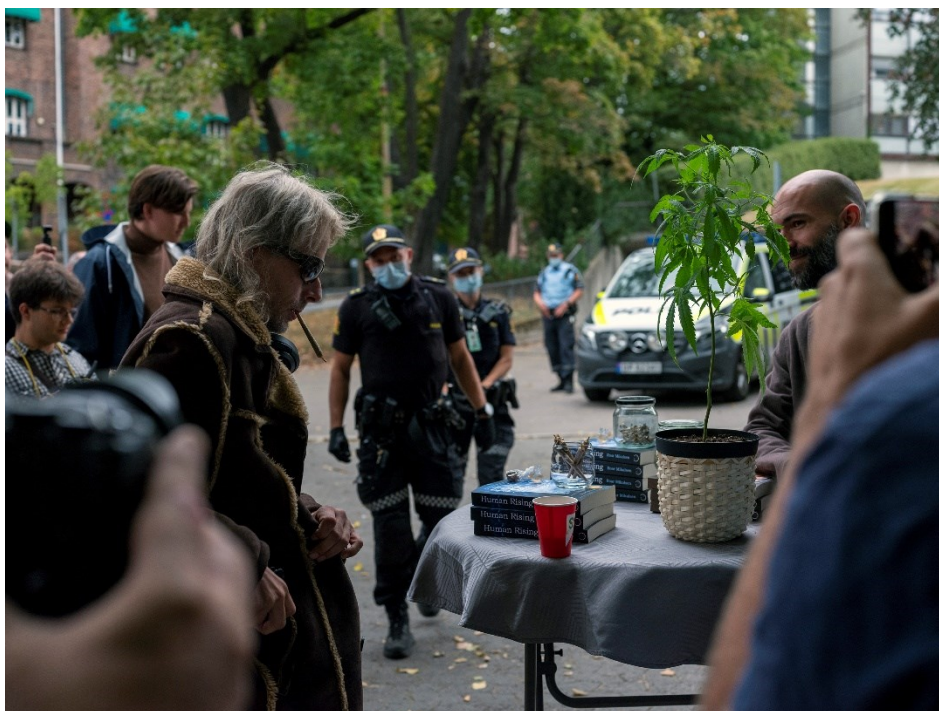


Drug Policy, Punishment & Human Rights

Document to the Court
22-01-2022





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Drug Policy, Punishment & Human Rights

Document for the Court

Written by Roar A. Mikalsen

Alliance for Rights-Oriented Drug Policies AROD)

22. January 2022

Introduction

“Looking back the system of Transatlantic slavery didn't need better regulation; it didn't become out of date; it didn't need reforming; exceptions were not needed to exclude more 'races'. No! The system was wicked, corrupt, immoral and needed abolishing — Just like Prohibition!”

— Julian Buchanan, [Professor](#) of criminology (ret.)—

For over 50 years, punishment has dictated drug policy. Over time, some have understood that this makes matters worse, and over 40 years ago, Norwegian criminologists and sociologists warned against the destructive dynamics of drug prohibition. Despite this, politicians did not listen and in the 1980s, even with increased penalties, the situation worsened. The Criminal Law Commission, therefore, proposed in 2002 the decriminalisation of drug use and a reduction in the legal penalty from 21 to 10 years, but the politicians would not listen. Without justification, Minister of Justice Odd Einar Dørum [rejected](#) this proposal, and major international changes were needed before punishment was perceived as unacceptable.

That act finally kickstarted the Norwegian drug reform in 2018. The world wised up, more and more countries decriminalised or legalised drugs, and several far-sighted politicians realised that Norway had to follow suit. The result was the report of the Royal Commission on Drug Reform, the most comprehensive study in this area, and the lack of a basis for punishment was again confirmed.¹

¹ 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 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 is why the Royal Commission concluded that decriminalisation is in line with human rights obligations. Whether this is good enough to secure rights, however, is uncertain. A handful of courts have recognised autonomy for cannabis use, and AROD asks whether it is necessary to continue a criminal market when half of Europe is in the process of regulating cannabis:

Is it the case that Norway needs the prohibition law to protect society, or are we better served by removing Sections 231 and 232 of the Penal Code? Are there good reasons for punishment in the domain of drug policy, or would it be better to acknowledge the hunt for scapegoats and the arbitrary persecution of earlier times?

This is for the court to answer. An effective remedy lies at the heart of human rights law, and the definition of arbitrary imprisonment is simple: we are dealing with arbitrary imprisonment when punishment is not within constitutional limits. To be within constitutional constraints, the law must be measured against principles such as equality, self-determination, proportionality, and the presumption of liberty; the law must promote a legitimate purpose, be the least intrusive of all available instruments, and reflect a well-adjusted balancing of the individual's right to freedom as measured against society's need 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 imagined 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 disputed.

Why punishment is frowned upon will be clarified in court proceedings, but for decades, sociologists, criminologists, psychologists, and

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. NOU 2019: 26 [Drug reform - from punishment to help](#)

lawyers have pointed out the scapegoat mechanism as the engine for prohibition. The defense holds that this phenomenon, our tendency to blame out-groups for problems we have a joint responsibility to solve, links the drug laws to the history of arbitrary persecution, and there is little doubt that the prohibition ideology is under pressure.

Not only does the Royal Commission reveal the numerous problems with punishment with uncertain benefits, but also all indications are that we can do better with less intrusive means, and plenty of experts concur that drug prohibition poses a threat to our civilisation. The wickedness inflicted on society by alcohol prohibition was nothing compared to the prohibition of drugs, and it is therefore not possible to talk about human rights obligations without considering a regulated market.

The problem of Norwegian drug reform

Yet, the politicians imposed such a debate on the Royal Commission. The government wanted to examine the human rights dimension of drug policy but ruled out a legal market, and the committee solved this by making a moral distinction between use and sale; thus, a larger blind spot could exist, while rights for drug users were confirmed. Despite this, politicians would not acknowledge the link between public panic and human rights violations. They continued to yearn for punishment on refuted terms, and rather than take the report seriously, the politicians ignored it.

Civil society reacted to this. The alliance for rights-oriented drug policies (AROD) and others [initially](#) made it clear that it is not possible to go from criminalising to pathologising drug users without emphasising human rights principles.² We pointed out that the rights of the persecuted were disputed and that the state was compelled to carry

² 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 how Sections 231 and 232 of the Penal Code are incompatible with the UN conventions, see MIKALSEN, [TO END A WAR](#) (2015) chapter 4

out a general human rights analysis — one that did not content itself with looking at the rights of only single-dose users, but also those with many doses.

This was the mandate and to save the drug reform, we [approached](#) the Standing Committee on Health and Care Services, the Royal Commission on drug law reform, the Ministry of Health and Care Services, the Ministry of Justice and Public Security, the Standing Committee on Scrutiny and Constitutional Affairs, and the Prime Minister's Office. All parties and politicians were informed of the responsibility for securing human rights, but the rights perspective remained ignored.

Series-linked disclaimers

The Standing Committee on Scrutiny and Constitutional Affairs would [not](#) interfere with the work of the Standing Committee on Health and Care Services. The Ministry of Health also did not want to get involved and [transferred](#) the responsibility for the persecuted to the Ministry of Justice following pressure from civil society. The Ministry of Justice [responded](#) by shifting responsibility back to the Department of Health, which after several [inquiries](#) failed its professional responsibility and [referred](#) the matter to the Norwegian Parliament. In this way, disclaimers of responsibility marked the political process, and rather than offering a human rights analysis, or answering [questions](#) about rights, the drug policy continued on totalitarian terms.

This is disturbing considering that the persecuted groups, 13 years ago, claimed the protection of the rule of law but were denied a defense. In 2009, the Director of Public Prosecutions, Tor-Aksel Busch, rejected the right of review of the prohibition law,³ and the Supreme Court's Appeals Committee followed up by refusing to put the question forward — without any justification. This is a clear human rights violation, and

³ The documents can be found in this [2010-version](#) of *HUMAN RISING*, pages 339-49

since then around 460,000 drug cases have been processed by the police and prosecutors. To the extent that the state cannot defend punishment, these are people who have been unjustly persecuted, and the recent dispute in the Norwegian media on police power is part of a larger picture concerning the rights of several hundred thousand Norwegians.

It is on this basis that AROD in 2019 [contacted](#) the Norwegian Prosecuting Authority and invited them to take responsibility. When politicians and ministries fail, it is up to the Higher Prosecuting Authority to secure the rule of law, and we have upheld the need for a truth and reconciliation commission, held the Director of Public Prosecutions [accountable](#) for continuing arbitrary prosecution, and [offered](#) to deliver cannabis products to the Director in order to launch a review of the law.

The Norwegian Prosecuting Authority, however, has not been forthcoming. Not even the [letter](#) that we had begun to store cannabis to trigger the state's obligations to the persecuted was answered, and this is the major reason for AROD's civil disobedience [action](#) on 11 September. Despite a clear responsibility, neither politicians, the Ministry of Health, the Ministry of Justice nor the Prosecuting Authority has dealt with the lack of a justification for punishment, and it is up to the court to provide an effective remedy.

The need for human rights analysis

As the politicians failed, AROD [informed](#) the Ministry of Health that we, through civil disobedience, would ensure accountability for the drug policy by involving the courts. Neither letters, consultation responses, nor 30 articles in the media proved sufficient to goad the politicians to safeguard human rights, and after [correspondence](#) with the police, we set up a desk with cannabis and psilocybin mushrooms outside the main police station in Oslo on September 11, 2021. We did not do this to provoke, but to illuminate a huge loophole and thus help the authorities follow the recommendations of the Council of Europe,

the Pompidou Group, the UN Working Group on Arbitrary Detention, Amnesty International, and Human Rights Watch. We all have a responsibility to promote human rights, and as Amnesty sums it up:

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 offenses. From police abuses and the continued use of the death penalty for drug-related offenses, 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.⁴

This image is not disputed. As the Royal Commission elaborates, there has therefore been a movement from interpreting the drug policy conventions in the light of a drug-free ideal, where criminal law was seen as a suitable tool, to emphasizing realities on the ground and the intention to promote health and welfare. There are more and more requirements to ensure the quality of legislation on human rights terms,

⁴ [Ending human rights abuses in drug control: Oral statement to the Interactive Dialogue with the Working Group on Arbitrary Detention at HRC47 - Amnesty International](#)

so that the control regime does not contribute to unnecessary harm,⁵ and as the Royal Commission wrote:

*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 as it entailed a disproportionate encroachment on the citizens' autonomy.*⁶

As we can see, after Director of Public Prosecutions Tor-Aksel Busch and the Supreme Court rejected the right of drug offenders to a constitutional review, the world has moved on. A handful of courts have decided on the merits of an argument that the Director of Public Prosecutions in 2009 seemed to think was impossible to settle, and the international community is increasingly emphasizing the need for quality control with drug laws. There is a solid basis for seeing human rights in conflict with punishment in drug policy, and the answer to a [rights analysis](#) depends on the questions asked.

The analyses that have been done affect the right to use. Several courts have given good judgments in this area,⁷ and it is obvious that principles such as autonomy, proportionality, equality, and the presumption of liberty invalidate punishment against cannabis users.

⁵ 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.

⁶ [NOU 2019](#): 26, Chapter 7.4.3., p. 181

⁷ 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 court could avoid repeating the same mistake as former Director Busch and the Supreme Court. It speaks volumes that Busch 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.*⁸

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

⁸ [Consultation statement on drug reform](#) - The Attorney General

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 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.⁹

Norway currently has a problem with points 3, 4, 5, and 6 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

⁹ WHO, UNDP, UNAIDS and International Centre on Human Rights and Drug Policy; [*International Guidelines on Human Rights and Drug Policy*](#) (2019)

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 respect human rights. 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, the Higher Prosecuting Authority and the courts. 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 court taking control of a political process that is beyond the rule of law.

Human rights analysis 101

That is why we are gathered for negotiations and a human rights analysis is not complicated. 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 why decriminalisation is seen as a minimum, but the Council of Europe¹⁰

¹⁰ "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.

and the UN Working Group for arbitrary imprisonment¹¹ recommend further investigations. Even INCB, the UN's supreme authority in drug-related issues, advocates that human rights 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.*¹²

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

¹¹ “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 offences are proportionate.” A/HRC/47/40, Arbitrary detention relating to drug policies: [Study of the Working Group on Arbitrary Detention](#) (2021) p. 6.

¹² [NOU 2019](#): 26, Chapter 7.4.3., p. 181

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 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.*

This cannot be postponed. As more and more courts emphasise the relevance 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 court must be familiar with the questions raised by the rights-oriented debate and demand answers from those responsible for the policy.¹³ This is the only way to ensure that the punishment is just. We have submitted our procedural claim, [Human Rising](#), and the following ECHR articles anchor the fundamental problem of the law.

¹³ See MIKALSEN, [HUMAN RISING](#) (2018) chapter 12.2.3, or [Five questions that must be answered | Alliance for Rights-Oriented Drug Policies \(arodpolicies.org\)](#)

Allegation of human rights violations

- *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.¹⁴ 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,¹⁵ 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

¹⁴ 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.

¹⁵ 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.

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."*

"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.¹⁶ For this reason, it can be argued that positive human rights obligations include a regulated market,¹⁷ and the court must weigh the

¹⁶ 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

¹⁷ 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,

state's reasons for demonising and imprisoning those who possess more than a minimum of user doses.

Are there good reasons for this? Is it vital for the right to self-determination whether people have 10 or 20 grams, or does the state enact an arbitrary division to be able to continue a policy that depends on scapegoats to survive?

- *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.¹⁸ 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

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

¹⁸ 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.

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."*

"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.¹⁹ 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. All parties 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

¹⁹ 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.

must show good reasons to discriminate in the field of drug policy. Cannabis and psilocybin users²⁰ 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 on national television when NRK's [Folkeopplysningen](#) examined the basis for the criminalisation of cannabis. Not only did he exhibit the double standards that drive politics forward, but also after much searching, all that the Ministry of Justice could find was an [unpublished](#) master's thesis from a Swedish medical student.

We do not expect any better this time. It is, after all, an extraordinarily thin argument that the supporters of drug prohibition have brewed 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 but also have suitable means to achieve the ends, and that is difficult to contend with.

The report of the Royal Commission not only summarised the myth of the drug fiend as political fiction, but 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 drug problem has played a

²⁰ In principle, this also applies to other forms of drug use.

minor role".²¹ "Panic" is used several times 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, but we expect the court to stand behind rule-of-law guarantees and the demand for a human rights analysis. In Norway, it is no less the task of the district court to assess the issue, as waiting for the Supreme Court is unnecessarily time-consuming and costly. If the court does not oppose such analysis, hundreds of lives and thousands of years of imprisonment can be saved, and the negotiations should be broadcast. We are dealing with the most important case for the Norwegian legal system since the Second World War, and the court's preparations and legal process should reflect this.

Witnesses

AROD has asked the police for investigative measures, but to what extent the agency emphasises human rights and our procedural claim remains to be seen. The original indictment did not inspire confidence, and the defense accepts the possibility that the prosecution will focus away from the facts.

We, therefore, have a list of witnesses who will explain why we are gathered in court. The fact that the persecuted, for 13 years, have been denied a human rights analysis is an important reason for AROD's civil disobedience, and the defense intends to expose how the safeguarding of human rights has failed.

We assume that the responsibility for the drug policy lies with the Ministry of Health but cannot be sure. According to the Department of Justice, the Ministry of Health has "the overall and coordinating responsibility for drug policy", but after questions on human rights, this ministry passed on the responsibility to the Department of Justice "as the right body". The Ministry of Justice, too, did not want this

²¹ See [NOU 2019](#): 26, chapters 3.2., 3.3.

responsibility and pushed the burden back to the Department of Health, which in the end failed its professional responsibility and referred it to parliament.

This is not acceptable. We have proved to both the Ministry of Health and the Ministry of Justice that the parliamentary debate was nonsense, as the Royal Commission has recognised the public panic while politicians continue as before, and we will therefore summon Ingvild Kjerkol and Bent Høie, current and former Minister of Health, as well as Emilie Enger Mehl and Monica Mæland, current and former Minister of Justice. AROD's correspondence will explain why these ministers have failed constitutional responsibility, and we have questions that must be answered.

In addition to these witnesses, AROD wants the lead investigator, as well as the prosecutor, on the witness list. This is how we intend to clarify weaknesses in the police's work, and last but not the least, we summon Director of Public Prosecutions Jørn Sigurd Maurud and Chief Public Prosecutor Runar Torgersen, the head of the Royal Commission.

Testimony of the Higher Prosecuting Authority

Some refuse to testify. AROD has extensively corresponded with these witnesses, showing how the state has executed its responsibilities, which is not good, and how a dysfunctional culture prevails at the workplace.²²

²² The defense considered having Pål Frogner, Associate Professor at the Police Academy, testify about the difficulties experienced by conscientious individuals when working in the police. As an activist in LEAP, the polar opposite of the Norwegian Narcotic Officers Association (NNPF), he can elaborate on how members of LEAP are being rejected by the culture of the police, as well as other issues that arise when the police enforce laws incompatible with common sense. The witness is relevant to shed light on a toxic culture but was excluded because the witness's opinions are publicly known and the question is whether it is necessary and proportionate to use punishment in drug policy. Frogner will not be able to convince the court of the correctness of such a legal understanding. For the same reason, the defense has also left out jurists who support the human rights argument, including Professor of Law Hans

We can say this with certainty because public panic has been proven and the lack of basis for punishment is clear, while all bodies of the state continue the penal regime. Torgersen in particular is in a difficult situation because he headed the commission, which showed that punishment for use is not legally justifiable. Personally, he therefore knows that history's verdict on the penal regime will be ugly, but as the chief public prosecutor, he feels an obligation to the system. To the extent he does not do so, the system (which continues to violate human rights) can be expected to turn against him, and his career will be uncertain. It, therefore, takes a lot to speak up against punishment, and Torgersen is among those who want a distance to the court's proceedings.

As he wrote to the accused: *"I am familiar with your argument but maintain that I am not to be regarded as a witness in the case within the meaning of the Criminal Procedure Act and that it is not pertinent for me to appear in court."*

By virtue of his position at the Higher Prosecuting Authority, we understand that Torgersen wants no role. Nevertheless, the Criminal Procedure Act is subordinate to human rights, and the chief public prosecutor is a key witness who can shed light on important nuances. As head of the Royal Commission, he received [seven](#) letters from AROD explaining why the mandate of drug reform is incompatible with the exclusion of a regulated market from human rights analysis. However, he chose to interpret the mandate narrowly, so that only the rights of users were discussed, and so the commission continued to safeguard the blind spot that we wanted to expose.

After talking to Torgersen about this in March 2019, AROD wrote a [letter](#) to members of the Royal Commission in which we encouraged mutiny, and it is largely because the commission accepted the government's demand to exclude the regulation of drugs from

Fredrik Marthinussen and Ketil Lund, former Superior Court Justice. If the judge or prosecutor so wishes, they can attend.

consideration that we stand in court. Had the commission followed its mandate, which was to assess the human rights situation of the proposed legislation, this would possibly have been avoided. The proposed legislation entailed punishment for other than small dosages of drugs, which meant that this had to be explained, and it is because everyone involved in this process has disregarded the rights of those who possess more than a few doses that we ask the court to do the job that the drug committee did not.

This is one reason we want Torgersen as a witness. He can divulge why the Royal Commission did not make a general human rights analysis, and why the commission made a moral distinction between use and sale. AROD is concerned with shedding light on how this distinction is justified, as it is based on turning the law of supply and demand into a victim and abuser context, and this is problematic. It is because no one takes a closer look at this that the drug policy and the scapegoat mechanism are extended, and the Higher Prosecuting Authority bears a special responsibility.

We have discussed how the Supreme Court's Appeals Committee, after Director of Public Prosecutions Tor-Aksel Busch in 2009 rejected the right of review of drug offenders, followed up by denying the question of their rights to be heard. The Norwegian Supreme Court did not explicate why, which is a human rights violation, and since then around 460,000 drug cases have been processed by the police and prosecution authorities. These measures are constitutionally controversial, and the recent dispute on the application of police power against drug users is part of a bigger picture — one that concerns the rights of several hundred thousand Norwegians.

In this context, the Director of Public Prosecutions could have done far [more](#) for clarification, and that is why we summon Jørn Sigurd Maurud. Tor-Aksel Busch would never [answer](#) how much cannabis AROD needed to bring to the office of the Director of Public Prosecutions to get heard in court. Since 2020, however, we have let Maurud know that

we have been [storing](#) cannabis products to promote human rights. We have held the Higher Prosecuting Authority [responsible](#) for the continuation of arbitrary persecution, emphasised the need for a truth and reconciliation commission, and [offered](#) a way to deliver on human rights obligations, but the Director of Public Prosecutions has not been interested.

This is the major reason for our civil disobedience action on September 11th. We would not have taken this step if those responsible for drug policy had done their job, but the [dispute](#) over the use of force continues. The Director of Public Prosecutions appears unmotivated to deal with a dysfunctional culture, and AROD intends to use the court to shed light on denials of responsibility and why an effective remedy is necessary.

Torgersen, in particular, knows how difficult it is to justify punishment in the area of drug policy. Thus, we want to know what individuals at the Higher Prosecuting Authority feel about the mission to put people in jail for drug crimes when the criminal law is so difficult to defend: *What is it like to lead a government-appointed committee, give politicians a basis for removing punishment, and see public panic continue? How does it feel to continue the criminal regime, when the drug report concluded that "the drug fiend was first and foremost a political figure, without empirical basis"? From this point of departure, how does the Norwegian Prosecuting Authority manage its responsibility as public prosecutors? What are these measures to protect the rule of law and the population against arbitrary persecution?*

The defense assumes that employees must be increasingly polarised due to a lack of quality control. In any case, the trend is clear elsewhere in society, and we want to offer those prosecutors who have the integrity to deal with the problem of moral panic a voice. Not only that, we also want to strip those of authority who continue to support punishment on rejected terms, and both the Director of Public Prosecutions and the

Chief Public Prosecutor can be key to the nation's cleansing. With their support for drug reform, they have shown loyalty to healthy values, and all that is needed is for them to distance themselves from the legal tradition that exonerates power regardless of right and wrong — exemplified in Tor-Aksel Busch.

We are not surprised that he was the only lawyer to approve the Labour Party's proposal for drug reform. Nor are we surprised that the questions raised by the rights-oriented debate remain unanswered, and we want to help the Higher Prosecution Authority move into a new era. This involves a showdown with the culture that has continued punishment for many years, and it was Torgersen who wrote the letter when Busch, 13 years ago, refused the persecuted a day in court.

This needs investigation. It may be that Torgersen was instructed by Busch and later changed his thinking, but it is also possible that this letter from 2009 can be linked to the decision of the Royal Commission to ignore the mismatch between human rights and the Penal Code sections 231 and 232. We are talking about a colossal legal scandal that increases every year, and it may be that the persecution is prolonged due to close ties with those in power.

AROD wants to know more about this. In the Norwegian media, the Norwegian Narcotic Officers Association (NNPF) has come to represent the toxic culture that enables drug policy on discredited terms, and the collusion between NNPF and the Police Directorate is linked to the Office of the Director of Public Prosecutions. Busch himself is an honorary member, and to the extent that Torgersen or Maurud do not see the connection between public panic, systemic unculture, and human rights violations, it will be relevant to delve into this picture. It may explain why the penal regime continues despite alarm bells tolling for quite some time and despite the state's responsibility for subjecting the law to adequate quality control being undisputed.

Duty to testify on human rights

There are therefore good reasons for AROD wanting the testimony of the Norwegian Prosecuting Authority and we would like both Maurud and Torgersen to meet in court. This is in the interest of not only the nation but also the Higher Prosecution Authority. The Criminal Procedure Act is subordinate to human rights, which everyone is obliged to promote, and the duty to testify is supported by the Director of Public Prosecution's own [letter](#) on guidelines for the prosecuting authority.

In this letter "it is emphasised that in the criminal proceedings of the police and the prosecuting authority, ethical reflections and professional objections shall be encouraged."²³ Furthermore, in the ethical guidelines, any 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. The legal order also includes fundamental values and principles on which the administration of justice is based, including the rule of law, equality before the law and the individual's fundamental freedom and autonomy."

It sounds nice on paper but is not the actual status. Neither rule of law, equality before the law, individual's fundamental freedom and autonomy, nor ethical reflections on this, have had consequences for the penal regime. The prosecuting authority still continues punishment on discredited terms, and the court has a unique opportunity to rectify the sins of the past.

²³ Quality requirements for criminal proceedings in the police and at the public prosecutor's offices, Attorney General Oslo, 8 November 2018 (rev. 21 February 2019) 4

AROD, therefore, maintains that Maurud and Torgersen are to be regarded as witnesses, on an equal footing with representatives from the Ministry of Justice and Health. Not only do these witnesses possess important first-hand knowledge but also the Director of Public Prosecutions recognises "no fundamental conflict between good crime-fighting and human rights".²⁴ The two follow as one from an understanding built over time, and society is ripe for a showdown with the regime of punishment.

The Office of the Director of Public Prosecutions and other bodies of state can thus look forward to their testimony. If the state wants to respond to the allegations of human rights violations, this is a good opportunity, and it will in any case be a welcome opportunity to reconcile the prosecution's practice with the theory of human rights. AROD, therefore, looks forward to hearing from all, as required by the rule of law.

Explanation with film

In addition to witnesses, the accused will use videos in his explanation. The defendant will speak to the facts of the case, respond to questions concerning the human rights argument, and then take the court on a journey in time. A documentary is an effective tool for seeing a bigger picture, and the defense presents the following screening:

- [Kampen om hampen Full movie](#)    - YouTube

This Danish film from 1997 (The Battle for Hemp 75 min) presents the status of cannabis 25 years ago. It slays the myths of drug prohibition, and its relevance is all the greater today because it demonstrates that the

²⁴ Employees at the Office of the Director of Public Prosecutions shall, in line with the [values](#) of the High Prosecuting Authority, not only work to ensure that the higher prosecuting authority fulfils its function as a guarantor of legal certainty, but contribute to the legal framework being applied and developed so that it provides the best possible fight against crime, at the same time as human rights, the accused's legal security and the interests of crime victims are safeguarded

human rights argument could have won in court already by this time and that public panic has persisted since no analysis has been made.²⁵

- [• The House I Live In \(2012\) HD - War on Drugs in the United States - YouTube](#)

This film from 2012 (108 min) documents the costs of the penal regime for American society. It shows the scapegoat mechanism and clarifies the destructive dynamics of criminalisation. We are dealing with a failed social experiment, and we must see the legalisation trend in the United States against this backdrop. As a policeman says at 14.46 min, "Over time, I have discovered that everyone involved hates what is going on."

- [• Folkeopplysningen – Cannabis – NRK TV](#)

With this Norwegian documentary from 2016 (45 min), we are back to cannabis. We get to see the regime of punishment and its effects on Norwegian society, and as we see, there are still no good reasons to deny cannabis users self-determination. AROD shows this movie because it elaborates on the insights gained from the Danish production. Everything needed to win in a human rights analysis has been seen, but the interview with the Minister of Justice is important. It shows how weak the basis for punishment really is. Not only does the Minister of Justice repeat allegations rejected 25 years ago, but also his argument shows why drug laws and racial laws are much the same, and the lack of factual basis is documented. After much searching, all the Ministry of Justice can point to is an unpublished master's thesis from a Swedish medicine student.

²⁵ By this time quite a few cannabis users had tried to counter the prohibition in the courts, but all had been denied an effective remedy. AROD has presented a [case study](#) that shows how over 100 constitutional challenges in US at this time had been mishandled and it's a paradigm breaker in law and constitutional construction. Professor Douglas Husak of Rutgers University has noted that it is "a wealth of information", and that "the Attorney General needs to see it!" See Mikalsen, [TO RIGHT A WRONG](#) (2016) part 3.

It is therefore time that the state produces something better, and we will see if the witnesses will do it in court.

- • [Neurons to Nirvana: Understanding Psychedelic Medicines - YouTube](#)

This film from 2013 documents the research on psilocybin and drugs in the same class. It shows that we are dealing with something very different from what the prohibitionists claim, that the ban on psilocybin and similar drugs is another example of excessive government intervention and that psychoactive drugs can help humanity.

For the sake of time, we stop there, but if the court wants to know more, this [documentary](#) showing the corruption in Mexico is recommended. This is one of the most damaged areas of the drug war, and it is no coincidence that the Mexican Supreme Court was one of the first to invalidate the prohibition on cannabis use. Military groups control the drug market, the political process is bought and paid for, and it was the people who eventually, through civil disobedience, pushed for change.

AROD expects that the Norwegian courts will help the Norwegian society do the same. With the Royal Commission's report, we have a base for rights adjudication that the state cannot overlook without failing obligations to human rights, and on behalf of civil society, we hope for an orderly process in which constitutional considerations are taken into account.

We reserve the right to present more evidence and look forward to negotiations.