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# Between the Agency and the Court: Ex Ante Review of Regulations

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*Administrative regulations are an important tool of modern government, but their legitimacy is often questioned since they are adopted by the executive branch rather than the legislature. Judicial review of the legality of regulations is necessary but not sufficient as an accountability mechanism because judicial review is subject to many practical and legal shortcomings, especially including its high cost. Consequently, the vast majority of regulations are never subject to judicial review, which creates an accountability deficit. This deficit can be remedied through ex ante administrative review of the legality of regulations by an executive branch agency that is independent of the adopting agency. This Article evaluates executive branch ex ante legality review schemes in California, Chile, Israel, and France. Although these regulatory review schemes vary greatly, each of them scrutinizes the substantive and procedural legality of regulations (as distinguished from their economic or environmental effect or their political acceptability). This review takes place before the regulations are judicially reviewed and before they become effective. Ex ante administrative review can compensate for the failings of judicial review, promote the rule of law, and enhance the legitimacy of the regulatory process.*

## INTRODUCTION

Most contemporary legal systems rely heavily on regulations adopted by the executive branch to supplement the necessarily incomplete terms of statutes adopted by the legislative branch. For that reason, regulations form an extremely important aspect of modern government,

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both to private parties subject to regulation and to the beneficiaries of statutory schemes who wish to see them effectively implemented.

By “regulations” we mean *generally applicable* and *legally binding* actions taken by the executive branch of government.<sup>1</sup> We use the words “regulations” and “rules” interchangeably, and often describe the process of adopting them as “rulemaking.” Regulations are usually considered and adopted by government agencies (rather than by the chief executive).<sup>2</sup>

This Article focuses on schemes of *ex ante administrative legality* review of regulations. These schemes provide administrative review on the grounds of procedural or substantive legality. The review is conducted by a reviewing agency that is independent of the adopting agency. Ex ante review precedes the effective date of the regulation and precedes judicial review. In contrast, judicial review occurs after the regulation is adopted and becomes effective. The rationale for ex ante review schemes is that judicial review of the legality of regulations is a necessary *but not sufficient* accountability mechanism. We use the term “accountability mechanism” to mean an institution that requires a public agent to justify its fidelity to applicable mandates.<sup>3</sup>

This Article discusses ex ante administrative review of regulations in four jurisdictions—California, Chile, Israel, and France. Each imposes a *legality check* on regulations adopted by executive branch agencies prior to their effective date and prior to judicial review. These institutions appear to be working well and to enjoy legitimacy within their political and legal cultures. We know of no other jurisdictions that employ comparable institutions. We believe that our comparative discussion of the four ex ante review systems is more useful than a granular study of the system of a single country, since the four systems differ in numerous practical, cultural, and historical ways. Comparative treatment increases the utility of the Article in analyzing the efficacy

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<sup>1</sup> Various countries refer to regulations as rules, secondary or delegated or subordinate legislation, quasi-legislative action, statutory instruments, ordinances, decrees, normative documents, or other titles.

<sup>2</sup> We use the term “agency” to refer to a unit of government other than the chief executive, a court, or a legislature. Such units may also be called a bureau, department, ministry, or other title.

<sup>3</sup> See Mark Bovens, Thomas Schillemans & Robert E. Goodin, *Introduction* to THE OXFORD HANDBOOK OF PUBLIC ACCOUNTABILITY 9 (Mark Bovens, Robert E. Goodin & Thomas Schillemans eds., 2014); Andreas Eriksen, *Agency Accountability: Management Expectations or Answerability to Mandate?* (TARN Working Paper 2/2019), <https://ssrn.com/abstract=3328444>; Edward Rubin, *The Myth of Non-bureaucratic Accountability and the Anti-administrative Impulse*, in PUBLIC ACCOUNTABILITY: DESIGNS, DILEMMA AND EXPERIENCES 52, 74–75 (Michael W. Dowdle ed., 2006); Jerry L. Mashaw, *Accountability and Institutional Design: Some Thoughts on the Grammar of Governance*, in PUBLIC ACCOUNTABILITY: DESIGNS, DILEMMA AND EXPERIENCES, *supra*, at 115, 117–22; Mark Bovens, *Analysing and Assessing Accountability: A Conceptual Framework*, 13 EUR. L.J. 450 (2007).

of ex ante review systems and pointing the way for other jurisdictions to consider possible transplantation.

The meaning of the term “legality” may vary among ex ante review systems. Legality review minimally includes consideration of the consistency of a regulation with the jurisdiction’s constitution and with the statute that delegated rulemaking power to the agency. It also considers whether the agency satisfied the procedural requirements for rulemaking. Depending on the legal system, legality review may also include consideration of additional criteria such as proportionality, abuse of discretion, reasoned decision making, factual support in the rulemaking record, illegal motives, and similar doctrines. This Article does not consider administrative review of regulations on non-legalistic grounds such as public policy, political acceptability, fiscal concerns, environmental impact, risk analysis, or cost-benefit analysis. Nor do we consider parliamentary review of regulations, such as exists in many countries and in some U.S. states. Finally, this Article does not consider systems of review of adjudicatory agency action, such as tribunals or ombudsmen.

Part I describes ex ante review schemes in California, Chile, Israel, and France. Part II claims that judicial review fails to provide a satisfactory accountability mechanism to check illegality of regulations. As a result, a system relying primarily on judicial review to check the legality of agency rules may suffer from an accountability deficit. Part III discusses whether ex ante legality review schemes might reduce that deficit and whether such schemes might create new problems. Part IV considers the relationships between the adopting agency, the reviewing agency, and judicial review. Part V briefly concludes.

We do not suggest that ex ante administrative legality review is a panacea and we acknowledge that adopting such a system involves tradeoffs. Nevertheless, ex ante legality review systems deserve to be considered along with other accountability mechanisms in pursuit of the goal of enhancing the legitimacy of the regulatory process.<sup>4</sup>

In addition to providing a useful accountability check, ex ante review systems could serve as an important step in pursuit of the rule of law, an important objective for legal scholars in all

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<sup>4</sup> See Gillian E. Metzger, *1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1 (2018) (rebutting academic claims of illegitimacy of administrative process); Mashaw, *supra* note 3, at 131–32 (explaining that ex post checks on government action fail to satisfy demands for legitimacy); Jon D. Michaels, *An Enduring, Evolving Separation of Powers*, 115 COLUM. L. REV. 515, 551–67 (2015) (discussing internal separation of powers as enhancing legitimacy of regulatory process).

countries. The meaning of the phrase “rule of law” is contested and may include many procedural and substantive elements.<sup>5</sup> Nevertheless, one indisputable element of even a minimal version of the rule of law is that regulations adopted by the executive branch of government should be consistent with applicable constitutional provisions and with the statutes that the regulations implement. This principle of legality is foundational in all administrative law systems.<sup>6</sup>

Administrative law scholarship around the world often consists exclusively of discussions of constitutional separation of powers and judicial review.<sup>7</sup> This academic preoccupation with constitutional law and judicial review is understandable in light of the court-centered training of legal scholars and the content of many administrative law courses in law school,<sup>8</sup> as well the relative accessibility of court cases and their practical and political importance in all countries. Unfortunately, it sometimes seems that the question of what occurred before the dispute gets to court matters little. We disagree with this approach and favor development and study of internal administrative law and practice<sup>9</sup> and internal separation of powers,<sup>10</sup> as well as judicial review. We hope that this Article helps to decenter judicial review and refocus administrative law on accountability mechanisms situated within the executive branch that enhance the core values of public law.

## I. FOUR EX ANTE ADMINISTRATIVE REVIEW SYSTEMS

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<sup>5</sup> See, e.g., Richard H. Fallon, Jr., *Judicial Supremacy, Departmentalism, and the Rule of Law in a Populist Age*, 96 TEX. L. REV. 487, 512–30 (2018); Todd S. Agaard, *Agencies, Courts, First Principles and the Rule of Law*, 70 ADMIN. L. REV. 771, 778–82 (2018).

<sup>6</sup> See, e.g., Paul Craig, *Legality—Five Views of the Cathedral*, in OXFORD HANDBOOK OF COMPARATIVE ADMINISTRATIVE LAW (Peter Cane, Peter Lindseth & Blake Emerson (2019).

<sup>7</sup> Nicolas R. Parrillo, *Introduction to ADMINISTRATIVE LAW FROM THE INSIDE OUT* 1 (Nicolas Parrillo ed., 2d ed. 2017) (the dominant concern of academics writing about U.S. federal administrative law are separation of powers and judicial review); Mark Mancini, *Ten Things I Dislike About Administrative Law*, DOUBLE ASPECT (Sept. 10, 2018), <https://doubleaspect.blog/2018/09/10/10-things-i-dislike-about-administrative-law> (“In [Canadian] law schools, administrative law almost exclusively is taught as the law of judicial review. Little attention is paid to the bowels of administrative law—the different sorts of decision-makers in the ‘administrative state,’ their policies and procedures . . .”).

<sup>8</sup> See Peter L. Strauss, *Jerry Mashaw and the Public Law Curriculum*, in ADMINISTRATIVE LAW FROM THE INSIDE OUT, *supra* note 7, at 87.

<sup>9</sup> See Gillian E. Metzger & Kevin M. Stack, *Internal Administrative Law*, 115 MICH. L. REV. 1239 (2017) (criticizing over-reliance on judicial review and encouragement of internal checking mechanisms); Christopher J. Walker, *Administrative Law Without Courts*, 65 UCLA L. REV. 1620 (2018) (urging that it is a mistake to fixate on judicial review as the core safeguard of the rule of law); Parrillo, *supra* note 7 (discussing Mashaw’s emphasis on internally generated checking mechanisms in Social Security). Some of the ex ante schemes described in this article are generated through legislation, rather than from within the bureaucracy, but, like internally generated systems, they permit the executive to correct its own errors before the external check of judicial review comes into play.

<sup>10</sup> See Michaels, *supra* note 4, at 553–70 (discussing legitimating effects of rivalrous separation of powers within agencies).

The following discussion provides information about ex ante review of rules in California, Chile, Israel, and France, including the status of the review scheme within the state or country's constitutional system, its history, the types of action that it reviews, its workload, the grounds for its review, the process whereby review occurs, and the relationship of ex ante review to judicial review.

### A. *California: The Office of Administrative Law (OAL)*

In the United States, each state maintains its own set of administrative agencies and has its own statutory and constitutional system for checking those agencies. Californian administrative law differs from federal law on nearly every contestable issue, including rulemaking procedures.

Both the federal and California Administrative Procedure Acts (APAs) require agencies to complete a process of public notice and comment before adopting a regulation. However, the required rulemaking procedures are quite different. Federal law consists of a simple set of rulemaking requirements that have been vastly amplified by court decisions and executive actions.<sup>11</sup> In contrast, California's APA sets forth painfully detailed requirements for rulemaking<sup>12</sup> and contains a unique ex ante review requirement.<sup>13</sup> The OAL must approve every "regulatory action" (meaning the adoption, amendment, or repeal of a regulation) before the action becomes effective.<sup>14</sup> To our knowledge, no other U.S. state employs ex ante administrative legality review of regulations.

#### 1. Status of the OAL in California Government

The OAL is an executive branch agency. The director of the OAL is appointed by the governor for the same term of office as the governor and cannot be removed without good cause. Under the 2017–2018 state budget, the OAL has twenty positions and its budget is \$3,619,000.<sup>15</sup> This is a tiny percentage of the entire state budget, which calls for expenditures in excess of \$125 billion. We are not aware of any executive branch interference with OAL decisions.

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<sup>11</sup> See, e.g., JEFFREY S. LUBBERS, A GUIDE TO FEDERAL AGENCY RULEMAKING (5th ed. 2018).

<sup>12</sup> ASIMOW ET AL., *supra* note **Error! Bookmark not defined.**, ch. 23.

<sup>13</sup> See MICHAEL ASIMOW ET AL., CALIFORNIA PRACTICE GUIDE: ADMINISTRATIVE LAW ch. 24 (2018). See also the OAL's informative website, <http://oal.ca.gov>.

<sup>14</sup> CAL. GOV'T CODE § 11349.1.

<sup>15</sup> See STATE OF CAL., ENACTED STATE BUDGET 2017–18—GOVERNMENT OPERATIONS—7910 OFFICE OF ADMINISTRATIVE LAW, [www.ebudget.ca.gov/2017-18/pdf/Enacted/GovernorsBudget/7500/7910.pdf](http://www.ebudget.ca.gov/2017-18/pdf/Enacted/GovernorsBudget/7500/7910.pdf) (last visited Mar. 15, 2020).

## 2. History of the OAL

The original California APA required only bare-bones notice and comment rulemaking procedure (similar to the federal APA approach). In 1979, however, the legislature fought a major battle over rulemaking. Republicans were suspicious of regulations. They favored enactment of a legislative veto (that would allow either house to veto a regulation without the governor's consent) and of sunset clauses on regulatory statutes that would phase them out unless the legislature renewed them. Democrats wanted to avoid the legislative veto and sunset clauses. The 1979 compromise legislation amended California's APA by setting forth a detailed set of requirements for rulemaking and establishing the OAL to conduct ex ante review.<sup>16</sup>

## 3. Agency Actions Reviewed by the OAL

The OAL reviews all regulatory actions taken by about 200 state agencies. In addition, California law prohibits agencies from adopting guidance documents (soft law) without going through the same notice and comment process that is required for the adoption of legally binding regulations (hard law). One of the OAL's jobs is to rule on whether this prohibition has been violated.<sup>17</sup>

## 4. Grounds for OAL Review

The OAL reviews regulations under a number of different standards<sup>18</sup> including necessity<sup>19</sup> and consistency with statutes or other provisions of law.<sup>20</sup> The "consistency" and "necessity" tests applied by the OAL ex ante are the same as those that a reviewing court applies ex post.<sup>21</sup>

## 5. Workload of the OAL

The OAL reviews around 600–700 regulatory actions annually. During the forty-five-day period ended August 1, 2018, the OAL approved sixty-four regulatory actions, disapproved none,

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<sup>16</sup> See Marsha N. Cohen, *Regulatory Reform: Assessing the California Plan*, 1983 DUKE L.J. 231, 235–37.

<sup>17</sup> CAL. GOV'T CODE § 11340.5(b). See Michael Asimow, *California Underground Regulations*, 44 ADMIN. L. REV. 43 (1992).

<sup>18</sup> CAL. GOV'T CODE § 11349.1.

<sup>19</sup> "'Necessity' means the record of the rulemaking proceeding demonstrates by substantial evidence the need for a regulation to effectuate the purpose of the statute, court decision, or other provision of law that the regulation implements, interprets, or makes specific, taking into account the totality of the record." *Id.* § 11349(a).

<sup>20</sup> "'Consistency' means being in harmony with, and not in conflict with or contradictory to, existing statutes, court decisions, or other provisions of law." *Id.* § 11349(d).

<sup>21</sup> *Id.* §§ 11342.2, 11350.

and six were withdrawn.<sup>22</sup> Withdrawal usually occurs after the OAL informally tells an agency that the OAL will disapprove the proposed regulatory action; agencies resubmit the regulation after withdrawal if the defect can be fixed. On August 2, 2018, the OAL had fifty-four regulations under consideration.<sup>23</sup>

During 2017, the OAL disapproved seventeen regulatory actions, usually for multiple reasons.<sup>24</sup> Of the disapprovals, fifteen were for lack of clarity, fifteen for lack of necessity, eight for procedural defects, and four for consistency (meaning illegality). During calendar 2016, it disapproved twenty-three regulatory actions—fourteen for lack of clarity, twelve for lack of necessity, sixteen for procedural reasons, and five for consistency.

## 6. The OAL's Review Process

Regulatory action must be submitted by the adopting agency to the OAL before it becomes effective. The public does not participate in the OAL's review process and the OAL does not accept ex parte communications from either the public or the adopting agency.<sup>25</sup> The OAL has thirty working days to disapprove a regulation or else it becomes effective without OAL approval.

## 7. Relationship of Judicial Review and OAL Review

California's judicial review system takes place in the general court system. It begins at the trial court level through an action seeking a writ of mandamus or a declaratory judgment; the trial court decision is subject to an appeal as of right to the Court of Appeal and discretionary review by the California Supreme Court.

Judicial review is "closed," meaning it is based on the record made at the agency level which consists of material considered by agency decision makers. It consists of written briefs and oral argument, not a new trial to determine evidentiary issues. The private party cannot make arguments that were not made by someone during the administrative process that led to the disputed rule; and the agency cannot state reasons for its action other than those it stated at the time the action was taken.<sup>26</sup>

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<sup>22</sup> *Recent Actions Taken by OAL on Proposed Regulations*, OFFICE OF ADMIN. LAW (OAL), [https://oal.ca.gov/rulemaking\\_process/regular\\_rulemaking\\_process/recent-actions](https://oal.ca.gov/rulemaking_process/regular_rulemaking_process/recent-actions) (last visited Mar. 15, 2020).

<sup>23</sup> *Proposed Regulations Under Review*, OAL, <https://oal.ca.gov/proposed-regulations> (last visited Mar. 15, 2020).

<sup>24</sup> *Disapproval Decisions*, OAL, [http://oal.ca.gov/publications/disapproval\\_decisions](http://oal.ca.gov/publications/disapproval_decisions) (last visited Mar. 15, 2020).

<sup>25</sup> CAL. CODE REGS. tit. 1, § 55(a)(2).

<sup>26</sup> See Michael Asimow & Yoav Dotan, *Open and Closed Judicial Review of Agency Action: The Conflicting U.S. and Israeli Approaches*, 64 AM. J. COMP. L. 521 (2016).

The issues on judicial review are whether the agency action is legal (meaning consistent with statutes and the federal and state constitutions), whether it satisfied procedural requirements for rulemaking under the APA, and whether the discretionary aspects of the rule satisfy the standard of reasoned decision making. The agency's factual determinations must be supported by substantial evidence in the record.

If the OAL disapproves a regulation, the adopting agency can appeal to the governor, but this rarely, if ever, occurs. Any interested person can seek judicial review of an OAL disapproval decision.<sup>27</sup> This provision allows a person or group that was in favor of a regulation (such as an environmental protection organization) to challenge an OAL disapproval; again, however, this seldom if ever occurs. If the OAL approves a regulation, interested persons can challenge the regulation in court. The OAL's prior approval of a regulation has no effect on such a challenge.<sup>28</sup>

#### 8. Hypothetical Example of OAL Review

California law allows parents to educate their children at home rather than enroll them in school. Assume a statute prohibits public schools from enrolling any child who has not been vaccinated against measles. The Department of Public Health (DPH) has the power to adopt regulations to implement this statute. The DPH proposes a regulation that prohibits parents from home schooling any child who has not been vaccinated against measles.

Under the California APA, the public must receive notice of the proposed regulation, which must be supported by extensive disclosures and analyses. The DPH must invite written comments and hold a public hearing. It must provide an analysis accompanying the final rule that includes responses to all public comments. If the DPH makes any changes in the proposed rule, it must give the public an additional opportunity to comment. Then the final rule must be submitted to the OAL.

The OAL might decide that the regulation is legally invalid because the vaccination statute does not apply to home schools. The regulation cannot go into effect, and the DPH must revise and resubmit it, presumably by eliminating the home school provision. On the other hand, if the OAL approves the rule, the parents of home schoolers could challenge it on judicial review. The OAL's prior approval would have no effect on the judicial review process.

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<sup>27</sup> CAL. GOV'T CODE § 11350.3. It is unclear whether an adopting agency qualifies as an "interested person" that could seek judicial review of an OAL disapproval of its regulation. We know of no case in which this has been attempted.

<sup>28</sup> *Id.* § 11350(c).

## B. Chile: Comptroller General of the Republic

The Comptroller General of the Republic (CGR) is the agency responsible for ex ante legality review of regulations in Chile.<sup>29</sup> The Spanish title is *Contraloría General de la República*. The head of the CGR is the *Contralor General de la República* (CG).

### 1. Status of the CGR in Chilean Government

The CGR is an independent executive agency, not subject to presidential control.<sup>30</sup> The Constitution prescribes such independence, usually described in Chile as “constitutional autonomy.”<sup>31</sup> The CGR is a large institution by Chilean and comparative standards, having around 2000 employees (of which 9.4% are assigned to regulatory review) and a 2018 budget of around \$126,000,000.<sup>32</sup>

The CG is appointed by the President with consent of three-fifths of the Senate. The CG has a term of eight years in office, unless the CG reaches age seventy-five before the end of that period. He or she can be removed only by impeachment<sup>33</sup> or by a special trial called *amovilidad*.<sup>34</sup>

The CGR performs numerous important functions in the Chilean system, among them exercising legality control of administrative acts mainly through a procedure called *toma de razón* (TDR). TDR originally meant a formal *record* of an administrative act; *tomar razón* was the formula for “taking note” of an administrative decision having budgetary consequences. But institutional practice and legislation progressively transformed TDR into a sophisticated ex ante legality control. In addition to administering the TDR process, the CGR is in charge of the general accounting of the nation, adjudicates cases of misuse of public funds, controls national and municipal revenues, and provides a forum to adjudicate disputes relating to public employees.

### 2. History of CGR Review Power

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<sup>29</sup> Guillermo Jiménez, Nonjudicial Administrative Justice in Latin America: A Case Study of the Chilean Comptroller-General (2018) (unpublished Ph.D. thesis, University College London) (on file with Asimow).

<sup>30</sup> The function of the CGR is so important that it is sometimes described as a fourth branch of government. See Eduardo Soto Kloss, *La Toma de Razón y el Poder Normativo de la Contraloría General de la República*, in 50 AÑOS DE VIDA INSTITUCIONAL 165 (Soto Kloss ed., 1977).

<sup>31</sup> CONSTITUCIÓN POLITICA DE LA REPÚBLICA DE CHILE [C.P.] art. 98(1).

<sup>32</sup> Dirección de Presupuestos, Ministerio de Hacienda, Ley de Presupuestos Año 2018—Partida: Contraloría general de la República, [www.dipres.gob.cl/574/articles-168734\\_doc\\_pdf.pdf](http://www.dipres.gob.cl/574/articles-168734_doc_pdf.pdf) (last visited Mar. 15, 2020).

<sup>33</sup> C.P. art. 98(2).

<sup>34</sup> Ley No. 10.336 art. 4, Mayo 29, 1952, **DIARIO OFICIAL [D.O.]** (Organic Statute of Contraloría); in the original text of 1952, art. 6..

TDR has existed since colonial times, when it was performed mainly as a budgetary control.<sup>35</sup> After independence in 1818, the republican authorities maintained the *Contaduría Mayor*, exercising TDR in a manner similar to present practice.<sup>36</sup> The *Contaduría Mayor* was replaced at the end of the nineteenth century by several other agencies, but this division led to confusion and financial disorder, so their powers were merged in 1927 in a new agency called CGR—essentially a successor to the *Contaduría Mayor*.<sup>37</sup> The TDR process is currently embedded in the Constitution, the Organic Statute of CGR (OSCGR), and specific regulations issued by CGR.

### 3. Agency Actions Reviewed by the CGR

The TDR process applies to executive orders (*decretos supremos*) issued by the President as either regulations or adjudications.<sup>38</sup> It also applies to *resoluciones*, the category comprising rules and adjudications issued by ministers and chiefs of agencies, but this case is more flexible than *decretos supremos*. The OSCGR allows the CG to decide which *resoluciones* will be considered as nonessential and therefore excluded from TDR.<sup>39</sup> Excluded acts are called *actos exentos*.

### 4. Grounds for CGR Review

TDR is considered a legality control. As a result, issues of *mérito*, *oportunidad*, and *conveniencia*<sup>40</sup> cannot be reviewed through TDR.<sup>41</sup> Nonetheless, the boundary between legality

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<sup>35</sup> GABRIEL BOCKSANG HOLA, EL NACIMIENTO DEL DERECHO ADMINISTRATIVO PATRIO DE CHILE (1810–1860) 172–73 (2017).

<sup>36</sup> *Id.* at 173–81.

<sup>37</sup> The first statute of the CGR (*Decreto con Fuerza de Ley No. 400 bis, Mayo 12, 1927, Diario Oficial [D.O.]*) was enacted during a period of political turmoil and constitutional change, resulting in a 1925 amendment to the Constitution of 1833.

<sup>38</sup> Presidential regulations cannot be excluded from TDR (e.g., *dictamen CGR No. 97773-2014*, Diciembre 17, 2014). Other presidential actions can be excluded, when approved through a “signature delegation,” which permits the President to authorize a minister to issue an act of presidential competence. OSCGR, *supra* note 34, art. 10(5).

<sup>39</sup> Ley No. 10.336 art. 10(5). The text currently listing these exclusions is Resolución No. 7, Marzo 29, 2019, *Diario Oficial [D.O.]*.

<sup>40</sup> In Chilean administrative law, these concepts are opposed to issues of legality. *Mérito* means “factual appropriateness,” *oportunidad* means “time appropriateness,” and *conveniencia* means “political or technical appropriateness.”

<sup>41</sup> OSCGR art. 21B, Mayo 29, 1952, *Diario Oficial [D.O.]*, excludes these forms of rationality review from CGR consideration. However, some scholars argue that TDR should be expanded to these domains. Baltazar Morales, *El Mérito, Oportunidad y Conveniencia en la Contraloría General de la República*, in 85 AÑOS DE VIDA INSTITUCIONAL, CONTRALORIA GENERAL DE LA REPUBLICA at 207, 218 (Ramiro Mendoza ed., 2012).

and these concepts is often unclear. In any case, the scope of legality<sup>42</sup> for purposes of TDR is very wide.<sup>43</sup> It includes lack of power of administrative bodies, unlawful scope, unlawful motives, procedural irregularities, or unjustified delay.

## 5. Workload of the CGR

Every year, the CGR performs hundreds of thousands of TDRs in different administrative actions. While actions exempt from TDR are more numerous than those subject to it,<sup>44</sup> the figures are nonetheless impressive. In 2017, there were 28,515 TDR procedures in non-civil servant issues. During the same year, there were 32,110 TDR procedures and 106,927 electronic TDR procedures involving civil servant issues. Therefore, a total of 167,552 TDR procedures were performed in 2017,<sup>45</sup> but less than 1% were related to regulations.

## 6. Process of TDR

The process of TDR review is well established. TDR is excluded from the Chilean APA and has its own procedural rules.<sup>46</sup> Regulations must be submitted by the adopting agency to the CGR before they can become effective. They have no legal force before TDR is performed and the regulation is properly communicated. The public does not participate in the CGR's review process. The CGR has fifteen days to complete the TDR process, plus a possible fifteen-day extension.<sup>47</sup> However, TDR can take much longer, and there is no legal consequence if such delays take place.

The TDR procedure ends either with approval of the legality of the measure or disapproval (*representa*). CGR's approval can be unconditional or it can add remarks (called *alcances*) that interpret the regulation or rectify errors. In case of disapproval, the measure will not be enacted unless the modified text is approved by the CGR. Disapproval is frequently avoided through

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<sup>42</sup> See Gabriel Bocksang Hola, *The Chilean Rule of Law Threatened by Contra Legem Hermeneutics*, in RECENT DEVELOPMENTS IN ADMINISTRATIVE LAW AND ALTERNATIVE DISPUTE RESOLUTION 77 (Russell L. Weaver & Stephen I. Friedland eds., 2017).

<sup>43</sup> Corte Suprema de Justicia [C.S.J.] [Supreme Court], 1 junio, 2012, "[Ovalle Lecaros v. Fisco de Chile](#)", rol No. 5525-2009..

<sup>44</sup> Enrique Rajevic & María Fernanda Garcés, *La Toma de Razón, Diagnóstico del Rol que Desempeña en el Sistema de Control Chileno*, in UN MEJOR ESTADO PARA CHILE at 613–46, 622 (Claudio Seebach, Visnja Tomicic & Cristián García eds., 2009).

<sup>45</sup> *Cuenta pública 2017*, CONTRALORIA GENERAL DE LA REPUBLICA 20, 31–32 (2017), <https://www.contraloria.cl/documents/451102/11514766/Cuenta+2017/63913698-bd1b-2f3f-6add-d34df479b187>.

<sup>46</sup> OSCGR art. 1(2), Mayo 29, 1952, [DIARIO OFICIAL \[D.O.\]](#). For a discussion of the TDR process, see Jiménez, *supra* note 30, at 219–37.

<sup>47</sup> Ley No. 10.336 art. 10(1).

*withdrawals* performed by the agency during TDR. This occurs when the CGR detects illegal features and informs the agency about a probable disapproval of the regulation.<sup>48</sup> The agency corrects the problem before asking the CGR to continue with the TDR procedure.

If the CGR disapproves an administrative decision, the President can still force its enactment with the concurrence of all ministers (currently around twenty), through a mechanism called *insistencia*. However, the political turmoil this mechanism unleashed during the period 1955–1973 was such that it has not been used since 1990.<sup>49</sup> Moreover, the President cannot exercise *insistencia* if the CGR declares that an administrative act is not merely illegal but unconstitutional. The President's only recourse in this situation is a challenge against the CGR before the Constitutional Court, a procedure that has never been used.<sup>50</sup>

## 7. Impact on Judicial Review

Chilean judicial review is performed by ordinary judges, except for some special courts that decide environmental or tax disputes. The judges are not expected to have specific knowledge on technical administrative issues but they are well prepared on general aspects of Chilean law. As judicial review is open, parties can introduce new evidence that was not considered during the administrative stages.<sup>51</sup>

The role of TDR was crucial between 1925 and 1989, when two constitutions (1925 and 1980) established that special administrative courts would provide judicial review. The legislature never created these courts. Ordinary judges considered themselves incompetent to resolve administrative issues because of Article 187 of the 1925 Constitution called for the creation of administrative judges, but none were appointed. Consequently, TDR served as a substitute for judicial review during that period. Beginning in the mid-1970s, courts ruled that Article 187 did not prevent judicial review. Judicial review of administrative action in the ordinary courts was formally institutionalized by the 1989 amendments to the 1980 constitution.

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<sup>48</sup> Rajevic & Garcés, *supra* note 45, at 622–23.

<sup>49</sup> In 1990, President Aylwin issued an executive order in order to remove the president of a state university: Septiembre 4, 1990, DIARIO OFICIAL [D. O], n. 647/1990.

<sup>50</sup> CONSTITUCIÓN POLITICA DE LA REPÚBLICA DE CHILE [C.P.] art. 99(1).

<sup>51</sup> Open review is the norm in Chile and there is no exception for administrative cases. See COD. PROC. CIV. art. 341. Closed review is exceptional in Chile but does occur in tax cases. See Florencia Larrain, *Algunas consideraciones en torno al artículo 132 del Código Tributario y la igualdad y defensa de las partes en el proceso*, 18 REVISTA DE ESTUDIOS TRIBUTARIOS at 161 (2017).

TDR does not immunize the administrative act against judicial review.<sup>52</sup> The supremacy of judicial review over the CGR's activity was emphasized in 2012, when the Supreme Court declared that the CGR "must bow before the jurisprudence of the courts."<sup>53</sup> Thus, it is always possible to challenge an action approved through a TDR. But TDR is considered as an important fact in the judicial assessment of legality. Judges frequently recall that a TDR had been performed when they want to add an argument in favor of the action's legality.<sup>54</sup>

It is unclear whether it is possible to secure judicial review of a TDR disapproval. Theoretically, judicial challenge might be possible.<sup>55</sup> However, the Supreme Court and the Senate have explicitly excluded review of a TDR disapproval in the case of an *acción de protección*, an action that enables immediate protection of constitutional rights.<sup>56</sup>

## 8. Hypothetical Example of TDR Review

Suppose that the President adopts an executive order related to new legislation stating that optional vaccines will be free of charge for people living in Chile. The executive order introduces an exception: irregular migrants will have to pay for the vaccination. The President and the ministers sign the executive order and send it to the CGR for TDR. The CGR would examine its legality and could determine that the rule is invalid because the legislation had no exceptions. In this case, the CGR may informally contact the President to allow withdrawal of the illegal executive order before official disapproval. If the President does not withdraw the order, the CGR

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<sup>52</sup> Tribunal Constitucional [T.C.] [Constitutional Court], Diciembre 27, 1990, rol No. 116-90, c. 3 and 4.

<sup>53</sup> Corte Suprema de Justicia [C.S.J.] [Supreme Court], Julio 3, 2012, "Contraloría Regional de Valparaíso c. Municipalidad de Zapallar," rol No. 2791-2012, (translated by Gabriel Bocksang Hola).

<sup>54</sup> See Corte Suprema de Justicia [C.S.J.] [Supreme Court], Agosto 3, 2016, "Poblete Novoa c. *Presidente de la República y otros*", rol No. 23725-2016; Corte Suprema de Justicia [C.S.J.] [Supreme Court], Enero 18, 2017, "Milla Cortés c. *Gendarmería de Chile*", rol No. 82331-2016. Based on extensive interviewing, Jiménez believes that the courts tend to defer to the legal findings of the CGR. See Jiménez, *supra* note 30, at 236.

<sup>55</sup> This possibility was recognized by the Supreme Court. See, e.g., Corte Suprema de Justicia [C.S.J.] [Supreme Court], Agosto 12, 1996, "Denham y Cia. Ltda. v. Contralor General de la República", rol No. 2254-1996. An influential scholar, and CG in office at the time this Article was written, acknowledges this possibility. See JORGE BERMÚDEZ, DERECHO ADMINISTRATIVO GENERAL 506–07 (2014). Another scholar, a former judge of the Constitutional Court, considers this subject controversial. See Enrique Navarro, *Jurisprudencia Constitucional en Materia de Legalidad (Toma de Razón y Potestad Dictaminante) de la Contraloría General de la República*, 19 REVISTA DE DERECHO UNIVERSIDAD CATÓLICA DEL NORTE at 446 (2012).

<sup>56</sup> Corte Suprema de Justicia [C.S.J.] [Supreme Court], Enero 25, 2005, "Sociedad de Ingeniería y Construcción Camino Nuevo Ltda. c. Director Regional de Vialidad de la Región del Maule y Contralor Regional del Maule", rol No. 6063-2005; and controversy between the CGR and the Court of Appeals of Santiago, Senate of the Republic, Nov. 9, 1994: Mario Verdugo Marinkovic, *Notas a un Acuerdo del Senado*, in 59 REVISTA DE DERECHO PÚBLICO at 95 (1996), <https://revistas.uchile.cl/index.php/RDPU/article/view/43298/45269>.

will disapprove it either because of its illegality or because of its unconstitutionality, so normally it will not go into effect.

The President could circumvent the disapproval of the regulation by the CGR. If the disapproval was made on the grounds of illegality (because the executive order was incompatible with the legislative text, which mentioned no exceptions), the President could invoke, with the countersignature of all ministers, the political device of *insistencia*, which has not been used since 1990. In this case, the CGR would be forced to approve the illegal order, but interested parties would still be able to challenge it through judicial review. But if the disapproval was made by the CGR on the grounds of unconstitutionality (because the CGR declared that the vaccination rule contravened the constitutional rights to life or to the protection of health or equality before the law), *insistencia* would not be possible. The President would have to challenge the disapproval before the Constitutional Court, whose decision could not be appealed before any other court or agency.

### C. *Israel: Office of the Attorney General (OAG)*

#### 1. Status of the OAG in Israeli Government

The OAG is a unit of the Ministry of Justice.<sup>57</sup> It is subject to administrative and budgetary control by the Minister of Justice who is a political appointee and a cabinet member. On the professional level, however, the OAG is controlled by the Attorney General (A.G.) who is a prominent jurist appointed by an independent committee headed by a former Supreme Court justice. The Minister of Justice has no power to instruct the A.G. in matters concerning law enforcement, litigation, or legal advice provided to other government departments.<sup>58</sup> In theory, the government has the power to remove the A.G., but such decision would be subject to non-deferential judicial review by the High Court of Justice (HCJ), which is the Israeli Supreme Court acting as a trial court.

The OAG is composed of two main wings.<sup>59</sup> The first is in charge of litigation on behalf of the Israeli government. It deals with criminal prosecution and represents the government in civil

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<sup>57</sup> ATTORNEY GENERAL, ISRAEL MINISTRY OF JUSTICE, [www.justice.gov.il/En/Units/AttorneyGeneral/Pages/default.aspx](http://www.justice.gov.il/En/Units/AttorneyGeneral/Pages/default.aspx) (last visited Mar. 15, 2020).

<sup>58</sup> See YOAV DOTAN, LAWYERING FOR THE RULE OF LAW: GOVERNMENT LAWYERS AND THE RISE OF JUDICIAL POWER IN ISRAEL 55–56 (2014).

<sup>59</sup> For a detailed description of the OAG, see *id.* at 65–66.

and administrative cases. The other wing provides legal advice to the government and supervises legislation (the Advising & Legislation Wing, or A&L). In 2017, the A&L employed a staff of around 250 persons of whom 160 are lawyers.<sup>60</sup> Most of the A&L staff is in charge of primary legislation (i.e., parliamentary bills). The Department of Secondary Legislation (DSL), composed of five lawyers and some assistants, is responsible for regulations. Staff in OAG departments that are responsible for primary legislation proposed by various ministries (such as agriculture or health) often work with DSL lawyers in supervising regulations proposed by those departments.<sup>61</sup>

## 2. History of the OAG

The position of the A.G. and the OAG were created at the time of the establishment of the State of Israel in 1948. Numerous statutes bestow power on the A.G. and the OAG. The advisory and supervisory functions of the A.G. are also embedded in many decisions by the HCJ. Judicial decisions since the late 1980s have expanded the A.G.'s authority.<sup>62</sup>

## 3. Agency actions reviewed by OAG

Regulations issued by any government department must be examined by the DSL. In addition, the OAG's advisory functions apply to any agency action that is potentially subject to judicial review. Since almost every administrative action is subject to judicial review in Israel, the A.G. and the OAG supervise regulations, guidelines, policy decisions, and various major licensing and other individual decisions.

## 4. Workload of the DSL

The DSL reviews hundreds of drafts of regulations every month. In 2017, it considered over 2,300 drafts.<sup>63</sup>

## 5. Grounds for DSL Review

The principal ground for DSL review is legality. This includes a wide variety of issues. The DSL verifies the compatibility of the regulations with the statutes under which they were made, as well their compatibility to other statutes and regulations. It also verifies that the regulations meet other requirements of judicial review such as equality, absence of improper

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<sup>60</sup> Memorandum from the OAG to Yoav Dotan (Feb. 19, 2017 (on file with Dotan).

<sup>61</sup> MINISTRY OF JUSTICE, LEGISLATIVE GUIDE §§ 11–14 (2017) [hereinafter LEGISLATIVE GUIDE].

<sup>62</sup> See DOTAN, *supra* note 58, at 54–64.

<sup>63</sup> Data provided by the OAG office (on file with Dotan).

motives, and reasonableness. In addition, the DSL verifies that the regulations meet general requirements of legislation such as clarity and standard language.

## 6. The OAG's Review Process

The DSL supervisory process takes place before the regulations come into force. After the relevant governmental unit completes the rulemaking process, the draft is sent to the DSL for its approval. The DSL staff examines the draft and comments on it. According to OAG internal guidelines, DSL input is usually composed of one of three types of responses. It may point to a "legal obstacle" or a "legal difficulty" or it may provide comments on policy issues.<sup>64</sup>

A "legal obstacle" means that a proposed regulation contains a serious legality defect. In that situation, the DSL would advise against approval of the draft unless the issuing agency revises the regulation to clear up the matter. A "legal difficulty" means that the DSL identifies potential issues of legality (such as erroneous interpretation of the authorizing statute by the issuing agency or potential infringement of basic human rights). In such a case, the issuing agency is likely either to insert corrections or clarifications or to convince the DSL that the difficulty can be handled appropriately on the enforcement level.

The OAG and the DSL have no formal authority to block a regulation since their powers are advisory in nature. The position of the OAG, however, is likely to influence the prospects of the regulation at the judicial review level. If the OAG identifies a "legal obstacle" or a "legal difficulty," the A.G. may refuse to defend the regulation in court which would likely lead to judicial disapproval.<sup>65</sup>

"Policy comments" consist of input provided by the DSL staff regarding the general wisdom or efficacy of a regulation. Given the extensive experience and professionalism of the A&L and the DSL, administrative agencies take such comments seriously. In addition, the DSL input includes technical comments and comments regarding issues of language, standardization, and style.<sup>66</sup>

## 7. Impact on Judicial Review

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<sup>64</sup> LEGISLATIVE GUIDE, *supra* note 61, § 30.

<sup>65</sup> For the binding force of the A.G.'s positions in judicial review, see H CJ 3094/93 Movement for Quality of Gov't in Israel v. State of Israel [1993] IsrSC 47(5), at 404, 426, *translation at* [https://supremedecisions.court.gov.il/Home/Download?path=EnglishVerdicts\93\940\030\Z01&fileName=93030940\\_Z01.txt&type=4](https://supremedecisions.court.gov.il/Home/Download?path=EnglishVerdicts\93\940\030\Z01&fileName=93030940_Z01.txt&type=4); DOTAN, *supra* note 58, at 55.

<sup>66</sup> See LEGISLATIVE GUIDE, *supra* note 61.

The impact of the OAG review process on judicial review is vast. After the OAG's scrutiny and approval, regulations remain subject to judicial review. However, the Supreme Court is less likely to intervene when the OAG has approved agency action because the Court relies heavily on the A.G. In addition, the A.G. and the OAG represent the agency in court, although these representatives are normally not the same personnel that did the advisory and supervisory work. Accordingly, the A.G.'s willingness to defend the decision vigorously in judicial review largely depends on the OAG's position in the preliminary stages. Since governmental agencies are well aware that the OAG will be called upon to defend the regulations on judicial review, they are likely to acquiesce in OAG findings of legal obstacle or legal difficulty or in its policy comments.<sup>67</sup>

#### 8. Hypothetical Example of DSL Review

Assume that the Social Security Law provides that families that receive monthly child benefits who failed to vaccinate the child according to the vaccination plan published by the General Manager of the Ministry of Health would lose ILS100 of the child's benefit.<sup>68</sup> The plan published by the General Manager in the Official Registry is defined as a regulation. The plan would undergo legal review by the legal advisory department of the Ministry of Health before it is signed by the General Manager. Then, it would be submitted to the OAG for its review. In the OAG it would probably be reviewed both by the DSL (which is in charge of reviewing regulations) and by the departments in the OAG that supervise legislation in the welfare and health fields.

The OAG has no authority to reject the regulation but it may critically comment on its legality and form. Then the matter goes back to the Ministry of Health. The Ministry may accept the critical comments and revise the plan or try to convince the OAG to accept its position. Normally, both sides are able to reach agreement on the final version of the regulations. If they cannot agree, the matter would be assigned to the A.G. for final determination. The Ministry of Health is not legally required to accept the position of the AG. However, if it proceeds to publish the regulation despite the A.G.'s comment of "legal difficulty" or "legal obstacle," the HCJ will probably strike down the regulation.

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<sup>67</sup> See DOTAN, *supra* note 58, at 55–59.

<sup>68</sup> According to the Social Security Law, every child in Israel is entitled to child benefits paid to his parents on a monthly basis. This vaccination provision was enacted by the Knesset in 2009. Some Bedouin families in southern Israel challenged the constitutionality of the vaccination plan on the ground that it infringes on the rights of poor children to receive welfare grants, but the petition was rejected by the Supreme Court. HCY 7245/10 Adalla v. Welfare Ministry [2013] IsrSC 66(2), at 442 .. In 2013, the government initiated an amendment that abolished the vaccination requirement.

## D. France: Advisory Departments of the Council of State (ADCoS)

In France, regulations are reviewed by the ADCoS.<sup>69</sup> As advisor to the government, these consultative bodies check the legality of regulations to ensure enforcement of the rule of law.

### 1. Status of the ADCoS in the French Administrative Law System

There are three layers of courts in the French administrative justice system: trial courts, courts of appeal, and the highest court which is called the “Council of State” (*Conseil d’État*, or CoS). The CoS is divided into two departments.<sup>70</sup> First, the Litigation Department is the supreme administrative court in France and comprises ten chambers. Each chamber is made up of one president, two assessors, and about ten members responsible for handling cases. Second, the Advisory Department is split into six specialized departments: Home Affairs, Finance, Public Works, Social, Administrative, and Reports and Studies.<sup>71</sup>

Most members of the CoS are appointed to serve in both the Litigation Department and one of the Advisory Departments. Each department is headed by a president. In practice, promotion to a higher grade is based exclusively on years of service. This structure helps to protect the independence of its members from political influence. We know of no public data on ADCoS’s budget.

### 2. History of the ADCoS

The French CoS was created by Article 52 of the 1799 Constitution. It had two missions: drafting laws and regulations, and resolving disputes of an administrative nature. Members of the CoS defended bills in Parliament. During the Consulate (1799–1804) and the Empire (1804–1815), the CoS drafted bills and adopted opinions. On its own initiative, the CoS could prepare opinions on legal issues even though the text had not been submitted to it by the Consuls or the Emperor. Moreover, article 11 of the Regulation of December 26, 1799 provided that the ADCoS could interpret all statutes and laws. According to the caselaw at that time, these interpretations were equivalent to legislation. The ADCoS could thereby legislate in place of Parliament, giving the CoS significant power.

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<sup>69</sup> See *Selected Publications*, CONSEIL D’ÉTAT <http://english.conseil-etat.fr/Advising> (last visited Mar. 15, 2020).

<sup>70</sup> CODE ADMINISTRATIF [C. ADM.] art. L121-3.

<sup>71</sup> Décret no. 2008-225 du 6 mars 2008 relatif à l’organisation et au fonctionnement du Conseil d’État [on the organisation and functioning of the Council of State], art. 11, JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], MAY 7, 2008, p. 4244.

The advisory function was developed by Napoléon Bonaparte during the First Empire. During the Bourbon Restoration (1815–1830) and the July Monarchy (1830–1848), the CoS advised the King's Counsel. There were five committees, each located within a ministry. The confusion between the advisory function of the CoS and the administrative activities of the ministries resulted in abolition of the CoS. The Second Empire (1852–1870) restored the earlier powers of the CoS, which again participated in the drafting of government texts. During the Third Republic (1870–1940), the ADCoS was little used. Finally, the Ordinance of July 31, 1945, created a statutory basis for the ADCoS with the mission of reviewing every draft bill. This role was entrenched in the Constitution in 1958.<sup>72</sup> Historically, there is a link between the primacy of the executive and the strength of the ADCoS. Regimes grounded on a strong parliament usually are linked to the weakening of the advisory function (Second, Third, and Fourth Republic).

### 3. Administrative Acts Examined by the ADCoS

French administrative law provides for two types of administrative acts—instruments of general and impersonal application are regulations and acts of individual application are non-regulatory provisions.

There are different types of regulations:

- Ordinances are statutory instruments: They are legislative acts but drafted by the government pursuant to a parliamentary delegation. In some cases, the ordinance is ratified by Parliament. Ordinances are reviewed *ex ante*.
- Decrees are regulations issued by the President of the Republic or the Prime Minister. Decrees are reviewed *ex ante*.
- Orders are regulatory instruments enacted by other administrative authorities. They are not reviewed *ex ante*.
- Circulars, directives, and instructions are guidance documents, often referred to as soft law. They are not reviewed *ex ante*.

Ordinances and the most important decrees must be enacted by the Council of Ministers, following which they are reviewed by the ADCoS and signed by the President. ADCoS review is either compulsory or optional. It is mandatory for draft ordinances<sup>73</sup> and most important decrees

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<sup>72</sup> 1958 CONST. arts. 37–39.

<sup>73</sup> *Id.* art. 38; C. ADM. art. L112-1 § 3.

called *décrets en Conseil d'État*.<sup>74</sup> Any amendment to these *décrets en Conseil d'État* requires a new ADCoS review. Other draft decrees are examined if a statute provides for such a review.

The CoS reviews bills submitted by the government to Parliament and advises the government about other nonregulatory provisions on an optional basis. For instance, these include drafts related to the construction of major facilities, takings, or individual naturalization measures. Finally, the government can seek ADCoS opinion on any subject.<sup>75</sup>

#### 4. Grounds for ADCoS Review

The ADCoS reviews the legal aspects of a regulation or other text as well as its merits and the quality of its drafting.<sup>76</sup> It must ensure that the regulation is consistent with the statute that it implements. It also considers legal certainty and the clarity of the text and must verify that the regulation does not infringe the rights of third parties. It reviews the government's technical and economic impact analysis. Finally, the result must contribute to the simplification of French law.

#### 5. Workload of the ADCoS

In 2017, the ADCoS issued 1,305 opinions and studies, including 106 government bills, 69 draft ordinances, and 1,101 draft decrees.<sup>77</sup> The overall workload was stable compared to 2016. Ninety-four percent of opinions were completed within less than two months (less than one month for government bills and less than two months for other drafts). There is no available statistical data on the number of approvals and disapprovals.

#### 6. The ADCoS Review Process

All draft texts are reviewed by the same process. An advocate-reporter (called the “*rapporteur*”) from the relevant department of the ADCoS is assigned to gather the legal documentation and to study the case. If an act involves various departments of the ADCoS, each

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<sup>74</sup> *Décrets en Conseil d'État* are important decrees under the Constitution, the law, or the regulation. When the law is silent, the government can decide, with the informal agreement of the CoS, that the decree will be a *décret en Conseil d'État* if the text is a legal guarantee or raises a very important legal issue. These *décrets en Conseil d'État* differ from *décrets simples*. *Décrets simples* are not deliberated in the Council of Ministers. Nevertheless, a *décret simple* may be reviewed because of the importance of the legal issues.

<sup>75</sup> See Nicole Questiaux, *Administration and the Rule of Law: The Preventive Role of the French Conseil d'État*, 1995 PUB. L. 247.

<sup>76</sup> CONSEIL D'ÉTAT, RAPPORT PUBLIC 2018: ACTIVITÉ JURISDICTIONNELLE ET CONSULTATIVE DES JURIDICTIONS ADMINISTRATIVES EN 2017, at 210, 395 (June 18, 2018), [www.ladocumentationfrancaise.fr/var/storage/rapports-publics/184000286.pdf](http://www.ladocumentationfrancaise.fr/var/storage/rapports-publics/184000286.pdf).

<sup>77</sup> *Id.* at 199ff.

of them reviews the text and the most competent department prepares a common and joint opinion. The most important regulations (parliamentary and government bills and ordinances) are reviewed by the General Assembly after analysis by the competent department. The General Assembly consists of the highest members of the CoS called “counsellors of state” under the chairmanship of the Vice-President of the CoS.

The advocate-reporter frequently calls on civil servants from the relevant ministries, called “government commissioners,” to clarify the text under review. Interested third parties are sometimes permitted to write a statement of the case for the department or the advocate-reporter. These parties include lawyers, local authorities, trade-unions, economic actors, or consumer associations. Experts can also be appointed by the Vice-President of the CoS on sensitive issues.

The advocate-reporter writes an alternative draft and explains it to the government commissioners during a session with the advisory department. This session is sometimes described as a “writing workshop.”<sup>78</sup> If there is no agreement between the advocate-reporter and his advisory department, the advocate-reporter has to justify his position within forty-eight hours to the Prime Minister’s Office. As a result, it is generally held that the ADCoS is a “co-writer” of the regulation.<sup>79</sup> Although some ADCoS opinions concerning government bills are published, its other opinions (including those concerning regulations) are confidential.

ADCoS opinions on draft regulations do not bind the government since to do so would be considered a usurpation of the public authorities’ constitutional regulatory power.<sup>80</sup> However, the government must choose whether to accept the advice or to reject it and proceed with the initial version; a mix is not permitted.<sup>81</sup> The government usually follows the advice and proceeds with the revised text.

## 7. Impact on Judicial Review

The administrative courts provide judicial review of executive and legislative acts, as well as disputes arising out of administrative adjudication. A party can challenge an ordinance, a decree, or a rule enacted by a minister or a national level authority before the Litigation Department of the

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<sup>78</sup> BRUNO LATOUR, *LA FABRIQUE DU DROIT: UNE ETHNOGRAPHIE DU CONSEIL D’ÉTAT* 56 (2002), translated as *THE MAKING OF LAW: AN ETHNOGRAPHY OF THE CONSEIL D’ÉTAT* 46 (Polity Press trans., 2010). Latour’s account of a regulation review is informative and witty. See LATOUR, *supra*, at 44–58.

<sup>79</sup> Hélène Hoepffner, *Les Avis du Conseil d’État: Essai de synthèse*, 5 REVUE FRANÇAISE DE DROIT ADMINISTRATIF 895 (2009).

<sup>80</sup> Loi de financement de la sécurité sociale pour 2007, No. 2006-544, Conseil constitutionnel (Dec. 14, 2006)

<sup>81</sup> FNIM, No. 283175, CoS (Jan. 10, 2007).

CoS as judge of first instance.<sup>82</sup> Other regulations are challenged before administrative trial courts and the Litigation Department provides the final decision.

A regulation that was subject to compulsory review before coming into force can be challenged on the basis that there was no *ex ante* review or that the review was incomplete or late. In such cases, the Litigation Department will quash the challenged regulation on the ground of a “competence defect.” If the review was optional rather than compulsory, the challenged regulation will be quashed on the ground of “legal defect.”<sup>83</sup>

The Litigation Department frequently examines a regulation that was previously reviewed and approved by the ADCoS. Since 2011, members of the CoS that have discussed a draft regulation in the Advisory Department are forbidden to take part in the judgment when the regulation is challenged.<sup>84</sup> The judges are not permitted to see the advocate-reporter’s study or the ADCoS’s opinion on the challenged regulation.<sup>85</sup>

Prior approval by the ADCoS does not have binding effect on judicial review. The CoS considers it cannot bind itself, as the ADCoS is not the “author” of the challenged regulation.<sup>86</sup> The administration cannot use the ADCoS’s previous opinion on the regulation to defend it in the Litigation Department. Nevertheless, the practical effect of prior ADCoS approval may well influence the decision on judicial review. If the ADCoS disapproves of a regulation, the law provides no remedy.

## 8. Hypothetical Example of ADCoS Review

A statute expanded the mandatory vaccination from three to eleven vaccines. The Prime Minister issues a decree specifying how these obligations would be implemented. The decree is drafted by the government commissioners of the Ministry of Solidarity and Health. To prepare the draft decree, the law requires opinions from five different government bodies. Then the government commissioners submit the draft decree to the Social Department of the ADCoS. The Department writes an alternative draft and explains it to the government commissioners during a

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<sup>82</sup> CODE ADMINISTRATIF [C. ADM.] arts. L311-12, R311-1, establish that the Litigation Department of the CoS (that is, the Administrative Supreme Court) is competent to hear protests against most important acts.

<sup>83</sup> The difference between a competence defect and a legal defect is quite significant. For example, in the case of a competence defect, the reviewing judge must raise the issue even if it has not been raised by the parties. This is not the case for legal defects.

<sup>84</sup> See C. ADM. art. R122-21-1. Cf. *Procola v. Luxembourg*, 22 Eur. H.R. Rep. 193 (1996) (setting aside a decision by the Luxembourg Conseil d’État because its members had taken part in an earlier regulation review).

<sup>85</sup> C. ADM. art. R122-21-3.

<sup>86</sup> USMA, No. 302040, CoS (Jul. 11, 2007).

session. This opinion is not published. The Minister of Solidarity and Health chooses the original text. The regulation is then issued by the Prime Minister and the Minister of Solidarity and Health and becomes subject to judicial review.

## **II. JUDICIAL REVIEW OF REGULATIONS: OBJECTIVES AND SHORTCOMINGS**

All countries should provide for judicial review of the legality of regulations. Regulations have broad systemic importance since they are inflexibly applied by law enforcement bureaucracies at both the agency and prosecutorial levels and by compliance bureaucracies in the private sector. Judicial review provides a valuable check on executive agency rulemaking and is an essential element of separation of powers and the rule of law.<sup>87</sup> Regulations are always subject to legitimacy concerns because they are legally binding but not enacted by the legislature. Judicial review at least mitigates that legitimacy concern.<sup>88</sup>

A minimally intrusive version of judicial review of regulations requires the reviewing court to determine whether a challenged regulation is legally valid. Legal validity includes substantive and procedural elements. Substantive legality means the regulation is compatible with the statutes that it implements and does not violate constitutional norms such as nondiscrimination or proportionality. Procedural validity means that the agency adopting the regulation complied with whatever procedural requirements were applicable, including mandatory consultations, notice to the public, public participation, explanation, and publication if the state or country requires these procedures. A more intrusive version of judicial review evaluates whether the regulation is supported factually and whether it represents a reasoned policy decision.

Part II of this Article contends that judicial review is necessary but not sufficient as an accountability mechanism to check illegal regulations because of serious shortcomings. Our discussion examines institutional, practical, and doctrinal constraints on judicial review which make judicial review an insufficient accountability mechanism. As we will discuss in Part III, a well-designed system of ex ante administrative review may compensate for many of the failures of judicial review.

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<sup>87</sup> Professor Cross disagrees. See Frank B. Cross, *Shattering the Fragile Case for Judicial Review of Rulemaking*, 85 VA. L. REV. 1243 (1999).

<sup>88</sup> See Peter L. Lindseth, *Judicial Review in Administrative Governance: A Theoretical Framework for Comparative Analysis*, in JUDICIAL REVIEW IN THE ADMINISTRATIVE STATE 175 (Jurgen de Poorter, Ernst Hirsch Ballin & Saskia Lavrijssen eds., 2019).

## A. *Institutional Limitations on Judicial Review*

### 1. Judicial Review Is Sporadic

Judicial review of administrative action occurs only if someone takes the initiative to challenge it. Accordingly, the most significant limitation of judicial review as an accountability mechanism is that the vast majority of regulations are never subjected to judicial challenge even though many present issues of legality.<sup>89</sup> This occurs because of the various legal and practical obstacles to seeking review that are discussed below. Thus, judicial review covers only those few regulations that private parties choose to challenge, not necessarily the most important regulations or those that are infected by the most serious flaws. In contrast, *ex ante* review systems evaluate the legality of most or all regulations.

Moreover, because relatively few regulations are challenged judicially, agency staff may decide to take the risk of adopting regulations that might not survive a legality challenge. The presence of a legality accountability mechanism that operates automatically might create a “sentinel effect,” meaning that agencies would be more diligent in making legal judgments if they knew that these judgments would be questioned by an outside agency.<sup>90</sup>

### 2. Judicial Review Is Focal and Fragmented

Another limitation of judicial review of the legality of regulations is the focal and fragmented nature of the judicial process. Courts are designed primarily to determine the specific facts of a dispute and apply preexisting general norms. They are ill-equipped to conduct broad investigations or consider comprehensive sets of data related to social phenomena.<sup>91</sup> When a court reviews a challenge to the legality of a regulation, it is likely to focus only on the specific portion that is challenged. It cannot evaluate how that portion fits into the entire regulatory scheme or to

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<sup>89</sup> See Metzger & Stack, *supra* note 9, at 1264 (vast majority of agency actions are never subject to judicial review). Jody Freeman and Joe Doherty estimated that about 3% of all regulations adopted by U.S. federal administrative agencies between 1995 and 2004 were subject to judicial review in the court of appeals. About 76% of those challenged were upheld in whole or in part. See Jody Freeman & Joe Doherty, U.S. House of Representatives Subcommittee on Commercial and Administrative Law, Committee on the Judiciary *Oversight Hearing on the Administrative Law, Process and Procedure Project* Washington, D.C., November 1, 2005. However, Freeman and Doherty’s study did not count decisions by federal district courts, so it undercounts the percentage of regulations that were challenged in court.

<sup>90</sup> See Adrien Vermeule, *Second Opinions and Institutional Design*, 97 VA. L. REV. 1435, 1464 (2011).

<sup>91</sup> See, e.g., DONALD L. HOROWITZ, *THE COURTS AND SOCIAL POLICY* 33–51, 261–64 (1977); Richard B. Stewart & Cass R. Sunstein, *Public Programs and Private Rights*, 95 HARV. L. REV. 1193, 1228 (1982); Frank B. Cross, *Pragmatic Pathologies of Judicial Review of Administrative Rulemaking*, 78 N.C. L. REV. 1013, 1019–40 (2000).

grasp the overall consequences of judicial intervention.<sup>92</sup> In contrast, an ex ante review agency evaluates a large number of regulations adopted by each agency and its staff members develop expertise in particular regulatory schemes. Thus, the review agency may be in a better position than a court to evaluate how a new regulation fits into an existing regulatory scheme.

### 3. Lack of Judicial Expertise

Where judicial review takes place in the general court system and the judges who hear a given case are randomly selected, the judges may be inexperienced in dealing with administrative law issues. They may not be competent to deal with many of the complex technical issues presented by judicial review of regulations, particularly those dealing with environmental, financial, government benefits, and health and safety issues.

In the United States, for example, state and federal administrative law cases are usually heard by unspecialized, generalist judges (frequently at the trial court level) under a closed record. As a result, the judge frequently lacks any familiarity with the particular regulatory scheme that is in dispute. Yet because the record is closed, it is not possible to call expert witnesses whose testimony would educate the judge.<sup>93</sup> As already discussed, staff members of ex ante review agencies tend to specialize and develop expertise in the regulatory problems the agency is seeking to solve.

On the other hand, in some systems judicial expertise is not a problem since administrative judges are specialists. In France, members of the CoS come from a variety of professional backgrounds. Most of them are former students of the École Normale d'Administration (ENA, the French Senior Civil Service College). In addition, members are recruited from the ranks of the judges in the lower administrative courts as well as the judicial courts. Members can also be former

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<sup>92</sup> See, e.g., Nicholas Bagley, *The Puzzling Presumption of Reviewability*, 127 HARV. L. REV. 1285, 1323 (2014); JERRY L. MASHAW, BUREAUCRATIC JUSTICE 185–90 (1983); R. SHEP MELNICK, REGULATION AND THE COURTS (1983); Richard J. Pierce, Jr., *The Unintended Effects of Judicial Review of Agency Rules: How Federal Courts Have Contributed to the Electricity Crisis of the 1990s*, 43 ADMIN. L. REV. 7 (1991).

<sup>93</sup> “Administrative cases are often brutally complex, and judges who hear them regularly clearly benefit from repeated exposure, while judges who do not may find their ordinary docket disrupted and their lives made rather miserable for the duration of the case.” Edward Rubin, *It’s Time to Make the Administrative Procedure Act Administrative*, 89 CORNELL L. REV. 95, 137–38 (2003). See similarly Cross, *supra* note 91, at 1276–79. See also Cross, *supra* note 91, at 1278 (“Practice in applying and defining the scope of common law, or even the Constitution, however, is not necessarily helpful in administrative law. Agencies, familiar with their organic statutes and with the problem area to be addressed, have some comparative advantages in related law-interpretation . . . When such vague mandates present trans-legal questions, any judicial expertise disappears.”).

university professors or administrators. This recruitment system assures a good deal of expertise at the CoS level.

Administrative mechanisms may assist generalist judges in conducting judicial review. In Israel, the HCJ (that is, the Supreme Court sitting as a court of first instance in important administrative law cases) is overwhelmed by its caseload. The judges have no time to familiarize themselves with difficult issues in administrative cases. As a result, the Court tends to rely heavily on the OAG attorneys who litigate the case on behalf of the government. This practice assists the Court, to some extent, to overcome its lack of expertise.<sup>94</sup> Less significant administrative law cases that are heard at the trial court level are frequently assigned to judges who specialize in administrative law and thus have more expertise. Likewise, in Chile, judicial review of regulations is normally done by ordinary judges. However, because judicial review is open rather than closed, expert witnesses can testify in these trials to enlighten the judge about complex issues. In addition, the Chilean courts may rely implicitly on the approval of a challenged regulation by the CGR.

#### 4. Uncertainties of Ex Post Judicial Review

In a system of ex post judicial review, regulations are often challenged years after they are adopted. For example, a regulation might remain unchallenged until it is applied in an enforcement action. Similar ex post problems arise if a challenger attempts pre-enforcement review, but the court refuses to grant a stay of the effective date of the regulation. Such delays can give rise to serious practical problems that would not occur in a regime of ex ante administrative review.

When review is delayed, many regulated parties probably complied with the regulation, thus incurring costs that a defiant challenger did not incur. If the challenge succeeds, compliant parties cannot recoup such costs or recover for lost business occurring because a defiant challenger was able to underprice the compliant entities. On the other hand, if the challenge fails, the defiant party may incur substantial penalties that its compliant competitors will not pay. In addition, regulations often give rise to reliance interests and legitimate expectations that will be disappointed if a regulation is invalidated years after it was adopted.

Another problem with delayed review of regulations is that the intended beneficiaries of the regulation may have been exposed to environmental, financial, or health risks arising because the defiant party or parties failed to follow the dictates of a regulation that they believed was legally

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<sup>94</sup> See DOTAN, *supra* note 58, at 23–29.

invalid. Alternatively, if the regulation denied benefits such as education, food, or access to medical benefits, recipients will suffer the loss of such benefits during the period before a challenge to the legality of the regulations succeeds.

Of course, these problems of delay do not arise when judicial review of a regulation occurs after an agency has adopted a regulation but before it goes into effect (so-called pre-enforcement review, which is quite common in the United States). Indeed, in the United States and France, short statutes of limitation sometimes compel such immediate challenges.<sup>95</sup> Even if pre-enforcement review is available, it may not actually occur; review of such regulations still occurs at the time the regulation is enforced, which may be years after it was adopted.

## ***B. Practical Constraints on Judicial Review***

In addition to the institutional constraints on judicial review described above, various practical constraints make judicial review unavailable or ineffective.

### **1. Cost of Obtaining Judicial Review**

Obtaining judicial review to challenge a regulation may be quite costly since the challenger must hire qualified and experienced lawyers and the government is likely to tenaciously resist the challenge. The cases are often complex and technical so that lawyers need to hire technical experts to help them prepare their arguments. Thus, for example, the costs of obtaining judicial review in the United States to challenge a regulation may run between \$100,000 and \$1,000,000.<sup>96</sup> The costs of judicial review litigation in the other three jurisdictions we studied are significantly lower than in the United States. Still, they amount to significant sums that often deter parties from seeking judicial review to challenge the legality of regulations.<sup>97</sup>

Such costs may place judicial review beyond the means of anyone other than big business, trade associations, unions, well-funded NGOs, or a few wealthy individuals. In some countries, the losing party must pay the winning party's costs, including attorney fees, thus increasing the risk to potential challengers. These cost problems are especially acute for public interest groups or

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<sup>95</sup> See *infra* text accompanying notes 110–113.

<sup>96</sup> These estimates reflect e-mails sent to Asimow by attorneys experienced in challenging federal administrative regulations.

<sup>97</sup> In Chile, the costs of judicial review litigation are estimated between \$10,000 to \$100,000. In Israel and France, the costs are estimated to run from a couple of thousand dollars to a couple of dozens of thousands. These estimates are based on interviews with practitioners.

other beneficiaries of regulatory schemes (such as consumers or victims of air or water pollution) that wish to challenge regulations on the basis that the agency is under-regulating, perhaps because it has been captured by the interests it is supposed to regulate. These groups often must rely on public support, and have difficulty gathering the resources for major litigation.<sup>98</sup>

## 2. Delays

Judicial review typically consumes large amounts of time. Indeed, the purpose of much litigation challenging regulations is simply to buy additional time before the regulation is enforced. Thus, for example, the median time for consideration of a case from filing to termination in the U.S. Court of Appeals for the D.C. Circuit (which hears many administrative cases) is 10.7 months. This figure includes cases that settle while on appeal; for cases actually litigated rather than settled, the delay is much greater.<sup>99</sup> Similar delays are prevalent in each of the other judicial review systems that we studied.<sup>100</sup>

Because litigation takes such a long time, the key question from the point of view of a rule challenger is whether the court will decide to stay the effective date of the rule pending completion of the judicial process. If no stay is granted and the rule goes into effect, it is likely that the damage to the challenger is done and cannot be rectified by a judicial victory years down the road. Yet if a stay is granted, the public is deprived of the benefits of the rule during the same lengthy period. In the United States, the decision whether to grant a stay lies in the discretion of the reviewing court, which engages in a multi-factor analysis.<sup>101</sup>

## 3. Risk of Reprisal

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<sup>98</sup> See Neil Komesar & Wendy Wagner, *The Administrative Process from the Bottom up: Reflections on the Role, If Any, for Judicial Review*, 69 ADMIN. L. REV. 891, 925–30 (2017) (arguing that the high cost of participating in the judicial review process causes it to be biased in the direction of special interests and against majority interests).

<sup>99</sup> [https://www.uscourts.gov/sites/default/files/data\\_tables/fcms\\_na\\_appsummary1231.2019.pdf](https://www.uscourts.gov/sites/default/files/data_tables/fcms_na_appsummary1231.2019.pdf)

<sup>100</sup> While there are no available statistics in Chile, it is estimated that some judicial review procedures take longer than two years. Likewise, in Israel, while administrative proceedings normally take less time than civil or criminal proceedings, more than a year often elapses before decision in the HCJ. According to Dotan's database, in 2005 around 30% of HCJ petitions were disposed after one year or more, while 27% were disposed within less than one month. In France, while typical administrative proceedings at one level take less than one year, since there are three levels of judicial review, the overall time of judicial review procedure may well be more than three years (see LES RAPPORTS DU CONSEIL D'ÉTAT (Mar. 9, 2017), [www.ladocumentationfrancaise.fr/var/storage/rapports-publics/174000512.pdf](http://www.ladocumentationfrancaise.fr/var/storage/rapports-publics/174000512.pdf)).

<sup>101</sup> *Nken v. Holder*, 556 U.S. 418 (2009).

As a practical matter, many parties are reluctant to institute litigation against government agencies because of a fear of reprisal. This is particularly true of benefit-providing agencies (such as welfare agencies or agencies providing loans or grants), where the beneficiaries must take care to avoid antagonizing agency officials. But it is equally true of regulatory agencies with which the challenger has a continuing relationship or when it must seek approval to introduce a product. Regulated parties often believe it is vital to maintain an agency's trust and confidence in order to diminish the risk of close regulatory scrutiny and to receive the benefit of the doubt when the agency discovers noncompliant conduct.<sup>102</sup> This concern seems magnified at state or local levels, where the regulators and regulatees are in particularly close and constant contact. While it is difficult to find anything other than anecdotal evidence about the possibilities of agency reprisal against those who cause legal troubles for the agency, occasional cases suggest that reprisal can occur (or at least that private parties think it occurs).<sup>103</sup>

### C. *Doctrinal Constraints on Judicial Review*

On top of the institutional and practical constraints discussed above, courts in many jurisdictions have developed various legal doctrines that block access to judicial review of administrative actions such as regulations.<sup>104</sup> These doctrines obviously would not apply to ex ante administrative review schemes.

#### 1. Standing

Persons wishing to challenge the legality of regulations must establish standing. In the United States, at the federal level and in many states, standing presents serious issues when a plaintiff seeks to represent the public interest or claims indirect harm because the agency is under-

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<sup>102</sup> See Nicholas Parillo, *Federal Agency Guidance and the Power to Bind: An Empirical Study of Agencies and Industries*, 36 YALE J. REG. 165, 191–200 (2019).

<sup>103</sup> See *Village of Willowbrook v. Olech*, 528 U.S. 562 (2000) (alleging that the village made unreasonable demands in retribution for prior litigation brought by the homeowner—trial court must consider constitutional issues); *Rowe v. Gibson*, 798 F.3d 622, 631 (7th Cir. 2015) (trial is required to determine truth of prisoner's claims of retaliation by prison staff after bringing lawsuit for inadequate medical care); *SecurityPoint Holdings, Inc. v. Transp. Sec. Adm'n*, 867 F.3d 180 (D.C. Cir. 2017) (rejecting claim that agency retaliated against party that had previously sued it for patent infringement); *Woodruff v. Mason*, 542 F.3d 545, 551 (7th Cir. 2008) (rejecting claim that state agency retaliated against nursing home operator because of prior litigation).

<sup>104</sup> Apart from the doctrines discussed here, some systems erect additional doctrinal barriers to judicial review such as ripeness, non-reviewability because of preclusion or commitment to discretion, lack of justiciability, and political questions. For an account of some of these obstacles in the United States, see Ronald M. Levin, *Understanding Unreviewability in Administrative Law*, 74 MINN. L. REV. 689 (1990).

regulating.<sup>105</sup> Both Chile<sup>106</sup> and France<sup>107</sup> generally require a showing of harm to the plaintiff (absent a statute that grants standing). However, both California<sup>108</sup> and Israel<sup>109</sup> recognize public interest standing.

## 2. Statute of Limitations

In many systems statutory or judge-made rules require parties to challenge regulations within specific time limits. Thus, in the United States, numerous statutes preclude judicial review of a regulation unless the litigation is commenced within a short period (typically sixty or ninety days) after it is adopted. A short limitation period is not a problem for well-funded participants in the notice and comment process who are prepared to attack a rule in court as soon as it is adopted. However, the limitations period often forecloses others from launching pre-enforcement challenges since they were unaware of the pending rulemaking or never thought the agency might interpret a rule to apply to them. Consequently, many persons who are negatively affected by a regulation may never have the opportunity to challenge its legality.<sup>110</sup>

Likewise, in France a regulation must be challenged within two months following the publication or notification of the decision. In an important 2016 case,<sup>111</sup> an administrative judge held the reasonable time limit for a plaintiff to challenge a regulation that had not been properly published or notified is one year following the time when they had knowledge thereof. In Chile,

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<sup>105</sup> Under the federal standing rule, a plaintiff must establish “injury in fact,” meaning that the rule will cause concrete, particularized, and imminent harm to that plaintiff. In addition, the challenged rule must be the cause of the injury and a judicial decision in plaintiff’s favor must be likely to remedy the injury. These requirements are rigidly enforced. *See, e.g.,* Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992) (rejecting standing of NGO on behalf of observers of endangered species who challenged failure by the federal government to protect those species). An additional problem for litigants challenging indirect harm is that their claim must fall within the “zone of interest” of the statute that they claim is violated. *See, e.g.,* Clarke v. Sec. Indus. Ass’n, 479 U.S. 388 (1987).

<sup>106</sup> Eduardo Cordero, *La Legitimación Activa en el Proceso Contencioso-Administrativo*, in LA JUSTICIA ADMINISTRATIVA 383 (Juan Carlos Ferrada ed., 2005); Juan Carlos Ferrada, *La Legitimación Activa en los Procesos Administrativos Anulatorios en el Derecho Chileno*, in LA NULIDAD DE LOS ACTOS ADMINISTRATIVOS EN EL DERECHO CHILENO 157 (Juan Carlos Ferrada ed., 2013). Chilean law provides for standing in several specific situations, including the *acción de amparo económico*, whose goal is to protect entrepreneurial freedom vis-à-vis interference from the administration or private parties (Ley No. 18.971, Marzo 10, 1990, [DIARIO OFICIAL \[D.O.\]](#)), and the action granted to “any person” against illegal administrative environmental regulations. (Ley No. 20.600, arts. 17 No. 7, 18 No. 6, Junio 28, 2012, [DIARIO OFICIAL \[D.O.\]](#)).

<sup>107</sup> Standing in France requires a personalized showing of injury to the plaintiff. Standing is a complex subject and depends on various factors. *Marcy*, No. 61217, CoS (Oct. 6, 1965); *Damasio*, 391, Rec. Lebon, (CoS 1971).

<sup>108</sup> *See* *Green v. Obledo*, 172 Cal. Rptr. 206 ([Cal.](#) 1981); ASIMOW ET AL., *supra* note 9, ch. 14.

<sup>109</sup> *See e.g.* H CJ 910/86 *Ressler v. Minister of Defense* [1988] IsrSC 42(2), at 441, 477, *translation at* [http://elyon1.court.gov.il/files\\_eng/86/100/009/Z01/86009100.z01.pdf](http://elyon1.court.gov.il/files_eng/86/100/009/Z01/86009100.z01.pdf); DOTAN, *supra* note 54, at 35.

<sup>110</sup> *See* Ronald M. Levin, *Statutory Time Limits on Judicial Review of Rules: Verkuil Revisited*, 32 CARDOZO L. REV. 2203, 2220–21 (2011).

<sup>111</sup> [Czabaj 340](#), Rec. Lebon (CoS, 2016).

most actions have a time limit (*prescripción*). These limitations can range from some days to several months or even years, depending on the case. However, there is an important exception related to legality: the *acción de nulidad de derecho público*, which Chilean law considers as imprescriptible,<sup>112</sup> and which can be used to challenge all kinds of administrative acts, including regulations. In Israel, while there is no statutory requirement regarding the timing to attack regulations, a petition not filed in a timely manner may be dismissed on the ground of laches, but the laches doctrine is rarely applied in case of challenges to regulations.<sup>113</sup>

### III. ADVANTAGES AND DISADVANTAGES OF EX ANTE REVIEW SYSTEMS

This Part tentatively assesses the advantages and disadvantages of ex ante administrative legality review where ex post judicial review also exists. As pointed out in Part II, judicial review fails to identify and overturn many illegal regulations. As a result, a system that relies primarily or exclusively on judicial review to assure the legality of regulations may suffer from an “accountability deficit,” especially if other checking mechanisms are weak.<sup>114</sup> Ex ante review systems can compensate for many of the shortcomings of judicial review but may create problems of their own. Thus, those who consider whether to adopt an ex ante review system must grapple with significant tradeoffs. In addition, in Part IV, we highlight a set of issues relating to the relationship between ex ante review and judicial review that designers of ex ante review systems should consider carefully.

#### A. *Advantages of Ex Ante Administrative Review*

##### 1. Compensate for the Shortcomings of Judicial Review

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<sup>112</sup> See Gabriel Bocksang Hola, *Voidness and Voidability of Unilateral Administrative Acts in the Western Tradition*, in *COMPARATIVE ADMINISTRATIVE LAW* 420 (Susan Rose-Ackerman, Peter L. Lindseth & Blake Emerson eds., 2d ed. 2017).

<sup>113</sup> For discussion of laches, see, e.g., H CJ 170/87 Asulin v. Mayor of Kiryat Gat 42(1) PD 678 (1988). Regulations are usually challenged by an indirect attack at the enforcement stage and are not barred by laches from raising arguments concerning the legality of regulations.

<sup>114</sup> See Richard Mulgan, *Accountability Deficits*, in *THE OXFORD HANDBOOK OF PUBLIC ACCOUNTABILITY*, *supra* note 3, at 545; Ellen Rock, *Locating the Courts Within the Australian Accountability System* (2018), <https://ssrn.com/abstract=3332745>. If legislative and civil society checking mechanisms are weak, the state or country is likely to suffer from an accountability deficit. See Miriam Seifter, *Gubernatorial Administration*, 131 HARV. L. REV. 483, 518–29 (2017) (pointing to weakness of state institutions to check overreach by executive branch); Miriam Seifter, *Further from the People? The Puzzle of State Administration*, 93 N.Y.U. L. REV. 107 (2018) (arguing that civil society institutions that constrain illegal action by agencies are much weaker at the state level than the federal level).

Many of the shortcomings of judicial review, as discussed in Part II, are not present in ex ante review systems. Thus, ex ante review systems are costless to private challengers since review occurs automatically. There are no technical legal obstacles such as standing or statute of limitations, no risk of retribution, and no period of uncertainty between the time a regulation becomes effective and the time its fate is determined by the courts.

The most obvious way in which ex ante review systems are superior to judicial review is that such schemes evaluate most or all regulations adopted by agencies in a particular jurisdiction, not just the small subset that challengers find worthwhile to challenge in court. In particular, ex ante review agencies consider whether an adopting agency is illegally underregulating—a claim that is often doctrinally difficult or too costly to assert on judicial review.

Of course, none of the schemes we describe subject every generally applicable agency action to ex ante review. Each legal system must establish the scope of the reviewing agency's jurisdiction. This choice will depend on available budgetary resources and will be affected by the prevailing legal culture. For instance, Chile's CGR performs universal ex ante control on presidential regulations, but this is possible only because of the CGR's large budget and human resources. And even the CGR does not review important types of regulations, such as those adopted by the municipal sector and various *actos exentos*. Ideally, however, ex ante review agencies should at least review all significant substantive and legally binding regulations.

Judicial review is often quite slow and can delay the implementation of regulations by many years. The ex ante review systems we studied provide only a limited time to conduct their review, although these deadlines are not always met. Even if ex ante review causes significant delay in implementation, that time is generally spent in identifying and resolving legal problems with regulations or making them better and clearer.

As mentioned in Part II, judges may lack competence to make determinations of the legality of regulations that implement complex and technical statutes. In contrast, the staff of ex ante review agencies often gains experience in evaluating regulations arising under various regulatory and benefit-granting schemes. Thus, the reviewers may acquire greater competence than randomly selected judges who know little or nothing about these problems. Reviewing agencies may also create useful precedents that convey valuable information to agencies about the methodology of legality review and of the legal constraints on their rulemaking processes, as compared to information furnished by judicial review which for many agencies occurs seldom or never.

## 2. Reduce Burden on the Courts

Ex ante review reduces the burden on the courts of conducting time-consuming judicial review of regulations. If the review agency invalidates regulations of dubious legality, they never reach the judicial review stage. Indeed, legality issues are often informally negotiated between the adopting and the review agencies, so the legality issue never gets to court. Moreover, the presence of ex ante review may produce a “sentinel effect,”<sup>115</sup> causing agency staff to be more cautious in evaluating the legality of regulations, which might prevent the legality issue from being considered either by the review agency or by a court. Finally, if a regulation passes ex ante review, parties subject to the regulation may decide that it is not worth challenging it in court.<sup>116</sup>

## 3. Flexibility

Ex ante review systems are more flexible than judicial review. Typically, when the reviewing agency in the four countries we studied identifies a legal problem with a regulation, it communicates informally with the adopting agency. Often the problem can be worked out and the regulation saved with minimum expense and delay. Perhaps the portion of the regulation that raises the legality problem can be severed from the balance of the regulation or some other adjustment can be made to avoid the legal problem. Perhaps the problem is a procedural one that the agency can correct. For example, these kinds of informal communication are quite common in Chilean administrative practice<sup>117</sup> and in the other systems as well.

When a legality problem surfaces for the first time in court, however, the court usually has no alternative but to invalidate the regulation, sending it back to the agency for reconsideration. Eventually, the agency may find a way to resolve the legal problem and to readopt the regulation, but this process is costly, and the public is deprived of the benefit of the regulation while it is being reconsidered.

## ***B. Potential Disadvantages of Ex Ante Review Systems***

Nevertheless, we identify a number of possible problems with ex ante accountability mechanisms. These problems may discourage policy makers from transplanting ex ante systems

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<sup>115</sup> See *supra* text accompanying note 90.

<sup>116</sup> Based on extensive interviews, Jiménez believes that existence of TDR review in Chile substantially reduces the number of regulations that are challenged in court. See Jiménez, *supra* note 30, at 235–37.

<sup>117</sup> See LUIS CORDERO, LECCIONES DE DERECHO ADMINISTRATIVO 574 (2015).

into new jurisdictions. At a minimum, the design of such systems should anticipate these problems and attempt to minimize them.

### 1. Additional Bureaucracy

Creation of an ex parte review system obviously entails the expenditure of scarce government resources. It adds a new bureaucratic function that requires substantial staffing. However, ex ante schemes may generate a significant offsetting cost saving at the judicial review level. When the reviewing agency disapproves a regulation on legality grounds, its opponents need not go to court to challenge it and government avoids the costs of defending its validity in court; if the reviewing agency approves a regulation on legality grounds, some (but obviously not all) challengers will decide that it is not worthwhile to pursue a judicial challenge.

Moreover, it is possible to create an ex ante system that functions well at modest cost. As discussed in Part I, California's OAL employs a staff of about twenty persons; its budget of \$3,619,000 is a trivial percentage of the cost of government. In Israel, about five lawyers in the OAG review secondary legislation out of a total staff of 160 lawyers. In contrast, the CGR in Chile is a large administrative agency with about 2,000 employees and a budget of \$126,000,000. However, most of the staff does not work on TDR. In 2017, 9.4% of CGR civil servants (about 200 people) performed TDR. In France, the number of employees of the ADCoS working on regulation review appears to be quite substantial but no specific budgetary or personnel information is available. It is difficult to calculate the cost of regulatory review since ADCoS staff members work on proposed legislation as well as regulation and discharge numerous other functions. In short, an ex ante review system can be designed to function at modest cost but can still produce substantial benefits.

### 2. Issues of Independence of the Ex Ante Review Mechanism

The efficacy of an ex ante reviewing mechanism depends on whether the reviewing agency is "independent" of both the adopting agency and of other political power centers within the jurisdiction. Independence for this purpose means de jure protection of the head and the staff of the reviewing agency from discharge without good cause as well as the presence of strong conventions protective of independence.<sup>118</sup> However, the reviewing agency must also possess de

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<sup>118</sup> See Adrian Vermeule, *Conventions of Agency Independence*, 113 COLUM. L. REV. 1163 (2013).

facto independence—a willingness to exert its authority despite political pressures or the contrary desires of the adopting agency or other power centers within the jurisdiction.

Although the reviewing agencies in our four comparative jurisdictions appear to have maintained their de jure and de facto independence, one could imagine a variety of hypothetical scenarios in which de facto independence would be lacking.

Imagine, for example, a situation in which an adopting agency is out of sync with the preferences of the chief executive. Assume further that it is not politically or legally feasible for the chief executive to remove the head of the adopting agency. Suppose the agency head seeks to adopt a stronger regulation to combat climate change than the chief executive desires. This regulation is based on an aggressive but defensible interpretation of the statute that delegated rulemaking power to the agency. The chief executive has recently appointed the head of the reviewing agency who reflects the chief executive's political preferences. The reviewing agency might rule that the regulation in question is illegal even though the courts would be likely to uphold its legality. This is a disturbing outcome because the regulatory initiative in question is probably dead. This situation is more likely to occur when the reviewing agency has veto power, as in Chile or California, as opposed to reviewing agencies with advisory functions, as in France or Israel. Designers of ex ante review systems might consider building in an option for the beneficiaries of regulations killed by the reviewing agency to seek judicial review of that decision.<sup>119</sup>

Or consider a contrary scenario in which the political preferences of the heads of the adopting agency and the chief executive are aligned. Assume the agency adopts a strong climate change regulation based on an aggressive and probably indefensible interpretation of the statute. The chief executive and the legislature strongly support the regulation. The reviewing agency might feel intimidated by the political situation and uphold the legality of the regulation. This scenario is less concerning than the previous one, because interests adversely affected by the regulation could still seek judicial review and would probably prevail at that level.

Clearly, like any other agency of government, ex ante reviewing agencies are vulnerable to capture, whether by the chief executive or by regulated entities. But the four agencies we studied have maintained an admirable degree of independence. The other branches tend to respect their

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<sup>119</sup> In California, the beneficiaries of a disapproved rule may seek judicial review of a decision of the OAL that invalidates a proposed regulation. *See supra* text accompanying note 27. This remedy is also possible in Israel. However, it does not appear to exist in Chile or France.

decisions and avoid exercising influence over them. Their assigned role as reviewers of legality tends to insulate them from the political concerns that drive adopting agencies.

### 3. Discouragement of Initiative and Ossification

Another possible downside of ex ante review systems is that they may induce adopting agencies to act too conservatively in order to avoid the risk that the reviewing agency might invalidate an innovative regulation. The agency might decide to take no chances, sticking to well-established regulatory paths and statutory interpretations that have already been judicially or administratively approved. Thus, ex ante review might stifle regulatory initiative to attack social problems through controversial but legally defensible expansions of agency authority.<sup>120</sup> To ameliorate this concern, reviewing agencies should be required to approve reasonable agency statutory interpretations as opposed to applying an excessively hostile or legalistic review methodology.<sup>121</sup>

A related risk concerns possible “ossification” of the rulemaking process. American scholarship often laments ossification, meaning that the demanding requirements for notice and comment rulemaking, as amplified by a variety of judicial requirements and executive orders, combined with hard-look judicial review, all tend to discourage agencies from adopting new rules or reconsidering obsolete ones. In addition, these obstacles may force agencies to incur massive costs in justifying proposed rules (thus limiting the number of rulemaking projects that can be initiated). Even if the agency acts, the obstacles to rulemaking produce unwarranted delays or they may induce agencies to take suboptimal shortcuts.<sup>122</sup>

We think the ossification thesis is plausible, especially in the United States, where rulemaking is subject to numerous procedural requirements and hard-look judicial review of rationality. Nevertheless, a well-designed ex ante legality review process should not exacerbate the ossification problem. The procedures that cause ossification relate more to issues of policy and discretion rather than legality. The presence of an additional veto point in the form of ex ante

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<sup>120</sup> Jiménez reports that several officials he interviewed believed that the Chilean TDR process was obstructive and discouraged innovative rulemaking projects. See Jiménez, *supra* note 30, at 222–25.

<sup>121</sup> See Part IV.C.

<sup>122</sup> See, e.g., Thomas McGarrity, *Some Thoughts on “Deossifying” the Rulemaking Process*, 41 DUKE L.J. 1385 (1992); Richard J. Pierce, *Seven Ways to Deossify Agency Rulemaking*, 47 ADMIN. L. REV. 59 (1995); Kathryn E. Kovacs, *Rules About Rulemaking and the Rise of the Unitary Executive*, 70 ADMIN. L. REV. 515, 547–49 (2018) (rulemaking ossification encourages executive overreach); Cross, *supra* note 96, at 1280–81. But see Aaron Neilson, *Optimal Ossification*, 86 GEO. WASH. L. REV. 1209 (2018) (high costs and delays of rulemaking make regulatory changes difficult which creates reliance and incentivizes investment).

review should not increase the cost, burdens, or delays of rulemaking, since an agency must be concerned with legality challenges on judicial review whether or not ex ante review exists. Ex ante legality review does not require any additional studies or findings beyond those the agency must perform anyway. Moreover, as explained above, ex ante review tends to produce rules with fewer legality problems because of a sentinel effect<sup>123</sup> and because legal issues are often worked out informally by negotiations between the adopting and review agencies, thus keeping them out of court.<sup>124</sup> Thus, ex ante review helps adopting agencies to produce better rules and improves their prospects on judicial review, while reducing the burden on courts of reviewing regulations of doubtful legality. Thus, ex ante review is more likely to de-ossify the rulemaking process than to worsen ossification.

#### 4. Transparency of the Review Procedure

An ex ante review system that lacks transparency may not contribute to legitimizing the regulatory process.<sup>125</sup> A lack of transparency exists in three of the four jurisdictions we studied. The exception is California; since all of the OAL's opinions are published, its review process is quite transparent.

In Chile, disclosure of information about TDR is subject to restrictions. During the TDR process, the CGR normally informs the adopting agency that the process is “ongoing,” for how long, and which employee is performing the legality control. Eventually, some minutes or memos of an ongoing TDR are disclosed, but only if the CGR specifically allows disclosure. Other information is usually not disclosed because of exceptions to transparency in the Transparency Act.<sup>126</sup>

In France, opinions on draft ordinances and decrees are not made public in order to preserve the secrecy of government deliberations.<sup>127</sup> This level of secrecy is problematic. It limits the level

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<sup>123</sup> See *supra* text accompanying note 90.

<sup>124</sup> See Part III.A.3.

<sup>125</sup> See Metzger & Stack, *supra* note 9, at 1297–301 (transparency is vital to assuring legitimacy of internal administrative checking mechanisms); Jiménez, *supra* note 30, at 310–11 (arguing that opacity of TDR process allows people to suspect special interest capture of the adopting agency).

<sup>126</sup> TDR may qualify for an exception from required disclosure in the Transparency Act. See Ley No. 20.285 art. 21, Agosto 20, 2008, [DIARIO OFICIAL \[D.O.\]](#). The petitioner can challenge denial of disclosure before a Court of Appeals. OSCGR art. 155, Mayo 29, 1952, [DIARIO OFICIAL \[D.O.\]](#). The Supreme Court recently decided that the general rule is one of transparency. The CGR must justify a denial of access to information. Corte Suprema de Justicia [C.S.J.] [Supreme Court], Enero 22, 2018, “Contraloría General de la República c. Ministros de la Corte de Apelaciones de Santiago”, rol No. 36857-2018..

<sup>127</sup> CODE DES RELATIONS ENTRE LE PUBLIC ET L'ADMINISTRATION, art. L311-5, 2.

of public awareness of the CoS's advisory function. In Israel, opinions of the OAG and the DSL are regarded as part of government deliberations. As such, they are not subject to exposure under the Freedom of Information Law.<sup>128</sup> In rare cases, however, the positions of the OAG is leaked to the media, particularly when there are serious disagreements within government circles regarding certain regulations.

## 5. Lobbying

Ex ante reviewing agencies may be subject to lobbying through oral and written communications, particularly from interests that oppose new regulations. Public concern about undue influence reduces the legitimating effects of the ex ante review process. We observe, however, that rulemaking is generally considered a political process that is subject to intense lobbying and pressures of various kinds on the adopting agency. An ex ante review process carried out by an independent agency that is at least less subject to lobbying than the adopting agency should improve the legitimacy of the rulemaking process.

California prohibits any outsider communications to OAL reviewers, ex parte or otherwise. In Israel, lobbying-type interference within the work of the DSL is extremely rare. In fact, the staff of the Ministry of Justice and the OAG regard themselves as gatekeepers against undue political intervention in the regulatory process.<sup>129</sup> The system of ex ante review by the OAG and the DSL is a check against undue influence by lobbyists at the ministry level or in the Knesset.<sup>130</sup>

In France, the ADCoS review process is subject to various types of outside intervention. First, persons who expressed interest in a draft regulation may be allowed to submit briefs to the ADCoS. These briefs are on file and the advocate-reporter informs the government commissioners about their existence. The advocate-reporter may conduct a meeting with these interest groups and report the discussions to the government commissioners. Thus, the ADCoS is often subject to lobbying efforts that mirror the informal consultations that occurred at the adopting agency level. Second, the vice president of the CoS or the president of an ADCoS department can appoint a qualified person who has special knowledge of the subject to furnish an opinion on a draft regulation. Third, it is said that some interest groups write submissions without seeking prior

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<sup>128</sup> See Freedom of Information Law, 5758-1998, § 9(b)(2) & 9(b)(4), <SH No. XX p. XX>.

<sup>129</sup> See LEGISLATIVE GUIDE, *supra* note 61, ch. II-14.

<sup>130</sup> *Id.* ch. VI-17.

authorization from the ADCoS.<sup>131</sup> These briefs can be included in the advocate-reporter's study if they contain interesting materials and if the ADCoS decides to accept them.

In September 2017, the ADCoS advised the government to comply with property rules in the its hydrocarbon bill.<sup>132</sup> An NGO (Friends of the Earth) asked the ADCoS to disclose all communications addressed to it during the preparation of that opinion. The NGO also published a report focusing on lobbying that occurred during the ADCoS review of the bill.<sup>133</sup> The CoS provided the NGO with information on the environment contained in the briefs submitted by private companies and employer federations to the ADCoS.<sup>134</sup> The CoS determined that this information did not affect the secrecy of the government's deliberations. However, no procedure for the transmission and publication of these informal documents has yet<sup>230</sup> been formalized.<sup>135</sup>

In Chile, the lobbying practice before the CGR has been evolving in recent years. Lobbying at the higher levels is strictly regulated. Lobbying of the CG and sub-CG was restricted by statute in 2014, specifically in connection with “elaboration, issuance, modification, abrogation or rejection of administrative acts.”<sup>136</sup> Nevertheless, an apparent increase in lobbying during the last ten or fifteen years<sup>137</sup> probably led the CGR to gradually widen the universe of employees subject to lobbying control. These now include “*jefes de división*,” “*subjefes de división*,” and “*jefaturas*” and their deputies.<sup>138</sup> An outside interest that wishes to lobby the CG, sub-CG, or any of these

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<sup>131</sup> See, e.g., Patrick Roger & Bertrand Bissuel, *Bataille de lobbys autour de l'application de la loi Macron*, LE MONDE (Oct. 7, 2015), <https://bit.ly/2ImfmM3>, quoted in Thomas Perroud, *Pour la publication des “portes étroites” devant le Conseil Constitutionnel et le Conseil d'État*, RECUEIL DALLOZ, 2511 (2015).

<sup>132</sup> Avis sur un projet de loi mettant fin à la recherche ainsi qu'à l'exploitation des hydrocarbures et portant diverses dispositions relatives à l'énergie et à l'environnement, No. 393503, CoS Advisory Department (Sept. 1, 2017).

<sup>133</sup> FRIENDS OF THE EARTH, REPORT, LES SAGES SOUS INFLUENCE? LE LOBBYING AUPRÈS DU CONSEIL CONSTITUTIONNEL ET DU CONSEIL D'ÉTAT (2018). The French law on transparency (Loi 2016-1691 du 9 décembre 2016 relative à la transparence, à la lutte contre la corruption et à la modernisation de la vie économique, JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Dec. 10, 2016, No. 2) created a register of interest representatives in France. The register confirmed that French mining companies had engaged in intense lobbying of ADCoS during the ex-ante review of this draft.

<sup>134</sup> E-mail from the Secretary General of the Council of State, Mrs. Catherine Bergeal, to the President of the Association Friends for the Earth Dec. 10, 2016, No. 2) (July 19, 2018, ref. SG-18-01951-D), <https://www.scribd.com/387333553>.

<sup>135</sup> Some authors believe that the CoS should create an adversarial procedure when it receives lobbying submissions similar to the practice before the Litigation Department. Arnaud Gossement, quoted in Coralie Schaub, *Écologie: comment les lobbys agissent jusqu'au Conseil d'État*, LIBÉRATION (Aug. 29, 2018), <https://bit.ly/2TuDFxL>.

<sup>136</sup> Ley No. 20.730 art. 4, Marzo 8, 2014, DIARIO OFICIAL [D.O.] (translated by Gabriel Bocksang HOLA).

<sup>137</sup> See Jiménez, *supra* note 30, at 232–35.

<sup>138</sup> Resolución n. 807/2018, Marzo 13, 2018, DIARIO OFICIAL [D.O.] “*Jefes de división*” and “*subjefes de división*” were included in former lists, but expansion to the lower levels of *jefaturas* and their deputies was achieved only in 2018.

CGR staff members, must first request a meeting. The meeting must be formally and publicly registered. Despite this expanded lobbying regulation, informal lobbying probably still occurs at lower staff levels.

#### **IV. THE RELATIONSHIPS BETWEEN EX ANTE REVIEW AGENCIES, ADOPTING AGENCIES, AND REVIEWING COURTS**

The relationships between the reviewing and adopting agencies and between the reviewing agency and reviewing courts differ sharply among the four ex ante systems we studied. These relationship issues present numerous design problems for officials who seek to transplant the concept of ex ante review into their own jurisdictions.

In addition, these relationships have a strong cultural dimension. The review agency may be influential because of its deep legal and constitutional footing within host jurisdiction, or this form of legitimacy may be lacking. The adopting and reviewing agencies may be competitive or cooperative. The reviewing agency may be deferential or non-deferential to the legal and policy determinations of the adopting agency. The court may review the agency action with or without consideration of the work of the reviewing agency. The review agency may do its work without taking account of future judicial review or it may be intensely concerned with the prospect of judicial review. We explore some of these dilemmas in this section.

##### **A. *Variations Between the Relationships in the Four Systems***

The OAL has no constitutional status in California. It dates only from 1979 and could be legislatively abolished or defunded at any time. The general public is completely unaware of its existence. Although adopting agencies initially resented the OAL's review function,<sup>139</sup> they now grudgingly accept it. In general, adopting agencies believe that the OAL improves the quality of their rulemaking process and may help to avoid troubles at the judicial review stage.<sup>140</sup> The OAL

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<sup>139</sup> *The Agencies of California Speak out About the Office of Administrative Law: A Startling Survey*, 8 CAL. REG. L. REP. 8 (1988); Cohen, *supra* note 16, at 266–77.

<sup>140</sup> A former California agency head stated: “My recollection is generally positive—I found them to be exacting and demanding but they are key to the legal defensibility of our finished product.” E-mail to Michael Asimow (Aug. 23, 2018) (on file with Asimow). In a subsequent phone conversation, that former agency head pointed out an instance in which staff lawyers submitted a proposed regulation to the OAL; the OAL identified a legal problem (overlooked by the agency staff) that would have caused the regulation to be overturned in court. The agency was able to withdraw the regulation and thus avoid serious embarrassment and wasted effort. A second former agency head expressed similar sentiments; for agencies that do not adopt too many regulations and thus have inexperienced legal staff, OAL scrutiny has been extremely helpful in identifying problems before the regulation is subject to judicial review. A third executive, who works for an agency that adopts a large number of economically consequential

strictly enforces the exacting procedural requirements of California's APA but is relatively deferential in deciding legality issues. If a legal text has several possible interpretations, the OAL accepts any reasonable interpretation.<sup>141</sup>

The OAL considers the quality of drafting under the "clarity" standard but it does not consider issues of policy in reviewing regulations. It requires that the rulemaking record contain factual support for regulations. The OAL review essentially applies the same legal standards that courts apply in the judicial review process. Reviewing courts do not consider the fact that the OAL has approved a challenged regulation. The OAL's disapproval decisions are binding on the adopting agency. An agency can appeal an OAL disapproval decision to the Governor. This occurred often in the early years of its existence but seldom occurs today. Groups that favor a disapproved regulation can judicially challenge an OAL disapproval decision, but this seldom if ever occurs.

In Chile, the office of the CGR is entrenched in the Constitution. The office is quite large and well known and has many important government functions besides reviewing proposed regulations. Accordingly, *ex ante* review by the CGR is routine, comprehensive, and penetrating. It encompasses all important regulations (as well as many other state actions) and is carried out with little or no reference to the prospect of judicial review. Its reviewing function is limited strictly to legality, but that term covers a wide range of defects. Agencies are bound by CGR disapproval. Reviewing courts take account of the fact that the CGR has approved a challenged regulation. It is probably not possible to judicially challenge the CGR's decision to disapprove a regulation.

In France, the CoS is grounded in the Constitution and in legislation. It has a lengthy historical lineage. The CoS is deeply rooted in French legal culture and highly respected. The ADCoS reviews the legality of important regulations and also considers the merits of the regulations and the quality of their drafting. The government is not bound by negative advice from the ADCoS decision, but it generally follows the advice. The ADCoS is institutionally a part of the CoS—France's administrative Supreme Court—and its members are also judges of the CoS (although the particular members who review a regulation never sit on the judicial review panel). As a result, ADCoS decisions take account of future judicial review of challenged regulations. It

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regulations that are frequently challenged in court, said that OAL had never been a problem or caused delays. That adopting agency has significant internal legal expertise and vets regulations carefully before they are adopted. If the OAL did identify a problem, the adopting agency would be quite appreciative, but it had never happened.

<sup>141</sup> ASIMOW ET AL., *supra* note **Error! Bookmark not defined.**, ¶¶ 24:105–:107.

seems likely that the CoS is influenced by prior ADCoS approval of a regulation, although the judges do not see the report of the advocate-reporter or the ADCoS opinion.

Israel's ex ante review system is not established in a specific statute and Israel has no constitution. Nevertheless, the review function has become deeply rooted in Israeli legal culture. The AG has enormous prestige, so a legislative repeal of the review function is unlikely. The OAG reviews proposed regulations on legality grounds, but this standard includes such criteria as equality, lack of proper motives, and reasonableness, all of which are the standards that would be applied on judicial review. The OAG also reviews for issues of drafting and style. The OAG's disapproval of a regulation is not binding on the adopting agency but its opinion is normally followed. OAG review is closely tied to future judicial review of the regulation, because the AG may refuse to defend a challenged regulation in court. Moreover, because the HCJ (the Supreme Court of Israeli sitting as a court of first instance) is overburdened, it is likely to follow the views of the AG on the validity of a challenged regulation.

## ***B. How Courts Should Treat Ex Ante Mechanisms***

One set of relationship issues concerns the impact of ex ante review on judicial review. Ex ante review does not immunize a regulation from judicial review in the four systems we studied. Ex ante review has many advantages, but it should not replace judicial review even if the issues considered at the two levels are the same. Scrutiny by an independent judiciary of the legality of important government actions like regulations is an essential element of legitimacy of the regulatory system and the rule of law.

In three of the four systems we studied (California being the exception), the fact that regulations successfully passed ex ante review influences the intensity of judicial review.<sup>142</sup> This seems appropriate. The regulations have been subjected to an exacting scrutiny of their legality by an independent agency that is expert in performing such reviews. A second exacting review would seem, in many cases, unnecessary and excessive. But ex ante reviewing agencies sometimes make mistakes that can be corrected, at least partially, through ex post judicial review. Moreover, in some cases the legality of a regulation is a difficult question on which reasonable minds can differ. For those reasons, it makes sense for ex ante approval to count as a relevant but not an absolute factor in favor of finding that a challenged regulation passes the test of legality.

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<sup>142</sup> This is the case in Chile, Israel, and France. See Parts I.B.7, I.C.7, and I.D.7.

If the ex ante agency disapproves a rule, in California and Chile the rule is likely dead. We believe that there should be some way for the beneficiaries of a regulation killed by the reviewing agency to obtain judicial review of that decision. As pointed out earlier,<sup>143</sup> there is a risk that a reviewing agency (backed by the chief executive) will be at odds politically with an agency and will stifle its rulemaking efforts. There should be some way that courts can intervene in such a situation.<sup>144</sup>

In Israel the ex ante process is advisory, but a disapproved regulation probably will not be defended by the AG and is likely to be overturned by the HCJ. In France, the government is not bound by ADCoS disapproval, but such disapproval may well be a negative influence before the CoS in light of the close institutional relations between the two bodies.

### *C. Deference by Reviewing Agency to Adopting Agency's Determination of Legality*

Ex ante reviewing agencies should presume the correctness of the adopting agency's determination that its regulation meets the test of legality. The adopting agency is exercising delegated legislative power when it adopts regulations and it has considerable expertise in working with the relevant statutes and their implementation.<sup>145</sup> Nevertheless, that presumption is rebuttable, and the reviewing agency must make its own determination of the legality issues.

An additional issue is whether the reviewing agency should give any extra weight to the agency's legal interpretation when the legality question is difficult. In other words, should the benefit of the doubt go to the agency in deciding close questions of legality? This is an issue of considerable importance if courts within the jurisdiction pay deference to an agency's legal interpretations.

In Israel, France, and Chile, courts review legal issues independently. This is true of a number of U.S. states as well. However, at the U.S. federal level and in some states, courts exercise so-called *Chevron* deference.<sup>146</sup> *Chevron* requires courts to uphold reasonable agency interpretations of ambiguous statutes, even if the court might prefer a different interpretation. In

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<sup>143</sup> See Part III.B.2.

<sup>144</sup> California permits a judicial challenge by the beneficiary of the disapproved regulation, although this remedy is seldom used.

<sup>145</sup> See Kevin Stack, *Purposivism in the Executive Branch: How Agencies Interpret Statutes*, 109 NW. U. L. REV. 881 (2015).

<sup>146</sup> *Chevron U.S.A. Inc. v. Nat. Res. Def. Council*, 467 U.S. 837 (1984).

many states (including California), the courts do not follow *Chevron*, but they do pay so-called *Skidmore* deference to agency legal interpretations. Under *Skidmore*, courts have the power to substitute judgment on legality questions but place a thumb on the agency's side of the scale, depending on various factors. These factors include comparative institutional advantage—for example, agencies have an advantage in interpreting the law if the issue is highly complex or technical and is different from the kind of issues courts generally deal with. In such cases, *Skidmore* deference is more likely to occur than in cases where the issue involves a straightforward question of statutory interpretation of the kind courts often resolve.<sup>147</sup>

Where judicial deference exists, it can be argued that agencies should exercise the same level of deference to the agency's interpretation as the courts, since respect for the agency's legal interpretation is built into the system. On the other hand, the rationales for judicial deference may not apply to reviewing agencies. First, the reviewing agency is usually part of the executive branch, not the judiciary, and therefore the inter-branch separation of powers rationale does not apply to the relationship between the adopting and reviewing agency. Moreover, judicial deference is often justified by reference to the court's lack of expertise in dealing with difficult and technical issues raised by review of regulations. As we pointed out earlier, reviewing agencies often develop expertise in various systems of regulation and therefore might make better decisions about legality than courts.<sup>148</sup>

If the courts of a jurisdiction provide no deference to an agency's legal interpretation, it can be argued that the ex ante review agency should be deferential. If regulations receive rigorous and demanding legality review at both the administrative and judicial levels, the system may suffer from accountability overload.<sup>149</sup> Obviously, if a state or country has in place other meaningful legislative or executive branch checks on rulemaking and strong civil society institutions in addition to non-deferential judicial review, the arguments for accountability overload are even stronger. Such an overload could stifle agency initiative.

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<sup>147</sup> Additional factors in deciding to grant deference are whether the agency has maintained the interpretation consistently, whether it considered the legal question thoroughly and carefully, and whether it used a deliberative process in arriving at the interpretation. *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944); *Yamaha Corp. of Am. v. State Bd. of Equalization*, 960 P.2d 1031 (Cal. 1998). See ASIMOW ET AL., *supra* note **Error! Bookmark not defined.**, ch. 17. *Skidmore* deference also applies to U.S. federal courts reviewing legal interpretations contained in soft-law documents.

<sup>148</sup> See Part III.A.1.

<sup>149</sup> See Rock, *supra* note 114; Jacob Gersen & Matthew Stephenson, *Over-Accountability*, 6 J. LEGAL ANALYSIS 185, 221–25 (2014) (adding politically insulated accountability mechanisms may worsen principal-agent problems).

Thus, the question of whether a reviewing agency should pay deference to the interpretation of an adopting agency has no simple answer. The issue is bound to be troublesome, and it should be addressed by the designers of new ex ante systems. As American law reformers have learned, however, it is difficult to express the ideas of more or less deference in statutory terms.

## V. CONCLUSION

We have surveyed the process of ex ante administrative review of the legality of regulations in California, Chile, Israel, and France. These jurisdictions adopted their systems of ex ante review at different times and for different historical reasons. So far as we can determine, none of them were influenced by the others. The systems vary in numerous respects, but each of them exercises scrutiny of the legality of regulations before the regulations become subject to judicial review and before they are implemented.

In each of these jurisdictions, regulations are subject to judicial review. As we point out in Part II, judicial review of the legality of regulations is necessary to establish the legitimacy of administrative rulemaking, yet judicial review suffers from serious shortcomings. This creates an accountability deficit. We make the modest claim that this deficit could be addressed by a well-designed system of ex ante administrative review that supplements but does not replace judicial review.

While ex ante review systems may have problems of their own, they could compensate for many of the shortcomings of judicial review. Designers of ex ante review systems must pay close attention to the potential problems of such systems and must carefully prescribe the relationships between the adopting agency, the reviewing agency, and the courts. That said, we think that ex ante reviewing systems could contribute in a positive and meaningful way to the legitimacy of the administrative process and to promoting the rule of law, depending, of course, on the particular legal culture and the presence or absence of other accountability mechanisms.

We hope this Article will be of interest to policymakers around the world who seek a relatively inexpensive checking mechanism against illegality of regulations to supplement the necessary but flawed system of judicial review. Thus, in years to come, we expect to see more states and countries consider transplantation of ex ante review mechanisms into their own administrative law systems.