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Chile: Legal Response to Covid-19

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Guillermo Jiménez, Pablo Grez Hidalgo, Pablo Marshall

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General editors: Prof. Jeff King; Prof. Octavio Ferraz

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For Parts I-IV, except where the text indicates the contrary, the law is as it stood on: 4 January 2021.

For Parts V-VI, except where the text indicates the contrary, the law is as it stood on: 4 January 2021.

I. Constitutional Framework

1. Chile is a unitary, presidential, and highly centralized republic, with a codified constitution.¹ The Chilean Constitution was originally enacted in 1980 during a military dictatorship headed by General Augusto Pinochet. Constitutional amendment is a rigid process. Some chapters require a two-thirds majority vote in order to be amended, while all the remaining chapters require a three-fifths majority vote in the National Congress. The Constitution has been reformed numerous times since its enactment, particularly in 2005 when crucial democratic reforms were introduced. After unprecedented social unrest, in November 2019 an agreement was reached to initiate a process for drafting a new constitution. The first stage of the process was a referendum that took place on 25 October 2020 and resulted in vast majority support for drafting a new constitution by a constitutional convention (see Part III.D below).

2. The National Congress is bicameral, with two elected chambers, called Chamber of Deputies and the Senate. The main difference between the Chamber of Deputies and the Senate is their size. The Chamber of Deputies is composed of 155 deputies, while the Senate is composed of 50 senators. Although both are elected through a proportional representation system, electoral districts for senators are larger than for deputies. There are 28 electoral districts for deputies and 16 for senators. There is also a difference in relation to electoral terms, as deputies hold office for four years, and senators for eight years. Age requirements are slightly higher for senators than for deputies (35 years versus 21 years of age). Lastly, the chambers' legislative powers are symmetrical, but supervision of government is exclusively allocated to the Chamber of Deputies.

3. The President of the Republic is elected by popular vote for a non-renewable four-year period. The President appoints their ministers, who are then exclusively responsible to them. The National Congress can remove a minister only through impeachment, which must be approved by majority vote in both chambers. The President of the Republic enjoys a position of dominance in both executive and legislative affairs, as they are both the Chief of Public Administration and hold broad powers in the legislative process as a co-legislator. The Constitution establishes that only the President can initiate legislative discussion on key policy areas, such as issues of public expenditure, social security, and public administration.

4. Law-making is divided between different types of legislation and executive regulations. Judicial decisions are excluded from this as they are generally considered to be lacking in general legal force extending beyond the parties to the dispute. The Constitution regulates three main types of laws, depending on the subject matter and requiring variable quorum for their approval. Organic Constitutional Laws are laws that regulate matters such as basic state organization and require a four-sevenths majority in each chamber to be approved. Qualified Quorum Laws are laws that regulate matters such as transparency and public enterprises and require a simple majority of the elected members in each chamber to be approved. Finally, Ordinary Laws regulate issues not assigned to the other two categories and require a majority of the members of Congress in attendance to be approved. Although

laws prevail over executive regulations, the Constitution grants the President power to issue autonomous regulations in areas not governed by laws. In practice this power has been rarely exercised.

5. Chile is a highly centralized country divided into 16 regions, each of them under the control of an Intendant, who is currently appointed by the President of the Republic at will. At the local level, there are 345 municipalities each headed by a mayor, who is elected by popular vote every four years. Municipalities are constitutionally autonomous from the central government. Most of a mayor's powers are focused on management of communal services like primary health, education, and issuance of driver licenses. But they can also enact ordinances that regulate public spaces, such as activities in streets and public parks. Although these ordinances are subordinate to government policy, which means that they cannot be contradictory to central government regulations, a minister cannot overrule a mayor at discretion. To approve ordinances, the mayor needs the consent of the municipal council, which is also elected by popular vote. Generally, the municipal powers are strongly concentrated in the mayor.

6. The response to the pandemic has not changed the basic constitutional structure of the state, but it has exacerbated pre-existing tensions in various areas. This has been particularly important considering the constitutional crisis that the country has been experiencing since October 2019. The pandemic has aggravated the Government's incapacity to control the political agenda and has strengthened the political role of the National Congress and municipalities. This is illustrated by the fact that the Constitution has been amended nine times between March and November 2020.

II. Applicable Legal Framework

A. Constitutional and international law

7. The Chilean Constitution provides that the exercise of constitutional rights can be 'affected' in situations of internal or external war, internal turmoil, emergency, and public calamity, when they gravely affect the normal operation of the institutions of the State (Article 39). Each of these situations can give rise to a different type of state of exception (assembly, siege, emergency, and catastrophe), each type governed by slightly different rules regarding their declaration (Articles 40, 41, and 42) and may affect different rights (Article 43).

8. In cases of public calamity, the most relevant in public health crises, the Constitution provides that the President of the Republic can declare a 'Constitutional State of Exception of Catastrophe' (*Estado de Excepción Constitucional de Catástrofe*) ('state of catastrophe'), designating geographical areas affected by the calamity (Article 41). The President of the Republic is under a duty to report to the National Congress about the measures adopted, and the National Congress can call off the declaration after 180 days if the causes of the public health emergency (ie the 'calamity') have ceased absolutely. The President of the Republic needs congressional assent for declaring the state of catastrophe for more than a year. Under a declaration of a state of catastrophe, the designated areas are under the immediate authority of a Chief of the National Defense, who is appointed by the President of the Republic. The Chief of the National Defense is a military officer who holds the powers delegated by the President of the Republic and those indicated in the Organic Constitutional Law of States of Exception. The state of catastrophe authorizes the President of the Republic to 'restrict' freedom of movement and freedom of assembly. The President can also order the requisition of goods, impose limitations on the exercise of property

rights, and 'adopt every extraordinary measure of administrative character that is necessary for the prompt restoration of normality in the affected area' (Article 43) .

9. To respond to the pandemic, the President of the Republic declared a state of catastrophe on 18 March 2020. This was done by Decree 104 of 2020, of the Ministry of the Interior and Public Security.² This declaration designated the entire country as being under a 'public calamity' for 90 days. The declaration has been extended thrice, for 90 days, on 16 June, 12 September, and 12 November 2020.

10. The declaration of a state of catastrophe did not entail suspension of the operation of the National Congress or any restriction on access to courts.

11. Chile is a party to the American Convention of Human Rights.³ On 27 March 2020, by note 37/2020, the country communicated to the General Secretary of the Organization of American States its decision to derogate from the Convention in respect to Article 15 (freedom of assembly) and Article 22 (freedom of movement).⁴

12. The World Health Organization's (WHO) International Health Regulations (IHR) were promulgated in Chile by Decree 230 of 2008, of the Ministry of Foreign Relations. It did not impose amendments to the Sanitary Code 1967, Chile's main piece of public health legislation. The Chilean Government has quoted WHO recommendations on a number of occasions during the pandemic, including within Decree 104, Decree 4 declaring a public health alert, and within some of the public health protocols issued by the Ministry of Public Health.⁵

B. Statutory provisions

13. No new general law has been introduced providing emergency powers to respond to Covid-19. The Government has relied almost exclusively on pre-existing legislation for the primary public health measures. The Sanitary Code 1967 has been the main legal body for this. It does not provide comprehensive regulation in respect to infectious diseases. It only contains fragmented provisions that have been invoked by the government as a basis for its response through decrees and administrative regulations. The main provision used by the Government is Article 36, which states that 'when a part of the territory is threatened or invaded by an epidemic or by a notable rise of any disease, or when emergencies occur that entail a grave risk for the health and life of the inhabitants, the President of the Republic, with a prior report by the National Health Service, can confer extraordinary powers to a Director General of Health the spread of disease or to face the emergency'⁶. It is important to notice that there is no systematic correlation between the extraordinary powers conferred by the Sanitary Code and the Constitution. They are overlapping sources of public health power that can be taken by the Government to justify an indeterminate set of measures. Moreover, the position of the Director General of Health currently corresponds to both the Undersecretary of Public Health and the Undersecretary of Public Health Networks, authorities directly appointed by the President of the Republic and who are subordinate to the Minister of Health.

C. Executive rule-making powers

14. Executive rule-making powers have played a preponderant role in the response to the Covid-19 crisis. The Chilean Constitution grants the President of the Republic the power to enact administrative regulations in matters not reserved to statutes and also to enact the 'decrees and instructions that he deems convenient to the execution of the laws' (Article 32(6)). This is a very broad regulatory power exercised with the agreement of the ministers competent in the specific subject-matter (Article 35). All decrees promulgated by the

President of the Republic are called 'supreme decrees' regardless of their content, which can be either an individualized order or a general rule.

15. Subordinate administrative bodies also issue administrative regulations. For instance, ministries can enact binding regulations called 'resolutions' (*resoluciones*) within their remit, which can be either rules of general observance or measures aimed at individual cases. Municipalities can also enact 'ordinances' (*ordenanzas*) within their territorial remit that are subordinate to laws. These may pertain to a wide array of subjects, such as: public order, urban planning, and commercial activities within a city.

16. In general, the duration of administrative regulations is indefinite. They have legal force until they are derogated, unless a term limit or a condition is introduced. Moreover, the government can easily reduce or extend their duration. For instance, the duration of Decree 4 (see Part II.C, para 19 below) is of one year but according to the Decree's Article 10 its duration can be extended if sanitary conditions do not improve. Generally speaking, decrees are of a more general nature and more stable than resolutions, as the latter deal with more specific and variable circumstances. The response to the Covid-19 crisis has been focused mainly on resolutions (see Part IV.A below).

17. There is no congressional scrutiny of supreme decrees and regulations in the Chilean constitutional system. However, the Office of the Comptroller-General—an independent specialized body—scrutinizes these administrative regulations exclusively on legal grounds before promulgation. This legality review procedure is mandatory for presidential decrees, among other administrative regulations. In general, ministerial resolutions are also subject to this legality review procedure, however some are excluded. These are called 'exempted resolutions' (*resoluciones exentas*) and they have played a central role during the pandemic, as seen below (see Part IV.A below).

18. The Chilean government declared a public health emergency in February 2020 by Decree 4 of 2020, which has been extended and modified a number of times. This decree was issued by the Minister of Health, by order of the President of the Republic, without any intervention of the National Congress. However, the Comptroller-General Office legally reviewed this decree before its promulgation. The main legal basis for this decree is Article 36 of the Sanitary Code, as noted in Part II.B above.

19. The main general regulation in response to the pandemic is Decree 4 of 2020 that declared a public health alert for Covid-19. This is a decree signed by the Minister of Health by order of the President of the Republic. This regulation confers on the Undersecretary of Public Health and on the Undersecretary of Public Health Networks the following powers:

- To lift restrictions in order to recruit and allocate medical personnel. These restrictions include prohibitions of hiring retired personnel or students of medicine, and limitations to the transfer of personnel from one hospital to another;
- To acquire and allocate equipment and drugs;
- To communicate new public health measures to the public using mass media;
- To supply medicine, medical devices, and other sanitizing elements to specific groups;

- To make mandatory the use of face masks and other medical devices on public transport, in classrooms, in workplaces, and, in general, in any other place of public access or where an agglomeration of people might exist;
- To cap the prices to be charged to the general public for pharmaceutical products, medical devices, sanitary elements, health services, and every other good and service needed to meet health needs;
- To ration the number of goods and services to be provided to a single person;
- To directly import medicines, medical materials and inputs, and medical devices needed to fulfil the powers this decree grants;
- To transfer goods acquired by the Ministry to public health services. This may include ventilators and similar equipment, and is a relevant addition because the Ministry and public health services are two different legal entities normally procuring goods separately.

20. Similar powers are granted to the regional offices of the Ministry of Health. These bodies were also granted, among others, the following powers:

- To close establishments and workplaces that may be hazardous to workers or customers;
- To order people to avoid mass gatherings;
- To track and trace people exposed to Covid-19;
- To reject entry to foreigners without residence in Chile and who are infected or suspected of being infected;
- To suspend educational activities and large indoor gatherings;
- To temporarily prohibit the landing of planes or vessels.

21. The Government has also used another form of administrative regulation called exempted resolutions. They are issued by a minister and are exempt from the legality review. They have been used to implement the policy of partial and dynamic lockdowns so that each week the government can define the restrictions that apply to a commune using such resolutions, the number of which has reached around a 100 in 2020. In addition, in July 2020 the Government issued Exempted Resolution 591 of the Ministry of Health, that created a five-tier system of restrictions.

22. Beyond the centralized measures adopted by the Ministry of Health, many municipalities have enacted municipal ordinances regulating issues ranging from the mandatory use of face coverings to the closure of industries and commerce, and the prohibition of entry to specific localities. The legal grounds for enacting these ordinances are very fragile, and they have been subject to critical scrutiny by the Office of the Comptroller-General. The Office has found them unlawful insofar as they depart from central government policy, since the Constitution allocates emergency powers exclusively to the President of the Republic.

23. The most important judicial challenges against Covid-19 government policies have centred on decisions not to impose lockdowns as opposed to challenges to the previously mentioned administrative measures (see Part III.C below).

D. Guidance

24. Most of the Government measures have been formalized in legal instruments. They are therefore binding and any infringement can be punished. Despite numerous instances of misinformation by government officials in press briefings, there has been no major confusion between guidance and law. Guidance has taken the form of instructions and protocols and has covered issues such as adaptation of schools and nurseries to the Covid-19 context, and recommendations for holidaymakers.⁷ These instruments are clearly non-binding and have not taken the form of decrees or resolutions.

25. Although the regulation of travel exemptions is not strictly guidance, it is a subject difficult to classify in legal terms. It is not guidance as it is binding. But the instruments that regulate travel exemptions do not take the form of decrees or resolutions. They are merely protocols or instructions issued by the Ministry of Interior and Public Security, and published on its website.⁸ These instruments are very detailed regulations of the types of travel restrictions in place and the existing permits to waive them. Even though they do not have a formal legal source, applications to obtain these permits are considered mandatory and have to be made online through specially designed websites.⁹

III. Institutions and Oversight

A. The role of legislatures in supervising the executive

26. As noted in Part II.C above, there is no ongoing legislative oversight of presidential rule-making powers in Chile. Moreover, the National Congress did not pass new general public health legislation to control the pandemic. In other words, most of the executive public health response has been carried out without the direct involvement of the National Congress. In relation to public health, the executive has relied on pre-existing legislation and, therefore, there has been no need to obtain fresh authorization from the legislature.

27. It is important to notice that the regulatory powers of the Government are quite independent from the National Congress. Indeed, the Congress cannot directly terminate a decree or resolution. To do so, it has to repeal the law on which the decree was enacted. Also, the regulatory powers of the Government do not need renewal by Congress. Just as the President of the Republic declared a public health alert for Covid-19 based on Article 36 of the Sanitary Code, he can terminate or extend that declaration and the powers associated to it, without further involvement by Congress. Even the Constitutional State of Exception of Catastrophe can be renewed by the President of the Republic with no need of congressional approval within some temporal limits (see Part II.A above).

28. However, Congress has engaged more intensively in negotiation about administrative powers in social security, economic aid programmes, and other matters related to the social and economic response to the pandemic. Despite its significant regulatory and legislative powers, the executive has encountered enormous difficulties in obtaining legislative approval for its economic plans. Firstly, the Constitution requires legislation to authorize new expenditure, so the Government cannot use its regulatory powers to this end. Secondly, the Government does not control the National Congress, which is controlled by opposition parties. Lastly, even though the Constitution grants the President powers to control the legislative agenda—for instance, only the President has the power of initiative to propose new spending—Congress has evaded restrictions through political manoeuvrings, such as narrowly interpreting presidential initiative rules and approving ad hoc constitutional rules

that are not limited by presidential restrictions. The cause of this frequent gridlock relates to the underlying political crisis the country has been undergoing since October 2019.

29. Since 18 October 2019, Chile has witnessed massive riots and public protests. An initial student protest in response to a small rise in public transport fees became violent protests against economic policy and inequality more generally. The government reacted by declaring a Constitutional State of Exception of Emergency, and deploying military personnel in the streets for the first time since the Pinochet dictatorship in the 1980s. This exacerbated the discontent and triggered even more massive and violent public protest. The military and the police were unable to control the unrest, and even aggravated the problem by a disproportionate use of force and many instances of police brutality. This led to an unprecedented social and political crisis, which was partially assuaged by the Agreement for Social Peace and a New Constitution reached by a wide spectrum of political parties on November 2019. This agreement was reached by the main political parties and consisted of a commitment to stop violence and initiate a constitution-making process. Despite this agreement, political support for the Government reached the lowest levels ever recorded, and its policy-making capacity has been significantly undermined. Enormous political fragmentation within both the governing coalition and the opposition has led to political gridlock in the National Congress.

30. As noted in Part II.A above, the Chilean Constitution imposes a duty on the President of the Republic to report to Congress on the measures adopted to deal with a calamity during a state of catastrophe. However, there has been no official report to Congress to fulfil this duty. Rather, the Government has been reporting on the measures adopted to the Chamber of Deputies and Senate's legislative commissions as they discuss specific bills related to the pandemic, particularly on the economic stimulus plans. Thus, no special commission has monitored the state of catastrophe in general, but the Government has been providing Congress information on the bills being discussed.

31. Using its constitutional power (Article 52(1) of the Constitution), between May and October 2020, the Chamber of Deputies established five Special Investigative Commissions charged with scrutinizing the following matters: (a) government measures to mitigate the effects of the pandemic, and government measures during the pandemic in relation to public health, the economy, and public order (joint commissions 47 and 48);¹⁰ (b) government measures that may have entailed an artificial reduction in death record reports (commission 50);¹¹ (c) government measures in relation to the rise in electricity prices during the pandemic (commission 51);¹² and (d) government measures in relation to quarantine facilities (commission 53).¹³ These commissions are bipartisan committees that can be established by a two-fifths vote in the Chamber of Deputies to gather information on the government's activities. The final reports were published between late November and mid-December 2020, they summarized the main findings, and provided the majority opinion about government performance. Three out of the four reports were highly critical of the government response to the Covid-19 emergency. Yet the main problem with these reports is that their conclusions are highly partisan, with each report providing a majority and minority opinion along political lines.

32. The Chilean Constitution also provides an extraordinary instrument to hold the executive branch to account, namely the impeachment of ministers of state, among other causes, for violations of the Constitution or the law or for failing to execute the laws (Article 52(2)). This is an exceptional device as, normally, ministers serve at the pleasure of the President, who can appoint and remove them at will (Articles 32(7) and 33). Despite stepping down from his post in June 2020 after widespread criticism of his management of the pandemic, former Minister of Health Jaime Mañalich was subject to impeachment proceedings on September 2020 on two charges: (i) infringement of the constitutional

rights to life and health for lack of due preparation for the pandemic, insufficient isolation of infected patients, confusing communication to the public, and poor support of people living with HIV; and (ii) infringement of the constitutional principle of transparency of public information, for concealing data about the ministry's management of the pandemic.¹⁴ However, on 13 October the Chamber of Deputies rejected the charges in a very close vote of 73 to 71.

B. The functioning of the legislature where its ordinary business is disrupted

33. The Chilean Congress has been in operation throughout the whole duration of the pandemic, having rapidly passed a law providing a constitutional amendment that enabled the remote operation of both the Chamber of Deputies and the Senate. The final chapter of the Chilean Constitution contains 'transitory dispositions' which include both rules that are of a temporary nature and rules that facilitate legal transitions when constitutional changes are made. Law 21,219, published on 26 March 2020, inserted a new 32nd transitory disposition into the Constitution providing that, for a period of one year, the chambers could meet, vote on bills, statutes, and constitutional amendments, and exercise their exclusive powers, using a remote system¹⁵. The remote system must ensure that the vote of parliamentarians is personal, motivated, and non-delegable. Later, Law 21,237, published on 30 May, introduced a new constitutional amendment to authorize the remote operation of the Plenary in Congress—a joint session of the Chamber of Deputies and the Senate.¹⁶

34. Beyond some blunders—including senators drinking wine during a session and impolite words uttered in the belief that microphones were off—there have been no reports of problems in the remote operation of Congress during the pandemic, nor any significant complaints about the fairness of its operations by members of opposition parties.

C. Role of and access to courts

35. The adaptation of the operation of the courts has involved new legislation and managerial changes prompted by the Supreme Court. Law 21,226, published on 2 April 2020, sought to tackle the more urgent problems that courts were facing as a result of the pandemic.¹⁷ It first granted the Supreme Court the power to suspend judicial hearings in the ordinary courts when they could not take place without affecting the right to be heard, publicity, and other due process guarantees (Article 1) as a result of pandemic restrictions imposed by the authorities. The Supreme Court was empowered to suspend individual or group hearings, across the civil, family, criminal, and labour justice systems, during the period in which the declaration of a state of catastrophe was in force. The Law allowed the remote operation of courts to carry out hearings that could not be suspended, ensuring that constitutional due process rights were respected (Article 10). Law 21,226 also provided that tribunals that were not under the administration of the Supreme Court could also suspend hearings, with the exception of those cases in which judicial intervention was urgent (Article 2). Finally, Law 21,226 granted extensions of time limits and recognized litigators' justifications for not appearing before the courts due to Covid-19 impediments. An additional bill was introduced in Congress in September 2020 to provide a deeper, more ambitious reform of the judicial system to respond to the pandemic.¹⁸ However, the legislative progress of this bill has been slow.

36. Beyond the framework regulation provided by Law 21,226, the Supreme Court has enacted most of the detailed rules governing the functioning of the courts. In exercising its constitutional duty to oversee the operation of the judiciary (Article 82) and using the additional powers granted by Law 21,226, the Supreme Court has issued a number of

internal regulations regarding the remote operation of the courts and public health measures at the courts' premises¹⁹.

37. As Law 21,226 postponed non-urgent hearings, a large backlog of cases ensued in the civil justice system.²⁰ In the early months, an avalanche of cases was expected once the initial suspensions of hearings were lifted. In family law matters, most of the urgent cases reaching the courts were related to domestic abuse (47% of the caseload), followed by parent-child related cases (27%).²¹ However, things rapidly changed on 30 July 2020 when Congress approved Law 21,248 that allowed people to withdraw 10% from their pension funds as a form of economic aid in the pandemic context²². This has, unintentionally, resulted in an enormous number of petitions for alimony and child support that were close to collapsing the family courts. The pandemic has also seriously affected the labour law courts, producing severe delays that have exacerbated pre-existing problems in the system.²³

38. Arguably the pandemic has had the most serious impact on the criminal justice system. Between March and May 2020, 3,663 trials were postponed as public defenders argued against the use of remote hearings in criminal trials.²⁴ This caused an open disagreement between the Public Defense Office and the judiciary. Defenders were protesting, for example, because of poor audio and because of unjustified variations in criteria among different courts about the use of video and audio technology in cross-examinations. As thousands of trials were postponed, an enormous delay and backlog was expected for the future. Some defenders have brought cases to the Constitutional Tribunal, arguing that Law 21,226 infringes on the Constitution in not allowing suspension of final hearing criminal law trials, forcing them to be conducted online.²⁵ The Constitutional Tribunal ruled on one of these cases, declaring the rule that allows courts to suspend final hearings unconstitutional only when there is an 'absolute' infringement of the right to defence. The due process considerations require that the courts hold the power to suspend oral trials even when there is a partial impact on the right to defence.²⁶

39. The courts have remained open for judicial review claims throughout the pandemic. In fact, Article 45 of the Constitution explicitly provides that although courts of justice cannot examine either the motives or the facts behind a declaration of a state of exception, there is always a right to judicial review in respect to particular measures that may affect constitutional rights.

40. Most of the challenges took place during the initial months of the pandemic and were directed at government inaction, namely, the government's decision not to declare broad lockdowns in some communes and cities. The Supreme Court has consistently rejected dozens of claims, arguing that the Constitution places public health decisions under the executive discretion, and that judges cannot examine the merit of political decisions.²⁷ In one controversial case, the Constitutional Tribunal declared the inapplicability of a rule of the Penal Code 1874 relating to Public Health (see Part IV.B below).²⁸

D. Elections

41. As noted in Part I above, the Covid-19 pandemic arrived in Chile in the midst of a constitutional crisis. After heated debate, on 24 December 2019 a constitutional amendment established an electoral itinerary to initiate a constitution-making process to replace the Constitution imposed by the Pinochet dictatorship in 1980.²⁹ The first stage of the process was a plebiscite to be held on 26 April 2020, in which the citizens were to be asked whether they wanted a new Constitution. As a result of the pandemic, however, the electoral process in general was postponed for at least six months. In fact, Law 21,221, published on 26 March 2020, amended the Constitution to establish that the first plebiscite in the constitution-making process was to take place six months later, on 25 October.³⁰ This

Law also postponed local government and regional government elections to April 2021. No other elections have been postponed on public health grounds during the pandemic.

42. The idea of again rescheduling the plebiscite on public health grounds, or even on economic grounds, was considered at various points between March and September 2020 as the pandemic continued to spread. Although the government suggested rescheduling several times, the opposition was adamant in rejecting the proposal. Eventually, the government and opposition agreed on conferring broad powers to the Electoral Service (Servel)—a constitutionally autonomous body in charge of the operation of elections—to adopt preventive measures and carry out the plebiscite and future elections that may take place during the pandemic. Law 21,257, published on 27 August, amended the Constitution and gave Servel the power to issue regulations to protect public health during the plebiscite, for example, by making the use of face coverings mandatory, ordering social distancing rules, setting a maximum capacity at the polling facilities, and so on.³¹

43. A connected debate ensued in relation to the right to vote of people infected as they could be prosecuted for committing a public health crime according to the Chilean Penal Code. Despite several calls to allow remote ways to cast the vote, the government did not take any action on this. After Servel issued its regulations on public health during the plebiscite,³² a claim was filed at the Electoral Court (*Tribunal Calificador de Elecciones*) against Servel for not duly protecting the right to vote of people infected with Covid-19. The Electoral Court upheld the Servel regulation asserting that there was a ‘constitutional conflict between the right to vote and the right to health’ and that Servel was not allowed to affect public health policy defined by the Ministry of Health.³³ Accordingly, the Public Prosecution Office issued guidance establishing that they would arrest and prosecute any infected persons who were found outdoors even if they were attempting to cast their vote.³⁴

44. On 25 October 2020, the referendum was finally held with an overwhelming majority of the vote in favour of rewriting the Constitution—78% of the electorate approved the proposal of drafting a new Constitution, while 22% expressed a preference for the current one. Public opinion was concerned about the electoral turnout for the referendum considering that many cities in the country were still under lockdown. However, despite the ample restrictions in place the turnout was slightly greater than the last presidential election in 2017 (51% compared to 49%).³⁵

E. Scientific advice

45. The Covid-19 Advisory Committee (*Consejo Asesor Covid-19*) is a body comprising experts from academia and officers from the Ministry of Health.³⁶ The Committee is responsible for guiding the Ministry on policies to deal with Covid-19 at different stages. The Advisory Committee is of a temporary nature as it was convened exclusively for the purposes of dealing with the current pandemic. There is neither legislation nor decrees setting up the Committee or appointing its members and its advice does not bind Government. Due to its ad hoc nature, fragile legal structure, and the fact that some members are public officers, this Committee cannot be considered as fully independent from Government. The minutes produced by the Committee are published and available on its website.

46. In an environment of political crisis and high distrust of Government, there was a need to set up an additional ‘social’ committee that could monitor and provide advice to the executive in the response to the pandemic. On 22 March 2020, the Government itself set up such a body called the ‘Social Roundtable’ which is comprised of central government

authorities, mayors, and academics.³⁷ The highly critical College of Physicians also participated in this roundtable, making public its own minutes for each session.³⁸

F. Freedom of the press and freedom of information

47. There is no indication of any restrictions on press reporting by the Government during the pandemic.

48. In March 2020, the Council for Transparency, an independent freedom of information watchdog, issued guidance recommending the government to strengthen the publicity of information about the spread of the pandemic³⁹. Later the body clarified that some of the requirements were legal duties, while others were mere recommendations to improve transparency and facilitate freedom of information. Since then it has continued monitoring compliance with freedom of information duties and providing guidance to introduce flexibility in the implementation of the law during the pandemic.

G. Ombuds and oversight bodies

49. The main body with responsibility to audit and to oversee the legality of administrative action in Chile is the Office of the Comptroller-General.⁴⁰ An independent authority in the country, this office performs several accountability functions in respect of the executive branch, including financial audits, ex-ante legality review of decrees and resolutions, and providing binding legal interpretations of the laws governing the public sector. The Comptroller-General is appointed by the President of the Republic with the assent of the Senate, and holds office for an eight-year period. They can only be removed by the National Congress after impeachment proceedings. This office has played an important role during the crisis.⁴¹ By exercising its legal interpretation power, it has issued binding rulings that have facilitated administrative adaptation to the pandemic, for example interpreting that public officers could work remotely without further legislative changes. A ruling also provided that, according to the Constitution, the central responsibility during an emergency lies with the central government, therefore municipalities were not allowed to adopt measures that could restrict fundamental rights, such as freedom of movement.⁴² The Office has also carried out audit activities in relation to the management of the figures of deaths during the pandemic and has closely monitored the delivery of goods and social aid by state bodies. Importantly, the Office of the Comptroller-General also performs mandatory, ex-ante legality review of decrees. In one of the most controversial cases, the Office forced the government to adjust a supreme decree that granted wide enforcement power to the military during the pandemic.⁴³ The Comptroller-General ruled that the Government was not allowed to grant new powers to administrative bodies by decree without further legislative authorization, and that the decree could not be interpreted as shifting Armed Forces' subordination to the civil authorities.

50. However, an important limitation in the Office's constitutional role resides in the fact that most public regulations enacted by the Ministry of Health have taken the legal form of exempted resolutions, which are not under the mandatory, ex-ante control of the Office of the Comptroller-General (see Part II above). As will be seen in Part IV.A below, some of the most intrusive measures have been taken by the Government through these 'exempted resolutions', which amount to more than a 100 during 2020. However, it is worth mentioning that exempted resolutions are the legal instrument regularly used by the Ministry of Health to take public health measures—this is not an ad hoc strategy based exclusively on Covid-19 considerations. Also, the Government does not decide on whether an administrative measure is exempted or not. Rules on exemption to the ex-ante legality review are set by legislation and the Office of the Comptroller-General itself. Finally, the Comptroller-General's scrutiny can be demanding, substantive, and time-consuming, so it is

politically consequential whether an administrative regulation is subject to legality review or not.

IV. Public Health Measures, Enforcement and Compliance

A. Public health measures

51. The public health measures adopted by the Chilean Government have relied heavily on pre-existing legislation. As noted in Part II.B below, no new general piece of public health legislation was enacted to respond to the pandemic. The measures adopted were based mostly on the Sanitary Code 1967, and were specified through administrative regulation.

1. Individual mobility restrictions on citizens (stay-at-home, curfews, etc)

52. Mobility restrictions in Chile were imposed by exempted resolutions of the Ministry of Health. The first in Chile were announced on 20 March 2020. They consisted of a general quarantine of 14 days and applied only to the Eastern Island by Exempted Resolution 194 of the Ministry of Health. A week later further restrictions were introduced consisting of curfew between 10pm–5am across the entire country and general quarantine measures in seven out of 32 communes in Santiago and other selected communes in other regions,⁴⁴ formalized in Exempted Resolution 215 of the Ministry of Health. Thereafter, mobility restrictions were highly variable, as the Ministry decided day-by-day if the restrictions would be extended to new communes. The Government called its policy ‘dynamic quarantines’, reflecting the attitude of avoiding restrictions of economic activity as much as possible. Each ministerial resolution contained the specific regulations applied to the respective general ‘quarantine’, with very little variation. But the resolutions became increasingly complex and detailed as the pandemic spread. Typically, the initial resolutions provided that all the residents in defined communes must stay at home for a renewable seven-day period. The only exceptions admitted were those indicated by instructions issued by the Ministry of Interior and Public Security about travel exemptions (*permisos de desplazamiento*) with no discernible legal form (discussed at Part II.D above).⁴⁵ This guidance required people to obtain a permit from the police (*Carabineros de Chile*) remotely or in person, to carry out activities such as attending an appointment with a doctor (24 hours); essential shopping (4 hours); and taking a pet outdoors (30 minutes). The only stipulation about enforcement in the resolutions was a generic reference to the sanctions contained in the Sanitary Code 1967 and the Penal Code 1874, which involve fines and prison sentences, respectively.

53. This strategy of ‘dynamic quarantines’ seemed to be working well during the first weeks of the pandemic. For instance, preliminary data showed that they reduced transmission by 30%.⁴⁶ In fact, in late April 2020 the government even announced a policy of ‘safe return’ as Covid-19 figures seemed low and stable.⁴⁷ This did not entail the promulgation of new decrees or resolutions. In May, however, the picture changed dramatically, and figures soared. Reacting to increasing public pressure and rising figures, on 13 May 2020 the government announced a shift from ‘dynamic quarantines’ affecting specific communes to a general complete quarantine across the whole city of Santiago and thereafter mobility restrictions were extended to practically the whole country until mid-August.⁴⁸ The Ministry of Health introduced this broader quarantine by Exempted Resolution 347. At this point, new resolutions with similar, but not identical, rules were published every day, indicating whether a commune was in or out of the regime of restrictive measures.

54. After the controversial former Minister of Health, Jaime Mañalich, stepped down in June 2020, the government adopted a new approach to mobility restriction measures. Mañalich was the target of severe criticism from opposition parties for lack of dialogue and for confusion regarding Covid-19 death figures.⁴⁹ Under a new Minister of Health, on 25 July, the Ministry published Exempted Resolution 591, which established the ‘step-by-step’ five stage-policy in relation to public health measures. In stage one, there would be a ‘full quarantine’, ie a strict stay-at-home order with the only exemptions being basic shopping and essential work provided for in the updated version of Ministry of Interior and Public Security guidance.⁵⁰ In stage two, the restrictive measures would be in place only during weekends, while in stages three, four, and five, there would be no restrictive mobility measures. However, they did include a variety of restrictions on gatherings, events, the opening of facilities, and use of face coverings (see Part IV.A.3 and Part IV.A.4 below). Decisions about which stage applies to each commune was defined by an ‘exempted resolution’ published weekly by the Ministry of Health. This framework represented an improvement as it set out a more stable framework of rules in the country. These are the rules currently in force at time of writing.

55. In addition to stay-at-home measures, since March 2020 ‘exempted resolutions’ have also provided for curfews from 10pm–5am. In later months, the curfew has been slightly relaxed and from November onwards it has been in place between midnight to 5am in most of the country. Another restriction was that people over 80 years old—later reduced to over 75—were under absolute confinement from March 2020, with almost no exemptions, although this was somewhat relaxed in the following months. In fact, from September 2020 people over 75 years old were under the same rules as the rest of the population. After the implementation of the ‘step-by-step’ policy, restrictions to the mobility of children and adolescents were also slowly relaxed as they were allowed outdoors for short periods, under parental supervision, after obtaining a permit from the police. Previously, children had not been exempted from the stay-at-home measures.

2. Restrictions on international and internal travel

56. Restrictions on international travel were imposed by Exempted Resolution 180, on 17 March 2020. This regulation required passengers arriving from Iran, China, Germany, France, Spain, South Korea, and Japan to self-isolate upon arrival in Chile for a period of 14 days. This was progressively extended to new countries such as Argentina, Bolivia, and Peru by later resolutions. Similarly, on 16 March, Supreme Decree 102, of the Ministry of Interior and Public Security, provided that from 19 March onwards, for five days, all borders would be closed for the transit of ‘foreigners’ into national territory.⁵¹ Chileans and foreigners with regular residence in the country were exempted from this restriction. This decree has been extended on a weekly basis since April 2020. Thus, these measures were adopted by an administrative act of higher legal status than exempted resolutions because supreme decrees are issued by the President of the Republic while resolutions are issued by ministers, (as discussed at Part II.C above). On 12 November 2020, in the context of increasing relaxation of mobility restriction measures, the Government modified Supreme Decree 102 to allow transit of foreigners into national territory exclusively through Arturo Merino Benítez Airport, the main international airport in Chile.⁵²

57. There were specific measures restraining travel between areas within the country. During the pandemic exempted resolutions of the Ministry of Health have imposed ‘sanitary cordons’ applicable to specific communes or provinces.⁵³ The only exceptions to these restrictions applied to the movement of people whose work was indispensable to the supply of provisions in the zone, the delivery of critical services—which remained unspecified—, and sanitary services. Since late March, exempted resolutions also prohibited people from

visiting their second home, which further restricted mobility within the country.⁵⁴ Therefore, mobility among regions of Chile has been severely affected.

3. Limitations on public and private gatherings and events

58. Public gatherings were restricted even before the first mobility restrictions were announced. On 17 March 2020, Exempted Resolution 180 prohibited public events with more than 200 people for two weeks. On 25 March 2020, by Exempted Resolution 203, the prohibition was extended to public events with more than 50 people for an indefinite period of time. Once mobility restrictions were extended all over the country (see Part IV.A.1 above), these measures did not exhibit much change.

59. Once the new 'step-by-step' policy was introduced by Exempted Resolution 591 in July, the rules became more complex, varying the limitations depending on the stage a commune was classified as being in. In stage one, all gatherings were prohibited using broad language, including 'social and recreational activities' and 'sport activities and events'. But at the following stages, rules were relaxed depending on the type of activity (either 'social and recreational' or 'sports') and the type of venue (outdoors or indoors). For instance, initially, in stage three social and recreational gatherings were limited to 50 individuals indoors and 100 outdoors, while in stage four, social and recreational gatherings were extended to 100 and 200 individuals, respectively. Thus, harsher restrictions were imposed on indoor activities.

4. Closure of premises and facilities (eg schools, shops, services, parks, churches, sport facilities)

60. Activities in nurseries and schools were suspended on 17 March 2020 by Exempted Resolution 180, which was among the first measures adopted by authorities. This measure was to last two weeks but was extended by later resolutions.⁵⁵ It was explicitly provided that the operation of educational activities could continue only in a remote manner. Under the 'step-by-step' scheme, Exemption Resolution 591 provided that the Ministry of Education could lift the restrictions to individual schools after a sanitary assessment.⁵⁶ During the first months of the policy, despite increasing interest in opening more schools from the Ministry of Education, few schools asked for the lifting of restrictions. Only in October, application figures rose to approximately 1,014 requests, yet most educational activity continues online.⁵⁷

61. From 20 March 2020 onwards, the Ministry of Health ordered the closure of cinemas, theatres, pubs, discotheques, cabarets, nightclubs, gyms open to the public, and analogous venues. Restaurants were also prohibited, with the exception of the selling of take-away food.⁵⁸ In July, under the 'step-by-step' policy, further nuance was introduced. According to this framework, restrictions would vary depending on the stage in which a facility was located.⁵⁹ In stages one and two, the full prohibition applied. In stage three, restaurants, cafes, and analogous venues were allowed to operate, but in open spaces only, at up to 25% of their capacity or keeping two meters of distance among the tables. In stage four, cinemas, theatres, and analogous venues could operate, without food and drinks, at up to 50% of capacity, and keeping one meter of distance between individuals. Gyms were also allowed to open under strict rules on capacity limits and distancing with no use of changing rooms. In stage five, rules for the operation of cinemas and theatres, restaurants and cafes, pubs, discotheques, and gyms were further relaxed allowing for larger capacity and more activities.

5. Physical distancing

62. Although there was official guidance in the beginning of the pandemic recommending physical distancing of one meter, only in July 2020 did Exempted Resolution 591 introduce the rule as legally mandatory. This regulation accepted the following five exceptions: people living in the same household; people on public transport; people who cannot keep distance because of the nature of their work; people doing activities of a nature that impede complying with the rule; and when there is a physical barrier between people.⁶⁰

6. Use of face coverings and personal protective equipment (PPE)

63. The mandatory usage of face coverings was initially instituted by local governments (municipalities), not the central government. As there are 346 municipalities in the country, this was a highly decentralized policy with each city setting out its own rules. For example, the Municipality of Viña del Mar, in the region of Valparaiso published an Ordinance making compulsory the use of face coverings in public spaces on the 25 May 2020. The fine for infringing this order was up to 150,000 Chilean pesos (approximately USD \$200)⁶¹.

64. Later, in July 2020, Exempted Resolution 591 introduced a centralized and more comprehensive regulation of face coverings. This regulation made it mandatory to use face coverings on public transport, in closed premises whatever the nature of the space or the activities carried out therein, and in the city-streets. The resolution also defined face covering as 'any piece that covers nose and mouth to impede the spread of the virus, either handcrafted or industrially made'.⁶²

7. Isolation of infected individuals and quarantine of individuals suspected of infection

65. Exempted Resolution 203, published on 25 March 2020, introduced the first comprehensive regulation of 'isolation or quarantine of determined persons' as opposed to a focus on 'locations'.⁶³ The isolation or quarantine for 14 days applied to persons with a positive test, persons that took the test and were awaiting the results, and those who had been in close contact with infected people. This latter category was defined as people who were in contact with an infected person and (a) had face-to-face contact for more than a minute with less than one metre distance between them; (b) shared a closed space for two hours or more; (c) stayed overnight together; or (d) commuted in less than one metre proximity.

66. The resolution also ordered that people who breached the aforementioned rules would be forcibly moved to special accommodations to comply with the isolation or quarantine, together with the application of Sanitary Code 1967 and Penal Code 1874 sanctions.⁶⁴ The police, military personnel, or ministry of health inspectors, with no need of further judicial authorization, implemented these orders.

67. In July 2020, Exempted Resolution 591 introduced a more detailed framework defining and distinguishing asymptomatic cases, suspected cases, and probable cases. Each of these situations has its own rules.⁶⁵ For instance, a person who exhibits symptoms must isolate for 11 days from the date symptoms began, while an asymptomatic person must isolate for 11 days from the they took a PCR test. The resolution also listed the Covid-19 symptoms that would be taken as a basis for classifying cases and, eventually, placing persons in mandatory isolation. Among the listed symptoms, the following were mentioned: cough, respiratory distress, chest pain, sore throat, muscle pain, chills, headache, diarrhoea, smell blindness, and loss of taste.

8. Testing, treatment, and vaccination

68. Positive PCR tests are officially recognized as the key factor for ordering the isolation of individuals. Exempted Resolution 591 says that persons diagnosed with Covid-19 through a PCR test shall quarantine for 11 days (originally it was for 14 days).⁶⁶ This resolution also sets the maximum price for PCR tests within the country at 25,000 Chilean pesos (USD \$35).⁶⁷ This is fully refunded for users of the state health insurance system (*Fondo Nacional de Salud* or *FONASA*) which corresponds to around 80% of the population.

69. Between March and December 2020, a medical prescription was generally required for PCR tests. The justification for this was that medical prescription facilitated information about new cases and was centralized, as the doctors had a duty to electronically report to the Ministry of Health. On 10 December, however, the Ministry of Health relaxed the policy allowing people to take PCR tests without a medical prescription in order to facilitate Covid-19 detection.⁶⁸ This was done by a new instruction issued by the Undersecretary of Health Networks that 'reiterated' that it was possible to take a PCR test without medical prescription.⁶⁹ A week later, the same authority insisted that 'it was always recommended' to consult to a doctor in case of Covid-19 symptoms.⁷⁰

70. Article 32 of the Sanitary Code 1967 states that the President of the Republic, after a proposal by the Director General of Health, may declare mandatory vaccination of the population against communicable diseases for which there are effective immunization procedures. The specific list of diseases for which vaccination is mandatory in Chile is defined by Exempted Decree 6 of the Ministry of Health.⁷¹ Thus far, this decree does not include mandatory vaccination for Covid-19. But it is worth mentioning that the Supreme Court has already supported mandatory vaccination in cases heard in the last decade.⁷² In these cases, parents refused to vaccinate their children, and hospital directors brought them to court to impose the vaccination. The Supreme Court decisions were based on the right to life, the right to health, and the United Nations Convention on the Rights of the Child.

9. Contact tracing procedures

71. Rules about contact tracing are contained in Exempted Resolution 591. Section 10 states that 'persons who have been in close contact with a person diagnosed with Covid-19 must quarantine for 14 days counted from the last day of contact'. This section adds that a negative PCR test 'does not exempt the person from total compliance with the quarantine'. Moreover, according to this section of, a contact is considered 'close' when (i) individuals were face-to-face for more than 15 minutes, at a distance shorter than one meter, and without face covering; (ii) individuals were indoors for two hours or more, in places such as offices, workplaces, and schools, without face coverings; (iii) individuals lived together or stayed overnight together; and (iv) individuals commuted together at a proximity of less than one meter, without face coverings.

72. In April, during the initial months of the pandemic, then-Minister of Health Jaime Mañalich announced, but never implemented, a sanitary pass to people who had recovered from Covid-19.⁷³ This pass would waive every mobility restriction on these people. The medical community criticized the measure cautioning that there was no scientific evidence supporting it.⁷⁴ Eventually, the Minister of Health decided to call off the implementation of the pass given the risk of discrimination against the people holding it.⁷⁵

10. Measures in long-term care facilities or homes for the elderly, restrictions of visitors etc.

73. Some of the first measures taken by the government concerned residential care for the elderly. Exempted Resolution 180, published on 17 March 2020, prohibited visits to nursing homes, and suspended all activities in social centres for the elderly⁷⁶. These measures were extended by subsequent ministerial resolutions, including Exempted Resolution 591, which included the same measures in the general framework it provided.⁷⁷

B. Enforcement and Compliance

1. Enforcement

74. Enforcement was based on pre-existing Sanitary Code 1967 rules that allow the Ministry of Health to apply fines for behaviour that put public health at risk. Additionally, the government has widely used the Penal Code 1874 as an enforcement tool. This strategy has a high symbolic effect, because in practice a significant number of cases are eventually dismissed by the courts.

75. The police (*Carabineros de Chile*) have performed the primary enforcement function in the country. But the military has also played an important role, as the ‘Declaration of Constitutional Exception’ enabled the government to deploy military personnel on the streets⁷⁸. The military has intervened in policing the mobility restriction rules as well as enforcing sanitary cordons across the country.⁷⁹ This has provided important relief to the police, whose services were overstretched by the social unrest that took place during the final months of 2019. To a lesser degree, inspectors from the Ministry of Health and Municipalities also collaborated in enforcement activities.

76. The enforcement strategy in the country includes fines and prison sentences. According to the Article 174 of the Sanitary Code 1967, infringement of the Code, regulations, or resolutions could be punished with fines between 5,000 to 5 million Chilean pesos (USD \$7-7,000)⁸⁰. These are applied by the Ministry of Health and can be judicially reviewed by the courts. The Ministry of Health has announced extremely broad guidelines to apply fines according to the gravity of the infringement⁸¹. Undoubtedly the heavier punishment for infringement of public health rules is prison, which can be imposed in certain cases according to the Penal Code 1874. Article 318 of the Penal Code 1874 provides that whoever puts public health at risk by infringement of hygiene and health rules at times of catastrophe, epidemic, or contagion, shall be punished with prison for 2-36 months or be fined.⁸²

77. According to police figures, between 18 March and 21 September 2020, 281,176 individuals were detained by the police for infringements of public health regulations, while 6,335 individuals were formally prosecuted and arrested for intentionally spreading Covid-19 as they were aware of being infected.⁸³

78. Nevertheless, very few cases resulted in actual imprisonment of people charged with these public health crimes, given that Public Defense Services have deployed an effective defense strategy in these cases. The main target of public defenders is questioning the particularly broad language of Article 318 of the Penal Code 1874. Practitioners report that very often criminal courts dismiss cases on these grounds, although the Supreme Court has not yet ruled on these cases. Yet the Constitutional Tribunal—a specialized tribunal exclusively in charge of ruling on the constitutionality of laws—has already heard some challenges to this legal provision, as noted in Part IV.B below.

79. In fact, echoing criticisms of public defenders, on 11 September 2020 the Constitutional Tribunal announced its decision to uphold an application to declare Article 318 of the Penal Code 1874 inapplicable for infringing the principle of legality, as it does not provide enough standards for judicial determination.⁸⁴ The detailed reasoning of the Tribunal is not available yet as the actual ruling is still unpublished at time of writing. This is due to the fact that the Tribunal sometimes issues a press brief announcing the decision without publishing the actual judicial decision containing its reasoning.⁸⁵

2. Compliance

80. Although conclusive studies have not been conducted so far, there is some evidence that compliance with health measures has been fragile at times, especially due to the extensive quarantines imposed in some regions. The data from the two more prestigious mobility reports seem to reveal important rises in commuting despite quarantines being in force.⁸⁶ The violation of mobility restriction measures was especially concerning during the first six months. For instance, in Santiago, between March and July 2020, Ministry of Health inspectors fined more than 300 companies for forcing their employees to continue working in spite of their businesses not falling within the category of essential services, which were the only industries allowed to function during quarantines.⁸⁷ Similarly, in late June, the National Congress passed Law No 21,240 that modified the Penal Code 1874 to punish the violation of isolation and other preventive measures taken by the authority, in case of a pandemic.⁸⁸ This law introduced a new Article 318ter, which punishes ‘whoever, knowingly and having the authority to arrange the work of a subordinate, orders him to attend the place of performance of his work when it is different from his home or residence, and the worker is in quarantine or mandatory sanitary isolation decreed by the sanitary Authority’. This illustrates that, as levels of compliance were perceived as low, new legislation was needed.

V. Social and Employment Protection Measures

A. Social protection measures

81. A clear trend that emerges from different aspects of the Chilean Government’s response to the Covid-19 crisis is political controversy over the executive’s social assistance response to the crisis. The opposition, which enjoys a majority in Congress, has claimed that it has been slow and insufficient. Pre-existing tensions over social policy reform between the executive and the opposition (see Part III.A above) have further complicated the relationships between the executive and Congress.⁸⁹ At times, the executive has lost control of the legislative process—it has suffered landslide government defeats over social and employment protection measures, and key private members’ bills on this subject matter have gained precedence over governmental bills. The executive struck back by threatening constitutional litigation.

82. In the Latin American context, Chile has implemented one of the largest fiscal support packages to tackle the economic crisis caused by the pandemic.⁹⁰ Generally speaking, the Chilean Government created new social protection programmes to respond to the pandemic. For instance, two of the main tools were the Emergency Family Income (*Ingreso Familiar de Emergencia*, IFE) and the policy of pensions withdrawals. Both were introduced through fresh legislation.

83. As the second wave was sweeping through Chile (see Part IV.A above), the Government announced in March 2021 a new social protection package. Various bills have been passed before Congress to respond to the economic consequences of a new lockdown.⁹¹

1. Social assistance

84. The main social assistance programme introduced by the Government is the Emergency Family Income. This programme was initially set out in Law 21,230,⁹² published in May 2020, but has been subsequently extended and modified by Law 21,243 and Law 21,251.⁹³ Due to having to introduce tougher restrictions due to an increase in infections, during 2021 the Government extended the programme a number of times.

85. The IFE consists of a conditional cash transfer for vulnerable households, that is, mainly but not exclusively, those that depend on informal work for their livelihood. Between January and March 2021, informal employment reached 26.7% (27.6% in the case of women and 26.1% in the case of men).⁹⁴ Originally, the programme involved three monthly payments to households belonging to the bottom 60% most vulnerable households in the country according to an ad hoc emergency socio-economic criterion, and whose members are not in receipt of any other social benefits set out in the law. The amount of the money transferred depended on the number of household members and decreased in the second and third transfers. After the third payment the recipients were cut off. To determine vulnerability, the Ministry of Social Development manages a Social Registry of Households which is based on information about income, services, and goods enjoyed by family members. Recipients must fill in a form, then the government agencies compare the information with their own databases.

86. The following table summarises the amount of each of the transfers, according to the type of family requesting the assistance, as set out in the original scheme:

	Amount of the extraordinary transfer		
	First transfer	Second transfer	Third transfer
Number of family members			
3 member-household	USD \$268	USD \$228	USD \$188
6 member-household	USD \$474	USD \$403	USD \$332
10 member-household	USD \$679	USD \$577	USD \$475

87. The original Law 21,230 also increased the transfers according to further need-based criteria such as households with elderly family members, unemployed family members, or members granted a disability pension.

88. In June 2020, Congress passed Law 21,243 to extend and increase IFE transfers. This piece of legislation included a fourth payment, and crucially increased the transfers in the second and third payments. By contrast with the original scheme, the amount of the second and third payments would now increase rather than decrease. For instance, under the new scheme, in a six member-household the second and third payments amounted to USD \$627 each, instead of USD \$403 and USD \$332 respectively under the original scheme. The reason for the change was that the amounts in the previous scheme were deemed insufficient considering the impact and duration of the crisis. The law also introduced additional changes to extend the benefits to families that had been excluded under the original scheme, benefiting 80% of the most vulnerable families. Furthermore, the law delegated powers to the Ministry of Finance to provide by means of decree fifth and sixth payments. The law gave discretion to the Minister to take into account public health

conditions, the labour market, and regional realities associated with the impact of the pandemic. Eventually, the last IFE payment took place in November 2021.

89. Law 21,252 introduced another conditional transfer programme, this time to support middle class families' income.⁹⁵ The beneficiaries of this scheme were people (i) earning between USD \$545 and USD \$2,000; (ii) who had suffered a 30% income reduction in 2020 compared to the previous year; and (iii) were subject to employment protection schemes (see Part V.B below). This law was published in August 2020 and consisted in two main measures. On the one hand, the law provided for one or more transfers of USD \$680 to the beneficiaries. On the other, it provided a Government loan of up to 70% of the difference between the 2019 monthly income and the current monthly income, capped at USD \$886. Beneficiaries could apply for this loan up to three times, and had to pay it back in four instalments, at a zero-rate interest or by way of deductions in their annual income tax returns.

90. Law 21,242, published in June 2020 and later modified by Law 21,252, targeted self-employed workers whose income was impacted by the pandemic.⁹⁶ This law provided both a loan and a transfer. The loan benefited self-employed workers whose income was reduced by at least 30% compared to the previous year and amounted to up to three USD \$886 monthly payments. The beneficiaries have to pay this back in four instalments at a zero interest rate or by deductions in their annual income tax returns. Furthermore, the law established a cash transfer of up to USD \$136 for self-employed workers whose income was less than USD \$683.

91. In December 2020, with cross-party support, Congress passed Law 21,288, which created the Emergency Temporary Fund (*Fondo de Emergencia Transitorio*).⁹⁷ This law executes an agreement between the Ministry of Finance and the Chamber's Finance committee, which sets out an emergency strategy to protect family incomes and to provide for economic and employment stimulus packages.⁹⁸ The law creates a flexible and transitory medium-term fiscal programme which enables the executive to spend up to USD \$12 billion until 30 June 2022. The executive can allocate this money towards a fixed set of 18 overarching objectives. A significant amount of this money will be spent in economic packages to foster market reactivation and job creation by various means. Insofar as social assistance measures are concerned, Law 21,288 enables the executive to allocate this money as direct cash transfers to families, to fund the local authorities' assistance programmes to support the most vulnerable people, and to third sector organizations. These funds can also increase spending in healthcare, including mental health, protect jobs, and support the self-employed and workers with childcare responsibilities.

92. Law 21,288 provides only a framework, and therefore leaves considerable room for executive discretion. The executive can allocate these funds to any social policy programme contained in the 2020, 2021, and 2022 budgets, and/or in other pieces of primary legislation. Whilst Law 21,288 provides some broad guidelines on spending priorities, it is for the executive to finetune them, to allocate funding, and to extend and withdraw programmes and benefits, including the making of more fine-grained regulations regarding the operation of the fund.

93. To counterbalance the executive's discretion, there are fixed review points built into Law 21,288. The executive shall lay before the Chamber's Finance committee, within five days, each decree and resolution made in execution of the fund. Furthermore, Article 4 of Law 21,288 imposes a statutory duty on the Ministry of Finance to report on a monthly basis to the Joint Committee on the Budget, as well as to the Chamber and the Senate's Finance committees, on the operation of the fund. Law 21,288, therefore, provides an ad hoc political accountability mechanism for the spending of the fund. From a legal

accountability point of view, it is for the Office of the Comptroller-General to review the legality of executive decrees concerning the fund, the general operation of the fund, and to audit its spending.

94. In March 2021, the Government announced IFE Covid, a programme that seeks to support socio-economically vulnerable families residing in communes under phase 1 (subject to mobility restrictions during the entire week) or phase 2 (only during the weekend) according to the step-by-step policy (see Part IV.A.1 above).⁹⁹ The amount of the transfer depends on several factors, such as the number of family members, whether the family resides in a phase 1 or 2 area, and the duration of the restrictions.¹⁰⁰ For example, a three member-family would receive USD \$318 or USD \$408 depending on whether they remain less or more than four weeks under phase 1. The purpose of this policy is to provide support to extremely vulnerable families dependent upon informal work and therefore losing their source of income during lockdowns.

95. In July 2020, Congress passed Law 21,247 to support those with parental leave and childcare responsibilities, amid heated debates with parliamentarians.¹⁰¹ Deputies had introduced and approved a bill that extended the parental leave during the pandemic, although the Constitution reserved this matter for presidential initiative, that is, only the President can initiate legislative discussion on these matters (see Part I above). During the first reading in the revising (upper) chamber, the President of the Senate admitted the bill to the next stage. In a polemical intervention, she declared that ‘I would rather commit a constitutional sacrilege and be dismissed than to reject an urgent demand from mothers’.¹⁰² This intervention took place as tensions between the executive and Congress grew over parliamentarians’ criticism of a slow and insufficient presidential social assistance, and the executive’s criticism of a ‘*de facto* parliamentarism’.¹⁰³

96. Law 21,247 created the ‘Emergency Parental Leave’ and has two specific purposes. On the one hand, it extends for a further 30 days parental leave for parents whose leave ended during the constitutional state of catastrophe. This additional leave can be renewed twice for a 30 day-period. On the other hand, the law entitles workers to suspend employment contracts for childcare reasons, and to get an unemployment subsidy, as set out in Law 21,227,¹⁰⁴ while schools and other educational institutions remain closed (see Part V.B below).

97. When the worst point of the first wave of the pandemic was in sight, the Government implemented a quick scheme for in-kind assistance (Food for Chile programme). In May 2020, the Government started to distribute food and hygiene products boxes in the communes under lockdown.¹⁰⁵ According to the programme, middle-class and poor families across the country were entitled to a box containing beans, pasta, cooking oil, canned food, flour, soap, and detergent. As this programme was funded through extraordinary funds available as a result of the state of catastrophe, no fresh legislation was needed. The implementation of this programme entailed an enormous challenge for the administration considering the amount of the population to be reached in an extremely short period of time. The central Government rapidly signed contracts with food suppliers, and the municipalities delivered the boxes to the families. The municipalities were only implementers as they generally lack initiative over social security matters. As standard public procurements rules were exempted, concerns over fraud arose. Indeed, the Comptroller-General Office has been monitoring the entire process, finding multiple instances of irregularities.¹⁰⁶

98. There has been no legislation on housing and suspension of evictions in Chile during the pandemic. Deputies introduced a bill on this matter, yet it attracted significant criticism from the legal profession, and it has not made progress in the legislative process.¹⁰⁷ Critics argued that suspension of evictions infringed the constitutional right to property. However, it has been argued that the suspension of civil procedures (see Part III.C above) has entailed the de facto suspension of evictions in the country in a manner comparable to other jurisdictions in terms of its practical effects.¹⁰⁸

99. Early on, in March 2020, the Government announced that it had reached a voluntary deal with the electricity distribution companies.¹⁰⁹ The primary components of the deal consisted in suspending service cuts due to outstanding bills; and deferring unpaid balances generated during the state of catastrophe for up to 12 months from the end of it, without penalties or interest rates. However, this voluntary deal was deemed insufficient by parliamentarians, who introduced multiple bills on this matter. Thus, eventually, Law 21,249 was passed despite the Government's opposition.¹¹⁰ In fact, Congress had to force the approval of this bill by a two-thirds majority vote in each house, after the President attempted to veto it arguing that legislation was unnecessary as a voluntary deal was struck with the companies.¹¹¹ Furthermore, the President argued that during the legislative debate Congress had introduced provisions that breached equality in the distribution of public duties and burdens, and the right to property since the public utility companies were denied an effective tool to prompt the payment outstanding bills without compensation.

100. Once published, Law 21,249 provided a number of support measures in relation to utilities such as water supply, electricity, and gas. The law prohibits utility companies from cutting supply for a period of three months from the date of its publication to (i) residential users; (ii) health centers and hospitals; (iii) prisons; (iv) youth centers; (v) care facilities for the elderly; (vi) fire departments; (vii) non-profit organizations; and (viii) small businesses. This law also permits deferrals of unpaid balances for up to 12 months. Later, in December 2020, the Government passed Law 21,301, which extended from three to nine months the period covered by the support measures of the original scheme.¹¹²

101. Law 21,290, published in December 2020, contains similar provisions concerning private educational institutions.¹¹³ It also originated in a private member bill. This law states that private educational institutions, including those that receive public funds, must elaborate plans to ensure continuity in the educational process. There is an emphasis on measures to tackle the economic consequences of the pandemic, such as rescheduling pending payments for families facing economic hardship due to the pandemic. The primary component of this law is a rule that states that students benefiting from these plans would be guaranteed a place in the educational institution for the 2021 academic year. As a result, it is forbidden for these institutions to cancel or reject student enrolment in spite of overdue payments.

2. Social insurance

102. Although there have been various clashes between the executive and Congress regarding social and economic assistance packages, the authorization to withdraw money from individual pensions savings accounts ('pensions accounts') has been the most politically controversial one.¹¹⁴ Congress has authorised three times, in July 2020, December 2020, and April 2021, members of the Chilean private pensions scheme to withdraw up to 10% of their pension funds or their entire funds if they amounted to less than USD \$1,350. Economists opposed this measure.¹¹⁵ As a result, a total of USD \$50 billion has been withdrawn, and almost 3.9 million people exhausted their pensions accounts.¹¹⁶ Withdrawal debates were set against the highly polarised pre-existing debate about the reform of the Chilean pensions system.¹¹⁷ On December 2021, after a long debate

and in the middle of a highly contested presidential campaign, the Chamber of Deputies rejected a fourth withdrawal bill.

103. The authorization to withdraw up to 10% of pensions accounts was an initiative of the opposition parties in Congress. The opposition denounced the Government's cash transfers (see IFE at Part V.A.1 above) as benefiting only those facing severe poverty, in circumstances where millions of people were facing economic hardship during the pandemic. They argued that, amid the Government's reluctance to support these people, Congress should authorise them to make ends meet by withdrawing money from their pensions accounts.

104. In June 2020, opposition senators introduced a constitutional amendment to authorize the withdrawal. Although social security matters can be regulated on a statutory footing, Article 65 of the Constitution provides that only the President can introduce statutory bills on this subject matter. To circumvent this provision, senators introduced their pensions withdrawal bill as a constitutional amendment, subject to a super-majoritarian approval requirement. Eventually, the bill gained cross-party support and the Government suffered a landmark defeat. Eventually, the President refrained both from vetoing the bill and from challenging it before the Constitutional Tribunal, and Law 21,248 was published by the end of July 2020.¹¹⁸

105. Law 21,248 authorises the withdrawal of up to 10% of pensions accounts, with a cap of USD \$5,800, and a minimal withdrawal of USD \$1,350. Those who had less than USD \$1,350 in their individual pensions savings account were authorised to withdraw the full amount of their savings. No tax was to be applied to withdrawals, and protection was given from embargo and similar measures, with the exception of applications regarding alimony and child support (see Part III.C above).

106. By the end of August 2020, opposition deputies introduced a new constitutional amendment to authorize a second 10% withdrawal. Despite the Government's fierce opposition, the bill was passed by a landslide in the Chamber on 10 November 2020. By mid-November 2020, facing the prospect of another landslide defeat at the Senate, the Government decided to strike back. On the one hand, to prevent the political costs of a new defeat, it introduced its own 10% withdrawal bill, enabling the Government to regain control over the legislative process. Eventually, Law 21,295 was passed in December 2020, authorising a second 10% withdrawal.¹¹⁹ The rules governing the withdrawal are similar to those of the first withdrawal, in terms of beneficiaries, capped amount, minimal withdrawal, and procedure to withdraw. Nevertheless, the Government introduced two relevant changes. Firstly, it prevented parliamentarians, the President, Ministers, and other top government officers, as well as some senior political advisors from withdrawing the 10%. Secondly, to discourage those earning the highest salaries from withdrawing, tax relief was capped to those earning no more than USD \$25,000 a year.

107. The Government also sought to prevent parliamentarians from passing further constitutional amendments authorising new withdrawals on pensions accounts. Thus, it challenged before the Constitutional Tribunal three bills introduced by parliamentarians. The Court split five against five, yet the Court's president exercised her deciding vote and endorsed the Government's position. In an unprecedented and controversial judgment, the Court held that these 'constitutional amendments' were 'unconstitutional'.¹²⁰ Whilst the Court's competence to review the formal passage of a constitutional amendment had a clear constitutional basis, the majority endorsed the doctrine of unconstitutional constitutional

amendments,¹²¹ and claimed that the Court could review the substance of constitutional amendments.

108. This precedent, however, did not discourage Congress from passing a third withdrawal constitutional amendment.¹²² This had the same basic features of the previous two schemes, but it contained a new controversial component as it authorised persons to withdraw funds under life annuities contracts with insurance companies. This new law was strongly criticised by insurance companies, most of them United States-based, because in these contracts there was no savings account in legal and economic terms. They claimed that their property rights were expropriated by Law 21,330, brought suits to the national courts and threatened to bring Chile to international investment tribunals.¹²³ Once again, the Government challenged the amendment before the Constitutional Tribunal reasonably expecting a new favourable decision. Yet, surprisingly, the Tribunal changed course and denied leave at permission stage.¹²⁴ A majority of the Tribunal argued this was not a constitutional but a political dispute between President and Congress over the economic and social response to Covid-19 which must be solved by legislative dialogue and not litigation.

109. The apparently final stage of this saga occurred on 6 December 2021 when the Chamber of Deputies rejected a constitutional amendment authorising a fourth withdrawal.¹²⁵ Although the public largely supported the proposal, Congress rejected it as a result of both political pressure coming from a contested presidential election and economic pressures coming from experts, including the Central Bank, who predicted catastrophic consequences if the bill was approved.

3. Tax relief and other social measures

110. A number of pieces of legislation have established tax relief and similar measures. First, Law 21,223, in April 2020, postponed the payment of road tax from April to June 2020 and allowed vehicle owners to pay it in two instalments.¹²⁶ Then, also in April 2020, Law 21,224 postponed the mandatory annual vehicles inspection to June 2020.¹²⁷ Thirdly, Law 21,225, in April 2020, imposed a tax relief for stamp duties due between 1 April and 30 September 2020.¹²⁸

111. A more complete piece of tax relief legislation was Law 21,256, published in September 2020.¹²⁹ Among other measures, it reduced income tax to small and medium-size enterprises from 25% to 10% for the years 2020, 2021, and 2022. Also, this law provided for the adaptation of VAT payments, and introduced further accelerated depreciation methods for companies.

112. Interestingly, this law also imposed a duty on both the Ministries of Finance and of Economy to set up a discussion roundtable with representatives of small and medium-size enterprises, including business associations, to assess the implementation of the Government's 'Emergency Plan for the Protection of Families' Income and Activation of the Economy and Employment, in the framework of fiscal convergence in the medium term'.

B. Employment protection measures

113. As will be seen in what follows, Chile's overarching approach in relation to employment protection has relied heavily on the suspension of employment contracts accompanied with an unsystematic array of subsidies targeting specific populations.¹³⁰ Most of the measures implemented have required new legislation, which ranges from remote working to contract suspensions. This approach has been deemed insufficient by the

opposition, which has insisted on the need for a basic universal income during the pandemic.¹³¹

1. Economic support for employers

114. A package of employment subsidies was granted by the National Service of Training and Employment (*Servicio Nacional de Capacitación y Empleo*, SENCE).¹³² This package seeks to promote the return of workers who have their employment contracts suspended and to incentivise the creation of new jobs, providing State funds to cover part of the salaries. Created under the umbrella of a previous employment protection programme,¹³³ this package contains two basic plans. On the one hand, the 'Return' plan consists of a subsidy for workers earning up to USD \$1,336 a month in companies that have lost 20% or more of their income and have suspended their employment contracts. The subsidy is for USD \$218 for up to six months, and USD \$273 for women, young workers between 18 and 24 years of age, and the disabled, for the same period. This financial subsidy is paid directly to the employer where the employer reactivates the employment contract of the suspended worker. The 'Hire' plan, on the other hand, consists of a subsidy for small and medium-size businesses that hire workers with a salary of up to USD \$1,336 a month. In the case of women, disabled people, men aged between 18 and 23 or older than 55, or persons who have a disability pension, the subsidy is slightly higher than for the rest of the beneficiaries. On September 2021, the Government sought to increase and expand the subsidy under the Hire Plan, which was renamed as 'Employment IFE'.¹³⁴

2. Worker protection from dismissal and other contractual protections

115. Law 21,227, published in April 2020, has been the main tool for employment protection in the country.¹³⁵ This law seeks to keep employment contracts in force during the pandemic and to facilitate workers' access to unemployment subsidy while their contracts are suspended. In particular, this law allows workers to withdraw their own unemployment funds if their contracts are suspended by an order of the authority (lockdown orders), by an agreement between employer and employee, or by a reduction of working hours also agreed between employer and employee. The distinctive aspect of this scheme is that there are no public funds involved as workers withdraw their own funds held in their individual unemployment insurance accounts. According to this law, during the period in which employment contracts are suspended, employers are under the duty to continue paying social security contributions to their workers. In case of partial suspension, which cannot exceed 50% of the agreed working hours, the worker can claim a proportional payment by their employer.

116. Importantly, Law 21,227 also establishes a form of protection dismissal for workers as it provides that during the state of catastrophe employers are not allowed to invoke the *force majeure* clause of Article 159(6) of the Labour Code to dismiss employees.¹³⁶ Although this clause does not absolutely prevent employers from dismissing their workers, it was relevant when published, as in March 2020 the Directorate for Labour ruled that the Labour Code allowed employers to invoke the pandemic to dismiss workers without compensation.¹³⁷ In contrast, the Labour Code establishes that economic dismissal requires compensation for the worker. This was a controversial ruling by the Directorate as it implied a significant reduction in legal protection for workers during the crisis.¹³⁸

117. Although keeping the original structure intact, this law has been adapted and expanded by several new pieces of legislation passed by Congress, such as Law 21,263 and Law 21,312, among others.¹³⁹

3. Other worker protection

118. As mentioned in Part V.B.1 above, the Government has implemented subsidies—the Return and Hire Plans, and Employment IFE—that seek to incentivise the hiring of workers from a vulnerable population, such as women, young workers, and persons with disabilities. As mentioned in Part V.A.1 above, the Government has also implemented a conditional cash transfer (IFE) targeting mainly those that depend on informal work for their livelihood.

4. Health and safety

119. Exempted Resolution 43,¹⁴⁰ of the Ministry of Health, regulates the step-by-step policy and provides for health and safety measures in the workplace. This exempted resolution replaced Exempted Resolution 591,¹⁴¹ which was in force during 2020 and was discussed in Part IV.A above. These regulations state that all spaces, surfaces, and elements regularly touched by workers and clients must be cleaned and disinfected at least once a day. It also states that working tools must be cleaned once a day and each time they are exchanged between employees. Lastly, this resolution indicates that cleaning and disinfection must follow the official Ministry of Health’s protocol.¹⁴²

120. Interpreting the Labour Code, the Directorate of Labour has ruled that non-compliance with Covid-19 health and safety measures may be considered a serious and imminent risk for the life and health of the workers which entitles workers to stop working without any sanction or retaliation.¹⁴³ Furthermore, the Directorate of Labour later also ruled that employers were allowed to require their staff to take PCR tests under the condition that they pay for them and apply them without discrimination.¹⁴⁴ The same doctrine was upheld by the Supreme Court in a case in which a worker complained against the requirement of PCR test in order to enter the premises of a mining company.¹⁴⁵

121. On June 2021, Congress passed Law 21,342 requiring companies to implement Covid-19 health and safety protocols in the workplace.¹⁴⁶ The law listed a number of measures including ‘testing infection according to norms and procedures determined by the authority’. It also established that companies cannot resume activities without a proper protocol and that companies cannot charge their staff for the health and safety equipment required by the protocols.

5. Activation

122. No other labour market policy interventions or ‘activation’ policies providing targeted support to unemployed workers have been found.

6. Social partners

123. The existing collective bargaining system in Chile is weak. According to the Organisation for Economic Co-operation and Development’s figures from 2015, the collective bargaining coverage rate in Chile was 10–20%,¹⁴⁷ but critics claim the figure could be even lower.¹⁴⁸ Moreover, collective bargaining is focused on individual enterprises as sectoral bargaining is exceptional.¹⁴⁹ At the beginning of the pandemic, the Government unsuccessfully attempted to pass a law that temporarily suspended collective bargaining during the emergency.¹⁵⁰ Expectedly, the unions strongly opposed this measure claiming that it infringed their constitutional right to collective bargaining.¹⁵¹

124. As mentioned in Part V.A.3 above, Law 21,233 imposes a duty to set up a periodic discussion roundtable with enterprises to monitor the implementation of reactivation policies.

7. Other legal measures

125. A special ‘protection’ subsidy was created to support workers who continue working and have care responsibilities in relation to children of two years old or younger and who have no access to nurseries.¹⁵² The support consists of up to three monthly payments amounting to USD \$273 for each child under the worker’s responsibility.

126. Law 21,220, published on 26 March 2020, amended the Labour Code to introduce a fully-fledged regulation on remote working.¹⁵³ Its passing was prompted by the pandemic. This law states that employers and employees can sign an addendum to their employment contract to incorporate a remote working regime. The law explicitly includes the right to disconnect, that is, the right to be able to disengage from work and refrain from engaging in work-related electronic communications.

VI. Human Rights and Vulnerable Groups

A. Civil liberties

127. As noted in Part II.A above, Chile declared a ‘constitutional state of catastrophe’ in March 2020, which empowered the Government to ‘restrict’ the freedoms of movement and of assembly. It has also been noted in Part III.A above that since October 2019 the country has experienced political unrest and ongoing public protest, which has sometimes been violent. This context has had a massive impact on civil liberties.

128. This situation of political instability has continued throughout the pandemic, although demonstrations have been considerably fewer than in 2019. As expected, Covid-19-related mobility restrictions have had a negative impact on freedom of assembly. The 2020 Annual Report of the National Institute of Human Rights explains that police responses to protest have discriminated against groups of people on political grounds. For instance, while protest demanding a more robust governmental response to economic hardship in deprived neighbourhoods has been harshly curtailed, the police have had a light-touch response to protest by truck owners. Furthermore, according to the report, the police have responded violently to protests by Mapuche indigenous activists (see Part VI.J below). There are also reports of unequal treatment of supporters and opponents of the new Constitution in the context of the October 2020 referendum (see Part III.D above). Such reports maintain that the police were unduly aggressive to the former and, it seemed, remarkably tolerant of the latter.¹⁵⁴

129. Freedom of religion (Article 19(6) of the Constitution) has also been interfered with by the restrictions imposed by the Government. Although generally the courts have shown extreme judicial deference (see Part III.C above),¹⁵⁵ in cases involving freedom of religion they have been more assertive. In July 2020, the Concepción Court of Appeals ruled that an administrative resolution banning religious ceremonies was unconstitutional.¹⁵⁶ The main argument was that, under the constitutional state of catastrophe, the authority could restrict constitutional rights, but not ban, withdraw, or suspend their exercise. Recently, the Supreme Court took a similar approach, mandating the Government to create a new special permit to attend Catholic mass during lockdowns.¹⁵⁷ Although Chile does not have a binding precedent, the Supreme Court has upheld this ruling in new cases.¹⁵⁸

B. Privacy

130. Privacy and personal data are protected by Article 19(4) of the Constitution. No fresh legislation has been enacted on this area during the pandemic. Nevertheless, it is worth mentioning that Law 20,584, which regulates the rights of patients, provides that medical records are sensitive data that generally cannot be accessed by third parties.¹⁵⁹ The Sanitary Code, on the other hand, provides wide-ranging powers to the health authority to

deal with a pandemic, arguably authorising access to personal data relevant for disease control (see Part II.B above). The data collected and used to deal with the pandemic has been public data. Private sector data, except for that produced by universities, have not been used by the authorities even though the Sanitary Code may authorise its use.¹⁶⁰ This legal uncertainty has been criticised by observers who argue that Chile needs robust regulation of data protection.¹⁶¹

131. During the pandemic, both the Comptroller-General Office and the judiciary prevented municipalities' access to clinical records of Covid-19 patients. The municipalities demand to access patients' sensitive data was denied by the Ministry of Health and some of them filed legal claims. In the first case, the Valparaíso Court of Appeals declared inadmissible a writ of protection filed by the Valparaíso Municipality against the Ministry of Health, arguing that this was a matter exclusively for the central Government.¹⁶² In the second case, the Ministry of Health requested the Comptroller-General Office to clarify the legal status of communications between the Ministry and the municipalities. Applying Law 20,584, the Comptroller-General Office ruled that municipalities were not allowed to manage sensitive data belonging to Covid-19 patients.¹⁶³

132. Lastly, it is worth mentioning that on 7 December 2020 the Council for Transparency published Exempted Resolution 304.¹⁶⁴ These regulations updated, in light of Covid-19, the 2011 recommendations on the use of personal data by public bodies.

C. Gender

133. The pandemic has had a particularly negative impact on women's rights, not least in terms of exposure to domestic violence and employment fragility. In this regard, the female participation rate in the labour force in Chile has dropped to 44.9% during 2020, far below the 58% achieved during 2019.¹⁶⁵ As noted in Part V.B above, most of the social assistance and employment measures have a gender component. In this section we focus on protection against violence. Early on, the Government announced that women facing domestic violence during lockdown would be exempted from requesting a special permit to escape domestic violence.¹⁶⁶ According to the Government, this would enable women to reach the police in spite of mobility restrictions. A more concrete measure to help women facing domestic violence is included in the Ministry of Women and Gender Equality's 'Contingency Plan for Care, Protection and Repair Against the Effects of Coronavirus'.¹⁶⁷ This plan has a special focus on domestic violence and includes a number of additional channels to report domestic abuse, such as telephone, Chat Webs, and WhatsApp contacts. Journalistic investigation has revealed a drop in cases officially reported to the police during the pandemic, but a dramatic rise in calls to emergency telephone help lines.¹⁶⁸ However, recent reviews pointed out serious deficiencies in the implementation of these programmes.¹⁶⁹

134. The judiciary has also adopted measures to enable quick responses to domestic violence. The Supreme Court issued a regulation for the operation of courts during the pandemic addressing this problem, including: prioritising 'domestic violence or gender violence complaints'; classifying their hearings as urgent; and simplifying the filing of these complaints.¹⁷⁰ Also in May 2020, the executive passed a bill on remote monitoring of interim measures to protect victims of domestic violence during the pandemic. The bill has been left aside and it has not been discussed since March 2021.¹⁷¹

D. Ethnicity and race

135. Even with recent migration from Haiti, Colombia, and Venezuela, Afro-Caribbean people constitute a minority in some urban areas of the country, and no special measures have been taken in relation to them in the context of the pandemic.

E. Disability

136. The response to the pandemic regarding people with disabilities has focused on three areas. The first area is access to healthcare. On 10 June 2020, after more than three months since the declaration of the constitutional state of catastrophe, the National Disability Service (SENADIS) published recommendations on care for people with disabilities by health services.¹⁷² This was the first measure regarding an issue that had already been discussed in other jurisdictions. Significantly, the recommendations stated that people with disabilities are entitled to equal access to all existing life-saving treatments. Accusations of discrimination by medical staff against a patient with Down's syndrome prompted a public debate on discrimination against people with disabilities in the access to scarce intensive care resources (ventilators and critical care beds).¹⁷³ In one hospital, the director had to withdraw a triage protocol which prevented some patients from accessing intensive care units.¹⁷⁴ Later, on 9 July 2020, the Government published recommendations stating that decisions regarding people with disabilities should be made strictly on medical criteria and not on judgements based on personal or social stereotypes and prejudices. However, no adjustment was made in those recommendations to account for the disparate impact of medical judgements on people with disabilities due to the prevalence of medical conditions in that population.¹⁷⁵

137. The second area is the regulation of care homes. Following the Ministry of Health's restriction on visits to elderly care homes (see Part IV.A.10 above), SENADIS issued a similar restriction for those hosting people with disabilities and provided further recommendations for the prevention of Covid-19 infections in these premises.¹⁷⁶ SENADIS set out special temporary residences for people with disabilities testing positive to Covid-19, and for disabled people whose caregivers must be hospitalized and lack a support network.

138. Finally, the third area is the provision of accessible information regarding Covid-19 for people with disabilities living in their family home. This information has included daily televised reports with sign language interpretation and several recommendations by SENADIS regarding the care of people with disabilities living in their communities, in easy-to-read formats.¹⁷⁷ In an interesting case, the Association of the Deaf-Mute of Chile successfully complained against television channels for not using sign language in their coverage of the crisis.¹⁷⁸ Additionally, special mobility permits have been issued for people with autism and other mental disabilities and their carers. The access to those permits was available during lockdown periods through the general online permits service *Comisaría Virtual*.¹⁷⁹

F. Elderly

139. In response to data showing that mortality rates for the elderly were the highest of the pandemic, the Government adopted a rather severe approach in the initial months of the pandemic. In fact, in May 2020 a very strict stay-at-home rule for people older than 75 was implemented, which prevented them from accessing the same mobility permits than the rest of the population (see Part III above). This regulation was much debated in the press as some observers claimed it infringed constitutional rights.¹⁸⁰ Two months later, the Ministry of Health considerably loosened the rule, authorising the elderly to leave their homes three

times a week for up to two hours each time.¹⁸¹ Eventually, this change in policy placated the strong criticism regarding the measures.

140. The Ministry of Health also published a number of protocols and guidance on care homes for the elderly, covering matters such as mobility, reaction to infection detection, visiting care homes, and the training of the personnel,¹⁸² although no compulsory vaccination policy has been imposed. Private care homes, as any other private employer, have been judicially authorised to demand periodic tests and a mobility pass from their workers.¹⁸³ Finally, Law 21,249 on utilities (see Part V.A.1 above) contains express provisions prohibiting the cutting of supply due to overdue payments for both elderly clients and elderly care homes.

G. Children

141. The Government's response to the pandemic in relation to children includes three main areas. The first area is the provision of educational services. The Ministry of Health suspended school classes on 17 March 2020.¹⁸⁴ From that date on, the Ministry of Education supported a plan for online classes and provided Covid-19 guidance for schools and pre-school levels.¹⁸⁵ In the context of the step-by-step plan, the Ministry of Education issued a plan to voluntarily return to face-to-face classes in September 2020 for those schools located in phases 3 and 4 (see Part IV.A.4 above), which covered various relevant matters.¹⁸⁶ In February 2021, the Ministry of Education restated the call to reopen schools on March 2021, the time when the academic year begins in Chile. The plan however remains voluntary and subject to the step-by-step five stage policy (see Part IV.A.4 above).

142. One salient issue that arose in this area was the exclusion of students from private schools due to outstanding fees. The Supreme Court ruled against a private school for conditioning student enrollment on the payment of debt.¹⁸⁷ This decision was followed by Law 21,290, published in December 2020, which prohibits private schools from denying enrollment for the 2021 academic year to students with debt due to the economic crisis resulting from the pandemic (see Part V.A.1 above). There is also a provision requiring the implementation of payment flexibility measures in private schools.

143. The second area of interest is childcare. As a result of the closure of schools and nurseries, working parents had to assume daily care responsibilities. Law 21,247 included two measures to tackle this critical issue, Emergency Parental Leave and the right to suspend an employment contract (as discussed in Part V.A.1 above).

144. The third main area relates to youth care homes and detention facilities. The Minors National Service (SENAME) published Covid-19 protocols for action for State- and privately-managed care homes, covering matters such as preventive health measures and visits, among others.¹⁸⁸ Additionally, SENAME published similar protocols for action in juvenile justice detention centers.¹⁸⁹

H. Prisoners

145. Chile's prison population amounts to around 45,000 inmates and there is consensus that the system is overcrowded.¹⁹⁰ In early 2020 a high-ranking Supreme Court official (*Fiscal Judicial*) warned that in the pandemic context the prison system was a 'time bomb'.¹⁹¹ Nevertheless, the virus did not spread significantly, according to figures one year on from the declaration of the constitutional state of catastrophe. Thus, only two staff

members and seven inmates have died from Covid-19-related causes according to official figures,¹⁹² while other sources report a slightly higher figure.¹⁹³

146. The prison response to Covid-19 has involved the collaboration of different criminal justice system actors, including the *Gendarmería*, the Prosecution Service, the Public Defense Office, the judiciary, and Congress. Inevitably, the *Gendarmería*, the national prison agency, has been the most relevant actor, as it has implemented a series of measures to curb the spread of the virus among prisoners and staff through a comprehensive action plan, presented on 23 March 2020. This plan includes the modification and suspension of the visits scheme, a protocol for relocations, and intra-prison isolation, among other measures.¹⁹⁴ Although social distancing was included within these measures, no practical steps have been taken to safeguard it. An additional plan of action was directed at the elderly and chronically ill prison population.¹⁹⁵

147. Both the Prosecutor's Office and the judiciary collaborated with the Government's declared objective of reducing the number of inmates. Prosecutors were asked to adjust their criteria and to request for defendants to be placed in custody only in cases where there was a material risk to the victim. In addition, they shall prefer other interim measures such as house arrest.¹⁹⁶ The Public Defense Office, in turn, promoted significant efforts to replace pre-trial detention for those already in prison with a high health risk.¹⁹⁷

148. Law 21,228, published on 17 April 2020, granted a commutative general pardon for (i) inmates aged 75 or more; (ii) women between 55 and 75 years old who have served at least half of their sentence; and (iii) pregnant women or women with children under two years-old who have served at least a third of their sentence. Those serving sentences fully or partially in the community also benefited from this pardon. All of them will serve house arrest for the rest of their conviction. This benefit did not extend offenders convicted of serious crimes, such as torture, rape, sexual crime against minors, femicide, homicide, human trafficking, terrorism, and crimes against humanity, among others. According to the *Gendarmería*, the pardon benefited more than 1,700 convicts.¹⁹⁸ In Congress, this measure was deemed controversial, as several elderly ex-military officers convicted of crimes against humanity perpetrated during the Pinochet dictatorship were excluded. A group of right-wing senators brought a case to the Constitutional Tribunal alleging discrimination on the grounds that the kind and seriousness of the offences used to exclude certain convicts were unrelated to the aim of the measure related to the protection of health and life of prison population. The Tribunal rejected the request claiming that the seriousness of the crimes committed justified excluding these inmates from the pardon.¹⁹⁹

I. Non-citizens

149. The Government's response to Covid-19 has affected foreign citizens residing abroad and in the country. Regarding the former, the closure of borders imposed in March 2020 prevented entry into Chile of foreign citizens lacking a definitive residence permit in Chile. Some qualified exceptions applied.²⁰⁰ The suspension of Chilean consular activities between 18 March and 23 November 2020 left a significant number of migrants unable to continue to apply for temporary or permanent residence permits.²⁰¹ The Santiago Court of Appeals decided that this closure was illegal and ordered the Consulate in Caracas to continue processing a visa for a minor. The decision was based on the fact that safety reasons were not relevant to the rejection of a visa currently being processed and that it affected the right to reunification of the minor with her mother²⁰²

150. In order to facilitate the implementation of quarantines among the migrant population, the Government adopted a series of extensions, waivers, and the digitalization of certain procedures. On the one hand, the Government extended the validity of ID cards for foreigners, provided they possessed a residence permit.²⁰³ In the case of Venezuelan citizens, whom the Government has granted special treatment, the validity of expired passports, as far as Chilean agencies were concerned, was extended until 2023.²⁰⁴ On the other hand, measures were adopted for the digitalization of visa stamping, and for applications for visa extension and permanent residence.²⁰⁵

151. Law 21,325, published on 20 April 2021, was long-awaited update on migration legislation.²⁰⁶ The Covid-19 pandemic has directly influenced the adoption of two of its provisions. The first prohibits the entry into the country of foreigners who ‘suffer from diseases that the health authority determines to be a cause for impeding entry to Chile, in accordance with the standards established in the Sanitary Code. The list of diseases must be established by a previously published exempted resolution’. The same kind of legal instruments were used to deal with the pandemic (see Part II.C above). The second prevents access to social security benefits and tax benefits to those who have resided in Chile for less than two years. It indicates that this period of residence will not be required in cases of ‘well-founded humanitarian reasons or health alert declared pursuant Article 36 of the Sanitary Code’. Once approved by Congress, the bill on migration was brought to the Constitutional Tribunal, which examined, among others, the aforementioned provisions, upholding its constitutionality.²⁰⁷

152. In a measure adopted to discourage ‘vaccination tourism’, the Government excluded from its vaccination plans those who are temporarily in Chile on a tourist visa.²⁰⁸ This led to a controversy and the Government later clarified that irregular migrants will be able to access the vaccine.²⁰⁹

J. Indigenous peoples

153. Law 19,253 recognizes nine indigenous groups in Chile, such as Mapuche, Aymara, Para Nui, among others.²¹⁰ Despite the problems of discrimination in the exercise of civil liberties already mentioned (see Part VI.A above), no relevant measures aimed specifically at indigenous peoples in relation to the Covid-19 pandemic have been implemented. Yet some measures indirectly connected to the pandemic have been adopted such as Law 21,244 which extended the mandate of both the authorities in indigenous communities and associations, and of indigenous representatives in the Council of the National Corporation for Indigenous Development (*Corporación Nacional de Desarrollo Indígena*).²¹¹ The Government also decided to suspend at least two indigenous consultation processes in relation to (i) a highway construction project,²¹² and (ii) the creation of a new administrative department in Easter Island.²¹³

154. However, in the context of the ongoing Constitution-making process, an event of great importance with regards to the improvement of relations between indigenous people and the State recently occurred.²¹⁴ During the election of the members of the Constitutional Convention, 17 representatives of the different existing indigenous people across the country were elected through a system of reserved seats. This represents nearly 11% of Convention members (155 members). Notably, 9% of Chile’s population identify themselves as having an indigenous background. This system of reserved seats was secured by a constitutional reform (Law 21,298), which introduced further changes in the composition of the Constitutional Convention, including reserved seats for indigenous people and electoral quotas for people with disabilities. Notably, these reserved seats are assigned respecting the principle of gender parity that governs the Convention’s composition. The election of indigenous representatives is a significant milestone in otherwise tense relationships between the Chilean State and indigenous minorities. It also improves the chances of the

new draft Constitution providing for indigenous peoples as a nation, and/or the constitutional protection of indigenous peoples' collective rights.

Prof. Guillermo Jiménez, Faculty of Laws, Universidad Adolfo Ibáñez

Dr. Pablo Grez Hidalgo, Lecturer in Public Law, University of Strathclyde

Prof. Pablo Marshall, Faculty of Laws, Universidad Austral de Chile

Footnotes:

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