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# Public Employment Law and the Transition to Democracy in Chile

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# PUBLIC EMPLOYMENT LAW AND THE TRANSITION TO DEMOCRACY IN CHILE

ROBERT G. VAUGHN\*

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## I. INTRODUCTION

By now, the dramatic stories of Chile's loss of democratic government as well as the events leading to a transition government

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Far too many Chilean professors, lawyers, and government officials contributed to the author's attempts to understand the transition in Chile fairly to be named. However, the author thanks Professors Eduardo Soto Kloss, Director of the Department of Public Law at the University of Chile, who made this research less daunting, and Arturo Aylwin, the Comptroller General of the Republic of Chile, whose cooperation and that of his staff provided many and useful insights. Thanks also go to the author's colleagues, Claudio Grossman and Richard Wilson, for their helpful comments on an earlier draft of this Article. Of course, none of the persons who have helped is responsible for any of the author's errors, nor does their assistance necessarily suggest agreement with the author's conclusions. Thanks also to Juan Milanés for his assistance in Chile and for his translation of a number of Spanish materials.

headed by Patricio Aylwin have been told.<sup>1</sup> On September 11, 1973, military forces ousted the elected government of Salvador Allende, ending one of the oldest democracies in South America. The brutal repression that followed stirred protest throughout the world.<sup>2</sup> The events leading to the transition are complex,<sup>3</sup> but throughout this period of repression, human rights advocates in Chile preserved a record of the abuses, exposed the activities of the military government, and sought to hold the government accountable under the law.<sup>4</sup> Partly as a result of the openings for political action created by these advocates, the people of Chile have undertaken a period of transition between the military regime and democracy.

Chile was one of the countries whose experience formed the basis for political and social analyses of the breakdown of Latin American democratic regimes in the 1970s.<sup>5</sup> More recent events have made Chile an appropriate case for examining transitions from authoritarian to democratic governments. These findings being, perhaps, applicable to other transitions in South America and Eastern Europe.

This Article examines one aspect of the transition and considers how public employment law in Chile relates to the transition to democracy. In so doing, the Article describes the character and

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1. *E.g.*, SAMUEL CHAVKIN, *STORM OVER CHILE: THE JUNTA UNDER SIEGE* (1985) (describing the coup and repression following); Carlos Huneeus, *From Diarchy to Democracy: Prospects for Democracy in Chile in Transition and Consolidation*, in *MEDITERRANEAN EUROPE AND THE SOUTHERN CONE* (Enrique A. Baloyra ed., 1987) (suggesting conditions permit use of noncompetitive elections to move to democratic rule); NATIONAL DEMOCRATIC INSTITUTE FOR INTERNATIONAL AFFAIRS, *CHILE'S TRANSITION TO DEMOCRACY* (1988) [hereinafter *CHILE'S TRANSITION TO DEMOCRACY*] (describing the 1988 Presidential Plebiscite).

2. A number of official and nongovernmental organizations criticized the human rights record of the military government. *See, e.g.*, *Report of the Special Rapporteur on the Situation of Human Rights in Chile*, U.N. Economic and Social Council, U.N. Doc. A/34/583 (1979); AMNESTY INTERNATIONAL, *CHILE: EVIDENCE OF TORTURE* (1983); ORGANIZATION OF AMERICAN STATES, *REPORT ON THE SITUATION OF HUMAN RIGHTS IN CHILE* (1985) [hereinafter *OAS REPORT*]; INTERNATIONAL COMMISSION OF ENQUIRY INTO THE CRIMES OF THE MILITARY JUNTA IN CHILE, *THE CRIMES OF THE CHILEAN MILITARY JUNTA IN THE LIGHT OF CHILEAN LAW* (1974) [hereinafter *INTERNATIONAL COMMISSION OF INQUIRY*].

3. *See* Huneeus, *supra* note 1; Manuel Antonio Garretón, *The Political Evolution of the Chilean Military Regime and Problems in the Transition to Democracy*, in *TRANSITIONS FROM AUTHORITARIAN RULE: PROSPECTS FOR DEMOCRACY* (Guillermo A. O'Donnell et al. eds., 1986).

4. A description of these activities may be found in Hugo Fruhling, *Repressive Policies and Legal Dissent in Authoritarian Regimes: Chile 1973-1981*, 12 INT'L J. SOC. L. 351 (1984).

5. *See generally* JUAN J. LINZ, *THE BREAKDOWN OF DEMOCRATIC REGIMES: CRISIS, BREAKDOWN, AND REEQUILIBRATION* (1978).

regulation of public employment prior to the 1973 coup, during the military regime, and during the period of transition. This examination is comparative in three ways. First, the experience in public employment in Chile can be evaluated under two models of public employment, both of which address part of the reality of the Chilean experience. In some respects, the transition in Chile can be analogized to the change of administrations in a liberal democratic state. In other respects, the transition can be analogized to the creation of a multiparty democracy from a one-party state. Therefore, evaluation and application of the Chilean experience rests on different views of public employment.

Second, the examination of Chile's public employment law in the transition to democracy provides one case study against which the experiences of other countries in transition can be compared. In this second sense, the Article recognizes the importance of the specific context in which the Chilean transition is occurring while still conceding its relevance to transitions occurring in significantly different circumstances. The Article suggests why public employment law offers a useful focus for examining how perceptions of law can influence events during a transition and presents some interesting implications for legal debates in the United States.

Third, a crucial institution in the regulation of public employment in Chile, *La Contraloría General de la República*, was patterned after a specific institution, the Comptroller General of the United States. During six decades, the two institutions have diverged, and their divergence offers opportunity for recognizing the influence of legal culture on the development of institutions.

Examination of the Chilean experience reminds us of the importance of the public service in any transition and cautions us that different perspectives of the character of public employment can influence the lessons to be drawn. These interpretations of the Chilean experience rest upon some understanding of the rules governing the transition in Chile, how the legal regulation of public employment has evolved from the 1960s through the transition, and how that regulation reflects more generally held views regarding the nature of law and the legal system.

## II. THE LEGAL CONTEXT

The transition to democracy in Chile occurs against a legal and political framework different from that which has marked the

transition in many other countries. Unlike transitions where the previous government has disintegrated or capitulated, the legal and political framework in Chile reflects the continuing power of both the military and the conservative elements of Chilean society. Because the transition government acquired office through procedures established after the coup, the rules of transition have been principally established by the military government.<sup>6</sup> In addition, the present government operates, with some recent changes,<sup>7</sup> under the Constitution of 1980<sup>8</sup> submitted by the military government and approved in a plebiscite.<sup>9</sup> The rules of transition guarantee a continuing role for the military and assure conservatives of influence in the government well beyond their electoral power. These rules of the 1980 Constitution and their reform in 1989 include separate powers and prerogatives for the military,<sup>10</sup> appointed senators,<sup>11</sup> multimember districts that increase the role of political minorities,<sup>12</sup> independence of the central bank,<sup>13</sup> a special constitutional court,<sup>14</sup> preservation of a Supreme Court, most of the

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6. After the democratic coalition won the 1988 Presidential Plebiscite, some modifications were made in the terms of the transition. These changes may have reflected direct negotiations as well as the altered political environment. Evidence of some of the modifications are the changes made in the 1989 reform of the Constitution.

7. The 1989 reform of the Constitution, although not changing the basic rules of the transition, did reduce the power of the military in the transition government. For example, the reform modified the role of the National Security Council, controlled by the military, as well as the prohibitions against the political participation of certain groups. *See generally* Law No. 18,825, *Modifica la Constitución Política de la República de Chile*, 33,450 DAIRIO OFICIAL, Aug. 17, 1989, at 5,405.

8. CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE CHILE DE 1980 [hereinafter CHILE CONST. or 1980 Constitution, interchangeably].

9. Considerable doubt exists regarding the fairness of the plebiscite adopting the 1980 Constitution. *E.g.*, AMERICAS WATCH, CHILE: HUMAN RIGHTS AND THE PLEBISCITE (1988) (detailing intimidation, fraud, and limitations on the opposition).

10. Article 95 of the 1980 Constitution creates a National Security Council with powers to comment on threats to national security (art. 96), as well as powers to appoint members to the Constitutional Tribunal (art. 81) and certain members to the Senate. *See supra* note 7 (the 1989 constitutional revision reduced the near veto powers of the National Security Council).

11. In addition to the elected senators and former presidents (who after the presidency serve in the Senate for life), there are at least nine nonelected members of the Senate. Two senators are former justices of the Supreme Court, elected by the present Supreme Court; one senator is to be a former comptroller general elected by the Supreme Court. The group also includes a former commander of each service: the army, navy, airforce, and *carabineros*, elected by the National Security Council; a former university rector and a former minister of state are appointed to the Senate by the President. *See* CHILE CONST. art. 45.

12. Two senators are elected from each electoral district. CHILE CONST. art 45.

13. The national central bank is made an "autonomous body." CHILE CONST. arts. 97-98.

14. The Constitutional Tribunal can determine the constitutionality of all organic con-

members of which were appointed by the military regime, and a tenured public service.<sup>15</sup>

### A. *The Civil Law Tradition and the Role of Law*

Unlike in the United States and some countries of Western Europe, no generation of legal realists in Chile has challenged the formalism of Chilean law. Chilean law rests heavily on the civil law traditions of Europe and the French Civil Code.<sup>16</sup> This tradition was passed to Chile through the Spanish<sup>17</sup> and in many areas the Spanish did not incorporate the reforms of the Code adopted elsewhere in Europe. In Chile, law consists of a set of norms that can be formally, almost mechanically, applied.<sup>18</sup> This tradition separates law from politics, from philosophy, and from ethics. In it law is evaluated almost solely by its content rather than its effects. Emphasis on the importance of formal norms and on the formal application of these norms creates legal actors, particularly judges, who see their law-making function as extremely limited. The often repeated phrase, "a judge is only a slave of the law," captures the spirit of this limitation.<sup>19</sup> This formalistic view of the law and its acceptance of the state as the sole source of law has generally precluded any role for natural law.<sup>20</sup> Moreover, the importance of the civil code, its permanence and influence, has reduced the importance of the Constitution, which has been more often changed and is more likely to be viewed as a document engineering the struc-

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stitutional laws prior to promulgation; resolve questions about the constitutionality of laws, treaties, and other provisions; determine the constitutionality of plebiscites; and declare certain organizations, political movements, or political parties unconstitutional. CHILE CONST. art. 82. The Constitutional Tribunal consists of seven members: three Supreme Court justices elected by the Court by an absolute majority, one attorney designated by the President, two attorneys elected by the National Security Council, and one attorney elected by an absolute majority of the Senate. *Id.* art. 81.

15. See discussion *infra* at text accompanying notes 26-40.

16. See generally JOHN HENRY MERRYMAN & DAVID SCOTT CLARK, *COMPARATIVE LAW: WESTERN EUROPEAN AND LATIN AMERICAN LEGAL SYSTEMS* 158-69, 208-16 (1976).

17. *Id.* at 208-16.

18. *Id.*

19. The author heard this phrase repeated often by law professors, attorneys, and judges.

20. At least in an environment of polarization, the Supreme Court appeared to abandon a purely formalistic role. Near the end of the Allende government, the Supreme Court denounced the government and alluded to the right of rebellion granted to the citizens of a government. The Supreme Court's criticism of the Allende government is discussed in *INFORME DE LA COMISIÓN DE VERDAD Y RECONCILIACIÓN, INFORME RETTIG 96* (1991) [hereinafter *INFORME*].

ture of government.

Chile shares the civil law perspective of courts as bureaucracy.<sup>21</sup> A judicial career separates the judge from other legal actors and places the judge in a bureaucracy where appointment, assignment, pay, and promotion are controlled or highly influenced by judges above in the judicial hierarchy. Indeed, the Chilean Supreme Court exercises personnel functions over lower courts and plays a significant, if not predominant, part in the selection of members of the Supreme Court.<sup>22</sup>

Not surprisingly, Chilean courts and judges provided little restraint on the military government installed after the coup. The courts acquiesced in the creation of courts and tribunals operating outside of the normal judicial system. During the years of the military regime, human rights advocates brought to the courts hundreds of petitions for habeas corpus seeking the release of persons held by the military or subjected to torture during imprisonment.<sup>23</sup> Fewer than a handful of these petitions were granted and the courts routinely accepted, at face value, seemingly incredible official explanations.<sup>24</sup> Moreover, the few judges who did act found themselves subject to discipline by the Supreme Court.<sup>25</sup> The Court admonished these judges because they were not acting as judges should—they were attempting to make rather than follow the law, and seeking to implement political or moral views beyond their purview. The traditions of the civil law system and the judicial structure in which they operated gave judges little theoretical or practical basis for resistance.

Also influenced by legal formalism, other institutions took the same limited view of their functions. Public employment law, less

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21. For example, in Chile, the Supreme Court administers all of the courts except the Constitutional Tribunal and the military courts. The Supreme Court has the power to discipline judges of lower courts. See CHILE CONST. art. 79.

22. A vacancy on the Supreme Court is filled by the President from a list of five names submitted by the Supreme Court. CHILE CONST. art. 75.

23. See generally THE VICARIA OF SOLIDARITY, EXTENT OF WORK IN OVERALL FIGURES (1990) (describing the use of petitions for habeas corpus)(copy of the report in the author's files); Fruhling, *supra* note 4, at 359, 363-66; INFORME, *supra* note 20.

24. Fruhling, *supra* note 4, at 364, 370 (describing the negative response of the courts). "The courts acted as if government officials were always telling the truth, particularly when they denied having detained somebody . . ." *Id.* at 364.

25. Consider, for example, the Supreme Court's sanctioning Judge René García Villegas. *Juez René García Villegas: Se Me Acusa de Violar Provisión a Jueces de Actuar en Política*, EL MERCURIO, Sept. 14, 1988, at 5D; and the sanctioning of Judge Carlos Cerda. JOAQUIN GARCIA-HUIDOBRO CORREA, A PROPÓSITO DE UNA SANCIÓN (1987).

dramatically, but just as importantly as human rights provisions, failed to provide an effective rebuke to the military government. Ironically, from one perspective, this lack of effective response resting on a formalistic view of the role of the law preserved the institutions which now play a role in the regulation of public employment during the transition.

*B. The Regulation of Public Employment Law in Chile 1960-1990*

This [failure to work more or produce more] is the same lazy bureaucratic path taken by prior regimes. . . . I do not know of one Head of Service that has requested a quarter or half an hour extra pay per day from his/her employees. In contrast, I tell you that I do know that no public office in Chile works on Saturday mornings and sometimes, not even the regular office hours: they wait for quitting time and a quarter hour beforehand they take off and when they have to work on the day prior to a long weekend, well, that afternoon, my friends only lasts a half hour to an hour.<sup>26</sup>

This 1971 statement by President Salvador Allende could easily reflect the sentiments of elected officials in many democratic governments. Indeed, Allende and previous Chilean leaders presided over a public service similar to and sharing the perception and values of those in other multiparty states. Chilean public employment law, as reflected in the Administrative Statute of that time,<sup>27</sup> was highly structured; the technical and professional skills

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26. GUSTAVO SANTISO GÁLVEZ, *LA BUROCRACIA* 86, 88 (1973) (reporting meeting between Dr. Allende and the heads of public services at "La Moneda," the Presidential Palace, on September 30, 1971).

27. In substance, the 1960 Administrative Statute, Decree Law No. 338 *Estatuto Administrativo* 24,613 *DIARIO OFICIAL*, Apr. 6, 1960, at 863 [hereinafter DFL 338], and the 1990 Administrative Statute, Law No. 18,834, are basically the same. See Law No. 18,834, *La Junta de Gobierno de la República de Chile ha dado su aprobación al siguiente*, 33,479 *DIARIO OFICIAL*, Sept. 23, 1989, at 6425 [hereinafter 1990 Administrative Statute]. The principal difference is the condensing of the 1960 Administrative Statute from 392 articles to 157 articles in the 1990 Administrative Statute. The few substantive differences between the two statutes illustrate their basic similarity. Some of these differences include: a limitation in the number of public employees who can serve on one-year contracts included in the 1990, but not the 1960 statute. *Id.* art. 9. The 1990 statute contains none of the exemptions for foreigners with scientific knowledge serving in the civil service, whereas exemptions in the 1960 statute permitted service by these foreigners. DFL 338, *supra* art. 9. The 1990 statute alters somewhat the performance appraisal system contained in the 1960 statute. See 1990 Administrative Statute, *supra* arts. 31-39. The 1990 statute increases the work week but does not require work on Saturday, as did the 1960 statute; the 1990 statute also



of public employees controlled appointment and tenure.<sup>28</sup>

The 1960 Administrative Statute contained a number of legal protections for public employees and gave most of these employees a property right in their positions.<sup>29</sup> Provisions for pay, promotion, and discipline provided criteria for employee evaluation and limited the discretion of administrative officials in personnel actions.<sup>30</sup> This approach not only recognized the rights of public employees but also reflected a concern that partisan political groups in a multiparty state be restrained in the exercise of the power of the bureaucracy. The approach also fit easily with the perception of formal legal rules structuring relationships in society.

As in many democratic governments, public employees were perceived as nonpolitical public operatives who carried out the orders of their superiors according to technical criteria. The 1960 Administrative Statute protected Chilean public employees from political coercion, prohibited the use of official positions for political purposes, and limited the type of political activities in which these employees could engage.<sup>31</sup>

Executives in democratic governments have long complained that this protection of public employees and the perception of the bureaucracy as nonpolitical implementers of policy in fact created institutions that were not responsive to control by democratically

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makes provision for compensatory time for employees required to work longer than the designated 44-hour work week. Compare DFL 338, *supra* art. 143 with 1990 Administrative Statute, *supra* art. 59.

28. DFL 338, *supra* note 27, art. 39 (skills control employment and tenure).

29. *Id.* art. 37 (employees have right to continued employment). One observer of the Chilean bureaucracy doubted the impartiality of the bureaucracy or its selection based on merit.

The social implications of the importance of kinship and political contacts for promotion is the perpetuation of existing groups and confinement of access to higher posts to select groups. In more general terms, the influence of political criteria and family ties tends to undermine the possibility of selecting personnel on the basis of merit, and makes it difficult, if not impossible, to build a competent, professional civil service capable of acting impartially on the basis of objective needs and criteria.

JAMES F. PETRAS, *POLITICS AND SOCIAL FORCES IN CHILEAN DEVELOPMENT* 308 (1969). A similar assessment of the civil service in Brazil can be found in LAWRENCE S. GRAHAM, *CIVIL SERVICE REFORM IN BRAZIL: PRINCIPLES VERSUS PRACTICE* 125-39, 177-78 (1968) (reform failed to consider the greater role of the family in Brazilian life, the aristocratic heritage of the Brazilian civil service, and the need for patronage by political parties as a unifying device).

30. DFL 338, *supra* note 27, arts. 40-52.

31. DFL 338, *supra* note 27, art. 99 (employees may not use authority of position to favor or prejudice any political party or teaching). See *infra* text accompanying notes 54-56.

elected officials. In the United States, this executive concern has been accommodated by increasing the number of "political appointees" over whom executive officials have discretion outside of the normal restraints of personnel authority.<sup>32</sup> In contrast, the Chilean public service, like many other western civil services, provided for very few political appointments.<sup>33</sup> At the time, only the first two levels of officials within a ministry could be appointed by the President or by politically appointed officials. For many ministries, this restriction limited the number of political appointees to two or three individuals.<sup>34</sup>

Structurally, the protections provided to public employees and the restraints imposed on administrative officials were supervised by the *Contraloría General de la República*. This office traced its antecedents to Spanish Colonial administration<sup>35</sup> but eventually came to adopt the Comptroller General in the United States and in Great Britain as its model.<sup>36</sup> Like the Comptroller General, the *Contraloría General* audited governmental expenditures and provided opinions on the legality of the expenditures of public funds.<sup>37</sup> The *Contraloría General*, however, had greater authority to review the constitutionality and legality of a variety of administrative acts and the responsibility to review all personnel actions

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32. For a history of the growth of such appointments in the federal government, see ROBERT G. VAUGHN, *PRINCIPLES OF CIVIL SERVICE LAW* ch. 1 (1976).

33. One observer focused on the flexibility that an administration had in maneuvering within these confines.

Almost all middle and upper administrative posts are spoils of the new government. Though protected from summary dismissal and salary cuts, the displaced administrators from the previous regime are delegated minor tasks in which they lose almost all influence. Their experience is not tapped; they are in a position neither to initiate policy nor sabotage it, if such were their intention.

PETER S. CLEAVES, *BUREAUCRATIC POLITICS AND ADMINISTRATION IN CHILE* 1 (1974). Such a strategy requires continual and perhaps substantial growth in the civil service.

34. Partly in response to the rigidities of the civil service, Chilean administrations relied on "independent" agencies or government corporations to carry out several important development projects in housing and in transportation. These agencies and corporations did not have to send regulatory decrees to the Comptroller General for approval and they could establish salaries higher than those provided in the civil service. The Allende government used nongovernmental groups more extensively than its predecessors. CLEAVES, *supra* note 33, at 1 n.1, 10-12. In 1970, Chile had 80 publicly owned companies. By 1973, there were 480 and by 1979, after a program of privatization by the military government, there were 32. JORGE MARSHALL & PILAR ROMAGUERA, *LA EVOLUCIÓN DE EMPLEO PÚBLICO EN CHILE 1970-1978*, at 3 (1981).

35. See generally SONIA PINTO ET AL., *ANTECEDENTES HISTÓRICOS DE LA CONTRALORÍA GENERAL DE LA REPÚBLICA 1541-1927* (1977).

36. See *infra* text accompanying notes 94-109.

37. CHILE CONST. OF 1925 art. 21 (added by Law No. 7727 of Nov. 23, 1943).

including disciplinary actions taken by other government ministries against public employees.<sup>38</sup> Indeed, personnel actions approved by individual agencies could not have been taken until reviewed by the *Contraloría General*. Much of this review was pro forma since it was accomplished on the basis of documents prepared by the agency with a concern about the compliance of the action with the specific requirements of the Administrative Statute. Still, the *Contraloría General* provided the mechanism for review and a body of opinion applying the provisions of the Administrative Statute.<sup>39</sup>

This administrative scheme reflected the more general legal climate in which formal rules provided the principal, often the only, basis for decision and in which review emphasized written forms and procedures. Such a system permitted the acceptance of technical formality for compliance and encouraged a narrow view of legality.

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38. *Id.*; FREDERICO G. GIL, *THE POLITICAL SYSTEM OF CHILE* 98 (Dayton McKean ed., 1966) (discussing history of the authority to review the legality of administrative decrees).

39. The disciplinary provisions provide an excellent example of the *Contraloría General*'s review of personnel actions. When the governmental agency begins an investigation of an employee on allegations that could lead to disciplinary action, the agency must notify the *Contraloría General*. The agency's investigation is inquisitorial with the appointed official taking testimony and compiling documents relevant to the charge. During the investigation, the employee has a right to have representation. If appropriate, the investigation may culminate in a notice of charges against the employee; these charges must be specific and properly alleged. If not, the *Contraloría General* will return the charges to the agency for correction. An agency prosecutor chosen by the agency conducts this investigation. The prosecutor must be of the same or higher rank than the employee investigated; the prosecutor is assisted by a secretary who takes statements and other materials for the record. The prosecutor writes a report or an analysis including a proposed sanction. The charged employee receives a notice of the report and access to it. The report is forwarded to the deputy chief of the agency who reviews the report and has the authority to lower or to increase the sanction.

The decisions of the *Contraloría General* set out procedures to be followed. If the *Contraloría General* finds that an error in procedure has been committed, the action is returned to the agency which must commence action anew from the point where the error was made. The *Contraloría General* requires that the error be an essential one that appears to have affected the outcome. This harmful error rule would not require return of an action for minor procedural errors, such as filing a report after the deadline. See generally Eduardo Soto Kloss, *El Procedimiento Disciplinario en el Estatuto Administrativo*, 17 *REVISTA DE DERECHO PÚBLICO* 111 (1975) (Chile).

As the statutes and the decisions of the *Contraloría General* indicate, the disciplinary provisions and the procedures for review have not changed significantly since the 1960s. This continuity of procedure and rule is discussed in more detail in the text *infra* at notes 79-81.

This process reflects the general character of Chilean adjudication that is judge-centered and that relies heavily on documentary material.

The military government benefitted from this legal tradition as well as from the structure of public employment law. The military regime retained the legality of public employment and the legitimacy of existing institutions while at the same time significantly altering the character of public employment and the nature of protections available to civil servants. By decree, the military government provided that the confidence of the President of Chile was required of all persons holding positions in the public service, with the exception of the judiciary and of the *Contraloría General*, thus rendering most public employees temporary ones.<sup>40</sup> Through this decree, the government removed the protections applicable to public employees and permitted the President to dismiss employees. The military government could thus remove employees without violating legal requirements since they did not provide protections to employees serving at the pleasure of the President.

The military government used this authority to remove a number of public employees. It appears that many of the removals were based on political tests that targeted employees with leftist persuasions. As the removals proceeded, they also served as a way of reducing the public sector, a goal of the Chicago trained economists who were placed in charge of the government's economic policy. It is difficult to determine precisely how many employees were removed under this authority, but from the time of the coup through 1978, the military government reduced public employment by approximately 94,000 positions.<sup>41</sup> Probably not all the positions of dismissed employees were removed from the public sector because the removal of public employees was also used to open positions for supporters of the coup and persons deemed ideologically acceptable. Therefore, the number of persons affected by the decree may have exceeded the reduction of public service positions during this period.

The military government also altered the structure of government ministries and used its power to place military personnel in influential positions. For example, from 1972 to April 1986 about half of the ministers had been members of the armed forces.<sup>42</sup>

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40. OAS REPORT, *supra* note 2, at 12.

41. MARSHALL & ROMAGUERA, *supra* note 34, at 4-5, 7 (Table 1). During the military regime, public employment also declined as a percentage of the workforce. In 1970 public employees were 9.3% of all workers; in 1973, 12.8%; and in 1978, 8.9%. *Id.* at 3. The decline in public employment reflected a general reduction in the percentage of GNP expended in the public sector. In 1970, the percentage was 22.7; by 1973, over 30; and by 1976, 17.6. *Id.*

42. Huneeus, *supra* note 1, at 117.

Likewise, regional and provincial superintendents were all military officers, as were the majority of governors.<sup>43</sup> One commentator concluded that the extensive role of the military in government gave Pinochet, as Commander in Chief of the army, "direct power and authority over civilian and military personnel in the governing coalition."<sup>44</sup> Thus, under the military government, the president enjoyed a control of public employment not enjoyed by his democratic predecessors.

The 1980 Constitution, approved by plebiscite, solidified the structure of government and symbolized the return to many of the formalities previously imposed by public employment law. Still, the 1980 Constitution did not significantly diminish the existing control of the military government over the public service and in fact legitimated the previous actions of the regime.

The 1980 Constitution called for a plebiscite, conducted in October 1988, in which the public was permitted to vote "yes" or "no" on an additional eight-year presidential term for Augusto Pinochet.<sup>45</sup> For a variety of reasons, political support for the regime had waned and, in what observers found a fairly conducted plebiscite, 54.7 percent of the voters rejected an additional term for Pinochet.<sup>46</sup> As a result of the plebiscite, freely contested elections for President and Congress were required. In those elections, conducted in December 1989, Patricio Aylwin, representing a coalition of opposition parties, was elected President of Chile.<sup>47</sup> Aylwin's term, deemed a transitional one, was limited to a period of four years.<sup>48</sup> Thus began the formal transition to democracy in Chile.

After the electoral defeat of General Pinochet, the military government acted to ensure continued influence or control over a number of institutions, including the public service. Persons ap-

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43. *Id.* at 116-17.

44. *Id.* at 118 (footnote omitted).

45. For a description of the 1988 Presidential Plebiscite, see CHILE'S TRANSITION TO DEMOCRACY, *supra* note 1.

46. *Id.* at 2. Although the election itself was fairly conducted, the government-controlled media gave the government a tremendous advantage in campaigning. The opposition was allotted a small amount of air-time compared to the resources available to the government.

47. With Aylwin, Buchi, and Errázuriz receiving 97% of the vote, Aylwin had received 55.2% of the vote, Buchi had received 29.4%, and Errázuriz had received 15.14%. Shirley Christian, *Ex-Senator Defeats Two Opponents in Election to Succeed Pinochet*, N.Y. TIMES, Dec. 15, 1989, at 1.

48. CHILE CONST. transitory art. 29 (added by Law No. 18,825, *supra* note 7, which also contains amendments in art. 53).

pointed as public employees during the Pinochet regime were granted legal protections.<sup>49</sup> For example, a new law was enacted allowing individuals, including public employees, to challenge actions by government officials, hereby, for the first time, granting them access to the courts to challenge removals from office.<sup>50</sup> This provision of judicial remedy perhaps reflected not so much a solicitude for the rights of public employees, a concern belied by the previous conduct of the military regime, as a desire to protect supporters within the bureaucracy and to confront the transitional government with a public service composed mostly of unsympathetic, if not hostile members.

The previous discussion of the types of administrative review available to public employees suggests the limitations on personnel actions imposed upon the new government. The newly created judicial remedy reinforces these limitations. The Court may award damages and in some circumstances can direct the reinstatement of the employee.<sup>51</sup>

The first cases involving public employees suggest that the provision is an important additional protection. In one case, the Supreme Court emphasized that the Constitution protected public employees by granting them property rights in their positions and by limiting the grounds for their removal.<sup>52</sup> The Supreme Court's decision and other interpretations of the rights of public employees limit the ability of political officials to remove employees and demonstrate the importance of providing judicial redress for violations of these rights.

The transitional government did enjoy a marginally greater ability to make political appointments than had previous democratic governments. Changes in the law permitted the President to make political appointments at the first three levels within a department rather than the two levels previously permitted.<sup>53</sup> This

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49. CHILE CONST. art. 20.

50. Article 38 specifically provides a right of action to public employees. *Id.* art. 38.

51. *Id.*

52. Judgment of Dec. 20, 1989 (Eduardo Méndez Cofe v. Mayor of the City of San Nicolás), Corte Suprema (Chile)(on file with author). See also Judgment of May 25, 1990 (Manuel Tapias-Rojas v. Director General of Sports and Recreation), Ct. App. Santiago (Chile)(on file with author); Judgment of Dec. 11, 1989 (Eduardo González Rivas v. Mayor of the City of Talagante), Corte Suprema (Chile)(on file with author).

53. Law No. 19.972, *Modifica Ley No. 18.575, Organica Constitucional de Bases Generales de la Administración del Estado y la Ley No. 18.834 Estatuto Administrativo*, 33.617 DIARIO OFICIAL Mar. 10, 1990, at 2083 (modifying Law No. 18.575, Organic Constitutional

change allowed somewhat greater flexibility but was perceived as more of a technical change to accommodate the administrative structure of agencies than as a political one. The practical benefits for the new government were limited and its choices dramatically more restrained than those permitted by the powers exercised in the early years of the military regime.

### III. IMPLICATIONS OF THE CHILEAN EXPERIENCE

The legal regulation of public employment in Chile presents interesting but conflicting models for evaluation of the transition. The Chilean experience also suggests the value of specific case studies, particularly in law, that allow generalizations about the role of law in transitions to democratic government and offer insight for debates now occurring in the United States. The historical link between the *Contraloría General de la República* and the Comptroller General of the United States permits an examination of the separate development of the two institutions. A variety of factors have influenced the separate development of the two institutions but, again, this comparison highlights the importance of the legal context, this time to institutional development. Finally, the Chilean experience reminds us of both the limits and the promises of comparative studies.

#### A. *Conflicting Perspectives of Public Employment Law*

The lessons to be drawn from the transition in Chile regarding legal regulation of public employment depend, in part, on the perspective from which one approaches the public employment problems confronting the Chilean transition. Because the transition in Chile involves the restoration of long-standing democratic traditions, it is possible to perceive the task of the Chilean transition as similar to, although greater in scope and magnitude than, that confronting the change of administration in a liberal democratic state. Most of the forms of public employment from Chile's democratic history are intact, as well as the principal institutions regulating public employment. The present Administrative Statute reflects the same view of public employees as neutral implementors of policy that prevailed prior to the coup. For example, the restric-

tions on the political activities of public employees and the guarantees of their political rights incorporate standards that existed prior to the coup.<sup>54</sup> The principal opinions of the *Contraloría General* regarding the political activities of public employees and discipline of employees from both before and after the military regime are theoretically indistinguishable.<sup>55</sup> Generally, public employees are prohibited from engaging in political activities while on duty, from allowing political consideration to interfere with the impartial administration of the law, from using their authority to coerce political acts from other public employees, and from using public assets or benefits to support political activities.<sup>56</sup> Indeed, as discussed above, the protections provided to public employees are more significant now than before the coup.

From this perspective, the transition confronts the problem of a new government taking over a public service that has been administered for a considerable time by the opposing party. The public service is likely to contain many persons who are unsympathetic or hostile to the new government. In these circumstances, the new administration confronts the difficult choice between adhering to the protections provided to public employees or filling the public service with sympathizers, even if this requires evasion or violation of existing procedures. Democratic regimes can take either course, although faithfulness to the law usually requires the new government to be bound by the existing legal restraints, unless altered.<sup>57</sup> Therefore, the importance the transition government attaches to legal norms as limitations on the power of antidemocratic groups counsels restraint.

The transition could draw more readily from governmental transitions in liberal states. Likewise, the lessons to be drawn re-

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54. See generally Contraloría General de la República, *Derechos Politicos de los Funcionarios Publicos y Prescendencia Politica en la Administracion Publica* [Political Rights of Public Employees and Political Party Abstraction in Public Administration], 97 JUDICIAL GAZETTE, July 21, 1988, at 113.

55. Compare Contraloría General Official Notes: Political Rights of Public Employees, CGO numbers 85.320/64, 12.822/65, 3.509/71 with CGO numbers 24.776/87, 30.584/87, 17.404/88, 24.350/88, 26.889/89 (copies on file with author).

56. Contraloría General de la República, *supra* note 54.

57. In the U.S., for example, many of the Watergate abuses surrounded attempts of the Nixon administration to gain control of the civil service, which it perceived as partisan and unresponsive to elected officials. In so doing, it violated a number of civil service laws and rules. See generally *Watergate and Related Activities, Use of Incumbency-Responsiveness Program: Hearings on S. Res 60 Before the Senate Select Committee on Presidential Campaign Activities*, 93d Cong., 2d Sess. (1974).



garding legal regulation of public employment in transition governments are likely to be of limited application and usefulness for many governments now in transition.

The perspective above fails to capture the brutality of the previous regime or its strong antidemocratic philosophy. Although the military government initially stated that its goal was to reaffirm democratic government, its actions, and soon its rhetoric, were much different.<sup>58</sup> The military government, particularly its leader, General Pinochet, denounced democratic government and its politicians. It touted a new vision of government in which consultation replaced election, and in which the weakness of tolerance was replaced by the strength of the exclusion of undesirable elements from political life.<sup>59</sup>

From this perspective, the transition government confronts the same problems faced by a government taking over a public service that has been constructed in a one-party state. In such a system, loyalty to the coalition in power was a necessary condition to appointment and retention, and the bureaucracy does not hold, but, indeed, rejects democratic values and rules. Moreover, the constitution under which the transition government must function contains within it a number of provisions that are inconsistent with Chile's democratic traditions.<sup>60</sup> The return of antidemocratic forces is not foreclosed and the transition government must attempt to convert as well as control the public employees it has inherited.

Viewed from this angle, the transition has fewer models, particularly legal ones, upon which to draw. Its task is therefore much more difficult. On the other hand, the lessons to be drawn from the transition are perhaps more readily applicable in other situations, particularly in Eastern Europe. Crucial is the inculcation in the existing bureaucracy of the importance of fidelity to law. In a bureaucracy in which actions whether by or against public employees were not significantly restrained by law, the task requires an articulation and adherence to rules. Paradoxically, it may also require

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58. The pre-coup arrangements were called "formal democracy" and the 1980 Constitution was called part of a transition to an "authoritarian and protected" democracy. OAS REPORT, *supra* note 2, at 13 para. 23, at 15 para. 30 (1985).

59. See generally INTERNATIONAL COMMISSION OF ENQUIRY, *supra* note 2.

60. Examples include the concentration of power at the presidential level, limitations on individual rights, prohibitions on political party activity, and the role of the National Security Council. OAS REPORT, *supra* note 2, 18-21 paras. 46-62; see generally AMERICAS WATCH, *supra* note 9, at 36-49.

emphasizing individual judgment and responsibility.

Adherence to rules is required in order to emphasize the restraints on the exercise of power that are basic in a democratic system in which competing values and views are recognized. The temptation in any bureaucracy, but particularly in one that has served a one-party state, is to equate compliance with the orders of superiors with compliance with the law. If so, law fails to restrain but rather facilitates the implementation of limited and restricted visions. Therefore, some sense of the law as separate from the will of superiors is required.

The choice for the transition government, then, is not an easy one. The transition government can benefit from these attitudes of obedience. However, in emphasizing individual judgment regarding fidelity to law, it risks authorizing opposition and obfuscation within the bureaucracy. Still, even if the transition possesses the power to compel obedience, in so doing it is likely to teach the lessons taught by its predecessor and in the long run may secure the enmity rather than the support of public employees.

Chilean public employment law contains a provision that illustrates these problems and opportunities. Although the Constitution imposes a duty to obey the orders of superiors,<sup>61</sup> it also provides a mechanism permitting employees to challenge the legality of such an order.<sup>62</sup> An employee must state his or her objection in writing. If the superior then reaffirms the order in writing, the employee is required to obey but is released from any personal responsibility for the implementation of the order.<sup>63</sup> One Chilean legal scholar has argued that an employee should never be compelled to commit a crime and that he or she would be protected from discipline for refusal of such an order even if the procedures of the law are applied.<sup>64</sup> Moreover, if the instruments of the state are

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61. CHILE CONST. art. 55(f).

62. *Id.* art. 56.

63. *Id.* Both the employee that has asserted the order's illegality and the superior that has reiterated it shall send copies of the communications to the appropriate agency headquarters within five days from the date of the last communication between the employee and superior. The employee, however, has no specific right to compel decision regarding legality by any official higher in the agency. If an employee was disciplined for refusal to follow an order, the discipline would be reviewed by the *Contraloría General* as it would review other disciplinary actions. See *supra* note 39. The *Contraloría General* would accept as a defense to disobedience that the order required the commission of a crime. *Id.* The employee would also have the right to present a claim to the courts. *Id.*

64. Interview with Professor Eduardo Soto Kloss, Director of the Department of Public Law at the University of Chile (June 27, 1990) (interview notes in the author's files).

subject to the Constitution, an order compelling the commission of a crime does not comport with the Constitution and, therefore, does not provide a basis for discipline.<sup>65</sup>

The provision regarding illegal orders seems to have been rarely used, partly due to the realities of bureaucratic life discouraging dissent and partly because of the constrained view of law in Chile.<sup>66</sup> The transition government could use this provision as an illustration of the differences between the attitudes of a bureaucracy in an authoritarian state and of one in a democracy. To do so would require placing greater importance on the individual judgments of employees by protecting an employee who appropriately refuses an order that violates the law even if the order has been affirmed in writing. Such a position is possible within the structure of the existing provisions and is consistent with some interpretations of the provision.

Of course, neither of these perspectives fully captures the character of legal regulation of public employment in Chile. The view of the transition in light of the historical links to Chilean democracy does not capture the character of the change in 1973. This view also fails to consider the philosophy of the military government, a government that not only violated but also rejected the rules of the game in public employment law, rules that rested upon democratic practice and theory. Likewise, the view of the transition as the movement from a one-party state fails to recognize the many links with Chile's democratic traditions. It also fails to consider that room for political action remained as did, therefore, the possibility for change and modification in the regime.<sup>67</sup> The regime

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65. *Id.* This position is similar to one taken in the cases in the United States that have considered the issue. See generally Robert G. Vaughn, *Public Employees and the Right to Disobey*, 29 HASTINGS L.J. 261 (1977). See also *Ferrone v. Department of Labor*, 797 F.2d 962 (Fed. Cir. 1986) (holding that employee who violated an illegal order is protected from disciplinary action); *Bigelow v. Department of Health & Human Servs.*, 750 F.2d 962 (Fed. Cir. 1984) (similar position); *Harley v. Schuylkill County*, 476 F. Supp. 191 (E.D. Pa. 1979) (noting that public employees are not compelled to obey orders that would violate the constitutional rights of third parties).

66. See *supra* notes 16-25 and accompanying text.

67. Manuel Garreton describes the forces and events that created space for political action. Garreton, *supra* note 3.

The Pinochet government closed Parliament and prohibited party activity but did not organize a mass party; it prohibited large trade union federations but permitted trade unionism; it intervened in the universities but did not synchronize their faculty and students with an official ideology and apparatus of party control; and it permitted large institutional spaces for the Catholic Church, including lay organizations . . . . The complexity and long democratic tradition of

never effectively implemented a uniform political view applied to all organizations and elements in society. Particularly in public employment law, the military regime sought to emphasize the continuity in the law and the links to institutions that existed in previous democratic governments.

The lessons to be drawn from the Chilean transition rest not simply on the concrete facts of the transition but on the perspectives from which those facts are interpreted. Different views of public employment law present the problems and responses of the transition differently. In drawing lessons for transitions elsewhere, the subjectivity of analysis remains, perhaps, the greatest lesson to be drawn; this lesson should counsel both caution and humility.

### *B. The Importance of Law in the Regulation of Public Employment*

Just as perspective plays an important part in the lessons to be drawn from Chilean transition, so perspective guides the lessons to be drawn from case studies of the role of legal regulation. The examination of the transition in Chile by considering legal regulation of public employment offers some perspective of the role and of the importance of public employment.

#### 1. The Role of Law

Many studies of transitions draw on economic or political perspectives.<sup>68</sup> Quite appropriately, law is seen as a codification of decisions reached on other grounds or as a factor conferring legitimacy on political and social institutions arranged, in particular forms, for other reasons. These studies, however, are sophisticated and recognize that law is one of many factors affecting outcomes,<sup>69</sup> but the perspectives chosen place the role of law in the background

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a country such as Chile did not permit a total synchronization.

Huneus, *supra* note 1, at 124.

68. *E.g.*, Huneus, *supra* note 1 (comparing political and economic factors); DEMOCRATIC POLITICS IN SPAIN: SPANISH POLITICS AFTER FRANCO (David S. Bell ed., 1983) (essays principally concerning social and political developments); Garreton, *supra* note 3 (essays focusing on political and social factors); ROBERT GRAHAM, SPAIN: A NATION COMES OF AGE (1984) (focusing on the political process leading to change); LINZ, *supra* note 5 (stressing socioeconomic variables).

69. *E.g.*, Pierre Subra De Bieusses, *Constitutional Norms and Central Administration: Reflections on Some of the Articles of the 29 December 1978 Constitution*, in DEMOCRATIC POLITICS IN SPAIN: SPANISH POLITICS AFTER FRANCO (David S. Bell ed., 1983).

rather than in the foreground of analysis. Certainly legal writers as well are not parochial, but understand that social, economic, and political factors are crucial to understanding the operation of the law in a particular setting. A perspective based on the role of law, however, is more likely to remember that the law does not simply codify decisions made and reached for other reasons but also influences the outcome of a particular situation.

This difference in perspective can be illustrated by looking again, briefly, at the role of law in the transition to democracy in Chile. This Article has already described how a formalistic view of law contributed to the inability of the courts and other legal institutions to respond significantly to the military coup.<sup>70</sup>

The complexity of the situation, however, cautions, legal realists in particular, against too hasty an indictment of formalism.<sup>71</sup> The first of these cautionary signs is the visible, if not central, role that human rights lawyers played in the opposition to the military regime.<sup>72</sup> The second arises from the continuity and viability of legal institutions in Chile. Indeed, the survival of these institutions is one of the reasons that it is possible to treat the transition under

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70. See *supra* text accompanying notes 16-25. Ironically, the Chilean civil law tradition rests heavily on the French Civil Code. In the context of the French Revolution, the formalism of the law and restrictions on judges sought to protect democratic development from an unpopular judiciary closely connected with the ancient regime. MERRYMAN & CLARK, *supra* note 16, at 183-85 (citing JOHN PHILIPPE DAWSON, *THE ORACLES OF THE LAW* 369-71 (1968)). In a different context these principles limiting the judiciary helped to undermine democratic government by removing the courts as a significant restraint on abuse of the law.

71. Suspending judgment is particularly difficult for attorneys trained in the United States where legal realism dominates legal education. The difference in perspective between U.S. law students and many Chilean scholars was exemplified by an exchange between U.S. students and a Chilean constitutional law scholar on the issue of whether the Chilean Supreme Court could declare a statute unconstitutional.

The professor noted that although the Supreme Court could find that the application of a statute in a particular case violated constitutional norms, it could not declare the statute unconstitutional because the decision was applicable in only one case and not binding on the courts as precedent. Students immediately argued that regardless of the rule limiting application of the decision, it would likely have an effect similar to precedent.

One student asserted that attorneys have an incentive to examine the case to advise clients acting in similar circumstances; in fact another student believed it would be unprofessional not to do so. Still another student, noting the hierarchical structure of the court system and the personnel authority of the Supreme Court over lower court judges, argued that lower court judges were likely to be guided by the Supreme Court's decision without regard to the formal rules of precedent. The Chilean scholar seemed puzzled, and somewhat amused, by these responses, particularly when the rule limiting the impact of the decision was so clear. Conversation held at the University of Chile School of Law during the Washington College of Law's Law Program in Chile (1990).

72. See generally Fruhling, *supra* note 4.

the model of a change of governments in a democratic system.<sup>73</sup>

Chile offers, in contrast to the popular perception of lawyers in the United States, the ideal of the lawyer as political hero or heroine. For a substantial period of time the only space for the opposition in Chile, particularly during the years immediately following the coup, was that formed by the activities of attorneys.<sup>74</sup> These lawyers prepared cases for presentation to the courts, interviewed and represented clients, and, at some personal risk, asserted the accountability of the government for its actions.<sup>75</sup>

These activities by lawyers contributed greatly to the organization of groups victimized by the repression,<sup>76</sup> and the documentation of the abuses by the military regime.<sup>77</sup> This documentation played an important role both internally and externally, where officials of governmental and nongovernmental organizations in a variety of countries responded to the abuses.<sup>78</sup> The selection of this strategy suggests that, despite their unresponsiveness, the courts

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73. See *supra* text accompanying notes 54-58.

74. To some, the activities of these lawyers illustrates as much the power of the Catholic Church that shielded them as the importance of attorneys in the opposition. Huneeus, *supra* note 1, at 124. Still, of the strategies possible, one based on legal action was chosen.

75. Human rights advocates did face considerable personal risk.

But human rights monitors have not gone unpunished for their attempts to publicize abuses. By 1976, the Vicariate was under attack, its lawyers arrested, detained, exiled. Since then, pressure on human rights monitors has varied but never ended altogether. In 1980, the archbishop of Santiago was threatened with death. And both 1981 and 1982 showed an increasing incidence of harassment. In 1981 [the president of a human rights group] was expelled, and eight human rights monitors arrested—on Human Rights Day—on charges of political activity. In 1982, there were threats against Church lawyers by a secret squad calling itself *Catacumbas* ('Catacombs'); members of virtually all the existing human rights groups were arrested, tortured, threatened and/or sent into internal exile, and the offices of one organization, CODEPU (The Committee for People's Rights), were burned down.

AMERICAS WATCH, CHILE SINCE THE COUP: TEN YEARS OF REPRESSION 40 (1983).

76. Fruhling, *supra* note 4, at 371.

[L]egal aid became a source of moral support to people persecuted, and created common bonds among lawyers who had held contradictory political views in previous years. To this extent, human rights advocacy played a role in the revival of political dissent, forging a common ground from which it was possible to criticize the regime.

*Id.* at 371-72. These contacts may have begun the return to trust and cooperation that permitted the coordination leading to the electoral victories of 1988 and 1989.

77. *Id.* at 365, 369 (discussing the importance of the dissemination of information regarding human rights abuses). The lawyers continued to function even when the military regime modified the laws to eliminate previous constitutional defenses. Garreton, *supra* note 3, at 105 (noting changes to eliminate constitutional defenses).

78. See generally the sources cited in *supra* note 2.

remained a viable focus of activity. Perhaps the formalism of the law explains why it remained an option for attorneys and why such recourse was tolerated by the military. The narrow conception of the law permitted challenges to the regime that could neither have been made nor tolerated in a forum where the political character of the challenges was more openly acknowledged or their success more likely anticipated.<sup>79</sup>

The second cautionary sign is the number of important legal institutions that survived the military regime. Among these institutions were the courts and the *Contraloría General*. These institutions survived in more than name alone. The courts retained the same theory or philosophy of law and the same structure as before the coup.<sup>80</sup> Likewise, the *Contraloría General* remained intact and, as an examination of its opinions indicates, its interpretations of public employment law looked much the same in 1988 as in 1971.<sup>81</sup>

Of course, these events may only attest to the impotency of the courts and the irrelevancy of the law to much of what occurred during the regime. Still, the survival of legal institutions and the maintenance of a consistent jurisprudence were not small accomplishments during eighteen years of dictatorship. It provided the transition government with a framework making it possible to claim legal rules as restraints on power, a claim of great importance and significant practical value.

The events in Chile suggest that a society's view of the importance of the legal rules and the scope of judicial discretion can significantly influence the choices available to a transition government. A North American can also detect in the events in Chile implications for the debate in the United States regarding the role of the judiciary.

If we can detect these implications, the Chilean experience offers some warning to the more extreme advocates of judicial restraint. Likewise, it warns those who see the courts of necessity involved in discretionary choices implicating politics, economics, and philosophy and who advocate the abandonment of formal doc-

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79. One reason for the strategy of human rights lawyers despite the conservatism of the courts was the belief of the lawyers "that the judiciary was the last institutional remnant of the liberal-democratic state." Fruhling, *supra* note 4, at 359.

80. The courts, but particularly the Supreme Court, remain very conservative. Under the constitutional provisions now in effect, new courts, such as the reformed Constitutional Tribunal, play a greater role than before the coup.

81. See *supra* note 55 and accompanying text.

trine that obscures the true character of the decisions to be made.

As noted above, legal realists should be concerned that too expansive a view of legal discretion risks undermining the divisions that permit protection of legal institutions. The narrow rule-based formalism of the civil code gave a primacy to the legislature, a primacy now used effectively by advocates of a limited judicial role. The Chilean experience shows that formalism, because of its modest perception of the scope of legal questions, possesses some important strengths. While the scope of the law is diminished, this diminution, ironically, protects the institutions designed to apply these rules and within its scope may give the law greater influence.

The advocates of judicial restraint should be concerned about the inability of the Chilean judicial system to make rights meaningful in a time of crisis. As the activities of the military regime demonstrated, the perception of law as a formally applied set of codified rules limited the ability of the law and legal institutions to respond to abuses. Clearly, perceptions about the role of judges influenced the attitudes and behavior of Chilean jurists and encouraged accommodation with the military regime. Moreover, the constrained role of the legal system abdicated many important functions of law and, by hiding the choices that judges made, convinced judges they were making no meaningful political or social decisions—that they were “slaves of the law.” Judicial restraint then justified abdication and prevented self-examination as cant replaced analysis and slogan replaced introspection.

## 2. Regulation of Public Employment

Public employment law offers a unique perspective of the problems and challenges confronting a transitional regime. This perspective relies on viewing the regulation of public employment as a legal problem, the solution of which is particularly efficacious in exposing the legal context in which a transition government must operate.

Public employment and public employees viewed from an economic or political perspective seem often to have already been considered as part of the political, social, and economic forces that led to transition.<sup>82</sup> For those reasons, public employees can be ex-

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82. There are, of course exceptions. For example, Robert Graham discusses the role of the civil service in a transition and the techniques used to control it by the transition gov-



pected to follow the policies of the transition government. Public employees can also be easily conceived as instruments of the particular government in power. While they have their own political and economic interests, they can be expected to follow the directives of that government. Visions of public employment in both one-party and liberal states often share, for differing reasons, the view that public employees are to implement the will of the government rather than their own particular interests.

In a one-party state, this view of public employees follows from the preeminent role of the party and its responsibility to direct the administration of the state.<sup>83</sup> In a liberal state, this vision of public employment also is intended to assure party control and substitutes for a more complete theory of accountability of the bureaucracy.<sup>84</sup>

Of course, a considerable amount of analysis focuses on the interests of public employees and on how their economic and political views shape governmental policy.<sup>85</sup> By implication, it shows how they could seriously impede a transition government whose goals conflict with the interests of significant groups in the bureaucracy. This perspective would suggest much greater attention to the techniques of control of public employees by a transition government, with some emphasis on legal regulation, than has generally been given by much of the transition literature. From this perspective, public employment law becomes a tool or device to deal with administrative and practical details.

Chilean public employment law continues to reflect the perspective regarding legal control that could be expected in a liberal, multiparty state. Several provisions, such as the protection of the

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ernment. GRAHAM, *supra* note 68, at 258-60.

83. See generally A. DOAK BARNETT, CADRES, BUREAUCRACY, AND POLITICAL POWER IN COMMUNIST CHINA (1967).

84. The principal differences in the vision in a multiparty state and a one-party state concern the principle of political neutrality. In a one-party state, such neutrality would be disfavored or prohibited. In a multiparty state, the needs regarding the transition of power require neutrality. Neutrality, and the protections for civil servants from the government in power that it implies, creates a special need for a theory of accountability because the authority of the democratically elected government is limited in controlling the civil service. In the United States, the dominant theory deemphasized the policy-making functions of public employees.

85. For examples of literature addressing the importance of the economic and political interests of the bureaucracy, see CLEAVES, *supra* note 33 (focusing on development); PETRAS, *supra* note 29, at 288-317 (also focusing on development); and THE NEW AUTHORITARIANISM IN LATIN AMERICA (David Collier ed., 1979) (discussing the breakdown of democracy).

tenure of public employees and the requirement of political neutrality, implement a view that public employees are to be neutral in the performance of their duties.<sup>86</sup> Protection of their positions provides a ground for principled action and assures that decisions affecting their careers will rest upon the performance of their duties.<sup>87</sup> As protection prevents coercion, requirements of political neutrality prevent abuse of their positions. These aspects of public employment law reflect a general view of public employees as neutral implementors of policy.

The provisions designed to insure that public employees have a method of raising concerns about the illegality of orders, in fact, act to guarantee compliance with the orders of superiors and stress the importance of chain of command within the hierarchy.<sup>88</sup> Unitary command has fitted well, in the United States, with the theory that public employees are politically neutral servants of the government in power.<sup>89</sup>

Although the United States and Chile differ significantly regarding the role of law and of the courts, the perceptions of public employment contained in the two legal systems bear some striking similarities. These similarities suggest that the transition has a variety of legal controls on which to draw. These similarities also suggest some additional caution in applying the Chilean experience to legal regulation of public employment required by other transition governments, as in Eastern Europe.<sup>90</sup>

The similarities of views in Chile and in the United States regarding public employment also present issues for the debate regarding public employment in the United States. Increasingly, public employment law in the United States has given elected officials greater control over public service by increasing the number of political appointees,<sup>91</sup> by easing the protections against removals

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86. *Supra* text accompanying notes 26-39.

87. *Id.*

88. *See supra* text accompanying notes 60-65; but *see* text accompanying note 66 (noting how infrequently these provisions are utilized).

89. *See generally* Robert G. Vaughn, *Ethics in Government and the Vision of Public Service*, 58 GEO. WASH. L. REV. 417 (1990).

90. Legal control arises more readily in a multiparty state. Therefore, the problems of control and the role of legal regulation are likely to be different in the transition from a one-party state.

91. *See supra* note 32 and accompanying text. In *Rutan v. Republican Party of Illinois*, 110 S.Ct. 2729 (1990), the Supreme Court held that the use of a patronage system in making promotion and transfer decisions regarding lower-level government employees violated those employees' First Amendment right of freedom of speech and association.

of public employees,<sup>92</sup> and by creating incentives for high level civil servants to follow the directions of political appointees.<sup>93</sup> The rationale for these developments has been greater political accountability of the bureaucracy to officials elected democratically. The Chilean experience suggests that such experiments may be inconsistent with some basic premises of neutrality and indicates the importance of legal control of public employment in a democratic society.

The experience in Chile offers lessons for other transitions; it also offers some lessons for us. The comparisons and contrasts enable us to examine our own system from a new perspective. Just as a study of public employment law in Chile's transition emphasizes the importance of law, it also suggests a more central role to be accorded to public employment in studies of transition.

### C. *Institutional Parallels and Divergences*

One method of examining the similarities and differences in regulation of public employment requires an exploration of the substance and content of public employment law as suggested above. Another method explores institutional frameworks of regulation. A comparison of the development of the *Contraloría General de la República* with that of the Comptroller General of the United States provides an opportunity for such an exploration.

The Budget and Accounting Act of 1921<sup>94</sup> created the Comptroller General of United States and the General Accounting Office that the Comptroller General heads. The Act created an independent office with wide powers of audit and control over governmental expenditures, investigative authority, and with some limited judicial responsibilities.<sup>95</sup> The Comptroller General embodied a long tradition in both British and American government; the Budget and Accounting Act reminded contemporary observers of landmark British legislation.<sup>96</sup>

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92. See 5 U.S.C. ch. 43 (1982). The Civil Service Reform Act of 1978 eased the burden on managers who remove employees for unsatisfactory performance. See, e.g., 5 U.S.C. §§ 4302-4303 (1980).

93. 5 U.S.C. ch. 33 (1982). This chapter of the Reform Act provides flexibility in the selection of high level executive officials, as well as more flexibility in assignment and pay.

94. 42 Stat. 20 (June 10, 1921) (codified in 31 U.S.C. §§ 701-779 (1982)).

95. *Id.* §§ 711-720.

96. WILLIAM F. WILLOUGHBY, *THE LEGAL STATUS AND FUNCTIONS OF THE GENERAL ACCOUNTING OFFICE OF THE NATIONAL GOVERNMENT* 17 (1927) (noting a "close analogy to the

The Comptroller General exercised indirect authority over government employees through review of government expenditures and through opinions regarding the legality of employment practices related to the fiscal matters.<sup>97</sup> The Civil Service Commission, created in 1883, exercised much broader authority over the personnel practices of federal agencies.<sup>98</sup>

The first Comptroller General, J. Raymond McCarl, emphasized detailed examination of governmental expenditures. The General Accounting Office examined literally millions of individual transactions with a meticulousness decried by critics of the office.<sup>99</sup> This view of the function of the office created the setting in which its operating rules, procedures, and forms were developed.

The 1921 Budget and Accounting Act also demonstrated congressional concern about executive control of the existing comptroller functions and its desire to create mechanisms to strengthen legislative control over appropriations.<sup>100</sup> The legislative orientation of the Comptroller General and of the General Accounting Office has played an important role in its subsequent development.

The creation of the *Contraloría General de la República* coincided with a period of intense legislative-executive conflict in Chile.<sup>101</sup> The *Contraloría General*, although granted considerable independence, did not acquire the same legislative orientation as the Comptroller General of the United States.

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famous Exchequer and Audit Department Act, 1866, of Great Britain").

97. For a discussion of the history of this role of the Comptroller General, see JOSEPH POIS, *WATCHDOG ON THE POTOMAC: A STUDY OF THE COMPTROLLER GENERAL OF THE UNITED STATES* chs. 2, 7 (1979).

98. A discussion of the history of the United States Civil Service Commission can be found in VAUGHN, *supra* note 32, ch. 1.

99. GEORGE CHARLES SUMNER BENSON, *FINANCIAL CONTROL AND INTEGRATION: A STUDY IN ADMINISTRATION WITH SPECIAL REFERENCE TO THE COMPTROLLER-GENERAL OF THE UNITED STATES* ch. III (1934) (criticism of the practices of the Comptroller General); HARVEY CLAF LIN MANSFIELD, *THE COMPTROLLER GENERAL: A STUDY IN THE LAW AND PRACTICE OF FINANCIAL ADMINISTRATION* 2-5 (1939) (outlining criticisms of the Budget and Accounting Act based on McCarl's tenure); FREDERICK C. MOSHER, *A TALE OF TWO AGENCIES: A COMPARATIVE ANALYSIS OF THE GENERAL ACCOUNTING OFFICE AND THE OFFICE OF MANAGEMENT AND BUDGET* 48-56 (1984) (describing criticisms of McCarl's tenure).

100. MOSHER, *supra* note 99, ch. 1.

101. Between 1924 and December 1932, a junta dismissed the parliament, a constitutional revision established a new parliament, a coup replaced the parliament; the President driven from power in 1924 returned and Parliament was again restructured similar to its organization in 1924. Bernadino Bravo, *Chile 1925-1932: De la Nueva Constitución al Nuevo Régimen del Gobierno*, in *LA CONTRALORÍA GENERAL DE LA REPÚBLICA: 50 AÑOS DE VIDA INSTITUCIONAL 1927-1977*, at 29-42 (1977).

The Chilean Congress drew on both the British and the U.S. experience in creating the *Contraloría General*. A presidential commission, studying the creation of the office, sought to rely on a plan prepared for the commission by Professor Walter Kemmerer of Princeton University.<sup>102</sup> The commission, however, had difficulty in obtaining a Spanish translation of Kemmerer's text and instead relied on the North American models contained in the Report of the Committee on Economy and Efficiency established by President Taft prior to the creation of the Comptroller General of the United States.<sup>103</sup>

After the commission's report, the Chilean Congress enacted legislation creating the *Contraloría General de la República* and articulating its powers.<sup>104</sup> These powers followed those held by the Office of the Comptroller and Auditor General of England.<sup>105</sup> Also, the legislation created the project on the Office of the *Contraloría General*, a project empowered to establish procedures and rules for the office.<sup>106</sup> On March 25, 1927, one day before the enactment of the legislation creating the office of the *Contraloría General de la República* and the project, the Chilean government asked the U.S. for a set of "rules, forms, proceedings of labor and other such things as are related to the General Accounting and Comptroller General of the United States."<sup>107</sup>

The exigencies of its creation influenced the development of the *Contraloría General*. The English model, although sharing much with the North American one, failed to provide the investigative authority of the Comptroller General or to articulate the legislative-executive conflict inherent in the Budget and Accounting Act.<sup>108</sup> Also, the forms and procedures of the U.S. Comptroller General incorporated the view of the first Comptroller General, emphasizing formal compliance and detailed examination of individual records.<sup>109</sup>

In the United States, the Comptroller General and the General Accounting Office moved first from detailed examination of in-

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102. Hector Humeres Magnan, *Creation of the Contraloría General de la República*, in PINTO ET AL., *supra* note 35, at 5 (1977).

103. *Id.*

104. *Id.* at 6.

105. *Id.*

106. *Id.* at 5.

107. *Id.*

108. See MOSHER, *supra* note 99, ch. 1.

109. *Id.*

dividual transactions to the analysis of accounting and control systems within the agencies.<sup>110</sup> The first evolution contributed to a second in which the General Accounting Office emphasized its analysis and examination of policies and programs as well as accounting and fiscal control.<sup>111</sup>

Although the Civil Service Commission exercised review of a variety of agency personnel actions, the Comptroller General influenced policy through fiscal rules and directives and more recently through reports and program analyses.<sup>112</sup> By 1973, the Comptroller General and the General Accounting Office had emerged as an investigative and policy agency identified with legislative interests.<sup>113</sup>

The *Contraloría General* remained much more a review agency concerned with formal compliance. Its review of personnel actions reflected this perspective; it did not examine the merits of actions but focused on compliance with formal procedures.<sup>114</sup> The *Contraloría General*, an office which enjoyed protected tenure,<sup>115</sup> remained an influential and prestigious office. Through formal review, it supported the rule of law, a function closely tied to the view of law in the Chilean legal system.

The *Contraloría General* also lacked the legislative orientation of the Comptroller General. The legislation establishing the *Contraloría General* did not create an agency analogous to the Office of Management and Budget. Therefore, the *Contraloría General* lacked the institutional framework inclining the Comptroller General of the United States to a legislative role.<sup>116</sup>

By 1973, the *Contraloría General* was established as an important and powerful office in the Chilean government. For a variety of reasons, including those discussed above, the character of the function of the *Contraloría General* had diverged from that of the

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110. *Id.* at 5-12, and chs. 2, 3 & 5.

111. *Id.*

112. See generally POIS, *supra* note 97.

113. See generally RICHARD E. BROWN, *THE GAO: UNTAPPED SOURCE OF CONGRESSIONAL POWER*, 57-97 (1979); MOSHER, *supra* note 99, ch. 5; POIS, *supra* note 97, ch. 2.

114. See *supra* text accompanying notes 35-39.

115. The 1980 Constitution as amended reproduces a provision from earlier constitutions regarding the tenure of the Comptroller General. The Comptroller General of Chile is appointed by the President with the approval of a majority of the Senate. The appointment is until the age of 75 at which time the Comptroller General must leave office. Otherwise, the Comptroller General is not removable. CHILE CONST. art. 87.

116. GIL, *supra* note 38, at 97-98 (noting the uniqueness, independence and executive authority of the *Contraloría General de la República*).

Comptroller General. Two aspects of this divergence—the emphasis on formal review and the greater executive orientation of the office—played important roles in the operation of the *Contraloría General* during the military regime.

The military government exempted the *Contraloría General*, as well as the courts, from the decree directing that all public employees serve at the pleasure of the President.<sup>117</sup> As noted earlier, the *Contraloría General*, consistent with the formalism of Chilean legal culture, functioned within the military regime without repudiating its duties and responsibilities in the regulation of public employment.<sup>118</sup>

The military, soon after the coup, began a series of administrative reforms that ostensibly decentralized power at the local level by removing these levels from some administrative controls, including ones by the *Contraloría General*, previously applicable to them.<sup>119</sup> In practice, these reforms tended to centralize power because regional officials, such as superintendents, mayors and governors, were directly appointed by and responsible to President Pinochet and the military junta.<sup>120</sup>

The *Contraloría General* continued to exercise its remaining review functions and retained some power based on these functions. That power, however, could be more formal than real. This formal power as well as the practical weakness of the *Contraloría General* were demonstrated by the exercise of the *Contraloría General*'s authority to object to executive decrees and resolutions that would exceed the authority granted or violate the Constitution.<sup>121</sup> In 1978, the military government held a "consultation" in which citizens were asked to confirm by vote the government's administration in light of external criticisms of it. The government characterized the vote as a "consultation" because the procedures

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117. See OAS REPORT, *supra* note 2, at 12.

118. See *supra* text accompanying note 40.

119. See Bravo, *supra* note 101, at 339-41.

120. The control over regional and local officials by General Pinochet and the junta is described in the text accompanying notes 42-44, *supra*.

121. This power was a historical one of the CGR incorporated into subsequent constitutional revisions. As to those decrees subject to review by the Comptroller General, the Comptroller General may "take reason" that a decree or resolution is illegal but shall not interfere with its application if the President of the Republic insists on implementation supported by the signatures of all of the president's ministers. If the Comptroller General's objection is that the decree is contrary to the Constitution, the matter must be referred to the Constitutional Tribunal for resolution. The decree is not enforced until its constitutionality is resolved. CHILE CONST. art. 88.

used did not meet the constitutional requirements of a plebiscite. The *Contraloría General* held that the decree establishing the "consultation" was unconstitutional.<sup>122</sup> Within a few days, the Chilean Comptroller General had been forced to resign.<sup>123</sup>

A number of historical and societal factors created the divergence in role and function between the *Contraloría General de la República* and the Comptroller General of the United States. One of these factors relates to the view of the law in Chilean society. In Chile, enforcement concerns compliance with formal norms rather than with actual results; review in a variety of legal institutions, including the courts, rests on documentary evidence; and the role and function of the law is strictly limited. The development of the *Contraloría General* reflects this legal culture. This relationship between the development of specific legal institutions and the legal culture in which these institutions operate offers insight into not only institutions in Chile but also ones in the United States. Institutional roles that comport with generally accepted views of law are much easier to adopt and to maintain than roles that diverge from the general legal culture. This relationship suggests that the history of administrative institutions in the United States can fruitfully consider these issues of legal theory, particularly the role of legal realism.

The divergence of role and function between the *Contraloría General* and Comptroller General presents in another setting the importance of the legal context in comparative studies. The importance of the legal context demonstrates the pertinence of comparative law to the study of transitions to democracy.

#### IV. CONCLUSION

An examination of public employment law in the transition to democracy in Chile reminds us that the evaluation of a transition and the lessons to be drawn from it rest upon the analytical models chosen. In public employment law, these models present differing lessons for other governments involved in the transition to democracy. Much depends on perspective.

The Article shows that the legal context provides not simply a

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122. AMERICAS WATCH, *supra* note 9, at 18 (citing INTERNATIONAL HUMAN RIGHTS LAW GROUP, REPORT ON THE CHILEAN ELECTORAL PROCESS 38 (1987)).

123. *Id.* at 18.



background against which other factors play, but forms a steady influence on the development of institutions, on the content of the specific laws, and on the behavior of individuals. In particular, the Chilean experience exposes the weaknesses and strengths of formalism and affirms legal theory as an important element in comparative studies.

Comparative law emerges as a crucial discipline in the study of transitions to democracy. It emphasizes the role of law; it directs inquiry beyond the cataloguing of specific provisions; it offers unique insights. Comparative study also highlights the role of the legal culture, often hidden from the observer within a particular legal system, in the development of legal rules and institutions.