The Constitutional Costs of the War on Drugs

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Introduction

The costs of the prohibition of drugs -or, in its more bellicose version, the "war on drugs"- are many. Efforts to identify, understand and quantify them are increasing. Independently of wether the currently prevalent prohibitionism has succeeded or failed to achieve its objectives, the burdens societies around the world are bearing in the name of prohibition are increasingly a concern (e.g. countthecosts.org). Violence -be it criminal or official- (Escalante 2010; Silva Forne, Pérez Correa et al. 2012; Castillo, Mejía et al. 2013), incarceration (Metaal & Youngers, eds. 2011; Uprimny, Guzmán, et al. 2013; Alexander 2013), discrimination (Alexander 2010) and human rights violations (HRW 2011; Anaya 2013) are some of the most salient "costs" that are increasingly counted, and which allow for a more nuanced and realistic evaluation of the prohibitionist policies currently in place. To this list costs, we need to add a new register: the constitutional costs of the war on drugs. Many countries and societies have undertaken profound restructuring of some of their key normative and political commitments so as to wage a more effective war on drugs. Constitutional commitments such as due process rights, federalism, separation of powers, or limits on reelection have, at one time or another, been called into question, suspended or otherwise affected in the name of successfully enforcing drug prohibition.

In order face the purported threat of that drugs and drug trafficking represent to our societies, our leaders and governments have time and again requested and obtained broader powers and/or the evisceration of constitutional barriers to state power. By constitutional costs I mean the permanent curtailment, renunciation, impingement, carving out or any other affectation to long held values and institutions in our systems of government. I believe we need to tally the costs of attempting to enforce a prohibition of drugs not only in terms of coin and blood, but also in terms of the legal and political impact that waging this war has had in our political communities.

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The question guiding inquiry is how far are we willing to reshape our polities to enforce this ban? I focus on the constitution, and use constitutional texts, not practices, as the point of entry. Often these costs are presented as transitory measures, and then become entrenched. I want to begin the inquiry by limiting it to those alterations that, from the start, we deem as permanent, and so I begin by working on those entrenched in the legal system from the outset. But the inquiry can be expanded further and beyond: first to empirical work regarding constitutional practices and not only texts; then to affectations that are purportedly transitory but later come to be entrenched; but further still, to cultural attitudes towards government and society. For now, I limit myself to the legal-constitutional and textual dimension of the question. This is, then, at least initially, a normative legal inquiry.

Many may consider that these constitutional costs are already being tallied. After all, government misbehavior in the name of the war on drugs is not a novel phenomenon: human rights violations, extrajudicial executions, etc. have all been documented before. Underlying my proposal that we include the register of "constitutional" costs is a concern with the degree to which we have come to *accept* some government actions which we used to deem unacceptable and today we see as legitimate and even normal, and normed. As the examples taken from the Mexican experience I will offer will hopefully illustrate, we have substantively reshaped our constitutional commitments int eh name of the war on drugs; that is, as political communities we have altered our normative commitments and, in doing so, have transformed our identities as political communities.

A few important clarifications need to be laid out before continuing. First, because many of the legal changes adopted *change* the constitution by becoming a part of it (i.e. the formal constitutional amendments), they cannot technically be charged with impinging or violating the constitution. That is, formal constitutional amendments *by definition* cannot counter the constitution. To asses the constitutional *cost* in these cases, we need to adopt a *diachronic* perspective: we need to consider the values and institutions as they were *prior* to a war-on-drugs amendment and contrast these with they way they come out of the amendment process. The difference that emerges from such a juxtaposition is the constitutional cost of a constitutional amendment.

Other constitutional costs need not take this approach: legal changes, with no constitutional amendment that explicitly accommodates them, can impinge upon the constitutional commitments. In both cases, the perspective is somewhat conservative: it presumes that the constitutional commitments held *before* the legal changes are cherished and valuable, and that those adopted are deemed as either necessary evils or exceptional circumstances which require the cherished values and institutions be suspended. It may be that this is not so. It may be that a polity as a whole may renounce its prior constitutional commitments to, say, due process rights, and that the fact that the curtailment of due process rights was adopted initially in the name of the war on drugs, os merely accidental. In any case, because the war on drugs seems to be the driving reason or motivation for the amendments, I take the changes as being considered *instrumental* to prohibition/war-on-drugs and not shifts in value commitments of our political communities themselves.

This presentation will lay out a tentative analytic framework which may (or may not) be helpful as an entry point to identify, understand and asses what I have called the "constitutional costs" of the war on drugs. The *categories* or *types* of constitutional costs have been developed around one case study: Mexico during the early 21st century when its own "war on drugs" has been most costly, but also when it has spurred an avalanche of legal and constitutional changes. They will be illustrated with examples from that case study but by no means do I intend this to be a sort of exercise in "Mexican exceptionalism". The analytic framework I present here will surely need substantive revision when applied elsewhere, but hopefully they will help stimulate reflection as to what constitutional costs each of our societies has been willing to pay.

For now, I propose we consider at least three types of constitutional costs: a) the curtailment of fundamental rights; b) the restructuring of our forms of government, specifically the curbing of federalism and state powers; and c) the undermining of legal security, by conflating legal concepts and state functions. This note is structured around those three categories.

Curtailment of fundamental rights

Curtailment of fundamental rights can mean one of two things: a) the restriction of fundamental rights across the board, or else b) the carving out of a regime of reduced rights

for certain people. Fundamental rights are, in theory, the core value commitments of the political community which government is bound to respect or even guarantee or foster (Abramovich & Courtis 2003). They can be understood alternatively as the core commitments that government is under obligation to pursue, regardless of the preferences of transitional majorities; or else the residual sphere left to individuals or groups upon which government -and thus majorities- cannot impinge. Historically, at least in the Americas, they were set up principally to *limit* potential excesses of government (Gargarella 2010). Today, they are distinguished from other -non-fundamental- rights because they are universally attributed, as opposed to exclusionary or circumstance-dependent rights (Ferrajoli 2004).

Certainly, a case can be made that prohibition itself is a restriction across the board of certain fundamental rights, ranging from freedom of religion (i.e. religious uses of peyote) and freedom of consciousness (i.e. a right to alter one's consciousness) to the right to health (i.e. growing and using marihuana for medicinal purposes). This is not the phenomenon I want to focus on here, not because it is not relevant, and not because it is intrinsically debatable (it is both relevant and debatable). I want to focus on the phenomenon of carving out "special" regimes of *reduced* rights because while limiting the use of drugs is the explicit objective of prohibitionism, reducing (other) fundamental rights is not. Limiting freedom of religion or freedom of consciousness[2] can be deemed an *objective*, not a cost, of prohibitionism, reducing other fundamental rights, such as due process rights, is not (at least not explicitly) and objective of the current prohibition regime. A recurrent argument that exceptional powers be granted to authorities so they can effectively pursue the war on drugs has had an important corrosive effects on the system of fundamental rights, but that was not the stated objective of the war on drugs. The exceptions can be temporary or can affect only one group -drug dealers; organized crime- but in and of itself creating an "exceptional" regime of diminished fundamental rights cuts against the logic of fundamental rights: that they be universal. Furthermore, there is a risk that, as exceptions are admitted, they can broaden.

Concretely, Mexico's decision to carve out of a special regime of criminal prosecution and adjudication for "organized crime" and embedding this regime in the Constitution itself illustrates precisely this kind of measures, and the threat they represent to constitutions. In

[2] The right to health is a different matter, but I will not discuss it here. For some initial considerations on the matter, see (Madrazo 2009).

2008 an exceptional regime of reduced rights and extraordinary police powers was imbedded in the constitution for "organized crime" delinquency (of which drug crimes are the main cohort), exactly in the same amendment process as the whole of Mexico's "ordinary" criminal procedure was overhauled so as to make it more transparent and adversarial (DOF 2008). In other words: in 2008, Mexico bifurcated its criminal procedure. Recognizing that discretion and arbitrariness had plagued both criminal investigations and adjudication and rendered the criminal justice system inoperative and oppressive, it amended the constitutional text so as to include notions such as presumption of innocence, oral and public trials, victim's rights and an adversarial structure to criminal trials. At the same time, it defined organized crime loosely ("three or more people who organize to commit crimes in a permanent or repeated manner as specified in law"[3]) and created a regime of reduced rights for processing organized criminals. This exceptional regime included the possibility of being held, in-communicated and without formal charges, for up to 80 days if it is deemed instrumental to *any* "organized crime" investigation (*arraigo*); a doubling of the time period allowed for police detention prior to presentation before judicial authority (from 2 days to 4 days); in-communication while in prison (legal counsel excepted); incarceration in "special" prisons separate from the general population; a blank authorization to apply "special" and unspecified "security measures" within prisons; and the possibility of being charged anonymously. All of these measures are, of course, constitutionally banned under the "ordinary" criminal justice process.

The case of the *arraigo* is particularly illustrative of the "constitutional costs" we are willing to pay for our war on drugs. A purportedly extraordinary measure by which people can be put in house arrest (although it is almost exclusively carried out in police *safe houses*), without charges, so as to further criminal investigations, in Mexico the *arraigo* was deemed unconstitutional by the Supreme Court in 2005. In the case brought before it, the inclusion of the *arraigo* in the state of Chihuahua's procedural code, the Court struck down the figure because it was deemed incompatible with several due process rights established in the federal constitution (SCJN 2005). The 2008 amendment overrode the impediment of constitutional incompatibility by inserting the figure of *arraigo* directly in the text of the

[3] One of the key things that "the law" does regarding "organized crime" is to determine which crimes can be purported to be carried out in this manner. Drug crimes, of course, figure first and foremost, but the list includes car theft, kidnapping and quite a long list. Importantly, the deferral to "the law" effectively left in the hands of simple majorities the possibility to amplify that list and, with it, the applicability of the constitutional regime of exception.

constitution (without touching upon the rights it was deemed to be incompatible with by the Supreme Court) and thus making it technically impossible to challenge it and demand that it be held unconstitutional. The inclusion was justified as an exception to enable the Federal government, and only the federal government, to fight organized crime and drug trafficking. That is, it was purportedly restricted to the "exceptional" regime of reduced procedural rights referred to here. In a very self-conscious decision, Mexico decided to curtail the constitutionally established fundamental rights of those its authorities accused of being criminals, with drug dealers as the poster-criminal that demanded such curtailment.

The *arraigo* is also illustrative of the expansive impulses of the exceptions regime. The constitutional amendment which constitutionally entrenched the *arraigo* along with the other measures described above, included a transitory clause by which *arraigo* could be applied to any "serious crime" deemed so by federal district attorneys office. This clause may explain, in part, the extensive use of the *arraigo*, seemingly beyond organized crime. In any case, the use of *arraigo* expanded enormously during Mexico's recent "war on drugs". In 2006, the year in which the Calderon Administration declared its war on drugs (in December), the federal government used the *arraigo* in 42 occasions and obtained 137 guilty verdicts from the federal judiciary for crimes committed under "organized crime" modality; in 2010 the *arraigo* was used 1,679 times, but guilty verdicts for organized crime had only risen by 11, to 148 (Madrazo & Guerrero, 2012). CIDE's 2012 survey of Mexico's federal prison population (Pérez Correa & Azaola, 2012) also suggests a very liberal use of *arraigo* by the federal government: 27% of those convicted and detained in federal prisons report having been under *arraigo* before charges were brought forth against them; yet only 14.6% of the convicted prisoners were convicted for crimes committed in the modality of "organized crime". That means that *arraigo* is used *at least* (we know not how many were detained under *arraigo* but not convicted) twice as often as organized crime is successfully prosecuted (that is, assuming *all* organized crime convicts required *arraigo* prior to their being charged).

Limits and exceptions to other rights, such as privacy of communications and property rights, have also been carved out in recent years. For instance, a 2012 law (DOF 2012) allowed for prosecutors to demand from cell phone providers, without a court order, the geographic localization in real time of users; the 2009 Federal Police Law (DOF 2009b) law allowed for

sting operations, illegal in Mexico until then by virtue of being considered a form of *entrapment*. A full recount of all these impingements is warranted, but exceeds the ambitions of this note.

Restructuring government

By restructuring government I understand important, substantive adjustments to arrangement under which the powers and responsibilities are distributed between branches and/or levels of government. The reconfiguration of federalist relationships, for instance, is one such adjustment. The delegation of legislative or judicial functions to the Executive could be another. What matters is that the way in which power is distributed and contained among authorities is altered. That powers and responsibilities be redistributed in order to effectively enforce a specific (and deeply contested) policy should call our attention. That is, it sound counterintuitive, when thinking about the structural design of constitutional government that it should be adjusted in function of specific policies, which are contingent on the circumstances and the specific objectives which they are aimed to address. This, however, seems like a phenomenon that is easily expected or at least accepted in the context of the war on drugs.

Mexico in recent years, has undergone precisely such mayor constitutional rearrangements: the relationships between national, state and city governments have come to be rearranged as security measures are taken to face the threat of narcotrafficking. Purportedly temporary and extraordinary, but by now quite long-lasting, these include notorious actions such as local police functions being carried out by federal forces in specific cities. These cases are worrisome and they may account for most of the gargantuan rise in homicide rates in specific cities (Escalante, 2010).

However, I want to illustrate the phenomenon of government restructuring with a different, less news savvy transformation; a rearrangement of state-federal relations that was, from inception, explicitly permanent. Mexico's *Ley de Narcomenudeo* (DOF 2009), often portrayed as a reform aimed at decriminalizing of drug consumption (which is imprecise, to say the least, but it is not my concern here to clarify that point here) was in fact the first occasion, in over a century and a half, in which the federal government has intervened in state criminal policy (at least officially). Since the toppling of the Santa Anna dictatorship in 1855 and the

definitive establishment of Mexico as a federal (as opposed to centralist) republic with the 1857 Constitution, states had had complete autonomy regarding their internal criminal law (except, of course, for the limits established through federal constitutional rights).

In 2005, in a first, frustrated, attempt at passing a version of the *Ley de Narcomenudeo*, the Constitution was amended empowering federal Congress to dictate "the manner in which federal entities may participate in the persecution of crimes in concurrent matters". Concurrent matters are those in which the Constitution establishes the concurrent jurisdiction of the Federation and the States; one of which is health and drug crimes are formally categorized as "crimes against health". So the 2005 amendment constitutionally enabled what would not become a reality until 2009. This bill consists a series of amendments to federal health and criminal laws, that transferred jurisdiction for certain drug crimes (petty dealing) to the states. The thrust of the reform was consistent with one of President Calderón's key programatic objectives: to bring state and local governments on board the "war on drugs" (Plan Nacional de Desarrollo 2007) which he claimed was being fought single-handedly by the federation. Drug crimes were, until 2009, exclusively the jurisdiction of the federal government. With the *Ley de Narcomenudeo* they became also a matter of state jurisdiction. The thrust of the reform established that possession and dealing up to certain amounts was to be under state authority and, beyond that, under federal jurisdiction, effectively forcing the hand of state governments to come on board the Calderón Administration's "war on drugs".[4]

Until today, most states have been slow or reluctant to exercise their novel jurisdiction. At least one -Campeche- attempted to vary the federal policy by raising the amounts of drugs that determine which cases should be decriminalized and which prosecuted. The federal government's reaction was quick and energetic: it challenged the state's tweaking and obtained a Supreme Court ruling stating that the determination of which conducts must be punished and how much they should be punished was *exclusively* the federal governments prerogative (SCJN 2011).

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[4] Wether the states, under the new law, *can* or *must* prosecute drug crimes is still up in the air: most states have neither seriously undertaken the enforcement of these laws or resisted it. However the clear intention of the package of amendments is to force the states -who had remained in the sidelines- to join the federal government's "war". The text of the Constitution, however, seems to cut against the mandatory nature that the federal government's bill clearly intends (Madrazo 2012).

It can be argued that criminal law should, properly, be a national jurisdiction. Other federations, such as Canada, have retained criminal law as an exclusive federal matter; but not Mexico. State criminal law as a matter to be decided by state governments was, until 2005, a long-standing constitutional principle and one of the most important powers reserved to the states in our federal system. An exception to that principles was carved out in the context of the "war on drugs" and today federal-state relations regarding criminal law are in a process of deep transformation.[5]

Conflating functions

By conflation of functions I mean the blurring of distinctions between legal definitions or of powers and functions which results in diminished clarity and diminished legal security for citizens when facing state action. This can be understood as an *indirect* constitutional cost, as opposed to the *direct* changes to the constitution system that diminished rights or undermined principles such as those described in the previous two sections represent. This type of constitutional cost is *indirect* because in blurring distinctions or conflating state functions, *legal uncertainty* is fostered; and so a central constitutional commitment -the principle of legality- by which all state action, particularly repressive state action, should clear legal grounding is undermined. The distinction itself is not (necessarily) a constitutional value, but its blurring affects a core constitutional commitment: legal security. The blurring of previously clear (or comparatively clear) distinctions makes citizens more vulnerable to arbitrariness and authorities less accountable for their actions.

I want to illustrate this conflation with the core state functions regarding crime, because, at least in Mexico, the conflation has reached alarming proportions, as we shall see. Traditionally, there has been a sharp distinction between three different spheres: national security, public security and criminal investigation and prosecution. Each of these concepts referred to a distinct area that a state organ was charged with. National security referred external threats to the state and was the proper realm of the armed forces; accordingly, the duties of the armed forces were limited to facing national security (or, exceptionally, at least in

[5] Notably, this transformations includes colaborations schemes -known as COE's- which establish "units" of coordinated efforts between state and federal prosecutors and police, but extend collaboration beyond the "health crimes" the law speaks of. (Pérez Correa, Márquez & Alonso 2013)

theory, natural catastrophes). Public security meant internal threats to society and was the realm of different police bodies -federal, state and municipal-; it included crime prevention, and crime fighting when *in flagranti*, but not criminal investigations. Criminal investigations were the "monopoly" of the *ministerio púbico,* the attorney generals' offices (be they state or federal), which was aided by a separate, special police body -the *investigative* or *judicial* police- directly subordinate to it and which was the only police allowed to cary out criminal investigations. In short: national security was the realm of the armed forces; public security the realm of police bodies; and criminal investigation and prosecution the realm of the attorney generals offices.

Starting in 2005, again, in a purported effort to better vest authorities with the legal tools to enforce drug prohibition and fight organized crime (notably narcotrafficking), these distinctions rapidly collapsed. In 2005, the novel National Security Law (DOF 2005) defined "threats to national security" and thus the scope of action of armed forces, as including "actions which obstruct authorities in acting against organized crime" and "actions intended to obstruct naval and military operations against organized crime".

In doing so, this definition gave legal grounding to "naval and military operations against organized crime". That is, although the text seems to presume naval and military operations it was, in fact, legally enabling them. Yet organized crime, *qua* crime, was and is -according to the text of the constitution- the *exclusive* realm of the the (in this case, federal) Attorney General's office, which has de "monopoly" to initiate criminal prosecution. This means that, *around* the concept of organized crime -which remained the turf of the attorney general- the National Security Law established a "buffer zone", unclearly distinguished from the core, that allowed for armed forces to be deployed in fighting (organized) crime. This is the seminal confusion which allowed President Calderón to massively deploy the Army and Navy to carry out police work -in some instances, suppressing and substituting local police- throughout the country. The National Security Law also included broad clauses empowering armed forces to collaborate and support criminal *investigations* carried out by the Attorney General's office.

The participation of armed forces in police work and criminal investigations -which has gone as far as having the Navy patrol the deserts of Coahuila, far from any body of water- went on, unmolested, even after the 2008 constitutional amendment (referred to above) established

that *only* civilian bodes could carry out police functions. Which brings us to the next conflation: the 2008 amendment redefined "public security" to include criminal investigation (while stating, rhetorically it seems, that it was to be carried out, exclusively, by civilian bodies), thus collapsing policing with criminal investigation and prosecution. In subsequent, and derived, legal changes the Federal Police Law of 2009 (DOF 2009b) gave the federal police broad powers to "help out" (coadyuvar) the Attorney General's office in criminal investigations by directly participating in criminal investigations, but also to carry out independent, "preventive" investigations. One is left to wonder in what -other than the absence of the Attorney General's office- do these independent, preventive investigations differ from the criminal investigations over which the Attorney Generals' offices have a monopoly (according to the constitution).

The result of these conflations -between national security, public security and criminal investigation- has been a confusing situation in which it is unclear what each of the bodies involved -Army, Navy, Federal Police and Attorney General's Office- does and what each is responsible for; who can detain, investigate, question and charge who. Uncertainty is the very least of the wrongs that this implies for civilian population. The situation has reached such alarming proportions. Jesus Murillo Karam, the incoming government's Attorney General recently stated that such confusions rendered the Attorney General's office's capacity to investigate crime moot: "The Police was given a role that used to be the Attorney General's, and I say *used to* because it turns out that the [special investigative police under the authority of the Attorney General] were being used as bodyguards and security guards. [...] While the powers to carry out investigations were being transferred to the Federal Police, what happened was the Federal Police and the Attorney General's Office were in conflict, there was no interaction, today we are seeing the results of this: accusations that are not holding up one after the other, because there was no investigation [...]" Of the more than four thousand special investigative police officers, only 495 were assigned to doing investigative work; the rest were assigned to bodyguard duty. (Excelsior 2013).

If preventive police do the prosecutors' job, and in turn investigative police are into bodyguards, we shouldn't wonder at the notorious criminal prosecutions that increasingly seem to be falling apart in Mexico. And as my colleague, Alejandro Anaya, will explain in this panel, having the Armed Forces carry out police work has also had nefarious repercussions.

The end result, it seems, is that the citizenry does not benefit from a functional criminal prosecution and, in contrast, needs be wary of being stopped by the military while on the road. When everyone can do anything, and nobody is responsible for actually getting things done, the result in deepened insecurity and uncertainty for everyone except empowered authorities.

Conclusions

The war on drugs consistently demands great sacrifices from societies around the world. Among them we need to take into consideration fundamental changes that, as political communities, we are willing to undergo; the sacrifices we engage in regarding manner way we are constituted *as political communities* must be tallied among the other many costs of the war on drugs. When we sacrifice the core values we hold together and renounce core commitments we had promised each other as members of a political community, we must be sure that it is for good reason. So far, these constitutional costs are most often not understood as such but as extraordinary -exceptional- measures we must adopt to achieve our objective. But these measures are reshaping us as political communities and if we continue to accept them without understanding them as costs in the way we exist as communities, we will soon find that we no longer recognize our polities. Our structure and commitments will no longer be there, at least not as we know them.

The agenda I propose we engage in is that of identifying and analyzing these constitutional costs, understanding them as such. I propose that, in making them visible, we compare them across our different experiences and see what they have in common. Only in facing them as what they are -constitutional sacrifices- will we be able to asses how much we are demanding of ourselves in order to enforce prohibition, and knowingly decide if we are willing to continue paying the costs, especially if this is, in fact, a war we cannot win. Counting the constitutional costs of the war on drugs is one of the ways in which we can most visibly see that, in the end, the war on drugs is a war on ourselves, as communities.

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