

Myanmar's Military Coup d'État Is Unconstitutional

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Early on the morning of 1 February 2021, Myanmar's military (the Tatmadaw) detained President Win Myint, the State Counsellor Aung San Suu Kyi, and other high-ranking government officials. The Tatmadaw declared that Tatmadaw-nominated First Vice-President Myint Swe was Acting President under article 73a of Myanmar's 2008 Constitution. Myint Swe then declared a state of emergency for one year, and transferred legislative, executive and judicial powers to the Commander-in-Chief, Min Aung Hlaing.

The multilateral response should focus on the constitutionality of the Tatmadaw's actions. Myanmar's state of emergency is a military coup d'état, and is flagrantly unconstitutional. The international community should support Myanmar's democratically elected government by insisting that the constitution be followed, and civilian authority restored immediately.

The two of us have worked in over a dozen countries across the world, for over two decades, on constitutional reform. What we see in Myanmar deeply alarms us.

Myanmar's state of emergency is unconstitutional

Myint Swe declared a state of emergency under article 417, which authorizes the President to do so after consulting the National Defense and Security Council (NDSC). Such a declaration is permitted only if there is a threat to 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'.

The pretext for the state of emergency was the alleged failure of the Union Election Commission to ensure free, fair, and transparent elections on 8 November 2020. The National League for Democracy (NLD) won a landslide victory. The Tatmadaw and its allied political party, the Union Solidarity and Development Party (USDP) claim that the election was marred by fraud. They have also faulted the Speaker for rejecting their proposal to hold a special session of Parliament to discuss allegations of electoral fraud.

This argument is legally incoherent and unconvincing. The military has not provided concrete evidence of electoral fraud despite its repeated public claims and objections. If there were evidence of fraud, it is highly doubtful that such fraud amounted to a loss of sovereignty. If anything it is the Tatmadaw's refusal to respect election results that amounts to a loss of sovereignty, as the votes of the people, who bear sovereign power under article 4, were not respected and given effect to.

Moreover, the nature of the electoral fraud alleged does not constitute 'wrongful forcible means', because it did not entail the use of force – an interpretation of 'forcible means' supported by the other enumerated methods for attempting to take over sovereignty in article 417, 'insurgency' and 'violence'.

In addition, the Tatmadaw has taken power unconstitutionally because the procedure for declaring the state of emergency was breached.

First, under article 417, only the President has the authority to declare a state of emergency. The Tatmadaw has argued that its detention of the President led to the office of the President falling vacant. However, this argument is legally questionable. It is implausible that the detention of the President means that the office of the President has fallen vacant. Article 73a refers to a vacancy due to 'resignation, death, permanent disability or any other cause'. 'Any other cause' should be interpreted to exclude the illegal removal of the President. The President was detained without any legal basis. He has reportedly refused to sign a resignation letter.

On 3 February 2021, criminal charges were brought against the President for breaching campaign guidelines and COVID-19 restrictions under the Natural Disaster Management Law. The Tatmadaw might argue these charges have made the Presidency vacant. However, they cannot, since they were filed on 3 February 2021, two days after article 73a was triggered and the declaration of the state of emergency. Moreover, article 73a should be interpreted in accordance with article 71a, which sets out the grounds for impeaching the President that could lead to his removal under article 71g. 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). The Union Parliament was never convened nor consulted in any of the processes undertaken.

Second, article 417 provides that the President can only declare a state of emergency after coordinating with the National Defence and Security Council. The NDSC is composed of 11 members, including 6 military and military-nominated officials and 5 civilian authorities (article 201). Although Myint Swe convened a meeting of the NDSC on 1 February 2021, only military members of the NDSC attended the meeting. Some of the civilian members had been already been detained. The fact that not all the members of the NDSC attended the consultative meeting makes the state of emergency unconstitutional.

Third, after declaring a state of emergency under article 417, the President must 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 make any such efforts.

The Tatmadaw may argue that there was no Union Parliament in place on 1 February 2021, the day the state of emergency was declared. On 1 February 2021, the new Union Parliament elected during the 8 November 2020 elections had not yet commenced its term. Moreover, on 31 January, the term of the Union Parliament

elected in the 8 November 2015 elections had just been completed (it ran for 5 years from the day of its first session, 1 February 2016, until 31 January 2021).

The Tatmadaw struck on 1 February 2021 deliberately to fall in between the terms of the 2016 and 2021 Union Parliaments. However, article 421a requires the President to inform the Union Parliament. Not doing so renders the state of emergency unconstitutional. Moreover, article 421a impliedly requires that the new Union Parliament be brought into session, and its term commenced, and for Myint Swe to inform it of his declaration under article 417 (assuming that Myint Swe is Acting President, and that the NDSC was appropriately consulted). Since the effect of a declaration of a state of emergency under article 417 is to vest all legislative, executive, and judicial power in the Commander-in-Chief, and to suspend the legislative powers of the Union Parliament, dispensing with article 421a would subvert this scheme. Such an interpretation of the Constitution would be absurd.

What should the international community do?

The international community should take the following steps.

1. Affirm the validity of the 2008 Constitution

From a legal perspective, the 2008 Constitution remains in force. As a political matter, there are strategic reasons to affirm the validity of the 2008 Constitution, because it provides a set of institutions, procedures, and substantive norms for the exercise of public power in Myanmar. While it is in place, political conflict can be channeled, at least to an extent, into institutions and peaceful contestation, with benchmarks to assess and criticize exercises of public power. By contrast, if the 2008 Constitution is set aside, political conflict will solely be a matter of raw power politics, settled by force.

Thus far, the Tatmadaw has asserted that it is acting under the 2008 Constitution, and there has accordingly been no rupture in constitutional legality, in order to legitimize the state of emergency. But this may change, so the international community must act quickly to affirm the 2008 Constitution remains in place. Adhering to the 2008 Constitution constrains the power of the military and the Commander-in-Chief. Since the declaration of the state of emergency itself has breached multiple constitutional requirements, treating the 2008 Constitution as valid and in operation provides the legal basis for demonstrating that the Commander-in-Chief and the forces he controls are acting extra-constitutionally, despite repeated claims to the contrary – which in turn is a source of political leverage. The 2008 Constitution also provides constitutional limits on the length of the emergency to 12 months, with two extensions of six months, or 24 months in total (article 425). Operating under the 2008 Constitution allows other public officials and institutions to attempt to wield constitutional powers and challenge the military.

Insisting on compliance with the 2008 Constitution also permits the international community to hold Myanmar to account in terms of its own constitutional commitments. The fact that it was the Tatmadaw, through its governing structures

that prepared and led the enactment of the 2008 Constitution, is a powerful response to any criticism of outside interference.

Moreover, the ASEAN Charter supports such an approach, which may also be helpful in engaging diplomatically with ASEAN Member States. Article 2(2)(h) of the ASEAN Charter provides that Member States shall act in accordance with the principle of 'adherence to the rule of law, good governance, and the principles of constitutional government'. This language provides a basis for regional diplomacy to advocate for the ongoing validity of, and adherence to, the 2008 Constitution.

2. Declare the state of emergency unconstitutional under the 2008 Constitution

Based on the legal arguments outlined above, the international community should state unequivocally that the state of emergency is unconstitutional, on the grounds set out above.

3. Support the exercise of constitutional powers by institutions to counter the Tatmadaw and mobilize political support

One way to counter the Commander-in-Chief would be for other institutions to check his authority by exercising their own powers under the 2008 Constitution. These actions would seek to undo the state of emergency. This would serve two principal purposes. First, they would mobilize public support against the state of emergency and build support for the Union Parliament. Second, by taking the Tatmadaw's asserted fidelity to the 2008 Constitution at face value, these actions would reinforce that the 2008 Constitution provides Myanmar's governing framework, make it more politically costly for the Commander-in-Chief to act unconstitutionally, and increase the political leverage of forces seeking to end the state of emergency.

The international community should provide diplomatic support of various kinds to these actions, by quietly encouraging these steps to be taken, and then to publicly recognize them as official acts of government institutions.

The major contender for popular legitimacy is the recently elected Union Parliament. On 5 February 2021, the NLD announced the formation of the Committee Representing the Union Parliament, with 289 elected Members of Parliament (MPs) from the 2020 elections. However, constitutionally, this announcement was not the first session of the Union Parliament since article 85a of the Constitution requires the attendance of more than half of the total number of MPs (321) for the session to be valid.

The elected MPs should convene online the first session of the lower house (Pyithu Hluttaw) with more than half of the total number of members of that chamber (213), in accordance with article 128a. Such a session would start the term of both chambers of the Union Parliament (articles 119 and 154a). The next step would be to engage the procedure in article 75 to convene the Union Parliament, to administer the oath of affirmation, and to elect the Speaker and Deputy Speaker. The Union Parliament should then move immediately into a debate on the state of emergency. It should declare the unconstitutionality of the state of emergency through resolutions

and legislation, and assert its authority over the state in accordance with the 2008 Constitution. In addition, it should encourage civil servants and state institutions to accept the authority of the Union Parliament and to reject the unconstitutional authority of the Commander-in-Chief.

The strategy is to set up the Union Parliament as a competing source of authority within Myanmar. It would serve as a focal point for political mobilization against the structures established by the Commander-in-Chief, and a rallying point for the public to call for the restoration of the constitutional order.

A civil disobedience movement initiated by doctors and nurses has gained massive support among the general public, including civil servants and security officers. The tide is turning. The international community must act decisively to support democracy in Myanmar before the Tatmadaw strikes back with violent force – as it did in 1988 and 2007.

