Q&A With Federico Díaz Chacón: Constitution-Making in Chile

On September 4, 2022, Chile will hold a landmark national referendum on whether to pass a new constitution to replace the Pinochet Constitution of 1980. CCS summer student Hassan Ahmed talked to Federico Díaz Chacón (LL.M. Candidate, McGill University) about how the Chilean constitution-making process has unfolded thus far, and about the key elements of the draft constitution.

Q: In 2020, Chile held a national plebiscite asking the Chilean people if they would like a new constitution, and if they would like it to be drafted by a "constitutional convention." What were the social, political, and economic factors that led to this plebiscite?

A: The Chilean National Plebiscite of 2020 was the outcome of a massive social uprising that occurred in October 2019. This uprising was caused, in part, by the significant levels of economic inequality in the country. In this regard, although Chile has been internationally recognized for its economic growth, this growth has not been equitable. Indeed, according to the OECD, Chile is one of the three most unequal Latin American countries in terms of income.

In addition, the uprising was also rooted in the lack of progress on the promotion of social rights in Chile, a problem that has been defined by poor public education, environmental degradation, weak protection of women's rights, low pensions, and non-recognition of Indigenous people's rights. Consequently, the 2019 uprising brought together thousands of neglected people and groups of different kinds: high school students, people with large university debts, environmental movements, feminist groups, pensioners, and Indigenous peoples, among others.

The uprising accordingly demonstrated the existence of a structural problem in the country, and the need for a new social pact that would incorporate all the excluded people, and reframe the state's political and economic model to better accommodate Chile's heterogeneous civil society. Indeed, many of the problems that gave rise to the uprising were related to Chile's current "neoliberal" Constitution, which was imposed in 1980 by the military dictatorship of Augusto Pinochet. In this context, in order to soften the protests and social discontent, the political parties of both the government and the opposition signed the "Agreement for Social Peace and New Constitution" in November 2019. Through this agreement, they committed to organizing a national plebiscite to see if Chilean people would like a new constitution. The result of the national plebiscite was overwhelming: almost 80% voted in favor of drafting a new constitution.

Q: For an unfamiliar reader, how would you explain the concept of a "constitutional convention"? How were members of the constitutional convention selected, and

how did the architects of the process ensure that all relevant voices were represented at the table?

A: Simply put, the constitutional convention was the public body in charge of drafting the new Constitution. The Chilean National Plebiscite of 2020, in addition to asking whether Chilean people wanted a new constitution, asked which type of body should draft it: 1) a mixed constitutional commission, composed equally of popularly elected members and parliamentarians, or 2) a constitutional convention, composed exclusively of popularly elected members. Again, almost 80% voted for the second option, and the creation and structure of this body was then promptly established by Law No. 21,200, which amended the Constitution to incorporate the new constitution-making process. Thus, the constitutional convention was a *sui generis* public body created by law exclusively for this purpose (the purpose of drafting a new constitution).

The convention was composed of 155 members, elected by popular vote in elections held in May 2021. To ensure that all relevant voices were represented, Law No. 21,216 established gender parity, requiring an equal representation of men and women on the convention. Likewise, to ensure the effective participation of Indigenous peoples, Law No. 21,298 reserved seats for representatives of the Indigenous peoples that inhabit Chile.

In addition, the convention involved several mechanisms to enhance public participation. For example, public hearings were scheduled so that individuals and institutions could make presentations to the convention. More than two thousand public hearings were requested, where NGO's, IPO's, scholars, and young people, among others, presented their thoughts, opinions, and proposals.

The convention also created a mechanism through which a person or group of persons could submit proposals to the convention for the establishment of new constitutional norms. These proposals were published on the convention's website and, if they exceeded 15,000 signatures, they were discussed by the convention. Approximately one million people participated and 78 proposals reached this threshold.

Q: One aspect of the draft constitution that has attracted a lot of international interest is its emphasis on socio-economic rights. Why was this viewed as important in Chile? And what might be some of the key challenges involved in the implementation of these rights?

A: The current Chilean Constitution has a narrow list of socioeconomic rights that does not fully reflect the more extensive list recognized in international instruments, such as the International Covenant on Economic, Social and Cultural Rights (CESCR). The Chilean Constitution does not recognize the right to adequate housing and food, for example, and under the "subsidiarity" principle, it is private companies that are called upon first to satisfy socioeconomic rights — not the state. This has generated important restrictions and difficulties in the realization of relevant social rights, such as the rights to healthcare and education.

The draft constitution addresses both of these issues. It incorporates rights already recognized in international instruments, such as the right to adequate housing; strengthens other rights, like the right to work and to live in a healthy environment; and affirms "emerging" rights, such as the collective right to the city and territory, the right to sports, and sexual and reproductive rights. Moreover, the constitutional draft changes the subsidiary role of the state, defining it instead as a social and solidarity state that has a primary duty to provide conditions and services to effectively guarantee socioeconomic rights.

In my opinion, if the draft constitution is approved in the upcoming referendum, one of the great challenges will be to reach the necessary agreements in Congress to pass the laws that would implement the new constitution. A great number of constitutional provisions, especially those consecrating socio-economic rights, entrust their development and implementation to Congress. Thus, it will be the responsibility of the Congress to determine the scope and form of these new constitutional provisions, in a timely manner, to prevent them from becoming a hollow promise. At present, though, there is no large political majority in Congress to enable these kinds of agreements, and the implementation of socioeconomic rights will therefore not be an easy task.

Q: The final version of the constitution has to be approved in an upcoming referendum. What criticisms are being leveled at the constitution, and what happens if it is not approved by the Chilean public?

A: It is difficult for a constitutional project to be perfect and, certainly, every constitution can always be improved. This case is no different. One criticism is that the draft constitution modifies the system for the selection and appointment of judges, creating a "Council of Justice" for this purpose, of which only 8 of the 17 members are judges. In this sense, there is concern that the composition of the Council could affect the due independence and impartiality of the courts; considering that judges are not in a majority on the Council, there are some fears that the courts could become politicized.

In addition, while the consecration of Chile as a plurinational state – this is, the constitutional recognition of the Indigenous peoples that inhabit Chile as nations and the consecration of the rights that emanate from this status – has been understood as great progress, there are doubts about the scope of certain rights, especially the rights of consultation and of free, prior, and informed consent (FPIC). The draft constitution recognizes both rights, which is important, but their extent and application is unclear. Due to this ambiguity, there are concerns as to how these rights will ultimately materialize and operate.

If the draft Constitution is not approved in the upcoming referendum of September 4, naturally, the current Constitution will remain in force. However, there is a widespread consensus at the political and citizen levels that the Constitution must undoubtedly be modified. The current Constitution does not enjoy any real legitimacy, given that almost 80% voted to draft a new constitution in the National Plebiscite. For now, there is no clear and concrete path for changing the Constitution if the referendum fails. Nonetheless, the

idea that currently has the most political strength is that the Congress has to pass a law for the creation of a new constitutional convention, thereby restarting the amendment process.

Q: Finally, could you comment on the broader social and political implications of Chile's method of constitution-making? In particular, what are some things that Canada can learn from the process, especially in light of previously failed attempts at constitutional amendment such as the Meech Lake and Charlottetown Accords?

A: It is impossible to find a perfect recipe for situations of high social, political, and legal complexity such as the constitution-making process in Chile. It is also important to consider that each country is different and has its own history, cultural identity, and political organization. Just as an example, it is worth noting that Chile is organized politically as a unitary state, not as a federal state like Canada. These differences make it difficult to know for sure which features of the constitutional process will fit successfully in the Canadian context.

Having said this, I strongly believe that a fundamental element for the success of the constitution-making process is to ensure full and effective public participation in each of stage of the process. In the case of Chile, referendums at each phase have endowed the constitutional process with legitimacy. A first referendum was held to decide whether to initiate a process for making a new constitution and, if so, how to shape the body in charge of the drafting the new constitution. A national plebiscite was also held for the election of the members of this body.

These referendums gave credibility to the origin and development of this constitutional process. Likewise, in the particular case of Chile, the constitutional convention created various mechanisms for public participation, and Chileans will now have another referendum (on September 4, 2022) to approve or reject the constitutional draft.

Whatever the outcome of the upcoming referendum, this constitution-making process will have been successful because of its undoubtedly participatory and democratic nature. In my opinion, this is something that other countries entering into this type of constitutional process can learn from Chile.