Constitutional Federalism Institute

INCREMENTALISM

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An Approach to Constitution Making: Incrementalism

November 2023

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An Approach to Constitution Making: Incrementalism

Introduction

Constitutions establish the structure of government, the state's institutions and regulate the balance of power among the branches of government. Constitutions expressed themselves as legal means of a society that reflects the common characters and identity of the country, and the values of that country (Lerner, 2011). In addition, constitutions protect citizens from the violations of their basic human rights by enshrining the fundamental rights of every citizen in the constitutions. If overviewing them, the constitutions often include the distribution of the sovereignty of the country, the structure of government institutions, the grantee of the citizens' fundamental rights, the characteristics of the country, the language provisions, and the relationship between state and religion (Lerner, 2011). The responsibilities of the constitution include how the state's institutions such as executive, legislative, and judicial, etc. will be formed and arranged, how the state's power will be divided and distributed horizontally and vertically is also important. On the other hand, standards and values, parts of the "Basic Principles" that define how the country is established also cannot be omitted.

In countries that live in diverse societies and have experienced many political conflicts, the process of drafting a new constitution is to reduce internal conflicts, to comprehend and bring into the diverse views of society, and aims to promote democracy (Lerner, 2011). However, the fundamental factors considered to be incorporated in the constitutions of these societies are different, and it is difficult to reach a common agreement. As a result, constitutional drafters have understood that there are number of limitations to resolving these disputes in the context of constitutional drafting (Lerner, 2010). On the other hand, ignoring the disagreements and adopting a constitution creates a sensitive political situation, situations such as rebellions break out and secession takes place (Landau and Lerner, 2019). Even though the process of constitutional drafting is meant to resolve the conflicts, the cause of deterioration of the existing conflicts is often the process itself.

Therefore, in countries that live with a diversity of societies and have gone through many political conflicts, the drafters of the new constitution try to finalize the decision on the disagreements that arise during the drafting process, which can lead to a deadlock situations, take a long time to reach basic common agreement, so such disagreements are no longer resolved in according with the constitution, but are used as an approach to resolve the future political context (Lerner, 2011). Another way of looking at this approach is that the constitutional drafting is regarded as a consensus process to find a solution rather than an agreed answer to the existing variety of problems and diversity.

This paper introduces constitutional disputes and constitution disparity encountered in the diverse countries, by bringing them to the political senses rather than resolving them rebellion means approach, by introducing an incrementalism approach, its impacts, and consequences, compares with and examines the constitutional processes in India and Ireland.

Divided Societies, Constitutional Conflict and Controversy

According to Lerner (2011), dissident societies have political or religious provisions and social values that they wish to reflect in their constitutions, often differ from the others, and such differences often lead to conflict. Particularly, due to the different historical experiences and interests among these societies, the lack of consensus on the fundamental goals and values of the constitution has become a challenge for constitution-making. The consequences of lacking agreements between the differences in the post-conflict countries can be seen in the armed conflicts in Iraq and Afghanistan.

Constitution writing is an enactment of adopting explicit points and agreements that are difficult to amend despite the competitive norms and values of societies with different characteristics. Therefore, adopting a constitution is defining the common characteristics of a country, by trying to do so, it often leads to political conflicts and secession (Lerner, 2010). An example is Pakistan seceded in June 1947, seven months after the Constitution drafted in India. The secession was due to the failure of

efforts to reach consensus among the differences in the constitution drafting. The attempts to resolve these conflicts through preliminary constitutional negotiations also failed. According to Lerner (2010), the failure is due to the fact different societies do not try to comprehend the existing political conflicts, rather they try to resolve the conflicts through only during the process of constitution making. It cannot be regarded that the dissident societies norms and values are distant from the reality of people's lives, the principles of power sharing, structure of government institutions are far from the reality. In the following examples, the norms and values of the separated groups have quite impacted on the public life, the country's characteristics. Moreover, if the groups involved in the constitutional making process no longer believe that coexisting provides their political guarantees, then it can intensify the existing conflicts.

Incrementalism

Incrementalism approach is an approach used by the constitutional drafters in order to avoid conflicts arising from the different opinion on the national identity, the relation between the state and religion, which are the enacted basic provisions of the constitution (Lerner, 2010). Therefore, in the process of incrementalism approach to constitutional making, it involves by avoiding use of clear and definitive provisions for areas where it is hard to reach consensus and agreements, by writing the provisions in vague legal language that can be interpreted and generally accepted by all involved. For these areas, a political planning method is adopted for making specific decisions in the future.

By its nature, the constitution is not easy to amend or change as common laws, it is the supreme source of laws. Diverse groups strive to draft a constitution that will impact for next generations. As trying their best as they can, it is natural to have friction among different norms and values. From this perspective, the incrementalist approach is an unconventional way of thinking. The reason is that such an approach does not deal with the function of constitutional procedure such as how to include a consensus in resolving the friction problem and manage to reflect the public opinion. It instead proposes to gradually resolve issues later that are difficult to practically reach agreement at this moment. According to that approach, the constitution drafting is not perceived as the norms, values, and function mechanism of the society, which will

completely be changed as a historical event overnight, but as a step or a framework for gradually evolving in the future. So, the main feature of incrementalism is that it is not written clearly in the constitution for interpretation on sensitive issues, intentionally left vague interpretation, and unclear provisions, and planned carefully to be decided in the future. Moreover, methods such as avoiding clear decisions, using the inclusion of contradictory provisions in the constitution.

An obvious limitation of this approach is that it cannot be referred for all constitutional provisions. For example, regarding the structure of the government institutions, their function, distribution of powers, it is inappropriate and impossible to resolve after adopting the constitution, or leave contradictory and unclear provisions in the constitution.

According to Lerner (2010), there are four principles of incrementalism approach in constitution-making. The four principles are as follows.

1. Non Majoritarianism
2. Non-revolutionary concept of constitutional making
3. Recognizing Differences
4. Transferring conflicts from the constitutional sphere to the future political sphere

Non-Majoritarianism

In determining the basic principles, it can face challenges if imposing the majority rule when approaching the constitutional matters. In addition, even democratic system itself does not rely on the majority's support alone, it also depends on the consensus and support of the minority. Lerner (2010) sees that to gain the support of the minority groups for all inclusivity in order to adopt the country's national identity is not possible within the time frame set for constitutional making and it may take a long time. From the perspective of non-majoritarian, an incrementalism approach can be categorized in two: the Pragmatic argument and the Consensual argument. The pragmatic Argument is defined as making decisions with only the majority's views by excluding the minority's voices, and such decisions can undermine democracy and lead to conflicts (Lerner, 2010). The Consensual Argument views that the fundamental principles and values of a constitution should emerge from the country's different

societies and should not be based upon the sole views and interests of majoritarianism. Therefore, provisions that are not widely supported, and widely disagreed with should be postponed until gain the support of all (Lerner, 2010).

Non-revolutionary Approach in the Constitution Drafting

The process of the constitution drafting usually coincides with the important events in the country's history, and the nature of constitutions can have a quite impact on the political life of citizens, so it is not surprised that the process of constitution drafting is taken as a rare opportunity and expected to bring changes that are convenient for the relevant groups. However, it is not easy to solve the decades-long problems that have been rooted for many reasons within a short period of the constitution drafting, and as mentioned above, there is a danger that the problems may grow even more. Therefore, the incrementalism approach suggests considering the constitution as a first step or a framework to bring about the desired changes. This approach is identified as ‘practical imagination’ by Gerald Chapman (Burke 2006).

The constitutional makers in India shifted the right to make decisions on the controversial issues to the post constitutional-making political sphere or the institutions and avoided incorporating the revolutionary principles and concepts in the basic principles of the Constitution. A revolutionary basic regulation or law is more like an interim period and flexible for amending, however; when laying down the foundations of a new constitution of the state, it is important to reconsider the tendency to change everything of the existing things. The constitution makers need to consider whether the constitution represents “a revolutionary moment or an initiative of an evolutionary process of social-political change.”

The framers of the constitution need to consider whether the constitution "represents a revolutionary moment or initiates an evolutionary process associated with social and political change." In the constitutional making, drafters sometimes wanted the provisions that represented the principles of revolutionary reforms. However, in order for the long-term of the Constitution, the provisions of gradual change can be used as a solution to prevent the cracks of opinion from becoming more apparent.

Representing the Existing Disagreements

The incrementalism approach is a way for constitution-making in diverse societies, and the third concept is representing the existing disagreements. As important as the inclusion of diverse groups is, the management inclusion of the different views of no consensus in the constitution.

In the process of constitution drafting, the existing diverse discussions and preferences are openly expressed, and simply addressed that the ongoing discussions are shifted to the political framework and highlights that the constitution acknowledges such diverse preferences, and then the following discussions can have significant impacts.

Moving decisions into the political sphere

The most important and significant fact of incrementalism is moving decisions regarding disputes and diverse preferences in the constitutional drafting agenda into the political sphere. Moving to the political sphere means that some decisions to be included in the constitution, which is in the deadlock position, are postponed discussing later in political dialogue after the law is drafted, ratified in legislation and enforced.

On disputes over the political ideologies of different societies, the constitutional makers tend to think that the conflicts can be avoided by resolving it through political ways rather than constitutional means. By postponing that, the political ideologies and values of different societies, its values can be more widely represented and boosted its acceptance and legitimacy (Lerner, 2010).

Analysis of the Process of Constitution-Making of India

India is one of the countries that is composed of diverse ethnicities, cultures, religions, and languages. Therefore, the main goal of the Indian constitutional leaders before independence in 1947 was to balance the multi-diversity of societies rather than building a "common" identity of the entire country. Reflecting this goal in the Constitution was the biggest challenge for the Constituent Assembly held from December 1946 to December 1949 (Lerner, 2010).

The Indian constitutional drafters realized that by only adopting a point to put it in practice out of the multi-existence disagreements could damage the democratic system of a young country. The decisions for the controversial issues agenda were postponed to the national level political dialogue after the constitution was drafted and adopted (Lerner, 2010). This approach is called incrementalism approach.

Disputes of Indian Constitution-making process and Incrementalism Approach

The two major disputed issues over the Indian constitution-making process were the determination of the official language of the country and the Unified Civil Code covering the entire country (Lerner, 2010). Before analyzing the first dispute on the country's official language, it needs to understand its priority. In countries where many people live with different languages, if one single language is imposed as the official language of the country, it excludes the rights of minorities who do not use that language, and this may lead to conflicts, even leading to secession (Williams, 2007).[1]

Therefore, the adoption of more than one language as official languages is the recognition and protection of other languages. Such an approach is a suitable option for countries with multiple or more than one language (Williams, 2007).[2]

Looking at the languages used in India, Independence in 1947, there were ten languages spoken by approximately 13 million and more than one million people speak more than 17 languages (Stepan, Linz and Yogendra Yadav, 2010). According to the 1961 census, Hindi speakers constituted 33.37 percent of the total population,

[1]For example, In Sri Lanka, after independence Sinhala language was designated as the only official language. Because of that, Tamil language spoken people demanded the use of both languages in the central government bodies. Later, they increasingly demanded the separation of the federal system that would define a state where the majority Tamils live, and a civil war broke out in the country for a decade (Sakunthala Jayamaha, 2022). In addition, in 1971, Pakistan began considering Urdu and Bengali as official languages, and the division of East Pakistan continued, and wars took place between East Pakistan and West Pakistan. Finally, East Pakistan was separated, and Bangladesh was established (Sazzad, 2020). In addition, there are conflicts arising from the demand for Hindi as an official language by the people of Madhadha in the Tatrai region of Nepal, bordering India (Ashish Giri, 2010).

[2] For example, in Indonesia, where there are more than 700 languages spoken by various ethnic groups, Bahasa Indonesia, spoken by less than 5% of the population, was recognized as the official language under Article 36 of the Indonesia Constitution. According to Article 4 of the 2005 Constitution of Iraq, Arabic and Kurdish languages are recognized as official languages and must be used in government gazettes, legislature, government institutions, judicial courts, and drafting contracts. In addition, in the Constitution of Belgium (1831), based on language, there are four regions; the Dutch-speaking region, French-speaking region, German-speaking region and the bilingual (Dutch and French) metropolitan Brussels region, granted the right to legally recognition of language is allowed at the regional level.

and in the 2001 census, it was 41.03 percent (Office of the Registrar General, India (ORGI), 1968). The amount is not even half of the country's population in percentage terms, despite having millions of population.

At the constituent assembly, disputes arose between representatives from Hindi-speaking regions and non-Hindi-speaking regions over the designation of the official language (Lerner, 2011). Hindi speakers called for Hindi to be the official language and English as a lingua franca. On the other hand, speakers of other languages pointed out that recognizing and accepting other languages would be more conducive to unity in diversity rather than establishing a uniform language on a national scale (Legislative Assembly Debates, 1947).

The negotiations took almost three years from 1946 to 1948 regarding the determination of the official language in the constitution drafting. While English was the official language during the British colonial period, at the time of independence an indigenous language (particularly Hindi), it was discussed whether only Hindi be used as the official language or not. After the end of the tensions, with the interim transitional arrangement, Hindi was recognized as official languages under Article 343 of the Constitution of India and English under Article 351 of the Constitution of India. Furthermore, the Government Commission in accordance with the law has been given the authority to make efforts within the transitional 15 years period, and a review be considered after 15 years announced by the Constituent assembly. However, such attempts have implications for the Indian civil service entrance examination, especially since the examination is highly linked to access to political power and business opportunities, where entry to most senior positions in the bureaucracy of the central and state governments has raised objections against the preference for the Hindi language. Non-Hindi speakers said that the choice of Hindi is a new era of colonization of their states. Then, in the 1960s, when the 15-year period ended, there were protests in the states, and the attempt to set Hindi as the official language was abandoned by the Indian Parliament, and English was used as the lingua franca in the bureaucratic buildings and private sectors (Lerner, 2010).

The second dispute is the establishment of a Uniform Civil Code to be consistent throughout the whole country. That is, the law excludes the influence of religious traditions (usually Hindu). A Secular State is a state in which the constitution

is not based on any religion and protects the freedom of religion (Williams, 2007). The majority population in India is Hindu, while 12 percent of the total population is Muslim (Lerner, 2010). Since India is also different in religion, Chapter 4, Section 44 of the Indian Constitution mandated that the constitution of India should be derived from the social environment and not from religion (Lerner, 2010). However, according to Article 37, the above-mentioned provisions for establishing a rule of law cannot be used in the courts yet (as they do not come into effect yet) and must continue to be discussed in the legislative process, and then only established as principles to be followed. As a result of that provision, the Indian Parliament enacted various laws applicable to different religious communities (Lerner, 2010). By looking at them, we see that the disputes encountered in India's constitution-making process were resolved through an approach of incrementalism.

Analysis of the Irish Constitution

The Constitution of Ireland (Bunreacht na hÉireann) was adopted in 1937 and its constitution is derived from the Constitution of the Independent State of Ireland (Saorstát Éireann - 1922). The Constitution of the Independent State of Ireland was drafted and passed in the period of the Irish Civil War from June 1922 to May 1923. In addition, the constitution was formed through the Anglo-Irish Treaty signed between the British government and Irish people's representatives to end the ongoing civil war in the country. It was found that the relationship between the two opposing ideologies of British domination’s role and the rising of rights of National Sovereignty in the country has been resolved through an incrementalism approach.

After the two-years long British and Irish War (1919-1921) ended, the Anglo-Irish Treaty was signed. The 1922 Constitution was drafted based on that treaty. Of the different opinions of the constitution-making discussions, there were two main groups: those who accept the treaty and demand independence based on the treaty, and those who oppose the treaty and demand absolute independence.

In particular, in accordance with the treaty, the points of to keep Ireland’s status like other countries such as Canada, Australia, New Zealand, South Africa and British dominions (section 1); the Irish Parliament to pledge allegiance to the King of Great Britain (section 4); the Great Britain pays war reparations (Section-5); to keep Britain's

navy and army in the country (Sections 6 and 7) and to keep the strength of the Irish Defence Force with limitation (Section 8) are the controversial ones. In summary, accepting the treaty and demanding independence and the treaty is being under British influence, and so the independence given by the treaty is also a fake independence, the two ideas of rejecting the treaty were significantly different, and the differences were quite intense until the civil war finally broke out (Kissane, 2005).

In early January 1922, when the efforts of the constitution drafting began, two drafts of the constitution came out based on the two differences. The first draft proposed the Political Nationalism of the constitution-making involving the British in accordance with the current situation of the country, and the second draft proposed the Cultural Nationalism of the Constitution-making expressing genuine Irish nationalism (Hutchinson, 1987). According to the Anglo-Irish Treaty, the Irish Constitution will come into force only after the approval of the British Government (Article 18 of the Treaty).

Therefore, the main problem of the initial constitution of Ireland is 'Will Ireland draft a constitution with its own national identity and Ireland liberation? Or Will it go with incrementalism under British pressure?' When taking a look at the political forces in the process of the Ireland constitution-making at that time, it generally can be found in three forces: those who do not accept the treaty, those who will incrementally gain independence based on the treaty, and those living outside the British government (Lerner, 2010). As the British insisted on maintaining their administrative powers and influence under the treaty (Curran, 1980); as those domestic forces did not accept the treaty, rejected British authority, and held the principle of incorporating national identity into the constitution. Thus, the first Irish constitution reflects a situation of symbolic ambivalence. It can be found that the British included not only set restrictions in the treaty but also the characteristics of national liberation. For example, at one point it states' all the powers of Ireland government; executive, judicial and legislative power shall be derived from the people of Ireland' (Section -2), elsewhere it is also written that 'The emblem of the country' is the King of Great Britain (Preamble to the Constitution Part -2) (The Constitution of the Irish Free State – 1932, London).

Since the beginning of the Constitution, both opposing viewpoints were included, so are their advantages and disadvantages. The advantage is because it

was drafted in such a way, democratic elections were held with the acceptance of the British government and enabled forming the Irish Parliament and governments. (Leo Kohn, 1932) (WK Hancock, 1937). The disadvantage is the question of Irish sovereignty arose whether the Irish sovereignty derived from the Irish people or Ireland remains under the British government, and there are two views on whether it will continue to be part of British Dominions or continue to demand absolute governing (Lerner, 2010). Later, the demand for total liberation grew significantly stronger.

In 1923, Ireland was able to join the League of Nations as an independent country, and in 1924 the League of Nations conference succeeded in getting the Anglo-Irish Treaty recognized as a treaty between two independent countries (Harkness, The Restless Dominion). In 1931, the British had adopted and passed the Statute of Westminster, which would fully guarantee the autonomy of the Dominions. After that, Ireland became independent, emerged as an independent country with full self-determination right.

Later, free from the British external pressure, Irish internal forces enabled carrying out its constitutional reform. In the beginning, the constitution was only drafted as basic principles, so it was able to be modified flexibly without becoming a permanent dead-end (Lerner, 2010). Particularly, the provisions of the British-influenced constitution were able to be amended by incrementalism. In 1933, the provisions on pledged loyalty to the British King and the Rights to Appeal to the Privy Council were repealed, and all administrative provisions relating to the British King were also repealed in 1936 (Brian Farrell, 1988). The 41 of the 83 articles of the original constitution was amended, and in 1937 a new constitution of Ireland (bunreacht na héireann) was enacted (Lerner, 2010).

In this way, the constitution of the Free Irish State began another example of incrementalism. It is noticeable to state that it was a wise decision at that time drafting without clearly stating how the future of Ireland would carry out between the two views of total independence and independence from British influence. Total independence is the only goal for all Irish people. However, with the real conditions such as the treaty with Great Britain, British influences, there were many limitations to achieve total independence immediately. In this situation, the constitution was drafted vaguely without details, and a method was devised that would be convenient in the long run.

According to the developments that have taken place, it can be said that the approach has been successful.

Analysis of Incrementalism Approach

As discussed above, the incrementalism method can be used to approach the different opinions that inevitably arise in the process of drafting the constitution, however, it is not the universal fixed method. Depending on country's situation, the obstacles they are facing, and the ears, the method can be used as suited. According to the practical examples above, the main essence of the incrementalism approach is that no matter how much it coincides with the turning point of the country's history, the constitutional drafting process is not viewed as a revolutionary face, but it is common nature to view beyond it. Another concept can be found is that it is an acknowledgment that in certain matters such as the establishment and regulation of government institutions, it is necessary to specifically define the regulations and, but on some issues, no matter how fundamental and crucial they are, there is no need to specifically define them. In addition, the values and standards desired by the state and the people, to make the values widely accepted among different societies, reflect those standards and values in the constitution, make the efforts to be inclusive is a recognition of the fact that it may not be possible to complete the constitution drafting in the relatively short period of time and may require time consuming.

It has been discussed above that in drafting a constitution, it is not possible to go by with the majority will alone and to gain the support of different communities as widely as possible. Depending on the country's situation, the more groups considered to be widely included, or the greater the diversity among the groups, the more difficult trying to reach consensus. To overcome this ambivalence, the constitution-making process is no longer viewed as a 'once-in-a-lifetime' golden opportunity, but is treated as a step in many steps, and decisions are moved to the political framework. By introducing the provisions that have multiple meanings and inconsistent provisions, a postponement can be managed to resolve disagreements later.

Such postponement will serve the needs of different communities in the future. It is very important not to postpone future settlement by manipulations. The incrementalism approach does not suggest avoiding the difficult decisions in the

constitution drafting by delaying it. In the future, the needs of diverse communities should be widely included, or it is necessary to put in place fully guaranteed measures to secure their support. The first step is to acknowledge and document the existence of different opinions. After that, the all-inclusive future political decision-making process must be arranged. In the constitution, the structure of state institutions, such as government, parliament and their regulations may be the most important framework for more flexible decisions to be made in the future.

A question that may arise here is the question of how many diverse societies are able to participate and represent in the State Institutions (for example - the electoral system, the presidential (or) parliamentary system, the division of power between the federal and state governments). This is a very important question for decisions to be deferred to the political sphere. Members with diverse interests will want to effectively participate in the future decision-making processes that are designed to exclude from the constitution-making process and postpone decisions agenda. In addition, to improve the quality of State institutions, it is also a natural desire to have the broadest possible representations of the diverse communities in the country. This means that decisions are either deferred to the political framework or not, the quality of the State institutions and mechanisms are not to be less considered.

In addition, the provisions regarding decisions deferred to the future political dialogue process, set limitations on hold can be incorporated in the constitution. Decision-making authority regarding the issues to decide on more than one political platform (for example: Parliament, Special Commission, Conference, etc.); reporting powers can be delegated and restrictions can be placed on those powers through directive principles.[3] In India, for example, governments are tasked with setting the country's official language and the rule of law across the country, but the setting is restricted by directive principle not to undermine the minority's cultural rights and their security (Lerner 2010). In this way, issues with different opinions are not postponed just in name to be resolved in the future, but are practical, guaranteed improvements to be implemented for all stakeholders.

[3] Directive Principle means the provisions of limitations/frameworks set by law, by not granting unlimited power by respecting human rights, consulting with the people who may be affected by the policy, allowing all related stakeholders included in the decision-making process.

Limitations and Potential disadvantages of Incrementalism

Incrementalism approach has its own weaknesses and limitations. If there is a need to make arrangements of postponing the political dialogue into the future, they will create unnecessary tensions and conflicts in the long run. Hanna Lerner says that basic rights can be affected, temporary measures are inflexible and last longer than expected, and there is no agreement between the legislative branch and the judicial branch about the interpretation of constitutional provisions.

When adopting an incrementalism approach, constitutional drafters need to be very careful not to lose sight of the important aspect of the constitution: the protection of citizens' freedom and fundamental rights. Postponement into the future, especially with regarding preferences related to religion, has the potential to affect fundamental rights (especially freedom of the religion and culture of members of diverse groups) in the future.

Another disadvantage is that measures agreed to be temporary without being written into the constitution can take longer than expected. Informal constitutional arrangements that temporarily put in place; statutory measures may remain in place longer than expected in practice, it also happens that it becomes more difficult to prepare and amend. As a result, the basic values that were supposed to be developed in a timely manner are often delayed in practice, and the measures which are not in the best situation can continue to be long.

A third weakness relates to the tensions that often arise between the legislative and judicial branches. The incrementalism approach suggests that when the constitution drafters could not agree on the most basic provisions, they could defer to the future, as described above, or leave ambiguous provisions within the constitution that could have different meanings. Hanna Lerner says such unclear provisions could lead to future friction between the legislature and the judiciary (especially the Supreme Court). This weakness is related to the first disadvantage discussed. Such frictions are due to the power struggle between the two pillars in the interpretation of the basic rights of the people. The main duties of the judiciary are to protect the fundamental rights of the people and to check and balance the powers of the other two branches. On the other hand, the legislative branch is an elected mechanism and a body that represents the

people, representing the desires and interests of the people that they are responsible for. In addition, they are also responsible for conducting political dialogues on issues that are postponed being decided later, and sometimes conflict arises between the legislative and judicial branches on the interpretation of the basic human rights and standards that are not clearly defined in the constitution. For example, in India, whether same-sex married is permitted for people with different sexual orientations is not specifically stated in the civil rights standard of the Constitution, but under the existing Penal Code Section 377, it prohibits same-sex marriage as a crime. At the same time, however, the Supreme Court of India has ruled that same-sex marriage is not a crime and has led to disagreements between the two branches regarding the most basic human rights. But the likelihood of such friction depends on the extent to which the judiciary exercises judicial independence and discretion, says Hanna Lerner.

The Process of 1947 Constitution Drafting and General Issues

The 1947 Constitution was the first constitution of Myanmar. The paper will study some of the controversial issues that arose between different groups during the constitutional drafting and how these issues were dealt with within the constraints that existed at the time.

Background history

At that time, the 1947 Constitution was drafted by the Anti-Fascist and People's Freedom League (AFPFL), which included many political forces, and had the most public support. The AFPFL originally consisted of three main forces: People's Comrade, The Communist Party of Burma (CPB) and the People's Uprising Party. However, in October 1946, right even before the constitution drafting the CPB had already been expelled from the AFPFL. There were two positions that emerged from the AFPFL-CBP conflict. One is to join English and at the same time fight for independence, and the other is vowing to continue the armed struggle and fight for independence. Despite these differences, the CBP supported the AFPFL’s demand to give independence within a year.

On December 20, 1946, British Prime Minister Attlee and General Aung San reached a basic agreement. As the result of the agreement, Attlee declared in the Lower House of

Parliament that "The commonwealth countries may secede at will. And the Burmese people must decide their own future according to their wills,"

Then, after the 10 rounds of talk between 10th and 27th January, then the Aung San - Attlee Agreement was signed. The basic agreements are to recognize the current Executive Council as an interim government, to give independence, by convening the National Assembly and ratified at the British Parliament (Aung San-Atlee Agreement, 1947).

According to the treaty, Burma's first national elections were held in April 1947. The 255 parliamentary seats are divided into 182 seats for mainland and 73 seats for ethnic nationalities.[4] AFPFL won 171 out of 182 seats in the country, CBP won 7 seats, and 4 independent representatives won. In this way, the National Assembly was held on June 9. The constitution was submitted by General Aung San on June 16 and approved by the parliament. On June 18, Parliament unanimously decided to establish itself as an independent country outside of the British Commonwealth.

On September 24, 1947, the first 1947 constitution of Burma, was signed by Chairperson Sao Shwe Thike. By counting from June 9th, within 108 days, the conference was called (3) times and the constitution drafting was completed.

1947 Dissent from the Constituent Assembly

Problem of union and unitary

Burma, a country which gained independence, will it adopt a Union or Unitary system? There had been different opinions on that. There is a controversial ideology when studying the speeches of General Aung San, one of the AFPFL leaders at that time. At the preliminary conference on the constitutional drafting held by the AFPFL Federation held at the Jubilee Hall from May 19 to 23, 1947, General Aung San asked, "When we establish a new Burma, should we establish a union or unitary state?" I want to answer that question, from my point of view, it is not possible to establish a

[4] It refers to the total (73) seats; Karen (24) Shan (23), Kachin (7), Chin (7), Karenni (2), other hill tribe ethnics (6) and Englo-Burmese (4).

country called a Unitary State by defining the above racial rights and establishing a nation of one nation" (Council of Lawyers, 1995).

However, in U Pe Khin's autobiography book, he wrote, "The General wants to see an independent Myanmar, a country with a population of about 50 million people, has a strong unitary state in the world stage that is well-respected" (U Pe khin, 1990). In addition, the general mentioned that he did not want secession, and it will take a long time for the formation of a unified state. Therefore, it is stated that carrying out the second best option "the implementation of the building a union" (U Pe Khin, 1990).

In Appendix (13) of the AFPFL revision conference, it is directly mentioned as 'Federal State', but in that section, according to the division of power between the Union and the States, there are two systems: a system that gives residual power to both the state and the Union. It is stated that if residual powers is given to the state, it is the federal system. If given to the union, it will be a union leaning towards a unitary system (AFPFL, 1947). However, it is not clearly stated what system to be adopted.

At that time, U Chen Tun, an advisor of the constitutional drafting, also presented three forms of union at the 1947 Constituent Assembly. These include the quasi-federal system, confederation where states have more power, and a federal system in which the union and states exercise powers as written in the Constitution (University Myat Thu). However, the conference did not decide which system to adopt.

Not only that, but also chapter 5 of this initial draft; Article (4) Clause (23) contains "the types of matters that are not declared among the types of matters listed in the constitution of the country's Constitution to the legislative bodies of the "federal state" or "self-governing state" or "ethnic state" (AFPFL, 1947). This means residual power has been given to the union government. That provision makes the structure of the country become a unitary system. In the draft, when the 1947 Constitution was approved, the third schedule of the Constitution, List (1) of the Union Legislation List, Clause (5), Sub Clause (40), List (2) of 'other matters not mentioned', gave residual powers to the Union Government. Therefore, based on the 1947 Constitution, Myanmar has become a unitary country.

The Problem of the Number of Nationalities' Chamber

In Chapter 5 of the draft Constitution of the AFPFL, Union Legislative Body of People's Assembly (lower house), Section (6-2) states that the total number of members of the People's Assembly shall not be less than the number of members per 75,000 population or more than the total number of members per 30,000 population. The number of members of the Tribal Assembly is not specified. The number of members of the People's Assembly is specified in Article 10.

When the Constitution of 1947 came into effect, Article (83-2) stipulated that the number of members of the Chamber of Deputies (lower house) should be as close as possible to double the number of members of the Chamber of ethnicities (upper house).

Secession Issue

There is no clear mention in the draft constitution submitted by the AFPFL regarding the right of states' secession. In that draft, the states are defined in three types: union states, self-governing states and ethnic states, and under the Chapter (12) the right to secede clause (1) states that only union states and self-governing states are allowed to secede. In Appendix 14, the chapter on the rights of secession also states that "the states decided to unite together for the purpose of establishing a united states and jointly carrying out for the country ventures, so there is no consideration of secession that would lead to the loss of the benefits of unity in a union country and lead to a life of isolation."

States problem

If the union is made up of ethnic states, other regions such as Kachin, Shan the region where Burman majority live should be formed as a Burmese state, but U Chen Tun, a constitutional advisor, did not form the prospered Burma as a state, but rather merged it with the union government. As a result, the Burmese gained a lot of power through the central federal government. Out of the 125 seats for the Chamber of Nationalities in the 1947 constitution, 25 seats for Shan, 12 seats for Kachin, 8 for Chin, 3 for Karenni, 24 seats for Karen, and the remaining 53 seats, and the remaining 53 seats are dominated by Burmese. This means that out of the 125 seats in the Chamber of Nationalities, the number of Burmese seats has increased up to 53 seats.

Discussions of Incrementalism Approach

Secession Problem

Issues related to the rights of secessions have been embedded since the drafting of the 1947 Constitution, Chapter 10 of the Constitution, Article 201 guarantees states have the right to secede from the Union. In allowing such separation, it is not a uniformity for all states in today's era. Only Shan State and Karenni State, which are designated as ethnic states, have this right. In addition, states are not mandated to draft their own constitutions. However, states (especially Shan State, Kachin State, Korthule, Karenni State, Chin Hill) administrative matters are included in Chapter 9. After the signing of the Panglong agreement, to guarantee the commitments of the agreement, it is imposed in order to be reviewed if there were no implementation of them, and it is stipulated that the states should not exercise that right for 10 years and discuss it only after 10 years.

Transitional Provisions

In the transitional provisions, there are some procedural difficulties in transitioning from the existing system of the state to a new system. For these difficulties, which are hard to predict, even if they are not the matters of disagreement, the nature of the transfer to the future political sphere (parliamentary framework) can be found in Article 230 of the 1947 Constitution. Under that section, the power to approve measures to overcome unforeseen difficulties is given to the two houses of parliament.

In addition, the 1947 Constitution has two manuscripts: in Burmese and in English language, both manuscripts are archived at the Secretariat of the Supreme Court. The purpose is in order to interpret the expressions of the provisions of the Constitution, both manuscripts (the Burmese and the English manuscript) can be used. It can be found in Article 217 of the 1947 Constitution. This means that the Constitutional Principle (Edition) can legally be used not only in Burmese but also in English. If the interpretation of the constitutional contents, phrases, words, expressions in its original language (Burmese) are not convenient and lead to controversy, it can use the English language version as a reference. For example, if it is difficult to fully define the term "Rule of Law" in Burmese, or if there are other different opinions, it is allowed to refer to how the meaning of the term is interpreted by other international standards. In addition to the idea of which language will be used as the

official language in an incrementalism approach, the use of the English version in the interpretation of constitutional terms, rather than relying on a single language (Burmese), has allowed for political contexts, discussions and constitutional interpretations in the future interpretation of controversial provisions. This is the vision of the 1947 constitution drafters who had in mind an incrementalism approach.

If we study the disagreements from the 1947 Myanmar Constitution from the perspective of incrementalism, unlike India and Ireland, it appears that the problems are usually related to union building. There is mainly the problem of residual powers, the number of MPs in the Parliament. The dispute of whether it will go for a union or unitary system happened since the beginning. Since these issues were not thoroughly resolved, when the constitution finally came into effect, the problems of division of power between the Union and the state, the problem of determining the number of MPs in the upper and lower house arose, which eventually led to the issue of secession.

In addition, according to the AFPFL's draft, it divided the Union State, autonomous state, ethnic states and minority. Even though General Aung San said that "only Shan State should be given the status of a Union State," after General Aung San was assassinated, the integration of only Burma into the Union Government in the Constituent Assembly was also a problem. That's the reason why the 1961 Shan Federal Principle called for Burma to be designated as a state.

Issues related to the current Myanmar

This paper does not want to label incrementalism as an antidote for Myanmar's future federal constitution-making crisis. Incrementalism is not the answer to all problems, and stakeholders from the relevant groups, depending on the situation they face, have limitations, trust among each other, weighting those with the current reality and resolve it. This paper aims to introduce an approach that has been less discussed not only in the Myanmar political arena but also in the world's constitutions study community, and to present the rationale of the approach. On the one hand, this paper is only a starting point for incrementalism and similar approaches to be considered in the constitutional design process. And it needs consultation and discussions on this issue from the stakeholders, constitutional-making experts, and well-experienced persons. According to decades of state-building experiences, the process of building a federal structure in

Myanmar cannot be smooth. Disagreements may arise over some policies and issues. In such situations, an incrementalist approach can be considered. When speaking of incrementalism, as mentioned above, it is not just one approach or form. According to each country, the encountered problems, it must figure out ways and means that are balanced and tailored to the given realities.

From the point of view of incrementalism, generally, there are two types of issues that are difficult to agree on are the collective representation, values, standards, identities and the formation of the establishing the country. In practice, there may be a situation where both crises are intertwined with each other.

The symbolic collective representation, including the country's name, identity and characteristics, and religious matters, whether or not these matters will be kept under the government's responsibility or establish a secular government. In addition, in the adoption of the official languages and other languages in education, public services, judiciary, police sector, questions of how it will be recognized and adopted are more relevant to the values and standard. Regarding the structure of state-building, formation of government system, how many states will be established, keep Burma state or not, the composition of upper house, the setting of states boundaries, the demarcation borders between the mixed-ethnics states, as well as the political representation of minority in the ethnic states, including the guaranteeing of language and cultural rights and so on, these are the important questions.

If an incrementalist approach is used to build a model that suits our current situation despite the pragmatic limitations, it is very important to take measures of minimizing the possible disadvantages at all costs. In this regard, it is very essential to carefully manage decisions that are deferred from the current constitutional drafting process to future political dialogue so that they do not fall under the majority dominant decisions. Particularly, if such deferred decisions are to be deferred to the ordinary legislative process of the legislature or to the on-going political sphere, it is important to ensure the widest possible representation and participation of diverse ethnics and religious groups in the legislative and executive branches, the electoral system, and other constitutionally determined institutions of government.

In order not to make populist decisions, a practical useful approach is by forming Commissions consisting of experts from various fields, representatives from relevant

groups, and the adoption of decisions on controversial issues through parliaments, conventions, and referendums on the basis of their comments and reports.

In order to protect against the violation and infringement of fundamental rights enshrined in the Constitution, it is possible to use specific provisions in the Constitution that guarantee the enjoyment of these rights, such as setting the directive principles. It is also possible to set up policies and guidelines to deal with the situation in the future, by setting a timetable for making decisions when necessary.

The last and most important thing is, of all the above measures, including the postponement of decisions, the writing of legally ambiguous provisions, the insertion of contradictory provisions, and so on, require unity and political good faith. An example of a betrayal of the agreement is the fact that the 1947 constitution guaranteed states the rights of secession from the union after 10 years, but in practice it was not politically came into effect due to the coup d'état. If all involved stakeholders do not respect and have strong will, political good faith continues to implement these agreed arrangements, the problems will be unresolved.

It is necessary to ensure implementation of the security sector reform that military under control of the civilian government, including a broadly inclusive representatives from different ethnic, religious, so that decisions-making are free from the influences, threats by partial political representation groups, and armed groups. For the weak groups; in terms of population, political representation, when they no longer believe that their political goals in the deferred decisions do not represent their values and standards, they can return to the arms struggle path. To minimize the likelihood of proceeding that path, it is extremely important to build trust and demonstrate good intentions among those involved throughout the process.

Conclusion

In countries where diverse communities live, when drafting a constitution that authority applies to all citizens and the entire country, it is necessary to take into account the conflicts and different aspects of each other in discussions. In such cases, the process of drafting a constitution is stalled and sometimes takes too long to proceed; when it is forced, conflicts can escalate. In such situations, it is more effective to resolve the

problem at the political table, which is easier to negotiate than the constitutional forum. Such solutions can be found in most countries that use an incrementalism approach. Constitutions drafted in this way try to reduce the tension of controversy regarding the foundations, norms, and principles of the constitution by incorporating general provisions and attempting to resolve it through political negotiations in the future. In order to resolve this, there are delays in the legislative process and friction between the existing government mechanisms in the future over things that are not clearly defined (Lerner, 2010). In addition, we should be aware of the fact that there are some areas of human rights and citizenship that are controversial and that if these issues are transferred to the political table, it will be difficult to achieve these basic human rights and citizenship rights until an agreement is reached on these issues.

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