

**DRUG POLICY IN MEXICO: THE CAUSE OF A NATIONAL  
TRAGEDY  
A RADICAL BUT INDISPENSABLE PROPOSAL TO FIX IT**

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ABSTRACT

For over a decade, the Mexican government has invested itself in a “frontal attack” on drug trafficking organizations with catastrophic results. Little to nothing has been gained in limiting drug production, use, or trafficking, while violence has skyrocketed and major institutional and human rights crises have evolved. Through a multidisciplinary approach—which includes history, sociology, policy analysis, and constitutional doctrine—this essay evaluates drug prohibition in Mexico: its history, key components and documented results. It concludes that prohibition, as a guiding principle of drug policy, can and should be abandoned for all drugs, for both practical and normative reasons. It proposes a set of guiding principles that should orient the legalization of all drugs and then fleshes out concrete regulatory proposals for specific drug markets, pondering their relative benefits and risks. Although anchored in a specific case study, the essay should be considered a broader contribution to enrich discussions as drug policy reform moves from state to national jurisdictions and from marijuana to other drugs.

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## 1. INTRODUCTION

We start by fully agreeing with a chief conclusion of the 2011 Report of the Global Commission on Drug Policy: “The global war on drugs has failed, with devastating consequences for individuals and societies around the world.”<sup>1</sup> We adhere to the Commission’s observation that the international drug control regime, by being based essentially on a punitive law enforcement paradigm, has resulted in more violence, larger prison populations, and the erosion of governance around the world.<sup>2</sup> Additionally, the health concerns associated with drug use have been negatively affected by the drug control regime’s efforts.<sup>3</sup>

Globally, prohibition has proven to be a poor framework for the protection of health, risk management and harm reduction. Moreover, when strongly enforced, prohibition has devastating effects on institutional capacity and legitimacy, economic development, social peace, and public health, as measured in terms of the most basic indicators.<sup>4</sup> The prevailing drug policy, including reduction of drug use, availability of illicit drugs or the efficiency of institutional resources, has been ineffective and, in fact, counterproductive. As stated in the 2014 Global Commission on Drug Policy’s Report: “After more than half a century of this punitive approach, there is now overwhelming evidence that [prohibition] has not only failed to achieve its own objectives but has also generated serious social and health problems.”<sup>5</sup>

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<sup>1</sup> Global Commission on Drug Policy, *The War on Drugs 2* (June 2011), [https://www.globalcommissionondrugs.org/wp-content/uploads/2017/10/GCDP\\_WaronDrugs\\_EN.pdf](https://www.globalcommissionondrugs.org/wp-content/uploads/2017/10/GCDP_WaronDrugs_EN.pdf) [<https://perma.cc/87HL-5GAC>].

<sup>2</sup> *Id.* at 2–3.

<sup>3</sup> *See id.* at 2 (“[r]epressive efforts directed at consumers impede public health measures to reduce HIV/AIDS, overdose fatalities, and other harmful consequences of drug use.”).

<sup>4</sup> *See* OLIVER MEZA & EDGAR GUERRA, *POLÍTICA DE DROGAS EN LAS AMÉRICAS: REDEFINIENDO EL PROBLEMA Y EL PAPEL DEL ESTADO [DRUG POLICY IN THE AMERICAS: REDEFINING THE PROBLEM AND THE ROLE OF THE STATE]* 1, 26 (2017), [http://www.politicadedrogas.org/PPD/documentos/20171204\\_124423\\_pol%C3%ADtica\\_de\\_drogas\\_en\\_las\\_am%C3%A9ricas\\_v0.10\\_isbn.pdf](http://www.politicadedrogas.org/PPD/documentos/20171204_124423_pol%C3%ADtica_de_drogas_en_las_am%C3%A9ricas_v0.10_isbn.pdf) [<https://perma.cc/WPY3-MVAG>] (affirming that the current state drug enforcement scheme harms its citizens by reducing public health, delegitimizing the state, and creating avoidable social and economic costs).

<sup>5</sup> Global Commission on Drug Policy, *Taking Control: Pathways to Drug Policies That Work* 11 (Sept. 2014), <https://www.globalcommissionondrugs.org/wp->

The irony is that this failure, happening in Mexico and globally, should not be surprising at all, considering that the policy is wholly inconsistent with best knowledge from life sciences, sound public health research, and basic economic analysis. Essential insights from life sciences indicate that even if the best possible prevention strategies were applied—which unfortunately has never been the case—there would still be a residual demand for drugs, irrespective of whether they are prohibited or even highly priced in whichever market they are available. For its part, economic analysis 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>6</sup> Significantly, it also indicates that decriminalizing the use and production of a prohibited drug and taxing its consumption would cause a greater reduction in its output than the enforcement of its prohibition (even if enforcement were aimed at an optimal level, in practice, most likely unachievable).<sup>7</sup>

Drugs have been a part of human culture throughout history. Prohibition has been the exception, not the rule, in deciding what to do about drugs. Prohibition is an experiment that has failed brutally.<sup>8</sup> Mexico is one of the most dramatic examples of this failure and its costly consequences. It is both a transit country and a producer of illicit substances destined primarily for the United States. The size of Mexico's illegal drug activities makes it a fertile ground for criminal organizations to profit and obtain abundant resources that can be used to corrupt authorities and institutions. Despite harsh drug laws and intensive enforcement of these laws, the use of drugs in Mexico has increased over the past decade. Additionally, legal institutions and constitutional protections have

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content/uploads/2016/03/GCDP\_2014\_taking-control\_EN.pdf  
[<https://perma.cc/W7RL-K8AD>].

<sup>6</sup> See, e.g., Ernesto Zedillo, *Drug Policy: A Shameful Failure of Modern Civilization*, in *ENDING THE WAR ON DRUGS*, 23-38 (Richard Branson ed., 2016) (observing the connections between drug prohibition policies and the rise of black markets and violent crime in the Americas).

<sup>7</sup> See Gary S. Becker, Kevin Murphy, & Michael Grossman, *The Economic Theory of Illegal Goods: The Case on Drugs* 18-19 (Nat'l Bureau of Econ. Research, Working Paper No. 10976, 2004), <https://www.nber.org/papers/w10976.pdf> [<https://perma.cc/54EK-36T7>].

<sup>8</sup> See, e.g., Oriol Romani, *Una antropología de las drogas* [*An anthropology of drugs*], LA JORNADA (July 2, 2015), <https://www.jornada.com.mx/2015/07/02/1s-opinion.html> [<https://perma.cc/83KY-NTZP>] (noting that the main flaw in the experiment of prohibition is that it assumed the ability to solve complex social problems with scientific or bureaucratic management).

been weakened, scarce resources have been misspent and violence has been fueled. And yet, Mexico's drug laws—premised on prohibition—have remained practically unchanged. More strikingly, their enforcement has been increasingly enhanced. Today, Mexico criminally persecutes and incarcerates people who use drugs, women with no prior convictions who transport drugs from one place to another, and small-scale drug dealers (who are easily replaced by other young men or women when detained).<sup>9</sup> Mexico also uses military forces to intercept drug trafficking and to eradicate illicit crops, using dangerous pesticides that pollute the water and contaminate the land in poor rural areas.<sup>10</sup>

The policy conclusions stemming from the above insights, for which the Global Commission has advocated and which we fully endorse, are very concrete: if drug policy puts public health, community safety, human rights and development at its center, the last thing that governments should be doing is inducing black markets where criminal organizations thrive.<sup>11</sup> Consequently, States should stop criminalizing people for drug use and possession. It would be inconsistent to decriminalize demand without taking supply out of the hands of criminal organizations. Other aspects being equal, demand liberalization could boost the illegal traffickers' revenues and thus their criminal power. Hence, the Commission's other key recommendation is for States to get the supply of drugs under control through responsible legal regulation.<sup>12</sup>

We subscribe to those recommendations mindful that for over a century, prohibition—and its intended enforcement—has prevailed as the preferred policy approach for dealing with the use of drugs, but also encouraged by changes that have been taking place lately. In 2013, Uruguay became the first country to pass a law fully regulating cannabis, which took effect in 2017.<sup>13</sup> Canada followed

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<sup>9</sup> See Catalina Pérez Correa & Andrés Ruiz, *A ras de tierra: Marihuana y Pesticidas* [At ground level: Marijuana and Pesticides], NEXOS (July 2018), <https://www.nexos.com.mx/?p=38377> [<https://perma.cc/TTM3-EVVK>].

<sup>10</sup> See *id.* at 9 (asserting that paraquat, the pesticide often used by the state to destroy marijuana crops, often causes severe health problems such as intestinal bleeding, liver damage, skin problems, and an increased risk of Parkinson's when ingested due to water and crop contamination).

<sup>11</sup> *Taking Control: Pathways to Drug Policies That Work*, *supra* note 5.

<sup>12</sup> *Taking Control: Pathways to Drug Policies That Work*, *supra* note 5, at 23–31.

<sup>13</sup> Global Commission on Drug Policy, *Regulation: The Responsible Control of Drugs* 10 (2018), <https://www.globalcommissiondrugs.org/wp->

in 2017.<sup>14</sup> By November 2018, 28 states within the United States had regulated cannabis for medical purposes and eight of those had regulated cannabis for recreational purposes.<sup>15</sup> In January 2018, Vermont became the first state to legalize cannabis for adult use through the legislative process.<sup>16</sup> Several Latin-American countries have also regulated cannabis for medical purposes.<sup>17</sup> Of course, earlier successful experiences with policies giving more importance to public health than to punitive actions, like those in Portugal, Switzerland and Australia, are also supportive of the approaches suggested below for Mexico's case.<sup>18</sup>

The first part of this document briefly explains the origins of Mexican prohibition early in the 20<sup>th</sup> century and describes some of the existing drug policies and laws. The second part reviews some of the most salient negative consequences of current policies, both for people who use drugs and for the broader population in terms of public health and public security. It shows that prohibition, undoubtedly, has had serious costs on the institutional capacity to prevent and punish criminality. The third section proposes basic principles that should orient drug policy in Mexico and recommendations for its reform. Finally, based on those principles, we offer concrete proposals for the decriminalization and regulation of drug markets in the country.

As the Global Commission on Drug Policy affirms in its 2018 report, *Regulation: The Responsible Control of Drugs*, there is no "one size fits all" regulation model.<sup>19</sup> Rather, "regulation models adopted

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[<https://perma.cc/E47F-YNCK>].

<sup>14</sup> *Id.* at 14, 31.

<sup>15</sup> *Marijuana Overview*, NATIONAL CONFERENCE OF STATE LEGISLATURES (Oct. 17, 2019), <http://www.ncsl.org/research/civil-and-criminal-justice/marijuana-overview.aspx> [<https://perma.cc/TX4C-UWCG>].

<sup>16</sup> *Id.*

<sup>17</sup> See, e.g., Juan Diego Bogotá, *Marihuana Medicinal: ¿cuáles Países Lideran En América Latina?* [Medical marijuana: which countries lead in Latin American?] LATIN AMERICAN POST (June 26, 2019), <https://latinamericanpost.com/28658-medical-marijuana-which-countries-lead-in-latin-america> [<https://perma.cc/54B9-A92Q>] (noting that Chile, Colombia, Mexico, Peru, and Uruguay have approved the medical use of marijuana).

<sup>18</sup> GLENN GREENWALD, DRUG DECRIMINALIZATION IN PORTUGAL: LESSONS FOR CREATING FAIR AND SUCCESSFUL DRUG POLICIES, (CATO Institute, 2009), [https://www.cato.org/sites/cato.org/files/pubs/pdf/greenwald\\_whitepaper.pdf](https://www.cato.org/sites/cato.org/files/pubs/pdf/greenwald_whitepaper.pdf) [<https://perma.cc/VNU3-LY8J>].

<sup>19</sup> Global Commission on Drug Policy, *Regulation: The Responsible Control of Drugs*, *supra* note 13, at 11.

in different places will need to be shaped by, and sensitive to, local economic political, and cultural environments.”<sup>20</sup> The approaches sketched here draw from international experiences but aim specifically to fit the Mexican context. Whenever convenient, rather than advocate for a particular model, we present a spectrum of regulatory options that could be considered in the Mexican context.

Mexico’s current security crisis is profound and complex. Corruption and impunity are common in many public institutions, notably in those in charge of providing justice and security. The 2017 Corruption Perceptions Index ranks Mexico 135 out of 180 countries with a score of 29 (out of 100).<sup>21</sup> The country’s ranking has worsened since 2012.<sup>22</sup> Additionally, a recent report measuring the quality of criminal justice institutions at the state level showed that the probability of a crime being investigated in Mexico is .90 percent.<sup>23</sup> Even violent crimes, like homicides, have extremely high impunity levels. In the State of Guerrero for example, during 2016 the probability of a homicide being criminally punished was less than 4 percent.<sup>24</sup> Another report shows the difficult conditions in which police operate throughout the country, with poor wages and no labor stability, despite the risks involved in their work.<sup>25</sup>

Drug policy reform is a necessary but not sufficient condition to address this crisis. It will not, on its own, solve the problem of weak

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<sup>20</sup> Global Commission on Drug Policy, *Regulation: The Responsible Control of Drugs*, *supra* note 13, at 12–13.

<sup>21</sup> The Corruption Perceptions Index undertaken by Transparency International ranks 180 countries and territories by their perceived levels of public sector corruption according to experts and businesspeople, it uses a scale of 0 to 100, where 0 is highly corrupt and 100 is very clean. Mexico’s score of 29 has gotten worse in the last five years. It had a score of 34 in 2012, dropping to 31 and 30 in 2015 and 2016 respectively. See *Corruption Perceptions Index 2017*, TRANSPARENCY INTERNATIONAL, (Feb. 28, 2018), [https://www.transparency.org/news/feature/corruption\\_perceptions\\_index\\_2017#table](https://www.transparency.org/news/feature/corruption_perceptions_index_2017#table) [<https://perma.cc/46Y7-RSVB>].

<sup>22</sup> *Id.*

<sup>23</sup> See GUILLERMO RAÚL ZEPEDA LECUONA, ÍNDICE ESTATAL DE DESEMPEÑO DE LAS PROCURADURÍAS Y FISCALÍAS [STATE INDEX LEVEL OF PERFORMANCE OF THE ATTORNEY AND PROSECUTION OFFICES] 26–27 (2017), <https://www.impunidadcero.org/uploads/app/articulo/49/archivo/1526575583R54.pdf> [<https://perma.cc/G4DQ-9BYU>].

<sup>24</sup> *Id.* at 29.

<sup>25</sup> See *Causa en Común, ¿Qué piensa la policía?* [What do the police think?] 5, 17 (2017), [http://causaencomun.org.mx/beta/wp-content/uploads/2018/03/Presentaci%C3%B3n\\_encuesta.pdf](http://causaencomun.org.mx/beta/wp-content/uploads/2018/03/Presentaci%C3%B3n_encuesta.pdf) [<https://perma.cc/7HDS-FFUC>] (aggregating police responses to various survey questions about job security, wages, and other related topics).

rule of law, lack of justice, or insecurity problems that Mexico has suffered for too long. The often-precarious state of legal institutions is a problem that, in our view, constitutes the chief obstacle for achieving the country's full economic, social and political development. To tackle effectively that immense problem, a comprehensive, ambitious, well-thought, and properly funded reform of the pertinent institutions is indispensable. However, a radical change in drug policy is a fundamental part of rule of law reform. Through the criminalization of drug-related activities the State spends scarce human, economic and institutional resources that should be placed elsewhere. Drug policy today is also the justification for the prosecution and incarceration of thousands of young men and women, the impoverishment of farmers and communities and the use of violence by the State. As stated by the Global Commission on Drug Policy:

A new and improved global drug control regime is needed that better protects the health and safety of individuals and communities around the world. Harsh measures grounded in repressive ideologies must be replaced by more humane and effective policies shaped by scientific evidence, public health principles and human rights standards. This is the only way to simultaneously reduce drug-related death, disease and suffering and the violence, crime, corruption and illicit markets associated with ineffective prohibitionist policies.<sup>26</sup>

## 2. PROHIBITION

### 2.1. *History of prohibition in Mexico*

Prohibition is often justified as a means to protect public health. A brief historic contextualization of prohibition in Mexico, however, shows that the origins of its normative justification lie, not in the protection of public health, but in prejudices and discrimination.

In the late nineteenth and early twentieth centuries, the use of drugs such as marijuana, cocaine, and opium was not uncommon in Mexico. Products derived from these substances were available in pharmacies and public markets. The first attempts to regulate these

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<sup>26</sup> Global Commission on Drug Policy, *Taking Control: Pathways to Drug Policies That Work*, *supra* note 5, at 6.



substances in the late nineteenth century sought to protect consumers by controlling quality.<sup>27</sup>

In the 1920s, the discourse surrounding drugs changed dramatically as the government sought to regulate both the use and trafficking of narcotics to address public health-related issues and contain nascent drug trafficking networks. In 1923, drug trade was prohibited for the first time.<sup>28</sup> Mexico's post-revolutionary government was keen on international recognition, particularly from the United States, which was advocating prohibition beyond its borders.<sup>29</sup> There was no evidence of serious health problems related to drug use at the time, yet public health protection was presented as the primary reason to adopt prohibition.<sup>30</sup> Absurdly, another core argument used then to support the adoption of prohibition was the purported association of drugs with the "degeneration of the race".<sup>31</sup>

The Federal Criminal Code of 1931 first introduced a blanket prohibition for certain substances in a chapter labeled "Crimes Against Health". Trade, production, possession, purchase, sale, supply, traffic, and cultivation of specific substances and plants were defined as crimes.<sup>32</sup> What existed prior to this blanket prohibition of substances was a series of specific bans on adulteration and trade. Again, prohibition was justified under the grotesque argument that drug use was "a vice that poisons and

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<sup>27</sup> Luis Astorga, *Drug Trafficking in Mexico: A First General Assessment*, (Mgmt. of Soc. Transformations (MOST) & UNESCO, Discussion Paper No. 36, 1999), <http://unesdoc.unesco.org/images/0011/001176/117644eo.pdf> [<https://perma.cc/7HDS-FFUC>].

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

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

<sup>31</sup> "Racial degeneration" is never explicitly defined in any congressional proceedings. The concept, however, is analyzed in Campos, where the idea is understood to be central in justifying prohibition in Mexico. According to him, "degeneration" had, since the late nineteenth century, been used as a scientific concept used in the West to refer to "an empirically demonstrable biological, medical or physically fact" and not just a philosophical problem. In Mexico, it had been used to establish a separation between pre-independence period and modernity. Implicitly, saying that drugs would cause "degeneration of the race" meant that people who use drugs would return to pre-colonial—i.e. indigenous—ways of life, away from the new Europeanized life of the cities. See Isaac Campos, *Degeneration and the Origins of Mexico's War on Drugs*, 26 MEXICAN STUD. 379 (2010).

<sup>32</sup> See Fernanda Alonso, *La historia de la política mexicana de drogas en el siglo XX* [*The history of Mexican drug policy in XX century*], in DROGAS, POLÍTICA Y SOCIEDAD EN AMÉRICA LATINA Y EL CARIBE [DRUGS, POLITICS AND SOCIETY IN LATIN AMERICA AND THE CARRIBEAN] (Beatriz Labate & Thiago Rodrigues eds., 2015).

deteriorates the individual and more generally, the species".<sup>33</sup> No scientific or empirical evidence was given at the time to support either that claim or the claim that there was a relevant drug-related health problem in Mexico.

During the Lázaro Cárdenas Administration (1934-1940), the Department of Public Health adopted a policy that briefly broke away from prohibition. Stating that people who use drugs should not be criminalized but treated as patients, the Cárdenas Administration published a federal "Drug Addiction Decree," which launched a program for state-controlled drug distribution and medical use. Under the Decree, users could be prescribed drugs that were banned by the Sanitary Code, including heroin, morphine, cocaine and cannabis. Both registered doctors and government-controlled dispensaries could prescribe these substances in a controlled manner and at a price lower than in that of the black market.<sup>34</sup> The Decree also provided funding for sustaining hospitals and dispensaries that lacked sufficient resources for users who needed treatment or care.

The policy, although short-lived, was seemingly successful; it drew an important number of users, especially in Mexico City, away from the black market and into the safer, state-sponsored distribution system.<sup>35</sup> In 1939, Mexico defended this policy at the XXIC Session of the Advisory Commission *on Traffic in Opium and Other Dangerous Drugs, in Geneva*. Government officials argued that the new regulation was backed by scientific studies which had been carried out by experts, both from the medical and legal perspective. The United States, however, criticized the proposal to further it, arguing that it would result in the uncontrollable increase of illicit traffic and smuggling of drugs to the United States. The United States government further pressured the

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<sup>33</sup> Código Penal Federal [CPF], Distrito Federal y Territorios Federales en materia de fuero común y para toda la República en materia de fuero federal [Federal District and Federal Territories in matters of common jurisdiction and for the entire Republic in matters of federal jurisdiction], art. 194, 1931 (Mex.), [http://www.diputados.gob.mx/LeyesBiblio/ref/cpf/CPF\\_orig\\_14ago31\\_ima.pdf](http://www.diputados.gob.mx/LeyesBiblio/ref/cpf/CPF_orig_14ago31_ima.pdf) [<https://perma.cc/Z5LV-76NY>].

<sup>34</sup> Reglamento Federal de Toxicomanías [Federal Regulation of Drug Addictions], Diario Oficial de la Federación [DOF] 17-02-1940 (Mex.), [http://dof.gob.mx/nota\\_to\\_imagen\\_fs.php?codnota=4510267&fecha=17/02/1940&cod\\_diario=191983](http://dof.gob.mx/nota_to_imagen_fs.php?codnota=4510267&fecha=17/02/1940&cod_diario=191983) [<https://perma.cc/24MD-HUH6>].

<sup>35</sup> See FROYLÁN ENCISO, NUESTRA HISTORIA NARCÓTICA: PASAJES PARA (RE)LEGALIZAR LAS DROGAS EN MÉXICO [OUR NARCOTICS HISTORY: PASSAGES TO (RE)LEGALIZING DRUGS IN MEXICO] (Debate 2015).

Cárdenas Administration by suspending pharmaceutical trade between the two countries. Under pressure from both the United States government and lobbyists from the United States' pharmaceutical companies, Mexico adopted a prohibitionist policy once again, backtracking from the innovative program just four months after it was launched.<sup>36</sup>

In 1947, prohibition was made stricter: higher penalties were adopted, under the argument that Mexico had to act "for the due fulfillment of its international obligations" and that in order to show its commitment "with the joint action of all the governments of the *civilized* countries" it had to "repress the use of drugs"<sup>37</sup> in reference to the Hague and Geneva Conventions of 1912, 1925, and 1933. Mexican legislators, however, recognized that in Mexico, "addiction had not been a serious problem in relation to policing, social or medical issues."<sup>38</sup> Other than compliance with international trends, the arguments for stricter penalties once again lacked evidence and deepened the discriminatory undertones that inspired the original ban. As in the 1920's, harsher laws were justified by using what

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<sup>36</sup> See ENCINAS, ALEJANDRO, *DROGAS Y PODER EL FRACASO DE LA POLÍTICA PROHIBICIONISTA* [DRUGS AND POWER THE FAILURE OF THE PROHIBITIONIST POLICY] 23–25 (2d ed. 2016.) (recounting how the United States encouraged countries around the world to adopt prohibitionist drug policies in response to growing drug use domestically); ENCISO, *supra* note 35.

<sup>37</sup> Exposición de motivos del proyecto de Decreto para que reforma y adiciona los artículos 193, 194 y 197 del Código Penal para el Distrito Federal y Territorios Federales en materia de Fuero Común y para toda la República en materia de Fuero Federal [Statement of reasons for the draft Decree to reform and add articles 193, 194 and 197 of the Criminal Code for the Federal District and Federal Territories in matters of common jurisdiction and for the entire Republic in matters of federal jurisdiction], *Diario de los Debates de la Cámara de Diputados* [Journal of Debates of the Chamber of Deputies] 30-09-1947 (Mex.), <http://cronica.diputados.gob.mx/DDebate/40/2do/Ord/19470930.html> [https://perma.cc/3DSA-XH2F].

<sup>38</sup> See Dictamen del proyecto de Decreto que reforma y adiciona los artículos 193, 194 y 197 del Código Penal para el Distrito Federal y los Territorios Federales en materia de Fuero Común y para toda la República en materia de Fuero Federal [Opinion of the draft Decree that reforms and adds articles 193, 194 and 197 of the Penal Code for the Federal District and the Federal Territories in matters of common jurisdiction and for the entire Republic in matters of federal jurisdiction], *Diario de los Debates de la Cámara de Diputados* [Journal of Debates of the Chamber of Deputies] 07-10-1947 (Mex.), <http://cronica.diputados.gob.mx/DDebate/40/2do/Ord/19471007.html> [https://perma.cc/CHY6-WTDJ] ("Hasta entonces, en nuestro país, no había surgido como un mal grave ni policiaco, ni social, ni médico el problema de los toxicómanos.") ["Until then, in our country, the problem of drug addicts had not arisen as serious, police-related, social, or medical evil."].

today would be considered ridiculous and unacceptable arguments such as the alleged impact drugs have on sexual preference:

From the sexual point of view, the tendency of the species is the reproduction of the individuals, and it is in this aspect where, fundamentally, greater degradations are observed in the drug addicts. It seems that morphinomania produces a setback in sexual maturity, at the initial stages of its development, such as 'narcissism' and homosexuality . . . And not only that, but drug addiction often discovers in the addicted individual homosexual tendencies that naturally prevent the development of the species.<sup>39</sup>

Today, under the binding Constitutional text and interpretation, the arguments used for the establishment and enhancement of prohibition would not stand constitutional scrutiny and would certainly be deemed as a violation of the right to equality and the principle of non-discrimination.<sup>40</sup> Fortunately, the racist and homophobic arguments that were deployed as the key support for prohibition during the first half of the century are no longer admissible. Nevertheless, the "crimes against health" chapter of the Federal Criminal Code remains in force, albeit with no new arguments to support it.

## 2.2. *Prohibition in the post-Single Convention 1961 era*

Since 1947, the criminal thrust of the ban on drugs has remained fundamentally unaltered. However, two tendencies dominated reforms to the legal regime throughout the second half of the 20<sup>th</sup>

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<sup>39</sup> *Id.*

<sup>40</sup> The non-discrimination clause was included within the Mexican Constitution, in the reform of August 14, 2001, when a paragraph was added, to Article 1, where it was noted: "Queda prohibida toda discriminación motivada por origen étnico o nacional, el género, la edad, las discapacidades, la condición social, las condiciones de salud, la religión, las opiniones, las preferencias sexuales, el estado civil o cualquier otra que atente contra la dignidad humana y tenga por objeto anular o menoscabar los derechos y libertades de las personas." ["Any discrimination motivated by ethnic or national origin, gender, age, disabilities, social condition, health conditions, religion, opinions, sexual preferences, civil status or any other that attempts against human dignity and aims to annul or undermine the rights and freedoms of individuals is prohibited."] See Constitución Política de los Estados Unidos Mexicanos [CPEUM], art. 1, Diario Oficial de la Federación [DOF] 05-02-1917, últimas reformas DOF 27-01-2016 (Mex.), <http://www.sct.gob.mx/JURE/doc/cpeum.pdf> [<https://perma.cc/2N9A-RLJR>].

century: an increase in sanctions for drug related conducts and the addition of new substances--such as MDMA and LSD--to the list of illegal substances.<sup>41</sup> In 1967, penalties increased in deference to the recently entrenched international consensus on drug use: "due to its international projection, internal repercussion, extreme gravity and nature which is an assault on the physical and moral integrity of man."<sup>42</sup> In 1974, possession for personal use was decriminalized for people who "have a habit or need to consume" as long as the amount of possession was "strictly necessary" for personal use.<sup>43</sup> For "non-addicts" (a legal term) sanctions were lowered to a minimum of six months and maximum of three years prison sentence.<sup>44</sup> However, for all other drug offenses, sanctions were increased, suggesting that "the tragic increase in the illegal use of narcotics and psychotropic drugs, mainly in the last decade" warranted a harsher response from the State.<sup>45</sup> Again, no evidence was given to support this.

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<sup>41</sup> 3, 4-Methylenedioxyamphetamine (MDMA), commonly known as ecstasy (E) is a psychoactive drug primarily used as a recreational drug, whose effects include altered sensations and increased energy, empathy and pleasure. Lysergic acid diethylamide (LSD), also known as acid, is a hallucinogenic drug, whose effects typically include altered thoughts, feelings, and awareness of one's surroundings.

<sup>42</sup> Exposición de motivos del proyecto de Decreto que reforma disposiciones del Código Penal para el Distrito Federal y Territorios Federales en materia de Fuero Común y para toda la República en materia de Fuero Federal [Statement of reasons for the draft Decree to reform and add articles 193, 194 and 197 of the Criminal Code for the Federal District and Federal Territories in matters of common jurisdiction and for the entire Republic in matters of federal jurisdiction], *Diario de los Debates de la Cámara de Diputados*, 28 de noviembre de 1967 (Mex.), <http://cronica.diputados.gob.mx/DDebates/47/1er/Ord/19671128.html> [<https://perma.cc/TJB8-F3V2>].

<sup>43</sup> Código Penal Federal [CPF], art. 198, *Diario Oficial de la Federación* [DOF] 31-12-1974 (Mex.), [http://www.diputados.gob.mx/LeyesBiblio/ref/cpf/CPF\\_ref34\\_31dic74\\_ima.pdf](http://www.diputados.gob.mx/LeyesBiblio/ref/cpf/CPF_ref34_31dic74_ima.pdf) [<https://perma.cc/FG63-3WA9>].

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

<sup>45</sup> Exposición de motivos del proyecto de reforma que incluye disposiciones del Código Penal para el Distrito Federal y Territorios Federales en Materia de Fuero Común y para toda la República en materia de Fuero Federal, Código Federal de Procedimientos Penales y el Código Sanitario de los Estados Unidos Mexicanos, en Relación con Estupefacientes y Psicotrópicos [Statement of reasons for the draft Decree to reform and add articles 193, 194 and 197 of the Criminal Code for the Federal District and Federal Territories in matters of common jurisdiction and for the entire Republic in matters of federal jurisdiction, Federal Code of Criminal Procedures and the Sanitary Code of the United Mexican States, in relation to narcotic and psychotropic drugs], *Diario de los Debates de la Cámara de Diputados*, 06-12-1974 (Mex.), <http://legislacion.scjn.gob.mx/Buscador/Paginas/wfProcesoLegislativoCompleto>

In 1983, the Mexican Constitution was amended to include the right to health. To justify this landmark step, the supermajority of Congress defined health as a broad concept that encompassed the provision of health care services, disease prevention, rehabilitation, technology and *regulation of products for human consumption*, including drugs (“food, beverages and medicines, narcotics and psychotropics”).<sup>46</sup> The 1983 constitutional amendment should have been of great significance for drug policy, as it put health policy and health-oriented regulation at the forefront of state priorities. Yet when drug crimes—catalogued as “crimes against health” in the Federal Criminal Code—were revised two years later, there was no significant revision of prohibition, but instead the adoption of harsher punishments. In 1985, sanctions were again increased, stating that drug trafficking should be “considered a crime against humanity which transcends borders and satisfies petty and selfish interests, endangering the physical and moral health of all the inhabitants of the planet; which is why, as far as Mexico is concerned, we must promote programs aimed at eradicating these evils, in all their aspects.”<sup>47</sup>

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w.aspx?q=BHGcbWrG7ukiUiW/WEuu/r7I8GQqjgVu6ZuRSZ5azXHCZOKkdc9PP9Y+ETNIPCoonBT5TPMyfoyhK+OoV+r+og== [https://perma.cc/AFC7-8X9W].

<sup>46</sup> Alejandro Madrazo & Fernanda Alonso, *El derecho a la salud en el sistema constitucional mexicano* [*The Right To Health in the Mexican Constitutional System*] (Legal Studies Department (DEJ) CIDE, Working Paper No. 62, 2013), <http://www.libreriacide.com/librospdf/DTEJ-62.pdf> [https://perma.cc/5BWM-RYV6]. During parliamentary debates leading to the constitutional amendment, the concept of health was discussed. When exploring the “rich and vast” health legislation that had been produced at the time, the constitutional initiative refers matters such as “the prevention of disabilities; the rehabilitation of people with disabilities, the supplying of organs, tissues and corpses; food, beverage and medicine control; narcotics and psychotropic drugs control; protection of the health of children and the elderly; improvement and care of the environment.” Later on, the initiative also mentions “drug quality control systems” and “preventive medicine and education for health” and links these with “mass communication.”

<sup>47</sup> Dictamen del proyecto de Decreto que reforma disposiciones del Código Penal para el Distrito Federal y Territorios Federales en Materia de Fuero Común y para toda la República en materia de Fuero Federal [Dictation of the draft Decree that reforms provisions of the Criminal Code for the Federal District and Federal Territories in matters of common jurisdiction and for the entire Republic in matters of federal jurisdiction], *Diario de los Debates de la Cámara de Diputados*, 09-12-1985 (Mex.), <http://legislacion.scjn.gob.mx/Buscador/Paginas/wfProcesoLegislativoCompleto.aspx?q=BHGcbWrG7ukiUiW/WEuu/r7I8GQqjgVu6ZuRSZ5azXGhOIa3/ENfPEN3iy1Ok4z8Z5p6GoyQkxbunCXJrQYbxg==> [https://perma.cc/AKZ3-7ZPM].

The history of prohibition throughout the 20<sup>th</sup> century reveals that even though drug legislation discursively aimed to protect health, it was actually grounded in prejudice and discrimination, not evidence. Furthermore, prohibition as a legal regime did not reflect the constitutional inclusion of health as a fundamental right. The few changes that reflect the introduction of a health-centered approach were overwhelmed by increasingly punitive measures. Like other fundamental rights, such as the right to a healthy environment (clearly damaged by chemical eradication of crops), the right to health has been sidelined by drug policymakers and enforcers, in favor of violent, repressive responses which still constitute the core of drug policy.

Changes in the *enforcement* of prohibition at the end of the 20<sup>th</sup> century are also key to understanding Mexican drug policy. Mexico acquired heightened importance as a trafficking route for Andean cocaine into the United States as the Caribbean Sea became increasingly patrolled in the 1980s and 1990s.<sup>48</sup> Under changing circumstances, trafficking organizations eventually developed the capacity and need to recruit and train small private armies to protect their interests. Eventually, organized crime organizations began recruiting state officials, particularly personnel assigned to prosecutorial tasks at the Attorney General's office and highly trained members of the military.<sup>49</sup> Criminal organizations that set up such militias used them to protect their routes, but also to expand their operations in detriment of their competitors. Thus, by the beginning of the 21<sup>st</sup> century, regional pockets of violence appeared in contested territories.<sup>50</sup>

As revenues from illicit activities increased, violence and other forms of criminality also increased, generating a sense of urgency

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<sup>48</sup> CARMEN BOULLOSA & MIKE WALLACE, *A NARCO HISTORY: HOW THE UNITED STATES AND MEXICO JOINTLY CREATED THE MEXICAN DRUG WAR* Ch. 4-6 (Counterpoint Press, 2015).

<sup>49</sup> See generally Richard Snyder and Angélica Durán Martínez, *Does Illegality Breed Violence? Drug Trafficking and State-Sponsored Protection Rackets*, 52 *CRIME L. AND SOC. CHANGE* 253, 262-267 (2009) (analyzing the emergence and breakdown of state-sponsored protection rackets in Mexico and Burma); Guillermo Trejo and Sandra Ley, *Why Did Drug Cartels go to War in Mexico? Subnational Alternations, The Breakdown of Criminal Protection, and the Onset of Large-Scale Violence*, 51 *COMP. POL. STUD.* 900 (2017) (showing that the removal of top- and midlevel officials within Mexico's state attorney's office and judicial police, incoming governors unknowingly triggered the outbreak of intercartel wars). RICARDO RAPHAEL, *HUJO DE LA GUERRA [SON OF WAR]* (Seix Barral Biblioteca Breve, 2019), *passim*.

<sup>50</sup> Snyder and Durán Martínez, *supra* note 49, at 267; Trejo and Ley, *supra* note 49.

for the government to take further action to contain what was perceived as a rising wave of insecurity. Rather than revisit the punitive strategy in light of its poor results and the changing context, the federal government's reaction consisted of deepening the enforcement of prohibition to an unprecedented extent. The decision, which took place in late 2006, enhanced the enforcement of prohibition to the extreme of using military forces to substitute police in broad portions of the territory.<sup>51</sup> In retrospect, it is clear that the deepening of the war on drugs that started almost twelve years ago has been associated with the unprecedented escalation of violence suffered by the country. In itself, this escalation has become a major public health problem in Mexico and has undermined the overall capacities of the federal and local governments.<sup>52</sup>

### 2.3. Deepening enforcement of prohibition (2006–2018)

Starting in late 2006, Mexico's drug policy has moved actively into both more militarization and further centralization, with rather poor and even perverse results, incurring in serious violations of the Constitution.

Enhanced militarization started in late 2006 when the federal government's security cabinet announced the first "joint operation" with a state government to fight organized crime. The Minister of Interior stated in a press conference:

[W]e inform Mexicans of the launch of the *Michoacan Joint Operation*, with the deployment of more than 5,000 soldiers for this operation, activities such as eradication of illegal crops, the establishment of checkpoints to stop narcotic

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<sup>51</sup> Laura H. Atuesta, *Capítulo IV: Militarización de la lucha contra el narcotráfico: los operativos militares como estrategia para el combate al crimen organizado* [Chapter IV: Militarization of the fight against drug trafficking: military operations as a strategy against organized crime], in *LAS VIOLENCIAS: EN BUSCA DE LA POLÍTICA PÚBLICA DETRÁS DE LA GUERRA CONTRA LAS DROGAS* [THE VIOLENCE: IN SEARCH OF PUBLIC POLICY BEHIND THE WAR ON DRUGS] (Laura H. Atuesta & Alejandro Madrazo eds., 2018).

<sup>52</sup> See, e.g., Oliver D. Meza, *La Retracción del Estado: Cómo la Violencia Afecta la Capacidad de Gobernar de los Municipios en México* (Cuadernos de Trabajos del Programa de Política de Drogas del Centro de Investigación y Docencia Económicas, Cuaderno de Trabajo No. 17, 2016) [*The Retraction of the State: How Violence Affects the Capacity of Municipalities in Mexico*] (Working Papers of the Drug Policy Program of the Economic Research and Teaching Center, Working Paper No. 17, 2016)] (supporting that violence is a major public health problem in Mexico affecting the capacities of the local governments).



trafficking on highways and secondary roads, the fulfillment of search and arrest warrants, as well as locating and dismantling points of drug sale will be carried out.<sup>53</sup>

On January 4, 2007, the federal government sent another 3,500 soldiers to Tijuana, a city less than an hour away from San Diego, California.<sup>54</sup> On January 21, 2007, additional operations were announced in Guerrero, Chihuahua, Durango, and Sinaloa.<sup>55</sup> The operation in Guerrero initially included the participation of 6,388 soldiers,<sup>56</sup> and the Sierra Madre Joint Operation (Chihuahua, Durango, and Sinaloa) 9,054 soldiers.<sup>57</sup> Between 2006 and 2011, the number of soldiers deployed across the country grew by 70 percent, reaching 52,690.<sup>58</sup> According to the Ministry of Defense, in 2016 there was an average of 52,000 soldiers deployed daily across the country, a number that does not include other federal forces such as the Marines or Federal Police.<sup>59</sup>

As different studies have shown, the 2006 decision to further militarize the war on drugs proved to be costly in human lives, rule of law, crime control, and institutional capacity. State violence, especially in contexts of low institutional capacity and corruption, leads to further violence from criminal organizations that confront the State's power by increasing their capacity to deploy violence.<sup>60</sup> The number of shoot-outs points to this fact. In 2007, the military

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<sup>53</sup> *Id.* [Translation by the authors].

<sup>54</sup> Atuesta, *supra* note 51.

<sup>55</sup> *Mensaje de Gabinete de Seguridad del Gobierno Federal [Message from the Security Cabinet of the Federal Government]*, PRESIDENCIA DE LA REPÚBLICA, (Jan. 21, 2007).

<sup>56</sup> Atuesta, *supra* note 51.

<sup>57</sup> Atuesta, *supra* note 51.

<sup>58</sup> Carlos Silva Forné et al., *Índice de letalidad 2008–2014: menos enfrentamientos, misma letalidad, más opacidad [Lethality index 2008–2014: less shooting, same lethality, more opacity]*, 25 PERFILES LATINOAMERICANOS 331 (2017), [http://www.scielo.org.mx/scielo.php?script=sci\\_arttext&pid=S0188-76532017000200331&lng=en&tlng=en](http://www.scielo.org.mx/scielo.php?script=sci_arttext&pid=S0188-76532017000200331&lng=en&tlng=en) [<https://perma.cc/Z4UR-EHBS>].

<sup>59</sup> CENTRO DE DERECHOS HUMANOS MIGUEL AGUSTÍN PRO JUÁREZ A.C., *PERPETUAR EL FALLIDO MODELO DE SEGURIDAD [PERPETUATING THE FAILED SECURITY MODEL]* 33 (2d ed. 2018), <https://centroprodh.org.mx/wp-content/uploads/2018/01/InformeSeguridad.pdf> [<https://perma.cc/2QX2-SRWK>].

<sup>60</sup> *See generally* BENJAMIN LESSING, *MAKING PEACE IN DRUG WAR: CRACKDOWNS AND CARTELS IN LATIN AMERICA* (2017) (arguing that aggressive crackdowns of drug cartels in Latin America provide an incentive for cartels to retaliate, whereas policies which encourage repression of cartel violence reduce the conflict between the cartels and the state). *See also* Atuesta, *supra* note 51; Zedillo, *supra* note 6.

reported 48 shoot-outs; by 2011 they reported 1009.<sup>61</sup> By 2015 the number was reduced substantially to 171, yet it remained much higher than at the onset of the war on drugs.<sup>62</sup> The Federal Police also reports a tremendous increase in shoot-outs. In 2007 it reported 3; by 2012 it had increased to 143 and fell to a still very large 96 in 2015.<sup>63</sup>

The enforcement of drug laws using the military has had a negative effect both on police and military capacity.<sup>64</sup> The growing use of the military is reflected in the increase in “mixed operation bases,” permanent infrastructure from which federal forces carry out public security tasks.<sup>65</sup> In 2012, the National Defense Ministry (SEDENA) reported 75 such facilities; by 2016, there were 142 bases in 24 of Mexico’s 32 states.<sup>66</sup> Thus, what at first was presented as a temporary measure—the use of the military forces to control drug cartels—is now a permanent feature of everyday life in large portions of Mexican territory.

Further militarization of the war on drugs also had major repercussions on the way these institutions work. Some studies suggest an increase over time in the use of lethal force, and a growing use of illegal practices like torture, due process violations and even the occurrence of extrajudicial killings.<sup>67</sup> Another study suggests that torture and mistreatment grew significantly after 2006.<sup>68</sup> Using information from the only existing federal prison

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<sup>61</sup> Forné, *supra* note 58, at 339, graph 1.

<sup>62</sup> Catalina Pérez Correa et al., *Deadly Forces: Use of Lethal Force by Mexican Security Forces 2007–2015*, in *MEXICO’S HUMAN RIGHTS CRISIS* 33 (B. Frey & A. Anaya-Múñoz eds., 2019).

<sup>63</sup> See CENTRO DE DERECHOS HUMANOS MIGUEL AGUSTÍN PRO JUÁREZ A.C., *supra* note 59, at 133.

<sup>64</sup> See CENTRO DE DERECHOS HUMANOS MIGUEL AGUSTÍN PRO JUÁREZ A.C., *supra* note 59, at 133.

<sup>65</sup> See CENTRO DE DERECHOS HUMANOS MIGUEL AGUSTÍN PRO JUÁREZ A.C., *supra* note 59, at 31.

<sup>66</sup> See CENTRO DE DERECHOS HUMANOS MIGUEL AGUSTÍN PRO JUÁREZ A.C., *supra* note 59, at 31.

<sup>67</sup> On average, between 2007 and 2014, the Federal Police killed 4.8 civilians for every civilian they wounded in a shoot-out. The Army killed, during that same period, an average of 7.9 civilians for every civilian wounded in shoot-outs. The evolution of the use of lethal force is also worrisome. For instance, in 2007 the Army averaged 1.6 civilians killed for every civilian wounded in a shoot-out. By 2012 that number had risen to 14.7. See Pérez Correa et al., *supra* note 62.

<sup>68</sup> See Beatriz Magaloni et al., *La tortura como método de investigación criminal: El impacto de la guerra contra las drogas en México* [Torture as a method of criminal investigation: The impact of the war on drugs in Mexico], 25 *POLÍTICA Y GOBIERNO* 223 (2018).

population survey, that study shows that mistreatment and violence perpetrated against detainees increased significantly after December of 2006.<sup>69</sup> When observing specific types of rights violations and institutional involvement, disaggregated by type of crime, the data shows a general increase in alleged torture and other forms of human rights violations during detention, especially against people detained for drug crimes.<sup>70</sup> Further, a Lancet Commission report published in 2016 found a significant rise in torture since 2006, estimating that it became 1.57 times more likely for a detainee to be subjected to torture or abuse during detention for a drug related crime after December 2006 than prior to that time.<sup>71</sup>

Through prohibition, the Mexican State unintentionally created a black market where criminal organizations have thrived and prospered enormously. The State has responded to the existence of the black market of its own creation and its violent participants by deploying the most lethal response possible, contributing to an unprecedented escalation of violence. Today, violence has in itself become a major public health problem in Mexico and a factor for the undermining of the overall capacities of federal and local governments.<sup>72</sup>

In 2009, the Petty Dealing Law<sup>73</sup> transferred responsibility for prosecuting small-scale drug dealing and treatment of people who use drugs to Mexico's 32 states. One of the main objectives of that law was to free federal resources so these could focus on the most relevant drug crimes (such as large-scale trafficking, financing operations, etc.). Data shows that after reaching its peak in 2007, the federal government steadily reduced the number detentions and prosecutions for drug crimes. According to the General Attorney's Office (PGR), while in 2007 there were more than 80,000 federal arrests for drug crimes, in 2014 there were less than 14,000.<sup>74</sup>

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<sup>69</sup> *Id.* at 238

<sup>70</sup> *Id.* at 256.

<sup>71</sup> Joanne Csete et al., *Public health and international drug policy*, 387 THE LANCET 1427, 1434 (2016).

<sup>72</sup> Meza, *supra* note 52.

<sup>73</sup> The Petty Dealing Law, known in Spanish as the Ley de Narcomenudeo, was a series of reforms to different articles of the General Health Law and the Criminal Code.

<sup>74</sup> Information request to Office of the General Prosecutor (PGR), No. 0001700072215, <http://www.infomex.org.mx/gobiernofederal/moduloPublico/rMedioElectP.action?idFolioSol=0001700072215> [<https://perma.cc/R7U7-QQTQ>].

However, the reform was not as successful in making federal institutions focus on the most important drug cases. Although possession and use had been transferred to state jurisdictions beginning in 2009, they remained the main cause of federal arrests, constituting 56 percent of federal detentions in 2014.<sup>75</sup> At the same time, State authorities drastically increased arrests for drug crimes. In 2011 official data reported 16,680 drug crimes as the cause for individuals kept in state prisons; by 2015 that number had risen to 30,614, an increase of 83 percent in 4 years.<sup>76</sup>

While the Petty Dealing Law was meant to be a decentralizing one, ironically it has brought about an important encroachment of states' powers by the federal government. State authorities are responsible for prosecuting minor federal drug crimes. This means that federal legislators in fact dictate key state criminal policy decisions. Since the mid-nineteenth century and up until 2009, state criminal policy was strictly the domain of state legislatures. By demanding that states persecute federal drug crimes, Congress forces local state authorities to allocate a substantial part of their human and institutional resources to persecuting (federal) drug crimes, regardless of local needs and context. This represents a centralization of criminal policy decisions and a weakening of local autonomy unprecedented since the nineteenth century, when federalism was adopted in Mexico as a guiding principle of government. This form of encroachment in state criminal policy has since expanded to other areas beyond drug crimes (such as kidnapping, crimes related to reproductive health, and other issues). Today, local jurisdictions are impeded by law to reform drug laws and are thus very limited when they attempt to adopt an approach to drug-related issues that responds to local needs.<sup>77</sup> Attempts by state governments to adapt their criminal policy according to local

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<sup>75</sup> *Id.*

<sup>76</sup> The National Institute of Statistics and Geography (INEGI) reports crimes sanctioned not people imprisoned. See INEGI, CENSO NACIONAL DE PROCURACIÓN DE JUSTICIA ESTATAL 2015 [NATIONAL CENSUS OF STATE PROSECUTOR'S OFFICE 2015], <http://www.beta.inegi.org.mx/proyectos/censosgobierno/estatal/cnpje/2015/> [<https://perma.cc/R7U7-QQTQ>].

<sup>77</sup> For instance, this summer the Guerrero's state congress voted to allow for legal cultivation and production of opioids for medical use. The vote, however, does not become law, but rather simply initiates a legislative procedure before federal Congress. See *El Estado Mexicano de Guerrero abre el debate sobre la legalización de la amapola* [The Mexican State of Guerrero opens the debate on the legalization of the poppy], EL PAÍS (Aug. 18, 2018), [https://elpais.com/internacional/2018/08/18/mexico/1534623073\\_429355.html](https://elpais.com/internacional/2018/08/18/mexico/1534623073_429355.html) [<https://perma.cc/L64N-ZYJ4>].

needs under the new law have been successfully challenged by the federal government.<sup>78</sup>

#### 2.4. Medical marijuana

Mexico is sometimes perceived internationally as having a progressive position on marijuana, particularly after being one of the three countries calling for the UNGASS (2016) to revise the international treaty system stemming from the 1961 Convention. While some steps towards drug policy reform have taken place in Mexico, in practice they have not yet limited prohibition at all. Openness has been more discursive and symbolic than coherent and effective.

A few months before UNGASS 2016 and after an important Supreme Court ruling that declared prohibition of cannabis for recreational use unconstitutional,<sup>79</sup> two national dialogues on cannabis were called upon by the Federal Executive and by Congress. From that process, legal reform of health and criminal laws was approved in 2017,<sup>80</sup> allowing for the production and commercialization of cannabis for medical purposes. The reform fell short of expectations, as it failed to address the Court's ruling regarding recreational use of cannabis.<sup>81</sup> Furthermore, after the bill's approval more than a year ago, the government has failed to publish minimal regulations in order for licensing to begin. The Federal Administration's original proposal limited legalization to

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<sup>78</sup> See, e.g., Acción de Inconstitucionalidad 33/2010, Pleno de la Suprema Corte de Justicia de la Nación [SCJN], 30 de junio de 2011 (Mex.), <http://www2.scjn.gob.mx/ConsultaTematica/PaginasPub/DetallePub.aspx?AsuntoID=122648> [<https://perma.cc/U4YX-U4L3>]; Acción de Inconstitucionalidad 21/2010, Pleno de la SCJN, 28 de junio de 2011 (Mex.), <http://www2.scjn.gob.mx/ConsultaTematica/PaginasPub/DetallePub.aspx?AsuntoID=120845> [<https://perma.cc/6UZG-9KQX>].

<sup>79</sup> Amparo Indirecto 237/2014, Primera sala de la SCJN, 4 de noviembre de 2015 (Mex.), [https://www.sitios.scjn.gob.mx/encuentro\\_universitario/assets/ar-237-2014-marihuana.pdf](https://www.sitios.scjn.gob.mx/encuentro_universitario/assets/ar-237-2014-marihuana.pdf) [<https://perma.cc/RP8T-NB68>].

<sup>80</sup> Decreto por el que se reforman y adicionan diversas disposiciones de la Ley General de Salud y Código Penal Federal [Decree by which various provisions of the General Health Law and Federal Criminal Code are amended and added], DOF 19-06-2017 (Mex.), [http://dof.gob.mx/nota\\_detalle.php?codigo=5487335&fecha=19/06/2017](http://dof.gob.mx/nota_detalle.php?codigo=5487335&fecha=19/06/2017) [<https://perma.cc/UFM6-FFQ9>].

<sup>81</sup> *Id.*

the sale of imported medical cannabis products.<sup>82</sup> Congress, in contrast, approved national production and established a time limit for the Executive to publish the bylaws regulating the licensing process for medical cannabis. Both production and importation are currently stalled, as the Executive refuses to publish the required bylaws, even though the end of the grace period established by Congress is long overdue. Consequently, in practice, even medical cannabis remains illegal in Mexico.

The most significant steps towards changing drug policy have come from the Supreme Court. In 2015, a first historic ruling held that the administrative ban on marijuana use for recreational purposes was unconstitutional, because it disproportionately restricted the fundamental right to freely develop one's personality.<sup>83</sup> Four more rulings holding that a blanket prohibition of cannabis is unconstitutional have since followed,<sup>84</sup> making the courts decision a binding criterion for all lower tribunals to follow.<sup>85</sup> However, not only does the law require five consecutive rulings for the Supreme Court, a separate super-majoritarian vote by the Court is needed to strike down any law (otherwise the rulings only protect the plaintiffs and the law remains in force).<sup>86</sup> The Court has already formally notified Congress of the unconstitutionality of cannabis prohibition, but Congress is still discussing initiatives for reform

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<sup>82</sup> *Id.*

<sup>83</sup> Amparo Indirecto 237/2014, *supra* note 79. The ruling, commonly known as SMART, can be found here: <http://www.smartclub.mx/uploads/8/7/2/7/8727772/doc.pdf> [<https://perma.cc/RP8T-NB68>].

<sup>84</sup> Amparo Indirecto 637/2017, Primera sala de la SCJN, 16 de mayo de 2018 (Mex.), [https://www.scjn.gob.mx/sites/default/files/listas/documento\\_dos/2018-04/AR-623-2017-180430.pdf](https://www.scjn.gob.mx/sites/default/files/listas/documento_dos/2018-04/AR-623-2017-180430.pdf) [<https://perma.cc/RP8T-NB68>]; Amparo Indirecto 1115/2017, Primera sala de la SCJN, 11 de marzo de 2018 (Mex.), [https://www.scjn.gob.mx/sites/default/files/listas/documento\\_dos/2018-03/AR-1115-17-180316.pdf](https://www.scjn.gob.mx/sites/default/files/listas/documento_dos/2018-03/AR-1115-17-180316.pdf) [<https://perma.cc/2MJ3-9Y9G>]; Amparo Indirecto 1163/2017, Segunda sala de la SCJN, 12 de julio de 2017 (Mex.), [https://www.scjn.gob.mx/sites/default/files/listas/documento\\_dos/2018-06/AR-1163-2017.pdf](https://www.scjn.gob.mx/sites/default/files/listas/documento_dos/2018-06/AR-1163-2017.pdf) [<https://perma.cc/B6HL-YKZ2>].

<sup>85</sup> *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], BOLETÍN OFICIAL [OFFICIAL BULLETIN] No. 140/180, 31 de octubre de 2018 (Mex.), <http://www.internet2.scjn.gob.mx/red2/comunicados/noticia.asp?id=5785> [<https://perma.cc/9J67-LUWU>].

<sup>86</sup> CPEUM, *supra* note 40, at art. 107, II, para. 3

(which are expected to pass before April 2020).<sup>87</sup> If Congress does not act soon, the Court will make a general declaration which will strike marijuana prohibition from the law.

Legalizing the possession and use as well as regulating the supply of cannabis is not only a policy imperative in Mexico today, it is also a constitutional one, but Mexico's rather cumbersome constitutional justice system has so far failed to make it a reality.

### 3. PROHIBITION, VIOLENCE AND PEOPLE WHO USE DRUGS

Prohibition and its purported enforcement have had devastating effects in Mexico. As a policy, drug prohibition has failed to protect public and individual health and undermined State institutions. The decision of the Mexican government to deepen the enforcement of prohibition and persecute organized criminal organizations, using the most violent tools at hand, rather than undermining its access to enormous economic resources, has driven violence to unprecedented levels, affecting individual lives and communities deeply.

This section reviews some of the most negative consequences of current policies, specifying how current laws and the application of policies explain them. It shows how homicidal violence since the outset of the war on drugs has risen to the point of becoming a public health problem, as well as causing the displacement and disappearance of thousands of people. It then explains how, although current laws and policies purportedly aim to protect the health of both potential users and people who use drugs, they in fact negatively affect the rights of both these groups.

#### *3.1. The epidemic of violence. Violence as a harm to public health: homicides, internally displaced populations and disappearances*

In Mexico, prohibition has led to an unprecedented human tragedy as shown by the massive numbers of people killed, displaced or disappeared. Sadly, the government's wrongheaded

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<sup>87</sup> Silvia Arellano, *Corte da prórroga a Senado para regular marihuana*, MILENIO DIARIO (Nov. 2, 2019), <https://www.milenio.com/politica/marihuana-corte-prorroga-senado-regular> [<https://perma.cc/8L62-RU7A>].

drug policy seems to be at the root of the current Mexican security and justice crisis.

Between 2006 and 2017, 254,633 homicides occurred in the country.<sup>88</sup> In 2006 the National Institute of Statistics (INEGI) reported 10,452 homicides.<sup>89</sup> By 2011, it reached an annual peak of 27,213 and then waned slightly during the following years with 24,559 homicides reported in 2016.<sup>90</sup> But the trend has accelerated upward again in 2017 when, according to the latest reports, the figure reached over 31,000 homicides.<sup>91</sup> For more than two decades Mexico had enjoyed a sustained and prolonged drop in homicide rates, reaching a historic low with 8 homicides per 100,000 inhabitants in 2007.<sup>92</sup> As the bulk of federal forces were deployed to enforce prohibition that trend, however, was abruptly ended and homicide rates rapidly started to increase—by 50 percent in 2008 and by the same percentage again in 2009, when that rate reached 20 homicides per 100,000 inhabitants (a different estimate placed homicide rates at 24 per 100,000 in 2009).<sup>93</sup>

In several studies, the government's *operativos conjuntos*—the core of Mexico's strategy against organized crime involving drug trafficking—have been causally linked to the rise in homicides.<sup>94</sup>

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<sup>88</sup> INEGI, MORTALIDAD, CONJUNTO DE DATOS: DEFUNCIONES POR HOMICIDIOS, INFORMACIÓN DE 1990 A 2018 [MORTALITY, DATA SET: HOMICIDES, INFORMATION FROM 1990 TO 2018] (2019), <http://www.inegi.org.mx/sistemas/olap/proyectos/bd/continuas/mortalidad/defuncioneshom.asp?s=est> [<https://perma.cc/SD8C-V626>].

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> While most of these deaths were men, homicide rates for women have risen at a similar pace, with 1,298 deaths in 2006 and a peak of 3,324 in 2017. *See id.*

<sup>92</sup> Fernando Escalante, *Homicidios 2008-2009. La muerte tiene permiso* [Homicide 2008-2009. *Death has permission*], NEXOS (Jan. 1, 2011), <https://www.nexos.com.mx/?p=14089> [<https://perma.cc/M4NE-BKAS>].

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

<sup>94</sup> Several studies have established some type of causality between the security strategy implemented by the 2006-2012 administration and the increase in violence observed in the country since 2008. *See, e.g.,* Atuesta, *supra* note 51; Laura Atuesta & Aldo Ponce, *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) (linking the dramatic increase in homicide rates in 2006 to the start of President Calderon's campaign against drug cartels); Valeria Espinosa & Donald B. Rubin, *Did the Military Interventions in the Mexican Drug War Increase Violence?*, 69 AM. STATISTICIAN 17, 24 (2015) (claiming military intervention in the drug war caused in increase in



The mechanisms through which this happens are still unclear, but existing data highlights two main findings: First, a rise in homicide rates takes place in localities where *operativos conjuntos* against organized crime have been deployed. Second, that increase is more pronounced when military forces are involved (as opposed to federal civil forces like the Federal Police).<sup>95</sup>

The increase in homicides has been so pronounced that it has had a direct negative impact on life expectancy: for the first time in over six decades, life expectancy dropped in Mexico. Though the national drop was only 0.6 percent between 2005 and 2010, certain regions most affected by the war on drugs showed a higher decrease.<sup>96</sup> In Chihuahua, Sinaloa, and Durango life expectancy decreased by three years over the same period.<sup>97</sup> This drop in life expectancy occurred at a time when there were substantial positive changes in other health indicators and causes of death in the country. This means that the possible positive effects of inclusive health policies and their improvements have been exceeded and overwhelmed by the negative health impact of the violence caused by the attempts to enforce the ill-conceived drug policy.

Moreover, violence permeates the population and creates numerous health problems: somatic, psychological and behavioral. Homicides are not the sole negative impact of drug-war-driven violence on public health. Violence begets violence: young people

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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> [<https://perma.cc/2TRJ-ZEW7>] (using statistical tools to argue that the strong correlation between government intervention and violence is causal).

<sup>95</sup> On average, during the first five years of the drug war, each shoot-out between authorities and organized criminals produced a 6 percent rise in the homicide rate in that locality within three months. The compound increase is staggering in localities with tens or even hundreds of such exchanges. Where the armed forces are used, the average increase is by 8 percent, but when the Army is used, the increase is of 9 percent. See Atuesta, *supra* note 51, at 24–26.

<sup>96</sup> José Manuel Aburto et al., *Homicides in Mexico Reversed Life Expectancy Gains for Men and Slowed Them for Women, 2000–10*, 35 HEALTH AFF. 88, 88 (2016).

<sup>97</sup> *Id.* at 90–91.

who are victims of violence are at higher risk of perpetrating violence with fire-arms themselves.<sup>98</sup> Also, being a victim of violence raises the risk of depression, alcohol abuse, suicidal behavior, and psychological problems, among other negative consequences on health.<sup>99</sup> For instance, exposure to the recent escalation of violence in Mexico is associated with lower weight at birth of children born to women of scarce economic resources and children born to women with mental health problems.<sup>100</sup> Merely witnessing violence may affect the health of the exposed population by increasing the rates of Post-Traumatic Stress Disorder and depression.<sup>101</sup> A 2015 study analyzed not only the mortality rates in Mexico, but also the psychological wellbeing of those affected by violence.<sup>102</sup> In this study, researchers measured the fear and perceived vulnerability (feeling unsafe) in the population.<sup>103</sup> The findings show that between 2005 and 2014 the average number of years that individuals live feeling at risk from violence increased considerably.<sup>104</sup>

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<sup>98</sup> See, e.g., Paula Braveman & Laura Gottlieb, *The Social Determinants of Health: It's Time to Consider the Causes of the Causes*, 129 PUB. HEALTH REP. 19, 22 (2014) ("For instance, exposure to violence can increase the likelihood that young people will perpetrate gun violence").

<sup>99</sup> Jonathan R. T. Davidson et al., *The Association of Sexual Assault and Attempted Suicide Within the Community*, 53 ARCHIVES GEN. PSYCHIATRY 550, 553 (1996).

<sup>100</sup> See Ryan Brown, *The Mexican Drug War and Early-Life Health: The Impact of Violent Crime on Birth Outcomes*, 55 DEMOGRAPHY 319, 326 (2018) (discussing the relationship between *in utero* exposure to violence and birth weight).

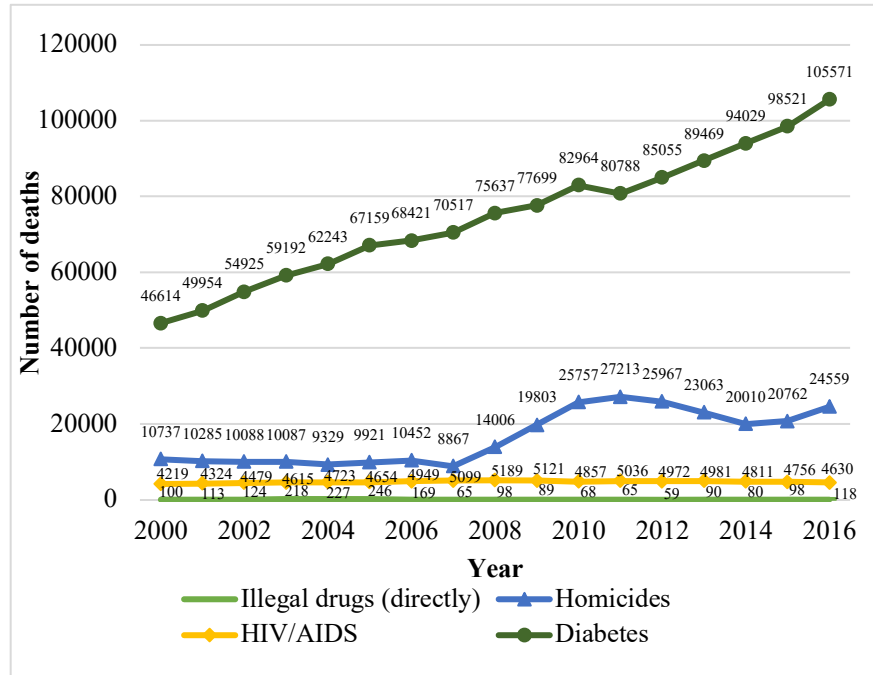
<sup>101</sup> See, e.g., Stephen L. Buka et al., *Youth Exposure to Violence: Prevalence, Risks, and Consequences*, 71 AM. J. ORTHOPSYCHIATRY 298, 302-303 (2001) (analyzing the mental health effects on children and adolescents who witnessed community violence).

<sup>102</sup> Vladimir Canudas-Romo et al., *Mexico's Epidemic of Violence and its Public Health Significance on Average Length of Life*, 71 J. EPIDEMIOLOGY & COMMUNITY HEALTH 188 (2017).

<sup>103</sup> *Id.* at 189 (defining vulnerability as the respondent's perception of crime based on answers to the question "In terms of crime, how do you consider living in your state and in your home?" with two response options, vulnerable and safe).

<sup>104</sup> *Id.* at 192. In 2014, female life expectancy at age 20 was 59.5 years (95 percent CI 59.0 to 60.1); 71 percent of these years (42.3 years, 41.6 to 43.0) were spent with perceived vulnerability of violence taking place in the state and 26 percent at the home (15.3 years, 15 to 15.8). For males, life expectancy at age 20 was 54.5 years (53.7 to 55.1); 64 percent of these years (34.6 years, 34.0 to 35.4) were lived with perceived vulnerability of violence at the state and 20 percent at the home (11.1 years, 10.8 to 11.5).

Graph 1: Yearly deaths due to illegal drugs, homicides and other public health issues<sup>105</sup>



Violence among cartels and between cartels and government forces places innocent people in the crossfire. Because of this, an increasing number of people leave their homes in search of refuge. Forced displacement is also a tactic used by criminals to empty ranches and villages in order to grab land and natural resources. A 2017 report by the Mexican Commission for the Defense and Promotion of Human Rights concluded that at least 329,917 people have been internally displaced in Mexico since 2006.<sup>106</sup> This NGO

<sup>105</sup> Chart created with data from the INEGI's record of homicides from 1990 to 2016 and the 2006-2016 mortality databases from the National System for Health Information. Conjunto de Datos: Defunciones por Homicidios, [Dataset: Deaths by Homicide], INSTITUTO NACIONAL DE ESTADÍSTICA Y GEOGRAFÍA, [NATIONAL INSTITUTE OF STATISTICS AND GEOGRAPHY], <https://www.inegi.org.mx/sistemas/olap/proyectos/bd/continuas/mortalidad/defuncioneshom.asp?s=est> [<https://perma.cc/SD8C-V626>].

<sup>106</sup> COMISIÓN MEXICANA DE DEFENSA Y PROMOCIÓN DE LOS DERECHOS HUMANOS (CMDPDH), EPISODIOS DE DESPLAZAMIENTO INTERNO FORZADO MASIVO EN MÉXICO INFORME 2017 [EPISODES OF FORCED AND MASSIVE INTERNAL DISPLACEMENT IN MEXICO. 2017 REPORT] 8 (2017), <http://www.cmdpdh.org/publicaciones-pdf/cmdpdh->

registered 25 episodes of mass forced displacements in 2017 alone.<sup>107</sup> According to the same report, the main – but not the only – cause of displacement that year was violence generated by organized armed criminal groups, which accounts for 68 percent of the total number of episodes.<sup>108</sup> Another study states that there were 123,000 internally displaced persons in 2010, and that number has increased steadily, reaching 311,000 by 2016.<sup>109</sup> Between 2006 and 2015, population rates decreased in 691 municipalities, 28 percent of the country's total number, with most of these municipalities located in three regions most affected by violence.<sup>110</sup> Overall, the number of people leaving violent municipalities in Mexico is four to five times higher than that of those leaving non-violent municipalities with similar socio-economic conditions. However, to date, the government only acknowledges a fraction of the internally displaced population making it difficult to assess and address the magnitude of the problem.<sup>111</sup>

People who have been forced to move rarely have access to legal mechanisms or institutions for protection or assistance. Local

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informe-de-desplazamiento-interno-masivo-en-mexico-2017.pdf  
[<https://perma.cc/E675-DQ5Z>].

<sup>107</sup> A mass episode of forced internal displacement occurs when families (in a number equaling or greater than ten) or groups of people (equaling or greater than fifty individuals in total) are obligated to collectively abandon their place of residence, as a reactive or preventative measure when faced with a situation of widespread violence. The episodes registered in 2017 displaced around 20,390 people and affected at least nine states, twenty-seven municipalities, and seventy-nine localities. *See id.* at 9.

<sup>108</sup> Other causes registered over the year were political violence, social conflict, territorial conflict, and mining extraction projects. Furthermore, the CMDPDH's research identified the forms of violence that originated or that were present during these displacements. The most frequently registered were: armed attacks against communities; armed confrontations between criminal groups or between these and state agents; threats and intimidation; burning or destruction of houses, crops, businesses, and vehicles. *See id.* at 10.

<sup>109</sup> These figures were obtained by the Internal Displacement Monitoring Centre (IDMC) and are available on their Mexico profile page at: <http://internal-displacement.org/countries/mexico/> [<https://perma.cc/MAU2-PACU>]. Most recent 2016 estimates are based on a preview of a forthcoming report prepared by the CMDPHD.

<sup>110</sup> *Id.*

<sup>111</sup> *See, e.g.,* Laura H. Atuesta & Dusan Paredes, *Do Mexicans Flee from Violence? The Effects of Drug-Related Violence on Migration Decisions in Mexico*, 42 J. ETHN. MIGR. STUD. 480 (2015) ("However, up to now, the government has not recognised the existence of the internally displaced population (IDP) and there is no data to assess the magnitude of the problem neither to estimate the economic consequences of that displacement.").

governments often lack the capacity to guarantee and protect the rights of displaced populations. In addition to problems related to their personal safety, internally displaced populations need assistance with basic survival issues, such as shelter, health services, drinking water, sanitation, clothing, and food. The existing health care services in Mexico, however, often lack the capacity to respond to these basic needs, much less provide broader psychological and physical care for this population.

In addition to homicides and displacements, the war on drugs has also left the country with a large number of missing persons. According to the Mexican government, since 2006, over 35,000 people have disappeared in the country, and the number seems to be growing.<sup>112</sup> From 2006 to 2012, 13,767 people disappeared.<sup>113</sup> From December 2012 to April 2018, 23,236 people were reported missing or disappeared.<sup>114</sup> Many of these cases are accused of being enforced disappearances, in which presumably authorities were involved.<sup>115</sup> Unfortunately very few cases are investigated. For example, by 2016, Mexico had informed the United Nations of only fourteen convictions for enforced disappearances, six of which occurred before 2006.<sup>116</sup>

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<sup>112</sup> See SECRETARIADO EJECUTIVO DEL SISTEMA NACIONAL DE SEGURIDAD PÚBLICA, REGISTRO NACIONAL DE DATOS DE PERSONAS EXTRAVIADAS O DESAPARECIDAS (RNPED) [NATIONAL REGISTRY OF DATA OF LOST OR MISSING PERSONS (RNPED)], <http://secretariadoejecutivo.gob.mx/rnped/datos-abiertos.php> [https://perma.cc/E675-DQ5Z].

<sup>113</sup> See Open Society Justice Initiative, *Corrupción que Mata: Por qué México Necesita un Mecanismo Internacional para Combatir la Impunidad* [Corruption that Kills: Why Mexico Requires an International Mechanism to Combat Impunity], 22 (2018), <https://www.justiceinitiative.org/uploads/39bec249-a57e-4f26-aeaa-160acd0088dd/corruption-that-kills-es-20180502.pdf> [https://perma.cc/7YLL-RGXJ].

<sup>114</sup> See RNPED, *supra* note 112.

<sup>115</sup> According to a study by the Observatory on Disappearances and Impunity, out of 548 cases of disappearances committed between 2005 and 2015 in the state of Nuevo Leon and adjacent states, 46.7 percent had a state authority reported as the offender. See Observatorio de Desapariciones e Impunidad, *Informe Sobre Desapariciones En El Estado De Nuevo León, 2016* [Observatory of Disappearances and Impunity, *Report On Disappearances In The State Of Nuevo León, 2016*] (FLACSO 2016), [http://www.flacso.edu.mx/sites/default/files/170616\\_resumen\\_informe\\_nl\\_vf.pdf](http://www.flacso.edu.mx/sites/default/files/170616_resumen_informe_nl_vf.pdf) [https://perma.cc/R8NY-TSQ8] (presenting the study report).

<sup>116</sup> Open Society Justice Initiative, *supra* note 113, at 25.

### 3.2. *People who use drugs*

If the constitutional right to health were taken seriously, people who use drugs would be treated very differently. In practice, drug users are not the subjects of a serious public health policy; rather, they are most often treated as criminals. Although technically the use of illegal drugs is not a crime, the criminalization of all drug-related conduct—including possession—leads effectively to the criminalization of individuals who use drugs. People who use drugs are particularly vulnerable to arbitrary application of state force, including illegal detention, torture, and imprisonment. Existing data suggests that people who use drugs are often the main target of repressive efforts by government. At the same time, health services offered to people with problematic drug use are scarce, inadequate, and tend to be poorly regulated and policed, be they private or public.<sup>117</sup>

#### 3.2.1. *People who use drugs and the criminal justice system*

People who use drugs are the most frequently targeted by the criminal justice system for breaking drug laws. Although drug use is not a crime, users are forced to participate in a market that is clandestine and controlled by criminal organizations. They are directly brought into the criminal justice system when charged with drug possession, which is a crime in Mexico. Because possession necessarily precedes use, people who use drugs formally commit a crime every time they use.<sup>118</sup>

Possessing any amount of illegal drugs warrants arrest and the opening of a criminal investigation file, regardless of circumstance. According to Mexico's Health Law, possession of up to 5 grams of marijuana, 0.5 grams of cocaine, 50 milligrams of heroin, 40 milligrams of methamphetamines or 2 grams of opium, remains a crime and must be investigated by the public prosecutor, but "shall

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<sup>117</sup> See EN BUSCA DE LOS DERECHOS: USUARIOS DE DROGAS Y LAS RESPUESTAS ESTATALES EN AMÉRICA LATINA [IN THE QUEST FOR RIGHTS: DRUG USERS AND STATE RESPONSES IN LATIN AMERICA] (Catalina Pérez Correa & Coletta Youngers eds., 2015), <http://www.drogasyderecho.org/wp-content/uploads/2015/03/reporte-completo.pdf> [<https://perma.cc/RJ3C-YXCE>].

<sup>118</sup> *Id.*

not be punished.”<sup>119</sup> This means that a criminal investigation is to be opened and the accused person may be subject to temporary detention, especially if caught in the act of possession. However, if, upon conclusion of the investigation, the amounts are shown to be within the thresholds, the case will not be filed before a judge but instead reported to health authorities.<sup>120</sup> If the amounts possessed are above the thresholds—which are notoriously low compared to thresholds established in other Latin American countries like Uruguay or Colombia—mere possession will result in prosecution and incarceration. This threshold system is often invoked as a progressive policy adopted with the 2009 amendment to the General Health Law to decriminalize possession. However, corruption, inadequate police training,<sup>121</sup> and an inefficient justice system have rendered depenalization mute. In this context, the Petty Dealing Law has increased harm to people who use drugs. Lacking proper skills to investigate crime and often asked to reach arrest quotas, regardless of the specific crimes, police and prosecutors find in young people who use drugs easy cases, as drug possession requires no investigation beyond possession itself. The ease with which police can report drug amounts which exceed these thresholds makes extortion by police a common practice.<sup>122</sup>

According to the National Institute of Statistics and Geography (INEGI), in 2015, states reported 50,083 criminal investigations opened in state jurisdictions for drug related crimes.<sup>123</sup> These investigations were opened under the Petty Dealing Law. Simple possession—that is, possession without intent to sell or supply—represented 65 percent of the open investigations, while possession

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<sup>119</sup> See Ley General de Salud [General Health Law] (LGS) art. 479, Diario Oficial de la Federación [DOF] 12 de julio de 2018 (Mex.), [http://www.salud.gob.mx/cnts/pdfs/LEY\\_GENERAL\\_DE\\_SALUD.pdf](http://www.salud.gob.mx/cnts/pdfs/LEY_GENERAL_DE_SALUD.pdf) [<https://perma.cc/6BXT-H9J8>].

<sup>120</sup> *Id.*

<sup>121</sup> See Annick Borquez et al., *The Effect of Public Health-Oriented Drug Law Reform on HIV Incidence in People who Inject Drugs in Tijuana, Mexico: an Epidemic Modelling Study*, THE LANCET PUBLIC HEALTH (2018), [https://www.thelancet.com/pdfs/journals/lanpub/PIIS2468-2667\(18\)30097-5.pdf](https://www.thelancet.com/pdfs/journals/lanpub/PIIS2468-2667(18)30097-5.pdf) [<https://perma.cc/2J5P-TTQ5>].

<sup>122</sup> EN BUSCA DE LOS DERECHOS, [IN THE QUEST FOR RIGHTS], *supra* note 117.

<sup>123</sup> See Censo Nacional de Gobierno, Seguridad Pública y Sistema Penitenciario Estatales 2016 [National Government Census, Public Safety and the State Penitentiary System] (2016), INEGI, <http://www.beta.inegi.org.mx/proyectos/censosgobierno/estatal/cngspspe/2016/> [<https://perma.cc/7WR4-XQ3E>].

with intent to sell or supply represented 17.5 percent.<sup>124</sup> Sale and supply comprised a mere 1.7 percent of all local investigations.<sup>125</sup>

Regarding incarceration, many states do not keep track of the specific drug related criminal offences committed and sanctioned in their prisons.<sup>126</sup> Where information is available, possession is consistently the most frequently sanctioned drug crime. As to what type of drug is involved, in 40 percent of the cases the information is not available.<sup>127</sup> Where information is available, marijuana is the most frequent substance (32 percent), followed by cocaine (13 percent) and methamphetamines (12 percent).<sup>128</sup>

Once processed through the criminal justice system, people who use drugs face a prison system that is hazardous to health. Prisons are high-risk environments for numerous diseases. There is a high prevalence of HIV due to shared use of needles for drug injection and tattooing with homemade and unsterilized kits, as well as high-risk sex and rape.<sup>129</sup> According to the UN, globally, in 2012, the prevalence rates among the prison population of HIV was 6.7 percent, Hepatitis B was 4.4 percent and Hepatitis C reached 10 percent, much higher than those seen in the general population (i.e. HIV prevalence is 0.3 percent for the general population).<sup>130</sup> Tuberculosis in prisons is, on average, twenty-three times higher than in the general population.<sup>131</sup> In 2008, the likelihood of dying if

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<sup>124</sup> *Id.*

<sup>125</sup> The remaining 16 percent were classified as "other" which could refer to investigations initiated for possession under the thresholds or else investigations of drug crimes which were deemed to fall within federal jurisdiction and accordingly transferred. *See id.*

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> See SERGIO CHAPARRO & CATALINA PÉREZ CORREA, SOBREDOSIS CARCELARIA Y POLÍTICA DE DROGAS EN AMÉRICA LATINA [PRISON OVERDOSE AND DRUG POLICY IN LATIN AMERICA] (Dejusticia, Working Paper No. 41, 2017), <https://www.dejusticia.org/wp-content/uploads/2017/12/Sobredosis-carcelariay-politicadedrogasenamericalatina.pdf?x54537> [<https://perma.cc/W5SN-NSNS>].

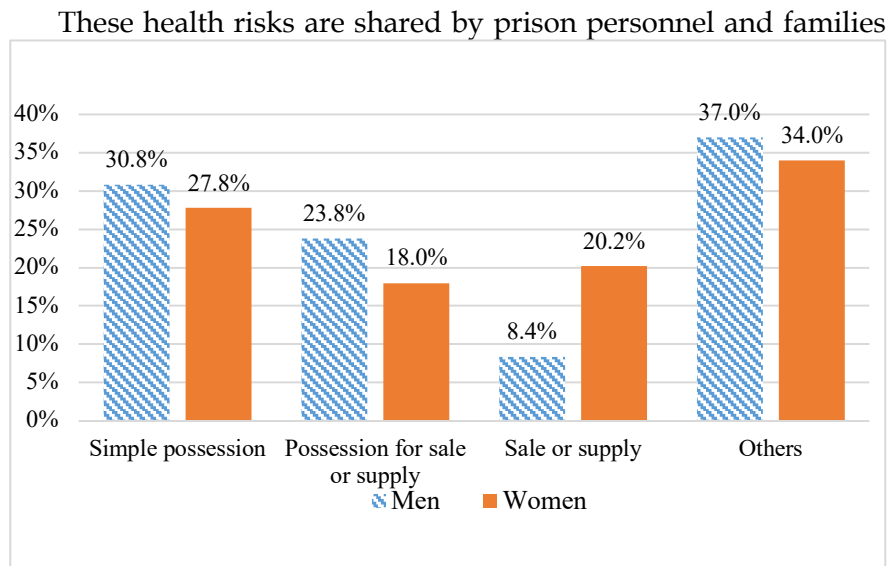
<sup>130</sup> *Id.*

<sup>131</sup> Iacopo Baussano et al., *Tuberculosis Incidence in Prisons: A Systematic Review*, 7 PLOS MEDICINE (2010), <https://journals.plos.org/plosmedicine/article?id=10.1371/journal.pmed.1000381> [<https://perma.cc/9AQQ-GSWL>].



one was in a Mexican prison was five times greater than if one was not in a Mexican prison.<sup>132</sup>

Graph 2: Micro-dealing crimes sanctioned in state prisons, by sex, 2015 (local jurisdiction)<sup>133</sup>



who are in frequent contact with the prison population. Mexico City's prisons alone have over 3 million visitors per year.<sup>134</sup> For families of inmates, incarceration also has severe economic, health, and social costs. The imprisonment of a family member often leads to economic vulnerability and stigmatization. This is particularly

<sup>132</sup> Guillermo Zepeda Lecuona, *Índice De Desempeño Del Sistema Penal [Performance Index Of The Criminal Justice System Index]*, MÉXICO EVALÚA (Nov. 10, 2010), <https://www.mexicoevalua.org/2010/11/10/indice-de-desempeno-del-sistema-penal/> [ <https://perma.cc/JG53-EB36>].

<sup>133</sup> National Census of Government, Public Security and State Prison Systems of 2016, INEGI, <http://www.beta.inegi.org.mx/proyectos/censosgobierno/estatal/cngspspe/2016/> [ <https://perma.cc/7WR4-XQ3E>].

<sup>134</sup> 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 the indirect effects on women]* (Banco Interamericano de Desarrollo, Working Paper No. IBD-DP-405, 2015), <https://publications.iadb.org/handle/11319/7235> [ <https://perma.cc/28FJ-FGD3>].

true for women, as they are usually the ones who provide basic necessities for their family members in prison.<sup>135</sup>

3.2.2. *Prevention, treatment and harm reduction for people who use drugs*

Evolution of drug use in Mexico cannot be properly assessed, as the national surveys regarding drug use published over the years are not comparable to each other.<sup>136</sup> Nevertheless, the available data suggests that use of illegal drugs has increased, despite harsh prohibition policies, as Table 1 shows.<sup>137</sup> It is important to point out that only 0.6 percent of the population reported a drug use disorder (1.1 percent men, 0.2 percent in women).<sup>138</sup>

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<sup>135</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 percent 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 percent said that they had lost a job, more than 18 percent said that they had had to move, and almost 40 percent said the imprisonment had impeded their ability to care for their children or grandchildren. A range of health problems also disproportionately affected spouses of those incarcerated, including high blood pressure and depression. *Id.*

<sup>136</sup> Beatriz C. Labate & Pamela Ruiz Flores López, *Midiendo el uso de Drogas ilegales en México: Reflexiones sobre las Encuestas Nacionales de Adicciones y una encuesta independiente* [Measuring the use of illegal Drugs In Mexico: Reflections on National Addiction Surveys and an independent survey] (Drug Policy Workshop (PPD) CIDE, Working Paper No. 13, 2015), <http://ppd.cide.edu/documents/302668/0/Midiendo%20el%20uso%20de%20drogas%20ilegales%20en%20México.pdf> [<https://perma.cc/P4XZ-E8VN>].

<sup>137</sup> According to the National Survey on Consumption of Drugs, Alcohol and Tobacco 2016-2017 (ENCODAT), use by women increased disproportionately, with any drug increasing from 0.7 percent to 1.3 percent, illegal drugs from 0.4 percent to 1.1 percent and marijuana from 0.3 to 0.9 percent. Youth use (12-17 years) has also gone up from 0.6 percent to 3.1 percent for any drug, 1.5 percent to 2.9 percent for illegal drugs, and 0.6 percent to 2.1 percent in marijuana. The group with the highest rates of use remains men between 18-34 years. Instituto Nacional de Psiquiatría Ramón de la Fuente Muñiz et al., *Encuesta Nacional de Consumo de Drogas, Alcohol y Tabaco 2016-2017 (Encodat): Reporte de Drogas* [National Drug, Alcohol, and Tobacco Consumption Survey 2016-2017 (ENCODAT): Drug Report] (2017), [hereinafter ENCODAT] <https://www.gob.mx/salud%7Cconadic/acciones-y-programas/encuesta-nacional-de-consumo-de-drogas-alcohol-y-tabaco-encodat-2016-2017-136758> [<https://perma.cc/NRN3-XKRU>].

<sup>138</sup> *Id.*

Table 1: Percentage of adult population (12–65 years old) who used at least once in the last year<sup>139</sup>

Drug	2002	2008	2011	2016
Illegal drugs	0.8	1.4	1.5	2.7
Marijuana	0.6	1	1.2	2.1
Cocaine	0.3	0.4	0.5	0.8
Methamphetamine	-	0.1	0.2	0.2

Specific regions have more pronounced increases than the national average, and these regions are those in the country suffering the most from violence due to trafficking and prohibition enforcement.<sup>140</sup> Violence and its impact on well-being could partly explain the possible rise, but it should not be discarded that efforts to intercept drugs going to the U.S. border lead to substances being retained and dispersed in the Mexican territory. This especially appears to be the case in border cities like Tijuana.<sup>141</sup>

Drug use in Mexico, however, is still below global rates, and even drug dependence estimates for Mexico (6 percent of Mexico's people use drugs) are significantly lower than worldwide estimates (11 percent).<sup>142</sup>

<sup>139</sup> *Id.*

<sup>140</sup> In the North Central region of Mexico, for example, rates rose from 1.6 percent to 3.3 percent. The North-West and North-East regions are also above the national averages going from 2.8 percent to 3.5 percent and staying at 2.4 percent respectively. The West has also seen an enormous rise from 3.6 percent. Other border states in the North that already had high rates, such as Baja California (from 4.1 percent to 4.4 percent) and Chihuahua (from 3.3 to 3.4 percent) remain so. See ENCODAT, *supra* note 137.

<sup>141</sup> As the United States has tightened security along the border, drugs have pooled on the Mexican side. Mid and low-level distributors are pushing not only heroin, but also meth out into the local markets, particularly along the border. This has been documented in local newspapers. See Yerson Martínez, *Aumenta BC el consumo de heroína y "cristal"* [BC increases the consumption of heroin and "crystal"], FRONTERA INFO (Aug. 30, 2016), <http://www.frontera.info/EdicionEnLinea/Notas/Noticias/30082016/1121859-Aumenta-BC-el-consumo-de-heroina-y-cristal.html> [https://perma.cc/GA29-YZKT]. It has also been documented in treatment centers. See Eneida Sánchez Zambrano & Rubén Gómez, *Adicciones en Baja California, ausentes en políticas públicas* [Addiction in Baja California, absentabsence in public policies], LA JORNADA BAJA CALIFORNIA (Feb. 13, 2015), <http://jornadabc.mx/tijuana/13-02-2015/adicciones-en-baja-california-ausentes-en-politicas-publicas> [https://perma.cc/JR4M-XDW4].

<sup>142</sup> According to UNODC's World Drug Report 2017, it is estimated that 5 percent or a quarter of a billion people between the ages of fifteen and sixty-four years, used at least one drug in 2015, while 3.8 percent of the adult population used

The government's investment in prevention and treatment pales in comparison to its investment in punishment. Between 2006 and 2012, 97.07 percent (\$790 billion pesos) of total spending on drug policy was allocated to law enforcement while only 2.91 percent (\$23 billion pesos) was spent on prevention *and* treatment (including related human rights programs).<sup>143</sup> Yet the prevention effort, as small as it is, seems to yield results: 5.1 percent of those exposed to prevention programs report having used drugs, compared to 12.3 percent of people who have not had access to prevention services and campaigns.<sup>144</sup> Positive outcomes of prevention are more noticeable amongst youths: 3.3 percent of 12–17-year-olds reported as using drugs after exposure to prevention programs, in contrast to the 10.3 percent who used drugs but had not been exposed to prevention programs.<sup>145</sup> In spite of these tangible results, the percentage of the population exposed to prevention programs has grown only marginally between 2011 and 2016 (from 43.3 to 47.1 percent).<sup>146</sup>

People who suffer from problematic drug use have limited access to treatment, particularly for science-based services. According to the ENCODAT, of the people who reported problematic drug use, only one out of five (20.4 percent) received treatment (22.1 percent of men, 12.8 percent of women), and only 24.5 percent completed it.<sup>147</sup> Several barriers to accessing treatment exist, especially for women.<sup>148</sup> For people who wanted to receive

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marijuana. Mexico's numbers are well below that, at 2.7 percent for all illegal drugs and 2.1 percent for marijuana. See UNITED NATIONS OFFICE ON DRUGS AND CRIME, WORLD DRUG REPORT 9 (2017), [https://www.unodc.org/wdr2017/field/Booklet\\_1\\_EXSUM.pdf](https://www.unodc.org/wdr2017/field/Booklet_1_EXSUM.pdf) [<https://perma.cc/H6ZX-U2FA>].

<sup>143</sup> Gabriel Purón-Cid, *El Impacto Económico de una Política de Drogas Prohibicionista 2006–2012* [The Economic Impact of a Drug Prohibition Policy 2006–2012] (Drug Policy Workshop (PPD) CIDE, Working Paper No. 3, CIDE 2014).

<sup>144</sup> See ENCODAT, *supra* note 137.

<sup>145</sup> See ENCODAT, *supra* note 137.

<sup>146</sup> See ENCODAT, *supra* note 137, at Cuadro TD10 (“Población de 12 a 65 años que le han ofrecido alguna droga regalada o comprada según sexo y edad” [“Population ages 12 to 65 years old who have been offered, given, or bought any drug, according to sex and age”]).

<sup>147</sup> We don't know what the rate of relapse was. Surprisingly, even though women access treatment much less frequently than men, of those women who did get treatment, 90.5 percent completed it, while only 19.8 percent of men did. See ENCODAT, *supra* note 137.

<sup>148</sup> According to the ENCODAT, *supra* note 137, 8 percent of people who use drugs and 20.4 percent of people with drug use disorder underwent treatment. However, numbers are two or three times lower for women (3.9 percent of women

treatment, the lack of economic resources, distance, lack of quality of services, and stigma associated with drug use were identified as being amongst the main barriers to accessing treatment.<sup>149</sup>

Problematic drug use is managed through special units in public health centers. The great majority of these are outpatient programs. There are only 43 public residential centers where people can be interned.<sup>150</sup> Private residential facilities with standardized quality care can cost anywhere between 3,500 to 16,000 USD for a forty-five-day treatment,<sup>151</sup> a price outside the reach of most of Mexico's population. People with insufficient economic resources, living in areas of extreme poverty and scarcity of public services, go to what are known as *anexos* or *granjas* (51.1 percent of men and 22.9 percent of women who reported accessing treatment).<sup>152</sup> These are low-cost private centers, mostly operating outside the law, with no official supervision.<sup>153</sup> Government data estimates that there are approximately 2,300 residential rehabilitation centers, of which only 16 percent are registered with health authorities and only 12 percent

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who use drugs and 12.8 percent of women with drug dependence to respective 9.3 percent and 22.1 percent of men). The study also mentions that women mainly go to individual non-group therapies, which could be due to stigma and harassment.

<sup>149</sup> According to the ENCODAT, *supra* note 137, of those who actually did want to go to treatment, the top reasons for not getting help include the following: do not know where to go (11.7 percent), do not want to be committed against their will (10.6 percent), thought that the treatment would not help (9.8 percent), do not have enough economic resources (9.6 percent), thought it would take too long (8.8 percent), treatment centers are far from their residence (8.5 percent), did not go because of shame (8.2 percent), were not satisfied with the services available (7.5 percent) were concerned about what people would think (7.0 percent) and couldn't go because medical insurance does not cover it (6.0 percent).

<sup>150</sup> See ENCODAT, *supra* note 137.

<sup>151</sup> See ENCODAT, *supra* note 137.

<sup>152</sup> See ENCODAT, *supra* note 137.

<sup>153</sup> For a more detailed description of annexes and where they are found, see ENCODAT, *supra* note 137, and Brian Anderson et al., *Regulación repensada: la necesidad de nuevas políticas y normas en el tratamiento de las adicciones* [Regulation rethought: the need for new policies and regulations in the treatment of addictions], in *LAS VIOLENCIAS: EN BUSCA DE LA POLÍTICA PÚBLICA DETRÁS DE LA GUERRA CONTRA LAS DROGAS* [VIOLENCES: IN SEARCH OF PUBLIC POLICY BEHIND THE WAR ON DRUGS] (Laura Atuesta & Alejandro Madrazo eds., CIDE 2018).

comply with government regulation.<sup>154</sup> Some states in the country, like Oaxaca, have only one registered center for the entire state.<sup>155</sup>

There is no regular or systematic monitoring of practices in *anexos* and *granjas*, but conditions are consistently reported as troubling and treatment as not based on medical or scientific principles. According to Mexican law, enrollment in treatment centers must be “strictly voluntary.”<sup>156</sup> However, studies and human rights reports based on patient interviews, disclose involuntary retention, often in violent conditions.<sup>157</sup> 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. In some cases, there are reports that patients died by suicide due to desperation. Interviewees mention lack of trust in the treatment system and fear that they will be put through similar

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<sup>154</sup> At the national level, from 2006 to 2012, the National Center for the Prevention and Control of Addictions (CENADIC), through the National Census of Establishments Specialized in the Treatment of Addictions, reported the existence of 560 outpatient facilities and 1736 residential establishments (including *anexos* and *granjas*, as well as private institutions), which deal with drug use. According to recent data from CONADIC, as of April 2018, only 340 “Specialized Establishments in the Treatment of Addictions in Residential Modality” were registered by the government. These 340 include the forty-three public centers.

<sup>155</sup> Other studies have much higher numbers, with public health officials estimating that there are between 1,000–4,000 annexes in Mexico City alone. Because most centers are not registered, the information that is available about the annexes comes mainly from unofficial sources, such as newspapers and the radio. See Blanca Valadez, *Retiros de alcohólicos, cárceles de terror* [Withdrawals of alcoholics, prisons of terror], MILENIO, 2008, <http://www.milenio.com/node/134891>; Arlett Mendoza, *Dañan a adictos centros piratas* [Damage to addicted pirate centers], REFORMA 2010, <https://webmaster316.wordpress.com/2010/02/17/retiros-de-alcoholicos-carceles-de-terror/> [<https://perma.cc/QLH4-BNN3>].

<sup>156</sup> Norma Oficial Mexicana, [Official Mexican Standard], NOM-028-SSA2-1999, Para la prevención, tratamiento y control de las adicciones, [For the prevention, treatment, and control of addictions], Diario Oficial de la Federación [DOF] 12-04-2000 (Mex.), <http://www.salud.gob.mx/unidades/cdi/nom/028ssa29.html> [<https://perma.cc/6DE6-9J88>].

<sup>157</sup> See OPEN SOCIETY FOUNDATIONS, NI SOCORRO, NI SALUD: ABUSOS EN VEZ DE REHABILITACIÓN PARA USUARIOS DE DROGA EN AMÉRICA LATINA Y EL CARIBE, [NO HEALTH, NO HELP: ABUSE AS DRUG REHABILITATION IN LATIN AMERICA AND THE CARIBBEAN], 2016. See also Anderson et al., *supra* note 153.

conditions as reasons for not seeking treatment again. Additionally, people who work in these centers are not properly trained to diagnose or treat the symptoms.<sup>158</sup> Patients often relapse for lack of proper treatment.<sup>159</sup>

Drug courts were created in Mexico as an alternative to incarceration, alleging a shift towards a health perspective in drug policy. In 2009, the first drug court was created in the state of Nuevo Leon.<sup>160</sup> By 2013, the government decided to expand the program throughout the country. Since then, five more states – Morelos, the State of Mexico, Chihuahua, Durango, and Chiapas – have established drug courts, while Mexico City and Baja California are also considering their implementation.<sup>161</sup>

Drug courts are not specialized tribunals, but rather special procedures within ordinary criminal courts. If a person is eligible for the program, prosecution is suspended for as long as that person complies with it. Failure to complete the program results in the reactivation of prosecution. This means treatment operates within the criminal justice system, not through health service providers. As stated by a recent report by the Social Science Research Council,

Defendants remain in criminal proceedings at every step in the drug court program, risk incarceration both as a sanction while in the program and for failure to complete it, and, in some cases, spend more time behind bars than they would

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<sup>158</sup> The substance abuse that people are treated for in these centers differs from study to study, with alcohol being consistently the most common (39.3 percent), followed by methamphetamines (22.9 percent), marijuana (14.3 percent), cocaine (9.4 percent), inhalants (5.5 percent) and heroin (3.4 percent). In the government's youth-centered institutions, Youth Integration Centers (CIJ), the two drugs most frequently reported were marijuana (41.1 percent) and methamphetamine (16.1 percent). It is important to point out that methamphetamine does not appear as widely-used (with less than 0.2 percent) in the national survey, yet it is a drug that is often visible at treatment centers. See ENCODAT, *supra* note 137.

<sup>159</sup> COMISIÓN ESTATAL DE DERECHOS HUMANOS DE SAN LUIS POTOSÍ [STATE COMMISSION ON HUMAN RIGHTS IN SAN LUIS POTOSÍ] (CEDHSLP), INFORME ESPECIAL: SOBRE CENTROS DE TRATAMIENTO DE ADICCIONES EN MODALIDAD RESIDENCIAL, [SPECIAL REPORT: ON ADDICTION TREATMENT CENTERS IN RESIDENTIAL MODALITY], 2011.

<sup>160</sup> Tania T. Ramírez, *Cortes de drogas en México: persiguiendo a los consumidores* [Drug Courts in Mexico: Persecuting Consumers], NEXOS (June 25, 2015), <https://eljuegodelacorte.nexos.com.mx/?p=4743> [https://perma.cc/Z2D]-A7BR].

<sup>161</sup> SOCIAL SCIENCE RESEARCH COUNCIL, DRUG COURTS IN THE AMERICAS: A REPORT BY THE DRUGS, SECURITY AND DEMOCRACY PROGRAM 50 (2018).

have had they chosen to pursue criminal justice proceedings instead of drug court.<sup>162</sup>

Initial data regarding the functioning of drug courts shows that in most cases the program is used for young men accused of simple possession of cannabis.<sup>163</sup> The exception was the state of Nuevo Leon where the program is used mostly to treat alcohol abuse and family violence. Since 2016, the Mexican government took steps to replace the original drug treatment model with the “Model of Therapeutic Justice Program for People with Psychoactive Substance Use”. This new model, still based on the drug court model, seeks to standardize the criteria by which they operate.<sup>164</sup> However, as before, it keeps all drug offences within the sphere of the criminal justice system.

### 3.2.3. *Other vulnerable populations*

Drug policy based on prohibition does not affect everyone equally. Certain groups, such as women, young men from poor suburban areas, and farmers, have been disproportionately affected by prohibition.

In the case of women, several studies show that, although the majority of the incarcerated people in Latin America (including Mexico) are men, the number of women in prisons is growing. The majority of these women are incarcerated for drug-related crimes,<sup>165</sup> come from poor backgrounds and, in some countries, are predominantly black.<sup>166</sup> Many women get involved in the drug trade due to economic difficulties, but the penal response further

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<sup>162</sup> *Id.* at 2.

<sup>163</sup> Ramírez, *supra* note 160.

<sup>164</sup> SOCIAL SCIENCE RESEARCH COUNCIL, *supra* note 161, at 51.

<sup>165</sup> Wola et al., MUJERES, POLÍTICAS DE DROGAS Y ENCARCELAMIENTO, UNA GUÍA PARA LAS REFORMAS DE POLÍTICAS EN AMÉRICA LATINA Y EL CARIBE, 2016. [WOMEN, DRUG POLICIES, AND INCARCERATION, A GUIDE TO POLICY REFORMS IN LATIN AMERICA AND THE CARIBBEAN], 2016, <https://www.oas.org/es/cim/docs/womendrugsincarceration-es.pdf> [<https://perma.cc/6U35-LHRN>]. See also Gretchen Cloutier, *Latin America's Female Prisoner Problem: How the War on Drugs, Feminization of Poverty, and Female Liberation Contribute to Mass Incarceration of Women*, 7(1) CLOCKS & CLOUDS (2016).

<sup>166</sup> Jodie Michelle Lawston, *Women, the Criminal Justice System, and Incarceration: Processes of Power, Silence and Resistance*, 20 FEM. FORM. (2008).



aggravates these problems. Due to their incarceration, their dependents are further exposed to risk and vulnerability.<sup>167</sup>

Most of the women processed and sanctioned for drug crimes are non-violent offenders, processed for micro-trafficking or possession of illicit substances.<sup>168</sup> They often enter the drug trade as low-level mules, but have little chance of upward mobility in terms of economic earning and decision-making power.<sup>169</sup> Furthermore, in several Latin American countries, like Mexico, transportation of drugs is more severely punished than other drug crimes. This means that, when women are detained for carrying substances from one point to another, they often receive extremely harsh punishments.<sup>170</sup>

Studies also show that prohibition has caused thousands of adolescents to be prosecuted and incarcerated, shattering their life projects.<sup>171</sup> Enforcement of current drug laws puts these young men and women through a criminal justice system that not only stigmatizes them for life but also impairs their right to health.<sup>172</sup> As described earlier, prison conditions in Mexico are precarious. Prisoners live in overcrowded cells, lacking water, food, medicine and general services.<sup>173</sup> Youth centers share many of the problems of adult prisons in the country. Through their exposure to this system, these young men and women are exposed to violence, drug abuse, and discrimination. Like women, however, their participation in the drug market is often trivial and when arrested, they are easily replaced with other minors.<sup>174</sup>

The criminalization of these social groups often has devastating effects on their families and communities but makes little difference in the illegal market. The use of prison represents a burden to families and often worsens the situation that pushed them into entering the illegal market. As stated by the Washington Office on

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<sup>167</sup> CHAPARRO & PÉREZ CORREA, *supra* note 129, at 110.

<sup>168</sup> Lawston, *supra* note 166.

<sup>169</sup> Cloutier, *supra* note 165.

<sup>170</sup> CHAPARRO & PÉREZ CORREA, *supra* note 129, at 110.

<sup>171</sup> CHAPARRO & PÉREZ CORREA, *supra* note 129, at 120.

<sup>172</sup> CHAPARRO & PÉREZ CORREA, *supra* note 129, at 120.

<sup>173</sup> CHAPARRO & PÉREZ CORREA, *supra* note 129, at 33–34.

<sup>174</sup> ROSE MARIE ACHÁ, JÓVENES Y ADOLESCENTES PRIVADOS DE LIBERTAD POR DROGAS EN AMÉRICA LATINA [YOUTH DEPRIVED OF LIBERTY BY DRUGS IN LATIN AMERICA] (Colectivo de Estudios de Drogas y Derecho, 2015), [http://www.drogasyderecho.org/wp-content/uploads/2015/10/Rose\\_v07.pdf](http://www.drogasyderecho.org/wp-content/uploads/2015/10/Rose_v07.pdf) [<https://perma.cc/ZHB3-KFN3>].

Latin America (WOLA) report "Women, Drug Policy and Incarceration", women accused of drug crimes

[ . . . ] rarely pose a threat to society. Most are arrested for low-level yet high-risk tasks (small-scale drug dealing or transporting drugs); they become involved as a result of poverty, or at times due to coercion by a partner or relative. Their incarceration contributes little if anything to dismantling illegal drug markets or improving public security. To the contrary, prison tends to worsen the situation, further limiting their chances of finding decent and legal employment when released from prison, thus perpetuating a vicious cycle of poverty, involvement in drug markets, and incarceration.<sup>175</sup>

Farming communities dedicated to growing poppy and marijuana are usually located in very poor rural regions of the country.<sup>176</sup> They often plant illicit crops as the only means of obtaining an income.<sup>177</sup> Eradication of these crops is commonly done with the use of dangerous pesticides that pollute water sources, animals, and sometimes even legal crops, leaving communities without food sources. These chemicals present a risk to the health of farmers and their communities. In the case of marijuana, the chemical Paraquat is often used in Mexico to eradicate illicit crops.<sup>178</sup> Paraquat is a chemical used to control grass, however, it is highly toxic and may lead to poisoning.<sup>179</sup> If ingested in large amounts, it will likely lead to pain and swelling of the mouth and throat and gastrointestinal (digestive tract) symptoms, such as nausea, vomiting, abdominal pain, and diarrhea (which may become bloody).<sup>180</sup> Ingestion of small to medium amounts of Paraquat can lead to other issues such as liver failure, kidney failure, heart failure and lung scarring.<sup>181</sup>

According to COFEPRIS (Comisión Federal para la Protección Contra Riesgos Sanitarios), the Mexican FDA, Paraquat can remain

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<sup>175</sup> Wola et al., *supra* note 165.

<sup>176</sup> Pérez Correa & Ruiz, *supra* note 9.

<sup>177</sup> Pérez Correa & Ruiz, *supra* note 9, at 41.

<sup>178</sup> Pérez Correa & Ruiz, *supra* note 9, at 37-38.

<sup>179</sup> *Paraquat*, CENTER FOR DISASTER CONTROL AND PREVENTION, <https://emergency.cdc.gov/agent/paraquat/basics/facts.asp> [<https://perma.cc/9N2Q-PQQU>].

<sup>180</sup> *Id.*

<sup>181</sup> *Id.*

in the ground for up to three years<sup>182</sup>, which raises serious concerns regarding the potential risk to communities where it is used by the government to eradicate illicit marijuana crops. In addition to Paraquat, Glyphosate is used in Mexico to eradicate both marijuana and poppy plantations. In Colombia, given the potential risk to the health of farming communities, the Constitutional Court ruled against the aerial aspersion of Glyphosate to eradicate poppy plantations.<sup>183</sup> In 2017, the court ordered the discontinuation of the aerial aspersion of Glyphosate in all territories arguing that “when a reasonable doubt exists regarding the possible damage to the environment or to the health of people [ . . . ] all measures should be taken to avoid any damage.”<sup>184</sup>

The logic justifying the use of these chemicals in Mexico – for the destruction of illicit crops to protect health – highly contrasts with the harms caused by the policy. Put together with other costs generated by prohibition and shown above, the transformation of drug policy in Mexico becomes a necessity.

#### 4. GUIDING PRINCIPLES FOR MEXICO’S DRUG POLICY

In this section, we outline five guiding principles that, in our view, should inform Mexico’s drug policy. In addition, as a sixth point, we address the constraints to domestic regulation that stem from international treaties that govern prohibition.

Principles can better guide policy interventions when they are formulated with clear objectives in mind. Therefore, identifying the public problems that need to be addressed by policy is crucial. There are two types of problems that a comprehensive and evidence-based drug policy needs to address in Mexico: (i) problems that have resulted from the drug policy currently in place, and (ii) problems stem from unmanaged drug use.

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<sup>182</sup> *Paraquat: datos de identificación [Paraquat: identification data]*, Instituto Nacional de Ecología y Cambio Climático [National Institute of Ecology and Climate Change] (INECC), <http://www2.inecc.gob.mx/sistemas/plaguicidas/pdf/paraquat.pdf> [<https://perma.cc/TD5K-CNAR>].

<sup>183</sup> Corte Constitucional [Constitutional Court] [C.C.], febrero 7, 2017, Sentencia T-080/17 (Colomb.), <http://www.corteconstitucional.gov.co/relatoria/2017/t-080-17.htm> [<https://perma.cc/VQU6-USXN>].

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

In Mexico, drug policy reform should aim, first and urgently, to address the problems that drug policy itself produces: violence, systematic violations of human rights, population displacement and criminalization of people who use drugs. Secondly, it should also prevent and address harms to health stemming from problematic drug use.

With these objectives in mind, the guiding principles that inform the recommendations that will be offered in the last section are the following:

a. The right to health<sup>185</sup>

Prohibition, as applied today, should be considered unconstitutional simply because it violates the right to health. Legislative history<sup>186</sup> and Supreme Court precedents establish that substance regulation is one of the ways through which the State must protect the right to health, as determined in Article 4 of the Constitution.<sup>187</sup> In key tobacco control cases, the Supreme Court has upheld substance regulation on the grounds that proper regulation, in relation to substances potentially damaging to health, is grounded in the right to health and a means of fulfilling state obligations in relation to it. Moreover, the Court found that the regulation most protective of health prevails over that which is less protective.<sup>188</sup> Furthermore, the Court has found that adequate regulation of a substance—that is, regulation that is effective in

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<sup>185</sup> In the end, the negation of the right to health transits into a negation of the right to life. We focus here on health as the broader category. Whereas the violation of right to life is a violation of a right in itself, it can also be conceived as an extreme in a range of affectations to the right to health. Moreover, whereas the right to life can only be negated at an individual level, the epidemic proportions of homicides have a secondary impact on public health, as the decrease in life expectancy in Mexico under the war on drugs illustrates. Thus, we choose to use the right to health as a broader category that allows us to see the public health impact of the epidemic rise in homicides. It should be understood, however, that the extreme affectation of health that is the loss of life can also be framed and understood, at an individual level, as the negation of the right to life. See Madrazo & Alonso, *supra* note 46.

<sup>186</sup> See CPEUM, *supra* note 40, at art. 1 (referring to the 1983 constitutional amendment introducing the health as a constitutional right).

<sup>187</sup> CPEUM, *supra* note 40, at art. 4.

<sup>188</sup> See, e.g., Acción de Inconstitucionalidad 119/2008, Pleno de la SCJN, Novena Época, 3 de septiembre de 2009 (Mex.), [www2.scjn.gob.mx/juridica/engroses/3/2008/19/3\\_103860\\_0.doc](http://www2.scjn.gob.mx/juridica/engroses/3/2008/19/3_103860_0.doc) [<https://perma.cc/2AG9-CNXS>] (supporting that the most protective regulation of health prevails over that which is less protective).

protecting health—is something that individuals can judicially demand from the State.<sup>189</sup> Specifically, it has found that citizens can challenge legislation that purportedly seeks to protect human health but in reality ends up effectively harming or risking the health of individuals.<sup>190</sup>

Fundamental rights imply an obligation on the State to refrain from impinging upon them (a negative obligation), but also—according to Article 1 of the Constitution—imply further obligations to *procure* a context that is conducive to the enjoyment of those rights (positive obligations). Among the positive obligations of the State that stem from all fundamental rights is the obligation to protect people from impingement of that right by third parties (*i.e.*, private actors). Also, on occasion, there may exist an obligation of the State to directly provide goods and services necessary for the enjoyment of that right by the State itself.<sup>191</sup> For instance, providing public education or basic health services, such as vaccination campaigns, would fall under this type of obligation. In other words, every fundamental right may engender different types of obligation for the State, not just the (negative) obligation of refraining from impinging upon a fundamental right.

Since 2011, Article 1 of the Constitution explicitly recognizes four such types of obligations: (i) to *promote* conditions enabling their enjoyment; (ii) to *respect*, through non-interference, a person's enjoyment of a right; (iii) to *protect* from impingement on that right by third parties; and (iv) to *guarantee*, in some cases, the direct provision of goods and services needed for the exercise of that right. The government thus has obligations to *respect* the right to health, *i.e.*, refrain from directly engaging in situations which unnecessarily

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<sup>189</sup> See, e.g., Amparo en Revisión [Petition for Constitutional Relief] 315/2010, Pleno de la SCJN, 28 de marzo de 2011 (Mex.), [https://www.globalhealthrights.org/wp-content/uploads/2013/08/Balderas\\_Woolrich\\_v.\\_Mexico-Mexico-20111.pdf](https://www.globalhealthrights.org/wp-content/uploads/2013/08/Balderas_Woolrich_v._Mexico-Mexico-20111.pdf) [<https://perma.cc/F64Q-JZ4P>] (supporting that the regulation of a substance protecting health can be judicially demanded from the State).

<sup>190</sup> Acción de Inconstitucionalidad 119/2008, *supra* note 188; Amparo en Revisión 315/2010, *supra* note 189.

<sup>191</sup> See CPEUM, *supra* note 40, at art. 1 (“Todas las autoridades, en el ámbito de sus competencias, tienen la obligación de promover, respetar, proteger y garantizar los derechos humanos de conformidad con los principios de universalidad, interdependencia, indivisibilidad y progresividad”; “All authorities, within the scope of their powers, have the obligation to promote, respect, protect and guarantee human rights in accordance with the principles of universality, interdependence, indivisibility and progressivity.”). For an analysis of this article specifically focusing on the right to health, see Madrazo & Alonso, *supra* note 46.

threaten the health of the population; to *protect* the right to health by keeping third parties from harming the health of individuals; to *provide* key services, such as treatment for and prevention of abuse; and to *promote* health, by providing a context in which people can protect their own health effectively.

Prohibition fails to comply with all four types of obligations and should thus be deemed unconstitutional on the grounds of the right to health. Even if it failed to comply with only one of these obligations, without procuring effective protection to some aspect of health, that is tangible and documented, it should be considered unconstitutional.

In the following lines, we flesh out how prohibition in Mexico violates the right to health by looking at the four types of obligations that the State has in reference to the population's health. The following paragraphs are illustrative and should not be understood to be the only actual—or potential—negative impacts on (the right to) health that prohibition has engendered.

First, Mexico, by enforcing prohibition, fails to *promote* the right to health by creating a situation in which health (and life) become far more vulnerable. Enforcement policies in Mexico have propagated the epidemic of homicides. A result of this epidemic, as mentioned above, is a fall in average life expectancy in Mexico. This means that there are good reasons to believe that prohibition negatively affects the *general* health conditions of Mexicans to a degree that it affects even the broadest indicators of health of a population: average life expectancy. Also, Mexico's government fails to promote health when its prohibitionist discourse crowds out harm reduction efforts to communicate vital information for safe use.

Second, through its enforcement of prohibition, Mexico fails to *respect* the right to health. Users are exposed to an unclear and uncertain legal system that makes them targets of the criminal justice system rather than being offered information or services to take care of their health. Also, it fails in this type of obligation by widely tolerating—or, according to some reports, promoting<sup>192</sup>—the unnecessary use of lethal force or the use of torture by

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<sup>192</sup> See *Cadena de Mando* [translated in *Chain of Command*], PERIODISTAS DE A PIE, <http://cadenademando.org/> [https://perma.cc/DU5J-K4EB]; Ana Langner, *La orden a los militares fue abatir a los delincuentes* [The order to the military was to kill the criminals], EL ECONOMISTA (July 2, 2015), <https://www.economista.com.mx/politica/%20La-orden-a-los-militares-fue-abatir-a-los-delincuentes-20150702-0085.html> [https://perma.cc/7BCK-QCV3].

authorities. That is, through its unchecked use of torture and lethal force, the Mexican government fails to fulfill its obligation to *respect* the right to health of the individuals who are presumed to have committed criminal acts.

Third, under prohibition, Mexico fails to *protect* the health of users from third parties who provide unsafe substances in the black markets and unsafe treatment facilities that informally operate throughout the country.

Finally, under prohibition and with a public treatment service focused exclusively on abstinence, Mexico fails to *provide* necessary health services—specifically, treatment options—for people who would benefit from assisted treatment and/or substitution treatment.

For these reasons, we hold that the State is under the obligation to provide health services—such as safe and voluntary treatment for problematic use—as well as a regulatory framework that allows people who use drugs to have informed and safe access to drugs they choose to use.

The right to health also implies an obligation to refrain from adopting policies that create serious harm to health for both people who use drugs and the general population. We have presented, in the previous sections of this paper, a considerable amount of evidence that points to this problem. Prohibition enforcement has been a key driver in the homicide epidemic, affecting the general population—not only people the State claims were committing drug crimes or drug users. Prohibition harms the health of people who use drugs and who commit drug crimes and are imprisoned for doing so. Prohibition also affects their families' health. Many people are harmed by prohibition, and there are no documented benefits to the health of users, or anyone else, stemming from prohibition.

Damages and risks related to drugs are of two types: the primary, related to the use, and the secondary, related to the illicit nature of the drug market. In Mexico, the secondary risks and harms clearly outweigh the primary. The harms to health resulting from violence significantly surpass those caused by the direct use of illegal drugs, especially when more stringent measures are adopted to enforce prohibition. In other words, grounding drug policy in the right to health calls for the adoption of a robust understanding of harm reduction, which includes not only minimizing the negative health impact of drug use, but—more urgently—minimizing the negative health impact of the current drug policy. The data

summarized in this text suggests that separating a third type of damage and risk to health related to drugs may be in order, at least in Mexico: the risks and damages resulting directly from enforcing prohibition.

*b. The right to freely develop one's personality*

In principle, drug use is permitted by the Mexican Constitution.<sup>193</sup> By implication, the Mexican Constitution permits the production of drugs. Mexico's Supreme Court found that the fundamental right to the free development of an individual's personality protects an individual's choice to use marijuana.<sup>194</sup> Accordingly, it has found that a blanket ban—as exists today—on actions such as possession, cultivation, and access to this substance is incompatible with Mexico's Constitution. The protection of such an individual choice—with all its implications regarding safe access to drugs—must, therefore, be a core principle guiding drug policy. As regulation substitutes for prohibition, safe access to drugs and the conditions to make an informed choice regarding use must be factored into policy design.

*c. Policies tailored to and by local communities*

Prohibition is the wrong approach to drug policy, because it is a one-size-fits-all solution to a phenomenon that is both complex and highly context-dependent. Regulation should leave room for the tailoring of interventions to the needs of each community, but also and importantly, for community involvement in defining those needs and interventions.<sup>195</sup> Much of the violence documented throughout Mexico relates to the undermining of local governments'

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<sup>193</sup> The Court opinions speak exclusively to cannabis, but arguably the substantive arguments that constitute their *ratio* hold equally for other substances. While the Constitution may admit more restrictive specific policy designs for other drugs, the core finding—that an absolute ban on use overreaches margins of legislative regulatory powers—in principle holds for all drugs.

<sup>194</sup> Amparo indirecto 237/2014, *supra* note 79; Amparo Indirecto 637/2017, *supra* note 84; Amparo Indirecto 1163/2017, *supra* note 84; Amparo Indirecto 1115/2017, *supra* note 84.

<sup>195</sup> This of course, should always be within a human rights framework and the protection of personal freedom.



institutional capacities.<sup>196</sup> Restoring community trust and social reparations to populations affected by the violence stemming from prohibition must be the focus of locally tailored interventions.

*d. Effective access to information, medication and treatment*

Making evidence-based information available regarding the risks and dangers of drug use is one of the State's obligations in protecting the right to health. As to treatment, the State has the obligation to offer prevention and rehabilitation services. These services should be voluntary, free, secular, and universally accessible based on health and human rights. Any model that is used to comply with this obligation must be tailored to reduce risks and harms.

*e. Diversification and evidence-based revision of the laws*

Prohibition has inhibited the exploration of less harmful and more effective policies. A swift shift away from violently enforced prohibition and militarization should include strict independent monitoring and evaluation of results of new different interventions. Systematic monitoring and evaluation of results must be essential components of a drug policy comprising regulation.

*f. Respect for human rights and a note on international law*

Much has been written regarding the weight of constraints to domestic regulation that stem from international treaties that govern prohibition. The debate is ample and complex, but the basic positions on the matter are clearly and succinctly set forth in the Global Commission's 2018 Report on *Regulation: The Responsible Control of Drugs*.<sup>197</sup>

We affirm, confidently, that regulation is a constitutional obligation in Mexico notwithstanding the country's condition as signatory of the prohibitionist UN Conventions.

Mexico's drug policy must be grounded, first and foremost, on human rights. As explained above, Mexico has a peculiar position

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<sup>196</sup> See, e.g., Meza, *supra* note 52; Escalante, *supra* note 92; and Catalina Pérez Correa & Carlos De la Rosa, *(In)Security and Self-Government: Lessons from the Mexican Experience*, ICLJ. (forthcoming).

<sup>197</sup> *Regulation: The Responsible Control of Drugs*, *supra* note 13.

in this respect, for its Supreme Court has repeatedly held that drug use falls within the constitutional protection of the right to freely develop one's personality. Moreover, Mexico's generous right to health doctrine provides solid grounding for harm reducing regulatory models regarding drugs. Because of this, it makes sense to ponder the weight of the international drug regulation regime in light of the international human rights regime, for the latter is inextricably tied to Mexico's robust human rights domestic law. Reputable legal scholars have put forward a clear and compelling case that according to "a systematic and comprehensive interpretation of international law, the human rights system has legal primacy over the international drug control regime."<sup>198</sup>

These authors recognize that international human rights law and international drug policy regulation have evolved independently and, consequently, come into tension as the international drug policy regime directly and indirectly violates human rights. Directly, for instance, because prohibition implies measures such as denying access to essential medicines, establishing disproportionate punishments, or disregarding traditional uses of coca for minority cultures. Indirectly, because empirical evidence shows that prohibition enforcement exacerbates phenomena such as violence, human rights violations, displacements, disappearances, and torture. Undoubtedly, as we lay out in this paper, this is the case for Mexico.

When the two international law systems clash, international human rights law should prevail. The UN's human rights norms prevail over drug conventions, for the former derive directly from the UN Charter itself, whereas international obligations regarding drug prohibition are "not an expression of the state obligations under the charter."<sup>199</sup> Moreover, one of the fundamental purposes of the UN is the promotion and protection of human rights; this is not so for drug prohibition. Furthermore, many of the human rights norms are considered *jus cogens* (the highest level in the hierarchy of norms in international law); in fact, they correctly point out, most *jus cogens* norms are human rights norms. Finally, the General Assembly of the United Nations has declared that the international

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<sup>198</sup> Rodrigo Uprimny & Diana Esther Guzmán, *Drug Policies and Human Rights* (forthcoming) (on file with authors).

<sup>199</sup> *Id.*

drug regulation regime must respect the UN Charter in general and human rights in particular.<sup>200</sup>

As this paper shows, prohibition in Mexico has led to the gravest human rights crisis in decades, while drug regulation as here proposed is grounded in domestically and internationally recognized human rights. The choice, we believe, is clear. Regulation is a constitutional obligation.

## 5. FROM PROHIBITION TO REGULATION

This section sets out concrete regulatory and policy proposals for the most important drug markets that are currently illegal. We draw from international experiences, but offer regulatory models and policies tailored to Mexico's specific needs, weaknesses, and strengths. Admittedly, the proposals are not fully developed here, but simply sketched. Although prevention, information, and treatment for those who need it are not mentioned in every regulatory proposal, we consider them an essential part of any model.

We begin by presenting two measures that we believe should be adopted immediately, regardless of how far and how quickly Mexico's government is willing and capable to move towards regulation of all substances. A third section contains concrete proposals for regulating access to some drugs, with each substance discussed separately.

### 5.1. *Release of non-violent prisoners*

Draconian prohibition has frequently entailed the criminalization of people who use drugs, and, therefore, has had a discriminatory and disparate impact on the poorest participants in today's illegal market. This is, for example, the case for most women and farmers detained for drug crimes. Because of this, an aggressive program of case revisions in which non-violent drug offenders can obtain their release from prison should be put in place

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<sup>200</sup> See G.A. Res. 63/197, ¶ 1 (Dec. 18, 2008); G.A. Res. 62/176, ¶ 1 (Dec. 18, 2007).

immediately.<sup>201</sup> There are several legal modalities for the implementation of such a program, ranging from early release to amnesty. Whatever the choice of legal vehicle, what is most important is to rapidly alleviate one of the most harmful and continuing burdens that prohibition has placed on users and vulnerable communities: imprisonment.

People who have been convicted for use or simple possession of any illegal drug should have their cases revised with the objective of securing their release and/or their sentences revoked. Additionally, the government must implement measures that allow for a successful social and labor reintegration of those prisoners who benefit from the early release, pardon or amnesty. The following measures are recommended:

- Eliminate criminal records for those crimes and restore all active rights.
- Design programs specifically tailored to help released drug prisoners in their reintegration into society. Education and training consistent with their capabilities and compatible with the needs of the labor-market should be an essential part of those programs.
- Provide incentives and other stimuli through which the populations disproportionately affected by prohibition can participate in the opportunities stemming from the emerging legal drug industries. For instance, lowly farmers in regions where chemical eradication of crops has taken place and caused most harm should be given priority if they wish to become legal producers.
- Implement non-discrimination measures to de-stigmatize drug users who have long been targeted by government campaigns in the context of prohibition.
- Provide counseling, medical attention and voluntary treatment to those who require it.

Additionally, Congress should revise the proportionality of all existing penalties for “crimes against health”, especially prison sentences. In particular, the penalties for the crime of transporting drugs, which, as applied, disproportionately criminalizes women, should be revised.<sup>202</sup> Alternative sanctions – excluding compulsory

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<sup>201</sup> This proposal should not be confused with the proposal for amnesty in Mexico, which is circumscribed in the idea of transitional justice.

<sup>202</sup> Many women who are persecuted for crimes against health are detained because of drug transportation. They are generally not dangerous to society and having them in prison presents high social costs, many times much greater than the

treatment—should be favored for non-violent crimes related to drugs.

### 5.2. Decriminalization of use of all drugs

Decriminalization of the use and possession for personal use of all illegal substances is recommended, including the decriminalization<sup>203</sup> of possession of amounts needed for personal use, which are currently unrealistically low. Importantly, thresholds should be based on user's practices, and defined as a floor below which possession cannot be persecuted and above which intent to sell or distribute needs be proven in order to persecute.<sup>204</sup> Prosecutors and judges should prove intent for illegal commerce in the case of possession and not simply punish individuals on charges of simple possession.

### 5.3. Legal and regulated access to specific drugs

Considering the harms resulting from the existing drug policy, we unequivocally recommend moving towards the establishment of legal and well-regulated systems that allow people who use drugs to access them in a safe and informed manner, beginning with cannabis but also moving promptly to regulate the supply of other currently illegal drugs. Although prudence may suggest gradual, tiered changes in policy, we believe that regulating only one drug and leaving the people who use others in the hands of criminals and

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costs of the crime for which they are being accused. The Federal Criminal Code currently establishes that penalties for the transport of drugs range from ten to 25 years in prison. This Federal Criminal Code also establishes that alternative measures can only be applied for crimes that do not surpass a penalty of four years of prison. This means that most women are automatically taken out of the pool of people that can receive alternative measures. Therefore, thinking about alternative measures must be done at the same time as a review of penalties. See Rodrigo Meneses & Catalina Pérez Correa, *Mujeres y drogas: Cómo sentencian los jueces federales a hombres y mujeres acusados de delitos contra la salud*, in CATALINA PÉREZ CORREA, ET AL., *DE LA DETENCIÓN A LA PRISIÓN: LA JUSTICIA PENAL A EXAMEN*, (CIDE, 2015).

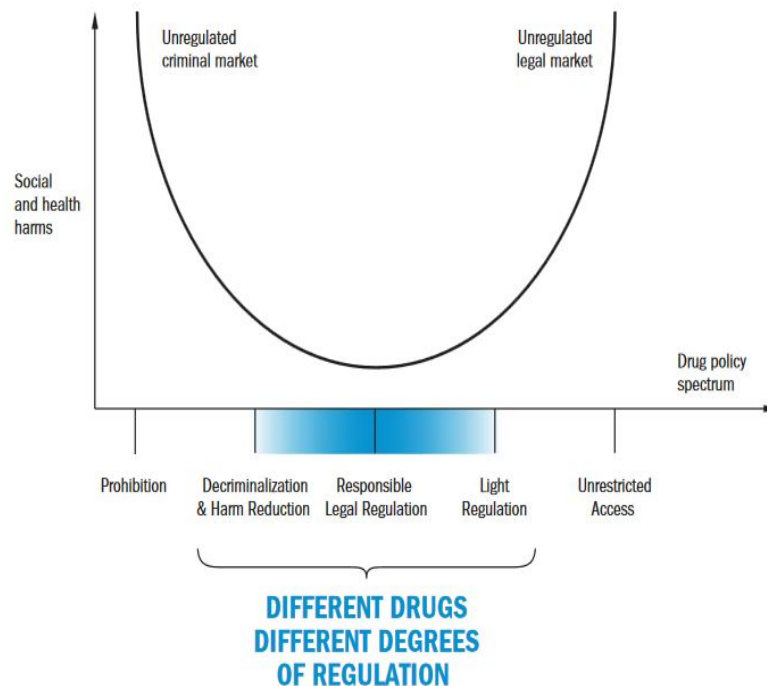
<sup>203</sup> Currently, possessing drugs within the tolerated amounts is not penalized but remains a crime.

<sup>204</sup> Currently, thresholds function as a roof, above which possession is always persecuted.

the criminal justice system, means accepting unjustifiable social harms. As argued before, only decriminalizing use and simple possession of drugs leaves us in a predicament close to the current crisis: both black markets and violent prohibition would continue to exist. To avoid this, we propose a policy aiming to regulate the supply of all drugs.

Importantly, the substance-specific policies set forth should be understood under the same logic identified as “the essence of the case for regulation” in the Global Commission’s 2018 Regulation report.<sup>205</sup> There, the Global Commission subscribes the idea that full prohibition and a fully free market are functional equivalents: both represent a substantially unregulated market, maximizing the potential risks and harms that derive from the operation of any market trading in psychoactive substances.<sup>206</sup>

Graph 3: Different Drugs Different Degrees of Regulation<sup>207</sup>



<sup>205</sup> *Regulation: The Responsible Control of Drugs*, supra note 13, at 12.

<sup>206</sup> *Id.*

<sup>207</sup> See *Regulation: The Responsible Control of Drugs*, supra note 13, supra note 13, figure 1 at 12.

If the extremes of the curve in the regulatory model in Graph 3 are functionally equivalent, and minimal risks and harms are to be found at the lowest point in the curve, then the relevant question is which type of regulation brings us to that lowest point. Unavoidably, the answer is both context and substance specific. Different communities may reach the lowest point in the curve with different regulatory models; the same is true for every substance. There is no one-size-fits all solution. Furthermore, we cannot be sure how a specific regulation will play out in a given community until it is actually in place and properly measured. Accordingly, regulatory models should be brought under revision periodically, provided that there is good information and a rigorous methodology to make a reliable assessment.

The proposed regulation models, therefore, should be understood as entry points into regulation and away from prohibition, and they should be always susceptible to revision. Because prohibition has been the rule and not the exception for a long time, there is a scarcity of experiences to draw from. Some substances—such as cannabis—offer a broader spectrum of previous and ongoing experiences than others—such as cocaine. Accordingly, for the case of cannabis, we lay out more than one possible entry point into regulation. In other cases, such as cocaine, we offer one possible entry point which we believe could guide the experimentation of policy in the case of Mexico. All proposals here contained are compatible with and informed by the general recommendations for regulation set forth by the Global Commission 2018 Report on Regulation.

### 1. Cannabis

The first substance that should be regulated is cannabis. The Supreme Court, following legal procedure, has notified Congress that a blanket prohibition on cannabis has been repeatedly held to be unconstitutional.<sup>208</sup> Regulating access to cannabis is not only a policy imperative but required by the Constitution and therefore necessary in order to abide by the rule of law.

There are different models that can be used for regulating cannabis, ranging from the alcohol-style commercial model,

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<sup>208</sup> Suprema Corte de Justicia de la Nación, Declaratoria de Inconstitucionalidad 1/2018, <http://www2.scjn.gob.mx/denunciaincumplimiento/ConsultaGenerales.aspx> [<https://perma.cc/U9NP-8744>].

currently in place in some US states such as Colorado and Washington, to a state monopoly, as in Uruguay. We explore three different models in this section and try to identify their relative strengths and weaknesses. Irrespective of the model chosen, public health should be accorded the highest priority by the government. Regulation should therefore seek to:

- Reduce harms caused by the illicit market (harms such as violence and proliferation of organized crime);
- Reduce harms to individual health from heavy/problematic use;
- Reduce youth use;
- Prevent harms from contaminants and additives, and provide for quality assurance and consumer information;
- Reduce harms to others from harmful use of cannabis (impairment/intoxication, exposure to second-hand smoke);
- Minimize the risk of corporate—or any other special interest—capture of regulation; and
- Make efforts to include in the new legal markets those communities and populations most affected under prohibition, such as growers, dealers from the poorest communities, and internally displaced communities.

Additionally, the following measures—drawn from international legal standards for substance regulation—should be adopted, independently of the model chosen:

- (i) Packaging and labeling: use childproof packaging, clear and explicit health warnings, content labeling (potency and ingredients), and plain packaging.
- (ii) Advertising, promotion and sponsorship: prohibit all publicity, promotion, and sponsorship of cannabis products. This is in line with the international best practices in tobacco control.
- (iii) Taxes: establish a tax system that keeps the price sufficiently low so that consumers do not return to the black market, but high enough to discourage use at the margin. Taxes and other fiscal revenues from this activity should be, at least partially, earmarked for three areas: a) prevention and treatment programs especially targeted at youth prevention; b) economic development, education, and job placement for communities most affected by prohibition; and c) medical cannabis research. We propose earmarking for reasons of political economy, although we concur that it is not an impeccably sound fiscal practice.



- (iv) Regulate modalities of use: implement tobacco control efforts, such as the establishment of smoke-free zones. Employ alcohol control measures, such as a ban on driving under the influence.
- (v) Product regulation: regulate the type of products (edibles, lotions, concentrates), permitted ingredients (prohibit any product mixed with nicotine or other, more addictive substances, for example), and potency levels.
- (vi) Regulate the distribution and sale: this includes the number and type of stores, locations where they can be established, restrictions of on-site use, minimum age for purchase, limits on sales and who can sell or grow for commercial purposes.

The first five elements should be similar in any model. Differences between models should lie mainly in the structure of the industry: the regulation of production, distribution, and access so as to determine who can participate in the cultivation, production, and sale of cannabis, and how.

Independently of the model chosen, regulation should always allow for two modalities of production and access: (I) Domestic cultivation for personal use of a limited number of plants per household at any time. (II) Cannabis clubs, conceived as non-profit civil associations, constituted with the purpose of guaranteeing for members the monthly supply of a determined amount of cannabis. It is an associative self-provisioning mechanism produced exclusively for its members, who pay a fixed fee to produce their cannabis in a regulated manner, with standards set by a specialized public body.

These two modalities, by themselves, would not be sufficient to satisfy the existing demand, as most users are occasional and may decide not to participate in them. Therefore, it is necessary to allow for the formation of a cannabis industry to supply most (occasional) users. With this in mind, we sketch three possible models for establishing a legal cannabis industry. They should be seen as three cases within a continuous range of possibilities. The three models offered here can also be seen as stages of a path through which regulation can transit. Direction of transit, however, is not irrelevant: if the initial model is commercial, it will be difficult to move it to a more state-controlled model even if the experiment suggests the latter approach as the best. Vested interests will quickly become entrenched as a private industry is set up. The other direction—from government control to commercial orientation—in principle would pose a lesser problem of entrenched vested interests

resisting the evolution of the model. Yet it should be kept in mind that in Mexico, in the past resistance to transform state owned enterprises has been strongest from government insiders.

a. *A commercially oriented model*

Under this system, cultivation, production, distribution, and sale would be in the hands of the private market, subject of course to the pertinent laws and regulations, which should be enforced by a specialized government institution properly empowered—legally and financially. The main advantage of this model would be to offer an array of products and prices that better satisfy demand at little cost to the State. The main disadvantage of this model, specifically in the case of Mexico, is the potential creation of an industry whose primary concern is profit maximization, not public health. Mexico has a history of substance regulation being obstructed or trumped by industry lobbying and should heed the warnings of past experiences.<sup>209</sup> In choosing this model, strict limits on vertical integration are crucial. Regulation should aim to keep the industry fragmented and compliant with very strict competition rules, so as to minimize the risk of capture of the regulator, as has happened before in Mexico with substances such as tobacco.

Conceivably, this model is the least likely to be conducive to integrating vulnerable communities disproportionately affected by the war on drugs into the new legal markets. Often marginalized and criminalized participants in today's current illicit market, and the communities they come from, would probably not have the capacity to compete in a free market by themselves, at least initially. It is important to actively incorporate these vulnerable communities into the new legal market, so as to draw them away from the (smaller) illegal market that may subsist during transition from prohibition to regulation.

b. *Government monopoly*

A second possibility is a state monopoly. Like in Uruguay, the government would be responsible for every step of the production

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<sup>209</sup> See Ángela Guerrero et al., *Identificación de las estrategias de la industria tabacalera en México* [Identification of the strategies of the tobacco industry in Mexico] (Legal Studies Department (DEJ) CIDE, Working Paper No. 51, 2010), <http://www.libreriacide.com/librospdf/DTEJ-51.pdf> [https://perma.cc/9U6P-UCSV].

chain, from seed to sale. Under this model, the government could franchise producers to cultivate the drug, and then sell it through licensed pharmacies. Still, there should be a separate and specialized government agency in charge of regulating the entire activity even if the latter is in the hands of the government itself.

There are several arguments in favor of a government-run industry. It could minimize diversion of drugs to the black market by giving the government close control over the product. By removing profit-seeking from the core of the industry, the model allows the government's commitment to public health to be paramount. Practices which are used to promote sales, such as advertising, attractive packaging, and equivocal labeling, would be more easily avoided, and quality control could focus on health objectives rather than profit-maximization. Importantly, a public, non-commercial model avoids one of the most problematic features of current legal drug industries like tobacco: the emergence of a few large private actors with the capacity and incentives to capture the regulator.

A disadvantage of a government monopoly could be inefficiency and difficulty in adapting to shifts in demand. If there is not enough production, or the product is not of good quality or high enough potency, some users could return to the black market. Government monopolies are often inefficient.

c. *Mixed model*

This mixed model seeks to harness the benefits of the two previous models by establishing a government monopoly exclusively on wholesale while allowing for private production and retail distribution through franchises. Retail sale at point-of-production could be permitted for producers, but the bulk of the market would be served while avoiding vertical integration. This model would allow for close government control of the substance itself and simultaneously facilitate the gathering of information about the market so as to document and assess success in achieving the public-health goals of regulation.

Two government entities would need to be established, at least initially: a public enterprise that would hold the monopoly over wholesale; and as in the previous cases, a separate regulatory agency. This bifurcation would also allow for later break-up and privatization of the wholesale monopoly once the regulating agency is deemed robust enough to enforce regulation without risk of

capture. The regulating agency would license growers and approve franchise of retail points. The public enterprise would buy the bulk of the production (excepting point-of-sale retail), test for quality control, package and label it and sell it to the licensed retailers. The regulating agency would, among its other regulatory powers, establish limits for how much can be grown for each licensed grower or sold by retailers, and would enforce regulation such as limits on advertising linked to cannabis and sale to minors. Through both the state-owned distribution company and the government regulatory agency, the state would maintain control and ensure that public health is the priority at each link in the production chain, while allowing for private participation in production and sale. This is important for a country like Mexico that, unlike Uruguay, has a considerable number of citizens currently participating in illegal production and retail. If incorporation of this population into the legal economy is one of the driving objectives of regulation—and it should be—then this model has a considerable advantage over a state monopoly.

The mixed model has all the benefits of a state monopoly, and additional ones:

- By eliminating the profit-maximizing thrust of private intermediaries, the licit cannabis industry could quickly become competitive and displace the illicit market.
- As all products must flow through one (public) entity, the cost of government inspection and monitoring could be considerably lower than in a purely commercial model. A commercial model would purportedly require inspecting and monitoring a multiplicity of private actors. This is particularly relevant for Mexico, as it does not currently have the institutional capacity to effectively monitor and inspect an open market with a large number of outlets, as tobacco control efforts have shown in the past.
- Information gathering will be significantly eased through wholesale control. This capacity will be crucial in the initial phases of setting up a regulated market. Periodic revisions and adjustments of regulation will be crucial to ensure success of a transition away from prohibition.
- For the specific case of Mexico, which has a much larger industry (production) and market (distribution) than Uruguay but relatively weaker regulatory institutions, than, for instance, Colorado or Canada, the mixed model allows for simultaneously maintaining control of information and

the market, while allowing the overwhelming majority of non-violent private individuals, who currently participate in the illicit industry, to move into a licit market.

Communities currently most affected by prohibition—such as farmers and dealers from the poorest areas and those who have been internally displaced—should be the focus of targeted programs to ensure their incorporation into the newly established legal markets as a form of social reparation, no matter what model is chosen. The mixed model could be most beneficial to these groups. By allowing the government to work as the middle-man, it would be easier and probably less costly to have those from poorer communities participate in the market and also ensure a safer product.

Farmers who are already growing cannabis should have the option to continue with the cultivation of such crops. This would have two advantages: 1) it is an incentive to exit the illicit market, thus increasing the potential of the regulated market to displace the former; and 2) it provides producers already specialized in the production and distribution of marijuana, which would facilitate the rapid construction of a legal market (and consequent displacement of an illegal market). Those convicted only of non-violent crimes against health and those who have not been convicted for selling to minors should still be able to participate in the market.

## 2. Opioids

Opioids should also be brought into a legal market, but under much stronger regulation than cannabis. We recommend two parallel regulations, which are non-exclusive: (i) regulated poppy cultivation and private production of pharmaceuticals for medical use—both national and international—and (ii) a public monopoly for poppy cultivation and the production and distribution of opioids destined for uses other than pharmaceutical. Regulating poppy cultivation and production of opioids would allow current growers and producers to exit the illicit market and to take advantage of an already specialized sector. This could facilitate the construction of a legal market (and the displacement of the current illicit one).

Mexico does not have an opioid use problem like in other countries, such as the neighboring United States. It is however, one of the world's main poppy cultivators. According to the United Nations Office on Drugs and Crime (UNODC), Mexico is the third-largest opium poppy cultivator in the world, after Afghanistan and

Myanmar.<sup>210</sup> By 2016, Mexican poppy cultivation had purportedly grown more than three times the national amount estimated in 2013.<sup>211</sup>

The central objective of drug policy should be to prevent or limit the use of opioids for non-medical purposes, while bringing cultivators into the legal market. This can be done through regulation. As shown by the Global Commission on Drug Policy's Position Paper "*The Opioid Crisis in North America*",<sup>212</sup> the opioid epidemic in the U.S. started with poorly regulated medical prescription and by allowing overly permissive publicity and promotion of opioid medications. The problem was exacerbated when a crackdown on the medical supply was carried out without providing adequate treatment and harm reduction measures to existing users. By abruptly cutting off legal supply, users moved into the black market to more dangerous illicit street drugs, such as heroin, and highly potent synthetic opioids, such as fentanyl. The result was an increase in overdoses and mortality.<sup>213</sup> To ensure that Mexico does not face a similar problem, a two-pronged approach should be implemented. On the one hand, strict controls must be placed on the distribution, promotion, and publicity of opioid-derived medicines. This should include guidelines and training on prescription and regular monitoring of health providers. Additionally, public health campaigns should be put in place to warn the medical community (doctors, nurses, and hospital staff) and patients of the risks of drug use disorder and overdoses that can arise from the medical use of opioids. On the other hand, existing users and people who lose access to prescription opioids should be

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<sup>210</sup> See UNITED NATIONS OFFICE ON DRUGS AND CRIME, WORLD DRUG REPORT 26 (2016), [https://www.unodc.org/doc/wdr2016/WORLD\\_DRUG\\_REPORT\\_2016\\_web.pdf](https://www.unodc.org/doc/wdr2016/WORLD_DRUG_REPORT_2016_web.pdf) [<https://perma.cc/BZ3P-JXHA>].

<sup>211</sup> *Id.*

<sup>212</sup> See *The Opioid Crisis In North America* (Global Commission on Drug Policy, Position Paper, Oct. 2017), <http://www.globalcommissionondrugs.org/wp-content/uploads/2017/09/2017-GCDP-Position-Paper-Opioid-Crisis-ENG.pdf> [<https://perma.cc/4N9L-49CS>]. See also Nick Werle & Ernesto Zedillo, *We Can't Go Cold Turkey: Why Suppressing Drug Markets Endangers Society*, 46 J. L. MED. & ETHICS 325 (2018).

<sup>213</sup> See Werle & Zedillo, *supra* note 212 (noting that the U.S. regulation of opioids simultaneously suppresses and promotes their use, and the law employs harsh criminal and regulatory sanctions to suppress illicit use, while at the same time legally supplying opioids through an immensely profitable and powerful pharmaceutical industry).

offered immediate access to adequate treatment and harm reduction measures.

Although Mexico does not yet have a problem with prescription opiate use, it has registered a rise in heroin use.<sup>214</sup> For the existing heroin-using population, we propose public treatment services that should offer a range of options including provision of heroin-assisted treatment (HAT) in affected communities. If needed, registered dependent users would be able to obtain a strictly controlled, quality supply of heroin from doctors or pharmacists. People who use heroin would have medical settings in which to use, with the possibility of taking small quantities for external use. This ensures the strength and purity of heroin is known and controlled, and that it is used with clean injecting equipment. Pilot programs for HAT should be set up in those places that currently have the most prevalence, such as Tijuana and other border cities.<sup>215</sup>

Additionally, in terms of treatment, opioid substitution therapy (OST) should be explored, including the use of medical cannabis as a substitute for problematic opioid use. OSTs—including methadone<sup>216</sup> and buprenorphine—should be put in place without burdensome rules or drug testing requirements.<sup>217</sup> While OSTs are not a cure, *per se*, they can help patients stabilize their lives and manage their use, and reduce the harmful consequences of problematic drug use. Maintenance therapy has been shown to be more clinically effective and cost effective than detoxification.<sup>218</sup>

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<sup>214</sup> See Martínez, *supra* note 141; Zambrano & Gómez, *supra* note 141.

<sup>215</sup> In other countries currently using HAT, availability is limited. It is only available under strict criteria, including long-term use and failure to respond to other treatments. We recommend providing HAT without those barriers to entry.

<sup>216</sup> Methadone is a synthetic opioid that produces longer-lasting, less intense intoxication than heroin, permitting people with opioid dependence to achieve a stable, high-functioning state without withdrawal symptoms or cravings. It has been proven to reduce illicit opioid use.

<sup>217</sup> In countries like the United States, there are extensive federal regulations governing methadone maintenance. Under federal law, all methadone maintenance treatments must occur in a federally regulated opioid treatment program. Specially licensed practitioners must provide the treatments, and the law prohibits them from prescribing methadone. Methadone for maintenance generally must be dispensed and immediately consumed, requiring patients to visit clinics daily. Finally, opioid treatment programs must randomly screen patients for illicit drugs. Other forms of opioid maintenance are also restricted by law. Doctors seeking to prescribe buprenorphine must receive special training and certifications, and federal law limits the number of patients they may treat at any time.

<sup>218</sup> See Werle & Zedillo, *supra* note 212.

For opiates, we also recommend the following harm reduction measures:<sup>219</sup>

- Providing safe-injection facilities, which provide people who use drugs with a safe, hygienic place to consume drugs obtained off-premises;
- Ensuring patients are not summarily cut off from opioids;
- Implementing needle and syringe exchange programs, including access to clean syringes, other sterile drug equipment and education (e.g. teaching sterilization techniques);
- Providing HIV and Hepatitis C testing;
- Preventing overdose, which should include prescribing naloxone with opioids; and
- Counseling and educating the community.

Finally, apart from an increase in federal, state, and local budgets for prevention, education, and treatment, we recommend that public funding go to the Ministry of Health to create more public centers for residential treatment, so that people who use drugs are not left with poorly regulated, privately run “annexes” as their only option.<sup>220</sup>

### 3. Cocaine

In contrast to other substances, we offer here only one recommendation merely as an illustration of a possible regulation model. As in the other cases, any decision on cocaine regulation must be based on sound, multidisciplinary and comprehensive studies not yet available. It is important to note that what little experience with regulation of legal coca exists is not applicable to Mexico, as Mexico is not currently a producer of coca and has no documented traditional use of coca. For coca and, more importantly, cocaine, a state monopoly of cultivation, production, importation, and wholesale should be set up, and a limited number of pharmacies should be licensed to sell the final product with

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<sup>219</sup> These recommended measures also apply to people who use other injection drugs, such as meth. These policies and services should be easy to access, involve people who use drugs in the program design, and include those people as peers and providers. Additional providers should be trained in drug user health, ensuring that anybody working on harm reduction measures or treatment has the proper training and scientific and medical knowledge.

<sup>220</sup> Like the harm reduction measures, this applies to people who use any drug where residential treatment is needed.



required doctor prescriptions. These pharmacies should follow strict guidelines such as labeling and registering quantities, and not publicizing that they sell the drug. Regulating cocaine would serve as a harm reduction measure avoiding other, more dangerous, forms of coca derivatives, such as crack, while providing access to safe products. It would also be a means to reduce violence and trafficking, specifically international trafficking as national production would substitute for importation.

#### 4. Others

Methamphetamine and commercial inhalants are two substances particularly problematic under current prohibition, yet regulated policy solutions are less frequently explored in the literature than in the cases of opioids or cannabis. Consideration could be given to a two-pronged approach: decriminalizing methamphetamine use and possession for personal use and prompting people who use methamphetamine to switch over to safer, legal drugs. Later, the HAT model could potentially be adapted for methamphetamine use. Currently, there are no market-approved medications used to treat meth dependence; however, some studies show that using prescription stimulants could treat both methamphetamine and cocaine dependence.<sup>221</sup> Research should be funded to further investigate this alternative.

As to inhalants (a commercial product not currently under prohibition yet very harmful when used as a drug), pilot programs could be explored, such as a program to substitute an inhalant with legal cannabis. Revenue from the emergent licit markets in cannabis, opioids, and cocaine should be partially earmarked to provide prevention and treatment for populations who use inhalants, particularly youth.

#### 5.4. Enforcement of drug laws: quickly deescalating militarization

The enforcement of drug laws should be primarily an administrative matter, not a criminal one. The military should not

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<sup>221</sup> See John Mariani & Frances Levin, *Psychostimulant Treatment of Cocaine Dependence*, 35(2) PSYCHIATRIC CLINICS OF NORTH AMERICA (June 2012) 425; Alison Knopf, *AMAT for methamphetamine or cocaine addiction: The case for Rx -stimulants*, 27(36) ALCOHOL & DRUG ABUSE WEEKLY (Sept. 21, 2015).

participate in drug control efforts or any other criminal or public security matters, in accordance with Article 21 of Mexico's Constitution. Current militarization must be deescalated in a programmed manner, which takes into consideration the differentiated security needs of regions and cities and sets out time-frames needed to professionalize civil authorities that would substitute the military forces currently tasked with public security duties. While the military continues to perform tasks constitutionally reserved to civil authorities, it should be regulated by a transitory and exceptional public security framework, which would include guidelines for the use of weapons and protocols as regards their presence and operations among the civilian population. The currently used framework designed for military conflict, to which the military's training and tactics logically correspond, should not be used.

It is also indispensable that government gather, produce, and publish information about the use of force by public authorities. Investigations should be carried out to determine responsibility in the systematic rise of violence and torture, with civilian supervision to ensure transparency. Importantly, every recorded case in which authorities have used lethal force should be fully investigated by civil – as opposed to military – authorities.

### *5.5. Other considerations*

Given the importance of the right to health – and the obligation of the government to respect, protect, promote, and guarantee it – any drug policy reform should have the health system – both public and private – as a key player. The public health system, including the Ministry of Health and the social security institutes for private and state workers (IMSS and ISSSTE national and state's), should decisively and directly participate in education, prevention and treatment efforts, alongside the more traditional drug policy offices, such as the National Commission Against Addictions (CONADIC). Drug policy and the right to health in relation to drug policy are not simply about drug use, but also about health and wellbeing in a broader sense. Additionally, because drug policy in Mexico is tied to many other arenas, including opportunities for employment and education, the health sector should lead the inter-sectorial work, with the education, agriculture, and labor sectors, to guarantee the

right to health. The private health system should follow any new recommendations for drug treatment as well.

In order for the government to guarantee the right to health, it needs to improve efforts geared toward treatment, prevention, and education. For this to take place, it is crucial to increase the federal and state budgets, to allocate more resources.

#### Education and prevention:

- Education and prevention should be at the center of drug policy. This includes providing information about risks and adopting policies to manage risk. For example, the quality of products must be supervised, advertisement of drugs should be tightly restricted or even banned, and sales to minors should be punished.
- The public needs to see drug use as a public health issue, not a criminal one. The government should promote a destigmatizing campaign so that people who use drugs are not criminalized or shunned.
- Any strategy of prevention and education must start from childhood to prevent the use of drugs by children. A broad set of prevention measures need to be adopted specifically for minors, including but not limited to services aimed at preventing use by minors in general and early detection programs to identify populations already engaged in experimental or occasional use in order to help them avoid excessive, frequent or problematic use.
- Respecting the framework of human rights and, specifically, the right to the free development of personality, an ambitious campaign of objective and truthful information about marijuana and its risks should be put in place so that adults can make their personal choices.
- Actions tailored to vulnerable groups, including children, adolescents, people suffering from mental illness, and problematic or dependent users should be designed and implemented.

#### Treatment:

- The State has the obligation to offer prevention and rehabilitation services. Any model that is used to comply with this obligation must be based on the reduction of risks

and damages, understanding this concept as a set of policies and non-coercive incremental programs aimed at avoiding or reducing risk situations with a clear view to reduce the associated damages. It must also guarantee that all the institutions and people in charge of working in the prevention and treatment of the problematic use of substances are trained and sensitized with the most up-to-date information.

- These services should be voluntary, free, secular, and universally accessible based on health and human rights.
- It is crucial to provide resources to the Ministry of Health to enable it to offer in-patient rehabilitation at public centers. So that the so-called annexes will not be the only cost-effective solution, the State needs to provide rehabilitation centers where patients can stay long-term and receive appropriate medical treatment. Budgets also need to be increased so that monitoring and inspection of all existing centers and annexes can take place.
- There must be rehabilitation centers specifically tailored for women.

#### Information:

- Strengthen data collecting capabilities on the use of marijuana in particular, and all other drugs in general.
- Strengthen data collecting capabilities regarding black markets of drugs.
- Procure information on the changes in drug policy so that variables can be identified and measured over time. This will ensure an accurate evaluation of the success or failure of the policy.

## 6. CONCLUSION

The “war on drugs” has failed globally and has led to a national tragedy in Mexico. The attempt to enforce prohibition has brought about crime, violence, death, disease, corruption, undermining of institutions and violation of essential human rights. Indeed, Mexico’s extremely weak rule of law is a big problem of which the explosion of organized crime is one of its many expressions. Strengthening the rule of law is possible by undertaking a

comprehensive and intelligently conceived overhaul of the justice and security institutions according to internationally established and tested standards. But addressing the severe ills stemming from the illegal trafficking of drugs requires the total abandonment of the paradigm of prohibition that has guided drug policies for too long in Mexico and practically everywhere else in the world. Human rights and public health must be the two essential pillars of the new paradigm. Prohibition must be discarded and replaced by regulation. We have sought, in this paper, to give many reasons for why a radical transformation of drug policy in Mexico is not only justified but indispensable. We have also outlined possible avenues for pursuing reform. It is crucial that this transformation be undertaken as soon as possible.