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Impact of Covid-19 on Freedom of Expression in Morocco and Tunisia

Elhafad Nouini

Abstract

With the onset of the Covid-19 pandemic, many countries declared a state of emergency to cope with the crisis, including countries in the Middle East and North Africa (MENA) region. This paper explores the state of emergency's impact on the practice of rights and freedoms in the region, with a focus on freedom of opinion and expression in two North African countries, Morocco and Tunisia. In these two countries, constitutional and rights-related developments have unfolded over the last few years, especially with the 2011 Constitution in Morocco and the 2014 Constitution in Tunisia. Constitutional and rights-related developments are evaluated within the framework of the state of emergency declared in both countries during the Covid-19 crisis. This study sought to determine the extent to which the state of emergency impacted rights and freedoms in Morocco and Tunisia, with a focus on freedom of expression. The results show that both countries are still lacking in terms of constitutional protections for free expression, and for fundamental rights and freedoms in general. The systems of governance in Morocco and Tunisia, especially their executive authorities and security apparatuses, still engage in authoritarian practices and do not shy away from exploiting any extraordinary or exceptional situation to further consolidate their power and reach.

Keywords: State of Emergency; Rights and Freedoms; Covid-19; Morocco; Tunisia

Introduction

The Covid-19 pandemic is under the spotlight in the scientific and academic communities, being as it is a novel, inexhaustible, and multidimensional field for writing, research, and studies. Covid-19 has caused great upheavals and dilemmas in our contemporary world, as it is perhaps the most dangerous pandemic afflicting humanity over the last century. In the name of protecting their citizens, states have taken remedial and preventive measures.

The Covid-19 pandemic threatens the normal institutional functioning of constitutionally-governed states, and it threatens the lives of persons residing in these states. There looms fear of a

large death toll from the pandemic. This rare, exceptional state of affairs has required urgent, unusual, and exceptional measures, foremost among them a state of emergency. A state of emergency is declared to run and protect the country, in accordance with the famous Roman saying “The safety of the People is above the law.”¹

Seemingly overnight, states of emergencies were adopted all over the world; impelling us to review the concept of the state of emergency together with related or equivalent concepts, such as the state of exception, the state of health emergency, and the state of siege. These states all refer to legal systems that replace the normal functioning of a country's system of governance.² In particular, a state of emergency leads to the expansion of a government's executive powers and its security institutions, as security apparatuses are primarily in charge of governing during extraordinary or exceptional times. Concurrently, the state of emergency shrinks the space to exercise rights and freedoms in a country.

The concept of a state of emergency, siege, or exception was linked in earlier times to military coups against the ruling regimes. As such, a state of emergency is usually correlated with a security disruption or attempt at regime change. With few exceptions, a state of emergency has never before been associated with a public health crisis. This includes but is not limited to the 'Spanish Flu'³ in 1918, the SARS virus afflicting China and other countries in 2002-2003,⁴ the swine flu in 2009,⁵ and the Ebola virus, which had two outbreaks in 1976 and 2014.⁶ Now a public health crisis has arrived in the form of Covid-19, which is responsible for the most widespread public health emergency as of yet witnessed on a global scale in the twenty-first century.

This paper highlights an important aspect of the Covid-19 crisis, which is the impact of the state of emergency declarations in Morocco and Tunisia on basic rights and freedoms, especially the right to free expression and opinion. By studying and monitoring the impact of these emergency declarations on human rights in the two countries, this paper confirms the hypothesis that Morocco and Tunisia took advantage of the state of emergency; using it not only to confront Covid-19 but also to extend and reinforce their regimes' security reach and authoritarianism at the expense of rights and freedoms. Setbacks have resulted in rights victories achieved after the 2011 uprisings in the MENA region. These rights are stipulated in the two recent constitutions of Morocco and Tunisia, enacted in 2011 and 2014 respectively, especially the right to freedom of opinion and expression.

The main question problematized by this paper is the extent to which the state of emergency impacted rights and freedoms in Morocco and Tunisia, especially the right to freedom of opinion and expression. In order to problematize this question, this paper relies on the analytical legal method, which is based on analysing and deconstructing legal, regulatory, and constitutional texts to reach conclusions on concepts, expressed through the texts, within the context in which they were written. The case study method will also be used as an analytical tool.

State of Emergency in the International System, Rights and Freedoms

The study of the state of emergency is important; albeit the enactment of an emergency state hypothetically only occurs in exceptional circumstances and in specific contexts, and for specific durations of time. In other words, the state of emergency is framed with conditions that temporally limit its field of action. During states of emergency or exception, a departure from the ordinary happens, which in turn limits a number of rights and freedoms stipulated in international charters and national constitutions.

The definitions of the state of emergency differ between a number of thinkers, researchers, and writers, rendering it difficult to accurately define and categorise. French jurist Maurice Horio defined the state of emergency as 'a legal system prepared in advance to secure the country, based on strengthening powers by transferring civilian power to the hands of the military authority'⁷. Yazilian Kensch defined it as: 'the state that occurs when exceptional crises and disturbances are provoked, and can be considered a legal system in the service of the state, which meets the requirements of efficiency in the context of war or crisis, and which uses methods of restraint to maintain public order. These legal techniques must enable the state to achieve the goal it seeks to achieve – i.e., the rule of law - especially by concentrating the powers in its hand and restricting rights and freedoms'.⁸

When reviewing the definitions of the state of emergency, we note that most of them fall short of providing a direct definition, instead limiting themselves to presenting the purpose of the state of emergency's declaration. In general, the purpose of a state of emergency is to strengthen the executive authority by transferring some of the legislative and judicial powers to it, or to establish an exceptional legal system for the benefit of the institutions of the executive authority. The latter is liberated from the restrictions imposed on it during ordinary circumstances. In addition, the exercise of a number of rights and freedoms is restricted under the state of emergency's cover, to a degree that sometimes exceeds acceptable limits.⁹

The state of emergency is referenced in international law, within international agreements. International human rights treaties have granted states the right to place restrictions on the exercise of internationally guaranteed rights, as these treaties are the legal basis for declaring a state of emergency in exceptional circumstances. The International Covenant on Civil and Political Rights (ICCPR), and the International Covenant on Economic, Social and Cultural Rights (ICESCR) include provisions that allow member states to restrict rights and freedoms under their national laws in a state of emergency.

International human rights law regulates how this power is exercised, so that it does not become an excuse that the state can freely use; and so that the emergency declaration is decided upon according to its own merits and practices. International human rights law has established a legal system for rights restrictions in normal and exceptional circumstances, to ensure that human rights abuses and violations do not occur and to ensure the legitimacy of restricting rights and freedoms is enshrined in national legislation.¹⁰

The ICCPR regulates the practice and restriction of political and civil rights during a state of emergency. The ICCPR is the basic rights convention included within the framework of the United Nations. Outside of the UN framework, the right to free expression is guaranteed by both the European and American conventions on human rights, while this right is not guaranteed by the African Charter on Human and Peoples' Rights.¹¹

States and governments have begun to respect the rules and ethics underlying the declaration of an exceptional or emergency state, since it was stipulated in the ICCPR, which entered into force on 23 March 1976. Article 4 of the ICCPR provides for the conditions necessitating the practice of an emergency state, and for restriction upon the exercise of fundamental rights and freedoms.¹²

In addition to the ICCPR, there are European Convention on Human Rights and the American Convention on Human Rights, which entered into force in 1958 and 1978 respectively.¹³ The conventions address the state of emergency and restrictions on the exercise of some rights under emergency circumstances, and the conditions for deploying these restrictions. There are also the Siracusa Principles of 1984, adopted by the United Nations Social and Economic Council, as well as the general comments issued by the Human Rights Committee. These principles, developed by a committee of twenty-one international experts, provide guidance on the state of emergency and rights and freedoms. Explanations are given for all measures that may be taken in the context of the state of emergency and in regards to restricting fundamental rights and freedoms.¹⁴

When declaring a state of emergency, international law stipulates conditions that must be met to restrict rights and freedoms:

- Threatening the life of the nation. What is meant by this criterion is that the state party to the International Covenant is exposed to an imminent and unusual danger, which necessitates the disavowal of its international obligations arising from it, especially in the field of human rights. This disavowal of obligations, including human rights obligations, is deemed necessary due to the extraordinary circumstances threatening the state's existence and stability, which in turn impedes the functioning of public life within it, jeopardising the entire nation;¹⁵
- Official declaration. The state is required to officially declare the state of emergency;
- Goal. The goal of this declaration shall be to protect public interest;
- Determining the period of time and achieving balance. The state must achieve a balance when it limits rights and freedoms during a state of exception and emergency – a balance between the measures and procedures it takes during this period and the requirements of the situation i.e. within the limits of the state of emergency; provided that the conditions are met for declaring a state of emergency and for restricting the exercise of the rights stipulated in the International Covenant;¹⁶
- Legal stipulation. That is, this situation must be stipulated in the domestic law of the state - especially the constitution - so that all its procedures are constitutional and legal;¹⁷

- Rights that may not be suspended. Article 4 of the ICCPR stipulated the right of states to suspend fundamental rights and freedoms, by providing conditions in normal and exceptional circumstances for the permissibility of this restriction. In the same article, in the second paragraph, it excluded some of the stipulated rights in Articles 6 and 7, the first and second paragraphs of Article 8, as well as Articles 11, 15, and 16, of this restriction. This is because the rights contained within these articles are not subject to infringement, and the state is prohibited from including them in the rights that are subject to suspension. These rights are protected by the force of international law, and therefore they cannot be abandoned, in order to preserve human dignity in all circumstances by the state parties to the International Covenant.¹⁸

In general, it appears that the provisions of article 4 (that prohibit the state from excluding or violating the fundamental rights referred to in the second paragraph during a state of emergency) did not achieve the goal for which these provisions were stipulated. Imposing restrictions or limiting other rights related to the inviolable rights, made the latter rights have little effect when declaring a state of public emergency in the country.

On the other hand, the obligation of state parties under the third paragraph of article 4 to inform other state parties immediately of the provisions to which they did not adhere and the reasons that prompted them to do so, is intended to circumscribe the powers of the state when it restricts or denies basic rights. In this respect, article 4 establishes a system for international monitoring of the extent to which the state respects fundamental rights and freedoms, during normal or exceptional circumstances.¹⁹

According to international law, the state of emergency is an exceptional state that cannot be transformed into a normal state of governance that lasts indefinitely. Neither can it be used by governments as a cover to restrict and disrupt the exercise of the fundamental rights and freedoms guaranteed by international human rights conventions and contained within the constitutions of most countries.²⁰

Legal Framing of Covid-19's State of Emergency in Morocco and Tunisia

Most national constitutions frame states of exception and emergency in a way that gives public authorities more powers to manage the situation. In connection with the Covid-19 pandemic, a health crisis afflicting the world, most countries did not differentiate between the state of emergency and the state of health emergency in their legal systems. They consider the latter as a rare occurrence, so it is absent from their legal systems. In contrast, there commonly is a legal and constitutional framing for the state of emergency. Furthermore, there are also countries that have adopted a state of health emergency. Accordingly, we will refer to the state of emergency and the state of health emergency as one state – simply a state of emergency - since the first includes the second.

In the case of Morocco, the government attempted to respond to the standards stipulated in international law. As such, the Moroccan Constitution of 2011 stipulated a state of exception and emergency in articles 59 and 74, to give the king broad powers to take measures by way of adapting to changing emergency circumstances. These include the power to suspend the exercise of rights and freedoms. By indicating the parameters of the exceptional circumstances, Morocco's constitution has adhered to the basic standard stipulated in the ICCPR, especially with regard to threats to territorial integrity, or the occurrence of events that hinder the normal functioning of government institutions.²¹

The reasons necessitating the declaration of a state of exception according to the 2011 Moroccan Constitution are broad and vague. The language is malleable and imprecise, which leaves the interpretation of constitutional provisions open to the ruling authority, which may consider virtually anything a threat to territorial integrity or an obstruction upon the functioning of public institutions.²² Consequently, the interpretation remains open to events during which the authority may deem it necessary to declare a state of exception, which in some cases may not constitute a real threat to the nation's territorial integrity or the functioning of its institutions.²³

The Moroccan government had previously declared a state of exception and emergency, but it was largely due to an explicit threat to the ruling system. Moroccan constitutions thus sought to grant absolute authority to the executive government authorities, in regards to determining the reasons for declaring a national state of emergency. A debate arose on this issue after King Hassan II declared a state of exception in 1965, which confirmed the orientation of the Moroccan constitutions regarding emergency/exception.²⁴ All this left the Kingdom in a legal and constitutional vacuum when it was hit by the global health crisis of Covid-19. This pushed the government to rectify the matter²⁵ by stipulating Decree Law No. 2.20.292 related to the state of health emergency and the procedures for declaring it, and Decree No. 2.20.293 related to declaring a state of health emergency across the country to confront the coronavirus outbreak.²⁶ The Moroccan government invoked article 81 of the constitution, which allows it to issue laws during the interval between parliamentary sessions.²⁷

The two decrees - consisting of seven articles in the first and five in the second - declared that Morocco is in a state of health emergency under Article 1 of Decree Law No. 2.20.292. That decree also affirmed that the government has the right to take all legislative, organisational, administrative and other measures during the emergency period. It deemed it within the government's powers to mobilise all possible means and measures necessary to prevent the Covid-19 crisis from worsening.²⁸

Whereas in Article 4 of the same decree states that anyone who violates orders and decisions issued by the public authorities is subject to imprisonment for a duration ranging from one to three months, and a fine ranging from 300 to 1,300 Moroccan dirhams (28 to 121 euros). This is in addition to the application of the penal code or criminal law when deemed necessary. The article adds that all citizens are subject to the same penalty if they obstruct or interfere with – in any manner- the work of the public authorities in managing emergency or exceptional circumstances.²⁹

The Moroccan government, in Decree No. 2.20.293 related to the procedures for declaring a state of health emergency, defined these measures and determined their duration (set them for thirty days). It generally stipulated the transfer of all legislative, executive and administrative powers in favour of the Ministry of Interior and authority figures, from governors, workers and leaders subordinate on various local scales. This decree enabled them to take all measures and issue any decision required by the state of health emergency, in a way that gives Ministry of Interior officials the power to enact these measures based on their personal reading of the epidemiological situation in the geographical areas in which they are based.³⁰ The measures taken were related to movement in general, as the right to movement was prohibited with few exceptions by means of a travel permit granted by the Ministry of Interior's local officials.³¹

The government did not stop at the two decrees. It continued to extend the state of health emergency by legislating new decrees without resorting to parliament, which is invested with original jurisdiction. In 2020, the government issued Decree No. 2.20.330 on 9 April,³² Decree No. 2.20.371 dated 19 May,³³ Decree No. 2.20. 406 dated 9 June,³⁴ and Decree No. 2.20.503 dated 8 August.³⁵ The legislation of all these decrees sparked an extensive debate in academic, partisan and political circles inside Morocco, given that the government did not find direct constitutional support for the decrees, and relied on articles 21, 24, and 81. Intensifying the debate was the executive governing authority's lack of reliance on parliament, and its failure to involve parliament in other decrees. Nevertheless, there remain legislative solutions to deal with the legal vacuum related to the state of emergency. In this paper, we focus on rights and freedoms during this period, without entering into debates related to the legal and constitutional framework regulating the state of emergency in Morocco.

In comparison, the Tunisian state has witnessed less debate and disagreement than Morocco in regards to the legal and constitutional framework regulating the state of emergency. This is because Tunisia has been under a state of emergency since late 2015, after the terrorist attack on the presidential security convoy in the capital Tunis.³⁶ Since then, the state of emergency has remained declared in Tunisia, renewed every time.

When the pandemic reached Tunisia, the legal basis for taking favourable measures had already been established, given that the country was already in a state of emergency. Executive decisions and orders were straightforward to issue. President Kais Saied, by presidential order, imposed curfew all over Tunisia from six p.m. to eight a.m., starting on 18 March 2020 until further notice, with exceptions made for medical emergencies.³⁷ The President issued a second order, in the context of responding to Covid-19, that banned gatherings of more than three persons in public places. It banned the movement of people and vehicles during curfew times.³⁸ The presidential orders, similar to decrees, are legally binding and constitutionally based, especially Article 80 of the constitution, which gives the president the right to enact measures necessitated by the state of emergency.³⁹

The Tunisian state also granted a mandate to the head of government in the form Law 19 of 2020, whereby the president can issue legislative decrees to confront and address the Covid-19 pandemic. This law, which consists of four articles, covers rights and freedoms. It provides that

the management of human rights in Tunisia during a state of emergency will be in line with the epidemiological situation in the country. The law contains provisions on how to resist the spread of the virus and harness efforts to eradicate it, in a manner that does not contradict the requirements of Article 49 of the Tunisian Constitution.⁴⁰

In the same context, and in order to control the spread of the pandemic, the Tunisian government criminalised every breach of curfew during quarantine, and set a fine for those who violate the curfew at fifty Tunisian dinars (fifteen and a half euros). Furthermore, anyone (especially the infected) who does not comply with the preventive and remedial measures to limit the spread of the novel coronavirus is penalised with a fine ranging from 1,000 to 5,000 Tunisian dinars (308 and 1544 euros). In the event that a person is the source of transmission to another person, the vector shall be punished according to the criminal procedures law and the penal code, as the vector is considered a person who has committed a crime requiring imprisonment.⁴¹ Based on that law, the government issued another decree to address the social and economic impacts of the coronavirus. According to the decree, the quarantine is to be gradually lifted in accordance with a strict preventive system, and some economic activities can be resumed according to a specific program and government plan related to developments and evaluation of the pandemic situation in the country.⁴²

In July, the Prime Minister issued a government order to end the state of comprehensive quarantine imposed on the country during the month of March 2020.⁴³ The state of emergency continued and was extended for six months, beginning on 30 May 2020 and ending on 25 November 2020, by order of the President who had previously stated that the emergency law is unconstitutional, saying that he is, 'obliged to extend the state of emergency, like someone holding a burning coal'.⁴⁴

There were many violations of rights and freedoms during the state of emergency in Tunisia, and these violations were shown even more clearly during the imposition of the quarantine. There was a debate regarding the constitutionality of the presidential order of 2015 declaring a state of emergency in the country, which continued to extend automatically; there was also debate regarding the legality of restrictions on the exercise of some rights. Article 49 in the constitution explicitly provides that: 'The law determines the controls related to the rights and freedoms guaranteed in this constitution and their exercise in a way that does not undermine their essence'.⁴⁵

Impact of the Health Emergency on Freedom of Expression in Morocco and Tunisia

Restricting freedoms under the pretext of applying the law has been problematic throughout history. For example, the US Supreme Court heard a case in 1985 on the killing of a child, accused of stealing ten dollars, by a policeman during⁴⁶pursuit. Several issues were raised. Although the policeman behaved according to the law and sought to preserve public order, that behavior cost a person's life over a very small sum of money. Is it permissible to deprive a person of their right to life in order to preserve public order, security or health? Does the problem lie within the laws

that do not provide for the principle of proportionality and gradualism in the strict application of the legal rule across different contexts?⁴⁷

The Office of the United Nations High Commissioner for Human Rights has warned against the exploitation of states of emergency by governments to retreat from human rights gains. The OHCHR called for the observance and inclusion of human rights during the response to Covid-19, and a number of United Nations human rights experts issued a memorandum at the beginning of the pandemic's global spread, in which they warned countries against using state of emergency to settle scores with individuals or groups, or to suppress and violate human rights in their countries.⁴⁸

Since their respective declarations of a state of emergency in response to the Covid-19 pandemic, both Morocco and Tunisia have taken a number of measures that restrict the rights and freedoms of their citizens. While many rights were negatively affected during the public health crisis, the focus of this study is limited to freedom of expression and opinion, as an illustrative case.

In Morocco, since the declaration of the state of emergency⁴⁹ and the restriction of movement throughout the country on 20 March 2020, all powers have been transferred to the executive authority, and the hand of the Ministry of the Interior has been significantly extended ever since, especially in regards to violating rights and freedoms. A large number of the executive authority's agents have transgressed human rights, and at times, cases of violence by security forces against citizens, especially in the first weeks of the health emergency, were documented.⁵⁰

The Moroccan government also took advantage of the exceptional global health emergency to restrict and deny the right to free expression and opinion in the country. It prevented the printing of newspapers for more than two months, and did not allow printing to resume until 26 May 2020.⁵¹ Moroccan human rights organisations considered the Moroccan authorities' violations of the right to free expression during the health emergency as tantamount to a 'human rights setback'.⁵²

Within the framework of Law Decree No. 2.20.292,⁵³ the Public Prosecutor's Office moved the arrest and prosecution of 91,623 persons who violated the state of emergency, including 558 people in detention simply for violating quarantine measures, up to 22 May 2020 - according to an official statement from the Moroccan Public Prosecution Office.⁵⁴ Among the detainees were five journalists arrested solely for exercising their right to free expression and opinion. After expressing their views on the state's response to the Covid-19 crisis, the journalists were arrested and prosecuted under emergency law on charges such as 'broadcasting false facts', which does not constitute a crime in such exceptional circumstances, according to the international standards.⁵⁵

Three journalists from among the five arrested - Mohamed Bouzrou, Mohamed Shajia and Hassan Al-Morabti - were arrested on 17 and 19 April for expressing their opinions on a Facebook page called 'Fazaz 24'. They criticised some of the government's behaviours and actions in regards to measures taken in response to the Covid-19 crisis. This included a comment about the 'clientelism' that marred the distribution of aid to citizens. Later on, the authorities released one of the journalists, while the other two remain behind bars.⁵⁶

On May 15, security forces arrested another journalist in the city of Figuig because he too exercised his natural right to express his opinion, which is guaranteed by all international

covenants and Morocco's 2011 constitution. Authorities arrested the journalist after he commented on social media that he considers some practices by authority figures to be 'violations of human rights'. Amna Goulali, Deputy Director of the Middle East and North Africa Regional Office at Amnesty International, said that Morocco should not use the state of emergency to 'silence the voices of those who dare to criticize the government's measures to confront and deal with the pandemic'.⁵⁷

The Moroccan government further exploited the state of emergency by attempting to pass law number 22.20 related to the use of social networks. The law was set to restrict freedom of opinion and expression for Moroccan citizens, especially on social networks.⁵⁸ Yet the law's passage was prevented by the pressure exerted by Moroccan public opinion, including a substantial amount of popular protest and rejection on social media, forcing the government to postpone its consideration.⁵⁹ The law, which was presented by the Minister of Justice and approved by the Government Council, is evidence of the concerns previously raised about the exploitation of the state of emergency to eliminate basic rights and freedoms, foremost among them the right to freedom of opinion and expression.

The 'postponed' bill consists of twenty-five articles, including articles that criminalise speech on the Internet. Article 14 stipulates that anyone who incites a boycott of products, goods or services shall be punished with imprisonment of three months to three years and a fine of 5,000 to 50,000 Moroccan dirhams. Article 16 of the draft law itself criminalises anyone who publishes or promotes electronic content, which includes false news, with a prison sentence of three months to two years and a fine of 1,000 to 5,000 Moroccan dirhams.⁶⁰ It is worth noting here that the falsity of the news is determined by the government, and therefore there is no specific and clear criterion for determining the meaning of 'falsity' here.

The articles of this law contradict international human rights obligations, and in particular the article 19 of the ICCPR, which does not allow states to restrict freedom of opinion and expression except in accordance with international standards. Accordingly, the United Nations ranked Morocco among the countries that violated human rights during the state of emergency to confront Covid-19. The Office of the High Commissioner for Human Rights confirmed in a statement that there are more than eighty countries - including Morocco - that have exploited the state of emergency to violate rights and freedoms, while citing the need to resolve the public health crisis. The High Commissioner's statement stressed that, 'emergency powers must not be transformed into a weapon in the hands of governments to be used against opposition, monitor peoples and stay in power'.⁶¹

The rights situation in Tunisia is less severe compared to Morocco. Since its announcement of the quarantine to confront the outbreak of the novel coronavirus, the government has taken a number of measures and procedures, the first of which was to impose a curfew on 18 March 2020, and tighten the screws on people's freedoms outside the hours of the ban. The President used the army - deployed on the national level across the territory - to impose these measures under the cover of fighting the pandemic's spread.⁶² Several Tunisian human rights organisations confirmed that these governmental measures were taken to limit the right of citizens to express opinions on

public policies in the country, taking advantage of the quarantine. Rights organisations also condemned the arbitrary practices of security personnel against individuals who left their homes for shopping.⁶³

The Tunisian authorities took advantage of the state of emergency and quarantine imposed in the country due to the Covid-19 pandemic, and arrested a Tunisian blogger simply for expressing her opinion. The blogger in question shared a satirical post on her Facebook page entitled 'Surat Corona'. She was sentenced to six months imprisonment and a fine of 2,000 dinars (616 euros) for 'insulting the sacred, outraging morals and inciting violence'. Human rights organisations, including Amnesty International, called for the release of the Tunisian blogger and for the government to respect free opinion and expression, especially considering Tunisia's status as an emerging democracy in which it is not appropriate for the government to exploit a public health emergency to restrict basic freedoms and rights.⁶⁴

Tunisian rights activists are concerned about the rapidity with which this blogger's case was handled. Some expressed astonishment at the way the case proceeded, especially in light of the exceptional circumstances in Tunisia - the state of emergency and quarantine. What raised suspicion is that the authorities did not prosecute more serious violations, such as domestic violence, in the same speed and manner.⁶⁵ This is even more problematic given that Tunisia's 2014 constitution - considered the most supreme legal document in the country - guarantees the exercise of freedom of opinion and expression for all individuals without restriction.⁶⁶

Media professionals and those interested in Tunisian public affairs expressed their dismay and frustration at the measures taken by the government under the cover of the health emergency and home quarantine, which contributed to restricting freedoms and hindering access to information. In effect, official media platforms became the only parties that obtained information, which in turn made the exploitation and manipulation of this information highly probable. On the occasion of World Press Freedom Day, Ritaj Ibrahim of the Arab Foundation for Freedoms and Equality stated: 'This pandemic has placed additional restrictions and made the task of journalists more difficult, as it made it difficult for them to access information, and complete information cannot be accessed through the use of the Internet only'.⁶⁷

Tunisia continues to exploit the state of emergency and quarantine to restrict rights and freedoms, especially free expression and opinion. It is still unwilling to legislate a law regulating the press council, which in turn would ensure the protection of freedom of expression and the press from deviations, abuses of power, and unprofessional practices by the authorities. A law regulating the Press Council would develop a code of ethics based on respect for human rights and free expression, contributing to education on human rights in Tunisian society, given that genuine democracies value a free press. The Tunisian government, however, is still hindering the process, and during the home quarantine period withdrew a bill on the press council.⁶⁸

On the legislative front, Tunisia exploited the state of emergency to make urgent amendments to articles 245 and 247 of the Criminal Code, with the aim of controlling free opinion on social networks and restricting free expression in all electronic media, criminalising the '[disclosure of]

any false or suspicious speech among users of social media networks and platforms, which may be offensive to individuals, groups, or institutions'.⁶⁹

These amendments regarding freedom of expression in the digital sphere completely contravene the Tunisian constitution and international human rights obligations. Article 31 of the constitution guarantees the freedom of expression, thought, opinion and access to information. It affirms that censorship is not permissible, while Article 49 states that the law defines the controls and restrictions on rights and freedoms in a manner that does not affect their essence, and adds that no amendment is permissible that contradicts human rights gains guaranteed in the constitution.⁷⁰

Nevertheless, Tunisia's violations of free expression and opinion during the state of emergency remain less severe than Morocco's violations. The latter recorded a large number of cases in which the right to free expression, thought and opinion was restricted. In general, all Arab countries, especially in North Africa, have taken advantage of the state of emergency declared during Covid-19 to limit the exercise of rights and freedoms. In particular, states sought to control freedom of expression and settle their accounts with dissidents during this exceptional period. This should not be the case, given that these countries are undergoing extraordinary circumstances that require a focus on overcoming the crisis rather than making gains for regimes.

Countries must rely on UN and international standards when dealing with human rights during pandemics, crises, emergencies, and exceptional circumstances, to allow their citizens to discuss and debate issues related to home quarantine, as well as express their views on measures and procedures related to public health emergencies. Previous experience with HIV showed that there is no justification for restricting and limiting rights and freedoms, especially free expression, and access to information. On the contrary, systems must be in place to guarantee access to information, and to allow everyone to freely express opinions and ideas.⁷¹

Conclusion

The Covid-19 pandemic has demonstrated the fragility and weakness of constitutional guarantees for rights and freedoms in North African countries, including those countries caught in the fervour of the 2011 Arab uprisings and that developed and changed their constitutions in consideration of international human rights standards. Likewise, the pandemic made clear that authoritarian regimes always remain true to their authoritarian traditions; they need only an opportunity to reproduce the same old authoritarian patterns. This is what we observed in the cases of Morocco and Tunisia, which witnessed multiple violations of rights and freedoms - especially the right to free opinion and expression - during the state of emergency enveloping the two countries.

Government authorities in Morocco and Tunisia arrested journalists and citizens simply for expressing their views, and also attempted to restrict this right by legislating draconian laws. This highlights the importance of having constitutional provisions and legal texts regulating the right to freedom of expression, opinion and thought, formulated in a way that fully recognises this fundamental right in the democratic system. This legislation should ensure the exercise of rights is not subject to restrictions set during exceptional circumstances except in a clear manner that

evokes proportionality and the Siracusa Principles in detail and free of any ambiguity and confusion that can be exploited by states.

Yet in Morocco and Tunisia - two constitutional states that have stipulated their commitment to international rights standards - the violation of human rights is the norm, not the exception. This widespread lack of respect for rights in the two countries was made evident in the context of their respective declarations of an emergency state in response to Covid-19. Both states took advantage of this period to consolidate the authoritarianism of their security apparatuses, and to grant the executive ruling authority more powers against all other branches of governance.

About the Author

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- ¹⁷ Ahrachan, Omar (2020) 'Rights and Freedoms in the state of emergency: problems with legislation, adequacy and application', p. 221.
- ¹⁸ These untouchable rights were determined after long discussions and debates between negotiating parties in the Preparatory Committee for the International Covenant, and by invoking all political, economic and military circumstances, the second paragraph of Article 4 was stipulated, and the importance of it to preserve human dignity. It is not permissible to violate according to Article 4: the right to life and the arbitrary deprivation of anyone of his life, torture or inhuman or degrading treatment, the right to not be subjected to servitude, the prohibition of slavery and the slave trade, the inability to imprison anyone for not being able to fulfill a contractual obligation, inadmissibility of retrogression of penalties or imposition of punishment more severe than they were, recognition of legal personality, the right to profess and practice the faith. See article 4, ICCPR (1976).
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- ³⁰ Article 3, decree 2.20.293 on the declaration of health emergency.
- ³¹ Ibid, article 4.
- ³² Official Gazette, Vol 6874, 25 Shaban 1441 (19 April 2020), p. 2218.
- ³³ Official Gazette, Vol 6883, 25 Ramadan 1441 (19 May 2020), p. 2776.
- ³⁴ Official Gazette, Vol. 6889, 17 Shawal 1441 (9 June 2020), p. 3394.
- ³⁵ Zahrouni, Samla Youssef (2020) 'Review of decree 2.20.503 in Morocco', *The Arab Union of Judges*, 9 August, accessed 22 August 2020, <https://bit.ly/3gdhGU0>.
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- ³⁷ Presidential order 24/2020 issued 18 March 2020 regarding curfew across the republic (2020) *Geneva Center for Security Sector Governance*, 18 March, accessed 22 August, <https://bit.ly/3j2fel5>.
- ³⁸ Presidential order 28/2020 dated 22 March 2020 regarding curfew and banning of gathering outside curfew times (2020) *Geneva Center for Security Sector Governance*, 22 March, accessed 22 August 2020, <https://bit.ly/2CPYy0C>.
- ³⁹ Article 80 of the Tunisian Constitution 2014: 'In the event of imminent danger threatening the nation's institutions or the security or independence of the country, and hampering the normal functioning of the state, the President of the Republic may take any measures necessitated by the exceptional circumstances, after consultation with the Head of Government and the Speaker of the Assembly of the Representatives of the People and informing the President of the Constitutional Court. The President shall announce the measures in a statement to the people. The measures shall guarantee, as soon as possible, a return to the normal functioning of state institutions and services. The Assembly of the Representatives of the People shall be deemed to be in a state of continuous session throughout such a period'.
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