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President
European Commission for Democracy through Law
Council of Europe

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Drug Policy and Human Rights: More on the Incompatibility between the two paradigms and the importance of an Effective Remedy

Dear Sir.

We thank you for your letter. Bureaucratically speaking, there may be good reasons for your decision not to follow up on these matters. Perhaps you are already working with the Committee on Legal Affairs and Human Rights in preparing the report “Drug policy and human rights in Europe: a baseline study” and that this is the reason why “the Venice Commission has no intention to prepare a study on the relationship between human rights and drug policy”.

If that is the case, we will simply reaffirm our support of this project and remind you that our report *Human Rising* already covers much of the disputed ground. Arguing from first principles, it is the closest thing to a baseline review so far, and we urge that you take it into consideration. We also urge that you look at its implications for constitutional law more generally, and we include *To Right a Wrong: A Transpersonal Framework for Constitutional Construction* (2016).

This book completes the discipline of constitutional law, adding psychology to the already accepted framework of political theory. It presents a model that systemizes the forces that act upon us, both individually and en masse; it explains why some will embrace a system of principled law while others will prefer a system of arbitrary law; and it exposes the qualitative difference between the worldview of these two groups of people, the reasoning that goes with either position, and its implications for society.

This work has the power to recalibrate the legal systems of COE member states into better structures, more aligned with the demands of first principles. It is a map-forming study, and the Venice Commission should consider this in your quest of reacting to identified deficits of democracy in member states. This is what you have been asked by politicians, and you now have the tools needed to do away with a legal tradition that long have undermined progress of the rule of law.



If, however, you are deciding not to look at this situation because of its controversy, we ask that you reconsider and that you reevaluate the implications. As you say, you “have no specific expertise”, and “this is a complex issue with many dimensions, which are by no means only legal”.

Indeed, you are right. It is not only a legal dimension to this issue; it is also a moral, a psychological, economic, social, and powerpolitical, and those who look into these dimensions will find that they unite in the overwhelming conviction of reason that not only do current drug policies violate basic human rights, but that those in charge of policy have a responsibility to fix things.

Except for reasons of expedience, therefore, we see no good reasons for resting comfortably. The issue may be complex, but it is definitely not (as you seem to assume) a political question open for interpretation. As seen from the perspective of first principles, drug prohibition is revealed to be a crime against humanity, and we have presented a report which documents that it can only be sustained by unconsciousness—a state not dissimilar to the equilibrium which ensures acceptance of the status quo at the Venice Commission.

For this reason, we remind the Commission that this status quo guarantees the continued persecution of 300 million, the continued incarceration of millions, and the continued misery of billions. As advisory body to the organization dealing with the rule of law, you serve as the intellectual alibi for a state of affairs which is being challenged by more and more drug users and human rights organizations, and you have a responsibility to look at this from a more educated perspective.

In the last 25 years, the Venice Commission has become more and more instrumental in the implementation of a transnational constitutional order, one that is to be constantly calibrated according to the demands of first principles. This is the essence of the rule of law, and the progression of our society depends upon the extent to which institutions like yours adapt to emerging knowledge.

Hence, as your main concern over the years has been the implementation of the principles of constitutionalism in the internal organization of the States, you should not ignore this issue, afraid of what you would find. More and more reports, law reviews, inquiries, commissions, and experts on drug policy reiterate not only that the drug laws have been more harmful than beneficial to users and society but that the separation between licit and illicit drugs doesn't make sense. Speaking in principled terms, which is what constitutional interpreters do, this translates to an increasing tension between the drug law and principles of proportionality and equality and as an NGO dedicated to the rule of law, we ask that the Venice Commission take this seriously.

As it stands, we have shown that only a cognitive dissonance ensures the survival of the status quo. As part of this system, you have been challenged to follow up on this topic, and your authority rests upon your ability to deal with this situation.

The fact that you “have no expertise in this respect”, therefore, should not be an occasion to accept the status quo. To do so is to admit defeat of the rule of law. And as the Commission



“shall give priority to work concerning the constitutional, legislative and administrative principles and techniques which serve the efficiency of democratic institutions and their strengthening”, “the principle of the rule of law”, in addition to “fundamental rights and freedoms, notably those that involve the participation of citizens in public life”, we expect that you recall our duties as well as the basic lessons of human rights law.

As legal scholars know, any human rights analysis begins with first principles. These are principles of autonomy, proportionality, dignity, equality and the liberty presumption, and you have received a report which documents how the drug laws are incompatible with principles of good governance. Not only does this report remain uncontested, but its findings conform with more and more constitutional courts as this process of discovery is proceeding at the national level.

So far, member states like Mexico and Georgia have studied the righteousness of this quest as it relates to the persecution of cannabis users and have found it to be contrary to the principles of law. The legal argument behind this analysis is another indication that the power of principled reasoning is growing strong, and if you have not begun to look into this matter, expect soon to be in a position where you must provide “emergency constitutional aid” to states who themselves have ignored this issue for too long.

We hope that you will be well-prepared when this time comes. More than that, we hope that our documentation will spur the Venice Commission into action, and that you will not shy away from the task of helping government officials overcome the cognitive dissonance that comes with the territory.

Yours sincerely

A handwritten signature in black ink that reads 'Roar Mikalsen'. The signature is fluid and cursive, with the first name 'Roar' and last name 'Mikalsen' clearly legible.

Roar Mikalsen
President of AROD

Appendix:

To Right a Wrong: A Transpersonal Framework for Constitutional Construction (2016).