



Rule of Law Promotion in Times of Covid-19

No. 2:

Covid-19 in Tunisia: Effects of the Pandemic on the Rule of Law

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Contents

- I. Introduction
- II. Background information: Tunisia
- III. The impact of the pandemic on the constitutional order
- IV. Effects on the justice and security sectors
- V. State-citizen relation
- VI. Possible long-term effects on the rule of law and democracy in Tunisia
- VII. Contributors

I. Introduction

The current paper series seeks to illustrate the effects of the measures taken against the spread of Covid-19 on the rule of law.

While the pandemic has already overloaded health systems of wealthier countries around the globe, fear of the effects of the crisis in the Global South has increased. Responding to this threat, governments have taken drastic measures, which do not always comply with the rule of law. In many countries the state of emergency has been imposed, fundamental rights have been restricted, parliaments and other democratic control mechanisms suspended. In some countries, the line between civilian and military means is blurred when armed forces are used to execute orders aimed at preventing the spreading of the disease. There are also cases where political rights are curtailed, and the freedom of the media is restricted.

This paper examines the measures taken against the pandemic in Tunisia, and their effects on the constitutional order, the justice and security sector and state-citizen relations. It is based on research carried out by the RSF Hub team and an expert talk held on 14 May 2020.

II. Background information: Tunisia

Tunisia is a very young democracy with a semi-presidential system. It passed a new constitution as recently as 2014, following the so-called Jasmine Revolution, which led to the ousting of long-time President Zine El Abidine Ben Ali in January 2011. In autumn 2019, Kais Saied was elected president. Prime Minister Elyes Fakhfakh and the government took office on 28 February 2020, only three days prior to the first confirmed Covid-19 case in Tunisia. As of 16 May 2020, there have been 1,037 confirmed cases and 45 deaths. While Tunisia ranks first in the MENA region in the categories fundamental rights, open government and constraints on government powers according to the 2020 Rule of Law Index of the World Justice Project, it is uncertain if the young democracy with its newly formed government will be able to retain those hard-won rights, or if there will be a push back to authoritarian tendencies after the pandemic.

III. The impact of the pandemic on the constitutional order

Tunisia's nationwide lockdown began on 22 March 2020, when less than 100 Covid-19 cases were confirmed. The lockdown was imposed through two presidential decrees published on 18 March and 22 March. Those decrees were based on Article 80 of the constitution which grants the President, following consultation with the head of government and the Speaker of the Parliament, to take exceptional measures "in the event of imminent danger threatening the nation's institutions or the security or independence of the country in such a manner as to prevent the normal functioning of the state" (state of exception). On 18 March, the President imposed a national curfew from 6pm to 6am. On 22 March he prohibited the movement of persons and vehicles outside the curfew hours except for basic needs or for urgent health reasons. While those restrictions are based on article 80 of the Constitution, the state of exception was not openly declared.

Subsequently, on 12 April, the Tunisian Parliament adopted a law empowering the head of government to issue decrees of legislative character regarding Covid-19 related topics for the duration of two months. The legislative authorisation is based on Article 70 of the Constitution and enabled Fakhfakh, among other things, to ease budget allocation procedures to counter Covid-19.

The experts attending the talk agreed that the use of two different constitutional articles could lead to ambiguity but were divided about its prospective implications. While some stressed the need of further clarifying the current state, others were less worried and pointed at the existing restrictions and control mechanisms implemented by Parliament during the pandemic. Against the background that President Saied is a former constitutional law professor, some experts seemed also confident that some of the legal ambiguities will be clarified in the near future and will in any case not be abused for other purposes unrelated to the spread of the pandemic.

At the moment, several Tunisian institutions are dealing with the Covid-19 pandemic at the same time. The Prime Minister has created a National Coronavirus Response Authority, there is a Regional and National Committee for Disaster Prevention and a Response Rescue Organization, and the National Security Council. Even though this shows great effort, roles and competencies are not always clear and there is a risk of insufficient exchange between institutions and double processing.

While the President and the Prime Minister appear to coordinate their measures in the fight against the pandemic very closely and possess extended powers, the role of the Parliament seems to be weakened, since it shifted its legislative power in parts to the head of government. At the same time, exceptional rules of procedures permitting plenary sessions via videoconference and digital voting were adopted in order to ensure the functioning of the Parliament during the pandemic. Also, in spite of opposition among political parties, governmental capacity was much better in reacting to the crisis than expected. Yet, in the talk it was underlined that financial and technical resources of the Parliament are narrow.

The capacity of the judiciary has been limited during the pandemic, reducing its activities mainly to criminal justice. One expert expressed concern related to the limitation of civil justice. The legality of measures like mandatory hospitalization of persons suspected to be infected with Covid-19 or the confiscation of vehicles circulating despite the curfew could not be challenged before a judicial authority.

Lastly, the establishment of a Constitutional Court had already been delayed before, and is now further hindered by Covid-19. In case of conflicts of interpretation or disagreement over competences among the different constitutional organs dealing with the pandemic, there is no court that could examine if an exceptional measure was actually in line with the Constitution.

In conclusion, the system of checks and balances in Tunisia has been weakened by the current situation. Not only is the political power concentrated in the hands of the executive, there is also no judicial organ that could review decree-laws enacted by the Prime Minister or exceptional measures in response to the pandemic taken by the President under article 80 of the Constitution. However, there was broad agreement among the experts that Tunisia has a strong civil society, which is observing controversial decree-laws very closely, thereby helping to minimize the risk of the executive abusing its power.

IV. Effects on the justice and security sectors

To enforce the curfew and other restrictions, the Tunisian police and army are patrolling the country with the aid of helicopters and, in some places, police robots. While this results in a higher level of surveillance, police officers, apart from very few exceptions, are reluctant to use force against citizens.

In the expert talk it was noted that the relation between citizens and the armed forces are historically loaded. While the military was able to gain the population's trust by not supporting then President Zine El Abidine Ben Ali during the Jasmine Revolution, civil society still sometimes associates the police with its role in the authoritarian regime before 2011. Critical voices fear the revival of a police state through the power given to security forces in the current situation. It was also noted during the talk that the security forces do not wear any protective clothing and are therefore not only exposed to the virus during work but could also spread infections more rapidly.

At the same time, the strict rules and their implementation by police and the military could provide room for bribery and corruption, since police officers and military soldiers decide whether a person

really needs to seek medical attention or has to purchase necessities, and bribery is a common way to avoid penalties and to bypass rules. Low salaries and high inflation could further promote corruption.

At least 1,400 people were arrested for violating the curfew or the confinement measures, which was highly criticized by human rights organizations like Amnesty International against the backdrop of Tunisia's already overcrowded prisons. At the end of March, President Saïed ordered the release of 1,420 prisoners as part of the measures to curtail Covid-19. Yet prisons continue being overcrowded. In addition there many migrants are detained in reception and orientation centres; Amnesty International reported about several of them being on hunger strike out of fear of an increased risk of infection due to the unhygienic conditions.

Besides arrests due to the violation of the curfew or the confinement measures, Amnesty International has also reported few cases of bloggers and journalists who criticized the government's approach to dealing with the Covid-19 pandemic. Criminal prosecutions related to freedom of expression are rare but did happen in past years, based on laws from the Ben-Ali era. However, the basis of the recent cases – i. e. whether persons were arrested due to their reporting about the government's response to the pandemic, or for other reasons – is not yet clear.

V. State-citizen relation

During the Covid-19 pandemic the President and the Prime Minister gained popularity, which indicates a broad approval of the government's crisis management by civil society.

The broad agreement with the taken measures was also reflected in the fact that the number of protests against them was very limited or only expressed on social media. Also, Covid-19 did not spread as broadly as in other countries, which could be understood as a success of the measures taken by the executive authorities.

Nonetheless, some experts, described the state-citizen relation as fragile, depending on the government's reaction to a prospective socio-economic crisis. Tunisia was already struggling with high unemployment rates close to 15% and state debt before the pandemic. In addition, it is estimated that half of the population is engaged in the informal economy, which was hit particularly hard by the crisis and lacks social protection.

VI. Possible long-term effects on the rule of law and democracy in Tunisia

Lastly, the pandemic's possible long-term effects on the rule of law and democracy in Tunisia were discussed.

Civil society initiatives shifted to crisis management during the pandemic, supporting the authorities and therefore gaining legitimacy and expertise on the ground. The emergence of these new actors showed that management is possible in a less bureaucratic way, and could thus serve as a model for state institutions. Especially the possibilities of digitalization were highlighted in relation to recently established start-ups and initiatives. They now need a legal framework to improve digitalization in Tunisia.

Besides this, the effects on the rule of law and democracy depend on how willing both government and Parliament will be to invest in health care, digital infrastructure, and education. A deepening of the inequality between the wealthier coastal area and the interior of the country has to be avoided to ensure the population's support of the new political system. With regard to the safeguarding of human rights and the separation of powers, the interrupted setting-up of the Constitutional Court is particularly problematic. It can hopefully be continued soon, as the Parliament extended the deadline for the submission of applications of candidates to 12 April and plans to vote on them soon afterwards.

A shift back to authoritarianism is not noticeable so far. Until now, the President and the Prime Minister have not used their exceptional powers under articles 70 and 80 of the Tunisian Constitution to adopt decrees that are politically motivated and/or unrelated to the Covid-19 pandemic. At the same time, the Tunisian media is more critical and vigilant than ever, while civil society remains highly dedicated and solidly united.

VII. Contributors

This paper is based on the expert talk "Covid-19 in Tunisia: Effects of the Pandemic on the Rule of Law", which was held on 14 May 2020. On behalf of RSF Hub, Tilmann J. Röder (moderation), Johannes Socher and Stephanie Lorang participated. The RSF Hub is grateful to all scholars and practitioners who contributed to this paper:

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About RSF Hub

RSF Hub is a project-based think tank funded by the German Federal Foreign Office fostering knowledge transfer between politics, academia and field practice in the area of rule of law promotion and related topics such as transitional justice. RSF Hub organises, in collaboration with various partners, expert talks and round tables. Team members teach at universities and train ministry staff, speak at events, contribute to blogs and publish academically. For more information on the Hub's activities see <http://www.polsoz.fu-berlin.de/en/polwiss/rsf-hub>.

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