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#يسقط القانون ٥٤

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## “All This for a Joint”

Tunisia’s Repressive Drug Law and a Roadmap for Its Reform

## **“All This for a Joint”**

Tunisia’s Repressive Drug Law and a Roadmap for Its Reform

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## Tunisia’s Repressive Drug Law and a Roadmap for Its Reform

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## Summary

For almost a quarter of a century, Tunisia's drug laws have mandated long prison sentences for drug offenses resulting in large numbers of low-level offenders in Tunisian prisons. Long prison sentences are cruel, disproportionate, and counterproductive punishment for recreational users. People convicted for drug use or possession leave prison with a criminal record that often prevents them from gaining employment and subjects them to social stigma and police harassment.

Law n.92-52 on Narcotics (referred to as Law 52), adopted in 1992, requires courts to impose a minimum mandatory sentence of one year in prison on any person found guilty of use and possession of an illegal drug, including cannabis. The law imposes a minimum sentence of five years in prison on repeat offenders. For both offenses, judges have no discretion to reduce the sentence in light of mitigating circumstances. Even in cases involving possession of a single joint, judges lack authority to impose alternatives to incarceration such as community-based sanctions or other administrative penalties.

As of December 2015, 7,451 people were prosecuted for drug related offences in Tunisia's prisons, and 7,306 men and 145 women, according to the Justice Ministry's General Administration of Prisons and Rehabilitation. Around seventy percent of these – about 5,200 persons, were convicted of using or possessing cannabis, referred to in Tunisia as "zatla." Drug offences represented 28 percent of the total state prison population.

Human Rights Watch has documented how state enforcement of criminal drug law in Tunisia has resulted in serious human rights violations. Human Rights Watch interviewed 47 people in several locations in Tunisia, including young residents of working-class neighborhoods, students, artists, and bloggers. The interviews showed that abuses accompany enforcement of Tunisia's drug control policies, such as beatings during arrest and interrogation, rude, insulting and threatening police behavior, mistreatment during urine tests and searches of homes without judicial warrants.

Once a person is convicted under Law 52 and sent to prison, another kind of ordeal begins. In its last report on Tunisia, the Office of The United Nations High Commissioner for Human Rights cited significant overcrowding in Tunisian prisons, suggesting that some prisons

were at 150 percent capacity. Therefore, a person convicted of smoking a joint has to share an overcrowded cell with persons imprisoned for serious crimes.

Precious law enforcement and court resources are expended processing thousands of cannabis possession arrests each year – resources that could be reallocated to handling more serious offenses.

The oppressiveness of the drug law is compounded by the abuses that frequently accompany criminal arrests in general. Tunisia’s code of criminal procedure gives the police broad discretion to arrest persons without reasonable suspicion of illegal behavior. After being placed under arrest, suspects have no right to a lawyer during the first six days they are held in custody before they must be presented to a judge. During this initial period, detainees are particularly vulnerable to mistreatment by law enforcement agents because they cannot receive visits by family members or a lawyer, including during their interrogation by police.

Calls by civil society groups and human rights activists for the revision of Law 52 have been growing for months. During the presidential and legislative electoral campaigns of 2014, the ultimately victorious candidate for president, Beji Caid Essebsi, said that he favors eliminating prison terms for first-time offenders. On December 30, 2015, the government approved a new draft drug law. At time of writing, the parliament has yet to discuss and vote on the draft law.

Human Rights Watch welcomes the draft law’s abolition of prison terms for first-time and second-time offenders in drug use or possession cases and its abolition of mandatory sentences for both first-time and repeat offenders, the discretion it grants judges to impose punishments less harsh than prison time, and the greater emphasis it places on access to treatment services.

Despite these improvements, a number of concerns remain.

By maintaining the option of prison sentences of up to one year for repeat use and possession of illegal drugs, the bill ignores calls from international experts on human rights and health urging countries to eliminate custodial sentences for drug use and possession.

Governments have a legitimate interest in preventing societal harms caused by drugs. However, criminalizing personal drug use per se clashes with a person's right to privacy and basic concepts of autonomy underpinning all rights.

The decision to use drugs, like the decision to consume alcohol or tobacco, is a matter of personal choice and an exercise of an aspect of the right to privacy under international law, a cornerstone of respect for personal autonomy. Limitations on autonomy and the right to privacy may be imposed, but are justified only if they meet the criteria of legitimate purpose, proportionality, necessity, and non-discrimination. The criteria of proportionality and necessity require governments to consider what means are available to achieve the same purpose that would be least restrictive or pose minimal interference with respect for and the exercise of human rights.

Human Rights Watch believes that arguments for criminalization of personal drug use or possession of drugs for personal use rarely, if ever, meet these criteria. Arrest, incarceration, and a criminal record with possibly life-long consequences are inherently disproportionate government responses to someone who has done nothing more than use recreational drugs.

The draft law contains provisions that may violate the right to free expression and of privacy. The draft adds a new offense of "public incitement to commit drug-related offenses," which entails half the sentence of the underlying offense. This new provision, as written, could be used to prosecute members of civil society groups that advocate for the decriminalization of drugs, rappers and singers who sing about drugs, organizations providing services to reduce drug related harms, and others who express themselves peacefully about drugs. The draft has also considerably expanded the special investigative measures available to the police when conducting anti-drug operations, such as surveillance, phone tapping and interception of communication.



# Recommendations

## To Parliament

- Reform Law 52 to remove criminal sanctions for the use or the possession of recreational drugs for personal consumption for first-time and repeat offenders.
- In the draft law reforming Law 52, state that the crime of public incitement to commit drug-related offenses should not criminalize discussions of public policy.
- Revise the draft law reforming Law 52 by providing that special investigative techniques such as surveillance and interception of communication be used as exceptional measures and in general only to target suspected drug-traffickers rather than simple consumers.
- Revise the draft law reforming Law 52 by specifying that hearings for drug suspects shall be public and that the judge may order closed or restricted sessions only in exceptional circumstances justified by the protection of court proceedings, victims and witnesses when there is real danger arising from making proceedings public. Restricted sessions should be for the minimum period necessary, and should not diminish the right of defendants to hear and challenge witnesses and other evidence against them.
- Specify in the draft law reforming Law 52 that anonymous testimonies may be permitted only in very exceptional circumstances and should not be the sole or decisive basis of the conviction.
- Specify in the new legislation that the Health Care Council for Drug Users may order that defendants accused of drug possession or use attend a specified number of meetings with the provider of a drug dependence treatment program, the purposes of which shall be to ensure the person is aware of the program's services that may assist in overcoming drug dependence and to determine whether the person wishes to avail himself or herself of the services of the program. The Council may not compel the person to undergo drug dependence treatment.
- Ensure that the relevant drug legislation does not prevent the giving of advice, information or instruction for safer drug consumption practices by outreach workers nor does it prohibit the sale or supply of syringes and other related material by outreach workers.

- Propose legislative reform of the Code of Criminal Procedure to require a police agent to have a reasonable, individualized suspicion of criminal wrongdoing in order to place a person under arrest.
- Reform the Code of Criminal Procedure to ensure access to a lawyer from the outset of detention in all cases and ensure that all suspects are brought promptly before a judge, normally within 48 hours. Any delay must be exceptional and justified with reasons.
- Eliminate from the draft law prison sentences for refusal to undergo the urine test.
- Provide, in the draft law, that the urine test can only be voluntary and that any evidence, including such tests, obtained by coercion is prohibited from being considered, and that coercion includes telling the suspect that such tests are compulsory.
- Provide penalties for law enforcement agents who coerce people to undergo the test.
- Ensure that the Health Care Council for Drug Users includes a legal expert, as well as other experts such as medical practitioners, psychologists, social service workers or others with appropriate expertise in the field of drug dependence. The Council should also include current or former drugs users.

### **To the Ministry of interior and of justice**

- Appropriately discipline public security personnel and agents who are responsible for the ill-treatment during arrest and detention of persons in drug related offences.
- Ensure a prompt, thorough, and impartial investigation and appropriate prosecutions of those responsible for serious abuses in connection with drug related arrests, including arbitrary arrests, torture, cruel, inhuman or degrading treatment or punishment, and coercing suspects to take urine tests.

### **To the Ministry of Health**

- Expand access to voluntary, community-based drug dependency treatment and ensure that such treatment is medically appropriate and comports with international standards.
- Expand access to voluntary, community-based drug dependency treatment for children, and ensure that such services are age-specific, medically appropriate and include components of education.

- Expand access to voluntary, community-based drug dependency treatment which addresses the special needs of women and girls who use drugs.

## Methodology

In September and October 2015, Human Rights Watch conducted 47 interviews with people who had been arrested for possessing or using cannabis. Most of the interviewees had served prison sentences for drug use or possession. They had all spent several days in police custody, following their arrest, ranging from three to six days. Some of these interviews were conducted individually and in private, others were conducted in group settings. The group interviewees were mostly between 17 and 30 years old. The subjects included bloggers, artists, students, and young residents of the working-class neighborhoods of Hay el Khadhra and Douar Hicher in Tunis, and Hay Ezzouhour and Ennour in Kasserine.

Human Rights Watch identified interviewees for this report through its extensive network of activists or through the association International Alert, which conducted a study in 2013 about youth and marginalisation in Tunisia. All participants verbally consented to be interviewed. They were informed of the purpose of the interview, its voluntary nature, and the ways in which the data would be collected and used. Human Rights Watch chose to withhold the names of most people interviewed in this report in order to protect them from retaliation and to protect their privacy. In cases that are already well-known, we used the persons' real names.

Human Rights Watch has also reviewed twenty case files in drug cases, including police reports and court decisions. These documents shed light on police practices in investigating these cases.

## I. Background

Tunisia’s drug law imposes mandatory imprisonment even for first-time offenses involving possession or consumption of illegal drugs, including cannabis. Enacted in 1992, the Law on Narcotics (often referred to as Law 52) takes a mostly repressive approach to drug offenses.<sup>1</sup> It imposes prison terms of between one and five years and a fine of 1,000 to 3,000 dinars (US\$562 to \$1,686) on any person found to be using or possessing for personal use any type of illegal narcotic. Conviction for a second offense under this law results in a mandatory five-year sentence. Even in situations where mitigating circumstances are present, article 11 of the law deprives judges of discretion to reduce drug-related sentences beneath these minimum periods.<sup>2</sup> This provision is an exception to the general principle enunciated in article 53 of the penal code, which permits judges, “when the circumstances of the act prosecuted appear of a nature to justify the mitigation of the penalty [...] to reduce the penalty below the legal minimum.”

As of December 15, 2015, there were 7,451 people prosecuted for drug related offences in Tunisia prisons, 7,306 men and 145 women. Around 70 percent (5,200 people) of the incarcerated drug offenders were convicted of using cannabis, referred to in Tunisia as “zatla”<sup>3</sup>. Drug offenders represented 28 percent of the total state prison population, and people convicted of the offence of consuming cannabis represented 20 percent.<sup>4</sup>

The costs—both financial and social—of arrest and incarceration for possession or use of cannabis are substantial. Precious law enforcement and judicial resources are expended arresting, processing, trying, and incarcerating thousands of cannabis possession arrests each year.

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<sup>1</sup> Law n. 92-52 of 18 May 1992 on Narcotics, <http://www.legislation-securite.tn/fr/node/34555>

<sup>2</sup> Article 12, law n.95-52 on Narcotics “Provisions of article 53 of the penal code do not apply to the crimes enunciated in this law.”

<sup>3</sup> Human Rights Watch interview with Saber Khfifi, director of the General Administration of prisons and rehabilitation (GAPR), Tunis, December 17, 2015. In addition to the 7,451, there are 2,749 other drug offenders who had been released in 2015 under the presidential amnesty.

<sup>4</sup> There are currently 26,000 inmates in all Tunisian prisons. Human Rights Watch interview with Saber Khfifi, Tunis, December 17, 2015.

According to official statistics, Tunisian prisons operate at 53 percent over capacity. The cost of each inmate being 21 dinars per day (US\$10.20), incarcerating 5,200 cannabis users for one year costs the state around 38 million dinars (US\$18 million) annually.<sup>5</sup>

Law 52 gives a judge the right to impose, in addition to the mandatory sentences, “administrative surveillance” for a period of up to 10 years, meaning that a person can be compelled to sign in at the police station on a daily or regular basis. The judge can also punish an offender by rendering him ineligible to receive a passport or to be hired in the public administration.

Chapter IV of Law 52 deals with health care and the prevention of drug use. It provides that a person using drugs will not face prosecution if, before law enforcement authorities discover his deeds, he voluntarily seeks treatment at a state rehabilitation center. This exemption applies only to first-time offenders.

Most of the people interviewed by Human Rights Watch in the working-class neighborhoods of Tunis and Kasserine complained about unemployment, marginalization, and the absence of opportunities and prospects for a better future. Firas, 21 and unemployed, said, “[smoking pot] helps me kill the time; I have nothing else to do.” Naim, a 30-year-old occasional worker, said, “There is nothing here to divert our attention from *zatla*.” Ahmed told us, “I started smoking to fill the void. Our future is dark. There is no way out.”<sup>6</sup>

In this context, sending young men to prison for smoking joints intensifies their feeling of marginalization, as they told Human Rights Watch.

Campaigning for the presidency in 2014, Beji Caid Essebsi advocated replacing prison terms for first-time offenders with alternative penalties such as fines.<sup>7</sup> Following legislative and presidential elections, the government created a commission composed of representatives from the ministries of justice, health, and social affairs, to draft a new narcotics law. The government received the commission’s draft in September 2015 and

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<sup>5</sup> Human Rights Watch interview with Saber Khfifi, Tunis, December 18, 2015.

<sup>6</sup> Human Rights Watch interviews with Naim, Firas and Ahmed, October 17, Kasserine.

<sup>7</sup> Interview on Radio Mosaïque FM, December 19, 2014, <http://www.mosaiquefm.net/fr/index/a/ActuDetail/Element/45571-bce-je-fais-une-campagne-electorale-et-mon-concurrent-fait-une-campagne-contre-moi>.

requested amendments. On December 31, the government has adopted the revised version but has yet to send it to the parliament at time of writing.<sup>8</sup>

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<sup>8</sup> Human Rights Watch interview with Mohamed Salah Ben Aissa, then Minister of Justice, October 5, 2015, Tunis.

## II. Abusive Police Practices in Drug-related Investigations

### General Legal Framework for Arrest and Detention

The injustice of imprisoning recreational and casual drug users is compounded by the abuses that frequently accompany police enforcement of the drug law, as well as the abuses and lack of legal safeguards that persons under arrest or in jail commonly experience, whether their suspected offense is drug-related or not.<sup>9</sup>

In Tunisia, police forces have broad powers to stop and check individuals regardless of whether they suspect criminal activity. The Code of Criminal Procedure (CPP) does not mandate a specific threshold of suspicion of commission of a crime in order to proceed with a search and arrest. The CPP grants officers of the judicial police the right to detain a person for up to three days, renewable once with an order from the prosecutor, if it is deemed necessary “for the requirement of the investigation.”<sup>10</sup> Thus, Tunisian law offers broad grounds to the police to arrest anyone.<sup>11</sup>

This means, in practice, that the police, and then the judicial authorities, do not need to find drugs on an individual; they can place him under arrest on the basis of suspicion of drug use and then administer a urine test which, if positive, usually provides, in practice, sufficient grounds for conviction<sup>12</sup>. This also means that someone taken into custody, for

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<sup>9</sup> See Human Rights Watch Report, “Cracks in the System. Conditions of pre-charge detainees in Tunisia”, December 5, 2013. <https://www.hrw.org/report/2013/12/05/cracks-system/conditions-pre-charge-detainees-tunisia>

<sup>10</sup> Code of criminal procedure, article 13.

<sup>11</sup> In contrast, other systems have a better definition of the threshold for arrest and identity check. Subsection 1 of the French code of criminal procedure stipulates that stops for crime investigation and prevention must be based on a reasonable suspicion (“one or more plausible reasons”), linked to actual behavior, that a person may have attempted or committed an unlawful act (*infraction*) or is preparing to commit a crime. The UK Police and Criminal Evidence Act gives police the power to stop, search, and detain someone only on the basis of a “reasonable suspicion” of wrongdoing. The accompanying Code of Practice explains that: “Reasonable suspicion can never be supported on the basis of personal factors alone without the supporting intelligence or information. For example, a person’s colour, age, hairstyle or manner of dress, or the fact that he is known to have a previous conviction for possession of an unlawful article, cannot be used alone or in combination with each other as the sole basis on which to search that person. Reasonable suspicion cannot be based on generalizations or stereotypical images of certain groups or categories of people as more likely to be involved in criminal activity. A person’s religion cannot be considered as reasonable grounds and should never be considered as a reason to stop and search an individual”.

<sup>12</sup> The Code of Criminal Procedures, article 13.



example for an argument in a café or for any other reason, may be ordered to undergo a urine test.

This unfettered discretion to arrest is inconsistent with international standards on arrest. Tunisia is a party to the International Covenant on Civil and Political Rights (ICCPR), which prohibits arbitrary arrest or detention. The Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa also mandate that States must ensure that no one shall be subject to arbitrary arrest or detention, and that “arrest, detention or imprisonment shall only be carried out ... pursuant to a warrant, on reasonable suspicion or for probable cause.<sup>13</sup>” The prohibition against arbitrary arrest or detention means that deprivation of liberty for criminal purposes, even if provided for by law, must be necessary and reasonable, predictable, and proportional to the reasons for arrest. In order for an arrest to be reasonable, the evidence at hand would have to satisfy an objective observer that there are reasonable grounds to believe that the suspect has committed a crime<sup>14</sup>.

Once persons are placed in a police jail, they have no right under the CPP to family visits or to a lawyer for the first six days they are in custody, including when the police is interrogating them. This makes suspects in detention especially vulnerable to mistreatment by law enforcement agents, especially to coercive measures to sign a statement, sometimes without even being permitted to read it. According to numerous persons who spent time in Tunisian jails and whom Human Rights Watch interviewed, police commonly use slaps, insults, beatings with a truncheon, and other forms of humiliation and mistreatments in order to coerce suspects to sign confessions. After six days, the police must present persons in their custody to a judge, who decides whether to release them or return them to custody.

The case of Adnène Meddeb and Amine Mabrouk, two members of the organizational committee for the Carthage Cinema festival (Journées Cinématographiques de Carthage, one of the most important film festivals in Africa), illustrates the lack of standards for arrest and how enforcement of Law 52 leads to abuse. According to their lawyer, the two

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<sup>13</sup> Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, adopted by the African Commission on Human and People’s rights in 2003, <http://www.achpr.org/instruments/principles-guidelines-right-fair-trial/>

<sup>14</sup> In his authoritative commentary on the ICCPR, Manfred Nowak included elements of injustice, unpredictability, unreasonableness, and non-proportionality in the meaning of arbitrariness. Manfred Nowak, UN Covenant on Civil and Political Rights: CCPR Commentary, (2nd rev. ed.). Kehl am Rhein: Engel, 2005 p.225.

men were returning home, on November 28, 2015, after attending the closing ceremony for the film festival.<sup>15</sup> The police report, which Human Rights Watch has reviewed, stated that the police arrested them shortly after the beginning of the nightly curfew, imposed in Tunisia following a deadly attack on a presidential guard vehicle, on November 24, 2015.<sup>16</sup> The report states that the evidence the police found was a pack of cigarette rolling papers in the men's car. The two men refused to undergo the urine test. Despite the lack of evidence, the court sentenced them both to one year in prison.

Following this case, the spokesperson of the Ministry of Interior, was quoted in the website Nawaat, saying, "Any person can be arrested in order to get tested." He added, "Even rolling papers can be considered as evidence of guilt. A urine test can confirm or deny this guilt."<sup>17</sup>

## Sweeping Arrests and Physical Abuse

Young people interviewed by Human Rights Watch who are living in economically disadvantaged areas said they were particularly frequent targets for such stops and searches for drugs. Various youths interviewed by Human Rights Watch said that the police frequently stopped them for no apparent reason, that gatherings of more than three people were likely to attract the suspicion of the police and trigger a search that would include inspecting their bags and pockets and patting them down. Discovery of drugs or drug related paraphernalia, including cigarette rolling papers, would likely result in arrest, followed by interrogation.

Most of the 47 interviewees described physical abuse, including beatings, and all of them complained of rude, insulting, and threatening behavior.

For example, **Malek**, a 19-year-old high school student at the time of his arrest on December 31, 2014, said police in a white van approached him and his friends when they were in their neighborhood in Douar Hicher in Tunis, at around midnight. They asked him to lean against the police car and after finding cannabis on him, placed him in handcuffs. He said one of the policemen punched him in the stomach until he fell and then kicked

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<sup>15</sup> Human Rights Watch interview with Ghazi Mraber, lawyer, December 18, 2015, Tunis.

<sup>16</sup> Report of the Bardo Police, Dated November 29, on file with Human Rights Watch.

<sup>17</sup> Article Nawaat: « Sous couvre-feu : si vous n'êtes pas un terroriste, vous êtes un zatal », 04 Dec 2015, <http://nawaat.org/portail/2015/12/04/sous-couvre-feu-si-vous-netes-pas-un-terroriste-vous-etes-un-zatal/>.

him on his legs. They took him and his friends to the police station of Douar Hicher, where they beat him again.<sup>18</sup>

**A. M.**, then 19 years old, left school to work in an aluminum factory. In March 2012 at midday, he met up with friends in his Hay el Khadra neighborhood in Tunis. They were smoking pot, he said, and he lingered, chatting with them. Three marked police vehicles pulled up and started searching them. Although they found no drugs on A.M., they still took him, together with his friends, to Hay el Khadra police station. He said they beat him to force him to confess that he had consumed drugs, slapping him on the face and kicking him on his legs. Then they presented him a statement to sign. When he asked them to read it they slapped him, he said, so he signed without reading.<sup>19</sup>

**Jawhar**, now 21 years old, works in a thrift shop in Zahrouni, a working-class neighborhood in Tunis. On February 10, 2014, at 10 p.m., he was with a friend smoking a joint in the courtyard of a high school in their neighborhood. Four plainclothes police officers confronted them and took them to Zahrouni police station. He said that in the police station one of the officers hit him with a baton on his legs. Then they took him upstairs to the judicial police, who wrote a statement that Jawhar signed without reading it because he was too afraid to ask, he said. He was later transferred to Bouchoucha jail. Two days later, the police took him back to the judicial police in Zahrouni for a urine test. When Jawhar tried to refuse, the officer took him to the toilet, filled a bucket with water and poured it on him, and threatened to put a pipe in his anus if he refused. Jawhar relented and underwent the test the same day in Charles Nicole hospital, with the same officer standing by him, he said.<sup>20</sup>

**Samia Marsni**, now 24 years old, audiovisual art student, was arrested on February 9, 2013, at 2 a.m., together with a male friend of her age. They were going back home from a bar when two uniformed policemen on a motorcycle stopped them on the Rue de Marseille in downtown Tunis. They asked them what they were doing and whether they were drunk. When one tried to search Samia, she resisted. She said he twisted her arm violently and forced her to kneel down while he handcuffed her. While searching her, the policeman found a small amount of cannabis. They took her and her friend to the police station called

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<sup>18</sup> Human Rights Watch interview with Malek, Douar Hicher, Tunis, September 15, 2015.

<sup>19</sup> Human Rights Watch interview with A.M., Hay el Khadhra, Tunis, September 21, 2015.

<sup>20</sup> Human Rights Watch interview with Jawhar, October 9, 2015.

the “Septième,” in Tunis center. There, she said, policemen insulted them and one of them slapped her friend on the face. At 4 a.m., they took the two to Bouchoucha detention center, and the following day, to Bab Bhar police station.

They took my friend, handcuffed, somewhere. After half an hour, they took me to an office, underground. There I saw my friend sitting on a chair, still handcuffed behind his back, surrounded by policemen in plainclothes. He was barefoot, with the bottom of his trousers rolled up to his knees, and there was a puddle around his feet, as if they had poured water on them. I saw one of the policeman holding a belt and slapping him on his feet and his knees.<sup>21</sup>

Samia spent five months in prison for drug consumption before being released by a presidential pardon.

In at least one case, police seem to have made an arrest under Law 52 in the absence of any evidence of drug use and in reprisal for the suspect’s unrelated, other activities. Policeman arrested Mourad Mehrezi, a cameraman, in August 2013 when he filmed someone throwing an egg at the minister of culture. Mehrezi told Human Rights Watch that policemen took him after three days of detention at the Charles Nicole hospital to do a urine test.<sup>22</sup> Mehrezi said he believed the urine test was ordered in reprisal for his refusal to sign the initial police statement accusing him of complicity with the egg-thrower. He said that the police lined up several detainees in the backyard of the hospital, insulted them, and told them to urinate in plastic cups. On September 5, Mourad Meherzi was released pending trial. On January 2015, the First Instance Tribunal acquitted him of the charges of conspiracy to assault a public servant and harming public morals. His urine test came back negative and he was never charged under the drug law.

**Chiheb Jlassi**, a 27 year-old student from Tunis, was arrested in February 2015 by two policemen during a routine identity check. He told Human Rights Watch that one of the policemen found on him nothing more than one cigarette rolling paper and told him, “We are placing you under arrest for drug possession. We will have you take a drug test.” He

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<sup>21</sup> Human Rights Watch interview with Samia Marsni, December 1, 2015, Tunis.

<sup>22</sup> Human Rights Watch Interview with Mourad Meherzi, September 13, 2013, Tunis. See Human Rights Watch press release on the case, September 2, 2013, <http://www.hrw.org/news/2013/09/02/tunisia-drop-charges-against-cameraman>.

said that they put him into a police car and started beating him on his head and face, and took him to a police station for interrogation. On the third day of detention, they took him for a drug test at Charles Nicole Hospital. He said he was too afraid to object. On February 17, the investigative judge of the First Instance tribunal released him without charge as his urine test was negative.

In the evening of November 19, 2015, about 15 policemen forced their way into the house, in Nabeul, 50 km from Tunis, of Ala Eddine Slim, a filmmaker, and his wife, Yosra Nafti, who was eight months pregnant. That day, the couple was hosting their friends, artists Fakhri Ghezal and Atef Maatallah.<sup>23</sup> The anti-terrorism brigade had received a search warrant for Slim's house from the prosecutor of the first instance court in Nabeul. The prosecutor's authorization, which Human Rights Watch has reviewed, stated, "In order to monitor the movements of extremist militant groups in the region and to prevent terrorist attacks, and, pursuant to information received by the police that there are suspicious individuals with signs of religious extremism in a house in Al Wafa neighborhood in Nabeul, I authorize the search of the said house and the seizure of any material useful for the investigations."<sup>24</sup> While the police discovered that the individuals were not terrorists, they did find pot in the house, and arrested the three men and woman under Law 52.<sup>25</sup> The three men spent six days in the Nabeul jail while the woman was released that same night.

On December 8, the first instance court in Nabeul sentenced the three artists to one year in prison for cannabis consumption. The appeals court in Nabeul acquitted them of the offense of drug possession and released them.

## Mistreatment During Urine Tests

As the drug law prohibits both possession and consumption, police can arrest people, and even if they find no drugs on them, have them undergo urine tests to prove consumption.

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<sup>23</sup> Fakhri El Ghezal is a photographer and filmmaker. He has just completed post production of his first feature film. His artistic work has been exhibited at the New Museum in New York, the Museum of European and Mediterranean Civilisations in Marseilles, and at the Beirut Art Center. Ala Eddine Slim is a director, screenwriter, editor and film producer. He is the managing director of Exit Productions. Ala Eddine Slim's movies represented Tunisia in several film festivals. He holds several awards including the International Grand Prix of the festival FIDMarseille in 2012. Atef Maatallah is a painter. His works have been acquired as part of the permanent collection of the Centre Pompidou in Paris.

<sup>24</sup> Search warrant signed by the prosecutor of the first instance court of Nabeul, November 19, 2015, on file with Human Rights Watch.

<sup>25</sup> Nabeul police investigation report, November 19, 2015, on file with Human Rights Watch.

According to Ghazi Mrabet, a Tunis-based lawyer who has represented many clients in drug cases, detainees feel compelled to submit to the tests even though the law does not require them to do so.<sup>26</sup> Statements collected from former detainees in this report indicate that most of them accept to undergo the test, either because they lack information about their right to refuse it, or because the police use force or threaten to use force if they refuse, or create an intimidating atmosphere in which the detainee feels he has no choice but to submit. One person, interviewed by Human Rights Watch, said, “Of course we are all afraid of the police. If we don’t do the urine test, they hit us.” Another said that he felt he had no choice after enduring insults, slaps, and other humiliating treatment.<sup>27</sup> One interviewee said a policeman told him, “If you don’t do it, I’ll slap you until you faint.”<sup>28</sup>

Moreover, when a detainee refuses to take the test, the practice and jurisprudence of the Tunisian judiciary is to consider this as an incriminating factor.<sup>29</sup> As mentioned above, Adnène Meddeb and Amine Mabrouk, for instance, were both sentenced to one year in prison for possession of drugs after they refused to undergo the urine test, even though the police found no drugs on them, only rolling paper. The judges in the first instance tribunal considered that their refusal to take the urine test was an incriminating evidence. They were acquitted during their appeal on the grounds of procedural flaws.

Law 52 does not explicitly mention urine testing. It only states that the judicial police officers are authorized to ensure the implementation of the law, in coordination with other competent authorities.

Law 54, of 2002, on medical testing, states that any human biological analysis must be performed under the supervision of a doctor or a biologist in authorized locations such as hospitals and other public health facilities. Failing a doctor or biologist, such exams can be performed by a technician under the supervision of a public health doctor.<sup>30</sup> This means that the urine tests should be performed by medical staff. However, most of the

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<sup>26</sup> Human Rights Watch interview with Ghazi Mrabet, March 10, 2015, Tunis.

<sup>27</sup> Human Rights Watch interview with Ahmed, March 15, 2015, Tunis.

<sup>28</sup> Human Rights Watch interview with Iskander, March 15, 2015, Tunis.

<sup>29</sup> Human Rights Watch interview with Ghazi Mrabet, March 14, 2015, Tunis.

<sup>30</sup> Law 54, of June 11, 2002, regulating medical analysis laboratories in Tunisia, [http://www.vertic.org/media/National%20Legislation/Tunisia/TN\\_Loi\\_Laboratoires\\_Medicales.pdf](http://www.vertic.org/media/National%20Legislation/Tunisia/TN_Loi_Laboratoires_Medicales.pdf)

interviewees for this report said that the police officers or agents were the ones supervising the collection of urine samples, and that no medical staff was present.

All of the 47 individuals interviewed by Human Rights Watch who said they had been arrested on suspicion of drug use said that they were taken for urine tests, some of them more than once during their period of pre-charge detention. Human Rights Watch reviewed twenty police reports from the investigation files in drug related cases. The reports show that the police, in these cases, ordered urine tests even after they found drugs on the person, and even after the person confessed to using drugs. In one case, where a Tunisian with a double nationality was found in possession of cannabis at airport border controls, the person confessed that he bought the cannabis in Holland and that he had smoked joints there. Despite his confession and possession of drugs, he was subjected to a urine test.<sup>31</sup>

**A. M.**, a 30-year-old rapper, said that on February 8, 2013, at 1 a.m., he was going back home with his girlfriend to their flat in Avenue de Paris in downtown Tunis. When they arrived to the building, he said that two policemen on a motorcycle approached them and asked them for their papers. When the police noticed that they had drunk alcohol, they took them to the police station of Bab Bhar, where they searched him and found a joint. He said that they slapped him on his face, punched him in his stomach and then put handcuffs on him and took him, around 3 a.m., to the Bouchoucha jail in Tunis, where he stayed six days in pre-charge detention. On the third day of detention he was taken to do a urine test, which came back positive. He was sentenced to one year and spent eight months in prison before being released by a presidential pardon.<sup>32</sup>

**F.B.**, now 21 years old, unemployed, said that police arrested him on May 6, 2014 when he was riding his motorcycle with a friend, in Kasserine. When the police asked them to stop they did not obey because the papers for the motorcycle were not valid. The police chased and eventually stopped them. Upon searching the two, the police found a joint in the pocket of his friend. They handcuffed him and started slapping him on the face, then took both of them to the central police station in Kasserine, F.B. said. During the fourth day of their detention, the police took them for a urine test at the Kasserine hospital. He said that

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<sup>31</sup> Case M.A., arrested on November 19, 2015, documents on file with Human Rights Watch.

<sup>32</sup> Human Rights Watch interview with A.M., Tunis, September 4, 2015.

two policemen stood by him. When at first he couldn't urinate, one of them beat him with a rubber tube on his head.<sup>33</sup> His urine test came back positive, and he was sentenced to a one-year term. He spent eight months and ten days in prison in Kasserine before being released by a presidential pardon.

**A.J.**, now 23 years old, currently unemployed, said that he was arrested in August 2013 in Kasserine. He was studying design in Nabeul and had come back to Kasserine on holiday. He said that at midday, he went out in the neighborhood of Hay Zouhour to buy cigarettes and was coming back home when the police stopped him to check his papers. They found a half-smoked joint when they searched him and took him to the central police station in Kasserine. He spent five days in police custody. He said that when they took him to do a urine test at the Kasserine hospital, there were three policemen surrounding him. When he had difficulty urinating, they poured cold water on his head. The test result was positive and he was sentenced to one year in jail. He spent eight months and 24 days in Kasserine prison before a presidential pardon freed him.<sup>34</sup>

**Hamza**, now 22 years, worked as an entertainment guide in a hotel resort in Jerba. In August 2013, he returned home to Tunis. On the afternoon of August 30, he went with a friend to a café in Hay Khadra. Police in plainclothes arrived, searching for his friend. The police searched Hamza but found nothing, he said. But they took him to the police station, and wrote a report in which they said they suspected him of drug use. They took him to Bouchoucha, and the following day they did a urine analysis that gave a positive result. He was sentenced to one year in prison and a fine of 1,000 dinars (486 US\$).<sup>35</sup>

## Arbitrary Home Searches

Article 29 of the Constitution states that “no person may be arrested or detained unless apprehended during the commission of a crime or on the basis of a judicial order.”

Law 52 states that judicial police require “the written authorization of the public prosecutor” before entering into private homes where there might be narcotics for consumption, production, movement or smuggling, except in cases of flagrante delicto.

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<sup>33</sup> Human Rights Watch interview with F.B., October 17, 2015, Kasserine.

<sup>34</sup> Human Rights Watch interview with A.J., October 17, 2015, Kasserine.

<sup>35</sup> Human Rights Watch interview with Hamza, September 21, 2015.



Article 33 of the Code of Criminal Procedure defines flagrante delicto as being one of the following cases:

- The offense is taking place or has just taken place;
- When the accused is in hot pursuit, or is found in possession of objects or shows signs or evidence suggesting guilt, provided it is at a time very close to the action;
- An offense is taking place within a residence and the owner or occupier requests a judicial police officer to conduct the arrest of the offender.

In several cases documented by Human Rights Watch, the police seems to have interpreted the flagrante delicto exception very broadly, allowing them to enter homes and search them without a judicial warrant.

In the 20 court files reviewed by Human Rights Watch, only two note that the search of houses for the purpose of finding drugs was done pursuant to a judicial warrant.

Several people told Human Rights Watch that when conducting searches in their homes, police forces did not show a search warrant. For example, on September 21, 2013 at 4 a.m., police broke into the Tunis house of Nejb Abidi, a filmmaker, and arrested him together with seven friends, on suspicion of drug consumption. Abidi told Human Rights Watch that the police did not show any search warrant when they entered and rounded them up, and did not tell them the reasons for their arrest. The police seized footage he was preparing for a documentary film about migrants in Tunisia, Abidi said. They detained all eight men and women at the Bouchoucha detention center in Tunis. The Tunis Court of First Instance sentenced four of them to one year in prison for drug consumption on September 28, 2013, and acquitted the rest (including Abidi, whose urine test was negative).

**S.B.**, 32, a waiter in a café in Hay Tadamoun in Tunis, was arrested on February 12, 2013, at his house. He said that around 2 a.m. the anti-crime brigade of the police knocked loudly at his door. When his mother opened it, the police burst in and began searching the house. They refused to say what they were looking for and showed no search warrant. He said that they didn't find anything, but decided nevertheless to arrest him and his brother. They took them in a white Kia car with "Police" written on the side. S.B. said:

On our way to the police station, we were asking ‘what did we do? Why are you arresting us?’ No answer. When they found nothing to blame us for, they decided to give us a urine analysis.

**S.B.** said that his test came out positive. The First Instance tribunal in Tunis sentenced him to one year in prison, on March 10. He spent six months in prison before being released by a presidential pardon.

## **Exposure to Crimes and to Dire Prison Conditions**

The law permits the police to hold a person suspected of committing a crime, including drug use or possession, in pre-charge detention for up to six days, time that is usually spent in police jails. During this period, detainees have no right to a lawyer and most face harsh conditions. During research conducted in 2013, Human Rights Watch found that in most situations detainees had insufficient food, limited access to water and soap, no showers, dirty and insufficient blankets, and dark, crowded, dirty cells. Some of the old buildings had problems with their sanitary systems, causing sewage to back up.<sup>36</sup>

After six days of custody, the police must present the suspect to an investigative judge or release him. If the judge orders him held, the person is transferred to a prison for pretrial detention and, if convicted, to serve his sentence.

Tunisia’s Law on Prisons provides for three categories of prisons: “detention prisons” reserved for persons in preventive detention; “judgment prisons” for inmates who the courts have sentenced to prison terms; and the “semi-open prisons,” lower-security facilities that house detainees sentenced for minor offenses.<sup>37</sup> Article 6 of the same law mandates prison authorities to classify, upon admission, detainees on the basis of gender, age, nature of the offense and the penal situation according to whether the inmate is a first offender or repeat offender. In practice, however, the only differentiation that seems to be applied regularly is the separation between males and females and between juveniles and adults. The UN High Commissioner for Human Rights’ report on Tunisian prisons, issued in April 2014, stated that prison authorities did not group inmates on the basis of types of offense, gravity of the crime, or their judicial status. They found prisoners for serious

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<sup>36</sup> See report “Cracks in the System. Situation of Pre-Charge Detainees in Tunisia”, December 5, 2013, <https://www.hrw.org/report/2013/12/05/cracks-system/conditions-pre-charge-detainees-tunisia>

<sup>37</sup> Law n° 2001-52 of 14 may 2001, on prison regulations, <http://www.legislation-securite.tn/fr/node/27953>

crimes such as murder and rape sharing cells with those detained for lesser offenses, including for drug use and possession. The same report concluded that, generally, due to overcrowding, inmates often must sleep on the beds in shifts or sleep two or three on the same bed. It also stated that several slept on the ground because they had no bed. The shortage of bedding creates friction among prisoners and facilitates the spread of skin diseases.<sup>38</sup>

Forty of the interviewees described in similar terms their experience in several Tunisian prisons, mainly the biggest one, Mornaguia, outside Tunis, and the Kasserine prison. All said that they were assigned to cells that housed all kinds of offenders, including convicted murderers, drug-traffickers and terrorists.

**Malek**, for instance, spent four months in Mornaguia prison before being released in April 2015. Malek described his ordeal in prison. He said that in the beginning, he was obliged to sleep on what is commonly called “The Highway” (*l’autoroute*), the inmates’ term for the corridor between the beds. He said that his 50 square meter cell was home to around 100 inmates. He also said that drugs, especially *zatla*, were available, though more expensive than outside. He also said that his cellmates included convicted terrorists and murderers. While he was in prison, he was punished with solitary confinement for 10 days, because he got into a fight with another prisoner. They put him in a *siloun*, the inmates’ term for a small underground cell that held up to nine people.<sup>39</sup>

**Hamza**, who was arrested before he was 18 years old, was first detained in a juvenile prison where he spent two months. He was later transferred to the Mornaguia prison, where he was put in a cell with all sorts of offenders, including convicted drug dealers and murderers.<sup>40</sup>

**A.J.**, was sentenced to one year in prison when he was 20 years old. He spent eight months and 24 days in prison in Kasserine. He said that he found himself in a cell full of all sorts of criminals.

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<sup>38</sup>. Office of the United Nations High Commissioner for Human Rights, Report “Prisons in Tunisia: International Standards versus Reality,” April 2014, [http://www.ohchr.org/Documents/Countries/TN/rapport\\_prison\\_inTunisia.pdf](http://www.ohchr.org/Documents/Countries/TN/rapport_prison_inTunisia.pdf)

<sup>39</sup>. Human Rights Watch interview with Malek, Douar Hicher, Tunis, September 15, 2015.

<sup>40</sup>. Human Rights Watch interview with Hamza, Tunis, September 21, 2015.

There were people who committed murder, one of them was in prison for more than 33 years. Others were prosecuted for theft and many were there for zatla. It's as if it was all the same: whether you kill, you steal, or you smoke a joint, your life will be destroyed.<sup>41</sup>

He described the mattresses as being filthy, the cell overcrowded, with more than 50 people in a very small space. He said there were different categories of beds: the most fortunate would sleep in two on the lower or middle level of bunkbeds, the less fortunate would sleep on the upper level. Others were sleeping on “the highway,” the corridor where prisoners come and go.

## A Broken Life After Prison

Most of those interviewed by Human Rights Watch, whose ages varied between 17 and 30 years old, said that their time in prison significantly disrupted their lives. Some were students at the time of the detention, and lost one year of education. Others had jobs that they lost after going to prison. All of those interviewed said that it became almost impossible to find a new job, as employers asked to see their judicial record and rejected or dismissed them upon learning of their prison stints. Many of those interviewed come from marginalized neighborhoods, where jobs are scarce even for persons with no criminal record.

**S.T.**, 28 years old now, who spent five months in prison in September 2014 in Kasserine, said that after his time in prison he felt “broken.” “When I got out,” he said, “people would look at me as a criminal. Someone who spent time in prison is always a criminal.”<sup>42</sup>

Several interviewees said that after they are released from prison, the police continue to harass them, holding them frequently for hours without any basis. Once they are known to the police as people who use drugs, they are regularly arrested and searched. For example, **Hamza**, who spent eight months in prison in 2013 for drug consumption, said that after his release, the same policemen who carried out his initial arrest continued to haul him to the police station where they made him wait for hours before releasing him without charge.<sup>43</sup>

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<sup>41</sup> Human Rights Watch interview with A.J., October 17, 2015, Kasserine.

<sup>42</sup> Human Rights Watch interviews with S.T., October 17, 2015, Kasserine.

<sup>43</sup> Human Rights Watch interview with Hamza, Tunis, September 21, 2015.

**Yahya**, now 22 years old, was arrested in March 2013 during a routine police check. He was in his neighborhood of Hay el Khadhra in Tunis, at 6 p.m., returning home from high school, where he was in his final year. When the police searched him they found rolling paper in his pocket and took him to the Hay Tadhroun police station. He spent five days in police custody. After his urine test came back positive, a court convicted Yahya and sentenced him to one year. He spent six months in prison. He said that after his release, police continued to stop him for no apparent reason. He described how, in October 2014, he was with his girlfriend, walking in Hay el Khadhra, when a white police car approached them. Four uniformed policemen came out. Yahya said that they told him, “We know you, you are a criminal, a junkie (*zatta*).” They started doing body search, even touching his genitals. After that, they took him to the police station in Hay el Khadhra, kept him there for several hours before releasing him.

For example, **Malek** said that after he was released from prison, he felt discouraged from going back to school as he missed his baccalaureate. He missed his mother’s funeral when he was in prison and was not allowed to attend it. His efforts to find a job were hampered by his criminal record. Malek said he became a drug dealer after he was released from prison.

When they imprisoned me I was merely a consumer. Now I am a dealer, I don’t have a choice. All other options are closed for me.<sup>44</sup>

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<sup>44</sup> Human Rights Watch interview with Malek, Douar Hicher, Tunis, September 15, 2015.

## II. The Draft Law: Insufficient Steps to Curb Abuses

On December 30, the government adopted a new draft revision of Law 52.<sup>45</sup> The bill maintains the criminalization of drug use and possession provides for fines of up to 5,000 dinars (\$US2,430) for first-time and second time offenders, and reduces the maximum penalty to one year in prison for repeat offenders.<sup>46</sup> The draft law restores to the judge the discretion to consider mitigating circumstances and impose a milder sentence, including non-custodial ones such as performing community service.

The new bill expands considerably the healthcare provisions contained in the current law. It creates a Health Care Council for Drug Users that will be linked to the Ministry of Health, with regional committees in charge of deciding on treatment and health care for drug users. The law states that the Health Care Council and regional committee's membership will be specified by governmental decree. In case a person decides to voluntarily denounce him or herself to the authorities as a drug user and chooses to undergo medical treatment at one of the public health centers, then this person is exempt from prosecution. In case a person is facing prosecution or has been sentenced for drug use for the first time, the law allows the public prosecutor, the investigation judge, or the court to refer the user, with his or her consent, to treatment or medical supervision in a public center. The law provides for the suspension of the prosecution or the sentence so long as the user completes his treatment and is not charged again with drug use. If the user drops out of his treatment, prosecution resumes. The bill states that a person will face no charges for drug use if the person willingly reports – before the offense is discovered by the police – his or her deeds to the Regional Committee and commits to undergo medical treatment. The draft law does not envisage any compulsory medical treatment for people who use drugs.

Tunisia's penal code on alternative sentences states that judges, when imposing a sentence of imprisonment for one year or less, can convert the sentence to a period of unpaid community work for a period not to exceed 600 hours, based on the formula of two hours' work for each day of the original prison sentence. Because the bill would reduce the

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<sup>45</sup> Loi 52 : polémique sur une réforme décidée à huis-clos. Retour sur quelques détails du nouveau projet de loi. May 29, 2015, <http://nawaat.org/portail/2015/05/29/loi-52-polemique-sur-une-reforme-decidee-a-huis-clos-retour-sur-quelques-details-du-nouveau-projet-de-loi/>.

<sup>46</sup> Draft law on the prevention of narcotics, the rehabilitation of consumers and repression of illicit traffic, article 23, <http://www.legislation-securite.tn/ar/node/36886>

punishments for repeat offenders to one year in prison and eliminate mandatory terms, judges would have the option to impose alternative sentences like this one.

The draft law has clear provisions regulating urine tests, which did not figure in the previous law. It states that “no one can be required to undergo a biological urine test, unless he or she is caught in flagrante delicto.”<sup>47</sup> If caught in flagrante delicto, a person who refuses to undergo the test can be sentenced to up to one year in prison and up to 5,000 dinars (US\$2,430) fines. The draft law states that the test can be carried out only on the order of the prosecutor and performed only by a doctor or medical assistant working in a public hospital, in the presence of the officer of the judicial police.<sup>48</sup> The doctor or medical assistant, the officer of the judicial police and the alleged offender are all required to sign the report of the urine exam. The draft law criminalizes an attempt by any person to substitute a person’s urine sample with that of another person, providing a prison term of five to ten years.

The draft law also tightly restricts the ability of the police to conduct home searches when looking for drugs. Article 49 of the draft law states that police officers can enter homes for search and seizure only if they have written authorization from the prosecutor or from the investigative judge. This contrasts with Law 52, which allows for a warrantless search in flagrante delicto cases. As noted above, the police have used this exception to enter homes, sometimes using force, without search warrants.

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<sup>47</sup> Draft law on the prevention of narcotics, the rehabilitation of consumers and repression of illicit traffic, article 26, <http://www.legislation-securite.tn/ar/node/36886>

<sup>48</sup> Draft law on the prevention of narcotics, the rehabilitation of consumers and repression of illicit traffic, article 48, <http://www.legislation-securite.tn/ar/node/36886>

### Key Points of the draft law

- Eliminates prison sentences as punishment for first-time and second time drug use or possession and replaces it with fines of up to 5000 dinars (US\$2,430).
- Reduces the maximum sentence for repeated drug use from five years to one year in prison.
- Provides for suspension of prosecution or serving of sentences for first time offender if he or she agrees to undergo a medical treatment.
- Removes the mandatory one-year sentence and gives judges the discretion to lower sentences on the basis of mitigating circumstances.
- Gives the judge more leeway to impose alternative sentences, such as community work.
- Adds the crime of public incitement to commit drug related offenses, including incitement to consume drugs, which would violate the right to freedom of expression.
- Empowers the police to employ special investigative techniques in combatting drug offenses, such as surveillance, accessing private communications and tapping of private phone conversations. As the bill is currently drafted, such techniques could be used not only against major traffickers and dealers, but also against ordinary users, thereby infringing on their privacy to a degree that seems disproportionate to the suspected offense being combatted.

The draft added a new offense of “public incitement to commit drug-related offenses,” which entails half the sentence of the original offense. This new provision, as written, could be used to prosecute members of civil society groups that advocate for the decriminalization of drugs, rappers and singers who sing about drugs, and others who express themselves peacefully about drugs.

The draft law has a section on special investigative measures in anti-drug operations, such as surveillance. The section states that if the investigation so requires, the prosecutor or the investigative judge may authorize surveillance of a person’s personal communications for a period of no more than four months, renewable once for the same period, through either phone tapping, or by “setting up a technical package aimed at capturing, recording and conveying words and photos of an individual secretly monitored in their private space, and in private or public locations or vehicles.” The draft specifies that if the collected information does not lead to criminal charges, it will be protected under Tunisia’s law on personal information and data. The draft does not distinguish between casual consumers and major traffickers, therefore implying that all these special investigative measures could be applied equally to both. Tunisian Code of Criminal procedures does not include such special investigative measures.



Article 17 of the International Covenant on Civil and Political Rights provides that “no one shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honour and reputation.” It further states that “everyone has the right to the protection of the law against such interference or attacks.”

The Human Rights Committee, the authoritative institution in charge of interpreting the ICCPR, has set out in General Comment 16 on article 17 of the ICCPR that any interference with the right to privacy must be lawful, i.e. prescribed by precise and circumscribed laws that themselves comply with the aims, provisions and objectives of the ICCPR. Furthermore, it stated that interference may not be arbitrary; reasonableness is required as well as proportionality.<sup>49</sup>

The provisions regarding special investigative mechanisms do not seem to conform to these requirements. The draft does not specify the circumstances in which surveillance will be allowed, and only uses the vague wording of “in the cases where the needs of the investigation so require...” That departs from the requirement to allow interference with privacy only in exceptional circumstances and in cases in which there is credible suspicion that serious offenses have been, or are being committed. In addition, resorting to such intrusive techniques for casual consumers seems to be inherently disproportionate and could lead to sweeping interferences with privacy. These special investigative techniques are specifically targeting drug related offences, and are not included as part of the general law on other crimes.

The draft law allows for courts to abridge certain due-process rights when deemed necessary to protect the safety of persons connected to the case. These abridgements include allowing for witnesses to provide testimony anonymously, holding a hearing outside of a normal courtroom setting and closing the hearing to the public. Such exceptional measures are included specifically to target drug related offences, and are not included as part of the general law on other crimes.

To protect the right to a fair trial, courts should impose such measures only in exceptional circumstances and only to the extent necessary. The draft law does not limit them to cases involving drug-traffickers deemed dangerous; they could be applied also in cases involving

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<sup>49</sup> Human Rights Committee, General Comment n.16, <https://www1.umn.edu/humanrts/gencomm/hrcom16.htm>

users. No one should be convicted on the basis of evidence, including witness evidence, they were not able to challenge in a fair hearing.

All trials should adhere to international standards on fair trial. Article 14 of the International Covenant on Civil and Political Rights (ICCPR) states that, “in the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.” A judge is entitled to order a hearing closed but under specific conditions laid down by article 14: “the press and the public may be excluded from all or part of a trial for reasons of morals, public order or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.”

Article 68 states that “in cases of imminent danger, and when necessary, it is permissible to collect all information likely to identify the victim, witnesses or informers or any other person who gave relevant information in statements and keep these separate from the main investigative file, and recorded in a secret register to be kept by the public prosecutor.” The accused or his lawyer can request the relevant judicial authority to disclose the identity of the people referred to in article 68 within 10 days of the date of access to the content of their testimonies. The judicial authority can order the disclosure of the information when the request appears to be well-founded and there is no credible threat against the life or livelihood of the person and their family to be protected. This decision can be appealed before the indictment chamber. In addition, the measures of protection cannot in any case prevent the accused or his lawyer from access to the content of the testimony and other statements.

The use of anonymous witnesses as specified in article 68 could jeopardize the rights of the accused to mount an effective defense and curtail a person’s ability to challenge witnesses against them. Article 14 of the ICCPR provides that the accused has the right to examine, or to have examined, the witnesses against them. The Principles and Guidelines on the Right to a Fair Trial in Africa, adopted by the African Commission on Human and Peoples’ Rights, says that: “The accused has a right to examine, or have examined, witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her. It further

states that: “The testimony of anonymous witnesses during a trial will be allowed only in exceptional circumstances, taking into consideration the nature and the circumstances of the offence and the protection of the security of the witness and if it is determined to be in the interests of justice.”

### III. The Human Rights Case against Criminalization of Drug Use

Criminalizing personal drug use per se clashes with a person's right to privacy and basic concepts of autonomy underpinning all rights, and in practice interferes with, and undermines the right to health.

The decision to use drugs, like the decision to consume alcohol or nicotine, is a matter of personal choice and an exercise of an aspect of the right to privacy under international law, a cornerstone of respect for personal autonomy. Limitations on autonomy and the right to privacy may be imposed, but are justified only if they meet the criteria of legitimate purpose, proportionality, necessity, and non-discrimination. The criteria of proportionality and necessity require governments to consider what means are available to achieve the same purpose that would be least restrictive or pose minimal interference with respect for and the exercise of human rights. Human Rights Watch believes that arguments for criminalization of personal drug use or possession of drugs for personal use rarely, if ever, meet these criteria. Arrest, incarceration, and a criminal record with possibly life-long consequences are inherently disproportionate government responses to someone who has done nothing more than partake in recreational drugs.

Different purposes have been advanced to justify the criminalization of drug use. One of those purposes is that of morality: drug use is seen by many as morally dubious or reprehensible, regardless of whether someone is harmed by it. Human rights norms, however, protect an individual's autonomy and right to privacy, which may include engaging in conduct that the majority may eschew as immoral, but where there is no harm to others. For example, human rights jurisprudence leaves no doubt today that the majority's beliefs in public morality cannot justify criminalization of private homosexual conduct by consenting adults. In essence, promoting public morality in the absence of harm to others is not a "legitimate purpose" for criminalization.

Protecting health is a legitimate purpose, as is protecting harm to others that may occur or be risked because of someone's drug use. But criminalization of drug use to protect someone from harming his or her *own health* does not meet criteria of necessity or proportionality. Governments have many non-penal measures to reduce harms to someone

who uses drugs, including offering substance abuse treatment and social supports. While the state has an important role in protecting health, it should not do so by punishing the person whose health it seeks to protect. As to proportionality: arrest, incarceration, and a criminal record with possibly life-long consequences are inherently disproportionate government responses to someone who has done nothing more than partake of recreational drugs. Criminalization can also disrupt the ability of individuals to secure their right to livelihood and housing, and it can separate families and parents from their children. The state can encourage people to make good choices around drugs without punishing them.

Criminal sanctions for drug possession and personal use have counterproductive health consequences. Imprisoning people who use drugs does little to protect their health, and fear of criminal sanctions can deter individuals who use drugs from accessing health services and treatment, subject them to stigma and discrimination.

In a 2010 report to the UN General Assembly on the right to health and international drug control, the UN Special Rapporteur on the Right to Health specifically called for decriminalization on grounds of respect for the right to health and recommended that member states...*should reform domestic laws to decriminalize or de-penalize possession and use of drugs, and increase access to controlled essential medicines* [emphasis added].

Drug use in some situations causes or threatens to cause serious harm to others, and states have a legitimate interest in protecting third parties from harm resulting from drug use. In such circumstances, states may impose proportionate penal sanctions on harmful behavior that takes place in conjunction with drug use. Thus, a state might choose to criminalize driving a car or flying a plane while under the influence of drugs. It might choose to arrest a person who seriously neglects or abuses a child, where drug dependence is a factor in the neglect or abuse. It might make drug use an aggravating factor in an assault. However, in such cases the conduct or offense being punished with criminal sanctions is not simply using drugs, but directly causing or risking harm to others while using drugs.

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# “All This for a Joint”

## Tunisia’s Repressive Drug Law and a Roadmap for Its Reform

Tunisia’s drug laws impose a mandatory sentence of at least one year in prison on anyone convicted of possession or consumption of any illegal drug, including cannabis.

In 2015, there were 7,451 drug offenders in Tunisia prisons, around 5,200 of them convicted for marijuana-related offenses. Drug offenders made up 28% of the total prison population.

Based on 47 interviews with people arrested or convicted for using cannabis, including artists, bloggers, students, and also young men in poor neighborhoods, the report documents the array of abuses that accompany enforcement of the drug law, including mistreatment during arrest and interrogation, humiliation during urine tests, searches of homes without judicial warrants, and the confinement of cannabis users in overcrowded, insalubrious prison cells with hardened criminals.

The government has proposed to ease but not eliminate prison terms as punishment for drug use. While its draft law could reduce the human rights abuses that accompany enforcement of the current law, it does not go far enough. The report calls on the Tunisian government to revise the current draft by relying on non-criminal approaches for drug consumption.



*The photograph shows a banner in a protest against Law 52 on drugs, in December 28, 2015, in front of Tunisian parliament building, in Bardo. It says: “Our Children and our Friends are not Criminals,” and articulates the demand to abrogate the law.*

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