

Passing the mace from the Myanmar's first to the second legislature

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When the five year term of the first legislature “Hluttaw” in Myanmar ends in January 2016, it will be remembered as a robust legislature acting as an opposition to the executive. The second legislature of Myanmar is set to be totally different from the first one in every aspect. This paper looks at three key defining features of the first legislature namely non-partisanship, the role of the Speakers and the relationship with the executive and how much of these would be embedded or changed when the mace of the first term of the Hluttaw is passed to the second.

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1. Introduction

When the five year term of the first legislature “Hluttaw” in Myanmar ends in January 2016, it will be remembered as a robust legislature acting as an opposition to the executive.² Overwhelmingly controlled by the pro-military Union Solidarity and Development Party (USDP), it was widely perceived as a rubber stamp when it was established in 2010 (ALTSEAN, 2011, Burma Campaign UK, 2011). It was also an institutionally weak legislature because of various legislative constraints to executive leverage and unaccountable nature of the Tatmadaw preserved in the 2008 Constitution (Williams, 2014, Ghai, 2008). Despite all these limitations, the Hluttaw exceeded expectations of analysts in its legislative functions of representation, lawmaking and executive oversight (ICG, 2009, Kean, 2014)

The second legislature of Myanmar is set to be totally different from the first one in every aspect. Most importantly, the November 2015 General Election brought a longtime opposition, the National League for Democracy (NLD) led by Aung San Suu Kyi to take its turn to control the executive and the legislature. Most of the lawmakers are new but are relatively more educated. None the less, legislatures especially those experiencing transitions from authoritarian regimes started their function by inheriting legacies from its predecessors. (Olson, 1994). This paper looks at three key defining features of the first legislature namely non-partisanship, the role of the Speakers and the relationship with the executive and analyzes how much of these would be embedded or changed when the first Hluttaw transferred its power to the second.

2. Highlights of the first legislature

Christina Fink (2015) attributed the better than expected performance of the legislature to the leadership inside the Hluttaw, relative freedom and opposition given to the lawmakers tolerable “up to a point of senior administration and military personnel”, and various support from civil society organizations including international organizations. Despite earlier signs of incompetence, lawmakers did try to be more representative to their constituencies. Initially, a handful of non-USDP lawmakers in the Hluttaw actively pioneered in raising constituency issues during question time. Afterwards, the majority USDP legislators followed suit and people learned about their representatives mostly through televised debates. Their motivations were enhanced when the legislature formalized constituency development fund.³ Moreover, the USDP leaders also encouraged their lawmakers to be more

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² The term legislature and the Hluttaw are used interchangeably to represent the Pyithu Hluttaw (House of Representatives), the Amyotha Hluttaw (House of Nationalities) and the joint chamber known as the Pyidaungsu Hluttaw (the Union Legislature).

³ It was meant to support the grassroots in the areas where the government failed to provide services. It covered small scale projects not exceeding Kyats 5 million (US\$ 5,100), not covered by any of these scheme or part of government projects and focused primarily on five sectors: electricity access, road and bridge repairs, school buildings' renovation and provision of clean drinking water. Each township fund is jointly managed by four concerning legislators: one each from Pyithu Hluttaw and Amyotha Hluttaw and two from State and Region Hluttaw.

accountable after suffering from a humiliating defeat to the opposition NLD during the By-Election 2012.

Next, the Hluttaw acquired its lawmaking skill mainly through learning by doing trial and error. As a transitional legislature, it had a long list of legislations to promulgate to repeal in order to support the reform. To make matters worse, it lacked expertise and support facilities. Nevertheless, during its five year term, the union legislature promulgated 189 laws. It was hailed as reform friendly legislature for passing laws intended to political and economic liberalizations such as labour union law, peaceful assembly law, association law, foreign direct investment law and etc. (See: Annex-1) Arguably, most of these legislations were initiated by the executive and legislature was lack of technical capability to contribute effectively. None the less, legislature became more responsive after public outcries and incorporated suggestions from the civil society organizations as in the case of association bill and education law amendment.

Perhaps, the most important highlight of the first legislature was its assertiveness on executive oversight. Even though the legislature was merely a USDP legislature, it was acting as on opposition to the executive. Lawmakers regardless of their party and ethnic affiliations were seen exposing the inefficiencies of the executive on governance and corruption matters. Moreover, legislators were united scrutinizing the budget. Unnecessary projects were either cut or postponed and more resources were allocated to education and health.

Throughout its five year term, the characteristics of the legislature had changed over time in accordance with the prevailing political condition. The earlier years can be seen as the legislature trying to find its own feet in the Myanmar politics. In those periods, the real politics was happening outside the premise of the Hluttaw between President Thein Sein and the opposition leader Aung San Suu Kyi rather than USDP and NLD; and between the military and the ethnic armed forces rather than local and governments and ethnic parties. When reform gathered pace, the Hluttaw was hailed for its active involvement in the transition process including significant freedom and opposition given to the lawmakers inside the Hluttaw. It had started to take the centre stage partly because of the obvious political ambition of the Speaker Thura Shwe Mann and Aung San Suu Kyi inside the Hluttaw. On the other hand, incompetence and institutional constraints of the legislature was superseded by various power struggle as election drew closer. A renowned researcher on Myanmar's legislature, Renaud Egretteau (2014) pointed out that "gradual reemergence of old-fashioned Burmese factional, personified and clientelist politics", would hamper some of the early promising signs of the legislature. From constitutional review to six party dialogue, from electoral system to race and religion law, the Hluttaw became contentious and fragile. In addition, deteriorating relationship between the legislative and executive within the USDP became public. (See: Annex-2)

Among various behaviors it developed, non-partisanship, the influence of the Speakers and the relationship with the executive defined the characteristics of the first legislature. When the first legislature handed its mace to the second legislature in January 2016, the institutionalization of the legislature built over the period of five years will no doubt have a profound influence to the second legislature. Therefore, it is important to analyze how much of these would be adapted and resisted in order to predict the type of legislature we are going to see in the next five years.

3. Non-Partisanship

One of the hallmarks of the Myanmar's first legislature was its non-partisan nature. It was quite common to see lawmakers standing on their own without being influenced by their political parties in less sensitive issues. Here are few examples: (i) A motion proposed by Thura Aung Ko, senior USDP lawmaker on 17 February 2012 to transform the Yangon University into an autonomous Myanmar National University was supported by other ethnic and minor parties but opposed by some of his own fellow USDP comrades (Pyithu Hluttaw, 2012). (ii) During the vote on Foreign Direct Investment rules on 18 March 2013, despite the instruction from the party to vote against the proposed ownership ratio of 80 (foreign) and 20 (local), many USDP lawmakers sided with the ethnic parties (Pyidaungsu Hluttaw, 2013).⁴ (iii) During the debate on the new electricity scheme, members of the Committee on Investment and Industrial Development voted against the rate hike (Pyidaungsu Hluttaw, 2014). While the NLD led by Aung San Suu Kyi voted in favour of the new scheme, Sandar Min from NLD in the committee voted against its own party.⁵

The main difference between the current and the past legislatures of Myanmar is the presence of unelected military representation and the military veto to the constitutional amendment process. The military presence in the Hluttaw was a constant reminder that the military was watching and may intervene when it deemed that the current arrangement was under threat. Moreover, with memories of fierce partisanship and power struggle between factions during Burmese parliamentary democracy era that gave birth to a coup culture in Myanmar (Farrelly, 2013), everyone was careful not to offend each other personally or politically and non-partisan co-operation was encouraged from the beginning.⁶ In addition non-partisan was tolerable in less sensitive issues because the legislature lacked much needed legitimacy and non-USDP elected seats were insignificant occupying less than a quarter of the seat in the legislature.

In contrast, the second legislature is heavily dominated by the NLD in both chambers. While a handful lawmakers from the first legislature who managed to secure their seat in the second would be familiar with the non-partisan approach, there is no guarantee that the NLD leadership would be willing to inherit this practice. At the same time, the USDP and the military will become a natural partner serving as an opposition. Ethnic parties depending on which side they choose, will be positioning their vote based on their coalition. Moreover, as the NLD has committed to amending the constitution and other important legislations, party discipline will become important as lawmakers will vote sensitive issues. Therefore, I argue that most of the non-partisan spirit will disappear in the second legislature.

But there are other administrative arrangements that indirectly supported non-partisanship of the legislature. Firstly, even though it has no obligation, the NLD may opt for inclusiveness in forming legislative committees. Its 15-member committee format was influenced by the socialist legislature where one from each 14 states/division were appointed. The first legislature had inherited this

⁴ Interview with an ethnic legislator Nay Win Tun from Amyotha Hluttaw representing PaO National Party on 19 February 2014.

⁵ Participant observation at the Pyidaungsu Hluttaw plenary session and subsequent interview with Aung Kyi Nyunt from Amyotha Hluttaw who was also an NLD whip after the vote on 19 March 2014.

⁶ Interview with Aung Zin from Pyithu Hluttaw representing National Democratic Front on 31 January 2014.

tradition and not only it was inclusive in terms of states and regions, parties were also represented proportionately. It would be hard for the NLD to change this tradition. Furthermore, the seating arrangement of the plenary sessions favours interactions among parties. It is based on geographic location rather than party blocs. Moreover, because lawmakers do not have their own office space, they relied committee rooms and staff as their offices and support. This would enable inter-party interactions. Lastly, because of the use of secret ballot, it is difficult to keep party discipline. Therefore, even though the second legislature may be partisan, various arrangements point to the weakening of partisanship in especially non-sensitive issues.

4. The role of the Speakers

One of the major difference between the institutional arrangement of Myanmar's legislature and that of its cohorts is the paramount importance of the Speaker. In established democracies, little importance is given to the role of the Speaker. The emphasis is on the leader of the ruling party or the majority / the minority in the house. There are some possible ways where the Speakers can influence the legislature apart from their ceremonial role but they are mostly limited to administrative matters rather than substantive ones (Bach, 1999) and Speakers rarely enjoy all of them because of their role is circumscribed.⁷

But the Speakers of Myanmar's legislature enjoyed more power if not absolute. According to the Pyithu Hluttaw rules, there are a list of twenty nine administrative powers vested to the Speaker (Pyithu Hluttaw, 2013), most importantly the power to convene and adjourn the plenary at his sole discretion⁸ and the choice of voting methods⁹ that can influence the outcome of the debate.¹⁰ The performance of the legislature highly depends on the Speaker's vision, goodwill and creativity. The institutional design of the Myanmar's legislature seems to avoid chaos and disorder in the legislature, as witnessed during the post-independence parliament, by giving absolute power to the Speakers.

The two Speakers who were former senior military generals in the military regime, took totally different approaches. Thura Shwe Mann, Speaker of the Pyithu Hluttaw developed his own character as a reformist and someone who was willing to initiate pact transition with the opposition. He openly criticized the executive policies led by President Thein Sein, supported the constitutional amendments and six party dialogue between the executive, the legislature, the opposition, the ethnic parties and the military. Khin Aung Myint, Speaker of the Amyotha Hluttaw on the other hand took a different approach. He tried to follow a conventional role of a Speaker and was renowned for his impartiality. His blunt criticism towards the military for lack of participation, the executive for vague presentation and his during the legislative debate reflected his desire to institutionalize the Hluttaw into an effective

⁷ Conventionally, the Speakers can influence on (i) Administrative staff, (ii) Allocation of resources and facilities such as staff, office space and equipment, (iii) Assembly's schedule, (iv) Interpreting procedural rules, (v) Plenary sessions, and (vi) The outcome as an active member of his political party.

⁸ Article 11 of Pyithu Hluttaw rules.

⁹ Article 19 (p) of the Pyithu Hluttaw rules.

¹⁰ The Speaker can indirectly influence the outcome of the vote by choosing the voting methods. For instance, voting by standing up can be intimidating especially if the Speaker is in favour of the other. Unless legislators really oppose to a particular decision of the plenary, they would rarely stood up.

legislature. While they have different approaches and ambitions, they had shaped the foundations of the legislature.

Most of the views on the Hluttaw prior to its establishment were negative with anticipation that it would be a rubber stamp and non-USDP (minor and ethnic parties) participation are regarded as being co-opted to legitimize the Parliament (Williams, 2009, Win Tin, 2010). These perceptions were still valid during the first session of the Parliament.¹¹ All these restrictions were removed noticeably starting from the second session of the parliament. Legislative committees were represented inclusively based on the party size, geographical location and expertise of the legislators though it is not required by law. The Speakers were able to take such bold steps because of three reasons: (i) they have absolute power to command the direction of the legislature; (ii) USDP has overwhelming majority and (iii) ethnic and minor parties inside the Hluttaw accepted the co-optation by the USDP willingly and choose co-operation rather than confrontation and were able to build trust.

The role of the upcoming Speakers is expected to be significantly different from their predecessors. The preceding Speakers did bring legitimacy and institutionalization to the Hluttaw to a certain extent with their almost absolute powers. In her first major speech after the election, Aung San Suu Kyi told her NLD's policy to be focusing on national reconciliation during its tenure (The Guardian, 2016). Therefore, the direction of the next legislature is likely to shift from building a legitimacy to creating conducive environment for constitutional amendments in order to build national reconciliation by formulating federalism. But we have witnessed that the military bloc is acting as a vanguard of the 2008 Constitution and any attempts to offset the political arrangement could face military veto. Therefore the priority of the next batch of Speakers would shift to a mediation role giving assurances to the military that its strategic interests will be respected so that the constitution can be amended. The initial pace of the second legislature would very much depend on the vision of the next Amyotha Hluttaw Speaker who will lead the Pyidaungsu Hluttaw for the first two and half years. With the almost absolute power vested in the Speakers, they will become important in transforming Myanmar into a democratic state.

5. Relationship with the executive

During the President Thein Sein's administration, constant tension between the legislature and the executive became the norm. Myanmar was without a legislature for more than two decades and without a robust one for more than five decades. Therefore, when legislative institutions were established neither the executive nor the legislature had precedents how to develop their relationship. The government agencies were not accustomed to legislative scrutiny on their policies and budgets. Lawmakers were not confident to deal with the Union Ministries who were headed by former military generals. None the less, both the executive and the legislature had tried to work in an uncharted water constantly testing and pushing their boundaries. For instance, during a legislative debate on 4 September, the government justified the President assignment to one of his six Union Ministers at the

¹¹ Most of the motions raised by the non-USDP legislators faced with stiff rejection from the respective Speakers. There were 41 motions submitted mostly by non-USDP MPs. Only 8 were approved while 3 motions were noted (meaning no action required). The rest of them were either declined or pressured to withdraw. According to my interview with an ethnic USDP lawmaker, they were instructed not to ask any questions. There were excessive restrictions and security arrangements imposed to the lawmakers.

Office of the President as important because he has to co-ordinate with the legislature (Pyidaungsu Hluttaw, 2012). On the side of the Hluttaw, it has a Government's Guarantees, Pledges and Undertakings Vetting Committee to keep track of the executive commitment made during debates, questions and motions raised by the legislators and determines whether they are implemented in a timely manner.

But the real problem lies in the 2008 Constitution itself. It emphasized on the separation of powers between the legislature, the executive and the judiciary and exert reciprocal control, check and balance between these pillars.¹² To draw a clear line between the party and the government, members of the executive including the President cannot hold dual position as legislators once they are appointed in the executive positions. This had a serious drawback on the ruling USDP party. During an interview with USDP senior leader the late Aung Thaung, he confessed that USDP was a winning party but was never a ruling party (Union Daily, 2015). This was because the President and his team though they were from the USDP, it is hard for the USDP to influence under the current constitution.

Separation of powers was also undermined by legislative inability to oversee executive appointments¹³ and budget.¹⁴ On the other hand, reciprocal control was challenged by the lack of executive veto on legislation.¹⁵ Instead of creating state institutions that exert checks and balance over each other, they had evolved as a parallel institution vying for power. Moreover, during the socialist regime because it practiced single party system, there is no classification as ruling or opposition party and oversight questions inside the legislature were directed towards the government unlike multi-party democracy system. Following this tradition, in the Hluttaw, questions were directed towards the government rather than to the ruling party. This encourages the legislature to become the opposition to the government. The Speaker Thura Shwe Mann's relative superiority over the President Thein Sein during the military regime era and the former's ambition of running for the presidency was regarded as the main contribution factor to this effect. The apex came when the legislature impeached members of the Constitutional Tribunal of the Union when it decided in favour of the executive on the dispute between the legislature and the executive on status of the legislative committees. The USDP tried to save the dilemma in the last days of the Hluttaw through the constitutional amendment process but it was lost among other sensitive issues.

The executive and the legislature in the post-2015 Myanmar will no doubt learn from the USDP experience. The relationship with the executive was the most unpleasant features of the first legislature. While there were signs of co-operation at the technical level, the deep division between the leadership became unamendable. The bitter experience would serve a constant reminder for the lawmakers when the second legislature meets in January 2016 and it is expected that the relationship

¹² Section 11 (a) of 2008 Constitution

¹³ The legislature cannot reject the President's appointees unless they do not meet formal constitutional qualifications such as age, nationality and insolvency.

¹⁴ Certain items such as salaries, allowances, public debts and expenses under international obligations cannot be refused or curtailed. (Section 103 (b) of 2008 Constitution)

¹⁵ Section 105 and 106 of 2008 Constitution.

with the executive would improve. The real challenge for the second legislature will be building confidence with the military assuring that both institutions are important for the stability of the country as the legislature is dependent on the military for any possible constitutional amendment.

6. Conclusion

While the power balance of the second legislature is almost the opposite of the first legislature, it would be influenced by some of the institutional characteristics developed during the first legislature most notably the three key features mentioned above. It would be hard for the second legislature to resist these features and there will be adaptations in accordance with the prevailing political situation.

In a nutshell, the second legislature of the post-authoritarian regime represent a classic transitional legislature with the pro-military party as the opposition. It is expected to be highly partisan in sensitive political issues such as the constitutional amendments and less partisan on issues like economic and administrative governance. Without the need to prove its legitimacy and with a noticeable level of institutionalization already achieved, the Speakers' attention will be tilted towards mediation with the USDP and the military in order to push for political transformation. Moreover, the party leadership inside the legislature will become stronger after learning valuable lessons from its predecessor such as the USDP's weak influence over its executive government.

History will remember the first post-authoritarian Hluttaw as building necessary foundations for an effective legislature against institutional and administrative constraints and paving the way for the successive legislatures to pursue its legislative functions of representation, law making and oversight for the peaceful prosperous democratic Myanmar.

(3,397 words excluding footnote, reference and annex)

Important laws promulgated in the first legislature of Myanmar

11 October 2011	Labour Union Law that allows formation of labour unions was promulgated.
4 November 2011	Law Amending to the Political Registrations Law that allows the NLD to register as a political party was promulgated.
2 December 2011	Peaceful Assembly and Demonstration Law that allows public demonstration was promulgated.
24 February 2012	Ward or Village Tract Administration Law that enables locals to elect their own ward / village tract chief was promulgated.
3 November 2012	Foreign Direct Investment Law was promulgated with investor friendly measures.
11 July 2013	Central Bank Law was promulgated making the Central Bank independent.
7 August 2013	Anti-Bribery Law was promulgated.
12 March 2014	Law on Constituency Development Fund was promulgated enabling lawmakers to spend about US\$ 5,000 on small infrastructure projects.
31 March 2014	Media Law and Printers and Publishers Registration Law was promulgated.
25 June 2014	Law Amending the Peaceful Assembly and Demonstration Law that reduces the restrictions and penalties was promulgated.
21 July 2014	Association Law was promulgated.
13 October 2014	Law on National Education was promulgated.
13 October 2014	Law on Second Amendment of the Political Registration Law was promulgated barring white card holders from political parties.
25 February 2015	Competition Law was promulgated dealing with monopoly and anti-trust issues.
20 May 2015	As part of “Race and Religion Law”, Population Control Law was promulgated after mounting pressures from the Buddhists nationalists and monks.
26 June 2015	Law Amending the National Education Law was promulgated after students’ protests on controversial education law.
27 August 2015	As part of “Race and Religion Law”, Religious Conversion Law and Myanmar Buddhist Women Special Marriage Law were promulgated.
31 August 2015	Monogamy law was promulgated.

Important events in the first legislature of Myanmar

31 January 2011	First session of the first legislature of Myanmar convened.
31 March 2011	The President and his cabinet were sworn in at the Pyidaungsu Hluttaw.
2 May 2012	Aung San Suu Kyi and her 41 NLD members became lawmakers.
6 September 2012	The Hluttaw impeached the members of the Constitutional Tribunal of the Union (CTU) accusing them of incompetence after it decided in favour of the executive annulling the Hluttaw's claim that its committees are par with other union level institutions.
25 July 2013	109-member a Constitutional Review Joint Committee was formed.
27 February 2014	The Pyidaungsu Hluttaw responding to the President's demand to enact "Race and Religion Law", requested the President to draft these bills.
24 July 2014	The Constitutional Amendment Implementation Committee submitted its preliminary report on the findings of the amendment proposal to the Hluttaw.
14 November 2014	The Pyithu Hluttaw rejected the proportional representation electoral system after its Speaker announced that it was unconstitutional by the CTU.
25 November 2014	The Pyidaungsu Hluttaw proposed a Six Party Dialogue for national reconciliation.
25 June 2015	The Pyidaungsu Hluttaw rejected major constitutional amendments requiring public referendum which included among others the controversial Article 59 (f) barring Aung San Suu Kyi from becoming a President and a relaxed constitutional amendment procedure.
10 July 2015	The Pyidaungsu Hluttaw voted for an amendment to Schedule One and Two of the constitution that would enable States and Regions to receive more legislative and executive power but rejected most of the constitutional amendments.
12 August 2015	Speaker Thura Shwe Mann was purged from the USDP Chairmanship.
20 August 2015	Recall Bill was rejected by the Pyidaungsu Hluttaw saving the Speaker Thura Shwe Mann from a possible removal from the Hluttaw by his own party.
28 August 2015	Adjournment of the First Hluttaw prior to the general election.
8 November 2015	Myanmar voted in historic general election.

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