

VIEWPOINT

What Does it Mean to Adopt a Human Rights-Based Approach to Drug Policy?

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The 25th anniversary of *Health and Human Rights* comes at an interesting time in international drug policy. Not long ago, references to human rights could be, and were, easily vetoed from draft UN drug policy resolutions. At best, human rights were included in declaratory preambles of omnibus resolutions, and largely forgotten in any substantive sense. Drug policy NGOs, for the most part, did not tend to foreground human rights, while human rights NGOs all but ignored drugs.

The past decade, however, has seen changes. Human rights are now central to international drug policy debates and are causing considerable controversy. Drug policy NGOs have made significant progress in highlighting the human rights dimensions of the field, while human rights NGOs have more and more come to see the issue as one warranting close attention. Indeed, it has become something of a cliché to say that a ‘human rights-based approach to drug policy’ should be adopted. The fact that this is so frequently heard, from NGOs and some governments, is a major step forward. But while much of the work to date has involved identifying rights violations in drug control, we still have not unpacked what adopting a human rights-based approach might mean.

Reconceptualising drugs issues as human rights issues

Over the years we have heard a good deal of scepticism about human rights in drug policy. Usually this has to do with the political palatability of human rights language when trying to achieve a certain goal. There is merit to that worry. No sensible human rights advocate claims your best foot forward is always human rights *language*. But if human rights are reduced to simply a functional strategy to some other end, then they can be used or discarded at will. This does not do justice to so fundamental an idea.

A human rights approach to any issue foregrounds the relationship between the individual and State power; this is especially the case with drug control. At present the burden falls on those opposing certain drug laws, such as criminalising personal possession, to explain why they don’t work. A human rights approach reverses that burden, placing it instead on the government to justify the limitations on rights and freedoms that such laws entail, and to be accountable for their decisions. Few governments have ever done this. But when these laws have been challenged on human rights grounds in constitutional courts, Governments have lost, as they did with regard to cannabis possession and the right to privacy in South Africa.

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This Viewpoint was originally published on the Journal website on 7 January 2020 and can be viewed here:

<https://www.hhrjournal.org/2020/01/what-does-it-mean-to-adopt-a-human-rights-based-approach-to-drug-policy/>.

What does human rights law say about drugs?

Drug policy work is complicated by the existence of three nearly universally adopted UN drug control treaties that form the basis of national drug laws around the world. Those treaties enshrine a focus on law enforcement and eliminating supply, where a great deal of human rights problems are evident. International human rights law has an important role to play in rebalancing the legal framework for drug control, but until recently, however, there has been no comprehensive study to investigate what human rights law has to say. The *International Guidelines on Human Rights and Drug Policy* are the first effort to do just that. With the financial support of the German and Swiss governments, and United Nations Development Program, the guidelines development involved over three years of research, regional consultations in Colombia, Thailand, and South Africa, including people who grow illicit crops and those who use drugs, as well as multiple expert drafting meetings. The Guidelines address a catalogue of affected rights, as well as specific groups—women, children, indigenous people and people deprived of their liberty. Each section in the Guidelines provides clear, actionable statements clarifying states' legal obligations, supported by an extensive commentary setting out the legal sources used.

A radically different approach: Human rights as the entry point

The Guidelines begin with human rights, and in drug policy this is a radically different starting point. They are not organised by, typically, “demand reduction” and “supply reduction”. The framework is not based on drug policy objectives. Rather, the focus is reversed so that human rights are the entry point.

Key to this is the section on ‘foundational principles’ which frames the Guidelines explicitly in human rights-based approaches to drug policy. These principles, however, can mean little in the abstract. The point is their application in context, and it is these principles that may ask some of the

most searching questions of drug policy. For example, the inherent dignity of the human person as the basis for human rights is reflected in Article 1 of the Universal Declaration of Human Rights. However, a widespread view of addiction is that dignity is not inherent, but contingent—lost through addiction and regained through intervention. The Guidelines reject this theory of dignity, because the absence of dignity and the power to restore it, is the absence of rights, and a licence for unaccountable intervention.

The politics of implementation

The Guidelines also include basic structural elements that should be in place. For example, they call on states to:

- review drug laws and policies for human rights compliance
- subject new laws and policies to transparent processes of human rights risk and impact assessment
- undertake budgetary reviews to ensure the realisation of the right to health in relation to drug use and dependence
- incorporate human rights into data collection and indicators.

This, of course, involves complex political work, but foregrounding the politics of such work is also a key feature of a human rights-based approach.

A frequent call at conferences is that drug policy should be based on ‘evidence, not ideology’. Usually this just means ‘evidence and not the moral objection to drug use some people (or governments) seem to hold’. But rejecting this necessarily entails embracing another view. Some of the biggest debates needed in drug policy are not about evidence, as such, but underlying principles or ideals. The evidence is fundamental, no doubt. But even the most exemplary research will be deployed in the service of a government’s policy directives to achieve its political ambitions. There are values and biases underpinning the technical language of, for

example, cost benefit analysis or epidemiology, that can make contested ideas seem seductively neutral.

Moreover, what is researched, how one views the evidence, what interventions are put in place and how one measures success are all affected by these underlying values. Consider harm reduction. For some it is a collection of interventions borne out of pragmatic and utilitarian public health thinking-interventions for which the right to health helps argue. But for others harm reduction is a social justice movement, within which inequity is the primary concern. There are many crossovers. But which perspective one takes will have a significant effect on what questions get asked and what solutions come into focus.

Prioritizing human rights over drug policy

A human rights-based approach suggests something simple: a commitment to placing priority on human rights over drug policy objectives. Make no mistake, this is a very controversial position. During the drafting of the Guidelines, this hierarchy was written into the introduction. One reviewer said it would 'kill the document'. Being (seen to be) tough on drugs wins votes. For some governments, moreover, drug control is a constitutional obligation. In international law, addiction is seen as an 'evil' that states have 'a moral duty to combat', and drugs are viewed as a threat to the very foundations of the state. Human rights are a threat too-to the unaccountable power that such rhetoric enables.

There is a tendency, when human rights are discussed, to think of the most egregious abuses. In drug policy it is the death penalty that has dominated. At the UN, states will say we need to adopt a human rights-based approach and immediately follow this with a rejection of the death penalty. But we should take care to avoid setting the bar for a human rights-based approach so low. We should also be concerned about those governments and multilateral agencies that perhaps too easily embrace human rights language. A tokenistic use of human rights might result in them being referred to in the preamble of a strategy but not being included in implementation; or by states criminalising those

whose rights they claim to uphold; or states claiming to support harm reduction and the right to health, but failing to take the logical next step and apply the principle of equivalence to prison services. Indeed, states may express concern about the death penalty for drugs, but continue to facilitate cross border drug enforcement in death penalty states. In this way, human rights language risks becoming an egregious form of window dressing for the inequities and power imbalances that human rights-based approaches should disrupt.

In his spirited dissent to a 2002 South African Constitutional Court judgement upholding the prohibition of cannabis, Justice Albie Sachs noted "[T]here is the tendency somnambulistically to sustain the existing system of administration of justice and the mind-set that goes with it, simply because, like Everest, it is there". That decision has recently been overturned. Sach's dissenting vision giving priority to rights protections over drug policy objectives became the majority.

Our challenge now is to realise the transformative potential of human rights in drug policy, while remaining vigilant against their subversion.

