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## Prohibitionist Drug Policy in Mexico: A Systemic Constitutional Underminer

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# PROHIBITIONIST DRUG POLICY IN MEXICO: A SYSTEMIC CONSTITUTIONAL UNDERMINER\*

Francisca Pou Giménez and Catalina Pérez Correa<sup>†</sup>

*Abstract:* This article explores and develops a comprehensive set of arguments demonstrating the unconstitutionality of drug prohibition policies in Mexico. Some of these arguments have been used to validate recreational and therapeutic uses of marijuana, while others remain unused and unexplored. There are more than ten constitutional framings that are useful to evaluate the unconstitutionality of prohibitionist drug policies. These framings can be grouped into two subcategories: rights-centered and non-rights centered. Rights-centered framings are grounded on equality, health, and the free development of the personality. Non-rights-centered framings include federalism, market regulation and preservation of basic rule of law guarantees. This paper details resources that may be helpful for judges, policy-makers, and civil society organizations interested in a human-rights or constitutional based approach to drug policy. An in-depth case study of Mexico reveals useful arguments to evaluate the legal status of drug policy in many other countries.

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## INTRODUCTION

Over the last few decades, many studies and policy papers have identified the problems that prohibitionist drug policies generate from the perspective of human rights and other legally relevant standpoints.<sup>1</sup> In an encouraging turn of events, however, the transnational conversation has progressively acknowledged the need to pay more attention to countries that have suffered from prohibitionist drug policies.<sup>2</sup>

In this paper, we examine why prohibition is unconstitutional and argue for drug regulation in Mexico. While many of the legal points in this area are common to a large array of political and social scenarios around the world, others are dependent on country-specific singularities. Our goal is to produce a set of analytic and argumentative resources that may be helpful for judges, policymakers, and civil society organizations that are interested in approaching drug policy from a constitutional perspective. While some of these arguments have played a role in the Mexican Supreme Court rulings on recreational and therapeutic uses of marijuana, many others remain unexplored. There is now an opportunity for political change, and it is important to explore this matter holistically, via the Mexican legal system's more basic guarantees. An in-depth case study of Mexico provides useful arguments to evaluate the legal status of drug policies in many other countries.

In Part I, we address the drug policy and system of legal sources in Mexico. We first discuss technical questions of hierarchy and distribution of jurisdiction that help explain how the various applicable legal sources interact with one another and show that, within the Mexican legal system, international drug-related treaties are subordinated to the Constitution and to human rights treaties. We also identify important elements of constitutional

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<sup>1</sup> See Joanne Csete et al., *Public Health and International Drug Policy*, 387 *THE LANCET* 1427 (2016); ORGANIZACIÓN DE ESTADOS AMERICANOS, *EL PROBLEMA DE LAS DROGAS EN LAS AMERICAS [THE DRUG PROBLEM OF THE AMERICAS]* (2013), [http://www.oas.org/documents/spa/press/Introduccion\\_e\\_Informe\\_Analitico.pdf](http://www.oas.org/documents/spa/press/Introduccion_e_Informe_Analitico.pdf); GLOB. COMM'N ON DRUG POLICY, *WAR ON DRUGS: REPORT OF THE GLOBAL COMMISSION ON DRUG POLICY* (2011), <https://www.globalcommissionondrugs.org/reports/the-war-on-drugs>; GLOB. COMM'N ON DRUG POLICY, *THE WAR ON DRUGS AND HIV/AIDS: HOW THE CRIMINALIZATION OF DRUG USE FUELS THE GLOBAL PANDEMIC* (2012), <https://www.globalcommissionondrugs.org/reports/the-war-on-drugs-and-hiv-aids>; GLOB. COMM'N ON DRUG POLICY, *THE NEGATIVE IMPACT OF THE WAR ON DRUGS ON PUBLIC HEALTH: THE HIDDEN HEPATITIS C EPIDEMIC* (2013), [https://www.globalcommissionondrugs.org/wp-content/uploads/2016/03/GCDP\\_HepatitisC\\_2013\\_EN.pdf](https://www.globalcommissionondrugs.org/wp-content/uploads/2016/03/GCDP_HepatitisC_2013_EN.pdf).

<sup>2</sup> See Ernesto Zedillo et al., *Drug Policy in Mexico: The Cause of a National Tragedy—A Radical but Indispensable Proposal to Fix It*, 41 *U. PA. J. INT'L L.* 107 (2019).

interpretation and adjudication in Mexico, and explore different paths of legal change, including administrative reform, statutory reform, and judicialization. Lastly, we discuss different goals that may govern those arguments, such as invalidation, inapplication, or modification of certain legal sources.

Having shown that the Mexican Constitution poses no formal obstacles to declare Mexico's prohibition system unconstitutional, we will survey the constitutional provisions that determine the substantive constitutional evaluation of drug policies in Mexico. Some of them are rights-centered and others are non-rights centered. Non-rights centered provisions have proved productive in Mexican constitutional litigation in the past.

Part II discusses rights-centered framings. Among these, three particularly capture our attention due to their importance. We call them "the three pillars." They are health, the free development of personality, and equality. We emphasize the three pillars because they provide a basis for the unconstitutionality of the prohibition regime, and also provide guidance for the Regulation regime that should replace it. Complementary framings include the rights to life, personal integrity, personal freedom and security, due process, professional freedom, a healthy environment, as well as the rights of indigenous communities. These complementary framings are useful because they allow us to identify the whole gamut of social problems caused by prohibition, but they are the product of repressive policy itself and would lose relevance once we move towards Regulation. As of now, however, they contribute to the demonstration of why and how prohibition violates the Mexican Constitution.

Part III addresses non-rights framings. With non-rights-centered framings, we underline the importance of three provisions: (1) market integrity and state management of the economy, (2) federalism, and (3) the principle of legality and other standards associated to the preservation of the rule of law. It is impossible to understand the situation in Mexico without first recognizing the role prohibitionist policy plays in undermining the Mexican State's capacity to fulfill its basic political, legal, and economic functions. Discussion of these framings helps avoid misconceptions about the nature and impact of drug cartels in Mexico and distinguishes the cartels from insurgent groups.

The various framings are important for several reasons. First, each framing highlights different aspects of the analysis, allowing for different normative evaluations that influence our perception of the world.<sup>3</sup> Second,

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<sup>3</sup> See Marta Machado & Ana Carolina Bracarense, *El movimiento pro y antiaborto en el Supremo Tribunal Brasileño* [The Pro- and Anti-Abortion Movement in the Brazilian Supreme Court], in *EL ABORTO EN AMÉRICA LATINA* [ABORTION IN LATIN AMERICA] 111, 136 (2018). As Marta Machado and Ana

each framing highlights the articulation between legal debates and the social impact of norms. As the debate on abortion illustrates, some framings are more ideologically divisive, others receive more consensus, some are preferred by those most affected, and others are better received by society at large. Thus, the framing impacts the support and consensus a policy may command. Third, framing determines the applicable body of law. Some rights have been strongly developed in international law (e.g., the right to health), others are more relevant in the comparative constitutional scenes (e.g., the right to the free development of personality), and still others have strong local components (e.g., the rights of indigenous communities). Some have a long tradition in the national legal system and carry over well-established precedents, while others do not have an extensive body of associated judicial doctrine. Most importantly, some framings offer more protection for individuals and groups than others and set more demanding standards for the elaboration of drug policy.

Ultimately, we conclude that prohibition is a “constitutional underminer.” The purpose of these closing remarks is to vividly emphasize the systemic and self-reinforcing effects of prohibition, measured in terms of constitutional violations. As demonstrated throughout the paper, prohibition not only violates several discrete parts of the Constitution, but also simultaneously attacks the preconditions necessary for the success of the entire constitutional project. It undermines constitutional normativity in multiple, mutually reinforcing ways. We close this article by recommending a systemic “constitutional reinforcer,” that is a drug policy based on market regulation, harm reduction, and the preservation of health.

## I. DRUG POLICY AND THE SYSTEM OF LEGAL SOURCES IN MEXICO

To analyze drug regulation in Mexico, we begin by identifying where regulation is formally contained and the position of these regulations in the legal system. As we will discuss, prohibition is contained in sources with sub-constitutional status. Moreover, the constitutional violations perpetrated by prohibition are not harbored under any explicit restriction contained in the constitutional text, and further cannot be justified on the basis of a proportionality analysis. In this section we take up these issues, which have been consequential in Mexican legal debates.

Drug prohibitions in Mexico are contained in three international treaties and a series of statutes. The treaties that form the core legal

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Carolina Bracarense underline, framings are interpretive schemes that allow individuals to locate, perceive, identify, and name certain events; framings help to understand patterns of social mobilization and are important to track how the domain of social movement action and the domain of legal-doctrinal developments articulate with one another.

framework of the United Nations' international drug control regime are the Single Convention on Narcotic Drugs of 1961, as amended by the 1972 Protocol, the Convention on Psychotropic Substances of 1971, and the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988.<sup>4</sup> Together, these sources “provide the legal structure for an international system of drug control by defining measures to be maintained within each state party to these conventions.”<sup>5</sup> Their core objective is to prevent “the non-scientific and non-medical production, supply and use or narcotic and psychotropic drugs.”<sup>6</sup> Only production, distribution, and possession of scheduled drugs for medical or scientific purposes is permitted.<sup>7</sup> The 1971 Convention prohibits the use of controlled substances listed in Schedule I, except for scientific and limited medical purposes.<sup>8</sup> However, countries are not obliged to make drug use criminally punishable. According to Amira Armenta and Martin Jelsma, “[t]he conventions are more restrictive with regard to possession, acquisition, or growing for personal use.”<sup>9</sup> With regard to possession, which is the conduct most punished by the Mexican state, “a distinction is made between possession for personal use and possession for trafficking. The Convention’s emphasis on trafficking may indicate that countries are not obliged, by virtue of Article 36 of the 1961 Convention, to declare simple possession a crime.”<sup>10</sup>

The statutes regulating drugs in Mexico are the General Health Law, the Federal Criminal Code, the Criminal Codes of the States, and the National Code of Criminal Procedure. Taken together, these statutes make any conduct related to illicit drugs—aside from drug use—a crime.

The Federal Criminal Code section on “Crimes Against Health” provides an inventory of drug-related conduct that is criminally punishable.<sup>11</sup> Subsequent articles regulate possession of illicit drugs, a crime punishable by up to 15 years in prison when carried out in conjunction with any of the

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<sup>4</sup> See Amira Armenta & Martin Jelsma, *The UN Drug Control Conventions—A Primer*, TRANSNATIONAL INSTITUTE (Oct. 8, 2015), <https://www.tni.org/en/publication/the-un-drug-control-conventions#6>.

<sup>5</sup> DAVID BEWLEY-TAYLOR, INTERNATIONAL DRUG CONTROL: CONSENSUS FRACTURED 3 (2012) (citing NEIL BOISTER, PENAL ASPECTS OF THE UN DRUG CONVENTION, 1–4 (2001)).

<sup>6</sup> *Id.*

<sup>7</sup> See Armenta & Jelsma, *supra* note 4.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* See also United Nations Single Convention on Narcotic Drugs art. 33, Mar. 30, 1961, 520 U.N.T.S. 151 (providing that “The Parties shall not permit the possession of drugs except under legal authority,” and, in such authorized cases, solely for medical and scientific purposes). Article 36 of the same treaty obliges the Parties to declare possession a punishable offence. *Id.* art. 36.

<sup>10</sup> See ARMENTA & JELSMA, *supra* note 4.

<sup>11</sup> See Código Penal Federal [CPF] [Federal Criminal Code], Diario oficial de la Federación [DOF] art. 194, 10-1-1994 (Mex.) (including drug production, transport, drug trafficking, commerce, supply, prescription of ‘narcotics,’ introduction or extraction from the country, contribution, or collaboration of any sort in financing, supervising, or encouraging the execution of any drug related crime, promotion, and acts of publicity or propaganda for consumption of any illicit substance.)

aforementioned conduct.<sup>12</sup> Sanctions may be lower depending on the quantity of substance possessed. Threshold quantities are established by the General Health Law, which also lists controlled and illicit substances, and requisites for obtaining permits for their commerce and distribution.<sup>13</sup>

In 2009, the General Health Law and the Federal and State criminal codes were amended to, among other things, distribute drug jurisdiction between the states and the Federation. A table of “Guidelines for Maximum Quantities for Personal Use” was included in the General Health Statute (Article 479), and established threshold amounts for personal use for several substances. Below this threshold, drug use is not punishable with a prison sentence, though it is still formally considered a crime.<sup>14</sup> Above this threshold, provided it does not exceed 1,000 times the personal use amount, possession of certain drugs is considered small-scale trafficking and falls within the jurisdiction of the States. When possession of those substances is 1,000 times the established amount, it is considered drug trafficking and falls under federal jurisdiction.<sup>15</sup> Federal jurisdiction also exists when the federal government initiates an investigation and does not remand it to the state prosecutor’s office, when the crime is committed under organized crime, and when the Attorney General’s Office investigates the case or attracts an ongoing State investigation.<sup>16</sup>

Finally, the National Code of Criminal Procedure determines which drug-related offenses merit automatic *ex officio* pretrial detention (all of them, except possession for consumption) and what public authorities should do with secured narcotics.<sup>17</sup>

These treaty and statutory sources are among a wider universe of legal sources that include different normative requirements and goals. This wider universe of sources incorporates progressive elements that demonstrate prohibition’s unconstitutionality.

#### A. *Prohibitionist Drug Treaties as Sub-Constitutional Legal Sources*

Prohibition is contained in legal sources that are hierarchically subordinate to the Mexican Constitution and must be invalidated because

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<sup>12</sup> *Id.* art. 195.

<sup>13</sup> *See* Ley General de Salud [LGS] [General Health Law], DOF art. 237, 19-6-2017; *see also* LGS, DOF art. 245, 23-12-1987.

<sup>14</sup> *See id.* art. 479, 20-8-2009.

<sup>15</sup> *Id.* art. 475 20-8-2009.

<sup>16</sup> *Id.* art. 474. *See also* Catalina Pérez Correa & Karen Silva, *Illicit Use of Drugs and Drug Users in Mexico*, in *IN SEARCH OF RIGHTS: DRUG USERS AND STATE RESPONSES IN LATIN AMERICA* 103 (Coletta Youngers & Catalina Pérez Correa eds., 2014), <https://www.wola.org/sites/default/files/Drug%20Policy/In%20Search%20of%20Rights%209july.pdf>.

<sup>17</sup> *See* Código Nacional de Procedimientos Penales [CNPP] [National Criminal Procedure Code], DOF art. 167, 03-05-2014.

they contradict the Constitution itself. To fully understand why this is so, we discuss how the upper echelons of the system of legal sources are structured in Mexico.

1. *The 2011 constitutional reform and human rights treaties*

On June 10, 2011, a constitutional reform substantially changed the architecture of Mexican legal sources. The first paragraph of the Mexican Constitution's Article 1 now states that the Constitution protects all human rights included in it, as well as those contained in treaties ratified by Mexico.<sup>18</sup> Therefore, the human rights included in ratified treaties now enjoy constitutional status. However, the 2011 reform did not alter Article 133 which, mirroring the United States Constitution's Supremacy Clause, states that "[t]his Constitution, the treaties signed in conformity with it, and statutes, are the Supreme Law of the Land."<sup>19</sup>

The Mexican Supreme Court interpreted the new constitutional provisions in a series of rulings issued between 2011 and 2015.<sup>20</sup> The Court emphasized that only treaties containing human rights norms enjoy constitutional status.<sup>21</sup> Other treaties, including drug treaties, remain governed by Article 133.<sup>22</sup> According to consolidated precedent, treaties are

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<sup>18</sup> Constitución Política de los Estados Unidos Mexicanos [CPEUM], art. 1, ¶ 1, DOF 05-02-1917, últimas reformas DOF 17-05-2021, states that "[i]n the United Mexican States all persons will enjoy the human rights recognized in this Constitution and in the international treaties of which the Mexican State is party, as well as the guarantees for their protection, whose exercise cannot be restricted nor suspended, except in the cases and under the conditions set forth in this Constitution" [authors' translation]. According to the constitutional wording, provisions that clearly contain a human right enter the Mexican Constitutional block, even if included in treaties that are not formal human rights treaties.

<sup>19</sup> *Id.* art. 133; U.S. CONST., art. VI.

<sup>20</sup> See *Caso Rosendo Radilla Pacheco* [Case of Rosendo Radilla Pacheco], Pleno de la Suprema Corte de Justicia de la Nación [SCJN], Julio de 2011, Varios 912/2010 (holding that international and constitutional rights sources enjoy the same hierarchical status but that conflicts among them must be solved by prioritizing the provision most favorable to the individual); *Trabajo a favor de la comunidad* [Work in favor of the community], Pleno de la SCJN, Febrero de 2012, *Acción de inconstitucionalidad* [Action of Unconstitutionality] 155/2007 (declaring the prevalence in the case of the most favorable international human rights source); *id.*, Septiembre de 2013, *Contradicción de tesis* [Thesis Contradiction] 293/2011 (holding that international and constitutional human rights sources enjoy the same hierarchical status but that conflicts among them must be solved by attending explicit constitutional rights restrictions); *Procede el recurso de revisión en amparo directo, cuando se alegue que una norma secundaria es contraria a una de derechos humanos contenida en un tratado internacional* [The Appeal for Revision in Direct Amparo Proceeds, when it is Alleged that a Secondary Norm is Contrary to one of Human Rights Contained in an International Treaty], Pleno de la SCJN, 5 septiembre, 2013, *Contradicción de tesis* 21/2011 (explaining the new understanding of constitutionality and legality conflicts within the new system of legal sources). See also Francisca Pou Giménez & Alejandro Rodiles, *Mexico, in DUELING FOR SUPREMACY: INTERNATIONAL LAW VS. NATIONAL FUNDAMENTAL PRINCIPLES* (Fulvio Palombino ed., 2019).

<sup>21</sup> Pleno de la SCJN, 5 septiembre, 2013, *Contradicción de tesis* 293/2011; Pleno de la SCJN, 9 septiembre, 2013, *Contradicción de tesis* 21/2011.

<sup>22</sup> See CPEUM, art. 133, DOF 05-02-1917, últimas reformas DOF 17-05-2021.

situated above ordinary statutes and below the Constitution, in an intermediate echelon.<sup>23</sup>

This line of jurisprudence explains that non-human rights treaties inhabit an intermediate echelon alongside General Statutes, which are federal statutes that distribute jurisdiction between the Federation, states, and municipalities. Examples of General Statutes include the General Health Law, the General Education Law, and the General Law of Transparency and Access to Governmental Information. General Statutes also provide broad parameters of regulation that must be respected by all levels of government. These parameters are part of the Mexican “block of constitutionality,” since the Constitution directs them to establish or regulate issues and questions that the Constitution could determine by itself.<sup>24</sup>

Supreme Court precedent makes clear that General Statutes are hierarchically superior to ordinary federal and state statutes because they set

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<sup>23</sup> See *Tratados internacionales. Son parte integrante de la ley suprema de la unión y se ubican jerárquicamente por encima de las leyes generales, federales y locales. Interpretación del artículo 133 constitucional* [International Treaties. They are an integral part of the Supreme Law of the Union, and are located hierarchically above General, Federal, and Local Laws. Interpretation of Article 133 of the Constitution.], *Semanario Judicial de la Federación y su Gaceta* [SJFG] [Federal Judicial Weekly Report and its Gazette], Novena Época Tomo XXV, Abril de 2007, Tesis P IX/2007, 6. (“The systematic interpretation of Article 133 of the Constitution allows for the identification of a superior legal order, of national character, integrated by the Federal Constitution, international treaties and general statutes. Additionally, from this interpretation, harmonized with the principles of international law spread all along the constitution and with the norms and fundamental premises of that branch of the law, one may conclude that international treaties are hierarchically below the Federal Constitution and above general, federal and state statutes, to the extent the Mexican State in subscribing to them (...) and in view of the fundamental principle of consuetudinary international law of *pacta sunt servanda*, freely assume obligations before the international community that cannot be disregarded invoking norms of internal law, and whose inobservance implies, moreover, a responsibility of an international kind” [authors’ translation].) See generally GABRIELA RODRÍGUEZ HUERTA, *LA INCORPORACIÓN Y APLICACIÓN DEL DERECHO INTERNACIONAL EN EL ORDEN JURÍDICO MEXICANO* 92–102 (2015).

<sup>24</sup> See Manuel Góngora-Mera, *The Block of Constitutionality as the Doctrinal Pivot of a Ius Commune*, in *TRANSFORMATIVE CONSTITUTIONALISM IN LATIN AMERICA: THE EMERGENCE OF A NEW IUS COMMUNE* 235 (2017). The notion of “block of constitutionality” emerged in France to account for the constitutional position enjoyed by the Preamble of the 1958 Constitution and by the 1989 Declaration of Rights. In Spain, the same language is used to describe the way the Constitution delegates on the Autonomy Statutes the delimitation of the areas of jurisdiction enjoyed by Autonomous Communities. Therefore, the Statutes become, functionally, part of the Constitution.

jurisdictional boundaries.<sup>25</sup> Thus, General statutes are part of the “superior legal order,” to which all other legal orders in Mexico are subordinated.<sup>26</sup>

## 2. *The hierarchy of non-human rights treaties and general statutes*

It is unclear, however, how General Statutes and non-human rights treaties interact with one another. Prior to the 2011 Amendments, the Court opined that non-human rights treaties were ranked above the General Statutes and ordinary federal and state statutes.<sup>27</sup> However, after the reforms, one may argue that conflicts between norms situated at the immediate sub-constitutional level must be handled according to the general criteria of conflict resolution for provisions of the same rank. These criteria state, for instance, that the most recent norm (*lex posterior*) or the most specific (*lex specialis*) must prevail.<sup>28</sup> In Mexico, these criteria include the “pro persona principle,” found in the second paragraph of Article 1 of the Constitution, which directs the interpreter to choose, in a clash of equal norms, the provision that is most beneficial to individuals.<sup>29</sup>

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<sup>25</sup> See Leyes generales. Interpretación del artículo 133 constitucional. [General Statutes. Interpretation of Article 133 of the constitution.] Pleno de la SCJN, SJFG, Novena Época, Tomo XXV, Abril de 2007, Tesis P. VII/2007, página 5. The reading of this article reveals that the constituent power wanted to establish a series of provisions of general observance which, to the extent they are in accordance with the provisions of the Political Constitution of the United Mexican States, are the “the Supreme Law of the Union.” In this regard, it must be understood that the statutes of Congress to which that constitutional article refers are not federal statutes, but general statutes, which are those that may validly have an effect on all the partial legal orders that integrate the Mexican State. General statutes are those with respect to which the Constituent or the Amending Power has explicitly renounced its powers to distribute attributions to the political entities that pertain to the Mexican State, something that translates into an exception to the principle set down in Article 124 of the Constitution. Moreover, these statutes are not issued *motu proprio* by the Congress of the Union but find origin in constitutional clauses. Once promulgated and published, these statutes will have to be enforced by federal, local, Mexico City and municipal authorities” [authors’ translation].

<sup>26</sup> *Id.* (“Departing from the interpretation of the aforementioned provision [article 133], if we accept that the statutes of Congress to which it refers are not federal statutes, but those statutes that have an effect on all partial legal orders integrating the Mexican State and whose issuance derives from constitutional clauses that oblige the Legislature to issue them, the principle of ‘constitutional supremacy’ implicit in the text of the article under analysis clearly translates itself into the General Constitution of the Republic, general statutes of the Congress of the Union, and the international treaties in accordance with it constituting the ‘Supreme Law of the Union,’ that is, conforming a *superior legal order*, of a national character, in whose context the Constitution is placed at the top, and below it international treaties and general statutes” [authors’ translation] (emphasis added).

<sup>27</sup> See SJFG, Tesis P IX/2007, *supra* note 23.

<sup>28</sup> See Voto concurrente que formula el Magistrado Fernando Rangel Ramírez respecto de la ejecutoria por la que se resolvió la contradicción de tesis 9/2019 [Concurring opinion of Judge Fernando Rangel Ramírez regarding the resolution of Thesis Contradiction 9/2019], Semanario Judicial de la Federación [SJF], Décima Época, Enero de 2020, Tesis PC.I.C. J/101 C (citing three principles for resolving conflicts between norms), <https://sjf.scjn.gob.mx/SJFSem/Paginas/DetalleGeneralScroll.aspx?id=43535&Clase=VotosDetalleBL>.

<sup>29</sup> See CPEUM, art. 1 ¶ 2, DOF 05-02-1917, últimas reformas DOF 17-05-2021 (“The provisions relating to human rights shall be interpreted according to this Constitution and the international treaties on the subject, working in favor of the broader protection of people at all times.” The Mexican Supreme Court

To understand the structure of legal sources at the highest level in Mexico, “explicit constitutional restrictions” must also be mentioned. This phrase was coined by the Supreme Court in *Contradicción de Tesis 293/2011* when grappling with constitutional provisions that contradict human rights treaty provisions, such as conflicts among sources that both enjoy constitutional status.<sup>30</sup> For instance, the provision restricting the right of indicted individuals to vote in Article 38.II is incompatible with the regulation of voting rights in Article 23.II of the American Convention of Human Rights, and with the right to the presumption of innocence in Article 20 of the Constitution.<sup>31</sup> To deal with these conflicts, the Court held in a leading case, *Contradicción de Tesis 293/2011*, that an explicit constitutional restriction prevails over conflicting human rights treaty provisions.<sup>32</sup> The majority opinion did not specify what constitutes an “explicit constitutional restriction.” However, in separate concurrences, several Justices stated that restrictions must be interpreted narrowly, so as to provide rights with the maximum possible scope.<sup>33</sup> The implied understanding of the case is that these “explicit constitutional restrictions” are to be identified with the constitutional provisions that directly collide with treaty provisions.<sup>34</sup>

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defines it as a “hermeneutical criterion that informs the whole international law of human rights, and according to which the widest norm or the most extensive interpretation has to be applied,” furthermore clarifying that norms related to human rights shall be interpreted in conformity with the Constitution *and* with international treaties to which Mexico is a party, in a way that broadly favors persons [authors’ translation]). *See also* Principio pro personae. El contenido y alcance de los derechos humanos deben analizarse a partir de aquél. [Pro personae principle. The content and scope of human rights must be analyzed on the basis of this principle.] Pleno de la SCJN, SJFG, Décima Época, Libro V, Febrero de 2012, Tomo 1, Tesis XXVI/2012, 659.

<sup>30</sup> *See* CPEUM, DOF 05-02-1917, últimas reformas DOF 17-05-2021.

<sup>31</sup> *Id.* *See* American Convention on Human Rights art. 38 ¶ 2, Nov. 22, 1969; *see also* American Convention on Human Rights, art. 23, Nov. 22, 1969. The provisions in article 38, section II, of the Constitution prescribe the withdrawal of all political rights to individuals condemned or simply under trial, in contravention of the presumption of innocence protected in Article 20 of the Constitution itself, and with Article 23 American Convention of Human Rights (ACHR), which allows for the regulation—not the withdrawal—of the voting rights of convicted individuals (not of those that have been merely indicted).

<sup>32</sup> *Contradicción de tesis 293/2011*, *supra* note 2120.

<sup>33</sup> Five of nine Justices voted in favor of the new criteria (Ortiz, Zaldívar, Franco, Silva, and Sánchez Cordero), arguing in favor of carefully examining in each particular case the reach of explicit constitutional restrictions.

<sup>34</sup> *See* Derechos humanos contenidos en la constitución y en los tratados internacionales. Constituyen el parámetro de control de regularidad constitucional, pero cuando en la constitución haya una restricción expresa al ejercicio de aquéllos, se debe estar a lo que establece el texto constitucional. [Human Rights contained in the Constitution and in International Treaties. They constitute the parameter for constitutional regularity control, but when the Constitution contains an express restriction on their exercise, the constitutional text must prevail.] Pleno de la SCJN, SJFG, Décima Época, Libro 5 Abril de 2014, Tomo I, Tesis P./J. 20/2014, 202; *see also* amparo directo en revisión, Pleno de la SCJN, 14 abril, 2015, 1250/2012 (on judicially unsupervised pretrial long-term home arrest or *arraigo*); acción de inconstitucionalidad, Pleno de la SCJN, 9 enero, 2014, 32/2012 (on geo-localization of individuals); Pleno de la SCJN, 11 mayo, 2015, Varios 1396/2011 (on implementation of the Inter-Am. Ct. H. R. *Rosendo Cantú* and *Fernández Ortega* rulings).

How can we understand prohibitionist drug treaties and statutes within this framework? Since drug treaties are not human rights treaties,<sup>35</sup> they are inferior to the Constitution and to human rights treaties. However, they are also superior to criminal statutes, occupying the same intermediate echelon as drug-related provisions in the General Health Law (a General Statute). prohibition is then contained in statutory and supra-statutory norms—that is to say, infra-constitutional norms—which must always respect constitutional provisions.

### B. *Prohibition and International Human Rights Law*

As we will see in the following sections, the prohibition regime contained in drug treaties, the General Health Law, and the Criminal Codes, impinges on a number of constitutional and treaty rights and other constitutional provisions. Some isolated aspects of the regime might be considered to be covered by constitutional provisions, such as those that habilitate mandatory pretrial detention for drug crimes and could also be considered to be a “explicit constitutional restriction.”<sup>36</sup> However, that is not the case with the bulk of the prohibitionist regulatory regime that restricts rights. As will become increasingly evident throughout this article, prohibition not only violates important rights provisions, but also violates constitutional provisions concerning market regulation, federalism, the division of powers, and the State’s responsibility to function in harmony with the rule of law.

Contradictions between prohibition and human rights are frequently observed by international human rights authorities. The United Nations has

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<sup>35</sup> See SCJN, *Reformas Constitucionales en materia de Amparo y Derechos Humanos publicadas en junio de 2011*, DOF 28-05-2011, formato HTML, <http://www.internet2.scjn.gob.mx/red/constitucion/>. In the “Normativity” section of the Supreme Court website, under the heading ‘International treaties to which Mexico is party where human rights are recognized,’ three treaties are identified as human rights treaties in the domain of health, including the OMS Framework Convention on Tobacco Control, but no drug treaties are listed. See also SCJN *determina que las normas sobre derechos humanos contenidas en Tratados Internacionales tienen rango constitucional* [SCJN determines that the norms regarding human rights within international treaties have constitutional range], SCJN, *Seguimiento de Asuntos Resueltos por el Pleno de la Suprema Corte de Justicia de la Nación* [Follow-up to Related Resolved Affairs by the Plenum of the SCJN], *Contradicción de tesis 293/2011*; *Procede el recurso de revisión en amparo directo, cuando se alegue que una norma secundaria es contraria a una de derechos humanos contenida en un tratado internacional*, SCJN, *Seguimiento de Asuntos Resueltos por el Pleno de la Suprema Corte de Justicia de la Nación* [Follow-up to Related Resolved Affairs by the Plenum of the SCJN], *Contradicción de tesis 21/2011-PL*.

<sup>36</sup> American Convention on Human Rights, art. 7.3, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 (stating that nobody may be subject to arbitrary detention or incarceration, noting that the Inter-American Court has said that preventive incarceration is arbitrary when not being carefully justified by public authorities in view of the specific needs and characteristics of the situation, under standards that include necessity and proportionality, not being possible to ground it simply on the imputation of a particular kind of criminal offense.) See *López Álvarez v. Honduras*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 141 ¶¶ 66–69, 81; *Norin Catrimán et al. (Leaders, Members, and Activist of the Mapuche Indigenous People) v. Chile*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 279 ¶ 311.

emphasized that drug policies must be implemented in conformity with the Charter of the UN, with full respect for all human rights and that, in cases of conflict, human rights obligations must prevail:

“A number of United Nations bodies enforce the three drug control treaties and are required to promote and protect human rights, as identified in Articles 1 and 55 of the Charter of the United Nations. When the goals and approaches of the international drug control regime and international human rights regime conflict, it is clear that human rights obligations should prevail. The General Assembly has consistently adopted resolutions declaring that international drug control must be carried out in conformity with the Charter, and ‘with full respect for human rights’ (see resolutions 62/176 and 63/197).”<sup>37</sup>

The Supreme Court of Mexico has already declared the prohibition of recreational and therapeutic possession and use of cannabis unconstitutional.<sup>38</sup> Additionally, a District Judge recently declared the prohibition of possession and personal use of cocaine unconstitutional.<sup>39</sup>

The arguments behind these rulings rely on the idea that rights have been infringed and show that infringement cannot be justified by a proportionality analysis. Because most constitutional rights are understood as principles, not absolute rules, contemporary rights reasoning is always a two-step process. First, a limitation on a right must be shown to exist. Second, whether this limitation is justified must be ascertained by applying the four-prong inquiry known as proportionality analysis. We start by explaining how a proportionality analysis functions in constitutional drug policy arguments. We will also mention other principles of interpretation and enforcement of rights that play a role in our later arguments.

### *C. Rules on Interpretation, Enforcement, and Limitation of Rights*

Due to the 2011 amendments, the Mexican Constitution now includes a capacious toolkit that “unpacks” and maximizes the scope of rights, facilitating their enforcement. Article 1 declares that all human rights-related provisions shall be interpreted according to the Constitution and treaties on

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<sup>37</sup> See G.A. Res. 51/12, ¶ 10 (Aug. 6, 2010).

<sup>38</sup> See Primera Sala de la SCJN [First Chamber of the SCJN] 04-11-2015, amparo en revisión 237/2014; Primera Sala de la SCJN 11-04-2018, amparo en revisión 1115/2017; Primera Sala de la SCJN 13-06-2018, amparo en revisión 623/2017; Segunda Sala de la SCJN [Second Chamber of the SCJN] 04-07-2018, amparo en revisión 1163/2017 concerning recreational use); see Segunda Sala de la SCJN 14-08-2019, amparo en revisión 57/2019 (on therapeutic use, which was previously decriminalized, but left largely unregulated by the legislature in 2017).

<sup>39</sup> Sentencia [Sentencing], Juzgado Décimo Cuarto de Distrito en Materia Administrativa [Fourteenth District Court on Administrative Matters] 31-05-2019, amparo indirecto 252/2019.

the subject, favoring the broad protection of the individual. Article 1 further states that all public authorities must promote, respect, protect, and guarantee human rights according to the principles of universality, interdependence, indivisibility, and progressivity. It provides that public authorities must prevent, investigate, sanction, and repair human rights violations as provided for by law.<sup>40</sup>

These principles and duties may be used to support an argument for changing current drug policies based on prohibition. Considering the post-2011 Constitution and the significant evidence regarding the negative effects of prohibition, Mexican public authorities are both constitutionally obligated to address and ameliorate the situation. They are also obligated to adopt drug policies that promote, respect, protect, and fulfill human rights to prevent repeat violations.

One of the relevant principles to consider is proportionality, which is considered intrinsic to the operation of rights as normative provisions. Contemporary rights clauses usually take the structure of principles, not rules.<sup>41</sup> This means that they are not absolute and that arguments that frame certain regulations, acts, or events, as a violation of rights, are not inherently conclusive. In contrast with rule-like rights, which are categorical, principle-like rights may be limited under certain conditions. Contemporary courts around the world evaluate whether these conditions are met by applying the proportionality test, a test used to evaluate when rights limitations can be justified and when they cannot.<sup>42</sup> The Mexican Supreme Court is no exception, and has used proportionality analyses in important rights cases, including those dealing with the consumption of cannabis.<sup>43</sup>

Public authorities must meet a four-step test under the proportionality analysis to preserve a government measure that *prima facie* violates rights.<sup>44</sup> First, the measure must pursue a *legitimate objective*, one that is admissible

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<sup>40</sup> CPEUM, art. 1 ¶ 2, DOF 05-02-1917; “The provisions relating to human rights shall be interpreted according to this Constitution and the international treaties on the subject, working in favor of the broader protection of people at all times / All authorities, in their areas of competence, are obliged to promote, respect, protect and guarantee Human Rights, in accordance with the principles of universality, interdependence, indivisibility and progressiveness. Consequently, the State must prevent, investigate, penalize, and rectify violations to Human Rights, according to the law.”

<sup>41</sup> An example of right that (exceptionally) displays structure of non-defeasible rule, not principle, would be the prohibition of torture, or the rule of non-refoulement.

<sup>42</sup> See KAI MÖLLER, *THE GLOBAL MODEL OF CONSTITUTIONAL RIGHTS* (2012) for discussion on the global use of proportionality; see also ALEC STONE SWEET & JUD MATHEWS, *PROPORTIONALITY BALANCING AND CONSTITUTIONAL GOVERNANCE: A COMPARATIVE AND GLOBAL APPROACH* (2019); Alec Stone Sweet & Jud Mathews, *Proportionality Balancing and Global Constitutionalism*, 47 COLUM. J. TRANSNAT'L L. 72 (2008).

<sup>43</sup> Arturo Bárcena Zubieta, *Proportionality and Human Rights in Mexico*, in *PROPORTIONALITY AND TRANSFORMATION: THEORY AND PRACTICE FROM LATIN AMERICA* (Francisca Pou Giménez et al. eds., forthcoming 2022) (exploring the use of proportionality analysis by the Mexican Supreme Court).

<sup>44</sup> See ROBERT ALEXY, *A THEORY OF CONSTITUTIONAL RIGHTS* (2002); AHARON BARAK, *PROPORTIONALITY: CONSTITUTIONAL RIGHTS AND THEIR LIMITATION* (2012); MATTHIAS KLATT & MORITZ MEISTER, *THE CONSTITUTIONAL STRUCTURE OF PROPORTIONALITY* (2012); CARLOS BERNAL PULIDO, *EL PRINCIPIO DE PROPORCIONALIDAD Y LOS DERECHOS FUNDAMENTALES* (3rd ed. 2007).

under the Constitution and coherent with its normative program.<sup>45</sup> Second, the measure must be a *suitable* means to achieve that goal; that is, it is instrumentally apt to achieve that goal.<sup>46</sup> Third, it must be *necessary*.<sup>47</sup> There are no alternative means that allow for the achievement of the goal, with a lesser impairment on rights. Fourth, the measure must be *proportional in the narrow sense*.<sup>48</sup>

It is important to be familiar with the mechanics of proportionality because public authorities typically justify prohibitionist drug policies on this basis. They argue that, even if prohibition negatively impacts constitutional rights, it protects legitimate objectives, and represents a suitable, necessary, and proportional means to achieve those objectives, thus justifying rights limitations. The rights-based arguments on drug policy developed in the next section must be read in this light. These arguments both identify the impingement of rights and provide grounds and elements that show prohibition does not satisfy the requirements of proportionality analysis and cannot be therefore considered justified rights limitations.

Prohibition clearly does not satisfy the requirements of proportionality analysis. In some instances, the goals said to justify prohibition are not constitutionally legitimate, as they are based on perfectionistic models of personal virtue that clash with constitutional rights. Other times, when health or national and public security interests are brought forward, these goals point to problems that have in part been generated by the prohibitionist policy itself. The only goals that seem to be legitimate goals in the context of the legal treatment of drug use are the concern for the health of people who use drugs, the health of minors, or of third parties. However, as we will corroborate in Part II, the problem is that prohibitionist measures are not suitable to protect these goals. They are unnecessary because there are far better alternatives to protect those goals. And they are disproportionate in the narrow sense, since there is an imbalance between what is gained through prohibition and the costs (in terms of rights violations and other constitutional infringements) its enforcement generates. As we will later outline, prohibition has proven to not only represent serious violations of rights but also threatens the foundations of the constitutional system.

Prohibition is not a reasonable and proportional limitation of rights, no matter the constitutional rights framing applied. Because of the scope of the damage caused by prohibition, there will always be a problem of “disproportionality in the narrow sense.” A balance between the consequent gains and losses will never be obtained.

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<sup>45</sup> See ALEXY, *supra* note 44.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* These are the steps identified, with slight variations, in the global literature on proportionality and in standard constitutional court’s practice. See MÖLLER, *supra* note 42. The fourth prong of the analysis is called “proportionality in the narrow sense,” “balancing,” or “ponderation.”

#### D. *How to Eliminate Prohibitionist Treaties and Statutes*

It is necessary to next consider how to nullify the normative force of prohibitionist treaties and statutes. Treaties can be internationally denounced, and statutes may be repealed or modified by the Executive and the Legislature. However, when these straightforward channels are unavailable, other options are worth considering. We explore three: (1) judicial invalidation, (2) judicial inapplication, and (3) judicial non-selection. Although we investigate these possibilities, we still find that it is optimal for Congress to regulate drug markets. There are many reasons why Congress, not the courts, should take up this responsibility, although the development of these reasons is beyond the scope of this article.<sup>49</sup>

##### 1. *Invalidation*

In Mexico, treaties may be subjected to abstract review if a legitimate party files an *acción de inconstitucionalidad* [action of unconstitutionality].<sup>50</sup> This specific channel of review is shaped after the Kelsenian model of abstract statutory review<sup>51</sup> and may be filed only by certain authorities and institutions, against a collection of general norms or regulations. All kinds of constitutional violations may be denounced through this review. If the Court concludes that the provisions under review are unconstitutional by a qualified majority of eight out of eleven Justices, they will be expelled from the legal system and erased from the books.<sup>52</sup>

An action of unconstitutionality can only be filed within thirty days following the publication of the general norms in the *Diario Oficial*.<sup>53</sup> This renders impossible the nullification of treaties that were signed and ratified

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<sup>49</sup> For general arguments about the role of courts and parliaments in a democracy see Roberto Gargarella, *Un papel renovado para la Corte Suprema: Democracia e interpretación judicial de la Constitución* [*A Renewed Role for the Supreme Court: Democracy and Judicial Interpretation of the Constitution*], in *TRIBUNALES CONSTITUCIONALES Y CONSOLIDACIÓN DE LA DEMOCRACIA* [Constitutional Courts and Consolidation of Democracy] 231 (2007).

<sup>50</sup> CPEUM, art. 105, DOF 05-02-1917.

<sup>51</sup> At the beginnings of the twentieth century, Hans Kelsen devised a system of judicial review of legislation that was very different—in a sense, opposed—to the one that had developed in the nineteenth century in the United States and Latin America. In his model, frequently called the “European model of judicial review,” judicial review is concentrated in only one, specialized organ, formed by members selected by special appointment procedures, who examine the validity of the law in the abstract (not in the course of resolving a specific controversy), at the instance of a limited set of institutional actors. If the statute is found to be invalid, it is expelled from the legal system—i.e., the declaration of invalidity has general effects, not only effects for the parties, as occurs in decentralized, incidental, inter-pars American systems. See VÍCTOR FERRERES COMELLA, *CONSTITUTIONAL COURTS AND DEMOCRATIC VALUES: A EUROPEAN PERSPECTIVE* (2009).

<sup>52</sup> Ley Reglamentaria de las Fracciones I y II del Artículo 105 de la Constitución Política de los Estados Unidos Mexicanos [Regulatory Law of Fractions I and II of Article 105 of the Political Constitution of the United Mexican States], arts. 59–73.

<sup>53</sup> *Id.* art. 60.

long ago. However, the Court has indicated that general norms can be challenged if they are modified; so, it is possible to challenge treaties if they are later altered.

The General Health Law, as well as the federal and criminal codes, may be also subject to abstract review through the same procedural channel. But again, only amendments to existing provisions would formally open the possibility of challenge before the Court.

## 2. *Inapplication*

The General Health Law, criminal codes, and drug treaties may be set aside, as any other norm or act of public authority, in an *amparo* [writ of amparo].<sup>54</sup> An *amparo* is a constitutional complaint that may be filed before federal judges by individuals, corporations, groups, or organizations, in defense of their constitutional rights. The writ of amparo is a channel of semi-decentralized, incidental review that, when filed against general norms, leads *only* to their inapplication in the case at hand. If, however, a normative provision is found unconstitutional and unapplied for five consecutive times, then the decision becomes binding precedent and judges are obligated to abstain from applying the norm whenever someone requests to do so by filing an *amparo*, which is an extraordinary constitutional appeal.<sup>55</sup> An *amparo* is often referred to as a “constitutional protection lawsuit.”<sup>56</sup> However, executive authorities may continue to apply the law as written and only people who file an *amparo* will benefit from the existence of a judicial precedent.

Once a binding precedent is established concerning a statutory or administrative regulation, the Supreme Court may hold a special vote to decide, by a qualified majority, whether those provisions must be definitely removed, *erga omnes*,<sup>57</sup> from the legal system.<sup>58</sup>

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<sup>54</sup> CPEUM, arts. 103, 107, DOF 05-02-1917.

<sup>55</sup> A recent constitutional and legal reform changed this requirement. One ruling of the Supreme Court, not five, is now sufficient to establish a binding precedent if supported by four votes in the Chambers and eight votes in the Plenary. Ley de Amparo, Reglamentaria de los Artículos 103 y 107 de la Constitución Política de los Estados Unidos Mexicanos [LARACPEUM] [Amparo Law, Regulating Articles 103 and 107 of the Political Constitution of the United Mexican States], arts. 215, 222, 223, últimas reformas DOF 07-06-2021 [hereinafter Amparo Act]. We still refer to the earlier rule (five consecutive rulings) because it is the one that applied to the mentioned cannabis cases. The five-ruling system continues to apply for precedents of the Collegiate Courts to be binding on lower courts. Amparo Act, art. 224.

<sup>56</sup> Mexico: New Amparo Law is Enacted, LIBRARY OF CONGRESS (Apr. 30, 2013), <https://www.loc.gov/item/global-legal-monitor/2013-04-30/mexico-new-amparo-law-is-enacted/>.

<sup>57</sup> *Id.* Removal, *erga omnes*, refers to the derogation of a provision for everyone, not just for people who file a writ of amparo.

<sup>58</sup> See *id.* arts. 107-II, 231, 232.

In regard to cannabis, the Supreme Court has upheld five consecutive rulings stating that a blanket prohibition of cannabis use is unconstitutional.<sup>59</sup> This makes the decision a binding criterion for all lower tribunals.<sup>60</sup> The Court gave Congress until October 30, 2019, to approve laws permitting the use of cannabis. However, one day before that date, the Senate petitioned the Court for an extension.<sup>61</sup> The Court accepted the petition as “an exceptional measure” and “on one single occasion,” and gave Congress until April 30, 2020, to pass the corresponding legislation.<sup>62</sup> In June 2021, the Supreme Court held a special vote and decided by a majority of eight Justices to expel the articles that prohibited people from obtaining permits to plant, grow, possess and use cannabis for personal use, from the Mexican legal system.<sup>63</sup> The Court’s ruling only applies to people who petition a permit but not to people who grow, transport or use, without a permit.<sup>64</sup>

### 3. *Non-selection*

The new architecture of legal sources in Mexico could provide a way to set aside prohibitionist infra-constitutional treaties by considering other sources to be prevalent in determining the law. This may be an interesting possibility for the Mexican Congress to derogate or modify prohibition without denouncing international drug treaties. The legal reasoning here is complex—it is only roughly outlined in this text—and requires that we recall

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<sup>59</sup> Comunicados de Prensa [Press Release], SCJN, Reitera Primera Sala inconstitucionalidad de la prohibición absoluta del consumo recreativo de marihuana e integra jurisprudencia [First Chamber reiterates unconstitutionality of the absolute prohibition of the recreational use of marijuana and integrates jurisprudence], No. 140/2018, 31-10-2018, <http://www.internet2.scjn.gob.mx/red2/comunicados/noticia.asp?id=5785>. The five decisions are: Primera Sala de la SCJN, 04-11-2015, amparo en revisión 237/2014; *id.* 13-06-2018, amparo en revisión 623/2017; *id.* 11-04-2018, amparo en revisión 1115/2017; *id.* Primera Sala de la SCJN, 31-10-2018, amparo en revisión 547/201; *id.* 31-10-2018, amparo en revisión 548/2018. *See also* Segunda Sala de la SCJN, 04-07-2018, amparo en revisión 1163/2017, <http://www2.scjn.gob.mx/ConsultaTematica/PaginasPub/TematicaPub.aspx>.

<sup>60</sup> CPEUM, art. 10, DOF 05-02-1917.

<sup>61</sup> *Solicita Senado prórroga a SCJN para legislar regulación integral del cannabis* [Senate Requests Extension to the SCJN to Legislate Comprehensive Regulation of Cannabis], SENADO DE LA REPÚBLICA, COORDINACIÓN DE COMUNICACIÓN SOCIAL (Oct. 29, 2019, 8:19 PM),

<http://comunicacion.senado.gob.mx/index.php/informacion/boletines/46624-solicita-senado-prorroga-a-scjn-para-legislar-regulacion-integral-de-la-cannabis.html>.

<sup>62</sup> *Otorga Suprema Corte al Senado prórroga para legislar sobre cannabis* [Supreme Court Grants Senate Extension for Cannabis Legislation], SENADO DE LA REPÚBLICA COORDINACIÓN DE COMUNICACIÓN SOCIAL (Nov. 5, 2019, 3:28 PM), <http://comunicacion.senado.gob.mx/index.php/informacion/boletines/46675-otorga-suprema-corte-al-senado-prorroga-para-legislar-sobre-cannabis.html>.

<sup>63</sup> Comunicados de Prensa [Press Release], SCJN, SCJN invalida, con efectos generales, la prohibición absoluta contenida en la ley general de salud para realizar actividades relacionadas con el autoconsumo lúdico o recreativo de cannabis y THC [The Supreme Court Invalidates, with General Effects, the Absolute Prohibition Contained in the General Health Law of Activities Associated to the Recreational or Ludic Self-Consumption of Cannabis and THC], No. 187/2021, 28-06-2021, <https://www.internet2.scjn.gob.mx/red2/comunicados/noticia.asp?id=6495>.

<sup>64</sup> *Id.*

what the Supreme Court has affirmed regarding the selection of applicable norms when assessing limitations to human rights.

In landmark rulings, the Supreme Court has stated that constitutional and treaty sources dealing with human rights must be treated as a functional unit, in their “material interrelation,” in order to fulfill the constitutional mandate of finding the greatest benefit for the individual.<sup>65</sup> When an explicit constitutional restriction is absent, and specific grounds that apply other criteria of normative conflict resolution are also absent, the Court directs the interpreter to holistically approach the Bill of Rights, selecting the norm that is most beneficial to the people. Of course, there will always be a substantive argument available, about which norm or body of law is “most beneficial to the person.” But as the following sections suggest, showing that prohibition legal sources are *not* the most beneficial to individuals and society as a whole—as compared to a reasonable scheme of regulation—is not difficult.

One may argue that the interaction between sources of law in the intermediate echelon (i.e., interaction between drug treaties and the General Health Law) must be managed by selecting the norm that is most beneficial to the person. The unselected norm would not be declared invalid nor expelled from the legal system but would lose precedence in its application (before a hypothetically amended, rights-promoting General Health Law). While this might create a problem of international responsibility, it would be a viable option under the constitutional system.

A recent ruling on abortion confirms that the Supreme Court now considers normative interactions with increasing sophistication.<sup>66</sup> This approach might be applied in the domain of drug policy if there is an interest in modifying or replacing prohibition with a human rights-based drug policy, while maintaining drug treaties. In this abortion ruling, a pregnant woman experiencing severe health problems and risks was denied medical assistance. The Supreme Court declared that denying medical attention when such attention is immediately necessary, is a violation of the individual’s right to health and a violation of the medical personnel’s duties under the General Health Law. The court concluded that this was true irrespective of whether adequate medical attention requires termination of the pregnancy

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<sup>65</sup> Pleno de la SCJN, 03-09-2013, Contradicción de tesis 293/2011, 29–31, 35–37, 47–54; *id.* 09-09-2013, Contradicción de tesis 21/2011, 54–74 (Paragraph 59 states that “the first paragraph of Article 1 of the constitution gave rise to a material interrelation between the norms in the constitution and those in the international treaties ratified by Mexico to the purpose of fixing the content of a human right, the hierarchy of its source in the legal system not being relevant.” Paragraph 68 states that “the content of the respective human will therefore only one and will be conformed on the basis of the constitutional and international treaty norm or norms which, in principle, allow a greater degree of free development of personal freedom and autonomy, on the basis of the second paragraph of Article 1 of the Constitution, this not implying the disregard of the explicit constitutional restrictions to the exercise of rights set down in the constitutional text”).

<sup>66</sup> Primera Sala de la SCJN, 15-05-2019, amparo en revisión 1388/2015.

(under consent of the petitioner).<sup>67</sup> This rule is important because applicable criminal provisions do not allow the interruption of pregnancies on health grounds.<sup>68</sup> The ruling reveals a careful handling of the interaction of different sources of law. The federal criminal code decriminalizes abortion only in situations of negligence, risk to life (not health), and rape,<sup>69</sup> but the Court grounded its decision within different, concurrently applicable sources of law.<sup>70</sup> And while it is true that the General Health Law is not the same as an ordinary criminal statute, the Court's argument was not based on hierarchy. Rather, it reflected an effort to apply valid norms, dictated within different areas of jurisdiction, with partially overlapping domains of application. The Court crucially demonstrated, in this case, that criminal code provisions do not preclude the application of health law provisions. This logic may be transferred to the issue at hand, prohibition.

## II. THE UNCONSTITUTIONALITY OF PROHIBITION: RIGHTS FRAMINGS

We now examine why a policy that maintains an immense illegal transnational market on drugs undermines core normative commitments of the constitutional system. This section includes both normative arguments and empirical data which demonstrate how prohibition damages constitutional rights.

We concentrate on three rights-related framings that have been most affected by prohibition: (1) the right to health, (2) the right to the free development of one's personality, and (3) the right to equality. The arguments we survey under the "health" rubric, cover right to health and right to life violations. We have combined these rights under the same category because violations of the right to life are outrageous violations of the right to health. They are also combined because health has been traditionally raised as a justification for prohibitionist drug policies. It is therefore greatly important to show the extent to which prohibition damages health. Lastly, we will briefly identify additional arguments that arise from other rights-framings.

### A. *Health*

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<sup>67</sup> *Id.* at ¶¶ 61, 96–122.

<sup>68</sup> *Id.* at ¶¶ 42–49. The Court considers that there was no "act of application" of the criminal code, only of the health normativity.

<sup>69</sup> See CPF, DOF 14-8-1931, últimas reformas DOF 24-01-2020, arts. 329–34.

<sup>70</sup> Amparo en revisión 1388/2015, *supra* note 66, ¶¶ 120–121.

The normative status of the right to health is strong in Mexico. Article 4 of the Constitution enshrines it in explicit language.<sup>71</sup> It is also guaranteed in key international human rights sources that make up a part of the Mexican Bill of Rights. These include the International Covenant on Economic, Social and Cultural Rights<sup>72</sup> or the San Salvador Protocol to the American Convention of Human Rights.<sup>73</sup> As made clear by the many auxiliary interpretative sources developed by international institutions in the domain of international human rights law, there are multiple and consequential dimensions of normativity and enforceability of this right.<sup>74</sup>

The large body of health-related international sources has recently increased its profile for two reasons. First, the Inter-American Court confirmed in *Poblete Vilches v. Chile* and *Cuscul Pivaral v. Guatemala*, that the right to health and other economic and social rights are directly enforceable under Article 26 of the American Convention.<sup>75</sup> This was a bold move by the Inter-American Court. It is still unclear how this line of

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<sup>71</sup> CPEUM, art. 4, DOF 05-02-1917. "All persons have the right to health protection. The law shall determine the grounds and conditions to access health services and shall establish the jurisdiction of the Federation and the Local Governments with regards sanitation, as provided in section XVI of Article 73 of this Constitution."

<sup>72</sup> International Covenant on Economic, Social and Cultural Rights, art. 12, Dec. 16, 1966, 993 U.N.T.S. 3 ("1. The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health. 2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for: (a) The provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child; (b) The improvement of all aspects of environmental and industrial hygiene; (c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases; (d) The creation of conditions which would assure to all medical service and medical attention in the event of sickness.").

<sup>73</sup> Organization of American States, Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights "Protocol of San Salvador" art. 10, Nov. 16, 1999, O.A.S.T.S. No. A-52 ("Right to health. 1. Everyone shall have the right to health, understood to mean the enjoyment of the highest level of physical, mental and social well-being. 2. In order to ensure the exercise of the right to health, the States Parties agree to recognize health as a public good and, particularly, to adopt the following measures to ensure that right: a. Primary health care, that is, essential health care made available to all individuals and families in the community; b. Extension of the benefits of health services to all individuals subject to the State's jurisdiction; c. Universal immunization against the principal infectious diseases; d. Prevention and treatment of endemic, occupational and other diseases; e. Education of the population on the prevention and treatment of health problems, and f. Satisfaction of the health needs of the highest risk groups and of those whose poverty makes them the most vulnerable").

<sup>74</sup> See, e.g., U.N. ESCOR, General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12), U.N. Doc. E/C.12/2000/4 (Aug. 11, 2000).

<sup>75</sup> *Poblete Vilches v. Chile*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 349 (Mex.) (protecting the right to health on the basis of Article 26 of the American Convention); *Cuscul Pivaral v. Guatemala*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 359 (Mex.) (protecting the right to health on the basis of Article 26 of the American Convention). See also *Acevedo Buendía et al. ("Discharged and Retired Employees of the Comptroller") v. Perú*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 198; *Lagos del Campo v. Perú*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 340; *Trabajadores Cesados de Petroperú y otros v. Perú*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 344; *San Miguel Sosa v. Venezuela*, Merits, Inter-Am. Ct. H.R. (ser. C) No. 348; *On the Environment and Human Rights*, Advisory Opinion OC-23/2017, Inter-Am. Ct. H.R. (ser. A) No. 23 (Mex.). See EDUARDO FERRER MAC-GREGOR ET AL., INCLUSIÓN, IUS COMMUNE Y JUSTICIABILIDAD DE LOS DESCALOS EN LA JURISPRUDENCIA INTERAMERICANA: EL CASO LAGOS DEL CAMPO Y LOS NUEVOS DESAFÍOS (2018).

precedent will settle, but it undoubtedly has the potential to be an extraordinarily rich source of new standards regarding the guarantee of the right to health. Second, the United Nations Committee on Economic, Social and Cultural Rights began to process individual complaints.<sup>76</sup> The Committee now expounds on the importance of guaranteeing the high standards of health protected in positive law at the request of individuals, not just at the request of States or through *ex officio* means. This may further develop the right to health's multiple dimensions of enforceability.

The Mexican Supreme Court, although late and somehow modestly in comparison to other Latin American high courts, is finally deciding cases based on the right to health.<sup>77</sup> Its most recent ruling on the therapeutic use of marijuana (AR 57/2019) is grounded on the right to the highest attainable level of health.<sup>78</sup> As a result, the Court directed the Ministry of Health to issue corresponding regulations within 180 days. In June 2017, the General Health Law was amended to legalize the therapeutic use of marijuana. However, it wasn't until 2021 that Mexican authorities finally passed the regulations necessary for cannabis to be legally used for research and medicinal purposes.<sup>79</sup>

Prohibition has devastating effects on the health and lives of individuals, and these effects urgently require a system of regulation of all drugs and all drug use, regardless of their purpose. Prohibition violates the right to health for various reasons. First, violence resulting from the enforcement of prohibition has been so detrimental to health that it concomitantly endangers the right to life. Second, current drug laws negatively affect the health of drug users. Third, supply reduction through eradication implies serious risks to the health of farmers and their

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<sup>76</sup> See G.A. Res. 63/117, Optional Protocol to the International Covenant on Social, Economic and Cultural Rights (Dec. 10, 2008), <https://www.ohchr.org/EN/ProfessionalInterest/Pages/OPCESCR.aspx>.

<sup>77</sup> See generally Francisca Pou Giménez, *Los albores de la justiciabilidad del derecho a la salud en México: el caso Pabellón 13* [*The Dawn of Justiciability of the Right to Health in Mexico: The Pabellón Case*], in DIEZ SENTENCIAS EMBLEMÁTICAS DE LA SUPREMA CORTE [TEN EMBLEMATIC JUDGMENTS OF THE SUPREME COURT] 135–56 (Pedro Salazar et al. eds., 2019) (regarding the emergence of health-related constitutional adjudication in Mexico); Alfredo Gutiérrez Ortiz-Mena, *La justiciabilidad del derecho a la salud en México* [*The Justiciability of the Right to Health in Mexico*], 5 REV. DEL CENTRO DE ESTUDIOS CONSTITUCIONALES 325 (2017); Rodrigo Gutiérrez Rivas, *La justiciabilidad del derecho a la salud en México y en el Sistema Interamericano de Derechos Humanos* [*The Justiciability of the Right to Health in Mexico and in the Inter-American Human Rights System*], 5 REV. DEL CENTRO DE ESTUDIOS CONSTITUCIONALES, 517 (2017); Alejandro González Pina, *Los derechos sociales y su exigibilidad. Algunos problemas para su protección a través del juicio de amparo* [*Social Rights and their Enforceability. Some Problems for Your Protection Through Amparo Lawsuit*], 5 REV. DEL CENTRO DE ESTUDIOS CONSTITUCIONALES, 455 (2017). Fernanda Cobo & Sofia Charvel, *Mexican Apex Judiciary and its Multiple Interpretations: Challenges for the Constitutional Right to Health*, 18 INT'L J. CONST. L. 1254 (2021).

<sup>78</sup> Segunda Sala de la SCJN, 14-08-2019, amparo en revisión 57/2019.

<sup>79</sup> See LGS, Reglamento de la Ley General de salud en materia de control sanitario para la producción, investigación y uso medicinal del cannabis y sus derivados farmacológicos [Regulation of the General Health Law on Sanitary Control for the Production, Research and Medicinal Use of Cannabis and its Pharmacological Derivatives] DOF 12-01-2021.

communities. Fourth, the use of the criminal justice system to punish drug crimes results in risks to individuals and to public health, a development that is especially worrisome given that many people prosecuted for drug crimes are indicted for possession without the intent to sell. In the following sections, we present evidence that shows how health—and in many cases, life—is undermined by prohibition.

### 1. *Violence and detriment to health*

Enforcement of prohibition in recent years has taken a toll on the health and lives of thousands of individuals and communities. In 2007, Mexico had a historically low rate of homicides, with eight homicides per 100,000 inhabitants.<sup>80</sup> The trend abruptly changed after the adoption of a harsher prohibition policy in 2006.<sup>81</sup> By 2009, the homicide rate had reached twenty homicides per 100,000 inhabitants.<sup>82</sup> According to the National Institute of Statistics and Geography, from 2006 to 2018, over a quarter of a million homicides occurred in a country with 125.3 million people.<sup>83</sup> The increase in homicides was so apparent that it had a direct negative impact on life expectancy.<sup>84</sup> From 2005 to 2010, life expectancy at the national level decreased by 0.6%.<sup>85</sup> And regions most affected by the war on drugs showed a more prominent reduction. In Chihuahua, Sinaloa, and Durango, life expectancy decreased by three years over the same period.<sup>86</sup>

Several studies show that the homicide crisis was driven by prohibition enforcement methods. Military deployment throughout the country,<sup>87</sup> as well as beheadings of prominent members of criminal

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<sup>80</sup> See Consejo Nacional de la Población [National Population Council], *La Situación Demográfica en México [The Demographic Situation in Mexico]*, GOBIERNO DE MEX. (Sept. 2019), <https://www.gob.mx/conapo/documentos/la-situacion-demografica-de-mexico-2018>; INSTITUTO NACIONAL DE ESTADÍSTICA Y GEOGRAFÍA [INEGI] [NATIONAL INSTITUTE OF STATISTICS AND GEOGRAPHY], MORTALIDAD, CONJUNTO DE DATOS: DEFUNCIONES POR HOMICIDIOS, INFORMACIÓN DE 1990 A 2019 [MORTALITY DATA SET: DEATHS FROM HOMICIDES, INFORMATION FROM 1990 TO 2019], <https://www.inegi.org.mx/sistemas/olap/proyectos/bd/continuas/mortalidad/defuncioneshom.asp?s=est>.

<sup>81</sup> See Consejo Nacional de la Población, *supra* note 80; INEGI, *supra* note 80.

<sup>82</sup> See *id.*

<sup>83</sup> See INEGI, *supra* note 80.

<sup>84</sup> See Zedillo et al., *supra* note 2, at 107.

<sup>85</sup> José Manuel Aburto et al., *Homicides in Mexico Reversed Life Expectancy Gains for Men and Slowed Them for Women, 2000–10*, 35 HEALTH AFFS. 88 (2016).

<sup>86</sup> See Zedillo et al., *supra* note 2, at 131.

<sup>87</sup> *Id.* Several studies have established causality between the security strategy implemented by the 2006–2012 Administration and the increase in violence. Laura Atuesta, *Militarización de la lucha contra el narcotráfico: los operativos militares como estrategia para el combate del crimen organizado [Militarization of the Fight Against Drug Trafficking: Military Operations as a Strategy to Combat Organized Crime]*, in LAS VIOLENCIAS: EN BUSCA DE LA POLÍTICA DE DROGAS DETRÁS DE LA GUERRA CONTRA LAS DROGAS [VIOLENCE: IN SEARCH OF DRUG POLICY BEHIND THE WAR ON DRUGS], (Laura Atuesta & Alejandro Madrazo eds., 2018) (showing how shootouts with federal forces, especially with the military, result in increases of violence both in short and long term); Laura H. Atuesta & Aldo F. Ponce,

organizations involved in the illicit drugs market (also known as the “kingpin strategy”<sup>88</sup>), had a detrimental effect.<sup>89</sup> In the context of weak institutions, impunity, and lack of rule of law, the strategies adopted to curb the illicit drugs markets ended up fueling the homicide epidemic. This crisis was the result of policies implemented in the name of the war on drugs.<sup>90</sup>

Beyond life expectancy, violence takes a serious toll on health. Health problems resulting from prohibition include depression, alcohol abuse, suicidal behavior, and psychological problems.<sup>91</sup> People in Mexico spend a substantial portion of their lives in fear. In Mexico, there has been an increase in the average number of years lived in vulnerability due to social changes both in the public sphere and at home.<sup>92</sup> In 2014, seven years into the “war on drugs,” female life expectancy at age twenty was fifty-nine and a half years.<sup>93</sup> Seventy-one percent of a woman’s life was spent in “perceived

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*Meet the Narco: Increased Competition Among Criminal Organizations and the Explosion of Violence in Mexico*, 18 GLOB. CRIME 375, 376 (2017) (explaining that increased intervention by law enforcement increases the number of assassinations and unrest, which leads to the creation of more criminal organizations); Gabriela Calderón et al., *The Beheading of Criminal Organizations and the Dynamics of Violence in Mexico*, 59 J. CONFLICT RESOL. 1455, 1456 (2015) (correlating the dramatic increase in homicide rates in 2006 to the start of President Calderón’s campaign against drug cartels); Valeria Espinosa & Donald B. Rubin, *Did the Military Interventions in the Mexican Drug War Increase Violence?*, 69 AM. STAT. 17, 24 (2015) (claiming military intervention in the drug war caused an increase in the average homicide rate); Javier Osorio, *The Contagion of Drug Violence: Spatiotemporal Dynamics of the Mexican War on Drugs*, 59 J. CONFLICT RESOL. 1403, 1407 (2015) (proposing a theory of criminal competition whereby government intervention reduces the power of one criminal organization and therefore encourages a rival organization to strike its weakened competitor); Brian J. Phillips, *How Does Leadership Decapitation Affect Violence? The Case of Drug Trafficking Organizations in Mexico*, 77 J. POLITICS 324, 326 (2015) (explaining why leadership decapitation can sometimes have the unintended effect of increasing levels of violence); José Merino, *Los operativos conjuntos y la tasa de homicidios: Una medición* [Joint Operations and the Homicide Rate: A Measurement], NEXOS (June 1, 2011), <https://www.nexos.com.mx/?p=14319> (using statistical tools to argue that the strong correlation between government intervention and violence is causal); see Zedillo et al., *supra* note 2, at 107.

<sup>88</sup> See Patrick Corcoran, *Mexico President Reprises Controversial Kingpin Strategy*, INSIGHT CRIME (June 6, 2017), <https://insightcrime.org/news/analysis/mexico-president-reprises-controversial-kingpin-strategy/>.

<sup>89</sup> Calderón et al., *supra* note 87 (finding evidence that the capturing and killing of drug cartel leaders had exacerbating effects not only on Drug Trade Organization related violence but also on homicides that affected the general population).

<sup>90</sup> In 2006, the federal security cabinet announced the first deployment of federal troops. The minister of interior stated that the purpose of this deployment was eradication of illicit crops as well as the establishment of checkpoints to stop narcotics on highways and state roads. See *Anuncios sobre la Operación Conjunta Michoacán* [Announcement Regarding the Joint Operation Michoacán] PRESIDENCIA DE LA REPÚBLICA (Dec. 11, 2006), <https://www.resdal.org/caeef-resdal/assets/mexico---anuncio-sobre-la-operaci%C3%B3n-conjunta-michoac%C3%A1n.pdf>.

<sup>91</sup> Zedillo et al., *supra* note 2, at 132. The authors mention how exposure to violence is associated with lower weight at birth of children born to women of scarce economic resources and those born to women with mental health problems (citing Ryan Brown, *The Mexican Drug War and Early-Life Health: The Impact of Violent Crime on Birth Outcomes*, 55 DEMOGRAPHY 319 (2018)). See also Stephen Buka et al., *Youth Exposure to Violence: Prevalence, Risks, and Consequences*, 71 AM. J. ORTHOPSYCHIATRY 298 (2001). Violence may also affect the health of the exposed population by increasing the rates of posttraumatic stress disorder and depression.

<sup>92</sup> See Vladimir Canudas-Romo et al., *Mexico’s Epidemic of Violence and its Public Health Significance on Average Length of Life*, 71 J. EPIDEMIOL. CMTY. HEALTH 188 (2017).

<sup>93</sup> *Id.*

vulnerability” due to violence occurring in the public sphere and twenty-six percent because of domestic violence. For males, life expectancy at age twenty was fifty-four and a half years.<sup>94</sup> Sixty-four percent of that time lived with perceived vulnerability because of violence occurring at the State sphere and twenty percent because of domestic violence.<sup>95</sup>

Evidence of negative effects on vulnerable populations caused by the war on drugs is also compelling. A recent study showed that the early gestational exposure to the drug war is associated with a substantial decrease in birth weight.<sup>96</sup> Another study found that collective violence has specific effects on older adults and is associated to weight loss and other geriatric problems.<sup>97</sup> Thus, violence may indirectly affect individuals’ health, especially in vulnerable groups.

## 2. *Health of people who use drugs*

The wellbeing, health, and other fundamental rights of people who use drugs should be at the center of drug policy. Yet prohibition often undermines the health of drug users. Repressive drug policies contribute to higher risks of contracting HIV (linked to unsafe injections), discriminatory policies, and lack of treatment for people with problematic use of drugs.<sup>98</sup> In Mexico, despite the harsh enforcement tactics of the State, the use of illegal drugs has increased. According to the National Survey on Consumption of Drugs, Alcohol, and Tobacco (ENCODAT, 2017), there was a general rise in the number of people who use drugs, from 4.1% in 2002, to 7.2% in 2011. From 2011 to 2016, the numbers again to 9.9%.<sup>99</sup> Compared to other countries, however, drug use and dependence estimates in Mexico are still low.<sup>100</sup>

For people who use drugs, prohibition entails many health risks. Drug prohibition contributes to overdose risks in various ways, due to the presence of adulterants in drugs used, rushed injections, lack of ready access to opioid

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<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> See Zedillo et al., *supra* note 2, at 132.

<sup>97</sup> See Carmen García-Peña et al., *Collective Violence and the Health of the Elderly: A Cross-sectional Analysis of a Population-based National Survey in Mexico*, 41 REV. PANAM. SALUD PÚB. (29th ed. 2017).

<sup>98</sup> Joanne Csete et al., *supra* note 1, at 1428.

<sup>99</sup> COMISIÓN NACIONAL CONTRA LAS ADICCIONES, ENCUESTA NACIONAL DE CONSUMO DE DROGAS, ALCOHOL Y TABACO 2016–2017: REPORTE DE DROGAS (ENCODAT) [NATIONAL SURVEY ON CONSUMPTION OF DRUGS, ALCOHOL AND TOBACCO: REPORT ON DRUGS] 21, 47–48 (Secretaría de Salud Mexico ed. 2017). According to the survey, use by women increased more than by men, with the use of any drug increasing from 0.7% to 1.3% and illegal drugs from 0.4% to 1.1%. Use in youth (12–17 years) also experienced an increase, from 0.6% to 3.1% for any drug, and from 1.5% to 2.9% for illegal drugs.

<sup>100</sup> See Zedillo et al., *supra* note 2, at 141. According to the authors, the UNODC’s World Drug Report 2017 estimates “that 5% or a quarter of a billion people between the ages of 15 and 64 years, used at least one drug in 2015, while 3.8 percent of the adult population used marijuana. Mexico’s numbers are well below that, at 2.7% for all illegal drugs and 2.1% for marijuana.”

substitution therapy, and unnecessary controls on naloxone (a medication that can effectively reverse opioid overdose).<sup>101</sup>

Because prohibition uses the criminal justice system to reduce demand and supply, eradicate crops, and seize illegal shipments, health aspects of prohibition are often treated as a secondary issue. The disproportionate budget allocation demonstrates this disparateness. During Felipe Calderón's presidency, for example, the government spent only 2.9% of the 814 billion pesos assigned to drug policy, on areas of "prevention, treatment, and human rights."<sup>102</sup>

These repressive approaches have translated into fewer resources for prevention and treatment.<sup>103</sup> As has been noted, people with problematic drug use "have limited access to treatment, particularly for science-based services."<sup>104</sup> In Mexico, just one in five people with need of treatment receives one and, of those, only about twenty-four percent complete treatment.<sup>105</sup>

Treatment opportunities for women are even lower, impinging on the right to equality. As noted by the Johns Hopkins–*Lancet* Commission on Drug Policy and Health, "[women] face enormous barriers to humane and affordable treatment. In many countries, there is no treatment particularly designed for women, although it has been recognized that women's motivations for, and physiological reactions to, drug use differ from those of men."<sup>106</sup> While 22.1% of men with problematic use received treatment, only 12.8% of women reported so.<sup>107</sup> Treatment for women is often based on the traditional women's role.<sup>108</sup>

Barriers to treatment include distance to treatment centers, lack of quality in the services provided, stigma associated with use, and lack of economic resources.<sup>109</sup> There are only forty-three public residential centers where people can receive in-patient treatment. Private residential facilities with standardized quality care can cost anywhere between \$3,500 to \$16,000 USD for a forty-five-day treatment, a price outside the reach of most of

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<sup>101</sup> See Joanne Csete et al., *supra* note 1, at 1428.

<sup>102</sup> Alejandro Madrazo & Catalina Pérez Correa, *Drugs and the Law in Latin America: The Legal, Institutional and Social Costs of Drug Policy*, in ROUTLEDGE HANDBOOK OF LAW AND SOCIETY IN LATIN AMERICA 453 (Rachel Sieder et al. eds., 2019).

<sup>103</sup> See Zedillo et al., *supra* note 2, at 142.

<sup>104</sup> *Id.* at 143.

<sup>105</sup> *Id.*

<sup>106</sup> See Joanne Csete et al., *supra* note 1.

<sup>107</sup> See Zedillo et al., *supra* note 2, at 143.

<sup>108</sup> According to Gloria Galaviz, most activities and conversations with women who abuse drugs are aimed at highlighting the importance of being mothers, wives, and daughters—traditional caregiving roles. The purpose of rehabilitation treatment is "to change deviated females and guide them towards the social ideal of women. It is intended that, through self-control and the gift of service to others, women stop consuming and recover their social function." Gloria Galaviz, *Mujeres, adicción y rehabilitación: Reflexiones desde la frontera noroeste de México*, [Women, Addiction and Rehabilitation: Thoughts from the Northwestern Mexican Border], 11 SALUD COLECTIVA 367, 373 (2015).

<sup>109</sup> See Zedillo et al., *supra* note 2, at 143.

Mexico's population. People with scarce resources, living in areas of extreme poverty and poor public services, go to the so-called *anexos* or *granjas* [annexes or farms] (51.1% of men and 22.9% of women reported access to treatment). These are low-cost private centers, mostly operating outside the law, with no official supervision.<sup>110</sup>

*Anexos* and *granjas* are often denounced for keeping patients against their will and violating human rights. It has been reported that these centers have, at times, used torture practices and other methods not based on scientific evidence, to treat patients.<sup>111</sup> In 2015, the Institute for Prevention and Attention of Addictions of Mexico City (IAPA),<sup>112</sup> closed twenty-eight treatment centers due to the inhumane treatment of patients and unsanitary conditions.<sup>113</sup>

People who use drugs are often detained by the police, prosecuted, and even imprisoned.<sup>114</sup> In 2016, the most prosecuted drug crime at the state level was simple possession (31% of crimes punished in prisons),<sup>115</sup> a crime that punishes possession of illicit drugs without the intention to distribute or sell.<sup>116</sup> Punishing simple possession implies that users will remain under the scope of criminal law (and its institutions) and that many will be imprisoned. As will be elaborated upon later, prosecution and potential imprisonment also harms health.

### 3. *Eradication of illicit crops and health*

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<sup>110</sup> *Id.* See also Brian Anderson et al., *Regulación repensada: la necesidad de nuevas políticas y normas en el tratamiento de las adicciones* [Regulation Rethought: The Need of New Policies and Norms in the Treatment of Addiction], LAS VIOLENCIAS: EN BUSCA DE LA POLÍTICA PÚBLICA DETRÁS DE LA GUERRA CONTRA LAS DROGAS [VIOLENCE: SEARCHING FOR PUBLIC POLICY BEHIND THE WAR ON DRUGS] (Laura Atuesta & Alejandro Madrazo Lajous eds., 2018).

<sup>111</sup> Zedillo et al., *supra* note 2, at 144. “[S]tudies and human rights reports based on patient interviews disclose involuntary retention, often in violent conditions. Interviewees describe physical abuse, including punishments for minor infractions (not sitting up straight or not paying attention), which include kneeling on metal bottle caps for hours, sitting on cactuses or a jagged brick, isolation rooms, being struck with sticks or going without food. Many centers use emotional as well as physical humiliation, particularly in front of family members. Interviewees also report poor hygienic conditions, overcrowding and lack of medical services.” See also Galaviz, *supra* note 108.

<sup>112</sup> The IAPA is the institution in charge of reducing the use and abuse of psychoactive substances in Mexico City. It is also in charge of prevention and treatment programs in the city. See *About: IAPA*, INSP VIRTUAL, <https://www.iapa.cdmx.gob.mx/dependencia/acerca-de> (last visited Nov. 2, 2021).

<sup>113</sup> Alberto González, *Cierra el IAPA 28 Granjas y Anexos por Tratos Inhumanos* [IAPA Closes 28 Farms and Annexes Due to Inhumane Treatments], EL SOL DE MÉXICO (Dec. 11, 2015), <https://www.elsoldemexico.com.mx/metropoli/Cierra-el-IAPA-28-granjas-y-anexos-por-tratos-inhumanos-235513.html>.

<sup>114</sup> See CATALINA PÉREZ CORREA ET AL., AFTER THE WAR ON DRUGS, REPORT OF THE LSE EXPERT GROUP ON THE ECONOMICS OF DRUG POLICY (John Collins ed. 2016) <http://www.lse.ac.uk/ideas/Assets/Documents/reports/LSE-IDEAS-After-Drug-Wars.pdf> [hereinafter AFTER THE WAR ON DRUGS].

<sup>115</sup> Catalina Pérez Correa & Andrés Ruiz, *Marihuana en México: El Peso de la Prohibición* [Marijuana in Mexico: The Weight of the Ban], 28 CUADERNOS DE TRABAJO PROGRAMA DE POLÍTICA DE DROGAS DEL CIDE [CT-CIDE-PPD] 1, 62 (2018).

<sup>116</sup> AFTER THE WAR ON DRUGS, *supra* note 114, at 31–32.

Eradication of illicit crops—especially through aerial spraying—is one of the more obvious ways in which current drug policies negatively affect the right to health<sup>117</sup> and other Constitutional principles, such as equality. Mexico is one of the main producers of illicit cannabis and opium poppy in the world, although, due to its illicit character, the precise extent of production is unknown.<sup>118</sup>

Eradication of opium poppy and cannabis usually takes place either by manually pulling out the plants and burning the crops or through the aerial spraying of chemicals.<sup>119</sup> Aerial spraying is particularly worrisome due to the toxicity of the chemicals, the difficulty of containing them within the target area, and the potential harm to nearby farming communities and drug users who may later consume these chemicals.<sup>120</sup> Poppy plantations in Mexico are usually eradicated using glyphosate.<sup>121</sup> Glyphosate's use in crop eradication, and its risks, are now better known because of the Colombian Constitutional Court's recent decision ruling against the constitutionality of this chemical eradication technique.<sup>122</sup> Evidence suggests that, when consumed through treated crops, glyphosate may lead to myriad health issues such as vomiting, diarrhea, nausea, and headaches.<sup>123</sup> In Colombia, the use of glyphosate to eradicate illegal coca plantations resulted in a rise in medical consultations related to dermatological and respiratory illnesses in communities where the herbicide is sprayed.<sup>124</sup> The health risks associated with aerial spraying of pesticides<sup>125</sup> led the Colombian Constitutional Court to order the suspension of the program first in 2015<sup>126</sup> and again in 2019.<sup>127</sup>

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<sup>117</sup> See Joanne Csete et al., *supra* note 1, at 1428.

<sup>118</sup> See Catalina Pérez Correa & Andrés Ruiz, *A ras de tierra: marihuana y pesticidas [At Ground Level: Marijuana and Pesticides]*, 40 NEXOS 18, (2018) [hereinafter *At Ground Level*] (estimates of production are made using data on eradication).

<sup>119</sup> See México gobierno de la republica [Government of Mexico], *Destrucción de Plantíos Ilícitos: Protocolo Nacional de Actuación [Destruction of Illicit Plants: National Protocol of Intervention]* (2018), [https://transparencia.info.jalisco.gob.mx/sites/default/files/u528/Prot\\_Nal\\_Act\\_Destruccion\\_Plantios\\_Illicitos.pdf](https://transparencia.info.jalisco.gob.mx/sites/default/files/u528/Prot_Nal_Act_Destruccion_Plantios_Illicitos.pdf).

<sup>120</sup> See Catalina Pérez Correa & Andrés Ruiz, *In the Name of Public Health: Forced Eradication of Cannabis Crops and Use of Pesticides* (unpublished paper) (on file with authors) [hereinafter *In the Name of Public Health*].

<sup>121</sup> *Id.*

<sup>122</sup> Corte Constitucional de Colombia [C.C.] [Colombian Constitutional Court], febrero 7, 2017, Sentencia T-080/17.

<sup>123</sup> Martin Jelsma, *Círculo vicioso: la Guerra química y biológica a las drogas [Vicious Circle: Chemical and Biological Warfare on Drugs]*, TRANSNAT'L INSTITUTE (May 8, 2001), <https://www.tni.org/es/publicacion/circulo-vicioso>.

<sup>124</sup> Adriana Camacho & Daniel Mejía, *The Health Consequences of Aerial Spraying Illicit Crops: The Case of Colombia*, 54 J. HEALTH ECON. 147 (2017).

<sup>125</sup> Adam Isacson, *The Costs of Restarting Aerial Coca Spraying in Colombia*, WASH. OFF. ON LAT. AM. (Feb. 11, 2020), <https://www.wola.org/analysis/costs-restarting-aerial-spraying-coca-colombia/>.

<sup>126</sup> See Sentencia T-080/17, *supra* note 122.

<sup>127</sup> See Isacson, *supra* note 125.

Even Mexican authorities have recognized the negative consequences of glyphosate when it comes to human health, the environment, and the soil.<sup>128</sup>

A different chemical, called paraquat, is used in cannabis eradication, and is also sometimes used for poppy eradication. Paraquat, is a commercially used herbicide that deters photosynthesis and dries the plant.<sup>129</sup> Plants treated with paraquat must remain in the sun for two or more days for desiccation to take effect. Plants can be picked immediately after being sprayed with paraquat without significant changes occurring. But if the plant is later ingested, paraquat may negatively affect the health of consumers.<sup>130</sup>

Different medical studies have associated paraquat with severe health problems. Symptoms of paraquat poisoning include pulmonary fibrosis, diarrhea, intestinal bleeding, hepatic damage, and skin problems.<sup>131</sup> Accumulated exposure to paraquat may lead to the development of Parkinson's disease.<sup>132</sup> Paraquat can remain in the soil for up to three years.<sup>133</sup> The health risks may affect both the farmers reaping the crops and the people living or working nearby.

#### 4. *Prisons and health*

As previously mentioned, drug laws prescribe prison sentences, including mandatory pretrial detention, for most conduct related to illegal drugs. Mexican prisons, however, represent a risk to health due to overcrowding, lack of hygiene, and the lack of basic resources like food, water, blankets, proper health services, or medicine available to its inhabitants.<sup>134</sup> Overcrowding increases the risk of violence and creates an

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<sup>128</sup> COMISIÓN INTERSECRETARIAL DE BIOSEGURIDAD DE LOS ORGANISMOS GENÉTICAMENTE MODIFICADOS [INTER-SECRETARIAT COMMISSION ON BIOSECURITY OF GENETICALLY MODIFIED ORGANISMS], Monografía sobre el Glifosato [Case study about glyphosate] (2019), [https://www.conacyt.gob.mx/cibiogem/images/cibiogem/comunicacion/MONOGRAFIA\\_SOBRE\\_GLIFOSATO19.pdf](https://www.conacyt.gob.mx/cibiogem/images/cibiogem/comunicacion/MONOGRAFIA_SOBRE_GLIFOSATO19.pdf).

<sup>129</sup> *At Ground Level*, *supra* note 118.

<sup>130</sup> *Id.*

<sup>131</sup> *In the Name of Public Health*, *supra* note 120.

<sup>132</sup> Freya Kamel, *Paths from Pesticides to Parkinson's*, 341 *SCIENCE* 722–23 (2013).

<sup>133</sup> *See* COMISIÓN FEDERAL PARA LA PROTECCIÓN CONTRA RIESGOS SANITARIOS [FEDERAL COMMISSION FOR THE PROTECTION AGAINST SANITARY RISKS], CATÁLOGO DE PLAGUICIDAS [PESTICIDE CATALOGUE], annex 1, 448 (2016). The Commission warns that Paraquat causes injuries to the tissues it has contact with: it dries the skin of the hands, may cause the nails to fall out, it may cause ulcers and blisters if contact with the skin prolongs, and if absorbed by the skin in significant doses may lead to systematic poisoning. It is also toxic to liver, lungs, heart, kidneys, cornea, and the digestive system. If ingested, it can produce convulsions, pulmonary edema, burns in mouth and throat, tachycardia, vomit, and even death. If inhaled, its effects range from nose and throat irritation to nasal hemorrhage.

<sup>134</sup> *See generally* Elena Azaola, *Las condiciones de vida en las cárceles mexicanas* [*Life Conditions in Mexican Prisons*], 49 *REV. MEXICANA DE CIENCIAS POLÍTICAS Y SOCIALES* 87 (2007).

unhealthy environment for people who are imprisoned.<sup>135</sup> In a 2015 report, the Inter-American Commission for Human Rights (IACHR) stated, “[i]n addition to the main problem of overcrowding, [prisons] also suffer from more serious and precarious conditions due to the federated states’ lack of financial resources.”<sup>136</sup> The report also noted that imprisoned people often pay prison staff for “services and basic goods, such as food, water and health. They are also required to pay a regular fee in order to avoid being beaten and/or abused in detention centers.”<sup>137</sup> According to the National Human Rights Commission, between January 1 and October 20, 2019, there were 4,702 complaints of human rights violations in Mexican prisons. The rights most often mentioned in the complaints were the right to health, to personal integrity, to due process, to freedom, and to humane treatment.<sup>138</sup>

Many people incarcerated for drug crimes are held in local prisons, which generally have even worse prison conditions.<sup>139</sup> Yet, while federal detention centers usually have better conditions and are generally safer than local institutions, they are also extremely repressive. As stated by the IACHR:

[Federal prisons] are characterized by the use of prolonged isolation regimes (up to 22 and sometimes 23 hours a day), restrictions of communication between inmates and serious difficulties with outside contact... In one of the cells where three inmates were subjected to solitary confinement, the Commission observed deplorable conditions in terms of cleanliness: in particular, the toilet was dirty, the cell was littered with garbage, rotten food, paper, and even a used sanitary pad was observed. One of these inmates, who allegedly had been punished for four days, stated: “since we arrived on Saturday, they have not let us take the trash out. They have not allowed access to our things; we have no toothbrushes. I have

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<sup>135</sup> Sergio Chaparro et al., *Irrational Punishment: Drug Laws and Incarceration in Latin America*, 12 CENTRO DE ESTUDIOS DE DROGAS Y DERECHO [CEDD] [RESEARCH CONSORTIUM ON DRUGS AND THE LAW] (Coletta Youngers et al. eds. 2017), [http://www.drogasyderecho.org/wpcontent/uploads/2015/10/Irrational\\_Punishments\\_ok.pdf](http://www.drogasyderecho.org/wpcontent/uploads/2015/10/Irrational_Punishments_ok.pdf).

<sup>136</sup> INTER-AMERICAN COMMISSION ON HUMAN RIGHTS [IACHR], COUNTRY REPORT, SITUATION OF HUMAN RIGHTS IN MEXICO 147 (Dec. 2015), <https://www.oas.org/en/iachr/reports/pdfs/Mexico2016-en.pdf>.

<sup>137</sup> *Id.* at 148.

<sup>138</sup> COMISIÓN NACIONAL DE LOS DERECHOS HUMANOS [CNDH] [NATIONAL COMMISSION FOR HUMAN RIGHTS], DIAGNÓSTICO NACIONAL DE SUPERVISIÓN PENITENCIARIA [NATIONAL DIAGNOSIS OF PRISON SUPERVISION 552 (2019) [https://www.cndh.org.mx/sites/all/doc/sistemas/DNSP/DNSP\\_2019.pdf](https://www.cndh.org.mx/sites/all/doc/sistemas/DNSP/DNSP_2019.pdf).

<sup>139</sup> See INEGI, CENSO NACIONAL DE GOBIERNO, SEGURIDAD PÚBLICA Y SISTEMA PENITENCIARIO ESTATAL (2019), <https://www.inegi.org.mx/programas/cngspspe/2019/>; see also INEGI, CENSO NACIONAL DEL SISTEMA PENITENCIARIO FEDERAL (2018), <https://www.inegi.org.mx/programas/cnspef/2018/>.

been menstruating since Saturday and they have only provided two sanitary pads.<sup>140</sup>

Violence within prisons poses a risk to the life of inmates. As the IACHR has stated, “[c]ontinuous violations of the right to life of persons deprived of liberty are currently one of the main problems in prisons in the region. Every year hundreds of inmates in the Americas die of different causes, particularly as a result of prison violence.” The National Human Rights Commission reported forty homicides and sixty suicides in Mexican prisons during 2019.<sup>141</sup>

Other health risks within prisons include a higher prevalence of HIV and hepatitis B and C, due to the shared use of needles for drug injection, tattooing with homemade and unsterilized kits, and high-risk sex and rape.<sup>142</sup> Prisoners also face a higher risk of contracting tuberculosis.<sup>143</sup> These health risks are shared by prison personnel and inmates’ families, known as a bridge population between the inmates and the general population.

Additionally, most prisons lack treatment for inmates with addiction, in violation of their rights to health and non-discrimination.<sup>144</sup> As stated by the UN High Commissioner for Human Rights, people deprived of their liberty should have access to treatment and other health equipment: “[d]rug use, including by injection, has been consistently documented to occur in prisons throughout the world. High rates of injecting equipment sharing lead to an elevated risk of HIV transmission in prisons. Persons in custodial settings are entitled, without discrimination, to the same standard of health care found on the outside, including with regard to prevention, harm reduction and antiretroviral therapy.”<sup>145</sup>

For families of inmates, incarceration also has severe health consequences. This is particularly true for women, who usually provide the basic necessities to their family members in prison.<sup>146</sup> A recent study shows

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<sup>140</sup> See IACHR, *supra* note 136.

<sup>141</sup> See *id.*

<sup>142</sup> See generally SERGIO CHAPARRO HERNÁNDEZ & CATALINA PÉREZ CORREA, SOBREDOSIS CARCELARIA Y POLÍTICA DE DROGAS EN AMÉRICA LATINA [PRISON OVERDOSE AND DRUG POLICY IN LATIN AMERICA] (2017).

<sup>143</sup> On average, tuberculosis in prisons worldwide is 23 times higher than in the general population. Iacoppo Baussano et al., *Tuberculosis Incidence in Prisons: A Systematic Review*, 7 PLOS MED (2010).

<sup>144</sup> CNDH, MECANISMO NACIONAL DE PREVENCIÓN DE LA TORTURA [NATIONAL MECHANISM FOR THE PREVENTION OF TORTURE] (2016), [https://www.cndh.org.mx/sites/default/files/documentos/2019-03/Inf\\_2016.pdf](https://www.cndh.org.mx/sites/default/files/documentos/2019-03/Inf_2016.pdf).

<sup>145</sup> Human Rights Council Res. 28/28, U.N. Doc. A/30/65, at ¶ 21. See also, Joanne Csete et al., *supra* note 1, at 1427.

<sup>146</sup> A 2014 survey of people visiting family members in Mexican prisons indicated similar kinds of challenges in that setting. Of the visitors, who were mostly women, more than 50% said that because of the imprisonment of a spouse or family member they had had to get a job or an additional job. By contrast 41% said that they had lost a job, more than 18% said that they had had to move, and almost 40% said the imprisonment had impeded their ability to care for their children or grandchildren. A range of health

that both perceived stress and hair cortisol levels were significantly higher in Mexican women with an incarcerated family member as compared to women without one.<sup>147</sup> Women who reported incarceration of a family member “had 41% higher odds of carotid atherosclerosis compared with those who did not.”<sup>148</sup> Also, these women were more likely to smoke, be obese, and have diabetes. They were also more frequently exposed to violence. The study concluded that incarceration may have a long-lasting impact on the physical health of families affected by the imprisonment. This is true for incarceration in general, and in the case of drug crimes, especially non-violent ones, the crime itself may be outweighed by the potential long-lasting harm.<sup>149</sup>

In conclusion, prohibition has immense negative effects on health and other basic rights, including life, integrity, and dignity. These negative effects outweigh damage from drug consumption. Regulation is therefore necessary to address health concerns because drug use is not entirely free from risk. However, regulation is a viable solution to the tragic number of life and health problems associated with prohibition. Health is a central commitment of the Mexican legal system and yet it remains structurally frustrated by the Mexican policy approach.

### B. *Free Development of Personality*

The second framing that explains why current drug policies are incompatible with the Constitution, is the right to the free development of personality. This framing is crucial for two reasons. First, it immediately renders illegitimate the sort of moralistic and perfectionistic considerations that lurk behind prohibitionist policies. Second, it demonstrates why drug use is often part of human activities that contemporary constitutional law positively values. This creates tension with the categorical denigration of drug users as part of the “criminal class” that prohibitionist drug policies have installed in the collective imagination. Although not explicitly explored in this article, some dimensions we identify as protected could even be considered protected by the right to freedom of conscience and religion. However, the right to the free development of personality fits as a more appropriate lens for the purposes of this article.

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problems also disproportionately affected spouses of those incarcerated, including high blood pressure and depression. See CATALINA PÉREZ CORREA, LAS MUJERES INVISIBLES: LOS COSTOS DE LA PRISIÓN Y LOS EFECTOS INDIRECTOS EN LAS MUJERES [INVISIBLE WOMEN: THE COSTS OF PRISON AND INDIRECT EFFECTS ON WOMEN] (2014).

<sup>147</sup> Kaela Connors et al., *Family Member Incarceration, Psychological Stress, and Subclinical Cardiovascular Disease in Mexican Women (2012–2016)*, 110 AM. J. PUB. HEALTH 71 (2020).

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

The right to the free development of personality is explicitly recognized as a fundamental right in a number of constitutions including Germany,<sup>150</sup> Spain,<sup>151</sup> Colombia,<sup>152</sup> and Perú.<sup>153</sup> The American Convention of Human Rights also guarantees it.<sup>154</sup> In Mexico, the Supreme Court has derived it from the fundamental right to human dignity, recognized in Article 1 of the Constitution, and found to be implicit in international human rights treaties.<sup>155</sup> The Court has emphasized its constitutional status and has consistently used it for more than ten years in a strand of jurisprudence covering gender identity, divorce, and other aspects of family law, and, most famously, the personal use of marijuana.<sup>156</sup>

We next discuss how arguments based on this right operate, and point to its transformative potential for drug policy, beyond cannabis. We will also survey how drug-use related arguments based on this right have been used by the Mexican Supreme and other courts in comparative settings.

### 1. *The structure and scope of the right to free development of personality*

The concept of free development of personality reflects a dimension of autonomy commonly associated with the writings of John Stuart Mill.<sup>157</sup> Mill observed that human nature is not a machine destined to perform a prescribed function. Rather, that human nature should be pictured as a tree, which needs to grow and develop on all sides, following the internal

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<sup>150</sup> Grundgesetz [GG] [Basic Law], art. 2 (1), translation available at [http://www.gesetze-internet.de/englisch\\_gg/index.html](http://www.gesetze-internet.de/englisch_gg/index.html) (Ger.).

<sup>151</sup> CONSTITUCIÓN ESPAÑOLA [C.E.], Boletín Oficial del Estado [B.O.E.] n. 311, Dec. 29, 1978 (Spain).

<sup>152</sup> CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] [COLOMBIAN CONSTITUTION] 1991, art. 16.

<sup>153</sup> CONSTITUCIÓN POLÍTICA DE PERÚ [C.P.P.] [PERUVIAN CONSTITUTION] 1993, art. 2 (1).

<sup>154</sup> O.A.S.T.S. No. 36, *supra* note 36, arts. 7 and 11(2); *see* Gender Identity, Equality, and Non-Discrimination of Same-Sex Couples, Advisory Opinion OC-24/17, Inter-Am. Ct. H.R. (ser. A) No. 24 (Nov. 24, 2017).

<sup>155</sup> Dignidad humana. El orden jurídico mexicano la reconoce como condición y base de los demás derechos fundamentales. [Human dignity. The Mexican legal system recognizes it as a condition and basis for all other fundamental rights.] Pleno de la SCJN, SJFG, Novena Época, Tomo XXX, Diciembre de 2009, Tesis P. LXV/2009, 8. *See also* Pleno de la SCJN, 6 enero, 2009, amparo directo 6/2008; Primera Sala de la SCJN, 4 noviembre, 2015, amparo en revisión 237/2014 (on how the Court presents the status of the right).

<sup>156</sup> *See* Primera Sala de la SCJN, 4 noviembre, 2015, amparo en revisión 237/2014; Primera Sala de la SCJN, 11 abril, 2018, amparo en revisión 1115/2017; Primera Sala de la SCJN, 13 julio, 2018, amparo en revisión 623/2017; Segunda Sala de la SCJN, 4 julio, 2018, amparo en revisión 1163/2017 (on recreational use); *See* Segunda Sala de la SCJN, 14 agosto, 2019, amparo en revisión 57/2019 (on therapeutic use, which was previously decriminalized, but left largely unregulated by the legislature in 2017). *See supra* note 37.

<sup>157</sup> Carlos Alberto Jaramillo Rojas, *Libertad negativa y libre desarrollo de la personalidad en la jurisprudencia constitucional colombiana: un análisis desde la perspectiva de John Stuart Mill y Thomas Hobbes* [Negative Liberty and Free Development of Personality in Colombian Constitutional Jurisprudence: An Analysis from the Perspective of John Stuart Mill and Thomas Hobbes] 3 PRECEDENTE REVISTA JURÍDICA 71, 117–18 (2013).

impulses that makes it a living entity.<sup>158</sup> Mill vindicated the right of individuals to experience different ways of life and famously remarked that we value our decisions not because they are the best possible ones, but because they are the ones we have made and identify with.<sup>159</sup>

This right is understood as a general right to freedom,<sup>160</sup> with a residual character.<sup>161</sup> It comes into play whenever an action or interest is not protected by a more specific right. In a legal order that protects the free development of the personality, there are no constitutionally irrelevant exercises of freedom. Any decision that a person associates with the development of her personality will be protected unless the limitation is appropriately justified.<sup>162</sup>

Some courts have distinguished several dimensions of the right's scope. The German Constitutional Court, for instance, distinguishes between freedom of action (external dimension) and the personal sphere (internal dimension). Freedom of action authorizes people to do what they desire insofar as it does not interfere with others or with social order, allowing individuals to define themselves concerning society.<sup>163</sup> The personal sphere marks out a sphere of privacy within which individuals enjoy the freedom to determine who they are and how they relate to the world—if at all.<sup>164</sup>

The Mexican Supreme Court has said that “the individual, whoever he is, has the right to freely and autonomously choose his life project, the way in which he will achieve the goals and objectives that, for him, are relevant.”<sup>165</sup> The Court highlighted that the right to free development of personality obliges the State to recognize:

“[E]veryone’s natural faculty to individually be how she wants to be, without coercion, or unjustified controls or impediments by others, in order to meet the goals or objectives she has been set for herself, that is to say: it is the human person who decides on the meaning of her own existence, according to her values, ideas or expectations, etc.”<sup>166</sup>

<sup>158</sup> JOHN STUART MILL, ON LIBERTY 100 (1985).

<sup>159</sup> *Id.* at 114.

<sup>160</sup> Bundesverfassungsgerichts [BVerfGE] [Federal Constitutional Court], 1 BvR 253/566, Jan. 16, 1957

(Ger.) [https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/1957/01/rs19570116\\_1\\_bvr025356en.html](https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/1957/01/rs19570116_1_bvr025356en.html) (broadly construing article 2, concluding that the right to travel abroad flows from it, and preventing Wilhelm Elfes from exercising that right).

<sup>161</sup> BVerfGE, 1 BvR 185/77, June 3, 1980; See Edward J. Eberle, *Observations on the Development of Human Dignity and Personality in German Constitutional Law: An Overview*, 33 LIVERPOOL L. REV. 201 (2012); ROBERT ALEXY, *supra* note 44.

<sup>162</sup> Eberle, *supra* note 161, at 213.

<sup>163</sup> BVerfGE, 1 BvR 253/566, *supra* note 160.

<sup>164</sup> Eberle, *supra* note 161, at 211.

<sup>165</sup> Pleno de la SCJN, 6 enero, 2009, amparo directo 6/2008, at 85.

<sup>166</sup> *Id.* at 86.

Although the Court has held that the right to free development of personality does not have clearly defined “perimeters,”<sup>167</sup> it has declared that the right allows individuals to freely choose how to live their lives. These choices include the freedom to marry; to procreate; to make choices regarding one’s personal appearance; and to choose one’s sexual preference.<sup>168</sup> In subsequent cases, the right has protected the decision to remain married, including the invalidation of “fault divorce”<sup>169</sup> and the validation of a child marriage ban.<sup>170</sup>

However, the right to the free development of personality is not absolute. There is a disconnect between the right’s seemingly broad coverage and the aspects of personal freedom that are constitutionally protected. Textually, these limitations are usually associated with reference to “constitutional order” or other limitation clauses<sup>171</sup> and are interpreted in relation to their relative harm. The next section will discuss the role of this “harm principle” in the context of drug policy.

## 2. *The role of the harm principle in drug policy*

Reasoning about harm, to others and to oneself, is central to the right to the free development of personality. Stuart Mill formulated the “harm principle” in an effort to manage the tension between liberty and authority. The principle recognizes the need to simultaneously honor liberty and to justify the coercive nature of law.<sup>172</sup> For Mill, “the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant.”<sup>173</sup>

This principle is particularly important because traditional arguments backing prohibition have been based on the idea that drug consumption is a sign of “human deprecation” leading to the “degeneration of the species.”<sup>174</sup>

<sup>167</sup> See Arturo Bárcena Zubieta, *supra* note 43.

<sup>168</sup> Derecho al libre desarrollo de la personalidad. Aspectos que comprende [Right to the Free Development of Personality. Aspects Covered.], Pleno de la SCJN, Semanario Judicial de la Federación y su Gaceta, Novena Época, Tomo XXX, Diciembre de 2009, Tesis Aislada num. P. LXVI/2009, página 7.

<sup>169</sup> Primera Sala de la SCJN, 25 febrero, 2015, contradicción de tesis 73/2014 (arguing that in the context of divorce proceedings the obligation to prove that the behavior of one of the spouses results in a breach of conjugal duty as a precondition to dissolve the marriage, violates the right to the free development of personality).

<sup>170</sup> Pleno de la SCJN, 26 marzo, 2016, acción de inconstitucionalidad 22/2016 (reasserting that the essence of the right of free development of personality includes the right to freely and autonomously choose a life project but considering that a code that made 18 years old the minimum age for marriage could be seen as a justified limitation if it, operating in the best interest of the child).

<sup>171</sup> BVerfGE, 1 BvR 253/566, *supra* note 160, at 37 (“Restraints on the free development of personality come from the constitutional order”).

<sup>172</sup> See MILL, *supra* note 158, at 17–19.

<sup>173</sup> *Id.* at 18.

<sup>174</sup> See Zedillo et al., *supra* note 2, at 115.

In Mexico, the idea that drugs contribute to the “degeneration of the race,” and specifically the idea that drug use leads to narcissism and homosexuality, was used to support prohibition in the 1920’s and 1930’s. However, no evidence was ever presented showing this kind of “degenerative” harm from the use of drugs.<sup>175</sup>

International conventions also speak of moral goals. For example, the English text of the Single Convention on Narcotic Drugs of 1961 begins its preamble by stating that the parties are concerned with the “health” and “welfare” of mankind, but the Spanish version uses the word “moral” of mankind.<sup>176</sup> Thus, the Spanish version of the treaty reflects a specific concern with morality.

Moral-perfectionist arguments focus on the erosion of the moral character that accompanies drug use.<sup>177</sup> They exist in open conflict with the foundations of the right to the free development of personality. Only paternalistic arguments—those that prioritize the need to avoid individual self-harm over more fundamental interests—and protective arguments—those based on the need to protect individuals from harm inflicted by others—can be preliminarily raised to potentially justify the emission of criminal statutes against drug use and distribution. Perfectionistic arguments—those that point to ideals of virtue to be imposed on individuals regardless of what their preferences are—cannot. Hence, reasoning about harm to self and harm to others indeed dominates contemporary debates on drug policy.<sup>178</sup>

In terms of drug use, these arguments are based on the idea that, if the law is effective in deterring people from using drugs, it will spare people from personal and social harm.<sup>179</sup> These arguments also posit that the increased risk of societal harm from drug use justifies making drugs illegal.<sup>180</sup> Some argue that the criminalization of drug sales stops individuals from harming themselves. Others argue that criminalizing the sale and distribution of drugs creates legal barriers that deter potential users and prevents drug dealers from making profit.<sup>181</sup>

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<sup>175</sup> *Id.*

<sup>176</sup> See Single Convention on Narcotic Drugs of 1961, Mar. 30, 1961 [as amended by the 1972 Protocol], 520 U.N.T.S 151.

<sup>177</sup> For a summary of the moralist argument, see DAVID A. RICHARDS, *SEX, DRUGS, DEATH AND THE LAW: AN ESSAY ON HUMAN RIGHTS AND OVERCRIMINALIZATION* 168–177 (1982).

<sup>178</sup> See George Sher, *On the Decriminalization of Drugs*, 22 CRIM. JUST. ETHICS 30, 30–31 (2003) (distinguishing between the perfectionist argument, the paternalistic argument, and the protective argument).

<sup>179</sup> *Id.*

<sup>180</sup> Kyle J. Lucas, *Does the Harm Principle Justify Criminal Drug Statutes Against Drug Use?*, 7 HILLTOP REV. 6, at 35–38 (2014).

<sup>181</sup> Lucas S. Grosman, *Drugs under the Constitution*, 108 (SELA, *Seminario en Latinoamérica de Teoría Constitucional y Política: Papers*, 2012), [https://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=1107&context=yls\\_sela](https://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=1107&context=yls_sela).

Contemporary constitutional courts have largely deconstructed these arguments, at least in regard to certain drugs. The Mexican Supreme Court deployed a careful set of arguments in deciding the case, *Amparo en revisión 237/2014*, in which it analyzed legislation prohibiting the issuance of permits to engage in activities associated with personal consumption of cannabis.<sup>182</sup> The Court started its analysis by establishing that the right to the free development of personality protects recreational activities in general, including cannabis consumption.<sup>183</sup> The Court then explored whether there were legitimate goals that might justify the limitation to this right imposed on individuals through prohibition. It also inquired whether the means employed could be considered suitable, necessary, and proportional in the strict sense.<sup>184</sup> Having identified the health of consumers and “public order” as legitimate public goals for limiting marijuana consumption,<sup>185</sup> the Court engaged in a “suitability” analysis grounded in the harm principle. The Court then questioned whether prohibition could be considered adequate to stop or diminish the harms stemming from health detriments, drug abuse or dependency, inclination to use harder drugs, or stimulation to commit other crimes.<sup>186</sup>

The Court found certain instrumental connections to some legitimate public goals, but very weak or negligible ones to others.<sup>187</sup> Ultimately, this level of scrutiny failed at the “necessity” stage of proportionality analysis. The Court had no difficulty coming up with alternative strategies that were equally or more appropriate than the “system of prohibitions” to safeguard the legitimate public goals entertained by the legislation, while minimally infringing on free development of the personality.<sup>188</sup>

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<sup>182</sup> Primera Sala de la SCJN, 4 noviembre, 2015, *amparo en revisión 237/2014*.

<sup>183</sup> *Id.* at 39–41.

<sup>184</sup> *Id.* at 44.

<sup>185</sup> *Id.* at 44–49.

<sup>186</sup> *Id.* at 52–53.

<sup>187</sup> Primera Sala de la SCJN, 4 noviembre, 2015, *amparo en revisión 237/2014*, at 53–63. These are the conclusions of the Court regarding suitability analysis (the relations between means and legitimate public goals): “(the Court) concludes that evidence is available to consider that marijuana consumption does cause several affectations of people’s health. If it may be generally affirmed that they are damages of small import, that is not an obstacle to conclude that in the case at hand the ‘system of administrative prohibitions’ the challenged provisions establish is indeed a *suitable means* to protect people’s health / Notwithstanding that, the evidence under consideration was not able to prove that marijuana consumption translates into an increase in criminal behavior, because, although consumption is associated to antisocial or antilegal consequences, they may be explained by other factors, like the social context the user finds herself in or the drug-related punishment system in itself. In any case, the studies that have been analyzed do allow us to conclude that marijuana consumption among drivers is included among the factors that increases the possibility of suffering a car crash, something that means that, only with regards this aspect, the denounced measure *is also a suitable means* to protect the public order.” *Id.* at 63 (emphasis in the original).

<sup>188</sup> *Id.* at 63–74. The Court ponders alternatives that the Legislative branch has used in similar cases, particularly focusing on the regime of ‘controlled permission’ that applies to tobacco and alcohol in Mexico and the systems of regulated consumption of cannabis enacted in the comparative scene.

The Court concluded that prohibition was not proportional in the narrow sense since there was no proper equilibrium between the (serious) degree of affectation on the fundamental right and the (negligible) degree to which the legislative scheme could be considered to accomplish its goals.<sup>189</sup>

Other high courts have reached similar conclusions. In Argentina, the Supreme Court found the criminalization of drug possession for personal use to be unconstitutional.<sup>190</sup> In a ruling that strongly affirmed the constitutional value of personal autonomy, the Court pointed out that individuals must be able to lead their lives autonomously and free from undue interference associated to oppressive attempts to “enlighten their decisions.”<sup>191</sup> The Court further argued that, for individuals to pursue their life plans autonomously, drug policy must refrain from interfering with conduct that do not harm others.<sup>192</sup> Regarding harm, the Argentine Court largely endorsed the position that drug use must be recognized as fundamental to an individual’s life plans even when it includes a concomitant decision to harm oneself or produce possible distress on others, including the relatives or dependents of the user.<sup>193</sup>

In Colombia, the Constitutional Court made the free development of personality one of the more central rights under the 1991 Constitution by decriminalizing small scale possession of cannabis and cocaine for personal use.<sup>194</sup> The Court found that the prohibitions contained in Articles 51 and 87 of Law 30 (1986) were unconstitutional because they intruded on the privacy, autonomy, and the free development of personality of individuals.<sup>195</sup> The Court stated that “[i]f the right to the free development of personality is to make any sense in our legal system, it must be concluded that, for the aforementioned reasons regulation making drug use a crime is clearly unconstitutional.”<sup>196</sup> In 2012, the Constitutional Court confirmed its decriminalization ruling and held that drug use is a constitutionally protected activity. Soon after, it approved a new legal framework, which made drug addiction a matter of public health and obliged state authorities to guarantee treatment for those who voluntarily seek it.<sup>197</sup> In 2019, it also overruled a ban on the public consumption of cannabis.<sup>198</sup>

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<sup>189</sup> *Id.* at 74–79.

<sup>190</sup> Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], Aug. 25, 2009, “Caso Arriola,” (Arg.) (applying to all narcotic drugs, including cannabis, cocaine, heroin, or opium).

<sup>191</sup> *Id.* at ¶ 17.

<sup>192</sup> *Id.* at ¶ 36.

<sup>193</sup> See Carlos Santiago Nino, *¿Es la tenencia de drogas con fines de consumo personal una de ‘las acciones privadas de los Hombres’?* [Is Drug Possession for Personal Use One of the “Private Actions of Men”?], in LA LEY, D-743/758 (1979).

<sup>194</sup> C.C., 23 septiembre, 1992, Sentencia T-532/92; *id.*, 3 febrero 1993, Sentencia T-050/93, C-176/93; and *id.*, 28 octubre, 1993, Sentencia T-493/93.

<sup>195</sup> C.C., 5 mayo 1994, Sentencia C-221.

<sup>196</sup> *Id.*

<sup>197</sup> C.C., 28 junio, 2012, Sentencia C-491.

<sup>198</sup> C.C., 6 junio, 2019, Sentencia C-235.

Ending prohibition is also important to eliminate the degree of “second-level” interference it has on the right to the free development of personality. This is to say, it seriously compromises life choices—“second-level” interference—regardless of the degree to which one incorporates, or not, drug consumption into one’s life plan—“first-level” interference. This is because prohibition policies severely violate individual freedoms and frustrate life plans, independent of one’s relation to drug use.<sup>199</sup>

Children’s well-being is also affected when their parents’ access to economic, social, and cultural capital is disrupted by drug violence. Families are increasingly isolated from employment opportunities, and access to social interactions and community involvement becomes strained.<sup>200</sup> The right to the free development of personality, in short, is violated for second-order reasons because of the social destruction caused by prohibitionist policies, independently of the degree to which it often violates it for the first-order reasons traditionally pointed out by the courts.

Finally, to the extent prohibition remains in the law and is enforced by means extensive punitive criminal law, rights impingements will ultimately fall not only on the right to the free development of the personality, but also on other prerequisite rights, especially the right to personal freedom. Due to the ever-present character of drug-based repression, the existence of pretrial detention for drug related crimes, and the disproportionately long sentences attached to these crimes, many situations will involve a continuum of affectations to the rights to personal integrity, freedom, health, life, and the free development of personality

### 3. *From cannabis to other drugs*

In recent years, cannabis use, for recreational or medical purposes, has gained public acceptance around the globe. In the United States, the 2020 elections brought legal cannabis to new states when Arizona, Mississippi, Montana, New Jersey, and South Dakota approved cannabis legislation.<sup>201</sup> This brought the total number of states with legal cannabis markets up to thirty-six, while fifteen states (in addition to the District of Columbia) have

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<sup>199</sup> For example, Hernandez et al. point out how, in Ciudad Juarez, Chihuahua, everyday life was affected after the drug policy was hardened in the city. Social and economic capital declined significantly since 2008, as violence levels soared and families experienced crime, had increased difficulties in finding and maintaining employment, and decreased interactions outside the home. See Alma A. Hernandez & Sara Grineski, *Disrupted by Violence: Children’s Well-Being and Families: Economic, Social, and Cultural Capital in Ciudad Juarez, Mexico*, 31 REV. PANAM. SALUD PÚB. 373 (2012).

<sup>200</sup> *Id.* at 375–78.

<sup>201</sup> Mara Sheldon et al., *Election 2020 Putting Cannabis Center Stage*, NAT’L L. REV (Dec. 21, 2020), <https://www.natlawreview.com/article/election-2020-putting-cannabis-center-stage>.

regulated markets for adult use.<sup>202</sup> In Mexico, public support for medical and recreational cannabis has changed over the years. A recent poll, conducted by Congress, shows that almost half of people surveyed believe cannabis should be regulated, while the other half opposes regulation.<sup>203</sup> Almost ninety percent approve of regulation for medical purposes.<sup>204</sup> Several bills have been proposed in Congress to regulate cannabis nationally.<sup>205</sup> This has prompted an ongoing debate in Mexico regarding the costs and benefits of cannabis prohibition.

However, contemporary academics and courts argue that the right to the free development of personality requires the decriminalization of drug consumption beyond cannabis. They contend that less commonly used drugs, such as psilocybin, LSD, mescaline, MDMA, and cocaine should also be decriminalized.<sup>206</sup> Because so many of these arguments focus on how prohibition is ineffective at preventing harm, they are relevant in examining the validity of current prohibitionist drug policies in Mexico. Protection of individual autonomy applies with equal force to drugs traditionally labeled as “hard drugs.”<sup>207</sup> Even if there are reasons not to favor *laissez faire* drug policy, regulation coupled with harm reduction policies is the best way to prevent harm.

During the 2020 United States elections, several comprehensive measures towards regulation and harm reduction made it to the ballots. In the District of Columbia, a ballot initiative was approved to make possession and use of entheogenic plants (psilocybin) among the lowest law enforcement priorities.<sup>208</sup> Other cities like Oakland, California and Santa Cruz, California have already advanced similar decriminalization of plant-

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<sup>202</sup> *The Clear Winner of the 2020 Election: Marijuana*, NAT’L ORG. FOR THE REFORM OF MARIJUANA LAWS (Nov. 4, 2020), <https://norml.org/blog/2020/11/04/the-clear-winner-of-election-2020-marijuana/>.

<sup>203</sup> CENTRO DE ESTUDIOS SOCIALES DE OPINIÓN PÚBLICA DE LA CÁMARA DE DIPUTADOS [CENTER FOR SOCIAL STUDIES OF PUBLIC OPINION OF THE CHAMBER OF DEPUTIES], LEGALIZACIÓN Y USO DE LA MARIHUANA 2020 [LEGALIZATION AND USE OF MARIJUANA 2020] (2020), <http://www5.diputados.gob.mx/index.php/camara/Centros-de-Estudio/CESOP/Opinion-Publica/Encuestas/Legalizacion-y-uso-de-la-marihuana-2020>.

<sup>204</sup> *Id.*

<sup>205</sup> From September 2018 to July 2020, seventeen bills were proposed to regulate cannabis nationwide in Mexico. See Pilar Sánchez, *Estas son las propuestas sobre la legalización de la marihuana en México* [These are the Proposals on the Legalization of Marijuana in Mexico], DINERO EN IMAGEN (July 18, 2020), <https://www.dineroenimagen.com/actualidad/estas-son-las-propuestas-sobre-la-legalizacion-de-la-marihuana-en-mexico/118530>.

<sup>206</sup> See generally STEPHEN ROLLES, AFTER THE WAR ON DRUGS: A BLUEPRINT FOR REGULATION 70 (Emily Crick et al. eds. 2009), <https://transformdrugs.org/assets/files/PDFs/blueprint-for-regulation-fulltext-2009.pdf>.

<sup>207</sup> The distinction between hard drugs and soft drugs has been criticized for being confusing, blurred and often representing a popular belief about the dangers of certain drugs more than scientific distinctions. See generally Janik et al., *Categorization of Psychoactive Substances into “Hard Drugs” and “Soft Drugs”*: A Critical Review of Terminology Used in Current Scientific Literature, 46 AM. J. DRUG & ALCOHOL ABUSE 636 (2017).

<sup>208</sup> Kyle Jaeger, *Washington, D.C. Voters Approve Psychedelics Decriminalization in Nation’s Capital*, MARIJUANA MOMENT (Nov. 3, 2020), <https://www.marijuanamoment.net/washington-d-c-voters-approve-psychedelics-decriminalization-in-nations-capital-campaign-announces/>.

based psychedelics.<sup>209</sup> In these cases, possession or use may still be a crime but it is not actively prosecuted.<sup>210</sup> In Oregon, voters approved a measure allowing for legal administration of psilocybin products for therapeutic purposes to those over twenty-one years of age.<sup>211</sup> Oregon also passed a separate measure decriminalizing possession of heroin, methamphetamines, LSD, and other substances.<sup>212</sup> Although the sale of these substances remains a crime, possession will only be considered a civil violation subject to a fine.<sup>213</sup> Funds collected through the measure will serve to finance “health assessments, addiction treatment, harm-reduction efforts and other services for people with addiction disorders.”<sup>214</sup>

Expanding regulation recognizes the harms and costs of prohibition policies and the importance of adopting more effective and rights protective approaches. It further shows that alternatives to prohibition are possible and less costly.

### C. Equality

prohibition generates and deepens many forms of structural inequalities, such as social, economic, gender, cultural, and ethnic-origin inequalities. It also fosters specific acts of discrimination by permitting and encouraging prejudice, stigma, and stereotyping to the detriment of individuals and groups. Current drug policies generate vulnerability, disadvantages or deepen preexisting causes of the same.<sup>215</sup> Because of the prevailing punitive approach, drug use is generally associated with crime and other antisocial behavior. This association may even cause denial of treatment, housing, and employment.<sup>216</sup> Women who use drugs face more severe consequences, such as additional violations of their rights or loss of child custody.<sup>217</sup> Current policies on drug trafficking and consumption therefore fail to attain the objectives they pursue.

This situation is at odds with what Mexican constitutional equality provisions purport to guarantee. Article 1 of the Mexican Constitution

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<sup>209</sup> *Id.*

<sup>210</sup> *Id.*

<sup>211</sup> Kristen Foden-Vencil, *Oregon Voters Legalize Therapeutic Psilocybin*, OR. PUB. BROADCAST (Nov. 3, 2020), <https://www.opb.org/article/2020/11/04/oregon-measure-109-psilocybin/>.

<sup>212</sup> Andrew Selsky, *Oregon Leads the Way in Decriminalizing Hard Drugs*, AP NEWS (Nov. 4, 2020), <https://apnews.com/article/oregon-first-decriminalizing-hard-drugs-01edca37c776c9ea8bfd4afdd7a7a33e>.

<sup>213</sup> *Id.*

<sup>214</sup> Amelia Templeton, *Oregon Becomes 1st State in the US to Decriminalize Drug Possession*, OR. PUB. BROADCAST (Nov. 3, 2020), <https://www.opb.org/article/2020/11/04/oregon-measure-110-decriminalize-drugs/>.

<sup>215</sup> See Joanne Csete et al., *supra* note 1, at 1428.

<sup>216</sup> Karla Lopez & Deborah Reid, *Discrimination Against Patients with Substance Use Disorders Remains Prevalent and Harmful: The Case for 42 CFR Part 2*, HEALTH AFFS. BLOG (Apr. 13, 2017), <https://www.healthaffairs.org/doi/10.1377/hblog20170413.059618/full/>.

<sup>217</sup> Angélica Ospina, *Maternidad y uso de drogas. ¿Condiciones excluyentes? [Maternity and Drug Use. Excluding Conditions?]*, NEXOS (May 29, 2018), <https://economia.nexos.com.mx/?p=1414>.

contains an antidiscrimination clause that includes a long, open-ended list of protected grounds, the normative import of which has been recently strengthened by the Supreme Court. “Any form of discrimination, based on ethnic or national origin, gender, age, disabilities, social status, medical conditions, religion, opinions, sexual orientation, marital status, or any other form, which violates the human dignity or seeks to annul or diminish the rights and freedoms of the people, is prohibited.”<sup>218</sup> Although the Mexican Constitution does not contain an openly transformative equality mandate, court-made equality doctrines are fundamentally aligned with contemporary equality paradigms. These paradigms were designed to tackle not only arbitrariness and problems of formal equality, but also structural and “material” inequalities.<sup>219</sup>

Thus, the Mexican Supreme Court has declared that material equality “lies in achieving parity of opportunity in the enjoyment and real and effective exercise of human rights for all people, which means that in some cases it is necessary to remove and/or reduce social, political, cultural, economic or other obstacles that prevent members of certain vulnerable social groups from enjoying and exercising these rights.”<sup>220</sup> The Court has also observed that the Constitution protects individuals both against direct and indirect discrimination.<sup>221</sup> It has denounced the infiltration of traditional

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<sup>218</sup> CPEUM, art. 1. DOF 05-02-1917.

<sup>219</sup> For an overview of the concerns and instruments of contemporary equality law, see SANDRA FREDMAN, *DISCRIMINATION LAW* (Paul Craig ed., 2011); TARUNABH KHAITAN, *A THEORY OF DISCRIMINATION LAW* (2011); EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS, *HANDBOOK ON EUROPEAN NON DISCRIMINATION LAW* (2018); SOPHIA MOREAU, *FACES OF INEQUALITY: A THEORY OF WRONGFUL DISCRIMINATION* (2020); BARBARA HAVELKOVÁ & MATHIAS MÖSCHEL, *ANTI-DISCRIMINATION LAW IN CIVIL LAW JURISDICTIONS* (Barbara Havelková & Mathias Möschel eds., 2020); Anne Smith, *Equality Constitutional Adjudication in South Africa*, 14 AFR. HUM. RTS L.J. 609 (2014); MARCELO ALEGRE & ROBERTO GARGARELLA, *EL DERECHO A LA IGUALDAD: APORTES PARA UN CONSTITUCIONALISMO IGUALITARIO* [The Right to Equality: Contributions to an Equalitarian Constitutionalism] (2012).

<sup>220</sup> Derecho humano a la igualdad jurídica. Diferencias entre sus modalidades conceptuales. [The human right to legal equality. Differences between its conceptual modalities.] Primera Sala de la SCJN, *Semanario Judicial de la Federación y su Gaceta, Décima Época, Libro 3, Febrero de 2014, Tomo I, Tesis XLIV/2014, página 645. Igualdad jurídica sustantiva o de hecho. Fundamento normativo de las medidas tendientes a lograrla* [Substantive or Factual Legal Equality. Normative Foundation of the Measures Tending to Achieve It.], Primera Sala de la SCJN, *Semanario Judicial de la Federación y su Gaceta, Décima Época, Libro 3, Febrero de 2014, Tomo I, Tesis XLII/2014, página 662. See also* Derechos de las niñas, niños y adolescentes [Rights of girls, boys, and adolescents], El artículo 50, fracciones VII y XI, de la Ley General relativa, al reconocer el deber estatal de garantizar el acceso a métodos anticonceptivos y prestar asesoría y orientación sobre salud sexual, respeta el derecho humano al nivel más alto posible de salud física y mental de los menores de edad [By recognizing the state duty to guarantee access to contraceptive methods and to provide counseling and guidance on sexual health, it respects the human right to the highest possible level of physical and mental health of minors], Segunda Sala de la SCJN, 9 noviembre, 2016, amparo en revisión 203/2016.

<sup>221</sup> Primera Sala de la SCJN [First Chamber of the SCJN], 21 mayo, 2014, amparo directo en revisión 1058/2014; Pleno de la SCJN, 11 agosto, 2015, acción de inconstitucionalidad 8/2014 [Adopción por parejas del mismo sexo], Primera Sala de la SCJN, 5 diciembre, 2018, amparo directo 9/2018 [Trabajadoras del hogar]; Discriminación indirecta o por resultados. Elementos que la configuran, SJFG [Federal Judicial Weekly Report and Its Gazette], Décima Época, Libro 11, Octubre de 2014, Tomo I, Tesis

gender roles in several legal domains, especially family law.<sup>222</sup> It has also underlined the need to overcome structural discrimination<sup>223</sup> and has largely adopted the analytics of differentiated scrutiny.<sup>224</sup> Finally, it has declared the need to engage in strict scrutiny of public and private conduct whenever this conduct relies on a *suspect category*.<sup>225</sup>

International human rights sources, which enjoy constitutional status when aligned with Mexican constitutional provisions, provide additional analytic and argumentative tools for fighting specific forms of inequality. Gender inequality, for instance, may be countered by the Convention on the Elimination of All Forms of Discrimination Against Women.<sup>226</sup> It may also be countered by Inter-American instruments that focus on closely connected issues, like the gender-based violence provisions of the Belem do Pará Convention.<sup>227</sup> The Inter-American Court has given relevance in its rulings to the notions of disparate impact, indirect discrimination, and the need to provide special treatment to disadvantaged groups.<sup>228</sup>

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CCCLXXIV/2014, 603 (“[...] la discriminación puede generarse no sólo por tratar a personas iguales de forma distinta, o por ofrecer igual tratamiento a personas que están en situaciones diferentes; sino que también puede ocurrir de manera indirecta cuando una disposición, criterio o práctica aparentemente neutral ubica a un grupo social específico en clara desventaja frente al resto [...]”).

<sup>222</sup> See Pleno de la SCJN, 16 agosto, 2010, acción de inconstitucionalidad 2/2010; Pleno de la SCJN, 6 noviembre, 2013, amparo directo en revisión 2655/2013; Primera Sala de la SCJN, 19 octubre, 2016, amparo en revisión 208/2016; Pleno de la SCJN, 29 junio, 2016, amparo en revisión 59/2016.

<sup>223</sup> See Pleno de la SCJN, 11 agosto, 2015, acción de inconstitucionalidad 8/2014; Primera Sala de la SCJN, 23 noviembre, 2016, amparo directo en revisión 2730/2015; Discriminación indirecta. Su determinación requiere de un estudio sobre la existencia de factores estructurales o contextuales. [Indirect discrimination. Its determination requires a study on the existence of structural or contextual factors.] Décima Época, Gaceta del Semanario Judicial de la Federación [Gazette of the Federal Judicial Weekly Report] [GSJF] Libro 34, Septiembre de 2016, Tomo I, Tesis P. VIII/2016, 254.

<sup>224</sup> See Novena Época; Primera Sala de la SCJN; SJFG, XXVII, Abril de 2008, Tesis 1a/J. 37/2008, 175. (“When a law contains a distinction based on a suspect category . . . the judge must carry out a strict scrutiny of the measure to examine its constitutionality in the light of the principle of equality, since these distinctions are affected by a presumption of unconstitutionality. While the Constitution does not prohibit the legislator from using suspect categories, the principle of equality ensures that they are only used where there is a very strong justification for doing so.”)

<sup>225</sup> Primera Sala de la SCJN, 9 marzo, 2016, amparo directo en revisión 5267/2014; *id.* 6 abril, 2016, amparo directo en revisión 83/2015; Igualdad. Casos en los que el juez constitucional debe hacer un escrutinio estricto de las clasificaciones legislativas (interpretación del artículo 1 de la Constitución Política de los Estados Unidos Mexicanos) [Equality. Cases in which the constitutional judge must make a strict scrutiny of legislative classifications (interpretation of Article 1 of the Political Constitution of the United Mexican States)] SJFG; Tesis 1a/J. 37/2008, *supra* note 224.

<sup>226</sup> See Convention for the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 3. See generally powerful case law of the Convention Committee, at <https://www.ohchr.org/SP/HRBodies/CEDAW/Pages/CEDAWIndex.aspx>.

<sup>227</sup> Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women, O.A.S.T.S. No. A-61, 33 I.L.M. 1534, <http://www.oas.org/juridico/english/treaties/a-61.html>.

<sup>228</sup> González y otras (“Campo Algodonero”) v. México. Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H. R. (ser. C) No. 205 (Nov. 16, 2009); Comunidad Indígena Xákmok Kásek. v. Paraguay, Merits, Reparations and Costs. Judgment, Inter-Am. Ct. H. R. (ser. C) No. 214 (Aug. 24, 2010); Corte IDH. Caso Atala Riffo y Niñas v. Chile. Merits, Reparations and Costs. Judgment, Inter-Am. Ct. H. R. (ser. C) No. 239 (Feb. 24, 2012); Artavia Murillo y otros (“Fecundación in Vitro”) v. Costa Rica. Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H. R. (ser. C) No. 257 (Nov. 28, 2012); Duque Vs. Colombia. Preliminary Objections, Merits, Reparations and Costs,

Nothing covered so far implies that the Supreme Court has made progress in denouncing and providing remedies to the many inequalities created by prohibitionist drug policies. Both the Constitution and the Supreme Court's equality doctrines provide the means and foundations necessary to declare prohibition policies contrary to fundamental rights and invalidate them. The outcome of amparo directo en revisión 1464/2013, the case in which the Supreme Court first spoke of material equality, cautions against triumphalist narratives.<sup>229</sup> In that case, a woman denounced disparate gender effects of prohibitionist drug policies; the Supreme Court found her disparate effect arguments irrelevant to whether she should be prosecuted, and eventually allowed the prosecution to continue.<sup>230</sup> Because those who suffer most at the hands of drug policy have scarce access to justice, and because Mexican courts face difficulty applying equality mandates in the context of specific life problems.

In the following sections, we illustrate how current repressive drug policies exacerbate gender and socio-economic inequalities. First, we discuss disparate impact discrimination in both the content and the application of criminal law. This discrimination deepens structural inequalities of various types. Second, we identify problems of direct and indirect health damage to vulnerable communities, which also consolidate structural inequalities. These are just two examples of the many ways in which drug prohibition undermines equality in Mexico. Issues of social, ethnic-origin, and cultural inequalities also persist and continue to perpetuate stigma, discrimination, and stereotyping.

### 1. *Drug-related punishment and gender inequality*

There are important differences in how and why men and women are prosecuted, sentenced, and incarcerated in Mexico. Although most people incarcerated for drug-related offenses are men, the incarceration rate for women has grown significantly in recent years.<sup>231</sup>

At the state level, the number of women entering prison over the past two years has increased by over 100 percent.<sup>232</sup> The most punished crimes at state level for both men and women are simple possession and possession

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Judgment, Inter-Am. Ct. H. R. (ser. C) No. 310 (Feb. 26, 2016); Flor Freire Vs. Ecuador. Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H. R. (ser. C) No. 315 (Aug. 31, 2016); Trabajadores de la Hacienda Brasil Verde vs. Brasil. Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H. R. (ser. C) No. 318 (Oct. 20, 2016).

<sup>229</sup> Primera Sala de la SCJN, 13 noviembre, 2013, amparo directo en revisión 1464/2013.

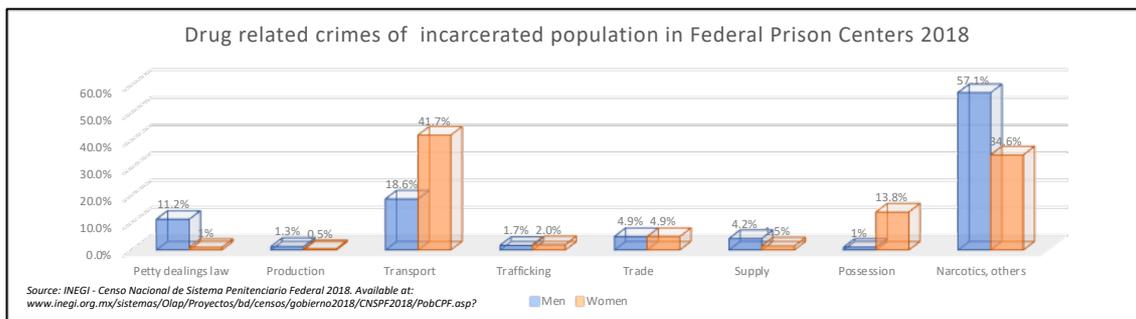
<sup>230</sup> *Id.*

<sup>231</sup> POLÍTICA DE DROGAS, GÉNERO Y ENCARCELAMIENTO EN MÉXICO: UNA GUÍA PARA POLÍTICAS INCLUYENTES [DRUG POLICY, GENDER AND IMPRISONMENT IN MEXICO: A GUIDE FOR INCLUSIVE POLICIES], EQUIS JUSTICIA PARA LAS MUJERES [EQUAL JUSTICE FOR WOMEN] (2018), [https://equis.org.mx/wp-content/uploads/2018/02/Gui%CC%81a\\_Drogas.pdf](https://equis.org.mx/wp-content/uploads/2018/02/Gui%CC%81a_Drogas.pdf).

<sup>232</sup> *Id.* at 2.

with intent to distribute or sell.<sup>233</sup> However, the percentage of women that are condemned on transportation grounds is higher than the percentage of men (9.2% for women, 4.2% of men).<sup>234</sup> At the federal level, gender differences are far more visible. According to the National Institute of Statistics and Geography (INEGI), in 2017, 7,943 crimes were punished with federal prison sentences: 95% of them committed by men, and 5% of them committed by women.<sup>235</sup> An important percentage of these crimes were tagged as “other crimes of narcotics,” making it impossible to determine the conduct that was punished. (See Figure below).<sup>236</sup> The information available, indicates that transportation most often imprisons both women and men, but the percentage for women is 41.7%, and only 18.6% for men. As shown in the following graph, petty dealing crimes account for 11.2% of the crimes for which men are in prison, while only 1% for women.<sup>237</sup>

**Figure 1: Drug Related Crimes of Incarcerated Population**



Determining the gender of punished crimes is important because of the differing severity of the associated punishments. According to the Federal Criminal Code, transportation is punishable with 10 to 25 years in prison, while possession without intent to distribute is punishable with a minimum of 10 months when drug quantities are below a certain threshold.<sup>238</sup> However, possession may be punished up to a maximum of 15 years when quantities exceed 1,000 times the thresholds established in the General Health Statute.<sup>239</sup> The difference between the minimum punishments in each case is significant. Higher incarceration rates for women for transportation of illegal substances lead to harsher sentences. In this way, a facially gender-neutral policy has an enormous disparate impact by failing to account for the different ways in which women and men interact

<sup>233</sup> *Id.*

<sup>234</sup> *See* INEGI, *supra* note 80.

<sup>235</sup> *Id.*

<sup>236</sup> *Id.* Interestingly, a higher percentage of men fall under this general category. This may be due to the fact that there are more men than women in Mexico.

<sup>237</sup> *Id.*

<sup>238</sup> *See* CPF arts. 193–95 bis.

<sup>239</sup> *See id.* *See also* LGS, arts. 475–78, DOF 20-8-2009.

with the drug market.<sup>240</sup> It constitutes a clear example of indirect discrimination prohibited by Mexican law.

Current drug policy also fails to acknowledge the different reasons why women and men become involved in drug markets, and the wider societal effects the policy perpetuates and reinforces. Many women become involved in drug-related activity “as a result of poverty or sometimes, due to coercion by a partner or relative.”<sup>241</sup> Most of them are single mothers, commit crimes with no violence, “have little or no schooling, live in poverty, and are responsible for providing care for dependents, whether children, young people elderly or persons with disabilities.”<sup>242</sup> The incarceration of women can have devastating effects on families and communities, often leading to further impoverishment.<sup>243</sup> It is thus clear that current drug-policies are blind to structural inequalities and that they represent a violation of the state’s obligations to respect, protect, and fulfill rights.

Another reason why drug laws disparately impact men and women is due to the role women play as caregivers of the incarcerated. Mexican prisons, like those in many other Latin-American countries, are characterized by scarcity.<sup>244</sup> Food, water, clothing, blankets, shoes, medications, and other necessities for inmates are typically provided by inmates’ families, and women typically assume this role as caregivers.<sup>245</sup> Women thus bear a disproportionate share of the indirect costs of the Mexican prison system.<sup>246</sup> By using the criminal justice system, and particularly prison sentences to punish drug related crimes, prohibition reinforces an unequal system of care, which disproportionately affects women.

## 2. *Eradication of illicit crops and social inequality*

As discussed above, the way in which illegal crops are eradicated carries important risks to health. Moreover, they disproportionately affect rural communities that participate in the drug industry. These communities participate in the initial levels of the market, where prices and income for participants are lowest.<sup>247</sup> Official data from Mexico shows that the municipalities where crop eradication occurs are often deeply impoverished

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<sup>240</sup> See *Women, Drug Policies, and Incarceration: A Guide for Policy Reform in Latin America and the Caribbean*, WASHINGTON OFFICE ON LATIN AMERICA (2019), [https://web.archive.org/web/2019081170023/https://www.wola.org/wp-content/uploads/2016/02/Women-Drug-Policies-and-Incarceration-Guide\\_Final.pdf](https://web.archive.org/web/2019081170023/https://www.wola.org/wp-content/uploads/2016/02/Women-Drug-Policies-and-Incarceration-Guide_Final.pdf)

<sup>241</sup> *Id.* at 8.

<sup>242</sup> *Id.*

<sup>243</sup> See Catalina Pérez Correa, *The Foundations of Modern Criminal Law and Gender Inequality*, 16 SEATTLE J. SOC. JUST. 19, 19–20 (2017).

<sup>244</sup> *Id.*

<sup>245</sup> *Id.*

<sup>246</sup> *Id.* at 38.

<sup>247</sup> FRANCISCO THOUMI, *ILLEGAL DRUGS, ECONOMY AND SOCIETY IN THE ANDES* 161 (2013).

and rank low in education, accessibility to health services, housing, and other official welfare indicators.<sup>248</sup> According to the Ministry of Defense, the municipality with the highest number of eradicated hectares is Badiraguato, Sinaloa.<sup>249</sup> Data from the National Council for the Evaluation of Social Policy Development (CONEVAL) shows Badiraguato has a “high” social lag index.<sup>250</sup> Other municipalities with large numbers of eradicated areas, show similar scores in terms of welfare indicators.<sup>251</sup>

Evidence shows that current eradication practices pose serious health risks to farmers, their families, and communities. Eradication policies seriously damage the health of highly vulnerable populations and are instrumental in directly and indirectly deepening many causes of structural inequality.

### III. THE UNCONSTITUTIONALITY OF PROHIBITION: NON-RIGHTS FRAMINGS

Beyond rights violations, prohibitionist drug policies in Mexico have spurred negative social, legal, and political outcomes as well, fueling problems of arbitrary enforcement, inefficient use of public resources, corruption, professional disruption, and environmental damage. Some of these negative effects amount to a violation of constitutional provisions, while others have seriously eroded the architectural integrity of the Mexican Constitution in ways that curb its functionality and undermine its most fundamental commitments.

In this section, we briefly describe how prohibition, and the repressive and materially “exceptionalist” policies that accompany it, seriously damage three main areas of constitutional normativity: (1) market regulation, (2) federalism, and (3) the principle of legality and other defining dimensions of the rule of law. Moreover, these policies concurrently destroy the Mexican State’s ability to fulfill its basic political, legal, and economic functions.

First, current drug policy in Mexico undermines the obligation of the Mexican State to effectively regulate the economy, as set down in Articles 25, 26, 27, and 28 of the Constitution.<sup>252</sup> This occurs because prohibition fosters a vast illegal, un-regulated market, and because drug cartels have

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<sup>248</sup> See In the Name of Public Health, *supra* note 120.

<sup>249</sup> *Id.*

<sup>250</sup> In 2015, 60% of the population of Badiraguato above 15 years old lacked a basic education degree, and 12% did not have access to health services. Approximately 66% of Badiraguato’s 32,000-people population was classified as poor, 48.5% as moderately poor, and 17.6% as extremely poor. See CONSEJO NACIONAL DE EVALUACIÓN DE LA POLÍTICA DE DESARROLLO SOCIAL [CONEVAL] [NATIONAL COUNCIL FOR THE EVALUATION OF SOCIAL DEVELOPMENT POLICY], ÍNDICE DE REZAGO SOCIAL 2015 (2016), [https://www.coneval.org.mx/Medicion/IRS/Paginas/Indice\\_Rezago\\_Social\\_2015.aspx](https://www.coneval.org.mx/Medicion/IRS/Paginas/Indice_Rezago_Social_2015.aspx).

<sup>251</sup> See In the Name of Public Health, *supra* note 120.

<sup>252</sup> CPEUM, arts. 25, 27, 28, DOF 05-02-1917.

sufficient economic power to influence both legal and illegal sectors of the economy.<sup>253</sup> prohibition has destroyed many areas of market integrity and the preconditions for the operation of the constitutionally endorsed “*rectoría económica del Estado*” [State orientation of the economy]. As previously noted, the cartels’ primary purpose is an economic one. Understanding this is crucial to avoid misconceptions about the nature and impact of criminal organizations in Mexico, which are radically different from the sort of politically motivated insurgent groups present in other contexts.

Second, prohibition has completely deformed the territorial division of powers. While an increase in the powers of the National government to the detriment of the federated units was a phenomenon common to many countries in the twentieth century, Mexico has witnessed a chaotic and non-systematic growth of centralized powers.<sup>254</sup>

Third, the principle of legality and the wider set of principles associated with the rule of law have been seriously compromised by prohibition. Prohibition has progressively replaced the application of constitutional and criminal law with regimes of exception, without regard for the safeguards of the formal declaration of “state of emergency” in Article 29 of the Mexican Constitution.<sup>255</sup> In the advancement of this “war on drugs,”<sup>256</sup> an important number of exceptional measures to combat criminal drug organizations have been enacted and implemented. The “constitutional costs” of the war on drugs are severe:<sup>257</sup> Prohibition reforms during the Calderón Administration included the insertion in the Constitution a special regime that completely disregards procedural safeguards for certain crimes. More broadly, the enforcement of prohibition has allowed Mexican authorities to detract attention from systemic failures and permit the perpetration of arbitrary practices or institutional malfunctions, such as the government’s incapacity to investigate crimes. Current drug policy appears at the core of the State’s incapacity to properly investigate crime, the existence of corruption, and the collapse of individual liberties and due

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<sup>253</sup> See, e.g., Ernesto Zedillo, *Drug Policy: A Shameful Failure of Modern Civilization*, in *ENDING THE WAR ON DRUGS*, 11–25 (Richard Branson ed., 2016).

<sup>254</sup> See Alejandro Madrazo & Antonio Barreto, *Undermining Constitutionalism in the Name of Policy: The Constitutional Costs of the War on Drugs*, 21 *NYU J. LEGIS. & PUB. POL’Y* 685 (2018).

<sup>255</sup> CPEUM, art. 29, DOF 05-02-1917, últimas reformas DOF 17-05-2021.

<sup>256</sup> In the United States, the PATRIOT Act and a long series of subsequent legislative and executive measures were passed after September 2001 to “efficiently” deal with terrorist organizations. For a detailed account of how these measures (and a strand of accompanying judicial rulings) affected a profound erosion of core constitutional principles in the United States, see OWEN FISS, *A WAR LIKE NO OTHER: THE CONSTITUTION IN A TIME OF TERROR* (2015).

<sup>257</sup> Constitutional costs are defined by these authors as the adoption of measures inconsistent with core constitutional commitments. See Madrazo & Barreto, *supra* note 254. According to these authors, “[t]he 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 these costs as part of the cost of the war on drugs.” *Id.* at 687.

process rights. It also effectively prevents the success of independent policies or initiatives addressed to tackle these problems.

A. *Market Integrity and State Orientation of the Economy*

The size and characteristics of illegal drug markets are difficult to ascertain and are often projected using production estimates.<sup>258</sup> Despite this difficulty, it is clear that prohibition has fostered illegal markets and consolidated power in a few, extremely powerful, criminal organizations. Economic analysis of the drug market “demonstrates that prohibiting the production and consumption of any merchandise for which demand exists, invariably leads to the creation of a black market by individuals and organizations willing to violate the law.”<sup>259</sup>

According to an appraisal made almost a decade ago, before the opioid and synthetic drugs market had not yet risen to prominence, drug trafficking was the most profitable of illegal businesses, ten times more profitable than the second in line (illegal traffic of human beings), and far higher than all others (e.g., human organs, weapons, or diamonds).<sup>260</sup> A more recent estimate suggests that the global drug trafficking market was worth between \$426 billion USD and \$652 billion USD in 2014.<sup>261</sup> According to an estimate specific to Mexico, the 2001 market value of drug trade was \$25 billion dollars, roughly six percent of Mexico’s gross domestic product.<sup>262</sup>

Many different factors influence how an illegal industry can affect a country. Factors may include: the number of participants at each stage of the production and marketing processes; the role the country plays in the international drug industry; whether the country is a producer of raw materials, a drug manufacturer, a money laundering center, or a territory used for transit; the size of the drug market relative to the rest of the

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<sup>258</sup> Jorge Javier Romero, *El misterioso tamaño del mercado de drogas* [*The Mysterious Size of Drug Markets*], 4 REV. DE LA UNIVERSIDAD DE MÉXICO 70 (2020), <https://www.revistadelauniversidad.mx/articulos/c5866187-a289-41a5-97ab-b88382b832cb/el-misterioso-tamano-del-mercado-de-drogas>.

<sup>259</sup> See Ernesto Zedillo, supra note 253.

<sup>260</sup> Although cautioning that available estimates vary, Pontón observes that, at the turn of the century, profit from drug trafficking was comparable to that generated by the largest legitimate industries—roughly a half of those generated by the car manufacturing industry, the petrol-derivates industry and the petrol and gas export industry, but comparable to those generated by production of cell phones, TVs, and radios. See Daniel Pontón, *La economía del narcotráfico y su dinámica en América Latina*, 47 ICONOS. REV. DE CIENCIAS SOCIALES 135, 137–39 (2013) (citing JEREMY HAKEN, TRANSNATIONAL CRIME IN THE DEVELOPING WORLD (2011)). He also reviews, inter alia, the figures produced by the United Nations Office on Drugs and Crime in its several reports on the matter.

<sup>261</sup> CHANNING MAY, TRANSNATIONAL CRIME IN THE DEVELOPING WORLD (2017).

<sup>262</sup> Oliver Meza, *El retraimiento del Estado: cómo la violencia afecta la capacidad de gobernar de los municipios en México* [*State Retrenchment: How Violence Affects the Governing Capacities of Municipalities in Mexico*], 17 CUADERNOS DE TRABAJO DEL MONITOR DEL PROGRAMA DE POLÍTICA DE DROGAS CIDE 1, at 13 (2016) (citing Samuel González-Ruiz, *Fighting Drug Cartels on the Mexico–United States Border*, 1 F. CRIME SOC. 19 (2001)).

economy; and how resources are distributed, among others.<sup>263</sup> Mexico is both a producer of raw materials like cannabis and opium poppy, a producer of synthetic drugs such as methamphetamines and fentanyl, and a transit territory.<sup>264</sup> The effect of the illegal drug market is therefore complex.

Next, we focus on three features relevant to understanding the economic effect of drug cartels in Mexico. The first is the size of the illegal drug market, including the degree the drug cartels have diversified and infiltrated many sectors of the economy, and the many opportunities this creates for criminal organizations to distort State economic regulations, preventing the fulfillment of its constitutional responsibilities. The second is the profit-driven character of the Mexican cartels' project, which, despite the levels of public and private violence, renders inadequate analysis under the NIAC (Non-International Armed Conflicts) framework. The third feature identifies an extreme consequence that current policies exert on the economic and political dynamics of the country: the recent transformation of the Mexican Army into an economic agent with economic incentives.

The specific way in which prohibition has been enforced in Mexico—especially after 2006, when a kingpin strategy and the deployment of the army to combat organized crime was enforced—has resulted in the use of open violence by organized-crime groups to expand their market influence.<sup>265</sup> Drug organizations, in response to prohibition enforcement, diversified their illegal activities to include kidnapping, extortion, and trafficking of other illegal goods.<sup>266</sup>

Recent events around the “*huachicol*” (fuel diversion and theft) provide a useful illustration of the cartels' economic expansion, the effect it has amidst the violence and disruption propitiated by State responses, and its direct and varied interconnection with State economic policy measures. In recent years, fuel theft has undergone important transformations. In the beginning, this practice was controlled by local bosses. However, the energy

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<sup>263</sup> See THOUMI, *supra* note 247.

<sup>264</sup> See UNODC, Monitoreo de Cultivos de Amapola 2018–2019 [Poppy Crop Monitoring 2018–2019], June 2021, [https://www.unodc.org/documents/crop-monitoring/Mexico/Mexico\\_Monitoreo\\_Plantios\\_Amapola\\_2018-2019.pdf](https://www.unodc.org/documents/crop-monitoring/Mexico/Mexico_Monitoreo_Plantios_Amapola_2018-2019.pdf); *México es el tercer mayor productor global de opio: UNODC* [Mexico is the Third Largest Global Opium Producer: UNODC], UNMEXICO, (June 26, 2021), <https://www.onu.org.mx/mexico-es-el-tercer-mayor-productor-global-de-opio-unodc/>.

<sup>265</sup> Illegality and black markets do not necessarily imply the existence of violence. As Snyder and Duran have pointed out, the relationship between illicit markets and violence depends on institutional protection. See Richard Snyder & Angelica Duran, *Does Illegality Breed Violence? Drug Trafficking and State-Sponsored*, 52 CRIME, L. & SOC. CHANGE 253 (2009). However, as seen earlier, the specific enforcement of prohibition in Mexico after 2006, led to further violence. See Consejo Nacional de la Población, *supra* note 80; INEGI, *supra* note 80.

<sup>266</sup> See Guillermo Trejo & Sandra Ley, *Federalismo, drogas y violencia: Por qué el conflicto partidista intergubernamental estimuló la violencia del narcotráfico en México* [Federalism, Drugs and Violence: Why the Inter-Governmental Partisan Conflict Stimulated Narco Violence in Mexico], 23 POLÍTICA Y GOBIERNO 11, 13 (2016). See Cecilia Farfan-Mendez, *Beyond Cartels and Kingpins: A Theory on Behavioral Patterns of Drug Trafficking Organizations* (2016) (Ph.D. dissertation, University of California Santa Barbara) (on file with author).

reforms enacted during the Peña Nieto Administration between 2012 and 2018 allowed the price of gasoline to rise, and thus multiplied the incentives to bypass the legal market.<sup>267</sup> According to analyses of Pemex data, the number of illicit taps rose from 132 in 2001 to 12,582 in 2018.<sup>268</sup> *Huachicolero* bands progressively grew in number, importance, and power, and entered into conflict with the cartels that were dominant in their respective territory. Over time, this caused a restructuring of both traditional cartels, who themselves entered the fuel trade (among them the Zetas and the CJNG), and local bands (some of which have adopted cartel-like practices and entered new activities in the illegal markets). Even a new cartel has emerged—Santa Rosa de Lima—whose core activities revolve around *huachicol*.<sup>269</sup>

The impact *huachicol* has had on State management of the economy was made transparent in December 2019, when President López Obrador announced that he was going to stop *huachicol* and issued a series of orders to that effect.<sup>270</sup> Among other things, the orders interrupted fuel distribution through the underground pipes and distribution by trucks; placed refineries under surveillance; fired a number of officials; deployed the army to strategic points along the distribution networks; and amended the federal criminal code to make fuel theft a “serious” offense.<sup>271</sup> By January 2020, the lack of planning by the federal government, together with the complexity of the situation, caused a serious fuel shortage.<sup>272</sup> One report estimated the economic costs of the shortage to be 23,600 million pesos.<sup>273</sup> Soon after, a terrible explosion in one of the illegal taps in Tlahuelilpan, Hidalgo left more than 135 people dead, most of whom were local villagers that were illegally collecting fuel.<sup>274</sup> The ineffective presence of the army, who were present at the time of the explosion, captured a Mexican State incapable or unwilling to manage the situation.

One of the criticisms of drug regulation is that cartels have diversified criminal activities to a point where removing the profits from illegal drug

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<sup>267</sup> Nathan P. Jones & John P. Sullivan, *Huachicoleros: Criminal Cartels, Fuel Theft, and Violence in Mexico*, 12 J. STRAT. SEC. 1, 7 (2019).

<sup>268</sup> *Id.*

<sup>269</sup> *Id.* at 8–11.

<sup>270</sup> Arturo Solís, *El combate al huachicol: una estrategia que calentó a los mexicanos este invierno* [*The Struggle Against Huachicol: The Strategy that Warmed up Mexicans this Winter*], FORBES MÉXICO (Mar. 11, 2019), <https://www.forbes.com.mx/el-combate-al-huachicol-una-estrategia-que-calento-a-los-mexicanos-este-invierno/>.

<sup>271</sup> *Id.*

<sup>272</sup> *Id.*

<sup>273</sup> *Id.*

<sup>274</sup> Alberto Najar, *Explosión en Hidalgo: qué originó la tragedia de Tlahuelilpan y otras 3 incógnitas que quedan por responder en México* [*Explosion in Hidalgo: What Caused the Tragedy of Tlahuelilpan and 3 Other Unknowns that Remain to be Answered in Mexico*], BBC NEWS (Jan. 22, 2019), <https://www.bbc.com/mundo/noticias-america-latina-46954992>.

markets would not weaken their economic power significantly.<sup>275</sup> However, this is untrue.<sup>276</sup> Drug regulation would not just weaken cartel economic power—it would also allow State agencies to redirect efforts to prevent more socially harmful crimes, such as human trafficking, kidnapping, and extortion.

The degree of violence necessary to operate these economic networks and the “war-on-drugs” has led some to ponder the possibility of resorting to the law of NIAC.<sup>277</sup> As remarked by Rodiles, however, even if the NIAC qualification finds some footing from a *lex lata* perspective, it is greatly misleading and counter-productive.<sup>278</sup> The NIAC framework fails to capture the nature and complexity of the situation and does not reduce levels of violence.<sup>279</sup> Because there are state-armed forces fighting non-state armed groups in Mexico, and Mexico is a contracting Party to the Geneva Convention, the conditions for Article 3 of the Convention are fulfilled.<sup>280</sup> Under authorized interpretations, Article 3 applies to scenarios where armed violence is “protracted” and has a high level of intensity. This is usually measured by the collective nature of the conflict, or by the State’s need to resort to the army; and non-state armed groups may be considered “parties to the conflict,” with defined hierarchical organizational structures and the capacity to sustain military operations.<sup>281</sup>

It is this latter condition that seems absent in the Mexican scenario. Although there are some rules organizing activities, networks are asymmetric and decentralized, and the “codes” enacted by some of the cartels seem unrelated to their daily operations.<sup>282</sup> Although the amount of power these organizations have amassed defies the State and its agents in many places, the cartels do not dispute the State’s right to govern.<sup>283</sup> Ultimately, the NIAC framing is not protective enough (since applicable national and international human rights law is far more protective) and risks legitimizing more violence on the ground.<sup>284</sup>

<sup>275</sup> Elizabeth Dickinson, *Legalizing Drugs Won’t Stop Mexico’s Brutal Cartels*, FOREIGN POL’Y (June 22, 2011), <https://foreignpolicy.com/2011/06/22/legalizing-drugs-wont-stop-mexicos-brutal-cartels/>.

<sup>276</sup> See Ted Galen Carpenter, *Undermining Mexico’s Dangerous Drug Cartels*, 688 CATO INST. POL’Y ANALYSIS 1 (2011).

<sup>277</sup> See, e.g., *Non-International Armed Conflicts in Mexico*, GENEVA ACAD. (Mar. 10, 2020), <https://www.rulac.org/browse/conflicts/non-international-armed-conflict-in-mexico>; See also, Carina Bergal, *The Mexican Drug War: The Case for a Non-International Armed Conflict Classification*, 34 FORDHAM INT’L L.J. 1042 (2011).

<sup>278</sup> Alejandro Rodiles, *Law and Violence in the Global South: The Legal Framing of Mexico’s “Narco War,”* 23 J. CONFLICT SEC. L. 269, 270 (2018).

<sup>279</sup> *Id.*

<sup>280</sup> *Id.* at 276.

<sup>281</sup> *Id.* (referring to the criteria set down in Prosecutor v. Tadić, Case No. IT-94-1-I, Judgment (Int’l Crim. Trib. for the Former Yugoslavia May 7, 1995)).

<sup>282</sup> *Id.* at 277.

<sup>283</sup> *Id.* at 278.

<sup>284</sup> *Id.* at 279–80.

Lastly, Mexico's prohibition policies and the resulting violence has transformed the Mexican army into an important economic actor. This transformation has been particularly apparent under President Obrador's Administration (2018 to present). As previously discussed, the war on drugs was used to justify the involvement of the army in public security tasks. This participation evolved into their inclusion in national and internal security tasks, such as the combat of fuel theft or the control of migration.<sup>285</sup> Today, the army's presence has spilled over into government tasks. These tasks include the construction and commercial administration of the new International Airport of Santa Lucía, the construction of the State-owned bank "*Banco del Bienestar*" with offices across the country, the management of Mexican customs and federal ports, and the operation of programs to protect the environment.<sup>286</sup>

The incursion of the army into government functions openly violates the constitutional purview of the Armed Forces,<sup>287</sup> and further compromises the fulfillment of the economic management and coordination functions of the State, under articles 25, 26, 27, and 28 of the Mexican Constitution. One possible negative outcome of military involvement in government functions is the creation of economic interests within the army, which may incentivize economically motivated action instead of neutral institutional behavior.<sup>288</sup>

### B. *Federalism*

According to Article 40 of the Mexican Constitution, "[i]t is the will of the people to establish a representative, democratic, secular and federal Republic, composed of free and sovereign states in all that concerns their interior regime, and Mexico City, united under one federation which is established according to the principles of this Fundamental Law."<sup>289</sup> Yet prohibition and the war on drugs have taken a massive toll on the country's organization as a federal republic in at least three ways. First, through the enactment of drug laws that centralize decisions about drug policy and

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<sup>285</sup> Catalina Pérez Correa, *AMLO's Broken Campaign Promise: Demilitarizing Mexico*, AM. Q. (Dec. 9, 2019), <https://www.americasquarterly.org/article/amlos-broken-campaign-promise-demilitarizing-mexico/>.

<sup>286</sup> Lidia Arista, *AMLO da el control de las aduanas y puertos a las Fuerzas Armadas* [AMLO Gives to the Army the Control of Customs and Ports], EXPANSIÓN (July 17, 2020), <https://politica.expansion.mx/presidencia/2020/07/17/amlo-da-el-control-de-las-aduanas-y-puertos-a-las-fuerzas-armadas>; Isabella Cota, *El poder del ejército como agente económico lasta el crecimiento de uno de los motores de México* [The Power of the Army as an Economic Agent Ballasts the Growth of One of Mexico's Engines], EL PAÍS (July 4, 2020), <https://elpais.com/mexico/economia/2020-07-05/el-poder-del-ejercito-como-agente-economico-lastra-el-crecimiento-de-uno-de-los-motores-de-mexico.html>.

<sup>287</sup> José Ramón Cossío, *La Marina en los Puertos* [Marines at the Ports], EL PAÍS (Aug. 4, 2020), <https://elpais.com/mexico/opinion/2020-08-04/la-marina-en-los-puertos.html>.

<sup>288</sup> Carlos Elizondo Mayer-Serra, *Amló y el Ejército* [AMLO and the Army], EXCÉLSIOR (Feb. 14, 2019), <https://www.excelsior.com.mx/opinion/carlos-elizondo-mayer-serra/amlo-y-el-ejercito/1296411>.

<sup>289</sup> CPEUM, art. 40, DOF 05-02-1917 [authors' translation].

prevent States from adopting distinctive policy approaches. Second, through the deployment of federal forces to combat criminal organizations. And third, through the generation of amendments to Article 73 of the Constitution, which contribute to a capricious and overly complex distribution of territorial power in the country.

Particularly after 2006, drug policy has been increasingly centralized in the federal government and away from state and municipal bodies. As discussed in Part I, the 2009 reform (regarding petty-dealing) to the General Health Law and the Federal and State criminal codes, redistributed drug enforcement jurisdiction among the States and the Federation.<sup>290</sup> The new laws entrusted the prosecution of possession and small scale trafficking to the states, while cases involving larger amounts or those deemed important by the central government were to be prosecuted at the Federal level.<sup>291</sup> Although the reform exhibited a federalist drive, it actually allowed the central government to determine state criminal policy regarding drugs.<sup>292</sup> At least one state—Campeche—tried to implement its own drug policy, but the federal government quickly challenged the state law and obtained a ruling from the Supreme Court stating that only the Federation has the ability to determine which and how drug-related crimes can be punished.<sup>293</sup> Because drug policy has such severe consequences and must be carefully considered with other regulations and public policy, the Mexican States should be allowed leeway in deciding drug policy.

The disruption of local affairs sharply increased in 2006, when the federal government decided to deploy federal troops to eradicate crops and stop illicit trafficking.<sup>294</sup> Today, there is military presence in most of Mexico, with soldiers carrying out public security tasks and combating drug trafficking organizations.<sup>295</sup> The centralized model of security hinders key components of public security, like citizen participation, self-governance, and the possibility of adopting distinctive local security strategies.<sup>296</sup> As the war on drugs advanced, more attention was placed on military and other national security institutions. This “reliance upon institutions designed to conduct war, increases the power of the central government, undermining federalism, while also expanding the power of the executive branch, altering the relative strength of the different branches of government.”<sup>297</sup>

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<sup>290</sup> See *supra* note 13.

<sup>291</sup> *Id.*

<sup>292</sup> See Madrazo & Barreto, *supra* note 254, at 700.

<sup>293</sup> *Id.* at 702.

<sup>294</sup> See *id.* at 18–20.

<sup>295</sup> Catalina Pérez Correa & Carlos De la Rosa Xochitiotzi, (*In*)*Security and Self-Government: Lessons from the Mexican Experience*, 12 VIENNA J. ON INT’L CONST. L. 457 (2018).

<sup>296</sup> *Id.* at 459–60.

<sup>297</sup> Juan D. Lindau, *The Drug War’s Impact on Executive Power, Judicial Reform, and Federalism in Mexico*, 126 POL. SCI. Q. 177, 178 (2011).

Oliver Meza investigated how chronic violence and prohibition has resulted in a contraction of Mexican municipalities' governmental capacities.<sup>298</sup> In particular, Meza noted a decrease of mechanisms and institutions that seek popular participation and consultation.<sup>299</sup> Although his study is inconclusive as to the exact causes for this shift,<sup>300</sup> he documents a very significant effect: for each drug-violence-related death per 1,000 habitants, municipalities cancel approximately two mechanisms of popular participation and consultation, and eliminate two institutions of popular participation and engagement.<sup>301</sup> Meza concludes that prohibitionist policies have severely damaged the core capacities of the same State that has so enthusiastically advanced them over the last years.<sup>302</sup>

The consequences of prohibition for the integrity of the constitutional territorial division of powers, as developed in Article 73, is unmistakable. Article 73, which lists the areas of jurisdiction of the Federation, has thirty-one sections, many of them further subdivided. These provisions regularly cover topics and institutions addressed elsewhere in the Constitution, creating repetition and inefficiencies. For example, Article 73 contains provisions conferring the Federation jurisdiction over federal crimes (Subsection 21); the National Guard and the use of force (Subsection 23); the creation, structure, and functions of a Federal Tribunal of Administrative Justice (Subsection 29-H); national security (Subsection 29-M); the emission of a General Statute on electoral matters and political parties (Subsection 29-U); the regime of administrative responsibility of all public servants (Subsection 29-V); the rights of victims (Subsection 29-X); or the extinction

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<sup>298</sup> Meza, *supra* note 262. The participation mechanisms whose presence he surveys include visits of the authorities to communities and neighborhoods; dedicated days to give attention to the public at the governmental offices; stands to receive requests from the public; dedicated phone lines, emails, and website links; popular consultations and surveys, among others. The participation-oriented institutions whose presence over time he evaluates include community assemblies; consultation assemblies; advisory committees, public security councils, municipal planning councils, municipal delegations (composed by citizens); comptroller bodies supervising public works (composed by citizens); and traditional organizations (like those managing community work). *Id.* at 20.

<sup>299</sup> *Id.*

<sup>300</sup> Meza lists four hypotheses that might be alternatively or simultaneously at play in the process that has led to the diminution of horizontal, participatory instances of local government: (1) municipalities may have privileged political agendas sponsored by the federal government, since these programs add federal resources to local finances; thus, the prohibition-triggered federal emphasis on security may have led Municipalities marginalize specifically local responsibilities; (2) municipalities may have diminished the amount of resources put into popular participation and consultation policies because of shrinking levels of citizens' trust in governmental institutions, associated to prevailing levels of drug-related violence; (3) drug cartels may have usurped activities that fall in principle within the sphere of governmental responsibility such as providing welfare, public services and deploying paternalist or clientelist policies that replace the functions of social interlocution that local governments might have otherwise played; (4) finally, efforts at promoting spaces of popular interaction might have been increasingly perceived by local governments as a risk to the smooth deployment of governmental functions, in providing a channel for citizens to denounce the appalling levels of insecurity and violence, or the contacts between local governments and illegal actors. *Id.* at 16–17.

<sup>301</sup> *Id.* at 24, 27.

<sup>302</sup> *Id.* at 30.

of property rights (Subsection 30). This disharmonic expansion of federal jurisdiction certainly contributes to the many problems that prohibitionist drug policies have caused in the country.

Even the horizontal division of powers is being seriously impinged on, as the Obrador Administration increasingly bypasses constitutional checks and balances in reacting to failed drug policy. In March 2019, a constitutional amendment was passed to create the National Guard, in replacement of the Federal Police.<sup>303</sup> Within the text of the amendment, the Guard was explicitly defined as a civil body, governed by the Public Security Secretary. A transitory regime was created to deal with the existing militarization.<sup>304</sup> This regime stated that for five years, and “as the National Guard advances the process of developing its structure, capacities and territorial deployment, the President may assign the Army to fulfill functions of public security in an extraordinary, regulated, supervised, subordinated and complementary manner.”<sup>305</sup> Despite the passage of a statute regulating the Guard in May 2019, on year later, the President issued an executive decree invoking the transitory provision and providing that the army would directly carry out many functions of the Guard (including, for instance, the ordinary investigation of crimes).<sup>306</sup> This action was challenged as an overreach of presidential authority by the President’s own party.<sup>307</sup> This episode illustrates to what extent the core resorts of the constitutional structure are now under stress in Mexico, for a variety of reasons that include an unwillingness to recognize and stop repressive drug policies that are deteriorating democratic institutions.

### 1. *Legality, due process, and the rule of law*

Legally, prohibition has justified adoption of laws that restrict due process rights, putting pressure on the administration of justice and creating a framework of State action that increases arbitrariness and does not align with the requirements of the rule of law.

In 2008, a special regime was adopted in Mexico to facilitate the prosecution of organized crime, which at the time primarily revolved around the illegal drug market.

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<sup>303</sup> See Correa, *supra* note 285.

<sup>304</sup> *Id.*

<sup>305</sup> Artículo Quinto Transitorio, Decreto por el que se reforman, adicionan y derogan diversas disposiciones de la Constitución Política de los Estados Unidos Mexicanos, en materia de Guardia Nacional [Fifth Transitory Article, Decree by which various provisions of the Constitution of the United Mexican States are amended, added, and repealed, regarding the National Guard], DOF 26-03-2019.

<sup>306</sup> Acuerdo por el que se dispone de la Fuerza Armada permanente para llevar a cabo tareas de seguridad pública de manera extraordinaria, regulada, fiscalizada, subordinada y complementaria [Agreement whereby the permanent Armed Forces are available to carry out public security tasks in an extraordinary, regulated, supervised, subordinate and complementary manner], DOF 11-05-2020.

<sup>307</sup> Pleno de la SCJN, controversia constitucional 90/2020 (pending).

This exceptional regime restricts fundamental rights for anyone suspected of certain crimes. It includes:

“(i) the possibility of authorities retaining people — without communication or formal accusation— for up to eighty days when ‘necessary for the advancement’ of a criminal investigation involving organized crime [known as *arraigo*]; (ii) an extended detention period (four days, as opposed to two) before a detainee has to be presented before a judge; (iii) restrictions on communication of prisoners while detained or in prison (excluding legal advice); (iv) serving out sentences in “special” prisons, separate from the general population; (v) the possibility of imposing “special,” non-specified surveillance measures during prisoners’ sentences; and (vi) an exception to the right to know who the accuser is.”<sup>308</sup>

The regime however, soon became permanent and more commonly used, eluding the “exceptionality” quality. The use of measures like the *arraigo* grew exponentially, while convictions for organized crime remained the same, showing their limited use for drug policy purposes.<sup>309</sup>

Organized crime is constitutionally defined as “an organization of three or more people, to commit crimes in a permanent or repeated way, in terms of the applicable law”<sup>310</sup> This open definition leaves to Congress the ability to determine which criminal conduct falls under the exceptional regime.<sup>311</sup> The Federal Law includes thirty-six crimes that can fall into this category, including include kidnaping, human trafficking, and drug crimes. In recent years, however, efforts to curb organized crime have focused primarily on prosecuting drug crimes under this special regime.<sup>312</sup> While the number of criminal investigations initiated for organized crime has decreased in the country since 2012, criminal investigations for organized crime related to drug crimes steadily rose from 2016 to 2019.<sup>313</sup>

As previously stated, the most punished drug crimes are possession crimes, often simple possession without the intent to sell or distribute.<sup>314</sup> The use of criminal law to punish crimes of possession is not only

<sup>308</sup> See Madrazo & Barreto, *supra* note 254, at 694.

<sup>309</sup> *Id.* at 698–99.

<sup>310</sup> CPEUM, art. 16. DOF 05-02-1917.

<sup>311</sup> Alejandro Madrazo, *Los costos constitucionales de la guerra contra las drogas: una primera aproximación (desde México)* [*The Constitutional Costs of the War on Drugs; A Preliminary Analysis (from Mexico)*], 12 CUADERNOS DE TRABAJO DEL SEMINARIO DE POLÍTICA DE DROGAS 1, 13 (2014).

<sup>312</sup> CATALINA PÉREZ CORREA & SARA VELÁZQUEZ, *DELITOS CONTRA LA SALUD Y DELINCUENCIA ORGANIZADA* [CRIMES AGAINST HEALTH AND ORGANIZED CRIME] (Manuales para juzgar con perspectiva de género, SCJN, 2021).

<sup>313</sup> *Id.*

<sup>314</sup> *Id.*

disproportionate, but also activates mechanisms which reinforce and deepen discretionary practices. The crime of possession does not require any criminal investigation from police or prosecutors, as the mere fact of possession is all the necessary proof. Many of these cases are initiated after a “frisk and search.” In one study conducted in the State of San Luis Potosí in Mexico, 100% of drug arrests cases studied were made in *flagrancia*, meaning they occurred because a police saw a person with suspicious characteristics on the street, and not as a result of an investigation.<sup>315</sup> The study shows how drug crimes, specifically possession, are often used as a tool to facilitate police detentions and prosecutors’ need of evidence in detriment of building institutional capacities.<sup>316</sup> In the long run, the use of drug crimes to sanction individuals who would otherwise would not be punishable by law, encourages impunity and weakens the rule of law.

Furthermore, the particular way in which prohibition has been enforced in Mexico, in a context of weak judicial and prosecutorial institutions, has led to an increase in mistreatment and human rights violations. A study by Ana Laura Magaloni, for example, shows how torture and mistreatment grew substantially after 2006.<sup>317</sup> According to her data, drug arrests nearly doubled during the bulk of the Calderón Administration, rising from 34% to 65%.<sup>318</sup> And while the Federal Police were responsible for 37% of all federal detentions, the army carried out 25% of them.<sup>319</sup> Magaloni analyzed the presence of torture and mistreatment in these cases, organizing them by the seriousness of the mistreatment and the institution involved,<sup>320</sup> and found that the seriousness of the mistreatment against detainees increased significantly after 2006 (when the war on drugs was launched), with a particular increase in reports associated with the military.<sup>321</sup> And the data shows an particular increase in the case of people detained for drug crimes.<sup>322</sup>

Another study by the Johns Hopkins-Lancet Commission on Drug Policy confirms the rise in mistreatment and torture in Mexico after 2006.<sup>323</sup> According to that study, it was 1.57 times more probable to experience

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<sup>315</sup> Catalina Pérez Correa & Sara Velázquez, Seminar at Seminario PPD *¿Consumidores o narcomenudistas?: la persecución de delitos contra la salud en el estado de San Luis Potosí [Consumers or Petty Dealers? The Prosecution of Crimes Against Health in San Luis Potosí]*, (Sept. 25, 2020).

<sup>316</sup> *Id.*

<sup>317</sup> Ana Laura Magaloni, *La arbitrariedad como método de trabajo: la persecución criminal durante la administración de Felipe Calderón*, in *DE LA DETENCIÓN A LA PRISIÓN: LA JUSTICIA PENAL A EXAMEN* 31 (Catalina Pérez Correa ed., 2015).

<sup>318</sup> *Id.* at 43.

<sup>319</sup> *Id.* at 36.

<sup>320</sup> *Id.* Of more than sixteen different reported types of mistreatment upon being detained, Magaloni chose three as proxy to represent increasing gravity and, also, increasing probability of institutional involvement: kicking, asphyxia, and electric shocks.

<sup>321</sup> *Id.*

<sup>322</sup> *Id.*

<sup>323</sup> Joanne Csete et al., *supra* note 1.

torture or abuse during detention for a drug crime after the onset of the war on drugs than prior to December 2006.<sup>324</sup>

Illegal drug markets thrive in contexts of corruption<sup>325</sup> and impunity,<sup>326</sup> and Mexico is no stranger to these problems.<sup>327</sup> Although the relationship between drugs and corruption is difficult to determine—in part due to the circular relationship between the two—some studies show how drug markets facilitate this problem.<sup>328</sup> The war on drugs preserves certain authoritarian proclivities of the Mexican state, thus fostering corruption and impunity, because the “elevation of the security agenda above other functions and priorities of the government increase the power of the least-transparent, least accountable portions of the regime.”<sup>329</sup>

Prohibitionist and repressive drug policies bolster authoritarian retrogressions while weakening the preconditions for the State to preserve the defining features of public action under the constraints of the rule of law.

## CONCLUSION

Prohibitionist drug policies are the remnants of another time. They are remnants of a time when we knew much less about the modalities and effects of drug use and when the production, transportation, and distribution of drugs involved very different channels and actors. They are from a time when legal frameworks were not transformed by contemporary ideas regarding constitutional normativity and the role of fundamental rights in national and international law.

Prohibitionist drug policies, with extremely harsh punishments, violate the Mexican Constitution. The Supreme Court has started to dismantle some aspects of this regime, specifically in its decisions on the personal use of cannabis. However, as important as these decisions are to transforming the public debate on drugs, they are still a far cry from altering the fundamental orientation of policy-making and social dynamics in the policy area.

Prohibition is at odds with the Mexican Constitution and the human rights treaties that are part of the Mexican Bill of Rights, even when

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<sup>324</sup> *Id.*

<sup>325</sup> See THOUMI, *supra* note 247, at 170.

<sup>326</sup> See Zedillo et al., *supra* note 2.

<sup>327</sup> The 2017 Corruption Perceptions Index ranked Mexico 135 out of 180 countries with a score of 29 (out of 100). It also shows that the country’s ranking has worsened since 2012. This Index ranks 180 countries and territories by their perceived levels corruption in the public sector. It uses a scale of 0 to 100, where 0 is highly corrupt and 100 is very clean. In 2012, Mexico had a score of 34, dropping to 31 and 30 in 2015 and 2016 respectively. In 2017, it scored 29. See *Corruption Perceptions Index 2017*, TRANSPARENCY INT’L (Feb. 28, 2018), <https://www.transparency.org/en/news/corruption-perceptions-index-2017#>.

<sup>328</sup> See THOUMI, *supra* note 247.

<sup>329</sup> See Lindau, *supra* note 297, at 177.

considering the limitations of explicit constitutional restrictions or the principle of proportionality. Current drug policy violates basic rights such as health, equality, and the free development of personality. And Prohibition seriously impairs the function of constitutional democracy for a much broader set of considerations. Prohibition has compromised the most structural aspects of democracy and the rule of law in Mexico.

Prohibitionist drug-policy may thus be characterized as a “systemic constitutional underminer,” since it generates many interconnected normative problems that penetrate all social domains. The rights and non-rights violations generated by current drug policies reinforce one another, projecting an extraordinary amount of unconstitutional damage to the functioning of the whole system. Prohibitionist drug policy violates constitutional rights, prevents individuals from pursuing legitimate life plans, permanently creates inequality, and generates severe and massive damage to the life and health of individuals. Prohibition does not effectively preserve legitimate health-related goals and disrupts the operation of the Mexican state. Even if there were no conflicts between prohibition and the Mexican Bill of Rights, regulation would still be necessary to prevent violations of other constitutional provisions concerning market regulation, federalism, and the collapse of State’s capabilities to meet its basic rule of law responsibilities. Regulation of drug markets is a necessary policy

There is a modest bright side to this depressing situation: if Mexico is interested in identifying strategic policies with an enhanced potential to reverse current patterns of social, political, and legal disruption, drug policy is the area to be prioritized. Due to its systemic presence, a reorientation of drug policy would improve many things at once. A reoriented regulation, one truly committed to the fulfillment of the rights to health, free development of the personality and equality, would become a “systemic constitutional reinforcer.” This would increase dignity, liberty, equality, and well-being. Such a turn is not only wise, but also urgently necessary to honor the fundamental mandates of the Mexican Constitution.