

POST LEGISLATIVE SCRUTINY AT PARLIAMENTS THE CASE OF CHILE AND UK

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“Post legislative scrutiny appears to be similar to motherhood and apple pie in that everyone appears to be in favour of it. However, unlike motherhood and apple pie, it is not much in evidence”.¹

Abstract

The article develops a comparative study between Chile and UK regarding the functioning of its system of post legislative scrutiny. To assess this issue, the different types of legislative scrutiny are briefly introduced to then focus on the scrutiny carried by Parliaments after the legislation is enacted. The comparison between both countries is made according to the compliance with the standards of: (i) effectiveness, (ii) efficacy and (iii) efficiency. The article examines how the Chilean and UK system of post legislative scrutiny achieve each of these goals, concluding that the UK model is overall a more successful system of post legislative scrutiny. Nevertheless, some recommendations are put forward to further improve the system of post legislative scrutiny in both countries.

Keywords: *Chile, United Kingdom, Parliament, Post legislative scrutiny, evaluation of legislation.*

1. INTRODUCTION

The ultimate goal of legislation is to actually be applied and achieve the results it pursued when proposed and enacted. Many factors can influence this process, from policy design, to the drafting process and also its implementation. Similarly, many actors play a role along this process, including government, legislature, courts, etc. In this article I'm going to focus on a specific aspect linked to achieving successful legislation: post legislative scrutiny by Parliaments.

To examine this issue, I will look at the cases of Chile and UK, offering a comparative analysis that will shed light on the components of post legislative scrutiny. The comparative criteria to assess both models will be the standards set by Luzius

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¹ HOUSE OF LORDS (2004), Par. 165.

Mader to evaluate legislation: (i) effectiveness, (ii) efficacy and (iii) efficiency,² since it was considered a comprehensive evaluation framework, able to account both for the technical side of this type of assessment, as well as for the performance of legislation as a public policy tool. The hypothesis of this article is that the UK model of parliamentary post legislative scrutiny better complies with Mader's criteria, even though it works as a diffuse system of evaluation.

The methodology followed in this article is the following: I will first introduce the topic of legislative scrutiny, the different types of controls and how they interact between them. Then, I will explain Mader's criteria and the meaning of the three standards that will guide our analysis. Afterwards, I will develop the comparative analysis by examining the Chilean and the UK model of parliamentary post legislative scrutiny and how they comply with each standard. A case-study will be presented to further show how both Parliaments evaluated mental health legislation. Finally, I will present some conclusions highlighting some recommendations that could strengthen both models.

2. GENERAL ASPECTS OF LEGISLATIVE SCRUTINY

There are multiple ways of evaluating legislative policy. Therefore, it is necessary to introduce some conceptual clarifications, in order to delimitate the specific area of parliamentary post legislative scrutiny. A first distinction could be drawn depending on who is carrying the evaluation: the Government, Parliament, an independent agency, an expert commission, or other possible actors. A second classification, focus on the moment the evaluation is done, recognizing that it could be carried out before the policy is in place, which is known as *ex-ante*, pre-legislative or prospective evaluation; or once the policy is already in place, known as *ex-post*, post-legislative or retrospective evaluation.³

The UK Department for Business, Innovation and Skills (BIS) refers to post legislative scrutiny (PLS) as one of the three types of *ex-post* review, together with policy evaluation and post-implementation review (PIR). Although both post-implementation review and post legislative scrutiny are ways of policy evaluation, they are not synonymous. Therefore, policy evaluation is the most generic term to refer to a systematic evaluation of a regulatory policy. The PIR instead, is meant to be a complement of the *ex-ante* evaluation done in the context of an "impact assessment". PIR is then, a "revised version" of the impact assessment; while PLS is a review of how the legislation is working in practice.

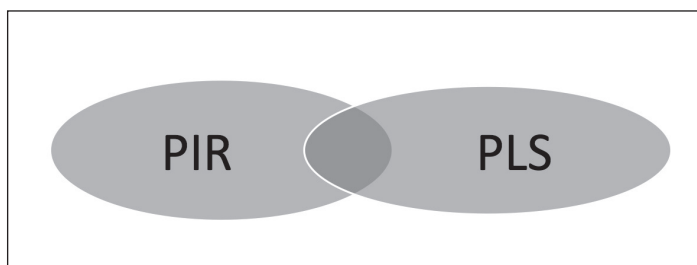
According to BIS, post legislative scrutiny "primary audience is Parliament, it includes a review of the extent to which the legislation and the supporting secondary legislation has been brought into force. Unlike PIR, it includes a review of the extent to which the legislation and the supporting secondary legislation has been brought

2 MADER (2001), p. 119.

3 Some authors add a third instance of evaluation, during the legislative process. KARPEN (2004), p. 310.

into force. Post legislative scrutiny should include consideration of all or much of the delegated legislation made under the Act”.⁴ A graphic way of explaining this relationship is the following:

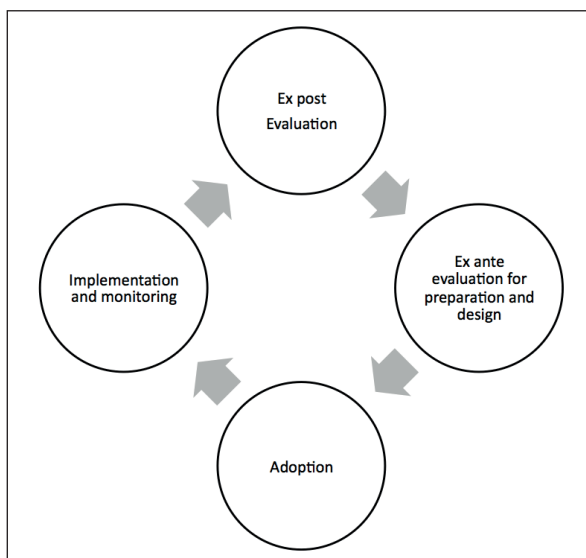
Policy Evaluation



* Source: Bis ‘Clarifying the Relationship between Policy Evaluation, Post-Legislative Scrutiny and Post-Implementation Review’ [2010]

There is a close relationship between the different categories of legislative scrutiny. On the one hand, the evaluation made by Parliaments is closely connected with the evaluation made by Government and other agencies; and on the other hand, ex-post evaluation must be understood in connection with ex-ante evaluation. The latter relationship has been explained by the OECD, with the following figure:

Gráfico 2. Etapas del ciclo de las político-regulatorio



*Source: OCDE, ‘Evaluating Laws and Regulations: The Case of the Chilean Chamber of Deputies’ [2012].

4 BIS (2010), p. 2.

This double relationship between evaluations made by different institutional bodies and at different stages of the regulatory cycle highlights the important benefits of post legislative scrutiny and helps us conceptualize the reasons to promote the development of PLS by Parliaments. We can group these reasons in three main categories:

Ex-post scrutiny can ultimately lead to improve the quality of legislation: it can contribute to a “better regulation”⁵ by multiple channels; firstly, post legislative scrutiny delivers a more evidence-based approach to the regulatory cycle; likewise, it can lead to identify the failures of current laws and consequently the remedies that could be necessary to amend them;⁶ and at the same time, it may identify best practices that could be replicated in other laws.⁷

A second reason to involve Parliaments in post legislative evaluation is linked to the idea of a better accountability over the legislative process and as a counter-balance to the Executive role.⁸ In this sense, post legislative scrutiny can also help to strengthen the oversight and representative role of Parliaments⁹ and it can further develop the parliament’s internal capabilities.¹⁰

Finally, there is more general reason to support the development of PLS by Parliaments, in order to improve the requirements of democratic governance, by emphasizing the need to implement legislation in full accordance with the principles of legality and certainty.¹¹ This connects legislative evaluation in general, and post legislative evaluation in particular, with the broader standard of rule of law.¹²

5 The movement pursuing a “better regulation”, afterwards referred as “smart regulation”, highlights the need to improve the quality of regulation. This approach has been embraced by the OECD, the EU and UK. For more insights on this agenda see WEATHERHILL (2007).

6 According to Hansard, “There are strong grounds for believing that more regular and systematic post legislative scrutiny would help to identify and rectify problems in flawed legislation. Furthermore, the knowledge that laws were to be subject to sustained monitoring may have a deterrent effect, making it less likely that laws unfit for their purpose would be passed”. BRAZIER (2005), p. 7.

7 The House of Lords has also highlighted the utility of post legislative scrutiny for the legislative process as a whole. HOUSE OF LORDS (2004), Par. 172.

8 In Chilean legislative process there are several features that give the Executive a preponderant role, including matters of exclusive initiative, ability to accelerate legislative process, etc. MANZI *et al.* (2011), p. 25. On the European Parliament context, Zwaan *et al.* found that ex post legislative evaluation hardly served accountability aims, but it was rather used with forward-looking purposes, aimed at agenda setting and policy change. ZWAAN *et al.* (2016).

9 BRAZIER (2017).

10 DE VRIEZE and HASSON (2017), p. 11.

11 DE VRIEZE and HASSON (2017), p. 11.

12 This connection that was already highlighted by the Venice Commission, who in June 2007 organized a specialized seminar for civil servants from 16 countries to share experiences on this field. Some of the presentations held in the UNIDEM Campus Trieste Seminar “Legislative evaluation” are available at <<http://www.venice.coe.int/webforms/events/default.aspx?id=650>> last accessed on 12th February 2018.

In this article we are going to focus on the first set of benefits of parliamentary post legislative scrutiny, since those are more closely linked to the legislative process rationale. The idea of parliaments pursuing PLS as a “legislative enabler” is in line with the rationalization of the law-making, designed to account for the growing complexities of legislation nowadays. In this context, an institutionalized system of PLS is meant to contribute to the reduction of legislative ambiguity and distrust.¹³

On the other hand, there might be also some downsides on parliamentary PLS. In this sense, prevention has been made in order to clarify that post legislative scrutiny should not be scenery for reviewing the policy arguments made when debating the passing of the law. This means that PLS should not be a second chance to debate the law, but rather the time to test it in a constructive and future-oriented manner. Additionally, it is necessary to acknowledge the costs involved on PLS in terms of time and resources, which will most likely translate on the need to prioritize those laws that can be submitted to PLS. Finally, a systematic approach to PLS require a considerable political will, both from the Government and from the Parliament.¹⁴

In sum, we recognize that a good system of parliamentary PLS allows to check if legislation is working in practice, to focus on implementation and policy aims, to identify and disseminate good practice and, overall, to improve regulation. However, we also acknowledge it may bring some risks and it is highly dependent on the political will and the resources devoted this task. Hence, a good system of parliamentary PLS must maximize these benefits while accounting for its constraints. Within this logic and in order to assess which system of PLS is better suited to deliver those results, is necessary to specify the comparative criteria that will allow us to compare the Chilean and UK systems of PLS.

3. OUR COMPARATIVE CRITERIA

The criteria chosen as the baseline for this comparative exercise is based on the three standards set by Mader: (i) effectiveness, (ii) efficacy and (iii) efficiency.¹⁵ According to Mader, these three standards don't account for all possible effects of legislation, which could be designated generically as “impacts” of legislative action. However, they emphasize particularly important aspects of law making.¹⁶ The meaning of each of these criteria is the following:

i. Effectiveness: it focuses on the implementation of the norm. This standard requires to test whether the norm is respected in practice or not, but also if the adjusted behavior can be indeed imputed to the norm.¹⁷

¹³ DE VRIEZE and HASSON (2017), p. 12.

¹⁴ DE VRIEZE and HASSON (2017), p. 13.

¹⁵ MADER (2001), p. 126.

¹⁶ MADER (2001), p. 127.

¹⁷ For the purposes of this essay, this will be the definition of “effectiveness”. However, it is necessary to highlight that the concept of effectiveness is in itself debated and can be approached from multiple

ii. Efficacy: “is the extent to which legislative action achieves its goal”.¹⁸ As Mader clarifies, implementation (effectiveness) is a necessary condition for efficacy, but it is not a sufficient one, since the assumptions underlying the legislative choice might be incorrect. Similarly, the efficacy of the norm does not prove its effectiveness, since the goals might be achieved for different factors rather than for the effect of the norm.

iii. Efficiency: focus on the costs and benefits brought by the norm. This analysis goes beyond the direct financial or monetary costs and benefits; it should also account for other type of externalities, including the bureaucratic burden, the overall effect on the economy and even the psychological effect over citizens.

Mader is certainly not the only author that has used these categories when defining which should be the legislative evaluation criteria. Ulrich Karpen, for example, also takes these three standards as parameters to evaluate the consequences of laws.¹⁹ From the perspective of legislative drafting, Helen Xanthaki, refers to them as “virtues” that should be pursued.²⁰ Other authors link quality of legislation with the fulfilment of some general principles of law, such as proportionality, consistency, transparency, responsibility and efficacy.²¹ However, once they develop how to evaluate such compliance, they explicitly acknowledge that “through ex post evaluation, specifically, it is promoted the obligation to evaluate periodically the implementation of enacted norms [effectiveness], in order to check if they have met their pursued goals [efficacy] and if the costs and burdens derived from them was justified and correctly assessed [efficiency]”.²²

The acceptance of these criteria among scholars, confirms that these three aspects can be considered as key components of quality in legislation, and therefore it makes sense to use them as a test for a successful parliamentary post legislative scrutiny, as long as they cover not only a technical or procedural perspective but mainly a performance check of legislation. Nevertheless, it must be noted that these parameters are not exact measures, and should be taken only as guidelines to assess each model of post legislative scrutiny.

perspectives (based on compliance, enforcement, quality of legislation, results, etc.). Professor Stefanou highlighted this lack of a general theory of effectiveness on the Conference on Effective Law and Regulation held at the Institute of Advanced Legal Studies the 7th July 2017. STEFANO (2017).

18 MADER (2001), p. 126.

19 KARPEN (2004), p. 310.

20 XANTHAKI (2010), p. 79.

21 DE MONTALVO (2017), p. 143.

22 DE MONTALVO (2017), p. 146.

4. COMPARISON BETWEEN THE MODELS OF CHILE AND UK

4.1 Post legislative scrutiny in Chile and UK

Before assessing how each model complies with our comparative criteria, it is useful to briefly describe the functioning of each of them, to then analyze more carefully those elements that are significant in terms of effectiveness, efficacy and efficiency.

In the UK, references to the need and importance of post legislative scrutiny go back to the 70s.²³ However, there were major studies on post legislative scrutiny since 2004, beginning with the House of Lords Constitution Committee report,²⁴ which was then followed by a Government Response²⁵ and a Law Commission Report.²⁶ The Office of the Leader of the House of Commons then published its Government's Approach on post legislative scrutiny²⁷ in response to the Law Commission's report. Since then, the Cabinet Office has consistently included post legislative scrutiny in its 'Guide to Making Legislation'.²⁸

Nowadays, the UK system of post legislative scrutiny works as follows: (a) three to five years after Royal Assent, the Government (through the corresponding department) submit a memorandum to the relevant departmental select committee²⁹ at the House of Commons;³⁰ (b) this memorandum assess how the Act has worked out in practice, considering the objectives and benchmarks mentioned on impact assessments, explanatory notes or other statements; (c) the committee then decide if to conduct a full post legislative scrutiny of the Act; (d) the committee can request a

23 LAW COMMISSION (2006), Par. 2.4.

24 HOUSE OF LORDS (2004).

25 HOUSE OF LORDS (2005).

26 LAW COMMISSION (2006).

27 OFFICE OF THE LEADER OF THE HOUSE OF COMMONS (2008)

28 Its latest version is in CABINET OFFICE (2017), part 43.

29 Both, The House of Commons and The House of Lords, develop its work through committees, made up of around 10 to 50 MPs or Lords. There are different types of committees, mainly: (i) Select Committees that check and report on areas ranging from the work of government departments to economic affairs, (ii) Joint Committees consisting of MPs and Lords; (iii) General Committees, unique to the House of Commons, which look at proposed legislation in detail, they include all committees formerly known as Standing Committees. Currently, The House of Commons has three Grand Committees; and (iv) Grand Committees which look at questions on Scotland, Wales and Northern Ireland.

30 The Law Commission mentioned the support for Joint Committees undertaking post legislative scrutiny, but the Government was not persuaded. In 2011, a report by the Leader's Group on Working Practices in the House of Lords recommended the establishment of a standing Post legislative scrutiny Committee; while in 2012, the Liaison Committee's report, 'Review of select committee activity and proposals for new committee activity' recommended the appointment of an ad-hoc post legislative scrutiny committee for certain matters. For the evolution of these proposals see KELLY and EVERETT (2013).

full report to the department and it may receive further inputs from experts, citizens, etc., including technical support by the Scrutiny Unit and National Audit Office; (e) a report is then published covering the committee assessment and its final conclusions and recommendations.

In the Scottish Parliament, PLS has been explicitly recognized as part of the functions of the Committees, and although from 2016 onwards there is an specific Public Audit and Post-legislative Scrutiny Committee, it is considered that “other committees of the Parliament have always been able to undertake PLS and will continue to do so”.³¹ More interestingly, the Scottish Parliament developed a “Post-legislative scrutiny checklist”³² in order to identify trigger points that might justify the task of PLS.³³

In Chile, post legislative scrutiny is far less advanced. However, there have been efforts to develop it. In the Executive there are ex-post evaluation mechanisms mainly linked with fiscal management, including performance indicators and programs of institutional evaluation.³⁴ Exercises of ex-ante evaluation are also carried away in a non-systematic way at the Executive. On the other hand, at the Congress the post legislative scrutiny efforts have been concentrated at the Chamber of Deputies.³⁵ Traditionally, there are thematic workshops where some sort of post legislative scrutiny is done, but that is not the main objective of these workshops.³⁶ Other authors also mention the Inquiry Committees as forms of post legislative scrutiny,³⁷ but these special committees are also not devoted to post legislative scrutiny per se.

The big step forward came with the creation of the “Law Evaluation Department” (LED)³⁸ at the Chamber of Deputies on 2011, with functional autonomy in order to: (i) evaluate legal norms approved by Congress, regarding its efficacy and influence on society; (ii) propose corrective measures when needed for its correct application; and (iii) create and administer a network of social organizations in-

31 <<http://www.parliament.scot/parliamentarybusiness/CurrentCommittees/105094.aspx>> last accessed on 16th February 2018.

32 Available at <<http://www.parliament.scot/parliamentarybusiness/CurrentCommittees/106829.aspx>> last accessed on 16th February 2018.

33 Among these trigger points, the check list consider if the Act has had sufficient time to have made a difference, if the Act has a measurable outcome or policy objective, if it contain an in-built mechanism for post-legislative scrutiny, etc.

34 OECD (2012), p. 54.

35 In 2015 a special Council for the Modernization of the Legislative Work was created in Chile. Similar to what happened in the UK; on December 2015 this Council included in its final proposals the creation of a joint department, common to the Chamber of Deputies and the Senate, to undertake the task of law evaluation. However, that joint office is still not created.

36 OECD (2012), p. 56.

37 PAUL DIAZ and SOTO (2009), p. 597.

38 <<http://www.evaluaciondelaley.cl>> last accessed on 13th February 2018.

terested on participating in this evaluation.³⁹ There is also a Committee for Law Evaluation, integrated by a Deputy of each political group, which cooperates with this department.

This department analyze the selected law so as to determine the compliance of its objectives, identify its impacts and externalities, identify good practices, know the citizen's perception and propose corrective measures. They work on a three-phase model: law analysis, citizen's perception and final report. The laws to be evaluated are selected each year by the Bureau of the Chamber of Deputies, from a list elaborated by the Law Evaluation Department following the criteria of political neutrality, general applicability, contingency, methodological, temporal and technical feasibility, and time of application (minimum one year in force).⁴⁰ Since its creation, ten laws have been evaluated and there is an eleventh ongoing report.

There are some common features between both models of post legislative scrutiny, primarily that in practice this task is systematically assumed by the lower Chamber of each Parliament –the House of Commons and the Chamber of Deputies-. However, in the case of Westminster Parliament they chose a diffuse system of control, developed by each select committee according to its own criteria; while in Chile, the post legislative scrutiny is done by a centralized unit working under the Chamber of Deputies, which propose to the Bureau what laws should be evaluated. A number of details on the procedure of evaluation also differ, which can have an impact on the outcome and successfulness of the post legislative scrutiny exercise. In the next section, I shall analyze these characteristics under the evaluation criteria we identified.

4.2. Compliance with the evaluation criteria

4.2.1 Effectiveness

Both models identify effectiveness as one of the key criteria that should be tested in post legislative scrutiny. This explains that in both cases a period of time must pass between the enactment and the post legislative scrutiny. In the case of UK, that time was set between three and five years; while in the case of Chile is at least one year.

A fundamental aspect to consider when testing for effectiveness is the cooperation with the government or the implementing agencies, since they are the ones that can best deliver information on how the law is working in practice. In the UK, this element is covered by the memorandum and eventually a full report which is send by the corresponding governmental department, as the starting point for parliamentary post legislative scrutiny. In Chile, the Law Evaluation Department is supposed to make its technical analysis including the opinion of experts and implementing institutions, but there is no institutional channel specifically designed to receive this information, so usually we can only see a legal summary of the institutions formally

³⁹ Resolution N° 857-2011 of 2011, from the Chamber of Deputies.

⁴⁰ OECD (2012), p. 62.

involved on the application of the law, while the analysis of the application is done mainly based on citizen's perception.

Another important aspect to consider is whether the post legislative scrutiny covers delegated and related legislation, since "much of the detail and meaning is contained in the secondary legislation" and "many pieces of legislation amend, or build upon, existing legislation".⁴¹ In this context, both, UK and Chile, extend their post legislative scrutiny to previous legislation, secondary legislation and even related legislation.

An additional way of ensuring post legislative scrutiny, in terms of effectiveness, is the use of sunset clauses, which is the legislative technique of including "a provision in a Bill that gives it an expiry date once it is passed into law".⁴² This technique can be used as a mean to improve effectiveness of the law and make sure there has to be post legislative scrutiny.⁴³ It is a way of inverting the "burden of proof", so as to force those who support the legislation to prove its effectiveness.⁴⁴ Other authors highlights that these clauses can constitute key tools to reinforce the position and influence of legislatures and minimize the influence of the Executive in a broad range of public policy issues.⁴⁵

Sunset clauses have been increasingly used in the UK, aligned with the agenda of "better regulation".⁴⁶ Although these clauses could be considered to go against the principle of certainty of law, we should consider that "the principle of legal certainty cannot be reduced to the mere continuity or stability of law" and has to be considered as a "multidimensional concept" that allows for flexibility and adaptability of the law.⁴⁷ In this same line, these forced revisions may facilitate legislative innovation⁴⁸ or allow risk-based decision-making.⁴⁹

While in the UK sunset clauses are a tool that have been explored and incorporated in their PLS model; in Chile they are very rarely used. Paul and Soto give some examples of Chilean laws with provisions demanding periodic revision or with an "expiration date", but they acknowledge that this practice is quite rare and they are usually limited to the revision of mathematical formulas or other technical provisions establishing percentages and economic figures.⁵⁰

41 BRAZIER (2005), p. 3.

42 <<http://www.parliament.uk/site-information/glossary/sunset-clause/>> last accessed on 13th February 2018.

43 RANCHORDÁS (2015), p. 32.

44 DE MONTALVO (2017), p. 157.

45 BAUGUS and BOSE (2015), pp. 13-19.

46 RANCHORDÁS (2015), p. 33.

47 RANCHORDÁS (2015), p. 45.

48 RANCHORDÁS (2014).

49 JANTZ and VEIT (2012).

50 PAUL DIAZ and SOTO (2009), pp. 588-560.

4.2.2 Efficacy

In order to test for efficacy, it is crucial to establish a reference or baseline that can clearly identify the goals that were pursued by the law. These goals can be established in purpose clauses or in other documents, such as explanatory notes, memorandums, briefing notes, etc. Purpose clauses are provisions “that explicitly states the social, economic or political objective or goal that is sought to be achieved”.⁵¹ Unlike explanatory notes or annex documents, purpose clauses are part of the statute itself and they serve the objective of clarifying beyond interpretations “why” the statute was enacted, therefore specifying the policy objective and constituting a “yardstick” that can be used to assess its efficacy.

In the case of Chile, the reports of the Law Evaluation Department usually refer to the objectives set on the law itself, which is hardly more than a paragraph. In the UK, there is also reference to the purpose of legislation, but with the important advantage of being able to refer also to pre-legislative scrutiny documents, such as impact assessments, governmental department’s reports, etc. Unfortunately, in Chile there is no systematic pre-legislative scrutiny that can inform post legislative scrutiny. Although pre-legislative scrutiny differs from post legislative scrutiny,⁵² this reminds us the complementary effect that exists among them.⁵³

Another important aspect is who assess the achievement of law’s goals. As we explained before, in UK post legislative scrutiny is carried by select committees, so it is members of Parliament (MPs) who evaluate if the law has achieved its objectives; while in Chile the Law Evaluation Department is formed by technical staff. Although post legislative scrutiny should not be an opportunity to re-debate the law, MPs may be better suited to assess if the political objective was successfully met. Additionally, if they were part of the legislative discussion of the law, they might be especially aware of its details and challenges.

Finally, in both models citizen participation is taken into account, as a way of ensuring that the affected users of the law may also give their insights on whether it is achieving its intended purposes. In Chile, the methodology followed by the Law Evaluation Department “gives special relevance to the participation of individuals and civil society groups related to the law being evaluated”,⁵⁴ since it is understood that they “can help visualize unexpected or unintended side effects of the laws; their participation promotes transparency and accountability to the legislative process; and it prevents the excessive influence of particular interests over the public interest in decision-making”.⁵⁵ Following this logic, the Law Evaluation Department administer

51 BERRY (2011), p. 49.

52 In this sense, post legislative scrutiny should not be considered as the “mirror image” of pre-legislative scrutiny. LAW COMMISSION (2006), Par. 4.5.

53 MADER (2001), p. 124.

54 <http://www.evaluaciondelaley.cl/participacion-ciudadana/foro_ciudadano/2012-11-09/122557.html> last accessed on 27th February 2018.

55 <http://www.evaluaciondelaley.cl/participacion-ciudadana/foro_ciudadano/2012-11-09/122557.html> last accessed on 27th February 2018.

‘Citizen Forums for the Evaluation of the Law’, where citizens and groups can express their opinions, concerns and suggestions around the law being evaluated. In the UK, the views coming from NGOs linked to the legislation and individual citizens are also heard as witnesses by the committees, but they are considered among a broader notion of relevant stakeholders, which include also experts, specialists, people from academia, professionals, etc.⁵⁶

4.2.3 Efficiency

The international movement for “better regulation” or “smart regulation”,⁵⁷ dated from 2000s onwards, placed particular emphasis on quality of legislation, since it considered it as a fundamental instrument to improve competitiveness and promote sustainable growth. Since then, the economic analyses have been a crucial element on the legislative agenda in general, and on the legislative evaluation in particular.⁵⁸

The efficiency test is strongly identified with the assessment of economic costs and benefits brought by the law, and consequently it usually rests on documents such as Regulatory Impact Assessments (RIAs) or Cost and Benefit analysis (C&B) made by Government or other agencies on their ex-ante policy evaluation.

In the UK, Regulatory Impact Assessments are elaborated for almost all proposed legislation and it’s even recommended that they include a post-implementation review and a description of how the recommended policy option should be reviewed. This exercise allows the Parliament to run, afterwards, an efficiency test on its post legislative scrutiny. Another relevant factor that enables this technical assessment is the support received by committees from specialized units such as the National Audit Office and the Scrutiny Unit. For example, the National Audit Office reports to Parliament regularly on the Regulatory Impact Assessments carried out by different government departments, they can outline potential areas for performance improvement and they may also produce briefings and memorandums to support committees in their scrutiny work.⁵⁹

On the other hand, in Chile “there is so far no particular quantitative methodological approach to measure the impacts, in terms for instance of the cost-benefit [of the law]”.⁶⁰ Even more, in their methodology description there is no mention to law’s costs & benefits or to its efficiency assessment. Although these evaluations might be costly,⁶¹ since they most likely require the contribution of highly trained professionals, it is important to include a quantitative aspect on a complete post legislative scrutiny.

56 DE VRIEZE (2017), p. 26.

57 See above note 5.

58 MERCADO (2013), pp. 95-101.

59 <<https://www.nao.org.uk/support-for-parliament/>> last accessed on 27th February 2018.

60 OECD (2012), p. 63.

61 KARPEN (2004), p. 314.

Regarding other types of impacts that could also be included within the efficiency test, both countries consider broader impacts of the law. The Law Evaluation Department in Chile mentions the need to account for social, cultural and environmental impacts.⁶² Similarly, in the UK there is also a broad notion of post legislative scrutiny, which includes not only legal and economic effects of legislation, but also social consequences of it.

4.3 An example of PLS: evaluation of legislation on mental health

To further understand the impact of these different systems of parliamentary PLS, it is useful to look at an example of legislation evaluated at both jurisdictions. Since both Parliaments evaluated their legislation on mental health, I shall compare these reports to highlight some of the differences we identified on the previous sections.

On March 2013, the Chilean Department of Law Evaluation delivered its PLS report regarding Law N° 18.600 on Mental Disabilities Regulation from 1987.⁶³ Only months later, on July 2013, The Health Committee of the House of Commons delivered a PLS report regarding the Mental Health Act of 2007.⁶⁴ Both reports appear as similarly comprehensive documents, since its analogous extension -75 and 87 pages respectively- however the scope of the analysis differs.

The first clear difference is that for the case of the Chilean report, the legislation being evaluated was very much outdated, with more than twenty years having passed since it was enacted, which probably accounted for much of the results of the analysis. For the UK instead, the scrutiny was done for a legislation that has been reformed only six years ago, which gave sufficient scope for legislation to have its effects, but at the same time it was early enough to identify potential failures and correct them for the future. In this sense, although in theory both systems acknowledge the need to leave some time before PLS; in practice, the UK period of three to five years is respected and seems more adjusted to its legislative cycles; while in Chile, the PLS has been done in some cases only one year after legislation was enacted, and in others twenty or thirty years later, showing a lack of systematization of the timing of PLS that can undermine its impacts.

When examining the content of both reports, we identify some structural similarities. They both start by contextualizing the background of the legislation that is being evaluated, including the explicit purpose and objectives established on the respective Acts. They also include an analysis of its interaction with other related legislation, whether it was previous national legislation on the field -UK Mental Capacity Act of 1983 and 2005-, delegated legislation or international treaties -a whole chapter of the Chilean evaluation is devoted to the consistency with the International Convention on the Rights of Persons with Disabilities-.

62 OECD (2012), p. 62.

63 DEPARTAMENTO DE EVALUACIÓN DE LA LEY (2013).

64 HEALTH COMMITTEE (2013).

However, the scope of the analysis differs. One of the most crucial differences among both examples of evaluation was the source of information used in each case. In the UK, the Government input was the cornerstone of the evaluation exercise made by the Health Committee. The evidence gathered to assess the implementation and operation of the Act came mainly from the dozens of reports and Government's responses sent to the Committee, which were contrasted and complemented with information provided by personal interviews to mental health professionals, networks of users and written evidence given by organizations from across the mental health sector and one anonymous contributor.

The Chilean report, on the other hand, mainly used legal and academic texts to assess the legislation, complemented by perception surveys and reports from citizen's forums and conferences, but there was not an official input coming from governmental agencies. In this sense, the only reference to implementation was a list of public institutions that had to deal with the law and the legislative measures that have been adopted, but lacking an official evaluation and any quantitative data regarding how they have worked in practice.

Regarding the core issues analyzed in each report, it is also worth noting that the UK Health Committee report is far more detailed and comprehensive than the Chilean one. The UK report examined each legislative measure in a separate chapter (the appropriate treatment test, the community orders and detentions, the independent mental health advocates, the places of safety, the supervised community treatment and the ethnicity implications of the Act), with explicit review of its effectiveness, impacts and weaknesses. The financial pressures and costs involved – in line with the efficiency test – were also a part of the analysis. Whereas in the case of the Chilean scrutiny, the report focused mainly on the issue of legal capacity of individuals with mental disabilities, although this was also in part due to the limited scope of the legislation being evaluated.

Finally, concerning the outcome of the PLS, both reports finish with a valuable chapter devoted to deliver precise recommendations. However, as a consequence of the different extent of each report, is not surprising that the UK recommendations are more comprehensive than the Chilean ones.

The Chilean report recommends eliminating some legal provisions related to the incapacity of individuals with mental disabilities and replace them by a proper system of support and assistance in line with international standards. They also pointed out that it is necessary to place financial and human resources for this system and complement it with an education and training program. Other recommendations dealt with proposed reforms to the figure of legal guardian and the modification of the legal vocabulary in some provisions to refer to individual with mental disabilities. Nonetheless, these recommendations have not been translated into legal reforms⁶⁵ and although a bill to establish rules of protection of the fundamental

65 The only recent reform to law N° 18.600 was the repeal of Article 16 which allowed to negotiate a labor contract with a person with mental disability, freely stipulating the remuneration among the

rights of people with mental illness or disability⁶⁶ was presented at the Chamber of Deputies on 2016, it is still under discussion.

In the case of UK recommendations, the PLS report delivered a list of 25 recommendations, including the request of data collection from the Health Department on a number of issues that should afterwards be reported to the Committee, the need to review the implementation of some of the powers enshrined in the Act, the extension of some particularly valuable institutions, such as the independent mental health advocate and ensure secure funding for those services, among others. Although there has not been a new Mental Health Act, it is worth noting that the Department of Health acknowledged these recommendations and consequently responded to each one of them.⁶⁷ Similarly, the Mental Health Code of Practice, designed to provide guidance for professionals, patients, their families and carers on their rights, was submitted to a process of revision and updated on 2015.⁶⁸ Other implementing guides were also amended.⁶⁹

Hence, this particular example shows that the UK model of parliamentary PLS is better suited than the Chilean one to account for the tests of effectiveness, efficacy and efficiency. On the other hand, there was no evidence of resurfaced political debates around the evaluated legislation due to the participation of British MPs.

parties, without being constrained by the rules on minimum wage. This provision was repealed by Ley N° 21.015 from 2017 as part of the legislation promoting the labor inclusion of people with disabilities.

66 Motion N° 10755-11, currently being analyzed by the Senate. Its legislative steps can be reviewed on the following link: <https://www.camara.cl/pley/pley_detalle.aspx?prmID=11189&prmBoletin=10755-11> last accessed on 15th February 2018.

67 The Response to the PLS Report is available at: <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/252876/33736_Cm_8735_Web_Accessible.pdf> last accessed on 15th February 2018.

68 More information available at: <<https://www.gov.uk/government/publications/code-of-practice-mental-health-act-1983#history>> last accessed on 15th February 2018.

69 For example, the guidance implementing changes to the police powers and places of safety provisions, which was updated on October 2017. Its updated version is currently available at: <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/656025/Guidance_on_Police_Powers.PDF> last accessed on 15th February 2018.

a) Summary table

Post Legislative Scrutiny		
Comparative Criteria	Reino Unido	Chile
Effectiveness (Implementation)	<ul style="list-style-type: none"> · Need to wait between 3-5 years · Strongly based on governmental reports · Covers also delegated, previous and related legislation · Strengthened by the use of sunset clauses 	<ul style="list-style-type: none"> · Need to wait at least 1 year · No intuitionalized method of receiving governmental inputs · Cover also delegated, Previous and related legislation · Limited use of sunset clauses
Efficacy (Goals)	<ul style="list-style-type: none"> · Mainly based on pre-legislative scrutiny inputs · Assessed by standing committees · Includes also citizen feedback 	<ul style="list-style-type: none"> · Based on purposes clauses (no systematic pre-legislative inputs) · Assessed by technical staff (LED) · Strong citizen feedback
Efficiency (Cost/Benefits)	<ul style="list-style-type: none"> · Use of RIA and C&B analysis · Support by specialized units · Broader consideration of impacts 	<ul style="list-style-type: none"> · No quantitative analysis of costs and benefits, nor quantitative support · Broader consideration of impacts

* Source: Own elaboration

5. CONCLUSIONS

This article analyzed the figure of parliamentary post legislative scrutiny. After reviewing the relationship with other types of evaluations, we highlighted the advantages and disadvantages of post legislative scrutiny. Taking the criteria set out by Mader, according to which post legislative scrutiny should test for effectiveness, efficacy and efficiency of the law, I developed a comparative exercise between two different models of parliamentary post legislative scrutiny: the UK and the Chilean

model. The former is characterized by a diffuse model of evaluation, where each standing committee has the possibility of engaging on post legislative scrutiny; while the Chilean case represents the concentrated model of post legislative scrutiny, where a specialized unit inside the Chamber is in charge of post legislative scrutiny. Consequently, another crucial difference rest on the fact that with the UK model the post legislative scrutiny is carried out by MPs, while the Chilean one trust this task to technical parliamentary staff.

After exploring the components of each model, particularly the methodology followed in each country, I can confirm the hypothesis that the UK model of parliamentary post legislative scrutiny better complies with Mader's criteria, since it can account for each of the standards in a much more comprehensive way than the Chilean model. The case study of the post legislative scrutiny made by both parliaments regarding mental health legislation further confirmed this finding.

In this context, it is possible to distinguish three types of recommendations for the Chilean model of parliamentary post legislative scrutiny: (i) coordinate and institutionalize a method of cooperation with the Government in order to better assess the implementation of the law (effectiveness); (ii) improve and regularize the exercise of ex-ante scrutiny in order to create useful inputs to determine the achievement of legislation's goals (efficacy); and (iii) reinforce the Law Evaluation Department unit ensuring they can incorporate a quantitative approach towards the analysis of legislation costs and benefits (efficiency).⁷⁰ Nevertheless, doing these adjustments will most certainly require political support and resources.

Regarding UK, the Westminster Parliament has developed a complete process of post legislative scrutiny, with a close cooperation between the Government and the Parliament. However, this system could have a more systematic approach in terms of defining a clear criterion to select the laws that will be subject to post legislative scrutiny, but keeping enough flexibility to adjust to changing circumstances. Due to time and resource constraints, the Parliament can't engage in post legislative scrutiny of every act and must prioritize, but it is important that those priorities are clear and transparent. A good example worth following is the checklist developed by the Scottish Parliament, in the sense that it shares some of the trigger points for parliamentary post legislative scrutiny, which contributes to further institutionalize this system of evaluation.

Finally, a recommendation for both the Chilean and UK system of parliamentary post legislative scrutiny deals with the need to develop a shared framework for both of its Chambers. Along this article we have confirmed that parliamentary post legislative scrutiny is mainly carried out by the Westminster House of Commons and the Chilean Chamber of Deputies, however, this does not exclude the possibility of post legislative scrutiny at the British House of Lords or

⁷⁰ These recommendations are consistent with those put forward by the OECD in its report dated back on 2012, where they distinguish institutional, methodological and governance recommendations. OECD (2012), p. 75.

the Chilean Senate, running the risks of duplication of efforts or even contradictory conclusions. This shared framework does not need to translate on Joint Committees or a Common Law Evaluation Department, but it should at least establish a formal channel of communication in order to avoid duplications and promote synergies between the Chambers.

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