Administrative policy law : a comparative institutional analysis of state reform in Chile, Brazil and Argentina

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SCIENCES PO DOCTORAL SCHOOL

PhD Program of Law

PhD in Public Law

Administrative Policy Law:

A Comparative Institutional Analysis of State Reform in Chile, Brazil and Argentina

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Defense: June 5th 2013

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Dedication:

To my mother, my example of courage. To my father, my example of kindness.

To Eduardo, for his temporary certainties and constant support, for our own and beautiful sense of love.

Acknowledgements

Professor Jean-Bernard taught me much more than law. His legal scholarship is based on grit, openness and wisdom. I enjoyed each of our conversations and felt encouraged by the confidence he always awards people who work with me. I am sincerely grateful for his gentle and sharp comments, and nostalgic for the pleasure to be daily in touch with him.

I would like to thank SciencesPo Law School for being the place where I spent exciting years of my life. The financial support, the internationalization project and the opportunity to do my first teaching steps made a great difference in my academic path. I especially thank Professors Duncan Kennedy and David Kennedy for their good questions and generous welcoming during my one-year research at Harvard Law School. Likewise, I thank professors Diego P Fernandez Arroyo and José-Luis Benavides, who opened all the doors of the University of Buenos Aires and the University of Chile. Furthermore, I kindly thank the members of the jury and all the interviewees, who collaborated to transform intuitions into arguments. Finally, I thank the De Gaulle Cabinet, which financially supported the last months of the doctorate program.

Thank you kindly: Túlio, Cíntia, Tércia and Rodrigo, my wonderful team leaders and lifetime companies.

Veronica, Dina, Delphine, Ivana, Kellen, Tomaso, Erik, Charles and Ming, for the glittery dreams, hot debates and delight to share with. Je vous adore.

Leo Combrade, Ivona Blazevic, Laurent Mangnan, Pri Andrade, Camis Duran, Jojo Dubois, Alex Dubois, Caro Varin, Guillaume Dupuy, Markus Glaser, Hanna Schroeder, Thomas Perroud, Thales Costa, Kátia Alves, Cecília Bottai, André Kwak, Manu Coelho and Gustavo Candotta, Paris is pretty much about you.

Christine Briatte, for being there, ready to give me a hand and a hug, easily mitigating my homesick days.

Marcel Morabito, for being a breathtaking personality, coffee loving and unpretentiously generous.

Zina Osmani and SciencesPo administrative personnel, for patiently taking care of all details.

Gustavo Almeida, for that and following emails. Nanda Jesuíno, Mao Liberato, Pri Spécie, Usha Abreu, Kevinha Duarte, Deborah Vilela, Lise Brito, Juli Ribeiro, Déa Mutti, Nan Nakamura, Fe Marcato, Simone Gordon, Karina Almeida, Rafa Amorim, Clarissa Freitas, Marçal Justen Neto, Cla Paiva, Catá Barbieri, Flavinha Mange, Gustavo Abreu, Thomas Pereira, Gi Mation and Diego Werneck, I could not wait to live closer to you.

All my family, for giving me so much joy. Tom and Lipe, for being the best part of it.

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(I) GENERAL INTRODUCTION[1]

1. The argument of this thesis is the following: "State Reform" is a continuous, self-conflicting and overall public policy that challenges any stable conceptualization of Administrative Law. Not only do we argue that the transformations of the State in the last twenty years have consequently affected the previous paradigm of Administrative Law. Beyond that, we argue that the new paradigm is deprived of any programmed content: the commitment *is* to not be committed to any fixed set of tools to elaborate and implement public policy. The very idea of newness constitutes the substance of the next paradigm and any deriving theory appears to be embedded within dynamic innovations[2]. As a result, understanding State action and public law *altogether* sounds particularly challenging nowadays because inventive manipulations of such endless set of tools are the wished-for rules of the game. The current understanding of State action and public law altogether does not seem to imply unwavering or coherent classifications, but rather a collection of experiments and the habit to reconsider them. State action abandons predictability and engages with continuous assessment. Public law underscores the fragility of its alleged coherence and enters into an experimentalist process to provide more efficient models.

2. We are aware of the potential dark sides of one important feature of our research topic: its amplitude. The choice of working on State Reform and its impacts on the Administrative Law of three countries takes several risks. We may overlook punctual legal norms, oversimplify complex institutional functioning or take too much distance from a more technical legal approach. To be sure, we do think that punctual legal norms are sometimes important, we do recognize that institutional functioning encompasses more variables than those we present in this work and we do credit value to the influential role of such technical legal approach in our comprehension of law.

[1] All the translations used in this work were freely made by the candidate, not based on professional expertise.
[2] Orly Lobel, "Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Leal Thought, The," *Minnesota Law Review* 89 (2005 2004): 274.

However, by dealing with our research topic we mean to take these risks. We mean to take these risks because State Reform reveals to be an organic research topic[3], the challenge of which is precisely to provide a big picture. More precisely, we intend to provide some insights regarding this big picture, instead of pursuing an exhaustive analysis of it. As such, it incited us to (i) develop a *comparative* narrative of the subject, (ii) the goal of which is to diminish the scholar gap on joint analyses of public law and public policy, (iii) without establishing clear distinctions between theoretical reasoning and concrete examples. Our examples are part of our theoretical arguments, as much as we understand implementation of public policy as part of the policy itself. Likewise, the State is understood as one element of the legal framework, *and vice-versa*. In this sense, we needed at some point to acknowledge the large focus of our lens.

3. That said, we do not keep the focus of our lens enlarged during the whole process nonetheless. Very much on the contrary, each of our chapters is an effort to build macroscopic arguments by zooming in on microscopic elements. If State Reform is an overall public policy, it comprises several sub policies, the implications of which deserve a rather detailed exploration. The thesis is therefore divided into specific research questions about the challenges that these sub policies appear to raise. On the same path, we intend to articulate these questions to further understand the impact State Reform entails on administrative legal regime.

4. To render our proposal clear, in this introduction we will (1) define the conception of State Reform used in this work, (2) explain the reasons why we chose Chile, Brazil and Argentina as our case-studies for comparative analysis and (3) put forward the theoretical background that will underpin our undertaking.

[3] We owe this expression to Goncalo Ribeiro, who helped us to handle this challenge, by lively discussing the several profiles a research question may encompass.

1. What do we mean by State Reform?

5. The State has recurrently been submitted to reforms in order to accomplish its contemporary goals in an optimum way[4]. Likewise, efficiency[5] has for a long time been part of the civil servants' vocabulary, regardless of the political colour of the goals[6] they were supposed to pursue. That is, the movement towards reform has been supported both by right and left wings governments[7], under a quite loose normative background[8]. Nevertheless, State transformations of the last two decades have gained a privileged status in the debates among politicians and scholars. The reason for this

[4] In the very beginning of the 20th century, the idea of increasing efficiency by specialization and scientific methods was already widely discussed through what became known as *Taylorism*. By publishing "The Principles of Scientific Management", F. W. Taylor promoted what he believed to be *the one best way* to accomplish better results in management. Henri Fayol, who became famous in 1917 for his « *Administration Industrielle et Générale* », refutes the division of authority, by claiming it would create a source of confusion, and accepts a certain independence of the worker in the phase of implementation. Besides, Fayolism also points out the need for formal and objective rules in order to discard improvisation and lack of predictability in large organizations. Jacques Chevallier, *Science Administrative*, Thémis. Science Politique (Thémis droit, Puf, 2007).

[5] For example, in both Vargas' and military regime's administrative reforms in Brazil, the idea of "efficiency" was present. The military President Castelo Branco followed the liberal discourse of Octavio Gouvea de Bulhoes, Roberto Campos, Antonio Delfim Neto e Mario Henrique Simonsen in order to create state-owned enterprises, which were supposed to perform « efficiently » and accordingly to private standards. Gilberto Bercovici, *O Direito Constitucional passa, o Direito Administrativo Permanece: a persistência da estrutura administrativa de 1967*, *in* O QUE RESTA DA DITADURA 84 (Edson Teles & Vladimir Safatle ed. 2010).

[6] In Latin America, if the main goal of the 1950s was industrialization, the one of the 1990s was fiscal balance, due to the deep economic crisis most countries underwent during the 1980s. Apart from Colombia, most Latin American countries experimented the so-called "lost decade", illustrated by the fact that income rates diminished 10%, there were hyperinflation rates, investments dropped and real transfers towards the creditor countries significantly increased. Luiz Carlos Bresser Pereira, *Une nouvelle interprétation de l'Amérique latine: la crise de l'Etat*, 17 CAHIERS DE L'AMERIQUE LATINE 25–49, 26 (1994).

[7] While in Britain the reform was launched by the conservative government of Margaret Thatcher, in New Zealand the ambitious project that, according to Allen Schick, led to « *a singular accomplishment in the development of modern public administration* » was promoted by the labour party, specially under the leadership of the Finance Ministry Roger Douglas. Donald F. Kettl, *The Global Public Management Revolution* (Brookings Institution Press, 2005), 9.

[8] See Grainne de Burca, "New Governance and Experimentalism: An Introduction," *Wisconsin Law Review* 2010 (2010): 237. Likewise, Amy Cohen proposes a comparison between Hayek's and Sabel's scholarships to argue that, although (i) at first new governance sounds different from liberal legalism and may reinforce neoliberal tendencies, (ii) there are normative differences between new governance and neoliberal governance and continuities between new governance and liberal legalism. Amy J. Cohen, *Governance Legalism: Hayek and Sabel on Reason and Rules, Organization and Law*, 2010 WIS. L. REV. 357, 387 (2010). The question to be answered is whether experimentalism is an engaging reconstruction of liberal legalism, by implying distributive justice, or deliberately faces the question with brackets by deferring to the realm of the wordless the meaning of social justice.

privileged status is that State transformations have been *institutionalized*[9] as a *continuous* and *overall*[10] public policy, rather than deemed as a contingent and shallow administrative rearrangement. The slogan "State Reform" in this work reflects a broad project *from inside* the government[11], which challenges the role of the State by itself (self-conflicting policy) and promotes the introduction of new governance[12] methods into the public sphere. Comparing to the previous attempts of reforms, *the reforming State* has promoted a new phenomenon in the last twenty years. This phenomenon is new because of the scope[13] of the transformations, the globalization[14] of their impacts and the perception of State Reform as an ongoing process rather than a definitive end[15]. To reform has become a globalized, general and permanent process.

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[9] By institutionalized, we mean here that specific mechanisms and structures have been conceived and consolidated to develop the project of State Reform.

[10] For instance, France launched in 2007 the « *Révision Générale de Politiques Publiques* » (our emphasis).

[11] The initiatives towards reforms have happened from inside the government not only in the countries analysed in this work, but also in several others around the world, such as France, the United States, Canada and New Zealand. The key actors are usually Prime Ministers, Presidents or high-level public officials who undergo the self-conflict between the support and assessment of State action. In Brazil, for example, the discussion regarding the managerial reform only included public opinion after the process had been initiated, and due to the communication skills of Minister Bresser-Pereira. Francisco Gaetani and Blanca Heredia, "La economía política de la reforma del servicio civil en Brasil: los años de Cardoso," *Inter-American Development Bank Publications* (2002): 1–44. The initial support came from governors and mayors who were interested in more flexible ways to manage their resources. For example, the governors of São Paulo (Mário Covas) and Rio Grande do Sul (Antônio Brito) played a crucial role to convince the federal government about the importance of the reforms. Luiz Carlos Bresser-Pereira, "Os Primeiros Passos da Reforma Gerencial do Estado de 1995," in *Democracia, Crise e Reforma: Estudos sobre a Era Fernando Henrique Cardoso* (Paz e Terra, 2010), 183.

[12] Hereinafter we will utilize the expression « *new governance methods* » to designate all the propositions towards decentralization, collaboration, performance measurement and customer services in the public sector. If we do identify different actors and historical moments that put forward different labels, such as "New Public Management", "*Nueva Gestión Pública*", "*Estado Gerencial*" and "New Governance", we claim that they are mostly driven by similar preoccupations, such as the continuous assessment of the public sector, drawing attention to practices that would improve the delivery of public service. The lack of a precise definition for these initiatives is neither a novelty nor a neglected issue, since the scholars themselves observe "*we know it when we see it*". Lisa T. Alexander, "Reflections on Success and Failure in New Governance and the Role of the Lawyer," *Wisconsin Law Review* 2010 (2010): 739.

[13] In order to overcome the crisis the Latin American States were facing in the late 1980s, it sounded necessary to reconsider its perimeter of action: the State abandons its role of protagonist of economic activities to simply regulate them. Instead of the main active actor of economic development, the State becomes a rather strategic decision-maker.

[14] Donald Kettl, in his « The Global Public Management Reform », puts forward that reform and reinvention are likely to become standard practice for government of all stripes. KETTL, *supra* note 7 at 72.

[15] Such reforms constitute an endless process. There is no one reform, but "Tides of Reform". Paul Charles Light, *The Tides of Reform : Making Government Work, 1945-1995*, 1997. For example, under the Vargas era, the Brazilian State underwent the so-called bureaucratic reform, the goal of which was

6. Several countries[16] have launched their "white papers" as an effort to review the organization and functioning of their States. But if the same language has articulated these initiatives[17], they may suggest an infinite variety of speeches to implement such a policy[1819]. The very acceptance of the existence of a *language* impedes any attempt to identify only one *speech*, although it comprises the adoption of common concepts and expressions, which have proliferated in public administration vocabulary[20]. For example, on the one hand, reforms have shared the main goals of improving government performance, introducing market-oriented incentives in public sphere and consolidating accountability by policy results. On the other hand, while the "Westminster-Style reforms[21]" are more focused on designing management devices, the "American-Style Reforms[22]" put more effort on changing bureaucratic behaviour to reinvent the government.

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to professionalize the civil service and therefore eliminate the patrimonial character of the State apparatus. Later on, during the military regime, there was an important restructuration of the Brazilian Administration, by the enactment of the decree-law no. 200/1967. As a result, the 1970s became known as the period « Bras », given the creation of several state-owned enterprises with mixed capital named as following: « Eletrobras », Nuclebras, Siderbras. Luis Roberto Barroso, "Agências Reguladoras. Constituição, Transformações Do Estado e Legitimidade Democratica," in *Agências Reguladoras e Democracia*, Gustavo Binenbojm, 2006, 61.

[16] If the movement might have started in the United States, England, Sweden, Canada and New Zeeland, it has been spread through Spain, France, Chile, Japan, Venezuela, South Korea, Argentina, Brazil, India and Portugal.

[17] Professor Duncan Kennedy explains the difference between the « language » and the « speech » in legal consciousness. While the "language" is the conceptual vocabulary that is globalized, the "speech" may imply infinite ways to translate such a mode of reasoning. Duncan Kennedy, "Three Globalizations of Law and Legal Thought: 1850-2000," in *The New Law and Economic Development. A Critical Appraisal.*, David Trubek and Alvaro Santos (Cambridge University Press, 2006).

[18] For example, while Mexico has put more effort on the tools to reduce corruption, Finland has focused on its management-by-result system. KETTL, *supra* note 7 at 7.

[19] Philippe Bezes observes that State Reform may not be outlined by its objectives because they are multiple and inconstant. The content of State Reform changes from time to time, even from one government to another. PHILIPPE BEZES, RÉINVENTER L'ÉTAT : LES RÉFORMES DE L'ADMINISTRATION FRANÇAISE, 1962-2008, 14 (2009).

[20] Expression such as « competition between providers », « mission statements » or « to steer and not row » have been widespread in Public Administration. FRANK VIBERT, THE RISE OF THE UNELECTED : DEMOCRACY AND THE NEW SEPARATION OF POWERS, 36 (2007).

[21] The main features of the reforms launched by Westminster government are customer service, operating autonomy, output measurement, human resources, information technology and privatization. KETTL, *supra* note 7 at 14.

[22] The American-style reforms are especially identified by the efforts of the vice-president Al Gore to reinvent government. These reforms had three phases with different strategies: (i) Works Better, Costs Less; (ii) What should government do? (iii) Search for Political Relevance. Ibid., 15–17.

7. Furthermore, the State Reform we talk about in this work corresponds to the variety of institutionally driven responses to the disenchantment regarding economic dogmas of the last twenty years. It is not limited to a circumstantial reaction to the economic crisis of the 1980s, but it is rather a symbol of a sceptical reconsideration method. Following this, the State Reform we talk about in this work is embedded within a moderate institutionalism approach, which resists conceiving reality as either the result of market failures or the result of government failures[23]. Hence, this work makes a conceptual distinction between State Reform and market-friendly reforms. Market-friendly reforms only stand for a temporary prevailing neoliberal economic model. This neoliberal economic model might have been exacerbated in some countries as an end in itself, or attenuated in others as a background influence for certain policies. Either way, this neoliberal economic model barely informs the political struggles, administrative rearrangements and legal implications involved into the ongoing process to reconsider the organization and functioning of the State. Whereas neoliberal reforms comprehend a quite touchable *content* of a finite system of belief and recommendations, State Reform reports to an endless and substantive-open *exercise*. Neoliberal reforms derive from a doctrine(s)[24], while State Reform rather proposes a method.

8. The confusion takes place because the expression "State Reform" as such turned out to be spread in the majority of countries under the influence of the Washington Consensus[25]. Globalization, economic stagnation, fiscal crisis and the

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[23] DANI RODRIK, ONE ECONOMICS, MANY RECIPES: GLOBALIZATION, INSTITUTIONS, AND ECONOMIC GROWTH (2007).

[24] As Chantal Thomas points out in her reconstruction of Law and Development discipline, two theories composed the reforms determined by the Washington Consensus: New Political Economy became the basis of structural adjustments and New Institutional Economy the basis of good governance legal and institutional reforms. C. Thomas, "Law and Neoclassical Economic Development in Theory and Practice: Toward an Institutionalist Critique of Institutionalism," *Cornell Law Review, Vol. 96, No. 967, 2011, Cornell Legal Studies Research Paper No. 11-16* (2011): 979.

[25] As it is widely known, Washington Consensus is the term attributed by John Williamson in 1989 to the macroeconomic prescriptions of the Washington DC based institutions: the World Bank, the International Monetary Bank and the United States Treasury Department. The ten policies were the following: fiscal discipline, tax reform, public expenditure priorities, interest rates, the exchange rates, trade policy, foreign direct investment, privatization, deregulation and property rights. To consult further details, John Williamson, "What Washington Means by Policy Reform," in *Latin American Readjustment: How Much Has Happened* (Washington: Institute for International Economics, 1989).

need for foreign investments pushed Chile, Brazil and Argentina to abandon the developmental State prescribed by Import Substitution Industrialization[26] (ISI) policy and to promote market-oriented reforms on the basis of neoliberal principles. In addition, the capture of the historical phenomenon through its slogan was obviously not meant to be neither uniform nor coherent. In Argentina, for instance, the association of State Reform with market-friendly reforms became intertwined for the fact that the first two laws that implemented the latter in 1989 were called "*Ley de la Reforma del Estado*"[27] and *"Ley de la Emergencia Económica*"[28]. However, just to illustrate the distinction we make, Chile had implemented profound market-oriented reforms under the dictatorship of Augusto Pinochet much before the expression State Reform emerged in this country, and even before the neoliberal flags of Margaret Thatcher and Ronald Regan became sound throughout the world[29]. To do shortly, historically speaking the expression as such did come about in most of the countries during passionate debates about the extent to which market-oriented reforms would provide solutions to hyperinflation and fiscal deficit. However, reflections on State Reform go beyond any type of prevailing economic agenda. State Reform as we define it here actually comprehends a denial that economics matters above all.

Interesting enough, the consensus turned out to be quite controversial. Williamson himself has admitted his disagreement with the meaning the expression has encompassed: "I find that the term has been invested with a meaning that is significantly different from that which I had intended . . . I had naively imagined that just because I had invented the expression, I had some sort of intellectual property rights that entitled me to dictate its meaning, but in fact the concept had become public property." Thomas, *supra* note 24 at 969.

[26] The ISI is an economic policy that employs public expenditure and state protectionism to encourage economic development of the national industry. This policy was applied to Latin American countries from the 1930s until the 1980s under the influence of structural thinkers, such as Celso Furtado and Raul Prebisch, and the institutional support of the United Nations Commission for Latin American and the Caribbean (CEPAL).

[27] Law number 23.696 of 1989.

[28] Law number 23.697 of 1989.

[29] The historical path of neoliberal ideas in Chile emerges in the 1950s, when the Catholic University made an agreement with the Department of Economy of the University of Chicago. After three decades, more than one hundred and fifth Chileans were trained under the influence of Theodore Schultz, Michael Friedman and Friedrich A. Hayek, who explicitly praised the Chilean experience and used it to incite discussion in the Mont Pelerin Society. This historical path has not been interrupted due to re-democratization, but rather accommodated to the contemporary political demands. In this sense, « it is precisely the mutability of the neoliberal knowledge and its flexible relation with power that sustained essential components of the neoliberal model path in Chile ». Karin Fischer, "The Influence of Neoliberals in Chile Before, During, and After Pinochet," in *The Road from Mont Pelerin - The Making of the Neoliberal Thought Collective*, Philip Mirowski & Dieter Plehwe (Harvard University Press, 2009), 338.

9. State Reform as we define here comprehends a denial that economics matters above all because it learns from the negligence of the Washington Consensus, not to say of any economic dogma. As criticisms to the Neoliberal recipe, one may point out (i) the imposition of policies on diverse social structures, without paying attention to local contexts; (ii) failures on implementation, by missing the right sequencing and timing of the policies or (iii) the lack of significance attention to the possibility of external shocks, as if the external market was an equal and stable place of participation. However, the most important criticism seems to be the analytical fragilities of the neoliberal prescriptions. This means that there has hardly been an effort to integrate distributive choices within the economic reasoning in order to clarify what an efficient market allocation would be[30]. As a result, it is difficult to identify the meaning of efficiency, as it sounds indifferent to distributive decisions.

10. A word is deserved to explain the importance of these analytical fragilities. In fact, we make the aforementioned distinction (market-oriented reforms and State reform) and remark some flaws of economic dogmas in order to explicit our research path. First, we do not intend to formulate a list of recommendations designing what State Reform should be, or what States should do. Elaborating such a list may possibly be an interesting exercise, but it is not the precise exercise this work takes in. Second, the renunciation of prescriptive goals does not mean that we are politically neutral or unbiased. This means we pursue an analytical rather than a prescriptive path to support our narrative. As a result, it does not seem to matter whether our arguments may be associated with political views, as we are afraid virtually any argument is. We are mainly concerned about incorporating the "how to do?" question into the debate, without limiting our focus to the "what to do?" one. We believe that in public policies good ideas are not that good unless they include the way they can be implemented.

[30] These observations were developed during the course Law and Economic Development, given by Professor David Kennedy on the 2nd November of 2011 at Harvard Law School.

2. Why are Chile, Brazil and Argentina legitimate comparative cases study?

11. Although various speeches are available on the grounds, comparative studies remain a challenging task, as such a work is quite analytically demanding[31] and presupposes a solid historical background on country-basis. Moreover, because of some striking records, one may overlook the particularity of the contexts and assume that reforms have derived from a mimetic transposition of earlier reformers[32], or simply from an imposition of international organizations upon developing countries as a conditionality to endorse loans[33]. To illustrate this point, 63 out of the 75 developing countries with a population of more than five million have employed decentralization[34]. With such a picture, it sounds difficult to see beyond the widespread discourse of mimetic transplantation[35].

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[31] Analytical problems have been put at the centre of investigations potentially applicable to other contexts, as they draw research questions, concepts and causal hypotheses from a variety of existing theoretical debates, especially from the juxtaposition of Weberian and recent neo-Marxist theories. Peter B. Evans, Dietrich Rueschemeyer & Theda Skocpol, *On the Road toward a More Adequate Understanding of the State*, *in* BRINGING THE STATE BACK IN, 348 (Evans, Rueschemeyer and Skocpol ed. 1999). As an example of difficulties, one of the experts of the *"Dirección Ejecutiva de la Comisión Ejecutiva del Proyecto de Reforma y Modernización del Estado"* pointed out the challenge of having a systematic view of the Chilean civil service. Rodrigo Egaña, "Profesionalización De La Función Publica En Chile," in *Retos De La Profesionalización De La Función Publica* (Venezuela: CLAD, 2003), 98.

[32] New Zealand was the first one, followed by Sweden, the United States, Canada and Great Britain.

[33] We do not neglect the power of international organizations to impose reforms as "conditionalities". Such "conditionalities" were actually crucial instruments to the globalization of the language. However, it would be an oversimplification to rely only on them to explain the phenomenon and puts forward its alleged isomorphism. Interactions between the national elites and international consultants cannot be described only through a constraining mode. For instance, Philippe Bezes, *Construire des bureaucraties wébériennes à l'ère du New Public Management ?*, CRITIQUE INTERNATIONALE 9–29, 25 (2007). Likewise, Carlos Aguiar de Medeiros, "Asset-stripping the State," *New Left Review* no. 55 (2009): 111–112.

[34] Ni Putu S.H. Mimba, G. Jan van Helden, and Sandra Tillema, "Public Sector Performance Measurement in Developing Countries: A Literature Review and Research Agenda," *Journal of Accounting & Organizational Change* 3, no. 3 (September 25, 2007): 198, doi:10.1108/18325910710820265.

[35] To consult a work that also challenges such mimetic transplantation by demonstrating the different approaches developed within the World Bank itself regarding « rule of law », Álvaro Santos, *The World Bank's uses of the "rule of law" promise in economic development*, *in* THE NEW LAW AND ECONOMIC DEVELOPMENT. A CRITICAL APPRAISAL. (David Trubek and Alvaro Santos ed. 2006).

12. However, the diffusion of the language in Latin America was neither predictable nor homogenous[36]. For instance, if Brazil was delayed for about 80 years to implement bureaucratic reforms in comparison with developed countries, it started its managerial reforms before France, Germany and Japan[37]. Furthermore, neither the World Bank nor the Inter-American Development Bank substantively influenced the initial design of the reforms in this country because this subject was not yet part of the International Organizations' mainstream agenda[38], which was rather limited to the neoliberal trend. In fact, under the direction of Enrique Iglesias, the BID[39] supported a colloquium in Brazil to discuss the reforms[40] and only one year later promoted a conference in Washington to launch the institution's perspective on the subject. In Argentina, in turn, the World Bank played a major role in the beginning of the 1990s by drawing, for instance, the lines of the future of civil service. However, these policies did not seem to imply a reflection about the substantive arrangement of the functioning and organization of civil service. These policies were restricted to simply cut the size of the civil service down. After having been called by president Carlos Menem on the 31st of December 1990, the World Bank sent one of its economists to Buenos Aires to offer a package of loans that were conditioned by the implementation of a list of policies (Public Sector Reform Loan)[41]. At this point, the language was about to globalize, but the speeches were diverse.

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[36] Chile was the first country in Latin America to insert managerial tools, just after redemocratization. However, the notion of State Reform came out later, consolidating the need to reconsider the State given the transparency crisis.

[37] Pereira, *supra* note 6 at 3.

[38] As the Brazilian Minister of State Reform at that time remarked, in the beginning of his mandate he received a delegation from the World Bank. The members of this delegation listened to his projects and made clear they did not know much about the managerial reforms in Britain and did not have a program to endorse them in Brazil. In turn, the Inter-American Bank of Development was much more receptive vis-à-vis the reforms, even though its personnel did not know either about them. Bresser-Pereira, *supra* note 11 at 184.

[39] The interviewee Paulo Modesto mentioned that the Inter-American Development Bank became familiar to the agenda of State Reform faster than the World Bank.

[40] The works presented in the colloquium were published in the following book: REFORMING THE STATE: MANAGERIAL PUBLIC ADMINISTRATION IN LATIN AMERICA / ED. BY LUIZ CARLOS BRESSER PEREIRA AND PETER SPINK (1999).

[41] Jeffrey Rinne, "The Politics of Administrative Reform in Menem's Argentina: The Illusion of Isolation," in *Reinventing Leviathan : the Politics of Administrative Reform in Developing Countries / Edited by Ben Ross Schneider and Blanca Heredia* (Lynne Rienner, 2003), 33–57.

13. Given the diversity of speeches in the regional scenario, Chile, Brazil and Argentina sound similar enough to render the comparison viable and different enough to make the comparison interesting. First, these countries share relevant political elements. Not only did they undergo similar paths in terms of recent political history[42], but they also have culturally conceived the State as an active economic actor and intense policy-maker[43]. Second, Chile, Brazil and Argentina are key representative pieces of South America in terms of political leverage and economic power, which means that these case studies would possibly avoid[44] too much unbalanced comparisons. In this sense, although conditioned by their obvious particularities, these are illustrative emergent countries of the Southern cone, which would allow us to significantly track what is going on in the region in terms of State Reform.

14. Furthermore, these countries share analogous legacies of Administrative Law. They were all influenced by the French system, by consolidating a special legal regime full of prerogatives to protect the public interest, regardless of the inexistence of a double jurisdiction[45][46]. Administrative law in all these countries derived from the need to apply to public entities a different set of norms, which does not confound with private law. According to this logic, public entities are driven by other motivations than profits, work within a specific type of structure (bureaucracy) and encompass a

[42] The last twenty years have been a re-democratization period in Chile, Brazil and Argentina, which had respectively been under seventeen, twenty and thirteen years of military rule. It is worth mentioning, however, that differently from Brazil and Argentina that had other dictatorships, the Pinochet's era in Chile was an exception of a history of rather stable democratic tradition. "The Chilean path to development" (presented at the Institute of Politics forum, John F. Kennedy School of Government at Harvard University, September 23, 2011), http://www.demotix.com/news/843738/chilean-president-sebastian-pi-era-speaks-harvard-university.

[43] A feature of Latin and Spanish traditions would be a legitimate state intervention in economic matters. Although some liberal initiatives have fought against this cultural trace, laissez-faire was neither deep nor widespread, even before the 1930s. Carlos Dias Alejandro, "The Argentine State and Economic Growth: A Historical Review," *Government and Economic Development* (1971): 220. However, it is important to mention a more liberal tradition in Chile, comparing to its neighbours. For instance, the first law of free-exchange currency in Chile was enacted in 1864 ("*Ley de Aduanes*").

[44] Of course, it is necessary to relativise the size of the Brazilian economy, territory and population in order to render comparison viable.

[45] In Chile there were attempts to implement the dual jurisdiction before the Constitution of 1925 and during the military regime of Pinochet, but they have never been fully accomplished. Juan Carlos Ferra Borquez, "El Sistema De Derecho Administrativo Chileno: Una Revisión Crítica Desde Una Perspectiva Histórica," 2006.

[46] Indeed, this work conceives the speciality of a given administrative law regime on the basis of the content of its principles and rules, rather than its jurisdictional organization.

special content comparing to private law. In addition, these public entities always follow a strict interpretation of the principle of legality, whereas private entities could do anything unless the law forbids it. The strict interpretation of this principle of legality implies that one could only take action in public administration if the law had beforehand prescribed all the steps. No freedom was supposed to exist if one is managing public goods and dealing with "the public interest"[47]. The law would have been able to predict and determine *how* civil servants should act[48].

15. In Chile, the influence of the principle "*duae sunt positiones*" is consolidated through the decision n. 13.592 of 1971 of the General Audit of the Republic[4950]. In addition, the courts continue to support this principle. For instance, the Chilean Supreme Court declared in 2005 that public services were necessarily submitted to the public law regime, as they must meet collective needs and work on regular and continuous basis[51]. In Brazil, the primary distinction between public and private regimes is intimately related to the authoritarian characteristics of the administration, based on patrimonial and hierarchical relations. For example, (i) federal states and municipalities used to strongly subject to the federal government's decisions, (ii) administrative contracts were protected by a system of exorbitant clauses and (iii) the vague concept of public services justified several State monopolies[52]. Since the 70s, this traditional view has been fundamentally supported by

[47] In Brazil, since the known article of professor Ávila, the meaning of public interest has been challenged: Humberto Ávila, "Repensando o 'Princípio da Supremacia do Interesse Público sobre o Particular'," *Revista Diálogo Jurídico* I, no. 7 (October 2001): 1–30.

[48] In Argentina, State Reform neglected the need to rethink administrative procedures. Armando Canosa, "El Procedimiento Administrativo En La Reforma Del Estado," in *El Derecho Administrativo Argentino, Hoy* (Buenos Aires, 1996), 78–86.

[49] Rolando Pantoja Bauza, *El Concepto de Derecho Administrativo*, *in* DERECHO ADMINISTRATIVO - 120 AÑOS DE CÁTEDRA, 67 (Rolando Pantoja Bauzá ed. 2008).

[50] The « Controladoría General de la República » is a very powerful organ of the Chilean public structure. It enjoys autonomy vis-à-vis the President and controls the income and expenditure of public resources. It is also responsible for the legality of administrative acts in general and the compliance with the Administrative Law. Alejandro Vergara Blanco and Francisco Zúñiga, "Contrapunto sobre el Rol de Controladoría General de la República," *Revista Chilena de Derecho* no. 2 (2008): 393–398.

[51] Distrinor S.A. v. Superintendencia de Electricidad y Combustibles, appeal, Rol n. 1.439-2005.

[52] Marçal Justen Filho, "Les nouveaux modes de gestion de l'action publique: la réforme des administrations centrales/service public et régulation/la contractualisation de l'action administrative - Rapport brésilien," in *Droit français et droit brésilien - Perspectives nationales et comparées*, Michel Fromont, Marie-Anne Frison-Roche, Thales Moraus da Costa, Bibiana Graeff et Tanísia Martini Vilariño (Porto Alegre - Brasil: Bruylant, 2012), 252–257.

the principle of supremacy of public interest, which remains influential in the Brazilian administrative law culture, in spite of an important effort of some scholars[53]. Along with the Constitution of 1988 and the Amendment of 1998, the set of principles that conduct public administration has expanded[54], but the principle of legality is still a persistent one. In Argentina, there has been a pervasive role of the doctrine to delineate the scope of Administrative law, pointing out their two main principles[55] and reinforcing the exorbitant character of public law as regards private law. This exorbitant character of public law comprises a set of prerogatives to enable the State to act rapidly and achieve the "*bien comúm*[56]". On the other hand, Administrative law also comprises the duty to protect people from the power of the State, saving their individual liberties. For instance, in order to legitimate mechanisms of dispute resolution within the Administration, it is not enough to guarantee the resort to the judicial system. Since the decision *Fernández Arias c/Poggio (1960)*[57], the Supreme Court of Argentina clarified that administrative organs with jurisdictional attributions were compatible with the National Constitution, as long as the resort to the judicial system entirely provided. However, the decision *Ángel Estrada (2006)*[58] determines that the Administration cannot intervene in some issues even if (i) the resort to the judicial system is ensured or (ii) the administrative organ for dispute resolution is justified by its expertise. Likewise, Administrative law in all three countries reveals the tension between limiting and ascribing powers to the State[59]. Hence, there is a

[53] However, as we saw below, some scholars, such as Humberto Ávila, has questioned this principle.
[54] The Article 37 of the Brazilian Federal Constitution establishes that the public administration should work according to the following principles: legality, impersonality, morality, transparency and efficiency.
[55] The two main principles of Administrative Law in Argentina are the principle of legality (the public administration must be subjected to law) and the principle of subsidiarity (the State can intervene as soon as the private initiative does not adequate solutions). Montserrat Font, *Programa Desarrollado de la Materia Administrativo*, Guia de Estudo (Buenos Aires: Editorial Estudio, 2012), 22.
[56] *Ibid., 23.*
[57] Ibid., 14–15.
[58] Pedro Aberastury, "Las Funciones de la Administración y el Derecho Común - un Aspecto del Caso 'Ángel Estrada'," *Revista de Derecho Administrativo - Revista de Doctrina, Jurisprudencia, Legislación y Practica* 18, no. 58 (2006): 961.
[59] Professor Bresser-Pereira discusses the potential tension between civil rights and political and social rights, or the negative liberty (liberty from) and the positive liberty (liberty to). He claims that « *while civil rights are often considered by classical liberalism as 'negative' in the sense that the state should not interfere with the freedom and the property of citizens unless they are harmed, political and social rights require a 'positive' action from the state.*" Luiz Carlos Bresser-Pereira, "Citizenship and Res Publica: The Emergence of Republican Rights," *Citizenship Studies* 6, no. 2 (2002): 149.

direct relationship between Administrative law and the profile of Constitutional law in a given country. Besides, Chile, Brazil and Argentina have all increasingly undergone a process of hybridization of Administrative Law with Anglo-Saxon systems, although Chile initiated this process earlier[60], especially with a more often use of private law to solve administrative matters and a historically weaker theoretical elaboration on administrative law[61].

16. Furthermore, Chile, Brazil and Argentina have articulated the language of State Reform, but have been institutionally praised in very different ways[62]. On the one hand, neither do we feel interested nor competent to rank the countries on the basis of any problematic criterion[63]. Indeed, we point out that State Reform is neither susceptible to success nor to failures because it is embedded within an instrumental rationality regarding the organization and functioning of the State. We cannot evaluate how successful an instrument is *in abstract*[64]. It is necessary to first have a specific substantive goal in order to see whether the chosen instrument was feasible for its implementation. Therefore, State Reform does not bring efficiency to all public policies, but put it at the centre of the preoccupations when we conceive the instruments to implement a specific policy[65].

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[60] At the end of the XIX century, Jorge Hunneus and Jose Domingo Amunategui already proposed a revision of the Administrative Law principles as French model conceived them. Ferra Borquez, *supra* note 45.

[61] It has significantly changed in the last twenty-five years with more focus on administrative matters and enactment of several laws, according to the Justice Carmona. Interview on October, 2010.

[62] For instance, Bresser-Pereira observes that, although in Argentina privatization was chaotic and ruinous, one could arguably say that it was a problem of implementation, not of conception. In the case of macroeconomic policy, however, Argentina's crisis called attention to the need for stronger state institutions and organization. Luiz Carlos Bresser Pereira, *Democracy and Public Management Reform : Building the Republican State / Luiz Carlos Bresser-Pereira*, 2004, 86.

[63] For instance, in June 2008, the World Bank Development Research Group (Macroeconomics and Growth Team & World Bank Institute Global Governance Program) published the report of the Worldwide Governance Indicators (WGI) Project, the title of which is "Governance Matters VII: Aggregate and Individual Governance Indicators, 1996 – 2007". The results of the three countries regarding the six indicators of governance demonstrate this general overview: (i) voice and accountability; (ii) political stability and absence of violence; (iii) government effectiveness; (iv) regulatory quality, (v) rule of law and (vi) control of corruption. To consult the results of the research, see http://info.worldbank.org/governance/wgi/index.asp.

[64] Héctor Masnatta, "En torno a 'Privatización y Desregulación' en la Argentina. Presente y Futuro.," *Revista de Derecho Administrativo* 72, no. 2 (2010): 310.

[65] Some of these reflexions emerged during a discussion with professor Bruno Dente, on the 23rd of September 2011, in Turin, at the Carlos Alberto International Summer School.

17. On the other hand, we have selected these countries to research on because of a frequent prominent position of Chile[66], the complexities that render Brazil[67] a country *"`a plusieurs vitesses*"[68] and the institutional crisis[69] that have hampered state capacity in Argentina[70]. These remarks are not a natural assumption, but a motivation derived from a significative part of the literature we had access to. It turned out we found ourselves attracted by these three institutional environments that promoted "turmoils[71]", "*exceptionalidades*[72]" and even "miracles[73]", but have scarcely been object of comparative analysis altogether[74].

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[66] For instance, Chile enjoys the sixth position among OECD countries in terms of efficiency with public expenditure, which represents 21% of its GDP. The indicator is calculated on the basis of economic stability, education coverage and children mortality. Moreover, Chile leads the indicators regarding control of corruption, country-risk, economic growth and human development among the Latin American countries. Mario Waissbluth, Cristian Leyton & Jose Inostroza, *La Descentralización en Chile 1990-2005: asignatura pendiente*, 37 REVISTA DEL CLAD REFORMA Y DEMOCRACIA 223, 225 (2007).

[67] In Brazil, State reform was gradual, through a loosely process of state retrenchment. The fragmented political party system, in addition to the importance of the federal states, promoted more negotiations about reform initiatives. Therefore, more democracy and less ideology were observed and reforms were implemented in a pragmatic way. Important results have been achieved, its economic growth is still lower than the other BRIC group of developing countries, too dependent on volatile commodity prices, it is one of the most unequal society in the world and, in terms of education system, the country has been classified on the bottom by the program for international student assessment of OECD. Francisco Panizza, *Contemporary Latin America: Development and Democracy Beyond the Washington Consensus* (New York, 2009), 241.

[68] One example of this lack of homogeneity in Brazil is the paralell paths of two types of Administrative law. Carlos Ari Sundfeld characterizes this bipolar characteristic of administrative law as following: (i) administrative law of binder clips and (ii) administrative law of business. These two streams of administrative law have different speediness and concerns and we should be aware of them to manage their positive and negative features at the same time. The administrative law of binder clips is concerned about the protection of equal treatment and sometimes uses this motivation to constraint public management and protect civil servants for not finding the most efficient way to carry out public policies. In turn, the administrative law of business seeks to enable the Administration to implement public interest and to diminish the distance between public and private sectors. As Carlos Ari Sundfeld proposes, it would be necessary to manage both types of Administrative law in order to finally build the Administrative law for development. Carlos Ari Sundfeld, "O Direito Administrativo entre os clips e os negócios," in *Direito Administrativo e seus novos paradigmas*, Alexandre Santos de Aragão e Floriano de Azevedo Marques Neto (Editora Forum, 2012), 87–93.

[69] Gabriela Agosto, "El Diálogo Argentino como un proceso de construcción institucional," *Institucionalidad: asignatura pendiente* 123, Colegio de Abogado (2007): 13. Guillermo E. Sagués, *La Búsqueda de la Denominada « Calidad Institucional »*, INSTITUCIONALIDAD : ASIGNATURA PENDIENTE 26–30, 29 (2007).

[70] The Argentinean experience has been an example of de-institutionalizing politics, which would have led to social and economic crisis, although the initial success of the dollarization of the economy.

[71] The turmoils we witness in Argentinean history are not limited to recent times. Back to the 19th century, the Ferrocarril Oeste was inaugurated in 1857, became nationalized in 1862 and was finally sold in 1889. As the company was a national pride, it was difficult to understand the reason why it was privatized. Several answers are available, but the only constant path is the movement between nationalization and privatization in Argentina. The nationalization called *« salvavidas »* are especially

3. Theoretical framework: between *"bricolage"*[75] and experimentalism

18. In addition to this deficiency of comparative work to assess the variety of speeches, the impact this globalized language has had on the mode of legal reasoning is to be further explored. Paradoxically, the jurists have remained virtually indifferent to the new manners to exercise power that new governance methods imply, whereas law remains, to an important extent[76], the *envelope* that comprises such relations of power[77]. Disappointed by the inadequacy of law to foster cooperation and promote flexibility within the government, scholars have paid little attention to the interface between new governance and law[78] and have actually struggled to elaborate an alternative system[79], as independent as possible from the traditional regulatory channels. Besides, a problematic side of this state of affairs is the insistence on the longstanding gap between lawmaking and policymaking. This gap reproduces an

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frequent in the country. It happens when a company with a lot of deficits is nationalized, even if it does not represent any social or political interest to the State. Masnatta, *supra* note 64 at 303.

[72] Chile became the first Latin American OECD country-member on the 11 January 2010 and is considered an "*excepcionalidad*" in terms of social and economic development. In this sense: "*On the basis of the findings analysed, it is only natural to classify Chile as a reform success. In the last twenty years it has transformed itself from an 'average' Latin American country into a dynamic economy that now exhibits accelerated growth rates and decreased volatility*" in José Maria Fanelli, *Understanding Market Reforms in Latin America: Similar Reforms, Diverse Constituencies, Varied Results* (New York: Palgrave Macmillan, 2007), 6.

[73] The Brazilian miracle is the expression to refer to the economic power of the country, which became quite popular during the dictatorship. However, this expression also represents the sceptical view regarding the Brazilian development, as a miracle could not consolidate a constant path.

[74] It is easier to find comparisons in terms of economic performance of these countries. For instance, while in Chile, an imposition of controls to the entrance of volatiles capitals (following the East Asian countries) ensured the stability of the economy, in Argentina, the radicalism of reforms coupled with an extended overvaluation of the peso gave rise to a deep economic crisis. PEREIRA, *supra* note 62 at 71.

[75] This expression emerged from a conversation with Charles-Henry Frouart and Eirik Bjorge on the May 28th, 2012, when I explained to them the challenged of theoretically classifying my work.

[76] We recognize the increasing role of soft law and of the so-called «negotiated norms». However, we believe these new modalities have not replaced the traditional legal system, but rather made it more complex.

[77] Jacques Chevallier, "La Gouvernance Et Le Droit," in *Melanges Paul Amselek*, 2005, 189.

[78] Alexander criticizes the « Transformation Thesis » defended in the work by Charles Sabel & William Simon, *Epilogue: Accountability Without Sovereignty*, *in* LAW AND NEW GOVERNANCE IN THE EU AND THE US (Grainne de Burca & Joanne Scott ed. 2006). She argues that the traditional litigator skills must not be dismissed, but complemented by new ones, as they are also necessary to ensure distributive justice. In this sense, she believes that there is an unbalanced relation of power between the parts when one side's advocacy has the traditional role of lawyers radically replaced by an exclusively cooperative expertise. Alexander, *supra* note 11 at 743.

[79] Chevallier, *supra* note 77 at 194.

unfruitful scenario in which scholars deem "legal framework" and "political context" as passive variables[80], by not taking into account their potential interactions. The language is globalized, but interdisciplinary dialogues barely take place.

19. As an attempt to take a step further in bridging the gap between joint analysis of public law and public policy, we were consciously exposed to various theoretical influences. A "*bricolage*" of theoretical sources sounded as a quasi-solution to deal with so different research questions involved in State Reform. The idea was that this "*bricolage*" would provide us more adequate tools to overcome this difficulty. In this sense, if a special attention to Max Weber was necessary to elaborate the chapter on civil service, a curious regard on Critical Legal Studies appeared to be useful to build our argument on public-private partnerships. Besides, the literature on Law and Economic Development, the clarifying analysis of Administrative Law doctrine (from several countries), the works on Latin American Comparative Politics and the New Public Management literature have helped us to grab the tensions and contradictions State Reform promotes.

20. Although we do recognize this theoretical "*bricolage*", we observe that our attempts to articulate these tensions and generate insights through these contradictions have been particularly attached to experimentalism theoretical movement. Through the whole text of the thesis, one may find references and examples of this experimentalist approach, which revealed to be the most feasible to explore State Reform as we conceive it here. Emerging as a theoretical movement from the 1990s, Experimentalism advocates that policy cannot be extensively defined before implementation, but has to be discovered under a problem-solving style, given the prevailing uncertainty of real circumstances[81]. This experimentalist approach mainly expresses three ideas: (i) it appoints to a direction that does not imply an ex-ante

[80] Duncan Kennedy puts forward that the terms "framework" and "context" are misleading to describe the relationship between law and economic development. They are misleading because they imply a set of passive institutions and constraints, whereas economic activities cannot be understood as autonomous from legal provisions. Kennedy, *supra* note 17 at 19.

[81] Charles Sabel and William Simon, "Minimalism and Experimentalism In the Administrative State," *Columbia Public Law & Legal Theory Working Papers* (April 28, 2010): 3, http://lsr.nellco.org/columbia_pllt/9187.

institutional arrangement; (ii) it proposes the submission of the State to frequent small crisis, rather than greater punctual transformations and (iii) it incites the search for creative institutional innovation given political and economic inertia[82].

21. The baseline of this experimentalist approach is that neither the market nor the State is a natural conception, but may rather assume different forms and institutional expressions[83]. The goal of the new paradigm would therefore be a frame that facilitates its own remaking, without limiting our capacity to criticize and revise it[84]. This experimentalist trend sounds to be behind the emergence of the new governance model, as it disregards formal regulations as the focus of change and proposes a reflexive approach of lawmaking, which is process oriented and tailored to local circumstances[85].

22. In this sense, our thesis articulates this theoretical framework with four sub-policies of State Reform in order to demonstrate the movement Administrative Law has taken. We will argue that this movement changes the referential point of Administrative Law. Coherence and predictability gave place to a tailoring set of rules and an experimental interpretation about them, the goal of which is to render the functioning and organization of the State more efficient. Among the several sub-policies State Reform may encompass, the following four policies are emblematic to show this movement and bring about a new *kind* of administrative law.

23. The organization of the State was supposed to be coherently structured and institutional imagination used to pursue the provision of a clear and stable picture of interconnected boxes. In Chilean, Brazilian and Argentinean administrative law books, one can easily find a chapter about "Administrative Organization", defining clearly the competencies of each organ and respecting the separation of powers. State Reform

[82] These observations derive from the lecture given by professor Roberto Mangabeira Unger for his course « Progressive Alternatives: Institutional Reconstruction Today », on the January 24th 2011, at Harvard Law School.
[83] Roberto Mangabeira Unger, *Free Trade Reimagined: The World Division of Labor and the Method of Economics* (Princepton University Press, 2007), 82.
[84] *Ibid., 90.*
[85] Lobel, *supra* note 2 at 274.

brought about decentralization and regulatory agencies, which question a stable or clear "Administrative Organization". The dynamics among centralized and decentralized units sounds more important than their arrangement in the map. Likewise, institutional imagination was liberated to provide solutions to the more and more complex social demands. As a result, decentralization and regulatory agencies made administrative law abandon coherence to become able to provide tailoring legal products.

24. On the same wake, the functioning of the State used to give us the impression that we could plan public policy in advance and in detail. We shared a comfortable feeling of reliability when we strictly divided the public and private spheres in order to define the roles in the implementation of a given public policy. Before State Reform, we proudly demonstrated our capacity to rationalize public acts and our preoccupation with public values by giving predictable answers. Nowadays, our preoccupation with public values remains, but we share an anxious feeling of uncertainty, as we are no longer able to classify public/private functions and generalize liability prescriptions. As a result, civil service is empowered to experiment the variety of mechanisms available under a more result-oriented construction of administrative procedure. Similarly, the content of public-private partnerships vary extremely, as the peculiar characteristics of each project, instead of administrative law in abstract, will define the clauses of the contract. Along with public-private partnerships, the subject "public contracts" in administrative law books has undergone a radical change. From now on, administrative law rules consist only on general directives of what is decided in detail in each contract. The distribution of risks, the possibility of arbitration and the continuous assessment of the contracts are the products of the experimentalist kind of administrative law. Things have got the more and more complicated and State Reform makes us conscious about that.

(II) FROM A COHERENCE TO A *TAILORED* ADMINISTRATIVE LAW

CHAPTER 1

LEGO GOT SOME BATTERIES:

DE-CENTRALIZING AND RESTORING THE STATE THROUGH ITS PARTS

1. Introduction

25. It has been time to give up a uniform[86] and coherent[87] legal system to be applied to the organization and functioning of the State. State Reform gives emphasis to the barely plausible uniform and coherent legal system through one of its policies: decentralization[88]. To be sure, we never needed a strong movement such as decentralization to be sceptical about such uniformity and coherence. Frustration vis-à-vis the linear deductive method of interpretation, or the autonomy of law as a pure device to accommodate conflicting interests, has been long-lastingly noticed and discussed[8990]. After all, it is not even necessary to have different layers of State (or

[86] By uniformity here we mean a systematic view of the *application* of the legal order, according to which equivalent norms would be applied to equivalent situations.

[87] By coherence here we mean a systematic view of the *content* of the legal order, according to which there is no internal contradictions, but simply rare exceptions.

[88] As we observe below, decentralization has articulated various meanings. In this work we will use the definition proposed by Tulia Falleti, according to which « decentralization is a process of state reform composed by a set of public policies that transfer responsibilities, resources, or authorities from higher to lower levels of government in the context of a specific type of state. ». Tulia G. Falleti, "A Sequential Theory of Decentralization: Latin American Cases in Comparative Perspective," *American Political Science Review* 99, no. 2 (2005): 328.

[89] Legal techniques to balance the several interests in place, such as « *technique du bilan* » have not sounded capable to rationalize the legal system as an autonomous body. It has not sounded capable because it is not possible to make a rational choice between interests that imply different values. In the end, it is necessary to make a choice highly based on political preferences. Charles-Albert Morand, "Régulation, Complexité et Pluralisme Juridiques," in *Melanges Paul Amselek*, 2005, 624.

[90] Duncan Kennedy has put forward that judges usually stake two behaviours to ensure neutrality: (i) « bipolarity », when he assumes a ideological neutrality, but actually alternates between the conflicting ideologies; (ii) « difference splitting », when he assumes his ideological neutrality through a « centrist » perspective, which encompasses the solution of giving something to each part, without attributing everything they demanded. Following this, Kennedy claims that an « activist » judge would be ethnically more plausible. Duncan Kennedy, "A Left Phenomenological Alternative to the Hart/Kelsen Theory of Legal Interpretation," in *Legal Reasoning*, Collected Essays, 2008.

non-State[91]) normative sources to envisage plurality of legal orders within the same legal system. Legal pluralism takes place even if the same norms are applied everywhere[92]. That is, the very simple fact that the same norms are subjected to contextual reactions is likely to bring about plurality and render the aforementioned uniformity and coherence hard to hold[93].

26. Nonetheless, decentralization does not only represent a striking triumph over any remaining illusion about the uniformity or the coherence of the legal system, *and* of public action[94]. Decentralization goes beyond this currently quite pervasive acknowledgment. Decentralization does so because it changes the very object of our anxieties: the question on the table is no longer limited to a *static* configuration of the State as either centralized or decentralized[95]. A rather dynamic approach has been put forward. Following the logic of State Reform as a process, what seems to matter

[91] Not only have we witnessed a proliferation of norms, but also a multiplication of normative poles and jurisdiction systems. There currently are around two thousand international organizations, more than one hundred international courts and forty-four thousand non-governmental organizations, not to mention the normative capacity of independent regulatory agencies within the State. Sabino Cassese, *Au-delà de l'Etat*, Jean-Bernard Auby, Droit Administratif (Emile Bruylant, 2011), 47–49.

[92] Jean-Bernard Auby points out that even when there is no legislative power at the local level, it would be too simple to defend a unitary law. The final legal product always derives from a certain level of evaluation, of discretionary power. Jean-Bernard Auby, *La Decentralisation et le Droit* (L.G.D.J., 2006), 16–18.

[93] In this sense, it is worth mentioning the process of «Trobriand Cricket», which is a known phenomenon among anthropology scholars about what happened in the Trobriand Island (Papua, New Guinea). English colonisers had diffused their traditional sport, that is, "cricket". In 1974, a documentary elaborated by Jerry W. Leach and Gary Kildea demonstrated that their game henceforth encompassed completely different rules and goals, as a result of arrangements made by the local culture. Marçal Justen Filho, *O Direito Das Agências Reguladoras Independentes / Marçal Justen Filho*, 2002, 287.

[94] We do not strictly identify the State to the legal order, in the Kelsenian terms. As we explained in the introduction of this thesis, our work is rather embedded within an institutionalism approach, which also conceives the State as a social and political phenomenon. However, the role of law as the formal envelope of the State is not to be disregarded. On the contrary, it is to be further investigated as a key element in the understanding of public action. JACQUES CHEVALLIER, L'ÉTAT / JACQUES CHEVALLIER, 4 (2011).

[95] In a comparative work regarding the implementation of decentralization in France, Belgium and Canada, it has been noticed that even our notions of federal, unitary or other type of State are too simple to deal with the questions State Reform has raised through decentralization. One may identify these questions regardless of the « type » of State in place, as Canada is a longstanding federal state, Belgium a recent federal one and France the usually remembered example of unitary State. LA MISE EN ŒUVRE DE LA DECENTRALISATION : ETUDE COMPAREE FRANCE, BELGIQUE, CANADA : ACTES DU COLLOQUE DE LA FACULTE DE DROIT ET DE SCIENCE POLITIQUE DE RENNES, 18 ET 19 NOVEMBRE 2004 / SOUS LA DIRECTION DE GILLES GUIHEUX ; PREFACE DE JEAN-BERNARD AUBY ; CONCLUSION DE FRANCIS DELPEREE (2006).

nowadays is the *articulation*[96] that decentralization promotes between local units and the centre, although decentralization does not necessarily attribute to the centre a central role. This focus on articulation, which challenges static configurations, seems to help us to conceive the State without resorting to the aforementioned illusory uniformity and coherence. After all, by highlighting the plurality of legal orders, decentralization may bring back the viability of the legal system as a whole[97], *and as a whole does not mean as a unity*. Decentralization would enable the State to still hold together precisely because it sheds light on its numerous pieces and legitimates its heterogeneities. These numerous pieces and heterogeneities are henceforth not to be hidden, but exposed. Decentralization ultimately includes another dimension into the image of the State, and makes the image shake.

27. In addition, beyond the managerial rhetoric[98] and political externalities[99] to which the phenomenon of decentralization has usually been linked, decentralization has shifted the way to think about the relationship between law and public policy. Differentiation is indeed and finally recognised[100]. More than that, differentiation is necessary to ensure the concretization of *a tailoring Administration*. This tailoring

[96] Abrucio states that there is no longer such an option between either centralization or decentralization, but an analysis of the articulation between them. Fernando Luiz Abrucio, "Descentralização e Coordenação Federativa no Brasil: Lições dos anos FHC," in *O ESTADO NUMA ERA DE REFORMAS: OS ANOS FHC - Parte 2*, Fernando L. Abrucio & Maria Rita Garcia Loureiro, 2002, 156.

[97] Auby explains that, although it is not our spontaneous perception of the matter, decentralization conciliates the unity and plurality of the legal system. It operates also in favour of the unity of the legal system, not only to recognize differentiation within it. AUBY, *supra* note 92 at 174. Decentralization would therefore breathe new life into "*le phantasme de l'unité du droit* », as it promotes the dialogue between the unity and the multiplicity. AUBY, *supra* note 92 at 145.

[98] One of the reasons to decentralize would be the improvement of the administrative functioning of the State. We do recognize such a reason behind the movement and will discuss it below. However, we do not limit our reasoning about decentralization to this aspect of the phenomenon.

[99] Decentralization has been strongly associated to democratization. The idea is that the politicians would reverse the centralism of the authoritarian period and that people would be more engaged with political matters as long as they are decided at the local level, more closely to the concerned community. On the other hand, some scholars present the dark sides of decentralization as follows: it can augment distributional conflicts, foster sub-national authoritarian behaviour and exacerbate patronage. Falleti, *supra* note 88 at 328. Moreover, according to the findings that are presented by Kent Eaton, episodic changes in regime type are important but ultimately insufficient as explanations of the movement along the decentralization continuum. Kent Eaton, *Politics Beyond the Capital : the Design of Subnational Institutions in South America*, 2004, 9.

[100] Auby argues that decentralization conciliates the unity and the territorial plurality of the legal system. He explains that the territorial criterion is relatively neutral because it is less problematic to accept legal differentiation when it is based on territorial heterogeneities. Decentralization would thus be a reduction of social and legal differences. AUBY, *supra* note 92 at 145.

Administration expresses the current model of public action: feasible to specificities and keen to manage contextual tools to achieve its goals. In this sense, instead of alternating between centralized and decentralized types of States, we may think about which functions should be centralized and which ones should be decentralized[101]. Decentralization sounds as a matter of selective action, not a matter of architectural models[102].

28. In this chapter, we will explore the movement of decentralization that State Reform has sponsored all over the world. If the rational behind decentralization is seldom obvious and one may argue that it is not an irreversible process[103], it has undoubtedly been a globalized phenomenon. The language[104] has been used to produce speeches from Philippines to Venezuela, and in Europe as a whole, where the European Charter of Local Autonomy (1985) and the European Charter for Regional and Minority Languages (1992) have encouraged this trend[105]. As a consequence, even countries that used to be deemed as prototypes of highly centralized States, such as France and Great Britain, decentralization came about in significant ways. For example, in France[106], we have witnessed the emergence of a "*juridicization*" of public local spaces: if litigation between regional and local authorities used to be rare, this situation has changed, along with an assimilation of the culture of risk-assessment and an intensification of the use of contracts[107]. In the United Kingdom, the so-called

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[101] In the same sense, Arretche explains the crucial role of the central State towards a "selective expansion" of its agencies regarding new activities of planning, supervisions and coordination. Marta T. S Arretche, "Mitos da Descentralização: Maior Democracia e Eficiência nas Políticas Públicas," *Revista Brasileira de Ciências Sociais* 11, no. 31 (1996): 17.

[102] *"The two governments in Argentina that pushed liberalizing, anti-statist agendas – one democratic and one authoritarian – supported the decentralization of some expenditures, but pushed the dramatic centralization of revenue*." Kent Eaton, *Decentralization, Democratization and Liberalization: The History of Revenue Sharing in Argentina, 1934–1999*, 33 JOURNAL OF LATIN AMERICAN STUDIES 1–28, 4 (2001).

[103] EATON, *supra* note 99 at 7.

[104] In Brazil, before decentralization has become a national policy, some federal states experimented it. For instance, the governor André Franco Montoro decentralized the administration of the federal state of São Paulo, especially regarding education. Antônio Bosco LIMA and Edaguimar Orquizas VIRIATO, "As Políticas De Descentralização, Participação e Autonomia: Desestatizando a Educação Pública," *REUNIÃO ANUAL DA ANPEd* 23 (2000), http://168.96.200.17/ar/libros/anped/0523T.PDF.

[105] AUBY, *supra* note 92 at 74.

[106] The first French steps towards decentralization were quite timid. Arretche, *supra* note 101 at 8. However, the movement has distinctively increased in the last fifteen years.

[107] AUBY, *supra* note 92 at 35.

revolutionary, but asymmetric, process of devolution[108] that has taken place since the late 90s seems to have pursued a pragmatic and incremental path, without strong links to any coherent programme[109]. One of the consequences of this process has been the emergence of controversies about the understanding of the country as either a unitary State, a union State, or something else. If the devolved bodies have roots with the Westminster Parliament, they also have roots in anti-Westminster politics, which would lead them towards different directions and make the United Kingdom an "*ever looser union*"[110].

29. Our case studies were not exceptions of this globalized phenomenon, and Latin America was actually the leading region in the implementation of decentralization reforms[111]. For example, regarding political decentralization, the region currently counts on thirteen thousand local elected representatives, whereas this number was limited to three thousand at the end of the 70s[112]. Indeed, if in the 1980s it was seldom to find Latin American countries that hold municipal elections, in 2008 the report handed by "*Cités et Gouvernement Locaux Unis*" showed that all of them currently have municipal governments elected by universal suffrage[113]. Besides, the sub-national shares of revenues and expenditures increased from averages of 14% and 16% in 1980 to 29% in 2000[114]. In this context, Chile, Brazil and Argentina substantively participated to this process, regardless of the "type" of State they used to encompass[115]. For instance, according to Alieto Guadagni**,** "*el gran país federal es*

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[108] In this work, we do not make any strict difference between decentralization and devolution, as the development of our research questions are not determined by such distinction.
[109] Dawn Oliver, cited in James Mitchell, "The Westminster Model and the State of Unions," *Parliamentary Affairs* 63, no. 1, Devolution: ten years on (2010): 85.
[110] Ibid., 86–87.
[111] Falleti, *supra* note 88 at 333.
[112] *Ibid., 151.*
[113] CITES ET GOUVERNEMENTS LOCAUX UNIS (BARCELONE), LA DECENTRALISATION ET LA DEMOCRATIE LOCALE DANS LE MONDE : PREMIER RAPPORT MONDIAL / [COORDONNE PAR LE GROUPE DE RECHERCHE SUR L'ADMINISTRATION LOCALE EN EUROPE (GRALE); SOUS LA DIRECTION SCIENTIFIQUE DE GERARD MARCOU,...] 77 (2008).
[114] Source of the World Bank, cited in Falleti, *supra* note 88 at 327.
[115] The difference between federalism and decentralization does not seem to be based on the extension of the normative power of the local unity or of the federal State. After all, legal pluralism is present in both decentralization and federalism. The difference between decentralization and federalism would be rather that federalism is not only a matter of legal pluralism, but also of institutional organization. This means that federalism supposes a constitutional division of competencies that imply an "organized

Brasil, mientras Chile es el más unitario. La Argentina no es ni chicha ni limonada"[116].

30. Indeed, at one extreme of the spectrum, Chile is *a unitary State*[117][118] that figures as a symbolic example[119] of the centralist tradition of the region[120][121]. The pioneering reforms that brought about decentralization in social policies, such as education, did not render the central government less central. As a promoter of decentralization, the central government reinforced "vertical linkages" that allowed itself to keep controlling decentralizing units[122]. On the same path, in 2005 Chile was considered the most rigorous and centralized country in the world financially speaking[123], as the sub-national units enjoy an anaemic revenue-raising capacity, no system of automatic revenue sharing exists for regions and the Ministry of Finance is deemed as a powerful actor in budgetary negotiations[124]. In turn, Brazil, which is a *federal State*[125], provides an intricate narrative. On the one hand, historical[126]

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participation" of the federal states into the federal organs. Jean-Bernard Auby, *Décentralisation et Pluralisme*, *in* MELANGES PAUL AMSELEK 39, 44 (2005).

[116] Alieto Guadagni is the former National Secretary of Energy and currently works at the World Bank.

[117] Article 3 of the Political Constitution (« *Constitución Política"*) prescribes that Chile is a unitary State.

[118] Even though the law of municipal autonomy was enacted in 1891, which was considered very advanced for the time, this law was never applied and a centralizing movement was retaken by the Constitution of 1925. (BARCELONE), *supra* note 113 at 83.

[119] For example, in 1842, Chile was the first Latin American country to establish a system of public education. By 1974, Chile had already achieved remarkable education statistics for a developing country, which counted on a highly centralized bureaucracy. The Ministry of Education were responsible for virtually all decisions and all teachers were public employees, whose salaries were determined by the central government. Consequently, the Chilean experience before the movement of decentralization revealed a quite uniform system of education with no adaptations to local characteristics. Taryn Rounds Parry, "Achieving Balance in Decentralization: A Case Study of Education Decentralization in Chile," *World Development* 25, no. 2 (1997): 211.

[120] Eliza J Willis, Christopher Garman, and Stephan Haggard, "The politics of decentralization in Latin America," *Latin American Research Review* 34, no. 1 (1999): 7.

[121] Although Latin American countries have a centralist tradition inherited by the concentration of power of the Spanish and Portuguese monarchies, the municipal councils («*cabildos* ») played an important role in the process of independence. Historically speaking, the debate between centralization and decentralization has a political connotation in the region, by differentiating conservators and liberals. (BARCELONE), *supra* note 113, at 79.

[122] We will explore more details of these vertical linkages in section 3.2. Rounds Parry, *supra* note 119 at 28.

[123] Waissbluth, Leyton, and Inostroza, *supra* note 66 at 227.

[124] Kent Eaton, "Risky Business: Decentralization from above in Chile and Uruguay," *Comparative Politics* 37 (2004): 10.

[125] Article 64, § 4o, I, of the Federal Constitution.

unbalanced relationships between local and central authorities[127] have built a model of *centralized federalism*[128][129]. On the other hand, Brazil has become the most decentralized country of the developing world on fiscal matters since the promulgation of the Constitution of 1988[130] and has ascribed to municipalities an increasingly active role regarding policy-making[131]. For example, federal states and municipalities operate more than 40% of the Brazilian public expenditure, which makes the country the most balanced example of resources distribution in the region[132], despite its eye-catching regional inequalities. Finally, Argentina, which is also a *federal State*[133], tells us a story of a country that struggled during two-third of the XIX century to organize a

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[126] Abrucio points out historical discontinuities of the unbalanced federalism that takes place in Brazil. During the Ancient Republic, the federal states enjoyed a large autonomy, there was little cooperation among them and the federal government was quite weak. During the era Vargas, on the other hand, there was a strengthening of the National State. Exceptionally, the following democratic period between 1946 and 1964 provided a more balanced federalism, which was significantly erased after the military takeover. Once in power, the military government consolidated a political, administrative and financial centralization. Fernando Luiz Abrucio, *Federative coordination in Brazil: the experience from the FHC administration to the challenges of the Lula government*, REVISTA DE SOCIOLOGIA E POLÍTICA 41–67, 46 (2005). However, as we will see in the section 3.2, these discontinuities do not provide the whole story. The focus on the discontinuities may overlook the continuities behind the concrete institutional arrangements of the State. Instead, we share the idea according to which it is the standard of the relationship between the centre and decentralized units that changes. E. Kugelmas and L. Sola, "Recentralization/decentralization: Dynamics of the Federative Regime in Brazil 90's," *Tempo Social* 11, no. 2 (1999): 64.

[127] Until the late 90s, decentralization was not a frequent object of study in Brazil because the country had undergone more centralization than decentralization. Besides, studies on intergovernmental relations have focused on (i) the relationship between the State and society and (ii) how the distribution of territorial power influences political arrangements. Celina Souza, "Federalism and Decentralization in the 1988 Constitution: The Decision-making Process, Conflicts, and Alliances," *Dados* 44, no. 3 (January 2001): 11, doi:10.1590/S0011-52582001000300003.

[128] *Ibid., 521.*

[129] The central government still plays an important role because of (i) the constitutional assignment of key functions; (ii) practical considerations, such as efficiency in revenue generation and (iii) institutional legacies. Marta Ferreira Santos Farah et al., "Intergovernmental Relations and the Subnational State - The Decentralization of Public Policy Making," in *Governance in the Americas: decentralization,*, Robert H. Wilson, Peter M. Ward, Peter K. Spink & Victoria E. Rodriguez (University of Notre Dame Press, n.d.), 162.

[130] Souza, *supra* note 127 at 49. To illustrate the Brazilian highly decentralization on fiscal matters, in the end of the 1990s, sub-national governments accounted for 44% of all spending on health, 69% on education and twice the federal government's public investment. Alfred P. Montero, "Decentralizing Democracy: Spain and Brazil in Comparative Perspective," *Comparative Politics* 33, no. 2 (2001): 161.

[131] For example, the family health program has allowed municipalities to formulate local policies, as long as they follow the federal guidelines. Likewise, local governments decide the allocation of educational resources and the content of their courses, provided that they conform to federal regulation. After all, the access to resources, such as FUNDEF, depends on the compliance with federal regulation. Ferreira Santos Farah et al., *supra* note 129 at 163.

[132] (BARCELONE), *supra* note 113, at 81.

[133] Article 1 of the Constitution of the Argentine Nation.

national society and consolidate a central State[134]. Interesting enough, at the end of the XX century, Argentina was understood as a « *de facto unitary State* »[135], in the sense that the president was formally empowered to intervene in provincial affairs. However, Argentina has always enjoyed a high level of administrative decentralization[136], since several responsibilities, such as the management of the education system, have historically been shared among federal and provincial governments. Likewise, back to the very beginning of the Argentinean constitutional history, the 1853 document already bequeathed the provinces with relevant revenue raising powers[137], which has considerably been deepened trough the system of co-participation[138] that has taken place since the 1930s[139].

31. By relying on our case studies, we will argue that the movement of decentralization reflects a *reconciliation* project between the parts and the whole. This reconciliation project has functioned according to a two-way logic. On the one hand, decentralization may provide local authorities with more tools (political, administrative or financial) to deal with the centre[140]. On the other hand, decentralization saves the State from its imminent internal implosion because it shifts the understanding of the legal system. To guarantee the existence of the State as a whole, decentralization would imply (a) empowerment of the local units to recover articulations with the centre and (b) recognition of plural legal orders. Decentralization keeps betting on cohesion, but it gives up coherence and uniformity.

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[134] It turns out that this struggle achieved some effective results through the role played by the government of Hipolito Yrigoyen, from 1916 to 1922 and from 1926 and 1930. He was the first president elected by a secret and general male suffrage in Argentina and took advantage of the legitimacy that post-election periods usually ascribe to mitigate the sub-national political forces. EATON, *supra* note 99 at 16.

[135] Willis, Garman, and Haggard, *supra* note 120 at 25.

[136] Falleti, *supra* note 88 at 336–337.

[137] EATON, *supra* note 99 at 4.

[138] We will develop in more details this system of co-participation in the next sections.

[139] Eaton, *supra* note 99 at 2.

[140] We will notice in the section 2.2 that decentralization can backfire because it is embedded within political articulations. That is, decentralization does not necessarily mean more political, financial or administrative autonomy to the local units.

32. To develop this reasoning, we will (2.1) present some reasons for giving up the idea of a uniform and coherent State. Our goal will be to demonstrate how decentralization has rendered uniformity and coherence implausible, given the complexity of the current State's apparatus, the attempts to accommodate it to globalization and the practical need to improve cooperation among its parts. Besides, we will (2.2) develop narratives about our three countries that describe decentralization as rather a political continuum movement than a proposition of a *type* of State. This "seesaw[141]" brings to light continuities and discontinuities of the decentralization process[142], by reminding us that there is no definite model to be conceived. As we assume that there is nothing natural about the State because it serves to organize politics, it would be helpless to imagine a permanent equilibrium among its parts. In fact, many countries[143] have carried out centralization and decentralization at the same time[144]. Moreover, the political continuum approach we adopt here sounds to undermine a hierarchical vision of the State[145], as potential bottom-up decentralizing initiatives may withdraw from the centre the power to play a central role.

33. Secondly, we will (3.1) analyse how decentralization has been one of the policies of State Reform, how decentralization has been a tool to assist the State in tackling its challenges. More specifically, we will put forward that intergovernmental

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[141] Tarry Parry uses the metaphor of a seesaw to explain the relationship between the Chilean central government and local units regarding the decentralization of the education system. According to Parry, the central government moved from "*a position where it dominated all decisions in education to a position where both levels of government have specific responsibilities*". Rounds Parry, *supra* note 119 at 217.

[142] M. Arretche, "Continuities and Discontinuities in the Brazilian Federation: How 1988 Made 1995 Possible," *Dados* 52, no. 2 (2009): 377–423.

[143] For instance, in Brazil, financial decentralization took its first steps during the military regime, although the country was considered highly centralized at that time. The tax reform of 1966 prescribed the devolution to the federal states of the tax of circulation of commodities (*Imposto sobre Circulação de Mercadorias*). On the same path, the constitutional amendment Passos Porto of 1983 ensured more financial autonomy to the federal states and municipalities, by increasing their participation to the revenues of income tax, industrial product tax and tax over gaseous and liquid lubricants.

[144] These observations were made by professor Patrick Le Gales during his course "Governance and Government", on the 20th October of 2009, at SciencesPo (Paris).

[145] This hierarchical vision of the State derives from the allegedly ascendant movement it underwent through modernity: the State becomes an abstract entity located on the top of society, by ensuring its identity and encompassing power. Jean-François Thuot, "Déclin De l'État Et Formes Postmodernes De La Démocratie," *Revue Québécoise De Science Politique* no. 26 (1994): 75–102.

relations play a key role to make the reconciliation project between the State and its parts realistic. We will discuss the main challenges for these intergovernmental relations, by illustrating it through the specific contexts of fiscal austerity and development of participatory democracy. Finally, we will (3.2) suggest some thoughts about the changing relationship between law and public policy that decentralization has brought about. This changing relationship reveals an increasing interaction between *legal experimentalism*[146] with the concerns derived from *implementation* of public policies. We claim that this changing relationship contributes to the construction of the *tailoring Administration* concept.

2. Giving up a uniform and coherent State

2.1. Reasons for the disenchantment

34. "It's not coherent, but it is governed"[147]. David Kennedy's sentence about the international world is far from being unsuitable to the national one, if one still intends to keep distinguishing national from international legal regimes[148]. The contemporary image of the State is a fragmented one[149], composed by national and sub-national multi-level layers of political, administrative and economic institutions. In this sense, attempts to regulate and manage these layers necessarily face disappointment whenever coherence and uniformity are the searching goals. And repetitive disappointments ultimately consolidated an existential crisis of the modern State. The foundations of such a State were turned upside down: law no longer

[146] As we pointed out in the introduction, in this work, we use Charles Sabel's and William Simon's definition of experimentalism: « *Experimentalism emphasizes interventions in which central government affords broad discretion to local administrative units but measures and assesses their performance in ways designed to induce continuous learning and revision of standards ».* Sabel and Simon, *supra* note 81 at 3.

[147] David Kennedy, "One, Two Three, Many Legal Orders: Pluralism and the Cosmopolitan Dream," *N.Y.U. Review of Law and Social Change* (2007): 646.

[148] Sabino Cassese asserts the increasing difficulty to draw any clear division between domestic and global law as a consequence of globalization. Domestic legal order has become highly porous and decision-making occurs with the participation of both national and international actors. S. Cassese, *Administrative Law without the State-The Challenge of Global Regulation*, 37 NYUJ INT'L. L. & POL. 663, 684 (2004).

[149] We could argue that the State has never been an opaque unitary bloc, but what matters in this work is to observe that this fragmentation has been recognized and exacerbated.

represents the incarnation of "Reason", becomes vulnerable to political and social contingent bargain powers and uninhibitedly exposes its incertitude, relativism and indeterminacy[150].

35. As a response to the disaggregation or multiplicity of the international legal regime, Kennedy purposes to take a break from a normative universalism[151]. The purpose of such break reflects the disenchantment regarding attempts to render the legal system a systematic "tapestry[152]". According to Kennedy, the diversity of professional sensibilities to conceive the world brings about pluralism, which should shift the nature of our concerns. Instead of asking questions about what law should be, as if there was a stable and definitive answer, we may develop projects of identity, power and ethnics, by recognizing the differences[153] and ultimately being better off in a fragmented international legal regime[154].

36. The question "what should Administrative Law be?" does not sound helpful either, as it insists on finding *one* normative answer. The legal system no longer represents a systematic set of general norms, and laws have become « *bavardes, précaires et banalisés*»[155]. Such a question overlooks the indeterminacy of legal norms, neglects the individualization of contemporary legal reasoning[156] and pretends control over the discretionary power of street-level bureaucrats. What is more, the aspiration of a uniform Administration does not fit to territorial realities, regardless of the level of heterogeneity found in a given country.

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[150] JACQUES CHEVALLIER, L'ÉTAT POST-MODERNE / JACQUES CHEVALLIER, (2008).
[151] In the case of Kennedy's work, he proposes a break from normative humanism universalism.
[152] Kennedy, *supra* note 147.
[153] These differences may be regarding the formal rules that may be applied, the sociological meaning of these rules, the role of international lawyers jobs in different places or the relations these lawyers have with the State. *Ibid., 648.*
[154] *Ibid., 646.*
[155] The adjectives refer to « la loi ». Therefore, we put them in the plural to go along « laws ». CHEVALLIER, *supra* note 150.
[156] Law has undergone a specializing process to serve to public policies, which vary along with territorial realities and target population. Besides, the participation of interest groups to the formulation and implementation of the regulatory apparatus of these public policies deeps the individual legal reasoning behind contemporary public action. Morand, *supra* note 89 at 625.

37. First, decentralization gives emphasis to historical inequalities among regions, states and municipalities. The attribution to sub-national entities of the responsibility to provide education and health care, for instance, discloses a national embarrassment. This national embarrassment consists on the fact that populations of different territories have had access to very different quality of services, although these services are supposed by law to be equally provided for all citizens. In Brazil, there is a great inequality in the provision of education. In some regions, teachers used to receive 20 or 30 dollars per month[157] before the creation of FUNDEF[158] in 1996[159]. Given such disparities, municipalities had to destine 60% of the amount of money received by the Fund to the salaries of teachers. The Fund was nourished by the contribution of federal, state-level and municipal governments. Each federal state had to contribute with 15% of its revenues to the fund, which would be distributed according to the number of students enrolled in the schools. The Fund had to ensure the amount of three hundreds "*reais*" (the Brazilian currency) per student. If it did not, the Federal Government would have to complete the required total amount of money to fulfil the task[160]. In Chile, the Common Municipal Fund was defined by the article 122 of the Constitution in the 1980s as a distributive mechanism of income revenues among municipalities. However, heterogeneities remain all over the place, as in 2002, 50,5 % of the national technicians and scholars were concentred in Santiago[161]. Likewise, the performance of students in rural areas and students from low-income families has declined, whereas the performance of students from higher economic

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[157] FERNANDO HENRIQUE CARDOSO, A ARTE DA POLÍTICA: A HISTÓRIA QUE VIVI / FERNANDO HENRIQUE CARDOSO; COORDENAÇÃO EDITORIAL, RICARDO A. SETTI 486 (2006).

[158] FUNDEF means Fund for the Support and Development of Fundamental Education and Teaching Valorization *(« Fundo de Manutenção e Desenvolvimento do Ensino Fundamental e de Valorização do Magistério »*).

[159] The Constitutional Amendment n. º 14 created the FUNDEF, which was regulated by the law n. º 9.424 of 1996 and the Decree 2.264 of 1997. The FUNDEF started being implemented in 1998 and was valid until 2006. The FUNDEF was replaced by the FUNDEB in 2007, which should be valid until 2020. This Fund for the Support and Development of Basic Education and Education Professional Valorization ("*Fundo de Manutenção e Desenvolvimento da Educação Básica e de Valorização dos Profissionais da Educação* ») differentiates from the FUNDEF essentially because it expands the benefit to the whole basic education cycle. Ministério da Educação, MINISTÉRIO DA EDUCAÇÃO - FUNDEF, http://portal.mec.gov.br/index.php?option=com_content&view=article&id=12407&Itemid=725 (last visited Apr 3, 2012).

[160] CARDOSO, *supra* note 157 at 487.

[161] Waissbluth, Leyton, and Inostroza, *supra* note 123 at 236.

levels has improved over time[162]. In 2007, a constitutional reform took place to try to put into effect the distributive character that the Common Municipal Fund was supposed to take in. The process goes on and it seems to go on towards further decentralization. If the Law 20.237 modified the distribution of the Common Municipal Fund[163] in 2007, the Chilean Association of Municipalities met up in March 2012 to denounce the remaining inequalities and claim for centre-municipalities transfer rates comparable to those existing in developed countries[164]. In turn, the Argentinean system of "*coparticipación*", which was deeply consolidated through the constitutional reform of 1994, has promoted a great diversity with reference to the autonomy of the municipalities. If the transfers from the centre to the intermediary level *("provincias"*) increased, the way to apply the resources has extensively varied among the municipalities. The way to apply the resources has extensively varied because it is up to the provinces to decide the degree and the terms of municipal autonomy. For instance, in the Argentinean province of Santiago del Estero, only five out of one hundred and twenty-six municipalities enjoy full local autonomy[165]. Indeed, if in Argentina more than 20% of public expenditure is operated outside the federal government, the majority of the resources remains at the provincial level: municipalities operate less than 10% of the national public expenditure[166].

38. As a result, decentralization reinforces disputes among sub-national units for the benefits of revenue sharing policy, which stresses the political character of the subject and rules out any attempt to keep coherence and uniformity as elements of the

[162] Rounds Parry, *supra* note 119 at 218.
[163] As a result of the constitutional reform, 25% of the Fund will be equally distributed among municipalities, 10% according to the number of poor people in the municipality, 30% according to the number of exempted tax buildings and 35% according to the municipalities that had low-income revenues in the previous year.
[164] The Association launched the *« 30 más »* agenda, which consists in achieving a transfer rate of 20% of national investment by 2020 and 30% of it by 2030. Comunicaciones ACHM, "Municipios Latinoamericanos concluyeron Congreso de Autoridades Locales con un Llamado a la Descentralizacion," *Asociacion Chilena de Municipalidades*, March 23, 2012. This Association was formed in 1993 by over 1.200 mayors and municipal councillors and has been a symptom of change in Chilean political dynamics. If Chilean sub-national actors have never been powerful and the decision to decentralize came from above, one of the consequences of decentralization has been the strengthening of bottom-up initiatives to provide technical support to municipal officers who are now charged with complex and important expenditure and to advance the cause of municipal autonomy.
[165] (BARCELONE), *supra* note 113, at 81.
[166] *Ibid., 88.*

organization and functioning of the State. By seeking for revenues to meet the new responsibilities attributed by decentralization, sub-national units have different regards with reference to tax distribution. A fiscal war has often taken place, in which *"richer states prefer rules allowing them to keep a larger share of the revenue they generate, while poorer ones seek redistribution"*[167]. Similarly, one can barely find coherence and uniformity in the potential effects of fiscal decentralization, since it is entangled to the capacity of the previous existing administrative apparatus at sub-national levels. As a consequence, if decentralization measures entitle sub-national units to establish new taxes, it does not necessarily mean that these units *will* obtain more resources. After all, a precarious administrative apparatus will not be able to collect these new taxes, whereas sub-national units will be anyway responsible to deliver more services. Following this, local budgets might face serious constraints when local units lack the necessary administrative apparatus to collect new taxes, in spite of their higher fiscal autonomy conferred by decentralization. Therefore, decentralization might actually buttress the dependence of local authorities on transfers from the centre, which would reveal rather an incoherent and diverse outcome of this process[168]. For example, during the first wave of decentralization in Chile, the decree-law number 1-3063 of 1980 established the transfer of the operation of pre-primary, primary and secondary schools to municipalities. Indeed, the measure substantially empowered the municipalities, by ascribing to them for a certain period of time all property and equipment owned by the Ministry of Education. The centre also promised to pay 5% of total municipal wages and salaries, 4% in 1981 and 3% in 1982. However, as the transfer of responsibilities occurred very rapidly, the municipalities still did not have the institutional capacity to manage their new responsibilities regarding the education system[169]. By trying to build some institutional capacity, municipalities created either Departments of Municipal Education or delegated them to Municipal Corporations (private non-profit entities). However, in 1988, the Controller General and Supreme Court ruled them as "*not constitutionally desirable*", by preventing the creation of new

[167] Willis, Garman, and Haggard, *supra* note 120 at 49.
[168] Falleti, *supra* note 88 at 329.
[169] Rounds Parry, *supra* note 119 at 216.

municipal corporations[170]. Furthermore, the vulnerability of local units vis-à-vis the centre may derive from the control of the latter over the automatic distribution of revenues. For instance, Argentinean municipalities are barely enabled to protest against mistakes committed by the federal government regarding the distribution of revenues because of the weakness of rule of law and the lack of judicial independence from the federal executive[171]. Likewise, the Chilean central government, personified by the Ministry for Finance, generated important debts vis-à-vis local governments. Indeed, the central government frequently failed to return to local governments amounts of income tax funds that belonged to them according to the law[172].

39. A second reason for giving up uniformity and coherence would be the increasing complexity of the State apparatus to meet contemporary society's demands. This increasing complexity has specially raised problems of organization. Territorial organization has so frequently been subjected to modifications, that it has become difficult to find its rationalization[173]. In fact, rationalization seems to stop being a priority in such circumstances: problems of coordination actually sound more appealing. For example, according to Abrucio, Brazilian administration looks like "*a set of little boxes*"[174] among which there is barely effective communication. Moreover, the exaggerated multiplication of municipalities[175], the lack of incentives for inter-governmental cooperation and the fact that patrimonial relations survive at the local

[170] *Ibid.*
[171] Eaton, *supra* note 102 at 6.
[172] Garry Bland, "Enclaves and Elections - The Decision to Decentralize in Chile," in *Decentralization and Democracy in Latin America*, Edited by Alfredo P. Montero and David J. Samuels (University of Notre Dame Press, n.d.), 96.
[173] Jean-Bernard Auby, "Réflexions générales sur la nouvelle gestion publique et sur les perspectives de reforme en Europe continentale," in *Reforme de l'Etat et de l'Administration en Europe - au dela de la Nouvelle Gestion Publique?*, Joachim Beck & Fabrice Lara, 2011, 49.
[174] Fernando Luiz Abrucio, "Trajetória recente da gestão pública brasileira : um balanço critico e a renovação da agenda de reformas," *Revista de Administração Pública* no. Edição Especial Comemorativa (2007): 83.
[175] The Federal Constitution of 1988 in Brazil prescribed that municipalities are also federal entities and enjoy the same status of federal states. Since its promulgation, there has been an impressive proliferation of municipalities, the number of which increased from 4.189 to 5.507 during the period between 1988 and 1997. Not only does this multiplication dilute the federal resources, but it also creates municipalities that largely depend on these resources to maintain its administrative apparatus. In almost all municipalities with at most ten thousand people, 59% of their budget derives from the Fund of Municipal Participation. Mendes 1999, Kugelmas and Sola, *supra* note 126 at 74.

level have pushed the project of rationalization[176] away. In its place, the phenomenon of "*municipal fragmentation*" has taken the floor: virtually 90% of the sixteen thousand Latin American municipalities have less than fifty thousand people and face serious financial and technical problems. In Brazil, the explosion of new municipalities was so impressive that a Constitutional Amendment (number 15 of 1996) was approved to prescribe stricter conditions for the creation of a new municipality[177].

40. Instead of searching for rationalization, attempts to alleviate economic and administrative weaknesses and to improve cooperation among decentralized units have more recently been pursued by Chile, Brazil and Argentina. More interestingly, associations between local units of *different countries* have recently been consolidated because of their geographical proximity[178]. The law of public consortia[179], enacted in Brazil in 2005, may be one of these attempts, as it finally[180] regulates the article 241[181] of the Federal Constitution. Along with the regulation of the article 241, the law of public consortia came to overcome the previous fragile status that associations among federal entities, such as conventions, used to have. For example, these associations could be easily dissolved and did not ensure continuity. Public consortia would overcome this fragile status because they constitute a new legal personality[182] along

[176] *Ibid., 69.*
[177] (BARCELONE), *supra* note 113 at 85.
[178] Five inter-municipal entities constituted by Chilean and Argentinean local units have been identified. D. Cravacuore and A. Clemente, "El Proceso Reciente De Asociativismo Intermunicipal En Argentina," in *XI Congreso Internacional Del CLAD Sobre La Reforma Del Estado y De La Administración Pública, Guatemala City, Guatemala*, 2006, 2.
[179] Law 11.105 of 2005.
[180] The Constitutional Amendment number 19 of 1998, which was the emblematic instrument of the Brazilian State Reform, inserted the article 241 into the Constitution. However, this article has been neglected since 1998.
[181] The article 241 establishes the principle of cooperation among federal entities, which are disciplined by laws of public consortiums and conventions. These laws authorize the associated management of public services and partial or total transfer of duties, services, personnel and goods. In Portuguese: *"A União, os Estados, o Distrito Federal e os Municípios disciplinarão por meio de lei os consórcios públicos e os convênios de cooperação entre os entes federados, autorizando a gestão associada de serviços públicos, bem como a transferência total ou parcial de encargos, serviços, pessoal e bens essenciais à continuidade dos serviços transferidos."*
[182] There is an academic debate about the legal nature of the public consortia. The law prescribes that they could be public or private associations, but in the Brazilian legal system the notion of public association is not known. As a result, scholars have considered it an "autarquia" or even a "federative

with the association of federal units. This new legal personality is entitled to manage the public resources and the administrative apparatus of the composing units in order to deliver public services. Besides, this new legal personality does not pursue economic goals, but appears as an arrangement to foster the so-called cooperative federalism principle and improve the provision of public services. Indeed, although the frequency of horizontal collaboration varies according to policy areas, rates regarding health care and environmental policy are encouraging, as 30% of all municipalities are involved in some kind of collaboration[183]. The use of consortia has made municipalities achieve a more efficient use of equipments, obtain better price for purchase them, improve personnel management and provide technical cooperation[184]. Beyond that, it has enhanced local governance capacity to promote "*novelties from below*"[185][186].

41. Likewise, Chile has also pursued a cooperative approach among its municipalities, regardless of the absent principle of federalism. The law 20.346 of 2009 was enacted to regulate the article 118 of the Constitution, and sounds clearer regarding the new legal personality constituted by associations than the Brazilian case. The Chilean Constitution itself prescribes the possibility of these associations to constitute or integrate corporations or foundations under the private legal regime, the object of which will be the promotion of art, culture, sport and public works for the local development[187]. In turn, in Argentina there is a low level of legal

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autarquia". Marcal Justen Filho, PARECER ELABORADO PELO PROFESSOR DOUTOR MARÇAL JUSTEN FILHO, VERSANDO SOBRE A PROPOSTA LEGISLATIVA DE CRIAÇÃO DE CONSÓRCIOS PÚBLICOS 22 (2005). Besides, the discussion has also been related to the type of legal regime in place. If public associations are supposed to be subjected to public law and private ones to private law, there is a mitigation of this clear separation. There is a mitigation of this clear separation because private associations ought to respect norms of public law and public ones are supposed to represent a much more flexible approach of public action. See more details in chapter 4.

[183] Ferreira Santos Farah et al., *supra* note 129 at 182.

[184] *Ibid.*

[185] Arretche, *supra* note 101 at 12.

[186] For example, as the rules of rural credit program in Brazil (The National Program for Development of the Family Farmer - PRONAF) excluded many farmers, municipalities sought mechanisms to overcome this barrier and expand their access. Ferreira Santos Farah et al., *supra* note 129 at 173.

[187] Article 118 of the Political Constitution (Chile) in Spanish: *"Las municipalidades podrán asociarse entre ellas en conformidad a la ley orgánica constitucional respectiva, pudiendo dichas asociaciones gozar de personalidad jurídica de derecho privado. Asimismo, podrán constituir o integrar corporaciones o fundaciones de derecho privado sin fines de lucro cuyo objeto sea la promoción y*

institutionalization of associations among local units, but an increasing practical use of them. The goals of associations are to (i) overcome the incipient administrative apparatus derived from the proliferation of municipalities and (ii) launch development projects that affect different local units. The low level of legal institutionalization in Argentina is given to the lack of national constitutional prescriptions or laws on the subject. Most of the provincial constitutions and municipal laws do not provide a legal framework for such associations: only the provinces of Buenos Aires, Chaco and Cordoba have specific laws on the matter, although some others mention it in general terms[188]. However, the increasing use of associations is a fact: if in 2002 there were fifty-two inter-municipal entities in Argentina, forty out of which encountered in only one province, in 2006 the number went up to seventy-six associations, involving municipalities of twenty-two different provinces[189]. Given the low level of legal institutionalization in Argentina, it seems to be difficult to identify a coherent association of legal institutes with the cooperation agreements. Nevertheless, "*convenios*", "*actas de acuerdo*" and "*ordenanzas municipales de adhesión*" have been often utilized to meet associations' practical demands, which has given rise to a debate about the actual need to create new instruments to regulate the subject[190]. At the end of the day, in Argentina there is an incoherent coexistence of formal and informal models of associations, among which one may find a significant variety of elements, such as (a) the number of local units involved; (b) the content of their goals; (c) the financial sources; (d) the level of participation of social actors; (e) the socio-economic indicators of the units and (f) the political parties involved[191].

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difusión del arte, la cultura y el deporte, o el fomento de obras de desarrollo comunal y productivo. La participación municipal en ellas se regirá por la citada ley orgánica constitucional."

[188] Catamarca, Corrientes, Chubut, Jujuy, La Rioja, Río Negro, Salta, San Juan, Santiago del Estero and Tierra del Fuego.

[189] Cravacuore and Clemente, *supra* note 178 at 2.

[190] *Ibid., 4.*

[191] Myriam Consuelo Parmigiani de Barbará, "La (re)significación de la autonomía local en el marco de la construcción de las relaciones intergubernamentales bajo formas regionales" (presented at the CUARTO CONGRESO ARGENTINO DE ADMINISTRACIÓN PÚBLICA SOCIDAD, GOBIERNO Y ADMINISTRACIÓN "Construyendo el Estado Nación para el crecimiento y la equidad", Buenos Aires, 2007), 5, http://www.asociacionag.org.ar/pdfcap/4/Parmigiani%20de%20Barbar%C3%A1,%20Myriam.doc.

42. Third, the structure of the public apparatus has become more complex because of the need to accommodate it to globalization. On the one hand, it is important to reinforce the central administrative levels in order to insert the country into the globalized world. On the other hand, the insertion of the country into the globalized world is essential to protect local communities[192]. Globalization goes local, which made scholars propose the term "glocalisation[193]", in spite of the paradoxical meaning this expression may encompass at first glance. De-territorialisation and local drivers have been at the same time crucial characteristics of the phenomenon of "glocalisation". Globalization goes local also because of the emergence in the last twenty years of global cities, which promote a particular dialectic between local and international realities[194]. These global cities[195] have nothing but uniform or coherent organization: they usually present a polycentric shape, wipe away any clear boundary between rural and urban areas and grant very distinct social conditions within the same spatial diameter[196]. Regarding the particular dialectic between local and international realities, globalization has challenged coherent approaches of the legal system (nationally or internally conceived) because local authorities may (i) act upon international legal constraints that their national law does not impose and (ii) benefit from legal privileges that prevail over the constraints prescribed under their national law[197]. Beyond the conceptions of national or international legal system, what globalization suggests is the need to manage a multi-level governance structure, which does not take into consideration coherence or uniformity as primary, not to say viable characteristics.

43. Finally, it would be controversial to understand decentralization as a political process and, at the same time, expect that the product of it would provide a

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[192] Abrucio, *supra* note 174 at 42.
[193] This expression was proposed by Watts in 1994, cited Abrucio, *supra* note 96 at 149.
[194] Jean-Bernard Auby, "Mega-cities, Glocalisation and the Law of the Future," 2011.
[195] It is worth noting the increasing complexity that urbanization has brought about to governments in all three countries. Four Latin American cities are among the ten biggest cities in the world: Sao Paulo (17,8 million people), Mexico City (16,7 million), Buenos Aires (12,6) and Rio de Janeiro (10,6 million). (BARCELONE), *supra* note 113 at 86. According to the same source, Santiago (Chile) has more than five million people.
[196] *Ibid., 2.*
[197] *Ibid., 4.*

uniform and coherent picture. The various reasons behind decentralization and the political bargains it entails dislocate uniformity and coherence from the list of priorities. For example, when democracy came back in Latin American as the rule in town, decentralization sounded as a way to limit power of the central government, by opening up social demands that had been oppressed during years of military command. However, in many senses decentralization has been pursued through a celebrated[198] massy path, by sidestepping what would allegedly be the likely preferences of the political actors and refuting predictable standards of rational choice for national and local politicians. In Argentina, during the constitutional reform of 1986, proposals of the reform council (*Consejo para la Consolidación de la Democracia*) were quite ambitions with reference to political decentralization. To illustrate their highly decentralizing character, the proposals would have ascribed to governors total control over the natural resources, such as oil, had the reforms been passed. Nevertheless, instead of endorsing these political highly decentralizing measures, the Argentine governors[199] focused on the proposition of a new revenue-sharing law, although local politicians are supposed to prefer political decentralization to financial one. This surprising behaviour of local politicians seems to derive from a historical learning process. In fact, the administrative decentralization of the late 70s was utterly *unfunded* and left the sub-national units eager for more resources, which changed preferences from political to rather financial decentralization[200].

44. In Brazil, a lack of national development project and of a disciplined political party system gave place to fragmented politics, which allowed the insurgence

[198] A massy path would be celebrated in the sense that democracy would make heterogeneities prevail over order. This perspective was discussed during the course Democracy and Development in Latin America, given by professor Francisco Panizza in the spring term of 2006/07 academic year, at the London School of Economics and Political Science. Prof. Panizza agreed with a famous quotation attributed to professor J.J. Calmon de Passos. The latter used to say that the Brazilian constitutional assembly of 1988 "was a mass" and the former put forward it could not be different, as democracy is massy.

[199] Carlos Menem, who was the governor of La Rioja at that time, proposed to his counterparts to cut the provision of energy from the countryside to Buenos Aires as a way to force the enactment of the new revenue-sharing law. Pirez 1986, cited in Falleti, *supra* note 88 at 341.

[200] Faletti argues from this narrative the path dependence of decentralization reforms. Although one would expect local authorities to prefer political decentralization to fiscal decentralization, the effects of prior reforms would condition preferences and support for the following one. *Ibid.*

of local political forces against the centre. Once Tancredo Neves, the first civilian president after the military dictatorship, passed away, president Sarney[201] came to power struggling for legitimacy. The fact that president Sarney was politically weak played a part in the movement towards decentralization: it was not a top-down decision, but derived from several heterogeneous coalitions among local representatives, who had been elected a couple of years before the first presidential elections took place. For instance, a Parliamentary Inquiry Commission ("*Comissão Parlamentar de Inquérito*") was constituted to discuss the causes of impoverishment of federal states and municipalities[202]. The report of the commission concluded that the financial centralization of the military period affected the autonomy of the states, and more severely the autonomy of the municipalities[203]. However, the empirical data demonstrated a more complex scenario: although the fiscal centralization of the military period reduced the autonomy of decision-making at the local level, it implied an increase of resources available for federal states and municipalities[204].

45. On the same path, in Chile the political tissue was preserved at the expense of local autonomy. The whole debate about the possibility to create a new region in Chile was lately neutralized by discourses that attributed to the central government the competence to settle the issue. Instead of engaging into a disruptive political position, local supporters of the cause found themselves quite powerless before the institutional centralism of the country[205]. During the mid-1990s, a New Region Commission was constituted to discuss whether Valdivia would be transformed into a region. The main declared reason for such initiative was to push the economic development of Valdivia[206], as the process of decentralization that has taken place in Chile is

[201] Jose Sarney was president from 1985 to 1990.
[202] This commission was constituted in 1979. Souza, *supra* note 128 at 522.
[203] *Ibid.*
[204] Arretche, *supra* note 101 at 11.
[205] Monje Reyes's work analyses the different actors of the debate and how they articulated their discourses to support their cause without entering in conflict with the central government. Pablo Aurelio Monje Reyes, "Central-regional Negotiation in Chile: Reality or Myth - the Case of the Los Lagos Region," *Revista De Administração Pública* 41, no. 4 (August 2007): 639–683, doi:10.1590/S0034-76122007000400003.
[206] Given that Valdivia was the political and administrative centre of the region, there was much expectation regarding its future in terms of infrastructure and political role. *Ibid., 642.*

superficial financially speaking[207], even if it has been gradually deepened. The debate was mainly political, as Valdivia fulfilled the technical requirements to be entitled as a region, by claiming that there was enough homogeneity and consistency in the local initiative[208]. The analysis of the negotiations between national and regional representatives demonstrated that their positions barely corresponded to their own reflexions and opinions regarding the question, but to the political and administrative institutional design of the country[209]. At the end of the day, Valdivia did not become a region and the dependence of local authorities vis-à-vis the central government prevented a further political clash.

46. In this sense, as we recognize a disenchantment regarding a uniform and coherent organization and functioning of the State, we propose a focus on the articulations among centralized and decentralized units in order to understand further the implications of the decentralizing movement.

2.2. Articulation between the centre and decentralized units

47. In this section, we will argue that decentralization has rather revealed a dynamic articulation between the centre and decentralized units than proposed a new static model of State. Certainly, it has always been difficult to define decentralization[210] because the term has been articulated in different contexts and to express various meanings, from the goal to improve government performance to the transfer of political authority to local levels[211]. However, the concern about its definition no longer seems to represent an appealing approach to understand the subject, both because of its usual vagueness and helpless normative assumptions[212]. In

[207] Waissbluth, Leyton, and Inostroza, *supra* note 123 at 229.
[208] Monje Reyes, *supra* note 205 at 673.
[209] *Ibid., 674.*
[210] This work had adopted the definition of Tulia Falleti. See note 88.
[211] CELINA MARIA DE SOUZA, CONSTITUTIONAL ENGINEERING IN BRAZIL: THE POLITICS OF FEDERALISM AND DECENTRALIZATION 4 (1997).
[212] For example, the literature on development has defended decentralization in normative terms, without assessing it under specific political and economic contexts. The idea is that decentralization is a tool to reduce the role of the State in developing countries and foster development, by (i) neglecting that

fact, there is an insufficiency of reliable empirical data about decentralization in several countries and a generalized frustration about its capacity to improve accountability at the local level[213]. The widely held focus on mapping the distribution of revenues and expenditures among the different levels of governments overlooked the understanding of decentralization as a process, in which administrative, political and fiscal authorities take part[214].

48. In this sense, we will build up our argument from two grounds: (i) decentralization is a continuum process[215] and (ii) decentralization is not only about administrative and financial organization, but also about political organization[216]. According to the first ground, sometimes the initiative of it comes from the central government, whereas other times it comes from the decentralized units. On the basis of the second ground, the meaning of decentralization will depend on the actors who pursue it (from the centre or from the local units) and on the arrangement of powers among them. Decentralization would therefore mitigate a hierarchical image of the State because it suggests an articulation between the centre and the decentralized units, in which the centre does not necessarily play a central role.

49. This understanding of decentralization as a continuum process may draw our attention to cases in which decentralization does not mean more autonomy to decentralized units. It usually happens when the processes of decentralization comes from the centre, which is able to deploy decentralized policies, but imposes demanding rules over decentralized units and, at the end of the day, keeps their control. We may resort to the Chilean case to illustrate this point. Regarding the education system, if the majority of the decisions were devolved to local governments and private schools, the central government remained a key actor to finance education. Not only through the provision of per-student subsidy, but also by distributing other in-kind transfers and

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it suggests that centralized countries are inefficient and (ii) limiting decentralization as a policy imposed by the centre to decentralized units. *Ibid., 13.*

[213] Jonathan Rodden, "Comparative Federalism and Decentralization: On Meaning and Measurement," *Revista De Sociologia e Política* no. 24 (June 2005): 2, doi:10.1590/S0104-44782005000100003.

[214] *Ibid., 17.*

[215] P. Montero, *supra* note 130.

[216] AUBY, *supra* note 92 at 47.

establishing safety regulations and minimum standards, the central government in Chile consolidated a "seesaw" with local units rather than relinquished former competencies[217]. Likewise, the central government may be able to control the fiscal autonomy of sub-national levels beyond the imposition of earmarked transfers or constraint regulations over the local tax collection. For instance, the fiscal autonomy of local governments would become seriously compromised if the centre established formal conditions upon sub-national units to obtain loans before international financial organizations[218]. After all, Chilean municipalities are vulnerable in terms of fiscal balance, as 76% of them were under debts in 2005[219]. Moreover, as the decision to decentralize came from a centralized compromise between the left and right wing parties[220], without the participation of sub-national officials, the measures were cautions and gradual, in contrast to rather radical approaches adopted in Argentina and Brazil, where sub-national officials served as the chief protagonists[221].

50. Nevertheless, there is another side of the story. Decentralization as a process may intensify competitive patronage relations between national and local politicians, as a result of the attribution of more autonomy to local governments. Here, we do not have financial decentralization with little autonomy, but some consequences of the marriage between financial decentralization and financial autonomy. When financial decentralization leads to financial autonomy, we may face disruption in the political arena. In Argentina, the co-participation system that has built the fiscal engineering of the country since the 1930s provided no earmarked funds. As a result, these funds were freely used and then helped local politician to create a local civil service system that would work independently from the federal one. This local system

[217] Rounds Parry, *supra* note 141 at 217.
[218] Rodden, *supra* note 213 at 7.
[219] Waissbluth, Leyton, and Inostroza, *supra* note 123 at 232.
[220] In the left, parties pushed for municipal democratization because they believed they would perform well in the aftermath of Pinochet's fall, not because they were afraid of loosing power over presidency, which is an usual reason why national politicians decide to decentralize. In the right, as they believed they would be locked out of the presidency, they used their still leverage in the national legislature to push reforms that would strength the regions, which were traditionally identified to the right. Eaton, *supra* note 124 at 2.
[221] *Ibid., 3.*

of patronage ultimately consolidated an archipelago of political interests that would serve as a jumping off point for their national careers[222].

51. Furthermore, because decentralization also involves political organization, in some cases it even backfires: not only does decentralization barely bring about more autonomy for decentralized units, but it also increases their dependence vis-à-vis the central government. Here, we do not have financial decentralization with little autonomy, but financial decentralization *with further dependence*. The backfire usually happens to financially unfunded administrative decentralization. For instance, the military *Junta* in Argentina was able to implement an administrative decentralization in 1978[223], according to which six thousand and five hundred schools, sixty-five thousand public employees and nine hundred thousand students were henceforth transferred to the responsibility of provincial administrations[224]. The problem was that neither was this transfer accompanied by financial aid, nor by political autonomy to create new taxes at the local level. Consequently, 13% of the primary schools were closed down[225]. Following this, the first civilian president, Raúl Ricardo Alfonsín[226], managed to enjoy some prevalent bargaining power until 1987[227] due to his discretionary power to attribute financial transfers. This discretionary power to attribute financial transfers helped him to manage his weak political position, as he was not backed by solid political forces and accomplished his term under a serious legitimacy crisis.

52. On the same path, a more recent experience in Brazil seems to reinforce the argument according to which decentralization does not necessarily mean more autonomy to decentralized units. Filippim and Abrucio argue that the decentralization

[222] Eaton, *supra* note 101 at 7.
[223] The administrative decentralization was passed through the decrees 21.809 and 21.810 of 1978.
[224] Falleti, *supra* note 88 at 341.
[225] *Ibid.*
[226] Raúl Ricardo Alfonsín was president from 1983 until 1989.
[227] In 1987 elections, the party that supported the President lost majority in the Congress and in the governments of five provinces. In 1988, a new revenue-sharing law was passed (*Ley de Coparticipación* n. 23.548), which limited the discretionary transfers to 1% of the shared revenues. Falleti, *supra* note 88 at 342.

program of the Brazilian federal state of Santa Catarina has actually brought about *more centralization*. In 2003, this federal state launched a decentralization program to pursue economic development in its infra-states regions. However, through the creation of Secretaries of Regional Development, the government overpassed the longstanding tradition of Forums of Regional Development, the basis of which were associations of municipalities and public and private entities that used to congregate forces of the civil society. At the end of the day, in spite of the label of a decentralization program, the governor and his allies have directly intervened in the development policies at infra-state level, whereas these policies used to be pulverized among diverse locus of decision-making[228].

53. Finally, a significant number of competencies of central and local governments are actually "joint" or "shared" competencies, which means that the question "*who does what?"* oversimplifies the debate around decentralization. This question actually starts a sterile process of avoiding responsibilities, as units may tend to consider others the competent to deliver a given service. What seems to count further is the understanding of how intergovernmental relations are developed to the execution of such competencies. This "*how do they do?*" question reinforces the need to approach the issue under a dynamic perspective, by recognizing that a continuum process cannot present an ultimate solution for multilevel governance. Therefore, the understanding of the "how do they do?" question will mainly depend on the assessment of intergovernmental relations, rather than on an allegedly clear map of competencies or on cyclical eminent role of either central or local units.

[228] We may recognize potential benefits that this program has carried on, as it was demonstrated in the article that local representatives did not need anymore to go so frequently to the capital of the federal state to discuss with the governor because they could do so through secretaries. In this sense, the state level apparatus has been more present at the local level. The author's goal, however, was rather to show that a decentralization program can actually centralize decision-making, as the governor directly monitors these secretaries. Eliane Filippim and Fernando Luiz Abrucio, "Quando Descentralizar é Concentrar Poder; O Papel Do Governo Estadual Na Experiência Catarinense," *Revista De Administração Contemporânea* 2 (2010): 212.

3. State Reform: restoring the State through its parts

3.1. Decentralizing the challenges of the State

54. In this section, we will argue that decentralization has been used to integrate local units into the battle to overcome the challenges of the State. If State Reform is a public policy that constantly reconsiders the functioning and organization of the State, decentralization would represent the effort to elucidate this functioning and organization at the most possible institutional and territorial extension. According to our argument, decentralizing units do not represent peripheral supply forces to overcome the challenges of the State and drive State Reform. On the contrary, decentralizing units have played an essential role to render the whole project of State Reform alive. Decentralizing units has played such an essential role because decentralization is not about a type of State (more or less decentralized), but about the dynamics of intergovernmental relations, which will selectively determine which functions should be centralized and which ones should be decentralized. We will develop this idea through two challenges that have been associated with decentralization in Chile, Brazil and Argentina: fiscal austerity and participatory democracy.

55. An analysis of intergovernmental relations is crucial to understand how the problem of fiscal austerity has been managed along with the movement of financial decentralization. If fiscal crisis is a common symptom of the need to push State Reform, high financial decentralization by no way has meant a mitigation of the central power to promote discipline in public expenditure. On the contrary, to recover the State as a whole, the central government has had to pay attention to the financial situation of its parts and employed its authority to include all of them in a new national pact.

56. The Brazilian story confirms the idea according to which *changes* in the macroeconomic policy may produce new institutional constraints on sub-national policy, in addition to impose higher costs on the violation of the recommendations assigned by the centre[229]. In the early 1990s, the Brazilian federal government ("*União Federal"*) was pretty much fragile during the political and financial decentralization process, given the fiscal deficit and political turmoil it underwent[230]. As a result, the intergovernmental relations were biased in favour of the federal state units, which started a predatory process of competition with the Union and among themselves[231]. Once President Cardoso took power in 1994, intergovernmental relations would experiment a change of taste. The need of macroeconomic stability was the convincing excuse to require fiscal discipline to the federal states. Likewise, the success of the "Plano Real" legitimated the President Cardoso's centralizing path and empowered his economic team to resist to local pressures[232]. Not only did the overvaluation of the Brazilian currency ("real") increase the costs of the states' debts, but also the federal states needed to comply with the measures of the Central Bank and Monetary Council in order to attract capital[233].

57. The President Cardoso was an enthusiast regarding the implementation of measures that would reduce debts of federal states, such as privatization of state banks[234] and reforms of the civil service. More specifically, his government launched

[229] P. Montero, *supra* note 130 at 150.

[230] First, the indirectly elected civilian president, the Governor Tranquedo Neves, passed way before starting his term. As a result, the Vice-President Jose Sarney lacked legitimacy to face difficult economic crisis and the transition of political regime. Second, the first directly elected civilian president, Fernando Mello de Collor, renounced his position once the Congress claimed for his impeachment, given to his alleged involvement with corruption. Once again, the Vice-President had to conduct the country, this time under the leadership of Itamar Franco.

[231] Abrucio, *supra* note 126 at 47.

[232] Gustavo Franco, who was one of the main authors of the elaboration of the Real Plan, could use this legitimacy in some episodes. For instance, once he became president of the Central Bank, he could resist the appeal of the Senator of Minas Gerais to invest Brazilian resources in a project in Iran. After several discussions and meetings, Franco succeeded in dissuading the Senator by arguing that he needed to "take care" of the macroeconomic stability. Guilherme Fiúza, *3.000 Dias No Bunker - Um Plano Na Cabeça E Um País Na Mao* (Editora Record, 2006), 232.

[233] P. Montero, *supra* note 130 at 150.

[234] The state level banks used to create currency through limitless loans to the federal states, which were their major shareholders. In this sense, the privatization of these banks is an example of the centralizing trend regarding monetary powers, by attributing their management to the federal bureaucracy of the Central Bank. This centralizing trend of monetary powers started back to 1986 with the opinion number

in 1995 the "*Program to Support Restructuring and Fiscal Adjustment of the States*". This program consisted in providing support for reform in exchange of the reschedule of the states' debt under more favourable terms. The results appeared to be quite effective[235]: in 1999 the central government rescheduled the debt of 24 of 27 states, fiscal discipline became a variable for competition among states and revealed a credit-claim for re-election success[236]. Following this, the nominal deficit of the states and cities fell from 19.43 of GDP in December 1994 to 2.3 percent of the GDP in February 1999[237]. Furthermore, the laws Camata[238], Kandir[239] and of Fiscal Discipline ("*Lei de Responsabilidade Fiscal*" - number 101 of 2000) substantially increased the control over sub-national units[240], as they were national laws that directly affected the fiscal situation of the federal states. To sum up, the federal states have been protagonists of the challenge to tackle the fiscal crisis and enhanced the economic power of the Brazilian State as whole.

58. In Argentina, the president's political strength also played a part to inaugurate a new fiscal pact between the centre and the local units. To face the challenge of fiscal deficit, there was a two-way process: decentralization of

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45 of the National Monetary Council, which extinguished the duplicity of monetary authorities (Central Bank and "Banco do Brasil"). I express my gratitude to Camila Villard Duran, who patiently played a crucial role in my limited knowledge of monetary policy in Brazil.

[235] If the results appeared quite effective, it is important to mention the crisis that originated by the moratoria declaration of Itamar Franco, who was the governor of Minas Gerais at that time. In the very beginning of his term, Franco declared that Minas Gerais would remain ninety days without obeying the agreement that it had made with the federal union regarding the debt of fifteen billion of "reais" (the Brazilian currency). Andrei Meireles and Guilherme Evelin, "Itamar levanta o topete," *IstoE Independente - Brasil*, 1999, http://www.istoe.com.br/reportagens/28366_ITAMAR+LEVANTA+O+TOPETE.

[236] Ferreira Santos Farah et al., *supra* note 129 at 157.

[237] P. Montero, *supra* note 130 at 163.

[238] We will discuss the law Camata in further details in the chapter 3 « Weber is not *Weberian*: a typology of civil service reforms". Basically, this law established limits to the expenditure of civil service payroll of the federal units.

[239] The law n. 83 of 1996 («*lei complementar*») is called Law Kandir because of the former federal deputy Antonio Kandir. This law exempted commodities and goods destined to the export market from the payment of the ICMS tax (tax of circulation of goods and services). This is a state-level tax, the exoneration of which importantly affected the revenues of the federal states.

[240] However, in spite of the fact that some progresses have been made, only 2% of the Brazilian municipalities have performed a high standard level of fiscal discipline in 2012. Só 2% dos municípios no Brasil teve boa administração financeira, aponta Firjan - politica - Estadao.com.br, ESTADÃO, http://www.estadao.com.br/noticias/nacional,so-2-dos-municipios-no-brasil-teve-boa-administracao-financeira-aponta-firjan,849503,0.htm (last visited Mar 18, 2012).

expenditures and centralization of revenues[241]. Indeed, by enjoying the legitimacy of the very beginning of his term, Carlos Menem managed to launch two fiscal pacts that actually promoted a loss of thirteen billion dollars to the Argentinean provinces[242]. In the pact of 1992, there was a reduction of 15% from the co-participation pool, the amount of which was to be transferred to the social security administration. In the pact of 1993, the federal government made with the provinces what the International Monetary Fund was doing across the globe[243]. A trade-off was explicitly established: the revenues transfers would increase as long as the provinces complied with a set of "*conditionalities*". The implementation of federally designed economic policy, such as bank privatization and social security reform, functioned as a condition to receive larger pieces of the revenue cake[244]. At the end of the day, the establishment of these conditions marked intergovernmental relations in a rather unexpected way: the liberalization of the state's role in the economy has come along with centralization of the revenue management[245].

59. In Chile, however, the story is rather different: if the country made a significant effort to foster its financial decentralization, the historical centralism still remains an important feature of the institutional arrangement of its State. While in Brazil the participation of sub-national governments in the national expenditure increased from 35% to 48%, in Chile it increased from 4% to 13%. In spite of the fact that Chilean municipalities have struggled with debts[246], the absolute meaning of the Chilean financial decentralization is still very modest vis-à-vis its regional counterpart, even if one takes into consideration the centralized Brazilian military period[247]. However, the emerging forces of sub-national units have pushed municipalities' financial interests, as a consequence of two decades of decentralization. For instance,

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[241] Eaton, *supra* note 124 at 20.
[242] *Ibid., 19.*
[243] As we observed above, this type of interaction between federal government and local units also happened in Brazil.
[244] Eaton, *supra* note 102 at 19.
[245] *Ibid., 25.*
[246] Waissbluth, Leyton, and Inostroza, *supra* note 123 at 232.
[247] J.R.R. Afonso & T. Lobo, *Descentralização fiscal e participação em experiências democráticas retardatárias*, PLANEJAMENTO E POLÍTICAS PÚBLICAS 8 (2009).

in 2000, the Association of Chilean Municipalities (ACHM) succeeded in persuading the Congress, which increased the taxes that business have to pay into the municipal common fund. As mayors have flexibility regarding the employment of this fund, this was an important achievement[248].

60. In addition to the characteristics of intergovernmental relations that faced fiscal austerity, the reconciliation project between unity and plurality has had a strong impact on the political life of Brazil, Chile and Argentina. However, this impact is not linear, let alone predictable, given the uneven territorial consolidation of democracy in Latin American sub-national realities[249]. Moreover, the very attempt to distinguish political decentralization from its other types (administrative and financial) does not seem to be an easy task. On the one hand, decentralization has not been limited to administrative organization, but has also influenced the political functioning of the State. As a very recurrent argument points out, decentralization would encourage the participation of the citizens because of the proximity to which their daily concerns are to be decided. On the other hand, after the excitement period led by re-democratization in Latin America, the concerning literature has sounded cautious, not to say frustrated, whenever to establish associations between participatory democracy and decentralization[250].

61. In point of fact, we will try to sidestep the debate regarding causal links. This work is rather interested in analysing the consequences of continuous institutional changes that State Reform has carried out through decentralization, at the expense of assuming automatic associations between decentralization and participatory democracy. We will use our case studies to argue the two following points. First, if one understands decentralization as a dynamic and continuous process of building intergovernmental relations, the idea of not having a stable rule regarding the level of participatory democracy in place seems to be sound. The results of decentralization

[248] Eaton, *supra* note 124 at 12.
[249] E. L Gibson, "Politics of the Periphery: An Introduction to Subnational Authoritarianism and Democratization in Latin America," *Journal of Politics in Latin America* 2, no. 2 (2010): 5.
[250] Arretche, *supra* note 101.

would vary with the elements that compose the contingent balance of power: to change again, as long as this balance of power changes. Second, if decentralization is about selective actions, not architectural models, we may find a deeper process of participatory democracy regarding *some* policies, not in the overall Administration. Beyond that, even if *all* policies were highly decentralized, one can easily imagine the possibility of local communities to be subjugated to local powerful elites and prevented from attending the restricted arenas in which political decision-making actually takes place. Our reasoning does not deny respective influences between decentralization and participatory democracy. We just observe that these influences may not be linear because neither the State nor municipalities are uniform and coherent decision-making arenas. Therefore, it appears that other elements but the place in which the policy-making occurs are to be integrated to the assessment of the level of participatory democracy in a given society.

62. For instance, the process of decentralization in Chile demonstrates *at the same time* progresses and limits of democratization. First, decentralization has occurred through a top-down process and has been perceived and implemented according to a managerial logic. In the Chilean case, society barely had a say[251]. If the return of local elections in 1992 represented an essential step towards democratization, this step was not to be taken beyond the borders of municipalities: there was a great resistance against the creation of regional governments. Regionalism[252] was considered an "unknown territory[253]" in Chilean history, which provoked the fear of fragmentation of the Chilean State. The "*Concertación*" itself was not really an enthusiast of regionalism because a rather centre-rightist share of the population particularly supported it, by openly declaring their anti-Santiago feelings[254]. Second, there is still a lack of accountability vis-à-vis local exercise of power[255], in spite of the effort to institutionalize some local forums of deliberation. On the one hand,

[251] Decentralization decisions were made by a small group of elites with minimal public input. Bland, *supra* note 172 at 116.
[252] The idea of an expanded regionalism has been also combated by a fear of fragmentation or transformation of the Chilean State into a federation.
[253] Bland, *supra* note 172 at 106.
[254] *Id.* at 111.
[255] Waissbluth, Leyton, and Inostroza, *supra* note 123 at 234.

Municipal laws have defined the Economic and Social Municipal Councils ("*Consejo Económico y Social Comunal*" - CESCO) as vehicles for public participation[256], ascribe to them a legal personality and promote elections to select their members[257]. Likewise, the PROFIM *("Programa de Fortalecimiento Institucional Municipal")* was a program to develop the institutional strength of municipalities, which integrates participatory democracy as an objective, in addition to the search for managerial improvements at the municipal level[258]. On the other hand, the institutional design of the political system in Chile has hampered the consolidation of participatory democracy as a principal concern. For instance, the attribution of regional financial support to municipal projects derives from a selective process composed by a technical organ[259] and political spheres[260]. The problem of this selective process is that it does not take into account the existence of the PLADELCO ("*Plan de Desarrollo Comunal"*) as a criterion. The PLADECO was an initiative to integrate citizenship participation into the decision-making process at the municipal level. As neither the existence, nor the inexistence of PLADECO counts as respectively a favourable and negative criterion for the selective process, mayors are not really encouraged to institutionalize such citizenship participation. These mayors end up finding that a more effective variable to obtain financial support for the municipal projects would be enjoying political prestigious and clientelist relations at the regional level. Therefore, the need to exercise political lobby has persisted in Chile because of the lack of institutional incentives to privilege participatory democracy[261].

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[256] Bland, *supra* note 173 at 109.
[257] (BARCELONE), *supra* note 113 at 100.
[258] The first PROFIM was launched in 1994 by the government of Eduardo Frei. It derived from a joint project between Chile and the World Bank to push the management capacity of municipalities. The goals were (i) to create a set of municipal projects and (ii) to promote studies about municipal actions. In 2001 the second version of PROFIM was launched, by integrating citizenship participation as one of its main objective. Egon Montecinos, *Los Incentivos de la Descentralizacion en la Gestion Municipal Chilena. Gestión Política sin Planificación Democrática.*, 12 REVISTA CHILENA DE ADMINISTRACIÓN PÚBLICA 61–84, 65 (2008).
[259] SERPLAC – *Secretario Comunales de Planificación*.
[260] These political spheres are the Regional Council (elected by the municipalities counsellors) and the "*Intendente*" (appointed by the President).
[261] These conclusions were withdrew from the work of Montecinos, who made a set of interviews at the Region of Los Lagos to identify the practical incentives the mayors are exposed to in order to implement the PLADECO. Montecinos, *supra* note 258 at 75.

3.2. Public policy is about implementation, implementation and implementation[262]

63. In this section, we will argue that the dynamic process of decentralization has also had an impact on the way to think about the relationship between public law and public policy. More specifically, while Administrative Law is supposed to be general and abstract, and essentially driven by the principle of isonomy[263], the elaboration of public policy would demand a focus on contextual and concrete elements, and essentially driven by the viability and efficacy of its implementation[264]. Decentralization takes the floor to underscore the gap between the concepts that public law encompasses and the obstacles the implementation of public policies has to face. Decentralization takes the floor to underscore this gap because it forces the inclusion of *differentiation* into the legal agenda.

64. The task of including differentiation into the legal agenda is challenging though. The task is challenging not only because it is about a new understanding of what administrative law and public policy are[265] (or should be). After all, as we observed above[266], searching for a new understanding does not sound helpful as long as we insist on finding *one* normative answer. The task is challenging also because the development of a new understanding appears to involve a struggle for power and long-

[262] We borrow this phrase from professor Patrick Le Galès, who usually repeated it in his course of Government and Governance at SciencesPo, second semester of the academic year 2009/2010.
[263] Cassese explains that one of the characteristics of Administrative Law is its intertwined connection with Constitutional law: administrative law depends on constitutional law, but it also conditions it. In this sense, one of the roles of administrative law is to ensure the protection of constitutional values and principles. Administrative law is therefore not limited to problems of efficiency and allocation of power, but it also includes the protection of freedom and collective interests. SABINO CASSESE, LA CONSTRUCTION DU DROIT ADMINISTRATIF : FRANCE ET ROYAUME-UNI / SABINO CASSESE; TRAD. DE L'ITALIEN PAR JEANNINE MORVILLEZ-MAIGRET 12 (2000).
[264] Lots of public policies fail in the implementation phase. In this sense, it has been frequently claimed that if the decisions are made less far away of the place it will be implemented, the concerning public policy is more likely to succeed. However, it has never been proved. Patrick Le Galès made this comment during a lecture on the 20th October 2009.
[265] The literature on public policy varies, by focusing on actors, processes, interests, instruments and institutions. Theoretically speaking, we do not privilege one model of inquiry at the expense of another because we consider they serve for different approaches of the same problem. In this work, we are especially interested in the analysis of public action through its instruments, by actually arguing for an increasing expansion of them.
[266] Section 2.2.

lasting institutional practices. For instance, one of the features of the Brazilian federalism was the fact that public policies were highly concentrated at the federal government, even if the matter was under the legal competency of federal states or municipalities[267]. The management of the federal school meals program points it up: until the mid-1990s the federal government used to buy the meals, usually bring them to Brasilia (the federal capital) and then distribute then around the whole country. As a result, we had several problems: the meals were wasted because they did not arrive on time to be consumed at local units, the regional dietary habits were disregarded and the centralized purchase of meals increased the costs for the State[268].

65. Moreover, the task is challenging because it would shift the functional role of legal norms: legal norms no longer would serve to constrain discretionary power of street-level bureaucrats, but to incite decision-making to be transparent and therefore open to democratic evaluation and continuous reformulation[269]. By keeping such difficulties in mind, we claim that decentralization draws our attention to the *implementation* of public policies, by conceiving it not as a simple phase, but as the core of any successful public policy. To do so, we will first explain how decentralization has been associated with the integration of the experimentalism theory into public affairs since the 1990s[270] in order to improve the delivery of public service at local levels. Following this, we will explore some examples of our case studies in order to illustrate our argument.

66. Indeed, the perception that implementation is not only a simple phase of public policy has inspired the development of new perspectives of administrative law. If the scholarship on the subject has been inspired by John Dewey's political

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[267] Celina Maria Souza, "'Estado Do Campo' Da Pesquisa Em Politicas Publicas No Brasil," *R.B.C.S.* 18, no. 51 (2003): 19.
[268] F. L Abrucio and M. R. G. Loureiro, "Descentralização e Coordenação Federativa No Brasil: Lições Dos Anos FHC," *O Estado Numa Era De Reformas: Os Anos FHC* (2002): 6.
[269] Charles Sabel & William Simon, *Minimalism and Experimentalism In the Administrative State*, COLUMBIA PUBLIC LAW & LEGAL THEORY WORKING PAPERS 40 (2010), http://lsr.nellco.org/columbia_pllt/9187.
[270] From the 1990s, experimentalism has become a popular approach in public policy in the USA, EU and elsewhere. However, neither is experimentalism trendy in legal scholarship, nor in popular policy. *Ibid., 26.*

philosophy of the beginning of the XX century[271], only more recently Experimentalism theory has become a central object of interest for the studies of governance systems around the world. On the basis of democratic ideals and under the influence of management theories[272], to experiment has become a concrete possibility, not to say the only alternative to the disappointment towards the role of law in governance matters[273].

67. However, this theoretical perspective behaves modestly before the complexity of public affairs. It behaves modestly before the complexity of public affairs because it does not propose any solution: the solution is to take the risk to experiment several solutions, and accommodate them to changing circumstances. Experimentalism is not committed to *a priori* models because it assumes uncertainty as a characteristic of reality and searches for reliability: the capacity for learning and adaptation to contextual features[274]. On the one hand, there are general goals to be pursued. On the other hand, these general goals imply the attribution of discretionary power to street-level bureaucrats, by transferring autonomy from central to local units. The centre would supervise local performance: the centre would provide disciplined comparisons and promote continuous improvement through incentives and opportunities[275]. To sum up, Experimentalism is a theoretical background that bears for differentiation and asserts that decentralization can be effective and accountable[276].

68. Beyond the scholar debates particularly promoted at the headquarters of Columbia[277], Harvard[278] and Yale[279] Law Schools, experimentalism has been

[271] To be sure, in 1927, John Dewey already claimed that policies should be « *subject to ready and flexible revision in the light of observed consequences* ». John (1859-1952) Dewey, *The Public and Its Problems*, 1954.
[272] Sabel and Simon, *supra* note 269 at 2.
[273] In the third chapter, we will discuss in more details the fact that scholars have paid little attention to the interface between new governance and law, and have actually struggled to elaborate an alternative system.
[274] Sabel and Simon, *supra* note 269 at 2.
[275] *Ibid.*
[276] *Ibid., 3.*
[277] Two main voices of experimentalism are professors at Columbia Law School: Charles Sabel and William Simon.

identified as a method to improve the implementation of public policies, the advantage of which would be the possibility to test a new mechanism in a limited scale of space and time. Such a test would allow the evaluation of potential problems and the subsequent proposition of solutions before expanding the use of the new mechanism[280]. However, as Experimentalism reinforces the idea of differentiation in law, its supporters have faced the challenge to persuade those who fear the principle of isonomy before law. The French example is quite illustrative: if the constitutional amendment of 2003 has consolidated the normative experimentation as a leading innovation of the decentralization process, several limitations to this experimentation had been historically debated. For example, experimentation was required to be progressively implemented and supported by public interest reasons[281]. Besides, given the principle of *"indivisibilité de la République*[282]" (national unity), the Constitutional Court required a certain period of time for experimentation, prevented its subsequent renovation and conditioned its legal permanent status to the enactment of an ulterior law[283].

69. By taking the example of social programs, one may argue that our cases studies have showed quite different trajectories in their attempts to "experiment" at the local level. In Brazil, we have witnessed two positive phenomena: (i) an institutional effort to facilitate the dialogue between the federal government and local units

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[278] Mangabeira Unger observes that the challenge remains to push institutional imagination. He explains that the specific focus of democratic experimentalism is to figure out how and in what direction we can renew the repertory of varied but analogous institutional arrangements that the advanced democracies have spread. Roberto Mangabeira Unger, *What Should Legal Analysis Become?* (Verso Books, 1996), 7.
[279] On the other hand, minimalism is the counterpoint theoretical perspective defended by Professors Bruce Ackerman and Jerry Mashaw, although they are also liberal and believe in the role of the State to promote welfare and human rights. As experimentalism, minimalism also disregards the New Deal's command-and-control formula, but it seeks to limit the discretionary power of street-level bureaucrats, to enact simple rules and to carry out efficiency through a cost-benefit analysis. Politically speaking, they are sceptical regarding the promises of participatory democracy and point out that people usually have little time for politics, apart from periods of crisis. Sabel and Simon, *supra* note 269 at 5.
[280] Andre Roux, *Réforme de l'Etat et Expérimentation*, *in* LA REFORME DE L'ETAT 99, 99 (Jean-Jacques Pardini and Claude Neves ed. 2005).
[281] *Id.* at 103. See Conseil d'Etat – CE, SECT., 13 OCT. 1967, Peny et CE, 21 février 1968, Ordre des Avocats `a la Cour de Paris
[282] Article 1 of the French Constitution.
[283] *Id.* at 104. See Conseil Constitutionnel - Décisions du 28 juillet 1993 et 21 janvier 1994, novembre 1996.

regarding the implementation of social programs, such as "*Bolsa Família*" and (ii) continuous modifications of these programs as reactions of their assessment and incorporation of new goals. Concerning the institutional effort (i), an Office for Federative Affairs was created as a subsection of the Secretary of Institutional Relations, which is attached to the Presidency. Among its main competencies, this Office should (a) articulate negotiations and partnerships among federal units, (b) operate the assistance system to states and municipalities, (c) strength the federative cooperation and (d) put federative questions into the agenda of the federal government[284]. Second, the Ministry of Cities was created in 2003 to formulate a national policy of urban development and promote coordination among federal units to the implementation of policies related to urban transport, urban development and environment projects[285]. Third, in the same year, the Commission of Federative Articulation (CAF) was created to consolidate a formal arena for negotiations between the federal government and the municipalities[286].

70. Concerning the implementation of "*Bolsa Família"* (ii), this has been the most celebrated social policy in Brazil and awarded as a main contributor to the fact that poverty rates have continuously declined since 2004, by achieving the lowest levels in the history of the country[287]. Several cash-transfer programs have been implemented in Brazil since mid-1990s, such as "*Bolsa Escola*", "*Bolsa Alimentação*" and "*Programa de Erradicação do Trabalho Infantil*". Nevertheless, since 2003 these programs have been unified under the label of "*Bolsa Família*", which is supposed to provide clearer rules and procedures, to better define the role of the civil servants and to consolidate regularity and certainty of monthly payments[288]. A main positive aspect of such policy is the development of concrete coordination between the federal government and municipalities: the former is mainly responsible for the management

[284] Portal Brasil, COMPETENCIAS DA SUBCHEFIA DE ASSUNTOS FEDERATIVOS SECRETARIA DE RELACOES INSTITUCIONAIS http://www.relacoesinstitucionais.gov.br/acesso-a-informacao/institucional/assuntos_fed (last visited Apr 11, 2012).
[285] Article 27, III (c) of the Law 10.683 of 2003.
[286] (BARCELONE), *supra* note 113 at 81.
[287] Sonia Rocha, *Le Déclin de la Pauvreté au Brésil et les Programmes de Transferts de Revenus*, 195 TIERS MONDE 631, 632 (2008).
[288] *Ibid., 636.*

of the program and the payment of the benefit, while the latter is mainly responsible for registration of the recipients and the provision of services that compose the set of "conditionalities"[289]. However, further modifications in the policy sound necessary to meet the diversity of the country and heterogeneities within the vulnerable part of the population. If the social programs "*Comunidade Solidária*" and "*Fome Zero*" seemed to take into consideration the multidimensional reality of the poor, and the Unified Database system revealed an effective tool to know in more details the situation of each family, *tailored* policies are still rare.[290]

71. In Chile, nevertheless, the effort to develop such *tailored* policies sound to be more incorporated into social programs. Positive social indicators regarding the system of "*personalized allocations*" have been celebrated: poverty reduced from 38% in 1989 to 18% in 2002[291]. Following this, in 2002 it was created the program "*Chile Solidario*[292]", which addresses people under extreme poverty, which counts around 1.5% of the Chilean population. The program seems to pursue a tailoring path because the amount of the benefits vary according to a multidimensional index, including housing conditions, education, labour market insertion and income. Besides, the social worker enjoys a significant level of discretionary power, as it is conceived by experimentalism theory above mentioned. The social worker enjoys a significant level of discretionary power because he is responsible for delivering the "Family Support" for two years, which means that he will regularly visit the beneficiary family to set up with it a plan to deal with its specific problems. The plans are therefore to be "personalized" and cover different areas, ranging from domestic violence to access to

[289] "*Bolsa Família"* is a conditional transfer-cash program, which means that the recipient must comply with some obligations to receive the benefit. For instance, children should have a minimum attendance to school and vaccination. In this sense, municipalities should render the compliance with these obligations viable for all recipients, by providing schools and vaccination.
[290] Rocha, *supra* note 287 at 645.
[291] (BARCELONE), *supra* note 113 at 99.
[292] Conditional cash-transfer programs are considered low cost policies and excellent targeting. However, the impact on the reduction of social inequality in Brazil turned out to be much more significative than in Chile, as the weight of the Chilean program is almost zero in the share of total income. In the case of Brazil, "*Bolsa Família*" represents 0.5% of the total income share. S. Soares et al., "Conditional Cash Transfers in Brazil, Chile and Mexico: Impacts Upon Inequality," *Estudios Económicos* no. 1 (2009): 222.

public services, identification (id cards), health notions and employment[293]. Furthermore, the social worker may decide weather the family has met the targets before the period of two years, which might entail the exclusion of the family from the program[294]. Finally, if the family has not met the target at the end of two-year period, it continues to receive a financial support, but with a reduction.

72. In turn, the Argentinean federal government did not even succeed in implementing its main social policy in the whole country[295], let alone in improving it through an experimentalist path. The program "*Familias*" was launched in 2003[296] in order to replace the Program for Unemployed Households[297]. The goal was to bypass the commanding governors and establish a direct national-local intergovernmental relationship to deliver benefits at the local level, regardless of the political party in power. Yet, Fenwick demonstrates that institutional and political variables have hampered such a goal. First, the municipalities have an ambiguous legal status in Argentina and are considered "creatures" of the provinces, which reduces the decentralization process to a "two-level game"[298]. As provinces enjoy a great level of discretion to distribute revenues among municipalities, mayors do not have enough incentives to challenge the power of governors in order to implement a national social policy. Such behaviour would represent a "fiscal suicide" for the municipalities[299]. Second, even the potential success of the policy does not represent an incentive for mayors to collaborate. The design of "*Familias*" does not attribute to municipalities a significant role in the implementation of the program[300], which means that mayors would not be able to have their say and credit-claim for eventual success. Finally,

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[293] *Ibid., 229.*
[294] *Ibid., 230.*
[295] Both *« Bolsa Família »* and "*Familias*" were technically and financially supported by the World Bank and the Inter-American Bank of Development. In 2006, while in Brazil « *Bolsa Família* » had delivered the benefit for more than 11 million households in all 5.564 municipalities, in Argentina "*Familias*" achieved only 372.000 households and covered 232 out of 1930 local units. Tracy Beck Fenwick, "The Institutional Feasibility of National-Local Policy Collaboration: Insights from Brazil and Argentina," *Journal of Politics in Latin America* 2, no. 2 (August 13, 2010): 161.
[296] The President Nestor Kirchner and his sister, Alicia Kirchner, the National Minister of Social Development, launched this program.
[297] The President Eduardo Duhalde launched this program during the 2001 crisis.
[298] Fenwick, *supra* note 295 at 167.
[299] *Ibid., 175.*
[300] « Municipalities just sit and watch ». *Ibid., 174.*

"*Familias*" did not sufficiently take part in the public agenda because, although the Program for Unemployment was legally speaking replaced by "*Familias*", it in fact continued as a source to nourish clientelistic networks[301]. As even the President depends on the support of governors, the actual implementation of "*Familias*" was slowed down, not to say rendered unviable.

4. Concluding remarks

73. This chapter aimed to argue that decentralization is a *reconciliation* project between the State and its parts. The emergence of this reconciliation project derives from two observations: (i) persistence on a uniform and coherent legal system misses the current functioning and organization of the State and (ii) implementation of public policies integrates differentiation as a key variable to effectively reach sub-national units. As a consequence of these two observations, we searched for understanding decentralization as a continuous political process that influences the selective actions between centralized and decentralized policies. Besides, we pursued an institutional analysis of the intergovernmental relations that frame this political process, by highlighting its controversies and dismissing causal-links assumptions. Indeed, this reconciliation project reveals to be a lively struggle for solving the challenges of the State, such as fiscal austerity, through the recognition of sub-national units as supply forces for a new national pact and as sources for innovative public action. This reconciliation project also reveals to be a delayed anxious claim for closer attention to the interactions between administrative law and public policy fields of expertise, as experimentalism seems be the starting-point for the construction of a *tailoring Administration*. For the narrative of all our case studies, batteries have been introduced into their State's *Lego*. However, political, financial and administrative configurations have unevenly distributed these batteries among the State's parts and made the countries play different games. Chile seems to play a one-level game, by concentrating decision-making capacity on the centre. Brazil has attempted to play a three-level game, through an emerging role of municipalities that would promote more balance

[301] *Ibid.*

intergovernmental relations. Finally, Argentina still cannot avoid playing a two-level game, given the prominence role of provinces in the institutional dynamics of the country. Batteries do not take too long and *Lego* provides any possible architectural model: the task remains to get used to instability and legal pluralism.

5. Comparative statement

	Chile	Brazil	Argentina
Type of State	Unitary – 15 regions and 54 provinces	Federal (centralized federalism) - 26 federal states and 1 Federal District	Federal – 24 provinces
Initiative	Top-down Increasingly bottom-up (role of ACHM)	Bottom-up (role of governors) Re-centralization (fiscal austerity)	Bottom-up (traditional strong governors) Re-centralization
Financial Decentralization	Very low - more revenues and less autonomy.	The most decentralized in the developing world.	Very high, but discretion power of provinces.
Administrative Decentralization	Very high	Centralized at the federal government. Increasing cooperation	Historically shared the centre and provinces
Political Decentralization	Very Low – prevalent role of the centre	Very high – "Three-level game"	Prevalent role of provinces
Co-participation	Common Municipal Fund	Earmarked (sectors: health, education, etc)	At first, not earmarked

CHAPTER 2

LIBERATING INSTITUTIONAL IMAGINATION:

THE CONTINGENT RATIONALITY OF REGULATORY AGENCIES

1. Introduction

74. As long as one looks at the explosive launching of regulatory agencies all over the world, such institutional change immediately draws our attention to the difficulty to "*classify*" the results of innovations. State Reform symbolizes a set of profound institutional changes, but as far as it concerns regulatory agencies, it unfolds a compulsory improvisation process rather than a rationally beforehand planned out choice. The anarchical introduction[302] of these imprecise and heterogeneous islands within the State apparatus meant more than an innovative mode of governance. The implementation of regulatory agencies meant, and it keeps meaning[303], the struggle of the State to adapt itself to new social demands. In order to remain powerful, the State needed to reinvent its ways to exercise power. The State was required to learn how to play different roles to preserve itself in the game[304]. In this sense, the introduction of regulatory agencies was not a fashionable public engineering project, but an attempt to render public action feasible to contemporary society.

75. This attempt to render public action feasible to contemporary society does not have a compromise with rational or systematic models, but with the need to (i) prevent conflict of interests[305] and (ii) cope with the crises of the regulatory system[306].

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[302] Carlos A. R. Stefanelli, "Entes Reguladores y de Control," *Revista Argentina del Régimen de la Administración Pública* 358 (January 7, 2008): 8.

[303] In the last section of this chapter, we will analyse the patterns of change of regulatory institutions.

[304] In order to illustrate the idea that it was necessary to reinvent the structure of the State in order to adapt itself to the new public action, Auby resorts to the sentence that Tancrède said to the prince Salina in « Le Guépard »: « *Il faut que tout change pour que tout soit comme avant* ». Jean-Bernard Auby, "Remarques terminales," *Revue française de Droit Administratif* no. 5 (May 11, 2010): 936.

[305] In Chile, the debate about conflict of interests and the notions of capture have been at the core of the movement of State Reform. These concerns are due to the recent corruption scandals, such as Chiledeportes, as it has been found irregularities in 90% of the funds transferred. "A Manos De La Justicia El Escándalo En Chiledeportes," *Nación.cl*, accessed February 10, 2013,

As a follow-up of the privatization[307] wave and given the parliamentary incapacity to manage an increasingly complex regulatory system[308], a new institutional balance was to be imagined. Nonetheless, no precise set of rules sounded able to empower governments to accomplish this balance. The only clear condition to this institutional imagination was that regulatory agencies should be equidistantly located between society and political representatives, in order to protect the former and assist the later at the same time.

76. In Latin America, the development of this institutional imagination was far from being an exclusive homemade process[309]. The expectation was that the use of a standard would reduce transactional costs for transnational investors, in addition to

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http://www.lanacion.cl/noticias/site/artic/20061020/pags/20061020211255.html. Moreover, the idea is not only to prevent corruption, as it was considered unusual in Chile, but also to redefine the regulatory institutional design. J. J. Romero Guzmán, "?` Capturados Por Nuestra Suspicacia?: Algunas Aproximaciones Acerca Del Origen, Desarrollo y Extinción De Las Regulaciones," *Revista Chilena De Derecho* 35, no. 1 (2008): 22.

[306] We take Bruce Ackerman's assumption that we have moved beyond an understanding of bureaucratic regulation based on the "*transmission belt*" theory of democratic legitimacy, under which bureaucratic experts merely specify legislative norms found in the law. Practical reasons incited regulators to make law because, although democratic legislation can provide guiding principles, parliaments have neither the time nor the expertise to provide all adequate regulatory solutions. As Ackerman points out, the parliaments' attempts to make specific environmental legislation have brought about highly counterproductive results. Bruce Ackerman, "The New Separation of Powers," *Harvard Law Review* 113, no. 3 (2000): 696.

[307] The privatization process in Argentina was deeper than in Brazil. Interesting enough, in Argentina, there was « transestatización », as the "*Aerolíneas Argentinas*" was acquired by the Spanish company « Iberia ». Carlos Botassi, "Servicio de Telecomunicaciones en La Argentina," in *Ensayos de Derecho Administrativo* (Editora Platense, 2006), 228. However, the criticisms regarding the privatization process in Argentina were much more related to the urgent and non-transparent procedures than to the initiatives themselves. Carlos Botassi, "Gestión de Intereses Públicos. El rol del Estado y de los particulares.," in *Ensayos de Derecho Administrativo* (Editora Platense, 2006), 61.

[308] For example, the Brazilian Health Surveillance Agency (ANVISA) was not created along with the privatization process. Its functions are not related to a competitive market, but to the audit of medicines. Marcus Melo, "As Agências Regulatórias: Gênese, Desenho Institucional e Governança," in *O Estado Numa Era De Reformas: Os Anos FHC*, ABRUCIO, F.; LOUREIRO, M. R. (Brasília: Seges-MP, 2002), 264.

[309] For instance, there is a widespread idea in Brazil that regulatory agencies are certainly a copy of the American model. Paulo Todescan Lessa Mattos, "The Regulatory Reform in Brazil: new decision-making procedures and accountability mechanisms," in *El Nuevo Derecho Administrativo Global en America Latina* (Cuadernos Res Publica Argentina, n.d.), 388. Likewise, the OECD guidelines to regulatory reforms have been considered a source for the design of new regulatory apparatus to regulate markets in several countries. *Ibid., 380.*

improve the institutional environment of the receiving country[310]. Conversely, although influenced by the almost one-century experience of regulatory agencies in the United States, Latin American countries translated the American model under quite different terms. While in the United States the new dealers defended the agencies as an expression of their political orientation towards more State intervention, in Latin America the agencies reflected the goals of depoliticizing governmental action, providing an expertise-based discourse and attracting international investors[311]. The agencies would be able to ensure the continuity of the State, regardless of the discontinuity of governments, not to talk about the historical political instability in the region[312]. The agencies would save the State by ironically downsizing its importance.

77. In fact, some scholars[313] have repeated that the new type of institutional balance promoted by the agencies is not that new in Latin America. Back to the 1920s[314], the financial sector in the whole region was already a consolidated laboratory for regulatory activities regarding banking, insurance and stock markets[315]. Besides, since the colonial period, decentralized organs were created to regulate important economic sectors, such as coffee, sugar and meat[316][317]. Nevertheless, the number of

[310] For a general analysis of the frustrating results of harmonization of laws in developing countries, Katharina Pistor, "The Standardization of Law and Its Effects on Developing Economies," *The American Journal of Comparative Law* 50, no. 1 (Winter 2002): 97.
[311] R. S. Pacheco, *Regulação no Brasil: desenho das agências e formas de controle*, 40 REVISTA DE ADMINISTRAÇÃO PÚBLICA 523–543, 525 (2006).
[312] Latin American political instability during the 20th century has been extensively discussed in the literature and exemplified through the « *coupes d'Etat* », exceptional political regimes and number of new constitutions or constitutional amendments implemented. ANÍBAL PÉREZ-LIÑÁN, PRESIDENTIAL IMPEACHMENT AND THE NEW POLITICAL INSTABILITY IN LATIN AMERICA / ANÍBAL PÉREZ-LIÑÁN, (2007).
[313] For example, Stefanelli, *supra* note 302 at 11.
[314] The first country to reform its monetary policies and to establish a mixed public-private central bank was Colombia in 1923, followed by Chile and Mexico in 1925. Jacint Jordana and David Levi-Faur, "Towards a Latin American Regulatory State? The Diffusion of Autonomous Regulatory Agencies Across Countries and Sectors," *International Journal of Public Administration* 29, no. 4–5 (2006): 344.
[315] Jacint Jordana and Carles Ramió, "Delegation, Presidential Regimes, and Latin American Regulatory Agencies," *Journal of Politics in Latin America* 2, no. 1 (April 26, 2010): 4.
[316] A. Gelis Filho, *Comparative analysis of the normative design of former and current regulatory institutions*, 40 REVISTA DE ADMINISTRAÇÃO PÚBLICA 589–613, 591 (2006).
[317] In Argentina, for instance, there were the « *Instituto Nacional de Vitivinicultura », « la Comisión Reguladora de la Yerba Mate », « el Instituto Forestal Nacional, « el Instituto Argentino para la Promoción del Intercambio », « el Instituto Cinematográfico Argentino* » and *« el Consejo Nacional de Radiodifusión* ». Augustín Gordillo, "La Regulación Económica y Social," in *Tratado de Derecho Administrativo*, vol. Tomo 2, 9 Edition (Buenos Aires, 2009), 5, http://mail.gordillo.com/tomos_pdf/2/capitulo7.pdf.

the agencies has been noticeably multiplied at the end of the 20th century, not to mention the increasing relevance of their meaning during the new wave of State transformations. From 1979 to 2002, the number of agencies jumped from 43 to 134, which radically transformed the structure and functioning of Latin American States[318]. No country in the region, including Cuba[319], passed through this period without being touched by such transformations[320][321]. Moreover, the current regulatory agencies were expected to enjoy levels of independence[322] from the executive power and act according to a sense of transparency that had no equivalent in early times[323].

78. Within this context, not only national, but also sectoral variation have been identified in our case studies. At first, the best practices recommended the construction of standardized regulatory agencies as an ideal that would prevail over the institutional process of creative destruction[324]. Nonetheless, no institutional imagination movement was predictable or susceptible to definitive classification. The only stable pattern among Chile, Brazil and Argentina has been the constant attempt to adapt state action to contextual and contemporary social demands. A copy-and-paste institutional logic is far from revealing how regulatory agencies have changed such structural functioning[325]. Given the objective to shape the State's structures to contextual

[318] Jordana and Levi-Faur, *supra* note 314 at 336.
[319] As a result of the fall of the Soviet Union, Cuba has searched for alternatives since the beginning of the 90s. The first initiative happened through the « *Téléfonos Celulares de Cuba S.A.* », which had public and private capital and managed telecommunications regarding mobiles. Following this, in 1994, the telecommunications service was also ascribed to a mix-capital company, « *Empresa de Telecommunicaciones de Cuba S.A.* ». Botassi, *supra* note 307 at 233.
[320] Beyond the quantitative aspect of the explosion of regulatory agencies, we will focus on the qualitative meaning of this phenomenon, by choosing a couple of examples to illustrate our arguments. These examples will try to assess whether there is an appropriateness of the new legal structures in relation to different regulated areas. Gunther Teubner, "The Transformation of Law in the Welfare State," in *Dilemmas of Law in the Welfare State*, Gunther Teubner (Berlin/New York: De Gruyter, 1985), 2.
[321] Jordana and Levi-Faur, *supra* note 314 at 336.
[322] There is a scholar debate about the distinction between the notions of autonomy and independence. We do not overlook the technical characteristics each term may highlight, but in this chapter we will use both as equivalent. That is, our concern is to understand how regulatory agencies are organized and empowered by functional competencies, in spite of the political colour in power.
[323] By analysing the Brazilian normative model, Gelis found out that the current agencies are more independent and transparent than the earlier regulatory organs. Gelis Filho, *supra* note 316 at 589.
[324] Pistor, *supra* note 310 at 98.
[325] For instance, in Colombia the law 142 of 1994 created regulatory commissions to exert the normative functions regarding water, electricity and telecommunications, but only one organism to

demands, one hardly identifies homogenous archetypes. As a result, administrative law has become a *tailoring* instrument to accomplish the specificities concerning each regulatory sector. Administrative law scholars have made an effort to handle the debate about regulatory independent authorities with their constitutional law peers[326]. Yet, models have had to be tested without being entirely understood[327]. Not only did the massive privatization process require an independent organ to render policies credible, but also this organ would consolidate a cross-sectoral dialogue in a globalized economy[328]. At the end of the day, the three States have reconsidered their structural functioning to make more effective policies and deliver specialized regulation.

79. In this chapter, we will argue that State Reform promotes institutional change that creates a system of contingent rationalities. By utilizing the same label of regulatory agencies, a variety of institutional arrangements took place at the expense of a coherent legal regime *as a whole*. In this sense, State Reform introduced regulatory agencies that have followed very heterogeneous patterns, as the main objective is to achieve more efficiency in public action. To build up this argument, we will analyse four variables[329]. The first two variables will highlight alleged

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control all the sectors (« *Superintendencia de Servícios Públicos Domiciliarios* »). Ismael Mata, "Los Entes Reguladores de los Servicios Públicos," in *El Derecho Administrativo Hoy* (Buenos Aires, 1996), 117.

[326] FLORIANO AZEVEDO MARQUES NETO, AGENCIAS REGULADORAS INDEPENDENTES – FUNDAMENTOS E SEU REGIME JURÍDICO 73 (2005). On the other hand, one should not overlook the criticism of some professors, who disregarded the relevance of regulatory agencies to simply administrative units. In Brazil, Eros Roberto Grau was representative of this resistance with his article Eros Roberto Grau, *Agẽncias, essas reparticões públicas*, *in* REGULACÃO E DESENVOLVIMENTO 25–28 (2002).

[327] Several questions are still unanswered, regardless of the long tradition of a given country regarding regulatory agencies. In the United States, constitutional and administrative lawyers have failed to engage in a serious conversation. It is still to be answered how the democratic legitimacy of ministers and the professional expertise of the bureaucracy should be managed by a credible system of public participation and judicial review. Ackerman, *supra* note 306 at 697.

[328] There is no consensus about the main reason why countries from all over the world implemented regulatory agencies, although the search for credibility seems to be a very sound one. Giandomenico Majone, "The Regulatory State and Its Legitimacy Problems," *West European Politics* 22, no. 1 (January 1999): 1–24, doi:10.1080/01402389908425284. Among some of the reasons, there is the idea of blame shifting, according to which the government would like to delegate some competencies to not be accountable for unpopular decisions. Pacheco, *supra* note 311 at 530.

[329] In this work, we do not use an econometric reasoning or any sort of statistic tools to point out, for example, the level of institutional continuity of each case study. It is the *comparison* of the institutional

incoherencies attributed to regulatory agencies, as far as they concern their relation with the government. These variables are (i) formal independence from the executive power and (ii) political legitimacy. Following this, the last two variables will assess alleged incoherencies attributed to regulatory agencies as far as they concern their institutional design to accomplish sectoral public polices. These variables are (iii) heterogeneity of organizational models and (iv) institutional continuity.

80. During the analysis of our first variable, that is formal independence (i), we will be concerned about the functional and organizational legal elements that aim at rendering the agency independent. We will not look at the practical enforcement of these elements. Our main goal here is to give a big picture of the main legal features that ascribe a certain level of independence to the agencies. Secondly, by political legitimacy (ii) we mean the capacity of representatives in power to formally or informally persuade regulatory agencies to follow their orientation regarding regulatory policies. In this sense, regardless of the level of formal independence that an agency may enjoy, the influence of representatives may be able to conform regulatory policies to the traditional chain of political legitimacy. Furthermore, by heterogeneous regulatory systems we mean the level of institutional diversity (iii) that arranges what are called regulatory agencies. We will verify in each country the effort to insert a plurality of organizational and functional elements into the same category[330]. The question to be asked regarding this variable is: to what extent the regulatory agencies are different from one another? At the fourth place, by institutional continuity (iv) we mean the frequency of interruptions and institutional replacements that happened in the regulatory sector of each country to provide an institutional balance that would match contemporary demands. Here we will evaluate how deeply the countries have tried to redesign their institutions.

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features and the analysis of concrete examples that support our characterization of Chile as a country with high institutional continuity. This characterization is therefore meaningless under absolute terms.

[330] An example of this effort was praised in Spain with the promulgation of the Law 2 of 2011, which tries to harmonize the economic regulatory authorities and consequently render them more intelligible and coherent. The goal of the government was to improve the methods of public action and eventually help the country to find a way out from the economic crisis Hubert Delzangles, "L'independance des autorites de regulation economique et financiere en Espagne: l'interet de la clarification du droit public," *Revue française d'administration publique* 3, no. 143 (2012): 721.

81. By employing a comparative analysis of our variables, in the first part of the chapter, we will (2) discuss the meanings of the two elements that have disturbed public law scholars regarding the agencies: independence and political legitimacy. We will point out that (2.1) the debate about the independence of the agencies has missed the diversified *content* of independence itself. In this sense, we will explore the numerous institutional manners to characterize independence in each of our case studies. As a result, the main point we will make in this section is that formal independence can be institutionalized under a very low level, but this does not necessarily undermine the credibility of regulatory agencies. Following this, (2.2) we will challenge the reasoning that sustains the deficit of legitimacy as a characteristic of the agencies. According to our argument, legitimacy is not to be understood as a stable feature of the agencies, but as a circumstantial capacity to justify the exercise of their powers[331]. The comparative analysis will show that the political legitimacy of the agencies may be high even where there is a high formal independence from the executive power. As a result, we will challenge the deficit of legitimacy of the agencies as an enduring flaw and point out that in some cases the agencies may even be *super legitimate*.

82. In the second part of the chapter, we will work on the following hypothesis: not only do agencies represent heterogeneous units, but also they tend to become more and more heterogeneous. To do so, (3) we will analyse the various institutional arrangements to challenge the importance of a by and large coherence of the regulatory sector. We will *displace* the locus of coherence from a comprehensive understanding of the regulatory State towards the limited perimeters of the agencies. In this sense, we will claim that (3.1) regulatory agencies have inaugurated a system of *contingent rationalities*. These contingent rationalities take into account the characteristics of each regulatory sector, such as credibility cost, political sensitiveness

[331] We will claim that neither is the legitimacy of the agencies a single, nor a static concept. We will put forward that there are two types of legitimacy: (i) the derived (political) legitimacy and (ii) the proper (institutional) legitimacy. This means that the agencies may enjoy a politically derived capacity to justify their exercise of power and/or an institutional capacity to justify by themselves their exercise of power. See below the section 2.2.

and intensity of the judicial control. Because of these sectoral different characteristics, there would hardly be a unitary coherence of different sectoral agencies altogether. Secondly, to examine the construction of these contingent rationalities, (3.2) we will draw our attention to the patterns of change promoted within the agencies. During this analysis, we will question whether the search for efficiency has prevailed over coherence, which pushed agencies to gradually adapt themselves to the specificities of their respective sectors and therefore become the more and more heterogeneous.

2. Breaking down the incoherence of the Regulatory State

83. The debate around the regulatory State would bring about incoherence. On the one hand, agencies would have to be independent to constitute the regulatory State we whish for. The independence of the agencies would give back to the State the legitimacy it lost during the years of economic crisis and ineffective policies. On the other hand, the independence of the agencies would deepen the deficit of legitimacy, as it interrupts the traditional political chain of popular expectations in order to trust in islands of expertise. Following this, in this section we will question the existence of this incoherence by making two arguments. First, (2.1) there are different manners to ascribe independence, which not necessarily have an impact on the credibility of the agency. Second, (2.2) neither is legitimacy a permanent nor an indivisible feature, but a contingent and double capacity to justify the exercise of power.

2.1. *Which* independence for regulatory agencies?

84. In this section we will argue that (i) the different meanings for the independence of agencies have been overlooked, (ii) which promotes a fictitious automatic association between independence and credibility[332]. It is necessary to

[332] The literature points out the importance to separate the functions of the Ministries and Agencies to enhance the credibility of the regulatory system. Indeed, this separation may reduce the risk of capture and clarify the goals of the agencies among multiple and contradictory objectives. However, a certain level of intertwined competencies allows us to better deal with unpredictable situations and avoid abuses. Aldo González, "Análisis y Propuestas para el Rediseño Institucional en Telecomunicaciones,"

identify which independence we are talking about to then verify whether the quality of being independent ascribes credibility to the agencies. Certainly, whether coercive or normative[333], the discourse towards independence of regulatory agencies has been effective, as these units are supposed to be equidistantly located between society and political representatives. On the one hand, they are supposed to be politically and functionally independent from the traditional structure of the government; on the other, they belong to the public administration and ultimately depend on its operational structure to the consecution of regulatory policies. As technically specialized forums for conciliation of conflicting interests and an ultimate hope against the political "*short termism"* of democratic governance[334], regulatory agencies are supposed to be independent. The autonomy to orient the path of public policies seems to be the very condition for the existence of the agencies. In this sense, it would be pointless to create new administrative units that would not be able to interrupt the biased chain of political interests that renders citizens or interest groups vulnerable vis-à-vis State action. The independence of the agencies sounds as a shield against the political game that influences all government levels.

85. However, the idea of being independent does not say much unless we identify the organizational and procedural features that conform it. The levels of control over the independence of the agencies derive from questions of institutional design[335]. To be sure, the independence of the agencies is far from being an untouchable myth, which means that agencies have always been submitted to some organizational and procedural control[336]. Their independence has nothing to do with lack of institutional control. It is the set of institutional mechanisms to exercise control that varies from one country to another (and also from one sector to another).

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in *Telecomunicaciones: Convergencia y Nuevos Desafios* (Santiago, Chile: Gobierno de Chile and Faculdad Economía y Negocios - Universidad de Chile, 2008), 99.

[333] By focusing on the independence of Central Banks, Costa has claimed that (i) the formal and informal pressure exerted by transnational institutions and (ii) persuasive conceptual models that fly among professional networks and educational institutions around the world are the most plausible explanation for ascribing independence to agencies. José Ignacio Costa, "Why Have Elected Politicians Established Independent Central Banks?," *Res Publica* no. 2 y 3 (2009): 5.

[334] Majone, *supra* note 328 at 6.

[335] *Ibid., 8.*

[336] *Ibid., 11.*

Furthermore, the search for credibility has shown that other variables than internal organization must complement the independent performance of the agencies. For example, it has been argued that the agencies' discretionary power must be counterbalanced through instruments of social control to consolidate this credibility[337].

86. In this sense, by revisiting the elements that ascribe independence to the agencies, there has been an effort to challenge commonplace assumptions and point out the need to expand the legal traces of such independency[338]. For instance, the understanding of "*degrés d'indépendance*" would enable us to escape from a static understanding of regulatory agencies and associate the levels of independence with the political sensitiveness of each sector[339]. In the United Kingdom, for instance, due to the improvisation and pragmatic[340] approaches that characterize the formation and reformation of agencies, there would be a gap between the widespread perception of their independence and the legal instruments to safeguard it[341]. Moreover, it is hardly clear how to compare whether one criterion of independence is more significant than another. For instance, on the one hand, the direction of the French agencies have always been composed by commissions instead of only one director, which would render the French agencies potentially more independent than the English ones. On the other hand, the set of competencies ascribed to the English agencies have been much larger[342]. That is why our aim will be to go beyond the automatic association between independence and credibility of regulatory policies. Agencies may be considered very independent and their policies not reliable exactly because the criterion of being

[337] Miguel Á. Montoya and Francesc Trillas, "The Measurement of the Independence of Telecommunications Regulatory Agencies in Latin America and the Caribbean," *Utilities Policy* 15, no. 3 (September 2007): 183, doi:10.1016/j.jup.2007.04.002.

[338] There is no monolithic legal definition of independence. In this sense, it would be inaccurate to define whether an agency is independent according to only one criterion, such as the stability of the directors in their positions. Mariana Mota Prado, "Agências Reguladoras, Independência e Desenho Institucional," in *Agências Reguladoras - Mercado De Capitais, Energia Elétrica e Petróleo* (Instituto Tendências de Direito e Economia, 2005), 129.

[339] Delzangles, *supra* note 330 at 708.

[340] Perroud states that the progressive implementation of the English regulatory agencies were mainly conducted by a pragmatic reasoning, which has constituted a *« table de désordre »* and a high level of institutional instability. Thomas Perroud, *L'indépendance des autorités de régulation au Royaume-Uni*, 143 REVUE FRANÇAISE D'ADMINISTRATION PUBLIQUE 735 (2012).

[341] *Ibid., 745.*

[342] Only from the 2000s the English agencies have introduced commissions as directory organs. As a result, the French and English models have become more similar. *Ibid., 743.*

independent may vary and the quality of being reliable may have more to do with institutional continuity. After all, one of the main objectives of ascribing independence to agencies was to ensure the continuity of the State regardless of the discontinuities of governments.

87. To make our point, we have chosen to look first at visible factors[343][344] that would formally prevent Presidents to politically intervene in regulatory agencies. These factors constitute the legal regime under which directors of agencies are able to exercise their powers. The logic works as following: the more the executive power plays a formal role in this regime, the less the agencies are independent. The extent to which the President is legally empowered to influence in this regime provides a formal idea of the levels of independency of the Chilean, Brazilian and Argentinean agencies vis-à-vis their respective governments. In this sense, we will search for the content and relative levels of this variable, not for a definitive answer to the question whether agencies are independent[345].

88. From one extreme of the spectrum, there is in Chile a quite low formal independence of regulatory agencies vis-à-vis the executive power[346]. Indeed, the very distinction between regulations enacted by the government and those enacted by regulatory agencies is quite subtle in Chile. Besides, because of the constitutional principle of subsidiary State, sectoral intervention happens under a timid pattern[347]. As

[343] As we have mentioned before, there are several institutional factors that attribute autonomy to the agencies. However, we believe that knowing the rules that conform the relationship between directors and the President will be a first decisive step towards the configuration of the agencies' independent performance.

[344] We could also have called this visible factor as the normative design that regulates the relationship between the agencies and the executive power, as it is the case of Gelis's work. Gelis Filho, *supra* note 316.

[345] In 1997, the constitutionality of the administrative independence of ANATEL (the Brazilian regulatory agency for Telecommunications) was questioned by the Brazilian Communist Party (PC do B), the Labour Party (PT) and the Brazilian Socialist Party (PSB). The Supreme Court refuted their argument and declared such independence in accordance with the Constitution. To consult more details, see the temporary injunction regarding the ADI-1668/DF.

[346] The frequently cited exception is the Central Bank.

[347] The principle of free entrepreneurship seems to be consolidated in the Chilean legal and political frameworks. Alejandro Vergara Blanco, *Una Tríada Economica y Juridica: Recursos Naturales, Bienes Públicos y Servicios Públicos Conexos para un Balance de 30 Anos de Liberalizacion Economica en Chile (1980-2010)*, *in* DERECHO ADMINISTRATIVO Y REGULACION ECONOMICA 1041–1074, 1053

a result, the "*superintendencias*", which are the closest equivalent to regulatory agencies in Chile[348], ends up by mixing-mingle their functions with Ministries and Secretaries, by following a rather coordinative logic than playing the role of independent units[349]. In Chile, most of the heads of agencies[350] are appointed by the President and remain in power as long as the President deems them trustful. Along with the reformation of the civil service system[351], some progress has been made to reduce the discretionary power of the President, but the "*superintendencias*" somewhat remain entities with an expertise profile that do not enjoy any guarantee to exert their functions with autonomy from the government[352].

89. In addition, Ministries function as principal regarding their "*superintendentes*"[353], who conduct the agencies individually and not under a *collegial directory*. For instance, in the Electricity sector[354], the "*Superintendencia de Electricidad y Combustible*" is competent to control the activities of the agents in the market and apply eventual sanctions. However, it is the Ministry of Energy that keeps the political orientation, the technical planning and the regulatory power of the policies[355]. Furthermore, the article 14 of the law 18.410 of 1985 prescribes that the "*Superintendente*", not a collegial organ, is the superior chief of the authority, being appointed by the President according to a criterion of political alignment or "*confianza*". Moreover, although the "*Superintendencia de Servicios Sanitarios*" is also recognized as a decentralized authority, it is subjected to a close oversight ("*supervigilancia*") of the President through the Ministry of Public Works[356]. It is the

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(Martinez, Juan Miguel de la Cuetara; Martinez Lopes-Muniz, Jose Luis; Villar Rojas, Francisco J. ed. 2011).

[348] José Francisco García G, "¿Inflación de superintendencias? Un diagnóstico crítico desde el derecho regulatorio," *Revista Actualidad Jurídica* Tomo I, no. 19 (2009): 329.

[349] In this sense, during the interviewee, Heidi Berner affirmed that agencies worked under a hybrid system of civil service and politically appointed public agents.

[350] The heads of the agencies are called « *superintendentes* ».

[351] Sistema de Alta Dirección Pública.

[352] García G, *supra* note 348 at 351.

[353] González, *supra* note 332 at 92.

[354] In addition to the Ministry of Energy and the « *Superintendencia de Electricidad y Combustible*", the sector counts on the work of the National Commission of Energy and the Chilean Commission of Nuclear Energy, which are responsible for studies, technical analyses and information.

[355] Vergara Blanco, *supra* note 347 at 1054.

[356] *Ibid.*

Ministry that actually controls the companies and exerts the regulatory functions of the sector. On the same path, the establishment and revisions of tariffs in the telecommunication sector utterly depends on a coordinated work between the Ministry of Telecommunication and the Ministry of Economy, although the SUBTEL[357] ("*Superintendencia de Telecomunicaciones*") provides technical information and companies can produce their own studies to compare the results with the suggestions made by the agency[358]. Likewise, even though SUBTEL is competent to apply sanctions, the Ministry of Telecommunication is competent to revise its decisions, by ultimately serving as an administrative organ of appeal[359][360]. The case of SUBTEL is a quite disturbing example of praised institutional functioning regardless autonomy. SUBTEL is reputed as one of the best regulatory authorities in Latin America, but it has neither nominal nor organizational autonomy[361]. In this sense, Chile has been notably considered one of the most effective countries in attracting private investment without relying on *independent* regulators[362].

90. In Brazil, one could easily note a legal system that ascribes a relevant level of formal independence to regulatory agencies. First, they are "*autarquias de regime especial"*, which means that their legal classification translates a reinforced regime of decentralized competencies and autonomy[363]. Second, in *all* the ten existing agencies, a *collegial directory* performs the highest hierarchical position, the stability of which demonstrates the legal attempt to ensure independence. Third, once the President has appointed the directors and the Senate has approved them, they will enjoy a fixed and

[357] The SUBTEL was created in 1977.
[358] González, *supra* note 332 at 82.
[359] *Ibid., 84.*
[360] Similarly, the Ministry of Telecommunications is competent to award concessions, with a previous analysis of the Ministry of Defence. The SUBTEL only participates as a technical organ to provide recommendations, as it is the political counterpart who makes the decision. *Ibid., 82.*
[361] Jordana and Levi-Faur, *supra* note 314 at 350.
[362] Montoya and Trillas, *supra* note 337 at 183.
[363] The « *autarquias* » are not a novelty in the Brazilian Administration. They were conceived as decentralized units that could enjoy various levels of independence. Therefore, the label "*autarquias*" by itself does not reveal a definitive level of independence. However, once the legislator introduced the category of "*autarquia de regime especial*", he inaugurated an institute that a priori ascribes administrative and political independence vis-à-vis the executive power. Paulo Eduardo Garrido Modesto, *Agências Executivas: a organização administrativa entre o casuísmo e a padronização*, REVISTA DE DIREITO 75–84, 75 (2002).

stable mandate[364]. This means that the directors cannot be dismissed *ad nutum,* that is, according to the willingness of the President. In other words, the directors of the agencies are supposed to remain in power at the expense of potential political changes derived from elections. If the political colour of the new President is not aligned with the political orientation of the directory of a given agency, the President has nothing to do but wait for the end of the director's mandate. However, the stability of the director's mandate is submitted to a couple of legal exceptions that make us relativise Brazil as a case of intermediate formal independence. The law 9.986 of 2000[365] establishes in the article 9 that there are three possibilities to remove the counsellors and directors of the agencies from their functions: (i) resignation, (ii) definitive judicial decision and (iii) disciplinary administrative procedure[366]. Beyond that, the same article leaves room for the laws that create each agency to prescribe other reasons for removing counsellors and directors. By analysing all the laws of the ten agencies, we found very little differences with regard the stability of the directors. In some cases, such as ANVISA and ANA, it was established the possibility to exonerate the directors as long as such exoneration happens in the first four months of the directors in power[367]. Another reason for removal is the non-accomplishment of the management contract[368] without a reasonable justification[369]. Besides, the laws that create the ANT, the ANTAQ and the ANS also prescribe as a reason for removing the director the "*explicit non-fulfilment of his functions*"[370]. Furthermore, the idea of independence seems to be mitigated by the strong influence the President has in the elaboration and availability of the agencies' budget. As the Brazilian Congress enjoys limited powers to modify the annual project of law regarding budget ("*Lei Orçamentária Annual*"), the President may manage to reduce the amount of resources

[364] The stable mandate is not enough to ensure the independence of the agencies. Sometimes the President finds manners to *convince* the director to resign before the end of his mandate, which is known as the « throwing the towel » phenomenon in the United States. Mota Prado, *supra* note 338 at 133.
[365] The object of this law is to regulate the civil service and human resources who work in the agencies.
[366] Before this law, the ANEEL enjoyed less formal independence than ANATEL because their directors could be dismissed *ad nutum* during the first fours months of their mandate. Mota Prado, *supra* note 338 at 132.
[367] See article 12 of the law 9.782 of 1999 and article 10 of the law 9.984 of 2000.
[368] The management contract (« *contrato de gestão*») will be further explored in the section 3.1.
[369] See article 12 of the law 9.782 of 1999.
[370] See article 56 of the laws 9.961 of 2000 and 10.233 of 2001.

attributed to the agencies[371]. Likewise, as the law only establishes the limit of this amount, the President is able to interfere in the actual amount of money at disposal of the agencies, by enacting the so-called *contingent* decree-law[372]. In addition, the Minister to which the agency is linked may[373] be the competent to initiate a disciplinary administrative procedure against the director. Moreover, the President is even able to suspend the exercise of the director's mandate during the procedure and before his final decision. Finally, the President Lula's lawmaking initiative in 2003 towards a reformation of the competencies of agencies demonstrates a decrease of their independence in Brazil. The project of law 3.337 of 2004 aimed to provide common guidelines to all regulatory agencies[374], by establishing general obligations. For instance, there would be required (i) to make public consultations before decisions made by the collegial directory, (ii) to present reports to the Federal Senate, Deputy Chamber and respective Ministry and (iii) to create Ombudsman.

91. In Argentina, the regulatory entities were established in the article 42 of the reformed Constitution of 1994 and were supposed to exert regulatory competencies in addition to control whether the sector has complied with norms. According to this article, the reasoning to be consolidated was that the power that concedes public services could not regulate and the regulatory entity could not concede public services[375]. For example, as regulatory entities are supposed to be independent[376], it is unconstitutional in Argentina to have a revision ("*vía de alzada*") of their acts by the executive power[377]. According to the National Treasury, as these entities are technically able to exert their functions, their acts can only be revised if they sound arbitrary[378]. However, the daily practice allows such revisions[379], which gives rise to a

[371] Mota Prado, *supra* note 337 at 152.
[372] *Ibid.*
[373] For instance, the article 14, § 2, of the law 11.182 of 2005.
[374] These attempts to put all the agencies under the same regulatory framework go against to our argument, according to which not only are regulatory agencies heterogeneous units, but they also tend to become the more and more heterogeneous.
[375] Gordillo, *supra* note 317 at 23.
[376] Carlos Botassi points out that the Argentinean telecommunications regulatory authority *(« La Secretaría de Comunicaciones* ») is dependent on the President. Botassi, *supra* note 307 at 236.
[377] Gordillo, *supra* note 317 at 24.
[378] *Ibid.*

fragile link between the formal independence and the credibility of the Argentinean agencies.

2.2. The legitimacy of regulatory agencies' *decisions*

92. The second element of incoherence regarding the Regulatory State is the discomfort with the legitimacy of regulatory agencies[380]. This discomfort is due to the interruption of the legitimacy chain that derives from elected politicians towards the various levels of the administrative machine[381]. After all, elected politicians are channels for the political expectations of the majority of the voters. Presidents are understood to work at the very top of the Government and spread through all administrative layers the political legitimacy they acquired in ballots. In this sense, public policies that are conceived according to presidential opinions would be ultimately legitimate by people, as they would follow people's democratic choice. Yet, regulatory agencies belong to the administrative structure but disregard the need to subscribe the presidential views. Regulatory agencies are supposed to be independent enough to sustain a regulatory policy in spite of the changes of political orientation that may occur in the government.

93. In this section, we will focus on two arguments to go beyond such discomfort regarding the democratic legitimacy of regulatory agencies. First, we will

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[379] *Ibid.*

[380] In order to tackle this discomfort, the American Administrative Procedure Act establishes that regulatory decision-making needs special forms to be legitimate, such as popular participation and serious normative reflection upon the policy choices derived from abstract statutory guidelines. Ackerman, *supra* note 306 at 697.

[381] At the state level, the governor of Rio Grande do Sul at the time, Olívio Dutra, pointed out that he should be able to substitute the members of the council of the multi-sectoral regulatory agency (ARGERGS). Against the transfer of public services to private hands, Dutra argued that (i) the regulatory agency was an organ of planning and therefore could not be autonomous vis-à-vis the political power, and (ii) the treatment ascribed to the members of the council did not correspond to any of the existing legal categories of the civil service, which was not possible. A. Peci & B. Cavalcanti, *Reflexões sobre a autonomia do órgão regulador: análise das agências reguladoras estaduais*, 34 REVISTA DE ADMINISTRAÇÃO PÚBLICA 99–118, 113 (2000).

argue that regulatory agencies may[382] enjoy two types of legitimacy, a derived (or political) legitimacy and an own (or institutional) legitimacy. Second, we will point out that legitimacy is not a static characteristic, but a circumstantial capacity to justify the exercise of power. We will claim that the articulation of these types of legitimacies may even render a given agency *super legitimate*, which completely goes against the aforementioned worry regarding their deficit of legitimacy[383]. Indeed, the fact that agencies are supposed to be independent enough to act regardless of presidential views does not mean that agencies' organization and activities are disconnected from the executive power at large. Whereas regulatory agencies represent islands within the Administration, there are many formal and informal manners to access these islands and align their activities to the political orientation in power.

2.2.1. The double legitimacy of the agencies

94. Our first argument is that agencies may enjoy two types of legitimacy: (i) a derived (or political) legitimacy and (ii) a proper (or institutional) legitimacy. A regulatory agency is politically legitimate as long as it acts according to the explicit presidential willingness or according to a tight interaction with the political power. As an example of this tight interaction, the executive and legislative powers are competent to formulate the national regulatory planning in Brazil. Even if an agency is legally competent to conceive the planning, the executive power should first evaluate it or even elaborate a planning on its own if the agency does not present any[384][385].

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[382] We say that agencies « may » enjoy, instead of just « enjoy » two types of legitimacy because we understand that legitimacy is not a permanent, but a circumstantial feature of the agencies. They are all able to be legitimate in a given circumstance, but such legitimacy is not beforehand guaranteed.

[383] To consult a study that puts forward these two types of legitimacy and assesses their dynamic through concrete cases in the Brazilian context, Tarcila Reis, "Dépendance ou indépendance des agences de régulation brésiliennes? Une contribution `a l'étude de la légitimité des agences de régulation," *Revue française d'administration publique* 3, no. 143 (2012): 803–816.

[384] Gustavo Binenbojm & Andre Rodrigues Cyrino, *Entre Política e Expertise : a Repartição de Competências entre o Governo e a Anatel na Lei Geral de Telecomunicações*, REVISTA ELETRÔNICA DE DIREITO ADMINISTRATIVO ECONÔMICO 1–25 (2009).

[385] The president of Brazil has also been able to participate in the elaboration of regulatory policies through provisory measures that eventually are passed as law. For instance, the President Dilma Roussef promoted the average reduction of electricity tariffs in 20% through the MP 579. Likewise, the same provisory measure allowed the prorogation of the contract in thirty years. This provisory measure was converted into the law 12.783 on the January 11th, 2013.

95. Following this, on the other side of the coin there is the proper (or institutional) legitimacy. The proper (or institutional) legitimacy is based on other than political elements, which enable the agencies to justify the exercise of their powers and highlight the limitations of democratic legitimacy[386]. There are three elements that constitute the proper institutional legitimacy of regulatory agencies. The first element is the fact that the structure and functioning of the agency follow the commands of the legal order. This means that the agencies are able to justify their troubling competencies through the fact they are lawful. Lawfulness contributes to the understanding of agencies as institutionally legitimate administrative units. In addition, the second element of their proper institutional legitimacy is the provision of mechanisms of *participation* available to operators and users[387]. These mechanisms render the agencies the adequate institutional locus to promote the expression and synthesis of conflicting interests[388]. In the last two decades, regulatory agencies were protagonist in developing mechanisms to facilitate the engagement of society in political matters, such as public audiences[389] and public consultations[390]. Third, the *performance* of the agencies is taken into account to evaluate whether the new institutional balance offers public services of higher quality and on the basis of technical expertise[391]. Hence, these three elements of institutional legitimacy would explain the very need to change the structure of the State through the creation of new units and therefore justify their special competencies within the Administration.

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[386] PIERRE ROSANVALLON, LA LEGITIMITE DEMOCRATIQUE: IMPARTIALITE, REFLEXIVITE, PROXIMITE / PIERRE ROSANVALLON (2010).

[387] For instance, the decree-law 92 of 1997 established the General Regulation for Users (« *Reglamento General de Clientes del Servicio Básico Teléfónico*") in the telecommunication sector in Argentina, in order to ensure that users would have a say regarding the non-fulfilment of the companies' duties. Botassi, *supra* note 307 at 237.

[388] Reis, *supra* note 383 at 809.

[389] Public audiences render possible the participation to dispute resolutions between agencies and users.

[390] Public consultations are directly associated with the normative competence of the agencies. Before enacting a regulation, regulatory agencies receive within a deadline opinions and comments regarding the specific regulation.

[391] The idea of expertise is highly controversial. If it justifies an intense effort to build up a regulatory apparatus, it is still to be proven as effective. Indeed, the functional separation promoted by agencies implies the relevance of scientific knowledge and professional experience in the modern effort to elaborate regulatory solutions. Conversely, bureaucratic documents reveal a shocking ignorance of the sector and economic relationships they are supposed to regulate. Ackerman, *supra* note 306 at 696.

2.1.2. The dynamics of the double legitimacy of the agencies

96. In addition to claim that regulatory agencies may enjoy a double legitimacy, we point out that legitimacy is to be understood under dynamic terms. This means that we focus on the acts, not on the features of the agencies to discuss their legitimacy. This change of focus allows us to recognize that the same agency can be legitimate, illegitimate or even super legitimate, depending on the consequences of the dynamics between the political legitimacy and institutional legitimacy. This change of focus actually challenges the preoccupation regarding the lack of legitimacy of the agency, by asking contingent questions instead of providing definitive diagnosis. Therefore, the important point here is to analyse the dynamics that includes the political legitimacy and the institutional legitimacy.

97. Sometimes the politically derived legitimacy confronts with the proper institutional legitimacy. As a result of this confrontation, one type of legitimacy may prevail over the other. This means that the President and the agency do not agree regarding a specific subject and use formal and informal methods to impose their view. When the proper institutional legitimacy prevails over the politically derived legitimacy, the agency resorts as an independent administrative unit, which is able to justify the exercise of its powers by itself. When the politically derived legitimacy prevails over the proper institutional legitimacy, the agency follows the orientation of the President and ends up showing it is not as independent as it was supposed to be.

98. Other times, the politically derived legitimacy is compatible with the proper institutional legitimacy. It means that both the President and the agency agree with the decision made, even if they justify this decision through different reasons. When the agency enjoys both types of legitimacy, the discussion goes beyond its level of independence and undermines the preoccupation regarding its deficit of legitimacy. In such cases, the decision of the agency is super legitimate, as it is based on the political agreement of the representative and on the institutional elements (lawfulness,

participation and performance) that make regulatory agencies distinctive actors in the transformation of state action.

99. There are several concrete cases that show this interaction between the politically derived and institutional types of legitimacy of the agencies, which demonstrate that legitimacy is to be discussed under dynamic terms.

100. In Argentina, the confrontation between the two types of legitimacy seems to have prioritized the political capacity to justify the powers of the agency[392][393]. For instance, a conflict between the Central Bank and the President Cristina Kirchner has provoked a thorny debate and legislative reforms. On December 14th, 2009, the President Cristina Kirchner enacted the decree-law 2010/2009 to create a governmental fund that would ensure the payment of debts and promote a friendly investment environment in the country. According to the President's initiative, the "*Fondo del Bicentenario*" would be composed by six billions and fifth hundred sixty-nine dollars of the Central Bank's stocks to solve part of the debt regarding 2010[394].

101. However, the President of the Central Bank, Martín Perez Redrado, refuted to use the stocks of the bank. As the Central Bank is a regulatory agency, Mr. Redrado argued that it would supposed to enjoy independence vis-à-vis the political willingness of the President in power. Likewise, Mr. Redrado claimed that he would need an authorization of the Congress to implement such a measure. As a result of the conflict, on the January 7, 2010, the President Kirchner dismissed Mr. Redrado through the

[392] Professor Alberto Bianchi explained during his interview on July 18, 2012, that the majority of regulatory agencies have constantly been object of political disputes. He pointed out that even in the beginning of the implementation of the agencies, during Menem's government, the idea of independence was hardly respected. According to him, regulatory agencies are nowadays « *intervenidas* ».

[393] Indeed, the political intervention in Argentinean public organs can be illustrated by other examples. The National Institute for Statistics and Census (INDEC) has been denounced for having distorting official information, although it has warned in its website: « Do not get yourself be taken in by the alleged independence of private consulting companies that represent particular interests ». Gordillo, *supra* note 317 at 9.

[394] G1, "Kirchner exonera presidente do Banco Central argentino," *Globo.com/Economia e Negócios*, July 1, 2010, http://g1.globo.com/Noticias/Economia_Negocios/0,,MUL1438710-9356,00-KIRCHNER+EXONERA+PRESIDENTE+DO+BANCO+CENTRAL+ARGENTINO.html.

"*Decreto de Necesidad y Urgencia*" number 18/2010, by claiming that Mr. Redrado's refusal configured a disobedience of the civil servant.

102. The legal authority of the decree-law 18/2010 was questioned on the basis of two reasons. First, the presidency of the agency is a stable position and therefore protected against political intervention. Second, the dismissal of the president of the Central Bank should have been first subjected to the scrutiny of the Congress. On the other hand, the supporters of the dismissal pointed out that the independence of the Central Bank was limited to monetary policies. In this sense, as the creation of the fund was related to the government's fiscal policies, the President Kirchner would be the competent to intervene.

103. Mr. Redrado tried to void the decree-law by using a « *recurso de amparo*»[395] and the judge María José Sarmiento temporarily suspended the effectiveness of the decree to submit the question to a commission in the Congress. Nevertheless, on the February 2, 2010, the bicameral commission manifested in favour of the dismissal, which means that the political legitimacy prevailed over the institutional legitimacy. Beyond that, the new organic law for the Central Bank (Law number 26.739 of 2012) has brought normative prescriptions to enable the government to use the stocks of the Central Bank to solve public expenditure[396]. The enactment of this law has therefore mitigated the independence of the Central Bank and intensified the role of the government in decisions regarding interest rates, destinations of credits and constitution of stocks[397]. In this case, there has been a high level of political legitimacy, at the expense of the institutional legitimacy.

104. In Brazil, there has lately been a trend towards a prevailing political legitimacy, although the results of confrontations within the dynamics of the double legitimacy have varied more than in Argentina. The revision of tariffs in the

[395] The goal of the « *recurso de amparo* » is to protect the citizens against the acts and norms that are contrary to the rights and guarantees prescribed in the Constitution.
[396] The article 20 of the law is particularly clear on the matter. Bernardo Saravia Frías, "La Carta Orgánica del Banco Central," *Microjuris.com* (July 19, 2012): 3.
[397] *Ibid., 7.*

telecommunication and electricity sectors may illustrate the point. In January 2003, the President Lula took power and his political team needed to cope with directors of agencies who had been appointed during the former government, as they enjoyed stability in their posts. In June 2003, the divergences between the new Minister of Telecommunications (Miro Teixeira) and the directory of the ANATEL (Schymura de Oliveira) started becoming explicit. Mr. Oliveira claimed for the revision of the tariffs according to the planning elaborated at the time of the former President. On the other hand, the new Minister considered the measure unpopular and incompatible with the political mode of the new government. As a result of the conflict, the Regulatory Agency of Telecommunications managed to pursue the revision planning established during the former government. In turn, the Ministry of Telecommunications incited society to resort to the judiciary power against the increase of the tariffs[398]. At the end of the day, in 2004, the Supreme Court of Justice maintained the revision of the tariffs, by arguing that it was prescribed in the conclusion of the concession contracts and therefore could not be undermined by political reasons[399]. In this case, the proper institutional legitimacy prevailed over the political legitimacy and the government could not manage the revision of the telecommunications tariffs. The regulatory policy was implemented in spite of the political orientation in power.

105. However, the dynamics of the double legitimacy in Brazil varies and no stable scenario takes place. In 2003, the National Agency of Waterway Transports (ANTAQ[400]) refuted the demand for a supplementary tariff on the basis of a technical assessment of the matter. The demand had been proposed by the company TECON-Salvador-S/A, who argued for the need of a supplementary tariff to carry out services in the seaport of the federal state of Bahia. The ANTAQ pointed out that all services were included in the contract with their corresponding costs. The company asked for an administrative reconsideration of the demand, but the directory commission of

[398] The press took part in the debate and characterized the Agency as « disobedient ». The Prosecutor Office in Brasília asked for the interruption of the revision of tariffs, which was accomplished by the federal judge. Following this, the telecommunications companies appealed to the Supreme Court of Justice to undermine the suspension and validate the revision of tariffs. "Decisão Elogiada," *Correio Braziliense*, June 28, 2003.
[399] Decision no 45.297 (Superior Tribunal de Justiça 2004).
[400] "*Agência Nacional de Transporte Aquaviário*".

ANTAQ confirmed the former decision[401]. The company then turned towards the Ministry of Transports to meet its aspiration regarding the implementation of a supplementary tariff. Regardless of the administrative independence of the agency, the Ministry managed to cancel its decision, by supporting the company's claim. More than that, the Ministry consulted the Federal General Attorney ("*Advocacia Gerald a União*" -AGU), who justified the revision of the agency's decision by *"the supervision power"* constitutionally[402] ascribed to Ministries. According to the AGU, there would be necessary to build up a coherent logic behind the public regulatory decisions, by preventing such conflicts. Consequently, the so-called independence of the agencies would be strictly limited to their specific competencies and therefore subjected to the regulatory instructions formulated by the government. Moreover, in June 2006, the President Lula approved the manifestation of the AGU, which rendered its application compelling to all federal administrative organs, according to the article 40, §1 of the complementary law 73 of 1993. Therefore, in this case, the political legitimacy prevailed over the proper institutional legitimacy, by showing how concretely susceptible the legitimacy of the agencies is.

106. In Chile, the discussion regarding conflict of interests has demonstrated the institutional vulnerability of the "*superintendencias*" in terms of independence from the political and economic power[403]. In 2007, the government submitted a bill that would establish governance practices and demand each company board to develop regulations in order to avoid frauds and define the circumstances under which directors may buy or sell shares in a company. For instance, shareholders who would obtain the control over 10 per cent of a company stock would be obliged to inform all the details to the "*Superintendencia de Valores y Seguro*"[404]. The legal requirement to disclose information by the company's website and the "*Superintendencia de Valores y Seguros*" prevents the purchase of shares on the basis of privileged information, in

[401] Moreover, the ANTAQ sent its decision to the Brazilian Competition Authority (CADE – *"Conselho Administrativo de Defesa da Concorrência"*), who confirmed the decision made by the regulatory agency.
[402] See the article 87, unique paragraph, I, of the Federal Constitution.
[403] García G, *supra* note 348 at 359.
[404] TRANSPARENCY INTERNATIONAL, GLOBAL CORRUPTION REPORT 2009 - CORRUPTION AND THE PRIVATE SECTOR 218 (2009).

addition to improve the monitoring capacity of the regulatory authority[405]. However, the case Piñera[406] questioned this logic and provoked an intense polemic in the country. On the July 24th, 2006, Sebastian Piñera bought 3 000 000 shares of the company LAN Airlines just few hours after the meeting of the directory, in which the financial situation of the company was informed. During the meeting, it was informed that the company's profits had increased 33,9% regarding the former year, which was considered privileged information. However, the "*Superintendencias de Seguros y Valores*" used a literal interpretation of the law and understood that Piñera had started the purchase *before* having the privileged information. In this sense, the "*Superintendencia de Seguros y Valores"* only applied a fine of 363 million "*pesos chilenos*" in July 2007, on the basis of the argument that Piñera *continued* the purchase, by not being at first incited by privileged information. On the other hand, Piñera payed the fine without appealing from the decision, but resigned from the directory of LAN Airlines and denounced the findings as politically biased[407]. In the end, the president of the regulatory agency, Guillerme Larraín, remained in his position of "*superintendente*" and applied the fines, regardless of the political and economic power that Piñera enjoyed. Therefore, the institutional legitimacy of the agency prevailed, although a more demanding sanction could potentially have been applied by the agency.

3. Dealing with contingent rationalities

107. In this second part of the chapter we will assess the various institutional arrangements to question the importance of a by and large coherence of the regulatory sector. On the contrary, we have witnessed the transition from an abstract to a concrete legal system, where general rules have become contextualized[408]. After all, neither do

[405] *Ibid., 219.*
[406] Sebastian Piñera is the current president in Chile.
[407] Anyhow, Piñera still held 25% of LAN's shares in 2008. TRANSPARENCY INTERNATIONAL, *supra* note 404 at 220.
[408] Gérard Marcou, "La Notion Juridique de Régulation," *Actualité Juridique de Droit Administratif* no. 7 (2006): 347.

we regulate the whole, nor do we always regulate[409]. Following this, we will put forward that regulatory agencies have rather inaugurated a system of contingent rationalities, as it is the concrete case that will reveal the level of punctual efficiency and the cost-benefit effects of the regulation[410]. We will support this argument through two main research paths, a static picture and a moving analysis. First, we will show that the heterogeneous characteristics of each regulatory sector, such as the credibility cost, political sensitiveness and intensity of the judicial control, are reflected on the structural elements of regulatory agencies. Second, we will draw our attention to the patterns of change promoted within the agencies. On the search for efficiency, regulatory agencies have gradually adapted themselves to the specificities of their respective sectors, at the expense of a coherent general model. As a result, not only do agencies present heterogeneous models, but also these models tend to become the more and more heterogeneous. In this sense, we will suggest a correlative[411] relation between the level of heterogeneity in the regulatory system and the level of institutional continuity. Our comparative analysis will point out that Chilean, Brazilian and Argentinean institutional paths respectively reveal a high, medium and low level of continuity.

3.1. Regulating heterogeneous public policies

108. The heterogeneity of institutional arrangements to regulate the distinctive regulatory sectors is a patent characteristic in the Chilean context. This heterogeneity has provoked a "*dolor de cabeza*[412]" to administrative law scholars, who keep trying to conform regulatory agencies acts to the conditions established by the article 3 of the law 19.880[413]. Following the early privatization under the military regime of Augusto

[409] Gordillo, *supra* note 317 at 7.
[410] *Ibid., 8.*
[411] We suggest a correlative relation, not a causal one, because we assume that many other variables may interfere on the fact that Chile enjoys a high level of institutional continuity, while Brazil enjoys a medium level and Argentina a low level. As this work does not intend to provide a comprehensive understanding of the variables that influence the functioning of the agencies, we only suggest a correlative relation.
[412] García G, *supra* note 348 at 331.
[413] This article prescribes the concept of administrative act, which is a formal decision that encompasses a declaration of intention under the power of public prerogatives.

Pinochet, there was already by the 1990s a solid institutional apparatus for different regulatory sectors, but no consensus was achieved among administrative law scholars regarding the legal nature of this apparatus[414]. Before the failures of social sciences to provide a coherent explanation about the regulatory dynamics, the State has increased its creativity to establish regulatory organs that enjoy a great deference from the General Controller of the Republic[415][416]. From the regulation of concession of public services, to social security and capital market, these units enjoy a large normative, audit, sanctioning and jurisdictional competencies. In Chile, there are ten « s*uperintendencias* » to regulate private activities that promote public interest: « *Seguridad Social* », « *Valores y Seguros* », «*Pensiones* », « *Electricidad y Combustibles* », « *Servicios Sanitarios* », « *Salud* », « *Bancos e Instituciones Financeiras* », « *Casinos y Juegos* », « *Quiebras* » and "*Medio Ambiente*". Beyond that, there has been an intensive legislative debate to ascribe new activities under the regulatory frameworks of the agencies. For instance, the Home Affairs Ministry has evaluated the possibility to create a "*superintendencia*" for private social security and another for political parties[417]. In addition, there are other organisms that are not called « *superintendencias* », but play a similar role, such as «*la Dirección del Trabajo* » and «la *Subsecretaría de Telecomunicaciones* »[418]. The main difference regarding these organs is that their accountability activities are exerted over indeterminate subjects[419].

109. Yet, the understanding of the Chilean case as a full application of a liberal ideology would be misleading, as there was a plurality of manners to organize the "*superintendencias*" and they have been subjected to strict restrictions to reduce their

[414] Carmona claims that the main attribution of regulatory agencies in Chile is their audit power. Interview on the 19th April 2011.
[415] García G, *supra* note 348 at 332.
[416] The « *Controladoría General de la República* » (CGC) is an audit organ of the State that comprises several competencies, according to the article 98 of the Constitution. For example, the control of legality of the administrative acts, the account of public resources and the general accountability of the Nation are under the responsibility of the CGC. To consult more details, Vergara Blanco and Zúñiga, *supra* note 50.
[417] García G, *supra* note 348 at 329.
[418] *Ibid.*
[419] *Ibid.*

discretionary powers[420]. First, as we have discussed above, Chile has enjoyed a historical leading position in implementing regulatory agencies[421] in the region, but the level of independence ascribed to the agencies' directors vis-à-vis the executive power varies and tends to be low[422][423][424]. In the majority of the agencies, the President is able to dismiss the director, although historically speaking such a power has not been frequently used[425]. Besides, although the civil service reformation applies to the majority of "*superintendencias*", those related to banks and financial institutions, securities, insurances and social security are clear exceptions prescribed in the article 36 of the law 19.882. Moreover, regarding the "*Superintendencia de Electricidad y Combustibles*", it enjoys a weak autonomy vis-à-vis the executive power, as the respective Ministry benefits from a major control over its regulatory policies. In addition, concerning the agencies on water and environmental issues, they enjoy no formal autonomy at all from the executive power[426]. However, the Central Bank and the "*Superintendencia de Valores y Seguros*" figurate as influential exceptions, as they enjoy a high level of autonomy vis-à-vis the executive power and incite a larger debate on the constitutional abuses provoked by the powerful regulatory toolkit at the disposal of agencies[427].

110. Second, Chilean regulatory agencies play different roles regarding the policy of tariffs. For instance, the levels of attributions differ from the electricity and sewage sectors. The "*Superintendenica de Agua Potable y Saneamiento*" enjoys a

[420] *Ibid., 341.*
[421] As we pointed out above, the regulatory agencies in Chile are called « *superintendencias* ». They are considered decentralized units, the very function of which would be to control specific regulatory sectors. The superintendencies are deemed as exceptional administrative organs because of their high level of human and material resources. On the other hand, there is a debate regarding the justification of their powerful competencies in the Chilean legal system. J. M. D. de Valdés, "Anomalías Constitucionales De Las Superintendencias: Un Diagnóstico Constitucional," *Estudios Constitucionales: Revista Del Centro De Estudios Constitucionales* 8, no. 1 (2010): 250.
[422] The clear constitutional exception is the Central Bank (article 108).
[423] The low level of independence of Chilean regulatory agencies vis-à-vis the politicians confirmed in the interviews with Rodrigo Egaña, Aldo Gonzalez, Rafael Ariztía, Heidi Berner, Juan Walker and Macarena Lobos Palacios.
[424] In the United States, the directors of the agencies are also dependent on the executive power, as the President can dismiss them any time.
[425] Tomas Jordan informed that the President usually does not interfere in the regulatory agencies.
[426] Jordana and Levi-Faur, *supra* note 314 at 350.
[427] De Valdés, *supra* note 421.

greater role in the establishment of the tariffs than the "*Superitentendencia de Electricidad y Combustibles*"[428]. This happens because there is another institution in the electricity sector that composes the regulatory functioning: the National Commission of Energy. This commission is responsible for accomplishing many more tasks than the "*superintendencia*" itself, such as (i) the technical analysis of the prices and tariffs for utilities and services and (ii) the enactment of rules about the quality and techniques required in the sector.

111. Third, there is a high level of heterogeneity, and sometimes uncertainty, regarding the normative background of the regulatory agencies' functioning and interaction with other organs of the public structure. Following this, the fragmentation of the regime of administrative law in Chile has provided a plurality of mechanisms of control over the "*superintendencias*" and highlighted the importance to mention the "*leyes habilitantes*" in order to verify whether they comply with the principle of legality[429]. For instance, there has been a conflict of competencies between the Central Bank and the «*Superintendencia de Bancos e Instituiciones Financeiras*» (SBIF). The regulation number 3.429 of 2008 of the SBIF, which establishes orientations about the payment of bank fees, appears to go against the article 2 of the decree-law number 3 of 1997. This decree-law attributes to the agency the competence to audit companies, banks and financial entities, *as long as* the law does not ascribe such role to other institution. However, the matter of bank fees had been already ascribed to the Central Bank, not to the SBIF, by the article 8 of the decree-law 707 of 1980, which is the law of Current Accounts and Checks[430]. In addition, a heterogeneous understanding of the power of the General Controller of the Republic may be found once we change the sector under analysis. On the one hand, the regulatory agencies would enjoy a great deference from the CGC[431], as the article 46 of the law 20.255 of 2008 and the article 2 of the law 16.395 of 1966 respectively establish that the Pension and Social Security Regulatory Agencies would only be submitted to the audit of their accounts and public

[428] González, *supra* note 332 at 95.
[429] The article 7 of the Constitution prescribes the principle of « *juridicidad* », which means that any authority or public prerogative must be attributed by the Constitution or the law.
[430] De Valdés, *supra* note 421 at 253.
[431] García G, *supra* note 348 at 332.

expenditures. On the other hand, in 1990, the Constitutional Court declared unconstitutional the legal attempt of the law 18.933 to limit the control of the CGR to the accounts and expenditure of the "*Superintendencia de Instituciones de Salud Provisional*"[432]. In 2008, the Constitutional Court reinforced the large competence of the CGC, by claiming that the law that created the Pension Agency could not have restricted the general control of legality established by the article 98 of the Constitution.

112. In Brazil, the boom of regulatory reforms took place later on, being 1997 the mean year for the creation of regulatory agencies[433]. Comparatively speaking, nonetheless, this boom was not so anarchical: regulatory agencies were analogous pieces of an explosion curiously[434] activated by the government. In spite of the strong resistance, a set of similar agencies was introduced and carried out one of the most innovation of State Reform[435]. First, the President was a major enthusiast of the reforms[436], although the creation of agencies would result in delegation of power from the government to the independent units. Second, a certain institutional isomorphism[437] marked the organizational and procedural characteristics of the agencies, regardless of the different tasks encompassed by infrastructure and social sectors[438].

[432] All the functions, attributions, rights and obligations of this « *superintendencia* » were ascribed to the « *Superintendencia de Salud* », according to the article 106 of the decree-law number 1 of 2006.
[433] Jordana and Levi-Faur, *supra* note 314 at 350.
[434] There are several attempts to explain why elected politicians ascribe more independence to the agencies, such as the analysis of the political preferences of the legislative coalition in power or the willingness to blame the agencies for eventual failures. To consult a work about the variation of perceptions regarding the relationship between the agencies and the President, Mariana Mota Prado, "Accountability Mismatch: As Agências Reguladoras Independentes e o Governo Lula," in *Agências Reguladoras e Democracia*, Gustavo Binenbojm (Rio de Janeiro: Lumen Juris, 2006), 225–251.
[435] Justen Filho, *supra* note 93 at 262–264.
[436] The Presidential Chief of Staff Ministry was the locus where regulatory agencies were elaborated, along with the assistance of the State Reform council. Pacheco, *supra* note 311 at 528.
[437] B. Mueller and C. Pereira, "Credibility and the Design of Regulatory Agencies in Brazil," *Brazilian Journal of Political Economy* 22, no. 3 (2002): 81.
[438] Pacheco, *supra* note 311 at 524.

113. Even though different regulatory tasks were behind each sector, the institutional design of the first agency (ANATEL) served as a model to be followed[439] by all the others. To highlight the importance of the agencies to consolidate the privatization wave[440], an international consultancy group conceived the model that eventually configured ANATEL. The main goal behind this initiative was to express the commitment of the Brazilian government to separate technical decisions from eventual political instabilities. Credibility was the main message to be transmitted to the international community, the search of which highly influenced the structural elements of the six regulatory agencies created between 1997 and 2000[441].

114. In this sense, at first, the Brazilian regulatory agencies were created under a quite strong uniformity. The case of ANCINE ("*Agência Nacional de Cinema*)", the Brazilian regulatory authority of cinema is peculiar. This authority sounded much more related to incentive activities than regulatory ones, but looked like any other regulatory agency. In this sense, it appeared to be awkward to justify a regulatory organizational structure to foment activities regarding the national cinema. Furthermore, the ANCINE was the only regulatory agency created by a provisional measure, not by a law, and only in 2003 it became part of the Ministry of Culture through the decree-law 4.858[442]. However, the reasons for structuring such activities under the framework of regulatory agencies are not secondary. First, under the framework of regulatory agencies, they would enjoy more autonomy to manage their personnel. Second, they would be able to execute the budget and carry out procurements according to a more flexible legal framework[443]. In this sense, the creation of the National Agency of Health ("*Agência Nacional de Saúde*"- ANS) and the Brazilian Health Surveillance Agency ("*Agência Nacional de Vigilância*

[439] Jordana and Levi-Faur, *supra* note 314 at 347.
[440] In Brazil, ANATEL was the only regulatory agency that was created before the privatization of its respective sector. In the other sectors, we had first the privatization and then the creation of agencies, the pattern of which was object to criticisms. Diogo Rosenthal Coutinho, "Parcerias Publico-Privadas: Relatos De Algumas Experiências Internacionais," in *Parcerias Publico-Privadas*, Carlos Ari Sundfeld, 2005.
[441] Mueller and Pereira, *supra* note 437 at 67.
[442] Pacheco, *supra* note 311 at 530.
[443] *Ibid., 531.*

Sanitária" - ANVISA) as regulatory agencies, and not something else, counted on the enthusiastic support of the Ministry of Health at the time, José Serra[444].

115. Following this, Brazil has become a leading country to establish regulatory authorities in other than economic sectors, such as food safety, pharmaceutical products and environment protection[445]. As a result, there is a difference between competitive and non-competitive sectors, or infrastructure and rather social sectors. Regulatory sectors in which the level of credibility has less impact on the interest of the recipients, such as the National Agency of Healthy, were submitted to more provisional decrees of the President than competitive sectors, such as telecommunications and electricity[446]. Moreover, if the organizational structure of the Brazilian regulatory agencies was originally similar to the best practices of the World Bank, one currently finds some innovations, such as multi-sector regulatory authorities, that are only usual in large countries, such as Mexico[447]. Nowadays, Brazil counts on ten regulatory agencies at the federal level[448] and several others at the state level[449], which reveal rather heterogeneous features. For instance, the National Agency of Water enjoys a high level of independence from the political power, but presents a low level of transparency[450]. Besides, the agencies that regulate the infrastructure sector enjoy a higher level of independence from the executive power than those that

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[444] *Ibid.*
[445] Jordana and Levi-Faur, *supra* note 314 at 356.
[446] Mueller and Pereira, *supra* note 437 at 81.
[447] Jordana and Levi-Faur, *supra* note 314 at 350.
[448] ANATEL (law 9.472 of 97), ANEEL (law 9.427 of 96), ANP (law 9.478 of 97), ANVISA (law 9.782 of 99), ANS (law 9.961 of 2000), ANA (law 9.984 of 2000), ANTAQ (law 10.233 of 2001), ANTT (law 10.233 of 2001), ANCINE (provisional law nº 2.228-1 of 2001) and ANAC (law 11.182 of 2005).
[449] The regulatory agencies at the state level have been characterized by their multi-sectoral functionality, given the lack of resources and civil service capacity to launch several sectoral agencies. Moreover, the role of these agencies in the functioning of the Brazilian regulatory state is still to be developed, depending on the level of interaction between federal and state governments. The level of interaction between political units will characterize the possible contribution of state level governments with the national regulatory policies. Peci and Cavalcanti, *supra* note 381 at 102.
[450] The levels of independence of the agencies are defined in Gelis' work through the assessment of the following normative questions: (i) does the agency enjoy legal personality? (ii) is the agency submitted to the management contract? (iii) does the agency have an autonomous budget? (iv) do the directors have a determined mandate? Gelis Filho, *supra* note 316 at 607. However, we do not propose a hierarchy among the criteria. In our work, we focus on the fact that there are different levels of independence.

regulate the social sector[451]. Finally, the Regulatory Chamber of the Medicine Market[452] has been cited as a regulatory institutional model that neither ensures independence nor provides transparency. This Chamber belongs to the structure of the Secretariat of Government and gained relevance because it captured functions of the Brazilian Health Surveillance Agency[453], which shows the increasing differentiation process that has happened in the regulatory arrangement.

116. In Argentina, the political interventionism and regulatory rearrangements of the last years have demonstrated that ideological coherence is not able to ensure rationality[454], but at most an "irrational rationality"[455]. There is no general rule or definitive notion of regulation[456], but a set of attempts to bring relevant subjects under the control of the State, to improve competition and enlarge the participation of society in this regulatory making process. Indeed, if there is no global consensus around the meaning of regulation[457], in Argentina the plurality of forms is quite intricate. For instance, concerning the regulation of ports, one can hardly consider that the law of deregulation and privatization of ports is any realistic. Before this law, there was no authorization to build private ports, which means that the law only recognized those ports belonging to the public sphere. However, private ports actually existed and were not subjected to any regulatory framework[458]. In this sense, instead of "deregulating" ports, the authorization for private ports ended up by "regulating" them, as the private ports have been incorporated into the legal order[459]. Likewise, the excessive regulation of products for exportation has undermined the capacity of producers to comply with international trade agreements and slowed down the national production[460].

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[451] *Ibid., 605.*
[452] The "*Câmara de Regulação do Mercado de Medicamentos*".
[453] Gelis Filho, *supra* note 316 at 605.
[454] Gordillo, *supra* note 317 at 3.
[455] *Ibid., 11.*
[456] *Ibid., 7.*
[457] Marcou, *supra* note 408.
[458] Gordillo, *supra* note 317 at 30.
[459] *Ibid.*
[460] *Ibid., 20.*

117. On the one hand, the Argentinean regulatory authorities usually enjoy the legal status of "*autarquias*", try to keep some independence from the central government[461], have their own budget and ascribe to their decisions the quality of administrative acts[462]. On the other hand, under the expression "*entes reguladores*", we find a variety of entities created by law or by decree-law that are in fact committees, commissions and regulatory organisms, such as "*Comisión Nacional de Comunicaciones*" (CNC), the "*Comité Federal de Radiodifusión*" (COMFER), la "*Comisión Nacional Reguladora del Transporte*" (CNRT), the "*Órgano de Control de Concesiones Viales*" (OCCOVI), the "*Organismo Regulador del Sistema Nacional de Aeropuertos*" (ORSNA), the "*Ente Nacional de Obras Hídricas de Saneamiento*" (ENOHSA), the "*Ente Nacional Regulador del Gas*" (ENARGAS) and the "*Ente Nacional Regulador de la Electricidad"* (ENRE)[463].

118. Another factor that shows the heterogeneity of models regarding regulatory entities in Argentina is the possibility of building an inter-jurisdictional regulation. This inter-jurisdictional regulation derives from a multi-level federal entities agreement, according to which there will be a unified regulation for a certain sector in all the federal spheres, local, state and federal. This agreement reinforces the idea that all spheres play an equal role. For instance, there have been the "*Yacimientos Mineros de Aguas de Dionisio*" (YMAD) and the "*Cinturón Ecológico del Gran Buenos Aires*" (CEAMSE). Besides, according to the federalism pact, federal entities should respect their respective competencies, not being able to intervene in one or another. As a result, there cannot be revision of administrative acts ("*vía alzada*"), as the President cannot revise the acts of a governor. However, the "*Ente Tripartito de Obras y Servicios Sanitarios para el Gran Buenos Aires*" (ETOSS) prescribes the possibility of revision, which has inaugurated another model of federalism system that

[461] In general, the direction of the Argentinean regulatory authorities is a collective organ. Botassi, *supra* note 307 at 231.
[462] *Ibid.*
[463] Augustín Gordillo, "Los Entes Reguladores," in *Tratado de Derecho Administrativo*, vol. Tomo 1, 9 Edition (Buenos Aires, 2009), 5, http://mail.gordillo.com/tomos_pdf/2/capitulo7.pdf.

will influence regulation[464]. Therefore, there is no homogenous structure to be identified, but contingent rationalities to deal with.

3.2. Patterns of adaptation

119. The search for a coherent public structure to conform a rational legal regime has hardly been given up. Once the explosion of heterogeneous regulatory agencies has transformed the State structure, scholars and legislative initiatives have tried to put the lost sense of coherence back on the track. For instance, the quite ambitious Spanish law n. 2 of 2011 establishes the goal of the government to render the regulatory system more uniform, in order to improve the methods of public action and eventually help the country to find a way out from the economic crises[465].

120. However, there is no guarantee we can render a regulatory system effective, even if we were able to conceive a perfect regulatory standards for a particular area of law[466]. The concern about effectiveness seems to provoke constant innovations and adaptations, under a relentless attempt to meet the process of social and economic change. Institutional change is therefore carried out by the goal to adapt regulatory agencies to the contemporary needs of the sector. Given the heterogeneity of the institutional design of the current regulatory agencies, their contingent rationalities seem to be the result of the interaction between their need to search for technical efficiency and the political possibilities available in each scenario[467].

121. In Brazil, the apprehension about the differences among agencies was discussed in a report elaborated by an inter-ministerial group. The report suggests us to identify the sectors that actually need the structure of regulatory agencies[468]. In spite of

[464] Gordillo, *supra* note 317 at 26.
[465] The Spanish Constitution does not prescribe the independence of regulatory agencies. However, this law has been praised by reinforcing mechanisms that would ensure independence to agencies and avoid the revolving-door effect. It has failed though for not forbidding the compatibility between regulatory posts and elective mandates. Delzangles, *supra* note 330 at 714.
[466] Pistor, *supra* note 310 at 107.
[467] Gelis Filho, *supra* note 316 at 608.
[468] Pacheco, *supra* note 311 at 535.

such suggestions, the project of law number 3.337 of 2004 did not point out the necessary distinctions between regulation and regulatory agencies. Not only did the project of law maintain the structure of the existing agencies, but it also promoted that agencies become more uniform, which goes against the particularities of each sector[469] and builds up a scenario of plastered regulation for dynamic regulatory authorities[470]. The first attempt to render the regulatory agencies more uniform was the promulgation of the general law 9.986 of 2000. However, this law was limited to the forms to hire professionals for the agencies[471]. Following this, the project of law number 3.337 of 2004 was elaborated under "urgent circumstances"[472] and provided a more comprehensive regulatory framework for all the agencies, by rejecting the fragmented realities their own laws had established. The project of law would prescribe the general lines regarding management, organization and control of all the regulatory agencies. Nevertheless, the project of law has not become a law yet and remained subjected to debates in the Congress[473]. In the end, it has been noticed that the Brazilian regulatory agencies have actually become powerless, by not performing the roles their original laws ascribed to them[474]. If the search for uniformity has not given rise to a radical institutional discontinuity, it has led to a meaningless and therefore unfruitful performance of the agencies.

122. In Chile, regulatory reforms have been smoothly implemented through several initiatives, such as the Commission for the Modernization of Regulatory Institutions, which was launched in 1998 under the direction of Alejandro Jadresic[475]. Indeed, if one can witness a high level of institutional continuity, several subjects are

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[469] *Ibid., 532.*
[470] For instance, one of the dangers of the performance contract ("contrato de gestão") between the agencies and the ministries is to condition the use of financial resources to the compliance with the Ministers' willingness. Cláudio Sales, "O Desafio das Agências Reguladoras," *Instituto Acende Brasil* no. 2 (June 2007): 4.
[471] Governo Federal quer uma única lei para as agências reguladoras. Carta Capital, http://www.cartacapital.com.br/politica/governo-federal-quer-uma-unica-lei-para-as-agencias-reguladoras/ (last visited Mar 10, 2013).
[472] Sales, *supra* note 470 at 6.
[473] "PL3337/2004," *Câmara dos Deputados*, June 2, 2012, http://www.camara.gov.br/proposicoesWeb/fichadetramitacao?idProposicao=248978.
[474] Sales, *supra* note 470 at 2.
[475] González, *supra* note 332 at 78.

under debate to address the flaws that hamper the functioning of the agencies. First, the "*Superintendencia de Educación Pública*" had a very short lifetime. This regulatory entity enjoyed a low level of influence and institutional capacity because of its lack of legal competencies and financial resources[476]. Second, one of the main problems faced by Chilean regulatory agencies is the lack of predictability regarding the competence to solve conflicts. In this sense, the law 19.880 was enacted under the objective to increase the level of this predictability[477]. As the agencies enjoy a sort of jurisdictional power, it has been identified the need to develop specialized courts and patterns of judicial revision as sophisticated as the questioned technical decisions. After all, the ability to solve conflicts is one of the most controversial aspects related to the "*superintendencias*"[478].

123. This polemic has even built a negative point of view regarding the agencies among administrative law scholars, who claim unconstitutionalities in their legal regimes. For instance, they criticize the power attributed to the regulatory agency of environmental issues and suggest the establishment of a new court, which would be specialized in such matters[479]. In turn, another way to solve this problem is the resort to arbitral panels, which have been successfully experimented by the electricity regulatory agency since 2004 and a source of influential discourse towards the telecommunications authority[480]. In fact, although this panel only enjoys a consulting status, its opinion was required in ten out of eighteen revisions of tariffs that happened between 2004 and 2005[481]. Hence, the telecommunications sector studies the redesign of such panels, without overlooking the need to alleviate its *ad hoc* characteristic through the consolidation of an enduring group of arbitrators to develop their own case law[482]. The idea is to render the regulatory framework increasingly compatible with the rapid technological transformations of the telecommunication sector. The

[476] García G, *supra* note 348 at 329.
[477] *Ibid., 361.*
[478] *Ibid., 362.*
[479] *Ibid., 366.*
[480] González, *supra* note 332 at 87.
[481] *Ibid.*
[482] *Ibid., 86.*

introduction of some flexibility in the normative system and the reinforcement of interpretative methods would attenuate the known regulatory to meet reality[483].

124. Yet, while in Chile the institutional heterogeneity seems to follow certain continuity, in Argentina one may find a heterogeneity that derives from several abrupt replacements of models[484]. In Argentina, the question of regulatory agencies has been associated with a permanent economic emergency that encompasses a very low level of institutional stability[485]. As a result, the successive economic crises have resorted to extraordinary measures on ordinary basis. First, the earliest regulatory authorities, created between 1875 (*Dirección General de Correos*) and 1891 (*Dirección General de Ferrocarriles*), did not last long. In the 1930s, the country confirmed the Latin American trend to be receptive to reforms[486], as several «*autarquias*» were implemented to consolidate the interventionist doctrine and respond to the economic crises at the time. The "*Junta Nacional de Carnes*", the "*Junta Nacional de Granos*" and the "*Comisión Reguladora de Yerba Mate*" are only some examples of "*autarquias*" created by the government to protect strategic economic sectors against international competition[487].

125. Second, in 1991, a big bang[488] happens. A strong economic deregulation came about through the decree-law n. 2284 and the majority of the regulatory authorities were suppressed[489]. The law of State Reform n. 23.696 was the well-known following step, which pushed a radical restructuring of the Argentinean State, such as the creation of seven new regulatory agencies within three years[490]. Based on the principle of subsidiary State, several small States appeared within the State[491].

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[483] *Ibid., 81.*
[484] Gordillo, *supra* note 317 at 5.
[485] *Ibid., 4.*
[486] Jorge L. Esquirol, "Fictions of Latin American Law (Part I), The," *Utah Law Review* 1997 (1997): 425.
[487] Alberto B. Bianchi, *La Regulación Económica* (Abaco de R. Depalma, 2001), 206.
[488] Jordana and Levi-Faur, *supra* note 314 at 347.
[489] BIANCHI, *supra* note 487 at 209.
[490] Jordana and Levi-Faur, *supra* note 314 at 347.
[491] BIANCHI, *supra* note 487 at 225.

126. Third, the delegation of regulatory powers to administrative units suffered several discontinuities, which undermines the credibility of the legal system and builds up what has been called "*verguenza colectiva*[492]". Between 1853 and 1994, more than 1900 norms have delegated legislative power to the government and its administrative units, such as the civil code, and the commerce code. In the Constitutional Reform of 1994, the article 76 prevented the government to enact norms, including Ministries and Secretaries, and prescribed in the article 42 the need to create proper regulatory organs, which would enjoy this normative prerogative. In addition, the transitory act number 8 of the reformed Constitution prescribed a delay of five years to promote the transition from the autonomous ordinance of administrative units towards the creation of regulatory agencies, by ensuring the validity of the former delegated norms. The problem is that at the end of the delay, in 1999, the Congress enacted the law 25.149 to defer all the legislative delegation comprised in the 1900 aforementioned norms and established another delay[493]. The Constitution was put aside and the deadlines were subsequently disobeyed in 2002 (law 25.645), 2004 (law 25.918), 2006 (law 26.135), 2009 and 2010[494]. The pattern of adaption in Argentina was accompanied with a high level of institutional discontinuity and it has had a cost in terms of credibility[495].

4. Concluding remarks

127. The goal of this chapter was to discuss the alleged incoherencies of the regulatory state, which no longer fits in a systematic view of administrative law, but demands a tailoring institutional design. Along with the comparative analysis among Chile, Brazil and Argentina, we have claimed that the disturbance regarding incoherencies actually derives from (i) the lack of exploration of the various meanings of independence and (ii) the static understanding of political legitimacy of agencies. By overcoming the debate about these incoherencies, we face the heterogeneous

[492] Gordillo, *supra* note 317 at 22.
[493] Carlos Pagni, "Facultades delegadas, una bomba de tiempo," *La Nación*, July 13, 2009, http://www.lanacion.com.ar/1149900-facultades-delegadas-una-bomba-de-tiempo.
[494] Gordillo, *supra* note 317 at 34.
[495] During the economic crisis of 2002, the law 25.561 (« *Emergência Pública y Reforma del Régimen Cambiario* ») was promulgated, which required the understanding of the companies and renegotiation of the contract's provisions. Botassi, *supra* note 307 at 242.

organization and institutional patterns that the contingent rationalities of regulatory agencies bring about. The diversity of institutional arrangements that regulatory agencies carry out shifted the focus of attention from the coherence of the system as a whole towards the effectiveness of the sectoral regulations. To insist on coherence is not rare or surprising. However, what State Reform provoked the most through the implementation of regulatory agencies was an astonishing, but liberator impression vis-à-vis complexity. This astonishing but liberator impression tells us that conflicts of interests and incoherencies are actually supposed to happen, and there is nothing left than to deal with that.

(III) FROM PREDICTABILITY TO AN EXPERIMENTAL ADMINISTRATIVE LAW

CHAPTER 3

WEBER IS NOT *WEBERIAN*: A TYPOLOGY OF CIVIL SERVICE REFORMS

1. Introduction

128. The State becomes much less abstract or obscure as soon as we identify those who drive the governing process. They might not be the only actors responsible for public action. Likewise, they might not be able to always overcome the strong limits imposed by institutional invisible rules. However, in times of crisis, civil servants have no alternative choice but to reconsider their political role and decide whether they will change with the State[496]. And sometimes, they make the State change. After all, they plan political strategies, they sign up contracts and they implement policies. For instance, the so-called street-level bureaucrats may appear as protagonists of the deepest transformations in public policy implementation because, by facing daily problems and exercising their discretionary power, they can be very much creative to push forward administrative reforms[497].

129. In this sense, analytically speaking, it would be naïve to ascribe to civil servants a natural lack of motivation due to the fact that they work at the public sector, as much as it would be naïve to assume that private employees are always efficient and responsive[498]. The civil service of a given country is a group of people, as diverse as a group of people can be under a defined institutional framework. As a result, to understand this institutional framework seems to be the shortcut to understand this group of people. After all, people may change every day but remain people in different historical times, whereas the State may change very slowly but promotes diverse

[496] PEREIRA, *supra* note 40 at 4.
[497] *Ibid., 7.*
[498] Masnatta, *supra* note 64 at 316.

classifications according to the historical moment. Indeed, the modern State begins absolute in political terms, mercantilist in economic terms and patrimonial[499] in administrative terms. Nowadays, we recognize a democratic, capitalist and managerial State, without really identifying the left pieces of the former models and the potential power of the new ones. Historically speaking, it might make sense to design a sequential path of the civil service from patrimonial, to bureaucratic and then managerial civil service[500]. However, it says too little about the possible miscellaneous of characteristics that constitutes the institutional framework on the grounds.

130. This chapter will deal with the following two questions regarding civil service reforms. First, we will address the meaning of civil service reforms in three countries where the twentieth century project of building a State on the Weber's basis was incompletely accomplished. Secondly, we will analyse the potential mismatch between rule of law[501] and the introduction of new governance methods. These two questions are intertwined by a common preoccupation regarding State action: how to increment flexibility and ensure predictability at the same time. After all, in all three countries, bureaucratic reforms gave rise to administrative law mechanisms, which would protect public sphere from corruption and nepotism, but did not turn out to be efficient[502].

131. We will argue, however, that this preoccupation is misleading both because (a) new governance methods are rather a complementary mentality than a theoretical model that would undermine the basis of the modern State, and (b) predictability is by no means guaranteed by an ex-ante definitive choice between either rules or standards. In order to illustrate these arguments, Chile, Brazil and Argentina

[499] Indeed, the violation of a republican conception of the State may derive from a patrimonialist or corporative perspective. The former confuses the public patrimony with the individual or family patrimony. The latter confuses the state patrimony with that of organized and corporative interest groups. Bresser-Pereira, *supra* note 59 at 150.
[500] PEREIRA, *supra* note 6 at 109.
[501] We use the term « rule of law » to identify this *wish* for predictability. We recognize though that « rule of law » could imply different meanings according to the policy on the table. David Kennedy, "Political Choices and Development," in *The New Law and Economic Development. A Critical Appraisal.*, David Trubek and Alvaro Santos (Cambridge University Press, 2006).
[502] Bresser-Pereira, *supra* note 59 at 152.

will provide analytical data concerning the new legal framework that regulates current bureaucracies and challenges the either negative or positive approaches of Administrative Law[503].

132. We will develop these arguments in three steps. In a first moment (I), we will explicit the reasons for the dilemma between the increase of flexibility and the consolidation of the rule of law in Public Administration, by approaching the sequential argument of reforms in *building* bureaucracies. In a second moment (II), we will claim that this is actually a false dilemma, as neither the new methods of governance undermine the legal basis of the modern bureaucracy, nor predictability is a question to be solved through rigid and formalistic systems. The existing dilemma is actually an old and unfruitful[504] one: it is the dilemma of the allocation of discretion, which remains a challenge within Administrative Law. Hence, we will support the development of a model of administrative accountability that aims to bring together flexibility with rule of law values, by inducing "*continuous reconsideration of a system's norms in the course of monitoring compliance with them*"[505]. In a third moment (III) we will propose a typology to draw a more concrete picture of the *reforming* States in Chile, Brazil and Argentina, concerning the specific sub policy of civil service reform. These reforming States will respectively be called: "the Pragmatic Weber", "the Confused Weber" and "the Would-be Weber[506]".

[503] The negative approach would be conceiving Administrative Law as a break on regulation, while the positive approach would be the acceleration on regulation to force the adoption and implementation of policies. Richard B. Stewart, "Administrative Law in the Twenty-First Century," *New York University Law Review* 78 (2003): 442.
[504] Christopher Edley, *Administrative Law - Rethinking Judicial Control of Bureaucracy*, 1990, 9.
[505] Katheleen Noonan, Charles Sabel, and William Simon, "Legal Accountability in the Service-Based Welfare State: Lessons from Child Welfare Reform," *Law and Social Inquiry* 34 (2009): 523.
[506] Following the suggestion of Professor Oscar Ozlak, we characterize Argentina as a « Would-be Weber », instead of a « Weber to be », because of the uncertainty regarding the capacity of the country to eventually consolidate a bureaucracy.

2. The reasons for the dilemma: *building* bureaucracy in Chile, Brazil and Argentina

133. Is it too early to talk about new governance methods in countries where the bureaucratic model proposed by Max Weber has not yet been accomplished? This question is based on two assumptions: (i) the development of bureaucracies follows a sequential path from patronage, through professionalization and eventually to efficiency, and (ii) it would be risky to introduce the flexibility that new governance methods imply where there is still a weak rule of law. Therefore, the sequential argument would point out that it is necessary to first reinforce bureaucratic features prescribed by Max Weber and then introduce new governance methods[507].

134. The sequential argument claims that the types of reforms to which the State has been subjected are not isolated movements, but respectively bureaucratic and management *stages* of the construction of the contemporary State. These stages would be logically chained because management reforms would have actually emerged from the diagnosis of the flaws affecting the bureaucratic State. The so-called bureaucratic pathologies, such as rigidity, over regulation and focus on rules rather than on results[508] constitute the practical incentive for the emergence of an innovative, result-oriented and competitive way to talk about Public Administration. Moreover, it would be inadequate to apply management techniques to developing countries because in such contexts the administrative bodies are highly politicized, which would rather require more stability and independence of civil servants[509]. Finally, the argument follows in the sense that such countries are not even able to implement one of the most important features of new governance, that is, public sector performance measurement.

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[507] Bresser-Pereira usually replies this argument with the following question: should developing countries complete their mechanical industrial revolutions before entering in the digital era? Bresser-Pereira, *supra* note 6 at 185.

[508] Ben Ross Schneider & Blanca Heredia, *The Political Economy of Administrative Reform in Developing Countries*, *in* REINVENTING LEVIATHAN: THE POLITICS OF ADMINISTRATIVE REFORM IN DEVELOPING COUNTRIES / EDITED BY BEN ROSS SCHNEIDER AND BLANCA HEREDIA 1–29, 7 (2003).

[509] Koldo Enchebarria and Juan Carlos Cortazar, "Public Administration and Public Employment Reform in Latin America," in *The State of State Reform in Latin America*, Eduardo Lora, 2007, 126.

The idea is that (i) low institutional capacity, (ii) a limited involvement of stakeholders, (iii) a high level of corruption and (iv) a high level of informality lead these countries to have an "*unsatisfactory demand*" for performance information[510]. And yet, this idea is also shared by some voices in International Organizations, which are, on the other hand, allegedly committed to the globalization of the language. For instance, in an article published by the World Bank Research Observer, Allen Schick claims that developing countries have not implemented such reforms because they are beyond their reach or do not fit their current needs[511].

135. Indeed, Chile, Brazil and Argentina have not fully accomplished the twentieth century task regarding their administrative apparatus[512]. None of the three countries have built a "professional" and "rational" bureaucracy that would ensure an impartial and universal treatment of the citizens through a legally oriented mode of functioning. Corruption, "clientelism" and shortage of high-qualified personnel within the State machine are still present, which hampers the allocation of resources and the delivery of public services in a democratic and effective way[513]. In Chile the debate about State Reform started with the enactment *by the government* of a document[514] that discussed ethics in the exercise of public functions and proposed devices to prevent corruption, although the country enjoys *"a long and solid tradition of public integrity"*[515] and the best evaluations in terms of transparency in the public sector[516]

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[510] Mimba, Helden, and Tillema, *supra* note 34 at 202.
[511] Allen Schick, "Why most Developing Countries Should not Try New Zealand's Reforms," *The World Bank Researcher Observer* no. 1 (1998): 49.
[512] The task was to consolidate democracy along with the implementation of bureaucratic States. Bezes, *supra* note 33 at 1.
[513] The line attributed to the former Brazilian president Getúlio Vargas *"to my friends, everything; to my enemies, the law"* is illustrative of this unequal and ineffective treatment dispensed by the Administration.
[514] The « *Informe de la Comisión Nacional de Ética Publica* » was published in 1994 under the government of President Eduardo Frei, who launched the public debate about State Reform in Chile. Mario Waissbluth and Jose Inostroza, "Globalización y Reforma Del Estado En Chile," *Nordic Journal of Latin American and Caribbean Studies* XXXVII, no. 1 (2007): 285.
[515] Comsión Nacional de Ética Pública, *Informe De La Comsión Nacional De Ética Pública Sobre La Probidad Pública y La Prevención De La Corrupción*, n.d., http://www.proacceso.cl/documentos/comisi_n_de_tica_p_blica.
[516] The International Transparency ranks the countries in this following order regarding the rate of corruption perception: Chile (7.5), Brazil (4) and Argentina (3.5). Gaetani and Heredia, *supra* note 11 at 5.

among its Latin American counterparts. In Brazil, until the mid-1970s, less than 10% of the civil servants had been submitted to meritocratic competition before accessing the career[517]. Besides, even though technocrats enjoyed an eminent prestige during the military period, at the end of the 1980s there was a coexistence of islands of excellence within a by-and-large ineffective bureaucracy. In Argentina, political instability still prevails in the recent history of the country and suspicious regarding public institutions elucidates the long path to be pursued in order to build State capacity[518][519]. For instance, the 2001 crisis[520] that broke down the economy also had political components. It has been claimed that the National Institute of Statistics and Census (INDEC) manipulated the inflation rate, as it reported a rate of 39.7%, whereas private consultants reported a one of 120%[521]. Following this, the Federal Government, which ended up unable to manage the crisis, underwent successive replacements. From the 20th December 2001 to the 2nd January 2002, Argentine people had five Presidents. Therefore, given this scenario, at a first glance one would have compelling contextual motivations to be sceptical about the idea of enhancing discretion and giving up the attempt to consolidate predictability in Administration' affairs.

[517] Ross Schneider and Heredia, *supra* note 41 at 7.

[518] Geddes explains that obstacles to build state capacity are not limited to technical requirements, the availability of funds, tax laws, procedures to enforce them and access to foreign capital. Beyond that, the politician's dilemma embedded within the need to choose between either short-term political support or longer-run collective interests plays a central role in entrentching state capacity. BARBARA GEDDES, POLITICIAN'S DILEMMA: BUILDING STATE CAPACITY IN LATIN AMERICA 18 (1994).

[519] However, the interviewee Lucas Nejamsky pointed out that some progress has been made in terms of efficiency. For instance, citizens used to spend two years to obtain their identification documents, while nowadays they can have them in fifteen minutes.

[520] In general lines, one of the reasons associated with the 2001 economic crisis is the recession the country faced due to the international economic crisis that devaluated the Brazilian currency (Brazil is a major Argentinean trade partner) and revaluated the dollar (Argentinean currency was pegged to the dollar at that time). Fearing the devaluation of the peso (the Argentinean currency), people started running to the banks in order to withdraw large amounts of money in dollar. Given the scarcity of dollars available, the government enacted the « *corralito* », which was a measure to frozen the bank accounts and restrict the amount of money that could be weekly withdrew. This measure provoked large popular protests, the so-called «*cacerolazo*».

[521] This information was obtained during a student presentation made at Harvard Kennedy School on the 30th, March 2011, at the course of Professor Elaine Kamarck.

3. Overcoming the dilemma

3.1. Theoretical (in)compatibility of new governance methods?

136. Although the aforementioned scepticism, the argument of this section is the following: new governance methods do not present theoretical grounds to undermine the assumptions of the modern State. Consequently, there is no fundamental incompatibility within speeches that articulate, for instance, New Public Management's jargons and Weber's concepts that structure a modern bureaucracy. If New Public Management appears as a "doctrinal puzzle" that reacts against the flaws of the bureaucratic State, it does not appear to propose a substantive model that would be inconsistent with Weber's prescriptions. What this ill-defined label[522] attempts to do is to introduce a "mind-set" that would relativise the concepts proposed by Weber, by drawing lessons from the practice, identifying new instruments of governance and replicating methods of private management into the public sector.

137. In order to demonstrate this argument, we will critically assess some of the alleged tensions between features of new governance methods and elements of the bureaucratic State. The adoption of such methods has indeed made the Administration change, but not necessarily by bypassing the grounds established in Weber's model[523]. To be sure, we do recognize the significative transformations that the State has undergone, but we claim that these transformations do not invalidate the premises defended by Weber[524]. On the contrary, Weber is not *Weberian*[525] under the new

[522] Christopher Hood, "A Public Management for All Seasons?," *Public Administration* 69, no. 1 (March 1, 1991): 3, doi:10.1111/j.1467-9299.1991.tb00779.x.

[523] We should make clear that neither is our ambition to analyse the whole theory Weber proposed about bureaucracy, nor to discuss all the new governance methods. The idea is to show that they are not necessarily incompatible and that in concrete terms the models are pretty much hybrid.

[524] Likewise, Abrucio argues that the meritocratic ideal of the Weberian model was not abandoned, but improved in the civil service reform in Brazil. He criticizes the opposition of bureaucratic reforms regarding managerial ones, by explaining that the "etapista" vision does not take into consideration the dialectic process of incorporation of the Weberian model with the creation of new managerial tools. Abrucio, *supra* note 174 at 74.

governance's rhetoric, and professionalization, efficiency and experimentalism do not have to be excluding projects in the public sector.

138. The shift from a unitary organization to disaggregation of units in the public sector would be the first difference from the traditional mode of Administration to the ones proposed by New Public Management[526] and New Governance[527]. The polycentric Administration[528] or government by network[529] would be opposed to the opacity of a hierarchical block that was supposed to function according to a strict and *ex-ante* legally defined routine basis. However, if it is true that there currently is a broader range of forms by which the Administration can be shaped, the very preoccupation behind the hierarchical configuration proposed by Weber remains the same: the possibility to supervise administrative decisions. In fact, the baroque way governmental bodies are nowadays organized, in addition to the participation of non-state actors in the delivery of public service, does not circumvent the question of institutional control. The literature about innovations in the public sector has actually pointed out the problem of insufficient oversight and coordination in the current disaggregated model[530], not to mention the increasing *juridicization* of administrative procedures within the autonomous administrative units[531], such as regulatory agencies or "*autorités administratives indépendantes*"[532]. In this sense, it is important to be

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[525] This observation came up in a discussion with Professor Duncan Kennedy in his office, on the 31st March 2001.
[526] Hood, *supra* note 522 at 5.
[527] New governance focuses on the idea of newness: *"The promise is not merely a shift from one regime to another, from one set of legal doctrines to another, or from one method of regulation to another; but rather an entirely new regime that will have the built-in ability to innovate and constantly renew itself. Newness itself becomes the essential substance of the emerging paradigm. The idea of dynamic innovation is intrinsic to the theory".* Lobel, *supra* note 2 at 354.
[528] Jacques Chevallier, "Régulation Et Polycentrisme Dans L'administration Française," *Revue Administrative* (January 1998): 43.
[529] STEPHEN GOLDSMITH, GOVERNING BY NETWORK: THE NEW SHAPE OF THE PUBLIC SECTOR / STEPHEN GOLDSMITH, WILLIAM D. EGGERS (2004).
[530] *Ibid., 43.*
[531] Pochard, "Autorités Administratives Indépendantes Et Pouvoir De Sanction," *Actualité Juridique De Droit Administratif* Numéro Spécial (2001): 106.
[532] In France, it has been admitted the application of due process conditions of the art. 6 §1 of the Convention for the Protection of Human Rights and Fundamental Freedoms to administrative procedures within the independent administrative authorities when they play a punitive role. The decision Didier (1999) of the French State Council is in the following link http://www.legifrance.gouv.fr/affichJuriAdmin.do?idTexte=CETATEXT000007998657&dateTexte=

aware of the fact that there has actually been a shift from external forms of control (by the legislature and courts) to a stricter internal assessment of Administration that reflects the coexistence of old and new forms of public management[533]. The question of the reconsideration of administrative decisions is therefore present in both unitary and decentralized government. Indeed, Weber did not sound to mean we needed a *pyramidal* Administration, but one that *"offers the governed the possibility of appealing, in a precisely regulated manner, the decision of a lower office to the corresponding superior authority"*[534]. Besides, Mashaw observes that anyhow it would not be realistic to think about hierarchies as a straightforward system of command. In this sense, because superiors often try to use influence and to negotiate for authority, there is no pyramid in place, but rather a network[535]. Beyond that, for Weber "*it does not matter for the character of bureaucracy whether its authority is called 'private' or 'public'*"[536], which means that non-state actors in public-private networks do not escape from the need to be submitted to such a control.

139. Secondly, the advent of the "electronic revolution", "digital administration" or even "e-government" does not appear to challenge the Weber's model, although it did made a significant change in the way to provide public services[537]. On the one hand, Weber elucidates that *"the management of the modern office is based upon written documents ('the files'), which are preserved in their original or draft form"*[538]. On the other hand, the concept to be understood here is the

[533] Carol Harlow, "Accountability, New Public Management, and the Problems of the Child Support Agency," *Journal of Law and Society* 26 (1999): 153.
[534] Max Weber, *Economy and Society*, vol. 2 (University of California Press, 1978), 957.
[535] Jerry Louis Mashaw, "Accountability and Institutional Design: Some Thoughts on the Grammar of Governance," *SSRN eLibrary*: 124, accessed May 19, 2012, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=924879.
[536] WEBER, *supra* note 534 at 957.
[537] For example, the Service of Assistance to Citizens (SAC) in the federal state of Bahia, in Brazil, has been rewarded by the United Nations Public Service Awards as a result of a facilitative access to several public services through electronic tools and interconnected information. Given the success of the initiative, representatives of countries such as South Africa, Chile, Canada and Nigeria have visited the service in order to learn its functioning and eventual flaws. To consult more details Noticias, "Prêmio Da ONU Renova Reconhecimento Internacional Conferido Ao SAC," Government of Bahia, *Saeb: Postos SAC*, n.d., http://www2.bahia.ba.gov.br/saeb/noticias.asp?cod_noticia=252.
[538] WEBER, *supra* note 534.

one of institutional memory[539], which means that there should be certain continuity in the functioning of the Administration, regardless of potential modifications in its personnel. The preservation of such a memory would permit accountability of administrative acts, as the Weber's idea of the modern State would transform the previous obscure administrative routines into transparent and accessible practices to the general public. Therefore, the replacement of written documents by technological devices does not provoke a fundamental shift in the need for building such an accessible database of organizations. The difference between Weber's preoccupation and e-Government is rather a generation question than a substantive one, and both the resistance and the overestimation vis-à-vis these electronic devices sound as extreme reactions, which misunderstand their instrumental character. Therefore, whereas electronic signatures and legal files have widely contributed to promote faster and more accessible administrative procedures[540], they are not incompatible with the Weber's premise of continuity within bureaucracy.

140. Thirdly, even regarding the elaboration of a civil service law, Weber sounds pretty much aware of the problems of efficiency such a law might have given rise. Weber actually admits that the striving for a civil service law that would provide full guarantees against arbitral removal from office *has its limits*[541]. These limits, Weber observes, derive from the difficulty to have, on the one hand, a *"right to the office"*, and, on the other hand, technical efficiency and ambitious candidates[542]. Yet, by stating expressions such as "let managers manage", or naming directors "free to manage"[543], new governance methods have not been able to propose a radical different solution[544]. Actually, OECD countries keep reaffirming the importance of a stable,

[539] Indeed, we do not neglect the other type of preservation of institutional memory that informal rules are able to consolidate. However, the informal rules may be more accessible from an internal perspective, by those who take part in those institutions.
[540] For instance, the decree-law 378 of 2005 launched the National Project of Electronic Government in Argentina, which would open up information regarding administrative procedures to the general public via Internet.
[541] WEBER, *supra* note 534 at 962.
[542] *Ibid.*
[543] Hood, *supra* note 522 at 4.
[544] According to Professor Elaine Kamarck, sending inefficient civil servants to the so-called « turkey farms » is still a recurrent practice within the American government, given the legal difficulties to

independent and high-qualified civil service[545]. The improvements are visible with reference to awards for performance or more demanding conditions to maintain job security, but the tenure of civil servants does not seem to be in risk.

3.2. Giving up coherence: the muddling Administrative Law[546]

141. After having pointed out the problems of the assumption that new governance methods would replace the model proposed by Weber, we will continue to argue against the aforementioned dilemma between flexibility and rule of law by critically approaching the either negative or positive role of Administrative Law[547]. In fact, the coexistence of new governance methods with the premises of the modern State does not create the problem of discretion. After all, the organization of the bureaucratic machine does not affect the existing amount of discretion within the State but it just allocates it differently[548]. What the coexistence of new governance methods with the premises of the modern State government does is to highlight the longstanding internal paradox of Administrative Law.

142. The paradox consists on the following two conflicting goals: (i) on the one hand, it is necessary to design a legal framework that ensures that private rights and liberties will be protected against the potential arbitrariness of the State. On the other hand (ii), the same legal framework should ascribe enough powers to the State in order to enable it to efficiently meet the expectations of the so-called "public interest"[549] through the elaboration and implementation of public policies. Given this

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dismiss civil servants. This observation was made on the 6th March 2011, during the course Public Management and Reform at Harvard Kennedy School.

[545] Among the case studies, only Chile is an OECD country. Brazil is part of the "Enhanced engagement countries".

[546] Edley claims that Administrative Law is about nothing, if not muddling. EDLEY, *supra* note 504.

[547] *Supra* note 503.

[548] According to Simon, both conservatives and liberals want to reduce discretion at the workers level, but the conservatives would increase it at the upper level, while the liberals would do so at the federal judiciary level. William H. Simon, "Legality, Bureaucracy, and Class in the Welfare System," *Yale Law Journal* 92 (1983 1982): 1198.

[549] The content of "public interest" is controversial. The public interest may be conceived as a synthesis of several private interests, which means that the senses of public and private interests can move closer together. «People» is also from now the plural of «minority» and the public interest should be

internal paradox, Administrative Law has historically struggled with the question of more or less discretion, cyclically hesitating between categorical and contextual norms[550]. From a Dostoyevsky's inquisitor to a passive Kafka's doorkeeper[551], Administrative law doctrine has focused on the both theoretically and practically unfruitful debate around how much discretionary power should be ascribed to the civil servant[552]. However, back in 1975, at least one decade before the new governance methods became popular, a *reformation*[553] of Administrative law seemed already to be unavoidable. Given (a) the limitation of the traditional model[554] to protect private interests, given to the too broad legislative directives in the hand of the agencies, and (b) the fail of the agencies to protect the public interest because of the problems of capture, Stewart put forward *"the reconsideration of the coherence of any theory of administrative law"*[555].

143. Indeed, the question of "how much discretionary power" does not seem to be able to solve the anxiety around predictability. First, there is a rule of conservation of discretion: if you reduce discretion at certain level, you increase it at another one. That is, one limits the discretion of one set of actors only by increasing that of others[556]. It would be therefore vain to try to terminate discretion within the system[557]. The reflections on the subject are therefore restricted to (a) the distribution of discretionary power among the actors (civil servants, supervisors, judiciary, etc) and

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understood as « general attention towards particularities». ROSANVALLON, *supra* note 386 at 14–18. Therefore, one could argue that sometimes the Administration faces several conflicting public interests.

[550] Noonan, Sabel, and Simon, *supra* note 505 at 40.

[551] Simon, *supra* note 548.

[552] EDLEY, *supra* note 504 at 3.

[553] The expression is borrowed from the following article Richard B. Stewart, "Reformation of American Administrative Law, The," *Harvard Law Review* 88 (1975 1974): 1671.

[554] The traditional model would be the one in which Administrative Agencies are simply transmission belts to implement legislative directives, which also means that their decisions are subjected to judicial review. Stewart, *supra* note 503 at 440.

[555] Stewart, *supra* note 553 at 1671.

[556] Simon, *supra* note 548.

[557] There is always some remaining discretion. Even in the case of Expertise Theory, by not admitting so one would have to argue that only one solution would be considered true among experts. As the practice demonstrated, it has not been the case. Following this, the Supreme Court tried to comfort such a variation through Chevron USA, INC v. National Resources Defense Council, Inc. 467 U.S. 837 (1984). This opinion establishes the well-known two-steps test to attribute administrative deference. If (i) the Congress has not spoken directly to the question at issue (ii) the court should analyse if the agency build up *a permissible construction* of the law.

(b) the consistency of accountability methods available regarding the *amount of discretionary power*[558] ascribed. Secondly, the attempt to promote more predictability through rules sounds to be a fallacy. It sounds to be a fallacy mainly because of two misleading assumptions: (1) rules facilitate compliance[559] and (2) rules are more easily accountable. In fact, the literature on compliance demonstrates that other more complex and informal factors may affect compliance[560] than the rigidity and specificity of the rules. For instance, Wilson argues that other factors, such as sense of duty, power and solidarity among peers, may be very influential to determine the levels of compliance in different agencies[561]. Besides, the focus on control may produce excessive and implausible rules, which eventually undermine the prestige and consensus vis-à-vis the legal system as a whole[562]. In this sense, the discredit of the formalistic system leads to the emergence of a "*Parasistema*" or "Parallel Administration"[563].

144. Regarding the question of accountability, there are also several problems to be identified. First, the work of "street-level bureaucracy" is barely revised

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[558] Binenbojm criticizes the dichotomy between « binding administrative acts » and «discretionary administrative acts » by arguing that there are different levels of discretion. Gustavo Binenbojm, *Uma Teoria Do Direito Administrativo - Direitos Fundamentais, Democracia e Constitucionalizacao*, 2008, 195.

[559]The topic of compliance may be explored from different perspectives and generally employs empirical examination. For instance, Halliday developed a study of the effectiveness of judicial review in securing compliance with administrative law's own standards of good administration. Simon Halliday, *Judicial Review and Compliance with Administrative Law*, 2004.

[560] Philip Selznick, "An Approach to a Theory of Bureaucracy," *American Sociological Review* 8, no. 1 (February 1943): 47–54. Marcia K. Meyers and Nara Dillon, "Institutional Paradoxes: Why Welfare Workers Cannot Reform Welfare," in *Public Management Reform and Innovation: Research, Theory and Application*, H. George Frederickson & Jocelyn M. Johnston, 1999. James Mahoney and Katheleen Thelen, "A Theory of Gradual Institutional Change," in *Explaining Institutional Change: Ambiguity, Agency, and Power*, James Mahoney & Kathleen Thelen, 2010.

[561] James Q Wilson, *Bureaucracy : What Government Agencies Do and Why They Do It*, 1989, 158.

[562] Augustin Gordillo, *Los Valores del Sistema Jurídico Administrativo*, *in* LA ADMINISTRACION PARALELA 29 (2001).

[563] Chile is supposed to be a «legalist» country, that is, a country with high level of legal compliance. The so-called "*vocacion legalista*" would mean the existence of a little gap between the rules and the actual functioning of the system. Egaña, "Profesionalización De La Función Publica En Chile." On the other hand, Brazil and Argentina seem to suffer with the question of parallel Administration and the tradition of creating rules for every other issue. For instance, Prof. Gordillo mentions an anecdote to illustrate this point. A Brazilian Constitutional law scholar would have answered the question of which type of proposition he would put forward to reform the Constitution as follows: the article first should prescribe that *« Todo brasileiro fica obrigado a ter vergonha »*, that is "Every Brazilian must be embarrassed". Gordillo, *supra* note 562 at 27.

according to the ultimate goal of the programs[564], which gives rise to the problem of alienation. The problem of alienation emerges once the workers become too focused on following detailed prescriptions. In this case, there may be a discontinuity between the purposes of the policy and the necessary conditions to be fulfilled by the governed. Moreover, this type of command-and-control model of bureaucracy tends to pay more attention to errors that cause benefits than to those that cause harm[565], which reveals a distortion of the system hard to be legitimate.

145. Finally, the idea according to which reforms consist in a set of *coherent* interventions that attempt to increase efficiency and effectiveness[566] does not sound to match with the language of State Reform. Coherence is not the value to be pursued in a framework where the law has become result-oriented. The way to reconcile rule of law machinations with this result-oriented characterization is not through coherence, but through a doctrine that is fair heuristic for sound results[567]. The idea is to go beyond the antinomy between "all-things-considered judgment" and a "grid" that *"mechanically dictate answers on the basis of a limited number o factors"*[568]. If both standards and rules remain important in the legal framework, their functioning should be recurrently assessed[569]. Their functioning should be recurrently assessed because we cannot enact a rule that will tell us when the advantages of a rule outweigh its losses[570]. The dialectic between rules and standards would mean therefore that the original legislation might be changed in one direction to another according to such assessment, in order to ensure that the goal of the policy has been achieved. The idea is not to get rid of rules or standards, but to try to get rid of the trade-off between the exemption of rule of law protection and the burden of the courts to hold interpretations of standards that cannot be reflective of reality[571].

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[564] Noonan, Sabel, and Simon, *supra* note 505 at 44.
[565] *Ibid.*
[566] Enchebarria and Cortazar, *supra* note 509 at 127.
[567] EDLEY, *supra* note 504.
[568] Noonan, Sabel, and Simon, *supra* note 505 at 39.
[569] This assessment is not only exercised by internal monitoring, but also through collaborative casework, in order to have a sense of how effective the system is and to identify its potential failures. *Ibid., 14.*
[570] WILSON, *supra* note 561 at 344.
[571] Noonan, Sabel, and Simon, *supra* note 505 at 48.

4. Civil service reforms in Chile, Brazil and Argentina: a typology of States

146. If the dilemma does not hold after a reflexion in abstract terms, it is left to us to verify concrete stories that confirm so. The following case studies are aimed at providing some grounds for such a task. In this section we will put forward a narrative that presents the different projects and paths of civil service reform in Chile, Brazil and Argentina. This narrative will illustrate our aforementioned argument in two ways: (i) speeches are diverse with regards State Reform, as the countries have articulated the language through different mechanisms to reform their civil services; (ii) instead of being undermined, the *Weberian* model is constant in all three countries, either as a parallel feature of fashionable ongoing transformations or, not surprisingly, as a normative element of the very same project that criticizes it. Weber is not *Weberian*.

4.1. Chile - the pragmatic Weber

147. State Reform in Chile has been an incremental[572] process. Instead of being designed as *the* solution to the crisis of the national state and to the disenchantment towards the neoliberal model, State Reform has gradually become part of the government agenda as a powerful but discrete political means to ensure democratic stability. Specially in the early 1990s, there was no ex-ante ambitious project, but rather an amalgam of initiatives that reflected the mood of the government *"to do everything better without really thinking about what [it] is going to do and why [it] is doing it"*[573]. In addition, the body of Administrative Law in place has contributed to such incremental path, since it used to enjoy a low degree of theoretical elaboration, in the sense that it has been historically perceived as an instrumental tool to solve

[572] To consult a work that compares the comprehensive reforms in Brazil with the incremental ones in Chile, see Enchebarria and Cortazar, *supra* note 509.
[573] Manuel Garreton & Antonio Carceres, *From the Disarticulation of the State to the Modernization of Public Management in Chile: Administrative Reform without a State Project*, *in* REINVENTING LEVIATHAN: THE POLITICS OF ADMINISTRATIVE REFORM IN DEVELOPING COUNTRIES / EDITED BY BEN ROSS SCHNEIDER AND BLANCA HEREDIA 113–149, 114 (2003).

punctual problems related to public action[574]. For example, the articulation of general principles has been the main practice among jurists, as in the beginning of the 1990s Administrative Law in Chile was basically restricted to three main norms[575]. Indeed, along with the recent relativisation[576] of the constitutional principle of "*Serviciliad del Estado*"[577] and of the primacy of private interests defended by Soto Kloss[578], the legacy of Administrative Law sources sound as an anarchic and not clear set of materials[579] to be manipulated.

148. First, Chile was not late to start talking about State Reform, but adopted a low profile approach to do so. In the late 1980s, when the American and Westminster experiences were being shaped, the modernization of State apparatus was far from being the main priority targeted by Chilean politicians, and Administrative Law did not enjoy a privileged position among legal fields[580]. Governability was the goal to be pursued in order to consolidate democracy and, at the same time, keep the macroeconomic policy developed during Pinochet's military regime. The new political order did not intend to be a radical replacement but rather a democratic version of the former one, which would thus be committed to comply with demands of a larger part of the population. In order to succeed, the democratic project of the late 1980s needed

[574] Ferra Borquez, *supra* note 45 at 208.
[575] The norms, which regulated municipalities, prescribed principles and defined the organization of personnel, are respectively as follows: Decree-Law no. 1.289 of 1986, Law 18.575 of 1986 and Law no. 18.834.
[576] The relativisation of these principles is due to the re-democratization of the Chilean State. The prerogatives derived from the French system started being taken into consideration again by the courts, which attenuated strict limits previously imposed by the neoliberal doctrine to these prerogatives. Ferra Borquez, *supra* note 45 at 215.
[577] Article 1 of the Political Constitution of 1980: *"The State is at the service of the citizens and its final goal is to promote common good, by contributing to create the social conditions that enable every member of the national community to be spiritually and materially accomplished, and by fully respecting the rights and guarantees established by this Constitution"*
[578] Soto Kloss has been for the last forty years an influential professor in Administrative Law in Chile, building up an individualistic view of this field, according to which the protection of the individuals should be privileged against State's prerogatives. In 2009, several authors contributed to a book to award him, Collection of Essays, *Estudios En Homenaje Al Profesor Eduardo Koto Kloss*, 2009.
[579] Patricio Aylwin Azocar, "Evolución y Progreso Del Régimen Jurídico De La Administración Del Estado De Chile," in *Derecho Administrativo - 150 Anos De Doctrina*, Rolando Pantoja Bauza, n.d., 160.
[580] We would like to thank Professor Carlos Carmona, who is a Justice at the Constitutional Court of Chile, for being really helpful in answering questions and providing materials about Administrative Law in Chile.

a moderate political discourse committed to reinforce State's capacity to delivery social services, in detriment to a shattering self-reconsideration of the State itself. In this sense, Patricio Aylwing, the first president under the coalition of parties for democracy ("*Concertación"*) did not engage his government in a sweeping organizational change, but rather proposed some modest initiatives that would improve State's capacity and achieve substantial progress in the social conditions of the Chilean population[581].

149. These modest initiatives though had an interesting constant feature: the coordination of the process of decision-making and implementation of public policies among different government units, which has enabled them to engage in a collective learning-process. In 1990, two important Ministries were created to foster such coordination: both SEGPRES (Secretary-General of the Presidency) and MIDEPLAN (Ministry of Planning and International Cooperation) were concerned about providing a general coherence for State action[582]. However, by 1993 it was clear that some of these initiatives, such as the working group on the Improvement of Public Management, lacked dynamism and enjoyed little relevance[583]. In order to reinforce them, the new President Eduardo Frei decided to formalize a public policy towards the "*Modernización de la Gestión Pública"* by creating the Inter-Ministry Committee of the Modernization of Public Management[584]. For the first time the expression "State Reform" was employed as such and the project looked like a long-term policy to be pursued.

150. Nonetheless, the path towards this modernization changed one more time once the President Ricardo Lagos took office in 2000, since the approach that President Eduardo Frei developed to deal with civil service reforms did not seem to be satisfactory enough. On the one hand, under his government the law 19.553 of 1998 prescribed the commitment of the government to award the efforts to improve

[581] Social policies were quite successful: between 1987 and 1994 the amount of people living in poverty fell from 45% to 28%. Garreton and Carceres, *supra* note 573 at 122.
[582] *Ibid., 121.*
[583] *Ibid., 122.*
[584] Waissbluth and Inostroza, *supra* note 514 at 293.

performance, which provoked a remarkable change in the culture of management within bureaucracy. For instance, according to the article 3rd of the cited law, the so-called "*Asignación de Modernización"* should take into account the institutional performance[585] to increase the salaries, which created a routine of establishing goals and recurrently assessing the results of their implementations. On the other hand, (i) 70% of the civil servants still declared they were unsatisfied with the career[586], (ii) differences among salaries in private and public sectors remained significative and (ii) any bold attempt to insert more flexibility in the immovability of civil servants persisted slightly plausible. For instance, in July of 1998, the Constitutional Court[587] declared unconstitutional the flexibility that the Ministry of Public Work would enjoy to appoint public servants of high degree of responsibility[588], had the project of law been validated. In despite of the approval of the project by the Parliament, the Court affirmed that regulations that define the access to civil service must be a matter of law, on the basis of the articles 38[589] and 63 (1)[590] of the Constitution, which means that Ministries are not entitled to do so through decrees.

151. Despite the aforementioned difficulties, the project of modernization that President Frei reinforced was not abandoned, but reinvented by President Ricardo Lagos. Under pragmatic terms, the first rather leftist President of the governments hold by *Concertación* launched the *"Nuevo Trato con los funcionarios públicos"*, which aimed at fostering the reforms with the support of, not against to, the civil servants[591]. The decisive step was the agreement signed in December of 2001 with the National Association of Fiscal Employees[592]. Beyond the obvious importance of the agreement

[585] To consult the law number 19.553 of 1998: http://www.leychile.cl/Navegar?idNorma=93381
[586] Egaña, *supra* note 563 at 140.
[587] To consult the decision number 276: http://www.tribunalconstitucional.cl/index.php/sentencias/view/342
[588] It is the so-called «función crítica».
[589] The article 38 prescribes that: *«An organic constitutional law will determine the basic organization of the Public Administration, guarantee a civil service career and the technical and professional principles it should be based on, and ensure equality of opportunity to access to it as well as a continuous training of its members ».*
[590] The article 68 (1) prescribes that: *«Solon son materias de ley: (1) Las que en virtud de la Constitución deben ser objeto de leyes orgánicas constitucionales».*
[591] Egaña, *supra* note 563 at 139.
[592] Agrupación Nacional de Empleados Fiscales (ANEF)

as a political symbol to enhance the process of modernization, there is an element that made the difference: the reforms have been directly tied to fiscal priorities, which made them more sustainable and adapted to the actual capabilities of the Chilean State. The government's side was also represented by the Treasury Department[593], which made sure that the augmentation of independence in the managerial activities would be exchanged by stricter fiscal control over the execution of the policies[594]. Not only did the Government raise support by promising stability and better work-conditions, but also did Inter-Ministerial coordination consolidate a strong link between State Reform and economic policy. Instead of focusing on a flexible civil service law that would equate its rules to those that regulate the labour relations in the private sector, the government tried to ensure technical *and* political efficiency.

152. Since 2003 the "pragmatic Weber" has betted on a reform that designs a Senior Public Management System[595], by proposing a model that combines universal merit-basis criteria with specific profile-oriented expectations. The law number 19.882 of 2003 comprises five main characteristics of this model. First, its target is the regulation regarding senior officials, that is, the ones that constitute the first and second levels of the Administration hierarchy. Secondly, it demands a merit-basis selection that is opened to any candidate who fulfils pre-established conditions[596]. Third, the power to appoint these senior officials still remains on political authorities, but they only do so after having a list of potential candidates who would fit the function, previously selected on merit basis. Fourth, the salaries of these senior officials will also vary according to their performance. Fifth, the law creates a Council, whose members are appointed by two-thirds majority of the Congress, which will function as the organ responsible to supervise the system.

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[593] More specifically, the «Dirección de Presupuestos» within the «Ministerio de Hacienda » was a major player in the process. To consult more details: http://www.dipres.cl/572/article-37508.html
[594] Enchebarria and Cortazar, *supra* note 509 at 140.
[595] In order to consult more details about "El Sistema de Alta Dirección Publica", Gobierno de Chile, "Sistema de Alta Dirección Pública," *Gobierno de Chile*, n.d., http://www.serviciocivil.gob.cl/sistema-de-alta-direcci%C3%B3n-p%C3%BAblica-0.
[596] It is interesting to note that the Chilean State enjoys one of the highest rates in the world in terms of appointment of women, which is 30%, although only 23% of the candidates are women. Mario Waissbluth, "Alta Dirección Publica: Una Reforma Contractual," *Revista Mensaje*, September 2008, 391.

153. The main strategy of this civil service reform was thus to *professionalize* the high level personnel, which resulted in the extinction of 3114 posts that used to be appointed only according to political criteria[597]. And this strategy was gradually implemented: while 417 posts were fulfilled by candidates selected by the Senior Management System in 2004, nowadays 978 posts of public services are bound to it[598]. Besides, the strategy emerged as a response to the excessive number of politically appointed posts in the central government and to recent corruption scandals. The Chilean State has the ratio of about 250 senior officials who are politically appointed for one million people. This rate is considered excessive compared to the ones in the United States of America (30 for one million) and in England (1.3 for one million)[599]. In addition, this rate is not compatible with the size of the Chilean State as a whole, which is considered quite small in comparison to other Latin American countries. Actually, one of the goals of State Reform in Chile was to make it bigger[600], which gave rise to an increase of 20% of personnel during the 1990s[601]. Finally, the incremental character of the reform in Chile continues do be reinforced through recent legislative innovations. For example, the Transparency[602], State Modernization and Quality of the Politics Constitutional Reform (law 20.414 of 2009) has added to the article 8 of the Constitution stricter conditions of control over the assets of civil servants. Due to popular claims for more transparency in public affairs, this recent legislature utensil illustrates, once again, that civil service reforms in Chile have tried to conciliate technical and political efficiency.

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[597] *Ibid., 395.*

[598] The numbers are published in the government's website on the Senior Management System Gobierno de Chile, *supra* note 595.

[599] Waissbluth and Inostroza, *supra* note 595.

[600] This example reinforces the idea that State Reform does not necessarily means downsizing the State. In this sense: "We do not question whether we need more or less state intervention. It is not a matter of simply downsizing but of rightsizing. The key, as we all know, is the quality of government." Luncheon Address, Global Forum, January 14, 1999.

[601] Egaña, *supra* note 563 at 120.

[602] The law 19.653 of 2000 was published to reinforce the idea that civil service must be exerted in a transparent way in order to ensure the public character of the administrative acts and the documents that support them.

4.2. Brazil - the confused Weber

154. State Reform in Brazil has been more than a political and legal process, but a *comprehensive*[603] intellectual project. Due to the fact that its principal actor[604] is also a scholar, Brazil has been influential to introduce the subject in other countries of the region. For example, after three years being the president of the Latin American Centre of Administration for Development (CLAD), Bresser-Pereira was able to convince the member's countries' ministers of Administration to formalize through a common document[605] the adoption of public management reforms[606]. Moreover, Brazil was the first developing country to take part in the discussion about the new governance methods that had been tested in Britain and diffused through member countries of the Organisation for Economic Cooperation and Development (OECD)[607].

155. In this sense, if it is true that the State was already an object of inquiry during President Collor[608]'s time in office, especially with the implementation of the National Privatization Program (law 8031 of 1990[609]), the comprehensiveness of the reform only took place later on. During Collor's term[610], the questions were restricted

[603] Enchebarría and Cortazar, *supra* note 509 at 129.
[604] Luiz Carlos Bresser-Pereira, who was the Ministry of State Reform and Federal Administration (1995-1998), has published several academic works on the subject. In order to consult his work, Luiz Carlos Bresser-Pereira, "Bresser-Pereira Website," n.d., http://www.bresserpereira.org.br/.
[605] In order to consult the «Carta Iberoamericana de la Función Pública», which was approved in June of 2003, in Santa Cruz de la Sierra (Bolivia), Centro Latinoamericano de Administracion para el Desarollo, CARTA IBEROAMERICANA DE LA FUNCIÓN PUBLICA (2008), http://www.clad.org/documentos/declaraciones/cartaibero.pdf/view.
[606] Luiz Carlos Bresser-Pereira, *The 1995 Public Management Reform in Brazil: Reflections of a Reformer*, *in* REINVENTING LEVIATHAN: THE POLITICS OF ADMINISTRATIVE REFORM IN DEVELOPING COUNTRIES / EDITED BY BEN ROSS SCHNEIDER AND BLANCA HEREDIA 89–111, 106 (2003).
[607] Bresser-Pereira, *supra* note 507 at 3.
[608] President Collor resigned in 1992 in order to avoid an Impeachment process that would be based on corruption accusations. He was the first civilian president directly elected after the end of the military dictatorship in Brazil.
[609] The law n. º 9491 of 1997 replaced the law n. º 8031 of 1990.
[610] Right before Collor arrived in power, there were attempts to improve the civil service through the Constitution of 1988, by consolidating a meritocratic and universal recruitment. Moreover, in 1986, the federal government created the National School of Public Administration (ENAP), which sought to form high-level bureaucrats. However, Abrúcio points out that these attempts resulted in more state-centred corporative mentality, as civil servant gained many financial privileges, kept distant from the

to the redefinition of the strategic economic role of the State, in order to constrain the external debt, improve the competitiveness of the national industry and strength the capital market (art. 1st of the law n. 8031/1990). Besides, Collor's neoliberal willingness to reduce the size of the civil service was actually implemented in a moderate way[611] and the country continued to have a large bureaucracy in comparison with its Latin American neighbours. Therefore, the intellectual project regarding the functioning and organization of the State only gained the form of a comprehensive public policy in 1995, with the enactment of the *"Plano Diretor da Reforma do Aparelho do Estado*[612]*"* and the creation of the Ministry of State Reform and Federal Administration (MARE).

156. And the project was ambitious. The reconsideration of the organization and functioning of the State mainly took the floor through a constitutional amendment, which after two years of debate got to be approved by Congress[613]. However, if several progresses have been made and a shift of mentality seems to have taken place, the oscillations of strategies to treat civil service in Brazil prevent the identification of an even path of reforms. The reforms go on, and go on in different directions[614]. The results have been unequal and fragmented, since one takes into consideration the State as a whole, and some of important problems have not even been attacked[615]. Up to now, what we may try to understand is the dynamic of a "confused Weber".

157. First, the replacement of a single legal treatment for all civil servants ("*Regime Jurídico Único"*) by a plurality of regimes within the direct Administration,

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population and ensured distortive rights, such as the right to do strikes. Abrúcio, *supra* note 524 at 69–70.

[611] It is important to mention, however, that with the enactment of the law 8112 of 1990, rights were extended to public employees that accessed the civil service through the private law regime. The consequence was the retirement of 45.000 civil servants who acquiesced to the attractive retirement program. Gaetani and Heredia, *supra* note 516 at 10.

[612] In order to consult the document, see http://www.planalto.gov.br/publi_04/colecao/plandi.htm

[613] The Constitutional Amendment n. º 19 (hereafter CA no.19/98) was enacted on the 4th June 1998.

[614] It is not the first time that the civil service reforms in Brazil have been considered ambiguous. The reforms implemented under the Vargas era would have led to *a dual bureaucracy*, which strengthened meritocracy along with the use of political favouritism. Kathryn Sikkink, "Las Capacidades y La Autonomía Del Estado En Brasil y La Argentina. Un Enfoque Neoinstitucionalista," *Desarrollo Económico* 32, no. 128 (1993): 548.

[615] Abrucio, *supra* note 524 at 68.

public foundations and "*autarquias*[616]" has been announced as one of the positive achievements of the reforms. This plurality entails that the type of labour regulation to be applied would have to be more consistent with the activities performed by civil servants, and that such a choice would be object of analysis by a Committee of Political Administration and Wages (article 39 after the CA no.19/98). Therefore, instead of having all civil servants submitted to the same statutory regime, the Administration would be able to also hire public employees under the labour legal regime applied to the private sector, by fulfilling the more flexible conditions and guarantees required by this regulation. Besides, the elimination of a single labour regulation would prevent rent seeking, which was supposed to be facilitated by tenure and early retirement with full salary[617]. However, in 2000[618] the Labour Party (PT[619]) challenged the constitutionality of the amendment number 19/98 before the Supreme Court ("*Supremo Tribunal Federal*"). In 2001, the Supreme Court issued the temporary injunction that suspended the efficacy of the article 39, and ultimately concluded the judgment in 2007, by voiding the article vis-à-vis the legal order. The withdrawal of the amended article 39 was motivated by a formal vicious in the legislative procedure: the constitutional amendment no. 19/1998 had not obtained in the first turn of approval a majority of 3/5 in the House of Representatives. The amendment was not therefore formally valid. Following this, the direct Administration, public foundations and "*autarquias*" are no longer allowed to hire public employees under the private regime of labour law, although it is still possible to conclude temporary contracts under the prevision of the article 37, IX[620], of the Federal Constitution[621]. However, this may not be the end of the story, since hesitations are still around. A new project of constitutional amendment was proposed

[616] The *« autarquias »* are administrative units that enjoy their own legal personality and a certain level of independency from the direct administration. They compose the so-called indirect Administration and were first prescribed by the decree-law n. 200 of 1967.
[617] Bresser-Pereira, *supra* note 606 at 95.
[618] The ADIN 2135-4 (Ação Direta de Inconstitucionalidade) can be consulted in the following link: http://www.stf.jus.br/portal/peticaoInicial/verPeticaoInicial.asp?base=ADIN&s1=2135&processo=2135
[619] At the time, the PT (Partido dos Trabalhadores) was still opposition. Only in 2002 the party had his first president elected: Luis Inácio Lula da Silva.
[620] The art. 37, IX of the Federal Constitution prescribes that *«the law will establish the possibilities of temporary contracts that will meet contingent necessities of exception public interest »*.
[621] Marcal Justen Filho, *Manual De Direito Administrativo*, 2010, 834.

in order to *re-introduce* the possibility of plural regimes, by eliminating the single labour regulation. The project n° 306 was launched in 2008 under the leadership of another Labour Party representative, Eduardo Valverde. In 2009, nevertheless, the representative withdrew his proposal of constitutional amendment[622].

158. Secondly, at first the reforms sounded able to establish a limit of public expenditure on personnel. Bresser-Pereira gained the support of the governors by convincing them that a limit of public expenditure on personnel would mean more available resources to other public purposes[623]. Following this, the complementary law n. 82[624] ("*Lei Camata*[625]*"*) was approved in 1995 and established that federal units (federal government, states and municipalities) were allowed to spend at most 60% of their revenues on personnel[626]. Besides, the constitutional amendment number 19 of 1998 inserted a requirement for the increases of salaries and subsidies: the article 37, X, of the federal constitution establishes that only through the enactment of a specific law the salaries and subsidies of civil servants could be altered. Such a reform would sound as an attempt to rationalize public expenditure and avoid populist uses of the administrative machine. Nevertheless, the Law Camata imposed to the governors a task that they could not fully accomplish. The governors could not fully accomplish this task because the law did not discriminate the type of personnel the expenditure on which was limited. As the public expenditure on personnel of the legislative and judiciary powers was increasingly higher, it was very difficult to obey the legal limit[627]. Beyond that, as Abrucio observes, the executive powers, at both state and federal levels, took too much time to identify one crucial reason for the excess of expenditure on personnel: only at the end of 1997 the exaggerate cost of the *inactive personnel* was detected as the root of the problem[628].

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[622] To consult the chronological phases of the amendment project, see http://www.camara.gov.br/sileg/Prop_Detalhe.asp?id=415587
[623] Gaetani and Heredia, *supra* note 516 at 14.
[624] To consult the law, see http://www.planalto.gov.br/ccivil_03/Leis/LCP/Lcp82.htm
[625] This law became known as «Lei Camata» because it was proposed by the representative Rita Camata.
[626] In 1999 the « Lei Camata II» was enacted and reduced the limit of the federal government to 50%. This law number 96 voided the previous one number 82.
[627] Abrucio, *supra* note 96 at 56.
[628] *Ibid., 57.*

159. Furthermore, the initiatives towards the use of new managerial tools enjoyed a weak linkage with economic policy[629] and lacked the capacity to solve the tension between more self-directed civil servants and stricter fiscal adjustment. The tension was the following: there were two conflicting goals regarding the improvement of performance in the civil service. On the one hand, it was necessary to ensure a fiscal adjustment, as the commitment to control inflation and preserve macroeconomic stability did not appear to be negotiable. On the other hand, the reforms also envisaged an institutional change towards more autonomy for civil servants. The goals are conflicting because if the institutional change presupposes the reconsideration of the command-and-control model, the stricter fiscal adjustment demands the reinforcement of such a model. Although the Minister of Treasury and the Minister of Budget and Planning were important actors to push some points of the reform agenda, they provided only a partial support, which actually functioned as an obstacle against the attribution of more autonomy to civil servants. To avoid risks for the fiscal balance, they defended that the reduction of personnel and the control of costs should prevail whenever the goals conflict[630]. In addition, if the President Cardoso did not prevent the advancement of the reforms, he was not either completely committed to it, as he also shared the concerns about fiscal adjustment. What is more, the reforms could not only rely on the commitment of the President because it was necessary to gain parliamentary support to pass legislation[631]. To set up this impasse, in 1999 the Minister of State Reform and Federal Administration proposed[632] the incorporation of MARE by the Ministry of Planning and Budget, which eventually became the Ministry

[629] Enchebarria and Cortazar, *supra* note 509 at 128.

[630] In his paper, Resende tries to explain the fact that most of times administrative reforms are abandoned, discontinuous or completely reformulated. Flavio da Cunha Resende, "Por Que as Reformas Administrativas Falham?," *Revista Brasileira De Ciências Sociais* 17, no. 50 (2002): 133. The common sense is that reforms usually fail, since *"reading evaluations of major government reform efforts from a number of national settings appears to indicate that a finding of no significant results is often the indicator of a reform success, while a failure often is characterized by serious negative side effects"*. Donald J. Savoie, "What Is Wrong with the New Public Management?" Research in Public Policy Analysis and Management, no. 15 (July 24, 2006): 593–602, doi:10.1016/S0732-1317(06)15025-3.

[631] Enchebarria and Cortazar, *supra* note 509 at 130.

[632] During his interview, Professor Paulo Modesto told us he was against this initiative of the Minister. He claimed that the absorption of MARE would undermine the reform agenda, which would become a minor issue in a Ministry that has many other priorities.

of Planning, Budget and *Management*. Following this, Martus Tavares, one of the economists who defended fiscal strictness, was appointed to be the head of the new Ministry[633]. The focus on fiscal strictness sounded even more explicitly with the enactment of the Law of Fiscal Responsibility in 2002, which largely deepened the control proposed by the statues 82 of 1995 and 96 of 1999.

160. Nevertheless, the reforms also introduced important incentives to improve performance within bureaucracy. For instance, the amendment number 19 of 1998 added the principle of efficiency as one of the constitutional principles to guide public administration. Secondly, there is a constant trend towards the appointment of higher qualified civil servants: if in 1995 the Brazilian bureaucracy counted on 39.2% of its personnel with university degree, in 2002 this number increased to 63.6%[634]. Besides, the structure of the career has changed because (i) there is a possibility to be awarded by performance, which has been regulated by the law 10.404 of 2002[635]; (ii) continuous programs to qualify civil servants have strengthened the role of the Schools of Government[636] and (iii) the amendment 19 of 1998 increased job flexibility, by prescribing that civil servants may be dismissed as a result of the periodic performance evaluation to which they are subjected[637]. Fourthly, the institutionalization of the National System of Users of the Public Sector has incremented the idea of accountability from outside, not only restricted to the mechanisms of assessment that are employed within the Administration[638]. For instance, the initiatives in this sense, at first undertook by the decree-law 3507 of 2000, have been recently improved by the decree-law 6932 of 2009. This decree-law has simplified the assistance to citizens, waved the need to submit documents to certificate authority and launched the bill of services to the citizen. Therefore, if the absorption of the MARE by the Ministry of

[633] Gaetani and Heredia, *supra* note 516 at 24.
[634] Gaetani and Heredia, *supra* note 11 at 33.13/02/2014 5:29:00 PM
[635] To consult the law, see http://www.planalto.gov.br/ccivil_03/Leis/2002/L10404.htm
[636] Art. 39, § 2º: *"The Federal Government, the States and the Federal District will support schools of government to the education and perfecting of civil servants, being facultative the conclusion of agreements and contracts between the federal units."*
[637] Article 41, §1º, III of the Constitution.
[638] One of these mechanisms is the Totality Quality Management (TQM), which is a business strategy management that is suitable to the public sector because it uses other criteria than profit. Bresser-Pereira, *supra* note 606 at 92.

Planning and Budget may indicate that fiscal adjustment prevailed over performance concerns, the latter have not disappeared. It is the path that has been confused.

161. The confused Weber continues to promote discontinuities and leaves few clues of the very direction of the Brazilian civil service reform. If Lula's government sounded completely unable to establish a lively reform agenda, it reinforced some public careers, expanded electronic tools and open the elaboration of public policies to popular participation[639]. In addition, on the one hand, the Federal Police and the General Audit of the Federal Government have improved their controlling mechanisms against corruption and patrimonial relations. On the other hand, President Lula was responsible for a significant increase of no tenure positions in federal administration and a politicization of regulatory agencies[640]. Additionally, the voluntaristic approach of the National Council for Economic and Social Development has launched a too general agenda and, therefore, missed the opportunity to focus on specific public policies[641].

162. Finally, it may be too early to characterize the path of reforms under the new Brazilian president, Dilma Rousseff. However, the reconsideration of the State is a quite expected preoccupation, the signs of which have already been given. For instance, the Decree 7.478 of 2011 derogated the Decree 5.883 of 2005 and created the Chamber of Public Policy, Performance and Competitiveness at the Government Council. This new decree actually brings about old objectives, which reaffirms our argument concerning the continuous reconsideration of the State. These objectives are prescribed as following: (i) to reduce public expenditure, (ii) to rationalize administrative procedures and (iii) to improve the performance of public administration. Conversely, the exchange with realities outside the State may be fruitful: four members of the civil society who are well known in the fields of management and competitiveness compose the chamber, in addition to four Ministries. Furthermore, the debate around new reforms sounds promising, as we have already

[639] Abrucio, *supra* note 524 at 77.
[640] In 2007 there were twenty thousand no tenure positions. Ibid., 77–79.
[641] Abrucio, *supra* note 524 at 79.

three important legislative projects to be discussed: Organic Law of Public Administration (*Lei Orgânica da Administração Pública*), Law of Administrative Simplification (*Lei de Simplificação Administrativa*) and Law of Public Careers (*Lei de Diretrizes de Cargos e Carreiras*). As a result, if we cannot affirm the persistence of the confusion, we would risk foreseeing Weber as a lasting element.

4.3. Argentina - the would-be Weber

163. Comparing with Chile and Brazil, the state of affairs of the Argentinean civil service seems to be more explicitly one of improvisation, clientelism and institutional weakness. If none of the countries has a fully professional, transparent and accountable civil service to be proud of, the picture in Argentina sounds the most distant from this ideal. Given the Argentinean economic difficulties and political circumstances in the late 1980s, the project of State Reform was an "overall"[642] one: politicians were compelled to provide a dramatic solution and people were willing to bet on it. At that time, Argentinean people were marked by the political violence and state of terror of the 1970s, the military adventure of the Falklands War in 1982 and the President Alfonsín's ineffectiveness to solve economic crisis[643]. Taking advantage of this scenario, Carlos Menem succeeded in winning the presidential elections with a populist[644] campaign and promising an economic turnaround. In office, in order to ensure economic stability and implement reforms, Menem sought to build up support from various sectors of the society and political arena. Nevertheless, his achievements did not turn out to be permanent and the powerful president of the beginning of 1990s left office having to deal with severe obstacles due to his political strategies, which in

[642] The laws 23.696 of « Reforma del Estado » and 23.697 of « Emergencia Económica » demonstrate this willingness to reach an overall redefinition of the State and the public services it provides.
[643] President Alfonsín was known as a « lame duck president ». Rinne, *supra* note 41 at 39.
[644] Menem used the slogan "Follow me, I will not let you down" and, according to Szusterman, "Menem's appeal as an astute, easygoing, charming, unflustered leader endeared him to the majority". The author also cites Bartolom'e de Vedia's paper, "Four Menems" in La Nacion (28 July 1998), in order to emphasize Menem's versatility in adapting to a changing environment, suggesting the following sequences of Menem's personages: populist, innovative leader, heroic leadership, the man who needed to come to terms with the fact that on 10 December 1999 he was due to leave power. Celia Szusterman, "Carlos Saul Menem: Variations on the Theme of Populism," *Bulletin of Latin America Research* 19, no. 2 (2000).

the beginning actually enabled him to make tough economic policies viable. The 2001 economic crisis is the well-known follow-up[645]. From the political instability during the crisis to the consecutive governments of the couple Kirchner[646], the following State Reforms have not been able to improve the delivery of public services and to alleviate the political influences that hamper economic development[647]. If the program was actually deeply based on Weber's prescriptions[648], the Argentinean State still remains a "Would-be Weber"[649]. In fact, the means to implement such a program provoked backlashes that undermined State capacity.

164. First, the remarkable reduction of the number of civil servants prevailed over the attempts to implement a National System of Administrative Professionalization (SINAPA). In the early 1990s, both downsizing the State and designing a civil service career were part of the political agenda, but the former element prevented the concretization of the latter. According to the Argentina's Civil Service Secretariat, around 120.000 public employees were dismissed between 1989 and 1993[650], which demonstrates the high commitment of the government to follow the neoliberal booklet[651]. Nevertheless, the reduction of the civil service apparatus was not a rational process, which means that temporary contracts often became necessary to supply the demand of mid- and high level civil servants. If the size of the regular staff was reduced, contingent contracts financed by donor funds recurrently took place,

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[645] Supra note 520.
[646] Néstor Carlos Kirchner was president from 2003 to 2007. Following this, his wife, Cristina Fernández Kirchner, succeeded him and was re-elected in 2011.
[647] Isolation from political influences and improvement of public services were main goals in the reforms proposed by the decree-law n. 2476 of 1990.
[648] For instance, the articles 36 and 37 of the decree-law n. 2476 of 1990 proposed (a) rules of hiring based on public competition, (b) a stable career with salary progressions, (c) a Public Administration School and (d) management mechanisms to improve the assistance to citizens.
[649] The interviewee Lucas Nejamsky observed that State Reform remains a very important issue in Argentina, but under different terms. According to him, instead of « a classical view », a revolutionary one prevails and intends to really change the country.
[650] Rinne, *supra* note 643 at 34.
[651] Argentina was a great laboratory for neoliberal experiences. Nicola Phillips observes that *"the privatisation process was one of the most rapid and thoroughgoing in the region and indeed outstripped the pace of privatisation in the UK under Thatcher"* Nicola Phillips, "Versions of Neoliberalism," in *The Southern Cone Model: The Political Economy of Regional Capitalist Development in Latin America*, 2004.

within a dynamic of firing civil servants to subsequently hire them back[652]. Therefore, informal arrangements, political appointments and arbitrary dismissal distorted the system and hindered the true size of civil service. In addition, if it is true that the new civil service system aimed to overcome the flaws of the career by introducing real incentives and strengthening the procedures of selection and evaluation (Decree-law 993 of 1991), the coverage of SINAPA was limited, which means that the majority of civil servants were not under the bureaucratic framework marked by Weber's characteristics. The oscillation concerning the size of the personnel ultimately emasculated its regulation.

165. In this sense, it is interesting to note the opposite points of view of the interviewees Enrique Iribarren, the coordinator of the Federal Council of Civil Service, and Marcelo Koening, the director of the Government School. The former explained that the National Institute of Public Administration in Argentina was inaugurated in 1973 and involved politicians from very different parties. In the 1990s, the Institute created the Government School under the inspiration of the French model of the "*École Nacionale d'Administration*". During the interview, Mr. Iribarren described the school as a place where plural ideas and missions could live together, under the influence of scholars, businessmen and politicians from a variety of backgrounds. The main goal was to "modernize" public administration by diffusing principles of the "*nueva gestión pública*" and technological tools. Mr. Iribarren claimed that alter the crisis the school has been deteriorated and destined to political goals. He criticized the current methods of selection, which would not be meritocratic based, and pointed out the prevailing role of the municipal leaders in the school. In turn, the current director of the Government School, Mr. Koening, argued that the former model was exclusively based on neoliberal ideas, which does politics under an allegedly neutral discourse. He defended the new method of the school, which intends to prepare the students "politically speaking". The current idea is to critically discuss the project of State they intend to implement in Argentina, ensuring a large popular participation.

[652] Rinne, *supra* note 643 at 48.

According to him, politics must be an instrument of transformation and this is one of the lessons for the students.

166. Moreover, while the main transformations in Chile were formalized by laws and in Brazil by a constitutional amendment, a striking feature of civil service reforms in Argentina is that they have been *reforms by decree*. To accept to take office five months before his term would begin, President Menem made a deal with the opposition party: all the legislation necessary to control the crisis should be adopted without resistance[653]. Following this, the Congress approved the State Reform and Economic Emergency acts, which ascribed such a legislative power to the president. It turned out that President Menem enacted 336 decree-laws, including those that regulated civil service reform. To illustrate this point, in the early 1990s, a hiring freeze of all vacancies in national public administration, the reduction of federal secretaries, the dismissal of non-permanent employees, the creation of the Executive Committee for Control of the Administrative Reform (CECRA) and the elimination of some government agencies were issued by the following decrees-laws n. 435, n. 1757 and n. 2476[654]. Instead of being a contingent device, the enactment of decree-laws continued to be part of the narrative of civil service reforms, by both undermining its stability and long-term strategic content. For instance, in 1996 the decree-law 588 created the State Reform and Modernization Unit, which in practice simply replaced the role the CECRA used to play. Likewise, President Fernando de la Rúa rescinded the decree-law n. 66[655], which formalized collective bargaining agreements between civil servants and the State, because this decree favoured the labour union that used to support Menem's government[656] and prejudiced the one that was backing de la Rúa's political party[657]. The consequences are (i) the proliferation of norms, which hampers

[653] President Raúl Alfonsín (1983-1989) transferred power to Menem five months ahead of the schedule. *Ibid., 39.*
[654] *Ibid., 38.*
[655] A Public Sector Collective Bargaining Law (n. 24.185 – Ley Abdala) was enacted in 1992, but remained ineffective because of the uncertainty about some issues, such as the degree of consensus necessary to conclude a collective agreement. *Ibid., 45.*
[656] Not only did the Ley Abdala prescribe that the « most representative » union would represent the employees during the negotiations, but also the Ministry of Labour issued the Resolution n. 42, establishing that UPCN had 72.3% of affiliates, while ATE shared only 27.7%. *Ibid., 46.*
[657] *Ibid., 48.*

stable substantive changes of the system, and (ii) the reform fatigue, which jeopardizes the legitimacy of future attempts to reconsider the organization and functioning of the State[658].

167. Furthermore, the argument according to which the institutional weakness influenced on the initial successful goals[659] achieved by Menem is backed by several trades-off or "*toma y daca*". The idea is that the neoliberal project of dismantling the State was easily viable because of the combination of "old politics" to implement "new economics"[660]. In fact, the same logic seems to be applied to civil service reforms. First, although civil service reforms are usually very unpopular among members of labour unions, President Menem managed to gather support from UPCN (*Unión del Personal Civil de la Nación*) by giving it the possibility to practically displace ATE (*Asociación Trabajadores del Estado*). For example, UPCN would have a say in the elaboration of the list of civil servants to be dismissed. Besides, one crucial author of civil service reforms in Argentina, Hector Domeniconi, used to represent UPCN when he was working at the Ministry of Labour and was manager of UPCN's social work office between 1985 and 1987[661]. Finally, if the support of UPCN made the reform viable, it diluted the attempts to build a civil service based on merit and professionalization. Indeed, if open competitions became henceforth a requirement

[658] In order to consult the general law that regulates civil service and its following modifications, see http://www.sgp.gov.ar/contenidos/onep/dictamenes/paginas/estatuto.html

[659] Based on the Washington Consensus, Menem implemented an extensive process of privatization, deregulation, labour market liberalization and the enforcement of property rights. In addition, his Minister of Economy, Domingo Cavallo, created the Convertibility Plan, which established the full convertibility of the currency with the US dollar, fixing one to one parity, constraining monetary policy through the currency board and allowing contracts in any currency. As positive and notable consequences, the economic growth was more than 6%, the inflation was under control, falling from 2300% to near zero, and public support was largely expanded.

[660] Panizza disagrees with the applicability of the Modernization Theory in Latin America, which argues that as soon as economic measures are able to erode traditional social institutions, they are able to undermine traditional politics as well. Panizza argues that free market has not brought an end to the "old politics" of clientelism, patronage and corruption. Rather, "old politics" has been instrumental and ensure economic reform, since leaders use traditional politics and democratic legitimacy to forge a political alliance to support their programmes of reform. Francisco Panizza, "Beyond 'Delegative Democracy' – 'Old Politics' and 'New Economics' in Latin America," *Journal of Latin American Studies* 32 (2000): 737.

[661] Rinne, *supra* note 643 at 53.

to access to several posts of civil service, UPCN took part in the selective process as a principal observer[662].

5. Concluding remarks

168. This chapter intended to deal with the following two questions: (i) what is the meaning of civil service reforms that took place in the last 20 years in countries that had not fully accomplished the twentieth century task of building a bureaucracy? (ii) is there a mismatch between the introduction of new governance methods and the struggle to consolidate rule of law? These two questions are driven by a common preoccupation: how to increment flexibility and ensure predictability at the same time. However, we argued that this is actually a false dilemma, not only because the new governance methods do not undermine the characteristics Weber put forward regarding the organization and functioning of a bureaucracy, but also because predictability is by no means guaranteed by rigid norms, *if it is guaranteed at all*. Neither is the question "either Weber or new governance methods", nor "either rules or standards". Weber's prescriptions take place in different ways and rules and standards are only two extremes of the same spectrum of normative models that should be continuously handled in one direction or in another. In this sense, the comparative analysis show that all three countries share a concomitant search for both Weber and new governance methods, through an ongoing process, which is surprising and diverse enough to produce different speeches. So far, what we have got is a "pragmatic Weber", "a confused Weber" and a "would-be Weber".

[662] An important measure taken to try to balance the asymmetrical bargaining power between ATE and UPCN was to incorporate ATE the Permanent Commission of Careers at SINAPA (Decree-law 106 of 2001). However, the politicization of appointments that are supposed to be subjected to open competition is still present. Mercedes Iacoviello and Laura Zuvanic, "Argentina," in *Informe sobre la Situacion del Servicio Civil en America Latina*, Koldo Enchebarria, 2006, 73, http://www.iadb.org/publications/search.cfm?query=&context=&doctype=&topic=&country=&lang=es&filter=publication_topic%3D%3DGesti%C3%B3n--MANA&searchLang=&stagecode=&page=3.

Comparative statement:

	Chile Pragmatic Weber	**Brazil Confused Weber**	**Argentina Would-Be Weber**
Rationality	Incremental	Comprehensive	Quantitative
Instruments	Laws	Const. Amendment Decrees	Decrees
Key Actor	Ministry of Finance – DIPRES[663]	Ministry of MARE[664]	The President
Political Articulation	Coordination	Tension Overlapping	Fragmentation
Path	Continuity	Hesitation	Discontinuity
Goal	Performance Transparency	Performance Fiscal Strictness	Size, Unification Professionalization
PIB/public personal[665]	5.48%	2.12%	2%
Political Appointments	1.34%	9.52%	5%
Central Civil Service/population	0.96%	0.32%	0.415%
Diagnosis	Centralization Experimentalism Fiscal Strictness	Meritocracy Unclear Inst. Goals	Parallel bureaucracy *Raquitismo* Reform Fatigue

[663] Direction of Budget.
[664] Ministry of State Reform and Federal Administration.
[665] These percentages were found in INFORME SOBRE LA SITUACIÓN DEL SERVICIO CIVIL EN AMERICA LATINA 73 (Koldo Enchebarria ed., 2006) (http://www.iadb.org/publications/search.cfm?query=&context=&doctype=&topic=&country=&lang=es&filter=publication_topic%3D%3DGesti%C3%B3n--MANA&searchLang=&stagecode=&page=3)

Civil service reforms – Chile:

1980	Constitution - Article 38 prescribes the enactment of an organic constitutional law to regulate the basic principles of public administration, including access and organization of civil service.
1986	Law 18.576 – The General Pillars of Public Administration (*Las Bases Generales de la Administración del Estado)*
1989	Law 18.834 – Legal Regime of Civil Service (*Estatuto Administrativo)*– Regulates specific aspects of the law 18.576 and the central issues of the management of human resources.
1994	The creation of the Inter-Ministries Committee for the Modernization of Public Management - *Comité Interministerial de Modernización de la Gestión Publica*.
1997	Law 19.518 – Training for the Civil Service – *Estatuto de Capacitación y Empleo* Strategic Planning for the Modernization of Public Management - *Plan Estratégico de Modernización de la Gestión Publica.*
1998	Law 19.553 (*Ley ANEF*[666]) and Decree 475 – fundaments of institutional evaluations and individual increment. The creation of the Program of Management Improvement (*Programa de Mejoramiento de la Gestión*) Decree 1825 – regulates the system of evaluation of civil service, by establishing the procedure to be follow and the factors to be taken into account.
2001	The creation of the Information System of Financial Management (*Sistema de Información para la Gestión Financiera del Estado* - SIGFE), which played a role in the creation of the Information System of Civil Service (*Sistema de Información de Personal de la Administración Pública* - SIAPER). The SIAPER generates a database in order to

[666] ANEF (*Agrupación Nacional de Empleados Fiscales*) is one of the most influent syndical organization in the public sector.

	facilitate the interaction among DNSC, DIPRES AND the General Audit Office (*Contraloría General*).
2003	Law 19.882 – Law of the New Deal (*Ley de Nuevo Trato)* It promotes (i) the creation of higher level positions in the bureaucratic hierarchy, (ii) the System of Public Direction, (iii) internal open competitions for permanent civil servants; (iv) the elimination of the increment for individual performance; (v) the introduction of increment for collective performance; (vi) institutional award and (vi) decentralized management of human resources policy (*Dirección Nacional del Servicio civil- DNSC* within the Ministry of Exchequer and *Consejo de Alta Dirección Publica- CADP*). The law differentiates the "*cargos de exclusiva confianza*" from the high-level public posts. The "*cargos de exclusiva confianza*" are those freely appointed by the President or by those who are authorized to do so, without a previous selection from the CADP. Because of this reform, the number of "*cargos de exclusiva confianza*" has dramatically fallen down.
2004	Decree 69 – it regulates the open competitions for high-level public posts, by creating a commission who will select the candidates and establish the criteria for evaluation.
2009	Law 20.414 – Constitutional Reform on Modernization of the State, Transparency and Quality of Politics – it regulates conflict of interests and limits the activities of politicians, such as to figurate as a part in a contract with the State.

Civil service – Brazil:

1967	Decree 200 - Administrative Reform to create decentralized units and introduce flexibility in the civil service career.
1988	Federal Constitution – re-introduced more rigidity because of the practices called *"clientelísticas"*
1990	Law 8.112 – Legal Regime of Federal Civil Service
1995	Directive Plan for State Reform (*Plano Diretor da Reforma do Estado*) The creation of the Ministry of State Reform and Federal Administration (MARE – *Ministério da Reforma do Estado e Administração Federal*) Law 82 (*Lei Camata I*) – Limits the expenditure of personnel on 60% of the net State revenue.
1997	Law 9527 – modifies the law 8.112, specially regarding the mobility of the civil servants.
1998	Constitutional Amendment n. 19 - (i) more possibilities of dismissal; (ii) multiple legal regime: civil service statutory and labour law regimes; (iii) balance of public expenditures by imposing limits to wages; (iv) more autonomy for the indirect administration; (v) principle of efficiency; Law 2.794 – Law of National Training Policy (*Política Nacional de Capacitação*)
1999	Law 96 (*Lei Camata II*) – Limits the expenditure of personnel on 50% of net State revenue Decree-law (*Medida Provisória*) 1911-8 – The Planning and Budgetary Ministry becomes The Planning, Budgetary and Management Ministry. Creation of the Management Secretary (*Secretaria de Gestão* - SEGES) Law 9.784 - Law of Administrative Procedure (*Lei de Processo Administrativo*). The administrative procedure should adopt simple forms, pursue a result-oriented path and comply with several principles, such as efficiency and legal certainty.
2000	Decree 3507 – it establishes standards of quality for the assistance of

	citizens.
2002	Law 10.404 - Awards for individual and institutional evaluations (*Gratificações de Desempenho de Atividades*) The creation of a "Manual of Planning for the Personnel", although it has been seldom used. Project of development of Operational Managers and Supervisors
2005	Decree 5.883 – It creates the chamber of Management Policy and National Program of Public Management (GESPUBLICA).
2008	Law 11.784 – It restructures the General Plan of the Executive Positions (*Plano Geral dos Cargos do Executivo - PGCE*). It is mainly focused on planning the salaries of civil servants.
2009	Decree 6932 – it simplifies the assistance to the citizens, by deepening the decree 3507 of 2000, which was derogated. Decree 6999 – It creates the System of Organizational and Institutional Innovation (SIORG).
2011	Decree 7.478 – It derogates the decree 5.883. It creates the chamber of Public Policy, Performance and Competitiveness at the Government Council. Innovations: the objectives are (i) to reduce public expenditure, (ii) rationalize administrative procedures and (iii) improve the performance of public administration. The chamber is composed by four members of the civil society who are well known in the fields of management and competitiveness, in addition to four Ministries.
Projects in Discussion	Organic Law of Public Administration (*Lei Orgânica da Administração Publica*), Law of Administrative Simplification (*Lei de Simplificação Administrativa*) and Law of Public Careers (*Lei de Diretrizes de Cargos e Carreiras*).

Civil Service – Argentina:

1957	Constitution – articles 14 and 16 prescribe civil service tenure
1973	Decree – 1.428 – several layers and exceptions to describe the civil services. The creation of the National Institute of Public Administration (INAP) as a decentralized organ (*autarquía*)
1977	Sub-secretary of the Civil Service of the Federal Government (*Subsecretaria de la Función Publica de la Presidencia de la Nación*)
1980	Law 22.140 – Legal Regime of Civil Service (*Régimen Jurídico Básico de la Función Publica)* - no possibility of collective negotiations
1980	Decree 1797 – regulates the law 22.140
1983	The Sub-Secretary becomes Secretary
1990	Decree 2476 – it prescribes (i) rules of hiring based on public competition; (ii) a stable career with salary progressions; (iii) Public Administration School and (iv) Management mechanisms to improve assistance to the citizens.
1991	Decree 993 - State Reform – the attempt to unify the civil service by creating the SINAPA (*Sistema Nacional pela Profesionalización Administrativa*). This unification would place the civil service of the central and decentralized administrations under the same regime. However, SINAPA covers only 40% of civil service. The decree 993 derogates the decree 1797, but the law 22.140 remains valid. Civil servants are supposed to be evaluate every year – art. 44-54. Remuneration is supposed to be targeted to performance. Elimination of long-service bonus.
1992	Law 24.185 – Collective Bargaining in the Civil Service (*Ley Abdala*).
1993	A unit of human resources and organization is created in each

	jurisdiction.
1996	Decree 588 creates the State Reform and Modernization Unit. The Secretary is transferred to the Direction of the Ministries Office (*Jefatura de Gabinete de Ministros*)
1999	First Collective Convention of the Public Sector – starts on the 1st January with the decree 66. It expires in 2000, but the *principio de ultractividad* makes it valid until new regulation is promulgated.
1999	Law 25.164 – Legal Framework of Civil Service (*Ley Marco de Regulación del Empleo Publico).*
2000	Several decree-laws (*decretos de excepción*) to politically appoint civil servants to functions that were supposed to be subjected to public competition. See Decree 353/2003 and Decree 1218/2003.
2001	Decree-law 103 – The President de la Rúa launches the *"Plan de Modernización del Estado"*. Decree 1184 – Different salaries for special bodies and civil servants financed by the WB, BID and PNUD. Decree 106 – ATE is incorporated to the Permanent Commission of Careers at SINAPA. Sub-secretary of Public Management is transferred to the Secretary of State Modernization of the Direction of the Ministries Office. INAP is no longer a decentralized organ and starts playing an oversight role.
2002	Decree 1421 – regulates the law 25.164
2004	Decree 682 – readjustment of the salaries because of macroeconomic reasons. Administrative Decision number 3 – attempt of equalization of salaries.
2006	Decree 214 – Homologation of the Collective Agreement of General Work
2008	SINAPA becomes SINEP (*Sistema Nacional de Empleo Publico*) Collective Agreement of Sector Work

	Decree 1378 – Homologation of the Collective Agreement of General Work

CHAPTER 4

STEP IN, STEP OUT: DRAWING THE LINE FOR PUBLIC-PRIVATE GOVERNANCE

1. Introduction

169. State Reform does not only encompass a set of transformations about the *internal* functioning and organization of the State's administrative machine. It is a deeper phenomenon that has altered the *external* dynamic of the State with private actors. State Reform has stretched out existing porous boundaries vis-à-vis private participation in the provision of public services. Indeed, this stretching out of the existing porous boundaries has been noticed through vast examples[667][668]. More than 50 countries have recently institutionalized public-private partnerships[669], such as the United States, Australia, Spain, Portugal, South Africa, India, Egypt, Mexico, Uruguay, Paraguay, Argentina, Chile and Peru[670]. In the project *Public Private Partnerships Around the World*[671], it has been shown that only from 1985 until 2000, two thousand and ninety-eight new public-private partnership projects have focused on infrastructure, especially highways and railways[672]. And in this scenario, Latin

[667] The United Kingdom, along with Australia, is frequently mentioned as one of the most important laboratories of public-private partnerships because of the development of Project Finance Initiatives (PFI). This PFI model, however, should not be confused with the diverse meanings of public-private partnerships implemented around the world. Even at the European level, it would be difficult to assert any homogenization on the matter. In fact, there is no European technical definition for public-private partnerships and one can identify different meanings for the expression in specific national contexts. These observations have been made by Professor Jean-Bernard Auby and the Post-doctoral candidate Sieglinde Pommer during the seminar Sieglinde Pommer, "PPP in the EU: Comparative Insights on Reinventing Government" (SciencesPo - Paris, November 30, 2011).

[668] It is interesting to note that the decree-law 965 of 2005, which is the legal instrument that regulates public-private partnerships in Argentina, tries from its very beginning to legitimate such partnerships by taking into account foreign experiences on the matter. In its foreword, the Decree cites Germany, United Kingdom, North Ireland and the United States of America as successful examples of countries that have used such partnerships to satisfy the public interest through the implementation of public works and provision of services. http://www.puntoprofesional.com/P/0650D/DECRETO_967-05.HTM

[669] Europe is the leader in terms of investments on public-private partnerships, followed by Asia and Latin American. Claudio Seebach S., "Evolución e Institucionalidad de la Concesiones en Chile," in *Concesiones: el Esperado Relanzamiento*, Ediciones LYD (Santiago, Chile, 2012), 69.

[670] Adriana Aguillar, *Casamento Público-Privado*, REVISTA CAPITAL ABERTO, 2003.

[671] Stephan Beatty, "Public-Private Partnerships Around the World" (presented at the Canadian Forum on Public Procurement, Canada, October 2001).

[672] Aguillar, *supra* note 670 at 10.

American countries have attracted half of the capital invested in the developing world from 1990 to 2003[673]; that is, three hundred and ninety-three billion dollars[674].

170. Following this movement, an intensified public-private interdependence has happened in virtually every public service[675] over the last ten years, such as fire protection and education. Besides, this intensified public-private interdependence has happened at both domestic and international levels[676]. As a consequence, this intensified interdependence has provoked intricate debates regarding (i) the latent mitigation of the distinction between public/private functions[677], (ii) the feasibility of administrative law tools to face this new reality[678] and (iii) the potential trade-off between accountability and efficiency[679].

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[673] Within the developing world, and excluding the transitory economies, Brazil is the country that has carried out the most intense private participation in infrastructure projects. Maurício Portugal, O OBSERVATORIO DAS PARCERIAS PUBLICO-PRIVADAS (2011), http://pppbrasil.com.br/portal/content/entrevista-mauricio-portugal-ribeiro.

[674] This data is provided by the World Economic Forum and cited in Sabah Zrari, "Les Concessions Routières Au Chili. Un Changement Sélectif," *Revue Internationale De Politique Comparée* 17, no. 3 (2010): 73.

[675] Professor Freeman cites examples of private participation in the United States for tax collection, policing, welfare provision, fire protection and education. Jody Freeman, "The Private Role in the Public Governance," *New York University Law Review* 75 (2000): 547.

[676] Regarding the international context, Laura Dickinson tries to bridge the gap between domestic administrative law and international law scholarship, by proposing the use of contractual mechanisms to extend the protection of public values to privatized foreign affairs. She argues that international law scholars usually fail to insert contractual provisions that would protect public values, while in the domestic arena such a practice is commonplace. For example, in the 60 Iraq contracts publicly available, none has such provisions. Laura Dickinson, *Public values/private contract*, *in* GOVERNMENT BY CONTRACT: OUTSOURCING AND AMERICAN DEMOCRACY / EDITED BY JODY FREEMAN, MARTHA MINOW 335, 345 (2009).

[677] For example, Bresser-Pereira argues that the confusion of the *res publica* with the State, or with what the State owns, is misleading. After all, the public space includes more than what the State owns, whereas state property is often appropriated privately. Bresser-Pereira, *supra* note 59 at 153.

[678] From the role to legitimate the new extensions of public power during the Administrative State, administrative law in the global era has pursed the legitimacy of new blends of public and private powers and the use of private power to achieve public interest ends. Alfred C. AMAN, JR, "Administrative Law for a New Century," in *The Province of Administrative Law*, Michael Taggart, 1997, 95.

[679] As we will develop in more details below, we share Professor Mashaw's view on the issue, and argue that it is misleading to think that the proponents of contracted-out would necessarily defend trading accountability for efficiency. Mashaw, *supra* note 535.

171. The very object of our inquiry in this chapter will be this partnership move that State Reform has endorsed. One may insist on utilizing *"privatization*[680]*"* as the large jargon to express the transfer of public authority and public property to private hands. However, *"partnership"*[681] reveals a rather specific claim behind the legal framework that has been more recently consolidated[682]. From the preponderance of either public or private actors, and thereby either public or private law, State Reform seems to change[683] towards the construction of a midway model[684]. This midway model would propose an increasing balanced interaction between public and private actors[685]. Contractual metaphors for the exercise of public governance[686] elucidate the effort to overcome the longstanding dichotomy[687] that divides legal order

[680] Here it is necessary to be careful about the terminology "privatization". It is usual in the American literature to use « privatization » as a general expression for several types of legal arrangements that transfer public authority and property to private hands, including public-private partnerships. In order to avoid misunderstandings, the section 3.2 of this chapter will be dedicated to explain the meaning of public-private partnerships in Chile, Brazil and Argentina, which is definitely different from the one of "privatization".

[681] The public-private interdependence has also ascribed to the State the quality of being constantly under relational positions. The State would have become a « *Estado relacional* ». Alfred Vernis Doménech, "Asociaciones Entre Lo Público y Lo Privado: En Búsqueda De La Complementariedad," *Revista Del CLAD Reforma y Democracia* no. 33 (2005): 69.

[682] These legal frameworks will be developed in details in the section 3.2 and 3.3, where we discuss the respective legal regimes of public-private partnership contracts in each of the three countries.

[683] We reaffirm our argument about *the continuous reconsideration* of the State's functioning and organization as the main characteristic of State Reform as a public policy. For instance, if State Reform in Argentina in the beginning of the 1990s meant a vast privatization of state-owned enterprises, in 2005 the President Cristina Kirtchner enacted the decree-law 967, which drew the lines for National Regime of Public-Private Partnerships ("*El Regime Nacional de Asociaciones Publico Privada*").

[684] By giving the example of subsidies of tariffs in concession contracts in Argentina, Agustín Gordillo concludes that both an exclusive reliance on the State and a refutation of any public subsidies for private activities are too simple propositions, which do not face the current economic situation. He claims that we will finally have to achieve a *« punto intermedio »* concerning this question. Augustin Gordillo, "La concesión de obras públicas y la privatización de empresas públicas por concesión," in *Después de la reforma de Estado* (Argentina, 1998), II9.

[685] This midway model is highlighted by the fact that the private sector has undergone difficulties with the aftermath of the economic crisis. As Auby observes, the economic crisis has challenged the conclusion of public-private partnership contracts in France precisely because the private partners have faced troubles to obtain financial support. Auby, *supra* note 667 at 50.

[686] Professor Freeman proposes a « contractual metaphor» to demonstrate a heuristic way in which governance has been exercised. Freeman, *supra* note 675 at 571.

[687] The dichotomy between Public and Private Law is specially overspread in countries that inherited the Roman legal tradition, not only by playing a conceptual role, but also a practical one, as one can find in France. Jean-Bernard Auby, "Le Rôle de la Distinction du Droit Public et du Droit Prive dans le Droit Français," in *La distinction du droit public et du droit prive: regards français et britanniques*, Jean-Bernard Auby & Mark Freedland, 2004, 20. Anyhow, it does not mean that common-law countries do not use the distinction at all. Our argument goes along with the historical analysis provided by Novak, according to which, although Americans have resisted the dichotomy and for a long time recognized public-private interdependence in governance, the public is considered prior to and superior to any

into public and private law. The ambition is thus to build a more horizontal interaction between public and private actors[688], which would finally recognize the enduring pervasive private participation in public affairs[689].

172. Nevertheless, this partnership tendency gives rise to the following backlash: a recall to a differentiate set of rules (public law) to protect public values[690]. That is, the contracting State[691] *highlights*[692] the mitigation of the distinction between public and private *functions*[693], but it does not weaken the need to resort to a specific set of rules (public law) to protect public values. In fact, partnerships seem to remind us that the existence of this differentiated set of rules is far from being justified by the type of actor (public or private) entitled to exert the function: it is the *values* deemed to

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private interest. William Novak, *Public-Private Governance: A Historical Introduction*, *in* GOVERNMENT BY CONTRACT: OUTSOURCING AND AMERICAN DEMOCRACY / EDITED BY JODY FREEMAN, MARTHA MINOW 23, 37 (2009). In this sense, see further details in the section 2.1.

[688] It is not to say that contracts between public and private actors are *per si* new. Contracts are a longstanding part of Administrative Law. However, the scope, the volume and the rules of the current transfers of public authority to private hands are a recent phenomenon.

[689] Freeman, *supra* note 675 at 551.

[690] We do recognize the difficulty in providing a definitive list of public values and the potential variation and overlapping of the terms within different national contexts. In this work, we will use public values as a set of principles that differentiates legal obligations, and therefore differentiates legal bodies. To give examples of public values discussed by the literature, Dawn Oliver suggests as public values the Seven Principles of Public Life, which were identified by the Committee on Standards in Public Life: duties of selflessness, integrity, objectivity, accountability, openness, honesty and leadership. In addition, Oliver observes that the protection of national security, efficiency and effectiveness in government may be included as public values, as they imply special procedural privileges for judicial review under the Supreme Court Act of 1981. Dawn Oliver, "The Underlying Values of Public and Private Law," in *The Province of Administrative Law*, Michael Taggart, 1997, 217. Michael Taggart, in turn, puts forward the following public law values: openness, fairness, participation, impartiality, accountability, honesty and rationality. Michael Taggart, "The Province of Administrative Law Determined?," in *The Province of Administrative Law*, Michael Taggart, 1997, 20. Furthermore, Jean-Bernard Auby proposes that public values would be translated into the following principles: (i) substantive principles - respect for fundamental rights, transparency, non-discrimination, respect for pluralism and proportionality and (ii) procedural principles - due process, notice, reason-giving or comment rulemaking. Jean-Bernard Auby, "Contracting Out and Public Values: a Theoretical and Comparative Approach," in *Comparative Administrative Law*, Rose-Ackerman & Lindseth, 2010, 511.

[691] Ian Harden and Norman Lewis, *The Contracting State*, ed. Cosmo Graham (Open Univ Pr, 1992).

[692] State Reform only *highlights* the mitigation of the distinction because it has always been difficult to make this distinction sound. It is not State Reform that causes doubts about the distinction. However, the transformations State Reform provokes on the interaction between public and private actors render even more difficult the task of proposing a criterion for the distinction.

[693] Whenever we mention "public function" in this work, we do not intend to establish a definitive meaning of the expression. As we are going to point out below, this distinction has never been easy to make because of the lack of analytical content to verify what a public function would be. State Reform highlights this difficulty as it is directly related to the distribution of tasks among public and private bodies and to the constant assessment of what the State is suppose to do.

be *public* that are the immediate object of this differentiated set of rules[694]. To sum up, the goal of resorting to public law is to protect public values.

173. In that way, the backlash derives from the fact that public-private partnerships actually raise important questions regarding the protection of public values, which ultimately *reaffirms* the importance of the public/private *law* distinction. That is, on the one hand, the intertwined relationship between public and private actors would blur the line that separates public and private functions[695], as one cannot[696] assert whether an activity is public or private by only looking at the actor who is exerting it. On the other hand, the very proliferation of public-private partnerships exposes the challenges concerning the protection of public values. These challenges are based on the fact that private entities entitled to exert public functions may escape from the obligation to comply with the legal regime (public law) that is designed to protect such values[697]. More than that, even when public law does apply to private contractors, government agencies often lack the capacity to enforce contractual terms[698] or coordinate the different private bodies that exert public functions[699]. To sum up, we have never been as much confused[700] about what public functions are, but

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[694] Auby, *supra* note 687 at 23.

[695] Paul Craig states that *« the very nature of the divide between 'public power' and 'private power' has become more blurred as of late, as a result of changes in the pattern of government*". Paul Craig, "Public Law and Control over Private Power," in *The Province of Administrative Law*, Michael Taggart, 1997, 196.

[696] Indeed, one never could assert whether a function is public or private by only looking at the actor who is entitled to exert it. The difference is that this interdependence has been intensified, which makes even more complex the attempt do identify *who does what*.

[697] Auby, *supra* note 690.

[698] Jody Freeman & Martha Minow, *Government by Contract*, *in* GOVERNMENT BY CONTRACT: OUTSOURCING AND AMERICAN DEMOCRACY / EDITED BY JODY FREEMAN, MARTHA MINOW (2009). See also Freeman, *supra* note 675 at 667. She points out that the tension emerges from the concurrent goals of providing sufficient contractual specificity for meaningful monitoring and enough flexible terms for possible adaptation to changing conditions.

[699] The problem of coordination has been also mentioned in the chapter three, regarding Civil Service. For further details, see GOLDSMITH, *supra* note 529.

[700] Mark Moore works on the idea of confusion and provides two main reasons why it has been hard to fully understand current reality in public governance. First, there is a central linguistic problem: nobody agrees with the meanings we ascribe to expressions such as privatization, partnerships and social provision. It turns out that we accept parts of the meanings these expressions may imply and do not have a comprehensive picture of the very object we are talking about. Secondly, these expressions have strong ideological content and promote expected blinkered opinions, which in no way encompasses the complexities of the issues. According to Moore, these two elements "*make it extremely difficult to keep*

at the same time the concern about the protection of public values prevents us from abandoning the public/private law division.

174. To develop our reasoning, we will argue that (2) State Reform highlights the analytical weakness of the attempt to propose ultimate criteria to distinguish public and private functions. This section will show the increasing difficulty to answer the question "how to make the distinction?"[701] between public and private functions. We have so frequently stepped in and out the alleged private and public spheres, that it has become hard to hold the dividing line meaningful. Hence, we will replace the goal of defining public and private realms by the idea that the distinction between public and private functions is rather *a point of reference*[702], the relativity of which does not undermine nonetheless its importance. If we endorse the distinction, we do not understand it under absolute terms.

175. Following this, we will argue that (3) State Reform underscores challenges about the protection of public values, not only because it includes a larger number of actors involved in such a protection[703], but also because it sheds light on mechanisms of accountability that used to be neglected, if not unknown. Our effort will be to question to what extent public-private partnerships have multiplied the roles the State[704] can play to exert public functions. These multiple roles would be attempts

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one's eye on the ball as one works through these diverse pieces". Mark H. Moore, "Introduction Symposium - Public Values in an Era of Privatization," *Harvard Law Review* 116 (2003 2002): 1213.

[701] Duncan Kennedy argues that the successful of a distinction is based on (i) the possibility to make it («How to make the distinction? » question) and (ii) the difference it must make ("What difference does the distinction make?" question). He puts forward six phases of the decline of the public/private distinction, along with all other several distinctions formulated by the liberal legal thought, such as state/society, law/policy, freedom/coercion, etc. He observes that they are all "the same", although they are not synonymous, and end up to the process of loopification, in which *"one seems to be able to move by a steady series of steps around the whole distinction, ending up where one started without ever reversing direction"*. Duncan Kennedy, "Stages of the Decline of the Public/Private Distinction," *University of Pennsylvania Law Review* 130 (1982 1981): 1354.

[702] See section 2.1.

[703] The State seems to loose its monopoly as the current public action has been characterized by a multiplication of actors. Pierre (1948-) Lascoumes and Patrick Le Galès, *Gouverner Par Les Instruments [ressource Électronique] / Pierre Lascoumes, Patrick Le Galès*, Académique, 2010, 24.

[704] The State must have the capacity to play a variety of roles in a mixed regime: broker, networker, supervisor, enforcer and partner, to name a few. Jody Freeman, "Private Parties, Public Functions and the New Administrative Law," *Administrative Law Review* 52 (2000): 854.

to revitalize State's capacity to meet the expectations of an increasing complex society[705]. This question will be analysed through the particular characteristics of public-private partnerships within the contexts of Chile, Brazil and Argentina. We will first unfold the legacies of public-private governance in these countries and then identify the main elements and experiences that have characterized the intensification of their partnership move over the last twenty years. Finally, we will explore in more details examples of prisons that have been built and managed under the public-private partnership model in our three case studies. The analysis of the concrete cases has not the goal to defend an abstract superiority or inferiority of public-private prisons[706], but to draw our attention to the current broader range of possibilities to conceive their functioning and organization. In this sense, we will try to go beyond the alleged trade-off between efficiency and accountability in order to gets closer to the current rational behind Administrative Law, a rational that appoints to the development of a system of accountability *on demand*[707].

2. State Reform: the analytical weakness of the distinction between public and private functions

176. In this section we will argue that State Reform highlights the weakness of analytical accounts regarding the distinction between public and private functions. We will replace the goal of defining public and private realms by the idea that the distinction is rather *a point of reference*, the relativity of which does not undermine nonetheless its importance. The relativity of the distinction does not undermine its

[705] As we have mentioned in other chapters, one of the reasons for the constant assessment of the State is its existential crisis vis-à-vis its capacity to meet the expectations of an increasingly complex society. This practical crisis has provoked a crisis of legitimacy as well, which pushes the State to search for new ways to justify its power. Sabino Cassese, *La Crisis del Estado* (LexisNexis Abeledo-Perrot, 2003).
[706] As we have argued in the introduction, State Reform is neither susceptible to success nor to failures because they are embedded within an instrumental rationality regarding the organization and functioning of the State. We cannot evaluate how successful an instrument is *in abstract*. It is necessary to first have a specific substantive goal in order to see whether the chosen instrument was feasible for its implementation. State Reform does not bring efficiency to all public policies, but put it at the centre of the preoccupations when we have to choose the instruments to implement a specific policy.
[707] See section 3.1.

importance because the question "*what difference does the distinction make*?[708]" persists every time one wants to protect public values from private interests or private values from State intervention. The consequence of the distinction would be the immediate[709] application of a specific legal framework to protect specific values. In this sense, we adopt Cane's position, according to which "public" and "private" *are not descriptive terms* because they do not imply "brute" characteristics. Instead, they imply the application of norms or set of norms[710].

177. If the State is increasingly committed to develop partnerships with private bodies in order to carry out public interest goals, it is not always clear when one can resort to the division between public and private law that the legal systems traditionally framed. A legal system that draws strict lines is susceptible to two types of consequences. Either it will hold back a rather creative engagement of both parties, or it will shield private partners from the control of public law[711]. The problem is that some private partners execute activities of large public impacts. More than that, given the enormous private participation in public affairs, attempts to establish a bright line between the private and the public realms based on the question "who does what?" would result in "loopification"[712].

178. In order to support this argument, we will (i) underscore historical variations of the public and private realms, (ii) point out the vagueness of the attempts to define what belongs to each realm and (iii) draw some attention to the uncertainty of the courts to clarify the content of the distinction through the criteria of state action doctrine and judicial review. Nonetheless, once again, these elucidations of our

[708] Kennedy, *supra* note 701.
[709] Since we defend a rather cross-fertilization of public and private law, there is no pure application of only one set of rules. For instance, although in a given situation private law may be immediately applied, this is not to say that public law is absent. Public law would have a mediate role, both because it limits the liberties existing in private law and because it ensures these liberties.
[710] Peter Cane, "Public and Private Law: a Study of the Analysis and Use of a Legal Concept," in *Oxford Essays in Jurisprudence, Third Series*, J. Eekelaar & J. Bell (Clarendon Press, 1987), 57.
[711] C. AMAN, JR, *supra* note 678 at 115.
[712] Kennedy, *supra* note 701.

argument do not undermine the distinction itself, but replaces the search for definitive criteria by the notion that it is rather a point of reference[713].

2.1. Historical variations against natural assumptions

179. As we have aforementioned, the distinction between public and private functions is rather a point of reference, the relativity of which does not undermine the distinction. To illustrate how this point of reference helps us to understand the distinction, we borrow the image Bobbio uses in his work to analyse the political distinction between left and right wings. Bobbio argues that the meaning of the left and right wings do change in different historical circumstances, but it does not imply that they are empty political terms. In this sense, the distinction should be understood under a relative perspective. For instance, one opinion regarding a specific matter can be considered of right wing in one circumstance and of left wing in others. Bobbio explains this point by claiming that an object can be more in your right or more in your left, but this relativity does not mean that it can be on your right and on your left at the same time[714].

180. We claim that the distinction of public and private function is rather a point of reference, as it seems to vary from time to time. The content of the private realm may eventually become part of the public sphere and vice-versa, which prevents natural assumptions of what would be essentially public or private. Beyond political ideologies[715], the historically continuous assessment of the organization and functioning of the State implies different distributions of tasks among public and private bodies, in order to efficiently accomplish a contingent political goal. This distribution of tasks is not definitely set because it is not possible to foresee *one*

[713] *Supra* note 702.
[714] NORBERTO BOBBIO, LEFT AND RIGHT: THE SIGNIFICANCE OF A POLITICAL DISTINCTION / NOBERTO BOBBIO (1996).
[715] The public/private dichotomy of the legal system has also been seen as a reproduction of political ideologies. Public law would be associated with left-wing political aspirations, the focus of which would be the accomplishment of collective welfare and the delivery of public goods. Private law, on the other hand, would be linked to right-wing political projects, by favouring a minor intervention of the State into the market and contractual freedom.

distribution of tasks that would promote the implementation of *all* political goals or the provision of *all* public services in an efficient way. The very same State, therefore, may envisage different formulas to allocate competencies between public and private actors in order to deliver the same public service in different circumstances or regions[716]. Some examples will demonstrate that attempts to define what public and private functions are do not historically hold.

181. In the United States, the oscillation, both historically and politically, of what is considered public and private is quite sound. Novak points out the distinctive way in which power has been distributed among public and private actors to the construction of the American State. There is an amalgam of persons, institutions and associations that are not easily identified as belonging to either the public or private spheres[717]. On the one hand, around sixty million people are currently living in private communities, and seven million of them in gated communities[718] in the United States. On the other hand, in 1849 a privatization of a simple park to pay for city waterworks was deemed as *"an offense against the public, and indictable as a common nuisance"* by the Pennsylvania Supreme Court[719]. Likewise, the Vermont Supreme Court confirmed that the destination of public property to the public was "*primary and irrevocable*" and "*the public rights could not be traded, sold, or bartered away to private interests no matter what the offsetting benefits to the city"*[720].

182. Besides, even the allegedly intrinsic public character of traditional State functions appears more vulnerable after one carries out a historical test. For example, prosecution was once a private activity, whereas nowadays it is widely exerted by

[716] This understanding has a significative importance in economically heterogeneous country. To provide infrastructure of roads, the State may use concessions, public-private partnerships or even be the only responsible for the service, depending on several factors, such as the local population's capacity to pay tariffs or economic viability to attract private investors.
[717] For example, the business corporation was devised as a peculiar instrument of statecraft. Novak, *supra* note 687 at 27.
[718] ANDREW WILLIAM STARK, DRAWING THE LINE : PUBLIC AND PRIVATE IN AMERICA / ANDREW STARK 13 (2010).
[719] Novak, *supra* note 687 at 38.
[720] *Ibid.*

public officials[721]. Likewise, tax collection was one of the very functions linked to the materialization of the State, while private bodies nowadays also provide it. Moreover, Weber himself observes that the alleged special character of bureaucratic activities, comparing to the management of private companies, is actually limited to a continental European notion, not really shared by other countries[722]. Weber goes further to observe that it is sociologically impossible to define the State by the set of its functions because of the historical variations of them[723]. Finally, prisons, as well as fire departments, were essentially private in the 18th and 19th century, although they have become State functions ever since[724].

183. The construction of the notions of public and private functions in Chile, Brazil and Argentina is also subjected to similar historical variations. The consolidation of national states in Latin America was largely backed by liberalism, one main characteristic of which being the separation between public and private realms. However, as these countries were former colonies, their political-administrative systems used to be confounded with the monarch himself, who exerted at the same time the control of very different functions, such as legislative, justice, commerce, finance, army and religion[725]. Besides, to make the system effective, exceptions for the distinction between the public and private spheres were all over the place. For instance, the army and the Church belonged so organically to the State that their members were subjected to a distinguished jurisdiction system even for issues not related to their functions ("*fueros*")[726].

184. Once the countries became independent from their respective colonies, the project of building a liberal State went on, by stressing the separation of the Church

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[721] *Ibid., 39.*
[722] WEBER, *supra* note 534 at 958.
[723] Enzo Falleto, "Renovación del estado y consolidación democrática en Chile," *FLACSO* (1992), http://idl-bnc.idrc.ca/dspace/handle/10625/12233.
[724] C. AMAN, JR, *supra* note 678 at 99.
[725] MARCOS KAPLAN, FORMACIÓN DEL ESTADO NACIONAL EN AMÉRICA LATINA / MARCOS KAPLAN 66 (1969).
[726] This topic was discussed during the lecture given by Professor Duncan Kennedy on the 18th February 2011, at Harvard Law School.

from the State, systematizing the legal system under the public and private law distinction and embracing the continental European trend of codification. Nevertheless, the attempts to build such liberal States had to deal with remaining imperial institutions[727] and social conditions in place, as private institutions and the emerging civil society were also entitled to perform State or Semi-State ("*para-estatales*") functions[728]. On the same path, the construction of Latin American legal culture seems to be a disoriented promenade around the "Europeaness" of its political aspirations and the "originality" of its social and historical basis[729]. Not surprisingly, this legal culture has had trouble in providing a clear concept of the distinction between public and private functions.

185. This trouble remains present[730]. Constitutions and laws keep reaffirming the discourse according to which the *type of activity* will drive the decision if it is either the private or the public legal regime that should be applied. However, historically speaking, the same *type of activity* has been subjected to different regimes. For instance, the mail service in Brazil used to be a Federal Department, submitted therefore to public law. In 1969, when it was transformed into a public enterprise bidding to the Ministry of Communications, the legal regime to regulate its activities

[727] For example, in Brazil, after the independence we still had monarchy. The monarch enjoyed a « moderate power », which constituted the fourth power of the Republican State, along with the Legislative, the Judiciary and the Executive. The Moderate power was supposed to be placed above the other powers and was exerted by the king.

[728] KAPLAN, *supra* note 725 at 42.

[729] Jorge Esquirol provides an analysis about the fictions regarding Latin American law. He focuses his analysis on the paradox behind the work of René David. On the one had, David affirms the importance of social conditions and historical circumstances applied to law, which can be perceived by the title of his work *« L'Originalité des Droits de l'Amérique Latine"*. On the other hand, David advocates for the "Europeanness" of Latin American law and classifies it within the Romano-Germanic legal family. At the end of the day, according to Esquirol, the identification with Europe promotes "a neo-colonial stance against popular expression" and a gap between law and society, as "Latin American society is not European, only their jurists pretend to be". Esquirol, *supra* note 486 at 462–470.

[730] During the interview, Paulo Modesto argued that State Reform has carried out a sort of approximation between public and private regimes in Brazil, especially on the matter of social security. However, this approximation is still very timid. Indeed, the distinction remains clear in the imaginary of scholars, judges and civil servants, as the State Reform process has been very careful. It has been careful because of the need to resort to the Constitution to carry out significative changes. At first, the staff of the Ministry of Federal Administration and State Reform wanted to « de-constitutionalize » the State to render it more flexible. However, as the political power of the Congress appeared to be pervasive, the idea of « de-constitutionalize » the State did not appear to be viable. Hence, they implemented State Reform through more constitutionalization, instead of « de-constitutionalization ».

changed to private law. The Brazilian Enterprise of Mail and Telegraphs[731] is an enterprise with public capital. However, its activities are not encompassed by the prerogatives of public law because of the *type of activity* the State executes is no longer considered public. The historical variations continued and in 2008 the law 11.668 was enacted to regulate the franchise of the mail service to entities of private personality, including exceptional derogations of public law[732]. Therefore, historical variations do prevent analytical criteria to hold the distinction between public and private functions.

2.2. The hopeless question: what can be outsourced?

186. The analytical weakness of the division between public and private functions is not only demonstrated by some historical investigation, but also by the legal attempts to draw the line. If laws may contingently determine the type of legal regime (private or public) under which one specific activity will be placed, such legal prescriptions do not enable us to conceive a substantial criterion to identify public and private functions by and large.

187. On the one hand, the arrangement of the legal system in public and private regimes may represent a political and moral division of the world between the spheres of public and private interests[733]. As a consequence, this division may act as two extreme references of what public and private functions would be[734]. On the other hand, this arrangement does not generate a set of concrete criteria to characterize norms belonging to either the private or the public legal order[735]. Moreover, when one

[731] "*Empresa Brasileira de Correios e Telégrafos"*.
[732] José dos Santos Carvalho Filho, *MANUAL DE DIREITO ADMINISTRATIVO: REVISTA E AMPLIADA ATE 31/12/2009* (Lumen Juris - Rj, 2010), 351.
[733] Auby, *supra* note 687 at 21.
[734] According to Duncan Kennedy, *continuumization* is the phase of the decline of the distinction in which people place almost everything in the middle, neither at the private, nor at the public realm. In such a phase, only the poles are apart from the «somewhere in the middle» classification: «passing laws or deciding lawsuits representing the "public" extreme, choosing a toothpaste or making love representing the "private" extreme". Kennedy, *supra* note 701 at 1352.
[735] Jean-Bernard Auby explains that it is not really meaningful to say that rules and principles of the public legal regime are characterised by *«the public interest, the public service, the public power and*

looks at the legal definitions of what would be "*intrinsically of public nature*" (and therefore could not be outsourced), only vague expressions, not to say artificial solutions, may be identified. At the end of the day, these expressions may be used in virtually any sense to characterize very different types of functions.

188. These legal attempts to define hard-core activities of the government, which would not be susceptible to contracting-out initiatives, are encountered in different countries. In the United States, the Fair Act of 1998 proposes a definition for such activities, by focusing on the identification of functions of the Federal Government that are not inherently governmental functions. Nevertheless, the legislator did not circumvent the employment of the following general lines: *"the term 'inherently governmental function' means a function that is so intimately related to the public interest as to require performance by Federal Government employees »*[736]. Moreover, the Fair Act goes on to give some examples, but it proceeds a description that is vague enough to be attributed to any activity, such as the interpretation and execution of laws to « *significantly affect the life, liberty, or property of private persons"*[737]. Besides, given the difficulty to define « *inherently government function* », the Office of Federal Procurement Policy of the United States launched on the 31st March of 2010 a second attempt to implement the Fair Act, by providing specific examples and creating a new category of "*critical functions*"[738].

189. In turn, English law sounds at first glance a little less restrictive because it limits State core functions to lawmaking and jurisdictional activities, according to the Deregulation and Contracting out Act of 1994. However, it also expands this list to the exercise, "*or failure to exercise"*, of functions that would affect the liberty of individuals, and the "*power or right of entry, search or seizure into or of any*

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the general will». It is not meaningful to say so because these are very general orientations that only have a concrete impact after a variety of intermediary considerations. Auby, *supra* note 687 at 26.

[736] Fair Action, STAT. 2385, Section 5 (2) (A) (1998)

[737] *Id*. at Section 5 (2) (B) (iii)

[738] W. Bruce Shirk and Jessica M. Madon, "Federal 'In-Sourcing': New Rules for Inherently Governmental Functions," *Government Contracts, Investigations and International Trade Blog*, June 14, 2010, http://www.governmentcontractslawblog.com/2010/06/articles/procurement-1/federal-insourcing-new-rules-for-inherently-governmental-functions/.

property"[739]. In French law, the Council of the State affirmed the recognition of certain public tasks that could not be transferred to entities through a contract of "*délégation de service public*". These public tasks are related to the activities called "*pouvoir de police*[740]", which include command and regulation. Moreover, the French court has reaffirmed that the State must be exclusively responsible for the police and for «*the inherent assignments to the exercise of sovereignty missions*»[741][742]. However, this exclusivity and so-called "*principe séculaire*[743]" have been somewhat challenged[744]. The concrete need for partnerships with private actors are based on the appealing higher complexity that the security system must face nowadays, the increasing demand for police control over anti-social behaviours and the widespread fiscal crisis of the State[745]. Indeed, even the sovereign functions (*"les fonctions*

[739] Deregulation and Contracting-Out Act, Section 71 (1) (c) (1994)

[740] Concerning the expression *"pouvoir de police*", although it does not seem to be frequently employed by the doctrine of the Common Law legal tradition, one may understand it by the cases law of the 19th century in the American world. In the case law Brown v. Maryland (1827), the discussion was about the state power to establish a licence upon *"importers of foreign goods by the bale or package, and other persons selling the same by wholesale, bale or package, for which they should pay fifty dollars, and in case of neglect or refusal to take out such license subjecting to certain forfeitures and penalties"*. The Supreme Court decided that such a power would confront with the Constitutional prohibition according to which "*no state shall, without the consent of the Congress, lay any impost or duty on imports or exports, except what may be absolutely necessary for executing its inspections laws"*. Even though the Court recognizes the police power of the state of establishing licences and executing its inspection laws, it should not prevail in this case because of the aforementioned constitutional exception for imports or exports. In turn, in the case law Noble Bank v. Haskell (1911), the Court reaffirms the acts of Oklahoma, of subjecting state banks to assessments for a Depositor's Guaranty Fund, as the exercise of the police power of the state. The Court points out that *"an ulterior public advantage may justify a comparatively insignificant taking of private property for what, in its immediate purpose, is a private use*". Furthermore, the Court explains that the police power extends to all the great public needs and thereby "*the power to restrict liberty by fixing a minimum of capital required of those who would engage in banking is not denied*". Finally, the Court confirmed that "*free banking is a public danger, and that incorporation, inspection, and the above-described cooperation are necessary safeguards"*.

[741] Jean-Marc Sauvé, SECURITE PUBLIQUE: PUISSANCE PUBLIQUE, ACTEURS PRIVES (2009), http://www.conseil-etat.fr/fr/discours-et-interventions/securite-publique-puissance-publique-acteurs-prives.html#_edn3.

[742] CE ass, 17 June 1932, commune de Castelnaudary, Rec. p. 595, concerning the rural police; CE sect, 23 May 1958, Amoudruz, Rec. p. 301, regarding the security of people attending a beach and CE 1er April 1994, Commune de Menton, Rec. p. 175, a company in charge, on behalf of a municipality, of managing car parking in local streets could not be transferred the power of determining the number and location of parking slots.

[743] Elina Lemaire talks about a « principe séculaire ». Elina Lemaire, "Actualité Du Principe De Prohibition De La Privatisation De La Police," *Revue Française De Droit Administratif* (2009): 767.

[744] CE 20 October, 2008, *Fédération Française de Football*, Req. 320111, the Council of the State resorted to the article 129 of the General Regulation of the French Federation of Soccer to affirm that those responsible for the organization of the sport events are also obliged to ensure the security of the place, being actually entitled to take the necessary measures to avoid potential troubles.

[745] *Supra* note 741.

régaliennes"), which used to constitute the heart of the State and provide the impermeable perimeter of justice, defence, foreign affairs and finance, have become subjected to a process of reconsideration[746].

190. Our case studies are not an exception on this matter. Both Brazilian and Argentinean legislation regarding public-private partnerships try to prevent some activities from being contracted-out, such as rulemaking, police power[747], "*among other exclusive State functions*[748]". For example, in Brazil, the article 4, of the law 11.079 of 2004, proposes these restrictions to outsourcing, as well as the considerations of the decree-law n. 967 of 2005 in Argentina. In Chile, it used to be rare to identify regulatory frameworks that would promote public-private associations. For instance, the law 19865 of 2003 ("*Ley de Financiamiento Urbano Compartido*") was supposed to promote "*contrato de participación*", but this type of contract has not become very common because of the lack of finance and guarantees (which contrasts with concession contracts). Besides, in 2004, the government tried to promulgate a project of law about associations and participation in public management[749], but it did not succeed in obtaining enough support[750]. However, the Chilean regime has faced the difficulty to pursue a rigid division between public/private with the Council of Concessions, as one of the competencies of this organ is to analyse the project and declare whether it encompasses the public interest[751]. In this sense, the Chilean system

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[746] Sebastian Roche, "Vers La Démonopolisation Des Fonctions Régaliennes : Contractualisation, Territorialisation Et Européanisation De Sécurité Intérieure," *Revue Française De Science Politique* 54, no. 1 (2004): 43.

[747] In Chile, Brazil and Argentina, we have a larger concept of police. It is divided into "*police judiciaire*" and "*police administrative*". One of the most important examples of public constraints over individual liberties is the police power. This is the power to intervene in the private sphere to ensure the public order. Indeed, the very idea of State has been considered inseparable from the idea of *police*, and the State would be a substantive element of the classical definitions of *police*. Jose Cretella Junior, "Policia e Poder de Policia," *Revista de Direito Administrativo* 162 (1985): 21–22.

[748] See article 4, III, of the law 11.079 of 2004.

[749] President's message n. 48351/2004.

[750] Claudio Moraga Klenner, "Asociación Público-Privada en la Contratación Administrativa Chilena" (presented at the Modernizando el Estado para un país mejor, Lima, Peru: IV Congreso Nacional de Derecho Administrativo- Asociación Peruana de Derecho Administrativo, 2010), 723.

[751] This Council has also been incrementally modified. During Ricardo Lagos' government, the Ministry of Public Works was enjoying an exciting time politically and judicially speaking. The minister at the time, Jaime Estévez, created the Council of Concessions with people belonging to the government and to the opposition parties. Its goal was basically to inform what was happening in terms of contracts. The Council of Concessions is currently working with a different composition (the Minister of Public

has left to a case-by-case analysis the identification of the public interest, instead of limiting it to the law.

2.3. The uncertainty of the Courts

191. By uncertainty of the courts we mean the hesitations regarding the application of State Action Doctrine and the scope of Judicial Review[752]. These hesitations appear to illustrate that courts have not either been able to set up an analytical criterion to define when a function is sufficiently public to bring about the application of public law.

192. The State Action doctrine points out that when private actors act as if they were a State, they will be considered *"under the colour of state law" (West v. Atkins,* 487 U.S. 42 (1988)), that is, they will be limited by constitutional constraints. This doctrine is based on the premise that only State actions are constrained by constitutional restraints. The idea is to identify the nature of the action carried out by a private party (a right or a privilege of State authority)[753]. Depending on the nature of the action, one would become able to assert if this private party "*could be described in all fairness as a State actor*" (Lugar v. Edmondson Oil Co., 457 U.S. 922 (1982))[754]. For example, in order to justify the application of the *due process clause* of the 14th amendment, the Supreme Court of the United States has developed three tests. Briefly speaking, (i) *the joint-participation test* verifies the level of interdependence with private actors[755]; (ii) *the nexus test* evaluates the extent to which the regulation has

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Works, another councillor freely appointed by the Minister and four scholars in the fields of engineer, law, architecture and economy) and according to consultant and deliberative competencies. *Ibid., 730.*

[752] The procedures regarding judicial review are prescribed in section 31 of the Supreme Court Act 1981.

[753] Freeman, *supra* note 675.

[754] To find the same reasoning, see *Leesville,* 500 U.S. at 620.

[755] Jackson v. Metropolitan Edison Co., 419 U.S. 345, 357 (1974) (citing Burton v. Wilmington Parking Auth., 365 U.S. 715 (1961) (holding race-based discrimination by private restaurant to be state action)

intervened into the activities of private actors[756] and (iii) *the public function test* interprets whether the function belongs to the very core of the State[757].

193. However, the historically intense private participation in public governance in the United States has rendered these tests extremely difficult, not to say meaningless. For example, it is tricky to figure out in such an environment of intense private participation in public governance which element would promote the recognition by the Supreme Court that a given activity is (among many others) a joint-participation that *deserves* the application of the doctrine. As Freeman points out, even when the State Action doctrine is applied, the cases are somehow punctual and extraordinary. As a result, a great amount of cases in which private actors play a significant role is actually overlooked[758]. Secondly, the Supreme Court has refuted the existence of nexus in recent cases, although the existence of the nexus appeared to be much more noticeable than in the case that inaugurated *the nexus test*[759]. Besides, the variations of what public functions are have mitigated the value of *the public function test* to give good reason for the application of the doctrine. To be sure, the current restrictive interpretation of State Action doctrine by the Supreme Court has allowed arguably public activities to escape from the application of constitutional constraints[760]. For example, in the case law *FlaggBros,* the Court characterized fire protection, taxation and education as functions both more traditional and exclusive to government than dispute resolution. However, the Court kept silent to clarify the circumstances of their performance that would lead to the application of the doctrine[761]. Beyond that, according to a restrictive interpretation of the *public function test*, it would be necessary the private party to "substitute" the State and exercise an activity associated with sovereignty in order to bring about the application of the doctrine. The problem is that, even if the Court was able to distinguish what a

[756] *Jackson,* 419 U.S. at 351 and *Blum,* 457 U.S. at 1010
[757] Marsh v. Alabama, 326 U.S. 501 (1946) (applying public function test for the first time). See Blum v. Yaretsky, 457 U.S. 991, 1027 (1982).
[758] Freeman, *supra* note 675.
[759] *Ibid.*
[760] *Ibid.*
[761] See *FlaggBros,* 436 U.S. at 163-64.

sovereign activity is, it would always be problematic to say that a private actor "substitute" the State[762].

194. Finally, the hesitations of the Court may derive from the need to preserve the doctrine from the challenging reality of public-private interdependence. The premise of the doctrine is the existence of the public-private dichotomy[763]: what falls in the public side must be subjected to constitutional restrictions and what falls in the private side must not. In this sense, even if the Supreme Court adopted a less restrictive interpretation of the doctrine, by applying it in a larger amount of cases, it may not capture the complexity of the current public-private interdependence. It would extend the province of constitutional rights, but it would not be able to promote sound policy and accountability. As we will develop below, the question does not seem to be fully solved by the application of public law to private parties. A dynamic of stepping in and stepping out around the line that separates public and private law does not appear to meet current complexity of public-private governance. A step forward, by questioning the feasibility of public law, sounds necessary.

195. The uncertainty does not seem to be avoidable either, if one seeks to understand the distinction between public and private functions by focusing on the contours of judicial review. After all, to identify the limits of judicial review does not sound a straightforward task. The inquiry behind such limits is whether a body is sufficiently public to be placed within the scope of the application of judicial review. To face such a question, tests were also developed, from an initial formalistic perspective towards a more "open-texture criterion". The problem is that the tests have not been satisfactory. While the formalistic approach oversimplifies reality, the more "open-texture criterion" sounds helpless to conduct a reasoning without a considerable level of arbitrariness[764]. The *"source of authority's power test"* proposes the criterion according to which the body is public as long as its powers derives from a law, which

[762] Freeman, *supra* note 675.
[763] The Supreme Court talks about the essential dichotomy in Jackson and Civil Rights Cases - 109 U.S. 3, 17 (1883).
[764] Craig, *supra* note 695 at 198.

means that it would not be subjected to judicial review if the source of authority was contractual. In this sense, this test fails to notice the fact that a body may have the source of its authority in a law and, at the same time, develop a range of commercial activities. Likewise, this test excludes a public law response to eventual violations of public values by bodies the source of authority of which is a contract.

196. Moving to the other extreme, the *"nature of the power" test* is much less demanding to apply the judicial review. This test verifies whether the activity is classified (i) as a public law function or (ii) as a function that has public law consequences[765]. As the meaning of public functions remains a puzzling question, the courts resort to heterogeneous motivations in order to apply judicial review. As Paul Craig points out, in the Datafin[766] case, several factors influenced the decision, such as the undoubted power wield by the Panel, the penalties and the lack of any other remedy available to the applicants[767]. Following this, Taggart has argued that the concern about administrative law doctrine and protection of public values has transcended the uncertain contours of judicial review. In the United Kingdom, there would be a temptation of the judges to extend such a protection, along with a top down, court-centred approach of the matter. There would be a "borrowing" of expressions and techniques, as "*the symbolic importance of administrative law and the liberation of its values from the confines of judicial review gave played their part*"[768]. To illustrate this point, in Associated Provincial Picture Houses Ltd v. Wednesbury, such an influence is clear by the use of the term "*unreasonabless*". After all, this term comes from an administrative law case in the delegation of discretion to a local authority.

[765] *Ibid., 199.*
[766] Datafin [1987] QB 815, 849. In this case it was asserted that judicial review could be extended to private bodies that exert public functions. The applicants complained about the competitor's acts and issued against the decision given by the Panel in Takeovers and Mergers. The Panel is a self-regulating body and the question was whether its decisions fall under administrative law.
[767] Craig, *supra* note 695 at 200.
[768] Taggart, *supra* note 690 at 20.

3. State Reform: *which* Administrative Law to protect public values?

197. The propositions to solve current challenges demonstrate a discomfort of administrative law with one of its premises: administrative law protects society from abuses against public values committed by the State, not by private entities[769]. From attempts to revive the non-delegation theory[770], to claims for an extension of the scope of State action doctrine or of judicial review, this premise does not seem to hold. In this sense, this administrative law's initial purpose[771] of creating constraints over State action is no longer satisfactory enough, given the increasing interdependence between public and private parties. Besides, this initial purpose of creating constraints over public action does not take into consideration the task of making good governance[772]. As the inclusion of this task has pushed the development of new instruments, such as public-private partnerships, it would be necessary to reconsider *the extent* to which public law should be applied, not only to public actors, but also to private ones.

198. Nevertheless, in this section we will suggest another perspective of the problem. We will question *which* administrative law would protect public values in the current context of public-private partnerships and draw the attention to the emerging accountability *on demand* model. Following this, we will unfold legacies and assess the transformations on the legal field due to the consolidations of public-private partnership contracts in Chile, Brazil and Argentina. Finally, to illustrate the concern about the protection of public values, we will use the experiences of our case studies on prisons built and managed under such public-private partnership model.

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[769] Auby, *supra* note 690.
[770] The non-delegation doctrine puts forwards that the constitutional law-making powers ascribed to Congress should not be delegated in order to preserve the separation of powers. Besides, concerning decision-making power, delegation may occur only under the boundaries established by the Congress. However, in practical terms, the Supreme Court of the United States has confirmed delegations to public bodies, and more invisibly to private ones. Freeman, *supra* note 675 at 580.
[771] For most of the XIX century, the « red light » theories of Administrative Law implied a negative role of the State and aimed at maximizing the protection of citizens from governmental action. C. AMAN, JR, *supra* note 678 at 92.
[772] Freeman, supra note 675.

3.1. Accountability *on demand*

199. The debate around the subject has been mainly based on the following question: should we *extend* Administrative Law obligations-like[773] to private actors? The idea would be thus to bring private parties under the regulatory umbrella provided by Administrative Law. Yet, we suggest that the approach of the debate has been somewhat narrow because it neglects the "cross-fertilization"[774] between the two bodies of law. The focus on *the extension* of Administrative Law insists on seeing the public/private law divide according to a one-way dynamic, without a dialogue. It seems to overlook that public law has shaped the celebrated freedoms of private law[775], as well as private law has inspired the introduction of flexibility[776], corporate models and labour protections[777] into public law. Moreover, by insisting on this approach, one would mean to close the eyes to the already unfolded myth of freedom of contracts: there is no absolute discretion to establish contractual provisions[778]. After all, this approach seems to neglect the existing prohibition of a contract to have arbitrary provisions[779], in spite of any need to look to public law.

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[773] On the other hand, Professor Beerman argues that one of the problems of privatization is actually that privatized entities do not escape from the application of restricted regulations, as the government still impose to them administrative law like obligation. Jack M. Beermann, *Administrative-Law-Like Obligations on Privatized] Entities*, 49 UCLA L. REV. 1717, 1730 (2001).

[774] Taggart argues we are witnessing a synthesis or blending of public and private law principles. Taggart, *supra* note 690 at 5.

[775] Some of these observations derived from the insights provided by Goncalo Ribeiro during the Byse Workshop « The Decline of Private Law » at Harvard Law School, in 2011. One crucial point of his argument was to explain that, along with the challenge of the pre-realists substantive assumptions, private law entered in decline. The first assumption was that (i) private law is less coercive than public law and the second one was that (ii) coercion under private law is horizontal, not vertical. It turns out that the absence of a rule to prevent one from pursuing his interests does not mean less coercion because it simultaneously implies that the person harmed by such interests are coerced to tolerate them. Besides, any legal system, public or private, manages a trade-off of competing interests in order to ensure freedom through coercion.

[776] As we have seen in the chapter three, the recent civil service reforms have introduced the possibility to dismiss a civil servant if he or she does not meet the performance expectations of his position. Therefore, every civil servant is currently subjected to systematic performance evaluations, which have impacts on the increment of salaries or attribution of institutional awards.

[777] For instance, in France, some of the rules that derive from private law are deemed as « general principles of law » and therefore may be also used by the administrative jurisdiction. This is the case for labour law, in which the interdiction of dismissing pregnant employees is considered a general principle of law and has been applied to public servants as well. Auby, *supra* note 687 at 26.

[778] Mallone v. BPB Industries plc [2002] EWCA Civ 126.

[779] Ewan Mckendrick, *Judicial Control of Contractual Discretion*, *in* LA DISTINCTION DU DROIT PUBLIC ET DU DROIT PRIVE: REGARDS FRANÇAIS ET BRITANNIQUES / SOUS LA DIR. DE JEAN-BERNARD AUBY ET

200. The consequence of this one-way dynamic perspective is the cyclical emergence of claims that public law has invaded private law or that public law has been privatized[780]. By questioning where to place the dividing line, one risks to miss the transformations that have taken place in the content of each side. The question is no longer whether we should apply Administrative Law to private actors[781], but *which* arrangements of Administrative Law's tools will be able to combine rather flexible contractual models with the protection of public values. Furthermore, by failing to assess the current rational behind Administrative Law, and simply trying to expand its application to private actors[782], one may pass over a backfire. The backfire derives from the negative consequences of applying public law to private actors who exerts public functions. After all, the potential advantages of contracting-out would be at least neutralized, if not wiped out, if the private party is obliged to behave just like the public bodies[783].

201. Therefore, it has been a tricky time for Administrative Law scholarship[784]. This tricky time is not essentially characterized by the fact that contracting-out could

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MARK FREEDLAND = THE PUBLIC LAW-PRIVATE LAW DIVIDE : "UNE ENTENTE ASSEZ CORDIALE?" / ED. BY JEAN-BERNARD AUBY [AND] MARK FREEDLAND , 185 (2004). Ewan's work is a comment about the decision of the Court of Appeal in Paragon Finance plc v. Nash and Stauton [2001] EWCA Civ 1466. The case sets that a lender's entitlement to vary the interest rate is conditioned by the implied term that the interest rate would not have been settled dishonestly, for un improper purpose, capricious or arbitrarily.

[780] Auby illustrates these contingent claims by asserting that during the expansion of the Welfare State after the World War II, private law experts in France denounced the invasion of public law, such as René Savatier in his book *"Du droit civil au droit public `a travers les personnes, les biens et la responsabilité civile"* (2nd ed., 1950). On the other hand, the recent privatization of public enterprises or the application of competition law by the administrative judge have incited some actors to envisage "the end of public law", such as J. Caillosse. Auby, *supra* note 687 at 21.

[781] In fact, we will see several examples in which the public legal regime has been already applied to private actors.

[782] After all, the application of administrative law to private parties may become mandatory by laws, regulations or contractual provisions.

[783] Mashaw, *supra* note 679 at 136.

[784] Scholars have made a significative effort to try to figure out the future lines behind the logic of Administrative Law. For instance, Lisa Blomgren Bingham, "Next Generation of Administrative Law: Building the Legal Infrastructure for Collaborative Governance," *Wisconsin Law Review* 2010 (2010): 297. Likewise, Alfred C. Jr Aman, "Privatization, Prisons, Democracy, and Human Rights: The Need to Extend the Province of Administrative Law," *Indiana Journal of Global Legal Studies* 12 (2005): 511.

be ideologically disturbing for some scholars[785]. What contracting-out more deeply does is to challenge the conceptual models of accountability we are used to working with[786]. In this sense, Jerry Mashaw makes an effort to "unpack" the usual models of accountability in order to show that much of the anxieties regarding the matter are related to the following misunderstanding: we are focused on what institutions *mean* to do, not on *how* accountable they are[787]. Therefore, we continue to ask what is the nature of the institutions (public or private) to subsequently apply the models we are familiar with (electoral, bureaucratic, social and market models of accountability). According to him, we should rather be more concentrated on answering the questions that render an institution accountable: (i) who is liable or accountable (ii) to whom; (iii) what they are liable to account for; (iv) through what processes accountability is to be assured; (v) by what standards the putatively accountable behaviour is to be judged and (vi) what the potential effects are of finding that those standards have been breached[788].

202. This perspective regarding the use of the accountability models we are familiar with inaugurates what we call the system of accountability *on demand*. We would have to design to a given activity a specific type of accountability model, although it might have been simply subjected to public law. More than that, accountability models would not pre-exist to activities; instead, accountability models would be conceived *along with* each specific sort of activity. The challenge is to think about policies that would include mechanisms to render them concretely accountable, not to rely on accountability regimes that may abstractly support them[789]. Accountability *on demand* would then develop accountability models that fit their respective activities. In fact, transformations of administrative law have already given signs of the need to cope with this accountability *on demand* logic. By using our case

[785] The debate around the principle of supremacy of public interest highlights the seizure between traditional and so-called «modern » administrative scholars in Brazil. Paulo Modesto affirmed that this seizure is still strong and generally derives from their respective interests to ensure power and develop a new perspective for the field.
[786] Mashaw, *supra* note 679 at 135.
[787] *Ibid., 117.*
[788] *Ibid.*
[789] *Ibid., 156.*

studies, we will assess these transformations and put forward the main elements that characterize current associations of public and private parties.

3.2. Unfolding legacies and assessing transformations in Chile, Brazil and Argentina

203. This section will seek to first unfold the legacies of contractual dynamics between the State and the private sector in Chile, Brazil and Argentina. After having explored their legal peculiarities and offered some experiences of public-private partnership contracts in all three countries, we will go further to explicit which of their main characteristics are the actual drivers of the transforming mindset regarding private participation in public governance. Based on our case studies, we will stand for three tied tendencies. Public-private partnerships represent a current attempt (i) to build up a more *balanced* relationship between the State and private actors (ii) in order to improve the *quality* of public services supplied to the population and (iii) to ensure the *rationalization of public expenditure*. At the same time, these tendencies appear as requirements, if the State is to meet the expectations of an increasingly complex society. After all, in most of the cases, public-private partnerships are basically concession contracts that have these goals written in highlighted colours. Consequently, these preeminent goals (balanced relationship between public-private parties, quality of public service and rationalization of public expenditure) are respectively translated into three elements of public-private partnership contracts in these countries: (i) objective sharing of risks, (ii) output-based contractual clauses and (iii) possibility of arbitration.

3.2.1. Unfolding legacies

204. Latin American countries enjoy a long tradition on concession contracts[790]. From the private entitlement of public lands during the colonial time[791], to the building of a network of railways and telecommunications[792] in the first part of the 20th century, the State recurrently relied on private actors to pursue its objectives, especially under the discourse of economic development[793]. After the World War II, however, Latin American States broadly used their assets to expand the provision of public services and actively[794] participate in their economies[795]. Two of the most

[790] In Chile, the first law of concession contracts was enacted on the 2nd September 1835, during the term of President Joaquim Prieto. However, no contract was concluded for a long time because of the lack of potential candidates from the private sector. In 1920, the first tared road of the country was built between Viña del Mar and Valparaiso under the concession model, which demanded the payment of tolls by the users. Zrari, *supra* note 674, at 76. Likewise, in 1930 the government concluded a concession contract with the *Compañía de Teléfonos de Chile*, 80% of the assets of which belonged to the American company ITT. CHRISTIAN BETTINGER, LA GESTION DELEGUEE DES SERVICES PUBLICS DANS LE MONDE: CONCESSION OU BOT 149 (1997).

[791] Enzo Faletto, *Burocracia y Estado En América Latina*, Material De Discusión / Programa FLACSO-Santiago De Chile; 14, 1981, 14.

[792] Before the military dictatorship of 1964 in Brazil, telecommunications were mainly provided through concessions. There were around 1000 companies that worked without coordination and under a very precarious system of supervision (http://www.telebras.com.br/historico.htm).

[793] Indeed, the definition of economic development does not enjoy a consensus. It does not enjoy a consensus because development is not an agnostic notion, but highly based on political preferences. In this sense, there are different tools to "measure" development, according to the definition one has in mind. For instance, gross domestic product, human development index or even happiness, in France, would be tools to measure different perspectives of development. In this work, we use an eclectic position about development, by which concession contracts have been articulated in different historical moments as a tool to foster infrastructure in Latin America. The observations about the plurality of definitions regarding development are resulting notes of the lecture of Professor David Kennedy, given on the 9th September 2010, on the basis of his course Law and Economic Development at Harvard Law School.

[794] We share the idea according to which the State always plays a significant role in the economy. The difference we may find is whether it is an active or passive role, but it is not related to the intensity of its impact. For instance, a State that does not regulate a specific economic issue may provoke a great impact on economy by passively preventing private actors from looking for compensation, when they are hurt by a larger liberty ascribed to the others. The inexistence of a regulation is therefore an intervention in economic matters.

[795] Both right and left wing governments invested in state-owned enterprises, although their justifications for such a policy may vary according to the narrator. There is a debate regarding this variation. On the one hand, the military regime in Brazil would have launched the era « Bras » with the creation of several state-owned enterprises, such as Telebras, Nuclebras and Siderbras, in order to invest in heavy industry and incite development of the national private sector. Barroso, *supra* note 15 at 61. On the other hand, the civil government of Salvador Allende in Chile would have nationalized 259 private firms for ideological reasons, in order to revert the power of the traditional oligarchies of the country. *Ibid., 112.*

noticeable consequences were the creation of several state-owned enterprises[796][797] and the implementation of national plans of economic development[798]. In this sense, the traditional concession contracts were somewhat put apart and administrative contracts became mainly restricted to public works and public procurement[799].

205. In the last twenty years, nevertheless, the concession tradition has again taken place along with the massive process of privatization[800], the break of several State monopolies[801] and the dramatic insufficiency of public financial resources to invest in highly expensive infrastructure projects[802][803]. Following this, these countries have developed in the last few years the aforementioned midway proposition of

[796] There was, however, a first wave of state-owned enterprises in some Latin American countries before the World War II. For example, under the political leadership of Lazaro Cardenas, in Mexico, and Getúlio Vargas, in Brazil, a program of nationalization was implemented towards oil, electricity and steel. Medeiros, *supra* note 33 at 111–112.

[797] In Brazil, the Decree-law 200 of 1967 created « empresas públicas », « sociedades de economia mista », « autarquias » and « fundações ». Likewise, in Argentina, several types of "empresas públicas" were created in order to enable the State to deliver services that used to be object of concession of public services. See Augustín Gordillo, *Clasificación de los contratos administrativos*, *in* TRATADO DE DERECHO ADMINISTRATIVO , 8 (2009).

[798] During the Import Substitution Industrialization period the State played an active role to foster economic development in Latin America, by for instance raising taxes for importations in order to protect national industries from international competition. This active role of the State is also perceived by the attempt to apply a rational economic development planning. Therefore, we saw the emergence of Ministries of Economic Planning, which were in charge of translating into policies this normative active role of the State regarding economic matters.

[799] Gordillo, *supra* note 797 at 9.

[800] Latin American countries underwent the largest process of privatization among developing countries, being responsible for 40% of the proceeds outside Western Europe and United States. Medeiros, *supra* note 796 at 109.

[801] For instance, monopolies were eliminated or relaxed on the oil, electricity and telecommunications industries. It is interesting to note though that in Chile, a country that embraced the privatization wave even before the United Kingdom, the State kept the exploitation of copper. Because of this significant mineral resource, *"the share of state-owned enterprise in economic activity was higher than in Brazil"*. Medeiros, *supra* note 796, at 113. The state-owned enterprise Codelco *(Corporación Nacional del Cobre de Chile,*) is responsible for 11% of the global production, which ensured the gross amount of 1.962 million dollars in the first months of 2011. (http://www.codelco.cl/prontus_codelco/site/edic/base/port/nosotros.html)

[802] To illustrate this point, the Argentinean State held in 1989 a debt of 85% of its domestic gross product (GDP), which prevented the government from envisaging new investments on its own. Augustin Gordillo, "Legalidad y urgencia en el derecho administrativo," in *Después de la reforma de Estado* (Argentina, 1998), 7.

[803] Not only did the fiscal debt push the need to use concession contracts, but also it affected the ability of the Argentinean State to guarantee the enforcement of the exorbitant clauses of such contracts. Indeed, during the renegotiations of the public debt, the creditor countries enjoyed a considerable leverage to demand benefits to their national enterprises that figured as concessionaires. This means that the exorbitant clauses that constitute the legal regime of concession contracts have been attenuated by the economic power of the private contractor. Gordillo, *supra* note 797 at 20.

public-private partnerships, that is, "*asociaciones publico privadas*" and "*parcerias publico-privadas*". This midway proposition introduces more flexibility in the allocation of risks between the public and private parties and emphasizes the output-based character of these contracts.

206. The story is not that linear though[804]. If all three countries seem to assimilate a *tailoring*[805] rationality for public action techniques[806], there are variations of legal regimes and institutional frameworks under which these techniques have been implemented. Moreover, public-private partnerships are far from suppressing the existence of former modalities of the general spectrum[807] of public contracts. As we have aforementioned, the tides of reforms leave legacies, which means that public-private partnerships are embedded within a multifaceted framework of contractual

[804] For example, Argentina is currently undergoing some counterpart experiences by bringing the State back to the scenario as a central player for the provision of public services. The concession contract of water provision with the company "*Aguas Argentinas SA"* was cancelled by the decree-law 303 of 2006. According to the decree-law 304 of 2006, the provision of water service is nowadays ascribed to "*Agua y Saneamientos Argentinos"*. *Ibid., 7.* Likewise, the Argentine government, under the "*expropriación de utilidad pública*", nationalized in April 2012 the oil enterprise YPF, which was part of a Spanish multinational Repsol.

[805] This expression emerged from a discussion with Eduardo Jordão in October 2011. He used the term "tailoring" to illustrate the current plural arrangements we can make to conclude a public contract. We will use this expression in an even broader sense. We argue that along with the process of State Reform, Public Administration has expanded its amalgam of tools to implement public policies. The idea is to *tailor* each of the government projects to the most adequate instruments available, by using the contract model to allocate risks and define priorities according to the specific circumstances of the project. In this sense, each policy would correspond to a tailored action, regardless of type of its titular being public or private.

[806] Public-private partnership contracts are understood in this work as a *technique,* by following the logic of "instrumentation of public action". Lascoumes and Le Gales define this logic as a set of problems and questions that come up during the selective process of the available tools that materialise and implement governmental action. This logic does not overlook, however, that no instrument is limited to a pure technical rationality. Indeed, the authors argue that each instrument has its own history and its features cannot be dissociated from its goals. LASCOUMES AND LE GALÈS, *supra* note 703 at 12–15.

[807] Prof. Gordillo explains that different types of legal regimes to regulate public contracts coexist in Argentina. The variation of this spectrum would be based on the number and content of exorbitant provisions. For instance, in contracts of monopoly and exclusive exploration of public services, which became usual after the laws 23.696 and 23.697 of 1989, a hierarchical relation between Administration and private concessionaires prevails. The reason why these contracts would be more susceptible to Administration's unilateral decisions and exorbitant provisions would be the need to protect public interest against the management of the private party. In turn, in the recurrent contracts during the second half of the XX century, an intermediate presence of exorbitant provisions attenuates this hierarchical relation. Finally, in contracts such as lease contracts, one could envisage an almost private contract, as the Administration deals with the particular party under a rather horizontal relationship. Gordillo, *supra* note 797 at 17.

models available to the Administration. Public-private partnerships do not fall alone, but represent one type among others of public contracts. Therefore, some clarifications regarding their legal peculiarities and flashes of concrete experiences sound necessary.

207. The Chilean case has been generally[808][809] praised for providing successful experiences[810], given the revolution that the infrastructure sector has undergone in this country in terms of volume of private capital invested in public projects[811]. Since 1994, the implementation of twenty-six contracts on highways, ten airports, ten seaports[812] and fourteen other projects are just some examples of the powerful public-private governance that has taken place in this country[813]. Likewise, the Minister of Public Works has celebrated the fact that forty-eight contracts on infrastructure have been concluded for the period between 2008 and 2012, whereas in 1995 the deficit of public transport investment was around 15% of the domestic gross product[814]. As in other case studies, the motivation behind the promotion of public-private partnerships was the need to render the execution of this infrastructure revolution viable, without compromising the contemporary commitment to a strict fiscal policy.

208. Yet, the mechanisms of this revolution look less revolutionary though. First, the new paradigm of infrastructure projects has developed under a process of learning from practice, or even learning from punctual mistakes. For instance, the

[808] It is important to mention, however, that some public-private partnership contracts encountered difficulties at the implementation level. Besides, the constant, not to say abusive, renegotiations of the provisions of public contracts have pushed the government to frame new regulatory measures. These new regulatory measures would have the goal to limit the scope and frequency of renegotiations.
[809] The results achieved in Chile sound even more enthusiastic once one compares them with the situation of other Latin American countries. Latin America should invest 4% to 6% of its Gross Domestic Product during the next twenty years in order to accomplish the desirable level of infrastructure quality. ROBERTO DROMI, LA REVOLUCION DEL DESARROLLO - INOVACIONES EN LA GESTION PUBLICA 222 (2007).
[810] Rosenthal Coutinho, *supra* note 440.
[811] From 1992 to 2005, forty-nine contracts were concluded through the investment of 5 billion dollars. Zrari, *supra* note 674 at 81.
[812] A specific law was enacted to regulate public-private partnerships of seaports in 1997.
[813] Information gathered from the presentation given by R. Fischer, on the February 17, 2011.
[814] Juan Eduardo Figueroa Valdés, *El Arbitraje en los Contratos de Concesión de Obras Públicas en Chile. Incorporación de los "Disputes Boards" o 'Paneles Técnicos o de Expertos*, REVISTA BRASILEIRA DE ARBITRAGEM 79, 80.

first public-private partnership contract on highways (*Túnel El Melón*)[815] was characterized by imposing a high tariff to the users. It turned out that the users started using an alternative highway in order to avoid the payment of such high tariff fixed under the public-private partnership contract. As a result, the private party was obliged to reduce the tariff and renegotiate the contract with the government. The private party needed to compensate the prejudices derived from this tariff revision by easing other of its contractual obligations, such as the payment to the State for the use of the existing infrastructure facilities[816]. Following the aforementioned learning-process from practice, one of the current conditions to conclude a public-private partnership contract in Chile is to choose the lowest tariff among the spectrum fixed by the Ministry of Public Works.

209. Secondly, public-private partnerships in Chile are actually concession contracts, which are not a new instrument in Administrative Law, as we have observed above. The tradition of concession contracts was revisited to enact a new law in 1991[817]. However, the former model did not undergo radical changes because it was perceived as quite efficient. Indeed, the lack of radical changes may be illustrated by the political consensus around the need to reinforce the role of the private sector in the development of infrastructure projects. This consensus led to the approval of this new law by unanimity, being amended only regarding the possibility of private initiatives to propose projects[818]. At the end of the day, the differences between traditional concession contracts and recent "*asociaciones publico-privadas*" consist mainly on the fact that the object of the latter (i) demands high initial investments to the private party, (ii) allows private initiatives for projects, (iii) enhances the managerial autonomy of the concessionaire and (iv) introduces alternative mechanisms of dispute resolution.

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[815] The authorization to operate the tunnel was definitely granted by the Ministry of Public Work in 1996 to the Chilean company Endesa and the concession contract would have a 10 years length.
[816] In order to consult a specific work on the impact of concession contracts on different actors (society, government, concessionaire and users), which uses the Melón Case as an illustrative case, see Francisco Ghisolfo, *La evaluación socioeconómica de concesiones de infraestructura de transportes: Caso Túnel El Melón – Chile*, Serie Recursos Naturales y Infraestructura (CEPAL, 2001).
[817] Law of Concessions of Public Work DFL MOF N. 164.
[818] Zrari, *supra* note 674 at 79.

210. Moreover, this revolution in the infrastructure sector has not swiped the former public administration organization, but, on the contrary, has been supported by a solid institutional background for the conclusion and implementation of these contracts[819]. Indeed, the Ministry of Public Works (*Ministerio de Obras Publicas* - MOP)[820] has been reinforced as the key administrative organ for the preparation and conclusion of contracts through decrees, which should also be signed by the Exchequer Ministry[821]. For instance, a concession contract may occur through two initiative channels: (i) a proposition from citizens or interested candidate companies or (ii) a recommendation of the Ministry of Public Works[822]. In any case, the biding procedure is always required. Furthermore, within the Ministry there is a department ("*Coordinación General de Concesiones"*), which functions as a regulatory agency[823]. This department is entitled to execute biding procedures, coordinate projects and supervise the implementation of the contracts. Finally, one of the innovations of the law 20.410 of 2010 was the creation of an interdisciplinary council[824] within the Ministry of Public Works. This interdisciplinary council has the ambition to provide a transversal perspective of the development of concession contracts, by promoting coordination among the other Ministries engaged in these infrastructure projects[825].

[819] Rosenthal Coutinho, *supra* note 810 at 136.
[820] In Brazil, the Decree 5.385 of 2005 created a Management Organ for Public-Private Partnerships, which will (i) define which activities are priorities for this contractual model, (ii) supervise the conclusion of the contracts and (iii) authorize the competitive bidding procedure. This organ will count on the participation of members of the Planning Ministry, the Exchequer Ministry and the Secretary of the Presidency. Odete Medauar, *Direito Administrativo Moderno*, 2008, 329. However, this organ is far from enjoying the leading role of the Ministry of Public Works in Chile.
[821] See article 8 of the Decree 900 of 1996.
[822] See Article 2 of the Decree 900 of 1996.
[823] Professor Fischer criticizes the lack of an independent regulatory organ to oversight contracts, although he asserts that general solid institutional apparatus backs the Chilean Administration. Fischer *supra* note 813.
[824] Article 1 of the Law 20.410 of 2010.
[825] Jose-Luis Benavides and Tarcila Reis, "International Arbitration and Public Contracts in Latin America," in *International Arbitration and Public Contracts*, Mathias Audit (Paris: Bruylant, 2011).

211. In Brazil[826][827], the first initiatives regarding public-private partnerships came up from the federal states[828], which engaged in elaborating new contractual mechanisms to encourage economic development. The formula was to have no formulas. Instead, the attempt was to balance the elements on the table: (i) the public financing resources available, (ii) the economic attractiveness of each activity and (iii) the technical capacity of the public and private parties to execute a determined project. The State needed to be strategic to allocate its scant resources. For example, if it sounded difficult to incite the private sector to lonely execute activities in economically unattractive areas, the scarcity of public resources has driven the State to search for private investments in the case of economically attractive activities. Following this, eight out of the twenty-six Brazilian federal states enacted their own laws regarding public-private partnerships. However, not many contracts have been concluded and implemented. The exceptions would be Sao Paulo, Minas Gerais and Bahia, which have implemented important initiatives, such as the expansion of the

[826] For an overview of the main characteristics of public-private partnerships in Brazil, see Carlos Ari Sundfeld, "Guia Jurídico Da Parceiras Publico-Privadas," in *Parcerias Publico-Privadas*, Carlos Ari Sundfeld, 2005.

[827] As we mentioned in the note 680, depending on the national context, several modes of public-private associations may not be considered public-private partnerships from the legal technical perspective. In Brazil, the management contracts ("*contratos de gestão"*) and the conventions ("*convênios*") that a public body may conclude with a private company do not belong to the legal definition of "*parcerias publico-privadas*" established in the law 11.074 of 2004. This law restricted the meaning of such partnerships to special types of concession contracts, while the law 9.637 of 1998 defines the management contracts as an instrument concluded between a public entity and a social organization, the activities of which are focused on education, research, technological development and protection of the environment, the culture and welfare (articles 1 and 5 of the law). The goal of such a management contract is to establish standards of performance and execute a constant evaluation of its implementation, in order to incite and supervise social activities. Likewise, the law 9.790 of 1999 created the legal instrument for associations between public entities and civil society organizations for the public interest (OSCIPs – *Organização da Sociedade Civil para o Interesse Publico*). This legal instrument is called "*termo de parceria*" and articulates a deeper cooperation between public entities and such organizations in order to achieve public interest goals, such as social and economic development, voluntary activities, legal assistance and promotion of human rights and citizenships. Given the "public interest" goals that both parties have, Carvalho Filho points out that this is the legal instrument to represent public-private partnerships. He argues that the partnerships established in the law 11.074 are not accurate because in concession contracts the private party does not only pursue the public interest, but also profits. CARVALHO FILHO, *supra* note 732 at 261. In this work, however, we will focus on public-private partnerships prescribed in the law 11.074, although we recognize that there have always been several other forms of associations between the public and private spheres.

[828] Minas Gerais was the first federal state to enact a law to regulate public-private partnerships (law 14.868 of 2003). The state level government counts on a specific organ ("*Unidade PPP*") located within the Secretary of Economic Development to provide technical support for the projects. (http://www.ppp.mg.gov.br/unidadeppp).

subway system in Sao Paulo and the Suburb Hospital (*Hospital do Subúrbio*) in Bahia[829].

212. The federal government was also concerned about this balance between (i) the amount of public financial resources available, (ii) the economic attractiveness of each activity and (iii) the technical capacity of the public and private parties to execute a determined project. As a result, at the end of 2004, the national level[830] law 11.074 was promulgated to provide a legal framework and solve the doubts regarding such contracts. The law makes clear[831] that public-private partnerships are actually *particular types of* concession contracts and, therefore, subsidiarily regulated by the general law of concessions[832].

213. These *particular concession contracts* or public-private partnerships may be of two kinds[833]: (a) sponsored concession contracts[834] and (b) administrative concession contracts[835]. The sponsored concession contracts (a) are concession contracts of public services or public works[836] in which not only do the users

[829] In Sao Paulo, the expansion of the subway (Yellow Line) has been executed through a public-private partnership contract, in which the private party will have 30 years to compensate its investments on the purchase of new trains and the implementation of operational systems. (http://www.metro.sp.gov.br/expansao/sumario/ppp/ppp.shtml). In Salvador, the capital of Bahia, the Suburb Hospital is the first public-private partnership initiative in the Brazilian health system. The contract is an administrative concession, under which the private party is obliged to provide furnitures and machines and operate the hospital for ten years. (http://www.sefaz.ba.gov.br/administracao/ppp/projeto_hospitalsuburbio.htm).

[830] The Constitutional distribution of legislative competencies (article 22, XXVII of the Federal Constitution) establishes that this national level law establishes general rules applicable to all the federal entities (the Federal Government, the Federal States, the Municipalities and the Indirect Administration) and specific rules, which are only applicable to the Federal Government. In the case of these specific rules, the sub-national legislative levels can enact their own rules, as we have seen above at the note 828.

[831] However, the project of law n. º 2.546 proposed by the Executive Power did not mention the type of contract that the partnerships would correspond. CARVALHO FILHO, *supra* note 732 at 459.

[832] The Law 8.987 of 1995 is subsidiarily applicable to the sponsored concession contracts. Nevertheless, regarding the administrative concession contracts, only some provisions of the laws 8.987 of 1995 and 9.074 of 1995 will be subsidiarily applicable (articles 21, 23, 25 and 27 to 39, according to the article 3 of the law 11.079 of 2004).

[833] See article 1 of the law 11.079 of 2004.

[834] In Portuguese, the sponsored concession contract is called «*concessão patrocinada*».

[835] In Portuguese, the administrative concession contract is called «*concessão administrativa*».

[836] Professor Carvalho Filho observes that it is not accurate to talk about *concession contracts of public works*. He affiliates himself to the part of the doctrine that affirms that there only can be concessions of public services, which means that the object of concession contracts should always be an activity, not a

remunerate the private party by paying tariffs, but also the Administration pays a consideration[837]. There are therefore two sorts of remuneration paid to the private party in the sponsored concession contracts: tariffs paid by the users and a consideration paid by the Administration. In turn, concerning the administrative concessions (b), the Administration is exclusively responsible for the payment of consideration to the private party. The reason for the exclusive responsibility of the Administration for the payment of the private party is that in administrative concession contracts the private party provides services *to the direct or indirect benefit of the Administration*[838]. It is the Administration the direct or indirect beneficiary of the services.

214. Moving to Argentina, the history of public contracts is notably impregnated by the perception that the State is not a trustful creditor. This perception derives from the recurrent delays the State incurs to pay private parties for the provision of services or execution of public works. The delays became so recurrent that the Supreme Court of Argentina admitted the suspension of public services by the private provider if the public party had not complied with its obligations. Indeed, the decision *Sade*[839] accepted the application of the principle "*exception non adimpleti contractus*[840]", which is usually forbidden for public contracts due to the primacy of

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thing. Therefore, public works cannot be object of concession contracts, but only of administrative contracts. CARVALHO FILHO, *supra* note 732 at 464.

[837] In 1995, the Congress tried to insert the sponsored concession contracts into the general law of concession (law 9.987 of 1995), but the President Fernando Henrique Cardoso did not sanction this provision of the project and motivated his refutation by arguing that the consideration payed by the Administration would incite an operational inefficiency of the concessionaires and promote the risk of public expenditure on subsidies. Gustavo Binenbojm, *As Parcerias Público-Privadas e a Constituição*, REVISTA ELETRÔNICA DE DIREITO ADMINISTRATIVO ECONÔMICO, 3 (2005).

[838] It is usual to question the difference between administrative concession contracts and general administrative contracts of services, given that in both cases the Administration is the beneficiary of services provided by the private party. The difference between administrative concession contracts and general administrative contracts of services is that in the former the private party must beforehand invest in the service to be provided. For example, the party must improve the facilities or buy equipments of the hospital, by building, expanding or renovating it, before starting to operate it.

[839] Gordillo, *supra* note 684 at 2.

[840] This principle means that, as long as a contracting part does not comply with his obligations, the other party can temporarily suspend the execution of the contract. This principle is not applicable to public contracts in Chile and Brazil, and it also used to be forbidden in public contracts in Argentina. However, after the decision *Sage,* this understanding has changed and public services may be suspended

the principle of continuity of public services. Besides, the phenomenon of hyperinflation rendered the situation more complicated because of the indexation of public debts vis-à-vis contracted parties. As a result, during the 90s, the contracts of public works were put aside and the government started using concession contracts and privatization of state-owned enterprises[841]. This government's mood was formalized by the enactment of the law of State Reform (*Ley de la Reforma del Estado* 23.696[842] of 1989), which eventually became known[843] the "Ley Dromi[844]". Moreover, the Argentinean legal system has provided a permanent state of emergency, which is constituted by several laws that regulate exceptional powers. This continuous emergency situation has undermined the credibility of the institutions and allowed a recurrent modification of contracts. In Argentina, the ordinary situation is to be regulated by exceptional norms[845]. The notion of emergency, mainly[846] illustrated in the cases Peralta[847] and Carlos Antônio Smiths v. Banco Galícia[848], has become

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given the systematic delays of the public entity. Likewise, this was the thesis defended in the case law "Cinplast I.A.P.S.A. c/EnTel s/ordinario" Fallos, 316:212 (1993).

[841] The case law Rodríguez illustrates the privatization of airports. The executive power enacted two decrees to privatize two airports. Following this, a group of deputies petitioned a « *recurso de amparo* », claiming that the government had intervened in the competencies of the Congress. The judge suspended the effects of the decree. However, Rodríguez, who is the chief of staff, asked the Supreme Court to declare the incompetence of judges to decide such a matter. According to him, the Congress was the competent to evaluate the decrees. The Court decided that judges could not assess decrees of "necesidad y urgencia" because it did not provoke to legislators a concrete damage. Besides, the judicial power is not the competent to decide about questions attributed to the political spheres. MONTSERRAT FONT, *supra* note 55 at 36.

[842] This is the first law to regulate concession contracts of *public services* in Argentina, although there was already the law for concession of *public works* 17.520 of 1967.

[843] Rodolfo C. Barra, *La concesión de obra pública en la Ley de Reforma del Estado*, REVISTA ARGENTINA DEL RÉGIMEN DE LA ADMINISTRACIÓN PUBLICA 9, 13 (1990).

[844] Roberto Dromi is a professor of Administrative Law in Argentina, who directly participated to the formulation and implementation of State Reform. He also published in 1997 the book «*Reforma del Estado*» with the former president Carlos Menem.

[845] Juan Carlos Cassagne, "Los Contratos Públicos y la Ley de Emergencia Pública y Reforma del Régimen Cambiario," *Revista de Derecho Publico* 1 (2002): 115.

[846] There are many other cases law, such as Video Club Dreams (1995), Verrochi (1999).

[847] The case Peralta illustrates this notion of emergency in Argentina. In Peralta (1990), the executive power enacted a decree to handle an emergency situation, establishing that the deposits of more than $1.000 would be devolved through bonus. As a result, Peralta petitioned a « *acción de amparo* » against the State and the Central Bank. However, the Court recognized the validity of the decrees when the emergencial situation (i) has an impact on the economic and social order, (ii) needs a rapid solution, (iii) lasts a determined delay. This case law was very important to justify other decrees and the reform of 1994. MONTSERRAT FONT, *supra* note 55 at 35.

[848] This case is about the « corralito financeiro » (decree 1570/2001), which prohibited the citizen from withdrawing more than U$ 250 dollars per week. A priori, this decree violated the article 17 of the National Constitution and the law 25.466. However, the law of Political Emergency and Reform of the

recurrent and taken place different scenarios[849]. As a result, some scholars have ascribed to emergency situations the status of "*fuente del Derecho Administrativo*", as otherwise several norms would have to be declared unconstitutional[850].

215. Then again, it turned out that neither was the amount of tariffs enough to cover private investments, nor did the State enjoy credibility to raise more capital from financial institutions and repay the private parties within a longer term[851]. This scarcity of capital led to an overturn of the logic behind the concession contractual model. The former concession contractual model traditionally comprised the idea according to which the users would be committed to pay a tariff as a counterpart of the provision of services. The overturn of this logic allowed the concessionaire to invest only the minimum amount of money to create a flux of capital, that is, the construction of the cash desks or "*casillas de cobro*"[852]. Only after the payment of tariffs starts, the concessionaire is obliged to execute the object of the concession, such as public works in highways. The law 23.696 introduced this possibility, modifying the law of concession of public works, which was actually the first law to regulate this type of contract in Argentina.

216. The case of the line *Belgrano Cargas* is illustrative regarding the circumstances of concession contracts on railways in Argentina. In 1999, the State stopped managing this railway and attributed it to the control of the labour union *"Unión Ferroviaria"*. However, the results were disappointing. If in 1991 its traffic used to carry out 2.3 million tonnages, in 2004 it was of 0.8 million tonnages, in addition to the precarious conditions of the facilities. As a result, the federal

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Cambiario Regime (law 25.561) confirmed the decree 1570/2001. In this case, the court condemned the system of « corralito », arguing that (i) the executive power abused of its delegation power; (ii) the decree could violate the property right and (iii) the system of « corralito » is not reasonable because it comprises a measure that is not proportional with its goal. *Ibid., 38.*

[849] The legal emergency has become « *el rayon que no cesa* ». Jorge Barraguirre, "Derecho y Emergencia," *Revista de De* 1 (2002): 21.

[850] MONTSERRAT FONT, *supra* note 55 at 39.

[851] After all, one of the main characteristics of concession contracts is its long length.

[852] Gordillo explains the evolution and reverse of the logic behind concession contracts in Argentina in the chapter Augustín Gordillo, *Concesión de Obras Publicas y Privatización*, *in* DESPUÉS DE LA REFORMA DE ESTADO , 5 (1998).

government promoted an open competitive bidding in 2005, but no enterprise presented itself as a potential candidate. Following this, the decree 446 of 2006 declared the emergency of the "*Ferrocarril Belgrano Cargas"* and its assets were acquired by the Enterprise of Emergence Management (*Sociedade Operadora de Emergencia*), which was constituted by three Argentinean companies and one Chinese[853]. On the same path, there are seventy-six airports in Argentina, thirty-six of which are under concession contracts, but thirty-eight terminals are not used at all, which renders the possibilities of flights quite restricted. Hence, it obliges the population to usually pass through the Airport of Buenos Aires (*Aeroparque Metropolitano de la Ciudad de Buenos Aires*) in order to make connexions for virtually all cities, even the most important ones[854].

217. In the last years, however, several private companies have presented projects for the building or expansion of highways, which are currently being analysed. For instance, there have been the *Autopista Pilar-Pergamino* (RN 8), the *Autovias Lujan-Carlos Casares* (RN 5), *Cordoba-Rio Cuarto* (RN 36) and *Rosario-Rafaela* (RN 34)[855]. Moreover, since 1995 the government has tried to incite private financial participation in projects of infrastructure, by creating trust funds. Since 2001, the fund-raising capacity of the State before multilateral financial institutions and the private sector in general has become very weak. As a result, several funds at the national level were created: *Fideicomiso de Asistencia al Fondo Fiduciario Federal de Infraestructura Regional*, *Fondo Fiduciario Federal de Infraestructura Regional and Fideicomiso de Infraestructura Hídrica.* These trust funds are legally backed by a law, which establishes obligations on transparency and on the specific use of the fund to a pre-defined object. Besides, the Administration is supposed to inform the Congress about the implementation of the trust funds, through the General Audit (*Auditoria General de la Nación*)[856].

[853] DROMI, *supra* note 809 at 229.
[854] *Ibid., 247.*
[855] *Ibid., 237.*
[856] However, the doctrine has claimed that these obligations have not been respected. *Ibid., 266.*

3.2.2. Assessing Transformations

218. In all three cases, however, legacies and innovations seem to go hand-with-hand. After all, public-private partnerships are basically concession contracts that have new goals written in highlighted colours. The contractual elements that express these new goals are the following: (i) output-based contracts, (ii) objective sharing of risks and (iii) possibility of arbitration.

(i) Output-based contracts

219. The rational behind the legal framework regarding public-private partnerships is different from the one that regulates traditional public contracts. The role of the Administration varies depending on the type of contract under scope. When the Administration is dealing with a public-private partnership contract, it is committed to assess the extent to which the private party achieved pre-determined goals. In the case of traditional administrative contracts, the Administration is traditionally concentrated on the legal correctness.

220. In Brazil, for instance, this result-oriented characteristic of public-private partnership contracts has an explicit impact on the payment of different public considerations. The innovation of the law 11.079 of 2004 in this matter is to condition the remuneration of contractors to their performance. Contractors are economically incited to accomplish the performance targets that the contract stipulates[857]. That is, the Administration will remunerate contractors according to their performance: the amount of considerations *varies* as soon as contractors do not accomplish the objectives beforehand prescribed in the contract[858].

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[857] See article 6 of the law 11.079 of 2004.

[858] There is also the so-called mechanism of « *desconto de reequilíbrio* », according to which the amount of the tariff may be reduced if the concessionary has not achieved the performance indicators. This discount is proportional to the performance of the concessionary and is carried out during the annual readjustment of the tariff. Maurício Portugal Ribeiro, *Concessões e PPPs - Melhores Práticas em Licitações e Contratos* (São Paulo: Atlas, 2011), 77.

221. Secondly, the payment of considerations is only due once the contracted services have already been put available to the population. The purpose of this legal obligation[859] is to incite the private party to provide the services as soon as possible and therefore avoid the delays that usually happen in the implementation of traditional concession contracts. In this sense, whenever the payment of the consideration is done *before* the provision of services starts, one might claim the illegality of the payment[860]. Moreover, public-private partnership contracts should be implemented within a minimum delay of five years, in order to allow the Administration and the private parties to dilute large investments in a long period of time[861]. Following this, although it is true that in Brazil the State is generally more able to have access to credits under lower interest rates than private parties, it would still be more efficient to use private capital to finance these large investments and then dilute them in the long term[862][863].

222. Another important innovation concerning the output-based characteristic is that the private party enjoys a greater autonomy to implement public-private partnership contracts. On the one hand, the provisions of these contracts will objectively define the criteria to evaluate the performance of private parties[864]. On the other hand, private parties will enjoy a significative innovative power to decide *how* they will implement the contract and *which* management strategy they will employ to comply with the prescribed targets. Furthermore, it is no longer the Administration who elaborates the project and afterwards selects the candidate who is able to execute it in the best and cheapest way. The elaboration of the project has been also delegated, in addition to the provision of the service. As a result, the fact that competition among private parties starts from the quality and feasibility of the project increases the

[859] See article 7 of the law 11.079 of 2004.
[860] This is called « *improbidade administrativa* » in Brazilian law and is regulated by the law 8.429 of 1992. CARVALHO FILHO, *supra* note 732 at 471. It is important to notice, on the other hand, the different perspective of the subject in Argentina. See above the explanation of the issue on the anticipated payment of "*peaje*" by Argentinean users.
[861] Article 2, §4, II of the law 11.079 of 2004.
[862] Marcos Barbosa Pinto, *A Função Econômica das PPP*, REVISTA ELETRÔNICA DE DIREITO ADMINISTRATIVO ECONÔMICO (2005).
[863] On the other hand, the lately scarcity of credit in the market has made the government change the law 11.079 of 2004. The law 12.766 of 2012 allows the public part to help the private part with an initial transfer of resources, sharing the responsibility to render the investments viable.
[864] See article 5, VII, of the law 11.079 of 2004.

efficiency of the offers. This competition around the project increases the efficiency of the offers because private parties are no longer limited to the expertise applied by the Administration. On the contrary, by being responsible for the elaboration of the project, private parties are able to use their expertise to combine two goals: the maximization of profits and the fulfilment of the quality targets required by the Administration. The Administration will benefit from the expertise of the private sector, as well as the private sector will benefit from the autonomy to elaborate the project by using less costly materials and operational mechanisms[865]. As a result, public-private partnership contracts introduce an important transformation in the logic of concession contracts[866]: from the idea that the Administration was responsible for the organization of the public service[867] to the autonomy of the private party to achieve the pre-fixed goals in a more efficient way.

(ii) Sharing risks

223. Another central characteristic of public-private partnership contracts is that both public and private parties should objectively share the risks of the contract in order to incite cooperation. The legal norms that regulate the subject in Argentina and Brazil explicitly establish that both parties should objectively *share the risks* of the contract[868]. Beyond that, public and private parties will decide the allocation of these risks in a rather flexible way, as even fortuity case, major force, extraordinary

[865] Barbosa Pinto, *supra* note 862.
[866] It has also to do with the object of the contract, which cannot be exclusively the provision of labour force, equipments or the execution of a public work. If the contract is based only on one of these objects, this will be a simple contract of services, purchases or public works, which is regulated by the law 8.666 of 1993, according to the article 2, §4, III of the law 11.079 of 2004.
[867] The responsibility of the Administration for the organization of public services can be perceived in Chile, Brazil and Argentina by the principle of mutability of the concession contract. This principle of «mutabilidad del contrato» means that the Administration is able to unilaterally change provisions once the contract has been concluded, in order to ensure the adequate delivery of public service, according to the social and economic circumstances. This principle is still applied to general concession contracts and demonstrates the remaining influence of French Administrative law in these three countries. In France, this principle was consolidated by two decisions of the State Council: (i) Arrêt Compagnie Française des tramways, on the 11th March of 1910 and (ii) Arrêt Société d'éclairage de Poissy, on the 8th February of 1918.
[868] See article 4, VI, of the law 11.079 of 2004 (Brazil) and the consideration of the Decree 967 of 2005 (Argentina).

economic fact and *factum prince* may be supported by the two parties[869]. As a result, the idea is that there is no fixed allocation of risks predicted by law, but that both public and private parties may negotiate it. The distribution of risks is not fixed beforehand by law, but arranged according to the peculiarities of the contract to be concluded. Therefore, this logic sounds hopeful to attenuate the longstanding Administration's dilemma between predictability of public action and flexibility of contractual models[870].

224. The idea is to allocate the burden of risks to the party that is more able to support it, with lower prejudices, according to its capacity to raise low cost capital and manage debts in the market. For instance, the risk of unilateral alteration of the contract, on the basis of the public interest, seems to be more easily managed by the State. Likewise, the article 55, II, "d" of the law 8.666 of 1993 has been interpreted in the sense that the risks of extraordinary economic fact or fortuitous case should be supported by the public entity[871]. As a result, one would accomplish the economic function of the contract, by distributing expenditure according to this criterion[872].

225. In Brazil, the joint liability of the parties reinforces the partnership logic highlighted in the allocation of risks[873]. The article 16 of the law 11.079 of 2004 prescribes the creation of a specific fund to the payment of pecuniary obligations due by public entities ("*Fundo Garantidor de Parcerias"*). However, the creation of such a fund provoked a debate about its constitutional and legal accommodation regarding the Brazilian legal order. First, the article 165, §9, of the Federal Constitution prescribes

[869] Marcos Barbosa Pinto, *Repartições de Riscos nas Parcerias Público-Privadas*, 13 REVISTA DO BNDES 155–182, 162 (2006).
[870] The Brazilian Constitution prescribes the principle of maintenance of financial-economic equilibrium of the contracts (art. 37). Therefore, although the law does not define how the risks should be allocated to achieve an economic equilibrium, it is necessary that the equilibrium established by the parts be ensured during the implementation of the contracts. *Ibid., 163.*
[871] Barbosa Pinto, *supra* note 869.
[872] In the United Kingdom, it has been calculated that 60% of the savings of the public-private partnership contracts derive from this rational behind the allocation of risks. Barbosa Pinto, *supra* note 869 at 150.
[873] The law 11.079 of 2004 prescribed a larger range of guarantees for the private part, in case the Administration does not comply with its pecuniary obligations. The article 8 of the law establishes that special funds, international organizations and insurances are some possibilities to ensure these obligations.

that the establishment and management of funds need to be backed by a special law ("*Lei Complementar"*), which depends on the approval of an absolute majority of the legislators. Second, the payment of pecuniary debts with such a fund would violate the system of payments of public debts ("*precatórios*"), which is regulated by the article 100 of the Federal Constitution. Finally, the article 71 of the law 4.320 of 1964 forbids that funds figurate as guarantees for pecuniary debts[874].

226. In order to overcome these obstacles, the doctrine[875] has pointed out that (i) the State is able to constrain a public good to serve as a guarantee of contracts; (ii) the guarantee fund could be constituted as a private entity, on the basis of the article 173, § 1, II, of the Federal Constitution[876], (iii) the constitutional provision is concerned about general norms about funds, not preventing the creation of specific funds and (iv) what the law of 1964 forbids is the creation of funds to guarantee general objects. In the case of guarantee fund, it is tagged to the execution of debts derived from public-private partnerships[877]. Beyond that, the law 12.409 of 2011 has regulated the guarantee fund, by ascribing to it a private entity nature and separating its assets from the shareholder's ones. In addition, the law 12.766 of 2012 facilitated the use of the guarantee fund. The private partner can resort to the fund as soon as (i) there is a net and acknowledged credit not paid within the delay of fifteen days or (ii) there are non-acknowledged debits not paid and not explicitly rejected within the delay of forty-five days. The initial objective of ensuring payments to the private party in to overcome its distrust vis-à-vis the State's solvency has been reaffirmed. It is a partnership time.

[874] CARVALHO FILHO, *supra* note 732 at 473–474.
[875] Bandeira de Mello supports a contrary doctrinal position. See Celso Antonio Bandeira de Mello, *Manual de Direito Administrativo*, 2010.
[876] Binenbojm, *supra* note 837 at 163. The article 173, §1, II, prescribes that public enterprises and mixed-capital enterprises are subjected to the private legal regime.
[877] CARVALHO FILHO, *supra* note 732.

(iii) Possibility of arbitration

227. The attempt to build up a rather balanced relationship between public entities and private parties goes beyond the alleged agreement around contractual provisions. The ambition to consolidate a consensual principle within public administration did not sound to be satisfactorily achieved by the expansion of contractual models. Hence, the possibility of enforcing these provisions through alternative mechanisms of dispute resolution has become a common feature in the regulatory framework regarding public-private partnerships. Following this, all the thorny debates regarding the alleged incompatibility[878] between public law and such mechanisms have become uneasy since the legislator made his position explicit[879]. In Chile, Brazil and Argentina, the respective legal norms on public-private partnerships establish the possibility to solve controversies derived from the interpretation and implementation of contracts through arbitration or other alternative methods. More than that, this explicit position had impact on other types of public contracts, the regulation of which admits from now on the use of alternative mechanisms of dispute resolution. For instance, after the enactment of the law of public-private partnerships in Brazil in 2004, the law of general concession contracts was modified in 2005, in order to also introduce the possibility of arbitration[880].

228. On the other hand, the path towards arbitration in public affairs was not equally polemic in all three countries. In Argentina, in 1964 the law allowed the

[878] This incompatibility would derive from the clash between the main principles behind Administrative Law and alternative mechanisms of dispute resolution. If Administrative Law was developed according to the idea that one cannot dispose of the public interest, the alternative mechanisms of dispute resolution are supposed to be applied only to conflicts around rights of which one can dispose. It turned out that the doctrine, among other arguments, highlighted the distinction between the public interest and the patrimonial interest of Administration, which could then be of disposable. Eros Roberto Grau, *Arbitragem e Contrato Administrativo,* Revista Trimestral de Direito Público – RTDP 32/20, quoted in Binenbojm, *supra* note 837 at 16.

[879] It should be noted, nevertheless, that the Brazilian legislator had already manifested his position in favour of alternative mechanisms of dispute resolution concerning concession contracts on telecommunication (article 93, XV, of the law 9.472 of 1997) and oil fields (article 43, X, of the law 9.478 of 1997) before the enactment of the law of public-private partnerships.

[880] Article 23 of the law 8.987 of 1995.

possibility to resort to arbitration in public contracts, but this permission was limited to contracts of public works. In 1976, the article 66 of the law 150 consolidated the possibility to include a compromising clause in public contracts on a more general basis. The system goes on and in 1993 the law 80 prescribed that any of the parts can demand the subscription of an arbitral compromise, regardless of the lack of compromising clause in the contract[881]. In turn, Chile is a country that already enjoyed a large tradition on arbitration[882]. Moreover, the possibility to use arbitration in concession contracts has gained a strong support since 1993, as it would arguably reduce the transactional costs of contracts[883]. In this sense, allegedly positive benefits brought about by arbitration have pushed the legislator to develop the matter and search for a continuous improvement of the system. For instance, the law 20.410 of 2010 added the so-called "Dispute Boards" to the alternative mechanisms of dispute resolution for concession contracts. The Dispute Boards or "*Paneles Técnicos o de Experts"* are intended to function in a pre-arbitral phase, while the eventual conflicts are still about to emerge, by trying to prevent the contract from being submitted to an arbitral committee. It has been claimed that the Dispute Boards would be an improvement of the arbitration system because their continuous intervention would (i) accompany the implementation of usually long-term concession contracts and (ii) prevent the object of dispute from becoming more complex or costly before being submitted to an arbitral committee[884].

3.3. Private prisons: towards less monopoly and more legitimate force?

229. In this section, we will look at the experiences of Chile, Brazil and Argentina on public-private partnership contracts within the penitentiary system. Indeed, we could have inserted this investigation into other difficult debates, if we discussed whether partnerships on education, religious associations and health-care

[881] Gabriel de Vega Pinzón, "El Contrato de Concesión," *Revista de Derecho Administrativo* no. 72 (2010): 328.
[882] The Code of Judicial Organisation of 1943 had a chapter on arbitrators ("*De los Jueces Árbitros*") and the Decree 2349 of 1978 prescribed the participation of the State as a part in international jurisdictions.
[883] Benavides and Reis, *supra* note 825 at 12.
[884] *Ibid.*

provoke harms on public values[885]. However, our choice to limit our inquiry to penitentiary systems was driven by the symbolic disturbing feeling[886] that private participation in security matters[887] usually cause. Besides, private participation in security matters arguably deals with the more vulnerable position of inmates to potential abuses of public values, such as human rights[888].

230. In Latin America, the discussion about the possibility to engage private participation in the governance of penitentiary systems was included into the official agenda of the region through a conference of Ministries of Justice, which took place in Buenos Aires on the 7th September of 1993. Before that, only the Government of São Paulo in Brazil had already enacted a law[889] to allow private parties to provide some services in the prisons of this federal state. By keeping the regional context in mind, the motivations of such initiatives are quite predictable: the quantitative and qualitative deficit of the penitentiary systems. Over and over again, Latin American prisons have been denounced as centres of violations of human rights[890], in spite of recurrent legal reforms[891] and increasing number of prisons[892]. For instance, on the one hand, Chile is

[885] For instance, see Martha Minow, "Public and Private Partnerships: Accounting for the New Religion," *Harvard Law Review* 116 (2003 2002): 1229. Professor Minow focuses on the problematic relationship between religious organizations and public funding. She states that the provision of social services by houses of worship and other religious institutions, a high priority for President George W. Bush, incited criticisms, not only from those who worry about maintaining a separation between church and State, but also from those who question whether the government aid will intrude on the autonomy and freedom of religious groups.

[886] To consult strong criticisms about private participation in the penitentiary system, see the work of Stephen Nathan, who has written, for example, Stephen Nathan, "Privatización De La Prisión: Acontecimientos y Temas Internacionales y Sus Implicaciones Para América Latina," in *Carcel y Justicia Penal En America Latina y El Caribe. Como Implementar El Modelo De Derechos y Obligaciones De Las Naciones Unidas*, 2009, 280.

[887] It would be the "virtual failure" of the very idea of State because the State would be the essential organic and instrumental subjective element of the concept of police. Cretella Junior, *supra* note 747 at 12.

[888] Jody Freeman claims that, regardless of the efficiencies to be gained, a "liberal ethical society" simply ought not delegate incarceration to private companies. Although prisoners may file suits alleging violations of their constitutional rights, and while families and advocates of prisoners may help to monitor conditions in prisons, the relative invisibility and low moral status of the prison population makes prisoners especially vulnerable and heightens the need for accountability. Freeman, *supra* note 675 at 631.

[889] Law 7.835 of 1992.

[890] To consult a narrative on the human rights abuses in the regional prisons, see Mark Ungar, "Prisons and Politics in Contemporary Latin America," *Human Rights Quarterly* 25 (2003): 909.

[891] The program « Sistemas Penitenciarios y Derechos Fundamentales en America Latina » is held by the Latin American Institute of the United Nations for the Prevention of Crimes and Treatment of

by far the Latin American country with the higher number of inmates per inhabitant[893], which increased 53% between 1995 and 2003 as a result of investments of 122 millions dollars in its penitentiary system. On the other hand, the deficit was still of 33%[894] in 1999, which pushed the Chilean government to launch its program of concessions for penitentiary system[895] through the Decree n. 572 of 2000. Likewise, in 2002 there were two hundred thousand warrants of arrest in Brazil that could not be enforced because of the lack of available places in the prisons[896]. In 2009, this number achieved five hundred thousand warrants of arrest, the enforcement of which would collapse the Brazilian penitentiary system[897]. In Argentina, overcrowding is also a constant in several custody units, the percentages of which were detected at the end of 1995 as following: Women Unit nº 3, in the Province of Buenos Aires (141%); Unit 14, in the province of Chubut (135%); Unit 19 of the Federal Capital, and its annexe for inmates of 18 and 21 years old (169% and 282%, respectively) and Unit 23, of the city Neuquén (321%)[898]. Furthermore, between 1997 and 2007 the population of inmates has double in the province of Buenos Aires and increased 76% in Argentina as a whole[899]. The institutional structure is also fragile. The International Observatory of Prisons has claimed that in Argentina «*inmates are sometimes coerced by prison staff*

Delinquents and has promoted studies about the situation of the prisons in the region. To consult recent publications, see Instituto Latinoamericano de las Naciones Unidas para la Prevención del Delito y el Tratamiento del Delicuente, http://www.ilanud.or.cr/.

[892] The contribution of Elias Carranza to the project « Penal Reform and Prison Overcrowding» shows that the penitentiary rates varied between 1992 and 2006 as follows: Argentina (from 63 to 152), Chile (from 154 to 259) and Brazil (from 74 to 211). Elias Carranza, "Penal Reform and Prison Overcrowding," 2009, www.unicri.it/news/2009/0904-4_penalreform.

[893] In Chile, the rate is 238 per 100.000 inhabitants, while in Brazil and Argentina the rates are respectively 161 and 107. Martín Besio Hérnandez and Álvaro Castro Morales, "Chile: las Cárceles de la Miseria," *revista latinoamericana de Política Criminal* 6 (2005): 85.

[894] Ministerio de Obras Públicas, PROGRAMA DE INFRASTRUCTURA PENITENCIARIA COORDINACIÓN DE CONCESIONES DE OBRAS PÚBLICAS, http://www.concesiones.cl/proyectos/Paginas/detalle_adjudicacion.aspx?item=84.

[895] *« Programa de Concesiones de Infraestructura Penitenciaria »*.

[896] Luis Flávio Borges D'Urso, *A privatização dos presídios*, SUPER INTERESSANTE, 2002.

[897] Gustavo Pamplona, *Parcerias Público-Privadas para Presídios*, 100 REVISTA ZENITE DE DIREITO ADMINISTRATIVO E LRF 324 (2009).

[898] This data were gathered from a work about the situation of the penitentiary system in Argentina, which was carried out by Mariano Ciafirni, under the institutional support of the Ilanud and the European Commission. ILANUD. Comisión Europea., "Argentina: Situación penitenciaria y alternativas a la justicia penal y a la prisión," http://www.ilanud.or.cr/centro-de-documentacion/biblioteca-digital/181-sistemas-penitenciarios.html, *Instituto Latinoamericano de las Naciones*, n.d., http://www.ilanud.or.cr/.

[899] Procuración Penitenciaria, "Informe Anual," *Procuración Penitenciaria* (2009): 368–369.

to kill fellow prisoners, prosecutors, defence lawyers or even judges who try to denounce injustices or get the system under control»[900].

231. Consequently, each of the three countries has promoted initiatives on the matter, the characteristics of which may help us to clarify the actual extension of private powers and the vulnerability of the protection of public values. The following table illustrates the point:

	Chile	**Brazil**	**Argentina**
Type of contract	Concession: Design, Build, Operate and Transfer (DBOT)	Administrative Concession Outsourcing Co-management[901]	Outsourcing (minor)
Length of the contract	Determined (at most 50 years)	Determined – for PPP minimum of 5 years	Determined
Biding Procedure	Legal Requirement	Legal Requirement	Legal Requirement
External Security	Public Part (*Gendarmería de Chile*)	Public Part	Public Part
Internal Security	Public Part (*Gendarmería de Chile*)	It depends on the contract Private Part Mixed Direction	Public Part
Oversight	Audit Unit of the Ministry of Public	Prosecutor Office Public Defense	Prosecutor Office

[900] Diego Cevallos, "RIGHTS: Latin America's Prisons - Hell on Earth," *Inter Press Service*, n.d., http://ipsnews.net/new_nota.asp?idnews=25461.

[901] In Brazil, arguments in favour of private participation on the management of prisons have used the article 4 of the law 7.210 of 1984 to respond criticisms. This law regulates the functioning of the penitentiary system and the application of penalties, and its article 4 prescribes that "*the State should resort to the cooperation of the community for the activities related to the application of penalties and security measures"*.

	Works (*Inspección Fiscal del MOP)*		
Administrative sanctions[902]	Fines	Fines	-
Obligations of the private party	Goods handling service Meals Health Laundering Hygienic Social reintegration Shop service	Provide 24/7 images Personal capacity for employees Report the behaviour of the inmates Audit the cells	Some Services: Meals Health Hygienic
Legal regime for employees	Private regime	Private regime Mixed Direction Public Agents for Criminal Law	Public regime
Inmate work	44% of the total personal in Serena	Inmates are obliged to work and study 4 hours per day[903]	Only in 23 prisons. Most of them in the province of Buenos Aires and La Pampa[904].
Financial Participation of	1.Fixed consideration for	The amount of the consideration paid	The State is responsible for all

[902] For example, if there are riots or if inmates escape.
[903] "MG: 1º Presídio Privado Do País Promete Terapia Ocupacional e Pudim," *Terra*, accessed April 25, 2013, http://noticias.terra.com.br/brasil/policia/,dd53fa3bc2b4c310VgnVCM4000009bcceb0aRCRD.html.
[904] The law 24.660 regulates the work of inmates in Argentina in order to improve their capacity to obey the law and become socially integrated. Following this, the law 24.372 created the « *Ente Cooperador* », the goal of which is to promote the work at prisons and modernize the methods of labour-therapy. This entity works on the basis of donations, the commercialization of the products and taxes. However, there are only 23 productive units in the country, mostly located in the provinces of Buenos Aires and La Pampa. The productive units sell food, furniture, clothes, tolls and cleaning products, the complete list of which can be consulted online. Marias José Pérez and Jorge De Santo, "El Trabajo en las Cárceles," *El Derecho Penal: Doctrina y Jurisprudência* 3 (2009): 18.

the State	the construction; 2.Fixed consideration for the operation 3.Variable consideration for the performance 4.Variable consideration for additional works 5.Variable consideration for overpopulation	by the Administration varies according to the performance of the private party.	the costs of the penitentiary system
Identified Problems	Late creation of the oversight organ Disadvantages for small and medium enterprises as candidates Different criteria and policies among the prisons Formalistic relations between the actors[905]	Disadvantages for small and medium enterprises as candidates Different criteria and policies among the prisons	Lack of legal certainty

[905] Miguel Angel pointed out these problems in the Chilean penitentiary system during his conference on the 27th November 2009, the title of which was "*Proceso de Implementación de los Establecimientos Penitenciarios Concesionados"*. Miguel Angel, "Proceso De Implementación De Los Establecimientos Penitenciarios Concesionados," 2009.

	High operational costs[906] Lack of optimization for the sharing risks[907].		

232. The Chilean program sounds quite ambitious and optimistic[908], as the idea has been to become a leader in the region on the matter[909] and attract private participation into ten new projects of prisons. The program for the "Modernization of the Penitentiary System" is divided into three different projects: (i) La Serena, Alto Hospicio and Rancagua[910], (ii) Concepción and Antofagasta[911] and (iii) Valdivia and Puerto Montt[912]. The goal with these three different projects has been to enlarge the capacity of the penitentiary system, by providing place for 13.193 inmates[913]. In 2009, 20% of the Chilean inmates were living in prisons under the concession system[914] and this number may increase, as the Ministry of Justice and the Ministry of Public Works have evaluated the design of a second program for the penitentiary system under the concession model. This second program will include five new units: (i) *Establecimiento Penitenciario Calama,* (ii) *Establecimiento Penitenciario Copiapó,* (iii) *Establecimiento Penitenciario Región de Valparaíso,* (iv) *Establecimiento Penitenciario Región de Bío Bío* and (v) *Establecimiento Penitenciario Temuco*.

[906] Pamplona, *supra* note 897 at 332.
[907] *Ibid.*
[908] The head of the Inter-ministry Coordination of the General Secretary of the Presidency claims that the Chilean State has been able to build prisons in which the living conditions are very different than in traditional prisons. Seebach S., *supra* note 669 at 72.
[909] Ministério de Obras Públicas, INFRAESTRUCTURA PENITENCIARIA ANTOFAGASTA Y CONCEPCIÓN COORDINACION DE CONCESIONES DE OBRAS PUBLICAS, http://www.concesiones.cl/proyectos/Paginas/detalle_adjudicacion.aspx?item=84.
[910] Decree 618 of 2002.
[911] Decree 2.191 of 2002.
[912] Decree 90 of 2004.
[913] Ministério de Obras Públicas, PROGRAMA DE INFRAESTRUCTURA PENITENCIARIA GRUPO 1 COORDINACION DE CONCESIONES DE OBRAS PUBLICAS, http://www.concesiones.cl/proyectos/Paginas/detalle_adjudicacion.aspx?item=84.
[914] Valeria Bruhn, "Desarollo Del Sistema Penitenciario Concesionado" (Ministerio de Obras Publicas - Gobierno de Chile, November 27, 2009), 62.

233. Regarding the implementation of the program, the role of the Ministry of Public Works in Chile is to be highlighted[915]: the Ministry of Justice enacted the Decree n. 572 of 2000 to ascribe to the Minister of Public Works the competency to conduct the project and constitute the General Coordination of Concessions as the technical unity of the program[916]. On the same path, the law 20.410 of 2010 seeks to combine public interest with efficiency, as contracts derive from a bidding procedure and the Audit Unit of the Ministry of Public Works ("*Inspección Fiscal del MOP)* is responsible for verifying whether the private partner has comply with the performance targets. The statue also seems to translate more deeply the complexity of the *"asociaciones publico-privadas*" because the concession contracts have also to establish the provision of services and equipments, in addition to the usual execution, preservation and exploration of public works[917]. Besides, the prescription of new performance benchmarking and new incentives to preserve the object of the contract has elucidated the output-based characteristic we discussed above. However, the private participation to the penitentiary system has also raised important challenges. For example, there have been noticed several delays in the construction of the prisons, which has extended the terms and rendered the accomplishment of the projects doubtful.

234. The Brazilian experiences have been heterogeneous, not only in terms of the types of contracts behind the public-private governance of prisons, but also because they have been concluded and implemented under a decentralized mode. Regarding the nature of the contracts, the initial and large majority of the experiences of private participation into the governance of prisons are actually co-management or simply outsourcing of services, not public-private partnership contracts, as they are understood in Brazil. For example, in 1999 the *« Penitenciária Industrial de Guarapuava* » was inaugurated in the federal state of Parana and had capacity for 240

[915] The concession program is embedded within the following institutional design (i) the Ministry of Public Works applies a specific regulatory framework, (ii) the agency of coordination of concessions carries out the administrative and auditing acts and (iii) the Council of concessions brings about the mechanisms of governance of the system. Seebach S., *supra* note 669 at 71.
[916] Bruhn, *supra* note 914.
[917] Flavio Tapia Carmagnani, "Nuevo Programa de Concesiones de Obras Publicas y la Ley 20.410," *La Razon del Derecho* no. 2 (November 15, 2010).

inmates. Similarly, in 2001, the "*Penitenciária Industrial de Juazeiro*", in the federal state of Ceará, was the second example in Brazil of prisons under the regime of simple outsourcing of services, and had the capacity for 540 inmates. Because of the characteristics of these outsourcing contracts, one may affirm that a significant part of the Brazilian experience is similar to the French one. For instance, following the enactment of the law 14.868 of 2003, the federal state of Minas Gerais has enabled the construction of a penitentiary complex that encompasses five new units and three thousand and forty places. On the one hand, if private parties can provide judicial assistance, professional training and healthy and food services, the State keeps the internal and external watch over inmates[918].

235. To be sure, as we have seen above, public-private partnership contracts are understood in Brazil as specific types of concession contracts and do not mean a general legal framework of jointly public-private activities. There are only two contracts for prisons that fall into the specific meaning of public-private partnership in Brazil, which are, therefore, *administrative concession contracts*. These two administrative concession contracts are the Criminal Complex of *Ribeirão das Neves*[919], in the federal state of Minas Gerais, and the Integrated Centre of Recuperation of Itaquitinga, in the federal state of Pernambuco. They will have each the capacity for three thousand inmates. The important point of these two new initiatives is that they will be the first ones in Brazil to delegate the internal watch over inmates to private companies, although the external watch will remain under the responsibility of the police. Besides, the payment of consideration to the private companies may vary 20%, according to the accomplishment of the indicators previously fixed by the State[920].

236. As a result of the positive perspective of the experience in Minas Gerais, other federal states intend to elaborate public-private partnerships to improve their

[918] Pamplona, *supra* note 897 at 331.
[919] This contract is an administrative concession that comprises a length of 27 years and 380 performance targets.
[920] Carolina Quelotti, COMPLEXO PENAL UNIDADE PARCERIA PÚBLICO-PRIVADA DE MINAS GERAIS (2012), http://www.ppp.mg.gov.br/projetos-ppp/projetos-celebrados/complexo%20penal.

penitentiary systems. For instance, the federal states of Ceará, Alagoas and Santa Catarina launched administrative procedures to study the viability of such projects[921]. Moreover, there is project of law in the Senate (nº 513 of 2011) to enact general norms regarding public-private partnerships for prisons. The project of law still has to be evaluated by several committees, but it already provokes an interesting debate. First, the new law will introduce more flexibility in the prisons management because only the director and vice-director will have to be a civil servant. It means that the private regime will regulate the rights and duties of all the other employees. Second, the inmates will work according to the strategy management of the concessionary. The product of their labour force will be commercialized in the facilities of the prisons and the profits will serve to remunerate the inmates[922].

237. In turn, in Argentina, public-private partnerships for prisons are virtually deemed as a heresy. Almost all interviewees demonstrated perplexity regarding the possibility of having prisons managed and controlled by a private partner. Most of them claimed that the distinction between public and private functions remains strong in the common understanding of the legal system[923]. Indeed, during the interview with professor Oscar Ozlack, he challenged this common understanding and gave examples public-private arrangements, such as the National Council for Farming Technology. However, the professor Alberto Bianchi observes that most of these arrangements end up as public bodies and real private-private partnerships has never succeeded. Besides, these arrangements do not touch the sphere of prisons, which means that the State remains the exclusive controller of the penitentiary system, apart from minor supply of goods. This attempts to preserve the State sounded as the backlash of the national

[921] PPP Brasil, "Alagoas e Santa Catarina publicam PMIs para projetos de infra-estrutura social," *Observatório das Parcerias Público-Privadas*, January 2, 2012, http://www.pppbrasil.com.br/portal/content/alagoas-e-santa-catarina-publicam-pmis-para-projetos-de-infraestrutura-social.
[922] PPP Brasil, "Projeto de Lei do Senado pretende estabelecer normas gerais para a contratação de PPP para presídios," *Observatório das Parcerias Público-Privadas*, September 14, 2012, http://www.pppbrasil.com.br/portal/content/alagoas-e-santa-catarina-publicam-pmis-para-projetos-de-infraestrutura-social.
[923] Interview with the Judge Carlos María Folco.

trauma regarding neoliberal policies[924]. Likewise, professor Pedro Aberastury explained that the construction of private prisons were not culturally accepted and even the outsourcing of some services did not sound a promising alternative. He pointed out two characteristics of the issue in Argentina: (i) the impossibility of the State to renounce its core functions and (ii) the lack of legal certainty as the main reason why public-private partnerships could not succeed.

238. Given the elements provided in the table and the concrete experiences we discussed above, we propose the following remarks. First, the question of the type of legal regime to which the employees of the penitentiary unit are submitted may imply important consequences for the trade-off between the gain of efficiency and the protection of public values. For instance, it has been argued that, because public servants enjoy further stability, it would be easier to dismiss corrupt employees submitted to the private regime[925]. On the other hand, there is the concern about the fact that formal oversight and legal constraints can go only part of the way to protect public values, by defending that "*a range of alternative accountability mechanisms might better serve to both control risks and facilitate sound correctional policies*"[926]. As we saw above, Brazil sounds to give a response that go beyond either the idea of State Failure or of a beforehand blind trust in public authorities. The lack of qualified personnel in Brazilian prisons is a tough problem: 50% of federal states do not provide professional schools to prepare them and 70% do not have an administrative organization of functions and salaries[927]. This situation certainly gives place to improvisation and abuses, which is verified by the fact that there are claims against

[924] The director of the Government School, Marcelo Koening, made clear that the private sector is about business, whereas the public sector is about the public interest. Therefore, he conceives private prisons as another neoliberal initiative to undermine State capacity.
[925] In the United States, the tendency is not to consider them as public official within prisons object of contracting out, which means that they do not enjoy qualified immunity. In McKnight v. Rees, 88 F. 3d 417 (1996) the Sixth Circuit recently held that correctional officers in a private prison were not afforded "qualified immunity" as a defence to a prisoner's claim under §1983 of the Civil Rights Acts, 42 U.S.C.[925]. In Richardson v. McKnight, 521 U.S. 399, 412 (1997), the decision hold that private prison guards are not entitled to qualified immunity from suit by prisoners charging violations of Civil Rights Act, 42 U.S.C. § 1983 (1994).
[926] These alternative accountability mechanisms are notwithstanding to be developed, as the scholar does not focus on explaining them.
[927] Pamplona, *supra* note 897 at 325.

deviations of power in 82% of the federal states[928]. On the other hand, in the majority of cases, the presence of civil servants in at least directive functions is a requirement of the contracts. Besides, any member of the personnel is considered civil servant for criminal matters, regardless of the type of legal regime under which he has been hired. For example, regardless of his status as a public agent, he is susceptible of being characterized as subject of corruption, a crime an essential element of which is the subjective quality of public agent.

239. Second, there is the question whether the State is able to play a role of supervisor[929]. The assumption is that if the government performs less and less a specific activity, it would not retain sufficient expertise to effectively oversee the work of private contractors. Therefore, the resistance against private participation in security matters is based on the dangerous scenario in which the State would no longer be able to enforce its decisions. The concern is not restricted to the fact that the State is loosing its exclusivity to legitimately employ violence. The question is a more practical one: can the necessary knowledge to supervise public activities be dissociated from the actual exercise of them? From the examples above, we may argue that public-private partnerships do not make the State pick up one of the roles: either executor or supervisor. On the contrary, the State manages prisons in most of the cases, supervise them in others and even plays both roles in some mixed regimes. Besides, as the Chilean case shows, if the delay to organize the audit office for prisons has been identified as a problem in this country, the impact of these evaluations on the remuneration of contractors have transformed the effectiveness of State supervision. There are at least three variables to implicate in the amount of consideration to be paid by the State to the private party: (i) the variable of performance, (ii) the variable of additional works and (iii) the variable of overpopulation. These variables used to be unusual in the management of public affairs and from now on count to the decision whether to pursue the activities of the prison. In this sense, the Special Commission

[928] *Ibid.*

[929] Although contracting-out might appear to diminish State control, as a private provider replaces the State, it may also enhance it, as when the State uses its contractual power to enforce antidiscrimination laws or environmental standards.

for Concessions of Prisons[930] have rendered a long report in 2008, which detects problems and makes suggestions that are not only based on a view from outside, but also on discussions with twenty-four people involved in the concessions, from both the public and private sectors. For example, it has been explained in the report that the Program of Concessions for Penitentiary Infrastructure (Group 2) was extinguished by the cancellation of the contract with the "Sociedad Concesionaria Bas Dos S.A.". The cancellation was formalized by the Decree 868 of 2006, which replaced the one of adjudication, that is, the Decree 2191 of 2002. According to the report, the concessionaire party tried several times before the Conciliation Commission to extend its delay for the construction of the penitentiary infrastructure. The Commission denied such demands, which characterized a breach of the obligations of the contract. Once the Arbitration Commission was established, a consensual term of cancellation was proposed and accepted[931].

4. Concluding remarks

240. The debate about the trade-off between the gain of efficiency and the more vulnerable protection of public values within public-private partnership is a difficult one and we do not have the ambition to settle it. Our intention was to first point out that State Reform highlights the analytical weakness of the distinction between public and private functions, as we have observed historical variations along with the transformations of the State and a recent increasing interdependence that renders the line difficult to be held. Secondly, we affirmed that the backlash of this increasing interdependence is precisely the concern about the protection of public values. Because of this concern, Administrative Law faces challenges and may be conceived differently, but the division between public and private law is hardly abandoned. Following this, Chile, Brazil and Argentina have served as laboratories to test these challenges and underscore the remaining importance of the division, as much as public-private partnerships have impressively taken the floor in these countries.

[930] La Comisión Especial Investigadora sobre el proceso de concesiones carcelarias, *Informe De La La Comisión Especial Investigadora Sobre El Proceso De Concesiones Carcelarias* (Chile, 2008).
[931] *Ibid., 35.*

Finally, we have chosen the penitentiary system under public-private partnership regimes to illustrate in more details the content and extension of the competencies of the parties. The concrete cases do not have the goal either to defend an abstract superiority or inadequacy of public-private partnerships in prisons. On the contrary, they are attempts to avoid abstract preferences and provide more tangible elements for the aforementioned debate. As a result, we may argue that State Reform has enlarged the possibilities available to the State to carry out its goals. These possibilities have revealed malleable and negotiable, instead of an ultimate set of tools. Beyond a trade-off between efficiency and accountability, public-private partnerships are an example of the aforesaid accountability *on demand* model that has modified the rational behind Administrative Law.

(IV) GENERAL CONCLUSION

241. The conclusion of this thesis is that State Reform has highlighted the gap between public policy and administrative law phenomena. On the one hand, coherence and predictability used to mark the goals of the legal phenomenon. On the other hand, efficiency and adaptability used to mark the goals of the public policy phenomenon. State Reform has incited the necessary interaction between these two realities. The consequence of this interaction is that Administrative Law has been deeply transformed in the last twenty years. Four sub-policies of State Reform clearly demonstrate this point. Decentralization and regulatory agencies downsized the importance of coherence to build a tailoring administrative law, which bets on plural structural innovations to meet the complexity of state action. Moreover, civil service reforms and public-private partnerships have promoted individual empowerment in the public sector, which inaugurates an experimental administrative law that acknowledges the failure to ensure predictability.

242. The level of approximation between public policy and administrative law phenomena varies from one country to another though. Chile pushed this approximation in a more aggressive way, promoting an impressive institutional innovation under an incremental path. The "pragmatic Weber" profoundly reformed the State without being revolutionary and articulated its parts without renouncing its unitary character. If it is true that the public-private distinction sounds less marked in Chile, the Ministry of Public Works has played a central role in the development of public-private partnerships. In Chile, nothing sounds truly public, but nothing seems to be completely out of the State control. Public and private confusion is further acknowledged. In turn, Brazil has absorbed some values from the public policy rational, but these values only consolidate one more « chapter » of administrative law books, by failing to constitute a comprehensive background for legal reasoning[932]. As a result, we see a fragmented understanding of administrative law in Brazil, which encompasses a bipolar (or even multi-polar) speech of a "confused Weber", who

[932] Interview with Paulo Modesto.

manages a *de*-centralized State, accommodates the tensions derived from the double legitimacy of regulatory agencies and bets on several public-private partnership models to satisfy the current socials demands. Finally, Argentinean administrative law is not confused, but it is neither real. The "would-be Weber" pursues an ideal structure of the State that actually enlarges the gap between administrative law and public policy phenomena. The legal speech still seeks to provide a coherent and predictable legal system, in which (i) public functions are clearly different from private ones, (ii) civil servants enjoy tenure positions, (iii) central government and provinces pursue co-participation and (iv) regulatory entities play a "politically conscientious[933]" role. On the other hand, the Argentinean institutional fragility constantly transforms this speech into a set of rhetoric arguments to allow the application of emergency measures. Administrative law in Argentina has not become closer to public policy phenomenon, but a server of it. It is a toolbox still concerned about the "how to do?" question, which barely discusses the "what to do?" one. On the other hand, politicians are concerned about the "what to do?" question, without giving attention to legal certainty and institutional capacity to implement policies. In theory, administrative law bets on strict legality and superficial categories of the world. In practice, it allows the arbitrary resort to any instrument, including numerous emergency decrees, to carry out political goals. In any country, State Reform will keep going, promoting a constant reconsideration of the organization and functioning of the State. The only way to overcome its existential crises is to face complexity through a joint effort between administrative law and public policy phenomena. The approximation of these phenomena will not render life more coherent or predictable, but it will tag the protection of public values to the need to meet social expectations more efficiently.

[933] "Politically conscientious" comprises a strong left-wing normative content.

(V) ANNEX I – LIST OF INTERVIEWEES

1) **Carlos Maria Folco**, Federal Judge – on the 5th July, 2012
2) **Oscar Ozlak**, Professor at the Centre for Studies of the State and Society (CEDES) – on the 11th July, 2012
3) **Gerardo Otero**, former Ministry of Economy of the Province of Buenos Aires and current chief of staff of the Ministry of Economy – on the 16th July, 2012
4) **Lucas Nejamsky**, President of the Federal Council of Public Administration of Argentina – on the 16th July, 2012
5) **Marcelo Koening**, Director of the Government School of Argentina – on the 17th July, 2012
6) **Enrique Iribarren**, Coordinator of the Federal Council of Civil Argentina in Argentina – on the 18th July, 2012
7) **Alberto B. Bianchi**, Professor at the University of Buenos Aires and at Catholic University of Argentina, Lawyer – on the 18th July, 2012
8) **Pedro Aberastury**, Professor at the University of Buenos Aires and the Belgrano University, Lawyer – on the 19th July, 2012
9) **Cláudio Moraga**, Professor at the University of Chile and Lawyer – on the 2nd August 2012
10) **Veronica Figueroa**, Professor at the Institute of Public Studies - on the 9th August, 2012
11) **Rodrigo Engaña**, Professor at the Insitute of Public Studies - on the 8th August, 2012
12) **Amaya Fraile,** Advisor for Microeconomic Policies and Modernization of the State at the Ministry of Economy – on the 17th August, 2012
13) **Aldo Gonzalez**, Professor of the Economy Department at the University of Chile – on the 13th August, 2012
14) **Rafael Ariztía,** Responsible for the Agenda of Modernization of the State at the General Secretary of the Presidency – on the 22nd August, 2012
15) **Heidi Berner**, Professor of the Economy Department at the University of Chile – on the 23rd August, 2012

16) **Mario Waissbluth,** Professor at the Industrial Engineering Department of the University of Chile - on the 27th August, 2012
17) **Emilio Pellegrini Munita**, Coordinator of Concessions at the Ministry of Public Works – on the 28th August, 2012
18) **Juan Ashley Walker,** Parlamentar – on the 30th August, 2012
19) **Macarena Lobos Palacios,** Coordinator of the Legislative Program at CIEPLA (Board of Studies for Latin America) - on the 31st August, 2012
20) **Tomas Jordan,** Lawyer**, on the 31st August, 2012**
21) **Paulo Eduardo Garrido Modesto**, Professor at the Federal University of Bahia, member of the Prosecutor Office and worked in the Ministry of Federal Administration and State Reform – **on the 11th April, 2013.**

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