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Liability to secure effective remedy against arbitrary prosecution

The Alliance for Rights-Oriented Drug Policies (AROD) awaits the status after our action of [civil disobedience](#) on September 11, 2021.

We ask for priority as the case has garnered great public interest and expect that the police and the prosecuting authority will use the full weight of the law. Despite mitigating circumstances, sections 231 and 232 of the Norwegian Penal Code are involved and it is this part of the law that must be reviewed. This is why AROD set up a booth with cannabis and psilocybin products outside the main police station in Oslo. We [wanted](#) to illuminate a larger blind spot and thus, help the Norwegian authorities follow the recommendations from the Council of Europe, the Pompidou Group, the UN Working Group on Arbitrary Detention, Amnesty International, Human Rights Watch, etc.

As [shown](#) earlier, the political process has failed to secure constitutional obligations. It is not possible to pathologize drug users or demonise sellers without considering the relationship to human rights principles, and we have [documented](#) the connection between the detection of public panic by the Norwegian Royal Commission and human rights violations.¹ Despite this, politicians have not secured a constitutional foundation. All parties continue to ignore the problem of arbitrary prosecution, and it is up to the courts to provide an effective remedy.

In this context, it is the task of the police and prosecuting authority to make the necessary investigations and to prepare the case for the court. AROD has, in its previous correspondence, given a basis to understand constitutional obligations and will say more about the crucial points in the following.

¹ For the connection between the Penal Code sections 231, 232 and arbitrary imprisonment, see MIKALSEN, [TO END A WAR](#) (2015) pp. 95–99. See also MIKALSEN, [TO RIGHT A WRONG](#) (2016) chapter 8.5.5.



The Weight of Evidence

The most important part of the handed-down material is our procedural claim, [Human Rising](#). This book does not only show how the application of sections 231 and 232 of the Norwegian Penal Code are historically connected to scapegoating and arbitrary persecution, but it also shows that the efforts of the police in the field of intoxicants have made matters worse. To that extent, if the department continues in the same trajectory, our constitutional values will be undermined.² The distance from civil society will increase until the police displays a knack for self-reflection, and it is important that the department does its part to emphasise the rule of law guarantees.

So far, the police have shown very good judgment. AROD has [noted](#) the personal responsibility that comes with living in times of moral panic, and we reckon that the police department will endeavour to do everything right. To the extent that the police have questions about the documentation, we look forward to respond and there are, in fact, two ways forward:

- *The police cannot recommend a closure as the case is too extensive. The cannabis plant alone is a major point of contention, and the National Criminal Investigation Service (Kripos) will confirm that it has the potential to become more than one kilo of finished product. Therefore, not only section 231 of the Penal Code applies, but also section 232 first paragraph. If one disregards the mitigating moments, the defendant shall have several years in prison, and the prosecuting authority must issue an indictment lest law and order is to lose its weight. Alternatively, more and more people will possess illegal drugs and hide it behind activism; respect for the law will erode, and society will be further polarized, but there is also another way.*
- *The police can evaluate its position based on the merits of the case. The agency's employees can see how the drug laws have affected western countries, realize that the drug-free ideal and exaggerated enemy images have made persecution possible on flawed premises,³ recognize the connection to the arbitrary persecution of past times and the distance to human rights principles, and see their role in a larger context. From there, the representatives of the police can take responsibility for the rule of law, mark loyalty to human rights and the constitution, and distance themselves from the problem of systemic unculture by supporting the rule of law and the requirement for human rights analysis.*

"Systemic unculture" may appear exaggerated. However, the public panic cannot exist without such a [disease](#) being widespread, even in a systemic manner. In this regard, the investigators and prosecutors must resist the pressure from the Norwegian Narcotics Officers Association (NNPF) and other established bastions of power to continue as before. To the extent that this is done, you will personally hide evidence that is relevant to the case and the liability that comes with constitutional violations will be substantial. This is nothing less than

² For the dynamics that the prohibition of drugs has inflicted on society, see MIKALSEN, [HUMAN RISING](#) (2018) part 2. See also MIKALSEN, [TO END A WAR](#) (2015) chapter 3

³ For the double standards that perpetuate the problem of arbitrary persecution, see MIKALSEN, [HUMAN RISING](#) (2018) pp. 46–71. See also MIKALSEN, [TO RIGHT A WRONG](#) (2016), Chapter 8, especially 8.5.3, 8.5.4, 8.5.5.



the most significant case for the Norwegian judiciary in the post-war period, and even if sections 231 and 232 of the Penal Code apply, we do not expect the prosecutor to proceed on autopilot.

Instead, we expect the prosecutor to emphasise the nation's obligations to the persecuted. AROD has [shown](#) how sections 231 and 232 of the Penal Code have a problem with the principles of human rights⁴ and to prosecute as usual would mean covering up serious human rights violations. We are dealing with critical issues, of which Amnesty International sums up the essence:

More than 50 years of drug policies based on prohibition and criminalization have left a legacy of violence, disease, mass incarceration, suffering and abuse across the world. It is usually the poorest and most marginalized communities who are suffering as a result of harsh drug control policies, devastating lives and tearing communities apart. Prohibitionist policies have failed to decrease the use and availability of drugs over the years, and have instead undermined the rights of millions, exacerbated the risks and harms of using drugs, deepened inequalities that fuel discrimination, and intensified the violence associated with illicit markets. . . . Arbitrary detention is usually only the beginning of a long list of abuses faced by people suspected of using drugs or accused of other drug-related offences. From police abuses and the continued use of the death penalty for drug-related offences, to discrimination, extrajudicial executions, torture and multiple violations of economic, social and cultural rights, including of the right to health, it is clear that the “war on drugs” has been effectively a war on people.⁵

The situation is no different in Norway. For decades, sociologists, criminologists, psychologists, and jurists have noted scapegoating as the engine of drug prohibition. This phenomenon—our tendency to blame out-groupings for problems that we have a collective responsibility to solve—links the drug laws to the arbitrary persecution of former times. It is the common denominator behind all human rights violations, and no matter what happens in court, there will be a truth and reconciliation commission.

This is the prescribed remedy for the healing of the nation's psyche and should the police disregard the very same principles that the Director of Public Prosecutions—in his support for drug reform—[stated](#) as values that “must be treasured if one is to maintain a humane, liberal rule of law”, the aftermath will be unpleasant. After all, alleged aspirations to respect human rights will be void of credibility and AROD will, therefore, map the constitutional terrain so that the police and prosecution are familiar with their tasks.

The need for human rights analysis

The summary provided by Amnesty is not in dispute. Hence, as the Norwegian Royal Commission elaborated, there has been movement from interpreting the UN Drug Control

⁴ For how the drug laws are incompatible with human rights principles, see MIKALSEN, [TO END A WAR](#) (2015) chapter 3. The UN human rights conventions are based on the same principles as the ECHR. For a review of how Sections 231, 232 of the Penal Code are incompatible with UN conventions, see MIKALSEN, [TO END A WAR](#) (2015) chapter 4

⁵ [Ending human rights abuses in drug control: Oral statement to the Interactive Dialogue with the Working Group on Arbitrary Detention at HRC47 - Amnesty International](#)



conventions in the light of a drug-free ideal—where the criminal law was seen as indispensable—to emphasise the ground reality and the intention to promote health and welfare. Internationally, therefore, to ensure that the control regime does not contribute to unnecessary harm, there is a push to ensure that the quality of the legislation meets human rights demands,⁶ and the Commission has summed up this part nicely.

After the most extensive work done by Norwegian authorities in this area, it is clear that the principles of equality, self-determination, proportionality, and the presumption of liberty invalidate the penalties against users. It is clear that the costs of punishment are enormous, while the gains are uncertain and that decriminalisation is in line with international responsibilities. As the Commission said about this:

The human rights perspective is . . . key to most recommendations. A major aim is to prevent human rights violations arising from the punitive policy, such as arbitrary imprisonment and disproportionate penalties for drug crimes.⁷

This is important. Arbitrary imprisonment is forbidden and if we can achieve better results with less restrictive means, we are in a dubious constitutional terrain. This is why the Royal Commission recommended decriminalisation but whether this is good enough is uncertain. Since the Norwegian politicians did not want to consider a regulated market, the Royal Commission made a moral distinction between use and sale. Thus, the Commission accepted the blind spot that was imposed by the politicians. As a result an otherwise excellent work was harmed by unnecessary acrobatics, abdications of responsibility, and inconsistent coverage.

Despite this, moral panic was seen and this is not far from an admission of arbitrariness. To the extent that panic has characterised politics, there will be a distance from the principles of human rights, and this constitutes not only a problem for the persecuted, but the Norwegian state as a whole. When it comes to human rights, obligations come into play and a key principle is that the harder the punishment, the more severe are the requirements for the quality of the law. Therefore, it goes without saying that the legal regime dealing with the sale and manufacturing of illicit drugs must be subject to control. It must be considered on the same terms the Royal Commission examines possession and drug use, and major weaknesses have been noted.⁸

⁶ See WHO, UNDP, UNAIDS and International Center on Human Rights and Drug Policy; [International Guidelines on Human Rights and Drug Policy](#) (2019), Council of Europe, Parliamentary Assembly: [Drug policy and human rights in Europe: A Baseline Study](#) (2019). A/ HRC/47/40, *Arbitrary detention relating to drug policies: Study of the Working Group on Arbitrary Detention* (2021). See also the Norwegian Royal Commission's [report](#), Chapter 7.

⁷ NOU 2019: 26 [Drug reform - from punishment to help](#), chapter 7.5.2.2., p. 185

⁸ The epidemic model that governed the early understanding of drug addiction has been disproved, the fallacy of twisting the dynamics of supply and demand into one of aggressor and victim has been exposed, and the hypothesis that removing criminal liability for drug users necessarily leads to increased use in the population is found wanting (3.2, 3.3). Instead, the Commission concludes "that factors other than legislation and legislative amendments as such are of great importance for the use of drugs in the population" (1.3.1), and that it is for the State to show that "the intervention corresponds to a pressing social need. The intervention must also be shown to be proportional held up to the purpose of the intervention, taking into account relevant interests that must be weighed in the assessment." (7.4.3) See especially sections 3.2.2.3., 3.2.2.4., 3.2.2.5, 3.2.3. and 3.3. where it is noted that the "'drug fiend' was primarily a political figure, with no empirical evidence" NOU 2019: 26 [Drug reform - from punishment to help](#).



The fact that sections 231 and 232 of the Norwegian Penal Code are the result of improper legal reasoning that are brought to bear on the populace without human rights consideration, is all that civil society needs to appeal to the judiciary. An effective remedy is at the very core of human rights conventions and the definition of arbitrary detention is simple:

We are dealing with arbitrary detention when punishment is not within constitutional limits. To be within constitutional constraints, the law must be weighed against principles of equality, autonomy, proportionality, and the presumption of liberty: the law must promote a legitimate aim, be the least intrusive of all available means, and reflect a careful balancing of the individual's right to freedom as measured against society's needs for protection.

It is the state's responsibility to show that this is the case, but no one has documented that punishment is a good idea. Politicians have seen drugs as the enemy at the gate, an evil against which war must be declared but whether the enemy must be fought by tyrannical methods is increasingly disputed. As the Council of Europe's Baseline study discusses this picture:

Until recently, there was a global understanding that the best way to deal with drug-related issues was to focus on reducing, and ultimately eliminating, the illicit production, supply and use of narcotic and psychotropic substances. The Assembly's Social Affairs Committee noted in 2015 that "drug-control efforts . . . focusing on repression have been responsible for generating large-scale human rights abuses, including the violation of the right to health, and disastrous consequences in terms of public health." Strong evidence suggests that the consequences of purely repressive policies include also death, violence, ill-treatment, discrimination, stigmatisation, marginalisation, absence of fair trials and inadequate sentencing. History reveals that there has never been any society without psychoactive drugs, begging the question whether a world free of drugs is a realistic aim.⁹

This is crucial. We are further away from a drug-free society than ever before and if this is no longer the main objective, old solutions must be reconsidered. The use of the Penal Code relies on the premise that the illicit drugs are so dangerous that the state must ignore following constitutional principles but if the end of a drug-free society is nowhere in sight, the only objective left is to protect public health. However, we see that the use of the Norwegian Penal Code has failed to limit the problem of illegal drugs. Instead, after 60 years, the combined insight is that the prohibition has had unfortunate additional consequences. There is a consensus that the distinction between legal and illegal substances is irrational and that a health policy approach is the most appropriate way to limit problems associated with drug abuse. Precisely for this reason, there is a broad agreement on decriminalisation.

Decriminalising drugs is not a solution

For unprincipled people, this is the easiest way to distance themselves from the sins of the past. The idea is to limit the damage that comes with punishment by using fewer totalitarian means, but without looking at the root of the evil; the prohibition itself. This is how those in charge would rather have it and we can see in the case of the Labour Party (Ap), the Center

⁹ Council of Europe, Parliamentary Assembly: [Drug policy and human rights in Europe: A Baseline Study](#) (2019) p. 2



Party (Sp), the Progress Party (FrP), and Christian People's Party (KrF), how difficult it is to reconsider. They will either punish or pathologise drug law violators to the extreme but less vindictive parties have stepped into a new paradigm and decriminalization is pushing. Within a few years, the opposition in the Norwegian Parliament will get through with this proposal, but it is a lousy solution. NNPF and the Police Directorate rightfully object to Norway opening the doors to organised crime, while others find it ridiculous that they can buy bad hashish from gangsters instead of growing it themselves or ordering from legal manufacturers.

It is difficult not to interpret such policies as a state-sponsored mafia racket. Decriminalisation only enables the continuing influence of a black market and if the goal is to reduce stigma (or the crime associated with the illicit drugs), we must consider incorporating a regulated market. We cannot have a fair and wholesome drug policy without it. Firstly, the different limits to the quantities of various drugs proposed for decriminalisation do absolutely nothing to prevent the arbitrariness in punishment. People having 10 or 20 grams in their pocket does not meaningfully decide if they should be pathologized or demonised, and it is just absurd to insist on drawing a line to justify subjugation. After all, the more the police intensify the persecution of producers and dealers, the more the quality of goods deteriorates, causing more violence to arise in the drug market. In the end, the society remains caught in a destructive cycle, and it is just because of the need for scapegoats that no one asks if there are good reasons for punishing sellers and manufacturers.

Since we distort the law of supply and demand into a context of victim and aggressor, the proponents of the drug law can still praise themselves for their efforts in the war on drugs. They can leave a market worth around \$500 million to criminals, thus maintaining a source of budget, self-esteem, and powers. However, no one has [shown](#) how this is compatible with human rights.

This is what needs to be done. From the report of the Royal Commission, it is clear that both the drug users and society are exposed to completely unnecessary risk, and we must look more closely at the implications of international law. If we recognise that there are not only pathological reasons for why people choose drugs, and that the humanisation of drug addicts makes it problematic to prosecute, how about subjecting them to the dangers of a criminal market? Is the prohibition of drugs necessary in a modern society?

The answer is obvious for those who want to see. Yet the blind spot remains and for more than 10 years the persecuted population has been fighting to claim human rights protection. Since this is an important chapter in Norwegian legal history, and because the implications are enormous, this belongs to the facts of the case.

The betrayal of the past

12 years ago, former Director of Public Prosecutions Tor-Aksel Busch rejected several offers to support a human rights analysis.¹⁰ The defendant tried to clarify the state's obligations to the persecuted, but Busch believed that there were no human rights for those who had violated Section 232 of the Norwegian Penal Code and that the question of guilt or state

¹⁰ The documents can be found in this [2010-version](#) of *HUMAN RISING*, pages 339-49



responsibility was impossible to decide. Since this time, a number of constitutional courts have come to other conclusions, for as the Royal Commission wrote in its report:

In several countries, including Mexico, South Africa and Germany, criminal prosecution of adult persons for possession of cannabis for their own use has been found to be inconsistent with constitutional provisions on the right to respect for privacy or related provisions on the individual's right to autonomy, which is naturally seen in context with the right to privacy under Article 8 of the ECHR and the right to free development of personality under the United Nations Universal Declaration of Human Rights Article 22. In Georgia, legislation authorizing civil penalties for a prohibition on cannabis was declared unconstitutional and invalid in 2018, because it entailed a disproportionate interference with the autonomy of the citizenry, see discussion in Chapter 6.¹¹

As we can see, after the former Director rejected the right of drug offenders to a review of the law in 2009, the world has moved on. Even so, in 2010, the Norwegian Supreme Court's Appeals Committee refused to deal with the issue without any justification which is, in itself, a violation of human rights and with this decision, the justices Stabel, Matheson and Tønder threw the nation into a constitutional quandary. The [case](#) was accepted by the European Court of Human Rights since Article 6 of the ECHR had been violated. However, it came to an end when a single judge, V.A. De Gaetano, decided that the matters complained of were not within the Court's competence.

Thus, the Court failed to protect the convention that it was set to defend. Hundreds of statements of support were sent to the President of the Court Nicholas Bratza and the Secretary General of the Council of Europe, Thorbjørn Jagland; these [complained](#) that the court effectively denied 40 million European drug users an interpretation of their rights, but to no avail. The persecuted remained without an effective remedy and since then, hundreds of thousands of drug cases have been registered with the Norwegian police. Thousands of inmates have served a total of over 10,000 years in prison and hopefully no one would ever want to subject themselves to the same situation as Tor-Aksel Busch, Ingse Stabel, Bård Tønder, Wilhelm Matheson, V.A. De Gaetano, Nicholas Bratza and Thorbjørn Jagland.

Thanks to their denial of responsibility, Norway—and Europe—have had a drug policy on totalitarian terms for over 10 years. Due to them, the prohibition ideology still lives on unchecked, but we are approaching a time when rights must be taken seriously.

As has been shown, for several years, the international human rights apparatus has emphasised the need for quality control in the area of drug laws with increasing force. There is also a solid foundation to contend that human rights conflicts with criminal law in the area of drug policy, and the answer to a rights analysis depends on the questions asked. The analyses that have been done touch upon the right to use. Several courts have given good judgments in this area,¹² and it is obvious that principles of autonomy, proportionality, equality, and the presumption of liberty invalidate punishment against cannabis users.

¹¹ [NOU 2019](#): 26, Chapter 7.4.3., p. 181

¹² See the judgements of constitutional courts in [Georgia](#), [Mexico](#), and [South Africa](#).



Whether the right to use cannabis includes a regulated market remains to be seen. The issue has not been the subject of a rights analysis, but [Amnesty](#) and [Human Rights Watch](#) argues that human rights concerns involve the drug market, and the police have the opportunity to avoid repeating the same mistake as former Director Busch. It speaks volumes that he is the only lawyer who has accepted the Labour Party's proposal to create a distinction between recreational and heavy users. It also says a lot that none of those responsible for the law have answered the [basic questions](#) about the rights of the persecuted. In this regard, the new Director seems to have a bigger picture in mind. As the Director of Public Prosecutions Jørn Sigurd Maurud noted in 2020:

*Society's threat of and use of punishment against citizens means that they are exposed to interventions that are normally unacceptable. It is therefore clear that not all unwanted actions or behaviour should be criminalized. Any criminalization must be justified in a way that explains why the behaviour should be banned and met with punishment. If it's about acts that lie on the periphery of what should be punishable, the rationale for using punishment should be challenged on a regular basis so that it can be properly explored. Criminal law must be developed in the light of the development of society in general. The legal history provides several examples of the use of punishment which, judged on the basis of present conditions and valuations, are difficult to understand.*¹³

On this basis, the new Director supported drug reform. Interestingly, Maurud felt that it was not yet a valid reason for passing such a judgment on the current criminalisation of drugs, but this is because Norway has not looked into the matter. Had the Supreme Court done its job in 2010, we would have had answers to important questions about the drug provisions of the Norwegian Penal Code and the Guidelines of UNDP et al. would have come in handy. As is said on the right to an effective remedy:

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

¹³ [Consultation statement on drug reform](#) - The Attorney General



for seeking remedies and redress, and appropriate means of ensuring the timely enforcement of remedies. (6). Take effective measures to prevent the recurrence of human rights violations in the context of drug control laws, policies, and practices.¹⁴

Norway currently has a problem with points 3 and 4 because Norwegian drug users have been working to have their rights reviewed since 2007. In this country, we cannot say that allegations of such abuse have promptly been investigated and acted upon in accordance with international standards. Instead, the persecuted have been without basic rule of law protections for more than ten years, and while the Norwegian Parliament is busy ignoring common recommendations, other countries have been regulating the drug market to better follow the Convention on the Rights of the Child. This is why Germany, Malta, the Netherlands, Luxembourg, and Switzerland legalised cannabis. Half of Europe's citizens will soon be living in a regulated market, while Norway insists on carrying out the law's most severe punishment.

This should worry not least the police. That the punishment, as the drug report concluded, works against its purpose should be enough for the Ministry of Health and/or Justice to take action and ensure compliance with human rights. When that does not happen, and everything continues as before, the police and civil society are in an even worse situation and much depends on the courts taking control of a political process that is beyond the control of the rule of law.

It obviously hurts to take on the scope of arbitrary prosecution. Projection and denial are the self-defence mechanisms inherent in scapegoating, and that is why the leader of the UN Working Group against Arbitrary Detention Dr. Elina Steinerte, was blocked from presenting the findings of a recent study on arbitrary imprisonment to the UN Commission on Narcotic Drugs (CND) on December 10, 2021.¹⁵ This is also why so many states have refused the call to ensure the quality of legislation in accordance with international recommendations, and why the Ministry of Health and Justice will not answer elementary questions. When pushed, they even disagree on which department that is responsible for the persecuted. Even so, hiding behind double standards must come to an end, as the outcome of a human rights analysis is quite obvious at this point.

Human rights analysis 101

To be "necessary in a modern society", there must be a certain relationship between goals and means. The prohibition must not only be the least intrusive of all available measures but suitable to achieve the goal of a drug-free society. In this regard, it is becoming increasingly obvious that the Norwegian Penal Code has failed to limit the problem of illegal drugs. This is

¹⁴ WHO, UNDP, UNAIDS and International Centre on Human Rights and Drug Policy; [International Guidelines on Human Rights and Drug Policy](#) (2019)

¹⁵ The working group's [report](#) showed that arbitrary imprisonment was extensive and recommended decriminalisation of cultivation and possession for personal use to remedy the problem. This is what human rights lawyers see as a minimum, but the Working Group is concerned about disproportionality in sentencing and recommends human rights analysis of the use of penalties for production and sales. A / HRC / 47/40, *Arbitrary detention relating to drug policies: Study of the Working Group on Arbitrary Detention* (2021) pp. 6, 18. AROD [contributed](#) to this report.



why decriminalisation is seen as a minimum, but the Council of Europe¹⁶ and the UN Working Group for arbitrary imprisonment¹⁷ recommend further investigations. Even INCB, the UN's supreme authority in drug-related issues, advocates that the principle of proportionality must be emphasised in drug policy, and as the Royal Commission noted:

*Interference with the exercise of the right to privacy, etc. can only happen 'when this is in accordance with the law and is necessary in a democratic society for the sake of national security, public security or the country's economic welfare, to prevent disorder or crime, to protect health or morality, or to protect the rights and freedoms of others', cf. Article 8 (2). In order to be compatible with ECHR Article 8, infringement of the right to respect for privacy, etc. the intrusion must promote a legitimate purpose and be necessary in a democratic society. . . . [Although] the states have a wide margin of discretion in assessing whether infringement of the right to privacy and family life is compatible with Article 8 of the ECHR, the requirement of necessity [implies] . . . that it must be demonstrated that the intervention corresponds to a 'pressing social need'. It must also be shown that the intervention is proportional 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 to do these assessments, but the ECHR may review whether the arguments alleged to justify the intervention are relevant and proportionate and whether the rights were adequately respected in the decision-making process leading up to the adoption of the intervention.*¹⁸

This is uncontroversial. The state can intervene in individual freedoms if the intervention reflects a rational intrusion as measured against society's need for protection but must show that this is the case. Beyond this point, the state has a margin of discretion that is relatively wide. In social and economic issues, it is allowed wide leeway to devise its policies, but when it comes to criminal policy, the matters are different. When it comes to coercion and deprivation of liberty, the room for discretion is smaller, and the law must be narrowly tailored to serve a significant governmental interest.

Traditionally, the courts have let politicians govern themselves in drug policy. Even so, the Royal Commission's detection of public panic, as well as the politicians' reluctance to accept its consequences, means that the courts must intervene. Otherwise, the problem of arbitrary prosecution will persist and it is on this basis the AROD disputes the application of the Penal Code sections 231 and 232. *The defendant does not invoke the right to sell cannabis, but has the right to engage in civil disobedience, to distribute cannabis outside the main police station in quantities above those discussed by the politicians, to ensure human rights protection for the persecuted.*

¹⁶ "Further to their existing legal obligations, States should assess the intended and unintended effects of envisaged drug policy measures, taking into account their potential impact on the enjoyment of human rights." Council of Europe, Parliamentary Assembly: [Drug policy and human rights in Europe: A Baseline Study](#) (2019) p. 5

¹⁷ "The Working Group has expressed concern about disproportionate sentences for drug-related offenses . . . and has called for reform to ensure that sentences for drug-related offenses are proportionate." A/HRC/47/40, *Arbitrary detention relating to drug policies: Study of the Working Group on Arbitrary Detention* (2021) p. 6.

¹⁸ [NOU 2019](#): 26, Chapter 7.4.3., p. 181



As more and more courts emphasise the relevance of the principle of autonomy for drug users, Norwegian courts must answer not only what a seller of illegal drugs has done to make them so much worse in the eyes of the law than others involved with the trading of goods, but if it is necessary to subject drug users and society at large to the mechanisms of an illicit market. The police must be familiar with the questions raised by the rights-oriented debate¹⁹ and demand answers from those responsible for the policy. This is the only way to ensure that the punishment is just. In this regard, the following ECHR articles anchor the fundamental problem of the law:

- *The application of sections 231 and 232 of the Norwegian Penal Code are incompatible with Article 3 of the ECHR, which states that "no one shall be subjected to torture or to inhuman or degrading treatment or punishment".*

"Inhuman" and "degrading" are associated with arbitrariness. To the extent that principles of equality, proportionality, autonomy, and presumption of liberty are not observed, that we are dealing with unreasonable discrimination in the field of intoxicants, and that we have allowed double standards to define a policy, there will be a violation of Article 3 of the ECHR. That is the case unless the [questions](#) posed by the rights-oriented debate are answered.

- *The application of sections 231 and 232 of the Norwegian Penal Code are incompatible with Article 5 of the ECHR which states that "everyone has the right to personal liberty and security. No one shall be deprived of his liberty except . . . in accordance with a procedure prescribed by law."*

"Prescribed by law" means that sections 231 and 232 of the Norwegian Penal Code must be within a framework as defined by the principles of human rights. The law must reflect an informed balancing of the individual's right to freedom as measured against society's need for protection. However, in this context, drug policy is characterised by public panic. This means that there is a mismatch between sections 231 and 232 of the Penal Code and human rights. The professional responsibility for the law is not being maintained, and the law is more intrusive than fair. As a society, without good reason, we expose an outgroup to evils that we do not wish for the ingroup, and this is a violation of Article 5 of the ECHR—unless the [questions](#) raised by the rights-oriented debate are answered.

- *The application of sections 231 and 232 of the Norwegian Penal Code are incompatible with Article 8 of the ECHR, which states that "Everyone has the right to respect for his private and family life, his home and his correspondence." It continues that "There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."*

¹⁹ See MIKALSEN, [HUMAN RISING](#) (2018) chapter 12.2.3, or [Five questions that must be answered | Alliance for Rights-Oriented Drug Policies \(arodpolicies.org\)](#)



"Necessary in a democratic society" is the key. Traditionally, the state has had a wide margin of discretion, but the Royal Commission documented that there are no good reasons for punishing drug use. Therefore, more and more courts are invalidating the drug law with regard to Article 8 of the ECHR. The Royal Commission elaborated on this in its report but did not consider the implications for distribution, as the government ruled out a regulated market. However, deprivation of liberty is an intrusive tool and if less invasive means are better suited to deal with the problem of drug abuse, it is difficult to see the necessity of a cure that hurts worse than the disease. In fact, professionals warn against the side-effects of the drug prohibition as one of the greatest challenges of our time and in this regard, no one has identified any necessity. For this reason, it can be argued that positive human rights obligations include a regulated market,²⁰ and the court must weigh the state's reasons for demonising and imprisoning distributors.

- *The application of sections 231 and 232 of the Norwegian Penal Code are incompatible with Article 9 of the ECHR which states that "Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance." It goes on to say that "Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or the protection of the rights and freedoms of others."*

This means that a human rights analysis is needed to assess the interference with freedom of thought, conscience, and religion. Principles of equality, proportionality, autonomy, and presumption of liberty put the bar high for criminalisation, and the state cannot be granted any margin of discretion as long as important questions remain unanswered. Public panic, after all, has been proven and the attached documentation shows how the right to freedom of thought, conscience, and religion entails a right to take illegal drugs.²¹ There is no doubt that drug use does offer something positive. There is also no doubt that several substances play an important role for seekers of the divine and if those responsible for the drug policy cannot respond, the prohibition is invalidated by Article 9 of the ECHR.

- *The application of sections 231 and 232 of the Norwegian Penal Code are incompatible with Protocol 12 and Article 14 of the ECHR, which states that "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."*

²⁰ PIET HEIN VAN KEMPEN, MASHA FEDOROVA, *INTERNATIONAL LAW AND CANNABIS: REGULATION OF CANNABIS CULTIVATION AND TRADE FOR RECREATIONAL USE: POSITIVE HUMAN RIGHTS OBLIGATIONS VERSUS UN NARCOTIC DRUGS CONVENTIONS* (2019); see also Jenkins, Bernstein, MacPherson, Tyndall, *Legal regulation as a human right and public health approach to currently prohibited substances*, *International Journal of Drug Policy*, Volume 91, May 2021

²¹ On sections 231 and 232 of the Penal Code and the problem with freedom of thought, conscience, and religion, see MIKALSEN, [TO END A WAR](#) (2015) p. 99-111.



"Other status" is crucial. The summary is not exhaustive, and any discrimination must withstand a human rights analysis if there is deprivation of liberty. Therefore, to the extent that there is an irrational distinction between legal and illegal substances and in the approach to different users, there will be a violation of Protocol 12 and Article 14 of the ECHR.²² We will be dealing with arbitrary persecution—which will be the case if the five [questions](#) remain unanswered.

Space considerations make the treatment short but all the articles are connected and reflect on each other. To the extent that drug prohibition violates the principle of equality, proportionality, or autonomy, there will be arbitrary persecution; it will be a discriminatory, disproportionate, and unduly infringing practice for which an effective remedy will be urgently needed.

Effective remedy

This is the task of the courts. The police and prosecution authorities have received all the information which is necessary to elucidate on the relationship between human rights and the Norwegian Penal Code sections 231 and 232, and it only remains to be seen whether anyone can reasonably show that the application of punishment has any utility. For that to happen, the state must show good reasons to discriminate in the field of drug policy. Cannabis and psilocybin users²³ must be shown to pose a greater threat than, for example, alcohol users. Otherwise, only "culture" can be used as a reason and it is not a proper legal justification.

It should be mentioned that it was on this basis that former Prime Minister Erna Solberg recently [defended](#) the drug law during a philosophical debate and that former Justice Minister Anders Anundsen, in 2016, looked like a fool when NRK's [Folkeopplysningen](#) examined the basis for the criminalisation of cannabis. After much searching, all that the Ministry of Justice could find was an [unpublished](#) master's thesis from a Swedish medical student, and we do not expect any better this time.

It is, after all, extraordinarily thin brew that the supporters of drug prohibition have cooked together, and if interference with the right to privacy and family life shall be compatible with Article 8 of the ECHR, the requirement of necessity entails that the intervention corresponds to an urgent societal need. The drug-free ideal must not only be worth fighting for; the means for it must be suitable to reach the end, and that is difficult to contend.

We have already seen how the report of the Royal Commission regards the myth of the drug fiend as political fiction, and words like "unbalanced views", "misleading perceptions", "misapplication of punishment", and "reality-resistant iniquity" summarize the development of drug policy. We are dealing with a debate characterised by "stereotypical representations", "moral indignation and revenge urges", and one in which, a "scientific understanding of the

²² On the principle of equality and drug policy, see MIKALSEN, [TO END A WAR](#) (2015) chapter 3.1.1. See also MIKALSEN, [TO RIGHT A WRONG](#) (2016) chapter 8.4.4.

²³ In principle, this also applies to other forms of drug use.



drug problem has played a minor role". "Panic" is used several times²⁴ and this catastrophe of a political process is behind the law's highest penalty.

It remains to be seen whether the state will defend the drug law. They are ignoring us for a reason but we expect the police and prosecution to stand behind rule of law and the demand for a human rights analysis. It is no less the task of the district court in Norway to assess the issue, as it is unnecessarily time consuming and costly to wait for the Supreme Court. In fact, if the prosecution does not oppose such analysis, hundreds of lives and thousands of years of imprisonment can be saved, and we want the case to be processed as soon as possible.

With the prosecutor defending human rights principles, the judge will appreciate the constitutional issues behind the case as well as the importance of the court accepting the rule of law. There is an opportunity to bring light to a long-overlooked area of the law and Norway can finally deal with the problem of arbitrary imprisonment.

AROD looks forward to hearing from the police about this—and not least the court proceedings. With the Royal Commission's report, we have a room for rights adjudication that the state cannot overlook without failing to make good the obligations to human rights. Each passing day brings only more unnecessary suffering and on behalf of the civil society, we pray for an orderly process where constitutional considerations are put first.

Yours Sincerely

A handwritten signature in black ink that reads "Roar Mikalsen". The signature is fluid and cursive, with a long, sweeping tail at the end.

Roar Mikalsen
President of AROD
The Alliance for Rights-Oriented Drug Policies

²⁴ See [NOU 2019](#): 26, chapters 3.2., 3.3.