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## AMNESTY INTERNATIONAL PUBLIC STATEMENT

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# **ALGERIAN DRAFT CONSTITUTION: HUMAN RIGHTS CONCERNS**

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## Introduction

On May 7, the Algerian authorities made public the "pre-draft for a constitutional revision" [hereinafter the pre-draft]. The pre-draft was produced by a Committee of Experts appointed by President Abdelmadjid Tebboune and presided over by Ahmed Laraba, a member of the International Law Commission at the United Nations.

Tebboune came to power in December 2019 after presidential elections opposed by part of the population, including many actors of the Hirak, a movement calling for radical political change which started in February 2019 to protest then-president Abdelaziz Bouteflika bid for a fifth mandate. Following his election, Tebboune announced that he was open to a dialogue with the Hirak movement and publicly stated that his government would "consolidate democracy, rule of law and respect for human rights."

Tebboune proposed a revision of the 2016 Constitution insisting in a letter to the Commission, that the amendment to the Constitution would be a "cornerstone for the construction of a new Republic in order to realize the demands of our people expressed by the popular movement (Hirak)." The pre-draft makes reference to the Hirak by stating in its preamble that the new constitution is a "translation of the people's aspirations for a new Algeria as expressed peacefully in the popular uprising of 22 February 2019 [...]."

Yet in reality, the 2020 pre-draft comes at a time when Algerian authorities are taking advantage of the COVID 19 pandemic to increase their repression against dissident voices and activists, with dozens of new summons, prosecutions and arrests of protesters and activists from the movement. Since April 2020, several online media have been made unavailable in Algeria. On April 15, the Minister of Communications announced that two online independent media, Maghreb Emergent and Radio M had been blocked by the authorities awaiting "further legal proceedings" against its director, Bouzid Ichalalene. This was the first time that authorities from the newly elected government would so clearly approve the censorship of an independent news media, known for publishing articles critical of the government.

In addition, legislative amendments to the penal code, adopted on April 23, added provisions that criminalize the spread of "fake news" with prison sentences of up to three years and the receipt of foreign funds for national organizations.

A number of voices in the Hirak have rejected the draft, criticising the lack of a consultative approach with civil society and called for a more inclusive process, including the Forces of the Democratic Alternative (FPAD) which is a group composed of political parties, the Algerian League for the Defense of Human Rights (LADDH) among other civil society groups.

This memorandum sets out Amnesty International's concerns about selected provisions of the pre-draft which are incompatible with international human rights obligations Algeria assumed including under the African Charter on Human and Peoples' Rights, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.

Overall, the proposed constitutional revisions are a mixed bag for human rights, strengthening some human rights guarantees and introducing new ones while leaving some existing human rights gaps unaddressed and perpetuating the preponderance of the executive over the judiciary.

Furthermore, the concrete implications of much of the new language on human rights in the pre-draft remains opaque, due to provisions making rights conditional on national legislation instead of clear and unambiguous constitutional safeguards. In many cases, such national legislation can itself undermine the right in question. For example, Algerian law is rife with provisions that criminalize legitimate expression and curtailing freedom of assembly and association, such as articles providing for prison sentences for "harming the integrity of the national territory," "incitement to unarmed gathering," or "publications meant at harming the national interest," used extensively by the authorities to prosecute bloggers, activists and protesters.

Amnesty International hopes that these comments will contribute to strengthening the constitutional text which enshrines rights on paper as a much-needed first step towards the enhancement of fundamental rights protections in Algeria.

However, Amnesty International notes that there is a glaring inconsistency between the aspirations in the pre-draft and the reality of ongoing human rights violations in Algeria. If the authorities wish to be taken seriously in their stated commitment to human rights, they must stop arresting opposition activists and release those already detained or sentences solely for exercising their right to freedom of expression and assembly. In a time when prominent human rights and political activists as well as journalists, such as Karim Tabbou and Khaled Drareni, languish in jail, the constitutional draft comes as a reminder that the authorities' promises are belied by the reality.

## Entrenching impunity

The proposed pre-draft endorses, as in the current constitution, the legacy of the “national peace and reconciliation” process by proclaiming its success and the “will of the Algerian people to preserve it.” In effect, this provision would impede any future attempts to amend legislation in place that blocks any accountability efforts.

Gross human rights abuses were committed on a mass scale by armed groups and state security forces during the 1990s internal conflict in Algeria, which claimed the lives of up to 200,000 people, according to official figures. Amnesty International considers that the unlawful killings, enforced disappearances, torture and rape to which civilians were subjected during the internal conflict amounted to crimes against humanity. Instead of investigating these crimes and bringing those responsible to justice, the Algerian authorities adopted a series of legislative measures from 1999 onwards which denied victims, survivors and families' access to truth, justice and reparation. By entrenching such impunity in the constitution, the Algerian authorities are ignoring the plight of victims and their families, who opposed amnesty measures and are denied their right to truth, justice and reparation to this day, in breach of international human rights law.

Amnesty International believes that in order to achieve genuine peace and national reconciliation, the Algerian authorities must take effective measures to combat impunity and to ensure the non-repetition of serious human rights abuses, including by omitting this provision from the pre-draft.

## Independence of the judiciary

The independence of the judiciary has been at the heart of the protest movement's demands with human rights lawyers pointing to the executive branch's control over the judiciary as one of the main reasons for the continuing prosecution of human rights defenders, activists, bloggers and journalists.

It is essential that Algeria's new constitution fully guarantees the independence of the judiciary and the impartiality of the justice system.

The pre-draft chapter on the judiciary contains several important provisions that incorporate general principles on the independence of the judiciary. For example, Article 169 stipulates that: “the judiciary is independent,” and that “judges enjoy independence in the exercise of their functions.” It adds that the judiciary “protects society and freedoms, and fundamental rights.”

However, the draft chapter contains weak guarantees for the tenure of judges, contrary to international standards, for example the UN Basic Principles on the Independence of the Judiciary and the Principles and Guidelines on the Right to Fair Trial and legal assistance in Africa.

**Security of tenure:** While the pre-draft prohibits the removal of judges or their transfer without their consent, a new protection that did not exist in the 2016 Constitution, the pre-draft also envisages the possibility of disciplinary measures for judges following a decision of the Supreme Judicial Council. The draft language states that this would occur “in accordance with guarantees provided for by the law,” a formulation that could be misused by the executive and legislative powers to undermine the essence of this protection.

- Amnesty International recommends that the pre-draft states clearly in Article 178 that any disciplinary measure against a judge should be possible only for serious misconduct, as determined by the Supreme Judicial Council and by respecting guarantees of due process.

**Composition of the Superior Judicial Council and persistent executive branch control:** The pre-draft provides for the establishment of a Supreme Judicial Council with "administrative and financial independence " (Article 187) with a mandate of deciding on the professional conduct of and disciplinary measures for judges. The draft proposes that the Council, to be presided over by the President of the Republic, will be composed of 27 members, 15 elected by their peers, 6 non-judges appointed (2 by the President, 4 by the presidents of the upper and lower chambers of the parliament,) 2 representatives of the union of magistrates, the President of the human rights council, the President of the Court of Cassation (Cour suprême) and the President of the Administrative Council (Conseil d'état).

While the fact that 15 members will be elected by their peers is positive and follows several international instruments which recommend that such bodies have a substantial proportion or even a majority of members as judges elected by their peers, the pre-draft still maintains an undue representation of the executive branch in the Council by retaining the President of the Republic as its president, as is the case with the current Supreme Judicial Council created by the Organic Law No. 04-12 of 6 September 2004. In addition, the two high judicial functions included in the composition will themselves be appointed by the President.

- Amnesty International recommends removing the President of the Republic from the membership of the Supreme Judicial Council.

**Appointment of judges:** while the pre-draft gives the Council the power to appoint judges and determine their career advancement, it grants the President of the Republic important prerogatives to "appoint judges in specific judicial functions, following a proposal from the Supreme Judicial Council." According to the Organic Law No. 04-11 of 6 September 2004 regulating the statute of magistrates, the specific judicial functions include important positions such as the President of the Court of Cassation and the Administrative Council, as well as the General Prosecutor of the Court of Cassation, presidents of courts and general prosecutors at courts. This means that the executive branch still retains significant powers over important judicial functions and would be able to exercise influence over the judiciary.

**Constitutional Court:** the pre-draft envisages the creation of a Constitutional Court, with the mandate to supervise the application of the Constitution. The Court will replace the old Constitutional Council, without fundamentally changing its composition and attributions under the 2016 Constitution. The Constitutional Court will have the power to review the constitutionality of proposed laws after a request from either the President of the Republic, the President of Parliament or at least 40 members of the lower chamber or 25 members of the upper chamber of Parliament. The Constitutional Court will also have the power to examine whether existing laws are consistent with rights and freedoms enshrined in the Constitution after a referral by the Court of Cassation or the Administrative Council, following a request by a party to a litigation, a procedure that was already introduced under the 2016 constitutional amendments.

While this provision is positive, as it allows citizens to indirectly challenge the constitutionality of laws that infringe rights and freedoms, the draft constitution does not state whether the court's pronouncements on a particular law will invalidate it in the legal order or whether it will only have a suspensive effect in the specific litigation only.

- We recommend that the provision is strengthened to add a stipulation to the effect that the Court of Cassation pronouncement that a law is unconstitutional in a specific litigation would invalidate the provision in question in the legal order.

The Court will be composed of 12 members, four to be appointed by the President of the Republic, 2 elected by the Court of Cassation, 2 elected by the Administrative Council, and 4 by the Presidents of the upper and lower chambers of parliament. The pre-draft grants the President of the Republic the power to appoint the President of the Constitutional Court. In this sense, the Constitutional court, like the Constitutional Council, will remain under strong control of the executive branch as the Head of State will appoint both the President and one third of its twelve members.

- We recommend that the president of the Constitutional Court shall be elected by a majority of its members rather than appointed by the President of the Republic.

## Right to life

Article 38 of the pre-draft provides that "the right to life is inherently attached to the human person, and no one should be deprived of it arbitrarily." The wording of this article is vague and leaves open the possibility of the death penalty continuing to be provided for by law. Although the Algerian authorities have maintained a de facto moratorium on executions since 1993 and have voted in favour of UN resolutions on a moratorium on the use of the death penalty, Algerian law still allows for the death penalty.

- Amnesty International calls on the Algerian authorities to fully guarantee the right to life in the Constitution and to explicitly abolish the death penalty. Amnesty International opposes the death penalty in all cases as it constitutes a violation of the right to life and the right to be free from cruel, inhuman or degrading treatment or punishment.

## Non-discrimination and women's rights

The pre-draft introduces an equality provision in Article 37 by stating that "citizens are equal before the law and enjoy equal protection of the law." The pre-draft restates the non-discrimination provision of the current constitution, by prohibiting discrimination against Algerian citizens based on "birth, race, sex, opinion or any other condition or personal and social circumstance." While the introduction of the principle of equality is a positive step, the pre-draft does not remedy the current constitution's failure to protect non-citizens which has led into violations of migrants rights, in breach of Algeria's obligations to protect the human rights of all persons within its territory and under its jurisdiction.

- Amnesty International calls on Algerian lawmakers to extend non-discrimination protections to all those under its jurisdiction.

The proposed amendments introduce positive language on women's rights. Article 40 mentions that "the State protects women from all forms of violence in all places and all circumstances, in the public space, in the professional sphere and in the private sphere. The law guarantees the access of victims to shelters, to care centers, to appropriate means of redress and to free legal assistance."

The pre-draft maintains the same provision as in the 2016 constitution, which obligates the state to "work to promote parity between men and women in the job market." The constitution also "encourages the promotion of women in leadership positions in institutions, public administrations and companies" (Article 71) and to "work towards the promotion of political rights of women by increasing their chances to access elected assemblies" (Article 59).

- Amnesty International calls on lawmakers to adopt these progressive amendments and enshrine women's rights in the constitution.

## Freedom of expression and freedom of the press

The pre-draft still has some broad limitations on freedom of expression and the press. The 2016 amendments to the constitution had conditioned media freedom on the "respect of religious, moral and cultural values of the Nation," broad and vague notions open to arbitrary interpretations, and to the interpretations of national legislation. The pre-draft provides in Article 52 that "freedom of expression is guaranteed" and that freedom of the press (article 54) should not be subject to prior limitations or censorship. However, the draft provision makes the exercise of this freedom subject to broad limitations by adding that "the right to publish information, ideas, and opinions shall be exercised in the framework of the law," thereby giving broad discretion to legislators to undermine the essence of the right. The pre-draft also retains the condition of compliance with "respect of the fundamental religious, moral and cultural values of the nation." Article 55 guarantees the right for citizens to receive and impart information, but

introduces the condition that the exercise of such right shall not infringe on "the private lives of others, on their rights, the legitimate interests of institutions, and the requirements of national security."

These limitations give too much leeway to the legislature to pass a law to restrict this right, without requiring the restrictions to meet strictly the three-part test set by international law. Under international law, any restrictions on human rights must be: 1. prescribed by law; 2. pursue a legitimate aim, such as respect of the rights or reputations of others, protection of national security, public order, public health, or morals; and 3. necessary to secure the legitimate aim and meet the test of proportionality.

For example, the Declaration of Principles on Freedom of Expression in Africa (African Declaration), adopted by the African Commission on Human and Peoples' Rights in 2002, affirms that, "any restrictions on freedom of expression shall be provided by law, serve a legitimate interest and be necessary in a democratic society." It further states that "freedom of expression should not be restricted on public order or national security grounds unless there is a real risk of harm to a legitimate interest and there is a close causal link between the risk of harm and the expression."

The Human Rights Committee stated in its General Comment on Article 19 of ICCPR that restrictions to freedom of expression may be only subject to these conditions: the restrictions must be "provided by law," they may only be imposed for a legitimate ground and they must conform to the strict tests of necessity and proportionality.

## Freedom of association and freedom of assembly

Article 52 of the pre-draft enshrines **the right to peaceful assembly** and provides that it shall be guaranteed and exercised upon simple notification, however it also states that the law will set up the "conditions and procedures" for its exercise. This is a matter of concern as the law in Algeria criminalizes "unarmed gatherings," a provision often used to repress peaceful dissent. Peaceful protesters and activists in Algeria continue to be arrested, prosecuted and even imprisoned solely for exercising their right to peaceful assembly. Algerian law still requires prior authorization to hold public gatherings and assemblies while the Algerian authorities continue to enforce a ban on all demonstrations in Algiers.

- Amnesty International calls on the Algerian authorities to ensure that the law regulating public gatherings does not contain undue restrictions to freedom of assembly beyond what is allowed under international law which requires that any restrictions to the right to freedom of assembly are strictly necessary in a democratic society in the interests of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others.
- In line with the recommendations of the UN Special Rapporteur on the rights to freedom of peaceful assembly and of association, Algeria should do away with requirement of authorization and institute a system of reasonable prior notice for holding peaceful assemblies which includes exceptions for spontaneous assemblies.

Article 53 enshrines **the right to form associations**. The article represents a progress compared to the 2016 Constitution as it provides that associations are created upon declaration. This suggests that a new organic law would be required to replace the current 2012 Law 12-06 on Associations which insists on prior approval by the authorities, long abused to deny independent associations legal status. The law also imposes restrictions on associations and civil society groups' activities and on their access to foreign funding. It grants the authorities the power to suspend activities or even dissolve groups on the grounds of "interference in the country's internal affairs or violation of national sovereignty."

- Amnesty International calls on the Algerian authorities to adopt this positive amendment and enshrine freedom of association in the new Constitution. Parliament should repeal Law 12-06 and elaborate the new organic law on associations in conformity with applicable international human rights standards.

## State of emergency

The pre-draft still allows the President to impose a state of emergency "in case of necessity" for 30 days after consulting with the two chambers of parliament, the president of the Constitutional Court, and the head of government (Article 112). The president can also decide of a "state of exception," for 60 days in the event of an "imminent danger threatening the entity, security, and independence of the country" (Article 114). The draft does not mention non-derogable rights.

- Amnesty International recommends that the pre-draft states that rights and freedoms shall be respected at all times, and that any limitations will conform to the requirements of the ICCPR on emergency situation as set out in Article 4 and General Comment No. 29. This should include that emergency limitations on rights should only be those that are necessary for a specific period of time to meet the exigencies of the situation, and that rights that are considered non-derogable in international law can never be limited or suspended under emergency powers. Both the declaration of the state of emergency and any powers assumed under it should be subject to judicial review.

## Social, economic and cultural rights

The pre-draft incorporates several important social, economic and cultural rights. It states that state institutions aim to achieve social justice and tackle regional disparities in development but in the absence of further elaboration it is unclear what this means in practice.

Article 64 of the pre-draft guarantees the right to access drinkable water. Article 65 mentions the person's right to the "protection of their health" and mentions that the state shall ensure that "conditions are met for healthcare of those in need." This is a much better formulation than the 2016 Constitution where Article 66 only mentioned the state's role in enabling access to healthcare for those living in poverty but fell short of recognizing the right to health for all.

- We recommend that the pre-draft strengthens the formulation of this right by including access to adequate healthcare physically and economically affordable to all those within its territory and under its jurisdiction without discrimination.

Article 66 maintains the same shortcoming as in the 2016 Constitution by mentioning the state's role in facilitating access to housing, without establishing the right to adequate housing for all, as defined under international law, and without prohibiting forced evictions, which are illegal under international law.

Article 67 mentions the right to environment in the "framework of the sustainable development."

Article 68 guarantees the right to education and specifies that public education shall be free.

Article 69 guarantees the right to work but adds that this right is "indivisible from the duty to work", an ambiguous formulation that could lead to criminalization of strikes. **بن** prohibits the work for minors under 16 and guarantees a minimum salary.

While enshrining these rights in the constitution is important, the pre-draft should strengthen guarantees for economic, social and cultural rights by specifying that Algeria has an obligation to progressively achieve the full realization of these rights to the maximum of the country's available resources, by taking reasonable legislative and other measures to implement them.

The draft fails to mention the right to food, although it is a fundamental human right, as well as the right to sanitation, which is interrelated with the rights to water and health as well as being a distinct right in itself which has been recently recognised by the UN General Assembly.

## Asylum and non-refoulement

The pre-draft, like the 2016 Constitution, prohibits the forcible return of political refugees (Article 50), but it omits any mention of the right to seek asylum. Furthermore, the Constitution makes no mention of refugees fleeing persecution on grounds other than political, whereas the 1951 Convention relating to the Status of Refugees enumerates five grounds: race, religion, nationality, and membership in a particular social group or political opinion. The pre-draft also omits the right to non-refoulement, ie protection against removal to any country or territory where the person concerned would face a real risk of serious human rights violations or abuses, such as torture; this right is owed to everyone subject to Algerian jurisdiction, and not merely refugees.

The pre-draft introduces a new right to foreign nationals "who are legally on the national territory to enjoy, for their person and property, of the protection of the law." (article 50) This article is problematic as it opens the door for abusive treatment of non-documented migrants. Since August 2017, the authorities have launched a discriminatory crackdown against foreign nationals, rounding up and summarily expelling more than 34,550 Sub-Saharan African migrants from a range of countries to neighbouring Niger and Mali, without any due process. The formulation of the article could lead to legalizing such a practice, which is contrary to Algerian authorities' obligations under the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, which prohibits collective expulsions of migrant workers and their families and requires examining and ruling on each potential expulsion individually. The convention applies to all migrant workers and their families, irrespective of their legal or work status.

- The organization urges Algerian lawmakers to bring the constitution in line with Algeria's obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol (UN Refugee Convention), the 1969 Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa (OAU Refugee Convention), the ICCPR, the Convention against Torture and the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families.

## General limitations clause

Article 34 of the pre-draft introduces criteria for the restrictions that the state can impose on rights and freedoms. It states that "no restriction can be imposed on rights and freedoms unless by law and for motives linked to the maintaining of public order, security and for safeguarding other rights and freedoms protected in this Constitution." It adds "in any case, those restrictions cannot infringe on the essence of these rights and freedoms."

In addition to these protections, the constitution should include a general clause stating that the rights and freedoms affirmed by the constitution may only be restricted under international law under the following conditions:

- They are defined in a clear law;
- They are permissible for a reason set out in a human rights treaty as a permissible reason to limit that specific right;
- They are reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom;
- They are not directly or indirectly discriminatory; and
- The scope of a limitation referred to in the constitution is proportionate to the interest to be protected and shall not be interpreted to jeopardize the essence of the right concerned or be interpreted in a restrictive way.

Amnesty International recommends that Article 34 be further strengthened by providing that judges should interpret the law, including the constitution, to give priority to enforcement of a right or fundamental freedom, and to take into account the interpretation of human rights treaties from any official treaty body, including courts and commissions, as a minimum standard.