The Impact of the COVID-19 Pandemic on Constitutionalism and the Rule of Law in North African Countries

Analytical report, Webinar, 30 June 2020

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Contents

1. Introduction

The COVID-19 pandemic has exacerbated the fragile socio-economic situation in the countries of North Africa, compounded existing challenges and created new challenges to democratization in the region. While much attention has been paid to the question of the consequences of COVID-19 for electoral processes, its impact on constitutionalism and the rule of law in the countries of North Africa has received relatively less attention. It is against this backdrop that the International Institute for Democracy and Electoral Assistance (International IDEA) organized, in partnership with the Department of Political Affairs of the African Union Commission (AUC), a webinar on the subject of the impact of the COVID-19 pandemic on constitutionalism and the rule of law in the countries of North Africa (Algeria, Egypt, Libya, Mauritania, Morocco, the Sahrawi Republic and Tunisia).

The webinar was based on two premises: first, the need to consider constitutionalism and the rule of law in terms of their ultimate goals, i.e. to guarantee respect for the fundamental rights and freedoms of citizens in both ordinary and extraordinary situations; second, the adoption of a holistic perspective that enables the consideration not only of civil and political rights but also of the economic and social rights of citizens in the context of the COVID-19 crisis in the countries concerned.

This analytical report is not a verbatim transcript of the webinar; instead, it provides a general summary of the contributions of the panellists and participants. While not necessarily expressing the views of International IDEA, it covers the main thematic aspects discussed, the key ideas exchanged and the recommendations that came out of the webinar. The inputs—based on a retrospective and forward-looking practical analysis—were aimed at inspiring decision-makers and shaping the thinking of experts, academics, researchers, journalists and citizens on the subject. More specifically, the discussion considered not only the challenges in terms of the sociopolitical dynamics induced by the COVID-19 crisis as well as its impact on constitutionalism and the rule of law in the countries of North Africa but also the opportunities the pandemic presents for their democratic development. All the presentations and discussions held during the webinar may be found in a recording of the webinar accessible at <https://business.facebook.com/Int.IDEA.AwA/>. The webinar programme, which includes a list of panellists, is attached as an annex to this report.

According to the Africa Centres for Disease Control and Prevention, North African countries have felt the impact of the COVID-19 pandemic harder than any other part of the continent except South Africa. With over 110,000 infections and 4,666 deaths, the region accounts for 25 per cent of the cases on the continent and close to half of the deaths due to the virus in Africa. While the numbers of infections and deaths continue to rise, the countries of North Africa continue implementing emergency regulations, although they have begun gradually lifting restrictions.

The main question for the panellists was to reflect on how to safeguard constitutionalism and the rule of law in the context of a long-term COVID-19 pandemic and in the fragile environment of countries that either are going through a transition process or are confronted with institutional uncertainty. Indeed, two of the countries in the region recently had revolutions; two others are going through institutional and political reform processes under civic pressure; one is subject to an international dispute; and another engaged in a civil war.

Other questions concerned the nature of the legal frameworks for emergency regulations and measures adopted by North African countries and their sociopolitical, economic and human security impacts, the risk that the economic recession caused by the pandemic might lead to democratic regression in countries of the region and the opportunities represented by the crisis in a context of sociopolitical transformation.

2. Legal frameworks and implementation procedures for emergency measures and regulations

To stop the spread of the pandemic, North African countries have adopted emergency measures and regulations. These measures have varied from school closures to isolation and quarantine policies, lockdowns and prohibition of movement in and between cities, health screenings at airports and border crossings, the suspension of international and national flights, domestic travel restrictions, limitations on public gatherings, the closure of public services and military deployment, among others.

Plurality of the legal frameworks in place

These measures and regulations have been adopted based on a plurality of legal frameworks. Indeed, North African countries have used different terms with no distinction: 'state of emergency', 'state of exception', 'state of siege', 'state of necessity' and decrees adopted on an ad hoc basis by governments to deal with the pandemic. None of these countries' constitutions contains provisions about a potential 'state of health emergency' that can be implemented to confront the COVID-19 pandemic or similar emergencies. One country did, however, opportunistically pass a decree that enabled the government to declare a state of health emergency and to take exceptional measures to stop the spread of the virus. This semantic confusion, which is linked to the content of these countries' constitutions as well as to their institutional trajectories, highlights the degree to which the countries of North Africa are not prepared from a legal point of view to face the pandemic or similar emergencies.

Countries of the region are also subject to binding and non-binding international and regional instruments. The latter include the African Charter on Human and Peoples' Rights; the African Charter on Democracy, Elections and Governance; and the African Union Agenda 2063, which articulates a vision of '*an integrated, prosperous and peaceful Africa, driven by its own citizens, representing a dynamic force in the international arena*'[1]. Two of the seven aspirations outlined in Agenda 2063 for the future of the continent are relevant here: Aspiration 3, which envisages an '*Africa of good governance, democracy, and respect for human rights, justice and the rule of law*'[2], and Aspiration 4, which promotes '*a peaceful and secure Africa*'[3]. Agenda 2063 resonates with the United Nations' 2030 Sustainable Development Agenda. Aspirations 3 and 4 of Agenda 2063 are fully in line with the latter's Sustainable

Development Goal 16, which aims to '*promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels*'[4].

The most important binding instrument at the global level is the International Covenant on Civil and Political Rights (ICCPR), article 4 of which provides a list of non-derogable rights, i.e. rights that cannot be suspended or limited, including during states of emergency. The minimum standards in terms of human rights protection during a state of emergency are as follows: some rights are non-derogable; restrictions on derogable rights should be provided by law, should be strictly necessary and proportionate to the aim pursued and should not affect the essence of the right; restrictions should be time-bound and subject to periodic review; mechanisms should be provided for the judiciary to oversee the legality and proportionality of emergency measures that restrict rights; all rights should be restored in full as soon as the state of emergency is lifted; and there should be a form of monitoring of the executive during the state of emergency.

In terms of regional instruments, the African Charter on Human and Peoples' Rights remains purposely silent on this matter in order to avoid situations where the member states might invoke war to derogate from the principles enshrined in the Charter. However, most of the constitutions of North African countries are not in line with the above-mentioned. Consequently, a majority of emergency regulations and measures adopted to stop the spread of the pandemic are vague when it comes to human rights protection; they do not require that countries adopt minimal provisions or any list of non-derogable rights; they do not provide for rigorous checks and balances; and they do not impose obligations on states to take appropriate corrective measures in order to mitigate the negative effects of emergency situations.

One can therefore understand that there was a debate about the legality and legitimacy of the emergency measures and regulations that were adopted. In several cases, particularly in countries undergoing institutional reforms, some of these measures and regulations have been challenged before the national courts. In other countries, while populations have acknowledged that these measures and regulations were taken to protect their right to health and as precautionary measures, those populations have also held protests opposing those same measures, thus contributing to the further spread of the virus. Protesters have argued that, if emergency laws failed to respect the constitution and violated the rule of law, then this would undermine the enjoyment of certain rights and freedoms that would be exceedingly difficult to recover particularly in fragile institutional contexts. Finally, the precarity of the legal frameworks for the emergency regulations and measures adopted has reinforced the crisis of the legitimacy of power and the distrust between citizens and governments—even in countries with recently elected or appointed governments. This deficit of public trust is expected to worsen, as the COVID-19 pandemic is still peaking, and even if some of these countries are currently gradually lifting lockdown requirements.

Differentiation in implementation

Faced with these challenges, North African countries have implemented different emergency regulations and measures to stop the spread of the COVID-19 pandemic. Some states have opted for a very strict approach with full lockdowns in all parts of the country, extensive curfews during day and night, the closure of schools, a complete shutdown of public services, banning of public gatherings (including for religious purposes), restrictions of movement and quarantine requirements for non-nationals. Others have targeted the most affected regions or cities with partial lockdowns, night-time curfews, partial restriction of movements, the establishment of alternative working hours for essential public services, the adoption and

implementation of teleworking procedures and the release of prisoners to reduce the risk of the spread of COVID-19.

The countries of North Africa also differed in terms of the institutional procedures used for the implementation of emergency regulations and measures. Several countries created dedicated task forces involving epidemiologists and emergency experts to oversee the process and provide some scientific legitimacy to the measures taken. But the majority of states decided to leave these tasks to government structures, including security forces and armies. In one case, militias and unconventional actors took the responsibility to enforce these regulations and measures. This created a wide gap in terms of respect for the civil, political, economic and social rights of populations, including for refugees, migrants, asylum seekers and internally displaced persons (IDPs) in camps.

Finally, and most importantly, all North African countries have experienced, and continue to experience, a top-down approach to the implementation of emergency measures adopted to fight the COVID-19 pandemic, marked by the absence of, or very poor, consultation processes with parliaments, independent consultative bodies (such as national human rights commissions, national communication commissions, transitional justice and reconciliation institutions), local authorities and civil society organizations. The COVID-19 pandemic has reinforced the trend of vertical governance that characterizes the countries of North Africa and most of the states across the continent.

Endnotes

1. African Union Agenda 2063, Aspirations, <https://au.int/en/agenda2063/aspirations>.
2. Ibid.
3. Ibid.
4. UNDP, Sustainable Development Goal 16, <https://www.un.org/sustainabledevelopment/sustainable-development-goals/>.

3. Impact of the emergency regulations and measures adopted

While the emergency measures and regulations adopted initially had a positive impact by curbing the spread of COVID-19 in North Africa, they did not stop the pandemic and have had several negative political, socio-economic and humanitarian effects.

Reinforcement of executive powers and the closing of the democratic space

Measures and regulations adopted to stop COVID-19 are leading to a reinforcement of executive powers in North African countries, with potentially dramatic implications for their democratic space. In most of these countries, there are signs that some governments are using the crisis to grant themselves more expansive powers than warranted by the health crisis, with insufficient oversight mechanisms, and that they are using their expanded authority to crack down on the opposition and tighten their grip on power. Therefore, the pandemic may end up reinforcing repression in already-closed political systems and accelerating democratic backsliding in these flawed democracies.

Governments are also instrumentalizing the crisis to further weaken checks and balances, mechanisms of accountability and the strong demand for participatory democracy. In one country, for example, the executive power appointed an expert committee to draft constitutional amendments. The majority of the population reject these amendments—they entrench the power of the executive rather than making substantive changes—because they adopt a top-down approach and lack both popular input and any indications of transformational change in comparison with the previous text. In another country, parliamentary elections scheduled to be held in November 2020 are at risk of being postponed until 2021 without any consultative process involving the opposition and definitely outside the constitutional framework. Finally, in a third situation, the emergency regulations adopted allow the executive to prosecute—including prosecute without official Charge—anyone who breaches the new rules or incites others to breach them through speech or threats uttered in a public place or meeting, written or printed materials, photos, posters, audiovisual or electronic communications or any other means. In such cases, emergency regulations are an additional tool at the disposal of the executive to control citizens' voice and shrink the civic space.

Some governments in North African countries are taking advantage of the crisis—and their emergency powers—to limit citizens' fundamental rights. One particularly clear trend is heightened control of free expression and the media, including social media, under the guise

of fighting 'misinformation' about the virus. Another trend is governments' increased use of new surveillance technologies under the pretext of tracking COVID-19 patients and their contacts. There is a considerable risk that these measures will be abused, particularly if they are authorized and implemented without transparency or oversight.

Most of the governments of the region are also using the crisis to restrict public gatherings as a pretext to crack down on the wave of anti-government protests that have roiled national politics over the past several years. A key issue to watch is whether these restrictions stay in place indefinitely. Another concern is that they will be enforced in discriminatory ways, meaning that opposition protests could be curtailed while pro-government rallies are tolerated or encouraged. Governments now also have a means to ban protests without officially saying so, as shelter-in-place orders have the same effect.

Consolidation of unbalanced military–civilian relations and the issue of security

Emergency regulations and measures adopted to fight the spread of the Coronavirus in North African countries may consolidate the unbalanced relationship between militaries and civilian authorities. In every country in the region, the military is being called upon to enforce lockdowns and aid the pandemic response in other ways. While this is almost certainly warranted while there is an immediate emergency, it may open the door to increased military involvement in the economy and domestic affairs. In most of the countries of North Africa, crisis responses may also entrench already-diminished civilian control over military actors. In countries where security forces—including the police and the army—have a history of human rights abuses, ceding more policing functions to these actors may have problematic implications in terms of transitional justice and the rebuilding of national cohesion.

In the coming months, it will be crucial to monitor whether policing functions and other powers are transferred back to civilian authorities or whether the pandemic ends up permanently strengthening the role of military actors in political decision-making, economic governance and internal security. On the other hand, in countries where military actors already exert high levels of political influence, an ineffective response could potentially weaken their public image as guarantors of stability.

Aggravation of existing economic and human security challenges

The COVID-19 pandemic and the emergency regulations and measures adopted to stop it have had a serious impact on North African countries' economies. In these already economically fragile contexts, as export earnings suffer and social distancing reduces domestic activity, incomes are declining sharply—especially for informal and low-skilled workers, including within large internally displaced populations and among refugees. In addition, the interruption of tourism, the sharp fall of oil and gas prices and the drastic reduction of remittances from citizens abroad are also affecting incomes. The dramatic downturn in gross domestic product is exacerbating inequalities and straining basic sociopolitical cohesion in all these countries. The differential effects of the health crisis along key axes—rich against poor, urban against rural, region against region and citizen against migrant—may sharpen existing sociopolitical divides. The pandemic could compound those strains by exacerbating political polarization where it already exists. As the crisis worsens, opposing sides may disagree about the gravity of the pandemic or about appropriate government responses—a dynamic that could be intensified by people's greater reliance on online communication while they remain

mostly isolated in their homes, and by governments using the crisis to advance partisan agendas.

The peak of the COVID-19 pandemic is likely to overwhelm the healthcare capacities of North African countries. Most of these countries are already suffering from a shortage of medical doctors. They are also facing a lack of hospital beds and artificial respirators as well as limited access to handwashing facilities, drinking water and sanitation, thus rendering individual protection against the virus an uphill battle. Shortages, due to reduced imports and international competition for medical equipment, will stress vulnerabilities even further. Finally, all these states are facing a serious issue of access to basic public services—including water supply, food, nutrition and sanitation, environmental protection, climate resilience— particularly by the poorest and most vulnerable, such as women, refugees, migrants and IDPs. This, in part, explains the aggravation during the pandemic of entrenched problems such as gender-based violence, corruption and poverty. High levels of food insecurity will further compound these challenges. Food supplies are being affected by the impact of transport restrictions, while a range of climate-change shocks such as droughts, floods and a desert locust swarm have affected production and prices in some areas. Economic disruption will worsen in the absence of comprehensive, inclusive and participatory responses in these countries, but the scope for such actions is limited by already-scarce and fast-depleting resources.

From another perspective, the COVID-19 pandemic has affected the security situation in North African countries. First, the redeployment of most of their security forces to ensure the enforcement of emergency regulations and measures adopted to fight the spread of the pandemic rather than for border control has created a golden opportunity for unconventional actors and terrorist groups to move across the region and to develop trafficking networks and conduct illegal activities. In addition, terrorist groups are exploiting the worsening socio-economic conditions in various ways. With large numbers of students no longer studying full-time and jobless youth spending more time online, terrorist groups now have a captive audience for their radicalization discourse and messages of hatred. Governments' enhanced control of social media is unable to combat this situation. Moreover, the reported rise in cybercrime in North African countries could also lead to increased connections between terrorists and other criminal actors.

Second, a wide variety of terrorist groups have already integrated COVID-19 into their narratives and propaganda, seeking to exploit the pandemic and the weaknesses of states as well as divisions among citizens. COVID-19 and governments' emergency responses have provided fuel for existing terrorist narratives, with the pandemic being repurposed to intensify hatred of particular groups, resulting in racist and anti-immigrant hate speech. Violent attacks against migrant and refugee camps and infrastructure (such as hospitals) already testify to this.

The pandemic could also provide terrorist groups (particularly those operating in areas where the state's presence is already weak or contested) with an opportunity to step up the delivery of basic public services and promote the relative effectiveness of their unconventional care efforts. Real or perceived failures in states' COVID-19 responses have already been exploited to promote anti-state violence and reinforce narratives, while also worsening the lack of trust in the financial system, which has led to a rise in cash withdrawals in some countries in North Africa. Criminal and terrorist organizations are exploiting the movement of cash into the informal sector.

Third, the fact that countries of the region and international actors are focusing on the crisis has given some external players an opportunity to interfere in the ongoing conflict in North Africa. This strategic use of the Coronavirus has resulted in high numbers of mercenaries being imported from other regions of Africa and elsewhere, an explosion in arms trafficking and the redefinition of regional geopolitics through the formation of alliances that

are hampering the chances of a return to peace and security in the country concerned. This led to a strong call by the AUC to interrupt this destabilizing interference in line with the African Union's declaration of 2020 as the year of 'Silencing the Guns: Creating Conducive Conditions for Africa's Development' and with the quest for African solutions to African problems. Countries cannot prevent, curtail or control COVID-19 successfully while experiencing violence, conflict, terrorism and violent extremism at the same time.

4. Turning the crisis into an opportunity

North African countries could transform this crisis into an opportunity. Indeed, with the comparative advantage of some of them in terms of human resources and technological advances, they could accelerate the push towards greater digitalization of public services, generating broader gains in areas such as education and training, transparency, efficiency of access to basic services and tax administration. Increased formalization of the economy is also possible, which would improve future access to food, commodities, finance and markets for both individuals and companies. Finally, the crisis is an opportunity for these countries to rethink the urgent need to diversify their economies—to reverse their dependency on tourism, oil, gas and loans from bilateral or multilateral partners—and to design a real regional integration project in view of the operationalization of the African Continental Free Trade Area.

In terms of broader governance, the COVID-19 pandemic and its effects are opening up a window of opportunity for countries of the region that are in transition and for those that are implementing institutional reforms to firmly anchor constitutionalism and respect for the human rights (civil and political rights as well as socio-economic rights) of their citizens in their democratic development. This will naturally require political will and transformative leadership on the part of each of them.

The virus may also reshape relationships between non-state actors and governments, which could have important implications for government legitimacy and claims to sovereignty. Where governments are experiencing low levels of trust on the part of citizens, cooperating with non-state systems of governance may be essential to ensuring an effective crisis response. An illustration of this is that some of the governments of North African countries are mobilizing official Islamic institutions and authorities to help them manage the crisis, which, in turn, may also help them compensate for low levels of public trust in official communications and directives, while potentially reinforcing government control over the religious domain. However, non-state actors' enhanced role in implementing crisis responses may also strengthen their legitimacy and authority in the eyes of local communities, thereby entrenching their political influence. As in many situations of acute crisis, rapid and effective efforts by non-state actors to enforce order or deliver services can foster or reinforce alternative systems of governance, particularly if the government is seen as absent, ineffective or divisive. On the other hand, different regimes may try to use the crisis to shore up their control over non-state entities. It will be important to monitor these: in North African countries, non-state actors' heightened roles in crisis response—or, alternatively, their efforts to impede effective responses—will likely reshape citizens' perceptions of state legitimacy and their expectations of the state.

5. Conclusion

International IDEA and the African Union Commission's Department of Political Affairs are available to provide the required technical assistance to support North African countries in crafting effective policy responses to the COVID-19 pandemic in general and focusing specifically on strengthening governance systems and institutions, and building societal resilience by placing human security at the centre of the response to the pandemic. Two good examples of this technical assistance are International IDEA's recent launch of the Global Monitor to track COVID-19's impact on democracy and human rights in 162 countries, including those in North Africa, as well as the development by the African Union Commission's Department of Political Affairs of guidelines for elections in Africa during the COVID-19 pandemic or similar emergencies.

Annex

Webinar on the Impact of the COVID-19 Pandemic on Constitutionalism and the Rule of Law in North Africa Countries, 30 June 2020, 14:00–16:45 Tunis time.

Programme

14:00–14:10   **Welcoming remarks: Maurice Engueleguele**, International IDEA
14:10–15:15   **Panel presentations. Moderator: Zaid Al-Ali**, International IDEA

- **Prof. Abderrahim El Maslouhi**, Professor, United Arab Emirates University, 'Overview of State-of-Emergency Regulations, Including Their Conformity with Constitutional Provisions as well as Regional, Continental and International Norms and Standards'

- **Dr Noha Bakr**, Associate Professor, American University of Cairo, 'Impact of the COVID-19 Pandemic on State–Citizen Relations'

- **Dr Yahia H. Zoubir**, Professor of International Studies, Visiting Fellow, Brookings Doha Center, 'Impacts of the COVID-19 Pandemic and State Responses on Peace and Security in North Africa'

15:15–15:30   **Questions for panellists**
15:30–16:30   **Responses from panellists**
16:30–16:45   **Conclusion and closing: Zaid Al-Ali**, International IDEA

About International IDEA

The International Institute for Democracy and Electoral Assistance (International IDEA) is an intergovernmental organization with the mission to advance democracy worldwide, as a universal human aspiration and enabler of sustainable development. We do this by supporting the building, strengthening and safeguarding of democratic political institutions and processes at all levels. Our vision is a world in which democratic processes, actors and institutions are inclusive and accountable and deliver sustainable development to all.

What do we do?

In our work we focus on three main impact areas: electoral processes; constitution-building processes; and political participation and representation. The themes of gender and inclusion, conflict sensitivity and sustainable development are mainstreamed across all our areas of work.

International IDEA provides analyses of global and regional democratic trends; produces comparative knowledge on democratic practices; offers technical assistance and capacity-building on reform to actors engaged in democratic processes; and convenes dialogue on issues relevant to the public debate on democracy and democracy building.

Where do we work?

Our headquarters are located in Stockholm, and we have regional and country offices in Africa, Asia and the Pacific, Europe, and Latin America and the Caribbean. International IDEA is a Permanent Observer to the United Nations and is accredited to European Union institutions.

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