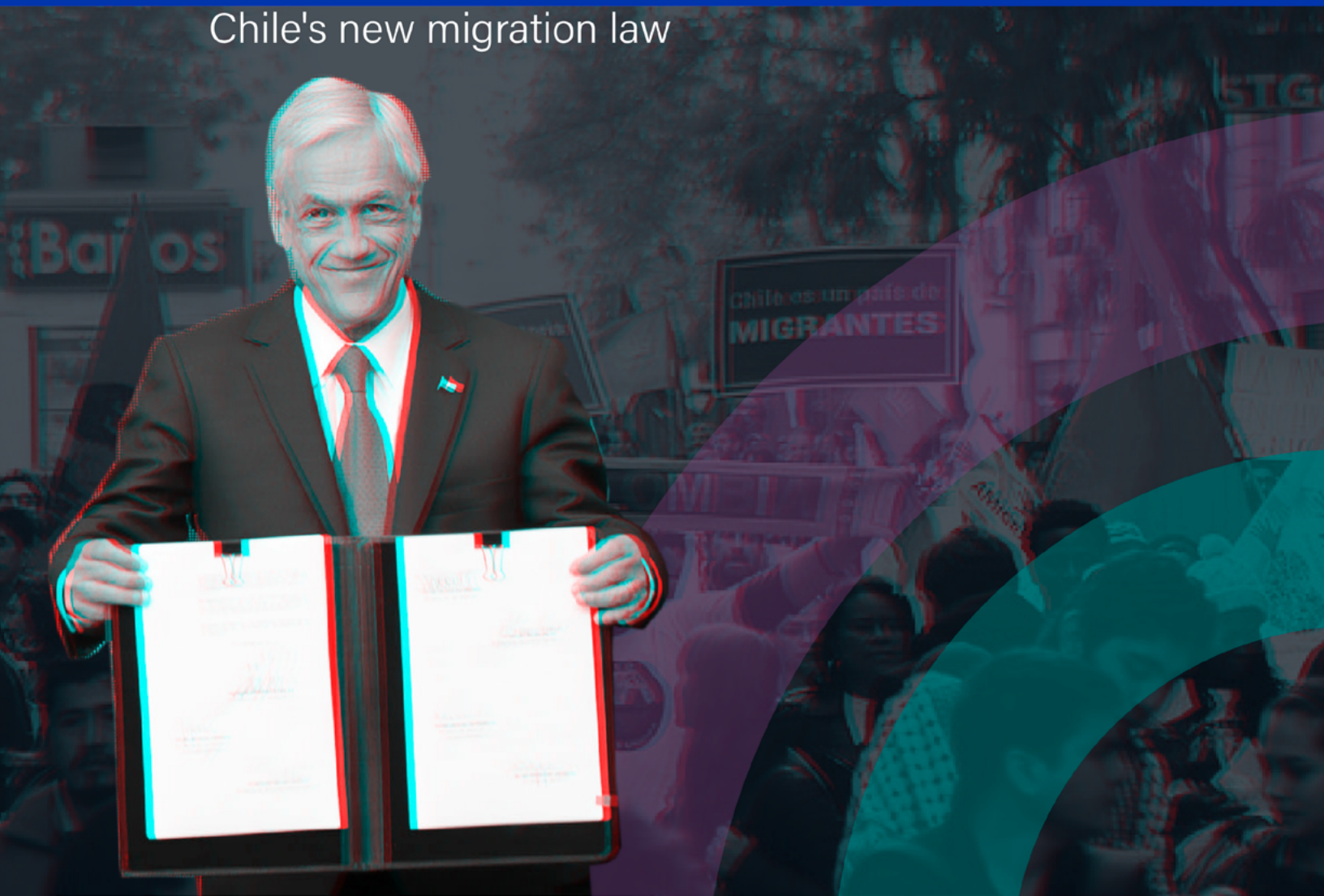
ARGOS
INTERNATIONAL OBSERVATORY
ON MIGRATION AND HUMAN RIGHTS

INSTITUTIONALIZING EXCLUSION:

Chile's new migration law



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Author: Portal Rock-Pop

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Chile's new migration law responds to a legislative vacuum of just over three decades in this area. Until the enactment of this law, Chile had the oldest legislation on the subject in the region (Law No. 1094, enacted in 1975). We consider it pertinent to briefly review the conditions in which the draft law was conceived and the construction of the framework –symbolic and material– that allowed its approval and acceptance[1] in the territory.

I. BACKGROUND AND CONTEXT
1. MIGRATORY FLOWS TO CHILE

1.1 Historical characteristics: the transition from migrant-receiving to migrant-sending country. Selective migration and spontaneous migration.

Studying the history of migration in Chile highlights the interrelationship between the construction of the nation-state and the acceptance and/or rejection of certain migratory flows: in the consolidation of the country symbol, national identity is not only reinforced through the border –in a geographical/territorial sense– but certain migrations are also promoted –explicitly– in order to stimulate national "progress". Thus, the colonization of the territory from the mid-19th century until the first half of the 20th century (after the constitution of Chile as an independent country) included a programme that considered increasing the volume of the population in order to boost the exploitation of raw materials and inhabit uninhabited regions, as a strategy to prevent the advance of some European countries into these territories. Unlike other countries in the region, it was not cheap labor –either outright slavery or slave labor– that was being sought at the time, but rather other levels of technical training. The arguments: seeking "greater economic progress thanks to the "spirit of order and work" brought by Europeans" (Cano and Soffia, 2009) and, specifically, Germans and Spaniards: "the idea was not only to bring more people to an almost uninhabited country, but to bring better people" (Villalobos, 1974. Quoted by Cano and Soffia, 2009).

This statement seems to permeate, to this day, the acceptance of certain migrant groups over others.

Historically, Chile has been considered a migrant-receiving country –with a considerable border opening– but both in the studies and research on the subject and in the discourses constructed by citizens regarding the local history of migration, we can identify the distinction between transoceanic and regional flows. In turn, among the migratory flows from Europe and Asia we can distinguish the class bias: a first phase of the migrant-receiving process seeks, as I said before, a "modernizing" effect of knowledge transfer with a strong reception in the technical-industrial and educational fields

(mainly German and Spanish migration, the latter lasting until the end of the civil war) and then, a second phase of stimulus to migration from Asia, which seeks –fundamentally– to complement the labor force for mining exploitation. In both cases, migration is stimulated and promoted by the Chilean state (with the exception of the reception of war victims), but with differentiated integration policies –not only from the state, but also from the citizenry. The first group is perceived –and received– as a civilizing collective, and the second as a labor force available to compensate for the lack of national labor. Despite this distinction, both groups correspond to selective migrations, stimulated by the state itself.

Meanwhile, interregional migration was not stimulated –head-on– by the Chilean state, but was a response to the labor supply that the country represented thanks to mining exploitation, and it was mainly migration from border countries. By the end of the 19th century, these migratory groups accounted for 67% of the foreigners living in Chile. (Cano and Soffia, 2009).

Another migratory flow, as large as it is little studied in Chile, came from Palestine, Syria and Libya at the end of the 19th century. The fact that, Chile is currently the country with the largest Palestinian population outside the Arab world and Israel, shows the steady pace of this flow.

This logic was maintained until the first decades of the twentieth century, when the correlate of exclusion that this selected migration entailed became tangible: "a certain racism and unwillingness to attract immigrants from different parts of the world, present in the Chilean state, led the Foreign Ministry in 1927 to send a Confidential Letter to all the consuls of Chile in which they were instructed to reject the immigration of undesirables, particularly the Chinese, Syrians and Africans, for reasons of race" (Zeran, 2019).

Later, in the 1970s and 1980s, migratory flows ceased almost completely as a consequence of the state dictatorship (basically, the borders remained practically closed). During this period, Chile became not only a country that expelled immigrants, but also a country that expelled Chilean men and women. It was at this time that the last law governing migration in Chile was passed. (the legislative chronology is a little further on).

Since the 1989 plebiscite and the return to democracy, migration to Chile has been characterized by being –for the most part– a return migration, in a constant flow that has increased following the publication of the Rettig Report –which recognizes citizens affected by the repressive policies of the Chilean state as victims– and the subsequent creation of the National Corporation for Reparation and Reconciliation (Corporación Nacional de Reparación y Reconciliación).

It was then in the 1990s that migratory flows to Chile were reactivated.

1.2 Characterization and reception of recent migration

According to population and housing census figures, the volume of immigrants has been increasing since 1992, with a sharp increase of three percentage points between 2002 and 2017. The vast majority of this migration comes from interregional migration channels. In December 2018, according to the National Institute of Statistics, the percentage of migrants in Chile reached 6.6% of the total population, almost two points higher than in 2017. During 2018, these flows began to decrease. This year also saw an increase in expulsion orders. (SJM, 2020) and an extraordinary regularization day takes place (detailed below). At the same time, Chile withdraws from the UN Global Compact on Migration, with the memorable statement to the Mercurio by the then Undersecretary of the Interior Rodrigo Ubilla:

> We say that migration is not a human right. It is the right of countries to define the conditions of entry of foreign nationals. If it were a human right, so we are in a world without borders. **We believe strongly in the human rights of migrants, but not that migrating is a human right. human right**.

In 2019, expulsion orders increase and then decrease again in 2020. In total, between 2018 and 2020, 18,725 expulsion orders were issued. The migratory flow drops sharply in 2020 (related to the health crisis). The observatory of the Jesuit Migrant Service (SJM) specifies a 71% decrease in the number of foreigners entering Chile during this year.

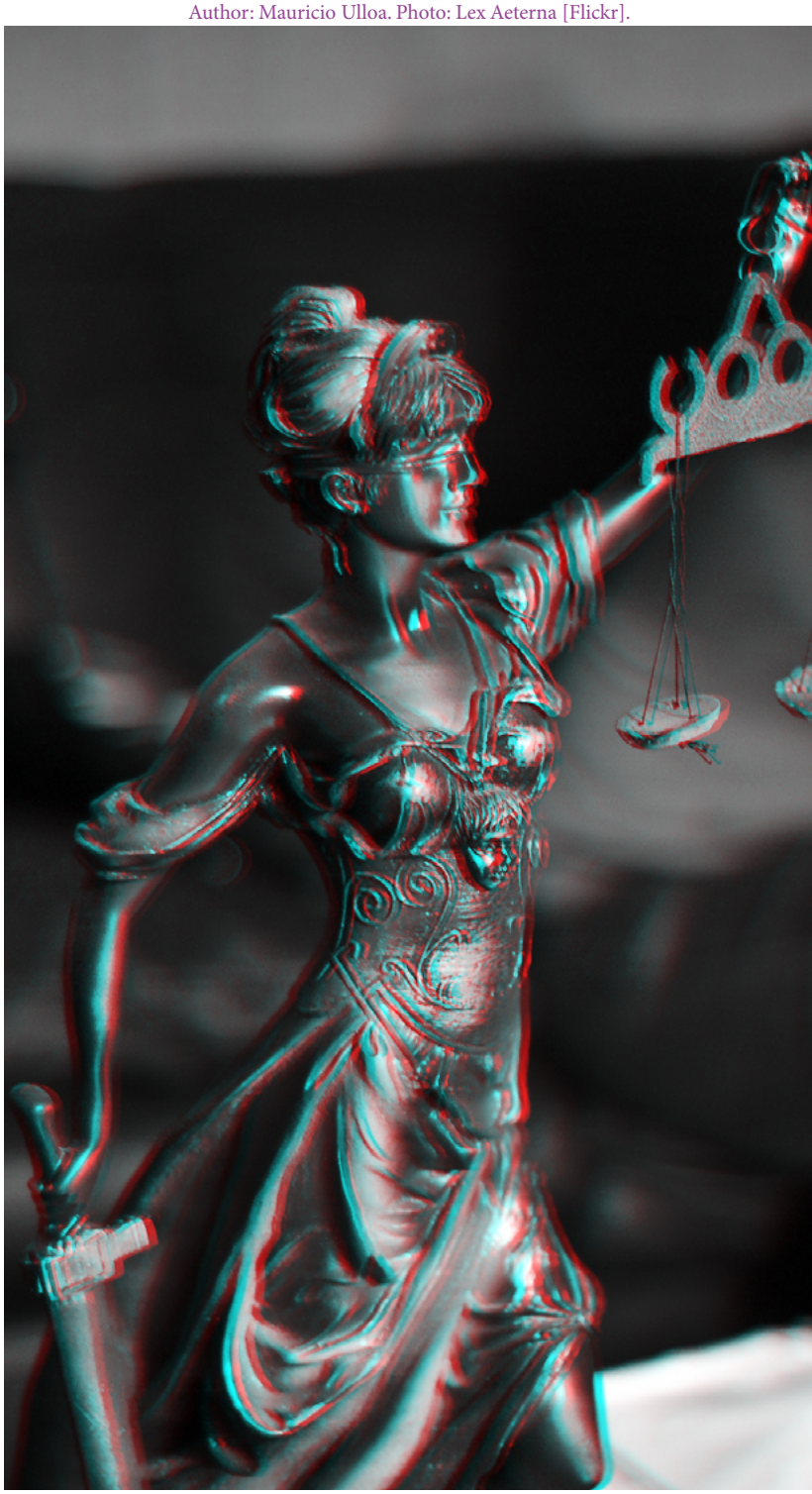
The composition of the migrant group in Chile also changed radically during this period. Until then, the largest percentages of migrants were from Ecuador, Peru and Bolivia. To date, the most predominant countries of origin is Venezuela, Haiti and Colombia (in order of proportion).

It is also interesting to note the variation in the social composition of this migration. Until 2017, according to data from the SJM, the educational level of the migrant population exceeded that of the national population, with the population from Spain, the USA, Cuba and Venezuela standing out in this respect. Since 2018, migration to Chile has become more precarious (between January 2018 and January 2019 there have been more than 35,400 entries through unauthorized crossings). The decrease in the granting of permanent residence permits and visas ("it should be noted that between 2018 and 2020 almost half of the temporary visas (46%) and permanent stays (45%) granted since 2010 have been issued" (SJM, 2020)) 2. The increase in the percentage of Venezuelan migrants who come from a land migration transit, i.e., their last country of residence is not Venezuela. The Venezuelan population increased, over a three-year period (2028-2021), by 134,622% in terms of entry through irregular passages.

II. THE NEW IMMIGRATION LAW

2.1 Legislative Background/ Regularization Processes

Author: Mauricio Ulloa. Photo: Lex Aeterna [Flickr].



• In 1850, Chile's first migration law was passed, specifically to promote German migration (Ley de colonizadores).

• In 1945, the "Coordinating Commission for Immigration" was created.

• In 1953, the Immigration Department was created under the Ministry of Foreign Affairs.

• In 1975, the "Ley de Extranjería" (Law No. 1094) was created. It is noteworthy that the constitutionality of this law is not evaluated at any point, given that, at the time of its approval, the Constitutional Court was dissolved. It also highlights:

> (...) the early concern to legislate on the matter, considering that Chile was not a major recipient of migratory flows due to the and that it was not likely to become one either, in the context of the of a dictatorial context. In fact, the commission that was entrusted with the elaboration of the The first draft of the decree began to be discussed as early as July 1974, i.e. during what has been called the foundational phase of the dictatorship (Stang, 2016).

This decree mainly regulates the conditions of entry, stay and exit in the country and some working conditions, but it does not establish the basis for access to health and education, for example. It does stop at regulating the

possible political participation of foreigners, as is evident in Article 26, paragraph 4 (Prohibitions and Impediments to Entry), which determines the prohibition of entry into the country to:

> 1) Those who propagate or promote, by word or deed, the following foreigners: (1) Those who propagate or promote, by word or deed, the following foreigners in writing or by any other means, doctrines which tend to destroy or alter by violence against the social order of the country or its system of government; those who are syndicated or reputed to be agitators or activists for such doctrines and, in general, those who carry out acts that Chilean law classifies as a crime against external security, national sovereignty, internal security or public order of the country and those who carry out acts contrary to the interests of Chile or who constitute a danger to the state.

Furthermore, class bias is institutionalized in establishing criteria for entry to the country, as foreigners who "do not have or cannot exercise a profession or trade, or lack the resources to live in Chile without constituting a social burden" are also banned from entering the country.

• This law was not repealed until the enactment of the new law. In the meantime, it was supplemented by a total of 39 amendments/complementation's, in the form of extraordinary circulars or amendments to decrees. Although some of these decrees "facilitate" the migration issue, the segregationist policy that characterizes the law is maintained. For example, the 1984 modification includes, among the criteria for applying for a residence visa, which foreigners should:

> (d) undertake in writing, by means of an affidavit, not to participate, during their stay in Chile, in internal politics or in acts that could have an impact on the Inferring discomfort to governments with which friendly relations are maintained, and to respect and comply with the Political Constitution, the laws and other provisions that govern the territory of the Republic.

• After the return to democracy, different institutions of the Chilean state structure enacted regulations or decrees that facilitate or allow foreigners' access to the health system (incorporation of the migrant population lacking resources into the FONASA system (2015), creation of a[2] temporary health routine to guarantee care in clinics for migrant children, among others), to the education system (temporary school routine to include migrant children in the basic and

"class bias is institutionalized in establishing criteria for entry to the country, as foreigners who "do not have or cannot exercise a profession or trade, or lack the resources to live in Chile without constituting a social burden".

pre-school education system) and to apply for the housing subsidy (reduction of the number of years of residence to be able to include migrant children in the basic and pre-school education system), among others), the education system (temporary school routine for the inclusion of migrant children in the basic and pre-school education system) and the application for the housing subsidy (reduction of the number of years of residence to be eligible for the benefit), for example, but none of these initiatives are part of a comprehensive migration law.

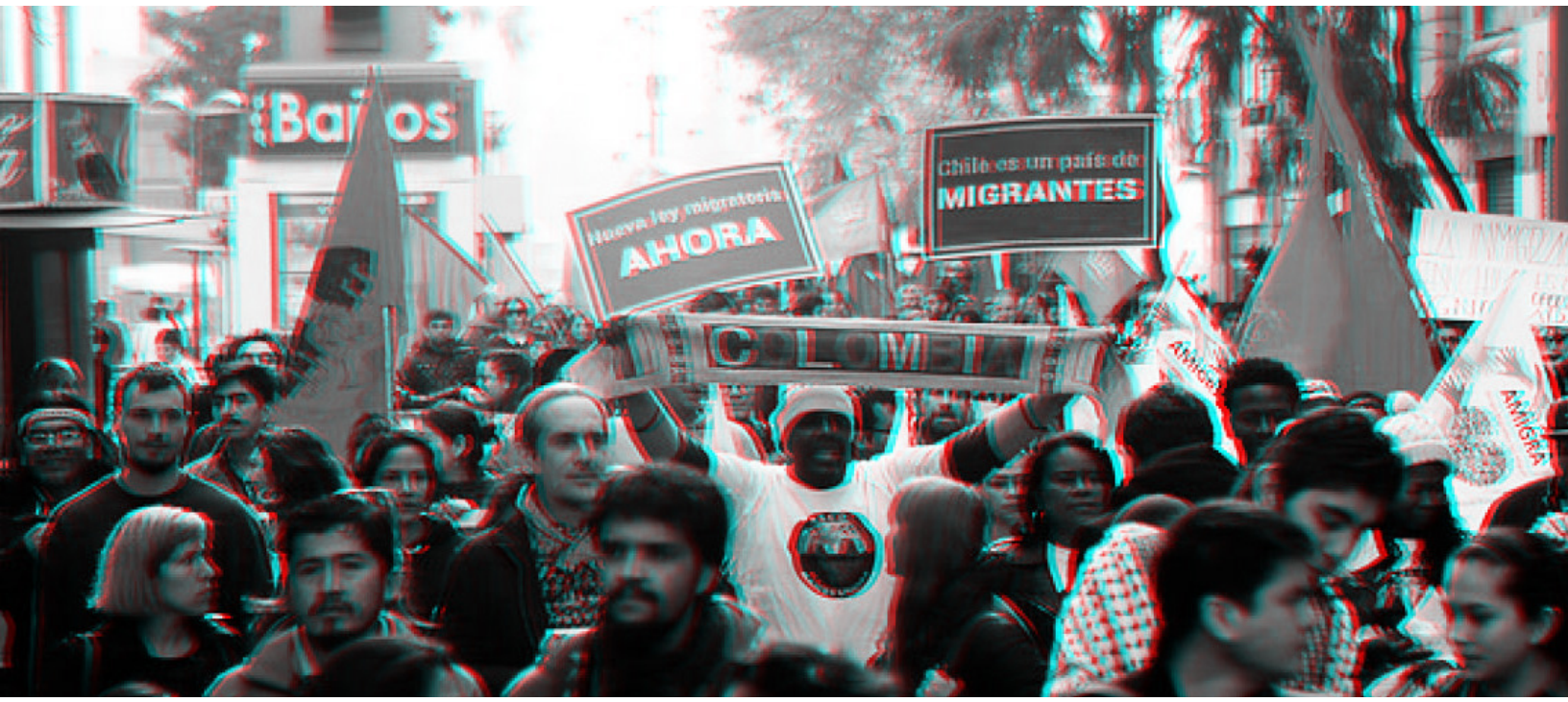
- The "First Regularization Plan for irregular immigrants" was implemented in 1998, under the Frei government (1994-2000). This plan benefited approximately 22,000 resident foreigners, most of them Peruvians, who migrated to Chile as a consequence of the Fujimori dictatorship.

- The second extraordinary regularization process was promoted by Michelle Bachelet's government (2006-2010). It took place between November 2007 and February 2008.

- In 2008, then President Michelle Bachelet proposed the creation of an immigration law, but it failed[3].

- The third migration regularization process was carried out during the Piñera government, in 2018. This was announced as the moment to "put order in this home we share".

- In 2013, during Piñera's first government (2010-2014), he presented a Migration and Aliens Bill, focused on the regulation of the migrant workforce, arguing the need to take advantage of "the potential advantages of international migration for the benefit of the country". During the following government (Michelle Bachelet), its processing was interrupted, to be taken up again and finally approved in 2020 and 2021.



Author: Portal Rock-Pop. Photo: New immigration law.

2.2 The new migration law. Reform process and approval[4]

• The law was introduced in the Chamber of Deputies on 04 June 2013.

• During 2018, the project will be reactivated. The text was discussed in the Chamber of Deputies by the Internal Government and Regionalization, Human Rights and Indigenous Peoples, and Finance Committees. It was approved in general and in particular on 16 January 2019, passing to the revising Chamber.

• In the Senate, the Bill was reviewed by the Government, Decentralization and Regionalization, Human Rights, Nationality and Citizenship and Finance Committees, and was approved with amendments that were approved in the Chamber and sent back to the Chamber of origin on 2 October 2020. In the Chamber of Deputies, some of the amendments approved by the Senate were rejected, so on 3 November 2020, a Joint Committee was set up to discuss these amendments.

• This Commission discussed ten articles, approving five with modifications and including a new article on complementary protection granted to refugees.

• The report generated by the Joint Committee was adopted by 102 votes in favor, 32 against and 11 abstentions. The new article was also adopted, with 108 votes in favor, 22 against and 13 abstentions.

• In the subsequent discussion process, we would like to highlight, as a good exposition of the main knots of the new law, what Senator Latorre argued in the session of 13/08/2019, when he observed that the bill highlights the absence of "a consecration of the principle of non-refoulement, mechanisms of protection for migrants who are in a situation of high vulnerability, procedures that give concrete expression to the principle of the best interests of migrant children and adolescents and avoid using the administrative sanction of expulsion as a criminal sanction that can even deprive migrants of

Author: My diary in Chile. Photo: Aliens Law.

their liberty at the hands of the authorities, procedures that concretize the principle of the best interests of migrant children and adolescents and avoid using the administrative sanction of expulsion as a criminal sanction that can even deprive migrants of their liberty at the hands of the administrative authority, without prior or subsequent judicial control, in an arbitrary manner; and equal access to social rights.

• On 3 December 2020, the Presidency of the Senate sent a letter to the Presidency of the Chamber of Deputies, informing that, in view of the approval of the report of the Joint Commission, the bill was ready to be sent to the Executive as a law. In view of this, and as a last measure to try to stop the enactment of the law, on 15 December 2020, a group of deputies, representing more than a quarter of the members in office, led by members of the Frente Amplio and the Communist Party of Chile, presented a Request for Unconstitutionality for 14 articles of the aforementioned law, which was partially accepted in January 2021.

The most important aspect of this unconstitutionality requirement is the following:

A. In the introductory text, the deputies explain that they had conducted an extensive debate on the law, during which they had opposed various norms, while proposing new ones that were not taken into account, the main points of the debate being "the prohibition of changing migratory status, the possible establishment of a visa for work opportunities, the existence of special visas for victims of migrant smuggling and human trafficking, the nature and scope of complementary protection, among others". They also assume the political defeat in terms of the approval of certain points and the rejection of others, understanding that "it will be through a political-legislative discussion that, in the coming years, those decisions that we consider wrong will have to be amended, but they also clarify that the precepts submitted for evaluation by the Constitutional Court, suffer "from serious unconstitutional defects".

B. The arguments for requesting the evaluation of the contested precepts cross three questions of constitutionality (in general terms): 1. "they manifest a restrictive and discriminatory approach to the exercise of the fundamental rights of migrants, institutionalizing exceptionality. They enshrine spaces of excessive administrative discretion, to the point of transforming it into arbitrariness, transgressing the limits of the legal reserve and 3. They enshrine a restrictive vision of the freedom of movement, which omits essential aspects of the same as constitutionalized in article 19 Nº 7.

C. Of the 14 articles challenged, six were upheld. The successful applications were:

• From Article 27, the second clause, the expressions "for qualified reasons of national interest," and "of low compliance with migration rules by nationals of a particular country": **arbitrary discrimination and violation of the strict legal reservation in matters of personal liberty**.

• From Article 117, paragraph 8, final part ("In addition, the employer who is sanctioned repeatedly under the terms of this article may be punished with the prohibition to contract with the State for a period of up to 3 years"): **infringement of equality before the law and due process**.

• Article 132: "Article 132. –Assisted return of children and adolescents. Children and adolescents

Unaccompanied foreign adolescents who do not have the authorization of article 28 may not be expelled. Without prejudice to this, they may be subject to an assisted return procedure to the country of which they are nationals, coordinated by the authority in charge of the protection of children and adolescents. The conditions under which this procedure will be implemented will be established in the regulations. The decision of assisted return, as well as the procedure itself, will be made in the best interests of the child or adolescent and his or her situation of vulnerability, with full respect for his or her rights and guarantees enshrined in the Constitution and in international treaties ratified by Chile and which are in force. This procedure must be initiated as soon as possible, which in no case may exceed three months from the entry of the unaccompanied child or adolescent into the national territory.

The assisted return procedure regulated in the regulation shall be subject to the principles of the best interests of the child, the right to be heard, non-refoulement and other applicable principles.

The child or adolescent shall be informed of his or her situation and rights, of the services to which he or she has access and of the return procedure to which he or she will be subjected, as well as of the place and conditions in which he or she will remain in the country until the return takes place.

The consulate of the child's country of nationality or residence shall be notified of the child's location and conditions.

Likewise, the search for adult relatives will be promoted, both in the national territory and in their country of origin, in coordination with the consulate of the country of nationality or residence of the child or adolescent.

Assisted return may only be suspended for reasons of force majeure and must be resumed once the force majeure has been overcome.

Unaccompanied or unauthorized children and adolescents will remain under the guardianship of the authority responsible for the protection of children and adolescents for the duration of the assisted return procedure. Foreign children and adolescents may not be deprived of their liberty in order to make this measure effective": **violation of children's rights and transgression of the competence of the courts of justice. It is worth mentioning that this article even generated a pronouncement by UNICEF**.

• Article 135, on the execution of the expulsion measure, 72-hour time limit ("the person concerned may be subjected to restrictions and deprivation of liberty for a period not exceeding seventy-two hours. "(...) "the person affected by an expulsion measure who is deprived of liberty in accordance with the provisions of this article shall be released if the expulsion does not take place after seventy-two hours have elapsed since the beginning of the deprivation of liberty"): **Infringement of Article 19 Nº7 letter c) and Article 5ª inc. 2ª (deprivation of liberty without compulsory judicial control, infringement of constitutional standards in**

matters of sanctioning activity of the State Administration, infringement of international standards in matters of protection of human rights of persons deprived of liberty, among others).

• Article 175, paragraphs 1, second part and 2 ("The loss of the migratory category of resident shall terminate the period of residence and shall cause the loss of all the time elapsed up to that date for the purposes of this article. This is without prejudice to the fact that, in the event of obtaining a residence permit subsequently, a new period of residence shall begin to be counted for these purposes"): **deprivation of the right to vote (Article 14) and arbitrary distinction (Article 19 Nº 2, both of the Constitution)**.

• Article 176 Nº 16 (Article 176. –Amendments to other regulations.

(…)17. In Decree-Law No. 321, which establishes conditional release for women, the following shall be included persons sentenced to deprivation of liberty, the following Article 2a, new:

> "Article 2 bis: Foreigners sentenced to major prison sentences and imprisonment, who apply and qualify for the granting of the benefit of conditional release, shall be expelled from the national territory, maintaining the internment of the convicted person until the execution of the sentence, unless it is established that their roots in the country make it advisable not to apply this measure, as determined by a technical report issued by the National Migration Service in accordance with article 129 of the law on migration and aliens.
>
> The Parole Commission shall decide on the matter, informing by the most expeditious means possible the National Migration Service and the Chilean Investigation Police so that the latter may execute the measure within a maximum period of 30 calendar days.
>
> Aliens thus expelled shall not be subject to the provisions of Article 6 and may not return to the national territory for a period of up to twenty years. If they infringe the latter provision within 10 years, they shall serve the balance of the prison sentence originally imposed": infringement of the principle of State service and the right to equality before the law.

We have considered it appropriate to expose the content of the articles included in the unconstitutionality request, as we consider that they expose in a more radical and clearer way the ideological background of the approved law. It is pertinent to take into account **that the articles not accepted** in this petition concur, according to the criteria of the petitioning deputies, in the following abuses:

• Infringements of personal freedom, the right to equality and the guarantee of the essential content of fundamental rights.

• Arbitrary discrimination, infringement of the constitutional maxim of reasonableness and violation of the rights of children and adolescents.

• Infringement of the right to equality before the law and of the Chilean State's commitment to respect the essential rights enshrined in ratified international treaties in force.

• Infringement of the right to personal liberty and freedom of movement, violation of the strict legal reserve imposed by the Constitution.

• Infringement of the legal reservation of personal freedom, of the guarantee of minimum content and of the principle of proportionality.

• Infringement of personal liberty, equal protection of the law in the exercise of rights and guarantee of the essential content.

• Infringements of the principle of legal reserve in matters of freedom of movement and the principle of criminality applicable to administrative sanctioning law.

• Infringement of the principle of constitutional proportionality.

• On 19 January 2021, the Constitutional Court issued the response to the detailed injunction.

2.3 Approval, enactment and immediate actions

• The law was enacted on 11 April 2021 and published on 20 April 2021.

Before its enactment, the "Colchane Plan" was implemented: 138 immigrants who had entered the country through unauthorized crossings were expelled. This act could be considered the first sign of what the enactment of the law would mean. In the words of the Interior Minister:

> They are people who have not committed serious crimes, they are people who have no family in Chile, who are not parents and have no children here, and what is appropriate, as the law says, is for them to be expelled. **What we want to give with this is a very strong signal that we have to order the migratory flow through our borders**.

Immediately after the enactment of the law, on 25 April 2021, 55 Venezuelan migrants were expelled. This expulsion even violated the deadline stipulated in the new law, which grants 180 days for those who have entered through an unauthorized crossing point to leave the national territory without being sanctioned. Furthermore, according to migrant organizations, the arrests were carried out in an arbitrary manner, when people presented themselves at police stations to sign (one possibility, prior to the approval of the law, to regularize their migratory status, was to self-report). This implied a periodical presentation at the police station to sign).

2.4 Civil society and collective responses

• On 28 April, after the expulsions, the National Coordination of Immigrants held a public demonstration in rejection of the expulsions.

• The Jesuit Migrant Service has carried out a constant work of denouncing and advising migrants since the approval of the Law.

• The National Coordination of Migrants started an autonomous process of regularization of migrant children.

• Under pressure from various human rights organizations, the national government began a migration regularization process, which was contemplated –with many limitations and complications in terms of the dates of

entry that allowed for regularization (migrants who entered through regular channels before 18 March 2020)– but which had not contemplated any enforcement mechanism at the time of enacting the law.

2.5 Main objections and criticisms

In addition to the aforementioned, argued on the legislative level by deputies allied to the migrant cause, the new law and the regularization plan imply:

• The impossibility of regularizing the migratory situation of people who entered through unauthorized crossings (the highest percentage of migrants).

• People who would have entered through legal channels after 18 March 2020 would have to leave the country again and apply for visas at the consulates of their countries of origin: an absolutely irrational requirement in a pandemic context. Moreover, it directly infringes on the right to refuge, since people who apply for this status are not in a position to return to their country. Moreover, the application for a visa from the consulate does not guarantee that it will be granted.

• The granting of consular visas depends on observations that border on subjectivity as the criteria for granting them are not clearly defined.

• The law establishes a prohibition on changing the category of entry into the country (you cannot change a transitory category to temporary). It has been repeatedly denounced that this type of legislation only promotes irregularity.

2.6 Advances

• As for what we could consider the "advances" in the aforementioned law, it is the creation of an institution to address the issue of migration (National Migration Service and Migration Policy Council).

• The law gives higher legislative status to some rights previously guaranteed in administrative documents (specifically the above-mentioned access to health and education).

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1. Although the law has been widely criticized by the migrant community and some international organizations, the reaction of the civilian population to its enactment has been practically nil.

2. Identity Card.

3. No information is available on this. In our terms, it was shelved.

4. Summary made on the basis of what is set out in the document of the request for unconstitutionality.


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