

UNDERMINING CONSTITUTIONALISM IN THE NAME OF POLICY: THE CONSTITUTIONAL COSTS OF THE WAR ON DRUGS

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Public policies are supposed to be transitory measures meant to face and solve public problems. Constitutional design, by contrast, involves permanent decisions adopted to rule the inner workings of the polity and its government. Although policy is most often imagined as transitory and constitutional law as permanent, some policy decisions reconfigure constitutional design permanently. This Article proposes a new analytic framework for rendering visible and understanding the impact of policy decisions on constitutional design. We call this framework “constitutional costs,” simultaneously pointing to the fields of constitutional law and policy analysis. Transcending the categories of constitutionality or unconstitutionality of a legal change or policy allows for a more robust critical assessment of the constitutional implications of policy decisions. We posit that, independently of their constitutionality, policy decisions and their consequences can come into tension with existing core constitutional commitments, significantly undermining them. Understanding how these dynamics play out in a long chronological arch is complex but important, for they can significantly change the way a constitutional system works, even if the depth and breadth of the changes are not acknowledged as they are adopted and implemented.

By looking in detail at the war on drugs—a complex policy—in two salient case studies—Mexico and Colombia—we flesh out our analytical proposal and exemplify how it can be deployed. The Article focuses on two case studies, but it does not purport to limit the analysis of constitutional costs to either of those two countries, or to the specific “war on drugs” policy. We offer these case studies so as to simultaneously illustrate the applications of the framework and lay the groundwork for comparative analysis of constitutional costs.

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INTRODUCTION

This Article proposes a new analytic framework for tackling a specific phenomenon that has gone virtually unnoticed: the undermining of key aspects of constitutional design in countries across the hemisphere in the name of the war on drugs. In the heterogeneous context of the Americas, policies adopted in the attempt to suppress illicit drug markets have required or justified complex legal reforms, as well as changes in institutional practices and design. These reforms have common patterns. When laid out and compared across countries, the emerging patterns should concern anyone committed to constitutional government: key aspects that lie at the core of constitutionalism—such as civil rights and systems of checks and balances—seem under siege. Changes adopted in the name of policy have deep constitutional repercussions. Because these changes are cast as policy choices, they remain off the radar of constitutional scrutiny. The analytic framework we propose seeks to make these patterns and their consequences visible and comparable and to provide a normative basis—one that is not strictly legal but is still grounded in constitutional law—from which to critique them.

We have chosen to call these phenomena “constitutional costs” and will flesh out the concept in this Article.¹ As far as possible, we

1. During the presentation of this framework at Yale Law School’s Human Rights Workshop in January 2018, Owen Fiss correctly—and critically—pointed out that the

propose that the framework for thinking through these phenomena be comparative. In this Article, we begin with the Mexican and Colombian cases.²

Before jumping into the two case studies, we first need to explain the theoretical underpinnings of “constitutional cost.” Consequently, this text is divided into two parts. In the first Part, we examine the “theoretical layers” involved in understanding what a constitutional cost is and why it is important, identifying the fields of knowledge that we draw from. We want to make clear that the purpose of this platform is for it to be used in further case studies regarding the war on drugs and its aftermath for the constitutional systems wherever it is

choice of words seemed more a concession to the jargon of the public policy field than a choice grounded in constitutional theory. He suggested it be substituted by “constitutional degradation” or other, stronger words in order to do justice to the breadth and depth of harm done to the constitution in Mexico. While we are open to both critiques and suggestions, we have decided to hold fast to the original label for several reasons. First, the work is rooted in interdisciplinary dialogue with colleagues working in the field of public policy—concretely in drug policy—and we hope to influence and continue to participate in cross-over discussions, so using jargon that is other-field-friendly seems correct. Second, (hopefully) not all constitutional costs will warrant the term “degradation” as the Mexican case seemingly does. Finally, previous work has already been published using the term, and we would like to wait until further case studies evolve before revising and further theorizing the analytic framework and its nomenclature. We do want to thank and acknowledge Professor Fiss’s critique and his effort to keep us (and lawyers) honest. Alejandro Madrazo, Professor of Law at the Ctr. for Econ. Research and Teaching in Aguascalientes, Mex. and Schell Ctr. Visiting Fellow, *The Constitution as a Casualty of War (On Drugs)*, Address at the Yale Law School Human Rights Workshop (Jan. 18, 2018).

2. We chose Mexico and Colombia for several reasons. First, both countries are relatively salient in the international drug market. Second, both countries have undertaken vigorous deployment of prohibitionist policies encompassed under the “war on drugs,” including major reconfigurations of key aspects of each country’s constitutional arrangements. Third, there are similarities in the discourses deployed in justification of the “war on drugs,” from the more sophisticated to the less reflective and dependent on tropes. Finally, Mexico and Colombia are most accessible to us, and, therefore, we deemed we could undertake more robust case studies.

Nevertheless, the United States is a natural candidate for application of the framework because some of the dominant critiques of U.S. drug prohibition frame the policy as a “constitutional cost.” See Alejandro Madrazo Lajous, *The Constitutional Costs of the ‘War on Drugs’*, in ENDING THE DRUG WARS: REPORT OF THE LSE EXPERT GROUP ON THE ECONOMICS OF DRUG POLICY 55, 59 (2014), <http://www.lse.ac.uk/ideas/Assets/Documents/reports/LSE-IDEAS-Ending-the-Drug-Wars.pdf> (providing a very brief exercise in applying the constitutional costs framework to the United States).

More interestingly, the exploration of the impact of the war on drugs on racial discrimination—arguably the key concern of American constitutionalism throughout the second half of the 20th century—is already a mainstream topic in American constitutional literature since the publication of Michelle Alexander’s book. See generally MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2012).

deployed.³ Also, we want to explain and justify its usefulness when compared with other possible frameworks that could be deployed, such as analyses that seek to determine whether a policy is constitutional or not, and theories of constitutional change. Accordingly, we will explain the benefits and shortcomings of our proposed framework when compared to these alternatives. In the second part of the Article, we present our two case studies, Mexico and Colombia. Finally, we offer some conclusions.

This Article is meant to be one step in a broader project aimed at fully fleshing out the impact of the war on drugs on constitutional regimes across Latin America and the United States. Previously, a predominantly case-by-case exploration of the Mexican case was undertaken.⁴ This Article moves beyond that initial step, by elaborating on and applying the concept of constitutional cost. It also shifts the exercise to comparative terms by introducing the Colombian case. As other regions and countries—in Latin America and beyond—are studied, the framework will require adjustment to issues that may emerge as each country's constitutional costs come into focus. The Article closes by inviting a discussion of the development of the framework for an amplified comparative exercise.

Let us first disclose where we are coming from and where we want to go. Our countries—Mexico and Colombia—are immersed in the core of a war on drugs launched by the United States government but carried out, by and large, in the territories and populations of other countries. In order to better wage this “war,” our governments have adopted legal and institutional changes that run deep and have dramatically changed our internal constitutional arrangements. The war on drugs is presented as a militarized and bellicose version of drug prohibition. The changes we refer to are therefore changes adopted in the name of a public policy. When introduced, they are championed as necessary means to the end of enforcing that policy.

These policy changes have had a substantive impact on the constitutional arrangements of Mexico and Colombia, often undermining constitutional systems that had long been cherished and have not been

3. In the years in which we have worked on this project and presented it in various fora, we have come to believe that there is no reason to limit its use to the war on drugs. Any policy choice with significant and understated constitutional consequences is amenable to its deployment.

4. ALEJANDRO MADRAZO LAJOUS, CENTRO DE INVESTIGACIÓN Y DOCENCIA ECONÓMICAS REGIÓN CENTRO, *LOS COSTOS CONSTITUCIONALES DE LA GUERRA CONTRA LAS DROGAS: UNA PRIMERA APROXIMACIÓN (DESDE MÉXICO)* [THE CONSTITUTIONAL COSTS OF THE WAR ON DRUGS: AN INITIAL APPROXIMATION (FROM MEXICO)], 2014.

renounced. Given this history, we first approached the war on drugs with critical normative interest. As constitutional lawyers, we thought that the policies associated with the war on drugs were unconstitutional. Many of these policies, however, have been etched into the constitutions of our countries and therefore can no longer be critiqued from the usual framework of constitutional validity. A new framework is needed to critique these policies: one that permits a normative stance and extends beyond the strict confines of assessing constitutional validity but is still grounded in constitutional law. While the critique we offer is constitutional, it is not entirely focused on constitutional validity.

With this background in mind, we can state what our proposed framework is and what it is not. Our framework is a normative theory, not a descriptive one. We want to take a critical stance on the phenomena we identify as constitutional costs, not just register them. Our grounding for exercising critique, however, is a *moment* in the life of a constitutional system, not an exogenous normative parameter (such as natural law, international law, or some form of higher law). We want to critique *what is* from the perspective of *what has been*. In that sense, it is a *conservative* normative framework. It presumes that sustaining constitutional commitments is valuable unless there is a deliberate and deliberated abandonment or curtailment of that commitment. This diachronic perspective, however, is not adopted to register change, but rather to expose deviation.⁵ We do not offer a theory about constitutional change,⁶ but rather of constitutional pathology. It is a specific type of pathology we want to explore: one preoccupied with political identity, not an ideal constitutional model. We are not interested in tracing the tracks of change, but in pointing out the changes that happen inadvertently, without a clear, conscientious trace to signal their presence or a coherent track to guide their development.

Ours is a normative framework, but not one contributing to a traditional legal analysis. We are not interested in questioning the validity of constitutional changes, but rather in marking their introduction and critiquing the impact they are having on the constitution. The traditional dichotomies of constitutional validity are not useful be-

5. As we will explain, this means that a synchronic analysis of constitutional costs is also possible when the undermining element introduced into the system is somewhere other than in the constitution itself. We emphasize the diachronic, however, in order to avoid confusion between an analysis of constitutional cost and an analysis of the constitutionality of a legal rule.

6. We should, however, say that our framework can be used as a contribution to a theory of constitutional change for those interested in descriptive exercises of how changes can come about inadvertently.

cause several of the changes we critique are, by most—if not all—parameters, valid constitutional changes. Most of these changes can, however, *also* be subject to a test for constitutionality. But that is not the task at hand.

I.

CONSTITUTIONAL COSTS

The idea of a constitutional cost stands on a network of theories that are not commonly brought into dialogue with each other. We must therefore first address the specific epistemic context in which we intend to work: which field (or fields) of knowledge interests us? What do we mean by “constitutional” when speaking of “constitutional cost”? We then move on to the second prong of the concept: the notion of “cost.” What is a “cost” in the “constitutional” field? Finally, we unpack how the idea of a constitutional cost can be deployed and how to identify and understand it.

A. *Where Does the “Constitutional” Lie?*

The “constitutional”—for our purposes—is located at the intersection between the fields of law and politics. What does this mean? In what sense do we understand certain phenomena as touching upon the legal field and in what sense do we understand them as pertaining to the realm of politics? Above all, we must clarify why we want to work at the intersection of both fields, instead of exclusively at one or the other.

When we speak of “constitution” and “constitutional cost”, we say something about certain types of norms. We are not interested in the role these norms play within a normative system—for instance, the top of the normative hierarchy or the source of validity for other norms—but rather in something that transcends the strictly legal: the role these norms play in identifying and signifying a political community.⁷

We are interested in legal norms as constitutive of collective identity. A constitution serves as terms of reference to—more precisely, if redundantly, it is constitutive of—a community’s collective identity. It does so in at least two ways. First, a constitution identifies the border of the political community, “the other” (those who do not belong to the community). Second, it provides cornerstones for cohe-

7. HANS KELSEN, *PURE THEORY OF LAW* 101-44 (1959); *see generally* ROLAND TAMAYO Y SALMORÁN, *INTRODUCCIÓN AL ESTUDIO DE LA CONSTITUCIÓN* [INTRODUCTION TO THE STUDY OF THE CONSTITUTION] (1998).

sion around a common experience. Hence, a constitution defines simultaneously the boundary between “us” and “them,” and also tells us what “we” are (other than not being “the other”).

Constitutions define boundaries of the political community. They allow us to draw the line between “friend” and “enemy”—the epicenter of politics, according to Carl Schmitt.⁸ Schmitt argued that any sphere of human life—religious, moral, economic, technical, and so on—in which confrontation takes place has the potential to become political if the confrontation is strong enough to effectively group men into friends and enemies.⁹ Yet he also argued that it is not necessary for confrontation to take place for the political to appear; a possibility of confrontation that allows for differentiating friends and enemies, be they actual or potential, suffices.¹⁰

Constitutions often specify—in legal terms—who participates in the political community, known as “nationals,” and who does not, known as “foreigners.” Constitutions, therefore, identify the potential for conflict—the distinction between (presumably) friends and (potential) enemies. But constitutions provide more than borders to the political community: they also provide the axes around which collective identity is built.

Legal order is, in modern states, the key reference of collective identity. In political communities that are not a “nation” in the original sense of the word (that is, as collectivities sharing a language, ethnicity, religion, or origin that distinguish them from others), the legal order lies at the core of political identity. Paul Kahn holds that the trans-temporal and communal subject we imagine as “the Nation” comes into existence through the legal order, not vice versa.¹¹ There is not a preexisting community and a trans-temporal subject first, which produces a legal order, even though the shared experience of a legal order allows us to pretend (believe) that such a subject exists.¹² The legal order binds us by establishing common normative references. Quoting Lorenz von Stein, Schmitt notes that, in the constitutional

8. CARL SCHMITT, *THE CONCEPT OF THE POLITICAL* 26 (George Schwab trans., The University of Chicago Press 1996) (1932).

9. *Id.* at 37.

10. *Id.*

11. PAUL W. KAHN, *THE CULTURAL STUDY OF LAW: RECONSTRUCTING LEGAL SCHOLARSHIP* 30 (1999).

12. “There is not first a transhistorical, communal subject who decides to maintain a common past. There is only the experience of law’s rule that shows itself ‘as if’ it was the extended temporal experience of a single subject. We come to this communal subject through law, not vice versa.” *Id.* at 45.

state (as opposed to, among others, the Nation State), the constitution constitutes “the existence of society itself.”¹³

To understand why a *chiapaneca* (from the southern border state of Chiapas, Mexico) sees herself as part of the same political community as a *sonorense* (from the northern border state of Sonora, Mexico), but not a *guatemalteca* (from Guatemala, across the border from Chiapas), we cannot look to traits such as cuisine, language, religious practice, history, or ethnicity. All of these are realms in which the *chiapaneca* has more in common with the *guatemalteca* than with the *sonorense*. The *chiapaneca* shares with the *sonorense* a common acceptance of a single authority: Mexico’s popular sovereign. This acceptance, in turn, allows them to imagine a common past and project it into the future. Sonora and Chiapas accept the jurisdiction of (some of) the same authorities, but that is not what makes them part of the same nation. What does the trick is their imagined common source of both their shared (federal) authorities and their not-shared (state) authorities. Guatemala does not share that common source of authority. Culturally, Sonora is closer to Arizona and Chiapas to Guatemala. Yet Arizonans and Guatemalans are foreigners while the *chiapaneca* and the *sonorense* are co-nationals. The legal system (more precisely, its imagined source, the popular sovereign) is the parameter through which we identify the boundary between “us” and “them” and thus establish the political community.

Constitutions establish the borders of the political community but also offer content for what lies within those borders. As a set of rules, constitutions are not only political, but also legal. They are (collections of) legal rules and, as such, establish and reflect values, aspirations, and canons by which we assess behavior and circumstance. These values, aspirations, and canons are axes around which we flesh out our collective identity. Mexicans from Sonora and Chiapas share a commitment to a universal human right to health; Arizonans do not.¹⁴ Arizonans cherish the right to bear arms, but Sonorans do not.¹⁵

13. SCHMITT, *supra* note 8, at 47.

14. Constitución Política de los Estados Unidos Mexicanos, CPEUM, Diario Oficial de la Federación [DOF] 05-02-1917, últimas reformas DOF 10-02-2014 (Mex.), <http://www.senado.gob.mx/comisiones/cogati/docs/CPEUM.pdf> (last visited Jan. 17, 2019).

15. U.S. CONST. amend. II.

B. *From “Constitutional” to “Cost”: Principles and the Undermining of “Constitutional Commitments”*

Apart from content, the legal dimension of the constitution bridges between the issues pertaining to identity of the political community and the idea of “cost.” To explore this bridge it is useful to revisit the distinction between two types of legal norms: rules and principles. This distinction allows us to understand how a legal or institutional change represents a cost in normative terms. Let us first recall the distinction between rules and principles.

Perhaps the most influential articulation of the distinction between rules and principles was the distinction proposed by Ronald Dworkin. In *The Model of Rules*, Dworkin criticizes theorists who reduce legal rules to coercive mandates and explains that there are different types of standards (we use the term “norm” to refer to what Dworkin refers to as a “standard”).¹⁶ The two fundamental types of norms are rules and principles.¹⁷ The distinction lies in the way rules and principles work. The rules imply a binary application: if the rule is applicable, it produces a specified consequence as a result. If the rule is not applicable, it produces no consequence. If a set of facts fit the hypothesis that the rule establishes as a condition for its application, then specific consequences follow.¹⁸ Rules allow for exceptions, but these must be understood as part of the rule itself. That is, the complete standard (or norm) would be articulated by stating the exceptions.¹⁹

In contrast, principles do not establish either specific hypotheses that render them applicable, nor do they establish specific consequences if they are infringed. They do not incorporate their own exceptions. Principles indicate the sense in which a legal problem can be solved, but they do not demand a specific solution.²⁰ This implies that

16. Ronald M. Dworkin, *The Model of Rules*, 35 U. CHI. L. REV. 14, 14-46 (1967).

17. *Id.* at 22-23. It is important to note that, by “principles,” Dworkin refers generically to regulatory standards, as opposed to the rules, and not just “principles” strictly speaking. *Id.* Dworkin defines “principles” as a standard that is observed “because it is a requirement of justice or fairness or some other dimension of morality.” *Id.* at 23. That is, he includes various standards of conduct that operate logically in the same way as principles and, therefore, speaks of them all generically as “principles.” *See id.* For example, Dworkin includes policies (*policy*) within the category of “principles,” but also “other standards” are included in such concept. *See id.* at 22-23. We will forward-draw the distinction between policies and principles, strictly speaking, since it is important to understand the space occupied by “the constitutional” between “the political” and “the legal.” *Id.* at 23.

18. *Id.* at 25.

19. *Id.*

20. *Id.* at 26.

they do not apply in a binary manner and, accordingly, they influence the solution of a legal problem to different extents, depending on the case. According to Dworkin, principles have weight or importance that can be balanced against other principles.²¹

When two rules clash, only one of them can be applicable, and, hence, the other one must be reconfigured or discarded.²² Different techniques can be applied to determine which rule should prevail when conflict arises: specificity, rank, subject matter, temporality, and so on.²³ In contrast, the function of principles is not to determine, but to guide the result of the legal qualification of conduct.²⁴ Consequently, if principles contradict each other or a rule, a principle's "weight" may be insufficient for it to prevail over the other.²⁵ The principle is still valid and applicable. For Dworkin, the principles guide the decision, but "survive intact" if they do not prevail in a specific case.²⁶ That principles survive "intact" even if they do not prevail is something we want to distance ourselves from because, as we will argue, principles *are* undermined—they may survive, *but not intact*—if they fail to prevail often enough or in sufficiently relevant aspects. This is where the cost lies.

Dworkin further distinguishes within the category of "principles." Principles, broadly understood, include policies, principles "and other sorts of standards."²⁷ For Dworkin, policies are standards that set out goals to be achieved. In contrast, principles, strictly speaking, are standards to be observed because "justice, fairness or some other dimension of morality" requires them.²⁸ This second, specific notion of "principle" is where constitutional costs operate.

We now have all the pieces of the puzzle that are needed to explain constitutional costs. A "constitutional cost," we hold, is the undermining of a "constitutional commitment." By constitutional commitment we refer to principles in the strict sense²⁹ that allow us distinguish between friend and enemy (e.g., the *jus soli* or *jus sanguinis* to ascribe citizenship) or to pinpoint what constitutes the

21. *Id.* at 27.

22. *Id.*

23. *Id.*

24. *Id.* at 36.

25. *Id.*

26. *Id.*

27. *Id.* at 22.

28. *Id.* at 23. It is important to keep in mind that Dworkin clearly establishes that the distinction between policy and principle (strictly) can collapse depending on the formulation given to one or the other. *See id.* at 22-23.

29. They may be linguistically articulated as rules but operate logically as principles. They have a non-binary form.

core of the collective identity of Kahn's trans-temporal entity³⁰ (e.g., federalism in the Mexican case; centralism in the Colombian case; or the secular, democratic, representative, and republican nature of the State in both cases).

Principles can be understood—as Dworkin understands them—as pertaining to the realm of morality; that is, as required by justice or fairness. By contrast, we are interested in understanding principles as *political*—that is, pertaining to the collective identity—rather than moral, and as normative and value commitments that constitute the core of the polity's collective identity. Principles are required by, and constitute, the polity, regardless of whether justice or fairness are involved. A polity may be unfair, but it cannot be something other than itself. Constitutional commitments can appear as an explicit affirmation of a value, as for example by making health a right. They can also be a guiding principle of the organization of government, for example federalism or checks-and-balances. Finally, they can serve as principles to guide the interpretation of the rules contained within the legal order, as for example the principle of progressiveness of fundamental rights.

It is against constitutional commitments that constitutional costs are tallied. When commitments are undermined they do not remain “intact,” as Dworkin would have it. In fact, if costs undermine commitments enough—as the case studies will show—they may lead to a complex reconfiguration—or, more precisely, disfiguration—of the political communities themselves. In the same manner as the constitutional commitments of a system—understood as the most cherished principles of a legal order³¹—reinforce and support each other, the constitutional costs that undermine and erode them can come to support and reinforce each other. If the constitutional costs are sufficiently pervasive and sustained, constitutional commitments may cease to be sustained. If so, constitutional change has occurred. Then there is no use crying over spilt milk, but our theory of constitutional costs wants to enable crying over milk in the process of being spilt, with the hope that it may move us to contain it.

C. “Cost”: *The Undermining of “Constitutional Commitments”*

Economists have, first and foremost, taken up the study of costs. Economics has provided concepts based on cost that have had wide

30. KAHN, *supra* note 11, at 45.

31. See Dworkin, *supra* note 16, at 41 (discussing Dworkin's view of the basic principles of a regime).

impact, such as cost-benefit analysis³² or transaction costs.³³ Cost is regarded as a burden that implies efforts and privations of various kinds. The minimization of cost is to be sought whenever possible. The notion of costs is not reduced to accounting: on the contrary, with the prevalence of inter- and intra-disciplinary analysis, it has been increasingly common to speak of, for instance, social cost,³⁴ political cost,³⁵ and ecological cost³⁶ as examples of the various dimensions that costs may assume in the institutional arena.³⁷ Hence, multiple fields of knowledge, such as engineering, economics, accounting, sociology, political science, history, and law, have shaped the study of costs.

We define “constitutional cost” as the undermining (affectation, suppression, or erosion) of a normative commitment identified as constitutional in the manner of the previous section. Importantly, this undermining must be neither explicit nor deliberate to be considered a constitutional cost. If an undermining change is deliberate, it is not a constitutional cost. It should simply be read as a change. Constitutional costs appear with the introduction of rules or counter-principles that undermine a constitutional commitment of a polity *without revising or rejecting the affected constitutional commitment*. This is why our framework is not a theory about constitutional change. Constitutional change comes about with the renouncement or conscientious reformulation of constitutional commitments. Constitutional costs oc-

32. See Barry Bennett, *Cost-Benefit Analysis, the Market, and Political Legitimacy*, 23 U.S.F. L. REV. 23, 24 (1988). This notion means that the analysis should weigh the costs and benefits of a particular state action. *Id.* The ratio between the costs and the benefits will determine whether such action will result in a net social gain or loss. *Id.*

33. See DOUGLASS C. NORTH, INSTITUTIONS, INSTITUTIONAL CHANGE AND ECONOMIC PERFORMANCE (1990) (providing a classic study on institutional economics).

34. See generally, R. H. Coase, *The Problem of Social Cost*, 3 J. L. & ECON. 1 (1960).

35. See generally Stephanie Álvarez & Angelika Rettberg, *Cuantificando los efectos económicos del conflicto: una exploración de los costos y los estudios sobre los costos del conflicto armado colombiano* [*Quantifying the Economic Effects of Conflict: An Exploration of the Costs and the Studies on the Costs of the Colombian Armed Conflict*], COLOM. INTERNACIONAL (Colom.), Jan.-June 2008, at 14; Geoffrey McNutt, Note, *Formal and Functional Approaches to Separation of Powers: The Political Cost of Check and Balances in Nixon v. United States and Morrison v. Olson*, 2 GEO. MASON L. REV. (STUDENT EDITION) 281 (1995).

36. See generally Esteban G. Jobbágy et al., *Forestación en pastizales: hacia una visión integral de sus oportunidades y costos ecológicos* [*Grassland Afforestation: Towards an Integrative Perspective of Its Ecological Opportunities and Costs*], AGROCIENCIA (Uru.), no. 2, 2006, at 109.

37. See generally STEPHEN HOLMES & CASS R. SUNSTEIN, *THE COST OF RIGHTS: WHY LIBERTY DEPENDS ON TAXES* (1999) (analyzing the scope and limits of the civil rights protection in democratic systems from a cost evaluation perspective).

cur when there is no explicit renouncement or reformulation of the commitment: when the commitment is simultaneously upheld yet undermined.

If the adoption of rules or counter-principles considered to be a cost leads to a conscious, open rejection or reformulation of a constitutional commitment, then the concept of constitutional cost may contribute to a theory of constitutional change. But we are not interested with change as the end-point of the process. Change may or may not come about. Rather, we are interested in understanding the process of undermining constitutional commitments either *before* they lead to a constitutional change or, more to the point, when they *do not* lead to such a change. It is when a policy is a *burden* to the constitutional commitment that it can be deemed a cost. It requires *efforts* to accommodate the means through which the policy pursues its ends. It implies the *privation* of the full realization of a collective commitment. Purportedly, these efforts, privations, and burdens are transitory, as a policy is meant to address a public problem and then retract when it is solved. When a policy is acknowledged as a permanent change, valued in and of itself, then it is no longer a burden, but a decision. If drug prohibition renounced its objective of achieving a “drug-free world” and instead assumed its role to simply repress a portion of the population who chooses and will continue to choose to use drugs, then prohibition would no longer be a policy but rather a regime that discriminates against drug users.

One can argue that prohibition is already that, as Michelle Alexander does in *The New Jim Crow*.³⁸ Alexander makes the case that the war on drugs is a substitute for Jim Crow, where drug-use serves as a proxy for skin color.³⁹ Even if we subscribe to this thesis—which we do—the fact that prohibition *presents* itself as a *policy* to achieve a drug-free world and not openly as a regime upholding racial discrimination makes it impossible to defend it as anything but a *policy* choice. The proponents of prohibition policy would disclose too much if they acknowledged it as a *regime* choice. While they refrain from doing so, these prohibition proponents can be held accountable from the perspective of a constitutional regime they nominally support, which happens to ban discrimination, not drugs.

It may be relevant to clarify that the location of the constitutional commitment—constitutional text, bill, bylaw or even institutional practice—is secondary. What is key is continued commitment. We

38. ALEXANDER, *supra* note 2, at 199.

39. *Id.* at 181, 185-90.

presume the affected constitutional commitment survives but is significantly undermined. Revising or rejecting a constitutional commitment—for example, renouncing a presidential system of government in favor of a parliamentary system of government, or renouncing federalism in favor of a centralist regime—should not be brought under the lens of constitutional cost. In the above examples, the constitutional commitment itself has been abandoned and is no longer part of the constitutional system. If we are no longer committed to that value or principle, then the effort to accommodate whatever is undermining it cannot be deemed as a cost.

It may be helpful to underscore the difference between “cost as a result” and “cost as a process.”⁴⁰ Cost analysis can focus on the *result* of a process. This may often be the case from an economic perspective. Focusing on outcome relegates the mechanisms and complex chains of actions that make something a burden and may also obscure the history and context of the cost. Instead of thinking of cost analysis as exclusively focused on the end product, in which the process is a “black box,” we try to approach it as a process that produces results gradually. This perspective allows us to link specific episodes, events, or decisions that at first glance may seem timely or spatially disconnected.

D. *Constitutional Cost: Process or Product?*

As we mentioned, unlike Dworkin, we believe that when principles are repeatedly defeated, they do not remain intact, oblivious to the weathering of space and time. The frequent undermining or defeat of a constitutional commitment, be it permanently etched onto the system or recurrently introduced, erodes the principles’ *weight* and, we warn, may eventually render the principles void. It is the maintenance of constitutional commitments that gives continuity to the political community as a trans-temporal entity.⁴¹ Attrition weakens commitments and may render them irrelevant. Attrition disavows constitutional commitments even if they are not renounced, for it drains their authority. When this happens, the identity of Kahn’s trans-temporal entity⁴² is altered: a political community may still exist, but because boundaries and normative commitments that furnish it with identity and cohesion are eroded, it will be a different, maybe even unrecognizable,

40. See STATHIS N. KALYVAS, *THE LOGIC OF VIOLENCE IN CIVIL WAR* 11 (2006) (recognizing the distinction in classifying violence according to the process that leads to it and the result it produces).

41. See KAHN, *supra* note 11, at 43-55.

42. KAHN, *supra* note 11, at 45.

political community. The constitutional cost, at its extreme, may result in a reconfiguration—or, more precisely, disfiguration—of the political community altogether. It is here that we may need to abandon the technocratic language of cost and speak of constitutional degradation.⁴³

Rendering irrelevant a constitutional commitment without abandoning it is the extreme case of a constitutional cost. Costs, however, can be understood as a process, not only as a result, Kalyvas tells us.⁴⁴ The erosion of a constitutional commitment may (or may not) lead to such an extreme. But if we want to be alert to the process as it is unfolding, we must tally the more immediate results, which together configure the process of undermining constitutional commitments.

This makes for different possible deployments of constitutional cost as an analytic tool. It is useful for identifying and critiquing processes and for identifying and analyzing a result. When, however, must we speak of constitutional change rather than cost? When and if the constitutional commitment is no longer upheld, even nominally, we can speak of change.

So how do we identify a constitutional cost? Let us recapitulate and make explicit the parameters of the framework. A constitutional cost does not refer to the abandonment of a constitutional commitment. When, for example, the Mexican legislators drastically modified the constitutional regime of oil ownership renouncing exclusive public exploitation of that resource⁴⁵—one of the key constitutional commitments of the twentieth century—by openly discussing and approving constitutional amendment, concluding that the previous regime was inadequate and needed to be replaced, there was constitutional change, not constitutional costs. Although a normative commitment that provides content to the trans-generational political project has changed, such change is not a “cost” because there is a conscious decision to give up a specific normative commitment and replace it with another. In contrast, as we shall see, when a particular commitment stands or is reaffirmed (e.g., due process), but measures that are inconsistent with it are adopted (e.g. *arraigo*), we are facing a constitutional cost, which undermines that commitment that is (at least formally) sustained.

43. This is when Fiss’s call for a more emphatic nomenclature should be heeded. See FISS, *supra* note 1; KAHN, *supra* note 11, at 1.

44. KALYVAS, *supra* note 40.

45. Decreto por el que se reforman y adicionan diversas disposiciones de la Constitución Política de los Estados Unidos Mexicanos, en materia de energía, art 28, Diario Oficial de la Federación, [DOF] 20-12-2013 (Mex.), http://dof.gob.mx/nota_detalle.php?codigo=5327463&fecha=20/12/2013 (last visited Jan. 17, 2019).

The idea of a constitutional cost does not speak of the constitutionality or unconstitutionality of norms or actions. Given that constitutional costs can come in the form of constitutional amendments, they cannot be regarded as infringements of the constitution and its principles (including constitutional commitments). Formal constitutional amendments, by definition, cannot contravene the constitution. This is where the diachronic perspective is necessary in making visible and assessing constitutional costs. One must observe a constitutional commitment *before* a constitutional amendment is adopted and juxtapose it with itself *after* the amendment is passed. The contrast that arises from such juxtaposition is the constitutional cost of the constitutional amendment.

Other constitutional costs do not require a diachronic perspective: changes in law or practice may undermine constitutional commitments yet remain part of the legal system. In such cases, the change could be deemed unconstitutional, but until it is actually declared so by the corresponding authority, it undermines the constitutional commitment and so can be analyzed as a constitutional cost. Here, the juxtaposition needed to expose the constitutional cost can be synchronic: the constitution is brought before the ordinary legal texts or practices that undermine it. It is not the formal status of a law—whether it is constitutionally valid—that is relevant for an analysis of constitutional costs. What is relevant is the effect it has on a constitutional commitment, independently of whether it is deemed unconstitutional or constitutional at some point. Until the law is qualified as unconstitutional, it undermines a constitutional commitment. As long as the measure adopted in the name of policy undermines a constitutional commitment, we can analyze it as a constitutional cost and contrast the current situation with the situation prior to its introduction and so it is a *normatively* diachronic exercise, even if the two elements in tension—constitution and law—can be contrasted synchronically. It is the situation *prior to the introduction of the measure* that serves as a canon for critiquing the measure and concluding it has costs.

It is key that changes that undermine constitutional commitments be adopted as a *means to an end*: that is, as pursuant to an end different from themselves. If changes are ends in themselves, then we do not face a burden—a cost—but the introduction of a conflicting value. A political community may wish to abandon certain constitutional commitments, or it may adopt new ones that it does not fully realize conflict with its already established commitments. A theory of constitutional costs is not tailored for such scenarios. What we want to make visible is the mismatch between the importance given to the under-

mining measure—a means to an end—and a constitutional commitment: an end in itself at the core of the political community. Constitutional commitments are foundational to a political community, and policy choices, in theory, are not. Policy choices are decisions taken to address more or less contingent problems the political community faces. Policy choices should not trump constitutional commitments, much less so the measures adopted as a means to achieve the policy objectives. If any such measure undermines a constitutional commitment, it needs to be addressed accordingly, lest it trump the constitutional commitment. As a political community, we may be willing to shoulder the cost, but at the very least we should understand it as a cost and decide to bear it. As long as there is no explicit renunciation of the affected constitutional commitment, and the commitment is undermined by a measure justified as instrumental to a policy objective, it falls within the scope of a theory of constitutional costs.

The war on drugs involves a myriad of measures adopted as means to achieve a policy goal, namely a drug-free society. When these measures undermine our constitutional commitments, we must tally this cost as part of the costs of the war on drugs.

One last note on the framework: the notion of constitutional costs was first thought to address the drug war, but it could just as well be brought to bear on other policy choices. For instance, an international treaty—such as NAFTA—is adopted as a means to further a policy choice, namely free trade. If that adoption requires or implies undermining constitutional commitments—constitutional labor rights, for instance—then it could be subject to this framework.

II.

THE CONSTITUTIONAL COSTS OF THE WAR ON DRUGS IN LATIN AMERICA: CASE STUDIES

With this framework in mind, we turn to how the war on drugs has been deployed in the Mexican and Colombian cases. The impact the drug wars have had in Mexico and Colombia is flabbergasting. To address all the implications they have had over the last few decades to both political communities, even if just focusing on constitutional commitments, would be overwhelming. We will therefore address only some of the broader measures or the more costly ones for each case. Our objective is to illustrate the utility of bringing the framework of constitutional costs to such phenomena rather than to exhaust our case studies.

A. *The Mexican Case*

In Mexico, drug prohibition is not new. The war on drugs, however, only started in late 2006. The war was launched at the outset of the Calderon administration (2006-2012) and continues to this day.⁴⁶ Despite being the cornerstone policy of Calderon's administration, no official document identifies the public problem that the war on drugs sought to address, its goals, or its planned interventions.⁴⁷ Purportedly, the war on drugs sought to make prohibition effective. In its name, major legal reforms and even constitutional amendments were adopted. We will look at these changes from within the framework of constitutional costs, but first we must trace them and, to do so, we must go back to previous administrations.

The inception of some of the constitutional costs of the war on drugs dates back to the late twentieth century, during the Zedillo administration (1994-2000). The first Federal Law Against Organized Crime, published in 1996,⁴⁸ was criticized at its inception because it cut against the historic logic of criminal law in Mexico.⁴⁹ The incipient militarization of enforcement can also be traced to the Zedillo administration, with the appointment of a general, the infamous Gutiérrez Rebollo, as head of the office in charge of prosecuting drug crimes within the Attorney General's Office. But militarization, for years to come, would remain informal and limited to appointing military men, often retired, to lead civil institutions.⁵⁰

46. See generally Laura H. Atuesta, *Militarización de la lucha contra el narcotráfico: Los operativos militares como estrategia para el combate del crimen organizado*, in *LAS VIOLENCIAS: EN BUSCA DE LA POLÍTICA PÚBLICA DETRÁS DE LA GUERRA CONTRA LAS DROGAS* (Laura H. Atuesta & Alejandro Madrazo Lajous eds., 2018).

47. See Ángela Guerrero Alcántara, *Análisis de los planes y programas de gobierno en materia de drogas* [*Analysis of Government Plans and Programs on Drugs*], in *EL MAL MENOR EN LA GESTIÓN DE LAS DROGAS: DE LA PROHIBICIÓN A LA REGULACIÓN* [*THE LESSER EVIL IN DRUG MANAGEMENT: FROM PROHIBITION TO REGULATION*] 83, 86 (Bernardo González-Aréchiga Ramírez-Wiella et al. eds., 2014).

48. Ley Federal Contra la Delincuencia Organizada [LFDO], Diario Oficial de la Federación [DOF] 07-11-1996, últimas reformas 07-08-2017 (Mex.), http://www.diputados.gob.mx/LeyesBiblio/pdf/101_070417.pdf (last visited Jan. 17, 2019).

49. One of its objectors was Sergio García Ramírez, former Attorney General, who later included some of the objectors' critiques in a prologue to his text. Olga Islas de González Mariscal, *Prólogo a la primera edición* of SERGIO GARCÍA RAMÍREZ, *DELINCUENCIA ORGANIZADA: ANTECEDENTES Y REGULACIÓN EN MÉXICO*, at xvii, xviii (2d ed. 2000).

50. Some cases of military men leading civil institutions of public security are: Brigadier General Inocente Fermín Hernández, designated director of the National Center for Planning, Analysis, and Information to Combat Crime (CENAPI); Lieutenant José Sigifredo Valencia Rodríguez, designated director of technical control staff of the Deputy Attorney General for the Specialized Investigation of Organized Crime

Important to later developments, but relatively innocuous at the time, a law establishing the National Council for Public Security—a coordinating body of all institutions charged with public security—provided that the Secretaries of Defense and Marine⁵¹ sit on the council.⁵² The law was challenged by a congressional minority before the Supreme Court, on the grounds that Article 129 of the Constitution restricts military personnel to carrying out matters strictly pertaining to military discipline during peace time.⁵³ Their inclusion was defended on the grounds that the role of the military Secretaries in the Council was administrative, not operative, and thus did not contravene the constitutional restriction.⁵⁴ The Court upheld the law,⁵⁵ stating that military personnel were allowed to carry out auxiliary tasks, but the *tesis* that was published stating the reasoning of the ruling was quite abstract and did not specify the administrative nature of the auxiliary tasks.⁵⁶ This omission would later be used informally by the Calderon and Peña Nieto administrations to defend the constitutionality of the mass militarization of public security, arguing that the precedent was

(SEIDO); Brigadier General Luis García Arévalo, designated General Commissioner of the Investigating Police of State Attorney General of Tamaulipas; Lieutenant Julián Leyzaola Pérez, designated chief of Tijuana, Cd. Juárez, and Cancún Departments of Public Security. See Benito López, *Asume militar mando en PGJE Tamaulipas*, REFORMA (July 18, 2016), <https://www.reforma.com/articulo/default.aspx?id=1165435&v=3>; Marcos Muedano, *Designan a nuevo titular de Servicios Periciales de PGR*, EXCELSIOR (Dec. 19, 2017, 7:20 PM), <https://www.excelsior.com.mx/nacional/2016/12/19/1135264>; Óscar Rodríguez, *Teniente coronel Julián Leyzaola toma posesión en SP de Cancún*, MILENIO (May 22, 2017, 11:25 PM), <https://www.milenio.com/estados/teniente-coronel-julian-leyzaola-toma-posesion-sp-cancun>.

51. In Mexico, the Army and the Navy are headed by separate cabinet members. Until today, all the heads of those two corresponding Departments—Department of National Defense for the Army and Department of the Navy for the Armed Navy—have always been headed by military personnel.

52. Ley General que Establece las Bases de Coordinación del Sistema Nacional de Seguridad Pública (General Law that Establishes the Bases of Coordination of the National Public Security System), Diario Oficial de la Federación [DOF] 11-12-1995, abrogada DOF 02-01-2009 (Mex.), http://www.diputados.gob.mx/LeyesBiblio/abro/lgbcsnsp/LGBCSNSP_abro.pdf (last visited Jan. 17, 2019).

53. Acción de inconstitucionalidad 1/96, Pleno de la Suprema Corte de Justicia de la Nación [SCJN], Novena Época, toma III, 5 marzo de 1999 (Mex.), <https://sjf.scjn.gob.mx/sjfsist/Documentos/Tesis/1001/1001284.pdf>.

54. *Id.*

55. *Id.*

56. In Mexico, the law does not require that court rulings be made public. The Supreme Court has adopted a policy of publishing its opinions for only a little over a decade. Back in 1996, opinions were not public and only summaries of the *ratio* known as “tesis” were published.

sufficient to deem the use of military personnel in public security as constitutional.⁵⁷

During the Fox administration (2000-2006), key changes were adopted that would later enable Calderon's war on drugs. In 2005, the Constitution was amended to empower Congress to dictate when and how states could prosecute federal crimes, a major change in what had until then been a strictly separate federal system in which states established their own criminal law and policies.⁵⁸ The National Security Act (*Ley de Seguridad Nacional*) was also enacted then.⁵⁹ As we will see below, this piece of legislation would provide what little normative grounding there was for the militarization of public security. Finally, near the end of its term, the Fox Administration also launched Operation Safe Mexico (*Operativo Mexico Seguro*).⁶⁰ This was the immediate precursor of the "joint operations" (joint meaning it involved federal and local as well as civil and military forces) that defined the Calderon presidency.

Mexico's war on drugs was launched by Calderon less than two weeks after he was sworn into office in December of 2006.⁶¹ Federal operations, most with military participation, went from one to fifteen in six years, involving all but four states.⁶² The militarization of public security in order to enforce prohibition would dominate and radically transform public life in Mexico for the coming decade. This militarization did not, strictly speaking, have a legal basis, other than that of the policy of prohibition itself, which did not contemplate military intervention or the other measures that we analyze here to tease out the constitutional costs. The Calderon administration did not wait for changes to the legal regime of drug prohibition to launch its war, but rather used a complex network of "collaboration agreements" with the

57. The Mexican State would argue as much in 2018. *López Álvarez v. Honduras*, Public Hearings, Order of the President of the Court, Inter-Am. Ct. H.R. (ser. C) No. 141, ¶ 95 (June 28, 2005), http://www.corteidh.or.cr/docs/casos/articulos/seriec_141_esp.pdf.

58. Decreto por el que se expide la Ley de Seguridad Nacional; y se reforma el artículo 50 Bis de la Ley Orgánica del Poder Judicial de la Federación, Diario Oficial de la Federación [DOF] 31-01-2005 (Mex.) [Decree by Which Issues the National Security Law; and Article 50 Bis of the Organic Law of the Judicial Power of the Federation Is Reformed], http://dof.gob.mx/nota_detalle.php?codigo=769100&fecha=31/01/2005.

59. Ley de Seguridad Nacional [LSN] (National Security Law), Diario Oficial de la Federación [DOF] 31-01-2005, últimas reformas DOF 26-12-2005 (Mex.), <http://www.diputados.gob.mx/LeyesBiblio/pdf/LSegNac.pdf>.

60. *Lanza Fox operativo México Seguro* [Fox Launches Operation Safe Mexico], EL UNIVERSAL (June 12, 2005), <http://archivo.eluniversal.com.mx/notas/288181.html>.

61. Atuesta, *supra* note 46.

62. *Id.*

corresponding state or city governments.⁶³ Such agreements did not have constitutional grounding, but they achieved political collaboration by affected governments and thus precluded the federal operations from being challenged before the judiciary, as standing for citizens is easy to deny in such cases.⁶⁴

Legal changes have been adopted piecemeal since, but usually only after de facto changes. Beginning with the carving out of a regime of reduced procedural rights in the prosecution of organized crime in 2008,⁶⁵ and culminating with the Internal Security Law of 2017, which allowed unchecked and unlimited militarization as a unilateral decision of the Executive,⁶⁶ the constitutional costs in Mexico are astounding.

This is not a history of Mexico's war on drugs, so we will not analyze all the changes chronologically. There are two major axes around which reforms and amendments can be organized: (i) the insertion, in the text of the Constitution, of a special regime of diminished procedural rights designed to prosecute crimes committed by organized criminals; and (ii) the "federalization" of the prosecution of drug crimes and its aftermath, which imposed centralized criminal policy and public security to an unprecedented degree⁶⁷ culminating in the

63. Although the text of those agreements is not public, they are referred to when operations are announced. See *Anuncio sobre la operación conjunta Michoacán*, PRESIDENCIA DE LA REPÚBLICA (Dec. 11, 2006), <http://calderon.presidencia.gob.mx/2006/12/anuncio-sobre-la-operacion-conjunta-michoacan>.

64. Individuals can bring challenges through the writ of Amparo, a complex and costly specialized procedure before federal courts designed in the nineteenth century and, as a general rule, with no relief for anyone but the plaintiff once a ruling is reached. *Constitución Política de los Estados Unidos Mexicanos*, CPEUM, arts. 103 & 107, *Diario Oficial de la Federación* [DOF] 05-02-1917, últimas reformas DOF 29-01-2016 (ar. 103) y 24-02-2017 (art 107) (Mex.), <http://www.senado.gob.mx/comisiones/cogati/docs/CPEUM.pdf> (last visited Jan. 17, 2019).

65. Decreto por el que se reforman y adicionan diversas disposiciones de la Constitución Política de los Estados Unidos Mexicanos, art 19, *Diario Oficial de la Federación* [DOF] 18-06-2008 (Mex.), http://dof.gob.mx/nota_detalle.php?codigo=5046978&fecha=18/06/2008 (last visited Jan. 23, 2019).

66. Decreto por el que se expide la Ley de Seguridad Interior [LSI], *Diario Oficial de la Federación* [DOF] 21-12-2017 (Mex.), http://www.dof.gob.mx/nota_detalle.php?codigo=5508716&fecha=21/12/2017 (last visited Jan. 23, 2019).

67. A complete descriptive analysis of these two major reforms, its aftermaths, and other reforms related to the war on drugs during the administration of Felipe Calderón was the basis for the present study case. See generally Alejandro Madrazo, *El impacto de la política de drogas 2006-2012 en la legislación federal* [The Impact of Drug Policy 2006-2012 on Federal Legislation] (Drug Policy Workshop, Working Paper No. 7, 2014), http://www.politicadedrogas.org/PPD/documentos/20160516_193404_7.-Alejandro-Madrazo-Lajous---El-impacto-de-la-pol%C3%ADtica-de-drogas-2006-2012-en-la-legislaci%C3%B3n-federal.pdf. The analysis of the impact of these reforms at the state level is pending—particularly those arising from the *Ley de*

possibility of militarization by unilateral decision of the Federal Executive.⁶⁸

A preliminary analysis of the Mexican scene allowed us to tentatively identify two types of constitutional costs: (a) the restriction of fundamental rights, and (b) the centralization of the federal regime and the conflation of functions of several governmental offices involved in the war on drugs.⁶⁹

1. *Restriction of Fundamental Rights*

Almost two years into the war on drugs in Mexico, Congress approved a constitutional amendment creating a special criminal regime of reduced rights and amplified police discretion.⁷⁰ It had originally been proposed by Calderon to better prosecute organized crime, with

Narcomenudeo. The reason is that the legal adaptation of the state legislation to the federal law is still underway. Several states lack the legislative adaptations that would regulate their powers under the new bill. *See generally* Guerrero, *supra* note 47; Alejandro Madrazo Lajous, *Marco normativo nacional de la política de drogas [National Regulatory Framework for Drug Policy]*, in *EL MAL MENOR EN LA GESTIÓN DE LAS DROGAS: DE LA PROHIBICIÓN A LA REGULACIÓN [THE LESSER EVIL IN DRUG MANAGEMENT: FROM PROHIBITION TO REGULATION]* 61 (Bernardo González-Aréchiga Ramírez-Wiella et al. eds., 2014); Catalina Pérez-Correa, Fernanda Alonso & Karen Silva, *La reforma en materia de narcomenudeo: seguimiento de los cambios legislativos e institucionales* (CIDE, Working Paper No. 61, 2013).

Therefore, this case study is limited to the federal level for reasons of necessity and because working at the federal level facilitates comparison with the Colombian case.

68. A law formally recognizing and enabling militarization of public security was first proposed in 2009, as an addition to the National Security Law. *See* *Iniciativa de ley por la que se reforma la Ley de Seguridad Nacional [Initiative of law to reform the National Security Law]*, *Diario de los Debates de la Cámara de Senadores [Journal of the Debates of the Senate]*, 23 de abril de 2009, p. 8 (Mex.), http://www.senado.gob.mx/64/diario_de_los_debates/documento/2310. The measure, similar to the original proposal, would be stalled and stopped several times in the following years, to be approved finally in December of 2017 as an independent *Internal Security Law*. It was struck down as unconstitutional by the Supreme Court on November 15, 2018. The ruling has not yet been published. *See* Arturo Angel, *Corte invalida Ley de Seguridad por el riesgo que implica convertir a militares en policias*. *ANIMAL POLITICO* (Nov. 15, 2018), <https://www.animalpolitico.com/2018/11/corte-ley-seguridad-interior/>; *see also* CARLOS GALINDO ET AL., *INSTITUTO BELISARIO DOMÍNGUEZ, SEGURIDAD INTERIOR: ELEMENTOS PARA EL DEBATE* 39 (2017); CENTRO PRODH, *PERPETUAR EL FALLIDO MODELO DE SEGURIDAD: LA LEY DE SEGURIDAD INTERIOR Y EL LEGADO DE UNA DÉCADA DE POLÍTICAS DE SEGURIDAD EN MÉXICO CONTRARIAS A LOS DERECHOS HUMANOS* 135-36 (1st ed. 2017); Alejandro Madrazo Lajous & Jorge Javier Romero, *Seguridad Interior: La regresión*, *NEXOS*, (Feb. 1, 2018), <https://www.nexos.com.mx/?p=35964>.

69. The first analysis of the Mexican case study appeared as a Working Paper of the Drug Policy Program at CIDE. *See* Madrazo, *supra* note 4. The three following sections are a revised and updated version of this first effort.

70. *See* Decreto por el que se expide la Ley de Seguridad Nacional; y se reforma el artículo 50 Bis de la Ley Orgánica del Poder Judicial de la Federación, *supra* note 58.

drug trafficking organizations signaled as the specific objective of the amendment.⁷¹ The package was adopted simultaneously with another, contrasting, set of constitutional amendments designed to radically reconfigure criminal procedure.⁷² By introducing adversarial trial and oral proceedings, this second package sought to make police and prosecutorial authorities more accountable to judges, and to strengthen both victims' and defendants' procedural rights.⁷³

Supporters of the amendments deemed accountability and procedural rights as guiding principles of the criminal procedure to be inadequate for all citizens:

due to the explicit incorporation of various principles and fundamental rights in the Constitution thus far only implicitly there established, the adversarial nature of criminal procedure has been significantly incremented; therefore, the incorporation of some special rules applicable to those cases involving organized crime is necessary, which constitute a restriction of rights.⁷⁴

In other words, in 2008, Mexico split criminal procedure into two distinct systems and lodged the distinction at the constitutional level. Mexican legislators recognized that discretion and arbitrariness had historically plagued both criminal investigations and prosecutions and rendered criminal justice ineffective and oppressive. Therefore, they explicitly introduced into the Constitution the presumption of innocence, oral and public trials, victim's rights, and the adversarial structure of criminal trials.⁷⁵ But at the same time, they created a special regime for people detained for or accused of participating in organized

71. SECRETARÍA DE SERVICIOS PARLAMENTARIOS, SAD-07-08, REFORMA CONSTITUCIONAL EN MATERIA DE JUSTICIA PENAL Y SEGURIDAD PÚBLICA (PROCESO LEGISLATIVO) 88 (2008), <http://www.diputados.gob.mx/sedia/biblio/archivo/SAD-07-08.pdf>

72. Decreto por el que se reforman y adicionan diversas disposiciones de la Constitución Política de los Estados Unidos Mexicanos, *supra* note 65.

73. Procesos legislativos del Decreto por el que se reforman y adicionan diversas disposiciones a la Constitución Política De Los Estados Unidos Mexicanos, 18 de junio de 2008 (Mex.), http://legislacion.scjn.gob.mx/Buscador/Paginas/wfProcesoLegislativoCompleto.aspx?q=b/EcoMjefuFeB6DOaNOimNPZPsNLFqe0s7fey1Fqriebelbb1Mn9GghkbHbZJR/8YCFNgq4qmWRZBiHT7YAx8w==http://www.diputados.gob.mx/LeyesBiblio/ref/dof/CPEUM_ref_180_18jun08.pdf. The reformers argued that the criminal procedure prior to reform "has ceased to be effective." They also explained that the defendants had to be recognized as entitled to rights first and foremost, not as "objects of investigation."

74. *Id.*

75. Constitución Política de los Estados Unidos Mexicanos, CPEUM, art. 20, Diario Oficial de la Federación [DOF] 05-02-1917, <http://www.senado.gob.mx/comisiones/cogati/docs/CPEUM.pdf> (last visited Jan. 17, 2019). Article 20 concerns oral trial and its adversarial structure, with subsection B.I. requiring a presumption of innocence, and section C delineating victims' rights).

crime—vaguely defined⁷⁶—where defendants have reduced fundamental rights and authorities have increased powers and discretion. This special regime includes: (i) authorities can retain—without communication or formal accusation—people for up to eighty days when “necessary for the advancement” of a criminal investigation involving organized crime (known as *arraigo*);⁷⁷ (ii) an extended detention period (four days, as opposed to two) before a detainee has to be presented before a judge;⁷⁸ (iii) restrictions on communication of prisoners while detained or in prison (excluding legal advice);⁷⁹ (iv) serving out sentences in “special” prisons, separate from the general population;⁸⁰ (v) the possibility of imposing “special,” non-specified surveillance measures during prisoners’ sentences;⁸¹ and (vi) an exception to the right to know who the accuser is.⁸²

All these measures are constitutionally prohibited from “ordinary” criminal justice. That is, most Mexicans are constitutionally vested with due process and procedural rights, but those who are accused of organized crime have restricted or eliminated rights.

The *arraigo* is particularly illustrative. It is an extraordinary measure (in theory) by which one person can be put under *house arrest*. In

76. Article Sixteen of the Constitution, in its ninth paragraph, defines organized crime as the association of “three or more people to permanently or repeatedly commit crimes, under the terms of the applicable legislation.” See *id.*, art. 16. One of the main functions of “applicable legislation” is precisely to determine which crimes are susceptible to fall under organized crime. Drug crimes, of course, are included in the list, together with car-jacking, and kidnapping, among others. The issue at stake is that the reference to the “applicable legislation” effectively leaves it up to ordinary laws to determine who can be subject to the regime of exception. Consequently, the scope of application of a constitutional regime of exception is determined by simple legislative majority.

77. *Id.* The impact of *arraigo* on prisoner mistreatment is considerable. See Diego Rodríguez Eternod et al., *El costo (constitucional) del arraigo: un legado de la guerra contra las drogas* [The (constitutional) cost of the rooting: a legacy of the War on Drugs], in LA REGULACIÓN DE LA MARIHUANA EN MÉXICO: LA REFORMA INEVITABLE [THE REGULATION OF MARIJUANA IN MEXICO: THE INEVITABLE REFORM] 55, 65-66 (Aram Barra ed., 2016), <https://www.yumpu.com/es/document/read/56691793/la-regulacion-de-la-marihuana-en-mexico-la-reforma-inevitable>. A constitutional amendment process is currently under way to remove *arraigo* from the Constitution. Iniciativa por la que se reforma el artículo 16 de la Constitución [Initiative for Amending Article 16 of the Constitution], Diario de los Debates de la Cámara de Diputados, 26-04-2018 (Mex.), <http://cronica.diputados.gob.mx/Estenografia/LXIII/2018/abr/20180426.html>.

78. Constitución Política de los Estados Unidos Mexicanos, CPEUM, art. 16, Diario Oficial de la Federación [DOF] 05-02-1917, <http://www.senado.gob.mx/comisiones/cogati/docs/CPEUM.pdf> (last visited Jan. 17, 2019).

79. *Id.* art. 18.

80. *Id.*

81. *Id.*

82. *Id.* art 20.

Mexico, however, it is almost exclusively carried out in undisclosed locations under the authority of the police, the Attorney General, or the Army.⁸³ The *arraigo* does not require that a formal accusation be brought against the suspect: in order to proceed with a detention, it is enough for prosecutors to argue that detention will contribute to the success of an ongoing investigation (which need not be formally underway).⁸⁴

Mexico's Supreme Court held *arraigo* to be unconstitutional in 2005.⁸⁵ The ruling struck down *arraigo* as regulated in the state Criminal Procedural Code of Chihuahua, for it was deemed incompatible with the constitutional rights relating to due process, such as presumption of innocence.⁸⁶ Because of the way constitutional adjudication works in Mexico, that ruling affected only the legislation of State of Chihuahua, even though it was practically identical to federal legislation and legislation of other state criminal codes.⁸⁷ The constitutional

83. See generally CATALINA PÉREZ & ELENA AZAOLA, RESULTADOS DE LA PRIMERA ENCUESTA A POBLACIÓN ENCUESTA A POBLACIÓN INTERNA EN CENTROS FEDERALES DE READAPTACIÓN SOCIAL [RESULTS OF THE FIRST SURVEY TO THE INTERNAL POPULATION IN FEDERAL CENTERS OF SOCIAL READAPTATION] (2012), https://publiceconomics.files.wordpress.com/2013/01/encuesta_internos_cefereso_2012.pdf.

84. Constitución Política de los Estados Unidos Mexicanos, CPEUM, art. 16, Diario Oficial de la Federación [DOF] 05-02-1917, <http://www.senado.gob.mx/comisiones/cogati/docs/CPEUM.pdf> (last visited Jan. 17, 2019).

85. Acción de inconstitucionalidad 20/2013, Pleno de la SCJN, Décima Época, tomo I, 21 de octubre de 2014 (Mex.), <http://www2.scjn.gob.mx/AsuntosRelevantes/pagina/SeguimientoAsuntosRelevantesPub.aspx?ID=155289&SeguimientoID=601>.

86. *Id.*

87. Before 2005, the *arraigo* was established in art. 133 Bis of the Federal Code of Criminal Procedure as well as in 20 state codes of criminal procedures, including the code for the state of Chihuahua. The other 19 states that included the *arraigo* in their criminal procedural law were Baja California Sur, Campeche, Distrito Federal, Durango, Guanajuato, Guerrero, Jalisco, Michoacán, Nayarit, Nuevo León, Oaxaca, Querétaro, Sinaloa, San Luis Potosí, Sonora, Tabasco, Veracruz, Yucatán and Zacatecas. Chihuahua's code set a limit for the duration of *arraigo* at 30 days. Of the other 19 state codes, only the Campeche code differed substantively for it did not specify the criteria for requesting an *arraigo*. See Código Federal de Procedimientos Penales (Federal Code of Criminal Procedures) [CFPP], art. 133, Diario Oficial de la Federación [DOF] 30-08-1934, abrogado DOF 05-03-2014, art. 133 (Mex.); Código de Procedimientos Penales del Estado de Chihuahua (Code of Criminal Procedures for the State of Chihuahua), art. 122, Periódico Oficial del Estado [PO] 04-03-1987, abrogado 19-01-2005 (Mex.); Código Procesal Penal para el Estado de Baja California Sur (Code of Criminal Procedures Code for the State of Baja California Sur), art. 113, BO 07-05-2013, abrogado 19-04-2016 (Mex.); Código de Procedimientos Penales del Estado de Campeche (Code of Criminal Procedures for the State of Campeche), art. 152, Periódico Oficial del Estado [PO] 09-12-1975, abrogado 02-10-2014 (Mex.); Código de Procedimientos Penales para el Distrito Federal (Code of Criminal Procedures for the Federal District), art. 270 Bis, Diario Oficial de la Federación [DOF] 29-08-1931, abrogado 10-01-2014 (Mex.); Código de Procedimientos Penales del Estado de Durango (Code of Criminal Procedures for the State of Durango), art. 135, Periódico

amendments of 2008 grafted the *arraigo* directly into the Constitution specifically for the regime of exception of federal organized crime. Consequently, it is now technically impossible to challenge the consti-

Oficial del Estado [PO] 30-01-1992, abrogado 05-03-2017 (Mex.); Código de Procedimientos Penales para Estado de Guanajuato (Code of Criminal Procedures for the State of Guanajuato), fracc. III, art. 3, Periódico Oficial del Estado [PO] 02-04-1959, abrogado 01-07-2016 (Mex.); Código de Procedimientos Penales para el Estado de Guerrero (Code of Criminal Procedures for the State of Guerrero), art. 60, Periódico Oficial del Estado [PO] 05-02-1993, abrogado 08-04-2016 (Mex.); Código de Procedimientos Penales para el Estado de Jalisco (Code of Criminal Procedures for the State of Jalisco), art. 102 Bis, Periódico Oficial del Estado [PO] 07-12-1982, abrogado 14-04-2016 (Mex.); Código de Procedimientos Penales para el Estado de Michoacán (Code of Criminal Procedures for the State of Michoacán), art. 129, Periódico Oficial del Estado [PO] 31-08-1998, abrogado 30-05-2014 (Mex.); Código de Procedimientos Penales para el Estado de Nayarit (Code of Criminal Procedures for the State of Nayarit), art. 157 Bis, Periódico Oficial del Estado [PO] 29-11-1969, abrogado 23-12-2016 (Mex.); Código de Procedimientos Penales para el Estado de Nuevo León (Code of Criminal Procedures for the State of Nuevo León), art. 139, Periódico Oficial del Estado [PO] 28-03-1990, abrogado 31-12-2013 (Mex.); Código de Procedimientos Penales para el Estado de Oaxaca (Code of Criminal Procedures for the State of Oaxaca), art. 19 Bis, Periódico Oficial del Estado [PO] 09-08-1980, abrogado 22-04-2016 (Mex.); Código de Procedimientos Penales para el Estado de Querétaro (Code of Criminal Procedures for the State of Querétaro), arts. 142 & 143, Periódico Oficial del Estado [PO] 06-07-1989, abrogado 20-05-2016 (Mex.); Código de Procedimientos Penales para el Estado de Sinaloa (Code of Criminal Procedures for the State of Sinaloa), art. 128 Bis, Periódico Oficial del Estado [PO] 26-09-1986, abrogado 31-07-2014 (Mex.); Código de Procedimientos Penales para el Estado de San Luis Potosí (Code of Criminal Procedures for the State of San Luis Potosí), art. 168, Periódico Oficial del Estado [PO] 30-09-2000, abrogado 07-02-2017 (Mex.); Código de Procedimientos Penales para el Estado de Sonora (Code of Criminal Procedures for the State of Sonora), art. 134 Bis, Periódico Oficial del Estado [PO] 17-08-1949, abrogado 15-10-2015 (Mex.); Código de Procedimientos Penales para el Estado de Tabasco (Code of Criminal Procedures for the State of Tabasco), art. 127, Periódico Oficial del Estado [PO] 22-02-1997, abrogado 09-04-2014 (Mex.); Código de Procedimientos Penales para el Estado de Veracruz (Code of Criminal Procedures for the State of Veracruz), art. 142, Gaceta Oficial [GO] 07-11-2003, abrogado 10-05-2013 (Mex.); Código de Procedimientos Penales para el Estado de Yucatán (Code of Criminal Procedures for the State of Yucatán), art. 248, Diario Oficial [DO] 15-12-1994, abrogado 29-11-2014 (Mex.); Código de Procedimientos Penales para el Estado de Zacatecas (Code of Criminal Procedures for the State of Zacatecas), art. 127 Bis, Periódico Oficial del Estado [PO] 19-07-1967, abrogado 01-11-2014 (Mex.).

In 2013, the Congress approved a constitutional amendment that made criminal procedure a federal matter. *See* Decreto por el que se reforma la fracción XXI, del Artículo 73 de la Constitución Política de los Estados Unidos Mexicanos, Diario Oficial de la Federación [DOF] 08-10-2013 (Mex.), http://www.diputados.gob.mx/sedia/biblio/prog_leg/084_DOF_08oct13.pdf. State codes of criminal procedure ceased to be valid one year after the Federal Code of Criminal Procedure was approved. *See* Decreto por el que se expide el Código Nacional de Procedimientos Penales, Diario Oficial de la Federación [DOF] 05-03-2014 (Mex.), http://www.dof.gob.mx/nota_detalle.php?codigo=5334903&fecha=05/03/2014; Código Nacional de Procedimientos Penales [CNPP], art. 155, Diario Oficial de la Federación [DOF] 05-03-2014 (Mex.), http://www.diputados.gob.mx/LeyesBiblio/pdf/CNPP_250618.pdf.

tutionality of *arraigo*. Importantly, the amendment incorporated *arraigo* to the Constitution without restricting or accounting for clauses pertaining to due process or presumption of innocence.⁸⁸ In fact, the same amendment package explicitly affirmed the presumption of innocence, which had until then been understood as implicit in the Constitution.⁸⁹

It is precisely here that our constitutional concept of cost is useful: while the *arraigo* is no longer unconstitutional by definition, it undermines and cuts against the fundamental rights of due process and presumption of innocence. Being part of the constitutional text, the restriction of the accused's liberty may be technically constitutional, but that does not render it compatible with Mexico's long cherished—and reaffirmed—constitutional commitments. In short, the same amendment package confirmed a constitutional commitment to presumption of innocence, and simultaneously undermined it by protecting the *arraigo* from being struck down as unconstitutional.

In admitting a presumption of innocence and due process as an exception, the amendment undermined constitutional commitments beyond that exception. Throughout the legislative process, the *arraigo* was justified exclusively as an exception allowing the federal government to effectively prosecute drug trafficking organizations.⁹⁰ However, the amendment included a transitory article through which it allowed for the amendment's use in cases of "serious crime," a category that includes an important proportion of crimes that are not federal and not susceptible of being committed under the "organized crime" regime.⁹¹

88. The Court ruled *arraigo* unconstitutional because "the restriction of the right to personal freedom was not provided in the General Constitution of the Republic." Acción de inconstitucionalidad 20/2013, SCJN, *supra* note 85. Thus, the legislators dealt with the ruling of the Supreme Court by explicitly incorporating *arraigo* into the Constitution and thereby "solving" the problem of unconstitutionality.

89. Constitución Política de los Estados Unidos Mexicanos, CPEUM, art. 20, sec. B, fracc. I, Diario Oficial de la Federación [DOF] 05-02-1917 (Mex.), <http://www.senado.gob.mx/comisiones/cogati/docs/CPEUM.pdf> (last visited Jan. 17, 2019).

90. Proceso legislativo del Decreto por el que se reforma y adicionan diversas disposiciones de la Constitución de los Estados Unidos Mexicanos, 18-06-2008 (Mex.), <http://legislacion.scjn.gob.mx/Buscador/Paginas/wfProcesoLegislativoCompleto.aspx?q=b/EcoMjefuFeB6DOaNOimNPZPsNLFqe0s7fey1FqriebelbbIMn9GghkbHbZJR/8YCFNgq4qmWRZBiHT7YAx8w==>.

91. Decreto por el que se reforman y adicionan diversas disposiciones de la Constitución Política de los Estados Unidos Mexicanos, art transitorio décimo primero, *supra* note 65.

Not surprisingly, use of the *arraigo* exponentially increased. In 2006,⁹² when Calderon started the war on drugs (in December) and two years prior to the constitutional amendment, the federal government had applied the *arraigo* 42 times⁹³ and completed 137 convictions in the federal courts for “organized crimes.” In 2010, two years after *arraigo* was constitutionalized, it was used 1,679 times.⁹⁴ The expansive use of the *arraigo* is remarkable, but it does not appear to have been very useful to the prosecution of organized crime. In 2010, authorities obtained only 148 convictions for organized crime, just 11 more than in 2006.⁹⁵

Undermining the presumption of innocence translates into practice. *Arraigo* is being used beyond the prosecution of organized crime, even by the federal government. A survey of the federal imprisoned population conducted by CIDE in 2012 suggests *arraigo* is frequently used for cases other than organized crime: 27% of the convicted prisoners reported being subject to *arraigo*, but only 14.6% of them were sentenced for “organized crime.”⁹⁶ These numbers mean that *arraigo* was used almost twice as often as the purpose for which it was passed.⁹⁷ More importantly, the use of *arraigo* seems to bring with it an increased incidence of mistreatment and torture in the hands of authorities: every registered form of mistreatment and torture has a considerably higher incidence when people are subject to *arraigo*.⁹⁸

Limitations and exceptions to other rights, such as the right to privacy in communications or property rights, have also been incorpo-

92. Despite having been declared unconstitutional in 2005 by the Supreme Court, the *arraigo* never ceased to be used by the federal government. The reason is that the *arraigo* was declared unconstitutional in a case pertaining to criminal legislation in the state of Chihuahua and, therefore, the ruling was only applicable against the state legislation. The rules of the federal criminal procedure and those of other states continued to be enforced from then until 2008, when the figure was constitutionalized. See *supra* notes 85-87 and accompanying text.

93. This number probably reflects its use *before* the drug war began, since the war was declared in December of 2006. See Antonio Barreto Rozo & Alejandro Madrazo Lajous, *Los costos constitucionales de la guerra contra las drogas: dos estudios de caso de las transformaciones de las comunidades políticas de las américas*, 43 *ISONOMÍA* 151, 167 (2015) (Mex.).

94. Alejandro Madrazo y Angela Guerrero, *Mas caro el el caldo que las albóndigas*, *NEXOS* (Dec. 1, 2012), <https://www.nexos.com.mx/?p=15085>.

95. Madrazo, *supra* note 4.

96. Pérez-Correa, Alonso & Silva, *supra* note 67.

97. We are assuming that all the people convicted for organized crime were subjected to *arraigo* before being charged, which is not necessarily the case. This number, of course, does not include suspects who were subjected to *arraigo* but were later either not charged or not convicted. In other words, the use of the *arraigo* is likely even more widespread than our numbers document.

98. Rodríguez Eternod, *supra* note 77.

rated in recent years into criminal procedures in Mexico, but without amending the Constitution.⁹⁹ For example, a law in 2012 allowed prosecutors to obtain, directly from cell phone providers and without the need for a warrant, the location of users in real time.¹⁰⁰ Another example: the Federal Police Act of 2009 allowed covert operations in Mexico, which had been until then deemed a form of entrapment.¹⁰¹

The undermining of fundamental rights continued beyond the Calderon administration. In July 2014, new legislation was enacted in the field of telecommunications.¹⁰² Without justifying why, it reproduces and extends the obligation of telecommunication providers to give information about their users to the executive authorities, without a warrant.¹⁰³ Unlike the law of 2012, which authorized only the Attorney General to request the information, the most recent legislation generically empowers all “instances of security and law enforcement” to obtain the information of telecommunications users, not limited to geo-localization.¹⁰⁴ It establishes an obligation for telecommunications companies to “attend every command” of these authorities.¹⁰⁵ To this end, providers are under an obligation to “keep a record of the communications made from any type of line being used . . . in any

99. See generally Madrazo, *El impacto de la política de drogas*, *supra* note 67 (providing an exhaustive list of the legislative reforms adopted in the context of the war on drugs during the Calderón administration).

100. Decreto por el que se reforman, adicionan y derogan diversas disposiciones del Código Federal de Procedimientos Penales, el Código Penal Federal, la Ley Federal de Telecomunicaciones, de la Ley que Establece las Condiciones Mínimas sobre Readaptación Social de Sentenciados y de la Ley General del Sistema Nacional de Seguridad Pública, Diario Oficial de la Federación [DOF] 17-04-2012 (Mex.), http://dof.gob.mx/nota_detalle.php?codigo=5243973&fecha=17/04/2012.

101. Ley de la Policía Federal (Federal Police Law) [LPF], art. 2, Diario Oficial de la Federación [DOF] 01-06-2009, última reforma DOF 25-05-2011 (Mex.), <http://www.diputados.gob.mx/LeyesBiblio/pdf/LPF.pdf>. A full documentation of infringements on fundamental rights is beyond the scope of this Article. See Madrazo, *El impacto de la política de drogas*, *supra* note 67, at 17.

102. Decreto por el que se adiciona un tercer párrafo al Artículo Séptimo Transitorio del Decreto por el que se expiden la Ley Federal de Telecomunicaciones y Radiodifusión, y la Ley del Sistema Público de Radiodifusión del Estado Mexicano; y se reforman, adicionan y derogan diversas disposiciones en materia de telecomunicaciones y radiodifusión, publicado en el Diario Oficial de la Federación el 14 de julio de 2014, Diario Oficial de la Federación [DOF] 14-07-2014 (Mex.), http://www.dof.gob.mx/nota_detalle.php?codigo=5526686&fecha=15/06/2018.

103. Ley Federal de Telecomunicaciones y Radiodifusión (Federal Telecommunications and Broadcasting Law) [LFTR], arts. 189 & 190, Diario Oficial de la Federación [DOF] 14-09-2014, última reforma DOF 15-06-2018 (Mex.), http://www.diputados.gob.mx/LeyesBiblio/pdf/LFTR_150618.pdf; Decreto por el que se adiciona un tercer párrafo al Artículo Séptimo Transitorio del Decreto por el que se expiden la Ley Federal de Telecomunicaciones y Radiodifusión, *supra* note 102.

104. Ley Federal de Telecomunicaciones y Radiodifusión, *supra* note 103.

105. *Id.*

form,” which includes the customer name and address as well as the type, origin, destination, date, time, and duration of the communication.¹⁰⁶ Again, we are facing an exception to a constitutional right—the privacy and inviolability of communications—that expands easily and quickly.

2. *Centralization and Militarization*

Mexico has also seen dramatic changes in the relationships between the federal, state and municipal governments as a result of the war on drugs. These changes consistently provide for increased centralization. Initially presented as temporary and extraordinary measures, they have proven durable. For several years now, municipal police functions in some cities have been taken up by federal security forces (police and the Army) in the context of so-called “joint operations.”¹⁰⁷ This is worrisome, considering that the presence of federal forces explains—at least partially—the unprecedented growth of homicide rates in specific cities.¹⁰⁸

The Petty Dealers Law of 2009 has often been presented as a reform to “decriminalize” drug use.¹⁰⁹ It did so, but it was also the first time in over a century and a half in which the federal government intervened in state criminal policy. Since the definitive establishment of Mexico as a federal republic with the Constitution of 1857, states had been autonomous on criminal matters (excepting, of course, the

106. Decreto por el que se reforman, adicionan y derogan diversas disposiciones del Código Federal de Procedimientos Penales, el Código Penal Federal, la Ley Federal de Telecomunicaciones, de la Ley que Establece las Condiciones Mínimas sobre Readaptación Social de los Sentenciados y de la Ley General del Sistema Nacional de Seguridad Pública, *supra* note 100; *see* Ley Federal de Telecomunicaciones y Radiodifusión, *supra* note 103.

107. *See* Atuesta, *supra* note 46, at 3; Catalina Pérez Correa, *Federalismo y seguridad comunitaria. La vigilancia como asunto federal*, in *VIOLENCIA, LEGITIMIDAD Y ORDEN PÚBLICO* 64, 66 (2012); Fernando Escalante Gonzalbo, *Homocidios 2008-2009: La muerte tiene permiso*, *NEXOS* (Jan. 1, 2011), <https://www.nexos.com.mx/?p=14089>.

108. *See* Atuesta, *supra* note 46; Laura H. Atuesta & Aldo F. Ponce, *Meet the Narco: Increased Competition Among Criminal Organizations and the Explosion of Violence in Mexico*, 18 *GLOB. CRIME* 375, 378 (2017); Gabriela Calderón et al., *The Beheading of Criminal Organizations and the Dynamics of Violence in Mexico*, 59 *J. CONFL. RESOL.* 1455, 1456 (2015); Valeria Espinosa & Donald B. Rubin, *Did the Military Interventions in the Mexican Drug War Increase Violence?*, 69 *AM. STATISTICIAN* 17, 24 (2015); Javier Osorio, *The Contagion of Drug Violence: Spatiotemporal Dynamics of the Mexican War on Drugs*, 59 *J. CONFLICT RESOL.* 1403, 1416 (2015); Brian J. Phillips, *How Does Leadership Decapitation Affect Violence? The Case of Drug Trafficking Organizations in Mexico*, 77 *J. POL.* 324, 333-34 (2015).

109. This categorization is inaccurate, to say the least. *See* Madrazo, *El impacto de la política de drogas*, *supra* note 67, at 29.

limits established by the fundamental rights written in the Federal Constitution).

As mentioned above, during the Fox administration, in 2005, the Constitution was amended to provide that “in the concurrent subject-matters under the Constitution, the federal laws will establish in which cases state authorities may prosecute federal criminal offenses.”¹¹⁰ Health is a concurrent subject under the constitution, and drug crimes are officially classified as “crimes against health.”¹¹¹ Consequently, this constitutional amendment empowered Congress to allow states to participate in the war against drugs. Importantly, the language of the Constitution was that states *may* prosecute federal crimes in certain cases.¹¹² This constitutional power was first used in 2009 with the approval of the so-called Petty Dealers Law. A battery of amendments to health and criminal federal legislation transferred the power to prosecute certain drug crimes (petty dealing, possession with intent to distribute and possession without intent to distribute) to the states. The reforms were consistent with a key programmatic objective of the Calderon administration: to involve state and local governments in his war on drugs.¹¹³ The reform entrusted the prosecution of the possession and selling of small amounts of drugs to the states; at the same time, the prosecution of larger amounts remained as a power of the federal authorities. In all cases, the federation can assume the power to take control of crimes prosecuted at the state level.¹¹⁴

110. Decreto por el que se expide la Ley de Seguridad Nacional y se reforma el artículo 50 Bis de la Ley Orgánica del Poder Judicial de la Federación, *supra* note 58.

111. Código Penal Federal (Federal Criminal Code) [CPF], cap. I, tit. VII, arts. 193-199, Diario Oficial de la Federación [DOF] 14-08-1931, última reforma DOF 21-06-2018 (Mex.), http://www.diputados.gob.mx/LeyesBiblio/pdf/9_210618.pdf; Ley Federal Contra la Delincuencia Organizada, *supra* note 48, at art. 30.

112. The constitutional text says: “En las materias concurrentes previstas en esta Constitución, las leyes federales establecerán los supuestos en que las autoridades del fuero común *podrán* conocer y resolver sobre delitos federales.” Constitución Política de los Estados Unidos Mexicanos, CPEUM, art. 73, fracc. 21, Diario Oficial de la Federación [DOF] 05-02-1917 (emphasis added), <http://www.senado.gob.mx/comisiones/cogati/docs/CPEUM.pdf> (last visited Jan. 17, 2019).

113. PRESIDENCIA DE LA REPÚBLICA, PLAN NACIONAL DE DESARROLLO 2007-2012, at 54 (Mex.), http://pnd.calderon.presidencia.gob.mx/pdf/PND_2007-2012.pdf; Guerrero, *supra* note 47.

114. Whether states can or should prosecute the crimes against health is an uncertain question. Most of the states have not fully assumed their powers. See CATALINA PÉREZ CORREA & KAREN SILVA MORA, CENTRO DE INVESTIGACIÓN Y DOCENCIA ECONÓMICAS REGIÓN CENTRO, EL ESTADO FRENTE AL CONSUMO Y LOS CONSUMIDORES DE DROGAS ILÍCITAS EN MÉXICO 20 (2014). Between 2009 and 2012, the federal authorities prosecuted 364,602 crimes against health, in comparison with the 13,131 cases prosecuted by state authorities in the thirty-two states. See CATALINA PÉREZ CORREA & RODRIGO MENESES, CENTRO DE INVESTIGACIÓN Y DOCENCIA ECONÓMICAS REGIÓN CENTRO, LA GUERRA CONTRA LAS DROGAS Y EL PROCESAMIENTO

So far, most states have been slow or reluctant to exercise their new powers.¹¹⁵ At least one—Campeche—tried to stray from the federal policy by increasing the amounts of drugs that determine which cases should, or should not, be “decriminalized.”¹¹⁶ The federal government reacted quickly and strongly: it challenged the state law and obtained a ruling from the Supreme Court indicating that the federal government has the exclusive prerogative to determine which offenses can be punished and how they should be punished.¹¹⁷ Thus, according to the Court’s ruling, the power of the states is limited to *how* these crimes should be prosecuted.¹¹⁸ States should limit themselves to execute the federal government’s criminal policy.

That state governments have exclusive power to determine state criminal policies was, until 2005, a strong constitutional commitment. It was one of the most important powers reserved to the states in the Mexican federal system. The exception to these principles emerged in the context of the war on drugs. Today, the federal-state relations in the criminal field are undergoing profound transformations. They include schemes of institutional collaboration through units in which federal forces and state police act together—the *centros de operación estratégica* (COEs)—in pursuit of criminals.¹¹⁹ These transformations began as an effort to coordinate actions against drug crimes, but today the federal-state collaboration extends beyond them.¹²⁰

Concurrence—that is, participation of both federal and state authorities—in criminal law was introduced in 2005 and was justified exclusively for drug crimes. Concurrence became operational in 2009,

PENAL DE LOS DELITOS DE DROGAS 2006-2012, at 16 (2014). Calderón’s purpose was clearly to compel the states into participating in his “war.” Nevertheless, when looking at the legislative process, it seems legislators did not fully endorse the same purpose. Most significantly, the constitutional text is clearly facultative, in the sense that it establishes that states *may* prosecute federal crimes, not that they *must* do so. See Madrazo, *El impacto de la política de drogas*, *supra* note 67, at 29.

115. See Pérez-Correa, Alonso & Silva, *supra* note 67.

116. See Decreto por el que se reforma distintas disposiciones al Código Penal del Estado de Campeche, Periódico Oficial del Estado de Campeche 08-01-1974, 23-07-2010 (Mex.); see also Acción de Inconstitucionalidad 20/2010, Pleno de la Suprema Corte de Justicia [SCJN], Novena Época, Diario Oficial de la Federación [DOF] 10-10-2011 (Mex.), <https://sjf.scjn.gob.mx/sjfsist/Documentos/Tesis/1001/1001284.pdf>.

117. Acción de inconstitucionalidad 20/2010, SCJN, *supra* note 116.

118. *Id.*

119. See, e.g., Convenio de Coordinación y Colaboración para la creación y funcionamiento de los Centros de Operación Estratégica, que celebran la Procuraduría General de la República y el Estado de Baja California Sur, Diario Oficial de la Federación [DOF] 31-10-2012 (Mex.), http://dof.gob.mx/nota_detalle.php?codigo=5231607&fecha=31/01/2012.

120. See Pérez-correa, Alonso & Silva, *supra* note 67.

with the enactment of the Petty Dealers Law.¹²¹ Subsequently, concurrence has extended to other crimes, such as kidnapping and human trafficking.¹²² With criminal *procedural* legislation unified throughout the country as an exclusive power of the Federal Congress, state autonomy to regulate criminal procedure was completely suppressed for the first time in over a century and a half. A national criminal procedural code was issued to rule both the federal and the thirty-two state criminal justice systems.¹²³ During the legislative process, drug trafficking and organized crime were not invoked as central motivations for the reforms.¹²⁴ However, one cannot ignore the fact that the immediate antecedents for centralization of criminal policy were justified and used precisely to implement the war on drugs.

Again, it seems that the norms that undermine constitutional principles, rights, and values, once introduced into the constitutional system, take on their own dynamics and tend to expand. Thus, a full accounting of the constitutional costs of the drug war must include not only the reforms explicitly adopted in its name but also their aftermath.

In addition to centralization, changes have tended towards a conflation of functions, leading to the militarization of public security.

121. Decreto por el que se reforman, adicionan, y derogan diversas disposiciones de la Ley General de Salud, del Código Penal Federal, y del Código Federal de Procedimientos Penales, Diario Oficial de la Federación [DOF] 20-08-2009 (Mex.), http://dof.gob.mx/nota_detalle.php?codigo=5106093&fecha=20/08/2009.

122. See Decreto por el que se reforman, adicionan y derogan diversas disposiciones de la Constitución Política de los Estados Unidos Mexicanos, en materia política-electoral, Diario Oficial de la Federación [DOF] 10-02-2014 (Mex.), http://www.dof.gob.mx/nota_detalle.php?codigo=5332025&fecha=10/02/2014; see also Decreto por el que se reforma el artículo 73, fracción XXI, inciso a), de la Constitución Política de los Estados Unidos Mexicanos, Diario Oficial de la Federación [DOF] 10-07-2015 (Mex.), http://dof.gob.mx/nota_detalle.php?codigo=5400163&fecha=10/07/2015.

123. See Decreto por el que se adiciona el párrafo de la fracción XXIX-O, del Artículo 73 de la Constitución Política de los Estados Unidos Mexicanos, Diario Oficial de la Federación [DOF] 30-04-2009 (Mex.), http://www.dof.gob.mx/nota_detalle.php?codigo=5089047&fecha=30/04/2009; Decreto por el que se reforma la fracción XXI, del Artículo 73 de la Constitución Política de los Estados Unidos Mexicanos, *supra* note 87; Decreto por el que se expide el Código Nacional de Procedimientos Penales, *supra* note 87. Originally, President Enrique Peña Nieto—upon assuming his position—proposed unifying the criminal law at the federal level. When it became clear that this would require solving conflicts as delicate as the prohibition of abortion, the proposal merely changed so as to unify the criminal procedure law.

124. See Anteproyecto de Dictamen de las Comisiones Unidas de Justicia y de Estudios Legislativos, Segunda por el que se expide el Código Nacional de Procedimientos Penales, 30 de abril de 2013 (Mex.), http://www.senado.gob.mx/comisiones/justicia/docs/Iniciativa/Anteproyecto_Dictamen_CNPP_211113.pdf.

Traditionally, the Mexican legal system distinguished clearly between three different functions: defense/national security, public security, and criminal prosecution.¹²⁵ Each of these concepts referred to a different area of state activity and was in charge of a specific entity. Defense referred to external threats to the political community and its protection was the mandate of the armed forces. Thus, the armed forces dealt with “existential” threats to the State (which included natural disasters). Public security referred to the internal threats to society which did not threaten political authority. It was the jurisdiction of the various police bodies—federal, state and municipal—and covered crime prevention and arrest in cases of *flagrante delicto*, but not criminal investigations (which corresponded to the field of criminal prosecution). Criminal investigations and criminal prosecution were the “monopoly” of Attorneys General offices, state and federal prosecutorial bodies, which were assisted by a special investigative police force directly under their command. This investigative police force was the only one authorized to carry out criminal investigations. In short, national security was the realm of the armed forces; public security was the domain of police; and criminal investigation and prosecution was the domain of the prosecutors and auxiliaries.

The conflation of functions between armed forces and civilian forces is a particularly delicate measure within our analytical framework, for it directly pertains to the borders that define the political community. National security and, accordingly, the use of armed forces, are the proper category and institution for dealing with threats to the political community *from the outside*. That is, they are the instruments through which the “us” faces a foreign existential threat, the “them.” Using the institutions—armed forces—created and designed for facing foreign enemies to deal with a political community’s citizenry—lawbreakers—makes enemies out of citizens, confuse the “them” with part of the “us.” This could imply a major reconfiguration of the political community, for part of it now becomes an “internal enemy.”¹²⁶

Beginning in 2005, but especially under the war on drugs, barriers between national security, public security, and criminal investigation have become eroded in order to provide the means for enforcing

125. Madrazo, *El impacto de la política de drogas*, *supra* note 67, at 23-26; *see also* Constitución Política de los Estados Unidos Mexicanos, CPEUM, arts. 21, 115, fracc. III, & 129 Diario Oficial de la Federación [DOF] 05-02-1917, <http://www.senado.gob.mx/comisiones/cogati/docs/CPEUM.pdf> (last visited Jan. 17, 2019).

126. *See generally* Alejandro Madrazo, *Criminals and Enemies: The Drug Trafficker in Mexico’s Political Imaginary*, 8 MEXICAN L. REV. 2 (2015) (discussing the confusion between criminals and enemies).

drug prohibition and fighting organized crime. The National Security Act of 2005 listed what was to be considered “threats to national security” and, in so doing, surreptitiously broadened the scope of action of the armed forces.¹²⁷ The list of threats to national security included “acts preventing the authorities to act against the organized crime” and “acts aimed at hindering or blocking military or naval operations against the organized crime.”¹²⁸ To an uninformed eye, this may fail to draw attention. But under Mexican law, organized crime is both a modality in which crimes are committed, and a crime in itself. That means organized crime can fall under either crime prevention—which was, until then, a police task—or criminal prosecution, a task reserved for prosecutors. Nowhere in the legal system was there a mandate or authorization to naval or military personal to carry out operations against organized crime. The wording of the text presumes the preexisting possibility of naval and military operations in the pursuit of organized crime; in fact, it was that passage that introduced the legal possibility of such operations, for they are not authorized in any other legal text.

Criminal prosecution and, specifically, the pursuit of organized crime are—according to the text of the Constitution—the exclusive domain of the Attorney General, which has the “monopoly” to initiate criminal procedures and undertake criminal investigations.¹²⁹ Thus, the National Security Act established a gray area around criminal investigation and prosecution of organized crime, allowing the armed forces to pursue organized criminals.¹³⁰ The participation of the armed forces in the pursuit of drug trafficking is, in practice, far from exceptional. Twenty five percent of sentenced federal prisoners reported they were originally detained by the Army.¹³¹ Armed forces assumed local police functions in different cities and regions in the country in 2005, a process that multiplied itself starting in late 2006 with the launching of the drug war.¹³²

The National Security Act also included extensive clauses enabling the armed forces to participate in criminal investigations under

127. Decreto por el que se expide la Ley de Seguridad Nacional y se reforma el artículo 50 Bis de la Ley Orgánica de Poder Judicial de la Federación, *supra* note 58.

128. Madrazo, *El impacto de la política de drogas*, *supra* note 67, at 39 & n.40.

129. Constitución Política de los Estados Unidos Mexicanos, CPEUM, art. 21, pfo. 2, Diario Oficial de la Federación [DOF] 05-02-1917, <http://www.senado.gob.mx/comisiones/cogati/docs/CPEUM.pdf> (last visited Jan. 17, 2019).

130. Ley de Seguridad Nacional, *supra* note 59, at art 5, fracc. V.

131. Pérez-correa, Alonso & Silva, *supra* note 67.

132. Atuesta, *supra* note 46.

the direction of the (federal) Attorney General's office.¹³³ Purportedly, these clauses could fall under the Court precedent of 1996 that allowed for "auxiliary" (and administrative) tasks by military bodies in aid of civil authorities.¹³⁴ But the constitutional amendments of 2008 referred to above¹³⁵ included an explicit clause stating that *only* civil agencies could carry out public security tasks,¹³⁶ thus rendering the judicial precedent moot.

This brings us to the last two conflations. First, the 2008 amendment redefined the concept of "public security" to include criminal investigation, collapsing the distinction between public security and criminal prosecution, and thus conflating the two.¹³⁷ The Federal Police Act of 2009 built on this conflation and gave broad powers to the Federal Police enabling it to assist the Attorney General directly in criminal investigations.¹³⁸ Furthermore, it also authorized the police to conduct independent "preventive" investigations, without reporting to the Attorney General.¹³⁹

Second, even while conflating public security and criminal investigation and prosecution, the 2008 amendment clearly *excluded* military authorities from carrying out these two.¹⁴⁰ Understood in context, this exclusion was a Congressional response to the Supreme Court's precedent of 1996, trumping the loophole which the Court had opened then for "auxiliary" tasks carried about by military bodies and which had, by 2008 under the war on drugs, led to the militarization of a large part of public security throughout the country.¹⁴¹

Instead of heeding the constitutional amendment, the Calderon administration attempted to bypass this ban in 2009 by introducing a bill that would add a chapter "Of Internal Security" to be introduced in

133. Ley de Seguridad Nacional, *supra* note 59, at arts 24 & 25.

134. *See supra* note 50.

135. *See supra* Section II.A.1.

136. As defined in Article 21 of the Constitution, public security includes investigation and prosecution of crimes. Constitución Política de los Estados Unidos Mexicanos, CPEUM, art. 21, Pfo. 0, Diario Oficial de la Federación [DOF] 05-02-1917, <http://www.senado.gob.mx/comisiones/cogati/docs/CPEUM.pdf> (last visited Jan. 17, 2019).

137. Madrazo, *El impacto de la política de drogas*, *supra* note 67, at 11.

138. Decreto por el que se expide la Ley de la Policía Federal [Decree by Which the Federal Police Law Is Issued], art. 2, fracc. IV., Diario Oficial de la Federación [DOF] 01-06-2009 (Mex.), http://www.dof.gob.mx/avisos/1888/SSP_010609/SSP_010609.htm.

139. *Id.* at art. 5.

140. *See* Decreto por el que se reforman y adicionan diversas disposiciones de la Constitución Política de los Estados Unidos Mexicanos, *supra* note 65.

141. Acción de inconstitucionalidad 1/96, SCJN, *supra* note 53.

the National Security Law.¹⁴² The move was pretty obvious: by re-labeling *public* security tasks carried out by the military as *internal* security, the newly introduced explicit constitutional ban was formally respected yet ignored in practice. The bill introduced a dormant clause of the Constitution that spoke of the President's authority to deploy military forces for matters of "internal security."¹⁴³ The clause had originally been included in the Constitution of 1824 and was incorporated in the Constitution of 1917, but the clause was never used.¹⁴⁴ It was linked to Article 119 that establishes an obligation for federal powers to aid state powers when they are either invaded or face internal revolts, but subjects their activation to a formal request by the concerned state.¹⁴⁵ Calderon's bill was defeated in Congress in 2011, but by 2016 it was reintroduced in an even more dramatic version as a free standing Internal Security Law.¹⁴⁶ It was approved in December

142. Proyecto de decreto por el que se reforma la Ley de Seguridad Nacional [Draft Decree Amending the National Security Law], *Gaceta del Senado* [GS], 21-04-2009, LX/3SPO-372/20288, http://www.senado.gob.mx/64/gaceta_del_senado/2009_04_23/682/documento/20288.

143. Constitución Política de los Estados Unidos Mexicanos, CPEUM, art. 89, fracc. VI, *Diario Oficial de la Federación* [DOF] 05-02-1917, <http://www.senado.gob.mx/comisiones/cogati/docs/CPEUM.pdf> (last visited Jan. 17, 2019).

144. The history of this clause, interestingly, relates most often to Native American revolts. The federal government refused to treat Native Americans as sovereign powers because the federal government considered them a threat to national security. At the same time, the government was not prepared to treat them simply as criminals, for that would have meant recognizing their citizenship, which the government was not prepared to do. The policies set in place to deal with such revolts—mass internal displacement, bounty per head collected—implied denying the rebellious Native Americans treatment as Mexican citizens. See Romero & Madrazo, *supra* note 68.

145. Constitución Política de los Estados Unidos Mexicanos, CPEUM, art. 119, Pfo. 2, *Diario Oficial de la Federación* [DOF] 05-02-1917, <http://www.senado.gob.mx/comisiones/cogati/docs/CPEUM.pdf> (last visited Jan. 17, 2019).

146. Iniciativa que reforma y adiciona diversas disposiciones de la Ley de Seguridad Nacional, a cargo del diputado Jorge Ramos Hernández [Initiative That Reforms and Adds Various Provisions of the National Security Law, by the Deputy Jorge Ramos Hernández] (Mex.), http://sil.gobernacion.gob.mx/Archivos/Documentos/2015/11/asun_3305658_20151124_1447256966.pdf; Iniciativa con proyecto de Decreto por el que se expide la Ley de Seguridad Interior, suscrita por el senador Roberto Gil Zuarth [Initiative with Draft Decree Issuing the Internal Security Law, Signed by Senator Roberto Gil Zuarth] (Mex.), http://sil.gobernacion.gob.mx/Archivos/Documentos/2016/09/asun_3413519_20160927_1474554109.pdf; Iniciativa con proyecto de Decreto por el que se expide la Ley de Seguridad Pública, suscrita por los diputados César Octavio Camacho Quiroz y Martha Sofía Tamayo Morales [Initiative with Draft Decree by Which the Law of Public Security Is Issued by the Deputies César Octavio Camacho Quiroz and Martha Sofía Tamayo Morales] (Mex.), http://sil.gobernacion.gob.mx/Archivos/Documentos/2016/11/asun_3441153_20161104_1478014676.pdf; Iniciativa que expide la Ley de Seguridad interior, a cargo del senador Luis Miguel Gerónimo Barbosa [Initiative That Issues the Internal Security Law by Senator Luis Miguel Gerónimo Barbosa] (Mex.), <http://sil.gobernacion.gob.mx/Archivos/Documen>

of 2017 and was immediately challenged before the Supreme Court.¹⁴⁷ Had the Court failed to strike it down, the President would have, for all practical purposes, the power to unilaterally militarize public security in any part of the country with no effective checks from the other branches of government, no time limit, and no need for state or city collaboration.¹⁴⁸ Effectively, the President was able, for almost a year—an election year—to bypass the Constitution without suspending it and thus without activating the corresponding controls that Article 29 establishes in case of national emergency.¹⁴⁹

The result of these confluences—between national security, public safety and criminal investigation—is an uncertain scenario in which the functions and responsibilities of each involved agency—the Army, the Navy, the Federal Police, State Police, County Police, and

tos/2017/01/asun_3473709_20170111_1484156817.pdf; GALINDO ET AL., *supra* note 68.

147. On February 9, 2018, the Supreme Court had admitted eight challenges to the bill. Three of them are writs of unconstitutionality (*acciones de inconstitucionalidad*), submitted by the National Human Rights Commission (case number 11/2018), the National Institute of Transparency, Access to Information, and Protection to Personal Data (case number 9/2018), and minorities of representatives and senators (case numbers 6/2018 and 8/2018 respectively). The other five are constitutional controversies (*controversias constitucionales*), submitted by the municipality of San Pedro Chula, Puebla (case number 4/2018); the municipality of Hidalgo del Parral, Chihuahua (case number 10/2018); Estado de Mexico's municipalities of Nezahualcóyotl, Ocuilan and Cocotitlán (case number 38/2018, 33/2018, and 34/2018); Yucatan's municipalities of Oxtutzcab, Tepekán and Hocotún (case number 40/2018, 35/2018, and 37/2018), and Puebla's municipalities of Ahuacatlán and Tepeyahualco (case number 39/2018 and 36/2018). Also, the Federal Judiciary has received more than 700 *amparo* challenges by individual citizens. According to Jorge Mario Pardo Rebolledo, a judge of the Supreme Court, the *amparo* challenges will be resolved after the eight writs of unconstitutionality. See Gustavo Castillo, *SCJN admitió ocho impugnaciones contra Ley de Seguridad Interior* [*SCJN Admitted Eight Challenges Against the Internal Security Law*], LA JORNADA, (Feb. 9, 2018, 6:44 PM), <http://www.jornada.com.mx/ultimas/2018/02/09/scjn-admitio-ochimpugnaciones-contra-ley-de-seguridad-interior-9564.html>; *¿Cómo va impugnación de Ley de Seguridad Interior en la Corte?* [*How Is the Internal Security Law Challenge in the Court?*], LA SILLA ROTA, (May 5, 2018, 10:30 PM), <https://lasillarota.com/scjn-ley-seguridad-interior-sentencia-amparo/225411>.

148. CENTRO PRODH, *supra* note 68; Romero & Madrazo, *supra* note 68; CMDPH, SEGURIDAD INTERIOR: ¿SEGURIDAD PARA QUIÉN? [INTERNAL SECURITY: SECURITY FOR WHOM?] (José Antonio Guevara Bermudez ed., 2017), <http://www.cmdpdh.org/publicaciones-pdf/cmdpdh-seguridad-interior.pdf>; *Ley de Seguridad Interior: Comparecencia en la Cámara del Senado del Congreso de la Unión* [*Internal Security Law: Hearing Before the Senate of Congress*], LXIII Legislatura (2017) (declaración de Alejandro Madrazo, profesor-investigador del CIDE [Statement of Alejandro Madrazo, Researcher-Professor of CIDE]).

149. On November 15 of 2018 the Court voted on the first of the cases, striking the bill in its entirety. The ruling, however, has not been published, so it is impossible at the time of publication to abound as to the ratio of the ruling. (See <https://www.economista.com.mx/politica/SCJN-declara-inconstitucional-la-Ley-de-Seguridad-Interior-20181115-0087.html>).

the Attorney General—are rendered unclear. Who can detain, investigate, question, and bring charges against people?¹⁵⁰ When authorities can do anything, and nobody is directly responsible for what is done (investigation, law enforcement), the consequences are insecurity and uncertainty for all, except the authorities.

150. Uncertainty is the least evil that affects civilians. The situation has reached alarming proportions. The Attorney General who took office immediately after the Calderon administration, Jesus Murillo Karam, stated soon after coming into office that these confusions undermine the capacity of his office to carry out criminal investigations:

“The [Federal P]olice were given a role that used to correspond to the Attorney General office, I say that it used to because they are no longer [investigative] police, since [the investigation police directly under the Attorney General’s authority were] assigned to bodyguard duty or to take custody of detainees, no longer carrying out criminal investigations. . . .

“While [Federal] Police received wide powers for [criminal] investigation; what happened was that the Federal Police and the Attorney General competed, were not interacting, and today we are seeing the effects of that: failed criminal investigations one after another, because there is not enough proofs to [properly] integrate a case file”

David Viceteño, *PGR se usó para escoltar; se perdió la capacidad para investigar: Murillo Karam [PGR Was Used to Escort; the Ability to Investigate Was Lost: Murillo Karam]*, EXCELSIOR (May 9, 2013, 9:14 AM), <http://www.excelsior.com.mx/nacional/2013/05/09/898086>. Of the almost 4000 special agents of the Federal Police, only 495 were assigned to investigation, while the rest worked as bodyguards for different people. *Id.*

If preventive police carry out the functions of the Attorney General, and simultaneously the Attorney General’s investigative police serve as bodyguards, it should not be surprising that even the most notorious criminal prosecutions fail in Mexico. In addition, as Anaya has documented, giving public security tasks to the Armed Forces has also had serious repercussions on human rights. Alejandro Anaya Muñoz, *Violaciones a los derechos humanos en el marco de la estrategia militarizada de lucha contra el narcotráfico en México 2007-2012* [Violations of Human Rights in the Framework of the Militarized Strategy for Fight Against Drug Trafficking in Mexico 2007-2012] (Drug Policy Workshop, Working Paper No. 4, 2014). Even recent events like the death of 22 civilians at the hands of the army confirmed these dangers. Pablo Ferri, *Exclusiva: Testigo revela ejecuciones en el Estado de México* [Exclusive: Witness Reveals Executions in the State of Mexico], ESQUIRA LATINOAMÉRICA, (Sept. 9, 2014), <http://www.esquirelat.com/reportajes/14/09/17/escluva-esquire-Testigo-revela-ejecuciones-ejercito>. Most troubling, the statistics of the use of force by different corporations indicate that it is highly probable that those facts are not the exception but the rule; see Carlos Silva Forné, Catalina Pérez Correa & Rodrigo Gutiérrez Rivas, *Uso de la fuerza letal. Muertos, heridos y detenidos en enfrentamientos de las fuerzas federales con presuntos miembros de la delincuencia organizada* [Use of Lethal Force. Dead, Wounded and Detained in Clashes with Federal Forces with Suspected Members of Organized Crime], DESACATOS, Sept.-Dec. 2011, at 47-64; Jesús Silva-Herzog Márquez, *Ejecuciones extrajudiciales* [Extrajudicial Executions], REFORMA (Sept. 29, 2014), <http://www.reforma.com/aplicaconeslibre/preacceso/articulo/default.aspx?id=37013>.

B. *The Colombian Case*

Drug trafficking has permeated Colombian society and affected one of its most egregious realities: the internal conflict that has endured for more than fifty years. Two phenomena have complicated this situation: the particular way in which the armed conflict has merged with the drug business over the last three decades, and a scenario that increasingly falls within the category of terrorism. For many people—perhaps jaded, but also disoriented by the painful persistence of violence—the armed conflict, drug trafficking, and terrorism are one and the same problem. In fact, the government’s tendency to consider the guerrillas, paramilitaries, or drug cartels as part of the same problem was labeled the “narcotization of the armed conflict.”¹⁵¹

Nevertheless, it is also possible to look at it from the other side of the coin: drug trafficking itself has acquired the bellicose language of the armed conflict. The consolidation of strong ties among paramilitaries, guerrillas, army, politicians, and “local caciques” can be characterized as the “warmongering transformation of drugs” in Colombia.¹⁵²

This context, combining drug prohibition¹⁵³ with drug traffickers joining in an armed conflict’s arms race, has produced—and is still producing—serious costs and consequences for the Colombian political community. When it comes to constitutional costs, two institutional spheres became conflated in Colombia during the war against drugs: criminal justice and public/national security.¹⁵⁴ Drug trafficking has been addressed with mixed doses—in varying degrees—of

151. MANUEL ITURRALDE, CASTIGO, LIBERALISMO AUTORITARIO Y JUSTICIA PENAL DE EXCEPCIÓN [PUNISHMENT, AUTHORITARIAN LIBERALISM, AND CRIMINAL JUSTICE OF EXCEPTIONALITY] 84 (2010). Samper’s government (1994-1998), for instance, frequently used the category “organized crime groups,” which included guerrillas, paramilitaries, and drug traffickers. *See id.* at 161.

152. In the eighties, the drug traffickers actually became a new rural elite—very warlike—in Colombia, by financing private armies in partnership with some landowners and the military. GUSTAVO DUNCAN, LOS SEÑORES DE LA GUERRA: DE PARAMILITARES, MAFIOSOS Y AUTODEFENSAS EN COLOMBIA [THE WARLORDS: PARAMILITARIES, THE MAFIA, AND SELF-DEFENSES IN COLOMBIA] 250-59 (2006).

153. In 1994, with the ruling C-221 of the Colombian Constitutional Court, the possession of certain doses of illicit drugs for personal use was decriminalized because criminalization represented a disproportionate affect on individual autonomy and development. However, in 2009, boosted by the persistent insistence of President Uribe, Congress passed a constitutional amendment prohibiting the possession and consumption of drugs in almost all cases. CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] [POLITICAL CONSTITUTION OF COLOMBIA] art. 49, reformada por el Acto Legislativo 2 de 2009 [amended by the Legislative Act 02 of 2009].

154. Public and national security are, in Colombia, two spheres that have long been conflated due to its prolonged internal conflict.

military logic and criminal legal reasoning. This fusion has generated costs—some of them, highly painful—to the detriment of the Colombian society.

When analyzing the institutional organization of the Colombian political community, three constitutional costs, among the many linked to drug prohibition, are the most notorious. As noted, all three draw simultaneously on criminal law with public/national security. They are: (i) the restriction of fundamental rights; (ii) the militarization of public power; and (iii) the emergence and consolidation of a special regime of criminal justice. In the following pages each of these constitutional costs will be explained and analyzed.

1. *Restriction of Fundamental Rights*

One of the most fundamental rights of the rule of law is that all restrictions on constitutional freedoms should be guarded from discretionary and unilateral decisions of the Executive Branch.¹⁵⁵ Procedures and administrative or judicial orders, habitually carried out to prevent and prosecute criminal offenses—such as arrests, seizures, raids, or communication interception—require that authorities act based on a preexisting law (“*reserva legal*” or legal reserve) and act following a judicial injunction that authorizes the specific action, which is known beforehand to be intrusive on individual liberty (“*reserva judicial*” or judicial reserve).¹⁵⁶ These two rights were seriously undermined in the name of the war on drugs.

Regarding searches, seizures, and interception of communications, one of the first steps taken during the eighties—when the drug war started—was transferring significant powers to the army and thereby marginalizing civilian authorities.¹⁵⁷ The authority of ordinary judges in drug crime procedures was curtailed.¹⁵⁸ In May 1984, the Betancur administration allowed for military intelligence to interfere

155. In this sense, from the first half of the twentieth century, the Colombian Supreme Court noted that “it is obvious that all the matters concerning the regulation of civil rights correspond to the legislature and not the government.” Corte Suprema de Justicia [C.S.J.] [Supreme Court], Sala Plena septiembre 4, 1939, M.P: P. Gómez Naranjo, Gaceta Judicial [G.J.] (No. 1947-1951, pp. 610-640) (Colom.), [http://www.cortesuprema.gov.co/corte/wp-content/uploads/subpage/GJ/Gaceta%20Judicial/GJ%20XLVIII%20n.º%201947-1952%20\(1939-1940\).pdf](http://www.cortesuprema.gov.co/corte/wp-content/uploads/subpage/GJ/Gaceta%20Judicial/GJ%20XLVIII%20n.º%201947-1952%20(1939-1940).pdf).

156. See MANUEL FERNANDO QUINCHE RAMÍREZ, DERECHO CONSTITUCIONAL COLOMBIANO DE LA CARTA DE 1991 Y SUS REFORMAS [COLOMBIAN CONSTITUTIONAL LAW: CONSTITUTION OF 1991 AND ITS REFORMS] 106–07 (2009) (discussing legal and judicial reserves).

157. Bruce M. Bagley, *Colombia and the War on Drugs*, FOREIGN AFF., Fall 1988, at 70, 80–81, 88.

158. ITURRALDE, supra note 151, at 82.

with all forms of communication allegedly involved in drug trafficking and kidnapping.¹⁵⁹ This measure—among many others—was taken one day after Colombia was declared under siege,¹⁶⁰ following the assassination of the Minister of Justice Rodrigo Lara Bonilla on April 30, 1984, by hitmen under orders from drug trafficker Pablo Escobar.¹⁶¹ This murder led to an open declaration of war against drug trafficking.

Throughout the state of exception, judicial control over the actions of the authorities—particularly the army—continued to erode. With the Statute for the Defense of Democracy, issued by President Barco,¹⁶² searches of private residences and offices suspected of being involved in terrorist operations increased.¹⁶³ For instance, in September 1989, the military criminal judges were empowered to order searches in all residences that had presumably been involved in the commission of drug trafficking, terrorism, and related crimes.¹⁶⁴

159. L. 2/84, enero 17, 1984, [120, No. 36450] DIARIO OFICIAL [D.O.] página 1 (Colom.), <http://www.suin-juriscol.gov.co/viewDocument.asp?id=1557186>.

160. Decreto 1042, mayo 14, 1984, [121, No. 36608] DIARIO OFICIAL [D.O.] página 673 (Colom.), <http://www.suin-juriscol.gov.co/viewDocument.asp?id=1213256>. It would be the last siege of the Colombian Republic, since later, in 1991—when another siege was attempted while, paradoxically, the new Constitution of 1991 was issued—such measures were replaced by the more moderate state of emergency. CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] [POLITICAL CONSTITUTION OF COLOMBIA] arts. 212-215, reformada por el Acto Legislativo 2 de 2009 [amended by the Legislative Act 02 of 2009].

161. Lara Bonilla had publicly denounced the power that the traffickers in Colombia had illicitly acquired, particularly those of the Medellín cartel, whose head (Pablo Escobar) had even become a member of the Colombian Congress. The infiltration of drug trafficking in politics was evident. The denunciation of this and other facts made Lara Bonilla the target of the powerful Medellín cartel.

162. Decreto 180, enero 27, 1988, [124, No. 38191] DIARIO OFICIAL [D.O.] página 1 (Colom.), <http://www.suin-juriscol.gov.co/viewDocument.asp?id=1040981>.

163. ITURRALDE, *supra* note 151, at 100.

164. Decreto 2103, septiembre 4, 1989, [126, No. 38981] DIARIO OFICIAL [D.O.] página 3 (Colom.), <http://www.suin-juriscol.gov.co/viewDocument.asp?id=1400150>. The Legislature tried to implement this measure in the Decree 1863 of 1989, but the Supreme Court declared it unconstitutional because the criminal offenses at stake were skimpily specified. Corte Suprema de Justicia [C.S.J.] [Supreme Court], Sala Plena octubre 3, 1989, M.P: F. Morón Díaz, Gaceta Judicial [G.J.] (No. 2436) (Colom.), [http://www.cortesuprema.gov.co/corte/wp-content/uploads/subpage/GJ/Gaceta%20Judicial/GJ%20CXC VII%20Parte%202%20n.%202436%20\(1989\).pdf](http://www.cortesuprema.gov.co/corte/wp-content/uploads/subpage/GJ/Gaceta%20Judicial/GJ%20CXC VII%20Parte%202%20n.%202436%20(1989).pdf).

Once the criminal offenses were clarified, and after the assassination of the liberal leader Luis Carlos Galán, the Court upheld the new attempt to implement that measure. Corte Suprema de Justicia [C.S.J.] [Supreme Court], Sala Plena noviembre 16, 1989, M.P: F. Morón Díaz, Gaceta Judicial [G.J.] (No. 2436) (Colom.), [http://www.cortesuprema.gov.co/corte/wp-content/uploads/subpage/GJ/Gaceta%20Judicial/GJ%20CXC VII%20Parte%202%20n.%202436%20\(1989\).pdf](http://www.cortesuprema.gov.co/corte/wp-content/uploads/subpage/GJ/Gaceta%20Judicial/GJ%20CXC VII%20Parte%202%20n.%202436%20(1989).pdf). In the nineties and the first decade of this century, various governments occasionally tried to implement such measures. With the introduction of the adversarial system in Colombia, regulated

As to the rules governing arrests, the war on drugs has also produced costs. The Constitutional Court, in a highly debated line of jurisprudence, stated that physical freedom of citizens should be regarded as the general rule; the affectation of them by the judicial authority is to be regarded as “its limit,” and the absence of such judicial authorization in cases of *in flagrante delicto* an acceptable “exception.”¹⁶⁵ Practice, however, has toned down this precedent when arrests for drug trafficking and terrorism are involved. In particular, the requirement of judicial authorization and supervision in order to curtail someone’s physical liberty has been undermined. The Barco administration in the late eighties—one of the cruelest phases of drug-related violence—established that suspects of drug trafficking could remain cut off from communication and without legal assistance for up to seven business days.¹⁶⁶ A few years later, during the Gaviria administration, Article 3 of the Law 15 of 1992 established that detention could be extended for indefinite periods in cases of drug trafficking and terrorism.¹⁶⁷ The Constitutional Court struck down this provision because it deemed that, like any punishment without a legal trial, it was disproportionate.¹⁶⁸ This measure reminds us of the *arraigo* in the case of Mexico because of the similar roles played by these rules and their problematic compatibility with basic constitutional freedoms. The difference, of course, is that, contrary to the Colombian case, in Mexico the striking of *arraigo* as unconstitutional was defeated by a constitutional amendment.

The war on drugs, fueled by the intensity of the guerrilla and paramilitary violence, served as one of the basic justifications for government to portray human rights as an obstacle to achieving security,

in 2004, it was established that none of these procedures could be advanced without a warrant.

165. Corte Constitucional [C.C.] [Constitutional Court], marzo 15, 2005, Sentencia C-237/05 (Colom.), *available at* <http://www.corteconstitucional.gov.co/relatoria/2005/C-237-05.htm>. This rule was reiterated in subsequent judgments. *See* Corte Constitucional [C.C.] [Constitutional Court], julio 12, 2005, Sentencia 730/05 (Colom.), <http://www.corteconstitucional.gov.co/relatoria/2005/C-730-05.htm>; Corte Constitucional [C.C.] [Constitutional Court], agosto 17, 2005, Sentencia C-850/05 (Colom.), <http://www.corteconstitucional.gov.co/relatoria/2005/C-850-05.htm>; Corte Constitucional [C.C.] [Constitutional Court], octubre 3, 2005, Sentencia C-1001/05 (Colom.), <http://www.corteconstitucional.gov.co/relatoria/2005/C-1001-05.htm>.

166. Decreto 1859, agosto 18, 1989, [126, No. 38945] DIARIO OFICIAL [D.O.] página 4 (Colom.), <http://www.suin-juriscol.gov.co/viewDocument.asp?id=1362149>.

167. L. 15/92, octubre 5, 1992, [No. 40612] DIARIO OFICIAL [D.O.] página 1, (Colom.) <http://www.suin-juriscol.gov.co/viewDocument.asp?id=1571777>.

168. Corte Constitucional [C.C.] [Constitutional Court], mayo 28, 1993, Sentencia C-301/93 (Colom.), <http://www.corteconstitucional.gov.co/relatoria/1993/c-301-93.htm>.

or assume—for the case studied in this section—that the principle of judicial reserve was an awkward obligation that obstructed important arrests, searches, wiretapping, and seizures. Nevertheless, in the first decade of the century, the incorporation of the adversarial system to Colombian criminal law required judicial reserve in criminal procedures but maintained the vestiges of the previous restrictive scheme by allowing judicial control after 36 hours of the intervention of the authorities.¹⁶⁹

Additionally, authorities have automatically addressed drug trafficking by creating new criminal offenses, increasing existing penalties, reducing procedural rights of those accused and generally limiting the legal rights of the indicted. Perhaps the most remarkable measure has been an increase in penalties related to drug offenses. In this regard, one of the most extreme moments took place in November 1988 when the Barco administration's war on drug cartels went beyond what had been imaginable. It established, in a decree, life imprisonment for any member of an illegal armed group—including, of course, the drug trafficking organizations that commit murder.¹⁷⁰ This was completely foreign to the Colombian criminal justice system, which had until then been characterized by limited imprisonment. Indeed, the Supreme Court struck down this measure in the following months, while underscoring the disproportion that it implied.¹⁷¹ Drug trafficking has thus been characterized by disproportionately high punishments. From the formal beginning of the war on drugs in 1984, illicit drug trafficking and all related crimes have been assigned to the highest penalties.¹⁷²

169. Thus, according to the Constitution and the Code of Criminal Procedure, captures must be authorized by guarantees controlled by the judge. With that being said, the General Prosecutor can exceptionally place captures under judicial control within thirty-six hours after the capture. Besides, seizures, searches, and wiretapping must also have legal, maximum control within thirty-six hours of its realization.

170. Decreto 2490, noviembre 30, 1988 [125, No. 38594] DIARIO OFICIAL [D.O.] página 2 (Colom.), <http://www.suin-juriscol.gov.co/viewDocument.asp?id=1455930>; Corte Suprema de Justicia [C.S.J.] [Supreme Court], Sala Plena marzo 27, 1989, M.P.: F. Morón Díaz, Gaceta Judicial [G.J.] (No. 2436, pp. 90-124) (Colom.), [http://www.cortesuprema.gov.co/corte/wp-content/uploads/subpage/GJ/Gaceta%20Judicial/GJ%20CXCVII%20n.%202436%20\(1989\).pdf](http://www.cortesuprema.gov.co/corte/wp-content/uploads/subpage/GJ/Gaceta%20Judicial/GJ%20CXCVII%20n.%202436%20(1989).pdf).

171. Corte Suprema de Justicia [C.S.J.] [Supreme Court], Sala Plena, marzo 27, 1989, *supra* note 170.

172. Manuel Iturralde & Libardo Ariza, *El tratamiento penal del narcotráfico y delitos conexos* [*Criminal Treatment of Drug Trafficking and Related Crimes*], in *POLÍTICAS ANTIDROGA EN COLOMBIA: ÉXITOS, FRACASOS Y EXTRAVÍOS* [ANTI-DRUG POLICIES IN COLOMBIA: SUCCESS, FAILURE, AND DEVIATIONS] 271, 274 (Alejandro Gaviria Uribe & Daniel Mejía Lodoño eds., 2011). Penalties ranged between four and twenty years.

The preferred tool of several administrations when carrying out the war on drugs has been the creation of new offenses. The 1980s are often remembered for the novel criminalization of “illicit enrichment” as well as money laundering.¹⁷³ Furthermore, the continued alteration of criminal offenses was frequently carried out in an improvised manner, without, for example, pondering the consequences that its application would have in overcrowded prisons.

2. *Militarization of Public Power*

The increase of violent drug trafficking organizations, guerrillas, and paramilitary forces—at different times and with varying intensity—was followed by an increase in the powers of the Army.¹⁷⁴ In terms of territorial control, the figure that served as a vehicle of military presence was the concept of “theater of operations.”¹⁷⁵ If a region became the “theater” of military operations, it meant that public order was contested and the State, through military intervention, was attempting to establish undisputed control. In one of the most acute phases of the drug war, from 1987 to 1990, the Colombian Supreme Court validated this mechanism.¹⁷⁶ In fact, in a ruling from March of 1987 that became famous because in it the Colombian Supreme Court banned the military trial of civilians, the Court also—and this went

173. Decreto 1895, agosto 24, 1989, [126, No. 38951] DIARIO OFICIAL [D.O.] página 3 (Colom.), <http://www.suin-juriscol.gov.co/viewDocument.asp?id=1367307>; L. 365, febrero 21, 1997, [132, No. 42987] DIARIO OFICIAL [D.O.] (Colom.), <http://www.alcaldiabogota.gov.co/sisjur/normas/Norma1.jsp?i=22771>.

The new drug-related crimes were part of a “punitive surge” that also took place in the armed conflict context. The “omission to report or provide testimony” was established as a crime by the Samper Administration, and is illustrative. Under this offense, anyone who knew about the commission of a crime in the region of Urabá and did not denounce it would be the subject of criminal sanction. Decreto 1590, mayo 23, 2006, [142, No. 46277] DIARIO OFICIAL [D.O.] página 27 (Colom.), <http://www.suin-juriscol.gov.co/viewDocument.asp?id=1314153>.

174. Bagley, *supra* note 157.

175. Corte Suprema de Justicia [C.S.J.] [Supreme Court], Sala Plena octubre 26, 1989, M.P.: H. Gómez Otálora, Gaceta Judicial [G.J.] (No. 2436, pp. 280-325) (Colom.), [http://www.cortesuprema.gov.co/corte/wp-content/uploads/subpage/GJ/Gaceta%20Judicial%20CXCXVII%20Parte%202%20n.º%202436%20\(1989\).pdf](http://www.cortesuprema.gov.co/corte/wp-content/uploads/subpage/GJ/Gaceta%20Judicial%20CXCXVII%20Parte%202%20n.º%202436%20(1989).pdf). This is a long-standing figure in Colombia. Since the independence period, the Constitution of 1821, the first national Constitution in Colombia, forged under the leadership of Simon Bolivar, authorized the Congress to grant extraordinary powers to the President “in places which are immediately serving as operation theaters.” CONSTITUCIÓN POLÍTICA DE COLOMBIA DE 1821 [C.P.] art. 55 § 25.

176. ANTONIO BARRETO ROZO, LA GENERACIÓN DEL ESTADO DE SITIO : EL JUICIO A LA ANORMALIDAD INSTITUCIONAL EN LA ASAMBLEA NACIONAL CONSTITUYENTE DE 1991, at 57-72 (2011); Corte Suprema de Justicia [C.S.J.] [Supreme Court], Sala Plena mayo 24, 1990, Sentencia 59, Gaceta Judicial [G.J.] (No. 2149) (Colom.), <http://www.suin-juriscol.gov.co/viewDocument.asp?id=30017305>.

almost unnoticed—validated theaters of operations and the existence of military mayors.¹⁷⁷

This concept—the theater of operations—has taken different names. During the Barco administration, they were called “emergency zones and military operations” (1986-1990);¹⁷⁸ during the Samper administration; “special areas of public order” (1994-1998);¹⁷⁹ during the Pastrana administration, “theaters of military operations” (1998-2002);¹⁸⁰ and during the Uribe administration, “rehabilitation and consolidation zones” (2002-2006 and 2006-2010).¹⁸¹ Regardless of the names, the fundamental idea remains the same: to transfer the powers of local civil government to the military. Between 1987 and 1990, in what could be described as a boom of the theaters of operations, Pacho (Cundinamarca),¹⁸² Urabá (Antioquia),¹⁸³ Puerto Boyacá,¹⁸⁴ Envigado, Bello, and La Estrella¹⁸⁵ were declared as special areas of public order, since they were exposed to drug traffickers and their paramilitary squads.

The link between drug prohibition and military government in Colombia is visible at the inception of these dynamics, under the López Michelsen administration (1974-1978), long before the official declaration of a “war on drug traffickers” in the 1980s. It was then that drug trafficking became a criminal offense under military jurisdiction.¹⁸⁶ Beginning in the late 1970s, and particularly in the early

177. The government of civil and military authorities were endorsed in subsequent opinions. See C.S.J., Sala Plena octubre 26, 1989, M.P. H. Gómez Otálora, *supra* note 175.

178. Decreto 2099, septiembre 14, 1989, [126, No. 38981] DIARIO OFICIAL [D.O.] página 1 (Colom.), <http://www.suin-juriscol.gov.co/viewDocument.asp?id=1758152>.

179. Decreto 871, mayo 13, 1996, [132, No. 42787] DIARIO OFICIAL [D.O.] página 8 (Colom.), [http://www.suin-juriscol.gov.co/clp/contenidos.dll/Decretos/1181860?fn=document-frame.htm\\$f=templates\\$3.0](http://www.suin-juriscol.gov.co/clp/contenidos.dll/Decretos/1181860?fn=document-frame.htm$f=templates$3.0).

180. Decreto 1341, julio 12, 2000, [136, No. 44089] DIARIO OFICIAL [D.O.] página 15 (Colom.), <http://www.suin-juriscol.gov.co/viewDocument.asp?id=1269990>.

181. Decreto 2929, diciembre 3, 2002, [138, No. 45020] DIARIO OFICIAL [D.O.] página 1 (Colom.), <http://www.alcaldiabogota.gov.co/sisjur/normas/Normal.jsp?dt=S&i=6342>.

182. Decreto 2099 de 1989, *supra* note 178.

183. Decreto 678, abril 14, 1988, [124, No. 38293] DIARIO OFICIAL [D.O.] página 1 (Colom.), <http://www.suin-juriscol.gov.co/viewDocument.asp?id=1724130>.

184. Decreto 2100, septiembre 14, 1989, [126, No. 38981] DIARIO OFICIAL [D.O.] página 2 (Colom.), [http://www.suin-juriscol.gov.co/clp/contenidos.dll/Decretos/1399522?fn=document-frame.htm\\$f=templates\\$3.0](http://www.suin-juriscol.gov.co/clp/contenidos.dll/Decretos/1399522?fn=document-frame.htm$f=templates$3.0).

185. Decreto 858, abril 24, 1990, [126, No. 29315] DIARIO OFICIAL [D.O.] página 7 (Colom.), <http://www.suin-juriscol.gov.co/viewDocument.asp?id=1914249>.

186. Corte Suprema de Justicia [C.S.J.] [Supreme Court], Sala Plena marzo 5, 1987, M.P. Jesús Vallejo Mejía, Expediente 1562, Gaceta Judicial [G.J.] (No. 2340, pp. 212-224) (Colom.), [http://www.cortesuprema.gov.co/corte/wp-content/uploads/subpage/GJ/Gaceta%20Judicial/GJ%20CXCI%20n.%C2%BA%202340%20\(1987\)%20Primer](http://www.cortesuprema.gov.co/corte/wp-content/uploads/subpage/GJ/Gaceta%20Judicial/GJ%20CXCI%20n.%C2%BA%202340%20(1987)%20Primer)

1980's through 1987, the administrations of Turbay Ayala (1978-1982),¹⁸⁷ Betancur (1982-1986),¹⁸⁸ and Barco (1986-1990)¹⁸⁹ allowed military courts to judge civilians. In March 1987, the Supreme Court declared this unconstitutional.¹⁹⁰ The Court stated that because military tribunals were outside the Judiciary Branch and within the Executive, it was not possible to ensure that they acted autonomously. The long period during which drug crimes were ascribed to the military jurisdiction must be tallied as a constitutional cost of the Colombian war on drugs. Despite functioning institutional mechanisms—the Supreme Court did, after all, eventually strike down the practice of military tribunals judging civilian criminal matters—there was a sustained undermining of a core constitutional commitment: the division of public powers.

The Lopez Michelsen administration (1974-1978)—under extraordinary state-of-exception powers—also exempted from criminal responsibility members of the security forces acting during “planned operations to prevent and punish the crimes of extortion and kidnapping, as well as the production, processing and trafficking of narcotics.”¹⁹¹ The press named this standard—with an eloquent cynicism—the “James Bond decree” because it openly granted the police licenses to kill.¹⁹² In challenging this measure as disproportionate, the applicants denounced it as the implementation of an extrajudicial death penalty.¹⁹³ The measure, however, was endorsed by the Supreme

%20Semestre.pdf.183. At least since 1945, the Supreme Court has allowed the military trial of civilians —with its judgment of June 12, 1945.

187. Decreto 70, enero 20, 1978, [114, No. 34944] DIARIO OFICIAL [D.O.] página 1 (Colom.), <http://www.suin-juriscol.gov.co/viewDocument.asp?id=1833239>; Decreto 1923, septiembre 6, 1978, [No. 35101] DIARIO OFICIAL [D.O.] (Colom.), https://www.minjusticia.gov.co/portals/0/MJD/docs/decreto_1923_1978.htm. This drastic regulation was known as the Security Statute. In 1978, approximately thirty percent of the offenses under the Penal Code were under the jurisdiction of the military courts. See ITURRALDE, *supra* note 151, at 80.

188. Decreto 1042, mayo 2, 1984, *supra* note 160; Decreto 1056, mayo 4, 1984, [121, No. 36608] DIARIO OFICIAL [D.O.] página 2 (Colom.), <http://www.suin-juriscol.gov.co/viewDocument.asp?id=1732881>; Decreto 1058, mayo 4, 1984, [120, No. 36587] DIARIO OFICIAL [D.O.] página 674 (Colom.), <http://www.suin-juriscol.gov.co/viewDocument.asp?id=1732905>.

189. Decreto 3665, diciembre 17, 1986, [123, No. 37737] DIARIO OFICIAL [D.O.] página 5 (Colomb.), <http://www.suin-juriscol.gov.co/viewDocument.asp?id=1533908>. The Barco administration granted full evidentiary value to the military and police reports in the military trials related to drug trafficking.

190. Corte Suprema de Justicia [C.S.J.] [Supreme Court], Sala Plena marzo 5, 1987, M.P: Jesús Vallejo Mejía, Expediente 1562, *supra* note 186.

191. Decreto 70, enero 20, 1978, *supra* note 187.

192. See ITURRALDE, *supra* note 151, at 74.

193. Corte Suprema de Justicia [C.S.J.] [Supreme Court], Sala Plena marzo 9, 1978, M.P: Guillermo González Charry, Gaceta Judicial [G.J.] (No. 2397, pp. 54-71)

Court, the constitutional arbiter at the time.¹⁹⁴ This is an example of a multi-faceted constitutional cost: It implied a violation of the right to life; it concentrated in a single figure the roles of police, judge, and prosecutor; and it abolished the presumption of innocence. None of this was formally struck down as “unconstitutional.”

3. *The Emergence and Consolidation of an Exceptional Criminal Justice*

In prosecuting crimes and criminal organization perceived as a major threat to social order—that is, behaviors strongly associated by the government with armed conflict, such as drug trafficking, terrorism, kidnapping, and related offenses—the Colombian government over the last three decades, like Mexico, established a criminal justice regime of exception.¹⁹⁵ Restrictive of the rights of those accused through it when compared to the ordinary justice system, this exception regime was designed to address situations of extreme crisis, but at the same time it has been increasingly normalized.

This regime emerged through a complex trajectory with the war on drugs as a backdrop, especially during the 1980s and 1990s. As noted above, the power of the military to judge civilians was struck down by the Supreme Court in March of 1987.¹⁹⁶ The ruling came down in the middle of a very tough period of drug cartel violence. The

(Colom.), available at [http://www.cortesuprema.gov.co/corte/wp-content/uploads/subpage/GJ/Gaceta%20Judicial/GJ%20CLVII%20n.º%202397%20\(1978\).pdf](http://www.cortesuprema.gov.co/corte/wp-content/uploads/subpage/GJ/Gaceta%20Judicial/GJ%20CLVII%20n.º%202397%20(1978).pdf).

194. *Id.* at 57-60.

195. See Libardo Ariza et al., ESTADO DE EXCEPCIÓN Y RAZÓN DE ESTADO EN COLOMBIA [STATE OF EMERGENCY AND REASON OF STATE IN COLOMBIA] (1998); Mauricio García Villegas, *Constitucionalismo perverso. Normalidad y anormalidad constitucional en Colombia: 1957-1997* [Perverse Constitutionalism - Normality and abnormality in Colombia: 1957-1997], in EL CALEIDOSCOPIO DE LAS JUSTICIAS EN COLOMBIA: ANÁLISIS SOCIO-JURÍDICO [THE KALEIDOSCOPE OF JUSTICE IN COLOMBIA: SOCIO-JURIDICO ANALYSIS] 317 (Boaventura de Sousa Santos & Mauricio García Villegas eds., 2001); Mauricio García & Rodrigo Uprimny, *Sistema judicial y conflicto armado en Colombia* [Judicial System and Armed Conflict in Colombia], in ¿JUSTICIA PARA TODOS? SISTEMA JUDICIAL, DERECHOS SOCIALES Y DEMOCRACIA EN COLOMBIA [JUSTICE FOR ALL? JUDICIAL SYSTEM, SOCIAL RIGHTS AND DEMOCRACY IN COLOMBIA] 235 (Rodrigo Uprimny Yepes, César A. Rodríguez Garavito & Mauricio García Villegas eds., 2006); Iturralde, *supra* note 151; see also Libardo Ariza & Antonio Barreto, *La Corte Constitucional frente a la excepcionalidad: Diez años de control material laxo y discursivo* [The Constitutional Court in the Face of Exceptionality: Ten Years of Lax and Discursive Material Control], in DERECHOS CONSTITUCIONAL: PERSPECTIVAS CRÍTICAS [CONSTITUTIONAL RIGHTS - CRITICAL PERSPECTIVES] 236 (2001), BARRETO, *supra* note 176 (describing the gradual intromission of exceptionality in Colombia).

196. Corte Suprema de Justicia [C.S.J.] [Supreme Court], Sala Plena marzo 5, 1987, M.P. Jesús Vallejo Mejía, Expediente 1562, *supra* note 186.

Barco administration (1986-1990) reacted to the Court's decision by establishing a new jurisdiction that sought to preserve the severity of the military courts, but this time formally ascribed to the Judiciary Branch.¹⁹⁷ The solution was the establishment of a Specialized Justice system. This new jurisdiction would try crimes associated with drug cartels, such as terrorism, kidnapping, and extortion.¹⁹⁸ The intensification of violence, coupled with the lack of immediate results from the newly installed jurisdiction, led to a rapid adjustment in August 1987: the creation of the Justice for Public Order.¹⁹⁹ This jurisdiction inherited those cases brought against civilians in military courts.²⁰⁰ It became widely known as "Faceless Justice," for it allowed the identity of judges and witnesses to remain secret. The label "public order" announced its overtly restrictive and exceptional character, theoretically erected to confront situations where public order itself was threatened. This was one of the main reasons that led to its amendment in 1991, when it became known as the "Regional Justice."²⁰¹ The Gaviria administration (1990-1994) sought to "launder" this system of exception by relabeling it Regional Justice, a name that made it seem territorially constrained, as other ordinary municipal, district, and circuit tribunals are. Nevertheless, the Gaviria administration knew well that this was an exceptional criminal justice regime, and so a sunset-clause was embedded in the statute so that it would disappear by July 1, 2002.²⁰²

197. For its creation, the Barco administration revived a law proposed, but never enacted, by the previous government. See L. 2/84, enero 17, 1984, [120, No. 36450] DIARIO OFICIAL [D.O.] página 1 (Colom.), <http://www.suin-juriscol.gov.co/viewDocument.asp?id=1557186>.

198. *Id.*

199. Decreto 1631, 27 de agosto 1987, [124, No. 38021] DIARIO OFICIAL [D.O.] página 1 (Colom.), <http://www.suin-juriscol.gov.co/viewDocument.asp?id=1322505>. The Specialized Justice did not disappear immediately; what generated was an unclear two-way system: the specialized and that of the public order. See ITURRALDE, *supra* note 151, at 101-02. Legislative Decree 2790 of 1990—the Statute for the Defense of Justice—integrated the Specialized Jurisdiction to the Jurisdiction of Public Order. See Decreto 2790, noviembre 20, 1990, [127, No. 39584] DIARIO OFICIAL [D.O.] página 1 (Colom.), <http://suin-juriscol.gov.co/viewDocument.asp?id=1490814>.

200. The Superior Court of Public Order was created by the Legislative Decree 474 of 1988, responsible for the cases of crimes closely related to drug trafficking. See Decreto 474, 16 de marzo 1988, [124, No. 38258] DIARIO OFICIAL [D.O.] página 4 (Colom.), <http://www.suin-juriscol.gov.co/viewDocument.asp?id=1104348>.

201. The Criminal Procedure Code labeled the Justice for Public Order as Regional Justice. Decreto 2700, 30 de noviembre de 1991, [127, no. 40190] DIARIO OFICIAL [D.O.] página 1 (Colom.), <http://www.suin-juriscol.gov.co/viewDocument.asp?id=1774206>.

202. This period of time was established by the Article 2 Transitional of the Criminal Procedure Code. See *id.*

Under the Samper administration (1994-1998), the Act 270 of 1996—Statutory Law for the Administration of Justice—pushed the expiration date forward, to June 30, 1999.²⁰³ Yet, a few days before the expiration came to be, Congress passed the Act 504 of 1999, which transferred the cases under Regional Justice to a new system—with long-term duration—called Specialized Criminal Justice.²⁰⁴ This was the last step toward the normalization of the exceptional criminal justice in Colombia, as the Specialized Criminal Justice was permanently embedded in, but distinct from, the ordinary judiciary.²⁰⁵ What was exceptional became permanent, without it being entirely clear whether the “specialty” of these courts was the result of the historical establishment of emergency regulation—through a process of reform, advanced by several Presidents—or of the professionalism and specialization required of its members.

The fact remains that the process by which the exceptional criminal justice regime was created, in each of its phases, strongly restricted the guarantees and civil liberties within the framework of the criminal procedure. For instance, during the time of the Specialized Justice—created in early 1987—longer periods of detention were allowed before having to file charges against the detainees: the possibility of parole was eliminated, and incarceration as a mandatory preventive measure was established.²⁰⁶ Furthermore, by the time of the Justice for Public Order—beginning in mid-1987—a suspect could remain in custody for up to 25 days without being charged,²⁰⁷ the power to assign cases to one court or another was granted to offices of the Gen-

203. L. 270/96, marzo 7, 1996, [No. 42745] DIARIO OFICIAL [D.O.] página 65, art. 205 (Colom.), http://www.secretariasenado.gov.co/senado/basedoc/ley_0270_1996.html.

204. L. 504/99, junio 25, 1999, [135, No. 43618] DIARIO OFICIAL [D.O.] página 4 (Colom.), <http://www.suin-juriscol.gov.co/viewDocument.asp?id=1833152>.

205. Act 600 of 2000 and Act 906 of 2004, governing the Criminal Procedure Code, ratified the Criminal Judges of the Specialized Circuit as ordinary courts of criminal justice. See L. 600, julio 24, 2000, [No. 44097] DIARIO OFICIAL [D.O.] (Colom.), http://www.secretariasenado.gov.co/senado/basedoc/ley_0600_2000.html; L. 906, agosto 31, 2004, [No. 45658] DIARIO OFICIAL [D.O.] (Colom.), http://www.secretaria.senado.gov.co/senado/basedoc/ley_0906_2004.html.

206. Decreto 468, marzo 11, 1987, [123, No. 37810] DIARIO OFICIAL [D.O.] página 1 (Colom.), <http://www.suin-juriscol.gov.co/viewDocument.asp?id=1103226>; Decreto 565, marzo 24, 1987, [123, No. 37827] DIARIO OFICIAL [D.O.] página 1 (Colom.), <http://www.suin-juriscol.gov.co/viewDocument.asp?id=1807897>; Decreto 1203, junio 30, 1987, [124, No. 37943] DIARIO OFICIAL [D.O.] página 4 (Colom.), <http://www.suin-juriscol.gov.co/viewDocument.asp?id=1242420>; Decreto 1204, junio 30, 1987, [124, No. 37943] DIARIO OFICIAL [D.O.] página 4 (Colom.), <http://www.suin-juriscol.gov.co/viewDocument.asp?id=1242539>.

207. Decreto 180, enero 27, 1988, *supra* note 162.

eral Attorneys,²⁰⁸ and the highly controversial “Faceless Justice,” with its secret judges and witnesses, was adopted.²⁰⁹ The measures outlined here resulted in a more restrictive and severe criminal justice permanently embedded in the daily life of the political community.

CONCLUSION

What can we say about these two case studies? The reader can see obvious parallels between the Mexican and Colombian experiences within the war on drugs: the ability of the State to detain people for long periods without presenting charges; the militarization of the public safety; the creation of special criminal regimes. The reader can probably think of other and better examples that illustrate common phenomena. In this Part, we want to offer—as a complement to the theoretical framework developed in the first Part of the Article—a proposal for systematizing further case studies and a comparative exercise on how to develop both.

Let us attempt to classify the types of constitutional costs that were found in both case studies. One common feature in both cases is the creation of special criminal justice systems for prosecuting certain people, different from ordinary criminal justice systems. In both countries the drug war prompted the creation of parallel justice systems. However, creating parallel systems—with restricted rights for defendants—does not exhaust the transformations undertaken in the name of the war on drugs, as the Colombian case shows. For instance, the disproportionate hardening of criminal justice does not necessarily require a parallel system of criminal justice. If we seek a similar phenomenon in Mexico—and elsewhere—we will find it.²¹⁰ But in neither case does disproportionate punishment depend on the existence of a special criminal regime. The reduced judicial supervision of the key procedural moments, as in the case of Colombia, does not

208. Decreto 2490, noviembre 30, 1988, *supra* note 170.

209. Decreto 1966, agosto 31, 1989, [126, No. 38961] DIARIO OFICIAL [D.O.] página 2 (Colom.), <http://www.suin-juriscal.gov.co/viewDocument.asp?id=1378441>; Decreto 1191, junio 6, 1990, [No. 39405] DIARIO OFICIAL [D.O.] (Colom.), https://www.redjurista.com/Documents/decreto_1191_de_1990_ministerio_de_gobierno.aspx#.

210. In fact, disproportionate criminal punishment seems to be a common thread in the war on drugs, as has been documented by the *Colectivo de Estudios de Drogas y Derecho* (CEDD). See R. Alejandro Corda, *Desproporción de la respuesta penal sobre estupefacientes en Argentina* [*Disproportionality of Criminal Response to Drugs in Argentina*], in JUSTICIA DESMEDIDA: PROPORCIONALIDAD Y DELITOS DE DROGAS EN AMÉRICA LATINA [DISMISSED JUSTICE: PROPORTIONALITY AND DRUG OFFENSES IN LATIN AMERICA] 13, 14 (Catalina Pérez Correa ed., 2012).

depend on a parallel system either. So, we face different and distinguishable phenomena.

Nevertheless, those phenomena have much in common. All these measures can be understood as cases in which fundamental rights are undermined, suspended, or restricted. They are usually linked to the criminal justice regime, but not necessarily. For instance, the recently established obligations of telecommunication providers in Mexico strongly affect the rights to privacy and information of clients, but are not directly dependent on the criminal justice system. Thus, a first category allows us to understand a common element to this type of constitutional cost, from which we can then distinguish between them: the restriction of fundamental rights so as to allow less restricted state action.

The restriction of fundamental rights can occur in two modalities: a) the restriction of fundamental rights for all (including the right to privacy, or disproportionate penalties), or b) the creation of an exceptional regime of reduced rights for some (like the Colombian “Faceless Justice,” or the Mexican regime for organized crime). As to the later, we can highlight three characteristics. First, an initially “exceptional” character that, through habit and repetition, becomes permanent. The initial exceptionality indicates that the measures are justified by emergencies and crises, the absence of which should, theoretically, render them inoperative. A second feature is the strong influence of the Executive branch on these special criminal justice systems, directly undermining one of the main characteristics required for adjudication: the autonomy of adjudication from external pressure. Third and finally, the logic of exceptional justice seems to be one of the “enemy.”²¹¹ The offender, instead of being confronted and treated so as to reinstate him or her to everyday life in society, is treated as an enemy that must be defeated. Until that mentality is abandoned, citizens cannot fully enjoy their rights and freedoms. “Peace and order, first; rights and freedoms, later.”²¹² The consequence is an ever-expanding restrictive approach to fundamental rights.

Drug prohibition is, in itself, a restriction to the fundamental rights of all citizens: from freedom of religion (e.g., the religious use

211. IVÁN OROZCO ABAD & JUAN GABRIEL GÓMEZ ALBARELLO, *LOS PELIGROS DEL NUEVO CONSTITUCIONALISMO EN MATERIA CRIMINAL* [THE DANGERS OF THE NEW CONSTITUTIONALISM IN CRIMINAL MATTERS] 115 (2d ed. 1999). This idea, as previously noted, is rooted in the political thought of Schmitt. See *supra* note 8 and accompanying text; see also Madrazo, *supra* note 126 (describing the use of the “enemy” in the official discourse on drug trafficking).

212. ITURRALDE, *supra* note 151, at 57.

of peyote) and consciousness (i.e., the right to alter one's consciousness),²¹³ to the right to health (e.g., the cultivation and use of marijuana for medicinal purposes,²¹⁴ or the problems of stigma and insufficient access to health faced by criminalized users). This, however, is not what we want to point out. Such restrictions are the aim, not the cost, of a prohibitionist drug policy. The constitutional costs of the war on drugs are what interest us: the "necessary evils" we are willing to burden ourselves with for a "higher good," a "drug-free world." Examples include the creation of "exceptional" regimes of reduced state obligations and restriction of the rights for all. The explicit goal of prohibition is eliminating the use of certain drugs, not reducing our fundamental rights.

Thus, the fundamental rights restriction seems a category general enough to allow for comparative work. It is also precise enough in terms of the constitutional affectation involved, so as to tell us something about the phenomena of interest. Consequently, we propose it be a first, broad category that can be disaggregated into different ones. A first sub-classification that may be useful, given the frequency of the fundamental rights restrictions, can be the difference between the (i) restrictions on the procedural rights, and (ii) restrictions on other rights involved. In the first case, one can distinguish the (a) reduction of judicial surveillance over the actions of the police and prosecutors, and (b) disproportionate increase in criminal penalties. The violation or restriction of other rights could be addressed right-by-right. For instance, the violations of (i) privacy (with the control of the telecommunications, as in the case of Mexico); (ii) health (with the denial of access to certain drugs such as opiates or cannabis); and (iii) transit (with the multiplication of military checkpoints throughout Mexican territory since the militarization of prohibition).

213. The two cases of marijuana addressed by the SCJN have been solved to protect the right to alter one's consciousness. See Amparo en revisión 237/2014, Pleno de la Suprema Corte de Justicia [SCJN], Décima Época, 5 de noviembre de 2015 (Mex.), <http://www2.juridicas.unam.mx/marihuana-caso-mexico/wp-content/uploads/2016/02/Engrose-de-sentencia.pdf>; Amparo en revisión 1115/2017, Primera Sala de la Suprema Corte de Justicia [SCJN], Décima Época, 11 de abril de 2018 (Mex.), <http://www2.juridicas.unam.mx/marihuana-caso-mexico/wp-content/uploads/2016/02/Engrose-de-sentencia.pdf>.

214. About the right to health, Grace's case was the first time that Mexican government approved the use of medical cannabis. See Tania T. Ramírez, *Caso Grace o el debate pendiente: cannabis medicinal y derecho a la salud* [Grace Case or Pending Debate: Medicinal Cannabis and Right to Health], NEXOS (Sept. 3, 2015) <https://eljuegodelacorte.nexos.com.mx/?p=4897>; Pablo Ferri, *La niña Grace, una pionera de la marihuana medicinal en México* [La Niña Grace, a Pioneer of Medical Marijuana in Mexico], EL PAÍS (Apr. 19, 2016), https://elpais.com/internacional/2016/04/19/mexico/1461089683_624693.html.

If we shift our attention to other constitutional cases reviewed here, it would seem at first glance that similarities are quickly exhausted. The centralization of federalism is not relevant to the Colombian case, as it has a centralist regime to begin with. The militarization of public security in Mexico seems to be a *de facto* and unconstitutional measure rather than a constitutional cost. We could say, however, that the unconstitutionality sustained over time should also be considered a constitutional cost. But that's not the point. The important issue at stake is to determine if a common platform for deploying a comparative analysis exists.

We believe so. A revision of the remaining constitutional costs allows us to suggest a second broad category that seems relevant for comparative purposes. The other constitutional costs of the two cases studied—including the militarization of the public force in Colombia, or the centralization or concentration of powers in Mexico—can be analyzed together from a perspective that is crucial to constitutionalism: the division of powers and a system of checks and balances between them. Federalism and separation of powers are two distinct mechanisms but they both serve to divide and balance public powers against each other, so as to hinder their arbitrary exercise and protect citizens from abuse. The same is true for civil—as opposed to military—jurisdiction: to concentrate the most repressive power of the state in one institution and withdraw it from government is a way of containing potential abuse of power against its citizens. The opposite is true of the creation of exceptional or special regimes of criminal prosecution:²¹⁵ allowing for an intrusive executive branch to impinge upon the independence of the judiciary withdraws barriers to abuse. The same happens with the concentration of power: the reason why the power to prosecute citizens had been historically circumscribed to one institution is to make it responsible and visible. Separating public security from national security seeks to ensure that citizens are not treated as enemies. In brief, we propose that a second broad category for comparative analysis of constitutional costs be the concentration of power (as opposed to the separation of powers and a system of checks and balances between them).

We find a last common element to constitutional costs: their expansive nature. We see in several cases—creating an exceptional jus-

215. A “special” regime is not presented as a temporary exception, but as a change permanently incorporated into the criminal system. Such is the case of Mexico. While the “exceptional” regimes were originally admitted as temporary or territorial exceptions—like the concept of military theater operations in Colombia—they, in fact, tend to endure.

tice in Colombia; the centralization of criminal policy in Mexico—that, once introduced into the system, constitutional costs extend beyond the specific cases that prompted them (the war on drugs). A useful metaphor is the introduction of an alien species into a new ecosystem. For example, the eucalyptus, belatedly introduced in America, is a plant that—without finding resistance in the receiving ecosystems—successfully colonized some regions of the continent, at the expense of other endogenous plants. Something similar happens with several of the constitutional costs studied here: once introduced into the constitutional systems, they found little resistance to contain them. For instance, it has proven difficult to uproot the *arraigo* in Mexico once it was legitimized by inserting it into the text of the Constitution. In the past, it was unlikely to think that the *arraigo* would enjoy the same entrenchment as, for example, the presumption of innocence. Nevertheless, its introduction in the constitutional text did exactly that: it protected an institution designed to expand, not limit, the power of authorities over citizens.

The argument is that granting special powers to the authorities in order to effectively “fight” against the drug trafficking organizations has had a corrosive effect on the system of fundamental rights. It was not the stated drug war aim. Exceptions may be temporary or may affect one group of individuals—drug traffickers, or those involved in organized crime—but the creation of a “special” regime restricting fundamental rights is in itself contrary to the logic of the fundamental rights: that they are universal. There is a constant risk that the exceptions admitted into the legal system can subsequently be generalized and expanded.²¹⁶

In conclusion, we propose two major categories for the future development of a comparative study on the constitutional costs of the war on drugs: (i) restriction of rights and (ii) the concentration of powers. These two categories must be analyzed in two different ways: on the one hand, the constitutional costs that they represent in themselves, on the other, the constitutional costs that they enable and engender. That is, in tallying constitutional costs, we should include the expansion of the original measures, which for our interests were adopted to more effectively fight the war on drugs, but which have had repercussions beyond drug policy.

216. See, for example, the cases referred to in Madrazo in which the ordinary legislation arising from the constitutional reform of 2008 involved the colonization of the logic of emergency inside the ordinary criminal regime. Madrazo, *El impacto de la política de drogas*, *supra* note 67, at 21.

If we step back, we find that our two broad categories coincide with the two basic parts of a constitution in which constitutional doctrine in Latin America usually divides a constitutional text: the dogmatic and organic parts. That is, some constitutional costs affect fundamental rights (dogmatic part), and other constitutional costs affect the institutional design of public authority (organic part). Both undermine the two main mechanisms through which modern constitutionalism has sought to protect citizens from the abuses of the public power: the creation of a protective shield for the individuals and communities before the State (fundamental rights), and the separation and balancing of power so as to obstruct abuses by authorities (separation of powers, federalism, checks and balances).

The war on drugs is a public policy, which in theory is transitory. It does not advance the basic constitutional commitments of the political communities of Latin America. Quite the contrary: this seriously questioned public policy is a vehicle to permanently reconfigure or, more clearly, disfigure the constitutional systems and traditions in the region.

The war on drugs is leaving us, as political communities, unrecognizable to ourselves.