



Bent Høie
Minister of Health and Care Services

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Drug law reform—a constitutional challenge.

The report of the Royal Commission on drug law reform is finished and there appears to be two ways forward. The political process can either (1) favor those who insist on punishment, or (2) it can move forward on the Royal Commission's recommendations and ensure policies that no longer penalize confinement with a small amount of drugs.

Historically, the former is more likely. As documented in the report, until today, politicians have let emotion trump reason and continued to advance drug control policies without basis in evidence.¹ Alternative number two, therefore, would be a huge step forward, because it would indicate that politicians really want what they proclaim—knowledge-based policy.

Still, when it comes to proposals of the report, critics are correct to point out challenges. Some fear that decriminalizing drug use will result in a growth of organized crime, as well as an increase in people who try different drugs, while others fear that politicians will go back on their promises. All aspects deserve more attention, and we therefore recommend a third way, that of the Constitution.

The reason is that these concerns will disappear (or become irrelevant) as soon as we map out international obligations. The report documents that punishment is counterproductive and from a perspective of law it is problematic to agitate for persecution when the premises on which it is based have been refuted.² Hence, not only is the constitutional perspective ideal for building bridges, but it is here we must put the bar if we take human rights seriously.

¹ See NOU 2019: 26 Rusreform – fra straff til hjelp (Drug Law Reform – from punishment to help), chapter 3: Main trends in Norwegian Drug Policy. Together with the chapter on human rights (chapter 7) and the principled reasoning against punishment (chapter 10 and 12), this part of the report invalidates prohibition.

² See NOU 2019: 26, Chapter 12

Human rights and problems with the report

As the commission explains, there has been a shift from interpreting drug control conventions in light of a drug-free ideal, where prohibition was seen as a proper tool, to emphasizing realities on the ground and the intention to promote health and welfare. As such, there is increasing demand from international bodies to ensure legislation compatible with human rights so that drug control policy does not aggravate problems.³

The Royal Commission elaborates on this bit in its review of human rights obligations. The report shows why decriminalization is in keeping with international obligations and why criminalization is increasingly being seen as an evil.⁴ As the commission concludes:

"These international recommendations indicate that changing the orientation of national drug policy from punishment to health, through decriminalization of use and possession and the introduction of health-oriented measures in response to drug use, will make Norway better respect the citizens' right to health."⁵

Not only that. As shown by the commission, decriminalization is also more in keeping with our obligations to the Convention on the Rights of the Child, as well as the right to privacy.⁶

Even so, it should be noted that the commission failed its human rights mandate.⁷ Because politicians had decided that legalization was unacceptable, the commission examined only the

³ See WHO, UNDP, UNAIDS and International Centre 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. Also see the report of the Royal Commission, NOU 2019: 26, chapter 7.

⁴"How a state's drug policy should be designed to promote the right to the highest attainable health standard depends on what, to the best of our knowledge, is considered to be the actual impact of the policy. Several bodies in the UN system have stated that criminalization of possession of drugs for their own use impedes the fulfilment of the right to health. The WHO has recommended decriminalizing drug use, as this will be a "critical enabler" to improve the situation for HIV-infected people. The UN Special Rapporteur on the right to health has recommended states to remove sanctions or decriminalize the use and possession of drugs. The United Nations High Commissioner for Human Rights has recommended states to consider the decriminalization of drug use and possession as punishment in several ways prevents the right to health. Again, several entities in the UN system have stated that criminalizing the use of drugs and possession for their own use constitutes an obstacle to providing good health care to vulnerable groups, see discussion in paragraph 7.2.3 above. See also statements of the same opinion from the United Nations High Commissioner for Human Rights and the UN Committee on the Rights of the Child presented in paragraph 7.4.1". NOU 2019: 26, Chapter 7.4.2., p. 180

⁵ NOU 2019: 26, Chapter 7.4.2., p. 180

⁶ "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. 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». NOU 2019: 26, Chapter 7.4.3., p. 181

⁷ Despite a decree to investigate with what right the state continues persecution; despite having received a letter from the police which indicated that law enforcement trusted the Royal Commission to look into the rights of the persecuted groups; despite having received documentation that the Norwegian state for more than ten years had denied violators an effective remedy; and despite having received documents from the UN and the Council of Europe confirming that rights are involved, and that the state has a responsibility to safeguard these rights, the Royal Commission chose to interpret its human rights obligations narrowly.

human rights implications of decriminalizing drug use, and the report does not check whether *prohibition itself* is compatible with our catalogue of rights.

This is regrettable for the quality of the report. An otherwise excellent work has been informed by unnecessary acrobatics, abdications of responsibility, and inconsistent reasoning—all to give politicians what they want.

Nevertheless, moral panic has been detected.⁸ This is a sign of unconsciousness among policy makers and the commission's constricted reasoning is not only a problem for the persecuted groups, whose rights remain unclear, but also the Norwegian state. When it comes to human rights, constitutional obligations come included, and we will now say more on this.

Human Rights and State responsibility

The report is devastating for those who have relied on punishment. It shows that we can achieve better results with less invasive means, and as the commission goes on to write: *"The human rights perspective is key to most recommendations. One of the main objectives is to prevent human rights violations arising from drug control policy, such as arbitrary imprisonment and disproportionate penalties for drug crimes."*⁹

Considering, therefore, that a key principle behind the rule of law is that the more severe the criminal law, the more stringent are the requirements needed to justify the act, also the more far-reaching regulation involving sale and production must be subject to scrutiny.¹⁰ It must be vetted by the same standard and principled reasoning with which the commission examined possession and use, and major problems are already evident.¹¹

From a constitutional perspective, how drug legislation has come about without concern for realities on the ground and human rights principles is a serious point of appeal, devastating to the credibility of law. "An effective remedy" is at the heart of human rights conventions, and when we take into account that the Norwegian judiciary for more than ten years has denied offenders their day in Court,¹² it becomes only more important that politicians provide this remedy.

A more solid constitutional debate, therefore, is required. Politicians could not have predicted a report so far-reaching in its implications, but the rationale for continuing the persecution of

⁸ See Chapter 3.2. and 3.3. Words such as "public panic", "unbalanced views", "misleading perceptions", "misapplication of punishment", and "reality-resistant iniquity" summarize the development of drug policy. We are dealing with a debate characterized by "stereotypical representations", "moral indignation and revenge urges", one in which "scientific understanding of the drug problem has played a minor role". "Panic" is used several times.

⁹ NOU 2019: 26, chapter 7.5.2.2., p. 18

¹⁰ According to the law, even after decriminalizing the actions of drug users, drug dealing will be punishable by up to 21 years in prison and any case of sale will qualify for imprisonment for up to 2 years.

¹¹ The epidemic model that governed 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".

¹² The Norwegian Supreme Court rejected drug law violators' call for an effective remedy in 2010. See appendix, Mikalsen, *Human Rising: The Prohibitionist Psychosis and its Constitutional Implications* (2019), or <https://www.arodpolicies.org/norwegian-authorities>

drug offenders is now missing.¹³ As the report states: *"The prevailing view in international research on drug control policy is that decriminalization will by far be the best option from a public health perspective. Criminalization of drug use/possession and intensified prosecution of users has had major negative implications for drug users' life and health."*¹⁴

Moreover, discussing the legal framework behind criminal prosecution, the Royal Commission describes "a change in the prevailing interpretation of the drug control conventions, which has implications for the states' authority to criminalize drug use. The legal implications arising out of children's right to protection against the negative consequences of harmful drugs, everyone's right to the highest attainable standard of health, and the right to respect for privacy," dictates "that states should decriminalize the use and possession of drugs, as punishment is considered an obstacle to providing good health care to vulnerable groups."¹⁵

The commission refers to "a summation of knowledge prepared or obtained by UN agencies over the past ten years, published by the UN in March 2019, where it is accepted that policies based on punishment does not appear suitable to combat the illegal use of drugs." And as the premises of prohibition have proved false, the burden of proof falls to the state.¹⁶

According to human rights law, politicians must now accept responsibility. A question of rights is unresolved and it is not up to individual politicians to abandon reform. Constitutional obligations come into play, and society cannot go from punishing drug users to a system of forced intervention without considering the right to self-determination.

We therefore hold Norwegian politicians responsible. For decades, civil society has observed how the political process fails by continuing a system of prohibition, despite warnings from science and human rights activists. Thus, moral panic has prevailed, and the commission's report risks being ignored unless courageous politicians defend the rights of the persecuted.

A vision of the future

If this is hard to stomach, imagine the alternative. If politicians fail their duties, refusing to ask by what right they deny self-determination to drug users, we will have several more years where drug policy stumbles in a state of unconsciousness. Despite that, the international

¹³ We find in the report of the Royal Commission an excellent work, one recognizing that punishment is wrong and that we need to think outside the box if we want to remedy the problems associated with drug prohibition. But not only that. We also find that "the available data weakens what has been a prevailing hypothesis that removing criminal liability for drug users necessarily leads to an increase in population use". NOU 2019: 26, Chapter 6.4.2., p. 160

¹⁴ NOU 2019: 26, Chapter 3.9., p. 70

¹⁵ NOU 2019: 26, Chapter 2.3., p. 28

¹⁶ As the report makes clear: "In contemporary Norwegian criminal policy, punishment is generally regarded as a means and not an end in itself. For the sake of clarity, "means" also denotes those cases where actions are punished with the aim of influencing the attitudes of the population or expressing basic values. Punishment, which means that the state is prepared to inflict an intentional suffering on its citizens, must therefore have a "sound justification". Consequently, the individual punishment must have an identified purpose, and it must be shown how punishment is suitable to achieve this purpose in such a way as to justify the human and financial costs of the punishment. This means that the burden of using punishment must be proportionate to the intended effects of the punishment. Hence, it is the expectation of the total intended and unintended consequences of the use of punishment—and that the benefits sufficiently outweigh the disadvantages of punishment—which may justify society's use of punishment. Since the immediate costs of punishment, both in the economic and human terms, are almost inextricably linked to our concept of punishment, the burden of argument and evidence lies on those who want the state to punish its citizens for a particular type of action." NOU 2019: 26, Chapter 12.2., p. 247-48

community and Norwegian citizenry will move on, realize to a greater extent how drug prohibition has corrupted the social fabric, and how it continues to steal our children.

After the commission's report, it is impossible to pretend that we are helping young people by punishing them. Begging to differ only shows that politicians are motivated by less than honest concerns, and this position is costly.

As noted, the world is moving forward and the question of a regulated market is becoming more urgent. 11 U.S. states, Canada, Luxembourg, as well as several African, South American and Asian countries have begun the process, and within 5-10 years it will be easy to see that Norwegian politicians settled for an overbureaucratized and unnecessarily costly solution, not least as measured in human suffering. The state of Illinois ended 2019 by overturning 11,000 convictions; the governor promised that this was only the beginning, and we can expect the same examinations (and results) in Norway when time comes.

The longer between now and then, the greater is the damage inflicted by prohibition—and the weightier the constitutional responsibility. As already noted, moral panic is documented, and one day politicians will be weighed by their support of the human rights paradigm. This calculation is simple enough. Constitutional issues come with constitutional obligations, and there is a choice between being remembered as human rights defenders or advocates of tyranny.

Consequently, we ask the Minister of Health to stand up for human rights and make sure that its principles are applied to drug policy. Following the findings of the Royal Commission and its narrow interpretation of human rights obligations, a new investigation must be completed to ensure rights to the persecuted en masse. This investigation can be expected to give way to a truth and reconciliation commission, for historically that is the result when moral panic is established and a principled recalibration of law required.¹⁷

This may seem arduous. The alternative, however, is to let unconsciousness continue to define legislation, and this is not good for authority.

We need only look at the Royal Commission's attempt to maintain a moral distinction between use and sale to see how this insentience not only weakens the report in the area of human rights but leads to proposals that the police and others object to. As said, there are good reasons not to punish drug use. However, it becomes absurd when the state denies people a right to grow cannabis themselves or to buy quality-assured goods from countries like the United States and Canada, while expecting them to deal with local thugs. It is difficult not to think of such policy as a gift to organized crime, and if the goal is to reduce stigma (and the crime associated with the drug market), politicians need to consider a regulated market.

Without it, more holistic drug policies cannot be. The more the police intensify their persecution of drug producers and dealers, and the more successful their eradication efforts,

¹⁷ When it comes to human rights inquiry, a key issue is if the law can overcome a proportionality analysis. This analysis done properly will reveal the extent to which modern drug policy is a result of scapegoating, our tendency to blame others for problems that are a collective responsibility—and to the extent this is the case, we can expect the formation of a truth and reconciliation commission. The need for such a commission has been mentioned in the Norwegian media. See Klassekampen, January 20, 2020, and Nettavisen January 18: <https://pluss.nettavisen.no/debatt/leserbrev/meninger/rusreformen-enkonstitus-challung/o/5-95-72508?fbclid=IwAR0Ua3kLO9Om62EnqNt3MI1wN6LcG9SUhogTES4e16cII6kCQQ1gGErvXX4>.

the worse is the quality of goods and the more violence occurs in the wake of the black economy. In other words, we expose people to needless risk and we need to look at the implications for human rights: If we acknowledge that pathological reasons alone cannot explain drug use and that the humanization of drug users makes it problematic to prosecute them as criminals, what about the dangers associated with a criminal market. Is prohibition really necessary in a modern society?

Considering the findings of the Royal Commission, the answer looks bleak for prohibitionists. It should not take too long before the rest of society catches up, and it is better to act now than in a few years when another thousand lives are lost, several thousands more have been arbitrarily imprisoned, and thousands of families have been unjustly ripped apart.

Whatever current preferences, the issue is becoming more prominent, and Norway can go from being a hypocrite in the area of human rights to taking the lead. All it takes is for politicians to comply with international requirements and look at the human rights dimension of drug policy.

We look forward to hearing from the Minister on this important subject.

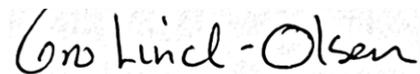
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