



UNCONSTITUTIONALITY OF THE 2021 MILITARY COUP IN MYANMAR

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INTRODUCTION

Since the coup conducted by the Myanmar military on 1 February 2021, the military regime has attempted to portray itself as the country's legitimate government by arguing that it is adhering to the 2008 Constitution. Although constitutional authority is only one dimension of the current struggle to restore democratic governance in Myanmar, it is important to demonstrate why the military's seizure of power was unconstitutional, and therefore why the military regime and its actions and decisions have no constitutional authority.

This Brief was developed to enable a better understanding of the unconstitutionality of the military coup in Myanmar. Through a detailed constitutional analysis, it seeks to help the general public and pro-democracy stakeholders in the country deconstruct the military regime's claim that it is adhering to the 2008 Constitution. The Brief also aims to help the international community develop informed positions on the current situation in Myanmar.

The Brief is divided into four sections. Section 1 details the events leading up to the military coup. Section 2 provides a constitutional analysis of the military regime's claim that it is adhering to the 2008 Constitution and explains why the military's declaration of a state of emergency and seizure of power are unconstitutional. Section 3 describes the actions taken by the military regime since the coup in an attempt to consolidate power and explains why the military regime and its decisions have no constitutional authority. Section 4 concludes by discussing the current constitutional vacuum and ongoing efforts undertaken by the National Unity Government and the people of Myanmar to defeat the military regime and restore democratic governance and constitutionalism.

This Brief was developed to enable a better understanding of the unconstitutionality of the military coup in Myanmar. It helps deconstruct the military regime's claim that it is adhering to the 2008 Constitution.

Following the general elections, the Myanmar military and the USDP claimed to have identified fraud and irregularities in the voter lists that undermined the credibility and fairness of the electoral process and its outcome.

1. BACKGROUND: FROM THE 2020 GENERAL ELECTIONS TO THE MILITARY COUP

On 8 November 2020, general elections were held for both Union Parliament (Pyidaungsu Hluttaw) chambers as well as the 14 assemblies of states and regions in Myanmar. The voter turnout, at more than 71 per cent, was very high given the Covid-19 restrictions. The National League for Democracy (NLD) won by a decisive majority, securing 79.5 per cent of the elected seats in the Union Parliament.

Following the general elections, the Myanmar military and the Union Solidarity and Development Party (USDP) claimed to have identified fraud and irregularities in the voter lists that undermined the credibility and fairness of the electoral process and its outcome. USDP candidates filed a total of 174 cases of alleged electoral irregularities with the Union Election Commission (UEC).

On 11 January 2021, 203 of the country's 664 lawmakers (including 160 military appointees, 36 USDP Members of Parliament (MPs), 4 Arakan National Party MPs, 1 National United Democratic Party MP, and 2 independent MPs) submitted a request to the Union Parliament to convene a special session on electoral fraud claims before the opening of the new parliament, scheduled for 1 February. The speaker rejected this proposal the following day. On 28 January 2021, the UEC rejected the accusations of electoral fraud on the basis that there were no errors on a scale that could discredit the election results ([Union Election Commission 2021](#)).

In January 2021, the USDP and the Democratic National Party (a new party formed by former military generals) filed writs of quo warranto to the Supreme Court against the president, the UEC chairperson, and 15 UEC commissioners ([Radio Free Asia 2021](#)). On 29 January 2021, the Supreme Court held a preliminary hearing to consider the admissibility of the writs petitions ([San Yamin Aung 2021](#)); it was supposed to issue its decision on the matter within 14 days.

On 1 February 2021, when the newly elected parliament was scheduled to convene its first session, the military detained high-level government officials including President Win Myint, State Counsellor Aung San Suu Kyi and other high-ranking NLD officials. The Parliament complex was sealed off and elected MPs were held under de facto house arrest in their guesthouses in Naypyitaw. The military declared military-nominated First Vice-President Myint Swe (who had received the second-highest number of votes in the presidential election) acting president. Myint Swe convened a meeting of the National Defence and Security Council (NDSC), which was attended by military and military-nominated members only, and declared a one-year state of emergency, effectively transferring legislative, executive, and judicial powers to the commander-in-chief.

2. THE MILITARY'S DECLARATION OF A STATE OF EMERGENCY VIOLATES MYANMAR'S 2008 CONSTITUTION

The military has stated that its actions on and since 1 February 2021 were made in accordance with the 2008 Constitution, especially articles 4, 6d, 6f, 73a, 417, 418, and 419. However, this Brief details that it has acted unconstitutionally. Indeed, the declaration of a state of emergency issued on 1 February 2021 was unconstitutional because the constitutional grounds were not met (see Section 2.1) and the procedural requirements (see Section 2.2) were not followed.

2.1 The constitutional grounds for declaring the state of emergency were not met

In Order Number 1/2021, new Acting President Myint Swe declared a state of emergency under article 417, which authorizes the president to do so after consulting with the NDSC if there is a threat of the 'disintegration of the Union or national solidarity or the loss of national sovereignty' due 'to acts or attempts to take over the sovereignty of the Union by insurgency, violence and wrongful forcible means' (Constitution of Myanmar, article 417). In this order, Myint Swe quoted article 417 to assert that the UEC's failure to ensure free, fair and transparent elections, and the refusal of the UEC and the government to address this matter, were 'wrongful forcible means' that caused the loss of the national sovereignty of the people (Office of the President Order 1/2021).

In an announcement to the public, the commander-in-chief questioned the constitutionality of the speaker of the Union Parliament's 11 January 2021 decision to reject the proposal put forth by 203 MPs to convene a special session of the Union Parliament to address claims of electoral fraud. The commander-in-chief further argued that:

The Tatmadaw follows Article 4 of the Constitution, which says 'the Sovereign power of the Union is derived from the citizens and is in force in the entire country'; Article 6 (d) and 7 of the Constitution, which says 'flourishing of a genuine, disciplined multiparty democratic system', and Article 6 (f) of the Constitution, 'enabling the Defense Services to be able to participate in the national political leadership role of the State'. The relevant officials failed to resolve the issues related to 10,482,116 possible fraudulent ballots in the 2020 general election, but they convened the Hluttaw and tried to form a government. These actions are 'acts to take over the sovereignty of the Union by wrongful forcible means' as mentioned in the Section 40 and 417 of the Constitution. Therefore, by following the provisions (of the Constitution) mentioned in paragraph 8 of this announcement, the Tatmadaw has been taking all duties and responsibilities of the State since 1 February. (Office of the Commander-in-Chief of Defence Service, Announcement to public, 2021)

The commander-in-chief and Myint Swe argued that the UEC's failure to ensure free, fair and transparent elections, and the refusal of the UEC and the government to address this matter, were 'wrongful forcible means' that caused the loss of the sovereignty of the Union.

The UEC is the only institution that has the constitutional authority to decide on claims of electoral fraud.

These arguments, however, are legally questionable. The decision of the speaker of the Union Parliament to decline to hold a special session on electoral fraud claims was constitutional, and therefore did not constitute a basis for declaring the state of emergency. Although article 84 of the Constitution provides that the speaker 'shall convene a special session as soon as possible, if at least one-fourth of the total representatives require so', the decision is ultimately up to the speaker. Article 82 stipulates that the speaker may convene a special session 'if necessary', but the president must recommend that the speaker convene such a session if he or she thinks it is necessary (article 83). Thus, the speaker is not necessarily required to convene a special session if one-fourth of the MPs request it. Moreover, the UEC is the only institution that has the authority to decide on electoral disputes (2008 Constitution of Myanmar, article 399g; [Union Election Commission 2021](#)); its decisions on this matter are 'final and conclusive' (2008 Constitution of Myanmar, article 402b). Therefore, the Union Parliament does not have the constitutional authority to decide on claims of electoral fraud.

Articles 40c and 417 of the 2008 Constitution suggest that an emergency is an extraordinary situation that poses a grave threat to the country, and it is far from obvious that election fraud would constitute such an emergency.

Furthermore, the military has not provided concrete evidence of electoral fraud despite its repeated public claims and objections. On 28 January 2021, the UEC said there were no errors on a scale to affect the electoral outcomes (Union Election Commission 2021; [Pyae Sone Win 2021](#)). In addition, observers who followed the process closely issued statements and reports that, despite the shortcomings of the electoral legal framework, voters were able to freely express their will ([The Carter Center 2020](#)) and the results of the elections were credible and reflected the will of the people of Myanmar ([Domestic Election Observer Organizations 2021](#); [ANFREL 2021](#)). Most importantly, there is no indication in the Constitution that electoral fraud could be interpreted as 'wrongful forcible means' of harming citizens' sovereignty. The 2008 Constitution does not define this term, leaving the issue vague and open to interpretation. But there are good reasons to interpret the term narrowly, and with due consideration to the principle of proportionality, based on the text of the Constitution itself. Articles 40c and 417 of the 2008 Constitution suggest that an emergency is an extraordinary situation that poses a grave threat to the country, and it is far from obvious that election fraud would constitute such an emergency. Indeed, the Constitution includes detailed processes and established institutions that have a mandate to process claims of election fraud (2008 Constitution of Myanmar, article 399g). The military's refusal to respect the election results and the constitutional processes set up to resolve any disputes around them may amount to a loss of sovereignty.

2.2 The constitutional procedure for declaring a state of emergency was not followed

In addition to defining the constitutional grounds, article 417 also provides three procedural requirements for declaring a state of emergency: (1) the president must coordinate with all NDSC members; (2) only the president has the authority to declare a state of emergency; and (3) the president must inform the Union Parliament.

The consultative meeting with the NDSC was not held with all of its members.

Article 417 provides that the president can only declare a state of emergency after coordinating with the NDSC, which has 11 members, including 6 military and military-nominated officials and 5 civilian authorities (2008 Constitution of Myanmar, article 201). Although Myint Swe convened a meeting of the NDSC, purportedly held on 1 February 2021, only military members attended the meeting. Indeed, some of the civilian members had already been detained. The fact that not all members of the NDSC attended the consultative meeting before the state of emergency was declared under article 417 makes this declaration noncompliant with the Constitution. This interpretation of article 417 is supported by article 412, which governs a separate kind of state of emergency that applies if there is a threat to 'lives, shelter and property' in a region, state, union territory, or self-administered area. Article 412b explicitly allows the consultative meeting to be convened with only military members of the NDSC if not all members can attend. However, article 417 does not have such a provision, presumably because all members of the NDSC need to be present for a meeting to qualify as such, which is also plausible given the gravity of its decisions.

Myint Swe was not the acting president and thus had no authority to declare a state of emergency. Under article 417, only the president has the authority to declare a state of emergency. On 1 February 2021, the military detained the president. The military claims that the detention of the president led to the office of the president falling vacant, and accordingly under article 73a, the military-nominated vice president (who received the second-most votes in the presidential elections) became acting president. However, this argument is legally questionable. Article 73a refers to a vacancy due to 'resignation, death, permanent disability or any other cause'. 'Any other cause' should reasonably be interpreted to exclude the removal and detention of the president with no legal basis. Nor could the criminal charges against the president count as 'any other cause' for the presidency falling vacant, since they were filed on 3 February 2021, two days after article 73a was triggered and the enactment of the order declaring the state of emergency was issued. Based on the text of the constitution and its internal coherence, article 73a should be interpreted in accordance with article 71a, which sets out the grounds for impeaching the president that could lead to her/his removal in compliance with a constitutional process (article 71g). The criminal charges filed against the president (i.e., breaching campaign guidelines and Covid-19 restrictions under section 25 of the Natural Disaster Management Law) arguably do not constitute grounds for impeachment. In addition, the Union Parliament is the only institution competent to initiate the impeachment procedure (article 71b) and ultimately decide whether the charges are substantiated (articles 71f and 71g), but it was never convened or consulted in any of the processes undertaken.

The Union Parliament was not informed. After declaring a state of emergency under article 417, the Constitution requires the president to inform the Union Parliament (article 421a). If the Union Parliament is not in regular session, the president must summon an emergency session (article 421a). Acting President Myint Swe did not do so. The military may take the position that

Myint Swe was not the acting president and thus had no authority to declare a state of emergency.

there was no Union Parliament in place to inform on 1 February 2021, when the state of emergency was declared.

On 1 February 2021, the new Union Parliament elected in the 8 November 2020 elections had not yet commenced its term. The five-year terms of both the lower house (Pyithu Hluttaw) and the upper house (Amyotha Hluttaw) start on the same day, the day of the first session of the lower house (articles 119, 154a). Those sessions had not yet taken place. Moreover, on 31 January 2021, the term of the Union Parliament elected in the 8 November 2015 elections had just been completed. The term of that Union Parliament ran for five years from the day of its first session, 1 February 2016 until 31 January 2021. Therefore, it seems likely that the date of 1 February 2021 was chosen to fall in between parliamentary terms.

Article 421a requires the president to inform the Union Parliament, and a failure to do so renders the declaration of the state of emergency unconstitutional.

The constitutional scheme of the emergency provisions (articles 417–423) states that the Union Parliament should be informed of any declaration of a state of emergency and the transfer of powers to the commander-in-chief, even if it is not in session. Article 421a requires the president to inform the Union Parliament, and a failure to do so renders the declaration of the state of emergency unconstitutional. Therefore, article 421a implies that the new Union Parliament elected on 8 November 2020 should have been brought into session and its term commenced, and that Myint Swe should have informed it of his declaration under article 417 (assuming that Myint Swe was serving as the acting president, and that the NDSC was appropriately consulted). Since the declaration of a state of emergency under article 417 concentrates all legislative, executive, and judicial power in the hands of the commander-in-chief, and suspends the legislative powers of all Hluttaws (and automatically dissolves them when their terms expire), dispensing with article 421a would subvert and undermine this constitutional scheme.

The military's declaration of a state of emergency was unconstitutional under Myanmar's 2008 Constitution because the constitutional grounds were not met and the constitutional procedure required to declare a state of emergency was not followed.

To conclude, the military's declaration of a state of emergency (Order No. 1/2021) was unconstitutional under Myanmar's 2008 Constitution because the constitutional grounds were not met and the constitutional procedure required to declare a state of emergency was not followed (see also Choudhry and Welikala 2021). Despite its flaws and undemocratic provisions, the 2008 Constitution did not allow the military to take power in such conditions. The military violated the constitution it drafted to depose civilian authorities and seize power.

3. ALL SUBSEQUENT ACTIONS AND DECISIONS MADE BY THE MILITARY REGIME ARE UNCONSTITUTIONAL

Since the (unconstitutional) declaration of a state of emergency on 1 February 2021, the military regime has attempted to entrench and consolidate power by portraying itself as a regime with constitutional authority. The coup regime has tried to give its actions a veneer of legality by grounding its decisions in various constitutional and legislative provisions. The commander-in-chief and coup

regime bodies have referred to articles 418 and 419 of the 2008 Constitution—which regulate the effects of a lawful declaration of a state emergency—in an attempt to assert constitutional authority for their actions and decisions. Article 418a transfers executive, legislative, and judicial powers to the commander-in-chief. The commander-in-chief may in turn transfer judicial and executive power to an appropriate body or new institution, and may establish a body chaired by him to help exercise legislative powers (article 419). Despite its claims that it is adhering to the 2008 Constitution, the military regime is in fact acting extra-constitutionally as all its actions and decisions are made based on the unconstitutional declaration of a state of emergency. As a result, the military regime has no constitutional authority, and all of its actions and decisions are unconstitutional.

Following the coup, the military regime has attempted to entrench and consolidate power by establishing new governing bodies at all levels of government and capturing existing institutions and processes by appointing new members (Figure 1).

With reference to articles 418a and 419, the commander-in-chief established a State Administrative Council (SAC) (Commander-in-Chief Order 9/2021, and SAC Order 14/2021). The commander-in-chief appointed the SAC's 16 members and serves as its chairperson. The SAC is purportedly tasked with helping him exercise legislative powers. The SAC established and appointed the 'Provisional Government of the Republic of Myanmar' (SAC Order 152/2021) which is tasked with performing state duties in accordance with the military regime's roadmap. The provisional government is headed by the commander-in-chief claiming to act as state prime minister, as well as a deputy prime minister, 27 Union ministers, the attorney general, and a permanent secretary. The SAC also created new bodies at the state and region levels (SAC Orders 10/2021 and 153/2021), as well as the district and township levels (SAC Order 16/2021), which are under the authority of the SAC and are thus ultimately accountable to the commander-in-chief.

In addition to establishing new bodies at all levels of government, the military regime also captured existing institutions, including the judiciary, by appointing new members who would support its narrative and are accountable to the SAC. The SAC appointed a new UEC (SAC Order 7/2021), a new union auditor general (SAC Order 2/2021), a new chair of the Central Bank (SAC Order 8/2021), new officials to the Union Civil Service Board (Order 8/2021), and a new attorney general (SAC Order 1/2021). The commander-in-chief has reappointed current members and/or appointed new members of the Anti-Corruption Commission (Office of the Commander-in-Chief Order 3/2021), the National Human Rights Commission (Office of the Commander-in-Chief Order 4/2021) and justices of the State and Region High Courts (Office of the Commander-in-Chief Order 2/2021). The same justices were at first reappointed to the Supreme Court (Order 1/2021), but four were later removed (SAC Order 24/2021) and replaced by two new justices (SAC Order 23/2021). Similarly, the SAC appointed new judges to the Constitutional Tribunal on 8 February 2021 (SAC Order 38/2021), after the commander-in-chief reportedly

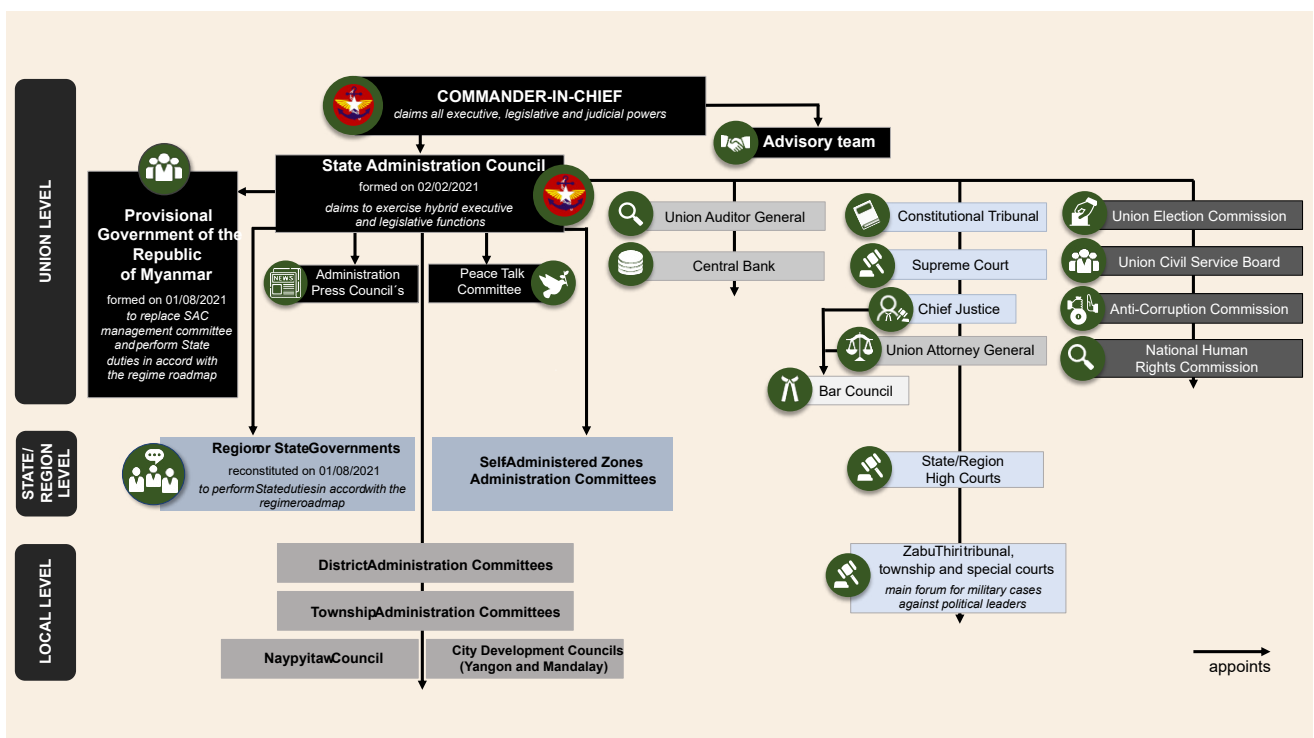
The military regime has no constitutional authority.

Following the coup, the military regime has attempted to consolidate power by establishing new governing bodies and capturing existing institutions and processes.

forced the incumbent judges to resign. Therefore, besides consolidating power quickly by establishing new appointed bodies at all levels of government, the commander-in-chief has also captured the judiciary, including the apex courts. The military regime also captured the Bar Council, the body responsible for issuing and revoking advocate lawyers' licences, regulating advocates, and investigating complaints against advocate lawyers. According to the amendments to the Bar Council Act released by the military regime on 28 October, council members will no longer be elected by licensed lawyers but will be appointed by the attorney general and chief justice. Some Myanmar legal experts have concluded that this amendment will affect the freedom of advocates who are likely to receive more politically motivated restrictions and instructions ([The Irrawaddy 2021](#)).

Since its unconstitutional seizure of power, the military regime has continued to levy unsubstantiated legal charges against, and impose sentences on, deposed civilian authorities, political leaders, and those who have condemned and opposed the military coup. Through sham trials conducted by captured judicial bodies, State Counsellor Daw Aung San Suu Kyi is being tried for allegations of electoral fraud, corruption, violating the Official Secrets Act, inciting public unrest, and illegally importing walkie talkies ([BBC News 2021](#)). She faces a total of 12 charges which together carry sentences of up to 116

Figure 1. Organizational chart of the military regime claiming to be 'provisional government' (bodies formed and/or reappointed following the coup)



Source: This infographic was produced by the MyConstitution programme, implemented by International IDEA.

years in prison ([Myanmar Now 2021a](#)). President Win Myint faces allegations of breaching campaign guidelines and Covid-19 restrictions under the Natural Disaster Management Law, as well as allegations of corruption under the anti-corruption law. On 6 December 2021, the president and state counsellor were both sentenced to four years in prison for inciting public unrest under the Penal Code and for violating Covid-19 regulations under the Natural Disaster Management Law ([Myanmar Now 2021b](#)). On 9 January 2022, the state counsellor was sentenced to four more years in prison for the possession of ‘illegally imported’ walkie talkies under the Export–Import Law and the Telecommunications Law. Win Htein, a senior member of the Central Executive Committee of the NLD, was sentenced to 20 years in prison for sedition under the Penal Code after condemning the commander-in-chief’s power grab during a media interview ([Myanmar Now 2021c](#)).

In the same vein, the coup regime has tried to annul the results of the 2020 elections. On 26 July 2021, the newly captured UEC invalidated the results of the 8 November 2020 general elections ([Union Election Commission of the military regime 2021](#)). However, as with all other actions and orders of the military regime, this decision is not legally valid as the new UEC was appointed by the SAC on the basis of an unconstitutional state of emergency.

4. CONCLUSION

Since the coup conducted by the Myanmar military on 1 February 2021, the military regime has tried to consolidate power through force and violence and to portray itself as the country’s legitimate government by arguing that it is adhering to the 2008 Constitution. Although constitutional authority is only one dimension of the current conflict in Myanmar, it is important to deconstruct the military’s claims and demonstrate through legal arguments why its seizure of power was unconstitutional, and therefore why the military regime and its actions and decisions have no constitutional authority.

The military’s declaration of a state of emergency (Order No. 1/2021) is unconstitutional under Myanmar’s 2008 Constitution because the constitutional grounds were not met and the constitutional procedure required to declare such a state of emergency was not followed. As a result, the military regime has no constitutional authority, and all of its decisions and actions made since the 1 February 2021 coup are unconstitutional. Despite its flaws and undemocratic provisions, the 2008 Constitution did not allow the military to take power in such conditions. The military violated the constitution it drafted to depose civilian authorities and seize power.

In response to the unconstitutional seizure of power, a group of MPs who won seats in the 8 November 2020 elections formed the Committee Representing the Pyidaungsu Hluttaw (CRPH) on 5 February 2021, mandated by 80 per cent of all elected MPs to represent and act in the interest of the legitimate legislature. In its founding document, the CRPH expressed allegiance to the

The military also captured the judiciary, including the apex courts, by appointing new members who would support its narrative and are accountable to the SAC.

The decision of the newly captured UEC to invalidate the results of the 2020 general elections is not legally valid as the new UEC was appointed by the SAC on the basis of an unconstitutional state of emergency.

The military’s declaration of a state of emergency is unconstitutional, and as a result the military regime has no constitutional authority.

2008 Constitution (Representatives of the Pyidaungsu Hluttaw, Statement 2/2021, paragraph 3). However, the unconstitutional actions of the military and the escalating crisis have made a return to the *status quo ante* increasingly unrealistic. The fact that the 2008 Constitution has been so severely violated and its authority undermined by the military's unbounded actions has created a constitutional vacuum. Indeed, many stakeholders in the country believe the social contract has been broken and that the 2008 Constitution has lost its legitimacy. In response to this constitutional vacuum, the CRPH released the Federal Democracy Charter on 31 March 2021. The charter can be seen as a negotiated 'offer' by the CRPH to other pro-democracy actors and ethnic groups, detailing the terms of the political alliance against the military. It creates an interim government and provides a vision for the country's future through a commitment to write a new democratic, federal constitution.

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