



Hannah Bardell
Rapporteur
Drug Policy and Human Rights in Europe:
A Baseline Study

18 June 2019

Comments and Guidelines regarding the Introductory Memorandum

Dear Madam.

We have read the memorandum and we are pleased to see that the COE has found an excellent rapporteur for this mission—a mission whose lives and liberty upon which millions of people depend.

Now, according to its definition, “a baseline study is an analysis of the current situation to identify the starting points for a programme or project”.¹ For human rights and drug policy, these starting points are the constitutional demands of first principles (those principles which give rise to our human rights heritage),² and so the essence of this quest must be to look at how current policies compare to principles of equality, proportionality, autonomy, dignity, and the liberty presumption.³

On these terms, memorandum AS/Jur (2019) 25 provides an idea of the issues at stake in the challenge of defining a human rights-based approach to drug policy. And while several important points are made, the primary objective of the report—if it is to be effective in “streamlining human rights into drug policies” (and leave no one behind)—must be to put

¹ Eurostat, Statistics Explained: https://ec.europa.eu/eurostat/statistics-explained/index.php/Glossary:Baseline_study

² As the memorandum points out: “As far as certain (non-absolute) rights are concerned, the Court leaves a wide margin of appreciation to member states. Nevertheless, the Convention as interpreted by the Court can provide useful elements of understanding when examining drug policy from a human rights perspective. In general, member states shall search for a fair balance between the demands of the general interest of the community and the protection of the individual’s fundamental rights. States may interfere with certain (non-absolute) rights if, for example, it is necessary to protect children or preserve public health and safety. However, this requires them to demonstrate that measures are necessary to achieve the objectives they are intended for and that no less restrictive means are available to achieve the same ends.” (p.4) While drug prohibition clearly fails this test, we would argue that the right to liberty from arbitrary persecution and imprisonment is not a “non-absolute” right: it is at the very heart of our catalogue of rights and the right to a fair trial means nothing when individual states like Norway for ten years have denied drug law violators their right to challenge the law. The rule of law demands an effective remedy to arbitrarily persecuted groups, and the time has come to let the healing process begin.

³ This should be uncontroversial. If *Human Rising* should leave any doubt, we have forwarded the Rapporteur a copy of *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 showing how legal, moral, psychological, economic, social, and powerpolitical incentives unite in an overwhelming conviction of reason that not only do current drug policies violate basic human rights, but that those who support the prohibition paradigm are doing it for illegitimate reasons.



weight on the accusation of paragraph 39 that the prohibition itself interferes with the right to privacy.

The Challenge

Autonomy, then, is the name of the game. To satisfy the obligations to drug users, we must ask ourselves whether the drug law is compatible with the implications of first principles and at the heart of the matter is whether the state has a right to deny self-determination in these matters.

The term *baseline* puts the bar right here. In the area of drug policy, your task is to identify deficits of democracy, and we have provided documentation that the persecution of drug law violators is a result of powerpolitics and the scapegoating phenomenon.

This explains the taboo surrounding important aspects of drug policy. This explains why no cost-benefit analysis has ever been encouraged by government. And this explains why no state has followed up on the recommendation of the Pompidou group that “member states conduct a comprehensive human rights-based review in their country”.⁴ Unconsciousness is the only option if one is committed to the prohibitionist regime, and we see it manifested in not only the persecution of drug users but also in the imprisonment of those involved with the drugs economy.⁵

Even so, considering (1) that the liberty presumption puts the burden on the state to show good reasons for criminalizing populations; (2) that the problems summarized in the memorandum (the evolving patterns of drug use, drug related harm and drug related crime) must be attributable to the prohibition regime; (3) that so must also the immense toll of death, disease and suffering that comes with persecuting hundreds of millions whose only crime is exercising their choice in drugs; (4) that more and more UN and COE documents are coming out saying that the status quo is deeply problematic;⁶ and (5) that documentation has been received, vetted by professionals, showing how this regime of prohibition fails the standard raised by human rights law, we appeal that the task of the commission should be to focus towards this controversial subject.

While “measuring the success and coherence of drug policies”, as you say, “is not an easy task”, *the only meaningful way to “advocate for the adoption of indicators tailored to a new*

⁴ Pompidou Group, *Statement on bringing human rights into drug policy development, implementation, monitoring and evaluation* (2017) p. 5

⁵ Because the moral basis for drug prohibition is found in turning the law of supply and demand into one of victim and aggressor, it is important for prohibitionists to continue to criminalize those involved with the drugs economy, even when more and more countries and courts recognize autonomy rights for drug users. Even so, having discarded the old idea of drug users as a depraved flock of beings, people that need to be protected from themselves, there is simply no legal basis for the continued persecution of drug dealers and producers. Instead, we must as a society awaken to the realization that, when all is said and done, the drugs themselves are neither good nor bad, but substances that can be used for better or for worse, and that there are the same supply and demand factors (and the same patterns of overall unproblematic use) involved when it comes to licit and illicit drugs. From a constitutional perspective therefore, the average drug dealer has less to fear from the rule of law than the average policeman and legislator, for while the former in this balancing of scales has been weighted and found an agent of autonomy the latter is shown to be agents of tyranny. Hence, reparations must be made. And the moral code of society, having proved to be supported by totalitarian predispositions, must be calibrated towards more wholesome ideals, values, and principles through a recognition that drug prohibition has been a crime against humanity—a mass movement gone terribly wrong.

⁶ As noted by the memorandum: “the UN Special Rapporteur for Extrajudicial, Summary, or Arbitrary Executions observed (speaking of the UNGASS 2016 outcome document) that governments thus had recognized explicitly that the war on drugs—be it community based, national, or global—does not work. And further, that many harms associated with drugs are not caused by drugs, but by the negative impacts of badly thought out, ill-conceived drug policies which not only fail to address substantively drug dependency, drug-related criminality, and the drug trade, they add, escalate and/or compound problems.” P.3



*understanding of drugs and related harm*⁷ is to ensure increasing resonance between policy and first principles. When it comes to this, our case study documents how the U.S justice system, due to the scapegoating phenomenon, has mishandled constitutional challenges to the drug law and our report *Human Rising*, which is the result of 25 years of fieldwork and research studies, documents how forces of unconsciousness and powerpolitics have guided the evolution of drug policy.

Hence, it pinpoints the “political and infrastructural obstacles” that must “be identified and addressed to allow for the implementation of effective and human rights-compatible responses”.⁸ Unless its conclusions can be shown to be false, it is difficult to find a better indicator to “provide comprehensive guidance to member states taking on the challenge to review the impact of their drug policies on individuals and societies”,⁹ and the Pompidou Group just discussed its contents at the 84th meeting of Permanent Correspondents which just took place in Lisbon.

At this meeting, however, the Permanent Correspondents also “endorsed the decision that any input regarding human rights and drug policy should be addressed to the Parliamentary Assembly in view of its upcoming report on ‘Drug policy and human rights in Europe: a baseline study’”, and they “will act in line with the findings of this report.”¹⁰

In other words, much depends upon a proper baseline. If this fails, it will mean several more years of unnecessary death and suffering, and we take this occasion to speak on behalf of those hundreds of millions of persecuted citizens who claim autonomy and liberty rights.

Whereas nations like Sweden and Norway continue to ignore the call for an effective remedy, we have strength in morality and numbers as 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 Commission take this seriously.

As it stands, we have shown that only a cognitive dissonance ensures the survival of the status quo. As seen from the perspective of first principles, drug prohibition is revealed to be a crime against humanity and we have documented that it can only be sustained by powerpolitics and unconsciousness—a state not dissimilar to the equilibrium which ensures acceptance of the status quo at the European Court of Human Rights and other places of power.¹¹

For this reason, we remind the Rapporteur that this status quo guarantees the continued persecution of 300 million, the continued incarceration of millions, and the continued misery of billions. As an advisory service to the organization dealing with the rule of law, your report must either (1) invalidate the drug law or (2) serve as the intellectual alibi for the continuation of a state of affairs which is being challenged by more and more drug users and human rights

⁷ Introductory Memorandum to the Committee on Legal Affairs and Human Rights, *Drug Policy and Human Rights in Europe: A Baseline Study*, AS/Jur (2019) 25, p. 3

⁸ *Ibid.*, p. 10

⁹ *Ibid.*, p. 3

¹⁰ Letter to AROD from Denis Huber, Executive Secretary of the Pompidou Group, 6 June 2019.

¹¹ See appendix, AROD complaint to the ECtHR, 9 May 2019.



organizations and we wish to help the Committee properly chart constitutional waters, so that the perspective of first principles can be drawn upon.

For half a century, humanity has suffered, blinded by the logic of fear and the power of exaggerated enemy images. Yet, with the passing of time it has become more evident that reversing the liberty presumption, as countries did in committing to the ideal of a drug-free world, was a mistake. Not only do we know that criminalization has been ineffective in curbing the supply and demand of illicit drugs; we also know, as the introductory memorandum notes, that 90 percent of drug users are well-functioning, normal citizens, and that prohibition only makes life more challenging for them and hardcore users.

As this recognition dawns, nations are moving away from the prohibition paradigm. Even so, they have yet to discover that behind the principles of harm-reduction are the first principles of human rights and that a human rights analysis will stop the prohibition regime dead in its tracks. For psychological reasons, this is difficult to admit, and so societies continue to rely on the scapegoating mechanism, persecuting drug law violators to feel better about themselves.

Nevertheless, as is easy to prove, only a moral panic and exaggerated enemy images maintain the credibility of the prohibition experiment. In summary, it is another mass-movement gone wrong, and the rule of law will mean nothing if society persists trying to define human rights law on prohibitionist terms.

Even in the history of man, it is hard to find a campaign more clearly incompatible with the demands of first principles. Professors of law have elaborated upon this for decades and our report *Human Rising* already does what the report of the Committee for Legal Affairs and Human Rights sets out to do—describe, “through concrete examples, how human rights standards increasingly form an integral part of drug policy development in member states”.¹² It also elaborates on the gap between human rights commitments and realities on the ground, and unless its findings are shown to be erroneous, it sets the standard for any baseline on drug policy and human rights.

Hence, your committee should focus its efforts towards (1) refuting its conclusions, or (2) build on this as a framework for the recommendations of your report.

The Way Forward

In our opinion, this is the only way to maintain the integrity of the assignment. If your report fails to deal with the implications of our report it may still be a small step forward, but it will also be another document that hides a more sinister reality of oppression, one that by omission validates unjust persecution and arbitrary imprisonment on a massive scale.

No one is served by this. If we are right, history will not be kind to those who fail their responsibility to humanity at this critical time, and as the COE’s 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.

From your discoveries, it should be clear that only an increasing resonance between policy and first principles will end the problem of “parallel universes”. Without this firmly in place as

¹² Introductory Memorandum to the Committee on Legal Affairs and Human Rights, *Drug Policy and Human Rights in Europe: A Baseline Study*, AS/Jur (2019) 25, p. 3



a foundation for drug policy, we will only delude ourselves as to the nature of our quest, thereby ignoring serious wrongdoing and higher potentials. And while it takes courage, in times of moral panic, to stand with first principles, the test of reason vindicates the brave.

This is why the rights-oriented paradigm is moving forward. And having already questioned the drug-free ideal, we see no reason why your report should not draw the obvious conclusion that it is not only “unrealistic” but the engine behind human rights violations in the area of drug policy. Indeed, the dream of a drug-free world has justified everything from denying drug users autonomy rights, to the imprisonment of millions, to the murder of innocent bystanders, and as an organization dedicated to the rule of law, we will assist in any way we can in helping the COE deal with this matter efficiently.¹³ At this point, however, to ensure that the report meet its objectives, our advice is to pay due attention to the five questions we have raised.¹⁴

Because the liberty presumption puts the burden on the state to prove that drug prohibition is necessary in a democratic society, these questions must be answered to the satisfaction of an independent, impartial, and competent tribunal, and while it is unlikely that you will see much effort from government, the proper line of proceedings would be to give them some time to respond to these allegations. If they continue to stall, however, you should leave their argument without merit and ensure that the report states the obvious: that the emperor has no clothes and that states have a responsibility to end this regime of unjust oppression.

It goes without saying that systemic inertia will resist this conclusion. No doubt, vested interests will object to human rights analysis for fear of being called out. Nonetheless, the fate of some 40 million European drug users is in your hands; the rule of law demands a resolution, and the COE’s authority rests upon your ability to deal with this situation.

To further support this argument, we provide a copy of our communication with the European Court for Human Rights. It elaborates on the implications of principled reasoning, and we hope that this brief has been helpful, providing some perspective on how to best ensure policies compatible with human rights.

To conclude, we thank you for your time and the sincerity with which you have taken on this task—and as the progression of our society depends upon the extent to which institutions like yours adapt to emerging knowledge, we pray that you have the courage to stand with first principles against the moral panic that has swept nations and ravaged communities.

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

¹³ If you want a full run on the rights-oriented debate, our website www.arodpolicies.org also provides a complete guide.

¹⁴ MIKALSEN, *HUMAN RISING: THE PROHIBITIONIST PSYCHOSIS AND ITS CONSTITUTIONAL IMPLICATIONS* (2019) 13.2.3