

EXCEPTIONAL REGULATIONS FOR AN EXCEPTIONAL MOMENT: THE LAW AND POLITICS OF COVID-19 IN CHILE

JORGE CONTESSE*

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INTRODUCTION

The first COVID-19 case in Chile was reported on March 3, 2020, at the end of the southern hemisphere summer.¹ Children were returning to school, their parents going back to work, and hundreds of thousands were getting ready to resume the massive demonstrations that erupted in October 2019 in response to pervasive inequalities and a sense of neglect from authorities.² At the time, a constitutional referendum on replacing the 1980 Constitution—enacted during the Pinochet dictatorship—was fast approaching, but Congress moved swiftly to postpone it until the end of October 2020.³ A month before the coronavirus arrived in the country, the

* Associate Professor of Law & Director, Center for Transnational Law, Rutgers Law School. I am indebted to Matías Guiloff, Flavio Quezada, Pablo Soto, and Rodrigo Vallejo for their invaluable insights, and to Gianni Garyfallos for excellent research assistance.

1. Fabian Cambero et al., *Chile Records First Confirmed Case of Coronavirus: Health Ministry*, REUTERS, reuters.com/article/us-health-coronavirus-chile/chile-records-first-confirmed-case-of-coronavirus-health-ministry-idUSKBN20Q2UU (Mar. 3, 2020, 3:01 PM).

2. *Coronavirus: Chile Protestors Clash with Police over Lockdown*, BBC (May 19, 2020), <https://www.bbc.com/news/world-latin-america-52717402>.

3. At the end of October, half of the population went to the polls and overwhelmingly voted in favor of enacting a new constitution. *Chile to Postpone Referendum on New Constitution as*

Chilean government issued an executive order declaring a national health emergency, following the World Health Organization's call of the outbreak as "a public health emergency of international concern," in late January.⁴ Despite the significant regulatory powers, including a state of exception and the possibility to essentially rule the nation through executive orders and military control, the government's failure to stop the spread of the virus put Chile at the top of the ranking of COVID-19 cases and deaths per 100,000 habitants.⁵ Along with the United States, Brazil, and the United Kingdom, Chile was considered to be "among the world's most prepared"⁶ nations; yet, it delivered "some of the worst outcomes."⁷ At the middle of October 2020, there were more than 491,000 COVID-19 cases and more than 13,000 deaths,⁸ a figure that seemed largely exaggerated when early studies warned about the country's preparedness.⁹

This Essay discusses Chile's legal response to the coronavirus crisis. It focuses on three key aspects. First, the Essay examines the extreme measures that the government adopted very early on, analyzing the constitutional, legal, and regulatory norms that are at stake. Second, the Essay situates the government's response in the larger and underlying context of lack of trust in public authorities and, in particular, the administration's rigid and closed position that led many to distrust the measures and the information provided by the government. Third, the Essay explores the role of the courts, noting that they largely acted with extreme deference towards the administration, with the understanding that it was the administration's competence to adopt measures and that such deference must be even greater in the context of a state of exception.

Coronavirus Concerns Grow, REUTERS, [reuters.com/article/us-health-coronavirus-chile/chile-to-postpone-referendum-on-new-constitution-as-coronavirus-concerns-grow-idUSKBN2163TL](https://www.reuters.com/article/us-health-coronavirus-chile/chile-to-postpone-referendum-on-new-constitution-as-coronavirus-concerns-grow-idUSKBN2163TL) (Mar. 19, 2020, 4:30 PM).

4. *Novel Coronavirus (2019-nCoV) Situation Report - 11*, WORLD HEALTH ORGANIZATION [WHO] (Jan. 31, 2020), https://www.who.int/docs/default-source/coronaviruse/situation-reports/20200131-sitrep-11-ncov.pdf?sfvrsn=de7c0f7_4.

5. Niall McCarthy, *COVID-19 Deaths Per 100,000 Inhabitants: A Comparison*, STATISTA (Aug. 10, 2020), <https://www.statista.com/chart/21170/coronavirus-death-rate-worldwide/>.

6. Martha Lincoln, *Study the Role of Hubris in Nations' COVID-19 Response*, NATURE (Sept. 15, 2020), <https://www.nature.com/articles/d41586-020-02596-8>.

7. *Id.*

8. *COVID-19 Dashboard by the Center for Systems Science and Engineering (CSSE) at Johns Hopkins University*, JOHN HOPKINS UNIV. & MED., <https://coronavirus.jhu.edu/map.html> (last visited Jan. 30, 2021).

9. *U. de Washington actualizó sus proyecciones para Chile y anticipó casi 12 mil muertes por COVID-19*, CNN CHILE (May 27, 2020, 8:17 AM), https://www.cnnchile.com/coronavirus/universidad-de-washington-proyecciones-muertes-covid-19-chile_20200527/.

I. A CONSTITUTIONAL EMERGENCY

In response to the COVID-19 outbreak, the Chilean government declared a three-month “state of constitutional exception.”¹⁰ This measure was important for two reasons. First and foremost, it allowed the restriction of fundamental rights—specifically, the freedoms of movement and assembly—and it gave the government the power to adopt drastic measures, such as imposing curfews and requisitions.¹¹ However, the measure was also significant because the Piñera Administration had declared a state of constitutional exception only five months earlier, in October 2019, responding to the protests that erupted in Santiago and other major cities of Chile.¹² Then, President Piñera said that the country was “at war with a powerful, relentless enemy that respects nothing or anyone;”¹³ a statement that became infamous as Chileans witnessed tanks patrolling the streets of Santiago—a common sight during the Pinochet years.¹⁴ Police and military carried out serious human rights violations, as documented by international organizations.¹⁵ Declaring a new state of exception—although this time for very different reasons—was not a light decision.

Pursuant to the powers under the state of emergency, military commanders immediately imposed a curfew.¹⁶ The measure seemed like an overreach to

10. Decree No. 104 art. 1, Marzo 18, 2020, DIARIO OFICIAL [D.O.] (Chile).

11. *See id.* art. 3.

12. John Bartlett, *Chile Protests: State of Emergency Declared in Santiago as Violence Escalates*, GUARDIAN, (Oct. 18, 2019, 11:56 PM), <https://www.theguardian.com/world/2019/oct/19/chile-protests-state-of-emergency-declared-in-santiago-as-violence-escalates>.

13. *‘We Are at War,’ Declares Piñera, as Violence in Chile Continues*, BUENOS AIRES TIMES (Oct. 21, 2019, 12:54 AM), <https://www.batimes.com.ar/news/latin-america/we-are-at-war-says-pinera-as-violence-in-chile-continues.phtml>.

14. Lili Loofbourow, *Chile’s People Have Had Enough*, SLATE (Oct. 26, 2019, 5:27 PM), <https://slate.com/news-and-politics/2019/10/chile-protests-against-president-pinera-and-deep-inequality.html>.

15. Press Release, United Nations Hum. Rts. Off. of the High Comm’r, UN Human Rights Office Report on Chile Crisis Describes Multiple Police Violations and Calls for Reforms (Dec. 13, 2019), <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25423&LangID=E> (issuing a report finding that the “police and army failed to adhere to international human rights norms and standards relating to management of assemblies and the use of force” during October 2019 protests).

16. *Chile Announces Nationwide Nightly Curfew, Coronavirus Cases Hit 632*, REUTERS, <https://www.reuters.com/article/health-coronavirus-chile/chile-announces-nationwide-nightly-curfew-coronavirus-cases-hit-632-idUSL1N2BF05L> (Mar. 22, 2020, 10:47 AM); *Chile: Military Deployed as Protesters Demand Aid Amid COVID-19*, TELESSUR (May 19, 2020), <https://www.telesurenglish.net/news/Military-Deploy-While-Covid-Increases-In-Chile-20200519-0018.html>.

have not just the police but also the military on the streets checking individuals' identity cards, and it raised concerns as it lacked a clear health rationale.¹⁷

Before the administration declared a constitutional emergency, however, it had adopted regulatory measures pursuant to a health emergency. On February 5, 2020, the Piñera Administration issued an executive order to establish a regulatory framework for the pandemic.¹⁸ The order declared a one-year health emergency (“*alerta sanitaria*”)¹⁹ and gave health officials expansive powers to adopt sweeping measures.²⁰ These measures included stay-at-home orders, curfews, establishing sanitary controls, hiring personnel (including retired officials), purchasing and distributing goods, setting price cap regulations on drugs and medicines, limiting the number of items that business can sell to individual buyers, and provisionally authorizing the set-up of tent hospitals.²¹ With such immense powers at his disposal, President Piñera was confident enough to proclaim that the country was prepared like none other and that it would be a model for the rest of the world.²² The crisis would overwhelmingly prove him wrong.

II. LAWS & REGULATIONS

As noted, Chile's health authorities have significant power to manage health crises. Under Chilean law, the President may grant health authorities “extraordinary powers to prevent the spread of a disease or face an emergency.”²³ The country's Health Code, enacted in 1967, sets up a governmental structure that does not entirely square with existing regulatory

17. Such perplexity increased the following morning when Santiago woke up to find that the first measure the government adopted—during the first night of the curfew—was a wash down of Santiago's main square, the epicenter of the protests. See John Bartlett (@jwbartlett92), TWITTER (Mar. 19, 2020, 8:42 AM), <https://twitter.com/jwbartlett92/status/1240619606697562112>. Two weeks later, while people in downtown Santiago were ordered to stay at home, President Piñera made a random stop at the square to pose for a photo, sparking outrage. Such was the context when regulations were being adopted. See Aislinn Laing, *Chile's President Sparks Outrage with Visit to Quarantined Protest Square*, REUTERS, <https://www.reuters.com/article/us-chile-protests-president/chiles-president-sparks-outrage-with-visit-to-quarantined-protest-square-idUSKBN21M02U> (Apr. 3, 2020, 9:49 PM).

18. Decree No. 4, Febrero 5, 2020, D.O. (Chile).

19. *Id.* art. 10. In January 2021, the administration announced a six-month extension of the health emergency. See *Gobierno extiende alerta sanitaria por el coronavirus*, T13 (Jan. 7, 2021, 11:01 AM), <https://www.t13.cl/noticia/nacional/coronavirus-chile-alerta-sanitaria-extension-07-01-2021>.

20. T13, *supra* note 19.

21. *Id.*

22. T13, *Presidente Piñera se refiere a primer caso de Covid-19 en Chile*, YOUTUBE (Mar. 3, 2020), <https://youtu.be/c91BMwH0wfQ>.

23. CÓDIGO SANITARIO [CÓD. SANIT.] [HEALTH CODE] art. 36 (Chile).

frameworks.²⁴ To start, the officer to whom the President may delegate “extraordinary powers”—the National Director of Health—no longer exists, and so it is interpreted that the law now refers to the Minister of Health.²⁵ Most significantly, the current regulatory (and constitutional) framework poses a challenge to the extreme powers vested in the administration, even within the context of a state of constitutional exception.

The Health Code does not identify which powers the President can delegate to other officials—an omission that gives health authorities impressive leeway. The Code does specify, however, that health authorities have the power to inspect and search “any site, building, house, premises and workplace, whether public or private,”²⁶ and issue direct orders to the police to enforce health authorities’ orders.²⁷ Authorities may also impose fines against those who breach orders and regulations—and may even order the closure of the inspected place or facility.²⁸

Commentators have noted that the expansive powers in the hands of the administration resembles the features of the 19th century health police.²⁹ Back then, local governments were the primary agencies charged with the responsibility to manage sanitary crises and prevent the spread of communicable diseases.³⁰ Local governments could establish sanitary checkpoints, curfews, and quarantines—and in all cases, they could resort to the police, which was conceived of as “health police” (“*policía sanitaria*”), to enforce these mandates.³¹

The cholera pandemic that hit the country in the late 19th century caused a change in the regulatory framework.³² The central government realized that municipalities did not have enough resources to effectively handle an epidemic and therefore promoted changes in the regulatory framework.³³

24. See *Código Sanitario*, BIBLIOTECA DEL CONGRESO NACIONAL DE CHILE, <https://www.bcn.cl/leychile/navegar?idNorma=5595> (last visited Feb. 17, 2021) (providing electronic copy of Chile’s Health code and details relating to its enactment).

25. CÓD. SANIT. art. 36.

26. *Id.* art. 155, 157.

27. *Id.* art. 8.

28. *Id.* art. 174.

29. See Pablo Soto Delgado, *La resurrección de la policía sanitaria municipal durante la pandemia de covid-19. Una cuestión de densidad legal en clave histórico-normativa*, in *DERECHO PÚBLICO EN TEMPOS DE COVID-19: IMPLICANCIAS JURÍDICO-PÚBLICAS ANTE LAS PANDEMIAS* (Christian Rojas & Juan Carlos Ferrada eds., forthcoming 2021) (manuscript at 2) (on file with author).

30. *Id.* (manuscript at 3).

31. *Id.*

32. *Id.* (manuscript at 4).

33. *Id.*

The President would now be able to intervene in the local administration of the health police whenever local governments proved unable to “stop or combat an epidemic.”³⁴

The 1967 Code kept this regulatory framework, allocating the health police functions primarily in the local governments (municipalities), but reserving the power to the central administration to intervene.³⁵ In the 1970s, however, the Pinochet regime changed the legal landscape of the country, including health laws and regulations.³⁶ One of those changes was to put an end to the notion of a health police managed by local governments.³⁷ The central government would now possess *all* authority, much like Pinochet himself concentrated all power in the nation.

Pablo Soto argues that the COVID-19 pandemic has made the sanitary police resurface.³⁸ Just a couple of weeks after the first reported case in the country, local governments attempted to adopt measures as they perceived that the central government was too slow to respond to the gravity of the situation.³⁹ Some municipalities ordered the use of masks; others ordered the closure of clubs, bars, theaters, and gymnasiums; others established quarantines.⁴⁰ However, the General Comptroller—the administrative body that reviews the legality of administrative regulations—found that municipalities did not have the power to adopt such measures, especially in the context of a pandemic.⁴¹ In the words of the General Comptroller:

[I]t is for the President of the Republic and the heads of the National Defense, as appropriate, to adopt decisions that can affect fundamental rights in the terms established by the pertinent regulations, as well as to provide for the measures that . . . are required for the restoration of normality in the affected area.⁴²

Thus, the extreme concentration of power in the hands of the central government was now legally sanctioned by the administration’s comptroller.

34. *Id.* (manuscript at 6) (quoting Decree No. 3385 art. 59, Junio 22, 1918, D.O. (Chile)).

35. *Id.* (manuscript at 5).

36. *Id.* (manuscript at 7–8).

37. *Id.*

38. *See id.* (manuscript at 2).

39. *See* Lidia Casas Becerra, *The Novel Coronavirus and Civil Rights: A Snapshot from Chile*, PETRIE-FLOM CTR: BILL OF HEALTH (May 14, 2020), <https://blog.petrieflom.law.harvard.edu/2020/05/14/chile-global-responses-covid19/> (describing how authorities from small and rural communities filed writs with the courts asking for greater resources from the Ministry of Health).

40. *Id.*

41. General Comptroller, Opinion Letter N° E8935 (June 4, 2020) (Chile), <https://www.contraloria.cl/pdfbuscador/dictamenes/0E8935N20/html>.

42. *Id.*

III. EXTREME JUDICIAL DEFERENCE

Courts showed an almost invariable deference to the administration. Individuals brought several challenges against the measures adopted by the health authorities, but they consistently lost.⁴³ The courts relied on two sets of arguments: first, they understood that the administration's powers to adopt health measures were "exclusive," which meant that there was almost no space to challenge them and that such power was not shared with any other branch of government;⁴⁴ second, courts interpreted that they may not assess the administration's decisions adopted under a state of constitutional exception.⁴⁵ Thus, the administration found no checks to impose administrative measures.

Most individuals who brought challenges against the pandemic measures resorted to a constitutional injunction known as "*recurso de protección*," which in other Latin American countries is commonly referred to as "*amparo*" (Argentina, Peru), "*tutela*" (Colombia) or "*mandato de segurança*" (Brazil).⁴⁶ The *recurso de protección* allows individuals to challenge administrative measures when they believe such measures—or the lack thereof—infringe upon their constitutional rights.⁴⁷

In the context of the COVID-19 crisis, the first *recursos* were filed as a result of individuals, local governments, and scientific associations' concerns with the Piñera Administration's failure to respond to what they saw as a slow response to the then initial crisis. A week after the government declared the state of constitutional exception, local governments of several towns in the north of Chile—where no cases had been reported yet—asked the courts to force health authorities to order quarantines and lockdowns.⁴⁸ The court, however, found

43. *Botillerías presentan recurso alcaldes cierre locales*, T13 (Apr. 1, 2020), <https://www.t13.cl/noticia/nacional/botillerias-presentan-recurso-alcaldes-cierre-locales>; Becerra, *supra* note 39.

44. Corte Suprema de Justicia [C.S.J.] [Supreme Court], 7 mayo 2020, "Zepeda Rodríguez c. Marcic Conley," Rol de la causa: 43842-2020, apelación protección (Chile).

45. See Corte de Apelaciones [C. Apel.] de Santiago [Court of Appeals of Santiago], 8 agosto 2020, "Colegio de Enfermeras de Chile A.G. c. Subsecretaría de Redes Asistenciales," Rol de la causa: 39517-2020, recurso de protección rechazado, para. 7 (Chile) (holding that the constitutional exception of catastrophe cannot be invoked to challenge the administration's alleged failure to act).

46. See ALLAN R. BREWER-CARÍAS, CONSTITUTIONAL PROTECTION OF HUMAN RIGHTS IN LATIN AMERICA: A COMPARATIVE STUDY OF AMPARO PROCEEDINGS 142–50 (2009).

47. Juan Carlos Ferrada Bórquez et al., *El Recurso de Protección como Mecanismo de Control Jurisdiccional Ordinario de los Actos Administrativos: una Respuesta Inapropiada a un Problema Jurídico Complejo*, 14 REVISTA DE DERECHO 67, 67 (2003).

48. C. Apel. de Copiapó [Court of Appeals of Copiapó], 23 marzo 2020, "Municipalidad de Caldera c. Heyermann Ríos," Rol de la causa: 97-2020, recurso de protección; C. Apel. de Copiapó, 25 marzo 2020, "Municipalidad de Freirina c. Heyermann Ríos," Rol de la

that the petitioners had failed to demonstrate that the administration's alleged failure to adopt measures could infringe the constitutional rights of specific individuals, and that they merely "disagree[d]" with the government's strategy to address the pandemic.⁴⁹ The court also noted that it lacked the technical competences to assess the merits of the government's strategy.⁵⁰

The Chilean Supreme Court confirmed this doctrine, finding that local governments could not use the *recurso de protección* to demand health authorities to adopt certain measures, namely, lockdown and quarantines.⁵¹ In at least one case, the Supreme Court refused to even consider the merits of the issue, holding that the adoption of, and the opportunity to adopt measures, was a nonjusticiable claim.⁵²

Similarly, nonessential health workers, that is, administrative personnel, filed a *recurso* before the Court of Appeals of Rancagua, requesting the court to order the administration to establish systems of working remotely due to the health risks to which many workers would be exposed.⁵³ The court, however, quickly dismissed the claim, noting that the petition was inadmissible, as it "exceeded the competences of th[e] court."⁵⁴ The Supreme Court affirmed the decision, using a formula that became reiterative in multiple inadmissibility decisions: "the merit, timeliness, convenience and effectiveness of [health] measures are all within exclusive competence of the [health] authorities, as they are implemented in response to the health policies."⁵⁵

Courts also relied heavily on the state of constitutional exception to grant deference to the administration—whether to implement certain measures or to refrain from adopting them. In April 2020, more than one hundred doctors

causa: 103-2020, recurso de protección; C. Apel de Copiapó, 26 marzo 2020, "Municipalidad de Huasco c. Heyermann Ríos," Rol de la causa: 107-2020, recurso de protección; C. Apel de Copiapó, 2 abril 2020, "Municipalidad de Vallenar c. Heyermann Ríos," Rol de la causa: 124-2020, recurso de protección.

49. C. Apel de Copiapó, 6 mayo 2020, "Municipalidad de Caldera c. Heyermann Ríos," Rol de la causa: 97-2020, para. 9.

50. *Id.*

51. C.S.J., 7 mayo 2020, "Zepeda Rodríguez c. Marcic Conley," Rol de la causa: 43842-2020, paras. 3-4.

52. *Id.*

53. C. Apel de Rancagua [Court of Appeals of Rancagua], 23 marzo 2020, "Federación de Funcionarios de Seremis de Salud Regionales c. Secretaria Ministerial de O'Higgins," Rol de la causa: 3208-2020, recurso de protección.

54. C. Apel. de Rancagua, 25 marzo 2020, "Federación de Funcionarios de Seremis de Salud Regionales c. Secretaria Ministerial de O'Higgins," Rol de la causa: 3208-2020, recurso de protección rechazado.

55. *See, e.g.*, C.S.J., 7 mayo 2020, "Zepeda Rodríguez c. Marcic Conley," Rol de la causa: 43842-2020, para. 2.

filed a *recurso de protección* requesting the imposition of lockdowns and quarantines in several villages in the south of Chile.⁵⁶ The Court of Appeals of Punta Arenas found against the petitioners, indicating that the concrete measures adopted in the context of such constitutional state of exception must be implemented in accordance to existing laws and regulations, “because said state [of exception] does not modify compliance with the organic rules of operation of the government.”⁵⁷ Still, the court found that it had no jurisdiction to rule on the adoption—or lack thereof, again—of measures.⁵⁸

Months later, a group of individuals who provided food to the poor in the northern city of La Serena filed a preventive habeas corpus because they feared that the police could arrest them while volunteering.⁵⁹ The administration had decreed a quarantine in La Serena county and, the petitioners noted, unless volunteers worked on behalf of the local government, they would not be able to obtain a permit to be on the streets.⁶⁰ In their filings, they argued that community kitchens had “proliferated and played a fundamental social function.”⁶¹ The court rejected the legal action, finding that the measures did not discriminate against the petitioners, as they could still seek leave to do their voluntary work in the streets of La Serena.⁶² The Supreme Court confirmed the ruling, but did it based on a political question doctrine, holding that the case concerned “policy within the scope of administrative measures.”⁶³

In one case, the Court of Appeals of Concepción rejected a habeas corpus filed by a private citizen on behalf of the residents of four counties.⁶⁴ The individual claimed that the decisions by several mayors to establish quarantines infringed upon her personal liberty and freedom of movement.⁶⁵ The case is interesting because it also referred to the early dispute between local governments and the central governments when local governments were adopting early

56. C. Apel. de Punta Arenas [Court of Appeals of Punta Arenas], 2 mayo 2020, “Garrido Ortega c. Ventura Sancho,” Rol de la causa: 426-2020, recurso de protección rechazado.

57. *Id.* para. 5.

58. *Id.* para. 8.

59. C. Apel. de La Serena [Court of Appeals of La Serena], 11 agosto 2020, “Correa Barraza c. Ministro de Salud,” Rol de la causa: 220-2020, recurso de amparo rechazado.

60. The regulations established that individuals who needed to leave their homes could do so only with a special permit issued by the local police. *Id.*

61. *Id.*

62. *Id.*

63. C.S.J., 19 agosto 2020, Rol de la causa: 95.135-2020, apelación amparo.

64. C. Apel. de Concepción [Court of Appeals of Concepción], 30 marzo 2020, “Comunas de San Pedro de la Paz y otras c. Municipalidad de San Pedro de la Paz y otras,” Rol de la causa: 70-2020, amparo rechazado, paras. 9–10.

65. *Id.*

measures to prevent the spread of the virus.⁶⁶ The petitioner claimed that it was only the central government who could adopt these drastic measures.⁶⁷ But the court found in favor of the mayors on two grounds: first, the court noted that it was within their legal powers under the Municipalities Act to adopt these measures; second, that the measures were necessary to contain the pandemic.⁶⁸ Although the court referred to both the February 2020 health emergency executive order and the March 2020 state of constitutional exception decree, the basis of its decision was the Municipalities Act.⁶⁹

Although the Supreme Court upheld the ruling, it limited its holding to declaring that the remedy of *amparo* (the habeas corpus in Chile) was not appropriate to seek redress for “undetermined groups of people.”⁷⁰ A dissenting judge held that the Court should have only found in favor of the petitioner, not an undetermined number of people, and that local governments lacked the power to adopt these measures, as they were within the exclusive powers of the central government.⁷¹ This decision, however, was just one more in the long line of decisions that refused to check the administration’s powers. Thus, the Chilean Piñera Administration concentrated enormous powers with the legal sanction of both the administrative comptroller and the courts. Despite such exceptional measures, the government failed to contain the crisis. In the next Section, I suggest that the main reason for Chile’s failure lies in the lack of trust in public power—an element that was closely connected to the underlying constitutional crisis where the pandemic landed.

IV. REGULATING WITHOUT PUBLIC TRUST

A key aspect of the health crisis in Chile was people’s lack of trust in authorities. The government was under severe pressure in the months leading up to the pandemic; once the health crisis erupted, government officials clashed with medical doctors, scientists, the Chilean medical union, and political opponents.⁷² The climate was not favorable for a crisis of this magnitude.

66. *Id.*

67. *Id.*

68. *Id.* para. 6.

69. *Id.*

70. C.S.J., 7 abril 2020, “Charpentier Rajcevich c. Municipalidad de Coronel,” Rol de la causa: 33401-2020, apelación amparo rechazada.

71. *Id.*

72. See Jason Beaubien, *How Chile Ended Up with One of the Highest COVID-19 Rates*, NPR (Jul. 2, 2020), <https://www.npr.org/sections/goatsandsoda/2020/07/02/885207834/covid-19-exploits-cracks-in-chilean-society> (explaining the bifurcation in the government’s handling of the virus among different citizen populations, which lead to citizen protests and clashes within the government).

The administration's standoff with scientists and the medical union was particularly problematic. While the head of Chile's medical union, Izkia Siches—a young doctor who gained both national and international notoriety as a compelling and respected spokesperson—repeatedly demanded a total lockdown; then, Minister of Health, Jaime Mañalich, defended the government's “dynamic quarantine.”⁷³ How did these dynamic or “flexible” quarantines work?⁷⁴ Suppose that New York City ordered residents in one area of Manhattan to stay at home while those in neighboring districts could freely circulate. It is next to impossible to stop transmission in such a dense landscape.⁷⁵ Siches and experts raised concerns about the government's strategy, but the Minister of Health dismissed the criticisms—even noting that the international community had gotten tired of congratulating Chilean health authorities.⁷⁶

Around the same time, the President—who by then was calling the virus “a powerful, cruel enemy that respects no one”⁷⁷—started talking about gradually and safely⁷⁸ reopening the economy under the notion of the “new normal.”⁷⁹ The Minister of Education discussed returning to schools,⁸⁰ health authorities told citizens that they could get together for coffee,⁸¹ and the Minister of

73. *Mañalich asegura que se está siguiendo una estrategia de “cuarentena dinámica,”* 24 HORAS (Apr. 13, 2020), <https://www.24horas.cl/coronavirus/ministro-manalich-explica-estrategia-de-cuarentena-dinamica-y-estrategica-del-gobierno-4094778>.

74. Liam Miller, *Coronavirus Threatens Middle-Class Families in Chile as They Fear Slide to Poverty*, NBC NEWS (Aug. 25, 2020), <https://www.nbcnews.com/news/latino/coronavirus-threatens-middle-class-families-chile-they-fear-slide-poverty-n1236941>.

75. See Beaubien, *supra* note 72 (explaining the landscape of Chile and the rapid transmission among its people).

76. Carlos Reyes, *Mañalich defiende su gestión: “Tengo claro que este es el momento en que tengo que estar a cargo del Minsal”*, LA TERCERA (Apr. 22, 2020, 12:10 AM), <https://www.latercera.com/politica/noticia/manalich-defiende-su-gestion-tengo-claro-que-este-es-el-momento-en-que-tengo-que-estar-a-cargo-del-minsal/X5FFYUBA6RCMFNRXAELMDKHKAM/>.

77. *Piñera y coronavirus: “Es un enemigo poderoso, cruel, que no respeta a nadie,”* EL DINAMO (Apr. 12, 2020), <https://www.eldinamo.cl/nacional/2020/04/12/pinera-y-coronavirus-es-un-enemigo-poderoso-cruel-que-no-respeta-a-nadie/>.

78. *Presidente Piñera y reapertura del comercio: “Queremos que sea gradual y segura,”* 24 HORAS (Apr. 17, 2020), <https://www.24horas.cl/coronavirus/presidente-pinera-y-reapertura-del-comercio-queremos-que-sea-gradual-y-segura-4107144>.

79. *Id.*

80. *Mineduc: El retorno a clases será gradual, la situación es mejor que lo proyectado inicialmente*, COOPERATIVA (Apr. 17, 2020, 9:35 PM), <https://www.cooperativa.cl/noticias/sociedad/salud/coronavirus/mineduc-el-retorno-a-clases-sera-gradual-la-situacion-es-mejor-que-lo/2020-04-17/091926.html>.

81. *Paula Daza y nueva normalidad: “¿Me puedo juntar con amigos a tomar un café? Probablemente sí,”* DIARIO UCHILE (Apr. 20, 2020, 11:18 AM), <https://radio.uchile.cl/2020/04/20/paula->

Economy issued a protocol for the reopening of malls and businesses.⁸² The people, however, seemed largely against the government's call for a "new normal."⁸³ In late April 2020, President Piñera said: "[G]iven that today we have roughly 5,800 active cases, anyone who needs health care, hospitalization, an intensive care bed, [or] mechanical respirator, is going to get it. None of the great powers of the world can say that."⁸⁴ The statements were confusing to say the least, as the President himself acknowledged that the peak of the epidemic was expected for late April through early May.⁸⁵ In fact, the peak occurred only in July, when the country became at one point the first in the world for cumulative confirmed COVID-19 deaths per million people, above the United States, Brazil, or India.⁸⁶

The "flexible lockdowns" strategy ultimately failed, and the trust in government quickly deteriorated.⁸⁷ Tensions among experts and health authorities reached a new high when scientists from a prestigious academic center pulled out of the Ministry of Health's COVID-19 Advisory Committee in protest against the government's persistent failure to provide full access to the data.⁸⁸ Weeks later, the head of Chile's medical union reiterated the

daza-y-nueva-normalidad-me-puedo-juntar-con-amigos-a-tomar-un-cafe-probablemente-si/ (recommending that, if friends choose to get coffee, the group is kept below four people, and everyone is wearing masks and observing social distancing protocols).

82. See *Gobierno publica protocolo para el funcionamiento del comercio cuando reabra durante la pandemia Covid-19*, RADIO AGRICULTURA (Apr. 17, 2020), <https://www.radioagricultura.cl/economia/2020/04/17/gobierno-publica-protocolo-para-el-funcionamiento-del-comercio-cuando-reabra-durante-la-pandemia-covid-19.html> (outlining protocols, such as conducting training for workers about COVID-19, assigning personnel to extra health measures, and simulating operations to evaluate the equipment and correct shortcomings).

83. See *69% rechaza "nueva normalidad" y aprobación a presidente Piñera sube a 25% en encuesta Cadem*, CNN CHILE (May 3, 2020, 11:46 PM), https://www.cnnchile.com/pais/encuesta-cadem-rechazo-nueva-normalidad-aumenta-aprobacion-pinera_20200503/ (stating that 65% of respondents indicated that they disagreed with the measures and 29% voted in favor).

84. Canal 13, *Entrevista exclusiva a Sebastián Piñera*, YOUTUBE (Apr. 24, 2020), <https://www.youtube.com/watch?v=rzHLJQne8iE&feature=youtu.be&t=513>.

85. *Id.*

86. *Coronavirus (COVID-19) Deaths*, OUR WORLD IN DATA <https://ourworldindata.org/covid-deaths?country=IND~USA~GBR~CAN~DEU~FRA> (Feb. 28, 2021) (type in "Chile").

87. Sebastián Minay, *¿Por qué no funcionó la estrategia de las cuarentenas dinámicas en el Gran Santiago?*, LA TERCERA (May 14, 2020, 2:06 PM), <https://www.latercera.com/la-tercera-pm/noticia/por-que-no-funciono-la-estrategia-de-las-cuarentenas-dinamicas-en-el-gran-santiago/SU4ICTJWENANBBJG4R6WM2FAGY/> (indicating that the government's messaging confused citizens and allowed some communities to leave and others to stay in lockdown).

88. *New Millennium Institute for Foundational Research on Data Committed to do Innovative Data Science in Chile*, NEW MILLENNIUM INST. FOR FOUNDATIONAL RSCH. ON DATA, <https://imfd>.

complaint against the Ministry of Health's failure to share information, accusing the government authorities of being ignorant about "the country where [they] live."⁸⁹

Government trust is critical for an effective implementation of regulations. In countries where authorities included scientific expertise in decisionmaking processes, there was a "high level of trust and support for the government's actions."⁹⁰ That is why quarreling with the medical societies was probably not a good idea. Good leaders seek—and rely—on scientific advice. When President Piñera proudly revealed that then-U.S. President Donald Trump—calling from the country with the largest COVID-19 cases in the world—expressed "congratulat[i]ons," for Chile's handling of the crisis, government trust may not have improved.⁹¹ By then, seven out of ten Chileans did not trust the information relayed by the government.⁹²

V. BACK TO THE *NEW* CONSTITUTION

The coronavirus crisis in Chile hit as the country dealt with a major constitutional reform moment. As Chileans fervently debated how to move forward the unprecedented constitutional change, the crisis showed some of the fractures of the country's social and political model.

cl/en/nuevo-instituto-milenio-fundamentos-de-los-datos-apuesta-por-innovadora-forma-de-hacer-ciencia-de-datos-en-chile/ (last visited Feb. 28, 2021) (outlining the Ministry of Health's Advisory Committee); Sebastián Rivas, *Quiebre en la Mesa de Datos del Covid-19: Instituto Milenio Fundamentos de los Datos congela participación y crítica al gobierno por "ausencia" de información*, LA TERCERA (Apr. 30, 2020, 10:27 PM), <https://www.latercera.com/que-pasa/noticia/quiebre-en-la-mesa-de-datos-del-covid-19-instituto-milenio-fundamentos-de-los-datos-congela-participacion-y-critica-al-gobierno-por-ausencia-de-informacion/BMWD3IDLWNF6VPSN7QQCRYCDYE/> (stating that the data table failed to contain enough information for scientists to carry out their decisionmaking process).

89. "No sé en qué país viven": La crítica de Izkia Siches a autoridades de Gobierno por la gestión en crisis sanitaria, CNN CHILE (May 14, 2020, 6:08 PM), https://www.cnnchile.com/coronavirus/critica-izkia-siches-autoridades-gobierno_20200514/.

90. Geo Quinot, *Regulatory Justification and Coordination in South Africa*, REGUL. REV. (Apr. 29, 2020), <https://www.theregreview.org/2020/04/29/quinot-regulatory-justification-coordination-south-africa/>; Eli M. Cahan, *Rwanda's Secret Weapon Against COVID-19: Trust*, BMJ (Dec. 11, 2020), <https://www.bmj.com/content/371/bmj.m4720>.

91. Meganoticias, *Presidente Piñera confirma llamado con Donald Trump para medidas ante coronavirus*, YOUTUBE (May 7, 2020), <https://www.youtube.com/watch?v=0er9DyBLgR4&feature=youtu.be&t=103>.

92. *Coronavirus en Chile Radiografía de la crisis*, TÚ INFLUYE 11–13 (May 21, 2020), https://www.cooperativa.cl/noticias/site/artic/20200522/asocfile/20200522233159/estudio_tuinfluyes_21_05_2020.pdf.

At the outset of the crisis, the government announced that “everyone” would be able to get a COVID-19 test. In reality, only those who could afford the test would get tested—and private health providers were charging as much as 70 USD.⁹³ The government decided to fix the price of COVID-19 tests at 30 USD. As the economic crisis began to unfold, the government’s labor agency declared that employers could be exempted from paying employees’ salaries based on a *force majeure* theory.⁹⁴ The statement sent shockwaves and forced Congress to enact legislation giving employers the chance to opt-in for the temporary suspension of labor contracts.⁹⁵ Although workers were not laid-off, they may use unemployment benefits available in their individual accounts.⁹⁶ Large companies and businesses,⁹⁷ both domestic and international,⁹⁸ took advantage of this new law. Eight weeks into the crisis, Congress approved a three-month emergency payment to support independent workers, who make up to 25% of the country’s population.⁹⁹ For the most vulnerable families, the government issued a one-time 58 USD cash transfer.¹⁰⁰

The pandemic, however, dramatically showed the cracks of Chilean society. One of the most eloquent and dramatic examples of the hardship that many were going through took place on May 18, 2020, when Chileans saw the word “hunger” projected at an iconic building in downtown Santiago.¹⁰¹

93. *Precio del test del coronavirus en el sector privado fluctúa entre \$30 y \$60 mil*, CNN CHILE (Mar. 20, 2020, 9:03 AM), https://www.cnnchile.com/coronavirus/precio-test-coronavirus_20200320/.

94. Law No. 1283, Marzo 26, 2020, CÓDIGO DEL TRABAJO [CÓD. TRAB.] [LABOR CODE].

95. Law No. 21,227, Abril 1, 2020, D.O. (Chile).

96. *Id.* art. 2(2).

97. *H&M suspende relación laboral con trabajadores de tiendas en Chile mientras se mantengan cerrados los locales*, DIARIO FINANCIERO (Apr. 10, 2020, 1:06 PM), <https://www.df.cl/noticias/empresas/multinacionales/h-m-suspende-relacion-laboral-con-trabajadores-de-tiendas-en-chile/2020-04-10/141638.html>.

98. *Starbucks Latin America Franchise Holder Suspends 1,600 Jobs in Chile*, REUTERS, <https://in.reuters.com/article/chile-starbucks/starbucks-latin-america-franchise-holder-suspends-1600-jobs-in-chile-idINKBN21M04B> (Apr. 3, 2020, 10:54 PM).

99. *Ministro Sichel por Ingreso Familiar de Emergencia: “Probablemente tres meses no van a ser suficiente,”* MEGANOTICIAS (May 14, 2020), <https://www.meganoticias.cl/nacional/301753-ministro-desarrollo-social-sebastian-sichel-ingreso-familiar-emergencia-quienes-beneficio-cuanto-tiempo-entrevista-meganoticias.html>.

100. *Bono de Emergencia COVID-19*, CHILE ATIENDE, <https://www.chileatiende.gob.cl/fichas/77255-bono-de-emergencia-covid-19> (June 1, 2020).

101. *See* Urban Theory Lab (@UrbanTheoryLab), TWITTER (May 19, 2020 10:27 AM), <https://twitter.com/UrbanTheoryLab/status/1262751816967573505>.

The artistic intervention caused shock and surprise to many, starting with the then-Minister of Health who days later acknowledged that he was surprised to see how much poverty there was in Santiago,¹⁰² proving the head of the medical association right: authorities did not know the country they lived in—and governed.

Another momentous event during the pandemic was the passage of constitutional amendments that allowed citizens to withdraw 10% of their mandatory retirement savings.¹⁰³ Congress adopted the measures in the midst of dramatic political and legal discussion on the scope of the right to social security and the government's failure to adequately respond to the economic crisis.

During the debate of the first amendment, in July 2020, the Minister of Economy, Lucas Palacios, said that with the adoption of such measure, “Chile would become a banana republic.”¹⁰⁴ Most lawmakers (including those from the ruling parties) ultimately supported the measures.¹⁰⁵ People were desperate as financial aid did not come their way.¹⁰⁶ The amendments were important for several reasons: first, they bridged some of the distance between elected representatives and the citizenry but further isolated the administration; second, many people perceived the measures as a stab on the pensions system—administered by private entities—that failed to deliver decent pensions and is seen as a major cause for the constitutional replacement.¹⁰⁷ Finally, as Minister

102. Carlos P. Reyes, *Mañalich reconoce que en un sector de Santiago “hay un nivel de pobreza y hacinamiento del cual yo no tenía conciencia de la magnitud que tenía,”* LA TERCERA (May 28, 2020 6:13 PM), <https://www.latercera.com/politica/noticia/manalich-reconoce-que-en-un-sector-de-santiago-hay-un-nivel-de-pobreza-y-hacinamiento-del-cual-yo-no-tenia-conciencia-de-la-magnitud-que-tenia/5BQZLGLPVDDBPKQ2SNSSSWRGYU/>.

103. Law No. 21,248, July 30, 2020, D.O. (Chile); Law No. 21,295, Dec. 10, 2020, D.O. (Chile).; *see also* Kejal Vyas, *Chileans Dip into Pensions to Ease Economic Pain*, WALL ST. J. (July 30, 2020, 5:53 PM), <https://www.wsj.com/articles/chileans-dip-into-pensions-to-ease-economic-pain-11596146022>; Aislinn Laing, *Chilean Lawmakers Approve Second Pensions Withdrawal*, REUTERS, <https://in.reuters.com/article/chile-pensions/chilean-lawmakers-approve-second-pensions-withdrawal-idUSL1N2IJ1UO> (Dec. 3, 2020, 3:54 PM).

104. Agencia Uno, *Ministro Palacios y su oposición al retiro de fondos de las AFP: «Nos transformaremos en un país bananero»*, EL DESCONCIERTO (July 10, 2020), <https://www.eldesconcierto.cl/2020/07/10/ministro-palacios-y-su-oposicion-al-retiro-de-fondos-de-las-afp-nos-transformaremos-en-un-pais-bananero/>.

105. *Id.*

106. *See* BBC, *supra* note 2 (detailing civil unrest due to “hunger and lack of work”).

107. Miriam Henríquez, *La actual Constitución no es compatible con las demandas sociales*, CIPER CHILE (Feb. 4, 2020), <https://www.ciperchile.cl/2020/02/04/la-actual-constitucion-no-es-compatible-con-las-demandas-sociales/>.

Palacios ultimately acknowledged, far from turning the country into a banana republic, the measure boosted the economy.¹⁰⁸

One policy aspect where the concentration of power in the administration showed good results was the provision of urgent care. As noted above, under the health measures, the Minister of Health had the power to order private clinics to accommodate beds and provisions to receive call patients.¹⁰⁹ This measure was important as it allowed Chile to avoid the “last bed” dilemma that other nations faced.¹¹⁰

In Chile, as in most of Latin America, one of the areas where inequality is more pronounced is health. Wealthy individuals have access to world-class treatment and facilities, while poorer individuals must seek care in understaffed and under resourced health facilities.¹¹¹ It is routine to hear stories of people lining up before dawn to secure spots in public health facilities—and to have their treatments scheduled for weeks or even months ahead.¹¹² It certainly did not help that then-Minister of Health Mañalich had previously been the manager of the most expensive and exclusive private clinic in Santiago, and that he had been accused of dubious management.¹¹³

Using the expansive regulatory powers, health authorities forced private providers to participate in the treatment of COVID-19 patients. The process of coordination—or “conversion,” as referred by the authorities—effectively addressed the shortage that was rapidly coming in sight.¹¹⁴ To some, it may seem as if these measures came too late: the number of infections and deaths kept going up, and there was no clear indication as to when the numbers

108. *Ministro Palacios reconoce que el retiro del 10% está reactivando la economía*, CNN CHILE (Aug. 12, 2020, 12:35 PM), https://www.cnnchile.com/economia/palacios-reconoce-retiro-10-reactiva-economia_20200812/.

109. *See generally* CÓD. SANIT. art. 36.

110. *The Extraordinary Decisions Facing Italian Doctors*, ATLANTIC (Mar. 11, 2020), <https://www.theatlantic.com/ideas/archive/2020/03/who-gets-hospital-bed/607807/>.

111. *See Chile*, PAN AM. HEALTH ORG., <https://www.paho.org/salud-en-las-americas-2017/?p=2518> (outlining Chile’s health system).

112. *Colas de madrugada en los consultorios: La indignante realidad que todavía se vive en algunas poblaciones*, LA SEGUNDA (Sept. 6, 2013), <http://www.lasegunda.com/Noticias/Nacional/2013/09/877034/colas-de-madrugada-en-los-consultorios-la-indignante-realidad-que-todavia-se-vive-en-algunas-poblaciones>.

113. *Informe acusa millonario gasto en días cama en la Clínica Las Condes en gobierno de Piñera*, COOPERATIVA (May 6, 2014, 8:52 AM), <https://www.cooperativa.cl/noticias/pais/salud/informe-acusa-millonario-gasto-en-dias-cama-en-la-clinica-las-condes-en/2014-05-06/085411.html>.

114. *Clinicas destacan que red privada casi triplicó la meta de camas UCI para pacientes COVID-19*, 24 HORAS (Nov. 6, 2020), <https://www.24horas.cl/coronavirus/clinicas-destacan-que-red-privada-casi-triplico-la-meta-de-camas-uci-para-pacientes-covid-19-4247010>.

could go down. Despite the dramatic spike in numbers, the health system did not structurally collapse.¹¹⁵

This feature was obviously of interest to social scientists, policymakers, and epidemiologists. But it was also consequential for ordinary citizens. Citizens who are not enrolled in the private provision of health are the ones who experience the problems of the public sector's lack of resources. They know how it feels to have someone close die or be denied treatment due to insufficient health workers and available beds. Perhaps, for the first time, many citizens could now look at a political and legal outlet to address these recurrent problems: the constituent process.

The constituent process that underlined the pandemic created a constructive space for a consequential reflection on the impact of some of the regulatory measures that were adopted.¹¹⁶ If pandemics, as some argued, become more frequent, how should local governments interact with the central administration? Should municipalities regain the powers that they had over a century ago and be able to adopt measures without the central administration's intervention? How much deference should courts give to administrative agencies? What is the importance of the law of exception for the management of pandemics? These are just some of the questions that Chileans addressed as the pandemic surged and the unprecedented constitution-making process unfolded.

CONCLUSION

The COVID-19 pandemic is a health crisis with significant legal implications. Despite the impressive administrative and constitutional powers at the disposal of health authorities, Chile was seriously hit by the virus. The administration retained enormous powers, at the expense of local government (municipalities), and could take advantage of the virtual absence of judicial oversight by the courts. One of the factors that accompanied the government's problematic response to the pandemic was the lack of credibility of elected officials, in the context of a major constitutional reform. The legal response to COVID-19 in Chile shows that juridical mechanisms may not be enough to contain a pandemic when trust in government is missing.

115. See Charis McGowan, *Chile Doctors Fear Complacency Over Covid-19 after Initial Successes*, GUARDIAN (Apr. 10, 2020, 7:36 AM), <https://www.theguardian.com/world/2020/apr/10/chile-doctors-covid-19-complacency>.

116. Jorge Contesse, *Webinar 3: Americas - COVID-19 Constitution-making in Chile*, IACL-AIDC: DEMOCRACY 2020 GLOB. ROUNDTABLE BLOG (Nov. 16, 2020), <https://www.iacl-democracy-2020.org/blog/2016/3/23/blog-post-sample-9wntn-6ye75-hwawc-pce7h>.