



## **The Director of Public Prosecutions’ responsibility for drug policy and human rights**

Director of Public Prosecutions Jørn Sigurd Maurud has been a staunch supporter of principles that must weigh heavily if a liberal rule of law is to survive. That is why the Director of Public Prosecutions endorsed the decriminalisation of drug use as part of the Norwegian drug reform, and it was in the spirit of the same principles that AROD set up a booth with psilocybin and cannabis products outside the main police station in Oslo. This was done in response to the fact that drug users have been demanding rights for almost 20 years but that all agencies involved with the drug prohibition have relinquished their professional responsibility.

With regard to the Directorate of Public Prosecutions, the head of the prosecuting authority was informed in 2009 about the lack of a basis for punishment. Drug users had since 2006 argued for the invalidity of the provisions of the Penal Code, but the problem was ignored by politicians, police, and others who kept the drug law above criticism. Not only a district court judge but also a public prosecutor protected the drug law from principled objections, and the Director of Public Prosecutions, Tor-Aksel Busch, was asked to ensure effective redress.

The appellant explained that personal integrity was the key to a systemic problem and requested the Director to support the rule of law, but Tor-Aksel Busch responded that the courts and politicians should take care of the current law. Mikalsen wrote back that in times of panic, these institutions could not be trusted to maintain the rule of law, that the approach of the Director of Public Prosecutions betrayed the constitution and subordinates, and that the Norwegian



people deserved better. Time should show AROD right, but Tor-Aksel Busch would not reconsider, and 10 years passed before AROD contacted the Director of Public Prosecutions again.

The background for AROD's attempt to re-establish communications in 2019 was the report of the Norwegian Royal Commission on Drug Reform, which gave new impetus to the fight for rights. With the detection of moral panic, the allegations that drug users had made 10 years earlier regained relevance, but a blind spot existed, as a regulated market was excluded from the commission's inquiry. Chief Public Prosecutor Runar Torgersen, as chair of the Royal Commission, had accepted that the system of prohibition should not be questioned. This decree from the Norwegian government directly contravened the human rights mission of the committee, and AROD informed the Director that several hundred thousand citizens had rights that remained overlooked. AROD also mentioned that as a result, the respect for law and order had been severely damaged, and a proposal was made to help the rule of law.

Since Director of Public Prosecutions Busch had, 10 years earlier, denied the right to review the drug law to serious drug offenders, AROD proposed to supply the prosecution authority with the amount of cannabis that the Director of Public Prosecutions deemed appropriate to trigger rule of law guarantees but there was no response. AROD, therefore, looked forward to Director of Public Prosecutions Busch's departure and wrote a new letter in 2020 when Jørn Sigurd Maurud took over. AROD thanked Maurud for his involvement in the Norwegian drug reform and referred to the report of the Royal Commission, which substantiated allegations of human rights violations. In this letter, AROD called for more responsibility from the Director of Public Prosecutions, as law and order had lost much of its weight. AROD wrote:

*While politicians, police officers, judges, public prosecutors, and other officials have ignored international law obligations in the area of drug policy, drug offenders have come forward with offers to provide information that could lead to the investigation of several tons of cannabis imports. Not only have the police, as an agency, refused since it conditioned the authorities to stand behind the rule of law guarantees but hundreds of police*



*officers and a justice minister have also declined the same offer because they did not want to consider the human rights of drug offenders.*

This was the status of law and order in 2020. Medical users of cannabis had contacted the Director of Public Prosecutions and stated that they cultivated cannabis under the emergency law principle, and AROD was aware that several would report themselves to the police. AROD, therefore, requested a circular with guidelines for the prosecution in the cases where recreational users, sellers, and manufacturers had contacted the police to promote a human rights argument. Had the Director of Public Prosecutions provided such guidance, the prosecutors in ARODs civil disobedience would probably have thought twice before opposing the realisation of human rights, but the regrettable reply was that AROD's inquiry "does not occasion measures or comments from the Director of Public Prosecutions".

AROD, therefore, responded on 15 July 2020 with a cease-and-desist letter. In this letter, AROD held Director of Public Prosecutions Maurud responsible for continuing the sentencing scheme on scientifically rejected grounds and offered a way out. Roar Mikalsen, the leader of AROD, wrote:

*In order to speed up the political process and limit the damage that post-constitutional conditions inflict on the people, we want to activate the judiciary's obligations to the persecuted groups. As the head of an organisation dedicated to this purpose, I, therefore, keep a small amount of cannabis products and will hand them over to government officials at the appropriate opportunity. It is up to the Director of Public Prosecutions and his office how the arrest/handover may take place. You can either arrange this in a decent way, one that does not further ruin the life of my immediate family, or you can kick in doors. In any case, you know how to get hold of me, and that I will exercise my right to a human rights defence. In addition, the Director of Public Prosecutions has been informed about the points where Norway does not satisfy international guidelines in the area of drug policy, that I take this step because the persecuted have been denied an effective remedy for 10 years, and that the damage that follows in the wake of a drug policy based on totalitarian premises is too large to ignore. I,*



*therefore, will do my civic duty. I do not ask to be considered in the mildest possible manner, but for a legal process worthy of the rule of law and on behalf of the persecuted groups, AROD hopes for constructive cooperation to ensure that we do not fall outside the rule of law again.*

AROD looked forward to hearing from the Director of Public Prosecutions, but nothing happened. Nor did another letter which dealt with the shortcomings in the Director of Public Prosecutions' investigation into means of force in less serious drug cases have any consequences, so AROD began civil disobedience. The Director of Public Prosecutions was invited to support this mission, which he never did. Therefore, to preserve the integrity of the law, AROD insisted that the Director had to testify before the District Court about the relationship between drug policy and human rights, but the defence was denied the right to present witnesses and other evidence. <sup>6</sup> Thus, the drug law remains protected from scrutiny. The loyalty of the District Court proved to be with power and not with principles, and the Director did not have to respond to AROD's allegations of human rights violations. Even so, the rule of law includes accountability, and these questions must be addressed by the Director of Public Prosecutions.

## **Questions to the Director of Public Prosecutions**

The Director of Public Prosecutions has been involved in drug reform, and the report of the Royal Commission shows why. This report shows that public panic has been influential in the formation of drug policy, that punishment for drug use cannot be defended, and that human rights considerations require new thinking. Does it follow that the Director of Public Prosecutions is against punishment for drug use, including recreational use?

The defence agrees that punishment must be abolished and that decriminalisation only for long-term drug abusers is problematic. The principle of equality must be respected, and we agree that recreational users, as the Director of Public Prosecutions says in his response to the drug reform, "have no need or desire for health care at all". However, if this is true, what is the point of punishing drug use, as politicians want? Is the director aware of good reasons for retaining a prohibition on drugs, or do human rights concerns point in a new direction?



The mandate of the Royal Commission was to assess the relationship between human rights and the proposed legislation, but the proposed legislation entailed punishment for more than a few doses of drugs, and freedom is presumed in the constitution. Does this mean that the defenders of prohibition must prove its legitimacy?

If the burden of proof lies on the state, as the Royal Commission has noted, does it make sense to talk about human rights without including a regulated market? Can politicians move from punishing drug use to making it a case of morbidity without emphasising human rights principles?

The report of the Royal Commission showed that public panic has shaped Norwegian drug policy, that punishment must be defended, and that the basis for punishment does not hold up. The punishment's lack of basis is confirmed by the Ministry of Health and Care Services in Prop. 92 L (2020-2021) but despite this, the Minister of Health and the Minister of Justice will not stop punishing users. Do the Minister of Health and the Minister of Justice put the political program of their parties above constitutional obligations on this basis?

Chapters 3.2 and 3.3 of the drug reform report use words such as "public panic", "disproportionate representation", "misleading ideas", "incorrect investment in punishment", and "reality-resistant wrongdoing" to summarise the development of drug policy. We are dealing with a policy characterised by "stereotypical representations," "moral indignation and motives for revenge," one where "scientific analysis of the drug problem have played a minor role". "Panic" is used several times. Could public panic have been shaping drug policy for 50 years if principles such as equality, proportionality, autonomy, and the presumption of freedom were sufficiently emphasised?

The Director of Public Prosecutions says in an interview with Kapital magazine that "the prosecuting authority has a special responsibility to ensure that the legal basis is justifiable when we decide to prosecute our citizens".<sup>i</sup> How, then, does it feel to be at the helm of prosecution in times of public panic? What is it like to see the Minister of Justice and the Minister of Health insist on punishment after the report of the Royal Commission? Is this perceived as problematic?



The Royal Commission was not the first to oppose the prohibition paradigm. In 2002, the Criminal Law Commission also rejected its inherent double standards, and for 20 years the drug laws have been built on a sketchy foundation. In 2023, the Committee for conduct, integrity, and conflict of interest in law enforcement released its report and found that in the tension between two different legal paradigms, governance law versus rights law, the latter had come out short.<sup>ii</sup> This explains why the report of the Director of Public Prosecutions in 2021 discovered systemic human rights violations in minor drug cases. It also explains why the prosecution in ARODs case failed to respect human rights, because the problem cannot be located to the narcotics police but to the drug-free ideal.

This is why 13 Ministers of Justice have done nothing to protect the political machinery from the influence of the NNPF, and the Director of Public Prosecutions has a special responsibility for ensuring that the quality of criminal proceedings respects human rights. The Committee for conduct, integrity, and conflict of interest in law enforcement noted the failure at top to deal with a dysfunctional culture, and after its detection of a conflict between governance law and rights law, where rights law has been given lower priority, what will the director do to advance the rule of law?

In the ethical guidelines for the state service, the responsibility of the leadership to ensure proper execution of the police power is emphasized. Even so, the committee concludes that the police have not taken sufficient responsibility for a culture that has provided fertile ground for both potential and actual role mixing. The committee raises questions about what has made this development possible: Why has the Director of Public Prosecutions not exercised sufficient control that could have prevented the mixing of roles, including ensuring compliance with basic police norms?

When it comes to the purpose of the police, it is clear from the Police Act that the institution's "responsibility and aim" is, through preventive, enforcement and assistance activities, to be a part of society's overall efforts to promote and strengthen citizens' legal security, security and general welfare in general (Police Act § 1, second paragraph). Despite this, the police prosecutor and state prosecutor in AROD's case have claimed that "it is outside the court's duties to



assess whether Norwegian drug policy is correct or reasonable at an overall level",<sup>iii</sup> and on this basis, the Norwegian justice system has gone against 200 years of legal development. Does the Director of Public Prosecutions agree that it is "outside the court's duties" to ensure that those persecuted by the drug policy have an effective legal remedy? Is that compatible with the right of judicial review?

In the Norwegian Police Directorate's ethical guidelines for the police, it is emphasized that the role of "society's law enforcement" makes it "especially important for employees in the police to have a conscious relationship with ethics, and what is good morals and how one should act". The ethical guidelines of the prosecution authority are also clear that every public prosecutor must promote the administration of justice in accordance with the values and principles on which a rule of law is based, "including legal certainty, equality before the law and the fundamental freedom and autonomy of the individual". Therefore, in protecting the drug law from review, have the police prosecutor and the state prosecutor acted in solidarity with the legislator's intention when codifying the right of judicial review in Section 89 of the Constitution? Did the prosecution authority ensure the rule of law, or is arbitrary persecution in drug policy possibly a problem because the prosecution went against its own ethical guidelines and 200 years of legal tradition?

In section 4.2.2, the report of the Committee for conduct, integrity, and conflict of interest in law enforcement describes central democratic values that lay down guidelines for how the administration of law should function. First, emphasis is placed on the "consideration of citizens' personal freedom and the authorities' responsibility that public organisations, such as the police, have mechanisms that protect from undue infringement on the limits of personal freedom". Moreover, the committee goes on to say:

*In addition to the principle of legality in domestic law, human rights form an important framework for the police's activities. Both the European Convention on Human Rights (ECHR) and the Constitution give citizens procedural rights to ensure that, for example, arrests and searches do not take place without sufficient reason, and that such interventions are*



*proportionate and can be reviewed. The human rights protection of privacy can also be important. The protection of privacy can be particularly important in the case of preventive measures that appear to be intrusive to the person exposed to them. If a measure is considered to be an invasion of privacy, it must both have legal basis and be proportionate in the individual case.<sup>iv</sup>*

It appears from AROD's case that the Norwegian court and the prosecuting authority have failed in their responsibility to clarify the relationship to human rights. Since 2009, the prosecution has undermined legal development, and while Norway twists the law of supply and demand into a victim and aggressor context to defend the law's strictest penalty, Germany and other nations intend to regulate the market to better ensure human rights obligations. The Committee for conduct, integrity, and conflict of interest in law enforcement, together with three other Norwegian reports demonstrate that for 20 years the Norwegian drug policy have continued on a constitutional side-track, so what will the director do to rectify any damage?

The Committee for conduct, integrity, and conflict of interest in law enforcement states that not only must the Norwegian society be better protected from power groupings such as the NNPF, but notes that "public organizations must work actively to ensure that underrepresented groups are drawn into decision-making processes. The consideration of deliberation implies that the police leadership has a special responsibility to ensure that all points of view are brought forward, that they are taken up for consideration and become the subject of public debate".

This quote is of interest, because AROD has contacted the Director of Public Prosecutions 30 times since 2009 to inform about public panic, human rights violations, and a connection with past arbitrary persecution. How have AROD's views been brought forward, taken up for consideration or become the subject of public debate?

For obvious reasons, prohibitionists have much invested in politics. As long as a criminal market exists, there will be prestige, budgets, and powers in the war on drugs, but the defence recalls page 26 of the Royal Commission's report in which the committee for reasons of principle does not propose coerced treatment or





provision of health care without the person's consent. The UN working group against arbitrary imprisonment is also clear that drug users should not be forced into recovery.<sup>v</sup> Therefore, what does the Director of Public Prosecutions think about the current drug reform? Does it secure human rights?

In his response to drug reform, the Director of Public Prosecutions emphasises "paradoxes in society's attitude to various drugs". The director acknowledges "that for many people, drug use has positive sides", "that the idea of a drug-free society or zero tolerance for drugs is no longer a real ideal that can govern how we should meet drug use", and that "it can be perceived as a paradox that alcohol is recognised as an acceptable drug, while others – and often substances that during proper use do not have the same harmful effect on society as alcohol abuse – are not recognised".

The Director of Public Prosecutions touches here on the blind spot that AROD wants to illuminate. Human rights prohibit unjustified discrimination in the field of criminal law, and as the director points out, "A recurring theme in the debate on alcohol versus other drugs is that alcohol abuse has much more destructive societal effects than other 'milder' narcotics" do. Based on this, what else but the hunt for scapegoats results in penalties for cannabis users, but not for alcohol users? What are the reasons for this discrimination? Is culture a good enough argument, or do human rights demand a larger perspective?

Over the years, professionals such as professors of Criminology Nils Christie and Ragnar Hauge have linked the hunt for scapegoats to drug policy. AROD believes that there is a connection between the scapegoat mechanism, which means the tendency to blame individual groups for problems that we have a collective responsibility to solve, and the Royal Commission's detection of public panic. Does the Director of Public Prosecutions agree? What thoughts does the director have about hunting scapegoats in drug policy? Do psychological defence mechanisms among prohibition supporters play a role in the continuation of punishment?

The German Psychiatrist Wilhelm Reich once noted: "It is in the nature of a political party that it does not orient itself in terms of truth, but in terms of illusions, which usually corresponds to the irrational structure of the masses.



Scientific truths merely interfere with the party politicians' habit of wriggling himself out of difficulties with the help of illusions".<sup>vi</sup> Do you see this quote as relevant for the Norwegian drug policy?

AROD believes that human rights violations are connected to public panic, which means that to the extent that panic characterises development of drug policy, principles such as autonomy, equality, proportionality, and the presumption of freedom will not be sufficiently emphasised. What does the Director of Public Prosecutions think about AROD's argument for a regulated drug market based on human rights? Can the director see a connection between public panic, human rights violations, and the arbitrary persecution of earlier times, or is today's policy well secured?

If the Director of Public Prosecutions does not see the connection between public panic, punishment on rejected grounds, and human rights violations, AROD's documentation identifies others who do,<sup>vii</sup> and from the point of view of society, we cannot assume that prohibition is necessary to protect society. Instead, the question becomes as follows: Has the war on drugs reduced supply and demand? Has it promoted unity, healthy values, and good research or done the opposite? Could the prohibition have fostered a collective psychosis, much like the Salem witch trials?

For over 14 years, the Director of Public Prosecutions has had information that indicates the latest. The connection between public panic, human rights violations, and the arbitrary persecution of earlier times is documented in Human Rising, a report forwarded to Norwegian authorities in 2010, and the use of force in drug policy is, therefore, extremely problematic. From the point of view of human rights, goals and means must be credibly related, and if less intrusive measures are better suited, the presumption of freedom dictates that the state of nature be emphasised. For thousands of years, people have used cannabis and other illicit substances with impunity, so why not take insights from the alcohol policy? Why live with threshold values so low that users must deal with criminals almost daily? Why not ensure quality-controlled substances? Is it reasonable to expose users and society to such a burden?



When it comes to punishment and human rights, the Ministry of Justice has professional responsibility. The Law Division has defended punishment in the drug policy by referring to HR-2022-731-A, as the Supreme Court finds in this judgment that "punishment for possession of drugs generally pursues a legitimate purpose", but the defense disagrees. As an outspoken supporter of the principles that build a liberal rule of law, does the Director of Public Prosecutions believe that the human rights analysis in HR-2022-731-A is well executed, or are there weaknesses?

The Supreme Court concludes in HR-2022-731-A that punishment pursues a legitimate purpose by referring to the Ministry of Justice's assessment in Ot.prp.nr.22 (2008–2009), and the problem with the fox guarding the henhouse becomes obvious. On pages 93 and 94 of the proposal, the Ministry of Justice presents its view as to why the ministry will not accept the proposal from the Criminal Law Commission to decriminalize the use of drugs. Good reasons are needed to reject an expert panel that pointed out the lack of grounds for punishment and differential treatment between users of legal and illegal substances. Still, this is the Ministry of Justice's assessment:

*The majority in the Criminal Law Commission maintains that since the use of alcohol and tobacco is without punishment, the use of drugs should also be with impunity. The ministry does not share this view. As the minority in the Criminal Law Commission, the ministry believes that even if the use of certain types of drugs is permitted, this is something that speaks against rather than allowing more harmful substances.<sup>viii</sup>*

We see that the Ministry of Justice rejected the proposal from the Criminal Law Commission because the ministry did not want to risk more damage. Does the Director of Public Prosecutions believe that a ban on substances other than alcohol and tobacco provides a benefit to public health?

Considerations of public health have been vital to the legislature. The Ministry of Justice emphasizes this in its rejection, but we must not forget that the laws against drug use, sale and possession began with a disregard of constitutional principles. The fear of drugs was widespread and the legislature assumed in 1961, when the Singel Convention was signed, that the world would be drug-free within 25 years.



It did not work out that way, and time has shown that the prohibition is not suitable for reducing supply and demand for illegal substances. Instead, organized crime has grown, and the more the state has fought a war against drugs, the more stigma, violence, deprivation of liberty, alienation, crime, morbidity, and mortality has been returned upon society. This has happened without much positive evidence to show, so does the Director of Public Prosecutions think that cannabis prohibition can be defended measured against cost-benefit considerations?

The defense understands that the question is difficult to answer, as no investigation has been carried out. Still, an overview shows that the drug policy not only costs Norwegian taxpayers NOK 6.5 billion annually, but that the more the state has fought a war against drugs, the more distress, suffering and death we get back. Since the 1980s, the price measured in overdoses and deprivation of liberty has been clear, and is this money and state power well spent when more and more evidence indicates that the intrusions into privacy have a high price and that less intrusive measures are better suited? On what basis is it necessary to expose users and society to the problems that come with criminalization?

The need for the protection of children and young people has always been the mantra of prohibitionists. The fact that we allow one harmful drug does not mean that it is wise to release more into society is the argument that the Justice Committee and the Ministry of Justice used in 2009 to reject the Criminal Law Commission's pitch for decriminalization, but every lawyer knows that there is a presumption of freedom in the law, and does the Director of Public Prosecutions believe that this has been sufficiently stressed?

The presumption of freedom and the presumption of innocence are two sides of the same coin and a fundamental part of the rule of law. Because the legislature in the 1960s assumed that drugs would destroy society unless the state fought this evil by all means, the legislature took for granted that the principles that build the rule of law had to give way, but we see in Prop 92 L (2020-2021) that the Ministry of Health accepts the Royal Commission's criticism of punishment. In section 6.3.2 of the proposal to parliament, the Ministry of Health assesses the knowledge base for the effect of the punishment:



*Many of the consultation bodies comment on the committee's principled assessment that punishment cannot be defended, based, among other things, on an assessment that the threat of punishment is not suitable for preventing and reducing drug use in society. Several also comment on the committee's conclusion that there is no knowledge base that indicates that the threats of punishment for the use and possession of drugs for personal use have the general preventive and individual preventive effect that must be the basis for an act to be criminalised. The fact that the committee did not find empirical evidence indicating that the use of drugs in the population will increase as a result of abolishing criminal responsibility alone is also commented on by some authorities. The Director of Public Prosecutions is one of the consultation bodies which, on this basis, believes that punishment is not sufficiently justified. Especially for established drug users, punishment appears to be unsuitable, as the Director of Public Prosecutions states about this:*

*"For a number of drug addicts, the general preventive considerations have been weighted too heavily in relation to the negative effects of the punishment for the individual. The Director of Public Prosecutions therefore agrees that punishment is not sufficiently justified for many of these, as the beneficial effects of punishment are not greater than the harmful effects. Society should therefore meet the drug addicts in a different way than today. (...) In other words, we are today in a situation where the use of punishment is in principle difficult to defend, and in addition has a very variable and uncertain effect. The criminal court can hardly operate with a threat of punishment for some, but not all, for the same type of action. The criminal justice system is therefore not desirable to use, and for many, not suitable, to counteract unwanted drug-related behaviour."<sup>ix</sup>*

On the basis of such input, the Ministry of Health in Prop 92 L (2020-2021) "assumes that a better effect can be achieved by using health and social work methodology than the threat of punishment to prevent and limit drug use."<sup>x</sup> Several consultation bodies were against, because they believed that punishment has a beneficial effect that exceeds the disadvantages, but the Ministry of Health's assessment is that "the knowledge base for continued prosecution of use etc. of



drugs helps to reduce drug use, or to keep use still low in the population, is uncertain." The defense therefore asks: If, after 60 years of prohibition, there is no evidence that punishment works, doesn't the presumption of freedom imply that the right to self-determination must be assessed?

The extent to which self-determination must be emphasized depends on how big the problem with cannabis and psilocybin really is, and how well the prohibition protects against problems. In other words, the enemy image of drugs is a factor that must be assessed, but the Director of Public Prosecutions has also noted the lack of empirical evidence that punishment works. As the director states in his consultation response to the Royal Commission:

*The investigation [of the commission] largely refers to research, which is commendable. It is not easy to find research-based counterarguments, simply because relevant research does not exist. For example, we have little exact knowledge about the effect of punishment and threats of punishment. Much is based on general considerations, experiences and "common sense".<sup>xi</sup>*

It is therefore clear, after 60 years of prohibition, that there is no documentation that punishment works. All the arguments of the Labour Party, the Progress Party, the Christian Democrats, the Police Directorate and other consulting bodies used to continue punishment boil down to personal concern (or a desire to retain disproportionate state power), and this characterizes their disregard for the presumption of freedom. To the extent that there is a fear of increased use, this will affect analyses, which we also see in the Director of Public Prosecutions' consultation response. While the Director of Public Prosecutions acknowledges that there is no good data to maintain punishment, the director continues as follows:

*We would also like to note that much of the research that the committee refers to is based on surveys and applies to changes in the law in one direction – namely the reduction or abolition of punishment, and then primarily for cannabis (the investigation p. 157). For that reason, we raise the question of how solid the research foundation for the committee's model is, especially as the model goes considerably further than the reforms it*



*refers to. By maintaining the threat of punishment, a normative effect is continued which we believe that punishment undoubtedly has. It also avoids the educational challenge of having to explain – including getting the public to understand – the difference between decriminalization and legalization.*

We shall hear more about the normative effect that the Director of Public Prosecutions believes "punishment undoubtedly has", but for the defense it is clear that decriminalization and legalization are two completely different things. It appears obvious that decriminalization implies control of the market by criminal gangs, while legalization means government control. Decriminalization therefore means more dangerous substances and unsafe neighbourhoods, as well as exposing users to a dynamic that first turns them into sellers and then inmates. It involves meeting out thousands of years in prison, huge expenses for the control industry, and all that the citizens receive in return is more alienation, suffering, disease and death and a society in constant war with itself.

The difference between decriminalization and legalization is therefore clear, as the consultation input from Marborg and RIO points out. It also appears obvious that a regulated market is better than a criminal, so does the "pedagogical challenge" lie in explaining why the state chooses the latter? Is there something other than the double standard in the drug policy that constitutes "the educational challenge of having to explain – including getting the public to understand – the difference between decriminalization and legalization"?

The defense is asking because for 50 years there has been increased discord between professionals and politicians, because this disagreement is reflected in two expert studies which conclude that punishment for drug use cannot be defended, and because the Ministry of Justice over the past 20 years has stressed political manoeuvring over human rights considerations. We have seen this reflected in the report of the Committee for conduct, integrity, and conflict of interest in law enforcement, and we also see this in the treatment of the Criminal Law Commission's work. Its report not only showed how punishment was incompatible with the principles of criminal law, but cast doubt on the politicians' moral compass:



*It may (...) appear that the legislator in many contexts has had an overly optimistic belief in what can be achieved with punishment. In many cases, it may appear to have been a short route from a type of action being disliked by the governing authorities, until it has been charged with punishment. The relationship between the punishment's beneficial effects and costs has not always been adequately assessed in this context.<sup>xii</sup>*

The criticism of the Criminal Law Commission is reinforced by the Royal Commission, which points out the same. The drug reform report not only shows the failure of the political process, but in its entirety constitutes a settlement with the arguments for punishment, and the Royal Commission says this about the rejection of the Criminal Law Commission's majority:

*Decisive arguments for the ministry's decision not to accept the proposal for decriminalization thus seem to have been that criminalization marks that drugs are undesirable in society, and that criminalization for citizens, especially young people, [helps to get people] to refrain from experiment with drugs. Whether there was empirical evidence that the use of punishment had actually had a preventive effect, and whether deterrence had been an effective means of reducing drug use among young people, was not discussed in this connection.<sup>xiii</sup>*

Thus, for 20 years there has been general consensus from a professional perspective that punishment cannot be defended, but the legislative branch has insisted on a strict line of punishment, and got away with it, because the Ministry of Justice prioritizes political games over reason-based considerations. This is what happened when the Ministry of Justice rejected the report of the Criminal Law Commission's majority because the Government had determined in the Soria Moria declaration that it must pursue a restrictive drug policy, and after the Royal Commission's report the Ministry again looked away from the problem of punishment with the principles of the rule of law because the Solberg-government through the Jeløya-platform made it clear that the prohibition would stand.

This is what we can expect in times of public panic. This phenomenon not only implies a distance between theory and practice, but that the distance is not dealt with due to systemic disregard for rights law, and for over 20 years the Storting





and government have arrested the realization of human rights in drug policy. The Royal Commission's NOU 2019: 26 chapter 3 shows the disdain for research and data that accompanies the drug prohibition, and the reality is that the Ministry of Justice continues punishment on false premises.<sup>xiv</sup>

This puts not only citizens, but the police and prosecuting authority in a difficult situation, because neither the Supreme Court nor the Ministry of Justice's treatment of human rights satisfies requirements for an effective remedy. All the Supreme Court does in HR-2022-731-A is to refer to the Ministry of Justice's "overall assessment", but is it sufficient to defend punishment by referring to "general concerns", "the protection of public health", or "fundamental values"?

More and more people, including the Royal Commission, claim that the prohibition has not reduced supply or demand, but led to increased crime, stigmatization, deprivation of liberty, morbidity and mortality, without much to show for it. If this is the case, doesn't the drug policy have a problem? Before the Ministry of Justice or the Supreme Court decides the question of legitimate purpose, must it not be clarified whether punishment has ensured public health or further reduced the quality of life for all involved?

It is established law in matters of coercion and deprivation of liberty that it is not considered sufficient that the intervention can be justified according to permitted purposes. The intervention must also be proven to have been "absolutely necessary", and Professor of Law Jørgen Aall says of the necessity assessment that there must be "an urgent social need for the intervention and, moreover, that it is in relation to the purpose".<sup>xv</sup> To the extent that the cure is worse than the disease, can punishment be suitable to pursue a legitimate purpose?

The Supreme Court confirms in HR-2022-731-A that the drug law seeks to achieve a legitimate purpose, which is obvious, but whether a criminal or regulated market is best for public health is uncertain. The Director of Public Prosecutions has himself abandoned a drug-free ideal in favour of more rational considerations, and internationally we see a movement towards state control of the cannabis market, precisely because the prohibition has caused major problems and little gain.



The status in this bigger picture is that Norway must reassess constitutional obligations, but rather than determine whether there are good reasons for punishing, the Supreme Court takes the wisdom of the drug law for granted. It follows that to the extent that HR-2022-731-A is used to defend punishment, one risks continuing the prejudices that built the law, so what does the Director of Public Prosecutions think of the Ministry of Justice's attempt to establish a platform for punishment in this way? Can the professional responsibility for section 231 and 232 of the Norwegian Penal Code be said to be maintained?

The defense has shown how for 20 years the Ministry of Justice has taken the legislator's side in a growing gap between professionals and politicians. Should the Supreme Court have emphasized the "legislative signals when determining the reaction" when the Royal Commission has found that public panic has been leading? To the extent that public panic has shaped drug policy, won't this perpetuate the problem?

It is as the defense will show a connection between public panic and human rights violations. To the extent that panic has characterized politics, principles such as autonomy, equality, proportionality and the presumption of freedom will not be sufficiently emphasized, and society will have an oversized punishment and control apparatus. This is what the defense believes is the situation today, and after the drug reform report, which shows the problems with the political process, shouldn't the Supreme Court have made an assessment based on human rights principles?

The defense believes that if the Supreme Court had carried out a human rights analysis, the distance between the law and constitutional ground would have been settled. Instead, by emphasizing the legislature's signals and the Ministry of Justice's rejection of the Criminal Law Commission's work, the Supreme Court ensures a continuation of public panic, because the ministry's discussion in Ot.prp.nr.22 (2008–2009) is not reassuring reading. In this proposal, the ministry explains that "the narcotic substances stand . . . in a different historical and cultural position",<sup>xvi</sup> but does the Director of Public Prosecutions think that culture is a sufficient reason to punish?



Culture is not in itself a good enough reason to retain punishment. In that case, it would not be possible to criticize totalitarian regimes, and human rights require a justification that is better founded. We must therefore look for other reasons, and the Ministry of Justice refers to the importance of sending the right signal:

*The ministry adds . . . considerable emphasis on the fact that decriminalization will send an unfortunate signal to young people. Decriminalization can be perceived as meaning that drug use is no longer considered harmful or dangerous, cf. Ot.prp.nr.90 (2003–2004) page 89. Such a signal is unfortunate when the action is still considered undesirable.<sup>xvii</sup>*

The defense therefore asks the Director of Public Prosecutions: If an action is undesirable, must it be criminalised? Does the state have to criminalize tobacco smoking, overeating, watching porn, and lack of truthfulness in order for people to understand that better habits are preferred? Is the lack of criminalization of such behaviour a sign that the state encourages destructive patterns of life, or does it indicate that the state respects the limits laid down by law?

The ministry's emphasis on the importance of sending the correct signal is anchored in Ot.prp.nr.90 (2003–2004), but according to NOU 2019:26, continuation of punishment has a questionable norm-forming status. The drug report shows that public panic has shaped politics, that prohibition must be defended, and that the basis for punishment does not measure up. The investigation is the most thorough work carried out by the Norwegian authorities and finds no connection between punishment and drug use. It is therefore unclear whether the prohibition signals bureaucratic overreach or whether citizens should take responsibility for their own use. The Ministry of Justice and the Royal Commission disagree on whether punishment is necessary or whether the state's efforts for public health do more harm than good, but one thing is certain: To the extent that policy is based on failed premises, prohibition signals the opposite of what the Storting, the Ministry of Justice, the Supreme Court, and The Director of Public Prosecutions wants. Rather than protecting the community, all agencies of government will instead perpetuate a destructive cycle, and is this a recommended state of affairs?



Integrity is a key if society is to build a bridge over the gap between theory and practice. The values, ideals, and principles that follow from our constitutional heritage are the compass that shows the way out of totalitarian waters, and it is difficult to imagine that the Directorate of Public Prosecutions is served by the current situation. Even so, the director seems confident in his consultation response that the threat of punishment continues to have a normative effect. We therefore ask, what kind of "signal" does a policy send that criminalises unproblematic drug use, makes drug use more dangerous than necessary, and punishes sellers of less dangerous substances than those distributed by the state? Traditionally, punishing people for behaviour that is less harmful than legally regulated behaviour is a sign of religious fanaticism more than reason-based concern, so can the Director of Public Prosecutions explain how drug policy differs from arbitrary persecution? Why do we need a prohibition to help cannabis users but not to limit the damage that alcohol does to society and the local environment?

Because the distinction between legal and illegal substances is culturally conditioned, and not based on reason, this is a question that is impossible to answer, and neither the Ministry of Justice's nor the Supreme Court's treatment of the law provides an answer. The Supreme Court's assessment of the equality principle in HR-2022-731-A refers to the Storting's treatment of the drug reform, where the issue did not receive attention, and the court does not shed light on the differential treatment between users of legal and illegal substances. Nor is the Ministry of Justice's overall assessment in Ot.prp.nr.22 (2008–2009) satisfactory. We only know, based on this, that "something" speaks against equal treatment in the drug policy, and that "the Department agrees with the Association Against Drug Addiction that society's need for protection against an ever-increasing drug traffic, accompanying social problems, crime for profit and insecurity, strongly argues for continuing to impose penalties".<sup>xviii</sup>

We see here that the ministry uses the problems that come with a prohibition to justify punishment in the drug policy. Does the Director of Public Prosecutions think this makes sense?



Elsewhere in the world, the control of the drug trade by criminal organizations, accompanying social problems, crime for profit and insecurity, are the reason why more and more state leaders want to regulate the market. In September 2022, Colombia's president referred to the prohibition on drugs as "genocide" and told the UN that "democracy will die" if the state does not take control of the market, and so the Ministry of Justice's assessment is, to put it mildly, controversial.

The ministry justifies its assessment saying "that the Sanctions Committee in NOU 2003: 15 at pages 268-269 assumes that dealing with drugs – use and possession – is such a serious offense that the qualification requirement for applying punishment is met", but the ministry should not emphasize this report. Since NOU 2003: 15, NOU 2019: 26 has concluded the opposite on a far more informed basis, and according to the Royal Commission, "the introduction of penal-like administrative fees may, depending on the circumstances, come into conflict with the citizens' right to privacy etc. and the right to health".<sup>xix</sup> If this is disproportionate, what about the current penalty framework?

Several courts have anchored the right to cannabis use in self-determination, and if there are good reasons to choose drugs other than alcohol, why should the state use its power to interfere with drug use? Can the Director of Public Prosecutions say anything about this that is not transferable to alcohol?

The Director of Public Prosecutions may point out the differences between the substances and that all drug use is not unproblematic. Cannabis, for example, is a much safer drug than opiates, but according to independent researchers, alcohol is the worst of all drugs,<sup>xx</sup> so why should users of other drugs risk punishment and the problems that result from an illegal market?

Through this and other testimonies, we will look at the reasoning that underpins the prohibition. The Court must review the answers to the questions that clarify rights, and the protection of disadvantaged groups is a fundamental part of the state's responsibilities. The Criminal Law Commission made arrangements for such protection, but the Ministry of Justice believed in Ot.prp.nr.22 (2008–2009) that the majority applied "too narrow an understanding of the harm principle" by emphasizing only the drugs' "direct harmful effects"<sup>xxi</sup> towards the users. The Ministry of Justice has a problem with such argumentation because the same is



the case for alcohol use, overeating, abortion, and motorcycling: to the extent that such activities increase in scope, a certain amount of harm will follow, so on what basis is such logic reserved for illegal substances in particular? If women's right to control their own bodies weighs so heavily that husbands, children, family members, or society have no say in a decision about abortion, how can the state deny self-determination in matters of drug use? How can section 231 and 232 of the Criminal Code be defended when the prohibition makes drug use more dangerous than necessary, and the Royal Commission "cannot see that the justification requirement for punishing these actions is met"?

It is the Court's mission to assess the Director of Public Prosecutions' reply, as well as the Storting and the Ministry of Justice's treatment of rights. It is nevertheless not without reason that these actors are held responsible for a failure to end arbitrary persecution in drug policy. As we have seen, the ministry has chosen the wrong side in a growing rift between professionals and politicians, and not only is "culture" used in Ot.prp.nr.22 (2008–2009) several times to defend differential treatment in the drug policy, but the ministry's assessment reveals an old-fashioned attitude to punishment. As the ministry states:

*It is not just about the deterrent function of the punishment. In the ministry's opinion, the criminalization of drug use is also important for highlighting basic values in society. Punishment thus constitutes an important element in the pedagogic guidance that society otherwise exhibits, for example at home and school.<sup>xxii</sup>*

This is what we are left with when the defense of punishment has been reviewed. The Justice Department refers to prohibition and punishment as necessary for the protection of society's morals, but are these values that the Director of Public Prosecutions want to convey? Belief in the educational effect of violence has long since been out of date in psychology, criminology and the sociology of law, and the defense assumes that employees of the prosecution do not use such means against their own children. In drug policy, more and more people understand that punishment hurts, so isn't it time to face the consequences?

In his consultation input on drug reform, the Director of Public Prosecutions says that "If it concerns actions that lie on the periphery of what should be punishable,



the rationale for using punishment should be challenged at regular intervals so that it can be explored whether it still stands." Now the status is, after 60 years, that no one can show a benefit of drug prohibition. What the prohibitionists recite are their own fear-based beliefs, while the damage that results from the policy is obvious. On this basis, the Royal Commission and the Ministry of Health come to the conclusion that punishment for drug use cannot be defended. The Director of Public Prosecutions' investigation into minor drug cases revealed an extensive overuse of force, but a blind spot exists, and if penalties for drug use are exposed as disproportionate, should not the harsher punishments for sale, production, and trafficking of drugs be looked at? Can the Norwegian people rest assured that section 232 of the Penal Code is proportional and just?

It is a basic principle of the rule of law that the longer the punishment, the stricter are the requirements for the law. More severe punishing demands better justification, and the Norwegian justice system regularly sentences people who grow cannabis to several years in prison. We therefore ask the director: What punishment does a grower who has produced one kilo of cannabis deserve? What punishment does a grower who has produced 100 kilos of cannabis deserve? And what punishment does a grower who has produced one ton of cannabis deserve?

The answers to such questions will depend on whether a Norwegian, Canadian, Thai, German, or Dutch Director of Prosecutions is examined. While the Norwegian Director of Public Prosecutions upholds the law's strictest sentence, such activities are legal in Canada and Thailand, and will also soon be regulated by law in Germany and Holland.

A Director of Prosecutions from Holland, Germany, Thailand, or Canada would therefore consider the Norwegian director's position as old-fashioned and ill-considered – and they would be right. As seen in this light, considering that it has been known for 20 years that the prohibition makes things worse, but that politicians maintain a market for organized crime, should not small-scale cannabis farming be considered vigilantism? What has a grower of cannabis done other than challenging the state's drug monopoly by offering less harmful substances?

AROD argues that that it is the politicians, not the growers of cannabis, who have failed in their social responsibility. These producers secure their health and



finances, they create a basis for others to do better, and the product they offer is sought after. Despite this, Norwegian citizens face life-destroying consequences from the criminal justice system for dealing with the cannabis plant, even though 95 percent of users have a well-functioning relationship with their drug. On the whole, cannabis creates a healthier and safer alternative to alcohol, and is all the aggression from the state worth it? Is it the concern of criminal law whether 5 or 10 percent of the population uses this substance?

Everything indicates that society can keep the drug use at a manageable level without punishment, so what social benefit is there in using budgets and state power on a control grid that makes it possible to intervene in buying and selling of drugs, imprison dealers and collaborators, and take away their houses, children, and property? Are these values that the Director of Public Prosecutions wants to represent?

It is clear that some users go on to become dependent on drugs, but does the state have a responsibility to prevent this experience? Doesn't personal growth, which includes the building of integrity, depend on freedom from over-supervision? Can we really grow as people without space to experience and explore? And isn't it the business of the state to provide the safest possible framework?

Not only is personal growth dependent on autonomy, but the right to develop one's consciousness is central to the human rights tradition. Freedom of speech and thought is linked to this and users attest that substances such as cannabis and psilocybin have great value for moral, cognitive and spiritual development. Yes, there is the possibility of cannabis addiction, but it is not a given that daily use is problematic. The consumers know their own health, and to the extent that cannabis use causes problems, it is up to the users to take action.

The same is true for alcohol. There is always a possibility that people drink themselves to death, but we know that criminalization in certain areas can lead to dramatic changes in overall crime, and that this was the result of the alcohol prohibition after the First World War. The intention behind the legislation was to get rid of all the disease, crime, social tragedy, and death caused by alcohol, but the prohibition generated so much new crime and social tragedy that after a few years the prohibition was repealed, because the desired effects of the legislation





were modest compared to the unwanted ones. This is today indisputable, and there is a professional consensus that the same applies to drug prohibition. On such basis, what reasons other than the hunt for scapegoats maintains the need to punish? Why not offer users and society a much safer framework?

Prohibitionists will say that drugs are dangerous, and that prohibition is the safer framework, but in 1996 the Dutch erected a commission consisting of eight experts from a variety of disciplines that looked at the consequences of a fully regulated drug market. They published their findings in *Drug Control Through Legalization – A plan for regulation of the drug problem in the Netherlands* and their insights were noteworthy. It was estimated that all out legalization would have little effect upon the prevalence of users; that society would save billions; and that prohibition was an ineffective, unjust, unnecessary, and destructive endeavor. This is what the commission noted on the effect a legalization would have on crime:

*[A] general legalization of drugs in the Netherlands will result in a reduction of the criminal money circuit by about 1 billion Dutch guilders and of total crime by about 50-80%. This unprecedented decrease will reduce the crime rate back to the level of the late seventies. This illustrates that the ever-increasing rate of crime has not been merely a natural phenomenon, to be attributed to factors that are hard to influence, such as the disintegration of traditional religious and socio-political organizations, divorces, tv-violence, immigration, unemployment etc. The rise of crime appears to have a clear and rectifiable cause: The prohibition of drugs.<sup>xxiii</sup>*

Do the Director of Prosecutions presume that prohibition has done a better job in Norway?

In 1971 a Dutch commission concluded that drug policy should be completely separated from criminal law in order to avert a never-ending and increasingly escalating conflict. The Hulsman Commission observed that once criminal law was to be applied to drug policy, "the investigatory apparatus will expand into a vast, well-trained and highly 'weaponised' unit, which must be continually improved and expanded upon in order to maintain the pace of the never-ending escalation".<sup>xxiv</sup> As Loek Hulsman, the head of the Dutch commission, stated:



*If we choose to make criminal law the main means of deterring drug use, then this choice is not only inadequate, but therefore also extremely dangerous. Time and time again, it shall prove to be an inadequate means, which will lead those in favour of applying penalties to plead for even harsher measures until investigatory activities will become a hundred times more intense than they are under the current situation. [...] They will exacerbate the polarisation between various groups in society, which can result in an increase in acts of violence.<sup>xxv</sup>*

In hindsight, this prophecy appears to have come true. Hasn't also the warning of criminologists materialised in the Norwegian drug policy?

In the 1970s, Norway was blessed with having a robust criminology tradition. Still, the drug-free ideal was stronger, and while the Dutch Government listened to its experts and came up with the coffee-shop system, the Norwegian Government has ignored all opposition to the drug laws for 50 years. Looking back, should the Justice Department have done things differently?

The defence has drawn attention to the lack of a basis for punishment and that the presumption of freedom remains ignored. Proponents of prohibition will claim that without punishment everything would be worse, but in those areas of the globe where cannabis has been legalized for a while, such as in Uruguay and Colorado, few want to return to disenfranchisement and coercion. Hence, there are adequate examples that responsible regulation is possible – and it does not bode well, either for the police, drug users, or citizens in general, that a regulated market is excluded from scrutiny.

For cannabis users and producers, this is obvious. They have the right not to be unfairly disadvantaged as compared to alcohol users and producers, but don't the police have the right to be the best possible version of law enforcement? Do not employees of the prosecution have the right to work with the law without a nagging sensation that something is rotten? Do not judges and prison authorities have a right to be free from the role of executioner for the community's tendency to look for scapegoats? Should not children have the right to grow up in a world where double standards and unduly invasive laws do not ensure the loss of their



mother, father, sister, or brother? Don't parents have a right for their children to grow up without propaganda or the destructive pull of the illegal economy?

As to the integrity of the justice system, Douglas Husak, Professor of Law at Rutgers University, has noted that "War has been declared on drugs. If war is to be declared on something, one would first hope that two conditions would be satisfied. First, the enemy should be clearly identified, Second, the special significance of the enemy should be demonstrated. Unfortunately, neither condition is satisfied by the war on drugs".<sup>xxvi</sup> If this is so, does not the drug law disparage justice?

In his consultation response to the Royal Commission, the Director of Public Prosecutions noted the paradox of the double standards in drug policy, but he remains reluctant to come to terms with its ramifications. Still, the rule of law demands an examination, because when policemen in Canada can legally smoke cannabis and drive to work a few hours later, why are Norwegian citizens punished for driving up to five days after consuming cannabis,<sup>xxvii</sup> when the experts agree that the intoxication is short-lived, and that people can drive after four hours? Why rely on THC values that are invalidated by international standards? Why not use common sense and let more reliable testing<sup>xxviii</sup> determine driveability?

The Director of Public Prosecutions has a special responsibility to ensure that the use of the police power is justified, and according to the Police Act, the police must "not use stronger means unless weaker means must be assumed to be insufficient or inappropriate, or without such having been tried in vain". If a regulated market has not been considered, how can citizens be sure that the police use the least intrusive means against the population? How have less intrusive means been vainly attempted?

If we look back in time, the problems with cannabis, psilocybin, and other substances were far less disturbing before the prohibition. In other words, everything indicates that a regulated regime is more appropriate than a criminal market, so how can the means of force be "necessary" and "in relation to the seriousness of the situation, the purpose of the Police Act and the circumstances in general"? How can the Director of Public Prosecutions say that responsibility



for law and justice is ensured, when less intrusive measures have not been considered?

International studies demonstrate a connection between the police's intervention in the illicit drug market and damage to the local community.<sup>xxix</sup> It is well-known that much extortion, kidnapping and murder are related to conflicts in the drug market, and the meddling of the police increase the chances of it happening. We also see this in Norway, where the strict approach to law and order in the 1980s resulted in more stigma, diseases, crime, and mortality. The drug market became more organized and ruthless in response to police efforts, while recruitment into crime continued. There are many indications that the rise in crime is linked to drug policy, and if we are to protect children and young people from the drug market (as required by the Convention on the Rights of the Child), isn't it time to think again?

The defense supports the fight against organized crime. In this respect, we believe that legalization is far better than criminalization and decriminalization, as this is the most effective way to drive capital and personnel out of the illegal market. The Norwegian police have described the ever more organized drug smuggling as "a local and national concern", and claim "that by removing the drugs we also avoid exposure and recruitment".<sup>xxx</sup> However, it has been a long time since police operations made a difference in the market. Despite several large seizures in recent times, the market remains saturated, and it is also not a given that the world will be better off without cannabis.

The last time there was a drought, during the Covid-19 pandemic, the visible effect was more violence and robbery,<sup>xxxi</sup> and the police described a shift towards harder drugs.<sup>xxxii</sup> The police therefore do not "prevent exposure and recruitment" through seizures, but increase the chances of conflict, so how have the police's efforts made the situation better?

The Supreme Court uses the danger of drugs as a justification for a system of threshold values, and this concept forms the basis of the penalty framework. Still, the supply and demand of drugs must be twisted into a victim and aggressor context for the threat of proliferation to make sense. After all, there is no talk of how much wine we can have in the cellar before it creates social problems, nor



about how many beers you can buy in the shop, and compared to alcohol, the problems with cannabis use are smaller. Of the challenges that may arise impure substances, psychosis, dealings with criminals, criminal intrigues, and problems with the police and child protection services are most relevant. The burden that a perpetual state of war imposes on society can be added, but all of this is linked to prohibition. Does it then make sense to talk about the danger of proliferation in a traditional context? Doesn't the real danger lie in the prohibition ideology? Isn't it this ideology that makes blind to a bigger picture, that depends on double standards and enemy images to persist, that divides society and is the source of so much suffering?

We know that, after a thorough review, the Royal Commission does not find that the justification requirement for penalizing use and possession has been met. As the Director of Public Prosecutions points out, the differential treatment of legal and illegal substances is instead a paradox, because the spread of cannabis also has positive aspects. The effect can make people more creative, connected, and interested in personal growth. The altered state of consciousness can increase the quality of social interaction, provide insight, improve the quality of life, and ease ailments. This applies not only to most users but also to those with daily needs, and isn't it time to reconsider the notion of proliferation risk so that the law can be shaped in line with less misleading terms?

The Norwegian professor of law Hans Fredrik Marthinussen has stated that "the danger of proliferation is an example that the rule of law does not apply in drug cases",<sup>xxxiii</sup> and he is right. Because public panic has prevailed, this concept remains the basis for judicial mistreatment, but it is not the mission of the police to continue the hunt for scapegoats. According to the Police Act, the police must "be a part of society's overall efforts to promote and strengthen the citizens' legal security", "and either alone or together with other authorities protect against anything that threatens the general safety of society". Is there anything that threatens "the citizens' legal security" more than public panic? Isn't this phenomenon, historically, that which has undermined law and justice to the greatest extent?



What does public panic mean for the Director of Public Prosecutions? Does the director agree that there is a gap between theory and practice, and that the gap is not settled due to a failure of leadership?

Not only is panic detected by the Royal Commission. With its focus on the tension between governance law and rights law, the Committee for conduct, integrity, and conflict of interest in law enforcement has demonstrated that human rights remain ignored due to a systemic failure, and so how should the police and the prosecution (including employees of the Higher Prosecution Authority) act when public panic is detected?

In the ethical guidelines, "every employee of the prosecuting authority, must act in a way that promotes a legally secure and trustworthy criminal justice system in accordance with law and order. The reference to law and order is intended to cover all rules and guidelines given in or pursuant to law and the constitution. The rules of international law that the Norwegian authorities are obliged to follow are also covered." Based on these guidelines, should employees in the prosecution enforce section 231 and 232 of the Penal Code without worrying "whether Norwegian drug policy is correct or reasonable at an overall level", or does the responsibility for law and order dictate that employees make an effort to ensure the quality of criminal justice?

Political and administrative leadership has the ultimate responsibility for legislation, but if the Storting, Ministry of Justice and the Police Directorate fail, the Police Act requires every policeman to "promote and strengthen citizens' legal security, security and general welfare in general". Considering that since 2009, the Ministry of Justice and the Director of Public Prosecution have been informed of arbitrary persecution, but no one has taken responsibility for the use of punishment, will the director say that employees in the police and prosecution have a duty to oppose the failure of leadership?

The Minister of Justice has been concerned on social media about how the police "elsewhere in the world" are used by "totalitarian states to enforce cruel laws that restrict fundamental rights". What should the police do in such states as Iran, where the clergy expects the police to enforce a regime of abuse?



In the public debate, AROD has shown parallels between the clergy in Iran and the Norwegian authorities.<sup>xxxiv</sup> If the discrimination from alcohol cannot be defended, it can hardly be worse to deny women a right to self-determination over clothing than it is to refuse self-determination in the area of drug use, but for 60 years the Norwegian police have made life miserable for users. More and more police officers feel a discomfort associated with this, so what should they do? Should they work for better management internally, sell cannabis to bring focus on rights (as the Danish policeman Lars Kragh Andersen did in 2011), or refuse to enforce the drug law? Isn't all this legitimate opposition to a system that rejects the rule of law?

What is the Director of Public Prosecutions' opinion on extremism? Does such ideology only exist in Iran and other distant nations or is it also found in Norwegian drug policy?

According to the UN, extremism is "extreme ideas or actions in which violence is considered an acceptable means of forcing through dramatic social changes and achieving political, religious or ideological goals".<sup>xxxv</sup> Isn't this a description of the prohibitionists?

If we look back, legislation against race, homosexuality, vagrancy, and other witch hunts all have in common that the followers wanted to free society from alleged evils. Because the end was supposed to justify the means, the police justified horrible actions, but can't the same be said of the prohibitionists? What distinguishes the Minister of Justice from other extremists?

"Extremism" is a negatively charged term and it is understandable if the Director of Public Prosecutions does not agree. Despite this, the definition transferred to Norwegian conditions is clear: According to the Great Norwegian Dictionary, "a society like Norway is characterized by very broad support for democracy, human rights and the distribution of power as laid down in the Constitution", and it will be "political extreme" to deprive "minorities or opposition fundamental rights, as these are defined in the Constitution and international agreements on human rights".<sup>xxxvi</sup> Isn't that exactly what the supporters of prohibition have done?

To save the world from drugs, prohibitionists have disenfranchised drug users and demonized sellers, they have made drug use as dangerous as possible, facilitated



organized crime, encouraged snitching to the police, used violence, split families, thrown people into prison, and mocked dissenters. Good reasons for doing this have been hard to find, but nothing has caused the prohibitionists to reconsider. Rather than respond to criticism and ensure human rights protection, the prohibitionists have set aside 200 years of legal tradition. For 14 years, the guarantees of the rule of law have been absent because the supporters of the drug law refuse to admit failure, so isn't the connection to the arbitrary persecution of earlier times obvious?

The defense has demonstrated how the risk of proliferation is uncritically used to justify a prohibition and how, on the basis of this, the Supreme Court has established a regime with threshold values. Nevertheless, thousands of human rights violations have been uncovered as a result of the Director of Public Prosecutions' report on the use of force in minor drug cases and the threshold values do not prevent arbitrariness. Instead, thresholds are a way of preserving a blind spot, allowing the prohibition to continue – so, let's talk about the thresholds.

The legislature, the Supreme Court and the Director of Public Prosecutions have worked out this system to distinguish between buying and selling, which it does not. One gram of cannabis can be shared with others in the same way that as much as 20 grams can be smoked alone, and the problem of arbitrary persecution continues. We shall have more to say on that, but if one does not distort the law of supply and demand into a victim and abuser context, why separate buying from selling? How does the possession of one gram or a hundred grams decide whether citizens are to be pathologised or demonised?

Fear of sending the wrong signal justifies a prohibition on drugs and the need to prevent the spread of drugs justifies threshold values. Despite this, no one in the government has explained how the basic right to life, liberty, and the pursuit of happiness is nullified by the possession of different amounts of substances, and if the spread of cannabis is less of a risk to society than that of alcohol, how can punishment of up to 21 years be justified?

It is unclear whether the prohibition suggests benign guardianship or whether it is better for citizens to take responsibility for their own consumption. We do not know whether politicians' denial of autonomy is necessary or whether their efforts





for public health do more harm than good, but due to the perceived risk of drugs, threshold values have become a compromise between those who want to remedy the damage of drug policy and those who do not want to think a new. Even so, can the director defend any principled basis?

The Norwegian government equates prohibition with solidarity in practice, but we are more likely talking about bureaucratic mismanagement of an unusually destructive nature. That is why the report of the Royal Commission was so discouraging for politicians, and "the dangers of drugs" and "fear of sending the wrong signal" remain weak justifications for punishment, for which there is no empirical evidence. In fact, constitutional courts have linked cannabis use to a legitimate autonomy interest, and if there are good enough reasons to choose drugs other than alcohol, why use police power against unproblematic drug use? Why should drug users risk penalties and the problems resulting from an illegal market?

It does not take much thought to realise that threshold values are useless as guidelines for punishment, so what is their point? Are they the result of prohibitionists' unwillingness to deal with past mistakes? Do the values provide any other benefit than prohibitionists living without shame in a time of upheaval?

This seems to be the case. The Supreme Court has used "signals from the legislature" to work out a limit for the amount of illegal drugs that disqualify for punishment: as decriminalisation moves forward – and the legislative wisdom evolves – this limit can be expected to be raised until the last prohibitionist have died and the world can conform to a more wholesome standard of morality and human rights. In this way, those responsible for a failed social experiment can ignore the parallels to other social experiments gone wrong – but is such a strategy a valid solution? Is it not making the victims bear the oppressors guilt?

Prohibitions do not appreciate the human rights paradigm because they have twisted the law of supply and demand into a victim and abuser context. This is how drug users are disenfranchised and drug dealers are demonized. Nonetheless, according to the Royal Commission, even "the introduction of penaltylike administrative fees may, depending on the circumstances, conflict with the citizens' right to privacy and the right to health".<sup>xxxvii</sup> If this is disproportionate,



what about current penalties? Why depart from the traditional measure of culpability? Normally, be it knives, axes, explosives, or legal drugs, social scorn and moral blameworthiness are reserved for those who abuse a product, not those who profit from its sale: Why is a dealer of cannabis more to blame than its abuser?

Proponents of drug prohibition have twisted the law of supply and demand into a victim and abuser context. This is how users are pathologised and dealers demonised. However, is it not the same law of supply and demand and the same varying patterns of use applicable to both legal and illegal substances?

If the Director of Public Prosecutions cannot deny that the same law of supply and demand and the same varying user patterns are involved, is it proper to turn supply and demand into a victim and abuser context? Does this not reveal a blind spot that should be illuminated? The Royal Commission's report shows that the idea of the drug shark is political fiction and that punishment must be defended: if penalties for drug use are exposed as disproportionate, should not penalties for sale be subjected to the test of reason? Does the Director think that this is the case today?

In a criminal market, there is no quality control and no protection against fraud and robbery. If politicians want to "ensure a better life situation and dignity and reduce stigma for people with substance abuse problems" and seek to pursue a "knowledge-based" drug policy that "makes it safe to ask for help", is it justifiable to exclude regulation? Could not a controlled market in drugs make everyday life safer for society and easier for the police? Could it not reduce crime, disease, violence, suffering, stigma, and death?

It appears that a more comprehensive drug policy would benefit the Norwegian people. Politicians, for example, want to protect the young, but prohibition promotes crime. Many people prefer cannabis to alcohol, and criminalisation means that they must deal with criminals. The better the contacts in the criminal world, the better the quality of products on offer, but at the cost of chaos and uncertain future prospects. Most people who sit on longer sentences are therefore users, and the myth of the drug shark is political fiction. Yet, the prohibition of drugs turns users into sellers and, later, into inmates, while leaving a market worth



hundreds of billions to criminals. Cannot young people be better protected through an alternative? Cannot a regulated market remove much of the allure of the banned substances?

The defence asks because thinking along these lines ensures that Canada, Germany, and other nations refer to the Convention on the Rights of the Child to defend the regulation of the cannabis market. A more holistic perspective could also save politicians the challenge of morally and legally separating drug users from drug dealers and problem use from recreational use. There are no good answers on how to solve this, but if the goal is to reduce overdoses and to help those in need, is not a regulated market most apt to remove the shame and stigma? Is it not a controlled supply that secures users the most?

Those who do not accept the ideal of a drug-free society regard the prohibition ideology as hypocritical. Users would rather deal with sellers than the police, and the prohibition experiment has led to a steady erosion of the authority of the state. Instead of inviting respect for law and order, the result of the drug law is that more and more people see illegal drugs as a symbol of freedom: Why not look at drug policy more holistically? Could not this have reversed the trend?

The Director of Public Prosecutions has to go by his gut, as no report has assessed the pros and cons of a regulated market. Nevertheless, few experts believe that drug use will increase significantly, and it is more likely that crime will fall to the level of the 1950s, before the war on drugs accelerated the statistics. This was at least what the Dutch authorities concluded after examining the case.<sup>xxxviii</sup> Therefore, it only makes sense that the director, like everyone else involved in drug policy, should be invested in clarifying whether there is a right to psilocybin and cannabis use, as several courts claim for the latter, and whether this right includes a regulated market. Public panic has been proven in the development of drug policy, and from the drug users' point of view, is it not natural that stigma, social exclusion, and overdoses are connected and that prohibition contributes to problematic drug use? Could not treatment equal to that for alcohol drinkers inspire more sensible drug use? Could it not have contributed to safer drugs and an increased incentive to seek help? Could it not have reversed a development that transforms drug users into criminals?



We ask further, from the point of view of morality, can citizens readily assume that prohibition is good and that those who undermine it are evil? Is the goal of a drug-free society a worthy ideal? What is it about cannabis and psilocybin that makes the protection of law enforcement necessary?

Opiates are special because of the physical dependence. Many people think that regulation of cannabis is relevant because this substance is more widespread and less addictive, but no one suffers more than opiate addicts under the prohibition. No one is serving sentences for smaller amounts of drugs, no one has more health problems, and no one is exposed to a more destructive dynamic. Does this minority grouping not deserve a rights analysis when 300 Norwegian lives a year depend on it?

It remains to be seen whether an independent, impartial, and competent court will rule that prohibition is necessary for a modern society. The Royal Commission is clear that punishment has not prevented the spread of drugs, and overall, there are very good reasons to consider a regulated market. The most important is, as the Royal Commission concluded,

*In the committee's assessment, the best available knowledge provides a fairly clear basis for concluding that criminalisation of drug use has unintended negative effects. At the same time, there does not seem to be good empirical evidence for a possible preventive effect of the punishment, at least not an effect that there is no reason to believe can be achieved through the use of alternative measures. In light of this, the committee cannot see that the justification requirement for penalising these acts has been met.<sup>xxxix</sup>*

If the justification requirement for penalties for use and possession is considered unfulfilled, should not the creation of a regulated market be justified? Is this not all the reason needed?

There are also other reasons for regulating illicit drugs as we did almost a hundred years ago with alcohol. We know that prohibition comes with major societal costs, that it forces users to have contact with criminals, and that the illegal market threatens society. For half a century, slowly but surely, the drug trade has corrupted law and order and the institutions intended to safeguard an open society while, at the same time, sacrificing a larger percentage of the population. These



are dynamics that receive little attention, but what does dignity entail: is it a drug-free life or one where self-determination is emphasised? And if we are not distorting the law of supply and demand, why are drug dealers so bad?

Prohibitionists can hardly answer, as tyranny and autonomy are opposites in a meaningful universe. We know that users would rather deal with sellers than with the police, and while the former have offered a product there are good enough reasons to use, the latter have offered coercion and deprivation of liberty. If human rights protect drug use, as more and more international courts are claiming, do not the police have a greater ethical problem than drug dealers do? Do not those who led the way in eradicating the "problem" have more to answer for?

The question touches the core of the drug law, the morality that perpetuates persecution. As the Director of Public Prosecutions acknowledged in his response to the work of the Royal Commission, the differential treatment of drug users is paradoxical, which strains the authority of the law: Can the idea of good and bad morals be turned upside down? Could this be the cause of public panic and the continuation of punishment, and can principled thinking heal a divided society?

The point of drug policy, just not stated, is to make drug use as dangerous as possible. Proponents of the prohibition see all drug use as abuse. There is no quality assurance, and the worse-off the users are, the less lucrative it is for young people to become "drug addicts". Thus, prohibitionists insist on punishment to keep the youth from becoming drug addicts, but can citizens trust the political process? If there is no rational distinction between legal and illegal drugs, can citizens learn anything from drug policy other than to see through its hypocrisy?

The Government's advisers in drug policy are former Director of Public Prosecutions Tor-Aksel Busch, retired judge and public prosecutor Iver Huitfeldt, and others who measure proportionality based on a drug-free ideal. This tradition is much defined by the moral panic documented by the Royal Commission, and the contrast to the Director of Public Prosecutions is noteworthy. This is how Huitfeldt answered the question of whether a body search is a proportional intervention if the police perceive a person as intoxicated:

*A state of intoxication in itself gives good reason for suspicion of possession and possession presupposes acquisition and again almost always import.*



*Proportionality must be related to a standard. If the police find a slice of salami with narcotics, the case is thus not clarified and decided. A sausage slice must come from a whole sausage; therefore, the whole sausage becomes the standard. This is the case with all drug discoveries; the proportionality must be assessed against a large, unknown quantity.<sup>xl</sup>*

It is no wonder that the Labour Party's lawyers and the Director of Public Prosecutions clash. The former weighs proportionality on the basis of a drug-free ideal, but if there is neither a rational distinction between legal and illegal drugs nor good reasons for punishment, can the intervention be proportionate?

What does the Director of Public Prosecutions think about the legal tradition that derives proportionality from a drug-free ideal? Is this tradition suitable for protecting the rule of law, or can the judgment of history be brutal? Should the government find new advisers?

What about the office of the Director of Public Prosecutions? Are the director and his staff reasoning from a position of principle? Are the requirements of the rule of law sufficiently emphasised by the higher prosecuting authority?

In Kapital, we could read that the director "constantly thinks about how we defend the use of punishment, and how we can defend the levels of punishment we set for different types of crime".<sup>xli</sup> The defence assumes that this is the reason the Director of Public Prosecutions has supported drug reform, but is decriminalisation enough? If we recognise that people do not choose intoxicants only for pathological reasons and that the humanisation of drug users makes it problematic to prosecute, what about a criminal market? Is it necessary to expose drug users and society to the problems that come with criminalisation? Are there good reasons to punish, when we have abandoned the ideal of a drug-free society, or do we have to acknowledge the connection to the arbitrary persecution of earlier times?

Because no investigation has been made, there is a blind spot, but the report on the use of force in minor drug cases shows that the assessments of the police have been systematically inadequate and that thousands of human rights violations occur every year: How does the current regime safeguard drug users? How can the director's efforts to ensure human rights protection for drug users in meeting



with the police prevent arbitrariness? As it is, cannot the police easily justify strip searches by claiming suspicion of sale, whether that is the case or not? Should this question be up to the individual police officer?

Under the current regime, the police shall distinguish between criminals and addicts. The Director of Public Prosecutions has issued directives, but can we trust the police to assess the threshold for impunity in the best possible way? How should the police separate between health problems and criminal behaviour in the area of drug policy? Is this a job the director wants for the police?

What about the distinction between use and sale? Five grams of cannabis can be sold just as much as 20 grams can be for personal use, so how should the police distinguish between personal use and criminal behavior in the area of drug policy? is this a job that the Director of Public Prosecutions wants for the police?

This is not a job that the Oslo police themselves want. In its consultation input to the Royal Commission, the Oslo Police District points out the following:

*In terms of experience, sellers adapt to the limit for punishment. If we have not been able to prove resale, we have the option of punishing the "presumed" seller for possessing drugs. The Oslo Police District assumes that the same challenges with providing the evidence will be linked to assessing whether the substance is for personal use or not. The police have neither the capacity nor the resources to investigate what is for their own use or what is intended for resale, in which case it would require a disproportionate use of resources compared to the investigation of other criminal cases which the police should and must prioritize.<sup>xlii</sup>*

The dread of the police has become reality through the system of threshold values. As the Director of Public Prosecutions and the Supreme Court both emphasise the legislator's signal more than principled considerations, threshold values distinguish between punishment and impunity, but no one has shown how these values prevent arbitrariness. As long as this is the case, the danger of human rights violations is profound and neither citizens nor the police can be on safe ground. We know, after 40 years of chasing drug users, that a toxic culture exists among the police and that a public prosecutor from the Norwegian Narcotic Officers Association (NNPF) has claimed that the Director of Public Prosecutions'



guidelines will not change much.<sup>xliii</sup> We have seen the same disregard for rights law among the prosecution in ARODs case, and should it be crucial to the sense of justice whether drug users meet a liberal or conservative police officer?

It is primarily the NNPF that wants a policy that the Royal Commission and an increasing number of courts find unjustifiable, while LEAP Scandinavia represents their opposite. The latter has long worked for a comprehensive and open-minded drug policy, and is it not logical to look to this environment if the name and reputation of the police is to be saved? In wake of the Committee for conduct, integrity, and conflict of interest in law enforcement, should not the police be reformed in line with constitutional values? Not only do those responsible have a duty to take alleged human rights violations seriously. The state must protect against forces that threaten the open society and provide the police service that society needs. Does the Director of Public Prosecutions believe that this is the case today?

We have seen that the Police Act requires the police not to use stronger means "unless weaker means must be assumed to be insufficient or inappropriate", but that less intrusive methods have not been tried. We have also seen that no one in charge can explain the principled difference between the supporters of prohibition and the clergy in Iran, or why a distinction between legal and illegal drugs is necessary. From a constitutional point of view, the Ministry of Justice violates the same principles as totalitarian regimes elsewhere in the world, so shouldn't the Minister of Justice and politicians be held accountable? Wouldn't that ensure a proper signalling effect if the goal is to secure the rule of law?

In the autumn of 2022, the Center Party tried to win votes on the need for more means of force and more punishment by claiming that drug use had dangerously increased after the Supreme Court had introduced threshold values and the Director of Public Prosecutions had ensured limited access to means of force. It has since been revealed that the Center Party used undocumented claims, or what others would call lies,<sup>xliv</sup> to gain support for a policy that violates human rights. According to the UN, impunity is the biggest problem for securing human rights, so why not hold politicians and ministers personally responsible?





If the director does not want to emphasize the signalling effect of holding politicians and employees of the Ministry of Justice responsible for human rights violations, but continues to punish on disproved premises, is that not a signal that the rule of law has failed and that a culture has developed where powerful people are above the law? What is then left of law and justice? How can the prosecution expect the people's respect?

We have seen that public panic implies a distance between theory and practice. It also means that the distance is ignored due to a widespread lack of culture, and LEAP is the faction of the police that has shown an ability for self-reflection. While the NNPF has crashed the drug reform by insisting on a need to maintain disproportionate means of power, LEAP wants to build a bridge to constitutional ground,<sup>xlv</sup> so shouldn't the leadership more actively listen to the latter? And shouldn't NNPF be abolished?

What does the Director of Public Prosecutions think about toxic culture in the state apparatus? Can public panic shape drug policy for 60 years without the dysfunctional culture being a problem? Can we trust that human rights violations will not be perpetuated, even after the director's guidelines in minor drug cases?

What does the Director of Public Prosecutions think about the toxic culture in the upper echelons? Can public panic continue decade after decade without leadership failure? Has it become a tradition in the drug fighting machinery to find managers who support a prohibition regardless of legitimacy? Has 60 years of prohibition promoted a culture in which the preservation of prestige, budgets, and powers defines the debate?

We touch here at the Achilles heel of the prohibition, that morality used to justify the law's most severe punishment for victimless acts. Only by turning the law of supply and demand into a victim and perpetrator context does the prohibitionist ideology make sense, only in this way can the infantilisation of drug users and demonisation of drug dealers continue. Still, culture is not a good enough reason to punish, and if better reasons fail, the court must recognise a parallel to the arbitrary persecution of earlier times.

Addressing the problem of arbitrariness is crucial, and the integrity of the department is one reason Are Frykholm, the leader of the Norwegian Association



for Police Lawyers, is calling for leadership.<sup>xlvi</sup> Equally important are the rule of law's guarantees for the persecuted groups, and should the director not accept responsibility for the drug policy's incompatibility with human rights and work for a more holistic approach?

We have seen the problem with threshold values, and the Director of Public Prosecutions has accepted the principle of turning from punishment to help in more significant drug cases also. The Director said the following in his consultation response to drug reform:

*Today, we have reached a point where even very serious drug offenses are met with alternative punitive measures if it is considered the best individual prevention. In a Supreme Court ruling in August last year, a 46-year-old woman who had been abusing drugs for about 30 years was sentenced to probation on terms of a drug program with court control for dealing with nearly 10 kilos of methamphetamine. The alternative unconditional prison sentence, and the subsidiary punishment for violation of the condition, was imprisonment for six years. The Supreme Court considered that such a conditional reaction made it far more likely that she would not fall back into drug use and new crime, and it became decisive for the result (in addition, a long time had passed since the act was committed). The Director of Public Prosecutions considers the ruling as a result of the increasingly common view that long-term drug addicts who are motivated for change need a different follow-up and a different content in the sentence than what serving a prison term entails. The verdict is thus an expression of the approach we share, namely a shift from punishment to help.*

How is this different for other violators of Section 232 of the Penal Code? Research indicates that not only is the myth of the drug shark political fiction but that the vast majority of those who sit on long sentences are users. Examination also shows that the longer the sentence, the more difficult the road back to society, and it is reasonable to assume that all non-violent offenders will benefit more from a suspended sentence than from years in prison. Preventively, this appears to be the best solution for the individual, so why maintain severe penalties? Are there other considerations?



If general preventive considerations are used to retain the most severe punishment of the law, it means that some are punished so that others will not do the same. Even so, as we have seen, the demonisation of the sale of drugs depends on turning the law of supply and demand into a victim and abuser context, and no one can explain why. Rather than punishing out of old habit, should not the Director of Public Prosecutions take care to justify the moral distinction between use and sale? When half of Europe and large parts of the United States have legalised similar actions, how is the requirement of proportionality met?

As mentioned in the introduction, for 14 years, the Director of Public Prosecutions has been informed about prohibition's problem with human rights, and the defence will go into more detail about the argument as presented in 2009. This is to clarify the state's liability over time, for as the appellant wrote in a letter dated September 9, 2009, "It is [the director's] responsibility to ensure that the police carry out orders that do not crash with law enforcement ethics and human rights, and it is also [the director's] responsibility to ensure that subordinates have guidelines that do not violate human rights conventions such as the European Convention of Human Rights (ECHR) and the UN human rights treaties".<sup>xlvii</sup> Is this controversial?

In 2009, the appellant held that "there is an unreasonable distinction between legal and illegal substances, as this distinction cannot be legitimised from either a perspective of health or any other rational point of view", and that "such unreasonable discrimination is contrary to the principle of equality" (ECHR Art. 14 and ICCPR Art. 26). Should the Director of Public Prosecutions have done more than trust the political process? Does not the director have a positive obligation to take alleged human rights violations seriously?

The Director of Public Prosecutions' response was that the appellant was unable to distinguish between truth and validity. According to Director Tor-Aksel Busch, the allegation of human rights violations could not be subjected to trial, but is this true? Have not several courts since then assessed the issue and ruled that the punishment for use is disproportionate?

If several courts have found a legitimate interest in cannabis use, does that not contradict the idea of a legitimate state interest in prohibition?



The work of Ronald Keith Siegel, an American psychopharmacologist who was an associate research professor in the Department of Psychiatry and Biobehavioural Sciences at the University of California, Los Angeles, betrays the idea of a legitimate state interest. Throughout his career, Siegel was a consultant to several government commissions on drug use. His research focused on the effects of drugs on human behaviour, including numerous clinical studies in which human volunteers took drugs such as ketamine, LSD, cannabis, mescaline, psilocybin, and THC, and when testifying in 2005 on the long-term effects of methamphetamine and cocaine use at the Robert Blake murder trial, the jury foreman in the trial, described Siegel as "one of the most compelling witnesses".

In his book *Intoxication*, Siegel claims that seeking altered states of consciousness is a natural part of our biology, much like the drives for thirst, hunger, and sex. He considers this as a fourth drive, and if we recognise that intoxication is a part of our biology, does criminalization make sense?

In *Human Rights and Drug Control*, Melissa Bone, a teacher of Criminal Law at the university of Leicester, connects Siegel's argument to human rights. Speaking of drug use as a fourth drive, she says:

*This notion corresponds with human rights foundationalism and the idea that human rights are entrenched in human nature itself. This perspective acknowledges that human rights have humanity at their source as there are certain appetites, social senses and needs which are shared across all cultures, thus some needs are not local but human. Though human rights foundationalism is subject to criticism, the consideration that human rights derive from our human nature is worth considering. Indeed, if human rights respond to the human condition by design, and human drug use is a naturalistic phenomenon rooted in our common humanity, then human rights could be utilised to respond to human drug use as a human need; in a way that could help human beings grow and flourish.<sup>xlvi</sup>*

If drug use is a natural part of human life, this explains why drugs have won the drug war. The notion of a fourth drive can explain why 60 years of rigorous state effort to eradicate drug use has failed, and cannot the director see a bigger vision for humanity than continuing the hunt for scapegoats?



After the Higher Prosecution Authority in 2009 failed to respect human rights, Director Tor-Aksel Busch was reported to the special unit for police matters.<sup>xlix</sup> The case was dropped, but from that time onwards, the office of the Higher Prosecution Authority was sufficiently informed to know better. Not only had the appellant explained the Director of Public Prosecutions' responsibility but also the effect of the enemy images and the comparison to the arbitrary persecution of the past were emphasised. The appellant wrote as follows:

*Although, for example, the leaders of Hitler's Germany believed that it was necessary for the stability of the state to treat Jews as they did, it did not legitimise the treatment of the Jews, and the same can be said about South Africa's treatment of the blacks under the apartheid regime, as well as about the Norwegian state's treatment of the Sami people and Tatars up to less than half a century ago. In order for such discrimination to be legitimised, the state must show that it is necessary – i.e., that it is not arbitrary – and that it is reasonable from the point of view of overriding societal considerations. The state must be able to show that the degree of social control is appropriate, because otherwise it is repressive, and considering that it can be proven that a health policy approach is a far more sensible and appropriate solution to the problem of drug use, it is not up to state representatives to a system of prohibition because it is in the perceived interests of existing agencies. Citizens' interests must take precedence over the agencies' hunger for powers and government subsidies. The drug laws must be said to serve the community, and if they demonstrably have an unfortunate social function and consequence they must be abolished if the state wants to appear as a defender of human values and the integrity of its citizens.*

Is this controversial? Does the Director of Public Prosecutions disagree with any of this?

The appellant's arguments in 2009 were the same as repeated by the Royal Commission in 2019. The drug reform report states as follows on page 29:

*The committee proceeds from the premise that punishment is society's strongest tool for counter-acting and condemning the citizens' unwanted*



*actions. Punishment is considered a means, not an end in itself. The use of punishment, therefore, requires a solid justification. It is the expectation of the overall consequences of the use of punishment that may possibly justify society's use of punishment. On the basis of this, the committee assumes that punishment can only be justified if the criminalisation is suitable for reducing the negative consequences of drug use. In addition, it must be required that other reactions and sanctions will be pointless or insufficient, and that the benefits of punishment are clearly greater than the harmful effects. The Committee cannot see that there is empirical evidence that decriminalisation of use or possession for own use will necessarily lead to a significant increase in the use of drugs. In light of the total amount of international research that is now available, which does not document any clear connection between changes in criminal law and the use of drugs in society, there is considerable doubt in the assumption that penalties against drug use and possession of drugs for own use as a whole has a preventive effect that cannot be achieved with other, less intrusive measures. The committee has therefore come to the conclusion that the best available knowledge as of today does not form the basis for any certain expectation that decriminalisation of drug users will lead to a significant increase in the use of drugs in the population.<sup>1</sup>*

In other words, all indications are that less intrusive measures are better suited as a foundation for drug policy. The Ministry of Health's assessment in Prop 92 L (2020-2021) was the same,<sup>li</sup> and the defense assumes that this was the reason that the Director of Public Prosecutions concluded that the use of force was disproportionate in minor drug cases. Is that right?

Still, a blind spot exists. The Royal Commission concluded that the punishment for use was disproportionate but did not investigate more serious circumstances. Politicians did not want the human rights situation in major drug cases to be elucidated, and the Director of Public Prosecutions followed up by limiting the investigation to minor drug cases. Despite this, the more severe the punishment is, the more stringent are the requirements for the law. This is a basic principle of law, and so should not the legislation for sales and manufacturing be subject to



control? Should it not be evaluated on the same terms as the Royal Commission examined drug use and possession?

This is exactly what the defendant asked for 14 years ago. As the appellant wrote to the Director of Public Prosecutions,

*As you know, I have the right to be heard in an independent, impartial, and competent court if I claim that rights have been violated (according to Article 13 of the ECHR), and shall have the opportunity to prove my claims (that there is an unreasonable discrimination of analogous cases, and that the drug laws represent a drug political/racial divide), while the state in turn must be able to show that the drug laws are proportionate (well-tailored and necessary/ reasonable) interventions, and that their goal (a drug-free society) is meaningfully connected with the means. Even if our leaders had therefore chosen to ban tobacco and alcohol as well, and in that sense had avoided violating the [principle of equality], I would still be able to prove that drug laws were unlawful, since it is easy to demonstrate that the drug prohibition has had far more unfortunate consequences for society than drug use itself. I would like to remind the Director of Public Prosecutions that although the political debate does not exactly reflect this fact, this was established as true for cannabis prohibition in an independent court in The Hague on 1–2 December 2008 (the cannabis tribunal). I do not think that drug use is a human right because drugs are unproblematic. I believe that drug use is a human right because it can be shown that the cure (drug prohibition) is worse than the disease (drug use); because no matter how much effort we put into the drug-free social ideal, we will never succeed; and because we can do far more for society and each other by embracing a health policy approach. There are Norwegian doctors who believe that the overdose statistics in this country can be cut by up to 90 percent if politicians switch to a health policy approach (Ole Martin Larsen, Mellom alle stoler, 2008). Thus, it appears clear that the drug-free ideal kills, and citizens can say that the current drug policy is a crime committed by the state against the citizens, as prohibition at no time could be said to serve society's interests, but nevertheless remains fixed and indisputable strategy.*



Based on such serious allegations, should not the state have accepted the burden of proof? Should not an independent, impartial, and competent court or tribunal have considered whether prohibition is necessary for a modern society?

Again, the appellant's correspondence from 2009 echoes in the report of the Royal Commission. The committee was clear that public panic had plagued politics, that the state was responsible for rights, and that punishment was difficult to defend. Similar findings have been made in other countries, which the drug report says more about:

*In several countries, including Mexico, South Africa and Germany, criminal prosecution of adults for possession of cannabis for personal use has been found to be incompatible with constitutional provisions on the right to respect for privacy or related provisions on the individual's right to autonomy as it is naturally seen in the context of the right to privacy under Article 8 of the ECHR and the right to free development of personality under the UN Universal Declaration of Human Rights Article 22. In Georgia, legislation authorizing civil sanctions against a cannabis ban was declared unconstitutional and invalid in 2018 it entailed a disproportionate interference with the citizens' autonomy, see discussion in Chapter 6. Interference with the exercise of the right to privacy, etc. can only take place "when this is in accordance with the law and is necessary in a democratic society for reasons of national security, public security or the country's economic welfare, to prevent disorder or crime, to protect health or morals, or to protect the rights and freedoms of others", cf. Article 8 no. 2. In order to be 32 compatible with Article 8 of the ECHR, interference with the right to respect for privacy, etc. promote a legitimate purpose and be necessary in a democratic society. . . . [Although] states have a wide margin of discretion in assessing whether interference with the right to privacy and family life in this regard is compatible with Article 8 of the ECHR, [implies] the requirement of necessity. . . nevertheless that it must be demonstrated that the intervention corresponds to an urgent social need ("pressing social need"). It must also be shown that the intervention is proportionate to the purpose of the intervention, taking into account relevant interests that must be weighed in the assessment. It is primarily the responsibility of the state*





*parties to make these assessments, but the ECtHR can review whether the arguments that are claimed to justify the intervention are relevant and proportionate and whether the rights were sufficiently respected in the decision-making process that led to the adoption of the intervention.<sup>lii</sup>*

Despite this, in 2009, the Director of Public Prosecutions would not support the right to judicial review. Instead, Director Tor-Aksel Busch invalidated a defence against the Penal Code, and persecution continued. It was only after the report of the Royal Commission, with its chapter on human rights, that the Director of Public Prosecutions saw the need to deal with a toxic culture and then only in smaller drug cases.

The Director of Public Prosecutions is to be commended for the efforts in this area, but apart from the light that the Director's report shed on a few weeks' work of the Norwegian police, the politicians, prosecution authority, and the courts have preserved a blind spot. As a result, 500,000 criminal cases have been brought on constitutionally dubious grounds after the Norwegian Supreme Court in 2010 rejected the issue without justification and an open wound in the Norwegian legal history must be healed. It remains to be seen whether an impartial and competent court will rule that the prohibition is necessary in a modern society, but what is the director's gut feeling? Does the prohibition signal a benign and necessary guardianship, or do the state's efforts for public health do more harm than good? Are the politicians free to deny citizens' autonomy, or is it better for citizens to take responsibility for their own use? What does the Director believe will be history's verdict on punishment in drug policy?

What are the Director of Public Prosecutions' thoughts on the need for a truth and reconciliation commission? Could such a commission bring light to the impact that these policies have had on individuals, families, and communities? Could it bring the drug policy in line with more wholesome values? Could it provide a basis for justice and lead to more effective and equitable drug policies in the future? Will the minister advocate for such a commission?



## Notes

- <sup>i</sup> [https://www.kapital.no/portrett/2020/06/02/7524464/maurud-pa-sikt-bryter-okonomisk-kriminalitet-ned-samfunnstrukturene?zephir\\_sso\\_ott=cTUo3z](https://www.kapital.no/portrett/2020/06/02/7524464/maurud-pa-sikt-bryter-okonomisk-kriminalitet-ned-samfunnstrukturene?zephir_sso_ott=cTUo3z)
- <sup>ii</sup> As chapter 4.2.1 summarizes the relationship between governance law and rights law: “*The norms for the police's behaviour must be seen in the light of the police's overall role in society. The modern police role is at the intersection of two different ways of exercising power, the democratic and the rule of law. The tension between the democratic exercise of power and its constitutional binding has been conceptualized by historians and jurists as a tension between two different legal paradigms, governance law versus rights law. Originating in the principle of popular sovereignty, governing law sees the court as a tool for the executive and legislative power. Rights law, on the other hand, sees the court as a tool to ensure citizens' personal integrity and freedom, with the help of rights that the state cannot interfere with without having very good reasons. Both paradigms have as a common premise that the exercise of power must be based on respect for basic human rights, democratic principles and rule of law values, but the criteria for assessing, for example, the importance of individual rights, can be quite different from a rule of law perspective and a democracy perspective, respectively.*” It is in this area that the Norwegian authorities have failed the rights law and those persecuted in the drug field. As the report continues: *Good role understanding involves . . . an expectation that the employee balances various considerations in their daily work. An ongoing balancing of different sets of values is essentially a good and hallmark of a modern and trust-inspiring state administration and thus police administration. For the police area, this means that such tensions are a feature of the system, and that the individual employee must balance different and often complex role elements. When it comes to the police's more concrete purpose in society, it is clear from the Police Act that the institution's "responsibility and aim" is, through preventive enforcement and assistance activities, [to] be a part of society's overall efforts to promote and strengthen citizens' legal security, security and general welfare in general*”. The Committee for conduct, integrity, and conflict of interest in law enforcement: Police and understanding of conflicts of interest: The relationship between the police and the Norwegian Narcotics Police Association section 4.2.1
- <sup>iii</sup> 22-120070AST-BORG/04, Judgement of the appeals court (Borgarting lagmannsrett) delivered 26.10.22
- <sup>iv</sup> <https://www.regjeringen.no/no/dokumenter/politi-og-rolleforstaelse/id2958426/?ch=1>
- <sup>v</sup> Study of the Working Group on Arbitrary Detention, Arbitrary detention relating to drug policies (2021) A/HRC/47/40
- <sup>vi</sup> WILHELM REICH, *THE MASS PSYCHOLOGY OF FASCISM* (1970) 210
- <sup>vii</sup> Phil Lord, *Moral Panic and the War on Drugs*, 20 U.N.H. L. Rev. 407 (2022). Se også Michael Vitiello, *The War on Drugs: Moral Panic and Excessive Sentences* (April 2020). *Cleveland State Law Review*, Vol. 69
- <sup>viii</sup> NOU 2002: 04 section 4.2.2.5
- <sup>ix</sup> Prop 92 L (2020-2021) 25
- <sup>x</sup> Prop 92 L (2020-2021) 34
- <sup>xi</sup> <https://www.riksadvokaten.no/document/horingsuttalelse-om-rusreform/>
- <sup>xii</sup> NOU 2002: 04 section 4.2.3.4
- <sup>xiii</sup> NOU 2019: 26 p. 53
- <sup>xiv</sup> The Justice Department's defense for punishment is found here: [https://www.rodopolicies.org/\\_files/ugd/a479b9\\_46549803c67a49fa8fc1287633063e86.pdf](https://www.rodopolicies.org/_files/ugd/a479b9_46549803c67a49fa8fc1287633063e86.pdf)
- <sup>xv</sup> AALL, *RETTSSTAT OG MENNESKERETTIGHETER* (2008) 128
- <sup>xvi</sup> Ot.prp.nr.22 (2008–2009) punkt 4.2.2.5
- <sup>xvii</sup> *Ibid.*
- <sup>xviii</sup> Ot.prp.nr.22 (2008–2009) punkt 4.2.2.5
- <sup>xix</sup> NOU 2019: 26 s. 176
- <sup>xx</sup> David J Nutt, Leslie A King, Lawrence D Phillips, on behalf of the Independent Scientific Committee on Drugs, *Drug harms in the UK: a multicriteria decision analysis* (2010)
- <sup>xxi</sup> Ot.prp.nr.22 (2008–2009) punkt 4.2.2.5
- <sup>xxii</sup> Ot.prp.nr.22 (2008–2009) punkt 4.2.2.5
- <sup>xxiii</sup> <http://www.druglibrary.org/schaffer/Library/studies/nlplan/index.htm>
- <sup>xxiv</sup> Cohen, Peter, *The earnings model for illegal drugs and the prescient view of the Hulsman Commission. A brief history of an Inquisition* (2021) p. 1

<sup>xxv</sup> Ibid.

<sup>xxvi</sup> DOUGLAS HUSAK, *DRUGS AND RIGHTS* (1992) 20

<sup>xxvii</sup> In an article from Dagsavisen 14 April 2023, for driving at a speed that was measured at 92 km/h in an 80-zone, a man was sentenced to sentence was imprisonment for 15 days, which was suspended with a probationary period of two years. In addition, he was sentenced to pay a fine of NOK 64,000. He also lost his driving license for 12 months and must take a full new driving test to get it back. This because blood sample was collected on the same day and showed that the man was under the influence of cannabis, corresponding to a blood alcohol level of between 0.5 and 1.2. As the Judgement held: "The court therefore believes that the accused has undoubtedly behaved as described in the charge and further believes that the accused acted negligently in that he should have realized that the hashish intake could lead to him being under the influence of drugs five days later. It is common knowledge that THC can be detected in the body for a long time after consumption, so that you can be affected without necessarily noticing it yourself."

<https://www.dagsavisen.no/rogalandsavis/roganytt/2022/04/14/tatt-i-92-kmt-i-80-sone-ma-betale-64000-kroner/>

<sup>xxviii</sup> Three validated tests by the US National Highway Traffic Safety Administration (NHTSA) are (1) the horizontal gaze test, which involves following an object with the eyes (such as a pen) to determine characteristic eye movement reaction, the walk-and-turn test (heel-to-toe in a straight line), and the one-leg-stand test.

<sup>xxix</sup> Dan Werb, Greg Rowell, Gordon Guyatt, Thomas Kerr, Julio Montaner, Evan Wood, *Effect of drug law enforcement on drug market violence: A systematic review*, International Journal of Drug Policy, Volume 22, Issue 2, March 2011, 87-94

<sup>xxx</sup> <https://www.vg.no/nyheter/innenriks/i/oWrbXB/narkobeslag-paa-mer-enn-50-kilo-to-tenaaringer-i-varetekt>

<sup>xxxi</sup> <https://www.akersposten.no/jeg-skulle-kjope-meg-hasj-men-sa-var-det-ingenting-a-fa-kjopt/s/5-142-51547>

<sup>xxxii</sup> <https://www.nrk.no/mr/flere-prover-farligere-narkotika-pa-grunn-av-koronapandemien-1.15103723>

<sup>xxxiii</sup> <https://twitter.com/HFMarthinussen/status/1542083262566334466>

<sup>xxxiv</sup> [https://www.morgenbladet.no/ideer/debatt/2022/10/07/justisministerens-manglende-selvinnsikt/?fbclid=IwAR312-97hUQ\\_h-x6z1asg9Fm7u4Mh12JEd9HWmcShn2vscPQ8gC6slmZEKI](https://www.morgenbladet.no/ideer/debatt/2022/10/07/justisministerens-manglende-selvinnsikt/?fbclid=IwAR312-97hUQ_h-x6z1asg9Fm7u4Mh12JEd9HWmcShn2vscPQ8gC6slmZEKI)

<sup>xxxv</sup> <https://www.fn.no/tema/konflikt-og-fred/ekstremisme-og-terrorisme#:~:text=Ekstremisme%20er%20ytterligg%C3%A5ende%20forestillinger%20eller%20handlinger%20der%20vold,skyldes%20en%20ekstrem%20virkelighetsforst%C3%A5else%20eller%20en%20ekstrem%20moralforst%C3%A5else>

<sup>xxxvi</sup> <https://snl.no/ekstremisme>

<sup>xxxvii</sup> NOU 2019: 26 p.176

<sup>xxxviii</sup> MIKALSEN, *HUMAN RISING* (2019) 136

<sup>xxxix</sup> NOU 2019: 26 p. 30

<sup>xl</sup> <https://rett24.no/articles/-vi-far-se-hvordan-det-gar-i-parker-og-friomrader-utover-sommeren>

<sup>xli</sup> [https://www.kapital.no/portrett/2020/06/02/7524464/maurud-pa-sikt-bryter-okonomisk-kriminalitet-ned-samfunnstrukturene?zephir\\_sso\\_ott=cTUo3z](https://www.kapital.no/portrett/2020/06/02/7524464/maurud-pa-sikt-bryter-okonomisk-kriminalitet-ned-samfunnstrukturene?zephir_sso_ott=cTUo3z)

<sup>xlii</sup> Prop 92 L (2020-2021) 33

<sup>xliii</sup> <https://rett24.no/articles/avviser-at-riksadvokatens-redegjorelse-gir-vesentlig-kursendring>

<sup>xliv</sup> <https://www.dagbladet.no/nyheter/ga-udokumenterte-pastander/77575721>

<sup>xlv</sup> <https://www.politiforum.no/gjor-stores-eventyrhistorie-at-politiet-sover-bedre-om-natta/213784>

<sup>xlvi</sup> <https://www.dagbladet.no/nyheter/kritiserer-lappeteppelesning-enhan/75796443?articleToken=75db0c4db55af6cdf7eb36046892a8f57f8107e09e9b50bddccb2b7d60af0308>

<sup>xlvii</sup> Correspondence is found at pages 339-353 in the 2010-edition of *Human Rising*. Can be found here: <https://www.yumpu.com/no/document/read/20295113/roar-mikalsen-human-rising-radiofr>

<sup>xlviii</sup> Melissa L. Bone, *Human Rights and Drug Control: A New Perspective* (Routledge 2021) 36

<sup>xlix</sup> [https://www.ardopolicies.org/\\_files/ugd/a479b9\\_192b0b7fe24849f5a0f681caf96706a3.pdf](https://www.ardopolicies.org/_files/ugd/a479b9_192b0b7fe24849f5a0f681caf96706a3.pdf)

<sup>1</sup> NOU 2019: 29 p. 29

<sup>li</sup> "Punishment is society's strongest tool for condemning an action and requires a solid justification. The positive effects of punishment must clearly outweigh the negative ones, both intended and unintended, in order to be legitimized. At the same time, it must be clear that the same effect cannot be achieved with more flexible measures. There are many and complex reasons for the extent of drug use in society. The ministry assumes that a better effect can be achieved by using health and social work methodology than the threat of punishment to prevent and limit drug use". Prop 92 L (2020-2021) 34

<sup>lii</sup> NOU 2019: 26 p. 181