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Admissible or Inadmissible: The Role of Formally Codified Rules of Evidence as a Safeguard in Mexico's Developing Adversarial System

Connie Dang

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Admissible or Inadmissible: The Role of Formally Codified Rules of Evidence as a Safeguard in Mexico’s Developing Adversarial System

CONNIE DANG*

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Long plagued by a reputation of corruption and inefficiency in its criminal justice sector, Mexican criminal procedure is in the process of an ambitious and aggressive reform. Mexico’s constitutional reforms began in 2008 and aim to be fully implemented throughout the country by 2016.¹ The reforms are transitioning Mexican criminal procedure from an inquisitorial system to an oral adversarial system.² This transition will be achieved through comprehensive constitutional and statutory changes at every level of a criminal proceeding: from the initial investigatory stage, to the trial stage, and finally to sentencing.³

Central to the goals of the reforms, there are now various clear procedural safeguards in place that protect the due process rights of Mexican citizens accused of crimes.⁴ These safeguards aim to ensure a fair trial for the accused by protecting criminal defendants from possible

1. Decreto por el que se reforman y adicionan diversas disposiciones de la Constitución Política de los Estados Unidos Mexicanos [Decree to reform and amend provisions of the Mexican Constitution], *Diario Oficial de la Federación* [DO], 18 de Junio de 2008 (Mex.).

2. *Id.*

3. Matthew C. Ingram & David A. Shirk, *Judicial Reform in Mexico: Toward a New Criminal Justice System*, 2010 U. SAN DIEGO TRANS-BORDER INST. 1, [http://catcher.sandiego.edu/items/peacestudies/2010-IngraShirk-JRM%20\(2\).pdf](http://catcher.sandiego.edu/items/peacestudies/2010-IngraShirk-JRM%20(2).pdf)

4. Decree to reform and amend provisions of the Mexican Constitution, *supra* note 1.

corruption and abuses of power within the criminal procedural process, and by preventing violations of their fundamental individual rights.⁵ Specifically, this Comment will examine and compare these safeguards within the newly implemented criminal proceedings for the purpose of proposing an additional procedural safeguard: formally codified rules of evidence.

In Part I, this Comment begins with a brief history of Mexico's political framework, including an introduction to its civil law tradition, the positivist values present in its legal framework, and the previous criminal procedure reforms that took place before the current 2008 constitutional reforms.⁶ It is important to understand the challenges that the previous—and unsuccessful—constitutional reforms faced in order to appreciate the drastic scope of the current changes to Mexican criminal procedure.

Part II will address the role of the United States in its relationship with Mexico relationship during the implementation of the 2008 constitutional reforms. As Mexico's direct neighbor, the United States is in the unique position of being particularly invested in the implementation of any changes to the Mexican legal system. While the current Mexican reforms only address criminal proceedings, it is likely that the United States would be similarly invested in reforming civil proceedings in light of increased trade and business dealings between the two countries. The United States' own adversarial system, so prominently displayed in American criminal procedure, will also inevitably influence the new Mexican adversarial system due to the proximity and involvement between the two countries. Consequently, the United States plays a significant role in facilitating the reforms by funding and actively assisting with the continuing education and training of Mexican citizens and legal personnel during this transition.

Part III will compare the pre-reform inefficiencies within Mexico's criminal procedure under the inquisitorial system with the goals of the 2008 constitutional reforms and introduce how the reforms simultaneously address the inefficiencies and goals with the implementation of new

5. *See generally* Universal Declaration of Human Rights, G.A. Res. 217 (III) A, arts. 8–12, U.N. Doc. A/RES/217(III) (Dec. 10, 1948); International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171.

6. Although Mexico is transitioning to an adversarial system, it is *not* trading its civil law system for a common law system. Thus, positivism remains an integral Mexican legal value. *See infra* Part A.

safeguards. Notably, although one of the goals of the reform is to ensure justice and protect a criminal defendant's basic human rights as mandated by international standards, the reforms expressly take away the rights of those criminal defendants accused of participation in organized crime.⁷

Part IV will propose the implementation of a separately written code of evidence as an additional safeguard within the scope of the reforms. The Codes of Criminal Procedure of several Mexican states already embody many evidentiary principles that are similar to those codified in the United States Federal Rules of Evidence, but these principles are not uniform across the codes of different states.⁸ This section proposes that the Mexican government formally codify its rules of evidence outside the code of criminal procedure as a procedural safeguard during evidentiary determinations to protect the criminally accused from arbitrary or inconsistent evidentiary standards. This section also explores how formally codified rules of evidence may evolve either under Mexico's positivist legal framework or under the indirect influence of the United States.

Part V contains a comparative analysis of Mexico's transition to an adversarial system to that of Chile, another Latin American country that successfully transitioned from an inquisitorial system despite a similar civil law framework. Like Mexico, one of the primary goals of Chile's reform was to prevent human rights violations in its criminal proceedings.⁹ However, Chile's reform is considered successful even though it did not formalize its rules of evidence.¹⁰ Thus, this section will examine the similarities and differences between the countries that led to their reforms, while taking into consideration that a comparable country that successfully transitioned to an adversarial system nevertheless fulfilled the goals of its reform without formally codifying its rules of evidence.

7. William Hine-Ramsberger, *Drug Violence and Constitutional Revisions: Mexico's 2008 Criminal Justice Reform and the Formation of Rule of Law*, 37 *BROOK. J. INT'L L.* 292, 302 (2011).

8. While each state within the United States has its own state code of evidence, their evidentiary principles are similar enough to be considered uniform for the purposes of this Comment.

9. See Carlos Rodrigo de la Barra Cousino, *Adversarial vs. Inquisitorial Systems: The Rule of Law and Prospects for Criminal Procedure Reform in Chile*, 5 *SW. J. L. & TRADE AM.* 323, 324–25 (1998).

10. See Cristián Riego, *Oral Procedures and Case Management: The Innovations of Chile's Reform*, 24 *SW. J. L. & TRADE AM.* 339, 341 (2007).

I. A BRIEF HISTORY OF MEXICO'S POLITICAL FRAMEWORK

A. *Mexico's Civil Law Tradition and Inherent Positivism*

Like most Latin American countries transitioning to an adversarial system, Mexico's inquisitorial system derives from the civil law tradition retained after Spanish imperialist rule.¹¹ Unlike a common law system, a civil law system is positivist in nature, governed by the idea that legal authority originates directly and solely from the enactment of laws.¹² Mexican courts are not bound by legal precedent, the driving force of the common law system, until that precedent is subsequently written into the civil law codes.¹³ As a result, Mexico's legal system is positivist because inherent rights are not guaranteed to Mexican citizens unless those rights are formally codified in the Mexican Constitution.¹⁴ Mexico's inherent positivism in relation to the current reforms is further explored in Part IV of this Comment.

Previous reforms to Mexico's constitution, however, also reflected its positivist foundation. For example, Mexico's first post-independence constitution of 1824 was heavily influenced by the United States Constitution, but conspicuously lacked the guaranteed individual rights afforded in the United States Constitution until later reforms made to the Mexican Constitution in 1857.¹⁵ Consequently, Mexican citizens could not demand for recognition of their individual rights until those rights were explicitly written into the constitution.¹⁶

Like the current 2008 constitutional reforms, the post-revolution constitution of 1917 may have similarly intended to protect basic human rights by reforming Mexican criminal procedure to constitutionally

11. See Jorge A. Vargas, *An Introductory Lesson to Mexican Law: From Constitutions and Codes to Legal Culture and NAFTA*, 41 SAN DIEGO L. REV. 1337, 1342 (2004); see also Hine-Ramsberger, *supra* note 7, at 293.

12. See Paul J. Zwier & Alexander Barney, *Moving to an Oral Adversarial System in Mexico: Jurisprudential, Criminal Procedure, Evidence Law, and Trial Advocacy Implications*, 26 EMORY INT'L L. REV. 189, 193 (2012).

13. See *id.*

14. See Constitución Política de los Estados Unidos Mexicanos [C.P.], *as amended*, art. 1, Diario Oficial de la Federación [DO], 5 de Febrero de 1917 (Mex.).

15. Vargas, *supra* note 11, at 1343.

16. Interestingly, although the 1917 Mexican Constitution provided a positive framework by guaranteeing individual rights, these guarantees appear largely ignored. See Carlos Rios Espinoza, *Redesigning Mexico's Criminal Procedure: The States' Turning Point*, 15 SW. J. L. & TRADE AM. 53, 56–57 (2008).

guarantee needed criminal rights.¹⁷ Under a positivist context, however, this Constitution did not guarantee inherent individual rights to Mexican citizens. Instead, the Constitution arguably offered the rights that it was willing to give to its citizens by statutorily defining how it would treat its citizens.¹⁸

B. Reforms to the 1917 Constitution

The 1917 Mexican Constitution and its subsequent reforms established an adversarial system, one that addressed many of the same goals of the 2008 reforms and included procedural safeguards similar to those of the United States.¹⁹ Unfortunately, this Constitution and its reforms were largely ignored due to the political turmoil surrounding the end of the Mexican Revolution and were never actually implemented into Mexican criminal procedure.²⁰ As a result, Mexican criminal procedure continued with its inquisitorial system until the current 2008 constitutional reforms by President Calderón.²¹

In 2004, President Vicente Fox first proposed federal reforms to the criminal justice system to facilitate a move towards an adversarial model.²² Although he was ultimately unable to pass these reforms through the legislature due to lack of political support and political resistance, President Fox is nevertheless credited with prompting the initial state level reforms towards an adversarial system.²³ For example, between 2004 and 2008, several Mexican states began implementing oral adversarial procedures into their criminal proceedings following the announcement of President Fox's proposed reforms, which included oral arguments in public courtrooms.²⁴ Remarkably, the first oral adversarial trial took place in 2005 in the city of Montemorelos, two years before the 2008 Calderón

17. See Espinoza, *supra* note 16, at 55–56.

18. Zwier & Barney, *supra* note 12, at 198.

19. See Constitución Política de los Estados Unidos Mexicanos [C.P.], *as amended*, art. 20, Diario Oficial de la Federación [DO], 5 de Febrero de 1917 (Mex.) (listing safeguards such as the right to confrontation, proper notice, a public jury trial, and bail).

20. Espinoza, *supra* note 16, at 56. In 1934, the legislature passed enabling legislation that contemplated the principles in the 1917 Constitution. *Id.* This enabling legislation, however, was defective and reflected a disparity between the Constitution's principles and the criminal procedure legislation. *Id.* at 56–57.

21. See *id.* at 56–57; see also Zachary J. Lee, *Wrestling with Criminal Procedure: How Law Schools in United States and Mexico Can Team Up to Rebuild Mexico's Criminal Trial*, 33 Hous. J. INT'L L. 55, 61–63 (2010).

22. Ingram & Shirk, *supra* note 3, at 8.

23. *Id.*; Lee, *supra* note 21, at 64.

24. See Lee, *supra* note 21, at 63–65.

constitutional reforms requiring oral trials were officially adopted by Mexican Congress.²⁵

Unlike the reforms proposed by the Fox administration, the reforms proposed under the administration of President Felipe Calderón were widely supported and quickly adopted in 2008, perhaps in response to the rising violence and corruption as a result of Mexico's drug war.²⁶ These current constitutional reforms primarily sought to improve the criminal justice system in response to Mexico's drug war and the high levels of violence from organized crime syndicates, restore the public's confidence in the legal system, and remedy the rampant human rights violations occurring during criminal proceedings as mandated by international standards.²⁷

These aggressive constitutional reforms require all Mexican states to adopt new criminal procedures to reflect the new oral adversarial system by 2016.²⁸ Per the constitutional reforms, Mexico must: sufficiently train all Mexican legal professionals in oral advocacy so that they may successfully partake in the new system, implement procedural safeguards at all levels of a criminal proceeding in order to protect the newly constitutionally guaranteed rights of the criminally accused, and separately address those accused of organized crime within the criminal justice system.²⁹ These reforms will be further examined in more detail in Part IV of this Comment.

II. INFLUENCE AND INVOLVEMENT BY THE UNITED STATES

Inevitably, Mexico's adversarial system will be exposed to and influenced by the United States' adversarial system, due to the proximity, accessibility, and the direct involvement between the two countries. As a direct neighbor, the United States is naturally invested in aiding Mexico with any changes to its legal system, as such changes may directly or indirectly impact the United States. For instance, in light of the proximity

25. *Id.* at 63–64.

26. *See* Ingram & Shirk, *supra* note 3, at 8; *see also* Ronald F. Wright, *Mexican Drug Violence and Adversarial Experiments*, 35 N.C. J. INT'L L. & COM. REG. 364–69 (2010).

27. *See* Ingram & Shirk, *supra* note 3, at 8; *see also* Wright, *supra* note 26, at 364–69.

28. Decree to reform and amend provisions of the Mexican Constitution, *supra* note 1, *segundo transitorio*.

29. Decree to reform and amend provisions of the Mexican Constitution, *supra* note 1, art. 20.

between the two countries and the threat of a potential violent spillover from Mexico's drug war into the United States, it is logical that the United States would also be invested in facilitating reforms that would create an efficient Mexican criminal procedure.³⁰

The United States funds the implementation of Mexico's criminal justice reforms partly in self-interest, in order to tackle organized crime and drug trafficking before those problems cross the border. For example, the United States actively assists in funding the implementation of Mexico's 2008 reforms through the Mérida Initiative, a \$1.4 billion foreign aid package providing assistance to Mexico and other Central American countries to combat against drug crime.³¹ Additionally, fifteen percent of Mérida funding to Mexico is contingent on Mexico's meeting certain requirements regarding human rights conditions.³² These requirements are determined by an annual United States State Department human rights progress report.³³ Thus, the United States is essentially compelling Mexico to address its human rights violations within its criminal reforms.

Most Mérida programs are currently administered by two federal agencies: the United States State Department and the United States Agency for International Development (USAID).³⁴ USAID in turn funds Proderecho, an agency designated to oversee the reform successfully implemented in each Mexican state.³⁵ Successful implementation requires successful standardization, which in turn requires changes to current legal education in Mexico.³⁶ Because the concept of an adversarial system is completely novel to pre-transition Mexican legal professionals, current practicing legal professionals must be retrained at every level of criminal procedure. Additionally, it must also overcome any possible resistance by established legal professionals who have spent their lives practicing without oral advocacy and may naturally not see a need for it, despite the mandatory reforms.

Continuous education and training is imperative to the success of the reform, as Mexican legal professionals cannot look to previous groundwork within Mexico's own legal history. Mexican judges, court employees,

30. See CLARE RIBANDO SEELKE & JUNE S. BEITTEL, CONG. RESEARCH SERV., R40135, MÉRIDA INITIATIVE FOR MEXICO AND CENTRAL AMERICA: FUNDING AND POLICY ISSUES I (2010); see also Wright, *supra* note 26, at 368–69.

31. SEELKE & BEITTEL, *supra* note 30, at 1.

32. *Id.* at 4.

33. *Id.* at 9–10. As recent as 2009, Amnesty International and other human rights groups have called for an unfavorable report due to the Mexican government's failure to address human rights violations committed by the military. *Id.* at 22–23.

34. *Id.* at 17.

35. Wright, *supra* note 26, at 375.

36. See Lee, *supra* note 21, at 68.

police officers, law students, and existing attorneys must all be trained to effectively play their part in oral advocacy proceedings.³⁷ The United States inevitably exerts an indirect influence on Mexican criminal procedure by playing a significant role in facilitating Mexico's reforms through its personal investment in Mexico's criminal justice system and active assistance in the transition to an adversarial system.

III. PRE-REFORM INEFFICIENCIES IN MEXICAN CRIMINAL PROCEDURE AND HOW THE 2008 REFORMS ADDRESS THESE WITH SAFEGUARDS

Under its inquisitorial system, Mexican criminal procedure was inefficient, corrupt, and lacked transparency.³⁸ Consequently, Mexican citizens had little confidence in the fairness of their criminal justice system.³⁹ However, despite the fact that Mexico's positivist framework does not acknowledge the existence of fundamental individual rights outside of those codified within its constitution, Mexico has signed multiple international agreements that have identified inherent human rights.⁴⁰ These include the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights (ICCPR), the American Convention on Human Rights (ACHR), and the European Court of Human Rights (ECHR).⁴¹

Together, these international agreements mandate the following fundamental rights for the accused: the presumption of innocence, the right to a timely trial, the right to an oral trial held before a neutral judge or jury, the right to remain silent, the right to counsel, the right to challenge evidence and confront witnesses, congruency between the charges and the verdict, and the exclusionary rule.⁴² In the transition to an adversarial system, the new reforms are intended to protect against Mexican criminal procedure's previous shortcomings, in addition to protecting the fundamental individual rights mandated by international human rights organizations and treaties.

37. Wright, *supra* note 29, at 376.

38. Zwier & Barney, *supra* note 12, at 189.

39. Hine-Ramsberger, *supra* note 7, at 292.

40. Gonzalo Reyes Salas, *Guidelines to Reform Mexican Criminal Procedure*, 15 SW. J. L. & TRADE AM. 53, 95 (2008).

41. See Universal Declaration of Human Rights, *supra* note 5; see also International Covenant on Civil and Political Rights, *supra* note 5; American Convention on Human Rights, Nov. 21, 1969, 1144 U.N.T.S. 143.

42. Reyes Salas, *supra* note 40, at 95.

A. Checks and Balances in an Oral Adversarial System

An oral adversarial system addresses Mexico's lack of transparency by allowing both parties to present their arguments and evidence in the court during trial.⁴³ In Mexico's previous inquisitorial system, the role of the public prosecutor was virtually unconstrained in that he or she was free to lead the investigation alongside investigatory police and gather evidence against the criminally accused without meaningful judicial supervision.⁴⁴ This complete lack of oversight opened the door to severe abuses of power by the prosecutor, including forced confessions by torture and illegally obtained evidence that would otherwise be inadmissible, but could nevertheless be used at trial to convict the defendant.⁴⁵

The new adversarial system boosts the role of the public defender to match that of the public prosecutor.⁴⁶ The defense counsel's more active role against the public prosecutor in the new adversarial system directly benefits the criminally accused because the checks and balances that arise from the regular competition between the two opposing parties at trial act as a safeguard against any abuse of power by either party.⁴⁷ Similarly, the introduction of a due process judge to oversee the admissibility of evidence before the trial also keeps the prosecution in check, by limiting the previously unfettered power of the prosecutor and acting as a safeguard against any abuses of power or injustices during the investigatory stage.⁴⁸

B. Presumption of Innocence

Before the 2008 reforms, those accused of crimes were treated as criminals prior to their verdict, due to the use of preventative detentions—*arraigos*—in which criminal defendant detainees awaited their verdicts in jail.⁴⁹ Pre-trial detainees essentially lost their freedom before they were even convicted and were negligently mixed with the general criminal prison population during this period regardless of whether or not the criminal defendant's offense was a severe or minor crime.⁵⁰ This was largely the norm, though it violated a criminal defendant's basic right against arbitrary detention, as determined by international agreements.

43. Ingram & Shirk, *supra* note 3, at 10.

44. *Id.* at 9.

45. *Id.* at 12–13.

46. See Ingram & Shirk, *supra* note 3, at 13.

47. *Id.* at 13, 15. On a practical note, while the public defender now theoretically acts as an “adversary” to the public prosecutor, the prosecutor may have difficulty adjusting to his or her newly diminished role. See *id.*

48. See *id.* at 12.

49. *Id.*

50. *Id.* at 17.

In 2009, President Calderón enacted an order establishing a presumption of innocence for criminal defendants at all stages of a criminal proceeding.⁵¹ This presumption of innocence restored the criminal defendant's fundamental human right against arbitrary pre-trial detention.⁵² Under the reforms, only criminal defendants who are suspected of committing violent crimes or those who pose a threat to society could be preventatively detained.⁵³ Thus, this new presumption of innocence created safeguards against the violation of the basic human rights of the criminally accused.

C. Police and Law Enforcement Reforms at the Investigatory Stage

The new police reforms target the investigatory stage of Mexican criminal procedure. Previously, only designated "investigatory" police had a duty to gather evidence in criminal proceedings, whereas "preventative" police agencies were only accountable for the prevention of crime.⁵⁴ Under the 2008 reforms, the two separate agencies merged their duties so that all police agencies will play an expanded role in the investigatory stage.⁵⁵ Currently, the police agencies are responsible for protecting and gathering evidence in addition to their general duties of crime prevention.⁵⁶

These procedural safeguards arose as a natural and direct result of the implementation of the new adversarial system.⁵⁷ To begin with, an adversarial system provides a stronger criminal defense for the accused, which in turn requires proper fact-finding and evidence gathering.⁵⁸ The evidence found at the investigatory stage is typically used against the criminally accused during the subsequent trial stage.⁵⁹ Accordingly, it is

51. Nota Informativa, Presidencia de la República, Firma el Presidente Felipe Calderón Decreto de Reforma Constitucional en Materia de Justicia Penal y Seguridad Pública (June 17, 2008), *available at* <http://calderon.presidencia.gob.mx/2008/06/firma-el-presidente-felipe-calderon-decreto-de-reforma-constitucional-en-materia-de-justicia-penal-y-seguridad-publica/>; *see also* Constitución Política de los Estados Unidos Mexicanos [C.P.], *as amended*, art. 20, Diario Oficial de la Federación [DO], 5 de Febrero de 1917 (Mex.).

52. Reyes Salas, *supra* note 39, at 94–95.

53. Constitución Política de los Estados Unidos Mexicanos [C.P.], *as amended*, art. 17, Diario Oficial de la Federación [DO], 5 de Febrero de 1917 (Mex.).

54. Ingram & Shirk, *supra* note 3, at 13–14.

55. *Id.* at 14.

56. *Id.*

57. *See id.* at 13–15.

58. *See id.* at 11–13.

59. *See id.* at 13–14.

particularly important that there are safeguards to ensure that the police agencies follow procedure during the initial investigatory stage. Although Mexico currently lacks evidence rules that dictate the handling of evidence, the admissibility of gathered evidence during trial, and the illegality of evidence obtained in a certain way—it seems natural that evidentiary standards will evolve as the police agency’s role in gathering evidence simultaneously evolves.

D. Protection Against Torture and Coerced Confessions

Mexico’s 2008 constitutional reforms explicitly forbid the use of torture against criminal defendants in response to disapproval by human rights organizations.⁶⁰ One of the human rights violations unfortunately tolerated during Mexico’s inquisitorial system was the use of torture to extract false confessions from the criminally accused.⁶¹ The confession would then be used at trial as evidence against the accused, often independently convicting the criminal defendant without corroborative evidence.⁶² These unfortunate procedures accounted for the public’s widespread association of unfairness with the Mexican criminal justice system. To combat this injustice and to renew the public’s faith in the fair treatment of criminal defendants, the new reforms specifically prohibit the use of torture within the language of the new criminal proceedings.⁶³ The state of Chihuahua’s Code of Criminal Procedure, for example, states that “[e]vidence that has been obtained through torture, threats or violation of a person’s fundamental rights will have no value.”⁶⁴

Furthermore, as a safeguard against using illicitly gained confessions as evidence, the reforms mandate that a criminal defendant’s confession can only be obtained in the presence of the criminal defendant’s defense attorney.⁶⁵ This ensures that the accused is never coerced into confessing to a crime without being first advised by his or her attorney, who also serves as a witness if the accused chooses to confess.⁶⁶ This also prevents

60. Constitución Política de los Estados Unidos Mexicanos [C.P.], *as amended*, art. 20(A)(II), Diario Oficial de la Federación [DO], 5 de Febrero de 1917 (Mex.).

61. Ingram & Shirk, *supra* note 3, at 13.

62. *Id.*

63. Constitución Política de los Estados Unidos Mexicanos [C.P.], *as amended*, art. 20(B)(II), Diario Oficial de la Federación [DO], 5 de Febrero de 1917 (Mex.).

64. Código de Procedimientos Penales del Estado de Chihuahua [CPPC] [Criminal Procedure Code of the State of Chihuahua], *as amended*, art. 19, Diario Oficial de la Federación [DO], 11 de Junio de 2006 (Mex.).

65. *See* Código Federal de Procedimientos Penales [CFPP] [Federal Criminal Procedure Code], *as amended*, art. 296, Diario Oficial de la Federación [DO], 30 de Agosto de 1934 (Mex.); *see also* CPPC art. 124 (Mex.).

66. *See* Wright, *supra* note 29, at 373–74.

the prosecution from relying solely on the confession, and no additional evidence to convict the criminal defendant at trial, as condoned by the previous system.⁶⁷

E. Corruption within the Criminal Justice System

Part of the 2008 criminal reforms expressly limits the due process rights of those suspected of participating in organized crime in order to combat any corruption instigated by the drug cartels.⁶⁸ The cartels have had a successful history of bribing law enforcement and political officials to enable themselves to continue engaging in illegal activities.⁶⁹ Those law enforcement and political officials who refused bribes faced violent repercussions or were coerced into participation.⁷⁰ Thus, the drastic reform decreases the amount of corruption within the criminal proceedings to combat the proliferation of violence from drug cartels and drug trafficking.⁷¹

Ironically, this approach actually results in fewer safeguards for criminal defendants accused of participating in organized crime and offers a less than fair trial for those particular defendants than defendants accused of other crimes.⁷² As part of the new reforms, these criminal defendants can have their constitutionally guaranteed rights taken away from them without any cause.⁷³ They may also be legally subjected to arbitrary and lengthy preventative detentions, forced into solitary confinement, and prevented from communicating with the outside world.⁷⁴ These reforms are problematic in that they condone the violation of the fundamental human rights of a certain class of criminal defendants—those accused of organized crime—despite the fact that the 2008 constitutional reforms are meant to ensure safeguards for the purpose of protecting *generally* accused defendants from violations of these same fundamental rights.⁷⁵

67. *Id.*

68. *See* Constitución Política de los Estados Unidos Mexicanos [C.P.], *as amended*, art. 16, Diario Oficial de la Federación [DO], 5 de Febrero de 1917 (Mex.).

69. *See* Hine-Ramsberger, *supra* note 7, at 302; *see also* Wright, *supra* note 26, at 365–66; *see also* Catalina Pérez Correa, *Distrust and Disobedience: Discourse and Practice of Law in Mexico*, 77 REVISTA JURIDICA UNIVERSIDAD DE P.R. 345, 355 (2008).

70. Lee, *supra* note 21, at 56.

71. Hine-Ramsberger, *supra* note 7, at 302.

72. *Id.*

73. *See* Constitución Política de los Estados Unidos Mexicanos [C.P.], *as amended*, art. 16, Diario Oficial de la Federación [DO], 5 de Febrero de 1917 (Mex.).

74. *Id.*

75. Hine-Ramsberger, *supra* note 7, at 302.

However, keeping in mind that another distinct goal of the 2008 constitutional reforms was to specifically combat the reality of drug trafficking and violence due to organized crime, the appropriateness of these reforms must be examined in a different context.⁷⁶ In direct response to the corruption caused by the drug cartels, which in turn perpetuate the idea of rampant injustice within Mexican criminal procedure, different standards may be necessarily justified to treat those accused of participating in organized crime in comparison to those accused of committing other crimes.

F. Assignment of Judges at Every Stage of the Trial

The new reforms divide the trial process among three separate judges for each stage of criminal procedure: a due process judge, an oral trial judge, and a sentencing judge.⁷⁷ The goal of utilizing a separate judge for each stage is to safeguard the accused from any conflicts of interest or biases that each judge could develop during one stage of the criminal proceeding that could carry over to another stage of the criminal proceeding.⁷⁸ This procedure also promotes judicial efficiency by streamlining the process, as each judge will only specialize in his or her own stage of criminal procedure.⁷⁹

By only moderating over his or her assigned stage, the judges will not be influenced by what other rulings occurred before and after that stage.⁸⁰ Thus, the due process judge will rule only on pre-trial determinations, particularly regarding evidence that may be utilized in the trial phase.⁸¹ The oral trial judge will rule according to the evidence and arguments presented at trial, but will not know which evidence, if any, might have been excluded with or without cause by the due process judge.⁸² Similarly, the sentencing judge will sentence the criminal defendant based only on the knowledge that the defendant was convicted of a particular crime at the oral trial and use only that knowledge to apply a proper sentence.⁸³

76. Notably, while this creates a class of defendants whose basic human rights are clearly violated, it does not impact the human rights contingency of Mérida funding due to the United States interest in combating the drug war. *Id.*

77. Ingram & Shirk, *supra* note 3, at 11.

78. *Id.*

79. *Id.*

80. *See id.*

81. *Id.*

82. *See id.*

83. *Id.* at 10–11.

Each judge has sole discretion over his or her own particular stage in the criminal proceeding.⁸⁴

Furthermore, the role of the due process judge itself is a significant safeguard against any inadequacies of every level of criminal proceeding leading up to the oral trial. The due process judge essentially guarantees that the oral trial judge will act as a neutral third party by ensuring that the oral trial judge can impartially weigh the evidence and arguments without being tainted by previous evidentiary determinations. In this way, the oral trial judge functions in a role very much like that of a jury in a United States criminal proceeding, in that the due process judge determines what the oral trial judge, like a jury, may or may not consider upon applying the law to the facts.⁸⁵

However, though it appears that the due process judge functions as a safeguard by himself or herself as part of the three-judge trial process, the due process judge nevertheless requires an additional safeguard—which is examined in the next section.

IV. AN ADDITIONAL SAFEGUARD: CODIFIED RULES OF EVIDENCE

Formally written rules of evidence make sense in light of Mexico's civil law tradition and reform goals. Presently, the due process judge—*juez de garantía*—is the only safeguard against the mishandling or inclusion of inappropriate evidence. The new criminal procedure only mandates that the due process judge use his or her own judgment and experience in making an evidentiary determination.⁸⁶ In the State of Chihuahua's Code of Criminal Procedure, for example, the only written guideline regarding how the due process judge should rule on the exclusion of evidence is as follows:

After examining the evidence presented and listening to the parties at the hearing, the judge will issue an order, based on law, stating what materials will be excluded from evidence, including that [evidence] which is clearly irrelevant,

84. Although not explored, using specialized judges may also act as an internal or institutional corruption from within the judicial system.

85. The role of the jury, which figures so prominently in the United States adversarial system, does not exist within Mexico's current adversarial system. *See generally* Hiroshi Fukurai & Richard Krooth, *The Establishment of All-Citizen Juries as a Key Component of Mexico's Judicial Reform: Cross-National Analyses of Lay Judge Participation and the Search for Mexico's Judicial Sovereignty*, 16 TEX. HISP. J. L. & POL'Y 37 (2010).

86. *See* CPPC art. 314 (Mex.).

that which has as its purpose to validate open and notorious acts, and that which is inadmissible under this code.⁸⁷

The language clearly indicates that the due process judge is not statutorily mandated to do anything other than issue an order “based on law.”⁸⁸ This in turn implies that the judge is free to make a determination however he or she sees fit, as the only other provision guiding the evaluation of evidence generally requires that “[j]udges will evaluate the evidence in accord with [the principles] of sound criticism, observing rules of logic, science, and the maxims of experience.”⁸⁹ As a result, different judges will use their different discretions to subjectively evaluate evidence.⁹⁰

Because the due process judge is not bound by any other guidelines, it follows that pre-trial evidentiary hearings are determined wholly at the discretion and judgment of one person. Each due process judge is free to make judgment calls without establishing any standard of consistency, neither across the states nor between each of that judge’s own individual determinations. Even on appeal, the due process judge’s decisions could not be reversed so long as the judge theoretically made his or her decision within his or her “judgment,” which would satisfy the broad guideline of the statutory text.⁹¹ Therefore, there is a need for an additional safeguard at this stage to ensure that evidence is presented fairly at the trial stages, and codified rules of evidence would serve this purpose.

A. Formally Codified Rules of Evidence Provide Consistency, Further Transparency and Fairness, and Prevent Potential Abuses of Power by the Due Process Judge

First, providing consistency between the evidence rules of each state is valuable in that it creates a practical standard that a criminal defendant can rely on, regardless of where and when that criminal defendant goes to court. While various evidentiary principles exist in the present Mexican code of criminal procedure, these principles are not uniform across the states, nor are they easily identified as explicit rules.⁹²

87. *Id.*

88. *See id.*

89. *Id.*

90. *See id.*

91. CFPP art. 485 (Mex.).

92. *See, e.g.,* CFPP art. 220 (Mex.) (guiding expert testimony); CFPP art. 242 (Mex.) (guiding witness testimony); CFPP 269 (Mex.) (guiding the use of private and public documents); CPPC art. 362 (Mex.) (mandating that a party may not ask leading questions to an expert witness); CPPC art. 365 (Mex.) (mandating how a defendant may read a document to refresh his or her memory at trial to overcome contradictions).

Codified rules of evidence further the 2008 reform's goal of transparency, by allowing those accused of crimes to compare a due process judge's evidentiary determinations to the statutory rules that would be available to the public through a formal code of evidence. Consequently, the due process judge would be forced to abide by an evidentiary standard, creating a system of checks and balances. Applying the same evidentiary standards from court to court ensures that every criminal defendant will be treated substantially the same, if not equally, which also instills a sense of fairness into criminal proceedings. Furthermore, a formal written code of evidence provides a safeguard against any possible abuses of power by the due process judge by creating a viable appeals process for unjust determinations.⁹³ Thus, not only must the judge act according to the statutory law, the judge must do so knowing that his or her interpretation of the law in making an evidentiary determination can be easily reviewed against the codified guidelines in a written code if the decision were to be contested on appeal.

Some evidence principles found in the Chihuahua Code of Criminal Procedure are reminiscent of, though not equivalent to, established principles in the United States Federal Rules of Evidence.⁹⁴ While the Chihuahua code sometimes reflects these principles, they are ultimately only vaguely established in comparison to the Federal Rules of Evidence. The concept of relevance, for example, is complex and significantly developed within the Federal Rules of Evidence as it spells out the step-by-step test that a judge must adhere to in determining whether the evidence at hand is admissible.⁹⁵

To illustrate, Rule 401 in the Federal Rules of Evidence states that “[e]vidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action.”⁹⁶ Rule 402 builds upon Rule 401 so that even relevant evidence is inadmissible in a criminal trial if prohibited by statutory provision, legislation, common law precedent, or other rules of evidence within the Federal Rules of Evidence that

93. Like the public prosecutor of the previous inquisitorial system, whose sole discretion during the investigatory stage was susceptible to gross abuses of power, the *juez de garantía* is similarly susceptible to abusing his or her discretion when unchecked.

94. See generally FED. R. EVID. 401–03.

95. See *id.*

96. FED. R. EVID. 401.

develop this concept of relevancy.⁹⁷ Rule 403 defines admissible relevant evidence by excluding evidence that is “outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.”⁹⁸

By contrast, the language in Article 314 of the Chihuahua Code of Criminal Procedure only generally states that the judge will exclude evidence “which is clearly irrelevant. . .”⁹⁹ Thus, the principle that evidence must be relevant to be presented at trial is clearly as important to Mexico’s new criminal procedure as it is to the United States criminal procedure, but is not yet defined or developed. In its current form, the Mexican evidence principle of relevancy is problematic because it once again gives the judge complete discretion without further established guidelines or safeguards against potential bias. Although the Mexican criminal justice system would not necessarily need its evidence principles to be as complex or detailed as that of the United States Federal Rules of Evidence, a formal code of evidence would fully incorporate and set the stage for further development and customization of concepts such as relevancy.¹⁰⁰

B. Implementing Codified Rules of Evidence Works in Conjunction with Mexico’s Civil Law Tradition and Does Not Conflict with Mexico’s Positivist Values

Second, Mexico retains its civil law tradition, which reflects its positivist values.¹⁰¹ Positivism derives from the idea that legal authority can only originate from enacted laws and statutory designations, as opposed to the idea of innate or inherent natural laws.¹⁰² There is nothing naturalistic about a statutory code, for example, which is merely created and administered by a society.¹⁰³ The Mexican Constitution states that privileges and immunities must be “granted” by the Constitution to be recognized and

97. FED. R. EVID. 401–02.

98. FED. R. EVID. 403.

99. CPPC art. 314 (Mex.).

100. Similar evidence principles exist in the Chihuahua code, such as Article 272 (regarding the preservation of evidence) and Article 297 (regarding expert testimony). See CPPC arts. 272, 297.

101. Despite the influences by the United States in Mexico’s transition to an *adversarial system* with these reforms, it is significant to keep in mind that Mexico is not transitioning to a *common law system*.

102. Zwiernick & Barney, *supra* note 12, at 193.

103. Mexican legal education reflects its positivist values in that schools promote the memorization of the black letter law due to the sole importance of the statutory code. Robert Kossick, *The Rule of Law and Development in Mexico*, 21 ARIZ. J. INT’L & COMP. L. 715, 731 (2004).

that “[s]uch privileges and immunities shall not be restricted or suspended, but in the cases and under the conditions established by the Constitution itself.”¹⁰⁴ In light of this, the best way to implement an evidentiary standard is to codify it into Mexican law, giving it the weight to be enforceable.

This would likely lead Mexico to develop a complex code of evidence similar to that of the United States Federal Rules of Evidence. While the Mexican code of evidence would not start out as complex as the Federal Rules of Evidence in this hypothetical, it would gradually build upon the statutory code and slowly develop the intricacies of the United States code. The Federal Rules of Evidence codified the totality of its common law evidence rules simultaneously, after years of the evidence rules developing and existing through the case law of individual states.¹⁰⁵

In contrast, the Mexican code of evidence would be compelled to periodically build upon its statutory framework by codifying any major precedent that it wanted to incorporate as a standard.¹⁰⁶ In a civil law system, a precedent cannot be applied as law until it is formally codified.¹⁰⁷ Unlike a common law system, a civil law system cannot use its judiciary to create law through precedent.¹⁰⁸ Instead, a civil law system *must* codify its common law into a statutory framework in order for it to be legally recognized.¹⁰⁹ Thus, every relevant legal precedent regarding an evidence principle would necessarily need to be formally designated as a rule—which in turn would contribute to a very detailed formal code of evidence.

It follows that codified rules of evidence would not conflict with Mexico’s positivist values. Rather, positivism strongly supports the implementation of a written code in favor of evidentiary principles that are regularly applied, but not contained into the law within written codes.

104. Constitución Política de los Estados Unidos Mexicanos [C.P.], *as amended*, art. 1, Diario Oficial de la Federación [DO], 5 de Febrero de 1917 (Mex.).

105. 21 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM JR., FEDERAL PRACTICE AND PROCEDURE § 5001 (2d ed. 2005).

106. As an alternative, Mexico could wait to implement a complex code of evidence at once rather than building up statutory rules.

107. Alfred W. Cortese Jr. & Kathleen L. Blaner, *Civil Justice Reform in America: A Question of Parity with Our International Rivals*, 13 U. PA. J. INT’L BUS. L. 1, 19 (1992).

108. *Id.*

109. *Id.*

*C. Influence on Mexico by the United States by Proximity for
Economic and Political Reasons*

Lastly, Mexico should codify its own rules of evidence due to the substantial influence resulting from its unique relationship with the United States and the significant role that the United States plays in assisting with Mexico's transition to an adversarial system. Although Mexico has previously looked to the United States for guidance in developing its past constitutions, it is nonetheless suspicious of any American interference in Mexican affairs.¹¹⁰ Thus, it may be difficult for Mexico to embrace a formal code of evidence similar to that of the United States Federal Rules of Evidence on the basis of United States influence alone.¹¹¹ Instead, Mexico should consider the practical and economic reasons that will inevitably influence its courts, and how a formal code of evidence would help serve those reasons.

Legislative history suggests that Mexico has always intended to look to the United States' legal framework for guidance.¹¹² Both the 1824 and 1917 Mexican Constitutions used the United States Constitution as a model.¹¹³ While this is certainly not enough to suggest that the reforms set out to bring Mexican criminal procedure in sync with the United States criminal justice system, it indicates that Mexico is at least not opposed to implementing established American legal concepts into its own developing framework to further the goals of its reform. Therefore, while Mexico may not elect for the complexity of the United States Federal Rules of Evidence, it may nevertheless look to the success of a uniform code of evidence and incorporate nothing else but that concept alone.¹¹⁴

*1. A Formal Code of Evidence for the Sake of Mexican Criminal
Proceedings Would Impact Any Future Reforms to
Mexican Civil Proceedings*

By its proximity, the United States will always exert more than influence by any other foreign country on Mexico's legal system. Accordingly, geography must be viewed as a substantial contributing factor to the

110. See Lee, *supra* note 20, at 66.

111. This type of influence is sometimes more unflatteringly referred to as "Americanization." See Vargas, *supra* note 11, at 1365–67.

112. See *id.* at 1344–45, 1365.

113. See *id.*

114. Alternatively, Mexico could borrow a legal concept and rework it to successfully address its unique needs.

growing economic relationship between the two countries.¹¹⁵ This in turn contributes to any resulting influence by the United States, which gradually and practically develops over the course of countless legal transactions that occur across the border through continuous trade and business interactions.¹¹⁶

Two events, for example, have already started the “Americanization” of Mexican Law: the North American Free Trade Agreement (NAFTA) and Mexico’s Foreign Investment Act of 1993.¹¹⁷ These events opened the door to foreign influence, by both the United States and other foreign countries, on Mexico’s legal system in order to facilitate growing trade and business interactions.¹¹⁸ The implementation of NAFTA, in particular, quickly transformed Mexico’s legal framework so that it could complement the framework of NAFTA, as determined by the United States.¹¹⁹ By the 1990s, Mexican law schools began to incorporate the study of United States law into their curricula.¹²⁰ Although Mexico did not purposely bring its legal system closer in sync with the United States’ legal system, it nevertheless did so indirectly when it purposely brought its legal system closer in sync with NAFTA.¹²¹

These increased business dealings between the two countries highlight the need for a uniform code of evidence to standardize civil evidence determinations in Mexican courts. Safeguards in civil proceedings, although not as indispensable as in criminal proceedings when a defendant’s liberty is at stake, are still necessary if Mexico were to later reform its civil courts to also incorporate oral advocacy. Currently, the transition to an adversarial system only applies to criminal procedure. Although the 2008 constitutional reforms primarily address reforms to Mexican criminal proceedings, it is still likely that any formalized code of evidence would be created generally and forward-looking enough to be

115. Vargas, *supra* note 11, at 1339–40.

116. *Id.* at 1366.

117. See North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 289 (1993); see also Ley de Inversión [LIEX] [Foreign Investment Act], Diario Oficial de la Federación [DO], 27 de Diciembre de 1993 (Mex.).

118. See Vargas, *supra* note 11, at 1339.

119. *Id.* at 1367.

120. See Stephen Zamora, *NAFTA and the Harmonization of Domestic Legal Systems: The Side Effects of Free Trade*, 12 ARIZ. J. INT’L & COMP. L. 401, 424 (1995).

121. Interestingly, unlike Mexico, Canada specifically worried about cultural dominance by the United States when it entered NAFTA negotiations. Vargas, *supra* note 11, at 1368.

applicable to both civil and criminal trials. Opponents in a civil trial are just as likely to need procedural safeguards regulating the evidence presented against them by the opposing party.

The increasing economic relations between the two countries make it natural that the United States' self interest in Mexico's legal system may follow in a later effort to help reform Mexico's civil proceedings so that businesses could expect a consistent civil proceeding irrespective of the country in which they happen to conduct their business. Arguably, formally codifying rules of evidence in the present could greatly facilitate trade and business dealings between the United States and Mexico, in addition to facilitating any projected reform to Mexican civil courts.

*2. Shared Objectives Between the United States and Mexico During
This Transition in Light of the Political Climate Make It
Inevitable That Some American Evidentiary
Principles will be Incorporated*

For now, the United States is primarily focused on controlling the spillover effects of the drug war across the border. The two countries already work together in certain criminal proceedings. In particular, Mexico currently extradites many of its drug suspects to the United States for trial.¹²² A formal code of evidence, especially one that was predominantly influenced by the United States Federal Rules of Evidence, would greatly assist in the prosecution of criminal defendants—specifically those involved in drug trafficking or organized crime, by ensuring against the misuse of evidence regardless of the country in which the defendant is prosecuted. Addressing those members of the drug cartels who would otherwise be prosecuted in the United States and adding a safeguard that would apply to all criminal defendants would in turn fulfill the goals of both the 2008 constitutional reforms and those of the Mérida Initiative. Consequently, the inevitable influence from proximity once again comes into play, as Mexico's national security concerns, combined with the goals of Mérida funding, is likely to bring its criminal reforms even further in sync with United States criminal procedure.¹²³

The Mérida Initiative directly funds the United States' involvement with Mexico's transition to an adversarial system.¹²⁴ In Part II, for example, this Comment addressed the United States' presence in Mexico through its active assistance in oral advocacy training and education. Through

122. Wright, *supra* note 26, at 366.

123. See Lee, *supra* note 21, at 66–67.

124. See *Mérida Initiative*, U.S. DEP'T OF STATE, www.state.gov/j/inl/merida (last visited Feb. 29, 2013).

USAID programs in which Mexican legal professionals and students learn oral advocacy at American law schools, as well as the United States-funded training programs in Mexico, Mexican law students and professionals are bound to be exposed to American legal principles during the course of their trial advocacy education.

As a natural result of this constant contact, some evidentiary principles central to the United State Federal Rules of Evidence may inevitably be introduced through the various transactions between a teacher of the United States adversarial system and a Mexican student. Due to the fact that many evidentiary principles act as safeguards independent of each other, a Mexican trainee may find certain principles useful and apply those principles individually in practice to ensure the presentation of evidence in a fair manner for the criminally accused. If such principles were widely utilized in practice, such principles would be informally incorporated into various state codes of criminal procedure, along with the evidentiary principles that are already present.¹²⁵ Thus, the rules would be formally codified, though not necessarily in the form of a separate code of evidence.

Furthermore, Mexico is leaving an inquisitorial system and American sentiment champions everything that is “not inquisitorial.”¹²⁶ The United States’ legal system is both staunchly adversarial and anti-inquisitorial, and thus by default represents everything that Mexico’s new system means to achieve.¹²⁷ While Mexico is not intentionally embracing the United States criminal justice system directly, it may do so inadvertently by gradually embracing the very characteristics that prominently define the United States legal system. United States criminal procedure is strictly adversarial in its aversion to stereotypically inquisitorial concepts.¹²⁸

If Mexico were to embrace this similar line of anti-inquisitorialism in its haste to adopt an adversarial system in all its states, it may incorporate major adversarial concepts featured in the American adversarial system. The process of presenting and objecting to evidence during trial advocacy,

125. As seen in Section B of this Part, these evidentiary principles are not fully developed, but are sometimes present in state codes of criminal procedure.

126. See David Alan Sklansky, *Anti-Inquisitorialism*, 122 HARV. L. REV. 1634, 1636 (2009).

127. *Id.* at 1635–36.

128. Most countries—including many Latin American countries that have similarly made the transition to an adversarial system—incorporate a “mixed” system with some inquisitorial and some adversarial features. *Id.* at 1683.

so integral to the adversarial process, plays a significant role in the American legal system.¹²⁹ Thus, Mexico may similarly find that codified rules of evidence are essential to its ancillary goal of promoting anti-inquisitorialism.

3. *Addressing the Problem of Using the United States as a Model
Simply Because the United States May be the Most
Accessible Adversarial Model*

Despite the fact that some influence by the United States on Mexico seems inevitable, Mexico is in danger of confusing its bilateral cooperation with the United States with “Americanization.” The United States is the adversarial system that is most accessible to Mexico. Although some influence by the United States on Mexico is inevitable, for the same reasons described, it is imperative that Mexico maintains the development of its own adversarial system and not merely adopts a replica of the American version of adversarialism.

Thus far, however, it appears that Mexico is successfully retaining the features that are distinct to its legal framework. It has opted to retain its civil law tradition and not transition to a common law system, for example, although the common law plays an integral part in the United States’ legal identity. For practical reasons, Mexico has also opted not to incorporate jury trials, another integral part of the United States’ legal identity—as well as a defining feature of the American adversarial system. It seems, therefore, that despite a significant amount of obvious influence from the United States, Mexico is developing an adversarial system of its own.

V. A COMPARATIVE ANALYSIS TO CHILE

Chile is an example of a Latin American country that successfully transitioned from an inquisitorial system to an oral adversarial system.¹³⁰ Like Mexico, one of the primary goals of the Chilean transition to democracy was to reform its criminal justice system to protect fundamental human rights by establishing basic due process into its criminal proceedings.¹³¹ Chile’s transition to an adversarial criminal justice system supplemented its transition to a democracy after the brutal dictatorship

129. See, e.g., *id.* at 1643 (discussing the defendant’s right to cross-examine witnesses).

130. This Comment will examine Chile, as opposed to the other Latin American countries that made the transition to an adversarial system, as it is considered a strong example of effective and successful reform.

131. See Carlos Rodrigo de la Barra Cousino, *Adversarial vs. Inquisitorial Systems: The Rule of Law and Prospects for Criminal Procedure Reform in Chile*, 5 SW. J. L. & TRADE AM. 323, 328 (1998).

of General Augusto Pinochet ended in 1990.¹³² Chile's inquisitorial system, under the Pinochet dictatorship, permitted numerous human rights violations at the hands of its police agencies and had a rampant reputation for injustice.¹³³ Like Mexico, this led to a widespread public distrust and lack of confidence in the Chilean judicial system by its citizens.¹³⁴

However, Chile's transition is considered a successful legal reform effort—in that it successfully implemented the adversarial system in all of its states—whereas many other Latin American countries have not yet achieved the same level of success in their legal reforms.¹³⁵ In particular, Chile has achieved its success without implementing a formal code of evidence. While this may seem to suggest that Mexico could similarly achieve a successful transition without a formal code of evidence, many Chilean experts believe that Chile is in a state of continuing education—even post-transition—and that formally codified rules of evidence can be essential to its continuing success. Thus, this section will introduce Chile's transition to an adversarial system, propose a formal code of evidence for Chile, and present why leading Chilean reform experts believe in the functionality of separately codified rules of evidence.

A. *The Chilean Transition to an Adversarial System*

Chile adopted a new code of criminal procedure in 2000 to reflect its transition to an adversarial system after the end of the Pinochet dictatorship.¹³⁶ By July 2005, the country fully completed the implementation of its reforms, which have been considered the most successful out of all Latin American countries.¹³⁷ Two different countries primarily influenced the Chilean reforms: Germany and the United States.¹³⁸ Although both countries have an adversarial system, Germany retains a civil law tradition whereas the United States follows a common law tradition.

132. See James M. Cooper, *Proyecto Acceso: Using Popular Culture to Build the Rule of Law in Latin America*, 5 RUTGERS J. L. & PUB. POL'Y 378, 379 (2008).

133. See *id.*

134. See Cousino, *supra* note 131, at 326.

135. James M. Cooper, *Competing Legal Cultures and Legal Reform: The Battle of Chile*, 29 MICH. J. INT'L L. 501, 520–21 (2008).

136. Cristián Riego, *Oral Procedures and Case Management: The Innovations of Chile's Reform*, 14 SW. J. L. & TRADE AM. 339, 340 (2008).

137. Cooper, *supra* note 132, at 379.

138. See Cooper, *supra* note 135, at 507.

This dual foreign influence differentiates Chile's transition to an adversarial system from that of Mexico's transition. Chile benefited from being able to look to the German adversarial system and civil law tradition, which included all of the positivist values that Chile's own legal framework so highly regards.¹³⁹ Therefore, the ease with which Chile applied Germany's adversarial system to its own criminal proceedings, was likely a contributing factor in Chile's successful reforms.¹⁴⁰ By contrast, Mexico's sole influence in transitioning to an adversarial system is the United States. Consequently, as Mexico retains its civil law tradition, its positivist values are often at odds with the United States common law system's emphasis on case law and legal precedent—creating an additional challenge that Mexico must overcome to make a successful transition.

Germany's presence and influence on Chile began in the nineteenth century, far predating the Chilean reforms.¹⁴¹ In fact, the Chilean government turned to Germany, not the United States, for assistance when it drafted a new Criminal Procedure Code.¹⁴² The German Agency for Technical Cooperation (GTZ) has been assisting with the implementation of rule of law in Chile through education and training since 1998.¹⁴³ GTZ is also planning to assist in Chile's civil procedure reforms.¹⁴⁴

The United States Embassy is also involved with Chilean legal reform. Since 1995, the Embassy has partnered with two organizations, Fundación Paz Ciudadana and Proyecto ACCESO, as well as American law schools, to help educate and train Chilean legal professionals in preparation for the implementation of oral trials.¹⁴⁵ Similar to the efforts of USAID and the Mérida Initiative in Mexico, continuous education and training are imperative to the long-term success of the Chilean reforms. Thus, even though the Chilean criminal reforms were fully implemented in 2005, both the German and American organizations have maintained their presence in Chile to continue working to ensure the ongoing success of the adversarial system.¹⁴⁶

139. *See id.* at 527–32 (discussing Germany's influence in the drafting of Chile's new criminal and civil procedure codes.) Like Mexico, Chile's positivism and the civil-law tradition similarly support codified rules of evidence.

140. *See id.* at 532. Interestingly, despite all of the similarities, Germany does not have a public defender role in its adversarial system. *Id.*

141. *Id.* at 527.

142. *Id.* at 530.

143. *Id.* at 502.

144. *Id.* at 531.

145. *Id.* at 540.

146. Any Chilean aversion to globalization will not be discussed in this Comment.

B. *The Case for a Code of Evidence in Chile*

Unlike Mexico, where public prosecutors are firmly embedded into its criminal procedure, the role of the prosecutor is relatively new to Chile, having not been introduced to the criminal system until 1997.¹⁴⁷ Whereas the Mexican prosecutor must overcome its notably diminished role in the new adversarial system, Chile was free to newly develop and define the role of its prosecutors.¹⁴⁸ Before the introduction of the Public Prosecutor's office, only the due process judge—the *juez de garantía*—was responsible for investigating and producing the evidence at trial against the criminal defendant.¹⁴⁹

Similar to Mexico's public prosecutor under its inquisitorial system, Chile's due process judge was susceptible to abuses of power due to a lack of checks and balances.¹⁵⁰ The due process judge, prior to the introduction of the public prosecutor, was virtually unconstrained in his or her investigative capacity and in making evidentiary determinations without significant limitations.¹⁵¹ Even after the initial introduction of the public prosecutor, Chilean criminal procedure remained an inquisitorial process. The lack of checks and balances in Chile's criminal justice system was remedied only after its transition to an adversarial system and the introduction of the role of the public defender.¹⁵²

Still, the changeover to a diminished role for the judiciary has been challenging for Chile as due process judges sometimes inadvertently revert to their old roles and insert themselves into the gathering of evidence during the investigatory phase, thereby changing the dynamic of the adversarial system to favor the prosecution.¹⁵³ This is especially problematic for the public defender, who depends on the due process judge to make impartial evidentiary determinations during oral trials.¹⁵⁴

147. CÓDIGO PROCESAL PENAL [CÓD. PROC. PEN.] [Chilean Criminal Procedure Code] art. 137 (Chile).

148. However, the role of the public defender was not introduced until 2000, as part of the adversarial system. Cousino, *supra* note 131, at 332.

149. *Id.* at 325.

150. *Id.* at 325–26.

151. CÓDIGO DE PROCEDIMIENTO PENAL [CÓD. PROC. PEN.] [Chilean Criminal Procedure Code of 1906] arts. 153–83, 19 de Febrero de 1906 (Chile).

152. CÓD. PROC. PEN. art. 137 (Chile).

153. Cousino, *supra* note 131, at 348–49.

154. *Id.* at 329.

Unfortunately, much like the Mexican due process judge, the Chilean due process judge is free to make evidentiary determinations at his or her own discretion, without having to abide by any definitive guidelines.¹⁵⁵ The language of the Chilean Penal Process Code is virtually identical to the language from the Chihuahua Code of Criminal Procedure from Part IV of this Comment. Under Article 297 of the Chilean Penal Process Code, the Chilean due process judge may freely assess the evidence, but cannot contradict the principles of logic, maxims of experience, and scientific knowledge.¹⁵⁶ Like the Mexican due process judge, the broad standard implied by the statutory text is not enough to provide any meaningful guidance or restraint on a Chilean due process judge who chooses to abuse his or her power. Thus, the current Chilean criminal procedure is still nevertheless susceptible to the misuse of evidence against a criminal defendant at trial due to the lack of safeguards keeping the due process judge in check. Once again, a separate code of evidence is a viable solution that would restore the checks and balances to evidentiary determinations and bring further transparency to Chilean criminal procedure.

C. Chilean Reformers Support the Implementation of Formally Codified Rules of Evidence

While Chile's success indicates that a formal code of evidence is not necessary for Mexico to successfully transition to an adversarial system, Chile nevertheless faces the same need for a safeguard against potential abuses of power in evidentiary determinations by the due process judge. Both Chile and Mexico, through broad statutory text, give the due process judge sole discretion over determining the admissibility of evidence. A formal code of evidence would address this need by establishing guidelines for the due process judge, standardizing evidentiary determinations from courtroom to courtroom, and bring further transparency to each country's criminal proceedings. Interviews with Chilean reform experts reveal that they believe that a formal code of evidence would greatly supplement Chile's post-transition success in upholding the goals of its reform.

Professor James M. Cooper, the director of Proyecto ACCESO, has attempted to implement a separate code of evidence in Chile since the introduction of the adversarial system.¹⁵⁷ Despite his involvement in the education and training of Chilean reforms, and despite the fact that he himself has drafted multiple codes of evidence as possible starting

155. Cód. PROC. PEN. art. 276 (Chile).

156. Cód. PROC. PEN. art. 297 (Chile).

157. Interview with James Cooper, Dir., Proyecto ACCESO, in San Diego, Cal. (Nov. 13, 2012).

points, Chilean officials have regularly rebuffed him.¹⁵⁸ He attributes this negativity and resistance to further reformation as a result of “reform fatigue,” but nevertheless sees the opportunity for improvement.¹⁵⁹ However, he optimistically believes that Chile will eventually incorporate a formal code of evidence because it is the most practical solution to maintaining effective due process in its new criminal procedure.¹⁶⁰ This outlook suggests that formally codified rules of evidence are an inevitable supplement to Mexico’s new criminal procedure regardless of its implementation before, during, or after the initial transition.

Sr. Claudio Pavlic, the former National Public Defender of Chile, believes that while the lack of codified rules of evidence makes the task of criminal defense more challenging than it already is, Chile is not yet in a position to create a formal code of evidence.¹⁶¹ Like Mexico, Chilean criminal procedure already utilizes certain evidentiary principles, some of which are codified within its Penal Process Code. Although these principles are significant to the trial process, Sr. Pavlic believes that the amount of evidentiary principles are currently so few and far between that Chile could not compile a code of evidence rules without further development.¹⁶² However, that is not to say that he believes a code of evidence is not fundamental to the continuing improvement of Chile’s criminal procedure—he does acknowledge its importance to effective due process in the courtroom—only that it is simply not currently a viable option.

Furthermore, the evidentiary principles that Sr. Pavlic considers most important to criminal procedure are already codified in the Penal Process Code, even if a separate code of evidence is nonexistent.¹⁶³ Article 276 of Chile’s Penal Process Code, for example, states that the due process judge will oversee the investigation and collection of the evidence.¹⁶⁴ Additionally, Articles 295 and 296 introduce the principle of relevancy, which was similarly important to Mexican criminal procedure and incorporated into its code of criminal procedure.¹⁶⁵ These are the

158. *Id.*

159. *Id.*

160. *Id.*

161. E-mail from Claudio Pavlic, former National Public Defender, Chile, to Connie Dang, Law Student, Univ. of San Diego (Nov. 15, 2012, 08:00 PST) (on file with author).

162. *Id.*

163. *Id.*

164. CÓD. PROC. PEN. art. 276 (Chile).

165. CÓD. PROC. PEN. arts. 295–96 (Chile).

evidentiary principles identified by Sr. Pavlic as rules that are significant to Chilean oral advocacy.¹⁶⁶ It makes sense then, in light of Chile's own inherent positivism, that these rules must be codified *somewhere* in order to effectively carry out due process.

However, there is room to further develop these evidentiary principles. The concept of relevancy, for example, is still vaguely defined in comparison to the United States Federal Rules of Evidence. Article 297 of Chile's Penal Process Code, introduced above, is again problematic as it only sets out scant guidelines that the due process judge must abide by in making evidentiary determinations.¹⁶⁷ A separate code of evidence would not only compile all existing evidentiary principles, but would allow each principle to be fully developed and better defined.

In light of Chile's reform efforts, Mexico should at least consider codifying within its criminal codes those evidentiary principles that it finds most significant to its oral trial process—but only until it can work towards implementing a formal code of evidence. Both the opinions of Professor Cooper and Sr. Pavlic seem to confirm that, while Chile's transition is considered complete, the possibility for further reforms remains. The continuous education of Chilean legal professionals suggests that the reformers are still refining Chilean criminal procedure. If Chile still acknowledges room for reform, then certainly Mexico should strive towards eventually developing a formal code of evidence.

VI. CONCLUSION

A formal code of evidence, though a lofty objective, would greatly supplement Mexico's 2008 constitutional reforms and achieve many of its reform goals. The evidentiary principles under its inquisitorial system were ineffective, condoned human rights violations, prone to corruption and abuses of power, and not transparent to the public. The reforms aim to ensure a fair trial for criminal defendants by drastically changing Mexican criminal procedure. Yet, at the evidentiary stage, there are still ambiguities and possible misuses of evidence that would prevent a criminal defendant from receiving a fair and impartial trial. Formally codified rules of evidence would address these issues by providing checks and balances during pre-trial evidentiary determinations, establish standards and guidelines for the due process judge, and make transparent the process of determining whether evidence is admissible.

The Mexican reforms must work within its civil law tradition and its positivist values. Formally codified rules of evidence make sense in that

166. E-mail from Claudio Pavlic, *supra* note 161.

167. CÓD. PROC. PEN. art. 297 (Chile).

the evidentiary principles that already exist in trial are written into the statutory law and uniformly utilized within its courts. While Chile's successful transition to an adversarial system without a formal code of evidence suggests that codifying evidentiary principles are not necessary to successfully achieve reforms to criminal procedure, its post-transition state of continuing education and refinement suggest that it is still in the midst of its reformation. Thus, Mexico must similarly remain forward-looking in its goals and work towards eventually implementing formally codified rules of evidence.

