



Ministry of Justice and Public Security
Your Reference 20/1388–ME

19 February 2021

Follow-up on response to human rights obligations

AROD refers to the response of 11 February 2021 where the Ministry of Justice and Public Security informs on the state's responsibility associated with the criminal prosecution of drug offenders.

The background for our inquiry is that several organizations have taken the [report](#) of the Royal Commission seriously. We have seen how the report prepared the foundation for a larger and more comprehensive catalogue of rights than envisioned by the politicians; before the investigation, we informed that the state cannot go from criminalizing drug use to making it a case of morbidity without the human rights principles being included in the calculation, and we are grateful for the chapter on human rights in the drug report; in the aftermath, we have reported on the need for a more comprehensive human rights analysis, explained the connection between the report's detection of public panic and an inherent problem to human rights, and [activated](#) the state's obligations for the persecuted groups.

Along the way, we have seen that a larger body of rights remains unaccounted for; politicians do not want to think in principled terms, and the political process continues without a proper review of the most important part of the Commission's mandate, the relationship to human rights. In fact, politicians do their best to shy away from rights thinking. After 60 years of a War on Drugs, an established defence is in place and few will admit mistakes. From there we have a collective denial of responsibility, where public officials close their eyes to the implications of constitutional considerations, only to avoid dealing with the double standards and conflicting logic that characterize drug policy.

It is not easy to accept [the scope](#) of arbitrary prosecution. Even so, opposition to human rights is a result of the public panic that the Royal Commission proved to be formative for policy, and the [Council of Europe](#) and [UN guidelines](#) are clear. With the Commission's report, a need for rights thinking has developed that politicians cannot overlook without failing commitments to human rights conventions, and together with other organizations, the AROD has held the Minister of Health constitutionally [responsible](#).



We have made it clear that only the scapegoat mechanism maintains the prohibition, that the Ministry of Health has a responsibility to ensure an effective remedy, and that a truth and reconciliation commission is necessary to fulfil human rights obligations. From there, the Ministry of Health has placed the responsibility on the Ministry of Justice for ensuring the constitutionality of the drug laws. The case was sent to this ministry "as the right department", and on behalf of hundreds of thousands of persecuted Norwegians, we looked forward to knowledgeable lawyers addressing the issue: Finally, the nation's best minds would connect principled thinking to the field of drug policy and elaborate on its implications for the nation!

There are many people waiting for a serious treatment of this issue, which is the most important for the rule of law since the Second World War. We are still waiting because, when after 5 months of consideration, we get an answer (1) that "the Ministry of Health has the main responsibility for following up the drug policy"; (2) that we "have previously received an elaborate response from the responsible ministry"; and (3) that "the Ministry of Justice has no further comments", we had expected more — and a rights dispute has only been side-stepped, not countered.

The department of Justice (and/or Health's) responsibility for Human Rights

Point (1) appears as a denial of responsibility, as we have received guidance from the department of Health that the case belongs to the "Ministry of Justice and Public Security as the appropriate body". A catalogue of rights remains unclear, the issue is now in the hands of this ministry, and with regard to point (2), we have never received an "elaborate answer" from health. An elaborate answer would be an account of the state's position based on the documents and the thinking presented. To be satisfactory, this answer would involve guarantees that the problem was being looked at, but we have never received anything like this.

We have only received a reply that, "according to the Ministry's understanding," our inquiry "deals with matters which are subject to the Minister of Justice and Public Security", and that "the case is forwarded to the Ministry of Justice and Public Security as the appropriate body". That's all. From there, we have been waiting for the Justice Department to investigate the issue and ensure that the rule of law is fulfilled. Thus, when the Department of Justice refers to "an elaborate answer from the responsible ministry", the ministry probably thinks of the correspondence with the department's Senior Adviser, which was elaborate enough.

In this correspondence, we got the impression that the Department of Health accepts human rights in the area of drug policy. We were told that "once a new action plan and/or report on intoxicants is to be prepared to the Parliament, we will in all probability do the exercise and check it against human rights", and the Senior Adviser referred to several authorities. He mentioned the work of the [Council of Europe](#), [UNDP and others](#), and [Damon Barrett](#) as examples to be followed, and the ARÖD explained that we were aware of the implications.



We reminded that our [own](#) body of work, as well as the drug reform report, was completely in line with the political theory and analysis model of these documents. We referred to case studies that expanded on rights in relation to the [European/global](#) model of human rights and the [American](#), and we quoted UNDP and others' guidelines on accountability and the right to an effective remedy:

Every State has the obligation to respect and protect the human rights of all persons within its territory and subject to its jurisdiction. (...) In accordance with these rights, States should: (1) Establish appropriate, accessible, and effective legal, administrative, and other procedures to ensure the human rightscompliant implementation of any law, policy, or practice related to drugs. (2) Ensure that independent and transparent legal mechanisms and procedures are available, accessible, and affordable for individuals and groups to make formal complaints about alleged human rights violations in the context of drug control laws, policies, and practices. (3) Ensure independent, impartial, prompt, and thorough investigations of allegations of human rights violations in the context of drug control laws, policies, and practices. (4) Ensure that those responsible are held accountable for such violations in accordance with criminal, civil, administrative, or other law, as appropriate. (5). Ensure that adequate, appropriate, and effective remedies and means of redress are available, accessible, and affordable for all individuals and groups whose rights have been found to be violated as a result of drug control laws, policies, and practices. This should include accessible information on mechanisms and processes for seeking remedies and redress, and appropriate means of ensuring the timely enforcement of remedies. (6). Take effective measures to prevent the recurrence of human rights violations in the context of drug control laws, policies, and practices.

AROD told the Senior Adviser that Norway has a problem with points 3 and 4 because the Norwegian drug users since 2007 have [asked](#) for such investigations but the legal system has not been forthcoming. This means that politicians have an even greater responsibility, one that has not been honoured with the drug reform proposal, and in this connection we referred to the Council of Europe's baseline [study](#). It points out that the drug prohibition and human rights regimes have developed along different tracks, that this has been detrimental to society, and that it is important to connect drug policy and human rights. In the area of the criminal law, therefore ,

The Assembly calls upon member States to. . . 4.4. ensure that criminal justice responses to drug-related crimes respect human rights, legal guarantees and due process safeguards pertaining to criminal justice proceedings, in particular by: 4.4.1. ensuring that arbitrary arrest and detention, as well as the use of excessive force and disproportionate sentencing against people who use drugs are effectively prohibited, and allegations of such abuse promptly investigated and acted upon, in accordance with international standards; 4.4.2. exhausting all available alternatives before incarcerating



drug-related offenders; . . . 6. The Assembly calls on the Council of Europe Congress of Local and Regional Authorities to consider supporting the development of rights-based policies on drugs at a local and regional level and ensure that every nation and region can implement policies appropriate to them under these guiding principles.

We made the Ministry of Health aware of this because the Norwegian users have been [denied](#) an effective remedy for over 10 years. In this country, we cannot say that "allegations of such abuse have promptly been investigated and acted upon, in accordance with international standards", and it is against this background that the drug reform must be anchored in sound principles. It means a full brake in the process that is now unfolding, that we must take the drug report's findings of public panic seriously, and that we must investigate the relationship between the principles of human rights and the prohibition regime. This is what responsible actors must ensure. Public panic has been identified and employees of the Justice Department have a personal responsibility to subject the prohibition of drugs to quality control — unless the Ministry of Health is responsible.

Otherwise, this is elementary. If the prohibition of drugs continues to do excessive and unnecessary damage because those responsible will not accept principled thinking, this means a heavy burden. More than ten years of denial of responsibility is already a long time, and the objections raised by the former Director of Public Prosecutions in 2008 have long been [invalidated](#). More and more countries are switching to regulated markets, and it will only become more imperative that Norway distances itself from a policy on totalitarian terms.

In any case, we can expect more and more international courts to conclude that the drug laws are invalidated by human rights principles. It is the same psychological phenomenon behind the prohibition of drugs (scapegoating) as gave rise to the Jim Crow laws of the past, and a major scandal is in the cards. Historical precedent dictates nothing less than a Commission of Truth and Reconciliation, as the situation is similar in principle to South Africa and the Apartheid system.

To the extent that Norway intends to fulfil the international [guidelines](#), therefore, such a commission is needed to deliver on the right to an effective remedy. For almost 15 years, our country has fallen short in relation to points 5.1 and 5.2, and we must emphasize 5.3, 5.4, 5.5, and 5.6. Only a Truth and Reconciliation Commission satisfies these requirements, and we expect those responsible to protect human rights. This does not necessarily mean the release of prisoners; it is up to an independent, impartial, and competent commission to decide what this means — but it clearly involves a drug policy that hurts the least and that is compatible with the principles of autonomy, proportionality, equality, and a presumption of liberty.

This in turn is elementary. It is standard human rights procedure, and so the ARÖA, on behalf of the persecuted, has activated human rights protections; it is in this context that we have informed politicians of obligations, held the Director of Public Prosecutions responsible for arbitrary persecution, filed a complaint to the police against politicians who agitate for



persecution on refuted terms, prepared human rights guidelines for patients under the LAR programme, prescribed human rights guidelines for parents in contact with child welfare services, offered the accused a rights-based defence, and had over 30 articles in the newspapers. The rights-oriented debate is here to stay, and the state must show that it recognizes key obligations.

The rule of law requirements

It is in the context mentioned above that the Ministry of Health, sometime in the future, "in all probability" will "do the exercise" to check the law against human rights. The Senior Adviser was unsure of what it entailed, but the AROD replied that the process is simple. It is neither the state nor the challenger that will make the final assessment. We will only facilitate for an independent, impartial and competent commission, and it is this body that shall perform a human rights analysis. We are only responsible for promoting a commission that can resolve this issue with dignity. This is standard for human rights issues, and the proportionality analysis is universal. Damon Barrett described it [here](#):

The (European) Court has developed the test of proportionality for assessing whether restrictions have been 'necessary in a democratic society'. There are varying iterations of the test, in particular depending on the nature of the right in question and the aim pursued (e.g. a stricter test would be applied to freedom of expression than to the right to property). Crucially, the burden is on the State to demonstrate the proportionality of the restriction. Thus it should become central to policy development, monitoring and evaluation.

States need not criminalise such behaviour if to do so would be contrary to constitutional principles or the basic concepts of their legal system. It is therefore not an international obligation to do so, even if there was a clear push towards such measures. The proportionality test is an important consideration in this regard. Whether or not States adopt such laws should be balanced against human rights considerations, which are often protected constitutionally or are central to the legal system in question. It is another obvious case of tension between the two systems of law.

. . . Again, a first step in this regard is mapping the potential human rights engaged. This certainly includes the right to privacy, which is inherently restricted by any broad behavioural ban. But it may also include the manifestation of religion or cultural or indigenous rights. Freedom of expression and freedom of thought may also be engaged. The question, then, is whether the criminalisation of possession for personal use is proportionate to the legitimate aim of protecting health, children, public order or other justifications. This of course will depend on the stated aim, but there must be a rational connection between these aims and indicators of success.



The burden is on the State to demonstrate the proportionality of the measure. It should not be merely assumed that a 'pressing social need' is there. This should be carefully considered based on the actual dynamics in the country. The current debates around whether to control ketamine are a serious example of why this is important. Similarly, the banning of khat in some European countries raises this question. Crucially, given that criminalising a behaviour bans it entirely, were any less restrictive means considered for the achievement of the same aim or aims? This requires the consideration of policy alternatives. Without this assessment, the burden of demonstrating that no less restrictive means were available cannot have been met.

The issue of outcomes is again crucial. It may, for example, be decided by a given State that the criminalisation of non-medical uses of controlled substances is proportionate given a pressing social need due to the harms of drug dependence. But it may later begin to fail the test once its effects become apparent. It may on the other hand pass the test if it has proven successful. Has the measure, over the years, made progress in achieving its aims? The key issue is that the proportionality test is not a one-off when it comes to policy development but an on-going process of reflection.

It is this test that the drug laws must withstand. The AROD informed the Senior Adviser that this was the basis for the rule of law and referred to the Council of Europe's baseline study which has more to say.

Neither this study nor the Royal Commission report leaves any doubt that a larger picture of rights remains overlooked, and we wanted answers. Vague assurances that a catalogue of rights would be secured someday in the future, "once a new action plan and/or report on intoxicants is to be prepared to the Parliament", were not enough. We therefore pushed on and were referred to the Ministry of Justice.

Who has the responsibility?

This is our "elaborate" correspondence. This is the status of human rights, and we have yet to understand why the Department of Justice, after six months, sends the issue back to Health. To the persecuted, their friends and family, as well as the officials who enforce the law, it is more than regrettable. It means that precious time has been lost and that their fate remains a hot potato in a political game where no one wants to look at reality. It means that we postpone a showdown with the scapegoat mechanism and its destructive power on the fabric of society, which again means increased constitutional responsibility for everyone involved, and with the drug report it is not acceptable to wait.

For more than ten years there has been evidence to suggest that 90 per cent of the overdose deaths are due to the prohibition.¹ The report of the Royal Commission confirms that there are rights to be remedied, and we must know who is responsible for the persecuted groups.

¹ OLE MARTIN LARSEN, [MELLOM ALLE STOLER: NARKOMANE OG LEGER UTENFOR RUSOMSORGEN](#) (2008).



Is it, as the Department of Health contends, the Department of Justice that is responsible or is it the Ministry of Health that must fulfil the rule of law?

We understand that this is a hot potato. However, we cannot accept that the responsibility for so much human suffering is ignored and invalidated by political gamesmanship or defensive bureaucracy. While the will to act has been minimal, our demands are anchored in basic constitutional requirements, and with each passing day international obligations are worse off. The AROD therefore wants to know who will ensure an effective remedy to the persecuted groups? Is it the Department of Justice or Health that should work out the implications of moral panic? The [connection](#) to a catalogue of rights has been made: When and how will an apparatus uphold human rights obligations?

We want these answers as soon as possible. It is not too late to get the political process on the right track, and the ministry may still act with a dignity that future generations can live with. The persecuted, however, have a voice that has been overlooked, and we want to ensure that the principled considerations of the drug reform report are not lost to posterity. We thus expect the responsible office to continue where the dialogue between the Department of Health's Senior Adviser and the AROD dropped off. This is as far as Norway has come in securing a catalogue of rights, and there are primarily five [questions](#) the state should concentrate on. These questions are at the heart of a human rights analysis, and we have every reason to believe that there is a distance between reality and obligations.

From there, state responsibility is activated — a liability that will paint the ministry's legacy. In matters of constitutional significance, it is better to act sooner rather than later, and we look forward to a statement from the Justice Department on how the state intends to protect the rights of the persecuted in the Norwegian drug reform.

Sincerely,

A handwritten signature in black ink that reads 'Roar Mikalsen'. The signature is fluid and cursive, with a long, sweeping underline.

Roar Mikalsen
President of AROD
The Alliance for rights-oriented drug policies