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# Comparative South American Civil Procedure: The Chilean Perspective

Richard B. Cappalli

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## ARTICLES

### COMPARATIVE SOUTH AMERICAN CIVIL PROCEDURE: A CHILEAN PERSPECTIVE

RICHARD B. CAPPALLI\*

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\* Professor of Law, Temple University School of Law. B.A., 1962, Williams College; J.D., 1965, Columbia University; L.L.M., 1972, Yale University. The author notes that law professors in Chile, as in Europe, are typically full-time practitioners or judges who lecture for small fees and large honor. Consequently, his many court visits and conversations about Chilean law, courts and procedures with the professors-attorneys at the University of Chile Law School were intensely practical and informative. Appreciation is extended to the Honorable José Cabranes, United States District Judge, for his comments, to Jesse Halvorsen for his valuable help with the footnotes, and to the Temple University Law School for a summer research grant.

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## I. INTRODUCTION

A survey of the civil procedures of South America contrasted with U.S. procedures may be a practical aid for legal practitioners

in both hemispheres.<sup>1</sup> Thousands of legal transactions with their attendant complexities and disputes occur between parties in North and South America.<sup>2</sup> A South American lawyer would find it difficult to understand why his North American counterpart might find the procedural complexity of a civil suit confusing when a client's interests are being adjudicated in the Southern Hemisphere.<sup>3</sup> A comparative survey might aid the conversations between the lawyers from both hemispheres, and therefore, this survey might be a practical aid for those lawyers.<sup>4</sup>

This article surveys the codes of civil procedure for South America's major Spanish-speaking republics as compared with civil procedure in the United States. The basic focus is on the current code provisions themselves; tracing the history of these codes was beyond available time and resources. Moreover, the subject of this study is the regular civil process. Although we recognize the great importance of special proceedings, particularly summary collection proceedings,<sup>5</sup> we were unable to cover them in this article.<sup>6</sup> How-

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1. See R. SCHLESINGER, *COMPARATIVE LAW* 270 (3d ed. 1970).

2. In 1986, exports from the United States to ten countries in South America—Argentina, Bolivia, Brazil, Chile, Colombia, Ecuador, Paraguay, Peru, Uruguay, and Venezuela—totalled US\$11.8 billion, while imports amounted to US\$19.8 billion. Derived from 26 STATISTICAL ABSTRACT OF LATIN AMERICA 605 table 2634 (J. Wilkie ed. 1988).

3. The legal systems compared here are themselves different. The legal system of the South American countries developed from a civil law background, whereas the U.S. legal system follows the common law tradition. Most of the differences in the procedures compared here can be attributed to the differences in the legal systems.

4. Other reasons for this survey include comparative scholarship and happenstance. Both hemispheres can profit from ideas about litigating civil cases drawn from other countries and cultures, and it is hoped that this North-South civil procedure survey will enrich comparative legal study. Additionally, the author, as the fortunate and grateful recipient of a Fulbright-Hayes grant, taught comparative civil process at the University of Chile Law School in 1988, studied the court system of that country, and became fascinated with the procedural codes of South America. This piece is the result of that good fortune.

5. Almost 60% of all contended civil matters in Chile's general trial courts are summary collection cases. See J. MERRYMAN, D. CLARK & L. FRIEDMAN, *LAW AND SOCIAL CHANGE IN MEDITERRANEAN EUROPE AND LATIN AMERICA* 95, 102 (1979).

Provisions in the respective codes of civil procedure for summary collection proceedings can be found in *CÓDIGO DE PROCEDIMIENTO CIVIL* arts. 434-529 [hereinafter *CODE CIVIL PRO.*] (Chile) (*juicio ejecutivo*); 1985 *CÓDIGO DE PROCEDIMIENTO CIVIL DE VENEZUELA* arts. 630-689 [hereinafter *VENEZUELAN CODE*] (*juicio ejecutivo*); *CÓDIGO PROCESAL CIVIL Y COMERCIAL DE LA NACIÓN* arts. 520-594 [hereinafter *ARGENTINE CODE*] (*juicio ejecutivo*); and *CÓDIGO DE PROCEDIMIENTO CIVIL DE COLOMBIA* arts. 488-568 [hereinafter *COLOMBIAN CODE*] (*proceso ejecutivo singular*).

6. We did, however, cover some unique appellate processes in Chile, the writs of "grievance" (*queja*) and "protection" (*recurso de protección*), because of their extraordinary impact on Chile's appellate system. These are not found elsewhere in South America. See *infra* text accompanying notes 419-36 (writs of grievance), 477-96 (writs of protection).

ever, the material which is covered will hopefully prove useful to lawyers in both North and South America.

## II. THE CODES OF SOUTH AMERICA

### A. *In General*

There is a remarkable congruence in the civil procedures of South America's major Spanish-speaking republics—Chile,<sup>7</sup> Venezuela, Argentina, Colombia, and Peru.<sup>8</sup> While the focus here is Chile, the close similarities in the codes of the cited countries enable many generalizations. Moreover, the parallels between code provisions are so striking that it is obvious that the drafters borrowed liberally from each other and to some extent from their mother country Spain.<sup>9</sup> There are, of course, differences in the filigree—indigenous vocabulary, variances in time periods, different levels of specificity and unique minor clauses. However, the lawyer who becomes familiar with one of these South American civil processes then becomes familiar with the essence of each of them. As a consequence, the title of this work is "South American Civil Procedure" despite the fact that most comparative references are to the Chilean codes and practices.

This article charts thirty-seven specific areas of procedure for purposes of comparing the South American codes.<sup>10</sup> The footnotes throughout this work mark the significant differences between the procedures of Chile and those of Venezuela, Argentina, Colombia and Peru. The following paragraphs highlight the most significant of these dissimilarities.

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7. The Chilean Code of Civil Procedure is supplemented by the *CÓDIGO ORGÁNICO DE TRIBUNALES* (Chile) [hereinafter *JUDICIAL CODE*].

8. Peru's Code of Civil Procedure is known as the *Código de Procedimientos Civiles de Peru* [hereinafter *PERUVIAN CODE*].

9. See generally Murray, *A Survey of Civil Procedure in Spain and Some Comparisons with Civil Procedure in the United States*, 37 *TUL. L. REV.* 399 (1963).

10. The specific areas of procedure are: pleadings, service, preliminary defenses, default, counterclaim, intervention, motion practice, proof-taking, judge's proof authority, party oath, proof instruments, judicial confession, exhibition of documents, experts, judicial views, oral testimony, witness competence, impeachment, weighing of proof, burden of proof, provisional remedies, subject matter jurisdiction, venue, joinder of claims, judicial panel, legal aid, bad faith litigation, case record, form of judgment, conciliation, voluntary dismissal, costs, cassation, appeal, execution of judgments, arbitration, and special appeal processes.

### B. Venezuela

The most striking dissimilarities between the Chilean and Venezuelan civil processes are the following. First, the litigants in Venezuela are not bound to a unipersonal trial court as in Chile. After the case is prepared for decision, the litigants can expand the bench by each adding a lawyer of his choice.<sup>11</sup> This presumably enables each party to have an advocate within the process during the decisional stage. The wisdom of this approach becomes apparent upon realization that the unipersonal decisional process in a civil law system like Chile's places a very difficult fact-finding burden on the judge. In Chile, the judge is totally unfamiliar with the case until his clerk delivers the record—a pile of witness statements taken by the *receptor* in summary form plus the pleadings and documents. Thus, presumptively, as the overworked Chilean judge labors to meet decisional deadlines in the dozens of cases in his chambers, he would be grateful for the adversary guidance through the record that the Venezuelan practice affords.

Another important way in which Venezuela differs from Chile is in permitting preliminary challenges to the legal sufficiency of plaintiffs' claims.<sup>12</sup> Unlike Chile, Venezuela has a procedural counterpart to the U.S. "12(b)(6)"<sup>13</sup> motion, which enables parties to avoid costly process in cases unsupported by law, and which serves as a main mechanism for introducing new legal theories of claim and defense into the corpus of law.

A third major distinction between Chile and Venezuela is that the latter, along with Peru, permits lawyers to examine and cross-examine witnesses in the style of the common law, while Chile and Argentina closely follow the civil law practice of having the judge pose questions prepared in advance by the lawyers.<sup>14</sup> Colombia goes even further, permitting all parties to question a witness freely after the judge has examined him.<sup>15</sup>

A final major distinction is that Venezuela accepts case law as a relevant and even mandatory source of law.<sup>16</sup> In comparison,

11. See VENEZUELAN CODE arts. 118-124.

12. See *id.* art. 346(11).

13. FED. R. CIV. P. 12(b)(6).

14. Compare VENEZUELAN CODE art. 485 and PERUVIAN CODE art. 474 with CODE CIVIL PRO. art. 364 and ARGENTINE CODE art. 442.

15. See COLOMBIAN CODE art. 228(4).

16. See VENEZUELAN CODE art. 321.

Chilean cases have little, if any, value as precedent.<sup>17</sup>

### C. Argentina

The most significant distinction between Chile and Argentina is the latter's federated system of government which generates a dual court system, provincial and national. There is a remarkable similarity between Argentina's national court system and the U.S. federal courts, since Argentina borrowed liberally from the United States in adopting its Constitution in 1853.<sup>18</sup> In Argentina, as in the United States, a separate judiciary distributes national justice at the trial and appellate levels.<sup>19</sup> Argentina's subject matter jurisdiction parallels that of the United States: questions involving the national constitution, agencies, officers, legislation and treaties as well as foreign states, officials and citizens. Argentina's federal courts also have diversity jurisdiction in disputes between residents of different provinces and, as in the United States,<sup>20</sup> local law provides the rules of decision in such matters.<sup>21</sup> Other important parallels to the United States are the unextendable nature of federal jurisdiction,<sup>22</sup> removal from state to federal court,<sup>23</sup> and federal question appeals from provincial high courts to the Supreme Court of Argentina.<sup>24</sup>

Another significant distinction between Chilean and Argentine procedure is that Chile, following the tradition in most civil law countries, deems all persons, including parties who have a direct or indirect interest in the litigation,<sup>25</sup> incompetent as witnesses. Ar-

17. See *infra* text accompanying notes 342-62.

18. See K. KARST & K. ROSENN, *LAW AND DEVELOPMENT IN LATIN AMERICA: A CASEBOOK* 43 (1975) [hereinafter KARST]. Argentina ignored Simón Bolívar's dictum "[Among the popular and representative systems of government,] I do not approve of that federal system. . . It is too perfect, and [it] requires virtues and political talents far superior to ours." S. BOLÍVAR, *CARTA DE JAMAICA* 123 (1815).

19. See generally *Ley* 27, 13/x/1862, reprinted in *ARGENTINE CODE* at 243; *Ley* 48, 25/VIII/1862, reprinted in *ARGENTINE CODE* at 244-48; Decree-Ley 1285/58, 4/II/1958, reprinted in *ARGENTINE CODE* at 267-80.

20. 28 U.S.C. § 1652 (1982); *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

21. *Ley* 27, 13/X/1862, art. 4, reprinted in *ARGENTINE CODE* at 243; *Ley* 48, 25/VIII/1862, art. 2(2), reprinted in *ARGENTINE CODE* at 244.

22. Compare *ARGENTINE CODE* art. 1 with C. WRIGHT, *LAW OF FEDERAL COURTS* 23 (4th ed. 1983) (parties cannot extend federal jurisdiction by waiver, agreement or otherwise).

23. Compare *ARGENTINE CODE* art. 354(1) with 28 U.S.C. § 1441 (1982).

24. Compare *ARGENTINE CODE* arts. 256-258 and *Ley* 48, 25/VIII/1862, art. 14, reprinted in *ARGENTINE CODE* at 247 with 28 U.S.C. § 1257 (1982).

25. See *infra* text accompanying notes 283-300.

gentina has moved towards the U.S. position of making bias a matter of impeachment rather than exclusion.<sup>26</sup>

A final major difference between Chile and Argentina is Argentina's relatively simple appeal system, in contrast to Chile's duplication and multiplication of appellate processes.<sup>27</sup> Argentina functions with a single appellate process which, typical of civil law systems, includes a review of questions of fact, as well as questions of law, and the possibility of new fact-finding on appeal.<sup>28</sup>

#### D. Colombia

The exciting comparison to be made between Chile and Colombia is Colombia's plunge in 1970 into judicial activism. That year brought about massive amendments to the Colombian Code of Civil Procedure. These were aimed at empowering judges to seek the truth in civil litigation rather than passively umpiring party battles.<sup>29</sup> In doing so, Colombia joined the family of civil law countries, led by Germany,<sup>30</sup> which direct their judges to achieve justice regardless of party desires, competence or resources.<sup>31</sup> This philosophy is in direct opposition to *laissez-faire* jurisdictions like Italy, where party control predominates.<sup>32</sup> Chile remains in this latter category, even after numerous procedural amendments in 1988 aimed at combatting civil case delay and backlog.<sup>33</sup>

Judicial duties in Colombia are now defined to include "di-

26. Compare FED. R. EVID. 601 with ARGENTINE CODE art. 456. Other than to authenticate signatures Argentina does deem direct blood relatives and spouses of the parties, incompetent as witnesses. ARGENTINE CODE art. 427.

27. See *infra* text accompanying notes 342-496.

28. See ARGENTINE CODE arts. 242-287. See also PERUVIAN CODE arts. 1090-1121. Argentina has a special procedure when a judgment violates established legal doctrine. See *infra* text accompanying notes 361-62.

29. See generally Devis Echandia, *El Moderno Proceso Civil y el Nuevo Código de Procedimiento Civil*, in COLOMBIAN CODE, comentarios. The amendments were effective January 1, 1971. See COLOMBIAN CODE art. 699.

30. See Rheinstein, *Common Law and Civil Law: A Comparison*, 12 PA. B.A.Q. 7, 13 (1940).

31. Parties maintain control over preliminary issues such as pleadings and causes of action. However, judges now actively participate in further direction of issues, such as in collection of evidence. See *infra* text accompanying notes 39-44.

32. While Italian judges technically have ample fact-finding powers, see Sereni, *Basic Features of Civil Procedure in Italy*, 1 AM. J. COMP. L. 373, 382 (1952), they customarily permit parties to control the pace and strategy of litigation. See M. CAPPELLETTI, J. MERRYMAN & J. PERILLO, *THE ITALIAN LEGAL SYSTEM* 144-47, 322 n.22, 328 n.29 (1967) [hereinafter CAPPELLETTI].

33. See *infra* text accompanying notes 563-66.



recting litigation, assuring its rapid resolution, adopting the means necessary to avoid paralysis, maximizing procedural efficiency, and assuming responsibility for all delays."<sup>34</sup> Additionally, Colombian judges are empowered to effectuate equality in litigation among parties by using their directive powers.<sup>35</sup> Although judicial activism to pursue objective truth is on the upswing in the United States<sup>36</sup> and Europe,<sup>37</sup> still there is no comparable mandate to judges to intervene actively on behalf of weakly represented parties.

In general,<sup>38</sup> Colombia's modifications seek to achieve four fundamental objectives. First is judicial supervision to achieve substantial justice. To achieve this end numerous powers are vested in the Colombian trial judge, including the authority to call and question witnesses,<sup>39</sup> and to put parties under oath and interrogate them.<sup>40</sup> Second is the objective of impulsion, that is, moving cases along without an avoidable delay. The Colombian code now imposes on the judiciary the responsibility for propelling cases along and makes the judges personally responsible for delays caused by their negligence.<sup>41</sup> Third is the goal of procedural efficiency, achieved by numerous new judicial mandates such as the powers to consider defaults as admissions<sup>42</sup> and to reject redundant and immaterial proofs.<sup>43</sup> Fourth is the goal of good faith and uprightness in procedural matters. To this end, Colombian judges are duty-bound to "prevent, remedy and sanction, using means authorized by the Code, any actions contrary to the dignity of justice and to procedural uprightness, honesty, and good faith, as well as every attempt at procedural fraud."<sup>44</sup> Parallel duties are placed on parties and their representatives.<sup>45</sup> An important new Code article lists as follows when "boldness" (*temeridad*) and bad faith may be

34. COLOMBIAN CODE art. 37(1).

35. *Id.* art. 37(2).

36. *See infra* note 48.

37. *See, e.g.,* von Mehren, *Some Comparative Reflections on First Instance Civil Procedure: Recent Reforms in German Civil Procedure and in the Federal Rules*, 63 NOTRE DAME L. REV. 609 (1988).

38. It is beyond the scope of this survey to itemize all the elements of the Colombian reform, though it merits the detailed attention of proceduralists.

39. COLOMBIAN CODE arts. 179, 224, 228(4).

40. *Id.* arts. 202, 207(2), 208(2),(6).

41. *Id.* art. 2.

42. *Id.* art. 95.

43. *Id.* art. 178.

44. COLOMBIAN CODE art. 37(3). Costs and fines are the main sanctions. *See, e.g., id.* art. 72.

45. *Id.* art. 71.

subject to sanction:

- 1) When the absence of legal basis for the complaint, exception, appeal or opposition is manifest;
- 2) When facts known to be contrary to reality are alleged;
- 3) When process, motions or appeals are used for clearly illegal ends or for fraudulent purposes;
- 4) When one obstructs the rendering of proofs; and
- 5) When by any other means a person repeatedly delays the normal course of the proceedings.<sup>46</sup>

This article is highly reminiscent of the U.S. reform in 1983 to the Federal Rules of Civil Procedure (the "Federal Rules") Rule 11, aimed at promoting honesty in federal civil trial practice.<sup>47</sup> Indeed, the Colombian efforts in 1970 strikingly presaged the federal procedural reforms in the United States in the 1980s, which were aimed almost exclusively at improving litigation speed and efficiency.<sup>48</sup>

#### *E. Peru*

Peru has a Code of Civil Procedure which, in expression and substance, is virtually identical to Chile's. From the intrinsic evidence, it is apparent that Chilean and Peruvian drafters have liberally shared each other's work. However, the Peruvian Code has one feature not found elsewhere in South America: each article of the code is comprised of a single sentence, which is usually short.<sup>49</sup>

46. *Id.* art. 74.

47. See FEDERAL RULES OF CIVIL PROCEDURE 341-45 (Foundation Press 1989).

48. See *id.* (FED. R. CIV. P. 11 requires good faith in pleadings and motions); *id.* at 345-54 (FED. R. CIV. P. 16 strengthens pretrial conference as a management tool); *id.* at 354-58 (FED. R. CIV. P. 26 allows good faith in discovery and strengthening judicial control thereof); *id.* at 375-76 (FED. R. CIV. P. 52 permits review of court findings based on documentary evidence); see generally *In re San Juan Dupont Plaza Hotel Fire Litigation*, 859 F.2d 1007, 1010-12 (1st Cir. 1988); Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494, 526-39 (1986).

49. The simplicity of locution is reminiscent of the original elegance and brevity of expression of the U.S. Federal Rules of Civil Procedure, irretrievably lost after five decades of tinkering. The Peruvian Code even has an appendix of forms, very similar to the appendix to the Federal Rules. *Manual de Demandas Civiles*, in PERUVIAN CODE at 270-97.

### III. CONSTITUTIONAL BASES OF JUDICIAL POWER

Typical of modern Western constitutions,<sup>50</sup> the 1980 Political Constitution of the Republic of Chile<sup>51</sup> establishes a tripartite form of government and subjects each branch to the superior force of constitutional norms and conforming laws. The Chilean Constitution orders all state entities to obey the law<sup>52</sup> and specifies that no person or group can claim any other authority or right except for those expressly invested by the Constitution and laws.<sup>53</sup> State power can be exercised only by entities which are previously empowered by law, which are regularly constituted, and which are acting within their jurisdictions.<sup>54</sup> Official acts which violate any of the above precepts are void and subject to legal sanction.

In Chile, judges are the ultimate guardians of law. They are held personally accountable for the proper administration of justice by the following constitutional text:

Judges are personally responsible for the crimes of bribery, substantial failure to observe laws regulating procedure, denial and tortuous administration of justice and, generally, all misdeeds occurring in the discharge of their functions.<sup>55</sup>

While the U.S. Constitution's Supremacy Clause<sup>56</sup> similarly estab-

50. LA CONSTITUTION art. 46(5) (Fr.), translated in CONSTITUTIONS OF THE COUNTRIES OF THE WORLD (A. Blaustein & G. Flanz eds. June 1988); COSTITUZIONE art. 1(2) (Italy) in *id.* (Mar. 1987); CONSTITUCIÓN art. 9(1) (Spain) in *id.* (Oct. 1979); GRUNDGESETZ [GG] art. 20(3) (W. Ger.) in *id.* (Dec. 1985).

51. CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE CHILE (Editora Cumbres Ltda. 1980). [hereinafter CHILE CONST.]

52. *Id.* art. 6, para. 1.

53. *Id.* art. 7, para. 2. This is consistent with the civil law's insistence that all rights are legislative in origin. See J. MERRYMAN, THE CIVIL LAW TRADITION 40-49 (1967).

The norm expressed in the text applies even under extraordinary circumstances. On September 11, 1973, a military *coup d'état* felled the elected government of Salvador Allende and began the long military regime of Augusto Pinochet Ugarte. See generally J. WHELAN, ALLENDE: DEATH OF A MARXIST DREAM (1981). The 1980 Chilean Constitution was adopted during that regime and effectively "constitutionalized" the regime by means of 29 "transitory provisions" at the end. These clauses recognized Pinochet as President for eight additional years, and vested in him and the Government Junta (*Junta de Gobierno*) all legislative and executive power. See CHILE CONST. Transitory Provisions 14, 15, 18, 19. Under these provisional clauses, see Transitory Provisions 27-29, a plebiscite was held on October 5, 1988. The negative vote on the government's candidate, Pinochet, caused governmental power to pass to an elected legislature and President in March 1990. See *id.* Transitory Provision 29. The transitory clauses dropped off and the 1980 Constitution's "normal" provisions came into full effect. *Id.*

54. CHILE CONST. art. 7, para. 1.

55. CHILE CONST. art. 76, para. 1. See also JUDICIAL CODE arts. 324-331.

56. U.S. CONST. art. VI, cl. 2.

lishes the rule of law and places judges in charge thereof, U.S. doctrines reverse the Chilean concept of judicial accountability by making judges absolutely immune from personal liability.<sup>57</sup> Viewing the rampant backlog and delay in cases before U.S. courts,<sup>58</sup> many U.S. judges might be serving time under Chile's "tortuous administration of justice" norm mentioned above.

Chapter six of the Chilean Constitution establishes the "Judicial Power." Chile is a unitary, non-federated country, and its Constitution, unlike the U.S. Constitution, vests the entire sovereignty of the people in its national branches of government.<sup>59</sup> Therefore, Chapter six is the source of all judicial power in the country.<sup>60</sup>

Similar to Article III of the U.S. Constitution, the judicial power in the Chilean Constitution is broadly drafted. It begins in Chapter six, Article 73, which vests exclusive power both to entertain and decide both civil and criminal cases (*causas*), and to execute its judgments in the courts established by law. It further forbids the other two branches of government from interfering with this power. The Chilean drafters presumed uniform definitions for "cases," "courts," "judgments," and other words of art sprinkled throughout the Chapter, much in the style of the Founding Fathers of the United States. Article 76 establishes that the President appoints judges from nominees submitted by the courts. Furthermore, Article 76 reveals that the Chilean court system is made up of a trial level (*jueces letrados*), courts of appeal, and a Supreme Court. But in the same way that Article III of the U.S. Constitution delegates the details of structure, organization and com-

57. See, e.g., *Stump v. Sparkman*, 435 U.S. 349 (1978); *Pierson v. Ray*, 386 U.S. 547 (1967); *Alzua v. Johnson*, 231 U.S. 106 (1913); *Spalding v. Vilas*, 161 U.S. 483 (1896); *Bradley v. Fisher*, 80 U.S. 335 (1872); *Randall v. Brigham*, 74 U.S. 523 (1869). *But see* Forrester v. White, 484 U.S. 219 (1988) (*Stump* distinguished). See generally Rosenberg, *Whatever Happened to Absolute Judicial Immunity?*, 21 Hous. L. Rev. 875 (1984).

58. See generally B. MAHONEY, L. SIPES & J. ITO, *IMPLEMENTING DELAY REDUCTION AND DELAY PREVENTION PROGRAMS IN URBAN TRIAL COURTS* (1985); M. SELVIN & P. EBENER, *MANAGING THE UNMANAGEABLE: A HISTORY OF CIVIL DELAY IN THE LOS ANGELES SUPERIOR COURT* (1984); T. CHURCH, A. CARLSON, J. LEE & T. TAN, *JUSTICE DELAYED: THE PACE OF LITIGATION IN URBAN TRIAL COURTS* (1978); Chase, *Civil Litigation Delay in Italy and the United States*, 36 AM. J. COMP. L. 41-43, 48-51 (1988).

59. The Chilean Constitution art. 5, places sovereignty in "the Nation." It is exercised by "the people," through plebiscites and periodic elections, and also by constitutionally created authorities. Such sovereignty is tempered by "essential rights" which emanate from "human nature." Cf. U.S. CONST. amend. X (residual power in people and the states).

60. See generally Campbell, *Bases Constitucionales del Derecho Procesal*, 14 REV. DERECHO PROCESAL 5 (1987).

petence to Congress,<sup>61</sup> Article 74 of the Chilean Constitution calls for an "organic constitutional law"<sup>62</sup> to "determine the organization and attributes of the courts necessary for the prompt and effective administration of justice throughout the Republic."

Chilean judges are guaranteed independence of action by lifetime appointments during their "good behavior,"<sup>63</sup> a phrase reminiscent of Article III of the U.S. Constitution. The Chileans, however, draw much clearer lines between their branches of government. The Chilean Constitution assures separation of the judicial power from the other branches: "Neither the President of the Republic nor the Congress can, in any case, exercise judicial functions, intervene in pending cases, revise the grounds or content of judgments or resuscitate terminated cases."<sup>64</sup> The Chilean Judicial Code prohibits the judges from "injecting themselves in matters pertaining to other public powers" and from exercising functions other than deciding civil and criminal cases.<sup>65</sup>

The U.S. doctrine of "separation of powers" does not preclude executive agencies from establishing administrative boards which "adjudicate" (or apply), in judicial fashion and format, the agency's substantive law to the facts of particular claims.<sup>66</sup> This executive-adjudicative mixture would likely violate the explicit Chilean prohibition quoted above. Chile solves the problem in the European civil law mode.<sup>67</sup> A separate administrative court system is to be created to adjudicate claims against the state, the city governments, and the agents of both.<sup>68</sup> This body, like the lower courts, is to be supervised by the Supreme Court of Chile.<sup>69</sup> A fur-

61. See C. WRIGHT, *supra* note 22, § 8.

62. The Chilean Constitution mentions numerous "organic constitutional law[s]" (*leyes organicas constitucionales*), which were to be approved by the legislative power after adoption of the constitution. These require a super-majority, three-fifths, of both houses. CHILE CONST. art. 63.

63. *Id.* art. 77, para. 1.

64. *Id.* art. 73.

65. JUDICIAL CODE art. 4.

66. See *FTC v. Ruberoid Co.*, 343 U.S. 470, 487-90 (1952) (Jackson, J., dissenting). See generally Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573 (1984); Abrahams & Snowden, *Separation of Powers and Administrative Crimes: A Study of Irreconcilables*, 1 S. ILL. U.L.J. 1 (1976).

67. See generally J. MERRYMAN, *supra* note 53, at 100-02; D. CLARK & J. MERRYMAN, *COMPARATIVE LAW: WESTERN EUROPEAN AND LATIN AMERICAN LEGAL SYSTEMS* 306-10 (1978) [hereinafter CLARK & MERRYMAN].

68. CHILE CONST. art. 38, para. 2. At the time of writing, the administrative courts were still not established.

69. *Id.* art. 71, para. 1.

ther distinction between the U.S. and Chilean systems is found in the above-quoted language preventing the Chilean President (or Congress) from intervening in pending cases. In the U.S. system, the Attorney General, a cabinet member, regularly participates in civil cases in defense of government interests.<sup>70</sup> In Chile, who performs this function? The answer is typical of civil law<sup>71</sup> systems: a corps of public attorneys, known as *fiscales*, who are members of the judicial branch. These *fiscales* share the same honors and prerogatives as judges<sup>72</sup> and, among other assignments,<sup>73</sup> present the legal views of the government in cases involving its interests.<sup>74</sup>

Chilean courts depend on the national police force (*carabineros*)<sup>75</sup> for the execution of their judgments and orders.<sup>76</sup> According to many reports, however, the state police flagrantly ignored judicial orders during the presidency of Salvador Allende.<sup>77</sup> The 1980 Constitution not only authorizes judges to order police action, it also expressly prevents the latter from questioning the grounds, justice or legality of the judicial order to be executed.<sup>78</sup>

The Chilean Constitution also contains the judicial obligation to decide all jurisdictionally and procedurally proper controversies,<sup>79</sup> a hallmark of U.S. tradition as well.<sup>80</sup> The Constitution of Chile mentions that the "absence of law" cannot justify judicial inaction.<sup>81</sup> This is curious in light of the civil law's customary insistence that no lacunae exist in its codes.<sup>82</sup> The Chilean Code of

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70. See, e.g., 28 U.S.C. § 2403 (1982); Fed. R. Civ. P. 24(c).

71. See J. MERRYMAN, *supra* note 53, at 111-13.

72. See JUDICIAL CODE art. 352.

73. See *id.* arts. 350-364.

74. See *id.* art. 350, para. 3.

75. See generally CHILE CONST. ch. X.

76. *Id.* art. 73, para. 3.

77. See Velasco, *The Allende Regime in Chile: An Historical and Legal Analysis: Part II*, 9 LOY. L.A.L. REV. 711, 725 (1976).

78. CHILE CONST. art. 73, paras. 3, 4.

79. *Id.* art. 73, para. 2.

80. See *Canada Malting Co., v. Paterson Steamships, Ltd.*, 285 U.S. 413, 422-23 (1932); K. LEWELLYN, *THE BRAMBLE BUSH* 35 (1951). *Cf.* *Williams v. North Carolina*, 317 U.S. 287, 294 n.5 (1942) (*forum non conveniens* exception); *Broderick v. Rosner*, 294 U.S. 629, 643 (1935) (same). See generally C. WRIGHT, *supra* note 22, §§ 16, 42, 44.

81. CHILE CONST. art. 73, para. 2.

82. See J. MERRYMAN, *supra* note 53, at 30-31. In practice, of course, legislators recognize the inevitability of gaps and ambiguities. For example, Colombian judges are instructed to reach a decision "even though there is no applicable statute, or the statutes are obscure or incomplete, and in such cases to apply analogous statutes, or, in their absence, constitutional doctrine, customs and rules of substantive and procedural law." COLOMBIAN CODE art. 37(8).

Civil Procedure similarly admits the incompleteness of positive law by authorizing judges to apply "principles of equity" to resolve controversies when statutory law, including codes, does not provide an answer.<sup>83</sup> This is not a springboard for a body of equity law, such as that created by England's Court of Chancery,<sup>84</sup> but merely an invitation to the judges to apply standards of fairness and good conscience when the positive law has no clear answer to a particular controversy.<sup>85</sup>

#### IV. THE JUDICIAL FUNCTION

##### A. *In General*

The function of adjudication, that is, resolving disputes by establishing case facts and applying relevant law to them,<sup>86</sup> is traditionally placed in the hands of the courts in civil law systems, as it is in common law counterparts.<sup>87</sup> Therefore, it is not surprising to find the Chilean courts performing the same public function as the U.S. courts. The opening article of the Chilean Judicial Code vests exclusive power in the Chilean courts to "entertain civil and criminal causes, judge them, and execute these judgments. . . ."<sup>88</sup> The Chilean judges are instructed by the procedural code to adjudicate according to the "merits" of cases.<sup>89</sup> It is apparent from the structure of the adjudicatory system<sup>90</sup> and from the form of Chilean

83. CODE CIVIL PRO. art. 170(5).

84. See *Klepinger v. Rhodes*, 140 F.2d 697 (D.C. Cir. 1944) (equitable power of court exists apart from legislated authority). See generally T. PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW* 673-707 (5th ed. 1956).

85. While the civil law does not know equity in the Anglo-American sense of separate courts and doctrines, the civil law countries have functional equivalents to equitable powers. See J. MERRYMAN, *supra* note 53, at 54-55; Bernstein, *Whose Advantage After All? A Comment on the Comparison of Civil Justice Systems*, 21 U.C. DAVIS L. REV. 587, 598 (1988).

86. See generally Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353 (1978).

87. See KARST, *supra* note 18, at 65:

The formal legal systems of Latin American countries are modern, developed institutional structures. Disputes are resolved by a hierarchical arrangement of courts on the basis of the wording and legislative history of legal norms, scholarly doctrine, opinions of distinguished jurists, and prior court decisions. Official determinations of the rights and obligations are based upon the application of impersonal, universalistic principles by professionals trained in the system.

88. JUDICIAL CODE art. 1.

89. CODE CIVIL PRO. art. 160. Cf. COLOMBIAN CODE art. 174 ("Every judicial decision shall be based upon timely and regular proofs.").

90. See *infra* text accompanying notes 242-341.

judgments<sup>91</sup> that "judging" and "merits" have similar meanings in Chile and in the United States. Furthermore, Chile has a court system structured similarly to that of the United States: single-judge trial courts,<sup>92</sup> several intermediate appellate courts sitting in panels,<sup>93</sup> and a single high collegiate court.<sup>94</sup>

Many other features of a judicial system familiar to North American lawyers are found in Chilean law and practice. These include: free lawyers and court services for the indigent;<sup>95</sup> notice and an opportunity to be heard prior to judicial action;<sup>96</sup> control of delay by "fatal" time limits for completing steps in the process;<sup>97</sup> motion practice;<sup>98</sup> swearing to official acts;<sup>99</sup> and compilation of all resolutions, party submissions, and all other case documentation in an orderly case file.<sup>100</sup>

91. CODE CIVIL PRO. art. 170.

92. See JUDICIAL CODE arts. 42-48 (*jueces de letras*). In comparison, Venezuelan litigants can have the trial decision made by a panel (*terna*). After proof-taking, two "associate judges" are added, one picked by each party from a list of three proposed by the opponent. Associate judges are lawyers who are paid by the parties, presumably after having advocated that party's cause. See VENEZUELAN CODE arts. 118-124. The civil law tradition is for cases to be adjudicated at the trial level by a panel of three judges. See, e.g., G. CERTOMA, *THE ITALIAN LEGAL SYSTEMS* 206-07 (1985); R. SCHLESINGER, *supra* note 1, at 284; Schopflocher, *Civil Procedure: A Comparative Study of Some Principal Features Under German and American Law*, 1940 WIS. L. REV. 234, 237. The unipersonal trial bench in South America may reflect a lack of judicial personnel rather than an ideological deviation from the civil law tradition.

93. See JUDICIAL CODE arts. 54-92.

94. See *id.* arts. 93-107.

95. CODE CIVIL PRO. arts. 129-137.

96. *Id.* arts. 35-58, 65, 69, 80.

97. In an effort to accelerate judicial proceedings, several amendments were made to the Chilean Code of Civil Procedure in 1988. Law No. 18.705, May 24, 1988, in CODE CIVIL PRO. annex. Article 64 was revised to read as follows:

The time limits established by this Code are fatal no matter how they are expressed, except for those governing the court's own action. As a consequence, the possibility of exercising a right or the opportunity to exercise an act is extinguished at the end of the time limit.

The parties may, only one time in each case, agree to suspend the proceeding for up to thirty days . . . .

If the court establishes a time period, the judge may extend it for "just cause" when a party requests an extension within the term. CODE CIVIL PRO. art. 67.

98. Motions and accompanying procedures are called *incidentes*. See CODE CIVIL PRO. arts. 82-91.

99. *Id.* art. 62. The form of the oaths is similar to ours: "Do you swear to God to tell the truth concerning the matter about which you will be questioned?" "Yes, I so swear." "Do you swear to God to discharge faithfully the responsibility imposed upon you?" "Yes, I so swear." There is no secular affirmation in Chile. Cf. 1 U.S.C. §1 (1982) ("oath" includes affirmation and "sworn" includes affirmed); FED. R. CIV. P. 43(d) (affirmation permitted in lieu of oath).

100. The record is *el proceso*. See CODE CIVIL PRO. arts. 29-37. We observed archaic



### B. *Adversary Versus Inquisitorial*

A common point of comparison between common and civil law is the extent to which each system encourages its judges to pursue the objective truth of contested matters.<sup>101</sup> The distinction is apparent in the following example. The common law judge's concern runs only to providing the parties a fair and equal opportunity to litigate.<sup>102</sup> Should they decline such opportunity, as by default or other means, judgment can be entered against them regardless of the likely result had they defended.<sup>103</sup> Theory, spun from the adversary loom, supplies the justification that failure to defend is an admission of the truth of plaintiff's claim.<sup>104</sup>

In comparison, the civilian plaintiff still has the burden of proving his case. Default means simply that the case proceeds without the participation of the defaulting party.<sup>105</sup> The absent party can return to the proceeding but must take the record as he finds it.<sup>106</sup> While in this example, the civil law seems more protective of the "truth," the *ex parte* proceeding rarely results in a victory for the defaulter.

systems for storing and retrieving case files in the Chilean trial courts.

101. Bernstein, *supra* note 85, at 587.

102. One famous quote provided by Dean Roscoe Pound is as follows:

[I]n America we take it as a matter of course that a judge should be a mere umpire, to pass upon objections and hold counsel to the rules of the game, and that the parties should fight out their own game in their own way without judicial interference. We resent such interference as unfair, even when in the interest of justice.

See Fox, *Settlement: Helping the Lawyers to Fulfill Their Responsibility*, 53 F.R.D. 129, 137 (1971). This position is not without its challengers. Justice Frankfurter penned the following oft-cited view: "In a trial by jury in a federal court, the judge is not a mere moderator, but is the governor of the trial for the purpose of assuring its proper conduct . . ." *Herron v. Southern Pacific Co.*, 283 U.S. 91, 95 (1931). See also *Evans v. Wright*, 505 F.2d 287, 289 (5th Cir. 1974) (" . . . a United States district judge is not a bump on a log. Nor is he a referee at a prize fight. ").

103. See FED. R. CIV. P. 55(a) (failure to "plead or otherwise defend" results in a party's default).

104. See J. FRIEDENTHAL, M. KANE & A. MILLER, *CIVIL PROCEDURE* § 9.4 (1985) [hereinafter *CIVIL PROCEDURE*]. Venezuela, like the United States, reads an admission of liability into a default. See *VENEZUELAN CODE* art. 362.

105. See *CODE CIVIL PRO.* arts. 78, 318; Bernales Pereira, *Mesa Redonda en Tulane 9* (April 1965) (unpublished manuscript on file with the author). See also Chase, *supra* note 58, at 71 (default in Italy not admission). In Argentina, the case goes to proofs but any doubts are resolved against the defaulting party. *ARGENTINE CODE* art. 60. In Colombia, the judge may consider failure to answer the complaint as proof against the defendant. *COLOMBIAN CODE* art. 95.

106. See *CODE CIVIL PRO.* art. 21. *Accord* *ARGENTINE CODE* art. 64.

Another common distinction between common and civil law is the extensive power vested in the civil law judge to "investigate" the truth of matters.<sup>107</sup> The common law judge presumably sits back and judges the case presented by the parties' attorneys, for better or worse. Should the judge actively litigate the case, he is reversed for unauthorized interventionism, as in the case of the judge who ordered the plaintiff's lawyer to conduct discovery,<sup>108</sup> or of the one who mandated a negotiation technique called "summary jury trial."<sup>109</sup> Conversely, the civil law judge supposedly intervenes actively in the fact-finding process by attempting to fill "gaps" in the proof. Article 159 of the Chilean Code of Civil Procedure, for example, declares that a Chilean judge can, "to better resolve the controversy," order: 1) the addition of any document to the record when necessary to clarify the litigants' rights; 2) sworn statements by a party on central fact questions;<sup>110</sup> 3) personal judicial inspection of property in question;<sup>111</sup> 4) report of experts;<sup>112</sup> 5) the recall of witnesses to clarify ambiguous or contradictory testimony; and 6) any other measure necessary for the lawsuit. This last catchall would presumably justify the judge's ordering testimony from a

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107. See Homburger, *Functions of Orality in Austrian and American Civil Procedure*, 20 BUFFALO L. REV. 9, 26-27 (1970) (Austria); Kaplan, *Civil Procedure—Reflections on the Comparison of Systems*, 9 BUFFALO L. REV. 409, 410 (1960) ("[W]e find the presiding [German] judge highly vocal and dominant. . ."); Langbein, *Comparative Civil Procedure and the Style of Complex Contracts*, 35 AM. J. COMP. L. 381, 388 (1987) ("[In] [c]ontinental procedure. . .the judge has the primary responsibility for eliciting the facts."); Rheinstein, *supra* note 30, at 13 ("A German judge. . .regards himself as a government officer whose primary function is that of safeguarding the interests of the community."). *But see* Allen, Kock, Reichenberg & Rosen, *The German Advantage in Civil Procedure: A Plea for More Details and Fewer Generalities in Comparative Scholarship*, 82 NW. U.L. REV. 705, 723-27 (1988); Rheinstein, *supra* note 30, at 13 ("The image of the German judge in a civil case as an investigator is a chimera.").

108. See *Identiseal Corp. v. Positive Identification Systems, Inc.*, 560 F.2d 298 (7th Cir. 1977). "Our decision is also based on the traditional principle that the parties, rather than the court, should determine litigation strategy." *Id.* at 302. The opinion in *Identiseal* cites as authority Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1283 (1976). Professor Chayes notes, however, that the "traditional model is clearly invalid as a description of much current civil litigation in the federal district court." *Id.* at 1283-84 (footnote omitted).

109. See *Strandell v. Jackson County*, 838 F.2d 884 (7th Cir. 1988). *But see* *McKay v. Ashland Oil, Inc.*, 120 F.R.D. 43, 46-49 (E.D. Ky. 1988); *Cincinnati Gas & Elec. Co. v. General Elec. Co.*, 117 F.R.D. 597, 599 (S.D. Ohio 1987) (*dicta*). See generally Frankel, *The Search For Truth: An Umpireal View*, 123 U. PA. L. REV. 1031 (1975); Uviller, *The Advocate, The Truth, and Judicial Hackles: A Reaction to Judge Frankel's Idea*, 123 U. PA. L. REV. 1067 (1975).

110. See *infra* text accompanying notes 301-08.

111. See *infra* text accompanying notes 313-18.

112. See *infra* text accompanying notes 319-26.

witness, revealed by the record, but not called by any party. Should his study of the record show a need to clarify or to establish new and essential facts by any of the listed means, Article 160 authorizes the judge to reopen the proof-taking term<sup>113</sup> for up to eight days.

While Article 159 empowers a Chilean judge to take charge of the civil proceeding, these powers are infrequently utilized. As elsewhere, overburdened and understaffed Chilean judges do not have the luxury of supervising the detailed conduct of cases flowing through their courtrooms. In comparison, common law judges probably have as much theoretical power as their South American brethren. For example, U.S. judges, unhappy with the factual result of a jury case, can grant a new trial.<sup>114</sup> There also is considerable precedent supporting a power to visit sites,<sup>115</sup> inspect objects,<sup>116</sup> call and recall witnesses,<sup>117</sup> question witnesses called by parties,<sup>118</sup> and even appoint court experts.<sup>119</sup>

## V. TRIAL COURTS

This section illustrates some significant distinctions between the U.S. and Chilean pre-trial and trial processes. The reader should not, however, lose sight of the remarkable congruence between the two systems.<sup>120</sup>

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113. See *infra* text accompanying notes 277-81.

114. See FED. R. CIV. P. 59. See generally *Tidewater Oil Co. v. Waller*, 302 F.2d 638, 643 (10th Cir. 1962); *Aetna Cas. & Surety Co. v. Yeatts*, 122 F.2d 350, 352-54 (4th Cir. 1943); Riddell, *New Trial at Common Law*, 26 YALE L.J. 49 (1916).

115. See *Bizich v. Sears, Roebuck & Co.*, 391 Pa. 640, 649, 139 A.2d 663, 668 (1958) (discretionary power of judge to grant view upheld). See generally MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE § 216 (2d ed. 1972) [hereinafter MCCORMICK]; 4 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1162-1169 (1972).

116. MCCORMICK, *supra* note 115, § 216.

117. See FED. R. EVID. 614(a); *United States v. Ramos*, 291 F. Supp. 71, 74 (D.R.I. 1968), *aff'd*, 413 F.2d 743 (1st Cir. 1969) (court has power to call a witness, adduce evidence and itself examine the witness in front of the jury). See generally MCCORMICK, *supra* note 115, § 8.

118. See *United States v. Liddy*, 509 F.2d 428, 459 (D.C. Cir. 1974); FED. R. EVID. 614(b).

119. See FED. R. EVID. 706.

120. Cf. *Murray*, *supra* note 9, at 399: "When one first looks at the Spanish system it is possible to be blinded by the differences from the Anglo-American system and thereby overlook the many startling similarities."

### A. "Competence"

As in U.S. jurisprudence,<sup>121</sup> Chile distinguishes between judicial power vested constitutionally and that portion allocated by the legislature to a particular court. Chile, like the United States,<sup>122</sup> calls the latter "competence," and defines it as "the power of each judge or court to adjudicate those matters which the law has placed within its sphere of authority."<sup>123</sup> The concept of ancillary jurisdiction is also found in the Chilean Judicial Code. Article 111 permits small claims to be filed by the defendant as a counterclaim, even though as original matters they would belong in small claims court. Chile deals with duplicate filings of the same case in a straightforward, commendable fashion. Once a case is commenced in a competent court, all others lose their competence as to that case.<sup>124</sup> Like the United States,<sup>125</sup> Chile permits the question of competence to be raised by the defendant and decided by the court right away.<sup>126</sup>

As in the United States,<sup>127</sup> a court's competence is often defined in Chile by the value of the matter in litigation,<sup>128</sup> and sometimes the judicial process permitted varies with such value.<sup>129</sup> Consequently, it is not surprising to encounter in the Chilean Judicial Code a complex set of rules for determining the economic value of the myriad matters which may be brought to court.<sup>130</sup>

In Chile, no functional distinction is made between "subject matter jurisdiction" and "venue." In the United States, venue is the geographical allocation of business among courts of the same level, in the same judicial system.<sup>131</sup> Jurisdiction over the subject matter is the competence of courts defined in terms of the type

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121. See M. ROSENBERG, H. SMIT & H. KORN, *ELEMENTS OF CIVIL PROCEDURE* 207-08 (4th ed. 1985) [hereinafter *ELEMENTS OF CIVIL PROCEDURE*].

122. *Id.*

123. JUDICIAL CODE art. 108. For procedures utilized to challenge competence, see CODE CIVIL PRO. arts. 101-112, 303(1).

124. JUDICIAL CODE art. 112. See also VENEZUELAN CODE art. 346(1) (*litispendencia*); accord ARGENTINE CODE arts. 347(4), 354(3).

125. See, e.g., FED. R. CIV. P. 12(b)(1).

126. CODE CIVIL PRO. art. 303(1).

127. See, e.g., 28 U.S.C. § 1332 (1982), as amended by Act of Nov. 19, 1988, Pub. L. No. 100-702, § 201, 102 Stat. 4642, 4646 (\$50,000 for federal diversity action).

128. See, e.g., JUDICIAL CODE arts. 14, 25(1).

129. See *infra* text accompanying notes 502-16.

130. See JUDICIAL CODE arts. 115-132.

131. See generally C. WRIGHT, *supra* note 22, § 42.

and value of claims and party characteristics.<sup>132</sup> Thus, in the United States, separate processes and rules exist to test the validity of each.<sup>133</sup> In contrast, Chile, while recognizing the analytical distinction between the two,<sup>134</sup> categorizes both under the concept of "competence" and treats them indiscriminately. The venue factors in Chile are quite familiar to an American lawyer. Domicile of the defendant,<sup>135</sup> main office of a company,<sup>136</sup> location of real estate,<sup>137</sup> and location where a contract is executed<sup>138</sup> are several of the bases for determining the appropriate judicial district for filing a civil action.

An interesting difference between U.S. and Chilean practice is that the former typically does not permit parties to vest, by agreement or waiver, subject matter jurisdiction in a court not so vested by law,<sup>139</sup> while the latter explicitly authorizes this practice.<sup>140</sup> The parties in Chile can expressly or tacitly "extend" a court's competence with regard to both venue and subject matter jurisdiction. A tacit extension occurs when the plaintiff files in an "inappropriate" court and the defendant fails to object. The principal limit on this practice is that the court of filing must exercise an "analogous" jurisdiction; thus, a civil case cannot be filed in a military court and vice versa.<sup>141</sup> Presumably, the court itself would *sua sponte* dismiss actions violating this limitation.

Chile, like Italy<sup>142</sup> and Spain,<sup>143</sup> has the flexibility of being

132. See generally *id.* § 7.

133. For example, in federal practice, subject matter jurisdiction may be questioned by a FED. R. CIV. P. 12(b)(1) motion and may be raised at any time. See FED. R. CIV. P. 12(h)(3). Venue may be challenged by using FED. R. CIV. P. 12(b)(3), and may be waived. See FED. R. CIV. P. 12(g),(h).

134. See JUDICIAL CODE tit. VII, § 4.

135. *Id.* art. 134. Accord ARGENTINE CODE art. 5(3),(4).

136. JUDICIAL CODE art. 142.

137. *Id.* art. 135(3). Accord ARGENTINE CODE art. 5(1).

138. JUDICIAL CODE art. 138. Accord ARGENTINE CODE art. 5(3).

139. See, e.g., *Finley v. United States*, 109 S. Ct. 2003, 2011 (1989) (Stevens, J., dissenting) (dictum); *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982) (dictum); *Mansfield, Coldwater & Lake Michigan Ry. Co. v. Swan*, 111 U.S. 379, 382-86 (1854); FED. R. CIV. P. 12(h)(3) ("Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.").

140. JUDICIAL CODE arts. 181-187. Accord ARGENTINE CODE art. 2. In stark contrast, Colombia prohibits the extension of subject matter or territorial competence, see COLOMBIAN CODE art. 13, and instructs its judges to dismiss jurisdictionally improper cases *sua sponte*. *Id.* art. 85.

141. See JUDICIAL CODE art. 183.

142. See G. CERTOMA, *supra* note 92, at 265-66.

able to combine criminal and civil actions when a criminal act produces actionable damage to third parties.<sup>144</sup> The absence of juries and of particularly high burdens of proof in criminal cases makes this efficient method possible in civil law systems. The action is first filed in criminal court by the prosecutor, the injured party may then add a civil complaint, and the two cases are tried jointly. "Trial," in the civilian style, is primarily the accumulation of sworn witness' statements, upon which the judge's fact-findings are based. The facts used to exonerate or inculcate the accused on the criminal charges may also be used in the civil action. Any additional facts or proofs necessary for findings relevant only to the civil case, such as the quantum of damages, are also included.

In cases which are tried separately, any criminal judgment against the accused can be introduced with *res judicata* effect in the civil case. Should the accused win the criminal case, the civil plaintiff may also suffer *res judicata* effects. The Code lists three such situations: 1) where no criminal conduct was proven; 2) there was no proof that linked the accused to the crime; and 3) insufficient proof against the accused in cases where the civil plaintiffs participated in the criminal process as parties or helpers (*coayudantes*).<sup>145</sup> "Res judicata" effect means that no contrary pleadings or proofs will be permitted in the civil case.<sup>146</sup> This is akin to collateral estoppel in the United States.<sup>147</sup>

### B. Pleadings

A U.S. lawyer would be surprised at the similarities in the pleadings used to commence and frame controversies in both legal systems. As does his counterpart in the United States,<sup>148</sup> a Chilean lawyer begins a lawsuit by filing in court and serving<sup>149</sup> a complaint upon the defendant.<sup>150</sup> Besides providing information about parties and representatives, the complaint must contain "a clear statement of the [supporting] facts and legal grounds. . . ."<sup>151</sup> The conclud-

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143. See Murray, *supra* note 9, at 401.

144. See JUDICIAL CODE arts. 171-174.

145. *Id.* art. 179.

146. *Id.* art. 180.

147. See generally J. GLANNON, CIVIL PROCEDURE ch. 20 (1982).

148. See, e.g., FED. R. CIV. P. 3; PA. R. CIV. P. 1007.

149. Notifications to parties are comparable to those in the United States. See CODE CIVIL PRO. arts. 38-58.

150. CODE CIVIL PRO. arts. 40, 253.

151. CODE CIVIL PRO. art. 254. Cf. FED. R. CIV. P. 8(a)(2) ("a short and plain statement

ing section of the complaint must specify the relief sought in precise and clear terms.<sup>152</sup> The adjectives "precise" and "clear" suggest that Chile encountered the same problems with lawyers' prolixity and obscurity which moved U.S. drafters to fill Federal Rule 8 with comparable exhortations.<sup>153</sup> Similar to U.S. practice,<sup>154</sup> the Chilean lawyer attaches documentary proof to his complaint.<sup>155</sup> Unlike rules in the United States requiring authentication of documents,<sup>156</sup> in Chile, such attachments are considered authentic proof, unless contrary parties start an impeachment process within a few days of receipt.<sup>157</sup> This aspect of the Chilean approach resembles the "short cuts" becoming acceptable in small claims proceedings in the United States, such as those whereby expert reports and plaintiff's bills are acceptable without further proof.<sup>158</sup>

In Chile, the answer to the complaint must be filed within fifteen days of service, with additional time for those whose domicile is far from the seat of court.<sup>159</sup> The answer must contain the defendant's "exceptions," with a clear supporting statement of fact and law<sup>160</sup> and supporting documents. No effort is made to distinguish between negative and affirmative defenses.<sup>161</sup> As in the United States,<sup>162</sup> the Chileans include counterclaims in the answer. The amount requested in the counterclaim may not exceed the

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of the claim showing that the pleader is entitled to relief"). Chile's pleading rules are more comparable to those in the United States than those in Europe, which require detailed statements of facts, law, proof, and witnesses. See M. CAPELLETTI & J. PERILLO, *CIVIL PROCEDURE IN ITALY* 155, 169 (1965); Jacoby, *The Use of Comparative Law in Teaching American Civil Procedure*, 25 CLEV. ST. L. REV. 423, 423-27 (1976); Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823, 827 (1985). In contrast, Colombian pleadings follow the Continental model. See COLOMBIAN CODE arts. 75-79, 92.

152. CODE CIVIL PRO. art. 254(5). Cf. FED. R. CIV. P. 8(a)(3) ("a demand for judgment for the relief the pleader seeks").

153. See FED. R. CIV. P. 8(a)(1) ("short and plain statement"), 8(b) ("short and plain statement"), 8(e)(1) ("simple, concise, and direct statement").

154. See T. MAUET, *FUNDAMENTALS OF PRETRIAL TECHNIQUES* 111-14 (1988).

155. This is customary rather than a code requirement.

156. See FED. R. EVID. 901(a); 1 J. MOORE, A. VESTAL & P. KURLAND, *MOORE'S MANUAL, FEDERAL PRACTICE AND PROCEDURE* § 4.09 (1984).

157. CODE CIVIL PRO. art. 255.

158. See, e.g., PHILADELPHIA CIV. R. 180 § III(B)(2), in *Compulsory Arbitration Seminar*, Philadelphia B.A. (May 22, 1987) (mimeographed).

159. CODE CIVIL PRO. arts. 258, 259.

160. *Id.* art. 309(3).

161. Cf. FED. R. CIV. P. 8(b),(c). Similar to U.S. practice, the answer in Argentina requires a categorical acceptance or denial of facts alleged in the complaint and the authenticity of attached documents. See ARGENTINE CODE art. 356.

162. FED. R. CIV. P. 13.

court's competence,<sup>163</sup> keeping in mind that the parties can freely waive this jurisdictional defect.<sup>164</sup>

Any defenses omitted from the pleadings are waived, except for the following four: 1) statute of limitations; 2) *res judicata*; 3) settlement; and 4) payment.<sup>165</sup> These defenses are provable at any time prior to the citation to hear judgment at the trial level, or before an appellate hearing. The fact that the objection to subject matter jurisdiction is not preserved merely confirms that judicial competence has lesser dignity in Chile than in the United States.<sup>166</sup>

As in the common law,<sup>167</sup> Chile permits further pleadings—a reply by plaintiff (*réplica*) and a rejoinder by defendant (*dúplica*).<sup>168</sup> In these, the parties may expand and modify their claims and defenses as long as the “principal object” of the suit is not changed.<sup>169</sup>

Amendments are not liberally permitted,<sup>170</sup> perhaps because of the second round of pleadings. The plaintiff, however, has a right to amend his complaint prior to the answer; the amended document is then considered a new complaint for the purposes of service and answer.<sup>171</sup> Moreover, as noted above, the parties may expand, explain and modify their causes and defenses in two subsequent pleadings—plaintiff's reply and the defendant's rejoinder.<sup>172</sup>

A final comparison of pleadings reveals that Chile allows for a procedure similar to the United States' “judgment on the pleadings.”<sup>173</sup> Should the pleadings fail to show any controversies of material fact, the court may cite the parties to hear final judgment.<sup>174</sup>

163. CODE CIVIL PRO. art. 315. Unlike Chile, the Argentine counterclaim must derive from or be connected to the “juridical relation” set forth in the main claim. ARGENTINE CODE art. 357.

164. See *supra* text accompanying notes 139-41.

165. CODE CIVIL PRO. art. 310.

166. See *supra* text accompanying notes 139-41.

167. See generally T. PLUCKNETT, *supra* note 84, at 399-418.

168. CODE CIVIL PRO. art. 312.

169. *Id.*

170. Cf. FED. R. CIV. P. 15(a) (“leave shall be freely given when justice so requires”); COLOMBIAN CODE art. 89 (one amendment of right before order of proof-taking). See generally *Harlee v. Hagen*, 538 F. Supp. 389 (E.D.N.Y. 1982); *Hagee v. City of Evanston*, 95 F.R.D. 344 (N.D. Ill. 1982); *Grand Sheet Metal Products v. Aetna Casualty & Surety Co.*, 500 F. Supp. 904 (D. Conn. 1980).

171. CODE CIVIL PRO. art. 261.

172. *Id.* art. 312.

173. See FED. R. CIV. P. 12(c).

174. CODE CIVIL PRO. art. 313.



This process may be initiated with or without a party's petition.

### C. *Provisional Remedies*

U.S. state court procedures to sequester defendant's property for the purpose of securing plaintiff's potential judgment have undergone dramatic modifications in recent decades. These revisions have been mandated by U.S. Supreme Court due process jurisprudence.<sup>175</sup> Beginning with the premise that even a temporary seizure of defendant's property is a "deprivation" subject to constitutional "due process,"<sup>176</sup> the Court elaborated a series of protections aimed at balancing defendant's right to property against the plaintiff's need to freeze assets quickly in order to guarantee a productive judgment. While seizure without a prior hearing is constitutionally permissible when the plaintiff can show a clear and present danger to his security needs,<sup>177</sup> the defendant's interests are safeguarded through the plaintiff's posting of adequate bonds, the submission of affidavits showing plaintiff's prima facie rights on the merits, a judge's issuance of the writ for seizure following a study of the petition, and the availability of a reasonably prompt post-seizure hearing for the defendant.<sup>178</sup> Should there be a hearing before the writ is issued, the defendant must naturally be given the opportunity to offer adequate security, to demonstrate that he is not judgment-proof, to preliminarily show the lack of merit in the plaintiff's claims, and to prove other facts tipping the balance of interest in his favor.<sup>179</sup>

Remarkably, Chile has generally arrived at the same doctrinal point as the United States, but without the compulsion of constitutional rulings. The Chilean Code<sup>180</sup> reads much like a modern U.S. state attachment statute.<sup>181</sup> It exemplifies the idea that common concepts of procedural justice in the Western world cut across

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175. See generally J. NOWAK, R. ROTUNDA & J. YOUNG, HANDBOOK ON CONSTITUTIONAL LAW 546-62 (2d ed. 1988) [hereinafter HANDBOOK]; L. TRIBE, AMERICAN CONSTITUTIONAL LAW 718-31, 1637-38 (2d ed. 1988).

176. *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969).

177. See *North Georgia Finishing, Inc. v. Di-Chem., Inc.*, 419 U.S. 601, 606-07 (1975) (dicta).

178. See *id.* at 607.

179. See CAL. CIV. PRO. CODE § 484.060 (Deering 1989); N.Y. CIV. PRAC. L. & R. § 6223(a) (McKinney 1980); 42 PA. CONS. STAT. ANN. § 1291(a) (Purdon 1987).

180. CODE CIVIL PRO. arts. 290-302.

181. See, e.g., CAL. CIV. PRO. CODE § 481.010-493.060 (Deering 1989); N.Y. CIV. PRAC. L. & R. § 6201-6226 (McKinney 1980); 42 PA. CONS. STAT. ANN. § 1285-1292 (Purdon 1987).

broad gaps of distance and culture.

Remedies available to a Chilean plaintiff resemble those available in the United States: attachment of defendant's real or personal property; prohibitions against transfer of specified property and posting of such orders in the property registry; appointment of receivers; and seizure of any property which is the subject of suit.<sup>182</sup> The purpose of such a seizure is to "secure the effectiveness of the action,"<sup>183</sup> and judicial writs only reach that amount of defendant's property necessary to achieve that end.<sup>184</sup> Plaintiff may seek such relief at any time after filing suit.<sup>185</sup>

In Chile, the defendant's protections are ample. Writs are only issued by judges,<sup>186</sup> and only for the length of time necessary to secure the plaintiff.<sup>187</sup> Defendant can release the attachment by demonstrating a lack of danger to plaintiff's security interests or by posting adequate bonds to cover the judgment.<sup>188</sup> The plaintiff must offer preliminary proofs which "constitute at a minimum, a serious presumption that he has the claimed rights."<sup>189</sup> The writ can issue for ten days while the plaintiff is gathering such proofs. It may issue, however, only "in grave and urgent cases," and only after the plaintiff posts satisfactory bonds to cover the defendant's potential attachment damages.<sup>190</sup> Finally, writs can issue *ex parte* for five days if the plaintiff proves "grave reasons" to issue the writ without notice and a hearing for the defendant.<sup>191</sup>

A Chilean lawyer may obtain security before filing suit but, as is characteristic of post-filing remedies, abuse of this process is sought to be curtailed by rigorous standards and judicial supervision. The prospective plaintiff must demonstrate to the court "grave and qualified reasons" supporting pre-filing relief, specify the value of goods to be attached, and post enough security to cover the attachment damages and fines which may ensue.<sup>192</sup> Suit must be filed within ten days of the attachment, judicially extendi-

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182. CODE CIVIL Pro. arts. 290-297.

183. *Id.* art. 290.

184. *Id.* art. 298.

185. *Id.* art. 290.

186. *See id.* arts. 91, 302.

187. *Id.* art. 301.

188. *Id.*

189. *Id.* art. 298.

190. *Id.* art. 299.

191. *Id.* art. 301.

192. *Id.* art. 279.

ble to thirty days for cause, and the plaintiff must request the continuation of the decree ordering the security.<sup>193</sup> The pre-filing process described above is *ex parte*.<sup>194</sup> The fact that Chilean judges only hear from one side suggests vast possibilities of abuse. Once the suit is filed, however, and the plaintiff requests the continuation of the security decree, the defendant may argue that the *ex parte* assertions of the plaintiff were fraudulent, thus entitling the defendant to damages.

#### *D. Joinder of Claims and Parties*

A few simple articles in the Chilean Code of Civil Procedure contain the doctrines of joinder of claims and parties, as well as intervention.<sup>195</sup> The Chilean standards tend to be much simpler than the U.S. Federal Rules.

In Chile, judges may jointly try separate actions which are not "incompatible."<sup>196</sup> As in U.S. practice,<sup>197</sup> plaintiffs may join in the complaint as many claims as they have against the defendants, even if they are inconsistent with each other.<sup>198</sup> Joinder of parties as co-plaintiffs or co-defendants is permitted as long as they are making or defending the same claim, or different claims which involve common facts.<sup>199</sup> If in the same suit co-parties are making identical claims or defenses, they must be jointly represented and speak with a single voice;<sup>200</sup> on the other hand, they may be separately represented on all claims and defenses which differ in fact or law.<sup>201</sup>

The Chilean Code has no rule which resembles the U.S. "necessary party" rule,<sup>202</sup> with one exception: If a cause of action be-

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193. *Id.* art. 280.

194. *Id.* art. 289.

195. *Id.* arts. 17-24.

196. *Id.* art. 17. *Cf.* FED. R. CIV. P. 42(a) ("common question of law or fact").

197. *See, e.g.,* FED. R. CIV. P. 18.

198. CODE CIVIL PRO. art. 17. *Cf.* COLOMBIAN CODE art. 82(2) (claims may not be mutually exclusive).

199. CODE CIVIL PRO. art. 18. *Cf.* FED. R. CIV. P. 20 (joinder permitted if claims by or against co-parties arise out of "the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all these persons will arise in the action").

200. CODE CIVIL PRO. art. 19.

201. *Id.* art. 20.

202. *See, e.g.,* FED. R. CIV. P. 19. *Cf.* ARGENTINE CODE art. 89 ("When a useful judgment requires several parties, these shall sue or be sued in the same case.").

longs to more than one person, the defendant can require that any plaintiffs not joined be notified of the suit.<sup>203</sup> Once notified, the absent plaintiffs may join in the suit. Those who expressly decline to join and those who remain silent are bound by the judgment. The latter class may later appear, accepting the case as they then find it. Curiously, one finds no mention in the Chilean Code of missing defendants when a debt or liability is jointly held.<sup>204</sup>

Chilean intervention norms are straightforward, unlike the complexity which attends the U.S. federal intervention rule.<sup>205</sup> Anyone may intervene in Chile who claims a right which is incompatible with that claimed by any party to the suit.<sup>206</sup> The intervenor may present separate pleadings, proofs, and appeals,<sup>207</sup> but, from the face of the rules, it is difficult to understand whether the intervenor can return to stages already past. It appears that if the intervenor comes in after pleadings are closed or proofs completed, he can only litigate from that point forward.

Chile has a curious "helper" (*coayudante*) status for those who claim some "actual interest," which is a "right and not a mere expectation," but which is not incompatible with nor independent of the rights sought by actual parties.<sup>208</sup> While these helpers are not direct parties to the lawsuit, they are bound by the judgment along with party-intervenors,<sup>209</sup> and should they be unhappy with the efforts of aligned parties they are permitted to litigate separately, in whole or in part.<sup>210</sup>

In the Chilean Code of Civil Procedure there is no class action rule,<sup>211</sup> nor is there a generic class action process in special legislation. There exists only an oblique reference in the joinder-of-par-

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203. CODE CIVIL PRO. art. 21.

204. Cf. COLOMBIAN CODE art. 83 ("When the case involves legal relations or acts which by their nature or by legal provision cannot be meritoriously resolved without the appearance of persons involved in such relations or acts, the complaint must be formulated by or against all.").

205. See generally C. WRIGHT, *supra* note 22, § 75; CIVIL PROCEDURE, *supra* note 104, § 6.10.

206. CODE CIVIL PRO. art. 22.

207. *Id.* arts. 16, 22.

208. *Id.* art. 23.

209. *Id.* art. 24.

210. *Id.* arts. 16, 23.

211. Nor does there exist a class action rule in the European codes of civil procedure. See Cohn, *Parties*, in XVI INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW: CIVIL PROCEDURE § 5-165, at 47-48 (M. Cappelletti ed. 1976); Kerameus, *A Civilian Lawyer Looks at Common Law Procedure*, 47 LA. L. REV. 493, 504-05 (1987).

ties rule to actions which are brought by or against "many" in cases authorized by statute.<sup>212</sup> Furthermore, according to Chilean lawyers there is no significant statutory authority for class actions.

### *E. Preliminary Motions*

Chile has a voluntary dismissal process similar to U.S. Federal Rule 41. A plaintiff has the right to retire his complaint before it is served on the defendant;<sup>213</sup> in U.S. practice such right exists prior to the defendant's answer or motion for summary judgment.<sup>214</sup> The practice of the two countries diverges considerably when the plaintiff must solicit a dismissal from the court. In both countries, the judge can impose conditions upon the plaintiff, such as payment of costs incurred to date by the defendant.<sup>215</sup> In Chile, however, the dismissal acts as *res judicata*,<sup>216</sup> while in the U.S. federal courts, only the second voluntary dismissal has such an effect.<sup>217</sup>

A major distinction between the two systems is the absence in Chile, as in other civil law countries,<sup>218</sup> of a process for determining the legal sufficiency of a claim or defense. In Chile there is no motion to dismiss for failure to state a claim,<sup>219</sup> nor a motion to strike the defense.<sup>220</sup> These U.S. motions enable the invalidity of legal theories to surface early and save the time and effort wasted in a futile action or defense. Lawyers in Chile and Italy, however, do not seem particularly troubled by this. In both places, the loser can be charged with the other side's costs, including attorney fees,<sup>221</sup> which naturally dissuades frivolous claims and defenses. Also, the absence of discovery in civil law countries<sup>222</sup> lessens the "nuisance value" of groundless claims. Finally, the civilian tradition seems to encourage a full day in court, not just a morning. If the law does not provide relief on the facts presented at trial, the judge will so

212. CODE CIVIL PRO. art. 18.

213. *Id.* art. 148.

214. FED. R. CIV. P. 41(a).

215. Compare CODE CIVIL PRO. art. 149 with FED. R. CIV. P. 41(a).

216. See CODE CIVIL PRO. art. 150 ("extinguishes the actions to which it refers").

217. See FED. R. CIV. P. 41(a).

218. See R. SCHLESINGER, *supra* note 1, at 305; Schopflocher, *supra* note 92, at 248. But see VENEZUELAN CODE art. 346(11) (motion to dismiss for lack of valid claim where "law prohibits" the right sought or "certain elements are necessary but not alleged").

219. See FED. R. CIV. P. 12(b)(6).

220. *Id.* 12(f).

221. See M. CAPPELLETTI & J. PERILLO, *supra* note 151, at 247-49; *infra* text accompanying notes 556-59.

222. See sources cited *infra* note 242.

decide at that time, not earlier.

Summary judgment is also unknown in Chile.<sup>223</sup> A Chilean trial is mostly a paper process where the judge's decision is based on facts found by studying documents.<sup>224</sup> The credibility of witnesses is not much of a problem because most biased witnesses are disqualified from testifying.<sup>225</sup> In essence, the Chilean trial process greatly resembles the U.S. summary judgment practice—identification of relevant facts admitted and those in dispute, collection of affidavits and other written proofs on the disputed facts, and a judgment by the court after studying the papers. Thus, Chile has little need for something like U.S. Federal Rule 56 and its attendant complexities.<sup>226</sup>

Preliminary exceptions can be made in Chile on narrow grounds.<sup>227</sup> Naturally, one is the absence of judicial competence, including both subject matter jurisdiction and venue.<sup>228</sup> Chile is not a federated country, and therefore, has little concern about allocation of adjudicatory power within its borders. U.S. doctrines like that of *International Shoe v. Washington*<sup>229</sup> do not exist, nor do motions aimed at challenging jurisdiction over the person.<sup>230</sup> In Chile an early challenge can be made to the plaintiff's capacity to sue or right of representation;<sup>231</sup> in U.S. practice, capacity and representation are presumed unless the defendant specifically raises the question and thereby shifts the burden to the plaintiff to prove it.<sup>232</sup> Chile also allows the defendant to challenge the form of the

223. The Colombians have a form of summary judgment. Parties can agree to have a judgment rendered without further proof-taking on the basis of the documents attached to the pleadings. COLOMBIAN CODE art. 186.

224. See *infra* text accompanying notes 260-81.

225. See *infra* text accompanying notes 284-88.

226. See, e.g., *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). See generally Childress, *A New Era for Summary Judgment: Recent Shifts at the Supreme Court*, 116 F.R.D. 183 (1987); Nelken, *One Step Forward, Two Steps Back; Summary Judgment After Celotex*, 40 HASTINGS L.J. 53 (1988).

227. The grounds for preliminary exceptions in Spain are quite similar. See Murray, *supra* note 9, at 416-17.

228. CODE CIVIL PRO. art. 303(1). Cf. FED. R. CIV. P. 12(b)(1),(3).

229. *International Shoe v. Washington*, 326 U.S. 310 (1945). In civil law, defendant's domicile provides general jurisdiction, and connections between the cause of action and the forum country provide special jurisdiction. See, e.g., Keramus, *supra* note 211, at 496-97. See generally R. SCHLESINGER, *supra* note 1, at 286-96. Chile presumably follows such doctrines, though they do not appear *eo nomine* in its procedural code.

230. Cf. FED. R. CIV. P. 12(b)(2).

231. CODE CIVIL PRO. art. 303(2).

232. FED. R. CIV. P. 9(a). See, e.g., *Ralston Oil & Gas Co. v. Gensco, Inc.*, 706 F.2d 685 (5th Cir. 1983); *Comstock v. Pfizer Retirement Annuity Plan*, 524 F. Supp. 999 (D. Mass.

complaint,<sup>233</sup> reminiscent of past pleading wars in the United States.<sup>234</sup> Also, defendants can preliminarily seek any other "correction of the proceeding," as long as the correction does not involve the merits.<sup>235</sup> This compares with the U.S. movement away from disputes on technicalities and toward matters of substance.<sup>236</sup> Finally, in Chile, the defenses of *res judicata* and settlement can be raised preliminarily.<sup>237</sup>

Preliminary objections in Chile are processed as "incidents,"<sup>238</sup> meaning that they can be decided on the papers alone,<sup>239</sup> or, if material facts are in dispute, after proof-taking.<sup>240</sup> This resembles the U.S. practice of raising defensive material as technical or affirmative defenses and, in cases where proofs are needed, moving for summary judgment thereon.<sup>241</sup>

## VI. PROOFS AND JUDGMENT

### A. *Discovery*

Probably the most dramatic distinction between U.S. and Chilean procedure is the latter's total disregard for discovery mechanisms. Chile follows the civil law tradition of eschewing discovery mechanisms such as pre-trial depositions, interrogatories, document inspections, and medical examinations.<sup>242</sup> But, in con-

1981); *Waldrip v. Liberty Mutual Ins. Co.*, 11 F.R.D. 426 (W.D. La. 1951).

233. CODE CIVIL PRO. art. 303(4).

234. See generally Weinstein & Distler, *Comments on Procedural Reform: Drafting Pleading Rules*, 57 COLUM. L. REV. 518 (1957).

235. CODE CIVIL PRO. art. 303(6).

236. "These rules. . . shall be construed to secure the just, speedy, and inexpensive determination of every action." FED. R. CIV. P. 1. See, e.g., *Markham v. Holt*, 369 F.2d 940 (5th Cir. 1966); *Hartley & Parker, Inc. v. Fla. Beverage Corp.*, 348 F.2d 161 (5th Cir. 1965); *Boxer v. Smith, Kline & French Laboratories*, 43 F.R.D. 25 (S.D.N.Y. 1967).

237. CODE CIVIL PRO. art. 304. Under the Federal Rules of Civil Procedure these could be pleaded affirmatively and then be the basis for a summary judgment motion. See FED. R. CIV. P. 8(c), 56.

238. CODE CIVIL PRO. art. 307.

239. *Id.* art. 89.

240. *Id.* art. 90.

241. In the federal courts considerable ambiguity attends the process of proving the facts on which a preliminary motion is based. See *Thompson Trading Ltd. v. Allied Lyons PLC*, 123 F.R.D. 417 (D.R.I. 1989).

242. See, e.g., *Homburger*, *supra* note 107, at 19 (Austria); von Mehren, *supra* note 37, at 609, 626 n.56 (Germany); von Mehren, *The Judicial Process: A Comparative Analysis*, 5 AM. J. COMP. L. 197, 225 (1956) (France and Germany) [hereinafter *The Judicial Process*]. Cf. FED. R. CIV. P. 26-35.

trast to other civilian regimes,<sup>243</sup> Chilean proof-taking is "concentrated;" all proof is presented in a single block of time fixed by the trial judge.<sup>244</sup> Therefore, the Chilean lawyer is engaged in the sporting battle of wits once familiar to common law trial lawyers but repudiated through the adoption of pre-trial discovery.<sup>245</sup> The Chilean judge can, in theory, avoid miscarriages of justice by actively calling and examining witnesses and demanding the production of documents.<sup>246</sup> In reality, however, these powers are infrequently exercised.

The Chilean Code of Civil Procedure contains certain inspection mechanisms similar to discovery.<sup>247</sup> But these are pre-filing (*prejudicial*) activities and are aimed at helping a potential plaintiff determine both whether he has a valid claim and whom to sue. For example, a person can obtain a sworn declaration about another's legal capacity,<sup>248</sup> can inspect "judgments, wills, inventories, appraisals, property titles and other public or private instruments which by their nature may be of interest to others,"<sup>249</sup> can demand sworn affirmation of a signature on a private document,<sup>250</sup> and can take testimony from a person who is either about to leave the country,<sup>251</sup> or who suffers "grave impediments" and may not be available for trial.<sup>252</sup> Not only are these excursions much narrower than the typical U.S. pre-trial "fishing expedition"<sup>253</sup> but they are controlled by judicial discretion which, in turn, is controlled by the standard that the inspection "be necessary for the plaintiff to com-

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243. Cf. Homburger, *supra* note 107, at 22-23 (episodic proof-taking in Austria); Murray, *supra* note 9, at 400 (episodic proof-taking in Spain); Kaplan, *supra* note 107, at 410-12 (episodic proof-taking in Germany).

244. CODE CIVIL PRO. arts. 327-340. See *infra* text accompanying notes 276-79. The Colombian Code urges judges to set continuous dates for proof-taking or "greater concentration." COLOMBIAN CODE art. 110.

245. See *Hickman v. Taylor*, 329 U.S. 495, 507-08 (1947) (sporting theory); *id.* at 566 (Jackson, J., concurring).

246. See CODE CIVIL PRO. art. 159; *supra* text accompanying note 110.

247. See CODE CIVIL PRO. art. 273.

248. *Id.* art. 273(1).

249. *Id.* art. 273(3).

250. *Id.* art. 273(5).

251. *Id.* art. 284. Cf. FED. R. CIV. P. 27(a); *In re Boland*, 79 F.R.D. 665 (D.D.C. 1978).

252. CODE CIVIL PRO. art. 286. Cf. FED. R. CIV. P. 27(a); *Petition of Ernst*, 2 F.R.D. 447 (S.D. Cal. 1942).

253. See *Hickman v. Taylor*, 329 U.S. 495, 507 n.8 (1947) ("No longer can the time-honored cry of 'fishing expedition' serve to preclude a party from inquiring into the facts underlying his opponent's case."). See generally P. CONNOLLY, E. HOLLEMAN & M. KUHLMAN, *JUDICIAL CONTROLS AND THE CIVIL LITIGATIVE PROCESS: DISCOVERY* (1978).



mence an action"<sup>254</sup> and that the plaintiff demonstrate his potential claim and supporting grounds.<sup>255</sup> Ultimately, however, Chile has no true procedure analogous to U.S. discovery practice.

The Chilean process provides a right to inspect documents during the course of litigation. Article 349 of the Code permits a party to request from the court an exhibition of documents which have a "direct relation" to the questions in controversy and which are not "secret or confidential." These documents may be in the possession of the other party or a third person. Their custodian either must produce them for inspection under penalty of fines or even arrest<sup>256</sup> or be precluded from using them at trial.<sup>257</sup> These discovery rights, however, are modest compared to the major investigations permitted in the United States under the broad standard of discovery relevance<sup>258</sup> and accompanying discovery mechanisms.<sup>259</sup>

### B. Proof-taking Process

When pleadings, preliminary motions, and other incidents are terminated, the action moves into a proof-taking stage. At this juncture, in the United States, a pre-trial conference is used to identify trial issues, witnesses, evidentiary documents, and special proof controversies.<sup>260</sup> In contrast, the Chilean judge sets the stage for trial by studying the case file and establishing "points of proof."<sup>261</sup> These are controversies about relevant and substantial facts which the pleadings reveal. Parties may then move within three days for a modification of the judge's order.<sup>262</sup>

Subsequent to their establishment, each party submits a docu-

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254. CODE CIVIL PRO. art. 273.

255. *Id.* art. 287.

256. *Id.* arts. 274, 349.

257. *Id.* arts. 277, 349. *Cf.* FED. R. CIV. P. 37(b)(2)(B).

258. *See* FED. R. CIV. P. 26(b)(1) ("Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action. . ."); *Heathman v. United States Dist. Court*, 503 F.2d 1032, 1035 (9th Cir. 1974); *Reliance Ins. Co. v. Barron's*, 428 F. Supp. 200, 202 (S.D.N.Y. 1977).

259. *See* FED. R. CIV. P. 30 (witness depositions), 33 (party interrogatories), 34 (inspection of tangibles), 35 (physical and mental examinations).

260. *See id.* 16; *Seck by Seck v. Hamrang*, 657 F. Supp. 1074 (S.D.N.Y. 1987); *Gardner v. Safeway Stores*, 99 F.R.D. 258 (D. Kan. 1983).

261. CODE CIVIL PRO. art. 318. *Cf.* Homberger, *supra* note 107, at 32-33 (proof orders in Austria); Jacoby, *supra* note 151, at 428-30 (German, Italian, and Swiss decrees of proof).

262. CODE CIVIL PRO. art. 319.

ment specifying those "points of proof" to which the party will direct testimonial evidence and listing witnesses.<sup>263</sup> A maximum of six witnesses is permitted per fact,<sup>264</sup> compared to the U.S. practice of relying predominantly on the trial judge's ability to persuade lawyers to avoid witness redundancy.<sup>265</sup> In Chile, parties submit questions which the judge<sup>266</sup> poses to witnesses.<sup>267</sup> The U.S. trial art of examination and cross-examination by crafty lawyers is absent; rather the Chilean practice resembles juror voir dire in U.S. federal court, where the common practice is for the judges to qualify jurors using their own questions and those submitted by the lawyers.<sup>268</sup> A court functionary, the *receptor*,<sup>269</sup> summarizes the answers given by the witness to each question,<sup>270</sup> which is quite unlike the U.S. practice of verbatim stenography. These summaries of testimony are read aloud by the *receptor* and signed by the witness, the judge, and the parties present.

As in the United States,<sup>271</sup> witnesses in Chile are subpoenaed to appear.<sup>272</sup> They testify under a religious oath similar to that used in the United States,<sup>273</sup> though we found no secular affirmation as permitted in U.S. federal<sup>274</sup> and state<sup>275</sup> practice. Chilean

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263. *Id.* art. 320.

264. *Id.* art. 372.

265. *See, e.g.*, FED. R. CIV. P. 16(c)(4),(5); R. FIGG, R. McCULLOUGH II, & J. UNDERWOOD, CIVIL TRIAL MANUAL: STUDENT EDITION 314 (1974).

266. The Chilean Code orders the trial judge to question witnesses "personally," CODE CIVIL PRO. art. 365, but we observed court officials called *receptores* performing this function and were told that such delegation was common. In this, the Chilean practice parallels that in Spain. *See Murray, supra* note 9, at 400. The Colombian Code similarly requires judges to take proof personally. COLOMBIAN CODE art. 181.

267. CODE CIVIL PRO. art. 365. In this, Chile follows Spain, *Murray, supra* note 9, at 430-31, 442-45, but, in stark contrast, Venezuela has adopted the common law technique of lawyer direct examination and cross-examination. *See VENEZUELAN CODE* art. 485.

268. *See* FED. R. CIV. P. 47(a); Levit, Nelson, Ball & Cheznick, *Expediting Voir Dire: An Empirical Study*, 44 S. CAL. L. REV. 916, 928-29 (1971); Committee of United States District Judges, *The Jury System in Federal Courts*, 26 F.R.D. 409, 466 (1961).

269. For a description of the job function of the Chilean court official called a *receptor*, see JUDICIAL CODE, arts. 390-393.

270. CODE CIVIL PRO. art. 370. The Venezuelan Code expressly permits stenography, tape recording or video-taping. *See VENEZUELAN CODE* arts. 189, 485. Similarly, Argentinean parties can request and pay for stenography or any other technical recording method. ARGENTINE CODE art. 126.

271. *See, e.g.*, FED. R. CIV. P. 45; PA. R. C. P. 234, 1357.

272. CODE CIVIL PRO. art. 380.

273. "Do you swear to God to tell the truth concerning the matter on which you will be questioned?" "Yes, I do so swear." CODE CIVIL PRO. art. 363. *Cf.* ARGENTINE CODE arts. 404, 440 (oath or "promise to tell the truth").

274. *See supra* note 99.

275. *See, e.g.*, 18 PA. CONS. STAT. § 4903 (1982) ("oath or equivalent affirmation").

witnesses can be incarcerated if they fail to testify without just cause.<sup>276</sup>

The Chilean Code fixes the proof-taking term at twenty days. A reduction is possible, however, if all parties agree<sup>277</sup> and some extensions for proof-taking outside the court's territory are available.<sup>278</sup> The Code prefers a single hearing, although it vests discretion in the judge to convene multiple hearings in cases involving many "points of proof" or many witnesses.<sup>279</sup> The proof-taking term applies to witness testimony and, absent justified causes for extensions and postponements,<sup>280</sup> such testimony will not be received outside the term.<sup>281</sup> Other forms of proof, including documents and reports of experts, do not seem to be as restricted.

### C. Rules of Evidence

A sharp variation from U.S. practice is the Chilean concept of acceptable proof; a concept derived directly from civilian tradition and practice.<sup>282</sup> Access to facts is severely curtailed by extraordinarily restrictive rules concerning witness competence, although written documents are freely admitted.<sup>283</sup> No person who has a direct or indirect interest in the lawsuit may testify.<sup>284</sup> Thus, the litigants

276. CODE CIVIL PRO. art. 380.

277. *Id.* art. 328. In 1971 Colombia adopted the concept of a "concentrated trial," that is, continuous hearings whenever possible. See COLOMBIAN CODE arts. 110, 220; Gomez Duque, *Reflexiones Sobre el Nuevo Régimen Probatorio*, in *id.* comentario. In comparison, the Peruvians give the judge discretion to set the term between 10 and 30 days. PERUVIAN CODE art. 348.

278. CODE CIVIL PRO. art. 329.

279. *Id.* art. 369.

280. See, e.g., CODE CIVIL PRO. art. 340 (judge's incapacity).

281. Cf. von Mehren, *supra* note 37, at 626 (German judges reject untimely submissions).

282. See, e.g., G. CERTOMA, *supra* note 92, at 205; P. HERZOG, CIVIL PROCEDURE IN FRANCE 337 (1967); R. GINSBURG & A. BRUZELIUS, CIVIL PROCEDURE IN SWEDEN 283-84 (1965).

283. See R. SCHLESINGER, *supra* note 1, at 308 ("The civilian view is that a document, unless its authenticity is specifically challenged, proves its own existence. . .") (footnote omitted); "There is a marked tendency to presume that every citizen is lying unless one produces written documentary proof that one is telling the truth. The formal legal systems of Latin American countries . . . display a decided tendency to believe only documents and not people." KARST, *supra* note 18, at 63 (footnote omitted).

284. CODE CIVIL PRO. art. 358(6). In Chile, the topic "evidence" is contained within the rules of procedure, see CODE CIVIL PRO. arts. 318-429, and taught in the universities as part of the "process" course. See MORALES ROBLES, II EXPLICACIONES DE DERECHO PROCESAL 164-250 (1987) (transcribed lectures of Prof. Mario Mosquera Ruiz) [hereinafter II EXPLICACIONES].

themselves,<sup>285</sup> as well as any person potentially affected by the judgment, are incompetent to testify. Spouses, relatives, domestic servants, and dependents of litigants are deemed incompetent to testify.<sup>286</sup> The exclusionary principle even reaches a party's employees.<sup>287</sup> Finally, neither can a close friend testify on a party's behalf, nor can an enemy testify against a party.<sup>288</sup> These distrustful rules would decimate the U.S. justice system in which such witnesses testify daily in courtrooms throughout the land.<sup>289</sup> U.S. lawyers would naturally wonder how substantive rights can vest in cases where the primary actors are in the above categories and disinterested third party witnesses do not exist. Certainly, the civil law cannot entertain the many claims<sup>290</sup> in U.S. law which can only be proven by facts known exclusively by parties or those close to them. The United States accepts all witnesses in the hope that fact-finders, aided by lawyers' credibility probes during cross-examination, can see through bias and ascertain the truth.<sup>291</sup>

In Chile, questions going to witness competence generally precede but do not block testimony on the merits.<sup>292</sup> The one exception is the judge's power to declare on the spot that the witness is patently physically, mentally, or occupationally incompetent.<sup>293</sup>

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285. Apparently, the harsh civil law exclusion of party testimony is mollified somewhat by interrogation of unsworn parties at conference. *See, e.g.,* Kaplan, *supra* note 107, at 420. The "judicial confession" of a party takes place in pleadings or at hearings. *See, e.g.,* COLOMBIAN CODE arts. 194-195.

286. CODE CIVIL PRO. arts. 358(1),(2),(4).

287. *Id.* art. 358(5).

288. *Id.* art. 358(6).

289. *See, e.g.,* FED. R. EVID. 601 (every person competent to be a witness); McCORMICK, *supra* note 115, at 78-80 (bias as ground to impeach credibility). Argentina is more closely aligned to the United States than Chile. It absolutely disqualifies for bias only spouses and relatives and allows the judge to consider bias in his weighing of proof. *See* ARGENTINE CODE arts. 427, 441, 456. Colombia considers interested witnesses as "suspicious," but allows their testimony and lets the judge evaluate it according to the particular circumstances. COLOMBIAN CODE arts. 217-218.

290. In the United States, we have become accustomed to creating claims for relief which require plaintiffs to probe defendant's mind and files in order to gather proof on main elements of the claim. *See, e.g.,* Washington v. Davis, 426 U.S. 229 (1976) (constitutional equal protection claim requires showing of defendant's discriminatory purpose); Trans World Airlines v. Thurston, 469 U.S. 111 (1985) (discriminatory treatment based on age; double damages for willful violation); Public Employees Retirement Sys. v. Betts, 109 S. Ct. 2854 (1989) (plaintiff must show benefit plan a "subterfuge"); Annotation, *What Constitutes Bad Faith on the Part of Insurer Rendering it Liable for Statutory Penalty Imposed for Bad Faith in Failure to Pay, or Delay in Paying, Insured's Claim*, 33 A.L.R. 4th 579 (1984) ("bad faith" refusals by insurance companies to pay claims).

291. *See supra* note 289.

292. CODE CIVIL PRO. arts. 373, 375.

293. *Id.* art. 375. Like the United States, *see generally* McCormick, *supra* note 115, ch.

Judges can also have a separate hearing on the question of a witness' competence.<sup>294</sup> In the normal case, however, all questions are posed to the witness at the same time and it is not until the final judgment in the case that the judge determines whether the witness was competent and his proof therefore acceptable.<sup>295</sup>

While the Chilean Code is tough on witness competence, it liberally permits hearsay testimony.<sup>296</sup> It is not surprising that the civil law, which has no jury to influence, has declined to adopt such exclusionary rules as hearsay.<sup>297</sup>

Judges in Chile, as in some other civil law countries,<sup>298</sup> are subject to mechanical proof-weighting rules.<sup>299</sup> When the judge concludes that a single witness was impartial and credible and that his declaration was sufficiently serious and precise to convince the judge, the witness' testimony constitutes "full proof." This leaves the judge considerable leeway to reject the testimony in whole or in part. Testimony by two or more unimpeached and uncontradicted witnesses, however, is "full proof" which the judge is bound to accept. When testimony of witnesses conflicts, the judge determines the facts not by the greater number of witnesses but by the quality of proof: detail, impartiality, credibility, and consistency with other proofs. The greater number does control, however, if all contradictory witnesses are credible, impartial and equally "scientific." If all factors are equal, the judge declares the contradicted fact unproved, presumably to the detriment of the party with the burden of proof.<sup>300</sup> Each party can benefit from the favorable testi-

7, Chile excludes witnesses with certain disabilities. The list includes: children under 14; those confined in a mental institution; those deprived of reason by alcoholism or otherwise; those who lacked the senses necessary to perceive the facts; deaf-mutes who cannot write; vagrants without a job or office; convicts whom the court believes unworthy of belief; and professional witnesses. CODE CIVIL PRO. art. 357.

294. CODE CIVIL PRO. art. 376.

295. *Id.* art. 379.

296. *Id.* art. 383.

297. *See, e.g.*, Kerameus, *supra* note 211, at 500.

298. The quantitative evaluation of witnesses and their evidence is on the decline in Europe. *See id.* at 500-01; CAPPELLETTI, *supra* note 32, at 139-40. In 1971 Colombia converted to a system of free judicial evaluation of proofs. *See generally* Gomez Duque, *supra* note 277.

299. CODE CIVIL PRO. art. 384. Venezuela, Colombia, and Argentina, by comparison, submit fact-finding to the "wise judgment" (*sana critica*) of the court. VENEZUELAN CODE art. 507; COLOMBIAN CODE art. 187; ARGENTINE CODE art. 386. Peru merely says that the probative value of witness testimony is judicially evaluated under the rules of evaluation. PERUVIAN CODE art. 490.

300. The author could find no explicit burden of proof rule in the Chilean codes. The Venezuelan Code simply says, "The parties have the burden of proving their respective as-

mony of witnesses called by others; thus, a party's own witnesses can create the conflicts which put the matter within the judge's guided discretion.

Chile, like Italy,<sup>301</sup> utilizes the party oath called a "trial confession."<sup>302</sup> The opposing party or the judge *sua sponte* may require a party to swear to relevant facts and answer to clear and precise questions.<sup>303</sup> In practice, sealed questions are submitted to the court in a petition which requires "the resolution of positions." The judge reads the questions and the *receptor* records the answers. The Code permits each party to use the technique twice and yet a third time whenever new facts surface at trial.<sup>304</sup> When the facts are personal to the responding party, he can answer positively, negatively, or claim not to remember. Similar to the U.S. admissions rule,<sup>305</sup> if the party confesses to damaging facts on personal knowledge, no contrary proof is permitted at trial.<sup>306</sup> Technically, the judge retains power to determine the contrary,<sup>307</sup> but in practice the confession is conclusive on the facts confessed. Apparently, the trial confession is declining in importance because modern parties rarely swear to anything contrary to their interest. Lawyers in Chile still try to obtain a trial confession, since it is a cheap, risk-free opportunity.<sup>308</sup> Such an attempt carries no risk since a party's negative response does not prove anything.

"Public" instruments are an important source of proof in Chile. These are documents and copies thereof which are properly notarized within Chile<sup>309</sup> or certified by authorized public officials

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sertions of fact." VENEZUELAN CODE art. 506. The Argentine Code says, "The burden of proof falls upon the party who affirms the existence of a controverted fact. . . ." ARGENTINE CODE art. 377. The Peruvian Code ordains that the defendant is absolved "if the plaintiff does not prove his claim," PERUVIAN CODE art. 338, and burdens parties "to prove the facts they allege." *Id.* art. 337. Colombia places the burden upon those who pursue a "legal effect" which requires "factual suppositions." COLOMBIAN CODE art. 177.

301. See, e.g., Murray, *supra* note 9, at 429-30; G. CERTOMA, *supra* note 92, at 204; P. HERZOG, *supra* note 282, at 358-61.

302. CODE CIVIL PRO. arts. 385-402. Venezuela appears to allow oath-taking on both material facts and "decisive" facts, the latter presumably being those at the heart of the controversy. See VENEZUELAN CODE arts. 370-387. PERUVIAN CODE arts. 363-393.

303. CODE CIVIL PRO. arts. 385, 386.

304. *Id.* art. 385. Cf. ARGENTINE CODE art. 422 (one time at trial and once on appeal).

305. See, e.g., FED. R. CIV. P. 36(b).

306. CODE CIVIL PRO. art. 402.

307. *Id.* art. 399.

308. In comparison, Italian lawyers no longer even bother to use the party oath. See G. CERTOMA, *supra* note 92, at 203.

309. CODE CIVIL PRO. art. 342.

abroad.<sup>310</sup> "Private" instruments can be proven authentic at trial,<sup>311</sup> but most of these documents enter into evidence when opposing parties concede their authenticity by failing to pose timely objections.<sup>312</sup>

Two other methods of proof in Chile are judicial inspection<sup>313</sup> and expert testimony.<sup>314</sup> The former is similar to the U.S. practice.<sup>315</sup> When he considers it necessary,<sup>316</sup> the judge may travel outside his chambers and, in the presence of the parties and lawyers, inspect places and things in dispute. The judge officially records the circumstances and material facts he observes, and the parties are able to request supplemental observations.<sup>317</sup> What is observed and recorded is considered "full proof."<sup>318</sup>

Expert testimony is used in Chile for fact questions that require special knowledge of art or science,<sup>319</sup> as well as questions of foreign law.<sup>320</sup> At a hearing, the court determines the number of experts needed, their qualifications, and the questions on which they will report.<sup>321</sup> Should the parties fail to agree on a particular expert, the court will name one.<sup>322</sup> As in European civil law countries,<sup>323</sup> experts belong to the court and not to the parties.<sup>324</sup> This means that parties may not be present during the expert's deliberations, although all parties may inform him of relevant facts and circumstances.<sup>325</sup> The probatory force of expert opinions is left to the "wise judgment" of the tribunal.<sup>326</sup>

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310. *Id.* art. 345.

311. *Id.* arts. 346(1),(2),(4).

312. *Id.* arts. 346(3).

313. *Id.* arts. 403-408.

314. *Id.* arts. 409-425.

315. See, e.g., McCORMICK, *supra* note 115, at 537-39 ("views").

316. CODE CIVIL PRO. art. 403.

317. *Id.* art. 407.

318. *Id.* art. 408.

319. *Id.* art. 411(1).

320. *Id.* art. 411(2).

321. *Id.* art. 414.

322. *Id.*

323. See R. GINSBURG & A. BRUZELIUS, *supra* note 282, at 290-91; G. CERTOMA, *supra* note 95, at 220; Langbein, *supra* note 151, at 835; *The Judicial Process*, *supra* note 242, at 223-24 (France and Germany).

324. In the United States, experts belong to the parties. See FED. R. EVID. 706(d). See generally T. MAUET, *FUNDAMENTALS OF TRIAL TECHNIQUES* 135-59 (1980) (on a lawyer's preparation and examination of experts).

325. CODE CIVIL PRO. art. 419.

326. *Id.* art. 425.

### D. Judgment

After proof-taking is closed, the parties have ten days to submit briefs containing their "observations that an examination of the proof suggests to them."<sup>327</sup> These are, presumably, post-trial briefs arguing points of fact and conclusions therefrom. This is reminiscent of U.S. lawyers' proposed findings in bench trials and closing arguments in jury cases. Finally, the Chilean courts cite the parties to hear judgment,<sup>328</sup> which must be rendered within sixty days of the close of proofs and briefs.<sup>329</sup>

### E. Remedial Power

The remedial powers of Chilean courts appear on paper to be no less ample than remedies in the United States.<sup>330</sup> These include the familiar remedy of attachment and sale in executing money judgments,<sup>331</sup> along with the use of public force to execute judicial orders to deliver specific property, to create or destroy a particular work, to sign an instrument, to create an obligation or property right, and to provide restitution.<sup>332</sup> If a judgment calls for periodic payments, the judge may order a defaulting judgment debtor to post sufficient security.<sup>333</sup> Although civil law tradition does not include equitable remedies,<sup>334</sup> the Chilean Code contains judicial decrees ordering a party to act or to refrain from acting.<sup>335</sup>

An interesting catchall power is found in Chile's Article 238:

Concerning compliance with resolutions not covered by the previous articles, the judge may order measures to accomplish compliance, to that end being able to impose fines not exceeding one monthly tax unit or arrest up to two months, both in the court's sound judgment, without prejudice to repeating the penalty.

The literal meaning of the quoted clause provides sweeping authority to assure obedience to judicial decrees, including the con-

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327. *Id.* art. 430.

328. *Id.* art. 432.

329. *Id.* art. 162.

330. See generally Wright, *The Law of Remedies as a Social Institution*, 18 U. DET. L.J. 376 (1955).

331. CODE CIVIL PRO. art. 235(3).

332. *Id.* art. 235(1),(5),(6).

333. *Id.* art. 236.

334. See J. MERRYMAN, *supra* note 53, at 51-52, 56-58.

335. CODE CIVIL PRO. art. 237.



tempt power. Indeed, the remedial power seems no less potent than that exercised by U.S. federal judges in institutional reform litigation.<sup>336</sup> According to Chilean lawyers, judges, and law students, however, the clause is not perceived as a reform instrument by Chilean judges and is not used against government officials and entities to enforce civil and constitutional rights.<sup>337</sup>

Part of the problem may be that Chilean courts depend on the national police (*carabineros*) for enforcement of their judgments and orders. While they have a constitutional duty of enforcement,<sup>338</sup> the police are located in the executive branch and, in times of social and political ferment, are more likely to obey the President's orders than a judge's.<sup>339</sup> Courts also depend on the national police for the investigation of crimes, creating a problem when members of the police are themselves charged with the criminal acts.<sup>340</sup> For this reason, the Special Rapporteur of the United Nations Commission on Human Rights has recommended that Chile establish a judicial police force.<sup>341</sup>

## VII. APPELLATE PROCESSES

### A. *The Doctrine of Precedent*

Chile appears to follow the civil law postulate that legislatures, not courts, make law.<sup>342</sup> The judicial function is merely to apply

336. See, e.g., R. COVER, O. FISS & J. RESNIK, PROCEDURE 219-370 (1988); Chayes, *supra* note 108, at 1292-96; Note, *The Remedial Process in Institutional Reform Litigation*, 78 COLUM. L. REV. 784 (1978).

337. Historically, civil law judges have not had civil contempt power, see J. MERRYMAN, *supra* note 53, at 57-58, which may explain Chilean attitudes without satisfactorily explaining why the liberating force of Article 238 has been untapped. A similar clause in Italian legislation has been widely used by judges to protect political, civil, and employment rights. See Chase, *supra* note 58, at 73.

338. CHILE CONST. art. 73, para. 3.

339. See, e.g., Valasco, *supra* note 77, at 725.

340. See, e.g., W. Zabel, D. Orentlicher & D. Nachman, Human Rights and the Administration of Justice in Chile: Report of a Delegation of the Association of the Bar of the City of New York and of the International Bar Ass'n 51 (1987) (on file with author).

341. See *Report on the Question of Human Rights in Chile by the Special Rapporteur to the Commission on Human Rights*, 7 U.N. Doc. E/CN/4 at 29 (1989).

342. For succinct exposition of the Chilean "positivist" approach to law, see Bascunan, *El Concepto de Derecho y el Problema de las Fuentes del Derecho, Rol Expresivo e Instrumental del Derecho en la Sociedad*, in LA CULTURA JURÍDICA CHILENA (A. Squella ed. 1988) [hereinafter CULTURA JURÍDICA]. For a critique thereof, see Barros, *Funciones del Derecho y Métodos de Argumentación Jurídica: Reflexiones Sobre el Positivismo y Legalismo Chileno*, in *id.* at 105. See generally CLARK & MERRYMAN, *supra* note 67, at 306-07; J. MER-

the body of statutory norms, codes and other enactments to the particular facts of the cases brought to court. This thinking rejects the common law doctrine of precedent or *stare decisis*. On the contrary, each case is decided anew, with little or no concern about how similar cases were judicially resolved in the past. This result is ordained by an opening command of the Chilean Civil Code which admonishes that "court judgments have obligatory force only for those cases in which they are rendered."<sup>343</sup>

The European tendency has been to modify the strict application of this ancient civil law doctrine. The powerful moral position of common law that fairness requires treating like cases alike<sup>344</sup> has had its influence, and there has been a begrudging realization that the purpose behind civil law, legal certainty,<sup>345</sup> is ill served by decisional contradictions. This has led, in this century, to the rise of the doctrine of "constant decisions" (*jurisprudencia constante*).<sup>346</sup> In other words, when a country's high court has decided the same issue in the same way on more than one occasion, the same court and its inferiors are obligated to obey the "rule" in future cases.

Despite the urging of Professor Mosquera Ruiz,<sup>347</sup> Chilean judges are little inclined to bend to the principles of equality, and the concept of precedent rarely appears in the Chilean appellate decisions. One can read an entire volume of a reporter without seeing a single citation to past authority. It is as if there is no past case law for the Chilean appellate judge to look at, merely the facts of the case and the words of the written law. This custom feeds itself by encouraging disinterest in the compilation and reporting of judicial doctrine,<sup>348</sup> although one wonders whether the reverse is

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RYMAN, *supra* note 53, at 40-49.

343. CHILE CIVIL CODE art. 3(1).

344. See K. LLEWELLYN, *supra* note 80, at 36; R. DWORIN, *TAKING RIGHTS SERIOUSLY* 113 (1978).

345. See, e.g., J. MERRYMAN, *supra* note 53, at 50-51; KARST, *supra* note 18, at 62.

346. See R. SCHLESINGER, *COMPARATIVE LAW: CASES, TEXT, MATERIALS* 158 n.3 (1959); Colliers, *Precedent and Legal Authority: A Critical History*, 1988 *Wis. L. Rev.* 771, 823; G. CERTOMA, *supra* note 92, at 86.

347. See Morales Robles, *IV EXPLICACIONES DE DERECHO PROCESAL* 180 (1987) (transcribed lectures of Prof. Mario Mosquera Ruiz [hereinafter *IV EXPLICACIONES*]).

348. For example, Chile has no compilations of judicial law such as state law digests, *Corpus Juris*, *American Jurisprudence Annotated Law Reports*, A.L.R., textbooks and hornbooks. It does have some annotated codes which list the court decisions citing particular code articles. These annotated codes are expensive and not readily available. The author examined a few which were under lock and key at the library of the Chilean Bar Association. Chile has just started to computerize its legal sources and has, at present, a small data base and terminals in the courts. Lack of legal research tools is also apparently common in

the real cause; the absence of adequate reporting systems inhibits citation of relevant precedents. Certainly the formalized style of writing appellate opinions does not promote the use of judicial doctrine. The appellate courts do not write full opinions; rather, they amend or substitute portions of the appealed decision. To fully and accurately understand the appellate decision, the lower court's opinion would have to be located in some obscure file. Naturally, this is too cumbersome to be feasible.

The Chilean appellate judge might defend his practice of ignoring precedent by citing the Code of Civil Procedure, article 170(5), which limits him to codes and statutes (*las leyes*) and "principles of equity" in the decisional process. (The clause actually tells him to cite the *leyes* and *principios de equidad* he has used to reach a judgment.) This argument would be spurious because in all mature legal systems it is understood that courts should decide equal cases equally. Indeed, "equality before the law" is the second sacred right in the Chilean Bill of Rights.<sup>349</sup> Thus, principles of equity must at a minimum include an effort to resolve the present case equally with past resolutions and requires *las leyes* to be uniformly applied. Further, it is always relevant to know how the judges applied the principles of law and equity in similar, preceding cases already decided. This can be done without attributing an obligatory force to past actions. While the present court might strike a different equitable balance, it would do so in full consciousness of the contrary arguments which swayed a past court.

All of the above discussions would be unnecessary if the Chilean jurist were able to reach correct and consistent results without reference to his predecessor's efforts. This would occur if Chile were a jurisprudential Mecca where laws were clear in purpose and comprehensive in scope. This is not the case, however, and Chile has its fair share of rule ambiguity, gaps, contradictions and cross-

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South America. See KARST, *supra* note 18, at 65; R. SCHLESINGER, *supra* note 1, at 330.

One suspects that Chile's difficulty in locating past cases is as important an explanation of the absence of "precedent" as are theories of legislative supremacy. Court decisions are reported selectively by the editorial board of the *Revista de Derecho y Jurisprudencia*. This causes most of the corpus of potential precedent to vanish from sight. In short, the practice of law is mostly statute-based. Small, blue-covered books that contain the codes and other compilations of the Chilean *corpus juris* are omnipresent in legal circles. Memorization and regurgitation of their contents are the main ingredients of legal tutelage. After years in practice, lawyers can literally recite large parts of this corpus, which seems natural for a system which emphasizes finding the right rule and applying it syllogistically to the facts at hand.

349. CHILE CONST. art. 19, para. 2.

purposes. One suspects that if the tens of thousands of appeals heard by Chile's superior courts each year<sup>350</sup> were ever compared, one would find dramatic and stark conflicts. For example, one wonders how appellate courts can rationally judge the quantum of "moral damages"<sup>351</sup> in a particular tort case, without knowing the size of recent awards in comparable cases.<sup>352</sup>

From a U.S. perspective, Chile's denigration of precedent has two further costs. The first is the opportunity for the bench to articulate and promulgate public values.<sup>353</sup> Most of our appellate judges are free from the demands of political constituencies and as such can promote important constitutional and other public values without fear of political reprisal. On the other hand, Chilean judges are career servants, in the tradition of European civil law systems,<sup>354</sup> and enjoy similar liberty of action.<sup>355</sup> Their "bureaucratic" status, however, undercuts their claim to the role of oracle.<sup>356</sup>

A second lost opportunity is one of expediency. Each Chilean judge seemingly must "reinvent the wheel" on each legal issue before him, losing the benefit of the hard work of his brethren who

350. In the calendar year 1986, the Courts of Appeal of Chile issued 184,960 judgments, and the Supreme Court 4,769. See *Discurso de Inauguración del Año Judicial 1987*, 83 REV. DERECHO Y JURISPRUDENCIA x-xi (1987) [hereinafter *Discurso 1987*]. The reader should keep in mind that Chile liberally permits interlocutory appeals. See *infra* text accompanying notes 366-68.

351. "Moral damage" (*daños morales* in Spanish, and *dommage moral* in French) of the civil law includes a potpourri of non-pecuniary damages, including harm to feelings. See, e.g., 2 K. ZWIGERT & H. KOTZ, AN INTRODUCTION TO COMPARATIVE LAW 284 (1977).

352. See, e.g., Jeldes, Jacinto, Judgment of Dec. 30, 1985, Ct. App., Santiago, 82 REV. DERECHO Y JURISPRUDENCIA (pt. III), at 129 (1986).

353. See, e.g., Barros, *supra* note 342, at 105, 115; Fiss, *The Supreme Court, 1978 Term-Forward: The Forms of Justice*, 93 HARV. L. REV. 1, 5-17 (1979); Edwards, *Alternative Dispute Resolution: Panacea or Anathema?*, 99 HARV. L. REV. 668, 676 (1986).

354. See, e.g., Murray, *supra* note 9, at 403; G. CERTOMA, *supra* note 92, at 71-75 (1985); P. HERZOG, *supra* note 282, at 124-36; R. GINSBURG & A. BRUZELIUS, *supra* note 282, at 98-104. A. VON MEHREN & J. GORDLEY, THE CIVIL LAW SYSTEM 1146-49 (2d ed. 1977) [hereinafter THE CIVIL LAW SYSTEM]. Indeed, as von Mehren and Gordley state:

[C]ertain of the contemporary French theories of judicial decisions offer broad encouragement to judicial lawmaking; on the other hand, the French system of recruitment and advancement of judges does not tend to attract personality types likely to exploit fully the possibilities thus offered.

*Id.* at 1161.

355. See CHILE CONST. art. 77, para. 1.

356. See sources cited *supra* note 362. For an interesting debate concerning the quality of a career judiciary, compare Allen, Kock, Riechenberg & Rosen, *supra* note 107, at 723-27 with Langbein, *Trashing the German Advantage*, 82 NW. U.L. REV. 763, 779-83 (1988).

have already labored on the same issue.<sup>357</sup> In one such situation, a trial judge had to determine an award of "moral damages," standard fare in civil law's concept of extra-contractual obligations. The judge spent several paragraphs agonizing over whether such damages could be compensated.<sup>358</sup> The Chilean approach to precedent is not necessarily replicated throughout the Southern Hemisphere. For example, Venezuela promotes doctrinal uniformity through the writ of cassation.<sup>359</sup> In deciding a cassation, high court judges must "choose doctrines established . . . in analogous cases in order to promote the integrity of legislation and uniformity in case law."<sup>360</sup> Also, Argentina has a special appellate process, the writ of "inapplicability of the law," which is invocable when the final judgment of a trial judge or a panel of a higher court contradicts legal doctrine established either by that court or a higher court.<sup>361</sup> A majority of the judges on the court issuing the writ may decide to consider the question en banc (*tribunal plenario*). In such a case, the full court's interpretation of the law becomes binding precedent for that court and all below it until modified by a new judgment en banc.<sup>362</sup>

### B. General Appellate Norms

Chile and the United States have very different rules concerning classification of appealable orders. The rule of "finality" reigns in most U.S. states<sup>363</sup> as well as in the federal system.<sup>364</sup> This rule permits appeals only from a final judgment, so as to prevent piecemeal review and inordinate delay.<sup>365</sup> Most preceding judicial decrees are considered "interlocutory" and therefore unappealable. Chile, in general, reverses U.S. practice and makes immediately

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357. See K. LLEWELYN, *supra* note 80, at 64-66.

358. See Jeldes, Jacinto, *supra* note 352, at 123.

359. See *supra* notes 437-52 and accompanying text.

360. VENEZUELAN CODE art. 321. In Colombia, the writ of cassation similarly serves the "primordial purpose of unifying national case law." COLOMBIAN CODE art. 365.

361. See ARGENTINE CODE arts. 288-303.

362. See *id.* art. 303.

363. See ELEMENTS OF CIVIL PROCEDURE, *supra* note 121, at 1115. See, e.g., PA. R. APP. P. 341(a) ("final order" of administrative agency or lower court); *Hoberman v. Lake of Isles*, 138 Conn. 573, 87 A.2d 137 (1952).

364. 28 U.S.C. § 1291 (1982) ("final decisions" of the district courts).

365. See, e.g., *Catlin v. United States*, 324 U.S. 229, 233 (1945); *United States v. Feeney*, 641 F.2d 821, 824 (10th Cir. 1981); *Gavlik Constr. Co. v. H.F. Campbell Co.*, 526 F.2d 777, 781-83 (3d Cir. 1975).

appealable<sup>366</sup> all intermediate orders which might affect the merits.<sup>367</sup> To move cases along while still permitting piecemeal review, the Chilean lower court continues its process, subject to special "stay" orders, while the challenged point is being argued above.<sup>368</sup>

The above generalizations grossly simplify complex sets of norms in both juridical systems. Chile's appealability rules are so overlapping and ambiguous that understanding which judicial orders are immediately reviewable is usually an impossible chore. There are five general classifications of orders;<sup>369</sup> the first three are appealable.<sup>370</sup> First, "definitive judgments" are judicial resolutions putting an end to the controversy by deciding the question or matter which is the object of the suit. In short, these are judgments which reach the merits and end the case. Second are "interlocutory judgments of the first class." These are judicial resolutions which establish a "permanent right in favor of a party." The internal logic of this definition is such that "right" has a procedural as well as substantive meaning. For example, should the action be dismissed for lack of subject matter jurisdiction, the capacity of a party, or a defect in the complaint, this would vest a procedural right in the winning party and thereby afford the loser an opportunity to appeal. The second class of "interlocutory judgment" is an intermediate decision upon which a definitive judgment, or first class interlocutory judgment, may be based. This seems to reach events occurring prior to the merits or to the establishment of permanent rights, which are predicates for and essential to such ac-

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366. The word "appeal" is used non-technically to cover all forms of revision by superior courts, reflecting the fact that in Chile *apelación* and *revisión* are each specific processes.

367. See CODE CIVIL PRO. arts. 158, 187. In comparison, Venezuela allows interlocutory appeals only from decrees which produce "irreparable harm." VENEZUELAN CODE art. 289.

368. The appeal is permitted in *el efecto devolutivo*, which has no understandable translation, see CODE CIVIL PRO. art. 192, and many times the Code specifies that appeals are allowable only on that basis. See, e.g., CODE CIVIL PRO. arts. 100 (case consolidation), 112 (competence), 132 (*in forma pauperis* petitions), 159 (new proof period), 194(1) (orders in summary trials), 194(2) ("*autos*," decrees, and interlocutory judgments), 194(3) (orders in execution proceedings), 194(4) (orders lifting provisional remedies), 241 (execution of judgments), 307 (preliminary objections), 319 (points of proof), 366 (questions to witnesses). The appellant may petition the superior court to issue a "no innovation order" (*orden de no innovar*) which stops execution of the appealed order which, in turn, may have the effect of paralyzing the whole proceeding, depending on the nature of the order. See CODE CIVIL PRO. art. 292. See also *Auto Acordado de la Corte Suprema Sobre Transmisión y Fallo de los Recursos de Queja*, Dec. 1, 1972, § 6-8, in JUDICIAL CODE at 317, 319-20 (whole proceeding below is stopped) [hereinafter *Auto*].

369. CODE CIVIL PRO. art. 158.

370. *Id.* art. 187.

tions. Such events include a judge's action in determining the questions to be posed to witnesses<sup>371</sup> or determining a motion to disqualify a witness.<sup>372</sup>

The remaining two classifications of orders are typically not appealable. One is an *auto*, which does not have a translation. The *auto* is a ruling which does not fall into any of the first three categories, a sort of catchall category. Finally, there is the "decree," whose sole object is to determine or fix the course of proceedings. These seem to be *sua sponte* judicial actions of a managerial nature because, unlike *autos*, they are not issued in response to "incidents." The "decree" seems to be an interim occurrence in which a party asserts a procedural right, opposed by others, and which normally requires a hearing.<sup>373</sup> Out of the *incidente* comes a judicial decree which is either an appealable first or second class "interlocutory judgment" or an unappealable *auto*, depending upon the ruling's impact on the merits or on the parties.

The U.S. "final judgment" rule sweeps away much of the Chilean intricacy (and one might say confusion), as does the typical U.S. rule that once an appeal is filed, the lower court loses jurisdiction.<sup>374</sup> Nonetheless, systematic distinctions blur considerably when one considers the judicial and statutory exceptions to the American finality rule. As an example, a writ of mandamus can be issued by appellate courts to vacate interlocutory orders when the lower judge has violated a "clear legal duty"<sup>375</sup> or when there was a "clear-cut abuse of discretion."<sup>376</sup> While such a writ is supposed to be reserved for extraordinary situations, the quoted standards, particularly as applied in state courts, offer appellate flexibility to intervene in the name of justice.<sup>377</sup> Another illustration is the exception to the federal finality rule called the "collateral order doctrine." This permits review of inferior orders that are 1) too important to be denied review, 2) collateral to the merits, and 3) not correctable on review of the final judgment.<sup>378</sup> These standards are hardly self-executing; they require difficult classifications, much in

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371. See *id.* arts. 365-366.

372. See *id.* art. 373.

373. *Id.* art. 82.

374. See, e.g., *Apostol v. Gallion*, 870 F.2d 1335, 1337 (7th Cir. 1989) ("as a rule only one tribunal handles a case at a time"); PA. R. APP. P. 1701(a).

375. CIVIL PROCEDURE, *supra* note 104, at 595.

376. *A. Olinick & Sons v. Dempster Bros., Inc.*, 365 F.2d 439, 444 (2d Cir. 1966).

377. CIVIL PROCEDURE, *supra* note 104, at 595 n.31.

378. See, e.g., *Cohen v. Beneficial Loan Corp.*, 337 U.S. 541, 546 (1974).

the Chilean mode.

The descriptive effort advanced above serves an important purpose in illustrating the civil system's fascination with definitions and classifications. Chilean lawyers questioned about appealability rules were immediately able to recite them almost verbatim. This reflects the lecture memorization mode of legal education in Chile,<sup>379</sup> Europe<sup>380</sup> and elsewhere in South America.<sup>381</sup> When probed with hypothetical situations, however, the typical Chilean lawyer quickly plunges from dogma to doubt, confusions necessarily borne of the overlap and abstractness of the memorized dogma.

As in the United States,<sup>382</sup> Chile treats time limits for appeal as jurisdictional, using in its statutes the colorful adjective *fatal*.<sup>383</sup> In Chile, the lawyer is given only ten days, starting with the date of notice,<sup>384</sup> to appeal a final judgment. Before 1988, the appeal term was even shorter (five days), but was lengthened in order to give lawyers additional time to meet the new requirement of including the factual grounds and legal support for the appeal. In the United States, parties are usually given thirty days.<sup>385</sup> The Chilean limit would be impossibly short in U.S. jurisdictions where 1) it is commonplace for the appeal to be handled by a new attorney, 2) the appeal is a serious matter involving significant costs to the client, and 3) penalties for frivolous appeals may be severe.<sup>386</sup> Presumably, none of these conditions pertain in Chile, where a quick decision as to whether the appeal is feasible is the only consideration. One must wonder, however, whether the short period really encourages or discourages appeals.<sup>387</sup>

379. See Lavados, *El Conocimiento Jurídico y Su Cultivo y Difusión en las Facultades de Derecho*, in *CULTURA JURIDICA*, *supra* note 342, at 117, 120.

380. See *THE CIVIL LAW SYSTEM*, *supra* note 354, at 1139; *The Judicial Process*, *supra* note 242, at 210-11.

381. See KARST, *supra* note 18, at 66-69.

382. See, e.g., J. LANDERS, J. MARTIN & S. YEAZELL, *CIVIL PROCEDURE* 879 (2d ed. 1988).

383. *CODE CIVIL PRO.* art. 189.

384. *Id.*

385. See, e.g., *FED. R. APP. P.* 4(a)(1); *PA. R. APP. P.* 903(a).

386. See, e.g., *PA. R. APP. P.* 2744 (reasonable counsel fees and damages for delay); *FED. R. APP. P.* 38 ("just damages" and single or double costs to appellee).

387. See *infra text* accompanying note 401. In light of the 189,606 judgments issued in 1986 by Chile's 16 courts of appeal, one wonders whether any appeal in Chile is considered "frivolous."



### C. Appeal

As in the United States, the "appeal" in Chile is the traditional mode of bringing a matter from the trial level to the appellate level.<sup>388</sup> The "grievance," however, a newcomer to Chilean procedure, is rapidly supplanting the appeal in use.<sup>389</sup> The appeal is from the "court of first instance" to that of the second.<sup>390</sup> The appellate court is normally one of the seventeen middle tier courts of appeal. "First instance," might refer to a court of appeals, as when a "writ of protection" is originally filed there.<sup>391</sup> Appeals would then lie to the Chilean Supreme Court. In 1986, parties filed 1,524 appeals in the high court, comprising thirty-two percent of its total docket as compared to 2,263 "grievances" which represented forty-seven percent of its docket.<sup>392</sup>

In both theory and practice, appeals to the Chilean courts of appeal are expected within the normal course of litigation. The higher court can reverse on either law or fact with few technical restraints.<sup>393</sup> Chile does not have the equivalent of such concepts as "clearly erroneous"<sup>394</sup> or "substantial evidence,"<sup>395</sup> which in the United States shield all but the most egregiously incorrect trial court factual findings from judicial scrutiny. A Chilean professor has stated that the ease of appeal produces greater legal certainty and accuracy by substituting the views of an appellate panel for those of a single trial judge.<sup>396</sup> Also, the trial judge's factual findings are given less weight in the Chilean system because credibility plays a minor role,<sup>397</sup> and as such, the decision is based mostly upon a written record equally available to the panel above. Fur-

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388. See CODE CIVIL PRO. arts. 186-230 (appeal rules); JUDICIAL CODE arts. 54-92 (courts of appeal).

389. See *infra* text accompanying notes 419-36.

390. CODE CIVIL PRO. art. 187.

391. See *infra* text accompanying notes 477-96.

392. See *Discurso* 1987, *supra* note 350, at x.

393. In the civil law, "[t]he reviewing court conceives its function to be that of making a fresh determination on the merits." Herzog & Karlen, *Attacks on Judicial Decisions*, in XVI INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW: CIVIL PROCEDURE § 8-50, at 26 (M. Cappelletti ed. 1982).

394. See, e.g., FED. R. CIV. P. 52(a) (in judge-trying case, fact findings shall be set aside only when "clearly erroneous").

395. This is the classic standard of review from administrative agency findings. See B. SCHWARTZ, ADMINISTRATIVE LAW 606 (2d ed. 1984).

396. See IV EXPLICACIONES, *supra* note 347, at 41. See also Herzog & Karlen, *supra* note 393, at 26 n.135 ("an essential guarantee for the good administration of justice").

397. See *supra* text accompanying notes 284-88.

ther, the U.S. functional distinction between lawmakers, the appellate courts, and the trial courts,<sup>398</sup> does not hold in a civil law system, since the precedential value of appellate decisions is unrecognized.

On the question of factual review, however, the operational reality may sharply depart from the theories advanced above. The Chilean lawyer is trained to automatically appeal every significant adverse decision, agreeing with the theorists that two bites of an apple are better than one.<sup>399</sup> In 1986, a staggering total of 189,606 reviews were filed in Chile's sixteen<sup>400</sup> courts of appeal.<sup>401</sup> This works out to one appeal for every sixty-two Chileans, making the supposedly litigious North Americans a happy family by comparison. These appeals, which the data unfortunately does not divide into different types, were reviewed by twenty-nine appellate panels, producing an incredible caseload of 6,538 appeals per panel, or eighteen per day if the ministers worked without rest.

The judges would appear to simply have no time to scrutinize the records on appeal. Indeed, case facts are summarized and orally presented to the panel by a court official called a *relator*.<sup>402</sup> While data is not available, one can surmise that few factual reversals are produced by this system. This conclusion is strengthened by the Chilean appellate practice of relying on lawyers' oral arguments. Indeed, written briefs are prohibited.<sup>403</sup>

In the civil tradition, courts of appeal are authorized to take new evidence.<sup>404</sup> In Chile, however, this power is sharply circumscribed. The higher courts can take new evidence as follows: 1) evidence on the defenses of statute of limitations, *res judicata*, settlement and payment;<sup>405</sup> 2) "public instruments," that is, specially recognized documentary proof<sup>406</sup> can be introduced at any time before the appellate hearing;<sup>407</sup> 3) on appeal, each party is given one opportunity to place an opponent under oath and pose rele-

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398. See FED. R. CIV. P. 52(a) advisory committee's note (1985 amendment).

399. Cf. Chase, *supra* note 58, at 47 (almost 50% appeal rate in Italy).

400. See JUDICIAL CODE art. 54. Chile now has 17 courts of appeal.

401. See *Discurso 1987*, *supra* note 350, at xi.

402. See JUDICIAL CODE art. 372(3).

403. See CODE CIVIL PRO. art. 226. In Chile, contrary to other Spanish-speaking countries, an *alegato* is not a lawyer's brief but rather a lawyer's oral argument.

404. J. MERRYMAN, *supra* note 53, at 127.

405. See CODE CIVIL PRO. arts. 207, 310.

406. See *id.* arts. 342-355; *supra* text accompanying notes 309-11.

407. See CODE CIVIL PRO. art. 348.

vant questions (through the court) which must be answered;<sup>408</sup> and 4) original verbal testimony can be heard on appeal when the appellate court finds that such proof was not available during the proof-taking term below, and that the new evidence is "strictly essential" for the true resolution of the controversy.<sup>409</sup> Proof-taking may be conducted by just one of the members of the panel assigned to hear the appeal.<sup>410</sup> Despite the theoretical rights listed above, in reality, proof-taking on appeal is a rare occurrence.

In comparing U.S. and Chilean appellate practice, the role of lawyers is virtually at odds. Lawyers in the United States are accustomed to detailed legal briefs and short oral arguments. During the latter, U.S. lawyers expect to be constantly interrupted by questions from the bench. In Chile, however, lawyers do not submit briefs, but rather summary statements of their points of contention. They are subsequently permitted to argue uninterrupted for an hour on appeals from final judgments, and for thirty minutes on interlocutory appeals.<sup>411</sup> One minister in Santiago, who has some experience with U.S. jurisprudence, regularly poses gentle questions to Chilean advocates, both to their surprise and dismay. Several of this minister's brethren question this deviant imported practice.

One final point merits attention. The Chilean appeal is preliminarily verified by the judge being reviewed.<sup>412</sup> He decides whether to "allow" the appeal depending on whether 1) the particular order is appealable, 2) time limits have been met, and 3) the appeal papers are in order. He further determines if the appeal is interlocutory or not. All of these actions are reviewable by the appellate panel.<sup>413</sup> In typical U.S. practice, permission from a lower court is not necessary in order to file an appeal, though the notice is first filed there.<sup>414</sup> Often, the filing of appeal strips the lower court of jurisdiction.<sup>415</sup> Should the appeal be faulty, the higher court may

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408. *See id.* CODE CIVIL PRO. art. 385. *See supra* text accompanying notes 301-08.

409. CODE CIVIL PRO. art. 207.

410. *Id.* art. 325.

411. *Id.* art. 223. The 1988 amendments, *see sources cited infra* note 563, reduced the oral argument period by half. In cassation, *see infra* text accompanying notes 437-52, each lawyer gets two hours to argue a "merits" cassation and one hour for "form" cassation. CODE CIVIL PRO. art. 783.

412. CODE CIVIL PRO. art. 196.

413. *Id.* art. 203.

414. *See, e.g.,* FED. R. APP. P. 3; PA. R. APP. P. 902.

415. *See, e.g.,* PA. R. APP. P. 1701(a).

dismiss it *sua sponte* or upon motion.<sup>416</sup> The Chilean practice corresponds to exceptional appeals in the United States, as for example, when review is sought from a partial judgment<sup>417</sup> or when interlocutory appeal is sought under special statutory authority.<sup>418</sup> In these cases the lower court participates in determining the suitability of the matter for appeal.

#### D. Writ of Grievance (*Queja*)

The *queja*, which is translated as a "grievance,"<sup>419</sup> is an indignant, all-purpose, Chilean writ which owes its origin to a traditional process for disciplining judges. The Chilean Constitution authorizes the Supreme Court to exercise disciplinary power over all of the country's courts.<sup>420</sup> This constitutional authority is supplemented by procedures vested by the Judicial Code in the high court and in the courts of appeal.<sup>421</sup> The Code lists the types of conduct subject to disciplinary action including a category of immoral or unethical conduct, which includes verbal disrespect for superiors, abuse of employees, neglect of duty, immoral acts, incurring excessive personal debt, and favoritism in appointments.<sup>422</sup> A second category covers abusive judicial action, such as unexcused delays in entering judgments and decrees,<sup>423</sup> and issuing manifestly unjustified provisional remedies.<sup>424</sup> Penalties that may be imposed for any of the above listed conduct include: private censure, written censure, payment of costs, fines, and suspension with half-pay for a maximum of four months.<sup>425</sup> These penalties only apply to judicial conduct that constitutes "fault or abuse," which falls in or near the above categories and descriptions. Crimes, including misdemeanors, are not subject to this regimen.<sup>426</sup>

Over the years, the disciplinary process came to include simple

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416. See, e.g., FED. R. APP. P. 27(a); INTERNAL OPERATING PROCEDURES FOR THE COMMONWEALTH COURT § 221 (Apr. 1985) in PENNSYLVANIA RULES OF COURT 281 (1988).

417. See FED. R. CIV. P. 54(b).

418. See, e.g., 28 U.S.C. § 1292(b) (1982).

419. While the translation "complaint" seems more natural, this word is already used to describe plaintiff's first pleading.

420. CHILE CONST. art. 79.

421. JUDICIAL CODE arts. 66, 96(4), 535, 541.

422. *Id.* art. 544.

423. Trial judges submit monthly case status reports to their supervising court of appeals minister. See JUDICIAL CODE art. 586.

424. *Id.* art. 545.

425. *Id.* art. 537.

426. *Id.*

judicial error in normal case processing and in final judgments. In 1972, the Chilean Supreme Court sanctioned this practice by issuing a decree which formalized the "grievance" as a routine appellate process.<sup>427</sup> The writ is attractively unencumbered with any technicalities. Any judicial action is subject to immediate "grievance" by the simple process of: 1) paying a modest filing fee; 2) getting a certificate from the lower court's clerk which contains the date of notification of the grieved resolution, the record page in which the resolution is recorded, and basic case data; and 3) submitting a writing which describes the action from which the grievant wants relief.<sup>428</sup>

It appears that the grievant need not even specify the legal basis for his complaint. If the grievance is timely—within five days of notice of the resolution<sup>429</sup>—and complies with the requirements just described, the higher court orders the lower court to render a report within eight days of its action.<sup>430</sup> This report need not contain legal justification for the action. The high court also determines whether the proceeding below may continue while the grievance is under review.<sup>431</sup> The appellate body hears the case ahead of ordinary appeals,<sup>432</sup> swiftly decides the grievance, and retains discretion to hear the case.<sup>433</sup> The contents of a judgment in the grievant's favor includes "the considerations demonstrating fault or abuse, or the manifest and serious errors or omissions that constitute fault or abuse and which gave rise to the grieved resolution, and shall determine the measures necessary to remedy the harm caused the aggrieved party."<sup>434</sup> The court which rejects the grievance need not, and in practice does not, specify its reasoning.

Given the speed and simplicity of the "writ of grievance," it is not surprising to learn that the grievance has become the prevalent appellate process in Chile.<sup>435</sup> Another major reason for its "popularity" is that its stay of lower court proceedings has provided a

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427. *Auto, supra* note 368.

428. *Id.* § 1.

429. JUDICIAL CODE art. 549.

430. *Auto, supra* note 368, § 3, at 318.

431. Simultaneously with the "grievance," the grievant petitions for an "order not to proceed" (*orden de no innovar*) which argues why it would be unjust for the lower body to effectuate its order or otherwise proceed while the appellate body is determining the grievance. *See id.* § 6-8, at 319-20.

432. *See* JUDICIAL CODE art. 548.

433. *Auto, supra* note 368, § 9, at 320.

434. *Id.* § 12, para. 1. *See also id.* § 16.

435. *See supra* text accompanying note 392.

useful tool to lawyers whose real motive is delay. Further, since the penalty for frivolous use is nominal there is little deterrence for not using the writ in this manner.<sup>436</sup>

### E. Cassation

In the civil law tradition, the writ of cassation is the classic mode of bringing legal error to a high court.<sup>437</sup> This writ is employed in Chile along with a variation used to bring certain technical defects in a case to a higher court's attention.<sup>438</sup> For the purposes of this article, the former will be referred to as "merits cassation" (*casación en el fondo*); the latter will be designated "form cassation" (*casación en la forma*).

#### 1. Merits Cassation

This writ is issued by the Chilean Supreme Court to the courts of appeal for the purpose of invalidating final judgments vitiated by legal error (*infracción de la ley*). The error must substantially influence the judgment,<sup>439</sup> a standard which echoes our "prejudicial error" rule.<sup>440</sup> In addition, the judgment below must be unappealable.<sup>441</sup> It has been shown that appeals lie only from courts of first instance to the next higher court.<sup>442</sup> Therefore, whenever a court of appeals has acted in first instance, as in entertaining a writ of protection,<sup>443</sup> the proper route to the high court is an appeal. Conversely, whenever a court of appeals has acted in second instance, as in an appeal from a trial court, the next level of review may be by cassation or, as already discussed, the writ of grievance.<sup>444</sup> Cassation also lies against "law arbitrators"<sup>445</sup> acting in second instance.

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436. *Auto*, *supra* note 368, § 22, at 322.

437. See CLARK & MERRYMAN, *supra* note 67, at 307; R. SCHLESINGER, *supra* note 1, at 332-33.

438. CODE CIVIL PRO. arts. 764-816.

439. *Id.* art. 767.

440. See, e.g., 28 U.S.C. § 2111 (1982) ("On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not effect the substantial rights of the parties.").

441. See CODE CIVIL PRO. art. 767.

442. See *supra* text accompanying note 390.

443. See CHILE CONST. art. 20.

444. See *supra* text accompanying notes 419-36.

445. See *infra* text accompanying notes 538-45.

The Chilean cassation writs are encrusted with procedural complexities.<sup>446</sup> Normally, the high court readily dismisses a procedurally flawed petition for this writ. Today since legal review is easily obtained by means of the writ of "grievance,"<sup>447</sup> merits cassation is apparently becoming obsolete in Chile.<sup>448</sup>

## 2. Form Cassation

This is a narrow writ, which is issued either by the high court or the courts of appeal to correct certain technical defects in or underlying the judgment below. The precise grounds for issuance are:<sup>449</sup> 1) lack of jurisdiction in the court issuing the judgment or the court's unlawful composition; 2) judgment issued by or concurred in by an interested, partial or otherwise incompetent judge; 3) judgment not supported by the necessary votes or voted by one or more judges who did not participate in the hearing; 4) judgment giving more relief than requested<sup>450</sup> or resolving issues not submitted by the parties; 5) error in the form of the judgment; 6) judgment in violation of a timely presented defense of *res judicata*; 7) contradictory decisions within the judgment; 8) an appellate judgment in an appeal which had been dismissed or abandoned; and 9) judgment lacking some predicate or element declared essential by a law which expressly imposes nullity in its absence. As in the case of merits cassation, petitioner must show that the error influenced the judgment and that petitioner's harm can be rectified by vacating it. If the error is that the sentencing court did not mention and dispose of a timely presented claim or defense<sup>451</sup> the appellate court may remand the case to the lower court with an order to "complete the judgment."<sup>452</sup>

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446. For example, in a civil controversy there must be a showing that the matter has an economic value in excess of 15 monthly tax units. Cases involving civil status or personal capacity are exempt from this requirement. CODE CIVIL PRO. art. 767.

447. See *supra* text accompanying notes 423-34.

448. In 1986 the Chilean Supreme Court received 211 petitions for writs of merit cassation compared to 1,180 writs of grievance. See *Discurso 1987, supra* note 350, at x.

449. CODE CIVIL PRO. art. 768.

450. Cf. FED. R. CIV. P. 54(c) ("[E]very final judgment shall grant the relief to which the party in whose favor it is rendered is entitled even if the party has not demanded such relief in his pleadings.").

451. For a discussion of this requirement, see *infra* text accompanying note 499.

452. CODE CIVIL PRO. art. 768.

### F. *Constitutional Review*

The U.S. judicial system is based on the theory of judicial review, that is, the testing of laws and official actions against a constitutional standard at all levels in both state and federal courts.<sup>453</sup> All judges from the highest to the lowest rank, are "bound" by the commands of the U.S. Constitution, as well as federal statutes and treaties.<sup>454</sup> The judges must recognize, comprehend and apply the dictates of the Constitution whenever conflicts are properly presented during court adjudications. Consequently, it is common for State and federal trial judges to rule on the constitutionality of laws and the actions of government officials. Such constitutional adjudications, until reversed on appeal, become binding precedents between the parties and in future cases in that court.

This tradition is quite foreign to civil law countries which have adopted "rigid" constitutions.<sup>455</sup> In Chile, for example, the Constitution vests this power of judicial review in its highest courts; in the Supreme Court for constitutional issues in pending cases, and in a Constitutional Court for declaratory judgments prior to the enactment of certain laws.

An oddly named writ, the "writ of inapplicability" (*recurso de inaplicabilidad*), is established by Article 80 of the Chilean Constitution. Its purpose is to bring before the full Supreme Court the question of a law's constitutionality, as that law is sought to be applied in the particular case.<sup>456</sup> If applying the law would violate some norm of constitutional rank, the Supreme Court will determine that the law is "inapplicable" in the case. The writ was first established in the Chilean Constitution of 1925, thereby bringing the concept of judicial review to Chile.<sup>457</sup> Before then, the legisla-

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453. See, e.g., *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). See generally HANDBOOK, *supra* note 175, at 2-22.

454. See U.S. CONST. art. VI, cl. 2:

This Constitution and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every state shall be bound thereby, anything in the Constitution or Laws of any State to the contrary notwithstanding.

See also *Stone v. Powell*, 428 U.S. 465, 494 n.35 (1976).

455. The adjective "rigid" seems to be reserved for constitutions which are written, contain numerous fundamental guarantees, and cannot be modified by ordinary legislation. See, e.g., M. CAPPELLETTI & W. COHEN, *COMPARATIVE CONSTITUTIONAL LAW* 14 (1979); J. MERRYMAN, *supra* note 53, at 25.

456. See JUDICIAL CODE art. 96, para. 1.

457. See Bulnes Aldunate, *El Recurso de Inaplicabilidad en la Constitución de 1980*,



ture had the sole power to determine the constitutionality of its enactments.<sup>458</sup>

The effect of the Court's ruling is to relieve a particular party from the demands of the legal precept. Although the law might be inapplicable whenever and wherever it is sought to be applied, these other cases are not before the Court. The Constitution itself declares that the "inapplicability" of the law governs only in those particular cases brought to the high court. While there is some evidence in the legislative history of Article 80 that if three consistent rulings on the same issue were made, it would convert them into a binding doctrine of unconstitutionality (*efecto absoluto*),<sup>459</sup> it remains to be seen whether this common sense approach will overcome the strong civil law tradition that judicial resolutions do not make law.<sup>460</sup>

The Chilean judicial system generally permits piecemeal appeals, and these may or may not suspend any further proceedings below, depending on the issue appealed.<sup>461</sup> Not surprisingly, at any stage of any judicial proceeding, a party may present the writ of inapplicability in the Supreme Court. The Court docketes the writ for special processing en banc. The Court is empowered to suspend the proceedings below and answer the question of constitutionality.<sup>462</sup> It appears from both the Constitution and constitutional doctrine<sup>463</sup> that the Court may not declare the writ improvident for lack of a substantial question, or a failure to show legal prejudice from the law's effects, or any other preliminary screening factor.<sup>464</sup> Still, only twenty-eight writs of inapplicability were filed in 1986,<sup>465</sup> a surprisingly small number. Furthermore, the Constitution, in Article 80, permits the writ at any stage of the case. This

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in COLECCIÓN SEMINARIOS No. 5, FACULTAD DE DERECHO, U. CHILE, RECURSOS DE RANGO CONSTITUCIONAL 25-29 (1983).

458. *Id.* at 26.

459. *See* IV EXPLICACIONES, *supra* note 347, at 131.

460. *See supra* text accompanying notes 342-62; CLARK & MERRYMAN, *supra* note 67, at 309 ("The popularly elected legislature enacted statutes which it was the job of the public administration to execute and the job of the courts to apply to specific cases.")

461. *See supra* text accompanying notes 369-73.

462. CHILE CONST. art. 80.

463. *See* IV EXPLICACIONES, *supra* note 347, at 131-32; Bulnes Aldunate, *supra* note 457, at 25-46.

464. *Cf.* G. CERTOMA, *supra* note 92, at 156. ("[T]he original court [in Italy] must be satisfied that the resolution of the issue is significant to the resolution of the original proceedings and that the issue is not manifestly unfounded.")

465. *See Discurso 1987*, *supra* note 350, at xi.

means that parties do not waive this objection by untimely interposition, which is contrary to our U.S. tradition of insisting upon timely and orderly presentation below of all issues.<sup>466</sup>

In sum, these seem to be waiver-proof issues in Chile despite the strong efficiency argument that early presentation avoids the mooting and waste of earlier proceedings. Indeed, the face of the Chilean Constitution appears to permit the writ to be presented for the first time during a high court proceeding, cassation for example, and even on the Court's own initiative. Conversely, since the decisional effect of "inapplicability" is merely between the parties, one would expect the Chileans to insist that the argument be made as early as possible, for instance when a party or the judge first cites and tries to apply the law. The constitutional regime is not in jeopardy, only the legal relations of the parties. A failure to abide by procedures regularly affects those legal relations, as when the slightest slip in form causes the loss of a writ of cassation.<sup>467</sup> Given the typically hard-nosed Chilean attitude about form and process, one is surprised at the informality that surrounds this particular writ. Of course, the reverse incongruity exists in the United States, where courts maintain the constitutional order through binding precedent. Given the magnitude and importance of this U.S. judicial function, plus typical U.S. leniency about procedural slips,<sup>468</sup> it can be expected that U.S. judges would not readily surrender their constitutional surveillance to the vagaries of lawyer competence.

The Constitutional Court in Chile is a separate seven-member judicial body created by Chapter seven of the Chilean Constitution. Its principal function is to determine the constitutionality of proposed legislation, treaties, and decree-laws.<sup>469</sup> In other words, the Constitutional Court offers declaratory judgments in advance of a law's final promulgation, while the Supreme Court handles

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466. See, e.g., *Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 109 S.Ct. 2909, 2921 (1989); *Davis v. United States*, 411 U.S. 233 (1973); *Wolff v. United States*, 737 F.2d 877 (10th Cir. 1984).

467. See IV EXPLICACIONES, *supra* note 347, at 192-95.

468. See, e.g., *Jackson v. Washington Monthly Co.*, 569 F.2d 119, 123-24 (D.C. Cir. 1977):

Trial court dismissal of a lawsuit never heard on its merits is a drastic step, normally to be taken only after unfruitful resort of lesser sanctions. . . Dismissals for misconduct attributable to lawyers and in no [way] to their clients invariably penalize the innocent and may let the guilty off scot-free. . . .

469. See CHILE CONST. art. 82, paras. 1, 2, 3, 6.

constitutional issues which arise when enacted laws are used to govern.<sup>470</sup> The Chilean system, therefore, rejects the U.S. decentralized approach, which vests the duty of constitutional control in the entire judiciary, and adopts the centralized approach, which focuses control in special judicial organs.<sup>471</sup> It divides control between two bodies, however, thereby incorporating both the French system of pre-enactment control<sup>472</sup> and the Italian system of a special court which deals with constitutional issues arising during normal litigation.<sup>473</sup>

Chileans coordinate the constitutional resolutions of their two bodies in two basic ways. First, the Constitution makes resolutions of the Constitutional Court unappealable to any other body.<sup>474</sup> Second, it makes the Constitutional Court's decisions in favor of constitutionality<sup>475</sup> binding on the Supreme Court. Thus, once the legislation is passed and applied, a writ of inapplicability cannot be issued on the basis of the constitutional argument rejected by a previous declaratory judgment of the Constitutional Court.<sup>476</sup>

### G. *Writ of Protection*

The "writ of protection" is another path to constitutional review in Chile. It is a writ created by Article 20 of the Chilean Constitution. The writ is also part of the Chilean Bill of Rights, which is an exhaustive listing of individual and group rights held by Chileans and persons within Chile's borders.<sup>477</sup> Currently, the writ, as applied in the Chilean courts, presents serious functional and conceptual difficulties, particularly for lawyers trained in the United States. This occurs despite the fact that on its face, the writ seems reasonably straightforward. It is issued against any per-

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470. *Cf. In re Workmen's Compensation Fund*, 224 N.Y. 13, 17-18, 119 N.E. 1027, 1028 (1918) (Cardozo, J.): "We are asked by an omnibus answer to an omnibus question to adjudge the rights of all. That is not the way in which a system of case law develops. We deal with the particular instance; and we wait till it arises."

471. See generally M. CAPPELLETTI & W. COHEN, *supra* note 455, at 73-112.

472. See P. HERZOG, *supra* note 282, § 3.04.

473. See G. CERTOMA, *supra* note 92, at 155-57.

474. CHILE CONST. art. 83, cl. 1.

475. In case of unconstitutionality, the proposed law cannot be approved without correcting amendments. *Id.* art. 83, cl. 2.

476. See *id.* art. 83, cl. 3.

477. See *id.* art. 19, paras. 1-26. Many of these rights were suspended under the military regime during periods of internal disorder declared by President Pinochet, as authorized by the Chilean Constitution, Transitory Provision 24.

son, public or private,<sup>478</sup> who deprives, disturbs, or threatens another's constitutional freedoms and guarantees.

Jurisdiction to issue the writ is vested in the courts of appeal. These courts are empowered by Article 20 to issue whatever judicial orders are necessary to "reestablish the rule of law and assure due protection of the affected party." One suspects that Article 20 was meant to provide swift and authoritative injunctive relief against unconstitutional threats, acts and omissions.<sup>479</sup> This suspicion is confirmed by the clause which enables the affected party to pursue any other available remedies—for example, a damage action in the lower courts. Still, the empowerment of the appellate courts is not textually constrained; on the contrary, the power to "immediately take whatever steps are deemed necessary" is literally without boundaries. Overall, an understanding of the structure of the Chilean Bill of Rights as opposed to its U.S. counterpart is necessary to understand the confusion which may arise in reading cases applying the writ.

The U.S. Constitution's Bill of Rights does not create individual rights and protections; instead it presumes their existence prior to the Constitution and enacts bulwarks against government infringement of them.<sup>480</sup> For example, in using the First Amendment, the people of the United States already possessed the natural right of freedom of speech; the Constitution's beneficial effect is to insure that Congress would not use its lawmaking power to "abridg[e]" that preexisting right. This presupposition of existing rights is confirmed in the ninth amendment, which states that the Constitution's mention "of certain rights shall not be construed to deny or disparage others retained by the people." In sum, the Bill of Rights is essentially a bill of duties imposed on government officers which restricts them from acting in certain ways.

In line with this structure, the typical constitutional claim in U.S. courts is that the government, whether Congress acting

478. Unlike the American constitutional scheme which mostly guards against governmental encroachment of specified liberties, see HANDBOOK, *supra* note 175, at 378-79, Chile's protection extends to private actions too.

479. See Mohor Abuaquad, *El Objeto del Recurso del Protección*, 14 REV. DERECHO PROCESAL 55, 78 (1987).

480. See, e.g., The Declaration of Independence, para. 2 (U.S. 1776), reproduced in 1 U.S.C. pp. xxxv-xxxvii (1982): "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among them are Life, Liberty and the pursuit of Happiness. That to secure these rights, Governments are instituted among Men. . . ."

through laws or executive officials acting under (or without) authority of law, has violated one of the constitutional controls. In this manner, the constitutionality of laws and their application are adjudicated. This is a relatively rare but classic constitutional confrontation in U.S. litigation.

It is certainly arguable that the U.S. Constitution creates individual freedoms in an oblique way, but it is beyond controversy that the Constitution is reserved for the most sacred and exalted of human rights, which include, among others: freedoms of religion, speech, press, and assembly; inviolability of our homes and bodies; fundamental fairness in legal process; equality; and compensation for property takings. The vast array of rights that are regularly asserted and honored in U.S. state and federal courts originate not in constitutions but rather in statutes, agency regulations, and precedents. Ordinary law is utilized for our daily dealings, while the extraordinary norms of the Constitution are reserved for our most serious confrontations with the government.

Many of the rights U.S. citizens have become accustomed to over the years have not actually been constitutionalized. In areas such as education, health, housing, environment, welfare and work place, we have come to enjoy public protections through law. The populace has also been content to leave such matters in the hands of our political branches in the expectation, usually fulfilled, that the essence of such matters will be respected. Thus, the U.S. Constitution promises very few economic benefits: the right to "just compensation" for property takings<sup>481</sup> and the right of an indigent to a government subsidized attorney when charged with a crime.<sup>482</sup>

In comparison, modern Western constitutions tend to contain elaborate statements of human rights, including those of mere public convenience.<sup>483</sup> Chile's Article 19 is of this genre: it contains a multitude of rights which are announced in twenty-six separate enumerations.<sup>484</sup> In such constitutions, the distinction between those rights which are generated and protected by the Constitution, and those rights created by law, whether in statutes or precedent, becomes blurred. In sum, what happens to the hierarchy of

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481. U.S. CONST. amend. V.

482. *Id.* amend. VI. See *Gideon v. Wainwright*, 372 U.S. 335 (1963).

483. See, e.g., G. CERTOMA, *supra* note 92, at 173-84.

484. It is important to keep in mind that in South America, "[p]articularly in constitutional law, the social reality seems especially far removed from guarantees found on paper." KARST, *supra* note 18, at 79.

norms? This question has particular relevance in the case of Chile, where the combination of: 1) a sweeping protective writ enabling courts of appeal to correct unconstitutional conduct; and 2) a sweeping bill of rights which guarantees virtually all rights contained in the country's positive law, has virtually "constitutionalized" the entire corpus of law in Chile.

Dozens of ordinary disputes can be found in the courts of appeal through the writ of protection. For example, in one case, a gun club's target shooting was producing a hail of bullets on petitioner's land.<sup>485</sup> The court first established whether petitioner's rights to enjoy property under the civil code were being violated. The court then examined the constitutional issue citing Article 19, Paragraph 24: "The Constitution guarantees to all people: . . . The right of property in its different species including all classes of corporeal and incorporeal things." In another, ordinary public benefits case, the petitioner claimed the defendant had miscalculated the amount of the petitioner's entitlement.<sup>486</sup> After agreeing with the petitioner's reading of the statutes creating the entitlement, the court "constitutionalized" the matter by citing the Bill of Rights guarantee in Paragraph 18 of the "right to social security." These "constitutional" decisions are regularly affirmed by the Chilean Supreme Court. When petitions for protection are denied, it is typically because the court's interpretation of the relevant facts and statutes favor the respondent, and not because the matter lacks a substantial constitutional question.<sup>487</sup>

To a U.S. practitioner, these examples are disturbing for several reasons. One reason is the "constitutionalizing" of ordinary legal norms. U.S. courts reach constitutional questions as a matter of last resort, since under the doctrine of *stare decisis*, a constitutional precedent can be eliminated only by the difficult processes of overruling it or amending the U.S. Constitution. This pervasive and enduring precedential effect makes the courts press hard to find alternative decisional bases.<sup>488</sup> This may not be such a serious

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485. Club Arabe de Tiro al Vuelo Judgment of Jan. 23, 1985, Ct. App. Pres. Aguirre Cedra, 82 REVISTA DERECHO Y JURISPRUDENCIA (pt. II) §5, at 67 (1985).

486. *Id.*

487. *See, e.g.,* Werner Held, Judgment of Oct. 31, 1985, Ct. App. Santiago, 82 REVISTA DERECHO Y JURISPRUDENCIA (pt. III) § 5, at 288 (1985) (common costs of condominium co-owner); Jamarne Jamarne, Judgment of Dec. 9, 1985, Ct. App. Temuco, 82 REVISTA DERECHO Y JURISPRUDENCIA (pt. III) § 5, at 304, *aff'd*, Judgment of Dec. 23, 1985, Sup. Ct. (firing and lockout of university employee).

488. *See, e.g.,* Webster v. Reproductive Health Servs., 109 S. Ct. 3040, 3058 (1989)

problem in a civil law system, like Chile's, in which court judgments are not precedents.<sup>489</sup> In Europe as well as in the United States, however, there is an increasing tendency to treat constitutional precedent as binding.<sup>490</sup> In addition, there is the natural tendency of courts and panels to follow their earlier judgments in comparable later cases.

If there is some force of precedent, whether official or a matter of practice, then the concern about the quality of decision-making is heightened. In this regard, some strained and unconvincing constitutional analyses appear in the Chilean reports. These analyses are produced by the writ of protection's misuse. Pushing ordinary matters into constitutional niches may distort natural and rational uses of constitutional principles. For example, Chile appears to considerably overuse the doctrine of equal protection to invalidate government actions<sup>491</sup> which violate specific laws or minimum standards of rationality.<sup>492</sup>

The use of writs of protection to avoid trials in the courts of first instance is troubling as well. Courts of appeal in civil law systems are considered capable of substituting their own factual judgments for judgments of the trial courts<sup>493</sup> and are empowered to take proof on appeal.<sup>494</sup> The courts of appeal, however, rarely engage in fact-finding in a case coming from below. Consequently, the Chilean courts of appeal take an extraordinarily casual approach to fact-finding in protection cases. By and large, the ministers accept as fact what they find in the pleadings and attachments, as well as what they consider to have been admitted by the respondent. If government programs are involved, the courts will often ask for reports from agencies and will accept as truth the allegations made therein.<sup>495</sup> Should a party vociferously contest the

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(O'Connor, J., concurring); *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 345-48 (1936) (Brandeis, J., concurring).

489. See *supra* text accompanying notes 342-62.

490. See, e.g., CHILE CONST. art. 83, para. 3 (Supreme Court bound by Constitutional Court determination of constitutionality); G. CERTOMA, *supra* note 92, at 87, 88.

491. Part of the problem may be the failure of the Chilean government to establish administrative courts to oversee government bureaus, as is contemplated by the Constitution. See CHILE CONST. art. 79.

492. See, e.g., Gomez Chamorro, Judgment of Oct. 8, 1985, Ct. App. Pres. Aguirre Cerda, 82 REVISTA DERECHO Y JURISPRUDENCIA (pt. III) § 5, at 236 (1985), *aff'd*, Judgment of Oct. 22, 1985, Sup. Ct. No. 20,032.

493. See Langbein, *supra* note 107, at 387.

494. CODE CIVIL PRO. art. 207. See *supra* text accompanying notes 397-427.

495. See, e.g., Gomez Chamorro, *supra* note 492, at 296, 297.

truth of a material assertion, the appellate court may order a local trial judge to visit the site, take statements of witnesses, and render his factual conclusions.<sup>496</sup>

### VIII. JURIDICAL REASONING

As a matter of training and statutory obligation, the Chilean judge must operate within the strict confines set forth in the decisional process. This is consistent with the civil law tradition: deciding cases merely means selecting the appropriate code article or public law and applying it syllogistically to the facts of the case, which are themselves found somewhat mechanically.<sup>497</sup> The Chilean Code, Article 170, instructs judges on how to organize their thinking in six parts: 1) names, domiciles and occupations of litigants; 2) claims and relief sought by plaintiffs and their legal bases; 3) the defenses; 4) findings of fact and law; 5) citations to controlling laws, or, in their absence, equitable principles; and 6) resolution of the controversy, including a ruling on each distinct claim and defense.<sup>498</sup>

While the fourth and fifth parts of the Chilean judgment seem to offer some room for judicial creativity, one typically finds only a meticulous recitation of claims, defenses, and facts followed by a very concise legal reasoning. In the normal opinion, one finds no more than a few sentences explaining the application of law to fact and rarely is there discussion about alternative readings and possibilities. The judgment is made to appear simple and inevitable. Only a person with legal training would know the multiple decisional pathways which were available to the judge.

The most energy put forth in the process is directed at the purely formal aspects of the opinion. In the civil law tradition, it is considered important to demonstrate to the parties that each of their arguments and claims has been addressed.<sup>499</sup> After these reci-

496. See Carrasco Soto, Judgment of Sept. 12, 1985, Ct. App. Valdivia, 82 REVISTA DERECHO Y JURISPRUDENCIA (pt. III) § 5, at 300, 303, *aff'd*, Judgment of Sept. 30, 1985, Sup. Ct. No. 19,919.

497. See Correa, *La Cultura Jurídica Chilena en Relación a la Función Judicial*, in CULTURA JURÍDICA, *supra* note 342, at 75, 78-79. See also J. MERRYMAN, *supra* note 53, at 125-28; von Mehren, *supra* note 242, at 201-03 (France and Germany).

498. "Regarding length and style of judicial opinions, there is no uniformity in the civil law world." R. SCHLESINGER, *supra* note 1, at 322 (footnote omitted).

499. See, e.g., S.M.S. Corp. v. Toscano, Judgment of Mar. 12, 1962, Corte Cass., Italy, reproduced in CAPPELLETTI, *supra* note 32, at 423-26.



tations, the judge systematically works his way through the findings of fact, aided by the "points of proof" and the statute-based scoring system.<sup>500</sup> Subsequently, the Chilean judge ventures a summary conclusion applying law to fact at the very point at which U.S. judges begin their intellectual evaluation.

The Chilean method can be defended as necessary to impose order and structure on a career judiciary of uneven quality. The Article 170 procedure presumably forces logical and rational thought patterns where otherwise arbitrariness might be found. The judge in the United States, in contrast, is completely free to structure opinions as he deems appropriate. The judicial opinions in the United States predominantly reach the crux of the matter quickly and justify their conclusions with greater thoroughness.<sup>501</sup>

## IX. ALTERNATIVE PROCESSES

### A. *Small Claims*

In conformity with U.S. practice, Chile has tried to establish a streamlined process for small claims. Chile, however, has not created separate courts but rather vested competence in the ordinary trial courts.<sup>502</sup> For cases involving 4,719 pesos (about twenty U.S. dollars), the Chilean Code of Civil Procedure provides a separate process, structured in essence like an ordinary trial, but with time and cost saving devices.<sup>503</sup> These include: 1) mandatory, judicially-conducted settlement conferences;<sup>504</sup> 2) the option of verbal pleadings and appeals;<sup>505</sup> 3) consolidated processing of the merits and all motions;<sup>506</sup> 4) freer judicial evaluation of proofs;<sup>507</sup> 5) judgment verbally read to the parties within sixty days of proof-taking;<sup>508</sup> and 6) quick, efficient execution of judgments.<sup>509</sup> Despite these efforts to achieve time and cost savings, there remains a reluctance to abandon the normal adjudicatory process in favor of other procedures, such as a brief hearing without legal papers before a panel

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500. See *supra* text accompanying notes 261-62, 298-300.

501. See generally B. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* (1962).

502. *CODE CIVIL PRO.* arts. 703-738.

503. See *id.*

504. *Id.* art. 711.

505. *Id.* arts. 704, 727.

506. *Id.* art. 723.

507. *Id.* art. 724.

508. *Id.* art. 722.

509. *Id.* arts. 729-736.

of lawyers.<sup>510</sup> As in the United States, the statutory money-in-controversy threshold has been made obsolete by inflation. At the present time, the definition of an eligible "small" claim (approximately twenty U.S. dollars) is so low that the process is rarely invoked.

An interesting variation on the small claims alternative is the Chilean treatment of cases in the next economic bracket, between 4,719 *pesos* and 94,920 *pesos* (US\$387).<sup>511</sup> These are also filed in the ordinary trial courts and follow, for the most part, normal processes. The Chilean legislature, however, has curtailed some of the procedural rights that cases with larger amounts in controversy have available. For example, the period in which to answer the complaint is nearly cut in half, as are several of the other time periods.<sup>512</sup> Also, interlocutory appeals are disallowed,<sup>513</sup> and oral argument on appeals from final judgments is shortened from one hour to fifteen minutes.<sup>514</sup>

The concept of tailoring procedure to the monetary amount in dispute is both efficient and fully consistent with the U.S. concept of procedural due process.<sup>515</sup> The problem that emerges, however, is that the amount sought does not have any relation to the factual or legal complexity of the matters at issue. Also, lawyers may easily skirt the abbreviated process by requesting more than 94,920 *pesos* in their complaints.<sup>516</sup>

### B. Conciliation

At any point in an ordinary civil case, the presiding judge may

510. Cf. J. ADLER, D. HENSLEY & C. NELSON, *SIMPLE JUSTICE: HOW LITIGANTS FARE IN THE PITTSBURGH COURT ARBITRATION PROGRAM* (1983).

511. CODE CIVIL PRO. arts. 698-702.

512. Compare CODE CIVIL PRO. art. 258 with *id.* art. 698(2).

513. CODE CIVIL PRO. art. 699.

514. Compare *id.* art. 223 with *id.* art. 699.

515. See, e.g., *Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976) (citation omitted):

[D]ue process is flexible and calls for such procedural protections as the particular situation demands. . . . [O]ur prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

516. See JUDICIAL CODE art. 117.

call the parties<sup>517</sup> to his chambers in order to attempt "conciliation."<sup>518</sup> At that time, the judge proposes terms of settlement that the parties can agree to, thus ending the case. The process is not "conciliation" or "mediation" in the sense in which those terms are used in the United States, where conciliators or mediators simply facilitate party communication and do not propose solutions unless invited to do so.<sup>519</sup> Chilean "conciliation" more closely resembles American "muscle mediation,"<sup>520</sup> which occurs when the presiding judge previews his likely adjudication as a sharp prod to settlement.

An essential element of mediation in the United States is often "shuttle diplomacy."<sup>521</sup> The mediator meets privately with each side in order to acquire confidential information which is helpful to his facilitative function. Further, in these meetings, the mediator tries to loosen unreasonable positions, correct misconceptions, deflate expectations and otherwise move the parties toward an agreement. In Chile, "shuttle diplomacy" does not work as part of the "conciliation" process, since the Code specifies that the "conciliating" judge is not disqualified from adjudicating a case which is not settled.<sup>522</sup> Consequently, parties are unlikely to share prejudicial secrets with the "conciliating" judge.

In any event, this conciliation process is rarely used since judges must make special efforts to attempt conciliation. Typically, the Chilean judge possesses little detailed knowledge of the cases being processed in his chamber. Thus, the judge masters the record only at the time the process is closed and the case ripe for decision. In order to "conciliate," the judge must start mastering the file beforehand, which few are apparently willing or able to do. If the

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517. The judge may order the parties themselves to appear, though the latter can insist that their legal representatives also attend. CODE CIVIL PRO. art. 264.

518. See *id.* arts. 262-268.

519. See, e.g., S. LEESON & B. JOHNSTON, ENDING IT: DISPUTE RESOLUTION IN AMERICA 133 (1988).

520. For examples of judges engaged in "muscle mediation," see Schuck, *The Role of Judges in Settling Complex Cases: The Agent Orange Example*, 53 U. CHI. L. REV. 337, 359-61 (1986); Bacigal, *An Empirical Case Study of Informal Alternative Dispute Resolution*, 4 OHIO ST. J. DIS. RES. 1, 22 (1988).

521. See, e.g., N. ROGERS & R. SALEM, A STUDENT'S GUIDE TO MEDIATION AND THE LAW 37-38 (1987).

522. CODE CIVIL PRO. art. 263. In comparison, the Argentine Code of Civil Procedure empowers the trial judge to order the personal appearance of the parties to a settlement session and, contrary to common sense and experience, declares that the judge's "mere proposal of terms of settlement shall not signify prejudgment." ARGENTINE CODE art. 36(2)(a).

proofs are completed, the judge has little incentive to attempt a conciliation which might fail, since the case is ready for adjudication.<sup>523</sup> While such disuse makes sense chamber by chamber, losses are readily apparent by looking at the Chilean judicial system as a whole. A case ending in conciliation, by nature a voluntary settlement, will not be appealed, while an adjudicated case in Chile is almost always appealed.<sup>524</sup> Thus, what might be gained in efficiency by adjudicating the case at the trial level would certainly be offset by additional labor at the appellate level.

### C. Arbitration

The Chilean codes recognize arbitration as a legitimate form of dispute resolution<sup>525</sup> and, as such, extend the judicial power to execute judgments.<sup>526</sup> During the course of litigation, the parties may agree in writing to nominate one or more arbitrators. This document specifies the matter submitted to arbitration, the power conferred on the arbitrators, the place of arbitration, and the arbitration term.<sup>527</sup> The parties can pick an informal process in which the arbitrator, also known as a "friendly settlor," (*amigable componedor*)<sup>528</sup> applies his prudence and equity in judging the matter<sup>529</sup> and uses the procedures specified by the parties<sup>530</sup> or, in absence thereof, a simple hearing system established by the Code itself.<sup>531</sup> The arbitrator's opinion and judgment consist of a specification of the parties' positions, the arbitrator's decision, and the supporting grounds of prudence and equity.<sup>532</sup> The arbitral award is appealable, unless the parties have waived their appeal rights or have also chosen to arbitrate the appeal.<sup>533</sup>

The arbitration process is available extrajudicially, although in such private dispute resolution only appeal by agreed arbitration is

523. The same point has been made about U.S. trial judges' reluctance to pursue dispute resolution, as compared to settlement efforts, given the preparation and negotiation time needed. See Note, *Judicial Participation in Settlement: Pattern, Practice, & Ethics*, 4 OHIO ST. J. DIS. RES. 31, 87 (1988).

524. See *supra* note 399 and accompanying text.

525. See CODE CIVIL PRO. arts. 628-664; JUDICIAL CODE art. 223.

526. See CODE CIVIL PRO. arts. 635, 643.

527. JUDICIAL CODE art. 234.

528. See *id.* art. 223.

529. CODE CIVIL PRO. art. 637; JUDICIAL CODE art. 223.

530. CODE CIVIL PRO. art. 636.

531. *Id.* arts. 637, 638.

532. *Id.* art. 640.

533. JUDICIAL CODE art. 239.

permitted.<sup>534</sup> This informal arbitration resembles the many examples of arbitration in the United States<sup>535</sup> promoted by the widespread adoption of the uniform<sup>536</sup> and federal<sup>537</sup> arbitration laws.

Chileans can also choose a more formal process which is conducted by a "law arbitrator" (*arbitrador de derecho*), who, unlike other arbitrators, must be a lawyer.<sup>538</sup> The "law arbitrator" must adjudicate under existing substantive law and follow the procedures for civil court cases.<sup>539</sup> This "law arbitration" resembles court-annexed arbitration, such as mandatory arbitration of smaller civil claims before lawyer panels, which is currently being tested in U.S. federal courts<sup>540</sup> and which has been adopted by several state courts.<sup>541</sup>

Certain types of Chilean disputes must be resolved by arbitration, whether formal or informal. These disputes consist primarily of accounting matters, such as liquidation of the common assets of spouses and collectives, partition of goods, presentation of accounts by business managers, and partnership disputes.<sup>542</sup> Other than certain matters which cannot be arbitrated,<sup>543</sup> parties have complete freedom whether to choose arbitration or to reject it and proceed in court.<sup>544</sup> Consequently, Chilean arbitration shares with the United States<sup>545</sup> the essential nature of voluntariness.

## X. ANTI-DELAY MEASURES

The caseload in Chile is undoubtedly extremely heavy for the available number of judges. This assertion, however, cannot be

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534. CODE CIVIL PRO. art. 642.

535. See generally J. MURRAY, A. RAU & E. SHERMAN, PROCESSES OF DISPUTE RESOLUTION: THE ROLE OF LAWYERS 387-435 (1989); L. RISKIN & J. WESTBROOK, DISPUTE RESOLUTION AND LAWYERS 250-323 (1987); S. GOLDBERG, E. GREEN & F. SANDER, DISPUTE RESOLUTION 189-225 (1985).

536. See UNIF. ARBITRATION ACT, 7 U.L.A. 5-229 (1985).

537. 9 U.S.C. §§ 1-14 (1982).

538. JUDICIAL CODE art. 225.

539. *Id.* art. 223; CODE CIVIL PRO. art. 628.

540. See 28 U.S.C. §§ 651-658 (1988); Siegel, *Changes in Federal Jurisdiction and Practice Under the New Judicial Improvements and Access to Justice Act*, 123 F.R.D. 399, 410-11 (1989).

541. See generally J. MURRAY, A. RAU & E. SHERMAN, *supra* note 535, at 628-52.

542. JUDICIAL CODE art. 227.

543. See *id.* arts. 229, 230 (spousal support, separation of marital property, cases involving the public minister, and lawyer-client disputes).

544. *Id.* art. 228.

545. See S. GOLDBERG, E. GREEN & F. SANDER, *supra* note 535, at 8.

confirmed with caseload statistics because usable data is impossible to locate. Based on appellate statistics,<sup>546</sup> there must be a large case volume at the trial level. Numerous judges confirm this in discussions; all agree that in urban areas like Santiago, the case load per judge is particularly oppressive. In the future, the Chileans should consider modern case management methods, including the compilation and reporting of caseload data necessary for scientific reform and management.<sup>547</sup>

At present, Chile attempts to push cases along by edicts and sanctions. Judges are required to make judgments within statutorily-based time frames.<sup>548</sup> For example, after a motion is made, the other side has three days to respond. Eight days later any proof-taking must end and the judge then has three days to reach a decision.<sup>549</sup> Also, whenever possible, motions are supposed to be handled concurrently with the principal cause so as not to slow down the case's march to the merits.<sup>550</sup> This theory, however, bows to reality. In the crush of business, the judges readily find just cause to grant time extensions,<sup>551</sup> exercise discretion to suspend the main cause,<sup>552</sup> or simply ignore the time limits.

The judges find it particularly difficult to meet the sixty-day statutory deadline<sup>553</sup> for reaching a decision on the merits after proof-taking is closed and the case is ripe for final decision. During this period, the judge must reacquaint himself with the entire file, find all necessary facts, study and apply the law, and render an elaborately written decision that conforms to a prescribed format.<sup>554</sup> Unlike judges on the criminal side, who are aided by clerical opinion-writers, the civil bench does its own drafting. In order

546. See *supra* text accompanying note 401.

547. See, e.g., LAWYERS CONFERENCE TASK FORCE ON REDUCTION OF LITIGATION COST AND DELAY, A.B.A., *DEFEATING DELAY: DEVELOPING AND IMPLEMENTING A COURT DELAY REDUCTION PROGRAM* (1986); M. SOLOMON & D. SOMERLOT, *CASEFLOW MANAGEMENT IN THE TRIAL COURT* (1987); JUD. ADMIN. DIVISION, A.B.A., *THE IMPROVEMENT OF THE ADMINISTRATION OF JUSTICE* (6th ed. 1981); S. FLANDERS, *CASE MANAGEMENT AND COURT MANAGEMENT IN UNITED STATES DISTRICT COURTS* (1977).

548. Cf. Chase, *supra* note 58, at 56 (footnote omitted) stating: "Nor do Italian judges control the pace of litigation. Attorney resistance to the exercise of judicial power has apparently frustrated the statutory reforms intended to give the judges the necessary 'whip'."

549. CODE CIVIL PRO. arts. 89-91.

550. *Id.* art. 87.

551. *Id.* art. 67.

552. *Id.* art. 87.

553. *Id.* art. 162. In Argentina, the deadline is 40 days and the judge is subject to fines for unexcused delay. See ARGENTINE CODE arts. 34(3)(b), 167.

554. See *supra* text accompanying note 498.

to control delay at this stage, the law obligates trial judges to send monthly case status reports to their supervising court of appeals minister.<sup>555</sup> This report, appropriately entitled "Monthly Bulletin of Adjudicated Causes," lists in chronological order the cases ready for decision, the date of readiness, the date each was decided, and explanations for any violations of the sixty-day rule.

Lawyers are also pressed by the Code to litigate efficiently. Although Chile has not adopted the rule that the prevailing party is automatically entitled to have the loser pay his costs, including attorney fees, it exerts somewhat similar economic pressure.<sup>556</sup> The Chilean Code allows the judge to order such payment when the loser lacked plausible reasons for the litigation.<sup>557</sup> Similarly, costs can be imposed on the party who has lost a motion that the judge believes was "dilatatory."<sup>558</sup> This aligns Chile with the U.S. court system, which, since 1983, has vested power in trial judges to sanction unreasonable litigation behavior with court costs and attorney fees.<sup>559</sup>

In its attempt to streamline litigation, Chilean law places additional duties on parties and attorneys, including a curious "two

555. JUDICIAL CODE art. 586(4).

556. This rule is prevalent in other South American countries. For example, in Argentina the party who loses either on a motion or on the merits shall pay the winner's costs, but further vests in the judge a power to relieve the loser of this cost for reasons the judge must put in writing. ARGENTINE CODE arts. 68, 69. Those who litigate recklessly or maliciously are subject to fines in favor of the other side. *Id.* art. 45. In Peru, the loser pays costs, unless the judge exempts him upon a showing of justifiable reasons for litigating ("*motivos atendibles para litigar*"). PERUVIAN CODE art. 1077. *See also* VENEZUELAN CODE arts. 274-287; COLOMBIAN CODE arts. 392-393.

557. CODE CIVIL PRO. art. 144.

558. *Id.* art. 147.

559. *See* FED. R. CIV. P. 11. *Cf.* VENEZUELAN CODE art. 170:

The parties, their representatives and lawyers' assistants must act in the litigation with loyalty and integrity. As such, they shall:

1. Put forth facts in accordance with the truth;
2. Avoid claims, defenses and motions when aware of their clear lack of merits;
3. Neither offer proofs nor acts unhelpful or unnecessary to the right asserted.

The parties and third persons who act in the litigation with recklessness (*temeridad*) or bad faith are responsible for the damages (*daños y perjuicios*) that are caused.

It is presumed, absent contrary proof, that the party or third person has acted in the litigation with recklessness or bad faith when:

1. They assert clearly unfounded principal or secondary claims or defenses;
2. They maliciously alter or omit facts essential to the cause;
3. They create apparent and repeated obstacles to the normal course of litigation.

time" rule.<sup>560</sup> When a party loses his second motion, the judge determines, within a fixed range, the amount to be deposited with the court should the party attempt any further motions. In setting the sum for deposit, the judge is guided by the loser's procedural activity. Upon losing another motion, the mover forfeits the deposit.<sup>561</sup> A finding of bad faith by the judge can increase the deposit up to twice the statutory requirement. Another noteworthy efficiency device is the "one postponement" rule. A lawyer is allowed one "trump card" to postpone an appellate hearing without cause.<sup>562</sup> Once the card is played, however, he can obtain postponement only by demonstrating one of the causes enumerated in the Code.

In 1988, Chile enacted extensive amendments to the Code of Civil Procedure.<sup>563</sup> One of the goals of this reform was to cut down on court delay. Time periods, such as the one concerning case abandonment, were shortened. Today, if six months pass without the parties taking any steps to move the cause along, the case is considered abandoned and is subsequently dismissed.<sup>564</sup> The previous rule allowed one full year of inactivity. Similarly, the 1988 amendments shortened the maximum term of inactivity from six to three months for an appeal from a final judgment and from three months to one for interlocutory appeals.<sup>565</sup> A similar time constraint cut in half the times allotted for appellate arguments.<sup>566</sup> Finally, the 1988 amendments increased the amounts of fines and forfeitures imposed throughout the Code.

## XI. CONCLUSION

This article's main value is in its focus on a body of law long neglected, that of South American civil procedure, and, more spe-

560. CODE CIVIL PRO. art. 88.

561. This and most other fines and forfeitures go into a fund which supports Chile's legal services for the indigent. For the rights of the indigent to free legal services, see CODE CIVIL PRO. arts. 129-137; CHILE CONST. art. 19, para. 3, cl. 3.

562. CODE CIVIL PRO. art. 165.

563. See Ley No. 18.705, May, 1988. See generally Informe de la E. Corte Suprema, *Proyecto de Ley Que Módifica Los Códigos de Procedimiento Civil, Orgánico de Tribunales y de Procedimiento Penal*, 14 REV. DERECHO PROCESAL 101 (1987).

564. CODE CIVIL PRO. arts. 152, 153. The defendant must move for such dismissal, suggesting that the parties may sidestep the rule by agreement. Also, the dismissal lacks the teeth of *res judicata*. *Id.* art. 156.

565. *Id.* art. 211.

566. *Id.* art. 223.



cifically, Chilean civil procedure. Had the author found, in the end, a crude civil process, badly conceived and badly functioning, this article would have merely confirmed the wisdom of allocating scholarly resources elsewhere. Instead, what was found was a rich body of procedural principles offering considerable experience and wisdom to legal scholars. In South America, there is a unique, indigenous adaptation of European codes. Also fascinating is the incorporation into the procedural codes of judicial techniques, found primarily in common law jurisdictions. While the "flavor" is of civil law process, many of the ingredients were grown on U.S. soil. Hopefully, this article may spark further research into the procedural law of South America and enrich the general knowledge of comparativists and the practicing bar as a whole.