudio Crítico*, vol 13 (Cuadernos de Análisis Jurídico 1990) 46.

⁶⁵⁵ See Chapter 8.

institutional basis of the nation or compromise national security.⁶⁵⁶ COSENA's seven members were four generals and three civilians: the President of the Republic, the President of the Senate, and the President of the Supreme Court. As this gave a dangerous majority to the military, it was a priority for the opposition and future government to modify the membership and powers of this institution.

The negotiators agreed to introduce a civilian majority of five to four into the Council, incorporating the Comptroller-General and the President of the Chamber of Deputies as civilian elements. However, the Junta rejected this proposal.⁶⁵⁷ It proposed instead the incorporation of just the Comptroller-General into the Council, and to raise the quorum to make decisions. Although the opposition considered this solution unsatisfactory,⁶⁵⁸ an agreement was eventually reached, and as a result, the Council ended up being a half-military, half-civilian body that was able to politically overrule decisions by the elected branches.⁶⁵⁹ Arguably, this negotiation reflected the vague position of the Comptroller-General within the institutional framework of the transition. On the one hand, it was included within COSENA as representing a civilian power. However, on the other hand, opposition politicians viewed the Comptroller-General with scepticism at that time, since it represented the 'legal profession' rather than the people or the citizenry.⁶⁶⁰ Moreover, the negotiation revealed that the military regime seemed particularly comfortable with a civilian 'counterbalance' represented by their former allies, that is, the Supreme Court and the Comptroller-General.

V. CONCLUSION

This chapter has outlined the role of the Comptroller-General during the Pinochet dictatorship during 1973 and 1990. The picture drawn by this chapter reveals convoluted interactions between the office and the authoritarian government. Three periods have

⁶⁵⁶ The power to 'make representations' was particularly worrying, since that was the expression used by the law in relation to the power of the Comptroller-General to veto administrative decisions. In other words, it could be easily interpreted as a veto power against any constitutional body, including Congress and the President.

⁶⁵⁷ Francisco Cumplido, 'Reformas al poder de seguridad' in Universidad Diego Portales (ed), *La reforma constitucional de 1989. Estudio crítico*, vol 13 (Cuadernos de Análisis Jurídico 1990) 74.

⁶⁵⁸ Ascanio Cavallo, *Los hombres de la transición* (Editorial Andrés Bello 1992) 77.

⁶⁵⁹ Andrade (n 233) 233. However, it must be said that the powers of the office were weakened with the reform. Thus, the reform replaced the expression 'give an opinion' with 'make representations'. See Cumplido (n 657). This Council was further reformed in 2005. After this amendment, the COSENA comprised a civilian majority, and its powers were advisory to the President only.

⁶⁶⁰ See Cumplido (n 657) 74.

been identified. First, the office collaborated with the regime during the early years of the regime. New powers were granted to the office in order to normalise administrative processes; numerous Comptroller-General officials worked in detached service or otherwise in the new government, and legality checks were lifted to facilitate repression. Then, when the legitimacy of the regime was under attack because of national and international pressure, the Comptroller-General took a more assertive approach. It attempted to reinstate legal accountability procedures, oversaw the economic policy of the dictatorship, and to a degree resisted overt co-optation in the appointment of its chief authorities. Of course, the new political assertiveness of the Comptroller-General depended on alliances with key actors within the regime. As expected, considering the authoritarian nature of the regime, the response against the institution was strong. Thus, in the last period, the Comptroller-General returned to passivity. The regime and its advisors not only neutralised the operation of the office for the rest of the dictatorship, turning it inwards; they also attempted to ensure that no further powers were granted to the office in the new Constitution. Against the original desires of the Comptroller-General and some high-ranking officers within the government, the commission responsible for drafting the new Constitution concluded that the role of the office should be diminished rather than enlarged.⁶⁶¹

Different forces may explain these disparate stages in the Comptroller-government relationship. On the one hand, the initial collaboration was probably due to overt ideological adhesion to the military coup d'état and the authoritarian government that followed. The office's expertise and its embeddedness in administrative structures also explain why the Junta kept it untouched in these initial times. In the second stage, on the other hand, the Comptroller-General asserted its powers in view of the weakness of the Pinochet regime because of internal and international pressures. The Comptroller-General also attempted to show the institutional relevance of his office when critical decisions about its future were being adopted by the regime. The final stage of renewed passivity, to conclude, may be explained by the need for institutional survival, but also by the personality and ideological allegiances of the new head of the office.

⁶⁶¹ See also the pro-military doctrinal literature advocating for placing emphasis on the judicial branch instead of the Comptroller-General as legal accountability devices. See for instance Bernardino Bravo, 'Régimen de gobierno en Chile 1924-73, visión retrospectiva y perspectivas' (1979) 25/26 *Revista de Derecho Público* (U. de Chile) 33, 50; Adolfo Ibáñez, *Herido en el Ala* (Universidad Andrés Bello 2003) 159–60.

At the institutional level, the Office of the Comptroller-General ended up with a pervasive uncertainty as to the rationale behind its functions. This vagueness existed during the Allende period and even before that. Although its political legitimacy did not suffice to transform itself into a Chilean version of the *Conseil D'Etat*, the very ambiguity and uniqueness of the institutional features of the office helped it to survive authoritarian times.

PART III CONTEMPORARY FUNCTIONS

INTRODUCTION TO PART III

This part examines the role of the Comptroller-General once Chilean democracy was re-established after the military dictatorship that ruled the country until 1990. Despite the absence of significant formal reform, the institution's orientation has shifted in important ways. Once a lethargic, obscure, and introspective accountability agency, it has become a major and visible institutional player in legal and political disputes. The office is now perceived as a relevant, impartial institutional player that provides broad access to interests seeking to influence executive policies and decisions. The different political context and the monocratic, personalistic character of the office explain the manner in which the office has been transformed. This period shows the institution's adaptation to the demands for legal and political accountability.

The period comprises the full terms of four Comptrollers-General that held office: Osvaldo Iturriaga (1978-1997); Arturo Aylwin (1997-2002); Gustavo Sciolla (2002-2007); and Ramiro Mendoza (2007-2015). In this brief introduction, I will sketch the main characteristics of each administration and the way they reveal the transformation of the office during this period.

Comptroller-General	Term in office	Background
Osvaldo Iturriaga	12 April 1978- 31 March 1997	Lawyer – Former Deputy CGR
Arturo Aylwin	2 April 1997- 11 Aug 2002	Lawyer – Administrative law professor – Former Deputy CGR
Gustavo Sciolla	12 Aug 2002- 19 July 2006	Lawyer – Former Chief of Legality Review Division
Ramiro Mendoza	10 April 2007- April 2015	Lawyer – Administrative law professor – Practitioner
Jorge Bermúdez	17 Dec 2015-	Lawyer – Administrative law professor – Practitioner

Table 7: Comptrollers-General, 1990-2015⁶⁶²

Osvaldo Iturriaga

After two decades of dictatorship, a democratically elected President of the Republic – President Patricio Aylwin – was sworn in in 1990. No doubt this was a vast change for

⁶⁶² Noemi Reyes and Patricia Arriagada were acting as Interim Comptrollers-General in the periods running between July 2006 and April 2007, and April and December 2015, respectively.

the country; yet Chile was still under the enormous influence of Pinochet's constitutional architecture. Notably, he remained Commander in Chief of the Army, and the Constitution drafted under his rule was still in force with a few amendments. As the country permanently feared a possible new coup d'état, the political establishment adopted a manifest attitude of compromise and negotiation with authoritarian forces.⁶⁶³ The Comptroller-General at the time was usually perceived as an authoritarian enclave, that is, an institution representing undemocratic elements and practices at odds with the political principles governing the new regime.⁶⁶⁴ Yet under closer inspection, the institution seems to have adopted an introspective but moderate role in line with the profile of the head of the office.

In the later days of the dictatorship, Osvaldo Iturriaga adopted a clear policy of institutional retreat. It consisted of avoidance of public confrontation with other branches of government, less interaction with the press, and a focus on routine decision-making rather than high-stakes cases. Importantly, this new introspective attitude continued during the early years of the transition.

The office's opacity conspired against initiatives of the executive branch in the early years of the transition from dictatorship. In fact, the newly recruited legal staff within the new democratic executive branch had limited knowledge of the Comptroller-General's importance and functions within the policy process. Indeed, having had little government experience for the previous 17 years, for them the institution was almost totally unknown. They were mystified, for instance, when Iturriaga rejected the first presidential decrees and administrative resolutions on legality grounds. In order to address these deficiencies, the executive departments were in urgent need of strengthening their ties with the office. In addition to inexperience, a further problem was that the Comptroller-General was staffed overwhelmingly with former adherents to the authoritarian regime. According to observers, taking advantage of their ties to the office, opposition parties threatened to paralyse some of the most prominent policies of the new administration. Moreover, the

⁶⁶³ Loveman (n 322) 310–1.

⁶⁶⁴ Santiso (n 27) 109. For definitions of the notion of 'authoritarian enclave', see Manuel Antonio Garretón, *Incomplete Democracy: Political Democratization in Chile and Latin America* (University of North Carolina Press 2003) 47–8.

government's legal staff had limited public law training, and the political opposition rapidly exploited this weakness.

Against this background, it does not seem surprising that frequent clashes between the executive and the Comptroller-General ensued in the initial years of the transition. By mid-1991 – only a year into the transition from dictatorship – executive officials believed it necessary to evaluate the impact of the Comptroller-General on the regulatory process.

⁶⁶⁵ Thus the Presidency ordered the ministries to report on their experiences with the process of legality review carried out by the office. Generally, the opinion was that even though the relationship was good overall, 'difficulties have arisen in relation to certain administrative acts'. Numerous ministries reported problems with the legality review, including the Ministry of Planning and Cooperation, the Ministry of Foreign Affairs, and the Ministry of Public Health. Although they affected valuable policy goals, those legal determinations appear to have been enforcing legitimate legal constraints. Most of them simply insisted on the need to enable legislation before initiating administrative action, and frequently the government subsequently achieved the respective statutory authorisations. Admittedly, nonetheless, in some cases a hint of conservative political bias can be easily detected. But despite his conservative political views, it cannot be said that Comptroller Iturriaga was entirely biased against the new democratic regime, as illustrated by the Advisory Committee Case, in which the office constrained the political activities of the Army early on, supporting the democratic president against Pinochet's interests.⁶⁶⁶

Arturo Aylwin

On 31 March 1997, after heading the office for 19 years and two years before reaching the age limit of 75, Comptroller Osvaldo Iturriaga retired. This provided the opportunity for the first appointment of a Comptroller-General by a democratic government in three decades. President Eduardo Frei nominated Arturo Aylwin. A moderate former Deputy Comptroller-General, he had served in the institution since 1957, that is, from the golden age of the office. Like many other elite students at the time, he joined the institution just after graduation from the law school, and after that he held several senior positions within

⁶⁶⁵ Ministry General Secretariat of the Presidency, 'Evaluación de trámite de decretos supremos en Contraloría General de la República' (1991).

⁶⁶⁶ Ascanio Cavallo, *La historia oculta de la transición: memoria de una época, 1990-1998* (Uqbar Editores 2012) 36–7.

the office. Just before the coup d'état in 1973, he was a close aide to Comptroller Humeres and director of the office's Municipalities Division. Although he continued serving in the office during the dictatorship, he decided to adopt a lower profile during the authoritarian period. After the end of the military regime, Aylwin was a top candidate to head the institution, but the fact that his brother – Patricio Aylwin – was the President of the Republic rendered his appointment politically impossible. In 1997, however, he was holding the post of Deputy Comptroller-General, so his nomination was seen as a natural seniority promotion and received cross-party support. Indeed, after a very fast deliberation in the Senate, Aylwin was sworn in as the new Comptroller-General in April 1997. He was politically pragmatic and moderate. He had a good reputation within the institution, and was viewed as a capable scholar in academic circles.

At the time, commentators were raising questions about the role of the Comptroller-General in the policy process in economic terms. As a reaction to technocratic criticism that it was a retrograde institution,⁶⁶⁷ the office sought to align itself with international standards and attempted to stress more decisively its auditing functions. In fact, Arturo Aylwin took office with a firm conviction of the urgency of introducing reforms to the institution. His agenda was filled with the language of economic efficiency and effectiveness, administrative reform, and state modernisation. In line with the spirit of the time, his focus was on auditing.⁶⁶⁸ However, because of his age, he would be heading the office for just five years, so he was in no position to lead ambitious reform. His interventions had to be targeted and, consequently, he favoured piecemeal reform over comprehensive transformation. In his view, the office should shift decidedly to auditing and avoid formalistic legality review as much as possible. Moreover, he was unwilling to promote changes in the office's teams and leadership. As such, he retained the same conservative staff that had run the office since the dictatorship. In other words, under Aylwin, the former conservative head of office was replaced by a centre-left figure, but looking further down the line, one will find that most of the senior posts remained held by strong right-wingers.

⁶⁶⁷ Mario Marcel, 'Las opciones para la reforma del estado en Chile' in Salvador Valdés (ed), *Reforma de Estado*, vol II: Dirección Pública y Compras Públicas (Centro de Estudios Públicos 2002) 271; Faúndez, 'The Fragile Foundations of Administrative Legality - Chile between 1932 and 1973' (n 22) 94.

⁶⁶⁸ Michael Power, *The Audit Society: Rituals of Verification* (OUP 2010).

Decisively, he wanted his new conception of the institution to be expressed in legislation. By the end of his mandate, Comptroller Aylwin had already made sure that the law was approved in Congress, yet its implementation would be the responsibility of his successor. But law 19817 of 2002 did not represent the major overhaul that many had been waiting for. It instead represented a pragmatic and short-term compromise between the interests of the executive in minute simplification of the legal review process and improving probity at the local level, and the interest of the Comptroller-General in seeing its auditing functions recognised in the statute book. Despite Arturo Aylwin's noteworthy efforts in reaching agreement on these reforms, in the end they were hardly sufficient in view of the demands and expectations of much of the political establishment. The Comptroller-General remained conceived as a somewhat awkward obstacle to the much-needed modernisation of the administrative process.

Gustavo Sciolla

In 2002, during the government of socialist president Ricardo Lagos, the mandate of Comptroller Aylwin came to an end. Aged 75, the Constitution required him to retire. The tradition was to fill the position with the former Deputy Comptroller-General.⁶⁶⁹ In other words, as an indication of inter-institutional comity, the President of the Republic was expected to nominate an incumbent from the institution's own ranks in strict hierarchical order. This tradition could be traced back some 50 years with just one or two exceptions in times of crisis. However, the executive was unwilling to honour this long-established practice since Jorge Reyes, then Deputy Comptroller-General, was considered an open supporter of the Pinochet dictatorship and the existing opposition.⁶⁷⁰

Eventually, with the agreement of the Senate, President Lagos appointed Gustavo Sciolla, head of the Division of *Toma de Razón* and third-ranked within the office's internal hierarchy.⁶⁷¹ Lagos intended the new head of the office to reform it from within, and foresaw a relation of collaboration bearing in mind Sciolla's affinities with the Christian Democrats, the main party in the governing coalition. Like previous Comptrollers, Sciolla had spent his entire career in the office. Just as Iturriaga had entered into the Comptroller-

⁶⁶⁹ 'Contralor Aylwin espera que su sucesor sea Jorge Reyes, pese a reparos del Gobierno' *Cooperativa* (26 March 2002); 'Sucesor de Aylwin: Lagos realiza sondeos por Contraloría' *El Mercurio* (11 July 2002).

⁶⁷⁰ Santiso (n 27) 109.

⁶⁷¹ 'Asume G. Sciolla: Inédito cambio de mando en Contraloría' *El Mercurio* (12 August 2002).

General in 1951 and Aylwin in 1957, Sciolla had begun working in the office in 1964.⁶⁷² As such, he had a trajectory encompassing more than three decades within the body. The expectation was that his knowledge of the institution would enable him to continue the changes initiated by Aylwin, maintaining a cordial relationship with the executive. Yet unlike his predecessors, Sciolla did not come from the prestigious Legal Department, which used to be the source of the office's elite. Instead, he predominantly served in a low profile division, responsible for examining more routine decision-making.

However, the expectations for Arturo Aylwin's successor were high. The new Comptroller-General should consolidate and ideally enlarge the transformation of the office. He should also strengthen the democratisation of the institution by removing the authoritarian elements that Aylwin had been unable to eradicate. Therefore, the appointment of a suitable individual to carry out these momentous tasks was of critical importance. Unfortunately, according to many of the observers, the decision of President Lagos to nominate Gustavo Sciolla as Comptroller-General was largely off-target, and the period that followed is now almost unanimously recalled as wasted years in terms of the transformation of the institution.

Sciolla did not promote further reform within the institution; more seriously, the Comptroller-General set itself on a collision course with the government. The main incident concerned expenditure issues.⁶⁷³ In addition, other legal opinions of the Comptroller-General were regarded as serious threats to the executive branch. The executive complained that the office was invading its sphere of action in a number of ways. A series of rulings that struck down administrative decisions in the domain of internal disciplinary measures was particularly upsetting for the executive.⁶⁷⁴ As a response, President Ricardo Lagos decided to cut off every channel of communication with the Comptroller-General.

By 2005, the negative reputation of the Comptroller-General had extended to public opinion. The institution was perceived as a source of red tape and the epitome of the defects of bureaucracy. In an influential survey concerning the perception of public

⁶⁷² Emilio Filippi, *La clase política chilena* (Pehuén Editores 2006) 185.

⁶⁷³ Santiso (n 27) 111.

⁶⁷⁴ As illustration, see rulings 1137 (2005) and 23824 (2003).

leaders about the degree of modernisation of several state institutions conducted in 2005,⁶⁷⁵ the score obtained by the Comptroller-General was remarkably low, averaging 2.2 points out of 5. The perception of opposition political leaders was particularly negative, as they evaluated it with only 1.8 points, while government leaders granted it 2.3 points and independent leaders 2.6. The perception of the office was especially weak compared to other institutions. In fact, the average score was 3.1, almost one full point above the Comptroller's mark. Commenting on the results, Mario Waissbluth – the author of the study – concluded that ‘an anachronistic and “Weberian” comptroller will believe that every innovation is in principle a threat to the current legal status quo, and that could slow down modernising efforts’.⁶⁷⁶ According to Waissbluth, public sector unions and the Comptroller-General were the primary obstacles to state modernisation. In the case of the latter, its legal protections, independence, and anachronism were singled out as factors accounting for its distrust of innovations in governance.⁶⁷⁷ In his conclusion, Waissbluth asserted that Chile could not afford, in the twenty-first century, to have an office that had been adequate in the 1950s but not any longer.⁶⁷⁸

Against this backdrop, a major constitutional amendment was approved in 2005.⁶⁷⁹ The purpose of this reform was to introduce an epoch-marking transformation in the Constitution bequeathed by the Pinochet dictatorship.⁶⁸⁰ The core of the amendments focused on reducing the autonomy of the Armed Forces, eliminating the appointed senators, and strengthening the Constitutional Tribunal. Not surprisingly, the Comptroller-General was also affected by the reform. In a probable reaction to the experience with Comptroller Sciolla, the amendments focused on the head of the office rather than on its powers, structure, and procedures. Indeed, the new constitutional provisions introduced three modifications to the Comptroller-General. First, new requirements for holding office in terms of age, legal training, and citizenship rights were incorporated. According to the new provisions, a person must be at least 40 to be appointed as Comptroller-General, and he or she needed at least ten years of legal

⁶⁷⁵ Mario Waissbluth, *La reforma del estado en Chile 1990-2005. Diagnóstico y propuestas de futuro* (Departamento de Ingeniería Industrial Universidad de Chile 2005).

⁶⁷⁶ *ibid* 63–4.

⁶⁷⁷ *ibid* 73–4.

⁶⁷⁸ *ibid* 100.

⁶⁷⁹ Law 20050 (18 August 2005).

⁶⁸⁰ Francisco Zúñiga (ed), *La reforma constitucional* (Lexis Nexis 2005).

experience. Secondly, the appointment procedure was modified. According to the new provisions, the quorum for consent of the senate was heightened from a simple majority rule to a 3/5 majority. This super-majority requirement strongly reinforced the position of the opposition in the Senate in respect to the appointment of the Comptroller-General. Finally, the reform eliminated the security of life tenure for the Comptroller by establishing a non-renewable appointment for a fixed term of eight years. Although the amendments' rationale is not entirely apparent, it seems that they aimed to foster cross-party support for the appointment of the Comptroller-General, and to promote a younger leadership capable of reforming the institution.

Ramiro Mendoza

15 years of democratic politics had shown that leadership within the Comptroller-General was critical for bringing about reform. However, it had also revealed the institution's tendency to inertia, and the fact that external forces may be needed in order to break traditions of isolation and unresponsiveness. Thus, in 2007 and again in 2015, the executive decided to promote the appointment of outsiders in order to enhance the chances of reformation of the office. However, on both occasions the executive faced insurmountable difficulties in having its favourite candidate endorsed by the political opposition in the Senate. As a result, the agreement reached during the appointment process involved selecting an outsider, but one who was palatable to the opposition. Thus, the view of the Comptroller-General as a safeguard against executive encroachments on individual rights and Congress prerogatives – rather than as a collaborator – was reinforced. Indeed, from then on, the institution seems to have been increasingly responsive to non-governmental interests.

In 2007, Comptroller Gustavo Sciolla reached the age limit of 75 years, and again the process of appointment gave rise to political controversy. Disappointed by the performance of Sciolla, the executive was now convinced that the priority for filling the position should be to appoint an outsider lawyer, but the opposition was unwilling to support the nomination of a candidate sympathetic to centre-left ideas. On the contrary, they were seeking the appointment of somebody who could guarantee that the office would serve as a counterbalance to executive power. After a first setback in the Senate, where the executive failed to gather support for his preferred candidate, the minister in charge of the nomination sought the appointment of a lawyer with a profile that could be

favoured by the right-wing opposition. The executive nominated Ramiro Mendoza, who was a centre-right academic and law firm associate. Drawing on the intellectual tradition of Catholic libertarianism, his academic work revealed a degree of political hostility to state action and distrust of administrative power; at the same time, he could be described as a pragmatist based on his extensive work as a practitioner. Unsurprisingly, the Senate easily confirmed Mendoza in April 2007, and after a prolonged interval, the Comptroller-General now had a permanent head of office. For many, Mendoza represented a long-expected opportunity to reform and modernise the office.⁶⁸¹

Aged 49 years, Mendoza was the youngest Comptroller-General to be appointed in 40 years, and he was the second outsider appointed in the office in half a century. Moreover, as we have seen, he took office at a time of dire relationships between the institution and the executive. Given his first opinions and his support for opposition ideas, the executive expected a somewhat aggressive style from the new Comptroller.

In Mendoza's era, the Comptroller-General not only acted as a check on administrative action, but also as an instrument for other political actors – especially congressmen – to hold the executive to account. Thus, it is no surprise that a senior government official pointed out Mendoza's personal political skills as key to understanding his period as the head of office. For such officials, unlike his predecessors, Mendoza was able to cleverly attract sympathy from a broad range of political actors by providing them with a 'balanced diet', that is, listening to their demands attentively and satisfying them with moderation and equilibrium. He did not pay attention exclusively to one single sector, and consequently this strengthened his institutional position. Critically, Mendoza's robust networks allowed him to keep at bay the threats of impeachment thrown at him on several occasions.

Comptroller Mendoza also initiated a new dynamic of revolving doors between the public and private sector and the Comptroller-General Office. In fact, after a few months, Mendoza reorganised the internal staff, bringing in external lawyers.⁶⁸² As expected, this attracted considerable criticism, especially within the office. Some senior officials

⁶⁸¹ Santiso (n 27) 121.

⁶⁸² 'Contralor conformó ayer su nuevo círculo de hierro' *El Mercurio* (5 December 2007).

complained that the institution had lost experienced personnel who had been forced to retire and that their younger replacements were unable to cope with the challenging job of reviewing complex legal materials. For others, however, this change in the staff might have prompted a fairly self-assertive approach in the office, as the more experienced officers allegedly had a more docile attitude when it came to delicate issues, whereas the new younger personnel had a bolder approach to legality review.

Mendoza also intended to broaden access to the office for private parties. One remarkable measure consisted in making public the database containing the entire jurisprudence of the institution. Before this, the decisions of the office were public, but access to the systematic digital record of them required a fee, even for administrative bodies. This single reform revolutionised access to the office's decisions, and attracted the attention of private practitioners who felt invited to use the institution as a further forum for challenging state action. As one interviewee put it, Comptroller-General opinions had always served as guidelines for bureaucrats, but now practitioners could also utilise them. Furthermore, Mendoza introduced a new, broader criterion for access by issuing a new pronouncement determining the rules governing requests for an interpretive opinion from the Comptroller-General.⁶⁸³

Over time, Comptroller Mendoza gained a strong reputation in public opinion as a protector of administrative probity. The media usually depicted him as a modern, efficient, and clean political arbiter in inter-branch conflicts.⁶⁸⁴ Moreover, he was highly regarded by practitioners. As an illustration of this, he ranked as the most prestigious public lawyer in the country in polls organised by private law firms for two years in a row.⁶⁸⁵ This complemented the perception of the institution as a defender of private rights against administrative encroachment.

⁶⁸³ Ramiro Mendoza, 'Exposición de clausura del seminario en "Conmemoración de los 85 años de la Contraloría General de la República"' (2013) 78 *Revista de Derecho Público* (U. de Chile) 19–20. See Ruling 24143 [2015].

⁶⁸⁴ 'El Vigilante Mendoza' *Revista Capital* (20 May 2013); 'Ramiro Mendoza, el abogado con un lejano pasado en la DC' *La Tercera* (3 October 2014).

⁶⁸⁵ See 'Ranking Leading Lawyers Chile 2013' *Qué Pasa* (20 November 2013); 'Ranking leading lawyers Chile 2014' *Qué Pasa* (26 November 2014).

As a consequence, Mendoza's strategy marked a stage of maturity and a new self-assertive orientation for the Comptroller-General. While traditionally the office viewed politics as something totally separate from its role, there was now a continuum between its functions and the political process. Former Comptrollers-General seem to have avoided calls from politicians and forcefully defended their independence from political pressures. This, however, contrasted heavily with Mendoza's style. As one collaborator puts it, Mendoza was proud of his cross-party support in the political establishment and his vigorous interactions with them. To be fair, although this contrasted with recent Comptrollers – notably Iturriaga and Sciolla – it did not depart too radically from the experience of the Golden Age of the Comptroller in the 1950s, as examined in previous chapters.

To conclude, there was no doubt a degree of change in the Mendoza period. This was not formal reform, but transformation in practices and attitudes. At the very least, confirming previous expectations, the outsider character of Mendoza did in fact prompt a shift in the main constituencies of the office, creating more room for legislators and private parties.

Although the long-standing aspiration of the enactment of a fully-fledged organic law was not realised in this period, it is undeniable that the institution experienced a notable transformation. In the early 1990s, Comptroller Iturriaga continued his inward approach and confined himself mostly to routine monitoring of compliance with administrative legality. This was probably a survival strategy, as the transition entailed severe clashes between conflicting political forces. Just as the judiciary did,⁶⁸⁶ the Comptroller-General adopted a strategy of institutional quietism. Later, the office tried to dispel the negative public reputation of bureaucratic obstructionism by assuming a collaborative approach to its legal functions in relation to control of executive power, and embraced auditing as its main purpose. In this sense, it was embracing the neoliberal reforms of public administration occurring elsewhere. But this new outlook did not survive Comptroller Aylwin's mandate, and very soon, new bitter clashes between the office and the presidency took place. As a result, the executive branch was determined to initiate a more decisive reform agenda. This new attitude was well-reflected in the appointment of

⁶⁸⁶ Javier Couso and Lisa Hilbink, 'From Quietism to Incipient Activism: The Institutional and Ideological Roots of Rights Adjudication in Chile' in Gretchen Helmke and Julio Ríos-Figueroa (eds), *Courts in Latin America* (CUP 2014).

outsiders as heads of office, breaking a long-standing convention of seniority nominations. The external energies brought by the new Comptroller-General reconnected the institution to external constituencies, especially political actors, media, and legal practitioners. As a result, the office has become a prestigious legal arbiter in a variety of spheres, purportedly protecting values of probity, legality, and impartiality.⁶⁸⁷

The very logic of the democratic transition is one explanation for this transformation, but the personalistic, monocratic nature of the institution also helps explain this adaptation of the Comptroller-General's Office to new demands. However, clarification of its functions, routine operation, and the delimitation between its functions and those of the judiciary is still pending – these are precisely the themes of the following chapters.

⁶⁸⁷ In this sense, the current Comptroller-General seems to have somewhat met the expectations of the observers who in the 2000s promoted a more active legality-oriented role for the office in mediating political disagreements that were hampering effective congressional oversight over executive action; see Siavelis (n 25) 202.

CHAPTER 6. REVIEWING EXECUTIVE RULEMAKING

This chapter explores the role of the Chilean Comptroller-General in overseeing administrative discretion in the rulemaking process. In the rulemaking domain, the Comptroller's role as an internal check on discretion appears in its strongest form.⁶⁸⁸ It is distinctive of this autonomous office that it intervenes in the administrative process, reviewing in advance the conformity of proposed administrative regulation with legality. Arguably, this feature makes the Chilean institution particularly influential within the administrative process and a quite exceptional mechanism in comparative administrative law.

The office examines thousands of acts every year, but in this chapter I will focus only on the interactions between the Comptroller-General and the executive in relation to administrative rules and regulations. This is what is often called secondary legislation elsewhere, that is, regulations enacted by executive departments under powers delegated by the legislature.⁶⁸⁹ Generally speaking, these rules are legislation-like acts that govern with general and permanent effect the interactions between the bureaucracy and private individuals or groups. The Comptroller-General also reviews individual decisions prior to their entering into effect – for example, the award of contracts, the hiring of staff, or the imposition of disciplinary sanctions. This dimension of its work is remarkably important for a number of purposes, such as prevention of corruption and cronyism. Nonetheless, because of space limitations, these acts will be excluded from this analysis. As said, the examination carried out in this chapter will focus exclusively on administrative rulemaking.

To some extent, the role of the Chilean Comptroller-General in this regard echoes the functions performed by a number of public institutions elsewhere. For instance, the Comptroller's review process resembles the work of the French *Conseil d'Etat* in its consultative role. Jumping in at the very end of the administrative process, it closely examines the drafts of rules pointing out mistakes, illegalities, inconsistencies, and so on. In contrast with the French case, however, the Chilean institution not only provides advice

⁶⁸⁸ On the principle of check, see Kenneth Culp Davis, *Discretionary Justice: A Preliminary Inquiry* (Louisiana State University Press 1971) ch 5.

⁶⁸⁹ Robert Baldwin, *Rules and Government* (Clarendon Press 2004) 60ff.

and makes recommendations, but can also entirely impede the promulgation of a rule if it is regarded as unlawful. Although rarely exercised in modern times, this veto power has an enormous upstream impact on the interactions between the Chilean bureaucracy and this checking institution. Similarly, the Comptroller's internal nature and its function as a supervisor of the regulatory process may attract comparisons to other nonjudicial review mechanisms that have mushroomed elsewhere in the last few decades in the wake of neoliberal reform of public administration.⁶⁹⁰ Yet a couple of elements of the Chilean case differentiate it from most of those legal devices. On the one hand, although Chile has not been immune to NPM policies, the practices of internal review developed by the Comptroller-General largely predate the neoliberal policies of the last few decades. In fact, its practices of legal control grew in the midst of the development of the Chilean interventionist state in the first half of the twentieth century. On the other hand, while most meta-regulation mechanisms have focused on cost-benefit analysis and the reduction of regulatory burden,⁶⁹¹ the Comptroller-General has remained centred on problems of administrative regularity, legality, and efficacy. So far, policy recommendations involving the introduction of meta-regulation mechanisms in Chile have overlooked the possibility of giving a role to this office,⁶⁹² yet the allocation of this kind of task to the institution cannot be completely ruled out.⁶⁹³

As will be seen, the mission of the Office of the Comptroller-General is to ensure not only respect for law but also compliance with procedural ideals. It might be argued that the ideals animating the work of the institution are reasoned administration, good government, and generally a well-functioning administrative process. Paraphrasing Sunstein's description of OIRA in the United States,⁶⁹⁴ it could be said that the Chilean

⁶⁹⁰ Christopher Hood and others, *Regulation inside Government: Waste Watchers, Quality Police, and Sleaze-Busters* (OUP 1999); Bronwen Morgan, 'The Economization of Politics: Meta-Regulation as a Form of Nonjudicial Legality' (2003) 12 *Social & Legal Studies* 489; Breyer (n 10) ch 3.

⁶⁹¹ Jonathan B Wiener and Alberto Alemanno, 'Comparing Regulatory Oversight Bodies across the Atlantic: The Office of Information and Regulatory Affairs in the US and the Impact Assessment Board in the EU' in Susan Rose-Ackerman and Peter L Lindseth (eds), *Comparative administrative law* (Edward Elgar 2010); Morgan (n 690); Cass R Sunstein, 'The Office of Information and Regulatory Affairs: Myths and Realities' (2013) 126 *Harvard Law Review* 1838.

⁶⁹² Organisation for Economic Co-operation and Development, *Estudio de la OCDE sobre la Política Regulatoria en Chile: La Capacidad del Gobierno para Asegurar una Regulación de Alta Calidad* (OECD Publishing 2016) 104–6.

⁶⁹³ See, for instance, the insinuations of these scholars: Letelier (n 191); Eduardo Engel and others, 'Una aproximación al valor económico del control fiscal superior. El caso de la Contraloría General de la República de Chile' (2015).

⁶⁹⁴ Sunstein, 'The Office of Information and Regulatory Affairs: Myths and Realities' (n 691) 1841.

Comptroller-General is ‘a guardian of a well-functioning administrative process’, or more precisely, its defenders would like us to believe it is. In order to reveal the actual role of the office in the rulemaking process, this chapter will take a close look at those day-to-day interactions that take place in the shadow of the veto power. The task of dealing with backstage stories will be carried out by analysing dozens of interviews of administrative officials, Comptroller reviewers, and practitioners. Going beyond the law in the books and paying attention to the law in action, I will reveal how the regulatory encounters between those officials unfold, and how they could be assessed in terms of their contribution to the final outcome of reasoned, accountable, and effective administrative action.

A complete account of this mechanism requires looking at the informal practices that have emerged behind the formalities of the *toma de razón* procedure. Indeed, informal rules and procedures have developed and filled the gaps left by the formal regulation of the process.⁶⁹⁵ Executive officers report that a rejection by the Comptroller-General imposes a high cost on them. In particular, when the decision under review is a regulation with general effects, a rejection may entail a political cost because opposition parties, and the regulated industries, will denounce the government for infringing the rule of law. Furthermore, for the legal advisors, a rejection will negatively impact on their credibility before the political authorities. This means that they make every effort to avoid a negative response by the Comptroller-General. In these cases, an informal dialogue between the office and the primary decision-maker may develop. The checking institution might then request specific changes to the administrative rule or even policy modifications. The real world of the *toma de razón* procedure takes place here. It is an almost completely unexplored area by scholars, only dimly understood even by most public officials.

I. SCRUTINY MEETINGS

Most of the comments received during the interviews conducted with practitioners and executive officers for this investigation were made in relation to experiences with

⁶⁹⁵ Most of them can be seen as what Helmke and Levitsky has termed ‘complementary informal institutions’. In their view, these informal institutions ‘shape behavior in ways that neither violate the overarching formal rules nor produce substantively different outcomes. Often, they are seen to enhance the efficiency or effectiveness of formal institutions’. See Gretchen Helmke and Steven Levitsky (eds), *Informal Institutions and Democracy: Lessons from Latin America* (Johns Hopkins Univ Press 2006) 13–4.

Committee IV and Infrastructure and Regulation Department (DIR), as these are the internal offices with primary responsibility for legal tasks. The interviews with Comptroller officers, however, were conducted with officers working at these levels, but also at higher levels including former Comptrollers-General. In the interviews, the dynamics of the meetings between reviewers, government lawyers, and practitioners were repeatedly discussed. In what follows, I outline the main features of these scrutiny meetings.

After basic preliminary filters, an officer – usually called a ‘reporter lawyer’ – initiates the process within the respective department, DIR, or Committee IV. Regularly, this officer is a junior lawyer who must conduct direct legal review of an administrative rule, draft a report, and propose an outcome – approval, disapproval, or modification. The reporter is often specialised in certain areas of law or in some defined regulatory schemes. She has to report back to the committee chief, with whom she usually can discuss doubts and define strategies. The result of their work is subsequently supervised by the chief or deputy chief of the division and could eventually be reviewed by the Comptroller-General himself. Therefore, the basic work routine consists of a chain of internal reviews comprising at least two levels of internal debate. These loops spark repeated discussions within the office.

The most likely preliminary outcome of the review process is the need to make amendments to the rule. It is most often the reporter lawyer who would discuss this directly with the rulemaking agency. After reaching an internal decision about the merits of the examined rule, the reporter calls the regulators and points out the defects she detects in the proposed regulation. Then, she convenes a formal meeting in order to discuss the terms of the amendments that need to be introduced. Until this point there is no formal decision made by the Comptroller-General Office, that is, no reasoned decision indicating the errors or illegalities in the rule is issued thus far.

The meetings where the legal boundaries of administrative power to make rules are discussed are somewhat informal. As the meetings take place in the premises of the institution, the reviewers host these conventions. They are normally bilateral gatherings attended only by one or two Comptroller officials and the officials representing the ministries. Only exceptionally do meetings adopt a multi-lateral character, gathering

representatives of diverse administrative agencies simultaneously. Most frequently, Comptroller officials meet them separately. Meetings with representatives of private interests also take place independently.

These meetings represent the core of the review process carried out by the Comptroller-General. Executive officers point to these meetings as the critical moment in their interactions with the checking institution. Not surprisingly, the formal regulations at the constitutional and legal level do not mention this stage of the process at all. Arguably, these discussions take place in the shadow of the law. However, they may also embody the ultimate rationale of this accountability arrangement. Administrative regulations that have successfully gone through the Comptroller review are stamped with a seal reading '*Tomado de Razón*', meaning 'Approved by the Comptroller-General'. But behind this simple seal, a long process of discussion, explanation, reason giving, persuasion, and even compromise usually unfolds.

II. LEGALITY CONTROL AND ITS COSTS

The primary function of the legality review process is to perform legal control over rules proposed by the executive branch. In other words, in line with the original mission of the Comptroller-General, the main aim of this reviewing mechanism is to ensure that the exercise of regulatory powers by executive officials does not overstep its legal bounds. Performing this function, the office has to subject administrative rules to review in order to verify whether they have been enacted in conformity with the authorising statutes and legality in general.

When looking at this aspect, the first issue that arises is whether this legality review procedure is just a mere rubber stamp for executive actions. This would be consistent with well-established ideas about the pervasiveness of one-man rule, presidential authoritarianism, and executive dominance in the Latin American region.⁶⁹⁶ From this viewpoint, the legality check would not represent a real threat to executive law-making powers, since the office would be prone to endorsing most of the actions promoted by the

⁶⁹⁶ See Roberto Gargarella, *Latin American Constitutionalism, 1810-2010: The Engine Room of the Constitution* (OUP 2013); Mariana Mota Prado, 'Presidential Dominance from a Comparative Perspective: The Relationship between the Executive Branch and Regulatory Agencies in Brazil' in Susan Rose-Ackerman and Peter L Lindseth (eds), *Comparative Administrative Law* (Edward Elgar Publishing 2011).

executive branch of government. Moreover, scepticism towards the office authority could be based on the belief that its administrative character makes it unlikely for it to depart from executive conceptions of legality. As institutional location tends to shape interpretations of law,⁶⁹⁷ one may be wary of allocating the task of ensuring that regulators exercise power within the boundaries of law to an administrative agency. To put it slightly differently, this checking office might well act as a subordinate organisation that could be performing functions on behalf of the executive – especially advisory functions – but hardly ever against presidential political will.

Perhaps surprisingly, this is not the prevailing view in the Chilean context. On the contrary, the Comptroller's legal review is usually viewed as an excessively cumbersome obstacle to administrative decision-making. The constitutional independence of the office and an internal culture of control may explain the institution's fairly assertive attitude to legal review. Although the Comptroller's officials view themselves as part of the administrative machinery, rather than as judicial personnel, they do not necessarily align with the policy preferences of the presidency. Furthermore, executive officials constantly complain that the office unduly interferes with their discretionary decisions.

In interviews conducted during this investigation, one government official said that the Comptroller-General invades the discretionary domain legitimately granted by the law to the executive. In his view, this is particularly acute in the rulemaking process. The Comptroller-General reduces the discretionary margin of the executive by imposing a legalistic and even literalist conception of public powers. In some cases, the restrictive conception of legality denounced by this official is based on the institution's own precedents. Executive officials report that on occasion, the Comptroller-General requests them to repeat practically verbatim the wording of the authorising statute, thus limiting the space for innovation and experimentation. According to another official, what is especially threatening is that this attitude is not necessarily expressed in formal adverse decisions but through informal interchanges with Comptroller officials. He maintains that this makes the Comptroller-General's views more pervasive and hostile than judicial rulings, since the latter are more sporadic, fragmented, and public.

⁶⁹⁷ Trevor W Morrison, 'Constitutional Alarmism' (2011) 124 Harvard Law Review 1688, 1747; Daintith and Page (n 70) ch 1.

Officials explain that this formalistic examination may also have serious consequences for their work, as the existence of even formal, minor errors undermines their professional credibility in the eyes of their political superiors. This leads executive officers to avoid contradicting the opinions of the Comptroller-General and to try to reach agreement in a more private, confidential setting. This may entail initial objectives being declined, and policy-makers may eventually settle the argument by adopting means and policy goals more palatable to the reviewing office.

The delay and conservative effect of the legality review process echo criticisms voiced against the ‘ossification effect’ of different forms of supervision – especially judicial review – on the rulemaking process in the United States.⁶⁹⁸ Ossification of the rulemaking process refers to the phenomenon of amplified inertia in the creation of rules by administrative agencies as a result of detrimental institutional hurdles imposed on regulators. The source of this regulatory lethargy may be located in the judicial or legislative branch, or even in the presidential office itself. Reluctance to undertake innovative rulemaking projects, to update old rules, and to design more flexible rules in the future have been reported as possible consequences of regulatory ossification.⁶⁹⁹

In Chile, a case of disagreement about an environmental regulation may illustrate the threat of ossification. The rule under review was intended to modify a regulation, enacted by a previous administration, implementing a decontamination policy in a small city.⁷⁰⁰ Although it did not affect the substance of the regulation, the new rule was aimed at correcting a number of technical deficiencies in the regulation in force. The change was therefore apparently quite simple. However, the reviewer adamantly opposed the new rule. Apparently, as he was the official responsible for reviewing the previous regulation, he did not see the point of further changes. According to the executive official in charge of the negotiation, his position was quite surprising and even irrational, since it was not based on reasons of legality. Initially, the negative position of the reviewer could have

⁶⁹⁸ Richard Pierce, ‘Seven Ways to Deossify Agency Rulemaking’ (1995) 47 *Administrative Law Review* 59; King, *Judging Social Rights* (n 3) ch 9.

⁶⁹⁹ Thomas O McGarity, ‘Some Thoughts on “Deossifying” the Rulemaking Process’ (1992) 41 *Duke Law Journal* 1385, 1396.

⁷⁰⁰ The original rule was introduced by decree 113, published on 24 October 2013, whereas the modification was made by decree 80, published on 4 September 2014.

impeded the introduction of beneficial changes to the former dysfunctional rule. The obstacle here would have been the existence of the mandatory ex-ante legality check. However, the administrative official conceded that the reviewer was eventually – after almost a year of discussions – convinced of the benefits of the changes, and even provided some insightful comments to make the rule more effective. When all is said and done, however, the promulgation of the rule was certainly not denied, but it was considerably delayed and its content modified.

An executive officer working on housing and urban planning issues also expressed a negative view of the Comptroller's effects on rulemaking. She pointed to delay and ossification as the more serious problems with the review process for her office. Despite the fact that the official timeframe for Comptroller revision is 15 days, when the entire process of review, meetings, and corrections is taken into account the review process for some rules can take more than a year. Although the process can be sped up on exceptional occasions, it is not unusual that the regulatory delays create problems for an administration that will govern for only four years without re-election. Therefore, executive advisors protest that key political opportunities for reform are missed. This official complained that she had ended up discussing and negotiating every regulation word-by-word. During long and exhausting meetings, the reviewers request a clear articulation of the objective of the rule, they go on to examine its adequacy, and then they examine in detail every provision in the regulation. They require the executive to exhibit specific legal support for each proposed provision, and clear definitions of the terms used in the regulation. After receiving the comments in a meeting, a painstaking process of email communication is triggered in which digital drafts are discussed.

An advisor to the executive indicates that a major problem is that legislation is already quite defective, and administrative rules could provide some remedy to this. In other words, administrative rules could compensate for the deficiencies of a legislative process whose outcomes are prone to ambiguity and unprincipled compromise.⁷⁰¹ Yet, because the regulatory requirements imposed by the Comptroller-General are so high and strict, opportunities to find solutions to these regulatory imperfections are missed. Another

⁷⁰¹ For a defence of delegation in similar terms, see Jerry Mashaw, *Greed, Chaos, and Governance: Using Public Choice to Improve Public Law* (Yale University Press 1999) ch 6.

consequence of what is perceived as an obstructive review process is the use of the equivalent to what have been called ‘non-rules’ in the US context.⁷⁰² In other words, executive agencies use instruments that are not subject to legality review in order to regulate their respective sectors. This route effectively circumvents Comptroller-General interference, but also completely eliminates the positive contribution of the review process to rulemaking. Nonetheless, the use of less formalised standards is not always possible. Sometimes it is a statute that requires the Comptroller’s preventive check. If the political escalation of a dispute with the office is also impossible, the agency will probably abandon the policy or seek explicit legislative authorisation. In the latter case, the most likely scenario will be that they seek legislative authorisation through appropriation legislation in the annual budget law. This alternative is notoriously inferior to ordinary legislation because of diminished deliberation, short time limits, and opacity.

III. REASONED DECISION-MAKING

Another task of legality review may be associated with one of the overarching goals of administrative law: reasoned administration.⁷⁰³ In the previous section, I discussed legality in the narrow sense of verifying the existence of prior legislative authorisation before taking administrative action. However, a more ambitious notion of administrative legality may require not only previous permission by the legislature but also the satisfaction of more demanding requirements of rationality and justice. In fact, to an important extent, one of the promises of bureaucracy as a political ideal is rational administration. In this sense, administrative activity may be associated with science and expertise, and with decisions backed by evidence and justification.⁷⁰⁴ This is consistent with the belief that administrative action should not merely be a blind implementation of the will of the elected branches, either the executive or the legislature. On the contrary, it should be able to make an independent contribution to governance in terms of what may be called bureaucratic justice.

⁷⁰² Pierce (n 48) 62.

⁷⁰³ Jerry Mashaw, ‘Small Things like Reasons Are Put in a Jar: Reasons and Legitimacy in the Administrative State’ (2001) 70 *Fordham Law Review* 17; Jerry Mashaw, ‘Public Reason and Administrative Legitimacy’ in John Bell and others (eds), *Public law adjudication in common law systems: process and substance* (Hart Publishing 2016).

⁷⁰⁴ For a critical discussion of the association of science and rationality with administration, see Edley (n 10) ch 2 & 3.

One way to ensure this justice element in administrative rulemaking is to promote deliberative procedures in which explanations are requested and reasons are given. From this perspective, the ultimate goal would be to ensure that public authorities take rationally justified decisions. Setting up instances of questioning and discussion inside government may help to produce better-justified administrative decisions in the first place. Reflecting on the operation of the *Conseil d'Etat* inside French administrative processes, Hamson highlights some of this. He asserts that 'the value of this preliminary and informal discussion, or of the help which it gives in bringing into focus the real elements of the problem and illuminating the solution' is of the highest importance for the action of the institution.⁷⁰⁵ Although this refers to the *Conseil's* internal deliberation, the same phenomenon takes place in the 'internal' interchanges between reviewing and reviewed officers. But does the legality review performed by the Chilean Comptroller-General have any connection with this dialogic ideal?

There are some signs of this sort of contribution in the action of the Comptroller-General. A government lawyer, for instance, provides a detailed description of the meetings during the revision process in a fairly dialogic mood. She describes them in terms of a series of workshops where pieces of draft are discussed. In these meetings, a group of lawyers representing diverse views on the issue share opinions about ways to make the rule stronger. Comptroller lawyers focus on ambiguous provisions and ask for explanations of the intention behind the regulation and its component provisions. As we have seen, although in less positive terms, other executive advisors have also stressed the need to explain to the Comptroller-General the goals of the proposed regulation and the way they fit the legal framework of the respective sector.

The discussion develops in informal terms without written opinions being released. This often entails that executive officials have to take their own notes about the observations and comments of their reviewing counterparts. The observations are not simply formalistic, one official indicates. When explanations provided by the executive satisfy the reviewers, the debates are settled at the meeting itself. But frequently, the discussion prompts changes in the drafts. The tenor of the conversation is professional and there is consensus that the technical level of the reviewers' work is high. In fact, one executive

⁷⁰⁵ Hamson (n 9) 62.

advisor describes the meetings as a discussion between experts, and even claims that it is always possible to persuade the counterpart if a well-crafted legal argument is articulated.

At the end of the meeting, executive officials are invited to withdraw the regulation in order to introduce the modifications requested. However, the executive and the reviewing officials might discuss under the understanding that some issues are non-negotiable. When the issues are politically sensitive, the disagreements can be escalated to the Minister and superior officials within the Comptroller's office, and could reach the Comptroller-General himself. However, elevation is an exceptional practice since it may entail a high political cost for government or damage the professional reputation of government officials.

Another senior government lawyer claims that she has personally drawn positive lessons from the legality review process. She perceives it as a reason-giving process and highlights the instrumental benefits of it. In her account, the examination helps the primary decision-maker in the sense of being forced to exercise self-discipline and to clarify her ideas about the aim of the proposed rule and the justifications for it. A sentinel effect or anticipatory reaction seems to be operating here: anticipating the review, the decision-maker is more diligent than she would otherwise be.⁷⁰⁶ The review may also sharpen the focus on the legal dimensions of the policy being implemented.⁷⁰⁷ This executive official does not think that it is the reviewer who provides beneficial insights, but rather the process itself that provides an opportunity to improve the legal quality of the rules enacted by the executive branch. All of this undoubtedly may help to make stronger rules.

Another government official working in the environmental protection sector also stresses the deliberative benefits of the review. Reflecting on her experience, she admits that the process was time-consuming and that the checking office took a long time to review the

⁷⁰⁶ Adrian Vermeule, 'Second Opinions and Institutional Design' (2011) 97 *Virginia Law Review* 1435, 1464–5. For an empirical analysis of 'anticipatory reactions' to the scrutiny of rules, see Stone Sweet (n 159) 122, 238; Page (n 174) 163–4; Meg Russell and Philip Cowley, 'The Policy Power of the Westminster Parliament: The "Parliamentary State" and the Empirical Evidence: The Policy Power of the Westminster Parliament' (2016) 29 *Governance* 121, 123.

⁷⁰⁷ For a discussion of connection between legality and focus, emphasising its individualistic dimension, see King, 'The Instrumental Value of Legal Accountability' (n 75) 130.

rule. But, in her view, this seems to be reasonably explained by the complexity of the issue under examination. She says that as the regulation involved a variety of sectors such as transport, economy, and sanitation, among others, the reviewers needed time to understand the rule and its implications. In her experience, the entire process took six months, during which questions were asked, explanations given, and consequently corrections made. Although the process was concentrated on lawyers, on occasions technical assistance was needed to clarify the scientific aspects of the provisions. Career corps within the Comptroller-General Office and the respective ministry conducted most of the discussion without politicians' intervention. Overall, this advisor's experience was positive and she even describes the review as a rewarding learning process.

However, there are also more sceptical views of the deliberative virtues of the legality review process. One senior executive official, for example, complained that the Comptroller-General provides no reasoning. He maintained that the institution does not engage in a real dialogue; rather, it imposes its opinion in an acutely authoritarian manner. Other executive advisors shared this negative view. One expressed her frustration with the institution's unconstructive opinions. She explained that she had given reasons and arguments, written memos explaining her position, and had long, tiring meetings with the reviewers, but the office remained unmoved. Apart from accepting the formal rejection of the proposed regulation, the only alternative was to withdraw the rule and introduce the amendments suggested by the office. Similarly, another officer protests that the Comptroller-General practically has unfettered discretion and adopts an arrogant attitude. In his opinion, the regulatory improvement after the review process is nonexistent. Finally, as a reaction to negative attitudes in the meetings, some advisors have chosen to obtain a formal rejection in order to understand what is actually underlying the position of the office. However, they have been disappointed by the lack of reasons for the decisions taken by the reviewing office, as it expresses its opinions in an obscure, laconic, and sometimes even cryptic manner.⁷⁰⁸

Executive officials suggest that stringent examination of executive regulations is sometimes based on a sense of professional superiority to government lawyers.

⁷⁰⁸ Also highlighting the negative side of the process, it has been argued that the review carried out by the Comptroller inhibits the development of stronger internal controls at the primary decision-maker level; see Organisation for Economic Co-operation and Development (n 3) 105.

Comptroller reviewers see themselves as technically superior in matters of administrative law to advisors within the executive branch. However, perhaps more importantly, they see themselves to some extent as exhibiting superior professional integrity. We can illustrate this with Fontana's distinction between government and civil service lawyers.⁷⁰⁹ According to this view, while Comptroller officials would constitute a form of civil service lawyers characterised by a commitment to more permanent ideals of executive legality, their executive counterparts would be seen as political lawyers who are prone to adopting more partisan and short-sighted conceptions of the requirements for legality. As a result, Comptroller lawyers may tend to adopt a patronising attitude, and be reluctant to engage in genuine deliberation and discussion.

IV. EXECUTIVE COORDINATION

Centralised executive legality review may also perform intra-executive coordination functions.⁷¹⁰ Taking advantage of its centralised nature and multi-sectorial jurisdiction, solving coordination problems within the executive branch could be one of the roles of the Comptroller-General. Facing a fragmented, heterogeneous, and often insufficiently professionalised bureaucracy, a centralised overseer like the Comptroller-General may facilitate inter-agency coordination and communication. Moreover, exploiting its strategic institutional location, it can aggregate perspectives and information from a broad range of actors within the bureaucracy. In addition, as a centralised overseer, the Comptroller-General could facilitate accountability from the bureaucracy to the head of the executive, and consequently political accountability from the executive to the people.⁷¹¹ In the end, in a presidential regime like Chile, the institution politically responsible to the people is the presidency, and there must be channels to monitor that its subordinate bureaucratic apparatus is implementing its policy preferences.

The view of the Chilean Comptroller-General as a remarkable institutional instrument of centralisation – in the Latin American region – is not entirely new. In a seminal monograph in the 1970s, Arturo Valenzuela suggested that the institution possessed an

⁷⁰⁹ David Fontana, 'Executive Branch Legalisms' (2012) 124 Harvard Law Review Forum 21, 28.

⁷¹⁰ Sunstein, 'The Office of Information and Regulatory Affairs: Myths and Realities' (n 691); Adrian Vermeule, 'Local and Global Knowledge in the Administrative State' in David Dyzenhaus and Thomas Poole (eds), *Law, Liberty and State. Oakeshott, Hayek and Schmitt on the Rule of Law* (CUP 2015); Breyer (n 10).

⁷¹¹ Elena Kagan, 'Presidential Administration' (2000) 114 Harvard Law Review 2245.

indirect and symbolic, but still relevant, centralising force affecting municipalities in Chile.⁷¹² Furthermore, some decades later, Angell, Lowden, and Thorp depicted the Comptroller-General as a powerful influence in the centralising forces operating in the country that contrasts sharply with its neighbours.⁷¹³ Yet the function of the Comptroller-General as a centralising force can also be detected beyond the interactions between central and local governments in Chile. It is also apparent within the central government itself. The contribution of the office at the level of rulemaking operates in two ways. On the one hand, the Comptroller-General's review process seems to facilitate monitoring over the ministries by the presidency. In this sense, the institution may prevent ministries and other administrative agencies from promulgating major rules without the prior knowledge of the presidential office. On the other hand, the Comptroller-General might strengthen inter-agency collaboration, preventing potentially myopic perspectives from prevailing in the regulatory process.

In relation to the former perspective, an advisor to the presidency explains the role of the Comptroller's review as a sort of fire alarm of ministerial insubordination. This official indicates that his office detected that ministries were sidestepping presidential control over rulemaking by directly submitting administrative rules to legal review without due regard to clearance procedures at the presidential office level. The reason for this is that the presidential office devoted most of its capacities to the legislative process, and therefore was unable to monitor all the rules produced by the rest of the executive branch. Only the most important of them were routinely overseen. As this threatened the internal standing of the presidential office within the administrative rulemaking process, the reaction was to use the Comptroller-General as a fire alarm for potential ministerial insubordination. Thus, the presidential office strengthened its links with the Comptroller-General in order to minimise adverse direct contact between sectorial agencies and the checking office. In other words, without the Comptroller stage, ministries and agencies could more freely promulgate rules without any engagement with the presidential advisors. The existence of the office therefore gave the presidency a chance for detection of unexpected promulgation of major rules and provided it with leverage to control the administrative rulemaking process.

⁷¹² Valenzuela (n 409) ch 2.

⁷¹³ Alan Angell, Pamela Lowden, and Rosemary Thorp, *Decentralizing Development: The Political Economy of Institutional Change in Colombia and Chile* (OUP 2001) 80–1.

More often, the role of the Comptroller-General is simply to act as a convenor and coordinator, solving disputes between sectorial ministries. An example of this function took place in relation to a recently introduced food labelling regulation that triggered a bitter controversy between the Public Health Ministry and the Ministry of Foreign Relations. The Public Health Ministry was proposing an aggressive labelling policy alerting customers to the components of unhealthy foodstuffs, while the Foreign Relations Ministry forcefully expressed its view that the policy could damage the international image of the country or, even worse, cause litigation with foreign companies at international trade forums. However, the dispute was eventually successfully arbitrated at the Comptroller's Office during the legality review process. Another example also relates to Public Health Ministry regulations. However, in this case, the rule – proposed by the ministry – was concerned with safety conditions in the workplace. Only after submission of the rule to Comptroller review did ministry officials become aware that the Ministry of Labour was proposing rules with similar objectives. The Comptroller-General then convened meetings between the respective ministries to reach a unifying regulation on the matter. The executive official interviewed indicated that in this type of case, the Comptroller-General performs a beneficial coordination function, facilitating joint action between different administrative offices.

A former Comptroller-General interviewed for this investigation emphasised this aspect of the work of the office he was commanding. He stated that, in his opinion, the office is not a sort of administrative tribunal. Instead, drawing a parallel with regulatory agencies supervising regulated industries, the institution is a 'regulator of public administration'. Speaking specifically about the legality review process, he said that Comptroller interventions aimed to enhance the legal quality of administrative rules by remedying 'systemic deficiencies'. By this, he was suggesting that the function of the Comptroller-General was to introduce a panoramic perspective into the sectorial rules. In his terms, this was a 'legal quality coordination task'.

V. INTEREST GROUP REPRESENTATION

A very valuable goal of modern administrative law is giving a voice to outsiders. Since at least the 1970s in the Anglo-American world, models of administrative law as a system

for interest representation in governmental processes have been put forward.⁷¹⁴ Interest group representation in the policy process may take different institutional forms, such as consultation and participation rights at the administrative level, appointment in administrative bodies, or broad standing to challenge decisions in judicial review proceedings. The ultimate aim would be to facilitate external insights in order to have an impact on administrative decisions, simultaneously improving and legitimating executive action.

Generally, there are no participation rights in the administrative process in Chile. Neither are there broad standing rules for participating in the administrative process or challenging administrative actions before courts. As such, the question arises whether the Comptroller-General may meet the need for interest group representation in the Chilean rulemaking process.

Comptroller-General review does not seem to promote interest representation at the front-line decision-maker level. In fact, some regulators complain that the ex-ante review process does not provide incentives to increase outsiders' participation in the administrative process. They indicate that because the office is indifferent to consultation practices that take place before its review, it does not encourage the use of participatory devices at earlier stages of the rulemaking process. An advisor in the urban planning sector expresses frustration at the null impact that participatory processes have had on the Comptroller's scrutiny. He explains that while the Ministry of Urban Planning and Housing had spent months setting into motion a modern consultation process before enacting a rule, this was totally dismissed by the Comptroller-General. In fact, the office did exactly the same as it would have done had no consultation process taken place. As a result, the advisor suggests that there is no point in engaging in this kind of initiative, as it only adds an additional layer of delay. Another government lawyer, who also engaged in innovative consultation processes, said that she was surprised when the reviewer requested the submission of the entire record before handing down its pronouncement on the legality of a new executive decree. She was also disappointed when she later found that this was a mere formality, as the reviewers did not look at the actual stakeholders'

⁷¹⁴ Richard B Stewart, 'The Reformation of American Administrative Law' (1975) 88 Harvard Law Review 1667; Richard Rawlings, 'Courts and Interests' in Ian Loveland (ed), *A special relationship?: American influences on public law in the UK* (Clarendon Press 1995).

opinions. It appears, in consequence, that the Comptroller-General has not adapted to the use of these consultation and participation mechanisms in administrative rulemaking.

A possible explanation for the office's disinterest in interest representation at the front-line level might be that it prefers to concentrate it at its own facilities. A former senior Comptroller official reported that the participation of industry in the legality review process is a key factor for the office. In his view, they bring information to the office, helping to detect discrepancies and disagreements. He mentioned three cases as illustrations: a case about digital TV regulation, the food labelling case already mentioned, and general price-setting procedures in regulated sectors such as telecommunications and energy. The widening of access in later years, according to this official, has been critical in detecting and remedying administrative abuse. It is noteworthy that the cases he mentioned all involved rules affecting well-resourced corporate interests.

A senior official concedes that private intervention has risen in the last ten or 15 years, which coincides with the shift from state provision towards regulatory oversight in utilities. She asserts that this enhanced private participation is a reflection of the legitimate interests of the industry in using as many forums as possible to advance and protect their interests. Likewise, a Comptroller official claims that some interest groups have permanent teams monitoring matters under examination at the Comptroller-General Office. For instance, he highlights the ongoing participation of pharmaceutical companies and industries affected by environmental regulations. Another senior official within the Comptroller-General argues that sometimes the office is pushed to hear the regulated industries as a result of requirements for fairness. He explains that the institution often listens not only to executive officials but also to the views of legislators who defend administrative rules that may have an economic impact on business. These parliamentarians provide additional support for a prompt approval of the rules proposed by the ministries. According to this officer, this means the Comptroller-General needs to hear the affected parties as well. The office needs to know the reasons they have to oppose the regulations affecting them. He indicates that, as the meetings with representatives of industry are immediately published on the Internet, there are no reasons to be suspicious of capture by the industry. Moreover, information gathered in this way may enhance the capacity of the office to make better decisions, he suggests.

The foregoing discussion already reveals the limitations of the Comptroller-General as an interest representation mechanism. First, interest representation is used essentially in an instrumental manner in order to collect more and better information regarding the rule under analysis. The scope of participation extends only to what is needed by the office for performing its own functions. As a senior official explains, interest groups often go to the Comptroller-General to make their voice heard, but they lack procedural rights. He points out that even though their views are taken into account in the review process, the institution lacks capacities to give a reasoned response to each of them. Second, the nature of the mechanism forces interest representation to be excessively legalistic, that is, the voices of the affected groups are expressed in terms of rules and laws, lacking the nuances of broader political discourses and technical perspectives. An attorney advising in regulated markets explains that the impact of the ex-ante review is enormous but not always positive. He complains that Comptroller decisions at this level are excessively legalistic; they lack technical expertise and are unprincipled. As a result, they are heavily prone to opportunistic exploitation by regulated industries. Third, many relevant administrative rules avoid the legality check and, accordingly, the Comptroller-General cannot be used as a forum for interest representation at all. Indeed, a number of practitioners interviewed for this investigation indicated that the ex-ante legality review process was not their favourite route to express their views or challenge administrative actions. While admitting that she has used the mechanism, one practitioner asserts that most of the rules that actually affect the industries acting in the most dynamic markets are exempted from the Comptroller's ex-ante legality check. Fourth, it seems that there is an imbalance among the interests heard by the office. While representatives of business may use this forum when convenient for the defence of their interests, advisors to less well-resourced groups are barely aware of the existence of legality review as a forum to express views on regulations affecting their interests. There is agreement among most of the interviewees that the office is quite impartial, but this dominance of some interests over others may at least signal the risk of 'epistemic capture', in the sense that the 'perspectives [of the office] might well be shaped by the limited class of people to whom they are listening'.⁷¹⁵ Finally, the procedure suffers from opacity and lack of adequate disclosure requirements. This inhibits outsiders' participation and creates space for

⁷¹⁵ Sunstein, 'The Office of Information and Regulatory Affairs: Myths and Realities' (n 691) 1860.

institutional capture by repeat players. Although meetings of senior officers with interest groups are regularly published online – as required by regulations of lobbying – exchanges of documents and interactions at lower levels remain unpublished. Experienced actors use FOI instruments to access documents provided by counterparts, but this route seems excessively cumbersome and appears to remain skewed towards well-organised groups. A significant overhaul seems to be needed in this area. Some models can be found in reforms to OIRA in the 1990s that triggered formalisation of procedures and increased public disclosure requirements and restrictions in ex-parte communications.⁷¹⁶

VI. PREVENTING LITIGATION

Arguably, the existence of ex-ante checks may help to shield administrative acts against future judicial review challenges. This is one of the justifications for having a system of preventive revision at the French *Conseil d'Etat*, for instance.⁷¹⁷ In the French context, this internal checking system developed largely because an increasingly dysfunctional legislature delegated power to the executive branch of government. Thus, along with its judicial functions, the *Conseil d'Etat* matured as a technical counsellor to government. The dual nature of the *Conseil* – as an advisory body and as a court⁷¹⁸ – appeared to be particularly helpful in providing legal knowledge at the stage when the primary decision is taken. Indeed, as former counsellor Nicole Questiaux suggests, this institution ‘is able to anticipate the problems that could arise in litigation while dealing with so far uncontested texts’.⁷¹⁹

The Office of the Comptroller-General also performs a double function. The institution takes action prior to the promulgation of administrative rules, but it can also declare the illegality of administrative decisions that have been already promulgated, through the exercise of its interpretive power. In this sense, there may be some space for transferring its expertise from ‘quasi-judicial’ adjudicatory functions to its advisory role during the ex-ante review process. Furthermore, in this institution there is no separation between the

⁷¹⁶ Cass R Sunstein and Peter L Strauss, ‘The Role of the President and OMB in Informal Rulemaking’ (1986) 38 Administrative Law Review 181, 192–3; Kagan (n 711) 2280, 2286–7, 2358.

⁷¹⁷ Nicole Questiaux, ‘Administration and the Rule of Law: The Preventive Role of the French Conseil d’Etat’ [1995] Public Law 247; Freedman (n 11) ch 5; Bell (n 11) ch 5.

⁷¹⁸ Hamson (n 9) 45–6.

⁷¹⁹ Questiaux (n 717) 255.

personnel and offices responsible for these diverse tasks. In this case, however, the tension between advice and supervision seems to be somewhat skewed towards the latter aspect of executive legality interpretation.

The Comptroller-General, nonetheless, does not monopolise adjudicatory powers in relation to administrative disputes. After a long history of disagreement over the existence of judicial review of administrative action in the country, it has only been since 1989 that the ordinary judiciary has possessed explicit legal accountability powers over the executive branch. Moreover, the Comptroller's legal interpretations themselves could be challenged before the judiciary. Therefore, as the Comptroller-General lacks the last word in questions of law, it may be unclear the extent to which its ex-ante legal review powers contribute to avoiding litigation.

The perception of actors operating in this context, nonetheless, is that the Comptroller-General does deter excessive litigation in matters of administrative law and particularly in rulemaking. A former Supreme Court justice with long experience in administrative disputes said, for instance, that judges show deference to the Comptroller's determinations of law. They 'respect the technical opinion' of the office and 'assume the correctness of what it says,' he reported. Moreover, he expressed his belief that the Comptroller-General helps to reduce litigiousness against administrative actions. Another former Supreme Court justice with a similar background, emphasising the uniqueness of the mechanism, said that 'the existence of ex-ante legality review, despite its narrow scope, to some extent has prevented the rise of judicial disputes over administrative acts'. He went on to explain the deterrent effect of this checking device: 'If one knows that the Comptroller Office – an autonomous body, staffed with good lawyers – examined the legality [of administrative decisions], then one does not waste time suing the state claiming that a decree is wrong. One only would do that when there is [a] very relevant [violation of law]'. He concluded, therefore, that 'somehow the Comptroller's review impedes that challenging decrees before the courts become a matter of routine'.

An executive senior advisor provides a concrete example. He mentions an ambitious regulation on animal rights that was a campaign pledge of the President to animal rights groups. The decree was repeatedly rejected by the Comptroller-General on legality grounds. The government lawyer conceded that the enabling legislation in this case may

actually have been insufficient, but he also said that the political pressure was difficult to resist. Be that as it may, he was happy with the outcome, because if promulgated, the decree could have opened enormous room for litigation. He said that ‘animal rights groups would have sued local governments on grounds of illegal inaction as the decree established too ambitious duties without enough financial support’. In other words, without Comptroller ex-ante review, the decree might have triggered a judicial dispute with unpromising results.

A practitioner and former senior official at the Comptroller Office shares these views. He says that ‘litigiousness against administrative rules in Chile is rare and this is due in part to the Comptroller’s ex-ante review’. A reviewer in the office expresses a similar idea. He maintains that in spite of the delays the preventive review causes, it actually makes a positive contribution because it minimises waste. He says that while without prior legality check, rulemaking could be more expeditious, reducing processing times at the high cost of an increasing number of judicial review challenges. He believes that excluding the legality review process would increase litigiousness since the quality of the work of front-line decision-makers tends to be poor. In his opinion, government lawyers take legal and constitutional violations frivolously, but legality review prevents errors from remaining in the final administrative rules.

VII. CONCLUSION

This chapter has explored the role of the Chilean Comptroller-General in administrative rulemaking. I have paid close attention to the practices of deliberation, reason-giving and veto that occur in the shadow of the formal rules. This sort of law-in-context perspective seems particularly suitable for researching a setting in which interactions take place with a high degree of informality. Moreover, this point of view may help to remedy the overly legalistic and formalistic approaches usually adopted in relation to public law in the Latin American region.

The review process under examination in this chapter may be compared to well-known institutions acting elsewhere. Like some of its counterparts in more developed jurisdictions, the Comptroller-General somewhat contributes to the following dimensions: (i) increasing compliance with legality; (ii) bringing into focus legal dimensions that could have been neglected by primary decision-makers; (iii) enhancing

coordination within the executive branch of government; (iv) facilitating representation of interests in administrative rulemaking; and (v) preventing excessive litigiousness. Yet this family resemblance to successful institutions cannot fully account for the resilience of the institution amid everlasting calls for change and even abolition. Indeed, the office performs these functions with only limited success.

There may be something distinctively Latin American that might explain the persistence of this mechanism. At least two factors seem to emerge as suitable candidates. On the one hand, the Comptroller-General has offered a countervailing power to the potential dominance of the executive branch in an institutional context characterised by weak supervision by courts and even weaker supervision by the legislature. The office, to put it differently, compensates for the perceived threat of executive authoritarianism and the dysfunctionality of the other branches of government in reacting to it. On the other hand, the Comptroller-General also seems to perform a compensation function in relation to bureaucracy. In a context of an unprofessionalised and fairly balkanised bureaucratic apparatus, the Office of the Comptroller-General has symbolically embodied the values of administrative integrity and legality. Simultaneously, it has worked as an effective repository for institutional memory and administrative expertise. This latter dimension of the office has legitimated and strengthened administrative action. Even though I am not convinced that this administrative justice arrangement achieves the right mix of rules, discretion, and accountability, the factors just sketched out may help to explain the fear of reforming it, especially when viewed against the backdrop of institutional fragility that unfortunately seems to characterise the Latin American region.

CHAPTER 7. THE COMPTROLLER AND DISPUTE-RESOLUTION

The development of nonjudicial forms of legal redress is one of the distinctive features of contemporary administrative law.⁷²⁰ They have mushroomed everywhere along with the expansion of the welfare state.⁷²¹ These new institutional devices have been designed to overcome the perceived shortcomings of traditional models of judicial review of administrative action. The creation of court substitutes has not been the only option for legal designers. Public law systems have also adapted traditionally ‘triadic’ judicial structures⁷²² in order to address the modern challenges raised by the growth of the administrative state.⁷²³ Adjudicatory institutions that deviate from the classic model have been designed in order to cope with problems of massive administrative justice, poorly resourced litigants, and polycentricity, among others.⁷²⁴

The development of the Comptroller-General can be located within that broader phenomenon. Writing in 1977, Eduardo Soto-Kloss described the office as an admirable innovation of Chilean public law, comparing it to ombudspersons and other institutions designed to remedy the limitations of traditional judicial review.⁷²⁵ Although he directed his praise towards the ex-ante legality review procedure, it may be argued that his point was of broader scope. He was conceiving the institution as a remedy to overcome the weaknesses of judicial review and not merely as a body operating inside government. Looking at the comparative landscape, Soto-Kloss claimed that contemporary administrative law had an urgent need to react to the tardiness of judicial mechanisms. In contrast, he portrayed the Comptroller-General as a ‘dynamic, promptly and possibly effective’ device for administrative justice. Certainly, there are evident ideologically motivated overstatements in these words. They were uttered in praise of the controversial behaviour of the office during the Allende period and expressed during the first months

⁷²⁰ Cane, *Administrative Tribunals and Adjudication* (n 2); Peter Cane, ‘Understanding Administrative Adjudication’ in Linda Pearson, Michael Taggart, and Carol Harlow (eds), *Administrative law in a changing state: essays in honour of Mark Aronson* (Hart Publishing 2008).

⁷²¹ John Bell, ‘Comparative Administrative Law’ in Mathias Reimann and Reinhard Zimmermann (eds), *The Oxford Handbook of Comparative Law* (1st edn, OUP 2006) 1278.

⁷²² Martin Shapiro, *Courts: A Comparative and Political Analysis* (Univ of Chicago Press 2004).

⁷²³ Abram Chayes, ‘The Role of the Judge in Public Law Litigation’ (1976) 89 *Harvard Law Review* 1281.

⁷²⁴ NW Barber, ‘Prelude to the Separation of Powers’ (2001) 60 *The Cambridge Law Journal* 80–4; King, *Judging Social Rights* (n 3).

⁷²⁵ Soto-Kloss, ‘La toma de razón y el poder normativo de la Contraloría General de la República’ (n 180) 205–6.

of the Pinochet dictatorship. However, they may still have anticipated possible routes that the institution could have navigated. Indeed, Soto-Kloss's claims raise some interesting questions. Has the office become a court substitute? What functions does it perform in this regard? For which weaknesses of judicial review could it compensate?

In the late 1970s, the institutional position of the Comptroller-General in relation to dispute-resolution was less controversial than today. At that point, although highly criticised in some circles, the dominant doctrine was that ordinary courts lacked general judicial review powers. Therefore, under such a setting, the position of the office as a court substitute was strengthened. In 1989, however, this scenario changed.⁷²⁶ As a result of the negotiation of constitutional reforms to facilitate the transition from dictatorship to democracy, the judiciary was granted powers of judicial review of administrative action. This was done by dropping the reference to administrative tribunals in the Constitution.⁷²⁷ With dispute-resolution powers having been granted to courts in public law issues, why does the Comptroller-General continue to perform a function in this domain? What is the distinctive contribution of the Comptroller-General as an institution of administrative justice?

In marked contrast to its counterparts elsewhere,⁷²⁸ the Chilean Comptroller-General is to an important extent concerned with individual legal grievances. In this sense, the Chilean office resembles an ombudsman, as it provides an additional forum for airing complaints against administrative action (or inaction). In the previous chapter I explored this issue in respect to ex-ante legality review in the rulemaking process. In this chapter, I examine the functions of the office in its ex-post function of handing down interpretive opinions. Here, the comparison to courts is definitely more straightforward.

Addressing the previous questions, this chapter examines the use of complaint-handling procedures in the Comptroller-General. The chapter thus focuses on the individualised aspect of legal accountability. I will deal with issues of independence, impartiality, expertise, access, procedural flexibility, and the impact of Comptroller-General

⁷²⁶ Aróstica, 'Notas sobre los dictámenes de la Contraloría General de la República' (n 223) 536–8.

⁷²⁷ See Chapter 5.

⁷²⁸ For the merely 'quality assurance' role of the Comptroller-General in other jurisdictions, see Birkinshaw (n 76) 20; Cane, *Administrative Tribunals and Adjudication* (n 2) 258.

procedures and remedies for individuals' grievances. The aim is to assess whether the institution provides significant redress for aggrieved individuals. In other words, this chapter will examine how the office fares as a venue for legal and social accountability, that is, as an institutional platform for challenges to government decisions by private parties.⁷²⁹

I. INDEPENDENCE, IMPARTIALITY, AND EXPERTISE

One of the main possible advantages of nonjudicial institutions of legal accountability over ordinary courts is that they provide innovative forms of handling the trade-offs between independence and impartiality on the one hand, and expertise on the other. Their defenders claim that nonjudicial institutions represent a superior form of administrative justice by securing sufficient independence while keeping larger degrees of expertise.

The administrative state entails a large concentration of power in public bureaucracy. This in turn creates enormous asymmetries of power between the administration and the citizen and a special need for grievance machinery capable of handling the specific kinds of disputes that stem from the exercise of bureaucratic power. The establishment of these dispute-resolution bodies results in difficult questions of institutional design. The trade-off between independence and expertise seems particularly salient among them. As John Allison explains, these kinds of adjudicatory institutions must satisfy demands of both independence and expertise. He states that independence is required to secure citizens' trust in 'impartial adjudication of administrative disputes despite the enormous power of the state administration'.⁷³⁰ On the other hand, in order to secure administrators' trust and their ultimate compliance, adjudicators must possess sufficient expertise, that is, knowledge of 'the complexity of administrative needs, the threats to administrative efficiency, and the adequacy of non-judicial controls over the administration'.⁷³¹ Thus, as stated above, there is a tension between these two goals that must be satisfied by the designer, as the adjudicatory institution 'must be sufficiently associated with the

⁷²⁹ Social accountability can be defined as 'a nonelectoral, yet vertical mechanism of control of political authorities that rests on the actions of an array of citizen's associations and movements and the media. The actions of these groups monitor public officials, expose governmental wrongdoing, and can activate the operation of horizontal agencies'; see Peruzzotti and Smulovitz (n 79).

⁷³⁰ Allison (n 10) 35–6.

⁷³¹ *ibid.*

administration to understand its activities, and sufficiently detached so as not to be partial'.⁷³²

Comparing the operation of the market, the political process, and the legal process, Neil Komesar has similarly highlighted the fact that adjudication secures independence and impartiality at the cost of reducing expertise by narrowing access to information.⁷³³ He explains that the institutional isolation of adjudicators increases the costs of participation in litigation when compared to the market and the political process. Costly participation screens information out of the adjudicatory process and causes informational shortages in courts. To put it slightly differently, here Komesar is emphasising the trade-off between independence and some forms of expertise. He claims that 'that insulation separates judges from a great deal of information about the desires and needs of the public'.⁷³⁴ The limited information possessed by adjudicators adversely affects their expertise or competence, understood as their ability to 'investigate, understand, and make the substantive social decisions that may come to them'.⁷³⁵ Of course, this raises a thorny dilemma for institutional designers:

The adjudicative process hears and considers less, but is more evenhanded in what it hears and considers. The price of evenhandedness is most dramatically revealed in that important range of social issues where the adjudicative process hears nothing – a significant disability traceable to the high cost of participation. This tradeoff between information and evenhandedness is among the most difficult issues in institutional choice.⁷³⁶

Adrian Vermeule has applied Komesar's insights to impartiality-expertise trade-offs in a somewhat more limited institutional setting. Pointing out the limits of independence, he explains that 'the bias of decision makers can be reduced only by reducing the information they hold or their incentives to invest in acquiring new information'.⁷³⁷ However, sometimes a degree of impartiality may need to be sacrificed at the expense of expertise. For although better-informed actors may be prone to biases, they may also 'have indispensable specialized knowledge'.⁷³⁸ Generally, Vermeule suggests that institutional

⁷³² *ibid* 138.

⁷³³ Komesar (n 17) 125.

⁷³⁴ *ibid* 141.

⁷³⁵ *ibid* 138.

⁷³⁶ *ibid* 141–2.

⁷³⁷ Adrian Vermeule, *The Constitution of Risk* (CUP 2014) 117.

⁷³⁸ *ibid*.

designers have to deal with such trade-offs by optimising all the institutional values at stake. One example is allocating the task of investigation and prosecution to information-rich but weakly independent administrative agencies,⁷³⁹ but then requiring an internal separation of functions within the organisation in order to secure a degree of independent decision-making. Thus, this arrangement may be further improved by putting in place substitute protections such as ex-post thin judicial review.⁷⁴⁰

As Elliot has claimed, independence is a critical feature of accountability institutions. In his view, there must be tension, or distance, between the adjudicatory body and the body being held to account.⁷⁴¹ Yet the question is how to find the right ‘measure of independence’ in light of the requirements for expertise. According to Peter Cane, this accommodation between independence and expertise is behind the introduction and permanence of ‘administrative tribunals’ in the United States. To explain the function of these institutions, Cane contrasts the respective orientations of the administrative and the adjudicatory processes. He claims that ‘[a]dministration, like politics, is primarily oriented towards the promotion of social goals whereas adjudication is primarily oriented towards the protection of the interests of individual members of society’.⁷⁴² Drawing on Komesar’s insights, it could be argued that these divergent orientations are due to their different institutional features and their informational capacities. Thus, whereas adjudication has a preference for individualised forms of participation,⁷⁴³ the administrative process tends to give priority to social interests.⁷⁴⁴ Against this backdrop, Cane suggests that administrative adjudication may represent a halfway house between administration and adjudication:

Embedded tribunals enable the demand for adjudication of disputes between citizens and government to be met without relinquishing too much control of the programs out of which the disputes arise; they facilitate maintenance of the integrity of government policy objectives while at the same time providing an outlet for individual grievances.⁷⁴⁵

⁷³⁹ *ibid* 119–20.

⁷⁴⁰ *ibid* 137.

⁷⁴¹ Elliot (n 71) 235.

⁷⁴² Cane, ‘Understanding Administrative Adjudication’ (n 720) 294–5.

⁷⁴³ Lon L Fuller, ‘The Forms and Limits of Adjudication’ (1978) 92 *Harvard Law Review* 353.

⁷⁴⁴ To the administrator, ‘issues are defined as social problems that call for action with a view to the accomplishment of some determinate result. The emphasis on expertise and discretion in the implementation of policy is an outcome of this orientation toward concrete action’. Philippe Nonet, *Administrative justice. Advocacy and change in a government agency* (Russell Sage Foundation 1969) 146–7.

⁷⁴⁵ Cane, ‘Understanding Administrative Adjudication’ (n 720) 298.

In other words, administrative adjudication is designed so that a sufficient degree of independence is granted while retaining an appropriate level of expertise, that is, an understanding of the policy goals underlying administrative action. In sum, this model represents one way in which independence and expertise could be optimised.

It is not entirely clear, however, whether expertise plays to the benefit of government, as Cane and Allison seem to suggest. Harry Arthurs, for instance, has argued that judicial oversight – arguably the most independent form of accountability – may not entail a more robust scrutiny of administrative action than expert but less independent nonjudicial forms of accountability. In his view, the latter arrangements are ‘more likely than the courts to address the substance, rather than the technicalities, of discretion abuse’.⁷⁴⁶ Similar insights can be collected from Hamson’s study of the *Conseil d’Etat*, which simultaneously highlights the body’s close proximity to the administration and its superior assertiveness in comparison with the English high court.⁷⁴⁷ This is a case, therefore, of expertise leading to more intrusive legal scrutiny of administrative action.

What is the situation in the Comptroller-General Office in relation to independence, impartiality, and expertise? As we have seen, the office is robustly independent in the more legalistic sense of the term, that is, in terms of appointment, tenure, and removal of the office-holder.⁷⁴⁸ With the exception of life tenure, the rules governing the office are currently similar to those for members of the higher courts. From this point of view, there is no notable difference between the two forums for dispute-resolution.

In a broader sense of independence, however, the office is considerably less isolated from the administrative process and the executive branch than are courts. A combination of numerous accountability functions in the office such as audit, ex-ante review, opinion-giving, and dispute-resolution tasks makes the institution much closer than courts to administrative action. In addition, the office is characteristically conceived as operating within administration. As a former head of the Comptroller’s Legal Department has

⁷⁴⁶ Harry Arthurs, ‘Rethinking Administrative Law: A Slightly Dicey Business’ (1979) 17 Osgoode Hall Law Journal 1, 25.

⁷⁴⁷ Hamson (n 9) 16, 65–6.

⁷⁴⁸ See chapter 3 and also Santiso (n 27) ch 6.

pointed out, the Comptroller-General is autonomous yet it is located inside the administration.⁷⁴⁹ In his view, its peculiar insertion within administration requires the institution to have a ‘close, robust and profound knowledge of the administrative milieu and the real problems that take place in it’.⁷⁵⁰ As a result, unlike courts, the office is expected to possess an acute consciousness of the internal law of the administration.

By contrast, the Chilean judiciary has been historically characterised by its isolation and autonomy.⁷⁵¹ Although there have been attempts to increase its connections and responsiveness to broader interests in the last 20 years, progress has been quite limited.⁷⁵² In relation to the administrative process, in particular, the distance is particularly significant. There are no generalist administrative courts in the country, and the specialised public law panels in the higher courts are the exception. Specialised panels were only created in the Supreme Court in 1995,⁷⁵³ and in the last 50 years just two Justices who could be considered specialists in administrative law have been appointed. The lack of expertise is exacerbated considering that the Court has 21 members, and, even worse, because of the internal rules of procedure, one of the mentioned specialists never sits on the public law panel. When asked about the Supreme Court’s knowledge of the administrative rulemaking process, a Justice declared that their approach was essentially formalist. In his view, Supreme Court justices did not have an understanding of the ‘law in action’ and the reality of legal operations beyond the books. He said that in their adjudicatory functions, they just turn a blind eye to administrative reality.

Informal networks also explain the proximity between the Comptroller-General office and the administrative process. The Comptroller-General himself has historically held routine meetings with Presidents and Ministers, and his subordinates directing sub-departments within the office follow the same practice of keeping ongoing contact with ministries and heads of departments. The Comptroller-General also pays personal visits to congressional committees quite frequently. Comptroller officials, moreover, frequently

⁷⁴⁹ Astorquiza (n 211).

⁷⁵⁰ *ibid* 198.

⁷⁵¹ Hilbink (n 23).

⁷⁵² Couso and Hilbink (n 686).

⁷⁵³ Luis Cordero, ‘De Marín a Pierry: veinte años de responsabilidad del Estado en la Corte Suprema’ in Juan Carlos Ferrada, Jorge Bermúdez, and Osvaldo Urrutia (eds), *Doctrina y enseñanza del derecho administrativo chileno: estudios en homenaje a Pedro Pierry Arrau* (Ediciones Universitarias de Valparaíso 2016).

receive telephone calls from members of Congress interested in specific policy areas or trying to speed up administrative decisions. Staff of the office admit that this form of ‘telephone justice’ is practised quite openly, but they claim that it does not affect their impartiality. In sharp contrast, members of the judiciary keep their contact with Congress and the executive branch on strictly formal terms. Their form of communication is almost exclusively formal, institutional memorandum. Most of these features distinguish the Office of the Comptroller-General from the judiciary in terms of its distance from executive policy-making. However, they also broaden their sources of information and thus increase their expertise.

In one aspect, Comptroller-General officers and members of the judiciary appear to be alike. Both groups embody bureaucratic cadres who have developed a strong feeling of belonging after possibly decades serving their respective institutions. This represents an acute element of institutional isolation and independence in both organisations. However, professional isolation seems less severe in the case of the Comptroller-General Office. First, the office’s workforce comprises not only lawyers but also a broader spectrum of professions. In some sub-departments, lawyers work alongside engineers, accountants, and architects, among others. Secondly, there has been a historical practice of commissioning Comptroller officers for detached service in ministries and other administrative departments. This has given officers proximity to the other side of the divide. In the historical chapters of this thesis we have seen how this practice has taken place.⁷⁵⁴ Despite the fact that detached service commissions are rarely used today, there are increasing instances of ‘revolving doors’ between administration and the office of the Comptroller-General. In fact, it is not uncommon to find Comptroller-General officers who were recruited after experience in the ‘active administration’ side and vice versa. There are even cases of people leaving the office for the executive branch and then being recruited to the Comptroller-General again. This is a third factor that lessens the isolation of the office. In sum, echoing Latour’s findings in his study on the making of law in the French *Conseil d’Etat*,⁷⁵⁵ the experience of the law inside the Comptroller-General is less autonomous than appearances may suggest.

⁷⁵⁴ For the work of Comptroller-General staff in executive functions during the Pinochet regime, see Chapter 5.

⁷⁵⁵ Latour (n 11) 126.

The foregoing point raises a set of complex questions: do close interactions between the Comptroller-General and administrative power adversely affect its impartiality? Does it entail excessive responsiveness to social policy? Does it genuinely increase its expertise? Has expertise entailed enhanced trust by administrators? Has it entailed greater deference to administrative determinations?

Despite divergence in terms of familiarity with administrative activity, perceptions of bias in the decisions of the Comptroller-General are not drastically different from the perceptions of judicial attitudes. Lawyers with litigation experience in the office say that Comptroller adjudicators behave in an impartial manner when conducting procedures. Furthermore, they report that they perceive a subtle anti-administration bias in the sense of the stringency of the office's scrutiny. Some lawyers also indicate that it is easier to find excessive acquaintance between lawyers and the officials in the judiciary. In the Comptroller-General, in contrast, officers may be 'happy to listen but always keep and show distance and that is good' – as one interviewee put it. A number of other observers pointed out the seriousness and professionalism of Comptroller-General rank-and-file officers.

When asked about the impartiality of front-level officers in the office, a litigant reported a similar experience. She said that they are experts in keeping an inscrutable face, which – in her opinion – reveals some form of impartiality. In her account, they never express a view for or against the question at stake. Yet looking at the cases escalated to higher levels within the office, the same lawyer expresses a more nuanced view. She says that higher authorities within the office have their own agenda and that this fact is less transparent than in the courts. In her view, at this level the Comptroller-General is more prone to clientele-ism and cronyism than courts, since the latter have worked in recent years to eradicate this kind of practice. She points out that as the portfolio is relatively small, the same attorneys repeat themselves in different cases, bringing about undesirable acquaintance. Perhaps more importantly, she indicates that policy considerations pollute decision-making at the higher levels of the office. She argues that 'there are cases that must be solved in one direction because otherwise it would not be viable...they have to protect institutional structures and official policy choices'. This lawyer concludes that whereas in routine cases front-line officers are impartial and adopt a legalist approach, in

high-stakes cases – where higher authorities in the office may get involved – impartiality becomes an issue.

Similarly, another practitioner remembers a meeting in which an acting Comptroller-General said that there were political limitations to his action. Due to the office's institutional location, there are some no-go areas; that is, at some points the office cannot obstruct the exercise of administrative powers. Another lawyer offers a similar perspective, claiming that the institution uses legality quite flexibly. The office applies legality more strictly during some periods or in relation to some bodies, and can be more lenient at other moments or in relation to different organisations. The office, in other words, adjusts legality depending to circumstances.

However, it is unclear how this attitude compares to the judicial one. For instance, another lawyer suggests that the Comptroller-General is more 'juridical' than the Supreme Court; its decisions are more 'purely' legal than decisions adopted by panels in the higher courts. While the Comptroller-General follows precedents and applies administrative law, the content of courts' decisions depend on the judges who are sitting in the bench on the specific day. In his view, there is much more variation and unpredictability in the courts than in the Comptroller-General. Moreover, he points out the high risk of cronyism in the operation of specialised tribunals compared to the Comptroller's procedures.

Anticipating our next theme, another lawyer manifested his preference for litigating in the Comptroller-General instead of in courts for considerations of process, but not impartiality. He said that both the courts and the Comptroller-General have a pro-administration or pro-government bias, but the latter is faster and less formalistic. As such, it is convenient for the government lawyers 'to bring everything into the judiciary and get the cases out of the Comptroller-General'. On this account, then, both institutions are equally either impartial or biased.

A human rights lawyer expresses doubts about the impartiality of the office in 'sensitive cases'. Having a mixed experience litigating in the office, he indicates that human rights cases are always politically controversial with government and this makes him reluctant to trust in the Comptroller-General. However, he points out that the same is true in the judiciary. Overall, he believes that the Comptroller's attitude is more receptive to

institutional than individual concerns. As such, when institutions raise human rights issues, the institution may respond well, but he is less confident about the reaction in cases of individual grievances. However, as we will see below, factors other than impartiality may explain the unresponsiveness of the Comptroller-General to human rights cases.

In sum, perceptions of partiality or bias do not seem to be a barrier to creating trust in the Comptroller's decision-making and promoting its use by litigators. While limited impartiality does not discourage the filing of complaints against administrative action in this office, there are other factors that positively contribute to the rising use of the office as a dispute-resolution forum. Perhaps surprisingly, superior expertise seems to be one of them.

Many regulatory lawyers see the Comptroller-General as a 'boutique court' in which they can file their complaints against regulatory agencies. They perceive that their chances of winning a case are higher in this office than in the judiciary. The key factor for them is its superior expertise in regulatory law compared to courts. In their view, increased expertise enables the institution to exercise a more searching examination of administrative action and to be less prone to accept at face value authorities' invocation of the public interest. This opinion of a lawyer illustrates the point well:

[These] are regulated markets with a very complex technical component in which legal procedures before courts to challenge administrative decisions are extremely brief [...] Hence, the timespan for the court to examine the issue is too little. The judges will not have time to study how the telecom sector works, or how the water-supply system works... For this reason, we opt for using the Comptroller-General as it possesses a specialised technical knowledge. The Comptroller-General has all these specialised departments that participate, for instance, in price-setting procedures. Then, they can grasp the logic of economic regulation that courts usually can't. And when you go to the Comptroller-General for instance because of a telecommunications dispute, or challenging the guidelines for a competitive bidding process, or a rule by the electricity and fuels regulatory agency... they are into that... They are lawyers but they have much specialised knowledge... If you go there, you make sure that the analysis will be more thorough than in courts. Furthermore, in courts – not because of deference but because of sheer ignorance – the decisions of the authority tend to be protected. If the authority says 'this has an impact on the population', judges rule in favour of the administration. In contrast, the Comptroller-General is accustomed to legality control. That is their job... [In sum,] because they have little time, because issues are very complex, and because it is easy [for

the authority] to explain the problems in terms of headlines such as ‘this will affect the general interest’, courts do not go deeply into these issues. The Comptroller-General, in contrast, exercises a more probing scrutiny.

Similarly, another lawyer working in regulatory settings claimed that administrative legality is better applied in the Comptroller-General than in courts. He explains that ‘not necessarily you will get better outcomes, but you will have a better discussion’. In his view, ordinary judges cannot grasp the subtleties of administrative law. In contrast, the epistemic capacities of Comptroller officials are far better in disputes with a highly technical component such as price-setting, urban-planning law, environmental law, and administrative legality more generally. In this lawyer’s view, the office is an intermediate point between a specialist tribunal and the generalist court. Numerous other lawyers interviewed supported this observation.

It was not only regulatory lawyers who expressed a preference for the Comptroller-General on expertise grounds. A civil society activist with experience of more than 1,000 urban planning cases expressed a generally positive opinion of Comptroller-General officials in similar terms. ‘They are serious people,’ he said. In his view, Comptroller officials have superior expertise to judges. They know the intricate discipline of urban-planning law and can understand the dynamic regulatory environment that is caused by constant administrative rulemaking. He highlights the capacities of the office to understand these processes. In his opinion, the expertise, independence, and autonomy of the office is fundamental to promoting trust in the institution by an NGO like his.

Perhaps surprisingly, an animal rights litigant also mentioned the office’s expertise as a factor in her successful use of the Comptroller-General. She explained that her NGO uses courts only in cases against private parties – in particular, criminal law. However, in complaints against state action, they use the Comptroller-General. This activist said that, compared to courts, ‘Comptroller officers involve themselves in a more methodical examination of the cases and are more thorough in the application of law’. In addition, in her experience, courts avoid ‘political issues’, that is, conflicts with administrative authorities, and as a result they rarely grant leave. However, she also indicates that while their success record is high in local government cases when using the Comptroller-General procedure, it is less so when it comes to challenging executive rules at the central, and therefore more political, level.

Many of those opinions consequently echo reasons provided elsewhere for establishing institutions of administrative adjudication that could supplement judicial adjudication. Cane reminds us of the rationale provided in Britain for this kind of machinery in these terms: ‘courts were perceived as lacking relevant and necessary expertise to resolve disputes about the operation of complex regulatory and welfare programmes’.⁷⁵⁶ Something quite similar could be said to explain the preference for using the Comptroller-General instead of judicial review in Chile.

II. ACCESSIBILITY

Another of the primary reasons often provided for setting up nonjudicial grievance machinery has been the need to overcome the traditionally narrow access to courts. Gellhorn, for instance, points out various factors that may block the courts’ gates: financial requirements, willingness to litigate, justiciability issues, and legal entitlements.⁷⁵⁷ To overcome such restrictions in the judicial sphere, the designers of these bodies must make sure that ‘complaints should be generously received with an absolute minimum of formality’.⁷⁵⁸ Patrick Birkinshaw likewise argues for taking nonjudicial mechanisms seriously, emphasising that the court’s ‘impact is problematical when there is limited access to them or where they are seriously curtailed in what they can address’.⁷⁵⁹ Looking specifically at the ombudsman technique, Seneviratne contends that these institutions ‘are useful for filling gaps in systems for redressing wrongs’ and emphasises the importance of cost, as they ‘are free to the users of the schemes’.⁷⁶⁰ In sum, reduction of cost and legal hurdles is one of the aims of nonjudicial forms of dispute-resolution in the administrative domain.

The Comptroller-General seems to satisfy some of these requirements. Let us start with the legal obstacles to the judicial process. In Chile, there is no unified access to judicial review of administrative action; that is, there is no ‘umbrella procedure’ for challenging administrative determinations. There are numerous remedies with varying conditions for

⁷⁵⁶ Cane, ‘Understanding Administrative Adjudication’ (n 720) 283.

⁷⁵⁷ Gellhorn (n 77) ch 1.

⁷⁵⁸ Gellhorn (n 2) 427.

⁷⁵⁹ Birkinshaw (n 76) 2.

⁷⁶⁰ Mary Seneviratne, *Ombudsmen: Public Services and Administrative Justice* (Butterworths LexisNexis 2002) 11.

their use.⁷⁶¹ These procedures require representation by a lawyer. In addition, they are subjected to fairly restrictive rules about standing to sue. In the broadest judicial remedy available against administrative decisions, only individuals who can claim a private right or a personal, direct, and existing legitimate interest at stake are allowed to sue. Here, interests are conceived as pecuniary losses or as having a direct adverse effect upon an entrepreneurial or personal activity of the claimant.⁷⁶² There is no broad, public law model for judicial review of administrative action in the rudimentary Chilean regime. To put it slightly differently, the Chilean model is still a rather drainpipe-shaped process.⁷⁶³

Not surprisingly, the narrow passages to judicial review exasperate litigants. One lawyer complains that the Supreme Court has dramatically reduced the chance for requesting a court to quash an administrative decision. He believes that the only path that remains relatively more open is seeking damages. Similarly, a lawyer practicing in immigration law claims that ‘in terms of remedies and due process immigration system is a disaster’. She goes on to say that even though the remedies may be effective, they are too restrictive. For instance, a special judicial writ to appeal against a removal order has to be filed within 24 hours in the Supreme Court, which is located in the country’s capital, and requires legal representation. As such, people in remote areas have no chance of obtaining legal protection. As this tool is so narrow, the avenue most often used to obtain redress is the habeas corpus writ – a remedy designed for a totally different purpose. A similar experience is recounted by a lawyer in the Office of Legal Aid in Human Rights, an administrative department responsible for providing free legal advice and advocacy. He states that judicial remedies are not as broad as one may expect, indicating that the use of the judicial process is contingent on circumstances, as there is a variety of remedies, depending on subject matter, that determines the tribunal, procedures, and deadlines. In these circumstances, the use of the Comptroller-General appears attractive for three

⁷⁶¹ Carlos Carmona, ‘El contencioso-administrativo entre 1990 y 2003’ in Juan Carlos Ferrada (ed), *La justicia administrativa* (Lexis Nexis 2005); Alejandro Vergara, ‘El nuevo paradigma de jurisdicción administrativa pluriforme e hiperespecializada: Crónica de una espera como la de godot’ [2014] *Anuario de Derecho Público UDP*; Valdivia (n 192).

⁷⁶² Bermúdez (n 170) 449–50; Juan Carlos Ferrada, ‘Nuevas restricciones a la nulidad de derecho público como proceso administrativo: Una jurisprudencia interesante, pero inconsistente’ [2010] *Anuario de Derecho Público UDP*; Eduardo Cordero, ‘La legitimación activa en el proceso contencioso-administrativo’ in Juan Carlos Ferrada (ed), *La justicia administrativa* (Lexis Nexis 2005); Rodolfo Aldea, ‘Interés actual y declaraciones Judiciales en las nulidades de derecho público’ (2003) 10 *Revista de Derecho del Consejo de Defensa del Estado*.

⁷⁶³ R Rawlings, ‘Modelling Judicial Review’ (2008) 61 *Current Legal Problems* 95.

reasons: it is cheaper; it does not require legal representation; and its topical cover is wider.

In fact, the economic and professional dimension of access is a critical factor for NGOs that possess no legal staff. As the president of an influential NGO explained, the primary factor for prioritising this institution is its cost-effectiveness: 'Going to the Comptroller-General is free and going to the courts is very expensive and we are a poor institution'. As an additional advantage, he also pointed out that they do not need to hire a lawyer. Similarly, an animal rights activist reported that the need for legal representation has been an insurmountable obstacle for their use of courts and, conversely, a critical consideration for challenging administrative action in the Comptroller-General. Both organisations have occasional informal advice by lawyers, but most of their actions are based on non-lawyer activity – architects and students respectively. Less stringent requirements in terms of financial and legal resources, therefore, seems to explain the use of the office in these cases.

However, financial and legal resources alone cannot fully explain access to the Office of the Comptroller-General by less well-resourced groups. The capacity to frame problems in terms suitable for treatment in the Comptroller-General provides a critical advantage in the mobilisation of the office in litigation strategies. Lisa Vanhala has examined this factor – legal framing capacity – in the French context, explaining the hypothesis of associates' capacity to frame legal mobilisation in these terms:

Groups that frame the problems they seek to address through a legal lens will be more likely to rely on legal tools, including litigation. Groups that are skeptical of law or perceive it as serving only elite interests will be less likely to litigate.⁷⁶⁴

As will be seen in what follows, while for some groups the use of the Comptroller-General appears obvious and natural, for others it is something inconceivable. This does not depend on legal resources, but on the capacity to identify the institution as an adequate forum for obtaining redress and frame the issues accordingly.

⁷⁶⁴ Lisa Vanhala, 'Legal Mobilization under Neo-Corporatist Governance: Environmental NGOs before the Conseil d'Etat in France, 1975–2010' (2016) 4 *Journal of Law and Courts* 103, 115.

The lawyers in the Office of Legal Aid in Human Rights, for instance, chose to channel their cases to the Comptroller-General instead of to the judiciary after inviting law professors to give talks on administrative law. Only then did they realise that they could utilise the office for airing complaints against administrative action. Similarly, the animal rights activist mentioned above became aware of the advantages of the Comptroller-General due to the advice of one member who was a lawyer in an administrative department within the executive. She was not allowed to litigate herself because of professional constraints, but she taught other members of the organisation how to use this forum. Later, they continued to use this complaint mechanism successfully without lawyer assistance, due to the initial advice provided by a public law expert.

A totally different scenario is revealed in relation to other groups that, despite possessing legal resources, do not use the Comptroller-General because of inability to frame their concerns in terms appropriate to resolution by the office. For example, a lawyer practising for an environmental protection NGO said that he was not aware of the office's jurisdictional remit or its procedures. He also pointed to his lack of previous experience as a reason for not using the Comptroller-General as a litigation platform. Surprisingly, after a while he admitted that the office is well-reputed as grievance machinery by architects with concerns in urban protection matters. He said that 'people who have suggested us going to the Comptroller-General are lay people...if there is an architect the first thing that comes to his mind is going to the Comptroller-General'. A lawyer serving in a human rights public institution reported similar experience. Despite having won some relevant cases in the Comptroller-General, he could not recall the details of them and explained that their focus was instead on judicial litigation. Yet another lawyer who participated in those cases eventually recalled that the person in charge of initiating the proceedings in the Comptroller-General was actually the erstwhile in-house lawyer – an expert in administrative law – and not the human rights litigation specialist in the office. This explains why the litigant did not have memory of the cases and, more importantly, why he lacked the capacity to frame the dossier of the office in terms suitable for administrative adjudication. This is not unreasonable, since many interviewees said that one of the most important factors for litigation in the Comptroller-General is framing the case in terms of strict legality and on the more technical concepts of administrative law. Many lawyers with long experience said that the office would very likely disallow cases

framed in terms of constitutional principle and human rights. In their accounts, to be able to go to the office, one has to frame the issue in terms of strict administrative legality.

A final illustration concerns immigration law. A lawyer trained in a foreign country, working in a legal clinic at a university, said that they had not used the Comptroller-General as a complaint mechanism because of unawareness of its functioning: ‘it has to do with lack of experience of our office and the academics in charge of the clinic... I am not a Chilean lawyer, so I do not have experience and I come from a country where this institution does not exist. We haven’t found the way and the advantages of filing a case in the Comptroller’s Office,’ she declared. In sum, in contrast to public lawyers with expertise in administrative law, experts in environmental law, human rights law, and immigration law were unable to recognise the office as a relevant actor in handling complaints against administrative activity. This of course reveals a severe problem with visibility, but it also exposes the lack of ‘legal framing’ capabilities that affects these groups.

III. PROCESS AND OPERATING METHODS

Writing about the causes that might explain the emergence of administrative adjudication in the Anglo-American world, Peter Cane points out that judicial procedures ‘were considered too formal and elaborate, and their operations too slow and costly. As a result, courts were unattractive and inaccessible to all but the most wealthy, educated and self-confident citizens’. Moreover, ‘because of the nature of judicial procedures, litigation in the courts could be unduly disruptive of the conduct of government business’.⁷⁶⁵ Responding to these deficiencies, nonjudicial bodies encapsulate a promise of informal and flexible procedures that may enhance administrative justice.⁷⁶⁶ Does Comptroller-General procedure fit this description of flexible and informal administrative justice arrangements?

Litigants explain that compared to judicial procedures, processes before the Comptroller-General are indeed informal. However, they have some important shortcomings as well. Although they are described as a faster route to justice, Comptroller complaints

⁷⁶⁵ Cane, ‘Understanding Administrative Adjudication’ (n 720) 283.

⁷⁶⁶ Seneviratne (n 760) 12; Hertogh (n 3).

procedures are essentially secretive. Also, they are paper-based procedures. However, lawyers generally have broad access to front-line reviewers for expanding their arguments or explaining them in detail. As said above, the reviewers listen to the parties, but they are very discreet and avoid releasing information to them. Finally, according to litigants, the office's internal decision-making procedures are quite opaque.

A lawyer serving in the Human Rights Legal Aid Office explains how, in her experience, the performance of the Comptroller-General is superior to courts in public employment cases because of procedural advantages. In particular, she pointed to the benefits of litigating in the office in terms of speed. While a case in the judiciary may take five years at the very least, timeframes are much reduced in the Comptroller-General. Moreover, administrative defence in the courts is led by the Council of Defence of the State, an institution that possesses enormous experience and resources in the forensic realm. As a result, procedures are complex and protracted. Finally, she emphasises that prolonged judicial litigation entails a delay that is terribly exhausting to the people who are represented by her office.

Likewise, for many other lawyers, the main advantage of the office's procedure is reduced waiting times. Even a lawyer who expressed very critical opinions about the institution said that he eventually advises his clients to use the Comptroller's Office in the context of limited judicial resources for handling regulatory issues. He said that 'it is the forum where you can obtain a sufficient analysis of the question and in less time'. While a procedure in the Comptroller-General may take one year, judicial litigation can take more than five years. Also, there are no tight time limits to appeal to the Comptroller-General. Deadlines are more generous than in the courts, so the office is viewed as a flexible tool for exploring different litigation strategies combining administrative and judicial routes.

As suggested above, less time-consuming procedures are highly correlated to the lack of participation of the Council of Defence of the State (CDS) in Comptroller-General procedures. This was highlighted by a lawyer in the Office of Legal Aid and confirmed by regulatory lawyers. The defence of state interests by this institution produces protracted litigation; this theme is well known in administrative law literature. For instance, in his classical work, KC Davis acutely criticised the procedural obstacles raised

by government in litigation.⁷⁶⁷ As such, it is not surprising that the decentralised nature of legal defence of administrative agencies in the Comptroller-General may significantly reduce timeframes. Moreover, in the case of conflicts in long-term relationships, litigation in the Comptroller-General allows the parties to avoid involving a third party – the CDS – in the controversy, which may also be seen as an advantage for them.

Indeed, avoiding disruption of regulatory relationships is pointed out as a crucial factor. According to numerous actors, the procedure before the Comptroller-General is perceived as less disruptive to ongoing regulatory relationships than judicial procedure. This echoes Coglianese's disturbance theory of disputing within the regulatory process.⁷⁶⁸ In his view, contrasting with theories suggesting that parties in regulatory contexts tend to avoid litigation in order to keep the ongoing relationships undisturbed,⁷⁶⁹ the mobilisation of courts actually depends on the type of litigation deployed. The most important point is that some litigation strategies may have a small adverse impact on the relationship, and may even have some advantages for the agencies and the regulated industries.⁷⁷⁰

In our case, with the availability of two alternative forums for challenging administrative action, actors in established regulatory relationships seem to prefer the Comptroller-General to the courts. They perceive this route as less harmful to the ongoing relationship. One lawyer says that industries do not use constitutional writ of protection – a typical judicial route – for complex regulatory challenges, as framing the case in constitutional rights terms risks caricaturising the problem and also risks the professional integrity of the firm. In his view, this context has led them to use the Comptroller-General as a more sophisticated forum for debating these regulatory issues, which also enables them to avoid harming their long-term relationship with the regulator. He indicates that 'big companies do not want to have "issues" with the regulators in courts, and the Comptroller-General is perceived as a less conflictive forum in the public opinion'. This legal counsellor insists

⁷⁶⁷ Davis (n 688) 159.

⁷⁶⁸ Cary Coglianese, 'Litigating within Relationships: Disputes and Disturbance in the Regulatory Process' (1996) 30 *Law & Society Review* 735. Jowell has also emphasised the unwillingness to use adjudication in continuing relationships between social welfare recipients and administrative agencies; see Jeffrey L Jowell, 'The Legal Control of Administrative Discretion' [1973] *Public Law* 178, 198–9.

⁷⁶⁹ Marc Galanter, 'Why the "Haves" Come out Ahead: Speculations on the Limits of Legal Change' (1974) 9 *Law & Society Review* 95.

⁷⁷⁰ Coglianese (n 768) 757–8.

that regulated industries do not want an adverse impact on their relationship with government and regulators. Likewise, another regulatory lawyer explains:

Judicial review [on constitutional grounds] is not a trump card unless you have a very clear case. And also [it may be disruptive] if you have to keep an ongoing relationship with the regulator, the judicial route may be too violent...the Comptroller-General is less confrontational as it is like their own regulator... Bringing a judge in is as if you want to engage in real fight... Moreover, the agency may need to hire a barrister if they are challenged in courts, while they defend themselves directly if the case is litigated in the Comptroller-General. Finally, press coverage is more intensive in the courts than in the Comptroller-General.

Similarly, another regulatory lawyer indicates that industries permanently operating in a regulated environment perceive litigation in the Comptroller-General as much less aggressive compared to courts. In his view, the reason for this is that it is natural for the public body to interact with the Comptroller Office, but not to go to the courts. He even mentions that regulators and regulated industries sometimes agree to bring a dispute to the Comptroller-General as a gentleman's agreement. As such, both commit themselves to respecting the outcome, whatever it is.

This is consistent with accounts provided by legal advisors in regulatory bodies. One government lawyer mentions two reasons for her preference for discussing challenges in the Comptroller-General instead of courts. First, the procedure is not judicial, which gives her some flexibility. Secondly, as it is not a judicial trial, she knows she will be asked to report and her brief 'will have some weight'.⁷⁷¹ Crucially, this legal advisor admits having used 'gentleman's agreements' as a way of resolving disputes: 'Sometimes I have to apply very ambiguous rules and then I have to take the risk and adopt an interpretation...if the regulated party disagrees, I say "let's go to the Comptroller-General" [despite the fact that] sometimes we win but sometimes we lose'.⁷⁷² Hence, her opinion points to the use of the Comptroller-General as a kind of arbitration mechanism that is less time-consuming and may provide greater flexibility than the judicial process.

⁷⁷¹ Yet she admits that the lack of legal representation may mean that there is a lack of a much-needed filter for some unfounded claims.

⁷⁷² Admittedly, this is also done to shield the regulator who adopts the most conservative stance and then goes to the Comptroller-General to obtain support. If she loses and a more generous interpretation is preferred, it is the decision of the Comptroller, not hers.

Finally, a government lawyer operating in the health sector expressed his preference for litigating in the Comptroller-General in similar terms. His main concern was the inability of court to grasp regulatory problems. In particular, he believed that judges apply private law doctrines that may not be suitable for appropriately resolving the cases. In contrast, he said that ‘with the Comptroller-General we work in the same public law sphere and that means that we speak the same language’. Furthermore, echoing previous opinions of litigants, he held that courts are increasingly more responsive to public opinion, especially in the environmental domain, suggesting that the Comptroller’s Office may be more sympathetic to agency positions. Nevertheless, he contends that they win most of the cases in the judiciary in any case. In sum, this regulator’s preference for the Comptroller-General is linked to mindset proximity as well as procedural benefits. The main point, however, is that lawyers’ intuition that litigation in the office could be perceived as less disturbing to regulatory relationships seems to be confirmed.

IV. FINALITY AND IMPACT

Arguably, one fundamental feature of legal adjudication of disputes is finality. Legal institutions perform a settlement function, according to which disagreements among parties about an issue are authoritatively decided independently of the desirability of the decision’s content.⁷⁷³ From this viewpoint, it has been argued that the idea that legal institutions ‘could merely provide an opinion that can be accepted or ignored – like the advice of a law officer – misconceives the nature of legal authority in the modern state’.⁷⁷⁴ The outcomes of nonjudicial institutions of administrative justice, however, tend to be less suitable for sharp descriptions in terms of finality. The manner in which they perform their dispute-resolution functions is sometimes more flexible and adaptable. Walter Gellhorn, for instance, has explained that an external critic ‘is more concerned with advising about what should be done next than with allocating praise or blame for what has already been done’.⁷⁷⁵ In other words, they ‘are adviser[s], not commanders. They rely on recommendation, not on compulsion’.⁷⁷⁶

⁷⁷³ Larry Alexander and Frederick Schauer, ‘On Extrajudicial Constitutional Interpretation’ (1997) 110 *Harvard Law Review* 1359; Larry Alexander and Frederick Schauer, ‘Defending Judicial Supremacy: A Reply’ (2000) 17 *Constitutional Commentary* 455; Keith Whittington, ‘Extrajudicial Constitutional Interpretation: Three Objections and Responses’ (2002) 80 *North Carolina Law Review* 773.

⁷⁷⁴ King, ‘Rights and the Rule of Law in Third Way Constitutionalism’ (n 184) 123.

⁷⁷⁵ Gellhorn (n 2) 433.

⁷⁷⁶ *ibid* 436.

Although stressing the importance of finality or impact, Mark Elliot also puts the question in less binary terms when examining the operation of nonjudicial accountability bodies. With apparent tones of optimising language, he claims that their outcomes ‘must be imbued with a sufficient degree of impact’. More concretely, Elliot argues that ‘[a]n accountability institution whose findings or recommendations can be ignored with impunity is not an effective accountability institution: to hold a public body to account must entail something more than the expression of a view that can readily evaporate into the ether’.⁷⁷⁷ Consequently, these institutions must ‘have clout, effective accountability being impossible if the output of the process is so readily dismissible as to have no meaningful impact’.⁷⁷⁸ One possible implication of this is that, in order to assess the effectiveness of these institutions, it is especially necessary to go beyond the formal allocation of powers. One needs to examine their real-world influence and impact on bureaucratic behaviour.

This is a well-known problem with the ombudsman technique, as they characteristically lack ‘coercive remedial power’.⁷⁷⁹ Indeed, these institutions have a softer power that does not normally include a quashing effect. They are empowered to ‘form judgements, criticise or vindicate, make recommendations as to remedies and corrective measures, and report on but not reverse, administrative action’.⁷⁸⁰ However, it has been suggested that in some circumstances their rulings may have a greater impact on administrative activity than their judicial counterparts. Although they lack formal legal authority, their cooperative and persuasive strategies of legal control may have a real influence on bureaucracies’ daily operation by deploying cooperation and persuasion tools.⁷⁸¹ In addition, even administrative departments that have had great exposure to judicial decisions may not be highly shaped by judicial directives. Research in the UK has suggested that ‘extensive and prolonged exposure to judicial scrutiny’ does not diminish

⁷⁷⁷ Elliot (n 71) 235.

⁷⁷⁸ *ibid* 246.

⁷⁷⁹ Peter Cane, *Administrative Law* (5th edn, OUP 2011) 390–1.

⁷⁸⁰ Gregory, Giddins, Moore, and Pearson, *Practice and prospect of the ombudsmen in the United Kingdom*, cited by Carol Harlow and Richard Rawlings, *Law and Administration* (2nd edn, Butterworths 1997) 423.

⁷⁸¹ Hertogh (n 3); Fredrik Uggla, ‘Through Pressure or Persuasion? Explaining Compliance with the Resolutions of the Bolivian Defensor Del Pueblo’ in Ryan Goodman and Thomas Innes Pagram (eds), *Human rights, state compliance, and social change: assessing national human rights institutions* (CUP 2012).

unlawful decision-making agency action.⁷⁸² At times, agencies struggle to translate judicial decisions into their own administrative processes. Against this backdrop, it is sometimes suggested that nonjudicial bodies may be more able to penetrate and infuse legality values into the bureaucratic culture of administrative agencies.

In Chile, one crucial difference between Comptroller-General decisions and judicial rulings is that the former are seen as creating a permanent precedent that will govern the public body behaviour in an ongoing manner, while the latter are viewed as decisions applicable only to the case at stake. Moreover, we have already seen that some government lawyers perceive the office as speaking the same language as theirs and even as sharing a similar bureaucratic ethos. This shared mindset may facilitate the impact of the office on administrative activity and compliance with its rulings.

Among legal advisors at least, the perception is that Comptroller-General legal interpretations are highly complied with. Interviewees in the central administration reported that they ordinarily obey the office's rulings. An advisor in the Ministry of Housing and Urban Planning said that they obey the rulings while they are in force. He remembered just one instance in which the decision was not implemented. Despite having disagreed with the Comptroller-General in many instances, this officer declared that they had never challenged its opinions in the courts. In his account, when the cases are judicialised, it is because private groups complain about Comptroller decisions before the judiciary. He illustrates the situation by indicating that they compile Comptroller-General interpretive opinions about urban development and disseminate the information among the local units of the ministry. Also, the ministry and the Comptroller-General jointly publish guidelines on urban planning case law and organise joint workshops for public officers and stakeholders. This officer highlights that there is nothing comparable in relation to judicial rulings, although they also take those decisions into account when exercising their regulatory powers.

Other government lawyers report similar experiences of internalising Comptroller-General guidelines and precedents for future action. One central government advisor, for

⁷⁸² Simon Halliday, 'The Influence of Judicial Review on Bureaucratic Decision-Making' [2000] Public Law 110. See also Simon Halliday, *Judicial Review and Compliance with Administrative Law* (Hart Publishing 2004).

instance, reports having examined Comptroller-made case law in order to ensure the uniform creation of sub-departments within ministries by administrative action. An advisor to a public health department recalls applying and citing Comptroller-General precedents in the department's enforcement actions. In her opinion, the use of Comptroller-backed criteria strengthened their decisions to impose sanctions on regulated actors. Similarly, a lawyer serving in a municipality remembers taking into account Comptroller precedents in order to tailor regulations restricting the use of plastic bags in shops at the local government level. These examples suggest a decent level of penetration of legal interpretations by the Comptroller-General into the activities of administrative agencies.

In contrast, judicial review does not seem to have a clear feedback channel into the administrative process. The Council of Defence of the State (CDS) plays the main role in litigation against the state, but has little interaction with administrative agencies outside of episodic lawsuits. A member of the Council says that there is scarce contact with administrative officers beyond particular lawsuits. Furthermore, he sees no point in the Council becoming an advisor to administrators to learn from previous litigation experiences. In his view, the administrative process requires substantive policy advisors, and the Council is merely an expert in law and process. Moreover, he conceives judicial cases as unique, discrete, and unrepeatable experiences that are difficult if not impossible to translate into permanent knowledge for administrators. In sum, there is no concern about producing guidelines or similar materials that compile CDS experience in litigation in courts in order to draw lessons from the administrative process.

Nonetheless, this rather sanguine view of the influence of the Comptroller-General on the administrative process must be tempered when considering problems with enforcing the office's decisions. In fact, even though the Comptroller-General possesses binding adjudicatory powers, the institution is beset with finality problems. As will be seen, some problems are related to the constant judicialisation of its findings and decisions, while other difficulties revolve around the implementation of its rulings.

Lawyers in regulatory departments readily claim that they have always conceived of Comptroller-General interpretive opinions as binding. Some admit, nevertheless, that sometimes they may delay or even defy the implementation of some rulings because of

supposedly practical or even political obstacles. In contrast to judicial procedures, where there is a party pushing to have the decision implemented, some suggest that in the Comptroller-General, monitoring is more flexible. Yet they concede that they are risking disciplinary sanctions if they disobey the rulings, and some report that they have witnessed disciplinary proceedings because of non-compliance. Therefore, disobedience does not go totally unpunished.

In other cases, public bodies directly challenge adverse Comptroller-General rulings in judicial review proceedings, entailing indirect disobedience of the office. Indeed, even though administrative bodies are bound by the Comptroller-General's legal interpretations, in a number of cases they have challenged these interpretations in court. Let me give some examples that might illustrate particularly well the problems of finality in this respect.

In *Defendamos la Ciudad v Municipalidad de Las Condes*, an NGO working in the domain of urban heritage protection requested that the Comptroller-General rule on the legality of an administrative authorisation to build a group of towers in a hitherto green area in Santiago. Opposing the construction in the area, the NGO maintained that the administrative bodies in charge had misinterpreted their powers and the by-laws governing the neighbourhood. The office ruled in favour of the claimant, ordering the administration to invalidate the authorisation granted to the respective real estate company and the owner of the piece of land.⁷⁸³ The defeated parties, however, successfully challenged this legal interpretation in the courts. The Santiago Court of Appeals overturned the Comptroller-General ruling, arguing that it had overstepped its powers as it could rule on matters of formal legality only.⁷⁸⁴ In other words, controversially, the judicial decision suggested that the Comptroller was not allowed to engage in substantive examination of the legality of administrative decisions.⁷⁸⁵ For this purpose, however, what is crucial is that from the perspective of the NGO that filed the

⁷⁸³ Ruling 56977 (2005).

⁷⁸⁴ *Club Deportivo Universidad Católica v Contralor General de la República* [2005] Santiago Court of Appeals 8344-05.

⁷⁸⁵ Eduardo Soto-Kloss, 'Urbanismo, Contraloría General de la República y tribunales de justicia. A propósito de la acción de protección deducida por la Fundación Club Deportivo de la Universidad Católica de Chile' [2006] *Sentencias Destacadas* 131.

initial complaint with the Comptroller-General, the final outcome of this saga seems largely disappointing.

Similarly, in *Aguas Andinas S.A. v Municipalidad de Providencia*, a privatised utility company complained about a municipality in the Comptroller-General. The complaint sought to quash the municipality's interpretation that the claimant could not build on a piece of land that the latter owned, as it was protected as a green urban area. The Comptroller-General ruled in favour of the utility company, declaring that the public body was imposing undue burdens on the complainant since the declaration of the protected area had expired.⁷⁸⁶ However, the municipality did not accept the rulings and challenged it before the courts, arguing that the Comptroller had violated its 'rights'. Siding with the municipality, the Supreme Court overturned the Comptroller's ruling, framing the dispute in completely different terms.⁷⁸⁷ While the Comptroller-General focused on the burden imposed by the municipality on the private company, the Court centred on the public service nature of the activities performed by the utilities company and the initial public destiny of the piece of land that it owned.⁷⁸⁸ As a result, it upheld the municipality's position and impeded the works in the protected green area. Once again, the initial decision by the Comptroller-General was totally futile in light of the later intervention of the Supreme Court.

Finally, in *Municipalidad de Zapallar v Contralor Regional*, the interpretive disagreement between the Supreme Court and the Comptroller-General adopted a particularly sharp character. The case concerned a local tax to be paid by investment corporations to municipalities. The activities of these organisations focused on making investments for their own private members without engaging in services for the general public. Thus, not being involved in commercial services, they argued that they did not have to pay duties that taxed for-profit activities. In 2010, the corporations obtained a significant victory in a landmark case in the Comptroller-General, which interpreted the tax legislation narrowly in order to rule that these corporations were under no duty to pay local taxes.⁷⁸⁹ The ruling had an enormous impact on municipalities' budget, as they were

⁷⁸⁶ Ruling 18196 (2012).

⁷⁸⁷ *Municipalidad de Providencia v Contraloría General* [2013] Supreme Court 8268-12.

⁷⁸⁸ For a critique of both rulings, see Juan Carlos Ferrada, 'El conflicto jurídico del parque de los estanques' *La Semana Jurídica* (11 February 2013).

⁷⁸⁹ Ruling 27677 (2010).

losing a substantial source of income. Attempting to forestall an imminent funding crisis, in 2012 the Chilean Association of Municipalities requested that the Comptroller-General revisit its ruling, but the office confirmed its previous decision in favour of the investment corporations.⁷⁹⁰ Then, as a last resort, the municipalities decided to bring the case to court to challenge the legality of the interpretation of the respective statute. The judiciary had actually been interpreting this piece of legislation for years in parallel to the Comptroller-General, holding exactly the opposite position. The Supreme Court had been maintaining that the corporations had to pay this local tax, as they were included in the cases indicated by the relevant legislation. In the case under comment, the Supreme Court rejected a preliminary argument raised by the Comptroller-General that municipalities were bound by its rulings and henceforth had no standing to sue. More importantly, the Court held that municipalities were entitled to challenge Comptroller-General legal interpretations that might adversely affect their interests. The judges also argued that the Comptroller-General had to ‘bow down’ to judicial precedents when they had been uniform and remained so over time. In other words, the Court strongly stressed its superiority as the last word in matters of interpretation of administrative legality.⁷⁹¹ In consequence, once again, a later negative judicial ruling frustrated the initial victory by the complainants.

These foregoing cases illustrate the problems of finality for the Comptroller-General, as the judiciary subsequently overruled the initial determinations of the administrative adjudicator. Thus, from the perspective of Comptroller users, the initial victories seem largely pyrrhic. In fact, many private lawyers criticised the practice of public bodies disobeying Comptroller-General rulings by challenging them in courts. Many interviewees say that the real legal authority of the office’s decisions and interpretations ultimately depends on whether public bodies seek judicial review and whether the judicial interpretation of the law concurs with that of the Comptroller-General. For instance, an interviewee representing telecommunication companies, who had won landmark cases in the Comptroller-General for millions of dollars, complained that they were trying to enforce the rulings for years to no avail. The administration eventually decided to challenge it in the courts, considering the Supreme Court stance against the Comptroller-

⁷⁹⁰ Ruling 6512 (2012).

⁷⁹¹ *Municipalidad de Zapallar v Contralor Regional* [2012] Supreme Court 2791-12 and *Asociación de Municipalidades v Contralor General* [2012] Supreme Court 5984-12. See also Luis Cordero, ‘Los límites de la jurisprudencia administrativa y las fuentes del derecho administrativo. Las consecuencias del caso de la municipalidad de Zapallar’ (2012) 20 *Derecho y Humanidades* 383.

General interpretations, and they actually overruled the initial criterion.⁷⁹² Likewise, an interviewee who is a member of a NGO litigating urban planning cases criticised the practice of many municipalities who act in tandem with urban developers to challenge negative Comptroller-General decisions paralysing construction works. In his view, continuous judicial review challenges have undermined the effectiveness of the Office of the Comptroller-General in the urban protection domain.

The other side of the coin is the problem of enforcing Comptroller-General decisions in courts. Some cases illustrate the difficulty with judicial implementation of its rulings, as courts have rejected their enforceability in some circumstances. In one groundbreaking case, the administrative agency in charge of agriculture and livestock affairs (*Servicio Agrícola y Ganadero*, SAG) used to charge a fee to issue a phytosanitary certificate for use in international trade. Exporters challenged this practice, arguing that unless a legal provision expressly said so, the administration was not allowed to charge fees for its services. They filed their complaint with the Comptroller-General, who eventually upheld their position.⁷⁹³ Consequently, in order to comply with the ruling, SAG reformed its practice and stopped charging fees.⁷⁹⁴ Yet this was not enough for the exporters, who wanted the money already paid to the administrative agency to be returned. Therefore, based on the Comptroller-General's opinion supposedly declaring the illegality of the levies charged, they brought a case to court seeking compensation. After years of litigation, in some cases the Supreme Court upheld the ruling of the Comptroller-General and ordered the restitution.⁷⁹⁵ In other cases, however, the Supreme Court ruled that the Comptroller-General statement was just an opinion and could not be invoked as a definitive reason to claim compensation.⁷⁹⁶ According to the Court, claimants had to initiate a judicial process anew in order to obtain financial relief in a case like this. In practice, this decision entailed that the ruling of the Comptroller-General declaring the retroactive illegality of the payment orders by SAG was unenforceable in courts. These

⁷⁹² This interpretive disagreement can be illustrated by ruling 28471 (2009) and *Fisco de Chile v. Telmex SA* [2013] Supreme Court 7614-12.

⁷⁹³ Rulings 40235 (2006) and 18390 (2007).

⁷⁹⁴ Decree 607, Agriculture Ministry (10 March 2007).

⁷⁹⁵ *Compañía Manufacturera de Papeles y Cartones v. Servicio Agrícola y Ganadero* [2013] Supreme Court 17-13. See also Cordero, 'Nulidad y dictaminación de Contraloría.' (n 222).

⁷⁹⁶ *Abufrut v Servicio Agrícola y Ganadero* [2015] Supreme Court 21920-14. See also María Eugenia Manaud, 'Comentario de jurisprudencia. Abufrut Limitada y otros con Servicio Agrícola y Ganadero y Fisco' (2015) 33 *Revista de Derecho del Consejo de Defensa del Estado* 207.

cases illustrate the enormous problems derived from the lack of proper coordination between the Comptroller-General and the judiciary. This deficiency has had an adverse effect on the former's legal authority and finality, as well as on certainty and predictability more generally.

V. CONCLUSION

The dispute-resolution function of the Comptroller-General is its most controversial feature. Some observers have argued that the engagement of the office in adjudicatory functions is unlawful. Others have suggested that it is an undesirable development linked to former Comptroller Ramiro Mendoza (2007-2015) and his links to the private sector and business. It has also been said that this power can encompass formal review only, as the Comptroller-General is forbidden to engage in substantive legal review or right-based reasoning. Finally, commentators have claimed that any form of legal adjudication by this office is too far a departure from the true aim of the institution, which should be limited to ensure financial regularity. In this chapter I have gone beyond these criticisms to inquire what the hypothetical benefits of the office performing these dispute-resolution functions are, and, more importantly, whether there is evidence that the advantages could be realised in practice.

It has been argued that the Comptroller-General may offer four types of advantages as a dispute-resolution mechanism. First, it represents a different mixture of impartiality and expertise to that of courts. While providing a reasonable degree of impartiality, it also possesses a superior expertise based on its proximity to the administrative process. The office's expertise, somewhat surprisingly, seems to facilitate a more rigorous scrutiny of administrative action. Indeed, its expertise is often mentioned as one of the reasons for complainants' preference for litigation in the Comptroller-General. Secondly, as a checking institution, it promises legal relief to aggrieved parties who otherwise would not have access to courts. According to experienced litigants, they use the office because it is an inexpensive forum, as it does not require representation by an attorney. However, to access the Comptroller-General, the capacity of the aggrieved party to frame the issue in the language of administrative legality might be even more important. Thirdly, the office also seems superior in terms of procedural flexibility. Its decision-making process is faster than that of the courts, and, above all, its proximity to the administration is translated into a dialogic approach that is perceived as less disturbing to ongoing

regulatory relationships. Finally, Comptroller-General determinations seem to be attentively listened to and followed by regulators. Although compliance problems are not unheard of, in at least some regulatory domains administrators' consciousness of legal doctrines developed by the office is greater than their awareness of judicial rulings. However, clashes with the judiciary and problems of jurisdictional delimitation have recently undermined the legal authority and finality of Comptroller-General judgments. This latter aspect will be examined in detail in the next and final chapter.

CHAPTER 8. THE COMPTROLLER-GENERAL AND THE COURTS

In this chapter I discuss the problem of delimitation of functions between the Comptroller-General and ordinary courts. In the last few decades, the issue of who has the last word in relation to the law governing administrative action has repeatedly arisen. This has raised difficult questions about values such as the separation of powers and the rule of law, and the limits between judicial and administrative functions in the contemporary state. Against that backdrop, this chapter examines whether judicial bodies and the Comptroller-General have developed relationships of collaboration, competition, or indifference. Once the judiciary's review powers were constitutionally recognised at the end of the dictatorship in 1989, the legal accountability dimension of the office overtly entered into a collision course with courts. It comes as no surprise, thus, that the ordinary judiciary could sometimes be seen as an adversary of the Comptroller-General Office. Indeed, they often interact as competitors rather than as collaborators. A leading Chilean scholar has called this a 'crisis in the system of control of the administration'.⁷⁹⁷ In Chile, as in other jurisdictions, the degree of subordination or coordination of the administrative dispute-handling machinery with courts is of prime importance. Thus, drawing boundaries among diverse legal accountability institutions might well be viewed as a critical task, and this chapter will examine such a problem.

The question this chapter seeks to address is where to draw the boundaries between the legal accountability functions performed by the Comptroller-General and courts. Are Comptroller determinations reviewable by courts, or should they be immune from judicial review? Could courts order the office to uphold or reject an administrative regulation in the ex-ante legality review procedure? Should judges rule on matters already decided by the Comptroller-General? Should they enforce or implement the office's rulings? This chapter will argue against formalist approaches to understanding the functions of these institutions, and will propose a flexible principle of coordination that balances the virtues and limitations of both legal accountability arrangements.

I. THE BOUNDARIES PROBLEM

⁷⁹⁷ Carmona (n 165) 36.

A. Some Historical Examples

Problems of demarcation between the Comptroller-General and the judiciary as mechanisms for policing administrative conformity with legality have been a prevalent feature of discussions in Chilean public law at least since the 1940s. We have already seen this in the debate about the impeachment of Comptroller Agustín Vigorena in 1945 for his unconstitutionally weak supervision of executive action (see chapter 3). One of Vigorena's justifications at the time was that Congress was misconceiving the role of his institution. He argued that unlike courts, the Comptroller-General Office had to adopt a public law approach to legal interpretation of regulatory statutes. By this, he meant an approach that departed from private law categories, favouring stability and private rights in order to give priority to administrative flexibility and the achievement of social objectives in a rapidly changing society. Although this argument did not gain congressional endorsement, the contrast between the office and courts in terms of a public-private law distinction resonated in discussions in the coming years.

Indeed, we found analogous ideas about the distinction between the functions of the Comptroller-General and the judiciary's in an influential policy statement issued by the former institution in 1970 just before President Allende's inauguration (see chapter 4). The office contrasted its purposive approach to legal interpretation with the judiciary's rather formalistic attitude. From this viewpoint, the Comptroller's interpretation was concerned with adaptation to reality and oriented towards facilitating the collective missions mandated by legislation, whereas judicial interpretation focused on private law with special concern for the ethical or moral content of the rules and their textual meaning. In the law administered by the Comptroller-General, that is, administrative law, purpose prevails over the subtleties of text, and it should be constructed with a view to the demands of a changing social reality.

These views on the contrast between Comptroller-General and the judiciary appeared again in the discussion about the design of the office in the context of the Pinochet Constitution in the late 1970s (see chapter 5). During the debate the Comptroller-General defended the distinctive contribution of his office against sceptical attacks by the commissioners. He proposed a distribution of functions with the judiciary by allocating annulment powers to the Comptroller-General, and powers to award compensation for torts to the courts. According to this proposal, public law remedies would be assigned to

one institution and private law remedies to the other. At the time, other participants insisted that what was characteristic of the Chilean system was the use of private law doctrines by courts and administrative law by the Comptroller-General, and alerted against excessive reliance on judicial review of administrative action as it could adversely affect the administrative process. More than anything, however, this debate reveals acute confusion and even obfuscation over the boundaries between the two institutions' legal accountability functions.

B. Controversies Concerning Ex-Ante Legality Review

The discussion about what constitutes an adequate relationship between the two institutions has continued in recent decades. Since 1990 there have been several constitutional clashes between the Comptroller-General and different Courts of Appeals. Following the pertinent constitutional rules, these controversies have been resolved by the Senate in four cases. All these cases have concerned judicial challenges to Comptroller-General determinations in the ex-ante legality review procedure, and all of them were decided against the judiciary despite vigorous appeals to judicial supremacy.

The first modern constitutional disagreement between the two institutions took place in 1988, during Pinochet's military dictatorship and therefore without an operational Senate.⁷⁹⁸ The case originated when the Office of the Comptroller-General vetoed an order by the General Directorate of Water (GDW) that granted an administrative concession to a private firm. As the decision paralysed the economic undertaking of the beneficiary of the concession, the party brought the case to the judiciary. In *Sociedad de Servicios Urbanos del Litoral S.A*, the Court of Appeal of Santiago upheld the petition and ordered the Comptroller-General to approve the administrative concession in the terms decided by the GDW as primary decision-maker. The office, however, brought the dispute with the Court of Appeals to the Military Junta, which had the jurisdiction to resolve controversies between political and administrative authorities, on the one hand, and the higher courts, on the other. Because of internal divisions, the Junta could not reach agreement as to whether the Comptroller-General was under the supervision of the

⁷⁹⁸ See Iván Aróstica, 'El trámite de toma de razón de los actos administrativos' (1991) 49 *Revista de Derecho Público* (U. de Chile) 152; Alejandro Silva Bascuñán, *Tratado de derecho constitucional*, vol VI (Editorial Jurídica de Chile 1997) 231.

courts, and left the issue undecided. As a matter of fact, however, the judicial position prevailed and the Comptroller-General surrendered.

In 1993 – now in a democratic setting – an even larger controversy between the two institutions arose. The clash involved two cases. In one of the cases, the Comptroller-General rejected a concession decree by the GDW and the beneficiary went to court to challenge the office’s legal opinion. The claimant was seeking a judicial injunction to force the office to endorse the decree. In the second case, the Comptroller-General had approved a Ministry of Transport and Telecommunications decree setting prices for telephone services, but the regulated industry in question was unsatisfied and sought a judicial injunction ordering the Comptroller-General to veto the decree. Thus, in one case the complainant was seeking an order against the office to uphold a decree, while in the other the complainant was seeking an order to strike down a decree. In these circumstances, the Comptroller-General decided to bring both controversies to the Senate, which was now the body responsible for resolving jurisdictional disputes between politico-administrative authorities and higher courts.⁷⁹⁹ In a cross party, 16-8 vote, the Senate sided with the Comptroller-General, declaring that the judiciary lacked review powers in respect to the ex-ante legality review decisions of the office.⁸⁰⁰ The Senate stated that judicial scrutiny of the Comptroller’s review process would lead to judicial invasion into functions exclusively allocated to the latter by the Constitution. In the opinion of Congress’ upper house, accepting judicial review in this case would entail infringement of the principle of specific jurisdiction of public bodies, and could undermine a number of constitutional mechanisms specifically designed by the Constitution to govern the relations between the Comptroller-General, the executive branch, and Congress.

In the meantime, the Comptroller-General had to repeat its objection to judicial overreach. In this new case, a functionary of the National Institute of Farming Development

⁷⁹⁹ Article 53 number 3 of the Constitution.

⁸⁰⁰ See *Diario de Sesiones del Senado* (330th extraordinary session, 4th [11 October 1994] and 14th [9 November 1994] sittings). For commentary, see ‘Memoria anual correspondiente al año 1994’ (Contraloría General de la República 1995); Eduardo Soto-Kloss, ‘¿Una contienda de competencia?’ *El Mercurio* (9 June 1994) 2; Pedro Pierry, ‘Contienda de competencia’ *El Mercurio* (22 June 1994) 2; Iván Aróstica, ‘Sobre el recurso de protección y la representación del contralor. Reflexiones acerca de una contienda de competencia’ (1993) 20 *Revista Chilena de Derecho* 745; Mario Verdugo, ‘Notas a un acuerdo del senado’ (1996) 59 *Revista de Derecho Público* (U. de Chile) 95.

challenged a Comptroller decision upholding a resolution that dismissed him. In other words, he petitioned the Court of Appeals of Santiago to order the office to reject a dismissal decree that the institution was willing to uphold. As the Court accepted jurisdiction to consider the complaint, the Comptroller-General decided to bring the controversy to the Senate in July 1994. After an intense debate, the Senate decided against the judiciary in a 25-15 vote in June 1995.⁸⁰¹ Two main arguments were given in favour of the Comptroller-General. On the one hand, it was argued that the ex-ante legality review procedure was an internal, inter-organic process integrally regulated by the Constitution, which was unreviewable by the ordinary courts, in the same way as any other process of an inherently political nature. The debate reveals a strong concern for judicialisation of political and, particularly, congressional processes. On the other hand, it was maintained that the rights to remedy and access to justice for the affected individual remained unaltered, since the petitioner could seek direct judicial review of the dismissal decision regardless of the Comptroller's judgment. Naturally, senators representing the minority position – i.e. favouring the judiciary over the Comptroller-General – put emphasis on the latter aspect of the problem, claiming that rights to remedy and access to courts should prevail over considerations of institutional integrity.⁸⁰²

Despite the consistency of the two previous decisions by the Senate, the judiciary insisted on its jurisdiction to examine the legality of Comptroller-General determinations in the ex-ante legality review procedure. In November 1997, the latter filed a new request to the Senate to declare its immunity from judicial review. Initially, considering the previous cases, the Comptroller-General requested that the Senate declare that previous judgments had general, permanent effect. However, the Senate stated that this was a jurisdictional decision and, therefore, it applied to the case at stake only. Thus, according to the Senate, conflicts between the two institutions have to be decided on a case-by-case basis. Having failed in its initial petition, the Comptroller-General requested a pronouncement on the merits. The new petition was based on two cases. The first involved a deadline extension for a construction company carrying out public works for the Housing and Urban Planning Service, which was rejected by the Comptroller-General. The firm challenged the negative decision in court, invoking rights to property. In the second case, a police

⁸⁰¹ See *Diario de Sesiones del Senado* (331st ordinary session, 3rd [31 May 1995] and 4th [9 June 1995] sittings).

⁸⁰² See especially the opinions expressed by Senator Otero.

officer complained against a dismissal decision on disciplinary grounds brought by the Investigatory Police Service and supported by the Comptroller-General. The final decision by the Senate was adopted in May 1998, and again it favoured the position of the Comptroller-General.⁸⁰³ This time, the vote was 30-7 – reflecting bipartisan agreement. For the majority position, in addition to previous arguments, it was emphasised that the Senate had to harmonise and coordinate different institutions and procedures with equivalent constitutional authority, and that this equally promoted the value of legality.⁸⁰⁴ The aim was to recognise institutional plurality and avoid the creation of hegemonic legal interpretation in the hands of the judiciary. Others also pointed to the need to avoid the obstruction of ongoing political and administrative processes by introducing potentially conflicting veto points. The minority, on the other hand, warned of the risk of leaving affected individuals in a position of vulnerability without means to challenge government actions in a properly judicial forum.⁸⁰⁵ Also, they emphasised the administrative nature of the Comptroller-General in contrast to the impartiality, professionalism, and competence of the judiciary. From this latter perspective, they stressed that only courts should conclusively decide on matters of legal interpretation and rights.

That was not the last instance of a jurisdictional dispute between the Comptroller-General and the courts. In 1998, the Comptroller's Regional Office in Magallanes rejected a decision by an intendant – the representative of the central executive in the region – that extended a contract involving the management of a duty-free area in a Southern region of Chile for 30 years. The reason for rejecting the contract renewal was that it did not comply with competitive bid process requirements for public contracts. The affected firm – *Sociedad Administradora Zona Franca de Punta Arenas Ltda* – went to court in order to challenge the decision to subject the contract to review. According to the claimant, the intendant's decision was exempt from legality review check as the contract was governed by private law. Once the judiciary decided to entertain the legal action, the Comptroller-General once again brought the case to the Senate. The Senate adopted exactly the same position as before, declaring that judicial scrutiny of ex-ante legality review process was

⁸⁰³ See *Diario de Sesiones del Senado* (337th extraordinary session, 10th [22 April 1998] and 11th [5 May 1998] sittings).

⁸⁰⁴ See especially the opinions expressed by senators Silva, Hamilton, Bombal, and Boeninger.

⁸⁰⁵ See especially the opinions expressed by senators Aburto, Zurita, Novoa, and Chadwick.

unconstitutional.⁸⁰⁶ This time, however, the decision was adopted on more partisan lines, but with a surprising outcome. In fact, pro-government senators sided with the Comptroller-General, while opposition senators favoured the judiciary. The irony is that in the case that caused the initial petition to the Senate, the Comptroller-General had rejected a contract involving the intendant, that is, an authority representing the central government.

In this case, the position in favour of the judiciary was more forcefully articulated, whereas the arguments for the Comptroller-General remained the same. Several senators argued that this case could be distinguished from previous precedents since the issue here was whether the Comptroller-General was allowed to define its own jurisdiction. The office was accused of scrutinising an act that was outside its jurisdictional domain. It was argued that if an individual challenged this assertion of power, it was for the court – as an impartial third party – to have the last word on determining the legality of state actions. They maintained that the protection of individual rights and judicial supremacy were the cornerstones of the Constitution, and they trumped considerations of institutional balance and inter-institutional comity. Finally, they asserted that the Comptroller-General's autonomy and special function did not shield it from judicial review. It was an administrative body equivalent to the rest of the institutions composing the executive branch, and therefore its decisions were entirely amenable to judicial supervision. As seen, however, these arguments failed to convince a majority in the Senate.

In 2000, the Comptroller-General filed what is thus far its final request to the Senate in relation to the ex-ante legality review procedure. The case involved the rejection of an urban plan for the commune of Santiago, which would allow certain industries to continue operating in an area formerly protected by an inter-communal plan as a green zone. The Comptroller-General based its negative decision on the fact that a communal plan could not modify a more general, regional plan. The affected industries – *Inmobiliaria La Laelina*, *Establecimientos Químicos Oxiquim S.A.*, and *Montajes Industriales Yungay S.A.* – challenged the determination in the Court of Appeals of Santiago, which decided

⁸⁰⁶ See *Diario de Sesiones del Senado* (339th extraordinary session, 37th [5 May 1999], 38th [11 May 1999] and 40th [18 May 1999] sittings). For commentary, see Alejandro Silva Bascuñán, *Tratado de derecho constitucional*. Gobierno, vol V (Editorial Jurídica de Chile 1997) 164–8.

for the claimants.⁸⁰⁷ Invoking the previous Senate pronouncements, the Comptroller-General brought the case to the Upper House of Congress, claiming judicial invasion on constitutional grounds.⁸⁰⁸ However, the case was eventually withdrawn from the Senate, as the lawyers representing the Comptroller-General in courts were unable to appeal the case to the Supreme Court and the judicial judgments became final.⁸⁰⁹

In conclusion, four consecutive Senate decisions have unequivocally favoured the position of the Comptroller-General in these constitutional disputes with the judiciary.⁸¹⁰ As said, these cases concerned the ex-ante legality review procedure, which is a mechanism with explicit constitutional regulation and standing. Ex-post dispute-resolution functions, however, appear to be exposed to greater contests with the judiciary.

C. Controversies Concerning Dispute-Resolution

As suggested, rivalry between these two legal institutions remains. Many new cases involve judicial review of Comptroller ex-post adjudicatory decisions, that is, concerning the office's dispute-resolution role. In fact, we have already examined, in chapter 7, many instances in which the Comptroller's legal opinions when resolving disputes between administration and private parties have been variously challenged and overturned in courts. In these cases, contradictory views on the distinction between these two functions have been expressed. Sometimes, both institutions were distinguished in terms of form and substance. Accordingly, on this position, whereas the Comptroller-General could aptly examine legal formalities, only the courts were legally justified to judge on legal substance and rights.⁸¹¹ On other occasions, perhaps surprisingly, the Comptroller-General conceived of its own tasks in terms of protection of individual rights against excessive state action, while the judiciary instead emphasised collectivist 'public service'

⁸⁰⁷ *Inmobiliaria La Laelina, Establecimientos Químicos Oxiquim S.A., and Montajes Industriales Yungay S.A v Contralor General de la República* [1999] Santiago Court of Appeals 4308-99.

⁸⁰⁸ Ruling 2951 [2000].

⁸⁰⁹ For the case's background, see Patricio Herman, 'La Ex Concertación Ayudó a Lucía de Pinochet «Diario y Radio Uchile»' <<http://radio.uchile.cl/2016/04/07/la-ex-concertacion-ayudo-a-lucia-de-pinochet/>> accessed 7 December 2017.

⁸¹⁰ Yet courts have continued to challenge Comptroller-General determinations as they see Senate decisions as not constituting binding precedents; see Letelier (n 191) 292.

⁸¹¹ See *Defendamos la Ciudad* case, in chapter 7.

considerations.⁸¹² The distinction between the two organisations, therefore, has been considerably unclear.

A recent significant case illustrates the problems of delimitation of the scope of judicial review for adjudicatory Comptroller determinations.⁸¹³ In September 2017, a panel of the Santiago Court of Appeals quashed a ruling by the Comptroller-General that had ordered the invalidation of pensions in favour of a group of employees of *Gendarmería de Chile* – the Chilean agency for prison services. The pensions were allegedly granted by unlawful means, taking advantage of the generous, special pension scheme that benefited Armed Forces institutions, including *Gendarmería*. The case sparked indignation among the public because it involved the former partner of a member of Congress, and also because it unveiled the unfair disparity between the meagre defined-contribution pension scheme for ordinary citizens and the defined-benefit scheme for the Armed Forces. The Court ruled that even though the Comptroller-General was allowed to state the illegality of an administrative action, the office lacked enforcement powers to invalidate it directly. According to the Court, in order to enforce his declaration of illegality, the Comptroller had to initiate a judicial action before the judiciary. From this viewpoint, only the primary administrative agency and the courts were allowed to invalidate administrative actions on legality grounds. Therefore, in this case the Comptroller-General was unlawfully invading the legitimate sphere of action of another public institution. Moreover, the Court maintained that the Comptroller-General's action was in fact imposing a sanction upon the affected pensioners without a due process of law that could only be secured by judicial review. As a result, the court quashed the Comptroller's ruling and upheld the suspected pensions. The judgment was not unanimous, however. In a dissenting opinion, Justice Rojas criticised the route used in this case to challenge the Comptroller's judgment, as it was a writ of urgency that did not allow for a fully-fledged debate focused on legality. Besides, he argued that it was against common sense to deny enforcement powers to the office by requiring it to seek judicial implementation of its rulings. In essence, the dissenting opinion emphasised the distorting effect of judicial invasion of a process of

⁸¹² See for example the *Aguas Andina* case, the *Municipalidad de Zapallar* case and the *Servicio Agrícola y Ganadero* case, in chapter 7.

⁸¹³ *Juan Carlos Estay Vergara v Contralor General de la República* [2017] Santiago Court of Appeals 19580-17, esp. par 23-6.

legal scrutiny possessing its own internal logic and integrity within the administrative process.

The Comptroller-General has recently decided to bring these kinds of controversies to an impartial forum that will be able to draw a boundary between judicial and administrative jurisdictions. Indeed, in November 2016 the Comptroller-General brought to the Constitutional Tribunal a jurisdictional dispute with a first-instance ordinary court under Article 93 n 12 of the Constitution.⁸¹⁴ The issue under discussion was a long-standing interpretation by the office about social security provisions concerning General Directorate of Civil Aviation (GDCA) personnel. In a lawsuit involving an enormous figure for the public purse, GDCA Unions requested that the courts declare that the pension scheme applicable to the GDCA personnel corresponded to that of the Armed Forces, and not the ordinary one. This interpretation went against a well-established doctrine by the Comptroller-General in at least seven previous rulings. The office stated that the judiciary was constitutionally banned from issuing ‘general and abstract’ interpretations of social security provisions in the public sector, as this was within the domain of the Comptroller-General. According to the institution, judges were allowed to adjudicate concrete cases, but they were not entitled to issue interpretive declarations.

Ultimately, the Constitutional Tribunal unanimously decided for the Comptroller-General in January 2017.⁸¹⁵ The Tribunal, however, was unable to draw a clear line between the interpretative space of the Comptroller and that of the courts. The ruling suggested that the Comptroller-General was an administrative body with exclusive powers to engage in ‘abstract and general’ interpretation of administrative legality. Judicial actions could only succeed if the Comptroller-General had created uncertainty in the interpretation of administrative legality by issuing a ‘legally objectionable opinion’. Otherwise, only the legislature could overrule administrative jurisprudence created by the Comptroller-General. In sum, the Constitutional Tribunal seemed to support strongly the interpretive authority of the office vis-à-vis the judiciary even in the dispute-resolution domain. This

⁸¹⁴ According to the Constitution, while disputes between ‘higher’ courts and political and administrative authorities are to be resolved by the Senate, the Constitutional Tribunal must resolve disputes between ‘inferior’ courts and political-administrative authorities.

⁸¹⁵ Constitutional Tribunal Decision (2017) Rol 3283-2016-CCO.

amounted to the establishment of a duty to place substantial weight on the Comptroller's interpretative views.

A similar dispute is still pending in the Senate.⁸¹⁶ It is an analogous case in which GDAC civil staff requested the courts to issue a declaration that the Armed Forces pension scheme applied to them. This declaration would contradict well-established precedents set by the Comptroller-General stating that the ordinary pension scheme applies to these employees. However, after winning at the Court of Appeals, their claim had already reached the Supreme Court. As such, the dispute now has to be considered by the Senate, since it involves the higher courts. The main argument of the Comptroller-General in this case is that the judiciary has no power to issue 'general and abstract' declaratory interpretations in relation to the administrative process, as this power is exclusively allocated to his office. In addition, the Comptroller concedes that his interpretations could be judicially challenged, but argues that in this case he had not participated in the lawsuit and thus had no opportunity to defend his legal powers. Despite the previous judgment by the Constitutional Tribunal, the Supreme Court has adopted an aggressive stance, defending its position as the final interpreter of administrative legality in the country.⁸¹⁷ In its response, the Court argued that there was no jurisdictional clash as the spheres of both institutions were mutually autonomous. Whereas the Comptroller-General acted as an administrative interpreter that sought to secure the uniform implementation of the law within the domain of the executive branch, the judiciary was focused on resolving concrete and discrete disputes with the purpose of protecting rights. In the Court's view, action in one area had no influence on the other, and therefore the Senate should not decide in favour of the Comptroller-General. Above all, the response of the Supreme Court emphasises that the judiciary is the ultimate protector of rights against administrative encroachment, including the Comptroller-General as one of the potential sources of administrative abuse.

⁸¹⁶ Chilean Senate (Bulletin S-1913-03). See also *José Antonio Pérez Aliste v Dirección General de Aeronáutica Civil* [2016] 29 Santiago Civil Court 4071-12; [2016] Santiago Court of Appeals 4049-16; [Pending] Supreme Court 76325-16.

⁸¹⁷ For media reports, see 'Contralor Bermudez advierte intento de crear gobierno de los jueces' *La Segunda* (4 January 2017) 8; 'Poder Judicial eleva tono frente a Contraloría por caso DGAC: argumentos son "preocupantes y agraviantes"' *Diario Financiero* (6 January 2017); 'Vocero de la Suprema: "Me parece preocupante que una autoridad (contralor) se exprese de ese modo"' *El Mercurio* (7 January 2017).

Before concluding, it seems convenient to examine what is going on behind these high-profile constitutional cases in order to capture a more nuanced picture of the interactions between the two offices. Indeed, although the cases that have attracted more publicity suggest confrontation between the two institutions, when we look at the routine practice we find much less hostility, and more signals of partnership and comity between the two legal accountability mechanisms. Certainly, the Comptroller-General very rarely mentions judicial precedents in its decisions, but front-level reviewers in the office reveal that they do consider judicial doctrines when making their own decisions. One of them stated that there is a great respect for the judiciary but also a recognition that both institutions work in separate domains. For him, as both institutions conduct their affairs using different procedures, it would be undesirable to directly apply their counterpart's doctrine. Yet he admitted that 'many times we consider decisions made by the courts, and we take that into account to avoid deciding exactly the opposite [to the judiciary] as this could generate considerable harm'. This opinion clearly reflects how considerations of comity take place within the Comptroller-General decision-making process. Similarly, a senior reviewer in the office maintains that, despite appearances, the relationship with the judiciary 'in general is good'. He says that both institutions have different perspectives on things, but they also collaborate. As an illustration, this officer recounts cases in which courts were flooded by claims, the Comptroller-General responded by signalling a way out of the problem, and the courts rapidly followed the proposed solution. Members of the judiciary also seem to assign weight to Comptroller-General determinations. A Supreme Court judge stated that before joining the judiciary, he thought that judges rarely pay due respect to the precedents set by the office. However, after years of experience reviewing lower tribunals' decisions, he believes that ordinary judges do assign substantial weight to the opinions of the office out of respect for its expertise and experience. These statements suggest that in practice, the polarisation between the two institutions is less dramatic than a quick glance at high-profile cases might indicate. They also hint that a sensible principle of coordination between the two mechanisms may be found and implemented.

D. Formalist Approaches and Conceptual Obfuscation

1. Judicial and Administrative Functions in Organic Law Article 6

The most obvious criteria deployed to delimit the functions of the two institutions is the ‘administrative’ versus ‘judicial’ functions distinction. Article 6.3 of the Comptroller-General Organic Law offers support for this approach. Originating from the first decades of operation of the institution, this provision supposedly provides criteria for delimitation with courts in respect to ex-post legal interpretation:

The Comptroller-General shall neither intervene nor report on issues that either by their nature are of *litigious character* or that fall under *the domain of the courts of justice*, or that fall under the remit of the State Defence Council, notwithstanding the powers that, regarding judicial matters, this law grants to the Comptroller-General (emphasis added).

This provision seems to clarify the issues to a considerable extent. Yet in reality it presents insurmountable problems. First, when the provision was enacted, courts had no public law jurisdiction. Thus, using a historical criterion, the remit of courts in relation to public law litigation should be almost non-existent. Second, although there may be some clear instances of matters properly judicial such as adjudication of private contracts, private torts, family law issues, or criminal law matters, all other matters remain radically undetermined. Finally, the criteria offered to topical delimitation is entirely question-begging. Since ‘litigation’ and ‘judicial domain’ are notions already present in the question to be posed, they are unhelpful as an answer to allocating matters between the Comptroller and courts respectively.

An additional weakness of this legal provision is that it creates opportunities for manipulation. As the administrative-versus-judicial conceptual division used here is inherently vague, the Comptroller-General sometimes invokes this provision in an unprincipled manner to avoid making judgments when faced with a difficult or uncomfortable matter (see Table 8 below). This is not an unusual reaction from the office; it infuriates litigants,⁸¹⁸ undermines the integrity of the legal system, and could entail the obstruction of access to legitimate and meaningful forms of redress. Above all, this result suggests that we should avoid the use of spatial distinctions that could create undesirable

⁸¹⁸ In interviews, lawyers representing all sorts of interests – from human rights lawyers to regulatory lawyers – complained against this practice of the office.

accountability gaps. An adequate principle of coordination between the Comptroller-General and the judiciary – as will be suggested below – requires more flexibility and an emphasis on functionality.

	2007	2008	2009	2010	2011	2012	2013	2014
Judicial nature of the issue	256	327	395	700	796	708	710	494
No previous adverse action or inaction	690	1660	1000	902	970	913	815	745
Issue within the remit of another body	1158	2039	2609	2923	1930	1583	1597	2104
Other ⁸¹⁹	1446	904	1455	1437	1641	1533	1365	984

Table 8: Grounds for Abstention⁸²⁰

2. Chilean Doctrine

Chilean academic debate has made a limited contribution to the clarification of the boundaries between the judiciary and the Comptroller-General's Office. It has simply echoed the arguments deployed in the Senate, the courts and the Comptroller-General. Attempts at explaining the principles that should guide the relationship between the two bodies have been infrequent, and insufficiently articulated. Here, I briefly reconstruct their essential positions in order to highlight the core insights that they reveal.

Enrique Silva developed the most sophisticated articulation of the interactions between the Comptroller-General and courts. Writing in the late 1950s as Comptroller-General, he argued that the creation of administrative tribunals must not entail the elimination of the legality review powers of the office.⁸²¹ In his opinion, both machineries were compatible and even necessary. On the one hand, both forms of review took place at different moments. While the Comptroller-General's ex-ante review powers occur before the promulgation of an administrative decision, judicial review was characteristically a-posteriori. On the other hand, Silva explained that whereas the Comptroller-General intervention was compulsory and ex officio, judicial review was contingent, as it was the affected parties that triggered it. Still, Silva admitted that the office's ex-post interpretative opinions were a more complex issue. In fact, the Comptroller-General had been acting as an alternative forum for hearing complaints against administrative action in absence of administrative tribunals. Yet he asserted that the independence of the office

⁸¹⁹ For instance, issue already adjudicated, insufficient information, out of remit, etc.

⁸²⁰ Source: Comptroller-General Annual Reports.

⁸²¹ Enrique Silva, 'Los Tribunales Administrativos y la Contraloría' *El Mercurio* (19 November 1959). This piece is included in Junta de Gobierno (n 240).

reduced the scope for conflicts with judicial determinations. More importantly, affected parties could challenge its legal judgments in the judiciary in any case. Silva concluded that as Comptroller, determinations were not final, as they did not affect the judicial sphere. Similarly, Urbano Marín has emphasised the similarities of both institutions and argued for a complementary relationship. He maintains that judicial review and administrative legality review are compatible as long as both functions are performed with objectivity and independence.⁸²² In his view, both contribute to the enterprise of providing uniform interpretations of the law governing administrative action. Yet unfortunately he does not point to any delimitation criteria and, therefore, does not clarify the problem of how to resolve clashes between the two organisations.

Pedro Pierry, in turn, expresses a concern for protecting the Comptroller-General's sphere of action. For him, there is a risk of judicial invasion that could threaten the institutional benefits of administrative legal accountability. Considering both ex-ante and ex-post control, he emphatically opposes judicial review of Comptroller determinations. In particular, he expresses fears that judicial review could have a corrosive effect on the office's 'administrative jurisprudence', that is, the set of precedents carefully and sensitively developed by the office over the years.⁸²³ Judicial overreach could adversely affect certainty and predictability from the point of view of administrative authorities and private individuals alike. In Pierry's view, this problem is especially serious considering the institutional weakness of the judiciary due to its lack of judicial specialisation and the use of procedural forms that discourage consistent decision-making.⁸²⁴ Thus, Pierry suggests that the Comptroller-General should remain as having the last word in respect to the ex-ante review process, and courts should restrain from invasive scrutiny of the office's legal interpretations.

Lastly, Alejandro Silva Bascuñán has also argued for a sphere free from judicial scrutiny for the office, especially in the ex-ante review procedure.⁸²⁵ This commentator has defended the Senate decisions against judicial attempts at judging the lawfulness of the

⁸²² Marín (n 211).

⁸²³ Pedro Pierry, 'Los tribunales administrativos' (2000) 2 *Revista de Derecho del Consejo de Defensa del Estado* 97, 106.

⁸²⁴ *ibid* 113.

⁸²⁵ Silva Bascuñán, *Tratado de derecho constitucional* (n 798) 230–9; Silva Bascuñán, *Tratado de derecho constitucional. Gobierno* (n 806) 164–8.

legality review procedure. On the one hand, he argues that these are proper jurisdictional controversies as they consist of disagreements between two constitutionally autonomous organisations that cannot be resolved by just one of them.⁸²⁶ Thus, the intervention of an impartial adjudicator is needed, and in this case the impartial third-party must be the Senate. On the other hand, Silva Bascuñán explains that issues of scope, content, and procedure of the ex-ante legality review are ‘outside the jurisdiction of the ordinary judiciary’.⁸²⁷ According to this author, these sort of issues consist of ‘problems of constitutional organisation that are beyond the remit of the judiciary’, defined by the Constitution as the adjudication of civil and criminal disputes. Silva Bascuñán’s argument echoes some forms of non-justiciability doctrine. Consider, for instance, Robert Summers’ definition of political questions as ‘issues which, under relevant constitutional structure, other branches of government might resolve’.⁸²⁸

Other academic commentators, however, have defended a more activist role for the judiciary in controlling the Comptroller-General Office. Their assumption is that courts must conclusively decide questions of law, and that the Comptroller-General is ultimately an administrative organisation that might represent a threat to individual rights. The position most critical of the Comptroller-General Office is that of Eduardo Soto-Kloss. Commenting on a case in which neighbours complained against a construction permit that benefited a construction firm, Soto-Kloss argued that the adjudicatory functions of the Comptroller-General are no longer justified, as now the judiciary has full jurisdiction to hear judicial review claims.⁸²⁹ The office thus has to refuse to hear complaints concerning ‘judicial issues’, according to Article 6 of its Organic Law. In his view, disputes over rights are issues paradigmatically for the courts – administrative institutions are absolutely banned from entertaining such controversies. Therefore, he finds that in urban-planning law cases, in which a planning license is at stake, the Comptroller-General ‘radically’ lacks adjudicatory powers. Arguing against Senate decisions, Soto-Kloss has also claimed that the institution has no immunity against judicial review in ex-ante legality review cases.⁸³⁰ In sum, he gives absolute primacy to courts over the Comptroller-General.

⁸²⁶ Silva Bascuñán, *Tratado de derecho constitucional* (n 798) 235.

⁸²⁷ *ibid* 239.

⁸²⁸ Robert S Summers, ‘Justiciability’ (1963) 26 *The Modern Law Review* 530, 536.

⁸²⁹ Soto-Kloss, ‘Urbanismo, Contraloría General de la República y Tribunales de Justicia’ (n 785) 140–3.

⁸³⁰ Soto-Kloss, ‘¿Una contienda de competencia?’ (n 800).

In a similar vein, examining the ex-ante legality review procedure, Iván Aróstica has defended the broad right to challenge Comptroller-General determinations in courts. He claims that it is for the courts – not for an administrative institution – to ascertain what the law ultimately is. He admits that the Constitution only provides for executive challenges to Comptroller-General judgments (either via insistence decree or through the Constitutional Tribunal). Yet he maintains that this must not entail that a private individual or public employee is not entitled to a right to overcome, for instance, the Comptroller's decision to reject a decree that benefits her.⁸³¹ In Aróstica's view, Comptroller decisions are administrative actions, as amenable to judicial review as any other primary administrative decision.⁸³² He denies that the ex-ante legality review procedure was exhaustively regulated in the Constitution, entirely excluding judicial supervision over the institution. Besides, he asserts that the office's autonomy cannot entail that its determinations are immune from judicial scrutiny.⁸³³ Aróstica suggests that the establishment of restrictions on judicial control of administrative action is a feature that characterises the French model of administrative law, but is foreign to Chilean constitutional practices.⁸³⁴ He concludes that conceding privileges or immunities to the Comptroller-General is contrary to the rule of law and the unending struggle against the abuse of administrative power. Aróstica adopts a similar position in relation to judicial review of ex-post interpretative opinions. He argues that affected parties have a constitutional right to bring complaints to the courts and that the judiciary has no jurisdictional restrictions on entertaining public law complaints. Therefore, in his opinion, the idea that the Comptroller-General has the last word as interpreter of administrative legality is unfounded.⁸³⁵ Aróstica's position is distinctively linked to a strong conception of the right to remedy against adverse administrative action, but seems quite insensitive to institutional dynamics and adverse unintended consequences.

⁸³¹ Aróstica, 'El trámite de toma de razón de los actos administrativos' (n 798) 151–2.

⁸³² Similarly, Alejandro Vergara has maintained that the Comptroller-General's autonomy does not preclude judicial review of its determinations, as it is an administrative institution like any other and consequently subjected to judicial supervision; see Vergara (n 178) 108.

⁸³³ Aróstica, 'Sobre el recurso de protección y la representación del contralor. Reflexiones acerca de una contienda de competencia' (n 800) 748.

⁸³⁴ *ibid* 753.

⁸³⁵ Aróstica, 'Notas sobre los dictámenes de la Contraloría General de la República' (n 223) 549–51.

Finally, other scholars have suggested that this area of law can only be streamlined by deliberate legislative action, as it is too convoluted as it currently stands. Raúl Letelier, for instance, accepts several functions for the office's interpretive opinions, such as adjudication concerning Civil Service regulations, defining jurisdictional boundaries between administrative bodies, and helping to reinforce internal control mechanisms. However, he expresses doubts as to whether the Comptroller-General should be used as a dispute-resolution mechanism, and is especially sceptical of the benefits of allowing administrative agencies the right to challenge Comptroller determinations in courts.⁸³⁶ Nevertheless, he concludes that current statutory law does not give one right answer in relation to the limits between judicial and administrative legal accountability functions. The office's organic law is particularly ineffective in providing authoritative guidance for drawing the boundaries. As a result, Letelier suggests that only future legislative action can resolve the dilemma, either by transforming the Comptroller-General into a proper administrative tribunal or confining its functions exclusively to advice-giving on non-controversial matters.⁸³⁷ In a similar vein, Juan Carlos Ferrada calls for legislative action by arguing that both the Comptroller's adjudicatory activities and current practices of judicial review in ordinary courts are irregular, damaging, and unlawful. In his view, the only appropriate solution would be proper administrative justice machinery carefully designed by the legislature.⁸³⁸

In this traditional debate, the similarities and contrasts between both institutions have not been examined with enough thoroughness. At times, excessive emphasis has been put on the unhelpful 'administrative-judicial' divide, and at other times the importance and the interests of the case at issue have obfuscated the need for understanding. Nevertheless, some lessons could be drawn from this brief attempt at reconstruction. First, both institutions perform different but compatible and possibly complementary functions. They have the common purpose of rendering public administration legally accountable, but they attempt to achieve the objective by adopting diverse approaches. Besides, both institutions possess recognised constitutional authority and are reciprocally autonomous. Therefore, their relationship should be one of coordination and comity rather than of one's subordination to the other. Secondly, subservience to judicial review might undermine

⁸³⁶ Letelier (n 191) 304–7.

⁸³⁷ *ibid* 307–8.

⁸³⁸ Ferrada (n 788).

the most evident benefits of the Comptroller-General, that is, the generation of internal administrative law jurisprudence that has secured a degree of certainty and predictability. This is especially important for the ex-ante legality review, as it has an internal nature and possesses its own bespoke institutional protections. Thirdly, judicial review is still needed, as the Comptroller-General might be located too closely to the administration and, consequently, there is a reasonable risk of bias against individual interests. Thus, it seems sensible to make an effort to strike a balance between judicial review's institutional inclination towards rights protection and the Comptroller-General's responsiveness to the demands of the internal legality of the administration. To elaborate an adequate principle of cooperation, these insights must be enriched with comparative experience and a more analytically robust framework.

3.A functional approach

Peter Cane has provided such a framework. In his rigorous study of administrative adjudication, he has identified a number of ways in which administrative (or nonjudicial) adjudication has been differentiated from judicial adjudication.⁸³⁹ These approaches have attempted to reveal in which sense administrative adjudication supplements the work of courts. On the one hand, he recognises three conceptualist or formalist approaches. The first is based merely on historical considerations, as it understands judicial functions in the terms used before the consolidation of the administrative state (i.e. the 19th century). The second perspective, in turn, operates on the basis of the public-private distinction, with private law strongly linked to disputes between citizens and public law associated with disputes between citizens and government, and with statutes. A final formalist approach is essentialist in nature and conceives of judicial power as the activity of 'find[ing] facts, 'ascertain[ing]' law, and apply[ing] law to facts in order to make a final and enforceable decision about (theoretically) pre-existing rights and duties'.⁸⁴⁰ Cane explains that when used – as in Australia – these formalist criteria have resulted in 'a large, complex and internally inconsistent body of case law'.⁸⁴¹ To this, it might be added that they offer extremely limited room for experimenting with and accommodating new

⁸³⁹ Cane, 'Understanding Administrative Adjudication' (n 720) 287–92; Cane, *Administrative Tribunals and Adjudication* (n 2).

⁸⁴⁰ Cane, 'Understanding Administrative Adjudication' (n 720) 288.

⁸⁴¹ *ibid* 289.

forms of adjudication that could satisfy urgent demands for legality in the administrative state.

As an alternative, Peter Cane describes a more flexible and pragmatic functional approach to articulating the interactions between administrative and judicial adjudication. It focuses on two aspects. On the one side, this perspective looks at whether ‘separation of powers’ values – rejection of undue concentration of power and protection of individual rights – are protected. On the other, in order to assign adjudicative power legitimately to nonjudicial bodies, it gives decisive weight to the possibility of reviewability, that is, to ensure that ‘the work of the non-judicial body [is] subject to review by a judicial body’.⁸⁴² Overcoming the limitations of formalist categories, this functional approach provides a more suitable framework for managing the virtues and limits of contemporary forms of administrative adjudication and the much-needed coordination with the judiciary.

II. SHORTCOMINGS AND ADVANTAGES OF HAVING TWO ALTERNATIVE FORUMS

Before moving to the development of a principle of coordination between courts and the Comptroller-General, I will examine the institutional costs and benefits of the existence of alternative forums for legal accountability. I suggest that in the Chilean context the coexistence of both institutions appears to be an inevitable feature of the constitutional framework of the country, but might also be justified on substantive grounds.

A. Defects

The Comptroller-General has evolved as a separate institutional structure that asserts a protected, exclusive sphere of jurisdiction in public law matters. Yet this type of arrangement generates considerable difficulties. As Carol Harlow has explained, a large defect of the existence of an exclusive public law jurisdiction alongside a private law one is that it brings about ‘sterile jurisdictional litigation which distracts attention from substantive issues’.⁸⁴³ She further explains that ‘[t]his is due to the difficulty in devising jurisdictional criteria which are at once precise and rational’.⁸⁴⁴ In her view, both

⁸⁴² *ibid* 288–9.

⁸⁴³ Carol Harlow, “‘Public’ and ‘Private’ Law: Definition without Distinction” (1980) 43 *Modern Law Review* 241, 250.

⁸⁴⁴ *ibid*.

functional and organic tests to select the forum fail to satisfy the basic requirements of clarity, simplicity, and certainty.⁸⁴⁵

There are further complications with a delimitation of jurisdictional boundaries that is indeterminate. The discussion on forum shopping in the United States might be illustrative. Although the source of the jurisdictional confusion there revolves around issues of territorial boundaries, research on the defects detected in that system might shed light on similar problems in the case of litigation in the Comptroller-General and courts. Forum shopping is caused by the availability of multiple forums for litigation, a situation which in turn creates an opportunity for litigants' attempts to have their actions tried in a particular court or jurisdiction where they anticipate they will have the greatest chance of success.⁸⁴⁶ The phenomenon has a number of negative consequences.

A first problem with the existence of alternative uncoordinated venues is that it threatens inter-institutional comity. In public law, the idea of comity refers to the institutional value governing the relationships among public institutions, which demands that the decisions of other institutions be treated as authoritative.⁸⁴⁷ In other words, comity is an attitude towards decisions adopted by a first authority that entails that the reviewer should refrain from undermining her capacity to exercise her authority in respect to the decision. As McGarity explains, the existence of multiple forums might create a situation that forces one authority into the position of issuing orders that directly conflict with those of its institutional partners.⁸⁴⁸ As a result, inter-institutional comity is severely undermined.

Secondly, the existence of disagreeing forums might also endanger attempts by administrative agencies to apply policy energetically and uniformly across the country.⁸⁴⁹ Administrative authorities might behave in an 'unduly timid' fashion when confronted with the chance of the most unsympathetic institution reviewing the legality of its

⁸⁴⁵ *ibid* 256.

⁸⁴⁶ Thomas O McGarity, 'Multi-Party Forum Shopping for Appellate Review of Administrative Action' (1980) 129 *University of Pennsylvania Law Review* 302, 304; 'Forum Shopping Reconsidered' (1990) 103 *Harvard Law Review* 1677, 1677; Richard J Pierce, Sidney A Shapiro, and Paul R Verkuil, *Administrative Law and Process* (4th edn, Foundation Press 2004) 184.

⁸⁴⁷ Timothy Endicott, 'Comity among Authorities' [2015] *Current Legal Problems* 1.

⁸⁴⁸ McGarity (n 846) 313–4.

⁸⁴⁹ Pierce, Shapiro and Verkuil (n 846) 184–5.

policies.⁸⁵⁰ Furthermore, as McGarity indicates, even a successful defence in one forum does little to ensure the evolution of a uniform policy, as other parties in later litigation can race to different venues to obtain conflicting interpretations. In the Chilean case, the problem is exacerbated by the absence of a sufficiently powerful adjudicator of last resort.

Thirdly, jurisdictional litigation resulting from venue indeterminacy creates unjustifiable costs. Above all, it might disproportionately affect thinly financed public interest groups.⁸⁵¹ The fairness and efficacy of such arrangements have been questioned, since ‘costly expenditures for the rendering of threshold determinations, irrelevant to the merits of the case’ will be especially harmful for the ‘party that can ill-afford the cost’.⁸⁵² Moreover, in addition to the costs for the parties, there will be costs for the adjudicatory institutions administering the system. Similarly, it has been claimed that alternative forum indeterminacy ‘overburdens certain courts and creates unnecessary expenses as litigants pursue the most favourable, rather than the simplest or closest forum’.⁸⁵³ Also, as a result of potentially contradicting forums, firms might face overwhelming uncertainty, as there will be ‘a strong possibility that the agency, a competitor, union, or public interest group might obtain a contrary ruling from another [adjudicator] sometime in the future’.⁸⁵⁴

Last but not least, the problem of jurisdictional demarcation can also raise ethical questions about the operation of the legal system. The ambiguity in the venue provisions might cause ‘a problem of fairness as it entails manipulations of the rules of precedents applicable to the matter’.⁸⁵⁵ Consequently, it may corrode citizens’ confidence in the objectivity and impartiality of legal institutions and the substantive law they apply. Equally, these flawed arrangements may raise questions about the ethical representation of clients, as the attorneys appear to be exploiting the loopholes in the system.

B. Advantages

Perhaps surprisingly, the concurrence of different forums exercising jurisdiction to make determinations on an issue could also bring about some benefits. Some of these

⁸⁵⁰ McGarity (n 846) 314–5.

⁸⁵¹ Pierce, Shapiro, and Verkuil (n 873) 184.

⁸⁵² McGarity (n 846) 318.

⁸⁵³ ‘Forum Shopping Reconsidered’ (n 846) 1684.

⁸⁵⁴ McGarity (n 846) 317.

⁸⁵⁵ ‘Forum Shopping Reconsidered’ (n 846) 1683–4.

advantages relate to broadening access to remedies to the affected parties, while others have a more systemic character.

Venue plurality could enhance the position of claimants and ‘serve the legal system’s goal of remedying injury’.⁸⁵⁶ From this viewpoint, it might not be illegitimate for claimants to seek the more convenient forum among many, considering that numerous other rules and social factors tend to favour the defendants – which is probably particularly true in some domains of state action. This is the case, for example, on occasions where parties have taken into account the expertise of the forum, and have tried to avoid the prejudices found in alternative sites.⁸⁵⁷ Similarly, the availability of multiple forums may contribute to the development of pluralistic forms of justice. In this sense, it has been argued that forum shopping ‘can enhance the possibility of pluralistic methods of remedying wrongs’.⁸⁵⁸ This perspective is particularly attractive in contexts in which dissatisfaction has been traditionally expressed in relation to judicial processes and outcomes, as in the domain of administrative justice.

There are two additional potential benefits deriving from the availability of multiple forums. On the one hand, venue diversity can have a ‘percolating function’, that is, it can allow for experimentation and provide the final adjudicator ‘with the opportunity to observe how several [venues] have resolved difficult questions before deciding them for itself’.⁸⁵⁹ On the other hand, the existence of disagreeing forums may serve a ‘signalling function’ in the sense of alerting users that there is divergence on an interpretive legal issue and, therefore, signalling that it deserves special attention.⁸⁶⁰ Both functions assume the legitimacy of divergent legal interpretations deriving from different institutions. Later I will suggest that the different institutional characteristics of the Comptroller-General and courts lead them to adopt distinctive interpretative approaches.

As seen in previous chapters, in the Chilean case the co-existence of two institutions with overlapping jurisdiction is an unintended consequence of a haphazard historical development. The availability of multiple venues is not the result of a careful and

⁸⁵⁶ *ibid* 1696.

⁸⁵⁷ *ibid* 1682.

⁸⁵⁸ *ibid* 1696.

⁸⁵⁹ McGarity (n 846) 318–9.

⁸⁶⁰ *ibid*.

deliberate design weighting benefits and costs. Moreover, legislation and precedents leave little room to change the current scenario, which generates a lot of space for forum shopping litigation. It is true that only deliberate legislative action could remedy this. However, a reasonable principle of coordination between both institutions could be implemented by judicial action, improving the overall situation considerably. This could probably be crystallised by legislative activity in the future as well. The next section will outline this principle for enhancing the coordination between the Comptroller-General and courts.

III. THE NEED FOR A PRINCIPLE OF COORDINATION

An appropriate principle of coordination between courts and the Comptroller-General in their respective legal accountability functions needs to give adequate weight to their comparative advantages and weaknesses.⁸⁶¹ I suggest here that such a coordination principle should have two parts. On the one hand, it must secure to the ex-ante functions of the office a sphere of action sufficiently protected from judicial review; on the other hand, the principle must counsel courts to exercise judicial restraint in reviewing the ex-post issuance of interpretive opinions by the Comptroller-General. This arrangement could secure a satisfactory mixture of the advantages of both legal accountability regimes, and minimise their defects.

A. High Deference and the Ex-Ante Legality Review Process

The ex-ante review procedure has a number of comparative advantages over judicial review. If judicial review of decisions adopted in this capacity were allowed, the benefits associated with this accountability mechanism would be adversely affected. Besides, the institution is not a primary decision-maker, but a reviewer.⁸⁶² Like the courts, it is engaged in tasks of legal interpretation and application, with independence of the administrative agency and primary responsibility for policy implementation. Moreover, the right of the affected parties to complain in court would not be severely affected in any case, as they could challenge the primary administrative body's action or inaction directly without involving the Comptroller-General. Indeed, Comptroller-General determinations do not shield the actions of administrative agencies, and affected parties could take them

⁸⁶¹ The idea of a 'principle of coordination' between courts and their legal accountability partners has been borrowed from King, *Judging Social Rights* (n 3) ch 3.

⁸⁶² Endicott makes a similar point in his discussion of judicial review of ombudsman determinations in the UK. See Timothy Endicott, *Administrative Law* (2nd edn, OUP 2011) 502.

to court anyway. Lastly, there are other constitutional mechanisms for challenging the office's opinions, such as the decree of insistence and the complaint before the Constitutional Tribunal (see Chapter 2).

The first aspect in which the Comptroller-General's ex-ante review seems superior to judicial review is its flexibility. With a few adjustments, the following description of the advantages of OIRA rule-making review vis-à-vis judicial review in the US could aptly apply to the work of the Chilean office:

OIRA's flexibility advantage inheres in its ability to engage in expeditious, two-way communications with a rulemaking agency. If a court has a serious question or reservation about the adequacy of an agency's treatment of an issue, it can communicate that concern only by holding the agency action arbitrary and capricious, typically a year or more after the agency issued the rule. The agency can respond only by taking further formal action on remand, typically a year or more after the judicial remand. In some cases, this lengthy and cumbersome communication process proceeds through multiple iterations. After several years of such attempts to communicate, the court and the agency often discover that each has misunderstood the other. By contrast, OIRA typically communicates its questions and concerns within a week or two of receiving an agency proposed final rule, and the agency often responds to OIRA's satisfaction within a week or two thereafter. If the written communications are unclear, as is often the case, OIRA and the agency can clarify their questions and answers, respectively, through oral communications. The OIRA review process always is completed in a small fraction of the time required for completion of the process of judicial application of the duty to engage in reasoned decisionmaking.⁸⁶³

Likewise, the communication between the Comptroller-General and primary agency is expeditious and informal, allowing the establishment of a process of dialogue and discussion that could more likely lead to some form of understanding. The process is also considerably shorter than conventional judicial review. I have discussed the details of this process in chapter 7. Permitting judicial direction of this legality review process could seriously undermine its integrity by formalising and judicialising it.

A second advantage of ex-ante legality review could be articulated in terms of expertise. As we have seen in previous chapters, Comptrollers-General possess more appropriate training and socialisation than ordinary judges, and due to their larger experience with

⁸⁶³ Pierce (n 698) 70.

administrative rules and decisions, they can understand technical matters more quickly. Judges, in contrast, would probably struggle to understand technicalities, as they review administrative rules only sporadically.⁸⁶⁴ Thus, expertise in this case leads to efficiency, as the review is fastest and will probably produce better outcomes using fewer resources.

A third aspect that reveals an advantage of the Comptroller-General over courts is the mandatory and ongoing nature of ex-ante review. In contrast, judicial review is contingent on the existence of an external interest sufficiently resourced and affected to engage in litigation. As Metzger and Stack explain,

[Judicial review] happens only episodically in agency life...the vast majority of agency actions and decisions, including those that lead to the adoption of a particular rule or policy, will never be subject to review. For any given agency, much less for any given bureau within an agency, a judicial decision validating or nullifying its analysis comes only infrequently and unpredictably.⁸⁶⁵

In contrast, ex-ante legality review by the Comptroller-General takes place in a less accidental manner, as it is generally mandatory since only ‘non-essential’ administrative action is in principle excluded. Besides, it operates independently of the external interests triggering it.

A fourth advantage of ex-ante legality review is precisely its operation before promulgation. This feature prevents that some forms of illegalities become irremovable before any legal challenge occurs. It also allows rapid reaction and rectification in case agency action purports to transgress its legal margins. Judicial review, on the contrary, is inevitably late. Echoing standard descriptions of the limitations of judicial control of administrative action, Metzger and Stack indicate that ‘judicial review [...] necessarily operates ex post, sometimes many years after the agency has taken the action. This means that even for the relatively few actions that are subject to review, any remedy of a violation of external administrative law comes at a time very distant from the violation’.⁸⁶⁶ Therefore, ex-ante review offers an earlier and probably more effective check against administrative abuse.

⁸⁶⁴ *ibid.*

⁸⁶⁵ Metzger and Stack (n 5) 1264.

⁸⁶⁶ *ibid* 1264–5.

The previous feature, however, could also lead to a serious shortcoming if Comptroller-General legal interpretation were overly stringent. In this latter scenario, this mechanism could provoke timid administration and inaction. Due to its administrative ethos, however, the office could represent a more constructive approach to the interpretation of statutes governing administrative action. From this perspective, the Comptroller-General could facilitate legal articulation of administrative activity without incurring the risk of sclerotic decision-making. In fact, as will be discussed in the next section, serving as a source of dynamic statutory interpretation could be an additional advantage of the arrangement.

The main disadvantage of ex-ante legality review is its lack of appropriate private party participation and opacity.⁸⁶⁷ However, this weakness is remedied by the possibility of challenging administrative rules by regular judicial review once they have been through the preventive scrutiny process. In fact, the ex-ante legality review does not preclude later challenges if the regulation is eventually promulgated. The main problem appears when the Comptroller-General has rejected the rule, as in this scenario only the President can challenge the office through the insistence procedure or by bringing the case to the Constitutional Tribunal. Private parties who would benefit from the action cannot challenge negative Comptroller opinions. Yet they could ultimately challenge executive inaction in courts.

To conclude, this analysis gives support to the consistent judgments of the Chilean Senate in favour of the Comptroller-General in relation to the autonomy of the ex-ante legality review procedure. This legal accountability arrangement promises a series of benefits that could be undermined if energetic judicial supervision were exercised. It is recommended that courts be required to exercise especially high restraint in reviewing this mechanism. Judicial review should be confined to cases amounting to action outside the Comptroller's jurisdiction or where a purported exercise of authority is a sham. This solution is not exposed to criticism, usually voiced through strong forms of deference, as the Comptroller-General Office is itself an independent review institution, and judicial review remains open in relation to the primary decision-makers.

⁸⁶⁷ These shortcomings have also characterised OIRA review in the past – see Sunstein and Strauss (n 716) 192–3; Kagan (n 711) 2280, 2286–7, 2358.

B. Deference and the Dispute-Resolution Process

The Comptroller-General's dispute-resolution function is substantially more similar to judicial review than its ex-ante legality review function. Several of the advantages mentioned above do not apply to this aspect of the office's work. Here, for instance, legal judgments are episodic as they are triggered by party petitions; pronouncements have a corrective rather than preventive nature; and the process is more formal and less dialogic than in the ex-ante legality review procedure. Moreover, there is no special arrangement in the case of disagreement between primary decision-makers in the executive branch and the Comptroller-General. In other words, the insistence decree and the appeal to the Constitutional Tribunal do not apply to the dispute-resolution function of the office. Therefore, it is worth questioning whether judicial oversight is more strongly justified in relation to this dimension of the office's operation.

However, as I have shown in the previous chapter, the Comptroller-General Office performs a dispute-resolution function in a manner that complements the judicial review conducted by ordinary courts. The office's adjudicatory role is different, and to some extent superior, in terms of expertise, speed, broader access for the affected parties, and flexible legal effects. In other words, the institution can better adjudicate cases involving complex regulatory statutes; unlike courts, it can do it in months instead of years; it offers a forum for challenging the legality of administrative action for groups that do not regularly use the judicial process; and their legal interpretations could be more easily modified if the circumstances change.

It is worth highlighting the latter point. Due to their diverse institutional structure, the Comptroller-General and courts have also different interpretive approaches. This attribute of the office could help satisfy important requirements of the contemporary administrative state. Reacting against rigid principles of statutory construction based on private law, it has been argued that the contemporary regulatory state demands new techniques of statutory interpretation. One of the problems requiring new principles of interpretation is statutory obsolescence. As Sunstein put it, '[s]ometimes statutory construction is informed by an effort to ensure integrity and coherence in the law by updating obsolete statutes...by interpreting them in a way that takes account of changing

conditions'.⁸⁶⁸ The Comptroller-General could perfectly collaborate in this task of dynamic statutory interpretation, breaking with the apparent dilemma of choosing between courts and the primary administration. Indeed, it has been claimed that courts should hardly 'be charged with issuing dynamic, updating interpretations of obsolete legislation' and that this task should be allocated to administrative agencies 'because of [their] relatively greater information about current conditions, superior technocratic expertise, and heightened political responsiveness'.⁸⁶⁹ However, an institution combining some institutional features of both administration and courts – independence, rule interpretation competence, greater information capacities, non-myopic viewpoints, technocratic expertise, and orientation to the achievement of social objectives – could be an even superior alternative or at least a valuable complement. A similar function has been played by the *Conseil d'Etat* in France, which itself combines administrative and judicial functions. As Bell has shown, it has developed some form of law-making function by adjudication, thus filling gaps in legislation.⁸⁷⁰ Similarly, Edley has viewed the French institution as an adequate structure for exercising a more flexible sort of scrutiny that he calls 'sound governance review', instead of an overly legalistic examination of government action.⁸⁷¹ To this end, he emphasises the mix of legal and non-legal components in the organisation. Likewise, Cane has argued that, because of its institutional location and the mindset of its personnel, the *Conseil d'Etat* 'seems to have at least the potential to strike that balance more in favour of social than of individual interests'.⁸⁷² More importantly, we have seen this argument playing a role in the Comptroller-General's own characterisation of its functions, and observers value the role of the institution in providing dynamic statutory interpretation in view of a dysfunctional legislative process. Some of the canons to be taken into account in performing this task could be the following: giving weight to presidential direction, allowing more flexible constitutional interpretation, mitigating agency tunnel vision, ensuring hierarchical

⁸⁶⁸ Cass R Sunstein, *After the Rights Revolution: Reconceiving the Regulatory State* (Harvard University Press 1993) 174.

⁸⁶⁹ Adrian Vermeule, *Judging under Uncertainty: An Institutional Theory of Legal Interpretation* (Harvard University Press 2006) 47–8.

⁸⁷⁰ However, he mentions that the collegial structure of the institution could have conspired against clarity of the outcomes; Bell, *French Legal Cultures* (n 11) 176–7.

⁸⁷¹ Edley (n 10) 243.

⁸⁷² Cane, *Administrative Tribunals and Adjudication* (n 2) 89.

control over subordinates, and paying attention to the contemporary political milieu, among others.⁸⁷³

The preceding advantages justify giving the Comptroller-General an enhanced role as a legal accountability institution, also in respect to its dispute-resolution function. Yet without a more robust institutional framework deliberately establishing it as an autonomous structure, those advantages do not support the idea of making the institution entirely immune from judicial review. Moreover, some shortcomings detected in the institution warrant giving the courts a supervisory role. A first limitation of the office is its relative opacity in comparison to courts, especially in terms of media coverage and comparability with judicial institutions elsewhere. A second limitation is the existence of poorly defined participation rights – for instance, in relation to rules of standing and intervention provisions. This feature explains the rapid response capacities of the office, but it could be inadequate for the adjudication of cases of constitutional nature. Thirdly, the office's supposedly public/collective interest orientation could offer an inadequate remedy for cases in which marginalised groups or individuals are involved, and, conversely, court proceedings could potentially provide a more suitable setting for these disputes. Lastly, although the institution enjoys an enhanced status in the Chilean political system, the expressive effect of its rulings and its constitutional authority is not exactly comparable to that of the judiciary. This might also justify having courts as an alternative check for cases that may require greater sensibility to the expressive dimension of legal adjudication.

To put it slightly differently, the Comptroller-General must have a leading role in the development of administrative law review, while courts should retain primary responsibility for adjudication of constitutional nature.⁸⁷⁴ But this does not entail a hard separation of functions between the two institutions. Their separate roles should not be conceived as a matter of autonomous spheres of action but as two complementary perspectives in the common task of securing legal accountability for government action.

⁸⁷³ Jerry Mashaw, 'Norms, Practices, and the Paradox of Deference: A Preliminary Enquiry into Agency Statutory Interpretation' (2005) 57 *Administrative Law Review* 501; Jerry Mashaw, 'Agency-Centered or Court-Centered Administrative Law? A Dialogue with Richard Pierce on Agency Statutory Interpretation' (2007) 59 *Administrative Law Review* 889.

⁸⁷⁴ For an explanation of this distinction, see Martin Shapiro, 'Judicial Review in Developed Democracies' (2003) 10 *Democratization* 7.

A formalistic implementation of a spatial conception of administrative and judicial functions would be practically unfeasible and normatively undesirable. Therefore, a more adequate relationship between the two institutions should be incarnated in a flexible principle of judicial restraint based on independence, institutional competence, and expertise. In brief, courts should remain in the position of having the last word in matters of legal interpretation in relation to dispute-resolution – especially in view of their constitutional authority and expressive functions – but they should be prepared to accord substantial weight to Comptroller-General determinations out of respect for its constitutional independence, institutional competence, and expertise.⁸⁷⁵

Although there may be certain overlap among them, three grounds for judicial deference to Comptroller-General determinations can be identified. First, constitutional independence entails that courts must assign weight to the fact that the institution is not a primary decision-maker, but an independent legality review institution operating in partnership with courts. This feature demands a special form of comity on the part of the judiciary to avoid undermining the scrutiny role of the first reviewer. Secondly, the courts should afford deference to the Comptroller-General on grounds of ‘institutional competence’. Judges should pay attention to whether their structure and procedures equip them to decide the matter better than the administrative adjudicator. They have to take into account, for instance, whether their investigative techniques are suitable for the problem at hand and the potential limitations of their processes.⁸⁷⁶ Finally, courts must place especial weight on the views of the Comptroller-General when the latter has greater expertise. The typical source of expertise for the office is ‘specialised adjudicative expertise’, which could be defined as the type of expertise that ‘is gained chiefly through adjudicative experience, training and repeated exposure to one area of administrative decision-making (and in some areas through educational or research experience)’.⁸⁷⁷ The Comptroller-General’s experience within the administrative process, its greater access to

⁸⁷⁵ My use of the notion of substantial deference here draws on Aileen Kavanagh’s work. See Aileen Kavanagh, ‘Deference or Defiance?: The Limits of the Judicial Role in Constitutional Adjudication’ in Grant Huscroft (ed), *Expounding the constitution: essays in constitutional theory* (CUP 2008); Aileen Kavanagh, *Constitutional Review under the UK Human Rights Act* (CUP 2009) ch 7; Aileen Kavanagh, ‘Judicial Restraint in the Pursuit of Justice’ (2010) 60 *University of Toronto Law Journal* 23.

⁸⁷⁶ Jeffrey L Jowell, ‘Judicial Deference and Human Rights: A Question of Competence’ in Paul Craig and Richard Rawlings (eds), *Law and administration in Europe: essays in honour of Carol Harlow* (OUP 2003) 73, 80.

⁸⁷⁷ King, *Judging Social Rights* (n 3) 228.

information, and the special training in administrative regulations for its staff are all reasons to place considerable weight on its determinations.

IV. CONCLUSION

This chapter has examined the problem of delimitation of functions between the Comptroller-General and ordinary courts from a number of different perspectives. I have looked at historical controversies, legal precedents, constitutional arguments, and doctrinal discussion. Eventually, a somewhat bewildering picture has emerged in which some criteria appear to be assumed but rarely thoroughly articulated. We have seen that the institutions have been distinguished in terms of, among other criteria, public-private law, political process versus judicial supremacy, abstract interpretation versus concrete dispute-resolution, collective interests versus rights considerations, and administrative versus judicial functions. An inclination towards understanding the proper domain of these two institutions in spatial terms has been pervasive but manifestly unhelpful. Having analysed the functions of both institutions in terms of comparative institutional advantages and drawing on comparative-law insights, this chapter has suggested that a spatial approach is unfeasible and unattractive. Instead, I recommend a principle of coordination that secures a protected functioning for the Comptroller-General in respect to its ex-ante operations, requiring courts to exercise high deference, and subjects it to judicial review in relation to its dispute-resolution functions, stressing the need for judicial restraint on grounds of constitutional independence, procedural advantages, and adjudicatory expertise.

CONCLUDING REMARKS

Conducting a socio-legal study of the role of the Comptroller-General in the Chilean administrative process, this dissertation has explored the limits and possibilities of the idea of nonjudicial legal accountability. Stress has been placed on internal nonjudicial forms of administrative justice. The story told by this thesis suggests that the office has provided an overall positive contribution to meeting the demands of legality in the context of a growing administrative state. More importantly, this thesis has outlined some rationales that may guide the future action and reforms of this institution.

I. OVERVIEW

In Part I of the thesis, I laid the groundwork for the core chapters of this study. In Chapter 1, I began by briefly introducing the problem of the interaction between state bureaucracy and legality in the Latin American context. Outlining the evolution of the views about the relevance of legality in the processes of development and democratisation in the region, I stressed the importance of the idea of horizontal accountability. Developed by leading scholar Guillermo O'Donnell, this notion illustrates the need to explore a series of institutions and processes often overlooked when studying traditional branches of government. I suggested that O'Donnell highlighted an important area of study but that a more fine-grained analysis was required. Drawing on political science and legal literature about accountability processes, I distinguished three types of tasks that nonjudicial institutions of administrative justice could perform. These are the political accountability, pedagogic, and contestability functions. While the first function highlights how these bodies help secure bureaucratic responsiveness to political authorities, the second function focused on strengthening administrative capacities within the executive branch, emphasising efficacy, accuracy, and institutional memory. The contestability function, in turn, relates to the need to broaden the sites in order to consider challenges to administrative action or inaction on legal grounds brought by affected parties. In this introductory chapter, I also stressed two kinds of risks posed by nonjudicial legal accountability arrangements: authoritarianism and excessive intrusiveness.

In addition, in Chapter 1, I reviewed current studies about the ideal of administrative justice and different institutional arrangements that attempt to materialise it. Two lessons drawn from these studies stand out. On the one hand, the most interesting current research

projects look at administrative justice institutions in their context, trying to ascertain how these processes work in real-life contexts, how officials and users perceive them, and their impact. On the other hand, remarkable studies such as Mashaw's *Bureaucratic Justice* have emphasised the importance of imagining alternative institutional articulations of bureaucracy as a political ideal. Mashaw's fictional bureaucratic justice superbureau, for example, aspires to incarnate ideals of institutional capacity and symbolic legitimation in one hybrid body.⁸⁷⁸ Mashaw's crucial insight is that these institutions and processes could be developed inside out, that is, they may grow out of administrative processes and practices themselves instead of being externally imposed. These methodological and theoretical insights have inspired the methods and the intellectual concerns behind this thesis.

Turning to the case study under examination, in Chapter 2 I outlined the main institutional features of the Chilean Comptroller-General, in terms of structures, procedures, and powers, in order to provide the legal background for the subsequent chapters. The Office was described as an inherently hierarchical and centralised organisation. Appointed by the President with Senate super-majority confirmation, the office holder can only be removed from office through impeachment, which has occurred only once, in the early years of the institution. The single-headed character of the office entails a strong reliance on the personal traits of its chief authority. In sharp contrast to Comptrollers and Auditors General elsewhere, early on this agency adopted the role of official interpreter not merely of financial regulations but of administrative legality in general. Currently, the Chilean Comptroller-General both conducts audit oversight and performs broad-ranging ex-ante and ex-post legality review functions. The Comptroller-General has also played a primary role as an anti-corruption watchdog. Accordingly, I have suggested that, somewhat echoing Mashaw's bureaucratic justice superbureau, this institution operates as a multi-tasking institution of internal administrative justice.

Unlike courts and despite its independence, the Comptroller-General operates in routine and close contact with public officials in all sorts of administrative decision-making procedures. The body has been mandated to exercise compulsory ex-ante legal review of

⁸⁷⁸ Mashaw, *Bureaucratic Justice* (n 1) 226; Nicholas R Parrillo, 'Introduction. Jerry Mashaw's Creative Tension with the Field of Administrative Law' in Nicholas R Parrillo (ed), *Administrative Law from the Inside Out: Essays on Themes in the Work of Jerry L Mashaw* (CUP 2017) 13–4.

most of the administrative decisions taken by executive officials. As a result, the channels of interaction between primary administrators and the Comptroller-General Office are abundant and remarkably broad. The embeddedness of the office gave it a hybrid – quasi-judicial and quasi-administrative – character, which could be appealing to sceptics of external review mechanisms. The Comptroller-General furthermore operates as a generalist interpreter of administrative legality. Its organic law granted the office ex-post power for interpreting the numerous, often vague, inconsistent, and sometimes obsolete pieces of legislation governing administrative agencies. We have seen that legislators, judges, politicians, bureaucrats and interest groups or individuals usually request the institution's intervention in order to clarify controversial points of law. The office's rulings are binding for the administrative officers, and over time have become a dense corpus of precedents that have allegedly enhanced the coherence and predictability of administrative action. Despite the tremendous veto power that might be exercised by the Comptroller-General through its ex-ante review procedure, this institution does not have the last word. By the decree of 'presidential insistence', the President is allowed to override adverse Comptroller-General determinations.

The task of Part II of the thesis was primarily historical reconstruction. Going beyond formal arrangements, this part of the case study offers a contextualised account of the origins, development, and main crises the Comptroller-General underwent during the twentieth century. In Chapter 3 I reconstructed the origins and growth of the Comptroller-General in the context of the emergence of the administrative state in Chile. I explained that the creation of the institution occurred as a consequence of the broader concentration of political power in the executive branch brought about by the Chilean Constitution of 1925. At the time, the Comptroller-General was conceived as a bureaucratic body subordinated to the President and whose primary purpose was the improvement of administrative effectiveness. Combining local and foreign influences, the organisation reflected a technocratic mindset and reacted against the perceived damaging oligarchic practices of the political class. Later, however, a series of constitutional events caused a sharp shift in the institution's animating ideals. As a result of its entrenchment in the Constitution, a remarkable impeachment procedure against the head of office, and the weakness of the judicial review of administrative action, the values of independence, impartiality, and legality began to take a preeminent place in the institution. The Office's new outlook and rising reputation required additional legal powers and protections, and

gradually made the organisation more attractive to an elite of young professionals. Crucially, this virtuous circle also entailed a more assertive attitude towards control of executive power. Thus, notwithstanding the imperfect understanding of the Office's rationale, it was undeniable that by the late 1960s the Comptroller-General had become a major actor in Chilean constitutional politics.

In Chapter 4, I examined a critical juncture for the current understandings of the Comptroller-General. This period was the presidency of Salvador Allende (1970-1973), who attempted to implement a transformative economic agenda of industrial nationalisation by administrative action. Constrained by the restrictive nature of the political process, a fragile legal framework, and the radical demands by his supporters – not to mention the volatile geopolitical context of the Cold War – President Allende attempted to implement a piecemeal nationalisation policy that heavily relied on strong executive power and docile legal controls. Compared to the judiciary, the Comptroller-General appeared to be a legal accountability body with a more responsive approach to collectivist policies and administrative needs. However, as this chapter shows, especially due to exercising ex-ante legality review of expropriation and requisition decrees, the office significantly eroded the reputation of government. In fact, although the executive repeatedly resorted to insistence decrees in order to override the Comptroller's adverse decisions, this strategy harmed Allende's credibility as a democratic, law-abiding president. Allende's government protested, claiming illegitimate partisan use of the Comptroller-General by a reactionary opposition. Although it is undeniable that some officials used the institution to undermine Allende's government, on balance the majority of the office's rulings reflected bona fide and reasonable legal interpretations. They required prior authorising legislation for the use of administrative power, consistency with legislative purpose, and decisions based on evidence. In general, these doctrines reiterated legal standards applied by the office to previous administrations. In addition, this form of legal scrutiny took place in a context of a general lack of jurisdiction by the ordinary courts, and in any case could be overridden by the executive. In short, this chapter suggests that it is unfounded to describe the behaviour of the Comptroller-General as reflecting naked political bias against the Allende government.

The historical part of the thesis closed with Chapter 5. Here, I examined the second most controversial period for the office in its historical trajectory: the Pinochet dictatorship. I

argued that to understand the role of the institution during the authoritarian period, we need to distinguish three periods. At the beginning of the military dictatorship, the office was used as a tool for asserting military control over civil bureaucracy. During these early years, the institution was strengthened and had a large influence on civil administration. Yet in terms of legal control, the institution focused on procedural regularity and formalism, taking a submissive attitude that facilitated repression and human rights violations. Later, as internal and international pressure on the military rulers increased, the office adopted a more intrusive approach, repeatedly colliding with part of the governing elite. Here, the legal accountability aspect of the institution resurfaced. By the late 1970s, however, Pinochet was intervening in the operations of the Comptroller-General, appointing a new head of the office, reflecting the further concentration of power in his hands. Consequently, the institution retreated to a survival strategy, and largely focused on the bureaucratic dimension of its work, avoiding further constitutional clashes with the military. Perhaps surprisingly, the regime's hostile attitude towards the Comptroller-General was not entirely reflected in the constitutional rules approved in 1980. Furthermore, to some extent the Constitution of 1980 improved the institutional standing of the office. More importantly, reflecting the legacy of the 1925 Constitution and uneasiness in respect to the functions of the Comptroller-General, the new Constitution was unable to provide a clear framework for the administrative justice machinery in the country.

Lastly, Part III of the thesis examined the contemporary Comptroller-General, with the aim of revealing how its distinctive instruments for controlling administrative power unfold in real-life contexts. I introduced this part by describing the role of the institution in the process of re-democratisation. I explained that the last three decades have seen the institution returning to its critical position in the constitutional politics of the country. This process of accommodation and adaption has taken place without major formal reforms. Its key elements are the flexibility provided by an ambiguous institutional framework, and the energy and flexibility that the office possesses as a result of the concentration of power in the top ranks.

In Chapter 6, I focused on the Comptroller-General's ex-ante legality review procedure and drew heavily on interviews with government and Comptroller-General officials. The chapter centred primarily on review of rulemaking. The purpose of the chapter was to dig

beneath the formal features of the procedure in order to capture the real operation of the office and the functions that it performs. The starting point was the traditional idea of legality review as simple verification that a previous legislative rule has been followed. Against fears that this kind of review process might serve as a mere tool for legitimisation of executive power, especially in a context of exacerbated presidential government, it was suggested that the scrutiny reveals quite a demanding probe for administrators. In fact, some civil servants criticised the device, complaining that it ossifies rulemaking, inhibiting administrative experimentation and policy innovation. Thus, the ex-ante legality review process is not confined to mere formalistic verification of legal authorisation. The interviews considered in this chapter also revealed potential contributions to reasoned administration and deliberation, participation of affected parties, internal coordination within the executive branch, and prevention of litigation. All these aspects of the office show a complex view of the interactions between the Comptroller-General, government officials, and third parties. The picture that emerges sheds light on the benefits and limitations of the mechanism, and explains why actors seem reluctant to engage in far-reaching reform, wishing either to abolish the organisation or transform it into a fully-fledged administrative tribunal.

In Chapter 7 I examined the second primary legal power of the office: the ex-post power to issue binding legal interpretations. In this chapter I also adopted a qualitative approach to the analysis. I explained that this power fulfils many of the functions of administrative adjudication reported in comparative literature. Above all, the power has been used as a dispute resolution mechanism that strikes a different balance between independence and expertise than that represented by the judiciary. I suggested that to an important extent the Comptroller-General is less independent from the executive branch than courts, as the office has pervasive links with public administration. However, this particular mix of independence and expertise has reinforced its reputation in the view of users and administrators alike. Moreover, at least in some policy areas, the Comptroller-General is perceived as offering less expensive, faster, and more flexible ways to resolve disputes between administrative agencies and affected parties. Finally, perhaps the main deficiency of the device relates to its weak finality or authority, as Comptroller-General decisions are challengeable in the courts, and especially because the boundaries between both institutions remain vague.

Finally, in Chapter 8, I inspected more closely the problem of delimitation between the Comptroller-General and courts. Here, I reconstructed a series of constitutional controversies regarding the boundaries between the two legal accountability institutions. I examined cases discussed in the Chilean Senate and the Constitutional Tribunal, and analysed debates among Chilean scholars. Acknowledging that without deliberate legislative action, any solution would remain contested and probably unsatisfactory, I proposed a flexible principle of coordination that may articulate in a sensible way the interactions between the two organisations. This principle recommends that both institutions continue performing legal accountability functions in relation to administrative action, but suggests robust judicial deference towards Comptroller-General determination, especially strongly in the context of ex-ante legality review. To arrive at this principle of coordination, the chapter examined the comparative advantages of the Comptroller-General and the judiciary. It was argued that the office has advantages in terms of enhanced expertise, flexibility, speed, and accessibility. In combination with judicial review in ordinary courts, these features seem attractive components in a system of administrative justice.

In this thesis, I have suggested that a number of factors might explain the endurance of this institution despite numerous forces that have promoted its abolition or radical transformation since its establishment in the early decades of the twentieth century. One concerns the Comptroller's ability to deal with conflicts between the legislature and the executive branch. A second factor relates to its capacity to enlarge the sites for external contestation of executive action on legality grounds as a reaction to the limitations of the judiciary. A third factor concerns the role of this institution as a mechanism for realisation of bureaucratic values such as compliance with legal rules, stability and political neutrality, and the preservation of institutional memory, among others. Last but not least, the institutional features of the organisation are a critical element for explaining its strength, as it has evolved as an 'administrative justice superbureau', which possesses constitutional authority, is structured in a monocratic way, concentrates legal and non-legal tasks, and operates in close proximity to primary decision-makers within the executive branch.

II. LIMITATIONS

Admittedly, the findings of this dissertation suffer from a number of limitations. To begin with, the limited previous empirical research on the office has been an important limitation of this thesis. Considerable effort has been put into reconstructing events and stories and gathering data about past and contemporary real-world operation of the office. This lack of information is explained by legal academia's traditional excessive reliance on rules and formal arrangements at the price of overlooking actual practice. Moreover, political scientists have paid insufficient attention to the role of legality in bureaucratic institutions in the Latin American context. Lastly, the lack of clear counterparts elsewhere has conspired against the involvement of foreign researchers, who could have brought less myopic disciplinary approaches.

Furthermore, due to the highly contextual nature of the research conducted in this thesis, analogous institutions in the Latin American region have not been paid enough attention. I relied on the received knowledge that the Chilean institution is quite unique in the region, but this assumption could be challenged by further empirically informed research. When case studies have already been done, the next step is to compare and contrast the institutions and attempt to explain the convergence and divergence among them.

III. POLICY REFORMS

I argue that a principle of coordination could inject rationality into current jurisdictional controversies affecting the relationship between the Comptroller-General and courts. However, it is undeniable that only legislative action could entirely overhaul the Chilean system of administrative justice. The core difficulty in such a course of action is the position of the Comptroller-General as a quasi-judicial, quasi-administrative institution of legal accountability. The problem is twofold. On the one hand, the abolition of the office seems to risk losing its highly desirable features, especially in terms of legal accountability and administrative effectiveness. On the other hand, transforming it into a court of justice could also entail losing or diminishing the positive consequences that its nonjudicial features seem to have had for the Chilean system. The question, in other words, is whether it is possible to reform the Comptroller-General without excessively judicialising it.

Nevertheless, a brief list of incremental changes could be suggested for future reform:

Leadership. The monocratic character of the Comptroller-General has been always been a controversial feature of the office. In the Allende period, critics singled out this characteristic of the institution as having the most damaging effect from a democratic point of view. Recently, it has also been suggested that introducing a collegiate top structure could reduce the body's arbitrariness and improve its rationality. However, being a single-headed organisation has given the Comptroller-General remarkable degrees of institutional energy and flexibility that would be entirely lost if transformed into a council. It would destroy the distinctive 'tribune' character of the office that has enabled it to effectively navigate turbulent times in the political domain. Rather, the way to reduce the authoritarian tendencies of the institution is to strengthen the bureaucratic component of the organisation.

Bureaucratic values. A worrying aspect of the institution is the degree of control of the head of office over his subordinates. It is here where a collegial element has to be introduced into the Comptroller-General Office. The ideal to be pursued here is to create a cadre of elite administrators that could deliberate and disagree among themselves, and improve and scrutinise administrative action. My suggestion echoes Breyer's recommendation for modernisation of the administrative process through the creation of an organisation comprising a technocratic elite: 'a mission oriented [group of administrators], seeking to bring a degree of uniformity and rationality to decision making in highly technical areas, with broad authority, somewhat independent, and with significant prestige...composed by civil servants who are following [a] career path, would draw strength from its ability to harness several virtues inherent in many administrative systems: rationalization, expertise, insulation, and authority'.⁸⁷⁹ This would require the strengthening of career protections and the independence of civil servants; formalising internal structures and procedures to promote collegiate deliberation; and encouraging diversity of experiences and professional backgrounds.

Separation of ex-ante and ex-post legality functions. I suggest introducing a divide between the ex-ante legality review and the ex-post dispute-resolution functions of the Comptroller-General. This proposal is partly inspired by the model of the French *Conseil*

⁸⁷⁹ Breyer (n 10) 61. See similar recommendations in Hood and others (n 690) 212.

d'Etat, whose consultative and judicial sections are institutionally detached from each other despite sharing a similar organisational culture and outlook.⁸⁸⁰ This change could also allow further changes in order to respond to serious due process concerns without unduly affecting the environment of dialogue with administration. However, it would be desirable that a future ex-post section of the Comptroller-General be modelled on inspectorial rather than adversarial processes.

Transparency and reason-giving. Opacity of procedures and vagueness of outcomes are pervasive problems in the Comptroller-General's current arrangements. This provides undesirable opportunities for capture by special interests and harmful strategic behaviour. Echoing early deficiencies in other scrutiny regimes such as Office of Information and Regulatory Affairs (OIRA) review in the US, the Comptroller-General currently seems to be shaping rules and decisions in ways that are fairly opaque for the public. Future reform has to avoid the transformation of the ex-ante review process of major administrative rules and decisions into an additional site for back-channel participation of special interests. Therefore, ex-parte communications with persons outside the executive branch have to be heavily formalised. Following reforms in the OIRA in the 1990s, future changes should establish that oral communications can be directed only to the Comptroller-General, granting civil servants representing administrative agencies the right to be present at any such meetings. In addition, following the example of OIRA, the Comptroller-General should be required 'to forward to the relevant agency all written communications from outsiders and to maintain a log, available to the public, of both written and oral communications involving these parties'.⁸⁸¹ Finally, after promulgation or a decision not to proceed, the Comptroller-General should be required to disclose all written communications between itself and the agency. Furthermore, future reform should impose on the Comptroller-General a duty to state reasons for its adverse decisions, at least in the context ex-ante review of major rules and decisions. The priority should be that Comptroller statements provide a concise and clear reasoning supporting its legal interpretations and findings in order to guide future administrative action and facilitate understanding by private parties.

⁸⁸⁰ Freedeman (n 11) 92; Bell, *French Legal Cultures* (n 11) 172–5.

⁸⁸¹ Kagan (n 711) 2286–7.

Judicial Review. We have seen in Chapter 8 that Organic Law Article 6 offers insufficient guidance on delimitation between the spheres of action of courts and the Comptroller-General. Furthermore, it assumes a formalistic distinction between administrative and judicial functions. Thus, I suggest making it a rule to establish specific conditions in which affected parties can challenge Comptroller determinations in courts. These conditions should be confined to questions of law, and clear cases in which the body has acted outside its jurisdiction.

IV. FUTURE RESEARCH

Several dimensions of the work of the Comptroller-General could be subject to further research. One is the relationship of the office with members of Congress and politicians more generally. This aspect emerged in several interviews with Comptroller-General officials. They said that politicians used their powers to request information concerning administrative processes, and also to initiate investigations. They also stated that politicians and members of Congress went to the Comptroller-General to represent their constituencies – community groups that needed to obtain benefits for their neighbourhood, for instance – and sometimes to accelerate administrative rules that implemented legislation that they sponsored in the legislative process. Qualitative research into this aspect of the office could ascertain the reasons why politicians use the office, the effectiveness of this function, the risk of the politicisation of the office, and the way the office uses this interaction to reinforce its standing vis-à-vis the executive branch.

Similarly, future research could investigate the role of the office at the local and regional level. The interaction of the Comptroller-General with the 340-plus Chilean municipalities is substantially different from the interaction it has with the more compact and centralised executive branch. With some of them, the office seems to have built quite constructive relationships, but with others – apparently the larger ones – there seems to be more friction. Taking advantage of the office's larger access, communities seem to use the office to adjudicate disputes between them and municipalities, and also with private companies operating under municipal permits. Finally, the office's role as a central interpreter of administrative legality may have special importance, as the degree of political and administrative fragmentation is remarkable, but legal practices seems to be

quite uniform across Chile – a country stretching 4,300 kilometres in length. The hypothesis here could be that the Comptroller-General has acted as a centralising force.

Another aspect of future research on the office should focus on particular policy areas such as human rights, anti-corruption and transparency, urban planning, and economic regulation. Research should use comparative institutional analysis – comparing courts and the Comptroller-General – to examine the advantages and shortcomings of the Comptroller technique in concrete policy areas. For instance, in some areas the expertise of the office might well be lower, inviting enhanced judicial involvement, while in other areas the need for dynamic, speedy decision-making could suggest a need to prioritise the Comptroller-General, with minimal, light touch judicial review. Empirically informed research into concrete policy areas could refine the findings of this thesis.

A further aspect that was touched on in this dissertation but could be examined more deeply by future research is the process of legitimation of the office within the Chilean political process. In other words, one future line of research concerns the factors that have contributed to the legitimation, or social acceptability, of this checking institution in the Chilean political system. Looking at the process of reputation-building and the development of robust institutional autonomy might shed light as to whether strong institutions can succeed in weak institutional contexts such as the Latin American one. Yet future studies should also look at the junctures in which the office retreated and lost public reputation.

Recently, Alan Angell has praised the office's contribution to the struggle against corruption, wondering how other Latin American countries could adopt a similar institution.⁸⁸² This raises the question of whether this institution could be exportable to neighbouring countries. The Comptroller-General Office was never deliberately designed as an institution of legal accountability. Its current shape emerged as an unintended consequence of historical contingency and political accommodation in the context of 'small country governance', that is, benefiting from its proximity among different groups within the governing elite. Put differently, it may be said that the office has grown in a

⁸⁸² Alan Angell, 'Democratic Governance in Chile' in Scott Mainwaring and Timothy R. Scully (eds), *Democratic governance in Latin America* (Stanford University Press 2010) 296.

functional or non-rationalistic manner.⁸⁸³ The institution adapted in a context of constant clashes between the executive branch and Congress in order to provide legal supervision over an expanding bureaucracy. Rather than a mechanical, direct legal transplant of an institution from one legal system into another, the development of the Comptroller's Office in Chile reveals a story of successful institutional cross-fertilisation understood as incremental internal legal evolution fitted to a domestic context.⁸⁸⁴ All this suggests that transplantation to other legal systems might be inherently difficult, but it recommends exploring whether similar indigenous institutions could grow and adapt in similar ways, incarnating internal administrative law values.

To conclude, the underlying issue this thesis has attempted to address is the ways in which public administration and legality interact. The thesis highlights the fact that legality and bureaucracy are not necessarily two opposing forms of social ordering. On the contrary, administrative action is shaped by legality as an enabling constraint. Administration, in turn might develop its own, distinctive forms of legality, that is, instances of what has been called 'internal administrative legality'. In addition, this thesis emphasises the diversity of the institutional forms that legal accountability can adopt in different legal cultures or traditions, and the way excessive focus on convergence may eclipse the plurality of legal forms that may have silently evolved over time in different jurisdictions. In this sense, this thesis is a reaction to court-centred studies on the law and politics. It also reacts to studies that focus on convergence on judicial institutions and practices by revealing a particularistic development of forms of legal control of bureaucracy. Furthermore, it reacts against assumptions that the existence of strong courts should be equated with higher stages of legal institutional development.

⁸⁸³ Graham Gee and Grégoire Webber, 'Rationalism in Public Law' (2013) 76 *The Modern Law Review* 708.

⁸⁸⁴ John Bell, 'Mechanisms for Cross-Fertilisation of Administrative Law in Europe' in J Beatson and Takis Tridimas (eds), *New directions in European public law* (Hart Publishing 1998).

APPENDIX I. INTERVIEWS

	Interviewee	Date
1.	Senior Legal Advisor of Presidency Office	11.09.2014
2.	Senior Legal Advisor to Regulatory Departments within the Executive, and Senior Officer in the Comptroller-General	13.09.2014
3.	Senior Legal Advisor to Regulatory Departments within the Executive, and Senior Officer in the Comptroller-General	22.09.2014 & 03.11.2015
4.	Attorney at a law-firm specialized in public law litigation and consultancy	20.09. 2014
5.	Legal advisor to the Treasury Solicitor's Department (<i>Consejo de Defensa del Estado</i>)	12.09.2014
6.	Senior Legal Advisor of Presidency Office	22.09.2014
7.	Former Chief of Staff of the Comptroller General	20.10.2014
8.	Attorney at a law-firm specialized in public law litigation and consultancy	20.10.2015
9.	NGO director (urban protection)	20.10.2015
10.	NGO attorney (human rights)	21.10.2015
11.	Former Chief of Staff of the Comptroller General	02.11.2015
12.	Attorney at a law-firm specialized in public law litigation and consultancy	02.11.2015
13.	Senior Legal Advisor of Presidency Office	04.11.2015
14.	NGO attorney (Women's rights)	05.11.2015
15.	Senior Legal Advisor of Presidency Office	04.11.2015
16.	Attorney at a law-firm specialized in public law litigation and consultancy	09.11.2015
17.	Attorney at a law-firm specialized in public law litigation and consultancy	10.11.2015
18.	In-house Lawyer in Regulated Industry	11.11.2015
19.	Senior Legal Advisor to Human Rights Institution	11.11.2015
20.	Senior Legal Advisor to Regulatory Departments within the Executive	16.11.2015
21.	Former Senior official in the Comptroller-General	16.11.2015
22.	Attorneys at a law-firm specialized in public law litigation and consultancy	17.11.2015
23.	Former Senior official in the Comptroller General and Former member of the judiciary	18.11.2015

24.	Senior Legal Advisor to Santiago Municipality	18.11.2015
25.	Former Senior official in the Comptroller General	19.11.2015
26.	Senior Legal Advisor to Regulatory Departments within the Executive	19.11.2015
27.	Senior Legal Advisor to Regulatory Departments within the Executive	19.11.2015
28.	Former Senior official in the Comptroller-General	20.11.2015
29.	Legal advisor to the Treasury Solicitor's Department (<i>Consejo de Defensa del Estado</i>) and senior member of the judiciary	18.04.2016 & 19.04.2016
30.	Senior Official in the Comptroller-General	26.04.2016
31.	Official in the Comptroller General	07.04.2016
32.	Senior Legal Advisor to Regulatory Departments within the Executive	02.05.2016
33.	Attorneys at a law-firm specialized in public law litigation and consultancy	19.05.2016
34.	NGO activist (animal rights)	02.05.2016
35.	Legal Advisor to Human Rights Institution	25.04.2016
36.	Senior Legal Advisor to Regulatory Departments within the Executive	17.05.2016
37.	NGO attorney (environmental)	13.04.2016 & 18.04.2016
38.	Senior Legal Advisor of Presidency Office & currently Attorney at a law-firm	06.04.2016
39.	Senior Legal Advisor of Presidency Office & currently Attorney at a law-firm	21.04.2016
40.	NGO Attorney (migrants)	25.05.2016

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