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COVID-19, public health, and criminal law: Criminalising non-compliance with quarantines in Chile and Argentina

Valentina Zagmutt
Martín Böhmer

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Preface

COVID-19 has reshaped the world and radically changed the way people, institutions, and systems function. Pre-existing economic, social, and institutional vulnerabilities have aggravated the impacts of the crisis, especially for less developed and emerging economies and their vulnerable populations. In response, Southern Voice has partnered with both member and non-member think tanks across the Global South to generate evidence and analyses of the pandemic's impact in various contexts. Through this research programme, teams of researchers, embodying different perspectives of the Global South, have produced new, evidence-based insights into the challenges and opportunities presented by the coronavirus crisis. Three core themes have guided this research initiative: social impact, economic and fiscal recovery, and accountable and inclusive institutions. Overall, the initiative aims to advance evidence-based policy solutions and recommendations to mitigate the middle- and long-term challenges of the crisis and to promote a better and more sustainable recovery.

Within this general context, the present study examines the use of emergency legislation to enforce COVID-19 regulations in Chile and Argentina. Specifically, it examines the impact on different populations, especially vulnerable groups, of using criminal law to enforce social isolation measures. Acknowledging that local contexts differ, we hope that this joint publication by Southern Voice, Espacio Público, and the Center for the Implementation of Public Policies Promoting Equity and Growth (CIPPEC) will be useful when it comes to crafting appropriate legal responses to the medium-to-long-term challenges presented by the pandemic.

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Chair, Southern Voice

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Abstract

This study presents a comparative analysis of the use of criminal law to enforce compulsory preventive social-isolation measures, or quarantines, in the context of the COVID-19 pandemic in Chile and Argentina. As the use of criminal law to enforce quarantines is a public policy decision, it should be subject to public accountability. In addition, the use of criminal law to guarantee the right to health has profound implications with the potential to compromise people's liberties. This clash must be considered when assessing the enforcement of social-isolation measures, given that the criminalisation of non-compliance may disproportionately affect specific sectors of the population, particularly those experiencing problems with housing and regular employment. In Argentina, where most criminal prosecutions declined over time, this study finds no evidence of socio-economic or geographic discrimination in law enforcement. While in Chile, prosecutions did not reduce over time and disproportionately affected vulnerable sectors. Overall, the disproportionate application of the law had negative consequences on the most vulnerable sectors of the population.

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Acronyms and abbreviations

AMBA	Buenos Aires Metropolitan Area [Área Metropolitana de Buenos Aires]
CABA	Autonomous City of Buenos Aires [Ciudad Autónoma de Buenos Aires]
CIPPEC	Center for the Implementation of Public Policies for Equity and Growth [Centro de Implementación de Políticas Públicas para la Equidad y el Crecimiento]
DNU	Decrees of Necessity and Urgency
ECLAC	Economic Commission for Latin America and the Caribbean
FMO	Eastern Metropolitan Prosecutor's Office [Fiscalía Metropolitana Oriente]
FMS	South Metropolitan Prosecutor's Office [Fiscalía Metropolitana Sur]
GCBA	Government of the City of Buenos Aires
INDEC	National Census of Population, Homes and Dwellings [Censo Nacional de Población, Hogares y Viviendas]
LDs	Legislative Delegations
PCSI	Preventive and Compulsory Social Isolation
SDGs	Sustainable Development Goals
UBN	Unsatisfied Basic Needs
UN	United Nations

COVID-19, public health, and criminal law: Criminalising non-compliance with quarantines in Chile and Argentina

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Introduction

In 2020, the governments of Argentina and Chile adopted preventive and compulsory social isolation (PCSI) measures, or quarantines, to control and prevent the spread of COVID-19. Although the regulatory path that led to adopting these measures differed in each country, both governments resorted to similar use of threats and criminal sanctions to enforce these measures.

In Argentina, the executive branch ordered that the measures be implemented in March 2020 by extending the health emergency act. The executive decree¹ states that whoever violates the decree will be subject to imprisonment from six months to two years for infringements of measures designed to prevent the introduction or the spread of an epidemic (Art. 4). Further, it sentences from fifteen days to one year for resisting or disobeying a public official (Art. 239) and corresponding provisions of the Penal Code. The fact that these regulations were passed by executive decree, and then subsequently ratified by Congress, has raised questions about their democratic legitimacy.²

The Argentinian National Constitution requires, that regulations are the result of democratic debate, mainly through deliberation by the National Congress. However, in exceptional situations, it also establishes means to implement such regulations

1 The decrees at issue are Decree 260/2020 and Decree 297/2020 of 20 March 2020 with its successive extensions. Article 2 of the latter decree established that "Individuals must remain in their usual residences or in the residence they are staying in ... at the time of the commencement of the measure ordered. They must refrain from going to their workplaces and may not circulate on routes, roads, or public spaces." Thus, an inverted regime was installed with regard to freedom: the general rule is prohibition, with exceptions being granted by means of norms dictated by the executive.

2 For example, multiple experts and lawyers criticized the executive branch's move to ban "social or family events in enclosed spaces and in people's homes" through a decree in August 2020. See <https://www.cronista.com/economia-politica/Es-constitucional-prohibir-las-reuniones-sociales-por-DNU-opinan-tres-expertos-20200803-0055.html>

without requiring a debate: namely, through decrees of necessity and urgency (DNU³) and legislative delegations (LDs). Regarding the LDs, the law establishes that Congress may delegate the enactment of certain norms to the executive branch in specific cases such as emergencies. The law also sets strict limits on the scope of such delegation and on the period of time during which the executive may exercise this power. Further, subsequent approval by Congress is required. However, unless both chambers of the Congress explicitly reject the decree, it will remain in force (Law 26.122). Therefore, if only one chamber favours the decree, it will be approved; likewise, if one of the two chambers is silent about revoking the regulations, the decree will not be repealed.

Meanwhile, in Chile, the authorities applied Article 318 of the Penal Code passed in 1874 and modified in 1969. The penalty for those infringing on regulations and endangering public health is a prison sentence ranging from 61 to 540 days or a fine ranging from USD 380 to USD 1,260.⁴ In June 2020, due to the COVID-19 crisis, Law 21.240 was passed, increasing the penalties to up to three years of imprisonment or a fine ranging from USD 380 to USD 13,597.⁵ The criminal prosecution that had already been carried out to enforce quarantines was toughened through this new law. (For a chronology of the quarantines and the measures used to enforce them in Santiago's districts, see Appendix 1).

The social, economic, and political consequences of measures that force citizens to stay at home during periods of crisis have been extensively studied (see United Nations [UN], 2020a; ECLAC, 2021). Given the aims and scope of this study, we will not analyse this issue in-depth. However, it is worth noting that people with lower levels of education and less secure jobs were the most affected by the economic fallout from the pandemic and resulting social-isolation measures (Díaz Langou et al., 2020; UNICEF, 2020). This finding is reinforced in the case of Latin American countries with high levels of temporary or informal labour and income inequality (Amarante & Arim, 2015).⁶

3 Article 99, paragraph 3 establishes that "under no circumstances may the Executive Power, under penalty of absolute and irrevocable nullity, issue provisions of a legislative nature. Only when exceptional circumstances make it impossible to follow the ordinary procedures established by this Constitution for the enactment of laws [should an exception be made] ... " (Art. 99, paragraph 3). Furthermore, the executive branch is not allowed to issue decrees of necessity and urgency, including decrees involving criminal regulations.

4 The penalty stipulates that the fine ranges from 6 to 20 monthly tax units (MTU).

5 The penalty stipulates 200 MTUs.

6 In addition, according to data from the Inter-American Development Bank (IDB), the members of 50% of households in Latin America are not formal workers (Busso & Messina, 2020).

According to estimates by the International Labour Organization (2021), the level of unemployment in the region was 10% in 2020, the highest level since 1991 (an increase of 2.3% compared to 2019). This increase was, in part, a consequence of mandatory quarantines. In 2020, the segment of the population living in poverty was expected to increase by 7%, and the segment living in extreme poverty by 4.5%. What is more, the regional gross domestic product (GDP) was expected to contract by 9% (UN, 2020; ECLAC, 2021).

Analysing the use of criminal law to penalise non-compliance with pandemic regulations is relevant for three reasons. First, choosing to redress infringements of social-isolation measures with criminal prosecution implies a public policy decision that should be subject to democratic deliberation and accountability.⁷ Indeed, the choice of which tools to use to tackle the pandemic depends on the priorities established by the authorities. Yet, there is little information about how different countries have pursued the criminal prosecution of non-compliance with quarantine measures or about the impact of those implementation measures on various population groups.⁸ This study seeks to provide evidence to better understand the impact of criminal prosecution.

Second, criminal prosecution for non-compliance with pandemic regulations designed to safeguard public health directly clashes with the exercise of individuals' right to liberty. Mobility restrictions combined with the threat of a custodial sentence in case of non-compliance, therefore, threaten to undercut fundamental rights emanating from the Constitution and guaranteeing individual liberties. And third, mobility restrictions and the consequent penalisation of non-compliance with sanctions, ranging from fines to imprisonment, are likely to disproportionately affect the poorest segments of the population. Disadvantaged groups have insufficient resources to face the crisis and, at the same time, are more likely to be engaged in temporary or informal labour (Maurizio, 2019).

7 Thus, Davis (2020), states that "with the suspension of the normal rules of civil and probable criminal liability, any client or student who becomes ill or dies becomes a potential victim of the acts or omissions of the executive, legislative or judicial branches at the state or federal level" (para 42).

8 The University of Oxford has developed an index that compares the relative rigorousness of quarantines established in different countries (Covid-19 Stringency Index, available at: <https://ig.ft.com/coronavirus-lockdowns/>). However, this index aims to compare the countries' capacity for enforcement rather than to provide information about the levels of criminal prosecution in each country.

Moreover, as Fernández (2006) pointed out, it can be empirically verified that more powerful groups in society use criminal law as an instrument of social control over less-favoured social groups. To confirm that criminal justice systems disproportionately target disadvantaged social groups, one only needs to check the statistics on who is being criminally prosecuted and who is in prison or youth detention centres. Thus, some researchers argue that the penal system has, to a large extent, been functioning as a factor in the re-victimisation of persons living in poverty (Baratta, 2004; Finkelstein Nappi, 2004; Zaffaroni, 2005; Vitale, 2008).

Hence, depending on how it is carried out, the criminal justice system's intervention can play a role in increasing and reproducing—or decreasing and reversing—structural inequalities prevailing in a given country. Within this larger context, the present study examines how criminal law has been used in Argentina and Chile as a tool to support the implementation and enforcement of health measures. Among the questions, it seeks to answer are the following: Was the law used effectively? Were offenders criminally prosecuted? Was the law applied in an egalitarian manner across different sectors of the population? What was the scope of the legal instruments used in cases of non-compliance with the quarantine?

In what follows, we begin by detailing the regulatory path followed by each country and then analyse how the implementation of Argentina's and Chile's quarantine laws has impacted the rights to liberty, equality, and non-discrimination of the population in general, and vulnerable groups in particular. By analysing the use of criminal law in this connection, we aim to shed light on a mechanism for social control that is still poorly understood in public-health contexts. In turn, we seek to contribute to the achievement of the UN's Sustainable Development Goals—specifically, the goals of reducing inequalities (SDG 10)⁹ and of bringing about peace, justice, and strong institutions (SDG 16).¹⁰

Although quarantine and enforcement mechanisms' economic and social impact have not yet been empirically analysed, we argue that both social-isolation measures and enforcement regulations affect vulnerable groups more severely than better-off groups, forcing these vulnerable populations to commit acts of non-compliance in order

9 In particular, the study investigates whether the use of the penal system vis-à-vis social-isolation measures introduced during the pandemic fails to meet the commitments to achieve greater equality and inclusion required by Targets 10.2 and 10.3.

10 With regard to SDG 16, its targets require a commitment to ensuring equal access to justice (16.3), to promoting accountable institutions (16.6), and to guaranteeing that decisions are made in an inclusive and participatory manner (16.7). This study investigates the extent to which the use of the criminal justice system to enforce pandemic-related quarantines is in line with these commitments.

to survive. In other words, the social and economic impacts of taking time off work, spending time on paperwork, risking stigmatisation, and so forth may be especially acute for these segments of the population.

The results of our study indicate that significant differences exist between the two countries when it comes to their use of this quarantine-enforcement tool. The data from Argentina show that criminal prosecution of quarantine violators declined over time and that most criminal prosecutions ultimately did not go forward. Further, there is no evidence of discrimination by class or geographical area. The heavier use of the law during the first months of the quarantine suggests a higher enforcement capacity at the outset of the pandemic, as well as a more lenient approach to enforcement in the months

that followed when the negative economic and social consequences of the lockdown deepened. In Chile, by contrast, the data show that criminal prosecution was carried out in a more or less consistent manner throughout the pandemic, and across the various social sectors studied. However, our findings also show that those living in poverty were subjected to longer and more burdensome prosecutions. Accordingly, the use of criminal law to enforce quarantine in Chile penalised vulnerable sectors to a disproportionate extent.



The application of criminal law to enforce the quarantine in Chile and Argentina harmed vulnerable sectors to a greater extent.

Literature review

In the context of the COVID-19 health crisis, the imposition of measures restricting personal rights and freedoms has been authorised within certain limits. The United Nations (2020b) has pointed out that although some rights, such as freedom of movement, expression, and peaceful assembly, may be subject to restrictions for public-health reasons, even when implementing these measures, states must respect international human rights treaties that are in effect. The International Covenant on Civil and Political Rights, for example, accepts the restriction of these rights as long as the limitations comply with the Siracusa Principles (United Nations Economic and Social Council, 1985). This document defines the minimum conditions for limiting rights, as well as prohibitions against unwarranted restrictions. According to the Siracusa Principles, restrictive measures must, inter alia, respect the principle of legality and be necessary, proportional, and

non-discriminatory; these rights may not be suspended nor derogated (Amnesty International, 2020). Under these principles, the State can adopt mechanisms to ensure compliance with health measures and guarantee their effectiveness in controlling the pandemic, while respecting the principle of proportionality in imposing sanctions and preventing such measures from being implemented in an arbitrary or discriminatory manner (UN, 2020b).

Both Argentina and Chile adopted the measure of preventive and compulsory social isolation (PCSI), or quarantine, and established criminal sanctions in the event of non-compliance. Hence, in addition to imposing a rights-restrictive measure, the criminal justice system was used as a means to enforce the regulations created to address the crisis and control the spread of the virus. However, although such enforcement has been a widespread practice in the region¹¹, and it is logical to ensure compliance with PCSI measures, it is not obvious that adherence to the measures should be achieved through criminal law. Establishing prohibitions on certain behaviours under the threat of imposing sanctions restricts personal freedom (Mera, 1998). For this reason, there are principles limiting the use of punitive power, including the principle of last resort. Criminal law should thus be the State's last means for protecting legal goods—for example, material or immaterial goods enshrined by law, including society's welfare. Nonetheless, even though the criminal justice system should be used only in the absence of less harmful "formal and informal" means of control (Carnevali, 2008), both Argentina and Chile took this route to ensure compliance with social isolation measures.

This is not the first time a global health crisis has forced states to adopt various containment measures. In reviewing previous cases, however, we determined that, in general, it is unusual to resort to criminal law in such situations. For example, during the Ebola crisis, affected countries did not use criminal law to control the spread of the disease. Criminal law was used to determine responsibility, not to prevent and control the spread of the virus. In Spain, for example, the authorities explored the possibility of attaching criminal liability to shortcomings with safety equipment and to the way patients infected with Ebola were treated (Rodríguez, 2014).

The situation is different in the case of sexually transmitted infections. In this connection, criminal law has been used as a tool to punish conduct that poses a risk of transmission. For instance, prior to the spread of HIV, several U.S. states criminalised the malicious intent to expose others to sexually transmitted diseases. Likewise, several states

11 Besides Argentina and Chile, other countries in the region established some kind of sanction for non-compliance with PCSI measures, including Brazil, Bolivia, Colombia, Costa Rica, the Dominican Republic, Ecuador, El Salvador, Mexico, Panama, Paraguay, Peru, Puerto Rico, Uruguay, and Venezuela.

have criminalised behaviours that present a high risk of transmitting HIV (Lazzarini et al., 2002). O'Byrne et al. (2013) have studied the impact of criminalising these behaviours, concluding that adopting criminal laws in the context of HIV control negatively affects public health.

As noted previously, in Argentina, coronavirus quarantine measures were ordered by decree and then ratified by Congress; they aimed to safeguard public health by reducing the circulation of COVID-19. Initially, the intent behind these measures seemed to be in line with regulations allowed by decrees of necessity and urgency (DNU) (Malavolta & Pulvirenti, 2020). However, the use of the measures has been extended, even with a fully functioning Congress. There is an extensive literature warning of the possible risks to the rule of law when granting the power to legislate (e.g., through decrees) to a unipersonal and non-deliberative body such as the executive branch (O'Donnell, 1994; Mainwaring & Shugart, 1997; Ferreira Rubio & Goretti, 1996). The recurrent use of this tool can weaken constitutional guarantees and erode the legitimacy of the decision-making process. Along these lines, various studies interpret the use of decrees in presidential systems as a usurpation of the legislative branch's authority and note the executive branch's incentives for legislating through decrees (Linz, 1994; Lijphart, 1994). Congress, by contrast, is the natural authority for deliberation and consensus-building, which is essential for public policy discussions around exceptional scenarios such as those generated by the COVID-19 pandemic.

In Chile, probes have been launched into the use of criminal law to sanction non-compliance with the pandemic. These probes were initiated when criminal prosecution for non-compliance began, and they intensified when Law 21.240 passed in Congress. Critics have opposed the use of criminal law to reduce and control contagion, warning of possible discriminatory effects on poorer groups. The National Institute of Human Rights has argued that, in general, the criminalisation of poverty is an endemic feature of the criminal justice system. Members of the most disadvantaged groups are those who most often fail to comply with laws given their lack of resources. They thereby expose themselves to penalties that generate a discriminatory consequence, as with fines that poorer people are unable to pay. As a result, the criminal justice system increases and reproduces existing structural inequalities (Pascual, 2020).

Furthermore, the constitutionality of the law related to PCSI in Chile has been questioned because it does not respect the principle of legality and proportionality, as required by the Constitution and international human rights treaties (Defensoría Penal Pública, 2020). The principle of proportionality is particularly relevant in this context. According to this principle, criminal laws are required to undergo a constitutionality review where the following factors must be taken into account: 1) whether or not the

measure is appropriate for achieving the intended purpose (protection of a legal good); 2) whether or not the measure needs to be adopted; and, finally, 3) whether or not it meets the criterion of reasonableness (Fernández, 2010). This last factor, also known as proportionality in the strict sense, involves an analysis of whether the seriousness of the criminal justice system's intervention equals the benefit expected from it.

The Chilean Constitutional Court has declared that, in some cases, Article 318 should not be applied on the grounds that it is at least partly unconstitutional.¹² The clause punishes non-compliance with social-isolation measures and other behaviours that endanger public health. Furthermore, behaviours that constitute mere administrative infractions (Londoño, 2020) are included in Article 318, a norm that punishes non-compliance with health regulations. At the same time, the clause allows subjects to be arrested and even deprived of their liberty, whether by means of detention, the imposition of preventive measures, or prison sentences, even when the infraction does not actually cause harm to public health, given that the offender need not be infected for the law to apply.

The use of the apparatus of criminal prosecution in situations involving the adoption of social measures is not a new phenomenon in the region. According to Miranda (2007), criminal policies, in general, often seem to replace social policies. Chile is an example of this tendency, as demonstrated by its enactment of Law 20.931, which authorises law enforcement officials to apply preventive identity checks. This is a tool that authorises the police to stop any individual 18 years or older and request that he or she produce an identification document. By authorising the police to ask for a person's papers without any evidence of a crime, the population is exposed to discriminatory treatment and possible violations of persons' rights to personal freedom, individual security, and privacy. Thus Sozzo (2012) argues that this measure aims to build consensus and legitimacy by using increased punitiveness as a bargaining chip in the political market instead of tackling the social problems of poverty and segregation implied by criminal activities.

According to Miranda (2007), this example suggests how governments use judicial-criminal interventions with very limited transformative capacity instead of using a political-structural intervention to address social problems. This tendency endangers the legitimacy of criminal law by straining the limits of the punitive power of the State (*ius puniendi*), i.e., the State's power to punish, especially the power of last resort. Criminal law thereby becomes the State's response to any conflict that may arise (Marqués, 2017). This strategy is ineffective because it fails to solve the problem intended to tackle,

12 See the STC Constitutional Court Role N° 8950-2020, available at <https://www.diarioconstitucional.cl/wp-content/uploads/2021/01/146328-1.pdf>

generating consequences opposite to those expected and deepening the conflicts associated with criminal policies (Arriagada & Nespoldo, 2012).

Methodology

This study describes the preventive and compulsory social isolation (PCSI) measures adopted by the governments of Argentina and Chile to control and prevent the spread of COVID-19, focusing on the use of criminal law in both countries as a means of enforcing these measures. The study explores the impact of the measures in question on the general population, emphasising the poorest sectors, by comparing the number of criminal prosecutions initiated in economically diverse regions in both nations.

We chose Argentina and Chile based on two main criteria. Specifically, both countries:

- Criminalised non-compliance with the health measures decreed due to the COVID-19 crisis.
- Engaged in this criminalisation despite having different judicial systems and designs. Argentina is federally organised, while Chile is unitarian. The Argentine criminal justice system is inquisitorial, whereas the Chilean system is accusatorial.

This is a descriptive study based on various observational data sources obtained through requests issued to institutions within the countries' criminal justice systems or through the information available on their official websites. More precisely, we used data on prosecutions and arrests in Chile and Argentina. The sources and scope of the information obtained from each country varied. In Argentina, the City's Public Prosecutor's Office in Buenos Aires provided information about the number of legal proceedings initiated for violations of Article 205 only in the Autonomous City of Buenos Aires (CABA, in Spanish). In contrast, the National Public Prosecutor's Office provided information about the 24 jurisdictions encompassed by the Argentinean territory (23 provinces plus CABA). Altogether, these data sources allowed

 **Employing criminal sanctions in the place of social policy exposes the population to discriminatory treatment and violations of their personal rights.**

us to analyse the strategies linked to quarantine compliance throughout the country. The data refer to the period from March 2020 to November 2020 and comprise a total of 7,910 cases distributed across the country's 23 provinces as well as 36,354 cases in the City of Buenos Aires.¹³

In Chile, meanwhile, data on the number of legal proceedings initiated for quarantine infringements between March 2020 and August 2020 were provided by the Public Prosecutor's Office [Ministerio Público] (MP) and the Public Defender's Office [Defensoría Penal Pública].¹⁴ Combined with the data from Argentina, the information on the proceedings initiated in Chile enabled us to develop a comprehensive analysis of the use of legal instruments in each country and account for the various strategies linked to the enforcement of social isolation measures in different areas. In comparing different sectors or districts in each country, we calculated the incidence rate of violations of Article 318 in various districts and areas in Chile, and violations of Article 205 across all provinces in Argentina. In the case of Chile, the incidence rate was calculated per 10,000 inhabitants. The breakdown of inhabitants in the districts and areas in Chile reflects the findings of that country's National Institute of Statistics (2020). In contrast, the province-by-province breakdown in Argentina reflects the data from the latest available National Census from 2010.

In Chile, we studied two sectors of Santiago: the eastern and southern zones, representing higher and lower socio-economic levels, respectively. These zones include the richest and poorest districts in the capital. In developing this categorisation, we used the 2019 district social-priority index prepared by the Regional Ministerial Secretariat of Social Development and Family. It integrates relevant aspects of districts' social development, such as income, education, and health. This synthetic index uses five



**Between
March and
August 2020,
Chile had 137,510
prosecutions
for violations of
Article 318.**

¹³ The data from Argentina cover the period from 9 March 2020 to 9 November 2020 in the case of CABA and from 11 March 2020 to 11 November 2020 in the case of the national office.

¹⁴ Our analysis covers the period from 1 March 2020 to 31 August 2020. The analysis start date reflects when government measures were first adopted in Chile.

categories to measure the relative standard of living achieved by the population of a district. The categories include high priority, medium-high priority, medium-low priority, low priority, and no priority from the poorest to the richest. The districts with no social priority belong to the rich eastern sector and those with high social priority to the poor south.

In Argentina, we studied the patterns of prosecution in the different districts of CABA. To develop socio-economic profiles for the various municipalities of CABA, we used data on the distribution of households with unsatisfied basic needs (UBNs) by the municipality, extracted from the 2010 National Census of Population, Homes and Dwellings (INDEC). Then, for both Argentina and Chile, we used empirical research methods to study legal proceedings related to quarantine violations vis-à-vis the socio-economic data just described. For Chile, we used information about the number of criminal cases filed and terminated during the period from March 2020 to August 2020, studying how these cases were terminated, and the number of pre-trial detentions (PP) decreed therein. This information was obtained from institutions at the national level and also from the territorial divisions of the Public Prosecutor's Office working in both areas within Santiago: The Eastern Metropolitan prosecutor's office [Fiscalía Metropolitana Oriente] (FMO) and the southern Metropolitan Prosecutor's Office [Fiscalía Metropolitana Sur] (FMS).

Obtaining data organised by zones has allowed us to study correlations between income levels and prison terms, as well as the various ways in which the cases ended and the number of pre-trial detentions that were meted out. In this way, we could determine how the use of this quarantine-enforcement tool varies in rich versus poor sectors, and explore whether measures introduced by the penal system have disproportionately affected the most vulnerable sectors. That said, the information about Chile that we obtained initially was insufficient, given the diverse socio-economic composition of the areas in question, especially those categorised as poorer. For this reason, we asked the Public Criminal Defender's Office for disaggregated information, pegged to the court with jurisdiction in the districts of interest. This additional data allowed us to clean up the sample and concentrate only on non-priority and high-social-priority districts. In addition, we used information about previous years published by the Public Prosecutor's Office in order to establish comparisons in relation to the use and application of Article 318.¹⁵ Table 1 summarises the data we obtained for Santiago.

15 Comparisons with the figures published in previous years can only be made for those offences which belong to the same category, i.e., "with known offender," because in the case of violations of Article 318 the offender is always known.

Table 1. Jurisdictional, geographic, and socio-economic information about the eastern and southern prosecutors' offices in Santiago, Chile

Court	District	Social Priority Index	Prosecutor's Office
4th Juzgado de Garantía (JG)	Las Condes, La Reina, Vitacura, & Lo Barnechea	No priority	FMO
8th JG	Providencia & Ñuñoa	No priority	FMO
13th JG	Peñalolén & Macul	Low priority	FMO
14th JG	La Florida	Low priority	FMO
10th JG	Pedro Aguirre Cerda & Lo Espejo	Medium-low priority & high priority, respectively	FMS
11th JG	San Miguel, La Cisterna, & El Bosque	Low priority, medium-low priority, & medium-high priority, respectively	FMS
12th JG	La Granja & San Joaquín	Medium-low priority & medium-high priority, respectively	FMS
15th JG	San Ramón & La Pintana	High priority	FMS
JG Puente Alto	Puente Alto, Pirque, & San José de Maipo	Low priority, medium-low priority, & medium-high priority, respectively	FMS

Source: Regional Ministerial Secretariat of Social Development and Family (2019) and Organic Code of Courts (2021).
Elaborated by the authors.

Meanwhile, the information that we obtained for our analysis of Argentina was complemented with mobility data from the data portal of the Government of the City of Buenos Aires (GCBA); these data indicated the number of daily trips made on public transport by type of transport (train, bus, and underground). This information enabled us to factor in the mobility of people in CABA. The data regarding the total number of trips on the three transport systems were aggregated by month to show changes in mobility in the city over time. The data reveal general population mobility and do not differentiate between authorised movements (involving essential health personnel) versus non-authorised.

We also used data on COVID-19 cases to provide information about the evolution of the epidemiological situation in CABA for the period between March 2020 and October 2020. These data, too, were obtained from the GCBA portal, which has a daily list of confirmed cases. We added the confirmed cases in CABA per month to account for contagion over time. This information allowed us to study the correlations among the number of cases, individuals' mobility, and criminal prosecutions.

Finally, we should note that the analysis presented here is descriptive and exploratory. The data available for each country allow us to draw preliminary and partial conclusions that should not be viewed as representative of the general reality of the two countries. Multiple factors may have affected the relationship between income and prison terms in Chile and between mobility and the penalisation of quarantine violations in different parts of Argentina.

Findings

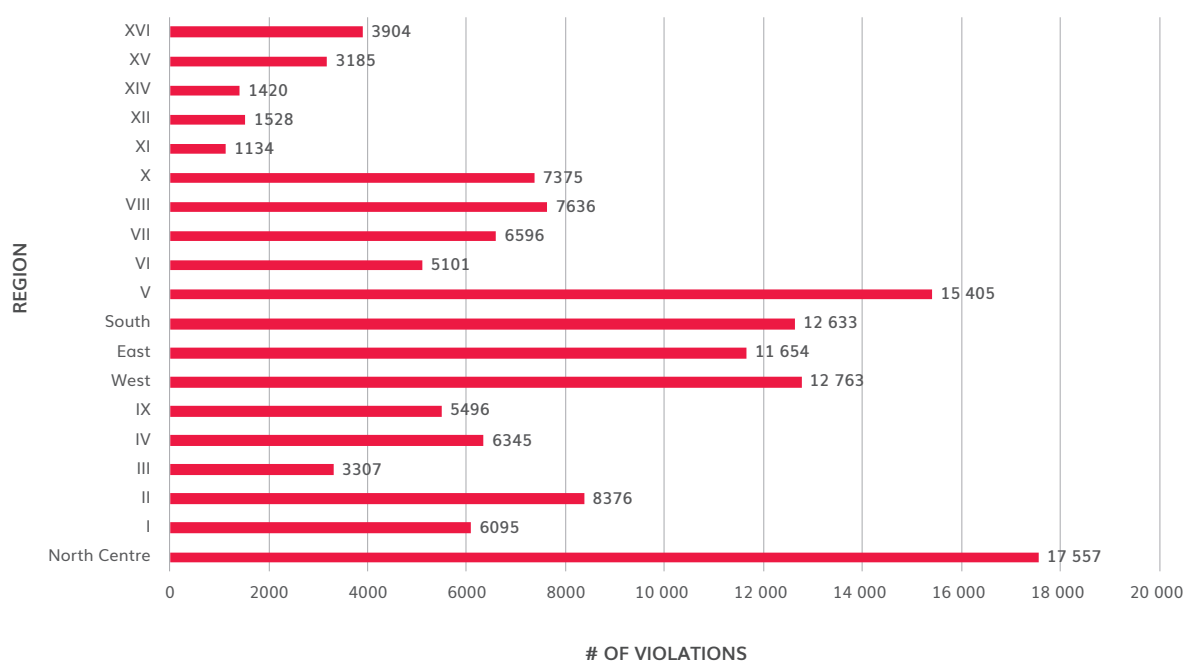
Data on Criminalisation in Chile

To study the patterns of criminalisation in Chile, we typified non-compliance with quarantine as an offence under Article 318¹⁶ of the Penal Code. For the period between

16 Art. 318 of the Penal Code: Anyone who endangers public health by violating the hygienic or health rules, duly published by the authority, in time of catastrophe, epidemic or contagion, will be punished with imprisonment lower in its minimum to medium degree or a fine of six to two hundred monthly tax units. It will aggravate this crime by calling shows, celebrations, or festivities prohibited by the health authority in times of catastrophe, pandemic or contagion. In cases in which the Public Ministry requests only the fine of six tax units monthly, proceed at any time by the general rules of the procedure payment for payment, the provisions of Article 398 of the Code of Criminal Procedure being applicable. When it comes to fines, superiors will proceed following the rules that regulate the simplified procedure.

March 2020 and August 2020, criminal cases were filed for infringements of Article 318 in every region of the country, with the total number of infringements during that period reaching 137,510 nationally (see Figure 1).

Figure 1. Number of cases involving violations of Art. 318 of the Penal Code in Chile



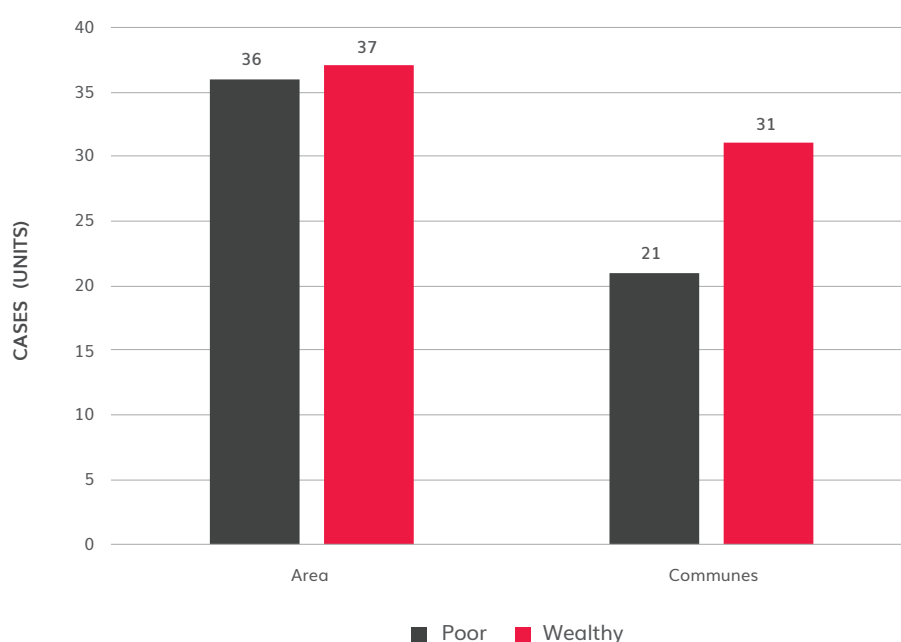
Source: Public Prosecutor's Office of Chile (2020).

Elaborated by the authors.

According to 2019 data from the Public Prosecutor's Office, in six months of prosecutions for violations of Article 318, cases involving these violations reached 21.1% of the total number of cases (with a known defendant or perpetrator) that entered the country's criminal justice system. This statistic reflects the magnitude of the prosecutions for this crime and the enormous burden it places on the criminal justice system as a whole. By contrast, according to the Public Defender's Office data, there were 76,393 cases, rather than 137,510 cases, filed at the national level. The discrepancy in the data provided by the two institutions stems from two factors. First, the Public Prosecutor's Office registers all cases, whereas the Public Defender's Office only registers those that are prosecuted. Prosecution happens when the Public Prosecutor's Office decides to bring the case to court. The second factor is that the Public Defender's Office handles only the cases of those offenders who do not have a private lawyer, whereas the Public Prosecutor's Office prosecutes all cases.

When comparing the number of case admissions in terms of poor versus wealthy areas, we see that there is a slight difference: 37 versus 36 admissions per 10,000 inhabitants, respectively. This difference increases if we focus the analysis on the districts with and without high social priority, as shown in Figure 2. For every 10,000 inhabitants, there were 21 admissions in the districts with no priority (rich) and 31 admissions in those with high priority (poor).

Figure 2. Cases of Art. 318 infringements (per 10,000 inhabitants) by districts and areas studied in Santiago, Chile



Sources: National Institute of Statistics (2020) and Public Defender's Office (2020).
Elaborated by the authors.

The data provided by the Public Defender's Office were disaggregated according to whether the case admissions corresponded exclusively to Art. 318 offences or to violations of Art. 318 plus another offence. This disaggregation is useful insofar as the admissions for Art. 318 alone imply that the criminal prosecution began with police officers checking a subject in order to determine whether he or she had a health permit to justify non-compliance with the quarantine. In this kind of admission, there is a direct link with the issue of compliance with sanitary quarantines. By contrast, in cases in which Art. 318 offences were coupled with other offences, it is reasonable to assume that the 318 violation was detected in connection with the perpetration of another offence, and not the other way round. Thus, the study of case admissions exclusively for Art. 318 offences allows for a more precise measurement of the criminal justice system's control

over individuals than does the study of criminal cases involving the infringement of Art. 318 plus another offence.

The data provided by the Public Defender's Office show that exclusive case admissions for violations of Art. 318 were more frequent in the rich (east) zone than in the poor (south) zone: 79% vs 71%. The same can be observed if we focus the analysis on the districts. In those with no social priority (rich), exclusive case admissions (i.e., admissions for violations of Art. 318 alone) account for 76% vs 74% in those with high priority (poor). These data could be indicative of greater police control in the wealthier sectors and districts. However, one must bear in mind that there are limits to what the evidence can suggest, given that there are other variables to consider: for example, the number of police officers available in each sector, and the extent of the "floating population", or people who are not officially registered in the community. Therefore, our results do not constitute a conclusive finding but rather an indication that opens the door to further investigation.

Beyond the number of case admissions across more or less vulnerable groups, it is appropriate to ask whether there are differences in how the criminal justice system treats members of these groups. To address this question, we considered first the number of terminated prosecutorial cases and then turned to the specific form that such case closures assumed.

As of August 2020, at the national level, 60% of the exclusive cases of violations of Art. 318 were closed. Meanwhile, in the richest sectors, 50% of these cases were terminated, whereas, in the poorest sectors (during the same period), the percentage of these case admissions that were closed reached only 24.1%. The same trend is reflected in the data from the Public Defender's Office. This trend indicates a difference in how these cases are processed, suggesting that there are faster processing times in the richer areas than in the poorer areas. Longer processing times result, in turn, in higher costs for the offenders. These differences may derive from the actions of those involved in the criminal justice system, i.e., the behaviour of the courts where the cases are processed. However, this preliminary hypothesis needs to be tested further.

Shifting to the district level and considering districts with and without high social priority, the data again supports the discussed trendline. The non-priority (rich) districts had the highest number of case closures for exclusive cases of violations of Art. 318: specifically, 1,020 closures, representing 37% of the total number of exclusive cases filed in this area. By contrast, the districts in the poor zone account for only 343 of the terminated exclusive cases, i.e., 14.4%. Once again, then, we see that more cases are closed for infringements of Art. 318 in richer districts than in poorer ones. Prosecutions of cases in wealthier areas

are closed more quickly than in poorer areas, meaning that more vulnerable populations must bear the higher costs that extended cases carry for offenders.

There are also differences in how cases were terminated for the wealthy versus the poor, both at the national level and in the specific areas studied. To clarify further the issues involved, some additional explanation of case closures may be helpful. The following comments do not cover all possible closures but only those relevant to the present study. Thus, there can be, in the first place, termination of a prosecution by means of a judgement, which can be either a conviction or an acquittal. A conviction determines that the offender is guilty, whereas an acquittal clears the putative offender of the charges.

In cases leading to conviction, different procedures are used to arrive at a sentence, such as the "order for payment" applicable only when a fine's levying is requested. In turn, fines can be, by express provision of the law, suspended for six months. The case can then be deleted if it has not been formalised or if the offender does not commit another offence in the meantime. Alternatively, a simplified procedure can occur, whereby a sentence of no more than 540 days' imprisonment is requested, i.e., a corporal sentence. Further, in addition to termination by means of a sentence, a case can also be closed via the following procedural alternatives:

1. When the background information is insufficient to carry out investigative activities needed to clarify the facts of the case (provisional closure).¹⁷
2. When it is determined that the case does not pose a serious threat to the public interest (principle of expediency).¹⁸
3. When the facts reported do not constitute an offence, or when the background information and data provided establish that the criminal liability of the accused

17 Art. 167 Criminal Procedure Code: Provisional file. As long as the intervention of the guaranteed judge in the procedure has not taken place, the Public Ministry may provisionally archive those investigations in which no antecedents appear that allow carrying out activities leading to the clarification of the facts. If the crime deserves an afflictive penalty, the prosecutor must submit the decision on the provisional file to the approval of the Regional Prosecutor. The victim may request the Public Ministry to reopen the procedure and carry out investigation procedures. Likewise, he may claim the denial of the said request before the authorities of the Public Ministry.

18 Art. 170 Criminal Procedure Code: Principle of opportunity. Prosecutors of the Public Ministry may not initiate the criminal prosecution or abandon the one already started when it is an act that does not seriously compromise the public interest unless the minimum penalty assigned to the crime exceeds that of imprisonment or imprisonment minors in its minimum degree or that it is a crime committed by a public official in the exercise of his functions [...].

has been exhausted, so long as a court has not intervened (power not to initiate an investigation).¹⁹

4. When there is insufficient evidence, such as a lack of background information, to prove the offence (decision not to prosecute).²⁰

Finally, another alternative solution involves the conditional suspension of proceedings. This scenario entails an agreement between the prosecutor and the accused, in which the former agrees to close the case if the latter complies with a set of conditions, including not committing any further offence for a period of one to three years. Once this period has elapsed and the conditions have been met, the criminal record is expunged, terminating the case and leaving the offender without a criminal record.

Of the total number of case closures at the national level between March 2020 and August 2020, 68,223 involve terms set out in judicial departures (83%).²¹ Meanwhile, 6,798 correspond to non-judicial departures (8.3%), which involve the exercise of some discretionary power by the Public Prosecutor's Office. In other words, through alternative solutions of the sort previously discussed, the Public Prosecutor's Office became aware of an offence but decided not to initiate an investigation or to abandon the investigation already initiated, using the powers granted exclusively to the Office by law. In comparison with previous years, these figures reveal a significant increase in the use of judicial departures, which rose by approximately 30%. In turn, this increase points to a change in the system's behaviour due to the increased use of judicial departures with respect to Art. 318.

19 Article 168 Criminal Procedure Code: Faculty not to initiate an investigation. If the intervention of the guaranteed judge in the procedure has not taken place, the prosecutor may refrain from any investigation when the facts reported in the complaint do not constitute a crime or when the background and data provided allow to establish that the criminal responsibility of the accused is extinguished. This decision will always be founded and will be submitted to the approval of the guaranteed judge.

20 Article 248 Code of Criminal Procedure: Closure of the investigation. Once the necessary steps have been taken to investigate the punishable act and its authors, accomplices or accessories, the prosecutor will declare the investigation closed and may, within the following ten days:

- a) Request the definitive or temporary dismissal of the case;
- b) To file an accusation, when it considers that the investigation provides a serious basis for the prosecution of the accused against whom it was formalized, or
- c) Communicate the decision of the Public Ministry not to persevere in the procedure, for not having gathered during the investigation sufficient information to find an accusation.

The communication of the decision contemplated in the preceding letter c) will render the formalization of the investigation without effect, lead to the judge revoking the precautionary measures decreed, and the prescription of the criminal action will continue to run as if it had never been disrupted.

21 In this category are considered the alternative exits of conditional suspension of the procedure, reparatory agreement; acquittal or conviction sentences; definitive or partial dismissal; power not to initiate investigation

In terms of judicial discharges for Art. 318, 95.3% corresponded to convictions, whereas 0.02% involved acquittals. Of the total number of terminations (judicial and non-judicial) of cases featuring offences to Art. 318 over the six-month period of interest, 79% involved convictions and 0.01% acquittals. Turning back to the three categories of crimes that garnered the highest percentage of convictions in 2019, of all the cases in the misdemeanour category, 52% ended in convictions, followed by homicides with 45.3% and traffic violations with 36%. Accordingly, in only six months, cases involving violations of Art. 318 ended in more convictions than did any other crime category in the previous year. It is also worth noting here that both misdemeanours and traffic-law offences group together more than one type of crime, unlike Art. 318. Further, the data provided by the Public Defender's Office confirm this same trend towards higher rates of convictions for offences involving violations of Art. 318, with convictions accounting for 71% of the reported terminations of relevant cases and acquittals for only 0.14%.

Table 2 presents the data provided by the different territorial divisions of the Public Prosecutor's Office (i.e., the eastern and southern divisions) concerning the number and forms of case closures according to the area, rich or poor. Only those forms of termination relevant for the purposes of this study are included. However, the percentages are nonetheless calculated for the total number of terminations for each zone.

Table 2. Types of termination of cases involving violations of Art. 318 in two sectors of Santiago, Chile

Metropolitan Regional Prosecutor's Office	East (Rich)	South (Poor)
Convictions	5708 91,38%	2786 91,58%
Acquittals	4 0,06%	0
Alternative outcomes	18 0,02%	120 3,94%

Discretionary powers (the power not to initiate the investigation, principle of expediency, power of provisional closure)	349 5,58%	100 3,28%
Total of terminations	6246 100%	3042 100%

Source: Public Prosecutor's Office of Chile (2020).
Elaborated by the authors.

Again, Table 2 shows a large number of convictions and very few acquittals. Determining the procedures used to reach conviction is relevant to this analysis, as they may imply more or less lenient treatment of offenders. In the rich zone, 91% of convictions were obtained through an order for payment; in the southern zone, by contrast, the figure was 87%. It is worth noting that the order-for-payment procedure is used only when the penalty required by the prosecuting authority is a fine. Therefore, we can conclude that in the poorest areas, procedures that are less beneficial for offenders were favoured rather than the order-for-payment procedure. The Public Defender's Office data support this conclusion, suggesting a differentiated treatment of poor offenders versus wealthier offenders vis-à-vis the same crime (i.e., infringement of a health measure).

Table 2 also reveals patterns in the use of discretionary powers with respect to cases involving violations of Art. 318. Specifically, more discretionary powers were used in the rich zone than in the poor zone: 6% versus 3.3%, respectively, of the total number of case terminations for violations of Art. 318. Of these discretionary powers, the use of the power not to initiate an investigation accounted for 59.3% of such terminations in the rich zone but only 4% in the poor zone. This contrast reveals a lot about the differential treatment given the inhabitants of eastern versus southern Santiago. The discretionary power in question is a policy tool that allows prosecutors to close cases without investigating them, relieving the criminal justice system of cases in which a crime is not likely to have occurred or for which criminal responsibility has elapsed. Hence, the figures for the use of discretionary powers in the wealthier versus, the poorer areas of Santiago point to inequities in the criminal justice system.

The same is true for using the principle of expediency, another discretionary power, which led to 8.2% of the terminations in the richer zone but only 2% in the poor zone. Again, this contrast points to a difference in how legal criteria are applied. In eastern Santiago, it seems that the infringements of Art. 318 do not seriously compromise the public interest, whereas they do in the southern part of the city. Clearly, there is no well-founded reason to justify this distinction.

However, the trend in the use of discretionary powers is reversed when it comes to the discretionary power of provisional closure, which led to 94% of terminations in the poorer zone but only 32.4% in the wealthier area. Yet, the fact that provisional closure is almost the only discretionary power used for cases involving poorer offenders again points to inequities of treatment and criteria. Specifically, in the poorest area, discretionary powers tend to be used in cases where the Public Prosecutor's Office does not have enough background information to go ahead; in other words, the powers apply to the decision not to prosecute. In contrast, in the rich zone, discretionary powers are applied as a criminal policy criterion. For instance, the principle of expediency is used when an act is deemed not to be a serious threat to the public interest, as determined by the prosecutorial body. Likewise, the conditional suspension of proceedings was more widely used in the poorer than in, the richer areas, which could imply differentiated treatment that works to the detriment of the poor. When proceedings are conditionally suspended, the termination is subject to the fulfilment of conditions for periods of up to three years. In contrast, instant termination of the case constitutes a less burdensome option. In this last connection, the data provided by the Public Defender's Office reveal the same general trend in the use of discretionary powers and alternative outcomes, confirming that non-immediate and conditional termination is more frequently used in the poorest area than in the wealthier zone.

The final consideration in this part of our analysis concerns the precautionary measure of pre-trial detention in the case of quarantine-related offences. In this instance, the only relevant data available were provided by the Public Defender's Office. At the national level, of the 76,393 cases related to violations of Art. 318, pre-trial detention was ordered in 2,203 of them or 3% of the total number of cases. Of these, 12% corresponded to cases in which offenders were charged exclusively with violations of Art. 318, with the remaining 88% involving infringements of Art. 318 along with other offences. Further, there are slight differences in poorer and wealthier offenders: 7% and 5% of the cases for which pre-trial detention was ordered were situated in poorer versus wealthier areas, respectively. We observe a similar difference in the use of pre-trial detention at the district level vis-à-vis no-social-priority (rich) versus high-social-priority (poor) districts.

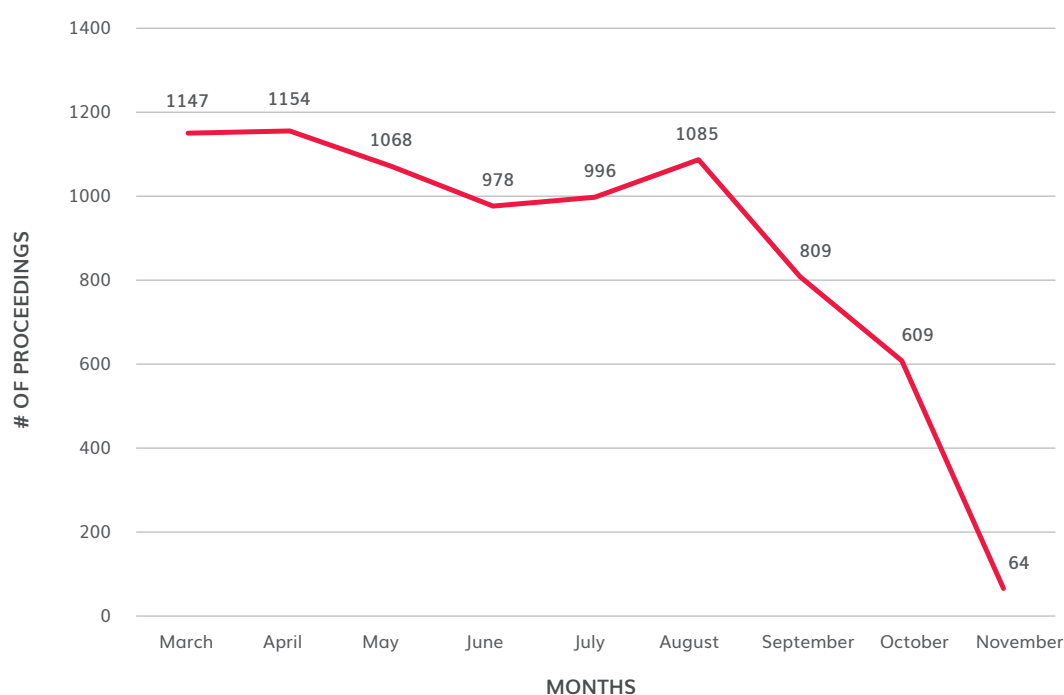
Data on Criminalisation in Argentina

In Argentina, in criminalising quarantine violations, authorities have characterised those violations as offences defined by Articles 205 and 239 of the Penal Code. Insofar as these crimes are federal in nature, the Federal Justice Department and the National Public Prosecutor's Office hold jurisdiction over them; therefore, the prevention of such crimes falls under the purview of the Federal Police. However, in cases of flagrant violations, it is not uncommon for local police to carry out enforcement measures under the supervision of local authorities (local Public Prosecutors' Offices and the province's

Judiciary or the Autonomous City of Buenos Aires' Judiciary), who then refer the case to the Federal Justice Department.

In what follows, we discuss data on the number of cases filed for violations of Article 205 of the Penal Code, organised by month, and disaggregated by the municipality in CABA. This information was obtained via a data request submitted to the authorities of the Public Prosecutor's Office of the Autonomous City of Buenos Aires. (It should be noted at the outset that Argentina lacks consistent data on the progress and speed of criminal cases' resolution). Figure 3 shows the total number of proceedings initiated for violations of Article 205 from March 2020 until the declaration of the end of the PCSI phase on November 9, 2020. It generally shows a slow decline in the number of criminal cases linked to PCSI per month until August, at which point there is a sharp drop until the beginning of November. This decrease in the number of violations registered is counterintuitive in light of data about the number of COVID-19 cases and inhabitants' mobility during the same months.

Figure 3. Proceedings initiated for violations of Art. 205 in CABA, 2020



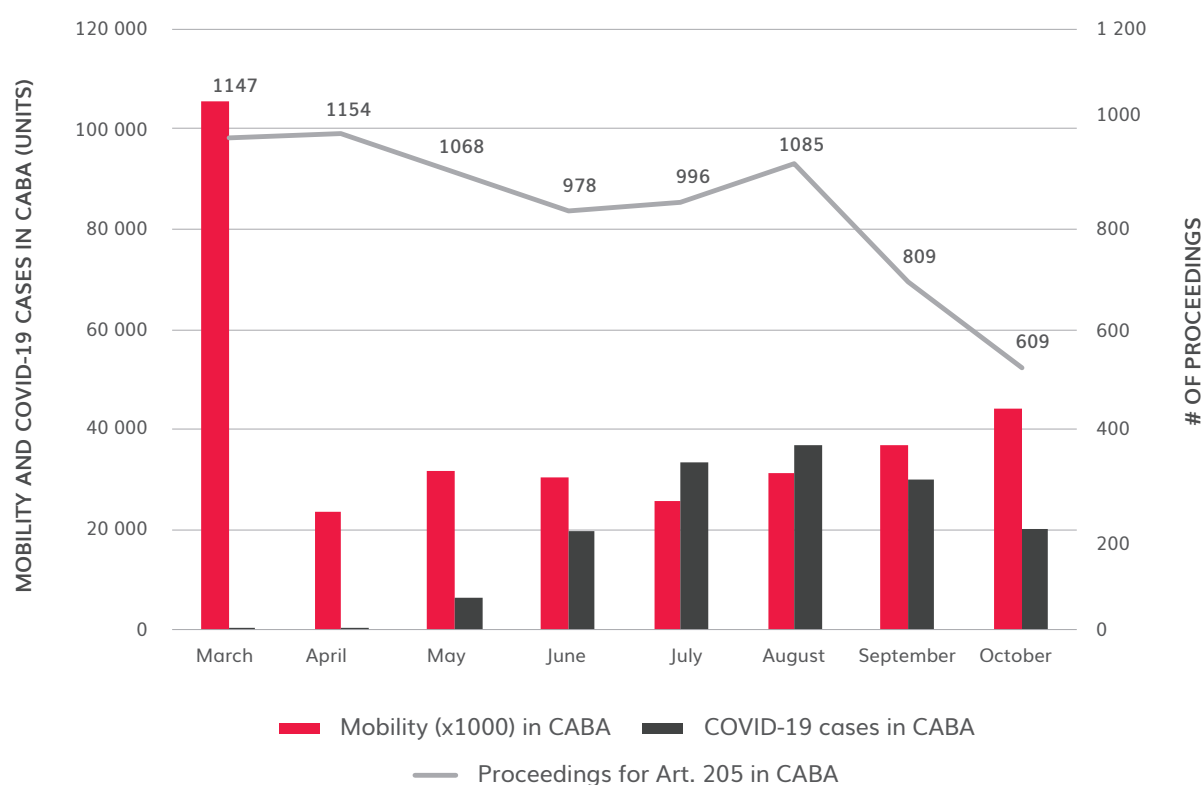
Note. The graph shows case admissions for violations of Article 205 in the Autonomous City of Buenos Aires from the beginning of March 2020 until November 9, 2020. The graph includes the days prior to the onset of Preventive and Compulsory Social Isolation (PCSI), which took place on March 20, 2020.

Source: Public Prosecutor's Office of CABA (2020).

Elaborated by the authors.

The initial increase in cases can be correlated with the extension of quarantine, although mobility data suggest that compliance decreased over time, as penalties for violations of Article 205 also declined. Figure 4 shows how the number of COVID-19 cases in the city increased until reaching a peak in August and then began to decline. As Figure 4 also shows, mobility in the city²² likewise began to trend upwards from July until the end of the period studied. Yet, according to the available data, the higher mobility did not lead to an increase in criminal prosecutions related to Article 205.

Figure 4. Population mobility, COVID-19 cases, and proceedings initiated for violations of Art. 205 in CABA



Note. Data on Article 205 proceedings are from the CABA Public Prosecutor's Office. The information used ranges from the beginning of March to November 9, 2020.

They are included in the graph the days before the start of the PCSI, which occurred on March 20, 2020.

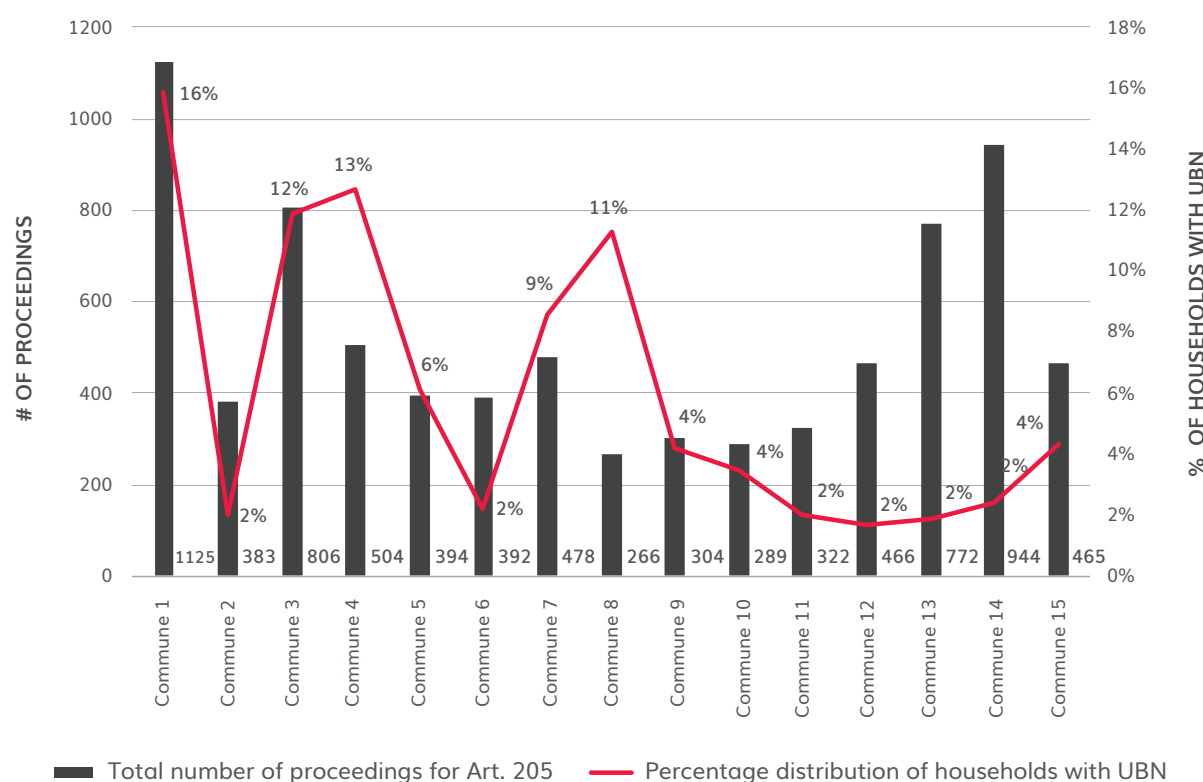
Sources: CABA Public Prosecutor's Office (2020) and GCBA (2020).

Elaborated by the authors.

²² Mobility was measured in terms of the number of people using public transport (train, underground, and bus).

Further, the city data allow for a disaggregation of the processes at issue by the district. In this way, the geographic location of the cases can function as a proxy for the socio-economic situation of those subject to criminal proceedings. Figure 5 presents the number of cases involving violations of Article 205 together with the proportion of inhabitants of each district who have Unsatisfied Basic Needs. It suggests a weak correlation between criminalisation and socio-economic status. Districts 1, 3, 13, and 14 are among those with the highest number of proceedings for violations of Article 205. However, although 13 and 14 are high-income areas, districts 1 and 3 are among those with the highest percentages of inhabitants who have Unsatisfied Basic Needs (UBNs).

Figure 5. Proceedings initiated for violations of Art. 205 and the distribution of households with UBNs by district in CABA



Note. The procedural data for Art. 205 correspond to the Public Prosecutor's Office of CABA.

The data on households with UBN were taken from the data carried out by the 2010 National Population, Household and Housing Census.

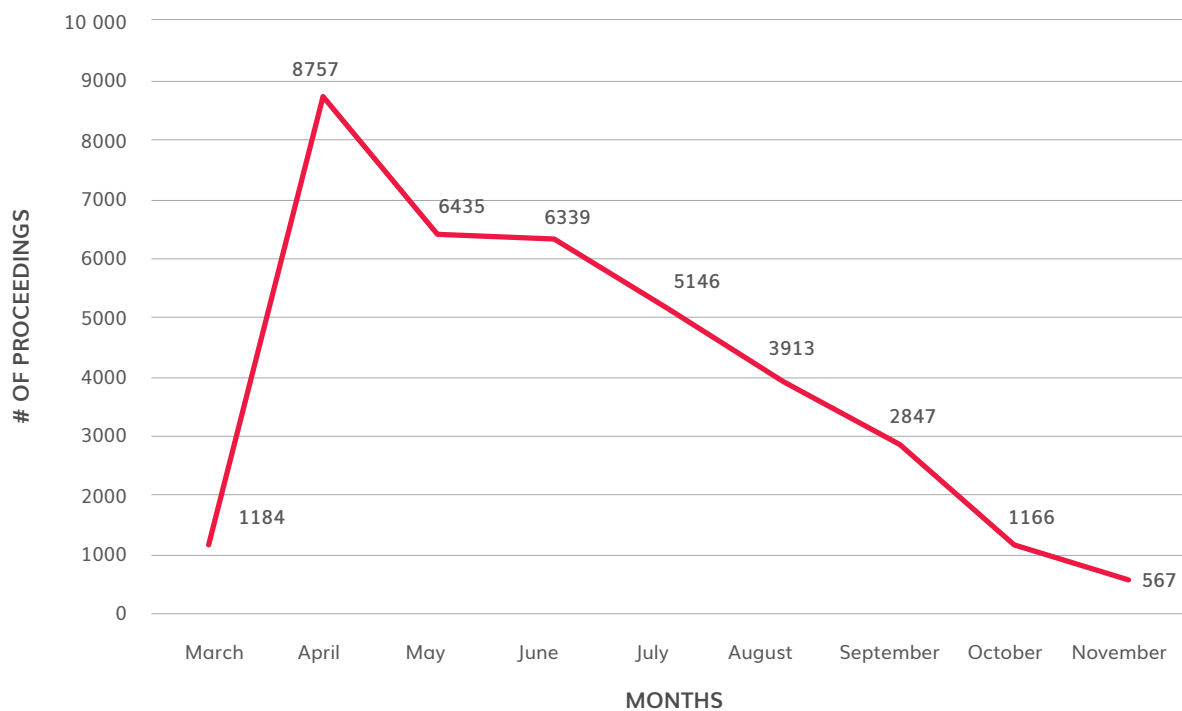
Source: Public Prosecutor's Office of CABA (2020); INDEC (2010).

Elaborated by the authors.

At the national level, according to data from the National Public Prosecutor's Office, after a peak in criminal cases in April 2020, the numbers did not stop falling until

November 2020. Thus, as shown in Figure 6, although there was a plateau in the number of cases in May and June, the downward curve at the national level mirrors the pattern obtained in CABA after June.

Figure 6. Proceedings initiated for violations of Art. 205 at the national level



Note. The data present the income in federal prosecutors and federal prosecutors in criminal and correctional matters for violation of Art. 205 from the beginning of March to November 11, 2020.

In this way, the days prior to the beginning of the PCSI (March 20, 2020).

Source: National Public Prosecutor's Office (2020).

Elaborated by the authors.

Why are there decreasing levels of case admissions for PCSI violations even as people's mobility increases? Why is the implementation of laws designed to prevent the spread of the virus unrelated to the population's mobility, at least at the city level? The available information is not sufficient to explain definitively why, despite increased mobility during quarantines in Argentina, criminal prosecution rates dropped considerably. Only preliminary answers can be attempted here. The first reason may be because Argentina, according to many accounts, is a country with weak institutions. In a society with strong institutions, "formal rules are 1) enforced rigorously enough to be routinely obeyed and 2) stable enough for actors to develop shared expectations based on past behaviour" (Levitsky & Murillo, 2007, p. 174). There are multiple explanations for the origin

of institutional weaknesses, such as the limited willingness and capacity of actors or the way expectations of stability develop only gradually (Levitsky & Murillo, 2007). In any case, this idea of institutional weakness assumes that authorities want to enforce the rules but are unable to do so (Bernazza & Longo, 2014). In other words, weak institutions have a direct impact on state capacity, understood as the ability to establish and maintain institutional, technical, administrative, and political functions (Grindle, 1996). Mapped onto the present analysis, this approach suggests that the State's inability to ensure enforcement explains the change in the trend of rule enforcement over such a short period of time.

The second possible explanation, which we will call the "forbearance" hypothesis, proposes instead that in certain contexts, political authorities have the capacity to enforce the rules, but for some reason, choose not to do so. According to Holland (2016, 2017), forbearance is the intentional and revocable non-enforcement of the law, with such non-enforcement becoming an important mechanism for distributing goods. It can be revoked (it does not constitute amnesty); can be hidden from public scrutiny, monitoring, and legislative debate, given that it implies the authority's freedom to decide; and is used to provide resources to those who are willing to bear the costs of illegality.

In Argentina, the National Secretary for Human Rights stated in Congress on August 7, 2020, that the pandemic would give rise to more cases of institutional violence. The concern lay precisely in the use of criminal law as a way to enforce PCSI, which is why the government committed to taking the actions required to prevent human rights violations. The decision to be lenient was not made public, but the synchronicity between the drop in cases and the Secretary's assertion is remarkable. In addition to highlighting the State's ability to enforce the law and its intentional restraint from doing so, the forbearance or leniency hypothesis raises a third issue: revocability. A drop in prosecution does not mean amnesty. Indeed, some criminal prosecutions continue, and it is not known how they will conclude. However, based on the number of prosecution requests observed, it is possible to anticipate that many of the cases will be provisionally closed, except for serious cases in which other crimes are involved.²³ If this pattern does obtain, then Argentina will, in fact, engage in criminal leniency. The country will, in turn, bring about a form of distribution of goods—in this case, wages from formal and especially informal employment—based on the decision not to apply criminal law, at least for the time being.

23 See, for example, the following account: <https://www.eldia.com/nota/2016-9-17-la-justicia-bonaerense-a-ciegas-no-saben-cuantas-denuncias-se-archivan>

Conclusions and recommendations

The present study has shown that in both Chile and Argentina, criminal law was used to enforce compliance with the sanitary quarantines that were decreed in attempts to halt the spread of COVID-19. However, the study has also underscored that the methods and the extent of the criminal prosecutions carried out in the two countries have been dissimilar.

In Chile, the data indicate that the Penal Code was enforced throughout the country, and that non-compliance with health measures was widely prosecuted via offences outlined in Article 318. Despite the magnitude of the prosecutions, there was no increase in the number of registered cases in the system, meaning that prosecution resources were placed under a greater strain. Indeed, a comparative analysis of case admissions during the pandemic in 2020 versus during 2019 suggests that resources were focused on penalising violations of Article 318 to the detriment of other crime-fighting activities. This finding opens the door to future studies on the reasonableness of the massive use of criminal prosecution in cases related to health and social emergencies, given the risks of disproportionately applying law-enforcement resources to certain crimes at the expense of others. More importantly, it must be recognised that one of the impacts of the health crisis on the criminal justice system in Chile has been the decrease in human resources at the institutional level of the Public Prosecutor's Office. Prosecutors and their teams have faced challenges in prioritising cases of human rights violations as well as other highly relevant cases—for instance, those involving gender-related violence that increased during the pandemic (Fuentes & Lillo, 2020).

In Argentina, the State seems to have developed a more lenient approach to applying and enforcing the law. Although the country's PCSI measures were long-lasting and quite strict, they were implemented within a complex context, in which a newly elected government faced an economic crisis characterised by inflation, budget deficits, and high levels of foreign debt. These challenges help explain the State's actions about its application of Article 205—and its eventual abandonment of the criminal prosecutions initiated about that article. According to data from the city of Buenos Aires, there was a high level of compliance with quarantines coupled with frequent use of the penal tool at the beginning of the confinement. However, this scenario began to change as it became clear, a few months into the crisis, that the economic measures that were being implemented to address the needs of the city's most vulnerable residents were insufficient, causing a profound deterioration of the currency. Inevitably, in this scenario, the quarantine backed by criminal law began to lose its perceived legitimacy.

The corresponding increase in mobility shows that people left their homes at the risk of criminal prosecution after months of long confinement, whose ill effects had been temporarily mitigated by emergency measures that started to lose their effectiveness as the economy deteriorated. At the same time, there was a decline in the prosecution of quarantine violations.

Hence, Chile and Argentina, countries facing similar types of economic scarcity, took different paths to address the implementation of social-isolation measures. In the case of Argentina, one way to explain the decline in the prosecution of quarantine violations over time is in terms of the incapacity of the Argentine State and the weakness of its institutions, including those related to law enforcement. However, the data we assembled show that during the first months of PCSI, prosecutions of quarantine violations remained (stably) high, and only later began to decrease. These data could be interpreted as indicating that the State had the capacity to prosecute but chose not to. Alternatively, it may be that after recognising its inability to meet the population's economic needs during the crisis, the State decided to be lenient and not pursue criminal prosecution, committing to a course of action (or non-action) that had an especially significant impact on vulnerable groups.

Meanwhile, in Chile, which recognised the diverse demands of the population during the crisis, the State promoted and carried out a prosecutorial programme that had an impact on the entire population; the programme was not adjusted according to socio-economic sectors, given that it was pursued in a more or less homogeneous manner in both wealthier and more impoverished areas. However, our analysis reveals differences between more and less favoured socio-economic sectors vis-à-vis the timing and methods of case closures. Thus, in August 2020, in the wealthy eastern zone of Santiago, approximately twice as many cases related to non-compliance with quarantines had been terminated compared to the poorer zone. This pattern shows that offenders belonging to the most vulnerable sectors of the city undergo more extended prosecution processes, which bring higher costs for them and add to the impact of the pandemic.

Another difference revealed by the data from Chile concerned how Article 318 offences were treated in different sectors of the population. In the poorer sectors, outcomes frequently did not lead to an immediate termination of cases but instead prolonged those cases for periods of up to three years; during that time, offenders were subject to the fulfilment of specific conditions. In the same circumstances, in the wealthier sectors, the criminal justice system used tools that allowed for immediate termination without the need for the offenders to take any further action. Moreover, our analysis points to differences in the criteria that are adopted to choose particular forms of termination precisely because such differences lie within the discretionary powers of the prosecuting authority, and those powers are exercised differently among different sectors of the population.

We also observed contrasts in the way convictions were obtained in the two zones. In the poorer areas, the prosecuting authorities preferred procedures that are applied when the sentence requested is of a corporal nature and involves stiffer punishment. By contrast, in the wealthier areas, the prosecuting authorities preferred to use the order-for-payment procedure, which necessarily involved the application of a fine. Finally, although we found that there was a more frequent use of pre-trial detention in the most vulnerable sectors, the difference is minimal, suggesting that poorer defendants are not treated significantly more harshly in this respect.

These differences (even the relatively minimal ones) pose problems when it comes to the principle of the equality of all before the law because they indicate that where a crime is committed or even to which sector the offender belongs may lead to more or less harsh treatment by the criminal justice system. These problems extend beyond the application of the law because the law itself involves typical or generic descriptions that are broad enough for prosecuting and adjudicating bodies in different areas to define different policies, and for judges to apply different terms when it comes to prosecution and sentencing. However, even if vulnerable sectors were to receive the same treatment as wealthier areas, they would be relatively more affected, given that they do not have the same resources to cope with the legal process. Therefore, there is an issue of reasonableness (or the lack thereof) in adopting quarantine-enforcement measures and not only in their application.

Recommendations for reform

Based on our comparative analysis, we put forward two key recommendations for reform. First, we recommend a move towards rationalising the use of criminal law. Second, we recommend a move towards strengthening democratic institutions.

Both countries used criminal law to enforce pandemic-related quarantines and even pursued legislative processes to strengthen this tool. The reasons behind this application of criminal law are more complex than we can go into here. Overall, however, we can say that the criminal-law response benefits the authorities insofar as it allows them to show that they are dealing directly with the problems that arise, decisively and firmly, without incurring additional costs for the State (Duce, 2020). Further, as mentioned at the beginning of this study, using the criminal justice system in this way allows the authority to free itself of responsibility by shifting it to those in charge of enforcing the rules, in case the rules themselves prove to be ineffective.

Although we recognise that criminal law fulfils important functions in a democratic society, we argue that it is not a viable response to social problems such as those created

by the COVID-19 pandemic. Rather, it is a tool that needs to be rationalised in its use, in a way that gives preference to mechanisms or alternatives that make it possible to deal effectively with conflicts that may arise. The use of criminal law should be reserved as an instrument of last resort in the absence of more effective and less harmful solutions. Further, in emergencies such as the current pandemic, political decisions related to public health must be clearly communicated to ensure their legitimacy. When initiatives are likely to clash with basic human rights, the process of decision-making should be especially deliberative, well-justified, and time-limited, with possibilities of reparation for those harmed by the initiatives in question.

Our second recommendation, concerning the strengthening of democratic institutions, is based on the following premise: In the face of weak institutions, inefficient policies, governments' limited capacity to respond to citizen demands, growing perceptions of endemic corruption and legal impunity, and the absence of participatory and respectful procedures, citizens have become increasingly distrustful of governments, political and other institutions, and even democracy itself. These issues are relevant for the present study precisely because non-compliance with the law is linked not only to low expectations of sanctions but also to a lack of trust in authority. In this connection, recommendations to increase the sense of legitimacy attaching to governmental and other authorities have been synthesised into four concepts based on the idea of procedural justice; these concepts derive from evidence collected over the last two or three decades regarding the relationship between legitimacy and law enforcement. As Berman and Adler (2018) state:

The experience of procedural justice is typically described as having several key elements, which include voice (were you given a chance to tell your side of the story?); respect (were you treated with dignity?); neutrality (did you perceive decision-makers as unbiased and trustworthy?); and understanding (did you understand your rights, obligations, and the decisions that were made about you?). (p. 993)

Voice, respect, neutrality, and understanding are the pillars of procedural justice. The source of this legitimacy lies, in part, in the perception of belonging to these institutions, in the feeling that citizens participated in the creation of the norms and the organisms that put them into practice, and in the feeling that there is respectful treatment in the process of applying these rules.

In the health crises unfolding in Chile and Argentina, the authorities often failed to take the necessary steps to ensure the legitimacy of their initiatives, as previously described. In critical contexts such as those imposed by the pandemic, consensual public policy decisions are essential if the decisions in question are to preserve their legitimacy and achieve majority support. In this case, Congress is the natural arena for deliberation

and consensus-building (Tchintian, Abdala, & Seira, 2020). However, many of the measures taken to deal with the spread of the virus and its social effects were, in Argentina, created through presidential decrees (only later ratified by Congress), and, in Chile, promoted via norms that have been questioned because of their lack of proportionality and dubious constitutionality.

As for respectful treatment and the perceived neutrality of authority, people who could not comply with the strict quarantine laws probably perceived that these rules (which were inconsistent and designed precisely for those who are able to comply with them) did not take them into account. When it comes to compliance with rules, key factors include the legitimacy of their origins, trust in the decision-makers and enforcers who develop and apply them, and the perception of their neutrality. These factors are absent in our two focal countries. At the same time, clear communication contributes to public awareness of the rules, as well as buy-in and acceptance. Again, such communication has been lacking in Argentina and Chile.

Improving trust in democratic institutions will contribute to increased compliance with and enforcement of the law, even as fostering greater respect for decision-makers will strengthen the role of democratic institutions. Therefore, we believe that the way forward is to work on building authorities' legitimacy in the context of a constitutional democracy, by listening to all voices and reaching broad consensus on policy decisions, treating people with respect when dealing with institutions of justice, not just appearing to be but actually being neutral vis-à-vis the decisions taken, and communicating clearly with the public about health-related and other policies and rules.



In Argentina, the criminal prosecution of those who violated the quarantine was declining over time since the economic needs of the population in crisis could not be met.

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Appendices

Appendix 1. A Timeline of the COVID-19 quarantines imposed in selected districts of Santiago, Chile

This Appendix tracks the timeline of the pandemic-related quarantines imposed in selected districts of Santiago, Chile. In particular, we focus on the following districts, which are part of our comparative analysis: El Bosque, La Cisterna, La Granja, La Pintana, Lo Espejo, Pedro Aguirre Cerda, Puente Alto, San Joaquín, San Miguel, San Ramón, Pirque, San José de Maipo, Las Condes, Vitacura, Lo Barnechea, La Reina, Ñuñoa, La Florida, and Peñalolén y Macul.

The content is presented in chronological order, beginning with the first quarantines decreed in March in the eastern zone of Santiago and concluding with the gradual openings allowed for under the "Step-by-Step Programme" [Plan Paso a Paso] from September onwards. The data were obtained from several primary sources, including the featured daily news published on the Ministry of Health's official site (available at <https://www.minsal.cl/category/destacados/>).

Timeline

25/03/2020: First total quarantine for seven districts in the RM (Metropolitan Region)

- "Jaime Mañalich said that the time has come to ask the entire population of the Metropolitan Region (RM) to remain isolated in their homes; this is where the largest number of new cases of COVID-19 in the country is concentrated."
- The districts affected include the following: Lo Barnechea, Vitacura, Las Condes, Santiago, Ñuñoa, Independencia, and Providencia. "The measure will affect 1,341,000 people, who must remain in their homes starting tomorrow, Thursday, March 26, at 22:00, for a renewable period of seven days."

31/03/2020: Quarantine is extended in six districts in the RM

- "The quarantine is extended for seven more days in six of the seven districts in the RM that have been affected by this measure: Vitacura, Lo Barnechea, Las Condes, Santiago, Ñuñoa, and Providencia. In the district of Independencia, the quarantine will not be prolonged, so it ends on Thursday, April 2, at 22.00 hours."

07/04/2020: The western zone of Puente Alto joins the quarantine

- Minister Mañalich announces that for all the districts under quarantine, the measure will be extended until Monday, April 13, at 5:00 a.m.
- Quarantine ends in Lo Barnechea, Vitacura, Providencia, the southern half of Ñuñoa, and the southern half of the district of Santiago.
- This means that after Monday, April 13, the districts of Las Condes, Santiago (north zone), and Ñuñoa (from Av. Grecia to the north) will be kept in quarantine for seven more days.
- Meanwhile, starting Thursday, April 9, at 10:00 p.m., and for a period of seven days, the western area of the district of Puente Alto is incorporated into the quarantine; the affected area extends from Av. Vicuña Mackenna towards the coast.

12/04/2020: Quarantine in El Bosque

- Starting April 16 at 10:00 p.m., total quarantine is decreed for the entire **district** of El Bosque and the northeastern sector of San Bernardo (from the Autopista Central south to Av. Colón, and from Av. Colón to the north).
- The quarantine measure for Las Condes ends.
- The western area of Puente Alto and the northern sectors of Ñuñoa and Santiago **are still under quarantine.**

21/04/2020: Quarantine in Pedro Aguirre Cerda

- Starting Thursday, April 23, at 10:00 p.m., total quarantine is decreed in the districts of Pedro Aguirre Cerda, Quinta Normal, and the southern area of Independencia—i.e., from Gamero Street to the Mapocho River.
- Quarantines are maintained for another week in the northern areas of Ñuñoa, Santiago, and El Bosque, the northeast sector of San Bernardo, and the western sector of Puente Alto.

28/04/2020: Quarantine in La Pintana and San Ramón

- Starting April 30, the northern area of La Pintana, the southern portion of San Ramón, and Estación Central enter into quarantine. Furthermore, the isolation measure is extended to the entire district of Independencia.
- Quarantines are maintained in the northern sectors of Ñuñoa and Santiago, the northeast part of San Bernardo, the western portion of Puente Alto, and the entire districts of El Bosque, Pedro Aguirre Cerda and Quinta Normal.

06/05/2020: 12 new districts go into quarantine

- 12 new districts of Santiago enter the quarantine system, meaning that 25 localities are now under quarantine in the capital. The new measure takes effect starting April 8 at 10:00 p.m. and extends for seven days.
- The new districts affected include La Granja, San Miguel, Lo Espejo, Macul, Peñalolén, La Florida, San Joaquín, La Cisterna, Cerro Navia, Conchalí, Renca, and Lo Prado.
- These districts are added to the 13 districts that were already under quarantine, and that will remain in that condition for another seven days: namely, Santiago, Estación Central, Pedro Aguirre Cerda, San Ramón, El Bosque, La Pintana, Quilicura, Recoleta, Independencia, Quinta Normal, and Cerrillos. Furthermore, in Puente Alto and San Bernardo, quarantine measures are extended to cover the entirety of both districts.
- The only district in the RM to emerge from quarantine is Ñuñoa.

13/05/2020: Total quarantine for the city of Santiago and six surrounding districts

- The isolation measure is now implemented in 32 districts of the Province of Santiago and Puente Alto, San Bernardo, Buin, Padre Hurtado, Lampa, and Colina. The measures begin on Friday, May 15, at 10:00 p.m..

20/05/2020: Quarantines are extended

- The quarantine measures are extended until Friday, May 29, and include 38 districts in the RM.

27/05/2020: Quarantines are extended

- The government maintains quarantine for another seven days, starting on May 29 at 10:00 p.m., in 38 districts in the RM.

10/06/2020: Quarantine in San José de Maipo

- Starting June 12 at 10:00 p.m., the quarantine includes San José de Maipo and other country areas. Additionally, a new cordon sanitaire is implemented in Pirque.
- The isolation measures previously established for the 38 districts in the RM are maintained.

19/07/2020: President Sebastián Piñera presents the Step-by-Step programme

The "Step by Step We Take Care of Ourselves" programme is rolled out; it consists of five phases or steps designed to overcome the Covid-19 pandemic, ranging from quarantine to "advanced opening". The programme constitutes a gradual plan of deconfinement. The five steps can be described as follows:

1. The first step is quarantine, which restricts people's mobility to minimise social interaction and hence, the spread of the virus. This phase includes the following restrictions: limited personal mobility; exclusive permissions for essential activities; compliance with lockdowns, physical distancing, and cordon sanitaires; compulsory quarantines for people over 75; and the prohibition of travelling to a second home. This stage also involves the suspension of face-to-face classes at educational institutions, the closure of borders, the prohibition of events involving more than 50 people, the shutdown of clubs, cinemas, theatres, pubs, discos, and gyms, and restrictions on cafes and restaurants.
2. The second phase is called "transition"; in this stage, the degree of confinement is reduced, but a complete opening is ruled out to minimise contagion risks. The quarantine is maintained on weekends and holidays. There are requirements for compliance with the lockdown and cordon sanitaires, mandatory quarantines for persons over 75 years of age, and limitations on personal travel. As with the quarantine, this phase entails the suspension of face-to-face classes at educational institutions, the closure of borders, the prohibition of events involving more than 50 people, the shutdown of clubs, cinemas, theatres, pubs, discos, and gyms, and restrictions on cafes and restaurants. In addition, social and recreational activities involving more than ten people are prohibited.
3. The third step is called "preparation," in which quarantine concludes for the general population but is maintained for higher-risk groups. Compliance with the lockdown, cordon sanitaires and compulsory quarantines for people over 75 years is still required. However, social and recreational activities, involving a maximum of 50 people, are allowed any day of the week. Travel is also allowed, apart from the hours covered by curfew. As in the previous phase, the suspension of face-to-face classes continues, unless otherwise indicated by mayors, as do the closure of borders, the shutdown of clubs, cinemas, theatres, pubs, discos, and gyms, and the restrictions on cafes and restaurants.
4. The fourth phase is the "initial opening"; this phase allows residents to resume certain activities with a lower risk of contagion. Residents must comply with the

curfew and cordon sanitaires, but general movement is permitted, and adults over 75 can go out once a day. The gradual return of face-to-face classes is authorised during this phase, according to the planning of the Ministry of Education. In addition, cinemas and theatres are allowed to operate at 25% of their maximum capacity, as well as restaurants and cafes. However, clubs, pubs, discos, and gyms are still closed, and events involving more than 50 people are forbidden.

5. The fifth step is the "advanced opening", which allows larger numbers of people to participate in activities re-initiated in the previous phase, though always with the proviso that they implement self-care measures. In this phase, travel to second homes and the free movement of people over 75 years of age are authorised. In addition, the gradual return of face-to-face classes is authorised; so too is the operation of cinemas and theatres at 75% of their maximum capacity. Restaurants and cafes are likewise allowed to operate at 75% of their maximum capacity. Gyms, pubs, and nightclubs are permitted to open at 50% of their maximum capacity. However, events involving more than 150 people are still prohibited.

24/07/2020: Santiago districts move from quarantine to phase 2

- The authorities announce that La Reina, Las Condes, Lo Barnechea, Ñuñoa, and Vitacura, among other districts, are moving to phase 2, or "transition."

12/08/2020: Santiago and Estación Central move to transition

- The districts of Santiago and Estación Central likewise move to phase 2, starting on August 17 at 5:00 a.m.

19/08/2020: Other districts shift to the next phase in the Step-by-Step Programme

- The districts of Peñalolén, San José de Maipo, Peñaflores, and Padre Hurtado move from quarantine to phase 2.

02/09/2020: Five districts in the Metropolitan Region begin the "preparation" stage

- Starting on this date, the districts of Vitacura, Las Condes, Nuñoa, San José de Maipo, and Providencia enter phase 3, or the preparation stage.

02/09/2020: Recoleta, San Ramón, La Cisterna, La Granja, San Joaquín, and San Miguel move from quarantine to transition

- Starting September 7 at 5:00 a.m., the following districts move from quarantine to phase 2: San Ramón, La Cisterna, La Granja, San Joaquín, San Miguel, and Recoleta.

09/09/2020: COVID-19: Other districts shift to the next phase in the Step-by-Step Programme

- Starting September 14, the following districts move from quarantine to transition: Isla de Maipo, Quilicura, and San Bernardo.
- The district of La Reina advances from phase 2 (transition) to phase 3 (preparation).

23/09/2020: Twelve districts in the RM move to the preparation phase

- Starting Monday, September 28, at 5:00 a.m., the following districts shift to phase 3: Santiago, Pedro Aguirre Cerda, Peñalolén, Lo Barnechea, Til Til, Calera de Tango, Talagante, Estación Central, Padre Hurtado, Lampa, Isla de Maipo, and Quilicura.
- Meanwhile, other districts shift to phase 2, including La Pintana, Puente Alto y Lo Espejo, Quinta Normal, Lo Prado, Cerro Navia, Buin, and Conchalí.

01/10/2020: The Step-by-Step Programme continues to unfold

- Starting Saturday, October 3, the districts of Paine and Renca pass to phase 2.
- Starting Monday, October 5, at 5:00 a.m., the districts of El Bosque, Huechuraba, Quinta Normal, María Pinto, Curacaví, Colina, Recoleta, and Cerrillos pass to the preparation phase, or phase 3.

19/10/2020: Six districts in the RM enter the initial opening phase

- Starting on this date, Pirque, Til Til, María Pinto, San Pedro, Curacaví, and Colina are the first districts in the Metropolitan Region to enter phase 4 of the Step-by-Step Programme.

02/11/2020: Initial opening in Ñuñoa

- The Sub-Minister of Public Health, Paula Daza, and other authorities approve the start of phase 4 in Ñuñoa.



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