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# The Bitter and the Sweet: Feminist Efforts to Reform Nicaraguan Rape and Sodomy Laws

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## ARTICLES

**THE BITTER AND THE SWEET: FEMINIST  
EFFORTS TO REFORM NICARAGUAN  
RAPE AND SODOMY LAWS**

MARTHA I. MORGAN\*

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\* Robert S. Vance Professor of Law, University of Alabama. This article is a continuation of my interest in Latin American women and how they are using the law in their struggles for gender justice, a term I use to refer to the related goals of equality and social justice. See, e.g., Martha I. Morgan, *Founding Mothers: Women's Voices and Stories in the 1987 Nicaraguan Constitution*, 70 B.U. L. REV. 1 (1990); Martha I. Morgan with Mónica María Alzate Buitrago, *Constitution-Making in a Time of Cholera: Women and the 1991 Colombian Constitution*, 4 YALE J.L. & FEMINISM 353 (1992); Michelle Saint-Germain & Martha I. Morgan, *Equality: Costa Rican Women Demand the Real Thing*, 11 WOMEN & POL. 23 (1991). The materials and views discussed in sections IV. and V.B. are part of a larger work in progress, tentatively titled *Taking Machismo to Court*, which examines the increasing use of litigation by women's rights activists in the region and the resulting gender jurisprudence that is emerging. The research for this article has been supported in part by research stipends from the University of Alabama Law School Foundation. Earlier versions of this work were presented at the Southeastern Council on Latin American Studies Annual Meeting in Antigua, Guatemala on February 19, 1993, and at a Faculty Colloquium at the University of Alabama Law School. *All translations of interviews and Spanish language materials are my own unless otherwise indicated.* I am grateful to Mónica Alzate for her research assistance during the summer of 1995, to Sindy Samayoa for her assistance in transcribing taped interviews, and to Wythe Holt and Ellen Stein for their comments on earlier drafts of this article.

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## I. INTRODUCTION

Latin American feminists often lament that other pressing demands leave them little time for reflection and writing,<sup>1</sup> yet they are at the forefront of contemporary feminist thought and action.<sup>2</sup> Insistent that gender theory be grounded in the diverse realities of women's lives and that it focus on changing these realities, they are working to develop strains of feminism capable of transforming their societies by confronting the *machismo*<sup>3</sup>

1. Costa Rican feminist lawyer Alda Facio described the dilemma Latin American women face in this regard in their struggle against *machismo*. While decrying "centuries of thinking of the man as the measure of everything . . . of thinking of the woman as different" and acknowledging the urgency of "conceptualiz[ing] a model of the human being that includes us," she confessed:

Unfortunately, the struggle against the horror of sex discrimination does not leave time for reflection. Because of this, though it seems contradictory, we have to support measures that tend to better our situation though we know beforehand that they will not carry us to sexual equality. At least they will give us a chance to catch our breath and time to conceive this new paradigm of the human.

Alda Facio Montejo, *¡Iguales a Quién?*, MUJER/FEMPRESS, Oct. 1988, at 3.

2. Fortunately, since writing the article cited in the previous note Facio has found time to author a book introducing a Latin American feminist methodology for gender-based legal analysis. ALDA FACIO MONTEJO, CUANDO EL GÉNERO SUENA CAMBIOS TRAE (UNA METODOLOGÍA PARA EL ANÁLISIS DE GÉNERO DEL FENÓMENO LEGAL) (1992). For other examples of Latin American feminist writings, see OFEILA URIBE DE ACOSTA, UNA VOZ INSURGENTE (1963); ANA SOJO, MUJER Y POLÍTICA (2d ed. 1988); MARÍA LADI LONDOÑO, EL PROBLEMA ES LA NORMA: ENFOQUES LIBERADORE SOBRE SEXUALIDAD Y HUMANISMO (1989); COLECTIVO DE MUJERES DE ILEANA RODRÍGUEZ, REGISTRADAS EN LA HISTORIA: 10 AÑOS DEL QUEHACER FEMINISTA EN NICARAGUA (1990); MATAGALPA, FEMINARIO: CORRIENTES FEMINISTAS EN AMÉRICA LATINA Y CENTROAMÉRICA (Memorial publication of a "feminar" held August 7 and 8, 1992, in Matagalpa, Nicaragua); SOBRE PATRIARCAS, JERARCAS, PATRONES Y OTROS VARONES (UNA MIRADA GÉNERO SENSITIVA DEL DERECHO) (Alda Facio & Rosalía Camacho, eds. 1993); DISCURSO, GÉNERO Y MUJER (Gabriela Castellanos, Simone Accorsi & Gloria Velasco compiladoras, 1994).

3. Literally, the Spanish word *macho* means a male animal. The late Carlos

and violence that permeate their existence. Extending the familiar call for "democracy in the country and in the home"<sup>4</sup> to "the bedroom" as well, many are now including sexual autonomy and freedom of sexual orientation on their agendas.<sup>5</sup> Despite deeply ingrained traditionalism, the size and volatility of their societies have provided opportunities for experimentation<sup>6</sup> that might not have been possible in larger and more stable settings.<sup>7</sup>

Núñez, then President of the Nicaraguan National Assembly, described what *machismo* meant to him as a Nicaraguan male:

To me, *machismo* is a particular form of manifestation of the oppression by the male of the female that not only carries with it discriminatory attitudes, but since the disappearance of patriarchy and the imposition of patriarchy, has meant reducing the female to the condition of object, with the male acting as head of the family, and thus demanding, ordering, and imposing, without taking into account what I would call the exercise of democracy inside the house and outside of it.

Interview with Carlos Núñez, President of the Nicaraguan National Assembly, in Managua, Nicaragua (Aug. 8, 1988), reprinted in *El machismo, el aborto, y el maltrato a la mujer*, NUEVO AMANECER CULTURAL, Sept. 24, 1988, at 2.

4. This slogan originated with the grassroots feminist movement in Chile during the fight against the Pinochet regime and has since been adopted by women throughout Latin America in their efforts to expose the fallacy of traditional attempts to separate public and private spheres. See JO FISHER, *OUT OF THE SHADOWS: WOMEN, RESISTANCE AND POLITICS IN SOUTH AMERICA 177-200* (1993).

5. For example, as the experience chronicled here demonstrates, Nicaraguan feminists have articulated a vision of sexual autonomy that not only incorporates traditional feminist critiques of rape and related crimes, but also addresses abortion and sexual orientation. This new vision provides a model for a feminism capable of transcending the divide some have posited between feminism and campaigns for sexual freedom. See, e.g., JEFFREY WEEKS, *SEXUALITY AND ITS DISCONTENT: MEANINGS, MYTHS & MODERN SEXUALITIES* 252 (1985), "Socialism, feminism, and sexual radicalism have different dynamics, embody contrary logics and have alternative definitions of their goals. Class struggle, gender conflicts, and campaigns for sexual freedom have separate rhythms of development and contradictions between them inevitably arise." *Id.*

For an argument noting Weeks' assessment of the difficulty of intertwining these different currents, but expressing optimism about the potential of contemporary Latin American women's movements to do so, see Larry S. Carney & Charlotte G. O'Kelly, *The Sexuality of Repression and the Repression of Sexuality in Latin America*, Address at the Fifth International Interdisciplinary Women's Conference, San Jose, Costa Rica, (Feb. 22-26, 1993).

6. José Figueres, revered by Costa Ricans as their modern founding father, reportedly referred to his small country as a "laboratory."

7. In the case of Nicaragua, the 1979 Revolution that overthrew the forty-five year Somoza family dictatorship was followed by eleven years of rule by the FSLN (Sandinista National Liberation Front) which brought unprecedented changes in the country's social, economic, and political landscape. See, e.g., HARRY E. VANDEN & GARY PREVOST, *DEMOCRACY AND SOCIALISM IN SANDINISTA NICARAGUA* (1993); JOSEPH COLLINS ET AL., *WHAT DIFFERENCE COULD A REVOLUTION MAKE?* (2d ed. 1985); PHILIP ZWERLING & CONNIE MARTIN, *NICARAGUA — A NEW KIND OF REVOLUTION* (1985).

The Sandinistas lost the 1990 elections to Violeta Chamorro and the loose

alliance called the National Opposition Union (UNO) (which spanned the political spectrum from communist opposition to the FSLN to the country's far right). Chamorro's presidential campaign was successful in part because as the mother of a politically divided but otherwise close family, she symbolized reconciliation to a tired and war-torn country. At the time of the election, two of Chamorro's children were ardent Sandinistas: a son who was editor of the FSLN daily *Barricada* and a daughter who held diplomatic posts for the FSLN administration. Her other two children — a son who worked with the *contras* and a daughter who was an editor of the anti-Sandinista *La Prensa* — strongly opposed the Sandinistas.

Following the 1990 elections, the Nicaraguan National Assembly was composed of ninety-two representatives and their respective alternates. The UNO coalition held fifty-one seats and the Sandinistas thirty-nine. In addition, the Social Christian Party won one seat, and the losing presidential candidate for the Revolutionary Unity Movement was entitled to a seat. Fifteen of the representatives were women (as were twelve of the alternates); six of the women representatives were from the UNO and nine from the FSLN.

Bare numbers, however, do not begin to tell the story of the changes that have occurred in the Assembly since the elections. Over time the allegiances of the UNO representatives shifted and the split widened between those loyal to President Chamorro and those critical of her conciliatory actions towards the Sandinistas. In 1994 and early 1995, disputes within the Sandinistas led to splits in their legislative delegation and ultimately to the creation of a second Sandinista party, the Sandinista Renovation Movement (MRS). See Guillermo Fernández Ampié, *Going separate ways*, BARRICADA INTERNACIONAL, Feb. 1995, at 5-6. In the National Assembly, of the thirty-nine members of the Sandinista delegation, thirty-two aligned themselves with the "reformist" MRS under the leadership of former FSLN guerrilla fighter and National Directorate member, Dora María Téllez, and seven maintained loyalty to the "orthodox" FSLN under the leadership of Daniel Ortega. *The Constitutional Reforms: Another Opportunity*, ENVÍO, Feb.-Mar. 1995, at 6. At the end of August 1995, nine legislators left the MRS delegation to form the Sandinista Unity bench. See *Pre-electoral warm-up: Jockeying for position*, BARRICADA INTERNACIONAL, Oct. 1995, at 4-5.

In the first half of 1995, the political rivalries provoked constitutional gridlock as Chamorro opposed constitutional reforms approved by the National Assembly in February 1995. The reforms generally strengthened the power of the National Assembly and reduced the broad powers accorded the executive in the 1987 Constitution. The real sticking point, however, was a reform that prohibited close relatives of the chief executive from running for the presidency, a provision some defended as necessary to prevent the emergence of another family dictatorship but others attacked as aimed at the candidacy of Chamorro's son-in-law and chief adviser Antonio Lacayo. When Chamorro refused to send the constitutional reforms for publication, the Assembly did so itself and then proceeded to fill vacancies and new seats on the enlarged Supreme Court created by the reforms. The Supreme Court ruled in early May that the Assembly lacked the authority to have the reforms published, but that Chamorro should do so. Chamorro nevertheless maintained her opposition to the reforms until pressure from the Catholic hierarchy, certain friendly foreign powers, and international lenders led to a June 15, 1995, agreement to accept the reforms. On July 4, 1995, the constitutional reforms were officially published. Lacayo, who earlier suggested he might obtain a civil divorce to evade the constitutional prohibition on his candidacy for president, said that he would petition the Supreme Court to revoke the prohibition. *Nicaragua: Accord Ends Constitutional Crisis, Allowing Adoption of Controversial Reforms*, NOTISUR — LATIN AMERICAN POLITICAL AFFAIRS, July 7, 1995, available in LEXIS, Nexis Library. His wife, Cristiana, later filed a

Written from a conviction that those of us in other parts of the world can learn from the experiences of Latin American feminists, this article will examine Nicaraguan feminists' recent attempt to reform their Penal Code's outdated treatment of rape and to repeal its criminalization of certain forms of consensual sodomy. It will examine how the new law<sup>8</sup> came about and how it changed Nicaragua's prior rape<sup>9</sup> and sodomy laws, and will analyze the unsuccessful constitutional challenge to the new sodomy provision in the Nicaraguan Supreme Court. Section II provides an overview of the history of the enactment of the new law. Sections III and IV then examine in more detail the new provisions concerning rape and related crimes and sodomy. Finally, Section V considers how the Nicaraguan feminists' experience speaks to the possibilities and limitations of other feminist attempts to use law as a tool for societal change.

The story behind the new law illustrates the difficulties of surmounting partisan loyalties and building broad-based support for feminist legal reforms, especially those which directly chal-

suit attempting to challenge the restrictions.

The post-election political instability has been accompanied by "horrendous social results." *Is ESAF's Career at an End?*, ENVÍO, Nov. 1995, at 6-7. According to the UN Development Program, in June 1994, 74.8% of Nicaraguan families lived below the poverty line, with 43.6% in extreme poverty; unemployment (particularly affecting women and youth) was around 60%. *Id.* at 7. UNICEF-Nicaragua reported that one in every four Nicaraguan children is chronically malnourished. *Hunger*, ENVÍO, Nov. 1995, at 28. Illiteracy, which had been lowered to less than 13% during the 1980 literacy crusade, has risen to over 35%, and according to UN Development Program reports from 1992 to 1995, Nicaragua has fallen from 106th to 109th among the 174 countries classified in terms of their "human development index." *Falling Literacy and Human Development*, ENVÍO, Oct. 1995, at 23. On the education front, a group of parents has filed a constitutional challenge against the new education minister's policy of "administrative autonomy" that permits public schools to charge supposedly voluntary monthly fees. *Parents start proceedings against Education minister*, BARRICADA INTERNACIONAL, Oct. 1995, at 9. Much of the population has come to see President Chamorro's government as part of the problem. And many seem to attribute Chamorro's inability to solve the country's pressing problems to her gender; in a recent poll, 68% said it would be an error to elect a woman as president in 1996. *Is ESAF's Career at an End?*, *supra*, at 10. Nevertheless, in October 1995, the National Assembly elected a woman as the country's vice-president as well, selecting Julia Mena of the Independent Liberal Party to replace Virgilio Godoy, who resigned his office as required by law in order to run for president.

8. *Ley de Reformas al Código Penal*, Ley No. 150, 174 LA GACETA 1837-1841 (Sept. 9, 1992).

9. For analyses of Nicaraguan rape law prior to the 1992 revisions, see MILÚ VARGAS ESCOBAR, *LA VIOLACIÓN: CUALQUIERA DE NOSOTRAS PUEDE SER VIOLADA* (1990); Beth Stephens, *A Developing Legal System Grapples with an Ancient Problem: Rape in Nicaragua*, 12 WOMEN'S RTS. L. REP. 69 (1990).

lenge existing gender roles. Nicaraguan society's reaction to the new law's adoption demonstrates the complexity of the direct and indirect<sup>10</sup> effects which flow from such efforts at legal reform.<sup>11</sup> Finally, the constitutional challenge to the new sodomy provision provides an opportunity to explore the role that courts are beginning to play in the struggle for gender justice in Latin America.

## II. THE ROAD TO REFORM

Rape is not a new concern for women's rights activists in Nicaragua.<sup>12</sup> The need for reform of the 1974 Nicaraguan Penal Code's nineteenth century treatment of rape was one of the issues Nicaraguan women raised during the adoption and early implementation of the 1987 Nicaraguan Constitution.<sup>13</sup> Demands for rape law reform increased in 1988 and 1989 as newspaper accounts of brutal rapes became a staple<sup>14</sup> of the country's ideologically divided but uniformly sensationalist print media.<sup>15</sup> During this time, reform proposals were put forward

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10. The term "indirect effects" is used here to refer to the interactive and constitutive role that law and attempts at law reform play in shaping societal values and consensus.

11. Costa Rican lawyer Marta Trejos underscores Latin American women's understanding of the importance of law's indirect effects: "Law is barely 10% coercive . . . . Ninety percent is educative." Marta Trejos, *Igualdad Real de la Mujer: Consideraciones Metodológicas*, DIVERGENCIAS, Sept. 1988, at 23, 25.

12. For discussions of the history of the Nicaraguan women's movement, see CLARA MURGUALDAY, NICARAGUA, REVOLUCIÓN Y FEMINISMO (1990); ADA JULIA BRENES, IVANIA LUZ RESTREPO, SYLVIA SAAKES & FLOR DE MARÍA ZÚNIGA, LA MUJER NICARAGÜENSE EN LOS AÑOS 80 (1991); MERCEDES OLIVERA ET AL., NICARAGUA: EL PODER DE LAS MUJERES (1992). See generally MARGARET RANDALL, SANDINO'S DAUGHTERS REVISITED: FEMINISM IN NICARAGUA (1994). For discussions of the movement's shift away from alignment with AMNLAE (the Association of Nicaraguan Women "Luisa Amanda Espinosa"), the women's organization of the Sandinista National Liberation Front (FSLN), and of attempts to build an autonomous broad-based movement, see Ana Criquillon, 1992: *Un Año de Efervescencia para las Nicaragüenses*, 136/137 MUJER/FEMPRESS, Feb.-Mar. 1993, at 5; *Entre éxitos, tropiezos y retos*, 10 LA BOLETINA, Dec. 1992-Jan. 1993, at 3-20.

13. See Morgan, *supra* note \*, at 44-49.

14. As is commonly the case, the extent to which the increased visibility of sexual crimes reflects increased occurrences is unclear, as is the extent to which victims of such crimes have become less hesitant to report them.

15. Not only do the country's leading newspapers span the ideological spectrum, they have also undergone internal ideological shifts. *La Prensa* was formerly under the direction of President Violetta Chamorro's husband Joaquín Chamorro, who was slain for his opposition to the Somoza regime. When Violetta Chamorro and the paper broke with the FSLN shortly after the 1979 revolution, many of its staff left to

in the media and in the Commission on Health, Social Security and Welfare of the National Assembly.<sup>16</sup>

The 1990 electoral victory of Violeta Barrios de Chamorro and the UNO temporarily forced rape reform proposals out of the spotlight. In the wake of the elections, however, women from the victorious UNO coalition and women from the defeated, but strong, Sandinista Party (FSLN) vowed to try to work together on issues of common concern. They participated in the newly formed Commission on Women, Youth, Children and the Family (commonly referred to as the Women's Commission or the Commission on Women) in the National Assembly. With eight women members, the commission was composed of four representatives each from the UNO and the FSLN.<sup>17</sup> Rape law reform was one of the topics upon which commission members were able to reach some consensus.<sup>18</sup>

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form *El Nuevo Diario*, which proclaimed itself the legitimate heir to *La Prensa's* pre-1979 heritage. After 1979, *La Prensa* opposed the FSLN and later supported the contras. Generally, in recent times, both these papers and the official FSLN paper, *Barricada*, have been headed either by President Chamorro's children or by other relatives. Several new papers have emerged following the 1990 elections, including the daily *La Tribuna* and the weekly *La Crónica*. Also recently, *Barricada* has undergone changes, including the replacement of president Chamorro's son Carlos Chamorro as director, as a result of the division of the Sandinistas into two parties. See generally Guillermo Fernández Ampié, *Journalists in Nicaragua: Behind the Headlines*, BARRICADA INTERNACIONAL, Aug. 1995, (Special Report), at 17-24.

16. Stephens, *supra* note 9, at 84-85.

17. *Comisión de la mujer, juventud, niñez y familia*, EL NUEVO DIARIO, Dec. 15, 1990, at 8.

18. The first area in which the Women's Commission successfully moved legislation through the Assembly involved *alimentos*, or support obligations. *Ley de Alimentos*, Ley No. 143, 57 LA GACETA 481-483, Mar. 24, 1992. See MILÚ VARGAS, *LOS ALIMENTOS* (1992). Like the rape law reforms, this law was both supported and subsequently challenged by lawyers of the Center for Constitutional Rights "Carlos Núñez Téllez." For a description of the Center, see *infra* note 19. The constitutional challenge to the *Ley de Alimentos* was filed on May 22, 1992, and attacked both the support law's preference for spouses in formal marriages over companions in de facto unions and its discrimination against the children of de facto unions. *Recurso Por Inconstitucionalidad Contra La Ley No. 143 "Ley de Alimentos"*, May 22, 1992. The challengers relied upon several of the 1987 Constitution's provisions addressing family rights to support their claim that the law discriminated against companions in de facto unions. In particular, they argued that Article 72 (which provides that "marriage and stable de facto unions are protected by the state") guarantees equal treatment of persons in stable de facto unions and married persons. In challenging the law's discrimination against children, they relied upon Article 75's guarantee of equal rights to all children, as well as Article 27's right to equal protection. Finally, they relied upon Article 46's incorporation of the American Convention of Human Rights of the Organization of American States which provides in Article 17 that the family is the natural and fundamental element of society, that it must be protected by the



Early in the National Assembly's 1992 Session, feminist lawyers affiliated with the Center for Constitutional Rights "Carlos Núñez Téllez"<sup>19</sup> moved quickly, enlisting eighteen representatives (five of the six women UNO representatives, all nine women FSLN representatives, and four male FLSN representatives) to sponsor a bill reforming the Penal Code's treatment of rape and other sexual offenses.<sup>20</sup> Amid revisions that seemed unlikely to draw significant opposition (such as increasing penalties for rape,<sup>21</sup> recognizing a series of specific aggravating circumstances applicable to rape cases,<sup>22</sup> and broadening the definition of rape<sup>23</sup>) there were two changes which were certain to be controversial. First, the proposal to decriminalize abortion for rape victims<sup>24</sup> was sure to provoke outcries in this predominantly Catholic country. The original proposal's other flashpoint was less obvious — it deleted the penal code article that criminalized consensual sodomy when practiced in a manner that was "scandalous" or "outraging modesty or public morality" as well as when engaged in by one who had a relationship of authority over a sexual partner.<sup>25</sup>

As the reform proposal moved through the two legislative commissions, or committees, to which it was referred (the Commission on Women, Youth, Children and the Family and the Commission on Justice<sup>26</sup>) and then into debate by the full As-

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society and the state, and that the law must recognize equal rights for children born inside as well as outside of marriage. Although filed more than six months before the challenge to the new sodomy law, the challenge to the support law was still pending in the Supreme Court long after the sodomy case was finally decided.

19. The Center for Constitutional Rights was one of many non-governmental organizations set up after the 1990 elections by those who held positions within the former Sandinista government. The founders of the Center had worked together in the National Assembly. Milú Vargas, who had headed the Legal Advisor's Office in the Assembly, became the Center's first director. Some of those affiliated with the Center also continued to work for the Assembly or for the FSLN delegation within the Assembly. One of the attorneys affiliated with the Center, Roberto Evertz, served as the Director General of Electoral Affairs for the Supreme Electoral Council, a fourth branch of government under the Nicaraguan Constitution. The Center is named for former President of the National Assembly and FSLN Comandante Carlos Núñez Téllez, who died on October 2, 1990 and for the Center for Constitutional Rights in New York City.

20. Proyecto de Ley de Reformas al Código Penal (1992).

21. *Id.* art. 195.

22. *Id.* art. 196.

23. *Id.* art. 195.

24. *Id.* art. 209.

25. CÓD. PEN. art. 205 (1974).

26. The nine member Justice Commission included only one woman — attorney

sembly, the media contained alarming accounts of brutal rapes of young Nicaraguan girls, including one in which the victim had been beheaded.<sup>27</sup> Despite the 1987 Constitution's prohibition on capital punishment,<sup>28</sup> some advocated the death penalty for rapists.<sup>29</sup>

The Assembly's Commissions on Women and Justice received formal comments on the proposed revisions from a variety of governmental bodies and private organizations, including the Catholic Church. They also held consultations with the public in six of the country's most populous cities. The Commissions made several significant modifications to the original proposal before approving it in late May 1992. The two most important modifications were directly opposed to feminist positions concerning the two flashpoint situations. The Commissions not only restored the existing code's criminalization of homosexual sodomy but broadened the provision to include "inducing, promoting or propagandizing" such conduct. And they deleted the provision that would have decriminalized abortion for a woman who became pregnant as a result of rape.<sup>30</sup>

Despite these setbacks, the bill's feminist backers and its FSLN proponents in the Assembly continued to push for the remaining reforms. Rather than abandon the reform effort altogether, the FSLN members of the Commissions joined with their UNO counterparts in signing the revised bill that the Commissions then submitted to the full Assembly.<sup>31</sup>

Most of the Commissions' proposals enjoyed broad support from both the UNO and the FSLN. On controversial issues, however, the votes split almost entirely along party lines. The UNO coalition narrowly prevailed in frustrating the reformers'

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Yadira Centeno, an FSLN representative.

27. *Other Penal Code Reforms for Better and for Worse*, ENVÍO, Aug. 1992, at 14.

28. NIC. CONST. art. 23: "The right to life is inviolable and inherent to all persons. There is no death penalty in Nicaragua." The 1974 Constitution had authorized the death penalty for certain crimes, but not for rape. NIC. CONST. art. 38 (1974).

29. Earlier calls for the death penalty had followed May 1988 reports of a father's rape of his eight-month-old daughter. See Stephens, *supra* note 9, at 1 n.2.

30. Dictamen, Proyecto de Reformas al Código Penal, May 22, 1992, at 3. "Article 209 of the bill which refers to the interruption of a pregnancy that is a product of rape is deleted given that it was not accepted by a majority in the process of consultations." *Id.*

31. *Id.*

attempt to decriminalize homosexual sodomy; the proposal to expressly decriminalize abortion in rape cases was not even raised for debate.

Rejecting calls to veto the new law's sodomy provision,<sup>32</sup> President Chamorro instead approved the law and transmitted it for publication in Nicaragua's official legal newspaper, *La Gaceta*.<sup>33</sup> Although the issue in which the reform appeared was dated September 9, 1992, it was actually published in the final days of October.<sup>34</sup> Given the stated publication date, the sixty-day period during which Nicaraguan citizens could challenge the constitutionality of new legislation ended on November 9, 1992; as a result, the same feminist lawyers for the Center for Constitutional Rights who had drafted the initial reforms worked feverishly to prepare a *recurso por inconstitucionalidad*,<sup>35</sup> or constitutional challenge, attacking the new law's sodomy provision. Only months after launching the reform effort in the National Assembly, on November 9, 1992, they filed a case in the Nicaraguan Supreme Court on behalf of thirty-one citizens,<sup>36</sup> attack-

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32. The national press featured a wave of negative national and international reaction to the new law's repressive sodomy provision. Local organizations of lesbians and gays solicited international support for their battle to have President Chamorro veto the law. Amnesty International wrote to Chamorro stating its concern that the new provision could be used to imprison persons who promote the rights of homosexuals or who take part in private homosexual acts. *Al preocupada por los derechos de homosexuales*, BARRICADA INTERNACIONAL, July 27, 1992, at 9. The International Gay and Lesbian Human Rights Commission also wrote to the Nicaraguan government expressing its concern about the new law. *Gays USA escriben a la Presidenta*, BARRICADA INTERNACIONAL, June 21, 1992, at 4.

33. *Ley de Reformas al Código Penal*, 174 LA GACETA 1837 (Sept. 9, 1992).

34. Interview with Milú Vargas, Director of the Center for Constitutional Rights, in Managua, Nicaragua (Dec. 28, 1992).

35. Article 187 of the 1987 Nicaraguan Constitution provides that: "There is established the *Recurso por Inconstitucionalidad* against all laws, decrees or regulations that are inconsistent with the Constitution, which can be filed by any citizen." NIC. CONST. art. 187. The Law of Amparo provides the implementing legislation for the *Recurso por Inconstitucionalidad* as well as for the writs of *amparo* and *habeas corpus* which are guaranteed in Articles 188 and 189 of the Constitution. *Ley de Amparo*, 241 LA GACETA 1631 (Dec. 20, 1988). For further discussion of these provisions, and of the history of judicial review in Nicaragua, see Morgan, *supra* note \*, at 68 n.297. In September 1995, the National Assembly approved revisions to the Law of Amparo that would expressly preclude *recursos por inconstitucionalidad* against the substance of constitutional reforms and impose limits on the use of *amparo* with respect to legislative matters. As of late 1995, those revisions had not been sent for publication.

36. Those named in the *recurso* included lawyers affiliated with the Center for Constitutional Rights as well as others active in struggles for the rights of women and homosexuals. The *recurso* stated only the name, civil status, and occupation of

ing what had become the new law's most controversial and widely debated provision. On March 7, 1994, the Nicaraguan Supreme Court rejected this challenge.

### III. OF REFORM: CHANGES REGARDING RAPE AND RELATED SEXUAL OFFENSES

In its treatment of rape, as in its general tenor, the 1974 Nicaraguan Penal Code differed little from its 1879 predecessor. Both were based on Napoleonic Codes and reflected their patriarchal premises (the Napoleonic Civil Code considered married women, along with minors, criminals, and the mentally deficient, as among "[t]hose persons without rights at law").<sup>37</sup>

The 1974 Penal Code defined rape and other sexual crimes against women largely from the point of view of protecting the proprietary interests that husbands and fathers claimed in their wives and daughters, rather than being framed to protect the interests of women themselves. For example, *estupro*, or carnal knowledge through use of misrepresentation or fraud (presumed when the victim was between the ages of twelve and eighteen), was defined to protect only *doncellas* (virgins);<sup>38</sup> and *rapto*, or kidnapping for sexual purposes, was punished with two to four years imprisonment if the victim was "a woman of good reputation" but if the victim was "another class of woman," the penalty was only three to six months in prison.<sup>39</sup> Similarly, kidnapping of a virgin between twelve and eighteen years old when her guardians were away or without violence was punishable by one to two years in prison if done without the intention of marrying her. This crime carried only a two to four month penalty if marriage was intended.<sup>40</sup>

Against such patriarchal conceptions of sexual crimes, Nicaraguan feminists began to posit their views of the crime of rape. In 1990, Milú Vargas, then director of the Center for Constitutional Rights and an alternate representative for the FSLN in the National Assembly,<sup>41</sup> offered the following perspective on

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each petitioner.

37. Napoleonic Civil Code, *quoted in* ESCHEL M. RHOODIE, DISCRIMINATION AGAINST WOMEN 61 (1989).

38. CÓD. PEN. art. 196 (1974).

39. *Id.* art. 197 (1974).

40. *Id.* art. 198 (1974).

41. Before the 1990 elections, Milú Vargas served as head legal counsel to the

rape:

For women, rape is a symbolic assassination. It is the most degrading situation that women and women workers can experience; it is the negation of the person, minimized and treated as an object.

Rape is an act of complete aggression. The damage is not only physical and psychological, it goes far beyond this; it is a situation that endures, it cannot be eliminated, but only goes into hibernation and if after time the topic again is raised, one lives through it again in her own body.

What is our conception of rape? *Rape is an act of aggression and violence, it attacks the physical, psychological, and moral integrity of women. It is a sexual aggression against our self-determination as women, as persons free to decide about our own sexuality, about our own body. It is to humiliate, subordinate and abuse a being that one considers inferior.*<sup>42</sup>

Vargas' proposal for reforming Nicaragua's rape law became the blueprint for the 1992 revisions.

Vargas has described her feminist perspective on rape law as situated within "the alternative [legal] current"<sup>43</sup>:

From the social sciences, philosophy, anthropology, sociology, economics, history, comparative analysis, popular culture and the life experiences of Latin American women, it is possible to attempt a pluralistic approach that is situated within the Alternative Current in Law, which tries to connect [law] to change and transformation.<sup>44</sup>

Consistent with her emphasis on an approach that analyzes

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National Assembly and in this capacity was a leading drafter and "founding mother" of the 1987 Nicaraguan Constitution. See Morgan, *supra* note \*, at 9 n.26. In January 1993, she was appointed legal counsel for the Nicaraguan Ministry of Health.

42. MILÚ VARGAS ESCOBAR, VIOLACIÓN, *supra* note 9, at 5 (emphasis in original).

43. For an English-language "alternative law" journal devoted to addressing "the transformative potential of law and legal services," see MÁS ALLÁ DEL DERECHO/BEYOND LAW: STORIES OF LAW AND SOCIAL CHANGE FROM LATIN AMERICA AND AROUND THE WORLD, published by the Latin American Institute for Alternative Legal Services, Bogotá, Colombia (1991-present).

44. MILÚ VARGAS ESCOBAR, COMENTARIOS A LA LEY NO. 150: LEY DE REFORMAS AL CÓDIGO PENAL 2 (Draft Sept. 30, 1992).

law in light of women's experiences and other social realities, the first change that Vargas proposed, and one that was easily secured, was the simple but symbolic step of changing the name of the section of the Penal Code covering rape from "Crimes Against Persons"<sup>45</sup> to "Crimes Against Persons and their Physical, Psychological, Moral and Social Integrity."<sup>46</sup> Another suggested reform had to do with the penal code's limited definition of rape as a crime perpetrated only by men and against women. The new law states that "persons of both sexes can be perpetrators and victims of this crime."<sup>47</sup>

The new law maintains and strengthens the prior code's special treatment of rape of a married woman when the perpetrator has caused her to believe he is her husband. The prior code listed this as one instance of rape.<sup>48</sup> The new Article 195 presumes lack of consent in such a case, extending this presumption to women in stable *de facto* unions as well.<sup>49</sup> Vargas admits that the conduct referred to may seem a little incredible on first glance, but explains that it seems less so when one considers the different life experiences of poor urban women:

[I]t seems not to be so [incredible] in poor barrios where the lots that houses are built on are very small, and thus they are very close together and also their construction is very precarious and they are lacking in minimal security measures, so that it is very easy to enter these dwellings and there have been instances where thieves have gotten into bed with a woman and have raped her.<sup>50</sup>

The new law also creates a presumption of lack of consent when the victim is under fourteen years of age and mandates the maximum penalty when the victim is under ten years old.<sup>51</sup>

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45. Cód. PEN. libro II, tit. I (1974).

46. Ley de Reformas al Código Penal, Ley No. 150, art. 1, 174 LA GACETA 1837 (Sept. 9, 1992). "The name of Title I, Book II of the Penal Code is revised to read as follows: 'Crimes Against Persons and their Physical, Psychological, Moral and Social Integrity.'" *Id.*

47. Ley de Reformas al Código Penal, Ley No. 150, art. 3, 174 LA GACETA 1837 (Sept. 9, 1992) (reforming Cód. PEN. art. 195).

48. Cód. PEN. art. 195(4) (1974).

49. Ley de Reformas al Código Penal, Ley No. 150, art. 3, 174 LA GACETA 1837 (Sept. 9, 1992) (reforming Cód. PEN. art. 195).

50. VARGAS ESCOBAR, COMENTARIOS, *supra* note 44, at 5.

51. Carnal knowledge through misrepresentation or fraud of a person over fourteen, but less than sixteen years, or of a person over sixteen years who has never

In addition to making it clear that the rape law applies to persons of both sexes as perpetrators and victims, the new law adopts a broader definition of acts constituting rape. The prior code spoke of "lying with a woman" without her consent in certain specified circumstances; this was understood to require penile penetration of a woman's vagina before rape could be charged. In contrast to this traditionalist and sexist focus on men's proprietary interest in restricting access to women's vaginas as a means of assuring knowledge of the paternity of offspring, feminist proposals for rape law reform have stressed that victims experience similar physical and psychological effects from forced anal or oral penetration, and from forced sexual penetration by instruments other than a penis.<sup>52</sup> In her critique of Nicaraguan rape law, Vargas also pointed out that total penetration was sometimes not physically possible in cases where children are victims. She illustrated this point with an account of a little girl whose vagina had to be reconstructed by a plastic surgeon following a rape.<sup>53</sup> The new rape law provides, in part:

The crime of rape is committed by he who, using force, intimidation, or whatever other method that deprives a person of will, reason or sense, has carnal access with her, or who for sexual motives introduces whatever organ, instrument or object . . . .

Persons of both sexes can be authors and victims of this crime . . . .<sup>54</sup>

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had sexual relations before, constitutes the less serious offense of *estupro* which is subject to three to five years in prison. However, if the perpetrator is in a position of authority over the victim the penalty for *estupro* is four to ten years. Fraud or misrepresentation is presumed if the perpetrator of *estupro* is over twenty-one, married, or in a stable de facto union. Ley de Reformas al Código Penal, Ley No. 150, art. 3, 174 LA GACETA 1837, 1838 (Sept. 9, 1992) (reforming Cód. PEN. art. 196).

In the plenary debates over the new law, Letecia Herrera, FSLN representative and secretary of the Women's Commission, unsuccessfully moved to delete a provision, added as the bill passed through commissions, stating that *estupro* is pardoned if the victim agrees to marry the perpetrator. *Id.*

The revisions introduce a new crime referred to as "illegitimate seduction," which occurs when one has carnal knowledge of a person over fourteen but under eighteen years old who was under their authority, or influence, in a relation involving confidence or family ties. The penalty for this offense is two to four years in prison. *Id.* at 1838-39 (reforming Cód. PEN. art. 197). Some feminists have expressed concern that this provision, which applies to wholly consensual conduct, unduly deprives young women of control over their own sexuality.

52. VARGAS ESCOBAR, COMENTARIOS, *supra* note 44, at 5.

53. VARGAS ESCOBAR, VIOLACIÓN, *supra* note 9, at 22.

54. Ley de Reformas al Código Penal, Ley No. 150, art. 3, 174 LA GACETA 1837

Responsive to the public demand for harsher punishment of rapists, the new law increases the penalty for rape from eight to twelve years in prison to fifteen to twenty years. The initial proposal had provided an even harsher penalty of twenty to twenty-five years imprisonment under certain aggravating circumstances.<sup>55</sup> As passed, the law includes ten aggravating circumstances, but does not raise the maximum penalty above twenty years.<sup>56</sup>

The new penalties were harsh, but they fell short of imposing the death penalty many had called for. Shortly after the Assembly approved the revisions, President Chamorro added her voice to those rejecting capital punishment as the answer to societal violence.<sup>57</sup> Speaking at an event marking the establishment of the Commission Against Violence to Women, she reminded the audience that "violence begets violence."<sup>58</sup>

Others worried that the new law's penalties were too harsh. Some even suggested that the long sentences could encourage rapists to murder their victims.<sup>59</sup> Under Nicaragua's penal code

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(Sept. 9, 1992) (reforming Cód. PEN. art. 195).

55. Proyecto de Ley de Reformas al Código Penal, art. 3 (reforming Cód. PEN. art. 196).

56. Ley de Reformas al Código Penal, Ley No. 150, art. 3, 174 LA GACETA 1837, 1838 (Sept. 9, 1992) (reforming Cód. PEN. art. 195). As previously noted, the maximum penalty is mandated if the victim is under 10 years old, regardless of other circumstances. *Id.*

57. Denis Garcia Salinas, *No habrá pena capital*, LA PRENSA, June 25, 1992, at 2.

58. *Id.* Empathy for those calling for the death penalty was widespread, yet members of the Assembly and other governmental officials seemed to agree that the Constitution's ban on capital punishment should not be disturbed. See, e.g., Luis Sánchez Sancho, *El derecho a la vida*, LA PRENSA, Mar. 21, 1992, at 10; Felix Navarrete, *Pena de muerte no es solución*, LA PRENSA (n.d.) (reporting on a survey of Assembly members who categorically rejected the death penalty as a solution to the country's social violence). During an interview, Leticia Herrera, FSLN Comandante and then secretary of the Assembly's Women's Commission, looked up from mending her children's clothes and confided that she understood well why a parent whose child was raped would want the death penalty applied to the rapist. She recounted the experience of losing the father of one of her children in the war against the Somoza dictatorship and her feelings towards those responsible. In the end, however, she did not advocate reinstating capital punishment in Nicaragua. Interview with Leticia Herrera, in Managua, Nicaragua, (Dec. 30, 1992).

59. Edgard Barberena, *Redactan nuevo "Código Penal"*, EL NUEVO DIARIO, June 20, 1992, at 4C (interview with Dr. Sergio García Quintero, author of a proposed revision of the entire penal code).



simple homicide carries a penalty of six to fourteen years.<sup>60</sup> But the penal code carries a mandatory thirty year sentence for atrocious murder, expressly including murder after committing rape or sexual abuse of the victim, and the new law provides that, when rape results in the death of the victim or the abortion or death of "one that would be born," the perpetrator is subject to the penalties for both crimes (not to exceed the maximum thirty year constitutional limit on criminal sentences).<sup>61</sup>

The proportionality issue was nevertheless a troublesome one, and most acknowledged that tougher penalties alone were not the solution to the country's alarming incidence of sexual violence.<sup>62</sup> In the *dictamen*, or report, transmitting their proposed revisions to the full Assembly, members of the Commissions on Women and Justice called upon governmental, religious, and private institutions, and upon the media to develop an educational campaign designed to change the society's values, and thus to aid in prevention of these crimes.<sup>63</sup>

Beyond increasing the minimum and maximum penalties for rape, the new law listed ten specific aggravating circumstances applicable to rape cases (in addition to the penal code's general list of twenty such factors) and further stipulated that neither drunkenness nor drug addiction would constitute an attenuating circumstance.<sup>64</sup>

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60. CÓD. PEN. art. 128 (1974).

61. Ley de Reformas al Código Penal, Ley No. 150, art. 3, 174 LA GACETA 1837, 1838 (Sept. 9, 1992) (reforming CÓD. PEN. art. 195).

62. See, e.g., Felix Navarrete, *Ordóñez, Vicedecano de Derecho, sugiere: Veto parcial a la reforma penal*, LA PRENSA, June 16, 1992, at 3. In this interview, Dr. Victor Manuel Ordóñez warned: "In countries where they have increased penalties, crime has worsened and increased." Instead, he argued, "[y]ou have to solve the underlying problem, that could be [lack of] bread or work." *Id.*

63. Dictamen de las Comisiones de Justicia, Mujer, Niñez y Familia sobre el Proyecto de Reformas al Código Penal, May 22, 1992, at 1.

64. The ten aggravating circumstances are:

1. When the perpetrator seriously damages the physical or mental health of the victim.
2. When the perpetrator of the crime is related to the victim within the fourth degree of consanguinity or the second degree of affinity, has custody or guardianship over, or is related by marriage or de facto union to the mother or father of the victim.
3. When the victim is a person who is physically or mentally incapacitated.
4. When a relation of authority, dependency or confidence exists between the perpetrator of the crime and the victim.

Feminist attempts to change the status of rape and related crimes to *public offenses*, prosecutable by the Prosecutor General without necessity of a formal complaint by the victim, were only partially successful. Prior to 1982, rape was viewed as a *private offense*.<sup>65</sup> The victim not only had responsibility for initiating the criminal proceeding (which was then handled by the judge rather than a prosecutor) but was also permitted to abandon it.<sup>66</sup> In 1982, the law was changed to permit the Prosecutor General to handle these cases, but only upon a complaint from the victim.<sup>67</sup> A 1988 law added confusion by including rape in a list of crimes within the prosecutor's exclusive jurisdiction to prosecute, but also requiring the victim's complaint for a prosecution to go forward.<sup>68</sup> The 1982 law was apparently interpreted to allow either the prosecutor or the judge to handle the proceedings.<sup>69</sup>

Under Article 205 of the new law, the Prosecutor General is given responsibility for handling rape cases only when the victim is under 16 years old, or when *rapto* is followed by rape or sexual abuse, or when *estupro* is committed by one who has a position of authority over the victim.<sup>70</sup> The prosecutor is also charged with initiating the proceedings in certain instances where the victim is unable or unlikely to do so, and once initiated, the judge and prosecutor must continue the proceedings even if the victim abandons the claim.<sup>71</sup>

5. When more than one person participated in the commission of the rape.

6. When the perpetrator is a carrier of a serious illness transmittable through sexual contact.

7. When the victim is pregnant.

8. When the victim is in prison.

9. When the victim is over sixty years old.

10. When the perpetrator and the victim have been united in marriage or in a de facto marriage.

CÓD. PEN. art. 195.

65. The discussion of the prior status of this confusing aspect of Nicaraguan rape law is drawn from Stephens, *supra* note 9, at 76 n.84.

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

70. Ley de Reformas al Código Penal, Ley No. 150, art. 6, 174 LA GACETA 1840-41 (Sept. 9, 1992) (reforming CÓD. PEN. art. 205).

71. *Id.* Article 208 provides that responsibility for certain sexual crimes is not extinguished though the offended party pardons the perpetrator. There is some confusion about the proper interpretation of this provision. As published in *La Gaceta*,

President Chamorro promulgated the new law, but she expressed concern about the effects of provisions removing the private character of certain sexual crimes. By letter dated July 15, 1992, she informed the National Assembly that she had promulgated the new law "in order not to contradict the will of the majority in a matter so delicate and of such human sensibility, as legislating over the conduct, morality and honor of persons."<sup>72</sup> She considered it opportune, however, to offer some observations which could be taken into account in future reforms to the law. She argued that removing the private character of the crime of rape would:

expose any adult person to an eventually scandalous and damaging penal process for a perhaps non-existent crime, because given the nature of it only the victim, whose honor is at stake, can know in her own interior if she really was the victim of this crime and if she feels offended by it.<sup>73</sup>

As the bill passed through plenary debate in the National Assembly, a section was added that allows proceedings in cases involving rape and related crimes to be kept private from the press and the public upon the victim's request.<sup>74</sup> The new section also stipulated that victims be provided a private audience if required to appear during the jury phase.<sup>75</sup> This provision, proposed by Dora María Téllez of the FSLN and approved by a

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this provision refers to "crimes contained in Article 206" which would cover all rapes, as well as all other crimes dealt with in the reform. But, the provision seems to have been intended to refer only to those crimes that were made "public offenses" by Article 205 (which had been numbered Article 206 in the Commissions' proposal). Copies of the new law produced by the Women's Commission have been revised by hand to refer to Article 205. COMISIÓN PERMANENTE MUJER-NIÑEZ-JUVENTUD Y FAMILIA, ASAMBLEA NACIONAL, LEY NO. 150, LEY DE REFORMAS AL CÓDIGO PENAL (1992). The reformers' original proposal would have extended this provision to all the crimes dealt with in the new law.

72. Letter from President Violeta B. de Chamorro to Alfredo César Aguirre, President of the National Assembly 1, 2 (July 15, 1992).

73. *Id.* at 1.

74. Ley de Reformas al Código Penal, Ley No. 150, art. 6, 174 LA GACETA 1841 (Sept. 9, 1992) (reforming Cód. PEN. art. 206).

75. *Id.* Juries, which were eliminated in Nicaragua in 1988, were reinstated in 1991. The judicial system encountered enormous problems due, in part, to difficulties in communication and transportation within the country. Janellys Carrollo, *Jueces piden revisar Reforma Procesal*, BARRICADA INTERNACIONAL, Apr. 7, 1992, at 1. The 1991 law provides for a jury composed of one judge from the city where the jury will sit and four citizens of good reputation. Ley de Reforma Procesal Penal, Ley No. 124, art. 137, LA GACETA 1353-57 (July 25, 1991) (reforming Cód. PEN. art. 275).

vote of eighty in favor, one opposed and three abstentions,<sup>76</sup> drew immediate criticism from the press and from criminal defense lawyers.<sup>77</sup>

For feminists, one of the most controversial aspects of the new law was Article 208:

Perpetrators of rape, *estupro* and illegitimate seduction shall be considered the fathers of the offspring that are borne by the offended woman for purposes of inheritance and support, but only if such is requested and the birth occurs between 180 days and 300 days from the date of the commission of the crime.<sup>78</sup>

The provision (which had existed in the prior code) was inserted as the bill passed through Assembly Committees and was unanimously approved by the eighty-four representatives present when it was voted on by the full Assembly.<sup>79</sup>

This section outraged many women. Having lost the battle to decriminalize abortion in cases of rape, these women insisted that the state should be responsible for providing for children born from rapes. They felt that the victim should not be subjected to continued contact with the rapist in order to obtain support for a child born of the rape.

This article is a cynical and gross insult to women rape victims. With abortion remaining penalized by law even in cases of rape, the article effectively obliges a raped woman who gets pregnant to resort to a clandestine and dangerous abortion, or to maintain a permanent relation with the rapist if she needs economic assistance.

We consider that, in the first place, the woman who is raped must have the right to decide whether or not to continue an unwanted pregnancy that results from a rape. On the other hand, we ask: If the rapist is going to be put in prison for 15 to 20 years, how is he going to provide economic sup-

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76. Acta No. 12, Décima Primera Sesión Ordinaria de la Octava Legislatura, Jun. 10-11, 1992, at 7.

77. *Aprueban cacería a homosexuales*, BARRICADA INTERNACIONAL, June 6, 1992, at 1.

78. Ley de Reformas al Código Penal, Ley No. 150, art. 6, 174 LA GACETA 1841 (Sept. 9, 1992) (reforming Cód. PEN. art. 208).

79. Acta No. 12, *supra* note 76.

port to his victim? In any case, considering that it is the state that obliges the woman to give birth, it should be the state that guarantees such economic support, so that the woman does not have to maintain contact with the rapist.<sup>80</sup>

President Chamorro also expressed concern about this provision in her July 15, 1992 letter to the President of the National Assembly:

That perpetrators of the crimes of rape, *estupro* and illegitimate seduction be considered fathers of the children that are born of the offended woman for effects of inheritance and support could result in injustice, because if the woman is married and maintains normal relations with her husband, this provision goes against the legal precept contained in the Civil code that the husband is the father of children conceived during matrimony. And if there were several rapists? Which of them would be the father?<sup>81</sup>

Finally, a significant change that drew little attention at the time was the creation of a new crime of sexual harassment or blackmail. Article 197 provides:

[O]ne who subjects a person to harassment or blackmail with sexual motives, without consummating the crime of rape or illegitimate seduction, will be punished with one to two years in prison. In these cases, once the action is initiated, judges must continue the proceedings until a definitive sentence is rendered.<sup>82</sup>

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80. CAMPAÑA POR UNA SEXUALIDAD LIBRE DE PREJUICIOS, CARTA INFORMATIVA 2 (Oct. 1, 1992).

81. Letter from President Violeta B. de Chamorro to Alfredo César Aguirre, *supra* note 72. Additionally, Chamorro expressed concern that because inheritance laws run in both directions, if the mother and child died the rapist could be rewarded with an inheritance. *Id.* at 2.

82. Ley de Reformas al Código Penal, Ley No. 150, art. 3, 174 LA GACETA 1838-39 (Sept. 9, 1992) (reforming Cód. PEN. art. 197).

The more serious crime of *abusos deshonestos* is described as non-consensual sexual contact short of carnal access or penetration by an object and is punished by three to six years in prison (or up to twelve years if one of the aggravating circumstances prescribed for rape is present). Lack of consent is assumed if the victim is less than fourteen years old. Ley de Reformas al Código Penal, Ley No. 150, art. 3, 174 LA GACETA 1839 (Sept. 9, 1992) (reforming Cód. PEN. art. 200).

The new law also prohibited bail or house arrest for sexual offenders, provided for indemnification of the victim, and enhanced the penalty for accomplices who abuse a position of authority or confidence. In addition the new law revised the

One writer questioned how this and other provisions would change the traditional behavior of Nicaraguan men towards women.<sup>83</sup> He argued that the lines between legal and illegal conduct were not very clear and expressed concern that a boss's "flirting" with "his" secretary could be subject to the new law's penalties.<sup>84</sup> Another newspaper article reported on charges brought before the National Assembly's Human Rights Commission by women journalists alleging that they had been subjected to sexual harassment and "pawing" by their bosses and other radio station personnel.<sup>85</sup>

#### IV. OF REPRESSION: CHANGES REGARDING SODOMY

The Nicaraguan Penal Code's treatment of sodomy was a point of contention for the country's lesbian and gay population and others concerned about their human rights, not because the law was vigorously enforced, but because of what its existence revealed about the society's attitudes toward homosexuality. Article 205 of the 1974 Code provided:

Concubinage<sup>86</sup> between persons of the same sex or against nature constitutes sodomy and those who practice it in a manner that is scandalous or outraging modesty or public morality will suffer the penalty of one to three years in prison; but if one of those who practices it, even in private, had over the other disciplinary power or control, as superior, guard, teacher, boss, guardian or in whatever other form that implies influence or authority or moral direction, the penalty shall be for him, from two to four years, the same as when it is practiced with one less than 15 years old or with force or

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code's treatment of prostitution (the conduct of prostitutes is not criminalized, but the conduct of pimps and those who run houses of prostitution is), trade in persons for sexual purposes, and corruption of minors. *Id.* art. 209.

83. Marcio Vargas, *¿Se acabará el piropo con la reforma al Código Penal?*, BARRICADA INTERNACIONAL, June 19, 1992, at 5.

84. *Id.*

85. Edgard Barberena, *Chantaje sexual con mujeres periodistas*, EL NUEVO DIARIO, June 17, 1992, at 2. Not surprisingly perhaps, one of the first prosecutions under this section was against a prominent journalist. See *infra* part V.B. for discussion of this case.

86. The Spanish term *concúbito* means *cópula carnal* or carnal knowledge. See CAMPAÑA POR UNA SEXUALIDAD LIBRE DE PREJUICIOS, ACERCA DEL ARTICULO 204 2 [Campaign for a Prejudice-free Sexuality, Regarding Article 204] (1992).

intimidation.<sup>87</sup>

Societal attitudes towards homosexuality in Nicaragua are even more complex than the penal code provision suggests. For example, while the terms *homosexual* and *gay* are increasingly used in Nicaragua, the derogatory Nicaraguan cultural term *cochón* is still widely used to refer to a so-called *passive* partner in male homosexual relations.<sup>88</sup> As has traditionally been true in many Latin American countries, it is only the *passive* or *penetrated* participant in male homosexual relationships who generally is stigmatized; many do not view the *penetrator's* actions as inconsistent with norms of masculinity in a culture of *machismo*.<sup>89</sup>

The 1979 revolution did little to change negative societal attitudes towards homosexuality. It was not until the mid-1980's that homosexuals began to meet other than socially in Nicaragua and they initially confronted resistance from within the FSLN.<sup>90</sup> In the early stages of the movement, gays and lesbians congregated with their aims and activities related to AIDS education.<sup>91</sup> Consciousness-raising among the country's largely closeted<sup>92</sup> homosexual population has been a gradual process.<sup>93</sup>

The initial reform proposal responded to growing concern about the penal code's outmoded treatment of sodomy by simply deleting this provision. If this escaped the attention of some who signed the initial proposal, it did not pass unnoticed in the Assembly Committees. It is unclear who proposed the language of the new law's sodomy provision, but by the time the reform bill

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87. CÓD. PEN. art. 205 (1974).

88. Interview with Marco Antonio Guevara Mora, in Managua, Nicaragua (Sept. 9, 1994).

89. See generally ROGER N. LANCASTER, LIFE IS HARD: MACHISMO, DANGER, AND THE INTIMACY OF POWER IN NICARAGUA 235-78 (1992).

90. For a description of the history of the lesbian and gay movement in Nicaragua and of the struggle to have its demands accepted within the FSLN, see Margaret Randall, Interview with Rita Arauz, in MARGARET RANDALL, SANDINO'S DAUGHTERS REVISITED: FEMINISM IN NICARAGUA 265-85 (1994).

91. Interview with Marco Antonio Guevara Mora, *supra* note 88.

92. Despite a history of rumors about the homosexual orientation of prominent Nicaraguans, by late 1994 only about a dozen gay and lesbian individuals in Nicaragua were fully *out of the closet* and willing to speak publicly about their sexual orientation. As for organized groups, there were two or three lesbian groups and three or four groups of gay men. *Id.*

93. *Id.*

reached the full Assembly, the crime of sodomy had been revived and the prior definition broadened to include "inducing, promoting or propagandizing" homosexual sodomy.<sup>94</sup> When the Assembly considered this provision, FSLN representatives Danilo Aguirre and Doris Tijerino moved to delete both the existing penal code's sodomy article and the commissions' proposed revision. After heated debate, the vote was taken twice. In the end, the Aguirre-Tijerino motion received forty-one votes, against forty-three votes for the commissions' proposal and one abstention.<sup>95</sup> With the exception of two liberal UNO members who voted for the Aguirre-Tijerino motion, the vote was entirely along party lines.<sup>96</sup>

The intent behind the new language about "inducing, promoting or propagandizing" homosexual conduct is unclear. The

94. PROYECTO DE LEY DE REFORMAS AL CÓDIGO PENAL, art. 205, at 5 (addendum to Dictamen, *supra* note 30).

95. Acta No. 12, *supra* note 76.

96. *Aprueban cacería a homosexuales* [Approval of homosexual witch-hunt], BARRICADA INTERNACIONAL, June 12, 1992, at 1. Liberals Orlando Buitrago and Iván Salvador were the only UNO representatives to vote with the Sandinistas; Socialist Alejandro Solórzano abstained. Other socialists and social democrats voted the UNO party line. Former Sandinista Moisés Hassan, then leader of the Revolutionary Unity Movement, used derogatory language to refer to homosexuals during the debates. Hassan argued:

I could say for example, it seems scandalous to me when, in the streets of New York or of whatever North American city, hundreds of homosexuals march claiming "gay power" (*el poder de los maricas* [queers]). How can this be permissible? Here we must have a law that prevents that any day one hundred of these people who have the right to be what they are, but do not have the right to make this ostentatious. This is what is immoral, to make it ostentatious, a hundred people that march in the streets in front of your house, in front of mine, in front of a school, saying "poder de los maricas," "poder de los maricas," "viva el poder de los maricas!" That is scandalous in the society, that is an example of scandal.

Moisés Hassan, Sesión Ordinaria, *supra* note 76, at 213.

Partisan loyalty admittedly was what motivated First Vice-President of the Assembly Luis Sánchez Sancho, who was acting President of the National Assembly at the time the new law was approved. Socialist Sánchez explained his vote on the sodomy provision by noting that he was not personally interested in the topic but felt that the FSLN, "should have asked for a reform of the *reform* and not its total elimination." "[B]esides," he added, "I am not going to [play ball] with the Sandinistas." *Id.* Sánchez later wrote a newspaper column about the new law's sodomy provision titled *Penal reform and the third sex*, in which he reminded readers that Nicaragua is not San Francisco or Holland and quoted a Nicaraguan saying that: "I would rather have a daughter who is a prostitute than a son who is a *cochón*." Luis Sánchez Sancho, *Reforma penal y tercer sexo* [Penal reform and the third sex], LA PRENSA, June 19, 1992, at 14.



reference to inducement and promotion is similar to language in the penal code's provision prohibiting inducement of one to enter a house of prostitution. Some of the debates focused on protecting minors against such inducements. But, as several representatives pointed out, the term *propagandize* suggests an intent to reach and suppress speech and other forms of expression as well.<sup>97</sup> That is how the media and the public interpreted what was Section 205 of the bill and is now codified as Section 204 of the penal code. As approved, the article states:

He commits the crime of sodomy who induces, promotes, propagandizes, or practices in a scandalous manner concubinage between two persons of the same sex. He will suffer the penalty of one to three years in prison. When one of those who practices this, even in private, has over the other disciplinary power or control, as superior, guard, teacher, boss, guardian or in whatever manner that involves influence or authority or moral direction, the penalty for illegitimate seduction [two to four years of prison] will apply to him as the only responsible party.<sup>98</sup>

The language of Section 204 is ambiguous in another respect. The provision could be read to apply only to *scandalous* forms of inducing, promoting or propagandizing sodomy, but the phrase "in a scandalous manner" may also be read to refer only to the *practice* of sodomy. Under the latter interpretation, any form of inducing, promoting or propagandizing homosexual conduct could be punished.

Two aspects of the new sodomy provision received little attention in the public debate. First, the provision decriminalizes heterosexual sodomy. The prior code spoke of concubinage

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97. See, e.g., Sergio Ramirez, XI Sesión Ordinaria VIII 199 (1992): "My concern is that someone who publishes an article in the daily *La Prensa* or in the daily *Barricada* that could be interpreted by a judge as favorable to homosexuality goes to prison for three years, and that is against the liberty of expression that the Constitution of the Republic proclaims." *Id.* See also William Frech, *id.* at 203 (proposing that the term "propagandizes" be deleted); Danilo Aguirre, *id.* at 211 (asking what would happen with respect to an article about SIDA (AIDS) that recommends how to have safe sex). Cf. Duilio Baltodano, *id.* at 209: "This doesn't deal simply with an article or analysis about conduct between persons of the same sex in a scientific manner or in a manner, let's say, of social profoundness. Absolutely not." *Id.*

98. Ley de Reformas al Código Penal, Ley No. 150, art. 5, 174 LA GACETA 1837, 1840 (Sept. 9, 1992) (reforming Cód. PEN. art. 204).

between persons of the same sex *or against nature*;<sup>99</sup> the new provision applies only to sodomy between persons of the same sex. Second, while the new sodomy provision retains the reference to *scandalous* practices, it removes the additional language about outraging modesty or public morals. The meaning of the provision remains vague.<sup>100</sup>

In addition, the new law further discriminates between homosexuals and heterosexuals by deleting what was Article 206 of the prior code. Anyone who in any manner offended modesty or good customs by seriously scandalous acts not otherwise expressly penalized, was penalized with six months to two years imprisonment or a fine.<sup>101</sup> However, as was pointed out during the debates, under the Police Code, committing sexual acts in public can be punished with up to six months in jail.<sup>102</sup>

The most noticeable, and clearly the most noticed, change in the treatment of sodomy was the new law's reference to "inducing, promoting or propagandizing" such conduct. National organizations of lesbians and gay men and human rights groups<sup>103</sup>

99. Cód. PEN. art. 205 (1974).

100. Much of the legislative debate focused on the meaning of "in a scandalous manner." Some worried that the law could be applied to a wide range of activities between homosexuals such as holding hands in public, single sex parties or erotic dances, sexual acts on the porch of a house where neighbors could observe what was happening, or even the act of openly cohabiting. See, e.g., Sesión Ordinaria, *supra* note 76, at 218, 221-23. As noted above, Moisés Hassan argued that parades or demonstrations in support of homosexuals were "scandalous." *Id.* at 213. Herty Lewites pointed out that each representative had a personal concept of what was scandalous, and warned that "we are meddling in the personal lives of people that have a life that is different from what is normal in the society and I do not believe that we are the ones to judge them in this manner . . ." *Id.* at 208.

101. See Aura Lila Morena, *Artículo 205 es inconstitucional* [Article 205 is Unconstitutional], EL NUEVO DIARIO, June 17, 1992, at 1.

102. Doris Tijerino, Sesión Ordinaria, *supra* note 76, at 201. Tijerino, who was head of the police under the Sandinista government, pointed out that concerns about minors and solicitation also were covered elsewhere and that "[i]n reality what this is punishing or trying to punish is homosexuality or lesbianism." *Id.* See also Sergio Ramirez, *id.* at 207; CAMPAÑA POR UNA SEXUALIDAD LIBRE DE PREJUICIOS, ACERCA DEL ARTÍCULO 204, *supra* note 86, at 4 (the police code prohibits acts against public order, security and morality). According to Omar Cabezas:

We have to define what "scandal" is; it is doing such things in a public manner. I believe that is punishable, but not punishable because one is a lesbian or because one is gay. It is punishable if any of us in here go making love in a park at 11:00 in the morning; be it man or woman, that is scandalous.

*Id.* at 226.

103. Dr. Vilma Núñez, President of the Nicaraguan Center for Human Rights,

led protests and panels to air their opposition. Activists also gathered over 4000 signatures and petitioned President Chamorro to veto this part of the new law. Some reportedly threatened *outing*<sup>104</sup> of prominent members of the National Assembly or those in other high governmental posts if the law were enforced rather than vetoed or repealed.<sup>105</sup> After Cardinal Obando y Bravo supported the new sodomy law, one gay activist suggested *outing* priests as well.<sup>106</sup>

In a press statement, the President's chief counsel and son-in-law, Antonio Lacayo, suggested that Chamorro might veto this part of the bill. Lacayo assured journalists that the President would review all the revisions approved by the legislature and held out the possibility of a partial veto:

It is obvious that if we are going to be a society of the twenty-first century and not of the nineteenth century, homosexuals have the right to certain things, perhaps not all that they claim, but neither can things stay as they were one hundred years ago . . . . In whatever society, even in Italy where the Vatican is, homosexuals enjoy certain rights and we do not see why we should try to persecute them . . . . Good or bad, the truth is that nobody wants a [witch hunt] after ten years of war.<sup>107</sup>

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described the new sodomy article as an act of "institutional violence." She called on Nicaraguans from all social sectors to fight against this provision and not leave it to those directly affected to defend their rights. Morena, *supra* note 101, at 1.

104. "Outing" is the controversial practice of publicly revealing the sexual orientation of a homosexual person, generally done in retaliation for actions against the interests of homosexuals.

105. Celso Canelo Candia, *'Gays' Divididos por Artículo 205 [Gays Divided Over Article 205]*, LA PRENSA, June 16, 1992, at 1.

106. Roger Suarez M., *Condena Desorden Sexual [Condemn Sexual Disorder]*, LA PRENSA, June 22, 1992, at 1. Cardinal Obando y Bravo told his listeners: "I believe that all sensible and responsible Christians must agree with the reform [of this article]." *Id.* Norman Batres, former leader of SINHOMCHIN, an organization of homosexuals in Chinandega, Nicaragua, responded via a radio talk show:

[I]f the Catholic Church is behind the decision of the deputies who approved [this article], it runs the risk that the names of many pastors of the Church who practice homosexuality be publicly divulged . . . . The Church has a long tail and we could flatten it.

*Id.* Interviewed on New Year's Day in 1993, Batres, who has since died, disclaimed fear of enforcement of the new law, noting that it had ignited, rather than chilled, expression by, and concerning, homosexuals. He described the new sodomy provision as a *smoke screen* passed to deflect attention from political scandals that were grabbing headlines. Interview with Norman Batres, former leader of SINHOMCHIN, in Chinandega, Nicaragua (Jan. 1, 1993).

107. Aura Lila Moreno, *Lacayo: "Lo del 205, Anacrónica"* [205 is an Anachro-

Despite this statement, the President approved and promulgated the law in its entirety. She did write a letter to the President of the National Assembly offering her observations about certain aspects of the new law.<sup>108</sup> The letter made no express reference to the sodomy provision but concluded by noting that “[t]here are also other provisions in the law that seem to me confusing and dangerous for the eventual injustice that they could cause.”<sup>109</sup>

On September 25, 1992, the group, Campaign for a Sexuality Free of Prejudices, delivered a letter and proposal to Azucena Ferrey, President of the Assembly’s Women’s Commission, asking that their proposal to repeal the new sodomy provision be introduced in the next legislative session. This request was signed by more than thirty persons including: Vilma Núñez, Director of the Nicaraguan Center for Human Rights; Milú Vargas, Director of the Center for Constitutional Rights; the president of the Nicaraguan Psychiatric Association; several well-known poets; leaders of women’s organizations; and lesbian and gay collectives.<sup>110</sup>

Although the issue of *La Gaceta* in which the new law was published is dated September 9, 1992, it was not issued until late October. The law appeared in print on the eve of a holiday. Based on the stated publication date, it appeared perilously close to the end of the sixty day period for filing constitutional challenges to new legislation by way of a *recurso por inconstitucionalidad*.<sup>111</sup> To ensure the *recurso*’s timeliness, lawyers for the Center for Constitutional Rights quickly undertook

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nism], EL NUEVO DIARIO, June 16, 1992, at 1.

108. Letter from Violeta B. de Chamorro, *supra* note 72.

109. *Id.* at 2.

110. Letter to Dr. Azucena Ferrey, President of the Assembly’s Women Commission, by Campaña por una Sexualidad Libre de Prejuicios (Sept. 24, 1992; *Nota de Prensa* (n.d.) (on file with author). Interviewed after the Supreme Court opinion upholding the new sodomy law, Ferrey challenged anyone to point to an instance where someone had been imprisoned under the law, and stated that she would move to repeal the law if this happened. Interview with Azucena Ferrey, President of the Assembly’s Women’s Commission, in Managua, Nicaragua (Sept. 8, 1994).

111. Pursuant to Article 187 of the 1987 Nicaraguan Constitution, *recursos por inconstitucionalidad* are governed by the Law of Amparo. NIC. CONST. art. 187. Under this law, such a petition of unconstitutionality must be filed within sixty days after the challenged law becomes effective. Ley de Amparo, 241 LA GACETA 1631 (Dec. 20, 1988).

preparation of their legal challenge and filed it with the Nicaraguan Supreme Court on November 9, 1992.<sup>112</sup>

The *recurso* challenged the constitutionality of Article 204 in its entirety and argued that it violated the following specific guarantees of the 1987 Nicaraguan Constitution: individual liberty (Article 25 (1)); respect for the private lives of individuals and their families, and for their honor and reputation (Article 26 (1) and (3)); equality before the law (Articles 4, 27, and 48); legality of crimes and punishments (Article 34 (10)); respect for the physical, psychological, and moral integrity of persons and the prohibition of torture and cruel, inhumane, or degrading proceedings, punishment or treatment (Article 36); and freedom of expression and information (Articles 30, 66, 67, and 68).

In addition, the *recurso* relied on Article 46 of the Constitution which expressly incorporates and protects international human rights as established in the Universal Declaration of Human Rights; the American Declaration of the Rights and Duties of Man; the Covenant on Economic, Social, and Cultural Rights and the Covenant on Civil and Political Rights of the United Nations; and the American Convention of Human Rights of the Organization of American States. The *recurso* cited parallel human rights guarantees in these incorporated international human rights documents.<sup>113</sup>

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112. In February 1993, I prepared a statement that was presented to the Nicaraguan Supreme Court on behalf of U.S. law professors supporting this *recurso*. For further analysis of the legality of the new sodomy provision, see CAMPAÑA POR UNA SEXUALIDAD LIBRE DE PREJUICIOS, ACERCA DEL ARTÍCULO 204, *supra* note 86.

113. *Recurso Por Inconstitucionalidad*, *supra* note 18, at 28-29. The specific guarantees cited were as follows:

In the *Universal Declaration of Human Rights*: Article 3: Right to liberty and the security of the person; Article 5: Prohibition of torture, cruel, inhuman or degrading punishment or treatment; Article 7: Equality before the law; Article 11.2: Principle of legality of crimes and punishments; Article 12: Respect for the private life of persons and their family, and for their honor and reputation; Article 18: Liberty of thought; Article 19: Liberty of expression.

In the *American Declaration of Rights and Duties of Man*: Article I: Right to the liberty and security of the person; Article II: Equality before the law; Article IV: Liberty of opinion, expression and diffusion of thought; Article V: Protection of the private and family life of persons, and of their honor and reputation.

In the *International Covenant on Civil and Political Rights*: Article 2.1: Respect and guarantee of the rights recognized in this Covenant for all persons, without any distinction; Article 7: Prohibition of torture and

The Nicaraguan Supreme Court accepted the *recurso* on November 18, 1992, and requested responses from President Chamorro, the President of the National Assembly, and the Procuraduría de Justicia. President Chamorro's response indicated that she had found no reason to veto the law; that if the law raised constitutional problems, it was the responsibility of the Supreme Court to resolve these questions according to the law.<sup>114</sup>

Alfredo Cesar, President of the National Assembly, responded that the challenge should be rejected because it failed to describe the direct or indirect prejudice that the law caused or could cause the challengers, as required by the Law of Amparo.<sup>115</sup> He also briefly addressed the merits of the constitutional challenge, arguing that what the law punishes is not strictly sodomy between persons of the same sex but its inducement, promotion, propagandizing or practice *in a scandalous*

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cruel, inhuman or degrading punishments and treatments; Article 9: Right to liberty and personal security; Article 15: Principle of legality of crimes and punishments; Article 17: Respect for the private life of persons and their family, and for their honor and reputation; Article 18.1: Liberty of thought; Article 19.2: Liberty of expression; Article 26: Equality before the law.

In the *American Convention on Human Rights* (San José Pact): Article 1: Respect for the rights and liberties recognized in this Pact for all persons without any discrimination; Article 5.1: Right to respect for the physical, psychological and moral integrity of persons; Article 7.1: Right of liberty and personal security; Article 9: Principle of legality of crimes and punishments; Article 11: Right to respect for the private life of persons and their family, and for their honor and reputation; Article 13: Liberty of thought and expression; Article 24: Equality before the law.

*Id.*

114. Response of Violeta Barrios de Chamorro, President of Nicaragua, to *Recurso por Inconstitucionalidad* (Dec. 14, 1992). Chamorro stated that she had promulgated the law and sent it for publication because she did not find reasons to veto it. She added, however, that she had sent a letter to the President of the National Assembly noting that the law contained provisions that seemed confusing and dangerous due to the eventual injustice they could cause. She attached a copy of this July 15, 1992 letter which contained no express mention of the sodomy provision. *Id.*

115. Response of Alfredo Cesar Aguirre, President of the National Assembly, to *Recurso por Inconstitucionalidad* (Dec. 4, 1992). Although Article 187 of the 1987 Nicaraguan Constitution states that any citizen can bring a *recurso por inconstitucionalidad*, the implementing law embodies a requirement of petitioner injury. Under the 1988 Law of Amparo such a petition can be brought when a law, decree, or regulation directly or indirectly injures the petitioner's constitutional rights. Ley de Amparo, 241 LA GACETA 1631, arts. 6, 11(4), 79 (Dec. 20, 1988) (potential injury is sufficient).

manner. According to Cesar, "[a]s has traditionally been said, 'the sin is in the scandal.'"<sup>116</sup> He then launched a religious attack on the challengers' allegations:

The allegations of the challengers are made from a personal point of view of a hedonist conception of life, against the Christian moral of almost the totality of the Nicaraguan people. While they, founded in the Bible and Church doctrine, consider that sexual relations have as their primordial end procreation and only secondarily the satisfaction of carnal instincts, for the challengers this satisfaction or "pleasure for pleasure's sake" is the fundamental object of sex. For Christians, which the immense majority of we Nicaraguans are, sodomy is contrary to natural law and Divine Law and its propagation in the society merits the biblical punishment that fell on the city of Sodom . . . . And with respect to legal doctrines and jurisprudence of other countries cited by the challengers, it must be said that these are not on point because they are inspired by different moral conceptions than those that dominate our society . . . . The legislation of our country cannot be made for the pleasure or satisfaction of a small group of ideologues or practitioners of sodomy. The Commission of this Assembly that reported out the proposed law to reform the penal code consulted the most diverse sectors of Nicaraguan society, and their general opinion was to condemn and penalize the *scandalous practice* and the *propaganda of unnatural sexual conduct*.<sup>117</sup>

Guillermo Vargas Sandino, then Procurador General de Justicia and subsequently named to the Supreme Court, also responded to the *recurso*. Like Cesar, he first argued that the prejudice to challengers had not been described and then addressed the merits of the constitutional challenges raised.<sup>118</sup> According to Vargas:

[Sexual relations] between adults who freely practice their sexual activity do not constitute the crime of SODOMY; ho-

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116. Response of Alfredo Cesar Aguirre, *supra* note 115.

117. *Id.*

118. Response of Guillermo Vargas Sandino, *Procurador General de Justicia*, to the *Recurso por Inconstitucionalidad* (Jan. 21, 1993). Vargas Sandino argued that publicity was the essential element of scandal, meaning that the act must be performed in public or in a place where the offenders could be surprised by various people. *Id.*

mosexual practices without scandal, without offending public morality, do not constitute the crime of SODOMY. That is to say, a homosexual act realized in private is immoral and, if you wish, repugnant, but if there is no offense to public morality, there is no scandal, then there is no crime . . .<sup>119</sup>

Vargas also relied on Article 24 of the Constitution which provides that “[t]he rights of each person are limited by the rights of others, for the security of all and for the just exigencies of the common good” in his defense of the sodomy law.<sup>120</sup>

Despite the expedited procedures called for by the law governing *recursos por inconstitucionalidad*,<sup>121</sup> the Supreme Court waited more than two years before ruling on this controversial issue. In an opinion dated March 7, 1994, the court rejected all challenges to the new sodomy provision.<sup>122</sup> With only the most cursory treatment of the challengers’ extensive arguments, the opinion brushed aside one constitutional provision after another, stating that none of them were implicated in the case at hand. After the opinion pointed out that the acts against nature that were penalized were those that were scandalous — which signified “uproar, tumult, shamelessness, bad example” — it turned to a defense of the sacred institution of the family as protected by law.<sup>123</sup> Noting the procreative function of marriage, the opinion declared:

To authorize the functioning and liberty of sodomy would be a legal attack against the growth of the Nicaraguan population, a move backwards in its political, economic, and social advances, due to the lack of men and women to push ahead the progress of Nicaragua . . . . To accept the arguments of the challengers would be equivalent to authorizing the practice of sodomy and as a consequence destroying the noble

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119. *Id.*

120. *Id.*

121. Under the Law of Amparo the Court must rule on a *recurso por inconstitucionalidad* within sixty days after all responses have been received. *Ley de Amparo*, *supra* note 35, at 1633. But as former Supreme Court President Rodrigo Reyes Portecarrero pointed out, the law includes no sanction for failure to rule within the prescribed time, and at times the Court has tacitly agreed to put off ruling on certain controversial issues. Interview with Rodrigo Reyes Portecarrero, attorney and former Magistrate and President of the Supreme Court of Nicaragua, in Managua, Nicaragua (Sept. 17, 1994).

122. Sentencia No. 18, Corte Suprema de Justicia, Mar. 7, 1994 (Nic.).

123. *Id.* at 8-9.



purposes of marriage.<sup>124</sup>

Warning against attacks on matrimony, the Court stated that rather than protecting sodomy, ways should be found to limit it.<sup>125</sup>

In subsequent interviews, Nicaraguan Supreme Court Justices Rafael Chamorro Mora and Rodolfo Robelo, defended the Court's opinion.<sup>126</sup> Magistrate Chamorro stressed that the sodomy law was limited by the phrase "in a scandalous form," and argued that it was neither discriminatory nor violative of the liberty of expression.<sup>127</sup>

However, two Supreme Court magistrates expressed unwillingness to accept the opinion's superficial treatment of the issues raised in the challengers' extensive analysis in the *recurso*. Magistrate Rodrigo Reyes Portocarrero, former President of the Court, and Magistrate Alba Luz Ramos, its only woman member at the time, dissented from the Court's opinion.<sup>128</sup> Their dissent did not reach the merits of the constitutionality of the sodomy provision. Rather, they argued that the court failed to provide legal analysis for its conclusions that various constitutional provisions were not implicated.<sup>129</sup> They also took the court to task for its excursion into moral arguments in defense of marriage, pointing out that the challenged law made no reference to prohibiting marriage.

It seems to us that all this argument is solely discursive, that it does not belong in an opinion of this Court, in which what should be analyzed is whether the law promulgated violates or goes against the principles established in our constitution, precisely comparing said law with the constitutional principles. [The Court's opinion] even says that ". . . [t]he existence

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124. *Id.* at 9-10.

125. *Id.* at 10.

126. Interview with Rafael Chamorro Mora, Magistrate of the Supreme Court of Nicaragua, in Managua, Nicaragua (Sept. 7, 1994); Interview with Rodolfo Robelo, Magistrate of the Supreme Court of Nicaragua, in Managua, Nicaragua (Sept. 13, 1994) (Robelo died in the Spring of 1995).

127. Interview with Chamorro Mora, *supra* note 126.

128. In addition, Magistrate Guillermo Vargas Sandino did not take part in the decision because he had participated in the case in his former position of Procurador General de Justicia. Interview with Guillermo Vargas Sandino, Magistrate of the Supreme Court of Nicaragua, in Managua, Nicaragua (Sept. 9, 1994).

129. Sentencia No. 18, *supra* note 122, at 11-13.

of marriage cannot be prohibited . . ." without finding in any part of the law that they are analyzing any reference to the prohibition of marriage. In conclusion, [the reasoning of the opinion] seems to us merely discursive without judicial argumentation.<sup>130</sup>

In an interview after the decision was announced, both the dissenting magistrates criticized the majority opinion.<sup>131</sup> Justice Ramos reiterated that the court's role is to say whether or not an act is constitutional.<sup>132</sup> Opinions about moral principles are for the Church, not the Court, she said.<sup>133</sup>

Former Magistrate Rodrigo Reyes Portecarrero was more forceful in his critique of the case, characterizing the Court's opinion as a "barbarity."<sup>134</sup> He viewed the opinion to be "solely political" and devoid of legal reasoning; none of the arguments made in the *recurso* were analyzed or contradicted. Reyes further expressed his opinion that the sodomy law was unconstitutional. He agreed with the challengers' arguments that it violated both equal protection and the liberty of expression.<sup>135</sup>

130. *Id.* at 13.

131. Interview with Alba Luz Ramos, Magistrate of the Supreme Court of Nicaragua, in Managua, Nicaragua (Sept. 7, 1994); Interview with Reyes Portecarrero, *supra* note 121.

132. Interview with Luz Ramos, *supra* note 131.

133. *Id.*

134. Interview with Reyes Portecarrero, *supra* note 121.

135. *Id.* In an opinion approved the same day as the Nicaraguan Supreme Court's decision upholding the new sodomy law, a panel of the Colombian Constitutional Court ruled that a person's status as a homosexual could not be a basis for exclusion from military institutions and schools. Sentencia No. T-097, 23 REVISTA MENSUAL 611 (Mar. 7, 1994). The opinion found that the petitioner's exclusion from a military school violated his fundamental rights to due process, to his good name, and to education. In ruling for the petitioner, Magistrate Eduardo Cifuentes Muñoz pointed to the 1991 Colombian Constitution's protection of the right to the free development of one's personality (Article 16) and of the right to intimacy and one's good name (Article 15). COLOM. CONST. arts. 16, 15.

The constitutional assembly wanted to raise to the status of a fundamental right the liberty related to vital choices and individual beliefs, and thus emphasized the liberal principle of no institutional interference in subjective matters that do not constitute attempts against social coexistence and organization. It is evident that homosexuality, within this ambit of protection and in this sense, cannot be a basis of social discrimination. This culminates a long process of normative acceptance and tolerance that began with the decriminalization of the described conduct in the 1936 Penal Code. It should be noted that if on this topic the law has played an essential role in transforming social beliefs, these still are found lagging behind in relation to the normative ideals. The values of

Notice of the Nicaraguan Supreme Court's decision was not served on the challengers until May 10, 1994. In contrast to the flood of publicity that accompanied the enactment of the law, the Supreme Court's decision upholding the law went virtually unnoticed in the press. The relative silence with which the opinion was greeted may be due in part to divisions that have taken place within Nicaragua's gay and lesbian community. As the movement has grown, this once small but united movement of gays and lesbians has fallen prey to divisions along gender lines as well as along political lines.<sup>136</sup>

The Supreme Court's opinion left open two obvious lines of attack, launching a new campaign to convince the National Assembly to repeal the new law or filing a petition challenging the law with an international body such as the Inter-American Commission on Human Rights in San Jose, Costa Rica. While international human rights groups offered assistance with the latter alternative, both strategies needed the full support of a strong gay and lesbian community and at this critical point such support did not seem to be forthcoming.

## V. TRANSFORMATIVE USES OF LAW

The story of Nicaraguan feminists' attempt at law reform merits study for what it says about the possibilities and limitations of using legislative reform and litigation as tools in the struggle for gender justice.

### A. *Legislative Reform as a Tool for Social Change*

Assessment of this recent attempt at legislative reform requires an appreciation of Nicaraguan feminists' conception of law and the role it plays in their struggle. Nicaraguan feminists are mindful of the dangers of falling prey to what Carol Smart

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tolerance and pluralism, fully adopted by judicial ordinance, must still overcome enormous obstacles in order to be fully ensured in daily life.

23 REVISTA MENSUAL, at 620. However, the opinion distinguished homosexuality from homosexual conduct, which like other sexual conduct could be prohibited within military institutions for disciplinary reasons. It further stated that such institutions had the right to demand discretion and silence concerning members' sexual preferences. *Id.* at 621.

136. See, e.g., Interview with Marco Antonio Guevara Mora, *supra* note 88.

calls the "siren call of law."<sup>137</sup> They would not quibble with Eschel Rhoodie's underlying premise that cultural, religious, and social traditions and the attitudes of men are more important determinants of women's position in society than are laws.<sup>138</sup> Yet they do not share Rhoodie's pessimistic view of the usefulness of law reform as a means of advancing women's interests. Milú Vargas describes laws as "instruments for ideological transformation in the long struggle to change the habits, customs, and values that discriminate against women."<sup>139</sup> As "the expression of the values to which the society aspires,"<sup>140</sup> laws not only control, but also teach.

The experience detailed here sheds light on the possibilities and difficulties of creating and sustaining a broad-based women's movement capable of using law as an instrument of social change. It illustrates important changes taking place within the women's movement in Nicaragua. "Diverse but United" was the theme in January 1992 when over 800 women from throughout the country came together in Managua to try and

137. CAROL SMART, *FEMINISM AND THE POWER OF LAW* (1990).

138. Eschel Rhoodie points to the gap between "equality on paper" and "equality in the streets" to support this view. This author posits:

Thesis One: Attitudes of men in general determine the pace and extent of women's advance, and not so much constitutional or other legal provisions.

Thesis Two: Women are hampered in their quest for equality by cultural, religious, and social tradition in the Western world, far more than by legal impediments . . . .

Thesis Four: Laws passed to protect the position of women have not always had the desired effect; in fact, in certain areas laws have worked to the detriment of women's position.

Thesis Five: Constitutional and statutory provisions for the rights of women promulgated to implement ratification of the United Nation's convention to eliminate all discrimination against persons on grounds of gender are not a guarantee that laws are applied or the objectives vigorously pursued; in fact, behind the facade of these laws, discrimination against women not only persists but also, in some countries, has broadened.

ESCHEL M. RHOODIE, *DISCRIMINATION AGAINST WOMEN* 9-10 (1989).

139. Milú Vargas, *Las Leyes, Instrumento de lucha para la Emancipación de la Mujer*, DOCUMENTOS SOBRE LA MUJER, Jan.-Mar. 1989, at 4. For further consideration of the relationship between law and social activism, see *LEGAL LITERACY: A TOOL FOR WOMEN'S EMPOWERMENT* (Margaret Schuler & Sakuntala Kadirgamar-Rajasingham eds., 1992) (defining "legal literacy" as "the process of acquiring critical awareness about rights and the law, the ability to assert rights, and the capacity to mobilize for change").

140. Vargas, *supra* note 139, at 4.

forge a cohesive broad-based women's movement.<sup>141</sup> The decision by the FSLN-affiliated women's organization AMNLAE not to participate in this event underscored that this group would no longer be a leading player in the women's movement,<sup>142</sup> in the future, the movement would be independent from AMNLAE and the FSLN.

The campaign to enact the penal code reforms reflected the changing nature of the women's movement in Nicaragua. AMNLAE took a back seat to the feminist lawyers from the Center for Constitutional Rights in the reform effort. Although some of the FSLN's women representatives in the Assembly also held top leadership positions within AMNLAE, the organization itself was not a major participant and stayed clear of the controversial issues of abortion and sodomy.

Early on, the reformers actively solicited the support of both UNO and FSLN female representatives in the National Assembly. Had they not enlisted the UNO women's support, the revisions obtained might not have been possible. As the bill passed through the commissions, however, the emphasis on consensus led to the sacrifice of the initial proposals dealing with controversial topics like sodomy and abortion. The FSLN failed to push the abortion issue, and not only were FSLN representatives unsuccessful in reversing the commissions' proposal on sodomy in the full Assembly, their efforts to do so after their representatives had signed the commissions' report led to predictable criticism by UNO representatives.<sup>143</sup> In the end, party allegiance

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141. See Ana Criquillon, *supra* note 12, at 5. Women from all parts of the country left this "Festival of the 52%" organized into various national networks according to themes including Health, Sexuality, Anti-Violence, Economy, and Environment. During 1992 these networks organized campaigns with events throughout the country on topics such as maternal mortality, violence against women, and sexuality free of prejudices. See also *Lo que hemos hecho en 1992*, 10 LA BOLETINA, Dec. 1992-Jan. 1993, at 4-17.

142. AMNLAE continued to play an important role in mobilizing *campesina* women and women from the popular sectors and in responding to their needs through its *Casas de la Mujer*. Many felt, however, that its ability to lead the women's movement had been compromised by its party ties. AMNLAE had a history of being willing to put aside controversial gender topics (such as abortion or homosexuality) to further party interests. See Morgan, *supra* note \*, at 14.

143. See, e.g., Felix Navarrete, *Diputada Ferrey comenta artículo sobre sodomía*, LA PRENSA, June 19, 1992, at 2. Azucena Ferrey (UNO), former contra leader and President of the Women's Commission, defended the commissions' work and pointed out that the three FSLN representatives on the Justice Commission and the four FSLN women on the Women's Commission all signed the committees' report sending

was still stronger than gender interest identification. For Nicaraguan feminists, the experience provided a difficult lesson about the problems involved in building a women's movement that cuts across, and rises above, party lines and that seeks to accommodate changing, and at times contentious, perspectives on what gender justice is and how it can best be achieved.<sup>144</sup>

More recently, Nicaraguan feminist groups have fallen prey to further bouts of the seemingly contagious divisiveness that has long plagued the country's political parties and social movements. In November 1994, the National Feminist Committee (NFC), which was formed in May 1992 by twenty-five feminist groups, announced its dissolution.<sup>145</sup> As the NFC broke into separate groups, Patricia Orozco, a leader of the "new" or "grass-roots" group, gave this analysis of the breakup: "Unfortunately the differences were stronger than we were; it is far easier to talk about divergences and respect for diversity than to actually incorporate those concepts into the daily work of the feminist community."<sup>146</sup> However, Amanda Centeno, another former NFC member, expressed optimism about the future of Nicaraguan feminism: "We're regrouping. When we have a common problem or a concrete plan, we'll come together. Perhaps we don't need to be organized in some great national structure, like a political party. There are no blueprints for this kind of work . . . ."<sup>147</sup>

Assessing these recent penal reforms requires consideration of the proponents' short-term and long-term objectives and of the

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their final proposals to the full Assembly. Interviewed after the Supreme Court's decision upholding the sodomy provision, Deputy Ferrey continued to defend the new law and to castigate the FSLN deputies for attacking the provision after signing the report containing it. Interview with Azucena Ferrey, President of the Women's Commission, in Managua, Nicaragua (Sept. 8, 1994).

144. An incident that gave cause for hope that Nicaraguan women can rise above party affiliations was the May 1992 meeting of the *Madres de Héroes y Mártires* [Mothers of Heroes and Martyrs] in Matagalpa, attended by over 2,000 women. For the first time, the organization's traditional membership of mothers of fallen FSLN guerrillas and soldiers were joined by mothers of fallen contra fighters. See *Lo que hemos hecho en 1992*, *supra* note 141. However, as its name suggests, this organization has focused on women's traditional roles as mothers rather than pursuing a feminist agenda.

145. *The Nicaraguan Feminist Movement: Divided Forces*, BARRICADA INTERNACIONAL, Mar. 1995, at 17-19.

146. *Id.* at 22.

147. *Id.* at 24.

direct and indirect effects of their efforts. Many of the rape law reforms reflected short-term strategies designed to deal more with the symptoms than with the underlying causes of the violence in Nicaraguan society. But proponents of the reform proposals also sought to transform the way society thinks about rape and sexuality. Their proposal to delete the penal code's provision on sodomy reflected concern primarily about the indirect effects of criminalizing forms of homosexual conduct. They sought to address the stigmatization of homosexuals rather than the actual enforcement of the law.

It is too early to assess what the long-term effects of the new law will be. Media accounts during and immediately after the law's enactment generated intense public debate, especially concerning the sodomy provision. Inside and outside the Assembly, the debate often was heated, as traditional assumptions about gender roles, sexuality, and morality were alternately challenged and reinforced.

While the new law drew heavy media attention, the debate centered on the sodomy provision and virtually ignored the proposed changes in the rape law. Various explanations can be offered for the general acceptance of these reforms. Broad societal consensus supported increasing the penalization and punishment of sexual violence. Indeed, as noted earlier, some believed that the Assembly should have gone further and authorized the death penalty for rapists.

Dr. Victor Ordoñez, criminal law expert and vice-dean of the law school at the University of Central America in Managua suggested another reason why the Assembly accepted the rape law provisions. He argued that "many voices were silent out of fear of the [steamroller] of the women parliamentarians."<sup>148</sup>

A third explanation for the general acceptance of the rape law reforms is that most of the changes that were approved did not directly challenge fundamental assumptions about gender roles.<sup>149</sup> The proposals that most clearly challenged existing

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148. Navarrete, *supra* note 62, at 3.

149. SONIA E. ALVAREZ, *ENGENDERING DEMOCRACY IN BRAZIL: WOMEN'S MOVEMENTS IN TRANSITION POLITICS* 252 (1990). Sonia Alvarez summarizes the results of the work of the "founding mothers" of the 1988 Brazilian Constitution by distinguishing their successful attempts to promote gender role equality from their unsuccessful attempts to promote gender role change.

gender roles were deleted as the bill passed through committees. Decriminalization of abortion in cases of rape was never even raised on the floor of the full Assembly. On the other hand, the Assembly approved a provision treating the rapist, for purposes of inheritance and support, as the "father" of a child born of a rape, despite opposition from women's rights activists. Moreover, though the FSLN raised the proposal to delete the penal code's reference to sodomy in the plenary debates, it was defeated in favor of the commissions' proposal to criminalize an even broader range of activity related to homosexuality.<sup>150</sup>

Well-known journalist, Sofia Montenegro, former senior editor of *Barricada* and founder of its magazine supplement *Gente*,<sup>151</sup> characteristically minced no words in describing these failures of the effort to reform the penal code:

The two faces of patriarchal reaction, misogyny (hate of women) and homophobia (rejection of people of the same sex) have conspired within the deputies, independent of their sex, sexual orientation, or party, to produce this juridical-penal perversion that violates the rights of citizens. With a parliament like this, who needs legislators?<sup>152</sup>

Ironically, the immediate effect of broadening the sodomy law to include "promoting, inducing, or propagandizing" sodomy was not to chill public expression by leaders of the gay and lesbian community or persons supportive of their cause. Instead, the passage of the new law brought much of Nicaragua's gay and lesbian community and their organizations out of the closet and into the public spotlight to an unprecedented degree. Reaction to the new law helped shape what had begun as loosely

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150. In addition, certain provisions were significantly narrowed or weakened as the bill passed through the Assembly. For example, initial proposals to make rape and related crimes "public offenses" were modified to cover only cases where the victim is under 16 and certain other limited cases. See *supra* text accompanying notes 66-74.

151. Montenegro, who has aligned herself with the "reformist" Sandinista tendency, was one of the *Barricada* journalists fired after Carlos F. Chamorro was replaced as director. See *The Shadow of Patriarchy*, BARRICADA INTERNACIONAL, Mar. 1995, at 18.

152. Sofia Montenegro, *La perversión Parlamento*, BARRICADA INTERNACIONAL, June 16, 1992, at 3. *Barricada* described the effect of Article 205 and the new sodomy law: "Regarding sexual matters, they put Nicaraguan legislation on the dubiously honorable level of being the most backward on Planet Earth." Quoted in *Other Penal Code Reforms for Better and for Worse*, ENVÍO, Aug. 1992, at 14.



coordinated efforts at AIDS education and social support into a recognized political movement.<sup>153</sup>

As feared, however, initial reactions to the law also included increased stigmatization of, and even violence towards, some Nicaraguan gays and lesbians. For example, shortly after the penal code revisions were approved by the Assembly, a gay man was attacked by a boy who threw stones at him causing cuts and profuse bleeding. The victim of the attack warned that some in the society had interpreted the new law as "a declaration of war on the gay movement" and feared that gays might even be killed. He stated: "We do not know where to turn, if we go to the police, instead, we could be taken prisoner for being what we are . . . . The law does not protect us, it is as if we were not human beings now that they have denied us our rights."<sup>154</sup>

The persistence of homophobia in Nicaraguan society was illustrated again during the 1995 fracture of the Sandinistas into two parties, the FSLN and the MRS.<sup>155</sup> At one point in the heated exchanges surrounding the split, the FSLN radio station, Radio Ya, carried a report alleging sexual relations between two women members of the reformist MRS delegation in the National Assembly.<sup>156</sup>

Interestingly, one provision of the reforms, which made sexual harassment or blackmail a crime punishable by one to

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153. The names of the country's major lesbian and gay organizations and some of their leaders were prominent in media reports about the new law. Four of these groups held a press conference demanding that President Chamorro veto the sodomy provision and announcing a "Campaign for a Sexuality Free of Prejudices" including a roundtable on "Homosexuality, Lesbianism, and Homophobia." See Denis Garcia Salinas, *Gays' demandan veto*, LA PRENSA, June 19, 1992, at 2.

154. *Homosexual denuncia golpiza por el 205*, EL NUEVO DIARIO, July 6, 1992, at 1. One woman interviewed by *La Prensa* expressed her view that the new sodomy provision would affect the "private life" of "decent" homosexuals because in revenge many people could bring charges against them. She said she knew of many couples who had separated out of fear of the police since the new law became known. Canelo Candia, *supra* note 105, at 1. Immediately after the law was approved by the Assembly, police in Managua reported that homosexuals had disappeared from some of the sites that they previously frequented and where police had found them "in flagrante" or practicing "immoral acts." *Id.* Police also warned motel owners against accepting homosexuals, threatening that such acts could result in temporary loss of their license and, if repeated, could lead to the closing of their business. *Id.*

155. See *supra* note 7.

156. See *The Constitutional Reforms: Another Opportunity*, ENVÍO, Feb.-Mar. 1995, at 6-7.

two years imprisonment, did significantly change existing law and challenge traditional assumptions about gender. Initially this provision garnered relatively little attention, but in early 1995, it attracted considerable notice when an editor of *La Prensa* was found guilty of sexual harassment in firing journalist Eloísa Ibarra for rejecting his sexual advances.<sup>157</sup> After the editor was sentenced to two years in jail, the newspaper's directors reportedly helped him hide out and then escape to Costa Rica. The paper also reportedly refused to publish an article in support of Ibarra written by Christiana Chamorro, a member of the paper's executive board and daughter of President Violeta Chamorro.<sup>158</sup>

Direct effects of other provisions of the new law are less noticeable thus far. The law seems to have had little effect on the wave of violence that engulfs this society. Despite the heavier penalties for rape and related acts, accounts of violent sexual crimes continue to be regularly featured in the media.<sup>159</sup>

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157. The account of this incident is from *Liberty of sexual harassment*, BARRICADA INTERNACIONAL, Feb. 1995, at 29.

158. *Id.*

159. *Tres Peloteros a la Carcel por Violación*, 136/137 MUJER/FEMPRESS, Feb.-Mar. 1993, at 27. One case that drew particular attention in the media involved a fifteen year-old who reported being raped seven times by a group of baseball players from one of the national teams. Although the forensic report found evidence of violence and an abundance of semen in the victim's vagina, sports writers in particular raised a "chorus against the young girl," with one commenting that "[b]all players are submitted to great provocation by women. From the very moment that a woman accepts a drink, she begins to run risks." *Id.*

According to *La Prensa*, reported rape cases have risen dramatically, from 538 cases in 1990, to 1,937 in 1994, with 961 rapes reported by mid-1995. Guillermo Fernández Ampié, *Into their own hands: Police action against rapists*, BARRICADA INTERNACIONAL, July 1995, at 25. In a recent survey of Nicaraguan youth (15-24 years old) 84.7% ranked rape as a very important social problem — only poor health services and poor education services were ranked higher. *Nicaraguan Youth: What Do They Want and What Are They Like?*, ENVÍO, Nov. 1995, at 29, 31.

An incident in June 1995, in which a national police officer killed a prisoner who had been accused of raping his own nine year old stepdaughter, intensified the national debate concerning rape. Guillermo Fernández Ampié, *supra*. (In Nicaragua, 87% of rapists are connected to the family and 60% of rapes occur in the victim's home. *Families: Violence and Survival*, ENVÍO, Sept. 1995, at 28, 35.) Some praised the officer, reflecting their lack of confidence in the judicial system. Some renewed calls for the death penalty for rapists, and attempts to lynch accused rapists were reported. But others criticized "police brutality," and the officer himself supposedly admitted that he was wrong for thinking only about his own two daughters and for acting "as a father, not as a police officer." *Id.*

Nicaraguan feminists editorialized about this recent incident, denouncing the officer for taking justice into his own hands, but also accusing the state of continu-

As for the sodomy provision, no one seemed to expect that it would be vigorously enforced; the would-be reformers were concerned mostly about its indirect effects. As discussed, the primary immediate impact of the new sodomy law was to push Nicaragua's lesbian and gay community into the public spotlight and to open a heated societal debate about sexuality and sexual orientation. Yet for those less open about their sexual orientation, the law and the publicity surrounding it clearly had an intimidating effect.

### B. *Litigation as a Tool for Social Change*

The story of the constitutional challenge to the new sodomy law is also an important example of how women in Nicaragua

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ing to cross its arms while dozens of women and young girls are raped each day. Editorial, *La falta de justicia es otra violencia más hacia las mujeres*, 21 LA BOLETINA 1-4 (1995). Although the creation of Comisariías de la Mujer y la Niñez (police stations for receiving charges of violence against women and children) was cited as a positive step, the editorial expressed concern over government statements that prisons had no more space and would accept no more prisoners, and noted that given prison conditions, prisoners leave the penal system as or more violent than when they enter. *Id.*; see also *Overflowing Jails*, ENVÍO, Sept. 1995, at 21; *No more prisoners*, BARRICADA INTERNACIONAL, Aug. 1995, at 29. The editorial also accused the media of seizing upon tragedies to make victims' lives a public spectacle, and questioned who would be willing to file charges given these conditions. (The treatment of the young girl at the center of the recent incident is unlikely to make victims any more willing to report rapes. She had been subjected to examinations by at least three forensic specialists because of disagreements between the findings of the first two.) Hundreds of persons signed a letter demanding that the government assume responsibility for correcting deficiencies in the judicial and police systems and that the media commit to sensitizing public opinion about the necessity of eliminating domestic and sexual violence. The letter was sent to the President, the Supreme Court, Judges, the Government Ministry and National police, the National Assembly, the Nicaraguan Women's Institute, and the media. Editorial, *supra* at 3-4.

One positive development was the creation of the Women's Network Against Violence, formed at the 1992 National women's Conference and now composed of over 150 independent organizations. *No excuse for violence*, (Interview with Violeta Delgado), BARRICADA INTERNACIONAL, Oct. 1995, at 27. And particularly encouraging is the formation of several Men's Groups Against Violence, growing out of a 1993 workshop on masculinity. On August 19, 1995, more than eighty participants from seven different groups (including representatives from a campesino protest camp) attended the First National Encounter of Men's Groups Against Violence. *Opening up the second front*, BARRICADA INTERNACIONAL, Oct. 1995, at 25-27. Another positive step is Nicaragua's recent ratification of the Belem Do Pará Convention to Prevent, Sanction, and Eradicate Violence Against Women. 203 LA GACETA 3985 (Oct. 30, 1995).

and other parts of Latin America are beginning to change their views about the judicial system. Traditionally, as Nicaraguan Supreme Court Magistrate Alba Luz Ramos points out, women in the region have been forced to turn to the courts defensively as their only alternative for resolving matters such as divorce or domestic affairs. However, they have not yet engaged in a strategic use of the courts to advance women's rights.<sup>160</sup> Changes are taking place, however, and as illustrated by the challenges the Center for Constitutional Rights filed against the sodomy law and against parts of the support law, Central American women are at the forefront of these changes.<sup>161</sup>

Women in the region have been hesitant to turn to the courts in their struggle for gender equality for at least two broad reasons: (1) they have not seen the law as able to bring about positive changes in women's lives, and (2) they have not seen the courts as able to bring about positive changes in the law.

As mentioned, some women have been reluctant to embrace any type of legal reform as a strategy for social change. They maintain that law itself is patriarchal and that changes in the law have done little to change the concrete conditions of subordination and discrimination women face in their daily lives. Change, if it is to occur, must come through changing societal attitudes and beliefs.

Cognizant of the limits of law as a tool for social change, many women's rights activists nevertheless have come to place

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160. Interview with Alba Luz Ramos, *supra* note 131.

161. Beginning in the early 1990s, several constitutional challenges concerning gender issues were brought in the Supreme Court of Costa Rica and one was brought in the Guatemalan Constitutional Court. See *infra* note 179; see also Martha I. Morgan, *Reflexiones en torno a Como Mujeres Centroamericanas Están Cambiando la Manera de Ver el Papel del Litigio en la Lucha por la Igualdad*, PAPER PRESENTED AT PANEL ON LA PARTICIPACIÓN CÍVICA Y POLÍTICA DE LA MUJER EN EL ESTADO GUATEMALTECA, Guatemala City, Guatemala, Nov. 22, 1994 (on file with author).

Further south, the 1991 Colombian Constitution and its mechanisms for judicial protection of constitutional rights have spawned numerous constitutional challenges and a flood of *tutelas*, or petitions to protect fundamental constitutional rights, including several raising gender related claims. See generally *Desarrollo Jurisprudencial de la Constitución Política: Informe de Labores de la Corte Constitucional Correspondiente al Período 1992-1995*, Apr. 1995.

As previously noted, these cases and their resulting jurisprudence are the subject of a larger work in progress by the author. See also Martha I. Morgan, *Taking Machismo to Court: Constitutional Litigation in Latin America*, COUNTERBALANCE INTERNATIONAL, Oct. 1995, at 7.

legislative and constitutional reform high on their agendas. Acknowledging that existing power structures, including the law and the courts, are patriarchal, feminist lawyers advocate the necessity of using these structures as part of the struggle to change them.<sup>162</sup> They have adopted what Sonia Alvarez refers to as "in the meantime" strategies designed to influence state policy *while* patriarchal practices and assumptions remain entrenched in existing power structures.<sup>163</sup>

Many Latin American feminists have accepted legislative and constitutional reform as tools in their gender-based struggles. However, some still do not view litigation and the courts as instruments for legal reform. Part of the explanation for this relates to the nature of courts in Latin America's predominately civil law systems.<sup>164</sup> Formally, at least, civil law systems traditionally limited the role of the courts more sharply than the common law systems. Courts are authorized only to interpret and apply law, not to change it.<sup>165</sup> Charged with interpreting often-antiquated codes, judges have little recognized leeway to adapt the law to needs of a changing society. Additionally, judicial decisions generally apply only to the case at hand and have no binding precedential value even for lower courts. Thus, the effectiveness of litigation in producing systemic changes is further limited.<sup>166</sup>

Other reasons that litigation has such low strategic priority relate to the overall low esteem in which the judicial system is held in much of Latin America. Traditionally, Latin American

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162. Interview with Alda Facio, in San José, Costa Rica (Oct. 13, 1994); Interview with Rose Mary Madden, in San José, Costa Rica (Oct. 10, 1994); Interview with María Cristina Calderon, in Bogotá, Colombia (July 7, 1995).

163. See ALVAREZ, *supra* note 149, at 273. According to Alvarez, feminists should put aside arguments about whether the state is the "worst enemy" or "best friend" of gender-based struggles and adopt "in the meantime" strategies to influence state policy "while patriarchal practices and assumptions remain embedded in the structures and policies of socialist and capitalist States." *Id.*

164. See generally MARÍA DE LOS ANGELES SOTO GAMBOA, *NOCIONES BÁSICAS DE DERECHO, COSTA RICA* (1992); RENÉ DAVID & JOHN E. C. BRIERLEY, *THE MAJOR LEGAL SYSTEMS IN THE WORLD TODAY* (2d ed. 1978). Although Latin American legal systems are predominately civil law systems they are more accurately classified as "hybrids." The adoption and interpretation of their constitutions have been influenced by U.S. Constitutional law imposed on legal systems otherwise based on civil law traditions.

165. See sources cited *supra* note 164; Interview with Rodrigo Reyes Portecarrero, *supra* note 121.

166. See Interview with Alda Facio, *supra* note 162.

judicial systems have suffered from a lack of real independence.<sup>167</sup> The judiciary is generally regarded as the weakest branch of government and is also often the most poorly financed. (Colombians refer to their judiciary as the "Cindarella" of the branches of government.) Courts are frequently, and at times with good cause, seen as inefficient, ineffective, or corrupt.<sup>168</sup>

In Nicaragua, these problems are particularly acute. According to Rodrigo Reyes Portecarrero, former Magistrate and President of the Nicaraguan Supreme Court:

The Nicaraguan has no judicial culture. The Nicaraguan does not respect the law. The Nicaraguan scorns the law. It has always been so. We have a culture of force; we do not have a culture of respect for the law. Thus, the Supreme Court does not have much authority. The authority here has always been presidential, has always been located in the executive branch, and to a lesser extent in the legislative branch . . . . Thus the Supreme Court cannot have any controlling weight in relation to women's issues, just as it cannot have any controlling weight in relation to any issue of national life.

It would not occur to anyone here to use the legal system as an instrument of power to change things. It would not occur to anyone. Here, they would think of taking to the streets, or of going on strike, or of making a scandal, or of making barricades, or of complaining to the National Assembly, but we Nicaraguans are not accustomed to using the mechanism of law as an instrument to obtain justice . . . . We don't believe in the law. It is a cultural problem of ours.<sup>169</sup>

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167. For discussions concerning judicial independence in Latin America, see generally *TRANSITION TO DEMOCRACY IN LATIN AMERICA: THE ROLE OF THE JUDICIARY* (Irwin P. Stotzky ed., 1993); Keith S. Rosenn, *The Protection of Judicial Independence in Latin America*, 19 U. MIAMI INTER-AM. L. REV. 1 (1987); Keith S. Rosenn, *The Success of Constitutionalism in the United States and its Failure in Latin America: An Explanation*, 22 U. MIAMI INTER-AM. L. REV. 1 (1990); Owen M. Fiss, *The Limits of Judicial Independence*, 25 U. MIAMI INTER-AM. L. REV. 57 (1993). For discussions of judicial independence in Nicaragua, see *INDEPENDENCIA DEL PODER JUDICIAL: CONSTRUIMOS LA DEMOCRACIA FORTALECIENDO EL PODER JUDICIAL* (Vilma Núñez de Escorcia compiladora, 1990); Michael B. Wise, *Nicaragua: Judicial Independence in a Time of Transition*, 30 WILLAMETTE L. REV. 519 (1994).

168. Not only are legal proceedings often protracted, the cost of lawyers and the limited availability of free or subsidized legal aid places litigation beyond the reach of most women. Interview with María Cristina Calderon, *supra* note 162; Interview with Annette Pierson de Gonzales, in Bogotá, Colombia (July 4, 1995).

169. Interview with Reyes Portecarrero, *supra* note 121. The crisis surrounding

Reyes Portecarrero also addressed the problem of delay plaguing the Nicaraguan judicial system, and identified three major causes of what is referred to as the *retardación de justicia*: (1) lack of training and experience of both judges and other judicial personnel, (2) lack of adequate pay and consequent problems of corruption, and (3) obsolete civil and criminal procedures which rely on written rather than oral proceedings.<sup>170</sup> He acknowledged that political factors contribute as well, noting that tacit agreements

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the 1995 constitutional reforms demonstrated the Nicaraguan judicial system's continued inability to resolve issues of national importance. As previously noted, see *supra* note 7, in the fall of 1994 and early 1995, over the bitter opposition of President Chamorro and the "orthodox" FSLN, the Nicaraguan National Assembly approved a series of reforms to the 1987 Constitution that shifted more power to the legislative branch. See *The Constitutional Reforms: Another Opportunity*, ENVÍO, Feb.-Mar. 1995, at 3. In April, the National Assembly elected five new justices to the Supreme Court (two to fill vacancies and three to expand it to twelve members as provided for in the reforms). President Chamorro objected to the elections, but accepted one of these justices, Rodolfo Sandino who earlier had been on her own candidate list to fill one of the vacancies, so that the Court would have a quorum to rule on the constitutionality of the constitutional reforms. *The Institutional Crisis: May's Events at a Glance*, ENVÍO, July 1995, at 4-5. On May 8, the Court ruled that the National Assembly did not have the authority to publish the reforms because only the President can do so. However, it also recognized the validity of the reform process and the Assembly's exclusive control over their content, exhorting Chamorro to promulgate the reforms. *Id.* Despite the Court's decision, the stalemate between the executive and legislative branches did not end until pressure from the Church, friendly foreign powers, and international lenders led to a June agreement and the official publication of the reforms on July 4, 1995. *Nicaragua: Accord Ends constitutional Crisis, Allowing Adoption of Controversial Reforms*, NOTISUR — LATIN AMERICAN POLITICAL AFFAIRS, July 7, 1995, available in LEXIS, Nexis Library.

As reformed, Article 163 increases the membership of the Supreme Court from a minimum of seven (at the time of the reforms there were nine seats) to twelve and divides the court into four separate chambers of at least three members — Civil, Penal, Constitutional, and Administrative. Under Article 163, the entire court continues to hear constitutional challenges by way of *recursos por inconstitucionalidad* and to resolve conflicts concerning competence and constitutionality between the powers of government. Article 162 increases the term for Supreme Court Magistrates from six to seven years, and Article 163 provides that they are to be elected by the National Assembly (under the prior Article 163, the National Assembly selected magistrates from a list of three names submitted by the president). See INSTITUTO NICARAGÜENSE DE ESTUDIOS SOCIO POLÍTICOS, CONSTITUCIÓN DE LA REPUBLICA DE NICARAGUA DE 1987, TEXTO DE LAS REFORMAS DE 1995 (1995).

170. Interview with Reyes Portecarrero, *supra* note 121. Recent surveys underscore the lack of public confidence in the judicial system. Only eleven and a half percent of participants in a survey of Nicaraguan youth (fifteen to twenty-four years old) expressed great confidence in the Supreme Court, and 39.1% had no confidence in the country's laws. *Nicaraguan Youth*, *supra* note 159, at 31. Another survey found that 76.9% of the population believes that laws are not fairly applied and that the poor are less likely to receive justice. Guillermo Fernández Ampí, *supra* note 159.

not to deal with controversial issues previously resulted in the Supreme Court withholding decisions for two to three years.<sup>171</sup>

In addition to these problems, despite the growing numbers of female lawyers and the increasing presence of female judges on lower level courts,<sup>172</sup> the judiciary continues to be viewed as characteristically *machista*. Not only do the higher courts remain overwhelmingly male, women's rights advocates are quick to point out that merely having female judges does not ensure gender consciousness.<sup>173</sup> They emphasize the lack of knowledge concerning women's rights and gender issues among judges, lawyers, and women in general.<sup>174</sup> Indeed, some men in the region have greater gender-consciousness than many women.<sup>175</sup>

Women's views on the role that courts can play in their struggle for equality and social justice have begun to change,

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171. *Id.*

172. See generally TIRSA RIVERA BUSTAMANTE, LAS JUEZAS EN CENTRO AMÉRICA Y PANAMÁ (1991). As of March 1994, one of the nine seats on the Nicaraguan Supreme Court was held by a woman (11.1%); eight of thirty-one Appellate Court judges were women (25.8%); seventeen of fifty district court judges were women (34%); and eighty-four of 157 local judges were women (53.5%). TOTAL DE FUNCIONARIOS DEL PODER JUDICIAL DE NICARAGUA HASTA 23 DE MARZO DE 1994. In April 1995, the National Assembly named five new Supreme Court judges, two to fill vacancies and three to fill new seats created by the February 1995 constitutional reforms. One of those elected was Josefina Ramos, Director of the Center for Constitutional Rights (and one of the thirty-one citizens who had filed the *Recurso de Inconstitucionalidad* against the new sodomy law), as well as former member of the Legal Advisor's Office of the National Assembly and advisor to the FSLN legislative delegation. Interviewed shortly after her selection (which President Chamorro contested), Ramos declared herself a feminist and stated that her greatest aspiration was to meet the expectations of the women's movement that supported her candidacy for the Court. *Entrevista, Josefina Ramos, Magistrada de al CSJ: Una feminista en la Suprema Corte*, EL SEMINARIO, Apr. 29, 1995, at 12-13.

173. See, e.g., Interview with Alda Facio, *supra* note 162; Interview with Rose Mary Madden, *supra* note 162; Interview with María Isabel Plata, in Bogotá, Colombia (June 29, 1995); Interview with María Cristina Calderon, *supra* note 162.

174. See sources cited *supra* note 173.

175. Not only did former magistrate Reyes Portacarrero support the feminist position on the unconstitutionality of the new sodomy provision, he described the pervasiveness of *machismo* within Nicaraguan society and spoke of his personal efforts to break down traditional gender roles within his family. Interview with Reyes Portacarrero, *supra* note 121. Similarly, with the exception of a divided opinion upholding the penalization of abortion, the all-male membership of Colombia's newly established Constitutional Court has developed an impressive body of gender jurisprudence. Interview with Eduardo Cifuentes Muñoz, Magistrate of the Colombian Constitutional Court, in Bogotá, Colombia (July 5, 1995); DESARROLLO JURISPRUDENCIAL DE LA CONSTITUCIÓN POLÍTICA: INFORME DE LABORES DE LA CORTE CONSTITUCIONAL CORRESPONDIENTE AL PERÍODO 1992-1995 (Apr. 1995).



however. In the middle or late 1980s, Nicaragua, Costa Rica, and Guatemala all adopted constitutional or statutory reforms that authorized direct constitutional challenges in their respective Constitutional or Supreme Courts.<sup>176</sup> While the specific procedures adopted and the circumstances in which such direct challenges are permitted differ, these reforms eliminated some of the traditional characteristics of a civil law system that typically impeded the use of courts as instruments of law reform. In these constitutional actions, the effects of the courts' decisions of unconstitutionality are not limited to the case at hand, but may also have binding effect in other cases. In some instances, individuals can bring claims directly in the Supreme or Constitutional Courts and, in other instances, can file actions with these courts when constitutional issues arise in the course of another proceeding. In any event, the new constitutional actions were designed to streamline proceedings<sup>177</sup> and to provide authoritative decisions. Lawyers quickly grasped the significance of these judicial reforms.<sup>178</sup> In the early 1990s, women's rights lawyers in Guatemala, Costa Rica, and Nicaragua filed cases challenging discriminatory laws or practices in their country's respective Constitutional or Supreme Courts.<sup>179</sup> Although the results so

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176. In Nicaragua and Guatemala, these constitutional actions were established in newly adopted Constitutions. NIC. CONST. arts. 187-190 (1987); GUAT. CONST. arts. 265-272 (1985). In Costa Rica, the changes were by legislation. *Ley de la Jurisdicción Constitucional*, Alcance No. 34, LA GACETA No. 198, Oct. 19, 1989. See generally Robert S. Barker, *Taking Constitutionalism Seriously: Costa Rica's Sala Cuarta*, 6 FLA. J. INT'L L. 349 (1991).

177. Despite this intent, litigants have experienced long delays in the courts' deciding these cases in both Nicaragua and Costa Rica.

178. In Costa Rica, where a new Sala IV of the Supreme Court was created to handle constitutional actions, the impact on the public perception of the role of the Court was dramatic. Costa Rica's *Ley de Jurisdicción Constitucional* was adopted on October 11, 1989, and newspapers began to feature stories about the constitutional challenges that have flooded the new chamber. Magistrada Zarela Villanueva of the Costa Rican Supreme Court recounts how her daughter, upset about something that had occurred at her school, proclaimed that she was going to "take her case to the Sala IV." Interview with Magistrada Zarela Villanueva, in San José, Costa Rica (Oct. 13, 1994).

179. For example, in August 1992, Costa Rican women who challenged a regulation requiring a husband's consent to sterilization obtained a Supreme Court ruling recognizing that such a requirement would be unconstitutional. Expediente No. 1496-M-91, Voto No. 2196-92 (Aug. 11, 1992). In June 1994, the Costa Rican Supreme Court upheld a challenge to social security regulations governing widows' pensions in cases involving de facto unions — which required that the couple had lived together for five years unless they had children — were unconstitutionally discriminatory. Expediente No. 1569-V-91, Voto No. 2648-94 (June 7, 1994). On the other hand, in

far have been disappointing at times, feminist lawyers argue that bringing these cases has been important.<sup>180</sup> They note that courts are now being forced to deliberate about and become more aware of gender issues.<sup>181</sup>

For the future, Costa Rican lawyer Alda Facio, well-known for her work with judicial systems throughout the region, urges greater use of comparative law and predicts that courts will increasingly be willing to look to decisions from other jurisdictions as guides in shaping the gender jurisprudence that is emerging from this litigation.<sup>182</sup> Rather than retreating in the face of negative decisions, women's rights activists advocate greater use of litigation on behalf of women's rights at all levels of their domestic judicial systems<sup>183</sup> as well as in international tribunals.<sup>184</sup>

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November 1992, the Court rejected a challenge to the practice of awarding lower monetary prizes in women's athletic contests than in men's events, Expediente No. 2910-S-92, Voto No. 3444-92 (Nov. 13, 1992), and in January 1994, it struck down a provision of the Law for the Promotion of Women's Social Equality that required property obtained through governmental programs be registered in the name of the woman in cases of de facto unions, Expediente No. 1237-90, Voto No. 0346-94 (Jan. 18, 1994). The Court has not ruled on a challenge to the labor code's discriminatory treatment of domestic workers, filed on February 13, 1991.

In Guatemala, the Constitutional Court has rejected a broad challenge to numerous discriminatory provisions of the Guatemalan Civil Code. The action was filed on March 7, 1992, by the acting Guatemalan Procurador of Human Rights. *Acción de Inconstitucionalidad Parcial Con Efectos General*, Expediente 84-92 (Mar. 6, 1992). Despite the 1985 Constitution's express guarantee that "men and women, whatever their civil status, have equal opportunities and responsibilities" (GUAT. CONST. art. 4), the Guatemalan Constitutional Court rejected all challenges, including an attack on a provision requiring married women to have the approval of their husbands (or a court) to work outside the home. *Sentencia*, Expediente 84-92 (June 24, 1993). One of the seven male judges dissented. *Voto Razonado del Magistrado Gabriel Larios Ochaíta*, Expediente 84-92 (June 24, 1993). On February 8, 1995, a complaint challenging the Civil Code's discriminatory provisions relating to marriage was filed with the Inter-American Commission on Human Rights. Letter from María Eugenia de Sierra and CEJIL (Center for Justice and International Law) to Ambassador Edith Márquez Rodríguez, Executive Director of the Inter-American Commission on Human Rights (Feb. 8, 1995).

180. Interview with Alda Facio, *supra* note 162; Interview with Rose Mary Madden, *supra* note 162.

181. Interview with Alda Facio, *supra* note 162.

182. *Id.*

183. Interview with Rose Mary Madden, *supra* note 162.

184. Interview with Alda Facio, *supra* note 162. See also Cecilia Medina, *Toward a More Effective Guarantee of Human Rights by Women in the Inter-American System*, HUMAN RIGHTS OF WOMEN: NATIONAL AND INTERNATIONAL PERSPECTIVES 257 (Rebecca J. Cook ed., 1994).

## VI. CONCLUSION

The recent attempt by Nicaraguan feminists to revise their penal code's treatment of rape and sodomy presents an example of women seizing the opportunity — available in part because of the increased visibility of violent attacks, particularly on young girls — to promote the reform of outmoded laws and the transformation of societal thinking concerning sexual violence, rape, and sexual autonomy and orientation. The endeavor reveals some of the possibilities and pitfalls of trying to build broad-based support for far-reaching feminist legal reforms. While it is too early to fully assess the long-range effects of the reform efforts, the short-term effects include a complex array of both negative and positive societal reactions. Although the judicial challenge to the new sodomy law was unsuccessful, the attempt provides an important example of how feminist activists in the region are beginning to use litigation as an instrument in the struggle for gender justice.

The Nicaraguan Supreme Court has rendered its decision upholding the new sodomy provision, but the Nicaraguan society itself must ultimately determine whether it will afford full respect and protection to the human rights of homosexuals and when, if ever, all Nicaraguans can live without fear of sexual violence or subordination. In the meantime, Nicaraguan feminists, like feminists elsewhere, must continue to use all available means, including legislative reform and litigation, in their struggle for a just society.