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# The independence of the judiciary in Algeria: the failure of the rule of law

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**Collectif des Familles de Disparu(e)s en Algérie**

77 bis rue Robespierre

93 100 - Montreuil

**Phone** : +33 9 53 36 81 14

**Email** : cfda@disparus-algerie.org

**Website** : <https://www.algerie-disparus.org>

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**Author** : Collectif des Familles de Disparu(e)s en Algérie

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# EXECUTIVE SUMMARY



The concept of separation of powers is one of the foundations of democracy. In a state governed by the rule of law, the judiciary counterbalances the executive, guaranteeing respect for the hierarchy of norms and equality before the law and justice. As Montesquieu said, « power stops power ». The judicial system, a real bulwark against authoritarianism, submits public action to the principle of legality. As such, it is its responsibility to fight against the impunity of the state. However, despite the various institutional reforms, including the latest one in 2020, the Algerian regime uses its judicial system to create impunity, which constitutes a violation of international human rights law.

In Algeria, this separation of powers, although guaranteed in the facade by the constitution, is only very little effective, with a concentration of legislative and judicial powers in the hands of the chief executive. The interference of the head of the executive in the attributions of the judiciary is materialised, for example, in the constitution of the Superior Council of the Magistracy. Indeed, the president of this body, which is supposed to guarantee the independence and impartiality of magistrates, is none other than the President of

the Republic. The President appoints the President of the Supreme Court, who also holds the post of who also holds the position of vice-president of the Superior Council of the Magistracy. This structural organisation ultimately creates a consubstantiality of powers.

Furthermore, the texts implementing the Charter for Peace and National Reconciliation, which came into force in 2006, institute the omnipotence of the executive power vis-à-vis the legislative and judicial powers. They prohibit all legal proceedings against agents of the state who served its interests during the 1990s, and deprive Algerians wishing to obtain the Truth and Justice on the fate of their disappeared relatives of their rights of their relatives who disappeared during the the 1990s and instrumentalism the judiciary, transforming it into de facto a tool of repression against voices of dissent.

The interest of this report is therefore to demonstrate how the organisation of powers, the pre-eminence of the executive in the political system, and the lack of independence of the Algerian judiciary contribute to guaranteeing the impunity of state agents guilty of serious human rights violations and perpetuate the negation of human rights in Algeria.

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# INDEX

**ARBITRARY** – the character of arrest or detention where it is ordered by a discretionary decision, contrary to national laws and international law. Arbitrary arrest and detention constitute deprivation of liberty, but more often than not involve the violation of other fundamental rights, ranging from the simple right to a fair trial to the right to be free from degrading or inhuman treatment, or worse, the right to life, including extrajudicial execution.

**CHARTER FOR PEACE AND NATIONAL RECONCILIATION** - a law adopted by referendum in 2005 and made applicable by Ordinance No. 06-01 of 27 February 2006, as well as by Presidential Decrees No. 06-93 of 28 February 2006, on compensation for victims of the national tragedy; No. 06-94 of 28 February 2006, on assistance to destitute families affected by the involvement of their loved ones in terrorism; and No. 06-95 of 28 February 2006, on the declaration provided for in Article 13 of Ordinance No. 06-01.

This is an amnesty law which led to the release of members of Islamist groups and instituted the most total impunity for state agents. Indeed, the texts implementing the Charter prohibit the prosecution of the security forces, and propose to compensate the relatives of those who disappeared during the black decade if they accept that a death sentence be issued by a court.

**HUMAN RIGHTS COMMITTEE** – a subsidiary body of the United Nations established by the International Covenant on Civil and Political Rights, adopted on 16 December 1966 by the General Assembly, and created in 1976. It is responsible for monitoring the implementation of the Covenant, and makes recommendations to States Parties. These recommendations are not binding, which means that the Committee has no power of sanction. However, it has an important symbolic authority on the international scene.

**NATIONAL CONSULTATIVE COMMISSION FOR THE PROMOTION AND PROTECTION OF HUMAN RIGHTS (CNCPPDH)** – Algerian institution in charge of evaluating the human rights situation in the country. The CNCPPDH was originally created within the framework of UN General Assembly resolution 48/134, encouraging member states to establish independent, non-judicial institutions, recognised in the Constitution, responsible for promoting and protecting human rights. These National Human Rights Institutions (NHRIs) must meet the Paris Principles listed in the annexes to resolution 48/134 and guarantee the independence, effectiveness and credibility of these institutions. Transparent appointment of members, sufficient human and financial resources, a comprehensive mandate and privileged access to political leaders - without being dependent on them - are necessary. NHRIs should produce reports assessing the human rights situation in their respective countries.

**SUPERIOR COUNCIL OF MAGISTRACY (CSM)** – an institution whose main objective is to guarantee the independence of the judiciary, thus applying the concept of separation of powers in the Algerian political system. It was established by the first Algerian constitution; its role, functions and composition are now defined in Articles 180, 181 and 182 of the 2020 Constitution.

According to the 2020 Constitution, the CSM is responsible for monitoring and managing the careers of magistrates. In other words, it decides on transfers and promotions of individual magistrates. It is chaired by the President of the Republic, and its vice-president is the first president of the Supreme Court, himself appointed by the President of the Republic. A symbol of the constitutional failure to separate powers in Algeria, the Superior Council of the Magistracy is, according to Article 181 of

the Constitution, 'provided with specific judicial functions by presidential decree' and ensures 'the control of magistrate discipline' under the influence of the executive.

Theoretically created to guarantee the independence of the judiciary and to promote the rule of law, the CSM is in reality only an additional tool at the disposal of the executive power to exert pressure on magistrates who act in opposition to the will of the government. By way of illustration, the magistrate Saadeddine Merzoug was heard by the CSM on 25 January 2021 for « inciting judges to join an organised strike », « obstructing the functioning of the judiciary » and « inciting CSM members to join the popular movement »<sup>1</sup>. As a result of these charges, he was suspended for several months and deprived of half his salary.

**CONSTITUTION** – a set of rules that covers a formal and a material criterion. Formally, the constitution was defined by Aristotle as the primary law from which all other norms flow. It is placed at the top of the hierarchy of norms of the internal legal order and serves as the basis for the validity of all other norms. It is also protected by a more complex revision procedure than other laws. In material terms, the constitution guarantees the autonomy of the people, provides for and protects human rights, and contains provisions on the organisation of the state, particularly with regard to the distribution of state powers.

**DEMOCRACY** – a political system in which political power is exercised by the sovereign people, directly, through a referendum, and/or indirectly, through their representatives. It is therefore referred to as direct or representative democracy. This definition is non-exhaustive and subjective.

**ENFORCED AND INVOLUNTARY DISAPPEARANCE** – according to Article 2 of the International Convention for the Protection of All Persons from Enforced Disappearance, adopted in 2006, « the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization support or acquiescence of the State, followed by the denial of acknowledgement of the deprivation of liberty or the concealment of the fate or whereabouts of the disappeared person from the protection of the law ».

According to the Working Group on Enforced or Involuntary Disappearances, there are therefore three elements of enforced or involuntary disappearance: deprivation of liberty, direct or indirect participation of the State and refusal to acknowledge the deprivation of liberty or to reveal the whereabouts of the disappeared person.

The practice of enforced disappearance violates the rights to liberty, security and recognition as a person before the law. It can also violate the right to human dignity, the right to life, the right to be free from inhuman or degrading treatment and torture, or the right to life.

Enforced and involuntary disappearance constitutes a crime against humanity according to Article 7 of the Rome Statute.

**RIGHT TO A FAIR TRIAL** – the fundamental right of every person to have his or her case heard by an impartial and independent tribunal established by law. It also implies that the judicial decision is rendered publicly and within a reasonable time, and includes respect for the rights of the defence: presumption of innocence, the right to be informed of the charges and the proceedings, the right to remain silent, the right to be assisted by a lawyer and an interpreter, the right of access to the criminal file, the right to have time to prepare one's defence and the right to present it.

**EVENTS OF OCTOBER 1988** – sporadic demonstrations that took place from 4 to 10 October 1988 in several Algerian cities, including Algiers, Oran, Constantine, Tizi Ouzou and Béjaïa, in which de-



monstrators demanded an increase in purchasing power. These demonstrations were violently repressed by the police. Hospital sources and NGOs consider that the death toll rose to more than 500, contrary to the claims of the government which, after the election of Abdelaziz Bouteflika, tried to cover up the death toll. Bouteflika tried to make the events forgotten.

**JURISDICTIONAL FUNCTION** – all the magistrates and courts of the state. It originates from the need for peace and the establishment of a conflict resolution mechanism. The institution responsible for resolving disputes, in accordance with national law, and by means of a binding decision. It has the task of receiving complaints, conducting effective investigations, identifying and punishing those responsible for offences and providing redress to victims.

**GUARANTEES OF NON-REPETITION** – a set of institutional, legal and administrative reforms taken in the aftermath of a serious internal conflict, aimed at preventing further violations of fundamental rights and ensuring respect for freedoms in the future. This is one of the four pillars of transitional justice identified by the United Nations.

**WORKING GROUP ON ENFORCED AND INVOLUNTARY DISAPPEARANCES (WGEID)** – a subsidiary body of the United Nations, established by the Commission on Human Rights on 29 February 1980. It receives individual communications from the families of the disappeared or from human rights associations, and carries out investigative work, aid and assistance to the families. It also serves as a point of contact between families and governments. Since the adoption in 1992 of the Declaration on the Protection of All Persons from Enforced Disappearance, it has also made it its mission to make recommendations to States to encourage national investigations into past disappearances and to prevent future disappearances. Since the entry into force of the International Convention for the Protection of All Persons from Enforced Disappearance, it has worked closely with the Committee on Enforced Disappearances.

**CIVIL WAR OF THE 1990S** – a war between the Algerian state and its military and various armed Islamist groups, following the government's cancellation of the second round of legislative elections, which were predicted by opinion polls to be won by the Islamic Salvation Front (FIS). This cancellation, followed by the dissolution of the FIS, gave rise to major guerrilla warfare, the first victims of which were the civilian population : this war, also known as the « black decade » or « national tragedy », left tens of thousands dead and thousands missing.

**HIRAK** – « movement » in Arabic. Refers to the weekly demonstrations that began in February 2019 to protest against Abdelaziz Bouteflika's candidacy for a fifth presidential term. This popular revolt is now fighting much more broadly for more transparency and for a democratic transition. It is subject to significant police and judicial repression : arbitrary arrests and detentions of activists, use of riot guns against demonstrators, bans on demonstrations and rallies, etc.

**IMPUNITY** – literally, lack of punishment. In this report, which focuses on crimes attributable to the Algerian state, impunity refers more broadly to the fact that offences committed by state agents are not punished, that no effective investigation is carried out when they are reported, that no reparation is made, and that no guarantee of non-repetition is given when they are proven. Thus, the term «impunity» will refer to the impunity of state agents.

**INDEPENDENCE AND IMPARTIALITY OF THE JUDICIARY** – characteristics of courts and judges in a truly democratic system, and components of the right to a fair trial. Independence is the institutional character of the judiciary that allows it to be free from pressure from the executive or legislative bodies. Impartiality is the fact that they do not take sides in a dispute.

The right to an independent and impartial tribunal is considered by the Ligue Algérienne pour la Défense des Droits de l'Homme (LAADH) as an 'international procedural standard' as it is indeed proclaimed in various international conventions for the protection of fundamental rights, including Article 14 of the International Covenant on Civil and Political Rights, Article 26 of the African Charter on Human and Peoples' Rights, and many other sectoral instruments such as the International Convention for the Protection of All Persons from Enforced Disappearance or the Convention against Torture and Other Inhuman or Degrading Treatment or Punishment.

**TRANSITIONAL JUSTICE** – a particular form of justice established by the state following a serious internal conflict as part of a process to combat impunity for serious human rights violations. One of its aims is to restore confidence between the population and the government. According to the United Nations, it is based on four pillars: the right to know, the right to justice, the right to reparation and the right to guarantees of non-repetition. Transitional justice involves the mobilisation of national and international institutional actors and civil society organisations, and must take into account the voices of victims and minorities.

**FREEDOM OF EXPRESSION** – the fundamental freedom of everyone to hold intellectual, political and religious views in the medium of their choice without risk of interference. Freedom of expression is in principle proclaimed in Article 48 of the Algerian Constitution, and protected by Article 19 of the International Covenant on Civil and Political Rights.

**FREEDOM OF THE PRESS** – a fundamental freedom that implies the right of journalists to communicate freely, by the means of their choice, their opinions. It is an offshoot of freedom of expression in journalism and has as its corollary freedom of information for citizens. Freedom of the press is in principle guaranteed by Article 54 of the Algerian Constitution of 2020.

**FREEDOM OF ASSOCIATION AND PEACEFUL ASSEMBLY** – the fundamental freedom of everyone to organise themselves with other citizens in groups, political parties or associations. It includes the right to create, join and conversely refuse to join any group. Freedom of association is in principle proclaimed in Article 48 of the Algerian Constitution, and protected by Article 22 of the International Covenant on Civil and Political Rights. In the short term, the freedom of association is realised in the right to demonstrate peacefully, guaranteed in principle by Article 53 of the new Algerian Constitution.

**LAW 20-06 OF 22 APRIL 2020** – legislative reform of the Algerian penal code, which provides for the criminalisation of the dissemination of false information that 'undermines public order and state security', the creation of a new offence of undermining the honour of a state official and a new offence concerning foreign funding.<sup>2</sup>

According to the provisions of the law, the penalty for such crimes can be up to 5 years' imprisonment in case of special circumstances such as the health situation. This law has been used as a basis for the arrest of several journalists and is denounced as a broad attack on freedom of expression and the press by human rights NGOs.<sup>3</sup>

**POLICY OF FORGETTING** – systematic impossibility of revisiting the crimes committed during the Black Decade in Algeria, whether judicially, politically or even by the absence of memory. This 'absence of the past in the present', as defined by Henry Rousso in his book *Le syndrome de Vichy (1944-198...)*, is the result of the policies of the powers that be following a conflict and is materialised in Algeria by the laws of generalised amnesty (Civil Concord and Charter for Peace and National Reconciliation). Systematised impunity is opposed to the process of transitional justice, which is based on pillars such as Truth, Justice, Reparation and Guarantees of non-repetition.



**PRINCIPLE OF REPARATION** – the principle that anyone found by a competent court to be a victim of any kind of damage should be adequately compensated. This implies that material, physical and moral damages are compensated, and that the reparation is proportional and fair. Reparation may be material or symbolic.

**TRUTH AND JUSTICE** – fundamental rights that are exercised individually by victims and families of victims of human rights violations, and collectively by the population of a State that has been seriously affected by an internal conflict, such as a civil war. The « right to know » and the « right to justice » are part of the four pillars of transitional justice identified by the United Nations.

The right to the truth includes the right to know the circumstances and the perpetrators of the human rights violations suffered, as well as a duty of memory for the State. The right to justice implies various procedural obligations on the part of the State: to conduct effective investigations, to take adequate measures against those responsible for violations, to provide effective remedies to victims and to ensure adequate reparation.



# INTRODUCTION

On 11 August 2021, in an Algeria ravaged by the resurgence of the Covid-19 pandemic and by numerous devastating fires, Djamel Bensmail was arrested and wrongly accused of being an arsonist.<sup>4</sup> The young man, who had been loaded into a police van, was allegedly targeted by an angry crowd while in the courtyard of the Larbaâ Nath Irathen police station. Djamel Bensmail had come to the region of Tizi Ouzou to support his compatriots, calling for national and international solidarity via statements published on his social networks. This tragedy of rare violence, committed in a region already largely ravaged and in mourning, has raised many questions about the Algerian political system and its impact on the country. Shortly after the tragedy, the Director General of the Judicial Police, Mohamed Chakour, praised the exemplary behaviour of the police officers present at the scene.<sup>5</sup> Following this statement, the Larbaâ Nath Irathen public prosecutor's office issued a communiqué exonerating the security services of any responsibility in the death of Djamel Bensmail. This decision was widely denounced by many observers, «an aberration at this stage of the investigation» according to the *Rassemblement pour la Culture et la Démocratie*.<sup>6</sup> This press release, issued in a general rush, following a statement by a representative directly appointed by the Director General of National Security (DGSN), and therefore under the aegis of the Algerian government (Ministry of the Interior), shows the tendency of the Algerian authorities to exonerate agents serving the state, and in par-

ticular the security forces, from any charges that might be brought against them, thus exceeding the powers of the national judiciary. In this case, even before the investigation began, under pressure from the executive and its agents, the Algerian justice system exonerated the security forces, proving the hold of the real power over the judiciary, and thus questioning the supposed independence of the judicial power vis-à-vis the executive power. This impossibility of investigating forces of order is not a new phenomenon in Algeria. This impunity is also felt when the



victims of the terrible crimes committed during the 1990s or even of the recent repression of any peaceful opposition in the context of the Hirak testify to their inability to bring those responsible to justice, due to the influence of the Algerian executive power over the judiciary.

In these circumstances, the question arises as to the extent to which the separation of powers in Algeria and the primacy of the executive in the political system facilitates the impunity for agents guilty of serious human rights violations? This report will attempt to demonstrate that the lack of independence of the Algerian judiciary, which allows the executive to establish a culture of impunity, is a major obstacle to the implementation of the law. This report will attempt to demonstrate that the lack of independence of the

Algerian judiciary, which allows the executive to establish a culture of impunity for estate agents, is the result of the refusal of the Algerian government to implement an effective separation of powers in the country's political system. This interlocking of powers prevents many families of victims of the black decade from bringing those responsible for the crimes committed to justice.

This functioning also facilitates and leads to the human rights violations observed in the repression of the Hirak. The current judicial system does not offer guarantees of non-repetition of the crimes of which Algeria has been a victim in its history.

The European Union has therefore co-financed three programmes in favour of the Algerian judicial system. The «Support Programme for the Justice Sector in Algeria» (PASJA) is a continuation of the two previous programmes Justice I and Justice II. For 34 months, the overall objective of PASJA was to contribute to the strengthening of the rule of law and to the guarantee of a fair, impartial and quality justice system, impartial and quality justice.

Following this report where we demonstrate real problems of independence of the historical and current justice system, it would be interesting to study the results of this 9 million euro programme that was supposed to modernise the Algerian justice system whereas the reality is different.

This report will discuss the responsibility of the Algerian state for the crimes of the 1990s, during which it is accused of having caused the disappearance of several thousand people, as well as the arbitrary arrests, detention and abusive prosecution of many human rights defenders. It will also deal with the arbitrary arrests, detention and abusive judicial proceedings of many human rights defenders.

We will therefore begin by addressing the concepts of separation of powers and participatory democracy, in the light of which we will analyse the foundations of the lack of independence of the judiciary, through the constitutional history of Algeria, from 1963 to the present day. We will highlight the subordination of the judiciary to the executive in Algeria, which is at the root of the impossibility of judging past crimes and the judicial persecution of any form of political opposition.



# **PART I**

## **The theory of the separation of powers in a democracy applied to Algeria**

## I/ THE DEMOCRATIC CONCEPT OF THE SEPARATION OF POWERS, A KEY ELEMENT FOR THE INDEPENDENCE OF THE JUDICIAL SYSTEM

### A) THE GENESIS OF THE SEPARATION OF POWERS

Nowadays, most democracies are, as Algeria is supposed to be, representative democracies: sovereign power is therefore in the hands of representatives of the people, elected by them.

This representative democracy is materialised at the time of the election, and over a longer period of time, that of the mandate. The principle of democratic election allows the governors to be designated by all, in an equal manner: each vote having equal weight. However, democratic elections are not enough to ensure that the regime remains democratic in the long term. This

is why mechanisms had to be put in place to ensure that representatives do not exceed the powers granted to them by the sovereign people at the time of the election, because, as Montesquieu observed, «it is an eternal experience that every man who has power is inclined to abuse it; he goes

**The separation of powers is at the heart of constitutionalism, which explains why Article 16 of the 1789 Declaration of the Rights of Man and of the Citizen states that «any society in which the guarantee of rights is not assured, nor the separation of powers determined, has no constitution»**

so far as to find limits»<sup>7</sup>. Two types of limits to the power of representatives have been devised: a normative limit with the constitution, which is the supreme rule organising the institutions and guaranteeing fundamental freedoms; a functional limit through the separation of powers. The aim is therefore to ensure that representatives are legitimate, i.e. appointed in accordance with the popular and sovereign will, and responsible, in that they must be accountable. In this scheme, we find the two times of democracy: legitimacy is expressed in part through the vote, and responsibility is the character to which they must respond daily. Powers are the result of legitimacy and responsibility.

Thus, Pasquale Pasquino states that «The principle of election, the primacy of the constitution and the separation of powers are the three pil-

lars of [the] [democratic] tradition and they cannot be considered separately without destroying the foundations of representative democracy. »<sup>8</sup>

The separation of powers is at the heart of constitutionalism, which explains why Article 16 of the 1789 Declaration of the Rights of Man and of the Citizen states that «any society in which the guarantee of rights is not assured, nor the separation of powers determined, has no constitution». This theory became particularly important when the State, set up as the defender of human

rights, also showed itself to be a threat to these same rights. It was therefore considered that the regalian functions had to be distinguished to avoid any concentration of power.

Aristotle had already distinguished three essential activities in the state: deliberating to reach decisions, commanding,

and adjudicating. Subsequently, John Locke also identified three powers in the state: the legislative power, the jurisdictional power and the federative power responsible for ensuring security, both internally and externally.<sup>9</sup>

However, it is Montesquieu's theory that seems to be the cornerstone of democratic regimes as they are constructed today. Montesquieu theorised the distinction of functions through the prism of the demand for freedom, in accordance with the idea that the separation of powers is «a sine qua non of freedom».<sup>10</sup> Montesquieu, after noting the tyrannical tendency of anyone entrusted with power, wrote that «by the disposition of things, power must stop power» and thus recommends the separation of powers as a solution. He observes that in every state organisation there are three types of power: the



legislating power, which makes or changes the law; the executing power, by which laws are carried out; and the judging power. He advocates distinguishing these three powers and placing them in the hands of distinct actors, thus adding an organic character to the functional distinction of Aristotle and Locke and carefully emphasising the importance of the independence of each of these powers.

The idea of checks and balances is put forward by the author who, as a former president of the Bordeaux parliament<sup>11</sup>, is well aware of the risks of government by judges. He considers that each power must cancel out the others, so that the power to judge becomes a «null» power. The very definition of the judicial function easily explains why it is in the interest of the executive, the government, to have control over it in an authoritarian regime. It is a strategic power to convict or exonerate whomever one wishes, allowing for example the total elimination of an individual from any electoral competition, especially when the penalty may be life imprisonment or the death penalty. In order to prevent the executive branch from taking over the judicial branch, the latter must therefore be able to counterbalance the weight of the government, and it is through its independent character that it is supposed to be able to do so. Again, this risk helps to explain why, in a democracy, constitutions and international human rights conventions make the principle of judicial independence and impartiality a fundamental principle.

This report intends to emphasise the importance of the independence of judges rather than their impartiality. Indeed, in an administrative dispute between a State agent or body and an individual, the State becomes a party to the conflict, so that impartiality and independence cover the same phenomenon, which prevents the State power from becoming both judge and party.

## B) INDEPENDENCE OF JUDGES

In a democracy, the independence of judges is in principle the result of statutory guarantees: the security of tenure of judges means that they cannot be removed or reassigned by the will of the legislative or executive powers without their consent. The incompatibility of mandates prevents a judge from also being a member of the government or parliament. Moreover, this principle of independence is expressed through the judicial review of laws and administrative decisions, always in the idea that « power stops power ».

The constitutional courts are in fact responsible for verifying the conformity of legislative texts with the provisions of the constitution, in particular those protecting fundamental freedoms, whereas the administrative courts exercise a control of administrative texts and decisions. In principle, therefore, the judicial power has certain prerogatives with regard to the control of other powers. In addition, the rule of law guarantees and ensures that everyone, including members of the government, the administration or representatives of the people, is equal before the law. Through these mechanisms, the principle of equality before the law, and consequently before justice, is ensured. The law, stated as a general and impersonal rule, will in fact be applied by judges in an egalitarian manner, in accordance with a principle of non-discrimination. In a state governed by the rule of law, there must be total indifference as to the identity of the accused or the victim, which implies, among other things, that the leaders of the state must not be further protected by justice. However, account must be taken of particular circumstances in order to respect the right to individualisation of sentences.

Ultimately, the role of independent magistrates remains that of fighting impunity.

Impunity is a violation of international human rights law, insofar as it obliges States, in principle, to prosecute and convict human rights violations.

This procedural obligation ensures the effectiveness of the substantive rights set out. Impu-

nity is a common phenomenon in many states. It may exist *de facto* but is most often achieved through amnesty laws that define a type of offence, a period of time and a category of persons who will not be prosecuted.<sup>12</sup> These laws are frequently presented by governments in power as part of a wider process of post-conflict pacification to restore peace and calm after a major national tragedy. However, depending on the context, these laws guarantee legal impunity to perpetrators of serious human rights violations, thereby promoting violence. In theory, it is up to the judiciary to decide at its discretion whether or not to prosecute a person or persons for a crime. The independence of the judiciary is the guarantee of the fight against impunity. As Olivier Beauvallet shows, the notions of 'impunity' and 'democracy' have a very close relationship: "In impunity speaks even more explicitly of the heart of the political regime in which it reigns (...) the fight against impunity (...) places the trial at the heart of access to power. It makes the accountability of elites a reality."<sup>13</sup>

It is therefore impossible to imagine a democracy in which the independence of judges is not guaranteed and does not make it possible to combat impunity.

The theory of the separation of powers as presented above is unfortunately not applied in Algeria, where the independence of judges is provided for in the constitutional texts, but is not effective. If access to the truth and the independence of the judiciary are to be achieved through institutional reform, successive Algerian constitutions, including that of 2020, cannot be considered a sufficient response to the lack of independence of judges in Algeria.

## II/ THE SUBMISSION OF THE JUDICIARY IN ALGERIA: THE CONSTITUTIONAL NEGATION

In order to understand the functioning of the current Algerian justice system, it is necessary to go back to the country's constitutional history, in order to consider how the judicial institution was conceived.

### A) A CONSTITUTIONAL HISTORY

Over the last sixty years, the Algerian Constitution has been amended nine times. Successive presidents have shown themselves to be adept at holding popular referendums - six of these amendments have indeed been adopted in this way - except for Abdelaziz Bouteflika, who appears to be an exception on this point. It was President Ahmed Ben Bella who drafted the country's first constitution on 10 September 1963. It established Algeria as a socialist regime, and introduced a one-party system<sup>16</sup>: indeed, only the National Liberation Front (FLN) was entitled to govern the country. One of the major elements of this constitution concerns the army, giving it, to this day, a central place in Algerian political thought. It provides for the army to be omnipresent in the daily life of Algerians.

**ARTICLE 8 OF THE INDEPENDENCE CONSTITUTION STATES THAT 'THE NATIONAL ARMY IS POPULAR (...) IT (...) PARTICIPATES IN THE POLITICAL, ECONOMIC AND SOCIAL ACTIVITIES OF THE COUNTRY, WITHIN THE FRAMEWORK OF THE PARTY'.**

In 1966, a coup was carried out against Ben Bella by the Minister of Defence, Houari Boumediene, who succeeded him as President. From then on, he held the position of Minister of Defence and Chief Executive. This constitutes a major flaw in the 1963 Constitution. Reda Dagbar, professor of constitutional law at the University of Algiers, explains that in 1976, President Boumediene amended the constitution so that the powers of the Ministry of Defence were officially placed in the hands of the president, i.e. himself. Thereafter, no constitutional reform was adopted until the popular revolts

of October 1988. On that date, a very important provision was written into the constitution: it provided for the end of the single party, thus introducing political pluralism in Algeria. This opening up of political life led to the emergence of new parties, the most important of which was the Islamic Salvation Front (FIS), whose victory in the first round of legislative elections in 1991 marked the beginning of the 1990s, known by some as the 'black decade'.<sup>17</sup>

During this period, President Liamine Zeroual amended the Constitution<sup>18</sup> once again and limited the renewal of the presidential mandate to two times.<sup>19</sup> He also introduced important institutional innovations by creating the Council of the Nation<sup>20</sup>, the Supreme Court of the State<sup>21</sup> and the Council of State<sup>22</sup>, and established the role of the Constitutional Council in the constitutional control of laws.<sup>23</sup> Finally, Abdelaziz Bouteflika, the last outgoing president, elected in 1999, has the largest number of constitutional reforms to date, so much so that the Hirak demonstrators did not hesitate to chant that 'the constitution is not a test book'. Indeed, there was considerable criticism of these reforms because, unlike past constitutional reforms, they were not adopted by the people, i.e. by referendum, but through the legislative branch, which was not subject to the president. Following the overthrow of the Bouteflika regime<sup>24</sup>, the current president, Abdelmadjid Tebboune, elected without any guarantee of true sovereignty, inclusiveness, transparency and in a context of repression of public freedoms, on 19 December 2019, announced on 7 May 2020 a reform of the constitution. In September 2020, this project was approved by the Parliament and the Senate - without any prior debate - and ratified by a highly contested popular referendum held on 12 December 2020. The low turnout and the boycott by some protest groups questioned the legitimacy of this referendum.<sup>25</sup>

## B) ALGERIAN JURISDICTIONAL INSTITUTIONS

To understand the impact of these frequent constitutional reforms on the independence of the Algerian judiciary, it is necessary to understand the functioning of the major jurisdictional institutions in Algeria. The composition of the Superior Council of the Magistracy (CSM), a body that is supposed to be the guarantor of the independence of the judiciary, is very telling on this point. It was very recently modified by the presidential amendments to the Constitution. Indeed, since the reform of 30 December 2020, the post of vice-president of the CSM has been held by the President of the Supreme Court<sup>26</sup>, whereas it was previously held by a member of the executive, the Minister of Justice. This organic change seems at first sight to be a strong element to reinforce the independence of the judiciary, since the vice-presidency is now held by a member of the judiciary. However, the reality is quite different. First of all, the Algerian president remains at the head of the Supreme Council of the Judiciary<sup>27</sup>, but above all, it is he who appoints the president of the Supreme Court.<sup>28</sup> Thus, the executive remains at the heart of the Supreme Council of the Judiciary, and this is all the more remarkable following the 2020 reform.

Indeed, this reform did not distinguish the composition of the Supreme Council according to its two functions. While the Chair and Vice-Chair of the Board did not intervene in decisions on disciplinary sanctions - their role being limited to matters relating to the careers of civil servants - the Board's composition was not differentiated. While the President and Vice-President of the Council were not involved in decisions on disciplinary sanctions - their role being limited to matters relating to the careers of judicial officials - the 2020 reform now provides that disciplinary control is the responsibility of the President of the Supreme Court, i.e. the Vice-President of the SJC. Many other powers are given to the SJC, although these are not specified in the constitutional text. Here again, what might seem to be a greater guarantee of the independence of the judicial function is nothing but a sham.

As explained above, the President of the Supreme Court, whether acting in his disciplinary

capacity or in his role of controlling the careers of magistrates, is appointed directly by the President, who thus retains control over the Supreme Council of the Judiciary. Professor Sofiane Abdali considers this to be an unjustified interference by the head of the executive in the work of the judiciary.<sup>29</sup> He had proposed to the legislator that the President of the Supreme Court, and not the President of the Republic directly, should head the CSM, which would, according to him, guarantee the independence of the judiciary in Algeria.

Apart from the Supreme Council of the Judiciary, the Algerian judicial system is hierarchically organised in such a way that it is subject to the executive power, as is the new constitutional court. The prosecutors and public prosecutors are indeed under the authority of the Ministry of Justice and the central directors of the Ministry. The Algerian judicial power has always oscillated between the control of the executive power and that of the administration. The significant presence of representatives of the executive in the structural organisation of the judiciary is therefore detrimental to the independence of the CSM, which is responsible for the autonomous functioning of the judiciary.

For all the reasons we have set out above, it is not fair to speak of the independence of the judiciary in Algeria, as the entire institution is subject to a Council that is subordinate to the executive. Indeed, all judges are in such a position that they cannot be considered independent of the ministry to which they are affiliated. Thus, all past constitutional reforms and the Constitution as amended in 2020 seem to guarantee the independence of the judiciary. Under cover of these provisions, it is in reality a power subject to the authority of the executive that has been constitutionalised since 1963. This dependence ultimately perpetuates a culture of impunity in Algeria, which has been institutionalised by the Charter for Peace and National Reconciliation and its implementation texts. Although it claims to uphold values of 'forgiveness and peace', the Charter and its implementation texts protect estate agents who have committed crimes and prevent victims from exercising their right to Truth and Justice.

## **PART II**

**Executive control of the judiciary has led to the impossibility of judging past crimes and the judicial persecution of any form of political opposition**



## I/ THE CHARTER FOR PEACE AND NATIONAL RECONCILIATION: REAFFIRMING THE PRIMACY OF THE EXECUTIVE

### A) A NEW AMNESTY LAW

The reality of the political system in Algeria has demonstrated on numerous occasions its inability to establish a real separation of powers, even though the Constitution seems in theory to guarantee it. Symbolising this

constitutional negation and the stranglehold of the executive power on the Algerian political system, the Constitution of December 2020 institutionalised the Charter for Peace and National Reconciliation and its various

implementing texts. In its preamble, we discover that, under cover of the values of 'forgiveness and peace', Algeria wishes to defend and preserve a policy of 'peace and reconciliation'. The text of the Constitution even states that this policy of peace and reconciliation has 'borne fruit'.<sup>30</sup> However, the Charter for Peace and National Reconciliation, which was passed by referendum in September 2005 and came into force on 27 February 2006, is a perfect example of how the executive branch takes advantage of its primacy within the Algerian political system to guarantee the impunity of its agents and to impose itself as the sole decision-making force in the country. We will focus here mainly on the consequences of Articles 45 and 46 of Ordinance No. 06-01 of 27 February 2006 on the implementation of the Charter for Peace and National Reconciliation. These provide that:

**«Art. 45 - No proceedings may be instituted, individually or collectively, against elements of the defence and security forces of the Republic, all components**

**combined, for actions carried out to protect persons and property, safeguard the Nation and preserve the institutions of the People's Democratic Republic of Algeria. Any denunciation or complaint must be declared**

**inadmissible by the competent judicial authority.**

**Art. 46 - Anyone who, through his or her declarations, writings or any other act, uses or exploits the wounds of the national tragedy to undermine the institutions of the People's Democratic Republic of Algeria, weaken the State, harm the reputation of its agents who have served it with dignity, or tarnish the image of Algeria internationally, shall be punished by imprisonment for a period of between three (3) and five (5) years and a fine of between 250,000 and 500,000 Algerians. Criminal proceedings are initiated automatically by the public prosecutor's office.”<sup>31</sup>**

Thanks to the Charter for Peace and National Reconciliation and its implementation texts, the Algerian leaders are therefore flouting the very principle of separation of powers through three different means. Firstly, the Charter, both in the way it was implemented and in its content, reaffirms the omnipotence of the Algerian executive vis-à-vis the legislative and judicial powers. Secondly, through its lack of transparency, it allows the Algerian state to guarantee impunity for all members of armed groups and all its agents who were guilty of crimes and serious human rights violations during the 1990s. Finally, in its application, the Charter forces the Algerian judiciary to remain a tool of the executive power, thus pre-





venting victims from accessing impartial and independent justice. Moreover, Article 30 of the new Constitution de facto enshrines the supreme power and impunity of the army, and therefore by extension, of the executive.

**Article 30: ‘The consolidation and development of the Nation’s defence potential is organised around the National People’s Army. The permanent mission of the National People’s Army is to safeguard national independence and defend national sovereignty. It is responsible for the defence of the unity and territorial integrity of the country, as well as the protection of its land space, its air space and the various zones of its maritime domain. The National Popular Army defends the vital and strategic interests of the country in accordance with the constitutional provisions.’<sup>32</sup>**

First of all, to understand how the Charter for Peace and National Reconciliation is a tool of the executive branch guaranteeing its primacy over the other branches of government, it is necessary to look at the way it was adopted. Indeed, following the terrible conflict of the 1990s in Algeria, President Abdelaziz Bouteflika, freshly re-elected for a second term, decided in 2005 to definitively turn the page of the black decade through the implementation of a so-called Charter for Peace and National Reconciliation.<sup>33</sup>

Many observers, however, regretted the «haste» with which this project was carried out.<sup>34</sup> Less than twenty-four hours after the speech of the President of the Republic, without any debate being organised to discuss the content of this future charter, the project of a national referendum on a text establishing new amnesty measures was unveiled<sup>35</sup>. The representatives of the government and the ruling power used the (mostly pro-government) media to carry

out a campaign to convince Algerians to vote in favour of this draft charter. The opposition was not able to organise itself properly and activists and members of opposition parties wishing to speak out against this draft were arrested and taken into custody by the Algerian police<sup>36</sup>. For example, during the international campaign led by the association *Sos Disparu*, Mr Mohand Arab, aged 75, whose son was the victim of an enforced disappearance during the 1990s, was arrested on 14 September 2005 by the Algerian justice system for distributing leaflets saying ‘no to the Charter’.<sup>37</sup>

In a general rush, and without any legislative or judicial counterweight being able to verify its legality, the referendum was decided. In addition to the disputes over the turnout - announced at almost 80% when journalists present in Algiers reported a much lower turnout of around 25% - and the ban on journalists attending the vote count, the period during which the charter and its implementing texts were put in place also raised questions.<sup>38</sup> Indeed, the government will itself adopt the various texts implementing the charter (including Ordinance No. 06-01 of 27 February 2006) by virtue of ‘the legislative and regulatory powers of the President of the Republic’.<sup>39</sup>

Indeed, according to Article 124 of the 1996 Constitution, ‘in the event of the National People’s Assembly being in recess or in periods of inter-session of Parliament, the President of the Republic may legislate by ordinance’.<sup>40</sup> Ironically, the texts implementing the Charter were all published between 27 and 28 February 2006, just three days before the opening of a new parliamentary session on 4 March.<sup>41</sup> Thus, by avoiding any parliamentary amendment, the executive can decide on the application of a body of law, without the intervention of any counter-power. These measures will then be imposed on Algerian courts and tribunals, whose magistrates will be unable to convict any state agent guilty of crimes during the black decade - articles 45 and 46 of Ordinance No. 06-01 allowing the government alone to decide who can be tried or not, clearly overstepping its power to the detriment of the judicial system.



## B) A SINGLE POWER WITHIN POWERS

The Algerian government imposes itself as the sole decision-making force in the political system, and thus guarantees the impunity of state agents working under its control. Indeed, the main criticism of opponents of the Charter for Peace and National Reconciliation is that its lack of transparency definitively closes the door to «clarification and judicial trials against the perpetrators of crimes committed»<sup>42</sup> during the black decade.

Article 45 of Ordinance 06-01, under the guise of vague illusions such as ‘the safeguarding of the Nation and the preservation of the institutions of the Algerian Republic’<sup>43</sup>, in reality guarantees the protection of all state agents, regardless of the crimes committed. Thus, the victims and their families are unable to bring to justice the perpetrators of the terrible human rights violations committed by the security forces in the 1990s. They are also unable to know the circumstances of the crimes committed, as they cannot request an in-depth investigation.

As the Collectif des familles de disparu(e)s en Algérie (CFDA) explained in a report published in April 2013, ‘Article 45 of Ordinance No. 06-01 has only legalised and organised the jurisdictional immunity

of state agents’. This institutionalised impunity of the defence and security forces of the Republic is evidence of the stranglehold of the executive power on the judiciary in Algeria.

According to Olivier Beauvallet, ‘[t]he trial, as a form of exercising power, lies at the heart of the democratic promise’.<sup>44</sup> The impossibility of bringing to justice the state agents responsible for the crimes committed in the 1990s, decreed by the texts implementing the Charter and institutionalised in the Algerian Constitution, testifies to Algeria’s democratic failure. Peace and reconciliation in a democracy cannot be built on oblivion and general amnesty. On the contrary, the fight against impunity «expresses first and foremost the separation of powers»<sup>45</sup>, the pillar of any democracy. By prohibiting trials of state agents guilty of serious human rights violations, the government makes certain fundamental rights inaccessible to a large number of victims and their families. Deprived of truth and justice, the families of the disappeared are particularly affected by this abuse of power. The executive has even given itself the possibility of criminalising the simple fact of mentioning the crimes committed by these agents

and the search for the families of more than 8000 'disappeared'. The Charter and its application texts provide that anyone who 'instrumentalises the wounds of the national tragedy' should be prosecuted and even sentenced to up to five years in prison.

### **C) COMPENSATION UNDER THE CHARTER**

Even before the Charter came into force, Algerian judges and court presidents were subject to pressure from the executive. This lack of independence of the judiciary is particularly noticeable in the context of the fight against enforced disappearances. The Euro-Mediterranean Human Rights Network notes in particular that the vast majority of judges do not 'follow up on the complaints of the families of the disappeared or ( ' ) [pronounce] a dismissal'.<sup>46</sup> Although in rare cases, Estate agents have

been convicted for crimes committed during the conflict of the 1990s<sup>47</sup>, the vast majority of perpetrators remain unpunished. The courts systematically refuse to act on the families' complaints, considering that the reparations proposed by the Charter and the policy of forgetting are satisfactory responses for the families.

The United Nations Human Rights Committee has noted that the compensation provided for in Articles 27 to 39 of Ordinance n°06-01 does not represent full and complete reparation for the prejudice suffered by the families of the 'disappeared'.<sup>48</sup> Despite this, on 25 May 2008, Madame Boucherf, mother of the 'disappeared', was received by the deputy prosecutor of Hussein-Dey who issued a procès-verbal declaring that 'the plaintiff's request is no longer within the competence of justice, insofar as she has undertaken the procedures foreseen by the Charter for Peace and National Reconciliation'.<sup>49</sup>

Indeed, since the entry into force of the application texts of the Charter, families of the 'disappeared' have been offered compensation (provided for in Articles 27 to 39 of Ordinance n°06-01) if they accept to have a death judgement established for their 'disappeared' relative. This practice is terrible for families as they have to take a crucial decision which, in any

***«I feel like I killed my son with my own hands»***

case, does not allow them to mourn and repair the crime committed. Some of these families who have accepted this procedure, eaten away by remorse, find themselves in a state of extreme psychological fragility. In a testimony collected by the CFDA, a mother of the disappeared, who gave in to the pressure of her daughter-in-law to follow the compensation procedure, declared while holding both her hands open «I feel like I killed my son with my own hands».

This death decree is therefore issued at the request of any family member accompanied by two witnesses who would have witnessed the arrest of the disappeared, even though the circumstances of his disappearance, abduction or detention are still unknown. In fact, «no effective investigation has been carried out into the facts of these various cases [of enforced disappearance], those responsible have not been prosecuted or punished, and the victims and their families have never received adequate reparation.»<sup>50</sup> Through the adoption of the Charter and its application texts, the executive orders the judiciary not to deal with the complaints of families of the 'disappeared', thus preventing them from asserting their fundamental rights to Truth and Justice. In an article published in 2008 the CFDA regretted the impossibility of carrying out investigations into the fate of the 'disappeared' of the black decade, indicating that they should be 'forgotten in accordance with the 'diktat' of the Algerian President'.<sup>51</sup>

Beyond the impunity of state agents, and the absence of full reparations, families of the 'disappeared' who wish to pursue their quest for Truth and Justice often face threats and police and judicial harassment. In 2007, for example, a seminar organised by the CFDA in collaboration with



associations of victims of terrorism on the theme of Truth, Justice and Conciliation was banned by the authorities in the name of Article 46 of Ordinance 06-01. Here again, justice is «put at the service of the authorities as a means of repression»<sup>52</sup>. On 4 August 2010, the weekly gatherings that families of the ‘disappeared’ have held every Wednesday in front of the headquarters of the National Consultative Commission for the Promotion and Protection of Human Rights (CNCPPDH) in Algiers since August 1998, were banned. Estate agents even resorted to “unjustifiable violence against the mothers of the ‘disappeared’”<sup>53</sup> to prevent them from gathering. These acts of violence were never investigated by the authorities and the perpetrators were never brought to justice. The District Commissioner who led the operation made it clear that «we received a fax last night asking us to prohibit this gathering by any means”.

In its work with the families of the ‘disappeared’, the CFDA has noticed that a large number of families have stopped taking steps to find their ‘disappeared’ relatives. Previously, it was mainly because of fear of reprisals, of seeing their other children disappear, but today it is because they are weary, having noted the imperviousness of the authorities to the various testimonies or to the evidence presented, and the total indifference of Algerian justice. The absence of trials against state agents who committed crimes and serious human rights violations during the conflict of the 1990s, the amnesty laws and the policy of oblivion imposed by the executive have left families with no hope of ever knowing the truth about the fate of their disappeared loved ones, and have offered the victims of these crimes no guarantee of non-repetition. By enshrining amnesty in Algerian law, taking advantage of its position of strength vis-à-vis the other powers in the Algerian political system, the government has imposed a culture of impunity in the country.

This culture of generalised impunity still prevents the Algerian judiciary from constituting itself as a counter-power necessary for democracy. Under these conditions, justice can no longer play its role of protecting citizens from the arbitrary will of the rulers.<sup>54</sup> The absence of guarantees of non-repetition, the culture of impunity and the impossibility of bringing estate agents responsible for crimes and violations of the fundamental rights of Algerians before an



impartial and independent court is at the origin of the violent repression of any political opposition and the judicial relentlessness against any dissenting voice since the summer of 2019 in Algeria. The Algerian executive is once again using the judiciary as a tool of repression against those who dare to peacefully criticise the regime. As demonstrated in the latest communication of the UN special procedures on transitional justice<sup>55</sup>, the Special Rapporteurs wish to draw the attention of the Algerian government to the fundamental principles and freedoms. Indeed, Algerian legislation is very restrictive. It prevents the families of victims of enforced disappearances (for example) from initiating legal proceedings, from holding the perpetrators of these serious violations accountable, and it supports the repressive attitude towards human rights defenders.

## II/ JUSTICE AS A MEANS OF REPRESSING DISSENTING VOICES

In the run-up to the 2019 presidential elections, the Algerian people, fed up with almost twenty years of Abdelaziz Bouteflika's presidency during which the regime has demonstrated its inability to address the country's economic and social problems, took to the streets in a peaceful protest movement that has been hailed internationally as exemplary.

### A) THE VOICE OF THE PEOPLE

Abdelaziz Bouteflika, who declared in 1999 that he was «the whole of Algeria»<sup>56</sup>, a symbol of the omnipotence of the executive, will have finally succeeded, twenty years later, «to put in the street (...) almost the whole of Algeria»<sup>57</sup>. However, although the Hirak succeeded in making Abdelaziz Bouteflika renounce a fifth mandate, and his successor, Abdelmadjid Tebboune, has multiplied promises of democratic transition and a break with the old regime, the Algerian government has indeed retained its grip on the country's political system.<sup>58</sup>

On the contrary, the government that had announced that it was «reaching out»<sup>59</sup> to the Hirak has perpetuated the violent repression of political opponents with impunity, while using the judicial system to condemn all those who dare to criticise the authorities. In a context where judges are not effectively protected by the Constitution, where lawyers are threatened by the executive power, justice is still only a means used by the Algerian government to repress any dissenting voice. Since the beginning of the popular Hirak movement and especially since 2020, the Algerian government has been facilitating judicial harassment against human rights defenders, while maintaining significant pressure on the judiciary, which has been strongly encouraged to use «vague» provisions of the Algerian Criminal Code in an abusive manner to convict opponents of the regime. There have been many attacks on the fundamental freedoms of Algerian rights defenders. A good example is the attack on the freedom of expression of journalists and more broadly on the freedom of the press as illustrated by the provisions of the law of 22 April 2020. Its provisions have

allowed the government to impose its vision of what is «appropriate» to express or not, resulting in the arrest of journalists and the banning of broadcasting and publication of many media. In March 2020, Khaled Drareni, a journalist who works for the TV5Monde channel and RSF, was arrested for «inciting an unarmed gathering and undermining national integrity»<sup>60</sup>. Similarly, journalist Rabah Karèche was arrested on 19 April 2021 and remanded in custody for over 110 days. He was prosecuted for «undermining national security» and sentenced to one year's imprisonment, of which eight months were suspended.<sup>61</sup> He had written an article on the Tuareg protest movement opposed to a new administrative division of the regions. These two cases, which are not isolated, appear to be contrary to the 2020 Constitution which guarantees press freedom.<sup>62</sup>

In addition to the arrest and detention of journalists, the Algerian government uses other means to silence human rights defenders. In particular, they resort to direct censorship, as was the case on 21 September 2020 with the television channel M6 after the broadcast of a report on the Hirak which, according to the Ministry, was intended to «tarnish the image of Algeria and [to] crack the unshakeable trust established between the Algerian people and its institutions».<sup>63</sup>

The law of 22 April 2020 stipulates that «anyone who disseminates or propagates 'fake news' aimed at undermining public order and security as well as undermining state security and national unity is liable to one to three years' imprisonment and double in the event of a repeat offence. This law has been widely criticised by human rights NGOs, which have not hesitated to support its libticial nature. Reporters Without Borders denounced «a vague and repressive bill that aims

to muzzle press freedom», and Amnesty International considered that this law was «a new blow (...) to freedom of expression in Algeria». This law is vague, which leaves the executive with a lot of room for manoeuvre to put pressure on the judiciary and condemn anything it considers to undermine national security or to be false information. Unfortunately, freedom of the press<sup>64</sup> is not the only one to be severely affected by the Algerian government. The freedoms of peaceful

assembly and association are also violated by the executive branch, which uses the judiciary to curb demonstrations and gatherings and to prevent popular protest movements from being organised, again through vague laws. The government orders and the courts execute, issuing decisions to dissolve associations and ban peaceful gatherings.

Since the resumption of weekly demonstrations in the early summer of 2021, the repression of demonstrations has been intensified by a government increasingly determined to muzzle these protests.

While numerous articles and amateur videos<sup>65</sup> show an upsurge in police violence during the rallies - use of water cannons, rubber bullets - and yet the police officers responsible are not punished, the demonstrators are subjected to major violations of their fundamental rights. NGOs<sup>66</sup> and the international press<sup>67</sup> report numerous arbitrary arrests and summary sentences of Hirak participants, some of them up to 18 months in prison.

**Sarah Leah Whitson**, director of the Middle East and North Africa division of Human Rights Watch, said that «this wave of arrests appears to be part of a strategy to weaken any attempt to oppose the interim leadership in Algeria. The NGO insisted that the arrests and convictions were indeed human rights violations.<sup>68</sup> The attacks on the freedom to demonstrate and association ordered by the executive and brought before the courts were not limited to the arrest and conviction of

**« This wave of arrests appears to be part of a strategy to weaken any attempt to oppose the interim leadership in Algeria. »**

demonstrators. As the government's intention is to destroy any popular protest movement, it has even dissolved Algerian human rights associations and organisations. The case of the Rassemblement Action Jeunesse (RAJ), an Algerian NGO whose aim is to raise awareness among young people of the socio-economic difficulties in Algeria, is strongly involved in the Hirak. Its dissolution by the Algerian state is a strong indicator of the repression that is taking place in the country. The association indicates that on 26 May 2021 it received a summons to appear before the Algiers court following a request from the Ministry of the Interior and Local Authorities to dissolve the RAJ for violating the law 12/06 on associations and violating its statutes. Its president was summoned to the police station.<sup>69</sup> This request to dissolve the RAJ is a serious infringement of the freedom of peaceful association, as it is in fact only a pretext to prevent the RAJ from continuing its awareness-raising activities among Algerian youth and its activism. The RAJ has played a considerable role in the mobilisation of the Hirak.

This event is in line with the government's policy of destroying any protest organisation. Indeed, a presidential ordinance published in the Official Gazette on 10 June 2021 vaguely defines the notion of «terrorism» and establishes a list of terrorist persons and entities<sup>70</sup>. This reform of the penal code follows the designation as terrorist organisations of the Rachad and MAK (Movement for the Self-Determination of Kabylia) movements by the High Security Council, chaired by Abdelmajdid Tebboune on 18 May 2021.<sup>71</sup> This will allow judges to ban any associative or political organisation that appears, in the eyes of the government, to be a risk by incorporating the broad definition of «terrorist». Since this reform, the risk of infringement of the freedom of association is thus increasingly high. The freedoms of association and assembly are constantly muzzled by the executive, which,



through particularly vague laws, uses the judicial system to legitimise its desire to silence certain movements that are too noisy and thus limit the scope of popular protests, which do exist.

## **B) REPRESSION WITH IMPUNITY**

In a context of systematic repression of opponents of the regime, supported by a dependent judiciary, activists, members of civil society organisations and journalists are systematically targeted by the Algerian authorities. As explained earlier, this repression is carried out by a judicial system that is subject to the will of the executive, which uses it as a real 'means' of repression. This judicial repression of opponents, even peaceful ones, does not take place without violating the fundamental right to a fair trial. In recent years, by way of reprisal against the Hirak, the Algerian authorities have multiplied the arbitrary arrests and imprisonments, without any clearly announced legal grounds, of many activists. Some are arrested in the street, in front of their relatives, questioned for several hours without knowing the facts of which they are accused and wit-

hout their families being informed of the reasons for their detention<sup>72</sup>. Others, such as Kaddour Chouicha, an activist and human rights defender, are even «arrested without a warrant, presented to the public prosecutor (...) and tried in immediate appearance»<sup>73</sup>. Kaddour Chouicha was even sentenced to one year's imprisonment in December



2019 and immediately incarcerated in Oran prison, before being provisionally released pending his appeal, after having been urgently transferred to Oran hospital.

Many activists are sentenced to prison terms during trials without their lawyers having access to their files to prepare their

defence. This was also the case in June 2020 for Zoheir Kaddam, a Hirak activist, and Karim Tabbou, the spokesperson for the Democratic and Social Union, who was sentenced to one year in prison without his lawyer being informed of the trial date<sup>74</sup>. Activists targeted by the government are also denied access to adequate health care in prison. In October 2020, for example, Amnesty International expressed concern about the health of activist Abdellah Benaoum, who has been detained for several months despite suffering from serious health problems requiring urgent surgery<sup>75</sup>. At his trial, the judge refused to grant him provisional release even though Abdellah Benaoum could not stand and was unable to speak. There have also been numerous reports<sup>76</sup> of the use of torture against human rights activists and defenders. Walid Nekkiche, a student arrested during a march on 26 November 2019 in Algiers, denounced, during his trial, the torture he suffered during his arrest, interrogation and detention, by police officers and agents of the General Directorate of Internal Security (DGSJ). Prosecuted for «undermining national security» and «plotting against the state», he was arrested again in April 2021. Although some magistrates, such as Yassad Mabrouk, president of the National Union of Magistrates (SNM), dare to criticise these authoritarian practices and in particular the widespread and

abusive use of pre-trial detention<sup>77</sup>, a large proportion of them apply the government's directives, for fear of reprisals. As we saw earlier in this report, the executive power strongly encourages judges to condemn political opponents who have criticised the regime, even going so far as to sanction magistrates who have decided to release certain activists. Judicial repression, flouting the fundamental freedoms of opponents illegally sentenced to prison for having peacefully criticised the regime, is therefore a direct consequence of the executive's control over the judiciary. Arbitrary arrests without a warrant, pre-trial detention without informing the family or lawyers, convictions and even torture, all in the context of widespread impunity, are sadly reminiscent of Algeria's dark years. They are inevitable in a regime where the judiciary cannot protect citizens from the will of decision-makers, and where magistrates are used as 'means' of repression.



# CONCLUSION



Since the first Constitution of independent Algeria, which came into force on 10 September 1963 under the aegis of President Ahmed Ben Bella, the separation of powers has never been established in an efficient manner. For nearly sixty years, the various constitutional reforms that followed have instituted the primacy of the executive power, which is largely linked, if not consubstantial, to the Army. Thus, the legislative and judicial powers, the real guarantor of the legality of laws and the equality of all before them, are concentrated in the hands of the head of the executive. So the rule of law is supposed to guarantee respect for fundamental rights and fight against all forms of impunity, the Algerian state has been departing from these democratic principles for several decades. By instrumentalising the judiciary, subordinating it to its power, the Algerian regime itself creates impunity, thus flouting international human rights law. The total control of the highest national judicial institutions, such as the Supreme Council of the Magistracy or the Supreme Court, the systematic refusal of any investigation, the denial of the rights to Truth and Justice of the families of victims by successive Algerian governments, fuel the current serious violations of human rights in the country, thus making impunity the norm. Whether it is through legal tools, such as the charter for Peace and National Reconciliation, establishing amnesty for crimes committed during the Algerian conflict, or through the judicial system, the same dynamics and processes have been at work since the 1990s. This ongoing phenomenon of impunity will not end without an effective separation of powers and a process of powers and a process of transitional justice. In this regard, we make several recommendations that we consider and deem necessary for the establishment of the rule of law with an independent judiciary. In this regard, we make several recommendations that we consider necessary for the establishment of a state governed by the rule of law with an independent judiciary.

- Our primary desire is to establish a transitional justice process in Algeria. Amnesty laws such as the Civil Concord or more recently the charter for Peace and National Reconciliation deprive Algerians of their rights. The serious violations of Human rights violations that have taken place and are still taking place cannot continue and remain unpunished by the Algerian State which continuously flouts the fundamental rights of its population.

The transitional justice process brings Truth, Justice, Reparations and the guarantee of non-repetition that all the victims and their relatives expect. Without the respect of these four pillars Algerian society will not be able to rebuild itself peacefully and sustainably. In order for its implementation to be possible, there must be a political will.

- The establishment of a Truth and Reconciliation Commission (TRC) is necessary in the framework of the transitional justice process. The establishment of a Truth and Reconciliation Commission (TRC) is needed as part of the transitional justice process. Indeed, this commission could be composed of Algerian experts (jurists, psychologists, etc.) who will be responsible for dealing with cases of victims of serious human rights violations perpetrated in Algeria. This Truth and Reconciliation Commission will make it possible to engage in a dialogue with the parties concerned, to look back at past events. This approach will initiate a process of peace and consolidation of the rule of law.

- The 2005 charter for Peace and National Reconciliation follows on from the 1999 Law on Civil Concord. Abdelaziz Bouteflika called on Algerian citizens, and in particular the families of the 'disappeared', to 'sacrifice themselves in the name of national reconciliation'. There is a desire to forget and to wipe out the past, the black decade. However, these amnesty laws prevent any binding action and open the way to a refusal to listen, to a refusal to accept and to act against the acts that have been committed. The UN Human Rights Committee has already called for the repeal of Article 46 of the charter. We wish to follow through on this and call for the repeal of the charter's implementing legislation in its entirety. Accept the political scope of these application texts is to resign oneself to the fate of the disappeared. However, the heart of our work is based on the fight against enforced disappearances and against the impunity of the perpetrators of human rights violations. impunity for human rights violations committed in Algeria.

- The Algerian government has declared on several occasions, before the United Nations Human Rights Council, that it wants to invite the UN Human Rights Council, to invite UN special rapporteurs, but no news has been given nor have any visits been scheduled. Special Rapporteurs have requested to visit Algeria. Special Rapporteurs have made requests to visit Algeria, but there has been no response. We therefore call on the international community to ensure that Algeria accepts the visit of UN special rapporteurs and working groups on human rights issues on its territory.

- After reading this report, it is certain that the Algerian judicial system requires an in-depth reform. Three points seem to us to be essential to address first: the separation of powers, the independence of powers, the independence of judges and a constitutional reform of the functioning and composition of the Superior Council of the Judiciary. Despite a façade that is well maintained by the Algerian government, the substance of this system is a failure.

- We would also like to call on the authorities to set up an independent National Institute for Human Rights, respectful of the Paris principles. These institutions are European countries, the creation of this one will allow a clear transparency and autonomy that do not exist to date, while contributing to the effective implementation of human rights in Algeria.

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Winner of the special mention of the Human Rights Prize  
of the French Republic in 2006

77 bis rue Robespierre  
93100 - Montreuil  
France  
+33 (0) 9 53 36 81 14  
[cfda@disparus-algerie.org](mailto:cfda@disparus-algerie.org)  
[www.algerie-disparus.org](http://www.algerie-disparus.org)